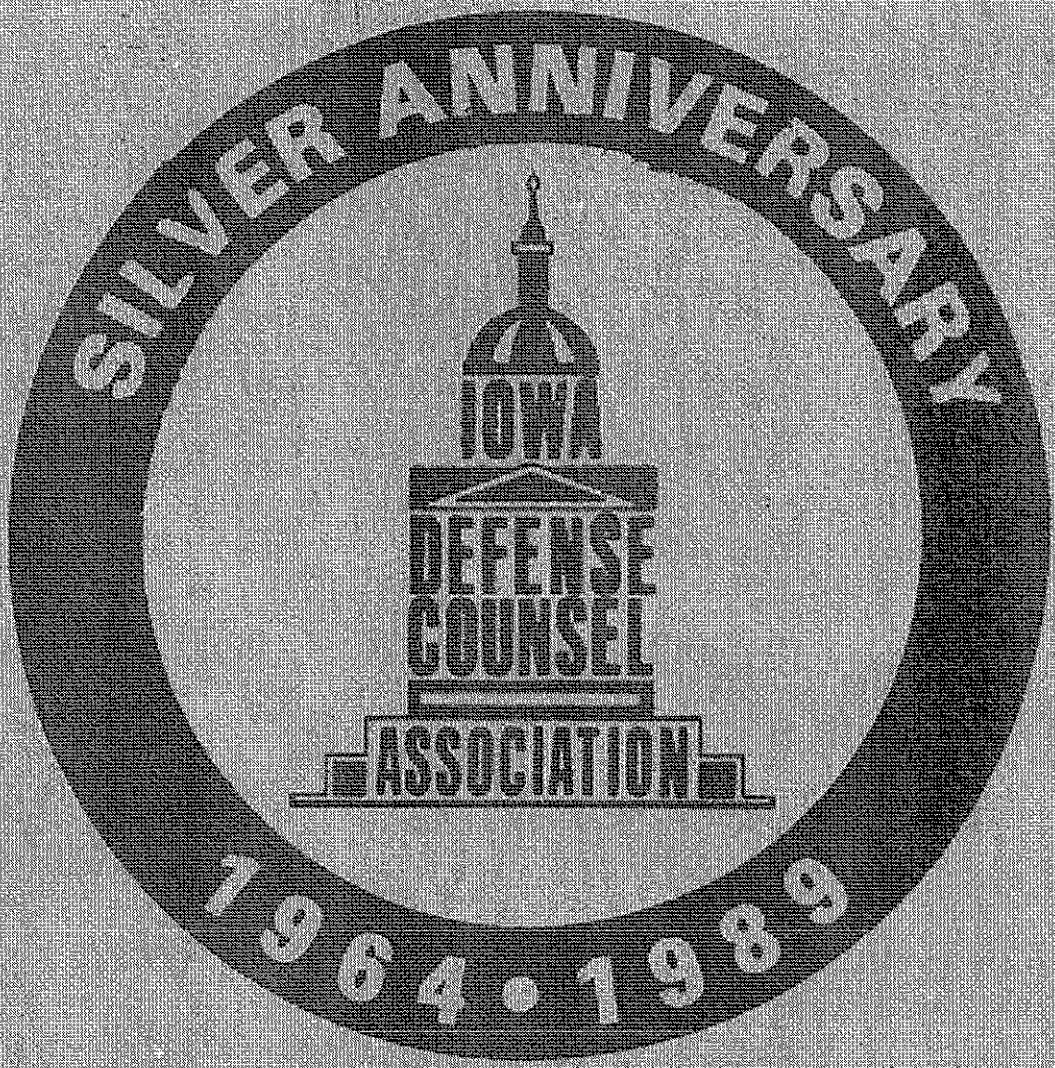


1989 Annual Meeting

OCTOBER 26, 27 & 28, 1989
UNIVERSITY PARK HOLIDAY INN
WEST DES MOINES, IOWA

THURSDAY, OCTOBER 26th

7:00 a.m. **Board of Directors Meeting**
8:00 a.m. **Registration**
8:45-9:00 a.m. **Report of the Association**
9:00-10:00 a.m. **Worker's Compensation Update Highlights and Compensible Suicide**
Judith Higgs - Sioux City
10:00-10:30 a.m. **IDCA Task Force Review of Civil Jury Instructions**
Thomas D. Hanson and
David L. Phipps — Des Moines
Angela Simon — Dubuque
Gregory M. Lederer — Cedar Rapids
10:30-10:45 a.m. **Break**
10:45-11:45 a.m. **IDCA Task Force Review of Civil Jury Instructions**
11:45-12:15 p.m. **Ethics and *Mallard v. U.S. District Ct. of Iowa,*** Gordon E. Allen - Des Moines
12:15-1:00 p.m. **Luncheon**
1:00-1:30 p.m. **Fair Settlement or Failed Justice? A Defense Lawyer's Ethical Dilemma**
The Honorable Linda K. Neuman, Justice, Iowa Supreme Court
1:30-2:30 p.m. **Accounting for Lost Profits in the Business Interruption Case**
Stephen G. Morrison - Columbia, SC
2:30-3:30 p.m. **The Problem of Unreliable Expert Witness Testimony**
Thomas M. Crisham - Chicago, IL
3:30-3:45 p.m. **Break**
3:45-4:45 p.m. **First Party Bad Faith in Iowa**
Timothy J. Walker - Des Moines
4:45-5:15 p.m. **A Fresh Look at Voir Dire**
John D. Stonebraker - Davenport
6:30-9:30 p.m.* Dinner aboard the ***Pathfinder Dinner Train***

***Note: 6:00 p.m.** Chartered buses to leave from NORTH side of University Park Holiday Inn for transportation to Train Station

FRIDAY, OCTOBER 27th

8:45-9:45 a.m. **Defending Toxic Tort Cases**
Richard J. Sapp - Des Moines
9:45-10:15 a.m. **Comparative Fault Update**
Gregory G. Barntsen - Council Bluffs
10:15-10:30 a.m. **Break**
10:30-11:30 a.m. **Settlement Techniques and Releases**
Eric J. Magnuson - Minneapolis, MN
11:30-12:00 p.m. **Discovery Sanctions and IRCP 125**
Constance M. Alt - Cedar Rapids
12:00-1:00 p.m. **Luncheon**
1:00-1:30 p.m. **Current Developments in Federal Practice**
The Honorable Ronald E. Longstaff
Magistrate, U.S. District Court
1:30-2:30 p.m. **Operator's Manual for a Witness Chair**
Thomas O. Baker - Kansas City, MO
2:30-3:00 p.m. **Current Activities of National Defense Associations - Representatives of:**
International Association of Defense Counsel, Federation of Insurance and Corporate Counsel, Association of Defense Trial Attorneys
3:00-3:15 p.m. **Break**
3:15-4:15 p.m. **Needs of Our Civil Justice System from a National Perspective**
Barry Bauman - Washington, DC
4:15-4:45 p.m. **Reminders and Suggestions on the Use and Non-use of Depositions Under Iowa Rules**
John B. Grier - Marshalltown
6:00-7:00 p.m. **Reception**
7:00 p.m. **Annual Banquet**

SATURDAY, OCTOBER 28th

9:00-10:00 a.m. **Annual Appellate Case Review**
Gregory M. Lederer - Cedar Rapids
10:00-10:15 a.m. **Break**
10:15-10:45 a.m. **Statutory Limitations on an Employer's Right to Discharge Employees**
Iris E. Muchmore - Cedar Rapids
10:45 a.m. **Election of Officers and Directors and Recess Annual Meeting**
11:30 a.m. **Board of Directors Meeting**

CLE HOURS:

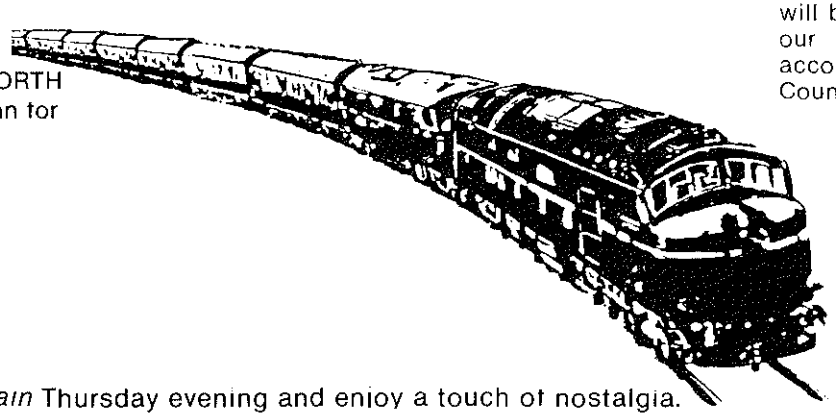
Iowa	15
Federal	6
Ethics	1

SPECIAL EVENTS

Thursday - Dinner aboard the *Pathfinder Dinner Train* Thursday evening will be an intriguing adventure as you return with us to the days of yesteryear a time when everyone traveled by train and the elite dined in luxurious dinner cars! As the train slowly departs from the Station, you first will enjoy cocktails served at your table or in the lounge car, followed by a delightful four-course meal. The *Pathfinder* will leave the Station at 6:30 p.m. for a 50-mile excursion returning at approximately 9:30 p.m.

Busses will take you from the University Park Holiday Inn to the Train Station. We will begin loading at **6:00 p.m. sharp** and the busses will leave the hotel as they are filled. (*Pathfinder* will leave the Station at 6:30 p.m.) Upon returning from our ride on the rails, the busses will take you back to the hotel.

Friday - The Annual Meeting Banquet Friday evening will be a relaxing trip down memory lane as we honor our Founders and Past Presidents, recalling the accomplishments and successes of the Iowa Defense Counsel Association.



ALL ABOARD!

Dine with us aboard the *Pathfinder Dinner Train* Thursday evening and enjoy a touch of nostalgia.

OFFICERS AND DIRECTORS
1988 - 1989

PRESIDENT

Patrick M Roby
500 Merchants National Bank Building
Cedar Rapids, Iowa 52406

PRESIDENT-ELECT

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Alan E. Fredregill
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Sioux City, Iowa 51102

TREASURER

Eugene Marlett
5400 University Avenue
West Des Moines, Iowa 50265

BOARD OF DIRECTORS
(Date is Term Expiration Date)

trict I

vid L. Hammer - 1990
) Dubuque Building
buque, Iowa 52001

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ig L Johnson - 1991
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200 American Building
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321 N. 3rd Street
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ward F Seitzinger, 1964-1965
3 Cummins Parkway
s Moines, Iowa 50311

rank W Davis, 1965-1966

Goode, 1966-1967
h Floor, Hubbell Bldg
s Moines, Iowa 50309

ry Druker, 1967-1968
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rshalltown, Iowa 50158

ilip H. Cless, 1968-1969

lip J. Willson, 1969-1970
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ncil Bluffs, Iowa 51502

Dudley Weible 1970-1971
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Forest City, Iowa 50436

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* Edward J. Kelly, 1977-1978

Don N. Kersten, 1978-1979
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Fort Dodge, Iowa 50501

Marvin F. Heidman, 1979-1980
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Sioux City, Iowa 51101

Herbert S. Selby, 1980-1981
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L.R. Voigts, 1981-1982
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Alanson K. Elgar, 1982-1983
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* Albert D. Vasey (Hon.) 1983

Harold R. Grigg, 1983-1984
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Raymond R. Stefani, 1984-1985
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Cedar Rapids, Iowa 52401

Claire F. Carlson, 1985-1986
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Des Moines, Iowa 50309

Thomas D. Hanson, 1987-1988
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Des Moines, Iowa 50309

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President

D.J. Fairgrave
Vice-President

*Frank W. Davis
Secretary

*Edward J. Kelly

Mike McCrary
Treasurer

William J. Hancock

Paul D. Wilson

HONORARY LIFE MEMBERS

Virginia E. Plummer
1910 Pleasant
Des Moines, Iowa 50314
October 27, 1988

Richard E Stifel
Attorney-at-Law
1600 Bancorp Tower
130 Merchant Street
Honolulu, Hawaii 96813
October 27, 1988

Mark B Desmarais
Attorney-at-Law
1600 Bancorp Tower
130 Merchant Street
Honolulu, Hawaii 96813
October 27, 1988

ANNUAL MEETING CHAIRPERSONS

Edward F Seitzinger
General Program Chair

Craig D. Warner
Program Chairperson

* Deceased

1989 Annual Meeting

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

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ANNUAL WORKERS' COMPENSATION UPDATE

Judith Ann Higgs
Eidsmoe, Heidman, Redmond, Fredregill,
Patterson & Schatz
200 Home Federal Building
Sioux City, Iowa 51102

A

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Pleadings - Petition

Procedure - Dismissal For Failure to Prosecute

Procedure - Hearing Assignment Order

Review-Reopening - Change of Condition

Special Case Settlement

Compensable Suicide - Sponatski Out, Chain of Causation In Iowa?

