

1986
Annual Meeting

OCTOBER 2, 3 & 4, 1986
AIRPORT REGENCY HOTEL
DES MOINES, IOWA

THURSDAY, OCTOBER 2, 1986

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

8:00 a.m.
REGISTRATION

8:30-9:00 a.m.
REPORT OF ASSOCIATION

9:00-10:00 a.m.
DIRECTORS' AND OFFICERS' LIABILITY
THOMAS D. HANSON,
Hanson, Bjork & Russell
Des Moines, Iowa

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

10:15-11:00 a.m.
PRODUCT LIABILITY - MEDICAL APPLIANCES
ROBERT HOUGHTON,
Shuttleworth & Ingersoll
Cedar Rapids, Iowa

11:00-noon
WORKERS' COMPENSATION UPDATE
ROBERT LANDESS,
Iowa Industrial Commissioner
Des Moines, Iowa

12:00-1:30 p.m.
LUNCHEON
Honorable DAVID R. HANSEN, Judge
United States District Court, Northern District of Iowa
Cedar Rapids, Iowa

1:30-2:30 p.m.
HUMAN FACTORS EXPERTS
DAVID L. HAMMER,
O'Connor & Thomas
Dubuque, Iowa

2:30-3:30 p.m.
IOWA O.M.V.U.I. LAW
KERMIT DUNAHOO,
Dunahoo Law Office
Des Moines, Iowa

3:30-3:45 p.m.
COFFEE BREAK

3:45-4:45 p.m.
"CLAIMS MADE" POLICIES
ALAN FREDREGILL,
Eidsmoe, Heidman, Redmond, Fredregill,
Patterson & Schatz
Sioux City, Iowa

THURSDAY EVENING

Ingersoll Dinner Theater - Bus Leaves @ 6:15 p.m.

FRIDAY, OCTOBER 3, 1986

8:30-9:00 a.m.
GREETINGS FROM NATIONAL ASSOCIATIONS

9:00-10:00 a.m.
BREACH OF FIDUCIARY DUTY
BERNARD L. SPAETH, Jr.,
Whitfield, Musgrave, Selvy, Kelly & Eddy
Des Moines, Iowa

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

10:15-11:00 a.m.
STRUCTURED SETTLEMENTS, 1986
DAN RAYMOND,
Kenneth H. Wells & Associates
Overland Park, Kansas

11:00-noon
ACCIDENT RECONSTRUCTION & COMPUTER
ANIMATION
GARRISON KOST,
Failure Analysis Associates
Palo Alto, California

12:00-1:30 p.m.
LUNCHEON
HONORABLE W. WARD REYNOLDS
Chief Justice, Supreme Court of Iowa
Des Moines, Iowa

1:30-2:30 p.m.
NATIONAL COALITION FOR LITIGATION COST
CONTAINMENT
CINDA BERRY,
The Defense Research and Trial Lawyers Association
Chicago, Illinois

2:30-3:30 p.m.
DEALING WITH BAD FAITH CLAIMS
WILLIAM F. FANTER,
Bradshaw, Fowler, Proctor & Fairgrave
Des Moines, Iowa

3:30-3:45 p.m.
COFFEE BREAK

3:45-4:45 p.m.
EFFECTIVE OPENING STATEMENT
JAMES HELLMAN,
Mosier, Thomas, Beatty, Dutton, Braun & Staack
Waterloo, Iowa

6:30-7:30 p.m.
COCKTAIL RECEPTION

7:30-9:30 p.m.
BANQUET
Entertainment by DAN HUNTER,
Humorist, Songwriter
Des Moines, Iowa

SATURDAY, OCTOBER 4, 1986

9:00-10:00 a.m.
EXTRA CONTRACTUAL LIABILITY
ROBERT J. LAUBENTHAL,
Smith, Peterson, Beckman & Willson
Council Bluffs, Iowa

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

10:15-11:15 a.m.
ANNUAL CASE REVIEW, IOWA APPELLATE COURTS
GREGORY LEDERER,
Simmons, Ferrine, Albright & Ellwood
Cedar Rapids, Iowa

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

12:00 Noon
BOARD MEETING



OFFICERS AND DIRECTORS 1985-1986

PRESIDENT

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

PRESIDENT - ELECT

David L. Phipps
1300 1st Interstate Bank Bldg.
Des Moines, Iowa 50309

SECRETARY

Thomas D. Hanson
1300 Des Moines Building
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

Craig L. Johnson - 1988
118 E. Main, P.O. Box 1180
Marshalltown, Iowa 50158

District IV

Robert J. Laubenthal - 1987
307 Midlands Mall
Council Bluffs, Iowa 51502

District VI

Patrick M. Roby - 1988
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

Emmanuel S. Bikakis - 1988
Suite 340, Insurance Exchange Bldg
Sioux City, Iowa 51101

Richard G. Langdon - 1986
1300 Financial Center
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
1300 First Interstate 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 50704

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

* Albert D. Vasey (Hon.) 1983
Harold R. Grigg, 1983-1984
1521 Elm Avenue
Primghar, Iowa 51245

* Philip H. Cless, 1968-1969

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

Raymond R. Stefani, 1984-1985
807 American Building
Cedar Rapids, Iowa 52401

IOWA DEFENSE COUNSEL FOUNDERS AND OFFICERS

Edward F. Seitzinger
President

D.J. Fairgrave
Vice-President

Mike McCrary
Treasurer

*Frank W. Davis
Secretary

William J. Hancock

Edward J. Kelly

Paul D. Wilson

ANNUAL MEETING CHAIRPERSONS

Edward F. Seitzinger
General Program Chairperson

David L. Phipps
Program Chairperson

* Deceased



1986 Annual Meeting

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DIRECTOR'S AND OFFICER'S LIABILITY AND LIABILITY INSURANCE

By Thomas D. Hanson

A

Introduction

Associated with the larger "crisis" in the liability insurance industry, there has been a sharp contraction in the availability of directors' and officers' (D & O) insurance in the past two years. Unique problems relating to the underlying corporate, securities and tort statutory and case case, create problems in interpretation of such policies. The economic climate and certain kinds of merger related business activity create difficult underwriting problems for insurers when writing such policies.

These conditions have led to a decline from about thirty to only a handful of insurers willing to write such policies. A few years ago policies with limits of \$200 million dollars were available, now \$50 million dollars is probably the maximum coverage. Premiums have escalated from 200 to 1000%. Companies engaged in such businesses as banking, high tech, utilities, real estate, petrochemicals and insurance are frequently unable to get such insurance at any price.

Policies being written today contain several new restrictions and are generally of much shorter duration. Carriers are requiring higher corporate and individual deductibles and are imposing a 5 percent participation clause.

CORPORATE DUTIES
AND INDEMNIFICATION

Sources of Liabilities

1. Common Law Obligations

Directors are the agents of the shareholders and have been entrusted with their funds as trustees to properly and prudently handle the corporate affairs.

Des Moines Bank & Trust Co. v. George M. Bechtel & Co. 51 N.W.2d 174 (Iowa 1952)

Rowen v. LeMars Mutual Insurance Co. 282 N.W.2d 639 (Iowa 1979)

First National Bank of Council Bluffs v. One Craig Place Ltd. 303 N.W.2d 688 (Iowa 1981)

a. Duty of Diligence Or Care

A director must make prudent and informed decisions and must be diligent to seek out necessary information to make informed judgments.

Rowen v. LeMars Mutual Insurance Co. 282 N.W.2d 639 (Iowa 1979)

b. Duty of Loyalty

A director owes a duty to the corporation not to personally profit from corporate activities or corporate opportunities.

Holi-Rest, Inc. v. Treloar 217 N.W.2d 517 (Iowa 1974)

First National Bank of Council Bluffs v. One Craig Place, Ltd. 303 N.W.2d 688 (Iowa 1981)

2. Statutory Duties

a. General Corporate Law

Section 496A.34 of the Code of Iowa provides as follows in relevant part:

496A.34 Board of directors - relationship or interest in contracts.

All corporate powers shall be exercised by or under the authority of, and the business and affairs of a corporation shall be managed under the direction of a board of directors consisting of one or more members, except as may be otherwise provided in this chapter or in the articles of incorporation. If any such provision is made in the articles of incorporation, the powers and duties conferred or imposed upon the board of directors by this chapter shall be exercised or performed to such extent and by such person or persons as shall be provided in the articles of incorporation.

* * *

A director shall perform the duties of a director, including the duties as a member of any committee of the board upon which such director may serve, in good faith, in a manner such director reasonably believes to be in the best interests of the corporation, and with such care as an ordinarily prudent person in a like position would use under similar circumstances. In performing such duties, a director shall be entitled to rely on such information, opinions, reports or statements, including financial statements and other financial data, in each case prepared or presented by: (1) One or more officers or employees of the corporation whom the director reasonably believes to be reliable and competent in the matters presented; (2) Counsel, public accountants or other persons as to matters which the director reasonably believes to be within such person's professional or expert competence; or, (3) A committee of the board upon which such director does not serve, duly designated in accordance with a provision of the articles of incorporation or the bylaws, as to matters within its designated authority, which committee the director reasonably shall not be considered to be acting in good faith if such director has knowledge concerning the matter in question that would cause such reliance to be unwarranted. A person who so performs such duties shall not have liability by reason of being or having been a director of the corporation.

* * *

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No contract or other transaction between a corporation and one or more of its directors or any other corporation, firm, association or entity in which one or more of its directors are directors or officers or are financially interested, shall be either void or voidable because of such relationship or interest or because such director or directors are present at the meeting of the board of directors or a committee thereof which authorizes, approves or ratifies such contract or transaction or because the director's or directors' votes are counted for such purpose, if any of the following occur:

1. The fact of such relationship or interest in disclosed or known to the board of directors or committee which authorizes, approves, or ratifies the contract or transaction by a vote or consent sufficient for the purpose without counting the votes or consents of such interested director.

2. The fact of such relationship or interest is disclosed or known to the shareholders entitled to vote and they authorize, approve or ratify such contract or transaction by vote or written consent.

3. The contract or transaction is fair and reasonable to the corporation.

Common or interested directors may be counted in determining the presence of a quorum at a meeting of the board of directors or a committee thereof which authorizes, approves, or ratifies such contract or transaction.

b. Other Specific State Statutory Obligations.

See for Example:

Insurance Companies - Chapters 491, 511, 514, 515 of the Code of Iowa

Not for Profit Corporations - Chapter 504A Code of Iowa

Banking Institutions - Chapter 524 Code of Iowa

Cooperatives - Chapters 497 and 499, Code of Iowa

c. Securities Acts Obligations

Securities Act of 1933, sections 11, 12, 15

Securities Exchange Act of 1934, sections 10 and 16

Iowa Uniform Securities Act, chapter 502 Code of Iowa

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Indemnification

Under common law the courts were divided as to whether a corporate officer or director could be properly indemnified for his actions. This led to the adoption in all fifty states of statutes authorizing indemnification. Indemnification is necessary:

"to 'promote the desirable end that corporate officials will resist what they consider' unjustified suites and claims, 'secure in the knowledge that their reasonable expenses will be borne by the corporation they have served if they are vindicated'. Beyond that, its larger purpose is 'to encourage capable men to serve as corporate directors, secure in the knowledge that expenses incurred by them in upholding their honesty and integrity as directors will be borne by the corporation they serve'." Hibbert v. Hollywood Park, Inc. 467 A.2d 339, 343-44 (Del. Supr. 1983) quoting E. Folk, The Delaware General Corporation Law 98 (1972)

The nature and extent of the indemnification to be allowed is still a subject of much dispute by the commentators. As stated by the drafters of The Model Business Corporation Act:

"The fundamental issue that must be addressed by an indemnification statute is ... to ensure that indemnification is permitted only where it will further accepted corporate goals and to prohibit indemnification where it might protect or encourage wrongful or improper conduct. As phrased by one commentator, the goal of indemnification is to 'seek the middle ground between encouraging fiduciaries to violate their trust, and discouraging them from serving at all.'"

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Model Business Corp. Act 412-13 (1984 ed.),
quoting Johnston, Corporate Indemnification
and Liability Insurance for Directors and
Officers, 33 Bus. Law. 1993, 1994 (1978).

Iowa's Business Corporation Act permits a corporation to provide indemnification in limited circumstances and to a certain extent. The entirety of section 496A.4A is set forth in the appendix but basically the statute, following procedural safeguards, permits:

2. A corporation shall have power to indemnify any person made a party to any proceeding by reason of the fact that the person is or was a director if:

a. The person acted in good faith; and

b. The person reasonably believed

(1) In the case of conduct in the person's official capacity with the corporation, that the conduct was in its best interests, and

(2) In all other cases, that the person's conduct was at least not opposed to its best interests, and

c. In the case of any criminal proceeding, the person had no reasonable cause to believe the person's conduct was unlawful.

* * *

10. A corporation shall have power to purchase and maintain insurance on behalf of any person who is or was a director, officer, employee or agent of the corporation, or who, while a director, officer, employee or agent of the corporation, is or was serving at the request of the corporation as a director, officer, partner, trustee, employee or agent of another foreign or domestic corporation, partnership, joint venture, trust, other enterprise or employee benefit plan, against any liability asserted against the person and incurred by the person in any such capacity or arising out of the person's status as such, whether or not the corporation would have the power to indemnify the person against such liability under the provisions of this section.

DIRECTORS' AND OFFICERS'
LIABILITY INSURANCE
AND ITS UNIQUE ASPECTS

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To understand the unusual structure and operation of D & O insurance policies some knowledge of the legal basis for corporate indemnification is necessary. This is because of the internally conflicting interests sought to be insured.

At common law a principal had a duty to indemnify his agent for liability for actions within the agent's scope of authority. As corporations only act through agents, a corporation would have such a duty to its officers and directors. However, since suits against officers and directors usually contain allegations of wrong-doing against the interests of shareholders and the corporation itself, a serious question arises as to whether such indemnity should occur. This problem is compounded by considerations of when the duty to indemnify exists i.e. during or only after a successful defense and the very nature of derivative suits where legally the corporation is suing its own officers and directors.

There is really no standard form of policy and there has been little litigation to interpret the various provisions so anyone dealing with these policies should use extra care.

1. Structure of Policy

a. Two Part Policy

Company reimbursement - insures company against losses from claims against officers and directors for wrongful acts but only when directors and officers have been indemnified by company pursuant to law, charter or by-laws.

Directors and officers - insured directors and officers, except for claims for which they are indemnified by the company.

b. Defense Obligations and Consent to Settlement

No duty to defend but may or must advance costs depending on policy.

Defense costs are allocated against limits and retentions not in addition.

Insurer's consent is required for settlement.

c. Policy Limits and Retention

Annual aggregate limit

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Three separate retentions:
one per officer or director,
a maximum for all officers and directors,
a corporate reimbursement retention

(D & O policies provide for a sharing of risk in excess of the deductible. Until recently the carrier assumed liability for 95% of the loss in excess of a certain amount while the insured's bore the other 5%. These percentages may be changing)

Co Insurance Feature

(Query Fidelity Bonds included?)

2. Coverage

All persons who were, now or shall be directors or officers of the company and its covered subsidiaries.

Wrongful Acts - (1) Any actual or alleged error or misstatement or misleading statement or act or omission or breach of duty by the directors or officers while acting in their individual or collective capacities and (2) any other matter claimed against them solely by reason of their being officers or directors of the company.

Definition of loss may also exclude fines, penalties, punitive damages and conduct "uninsurable under application law".

Claims made coverage - note discovery and notice of occurrence provisions. Notice of Circumstances clause.

3. Exclusions

For libel and slander

For bodily injury or damage to tangible property

For acts by which officers or directors obtain personal profit or advantage to which they are not entitled

For not properly authorized remuneration

For securities laws violations - state, federal specific

For pollution, contamination or seepage

For acts which are brought about by or contributed to
by dishonesty of officers or directors

Other insurance

Pending and prior litigation - expanded to include
litigation arising out of previously made claims

Take over exclusion - claims arising out of unfriendly
take over attempts

Insured vs. insured exclusion - probably doesn't
preclude coverage for bona fide derivative actions

Regulatory activity - precludes coverage for FDIC,
Department of Insurance and like claims.

CONCLUSION

Because of the nature of the underlying legal claims and the
unusual structure of the insurance policy, defending directors
and officers is fraught with hazard. It will be the source of
much litigation both between the third party and the insured and
the insured and his carrier.

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plans, stock-option plans and other incentive, insurance and welfare plans for any or all of its directors officers and employees

16. To cease its corporate activities and surrender its corporate franchise.

17. To have and exercise all powers necessary or convenient to effect its purposes.

18. To enter into general partnerships, limited partnerships, whether the corporation be a limited or general partner, joint ventures, syndicates, pools, associations and other arrangements for carrying on of any or all of the purposes for which the corporation is organized, jointly or in common with others

[C62, 66, 71, 73, 75, 77, 79, 81, §496A.4]

83 Acts, ch 71, §4

496A.4A Indemnification of directors and officers.

1. As used in this section:

a. "Director" means any person who is or was a director of the corporation and any person who, while a director of the corporation, is or was serving at the request of the corporation as a director, officer partner, trustee, employee or agent of another foreign or domestic corporation partnership joint venture, trust, other enterprise or employee benefit plan.

b. "Corporation" includes any domestic or foreign predecessor entity of the corporation in a merger, consolidation or other transaction in which the predecessor's existence ceased upon consummation of the transaction.

c. "Expenses" includes attorneys' fees.

d. "Official capacity" means:

(1) When used with respect to a director, the office of director in the corporation and

(2) When used with respect to a person other than a director, as contemplated in subsection 9, the elective or appointive office in the corporation held by the officer or the employment or agency relationship undertaken by the employee or agent in behalf of the corporation,

but in each case does not include service for any other foreign or domestic corporation or any partnership joint venture trust other enterprise or employee benefit plan

e. "Party" includes a person who was, is, or is threatened to be made a named defendant or respondent in a proceeding

f. "Proceeding" means any threatened pending or completed action, suit or proceeding whether civil criminal, administrative or investigative

2. A corporation shall have power to indemnify any person made a party to any proceeding by reason of the fact that the person is or was a director if:

a. The person acted in good faith; and

b. The person reasonably believed

(1) In the case of conduct in the person's official capacity with the corporation that the conduct was in its best interests, and

(2) In all other cases, that the person's conduct was at least not opposed to its best interests, and

c. In the case of any criminal proceeding, the person had no reasonable cause to believe the person's conduct was unlawful

Indemnification may be made against judgments, penalties, fines, settlements and reasonable expenses actually incurred by the person in connection with the

proceeding; except that if the proceeding was by or in the right of the corporation, indemnification may be made only against such reasonable expenses and shall not be made in respect of any proceeding in which the person shall have been adjudged to be liable to the corporation. The termination of any proceeding by judgment, order, settlement conviction, or upon a plea of nolo contendere or its equivalent, shall not, of itself, be determinative that the person did not meet the requisite standard of conduct set forth in this subsection.

3. A director shall not be indemnified under subsection 2 in respect of any proceeding charging improper personal benefit to the director, whether or not involving action in the director's official capacity, in which the director shall have been adjudged to be liable on the basis that personal benefit was improperly received by the director.

4. Unless limited by the articles of incorporation:

a. A director who has been wholly successful on the merits or otherwise in the defense of any proceeding referred to in subsection 2 shall be indemnified against reasonable expenses incurred by the director in connection with the proceeding; and

b. A court of appropriate jurisdiction, upon application of a director and such notice as the court shall require, shall have authority to order indemnification in the following circumstances:

(1) If it determines a director is entitled to reimbursement under paragraph "a", the court shall order indemnification in which case the director shall also be entitled to recover the expenses of securing such reimbursement; or

(2) If it determines that the director is fairly and reasonably entitled to indemnification in view of all the relevant circumstances, whether or not the director has met the standard of conduct set forth in subsection 2 or has been adjudged liable in the circumstances described in subsection 3, the court may order such indemnification as the court shall deem proper except that indemnification with respect to any proceeding by or in the right of the corporation or in which liability shall have been adjudged in the circumstances described in subsection 3 shall be limited to expenses

A court of appropriate jurisdiction may be the same court in which the proceeding involving the director's liability took place.

5. No indemnification under subsection 2 shall be made by the corporation unless authorized in the specific case after a determination has been made that indemnification of the director is permissible in the circumstances because the director has met the standard of conduct set forth in subsection 2. Such determination shall be made:

a. By the board of directors by a majority vote of a quorum consisting of directors not at the time parties to the proceeding; or

b. By special legal counsel, selected by the board of directors by vote as set forth in paragraph "a" of this subsection 5, or, if the requisite quorum of the full board cannot be obtained therefor, by a majority vote of the full board, in which selection directors who are parties may participate; or

c. By the shareholders



Authorization of indemnification and determination as to reasonableness of expenses shall be made in the same manner as the determination that indemnification is permissible, except that if the determination that indemnification is permissible is made by special legal counsel, authorization of indemnification and determination as to reasonableness of expenses shall be made in a manner specified in paragraph "b" of this subsection for the selection of such counsel. Shares held by directors who are parties to the proceeding shall not be voted on the subject matter under this subsection 5.

6. Reasonable expenses incurred by a director who is a party to a proceeding may be paid or reimbursed by the corporation in advance of the final disposition of such proceeding upon receipt by the corporation of

a. A written affirmation by the director of the director's good faith belief that the director has met the standard of conduct necessary for indemnification by the corporation as authorized in this section, and

b. A written undertaking by or on behalf of the director to repay such amount if it shall ultimately be determined that the director has not met such standard of conduct, and after determination that the facts then known to those making the determination would not preclude indemnification under this section. The undertaking required by this paragraph shall be an unlimited general obligation of the director but need not be secured and may be accepted without reference to financial ability to make repayment. Determinations and authorizations of payments under this subsection 6 shall be made in the manner specified in subsection 5.

7. No provision for the corporation to indemnify or to advance expenses to a director who is made a party to a proceeding, whether contained in the articles of incorporation, the bylaws, a resolution of shareholders or directors, an agreement or otherwise, except as contemplated by subsection 10, shall be valid unless consistent with this section or, to the extent that indemnity hereunder is limited by the articles of incorporation, consistent therewith. Nothing contained in this section shall limit the corporation's power to pay or reimburse expenses incurred by a director in connection with the director's appearance as a witness in a proceeding at a time when the director has not been made a named defendant or respondent in the proceeding.

8. For purposes of this section, the corporation shall be deemed to have requested a director to serve an employee benefit plan whenever the performance by the director of the director's duties to the corporation also imposes duties on, or otherwise involves services by, the director to the plan or participants or beneficiaries of the plan; excise taxes assessed on a director with respect to an employee benefit plan pursuant to applicable law shall be deemed fines; and action taken or omitted by the director with respect to an employee benefit plan in the performance of the director's duties for a purpose reasonably believed by the director to be in the interest of the participants and beneficiaries of the plan shall be deemed to be for a purpose which is not opposed to the best interests of the corporation

9. Unless limited by the articles of incorporation:

a. An officer of the corporation shall be indemnified as and to the same extent provided in subsection 4 for a director and shall be entitled to the same extent as a director to seek indemnification pursuant to the provisions of subsection 4;

b. A corporation shall have the power to indemnify and to advance expenses to an officer, employee or agent of the corporation to the same extent that it may indemnify and advance expenses to directors pursuant to this section; and

c. A corporation, in addition, shall have the power to indemnify and to advance expenses to an officer, employee or agent who is not a director to such further extent, consistent with law, as may be provided by its articles of incorporation, bylaws, general or specific action of its board of directors, or contract.

10. A corporation shall have power to purchase and maintain insurance on behalf of any person who is or was a director, officer, employee or agent of the corporation, or who, while a director, officer, employee or agent of the corporation, is or was serving at the request of the corporation as a director, officer, partner, trustee, employee or agent of another foreign or domestic corporation, partnership joint venture, trust other enterprise or employee benefit plan, against any liability asserted against the person and incurred by the person in any such capacity or arising out of the person's status as such, whether or not the corporation would have the power to indemnify the person against such liability under the provisions of this section

11. Any indemnification of or advance of expenses to, a director in accordance with this section if arising out of a proceeding by or in the right of the corporation, shall be reported in writing to the shareholders with or before the notice of the next shareholders' meeting.

83 Acts ch 71, §1

Referred to in §491.3, 491.16, 524.801, 534.605

496A.5 Right of corporation to acquire and dispose of its own shares.

A corporation shall have the right to purchase, take, receive, or otherwise acquire, hold, own, pledge, transfer or otherwise dispose of its own shares, but purchases of its own shares, whether direct or indirect, shall be made only to the extent of surplus

Notwithstanding the foregoing limitation, a corporation may purchase or otherwise acquire its own shares for the purpose of:

1. Eliminating fractional shares.
2. Collecting or compromising indebtedness to the corporation.
3. Paying dissenting shareholders entitled to payment for their shares under the provisions of this chapter.
4. Effecting, subject to the other provisions of this chapter, the retirement of its redeemable shares by redemption or by purchase at not to exceed the redemption price.

No purchase of or payment for its own shares shall be made at a time when the corporation is insolvent or when such purchase or payment would make it insolvent.

[C62, 66, 71, 73, 75, 77, 79, 81, §496A.5]

496A.6 Defense of ultra vires.

A

DIRECTORS AND OFFICERS LIABILITY and CORPORATION REIMBURSEMENT

NATIONAL UNION FIRE INSURANCE COMPANY OF PITTSBURGH PA



A CAPITAL STOCK COMPANY
ADMINISTRATIVE OFFICE
70 PINE STREET NEW YORK N Y 10270

THIS IS A CLAIMS MADE POLICY
PLEASE READ CAREFULLY

NOTICE. THE LIMIT OF LIABILITY AVAILABLE TO PAY JUDGEMENTS OR SETTLEMENTS SHALL BE REDUCED BY AMOUNTS INCURRED FOR LEGAL DEFENSE. FURTHER NOTE THAT AMOUNTS INCURRED FOR LEGAL DEFENSE SHALL BE APPLIED AGAINST THE RETENTION AMOUNT

DECLARATIONS

- ITEM 1 NAMED INSURED _____
MAILING ADDRESS _____
STATE OF INCORPORATION _____
- ITEM 2 POLICY PERIOD From _____ to _____
(12:00 Noon Standard Time at the address stated here in)
- ITEM 3 LIMIT OF LIABILITY \$ _____ such policy year and this shall be the combined limit of liability for both policy forms 8750 and 8749 which attach hereto and form a part hereof
- ITEM 4 RETENTION (Each Loss) \$ _____
- ITEM 5 PREMIUM 1 Year Premium Prepaid \$ _____
3 Year Installments payable each anniversary
1st \$ _____ Inception
2nd \$ _____
3rd \$ _____

ITEM 6 THIS POLICY DOES NOT PROVIDE COVERAGE FOR THE FOLLOWING OFFICER POSITIONS
(Absence of entry means no exceptions)

Authorized Representative

Date

Date

In consideration of the premiums and statements made to the Insurer by applicant on a copy of which is attached and made a part hereof, this Declaration Page with Policy Form 8749 and/or Policy Form 8750 together with the completed and signed application constitute the contract and the National Union Fire Insurance Company of Pittsburgh Pa here in called the "Insurer" agrees as follows

8749/8750

Order By
33301 (6/84)

COMPANY REIMBURSEMENT

A

1 INSURING CLAUSE

This policy shall subject to its terms, conditions and limitations as hereinafter provided pay on behalf of the Company named in Item 1 of the Declarations loss (as hereinafter defined) arising from any claim or claims which are first made during the policy period against each and every person jointly or severally, who was or now is or may hereafter be a Director or Officer (as herein defined) of the Company, by reason of any Wrongful Act (as hereinafter defined) in their respective capacities as Directors or Officers of the Company but only when the Directors or Officers shall have been entitled to indemnification by the Company for damages judgments, settlements costs, charges or expenses incurred in connection with the defense of any action, suit or proceeding or any appeal therefrom to which the Directors or Officers may be a party or with which they may be threatened pursuant to law, common or statutory, or the Charter or By-Laws of the Company duly effective under such law which determines and defines such rights of indemnity. This policy shall automatically cover any Subsidiary Company, acquired or created after the inception of this policy, subject to written notice being given to the Insurer as soon as practicable and payment of any additional premium required.

2 DEFINITIONS

- (a) The term "Director or Officer" shall mean:
 - (i) Any duly elected Director or duly elected or appointed Officer of the Company named in Item 1 of the Declarations, except as noted under Item 6 of the policy Declarations. Coverage will automatically apply to all newly created Directors and Officers after the inception date of this policy subject to:
 - a) Written notice of all such changes to the insurer within thirty (30) days after each anniversary date or the termination date and
 - b) payment of any additional premium required
- (b) The term "Policy Year" shall mean a period of one year commencing each year on the day and hour first named in Item 2 of the Declarations or if the time between the effective date or anniversary and termination of the policy is less than one year then such lesser period.
- (c) The term "Loss" shall mean any amount the Company shall be required or permitted by law to pay to a Director or Officer as indemnity for a claim or claims against him arising out of those matters set forth in the Insuring Clause above whether actual or asserted and subject to the applicable limits and conditions of this policy, shall include damages, judgments, settlements costs, charges and expenses (excluding salaries of Officers or employees of the Company) incurred in the defense of actions, suits or proceedings, and appeals therefrom for which payment by the Company may be required or permitted according to applicable law, common or statutory, or under provisions of the Company's Charter or By-Laws effective pursuant to such law provided always that such subject of loss shall not include fines or penalties imposed by law or other matters which may be deemed uninsurable under the law pursuant to which this policy shall be construed.
- (d) The term "Wrongful Act" shall mean any breach of duty, neglect, error, misstatement, misleading statement, omission or other act done or wrongfully attempted by the Directors or Officers or any of the foregoing so alleged by any claimant or any matter claimed against them solely by reason of their being such Directors or Officers.
- (e) The term "Subsidiary Company" shall mean a Company of which the named Insured as described in Item 1 of the Declarations owns more than 50% of the voting stock.

3 EXTENSIONS

Subject otherwise to the terms hereof, this policy shall cover the Company for loss arising from any claims made against the estates, heirs, legal representatives or assigns of deceased Directors or Officers who were Directors or Officers at the time the acts upon which such claims were based were committed, and the legal representatives or assigns of Directors or Officers in the event of their incompetency, insolvency or bankruptcy.

4 EXCLUSIONS

The Insurer shall not be liable to make any payment for loss in connection with any claim made against the Directors or Officers:

- (a) which at the time of happening of such loss is insured by any other existing valid policy or policies under which payment of the loss is actually made, except in respect of any excess beyond the amount or amounts of payments under such other policy or policies;
- (b) for which the Directors or Officers are entitled to indemnity under any policy or policies in force previous hereto.

5 LIMIT AND RETENTION

- (a) The Insurer shall be liable to pay 95% of loss excess of the amount stated in (c) below up to the amount hereafter stated. It being warranted that the remaining 5% of each and every loss shall be carried by the Company at its own risk and uninsured.
- (b) Subject to the foregoing, the Insurer's liability for any claim or claims made against it shall (except for any additional amounts payable by virtue of Clause 6) be the amount stated in Item 3 of the Declarations which shall be the maximum liability of the Insurer in (a) each policy year and in (b) the discovery period if the right is exercised by the Company in accordance with Clause 8(a) and not the maximum aggregate so payable with respect to the policy period and discovery period.
- (c) This policy is only to pay the excess over the retention amount shown in Item 4 of the Declarations in respect of each and every loss hereunder, including costs, charges and expenses as described in Clause 6 and such retention amount is to be borne by the Company and is not to be insured. Losses arising out of the same act or interrelated acts of one or more of the Directors or Officers shall be considered a single loss and only one retention amount shall be deducted from the aggregate amount of such losses.
- (d) The foregoing provisions shall apply to this policy and the Directors and Officers Liability Policy attached hereto as though they constitute a single policy and the Insurer's maximum liability under both policies together shall not exceed the limits and retention set out in Paragraphs 5(a), 5(b) and 5(c) above.

6 COSTS, CHARGES AND EXPENSES AND DEFENSE

- (a) No costs, charges and expenses shall be incurred without the Insurer's consent which shall not be unreasonably withheld; however, in the event of such consent being given, they will pay, subject to the provisions of Clause 5(c), 95% of all such costs, charges and expenses, subject nevertheless to the following conditions:
 - (i) If a payment not in excess of the limit of liability has to be made to dispose of a claim, costs, charges and expenses shall be payable in addition to the limit of liability otherwise applicable under this policy.
 - (ii) If the claim is successfully resisted by the Directors or Officers, costs, charges and expenses shall be payable up to but not exceeding the limit of liability under this policy.
 - (iii) If a payment has to be made to dispose of a claim in excess of the limit of liability under this policy, the Insurer's liability to pay costs, charges and expenses in connection therewith shall be limited to such proportion of the said costs, charges and expenses as the limit of liability herein bears to the amount paid to dispose of the claim; but the Insurer's liability as aforesaid to pay costs, charges and expenses shall be in addition to the limit of liability otherwise applicable under this policy.
- (b) The Directors and Officers shall not be required to contest any legal proceedings unless counsel (to be mutually agreed upon by the Directors and Officers and the Insurer) shall advise that such claim should be contested by the Directors and Officers and the Directors and Officers consent thereto, such consent not to be unreasonably withheld. In the event of the Directors and Officers being so required to contest legal proceedings, the Insurer, subject to the provisions of Clause 5(c) and notwithstanding the provisions of Paragraph (a) of this Clause 6, will pay 95% of all costs, charges and expenses in connection therewith in addition to the limit of liability otherwise applicable under this policy.
- (c) The words "costs, charges and expenses" as used in this Clause 6 shall include the cost of any appeal, attachment or similar bonds.

7 LOSS PROVISIONS

- (a) The time when a loss shall be incurred within the meaning of this policy shall be the date on which the Company shall give written notice to the Insurer as hereinafter provided.
- (b) The Company shall as a condition precedent to its right to be indemnified under this policy give to the Insurer notice as soon as practicable in writing of any claims made upon the Directors or Officers.
- (c) If during the policy period or during the discovery period if the right is exercised by the Company in accordance with Clause 8(a):
 - (i) the Company shall receive written or oral notice from any third party that it is the intention of such third party to hold the Directors or Officers responsible for the results of any specified Wrongful Act by the Directors or Officers while acting in the capacities aforementioned; or
 - (ii) The Company shall become aware of any occurrence which may subsequently give rise to a claim being made against the Directors or Officers in respect of any such Wrongful Act.



and shall in either case, during such period give written notice to the Insurer of the receipt of such written or oral notice under (i) above or of such occurrence under (ii) above. Then any claim which may subsequently be made against the Directors or Officers arising out of such Wrongful Act shall for the purpose of this policy be treated as a claim made during the currency hereof.

- (d) Notice hereunder shall be given to the Insurer 70 Pine Street New York N Y 10270
- (e) The Company shall give the Insurer such information and cooperation as it may reasonably require and as shall be in the Company's power.

8 GENERAL CONDITIONS

(a) Discovery Clause

If the Insurer shall cancel or refuse to renew this policy the Company shall have the right upon payment of the additional premium of 25% of the three-year premium hereunder to an extension of the cover granted by this policy in respect of any claim or claims which are made against the Directors or Officers during the period of twelve calendar months after the date of such cancellation or non-renewal but only in respect of any Wrongful Act committed before the date of such cancellation or non-renewal. This right shall terminate however unless written notice of such election together with the additional premium is received by the Insurer within ten (10) days after the effective date of cancellation or non-renewal. This Clause and the rights contained herein shall not apply to any cancellation resulting from non-payment of premium.

(b) Cancellation Clause

Notwithstanding anything contained in this policy to the contrary this policy may be cancelled by the Company at any time by written notice or by surrender of this policy. This policy may also be cancelled by or on behalf of the Insurer by delivering to the Company or by mailing to the Company, by registered, certified or other first class mail, at the Company's address as shown in Item 1 of the Declarations, written notice stating when, not less than thirty (30) days thereafter, the cancellation shall be effective. The mailing of such notice as aforesaid shall be sufficient proof of notice and this policy shall terminate at the date and hour specified in such notice.

If this policy shall be cancelled by the Company the Insurer shall retain the customary short rate proportion of the premium hereon.

If this policy shall be cancelled by or on behalf of the Insurer the Insurer shall retain the pro rata proportion of the premium hereon.

Payment or tender of any unearned premium by the Insurer shall not be a condition precedent to the effectiveness of cancellation but such payment shall be made as soon as practicable.

If the period of limitation relating to the giving of notice is prohibited or made void by any law controlling the construction thereof, such period shall be deemed to be amended so as to be equal to the minimum period of limitation permitted by such law.

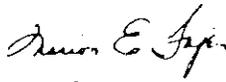
9 SUBROGATION

In the event of any payment under this policy, the Insurer shall be subrogated to the extent of such payment to all the Company's rights of recovery therefor, and the Company shall execute all papers required and shall do everything that may be necessary to secure such rights including the execution of such documents necessary to enable the Insurer effectively to bring suit in the name of the Company.

10 NOTICE

By acceptance of this policy, the Company named in Item 1 of the Declarations agrees to act on behalf of all Insureds with respect to the giving and receiving of notice of claim or cancellation, the payment of premiums and the receiving of any return premiums that may become due under this policy.

IN WITNESS WHEREOF, the INSURER has caused this policy to be signed by its President and a Secretary and countersigned on the Declarations page by a duly authorized agent of the Insurer.


Secretary


President

DIRECTORS & OFFICER LIABILITY

1 INSURING CLAUSE

This policy shall subject to its terms conditions and limitations as hereinafter provided pay on behalf of each and every person who was or now is or may hereafter be a Director or Officer of the Company named in Item 1 of the Declarations (who are hereinafter individually or collectively sometimes called the "Insureds") against loss (as hereinafter defined) arising from any claim or claims which are first made against the Insureds jointly or severally during the policy period by reason of any Wrongful Act (as hereinafter defined) in their respective capacities as Directors or Officers. This policy shall automatically cover Directors and Officers of any Subsidiary Company acquired or created after the inception of this policy, subject to written notice being given to the Insurer as soon as practicable and payment of any additional premium required.

2 DEFINITIONS

- (a) The term Director or Officer shall mean:
- (i) Any duly elected Director or duly elected or appointed Officer of the Company named in Item 1 of the Declarations except as noted under Item 6 of the Declarations. Coverage will automatically apply to all newly created Directors and Officers after the inception date of this policy subject to
 - a) Written notice of all such changes to the Insurer within thirty (30) days after each anniversary date or the termination date and
 - b) payment of any additional premium required
 - (b) The term Policy Year shall mean a period of one year commencing each year on the day and hour first named in Item 2 of the Declarations or if the time between the effective date or anniversary and termination of the policy is less than one year then such lesser period
 - (c) The term Loss shall mean any amount which the Insureds are legally obligated to pay for a claim or claims made against them for Wrongful Acts and shall include damages judgments settlements costs charges and expenses (excluding salaries of officers or employees of the Company) incurred in the defense of actions suits or proceedings and appeals therefrom provided always that such subject of loss shall not include fines or penalties imposed by law or other matters which may be deemed uninsurable under the law pursuant to which this policy shall be construed
 - (d) The term Wrongful Act shall mean any breach of duty neglect error misstatement misleading statement omission or other act done or wrongfully attempted by the Insureds or any of the foregoing so alleged by any claimant or any matter claimed against them solely by reason of their being such Directors or Officers of the Company named in Item 1 of the Declarations
 - (e) The term Subsidiary Company shall mean a Company of which the named Insured as described in Item 1 of the Declarations owns more than 50% of the voting stock

3 EXTENSIONS

Subject otherwise to the terms hereof this policy shall cover loss arising from any claims made against the estates heirs legal representatives or assigns of deceased Insureds who were Directors or Officers of the Company named in Item 1 of the Declarations at the time the acts upon which such claims were based were committed and the legal representatives or assigns of Directors or Officers in the event of their incompetency insolvency or bankruptcy.

4 EXCLUSIONS

The Insurer shall not be liable to make any payment in connection with any claim made against the Insureds

- (a) for libel or slander;
- (b) based upon or attributable to their gaining in fact of any personal profit or advantage to which they were not legally entitled;



- (c) for the return by the Insureds of any remuneration paid to the Insureds without the previous approval of the stockholders of the Company named in Item 1 of the Declarations which payment without such previous approval shall be held by the Courts to have been illegal
- (d) for an accounting of profits in fact made from the purchase or sale by the Insureds of securities of the Company named in Item 1 of the Declarations within the meaning of Section 16 (b) of the Securities Exchange Act of 1934 and amendments thereto or similar provisions of any state statutory law;
- (e) brought about or contributed to by the dishonesty of the Insureds; however, notwithstanding the foregoing the Insureds shall be protected under the terms of this policy as to any claims upon which suit may be brought against them by reason of any alleged dishonesty on the part of the Insureds unless a judgment or other final adjudication thereof adverse to the Insureds shall establish that acts of active and deliberate dishonesty committed by the Insureds with actual dishonest purpose and intent were material to the cause of action so adjudicated
- (f) based on or attributable to any failure or omission on the part of the Insureds to effect and maintain insurance;
- (g) which at the time of happening of such loss is insured by any other existing valid policy or policies under which payment of the loss is actually made except in respect of any excess beyond the amount or amounts of payments under such other policy or policies;
- (h) for which the Insureds are entitled to indemnity under any policy or policies in force previous hereto
- (i) for which the Insured shall be indemnified by the Company named in Item 1 of the Declarations for damages, judgments, settlements, costs, charges or expenses incurred in connection with the defense of any action, suit or proceeding and appeal therefrom to which the Directors or Officers may be a party or with which they may be threatened, pursuant to the law, common or statutory or the Charter or By-Laws of the Company named in Item 1 of the Declarations duly effective under law which determines and defines such rights of indemnity

NOTE The Wrongful Act of any Director or Officer shall not be imputed to any other Director or Officer for the purpose of determining the applicability of the Exclusions enumerated in this Clause 4

5 LIMIT AND RETENTION

- (a) The insurer shall be liable to pay 95% of loss excess of the amount stated in (c) below up to the amounts hereinafter stated, it being warranted that the remaining 5% of each and every loss shall be carried by the Insureds at their own risk and uninsured
- (b) Subject to the foregoing, the Insurers liability for any claim or claims made against it shall (except for any additional amount payable by virtue of Clause 6) be the amount stated in Item 3 of the Declarations which shall be the maximum liability of the Insurer in (a) each policy year and in (b) the discovery period if the right is exercised by the Insureds in accordance with Clause 8(a) and not the maximum aggregate so payable with respect to the policy period and the discovery period
- (c) This policy is only to pay the excess over the retention amount stated in Item 4 of the Declarations in respect of each and every loss hereunder including costs, charges and expenses as described in Clause 6. The retention amount stated in Item 4 of the Declarations is to be borne by the Insureds and is not to be insured. Losses arising out of the same act or interrelated acts of one or more of the Insureds shall be considered a single loss and only one retention amount shall be deducted from the aggregated amount of such losses. In such cases the retention shall be pro-rated among the Insureds in proportion to their respective losses
- (d) The foregoing provisions shall apply to this policy and the Company Reimbursement policy attached hereto, as though they constitute a single policy and the Insurer's maximum liability under both policies together shall not exceed the limits and retention set out in Paragraphs 5(a), 5(b) and 5(c) above

6 COSTS, CHARGES AND EXPENSES AND DEFENSE

- (a) No costs, charges and expenses shall be incurred without the Insurers consent which shall not be unreasonably withheld; however, in the event of such consent being given, they will pay, subject to the provisions of Clause 5(c), 95% of all such costs, charges and expenses, subject nevertheless to the following conditions:

- (i) If a payment not in excess of the limit of liability has to be made to dispose of a claim costs charges and expenses shall be payable in addition to the limit of liability otherwise applicable under this policy
 - (ii) If the claim is successfully resisted by the Insureds costs charges and expenses shall be payable up to but not exceeding the limit of liability under this policy
 - (iii) If a payment has to be made to dispose of a claim in excess of the limit of liability under this policy the Insurers liability to pay costs charges and expenses in connection therewith shall be limited to such proportion of the said costs charges and expenses as the limit of liability herein bears to the amount paid to dispose of the claim but the Insurer's liability as aforesaid to pay costs charges and expenses shall be in addition to the limit of liability otherwise applicable under this policy
- (b) The Insureds shall not be required to contest any legal proceedings unless counsel (to be mutually agreed upon by the Insureds and the Insurer) shall advise that such claim should be contested by the Insureds and the Insurers consent thereto such consent not to be unreasonably withheld In the event of the Insureds being so required to contest legal proceedings the Insurer subject to the provisions of Clause 5(c) and notwithstanding the provisions of Paragraph (a) of this Clause 6, will pay 95% of all costs charges and expenses in connection therewith in addition to the limit of liability otherwise applicable under this policy
- (c) The words costs charges and expenses shall include the cost of any appeal attachment or similar bond

7 LOSS PROVISIONS

- (a) The time when a loss shall be incurred within the meaning of this policy shall be the date on which the Company named in Item 1 of the Declarations or the Insureds shall give written notice to the Insurer as hereinafter provided
- (b) The Company named in Item 1 of the Declarations or the Insureds shall as a condition precedent to the Insured's right to be indemnified under this policy give to the Insurer notice as soon as practicable in writing of any claims made upon the Insureds
- (c) If during the policy period or during the discovery period if the right is exercised by the Insured in accordance with Clause 8(a)
- (i) the Company named in Item 1 of the Declarations or the Insureds shall receive written or oral notice from any third party that it is the intention of such third party to hold the Insureds responsible for the results of any specified Wrongful Act by the Insureds while acting in the capacities aforementioned; or
 - (ii) The Company named in Item 1 of the Declarations or the Insureds shall become aware of any occurrence which may subsequently give rise to a claim being made against the Insureds in respect of any such Wrongful Act;
- and shall in either case during such period give written notice to the Insurer of the receipt of such written or oral notice under (i) above or such occurrence under (ii) above, then any claim which may subsequently be made against the Insureds arising out of such Wrongful Act shall for the purpose of this policy be treated as a claim made during the currency hereof
- (d) Notice hereunder shall be given to the Insurer 70 Pine Street New York N Y 10270
- (e) The Insureds shall give the Insurer such information and cooperation as it may reasonably require and as shall be in the Insured's power

8 GENERAL CONDITIONS

(a) Discovery Clause

If the Insurer shall cancel or refuse to renew this policy the Insureds shall have the right upon payment of the additional premium of 25% of the three-year premium hereunder to an extension of the cover granted by this policy in respect of a claim or claims which are made against the Insureds during the period of twelve calendar months after the date of such cancellation or non-renewal, but only in respect of any Wrongful Act committed before the date of such cancellation or non-renewal. This right shall terminate however unless written notice of such election together with the additional premium is received by the Insurer within ten (10) days after the effective date of cancellation or non-renewal. This Clause and the rights contained herein shall not apply to any cancellation resulting from non-payment of premium

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(b) **Cancellation Clause**

Notwithstanding anything contained in this policy to the contrary this policy may be cancelled by the Company named in Item 1 of the Declarations or the Insureds at any time by written notice or by surrender of this policy

This policy may also be cancelled by or on behalf of the Insurer by delivering to the Company named in Item 1 of the Declarations or by mailing to the Company named in Item 1 of the Declarations by registered certified or other first class mail at its mailing address as shown in Item 1 of the Declarations written notice stating when, not less than thirty (30) days thereafter the cancellation shall be effective. The mailing of such notice as aforesaid shall be sufficient proof of notice and this policy shall terminate at the date and hour specified in such notice

If this policy shall be cancelled by the Company named in Item 1 of the Declarations or the Insureds the Insurer shall retain the customary short rate proportion of the premium hereon

If this policy shall be cancelled by the Insurer the Insurer shall retain the pro rata proportion of the premium hereon

Payment or tender of any unearned premium by the Insurer shall not be a condition precedent to the effectiveness of cancellation but such payment shall be made as soon as practicable

If the period of limitations relating to the giving of notice is prohibited or made void by any law controlling the construction thereof, such period shall be deemed to be amended so as to be equal to the minimum period of limitation permitted by such law

9 SUBROGATION

In the event of any payment under this policy the Insurer shall be subrogated to the extent of such payment to all the Insureds rights of recovery therefor and the Insureds shall execute all papers required and shall do everything that may be necessary to secure such rights including the execution of such documents necessary to enable the Insurer effectively to bring suit in the name of the Insureds

10 NOTICE

By acceptance of this policy the Company named in Item 1 of the Declarations agrees to act on behalf of all Insureds with respect to the giving and receiving of notice of claim or cancellation the payment of premiums and the receiving of any return premiums that may become due under this policy

IN WITNESS WHEREOF, the INSURER has caused this policy to be signed by its President and a Secretary and countersigned on the Declarations page by a duly authorized agent of the Insurer



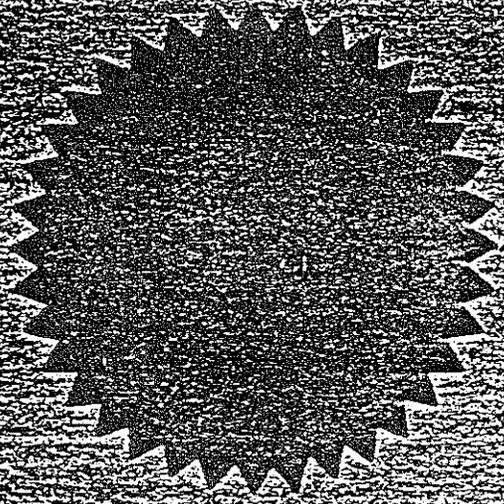
Secretary



President

EXHIBIT
261
1-5-83

A



DIRECTORS AND OFFICERS
LIABILITY INSURANCE POLICY
INCLUDING
BANK REIMBURSEMENT

MGIC INDEMNITY CORPORATION
A SUBSIDIARY OF MGIC INVESTMENT CORPORATION

EXHIBIT XVI



In consideration of the payment of the premium and in reliance upon all statements made and information furnished to MGIC Indemnity Corporation (a stock insurance company, hereinafter called the Insurer) including the statements made in the Proposal Form and subject to all of the terms, conditions, and limitations of this policy, the Insurer agrees:

- (a) With the Directors and Officers of the Bank that if, during the policy period, any claim or claims are made against the Directors and Officers, individually or collectively, for a Wrongful Act, the Insurer will pay, in accordance with the terms of this policy, on behalf of the Directors and Officers or any of them, their heirs, legal representatives or assigns all Loss which the Directors and Officers or any of them shall become legally obligated to pay.
- (b) With the Bank that if, during the policy period, any claim or claims are made against the Directors and Officers, individually or collectively, for a Wrongful Act, the Insurer will pay, in accordance with the terms of this policy, on behalf of the Bank, all Loss for which the Bank is required to indemnify or for which the Bank has, to the extent permitted by law, indemnified the Directors and Officers.

or collectively, or any matter claimed against them solely by reason of their being Directors or Officers of the Bank.

(f) The term "Subsidiary" shall mean any company which, at the inception date of this policy, is named in the Proposal Form and in which more than fifty percent (50%) of the voting stock is owned by the Bank named in Item 1 of the Declarations, either directly or through one or more of its Subsidiaries. In the event of sale or dissolution of any Subsidiary after the inception date of this policy, the policy period with respect to such Subsidiary shall terminate as of the effective date of such sale or dissolution. In the event of the creation of any subsidiary after the inception date of this policy, such newly created subsidiary shall be deemed to be a Subsidiary hereunder upon written notice thereof being given to the Insurer and the Insurer agreeing so to extend coverage subject to receipt of such information as the Insurer may request and payment of any additional premium required.

1. DEFINITIONS

- (a) The term "Bank" shall mean the Bank named in Item 1 of the Declarations and any Subsidiary as defined in Clause 1(f).
- (b) The term "Directors and Officers" shall mean all persons who were, now are, or shall be Directors of the Bank including officer positions held by such Directors and those persons who were Officers of the Bank at any time during the policy period of any directors' and officers' insurance policy written by the Insurer on the Bank.
- (c) The term "Policy Year" shall mean the period of one year following the effective date and hour of this policy or any anniversary thereof; or if the time between the effective date or any anniversary and the termination of the policy is less than one year, such lesser period.
- (d) The term "Loss" shall mean any amount which the Directors and Officers are legally obligated to pay or for which the Bank is required to indemnify the Directors or Officers, or for which the Bank has, to the extent permitted by law, indemnified the Directors and Officers, for a claim or claims made against the Directors and Officers for Wrongful Acts and shall include but not be limited to damages, judgments, settlements, costs (exclusive of salaries of officers or employees), and defense of legal actions, claims or proceedings and appeals therefrom and cost of attachment or similar bonds; provided however, such Loss shall not include fines or penalties imposed by law or matters which may be deemed uninsurable under the law pursuant to which this policy shall be construed.

2. EXTENSIONS

- (a) Coverage Clause - This policy shall cover Loss in respect of any Wrongful Act committed prior to the termination of this policy arising from any claim made (i) within the policy period or (ii) within the discovery period if the right is exercised by the Bank in accordance with Clause 2(b). For purposes of this Clause 2(a), any claim made subsequent to the policy period as to which notice was given to the Insurer within the policy period as provided in Clause 6(a), or 6(b), shall be treated as a claim made during the policy period.
- (b) Discovery Clause - If the Insurer shall cancel or refuse to renew this policy, the Bank shall have the right, upon payment of seventy-five percent (75%) of the annual premium or twenty-five percent (25%) of the three year pre-paid premium set forth in Item 5 of the Declarations, to an extension of the coverage granted by this policy with respect to any claim or claims which shall be made against the Directors or Officers during the period of twelve calendar months after the date of such cancellation or refusal to renew, but only with respect to any Wrongful Act committed before the date of such cancellation or non-renewal. A written request for this extension, together with payment of the appropriate premium, must be made within ten (10) days after the effective date of cancellation or non-renewal of the policy.

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~~(e) The term "Wrongful Act" shall mean any actual or alleged error, misstatement, misleading statement, act or omission, or any combination thereof, by the Directors or Officers of the Bank, or any officer or employee of the Bank, in the discharge of their duties as such in connection with the performance of the duties of the Bank and its officers and employees.~~

3. EXCLUSIONS

- (a) Except for Loss for which the Bank is required to indemnify the Directors or Officers, or for which the Bank has to the extent permitted by law, indemnified the

Directors or Officers, the Insurer shall not be liable to make any payment for Loss in connection with any claim made against the Directors or Officers:

- (1) for libel or slander;
- (2) based upon or attributable to their gaining in fact of any personal profit or advantage to which they were not legally entitled;
- (3) for return by the Directors or Officers of any remuneration paid to the Directors or Officers without the previous approval of the governing bodies of the Bank, which payment, without such previous approval, shall be held by the Courts to be in violation of law;
- (4) for an accounting of profits in fact made from the purchase and sale or sale and purchase by the Directors or Officers of securities of the Bank within the meaning of Section 16(b) of the Securities Exchange Act of 1934 and amendments thereto or similar provisions of any state statutory law or common law;
- (5) brought about or contributed to by the dishonesty of the Directors or Officers. However, notwithstanding the foregoing, the Directors or Officers shall be protected under the terms of this policy as to any claims upon which suit may be brought against them, by reason of any alleged dishonesty on the part of the Directors or Officers, unless a judgment or other final adjudication thereof adverse to the Directors or Officers shall establish that acts of active and deliberate dishonesty committed by the Directors or Officers with actual dishonest purpose and intent were material to the cause of action so adjudicated.

(b) The Insurer shall not be liable to make any payment for Loss in connection with any claim made against the Directors or Officers:

- (1) which is insured by another valid policy or policies except with respect to any excess beyond the amount or amounts of coverage under such other policy or policies;
- (2) for which the Directors and Officers are entitled to indemnity under any policy or policies in force previous hereto;
- (3) for bodily injury, sickness, disease, or death of any person, or for damage to or destruction of any tangible property including loss of use thereof.

NOTE: The Wrongful Act of any Director or Officer shall not be imputed to any other Directors or Officers for the purpose of determining the applicability of the Exclusions enumerated in this Clause 3:

4. LIMITS OF LIABILITY

- (a) The Insurer shall be liable to pay one hundred percent (100%) of any Loss (including costs, charges and expenses as referred to in Clause 5) in excess of the retention amount shown under Item 4 of the Declarations up to the Limit of Liability stated in Clause 4(b) below. One retention amount shall apply to each and every Loss.
- (b) The Limit of Liability shall be the amount stated in Item 3 of the Declarations, which amount shall be the maximum aggregate liability of the Insurer with respect to claims made in (i) each policy year and in (ii) the discovery period if the right is exercised by the Bank in accordance with Clause 2(b), and not the maximum aggregate so payable with respect to the policy period and the discovery

period. For purposes of this Clause 4(b), a claim shall be deemed to be made at the date that notice is given to the Insurer pursuant to Clause 6(a) or 6(b), or at the date the claim is made against the Directors and Officers, whichever shall occur first.

(c) Claims based on or arising out of the same act, inter-related acts, or one or more series of similar acts, of one or more of the Directors or Officers shall be considered a single Loss and the Insurer's liability shall be limited to the limit stated in Clause 4(b). In the event that more than one Director or Officer is included in the same Loss, the total amount of such Loss and the retention shall be prorated among the Directors and Officers in proportion to their respective losses unless otherwise mutually agreed upon by the Directors and Officers and the Insurer.

5. COSTS, CHARGES AND EXPENSES

(a) No costs, charges and expenses shall be incurred or settlements made without the Insurer's consent which consent shall not be unreasonably withheld; however, in the event such consent is given, the Insurer shall pay, subject to the provisions of Clause 4, such costs, settlements, charges and expenses.

(b) The Directors and Officers shall not be required to contest any legal proceedings unless counsel (to be mutually agreed upon by the Directors or Officers and the Insurer) shall advise that such claim should be contested by the Directors or Officers.

(c) The Insurer may at its option and upon request, advance on behalf of the Directors or Officers, or any of them, expenses which they have incurred in connection with claims made against them, prior to disposition of such claims, provided always that in the event it is finally established the Insurer has no liability hereunder, such Directors and Officers agree to repay to the Insurer, upon demand, all monies advanced by virtue of this provision.

6. NOTICE OF CLAIMS

(a) If during the policy period the Bank or the Directors or Officers shall: (i) receive written or oral notice from any party that it is the intention of such party to hold the Directors and Officers, or any of them, responsible for a Wrongful Act; or (ii) become aware of any occurrence which may subsequently give rise to a claim being made against the Directors and Officers, or any of them, for a Wrongful Act; and shall, during such period, give written notice thereof to the Insurer as soon as practicable and prior to the date of termination of the policy, then any claim which may subsequently be made against the Directors or Officers arising out of such Wrongful Act shall, for the purpose of this policy, be treated as a claim made during the policy year in which such notice was given.

(b) The Bank or the Directors or Officers shall, as a condition precedent to their rights under this policy, give to the Insurer notice in writing as soon as practicable of any claims made and shall give the Insurer such information and cooperation as it may reasonably require.

(c) Notice hereunder shall be given to MGIC Indemnity Corporation, Directors' and Officers' Liability Insurance Division, MGIC Plaza, Milwaukee, Wisconsin 53201.

(d) The Bank and the Directors or Officers shall give the Insurer the right to associate itself in the defense and set-

tlement of any claim that appears reasonably likely to involve the Insurer.

(e) The Bank and the Directors or Officers, following the furnishing of notice as provided in Clauses 6(a) and 6(b) shall, as soon as practicable, furnish the Insurer with copies of reports, investigations, pleadings and all other papers in connection therewith.

7. GENERAL CONDITIONS

(a) Representations - It is represented that the particulars and statements contained in the Proposal Form are true and are the basis of this policy and are to be considered as incorporated in and constituting part of this policy. However, this policy shall not be voided or rescinded and coverage shall not be excluded as a result of any untrue statement in the Proposal Form, except as to those persons making such statement or having knowledge of its untruth.

(b) Cancellation Clause - This policy may be cancelled by the Bank at any time by written notice or by the surrender of this policy.

This policy may also be cancelled by or on behalf of the Insurer by delivering to the Bank, or by mailing to the Bank by certified mail or other first class mail, at the Bank's address as shown in this policy, written notice stating when, not less than thirty (30) days thereafter, the cancellation shall be effective. The mailing of such notice as aforesaid shall be sufficient proof of notice and this policy shall terminate at the date and hour specified in such notice.

If this policy shall be cancelled by the Bank, the Insurer shall retain the customary short rate portion of the premium. If this policy shall be cancelled by or on behalf of the Insurer, the Insurer shall retain the pro rata portion of the premium. Payment or tender of any unearned premium by the Insurer shall not be a condition precedent to the effectiveness of cancellation but such payment shall be made as soon as practicable.

If the Insurer elects not to renew this policy, the Insurer shall provide the Bank for itself and as agent for the Directors and Officers with no less than thirty (30) days advance notice thereof. If the period of limitation relating to the giving of notice is prohibited or made void by any law controlling the construction thereof, such period shall be deemed to be amended so as to be equal to the minimum period of limitation permitted by such law.

(c) Action Against Insurer Clause - No action shall be

taken against the Insurer unless, as a condition precedent thereto, there shall have been full compliance with all of the terms of this policy nor until the amount of the Directors' or Officers' obligation to pay shall have been finally determined either by judgment against the Directors or Officers after actual trial, or by written agreement of the Directors or Officers, the claimant and the Insurer.

No person or organization shall have any right under this policy to join the Insurer as a party to any action against the Directors or Officers to determine the Directors' or Officers' liability, nor shall the Insurer be impleaded by the Directors or Officers or their legal representative. Bankruptcy or insolvency of a Director or Officer or of a Director's or Officer's estate shall not relieve the Insurer of any of its obligations hereunder.

(d) Merger or Consolidation Clause - If after the effective date of this policy action is taken which causes the Bank to become subject to the Federal Bank Merger Act or the Bank Holding Company Act of 1956 and amendments thereto, written notice thereof shall be given to the Insurer as soon as practicable together with such information as the Insurer may request and the Bank shall pay any additional premium required if the Insurer, at its option, agrees to insure the surviving entity. If the Insurer elects not to insure the surviving entity and the discovery clause is exercised by the Bank or the surviving entity, the extension of coverage shall be limited to Directors and Officers of the Bank as it existed prior to such merger or consolidation.

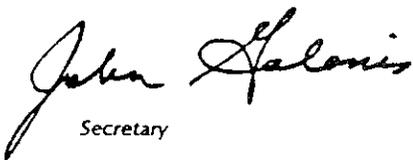
(e) Subrogation - In the event of any payment under this policy, the Insurer shall be subrogated to the extent of such payment to all the Directors' or Officers' or the Bank's rights of recovery therefor, and the Directors or Officers or the Bank shall execute all papers required and shall do everything that may be necessary to secure such rights, including the execution of such documents as may be necessary to enable the Insurer effectively to bring suit in the name of the Directors or Officers of the Bank.

8. NOTICE

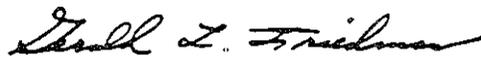
By acceptance of this policy, the Directors and Officers and the Bank agree that the Bank shall act on behalf of all Directors or Officers with respect to the giving and receiving of notice of claim or cancellation, the payment of premiums and the receiving of any return premiums that may be due under this policy.

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IN WITNESS WHEREOF, the Insurer has caused this policy to be signed by its President and Secretary and countersigned, if required, on the Declarations Page by a duly authorized agent of the Insurer.


Secretary

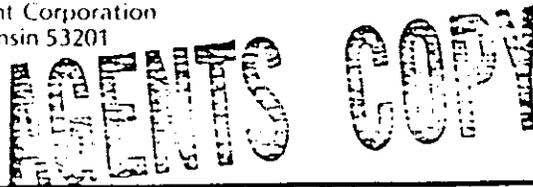



President

A

**AMERICAN
SOCIETY
OF
MUSIC
TEACHERS
ASSOCIATION**

**Directors' and Officers'
Liability Insurance Policy
Including Company Reimbursement**



In consideration of the payment of the premium and in reliance upon all statements made and information furnished to MGIC Indemnity Corporation (a stock insurance company hereinafter called the Insurer) including the statements made in the Proposal Form and subject to all of the terms, conditions, and limitations of this policy the Insurer agrees:

- (a) With the Directors and Officers of the Company that if, during the policy period, any claim or claims are made against the Directors and Officers individually or collectively, for a Wrongful Act, the Insurer will pay, in accordance with the terms of this policy, on behalf of the Directors and Officers or any of them, their heirs, legal representatives or assigns all Loss which the Directors and Officers or any of them shall become legally obligated to pay.
- (b) With the Company that if during the policy period, any claim or claims are made against the Directors and Officers individually or collectively, for a Wrongful Act, the Insurer will pay, in accordance with the terms of this policy, on behalf of the Company, all Loss for which the Company is required to indemnify or for which the Company has, to the extent permitted by law, indemnified the Directors and Officers.

1. DEFINITIONS

- (a) The term "Company" shall mean the Company named in Item 1 of the Declarations and any Subsidiary as defined in Clause 1(f).
- (b) The term "Directors and Officers" shall mean all persons who were now are, or shall be, Directors of the Company, including officer positions held by such Directors and those persons who were Officers of the Company at any time during the policy period of any directors' and officers' insurance policy written by the Insurer on the Company.
- (c) The term "Policy Year" shall mean the period of one year following the effective date and hour of this policy or any anniversary thereof, or if the time between the effective date or any anniversary and the termination of the policy is less than one year, such lesser period.
- (d) The term "Loss" shall mean any amount which the Directors and Officers are legally obligated to pay or for which the Company is required to indemnify the Directors or Officers, or for which the Company has, to the extent permitted by law, indemnified the Directors and Officers for a claim or claims made against the Directors and Officers for Wrongful Acts, and shall include but not be limited to damages, judgments, settlements, costs (exclusive of salaries of officers or employees), and defense of legal actions, claims or proceedings and appeals therefrom, and cost of attachment or similar bonds provided, however, such Loss shall not include fines or penalties imposed by law, or matters which may be deemed uninsurable under the law pursuant to which this policy shall be construed.
- (e) The term "Wrongful Act" shall mean any actual or alleged error, misstatement, misleading statement, act or omission, or neglect or breach of duty by the Directors or Officers in the discharge of their duties solely in their capacity as Directors or Officers of the Company, individually or collectively, or any matter claimed against them solely by reason of their being Directors or Officers of the Company.
- (f) The term "Subsidiary" shall mean any company which, at the inception date of this policy, is named in the Proposal Form and

event of sale or dissolution of any Subsidiary after the inception date of this policy, the policy period with respect to such Subsidiary shall terminate as of the effective date of such sale or dissolution. In the event of the creation of any subsidiary after the inception date of this policy, such newly created subsidiary shall be deemed to be a Subsidiary hereunder upon written notice thereof being given to the Insurer and the Insurer agreeing so to extend coverage subject to receipt of such information as the Insurer may request and payment of any additional premium required.

2. EXTENSIONS

- (a) Coverage Clause — This policy shall cover Loss in respect of any Wrongful Act committed prior to the termination of this policy arising from any claim made (i) within the policy period or (ii) within the discovery period if the right is exercised by the Company in accordance with Clause 2(b). For purposes of this Clause 2(a), any claim made subsequent to the policy period as to which notice was given to the Insurer within the policy period as provided in Clause 6(a) or 6(b), shall be treated as a claim made during the policy period.
- (b) Discovery Clause — If the Insurer shall cancel or refuse to renew this policy, the Company shall have the right, upon payment of seventy-five percent (75%) of the annual premium or twenty-five percent (25%) of the three year prepaid premium set forth in Item 5 of the Declarations to an extension of the coverage granted by this policy with respect to any claim or claims which shall be made against the Directors or Officers during the period of twelve calendar months after the date of such cancellation or refusal to renew, but only with respect to any Wrongful Act committed before the date of such cancellation or non-renewal. A written request for this extension together with payment of the appropriate premium must be made within ten (10) days after the effective date of cancellation or non-renewal of the policy.

3. EXCLUSIONS

- (1) Except for Loss for which the Company is required to indemnify the Directors or Officers, or for which the Company has, to the extent permitted by law, indemnified the Directors or Officers, the Insurer shall not be liable to make any payment for Loss in connection with any claim made against the Directors or Officers:
 - (1) for libel or slander
 - (2) based upon or attributable to their gaining in fact of any personal profit or advantage to which they were not legally entitled
 - (3) for return by the Directors or Officers of any remuneration paid to the Directors or Officers without the previous

(4) for an accounting of profits in fact made from the purchase and sale or sale and purchase by the Directors or Officers of securities of the Company within the meaning of Section 16(b) of the Securities Exchange Act of 1934 and amendments thereto or similar provisions of any state statutory law or common law;

(5) brought about or contributed to by the dishonesty of the Directors or Officers. However, notwithstanding the foregoing, the Directors or Officers shall be protected under the terms of this policy as to any claims upon which suit may be brought against them, by reason of any alleged dishonesty on the part of the Directors or Officers, unless a judgment or other final adjudication thereof adverse to the Directors or Officers shall establish that acts of active and deliberate dishonesty committed by the Directors or Officers with actual dishonest purpose and intent were material to the cause of action so adjudicated.