LAW CHANGES

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Iowa Code § 85.35 has been expanded to include a new basis for a final special case settlement: "A substantial portion of the claimed disability is related to physical or mental conditions other than those caused by the injury."

Iowa Code § 85.65 has been amended to increase Second Injury Fund payments to $4,000 in death cases when there are dependents and $15,000 in cases when there are no dependents.

Iowa Code § 85.61 was amended to include as employees basic or advanced emergency medical care providers as defined in Iowa Code § 147.1 or § 147A.1. The advanced emergency medical care provider may be covered by workers' compensation if an agreement to provide coverage is reached between the advanced emergency medical care provider and the employer for whom the volunteer services are provided.

RULE CHANGES

Rule 343-4.8(2)(e) was amended so that if an original notice and petition is not accompanied by the $65 filing fee or if a fee of less than $65 is sent, the original notice and petition is to be returned to the party filing it. Filing without paying the fee will not toll the statute of limitations.

Rule 343-4.24 was amended to allow notices or requests for reconsideration or for new trial or retrial or for any reexamination to be treated as an application for rehearing.

Rule 343-4.39, adopted by the industrial commissioner as of September 1, 1989 allows, facsimile filing of all documents

other than an original notice and petition. The FAX number for the industrial commissioner is 515-281-6501. The agency will not mail file-stamped documents filed by FAX. Please note the FAX number on the industrial commissioner's current letterhead is incorrect.

Rule 343-6.2 was amended to add the twenty-page rule for accompanying documents to petitions for commutations or partial commutations.

Rule 343-6.6, a new rule, places the same twenty page limit on agreements for settlement.

Rule 343-6.7, a new rule, places a one-third limitation on legal services approved by the industrial commissioner. Benefits not paid on a weekly basis, costs and litigation expenses are not to be included in the one-third calculations. The rule sets out documents to be included with written application for approval. Approval of the lien is not equivalent of approval of the fee.

RECENT CASES

OCCUPATIONAL HEARING LOSS

JOHN DEERE DUBUQUE WORKS vs. WEYANT, 442 N.W.2d 101 (Iowa 1989).

Defendant appealed and lost. Claimants 1 Defendants 0

Claimant began work for employer on January 27, 1959 and retired on September 1, 1983. He had exposure to up to 91 decibels of noise as he worked in forty positions around the plant. Beginning in November of 1982 and until his retirement, he was a tool crib attendant at a noise level of 73 decibels.

On September 3, 1985, the claimant filed for hearing loss benefits as September 1 fell on Labor Day weekend.

The employer urged on appeal that the date of injury in this claim for hearing loss benefits should be November of 1982 and an audiogram from that time rather than from 1985 should have been used to determine the amount of loss.

The court held that the first of the three events listed in Iowa Code § 85B.8 triggers the claim filing period. Those events are transfer from an excessive noise level, retirement or termination of the employer/employee relationship. In this case, it was necessary to determine what constituted a transfer from excessive noise. The court approved the analysis used by the deputy industrial commissioner which was as follows:

> "(1)a clearly recognizable change in employment status; (2) which provides a reduction of noise exposure to a level that is not capable of producing an occupational hearing loss; and, (3) which is permanent or definite in the sense that there is no reasonable expectation that the worker will be returned to a position with excessive noise level exposure in the ordinary course of operations in the employer's business. (4) It must also actually continue for at least six months."

The court approved the industrial commissioner's finding that the move to the tool crib was a reassignment not a transfer. The date of injury was found to be the date of retirement. There was substantial evidence to support the use of the 1985 audiogram.

IN THE COURSE OF EMPLOYMENT-GOING AND COMING RULE-BENEFIT TO EMPLOYER

McMULLIN v. DEPARTMENT OF REVENUE, 437 N.W.2d 596 (Iowa App. 1989).

Claimant appealed and won. Claimants 2 Defendants 0

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Petitioner, Mark McMullin, a tax auditor for the state of Iowa who worked out of an office in Ohio in various locations, sought further review of the industrial commissioner's decision denying him workers' compensation benefits because his injury did not arise out of and in the course of his employment. McMullin was seriously injured in an automobile accident that occurred when he was on his way in his personal vehicle as opposed to his state car to pick up from the airport a fellow employee who had been visiting his mother.

Neither employee was required to be in the employer's office at any specific time; however, they were to work forty hours with additional hours if duties so dictated and on prior approval by the employer. Assignments were sent by mail and picked up at the post office. McMullin planned to stop in the branch office to do some work after picking up his fellow employee at the airport and delivering him to the office garage where his car had been left during his trip.

The employer argued that the going and coming rule was applicable in this situation. The court found the rule inapplicable and stated that the rule relates only to those employees who have "fixed hours and a place of work." The court believed there to be a business benefit to the employer in one employee picking up another. The court also used the dual purpose doctrine.

The decision of the industrial commissioner was reversed and the court found that McMullin had suffered an injury that arose out of and in the course of his employment.

IN THE COURSE OF EMPLOYMENT-GOING AND COMING RULE

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MEDICAL ASSOCIATES CLINIC, P.C. v. FIRST NATIONAL BANK OF DUBUQUE, 440 N.W.2d 374 (Iowa 1989).

Defendants appealed and lost. Claimants 3 Defendants 0

On a Monday morning, decedent, a cardiovascular thoracic surgeon who had been on call over the weekend, was killed in an automobile accident on his way from home to work at Mercy Hospital in Dubuque, Iowa. He had three surgeries scheduled including one which was a continuation of treatment from an emergency call from the day before. The necessity of travel for the doctor who worked at three hospitals was recognized in the employment contract which stated there was no obligation for the employer to reimburse the employee's travel expenses. Decedent's duties as an employee of Medical Associates included being on call for emergencies every other day and every weekend.

The supreme court upheld the award of workers' compensation benefits. The general rule is that, absent special circumstances, an employee is not entitled to compensation for injuries occurring off of the employer's premises on the way to and from work. Larson was cited for the proposition that when a vehicle is a mandatory part of employment and it is a service to the employer for it to be available, an employee's trip to and from work is considered within the course of employment. The facts demonstrate decedent was required to bring his car to work for its use in furtherance of Medical Associates' practice. Decedent's death in an automobile accident on the way to work arose out of and in the course of his employment.

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COMMUTATION-BASED UPON BEST INTEREST OF CLAIMANT NOT HARDSHIP TO EMPLOYER

FRENCH & HECHT v. ARLINGDALE, 432 N.W.2d 705 (Iowa App. 1988).

Defendant appealed and lost. Claimants 4 Defendants 0

Employer challenged the district court's affirmance of the industrial commissioner's order of commutation. A commutation was affirmed by the industrial commissioner on April 14, 1987. Defendants filed for judicial review and for review-reopening on August 15, 1987. Defendants argued that as there was no finality to the commutation which was under judicial review, the case should be remanded to the industrial commissioner to consider the review-reopening.

The court of appeals held that the district court was correct in denying the motion for remand in that the industrial commissioner retains jurisdiction until there is a commutation. The commissioner lost jurisdiction over the case once the petition for judicial review was filed. The court also considered the tendered alleged new evidence, but found it to be nothing new.

The employer argued that claimant's commutation represented an unreasonable deprivation of property without due process of law due to the failure to consider whether payment of claimant's future benefits in a lump sum would entail undue expense, hardship, and inconvenience upon the employer. The court cited Dameron v. Neumann Brothers, Inc., 339 N.W.2d 160, 165 (Iowa 1983) for the proposition that whether a commutation will be granted turns on what is in the best interest of the worker, not on what is in the best interest of the employer or insurance carrier.

The court found no violation of equal protection. Employers and employees are in different classifications under workers' compensation laws. See Iowa Code § 85.61(1) and (2). The classifications are rationally related to furthering the purpose of workers' compensation. It is not required that employers and employees be treated equally in this situation.

A second basis asserted for the denial of the due process claim was that the granting of a full commutation to claimant in light of claimant's shortened actual life expectancy constituted an arbitrary and capricious application of the statutory standard for granting a commutation. The court rejected using one's actual life expectancy for determining the period during which compensation would be payable. The legislature approved the use of mortality tables in commutation cases due to the complexity and speculation that would otherwise be involved. Sidles Distributing Co. v. Heath, 366 N.W.2d 1 (Iowa 1985). (rejecting concept of work life expectancy) was cited.

EX PARTE COMMUNICATIONS DEFENDANTS AND TREATING PHYSICIAN

MORRISON v. CENTURY ENGINEERING, 434 N.W.2d 874 (Iowa 1989).

Defendants sought further review by the supreme court and WON!! Claimants 4 Defendants 1

Defendants deposed claimant's treating physician and then defendants' lawyer sought a private interview. Claimant wanted her attorney to be present during the interview and asked that the doctor not give the interview to defendants' attorney.

The supreme court noted a difference between civil and compensation cases and between Iowa Code § 622.10 and § 85.27.

The claimant had no right to have her attorney present as Iowa Code § 85.27 provides that an applicant waives any privilege concerning information of the worker's physical or mental condition in a workers' compensation claim.

The commissioner admitted a letter signed by claimant's physician, but prepared by defense counsel some three months after their private meeting. The court held that they "do not encourage the preparation of medical reports by counsel for a litigant, but we cannot find an abuse of discretion here." The court also found that a medical report was properly excluded from evidence since it was not served within the time prescribed by administrative rules then in effect. Finally the supreme court found that the denial of benefits to claimant was supported by substantial evidence in that claimant did not show any new or changed condition proximately related to her prior work injury.

EXTRATERRITORIAL JURISDICTION

EWING v. GEORGE A. HORMEL & CO., 428 N.W.2d 674 (Iowa App. 1988)

Claimant appealed and lost. Claimants 4 Defendants 2

Ewing was employed at the Fort Dodge, Iowa plant of Hormel from 1969 until 1981 when Hormel gave notice the Fort Dodge plant would close effective June 1982. Ewing then accepted a transfer to Hormel's Fremont, Nebraska plant effective November 2, 1981. Ewing maintained his domicile in Fort Dodge, but resided during the week at an apartment in Fremont with a fellow transferee. The transfer offer given Ewing was pursuant to the union contract at the Fort Dodge plant. Transfer papers were signed in Iowa.

In January 1982, Ewing allegedly injured his back at work at the Fremont plant. On January 18, 1983, he allegedly reinjured his back, again while working at the Fremont plant. Ewing then filed claims for workers' compensation benefits in both Nebraska and Iowa. The Iowa Industrial Commissioner determined his agency lacked jurisdiction, pursuant to Iowa Code § 85.71. The district court upheld this determination.

The supreme court held that there was no jurisdiction under either Iowa Code § 85.71(1) or (2) as all claimant's work was performed in Nebraska.

PROCEDURE-TIME IN WHICH TO ATTACK DEFAULT JUDGMENT

HELMERS v. ALTRUCK FREIGHT SYSTEMS, 436 N.W.2d 39 (Iowa 1989).

Defendants appealed and won. Claimants 4 Defendants 3

The agency entered a default against the employer and insurance carrier for their failure to answer a petition within the time required by agency rules. A final order fixing benefits was later entered. The agency refused to consider a motion to set aside the default filed fifty days after the final order on the ground that it was untimely. The employer and insurance carrier then filed a petition for judicial review seeking to challenge such refusal. That petition was dismissed by the district court on jurisdictional grounds. The supreme court held: I. The agency's refusal to set aside the default was itself a final agency order. Under Iowa Code § 17A.19, the district court always has jurisdiction to review a final order of the agency, including agency orders which dispose of a case

for lack of jurisdiction. II. Iowa Rule of Civil Procedure 236 is applicable. (The time in which to attack a default judgment is governed by I.R.C.P. 236 and defendants had 60 days to file an application to set aside default judgment.) The judgment of the district court and agency orders should be reversed. The case must be remanded to the agency for a consideration of that application. III. If the agency action is constitutionally infirm for want of proper notice at the inception of the proceedings, such action does not gain validity because of the passage of time. The court believed that the district court could have considered the constitutional claims contained in the petition for judicial review irrespective of the timing of the other grounds of the motion to set aside the default.

SECOND INJURY FUND

SECOND INJURY FUND v. NEELANS, 436 N.W.2d 355 (Iowa 1989)

Claimant appealed and won. Claimants 5 Defendants 3

Claimant injured his right hand twice in nonwork accidents. As a result he had an impairment of 10 percent to the right hand. Claimant later suffered a work injury which resulted in an impairment of 20 percent to his left leg. The cumulative effect of claimant's two scheduled injuries was an industrial disability of 65 percent of the body as a whole.

The issue before the court was: "Is the present employer's liability for benefits limited to the benefits for the latest injury, or must the employer pay a pro rata share of the benefits

payable for the worker's disability to the body as a whole?" The court upheld the industrial commissioner's determination that the employer was liable only to the extent provided by the schedule for the work injury (leg) and that the second injury fund should be responsible for the industrial disability less the total of the scheduled injuries. In this case the second injury fund's liability was a 65 percent industrial disability (325 weeks) less the total of 10 percent of the hand (19 weeks) and twenty percent of the leg (44 weeks). The second injury fund's liability was 262 weeks. The court rejected the second injury fund's argument that the employer should be liable for a pro rata share of the 262 weeks and found the fund liable for all of it.

The court provided some clarification of Second Injury Fund v. Mich Coal Co., 274 N.W.2d 300 (Iowa 1979) by saying that if the second scheduled injury standing alone does not amount to a disability to the body as a whole, § 85.64 limits the liability of the employer to payment of the scheduled amount attributable to the last injury.

DISCHARGE OF EMPLOYEE

CONAWAY v. WEBSTER CITY PRODUCTS CO., 431 N.W.2d 795 (Iowa 1988)

Plaintiffs appealed and won. Claimants 6 Defendants 3

Merry Conaway and Darlene Plain were employed by Webster City Products under a collective bargaining agreement which provided procedures for the discharging of employees. An employee could be discharged for being absent because of injury or illness

for more than two years or being absent for three consecutive days without proof of illness or injury. Prior to their discharge, Conaway and Plain filed claims for workers' compensation. The employer contended the employees were discharged according to the just cause provisions of the collective bargaining agreement. Both employees filed petitions at law against the company alleging the discharge violated the collective bargaining agreement and public policy. The district court entered summary judgment ruling that the actions were preempted by the Labor Management Relations Act and the cases were dismissed for failure to exhaust grievance and arbitration procedures.

The supreme court of Iowa held that the plaintiffs' actions were recognizable state tort claims which could be resolved without resorting to an interpretation of the collective bargaining agreement even though the agreement provides the procedure for discharging employees. The court concluded "the retaliatory tort actions relied on here are independent of the collective bargaining agreement and are therefore not preempted by section 301 of the Labor Management Relations Act." Resolution of these actions did not require any interpretation of the collective bargaining agreement. The plaintiffs properly sued in state court and the district court.

DISCHARGE OF EMPLOYEE

DAVENPORT v. CITY OF DES MOINES, 430 N.W.2d 405 (Iowa 1988).

Plaintiff appealed and lost. Claimants 6 Defendants 4

A discharged employee, a casual worker who had been employed in a number of positions from 1979 to January of 1986, appealed from an adverse judgment following a bench trial on claims for retaliatory discharge and disability discrimination. The supreme court affirmed the decision of the lower court.

The district court had found on clear and convincing evidence that the plaintiff was not discharged in retaliation for filing a workers' compensation claim, but rather the termination was due to the employee's loss of his driver's license for medical reasons which prevented him from performing one of the requirements of the job. He was told he could apply for a job not requiring a driver's license and when he got his license back, he was informed he could apply for any job.

The supreme court held that the lower court finding, based on substantial evidence in the record, was binding on them and precluded any recovery on the retaliatory discharge claim. On the second issue of disability discrimination the district court found that the employer had made reasonable efforts to accommodate the plaintiff's disability.

DISCHARGE OF EMPLOYEE

SPRINGER v. WEEKS AND LEO CO., INC., 429 N.W.2d 558 (Iowa 1988)

Plaintiff appealed and won. Claimants 7 Defendants 4

The plaintiff brought an action against her former employer in district court alleging that she was wrongfully discharged due to her efforts in pursuing a workers' compensation claim for carpal tunnel syndrome.

A

Plaintiff had carpal tunnel surgery and was paid workers' compensation benefits. When she returned to work, she was told she had to sign a document saying her condition was not work related. When she refused, she was asked for a statement from her doctor that her condition would not reoccur. She was released without restriction, but she had no statement regarding recurrence. The district court directed a verdict against the claimant primarily on the ground that she was an at-will employee and could be discharged for any reason.

The supreme court stated that "discharging an employee merely for pursuing the statutory right to compensation for work-related injuries offends against a clearly articulated public policy of this state. This type of conduct by the employer, if established, will support a claim for tortious interference with the contractual relationship." The court went on to say that the "employee's right to seek the compensation which is granted by law for work-related injuries should not be interfered with regardless of the contract of hire." The court determined that the plaintiff who was an at-will employee could maintain a tort action. Second, the court determined that in this case there was sufficient evidence available to grant a jury trial on whether the employee discharge was related to the workers' compensation claim. Finally, the court stated that it could not conclusively resolve all the evidentiary disputes so it reversed the district court and remanded the case for a retrial of the issues.

GROSS NEGLIGENCE-FAILURE TO BE INSURED IN IOWA

REID v. HANSEN, 440 N.W.2d 598 (Iowa 1988)

A

Plaintiff appealed and won. Claimants 8 Defendants 4

Plaintiff, a resident of Nebraska, was employed by a company which had its principal place of business in Omaha. The employee, who was injured while working in Iowa, applied for and received benefits under the Nebraska Workers' Compensation Law. After seeking benefits under the Iowa Workers' Compensation Act, the employee discovered that the employer was not insured against claims in Iowa. The employee then withdrew his claim for benefits under the Iowa act and commenced a tort action pursuant to Iowa Code § 87.21. The district court granted defendant's motion for summary judgment. The supreme court reversed the district court and rejected the employer's arguments.

Iowa Code § 87.21 pertains to the failure of an employer to insure against liability under the Iowa workers' compensation laws, not the laws of other states. If the election to seek benefits under the Nebraska Compensation Act does not preclude a later claim for Iowa compensation benefits, there is also no preclusion against seeking the ancillary consequences of Iowa benefit entitlement, i.e., the right to bring a tort action against an uninsured employer. Iowa Code § 85.20 (exclusive remedy provision) does not purport to bar an action where the employer's uninsured status triggers a right to sue under § 87.21. The right-to-sue policy expressed in § 87.21 extends to this employee in the same manner that it applies to all employees

eligible for benefits under the Iowa act. The right to sue under § 87.21 is not precluded by the exclusive remedy provisions in Nebraska.

The court noted in a footnote that any amount awarded would be subject to a pro tanto reduction by the amount received in Nebraska.

GROSS NEGLIGENCE-INDEPENDENT CONTRACTOR NOT A COEMPLOYEE

MERMIGIS V. SERVICEMASTER INDUSTRIES, INC., 437 N.W.2d 242 (Iowa 1989)

Defendant appealed and lost. Plaintiff cross appealed on matter of retrial and was awarded retrial from the date of filing. Claimants 9 Defendants 4

Plaintiff, Carol Ann Mermigis, was injured when struck by a door closer on the premises of her employer, Des Moines General Hospital. Defendant, Servicemaster, was employed at the time to manage the maintenance operations of the hospital's physical plant. Plaintiff's action, alleging her injuries were due to defendant's negligence in maintaining the hospital premises, was submitted to a jury which returned a verdict in her favor.

Servicemaster argued that it was an agent of the hospital and therefore plaintiff's coemployee. As a coemployee, Servicemaster claimed, absent allegations of gross negligence, the plaintiff's remedy was exclusively within the jurisdiction of the industrial commissioner. The court found that Servicemaster was employed by the hospital as an independent contractor, and therefore, was not a coemployee. Jurisdiction

in plaintiff's action was properly exercised by the district court.

A

Defendant argued that the jury in the present action should have been allowed to consider the acts of the hospital in assessing fault and assigning liability for plaintiff's injuries on the special verdict form. As plaintiff's employer, the hospital who had paid workers' compensation benefits enjoy statutory immunity from tort liability for plaintiff's injuries arising out of and in the course of her employment under § 85.20. There was no common liability between Servicemaster and the hospital and the hospital's negligence could not be considered by the jury to reduce the third party's liability.

GROSS NEGLIGENCE--INSUFFICIENT EVIDENCE

RIESSEN v. NEVILLE, 425 N.W.2d 665 (Iowa App. 1988)

Plaintiff appealed and lost. Claimants 9 Defendants 5

Plaintiff, an employee of Ida County, brought an action against the county engineer and the county maintenance foreman. A directed verdict was given for the engineer. The foreman's case was sent to the jury. The plaintiff lost. Plaintiff was required to present substantial evidence of gross negligence. The elements necessary are (1) knowledge of the peril to be apprehended; (2) knowledge that injury is probable, as opposed to a possible, result of the danger; and (3) a conscious failure to avoid the peril. All requirements of the test must be met. Not every violation of an OSHA regulation is gross negligence. The court concluded that there was no error in the trial court's

refusal to submit the issue of gross negligence to the jury as against the county engineer.

GROSS NEGLIGENCE-SHAREHOLDER AS COEMPLOYEE NOT IMMUNE

CREES v. CHILES, 437 N.W.2d 249 (Iowa App. 1988)

Plaintiff appealed and won. Claimants 10 Defendants 5

Plaintiffs appealed the ruling of the district court granting summary judgment for defendant Richard Heidman on the ground that defendant was the alter ego of the corporation Heidman Drywall, Inc., which employed plaintiff and thus was immune from suit under Iowa Code § 85.20(2).

Defendant and his wife were the sole stockholders and officers of the corporation. Defendant Heidman and a codefendant, Chiles, were also employees of the corporation. Plaintiff was injured in a work incident when a truck rolled from where it was parked and struck him. Plaintiff alleged specific and individual acts of gross negligence against both defendants as coemployees. The court held that the legislature did not intend a person lose his or her status as an employee merely because he or she is a shareholder of a corporate employer. Consequently, the legislature did not intend any person who may be determined an "alter ego" of a corporate employer to be immune from suit for gross negligence by a coemployee. The court held the defendant, who was a shareholder, officer, and director of the corporation, and also employed by the same corporate employer was not immune from suit. To the extent Pappas v. Hughes, 406 N.W.2d 459 (Iowa App. 1987) was in conflict with or contrary to this holding, it was overruled.

COSTS

PETERS v. SWIFT INDEPENDENT PACKING, (October 26, 1988)

The deputy's decision provided that the costs would be assessed against both parties equally "but for the cost of transcribing these proceedings, which shall be borne wholly by claimant's counsel." The industrial commissioner held that Rule 343-4.33, authorizing the assessment of costs, refers to parties and does not authorize assessment of costs against a party's counsel.

COSTS AGAINST PREVAILING PARTY

KERNS v. IBP, INC., (August 11, 1988)

Claimant received an award of compensation, but also was assessed costs. Claimant argued that under Iowa Code § 625.1, costs must be assessed against the losing party. It was held that this statute was not applicable to workers' compensation proceedings in light of Iowa Code § 86.40 which makes the relevant inquiry whether the deputy abused his or her discretion in assessing costs to a prevailing claimant. A review of the record revealed no abuse of discretion.

Even though defendants win a case, they frequently are assessed with costs. Counsel should inform their respective clients that there may be costs involved with bringing or defending a claim so that an informed decision on bringing or defending an action can be made. The actions of an attorney may greatly increase the costs of the proceeding. The deputy must consider all the variables in making his determination on who should pay such costs. (No Appeal)

CREDIT UNDER § 85.38(2)

SMITH v. FRENCH & HECHT, (August 23, 1988)

Under Iowa Code § 85.38(2), defendant is entitled to take a credit. Defendant is free to establish the amount of this credit unilaterally, and claimant may then petition the agency if he believes the credit taken is improper. (No Appeal)

INDUSTRIAL DISABILITY EMPLOYER'S ACCOMMODATIONS

RAUCH v. O'BRYAN BROTHERS, INC., (December 30, 1988)

Claimant developed a cumulative back injury while working as a sewing machine operator for which she was given an impairment rating of 15 percent of the body as a whole. The employer accommodated claimant's condition by modifying her work station.

Claimant suffered a loss of earnings of approximately $1 per hour. In addition, the record showed that due to automation of the plant all of employer's employees suffered a loss of earnings. Claimant's loss of earnings was caused by both her impairment and the automation. The employer sought to offset this loss by subsidizing wages.

The employer's efforts to accommodate claimant's impairment and reduce her loss of earnings held to minimize claimant's industrial disability. Claimant was awarded 15 percent industrial disability. (No Appeal)

ODD LOT DOCTRINE-INDUSTRIAL DISABILITY

WILLITS (COLLINS) v. FRIENDSHIP VILLAGE, INC., D/B/A FRIENDSHIP VILLAGE RETIREMENT CENTER, (October 21, 1988)

Claimant was 33 years old at the time she injured her lower back while working as a nurse's aide. She had two surgeries and was released to return to work as a ward clerk. She was

unable to do the work because of the lifting and bending required. She then had a third surgery.