(b) The Insurer shall not be liable to make any payment for Loss in connection with any claim made against the Directors or Officers:

(1) which is insured by another valid policy or policies except with respect to any excess beyond the amount or amounts of coverage under such other policy or policies;

(2) for which the Directors and Officers are entitled to indemnity under any policy or policies in force previous hereto;

(3) for bodily injury, sickness, disease, or death of any person or for damage to or destruction of any tangible property including loss of use thereof.

NOTE: The Wrongful Act of any Director or Officer shall not be imputed to any other Directors or Officers for the purpose of determining the applicability of the Exclusions enumerated in this Clause 3.

4 LIMITS OF LIABILITY

(a) The Insurer shall be liable to pay one hundred percent (100%) of any Loss (including costs, charges and expenses as referred to in Clause 5) in excess of the retention amount shown under Item 4 of the Declarations up to the Limit of Liability stated in Clause 4(b) below. One retention amount shall apply to each and every Loss.

(b) The Limit of Liability shall be the amount stated in Item 3 of the Declarations, which amount shall be the maximum aggregate liability of the Insurer with respect to claims made in (i) each policy year and in (ii) the discovery period if the right is exercised by the Company in accordance with Clause 2(b), and not the maximum aggregate so payable with respect to the policy period and the discovery period. For purposes of this Clause 4(b), a claim shall be deemed to be made at the date that notice is given to the Insurer pursuant to Clause 6(a) or 6(b), or at the date the claim is made against the Directors and Officers, whichever shall occur first.

(c) Claims based on or arising out of the same act, interrelated acts or one or more series of similar acts of one or more of the Directors or Officers shall be considered a single Loss and the Insurer's liability shall be limited to the limit of liability stated in Clause 4(b). In the event that more than one Director or Officer is included in the same Loss, the total amount of such Loss and the retention shall be prorated among the Directors and Officers in proportion to their respective losses unless otherwise mutually agreed upon by the Directors and Officers and the Insurer.

(d) In the event a single Loss is covered in part under both Insuring Clauses (a) and (b), the retentions set forth in Item 4 of the Declarations shall be applied separately to that part of the Loss covered by each Insuring Clause and the sum of the retentions so applied shall constitute the retention for each single Loss provided, however, the total retention as finally determined shall in no event exceed the maximum retention applicable to Company Reimbursement-Insuring Clause (b).

5. COSTS, CHARGES AND EXPENSES

(a) No costs, charges and expenses shall be incurred or settlements made without the Insurer's consent which consent shall not be unreasonably withheld; however, in the event such consent is given, the Insurer shall pay, subject to the provisions of Clause 4, such costs, settlements, charges and expenses.

(b) The Directors and Officers shall not be required to contest any legal proceedings unless counsel (to be mutually agreed upon by the Directors or Officers and the Insurer) shall advise that such claim should be contested by the Directors or Officers.

(c) The Insurer may at its option and upon request, advance on behalf of the Directors or Officers or any of them, expenses which they have incurred in connection with claims made against them prior to disposition of such claims, provided always that in the event it is finally established the Insurer has no liability hereunder, such Directors and Officers agree to repay to the Insurer, upon demand, all monies advanced by virtue of this provision.

6 NOTICE OF CLAIMS

(a) If during the policy period the Company or the Directors or Officers shall: (i) receive written or oral notice from any party that it is the intention of such party to hold the Directors or Officers, or any of them, responsible for a Wrongful Act; or (ii) become aware of any occurrence which may subsequently give rise to a claim being made against the Directors and Officers, or any of them, for a Wrongful Act; and shall, during such period, give written notice thereof to the Insurer as soon as practicable and prior to the date of termination of the policy, then any claim which may subsequently be made against the Directors or Officers arising out of such Wrongful Act shall, for the purpose of this policy, be treated as a claim made during the policy year in which such notice was given.

(b) The Company or the Directors or Officers shall, as a condition precedent to their rights under this policy, give to the Insurer notice in writing as soon as practicable of any claims made and shall give the Insurer such information and cooperation as it may reasonably require.

(c) Notice hereunder shall be given to MGIC Indemnity Corporation, Directors and Officers' Liability Insurance Division, MGIC Plaza, Milwaukee, Wisconsin 53202.

(d) The Company and the Directors or Officers shall give the Insurer the right to associate itself in the defense and settlement of any claim that appears reasonably likely to involve the Insurer.

(e) The Company and the Directors or Officers, following the furnishing of notice as provided in Clauses 6(a) and 6(b), shall, as soon as practicable, furnish the Insurer with copies of reports, investigations, pleadings and all other papers in connection therewith.

7. GENERAL CONDITIONS

(a) Representations — It is represented that the particulars and statements contained in the Proposal Form are true and are the basis of this policy and are to be considered as incorporated in and constituting part of this policy. However, this policy shall

not be voided or rescinded and coverage shall not be excluded as a result of any untrue statement in the Proposal Form, except as to those persons making such statement or having knowledge of its untruth

(b) Cancellation Clause — This policy may be cancelled by the Company at any time by written notice or by the surrender of this policy

This policy may also be cancelled by or on behalf of the Insurer by delivering to the Company, or by mailing to the Company by certified mail or other first class mail, at the Company's address as shown in this policy written notice stating when, not less than thirty (30) days thereafter, the cancellation shall be effective. The mailing of such notice as aforesaid shall be sufficient proof of notice and this policy shall terminate at the date and hour specified in such notice

If this policy shall be cancelled by the Company, the Insurer shall retain the customary short rate portion of the premium. If this policy shall be cancelled by or on behalf of the Insurer, the Insurer shall retain the pro rata portion of the premium. Payment or tender of any unearned premium by the Insurer shall not be a condition precedent to the effectiveness of cancellation but such payment shall be made as soon as practicable

If the Insurer elects not to renew this policy, the Insurer shall provide the Company for itself and as agent for the Directors and Officers with no less than thirty (30) days advance notice thereof. If the period of limitation relating to the giving of notice is prohibited or made void by any law controlling the construction thereof, such period shall be deemed to be amended so as to be equal to the minimum period of limitation permitted by such law

(c) Action Against Insurer Clause — No action shall be taken against the Insurer unless as a condition precedent thereto, there shall have been full compliance with all of the terms of this policy nor until the amount of the Directors' or Officers' obligation to pay shall have been finally determined either by judgment against the Directors or Officers after actual trial or by written agreement of the Directors or Officers, the claimant and the Insurer

No person or organization shall have any right under this policy to join the Insurer as a party to any action against the Directors or Officers to determine the Directors' or Officers' liability, nor shall the Insurer be impleaded by the Directors or Officers or their legal representative. Bankruptcy or insolvency of a Director or Officer or of a Director's or Officer's estate shall not relieve the Insurer of any of its obligations hereunder.

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(d) Merger or Consolidation Clause — In the event the Company acquires by merger, or consolidates with, or is merged into any company, after the effective date of this policy, written notice thereof shall be given to the Insurer as soon as practicable together with such information as the Insurer may request and the Company shall pay any additional premium required if the Insurer, at its option, agrees to insure the surviving entity. If the Insurer elects not to insure the surviving entity and the discovery clause is exercised by the Company or the surviving entity, the extension of coverage shall be limited to Directors and Officers of the Company as it existed prior to such merger or consolidation.

(e) Subrogation — In the event of any payment under this policy the Insurer shall be subrogated to the extent of such payment to all the Directors' or Officers' or the Company's rights of recovery therefor, and the Directors or Officers or the Company shall execute all papers required and shall do everything that may be necessary to secure such rights, including the execution of such documents as may be necessary to enable the Insurer effectively to bring suit in the name of the Directors or Officers of the Company

8 NOTICE

By acceptance of this policy, the Directors and Officers and the Company agree that the Company shall act on behalf of all Directors or Officers with respect to the giving and receiving of notice of claim or cancellation, the payment of premiums and the receiving of any return premiums that may be due under this policy

In Witness Whereof, the Insurer has caused this policy to be signed by its President and Secretary and countersigned, if required, on the Declarations Page by a duly authorized agent of the Insurer

MGIC INDEMNITY CORPORATION

President



Secretary

A

Endorsement

#2

Attached to and Forming
Part of Policy Number 20671 DC01

Effective Date of Endorsement:
September 1, 1983

In consideration of the premium charged, it is hereby understood and agreed that Exclusion (B) (3) is deleted and replaced by the following:

It is understood and agreed that the Insurer shall not be liable to make any payment for Loss in connection with any claim made against the Directors or Officers based upon or attributable to:

bodily injury, sickness, disease, or death of any person or for damage to or destruction of any tangible property including loss of use thereof.

Nothing herein contained shall be held to vary, alter, waive or extend any of the terms, conditions, provisions, agreements or limitations of the above mentioned Policy other than as above stated.

Jemnity Corporation
A Subsidiary of MGIC Investment Corporation
Box 488 Milwaukee Wisconsin 53201

MGIC

A

Endorsement

#3

Attached to and Forming
Part of Policy Number 20671 DC01

Effective Date of Endorsement:
September 1, 1983

In consideration of the premium charged, it is hereby understood and agreed that the Insurer shall not be liable to make any payment for loss in connection with any claim, including but not limited to any subsequent stockholders derivative or representative action, made against the Directors or Officers based upon or attributable to, or arising out of the following:

The litigation as outlined in the 6/30/83 letter from the lawfirm of Ahlers, Cooney Dorweiler Haynie & Smith to Shull & Co.

Nothing herein contained shall be held to vary, alter, waive or extend any of the terms, conditions, provisions, agreements or limitations of the above mentioned Policy other than as above stated.

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Failure to Maintain Insurance

#4

Attached to and Forming
Part of Policy Number: 20671 DC01

Effective Date of Endorsement:
September 1, 1983

Clause 3(a) of the Policy, dealing with Exclusions is hereby amended by the addition of the following paragraph (6) to said Clause:

3(a)(6) based upon or attributable to any failure or omission on the part of the Directors or Officers to effect and maintain insurance.

Nothing herein contained shall be held to vary, alter, waive or extend any of the terms, conditions, provisions, agreements or limitations of the above mentioned Policy other than as above stated



General Limitation of
Coverage Endorsement

#5

Attached to and Forming
Part of Policy Number 20671 DC01

Effective Date of Endorsement
September 1, 1983

It is understood and agreed that the Insurer shall not be liable to make any payment for Loss in connection with any claim made against the Directors or Officers based upon or attributable to:

the selling of franchises and/or any franchising operations, including but not limited to any subsequent stockholder derivative or representative actions arising therefrom/

Nothing herein contained shall be held to vary, alter, waive or extend any of the terms, conditions, provisions, agreements or limitations of the above mentioned Policy other than as above stated

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General Limitation of
Coverage Endorsement

#6

Issued to and Forming
Policy Number: 20671 DC01

Effective Date of Endorsement
September 1, 1983

Understood and agreed that the Insurer shall not be liable to make any payment for Loss in connection with any claim against the Directors or Officers based upon or attributable to:

Securities Act of 1933, the Securities and Exchange Act of 1934, Rules or Regulations of the SEC under either or both Acts, similar laws or regulations of any State relating to any offering of securities.

Nothing herein contained shall be held to vary, alter, waive or extend any of the terms, conditions, provisions, agreements or representations of the above mentioned Policy other than as above stated.



Joint Insured

#8

Attached to and Forming
Part of Policy Number 20671 DC01

Effective Date of Endorsement:
September 1, 1983

It is understood and agreed that Clause 8 of the Policy should be deleted in its entirety and be replaced with the following language:

"By acceptance of this Policy, the Directors and Officers, the Institutions defined in Clause 1(a) of the Policy, Subsidiaries and Affiliates agreed that the Institution named in Item 1 of the Declarations shall act on behalf of all Directors or Officers, the Institutions defined in Clause 1(a) of the Policy, Subsidiaries and Affiliates with respect to the giving and receiving of notice of claim or cancellation or any other notice required or permitted hereunder, the payment of premiums and the receiving of any return premiums that may be due under this Policy"

Nothing herein contained shall be held to vary, alter, waive or extend any of the terms, conditions, provisions, agreements or limitations of the above mentioned Policy other than as above stated

General Policy Modifications

A

#9

Attached to and Forming
Part of Policy Number 20671 DC01

Effective Date of Endorsement
September 1, 1983

In consideration of the premium charged it is understood and agreed

1 Clause 1(b) of the Policy is hereby amended to read as follows:

1(b) The term "Directors and Officers" shall mean all persons who were, now are or shall be Directors and/or Officers of the Company

2 For the purposes of the application of the retention, Loss applicable to the Company reimbursement (Insuring Clause (B)) includes Losses for which indemnification by the Company is legally permissible whether or not actual indemnification is granted

3 Clause 1(f) of the Policy is hereby amended to read as follows:

The term "Subsidiary" shall mean

(1) any company in which more than fifty percent (50%) of the voting stock is at the inception date of this Policy owned by the Entity named in Item 1 of the Declarations either directly or through one or more of its Subsidiaries and

(2) any Subsidiary existing prior thereto which were covered under any prior Directors' and Officers' Liability Insurance Policy written by the Insurer on the Entity named in Item 1 of the Declarations

In the event of sale or dissolution of any Subsidiary (as defined above) the Policy shall continue to apply to all persons who were Directors or Officers of the Subsidiary with respect to claims for Wrongful Acts prior to the time of sale or dissolution. However, in the event of sale of a Subsidiary coverage shall cease as of the date of sale for subsequent Directors and Officers

In the event that a Subsidiary shall be created or acquired subsequent to the effective date of this Policy coverage shall apply provided that written notice thereof be given to the Insurer within one hundred twenty (120) days of such creation or acquisition and premium adjustment and coverage revision shall be effected as may be required by the Insurer

4 Clause 7(A) is deleted and replaced by the following:

7(A) In issuing this Policy the Insurer has relied on the declarations and statements which are contained in the proposal form (a copy of which is attached hereto) and which are deemed to be incorporated in this Policy provided however that except for material facts or circumstances known to the person who subscribed the proposal form any misstatement or omission in such proposal form in respect to a specified Wrongful Act by a particular Director or Officer or his cognizance of any matter which he has reason to suppose might afford grounds for a future claim against him shall not be imputed to any other Director or Officer for purposes of determining the availability of coverage under this Policy

Nothing herein contained shall be held to vary, alter, waive or extend any of the terms, conditions, provisions, agreements or limitations of the above mentioned Policy other than as above stated

Pollution Endorsement

#10

Attached to and Forming
Part of Policy Number: 20671 DC01

Effective Date of Endorsement:
September 1, 1983

It is understood and agreed that the Insurer shall not be liable to make any payment for Loss in connection with any claim made against the Directors or Officers based upon, attributable to, or arising from charges of seepage, pollution or contamination and based upon or attributed to violation or alleged violation of any federal, state, municipal or other governmental statute, regulation or ordinance prohibiting or providing for the control or regulation of emissions or effluents of any kind into the atmosphere or any body of land, water, or watercourse or arising from any action or proceeding brought for enforcement purposes by any public official, agency, commission, board of pollution control administration pursuant to any such statutes, regulations or ordinances or arising from any suits alleging seepage, pollution or contamination based upon common law nuisance, trespass or negligence.

Nothing herein contained shall be held to vary, alter, waive or extend any of the terms, conditions, provisions, agreements or limitations of the above mentioned Policy other than as above stated.

**Nuclear Energy Liability
Exclusion Endorsement**

#11

Attached to and Forming
Part of Policy Number 20671 DC01

Effective Date of Endorsement
September 1, 1983

It is agreed that the policy does not apply

- 1 Under any Liability Coverage to injury, disease, death or destruction
 - a with respect to which an insured under the policy is also an insured under a nuclear energy liability policy issued by Nuclear Energy Liability Insurance Association, Mutual Atomic Energy Liability Underwriters or Nuclear Insurance Association of Canada, or would be an insured under any such policy but for its termination upon exhaustion of its limit of liability; or
 - b resulting from the hazardous properties of nuclear material and with respect to which (1) any person or organization is required to maintain financial protection pursuant to the Atomic Energy Act of 1954 or any law amendatory thereof, or (2) the insured is, or had this policy not been issued would be, entitled to indemnity from the United States of America, or any agency thereof, under any agreement entered into by the United States of America, or any agency thereof, with any person or organization.
- 2 Under any Medical Payments Coverage, or under any Supplementary Payments provision relating to immediate medical or surgical relief, to expenses incurred with respect to bodily injury, sickness, disease or death resulting from the hazardous properties of nuclear material and arising out of the operation of a nuclear facility by any person or organization.
- 3 Under any Liability Coverage to injury, sickness, disease, death or destruction resulting from the hazardous properties of nuclear material, if
 - a the nuclear material (1) is at any nuclear facility owned by, or operated by, or on behalf of, an insured, or (2) has been discharged or dispersed therefrom;
 - b the nuclear material is contained in spent fuel or waste at any time possessed, handled, used, processed, stored, transported or disposed of by, or on behalf of, an insured; or
 - c the injury, sickness, disease, death or destruction arises out of the furnishing by an insured of services, materials, parts or equipment in connection with the planning, construction, maintenance, operation or use of any nuclear facility, but if such facility is located within the United States of America, its territories or possessions or Canada, this exclusion (c) applies only to injury to or destruction of property at such nuclear facility.

4 As used in this endorsement

hazardous properties include radioactive, toxic or explosive properties; nuclear material means source material, special nuclear material or by product material.

source material, special nuclear material, and by product material have the meanings given them in the Atomic Energy Act of 1954 or in any law amendatory thereof.

spent fuel means any fuel element or fuel component, solid or liquid, which has been used or exposed to radiation in a nuclear reactor.



"waste" means any waste material (1) containing by-product material and (2) resulting from the operation by any person or organization of any nuclear facility included within the definition of nuclear facility under paragraph (a) or (b) thereof;

"nuclear facility" means

- a any nuclear reactor.
- b any equipment or device designed or used for (1) separating the isotopes of uranium or plutonium, (2) processing or utilizing spent fuel or (3) handling, processing or packaging waste
- c any equipment or device used for the processing, fabricating or alloying of special nuclear material if at any time the total amount of such material in the custody of the insured at the premises where such equipment or device is located consists of or contains more than 25 grams of plutonium or uranium 233 or any combination thereof, or more than 250 grams of uranium 235
- d any structure, basin, excavation, premises or place prepared or used for the storage or disposal of waste.

and includes the site on which any of the foregoing is located, all operations conducted on such site and all premises used for such operations

"nuclear reactor" means any apparatus designed or used to sustain nuclear fission in a self-supporting chain reaction or to contain a critical mass of fissionable material.

With respect to injury to or destruction of property, the word "injury" or "destruction" includes all forms of radioactive contamination of property.

Nothing herein contained shall be held to vary, alter, waive or extend any of the terms, conditions, provisions, agreements or limitations of the above mentioned Policy other than as above stated.

**Prior or Pending
Litigation Exclusion
Endorsement**

A

#12

Attached to and Forming
Part of Policy Number 20671 DC01

Effective Date of Endorsement
September 1, 1983

In consideration of the premium charged, it is hereby understood and agreed that the Insurer shall not be liable to make any payment for Loss in connection with any claim made against the Directors or Officers based upon or attributable to litigation prior to or pending at the inception date of this policy involving the company defined in Clause 1(a) of the policy (hereinafter called the Company) and/or its subsidiary(ies) and/or Directors or Officers of the Company and/or its subsidiary(ies) or arising out of the facts or circumstances underlying or alleged in any such prior or pending litigation

Nothing herein contained shall be held to vary, alter, waive or extend any of the terms, conditions, provisions, agreements or limitations of the above mentioned Policy other than as above stated



Deletion of Clause 5(c)

#13

Attached to and Forming
Part of Policy Number: 20671 DC01

Effective Date of Endorsement:
September 1, 1983

It is understood and agreed that Clause 5(c) of the Policy is hereby deleted in its entirety

Nothing herein contained shall be held to vary, alter, waive or extend any of the terms, conditions, provisions, agreements or limitations of the above mentioned Policy other than as above stated



Continental Casualty Company

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CNA Plaza
Chicago, Illinois 60685

A Stock Company

ASSUMPTION ENDORSEMENT

It is agreed that this Policy issued by the MGIC Indemnity Corporation is hereby insured by the Continental Casualty Company, an Illinois stock insurance company, CNA Plaza, Chicago, Illinois 60685.

Wherever the name MGIC Indemnity Corporation appears in the Policy, it is now Continental Casualty Company. All claims or inquiries relating to the Policy should be directed to Manager, Professional Liability Claim, Continental Casualty Company at the above address.

Corporate Secretary

Chairman of the Board

CONSIDERATIONS IN DEFENDING MEDICAL DEVICE AND DRUG CASES

By: Robert D. Houghton
Shuttleworth & Ingersoll
P.O. Box 2107
Cedar Rapids, IA 52406

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I. WARNINGS

A. Unavoidably Unsafe Products

"One who sells any product in a defective condition unreasonably dangerous to the user. . . is subject to liability for physical harm thereby caused . . . " Restatement (Second) of Torts, §402A (1965); Hawkeye Security Ins. Co. v. Ford Motor Co., 174 NW2d 672 (Iowa 1970). However, a common defense in a drug or medical device case is that the product was unavoidably unsafe. For this defense to be effective, the product must be designed as safely as possible and warnings must be given of the potential hazards of the drug or device.

An "unavoidably unsafe product" is neither defective or unreasonably dangerous, as long as it is accompanied by proper directions for use and adequate warnings as to potential side effects. Moore v. Vanderloo, 386 N.W.2d 108, 117 (Iowa 1986) (citing Restatement (Second) of Torts §402(A), Comment k (1965)).

The Restatement (Second) of Torts § 402A, Comment k (1965) provides:

There are some products which, in the present state of human knowledge, are quite incapable of being made safe for their intended and ordinary use. These are especially common in the field of drugs. An outstanding example is the vaccine for the Pasteur treatment of rabies, which not uncommonly leads to very serious and damaging consequences when it is injected. Since the disease itself invariably leads to a dreadful death, both the marketing and the use of the

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vaccine are fully justified, notwithstanding the unavoidably high degree of risk which they involve. Such a product, properly prepared, and accompanied by proper directions and warning, is not defective nor is it unreasonably dangerous. The same is true of many other drugs, vaccines, and the like, many of which for this very reason cannot legally be sold except to physicians, or under the prescription of a physician. It is also true in particular of many new or experimental drugs as to which, because of lack of time and opportunity for sufficient medical experience, there can be no assurance of safety, or perhaps even the purity of ingredients, but such experience as there is justifies the marketing and use of the drug notwithstanding a medically recognizable risk. The seller of such products, again with the qualification that they are properly prepared and marketed, and proper warning is given, where the situation calls for it, is not to be held to strict liability for the unfortunate consequences attending their use, merely because he has undertaken to supply the public with an apparently useful and desirable product attended with a known but apparently reasonable risk.

In Petty v. United States, 740 F.2d 1428, 1440-41 (8th Cir. 1984), the court pointed out that, in strict liability cases, the question is whether the product, as marketed, is defective. To focus on the product, knowledge of the risk is imputed to the manufacturer. The relevant question to be answered is the adequacy of the notice of the risk. The Court stated at page 1441:

Applied to our case, we determine the drug manufacturer's liability under strict liability, by assuming knowledge of the risk of serum sickness. Then the issue is whether the manufacturer, with such knowledge, has distributed an unreasonably dangerous product. In light of comment k of section 402A, the unreasonable dangerousness of this unavoidably unsafe product turns on whether the warning given with the product adequately apprises the recipient of those dangers. This issue has already been resolved: the warning is inadequate to apprise Petty of the known risk of serum sickness and its symptoms.

Since the swine flu vaccine was "administered without an adequate warning, the swine flu vaccine was defective, hence unreasonably dangerous."

Id. The lack of adequate warning was held to be the proximate cause of Petty's injuries.

Other courts have held, consistent with Restatement (Second) of Torts §402A, comment k (1965) that ethical drugs are not defective if accompanied by proper directions for use and adequate warnings as to potential side effects. Lindsay v. Ortho Pharmaceutical Corp., 637 F.2d 87, 90 (2d Cir. 1980). See also Dalke v. Upjohn Co., 555 F.2d 245, 247 (9th Cir. 1977); Fellows v. USV Pharmaceutical Corp., 502 F. Supp. 297, 300 (D. Md. 1980). Restatement (Second) of Torts §402A, comment k (1965) has also been applied in medical product cases. Perfetti v. McGhan Medical, 662 P.2d 646, 650 (N.M. Ct. App. 1983), cert. denied, 662 P.2d 645 (N.M. 1983) (mammary implant); Terhune v. A.H. Robins Co., 90 Wash. 2d 9, 577 P.2d 975, 977-78 (1978) (intrauterine contraceptive device). See also McKee v. Moore, 648 P.2d 21 (Okla. 1982) (intrauterine contraceptive device).

B. Negligence Cases

Iowa recognizes the distinction between negligence actions and strict liability actions in failure to warn cases. Petty v. United States, 740 F.2d 1428, 1440-41 (8th Cir. 1984 applying Iowa law). Cf. Kehm v. Procter & Gamble, 724 F.2d 613 (8th Cir. 1983). The duty to warn is triggered in negligence cases by reasonable foreseeability. Lakatosh v. Diamond Alkali Co., 208 N.W.2d 910, 913 (Iowa 1973).

In Petty, the appellate court found that the testimony supported the district court's conclusion that serum sickness and its symptoms were a recognized reaction to the Swine Flu vaccination. Expert testimony was introduced that serum sickness is a disease of long standing, well known in the medical

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A drug manufacturer has no duty to warn when it does not know or should not have known of the dangers. The adequacy of a warning must therefore be judged at the time of the injury. Moore v. Vanderloo, 385 N.W.2d 108, 116 (Iowa 1986). Moore cites as authority a case dealing with lack of warning in a negligence action. (West v. Broderick & Bascom Rope Co., 197 N.W.2d 202, 209 (Iowa 1972)). However, in Moore, the only claim against the manufacturer was based on products liability.

A warning may be found unreasonable if it is unduly delayed, reluctant in tone or lacking in a sense of urgency. Seley v. G. D. Searle & Co., 67 Ohio St. 2d 192, 198, 21 Ohio Ops. 3d 121, 423 N.E.2d 831 (1981).

Manufacturers have been held liable for failure to warn of known risks and dangers that are reasonably foreseeable for both intended and reasonably foreseeable unintended uses of a product. See Westerberg v. School District No. 792, 276 Minn. 1, 148 N.W.2d 312, 316 (1967); Putensen v. Clay Adams, Inc., 12 Cal. App. 3d 1062, 91 Cal. Rptr. 319, 328 (1970).

When an injury is caused by an abnormal use or misuse that is not reasonably foreseeable, manufacturers have been held not liable. See e.g.,

Venezia v. Miller Brewing Co., 626 F.2d 188 (1st Cir. 1980); Kay v. Cessna Aircraft Co., 548 F.2d 1370 (9th Cir. 1977).

In one case, McGee v. Wyeth Laboratories, Inc., 214 Cal. App. 2d 340, 29 Cal. Rptr. 322 (1963), the court found that "[f]ailure to follow an unchallenged method of use prescribed by the manufacturer constitutes a break in causation which exonerates the manufacturer from any liability."

"The manufacturer's duty to warn users of the potential danger inherent in its product is commensurate with its actual knowledge of the risk involved to those users or the knowledge constructively imparted to it by available scientific or other medical data." O'Hare v. Merck & Company, Inc., 381 F.2d 286, 291 (8th Cir. 1967).

The manufacturer has a continuing duty to test. With that continuing duty to test, the manufacturer has a continuing to warn of dangers subsequently discovered. See e.g., Schenebeck v. Sterling Drug, Inc. 423 F.2d 919, 922-23 (8th Cir. 1970); Basko v. Sterling Drug, Inc., 416 F.2d 417, 426 (2d Cir. 1969).

C. Statutory Requirements

1. Prescription drugs.

The federal Food, Drug and Cosmetic Act and regulations thereunder dictate the content and format of prescription drug labeling. The labels must address, among other things, indications, contraindications, warnings, precautions and adverse reactions. 21 C.F.R. § 201.56, § 201.57.

2. Patient package inserts.

The regulations require that patients be given a "patient package insert" with oral contraceptive drugs and intrauterine contraceptive devices. 21 C.F.R. §310.501, §310.502.

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3. Medical devices

The labeling requirements for medical devices are set forth in 21 C.F.R. §801.1 et. seq. Generally, the manufacturer must be identified, the intended uses stated and adequate instructions for use given. There are specific requirements for certain devices. See 21 C.F.R. §403 et. seq.

4. Effect of compliance with FDA regulations

Compliance with FDA regulations and directives as to warnings may not be sufficient to immunize the manufacturer or supplier of the drug from liability. Stevens v. Parke, Davis & Co., 9 Cal. 3d 51, 107 Cal. Rptr. 45, 507 P.2d 653 (1973). Compliance with FDA regulations is pertinent, however, to prove the adequacy of warnings, particularly where the producer of the drug is a small company merely compounding chemicals and printing labels consistent with FDA regulations. Brick v. Barnes-Hines Pharmaceutical Co., Inc., 428 F. Supp. 496 (D.D.C. 1977); cf., McDaniel v. McNeil Laboratories, Inc., 241 N.W.2d 822 (Neb. 1976) ("While approval by the Food and Drug Administration is not necessarily conclusive, its determinations, based upon the opinions and judgment of its own experts, should not be subject to challenge in a product liability case simply because some other experts may differ in their opinions as to whether a particular drug is reasonably safe, unless there is some proof of fraud or nondisclosure of relevant information by the manufacturer at the time of obtaining or retaining such federal approval").

D. Who Must Be Warned

Generally a manufacturer of a prescription drug discharges its duty to warn if it adequately warns the learned intermediary, the physician. Lindsay v. Ortho Pharmaceutical Corp., 637 F.2d 87, 91 (2d Cir. 1980); Sterling Drug, Inc. v.

Cornish, 370 F.2d 82, 85 (8th Cir. 1966); Mulder v. Parke, Davis & Co., 181 N.W.2d 882, 885 n.1 (Minn. 1970).

The learned intermediary doctrine has been extended in some cases to include medically related products used at the direction of a physician. See e.g., Terhune v. A.H. Robins Co., 577 P.2d 975, 979 (Wash. 1978) (warning to doctor of dangers associated with intrauterine contraceptive device sufficient).

There are exceptions to the learned intermediary doctrine. Two courts have held recently that a manufacturer has a duty to warn the consumer of the dangers of oral contraceptive. Stephens v. G.D. Searle & Co., 602 F. Supp. 379 (E.D. Mich. 1985); MacDonald v. Ortho Pharmaceutical Corp., 394 Mass. 131, 475 NE2d 65 (1985), cert. denied, 106 S.Ct 250, 88 L.Ed2d 258 (1985). In Stephens, the court distinguished oral contraceptives from other prescription drugs on the ground that the drugs are generally prescribed at the urging of the user and that "zealous marketing practices" aim "laudatory publicity directly at consumers." In MacDonald, the court relied on the fact that the pill is elective and the consumer is actively involved in the decision to use it as opposed to other birth control products. The court also relied on the extensive federal regulations regarding birth control pills. Compliance with FDA requirements regarding oral contraceptives did not shield the defendant from liability.

When a prescription drug is dispensed in a mass program or public health clinic, courts have held that the manufacturer has a duty to warn the patient or ultimate consumer of the risks involved. See e.g., Petty v. United States, 740 F.2d 1428, 1440 (8th Cir. 1984); Reyes v. Wyeth Laboratories, 498 F.2d 1264, 1276-77 (5th Cir. 1974), cert. denied, 419 U.S. 1096 (1974).

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Another exception to the learned intermediary doctrine is the requirement of FDA regulations that the manufacturer warn the ultimate consumer directly. Thus, if the manufacturer must provide a patient package insert, warnings about the product probably must be given directly to the patient. See e.g., Lukaszewicz v. Ortho Pharmaceutical Corp., 510 F. Supp. 961 (E.D. Wis. 1981), as amended, 532 F. Supp. 211 (E.D. Wis. 1981).

Warnings may be given by way of drug package inserts, detailmen, the Physician's Desk Reference, product cards distributed to doctors and available at medical conventions and hospital exhibits, and by "Dear Doctor" letters sent to physicians. Lindsay v. Ortho Pharmaceutical Corp., 637 F.2d 87, 92 (2d Cir. 1980).

II. TESTING

Testing is traditionally thought of as the initial testing designed to support an application for approval to market a drug or medical device. There are additional levels of testing, however, that a court or jury will consider. These include the manufacturer's quality control system to insure that the drug or drug device is manufactured in accordance with specifications and current good manufacturing practices. Post-approval testing also includes evaluation of ongoing research conducted by the manufacturer or under its auspices, considerations of complaints received from consumers or health care professionals and the analysis of scientific, medical and popular literature relating to the product or similar products.

A. Statutory Framework

1. New drugs - complete pre-market applications.
 - a. 21 U.S.C. §321(p) - definition.
 - b. 21 U.S.C. §335 and 21 C.F.R. § 314 - New Drug Application (N.D.A.) requirements



- c. 21 C.F.R. §314.1 - clinical and preclinical testing.
 - d. Abbreviated New Drug Application 21 C.F.R. §314.2
 - e. Paper N.D.A. - 46 Fed. Reg. 27396 (May 19, 1981).
- 2. Over the counter (O.T.C.) drugs - 21 C.F.R. § 330.1 et. seq.
 - 3. Medical devices - Class III full pre-market approval. 21 U.S.C. §360 and 21 C.F.R. §860.7(d) (1).
 - 4. Quality assurance - Good Manufacturing Practices.
 - a. Drugs - 21 C.F.R. Part 211
 - b. Devices - 21 C.F.R. Part 820
 - 5. Follow-up and monitoring - Drugs 21 C.F.R. § 211.198; 21 C.F.R. 310.300 et. seq.; and 21 U.S.C. §355.

B. Case Law

1. Introduction

While the testing required for the approval of a new drug device is exhaustive, compliance with FDA testing requirements and subsequent approval by the FDA will not insulate the manufacturer from liability for failure to conduct adequate testing. Stromsodt v. Parke, Davis & Company, 257 F. Supp. 991 (D. N.D. 1966), aff'd, 411 F.2d 1390 (8th Cir. 1969). Compliance with federal laws and regulations concerning a product may be pertinent to the question of due care, but does not in itself absolve a manufacturer of liability. See e.g., Salmon v. Parke, Davis & Co., 520 F.2d 1359, 1362 (4th Cir. 1975) ("although all the Government regulations and requirements have been satisfactorily met in the production and

marketing of Quadrigen, the standards promulgated are minimal. The defendant still owes a duty to warn of dangers which it knew or should have known in the exercise of reasonable care"); Tinnerholm v. Parke, Davis & Co., 285 F. Supp. 432, 448 n.12 (S.D.N.Y. 1968), modified, 411 F.2d 48 (2nd Cir. 1969) (a manufacturer cannot rely on the fact that the FDA does not require certain types of testing as a defense in a negligence claim).

Whether the manufacturer conducted adequate testing and whether testing would have disclosed the adverse effects claimed are jury questions. Parke, Davis & Co. v. Stromsodt, 411 F.2d 1390 (8th Cir. 1969); Hoffman v. Sterling Drug, Inc., 485 F.2d 132, 140-41 (3d Cir. 1973).

2. Test methods

Failure to test a product under the conditions in which it is to be used in commerce was held negligent in Tinnerholm v. Parke, Davis & Co., 285 F. Supp. 432, 446-49 (S.D.N.Y. 1968), modified, 411 F.2d 48 (2nd Cir. 1969).

Failure to test the actual product and failure to conduct long-term animal testing were considered negligent where a drug had been approved for treatment of malaria which requires short-term use, and was later used to treat lupus erythematosus and arthritis which require long-term treatment. Hoffman v. Sterling Drug, Inc., 485 F.2d 132, 140-41 (3rd Cir. 1973).

The manufacturer's duty to test and its duty to warn apply to adverse effects which occur even in a small but statistically significant percentage of users where the manufacturer should have foreseen such effects. Sterling Drug, Inc. v. Cornish, 370 F.2d 82, 85 (8th Cir. 1966).

3. Study of literature

It is a drug manufacturer's duty "to keep abreast of scientific developments

touching upon the manufacturer's product and to notify the medical profession of any additional side effects discovered from its use." Schenebeck v. Sterling Drug, Inc., 423 F.2d 919, 922 (8th Cir. 1970).

When there is any indication in medical or scientific literature of any possible adverse effect which could result from a drug or device, failure to investigate may be considered negligent. For example, a manufacturer of oral contraceptives was held liable in part because it failed to examine certain animal vessels during animal studies, after vessel lesions were attributed to the drug by a single author. Wooderson v. Ortho Pharmaceutical Corp., 235 Kan. 387, 681 P.2d 1038 (1984), cert. denied, 105 S.Ct. 365, 83 L.Ed.2d 301 (1984). See also, Ezagui v. Dow Chemical Corp., 598 F.2d 727, 733 (2nd Cir. 1979).

On the other hand, a manufacturer of a combination diuretic and enteric coated potassium tablet that promptly conducted testing after an article was published indicating a causal connection between potassium chloride and non-specific lesions in the small intestine was held not negligent. O'Hare v. Merck & Co., 381 F.2d 286, 290 (8th Cir. 1967).

4. Post-market duties

A manufacturer of a drug or medical device has a duty of continued care regarding the product placed on the market. That duty includes the continued study of medical and scientific literature regarding the drug or device, investigation of complaints and adverse reports, continued testing if indicated, and compliance with the FDA reporting requirements.

The question of whether a drug manufacturer was or should have been sufficiently certain of the connection between the drug Chloroquine and retinopathy after several articles were written and published in various medical

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journals in time to warn plaintiff's doctors and to prevent her injury is a question properly left to the jury. Sterling Drug, Inc. v. Cornish, 370 F.2d 82, 84 (8th Cir. 1966).

The failure of the manufacturer of Quadrigen to take action after clinicians reported adverse reactions was a sufficient basis for a finding of negligence. Parke, Davis & Co. v. Stromsodt, 411 F.2d 1390, 1401-02 (8th Cir. 1969).

Evidence of a manufacturer's unexcused noncompliance with statutory and regulatory adverse-reaction reporting requirements was sufficient to support a finding of negligence on the part of the manufacturer. Stanton by Brook v. Astra Pharmaceutical Products, Inc., 718 F.2d 553, 558-59 (3d Cir. 1983).

III. QUALITY ASSURANCE

A. Current Good Manufacturing Practices

The Food and Drug Administration regulations set forth specific and detailed instructions for quality assurance. These regulations are referred to as the Current Good Manufacturing Practices (GMP). There are separate GMPs for drugs (21 C.F.R. 211) and medical devices (21 C.F.R. 820). There are also specific GMPs for certain types of drugs and devices including, for example, intraocular lenses and electrical devices.

B. Current Good Manufacturing Practices Case Law

The court upheld the GMPs in National Association of Pharmaceutical Manufacturers v. Food and Drug Administration, 637 F.2d 877 (2d Cir. 1981).

A violation of the GMPs, like the violation of other safety regulations, may be considered negligence per se in most jurisdictions. See e.g., Stanton by Brooks v. Astra Pharmaceutical Products, Inc., 718 F.2d 553, 563-64 (3d Cir. 1983).

IV. DOCUMENT RETENTION

A. Record Keeping and Reporting Regulations

There are numerous record keeping and reporting statutes and regulations for drugs and medical devices. The length of time the records must be kept as well as the content of required records may be specifically set forth in the statutes and regulations. Attached is a summary of the Medical Device Reporting Regulations, 21 C.F.R. Part 803, taken from DHHS Publications No. (FDA) 85-4194.

Failure to comply with the record keeping and reporting requirements, in and of itself, can support a finding of liability against a manufacturer. In Stanton by Brooks v. Astra Pharmaceutical Products, Inc., 718 F.2d 553 (3d Cir. 1983) the court held that defendant's failure to file reports of adverse drug experiences regarding Xylocaine as required by 21 C.F.R §310.302(e) was negligence per se. The court also affirmed the jury's finding that the failure to file the reports was a cause of the injury. This finding was based on evidence that the FDA was not adequately informed without the information.

In Toole v. Richardson-Merrell, Inc., 251 Cal. App. 2d 701, 60 Cal. Rptr. 398 (1967) plaintiff alleged that MER-29, a drug which was supposed to lower cholesterol levels, caused cataracts. Plaintiff recovered compensatory as well as punitive damages based on defendant's failure to submit results of laboratory studies to the FDA and alleged falsification of test records.

B. Document Retention Policy

A company's records may be used to show that it exercised reasonable care in the design and manufacture of its product or that the product was not unreasonably dangerous. In Hardman v. Helene Curtis Industries, Inc., 198 N.E.2d

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681, 685 (Ill. 1964), a case involving a cosmetic, the court admitted evidence that despite the sale of 11,233,263 cans of the cosmetic over a period of more than six years the company had received no other complaints of injury from the use of the product. Defendant was permitted to offer such evidence to refute plaintiff's charge that defendant knew, or in the exercise of ordinary care should have known, that the product was flammable.

On the other hand, a company's records can be used to establish its liability. Complaints about the product Quadrigen received by defendant were held admissible in evidence to prove that defendant knew or should have known that the product would pose an unreasonable risk of harm to the user and to prove the product was defective. Ezagui v. Dow Chemical Corp., 598 F.2d 727 (2d Cir. 1979). See also Hoffman v. Sterling Drug, Inc., 485 F.2d 132 (3d Cir. 1973).

At least one court has based a default judgment on a company's failure to keep an adequate filing system so that it could produce documents requested by plaintiff. Kozlowski v. Sears, Roebuck & Co., 73 F.R.D. 73, 76 (D. Mass. 1976). Kozlowski involved a claim that plaintiff's pajamas ignited, causing burns. Plaintiff requested the production of records of all complaints and communications regarding personal injury or death allegedly caused by the burning of children's sleepwear marketed or manufactured by defendant. Defendant refused to comply with the discovery demand on the ground that the records requested by plaintiff were indexed by the claimant's name and it would be impossible to retrieve the documents. The court held:

The defendant may not excuse itself from compliance with Rule 34, Fed.R.Civ.P., by utilizing a system of record keeping which conceals rather than discloses relevant records, or makes it unduly difficult to identify or locate them, thus rendering the production of documents an excessively burdensome and costly

expedition. To allow a defendant whose business generates massive records to frustrate discovery by creating an inadequate filing system, and then claiming undue burden, would defeat the purposes of the discovery rules.

V. RECALLING A PRODUCT OR OTHERWISE REMOVING A PRODUCT FROM THE MARKET

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A. Types of Corrective Measures

1. Recall

A recall is defined at 21 C.F.R. 7.3(g) as follows:

"Recall" means a firm's removal or correction of a marketed product that the Food & Drug Administration considers to be in violation of the laws administered and against which the Agency would initiate legal action, e.g., seizure. 'Recall' does not include a market withdrawal or a stock recovery.

The recall may be either Class I, Class II or Class III. A Class I recall is defined in the FDA Enforcement Report (a weekly publication of the FDA Press Office) as:

A situation in which there is a reasonable probability that the use of, or exposure to, a violative product will cause serious, adverse health consequences or death.

A Class II recall is defined in the FDA Enforcement Report as:

A situation in which the use of or exposure to a violative product may cause temporary or medically reversible adverse health consequences or where the probability of serious adverse health consequences is remote.

The least serious type of recall, a Class III recall, is defined in that Report as:

A situation in which the use of, or exposure to, a violative product is not likely to cause adverse health consequences.

Despite the class of the recall, the recall may be FDA-requested, firm-initiated, or court-ordered. FDA-requested and firm-initiated recalls are outlined at 21 C.F.R. 7.45 and 7.46, respectively.

2. Market withdrawal

A market withdrawal is defined at 21 C.F.R. 7.3(j) as follows:

"Market withdrawal" means a firm's removal or correction of a distributed product which involves a minor violation that would not be subject to legal action by the Food and Drug Administration, or which involves no violation, e.g. normal stock rotation practices, routine equipment adjustments and repairs, etc. (Emphasis added.)

3. Stock recovery

Stock recovery is defined at 21 C.F.R. Section 7.3(k) as follows:

"Stock recovery" means a firm's removal or correction of a product that has not been marketed or that has not left the direct control of the firm, i.e., the product is located on premises loaned by or under the control of the firm and no portion of the lot has been released for sale or use. (Emphasis added.)

4. Seizure

Section 304 of the FD&C Act sets forth FDA's right of seizure. 21 U.S.C.

334. As defined in the FDA Enforcement Report, a seizure is:

An action taken to remove a product from commerce because it is in violation of the law. FDA initiates a seizure by filing a complaint with the US District Court where the goods are located. The US marshal is then directed by the court to take possession of the goods until the matter is resolved. The date listed is the date a seizure request is filed.

5. Injunction

The FDA's right to an injunction is set forth at Section 302 of the Act. 21 U.S.C. 332.

An injunction is defined in the FDA Enforcement Report as:

A civil action taken against an individual or company seeking to stop continued production or distribution of products that are in violation of the law.

B. Implications of Corrective Actions

DeLuryea v. Winthrop Laboratories, 697 F.2d 222, 228-229 (8th Cir. 1983)

holds that where products are inherently unavoidably dangerous, liability is determined on the adequacy of the notice. The standard for liability under either strict liability or negligence is essentially the same — foreseeability. Therefore, the court held that Fed.R.Evid. 407 required exclusion of evidence of subsequent remedial changes in the drug manufacturers warning literature, even though the plaintiff had brought a strict liability claim against the manufacturer. The evidence of subsequent remedial changes was excluded under Rule 407 which provides:

When, after an event, measures are taken which, if taken previously, would have made the event less likely to occur, evidence of the subsequent measures is not admissible to prove negligence or culpable conduct in connection with the event. This rule does not require the exclusion of evidence of subsequent measures when offered for another purpose, such as proving ownership, control, or feasibility of precautionary measures, if controverted, or impeachment.

In Kehm v. Procter & Gamble Manufacturing Co., 724 F.2d 613, 621 (8th Cir. 1983), the court addressed the subject of withdrawal of a product from the market. Procter & Gamble had voluntarily withdrawn Rely. The court stated at page 621:

Though we agree with and will in appropriate cases follow the DeLuryea reasoning, we do not believe it requires us to reverse the trial court in this case. For this case presents a slightly different issue than DeLuryea. Unlike the DeLuryea defendant, Procter &

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Gamble did not argue that the trial court should altogether exclude evidence of its withdrawal of Rely from the market; instead, it introduced the evidence on its own and requested that the jury be instructed to consider the evidence only for a specific limited purpose. Thus the issue before us is not whether the trial court erroneously admitted the evidence, but whether it abused its discretion in refusing to give a limiting instruction. We think it did not.

If the withdrawal from the market is voluntary, DeLuryea and Kehm would bar its admission into evidence "in the appropriate case."

VI. PUNITIVE DAMAGES

A. The Standard

1. Kehm v. Procter & Gamble Manufacturing Co., 724 F.2d 613, 623

(8th Cir. 1983) provides:

"Iowa permits an award of punitive damages only if the defendant's conduct was wanton or reckless, exhibiting complete disregard for the plaintiffs' rights."

2. Code of Iowa §668A.1.

B. Conduct in Recent Drug or Device Cases Sufficient to Support an Award of Punitive Damages.

1. Airco, Inc., v. Simmons First National Bank, 638 S.W.2d 660 (Ark. 1982). The bank as guardian sued on behalf of its ward who suffered lung injury and irreversible brain damage while under anesthesia due to failure of an artificial breathing machine and procedures. The alleged defect was a "selector valve" which allowed too much room for human error. Defendant manufacturer and anesthesiologists admitted liability on compensatory damages. The manufacturer challenged as unsupported by substantial evidence a punitive damages verdict of \$3,000,000. The Court upheld the verdict, holding that the proof showed that "the manufacturer knew from the outset, by its own testing, that an unnecessary

component of the product was so deadly that it should never have been made available to the public." 638 S.W.2d at 663. The plaintiff's evidence, mostly expert testimony, showed: premarket field tests were unfavorable, including reports which said "the selector was dangerous and could kill people"; that the benefit/risk ratio showed that the risks were overwhelming as compared to the benefit of convenience; that the accident was exactly what a safety engineer could have foreseen; and that the company knew of a similar incident three years before plaintiff's injury but did not recall the product. 638 S.W.2d at 662.

2. Vossler v. Richards Manufacturing Co., 192 Cal. Rptr. 219 (Ct. App. 1983). A Jury verdict of \$25,000 and \$500,000 punitive damages was affirmed by appellate court, in a case involving a defective knee prosthesis. The evidence showed that the manufacturer through engineering error manufactured metal components larger than the design called for and which did not match the template used by physicians in measuring for proper implantation of the device; the manufacturer had no procedure in place to ensure that final components were of the proper size; after discovery of the error the manufacturer concealed it from the medical profession, its own salesmen, and the orthopedic surgeon who designed the device and for whom the device was named. Plaintiff was implanted some ten months after the manufacturer discovered the manufacturing error. The defect caused the plaintiff significant medical complications which resulted eventually in removal of his kneecap.

C. Evidence Insufficient to Support Punitive Damages Claim

Kehm v. Procter & Gamble Manufacturing Co., 724 F.2d 613, 623 (8th Cir. 1983). In a toxic shock syndrome case involving Procter & Gamble's Rely tampon, the Eighth Circuit held as a matter of law a prima facie case had not been

established:

B We hold on the record before us that the plaintiffs did not make out a case for punitive damages. Iowa permits an award of punitive damages only if the defendant's conduct was wanton or reckless, exhibiting complete disregard for the plaintiffs' rights. . . . Less than three months elapsed between the time the public health studies first suggested an association between TSS and tampon use and the time that Procter & Gamble removed Rely from the market. Procter & Gamble first learned of the forthcoming CDC study linking Rely to TSS in mid-September of 1980, after Mrs. Kehm's death on September 6. Given the voluminous evidence produced at trial regarding the speculation and uncertainty during that period as to the cause of TSS, Procter & Gamble's conduct cannot be labeled reckless.

Even if the Kehms produced enough evidence to make out a prima facie case, the record shows that by the end of the trial, the Kehms failed to demonstrate Procter & Gamble's complete disregard for Mrs. Kehm's rights. In cases such as this, where there can be reasonable disagreement over the relative danger and utility of an act, and where it cannot be said that the defendant acted with subjective awareness of the consequences, the issue of punitive damages should not go to the jury. See Ellis, Fairness and Efficiency in the Law of Punitive Damages, 56 S. Cal. L. Rev. 1, 23 (1982).

724 F.2d at 623.

Introduction. This overview of the Medical Device Reporting (MDR) regulation provides general information and guidance for manufacturers and importers of medical devices about:

- who must report;
- criteria for reporting;
- when and how to report;
- what to report; and
- where to report

information that one of their devices (1) may have caused or contributed to a death or serious injury or (2) has malfunctioned and, if such malfunction recurs, is likely to cause or contribute to a death or a serious injury

The MDR regulation is intended to assure that FDA is informed promptly of all serious or potentially serious problems associated with marketed medical devices.

Applicability. The requirements of the Medical Device Reporting regulation are effective on December 13, 1984, and apply to all manufacturers and importers of medical devices including in vitro diagnostic devices

Who Must Report. Manufacturers and importers of medical devices, including in vitro diagnostic devices, are subject to the requirements of the MDR regulation. Under the Good Manufacturing Practices (GMP) regulations, a manufacturer is required to review, evaluate, investigate, and maintain a record of (1) any failure of one of its devices to meet its performance specifications and (2) any complaint about one of its devices pertaining to injury, death, or any hazard to safety. The MDR regulation imposes reporting requirements on manufacturers, supplementing the investigative regulations of the GMP regulations. In addition, the MDR regulation requires importers that may not be subject to the GMP regulations to report and to maintain complaint files. Importers, however, are not required to investigate the information, but only to forward the information to FDA and to identify the foreign manufacturer.

Criteria for Reporting

[§803.1; §803.24(a)]

A report must be submitted to FDA whenever a manufacturer or an importer becomes aware of information that reasonably suggests that one of its devices:

- may have caused or contributed to a death or serious injury; or
- has malfunctioned and, if the malfunction recurs, is likely to cause or contribute to a death or a serious injury.

A manufacturer or an importer may become aware of such information from (1) individuals or institutions, e.g., physicians, nurses, patients, consumers, and hospitals; (2) the medical or scientific literature; or (3) through its own research, testing, evaluation, servicing, or maintenance of its devices.

When and How to Report

[§803.24]

In cases where a death or a serious injury [§803 24(b)(1)] has occurred, a report should be submitted to FDA:

By Telephone

- as soon as possible,
- but no later than 5 calendar days after initial receipt of information, and

By Written Report

- within 15 working days of initial receipt of the information. A telephone report must be followed by a written report.

In the case of a malfunction [§803 24(b)(2)] which is likely to cause or contribute to a death or serious injury if it recurs, a report should be submitted to FDA:

- in writing as soon as the necessary information for making a report is obtained,
- but no later than 15 working days after initial receipt of the information. A telephone report is not required.

A manufacturer or an importer must report to FDA each time [§803 24(d)(1)] it becomes aware of a reportable event (death, serious injury, or malfunction which is likely to cause or contribute to a death

or a serious injury if it recurs), even if an event of the same or similar nature has been reported previously or if it is believed to be the result of user error, faulty service or maintenance, etc.

However, if there is more than one source of information concerning the same patient and the same event, only one report is required [§803.24(d)(2)].

What to Report

[§803.24(c)]

A telephone or written report is required to:

- identify the device (brand name, common name, and if known, the model, catalog, or other identification number/code, the manufacturing lot, serial number, etc.);
- identify the manufacturer or the importer and the foreign manufacturer;
- identify the individual making the report to FDA (name, address, and telephone number);
- describe the event (include whether any deaths or serious injuries have occurred, the number of persons who have died or were seriously injured, and a copy of any article in the scientific or medical literature describing the reportable event);
- identify the person (name and address) submitting the information to the manufacturer or the importer;
- state whether additional information will be submitted and if so, when; and
- state whether the reported event has occurred or is occurring more frequently or with greater severity than (1) is stated in the labeling for the device or (2) is usual for the device if there is no pertinent statement in the labeling.

No Report Required

[§803.24(d)(3)]

A report of a death or serious injury is not required if, before the report is due, the manufacturer or the importer determines that the information is erroneous because no death or serious injury has occurred. (However, a report may be required under the requirement to report malfunctions.)

Although a reportable malfunction [§803.24(d)(3)(iii)] may have occurred, no report is required if it can be determined that:

- there has been no death or serious injury;
- the potential for death or the type of serious injury that may result is specified in the labeling for the device;
- the malfunction and the routine service, repair, or maintenance instructions to correct the malfunction are described in the labeling for the device;
- the malfunction is occurring at or below its expected frequency and severity; and
- the malfunction does not lead the manufacturer or the importer to undertake a remedial action involving any other device.

In all cases, no report is required if the otherwise reportable information is erroneous because the device in question is not one of the manufacturer's or importer's devices.

FDA may give written notice to a manufacturer or an importer that reports of a particular type of event are no longer required [§803.24(d)(4)].

Where to Submit a Report

[§803.33]

MDR reports should be submitted to:

Device Monitoring Branch (HFZ-343)
Center for Devices and Radiological Health
Food and Drug Administration
8757 Georgia Avenue
Silver Spring, MD 20910
Telephone No (301) 427-7500

Complaint Files

[§803.31]

Complaint files must be maintained of any information, including written or oral communication, received by a manufacturer or an importer concerning a death, a serious injury, or a device malfunction that requires a report under the MDR regulation. The file also is required to contain a copy of any MDR report submitted to FDA and any additional information submitted.

- *Importers* - An importer must establish a complaint file and maintain a record of any information received by the importer concerning a death, a serious injury, or a malfunction that requires a report. Copies of the records must be maintained for

a period of 2 years from the date that the report or additional information is submitted to FDA, even if the importer has ceased importing the device.

The complaint file should be maintained at the importer's principal business establishment. If the importer is also a manufacturer, the file may be maintained at the same location that the manufacturer maintains its GMP complaint file.

- **Manufacturers** - A manufacturer must maintain its MDR records for a period of 2 years from the date that the report or additional information is submitted to FDA or for a period of time equivalent to the design and expected life of the device, whichever is greater. A manufacturer may maintain its MDR records as part of its complaint files.

Any authorized FDA employee (at all reasonable times) must be allowed access to the records contained in the complaint file.

Exemptions from Reporting

[§803.36]

A manufacturer or an importer is exempt from MDR reporting if:

- the manufacturer or the importer is a licensed practitioner who manufactures or imports devices solely for use in the course of that individual's professional practice; or
- the manufacturer or the importer is manufacturing or importing devices for use in research or testing and not for sale or under an investigational device exemption.

Definitions

[§803.3]

"Importer" means any person who imports a device into the United States and is required to register (21 CFR Part 807).

"Information that reasonably suggests a conclusion" means (1) information (such as professional, scientific, or medical facts and opinions) from which a reasonable person would reach the conclusion or (2) a statement to a manufacturer or an importer by a health care professional (e.g., a doctor, nurse, pharmacist, hospital administrator, etc.) reaching the conclusion.

"Malfunction" means the failure of a device to meet any of its performance specifications or otherwise to perform as intended. Performance specifications include all claims made in the labeling for the device.

"Manufacturer" means any person who is required to register under 21 CFR Part 807, other than a person who initially distributes a device imported into the United States.

A *"remedial action"* is any recall, repair, modification, adjustment, relabeling, destruction, inspection (including patient monitoring), notification, or any other action that is initiated by a manufacturer or an importer in response to information that is required to be reported under MDR.

A *"serious injury"* is an injury that (1) is life threatening; (2) results in permanent impairment of a body function or permanent damage to body structure; or (3) necessitates medical or surgical intervention by a health care professional to (a) preclude permanent impairment of a body function or permanent damage to body structure or (b) relieve unanticipated temporary impairment of a body function or unanticipated temporary damage to body structure. Temporary impairment of body function or temporary damage to body structure is unanticipated if no reference to such impairment or damage is stated in the labeling for the device or if such reference is made in the labeling for the device, the manufacturer of the device determines that such impairment or damage is occurring more frequently or with greater severity than is usual for the device.

FDA Request for Additional Information

[§803.24(e)]

If FDA determines that the protection of the public health requires additional information, the manufacturer or the importer will be notified in writing of the reason for such information and given a due date for its submission to FDA. Additional items that may be requested include:

- model, catalog, or other identification number or code of the device;
- manufacturing lot or serial number of the device;
- a complete description of the event including whether a death or a serious injury has occurred and the number of persons affected (If a complete description is unavailable, the reason for its unavailability must be given);
- any evaluation of the risk of death or serious injury and copies of any laboratory analyses available to or used by the manufacturer or importer;
- any available evaluation by a practitioner, such as a physician or dentist, of the event described in the initial report;

- any evaluation to determine whether the event described in the medical device report is attributable to the device and the basis for such determination;
- all the information on which the manufacturer or the importer determined that the reported event is occurring more frequently or with greater severity than is stated in the labeling or is usual for the device;
- any evaluation or analysis available to or used by the manufacturer or the importer in making a determination;
- an outline of the plan for remedial action or, if the manufacturer or the importer determines that a remedial action is unnecessary, the basis for such determination;
- a copy of any proposed remedial action communication and the names and addresses of recipients of the communication;
- information about the manufacture of the device (e.g., the total number manufactured or the number in the same batch, lot, or equivalent unit of production; the location and date of manufacture; and the device's expiration date); and
- information about the distribution of the device (e.g., the location and number of devices in inventory stock and distribution channels, a list of all consignees, and the dates of distribution).

Reporting Not an Admission of Liability

[§803.24(f)]

The submission of an MDR report and its public disclosure by FDA does not necessarily reflect a conclusion by the manufacturer, importer, or FDA that the device caused or contributed to a death or serious injury or malfunctioned.

Public Availability of Reports.

[§803.9]

Any MDR submission, including a telephone report, to FDA is available for public disclosure. Before public disclosure of a report, FDA will delete from the report:

- any information that constitutes trade secret and confidential commercial or financial information; and
- any personnel, medical, and similar information that would constitute a clearly unwarranted invasion of personal privacy.

If requested by a patient, however, FDA will disclose all the information in the report concerning the patient, excluding trade secret and confidential commercial or financial information.

ROBERT C. LANDESS
IOWA INDUSTRIAL COMMISSIONER

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

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.

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, 372 N.W.2d 199 (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.

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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. In so doing the supreme court observed at page 203: "We find no cases which permit recovery when employment merely provided a stage for the nervous injury. See Albertson's Inc. v. Workers' Compensation Appeals Board of California, 131 Cal.App.3d 308, 316, 182 Cal. Rptr. 304, 309 (1982)." (Emphasis by the court.)

District court's reversal of industrial commissioner affirmed.

APPEALS--TIMELINESS OF FILING

MILLER v. CIVIL CONSTRUCTORS, 373 N.W.2d 115 (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, 373 N.W.2d 101 (Iowa 1985)

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.

STATUTE OF LIMITATIONS

CARTER v. CONTINENTAL TELEPHONE COMPANY, 373 N.W.2d 524 (Iowa App. 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. Intra-agency 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.

EMPLOYER-EMPLOYEE RELATIONSHIP

POLK COUNTY v. STEINBACH, 374 N.W.2d 250 (Iowa 1985)

Claimant appealed from a district court decision reversing the industrial commissioner's determination that the claimant was an employee of Polk County on the date of his alleged injury.

Claimant participated in a Polk County work program to repay the county for general relief assistance. Claimant must establish a contract of hire, express or implied, in order to establish an employer-employee relationship under these circumstances. This determination is ordinarily one of fact. The industrial commissioner, after reviewing the record as a whole, concluded that the claimant met his burden of establishing an employer-employee relationship. The district court reversed this determination.

Supreme court reversed the district court and stated that the courts are bound by findings of fact of the industrial commissioner that are supported by substantial evidence. The

supreme court determined that the industrial commissioner's finding of fact on the employer-employee relationship issue was supported by substantial evidence and that the district court erred in concluding otherwise. The matter was then remanded to the district court for resolution of other issues raised in the county's petition for judicial review.

C

SECOND INJURY FUND

McKEE v. SECOND INJURY FUND OF IOWA, 378 N.W.2d 920 (Iowa 1985)

Claimant appealed from a district court decision affirming the decision of the industrial commissioner denying claimant's petition to commute weekly benefits payable under the second injury fund. Claimant sought a lump sum commutation. The supreme court focused on the language of the relevant Iowa Code sections and discussed conflicting decisions from Texas and Illinois on the issue being addressed. The Iowa Supreme Court relied on the Illinois court's decision in Moreland v. Industrial Comm'n, 47 Ill.2d 273, 265 N.E.2d 161 (1970).

The supreme court mentioned that it was deferring to the agency's construction of the Workers' Compensation Act and concluded that the agency correctly determined that commutation of weekly benefits under the second injury fund was not intended by the Iowa General Assembly.

CUMULATIVE INJURY

McKEEVER CUSTOM CABINETS v. SMITH, 379 N.W.2d 368 (Iowa 1985)

Defendants appealed from district court decision that

affirmed the industrial commissioner's adoption of a cumulative injury theory.

Division I of the supreme court decision concludes that the discovery rule applies to both Iowa Code section 85.23 and Iowa Code section 85.26 and cited Orr v. Lewis Central School District, 298 N.W.2d 256, 257 (Iowa 1980). In adopting a cumulative injury theory (referred to by Professor Larson as gradual injury theory) the court concluded that the claimant had complied with section 85.23 and section 85.26. In making this determination the court concluded that liability attaches in a cumulative injury case when the employee is no longer able to work because of pain or "physical inability." McKeever, 379 N.W.2d at 374. The court cited Professor Larson and stated that Professor Larson cites two rules regarding this matter: (1) the injury occurs when pain prevents the employee from continuing to work or; (2) when the pain occasions the need for medical attention. The Iowa Supreme Court adopted the first of these two alternative approaches.

The commissioner made a finding of fact that claimant "came by his injury gradually, ultimately resulting in his disabled condition about May 1, 1981, when he terminated his employment." Id. at 374. At the time the claimant separated from his employment he was being paid \$6.50 per hour; his initial wage for the employer in 1978 and 1979 was \$4.25. The commissioner used the \$6.50 figure in computing the weekly rate of compensation. The employer challenged the commissioner's rate determination on

appeal; however, the supreme court affirmed the agency's rate determination and based its decision on the fact that it upheld the agency's application of the cumulative injury rule.

INDUSTRIAL DISABILITY AND SCOPE OF REVIEW

ARMSTRONG v. STATE OF IOWA BUILDINGS, 382 N.W.2d 161 (Iowa 1986)

Employer appealed from district court decision and claimant cross-appealed. The industrial commissioner awarded claimant ten percent industrial disability (50 weeks of permanent partial disability benefits) and the district court substituted its judgment for that of the industrial commissioner and determined claimant's industrial disability to be fifty percent (250 weeks of permanent partial disability benefits).

The supreme court on appeal determined that the district court should not have engaged in its own fact finding to increase the claimant's industrial disability award and therefore reversed on the employer's cross-appeal. In this regard the supreme court concluded that the district court should have determined that there was substantial evidence in the record to support the decision of the industrial commissioner which the supreme court characterized as a finding of fact.

The supreme court also determined that claimant's appeal was without merit. Claimant argued that as a matter of law he was permanently and totally disabled and cited in support of this his position Guyton v. Irving Jensen Co., 373 N.W.2d 101 (Iowa 1985). Guyton formerly adopted the odd-lot doctrine in Iowa. The supreme court held that the claimant had not raised the



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odd-lot doctrine before the agency or on judicial review before the district court, and that it could not therefore be raised for the first time before an appellate court. Claimant's other arguments on appeal were also rejected for the reasons that formed the basis for the reversal on the employer's cross-appeal.

BURDEN OF PROOF/SCOPE OF REVIEW/INTEREST AND PENALTIES

KLEIN v. FURNAS ELECTRIC CO., 384 N.W.2d 370 (Iowa 1986)

Claimant appealed from decision of the district court affirming the decision of the Iowa Industrial Commissioner.

Claimant argued to the district court and subsequently to the supreme court that the agency should have placed the burden on the employer to show a change of condition subsequent to a hearing that ordered a running healing period award and some medical benefits; that the record made at a second hearing supported a greater award of industrial disability as a matter of law; and that agency should have ordered her employer to pay interest and penalties for a delay in paying medical expenses allowed by the commissioner after the first hearing. The district court rejected all these assertions and the supreme court affirmed the district court.

The agency, district court and supreme court concluded that the burden of establishing the extent of disability remained on the claimant at the second hearing. The industrial commissioner awarded the claimant 60 percent permanent partial disability and claimant argued that she was entitled to permanent total disability benefits as a matter of law. The supreme court reviewed the

record made before the agency and concluded that the commissioner's decision was supported by substantial evidence. In so doing it held that the odd-lot doctrine could not be relied on by claimant because claimant did not rely on the odd-lot doctrine before the agency. Finally the supreme court determined that judicial review proceedings under 17A provide no basis for claimant to litigate the issue of entitlement to interest on the amount due under an agency order. The court also determined that interest and penalty is not allowed because of late payment of medical expenses as opposed to late payment of weekly disability benefits.

ADMISSION OF HEARSAY TESTIMONY OR EVIDENCE

MAY CONSTRUCTION v. WOOLDRIDGE, 386 N.W.2d 139 (Iowa App. 1986)

Defendants appeal from a district court decision affirming the industrial commissioner's denial of the request to present additional evidence. Court of appeals affirmed the district court decision.

Court of appeals concluded that hearsay evidence is admissible before an agency in a contested case proceeding but that the agency has discretion as to whether a particular item of hearsay is admissible or not. In making this determination the court relied on Iowa Code section 17A.14(1). In upholding the exclusion of the evidence in question, the court of appeals concluded that the agency appropriately excluded an unsworn recorded statement where there was no showing of the unavailability of the witness and the witness had not been subjected to cross-examination. In making this latter determination the court of appeals relied on Iowa Code section 17A.14(3).

SUBJECT MATTER JURISDICTION

ORR v. McNAIR, d/b/a McNAIR PLUMBING, INC., 386 N.W.2d 145 (Iowa App. 1986)

Widow of deceased worker appealed from district court decision affirming agency's denial of benefits based on lack of subject matter jurisdiction. Iowa Court of Appeals affirmed district court decision.

The agency concluded in this case that since the employer had moved to Oklahoma that the required meaningful relationship between decedent's domicile in Iowa and the employer-employee relationship was negated. The decedent in this case died on October 22, 1981. The court of appeals observed that the agency had determined that "1981 was a year of closing down one operation and opening another." The alleged injury in this case occurred in Oklahoma, not Iowa.

The Iowa Court of Appeals relied on Iowa Code section 85.71 and George H. Wentz, Inc. v. Sabasta, 337 N.W.2d 495, 499 (Iowa 1983) in upholding a determination that the Iowa Act did not apply to the facts of this case. The court also cited Iowa Beef Processors, Inc. v. Miller, 312 N.W.2d 530 (Iowa 1981).

The court of appeals concluded that the employer-employee relationship in this case was established in Oklahoma and that the claimant's employment was principally localized there. Therefore, subject matter jurisdiction was lacking under the Iowa Act.

PUBLISHED SUPREME COURT DECISIONS
ON RELATED MATTERS

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.

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.

C 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, (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.

ARISING OUT OF AND IN THE COURSE OF
SHEERIN v. HOLIN CO., 380 N.W.2d 415 (Iowa 1986)

Administrator of deceased employee brought civil action in



Iowa District Court for damages against alleged employer. District court granted motion for summary judgment terminating civil litigation and appeal was taken. Supreme court reversed the district court and sent the case back for further proceedings after having determined that there was a genuine issue of material fact concerning whether decedent's injuries occurred in the course of her employment.

If an injury arises out of and in the course of an individual's employment the Iowa Workers' Compensation Act provides the exclusive remedy for the individual. However, if it is not established that an injury arose out of and in the course of an individual's employment, the person can then resort to the Iowa District Court and sue for civil damages. The district court determined as a matter of law that the worker in this matter had sustained her injuries while on the job and therefore the Iowa Workers' Compensation Act was the exclusive remedy. The Iowa Supreme Court reversed the district court and concluded that there was an insufficient showing presented by the moving party (alleged employer at the time of the death of decedent) and sent the case back to district court for further proceedings.

INDEMNIFICATION BY WORKERS' COMPENSATION CARRIER

MATA v. CLARION FARMERS ELEVATOR COOP, 380 N.W.2d 425 (Iowa 1986)

Workers' compensation insurance carrier appeals from district court order dismissing its petition for intervention in employee's tort action against third party. Supreme court reversed and determined that insurance carrier was entitled to intervene and

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therefore could seek to recover monies from the third party as the carrier had paid workers' compensation benefits to the claimant (the claimant was the plaintiff in the third party action filed at Iowa District Court). The procedural history of Mata is extremely unique and is unlikely to be repeated. The case was returned to district court for further proceedings not inconsistent with the decision of the Iowa Supreme Court.

CIVIL ACTION AGAINST COWORKERS

TAYLOR v. PECK, 382 N.W.2d 123 (Iowa 1986)

Defendants sought further review in the Iowa Supreme Court of court of appeals' decision. After collecting workers' compensation benefits from her employer, employee brought civil action in Iowa District Court against several supervisory employees to recover for injuries sustained due to their alleged gross negligence. District court jury returned verdict for plaintiff/claimant; however, the district court set this verdict aside. The court of appeal reinstated the jury verdict and then the Iowa Supreme Court reversed the district court once again depriving plaintiff/claimant of the benefit of the jury's verdict.

The supreme court concluded there was insufficient evidence of gross negligence to impose liability on claimant's supervisory employees. The supreme court cited the following factors in making its decision: (1) there had been no previous accidents on the particular punch press; (2) there had not been any safety inspections alerting claimant's supervisors of a danger or

malfunction by the machine in question; (3) there was no evidence that the supervisors knew that a safety mechanism was partially dismantled; and (4) the supervisors did not instruct claimant to put her hand into the machine to check for a loose pin.

The supreme court determined as a matter of law that plaintiff/claimant was not entitled to recover money damages in civil court and therefore determined that the jury verdict could not stand. The court in making its decision relied on Iowa Code section 85.20 and determined that there was not substantial evidence of gross negligence by the district court defendants.

INDEMNIFICATION

LIBERTY MUTUAL INSURANCE COMPANY v. WINTER, 385 N.W.2d 529 (Iowa 1986)

Workers' compensation insurance carrier appeals from dismissal by district court of action filed against workers' compensation claimant for indemnification out of proceeds of settlement with third-party.

Claimant received approximately \$20,000 in workers' compensation benefits from the workers' compensation carrier. The claimant then sued a third-party in district court and recovered \$30,000. The workers' compensation carrier then brought a separate action pursuant to Iowa Code section 85.22 to recover the approximate \$20,000 it had payed to the claimant in workers' compensation benefits. The claimant contended in district court that the insurance carrier had forfeited its rights to indemnification because it had turned over a recorded statement taken by



one of its adjusters to the third-party from whom the claimant had recovered \$30,000, and the claimant argued in district court that it was entitled to damages from the workers' compensation carrier under a third-party beneficiary theory. The claimant argued that the insurance carrier had breached the terms of its workers' compensation insurance contract with the claimant's employer. The district court concluded that the carrier had forfeited its right to indemnification by turning over the recorded statement mentioned above; however, it denied the claimant's damage theory after a bench trial. Supreme court decided that the claimant's forfeiture theory and damage claim were without merit and remanded the matter to the district court for a judgment against the claimant for the amount of the workers' compensation that had been paid to claimant, less an attorney fee for claimant's attorney.

ATTORNEY FEES

FARRIS v. GENERAL GROWTH DEVELOPMENT CORPORATION, ___ N.W.2d ___
(Iowa 1986)

An insurance carrier that paid workers' compensation benefits to a claimant appealed a decision by district court ordering it to pay attorney's fees pursuant to Iowa Code section 85.22(1). Supreme court affirmed the decision of the district court.

Plaintiff/claimant was injured on the job and received workers' compensation benefits and then subsequently sued a general contractor for damages in district court. The workers' compensation carrier filed a lien in the negligence action to

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recover the amount of the workers' compensation benefits paid to plaintiff/claimant. Plaintiff/claimant obtained a judgment against the general contractor, and the workers' compensation insurance carrier was reimbursed for its workers' compensation payments. The workers' compensation carrier was also the insurance carrier for the general contractor, the third party that was sued in district court.

The sole issue on appeal was whether or not the district court correctly deducted attorney's fees from the amount of the workers' compensation carrier's lien.

The supreme court affirmed the district court's determination that attorney's fees should be deducted from the amount of the lien in accordance with Iowa Code section 85.22(1). The supreme court stated in part that it would not "penalize an employee in a third-party suit because it happened that one insurance company had both ends of the insurance coverage."

UNPUBLISHED DECISIONS
(NON-PRECEDENTIAL)

MEDICAL EVIDENCE--WEIGHT GIVEN

WILSON FOODS CORPORATION v. JOHNSTON, (Iowa Court of Appeals 1985)

Self-insured employer appealed from district court decision which affirmed the decision of the Iowa Industrial Commissioner. Claimant became an employee of the employer in 1967. In August of 1975 he sustained a work-related injury and a final decision of the agency awarded benefits on January 6, 1977. The decision of January 6, 1977 awarded the claimant 25 percent industrial disability. On August 19, 1981 claimant petitioned for review-reopening and it was determined that claimant carried his burden of proof on the causation issues and that he was entitled to 55 percent industrial disability. The district court reviewed the final agency decision on review-reopening and determined that the agency decision was supported by substantial evidence. The agency's determinations on the causal connection issues and fifty-five percent industrial disability were supported by substantial evidence when the record was viewed as a whole, in the view of the district court. The agency had relied on an evaluating physician rather than a treating physician. The court of appeals cited Rockwell Graphics Systems, Inc. v. Prince, 336 N.W.2d 187, 192 (Iowa 1985), in concluding that the agency in carrying out its fact finding function may rely on an evaluating physician in making its ultimate determination, and that the



agency does not, as a matter of law, have to give a treating physician's testimony greater weight. The district court was affirmed.

WAIVER/PENALTY/MISCELLANEOUS MATTERS

WRIGHT v. NORTH D.M. NURSING CORP., (Iowa Court of Appeals 1985)

Defendants appealed from district court decision that affirmed final agency action awarding benefits to claimant. The court of appeals affirmed the district court decision.

The claimant argued to the court of appeals that the court need not address the defendants' appeal on its merits because the defendants had failed to file a brief before the deputy industrial commissioner and also failed to file a brief as ordered by the industrial commissioner. Court of appeals held that sanctions pursuant to Industrial Commissioner Rule 500-4.36 are discretionary and not mandatory. The commissioner had decided the case on its merits and had not imposed any sanctions, and the court of appeals concluded that this was within the discretion of the industrial commissioner. The claimant also argued that she was entitled to penalty benefits pursuant to Iowa Code section 86.13. The court of appeals rejected this argument after stating that the defendants had merely pursued their appeal rights and that had not otherwise delayed the matter.

On appeal defendants raised the following issues: (1) claimant did not receive an injury to her left knee that arose

out of and in the course of her employment (claimant alleged an injury to her left knee and injuries to both of her upper extremities); (2) there was no causal connection between the claimant's injury to her upper extremities and her alleged knee injury; (3) the trial court erred in finding 16 percent impairment of the left lower extremity; (4) the claimant failed to comply with Iowa Code section 85.23; (5) the trial court erred in upholding the commissioner's decision on healing period benefits; (6) the trial court erred in upholding the industrial commissioner's determination on weekly rate of compensation; and (7) the trial court erred in upholding the agency's decision to reject the testimony of a hearing witness. The trial court was affirmed in all respects; the trial court had upheld the agency in all respects.

MEDICAL CARE--HEALING PERIOD BENEFITS

LOVEJOY CONSTRUCTION CO. v. WEBB, (Iowa Court of Appeals 1985)

Defendants appeal from district court decision upholding the agency's order for medical and award of healing period benefits.

While treating with Dr. Jerome Bashara claimant received a letter from defendants stating that he should treat with Dr. Sinesio Misol. Claimant resisted the request that he change physicians and the question of appropriate medical care was then addressed by the agency. A deputy industrial commissioner, after a hearing, awarded the claimant healing period benefits and determined that Dr. Bashara should be claimant's treating physician. The deputy industrial commissioner's decision was

upheld by the commissioner and judicial review was sought by defendants. The district court affirmed the agency and the Iowa Court of Appeals affirmed the district court.

C The Iowa Court of Appeals quoted from Iowa Code section 85.27 and underscored the following language: "If the employer and employee cannot agree on such alternate care, the commissioner may, upon application and reasonable proofs of the necessity therefor, allow and order other care." The court of appeals then stated that an "employee has a right to continue with his doctor and a belated attempt by the insurance carrier to offer other care will not cut off the right of the employee to continue." Therefore, the court of appeals determined that the industrial commissioner did not exceed his statutory authority in the matter. The court then upheld the award of healing period benefits stating that this portion of the decision was supported by substantial evidence.

SCHEDULED INJURY OR BODY AS A WHOLE INJURY

LAUHOFF GRAIN COMPANY v. McINTOSH, (Iowa Court of Appeals 1986)

Defendants appeal from district court decision that affirmed industrial commissioner's decision to grant permanent partial disability benefits based upon body as a whole injury. Court of appeals affirmed the district court.

In 1978 claimant "fractured the femoral neck of his left leg while working for his employer." Surgery was performed to reduce the fracture and pins were placed across the fracture site. In October 1980 a total hip replacement was recommended



and surgery followed in November of 1980. Industrial Commissioner determined that claimant sustained a body as a whole injury and awarded the claimant 75 percent permanent partial disability to the body as a whole. This decision was affirmed by the district court.

The question on appeal to the Iowa Court of Appeals was whether the agency and the district court erred in awarding disability on the basis of a body as a whole injury rather than on a percentage of the impairment of the left leg. The defendants contended that the agency erred as a matter of law or, alternatively, that the agency decision was not supported by substantial evidence. The court of appeals rejected the defendants' arguments as just stated. In rejecting defendants' arguments the court cited Kellogg v. Shute and Lewis Coal Co., 256 Iowa 1257, 130 N.W.2d 667 (1964); Alm v. Morris Barrick Cattle Co., 240 Iowa 1174, 38 N.W.2d 161 (1949); and Dailey v. Pooley Lumber Co., 233 Iowa 758, 10 N.W.2d 569 (1943).

The court stated: "Based on Alm, we hold that if the injury is clearly to the hip and the joint itself is impaired, the injury is not a scheduled injury to the leg." The court stated that in the McIntosh case the evidence supported the conclusion that there was impairment to the hip joint.

EMPLOYER-EMPLOYEE RELATIONSHIP

SAMMONS TRUCKING CO. v. ANDERSON, (Iowa Court of Appeals 1985)

Claimant appealed from district court decision that reversed a decision by the industrial commissioner which found claimant's

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deceased husband was an employee of Iowa trucking firm. The district court concluded that a prima facie case had been established that the decedent was an employee, noting the trucking firm was responsible for paying decedent's wages, had the right to terminate the agreement, controlled the work to the extent of scheduling jobs, and would be considered the authority in charge to those businesses having goods hauled. Nevertheless, the district court found an independent contractor relationship existed. The court of appeals reversed the district court and reinstated the agency decision.

The court of appeals citing Swain v. Monona County, 163 N.W.2d 918, 921 (Iowa 1969); Nelson v. Cities Service Oil Company, 259 Iowa 1209, 146 N.W.2d 261 (1966); and Larson Workmen's Compensation Law, §44.34 (1982), stated:

The evidence shows that the service provided by Anderson was that provided by Sammons Trucking to its customers. Anderson was paid based on a percentage of revenue obtained by the load, and was paid every two weeks. Anderson worked exclusively and continuously for Sammons from January of 1981 until his death in August 1982. According to authorities in worker's [sic] compensation law, there is a growing tendency to classify owners-drivers of the trucks as employees when they perform continuous service that is an integral part of the employer's business.

Further, additional loads could not be hauled unless Sammons did not have a load for him to haul and he received permission from Sammons. The vice president of the company stated that the work the decedent did was an integral part of the business.

EMPLOYER-EMPLOYEE RELATIONSHIP

MORGAN v. STARCEVIC, (Iowa Court of Appeals 1986)

Claimant appealed from district court decision that reversed agency determination that claimant was an employee on the date of his alleged injury. The court of appeals reversed the district court and reinstated the agency's determination.

The court of appeals discussed the applicable six factors for determining whether a claimant is an employee or independent contractor; these factors are set out in Caterpillar Tractor Co. v. Shook, 313 N.W.2d 513 (Iowa 1981). Claimant received 26 percent of the proceeds of truck loads he hauled. The alleged employer also had the power to discharge the claimant. The alleged employer also controlled the details of claimant's work. The parties intended to enter into a lease agreement following a satisfactory probationary period, but did not do so prior to claimant's injury.

SCOPE OF REVIEW

BARTA v. LITTLE GIANT CRANE & SHOVEL, (Iowa Court of Appeals 1986)

Appeal from a district court decision affirming the industrial commissioner's denial of additional benefits for an injury which occurred in 1973. The court of appeals affirmed.

The court of appeals held that there was substantial evidence in the record to support the industrial commissioner's finding that the symptoms upon which claimant based her claim were the result of a prior non-work related auto accident in 1971 rather than the work injury. The court found ample evidence to warrant another finding of the commissioner that the temporary aggravation



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of these symptoms caused by the work incident diminished after twenty months. The record demonstrated that claimant admitted in her testimony before the agency that she experienced her symptoms before the work injury. The medical records revealed that the surgery recommended after the work injury was considered an eventuality after the 1971 auto accident and that claimant's current difficulties were the result of fibromyositis or osteoarthritis, not the work injury.

INTEREST--COMMENCEMENT

DICKENSON v. JOHN DEERE PRODUCTS ENGINEERING, (Iowa Court of Appeals 1986)

Appeal from the district court's affirmance of a review-reopening decision of the industrial commissioner that interest payments on permanent disability awards begin on the date of the decision of the deputy industrial commissioner.

The court of appeals modified the district court decision and held that interest payments begin in review-reopening cases on the date claimant files the petition. The court cited as authority Iowa Code section 85.30 as amended in 1985 which adopts as the rate of interest in workers' compensation cases the rate provided in Iowa Code section 535.3 for court judgments and decrees. Under section 535.3 the court noted that interest begins on the date of the commencement of the action. The court also stated that such a ruling is not contrary to prior supreme court decisions, most notably, Bousfield v. Sisters of Mercy, 249 Iowa 64, 86 N.W.2d 109 (1954) which held that interest was

to begin on the date of the decision. The court stated that Bousfield was decided before the last amendment to section 85.30 and that language in Bousfield suggested that interest could commence "when claimant applied for same." The court stated as follows:

At the time John Deere paid the healing period benefits, the nine days constituted all the compensation which John Deere owed to Dickenson. Therefore, at the time Dickenson filed his petition for review-reopening John Deere was current in its workers' compensation payments and owed nothing to Dickenson."

Claimant had returned to his regular job at that time after hospitalization for exposure to ammonia fumes. He continued to work for over a year with some difficulty until replaced by someone with more seniority.

As a matter of policy, the court emphasized that their decision was based upon the legislative intent of interest payments under the workers' compensation statute which is to encourage fast resolution of claims. Delaying the commencement of interest until the date of decision would be contrary to such intent. However, the court felt that beginning such payments before the filing of the petition would unfairly penalize defendants who had voluntarily paid healing period benefits to claimant.

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SELECTED
INDUSTRIAL COMMISSIONER
APPEAL DECISIONS

AGENCY EXPERTISE

Lundy v. Radio Shack Corp. (August 30, 1985)

C Claimant started working for Boise-Cascade in 1969. He stopped working for this employer on September 1, 1979. In 1972 while working for Boise-Cascade claimant "jerked the muscle" in his lower back. He sustained a similar injury while working for Boise-Cascade in 1973 or 1974. He was overweight while working for this employer. In January 1979, while working for Boise-Cascade, claimant slipped on some ice and "sprained" the muscles in his lower back immediately above his belt line.

In August 1980 claimant became a manager for Radio Shack Corporation in Oskaloosa, Iowa. He started working for this employer on April 23, 1980 as a salesperson selling stereo equipment. Claimant alleged that in April 1981 he sustained an injury while lifting a 120 watt receiver and trying to catch it as it fell back. He allegedly pulled the muscles in his lower back. This is the area that he had injured on numerous previous occasions. Claimant also asserted that on July 19, 1982 he injured his back while working for Radio Shack Corporation. While working for Radio Shack claimant weighed as much as 315 pounds.

The EMG and nerve conduction tests suggest a mild S-1 irritation. A discharge summary by a doctor, dated August 6, 1982, stated that claimant's lumbosacral spine "showed essentially

no abnormality." The hearing deputy, after reviewing all the medical evidence of record, concluded that claimant had a five percent permanent partial impairment and invoked the agency's expertise in dealing with medical evidence and causation. The record was silent as to the existence or extent of any permanent partial impairment. On appeal it was concluded that the agency's experience in dealing with medical evidence and causation should only be used in place of direct medical evidence where the lay testimony and evidence is overwhelming and the accompanying medical evidence is inconclusive or even nonexistent. The wealth of evidence was that claimant suffered only from a lumbosacral strain. Claimant was awarded temporary total disability from July 24, 1982 to June 17, 1983 and took nothing further from the proceeding. (No Appeal)

AGENCY EXPERTISE

Franklin v. Hazel L. Veldhuizen (November 13, 1985)

Claimant alleged that he sustained a permanent partial impairment to his whole body as the result of alleged permanent aggravation of a preexisting back condition which was allegedly caused by a right knee condition. Claimant had sustained a scheduled permanent partial disability to his right lower extremity. It was concluded in the appeal decision that there was an absence or lacking of medical evidence indicating claimant suffered a permanent material aggravation. It was observed that under appropriate circumstances agency expertise may be utilized to determine causal connection when medical evidence is lacking;

however, this expertise must be used with care and in this case it was concluded that claimant's back condition was of a temporary nature only. Lundy v. Radio Shack Corp., (Appeal Decision, August 30, 1985) was cited in this case. (No Appeal)

CHANGE OF CONDITION

Mason v. Armour-Dial, Co., (November 22, 1985)

Defendant appealed from a review-reopening decision that awarded claimant an additional five percent industrial disability. A prior decision had purported to give an award based on body as a whole impairment only. It was determined on appeal that there was no preponderate showing that the claimant had suffered a reduction in earning capacity not contemplated by the original arbitration proceeding and decision. It was held that there was no showing that claimant had suffered any deterioration of his physical condition or incurred further physical restrictions based upon his original injury that precluded him from additional jobs thereby justifying an adjustment to the original award. An award of disability to the body as a whole includes all of the factors in industrial disability. Individual elements cannot be isolated for compensability. (No Appeal)

CREDIT/INDEMNIFICATION

Bertrand v. Sioux City Grain Exchange (March 14, 1986)

Defendants requested a declaratory ruling presenting the question of the appropriate credit to be allowed against defendants' workers' compensation liability to claimant, from the proceeds



of a judgment in favor of Mary Bertrand, as Administrator of the Estate of Norbert J. Bertrand, deceased.

Norbert J. Bertrand sustained a work-related injury on April 30, 1974 that resulted in his death. He was employed by Sioux City Grain Exchange at the time of his death. On March 8, 1978 Mary Bertrand obtained a \$225,000 jury verdict against Bartlett Grain Company (a third party) as Administrator of the Estate of Norbert J. Bertrand.

The declaratory ruling construed Iowa section 85.22 as it existed at the time of injury. Section 85.22 provides reimbursement to employer or insurers out of employee's claims against third parties. See Mata v. Clarion Farmers Elevator Coop., 380 N.W.2d 425 (Iowa 1986). In the instant case it was determined that the employer or its insurer was entitled to indemnification of the workers' compensation payments made less reasonable attorney fees (attorney fees allowed by the district court to the administrator). The employer or its insurer has a lien to the extent of payments made on the administrator's recovery and the judgment thereon regardless of the manner in which the administrator had planned on distributing the proceeds from the judgment. (Appealed to District Court; Pending)

EQUITABLE ESTOPPEL/DISCOVERY RULE

Mount v. John Deere Component Works (August 30, 1985)

Defendant appealed from an arbitration decision that concluded that defendant was estopped from asserting the statute of limitations as a bar to claimant's action and that claimant's

current disability was causally related to his June 30, 1974 injury. The decision of the deputy was affirmed in part and reversed in part.

C The deputy did not accept the reading of x-rays regarding the healing of a fracture by a doctor retained by defendant. In June of 1982 he was told by a different doctor his fracture had never healed. Based on the deputy's view of this evidence, it was concluded that the defendant falsely represented a position to the claimant. On appeal it was determined that there was a meritorious issue as to medical causation and diagnosis and therefore the claimant had a heavy burden to establish fraudulent representation. The appeal decision concluded that equitable estoppel had not been established.

Also addressed in this decision was the question of whether the claimant's action was barred by the statute of limitations. On appeal it was reasoned that the basis for denying the establishment of equitable estoppel helped to defeat the defendant's argument that the action was barred by the statute of limitations. The defendant's doctor was not apparently able to accurately diagnose claimant's condition after viewing x-rays and told him his condition was from another source. It was concluded that the claimant would have a difficult time ascertaining the nature, seriousness and probable compensability of his claim until it was accurately diagnosed. (No Appeal)

HEALING PERIOD BENEFITS/RUNNING AWARD

Hungate v. Lear-Sigler, Noble Division (August 30, 1985)

Defendants appealed from a review-reopening decision that



awarded the claimant a running healing period award commencing on February 25, 1982 as the result of an injury sustained on January 15, 1979. The deputy's decision was modified in that the running award was disallowed and the matter was remanded to the deputy for determination of permanent partial disability in a manner consistent with the appeal decision.

Claimant hurt her right knee at work on January 15, 1979. The parties stipulated that claimant was entitled to healing period benefits through February 24, 1982 and claimant argued that she was entitled to additional healing period benefits. It was found on appeal that claimant reached maximum healing or recuperation on July 19, 1983 when the doctor indicated the condition of the claimant remained relatively unchanged and that he could give a rating of disability at that time.

In September 1983 claimant underwent surgery because of the condition of her right knee. This surgery was necessitated by a deterioration of claimant's already impaired condition from the plateau of permanency it had reached. Medical care which is maintenance in nature does not extend the healing period in and of itself. This September 1983 surgery was characterized as maintenance although of a high degree as it was designed to return claimant's condition to the same state as prior to the time her condition deteriorated. It was determined on appeal that the only healing period benefits claimant is entitled to under these circumstances are for the normal recuperation period

required for a surgery of this type unless a greater degree of permanency should result from the surgery. (No Appeal)

HEARING LOSS

Morrison v. Muscatine County, Iowa (October 7, 1985)

This is an occupational hearing loss case. The appeal decision comments that section 85B.5 lists times and duration which, if met, will be presumptively excessive noise levels requiring the employer to inform the employee of the existence of such levels. It is not a minimum exposure level necessary to establish excessive noise levels and therefore compensable hearing loss. The appeal decision further commented that if the legislature had intended that the tables be used as a minimum standard that the definition of excessive noise in section 85B.4(3) could have easily so stated. (Appealed to District Court; Affirmed. Appealed to Supreme Court; Pending)

IDIOPATHIC FALL/COMPELLED TO WORK

Fowler v. Amana Refrigeration, Inc. (April 28, 1986)

Defendants appealed an arbitration decision in which claimant was awarded temporary total disability benefits and medical expenses related to injuries received in a fall at claimant's place of employment. Award was upheld on appeal, but for reason other than that stated by the hearing deputy.

The hearing deputy found that claimant struck her head on her machine when she suffered an idiopathic fall in the course of her employment. On appeal it was not found specifically that



she struck her head on her machine as she fell. The award was affirmed, however, she had felt the symptoms of faintness and communicated this to her supervisors. She requested relief but was asked to remain at her work station until relief could be found. Professor Larson and Varied Enterprises, Inc. v. Sumner, 353 N.W.2d 407 (Iowa 1984) support the conclusion that "[i]f she had not felt compelled to remain at her work station claimant could have gone somewhere to relieve her symptoms. Were it not for the obligation of the employment claimant would not have received her injury."

It was further observed:

In the case sub judice although the fall was idiopathic it was not without warning -- both to the claimant and the employer. "The basic rule, on which there is now general agreement, is that the effects of such a fall (idiopathic) are compensable if the employment places the employee in a position increasing the dangerous effects of such a fall...." 1 Larson, The Law of Workmen's Compensation, §12.11 at 3-310 (1985).

(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: Swain v. Monona County, 163 N.W.2d 918 (Iowa 1969); Arne v. Western Silo Co., 214 Iowa 511 (1932); Mallinger v. Webster City Oil Co., 211 Iowa 847 (1929); 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.

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

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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)

INDUSTRIAL DISABILITY--AGE AS A FACTOR

Hainey v. Protein Blenders, Inc. (October 18, 1985)

Sixty-three year old claimant sought industrial disability benefits based on back injury which arose out of and in the course of his employment. Claimant injured his back on April 5, 1982. He was discharged by the employer on August 6, 1982. After his discharge he did not look for further employment and at time of hearing was receiving social security old age assistance. The deputy determined that the claimant's industrial disability was fifteen percent and this was affirmed on appeal. The primary focus of the appeal decision was on the question of the factor of age in determining or assessing industrial disability. The appeal decision reads in part: "Age is certainly a relevant factor in determining industrial disability. However a distinction must be drawn between a case where, for instance, persons age 45 to 50 are displaced from the only line of work for which they are trained or educationally qualified, and the present case where the vast majority of claimant's earning years are behind him." There was an additional finding of fact made in this case that claimant has well developed skills in the grain sales business. The appeal decision also makes the comment that "it could be argued that by the claimant's own testimony he considers himself retired." (Appealed to District Court; Pending)



MEMORANDUM OF AGREEMENT/CHANGE OF CONDITION

Shoemaker v. Adams Door Company (August 30, 1985)

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Claimant sustained an injury on November 14, 1980. A memorandum of agreement was filed on June 21, 1982. This memorandum of agreement established an employer-employee relationship and that claimant's injury arose out of and in the course of his employment. Payments were made to claimant based upon an injury to the arm. The evidence indicated the injury extended to the body.

Defendants argued to the deputy and on appeal that the memorandum of agreement constituted a "prior settlement" and therefore the claimant had to show a change of condition in order to recover. The deputy rejected this argument and this determination was affirmed on appeal. The appeal decision concluded that a memorandum of agreement leaves open the question of the extent of disability in accordance with the facts shown at the time of the contested case hearing. (No Appeal)

SEASONAL WORKER/EXTENT OF DISABILITY

Carlson v. Richard A. & Gregory L. Carlson, a Partnership (April 15, 1986)

Defendants appeal from a review-reopening wherein claimant was awarded benefits as a result of a scheduled injury to claimant's right arm.

The employer's argument that claimant was a seasonal worker was rejected as claimant was employed as a general farm laborer with multi-faceted tasks spread out over the year. It was also



determined that the permanent impairment produced by claimant's injury extended beyond his hand and wrist into the ulna and the radius of his right arm, and therefore the scheduled member in question was the right arm rather than the right hand. Healing period was allowed to extend when continued improvement, although slight in reduction of overall impairment, was significant in terms of restored utilization. (No Appeal)

SETTLEMENT--CHANGE OF CONDITION

Sirovy v. U. S. Gypsum Company (August 30, 1985)

Claimant sustained an injury on September 2, 1980 when a ladder fell from underneath him landing on its side and he fell on the ladder on his back. He immediately experienced pain up and down his back and side. A myelogram was performed in November 1980. Claimant underwent surgery to his lower back. An agreement for settlement was filed in April 1982. Claimant also applied for a partial commutation of benefits.

The hearing deputy in a review-reopening proceeding denied additional benefits to claimant because it was determined that he had not shown a change of condition after April 1982. On appeal this determination was affirmed and it was decided that claimant failed to show a change of condition after the settlement agreement was filed in April 1982. The settlement agreement was treated the same as a prior adjudication. Further failure to turn a self-employment venture into a success does not in itself justify an increase in compensation. (No Appeal)

SETTLEMENT--FAILURE TO OBTAIN APPROVAL

Serbick v. Armour Dial Co. (January 24, 1986)

Appeal from a review-reopening decision on a previously "settled" case denying the application for lack of jurisdiction.

In this case a petition was filed but was dismissed with prejudice after the case was "settled" (though the settlement was not submitted for approval). The final report was filed indicating the employee received permanency benefits based upon 30 percent of the hand. Later, a review-reopening was filed alleging a change of condition. The medical evidence showed no change of condition, but rather that the original rating should have been to the arm rather than to the hand.

The commissioner applied Iowa Code section 86.27 (which says that parties to a contested case may not settle the case without the approval of the industrial commissioner) and found that the original action was not "settled" as the "settlement" was not approved by the industrial commissioner; therefore, a settlement without the industrial commissioner's approval does not conclude or establish the claimant's entitlement and it is subject to determination in a review-reopening proceeding. Thirty percent of an arm was awarded. (No Appeal)

SETTLEMENT -- JURISDICTION

Mathieson v. Ebasco Services (March 20, 1986)

Claimant appeals from a deputy's decision that dismissed his claim for medical benefits due to a lack of subject matter jurisdiction.

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An application for compromise settlement was previously approved by the agency in this case. The settlement acknowledged a compensable injury and accepted the obligation for continuing medical benefits. It disputed that claimant's disability was related to the injury

Section 85.35 specifically states that "no final disposition affecting rights to future benefits may be had when the only dispute is the degree of disability resulting from an injury for which an award for payments or agreement for settlement under section 86.13 has been made." A memorandum of agreement for an injury on February 24, 1978 indicating "muscular strain to neck and soreness to both shoulders" was on file in this matter.

Defendants contended the disability resulted from matters extraneous to the injury and that a bona fide dispute exists that claimant's injury caused his total disability. As evidence they attached two medical reports. The only evidence which could support an allegation of a bona fide dispute that there were matters extraneous to the injury producing disability was the tenuous statement "that there has been some significant psychological overlay of symptoms."

What was being asked was the effect of the order approving the application. The deputy ruled quite properly that a settlement under section 85.35 is not subject to review-reopening. The statute specifically provides that approval shall be binding on the parties and a final bar to further rights for workers' compensation. The claimant insisted that the matter of continuing

medical care related to the acknowledged injury is reviewable as it was specifically retained.

In order for this argument to be consistent with section 85.35 the settlement must be viewed as having been considering two matters:--(1) a compensable injury of February 24, 1978 and (2) a condition unrelated to the injury which was causing or contributing to claimant's disability. Under such circumstances the first matter would be subject to review-reopening and the second matter would not.

In this case the question was whether or not the medical expenses for which claimant seeks reimbursement were related to the acknowledged compensable injury of February 24, 1978. Although it is not clear from the special case settlement what medical expenses would be considered related to the compensable injury and which would not, it would appear the only conditions providing evidence of an alleged bona fide dispute were the psychological symptoms. It would appear therefore the terms of the settlement included continuing medical benefits related to claimant's physical symptoms but not his psychological symptoms. This, however, is to be determined in a subsequent hearing.

The proposed decision denying the claim for want of jurisdiction was set aside and the matter remanded for determination of the relationship, if any, of the alleged medical expenses to the acknowledged injury of February 24, 1978. (Appealed to District Court; Pending)

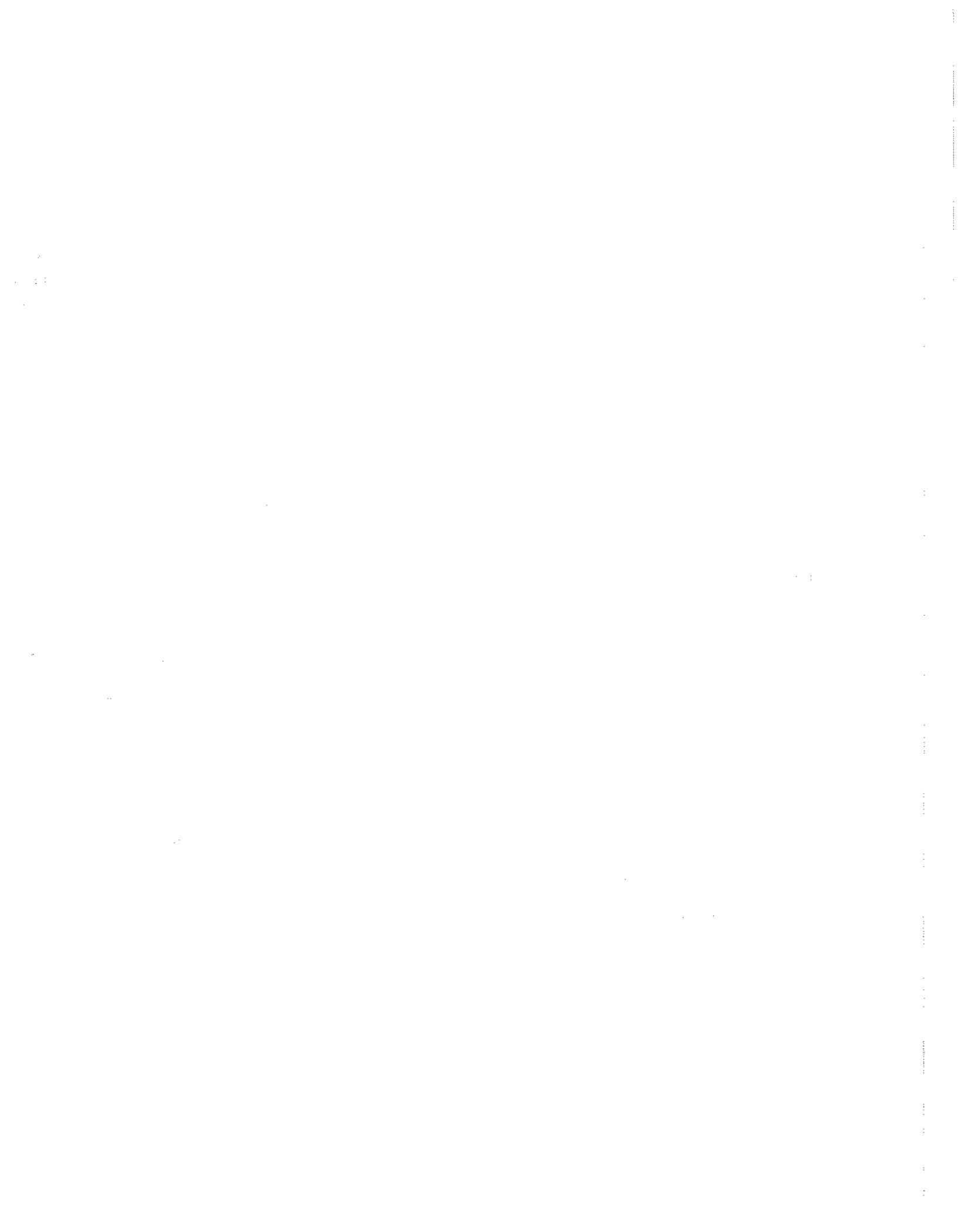
SEXUAL IMPAIRMENT

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. (Appealed to District Court; Pending)





THE HUMAN FACTORS EXPERT

PUTTING THE PROBLEM

1. It is in the law courts where the expert has finally come into his own.

"Commencing with questionable premises
And laddering assumption upon assumption
And inference upon inference,
The expert sweeps upward and onward
To the mellifluous exposition
Of the grand fallacy."

2. The latest and most dangerous of the breed of experts are the human factors specialists, a field known also as ergonomics, and defined by two of its practitioners as the study of machine design as it affects behavior. The dimensions of the discipline are such that the adepts offer themselves as experts in all areas of safety.

3. One of the earliest and most active of the human factors expert witnesses is a Ph.D. in Psychology, from the Washington D.C. area, and as he is representative of these specialists, following are cases - all for the plaintiff - in which he has testified: tire jacks, drums of flammable liquid, power saws, dump trucks, augers, automobiles, speedboats, weed-trimmers, airplanes, trash containers, booms and powerlines, sailboats and powerlines, railroad crossing cases, garden tractors, opaque dyes and falls in holes, on shirts, and on the Smithsonian steps.

4. Is there a connection between these disparate and discrete matters? Yes and a very dangerous one. It is the proposition that plaintiff's can never rise above human error, although defendants apparently are able to do so. It follows then that there is negligence for a manufacturer not to design machines which protect plaintiffs from misoperations or at the very least reduce the bodily risks. Because plaintiffs are frail beings and really not very bright they need lots of warnings and the proof that the warning was inadequate is that the plaintiff ignored it.

You think this overstates the problem? Here are the human factors expert's own words:

1. "A careful review of the accident data, including a reconstruction by a human factors

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engineer, established that virtually all guidelines ("cues") available to a human being to determine clearance were unavailable to the plaintiff at the time of the accident. The accident was not the result of carelessness on the part of the operator. To the contrary, the accident was the result of imposing upon the operator a task that was beyond human capability when there was a simple alternative, e.g., move the powerline to a different location."

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Edward M. Ricci, Judging Clearance Distances Near Powerlines, Personal Injury Deskbook. p. 817.

2. "It was many years after its initial appearance that the discipline of human factors came to be of interest to the legal profession. Only within the past few years has there begun to emerge the idea that the manufacturer of a machine has a responsibility to design it so that it cannot, in the course of normal operation and maintenance, injure the operator. It is the emergence of this new idea that makes the testimony of the human factors specialist worthwhile, for the essence of the human factors person's expertise is his training in the analysis of man-machine functions in such a way as to expose the operations which may be unsafe or inefficient and thus require special design safeguards."

William D. Bliff and Gordon H. Robinson, The Role of Human Factors Specialists as Expert Witnesses in Product Liability Cases, Wisconsin Bar Bulletin, June 1977, p. 36.

3. And as to warnings, "The ultimate test of the effectiveness of a warning involves determining whether or not a warning actually changes the behavior of the people who are to be warned." Robert Jesse Cunitz, Psychologically Effective Warnings, Hazard Prevention, May/June 1981, p. 6.

4. What happens is illustrated in two examples of Dr. Cunitz's testimony, both involving electricity - conducting objects touching powerlines:

- (a) The theory is that persons who come in contact with power lines do not appreciate what they are doing or they would not have done it.

"Q: As I understand it, the bottom line of your opinion that these fellows didn't

appreciate what they were doing, or they wouldn't have done it?

A: That's correct, yes, they didn't appreciate how dangerous it was, their attention and efforts were focused on something else."

Page 123, Deposition of Robert Jesse Cunitz, taken on March 29, 1982, in the combined cases of Frike, et al. v. Missouri Public Service Company, No. CV180-293CC and Strate, et al. v. Missouri Public Service Company and Others, No. CV180-330CC, the Circuit Court of Cass County, Missouri.

(b) It makes no difference if the injured party has testified that he was aware the powerline was where it was and that he was also aware of the hazards.

"Q: Is it your testimony that Mr. Dibble was unaware that the powerline was there?

A: No.

Q: He has acknowledged that, you are aware of that, are you not, doctor?

A: Yes.

Q: Are you aware that he has also acknowledged that he was aware of the hazards of this powerline?

A: I don't believe he was aware of the incident, the magnitude of the hazards of that powerline, at least as I am using those words, hazard, its ability to injure him in a way, I don't think he thoroughly understood that at all.

Q: On what basis do you reach the opinion that you don't think he knew what the hazards were? What facts do you have here, doctor, that lead you to that conclusion?

A: I read his deposition and my reading of that leads me to believe that he did not treat this powerline, did not perceive it--you are asking about awareness, and



that is what I understand, that he was unaware and did not perceive the powerline to have the capability of instantaneously producing the kind of damage that it actually could produce. I don't think he really understood that. . . ."

Pages 36 and 37, Deposition in Dibble v Interstate Power Company, et al., District Court of Iowa in and for Clayton County, Law No. C1936-1182.

"Q: I take it if Mr. Dibble thought he understood the hazards of the powerline you wouldn't quarrel with him, would you?

A: Yes, I think I would unless Mr. Dibble evidenced an actual understanding. I don't think he does to this day, really."

Page 39, Dibble cited supra.

The consequence of such testimony is apparent: the expert is instructing the jury what is reasonable, and what a reasonable person would and should know and do under the applicable facts and circumstances. If this isn't a total invasion of the Court's province to instruct and the jury's province to decide, then how would you otherwise characterize it?

SEARCHING FOR A SOLUTION

I. KEEP THE EXPERT FROM GIVING AN OPINION:

A. The door to the admissibility of expert testimony is Federal Rule 702 which permits expert testimony pertaining to a particular subject whenever it will assist the trier of fact in understanding the evidence. This supersedes the common law test that expert testimony was permissible only when the matter was incomprehensible to lay persons. Implicit in the broad mandate of 702 are four obvious areas of objection: (1) that the testimony would not aid the jury in determining the facts; (2) that the witness is not an expert; (3) that although an expert, his qualifications don't relate to the subject matter; and (4) that the subject of his expertise does not qualify as scientific evidence.

1. The testimony would not aid the jury in determining the facts. This is the basic requirement. Barwood v. International Paper Company, 666 F.2d 217 (5th CCA 1982). This determination under the Federal Rules is discretionary

with the trial court. (Id.) Interestingly enough, the reasons given by the 5th Circuit in affirming the lower court in this same case appear to have a relation to other objections.

"Garwood argues that the expert's deposition would have provided the jury with a helpful psychological evaluation of the effect on Garwood's conduct (1) of the available light on the day of his injuries, (2) of his nearsightedness, and (3) of the allegedly deceptive quality of the water. As to the available light, the expert's deposition reveals that in forming his opinion, he was aware only of the temperature, humidity, and time of day. He did not know the sun's position on the horizon, its position relative to Garwood, how bright the sun was, or how much glare was on the water. As to nearsightedness, the expert stated that Garwood 'would have the same trouble as anybody else would in terms of seeing distance in the water, but that he might see almost as well. It [the nearsightedness] wouldn't throw him off that much. As to the deceptive quality of the water, International Paper brought out a great deal of information about the pond with which the expert was unfamiliar, including his assumption that the water, in the area of the pond into which Garwood dove was bubbling and rushing, thus obstructing Garwood's view of the bottom. Garwood himself agreed at trial that he could see the bottom of the pond 'clearly and distinctly,' even though some people were in the water. Finally, toward the end of his deposition, the expert virtually discredited his own opinion by stating '[I]f I were going to [Garwood's] trial, I would never go without checking all the variables that were brought up today.' In light of all of these problems with the expert's deposition, we cannot say that the district court abused its discretion in concluding that the deposition would not assist the jury." (Page 223).

It appears that this is a good catch-all objection.

2. The witness must be an expert and must qualify as an expert. This threshold requirement presupposes that the witness has the necessary knowledge, experience and education. Federal



Rule of Evidence 702; United States v. Lopez, 543 F.2d 1156 (5th Cir. 1976) cert. denied, 429 U.S. 1111 (1977).

3. The expertise must relate to the subject matter. No citation of authority would appear to be necessary for this proposition.
4. The discipline itself must have a reasonable scientific basis. In United States v. Williams, 583 F.2d 1194 (2d Cir. 1978), an expert was permitted to discuss spectrographic voice analysis and in United States v. Fosher, the trial court's exclusion of a psychologist's testimony concerning the unreliability of eyewitness identifications was affirmed. 590 F.2d 381 (1st Cir. 1979). "If the state of the expert's field has not developed to a point that his opinions have a reasonable scientific basis, the Federal Rules of Evidence do not permit the testimony. Opinions that fail to satisfy this requirement cannot furnish assistance to the jury as required by Rule 702. Nevertheless, there must be an opportunity for new fields of scientific and specialized knowledge to be verified by courts as reliable. 'Neither newness nor lack of absolute certainty suffices to render it inadmissible . . . every useful new development must have its first day in court.' During that first day in court, however, the judge must scrutinize inovative developments before ruling that the proffered expert testimony is admissible." Admissibility of Human Factors Test Under the Federal Rules of Evidence, 60 N.C. Law Rev. 411 (1981). Using Florida as an example, as early as 1971 it permitted human factors testimony in Seaboard Coast Line Railroad v. Hill, 250 So.2d 311 (Fla. 1971) as well as subsequently in Public Health Foundation v. Cole, 352 So.2d 877 (Fla. 1977). See also, Ruddock v. Lodise, 413 Mich. 499, 320 N.W.2d 663 (1982); Tennis v. General Motors Corp., 625 S.W.2d 218 (Mo. App. 1981); Loftleidir Icelandic Airlines, Inc. v. McDonald Douglas Corp., 158 Cal. App. 3d 83, 204 Cal. Rptr. 358 (1984); Lenhaerr v. NRN Corp., 504 F.Supp. 165 (D. Kan. 1980); and Roundy v. Stewart, 140 Ariz. 201, 680 P.2d 1262 (Ariz. App. 1984). The human factors discipline has arrived. The

courts are prepared to hear testimony upon the subject of man's relationship to the machine.

5. There are two further objections:

A. Even granting all of the foregoing, there still remains an objection that the testimony in the particular case is conjectural and is based largely on hypothesis, theories, generalizations and speculation. State v. Galloway, 275 N.W.2d 736 (Iowa 1979); State v. Porraro, 404 A.2d 465 (R.I. 1979). The type of conjecture unacceptable for the court's discretion appears in Holmquist v. Volkswagen of America, Inc., 261 N.W.2d 516 (Iowa 1977), which the defense unsuccessfully proffered the human factors witness.

"Defendants offered the testimony of Derwyn Severy as an expert witness. Severy, a research engineer who has specialized in human factors engineering, was prepared to express his opinion of what happened based on his study of the facts surrounding the accident. Plaintiff's objection on the ground of improper foundation is sustained."

The trial court clearly set forth the reason for its ruling:

"We're not dealing with a situation where we had measurements made. We're dealing with a situation where most of the physical facts you include in your hypothetical are estimates arrived at years afterward by people who were there but made no effort to make exact measurements. Nobody seemed to think the accident was worthy of any sort of investigation at the time. They so testified. The policemen were admittedly not investigating. Deputy Fiser stated that he didn't make any of the measurements or do any of the things he normally does because it was so obvious to him what happened. I mean, that's what bothers me about eliciting an expert opinion on these matters as we are delaying with such vague, general, ambiguous--and I



think there are some contradictions in some of the facts you include in your hypothetical.

Iowa is committed to a liberal rule which allows opinion testimony if it is of a nature to aid the jury and is based on special training, experience, or knowledge with respect to the issue in question." (Page 254).

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- B. But even conceding all of the foregoing, the one final argument against admissibility is that the testimony not only does not assist the jury but indeed usurps the role of the jury. This is admittedly an uphill battle as even the ultimate question may be opined upon by a properly qualified expert provided it is not framed in terms of negligence. The basis of the objection must be that the expert does not assist the jury because the matter lies within the ordinary knowledge of the jury. The Florida Supreme Court in Seaboard Coast Line Railroad v. Buchman, 358 So.2d 836 (Fla. 1978), rev'd 381 So.2d 229 (Fla. 1980) permitted a human factors expert to testify relying upon the theory that extraordinary circumstances were involved and, therefore, the province of the jury was not invaded. In Barwood v. International Paper Company, (CCA 5th, 666 F.2d 217, 1982) the 5th Circuit affirmed the lower court who excluded a human factors expert from testifying. The trial court rested its decision on two grounds, the second being "that the contributory negligence issue involved in this case was not beyond the common understanding of the average person." (At page 223). The 5th Circuit, upholding the district court on another ground, did not reach the second issue. The significant point is that a federal trial judge is in essence holding that the jury's province was being invaded, but in the language and spirit of the common law rule. Surely if a plaintiff is aware of the presence and hazards of a product or situation, no human factors testimony as to these matters would be

helpful to a jury. To permit testimony that the plaintiff did not understand the hazards nor appreciate them would under these circumstances be a clear invasion of the jury's province.

II. DEFENSIVE USE OF HUMAN FACTORS EXPERTS:

There are psychologists who have familiarity with perception and cognition. Such qualifications would appear to be sufficient to ground testimony that no matter how many warnings are issued, people will pay no more attention and no matter how many times you warn about the hazards of powerlines, people will still thrust grain augers skyward in their proximity and sail boats with aluminium masts under them, and no matter what warning signs are placed on machines warning the operator not to insert their fingers, workers will persist in doing so. One does not have to read many morning papers to conclude that generic man is not the most careful of the primates. Consider using your own human affairs expert to testify that people who do not see what is in plain sight probably won't read warning signs either.

II. CONCLUSION:

Human Factors as a discipline and their adepts are accepted increasingly by courts. Historically the law has charged people with seeing what is in plain sight and which can be seen; indeed to do otherwise flies in the face of the scriptural complaint about those who having ears hear not and who having eyes see not. We are now faced with a phalanx of specialists who assert otherwise, and they are being heard.

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FURTHER REFERENCES

Evidence--Expert Testimony: Admissibility of Human Factors Test Under the Federal Rules of Evidence, 60 N.C. Law Rev. 412 (1981).

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MAJOR CHANGES IN OWI STATUTE

by

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A. Code Consolidation

A new Code Chapter 321J includes all of the OWI substantive law, implied consent procedures and license revocation regulations. It became effective on July 1, 1986. The 1986 statute, H.F.2493, expressly repeals the existing 1985 Code provisions in sections 321.281, 321.282, and 321.283 and chapter 321B.

B. Dot Regulations

Emergency DOT regulations corresponding to H.F.2493 statutory changes became effective on July 1, 1986.

C. Crimes -- Definition

1. "Per Se" Level Lowered

The "per se" level of intoxication was lowered from .13 to .10. CODE sec. 321J.2(1)(b); H.F.2493, sec. 2.

2. Permissive Presumption Repealed

In an "under the influence" prosecution for OWI, a chemical test result of .10 or higher has heretofore created a rebuttable presumption that the defendant was under the influence of an alcoholic beverage. CODE sec. 321.281(8). This statutory presumption was repealed by the enactment into law of chapter 321J.



3. Homicide by Vehicle

A new specific class D felony crime of Homicide by Vehicle was created in 1986, although the same conduct already had constituted part of the general class D felony crime of Involuntary Manslaughter. CODE sec. 707.6A (new);H.F.2493, sec.41.

D. Overlapping Charges Each to be Counted for Enhancement Purposes

The fact that an OWI charge was pending against a defendant when a new OWI charge was brought will not prevent both charges from counting for the purpose of enhancing a later OWI charge (provided, of course, that each prior charge resulted in a conviction, deferred judgment, or plea of guilty). CODE sec. 321J.2(3). This overrules the portion of State v. Clark, 351 N.W.2d 532 (Iowa 1984), which required overlapping offenses (i.e., a second OWI charge brought before a first had been disposed of) to be counted as only one offense for subsequent enhancement purposes.

E. Roadblocks

Statutory guidelines for emergency and routine vehicle roadblocks are set forth in CODE sec. 321J.23;H.F.2493, sec. 23.

F. Implied Consent Procedures

1. Grounds. A fifth ground for invoking implied consent has been added where a preliminary breath screening test indicated an alcohol concentration of less than .10 and

there is reasonable belief that defendant is under the influence of a drug or a combination of alcohol and drugs. CODE sec. 321J.6(1)(e);H.F.2493, sec. 6.

2. Urine Tests for Drugs. Peace officers now are authorized to offer a urine test even though a blood or breath test has already been administered -- if they have reasonable grounds to believe a person is under the influence of drugs or a combination of drugs and alcohol. Refusal to submit to the urine test constitutes a refusal even though a blood or breath test has already been administered. CODE sec. 321J.6(3);H.F.2493, sec. 6.

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3. Margin of Error. A margin of error of .05 in chemical test results has been established by the Dep't of Public Safety pursuant to legislative authority.

This margin of error will prevent a "per se" conviction where the test result does not exceed .105. CODE sec. 321J.2(9);H.F.2493, sec. 2.

The same rule applies to license revocations. CODE sec 321J.12;H.F.2493, sec 12.

4. Test Result Presumption. The alcohol concentration via a chemical test administered within two hours after defendant was driving is presumed to be the alcohol concentration at the time of driving. CODE sec. 321J.2(7);H.F.2493, sec. 2.

G. Sentencing

1. Third Offense. A mandatory minimum thirty-day jail sentence has been added to third offense - OWI which

remains a class D felony punishable by a five-year indeterminate sentence with all but the 30-day minimum term suspendable. CODE sec. 321J.2(c);H.F.2493, sec. 2.

As an alternative to the five-year indeterminate sentence, a court may sentence a third offender to a determinate term "for up to one year" in the county jail. Presumably, the thirty-day minimum term applies to this sentencing alternative also. CODE secs. 902.3 & 902.9 (1985), as amended by H.F.2493, secs. 43 & 44.

2. Substance Abuse Evaluation. The statute previously required the court to order substance abuse evaluation upon conviction for a second or subsequent OWI offense. CODE sec. 321281(2)(c)(1985). The new statute does not require the court to order such evaluation unless the defendant showed a chemical test result of .20 or higher -- and this applies also to first offense. The court, however, may order evaluation and in-patient treatment as a condition of a suspended sentence or as part of the sentence for a second or subsequent offense. CODE 321J.3(1),(2).

3. Treatment Facility. Defendants convicted of third or subsequent offense OWI and who are given a five-year sentence (instead of the one-year determinate sentence) may be assigned by the Department of Corrections to a treatment facility -- presumably both on a non-suspended (incarceration) sentence and a suspended (probationary) sentence. CODE sec. 321J.26;H.F.2493, sec. 26.

4. Restitution. A limit of \$2,000 has been put on court-ordered restitution for damages resulting from an OWI violation resulting in a conviction or a deferred judgment. CODE sec. 321J.2(8);H.F.2493, sec. 2.

5. Community Service. On a first-offense OWI when the court substitutes community service for a fine there no longer is a minimum of fifty hours (now up to 200 hours). CODE sec. 321J.2(2)(a);H.F.2493, sec. 2.

H. License Revocation

1. Interrelationship with Criminal Court Result.
The general rule remains that the DOT-imposed revocations are strictly administrative and are effective regardless of the existence or outcome of any subsequent criminal OWI prosecution. See Milota v. Dep't. of Transportation, ___N.W.2d___ (Iowa Ct. App. 1/29/85)(Sup. Ct. No. 84-180)(unreported).

A limited exception was created in 1986, however, when an OWI criminal charge results in a decision in which the court holds there was no reasonable ground to believe the defendant had committed OWI in order to justify a request for chemical testing, or if the court ruled such a test's results to be inadmissible or invalid, then the DOT may not revoke the defendant's driver's license for test refusal or a high test result. CODE sec. 321J.13(4);H.F.2493 sec. 13.



2. License Revocation Periods

a. Test Result. On a test result higher than .105 (including the .05 margin of error), the DOT will revoke for 180 days on the first revocation within the previous six years and one year on second or subsequent revocations within the previous six years. CODE sec. 321J.12;H.F.2493, sec. 12.

b. Test Refusal. On a test refusal, the DOT will revoke for 240 days on the first revocation within the previous six years and 540 days on second or subsequent revocations within the previous six years. CODE sec. 321J.9;H.F.2493, sec. 9.

c. Conviction but no Previous DOT Revocation. If the DOT does not impose a revocation based on a test result or test refusal, then upon conviction for OWI the DOT shall revoke the license for 180 days if the defendant has had no previous OWI conviction or OWI-related revocation in the past six years, or for one year if there has been such a conviction or revocation within the past six years. CODE sec. 321J.4(1),H.F.2493,sec. 4.

d. Deferred Judgment

On a deferred judgment, if the defendant's license has not already been revoked by the DOT in connection with the occurrence from which the charge arose, the court shall order the license revoked for not less than thirty nor more than ninety days. CODE sec. 321J.4(2),H.F.2493,sec. 4.

e. Third Offense

Upon conviction for third or subsequent offense, the court shall order a six-year revocation (but defendant may apply to the court for eligibility to regain license after two years). CODE sec. 321J.4(3); H.F.2493, sec. 4.

f. Serious Injury Caused. If the defendant's conduct in violating the OWI law caused serious injury to someone other than himself, the court shall order a one-year revocation in addition to any other revocation. CODE sec. 321J.4(4).

g. Death Caused. If the defendant's conduct in violating the OWI law has caused death, the court shall order the defendant's license revoked for six years (no two-year reinstatement provision in this subsection). CODE sec. 321J.4(5), H.F.2493, sec. 4.

h. Juveniles. Any OWI-related revocation is effective through the stated period of revocation or until the defendant reaches the age of eighteen, whichever period is longer. CODE sec. 321J.4(6); H.F.2493, sec. 4.

3. Administrative Review

a. A checkmark form is attached to the revocation notice given directly to defendant, with twenty (20) days to return the form with request for either a (formal) hearing on the license revocation or a request only for a work permit.

b. A formal telephonic hearing (bypassing the informal in-person hearing) must be held within thirty (30) days of receipt of defendant's request.

c. There is no time limit on a decision by the hearing officer.

d. Request for review by DOT Director must be filed within ten (10) days of the hearing officer's decision.

e. The Director's review must be completed within fifteen (15) days.

f. Any new hearing ordered by the Director must be held within thirty (30) days.

g. Judicial review of the final agency action (that is, the Director's review) must be filed in the district court within thirty (30) days, pursuant to the Iowa Administrative Procedures Act (Chapter 17A).

h. A license revocation shall be rescinded if the DOT has failed to comply with the abovementioned time limits provided that a continuance was not granted to either defendant or the peace officer who requested or administered the chemical test.

4. Work Permit (aka Temporary Restricted License)

a. Scope. The scope of a work permit has been broadened to include: (1) full-time or part-time employment; (2) continuing health care, including of a dependent; (3) continuing education; (4) substance abuse treatment; and (5) court-ordered community service. CODE sec. 321J.20;H.F.2493, sec. 20.

b. Ineligibility

i. Previous OWI-related revocatin within the past six years (ineligible until expiration of 360 days).

ii. Test refusal and defendant did/has not pled guilty.

iii. License already under revocation or suspension for another reason.

iv. Six-year revocation for third or subsequent OWI violation.

v. Six-year revocation for OWI violation causing death.

CODE sec. 321 J.20;H.F.2493, sec. 20.

I. Transitional Provisions

The 1986 Act expressly applies only to OWI violations occurring on July 1, 1986, or thereafter. However, the defendant has the absolute right to elect to apply the new Act to his judicial and administrative proceedings which were pending as of July 1, 1986. H.F.2493, sec. 52.

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House File 2493, p. 2

HOUSE FILE 2493

AN ACT

RELATING TO CRIMINAL PENALTIES ARISING FROM THE OPERATION OF MOTOR VEHICLES.

BE IT ENACTED BY THE GENERAL ASSEMBLY OF THE STATE OF IOWA:

Section 1. NEW SECTION. 321J.1 DEFINITIONS.

As used in this chapter unless the context otherwise requires:

1. "Alcohol concentration" means the number of grams of alcohol per any of the following:
 - a. One hundred milliliters of blood.
 - b. Two hundred ten liters of breath.
 - c. Sixty-seven milliliters of urine.
2. "Alcoholic beverage" includes alcohol, wine, spirits, beer, or any other beverage which contains ethyl alcohol and is fit for human consumption.
3. "Arrest" includes but is not limited to taking into custody pursuant to section 232.19.
4. "Department" means the state department of transportation.
5. "Director" means the director of transportation or the director's designee.
6. "Motor vehicle license" means any license or permit issued to a person to operate a motor vehicle in this state, including but not limited to an operator, chauffeur, or motorized bicycle license and an instruction or temporary permit.
7. "Peace officer" means:
 - a. A member of the highway patrol.
 - b. A police officer under civil service as provided in chapter 400.

c. A sheriff.

d. A regular deputy sheriff who has had formal police training.

e. Any other law enforcement officer who has satisfactorily completed an approved course relating to motor vehicle operators under the influence of alcoholic beverages at the Iowa law enforcement academy or a law enforcement training program approved by the department of public safety.

8. "Serious injury" means a bodily injury which creates a substantial risk of death, or which causes serious permanent disfigurement, or which causes protracted loss or impairment of the function of any bodily organ or major bodily member, or which causes the loss of any bodily member.

Sec. 2. NEW SECTION. 321J.2 OPERATING WHILE UNDER THE INFLUENCE OF ALCOHOL OR A DRUG OR WHILE HAVING AN ALCOHOL CONCENTRATION OF .10 OR MORE. (OWI)

1. A person commits the offense of operating while intoxicated if the person operates a motor vehicle in this state in either of the following conditions:
 - a. While under the influence of an alcoholic beverage or other drug or a combination of such substances.
 - b. While having an alcohol concentration as defined in section 321J.1 of .10 or more.
2. A person who violates this section commits:
 - a. A serious misdemeanor for the first offense and shall be imprisoned in the county jail for not less than forty-eight hours to be served as ordered by the court, less credit for any time the person was confined in a jail or detention facility following arrest, and assessed a fine of not less than five hundred dollars nor more than one thousand dollars. As an alternative to a portion or all of the fine, the court may order the person to perform not more than two hundred hours of unpaid community service. The court may accommodate the sentence to the work schedule of the defendant.

b. An aggravated misdemeanor for a second offense and shall be imprisoned in the county jail or community-based correctional facility not less than seven days, which minimum term cannot be suspended notwithstanding section 901.5, subsection 3 and section 907.3, subsection 2, and assessed a fine of not less than seven hundred fifty dollars.

c. A class "D" felony for a third offense and each subsequent offense and shall be imprisoned in the county jail or community-based correctional facility for not less than thirty days, which minimum term cannot be suspended notwithstanding section 901.5, subsection 3, and section 907.3, subsection 2, and assessed a fine of not less than seven hundred fifty dollars.

3. No conviction for, deferred judgment for, or plea of guilty to, a violation of this section which occurred more than six years prior to the date of the violation charged shall be considered in determining that the violation charged is a second, third, or subsequent offense. For the purpose of determining if a violation charged is a second, third, or subsequent offense, deferred judgments pursuant to section 907.3 for violations of this section and convictions or the equivalent of deferred judgments for violations in any other states under statutes substantially corresponding to this section shall be counted as previous offenses. The courts shall judicially notice the statutes of other states which define offenses substantially equivalent to the one defined in this section and can therefore be considered corresponding statutes. Each previous violation shall be considered a separate previous offense without regard to whether each was complete as to commission and conviction or deferral of judgment following or prior to any other previous violation.

4. A person shall not be convicted and sentenced for more than one violation of this section if the violation is shown to have been committed by either or both of the means described in subsection 1 in the same occurrence.

5. The clerk of court shall immediately certify to the department a true copy of each order entered with respect to deferral of judgment, deferral of sentence or pronouncement of judgment and sentence for a defendant under this section.

6. This section does not apply to a person operating a motor vehicle while under the influence of a drug if the substance was prescribed for the person and was taken under the prescription and in accordance with the directions of a medical practitioner as defined in section 155.3, subsection 11, if there is no evidence of the consumption of alcohol and the medical practitioner had not directed the person to refrain from operating a motor vehicle.

7. In any prosecution under this section, evidence of the results of analysis of a specimen of the defendant's blood, breath, or urine is admissible upon proof of a proper foundation. The alcohol concentration established by the results of an analysis of a specimen of the defendant's blood, breath, or urine withdrawn within two hours after the defendant was driving or in physical control of a motor vehicle is presumed to be the alcohol concentration at the time of driving or being in physical control of the motor vehicle.

8. The court shall order a defendant convicted of or receiving a deferred judgment for a violation of this section to make restitution, in an amount not to exceed two thousand dollars, for damages resulting directly from the violation. An amount paid pursuant to this restitution order shall be credited toward any adverse judgment in a subsequent civil proceeding arising from the same occurrence. However, other than establishing a credit, a restitution proceeding pursuant to this section shall not be given evidentiary or preclusive effect in a subsequent civil proceeding arising from the same occurrence.

9. In any prosecution under this section, the results of a chemical test may not be used to prove a violation of



paragraph "b" of subsection 1 if the alcohol concentration indicated by the chemical test minus the established margin of error inherent in the device or method used to conduct the chemical test does not equal an alcohol concentration of .10 or more.

Sec. 3. NEW SECTION. 321J.3 COURT ORDERED SUBSTANCE ABUSE EVALUATION OR TREATMENT.

1. On a conviction for a violation of section 321J.2, the court may order the defendant to attend a course for drinking drivers under section 321J.22. If the defendant submitted to a chemical test on arrest for the violation of section 321J.2 and the test indicated an alcohol concentration of .20 or higher, the court shall order the defendant, on conviction, to undergo a substance abuse evaluation and the court may order the defendant to follow the recommendations proposed in the substance abuse evaluation for appropriate substance abuse treatment for the defendant. Court ordered substance abuse treatment is subject to the periodic reporting requirements of section 321J.86. If a defendant is committed by the court to a substance abuse treatment facility, the administrator of the facility shall report to the court when it is determined that the defendant has received the maximum benefit of treatment at the facility and the defendant shall be released from the facility. The time for which the defendant is committed for treatment shall be credited against the defendant's sentence. The court may prescribe the length of time for the evaluation and treatment or it may request that the area school conducting the course for drinking drivers which the person is ordered to attend or the treatment program to which the person is committed immediately report to the court when the person has received maximum benefit from the course for drinking drivers or treatment program or has recovered from the person's addiction, dependency, or tendency to chronically abuse alcohol or drugs. A person committed under this section who does not possess sufficient income or estate to make

payment of the costs of the treatment in whole or in part shall be considered a state patient and the costs of treatment shall be paid as provided in section 125.44. A defendant who fails to carry out the order of the court or who fails to successfully complete or attend a course for drinking drivers or an ordered substance abuse treatment program shall be confined in the county jail for twenty days in addition to any other imprisonment ordered by the court or may be ordered to perform unpaid community service work, and shall be placed on probation for one year with a violation of this probation punishable as contempt of court.

2. As a condition of a suspended sentence or portion of sentence for a second, third, or subsequent offense in violation of section 321J.2, the court upon hearing may commit the defendant for inpatient treatment of alcoholism or drug addiction or dependency to any hospital, institution, or community correctional facility in Iowa providing such treatment. The time for which the defendant is committed for treatment shall be credited against the defendant's sentence. The court may prescribe the length of time for the evaluation and treatment or it may request that the hospital to which the person is committed immediately report to the court when the person has received maximum benefit from the program of the hospital or institution or has recovered from the person's addiction, dependency, or tendency to chronically abuse alcohol or drugs. A person committed under this section who does not possess sufficient income or estate to make payment of the costs of the treatment in whole or in part shall be considered a state patient and the costs of treatment shall be paid as provided in section 125.44.