Claimant had a ninth grade education and a work history of unskilled manual labor. She was reasonably motivated to work. She had a 25 percent impairment rating with an inability to bend, stoop, lift; and an inability to sit or stand for extended periods of time. She had a lifting restriction of 10-20 pounds. Claimant was found to have an industrial disability of 70 percent.

Claimant was not found to be unemployable under the odd lot doctrine. Claimant had not sought other employment and, therefore, she could not make a prima facie showing that she was unemployable when she had not sought employment. (No Appeal)

ODD-LOT DOCTRINE-PERMANENT TOTAL DISABILITY

BIRD v. T.H.I. COMMAND HYDRAULICS, (March 31, 1989)

In a battle of opinions by vocational rehabilitation counselors, it was determined that claimant was an "odd-lot" employee. Claimant established a prima facie showing by offering evidence that included his numerous unsuccessful attempts to gain employment and an opinion by a vocational rehabilitation counselor that he was unemployable. The primary disagreement between the parties was whether jobs were available that claimant could perform.

In spite of the fact that claimant had worked with the vocational rehabilitation counselor retained by defendants for six months, he had not completed his GED. He had not been offered

employment. He had not demonstrated any good possibility of retraining. There had been no openings for jobs he could perform. It was uncontested that claimant had low intelligence, little formal education, below average visual motor coordination, and an impairment of the lower back. He had a work history limited to manual labor. There was no showing that jobs were available in the geographical area that claimant was capable of performing. Claimant met his burden of proving that he suffered a total loss of earning capacity. (No Appeal)

PLEADING ODD-LOT

MARCKS v. RICHMAN GORDMAN, (June 29, 1988)

The claimant, who had a back injury, did not raise odd-lot prior to the hearing or at the hearing. It was improper for the deputy to raise this issue on his own.

Even if claimant had properly raised odd-lot in this case, the evidence showed she was working at the time of the hearing at a clerical position. Claimant's condition made it difficult for her to stand or walk. Claimant would eventually need to be confined to a wheelchair. Claimant fell frequently and had to hold on to walls in order to move about the office. In spite of the severity of her impairment, claimant was gainfully employed. Claimant was not an odd-lot.

Claimant received bonuses at her former job which varied in amount, but were paid on a monthly basis, including one month in which her bonus was $0.00. Nevertheless, the bonuses were included in the computation of claimant's rate in that they were paid on a regular basis under § 85.61(12).

Claimant's condition continually worsened from the time of injury, and was expected to continue to worsen. Improvement was not expected at any point in the future. Healing period is that period during which there is a reasonable expectation of improvement of the disabling condition. It ends when maximum medical improvement is reached or when the employee returns to work. Since the claimant in this case was not expected to improve, it was held that claimant was not entitled to any healing period. (No Appeal)

PLEADINGS - PETITION

JOHNSON v. GEORGE A. HORMEL & CO., (June 21, 1988)

Claimant suffered a bilateral carpal tunnel syndrome. Claimant relied on a traumatic injury theory at the hearing. The deputy found the evidence indicated a cumulative injury. It was held that restricting the claimant to a particular theory of injury when the evidence indicated another conclusion would allow the parties to make a mutual agreement to the detriment of a third party (in this case, the Second Injury Fund of Iowa). The deputy's determination of a cumulative injury was affirmed.

PROCEDURE-DISMISSAL FOR FAILURE TO PROSECUTE

HOFFMAN v. NATIONAL FARMERS ORGANIZATION, (January 31, 1989)

Nearly three years elapsed after filing of claimant's petition without any activity on claimant's part to prosecute the case. Defendants moved for dismissal which was granted by the deputy. However, claimant had not failed to comply with an order of the deputy or a rule such as would justify a dismissal under Rule 343-4.36. Nor had claimant received a notice of automatic dismissal as required under Rule 4.34.

The deputy's ruling did not clarify under what authority the case was being dismissed. Although grounds for dismissal under Rule 4.34 appeared to exist, the notice requirements of that rule were not followed and the dismissal was reversed and the case reinstated. (No Appeal)

PROCEDURE--HEARING ASSIGNMENT ORDER

MOUDRY v. PROTIVIN FIRE DEPARTMENT, (August 16, 1988)

The hearing assignment order which was entered advised the parties that only those issues listed would be considered at the hearing. Defendants sought to file an amended answer asserting an affirmative defense and an application to amend the hearing assignment order a short time before the hearing. The deputy's refusal of defendants' attempt to modify the hearing assignment order was affirmed on appeal.

Failure to give notice pursuant to Iowa Code § 85.23 is an affirmative defense which must be pled and subject to the prehearing process. By not even attempting to amend its answer until after the prehearing process was complete and a hearing assignment order was entered, defendants attempted to obviate the entire prehearing process.

Defendants had the opportunity to amend the answer to raise the affirmative defense much sooner in the contested case process and could not on appeal place the blame for their own failures on alleged manifest injustice. Even accepting defendants' contentions that they were not aware claimant was seeking recovery for a wrist fracture until claimant's answers to interrogatories were served, that event occurred almost two years before the

hearing assignment order was entered and, even more interesting, five months before the first of four prehearing conference was held. (No Appeal)

REVIEW-REOPENING CHANGE OF CONDITION

BIRD v. T.H.I. COMMAND HYDRAULICS, (March 31, 1989)

On appeal of a review-reopening decision, it was found that the claimant had suffered not only a change of condition, but also that he had failed to improve as anticipated. Claimant was released to full duty without restrictions prior to the settlement agreement. Claimant testified that he was feeling good and that he expected to return to work. Claimant attempted to work, but found that he was not able to do so. The treating physician increased claimant's impairment to 20 percent. Prior to the agreement, he rated claimant's impairment at 10 percent. Furthermore, it appeared that the treating physician thought that claimant would benefit from further treatment. Claimant did not improve from further treatment as the physician expected. (No Appeal)

SPECIAL CASE SETTLEMENT AS A BAR

MUMM v. FARMLAND FOODS, (December 14, 1988)

Claimant had previously entered into a special case settlement under Iowa Code § 85.35 for a right shoulder injury. Claimant then sought further benefits. The medical evidence, although indicating a higher rating of impairment, nevertheless causally connected her present condition to the original injury that formed the basis of the special case settlement. There was no evidence of a post-settlement injury, cumulative injury process, or aggravation of a prior injury.

A

The special case settlement for claimant's right shoulder injury served as a final disposition of claimant's right to benefits for that injury and no additional benefits were awarded. It also was noted that although the special case settlement recited that it went to "any and all" injuries claimant suffered while in defendant's employ, a special case settlement is limited to a particular injury. (No Appeal)

Razors pain you;

Rivers are damp;

Acids stain you;

And drugs cause cramps,

Guns aren't lawful;

Nooses give;

Gas smells awful;

You might as well live.

Dorothy Parker, Resume.

COMPENSABLE SUICIDE - SPONATSKI OUT, CHAIN OF CAUSATION IN IOWA?

The handwriting on the wall

A. Generally

1. Willful intent

2. In re Sponatski, 200 Mass. 526, 108 N.E. 466 (1915)

3. Chain of causation

a. Wilder v. Russell Library Co., 107 Conn. 56, 139 A. 644 (1927).

b. Whitehead v. Keene Roofing Co., 43 So.2d 464 (Fla. 1949).

c. City of Streator v. Industrial Commissioner, 92 Ill. 2d 353, 442 N.E.2d 497 (1982).

d. Trombley v. Coldwater State Home & Training School, 366 Mich. 649, 115 N.W.2d 561 (1962).

e. Brenne v. Department of Industry, Labor & Human Relations, 38 Wis.2d 84, 156 N.W.2d 497 (1968).

4. New York Rule

a. Fraozoni v. Loew's Theatre Realty Co., 22 A.D.2d 741, 253 N.Y.S.2d 505 (1964).

b. Seal v. Effron Fuel Oil Co., 284 App. Div. 795, 135 N.Y.S.2d 231 (1954).

c. Delinousha v. National Biscuit Co., 248 N.Y. 93, 161 N.E. 431 (1928).

B. Iowa

1. Iowa Code § 85.16

2. Schofield v. White, 250 Iowa 571, 95 N.W.2d 40 (1959).

II. If it ain't broke, don't fix it.

A. Actions speak louder than words.

1. Barton v. Nevada Poultry Co., 253 Iowa 285, 289, 110 N.W.2d 660, 662 (1961). ("for the benefit of the working man and should be, within reason, liberally construed")

2. Mincey v. Dettmeier Mfg. Co., 223 Iowa 252, 272 N.W. 430 (1937). (workers' compensation law is not intended to be and should not be construed as insurance for employers.)

3. Bulman v. Sanitary Farm Dairies, 247 Iowa 488, 494, 73 N.W.2d 27, 30 (1955). (statute is not a charity whose administration depends on sympathy.)

B. Forming the bridge.

1. Broad construction

a. Iowa Code § 85.3(1)

b. Hughes v. Cudahy Packing Co., 192 Iowa 947, 185 N.W. 614 (1921).

c. Almquist v. Shenandoah Nurseries, Inc., 218 Iowa 724, 254 N.W. 35 (1934).

d. Black v. Creston Auto Co., 225 Iowa 671, 281 N.W. 189 (1938).

2. The natural and proximate flow.

a. Oldham v. Schofield & Welch, 222 Iowa 764, 266 N.W. 480 (1936).

b. Eveland v. Newell Construction & Machinery Co., 236 Iowa 204, 17 N.W.2d 524 (1945). (compensable injury to back, arm and eye in 1939 followed by death in 1943 from heart failure contributed to by osteomyelitis which was a secondary result of the back injury.)

c. Coghlan v. Quinn Wire & Iron Works, 164 N.W.2d 848 (Iowa 1969); Gosek v. Garman & Stiles Co., 158 N.W.2d 731 (Iowa 1968); Yeager v. Firestone Tire & Rubber Co., 253 Iowa 369, 112 N.W.2d 299 (1961). (psychological problems after physical trauma.)

d. Bradshaw v. Iowa Methodist Hospital, 251 Iowa 375, 101 N.W.2d 167 (1960). (treatment aggravating or increasing disability.)

A

III A bird in the hand.

A. Seek and ye shall find.

1. Original compensable injury.

a. Dust in the eye. Veloz v. Fidelity-Union Casualty Co., 8 S.W.2d 205 (Tex. Civ. App. 1928).

b. Cerebral hemorrhage. Terminal Shipping Co. v. Traynor, 243 F.Supp. 915 (D.Md. 1965).

c. Myocardial infarction. Vernum v. State University of New York, 163 N.Y.S.2d 727 (1957).

d. Amputation of fingers. Widdis v. Collingdale Millwork Co., 169 Pa. Super. 612, 84 A.2d 259 (1951).

e. Purely mental. In re Fitzgibbons, 373 N.E.2d 1174 (1978).

2. Mechanism of demise

a. Guns. In re Stroer, 672 P.2d 1158 (Okla. 1983); Globe Security Systems Co. v. Workman's Compensation Appeal Board, 520 A.2d 545 (Pa. Commw. Ct. 1987).

b. Hanging. McFarland v. Department of Labor and Industries, 62 P.2d 714 (Wash. 1936); Seal v. Effren Fuel Oil Co., 135 N.Y.S.2d 231 (1954).

c. Drinking acid. Shewczuk v. Contrexeville Co., 53 R.I. 223, 165 A. 444 (1933).

d. Drugs. Reynolds Metal Co. v. Industrial Commission, 119 Ariz. App. 566, 582 P.2d 267 (1983); Schwab v. Department of Labor and Industries, 76 Wash. 2d 952, 459 P.2d 1 (1969).

e. Carbon Monoxide. Brenne v. Department of Industry, Labor & Human Relations, 38 Wis.2d 84, 156 N.W.2d 497 (1968); Vernum v. State University of New York, 163 N.Y.S.2d 727 (1957).

f. Jumping from a high place. In re Sponatski, 220 Mass. 526, 108 N.E. 466 (1915); Gasperin v. Consolidated Coal Co., 293 Pa. 589, 143 A. 187 (1928).

g. Starving. In re Sinclair, 248 Mass. 414, 143 N.E. 330 (1924).

h. Knife. Kelly v. Sugarman, 5 A.D.2d 1023, 17 N.Y.S.2d 41 (1958).

i. Power saw. Karlen v. Department of Labor & Industry, 41 Wash. 2d 301, 249 P.2d 364 (1952).

3. Notes

a. Schofield v. White, 250 Iowa 571, 95 N.W.2d 40 (1959).

b. Freedman v. State, 339 N.W.2d 67 (Neb. 1983).

c. Widdis v. Collingdale Millwork Co., 169 Pa. Super. 612, 84 A.2d 259 (1951).