Sec. 4. NEW SECTION. 321J.4 REVOCATION OF MOTOR VEHICLE LICENSE ON CONVICTION OR COURT ORDER.

.. If a defendant is convicted of a violation of section 321J.2 and the defendant's motor vehicle license or non-asset operating privilege has not been revoked under

section 321J.9 or 321J.12 for the occurrence from which the arrest arose, the department shall revoke the defendant's motor vehicle license or nonresident operating privilege for one hundred eighty days if the defendant has had no previous conviction under section 321J.2 or revocation under section 321J.9 or 321J.12 within the previous six years and for one year if the defendant has had one or more previous convictions or revocations under those sections within the previous six years.

2. If the court defers judgment pursuant to section 907.3 for a violation of section 321J.2, the court shall order the department to revoke the defendant's motor vehicle license or nonresident operating privilege for a period of not less than thirty days nor more than ninety days if the defendant's motor vehicle license or nonresident operating privilege has not been revoked under section 321J.9 or 321J.12 for the occurrence from which the arrest arose. The court shall immediately require the defendant to surrender to it all Iowa licenses or permits held by the defendant, which the court shall forward to the department with a copy of the order deferring judgment.

3. a. Upon a plea or verdict of guilty of a third or subsequent violation of section 321J.2, the court shall order the department to revoke the defendant's motor vehicle license or nonresident operating privilege for a period of six years. The court shall require the defendant to surrender to it all Iowa licenses or permits held by the defendant, which the court shall forward to the department with a copy of the order for revocation.

b. After two years from the date of the order for revocation, the defendant may apply to the court for restoration of the defendant's eligibility for a motor vehicle license. The application may be granted only if all of the following are shown by the defendant by a preponderance of the evidence:

(1) The defendant has completed an evaluation and, if recommended by the evaluation, a program of treatment for chemical dependency and is recovering, or has substantially recovered, from that dependency or tendency to abuse alcohol or drugs.

(2) The defendant has not been convicted, since the date of the revocation order, of any subsequent violations of section 321J.2 or 123.46, or any comparable city or county ordinance, and the defendant has not, since the date of the revocation order, submitted to a chemical test under this chapter that indicated an alcohol concentration as defined in section 321J.1 of .10 or more, or refused to submit to chemical testing under this chapter.

(3) The defendant has abstained from the excessive consumption of alcoholic beverages and the consumption of controlled substances, except at the direction of a licensed physician or pursuant to a valid prescription.

(4) The defendant's motor vehicle license is not currently subject to suspension or revocation for any other reason.

c. The court shall forward to the department a record of any application submitted under paragraph "b" and the results of the court's disposition of the application.

4. Upon a plea or verdict of guilty of a violation of section 321J.2 which involved a personal injury, the court shall determine in open court, from consideration of the information in the file and any other evidence the parties may submit, whether a serious injury was sustained by any person other than the defendant and, if so, whether the defendant's conduct in violation of section 321J.2 caused the serious injury. If the court so determines, the court shall order the department to revoke the defendant's motor vehicle license or nonresident operating privilege for a period of one year in addition to any other period of suspension or revocation. The defendant shall surrender to the court any Iowa license or permit and the court shall forward it to the department with a copy of the order for revocation.



5. Upon a plea or verdict of guilty of a violation of section 321J.2 which involved a death, the court shall determine in open court, from consideration of the information in the file and any other evidence the parties may submit, whether a death occurred and, if so, whether the defendant's conduct in violation of section 321J.2 caused the death. If the court so determines, the court shall order the department to revoke the defendant's motor vehicle license or nonresident operating privilege for a period of six years. The defendant shall surrender to the court any Iowa license or permit and the court shall forward it to the department with a copy of the order for revocation.

6. If a license or permit to operate a motor vehicle is revoked or denied under this section or section 321J.9 or 321J.12, the period of revocation or denial shall be the period provided for such a revocation or until the defendant reaches the age of eighteen whichever period is longer.

Sec. 5. NEW SECTION. 321J.5 PRELIMINARY SCREENING TEST.
When a peace officer has reasonable grounds to believe that a motor vehicle operator may be violating or has violated section 321J.2, or the operator has been involved in a motor vehicle collision resulting in injury or death, the peace officer may request the operator to provide a sample of the operator's breath for a preliminary screening test using a device approved by the commissioner of public safety for that purpose. The results of this preliminary screening test may be used for the purpose of deciding whether an arrest should be made and whether to request a chemical test authorized in this chapter, but shall not be used in any court action except to prove that a chemical test was properly requested of a person pursuant to this chapter.

Sec. 6. NEW SECTION. 321J.6 IMPLIED CONSENT TO TEST.

i. A person who operates a motor vehicle in this state under circumstances which give reasonable grounds to believe that the person has been operating a motor vehicle in

violation of section 321J.2 is deemed to have given consent to the withdrawal of specimens of the person's blood, breath, or urine and to a chemical test or tests of the specimens for the purpose of determining the alcohol concentration or presence of drugs, subject to this section. The withdrawal of the body substances and the test or tests shall be administered at the written request of a peace officer having reasonable grounds to believe that the person was operating a motor vehicle in violation of section 321J.2, and if any of the following conditions exist:

a. A peace officer has lawfully placed the person under arrest for violation of section 321J.2.
b. The person has been involved in a motor vehicle accident or collision resulting in personal injury or death.
c. The person has refused to take a preliminary breath screening test provided by this chapter.
d. The preliminary breath screening test was administered and it indicated an alcohol concentration as defined in section 321J.1 of .10 or more.
e. The preliminary breath screening test was administered and it indicated an alcohol concentration of less than .10 and the peace officer has reasonable grounds to believe that the person was under the influence of a drug other than alcohol or a combination of alcohol and another drug.

2. The peace officer shall determine which of the three substances, breath, blood, or urine, shall be tested. Refusal to submit to a chemical test of urine or breath is deemed a refusal to submit, and section 321J.9 applies. A refusal to submit to a chemical test of blood is not deemed a refusal to submit, but in that case, the peace officer shall then determine which one of the other two substances shall be tested and shall offer the test. If the peace officer fails to offer a test within two hours after the preliminary screening test is administered or refused or the arrest is made, whichever occurs first, a test is not required, and there shall be no revocation under section 321J.9.

3. Notwithstanding subsection 2, if the peace officer has reasonable grounds to believe that the person was under the influence of a drug other than alcohol or a combination of alcohol and another drug, a urine test may be required even after a blood or breath test has been administered. Section 321J.9 applies to a refusal to submit to a chemical test of urine requested under this subsection.

Sec. 7. NEW SECTION. 321J.7 DEAD OR UNCONSCIOUS PERSONS.

A person who is dead, unconscious, or otherwise in a condition rendering the person incapable of consent or refusal is deemed not to have withdrawn the consent provided by section 321J.6, and the test may be given if a licensed physician certifies in advance of the test that the person is dead, unconscious, or otherwise in a condition rendering that person incapable of consent or refusal.

Sec. 8. NEW SECTION. 321J.8 STATEMENT OF OFFICER.

A person who has been requested to submit to a chemical test shall be advised by a peace officer of the following:

1. If the person refuses to submit to the test, the person's license or operating privilege will be revoked by the department for the applicable period under section 321J.9.
2. If the person submits to the test and the results indicate an alcohol concentration as defined in section 321J.4 of .10 or more, the person's license or operating privilege will be revoked by the department for the applicable period under section 321J.12.

This section does not apply in any case involving a person described in section 321J.7.

Sec. 9. NEW SECTION. 321J.9 REFUSAL TO SUBMIT -- REVOCATION.

If a person refuses to submit to the chemical testing, a test shall not be given, but the department, upon the receipt of the peace officer's certification, subject to penalty for perjury, that the officer had reasonable grounds to believe the person to have been operating a motor vehicle in violation

of section 321J.2, that specified conditions existed for chemical testing pursuant to section 321J.6, and that the person refused to submit to the chemical testing, shall revoke the person's motor vehicle license and any nonresident operating privilege for a period of two hundred forty days if the person has no previous revocation within the previous six years under this chapter; and five hundred forty days if the person has one or more previous revocations within the previous six years under this chapter; or if the person is a resident without a license or permit to operate a motor vehicle in this state, the department shall deny to the person the issuance of a license or permit for the same period a license or permit would be revoked, subject to review as provided in this chapter. The effective date of revocation shall be twenty days after the department has mailed notice of revocation to the person by certified mail or, on behalf of the department, a peace officer offering or directing the administration of a chemical test may serve immediate notice of intention to revoke and of revocation on a person who refuses to permit chemical testing. If the peace officer serves that immediate notice, the peace officer shall take the Iowa license or permit of the driver, if any, and issue a temporary license effective for only twenty days. The peace officer shall immediately send the person's license to the department along with the officer's certificate indicating the person's refusal to submit to chemical testing.

Sec. 10. NEW SECTION. 321J.10 TESTS PURSUANT TO WARRANTS.

1. Refusal to consent to a test under section 321J.6 does not prohibit the withdrawal of a specimen for chemical testing pursuant to a search warrant issued in the investigation of a suspected violation of section 707.5 if all of the following grounds exist:

- a. A traffic accident has resulted in a death or personal injury reasonably likely to cause death.



- b. There are reasonable grounds to believe that one or more of the persons whose driving may have been the proximate cause of the accident was violating section 321J.2 at the time of the accident.
2. Search warrants may be issued under this section in full compliance with chapter 808 or they may be issued under subsection 3.
3. Notwithstanding section 808.3, the issuance of a search warrant under this section may be based upon sworn oral testimony communicated by telephone if the magistrate who is asked to issue the warrant is satisfied that the circumstances make it reasonable to dispense with a written affidavit. The following shall then apply:
- a. When a caller applies for the issuance of a warrant under this section and the magistrate becomes aware of the purpose of the call, the magistrate shall place under oath the person applying for the warrant.
- b. The person applying for the warrant shall prepare a duplicate warrant and read the duplicate warrant, verbatim, to the magistrate who shall enter, verbatim, what is read to the magistrate on a form that will be considered the original warrant. The magistrate may direct that the warrant be modified.
- c. The oral application testimony shall set forth facts and information tending to establish the existence of the grounds for the warrant and shall describe with a reasonable degree of specificity the person or persons whose driving is believed to have been the proximate cause of the accident and from whom a specimen is to be withdrawn and the location where the withdrawal of the specimen or specimens is to take place.
- d. If a voice recording device is available, the magistrate may record by means of that device all of the call after the magistrate becomes aware of the purpose of the call. Otherwise, the magistrate shall cause a stenographic or longhand memorandum to be made of the oral testimony of the person applying for the warrant.

- e. If the magistrate is satisfied from the oral testimony that the grounds for the warrant exist or that there is probable cause to believe that they exist, the magistrate shall order the issuance of the warrant by directing the person applying for the warrant to sign the magistrate's name on the duplicate warrant. The magistrate shall immediately sign the original warrant and enter on its face the exact time when the issuance was ordered.
- f. The person who executes the warrant shall enter the time of execution on the face of the duplicate warrant.
- g. The magistrate shall cause any record of the call made by means of a voice recording device to be transcribed, shall certify the accuracy of the transcript, and shall file the transcript and the original record with the clerk. If a stenographic or longhand memorandum was made of the oral testimony of the person who applied for the warrant, the magistrate shall file a signed copy with the clerk.
- h. The clerk of court shall maintain the original and duplicate warrants along with the record of the telephone call and any transcript or memorandum made of the call in a confidential file until a charge, if any, is filed.
4. Search warrants issued under this section shall authorize and direct peace officers to secure the withdrawal of blood specimens by medical personnel under section 321J.11. Reasonable care shall be exercised to ensure the health and safety of the persons from whom specimens are withdrawn in execution of the warrants. If a person from whom a specimen is to be withdrawn objects to the withdrawal of blood, and the person is capable of giving a specimen of breath, and a direct breath testing instrument is readily available, the warrant may be executed by the withdrawal of a specimen of breath for chemical testing.
5. The act of any person knowingly resisting or obstructing the withdrawal of a specimen pursuant to a search warrant issued under this section constitutes a contempt

punishable by a fine not exceeding one thousand dollars or imprisonment in a county jail not exceeding one year or by both such fine and imprisonment. Also, if the withdrawal of a specimen is so resisted or obstructed, sections 321J.9 and 321J.16 apply.

6. Nonsubstantive variances between the contents of the original and duplicate warrants shall not cause a warrant issued under subsection 3 of this section to be considered invalid.

7. Specimens obtained pursuant to warrants issued under this section are not subject to disposition under section 808.9 or chapter 809.

8. Subsections 1 to 7 of this section do not apply where a test may be administered under section 321J.7.

9. Medical personnel who use reasonable care and accepted medical practices in withdrawing blood specimens are immune from liability for their actions in complying with requests made of them pursuant to search warrants or pursuant to section 321J.11.

Sec. 11. NEW SECTION. 321J.11 TAKING SAMPLE FOR TEST.
Only a licensed physician, physician's assistant as defined in section 148C.1, subsection 6, medical technologist, or registered nurse, acting at the request of a peace officer, may withdraw a specimen of blood for the purpose of determining the alcohol concentration or the presence of drugs. However, any peace officer, using devices and methods approved by the commissioner of public safety, may take a specimen of a person's breath or urine for the purpose of determining the alcohol concentration or the presence of drugs. Only new equipment kept under strictly sanitary and sterile conditions shall be used for drawing blood.

The person may have an independent chemical test or tests administered at the person's own expense in addition to any administered at the direction of a peace officer. The failure or inability of the person to obtain an independent chemical

test or tests does not preclude the admission of evidence of the results of the test or tests administered at the direction of the peace officer. Upon the request of the person who is tested, the results of the test or tests administered at the direction of the peace officer shall be made available to the person.

Sec. 12. NEW SECTION. 321J.12 TEST RESULT REVOCATION.
Upon certification, subject to penalty for perjury, by the peace officer that there existed reasonable grounds to believe that the person had been operating a motor vehicle in violation of section 321J.2, that there existed one or more of the necessary conditions for chemical testing described in section 321J.6, subsection 1, and that the person submitted to chemical testing and the test results indicated an alcohol concentration as defined in section 321J.1 of .10 or more, the department shall revoke the person's motor vehicle license or nonresident operating privilege for a period of one hundred eighty days if the person has had no revocation within the previous six years under this chapter, and one year if the person has had one or more previous revocations within the previous six years under this chapter.

The effective date of the revocation shall be twenty days after the department has mailed notice of revocation to the person by certified mail. The peace officer who requested or directed the administration of the chemical test may, on behalf of the department, serve immediate notice of revocation on a person whose test results indicated an alcohol concentration of .10 or more.

If the peace officer serves that immediate notice, the peace officer shall take the person's Iowa license or permit, if any, and issue a temporary license valid only for twenty days. The peace officer shall immediately send the person's driver's license to the department along with the officer's certificate indicating that the test results indicated an alcohol concentration of .10 or more.



The results of a chemical test may not be used as the basis for a revocation of a person's motor vehicle license or nonresident operating privilege if the alcohol concentration indicated by the chemical test minus the established margin of error inherent in the device or method used to conduct the chemical test does not equal an alcohol concentration of .10 or more.

Sec. 13. NEW SECTION. 321J.13 HEARING ON REVOCATION -- APPEAL.

1. Notice of revocation of a person's motor vehicle license or operating privilege served pursuant to section 321J.9 or 321J.12 shall include a form accompanied by a preaddressed envelope on which the person served may indicate by a checkmark if the person wishes to request a temporary restricted license only or if the person wishes a hearing to contest the revocation. The form shall clearly state on its face that the form must be completed and returned within twenty days of receipt or the person's right to a hearing to contest the revocation is foreclosed. The form shall also be accompanied by a statement of the operation of and the person's rights under this chapter.

2. The department shall grant the person an opportunity to be heard within thirty days of receipt of a request for a hearing if the request is made not later than twenty days after receipt of notice of revocation served pursuant to section 321J.9 or 321J.12. The hearing shall be before the department in the county where the alleged events occurred, unless the director and the person agree that the hearing may be held in some other county, or the hearing may be held by telephone conference at the discretion of the agency conducting the hearing. The hearing may be recorded and its scope shall be limited to the issues of whether a peace officer had reasonable grounds to believe that the person was operating a motor vehicle in violation of section 321J.2 and either of the following:

- a. Whether the person refused to submit to the test or tests.
- b. Whether a test was administered and the test results indicated an alcohol concentration as defined in section 321J.1 of .10 or more.
- 3. After the hearing the department shall order that the revocation be either rescinded or sustained. In the event that the revocation is sustained, the administrative hearing officer who conducted the hearing has authority to issue a temporary restricted license to the person whose motor vehicle license or operating privilege was revoked. Upon receipt of the decision of the department to sustain a revocation, the person contesting the revocation shall have ten days to file a request for review of the decision by the director. The director or the director's designee shall review the decision within fifteen days and shall either rescind or sustain the revocation or order a new hearing. If the director orders a new hearing, the department shall grant the person a new hearing within thirty days of the director's order.

4. A person whose motor vehicle license or operating privilege has been revoked under section 321J.9 or 321J.12 may reopen a department hearing on the revocation if the person submits a petition stating that new evidence has been discovered which provides grounds for rescission of the revocation, or if the person submits a petition stating that a criminal action on a charge of a violation of section 321J.2 filed as a result of the same circumstances which resulted in the revocation has resulted in a decision in which the court has held that the peace officer did not have reasonable grounds to believe that a violation of section 321J.2 had occurred to support a request for or to administer a chemical test or which has held the chemical test to be otherwise inadmissible or invalid. Such a decision by the court is binding on the department.

5. The department shall stay the revocation of a person's motor vehicle license or operating privilege for the period that the person is contesting the revocation under this section or section 321J.14 if it is shown to the satisfaction of the department that the new evidence is material and that there were valid reasons for failure to present it in the contested case proceeding before the department.

6. If the department fails to comply with the time limitations of this section regarding granting a hearing, review by the director or the director's designee, or granting a new hearing, and if the request for a hearing or review by the director was properly made under this section, the revocation of the motor vehicle license or operating privilege of the person who made the request for a hearing or review shall be rescinded. This subsection shall not apply in those cases in which a continuance to the hearing has been granted at the request of either the person who requested the hearing or the peace officer who requested or administered the chemical test.

Sec. 14. NEW SECTION. 321J.14 JUDICIAL REVIEW.
Judicial review of an action of the department may be sought in accordance with the terms of the Iowa administrative procedure Act, chapter 17A. Notwithstanding the terms of that chapter, a petition for judicial review may be filed in the district court in the county where the alleged events occurred or in the county in which the administrative hearing was held.

Sec. 15. NEW SECTION. 321J.15 EVIDENCE IN ANY ACTION.
Upon the trial of a civil or criminal action or proceeding arising out of acts alleged to have been committed by a person while operating a motor vehicle in violation of section 321J.2, evidence of the alcohol concentration or the presence of drugs in the person's body substances at the time of the act alleged as shown by a chemical analysis of the person's blood, breath, or urine is admissible. If it is established at trial that an analysis of a breath specimen was performed

by a certified operator using a device and methods approved by the commissioner of public safety, no further foundation is necessary for introduction of the evidence.

Sec. 16. NEW SECTION. 321J.16 PROOF OF REFUSAL ADMISSIBLE.

If a person refuses to submit to a chemical test, proof of refusal is admissible in any civil or criminal action or proceeding arising out of acts alleged to have been committed while the person was operating a motor vehicle in violation of section 321J.2.

Sec. 17. NEW SECTION. 321J.17 CIVIL PENALTY -- SEPARATE FUND -- REINSTATEMENT.

When the department revokes a person's motor vehicle license or nonresident operating privilege under this chapter, the department shall assess the person a civil penalty of one hundred dollars. The money collected by the department under this section shall be transmitted to the treasurer of state who shall deposit the money in a separate fund dedicated to and used for the purposes of chapter 912, and for the operation of a missing person clearinghouse and domestic abuse registry by the department of public safety. A temporary restricted license shall not be issued or a motor vehicle license or nonresident operating privilege reinstated until the civil penalty has been paid.

Sec. 18. NEW SECTION. 321J.18 OTHER EVIDENCE.

This chapter does not limit the introduction of any competent evidence bearing on the question of whether a person was under the influence of an alcoholic beverage or a drug, including the results of chemical tests of specimens of blood, breath or urine obtained more than two hours after the person was operating a motor vehicle.

Sec. 19. NEW SECTION. 321J.19 INFORMATION RELAYED TO OTHER STATES.

When it has been finally determined under this chapter that a nonresident's privilege to operate a motor vehicle in this



state has been revoked or denied, the department shall give information in writing of the action taken to the official in charge of traffic control or public safety of the state of the person's residence and of any state in which the person has a license.

Sec. 20. NEW SECTION. 321J.20 TEMPORARY RESTRICTED LICENSE.

1. The department may, on application, issue a temporary restricted license to a person whose motor vehicle license is revoked under this chapter allowing the person to drive to and from the person's home and specified places at specified times which can be verified by the department and which are required by the person's full-time or part-time employment, continuing health care or the continuing health care of another who is dependent upon the person, continuing education while enrolled in an educational institution on a part-time or full-time basis and while pursuing a course of study leading to a diploma, degree, or other certification of successful educational completion, substance abuse treatment, and court-ordered community service responsibilities if the person's motor vehicle license has not been revoked under 321J.4, 321J.9, or 321J.12 within the previous six years and if any of the following apply:

- a. The person's motor vehicle license is revoked under section 321J.4, subsection 1, 2, 4, or 6.
- b. The person's motor vehicle license is revoked under section 321J.9 and the person has entered a plea of guilty on a charge of a violation of section 321J.2 which arose from the same set of circumstances which resulted in the person's motor vehicle license revocation under section 321J.9 and the guilty plea is not withdrawn at the time of or after application for the temporary restricted license.
- c. The person's motor vehicle license is revoked under section 321J.12.

However, a temporary restricted license may be issued if the person's motor vehicle license is revoked under section 321J.9, and the revocation is a second revocation under this chapter, and the first three hundred and sixty days of the revocation have expired.

2. This section does not apply to a person whose license was revoked under section 321J.4, subsection 3 or 5, or to a person whose license is suspended or revoked for another reason.

3. A person holding a temporary restricted license issued by the department under this section shall not operate a motor vehicle for pleasure.

Sec. 21. NEW SECTION. 321J.21 DRIVING WHILE LICENSE DENIED OR REVOKED.

A person whose motor vehicle license or nonresident operating privilege has been denied or revoked as provided in this chapter and who drives a motor vehicle upon the highways of this state while the license or privilege is denied or revoked commits a serious misdemeanor. The department, upon receiving the record of the conviction of a person under this section upon a charge of driving a motor vehicle while the license of the person was revoked or denied, shall extend the period of revocation or denial for an additional like period, and the department shall not issue a new license during the additional period.

Sec. 22. NEW SECTION. 321J.22 COURT-ORDERED DRINKING DRIVERS COURSE.

1. As used in this section, unless the context otherwise requires:
 - a. "Course for drinking drivers" means an approved course designed to inform the offender about drinking and driving and encourage the offender to assess the offender's own drinking and driving behavior in order to select practical alternatives.

b. "Satisfactory completion of a course" means receiving at the completion of a course a grade from the course instructor of "C" or "2.0," or better.

2. After a conviction for, or a plea of guilty of, a violation of section 321J.2, the court in addition to its power to commit the defendant for treatment of alcoholism under section 321J.3, may order the defendant, at the defendant's own expense, to enroll in, attend, and successfully complete a course for drinking drivers. The court may alternatively or additionally require the defendant to seek evaluation, treatment or rehabilitation services under section 125.33 at the defendant's expense and to furnish evidence of successful completion. A copy of the order shall be forwarded to the department.

3. The course provided in this section shall be offered on a regular basis at each area school as defined in section 280A.2. Enrollment in the courses is not limited to persons ordered to enroll, attend and successfully complete the course under subsection 2, and any person convicted of a violation of section 321J.2 who was not ordered to enroll in a course may enroll in and attend a course for drinking drivers. The course required by this section shall be taught by the area schools under the department of public instruction and approved by the department. The department of public instruction shall establish reasonable fees to defray the expense of obtaining classroom space, instructor salaries, and class materials. A person shall not be denied enrollment in a course by reason of the person's indigency.

4. An employer shall not discharge a person from employment solely for the reason of work absence to attend a course required by this section. Any employer who violates this section is liable for damages which include but are not limited to actual damages, court costs, and reasonable attorney fees. The person may also petition the court for imposition of a cease and desist order against the person's

employer and for reinstatement to the person's previous position of employment.

5. The department of public instruction shall prepare a list of the locations of the courses taught under this section, the dates and times taught, the procedure for enrollment, and the schedule of course fees. The list shall be kept current and a copy of the list shall be sent to each court having jurisdiction over offenses provided in this chapter.

6. The department of public instruction shall maintain enrollment, attendance, successful and unsuccessful completion data on the persons ordered to enroll, attend and successfully complete a course for drinking drivers. This data shall be forwarded to the court.

Sec. 23. NEW SECTION. ROADBLOCKS CONDUCTED BY LAW ENFORCEMENT AGENCIES.

1. The law enforcement agencies of this state may conduct emergency vehicle roadblocks in response to immediate threats to the health, safety, and welfare of the public; and otherwise may conduct routine vehicle roadblocks only as provided in this section. Routine vehicle roadblocks may be conducted to enforce compliance with the law regarding any of the following:

- a. The licensing of operators of motor vehicles.
- b. The registration of motor vehicles.
- c. The safety equipment required on motor vehicles.
- d. The provisions of chapters 109 and 110.

2. Any routine vehicle roadblock conducted under this section shall meet the following requirements:

- a. The location of the roadblock, the time during which the roadblock will be conducted, and the procedure to be used while conducting the roadblock, shall be determined by policymaking administrative officers of the law enforcement agency.



b. The roadblock location shall be selected for its safety and visibility to oncoming motorists, and adequate advance warning signs, illuminated at night or under conditions of poor visibility, shall be erected to provide timely information to approaching motorists of the roadblock and its nature.

c. There shall be uniformed officers and marked official vehicles of the law enforcement agency or agencies involved, in sufficient quantity and visibility to demonstrate the official nature of the roadblock.

d. The selection of motor vehicles to be stopped shall not be arbitrary.

e. The roadblock shall be conducted to assure the safety of and to minimize the inconvenience of the motorists involved.

Sec. 24. NEW SECTION. 123.151 POSTING NOTICE ON DRUNK DRIVING LAWS REQUIRED.

State liquor stores and holders of liquor control licenses, wine permits, or beer permits shall post in a prominent place in the state liquor stores or licensed premises notice explaining the operation of and penalties of the laws which prohibit the operation of a motor vehicle by a person who is intoxicated. The size, print size, location, and content of the notice shall be established by rule of the department.

Sec. 25. Section 125.44, unnumbered paragraph 6, Code 1985, is amended to read as follows:

The department is liable for the cost of care, treatment, and maintenance of a substance abuser admitted to the facility voluntarily or pursuant to section 125.75, 125.81, or 125.91 or section 321-281-321-283--~~subsection-37~~ 321J.3 or 204.409, subsection 2 only to those facilities that have a contract with the department under this section, only for the amount computed according to and within the limits of liability prescribed by this section, and only when the substance abuser is unable to pay the costs and there is no other person, firm, corporation or insurance company bound to pay the costs.

Sec. 26. NEW SECTION. 217A.30 ASSIGNMENT TO TREATMENT FACILITIES.

1. The director of the department of corrections may assign an offender committed to the custody of the director for a felony violation of chapter 321J to a facility which meets all of the following requirements:

a. Is a treatment facility meeting the licensure standards of the division of substance abuse of the department of public health.

b. Is a facility meeting applicable standards of the American corrections association.

c. Is a facility which meets any other rule or requirement adopted by the department pursuant to chapter 17A.

2. The assignment of an offender pursuant to subsection 1 shall be for purposes of substance abuse treatment and education, and may include work programs for the offender at times when the offender is not in substance abuse treatment or education.

3. Offenders assigned to a facility pursuant to this section shall not be included in calculations used to determine the existence of a prison overcrowding state of emergency.

4. The director shall prepare proposed administrative rules for the consideration of the administrative rules review committee for the funding of the program by means of self contribution by the offenders, insurance reimbursement on behalf of offenders, or other forms of funding, program structure, criteria for the evaluation of facilities and offenders for participation in the programs, and all other issues the director shall deem appropriate. Proposed rules prepared pursuant to this subsection shall be submitted to the administrative rules review committee on or before September 15, 1986.

Sec. 27. Section 307.27, subsection 5, Code 1985, is amended to read as follows:

5. Administer the provisions of chapters 321A, 321B, 321E, and 321F, and 321J relating to motor vehicle financial responsibility, the implied consent law, the movement of vehicles of excessive size and weight and the leasing and renting of vehicles.

Sec. 28. Section 321.178, subsection 1, unnumbered paragraph 1, Code 1985, is amended to read as follows:

An approved driver education course as programmed by the department of public instruction shall consist of at least thirty clock hours of classroom instruction, and six or more clock hours of laboratory instruction of which at least three clock hours shall consist of street or highway driving. An approved course shall include a minimum of two hours of classroom instruction concerning substance abuse as part of its curriculum. After the student has completed three clock hours of street or highway driving and has demonstrated to the instructor an ability to properly operate a motor vehicle and upon written request of a parent or guardian, the instructor may waive the remaining required laboratory instruction.

Sec. 29. Section 321.191, unnumbered paragraph 2, Code 1985, is amended to read as follows:

There shall be a fee of twenty dollars for reinstatement of a chauffeur's license or operator's license which is, after notice and opportunity for hearing, suspended or revoked pursuant to sections 321.193, 321.209 and 321.210, except subsection 4 thereof, 321.513, 321.560, 321A.6, and chapter 321B 321J. The twenty-dollar fee shall be collected only if the person whose license was suspended or revoked was served personally with notice. If the person whose license was suspended or revoked was served notice by certified mail, the reinstatement fee shall be ten dollars.

Sec. 30. Section 321.196, Code Supplement 1985, is amended by adding the following new unnumbered paragraph:

NEW UNNUMBERED PARAGRAPH. Prior to the renewal of a license pursuant to this section, the department shall issue

to each applicant information on the law relating to the operation of a motor vehicle while intoxicated and statistical information relating to the number of injuries and fatalities occurring as a result of the operation of motor vehicles while intoxicated.

Sec. 31. Section 321.209, subsection 2, Code 1985, is amended by striking the subsection.

Sec. 32. Section 321.210, Code 1985, is amended by adding the following new unnumbered paragraph:

NEW UNNUMBERED PARAGRAPH. The department shall not

consider or assess any points for speeding violations of ten miles per hour or less over the legal speed limit in speed zones that have a legal speed limit greater than thirty-five miles per hour in determining a license suspension under this section. This paragraph shall apply to only the first two such violations which occur within any twelve-month period.

Sec. 33. Section 321.213, Code 1985, is amended to read as follows:

321.213 LICENSE SUSPENSIONS OR REVOCATIONS DUE TO VIOLATIONS BY JUVENILE DRIVERS.

Upon the entering of an order at the conclusion of an adjudicatory hearing under section 232.47 that the child violated a provision of this chapter or chapter 321A or chapter 321J for which the penalty is greater than a simple misdemeanor, or that the child refused to submit to chemical testing under section 321B.47 the clerk of the juvenile court in the adjudicatory hearing shall forward a copy of the adjudication to the department. Notwithstanding section

232.55, a final adjudication in a juvenile court that the child violated a provision of this chapter or chapter 321A or chapter 321J constitutes a final conviction of a violation of a provision of this chapter or chapter 321A or chapter 321J for purposes of section 321.189, subsection 2, paragraph "b", and sections 321.193, 321.194, 321.200, 321.209, 321.210, 321.215, and 321A.17. Notwithstanding section 232.55, the



~~director shall revoke the license or permit of a child under section 321B-13 upon receipt of a copy of the final adjudication in a juvenile court that the child refused to submit to chemical testing under section 321B-4.~~

Sec. 34. Section 321.218, unnumbered paragraph 1, Code Supplement 1985, is amended to read as follows:

A person whose operator's or chauffeur's license or driving privilege has been denied, canceled, suspended or revoked as provided in this chapter, and who drives a motor vehicle upon the highways of this state while the license or privilege is denied, canceled, suspended, or revoked commits a simple misdemeanor. However, a person whose license or driving privilege has been revoked under section 321.209 or chapter 321B and who drives a motor vehicle upon the highways of this state while the license or privilege is revoked commits a serious misdemeanor. The sentence imposed under this section shall not be suspended by the court, notwithstanding section 907.3 or any other statute. The department, upon receiving the record of the conviction of a person under this section upon a charge of driving a motor vehicle while the license of the person was suspended or revoked, shall, except for licenses suspended under section 321.513, extend the period of suspension or revocation for an additional like period, and the department shall not issue a new license during the additional period.

Sec. 35. Section 321.228, subsection 2, Code 1985, is amended to read as follows:

2. The provisions of sections 321.261 to 321.2747-section and sections 321.277 and sections 321.280 to-321-282 shall apply upon highways and elsewhere throughout the state.

Sec. 36. Section 321.233, unnumbered paragraph 1, Code Supplement 1985, is amended to read as follows:

This chapter, except sections 321.277 and sections 321.280 to-321-282 does not apply to persons and motor vehicles and other equipment while actually engaged in work

upon the surface of a highway officially closed to traffic but does apply to such persons and vehicles when traveling to or from such work. The minimum speed restriction of section 321.285, subsection 8, and the provisions of sections 321.297 and 321.298 do not apply to road workers operating maintenance equipment owned by or under lease to any state or local authority while engaged in road maintenance, road blading, snow and ice control and removal, and granular resurfacing work on a highway, whether or not the highway is closed to traffic.

Sec. 37. Section 321.555, subsection 1, paragraph b, Code 1985, is amended to read as follows:

b. Operating a motor vehicle in violation of section 321-281 321J.2.

Sec. 38. Section 321A.17, subsection 1, Code 1985, is amended to read as follows:

1. Whenever the director, under any law of this state, suspends or revokes the license of any person upon receiving record of a conviction or a forfeiture of bail or revokes the license of any person pursuant to chapter 321B 321J, the director shall also suspend the registration for all motor vehicles registered in the name of the person, except that the director shall not suspend the registration, unless otherwise required by law, if the person has previously given or immediately gives and thereafter maintains proof of financial responsibility with respect to all motor vehicles registered by the person.

Sec. 39. Section 331.653, subsection 33, Code Supplement 1985, is amended to read as follows:

33. Carry out duties relating to the enforcement of laws prohibiting the operation of a motor vehicle while under the influence of an alcoholic beverage as provided in chapter 321B 321J.

Sec. 40. Section 602.8102, subsection 51, Code Supplement 1985, is amended to read as follows:

51. Forward to the department of transportation a copy of the record of each conviction or forfeiture of bail of a person charged with the violation of the laws regulating the operation of vehicles on public roads as provided in sections 321.281 321J.2 and 321.491.

Sec. 41. NEW SECTION. 707.6A HOMICIDE BY VEHICLE.

1. A person commits a class "D" felony when the person unintentionally causes the death of another by either of the following means:

a. Operating a motor vehicle while under the influence of alcohol or a drug or a combination of such substances or while having an alcohol concentration of .10 or more, in violation of section 321J.2.

b. Driving a motor vehicle in a reckless manner with willful or wanton disregard for the safety of persons or property, in violation of section 321.277.

2. A person commits an aggravated misdemeanor when the person unintentionally causes the death of another by operating a motor vehicle in any of the following manners:

a. Drag racing, in violation of section 321.278.

b. Eluding or attempting to elude a pursuing law enforcement vehicle, in violation of section 321.279.

3. As used in this section, "motor vehicle" includes any vehicle defined as a motor vehicle in section 321.1.

Sec. 42. Section 804.31, unnumbered paragraph 2, Code Supplement 1985, is amended to read as follows:

This section does not prohibit the request for and administration of a preliminary breath screening test or the request for and administration of a chemical test of a body substance or substances under chapter 321B 321J prior to the arrival of a qualified interpreter for a hearing impaired person who is believed to have committed a violation of section 321.281 321J.2. However, upon the arrival of the interpreter the officer who requested the chemical test shall explain through the interpreter the reason for the testing,

the consequences of the person's consent or refusal, and the ramifications of the results of the test, if one was administered.

Sec. 43. Section 902.3, Code 1985, is amended to read as follows:

902.3 INDETERMINATE SENTENCE.

When a judgment of conviction of a felony, other than a class "A" felony is entered against a person, the court, in imposing a sentence of confinement, shall commit the person into the custody of the director of the Iowa department of corrections for an indeterminate term, the maximum length of which shall not exceed the limits as fixed by section 707.3 or section 902.9 nor shall the term be less than the minimum term imposed by law, if a minimum sentence is provided. However, the court may sentence a person convicted of a class "D" felony for a violation of section 321J.2 to imprisonment for up to one year in a county jail under section 902.9, subsection 4, and the person shall not be under the custody of the director of the Iowa department of corrections.

Sec. 44. Section 902.9, subsection 4, Code 1985, is amended to read as follows:

4. A class "D" felon, not an habitual offender, shall be confined for no more than five years, and in addition may be sentenced to a fine of not more than seven thousand five hundred dollars. A class "D" felon, such felony being for a violation of section 321J.2, may be sentenced to imprisonment for up to one year in the county jail.

Sec. 45. Section 907.3, subsection i, paragraph g, Code 1985, is amended to read as follows:

g. The offense is a violation of section ~~321.281~~ 321J.2 and, within the previous six years, the person has been convicted of a violation of that section or the person's driver's license has been revoked pursuant to ~~that section or chapter-321B~~ section 321J.4, 321J.9, or 321J.12.



Sec. 46. Section 912.1, subsection 4, Code 1985, is amended to read as follows:

4. "Crime" means conduct that occurs or is attempted in this state, poses a substantial threat of personal injury or death, and is punishable as a felony, an aggravated misdemeanor, or a serious misdemeanor, or would be so punishable but for the fact that the person engaging in the conduct lacked the capacity to commit the crime under the laws of this state. "Crime" does not include conduct arising out of the ownership, maintenance, or use of a motor vehicle, motorcycle, motorized bicycle, train, boat, or aircraft except for violations of section 321.201 321J.2 or when the intention is to cause personal injury or death. A plea or verdict of guilty of a charge under section 321.201 321J.2 or a license revocation under section 321B.13 321J.9 or 321B.16 321J.12 shall be considered by the department as evidence of a violation of section 321.201 321J.2 for the purposes of this chapter.

Sec. 47. Section 321.281, Code Supplement 1985, is repealed.

Sec. 48. Section 321.282, Code 1985, is repealed.

Sec. 49. Section 321.283, Code Supplement 1985, is repealed.

Sec. 50. Chapter 321B, Code 1985 and Code Supplement 1985, is repealed.

Sec. 51. References in chapter 321J to actions which occurred previously under "this chapter" or "this section" include the preceding Code chapter or section which covers the same or substantially similar actions.

Sec. 52. This Act applies to any judicial or administrative action which arises due to violation of a section of this Act or an implementing rule, and which occurs after the effective date of this Act. This Act also applies to any judicial or administrative action which arose prior to the effective date of this Act due to a violation of a

preceding Code section or implementing rule which was the same or substantially similar to a section in this Act, or an implementing rule if the defendant or defendant's counsel requests that the action proceed under this Act.

DONALD D. AVENSON

Speaker of the House

ROBERT T. ANDERSON

President of the Senate

I hereby certify that this bill originated in the House and is known as House File 2493, Seventy-first General Assembly.

JOSEPH O'HERN

Chief Clerk of the House

Approved _____, 1986

TERRY E. BRANSTAD

Governor

CLAIMS-MADE POLICIES

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I.

DEFINITION OF A CLAIMS-MADE POLICY

- A. Appleman: A claims-made policy is one "wherein the coverage is effective if the negligent or omitted act is discovered and brought to the attention of the insurer within the policy term." 7A Appleman, Insurance Law and Practice, 312 (Berdal ed. 1979).
- B. Couch: No mention of claims-made policies or any distinction noted between occurrence policies and other types. See, i.e., 11 Couch on Insurance 2d § 44:8 "Occurrence of Loss During Time of Coverage" (1982).
- C. Long:
A claims-made policy is insurance coverage by which the insurer agrees to assume the liability for defense and payment of those claims first made against the insured during the period the policy is in force regardless of whether the act giving rise to a claim occurred before or during the policy period.
R. Long, Law of Liability Insurance, § 12.02, p. 12-3 (1986).
- D. A.L.R.:
[A claims-made policy is one that provides coverage] only if a claim of the insured's

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liability arising from a hazard insured against is presented during the policy period. . . . [This type] of policy has often been referred to as a "discovery" type of policy. A more accurate appellation is a "claims made" policy, a term which refers to the most significant fact in the triggering of coverage--the making of a claim." Annot., "Event as occurring within period of coverage of 'occurrence' and 'discovery' or 'claims made' liability policies, 37 A.L.R.4th 382,390 (1985).

II.

DISTINCTION FROM "OCCURRENCE" POLICY

- F**
- A. "An occurrence policy is a policy in which the coverage is effective if the negligent act or omission occurs within the policy period, regardless of the date of discovery or the date the claim is made or asserted." Gulf Insurance Company v. Dolan, Fertig and Curtis, 433 So.2d 512, 37 A.L.R.4th 374,377 (Fla. 1983).
- B. "The difference between occurrence and claims-made policy language may be best demonstrated by setting forth the applicable policy language. The insuring agreement from an occurrence policy provides as follows:

The company will pay on behalf of the insured all sums which the insured shall be legally obligated to pay as damages because of any act or omission . . . which occurs during the policy period

The insuring agreement from a claims-made policy provides:

The company will pay on behalf of the insured all sums which the insured shall be legally obligated to pay as damages for claims to which this insurance applies

because of any act or omission the insured is legally responsible to which claim is first being made against the insured and reported to the company during the policy period

R. Long, Law of Liability Insurance, § 12.02, p. 12-4 (1986).

III.

RATIONALE FOR USE OF CLAIMS-MADE FORMS

- A. "In the area of professional liability insurance written in the occurrence format, the lapse of time between the occurrence of the act of malpractice and the making or discovery of the claim is known as "long tail." The long tail represents the period of time during which a cause of action on the malpractice act may be instituted. This long tail has caused a number of problems for insurers, including the problem of predicting unknown but already occurred claims which might be made in the future years, and the problem of establishing proper premiums to cover such unknown claims. Claims-made insurance enables the insurer to predict with greater accuracy the frequency and severity of losses since claims arising after the termination of the policy are not covered, thereby avoiding the problem associated with occurrence coverage. Claims-made provides lower premiums to the insured because unlike occurrence insurance, the premium charge does not include coverage for future claims at inflated rates." Long, at 12-3.



B. Initially, all professional liability policies were occurrence policies, but because of numerous difficulties with this type of coverage, claims-made policies were initiated and the present trend is toward the latter type." Gulf Insurance Company at 378.

C. Measure of Success.

1. Have your premiums declined since American Home last offered an occurrence policy, circa 1975 (See Appendix 1) and changed to a claims-made form (See Appendix 2)?

IV.

TYPICAL RISKS INSURED WITH CLAIMS-MADE

A. Professional Liability.

1. Lawyers;
2. Physicians (M.D.'s and D.D.S.'s);
3. Hospitals;
4. Architects and Engineers;
5. Surveyors;
6. Abstracters;
7. Insurance Agents;
8. Other professions.

B. Products Liability.

C. Others.

V.
COVERAGE GAPS

- A. "While 'claims-made' policies do tend to inhibit an insured from changing carriers for fear he will lose coverage, it does appear that retroactive coverage is available where the insured is not aware at the time he applies for and obtains a new policy, of any particular circumstances that may lead to a claim against him." Heen & Flint Associates v. The Travelers Indemnity Company, 400 N.Y.S.2d 994 (1977).
- B. Gulf Insurance Company v. Dolan, Fertig & Curtis, 433 So.2d 512, 37 A.L.R.4th 374 (Fla. 1983). Law firm with claims-made malpractice policy changed companies with new policy effective November 20, 1979. Gulf policy expired November 19, 1979, on which day a claim was made against the firm. The expiring policy required notification to the company during the policy term. The new policy excluded pre-existing claims known to the insured prior to the policy term. Notification to the first company was not made within the policy term, and both companies declined coverage. Florida Supreme Court agreed and held neither policy to be applicable.
- C. Rotwein v. General Accident Group, 247A.2d 370 (N.J. 1968). Architectural firm changed carriers effective April 15, 1964. Initial policy required notice of claim

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to be reported during the policy term. The second policy did not cover losses from any previous policy term unless insured by second company. Suit filed in 1966 because of services rendered in 1963. The New Jersey Supreme Court holds no coverage on the first policy as a matter of law and under second policy, a question of fact whether the amendment was attached to the policy so as to exclude coverage.

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VI.
WHEN IS A CLAIM NOT A CLAIM?

- A. Hoyt v. St. Paul Fire & Marine Insurance Company, 607 F.2d 864 (9th Cir. 1979). Attorney with claims-made policy received during policy term letter from second attorney probating will drafted by first attorney. Letter from second attorney inquired why first attorney would draft will exercising a power of appointment when the effect of that was to needlessly burden the estate with substantial additional tax. Actual demand letter and suit was not made until after expiration of policy term. Held, no coverage. First letter within the policy period was merely "a request for information and explanation" and not a claim.
- B. Cornell, Howland, Hayes and Merryfield, Inc. v. Continental Casualty Company, 465 F.2d 22 (9th Cir. 1972). Engineers claims-made policy expired August 15, 1965. Prior to

expiration, the engineers were copied in on letter whereby contractor demanded compensation from city for defective information supplied to contractor on sewer project designed by engineers for city and built by contractor. Engineers notified company on August 13, 1965, of "potential claim" arising out of contractor's assertions pertaining to sewer project. Suit not filed until after expiration of policy term. Held, no coverage, because the contractor's letter did not constitute a claim against the engineer, and the engineer's notice of a potential claim was not an actual claim.

- C. Heen & Flint Associates v. The Travelers Indemnity Company, 400 N.Y.S.2d 994 (1977). Engineer's malpractice policy required reporting of claim in writing during the policy term. Letter directly to Travelers from eventual plaintiffs prior to expiration of policy notifying of "potential claims" held not a claim because not within definition of "judgment, arbitration or any demand for money or services."
- D. Troy and Stalder Company v. Continental Casualty Company, 206 Neb. 28, 290 N.W.2d 809 (1980). Architect's letter to malpractice carrier anticipating counter-claim for malpractice to architect's suit for unpaid fees held not sufficient notice of a claim.



VII.
HARD CASES MAKE BAD LAW

- A. Jones v. Continental Casualty Company, 123 N.J.Super. 353, 303 A.2d 91 (1973). Claims-made policy void as contrary to public policy. (Apparently the only case so holding.)
- B. Chamberlin v. Smith, 72 Cal.App.3d 835, 140 Cal.Rptr. 493 (1977). Use of word "may" created ambiguity, which, of course, is resolved in favor of insured and coverage was allowed even though claim not made during policy period.

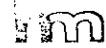
See also, Employers Reinsurance v. Mission Equities Corp., 74 Cal.App.3d 826, 141 Cal.Rptr. 727 (1977).

- C. Stine v. Continental Casualty Co., 112 Mich.App. 174, 315 N.W.2d 287 (1982)(overruled at 323 N.W.2d 679.) Notice 3 years after policy cancellation not too late. Michigan statute misconstrued pertaining to failure of notice on liability policies where earlier notice not reasonably possible.

Policy Number **LPL 346 69 18****Item 1. Name of Insured**

Lawyers
Not Members
of a
Partnership: **James Redmond**

All lawyers
who are
Members
of the **John W. Gleysteen, Duncan M
Robert R. Eidsmoe, Marvin F**



**HOLMES, MURPHY
AND ASSOCIATES, INC.**
515 243-8116
1022 HIGH STREET
DES MOINES, IOWA 50309

AMERICAN HOME ASSURANCE COMPANY
NEW YORK NEW YORK
(A stock insurance company, herein called the company)

Agrees with the insured named in the declarations made a part hereof, in consideration of the payment of the premium and in reliance upon the statements in the declarations and subject to the limits of liability, exclusions, conditions and other terms of this policy:

INSURING AGREEMENTS**I Coverage A—Individual Coverage**

To pay on behalf of the insured all sums which the insured shall become legally obligated to pay as damages because of any act or omission of the insured, or of any other person for whose acts or omissions the insured is legally responsible and arising out of the performance of professional services for others in the insured's capacity as a lawyer except that, if the insured is a member of any partnership, this coverage shall not apply if one or more claims arising out of the same professional service are made (1) jointly or severally against two or more members of the partnership or against any member of the partnership and the partnership, (2) against the partnership or (3) against the insured solely because he is a member of the partnership *

Coverage B—Partnership Coverage

To pay on behalf of the insured all sums which the insured shall become legally obligated to pay as damages because of any act or omission of the insured, or of any other person for whose acts or omissions the insured is legally responsible and arising out of the performance of professional services for others in the insured's capacity as a lawyer provided one or more claims arising out of the same professional service are made (1) jointly or severally against two or more members of the partnership insured hereunder or against any member and such partnership, (2) against the partnership or (3) against the insured solely because he is a member of the partnership insured hereunder.

II Defense, Settlement, Supplementary Payments

With respect to such insurance as is afforded by this policy, the company shall:

- defend any suit against the insured alleging such act or omission and seeking damages which are payable under the terms of this policy, even if any of the allegations of the suit are groundless, false or fraudulent; but the company may make such investigation and, with the written consent of the insured, such settlement of any claim or suit as it deems expedient;
- pay, in addition to the applicable limits of liability;
- all expenses incurred by the company, all costs taxed against the insured in any such suit and all interest on the entire amount of any judgment therein which accrues after entry of the judgment and before the company has paid or tendered or deposited

This policy does not apply:

- to any dishonest, fraudulent, criminal or malicious act or omission of any insured, partner or employee;
- to any claim made by an employer against an insured who is a salaried employee of such employer;

in court that part of the judgment which does not exceed the limit of the company's liability thereon;

- premiums on appeal bonds required in any such suit, premiums on bonds to release attachments for an amount not in excess of the applicable limit of liability of this policy, but without any obligation to apply for or furnish any such bonds;
- all reasonable expenses, other than loss of earnings, incurred by the insured at the company's request.

III Definition of Insured

The word "insured" means:

- under coverage A, (1) each lawyer named in the declarations, (2) any additional lawyers who during the policy period become partners of the partnership insured under coverage B and (3) if the policy at the effective date thereof included as insureds all lawyers employed by the insured or by the partnership insured under coverage B, any additional lawyers employed during the policy period by the insured or by such partnership;
- under coverage B, the partnership described in the declarations and any change therein during the policy period, and each member thereof.

IV Fiduciary Coverage

When the insured acts as an administrator, conservator, executor, guardian trustee, or in any similar fiduciary capacity, his acts and omissions in such capacity shall be deemed for the purpose of Insuring Agreement I to be the performance of professional services for others in the insured's capacity as a lawyer but only to the extent that such acts and omissions are those for which in the usual attorney-client relationship the insured would be legally responsible as attorney for a fiduciary.

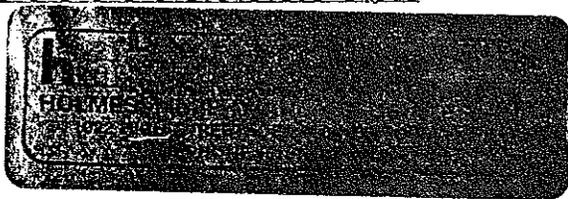
V Policy Period, Territory

This policy applies to acts or omissions within the United States of America, its territories or possessions or Canada (a) during the policy period or (b) prior to the policy period if claim is made or suit is brought against the insured during the policy period and such insured at the effective date of the insurance did not know or could not have reasonably foreseen that such acts or omissions might be expected to be the basis of a claim or suit. With respect to an insured who becomes an insured under this policy subsequent to its effective date, the policy period under (a) and (b) shall begin as of that subsequent date *

EXCLUSIONS

(c) to bodily injury to, or sickness, disease or death of any person, or to injury to or destruction of any tangible property, including the loss of use thereof;

(d) to any loss sustained by the insured as the beneficiary or distributee of any trust or estate



Policy Number LPL 0245050

1.

Name of Insured Gleysteen, Har

AMERICAN HOME
ASSURANCE COMPANY

NEW YORK, NEW YORK A CAPITAL STOCK COMPANY FOUNDED 1853

NATIONAL UNION
FIRE INSURANCE COMPANY
OF PITTSBURGH, PA.



ADMINISTRATIVE OFFICES
A CAPITAL STOCK COMPANY

102 MAIDEN LANE, NEW YORK, N. Y. 10005

The Company issuing this policy is indicated by an "X" in the box to the left of the Company's name



NATIONAL UNION FIRE INSURANCE COMPANY OF PITTSBURGH, PA.

(A stock insurance company, herein called the company)



AMERICAN HOME ASSURANCE COMPANY
NEW YORK, NEW YORK

(A stock insurance company, herein called the company)

I, the undersigned, agrees with the insured, named in the declarations made a part hereof, in consideration of the payment of the premium and in reliance upon the statements in the application and subject to the limits of liability, exclusions, conditions and other terms of this policy:

INSURING AGREEMENT

I Coverage

To pay on behalf of the insured all sums which the insured shall become legally obligated to pay as money damages because of any claim or claims first made against the insured and reported to the Company during the policy period, arising out of any act or omission of the insured in rendering or failing to render professional services for others in the insured's capacity as a lawyer, and caused by the insured or any other person for whose acts or omissions the insured is legally responsible, except as excluded or limited by the terms, conditions and exclusions of this policy.

II Defense, Settlement, Supplementary Payments

With respect to such insurance as is afforded by this policy, the Company shall defend any suit against the insured alleging such act or omission and seeking damages which are payable under the terms of this policy, even if any of the allegations of the suit are groundless, false or fraudulent; and the Company may make such investigation and, with written consent of the insured, such settlement of any claim as it deems expedient. If the insured shall refuse to consent to any settlement or compromise recommended by the Company and acceptable to the claimant and shall elect to contest the claim or suit or proceeding, then the Company's liability shall not exceed the amount for which the Company would have been liable for money damages and claims expenses at the time the claim or suit or proceeding could have been settled or compromised. It is further provided that the Company shall not be obligated to pay any claim, judgment, award or claims expenses, or undertake to continue defense of any suit or proceeding after the limit of the Company's liability has been exhausted by payment of judgments, awards, settlements or claims expense, or by deposit of the applicable limit of liability in a court of competent jurisdiction. The limits of liability include payments for claims expenses as well as money damages, and if the Company's limits of liability hereunder are exhausted prior to the reduction of any pending claim, or suit or proceeding arising in connection therewith, to settlement, final judgment or final award, the Company shall have the right to withdraw from the further defense thereof by tendering control of said defense to the insured.

III Persons Insured

Each of the following is an insured under this insurance to the extent set forth below:

- a) if the Named Insured designated in the Declarations is an individual,

the person so designated but only with respect to the conduct of a law practice of which the individual is the sole proprietor;

- b) if the Named Insured designated in the Declarations is a partnership, the partnership so designated and any lawyers who are partners thereof;
- c) if the Named Insured designated in the Declarations is a Professional Corporation or Professional Association, the Professional Corporation or Professional Association so designated and any lawyers who are stockholders or members thereof;
- d) any lawyer who is an employee of the Named Insured;
- e) any lawyer who previously qualified as an insured under subparagraphs III (b), (c) or (d) of this Policy prior to termination of the required relationship with the Named Insured but only for professional services rendered prior to the termination of such relationship.

IV Policy Period and Territory

This policy applies to acts or omissions occurring anywhere in the world provided claim is made or suit is brought within the United States of America, its territories or possessions or Canada, prior to the end of the policy period, if claim is first made during the policy period or an extended reporting period purchased in accordance with Condition IV.

A claim is first made during the policy period or extended reporting period if:

- a) during the policy period or extended reporting period the insured shall have knowledge or become aware of any act or omission which could reasonably be expected to give rise to a claim under this policy and shall during the policy period or extended reporting period give written notice thereof to the Company in accordance with Condition VII.
- b) if any claim is first made during a policy year alleging money damages which are payable under this policy any additional claims which are made, or suits or proceedings in connection therewith which are brought subsequent to that policy year for money damages resulting from the same or related acts or omissions shall be considered part of the claim which was first made during that policy year.

OVERVIEW OF LENDERS' LIABILITIES

October 3, 1986

Speaker: Bernard L. Spaeth, Jr.

WHITFIELD, MUSGRAVE, SELVY, KELLY & EDDY
1300 First Interstate Bank Building
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(515) 288-6041

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The speaker wishes to acknowledge the contribution of Wendy Carlson whose exhaustive research and analysis resulted in this outline and the speaker's presentation.

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OVERVIEW OF LENDERS' LIABILITIES

Introduction

In financially troubled times, the types and areas of potential liability for lenders tend to expand. The increasing number of borrowers who are unable to satisfy their debts become quite inventive in creating new legal theories and stretching old ones to shield themselves from the obligation of their debts. On the theory that the best defense is a good offense, many debtors interpose counterclaims on various grounds against lenders who have resorted to litigation to collect outstanding debts. Other potential counterclaimants include guarantors, accommodation parties, persons who have pledged their assets for the debt of a third party and competing creditors. On a practical level, this legal maneuvering increases the costs of collection, and, depending on the strength of the defenses or counterclaims presented, may reduce the chances of collecting at all. Moreover, the lender may find itself in the position of owing money to the debtor if counterclaims for damages are successful.

On a broader level, these increasing efforts to avoid debt incurred tend to change subtly the lender/borrower relationship with the result that the lenders' duties (actual or perceived) with respect to the granting, administering and collecting of loans increased. While the debtor/creditor relationship is presumed to be arms length, with each party looking after its own best interests; nevertheless, as a result of the expanding theories of liability, lenders' conduct is being scrutinized more closely and a somewhat higher standard of good faith and fair dealing may evolve. In defending lenders against the types of claims which may and often do arise in suits to enforce debts or rights to collateral, an awareness of both the legal elements of the claim and evidentiary factors peculiar to that claim are crucial to the formulation of a successful defense strategy.

Tort Theories

I. Breach of Fiduciary Duties.

One of the types of tort claims frequently pressed by borrowers against lenders is breach of fiduciary duties. The traditional rule is that the relationship between a bank and its loan customers is that of debtor and creditor. Under this rule, the lender has no duty to disclose material facts or otherwise protect the borrower's interests. However, a long standing exception exists in situations where the bank entered into a relationship of trust and confidence with its customer. Historically, this type of relationship was rarely found in a lending situation. Only a very overreaching banker could be guilty of breaching a fiduciary duty toward a very trusting and unsophisticated customer. Recent decisions, however, have expanded the types of situations in which the lender will be considered the fiduciary of the borrower.

The basic elements of a claim based upon breach of fiduciary responsibilities are:

- (1) the existence of the relationship; and
- (2) conduct establishing a breach.

A typical scenario in which this type of claim may arise involves a borrower whom approaches bank for a loan with plans to embark upon a new business venture or to keep an existing one afloat. Bank makes the loan, but somewhere down the line, the venture goes awry and bank sues on its notes, guaranties, etc. Borrower then counterclaims for a breach of fiduciary duties on the ground that bank knew, but failed to disclose to borrower the risks inherent in his business activities. Below are the types of factors considered by the courts in deciding whether this scenario will give rise to fiduciary liabilities.

A. Existence of a Fiduciary Relationship.

Some relationships, such as that between attorney and client or agent and principal, are by definition fiduciary in nature. Other become so only when circumstances exist which make appropriate the imposition of a high standard of dealing. See, e.g., Henkin v. Berea Bank & Trust Co., 566 S.W.2d 420 (Ky.App. 1978). The relationship between borrower and lender is not per se a fiduciary one. Washington Steel Corporation v. T.W. Corporation, 602 F.2d 594, 599-601 (3rd Cir. 1979). The great majority of courts reject the idea that any general fiduciary duties attach in a typical loan transaction. However, in a situation where a banker also acts as a financial advisor and/or holds himself out as having special business expertise, the potential for liability is there. See, e.g., Deist v. Wachholz, 678 P.2d 188 (Mont. 1984).

1. Definition of Fiduciary Relationship.

A fiduciary relationship has been defined as follows:

A fiduciary relationship imparts a position of peculiar confidence placed by one individual in another. A fiduciary is a person with a duty to act primarily for the benefit of another. A fiduciary is in a position to have and exercise, and does have and exercise influence over another. A fiduciary relationship implies a condition of superiority of one of the parties over the other. Generally, in a fiduciary relationship, the property, interest or authority of the other is placed in the charge of the fiduciary. (Emphasis in original)

Kurth v. Van Horn, 380 N.W.2d 693, 698 (Iowa 1986), quoting Denison State Bank v. Madeira, 230 Kan. 684, 692, 640 P.2d 1235, 1241 (1982).

2. Factors in Determining Whether a Fiduciary Relationship Exists.

The question whether a fiduciary relationship exists is generally one of fact, although occasionally, a court will decide the question as a matter of law. See, Dugan v. First National Bank of Wichita, 606 P.2d 1009 (Kan. 1980) (affirming a summary judgment in favor of the lender on the issue of whether fiduciary duties were owing). Although a variety of factors may have a bearing on the question, no one factor is a determinative. One court has described these factors as follows:

Some of the indicia of a fiduciary relationship include the acting as one person for another; the having and the exercising of influence over one person by another; the reposing of confidence by one person in another; the dominance of one person by another; the inequality of the parties; and the dependence of one person upon another. In addition, courts have considered weakness of age, mental strength, business intelligence, knowledge of the facts involved or other conditions giving to one an advantage over the other.

First Bank of Wakeeny v. Moden, 681 P.2d 11, 12 (Kan. 1984). These factors tend to go to the issue of whether the borrower reasonably relied on the bank to give financial advice. This factor, among others, is set out below.

a. Reliance on Bank to Give Advice. In a recent decision, the Iowa Supreme Court emphasized the fact the borrower had not relied on the lender to give financial advice in denying the existence of a fiduciary relationship. Kurth v. Van Horn, 380 N.W.2d 693 (Iowa 1986). In Kurth, the plaintiff's decedent, Herman B. Gerdes, was lessor of certain real estate which he mortgaged to the defendant bank in an effort to assist his lessee (Hall). Gerdes also cosigned a note with Hall with the understanding that the proceeds would be used by Hall to finance his farming operation. Shortly after Gerdes' death, the trustee of Gerdes' testamentary trust brought suit for damages and a cancellation of the mortgage on the grounds of fraud and breach of fiduciary duties. With respect to the fiduciary duty allegations, the plaintiffs emphasized the fact Gerdes was eighty years old, that he was pressured by Hall to make the loan, that frequent visits were made by Hall to the bank and that the bank had intimate knowledge of the lessee's financial problems. When the lessee began having financial difficulties, the bank attempted to obtain a FmHA extension for him but those efforts were unsuccessful.

Gerdes then attended several meetings with the bank and his lessee and eventually cosigned the note and conveyed the mortgage. The plaintiffs argued that the bank breached a duty of disclosure to Gerdes by failing to inform him of certain aspects of the transaction, including the fact the FmHA guarantee might be lost under certain circumstances and that the bank would use Gerdes'

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money to pay off a portion of loans previously written off. The court rejected these arguments because there was no evidence that Gerdes relied upon the bank to render advice in connection with the loan. Moreover, there was no evidence the bank misled Gerdes in any way. With respect to plaintiff's suggestion that the bank should have refused to close the loan until Gerdes had secured legal counsel, the court stated:

We believe, however, that this form of protectionism goes far beyond the exercise of the banker's responsibility in this case and its failure to do so does not amount to a breach of fiduciary duty. The bank had no affirmative duty to prevent Gerdes from doing what the evidence clearly shows he wanted to do.

It went on to summarize the grounds of its decision as follows:

It is undisputed that, from the time Hall and Gerdes entered into their lease arrangement, Gerdes was aware of Hall's financial condition. There is no evidence that the bank ever acted as an investment advisor for Gerdes. In fact, apparently Gerdes hardly knew Van Horn at all. He had only been a depositor at the bank. Prior to the Hall loan, Gerdes had never borrowed money from the bank or, apparently, from any other source. The record also shows that, while Gerdes had been hospitalized and was eighty years old, he was mentally astute and well oriented at the time of this transaction.

We believe in this case that the record fails to show substantial evidence that the customer relied upon the bank for advice in connection with this transaction or that, even if such reliance was placed in the bank, the bank was not aware of it. In addition, even if such reliance was placed in the bank and accepted by it, there is no substantial evidence that the bank failed to disclose the relevant facts necessary to make an informed decision.

Id. at 698.

b. Lender's Knowledge of Reliance. In Klein v. First Edina National Bank, 196 N.W.2d 619 (Minn. 1972), the Minnesota Supreme Court held that the claimant must show not only that she relied on advice given by the lender, but that the lender knew or should have known of her reliance. Id. at 622-623. In Klein, the plaintiff pledged certain securities to enable her employer to obtain a loan. She had been a customer of the defendant bank for almost twenty years. Mrs. Klein testified that she did not know certain facts about her employer's business and the consequences of pledging her stock, which facts might have prompted her to act differently. She did not know, for example, that her employer was already indebted to the bank and that part of the proceeds of the new endeavor would be used to retire the earlier debt. Further, she did not know the bank intended to release certain collateral pledged by

the employer upon the pledge of Mrs. Klein's stock. Mrs. Klein also testified that she did not fully understand the consequences of the security agreement and that she had signed it without reading it. She did not, however, ask any questions of the bank's representatives, nor did she advise the bank of her lack of understanding.

With respect to the question of reliance, Mrs. Klein testified that she trusted the defendant banker as she would trust a doctor or lawyer. She would not have signed the instrument, she said, if someone other than her banker had put the papers before her to sign. Despite this testimony, the court held that no fiduciary relationship existed between Mrs. Klein and her bank. In reaching this decision, the court stated that there was no evidence that the bank knew Mrs. Klein placed such great trust in him or that she lacked good business judgment. The banker observed no need to counsel her as to the transaction in question. Consequently, the court affirmed a directed verdict on the issue since the plaintiff failed to make a prima facie showing that the banker knew or should have known Mrs. Klein was placing her trust and confidence in him and was depending on him to look out for interests. For a case in which the court found that a banker had undertaken to give advice on which the plaintiff relied, see, Deist v. Wachholz, 678 P.2d 188 (Mont. 1984) (and Central States).

c. Borrower's Business Experience. As demonstrated by Klein, a borrower may easily claim to have relied on his banker for financial advice. In that case, this contention was defeated by proof that even if Mrs. Klein did in fact rely, the banker had no knowledge of this reliance. Another approach to the reliance issue is to show that the borrower had business experience and was aware or capable of evaluating the risks of his venture. Evidence of this type may establish that any claimed reliance was not in fact reasonable.

This factor was demonstrated in Manson State Bank v. Tripp, 248 N.W.2d 105 (Iowa 1976). In Manson, the plaintiff bank brought suit to recover on a note made by defendant Tripp. Tripp was a doctor who borrowed money to invest in a corporation engaged in the manufacture and distribution of golf equipment. Tripp was one of the organizers of the deal which involved reincorporating two existing companies and restructuring their financing. Tripp was in possession of information pertaining to the financial condition of the existing corporation and knew that one was insolvent. The scheme ultimately failed and when the bank sought to recover its loan, Tripp defended on the ground that the bank had recommended the investment both explicitly through certain representations, and implicitly by making the loan. The court rejected both contentions holding that because Tripp was an educated man with investment experience, he was not entitled to rely on the bank. Moreover, the court believed Tripp was capable of interpreting the financial statements for himself, despite his testimony to the contrary. See also, MacKenzie v. Summit National Bank of St. Paul, 363 N.W.2d 116 (Minn.App. 1985).