B. Don't count the chickens.

1. Iowa Code § 85.16(1).

2. Iowa Code § 85.16(2). Workmen's Compensation Appeal Board v. Sullivan, 348 A.2d 925 (Pa. Commw. Ct. 1975).

3. Iowa Code § 85.26(1)

a. Falso v. National Wiring & Protection Co., 230 N.Y.S.2d 164 (1962). (twelve years)

b. Campbell v. Young Motor Co., 684 P.2d 1101 (Mont. 1984). (five years)

c. McFarland v. Department of Labor & Industries, 62 P.2d 714 (Wash. 1936). (four years)

4. Prior attempts. Yate v. Life Insurance Co., 353 S.E.2d 297 (S. C. App. 1987).

5. Preexisting emotional or physical problems. McDonald v. Atlantic Steel Co., 133 Ga. App. 157, 210 S.E.2d 344 (1974).

6. Stress other than work or previously compensable injury.

a. Reynolds Metal Co. v. Industrial Commission, 119 Ariz. App. 566, 582 P.2d 656 (1978).

b. Consula v. Town of Harrison, 227 N.Y.S.2d 585 (1962).

c. Seal v. Effren Fuel Oil Co., 135 N.Y.S.2d 231 (1954)

7. Death certificate

IV Conculsion - See Drake Law Review coming soon.

I know some poison I could drink;
I've often thought I'd taste it;
But Mother bought it for the sink,
And drinking it would waste it.
Edna St. Vincent Millay, The Cheerful Abstainer

B

"OFFICERS OF THE COURT": Compulsory Ethics?

Gordon E. Allen
Deputy Attorney General
Des Moines, Iowa

B

IOWA DEFENSE COUNSEL ASSOCIATION
ANNUAL SEMINAR

"OFFICERS OF THE COURT": COMPULSORY ETHICS?

On May 1, 1989, the U.S. Supreme Court upon the invitation of John Mallard identified, took aim and shot down another oxymoron. To give you the flavor of that safari, I have provided the following excerpts from the Supreme Court opinion and the brief for the United States District Court.

SUPREME COURT OF THE UNITED STATES

No. 87-1490

JOHN E. MALLARD, PETITIONER *v.* UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF IOWA ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

[May 1, 1989]

JUSTICE BRENNAN delivered the opinion of the Court.

We are called upon to decide whether 28 U. S. C. § 1915(d) authorizes a federal court to require an unwilling attorney to represent an indigent litigant in a civil case. We hold that it does not.

I

Section 1915(d) provides: "The court may request an attorney to represent any [person claiming *in forma pauperis* status] unable to employ counsel and may dismiss the case if the allegation of poverty is untrue, or if satisfied that the action is frivolous or malicious." In *Nelson v. Redfield Lithograph Printing*, 728 F. 2d 1003, 1005 (1984), the Court of Appeals for the Eighth Circuit ordered "the chief judge of each district to seek the cooperation of the bar associations and the federal practice committees of the judge's district to obtain a sufficient list of attorneys practicing throughout the district so as to supply the court with competent attorneys who will serve in pro bono situations," such as *in forma pauperis* proceedings conducted under 28 U. S. C. § 1915. The District Court for the Southern District of Iowa heeded the Court of Appeals' command

B

Contrary to respondent's assertion, Brief for Respondent 7–9, construing § 1915(d) to allow courts to ask but not compel lawyers to represent indigent litigants does not render § 1915(d) a nullity. Respondent contends that statutory authorization is unnecessary for a court simply to ask an attorney to represent someone; § 1915(d) would be superfluous if it did no more than that, and thus it must be read to confer coercive power upon the federal courts. Respondent's major premise, however, is too strong. Statutory provisions may simply codify existing rights or powers. Section 1915(d), for example, authorizes courts to dismiss a "frivolous or malicious" action, but there is little doubt they would have power to do so even in the absence of this statutory provision. Nor do respondent's premises compel its conclusion. Section 1915(d) plays a useful role in the statutory scheme if it informs lawyers that the court's requests to provide legal assistance are *appropriate* requests, hence not to be ignored or disregarded in the mistaken belief that they are improper, like a judge's request to cut short cross-examination so that he can go fishing. Section 1915(d) may meaningfully be read to legitimize a court's request to represent a poor litigant and therefore to confront a lawyer with an important ethical decision; one need not interpret it to authorize the imposition of sanctions should a lawyer decide not to serve in order to give purpose to the provision.[8]

[8] Although we do not reach the question whether the federal courts have inherent authority to order attorneys to represent litigants without pay, see Part IV, *infra*, it bears noting that if respondent's argument regarding the function of § 1915(d) were correct, it would seriously undermine respondent's assertion that the federal courts possess inherent power to direct unwilling lawyers to serve. If the federal courts already had the authority to compel representation, then by respondent's reasoning § 1915(d) would have been otiose.

B

IV

We emphasize that our decision today is limited to interpreting § 1915(d). We do not mean to question, let alone denigrate, lawyers' ethical obligation to assist those who are too poor to afford counsel, or to suggest that requests made pursuant to § 1915(d) may be lightly declined because they give rise to no ethical claim. On the contrary, in a time when the need for legal services among the poor is growing and public funding for such services has not kept pace, lawyers' ethical obligation to volunteer their time and skills *pro bono publico* is manifest. Nor do we express an opinion on the question whether the federal courts possess inherent authority to require lawyers to serve. Although respondent and its *amici* urge us to affirm the Court of Appeals' judgment on the ground that the federal courts do have such authority, the District Court did not invoke its inherent power

SUPREME COURT OF THE UNITED STATES

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[May 1, 1989]

JUSTICE KENNEDY, concurring.

Our decision today speaks to the interpretation of a statute, to the requirements of the law, and not to the professional responsibility of the lawyer. Lawyers, like all those who practice a profession, have obligations to their calling which exceed their obligations to the State. Lawyers also have obligations by virtue of their special status as officers of the court. Accepting a court's request to represent the indigent is one of those traditional obligations. Our judgment here does not suggest otherwise. To the contrary, it is precisely because our duties go beyond what the law demands that ours remains a noble profession.

I join in full the opinion of the Court.

B

SUPREME COURT OF THE UNITED STATES

No. 87-1490

JOHN E. MALLARD, PETITIONER *v.* UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF IOWA ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

[May 1, 1989]

JUSTICE STEVENS, with whom JUSTICE MARSHALL, JUSTICE BLACKMUN, and JUSTICE O'CONNOR join, dissenting.

The relationship between a court and the members of its bar is not defined by statute alone. The duties of the practitioner are an amalgam of tradition, respect for the profession, the inherent power of the judiciary, and the commands that are set forth in canons of ethics, rules of court, and legislative enactments. This case involves much more than the parsing of the plain meaning of the word "request" as used in 28 U. S. C. § 1915(d). This case also does not concern the sufficiency of the lawyer's reasons for declining an appointment[1] or the sanctions that may be imposed on an attorney who refuses to serve without compensation. There are, of course, many situations in which a lawyer may properly decline such representation. He or she may have a conflict of interest, may be engaged in another trial, may already have accepted more than a fair share of the uncompensated burdens that fall upon the profession, or may not have the quali-

[1] The petitioner tried to persuade the Magistrate that he had valid reasons for not wanting to represent convicted felons in litigation against their prison guards, but those reasons were found insufficient by the District Court, see App. to Pet. for Cert. 2a-3a, and this Court does not question the accuracy of that finding.

fications for a particular assignment. As this case comes to us, however, the question is whether a lawyer may seek relief by way of mandamus from the court's request simply because he would rather do something else with his time. For me, the answer is quite plain.

A few weeks ago we held that the Virgin Islands Bar could not exclude nonresidents from its membership. See *Barnard* v. *Thorstenn*, 489 U. S. —— (1989). In that case, we expressly recognized the legitimacy of the Bar's interest in requiring its entire membership to share in the burdens of providing representation to indigent defendants in criminal cases.[1] *Id.*, at ——. That recognition reflects the fact that a court's power to require a lawyer to render assistance to

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[1] We stated:

"The final reason offered by petitioners for Rule 56(b)'s residency requirements is somewhat more substantial, though ultimately unavailing. Under District Court Rule 16, each active member of the Virgin Island Bar must remain available to accept appointments to appear on behalf of indigent criminal defendants. According to the affidavit of the President of the Virgin Islands Bar Association, each member can expect to receive appointments about four times per year. Once appointed, it is the duty of the lawyer 'to communicate with the defendant at his place of incarceration as promptly as possible and not later than five days from the date of the clerk's mailing of the order of appointment.' Although the statute does not specifically so provide, the District Court interprets Rule 16 to require that only the appointed attorney may appear on behalf of the criminal defendant. The District Court found that, in light of this individual appearance requirement and the strict time constraints imposed by the Speedy Trial Act, 18 U. S. C. §§ 3161–3174, it would be virtually impossible for this system of appointed counsel to work with nonresident attorneys.

. . . . . .

"As respondents point out, if handling indigent criminal cases is a requirement of admission to the Bar, a nonresident knows that he must either appear himself or arrange with a resident lawyer to handle the case when he is unavailable. If the nonresident fails to make all arrangements necessary to protect the rights of the defendant, the District Court may take appropriate action. This possibility does not, however, justify a blanket exclusion of nonresidents." *Barnard* v. *Thorstenn*, 489 U. S. ——, —— (1989) (citations omitted) (Slip op. 9–10, 11).

B

the indigent is firmly rooted in the authority to define the terms and conditions upon which members are admitted to the bar, *Frazier* v. *Heebe*, 482 U. S. 641 (1987); *United States* v. *Hvass*, 355 U. S. 570 (1958),[3] and to exercise "those powers necessary to protect the functioning of its own processes." *Young* v. *United States ex rel. Vuitton et Fils S.A.*, 481 U. S. 787, 821 (1987) (SCALIA, J., concurring in judgment). Cf. *Sparks* v. *Parker*, 368 So. 2d 528 (Ala.), appeal dism'd, 444 U. S. 803 (1979) (rejecting constitutional challenges to compelled representation of indigent defendants). The lawyer's duty to provide professional assistance to the poor is part of the ancient traditions of the bar long recognized by this Court and the courts of the several States.[4] As Justice Field, then sitting on the California Supreme Court, declared more than a century ago:

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[3] See, *e. g.*, *Supreme Court of New Hampshire* v. *Piper*, 470 U. S. 274, 287 (1985) ("Furthermore, a nonresident bar member, like the resident member, could be required to represent indigents and perhaps to participate in formal legal-aid work").

[4] Justice Cardozo stated for the New York Court of Appeals:

"'Membership in the bar is a privilege burdened with conditions.' The appellant was received into that ancient fellowship for something more than private gain. He became an officer of the court, and, like the court itself, an instrument or agency to advance the ends of justice. His co-operation with the court was due whenever justice would be imperilled if co-operation was withheld. He might be assigned as counsel for the needy, in causes criminal or civil, serving without pay." *People ex rel. Karlin* v. *Culkin*, 248 N. Y. 465, 470–471, 162 N. E. 487, 489 (1928) (citation omitted).

Cf. E. Brown, Lawyers and the Promotion of Justice 253–254 (1938) ("Because the lawyer is bound by his professional oath to render gratuitous service to poor persons, it has long been customary for the court to assign counsel to those who cannot furnish their own attorney"); H. Drinker, Legal Ethics 62–63 (1953); R. Smith, Justice and the Poor 100 (1967) ("In addition to the inherent power of courts to assign attorneys, on the general theory that they are agents of the court and ministers of justice, there are statutes in many jurisdictions expressly conferring this authority on the judges, to be used in their discretion").

> "[I]t is part of the general duty of counsel to render their professional services to persons accused of crime, who are destitute of means, upon the appointment of the Court, when not inconsistent with their obligations to others; and for compensation, they must trust to the possible future ability of the parties. Counsel are not considered at liberty to reject, under circumstances of this character, the cause of the defenseless, because no provision for their compensation is made by law." *Rowe* v. *Yuba County*, 17 Cal. 61, 63 (1860).

Or, as Justice Sutherland declared for the Court more recently, "Attorneys are officers of the court, and are bound to render service when required by such an appointment." *Powell* v. *Alabama*, 287 U. S. 45, 73 (1932).

Section 1915(d) embodies this authority to order counsel to represent indigent litigants even if it does not exhaust it. The statute was passed to give federal courts the same authority to allow *in forma pauperis* actions that the courts in the most progressive States exercised. In 1892, state courts had statutory authority to order lawyers to render assistance to indigent civil litigants in a dozen States, *ante*, at 6, and common law power to appoint counsel in at least another 10 States.[1] Congress intended to "open the United States

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[1] See *Rowe* v. *Yuba County*, 17 Cal. 61, 63 (1860); *Lamont* v. *Solano County*, 49 Cal. 158 (1874); *Elam* v. *Johnson*, 48 Ga. 348 (1873); *Hall* v. *Washington County*, 2 Greene 473, 476 (Iowa 1850); *Case* v. *Board of County Comm'rs of Shawnee County*, 4 Kan. 511 (1868); *State* v. *Simmons*, 43 La. Ann. 991, 10 So. 332 (1891); *Bacon* v. *Wayne County*, 1 Mich. 461 (1850); *Dismukes* v. *Board of Supervisors of Noxubee County*, 58 Miss. 612 (1881); *Johnston* v. *Lewis and Clarke County*, 2 Mont. 159 (1874); *House* v. *Whitis*, 64 Tenn. 690 (1875); *Dane County* v. *Smith*, 13 Wis. 585, 587 (1861). See also *Heckman* v. *Mackey*, 32 F. 574 (CC SDNY 1887) (noting that "[t]he practice of allowing paupers to have original writs and subpoenas *gratis*, and to have counsel and attorney assigned them without fee, and to be excused from paying costs when plaintiffs, dates back to the reign of Henry VII"). In his treatise on Constitutional Limitations written in 1868, Professor Cooley wrote:

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courts" to impoverished litigants and "to keep pace" with the laws of these "[m]any humane and enlightened States." H. R. Rep. No. 1079, 52d Cong., 1st Sess., 1–2 (1892). Congress also intended to insure that the rights of litigants suing diverse parties in the most liberal of these States would not be defeated by the defendant's removal of the suit to federal court. *Id.*, at 1. To be faithful to the congressional design of ensuring the poor litigant equal justice whether the suit is prosecuted in federal or state court, the statute should be construed to require counsel to serve, absent good reason, when requested to do so by the court. The Court's niggardly construction to the contrary departs from the enlightened laws the Congress intended to track and defeats Congress' beneficent purpose.[6]

"[T]he humanity of the law has provided that, if the prisoner is unable to employ counsel, the court may designate some one to defend him who shall be paid by the government; but when no such provision is made, it is a duty which counsel so designated owes to his profession, to the court engaged in the trial, and to the cause of humanity and justice, not to withhold his assistance nor spare his best exertions, in the defence of one who has the double misfortune to be stricken by poverty and accused of crime. No one is at liberty to decline such an appointment, [footnote omitted] and few, it is to be hoped, would be disposed to do so." T. Cooley, Constitutional Limitations 334 (2nd ed. 1871).

In a footnote, Cooley added:

"[A] court has the right to require the service whether compensation is to be made or not; and that counsel who should decline to perform it, for no other reason than that the law does not provide pecuniary compensation, is unworthy to hold his responsible office in the administration of justice." *Id.*, at 334, n. 1.

[6]The Court's reliance on a recent law review article that casts doubt on the power of state courts to sanction attorneys who refused to represent indigents largely misses the point. In its present posture, arising on petitioner's request for a writ of mandamus, the question in this case involves a court's power to order an attorney to represent an indigent party, not its power to sanction an attorney who fails to obey that order. Justices Cardozo, Field, and Sutherland all recognized that a court has such power and, at the time § 1915(d) was enacted, the state courts routinely appointed counsel who were obliged to serve. It is that understanding, against

I attach no particular significance to the difference, if any, between the ordinary meaning of the word "request" used in § 1915(d) and "assign" and "appoint" used in the various state statutes. See *ante*, at 6. The federal statute was introduced in the House and the Senate as an Act empowering courts to "assign" counsel for poor persons, 23 Cong. Rec. 5199, 6264 (1892), and uses the terms "assign" and "request" interchangeably. Significantly, it is entitled "An Act providing when plaintiff may sue as a poor person and when counsel shall be assigned by the court." Ch. 209, 27 Stat. 252. Every contempory decision uses the word "assign" to describe the judge's authority to secure counsel for parties under § 1915(d). See *Boyle* v. *Great Northern R. Co.*, 63 F. 539 (CC Wash. 1894); *Whelan* v. *Manhattan R. Co.*, 86 F. 219, 220--221 (CC SDNY 1898); *Brinkley* v. *Louisville & N. R. Co.*, 95 F. 345, 353 (CC WD Tenn. 1899); *Phillips* v. *Louisville & N. R. Co.*, 153 F. 795 (CC ND Ala. 1907), aff'd, 164 F. 1022 (CA5 1908); *United States ex rel. Randolph* v. *Ross*, 298 F. 64 (CA6 1924). It is evident that the drafters of this statute understood these terms to impose similar obligations and simply assumed that members of our profession would perform their assigned tasks when requested to do so by the court.

The notion that this petitioner had an absolute right to have his "motion to withdraw" granted by the District Court—and therefore that a writ of mandamus may properly issue—is completely unacceptable to me. An attorney who has entered an appearance in a case may not withdraw without leave of court because the court's interest in making sure that a litigant is adequately represented and that the orderly prosecution of the lawsuit is not disrupted is paramount to a lawyer's personal interest in terminating a relationship with a client. See, *e. g.*, *Ohntrup* v. *Firearms Center, Inc.*, 802 F. 2d 676 (CA3 1986); *Mekdeci ex rel. Mekdici* v. *Merrell Na-*

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which Congress legislated, rather than any "recent scholarship," *ante*, at 7, n. 4, that should guide our construction of this statute.

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tional Laboratories, 711 F. 2d 1510, 1521–1522 (CA11 1983). In this unique case the petitioner apparently filed his motion to withdraw without first entering an appearance—thus, the motion might more appropriately have been captioned as a "petition to be excused from performing a nonexistent duty to enter an appearance in a pending case." Indeed, the very fact that the petitioner considered it appropriate to ask the Magistrate to allow him to "withdraw" is evidence of his recognition of some duty to accept the appointment unless there was a valid excuse for declining it.

The program adopted by the District Court for the Southern District of Iowa to provide representation for indigent litigants was in operation when respondent became a member of that court's Bar. In my opinion his admission to practice implicitly included an obligation to participate in that program.[1] When a court has established a fair and detailed procedure for the assignment of counsel to indigent litigants, a formal request to a lawyer by the court pursuant to that procedure is tantamount to a command.

In context, I would therefore construe the word "request" in § 1915(d) as meaning "respectfully command." If that is not what Congress intended, the statute is virtually meaningless. There is no substance to the Court's speculation that Congress enacted this provision because of a concern that a court's requests to represent a poor litigant might otherwise be "disregarded in the mistaken belief that they are improper." *Ante*, at 10. There is no anecdotal or historical

[1] "[R]epresentation of indigents under court order, without a fee, is a condition under which lawyers are licensed to practice as officers of the court, and . . . the obligation of the legal profession to serve without compensation has been modified only by statute. An applicant for admission to practice law may justly be deemed to be aware of the traditions of the profession which he is joining, and to know that one of these traditions is that a lawyer is an officer of the court obligated to represent indigents for little or no compensation upon court order." *United States* v. *Dillon*, 346 F. 2d 633, 635 (CA9 1965), cert. denied, 382 U. S. 978 (1966), cited with approval in *Hurtado* v. *United States*, 410 U. S. 578, 589 (1973).

evidence to support this highly improbable speculation.[8] In my opinion Congress gave its endorsement to these judicial "requests," assuming that it would be "unthinkable"[9] for a lawyer to decline without an adequate reason.

I respectfully dissent.

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[8] Nor is there substance to the Court's surmise that the passage of the Criminal Justice Act of 1964, 18 U. S. C. § 3006A, and related statutes, indicates that Congress did not intend in 1892 to give the courts authority to require attorneys to render assistance to the indigent. See *ante*, at 8–9. The Criminal Justice Act was enacted precisely because of defects in the system under which an attorney was not "appointed to represent the needy defendant until he is arraigned" and the case was "then committed to an attorney who [would] receive no fee for his services or reimbursement for his expenses." S. Rep. No. 346, 88th Cong. 1st Sess., 12 (1963) (letter of Attorney General Robert F. Kennedy to President Kennedy).

[9] See Tr. of Oral Arg. 8. Justice Blackmar of the Missouri Supreme Court expressed precisely my sentiments in dissent from a decision denying the courts of that State the power to compel attorneys to represent indigents in civil cases:

"I have often served in court appointments, and I am sure that my brethren have also. When a judge said, 'help me out,' I really felt that I had no choice. Perhaps I had in mind the old army maxim that the commanding officer's desire is the subaltern's command. Perhaps I thought that the court could use its coercive power. I found, however, that judges were sensitive when good reasons for declining appointments were advanced, and were willing to explore alternatives. By issuing our absolute writ, we strip the respondent [the trial judge] of her bargaining power." *State ex rel. Scott* v. *Roper*, 688 S. W. 2d 767, 773 (Mo. 1985).

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APPENDIX I

IN THE UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF IOWA
CENTRAL DIVISION

JOHN COBURN, Plaintiff, v. CRISPUS NIX, et al., Defendants.	* CIVIL NO. 86-716-B * RULING DENYING * MOTION TO DISMISS * APPOINTMENT OF * COUNSEL AND ORDER * DISSOLVING STAY * * (Filed June 16, 1987) *

The court has before it a motion of attorney John D. Cruise to dismiss his appointment under 28 U.S.C. § 1915(d) as counsel for plaintiff. Cruise contends that the court has no power to compel him to serve as counsel for plaintiff.

Plaintiff, an indigent inmate at the Iowa State Penitentiary, brought this action under 42 U.S.C. § 1983 against various prison officials and health care providers alleging inadequacies in health care and living conditions at the penitentiary. After plaintiff's complaint was filed, he asked to have a lawyer appointed. On October 23, 1986 this court ordered the clerk of court to find counsel to represent plaintiff pursuant to 28 U.S.C. § 1915(d). The Volunteer Lawyers Project[1] reported on October 30, 1986 that John D. Cruise had been contacted and was assigned to represent plaintiff.

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[1]The Volunteer Lawyers Project is a joint venture by the Iowa State Bar Association and Legal Services Corporation of Iowa.

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After Cruise filed his motion, the court invited the Volunteer Lawyers Project to file an amicus curiae brief, which the Volunteer Lawyers Project did.

THE ATTORNEY APPOINTMENT PROCESS

Before addressing the merits of the motion it will be useful to explain the process by which attorney Cruise was appointed. In *Nelson v. Redfield Lithographic Printing* Chief Judge Lay, writing on the judge's duty to secure legal assistance for the poor, explained:

> We write here under our general supervisory authority involving the district courts. We think it incumbent upon the chief judge of each district to seek the cooperation of the bar associations and the federal practice committees of the judge's district to obtain a sufficient list of attorneys practicing throughout the district so as to supply the court with competent attorneys who will serve in pro bono situations such as the case presented.

728 F.2d 1003, 1005 (8th Cir. 1984).

In response to this directive, the judges of this court had the clerk of court prepare a list of attorneys from which section 1915(d) appointments were to be made. Initially, the list was composed of lawyers admitted to practice in this court who had been counsel of record in federal court in connection with five or more civil cases in 1982. Because this list provided a relatively small number of lawyers to bear the brunt of the pro bono assignment load, the list was expanded. Now any attorney admitted to practice in the Southern District of Iowa and in good standing who has appeared as counsel in a

nonbankruptcy federal case in the past five years is eligible for appointment. An alphabetized list of these attorneys was divided into three panels. All appointments for a given year are made out of one panel. Attorneys are asked to serve on a rotating basis within the panel, and the panels are on a three year rotation cycle. Therefore, no attorney should be unfairly burdened with appointments.[2]

A request for appointed counsel is subjected to judicial scrutiny under the following standards. First, the party must be indigent. Second, indigents who are not incarcerated must certify their efforts to contact and hire an attorney. (This requirement is waived for inmates.) Third, the complaint must not be frivolous or fail to state a claim. (A failure to meet this standard results in dismissal on initial review pursuant to Fed. R. Civ. P. 12(b)(6) or 28 U.S.C. § 1915(d).) Fourth, the judge weighs the complexity of the case, whether the facts need further development, and whether plaintiff appears to be capable of presenting the case in a orderly fashion. *See In Re Lane,*

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[2]Further accommodations are made to insure that attorneys are not burdened by pro bono appointments. Attorneys who have accepted pro bono cases in state court within the preceding year are not asked to take a federal appointment. Also, if an attorney has a busy schedule when called, the Volunteer Lawyers Project will permit the attorney to defer appointment to a time where the attorney's schedule will permit. Finally, some consideration is given to the distance the attorney would have to travel to represent a client. An attorney in southwest Iowa, for example, would be appointed to represent someone in a county jail somewhere in that region rather than an inmate at the Iowa State Penitentiary in Fort Madison in southeast Iowa.

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801 F.2d 1040, 1042-45 (8th Cir. 1986). The court orders appointment of counsel only if all of these criteria are met. The clerk of court then sends a copy of the order to find counsel to the Volunteer Lawyers Project.