These and other cases demonstrate that there can be no fiduciary relationship where the parties are equally able to evaluate the potential success or failure of a given transaction. This is often the key factor in defending a claim based on alleged fiduciary responsibility.

d. Access to Information. Because the question whether a fiduciary relationship exists is very factually oriented, a number of other factors may have a bearing on the issue. One such factor concerns the borrower's access to information about the proposed transaction. In most cases, the borrower will have had access to the relevant data. In Kurth, the banker had met with the borrower, Gerdes, and made the bank's entire file on the financial operation of Gerdes' lessee available for his inspection. See also, Ward v. Worthern Bank & Trust Co., 681 S.W.2d 385 (Ark. 1984). In the rare case, a borrower may not have had access to information due to factors such as illness or distance from the activity being financed. In this type of situation, it may be more difficult to disprove that the borrower relied on his banker to look after his interests--at least where the banker in fact has more knowledge of, and better access to, relevant information.

G In Smith v. Saginaw Savings and Loan Association, 288 N.W.2d 613 (Mich.App. 1980), for example, the borrowers took out a construction loan for a retirement home to be built some 250 miles away from their current residence. They were assured that the bank would monitor the contractor's performance. After the contractor declared bankruptcy, the borrowers were able to recoup their losses from the bank. Alleging a breach of fiduciary duty theory, the borrowers successfully argued they did not have access to information concerning the project and the banker had induced their reasonable reliance.

e. Length of Lender/Borrower Relationship. Another factor often mentioned, but rarely determinative, is the length of the relationship between the parties. If the lender and borrower have a history of business dealings, a court will be more inclined to find that a fiduciary relationship exists. In Deist v. Wachholz, 678 P.2d 188, 193 (Mont. 1984), for example, the fact the borrower had dealt with the bank for over a 24-year period played a role in the court's imposition of liability.

This factor is more important if the bank played an active role as an advisor in the past, rather than merely loaning money to the customer. The emphasis is on the lender's inducement of reliance; if the borrower never asked for advice and the lender never offered it, the fact they have had numerous dealings in the past may not be significant. In Dugan v. First National Bank in Wichita, 606 P.2d 1009 (Kan. 1980), for example, the plaintiff was a seventy year old widow who had dealt with the bank for almost fifty years. Nevertheless, the court refused to impose fiduciary liability because the bank had never acted as her financial advisor.

f. Presence of Attorney on Borrower's Behalf. Finally, the presence of an attorney may also be a significant factor. Some courts have held that a borrower who sought legal advice with respect to a loan and had his attorney present during the loan negotiations, was not in fact relying on the bank and recognized that the transaction was being made on an arm's length basis. See, e.g., Ward v. Worthern Bank & Trust Co., 681 S.W.2d 385 (Ark. 1984). While the presence of the borrower's attorney may be helpful in negating an alleged fiduciary relationship, the courts will not as a matter of fiduciary responsibility require the bank to ensure the borrower seeks legal advice. Kurth v. Van Horn, 380 N.W.2d 363 (Iowa 1986).

3. Per Se Fiduciary Duties.

As discussed above, most courts which have addressed the issue have held that the lender/borrower relationship is not per se a fiduciary one. They look to the facts of the particular case at hand to determine whether the bank acted as an advisor, whether the borrower reasonably relied, or whether other indicia of a fiduciary relationship are present. However, in Lash v. Cheshire County Savings Bank, Inc., 474 A.2d 980 (N.H. 1984), a New Hampshire court took the position that a lender may be liable for a breach of fiduciary duties by virtue of its status as a lender alone. Its rationale was stated as follows:

The reason so many banks use names like "Trust," "Security," or "Guarantee" is that they hold themselves out as a safe and responsible place to entrust funds.

The legislature has provided for detailed and extensive regulation of savings banks since 1895....The officers of a Savings Bank take an oath 'to the faithful discharge of their duties,'...and are governed by a prudent man test in investing money....The hundreds of pages of statutes and regulations affecting such banks clearly place them in a different category from all of the other corporations in this State who are not held to the high level of conduct which we expect of a bank.

The Uniform Commercial Code sections of Article 4 devoted to bank deposits and collections even go so far as to make illegal any attempt by a bank to enter into an agreement to 'disclaim a bank's responsibility for its own lack of good faith or failure to exercise care' or to 'limit the measure of damages for such lack or failure.'...Where a bank exercises 'bad faith' in handling an item consequential damages are awarded....While these sections of the law do not explicitly govern the instant facts they are indicative that the laws of the marketplace do not set a high enough standard for the financial institutions to which we trust our financial security.



Id. at 982. Ultimately, the court affirmed a jury verdict awarding damages for the bank's breach of fiduciary duties on the ground that all banks invite the trust and confidence of their customers. If this type of thinking catches on, it may be virtually impossible to defend a claim based on a breach of fiduciaries. However, the great majority of courts, including Iowa courts, have refused to adopt this extreme view.

B. Types of Conduct Which May Create Fiduciary Liability.

As discussed above, most of the cases in this area involve allegations of a breach of fiduciary duties based on the lender's nondisclosure of certain information to the borrower. However, other types of conduct may also create the potential for fiduciary liability.

1. Misuse of Confidential Information.

One very clear area of liability involves a lender's misuse of financial information received from a prospective borrower during an initial interview or negotiations for a loan. Most courts have no difficulty imposing liability for this type of conduct, whether or not the traditional elements of a fiduciary relationship are present. The typical case involves the prospective borrower who applies for a loan to enable him or her to take advantage of a lucrative deal. Rather than make the loan, the lender then snatches up the deal for itself. In Henkin, Inc. v. Berea Bank and Trust Co., 566 S.W.2d 420 (Ky. 1978), for example, the prospective borrower applied for a loan from the defendant bank to enable him to pay off a promissory note at a substantial discount. The bank denied the loan and then purchased the note itself. The plaintiff later defaulted on its first installment to the bank, which then accelerated the payments and sought to foreclose on the underlying security. The court held that the use of confidential information constituted a breach of fiduciary duty. The court also allowed the plaintiff to press a claim for intentional interference with a prospective business relationship, a type of claim commonly joined in cases with similar facts. See also, Dolton v. Capital Federal Savings and Loan Association, 642 F.2d 21 (9th Cir. 1981); Pigg v. Robertson, 549 S.W.2d 597 (Mo.App. 1977). But see, Thomson v. Norton, 604 S.W.2d 473 (Tex.Civ.App. 1980) (no liability imposed where a bank officer arranged for the sale of property to a borrower without disclosing that he owned the corporate seller and would make a profit on the deal).

2. Failure to Advise as to Credit Insurance.

The failure to advise a prospective borrower as to the riskiness of the transaction usually does not result in fiduciary liability. However, one type of breach which may create liability is the failure to advise the borrower of his or her option to procure insurance in connection with the loan. In Stone v. Davis, 219 N.E.2d 1094 (Ohio 1981), for instance, a lender was held liable for failing to advise as to insurance where the borrowers had clearly expressed an interest

in it. It was the lender's normal practice to provide insurance information, but in this case, it negligently failed to make clear to the borrowers that they would have to procure the insurance themselves. The court held that in this one aspect of the mortgage loan process, the bank acted as its customers' fiduciary. In this type of situation, the only defense would be to show that the lender had disclosed all pertinent information with respect to the procurement of credit insurance, if that was in fact the case. A comparative fault theory may reduce the lender's exposure as well.

3. Vague Reassurances.

Several cases have been brought in situations where the bank made vague reassurances to the borrower concerning the likelihood of his financial success. In Stenberg v. Northwestern National Bank, 238 N.W.2d 218 (Minn. 1976), for instance, a bank officer told its borrowers, the Stenbergs, not to worry about increasing their indebtedness, and that the proposed loan would help their business grow. When the business ultimately failed, the Stenbergs sued the bank on the basis of its "misleading assurances." The court ruled the bank's statements did not amount to a breach of fiduciary duty. It also noted that no fiduciary relationship could be shown to exist, since Mr. Stenberg was a businessman of some years of experience and was capable of making an independent judgment. See also, Busby v. Parish National Bank, 464 So.2d 374 (La.App. 1985).

Along the same lines are those cases in which the borrower argues that a lender tacitly recommended a proposed investment by making a loan to finance it. Although this theory has been raised in a number of cases, it has never been successful. See, e.g., Manson State Bank v. Tripp, 248 N.W.2d 105 (Iowa 1976); Noonan v. Granville-Smith, 537 F.Supp. 23 (S.D.N.Y. 1981); Flintridge Station Associates v. American Fletcher Mortgage Co., 761 F.2d 434 (7th Cir. 1985).

4. Fiduciary Relationships Among Banks.

One of the more interesting types of breaches alleged in a case involved an attempt by a participating bank to recover from the lead bank its losses on a participation loan. Manchester Bank v. Connecticut Bank & Trust Co., 497 F.Supp. 1304 (D.N.H. 1980). The participating bank argued that by virtue of its position as the originating or lead bank, the defendant owed a duty to act for the benefit of the participant. Noting the plaintiff had a heavy burden to establish a fiduciary relationship, the court nevertheless reversed a summary judgment in favor of the defendant and remanded the question for decision by the trier of fact. While this may be merely another example of a court's reluctance to grant summary judgment, the potential it creates for liability between two banks on a fiduciary theory is a startling expansion of the traditional notion of a fiduciary relationship. See also, Flintridge Station Associates v. American Fletcher Mortgage Co., 761 F.2d 434 (7th Cir. 1985)(No fiduciary duty owed by a bank to a mortgage company); Aaron



Fehrer & Sons, Ltd. v. Chase Manhattan Bank, 731 F.2d 112 (2nd Cir. 1984)(No fiduciary duty among large corporations and correspondent banks).

C. Preventive Measures.

The lender may protect itself from fiduciary liability in a number of ways. Perhaps the easiest is to include a standard clause in loan documents in which the borrower acknowledges that the lender has not acted as an advisor and is not recommending the investment in question. In Noonan v. Granville-Smith, 537 F.Supp. 23 (S.D.N.Y. 1981), for example, the court took into account the following clause from a loan document signed by the debtor:

I [the borrower] acknowledge that you [the bank] have in no way made any recommendations, warranties or representations with respect to the feasibility or wisdom of investing funds in the Partnership nor have you given me any financial or investment counseling with respect thereto.

Id. at 28. The clause was an important though not the controlling factor in the court's decision to deny the claim.

To prevent fiduciary liability, the lender may also suggest that the borrower seek legal advice with respect to the proposed transaction. Finally, full disclosure of the lender's interests, if any, and the known risks of a given transaction will prevent liability.

See, Section IV, infra; Hypothetical - Hawkeye Brenton Bank v. Calvin Crooked.

II. Fraudulent Misrepresentation.

Probably the most common type of counterclaim asserted against a lender in an action on a note is one for fraud. In any given situation, it may be easy to attack statements made, or not made as the case may be, by the lender in negotiating the loan. However, while the claim is often pleaded, it is difficult to prove. This is a function of the numerous elements of the claim, including two intent elements, as well as the relatively high burden of proof. It is perhaps due to these obstacles that less stringent offshoots of fraud, such as breach of fiduciary duties and breach of a duty to disclose, have developed as more problematic areas of liability for lenders.

A. Elements.

To recover in an action based on fraudulent misrepresentation, the borrower must prove each of the following propositions:

- (1) That a representation was made by the lender;
- (2) That the representation was false;

- (3) That the representation was material to the transaction in question;
- (4) That the representation was made with scienter, that is with knowledge of falsity;
- (5) That the lender intended to deceive the borrower;
- (6) That the defendant reasonably relied on the representation; and
- (7) That the plaintiff suffered damage as a result.

See, generally, Restatement (Second) of Torts, Section 525; Nie v. Galena State Bank, 387 N.W.2d 373, 375 (Iowa App. 1986). Below is a discussion of those elements which may provide the best avenues of defense for lenders' counsel.

1. Representation.

A representation is generally understood to mean any written or oral assertion of fact. A statement of opinion does not usually support an action for fraud, unless the parties are in a relationship of trust and confidence. See, State Bank of Iowa Falls v. Brown, 142 Iowa 190, 197, 119 N.W.81, 83 (1909). Thus, a banker who opines as to the profitability of the borrower's proposed investment may have a potential liability for breach of fiduciary duties, though probably not for fraud.

Although it has been stated that silence, in certain circumstances, may be actionable as fraud, nondisclosure has developed into a distinct theory of liability. See, Wilden Clinic, Inc. v. City of Des Moines, 229 N.W.2d 286, 292, 293 (Iowa 1975) ("Mere silence is not a representation and a mere failure to volunteer information does not constitute fraud.") Nondisclosure may give rise to a claim for breach of a fiduciary duty or other duties to disclose. See, Section III, infra.

2. Materiality.

A representation is material if it influences the borrower to enter into a transaction. For example, a representation by a lender that it has no liens on property subject to the transaction when in fact such liens would obviously be material. See, e.g., First National Bank in Lenox v. Brown, 181 N.W.2d 178 (Iowa 1970).

3. Scienter.

It is well established that scienter may be proven by:

- (1) establishing that the person making the representation had actual knowledge of the falsity of the representation;



(2) establishing that the statement was made in such absolute unqualified and positive terms as to imply personal knowledge of the fact, when in truth the speaker had no knowledge whether the language was true or false; or

(3) establishing that the party's special situation or means of knowledge were such as to make it his or her duty to know the truth or falsity of the representation.

Mills County State Bank v. Fisher, 282 N.W.2d 712 (Iowa 1979). In Mills, the court reversed a judgment in favor of the lender because the trial court instructed as to the first two, but not the third of the above-quoted alternatives. In its discussion of the scienter element, the court equated the third alternative with a fiduciary relationship, stating as follows:

The case, as developed at trial, indicated that the jury could have found a relationship of trust existed between the plaintiff bank and defendant. The defendant has made previous investments upon advice of the bank. The record indicates that the bank was more than merely the lending institution in this transaction; it acted as a catalyst to facilitate the sale. Bank officers described the sale as an excellent investment and took the defendant to the dancehall for an evening to observe its operation, and recommended that Fisher not talk to the owner. The bank's counsel also acted, at the behest of the bank, as counsel for Fisher in the transaction.

Given this evidence in the record, we conclude that it was reversible error for the trial court not to have instructed as to the third of the aforementioned formulations of scienter regarding relationships of trust and confidence.

Mills demonstrates the overlap between claims based on fraud and those based on a breach of fiduciary duties. Defense counsel could attack the applicability of the third definition of scienter by attacking the existence of a fiduciary relationship on the basis of the factors outlined above.

4. Reasonable Reliance.

The question of the borrower's reliance is more easily challenged in connection with a fiduciary theory than a fraud theory. As to the former, the fact the borrower had the ability and opportunity to investigate a transaction for himself will generally preclude fiduciary liability. Where actual misrepresentations have been proven, it may be more difficult to attack the reasonableness of the reliance. See, Sedco International v. Cory, 683 F.2d 1201, 1207 (8th Cir. 1982) (Reasonable reliance in a fraud action is a subjective standard which is not concerned with what a reasonable person would do, but rather, with what the claimant

reasonably could be expected to do). See also, Lockard v. Carson, 287 N.W.2d 871, 878 (Iowa 1980).

B. Burden of Proof.

Each of the elements of fraud must be proven by a clear and convincing preponderance of the evidence. Mills County State Bank v. Fisher, 282 N.W.2d 712, 715 (Iowa 1979). This is generally defined as requiring more evidence than a mere preponderance although less than proof beyond a reasonable doubt. The difference is a qualitative rather than quantitative one. Id. A showing greater than a mere preponderance is mandated by the presumption of fair dealing accompanying a transaction. Manson State Bank v. Tripp, 248 N.W.2d at 107.

It should be noted, however, that the evidentiary requirements will be less stringent where equitable relief such as rescission rather than legal relief, such as damages has been requested First National Bank in Lenox v. Brown, 181 N.W.2d 178, 181 (Iowa 1970) ("Fraud may be construed from circumstances in equity where as the law must find it as a fact. Furthermore, equity may grant relief absent a showing of scienter or pecuniary damage.").

III. Fraudulent Nondisclosure.

Traditionally, silence has been considered nonactionable except in circumstances where silence was deemed the equivalent of a fraudulent misrepresentation. First National Bank in Lenox v. Brown, 181 N.W.2d 178, 182 (Iowa 1970). More recently, nondisclosure has broken off as a separate theory of liability. Although nondisclosure may be actionable if a fiduciary relationship is established, the theory is broader than that. Nondisclosure under any "special" circumstances may give rise to liability.

A. Definitional Aspects.

In Nie v. Galena State Bank & Trust Co., 387 N.W.2d 373 (Iowa App. 1986), the Iowa Court of Appeals reversed and remanded a case in which the trial court granted a directed verdict as to a fraudulent nondisclosure claim. In Nie, the plaintiff was employed by a businessman who requested Nie to invest his inheritance in the employer's corporation. Nie met with the banker for the corporation to discuss the financial condition of the business. The banker represented that the company was a good business with which he was personally familiar. He failed to disclose, however, that he and another bank officer were doing business with the corporation and owned some of the inventory. In addressing the question whether the nondisclosure was supported by enough evidence to withstand a motion for directed verdict, the court defined the elements of an actionable nondisclosure claim as follows:

- (1) One who fails to disclose to another a fact that he knows may justifiably induce the other to act or refrain



from acting in a business transaction is subject to the same liability to the other as though he had represented the nonexistence of the matter that he had failed to disclose, if, but only if, he is under a duty to the other to exercise reasonable care to disclose the matter in question.

(2) One party to a business transaction is under a duty to exercise reasonable care to disclose to the other before the transaction is consummated,

(a) matters known to him that the other is entitled to know because of a fiduciary or other similar relation of trust and confidence between them; and

(b) matters known to him that he knows to be necessary to prevent his partial or ambiguous statement of the facts from being misleading; and

* * * * *

(e) facts basic to the transaction, if he knows that the other is about to enter into it under a mistake as to them, and that the other, because of the relationship between them, the customs of the trade or other objective circumstances, would reasonably expect a disclosure of those facts.

Id. at 375-376, quoting Restatement (Second) of Torts, § 551 (1977). Applying the foregoing to the facts at hand, the court stated:

A customer who seeks impartial investment advice from a bank officer justifiably expects to speak to a disinterested party and would have no reason to think the officer to whom he is speaking would have personal investments in the business the customer's inquiries are directed to. We think a bank officer should disclose personal investments in a business which happens to be the same business a customer seeks investment advice about.

Id. at 376. In Nie, it was debatable whether the plaintiff could make out a fiduciary relationship between himself and the bank. There was no evidence he was even a customer of the bank. Nevertheless, special circumstances existed which the court felt would justify liability for nondisclosure.

B. Special Circumstances -- Course of Dealing.

Other courts have been willing to impose liability for nondisclosure in special circumstances which fall short of creating fiduciary responsibilities. In Merrill Lynch v. First National Bank of Little Rock, 774 F.2d 909 (8th Cir. 1985), for example, the plaintiff brought a fraud action against its bank for failing to

disclose a check kiting scheme perpetuated by another of its customers. The bank had delayed in informing the plaintiff that a number of bad checks were to be charged back to its account in order to protect its own interests. At trial, plaintiffs established that a course of dealing existed between the parties whereby the bank consistently informed the plaintiff of large item returns when they were received. In summarizing the law pertaining to nondisclosure, the court stated:

When a fact is peculiarly within the knowledge of one party and of such a nature that the other party is justified in assuming the existence of that fact, then there is a duty to disclose the fact...Justifiable reliance of this sort may arise through the course of dealing between the bank and its customer...The duty to speak may be based on special circumstances, such as a confidential relationship, in which one party knows that another is relying on a misrepresentation to his detriment...The relationship including reliance need not be a fiduciary one in a strict sense; the surrounding circumstances may reveal reliance even though the parties are not in a confidential relationship.

Id. at 913-914. The court concluded that since the bank had committed itself to a course of dealing, it was not entitled to depart from that course of dealing in order to take advantage of superior knowledge.

C. Minnesota's Irretrievably Insolvent Test.

Minnesota has an interesting line of cases in which the court developed its "irretrievably insolvent" test. Under this rule, a lender has no duty to disclose the financial condition of another customer to a prospective borrower unless the customer is irretrievably insolvent. The court first applied this rule in the case of Richfield Bank and Trust Co. v. Sjorgren, 244 N.W.2d 648 (Minn. 1976). There the borrower obtained a loan to purchase a great deal of equipment from a company which was also indebted to the bank. The borrower had no prior dealings with the bank. He did not inquire into the financial condition of the other company nor was that information offered. The bank knew at the time the loan was made that the other customer would be unable to fulfill its commitment to the borrower. The company had stopped producing the type of equipment ordered and had virtually no work force and no inventory. The court held the bank liable for failing to disclose the customer's condition to the borrower on the ground the customer was irretrievably insolvent. It reasoned that the customer was committing a fraud by entering into the transaction with the borrower. The bank, by failing to disclose the customer's insolvent condition, had participated in the fraud. The court distinguished between a borrower who is merely insolvent and one who is irretrievably insolvent as follows:

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It is well settled that an insolvent purchaser, buying on credit, is not bound to disclose his financial condition to the seller if he has a reasonable expectation of being able to pay for the goods. If, on the other hand, a party is so insolvent that he has no reasonable expectation of fulfilling his contract obligations, then it is fraud for that party to fail to disclose his insolvency before entering the contract. We recognized this distinction in Forsythe v. First State Bank of Mentor, 185 Minn. 255, 258, 241 N.W. 66, 67 (1932), when we stated: 'The cases make a distinction between known irretrievable insolvency and where there is insolvency accompanied by reasonable hopes that by continuing the business fortune may be retrieved.'

Id. at 651. See also, MacKenzie v. Summit National Bank of St. Paul, 363 N.W.2d 116 (Minn.App. 1985) (Where the company in which plaintiff invested was in "precarious financial condition," but was not "irretrievably insolvent," held: no liability).

D. Disclosure to Guarantors.

A North Carolina court has ruled that a duty to disclose may be imposed in favor of guarantors generally. See, First Citizens Bank and Trust v. Akelaitis, 214 S.E.2d 281 (N.C.App. 1975). In Akelaitis, the plaintiff guaranteed a corporate loan. He was not told at the time he signed the guaranty of the extent of the corporation's indebtedness and its potential liability in several lawsuits. After the corporation defaulted, the bank attempted to collect on the guaranty. The court's opinion did not indicate the plaintiff's connection with the corporate borrower or his prior relationship with the bank. Nevertheless, the court held that a guarantor, as such, has a special status, and thus, a bank is subject to the defense that it failed to disclose facts which would materially increase the guarantor's risk. Old Iowa law would support the rule requiring disclosure to a surety. See, Bank of Monroe v. The Anderson Bros. Mining and Railway Co., 65 Iowa 692, 22 N.W. 929 (1885) cited in Meek v. Gralzfeld, 389 N.W.2d 300, 305 (Neb. 1986).

IV. Negligent Misrepresentation.

Iowa recognizes the tort of negligent misrepresentation and has applied it in claims brought against lenders. See, e.g., Cedar Falls Building Center, Inc. v. Vietor, 365 N.W.2d 635 (Iowa App. 1985).

A. Elements.

The elements of the tort negligent misrepresentation are stated in Restatement (Second) of Torts § 552 (1977) as follows:

- (1) One who in the course of his business, profession or employment, or in any other transaction in which he has a

pecuniary interest, supplies false information for the guidance of others in their business transactions, is subject to liability for pecuniary loss caused to them by their justifiable reliance upon the information, if he fails to exercise reasonable care or competence in obtaining or communicating the information.

(2)...[T]he liability stated in Subsection (1) is limited to loss suffered

(a) by the person or one of a limited group of persons for whose benefit and guidance he intends to supply the information or knows that the recipient intends to supply it; and

(b) through reliance upon it in a transaction that he intends the information to influence or knows that the recipient so intends or in a substantially similar transaction.

Beek v. Kapalis, 302 N.W.2d 90, 97 (Iowa 1981). In Iowa, the elements are akin to both general negligence and fraudulent misrepresentation. See generally, Larson v. United Federal Savings and Loan Association, 300 N.W.2d 281 (Iowa 1981). The fact the lender prepared the information primarily for its own purpose and protection will not preclude recovery if the information is supplied to another who may foreseeably rely on it, nor is it necessary that the claimant be the only party for whom the information was provided. Id. at 286.

B. Decisions Involving Lenders.

The question of whether a lender may be liable for negligent misrepresentation has been addressed in two Iowa decisions. In Larson v. United Federal, 300 N.W.2d 281 (Iowa 1981), the court affirmed a jury verdict awarding damages against a lender on a negligent misrepresentation theory. In Larson, an employee had prepared a real estate appraisal in which he accepted the offering price as the market value and omitted certain other valuation techniques. As it turned out, the appraisal was approximately \$20,000 too high. In summarizing the case against the lender, the court stated: "[T]he appraiser should also reasonably expect the home purchaser, who pays for the appraisal and to whom the results are reported (and who has access to the written report on request) will rely on the appraisal to reaffirm his or her belief the home is worth the price he or she offered for it." Id. at 287. Accord, Page v. Frazier, 445 N.E.2d 148 (Mass. 1983) (Mortgagors could not recover from bank for its alleged negligent misrepresentation that bank's attorney's title examination revealed no irregularities where there was no evidence of affirmative conduct on the part of the bank in connection with negligent title examination).

More recently, a lending institution was held liable for negligent misrepresentation in Cedar Falls Building Center v.



Viotor, 365 N.W.2d 635 (Iowa App. 1985). There the borrower expressed concern to the lender that the contractor on a construction project financed by the lender was not paying its subcontractors. A loan officer assured him that "lien waivers" had been filed by all subs which would exonerate him from the contractor's defaults. In fact no such waivers were obtained and the lender was sued for the amount of mechanics liens filed against the owner. The lender attempted to argue that there was no justifiable reliance since the claimant had been alerted to the fact that subcontractors were not being paid. The court stated, however, that "When an individual acts on the representations of another and relies on them in good faith, he has no duty to investigate." Id. at 639. See also, Wait v. First Midwest Bank/Danville, 142 Ill.App.3d 703, 96 Ill.Dec. 516, 491 N.E.2d 795 (1986) (action based on negligent advice in connection with a farm workout loan); Shosyo International Corporation v. First National Bank of Clarksdale, 475 So.2d 425 (Miss. 1985) (liability imposed for negligent misrepresentation to seller of goods concerning extension of credit to buyer); Bankline Corporation v. Bank of Mississippi, 453 So.2d 699 (Miss. 1984) (Creditor brought action against bank charging that bank made negligent misrepresentations regarding creditworthiness of one of its customers).

V. Negligence

In several cases, a borrower has attempted to hold a lender liable for "negligently loaning money." Not surprisingly, this type of claim has generally been thrown out at an early stage of the litigation. Negligence as to some specific aspect of the administration or collection of a loan may result in liability. Nevertheless, the bank's decision whether to loan or not loan generally will not support a claim based on negligence.

A. Negligent Loaning.

This type of theory is analogous to many of the fiduciary duty claims made by borrowers. In essence, the borrower claims the lender should have foreseen he would lose money on a risky venture and should have protected him from himself by refusing to make the loan. In Rojas v. First Bank Nat. and Association, 613 F.Supp. 968, 970 (S.D.N.Y. 1985), for example, the plaintiff was the president of the corporation to which the defendant bank had loaned substantial sums and which the plaintiff guaranteed. The plaintiff alleged that the bank was negligent in approving and allowing him to guaranty the loan. The court held that the bank owed no duty to the guarantor not to make imprudent loans, stating:

To relieve a guarantor from liability because a bank made a bad loan--absent a showing of fraud by the bank or collusion between the bank and borrower would be to stand surety law on its head. The law of suretyship is not to be disregarded to protect guarantors from their own imprudence.

Id. at 970-971. The court granted summary judgment on the claim, noting that summary judgment was generally inappropriate in negligence cases, but entirely proper in the present matter to conserve judicial resources. See also, Wagner v. Benson, 101 Cal.App.3d 27, 161 Cal.Rptr. 516 (1980) (where the plaintiffs alleged they suffered substantial foreseeable losses from the bank's negligence in loaning money to them, as inexperienced investors, for a risky venture over which the bank exercised influence and control, held: liability to borrower arises only when the lender actively participates in the financial enterprise beyond the domain of the usual money lender).

B. Negligent Processing.

A lender owes a general duty of care to its customers with respect to certain aspects of processing and collecting the loan. Some courts have held that no duty exists prior to the parties' entering into a contractual relationship. See, e.g., Jacques v. First National Bank of Maryland, 62 Md.App. 54, 488 A.2d 210 (Md.App. 1985) (involving negligence in the processing of a loan application). Other courts have imposed liability for negligence occurring during the precontractual stages for conduct which essentially amounts to negligent misrepresentation. See, First Federal Savings and Loan Association of Hamilton v. Candle, 425 So.2d 1050 (Ala. 1982) (where prospective borrowers justifiably relied on a bank officer's statement that their loan was approved when that was not in fact the case).

VI. Other Tort Theories.

In addition to those already described, a number of other tort claims have been pressed by borrowers against lenders. In one suit by a lender to recover amounts due and owing on a promissory note, the borrower asserted counterclaims based on breach of fiduciary duties, breach of the bank's obligation of good faith and fair dealing, conversion, fraud, deceit, misrepresentation, conspiracy, breach of implied warranty of good faith, fair dealing and performance and unconscionable action and course of action. First City Bank of Richardson v. Global Auctioneers, Inc., 708 S.W.2d 12 (Tex.App. 1986). In dealing with this type of "kitchen sink" approach, lender's defense counsel may consider the availability of sanctions under Rule 804 of the Iowa Rules of Civil Procedure or Rule 11 of the Federal Rules of Civil Procedure -- at least as to those theories which have been clearly rejected by the courts. Barring that, many "new" types of torts can be dispensed with by way of a motion to dismiss or for summary judgment. Those claims which survive will in many cases boil down to issues of misrepresentation, nondisclosure or negligence which lend themselves to the types of defense strategies discussed above.

Statutory Theories

Lenders are subject to numerous state and federal statutes regulating various aspects of the making of loans and

banking in general. Insolvent debtors ever more frequently raise violations of one or more of these statutes as counterclaims in actions on their debts. Several are discussed below.

I. Civil RICO.

Civil RICO has become one of the most popular types of claims arising out of commercial transactions, including the making of loans. It is doubtful the statute was ever intended to cover most types of banking activities; nevertheless, its terms are broad enough to bring into question even routine loan transactions.

A. Jurisdiction.

Section 1964(c) of Title 18 states that jurisdiction over civil RICO claims is in the United States District Court. Although § 1964 is not explicit as to whether state courts have concurrent jurisdiction to hear civil RICO claims, several courts have concluded that Congress intended jurisdiction over such claims to be exclusive in the federal courts. See, Kinsey v. Nester Exploration, Ltd., 604 F.Supp. 1365, 1370-1371 (E.D. Wash. 1985); County of Cook Midcon Corp., 574 F.Supp. 902, 911-912 (N.D. Ill. 1983). A lawsuit containing a RICO claim which was brought in state court and removed to federal district court must be dismissed because the court to which the claim was removed would have no derivative jurisdiction from the state court.

B. Statutory Provisions.

Below are excerpts of the statutes which contain the elements of a RICO claim.

1. Claimants - 18 U.S.C. § 1964.

Any person injured in his business or property by reason of a violation of...this chapter may sue therefor...and shall recover three-fold the damages he sustains and the costs of the suit, including a reasonable attorney's fee.

2. Prohibited Activities: 18 U.S.C. § 1962.

- (a) Investment of income from a pattern of racketeering activity or through collection of an unlawful debt in the operation of an enterprise in interstate commerce.
- (b) Acquisition of interest in an enterprise through a pattern of racketeering or collection of an unlawful debt.

(c) Association with an enterprise in the conduct of its affairs through a pattern of racketeering activity or collection of a unlawful debt.

(d) Conspiracy to violate (a), (b) or (c).

3. Definitions: 18 U.S.C. § 1961.

(a) Racketeering Activities.

(1) Certain crimes punishable under state law by imprisonment for more than one year.

(2) Certain federal crimes including extortionate credit transactions, wire fraud and mail fraud.

(b) Person: any individual or entity capable of holding a legal or beneficial interest in property.

(c) Enterprise: any individual, partnership, corporation, association or other legal entity and any union or group of individuals associated in fact though not a legal entity.

(d) Pattern of Racketeering Activity: at least two predicate acts occurring within ten years of each other.

(e) Unlawful Debt: a debt which is unenforceable because usurious or incurred in connection with gambling.

C. Pleading.

Based on the foregoing, a RICO complaint must include the following to withstand a motion to dismiss:

(1) Identification of an enterprise;

(2) Association of the defendants with the enterprise;

(3) Collection of an unlawful debt or a pattern of racketeering activity; and

(4) Identification of predicate offenses.

See, Rae v. Union Bank, 725 F.2d 478, 480-481 (9th Cir. 1984). The predicate acts need not be specifically pleaded as to precise dates and the details of conduct comprising the offense. Beth-Israel Medical Center v. Smith, 576 F.Supp. 1061 (S.D.N.Y. 1983). The enterprise must be distinct from the alleged pattern of racketeering and from the culpable person. Bennett v. Berg, 685 F.2d 1053 (8th Cir. 1982). See also, McArthur and White, "Civil RICO after Sedima, The New Weapon Against Business Fraud," 23 Houston Law Review 743 (1986).



D. Supreme Court Interpretation.

RICO's provisions are broad enough to cover many garden variety state law claims such as fraud. As a result, a number of courts have attempted to place a limiting interpretation on various provision to stop the flood of civil RICO litigation. In the case of Sedima, S.O.R.L. v. Imprex Co., 87 L.Ed.2d 346 (1985), however, the Supreme Court rejected such an attempt by the Court of Appeals for the Second Circuit. In that case, the parties had formed a joint venture to provide electronic components to a Belgian firm. Sedima brought an action against Imprex alleging common-law claims for breach of contract, breach of fiduciary duty and the like. The complaint also alleged civil RICO claims against Imprex and two of its officers. Mail fraud and wire fraud were alleged as the civil RICO predicate acts. The Court of Appeals for the Second Circuit dismissed the complaint on the basis that it did not allege a prior criminal conviction against the defendants for a violation of the predicate acts and did not allege any "racketeering enterprise injury" distinct from the injury caused by the underlying predicate acts.

G The United States Supreme Court reversed. The Court could find no support in the statute's language or legislative history or based upon considerations of policy for a criminal conviction requirement. In this respect the Court suggested, without deciding, that the "preponderance of the evidence" statement of proof should apply to civil RICO actions and not the more strict "beyond a reasonable doubt" requirement applicable to criminal proceedings. The Court also found no racketeering injury requirement in the statute and held that, where the plaintiff alleges each element of a civil RICO violation, the compensable injury necessarily is the harm caused by predicate acts. The Court suggested in a footnote that commission of two predicate acts may not always be sufficient since the statute requires "at least" two acts of racketeering activity to constitute a pattern. The Court suggested that the term "pattern" may itself require the showing of a relationship between the predicate acts so as to constitute a pattern of racketeering activity in the conduct of an enterprise as defined in the Act.

E. Defense of Cases Involving Lenders.

In any RICO case, the sufficiency of the pleadings may be the first line of defense. Beyond that, a defense as to the substance of the claim depends on the requisite elements of the predicate acts and whether those acts are so related as to constitute a "pattern of racketeering activity" within the meaning of the statute. See, Torwest DBC, Inc. v. Dick, 628 F.Supp. 163, 166 (D.Colo. 1986) (Where there is only one purpose, one result, one set of participants, one victim, one method of commission, there is no continuity and therefore, no patterns of racketeering activity).

The type of predicate acts most likely to be alleged against a lender are: (1) extortionate credit, indictable under 18 U.S.C § 892; (2) mail fraud or wire fraud, indictable under 18 U.S.C.

§ 1341 or § 1343, respectively; or (3) interference with commerce, indictable under 18 U.S.C. § 1951.

1. Extortionate Credit.

The two basic elements of the crime defined in 18 U.S.C § 892 are:

- (a) A debt which is unenforceable in the obligor's state or which was made at a rate of interest in excess of 45% per annum; and
- (b) The debtor reasonably believes that the creditor has or will use "extortionate means" to collect the debt.

Collection of the debt by "extortionate means" requires that delay or failure in repaying could result in violence or other criminal means. United States v. Palmieri, 456 F.2d 9 (2nd Cir. 1972). A RICO claim premised on 18 U.S.C. § 892 can usually be dispensed with by summary judgment.

2. Mail or Wire Fraud.

These are two of the broadest types of predicate acts and the ones most frequently utilized by claimants seeking RICO damages for losses incurred in commercial settings. The elements of 18 U.S.C. § 1341 or § 1343 are:

- (a) a scheme to defraud or obtain money or property by means of false pretenses; and
- (b) the use of the mails or wires for executing the scheme.

Like a standard fraud claim, proof of the crime of mail or wire fraud requires proof of an intent to deceive on the part of the lender. See, U.S. v. Brie, 617 F.2d 299 (1st Cir. 1980). In most cases, the evidence of deception will be nonexistent and this type of claim will not withstand a motion for summary judgment.

3. Interference with Commerce.

Section 1951 of Title 18 provides that a person may be found to have interfered with commerce if he "obstructs, delays or affects commerce...by robbery or extortion...or threat of physical violence" in furtherance of a plan to violate § 1951. 18 U.S.C. § 1951(c). Again, this type of claim will be patently frivolous in most lending situations.

In time, the interpretation of civil RICO will probably be clarified to the point that borrowers in typical commercial lending situations will not in good faith be able to bring a civil RICO claim against a lender. Until that time arrives, however, lenders' defense counsel can expect to encounter civil RICO claims on a not infrequent basis.



II. Private Right of Action under the Farm Credit Act.

The Farm Credit Act governs loanmaking by finance institutions comprising the farm credit system. Regulations promulgated under the FCA prescribe certain procedures to be followed in determining whether a loan will be made. For instance, the debtor's ability to repay must be calculated from various data in his financial history and must meet certain minimum levels. In a number of cases, agricultural borrowers have raised violations of these requirements to stave off collection efforts. However, all theories based on a private right of action under the FCA have been rejected by the courts. The analysis utilized by the courts denying a private right of action would apply to any claim based on a statute which does not expressly provide for private suits. See, Countryman v. Mt. Pleasant Bank & Trust Company, 357 N.W.2d 599 (Iowa 1984) (no private right of action under § 524.612 of the Iowa Code).

The violation of a federal statute does not give rise to a private remedy unless the language of the statute expressly or implicitly provides for such a right. Hartman v. Farmers Productions Credit Association, 628 F.Supp. 218, 220 (S.D.Ind. 1983). The Supreme Court has enunciated the following four-part test to determine whether a private cause of action should be implied:

- (1) Is the plaintiff one of the class for whose special benefit the statute was enacted?
- (2) Is there any legislative intent -- explicit or implicit -- to create a remedy?
- (3) Is the remedy consistent with the underlying legislative scheme?
- (4) Is the cause of action one traditionally relegated to state law?

Cort v. Ash, 422 U.S. 66, 78, 95 S.Ct. 2080, 2088, 45 L.Ed.2d 26 (1975). In analyzing the factors, the main question is whether Congress intended to create a private cause of action. Touche Ross & Co. v. Redington, 442 U.S. 560, 575, 99 S.Ct. 2479, 2489, 61 L.Ed.2d 82 (1982). Prior to Cort v. Ash, the courts frequently implied federal rights of action. However, since Cort, there is an increasing reluctance to imply new private causes of action. Hotbauer v. Northwestern National Bank of Rochester, 700 F.2d 1197, 1120 (8th Cir. 1983).

A. Whether the FCA was Enacted for the Special Benefit of Farmers.

On the issue of whether the FCA was enacted especially for the benefit of farmers, most courts have concluded it was not. See, e.g., Smith v. Russellville Production Credit Association, 777 F.2d 1544 (11th Cir. 1985). The purpose of the Act is to improve

"the income and well-being of American farmers and ranchers by furnishing sound, adequate and conservative credit." 12 U.S.C. § 2001(a). However, the substantive provisions of the Act do not confer substantive rights on behalf of any class of farmers to receive credit, but rather set a general goal of channelling credit to the farming community and established the machinery with which to achieve this goal. Id.

In Springwater Dairy, Inc., v Federal Intermediate Credit Bank of St. Paul, 625 F.Supp. 713 (D.Minn. 1986), the court considered two eighth circuit decisions dealing with the question of whether certain federal farming statutes created specific rights for farmers. In Wilson v. Mason State Bank, 738 F.2d 343 (8th Cir. 1984), the court for the eighth circuit held that the Emergency Agricultural Credit Adjustment Act, 7 U.S.C. § 1947, et seq., did not create an implied cause of action. The statute in question was intended to make credit available to farmers and did impose certain requirements on lender's conduct toward borrowers. Nevertheless, the court concluded that simply because a law seeks to aid a farmer does not necessarily mean it gives them specific rights. In contrast, the court in Allison v. Block, 723 F.2d 631 (8th Cir. 1983), held that a private cause of action should be implied under the Consolidated Farm and Rural Development Act 7 U.S.C. § 198(a). This act provides that the FmHA may not foreclose on loans if the farmer/borrower follow certain procedures to be promulgated via regulations by the Secretary of Agriculture. The Allison court concluded that the plaintiffs were entitled to bring suit to require the Secretary to establish and implement the regulations envisioned by the statute. Comparing these two cases, the court in Springwater concluded that the FCA does not create specific rights and thus, no private right of action should be implied.

B. Legislative Intent.

Several other courts have been willing to find that the FCA was enacted for the special benefit of farmers. Nevertheless, they have concluded that the argument in favor of an implied right flunks the remaining three parts of the test. See, e.g., Hartman v. Farmers Production Credit Association of Scottsburg, 628 F.Supp. 218 (S.D.Ind. 1983). In Hartman, the plaintiff's alleged, among other things that in granting a loan, they were required to consider the borrower's ability to repay. They argued that the defendant not only failed to consider this, but actually altered cash flow projections to enable the plaintiff to secure the loan. In determining that no private right of action existed with respect to the Hartmans' FCA claims, the court considered each of the factors set out in Cort. Addressing the second part of the test, the court stated that nothing in the legislative history of the Act indicates that Congress intended to create a remedy or that it even considered the issue.

In Hartman, the plaintiff's argued that § 2093(a) of the Act, granting the PCA's the power to sue and be sued, was indicative of an intent to create a private right. The court rejected the argument on the ground that by giving the PCA's

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power to sue or be sued was intended only to waive governmental immunity to suit. See also, Apple v. Miami Valley Production Credit Association, 614 F.Supp. 119, 121-122 (D.C. Ohio 1985). (The amendment granting the power to sue and be sued was primarily motivated by the need to enforce maritime liens.) Additionally, the court in Hartman mentioned that it was improbable Congress merely overlooked the question of a private remedy since under §§ 2201 and 2202 of the Act, certain procedures, including notice and a hearing, were established for applicants denied loans. Apart from those procedures, however, no private remedy exists.

The question whether the statute or its legislative history evidences an intent to create a private right was also addressed in Aberdeen Production Credit Association v. Jarrett Ranches, Inc., Slip.op. No. 85-1066 (N.D.S.D. 1986). There the defendants cited certain provision of the "General Loan Policies" of the Act as indicating an intent in favor of a private remedy. One of these policies require that loans be made in an amount and under terms and conditions that will reasonably assure repayment, usually without affecting the borrower's financial position. 12 C.F.R § 614.4140. Another policy relating to collateral states that the amount of collateral required shall reasonably protect the lender, provide the necessary control of equity and repayment and leave the borrower in a position to constructively manage his business. 12 C.F.R. § 614.41500(e) (1985). These provisions, stated the court, set forth a policy to guarantee fair and equitable service of loans to farmers, but do not establish an entitlement to specific procedures.

In Aberdeen, the court also considered whether the legislative history of the Farm Credit Amendments Act of 1984 demonstrated an intent to create a private right under the FCA. The new amendments create specific rights of disclosure and access to documents to borrowers, which apparently may be enforced in the courts. The court in Aberdeen, however, rejected the contention that all FCA regulations were intended to be enforceable in courts of law. It noted that the plaintiff had alleged no cause of action under the 1985 amendments and further that the acts complained of occurred prior to the passage of the amendments. Under these circumstances, the legislative history of the new provision is of no significance. Like other courts which have considered this issue, the court in Aberdeen concluded that neither the statutory language nor relevant legislative history evince any intent to create a private right of action. See also, Smith v. Russellville Production Credit Association, 777 F.2d 1544 (11th Cir. 1985).

C. Legislative Scheme and Adequate State Law Remedy.

The third consideration is whether the existence of a private remedy is consistent with the underlying legislative scheme and the fourth is whether the claim raised under the statute may be remedied under state law. These factors are interrelated in that a private federal remedy would not be indicated where an adequate remedy at state law already exists. See, Apple v. Miami Valley Production Credit Association, 614 F.Supp. 119 (D.C. Ohio 1985). There are

no broad remedial purposes underlying the FCA which would require a private cause of action. Moreover, Congress provided that each PCA is considered a citizen of the state in which its principal office is located and thus is subject to state law. Hartman v. Farmers Production Credit Association of Scottsburg, 628 F.2d 218 (S.D.Ind. 1983). Thus, state law remedies are considered adequate, and a federally created remedy is unnecessary. Id.

All but one of the decisions on this issue concludes that no private right exists. The one decision to the contrary was rendered in Delaigle v. Federal Land Bank of Columbia, 568 F.Supp. 1432, 1436-38 (S.D.Ga. 1983) where the court held that a particular regulation was a substantive rule having the force and effect of law. The holding was specifically disapproved of in Smith v. Russellville Production Credit Association, 777 F.2d 1544 (11th Cir. 1985), where the court held that general statements of policy or rules of agency procedure or practice are not substantive laws and thus do not give rise to an implied right of action.

D. Punitive Damages.

Banks operating in the farm credit system may, of course, be sued on state law claims. See, 12 U.S.C. § 2093. These institutions are not, however, subject to any claim for punitive damages. See, Rohweder v. Aberdeen Production Credit Association, 765 F.2d 109, 113 (8th Cir. 1965). Production credit associations are federal instrumentalities. 12 U.S.C. § 2091. As such, they are immune from suit unless Congress explicitly waives that immunity. See, Matter of Sparkman, 703 F.2d 1097 (9th Cir. 1983). Although a production credit association may be sued in an ordinary lawsuit, immunity from liability for punitive damages has not been waived. See, Printer v. Tennessee Valley Authority, 476 F.2d 943 (5th Cir. 1973).

III. Other Statutory Theories

A variety of both state and federal statutes govern various aspects of lending practices which may expressly or impliedly create a private action in favor of borrowers. At the state level, these include, among others, the Iowa Commercial Code and Iowa Consumer Credit Code. At the federal level are the antitrust statutes, the Truth in Lending Act, bank holding company regulations and others. Some borrowers have even attempted to characterize the failure of a bank to renew their outstanding obligations or to collect security as a violation of their civil rights actionable under 42 U.S.C. § 1983. Civil rights claims are subject to dismissal on the ground that lenders are not creatures of the state nor so closely tied to the state as to be treated as state actors. The merit of other types of statutory claims will depend, obviously, on particular statutory provisions and their interpretations. In the absence of an express right of action created, a strong defense can be made on the ground that no private right of action exists.

IV. HYPOTHETICAL CASE

Hawkeye Brenton Bank v. Calvin Crooked

A. Telephone Call from Bank President, Fred Friendly.

We have a written unlimited guaranty signed by Cal Crooked who is the uncle by marriage of Dan Deadbeat. We also have a pledge of two \$100,000 CDs. Dan Deadbeat just filed bankruptcy. He owes the bank \$500,000. The bank expects to net \$200,000 from the sale of the farm and equipment. The bank has already set off against the \$200,000 in CDs (net amount owed--\$300,000). Cal Crooked refuses to pay up on the guaranty. Fred wants suit filed against Cal immediately.

Ralph Rush was the loan officer who handled Deadbeat's account. Ralph had a heart attack a year ago and is deceased. The bank records show that the written guaranty and pledge agreement were taken on July 1, 1982. Deadbeat's financial statement of January 1, 1979 shows that he has a 360-acre farm and farm equipment valued at \$850,000. At that time, Deadbeat owed Hawkeye County Bank \$350,000. He had no other significant debt. All of the Hawkeye County Brenton Bank was secured by a first mortgage and a broad security interest in all other collateral.

January 1, 1980 -- Assets, \$750,000
Debt, \$425,000

January 1, 1981 -- Assets, \$700,000
Debt, \$500,000

January 1, 1982 -- Unsigned -- Assets, \$650,000
Debt to Bank, \$500,000

Significant Loan File Comments (all loan comments initialed by Ralph Rush up until his death ten months ago).

June 15, 1982 -- Comment: Dan came in today and inquired about borrowing additional money. I informed him that the bank would not extend additional credit to him without additional collateral. Dan said he would get back in touch with me.

July 1, 1982 -- Comment: Cal Crooked, Dan's uncle by marriage, signed an unlimited guaranty of Dan's indebtedness today. Cal also pledged \$200,000 in CDs to secure Dan's indebtedness. I agreed to give Dan a lower interest rate on future loans. Cal is a very prominent Hawkeye County resident. His financial statement shows zero indebtedness and \$800,000 in assets.

The bank records show that both the pledge and the written unlimited guaranty were signed on July 1, 1982. Neither signature is notarized.

B. Cal Crooked's Version of the Facts.

Cal Crooked is 77 years of age, has limited vision, and is hard of hearing. In May of 1980, his only heir, a niece, Donna Deadbeat (Dan's wife),

threatened to have Cal committed and to have Cal placed in a conservatorship with Donna as conservator of all his assets. Cal has been a customer of Hawkeye County Brenton Bank for 25 years. In the past, he has had checking and savings accounts with the bank. He has consulted with Ralph Rush for financial advice. On occasion, he borrowed small sums of money (unsecured) through Ralph Rush. To his knowledge, he has never signed a written guaranty, co-signed a debt, pledged any of his assets, or signed a security agreement. He doesn't know anything about Dan's financial condition and didn't in 1982. He doesn't understand legal things so he has his attorney handle all of those matters for him. On July 1, 1985, he was in the bank for the purpose of withdrawing some money which he intended to use to purchase some CDs at another bank. Ralph suggested to Cal that he purchase the CDs at Hawkeye County Brenton Bank. Ralph said that he would give his nephew a break on the rate of interest he charged him on his loan if Cal would purchase his CDs at the bank. Since he always had a soft spot in his heart for Dan, he agreed to do it. He doesn't remember signing any guaranty or pledge agreement and wouldn't have signed same. The signature on the pledge and guaranty must be a forgery. If his signature does appear on a guaranty or a pledge, he was tricked into signing it.

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UNLIMITED

GUARANTY

THIS GUARANTY given by the undersigned, hereinafter called the Guarantors, to induce Hawkeye County Brenton Bank hereinafter called the Lender, to extend credit to, or otherwise become the creditor of, Dan Deadbeat, hereinafter called the Borrower. Guarantors understand that the Lender is willing to become the creditor of the Borrower only if Guarantors guarantee the faithful performance of all the terms and conditions upon which such credit is extended to the Borrower, and Guarantors are desirous of having the Lender extend such credit to the Borrower upon such terms and conditions as are agreed upon by the Lender and the Borrower

In consideration of the foregoing, it is agreed:

1. The Guarantors jointly and severally guarantee to the Lender, its successors, and assigns the prompt payment to the Lender at maturity of every note, check, bill of exchange, draft, trade acceptance, loan, advance, discount, and order for the payment of money, and all other obligations, in connection with which, either as maker, drawer, guarantor, indorser, or otherwise, whether directly or contingently, the Borrower is or shall become liable to the Lender, with interest thereon, together with all attorneys' fees, costs, and expenses of collection incurred by the Lender in connection with any matter covered by this guaranty, except only that if this guaranty is for a consumer credit transaction, then attorney fees shall not be collected.

2. This guaranty is not limited to any particular period of time but shall continue until all of the terms, covenants and conditions of the said obligations of the Borrower to the Lender have been fully and completely performed by the Borrower or otherwise discharged by the Lender, and the Guarantor shall not be released of any obligation or liability hereunder so long as there is any claim of the Lender against the Borrower arising out of the obligations of the Borrower to the Lender which has not been settled or discharged in full.

3. This guaranty shall be construed as an absolute, continuing and unlimited guaranty of payment without regard to the regularity, validity or enforceability of any liability or obligations of the Borrower hereby guaranteed and this guaranty shall be both supplemental and additional to any other guaranty or guaranties, indemnity or indemnities which shall be furnished to the Lender to secure the indebtedness of the Borrower by the undersigned or by any other person or persons. The Lender shall not be required to proceed first against the Borrower or any other person, firm or corporation or against any collateral security held by it before resorting to the Guarantors for payment.

4. The Guarantors jointly and severally consent, without affecting the Guarantors' liability to the lender hereunder, that the Lender may, without notice to or consent of the Guarantors, upon such terms as it may deem advisable: (a) extend in whole or in part, by renewal or otherwise, the time of payment of any indebtedness owing by the Borrower to the Lender, or held by the Lender as security for any such obligation; (b) release, surrender, exchange, modify, impair, or extend the period of duration, or the time for performance or payment, of any collateral securing any obligation of the Borrower to the Lender; and (c) settle or compromise any claim of the Lender against the Borrower, or against any other person, firm, or corporation, whose obligation is held by the Lender as collateral security for any obligation of the Borrower to the Lender. The Guarantors jointly and severally hereby ratify and affirm any such extension, renewal, release, surrender, exchange, modification, impairment, settlement, or compromise; and all such actions shall be binding upon the Guarantors jointly and severally, who hereby waive all defenses, counterclaims, or offsets which the Guarantors jointly and severally might have by reason thereof.

5. The Guarantors jointly and severally waive: (a) notice of acceptance of this guaranty by the Lender; (b) notice of presentment, demand for payment, or protest of any of the Borrower's obligations, or the obligation of any person, firm, or corporation, held by the Lender as collateral security for the Borrower's obligation; (c) notice of the failure of any person, firm, or corporation to pay to the Lender any indebtedness held by the Lender as collateral security for any obligation of the Borrower; (d) all defenses, offsets, and counterclaims which the Guarantors may at any time have to any claim of the Lender against the Borrower; and (e) notice of any default on the part of the Borrower and any demand for the payment of the debt or obligations herein guaranteed, except only that if this guaranty is for a consumer credit transaction, bank shall give such notices, if any, as may be required by law.

6. The Guarantors jointly and severally represent that, at the time of the execution and delivery of this guaranty, nothing exists to impair the effectiveness of the liability of the Guarantors to the Lender hereunder, or the immediate taking effect of this guaranty as the sole agreement between the Guarantors and the Lender with respect to guaranteeing the Borrower's obligation to the lender.

7. The Lender may at its option proceed in the first instance against the Guarantors, jointly and severally, to collect any obligation covered by this guaranty, without first proceeding against the Borrower, or any other person, firm, or corporation, and without first resorting to any property at any time held by the Lender as collateral security.

8. This guaranty shall not be discharged or in any way affected by the death of the Guarantors.

9. The liability of the Guarantor hereunder shall not in any manner be affected by any change, exchange or alteration of any collateral or other security held by the Lender for payment of the debt herein guaranteed or the surrender or release of any such collateral or security or the failure to realize thereon or to take any action with respect thereto.

10. Guarantors and each of them understand and agree that this guaranty will, unless expressly otherwise agreed, be secured by all collateral previously, now or hereafter pledged to the Lender by any Guarantor and any security interest previously, now or hereafter granted the Lender by any Guarantor whether such pledge or grant of security interest specifically relates to the obligations herein guaranteed or not.

11. Guarantors and each of them understand and agree that in the event any payment made by or on behalf of Borrower respecting any obligation herein guaranteed, or any portion of any such payment, shall at any time be repaid by the recipient in compliance with an order (whether or not final) by a court of competent jurisdiction pursuant to any provision of Title 11, U.S. Code, Bankruptcy, as now existing or hereafter amended or any provision of applicable state law, the said obligation shall not be deemed to have been paid to the extent of the repayment so made, the obligations of Guarantors and each of them shall continue in full force and effect, and such recipient, whether or not that be the Lender, will continue to be entitled to the full benefits of this continuing unlimited guaranty.

12. The whole of this guaranty is herein set forth, and there is no verbal or other written agreement, and no understanding or custom affecting the terms hereof. The undersigned may revoke this guaranty by written notice delivered or mailed by registered mail by the undersigned to the Bank, but such revocation shall not affect or release the liability of the undersigned for the then existing Indebtedness, or any renewals thereof, theretofore or thereafter made and, if there be more than one signer upon the guaranty, such revocation shall be effective only as to the one so revoking.

13. This guaranty is delivered and made in, and shall be construed pursuant to the laws of, the State of Iowa, and is binding jointly and severally upon the Guarantors and their legal representatives, and shall inure to the benefit of the Lender, its successors and assigns.

In witness whereof the Guarantors have each signed this agreement on this 1st day of July, 19 82

X Calvin Crooked
CALVIN CROOKED

WITNESS

"GUARANTORS"

CNB 1010

(Over)

INDIVIDUAL CERTIFICATE OF ACKNOWLEDGMENT

STATE OF _____, County of _____, ss.

On this _____ day of _____ A D 19 _____ before me, the undersigned, a Notary Public in and for said County and State, personally appeared _____

to me known to be the identical person(s) named in and who executed the within and foregoing instrument, set forth on the opposite side and acknowledged that they executed the same as their voluntary act and deed.

Notary Public in and for said County and State

CORPORATE CERTIFICATE OF ACKNOWLEDGMENT

STATE OF _____, County of _____, ss.

On this _____ day of _____ A D 19 _____ before me, the undersigned, a Notary Public in and for said County and State, personally appeared _____

_____ and _____, to me personally

known, who, being by me duly sworn, did say that they are the _____

and _____, respectively, of said corporation executing the within and foregoing instrument set forth on the opposite side, that

(no seal has been procured by the said) _____ corporation; that said instrument was signed (and sealed) on behalf of (the seal affixed thereto is the seal of said)

said corporation by authority of its Board of Directors; and that the said _____ and _____ as such officers acknowledge the execution of said instrument to be the voluntary act and deed of said corporation; by it and by them voluntarily executed

Notary Public in and for said County and State



STATEMENT OF GUARANTOR

July 1, 1982
(date)

1. My name is Calvin Crooked

2. I am 77 years old. C.C.
(initials)

3. I consider my physical health to be
(poor/fair/satisfactory/average/above average/good/very
good/excellent). C.C.
(initials)

4. I (am/am-not) able to read and understand the
English language. C.C.
(initials)

5. I have carefully read and reviewed the unlimited
guaranty of the indebtedness of Dan Deabbeatt dated the 1st
day of July, 1982. C.C.
(initials)

6. Ralph Rush, of Hawkeye County Brenton
Bank, has explained the terms of the written unlimited guaranty
to me. I understand that if I sign the guaranty, I will be
personally responsible and liable for the indebtedness of
Dan Deabbeatt. C.C.
(initials)

7. I understand that, as of the 1st day of
July, 1982, Dan Deabbeatt owes Hawkeye
County Brenton Bank the sum of \$ 525,000. I further
understand that, at the present time, interest is accruing on
that debt at the rate of 14 percent per annum (or
\$ _____ per day) until the debt is paid. C.C.
(initials)

8. Mr. Rush has provided me with
Dan Deabbeatt's financial statement dated the 1st day
of January, 1982. I have carefully reviewed that
financial statement. C.C.
(initials)

9. I have spoken with Dan and I am
generally familiar with the economic condition of Dan's
business/farming operation. C.C.
(initials)

10. I understand that if Dan fails to pay
the indebtedness he owes to Hawkeye County Brenton Bank, then
Hawkeye County Brenton Bank will take the following actions:

A. Take my two One Hundred Thousand Dollar
(\$100,000.00) CDs, which I have pledged as security for
Dan's debt, and apply the proceeds of those CDs
against Dan's debt. C.C.
(initials)

B. If there is a balance on the indebtedness owed
after applying the proceeds of the CDs, the bank will make
demand upon me for payment of the balance of the debt.
C.C.
(initials)

C. If I fail to pay the balance of the indebtedness demanded, the bank will initiate a lawsuit against me to recover the amount of money owed by Don to the bank plus attorneys fees, legal expenses, and court costs.

C.C.
(initials)

11. I understand that after I sign this guaranty, Hawkeye County Brenton Bank, from time to time, may loan more money to Don. I specifically consent to such loans and I understand that I would be liable if Don does not repay those loans.

C.C.
(initials)

12. Ralph has explained that the Bank is not in a position to loan additional money to Don unless Don provides the Bank with additional collateral or security for Don's debt.

C.C.
(initials)

13. Hawkeye County Brenton Bank has given me an opportunity to consult with my attorney and to allow my attorney to review the guaranty before I sign it. I (have/~~have not~~) consulted with my attorney.

C.C.
(initials)

[If the guarantor indicates that he has not consulted with his attorney, have the guarantor state, in his own words, the reason why he chose not to consult with his attorney.]

14. I want to sign the guaranty of the indebtedness of Don because:

[Have the guarantor write in his own words why he wishes to guarantee the indebtedness of

Don
e.g. Don is a good boy and a hard worker and I do not want to see him go down the tubes;

e.g. I believe that if the bank will extend more credit to Don, his farming operation will be successful and he will be able to pay off his debt;

e.g. I do not wish to see Don lose the family farm.]

15. I choose to sign the unlimited guaranty of my own free will. The bank has made no threats in an effort to get me to sign the guaranty.

C.C.
(initials)

16. The bank has made no promises or representations to me in an effort to obtain my signature on a guaranty of the indebtedness of Don. All of the terms relating to my obligation to pay the indebtedness of Don are set forth in the written terms of the unlimited guaranty.

C.C.
(initials)

17. I ACKNOWLEDGE THAT NEITHER Ralph Rush NOR

UNLIMITED

GUARANTY

(initials)

THIS GUARANTY given by the undersigned, hereinafter called the Guarantors, to induce _____, hereinafter called the Lender, to extend credit to, or otherwise become the creditor of, _____, hereinafter called the Borrower. Guarantors understand that the Lender is willing to become the creditor of the Borrower only if Guarantors guarantee the faithful performance of all the terms and conditions upon which such credit is extended to the Borrower, and Guarantors are desirous of having the Lender extend such credit to the Borrower upon such terms and conditions as are agreed upon by the Lender and the Borrower.

In consideration of the foregoing, it is agreed:

1. The Guarantors jointly and severally guarantee to the Lender, its successors, and assigns the prompt payment to the Lender at maturity of every note, check, bill of exchange, draft, trade acceptance, loan, advance, discount, and order for the payment of money, and all other obligations, in connection with which, either as maker, drawer, guarantor, indorser, or otherwise, whether directly or contingently, the Borrower is or shall become liable to the Lender, with interest thereon, together with all attorneys' fees, costs, and expenses of collection incurred by the Lender in connection with any matter covered by this guaranty, except only that if this guaranty is for a consumer credit transaction, then attorney fees shall not be collected

2. This guaranty is not limited to any particular period of time but shall continue until all of the terms, covenants and conditions of the said obligations of the Borrower to the Lender have been fully and completely performed by the Borrower or otherwise discharged by the Lender, and the Guarantor shall not be released of any obligation or liability hereunder so long as there is any claim of the Lender against the Borrower arising out of the obligations of the Borrower to the Lender which has not been settled or discharged in full

3. This guaranty shall be construed as an absolute, continuing and unlimited guaranty of payment without regard to the regularity, validity or enforceability of any liability or obligations of the Borrower hereby guaranteed and this guaranty shall be both supplemental and additional to any other guaranty or guaranties, indemnity or indemnities which shall be furnished to the Lender to secure the indebtedness of the Borrower by the undersigned or by any other person or persons. The Lender shall not be required to proceed first against the Borrower or any other person, firm or corporation or against any collateral security held by it before resorting to the Guarantors for payment.

4. The Guarantors jointly and severally consent, without affecting the Guarantors' liability to the lender hereunder, that the Lender may, without notice to or consent of the Guarantors, upon such terms as it may deem advisable: (a) extend in whole or in part, by renewal or otherwise, the time of payment of any indebtedness owing by the Borrower to the Lender, or held by the Lender as security for any such obligation; (b) release, surrender, exchange, modify, impair, or extend the period of duration, or the time for performance or payment, of any collateral securing any obligation of the Borrower to the Lender; and (c) settle or compromise any claim of the Lender against the Borrower, or against any other person, firm, or corporation, whose obligation is held by the Lender as collateral security for any obligation of the Borrower to the Lender. The Guarantors jointly and severally hereby ratify and affirm any such extension, renewal, release, surrender, exchange, modification, impairment, settlement, or compromise; and all such actions shall be binding upon the Guarantors jointly and severally, who hereby waive all defenses, counterclaims, or offsets which the Guarantors jointly and severally might have by reason thereof

5. The Guarantors jointly and severally waive: (a) notice of acceptance of this guaranty by the Lender; (b) notice of presentment, demand for payment, or protest of any of the Borrower's obligations, or the obligation of any person, firm, or corporation, held by the Lender as collateral security for the Borrower's obligation; (c) notice of the failure of any person, firm, or corporation to pay to the Lender any indebtedness held by the Lender as collateral security for any obligation of the Borrower; (d) all defenses, offsets, and counterclaims which the Guarantors may at any time have to any claim of the Lender against the Borrower; and (e) notice of any default on the part of the Borrower and any demand for the payment of the debt or obligations herein guaranteed, except only that if this guaranty is for a consumer credit transaction, bank shall give such notices, if any, as may be required by law.

6. The Guarantors jointly and severally represent that, at the time of the execution and delivery of this guaranty, nothing exists to impair the effectiveness of the liability of the Guarantors to the Lender hereunder, or the immediate taking effect of this guaranty as the sole agreement between the Guarantors and the Lender with respect to guaranteeing the Borrower's obligation to the lender.

7. The Lender may at its option proceed in the first instance against the Guarantors, jointly and severally, to collect any obligation covered by this guaranty, without first proceeding against the Borrower, or any other person, firm, or corporation, and without first resorting to any property at any time held by the Lender as collateral security.

8. This guaranty shall not be discharged or in any way affected by the death of the Guarantors

9. The liability of the Guarantor hereunder shall not in any manner be affected by any change, exchange or alteration of any collateral or other security held by the Lender for payment of the debt herein guaranteed or the surrender or release of any such collateral or security or the failure to realize thereon or to take any action with respect thereto

10. Guarantors and each of them understand and agree that this guaranty will, unless expressly otherwise agreed, be secured by all collateral previously, now or hereafter pledged to the Lender by any Guarantor and any security interest previously, now or hereafter granted the Lender by any Guarantor whether such pledge or grant of security interest specifically relates to the obligations herein guaranteed or not

11. Guarantors and each of them understand and agree that in the event any payment made by or on behalf of Borrower respecting any obligation herein guaranteed or any portion of any such payment, shall at any time be repaid by the recipient in compliance with an order (whether or not final) by a court of competent jurisdiction pursuant to any provision of Title 11, U.S. Code, Bankruptcy, as now existing or hereafter amended or any provision of applicable state law, the said obligation shall not be deemed to have been paid to the extent of the repayment so made, the obligations of Guarantors and each of them shall continue in full force and effect and such recipient, whether or not that be the Lender, will continue to be entitled to the full benefits of this continuing unlimited guaranty

12. The whole of this guaranty is herein set forth, and there is no verbal or other written agreement, and no understanding or custom affecting the terms hereof. The undersigned may revoke this guaranty by written notice delivered or mailed by registered mail by the undersigned to the Bank, but such revocation shall not affect or release the liability of the undersigned for the then existing Indebtedness or any renewals thereof, theretofore or thereafter made and, if there be more than one signer upon the guaranty, such revocation shall be effective only as to the one so revoking

13. This guaranty is delivered and made in, and shall be construed pursuant to the laws of, the State of Iowa, and is binding jointly and severally upon the Guarantors and their legal representatives, and shall inure to the benefit of the Lender, its successors and assigns

In witness whereof the Guarantors have each signed this agreement on this 1st day of July, 19 82

Calvin Crooked

Fred Friendly

WITNESS

"GUARANTORS"

(Over)

CNB 1010

INDIVIDUAL CERTIFICATE OF ACKNOWLEDGMENT

STATE OF Iowa, County of Hawkeye, ss.

On this 1st day of July A.D. 19 82 before me, the undersigned, a Notary Public in and for said County and State, personally appeared CALVIN CROOKED

to me known to be the identical person(s) named in and who executed the within and foregoing instrument, set forth on the opposite side and acknowledged that they executed the same as their voluntary act and deed.

Nancy Notary

Notary Public in and for said County and State

Witnessed by Fred Friendly. N.N.

CORPORATE CERTIFICATE OF ACKNOWLEDGMENT

STATE OF _____, County of _____, ss.