COURT POWER TO APPOINT ATTORNEYS TO REPRESENT INDIGENT CIVIL LITIGANTS

Cruise does not seek leave to withdraw for good cause pursuant to Local Rule 1.5.7. Rather, he makes a frontal challenge to the court's power to appoint him to represent plaintiff. First, Cruise argues that the court lacks power to appoint attorneys to represent inmates in suits under section 1983. Second, he argues that if the court has such a power, it is limited to "active litigators", which Cruise professes not to be. Therefore, he argues, the court did not have power to appoint him to represent plaintiff, and the appointment should be dismissed, or otherwise dissolved. This court rejects both contentions.

Congress has authorized courts to obtain legal counsel for indigent plaintiffs in civil actions. "The court may request an attorney to represent any such person unable to employ counsel. . . ." 28 U.S.C. § 1915(d). Cruise contends that section 1915(d) grants no coercive power to the court, but only provides the power to "request". The Eighth Circuit Court of Appeals has rejected this interpretation:

> The district court ruled that it had no *power* to appoint counsel to represent an indigent in civil cases. This ruling overlooks the express authority given it in 28 U.S.C. § 1915 to appoint counsel in civil cases. This court and other courts of appeals regularly make these appointments in habeas corpus and civil rights cases.

Peterson v. Nadler, 452 F.2d 754, 757 (8th Cir. 1971) (per curiam) (footnote omitted). *See also In Re Lane*, 801 F.2d 1040, 1043 (8th Cir. 1986); *Hahn v. McLey*, 737 F.2d 771, 774 (8th Cir. 1984) (per curiam); *Nelson v. Redfield Lithographic Printing*, 728 F.2d 1003, 1005 (8th Cir. 1984). The Fourth Circuit Court of Appeals recently noted that, "[a]lthough the statute says that a court may 'request' an attorney to represent an indigent defendant, the cases construe the statute as authorizing the court to 'appoint' counsel." *Whisenaut v. Yuam*, 739 F.2d 160, 163 n.3 (4th Cir. 1984). Other courts construing the statute have viewed the statute as empowering the court to appoint a lawyer. *See Hodge v. Police Officers*, 802 F.2d 58, 60-62 (2d Cir. 1986); *Ulmer v. Chancellor*, 691 F.2d 209, 213 (5th Cir. 1982); *McKeever v Israel*, 689 F.2d 1315, 1319 (7th Cir. 1982). *But see Caruth v. Pinkney*, 683 F.2d 1044, 1049 (7th Cir. 1982) ("a court has the authority only to *request* an attorney to represent an indigent, not to require him to do so.") (emphasis in original), *cert. denied*, 459 U.S. 1214 (1983). This court concludes that the appointment of Cruise is authorized by the power granted by Congress in 28 U.S.C. § 1915(d).

The section 1915(d) appointment power is consistent with every attorney's ethical obligation to provide legal services to the poor. The Iowa Code of Professional Responsibility For Lawyers provides: "Every lawyer, regardless of professional prominence or professional workload, should find time to participate in serving the disadvantaged. The rendition of free legal services to those unable to pay reasonable fees continues to be an obligation of each lawyer." Iowa Code of Professional Responsibility For Lawyers EC 2-27. Attorneys admitted

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to practice in the Southern District of Iowa take an Oath of Admission that provides in part: "I do solemnly swear . . . I will never reject, from any consideration personal to myself, the cause of the defenseless or oppressed, . . . so help me God." Local Rule 1.5.5.

Cruise also argues that if the court has power to appoint, the power is limited to "active litigators." This limitation is nowhere expressed in any case authority cited by Cruise or found by this court. When the Eighth Circuit Court of Appeals has written on appointments under 28 U.S.C. § 1915(d), the court has not expressed or implied such a limit. On the contrary, the court has stressed the necessity to provide "competent" representation. *See Nelson*, 728 F.2d at 1005.[3]

Even if the court's power were limited to appointing "active litigators", Cruise could not evade appointment on the ground that he is not an active litigator. He has participated as counsel more than once recently in contested litigation in this court. *Amy Chu, a minor, by her next friend and guardian Robert Chu, v. The Iowa City Community School Board, et al.*, Civil No. 84-73-D-1; *Barbara and Darrell B., as next friends of Drew B., v. Dr. Robert Benton, et al.*, Civil No. 84-97-D-2; *Area Education Agency, et al., v. Stephen Smith, et al.*, Civil No. 84-370-B. Just a few months ago, in *Area Education Agency*, a case tried by me, he actively participated in a three day trial of a factually and

[3]Rules governing admission to practice in this court and requiring continuing legal education are designed to assure a minimal level of competence among members of the federal bar. Cruise has satisfied these requirements and is presumed competent.

legally complex case. He cross-examined witnesses. He signed and filed a forty page trial brief, and he cosigned with other counsel and submitted a twenty-two page proposed findings of fact and conclusions of law.

RULING AND ORDER

In sum, the court's appointment of Cruise to represent plaintiff is authorized by section 1915(d). The motion to dismiss appointment of counsel is denied. The order staying proceedings pending disposition of the motion to dismiss appointment of counsel is dissolved.

DATED this 16th day of June, 1987.

/s/Harold D. Vietor
HAROLD D. VIETOR,
Chief Judge
Southern District of Iowa

EXCERPTS FROM DISTRICT COURT'S BRIEF

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STATEMENT OF THE CASE

The Eighth Circuit Court of Appeals in *Nelson v. Redfield Lithograph Printing*, 728 F.2d 1003, 1005 (8th Cir. 1984), writing in its "general supervisory authority involving district courts," directed the chief judge of each district "to obtain a sufficient list of attorneys practicing throughout the district so as to supply the court with competent attorneys who will serve in pro bono situations . . . ". In so ruling, the *Nelson* Court noted that it had "in the past acknowledged the express authority of the district court to make such appointments." *Nelson* at 1004. *See also Hahn v. McLey*, 737 F.2d 771 (8th Cir. 1984).

To implement the *Nelson* mandate, the Clerk of Court for the Southern District of Iowa, acting in cooperation with the Federal Practice Committee of the Iowa State Bar Association, began in 1984 to employ a list of active federal court practioners to receive *Nelson* appointments. (*See Coburn* Order, 6/16/87, Brief Opp. Cert., App. 1a.) The list, which had been compiled in 1982, consisted of attorneys who were counsel of record in five or more civil cases or two or more criminal cases in the preceding year.

Within about a year and a half it became clear that the list, which included only about 4% of federal court practitioners, was too short and that unless the pool of attorneys were expanded, a relatively small group of attorneys would be unfairly burdened.

A new system was initiated in February of 1986. The plan for the appointment process is reproduced as Appendix I to this Brief. Under the new system, once the

Court had ordered that counsel be appointed to represent an indigent in a civil case, the Clerk would forward a copy of the court file to the Volunteer Lawyers Project ("the Project"), a joint venture of the Legal Services Corporation of Iowa and the Iowa State Bar Association. The Project had been provided a roster of all attorneys licensed to practice and in good standing in the district, and used this roster in arranging for representation pursuant to the court order. However, the Project would pass over any attorney already participating in the representation of indigents on a *pro bono* basis through the Project's own referral system of cases screened through legal aid offices.

An attorney staff member of the Project, proceeding systematically through the list but making allowances for geographical convenience, would telephone an attorney and ask whether he or she had been of record in federal court (other than in bankruptcy court) within the previous five years. If so, the attorney was eligible to receive an assignment and the Project staff lawyer would describe the case and identify the parties.

If the contacted attorney protested that he or she was then too busy to take the case, a grace period of weeks or even months would be arranged to allow that attorney an opportunity to make room for a *pro bono* assignment in his or her caseload. If the contacted attorney expressed concerns about a lack of familiarity with the area of the law in question, the Project lawyer would explain the resource materials and other support available to assist assigned counsel. If no obstacle to the assignment appeared, a copy of the court file was sent to the newly-appointed counsel, and a notice of the assignment was

filed with the Court. At this point, the Project would also provide appointed counsel with legal resource materials relating to the case in question, as well as a description of how out-of-pocket costs of representation could be reimbursed by the court.

Through this process, John Mallard was contacted by the Project to represent the indigent plaintiffs in *Mark Allen Traman et al. v. Steve Parkin et al.*, Civil No. 87-317-B (U.S. District Court, S.D. Iowa), in June of 1987. (J.App. 4.) After receiving the court file in the case, Mallard filed a Motion to Withdraw. The Magistrate denied Mallard's motion to withdraw and ruled Mallard was competent. (Pet. App. 3a). Mallard sought the District Court's review of that finding, and asserted as an additional excuse for not serving that he "did not like the role of confronting other persons in a litigation setting, accusing them of misdeeds, or questioning their veracity." (J.App. 38).

The District Court affirmed the Magistrate's decision, and expressly ruled that "Section 1915(d) empowers the court to appoint attorneys to represent indigent civil litigants." (Pet. App. 3a).[1] Mallard then sought a writ of mandamus from the Eighth Circuit Court of Appeals to

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[1] Although not asserted by the District Court, its local practice can be affirmed as an exercise of authority granted by Rule 83 of the Federal Rules of Civil Procedure and 28 U.S.C. 2071, as discussed in Brief Point II by Amicus Bar of the City of New York. The Eighth Circuit did not address the validity of this local practice in its order but this separate and independent ground must be considered on review of this certiorari to a mandamus request. See n. 2.

compel the District Court to grant his motion to withdraw the appointment. The Circuit Court, without opinion, denied the application for the writ. Certiorari was granted on October 3, 1988, to review the denial of mandamus.[2]

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[2] In *Gulfstream Aerospace Corp. v. Mayacamus Corp.*, 485 U.S. ___, 99 L.Ed.2d 296, 313 (1988), this Court reaffirmed the limited nature of mandamus. Limited to "exceptional circumstances" the writ may issue when there is a "judicial usurpation of power." *Allied Chemical Corp. v. Daiflon, Inc.*, 449 U.S. 33, 34 (1980); *Will v. United States*, 389 U.S. 90 (1967). The party seeking mandamus has the "burden of showing that its right to issuance is clear and indisputable." *Bankers Life and Casualty v. Holland*, 346 U.S. 379 (1953).

Petitioner did not demonstrate to the Eighth Circuit that the District Court of Iowa exceeded its authority, clearly and indisputably. The order of the Eighth Circuit Court of Appeals may be affirmed if the District Court had the authority from whatever source to appoint Petitioner, even if it relied on an incorrect reason. *Helvering v Gowran*, 302 U.S. 238 (1937).

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A. FEDERAL COURT LITIGANTS WHO CANNOT OBTAIN COUNSEL MAY BE DENIED JUSTICE

It is the rare *pro se* citizen asserting or defending against claims in federal court who is not greatly disadvantaged. The disadvantage is daunting enough not only to keep some from persevering in asserting their rights, but also to keep many others from asserting them in the first instance. It is compounded in the case of citizens who must contend with other impediments, natural or circumstantial, such as a lack of education, or the restrictions of institutionalization.

Societal efforts to meet this need for legal help have been halting and inadequate. As the brief of Amicus Legal Services Corporation of Iowa notes, federal funding for the Legal Services Corporation, the primary vehicle for providing legal help to the poor in civil cases, has never been adequate to meet the need. While a patchwork of other sources of legal assistance exists, no one seriously asserts that the poor have sufficient access to counsel in civil cases. That the need exists is conceded by Amicus State Bar of California. Brief p. 19. It is one of the means chosen by Congress and the Iowa District Court to address that need, with which Amicus and Petitioner disagree.

Just as it is unreasonable to contend that civil legal help to the poor is in ample supply, it is unfortunately

just as unreasonable to contend that some form of mandatory *pro bono*, standing alone, will meet the need. The wisdom of any one component, or of the construction of any system designed to fully address this need, are issues of public policy best left to Congress and the state legislatures. The issue for the Court is narrower. Could Congress have reasonably believed that providing courts with the discretionary power to direct counsel to represent indigents would foster meaningful access to the courts?

B. THE INVOLVEMENT OF COUNSEL BENEFITS THE COURTS

Courts have repeatedly acknowledged the benefits trial judges and appellate courts derive from having counsel present a case which would otherwise have been presented *pro se*. *See e.g., Heidelberg v. Hammer*, 577 F.2d 429, 431 (7th Cir. 1978)(" . . . [I]t is extremely helpful to the court to have the plaintiff represented by counsel in a case such as this [a prisoner's section 1983 action]. . . . Although a court is understandably reluctant to impose on an attorney the burden of representing a party in a civil case without a fee, the attorney who accepts such an appointment can perform a valuable service, if only in preventing the waste of valuable judicial time."); *Ulmer v. Chancellor*, 691 F.2d 209, 213 (5th Cir. 1982) ("The district court should also consider whether the appointment of counsel would be a service to Ulmer and, perhaps, the court and defendant as well, by sharpening the issues in the case, shaping the examination of witnesses, and thus shortening the trial and assisting in a just determination."). *See also Bounds v. Smith*, 430 U.S. 817, 826 (1977)

("Even the most dedicated trial judges are bound to overlook meritorious cases without the benefit of an adversary presentation.").