On this _____ day of _____ A.D. 19 _____ before me, the undersigned, a Notary Public in and for said County and State, personally appeared _____

_____ and _____, to me personally

known, who, being by me duly sworn, did say that they are the _____

and _____, respectively, of said corporation executing the within and foregoing instrument set forth on the opposite side, that

(no seal has been procured by the said) _____ corporation; that said instrument was signed (and sealed) on behalf of (the seal affixed thereto is the seal of said)

said corporation by authority of its Board of Directors; and that the said _____ and _____ as such officers acknowledge the execution of said instrument to be the voluntary act and deed of said corporation; by it and by them voluntarily executed.

Notary Public in and for said County and State



NO. _____ DEFINITION OF FIDUCIARY RELATIONSHIP

A fiduciary relationship is a special type of relationship in which particular confidence is placed by one individual in another. A fiduciary is a person who has a duty to act primarily for the benefit of another. A fiduciary is in a position to exercise, and does in fact exercise, influence over the other. A fiduciary relationship implies a condition of superiority of one of the parties over the other. Generally, in a fiduciary relationship the property, interest or authority of the other is placed in the charge of the fiduciary.

A fiduciary relationship does not ordinarily arise between a bank and its borrower. Unless you find that special circumstances created a peculiar relationship of trust and confidence between the bank and Leona Erickson, you must find that there was no fiduciary relationship existing between the bank and Leona Erickson, and your answer to Special Verdict Issue No. __ must be "no."

AUTHORITY

Kurth v. Van Horn, _____ N.W.2d _____ (Iowa 1985)
Denison State Bank v. Madeira, 230 Kan. 684, 640 P.2d 1235
(1982)
Manson State Bank v. Tripp, 248 N.W.2d 105 (Iowa 1976)

G

NO. _____ EXISTENCE OF A FIDUCIARY RELATIONSHIP -- FACTORS

In determining whether a fiduciary relationship existed between the bank and Leona Erickson, you should consider the following factors: (1) whether Leona Erickson placed her trust and confidence in the bank; (2) whether the bank had superior knowledge of the disputed transaction; (3) the length of the relationship between the bank and Leona Erickson; (4) the nature and duration of the contacts between the bank and Leona Erickson; (5) whether the borrower had access to financial information concerning the transactions in question and/or an opportunity to investigate same; (6) whether Leona Erickson requested the bank's advice on the transaction; (7) whether the bank in fact gave such advice; (8) whether Leona Erickson relied on that advice; (9) whether any representatives of the bank had actual knowledge that Leona Erickson was relying on his advice; and (10) whether Leona Erickson sought independent legal advice to protect her interests in the transaction.

AUTHORITY

Kurth v. Van Horn, _____ N.W.2d _____ (Iowa 1985)
Klein v. First Edina National Bank, 196 N.W.2d 619 (Minn. 1972)
Denison State Bank v. Madeira, 230 Kan. 684, 640 P.2d 1235
(1982)
Dugan v. First National Bank in Wichita, 227 Kan. 201, 606 P.2d
1009 (1980)
Ward v. Worthern Bank & Trust Co., 681 S.W.2d 365 (Ark. 1984)
First National Bank in Lenox v. Brown, 181 N.W.2d 178 (Iowa 1970)

NO. _____ EXISTENCE OF A FIDUCIARY RELATIONSHIP -- ADVICE

The factor concerning whether any representative of the bank gave specific financial advice about the disputed transactions to the borrower is controlling on the question of whether a fiduciary relationship exists. Therefore, if you find that no advice was given, then you must find that no fiduciary relationship existed, and your answer to Special Verdict issue No. _____ must be "no."

AUTHORITY

Dugan v. First National Bank in Wichita, 227 Kan. 201, 606 P.2d 1009 (1980)



NO. _____ EXISTENCE OF A FIDUCIARY RELATIONSHIP -- RELIANCE

As a matter of Iowa law, the question of whether a fiduciary relationship exists depends on whether the borrower in fact relied on financial advice given by one of the bank's representatives to counsel her. If you find that Leona Erickson did not rely on any advice given by a Brenton representative and did not rely on Brenton to counsel her, then you must find that no fiduciary relationship existed between Leona and Brenton and your answer to Special Verdict issue No. _____ must be "no."

AUTHORITY

Kurth v. Van Horn, _____ N.W.2d _____ (Iowa 1985)

G

NO. _____ EXISTENCE OF A FIDUCIARY RELATIONSHIP -- KNOWLEDGE
OF RELIANCE

For a fiduciary relationship to exist, the borrower must prove not only that she relied on financial advice given by the bank's representative, but that the representative knew of such reliance. It is not enough that the borrower expects the banker to counsel her if the banker has no knowledge of her expectations. Therefore, if you find that Leona Erickson relied on a Brenton representative to counsel her, but that the representative did not know of such reliance, then you must find that no fiduciary existed and your answer to Special Verdict issue No. _____ must be "no."

AUTHORITY

Klein v. First Edina National Bank, 196 N.W.2d 619 (Minn. 1972)
Denison State Bank v. Madeira, 230 Kan. 684, 640 P.2d 1235
(1982)

G

NO. _____ BREACH OF FIDUCIARY DUTY -- NONDISCLOSURE OF MATERIAL INFORMATION

If you find that a fiduciary relationship existed between the bank and Leona Erickson, you must next decide whether the bank breached a fiduciary relationship toward Leona. The failure to disclose information may constitute such a breach only if such information was material to Leona's decision to enter into the transactions in question and was not already known by or available to Leona. If you find the bank disclosed all material facts or that Leona knew or had ready access to such information, then you must find the bank committed no breach of a fiduciary duty.

AUTHORITY

First National Bank in Lenox v. Brown, 181 N.W.2d 178 (Iowa 1970)
Manson State Bank v. Tripp, 248 N.W.2d 105 (Iowa 1976)

G

STRUCTURED SETTLEMENTS TODAY

Daniel (Dan) R. Raymond
Regional Manager
KENNETH H. WELLS & ASSOCIATES
9200 Indian Creek Parkway
Overland Park, Kansas 66210

- I. How Structures Got Started
- II. Structures Went Along at a Very Slow Pace for Next 10 Years to 1983
- III. Industry Changes January, 1983 - Periodic Payment Act
- IV. Today's Industry is \$4.0 Billion with over 275 Companies in Business - Most One Person Shops
- V. What Can a Structure Do For You - Why Should You Use Them
- VI. What Should You Look for From a Structured Settlement and What Services Do They Offer
- VII. What Cases Fit Structures
- VIII. How Do You Get a Case Started on a Structured Settlement
- IX. Here's What to Expect

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**DEALING WITH FIRST PARTY BAD FAITH CLAIMS:
SUGGESTIONS FOR THE CLAIMS SUPERVISOR**

William F. Fanter
Bradshaw, Fowler, Proctor & Fairgrave
Des Moines, Iowa

I. THE ROLE OF THE CLAIMS SUPERVISOR IN PREVENTING AND DEFENDING FIRST PARTY BAD FAITH CLAIMS

A. AN OUNCE OF PREVENTION . . .

Since all first party bad faith claims are self-induced, a primary responsibility of the claim supervisor in managing the adjustment of claims is to educate his staff in understanding the nature of the exposure with a view towards avoiding problems entirely or, at the very least, facilitating early detection of potential areas from which bad faith liability may arise. Basically we are, of course, talking about conduct in the adjustment of the first party claim which would give a court reason to extend the liability of the insurer beyond the express limits of the policy. The woods are currently full of numerous checklists of "do's and don'ts" for front line adjusters which, while helpful, are no substitute for a training program which explains bad faith in simple terms emphasizing fundamental fairness and common sense in resolving the claim with the insurance contract itself declaring rules of substance and procedure. (See example of jury instruction attached at D-9,10).

Early detection of potential problems cannot be overemphasized in order that you may implement action to avoid even the appearance of procedural or substantive impropriety. Bad faith problems are most likely to arise:

(1) From those cases where policy defenses are suggested from the very facts presented in the investigation of the loss i.e. ARSON and FRAUD; or

(2) From the obstreperous insured who signals his difficulty from the beginning. Either case merits close monitoring by the supervisor to prevent the occurrence of events which could later become evidence of bad faith.

(1) WHERE POTENTIAL POLICY DEFENSES ARE IDENTIFIED, THE SUPERVISOR WILL ACT AS A CLEARING HOUSE OF INFORMATION, A COORDINATOR OF INVESTIGATION, A LIASON WITH OUTSIDE COUNSEL, AND, VERY LIKELY, THE ULTIMATE DECISION MAKER ON THE LIABILITY FOR THE CLAIM.

Several tasks may be included among his duties in an arson case:

- a. Early retention of cause and origin investigators;
- b. Retention of counsel as soon as potential policy defenses are perceived;
- c. Preparation and filing of PILR documents;
- d. Coordinating the background investigation;
- e. Dealing with the interest of the mortgagee and loss payee;
- f. Obtaining non-waiver agreements or issuing unilateral reservations of rights letters;
- g. Disbursing advance payments;
- h. Dealing with public agencies and complying with immunity statutes;
- i. Marshaling the valuation information simultaneously, but separately, from the liability investigation;

- j. Verifying your compliance with unfair claims practices legislation;
- k. Preventing the intrusion of delay into the file;
- l. Responding in writing to all letters from the insured or his counsel; and
- m. Reserving the claim.

(2) THE OBSTREPEROUS INSURED

- a. Let him know immediately that your authority for requests made of him derives from the contract of insurance which has been, at the very least, approved by your insurance commissioner and perhaps even mandated by legislation.
- b. Your initial letter acknowledging receipt of his notice of claim should make express reference to the language of the policy concerning his duties in case of loss as well as to the cooperation clause.
- c. Be gentle but firm explaining your other policyholders expect you to pay only bona fide claims in an amount provided for in the policy and substantiated by reasonable proof and documentation to justify your action upon review.
- d. Encourage the difficult insured to retain counsel. This will demonstrate that you have confidence in your position and nothing to hide. Moreover, counsel will usually add stability to the relationship by confirming to the insured that you are proceeding within the provisions of the contract.
- e. Document your conversations with follow-up letters so the record is clear.

(3). THE CONCEPT OF THE APPEARANCE OF IMPROPRIETY.

Juries may determine facts not based on what they truly are, but based upon how an insured may make them appear. Therefore, contemporaneous memoranda documenting actions will have high credibility

and will help or hurt you depending on the accuracy of the documentation. Claims people cannot be too careful in wording memos and should stick to the recording of facts only and minimize editorializing.

(4). DEALING WITH THE INSURED'S COUNSEL.

Avoid letting him paper your file with one-way, self-serving letters assailing your claims handling, articulating the distress being imposed on his client and threatening you with extra contractual liability. Write him back or have your counsel do so setting the record straight and stating the good faith reasons for your actions. (See exhibit D-12-14).

(5). DEALING WITH PUBLIC AUTHORITIES INCLUDING FIRE MARSHALS AND ARSON INVESTIGATORS.

- a. Exchange information only after executing written requests making express reference to immunity statutes.
- b. Even then you need only exchange "relevant information" as defined by the statute - not every piece of correspondence or memo in your claims file. "Relevant information" is precisely defined by statute in most instances.
- c. Treat them as the professionals they are and work strictly at arms length.

(6). WHAT YOU SHOULD EXPECT FROM YOUR COUNSEL.

- a. Early acknowledgement of the assignment exhibiting an understanding of the role he is to provide in rendering assistance as the matter progresses. Supervising and directing attorney or merely a consultant on difficult questions encountered periodically in this claim? (See letter of assignment exhibit D-15).

- b. A written recommendation to you providing his opinion as to the legal sufficiency of evidence to sustain denial or payment of the claim.
- c. A review of all letters to the insured, his counsel or public adjusters including the letter of denial.
- d. The production of case authority, if requested, for utilizing the various tools available under the Standard Fire Policy. (Example: Separate statements under oath for multiple insureds).
- e. Completion of Statements Under Oath of insureds.
- f. Preparation or review of Articles of Subrogation and Assignment from Mortgagees, etc.
- g. Commencing declaratory actions to establish policy defenses.
- h. Handling negotiations after the claim has been denied.

SUMMARY

A. SINCE MOST FIRST PARTY BAD FAITH CLAIMS ARE SELF-INDUCED, AN OUNCE OF PREVENTION IS INDEED WORTH A POUND OF CURE.

--Educate your staff in concepts of fair play governed by the mandates of the contract.

--Educate your staff about the need to patrol your files to accomplish early detection of potential problems.

--Educate your staff about the concept that ultimately cases may not be decided based on the true facts, but based on how those facts may be made to appear.

B. WHEN ASSERTING COVERAGE DEFEATING POLICY DEFENSES, MAKE SURE YOU HAVE:

- 1) a demonstrably adequate investigation;
- 2) a strong showing of timeliness;

- 3) the blessing of counsel on legal sufficiency;
- 4) a balancing of interests of company and insured in the ultimate analysis; and

C. BE ABLE TO FAIRLY STATE THAT YOUR POSITION CHALLENGING COVERAGE IS MANDATED BY A PHILOSOPHY THAT INURES TO THE BENEFIT OF OTHER POLICYHOLDERS.

One of the propositions Plaintiff must prove by a preponderance of the evidence before she can recover based on the tort of bad faith is that the Defendants acted in bad faith toward her in their adjustment of her fire loss.

The term "bad faith" as here used may be defined as the opposite of good faith. It means a wilfull neglect or refusal to fulfill a duty or contractual obligation not prompted by an honest mistake or legitimate difference of opinion as to one's rights or duties.

To show a claim for "bad faith", a Plaintiff must show by a preponderance of the evidence the absence of a reasonable basis for denying benefits of the policy and the Defendants' reckless disregard of the rights of the insured. A reckless disregard of the rights of the insured means proceeding with a heedless disregard for and indifference to the rights of the insured. Reckless disregard signifies an absence of all care and concern coupled with a complete disregard for the consequences which are obvious and which would naturally follow. However, conduct arising from mere error in judgment or legitimate differences of opinion does not constitute a reckless disregard of the rights of the insured.

"Bad faith" by definition must be intentional. "Bad faith" is defined as "deceit; duplicity; insincerity." "Deceit" is a strategem; trick; wile. "Duplicity" is deliberate deceptiveness in behavior or speech. "Bad faith" is the absence of honest intelligent action or consideration based upon a knowledge of the

facts and circumstances upon which a decision in respect to liability is predicated. It is a knowing failure to exercise an honest and informed judgment.

An insurer is not guilty of bad faith merely because it disputes or challenges an insured's claim as to valuation of a loss.

An insurer has the right to contest or challenge a claim which it reasonably concludes is debatable, whether the debate concerns matter of fact or law which needs to be decided before it is required to pay the claim.

Authorities: Iowa Civil Jury Instruction Number 22.3; Anderson v. Continental Insurance Company, 271 N.W. 2d 368 (Wisconsin, October 31, 1978); Drake v. Milwaukee Mutual Insurance Company, 236 N.W. 2d 204 (1975).

THE OPENING STATEMENT: A DEFENCE PERSPECTIVE

BY

JAMES R. HELLMAN
MOSIER, THOMAS, BEATTY, DUTTON, BRAUN & STAACK
3151 Brockway Road
Waterloo, IA 50704

I. DEFENDANT'S STRATEGY ON OPENING STATEMENT.

- A. Since some studies show that approximately 80% of jurors decide who should win the case during the opening statements, the importance of the opening cannot be overstated. Clarity and logic are the goals; when you finish the opening, the jury should have a clear understanding of the case, your theory, and why you should win.
- B. The opening statement must graphically portray defense counsel's theme of the case with force, clarity and efficiency.
- C. The opening statement should be used to establish the proper tone and mood rather than merely to communicate the substantive aspects of the defense or to discuss the evidentiary details.
- D. As may be said about almost every aspect of litigation, the key is to carefully select and define your goals and to prepare both in breadth and depth.
- E. The opening statement is an opportunity for you to establish in the mind of each of the jurors how even-handed you are in your approach to the case.
- F. The opening statement is probably more crucial to the defendant than to the plaintiff. The plaintiff's attorney goes first on voir dire. Plaintiff's attorney will often so thoroughly explore every reasonable area of inquiry that the defense attorney risks alienating the eventual factfinders by unduly prolonging voir dire while establishing some equivalent relationship. The opening statement may be the only significant opportunity that the defendant has to remind the jurors that there really is, or at least will be, another side to this story.

G. Every utterance and inference made in the opening statement can be scrutinized closely by opposing counsel and his witness, and evidence and arguments can be presented in rebuttal. During preparation, consider the opening statement to be a mine field in which your tactical goal is mainly to get across without stepping on something that will blow you up.

H. In the opening statement the lawyer should:

1. Condition the jurors to his theme;
2. Instill in their mind that the defense is confident and well-prepared;
3. Portray some basic models or analogies for them to use in mentally categorizing the evidence to be received during trial;
4. Diffuse the weakness of your own case;
5. Peek the juror's interest, at least slightly, in anticipation of one or two evidentiary points where the defense is certain to fair well - then sit down before something comes out of the mouth that will undo it all.

II. PRACTICAL POINTERS FOR A SUCCESSFUL OPENING STATEMENT

- A. Don't "wax eloquent". Don't be dramatic or use sweeping gestures. Don't exaggerate.
- B. Concentrate on quality, brevity and simplicity.
- C. You must have a carefully defined theme. Start on your theme, finish on your theme, and don't wander too far from it during the middle of the opening statement.
- D. To talk too long in opening statement is to be more than borish - it is to invite disaster.
- E. On voir dire, the defense attorney should have already stressed the "keeping an open mind" requirement. In your opening statement, talk about it again, forcefully. Obtain a commitment to withholding judgment.

- F. Maintain a respectful distance between you and the jury box. If you intrude at this early stage of the trial, you will risk creating discomfort by your presence.
- G. Start effectively. Memorize your first paragraph or first three sentences. Move away from the podium or your notes. Look the jury in the eye and maintain eye contact.
- H. Use everyday English. Even more important than using short sentences, is to train yourself to use common words instead of legalese.
- I. Gesture minimally. As the defendant's representative, you should appear as cool, confident and unflappable; you do not want the jurors to begin to wonder why you "protest so loudly".
- J. Use demonstrative aids, especially if the plaintiff has failed to do so. An opening statement can be made all the more effective if you use visual aids to help the jury grasp the nature of the case and the critical events. Charts, diagrams, photographs, and blackboards are effective tools.
- K. Defense counsel's opening statement should not include references to evidence the availability or admissibility of which is doubtful.
- L. Personalize your client.
- M. Admonish the jurors that opening statements are not evidence.
- N. Do not focus exclusively on contested issues. There are usually some points that are only technically at issue or that are stacked in your favor. It enhances the aura of success of the defense case to set up these skirmishes in the eyes of the jury - and then eventually prevail. If it is an element of your case, make certain that the jurors are aware of it from the beginning so that at the end of the trial, when they are given the instruction



listing these elements, they can graphically see that you have proved 80% of your case without competition.

- O. Use language carefully. Devote time and effort to choosing the right word. The use of the right word accomplishes in a subtle manner the creation of the proper subconscious mood or feeling that no amount of careful oration or emotional appeal can bring off.
- P. Diffuse your weak points. Without making an unnecessary admission, touch upon your weak points in the opening statement. To overlook doing this is to provide an opportunity for your opponent to magnify the impact. Be careful not to give an explanation that is too elaborate.
- Q. Use voice inflection and tone to bolster your positive approach. You may find that this helps to personalize your approach and to give a more sincere demeanor.
- R. Relate to the daily life of the jurors. Look for common experiences such as schooling, parenting, driving a car.
- S. Give the jury enough information to understand the case without overwhelming them with details.
- T. Emphasize the weakness in your adversary's case. Point out any fundamental flaw or weakness in plaintiff's case.
- U. Reinforce the principle that the burden of persuasion rests with the plaintiff. Candidly recognize any issues with respect to which the burden rests with the defense.
- V. Emphasize vital pieces of evidence or witnesses on which you want the jury to focus. In most cases there will be a particular witness, or a particular document, which will be a focal point for your position. The jury should hear about that witness or that document in your opening statement.
- W. Forewarn the jury about conflicts in testimony. If you know that your case will involve contradictions or conflicts in testimony between witnesses, candidly tell

the jury about this. It is a mistake to make an opening statement which suggests there is only one version of the events when you know that the jury will hear conflicting versions. Tell the jury that there will be such conflicts and explain why the evidence will support your client's version, but avoid improper argument.

- X. Tie in the opening statement to the planned closing argument.
- Y. Quickly catch the jury's attention. During preparation, you should devote considerable energy to finding some way to immediately grasp the juror's attention. Long prefatory remarks will lose their attention. Tell the jury as quickly as possible what the case is about.
- Z. Use the opening statement to develop rapport and confidence with the jury.
- AA. Don't read.
- BB. Be courteous to your adversary.
- CC. Cover expert witnesses. If your case involves expert witnesses, it is important to explain what an expert witness is in general, who your expert will be, and why the expert will be testifying. By contrast, if your adversary's case will rely heavily upon experts, care should be taken to explain that a jury is not required to follow what an expert says.
- DD. Respond to your adversary's opening. Well developed skills in handling an opening statement include a well considered response to the opening statement made by your adversary.
- EE. Finish with your theme. Have the closing firmly in mind as to content, tone, inflection, and other elements of effective advocacy. A strong conclusion is essential to the tone and aura you are establishing.



FF. Finish your opening statement expressing confidence that the jury will return the verdict your want.

III. DEALING WITH DAMAGES ON OPENING STATEMENT.

- A. Point out the parameters of the case, i.e., no hospitalization, no surgery, little time off from work, no future medical treatment. This should also be done with respect to liability issues, i.e., no claim of excessive speed, intoxication, etc.
- B. Admonitions about being conservative in the opening statement are even more crucial as the defense addresses the issue of damages. Depending upon the facts of the case and the defense theme you have selected, you may wish to say very little about damages. The difficulty and danger with discussing damages in the opening statement stems from defense counsel's lack of control over the presentation of the damages issue. No attorney wants to appear to have belittled the injury of any person. Avoiding a detailed discussion of damages provides less of a target for the plaintiff.
- C. Defense counsel in opening statement can take advantage of the amount of money damages being requested; the defendant can hardly be faulted for pointing out the large figures being sought and subtly allowing the jurors at the beginning to conclude that the plaintiff may be greedy.

**EXTRA CONTRACTUAL LIABILITY -- INSURANCE TRADE
PRACTICE ACT -- UNFAIR CLAIM PRACTICES -- LIABILITY
WHICH MAY ARISE BECAUSE OF FACTS OF THE COMPANY,
ITS ADJUSTERS OR INDEPENDENT ADJUSTERS**

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I. THE ACTS

A. Introduction

Beginning in the year 1947 life for Claims Supervisors became increasingly more complicated. For it was in 1947 that the National Association of Insurance Commissioner (NAIC) adopted legislation entitled "An Act Relating to Unfair Methods of Competition and Unfair and Deceptive Acts and Practices in the Business of Insurance (Unfair Trade Practices Act; hereinafter Trade Practices Act).

The NAIC adopted this Act in 1947, it was amended in 1960, and then again in 1972; telephone interview with Jan Gindra, librarian NAIC, (March 18, 1986); See also, legislative history of the Trade Practices Act. As of 1979, forty-five (45) states had adopted some version of the NAIC Trade Practices Act; Comment, Liability Insurers and third party claimants; the limits of duty, 48 Univ. Chi. L. Rev. 125 (1981).

Of critical importance, to those dealing with claim files, is Section 4 (9) of the Trade Practices Act. This section provides that certain practices or procedures, constitute "unfair" trade practices, the original act also contained an omnibus clause covering certain other undefined acts by insurers. As proposed the intent of the NAIC was to vest the regulatory power, for this Act, with the State Commissioner of Insurance. As will be discussed later, the power to enforce the Acts may now be vested elsewhere.

As if this Trade Practices Act were not sufficient, in 1976 the NAIC adopted Model Legislation entitled, "Claims Settlement Act (Claims Act), this Act was amended in 1980 and has been adopted by several states; See, legislative history of the Claims Act. This second piece of legislation dealt with claims handling only and not with other insurer activities (e.g. rebates, twisting price discrimination).

The focus of this paper will be directed only to claims handling procedures, it is strongly suggested that both pieces of model legislation be reviewed.

B. Legislative History

Excluding the legislative history of the model acts most states can trace their versions to one source:

"the purpose of this Uniform Trade Practices Act is to regulate trade practices in the business of insurance in accordance with the intent of congress as expressed in the Act of Congress of March 9, 1945 (Public Law 15, 79th Congress as Amended), by defining, or by providing for the determination of (under standards or procedures herein prescribed), all such practices in this state which constitute unfair methods of competition or unfair or deceptive acts or practices, and by prohibiting the trade practices so defined or determined."

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MICH. STAT. ANN. § 24.12002 (Callaghan 1982); See also,
TEX. STAT. ANN. art. 21.21 § 1(a) (Vernon 1986 Supp.).

It appears then we have our old friend McCarren-Ferguson 15 USCA
Section 1011 et. seq. (West 1968) to thank for most, if not all,
state regulation in this area.

According to Thomas and Reed, *Adjusting of Property Losses* (4th
ed. 1977), the 1971 revisions to the Trade Practices Act were
due to, among other factors, a dramatic increase in
claim-related consumer complaints. According to this same
source, in 1971 there was a rising tide of consumerism. If
there was a rising tide in 1971, it is safe to assume that in
1986 high tide is in. One can only imagine what the future
holds.

II. OPERATION AND COVERAGE

A. Scope

As alluded to above both the Model Trade Practices Act and
the Claims Act, as adopted and amended, contain language that
defines certain conduct by insurers as unfair and violative
of the Acts.

Of critical importance is that Section 4 (9) of the Trade
Practices Act, and the preamble of most state statutes share
on general requirement. That being in order to constitute
a violation, these actions, must be committed with such
frequency so as to indicate a general business practice.

The important condition being one single act may not constitute a violation. See e.g., CAL. INS. CODE § 790.03 (West 1958 Rev. & Supp. 1985); FLA. STAT. ANN. § 626.9541 (i) (West 1984); IOWA CODE § 507B 4(9) (1985 Code Supplement); NEB. REV. STAT. § 44-1525 (9) (1985 Supp); 1984 N.Y. LAWS Chpt. 367 § 2601; TEX. STAT. ANN. art. 21.21-2 § 2 (Vernon 1986 Supp.); VA. CODE § 38.1 - 52.9 (1981 & Supp. 1985); W. VA. CODE § 33-11-4(9) (1982 & Supp. 1985). This same general business practice requirement is found in other state statutes, e.g., MO. ANN. STAT. § 375.936 (10) (Vernon 1968 & Supp. 1986). It appears that the majority of states which have adopted some version of the NAIC Model included a similar requirement.

While no national datum was obtained, in Iowa, more than one violation is generally required in order to establish the requisite general business practice; Interview with Tony Schrader, Deputy Commissioner (Prosecutions/Agents licensing) Insurance Department of Iowa, in Des Moines (February 3, 1986).

As indicated above, the model act as well as many state versions, require a series of violations. However, not all statutes are identical. There are some significant variations on this theme.



For example:

"It is an improper claims practice for any domestic, foreign or alien company transacting business in this state to commit any of the acts....if:

(a) it is committed knowingly in violation of this Act or any rules promulgated hereunder; or

(b) It has been committed with such frequency to indicate a persistent tendency to engage in that type of conduct."

ILL. ANN. STAT. ch. 73 § 766.5 (Smith-Hurd Supp 1985). the Illinois statute is somewhat of a hybrid. The complained of practice may constitute a violation if done intentionally, or frequently. There are some other noteworthy variations on this theme.

In Minnesota, certain acts must be committed with frequency in order to constitute a violation, MINN. STAT. ANN. § 72A.20 subd. 12 (West 1968 & Supp. 1986) While other acts, if done once, may constitute a violation of the Minnesota statute; MINN. STAT. ANN. §72.A.20 Subd. 12(a) (West 1968 & Supp. 1986). It goes without saying, that determining which statute controls is critical. This same dichotomy can be found in other states; UTAH CODE ANN. § 31A-26-303(1) (2) (3) (1985). Also worth note is that one state has adopted an interesting evidentiary requirements, regarding this general business or frequency element, for example;

"three or more written complaints received by the commissioner within any twelve-month period charging separate violations of this section shall constitute a rebuttable presumption of a general business practice."

HAWAII REV. STAT. § 431-643 (10) (1984 Supp.). Having determined that a general business practice, or pattern of behavior, must be established the task then becomes one of examining what types of behavior are prohibited by the various statutes.

B. Operation

As mentioned earlier, there are two sources of concern. One the Trade Practices Act, the other the Claims Settlement Act. The Trade Practices Act covers a multitude of transgressions, including claims practices. While the Claim Act deals specifically with claims settlement procedures.

It is impossible to generalize about what practices, or procedures, are prohibited. However, after reviewing the NAIC model, and the variations adopted by the states, several common elements can be discerned.

Again, a caveat, it is suggested that specific reference to relevant state statutory authority is necessary in order to adequately answer any specific question.



1. Prohibited Practices

The usual custom is to designate a "laundry list" of prohibited actions. Then to label such actions as unfair claims practices, for example:

"(1) knowingly misrepresenting to claimants pertinent factors or policy provisions relating to coverage at issue:

(2) failing to acknowledge with reasonable promptness pertinent communications as to claims arising under its policies;

(3) failing to adopt and implement reasonable standards for the prompt investigation of claims arising under its policies:

(4) not attempting in good faith to effectuate prompt, fair, and equitable settlements of claims submitted..."

1984 N.Y. LAWS Chpt. 367 §2601(1)(2)(3)(4). Other statutes are much broader: for example, Iowa list fourteen acts which, if committed in a manner that indicates a general business practice, are unfair claims settlement procedures. See, IOWA CODE §507B.4(9) (a)(n) (1985 Code Supp.) The list runs from misrepresenting facts to compelling insureds to institute litigation, in order to recover on a policy.

Other acts have some unique variations. In addition to the list used in the Iowa statute, Connecticut includes the following:

"...[U]sing as a basis for cash settlement with a first party automobile insurance claimant an amount which is less than the amount which the insurer would pay if repairs were made unless such amount is agreed to by the insured or provided for by the insurance policy."

CONN. GEN. STAT. ANN. § 38-61(6)(o) (West 1958 Rev. & Supp. 1985). There are of course many variations on this theme. They range from the obvious; In California; "...[M]isleading a claimant as to the applicable statute of limitations", constitutes an unfair claims settlement practice, CAL. INS. CODE § 790.03(h)(15) (West 1972 & Supp. 1986). To the ridiculous; again in California it is a violation to advise a claimant that they need not obtain the services of counsel, Id at § 790.03(h)(14).

In Florida, it is an unfair claim settlement practice for;

"Attempting to settle claims on the basis of an application, when serving as a binder or intended to become part of the policy, or any other material document which was altered without notice to, or knowledge or consent of, the insured."

FLA. STAT. ANN. § 626.9541 (i)(1) (West 1984). This same act would also constitute a violation in Indiana, IND. CODE ANN. § 27-4-1-4.5 (Burns 1986). Clearly there are an infinite number of variations on the basic theme. However, each act bears some resemblance to the NAIC model.

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After reviewing the multitude of variations, contain is several state statutes, one element can be found in them all. That being, any unreasonable delay once liability has been established, will run afoul of the spirit if not the letter of the law. Many acts make specific reference to this form of behavior. In some cases specific time requirements are established, for example;

"(1) except for claims made under a health insurance policy, after receiving notification of claim from an insured or a claimant, failing to acknowledge receipt of the notification of the claim within ten business days, and failing to promptly provide all necessary claim forms and instructions to process the claim, unless the claim is settled within ten business days."

MINN. STAT. ANN. §72A.20 Subd. 12a (d) (1) (West 1968 & Supp. 1986). This same section further provides that it is an unfair settlement practice for:

"...[F]ailing to complete its investigation and inform the insured or claimant of acceptance or denial of a claim within 30 business days after receipt of notification of claim unless the investigation cannot reasonably be completed within that time." Id., at §72A.20 Subd 12a (d) (3).

This subdivision is probably one of the most encompassing pieces of state legislation adopted. It is suggested that the entire subdivision be reviewed. Further, the statute includes the words insureds and claimants, as will be seen later this inclusion is significant.

In order to expedite prompt resolution of claim files the state of Michigan has adopted the following:

"A person must pay on a timely basis to its insured, an individual or entity directly entitled to benefits under its insured's contract of insurance, or a third party tort claimant the benefits provided under the terms of its policy, or, in the alternative, the person must pay to its insured, an individual or entity directly entitled to benefits under its insured's contract of insurance, or a third party tort claimant 12% interest..."

the act goes on:

"When benefits are not paid on a timely basis the benefits shall bear simple interest from a date 60 days after satisfactory proof of loss was received by the insurer at the rate of 12% per annum, if the claimant or entity directly entitle to benefits under the insured's contract of insurance."

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MICH. STAT. ANN. §24.12006(1)(4) (Callaghan 1982). Apparently, the states of Minnesota and Michigan are deeply committed to prompt claim settlement. What is even more significant is the fact that both statutes use the terms insured and claimant virtually interchangeable. This fact has significance in that it appears to give both the insured and third party claimants rights under the statute. Again, the common thread that runs through all of the statutes is the requirement that claims be paid in a timely fashion. Some states define timely (eg. Minnesota, Michigan) while others use words such as "prompt", (New York) still others use language like "delaying the investigation" (Connecticut). Other Acts consider any delay in the investigation or payment of claims to be as unfair claims settlement practice, (Virginia, West Virginia). However, the acts all share one thing in common, that is any unreasonable delay in either the investigation or settlement is frowned upon, and more importantly will warrant the attention of the Insurance Commissioner.

2. Enforcement

Again, while its impossible to generalize, power to enforce the acts is usually vested in the commissioner of Insurance. The usual custom is to provide:

"Whenever the Commission shall have reason to believe that any such person has been engaged or is engaging or in this state in any unfair method of competition or any unfair or deceptive act or practice... it shall issue and serve upon such person a statement of the charges in that respect and a notice of a hearing thereon to be held at a time and place fixed in the notice,..."

VA. CODE §38.1-54(a) (1981). See also, IOWA CODE ANN. §507B.6(1) (West 1949 & Supp. 1985); W. VA CODE ANN. §33-11-6 (1982 & Supp. 1986). Some statutes go further in defining the powers of the commissioner:

"the insurance commissioner may examine and investigate into the affairs of every person engaged in the business of insurance in this state and of any person domiciled in or resident of this state engage in the business of insurance in any other state..."

HAWAII REV. STAT. §431-644 (1976 & Supp. 1984).

Again, it becomes obvious that most statutes follow a similar pattern. Of course each state will have its own unique administrative procedures, however, some patterns are common in many of the statutes. Again, it is suggested that each states administrative procedure act be reviewed in order to resolve specific issues.

Following the initial hearing, if the administrative body finds that a violation has taken place, an order requiring the person to cease and desist is the usual remedy. See, CONN. GEN. STAT. ANN. §38-62(b) (West 1958 & Supp. 1985); ILL. ANN STAT. ch. 73 §766.8(1) (Smith - Hurd 1985); IND CODE ANN. §27-4-1-6(a) (Burns 1985 & Supp. 1986), (in Indiana the commissioner may also order a fine of not more than two thousand dollars [\$2,000]); IOWA CODE ANN. §507B.7(1) (West 1949 & Supp. 1985) (Here again a monetary fine may be levied); NEB. REV. STAT. §44-1528 (Reissue 1984) (Commissioner may also levy monetary fine). Identical provisions are contained in most versions of the acts. Again specific questions can only be resolved by reference to relevant state statutes.

Assuming that a cease and desist order has been issued, and the order violated, most statutes provide that the commissioner may assess a monetary penalty. Again, the amount of these fines varies from jurisdiction to jurisdiction. For example, in California the sum shall not exceed fifty dollars (\$50), unless the violation is found to be willful, then the penalty is five hundred dollars (\$500); CAL. INS. CODE §790.07 (West 1958 Rev. & Supp. 1985). For each subsequent violation, the Commissioner may, revoke or suspend the insurers license for up to one year; Id at §790.07. In Florida, the Commissioner may either suspend the insurers license or impose a fine. Generally, non-willful violation

will warrant a fine "not to exceed \$2,500 per violation", a willfully violation more. What is interesting is that an insurer may also be ordered to make restitution and include interest on such sums; FLA. STAT. ANN. §626.4211 (1)(2) (West 1984). In Minnesota:

"Any person who violates a cease and desist order of the commissioner under...shall forfeit and pay to the state of Minnesota a sum not to exceed \$10,000 for each violation which may be recovered in a civil action."

MJNN. STAT. ANN. §72A.28 (West 1968 & Supp. 1986). It should be apparent to all that Minnesota is, and will continue to be aggressive in the enforcement of its Insurance Laws. See also, MO. ANN. STAT. §375.946 (Vernon 1968 & Supp. 1986); 1984 N.Y LAWS Chpt. 367 §§109, 2603(b)(c).

While, in some jurisdictions these fines for violation are significant, they are all in the nature of an administrative proceeding. The real issue running throughout this topic is twofold. First is the Act the exclusive remedy and secondly who has standing to sue for a violation of the Act. Both issues will be discussed together.

3. Exclusively and Standing



The Tort concept of bad faith is so intricately woven throughout this area that it is virtually impossible to discuss a violation of the act without being concerned with this Tort. However, the concept is beyond the scope of this paper and the discussion will be limited to statutory violations only.

In some cases the issues of who has standing and how far does the statutory duty run are clear. In other situations the issue have not yet been resolved.

a. Exclusive Remedy

In a minority of states, a violation of the applicable statute, does not create a private cause of action. Additionally, in most of these same jurisdictions a third person does not have standing to sue. Generally, the logic is as follows:

"While section 507B.12 clearly reveals that the legislature did not intend the chapter to be the exclusive means of enforcing the acts and practices prohibited therein, we also believe it indicates that the legislature, in enacting 507B, intended only to invest the insurance commissioner with administrative enforcement powers..."

Seeman v. Liberty Mut. Ins. Co., 322 N.W. 2d 35,42 (IOWA 1982); cited in Shidler v. All American Life & Financial Corp., 775 f.2d 917 (8th Cir. 1985); But see, Countryman v. Mt. Pleasant Bank & Trust Co., 357 N.W. 2d 588 (IOWA 1984); (implying that a private party has standing to compel agency enforcement of an act.) This same logic has been adopted in other jurisdictions;

"However, paragraph 766.6 provides no private cause of action of remedy beyond those powers given to the State Director of Insurance in Section 766.7..."

Van Vleck v. Ohio Cas. Ins. Co., 128 Ill. App. 3d 959, 471 N.E. 2d 925, 927 (1984); Scroggins v. Allstate Ins. Co. 74 Ill. App. 3d 1027, 393 N.E. 2d 718 (1979) (in absence of statutory or contractual language... no action by third party); for an excellent discussion; UNR IND. INC. v. Continental Ins. Co., 607 f. Supp. (N.D. Ill. 1984). As a general rule no private cause of action will be recognized when the relevant statute vest enforcement power exclusively in an administrative body. See, T.D.S. Inc. v. Shelby Mut. Ins. Co., 760 F. 2d 1520 (11th Cir. 1985) (dissent discussing trade practices); J & B Schoenfeld v. Albany Ins. Co., _____ A.D. 2d _____, 492 N.Y.S. 2d 38 (1985); Riffat v. Continental Ins. Co., 104 A.D. 2d 301, 478 N.Y.S. 2d 635 (1984); (...act performs a disciplinary function); LTS Contractors Inc. v. Hartford Ins. Co., 99 A.D. 2d. 644, 472 N.Y.S. 2d 222 (1984); Royal Globe Ins. Co. v. Chock Full O'nuts Corp., 86 A.D. 2d 315, 449 N.Y.S. 2d 740 (1982), (excellent discussion); Compare, McKnight v. Ideal Mut. Ins. Co.

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534 F. Supp. 362 (N.D. Tex 1982) (no private cause under claims settlement act); with, Allstate Ins. Co. v. Kelley, 680 S.W. 595 (Tex. Ct. App. 1984) (private cause for violation of Trade Practices Act); In one state you will discover the following language "this section does not create nor destroy any private cause of action." UTAH CODE ANN. §31A-26-303(5) (1985), apparently the legislature could not decide which position it favored, so it adopted them both.

b. Not the Exclusive Remedy

In the majority of states, who have passed upon the issue, a breach of duty under the applicable statute does create a private cause of action.

Generally, the issue is to who is the duty owed and what penalty arises for a violation. Leading the way, on both issues, is the state of California. Early on the Supreme Court of California addressed the first issue and held;

"We hold that a third party claimant may sue an insurer for violating (the act), but that the third party's suit may not be brought until the action between the injured party and the insured is concluded."

Royal Globe Ins. Co. v. Superior Court of Butte County, 23 Cal. 3d 880, 153 Cal. Rptr. 842, 592 P. 2d 329, 332 (1979); See also, Reasoner v. Aetna Life Ins. Co., 600 F. Supp. 278 (S.D. Cal 1984) (Trade practices applicable to insurance company employees); Fuso v. United State Fidelity & Guaranty Co. Inc., 169 Cal. App. 3d 859, 215 Cal. Rptr. 490 (1985) (the requirement established in Royal Globe can be easily met).

In considering this issue the Supreme Court of Connecticut held:

"It is a settled principle of administrative law that, if an adequate administrative remedy exists, it must be exhausted....courts will not, however, require exhaustion of an administrative remedy when that remedy is either inadequate or futile".

Griswold v. Union Labor Life Ins. Co., 186 Conn. 507, 442 A 2d 920, 925 (1982), the court goes on to hold that the Connecticut administrative remedy was inadequate; Id, at 442 A 2d 926. Also of interest is Wilson v. Fireman's Fund Ins. Co., 40 Conn. Super. Ct. 336, 499 A. 2d 81 (1985) (Holding plaintiff need only establish a potential effect on the general public). Accord, Commercial Union Ins.v. Liberty Mut. Ins., 137 Mich. Ct. App. 381, 357 N.W. 2d 861 (1984); Warner v. Collavino Brothers, 133 Mich. Ct. App. 230, 347 N.W. 2d 787 (1984); Medley v. Canady, 126 Mich. Ct. App 739, 337 N.W. 2d 909 (1983); Morris v. American Family Mut. Ins. Co., 371 N.W. 2d 620 (Minn. App. 1985) (private cause permitted by statute

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dealing with general trade practices MINN. STAT. § 8.31 subd. 3(a) [1984]), petition for review granted mem., 378 N.W. 2d 625 (1985). Klaudt v. Flink, 658 P.2d 1065 (Mont. 1983) (case of first impression, act similar to model); A & E Supply Co. v. Nation-wide Mut. Fire Ins. Co., 612 F. Supp. 760 (W.D. Va. 1985) citing with approval, Mogran v. American Family Life Assur. Co., 559 F. Supp. 477 (W.D. Va. 1983) (allowance of compensatory and punitive damages) and cases cited therein; Davis v. Robertson, 332 S.E. 2d 819 (W. Va. 1985) (adopting the Royal Globe exhaustion of action against insured standard); Jenkins v. J.C. Penney Cas. Ins. Co., 280 S.E. 2d 252 (W. Va. 1981) (cause recognized); Gould v. Mutual Life Ins. Co. of New York, 37 Wash. App. 756, 683 P. 2d 207 (1984) (cause arising under Consumer Protection Act. Insurers are covered), this same concept applied in the federal trial of this case, Gould v. Mutual Life Ins. Co. of New York, 735 F. 2d 1165 (9th Cir. 1984) cert. denied. 105 S. Ct. 2023 (1985).

K It should be obvious that the trend is clearly toward expanding the doctrine and allowing a private person to sue for a violation of the claims settlement act. What is also troubling is the allowance of actual as well as punitive damages.

It is also apparent that the duty imposed, under the statute, runs not only to the insured. In fact, there appears to be an indication that a claimant or third party may also having standing to sue for a violation of the act.

One final word of caution. While most of the above discussion has centered upon the so called, trade practice act or claims settlement acts, there appears to be other legislation that should be of concern to persons handling claim files.

For example, many states have adopted statutes dealing with general business practices, and certain methods of unfair or unlawful competition. See, MINN. STAT. § 8.31 subd 3(a) (1984), (this statute includes acts by insurers under MINN. STAT. § 72.A20 subd 12[1984]); TEX. STAT. ANN. art. 21.21 § 16(a) (Vernon 1981 & Supp. 1986), the Texas scheme is unique in that the Insurance Trade Practices Act gives an aggrieved party a cause of action under the Texas Business & Commerce Code. The only redeeming portion is found in TEX. STAT. ANN. art. 21.21-2 (Vernon 1981 & Supp. 1986), this code section has been held not to authorize a private cause of action. See, McKnight v. Ideal Mut. Ins. Co., 534 f. Supp. 362 (N.D. TEX 1982) (while a private cause may arise under trade practices act - none under claims settlement act); WASH. REV. CODE ANN. § 19.86.020 & § 19.86.170 (1978 & Supp. 1986); As indicated above, in Gould v. Mutual Life Ins. Co. of New York, the claims settlement practices of an insurance company may also be regulated by any relevant Consumer Protection Act.

It will no doubt become common for an aggrieved insured, or third party claimant, to attempt to use these Consumer Protection Acts to their own advantage. The existence of these acts is included to alert you to their existence, and the potential exposure under your state's version.



III. CONDUCT CONSTITUTING A VIOLATION OF THE ACTS

(See discussion of "Exclusive Remedy and Standing," supra.)

A. By Agents

1. In Jenkins v. J. C. Penney Casualty Insurance Co., 280 S.E.2d 252 (W. Va. 1981), the plaintiff, whose car had been damaged in a collision with insured's car, brought suit under the Unfair Insurance Claim Settlement Practices statute. He alleged that the claims agents had failed to effectuate a prompt settlement when the liability was reasonably clear. The West Virginia Supreme Court held that a third party could sue the insurer for the breach of its statutory duty, once the liability of the insured had been determined.

2. In Whistman v. West American of the Ohio Casualty Group, 38 Wash. App. 580, 686 P.2d 1086 (1984), the insurer's agent wrote to the personal representative of the insured on February 19, advising him that he had

requested cancellation of the insured's home insurance policy as of February 2nd. The personal representative wrote back to request a renewal of the policy. The agent replied that the present policy would be cancelled as of March 9th. No notice of cancellation was ever sent to the personal representative by the insurer or the agent. Fire destroyed the house on February 28th. The insurer argued that the policy had expired at the time of the fire. The court remanded the case, stating that the insurer could be held to have changed the interpretation of the policy to avoid liability, thus violating the Unfair Insurance Practices Statute, the Unfair Claim Practices Regulations, and the Consumer Protection Act.

3. In Royal Globe Insurance Co. v. Bar Consultants, Inc., 566 S.W.2d 724 (Tex. Civ. App. 1978), the insured filed a claim for damage to the contents of its bar due to vandalism. The president of the insured corporation alleged that, prior to the investigation of the loss, both the agent and the agent's

secretary had told him that the loss would be covered. However, after investigation the insurer denied coverage. The president also claimed that the agent had previously represented that such losses were covered by policies between the same two parties that were identical to the present one. The court affirmed the judgment against the insurer for violations of the deceptive practices section of the Insurance Code, and furthermore held that the misrepresentations by the agent and his secretary also violated the Deceptive Trade Practices Act, which covered all trades and businesses.

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B. By Adjusters

1. In Frizzy Hairstylists, Inc. v. Eagle Star Insurance Co., 89 Misc. 2d 822, 392 N.Y.S. 2d 554 (N.Y. Civ. Ct. 1977), the insured, a beauty parlor, submitted a claim for fire loss. The insurer allegedly "low-balled" plaintiff's claim based upon the fact that the adjuster had heard that the Fire Marshal's report suggested arson. The court

found that the insurer had exhibited a "complete lack of interest" in investigating the suspected arson, although the adjuster claimed that he had confirmed his suspicions by his own observations of the premises. Furthermore, the court found that the insurer's employees had acted maliciously in offering a low settlement with the intention of forcing the insured out of business, and of pushing the insured into the lengthy process of litigation. Thus, the insurer had not only violated the deceptive acts and practices section of the Insurance Code, but was also liable for punitive damages.

2. In Sulner v. General Accident Fire and Life Assurance Corp., Ltd., 122 Misc. 2d 597, 471 N.Y.S. 2d 794 (N.Y. Sup.Ct. 1984), adjusters delayed the investigation of the insured's water damage for five months, then allegedly told the insured that there was no coverage. The court held that the insurer's actions could constitute a violation of the deceptive acts and practices section of the General Business Law.

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3. In Hornis v. Liberty Mutual Insurance Co., (Los Angeles Superior Court, Central Division, 1985) (reported in Ryan, The Bad Faith Blast, FOR THE DEFENSE, March, 1986, at 25), the adjuster allegedly induced settlement by telling the insured that if he wanted a fair settlement of his soft tissue injury claim, he would have to wait four years, and if he wanted prompt settlement, he would have to discount his case. The insured settled for \$10,000.00. The jury awarded him \$7.8 million in damages.

C. By Claims Managers

1. In Farris v. United States Fidelity and Guaranty Co., 284 Or. 453, 587 P.2d 1015 (1978), the owners of a sandwich shop, were sued for unfair business practices and tendered the defense of the case to their liability insurer. The insurer denied coverage. A letter from the Claims Manager indicated that he knew that there was coverage but that he had decided to "bluff it out," since they could always "buy out at a

later date." The Oregon Supreme Court held that the insured could bring an action under the unfair trade practices section of the Insurance Code, and suggested that the insurer's failure to settle the claim within the policy limits could give rise to a separate tort action for "bad faith," but only where the insurer undertakes its fiduciary duty to defend the insured -- not where it refuses to do so, as in this case.

2. In Tan Jay International, Ltd. v. Canadian Indemnity Co., No. C-485-516 (Los Angeles Superior Court, April 10, 1985) (reported in Ryan, supra), the insured, a corporation, brought a claim for an accident occurring after a company softball game. The liability insurer denied coverage. The insured produced a note, written by a unit supervisor after a telephone call from his lawyer, which one of the insured's expert witnesses characterized as "self-serving." In addition, the insured alleged that the claims file handler had acted in bad faith when she wrote in the pre-trial report that the claim represented



\$1,500.00, although she knew it was worth more. Ultimately, the insured was awarded damages of \$500,000.00 for a \$15,000.00 claim.

D. Other Employees

1. Both Royal Globe Insurance Co. v. Bar Consultants, Inc., supra, and Tan Jay, supra, indicate that secretaries, claims file handlers and other employees can implicate the insurer in violations of the Deceptive Trade Practices and Unfair Claim Settlement Practices Statutes.

K IV. DEGREE OF MISCONDUCT NECESSARY TO IMPOSE LIABILITY ON THE INSURER FOR VIOLATION OF THE ACTS

A. The Unfair Trade Practices Act

1. Frizzy Hairstylists, supra, exemplifies the sometimes inconsistent application of the statutes, so that while the unfair claim settlement practices statutes may require repeated offenses by the insurer so as to

indicate a general business practice, a single violation of the more general unfair or deceptive acts or practices statutes may provide a cause of action.

2. Another example of the problem is found in Casson v. Nationwide Insurance Co., 455 A.2d 361 (Del. Super. 1982), wherein the court states that the insurer's misconduct must be chronic enough to be established as a general business practice, if the insurer's actions are to be deemed violative of the Unfair Claim Settlement Practices Statute. Thus, the court implies that the insurer could be liable for a violation of the deceptive trade practices provisions on the basis of less frequent misdeeds.

3. In Young v. Michigan Mutual Insurance Co., 362 N.W.2d 844 (Mich. App. 1984) the court noted that an isolated incident of insurer misconduct did not constitute an unfair trade practice under the Michigan statutes. The court further reasoned that since an insured's dealings with the insurer are "of

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necessity" an isolated incident, there could be no independent cause of action against the insurer.

B. Unfair Claim Settlement Practices Act

1. In Royal Globe Insurance Co. v. Superior Court, 23 Cal. 3d 880, 592 P.2d 329, 153 Cal. Rptr. 842 (1979), a customer in a supermarket is injured in a slip and fall and sues the insurer under the unfair claim settlement practices provisions of the Unfair Practices Act for its failure to effectuate a prompt, equitable settlement when liability was reasonably clear, and for advising plaintiff not to obtain the services of an attorney. The California Supreme Court held that while the Insurance Commissioner could prosecute only in a case of conduct amounting to a general business practice, such a restriction was not relevant to a "aggrieved private litigant." Thus, a "single violation knowingly committed" was a sufficient basis for a suit by the plaintiff under the statute.

2. A contrary view is expressed in Halpin v. Prudential Insurance Co. of America, 48 N.Y. 2d 906, 401 N.E.2d 171, 425 N.Y.S. 2d 48 (1979). The insured sued his insurer for the wrongful termination of his disability benefits under a group accident and sickness policy. The Court of Appeals of New York held that even if a private right of damages existed under the Unfair Claim Settlement Practices Statute, one instance of misconduct would not constitute a "general business practice" within the meaning of the statute.

3. In Jenkins, supra, the West Virginia Supreme Court expressly rejected the principle set out in Royal Globe Insurance Co. v. Superior Court, supra, that a single violation provided a cause of action under the Unfair Claim Settlement Practices Statute. The court explained that the existence of a general business practice of unfair claim settlement could be established by proof of multiple violations on the same claim, or by proof of other company misconduct obtained from other claimants or attorneys who had



dealt with the company and its claims agents, or from a person who had knowledge of the company's business practices regarding claim settlement.

4. The Montana Supreme Court followed the Jenkins rationale in Klaudt v. Flink, 658 P.2d 1065 (Mont. 1983). Plaintiff, a passenger in an automobile driven by the insured while the insured was intoxicated, was killed when the car rolled over. When the insurer denied liability and refused to negotiate, the insured's personal representative brought suit under the unfair trade practices section of the Insurance Code. The Montana Supreme Court differed with other state courts in holding that a third party could sue the insurer before the insured's liability had been determined by litigation. However, the first step in a suit against the insurer would be a determination that the insurer's lack of good faith in settlement negotiations, or its other unfair trade practices, amounted to a general business practice. The court followed the same method for proving

such a general business practice as was set out in Jenkins.

5. Another instance of insurer misconduct under the statute is found in Kranzush v. Badger State Mutual Casualty Co., 103 Wis. 2d 56, 307 N.W.2d 256 (1981). The passenger in a car driven by her husband, the insured, was injured when the car struck a utility pole. She sued both her husband and his liability insurer. A second action was brought against the insurer after her death by the administrator of her estate. The plaintiff alleged that the insurer had knowledge that the woman was dying of cancer at the time of the accident, and that it was prolonging the first action in the hopes that she would die or become incapacitated before the trial. The Wisconsin Supreme Court held that the statutory sections relating to fair treatment of policyholders, and the administrative code section setting out unfair claim settlement practices, did not provide a private cause of action, but left enforcement up to the Insurance Commissioner, and required a



general business practice in order to be activated. However, the court did not foreclose the possibility that the insurer's treatment of a claimant in the course of handling a single claim could be considered a "business practice," though even then the court expressed doubt that this could be considered a "general" business practice.

6. In Minnesota, a deceptive trade practice or unfair claim settlement practice must also be a general business practice to be actionable. Morris v. American Family Mutual Insurance Co., 371 N.W.2d 620 (Minn. App. 1985). A single instance of insurer's refusal to defend does not provide a cause of action under the statute. United States Liability Insurance Co. v. Johnson and Lindberg, P.A., 617 F.Supp. 968 (D. Minn. 1985).

V. ENFORCEMENT OF THE ACTS

A. By The Insured

1. Aetna Casualty and Surety Co. v. Broadway Arms Corp., 281 Ark. 128, 664 S.W.2d 463 (1984) is one of the few cases that suggests that the Acts reserve a right of action for the insured alone. In this case the insurer initially advanced partial payments for the insured's loss of inventory due to a fire, but then ceased payments when it became involved in a dispute over the insured's ownership of some of the salvage. The insured filed suit under the Trade Practices Act, alleging that the insurer had refused in bad faith to pay the policy limits, had refused to release the salvage to the insured, and had threatened to report the insured to the IRS. The Arkansas Supreme Court held that the sections of the Trade Practices Act at issue only applied to first party claims in which the insurer fails or refuses to pay a claim but does so in good faith. However, the court went on to say that the insured, or any third party, could bring a separate action in tort based upon the insurer's bad faith, although the restrictive nature of the Trade Practices Act

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meant that any violation of it was not "necessarily" evidence of bad faith.

B. By The Commissioner Of Insurance

1. In Seeman v. Liberty Mutual Insurance Co., 322 N.W.2d 35 (Iowa 1982), plaintiff claimed that the insurer's unreasonable delay in payment of an agreed upon settlement of a workers' compensation claim constituted an unfair claim settlement practice under §507B.4(9)(f) of the Iowa Code. The Iowa Supreme Court held that, while a private cause of action would be "consistent with the underlying purpose" of Chapter 507B, the legislature had intended the Act to be enforced exclusively by "administrative sanctions." Furthermore, in both Brown Township Mutual Insurance Association v. Kress, 330 N.W.2d 291 (Iowa 1983) and Pirkl v. Northwestern Mutual Insurance Association, 348 N.W.2d 633 (Iowa 1984), the Iowa Supreme Court has refused to recognize an independent tort action based on the insurer's bad faith



failure to settle a claim with its own insured.

2. The case of Sheeran v. Progressive Life Insurance Co., 182 N.J. Super. 237, 440 A.2d 469 (1981) involved an appeal from an administrative law judge's finding that the insurer had committed 114 violations of the Unfair Claim Settlement Practices and Deceptive Practices statutes, resulting in injury to 17 claimants. The charges had been brought by the Commissioner of Insurance. The New Jersey Court held that while the Commissioner had not been specifically empowered by statute to order payment of individual claims, the action instituted by the Commissioner was an appropriate vehicle for the prosecution of the claims as a "limited class action." Furthermore, the 114 charges were allowed to stand as "distinctly different violations of the rights of a single individual" or violations of the rights of different persons.

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3. Another situation in which charges were brought by the Commissioner of Insurance against an insurer is found in Erie Insurance Exchange v. Sheppard, 394 A.2d 1075 (Pa. Cmwlth. 1978). There the Pennsylvania court found that the insurer's practice of subtracting the insureds' sick pay benefits from their no-fault automobile insurance claims constituted unfair discrimination between insureds of the same class in the amount of premiums charged or benefits payable. This was held to be a violation of the Unfair Insurance Practices Act.

4. In Texas, it appears that the plaintiff can sue the insurer so long as he/she picks the right statute. In Russell v. Hartford Casualty Insurance Co., 548 S.W.2d 737 (Tex. Civ. App. 1977), the plaintiff had been injured in a collision caused by the insured's negligence. The insurer initially provided plaintiff with a rental car at its own expense, then abruptly cancelled the offer one week later. The Texas court held that the plaintiff could not bring an action

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under the unfair claim settlement practices section of the Insurance Code, inasmuch as this could only be done by the State Board of Insurance. However, in Royal Globe Insurance Co. v. Bar Consultants, Inc., supra, it was held that the insured could bring its misrepresentation action against the insurer under both the deceptive trade practices section of the Insurance Code and the Deceptive Trade Practices Act.

5. In Wisconsin, the Unfair Claim Settlement Statute does not provide a private cause of action for the plaintiff against the insurer. Kranzush, supra. No private cause of action is likewise permitted in Michigan or Kansas. Young, supra; Spencer v. Aetna Life and Casualty Co., 227 Kan. 914, 611 P.2d 149 (1980).
6. In Tufts v. Madesco Investment Corp., 524 F.Supp. 484 (E.D. Mo. 1981) a federal court, noting that Missouri courts had not yet decided on whether a private cause of action existed under the Unfair Claims Settlement

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Act and the Unfair Insurance Practices Act, chose not to follow California's lead in Royal Globe Insurance Co. v. Superior Court, supra. The court read language in the statutes that left violators open to liability under "other laws of the state" to mean that no civil liability could arise from violations of the statutes. Furthermore, the court cited Young v. United States Fidelity and Guaranty Co., 588 S.W.2d 46 (Mo. App. 1979), which held that no such right existed under Missouri common law.

C. By A Third Party

1. In Jenkins, supra, the West Virginia Supreme Court held that the plaintiff, whose car was damaged in an accident caused by the insured, could sue the insurer for breaches of the Unfair Claim Settlement Practices Statute, but not until the underlying suit against the insured has been resolved.
2. In Montana, a third party can commence an action against the insurer either before,

concurrently with, or after a suit against the insured, since the insurer's violation of its statutory duty is independent of any wrongful act on the part of the insured. Klaudt, supra.

3. In Royal Globe Insurance Co. v. Chock Full O' Nuts Corp., 86 A.D.2d 315, 449 N.Y.S. 2d 740 (1982), the insurer sued for \$3.3 million in unpaid insurance premiums. The insured counterclaimed for damages for unfair claim settlement practices, alleging that the insurer failed to respond to insured's queries regarding the status of claims, failed to investigate claims promptly, and failed to effectuate prompt settlements when liability was reasonably clear. The court pointed out that while the Unfair Claim Settlement Practices Statute did not expressly create a private right of action for the insured against the insurer, recent New York cases allowed for the possibility of private damages actions. However, no such cause of action could be construed in this case, where the insured had alleged conduct that entailed



a breach of contract by virtue of the insurer's negligent handling of the insured's claims. Recall that in Sulner, supra, it was held that the insured does have a private cause of action under the recent deceptive acts and practices section of the New York General Business Law.

4. A contrary view is expressed in Spencer, supra, wherein the Kansas Supreme Court held that while no private right of action was permitted for breach of the unfair or deceptive acts or practices statutes, an insurer could violate the statutes through its negligent handling of a claim.
5. Royal Globe Insurance Co. v. Superior Court, supra, was the seminal case in which the California Supreme Court held that third parties could sue insurers directly for violations of the unfair claim settlement practices section of the Unfair Practices Act. However, the insurer could not be sued until the liability of the insured had been determined.

6. A recent statutory enactment in Florida, Fla. Stat. §624.155 (1982), permits any person to bring an action against an insurer engaging in unfair claim settlement practices, without being required to prove that such practices constitute a "general business practice." However, two federal cases heard subsequent to the new statute, Fortson v. St. Paul Fire and Marine Insurance Co., 751 F.2d 1157 (11th Cir. 1985), and Gregg v. Metropolitan Property and Liability Insurance Co., 595 F.Supp. 529 (D.C. Fla. 1984), were dismissed because the liability of the insureds had not been first established.
7. In Griswold v. Union Labor Life Insurance Co., 186 Conn. 507, 442 A.2d 920 (1982), a passenger in the insured's car claimed reimbursement for medical expenses under the state's no-fault statute. The insurer denied the claim on the basis of the policy provision excluding coverage for "basic reparations benefits" called for by the statute, and because the plaintiff failed to carry her own insurance as required by the statute.

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The insured brought suit under the unfair trade practices and unfair claim settlement practices sections of the General Statutes. The Connecticut Supreme Court held that the insured did not have to exhaust administrative remedies through the Commissioner of Insurance before bringing suit directly against the insurer. This was especially true since the statutes did not authorize the Commissioner to seek or award any damages.

8. In Minnesota, a person injured by the insurer's violation of the Unfair Claims Practices Act can bring an action for damages so long as the violation can be shown to be a "general business practice." Morris, supra.

9. In Young, supra, the Michigan court held that the unfair trade practices statutes did not permit a private cause of action, nor could an insurer bring a separate cause of action in tort. However, the court cited prior decisions which permitted an insured to sue the insurer where the insurer refuses in bad

faith to settle with a third party, thus exposing the insured to excess liability.

10. The right of a third party to bring suit against the insurer extends to representatives of that party.

a. In Carr v. Progressive Casualty Insurance Co., 152 Cal. App.3d 881, 199 Cal. Rptr. 835 (1984), the passenger in the insured's car made demand on the insurer for his injuries, but the insurer made no offer of settlement. Meanwhile, the passenger committed suicide, and the administrator of his estate was substituted as plaintiff in the action against the insured. After the arbitrator gave the plaintiff an award greater than the belated settlement offer, plaintiff filed suit against the insurer for failure to promptly settle. The court held that the cause of action survived the death of the passenger even though it did not arise during his lifetime.

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- b. Similarly, Coleman v. Gulf Insurance Group, 200 Cal. Rptr. 619 (Cal. App. 2 Dist. 1984) involved a suit against the insurer by the third party's heirs; and Garden State Community Hospital v. Watson, 191 N.J. Super. 1225, 465 A.2d 1225 (1983) involved a "third party action" by the insured against the insurer for its initial failure to pay the first party claim, resulting in a suit against the insured by the hospital.

VI. SUGGESTIONS ON HOW TO AVOID LIABILITY UNDER THE ACTS

A. Insurers

1. Processing Claims

- a. Do not delay the processing of claims.

- i. In Schlauch v. Hartford Accident and Indemnity Co., 146 Cal. App.3d 926, 194 Cal. Rptr. 658 (1983), the court held that the plaintiff could

recover for the insurer's failure to acknowledge and act promptly upon communications with respect to claims, and for its failure to adopt reasonable standards for the prompt investigation and processing of claims, among other charges, if the insured could show he had suffered damages before the insurer had rectified the initial violations of its duties.

- ii. Similarly, in Chub v. Electric Insurance Co., 17 Mass. App. 61, 455, N.E.2d (1983), the insured could not recover under the Unfair Claim Settlement Statute without showing that he had been adversely affected by the violations.

2. Coverage

- a. Do not delay the affirmance or denial of coverage. In Schlauch, supra, the court held that the plaintiff could recover



against the insurer for its failure to affirm or deny coverage "within a reasonable time of a claim," if he could show he was damaged by the delay.

b. Be cautious in representing to claimants any facts or policy provisions relating to coverage. Both Newsom v. Republic Financial Services, 497 N.Y.S. 2d 830 (N.Y. Sup.Ct. 1985) and Russell v. Hartford Casualty Insurance Co., supra, involved third party actions against the insured that alleged violations of the Unfair Claim Settlement Practices Statute for knowing misrepresentations of facts and provisions relating to coverage under the insureds' policies.

c. Failure to deny coverage does not create insurance where there is none. In Hessley v. Travelers Indemnity Co., 468 So.2d 456 (Fla. App. 3 Dist. 1985), the court held that the insurer's initial failure to deny insurance coverage and its actions in defending the claim did

not constitute prejudice to the putative insured, by preventing him from taking advantage of settlement opportunities, so as to create "insurance by estoppel."

3. Settlement

a. Do not refuse to settle.

i. In Pirkl, supra, the insured failed to settle in the belief that the insured's failure to file a timely proof of loss and to produce proof that the loss was caused by theft meant that the claim could be disallowed. The Iowa Supreme Court held that the claim was not barred in the absence of a showing of prejudice to the insurer, and that punitive damages might be assessed against the insurer where the insurer's failure to settle was accompanied by bad faith as well as "positive misconduct of a malicious, illegal or immoral nature."



ii. Similarly, the Arkansas Supreme Court, in Aetna, supra, held that the insurer's bad faith failure to pay the policy limits did not preclude a separate action in tort for "bad faith."

b. However, there is no duty imposed on the insurer to settle in excess of the policy limits. Schlauch, supra.

c. Do not refuse to negotiate. In Klaudt, supra, it was held that a third party had a cause of action against the insurer for its refusal to negotiate, and that this action could be brought regardless of the liability of the insured.

d. Settle claims expeditiously once liability has become "reasonably clear." This is apparently the most frequently made claim brought under the Unfair Claim Settlement Practices Act. That delays in settling are of no avail is evident

from such decisions as Carr and Kranzush, supra, in which the actions against the insurers survived the death of the claimants.

- e. However, the duty to settle promptly does not impose a duty to make partial payments, so long as there is an honest dispute about the amount of the loss. This was held to be so in Cohen v. New York Property Insurance Underwriting Association, 65 A.D.2d 71, 410 N.Y.S. 2d 597 (1978), even though the delay in making payments to cover the cost of repairs resulted in increased water damage to the premises and citations by the Department of Rent and Housing Maintenance of the City of New York. No "affirmative duty" to make partial payments was imposed upon the insurer by virtue of the Unfair Claim Settlement Practices Statute.

- f. Furthermore, in Cohen, the aggravated circumstances resulting from the

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insurer's delay in making the payments did not require the insurer to waive the 60-day period between the insurer's receipt of the proof of loss and the obligation to pay pursuant to a standard fire policy. Similarly, in Amsden v. Grinnell Mutual Reinsurance Co., 203 N.W.2d 252 (Iowa 1972), the insurer was held to be not guilty of "outrageous conduct" in waiting a reasonable period of time for an arson investigation before paying a fire loss claim.

- g. Do not make the settlement too low.
 - i. Both Schlauch and Chub, supra, involved allegations that the settlement offers were extremely low. However, the courts in both cases required the claimant to show damage as a result of the insurer's alleged violations.
 - ii. On the other hand, the insurer's employees were found guilty of

maliciously "low-balling" the plaintiff's claim in Frizzy Hair-stylists, supra, in order to force plaintiff out of business and to push it into litigation. Thus, the plaintiff was entitled to an award of punitive damages.

4. Litigation

- a. Do not put disclaimers in the policy that are so restrictive as to be construed as forcing claimant to litigate. This was the charge made by insureds who brought suit as subrogees of claimants against the defendant-insurer in Cosmopolitan Mutual Insurance Co. v. Nassau Insurance Co., 99 Misc. 2d 1018, 417 N.Y.S. 2d 835 (N.Y. App. Term. 1979). The court required the charge to be brought by the State Superintendent of Insurance.
- b. Do not prolong the litigation without a good reason. In Kranzush, supra, the



insurer allegedly prolonged litigation hoping that the claimant would not live to see the trial. She did not, but, as we have seen, depending on the state, the cause of action could go on without her, or the insurer could be prosecuted by the Commissioner of Insurance.

B. Agents

1. Do not state or imply that there is coverage before the investigation starts. The subsequent denial of coverage could give rise to an action of misrepresentation. Royal Globe Insurance Co. v. Barr Consultants, Inc., supra.
2. Be sure that notice of cancellation is sent to the right party. In Whistman, supra, the notice of cancellation had been sent to a lienholder, but not to the personal representative of the insured. Thus the insurer was potentially exposed to liability for unfair claim settlement practices. In addition, the failure to send the notice ten days prior to

the cancellation meant that the loss was covered by the policy, when the policy might otherwise have been held to be cancelled.

3. Be sure the correspondence in relation to a claim or policy is consistent. In Whistman, supra, there was ample correspondence to contradict the insurer's claim that the policy had been cancelled.

C. Adjusters

1. Do not delay the investigation. In Sulner, supra, a five-month delay in the commencement of an investigation was a part of the litany of misconduct that was the foundation of an action under the Deceptive Acts or Practices statute.
2. Try to avoid the influence of hearsay in making your investigation. In Frizzy Hair-stylists, supra, the fact that the adjuster had heard about the suggestion of arson in the fire marshal's report was not offset by the adjuster's testimony that he had



confirmed the arson charge with his own observations, inasmuch as the report was not ultimately found to contain enough evidence to support the arson theory.

3. Do not affirm or deny coverage during the investigation. In Sulner, supra, the adjuster allegedly denied coverage on his first visit to the premises.

4. Do not induce the claimant to act or fail to act so as to allow the claim to expire.
 - a. In Johnson v. Kentner, 71 Or. App. 61, 691 P.2d 499 (1984), the plaintiff was injured by a snowmobile owned by the insured. The insurer contacted the plaintiff and began making payments for plaintiff's medical expenses. At the same time, the insurer advised the plaintiff of the limitations period for bringing suit. When the insured expressed concern over the approach of the expiration of the period, the insurer extended the period. Prior to the

expiration of the second extension, the plaintiff retained an attorney who commenced settlement negotiations. The insured believed that these negotiations satisfied the deadline. The attorney met with the adjuster only once. Then the second extension ran out and the insurer discontinued negotiations. The Oregon Supreme Court found that the adjuster had not acted to induce the attorney not to file suit, nor did the adjuster's silence about the imminent end of the second extension period mean that the insurer was estopped from asserting the limitations defense. The insurer may have committed an unfair trade practice by failing to comply with the statutory requirement of providing written notice of the expiration of the time limit at least 30 days before it occurred. However, this violation did not prevent the insurer from asserting the limitations defense.

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b. A contrary result obtained in Pellegrin v. Cashway Pharmacy for Franklin, Inc., 396 So.2d 371 (La. App. 1981) (reported in Bergadano, The Exposure of the Adjuster or Other Claim Person to Personal Liability, DRI DEFENSE PRACTICE SEMINAR No. 85-13 (1985)). The plaintiff was suing the insured pharmacy in which he had been injured. In a settlement discussion, the adjuster told her to come back after her medical treatment was completed. When she did so, the insurer refused settlement of the claim on the ground that the statute of limitations had expired. The court held that the plaintiff could amend her pleadings to allege a breach of duty on the part of the adjuster in failing to inform her of the limitations period.

5. The Johnson case cited above also provides another suggestion for the adjuster: Do not make any remarks that could be construed as a promise that settlement will be reached. In that case it was found that the adjuster had

made no representations that the case would be settled or that a lawsuit would not be necessary.

6. Do not suggest to the claimant that settlement will be a lengthy process so long as the claimant insists on the amount of his/her claim. The possible result of such an inducement to settlement is the mammoth verdict awarded to the claimant in Hornis, supra.

7. Do not be negligent in handling any claim. While mere negligence did not give rise to a cause of action against the insurer in Royal Globe Insurance Co. v. Chock Full O' Nuts Corp., supra, the case of Continental Insurance Co. v. Bayless and Roberts, Inc., 608 P.2d 280 (Ala. 1980) (reported in Bergadano, supra) suggests that some courts consider the adjuster's negligent handling of a claim to be a breach of fiduciary duty that can be considered in determining an award against the insurer.



D. Claims Managers

1. Do not deny coverage with the idea that you can always allow it later. This stance can result in an action under the Unfair Claim Settlement Practices Statute. Farris, supra.

2. Avoid writing notes, reports, memos, etc., that can be later characterized as contrived or self-serving. Hornis, supra.

E. As a final note, it must be reported that, at present, few if any courts will allow employees of insurers to be held personally liable for bad faith in the handling of claims, at least in the absence of any fraud or conspiracy to defraud a claimant. Bergadano, supra.

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CHAPTER 507B. INSURANCE TRADE PRACTICES

Section		Section	
507B.1	Declaration of purpose	507B.7	Cease and desist orders and modifications thereof.
507B.2	Definitions.	507B.8	Judicial review of cease and desist orders.
507B.3	Unfair competition or unfair and deceptive acts or practices prohibited	507B.9.	Sale of duplicate coverage prohibited.
507B.4	Unfair methods of competition and unfair or deceptive acts or practices defined.	507B.10	Repealed.
507B.5.	Favored agent or insurer—coercion of debtors	507B.11	Penalty.
507B.6	Hearings, witnesses appearances, production of books and service of process.	507B.12	Rules.
		507B.13	Immunity from prosecution.
		507B.14.	Transfer of insurance stock.

507B.1. Declaration of purpose

The purpose of this chapter is to regulate trade practices in the business of insurance in accordance with the intent of Congress as expressed in the Act of Congress of March 9, 1945 (Public Law 15, 79th Congress)¹, by defining, or providing for the determination of, all such practices in this state which constitute unfair methods of competition or unfair or deceptive acts or practices and by prohibiting the trade practices so defined or determined.

507B.2. Definitions

When used in this chapter:

1. "Person" shall mean any individual, corporation, association, partnership, reciprocal exchange, interinsurer, fraternal beneficiary association, and any other legal entity engaged in the business of insurance, including agents, brokers and adjusters. "Person" shall also mean any corporation operating under the provisions of chapter 514 and any benevolent association as defined and operated under chapter 512A. For purposes of this chapter, corporations operating under the provisions of chapter 514 and chapter 512A shall be deemed to be engaged in the business of insurance.

2. "Commissioner" shall mean the commissioner of insurance of this state.

3. "Insurance policy" or "insurance contract" shall mean any contract of insurance, indemnity, subscription, membership, suretyship, or annuity issued, proposed for issuance, or intended for issuance by any person.

507B.3. Unfair competition or unfair and deceptive acts or practices prohibited

No person shall engage in this state in any trade practice which is defined in this chapter as, or determined pursuant to section 507B.6 of this chapter to be, an unfair method of competition, or an unfair or deceptive act or practice in the business of insurance.

The commissioner shall have power to examine and investigate into the affairs of every person engaged in the business of insurance in this state in order to determine whether such person has been or is engaged in any unfair method of competition or in any unfair or deceptive act or practice prohibited by this section

507B.4. Unfair methods of competition and unfair or deceptive acts or practices defined

The following are hereby defined as unfair methods of competition and unfair or deceptive acts or practices in the business of insurance:

1. **Misrepresentations and false advertising of insurance policies.** Making, issuing, circulating, or causing to be made, issued or circulated, any estimate, illustration, circular, statement, sales presentation, omission, or comparison which does any of the following:

a Misrepresents the benefits, advantages, conditions, or terms of any insurance policy.

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CHAPTER "I"
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b Misrepresents the dividends or share of the surplus to be received on any insurance policy.

c Makes any false or misleading statements as to the dividends or share of surplus previously paid on any insurance policy.

d. Is misleading or is a misrepresentation as to the financial condition of any person, or as to the legal reserve system upon which any life insurer operates.

e. Uses any name or title of any insurance policy or class of insurance policies misrepresenting the true nature thereof

f. Is a misrepresentation for the purpose of inducing or tending to induce the lapse, forfeiture, exchange, conversion, or surrender of any insurance policy.

g Is a misrepresentation for the purpose of effecting a pledge or assignment of or effecting a loan against any insurance policy.

h Misrepresents any insurance policy as being shares of stock.

2. **False information and advertising generally.** Making, publishing, disseminating, circulating or placing before the public, or causing, directly or indirectly, to be made, published, disseminated, circulated, or placed before the public in a newspaper, magazine or other publication, or in the form of a notice, circular, pamphlet, letter or poster, or over any radio or television station, or in any other way, an advertisement, announcement or statement containing any assertion, representation, or statement with respect to the business of insurance or with respect to any person in the conduct of his insurance business, which is untrue, deceptive or misleading.

3. **Defamation.** Making, publishing, disseminating, or circulating, directly or indirectly, or aiding, abetting or encouraging the making, publishing, disseminating, or circulating of any oral or written statement or any pamphlet, circular, article or literature which is false, or maliciously critical of or derogatory to the financial condition of any person, and which is calculated to injure such person.

4. **Boycott, coercion and intimidation.** Entering into any agreement to commit, or by any concerted action committing, any act of boycott, coercion or intimidation resulting in or tending to result in unreasonable restraint of, or monopoly in, the business of insurance.

5. **False statements and entries.**

a. Knowingly filing with any supervisory or other public official, or knowingly making, publishing, disseminating, circulating or delivering to any person, or placing before the public, or knowingly causing directly or indirectly, to be made, published, disseminated, circulated, delivered to any person, or placed before the public, any false material statement of fact as to the financial condition of a person.

b Knowingly making any false entry of a material fact in any book, report or statement of any person or knowingly omitting to make a true entry of any material fact pertaining to the business of such person in any book, report or statement of such person.

6. **Stock operations and advisory board contracts.** Issuing or delivering or permitting agents, officers or employees to issue or deliver, agency company stock or other capital stock, or benefit certificates or shares in any common law corporation, or securities or any special or advisory board contracts or other contracts of any kind promising returns and profits as an inducement to insurance

7. **Unfair discrimination.**

a. Making or permitting any unfair discrimination between individuals of the same class and equal expectation of life in the rates charged for any contract of life insurance or of life annuity or in the dividends or other benefits payable thereon, or in any other of the terms and conditions of such contract.

b. Making or permitting any unfair discrimination between insureds of the same class for essentially the same hazard in the amount of premium, policy fees, or rates charged for any policy or contract of insurance other than life or in the benefits payable thereunder, or in any of the terms or conditions of such contract, or in any other manner whatever.

8. **Rebates.**

a. Except as otherwise expressly provided by law, knowingly permitting or offering to make or making any contract of life insurance, life annuity or accident and health insurance, or agreement as to such contract other than as plainly expressed in the contract issued thereon, or paying or allowing, or giving or offering to pay, allow, or give, directly or indirectly, as inducement to such insurance, or annuity, any rebate of premiums payable on the contract, or any special favor or advantage in the dividends or other benefits thereon, or any valuable consideration or inducement whatever not specified in the contract; or giving, or selling, or purchasing or offering to give, sell, or purchase as inducement to such insurance or annuity or in connection therewith, any stocks, bonds, or other securities of any insurance company or other corporation, association, or partnership, or any dividends or profits accrued thereon, or any thing of value whatsoever not specified in the contract.

b. Nothing in subsection 7 or paragraph "a" of this subsection shall be construed as including within the definition of discrimination or rebates any of the following practices:

(1) In the case of any contract of life insurance or life annuity, paying bonuses to policyholders or otherwise rebating their premiums in whole or in part out of surplus accumulated from nonparticipating insurance, provided that any such bonuses or rebatement of premiums shall be fair and equitable to policyholders and for the best interests of the company and its policyholders

(2) In the case of life insurance policies issued on the industrial debit plan, making allowance to policyholders who have continuously for a specified period made premium payments directly to an office of the insurer in an amount which fairly represents the saving in collection expenses.

(3) Readjustment of the rate of premium for a group insurance policy based on the loss or expense experienced thereunder, at the end of the first or any subsequent policy year of insurance thereunder, which may be made retroactive only for such policy year.

9. **Unfair claim settlement practices.** Committing or performing with such frequency as to indicate a general business practice any of the following:

a. Misrepresenting pertinent facts or insurance policy provisions relating to coverages of issue.

b. Failing to acknowledge and act reasonably promptly upon communications with respect to claims arising under insurance policies.

c. Failing to adopt and implement reasonable standards for the prompt investigation of claims arising under insurance policies.

d. Refusing to pay claims without conducting a reasonable investigation based upon all available information.

e. Failing to affirm or deny coverage of claims within a reasonable time after proof of loss statements have been completed.

f. Not attempting in good faith to effectuate prompt, fair and equitable settlements of claims in which liability has become reasonably clear.

g. Compelling insureds to institute litigation to recover amounts due under an insurance policy by offering substantially less than the amounts ultimately recovered in actions brought by such insureds.

h. Attempting to settle a claim for less than the amount to which a reasonable person would have believed the person was entitled by reference to written or printed advertising material accompanying or made part of an application.

i. Attempting to settle claims on the basis of an application which was altered without notice to, or knowledge or consent of the insured.

j. Making claims payments to insureds or beneficiaries not accompanied by a statement setting forth the coverage under which payments are being made.

k. Making known to insureds or claimants a policy of appealing from arbitration awards in favor of insureds or claimants for the purpose of compelling them to accept settlements or compromises less than the amount awarded in arbitration.



l. Delaying the investigation or payment of claims by requiring an insured, claimant, or the physician of either to submit a preliminary claim report and then requiring the subsequent submission of formal proof of loss forms, both of which submissions contain substantially the same information.

m. Failing to promptly settle claims, where liability has become reasonably clear, under one portion of the insurance policy coverage in order to influence settlements under other portions of the insurance policy coverage.

n. Failing to promptly provide a reasonable explanation of the basis in the insurance policy in relation to the facts or applicable law for denial of a claim or for the offer of a compromise settlement.

10. **Misrepresentation in insurance applications.** Making false or fraudulent statements or representations on or relative to an application for an insurance policy, for the purpose of obtaining a fee, commission, money, or other benefit from any insurer, agent, broker, or individual.

11. Any violation of section 515A.16.

507B.5. Favored agent or insurer—coercion of debtors

1. No person may do any of the following:

a. Require, as a condition precedent to the lending of money or extension of credit, or any renewal thereof, that the person to whom such money or credit is extended or whose obligation the creditor is to acquire or finance, negotiate any policy or contract of insurance through a particular insurer or group of insurers or agent or broker or group of agents or brokers.

b. Unreasonably disapprove the insurance policy provided by a borrower for the protection of the property securing the credit or lien.

c. Require directly or indirectly that any borrower, mortgagor, purchaser, insurer, broker, or agent pay a separate charge, in connection with the handling of any insurance policy required as security for a loan on real estate, or pay a separate charge to substitute the insurance policy of one insurer for that of another.

d. Use or disclose information resulting from a requirement that a borrower, mortgagor or purchaser furnish insurance of any kind on real property being conveyed or used as collateral security to a loan, when such information is to the advantage of the mortgagee, vendor, or lender, or is to the detriment of the borrower, mortgagor, purchaser, insurer, or the agent or broker complying with such a requirement.

2. Subsection 1, paragraph "c" of this section does not include the interest which may be charged on premium loans or premium advancements in accordance with the security instrument.

3. For purposes of subsection 1, paragraph "b" of this section, such disapproval shall be deemed unreasonable if it is not based solely on reasonable standards uniformly applied, relating to the extent of coverage required and the financial soundness and the services of an insurer. Such standards shall not discriminate against any particular type of insurer, nor shall such standards call for the disapproval of an insurance policy because such policy contains coverage in addition to that required.

4. If a violation of this section is found, the person in violation shall be subject to the same procedures and penalties as are applicable to other provisions of this chapter.

5. For purposes of this section, "person" includes any individual, corporation, association, partnership, or other legal entity.

507B.6. Hearings, witnesses appearances, production of books and service of process

1. Whenever the commissioner shall have reason to believe that any such person has been engaged or is engaging in this state in any unfair method of competition or any unfair or deceptive act or practice whether or not defined in section 507B.4 or 507B.5 and that a proceeding by him in respect thereto would be to the interest of the public, he shall

issue and serve upon such person a statement of the charges in that respect and a notice of a hearing thereon to be held at a time and place fixed in the notice, which shall not be less than ten days after the date of the service thereof

2. At the time and place fixed for such hearing, such person shall have an opportunity to be heard and to show cause why an order should not be made by the commissioner requiring such person to cease and desist from the acts, methods or practices so complained of. Upon good cause shown, the commissioner shall permit any person to intervene, appear and be heard at such hearing by counsel or in person.

3. Nothing contained in this chapter shall require the observance at any such hearing of formal rules of pleading or evidence.

4. The commissioner, upon such hearing, may administer oaths, examine and cross-examine witnesses, receive oral and documentary evidence, and shall have the power to subpoena witnesses, compel their attendance, and require the production of books, papers, records, correspondence, or other documents which he deems relevant to the inquiry. The commissioner, upon such hearing, may, and upon the request of any party shall, cause to be made a stenographic record of all the evidence and all the proceedings had at such hearing. If no stenographic record is made and if a judicial review is sought, the commissioner shall prepare a statement of the evidence and proceeding for use on review. In case of a refusal of any person to comply with any subpoena issued hereunder or to testify with respect to any matter concerning which he may be lawfully interrogated, the district court of Polk county or the county where such party resides, on application of the commissioner, may issue an order requiring such person to comply with such subpoena and to testify; and any failure to obey any such order of the court may be punished by the court as a contempt thereof.

5. Statements of charges, notices, orders, and other processes of the commissioner under this chapter may be served by anyone duly authorized by the commissioner, either in the manner provided by law for service of process in civil actions, or by mailing a copy thereof by restricted certified mail to the person affected by such statement, notice, order, or other process at his or its residence or principal office or place of business. The verified return by the person so serving such statement, notice, order, or other process, setting forth the manner of such service, shall be proof of the same, and the return receipt for such statement, notice, order or other process, and mailed by restricted certified mail as aforesaid, shall be proof of the service of the same.

507B.7. Cease and desist orders and modifications thereof

1. If, after such hearing, the commissioner shall determine that the person charged has engaged in an unfair method of competition or an unfair or deceptive act or practice, he shall reduce his findings to writing and shall issue and cause to be served upon the person charged with the violation a copy of such findings, an order requiring such person to cease and desist from engaging in such method of competition, act or practice and if the act or practice is a violation of section 507B.4 or 507B.5, the commissioner may at his discretion order any one or more of the following:

a. Payment of a civil penalty of not more than one thousand dollars for each act or violation, but not to exceed an aggregate of ten thousand dollars, unless the person knew or reasonably should have known he or she was in violation of section 507B.4 or 507B.5, in which case the penalty shall be not more than five thousand dollars for each act or violation, but not to exceed an aggregate penalty of fifty thousand dollars in any one six-month period. The commissioner shall, if the commissioner finds the violations of section 507B.4 or 507B.5 were directed, encouraged, condoned, ignored, or ratified by the employer of the person or by an insurer, also assess a fine to the employer or insurer.

b. Suspension or revocation of the license of a person as defined in section 507B.2, subsection 1, if he knew or reasonably should have known he was in violation of section 507B.4 or section 507B.5.

2. Until the expiration of the time allowed under section 507B.8 for filing a petition for review if no such petition has been duly filed within such time, or, if a petition for review has been filed within such time, then until the transcript of the record in the proceeding has been filed in the district court, as hereinafter provided, the commissioner may at any time, upon such notice and in such manner as he may deem proper, modify or set aside in whole or in part any order issued by him under this section.



3. After the expiration of the time allowed for filing such a petition for review if no such petition has been duly filed within such time, the commissioner may at any time, after notice and opportunity for hearing, reopen and alter, modify, or set aside, in whole or in part, any order issued by him under this section, whenever in his opinion conditions of fact or of law have so changed as to require such action, or if the public interest shall so require.

507B.8. Judicial review of cease and desist orders

Judicial review of the actions of the commissioner may be sought in accordance with the terms of the Iowa administrative procedure Act¹ To the extent that an order of the commissioner is affirmed in any judicial review proceeding, the court shall thereupon issue its own order commanding obedience to the terms of such order of the commissioner.

After the period for judicial review of an order of the commissioner has expired and no petition for judicial review has been filed, the attorney general upon request of the commissioner of insurance shall proceed in the Iowa district court to enforce an order of the commissioner. The court shall enter its order commanding obedience to the terms of the commissioner's order.

No order of the commissioner under this chapter or order of a court to enforce the same shall in any way relieve or absolve any person affected by such order from any liability under any other laws of this state.

507B.9. Sale of duplicate coverage prohibited

1. A person shall not knowingly engage in the sale of duplicate medicare supplement insurance coverage, as defined by rule of the commissioner.

2. The commissioner of insurance shall adopt rules pursuant to chapter 17A which define the sale of duplicate medicare supplement insurance coverage.

507B.10. Repealed by Acts 1974 (65 G.A.) ch. 1090, § 211, eff. July 1, 1975

The repealed section relating to judicial review by intervenor, was enacted by Acts 1955 (56 G.A.) ch. 237 § 10. and amended by Acts 1972 (64 G.A.) ch. 1111 § 8

1111 § 8 related to judicial review by intervenor Subject matter is now covered by Iowa Administrative Procedure Act (§ 17A.1 et seq)

This section, derived from Acts 1955 (56 G.A.) ch. 237, § 10, amended by Acts 1972 (64 G.A.) ch

507B.11. Penalty

Any person who violates a cease and desist order of the commissioner under section 507B.7, and while such order is in effect may after notice and hearing and upon order of the commissioner be subject at the discretion of the commissioner to any one or more of the following:

1. A monetary penalty of not more than ten thousand dollars for each and every act or violation.

2. Suspension or revocation of such person's license.

507B.12. Rules

The commissioner may, after notice and hearing, promulgate reasonable rules, as are necessary or proper to identify specific methods of competition or acts or practices which are prohibited by section 507B.4 or 507B.5, but the rules shall not enlarge upon or extend the provisions of such sections. Such rules shall be subject to review in accordance with chapter 17A.

The powers vested in the commissioner by this chapter shall be additional to any other powers to enforce any penalties, fines or forfeitures authorized by law with respect to the methods, acts and practices hereby declared to be unfair or deceptive



507B.13. Immunity from prosecution

If any person shall ask to be excused from attending and testifying or from producing any books, papers, records, correspondence or other documents at any hearing on the ground that the testimony or evidence required of him may tend to incriminate him or subject him to a penalty or forfeiture, and shall notwithstanding be directed to give such testimony or produce such evidence, he must nonetheless comply with such direction, but he shall not thereafter be prosecuted or subjected to any penalty or forfeiture for or on account of any transaction, matter or thing concerning which he may testify or produce evidence pursuant thereto, and no testimony so given or evidence produced shall be received against him upon any criminal action, investigation or proceeding, provided, however, that no such individual so testifying shall be exempt from prosecution or punishment for any perjury committed by him while so testifying and the testimony or evidence so given or produced shall be admissible against him upon any criminal action, investigation or proceeding concerning such perjury, nor shall he be exempt from the refusal, revocation or suspension of any license, permission or authority conferred, or to be conferred, pursuant to the insurance law of this state. Any such individual may execute, acknowledge and file in the office of the commissioner a statement expressly waiving such immunity or privilege in respect to any transaction, matter or thing specified in such statement and thereupon the testimony of such person or such evidence in relation to such transaction, matter or thing may be received or produced before any judge or justice, court, tribunal, grand jury or otherwise, and if so received or produced such individual shall not be entitled to any immunity or privilege on account of any testimony he may so give or evidence so produced

507B.14. Transfer of insurance stock

When a controlling interest in two or more corporations, at least one of which is an insurance company domiciled in this state, is held by any person, group of persons, firm, or corporation, no exchange of stock, transfer or sale of securities, or loan based upon securities of any such corporation shall take place between such corporations, or between such person, group of persons, firm or corporation and such corporations, without first securing the approval of the insurance commissioner. If, in the opinion of the insurance commissioner, such sale, transfer, exchange, or loan would be improper and would work to the detriment of any such insurance company, he shall have the power to prohibit the transaction. Any person, firm or corporate officer or director aiding such transaction carried out without approval of the insurance commissioner shall be deemed guilty of a felony and upon conviction punished as provided in section 502 605.

For purposes of this section, controlling interest means actual control or the possession directly or indirectly of the power to direct or cause the direction of the management and policies of a firm, partnership, corporation, association, or trust, whether through the ownership of voting securities, by contract, or otherwise



ANNUAL APPELLATE DECISIONS REVIEW

October 1985 - October 1986
371 N.W.2d through 391 N.W.2d

By
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ADMINISTRATIVE LAW

Heath v. State, 372 N.W.2d 265 (Iowa 1985).

Application for post conviction relief, challenging revocation of parole, should be treated as a petition for judicial review of a contested case proceeding, even though post conviction act refers to the unlawful revocation of parole as a basis for relief.

Sturtz v. Iowa Department of Revenue, 373 N.W.2d 131 (Iowa 1985)

Sales and Use Taxes.

Sale by manufacturer of modular homes was held to be subject to Iowa sales tax when homes were manufactured in Wisconsin but delivered to wholesaler at site determined by ultimate consumer and removed from manufacturer's trucks by wholesaler's equipment.

El-View Construction Company v. North Scott Community School District, 373 N.W.2d 138 (Iowa 1985)

Construction Bidding.

Supreme Court held that unsuccessful bidder lacks standing to challenge legality of bidding procedures, but taxpayers within the district have standing. Supreme Court also held that while district erred in not requiring performance bonds, claim was moot because work had to be undone, contractors had been paid, no claims have been filed, and bonds if posted would have been returned by time of trial. Supreme Court also held that, assuming construction contracts were void, payment to contractors precludes recovery back from contractors, at least where general-assessment taxpayer are involved. Recovery from board members requires showing of fraud, bad faith, or personal profit. DICTA: on difference between void and voidable contracts.



Hettinga v. Dallas County Board of Adjustment, 375 N.W.2d 293 (Iowa App. 1985).

Open Meetings Law

Gathering of majority of members of board behind closed doors in room adjoining public hearing room was not a "meeting" for purposes of open meetings law when no deliberation or action occurred, even though law governing special use permits was discussed.

Veach v. Iowa DOT, 374 N.W.2d 248 (Iowa 1985).

DOT-Work Permits

DOT regulation denying work permit to driver who refused test did not violate equal protection.

Cruise v. Iowa DOT, 390 N.W.2d 602 (Iowa App. 1986)

License Revocation - Work Permits

DOT regulation denying work permit to driver who refused test was not ultra vires. Issue is different than issue in Veach, since the test for ultra vires is whether rational agency could conclude that rule was within its delegated authority.

Nugent v. Iowa DOT, 390 N.W.2d 125 (Iowa 1986)

License Revocation

License was properly revoked upon showing of test results of 0.102, even though test allegedly has margin of error of 0.005. Statute requires revocation when test results show 0.10 or more. Statute does not require DOT to prove 100% accuracy of results. Criminal cases that require consideration of margin of error are not applicable in administrative proceeding.

Rozinek v. Iowa DOT, 390 N.W.2d 594 (Iowa 1986)

License Revocation

Petitioners who were older than 19 and had their licenses revoked for drunk driving sought temporary restricted driving permits. Statute authorizing such permits limits their availability to drivers 19 or younger. HELD: Statute will not be interpreted to apply to older drivers. Statute complements revocation statute that provides that revocation shall be for the period provided by law or until the driver reaches the age of 19, whichever period is longer.

ADMINISTRATIVE PROCEDURE

Cerro Gordo County Care Facility v. Department of Job Service, 374 N.W.2d 673 (Iowa 1985).

Employer's failure to properly serve employee a copy of application for rehearing before agency did not deprive district court of jurisdiction over petition for judicial review, when petition was filed within thirty days of agency's initial decision. No question of exhaustion of administrative remedies involved because rehearing is not a prerequisite to judicial review of job service decisions.

Studer v. Iowa DOT, 378 N.W.2d 300 (Iowa 1985).

Discovery.

Discovery procedures set forth in rules 136 through 138 are not applicable to or available in judicial review proceedings of a contested case determination by an administrative agency.

Maschino v. George A. Hormel & Co, 372 N.W.2d 256 (Iowa 1985).

Judicial Review (see Labor for facts).

On judicial review of 11 consolidated unemployment compensation cases, parties submitted a statement of agreed facts

and submitted only those facts with single legal issue to court for disposition. District court did not review entire records of the 11 tested case proceedings. Supreme Court notes that caution must be used in applying rules on the use of pre-trial proceedings and agreed statements of fact, designed for use in original actions, while exercising of appellate jurisdiction in the judicial review of administrative proceedings. Parties and the court are not "entirely" at liberty to present a record different from that produced by the administrative proceeding.

Iowa Planners Network v. Iowa State Commerce Commission, 373 N.W.2d 106 (Iowa 1985)

Decision in contested case proceedings do not have the same binding effect as rules and are of limited precedental value.

Miller v. Civil Constructors, 373 N.W.2d 115 (Iowa 1985)

Administrative Appeals.

Rule requiring timely receipt (as opposed to mailing) of notice of appeal was held to be a reasonable interpretation of statute.

Hoefler v. Sioux City Community School District, 375 N.W.2d 222 (Iowa 1985).

Certiorari - School Board

Conduct of school board in awarding a group health insurance contract could be reviewed by petition for certiorari. RATIONALE: board may have exercised a quasi-judicial function in determining that prevailing bidder was authorized to do such insurance business in Iowa. COMMENT: Court expressly noted that issue of exclusivity of administrative remedies under Chapter 19A had not been raised.

Heidemann v. Sweitzer, 375 N.W.2d 665 (Iowa 1985).

Preclusion

In drunk driving prosecution, district court determined that officer had not complied with implied consent procedures. HELD: Decision not preclusive in DOT revocation of driver's license. Legislature has allocated jurisdiction for license revocation to DOT, which gives it right to make independent determination as to compliance with consent procedures. Also, burden on issue of consent procedure is on state in criminal prosecution but on driver in revocation proceeding.

Saemisch v. Ley Motor Co., 387 N.W.2d 357 (Iowa 1986).

Complainant's 90 days in which to commence civil action begins to run on date "right to sue" letter is sent by certified mail, not from date of receipt.

Norland v. Iowa Department of Job Service, 387 N.W.2d 365 (Iowa App. 1986).

Judicial Review

Failure of claimant to name former employer in caption was not fatal where employer was identified in petition.

Elliott v. Iowa DOT, 377 N.W.2d 250 (Iowa App. 1985).

License Revocation.

Rule precluding issuance of work permit to person whose license has previously been revoked was within the DOT's authority.

AGENCY

Cruikshank v. Horn, 386 N.W.2d 134 (Iowa App. 1986).

Auctioneer deposited monies received at auction in bank

which then closed due to insolvency. In equity action for accounting, Court of Appeals found on de novo review that auctioneer's fiduciary obligation required auctioneer to obtain consent to deposit funds, regardless of custom or habit of this auctioneer or auctioneers in general.

APPELLATE PROCEDURE

Mason City Production Credit v. VanDuzer, 376 N.W.2d 882 (Iowa 1985).

Appealability - Interlocutory Appeal.

In action to recover on notes and to foreclose on collateral, several defendants appealed from entry of partial summary judgment on some notes. Issues as to each note and as to each defendant were left open for trial, and all issues as to foreclosure remained to be tried. HELD: Order does not completely dispose of any claim that is separate and distinct from the undecided claims, and nothing about the summary judgment terminated the district court's ability to correct its ruling later and return the parties to their original positions. COMMENT: Court used denial of defendants' alternative request for permission to appeal to comment again on just how exceptional the situation must be for an interlocutory appeal application to be granted.

Beck v. Fleener, 376 N.W.2d 594 (Iowa 1985).

Plaintiffs filed motion to reconsider denial of motion for new trial. The court construed the motion to reconsider to be in substance a timely 179(b) motion because the trial court decided issues of fact in ruling on motion for new trial. As a result, appeal filed within thirty days after the court overruled the motion to reconsider was held to be timely.

Prochelo v. Travelers Insurance Company, 376 N.W.2d 591 (Iowa 1985).

Final Judgment.

Insurance company brought declaratory judgment action claiming that fire loss was the result of arson. Insureds counterclaimed for the insurance proceeds and for bad faith. Insurance company obtained summary judgment dismissing the counterclaim on grounds of limitations of action. Arguments on

motion and the court's ruling mentioned estoppel and waiver. No appeal was sought. Insurance company dismissed, and insureds immediately commenced another action identical to their counterclaim. HELD: Adjudication in first case was preclusive. Court notes that result is not inequitable because plaintiffs could have appealed as a matter of right from the summary judgment when Travelers dismissed.

Lemke v. Albright, 383 N.W.2d 520 (Iowa 1986).

Timeliness.

Party who timely files motion for new trial may abandon motion by filing notice of appeal, and appeal will not be deemed to be untimely because it was taken more than thirty days after judgment entered on verdict.

Argenta v. City of Newton, 382 N.W.2d 457 (Iowa 1986).

Appealability.

Plaintiff was injured while on the job at a construction project for the city. HELD: Plaintiff could appeal as a matter of right from dismissal, on claims-notice grounds, of action against the city, because such claim was separate and distinct from remaining claims against project supervisor of plaintiff's employer and insurance company that inspected work site.

Estate of Grossman v. McCreary, 373 N.W.2d 113 (Iowa 1985)

Error Preservation - 179(b)

Questions "asked" by appellant at trial "but not answered" in decision by trial court were not reviewable on appeal in absence of 179(b) motion. Court overrules "intimation" in IDOT v. Nebraska-Iowa Supply Co., 272 N.W.2d 6, 15-16 (Iowa 1978), that submission of proposed findings and conclusions obviates 179(b) motion.

Heishman v. Jenkins, 372 N.W.2d 506 (Iowa 1985).

Supersedeas Bond-Divorce Proceedings

Divorce decree gave husband title to residence. Wife refused to move out. Husband eventually obtained a decree of ouster in an action to recover real estate under Chapter 646, Code of Iowa. Wife appealed and, on the advice of counsel and the district court clerk, deposited \$300.00 cash with the clerk. The clerk approved such deposit as a supersedeas bond, but no formal stay order was entered. At husband's request, district court issued an order requiring wife to show cause why she should not be held in contempt for failing to obey the decree of ouster. Court found wife in contempt. Supreme Court reversed, holding that wife's good faith belief that she had successfully stayed enforcement was a valid defense to the claim of willful violation of the decree of ouster. IMPORTANT HOLDING: Deposit of cash is not a supersedeas bond within I.Rs.App.P. 7 & 8. Supersedeas bond is written promise to perform certain conditions, which may or may not be secured by deposit of cash. Terms of cash bond must be approved by court rather than clerk when judgment does not involve the payment of money.

In re Estate of Mack, 373 N.W.2d 97 (Iowa 1985)

Finality.

Declaratory judgment entered in action with other counts yet to be adjudicated was final for purposes of appeal only because action was docketed in probate.

Hayes v. Kerns, 387 N.W.2d 302 (Iowa 1986).

Final Judgment

Plaintiff sued for rescission of agreement for purchase of interesting corporation. Defendant counterclaimed for balance of purchase price. The court filed document titled "Order, Judgment, and Decree," which, among other things, rendered judgment in favor of defendant for contract payments owed prior to the date of the filing of the petition and which required defendant to "certify to clerk of court the amount due." More than 30 days later, and after hearing the contentions of the parties as to the amount due, the court filed a document prepared by defendant and titled "Supplemental Judgment, Order, and Decree." HELD:

Initial judgment was final for purposes of appeal because of the form of the document, the language used, the finality with which the court disposed of all issues litigated, and the absence of any matter retained by the court for further action. The calculation of the amount due was to be submitted to the clerk, not the court.

Hayes v. Kerns, 387 N.W.2d 302 (Iowa 1986).

Motion Practice

Single justice deferred ruling on motion to dismiss appeal and ordered that issue be determined with merits of appeal. On application for review of single-justice order, three-justice panel overruled motion to dismiss. HELD: As long as case is before court, appellate court may reexamine decision of three-justice panel.

Ritam Corp. v. Applied Concepts, Inc., 387 N.W.2d 619 (Iowa App. 1986).

Transcript

In what appears to be non-jury trial, court dismissed petition because plaintiff had failed to prove damages that were not speculative. On appeal, plaintiff did not order a transcript, and defendant raised Rule 10(b), which provides that appellate who urges that a finding or conclusion is unsupported by evidence shall include a transcript of all evidence relevant to such finding or conclusion. HELD: 10(b) applies only when motion for directed verdict has been granted.

ATTORNEY AND CLIENT

Devine v. Wilson, 373 N.W.2d 155 (Iowa App. 1985)

Malpractice.

Verdict against attorney for legal malpractice in failing to serve judicial review petition on department of job service as well as executive counsel was proper subject of motion for judgment n.o.v., when plaintiff adduced no expert testimony. Supreme Court case requiring service upon job service had not

been filed until after attorney's conduct, and district court cases at the time required only substantial compliance with notice provisions of judicial review statute. HELD: An attorney is not required to predict future supreme court decisions which clarify the law.

Committee v. Humphrey, 377 N.W.2d 643 (Iowa 1985).

Advertising.

On remand from United States Supreme Court, court held that rule on lawyer advertising does not amount to a blanket ban as proscribed in Zauderer and is constitutional.

Rerat Law Firm v. Iowa District Court, 375 N.W.2d 226 (Iowa 1985).

Fees

Law firm representing some of the persons injured in a grain explosion applied for an order requiring firm representing the other plaintiffs (who had settled) to pay certain fees and costs pursuant to an alleged fee agreement. HELD: Court lacked jurisdiction to order recovery for first firm or to order payment by the second firm. Firms were before the court only in representative capacity and were not parties. Equitable exception for situations when a third person benefits from litigation instituted by another is not applicable because litigation was commenced by clients, not firm, and because settling plaintiffs had not benefited from litigation commenced by remaining plaintiffs. "Common fund theory" applicable in class actions not applicable because no class was certified.

CIVIL PROCEDURE

Doland v. Boone County, 376 N.W.2d 870 (Iowa 1985).

215.1

Plaintiff filed 215.1 motion on December 27, and court set a hearing for January 16. At hearing, both parties suggested

that case was already dismissed by operation of law on January 1, and plaintiff made oral, on the record, motion to reinstate. Court subsequently ruled that case had been dismissed by operation of law as of January 1 and then denied the application for reinstatement. Plaintiff filed a subsequent written application for reinstatement, which also was denied. Plaintiff's appeal was timely as to second denial of reinstatement, but not as to first. HELD: Case was dismissed by operation of law as of January 1. Sole exception is where motion is filed and matter is submitted before January 1. Mere filing of motion prior to January 1 is insufficient. Oral application to reinstate was valid, and order denying oral application was final for purposes of appeal. Second application was of no effect and notice of appeal had to be filed within thirty days of first denial.

Erickson v. Salama, 379 N.W.2d 904 (Iowa 1986).

215.1

Clerk's failure to serve 215.1 notice on both of plaintiff's attorneys, when the attorneys are not partners or in any way associated in practice, is insufficient, and dismissal was not effective. Court notes that a 215.1 notice sent to a law firm in which more than one attorney has appeared for plaintiff is sufficient.

State v. Hydro Mag, 379 N.W.2d 911 (Iowa 1986).

Adjudication of Law Points.

In absence of stipulation, adjudication of law points may be considered only when questions of law arise independently of disputed factual issues and when a ruling favorable to movement will be dispositive of the case in whole or in part.

Studer v. Iowa DOT, 378 N.W.2d 300 (Iowa 1985).

Judicial Review Proceeding.

Discovery procedures set forth in rules 136 through 138 are not applicable to or available in judicial review proceedings of a contested case determination by an administrative agency.

Willson v. City of Des Moines, 386 N.W.2d 76 (Iowa 1986).

Amendments.

Plaintiff's original petition asserted 1983 and common-law claims for false imprisonment and false arrest, malicious prosecution, and trespass. Three years after the underlying search and seizure and two years after the petition was filed, plaintiff moved for leave to amend to add a count for invasion of privacy, arising out of one defendant's statements to news media. HELD: Invasion of privacy claim did not arise out of the same conduct, transaction, or occurrence as formed the basis for the original actions alleged in the petition. Trial court should not have permitted the amendment, and the district court's directed verdict on claim is affirmed.

Albert v. Davenport Osteopathic Hospital, 385 N.W.2d 237 (Iowa 1986).

179(b)

Plaintiff was a union employee with job tenure under a collective bargaining agreement, but then was promoted to a non-union supervisory position. When he was fired as part of a staff reduction plan, plaintiff sued for wrongful discharge. HELD: Although plaintiff claimed that he would not have accepted promotion had he realized he was giving up tenure, court made no such finding. Such a finding was important because absent special consideration, contract for permanent employment is construed to be terminable at will. Plaintiff filed no 179(b), so court must assume that trial court decided factual issue adversely to plaintiff.

Smith v. Lally, 379 N.W.2d 914 (Iowa 1986).

Multiple Dismissals.

Plaintiffs filed the same medical malpractice action on three separate occasions and in three separate counties, dismissing the first two filings without prejudice in the face of motions for change of venue. HELD: Rule 215's requirement that second dismissal constitutes an adjudication on the merits applies notwithstanding the involvement of different counties. Application in second county to reinstate or otherwise rescue second action after defendants asserted multiple dismissal rule

in response to third action was properly denied. Court had no authority to act after second dismissal was filed.

Hoefler v. Sioux City Community School District, 375 N.W.2d 222 (Iowa 1985).

Certiorari

Conduct of school board in awarding a group health insurance contract could be reviewed by petition for certiorari. RATIONALE: Board may have exercised a quasi-judicial function in determining that prevailing bidder was authorized to do such insurance business in Iowa. COMMENT: Court expressly noted that issue of exclusivity of administrative remedies under Chapter 19A had not been raised.

Gold Crown Properties, Inc. v. Iowa District Court, 375 N.W.2d 692 (Iowa 1985)

215.1

Order removing case from operation of Rule 215.1 and continuing case to certain trial date was entered upon stipulation of parties. When court determined that pending motions prohibited trial on that date, court instructed administrator to reset trial date. Next six months were filled with activity, but after expiration of six months from date of old trial date, defendant moved for dismissal. HELD: Entry of new trial date prior to expiration of previous continuance was sufficient to carry case past 215.1 deadline. Also, subsequent stipulation that case would be continued notwithstanding 215.1 if case were not ready to be tried by new trial date was held to be applicable to previous instructions by court to administrator.

Thorp Credit, Inc. v. Gott, 387 N.W.2d 342 (Iowa 1986).

Summary Judgment

Entry of partial summary judgment for foreclosure of part of farmland incumbered by mortgage was reversed, in part because the partial summary judgment created the possibility of two sale proceedings and also because it would result in

piecemeal litigation and increased costs. Court also found factual issues.

Norwest Bank Marion v. L P Enterprises, Inc., 387 N.W.2d 359 (Iowa App. 1986).

Amendments

Defendant filed cross-claims but did not seek leave of court to amend until the eve of trial. Defendant did not show that co-parties had actual knowledge of the cross-claims. HELD: No abuse of discretion in refusing leave to amend as to parties who did not answer cross-claim. One co-party who filed an answer shortly after amendment was held to have consented to the amendment.

Dolezal Commodities v. City of Cedar Rapids, 387 N.W.2d 572 (Iowa 1986).

215.1

After 215.1 notice was issued, corporation and 80% owner both entered bankruptcy. Application filed within six months after automatic dismissal was properly granted. Subsequently, case was not reached for trial and court administrator reassigned the case. Failure of court to remove the case again from the operation of 215.1 was held not to be fatal to plaintiff's cause of action.

Taylor v. Wiebold, 390 N.W.2d 128 (Iowa 1986)

Commencement of Action - Statute of Limitations

Petition in dog bite case was filed more than six years after accident but one day before statute ran (plaintiff was a minor when bitten). Counsel did not include directions for service, and original notice was not served for seven months. HELD: Absent evidence of intentional delay, filing tolls statute.

In re Estate of Bearbower, 376 N.W.2d 922 (Iowa App. 1985).

215.1

Action amounting to will contest was filed 5-27-83. Matter was actively litigated through discovery and motion practice through 7-2-84. No activity of record by plaintiff until 1-8-85, when application for reinstatement was filed. HELD: No abuse of discretion in ordering reinstatement, because evidence was sufficient to show excusable neglect by attorney rather than willful procrastination.

CIVIL RIGHTS

Willson v. City of Des Moines, 386 N.W.2d 76 (Iowa 1986).

Plaintiff sued city and police officers for their conduct in applying for issuance of and executing search warrant on his property. HELD: Plaintiff has right to sue under section 1983 despite the availability of state remedies, because the alleged deprivation violates specific Bill of Rights provisions. Parratt's preclusion of 1983 suit where state remedies are available applies only to claimed violations of procedural due process.

Saemisch v. Ley Motor Co., 387 N.W.2d 357 (Iowa 1986).

Complainant's 90 days in which to commence civil action begins to run on date "right to sue" letter is sent by certified mail, not from date of receipt.

Sundholm v. City of Bettendorf, 389 N.W.2d 849 (Iowa 1986)

False Arrest

Court reversed dismissal of 1983 claims and remanded for trial on those claims only. Court noted, however, that jury findings that plaintiffs were either not arrested against their will or had not been damaged are binding on plaintiffs in 1983 claims. Court notes that under Section 1983, a finding of no damage does not preclude an award of punitive damages or attorney fees. Punitive damages can be awarded, however, only against the officers, not the municipality. The claim for attorney fees can be directed against the municipality as well as the officers.

COMMERCIAL LAW

Paglia v. Elliott, 373 N.W.2d 121 (Iowa 1985)

Plaintiff loaned money to little old lady. Plaintiff was a pawnbroker. Supreme Court found that loans were not made by plaintiff as a pawnbroker, but court used plaintiff's business activities as pawnbroker to find plaintiff to be in business of loaning money so as to apply Iowa Consumer Credit Code to loan. Court also held that federal Truth in Lending Act applied. Lastly, the Court held that TLA's 3-year limit on right to rescind (available where lender does not give 3-day right to rescind) expires only upon transfer of all property to which mortgage applied.

Hawkeye Bank & Trust v. Michel, 373 N.W.2d 127 (Iowa 1985)

Loan of money for construction of "spec house" to be used in commercial enterprise was not controlled by Iowa Consumer Credit Act and federal Truth in Lending Act.

Dotts v. Bennett, 382 N.W.2d 85 (Iowa 1986).

Farmer-Implied Warranty of Merchantability

Court affirmed jury's finding that farmer who sold a portion of his hay crop for feed for many years, had advertised, had done custom farming, had continuing education in farming, and considered himself knowledgeable in hay farming, was a merchant for purposes of application of an implied warranty of merchantability of hay sold to another farmer.

F.S. Credit Corp. v. Shear Elevator, Inc., 377 N.W.2d 227 (Iowa 1985).

Security Agreement

Court held that oral modification of a security agreement to expand the amount of the security interest was valid. RATIONALE: Elements of a security agreement do not include the amount secured, which is instead an element of the underlying debt instrument. Iowa contract law permits oral modification of a written contract if adequate consideration is provided.

John Deery Motors, Inc. v. Steinbrown, 383 N.W.2d 553 (Iowa 1986).

Secured party's sale of repossessed automobile at auction was "private sale" for purposes of notice requirements where attendance was restricted to automobile dealers.

CONFLICTS/CHOICE OF LAW

In re Estate of Mack, 373 N.W.2d 97 (Iowa 1985)

Full Faith and Credit.

Divorce decree entered in Missouri was given effect with respect to disposition of real property owned by parties in Iowa Supreme Court relied on principles of comity but "suspect[ed]" that result was required by "full faith and credit" clause of U.S. Constitution.

CONSTITUTIONAL LAW

Beeler v. VanCannon, 376 N.W.2d 628 (Iowa 1985).

Equal Protection.

The legislature's decision to apply joint and several liability provision of Comparative Fault Act to all cases tried on or after 7-1-84, does not violate equal protection. Rational basis test was applied.

Iowa Southern Utilities Co. v. Iowa State Commerce Com'n, 372 N.W.2d 274 (Iowa 1985).

Section 476.5, Code of Iowa, provides that utilities may not give a discount to employees. Exception in statute for communications utilities does not violate equal protection.

Colton v. Branstad, 372 N.W.2d 184 (Iowa 1985).

Item Veto

Legislation that conditioned appropriation to state department of health upon department's relinquishment of authority over certain federal funds to the family planning council was subject of an item veto. HELD: Item which is an unrelated contingency can be subject to item veto.

Committee v. Humphrey, 377 N.W.2d 643 (Iowa 1985).

Lawyer Advertising.

On remand from United States Supreme Court, court held that rule on lawyer advertising does not amount to a blanket ban as proscribed in Zauderer and is constitutional.

Kleman v. Charles City Police Department, 373 N.W.2d 90 (Iowa 1985)

First Amendment

Unverified petition seeking injunction against publication of information disseminated from child-abuse registry and information relating to civil action arising out of such dissemination was insufficient to support prior restraint.

Veach v. Iowa DOT, 374 N.W.2d 248 (Iowa 1985).

Equal Protection

DOT regulation denying work permit to driver who refused test did not violate equal protection. Court applied rational basis test.

CONTRACTS

City of Carlisle v. Fetzer, 381 N.W.2d 627 (Iowa 1986).

Warranty.

City sued manufacturer for breach of implied warranties in sale of street sweeper. Action was filed more than five years after delivery of sweeper, and plaintiff asserts discovery clause in section 554.2725(2). Discovery rule applies only where warranty explicitly extends to future performance. Garden-variety implied warranties of fitness will not satisfy this limitation on the discovery rule.

Manning v. International Harvester Co., 381 N.W.2d 376 (Iowa App. 1986)

Warranty.

In property damage case, manufacturer's warranty provided that manufacturer would replace or repair defective parts and then proceeded to exclude all other warranties and other liabilities, including liability for incidental and consequential damages. HELD: because exclusion of liability for incidental and consequential damages is used in context of warranty rather than negligence, manufacturer has not expressly disclaimed liability for negligence.

Sioux County State Bank v. Veenstra, 372 N.W.2d 309 (Iowa App. 1985).

Reformation-Mortgage Disclosure Statement

Bank took second mortgage on Defendants' house, with payments amortized over twenty years. Note contained a clause permitting bank to declare entire balance due at end of five years. Disclosure statement required by Federal Truth and Lending Act did not mention five-year balloon payment. Defendants denied that balloon clause was built in when documents were signed. HELD: While a disclosure statement is not per se part of the contract, it is a factor which should be considered in determining the intent of the parties.

F.S. Credit Corp. v. Shear Elevator, Inc., 377 N.W.2d 227 (Iowa 1985).

Modifications

Court held that oral modification of a security agreement to expand the amount of the security interest was valid. RATIONALE: Elements of a security agreement do not include the amount secured, which is instead an element of the underlying debt instrument. Iowa contract law permits oral modification of a written contract if adequate consideration is provided.

Linn County v. Kindred, 373 N.W.2d 147 (Iowa App. 1985)

Settlement Agreement.

Letters between counsel indicate at best an agreement to agree and reflect continuing negotiations rather than an actual settlement agreement that may be specifically enforced.

Dyer v. National Bi-Products, Inc., 380 N.W.2d 732 (Iowa 1986).

Exclusive Remedy

Employee injured in job-related accident sued for breach of oral contract in which employee agreed not to sue employer in return for promise of lifetime employment. Employer maintained that Chapter 85 provided employee with sole remedy and that his promise to forego civil litigation provided no consideration. HELD: Presumed invalidity of employee's civil suit does not foreclose, as a matter of law, forbearance as consideration for settlement contract, overruling old case law to the contrary. Evidence of exclusivity is relevant on issue of employee's claimed belief that he was foregoing a valid claim.

Turner v. Low Rent Housing Agency, 387 N.W.2d 596 (Iowa 1986).

Settlement Agreement - Duress

Court found insufficient evidence of economic duress to establish defense to performance of settlement agreement.

Defendant contended that bankruptcy was only alternative to settlement, but evidence showed that defendant had other alternatives which disappeared through defendant's inaction.

CONTRIBUTION

Reese v. Werts Corp., 379 N.W.2d 1 (Iowa 1985).

Comparative Negligence.

In dicta, court observes that chapter 668 should not change Abild or Thompson v. Stearns Chemical with respect to claims for contribution by a third party against the plaintiff's employer.

CORPORATIONS

Hog Heaven Corp. v. Midland Farm Management Co., 380 N.W.2d 756 (Iowa App. 1985).

Corporation may enforce contract executed by corporate promoter prior to incorporation if the corporation adopts or ratifies the contract.

Adam v. Mount Pleasant Bank and Trust Co., 387 N.W.2d 771 (Iowa 1986).

Prairie Grain of Stockport

Court affirmed finding that Raymond Keller, the manager and one of the principal owners of Prairie Grain and a director of the bank, had sufficient "control" over Prairie Grain that its obligations to the bank could be combined with Keller's for purposes of determining that the bank violated the statutory limit as to the amount of obligations one director of a bank may hold. Court also approved the finding that the statutory bar against a director overdrawing his checking account was violated by Prairie Grain's overdrafts. Court held that statutory violations were evidence of fraudulent activity by bank of illegally giving money to Prairie Grain for the purpose of giving a false appearance as to Prairie Grain's solvency, all for the bank's benefit.

COURTS

Proctor v. Garrett, 378 N.W.2d 298 (Iowa 1985).

Common-law Lien.

On mandamus, court ruled that county recorder had no discretion to refuse to record notice of common-law lien in favor of owners of land scheduled for foreclosure on the ground that the lien was a legal nullity.

South Central Iowa PCA v. Scanlan, 380 N.W.2d 699 (Iowa 1986).

Federal Tort Claims Act.

A PCA is not a federal instrumentality within the meaning of the FTCA, and the federal statute does not deprive state court of jurisdiction over claims against the PCA.

In re K.L.C., 372 N.W.2d 223 (Iowa 1985).

Juvenile Court Judge who presided over trial of termination of parental rights case on October 17 retired without ruling. New Judge entered order terminating parental rights nine months later. HELD: No denial of due process when substitute Judge has examined entire record, including testimony and presiding Judge's notes, even though substitute Judge did not have the opportunity to observe the witnesses. Procedure authorized by I.R. Civ. P. 367(b). COMMENT: Evidence in support of termination was overwhelming.

In re Estate of Mack, 373 N.W.2d 97 (Iowa 1985)

Full Faith and Credit.

Divorce decree entered in Missouri given effect with respect to disposition of real property owned by parties in Iowa Supreme Court relied on principles of comity but "suspect[ed]" that result was required by "full faith and credit" clause of U.S. Constitution.

Kleman v. Charles City Police Department, 373 N.W.2d 90 (Iowa 1985).

Temporary Injunction

Court may not issue temporary injunction solely on basis of unverified petition.

Wolfe v. Graether, 389 N.W.2d 643 (Iowa 1986).

Court of Appeals

Decision of court of appeals that is not vacated controls issues determined by that decision, even during subsequent appeals. Language and opinion that was not necessary to determination of those issues, however, has no effect or is at least non-binding during subsequent appeals.

DAMAGES

Laube v. Estate of Thomas, 376 N.W.2d 108 (Iowa 1985).

Trees.

Measure of damages for wrongful destruction of trees is current market value of trees as lumber, where trees have no special purpose such as a windbreak, ornamental use, or bearing of fruit.

Pfiffner v. Roth, 379 N.W.2d 357 (Iowa 1985).

Punitive Damages.

Iowa competition law expressly provides for exemplary damages and made no exception for cities until after case had been remanded for retrial on damages on first appeal. HELD: Amendment to competition law to exclude municipalities from grant of punitive damages will not be applied retrospectively. Court held in 1978 in Young that city could be liable for punitive damages. Legislature overruled Young with respect to the Tort Claims Act, but not otherwise and specifically not with respect to the competition law until after this case began and was first tried.

Hardy v. Britt-Tech Corp., 378 N.W.2d 307 (Iowa App. 1985).

No abuse of discretion in granting new trial in wrongful death, products liability case where jury determined present value of support decedent would have provided wife and three children to be \$1.725 million and present day value of estate to be less than \$3,000.00.

Hoekstra v. Farm Bureau Mutual Insurance Co., 382 N.W.2d 100 (Iowa 1986).

Punitive Damages - Evidence of Net Worth.

Trial court admitted evidence of insurance company's net worth in first-party bad faith claim in which contract, compensatory, and punitive damages were sought. HELD: Because the jury found against plaintiffs on compensatory damages and punitive damages, it is not necessary to decide whether evidence of net worth should be admitted only after trier of fact determines liability for punitive damages. Only award in favor of plaintiffs was for contract damages, and computation of same could not have been affected by evidence of net worth. COMMENT: Could not the evidence of net worth affect the jury's decision on liability for contract damages?

Manning v. International Harvester Co., 381 N.W.2d 376 (Iowa App. 1986)

Economic Damage.

Manufacturer was negligent in supplying wrong seed drum with planter. HELD: Plaintiff's crop was not as large as it should have been so damage suffered by plaintiff to his crop was recoverable proper damage and not economic damage for which recovery will not be permitted.

Suss v. Schammel, 375 N.W.2d 252 (Iowa 1985).

Punitive Damages

Deliberate refusal to tender deed and abstract when due constituted only deliberate breach of contract and did not support award of punitive damages. Further, plaintiff made no

showing of actual damages. Although award of compensatory damages is not required, a showing of actual damages is required. Plaintiff's evidence establishes only frustration, not "humiliation" or "mental anguish".

Suss v. Schammel, 375 N.W.2d 252 (Iowa 1985).

Attorney Fees

Exception permitting recovery of attorney fees without contract provision for same when defendant's conduct is "oppressive and tinged with legal malice," not applicable where defendant's conduct amounted only to intentional breach of contract.

Ritam Corp. v. Applied Concepts, Inc., 387 N.W.2d 619 (Iowa App. 1986).

Profits

Contract provided non-refundable advance on royalties for computer program of \$6,000.00. Defendant cancelled contract before selling any computer games, and plaintiff sought recovery in the amount of the contracted-for advance. HELD: Plaintiff's failure to prove cost of performance precludes recovery of liquidated damage.

Sundholm v. City of Bettendorf, 389 N.W.2d 849 (Iowa 1986)

False Arrest

Jury found that plaintiff had been arrested without probable cause but had suffered no damage. No evidence of medical or other special damages. Plaintiff testified that she could not attribute neck pain as between the arrest and a diving accident occurring two days earlier, that she had been treated "all right" while in jail, and that she had been humiliated by the incident and the resulting publicity.



DISCOVERY

Jones v. Blair, 387 N.W.2d 349 (Iowa 1986).

Experts

Plaintiffs called the investigating officer as witness. Report which referred to weather was introduced, and officer was asked about weather on direct examination. On cross, defense obtained officer's expert opinions as to role of weather in accident. HELD: Defendant's failure to list officer as expert is irrelevant, since officer was called by plaintiffs.

AgriVest Partnership v. Central Iowa PCA, 373 N.W.2d 479 (Iowa 1985).

Privilege.

PCA's claim of common-law privilege against disclosing minutes of its board meetings was properly overruled in the absence of any particularized designation of materials and any affidavit in support of the claim of privilege. Governmental claim of privilege must (1) designate the particular material to be privileged, (2) articulate the precise reasons why public interest would be adversely affected by disclosure, and (3) submit an affidavit by agency head, attesting that the documents have been reviewed personally and the assertion of privilege is proper. Privilege may not be simply invoked by the agency's attorney.

Countryman v. McMains, 381 N.W.2d 638 (Iowa 1986).

Sanctions.

Plaintiff moved at commencement of trial for continuance because defendant had refused to complete a discovery deposition, allegedly leaving plaintiff unprepared. Defendant had refused to answer questions on deposition and plaintiff had obtained order compelling such discovery, but defendant continued to refuse. Plaintiff never followed up to obtain further sanctions, and conceded that she did not expect defendant to appear at trial, permitting entry of default. Record also establishes that defendant did not terminate deposition entirely and was prepared to answer questions in other areas, which could

have alleviated plaintiff's surprise when defendant testified on those areas at trial. HELD: Court did not abuse its discretion in refusing to grant continuance.

Rhiner v. City of Clive, 373 N.W.2d 466 (Iowa 1985)

Witness Statements.

Statements taken by city within hours of shooting are trial preparation materials and are protected by Rule 122(c) and Ashmead, 336 N.W.2d 197 (Iowa 1983), without special showing. Victim said he was going to sue before he was even placed in the ambulance. Identity of persons interviewed were provided during discovery, and witnesses had not been deposed.

ESTATES

In re Estate of Mack, 373 N.W.2d 97 (Iowa 1985).

Final Judgment

Declaratory judgment entered in action with other counts yet to be adjudicated was final for purposes of appeal only because action was docketed in probate.

In re Estate of Mills, 374 N.W.2d 675 (Iowa 1985).

Court held that adoption by single parent extinguishes both natural parents' rights of intestate succession.

EVIDENCE

Beck v. Fleener, 376 N.W.2d 594 (Iowa 1985).

Circumstantial Evidence.

No harm occurred in medical malpractice case when the trial court instructed the jury that circumstantial evidence

could not be used when expert testimony was required for proof of their claim since expert opinion testimony is a form of direct evidence. Court observed "that no useful purpose is served by attempting to instruct a jury on the difference between direct and circumstantial evidence."

State v. Chancy, 391 N.W.2d 231 (Iowa 1986).

Expert Testimony.

No abuse of discretion in permitting social worker to express opinions about the relative intelligence level of the victim in a prosecution for violation of section 709.4(2) (sex act with person mentally incapable of giving consent).

State v. Myers, 382 N.W.2d 91 (Iowa 1986).

Expert Testimony.

Admission of expert testimony that children rarely lie about sexual abuse constituted abuse of discretion.

Reihmann v. Foerstner, 375 N.W.2d 677 (Iowa 1985).

Double Hearsay

Bank employee sued bank and corporate director for slander. Employee testified that bank officer told him that director told officer that employee was examining confidential records of customers. HELD: Assuming that officer's statement to employee is admissible against the bank as an admission, employee's testimony is still hearsay as to director.

Schmeling v. Ott, 388 N.W.2d 195 (Iowa App. 1986).

Subsequent Remedial Measures

Accident investigator who was injured in second accident at scene sued telephone company for failing to effect timely repairs after first accident. Telephone company stipulated that repair crew had not been notified by company personnel on scene

until after investigator was injured. HELD: Given stipulation, trial court properly excluded evidence as to when crew was actually notified.

Rhiner v. City of Clive, 373 N.W.2d 466 (Iowa 1985)

Character Evidence.

Evidence of victim's character for violence was relevant to the issue of self-defense. Objections to specific instances of misconduct by victim were not made, but probably would have been sustained by virtue of Rule 405(b), which permits evidence of specific instances only when character is an essential element of the defense.

Rhiner v. City of Clive, 373 N.W.2d 466 (Iowa 1985)

Excited Utterance.

Statements by victim's friend, who came to victim's aid, fought with officer, and ultimately was shot, were properly admitted as excited utterance under Rule 803(2). Although content of statements indicated they were reflective in nature, declarant was in pain, scared, and under the impression he was seriously wounded. Only a short interval of time had elapsed.

Rhiner v. City of Clive, 373 N.W.2d 466 (Iowa 1985)

Expert Testimony.

Officer adduced expert testimony as to distance between victims and gun at time of shooting. Expert conducted tests with gun and white cotton targets, and compared targets with victim's clothing. HELD: No error to permit opinions when targets were not introduced into evidence. Rule 703 permits expert to base opinions on facts not admissible in evidence if of a type reasonably relied upon by experts in that field.



Kleman v. Charles City Police Department, 373 N.W.2d 90 (Iowa 1985)

Temporary Injunction

Court may not issue temporary injunction solely on basis of unverified petition.

Rinkleff v. Knox, 375 N.W.2d 262 (Iowa 1985).

Hearsay

Manufacturer's catalog was not admissible under the exception for "published compilations, generally used and relied upon by the public or by persons in particular occupations." No evidence that catalog was relied upon by public or particular group of persons as a source of safety literature. No showing that items designated in catalog were available at relevant time. Catalog is not self-authenticating as to availability of items listed at a particular time or place.

State v. Reddick, 388 N.W.2d 201 (Iowa App. 1986).

Hearsay - Unavailability

Witness gave sworn statement to county attorney, which State successfully used at trial pursuant to Rule 804(b)(5). HELD: No adequate showing of unavailability when witness had indicated a willingness to appear and had volunteered to postpone trip to Mexico, even though witness had been subpoenaed four weeks prior to trial and had then indicated that she would stay until she testified. COMMENT: Sworn statement was not a deposition, and defendant was not present or represented at taking of statement.

Thacker v. Eldred, 388 N.W.2d 665 (Iowa App. 1986).

Circumstantial Evidence

In reversing an order granting defendant's motion for judgment n.o.v., court quoted 1961 case that required plaintiff to meet elevated burden of proof when case was based entirely upon circumstantial evidence. Court then proceeded to state that

plaintiff had direct evidence as well as circumstantial evidence, so reference may be dicta. COMMENT: After the supreme court eliminated the difference between direct and circumstantial evidence, does the heightened standard for a case based strictly on circumstantial evidence still exist?

Klaes v. Scholl, 375 N.W.2d 671 (Iowa 1985).

Prior Acts

Police officer sued arrestee for injuries sustained while effecting arrest. HELD: Evidence of specific instances of other assaults by arrestee and his subsequent guilty pleas to assault charges was inadmissible. Evidence of specific instances is admissible as substantive evidence only where character is essential element of claim or defense. Proof of peaceable character or personality is not an element of defense of self-defense. Further, arrestee's counterclaim alleging public ridicule and contempt due to his arrest did not place his character in issue.

Sundholm v. City of Bettendorf, 389 N.W.2d 849 (Iowa 1986)

False Arrest

Trial court did not abuse discretion in excluding evidence that plaintiff was acquitted in criminal trial on charges that had resulted in the arrest.

FAMILY

In re Marriage of Cernetisch, 376 N.W.2d 598 (Iowa 1985).

Alimony.

Statute authorizing court to order assignment of income to enforce child support obligation does not apply to alimony.

In re Estate of Mack, 373 N.W.2d 97 (Iowa 1985).

Full Faith and Credit

Divorce decree entered in Missouri given effect with respect to disposition of real property owned by parties in Iowa. Supreme Court relied on principles of comity but "suspect[ed]" that result was required by "full faith and credit" clause of U.S. Constitution.

In re Marriage of Detert, 391 N.W.2d 707 (Iowa App. 1986).

Dissolution - Paternity.

Paternity was litigated in divorce proceeding, with a determination that husband was the natural father. Husband applied for modification on the basis of new blood test, the technology for which was not available earlier. HELD: Original proceeding is preclusive, and the result of the blood test is newly discovered evidence, not changed circumstances that would justify modification. COMMENT: Judge Snell begins his dissent with the following: "Where hath truth gone?"

Leitch v. Leitch, 382 N.W.2d 448 (Iowa 1986).

Foreign Dissolution.

Court would recognize and enforce Canadian divorce decree, but would not permit modification.

In re Marriage of Bales, 380 N.W.2d 754 (Iowa App. 1985).

Modification.

Father applied for modification, alleging loss of job due to injury. Evidence established that father's net income is actually greater due to workers' compensation benefits that he receives as a result of accident that also made him unemployed. HELD: Compensation payments were properly considered as assets in determining whether there had been a substantial change of circumstances warranting modification of alimony provisions, notwithstanding statute that exempts such payments from execution.

In re Marriage of McFadden, 380 N.W.2d 6 (Iowa App. 1985).

Jurisdiction.

Wife's response to application for modification and application for order to show cause why she should not be held in contempt for violating visitation provisions waived her right to challenge jurisdiction because she went beyond claims of improper service and jurisdiction to deny factual allegations on the merits. Also, the fact that wife and child have not lived in Iowa for over three years does not justify deference by Iowa court, which issued dissolution decree, in favor of courts of another state.

In re Marriage of Hoag, 320 N.W.2d 8 (Iowa App. 1985).

Modification.

Deteriorating farm economy was insufficient justification for departure from rule prohibiting the reservation of jurisdiction to review child support after one year and to make appropriate adjustments without the need of showing a change in circumstances.

In re Marriage of Zeliadt, 390 N.W.2d 117 (Iowa 1986)

Dissolution

Court approved post-decree settlement because it was supported by consideration (husband gave up interest in real estate in return for dismissal of contempt action and credit for portion of child support obligations), but remanded for determination by a district court as to whether effective revision of decree by settlement was in the best interest of the minor child.

In re K.L.C., 372 N.W.2d 223 (Iowa 1985).

Juvenile Court Judge who presided over trial of termination of parental rights case on October 17 retired without ruling. New Judge entered order terminating parental rights nine months later. HELD: No denial of due process when substitute Judge has examined entire record, including testimony and presiding Judge's notes, even though substitute Judge did not

have the opportunity to observe the witnesses. Procedure authorized by I.R. Civ. P. 367(b). COMMENT: Evidence in support of termination was overwhelming.

In re Marriage of Gonzales, 373 N.W.2d 152 (Iowa App. 1985)

Custody Modification.

Mother moved to California with two children after separation and did not appear or litigate dissolution. Default divorce decree granted father custody of both children. Father was able to obtain custody of only one child, but made a variety of efforts to locate and obtain the other. After three years, mother filed a petition for modification. HELD: Mother did not sustain her burden to show substantial change in circumstances or her superior parenting abilities.

In re Marriage of Short, 373 N.W.2d 158 (Iowa App. 1985)

Temporary Custody.

The father had temporary custody by court order, and district court eventually granted joint custody with primary physical care to father. District court found, among other things, "no compelling reason to transfer the primary care" to wife. HELD: District court's statement does not constitute improper presumption of continuing physical care in father's favor.

In re Marriage of Hobart, 375 N.W.2d 290 (Iowa App. 1985).

Default Dissolution

Wife obtained order finding husband in default and waiving conciliation forty days after service. Forty-seven days later, husband filed answer and requested conciliation. Another forty days later, husband filed motion to set aside default. HELD: Husband not entitled to conciliation as a matter of right, and court did not abuse discretion in refusing to order conciliation.

In re Marriage of Orgren, 375 N.W.2d 710 (Iowa App. 1985).

Alimony

Cohabitation after separation but before decree is not ground for automatic denial or limitation of alimony payments.

In re Estate of Mills, 374 N.W.2d 675 (Iowa 1985).

Adoption

Unmarried adult has an unquestioned right to adopt.

In re Adoption of M.M. Bee, 376 N.W.2d 900 (Iowa 1985).

Court held that natural father whose parental rights had been terminated could not be heard in adoption proceeding because termination order cannot be vacated once child is placed or adoption petition is on file.

In re N.H. and C.H., 383 N.W.2d 570 (Iowa 1986).

Termination of Parental Rights

Divorced father accused of child abuse sought counseling, and juvenile court construed Section 232.116(3) to prohibit termination only when abuse occurred after such services were received or offered. Court reversed to avoid requirement that abuse be repeated after counseling in order to provide basis for termination.

In re Marriage of Schober, 379 N.W.2d 46 (Iowa App. 1985).

Court held that cohabitation (as opposed to remarriage) after dissolution is a relevant factor to be considered in application for modification of alimony payments, but does not automatically terminate alimony.

Iowa Dept. of Social Services v. Barnes, 379 N.W.2d 377 (Iowa 1986).

AFDC Payments

State sought reimbursement from husband for AFDC payments to former wife and his children. Parents had stipulated that wife would forego all future child support payments. HELD: Stipulation not conclusive on father's obligation to support minor children and to reimburse state for AFDC payments.

In re: Marriage of Miller, 390 N.W.2d 596 (Iowa 1986)

Dissolution - Joint Custody

Court approves of new legislation amending joint custody provisions of Chapter 598, which legislation requires court to expressly cite clear and convincing evidence supporting its decision not to grant a request for joint custody.

INDEMNITY

Payne Plumbing v. Bob McKiness Excavating and Grading, Inc., 382 N.W.2d 156 (Iowa 1986).

Where subcontractor defended against claims that it was negligent in rolling frozen dirt into pipes, subcontractor was defending against claims of active or primary negligence, and could not seek indemnity on the active-passive negligence doctrine.

Reese v. Werts Corp., 379 N.W.2d 1 (Iowa 1985).

Court reverses the retention of manufacturer's claim against employer for indemnity. Evidence does not support claim of an independent duty running from employer to manufacturer. Also, court concludes it would have been improper to permit jury to assess percentage of negligence against employer in any event. Employer was in the case only by virtue of manufacturer's claim for indemnity. Employer's fault toward plaintiff was not in issue and, by virtue of the exclusive remedy provided by workers' compensation law, could not be an issue.

INSURANCE

Allmon v. Hale Insurance Agency, Inc., 390 N.W.2d 120 (Iowa 1986)

Plaintiff purchased two separate insurance policies on business, and business then burned. One policy paid its \$80,000.00 limits. Plaintiff sued on the other policy, and jury fixed loss at \$75,000.00 in instruction which asked them to fix the "actual cash value of the property . . . without taking into consideration . . . any amounts received from any other insurance company." HELD: Plaintiff is entitled to no further recovery because he has already received more than the value found by the jury for the loss under another policy.

Gateway State Bank v. North River Insurance Co., 387 N.W.2d 344 (Iowa 1986).

Banker's blanket bond, which provided "on premises" coverage for loss of property resulting from, among other things, false pretenses, did not cover bank's loss on loans, because (1) policy excluded loss due to loans procured by false pretenses, (2) debtor signed his own name to documents and bond defined forgery to exclude the signing of one's own name, and (3) the loan documents were not counterfeit, even though they were based on false pretenses.

Tri-State Insurance Co. v. DeGooyer, 379 N.W.2d 16 (Iowa 1985).

Stacking

Court held that an insurer may provide for limitations designed to prevent stacking of underinsured motorist coverage.

IMT Insurance Co. v. Amundsen, 376 N.W.2d 105 (Iowa 1985).

Homeowner's liability policy exclusion for liability arising out of use by insured of motorized vehicles was inapplicable to accident where boy scout fell from wagon tongue and insured had no role in selecting operator of tractor pulling wagon and was present merely as supervising scout master.



JUDGMENTS

Prochelo v. Travelers Insurance Company, 376 N.W.2d 591 (Iowa 1985).

Preclusion.

Insurance company brought declaratory judgment action claiming that fire loss was the result of arson. Insureds counterclaimed for the insurance proceeds and for bad faith. Insurance company obtained summary judgment dismissing the counterclaim on grounds of limitations of action. Arguments on motion and the court's ruling mentioned estoppel and waiver. No appeal was sought. Insurance company dismissed, and insureds immediately commenced another action identical to their counterclaim. HELD: Adjudication in first case was preclusive. Court notes that result is not inequitable because plaintiffs could have appealed as a matter of right from the summary judgment when Travelers dismissed.

Fournier v. Illinois Casualty Company, 391 N.W.2d 258 (Iowa 1986).

Preclusion.

Result in suit by plaintiff as administrator of injured party's estate is preclusive in second suit by plaintiff in her individual capacity.

Donahue v. American Farmers Mutual Casualty Co., 380 N.W.2d 437 (Iowa App. 1985).

Preclusion.

Plaintiff sued his own automobile insurer in small claims court for failing to pay his claims arising out of a collision. After trial, plaintiff's claims were dismissed. Plaintiff then filed a petition in district court for an amount in excess of the maximum jurisdictional amount in small claims. HELD: Although there may be a factual issue as to whether the insurer and plaintiff made a settlement while the small claims case was pending, the dismissal of the small claims action is preclusive of the subsequent action making the same claim.

Heidemann v. Sweitzer, 375 N.W.2d 665 (Iowa 1985).

Preclusion - Administrative Proceeding

In drunk driving prosecution, district court determined that officer had not complied with implied consent procedures. HELD: Decision not preclusive in DOT revocation of driver's license. Legislature has allocated jurisdiction for license revocation to DOT, which gives it right to make independent determination as to compliance with consent procedures. Also, burden on issue of consent procedure is on state in criminal prosecution but on driver in revocation proceeding.

JURISDICTION

Smalley v. Dewberry, 379 N.W.2d 922 (Iowa 1986).

Operator of automotive parts business in Tennessee who sold steering wheel to Iowa resident stationed in Kentucky while in military service did not have sufficient minimum contacts to justify assertion of jurisdiction in Iowa. Worldwide Volkswagen requires that Edmundson v. Miley Trailer be overruled because it permits exercise of jurisdiction strictly on foreseeability of automobile component finding its way to Iowa.

Bankers Leasing v. Eagle Valley Environmentalist, Inc., 387 N.W.2d 380 (Iowa App. 1986).

Minimum Contacts

Foreign corporation who leased through a broker, who in turn contacted the Iowa lessor, was not an "active purchaser" for purposes of minimum contacts. Court held, however, that presence in Iowa of 40 members of defendant, which was a not-for-profit corporation, could constitute minimum contacts, and case was remanded for further proceedings upon issue of jurisdiction. Court also held that corporation's executive director's personal guarantee on lease was made for a corporate purpose, as opposed to a personal purpose, and did not testify assertion of jurisdiction over him.

LABOR

Des Moines Independent Community School District v. Department of Job Service, 376 N.W.2d 605 (Iowa 1985).

Rules regarding exceptions to voluntary quit for certain temporary employees do not apply to substitute teachers.

Henry v. Iowa Dept. of Job Service, 391 N.W.2d 731 (Iowa App. 1986).

Court of Appeals reverses Job Service's ruling denying unemployment because the finding of misconduct was based on a single incident of carelessness with respect to cash receipts.

Peterson v. Pittman, 391 N.W.2d 235 (Iowa 1986).

Independent Contractor.

Trial court properly determined as a matter of law that defendant was not a co-employee. Part-time farmer who owned and operated earth moving equipment, with his own employees, was hired by the county. Fact that defendant was directed in part by county foreman was insufficient to create a factual issue.

Albert v. Davenport Osteopathic Hospital, 385 N.W.2d 237 (Iowa 1986).

Plaintiff was a union employee with job tenure under a collective bargaining agreement, but then was promoted to a non-union supervisory position. When he was fired as part of a staff reduction plan, plaintiff sued for wrongful discharge. HELD: Although plaintiff claimed that he would not have accepted promotion had he realized he was giving up tenure, court made no such finding. Such a finding was important because absent special consideration, contract for permanent employment is construed to be terminable at will. Plaintiff filed no 179(b), so court must assume that trial court decided factual issue adversely to plaintiff.

Meyer v. Iowa Department of Job Service, 385 N.W.2d 524 (Iowa 1986).

Seventy-five percent reduction in employer's production constitutes a stoppage of work for purposes of denial of unemployment compensation for work stoppage due to labor dispute.

Maschino v. Geo. A. Hormel & Co., 372 N.W.2d 256 (Iowa 1985).

Voluntary Quit-Collective Bargaining Agreement.

Hormel's Fort Dodge plant was closed. Claimants exercised their rights under collective bargaining agreement to transfer to other Hormel plants. Agreement also provided a six-month trial period during which employees who transferred could return to original plant and accept current status there. HELD: Claimants who returned to original plant within the six-month trial period did not voluntarily quit.

Wiese v. Iowa Department of Job Service, 389 N.W.2d 676 (Iowa 1986)

Job service rule that refusal to accept transfer when employee was advised at time of hire that transfers were customary did not apply to "temporary job in Texas," because it was temporary.

Wolfe v. Graether, 389 N.W.2d 643 (Iowa 1986).

Employment at Will

Optometrist-partner agreed to become employee instead of shareholder when partnership was converted to professional corporation, but claimed he received permanent employment agreement in return. HELD: Surrender of shareholder rights constitutes sufficient additional consideration to prevent interpretation of permanent employment agreement as one for employment at will. Parole or extrinsic evidence on the intent of the parties was admissible to prove plaintiff's claim. A finding of additional consideration, however, is not conclusive; employee must also prove that both parties intended a contract for permanent employment or that the employee so intended and the employer knew. Instructions that declared the existence of a permanent

employment contract simply by virtue of the existence of additional consideration were in error.

Porth v. Iowa Department of Job Service, 372 N.W.2d 269 (Iowa 1985).

Misconduct.

Employee who solicits co-workers to quit and work for him in new business that competes with employer can be denied unemployment benefits for misconduct.

Contract Services, Ltd. v. Iowa Dept. of Job Service, 372 N.W.2d 212 (Iowa 1985).

Successor Employer-Unemployment Compensation

Employer who acquired only 50% of the total asset value of the predecessor company still qualified as a successor employer for purposes of contribution rates. Determination of successor employer under Section 96.19(5)(b), Code of Iowa, involves two alternative tests: acquisition of substantially all of the assets, or acquisition of the organization, trade, or business of the predecessor. Regardless of whether 50% of the asset value was acquired, evidence supported finding that employer acquired organization, trade, or business of the predecessor employer. COMMENT: Rule applied in Eswood Homes, Inc. v. Iowa Dept. of Job Service, 379 N.W.2d 33 (Iowa App. 1985).

Lamp v. American Prosthetics, Inc., 379 N.W.2d 909 (Iowa 1986).

Court invalidated a covenant not to compete that barred former employee from competing within 100 miles of any of employer's Iowa offices, since result was to prohibit competition in almost the whole state.

Pohlman v. Ertl Co., 374 N.W.2d 253 (Iowa 1985).

Unemployment Compensation

Court held that employer's offer of same job on second shift to employee discharged from first shift for lack of work constituted "suitable work," and that difficulties in child care arrangements did not constitute "good cause" for turning down such offer of "suitable work." COMMENT: Facts also establish that claimant likely would have been returned to first shift after only a few weeks, and that pay was 20 cents an hour more on second shift.

LIMITATIONS OF ACTIONS

Franzen v. Deere & Company, 377 N.W.2d 660 (Iowa 1985).

Discovery Rule.

On appeal from summary judgment for defendant, court holds that plaintiffs knew as a matter of law from the date of injury that cause of injury was movement of component of a forage wagon. HELD: Plaintiffs knew on the date of the accident all facts they needed to know to be charged with a duty to investigate to determine the existence of a cause of action.

Becker v. Star Auto, Inc., 376 N.W.2d 645 (Iowa App. 1985).

Plaintiffs filed their petition against Chrysler and other defendants on 2-9-82. In moving for a 215.1 continuance in late 1983, plaintiffs claimed difficulty in obtaining service on some defendants and represented that service on Chrysler would be made shortly. Chrysler was served 8-20-84. HELD: Commencement of action did not toll statute at least as to Chrysler where plaintiffs did not submit any explanation for delay.

Carter v. Continental Telephone Co., 373 N.W.2d 524 (Iowa App. 1985).

Waiver.

Letter by claims adjuster denying injured employee's

claim on grounds that injury was not work related contained observation that claim also would be barred by two-year statute but that adjuster desired not to make a decision "based on any statutes." HELD: Insufficient to constitute waiver of statute of limitations defense.

Willson v. City of Des Moines, 386 N.W.2d 76 (Iowa 1986).

Relating Back.

Plaintiff's original petition asserted 1983 and common-law claims for false imprisonment and false arrest, malicious prosecution, and trespass. Three years after the underlying search and seizure and two years after the petition was filed, plaintiff moved for leave to amend to add a count for invasion of privacy, arising out of one defendant's statements to news media. HELD: Invasion of privacy claim did not arise out of the same conduct, transaction, or occurrence as formed the basis for the original actions alleged in the petition. Trial court should not have permitted the amendment, and the district court's directed verdict on claim is affirmed.

Koppes v. Pearson, 384 N.W.2d 381 (Iowa 1986).

Six-year limitation on "discovery rule" language in medical malpractice statute of limitations does not violate equal protection. Plaintiff attacked two classifications: The difference between actions against health professionals and actions against other tort feasons, and the distinction between malpractice actions based on foreign objects in the body and other malpractice actions. Court found both distinctions to have a rational basis. Court also found no deprivation of due process.

Allegations of fraudulent concealment sufficed to hold, on motion to dismiss, that the two and six-years statutes of limitations were tolled.

Kurtz v. Trepp, 375 N.W.2d 280 (Iowa App. 1985).

Fraudulent Concealment

Corporate director who reinstated corporation and took action with respect to corporate assets without knowledge or approval of other director established fraudulent concealment sufficient to toll statute of limitations in action by second director against first for breach of fiduciary duty and fraud and waste. Where director reinstated corporation, fiduciary relationship continued, Director's silence constitutes an affirmative act of concealment for purposes of applying doctrine of fraudulent concealment.

MUNICIPAL CORPORATIONS

Willson v. City of Des Moines, 386 N.W.2d 76 (Iowa 1986).

Limitations of Action.

Plaintiff's original petition asserted 1983 and common-law claims for false imprisonment and false arrest, malicious prosecution, and trespass. Three years after the underlying search and seizure and two years after the petition was filed, plaintiff moved for leave to amend to add a count for invasion of privacy, arising out of one defendant's statements to news media. HELD: Invasion of privacy claim did not arise out of the same conduct, transaction, or occurrence as formed the basis for the original actions alleged in the petition. Trial court should not have permitted the amendment, and the district court's directed verdict on claim is affirmed.

Hansen v. City of Audubon, 378 N.W.2d 903 (Iowa 1985).

City's decision not to maintain or repair sanitary sewer system over a period of nine years after it discovered infiltration and inflow problems is an operational decision and is not excluded from liability by virtue of the discretionary function exception.

Argenta v. City of Newton, 382 N.W.2d 457 (Iowa 1986).

Sufficiency of Notice.

City inspector's handwritten entry in daily log kept on construction project that noted cave-in, injuries sustained by plaintiff, investigation by inspector, and inspector's opinion as to reason for cave-in, and newspaper article that reported cave-in and fact that plaintiff had been rescued and taken by ambulance to hospital for treatment and observation, were insufficient to comply with notice requirements because, among other things, neither document was caused to be presented to the municipality by plaintiff and neither document reports a claim or intent to make a claim.

Hershberger v. Buena Vista County, 391 N.W.2d 217 (Iowa 1986)

Tort Immunity

Accident occurred before enactment of comparative fault act, which also barred state or municipal liability for failure to erect a regulatory sign. Because suit was filed after July 1, 1984, that portion of the act was applicable. Allegations of negligent installation of regulatory devices and failure to maintain devices are not barred by Section 668.10(1). Court also holds that on motion for adjudication of law points, it is premature to dismiss general allegations of failure to warn, since facts might be envisioned under which the government might have a duty to warn in a manner other than regulatory devices.

Spechtenhauser v. City of Dubuque, 391 N.W.2d 213 (Iowa 1986)

Sidewalks

In case that arose before 1984 amendment to Section 364.12(2), court affirmed use of an instruction that provided: "It is the duty of a municipality to exercise reasonable care to know whether the [sidewalks] it is responsible for are in a safe condition. No iron clad rule can be laid down with respect to when the municipality has satisfied its duty under this requirement." COMMENT: Court noted that instructing separately on failure to maintain, failure to repair, and failure to inspect may tend to overly emphasize plaintiff's theory and could constitute reversible error in some circumstances. Issue was not preserved in this case.

Construction Associates, Inc. v. City of Des Moines, 375 N.W.2d 273 (Iowa App. 1985).

613A.5 Notice

Plaintiff was an unsuccessful bidder on municipal paving contract. HELD: Letter of protest did not constitute a valid 613A.5 notice because there was no statement of loss and contractor was not named as a damaged party.

Oliver v. Sioux City Community School District, 389 N.W.2d 665 (Iowa 1986).

Claim Notice

Father of student injured in gymnastics practice presented ambulance bill to school representatives and requested reimbursement. HELD: Substantial compliance with notice provision of Section 613A.5. Request for reimbursement of ambulance bill (other medicals had been paid by health insurance) did not limit scope of eventual damage suit. Court also overruled prior case law that suggested the need for specific allegations as to compliance with notice provision. Notice pleading makes general allegation of compliance sufficient. Fact that petition in this case specified a subsequent and untimely notice instead of the possibly timely request for reimbursement could be cured by amendment in the interest of justice. COMMENT: Appeal was taken from summary judgment, and plaintiff did not adduce evidence in resisting motion that request for reimbursement was timely. Why would court remand under these circumstances for determination of timeliness?

NEGLIGENCE

Beeler v. VanCannon, 376 N.W.2d 628 (Iowa 1985).

Comparative Fault.

The legislature's decision to apply joint and several liability provision of Comparative Fault Act to all cases tried on or after 7-1-84, does not violate equal protection. Rational basis test was applied. COMMENT: Court expressly declined to express opinion as to the effective date of the following language from 668.7: "The claim of [a person giving a release

from liability] against other persons is reduced by the amount of the released person's equitable share of the obligation"

Reese v. Werts Corp., 379 N.W.2d 1 (Iowa 1985).

Comparative Negligence.

Plaintiff was injured on the job, and commenced a products- liability action in 1983. Manufacturer filed a third-party claim against plaintiff's employer and ABCM, which owned the employer and who had contracted with the employer to manage the business. The manufacturer's claim for indemnity against the employer survived summary judgment. After trial, the jury awarded damages of \$100,000.00 and assessed the following percentages of negligence:

Plaintiff	5%
Manufacturer	15%
Employer	20%
ABCM	60%

HELD: Trial court should have sustained plaintiff's objections to instructions that did not advise the jury as to the effect of the percentages on plaintiff's recovery. Because the case was tried after 7-1-84, section 668.4's elimination of joint and several liability for defendants found to be less than 50% at fault applies to this case. Baldwin recognized that the legislature must have intended that the definition of "party" in section 668.2 applied to interpretations of section 668.4, and other sections affecting the application of 668.4 must also be utilized. Otherwise 668.4 will operate differently and more harshly to claimants whose cases are filed before 7-1-84 (but tried after) than claimants whose cases are filed after 7-1-84. Accordingly, provision in 668.3(5) that "court shall give instructions . . . with respect to the affects of the assessments of percentages of negligence" applies to a case filed before 7-1-84 but tried afterwards. COMMENT: Court notes in dicta that section 668.7, which discusses the effect of a release, also must apply to a case filed before 7-1-84 but tried thereafter. Other language indicates that additional submission procedures outlined in section 668.3 would apply as well.

Prior to trial, plaintiff sought to amend to claim directly against ABCM. Trial court overruled, holding that plaintiff's claim would be barred by the two-statute of limitations. Plaintiff claims a violation of equal protection. HELD: Section 668.8, which tolls the statute of limitations upon filing

of a petition as to all parties who may be assessed any percentage of fault, "is a trade off for the modified joint and several liability rule of section 668.4 and is intended to ameliorate it." Because section 668.8 applies in any case in which section 668.4 applies, plaintiff's claim against ABCM was not barred and the constitutional claim is moot. Because case is remanded for new trial on other grounds, it is of no significance that trial court denied plaintiff's motion to claim directly against ABCM on additional ground that motion came too late. COMMENT: Court closed this section of its opinion with this perplexing sentence: "In any event, section 668.8 preserves the right of plaintiff to bring a separate action against ABCM." For how long is this right in existence? While much of Reese will fade as Goetzman cases are completed, this issue as to the duration of the effect of section 668.8 will continue to exist and needs to be resolved.

In dicta, court observes that chapter 668 should not change Abild or Thompson v. Stearns Chemical with respect to claims for contribution by a third party against the plaintiff's employer.

Court also reverses the retention of manufacturer's claim against employer for indemnity. Evidence does not support claim of an independent duty running from employer to manufacturer. Also, court concludes it would have been improper to permit jury to assess percentage of negligence against employer in any event. Employer was in the case only by virtue of manufacturer's claim for indemnity. Employer's fault toward plaintiff was not in issue and, by virtue of the exclusive remedy provided by workers' compensation law, could not be an issue.

Mulinix v. Saydel Consolidated School District, 376 N.W.2d 109 (Iowa App. 1985).

Court of Appeals declines to distinguish Glidden's use of pro tanto credit rule in Goetzman cases where jury finds settling party not to be negligent.

Peterson v. Pittman, 391 N.W.2d 235 (Iowa 1986).

Injured county employee sued third party. Defendant asked in his answer that the county and county foreman be listed as parties against whom percentage of fault could be assessed. Both were served with original notice, but no relief was sought.

HELD: County and foreman were not parties to the suit because no relief of any kind was sought against them.

Whiteaker v. State, 382 N.W.2d 112 (Iowa 1986).

Legal Malpractice.

In legal malpractice suit by consumer against state for mishandling of action by Consumer Protection Division of Attorney General's office, evidence supported trial court's finding that plaintiff had not proved that a successful action would have resulted in an actual recovery, because plaintiff adduced little evidence of the defendant's financial status, assets, or other ability to pay a judgment. Also, in claiming loss of settlement opportunity due to professional malpractice, court held that plaintiff must prove that a settlement would have occurred but for counsel's negligence. This requires proof that a settlement in an ascertainable amount would have been reached and paid. Where no offer was ever made by the defendant's attorney, where he never received authority from the defendant to make any offer that involved payment of money, and where defendant's financial ability to fund any settlement has not been established, record supports trial court's finding that plaintiff has not proved collectibility.

Taylor v. Peck, 382 N.W.2d 123 (Iowa 1986).

Co-employee/Gross Negligence.

Evidence of gross negligence was insufficient to support verdict against co-employee where there had not been previous accidents on the press machine, no safety inspections had alerted the co-employee to any danger or malfunction, co-employee did not know that operating button had been weighted down, and co-employee did not instruct plaintiff to put her hand into the die.

Payne Plumbing v. Bob McKiness Excavating and Grading, Inc., 382 N.W.2d 156 (Iowa 1986).

Comparative Negligence - Parties.

Third-party defendants who were dismissed at the close of evidence on the ground that they owed no duty to third-party plaintiff could not be assessed with percentages of negligence because they do not come within the definition in section 668.2 of party.

Schmeling v. Ott, 388 N.W.2d 195 (Iowa App. 1986).

Duty of Care

Trial court properly instructed that telephone company had a duty to inspect lines and poles and remedy dangerous conditions within a reasonable time, and properly refused to instruct that telephone company had a duty to use "all due haste" to remedy dangerous conditions. Court also properly refused to instruct that city's accident investigator could not be negligent for failing to control traffic if telephone company represented that it would remedy hazard. Court notes that telephone company's duty to remedy danger does not affect city employee's duty to control traffic.

Rosas v. Danilson, 387 N.W.2d 767 (Iowa 1986).

Moped

Statute provides that moped must not be capable of going faster than 25 miles an hour. Statute also provides that moped license entitles licensee to operate moped on the highway. Statute also provides that motor vehicle laws apply to mopeds "to the extent practically applicable." Plaintiff was operating moped at 25 miles an hour when struck from behind by drunk driver. On appeal, dram shop contended that trial court erred in not submitting an instruction on duty of the moped operator to maintain a minimum speed. HELD: Statute prohibiting travel on highway at speed so slow as to impede or block normal traffic contains exceptions for situations when reduced speed is necessary for safe operation or for compliance with law. For moped to comply with law, it cannot operate at more than 25 miles an hour. Accordingly, moped operator cannot be charged with driving too

slow. QUESTION: What if moped was traveling at less than 25 m.p.h.?

Jones v. Blair, 387 N.W.2d 349 (Iowa 1986).

Legal Excuse

Sudden left-hand turn by plaintiff under icy conditions was sufficient to create jury issue on claim by following vehicle of sudden emergency. Instruction which defines other in-applicable definitions of legal excuse, which does not specify which particulars of negligence the defense applies to, and which does not specify the factual circumstances supporting the claimed sudden emergency, was erroneous.

Rinkleff v. Knox, 375 N.W.2d 262 (Iowa 1985).

Comparative Negligence

In Goetzman, commercial painter who fell from rented scaffolding was found 90% negligent. HELD: Basis for contributory negligence is conduct that "creates an unreasonable risk of harm to one's self or one's own interest." Person who assembles a structure on which he intends to work at some height above the ground has a duty to evaluate stability and safety of the components and finished structure before using it.

Rinkleff v. Knox, 375 N.W.2d 262 (Iowa 1985).

Employment Safety Standards

ANSI and IOSHA standards are not applicable in determining the contributory negligence of an employer who is himself injured.

PLEADING

Kleman v. Charles City Police Department, 373 N.W.2d 90 (Iowa 1985)

Temporary Injunction

Court may not issue temporary injunction solely on basis of unverified petition.

PROPERTY

Nadler v. City of Mason City, 387 N.W.2d 587 (Iowa 1986).

Condemnation

Property owner's appeal of assessment by compensation commission on condemned property included separate claims for damages by city's unreasonable delay in instituting condemnation proceedings. HELD: Good faith and bad faith are factors to be weighed in determining whether delay has been unreasonable.

Linn County v. Kindred, 373 N.W.2d 147 (Iowa App. 1985)

Reversion.

Deed of property to county with possibility of reverter for failure of county to prohibit hunting and trapping was the subject of action by estate of grantor to quiet title. HELD: County concedes a failure to comply with restrictions, and the claim of impossibility of performance was neither supported by the evidence nor relevant, given the county's acceptance of the deed.

Federal Land Bank v. Boese, 373 N.W.2d 118 (Iowa 1985)

Foreclosure.

Property owners filed "common-law" and "equitable servitude" lien in action by lender to foreclose. HELD: Property owner cannot have lien on own property. Essential element for equitable lien is debt or obligation to property owner, and owner cannot owe debt to himself.

Hawkeye Bank & Trust v. Michel, 373 N.W.2d 127 (Iowa 1985)

Dragnet Clause - Homestead.

Debtors knowingly secured loan with deed of trust with legal description of property but no identification of it as homestead. Notes referred only to deed of trust, which in turn referred to notes only by virtue of dragnet clause. Section 561.21(2), Code of Iowa, permits sale of homestead to satisfy debt only when written contract expressly stipulates that homestead shall be liable. HELD: Documents meet both of alternative standards for dragnet clauses in Freese Leasing case, 253 N.W.2d 921 (Iowa 1977): notes all relate to same series of transactions, and notes refer to deed of trust as providing security. There is no requirement that properly described property be specifically labeled as homestead.

Suss v. Schammel, 375 N.W.2d 252 (Iowa 1985).

Purchaser's delivery of final payment on real estate contract to purchaser's attorney to be disbursed to decedents of contract seller upon their tender of deed and abstract, constituted performance as a matter of law.

Buckingham v. Stille, 379 N.W.2d 30 (Iowa App. 1985).

Listing Agreement

Real estate agent sued to recover on oral agreement for finder's fee against seller. HELD: Agent cannot avoid administrative rule requiring that listing agreement be in writing by attempting to enforce oral agreement as a finder's fee.

Kirk v. Ridgway, 373 N.W.2d 491 (Iowa 1985).

Court recognizes implied warranty of workmanship or workmanlike instruction in sale of home by builder-vendor.
ELEMENTS:

- 1) house was constructed to be occupied as a home,
- 2) house was purchased from builder-vendor who had constructed it for the purpose of sale,

3) when sold, house was not reasonably fit for intended purpose or had not been constructed in a good and workmanlike manner,

4) buyer was unaware of the defect at time of purchase and had no reasonable means of discovering it, and

5) damages as a result of defective condition.

Court further held that reasonable notice after discovery of defect was required, and that failure to reserve implied warranty when taking title did not constitute waiver. Court also defined "builder-vendor."

Thorp Credit, Inc. v. Gott, 387 N.W.2d 342 (Iowa 1986).

Mortgage Foreclosure

Entry of partial summary judgment for foreclosure of part of farmland incumbered by mortgage was reversed, in part because the partial summary judgment created the possibility of two sale proceedings and because it would result in piecemeal litigation and increased costs. Court also found factual issues.

Farmers Production Credit Association v. McFarland, 374 N.W.2d 654 (Iowa 1985).

Foreclosure-Redemption

After foreclosure, property was sold to senior mortgagee at sheriff's sale. Within six-month redemption period, assignee of mortgagor tendered check for redemption of property. A junior mortgagee subsequently (but also within the six-month period) tendered its own check in an attempt to redeem the property as well. HELD: Assignee of mortgagors has exclusive right of redemption for six months after foreclosure. Second mortgagee's lien was not extinguished by redemption, so assignee's title is subject to second mortgagee's right.

Rembe v. Stewart, 387 N.W.2d 313 (Iowa 1986).

Joint Tenancy

Upholds rule that surviving joint tenant takes real

property free of debts of deceased joint tenant.

TORTS

Haldeman v. Total Petroleum, Inc., 376 N.W.2d 98 (Iowa 1985).

Defamation.

Gas station cashier was discharged for unexplained shortages in cash receipts. Cashier sued for defamation, wrongful discharge, and intentional infliction of emotional distress. HELD: Evidence that plaintiff submitted to polygraph examination at request of her employer was admissible for limited purpose of showing employer's conduct. Employer had absolute privilege to state reasons for termination in responding to plaintiff's application for unemployment. The employer's responses to inquiries by new prospective employers of cashier as to reason for her termination were protected by a qualified privilege. Employer's conduct does not rise to the level of outrageous conduct required for intentional infliction of emotional distress.

Mulcahy v. Ely, Lily & Co., 386 N.W.2d 67 (Iowa 1986).

Product Liability

Plaintiff sued 25 drug companies who manufacture DES for injuries allegedly caused by the ingestion of DES in 1949 by plaintiff's mother while pregnant with plaintiff. After conducting extensive discovery, plaintiff was unable to positively identify which defendant manufactured or marketed the DES that her mother ingested.

Court held that enterprise liability theory, if it is to be recognized in Iowa, would not apply to these facts. Theory should be applied only where there are a small number of defendants in the industry, because the assumption underlying enterprise liability is that defendants jointly control the risk. Evidence is that DES manufacturers do not control their conduct by committee.

Court also held that alternative liability theory was inapplicable to these facts. Alternative liability applies only whether the conduct of two or more actors is tortious but there is uncertainty as to which one caused it. In this case,

plaintiffs could prove only that one manufacturer had DES available in at least one pharmacy in Ames in 1949, and that two others may have had DES available in one Ames pharmacy in 1949. Plaintiffs could not rule out the existence in Ames' pharmacies of other companies' DES. Plaintiff could not prove from what pharmacy in Ames the DES was purchased.

Court rejects application of market share liability theory on policy. While plaintiff's claim may be appealing and the theory for removing her inability to prove causation may have social appeal, decision to depart from standard requirements of causation is a legislative question. COMMENT: Court specifically reserves the question of how to handle a case involving actual concert of action by defendants.

Moore v. Vanderloo, 386 N.W.2d 108 (Iowa 1986).

Educational Malpractice

Plaintiff suffered a stroke after chiropractic manipulation of her neck. She sued Palmer College of Chiropractic for educational malpractice, alleging that Palmer failed to teach chiropractor about known risks created by chiropractic adjustments. HELD: Plaintiff's claims based on express warranty, either under the Uniform Commercial Code or general contract law, do not state a claim because of lack of consideration, lack of privity, and the independent intervening act of state licensing. Plaintiff's claims based on negligence fall because court is unwilling to determine what any educational institution should teach its students. Court also finds an inherent uncertainty in determining causation and damages. Lastly, recognition of such a cause of action has major financial consequences for all educational institutions and imposes threats to academic freedom that is central to functioning of educational institutions.

Failure to Warn

Plaintiff also sued Ortho, which manufactured birth control pill that plaintiff used during time period that adjustments occurred. Plaintiff claimed that ortho should have warned chiropractors of the risk to chiropractic patients of the combinations of birth control pills and chiropractic

manipulations. Because evidence was to the effect that information pertaining to the risk caused by the interrelationship between cervical manipulations and ingestion of birth control pills was not available until after plaintiff's injuries, Ortho had no duty to warn.

Instructions

Trial court instructed that plaintiff must prove not only lack of adequate warning by ortho but that "lack of adequate warning was a proximate cause of [plaintiff's] ingestion of the drug." HELD: Instruction was proper because plaintiff had to show lack of warning was a proximate cause of plaintiff's injury. COMMENT: Does not instruction require plaintiff to prove that she ingested the drug because there was an inadequate warning?

Hardy v. Britt-Tech Corp., 378 N.W.2d 307 (Iowa App. 1985).

Product Liability - Alterations.

Where there was sufficient evidence that numerous alterations in product did not affect operation of component that plaintiff contended was defective, court held that plaintiff had adduced substantial evidence that product had reached victim without a substantial change in its condition. COMMENT: Citing an Indiana case, court said in dicta: "if the machine had been altered, the defendant can still be held liable but only if the plaintiff can show it is foreseeable that the alteration would be made and a change does not unforeseeably render the product unsafe."

Anthony v. State, 374 N.W.2d 662 (Iowa 1985).

Inmate with criminal record and history for sexual assaults raped plaintiff while on work-release. Plaintiff sued the state for, among other things, failure to warn. HELD: Absent prior threats to a specific, identifiable victim, the state had no duty to warn. Decision based on inability to warn plaintiffs without such prior and specific threats. COMMENT: State did not urge discretionary function defense, and court

expressly noted that it was not deciding whether discretionary function would be a defense in a more factually appealing case.

Edward Vantine Studios, Inc. v. Fraternal Composite Service, Inc., 373 N.W.2d 512 (Iowa App. 1985).

Intentional Interference.

Despite highly competitive nature of business of photographing composites for fraternities and sororities, court found sufficient evidence to support claim for intentional interference with existing contractual relations. Defendant contacted houses "already signed up" with plaintiff and contracted with them after including a clause that indemnified the houses in any action by plaintiff for breach of contract. Fact that plaintiff's contracts contained clause that plaintiff would not honor contract unless it was signed and returned within fourteen days, and fact that plaintiff could not prove receipt of any contracts prior to defendant's conduct, made plaintiff's contracts voidable only, still valid until plaintiff acted. Award of punitive damages, however, was reversed due to absence of sufficient evidence of legal malice.

Roberts v. Bruns, 387 N.W.2d 140 (Iowa 1986).

Emotional Distress.

Mother of injured motorcyclist sued dram shop, drunk driver, and driver's employer for, among other things, infliction of emotional distress. Mother was not bystander, but based claim on alleged conduct by driver and employer to conceal identity of driver over an extended period of time, with resulting emotional distress to mother. HELD: Too difficult to separate the continuing consequences of defendants' alleged tortious conduct from the continuing effects of the original injuries. Claims were properly dismissed.

Quade v. Heiderscheit, 391 N.W.2d 261 (Iowa App. 1986).

Without discussing factual details at all, court found no factual support for a tenant's counterclaim for intentional infliction by the landlord of emotional distress.

Ahrens v. Ahrens, 386 N.W.2d 536 (Iowa App. 1986).

Abuse of Process.

Advice of counsel is not a defense to an action for abuse of process.

M.H. v. State, 385 N.W.2d 533 (Iowa 1986).

State is not liable in tort for social service personnel's negligent failure to remove child from inadequate parental home and thereby avoid abuse. Action for intentional infliction of emotional distress, however, might lie under certain facts. Tort Liability Act excludes liability only for willful and wanton acts, and recovery for intentional infliction requires proof only of outrageous conduct. Outrageous conduct may be proved without showing that such conduct is also willful and wanton.

Feltes v. State, 385 N.W.2d 544 (Iowa 1986).

Plaintiff filed civil damage action against state without first exhausting state appeal board remedy because plaintiff wished to commence action before 7-1-84 and avoid new legislation about state's liability for failure to remove accumulations of snow or ice. HELD: Compliance with procedure for claims before state appeal board is mandatory. COMMENT: Court takes pains to reserve question as to whether new statute will apply to suit filed after appeal board denies claim.

Prell v. Wood, 386 N.W.2d 89 (Iowa 1986).

Rumble strips in pavement, which warn drivers of their approach to a stop sign, constitute a traffic control device for purposes of section 668.10's exemption of a municipality from tort liability for placement of same.

Hoekstra v. Farm Mutual Insurance Co., 382 N.W.2d 100 (Iowa 1986).

First-Party Bad Faith Claim.

Insureds sued homeowners insurer for bad faith in refusing to settle their claim arising from fire loss. HELD: Where insurer knew that plaintiffs had previously suffered a large home fire, where plaintiffs were responsible for some of the delay involved in the investigation, and where there was a clear issue as to whether plaintiffs had satisfied the compliance provisions of the policy, evidence would not suffice to support a claim for first-party bad faith, even if the court decides to recognize such a claim.

H.L.O. v. Hossle, 381 N.W.2d 641 (Iowa 1986).

Emotional Distress.

Parents who discovered two months after the fact that children had been abused could not recover for emotional distress.

Nichols v. Westfield Industries, 380 N.W.2d 392 (Iowa 1985).

Products Liability.

Westfield manufactured grain auger with shield. Van Zetten was Westfield's dealer and sold auger to farmer Guter. Westfield then established design change on shield and instituted recall. Westfield wrote to Van Zetten twice, but never received Guter's name from Van Zetten, even though his name was in Van Zetten's files. Guter removed the shield because it had become damaged over time. He eventually sold the auger, without the shield and without advising as to its absence, to plaintiff's employer. Plaintiff suffered a work-related accident with the auger, and sued Westfield, Van Zetten, and Guter. After trial, the jury fixed plaintiff's damages at \$500,000.00 and assessed the following percentages:

Plaintiff	60%
Westfield	15%
Van Zetten	15%
Guter	10%

Apparently case was tried before 7-1-84, because court accepted without comment the judgment against all three defendants, jointly and severally, in the amount of \$200,000.00.

HELD: It was error to submit claim against dealer Van Zetten for negligent design, when there was no evidence of dealer's involvement in design process. There was, however, sufficient evidence to support jury finding that Van Zetten was negligent in not responding to recall letters. Record would permit inference that had Van Zetten supplied Westfield with Guter's name, a chain of events could have occurred that would have prevented this accident.

Instruction on assumption of risk was not intended to apply to negligence claims even though language of instruction said that if defendants established elements of defense, "then your verdict should be for the defendants." Record established that court and counsel all envisioned that defense applied only to strict liability counts. COMMENT: Instruction language clearly refers to assumption of risk in the secondary sense.

Although section 388 of the Restatement (Second) of Torts applies to Guter's casual sale of farm machinery, Guter has no duty to warn. Guter has duty to warn only of those dangers which are not obvious. Plaintiff was experienced, and danger posed by coming in contact with unshielded auger would be obvious to anyone using it. Accordingly, verdict against Guter is reversed. COMMENT: Court added following language with respect to 388: "It does not require the supplier to give information concerning available means for amelioration of obvious dangers, even though it is aware of these means and the party to whom the chattel is supplied is not.

Case is reversed for new trial as to Van Zetten only. No errors were committed against Westfield, which argues that elimination of Guter completely as a defendant and granting of a new trial for Van Zetten on fewer specifications of negligence mandates retrial as to Westfield as well. While reversal of judgment against all parties for errors committed only against some parties is permissible, this is appropriate only where rights and issues are interdependent and injustice might result from a reversal as to less than all parties. Here, although Westfield could conceivably obtain a more favorable result on retrial, Westfield "has failed to establish that any injustice befell it at the original trial as a result of errors committed against Van Zetten and Guter." COMMENT: Court says test is whether injustice might result from a reversal as to less than all parties, but then concludes that Westfield has failed to establish that it suffered any injustice as a result of the

errors committed against others. Are not these two separate issues?

On retrial, plaintiff's 60% allocation and damages of \$500,000.00 are binding. Only remaining issue, therefore, is whether Van Zetten is negligent. If so, plaintiff is entitled to a judgment against Van Zetten, but neither this subsequent verdict against Van Zetten nor the original verdicts against Van Zetten and Westfield shall be preclusive between them in any action for contribution. COMMENT: The decision re result and scope of remand was reached on a vote of 5-4.

Sheerin v. Holin Co., 380 N.W.2d 415 (Iowa 1986).

Workers' Compensation - Exclusive Remedy.

Plaintiff's decedent was murdered by coemployee during working hours. Plaintiff filed wrongful death action against employer, who moved for summary judgment on exclusive remedy provisions of Chapter 85. HELD: Although injury "arose out of employment" as a matter of law, record is silent as to circumstances at and immediately prior to the attack. Record does not negate the possibility that attack was preceded by a departure from the course of employment, because an employee who deviates from the line of duty so that her actions are foreign to employee's work, cannot sustain injury "in course of employment."

Spechtenhauser v. City of Dubuque, 391 N.W.2d 213 (Iowa 1986)

Sidewalks

In case that arose before 1984 amendment to 364.12(2), court affirmed use of an instruction that provided: "It is the duty of a municipality to exercise reasonable care to know whether the [sidewalks] it is responsible for are in a safe condition. No iron clad rule can be laid down with respect to when the municipality has satisfied its duty under this requirement." COMMENT: Court noted that instructing separately on failure to maintain, failure to repair, and failure to inspect may tend to overly emphasize plaintiff's theory and could constitute reversible error in some circumstances. Issue was not preserved in this case.

Hershberger v. Buena Vista County, 391 N.W.2d 217 (Iowa 1986)

Accident occurred before enactment of comparative fault act, which also barred state or municipal liability for failure to erect a regulatory sign. Because suit was filed after July 1, 1984, that portion of the act was applicable. Allegations of negligent installation of regulatory devices and failure to maintain devices are not barred by Section 668.10(1). Court also holds that on motion for adjudication of law points, it is premature to dismiss general allegations of failure to warn, since facts might be envisioned under which the government might have a duty to warn in a manner other than regulatory devices.

Rhiner v. City of Clive, 373 N.W.2d 466 (Iowa 1985)

1983 Action.

Supreme Court held that district court properly instructed that municipality could not be liable for simple negligence in training or supervision of police force. Supreme Court also held that availability of state tort claim remedy makes simple negligence claim against municipality employee under Section 1983 unnecessary. Court also held that officer's good-faith defense is not conditioned upon an admission of excessive force, and is not mutually exclusive of an additional claim of self-defense.

Kleman v. Charles City Police Department, 373 N.W.2d 90 (Iowa 1985)

Section 235A.20, Code of Iowa, authorizes action for damages for unlawful dissemination of information from child abuse registry. In affirming the district court's refusal to dismiss child-abuse suspect's action, court held that newspaper and editor could, under some circumstances, be persons authorized to receive such information from the registry and accordingly could be liable for improper dissemination of same. The court also refused to hold that only persons authorized to receive information could be liable for improper dissemination.

Wolfe v. Graether, 389 N.W.2d 643 (Iowa 1986).

Intentional Interference

Employee sued for breach of alleged permanent employment contract by professional corporation, and also sued shareholder-director for intentional interference. HELD: Reversal of judgment on breach of contract claim required retrial of claim for intentional interference as well, because shareholder-director's claim of qualified privilege could not be properly evaluated until the jury determined whether the contract for employment was permanent or at will. The court continued to approve U.J.I. 28.1 through 28.6, which are based on the 14th draft of the Restatement (2d) of Torts, instead of the final draft, which would require proof that the acts of interference be "improper" as well as intentional. The trial court should have instructed, however, on qualified privilege of an officer or director to act in corporate capacity without liability in conduct that resulted in termination. Court also notes that a shareholder-director's threat to withdraw from professional corporation if plaintiff were not terminated by corporation can constitute sufficient threat of economic reprisal to provide basis for intentional interference claim.

Grell v. Poulsen, 389 N.W.2d 661 (Iowa 1986).

Abuse of Process

Employees sued former employer for breach of alleged agreement to give them interest in business. In discovery, plaintiffs unsuccessfully sought production of customer list. HELD: Proof of some improper act - an act not consistent with the regular prosecution of the proceeding - is essential to recovery for abusive process. Routine discovery requests are not improper.

Adam v. Mount Pleasant Bank and Trust Co., 387 N.W.2d 771 (Iowa 1986).

Prairie Grain of Stockport

Court affirmed finding that Raymond Keller, the manager and one of the principal owners of Prairie Grain and a director of the bank, had sufficient "control" over Prairie Grain that its obligations to the bank could be combined with Keller's for

purposes of determining that the bank violated the statutory limit as to the amount of obligations one director of a bank may hold. Court also approved the finding that the statutory bar against a director overdrawing his checking account was violated by Prairie Grain's overdrafts. Court held that statutory violations were evidence of fraudulent activity by bank of illegally giving money to Prairie Grain for the purpose of giving a false appearance as to Prairie Grain's solvency, all for the bank's benefit.

Alberg v. Hardin Marine Corp., 387 N.W.2d 779 (Iowa App. 1986).

Product Liability - Alterations

On motion for summary judgment, supplier of motor mount assembly used on boat established that bolts present at time of accident were too short and were substitutes supplied by persons other than supplier. Plaintiff resisted on ground that defendant still had a duty to warn of improper installation by use of shorter bolts. Relying on Allers, court concluded that there was a factual issue as to whether substitution of new bolts was a foreseeable intervening cause or whether it was a substantial alteration that precluded recovery from the original supplier. COMMENT: Essence of opinion is that manufacturer must warn against foreseeable alterations in product that moves from one user to another.

Maguire v. Pabst Brewing Company, 387 N.W.2d 565 (Iowa 1986).

No cause of action in Iowa against brewer for injuries suffered because driver of other car has been drinking at tavern that sold beer manufactured by brewer.

State of Smith v. Lerner, 387 N.W.2d 576 (Iowa 1986).

Where doctor left patient overnight for observation at medical center after complaints of chest pain, court properly refused to instruct on abandonment. Court also held that it was proper to instruct jury that doctor is not negligent in exercising best judgment as to which of two or more recognized methods of treatment should be followed.

Jones v. Blair, 387 N.W.2d 349 (Iowa 1986).

Respondeat Superior

Defendant involved in car accident while driving from work to home. Court refused to apply well-established exception to "going and coming" rule in workers' compensation cases where employee is compensated for travel time and costs. Court said that bare fact of travel reimbursement did not establish a jury question on respondeat superior.

Nie v. Galena State Bank and Trust Company, 387 N.W.2d 373 (Iowa App. 1986).

Nondisclosure As Misrepresentation.

Court holds that bank officer's failure to disclose financial interest in business about which officer was advising bank customer who was considering investing in business could constitute actionable misrepresentation through silence. Court reversed a directed verdict.

Kleman v. Charles City Police Department, 373 N.W.2d 90 (Iowa 1985).

Statutory Damage Action

Section 235A.20, Code of Iowa, authorizes action for damages for unlawful dissemination of information from child abuse registry. In affirming the district court's refusal to dismiss child-abuse suspect's action, court held that newspaper and editor could, under some circumstances, be persons authorized to receive such information from the registry and accordingly could be liable for improper dissemination of same. The court also refused to hold that only persons authorized to receive information could be liable for improper dissemination.

Reihmann v. Foerstner, 375 N.W.2d 677 (Iowa 1985).

Emotional Distress

Corporate director's use of influence to effect transfer of employee would not constitute outrageous conduct for

purposes of claim for intentional infliction of emotional distress, despite evidence of threats by director against employee that employee would lose job if he persisted in support of other litigation that involved director.

Reihmann v. Foerstner, 375 N.W.2d 677 (Iowa 1985).

Wrongful Discharge

Imposition of transfer on employee as a condition to continued employment in a terminable-at-will employment contract did not constitute constructive discharge. RATIONALE: Plaintiff did not meet burden of showing that a reasonable person would have felt compelled to resign, where plaintiff's real complaint was tangential to transfer.

Kirk v. Ridgway, 373 N.W.2d 491 (Iowa 1985).

Court recognizes implied warranty of workmanship or workmanlike instruction in sale of home by builder-vendor.
ELEMENTS:

- 1) house was constructed to be occupied as a home,
- 2) house was purchased from builder-vendor who had constructed it for the purpose of sale,
- 3) when sold, house was not reasonably fit for intended purpose or had not been constructed in a good and workmanlike manner,
- 4) buyer was unaware of the defect at time of purchase and had no reasonable means of discovering it, and
- 5) damages as a result of defective condition.

Court further held that reasonable notice after discovery of defect was required, and that failure to reserve implied warranty when taking title did not constitute waiver. Court also defined "builder-vendor."

Kurth v. Van Horne, 380 N.W.2d 693 (Iowa 1986).

Decedent's administrator sued bank for breach of fiduciary duty to decedent with respect to note decedent co-signed

with tenant and which was secured by mortgage on decedent's farm. HELD: No breach of fiduciary duty without substantial evidence that customer relied upon bank for advice in connection with loan transaction or that bank was aware of such reliance, if it in fact occurred.

Metier v. Cooper Transport Co., 378 N.W.2d 907 (Iowa 1985).

State's ownership of wild deer did not provide basis for state liability for motor vehicle collision allegedly caused when driver swerved to avoid deer on highway.

Moser v. Stallings, 387 N.W.2d 599 (Iowa 1986).

Medical Malpractice

Doctor's failure to perform chin implant did not constitute battery because evidence was that chin implant was unnecessary due to results obtained by other surgery authorized by plaintiff. Also, court held that instruction that a physician does not impliedly warrant a cure or guarantee the best possible result is irrelevant to a claim based on battery or informed consent.

South Central Iowa PCA v. Scanlan, 380 N.W.2d 699 (Iowa 1986).

Federal Tort Claims Act.

A PCA is not a federal instrumentality within the meaning of the FTCA, and the federal statute does not deprive state court of jurisdiction over claims against the PCA.

Adam v. State, 380 N.W.2d 716 (Iowa 1986).

State can be held liable under tort claims act for damages arising from negligent inspection of grain elevator by Iowa State Commerce Commission. Failure to perform mandated duties or performance of authorized functions without due care constitutes negligence.

Burr v. Dahlgran, 377 N.W.2d 244 (Iowa App. 1985).

Plaintiff sued state and DCI employee for recklessness in investigation that led to murder charge against plaintiff, which charge was subsequently dismissed. Prior case, State v. Smith, 324 N.W.2d 299 (Iowa 1982), establishes that state is not liable for negligent investigation by the DCI. Plaintiff claimed that legislature's exclusion of liability for "willful and wanton acts" is an implicit consent to be sued for reckless acts. Plaintiff appealed from trial court's finding that agent's actions were willful and wanton but not reckless. Without addressing the logic of plaintiff's "recklessness" argument, Court of Appeals found no substantial evidence to support a finding of either recklessness or willful and wanton conduct.

TRIAL

Beck v. Fleener, 376 N.W.2d 594 (Iowa 1985).

Instructions.

No harm occurred in medical malpractice case when the trial court instructed the jury that circumstantial evidence could not be used when expert testimony was required for proof of their claim since expert opinion testimony is a form of direct evidence. Court observed "that no useful purpose is served by attempting to instruct a jury on the difference between direct and circumstantial evidence."

Moore v. Vanderloo, 386 N.W.2d 108 (Iowa 1986).

Exclusion of Expert Testimony

Plaintiff first disclosed a rebuttal expert at the close of their case in chief. HELD: No abuse of discretion in excluding the expert. Timing of the request indicates that expert was actually part of plaintiff's case in chief. Court also agrees with defendant that claimed need for rebuttal testimony did not exist, because defendant's testifying expert did not change his testimony from that given in his deposition.

Moore v. Vanderloo, 386 N.W.2d 108 (Iowa 1986).

Final Argument

Defense counsel referred in opening statement to the expected testimony of a defense expert regarding the presence of a congenital defect that may have contributed to plaintiff's stroke. Expert was never called. HELD: No abuse of discretion in sustaining objections to plaintiff counsel's discussion in final argument of fact that expert had not testified. Possibility of congenital defect in plaintiff's vascular system never became an issue in the case.

Moore v. Vanderloo, 386 N.W.2d 108 (Iowa 1986).

Juror Misconduct

Fact that juror read an article about the pre-trial settlement between plaintiff and chiropractor and Palmer's dismissal from case was insufficient to merit a mistrial.

State v. Sauls, 391 N.W.2d 239 (Iowa 1986).

Juror Misconduct.

In murder case, defendants were accused of stabbing victim in his Volvo. During deliberations, jurors inspected other Volvos to determine whether someone sitting in the backseat could stab someone sitting in the driver's seat. HELD: Misconduct did not, to a reasonable probability, influence the verdict. The experiments involved matters of common knowledge, and many photographs of the interior of the Volvo were introduced.

Countryman v. McMains, 381 N.W.2d 638 (Iowa 1986).

Continuance.

Plaintiff moved at commencement of trial for continuance because defendant had refused to complete a discovery deposition, allegedly leaving plaintiff unprepared. Defendant had refused to answer questions on deposition and plaintiff had obtained order compelling such discovery, but defendant continued to refuse. Plaintiff never followed up to obtain further

sanctions, and conceded that she did not expect defendant to appear at trial, permitting entry of default. Record also establishes that defendant did not terminate deposition entirely and was prepared to answer questions in other areas, which could have alleviated plaintiff's surprise when defendant testified on those areas at trial. HELD: Court did not abuse its discretion in refusing to grant continuance.

South Central Iowa PCA v. Scanlan, 380 N.W.2d 699 (Iowa 1986).

Jury Demand.

PCA brought foreclosure action against farmers, and farmers filed counterclaim for damages with a jury demand. HELD: Jury demand was improperly stricken. Counterclaimants had right to jury trial on issues ordinarily triable to a jury.

Jensen v. Crabb, 380 N.W.2d 736 (Iowa App. 1985).

Instructions.

In medical malpractice action plaintiffs alleged mistreatment, and supplied expert testimony that use of "high" forceps during delivery was inappropriate under any circumstances. Defendant adduced expert testimony that concurred, but that also opined that "high" forceps had not been used. HELD: Instruction that referred to misdiagnosis as well as mistreatment was confusing and may have required plaintiff to prove more than was at issue.

Schmeling v. Ott, 388 N.W.2d 195 (Iowa App. 1986).

Instructions

Trial court properly instructed that telephone company had a duty to inspect lines and poles and remedy dangerous conditions within a reasonable time, and properly refused to instruct that telephone company had a duty to use "all due haste" to remedy dangerous conditions. Court also properly refused to instruct that city's accident investigator could not be negligent for failing to control traffic if telephone company represented that it would remedy hazard. Court notes that telephone

company's duty to remedy danger does not affect city employee's duty to control traffic.

Moser v. Stallings, 387 N.W.2d 599 (Iowa 1986).

Instructions

At trial plaintiff asserted multiple theories of recovery, including negligence in providing surgical care. Plaintiff limited theories at close of evidence to battery and informed consent. At request of defendant, trial court instructed that physician does not impliedly warrant a cure or guarantee the best possible result. HELD: Instruction has no relevance to remaining claims, and fact that it was relevant to claims tried but subsequently withdrawn is not justification for giving instruction. Trial court should have simply instructed that jury should disregard evidence on withdrawn issues. Court did not reverse because erroneous instruction expressly cautioned that it was not a defense to informed consent claim.

Moser v. Stallings, 387 N.W.2d 599 (Iowa 1986).

Motion To Reopen

At close of defendant's evidence, plaintiff rested (had no rebuttal) after being given "a couple of minutes to review a few notes." Plaintiff attempted to reopen the next day in order to read portions of defendant's deposition. HELD: No abuse of discretion in refusing plaintiff's request to reopen.

Jones v. Blair, 387 N.W.2d 349 (Iowa 1986).

Expert Testimony

Plaintiffs called the investigating officer as witness. Report which referred to weather was introduced, and officer was asked about weather on direct examination. On cross, defense obtained officer's expert opinions as to role of weather in accident. HELD: Defendant's failure to list officer as expert is irrelevant, since officer was called by plaintiffs. Plaintiffs opened door to expert opinions by asking officer about the weather.

Rhiner v. City of Clive, 373 N.W.2d 466 (Iowa 1985)

Juror Misconduct.

Juror read article about similar litigation being filed against his best friend, who also was a police officer in a neighboring community. Juror said he did not read the accompanying story about the instant trial. Juror denied awareness of plaintiff's relative as a client of the social services agency where the juror worked. HELD: No evidence of misconduct that was calculated to influence the verdict.

Rinkleff v. Knox, 375 N.W.2d 262 (Iowa 1985).

Instructions

Trial court instructed jury on the following particulars of contributory negligence:

- 1) not knowing or applying safe scaffolding use practices as required under Iowa law, and
- 2) not knowing or applying safe scaffolding use practices as recommended by ANSI.

Only instructional definition of standard of care was the UJI definitions of ordinary care and negligence. HELD: Specifications are in error. They fail to specify any particular act or omission, and instead incorporate extraneous standards of care not applicable to plaintiff's conduct.

Rinkleff v. Knox, 375 N.W.2d 262 (Iowa 1985).

Instructions

Plaintiff was professional painter who fell from rented scaffolding. Court held that plaintiff's status did not establish as a matter of law that plaintiff had superior knowledge. Jury should have been instructed on full extent of bailor's obligations to warn users and also on the exception to such duty where the user has superior knowledge.

Rinkleff v. Knox, 375 N.W.2d 262 (Iowa 1985).

Retrial

Reversal in negligence case only on liability grounds results in retrial only on liability aspect of case. Damages are as established by first trial.

Thacker v. Eldred, 388 N.W.2d 665 (Iowa App. 1986).

New Trial

Wrongful death of teenager resulted in verdict of \$15,000.00 in compensatory damages and \$200,000.00 in punitive damages. HELD: Defendants may not use Rule 244 and case law on adequacy of damages to obtain a new trial on the argument that the assessed damages were the result of compromise on the issue of liability.

WILLS

In re: Estate of Henrich, 389 N.W.2d 78 (Iowa App. 1986).

Undue Influence

Evidence that decedent's grand-nephew, who was named as sole beneficiary, had opportunity to exercise undue influence during two visits to decedent at hospital was insufficient to establish undue influence absent any evidence of decedent's susceptibility to influence or grand-nephew's intent.

In re Estate of Hoffman, 375 N.W.2d 231 (Iowa 1985).

Revocation

Original will and subsequent codicils established son's right to lease farm for 5-year period and to purchase farm at fixed price. Subsequent will that did not revoke prior wills stated farm was not to be sold until five years after testator's death. HELD: Subsequent document revokes only those portions of prior documents that are inconsistent. Lease and option to purchase are not inconsistent.

In re: Estate of Johnson, 387 N.W.2d 329 (Iowa 1986).

Testator

Will made "absolute bequest" of remainder interest to natural children and then provided that one child's remainder interest would be administered by trust. Child then predeceased life tenant. HELD: Will gave child a vested remainder interest, which passed under his own Will, rather than a life-income interest with only a general power (unexercised) of appointment.

WORKERS' COMPENSATION

Carter v. Continental Telephone Co., 373 N.W.2d 524 (Iowa App. 1985).

Letter by claims adjuster denying injured employee's claim on grounds that injury was not work related contained observation that claim also would be barred by two-year statute but that adjuster desired not to make a decision "based on any statutes." HELD: Insufficient to constitute waiver of statute of limitations defense.

Carter v. Continental Telephone Co., 373 N.W.2d 524 (Iowa App. 1985).

Two-year statute of limitations began to run when employee received letter from company physician in which doctor specifically indicated that dermatitis was caused by a substance he came into contact with while on the job.

McKeever Custom Cabinets v. Smith, 379 N.W.2d 368 (Iowa 1985).

Cumulative Injury.

Supreme Court adopted cumulative-injury rule. Time for filing claim begins to run when, because of pain or physical inability, claimant could no longer work. Insurer covering date on which claimant can no longer work is liable.

Reese v. Werts Corp., 379 N.W.2d 1 (Iowa 1985)

Comparative Fault - Indemnity.

Court reverses the retention of manufacturer's claim against employer for indemnity. Evidence does not support claim of an independent duty running from employer to manufacturer. Also, court concludes it would have been improper to permit jury to assess percentage of negligence against employer in any event. Employer was in the case only by virtue of manufacturer's claim for indemnity. Employer's fault toward plaintiff was not in issue and, by virtue of the exclusive remedy provided by workers' compensation law, could not be an issue.

Reese v. Werts Corp., 379 N.W.2d 1 (Iowa 1985)

Contribution.

In dicta, court observes that chapter 668 should not change Abild or Thompson v. Stearns Chemical with respect to claims for contribution by a third party against the plaintiff's employer.

McKee v. Second Injury Fund, 378 N.W.2d 920 (Iowa 1985).

Workers' compensation commutation provisions do not apply to benefits payable under Second Injury Compensation Act.

Liberty Mutual Insurance Company v. Winter, 385 N.W.2d 529 (Iowa 1986).

In response to workers' compensation insurer action for indemnity out of defendant-employee's settlement proceeds from third party suit, employee alleged that insurer forfeited its statutory right to indemnification by providing a recorded statement of employee to the third party. HELD: Without regard to whether insurer owed a duty of good faith and fair dealing to employee or whether insurer violated such a duty, if it exists, forfeiture theory does not affect insurer's statutory claim to indemnification from settlement proceeds. If employee's actual and legal allegations are correct, they support a civil cause of action for damages, which employee in fact pled in counterclaim. COMMENT: Court went on to hold that counterclaim was properly

dismissed because employee offered no evidence to support claim that providing statement to third party diminished settlement value of third-party claim or that claim was worth more than the amount for which it was settled.

Farris v. General Growth Development Corp., 381 N.W.2d 625 (Iowa 1986).

Even when workers compensation insurer is the same company who provides the liability insurance for the defendant sued by the injured employee, the court properly deducts from the insurer's recovery by comp lien its share of the attorney fee.

Mata v. Clarion Farmers Elevator Cooperative, 380 N.W.2d 425 (Iowa 1986).

Third-Party Action.

Injured and compensated employee sued, along with his spouse and children, a third-party for civil damages. Defendants apparently settled with plaintiffs by paying the children and the spouse but not the employee in return for dismissals by all plaintiffs. Four hours after dismissals were filed, employer and insurer filed liens. The next day the insurer filed a petition of intervention. HELD: Section 85.22's rules on settlements of an employee's claims against third parties requires a conclusion that a dismissal is tantamount to a settlement and is not valid without the employer or insurer's consent or the commissioner's approval. If third-party defendants insist that employee's dismissal was coincidental and not induced by payments to family members, then his claim survives and can be prosecuted by insurer without any credit for settlements paid to family members. Insurer has the right to intervene and also may enlarge upon employee's allegations of negligence.

Sheerin v. Holin Co., 380 N.W.2d 415 (Iowa 1986).

Exclusive Remedy.

Plaintiff's decedent was murdered by coemployee during working hours. Plaintiff filed wrongful death action against employer, who moved for summary judgment on exclusive remedy provisions of Chapter 85. HELD: Although injury "arose out of

employment" as a matter of law, record is silent as to circumstances at and immediately prior to the attack. Record does not negate the possibility that attack was preceded by a departure from the course of employment, because an employee who deviates from the line of duty so that her actions are foreign to employee's work, cannot sustain injury "in course of employment."

Guyton v. Irving Jensen Co., 373 N.W.2d 101 (Iowa 1985)

Supreme Court adopts "odd-lot doctrine": "[W]hen injury makes employee incapable of obtaining employment in any well-known branch of labor market," employee is totally disabled.

Miller v. Civil Constructors, 373 N.W.2d 115 (Iowa 1985)

Appeals.

Rule requiring timely receipt (as opposed to mailing) of notice of agency appeal was held to be a reasonable interpretation of statute.

Dyer v. National Bi-Products, Inc., 380 N.W.2d 732 (Iowa 1986).

Exclusive Remedy

Employee injured in job-related accident sued for breach of oral contract in which employee agreed not to sue employer in return for promise of lifetime employment. Employer maintained that Chapter 85 provided employee with sole remedy and that his promise to forego civil litigation provided no consideration. HELD: Presumed invalidity of employee's civil suit does not foreclose, as a matter of law, forbearance as consideration for settlement contract, overruling old case law to the contrary. Evidence of exclusivity is relevant on issue of employee's claimed belief that he was foregoing a valid claim.

Polk County v. Steinbach, 374 N.W.2d 250 (Iowa 1985).

Person injured while participating in county work program to repay county for general relief assistance may be an employee for workers' compensation purposes.