Court calendars are notoriously crowded, and an attorney helps preserve judicial resources by bringing his or her legal judgment to bear in winnowing out duplicative witnesses, abandoning ineffective arguments or lines of inquiry, and generally streamlining proceedings. The special solicitude and latitude a court grants the *pro se* litigant, while serving to diminish somewhat the ill-effects of lack of counsel, is itself likely to further drain the court's resources.

C. CONGRESS INTENDED TO RECOGNIZE THE PUBLIC POLICY CONSIDERATIONS WHICH SUPPORT A SYSTEM UNDER WHICH LAWYERS MAKE PRO BONO CONTRIBUTIONS TO THE ADMINISTRATION OF JUSTICE

The interpretation of section 1915(d) urged here is consistent with the long tradition of the lawyer's professional obligation to the poor, to the courts, and to the administration of justice.

1. Historical Background

The lawyer's duty to represent impoverished litigants at the instance of the Court is deeply rooted, and extensively discussed in *United States v. Dillon*, 346 F.2d 633, 636 app. (9th Cir.), *cert. denied*, 382 U.S. 978 (1965), and cited with approval in *Hurtado v. United States*, 410 U.S. 578, 589 (1973).

The *Dillon* court noted that English historical records from as early as 1292 reveal the prayer of plaintiff's that the court "grant them a serjeant . . . for that they are poor folk." *Dillon*, 346 F.2d at 636, n. 2. Presumably this prayer evidences some disposition on the part of the courts to grant such entreaties. The practice of representing the poor upon court assignment, without fee, extends at least to fifteenth-century England, where "serjeants-at-law" could be required by the courts before which they practiced "to plead for a poor man." *Dillon*, 346 F.2d at 636.

It is not surprising that when the American legal profession became sufficiently coherent and self-conscious to express its own views as to its duties, the *pro bono* obligation and the obligation to assist in the administration of justice were given prominence. The first detailed treatments of the American lawyer's ethical responsibilities were set forth by Baltimore lawyer David Hoffman in "Fifty Resolutions In Regard To Professional Deportment",[24] and George Sharswood's 1854 "Essay on Professional Ethics".[25] These premier works "were the progenitors of the profession's major codes of ethics. The draftsman of the Alabama Code of Ethics, Judge Thomas Goode Jones, relied heavily on the earlier works; the Alabama Code was the model for the ABA Canons [of Professional Ethics of 1908] which in turn was the basis

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[24] D. Hoffman, Fifty Resolutions, 2 A Course of Legal Study 752 (2d Ed. 1836).

[25] G. Sharswood, A Compend of Lectures on the Aims and Duties of the Profession of the Law (1854).

for the Model Code [of Professional Responsibility of 1969]" [26]

Hoffman refers in Resolution VI to the lawyer as "an officer of the court" obligated to those unable to afford counsel. Resolution XVIII states:

> Those who can afford to compensate me, must do so; but I shall never close my ear or heart because my client's means are low. Those who have none, and who have just causes, are, of all others, the best entitled to sue, or be defended; and they shall receive a due portion of my services, cheerfully given.

George Sharswood echoed the nature of the obligation:

> There are many cases, in which it will be [counsel's] duty, perhaps more properly his privilege, to work for nothing. It is to be hoped, that the time will never come, at this or any other bar in this country, when a poor man with an honest cause, though without a fee, cannot obtain the services of honorable counsel, in the prosecution or defence of his rights.[27]

To Sharswood, an attorney held "an office in the administration of justice, held by authority . . . [of] the majesty of the commonwealth". Because of the rights and privileges granted "to no other class or profession", a duty was owed in recompense.[28]

The ABA Canons of Professional Ethics of 1908 built upon these foundations. Canon 12 stated that "[i]n fixing

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[26] Patterson, Legal Ethics and the Lawyer's Duty of Loyalty, 29 Emory L.J. 909, 935 (1980).

[27] G. Sharswood, supra, at 83.

[28] G. Sharswood, *Id.* at 11.

fees it should never be forgotten that the profession is a branch of the administration of justice and not a mere money-getting trade." The Canons refer to "the office of attorney" (Canon 15), and even pronounce attorneys "ministers" of the law (Canon 32), with the "duty of aiding in the administration of justice." (Canon 22.)[29]

These descriptions of the profession have been supplemented by modern observers. *See e.g.*, Woodrow Wilson, address to the American Bar Association in 1910, "The Lawyer and the Community", 35 A.B.A. Reports 419, 435 (1910) ("You are not a mere body of expert business advisors in the field of civil law or a mere body of expert advocates. . . . You are the servants of the public, of the state itself. You are under bonds to serve the general interest . . . "); Henry S. Drinker, *Legal Ethics* 5 (1953) (Two of the "[p]rimary characteristics which distinguish the legal profession from business are: 1. A duty of public service, of which the emolument is a by-product . . . . 2. A relation as an 'officer of the court' to the administration of justice . . . . "); Roscoe Pound, *The Lawyer From Antiquity to Modern Times* VII (1953) ("The legal profession is a public profession. Lawyers are the public servants. They are the stewards of all the legal rights and obligations of all the citizens. It is incumbent on stewards, if they are to be faithful to their trust, to render an accounting from time to time.").

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[29] For a discussion of the history of the debate over whether this duty should result in a mandatory *pro bono* component, *see State ex rel Scott v Roper*, 688 S.W.2d 757, 763-764 (Mo. Banc. 1985.)

B

2. The Nature Of A Profession

The practice of law is distinguished from a business or trade by its high standards of conduct and commitment to public service. The earning of a livelihood is to be considered incidental to its primary purpose, namely, "the pursuit of the learned art in the spirit of public service."[30]

In Iowa, that public service requires *pro bono* work. It is against this backdrop that the orders of the district court must be viewed. "Every lawyer, regardless of professional prominence or professional workload, should find time to participate in serving the disadvantaged. The rendition of free legal services to those unable to pay reasonable fees continues to be an obligation of *each lawyer*. . . ." Iowa Code of Professional Responsibility for Lawyers, EC 2-27 (emphasis added).

For Iowa lawyers this Ethical Consideration is not merely aspirational. The Iowa Supreme Court has repeatedly held that compliance by Iowa lawyers with the terms of Ethical Considerations is mandatory, and that violation of an Ethical Consideration, standing alone, provides grounds for disciplinary action. *See Committee On Professional Ethics and Conduct of State Bar Ass'n v. Behnke*, 276 N.W.2d 838, 840 (Iowa 1979), appeal dismissed 444 U.S. 805 (1979). In acknowledgement of duty, the Iowa lawyer upon admission to the bar takes a statutory

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[30] R. Pound, *The Lawyer From Antiquity to Modern Times* 5 (1953).

oath, "[n]ever to reject for any consideration personal to the attorney or counsellor the cause of the defenseless or oppressed." Iowa Code § 602.10112(7) (1987).

Lawyers have de facto control over the distribution of a fundamental and valuable resource, namely access to society's tribunals, or, at the highest level of abstraction, justice. Through license and regulation, the state actively excludes non-lawyers. This vigorous restriction of the unauthorized practice of law is undertaken in the public interest. Lawyers, as well as the public in general are the beneficiaries of those restrictions. With the license to dispense this resource for a fee comes certain duties, including the duty to see that the poor and unpopular are not excluded.

The argument that this duty could be expected of all professions and state-licensed occupations is simply not valid. In granting lawyers the exclusive right to advise on the law and advocate in the courts, lawyers are placed in a unique role, with roots deep in the Constitution. The societal importance of the role of the lawyer is reflected in the constitutional right to counsel. The concept of justice through fair treatment in the courts occupies a central role in our constitutional framework.[31] Other professions are vital. Other licensed occupations receive and

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[31] "The United States Constitution provides in part: 'We the People, of the United States, in order to form a more perfect union, establish Justice . . . .' Noting that our forefathers designated the *establishment of justice* of such priority as to

(Continued on following page)

deserve state regulation. But the Constitution is silent on the subject of medicine, dentistry, engineering, accounting, architecture and education.

Society permits only one group to earn a living – in most cases, a very good living – through the effective control of access to the courts and the consequent dispensation of justice. That special obligations should attend this privilege, including the obligation to enable meaningful access to the courts for impecunious citizens, is not unreasonable.[32]

III. CONSTITUTIONAL ARGUMENTS

A. THE CONSTITUTIONAL QUESTIONS PETITIONER RAISES FOR THE FIRST TIME IN HIS BRIEF TO THIS COURT OUGHT NOT BE CONSIDERED

Neither the magistrate, the U. S. District Court, nor the Eighth Circuit Court of Appeals were presented constitutional questions for their consideration in this cause. The Petition for Certiorari identified no constitutional questions.

(Continued from previous page)

make it the second phrase of that magnificent document, ABA President Robert Raven contends that they intended government has the primary responsibility to ensure that legal services are available to the poor. I couldn't agree more. Our profession, like any profession has a duty to supplement the effort of government." President David Funkhouser, "President's Letter", Iowa State Bar News Bulletin, Vol. 48, No. 9, October, 1988.

[32] See also, H. Drinker, *Legal Ethics* 59 (1953) ("In recognition of these exclusive privileges the lawyer is charged with certain obligations to the public [including the duty] to represent without charge those unable to pay.")

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B

D. COMPELLING AN ATTORNEY TO PROVIDE REPRESENTATION WITHOUT COMPENSATION DOES NOT CONSTITUTE AN UNCONSTITUTIONAL TAKING OF PROPERTY

For purposes of this discussion, it may be assumed that the services which Mallard was called upon to pro-

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[37] In an October, 1988, Iowa Bar Association survey, 41 percent of *pro bono* work was attributed by answering attorneys to reduced rate court appointments; only 5 percent and 3 percent respectively were attributed to the Volunteer Lawyers Project and *pro bono* court appointments. These statistics are enlightening but inconclusive due to the size of the response to the survey (18 percent). "The News Bulletin", Vol. 48, No. 9, Iowa State Bar Association, October, 1988.

[38] Mallard has never claimed, and the record does not indicate, that he performed *pro bono* work equivalent to Project participation. Had this been the case, the magistrate may have exercised his discretion differently at the outset. *See e.g.*, Order, *Townsend v. Rice*, 84-655-A, Southern District of Iowa, Feb. 10, 1987, attached as Appendix II here.

vide in the *Traman* case would have been uncompensated.[39] Thus, the points of focus are whether such services constitute "private property" and whether requiring such services to be performed constitutes a "taking", within the meaning of the Constitution's just compensation clause ("[P]rivate property [shall not] be taken for public use, without just compensation").[40]

Petitioner devotes no analysis to the issue of how an attorney's services might relate to the "private property" language of the just compensation clause. Instead, he cites *Schware v. Board of Bar Examiners*, 353 U.S. 232 (1957)

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[39] In fact, under the terms of the appointment, Mallard's services would go uncompensated only if the claims of Mallard's clients, claims which had already passed initial screening by the court, ultimately proved unmeritorious, as to any of the issues raised. 42 U.S.C. § 1988. Amici California Attorneys for Criminal Justice and the National Association of Criminal Defense Lawyers strenuously assert constitutional and ethical objections to payment of costs by counsel appointed by the court, a distinction recognized by the Eighth Circuit as well. *Williamson v. Vardeman*, 674 F.2d 1211, 1215 (8th Cir. 1982) ("Requiring lawyers to pay the necessary expenses of criminal defense work without reimbursement is however constitutionally distinct from merely compelling lawyers to provide their services."). The issue is not however present in this case. Mallard's out-of-pocket costs would be reimbursed in any event.

[40] Although this is civil litigation, Petitioner's argument has significance for criminal cases as well. "If a requirement of uncompensated service in a criminal case does not constitute a 'taking' . . . then it cannot be said categorically that such violations exist in civil appointments. The two kinds of cases differ in degree but not in quality." *State ex rel Scott v. Roper*, 688 S.W.2d 757, 773 (Mo. Banc 1985).

and *Konigsberg v. State Bar*, 353 U.S. 252 (1957) for the proposition that "[a]n attorney's services constitute 'private property' within the meaning of the Fifth Amendment." Petitioner's brief, page 57.[41]

But *Schware* and *Konigsberg* are not compensation cases. Rather, they interpret that part of the fifth amendment which prohibits the deprivation "of life, liberty or property, without due process of law." In that context, the practice of law was deemed a protectible property interest, and unreasonable standards for admission to the bar were struck down. However, these decisions did not address and do not resolve the different issue of whether a lawyer's services necessarily constitute "private property" within the meaning of the taking clause.

To establish this, Petitioner must show: (1) a reasonable expectation that his services are for his private use only and (2) that compulsory representation without compensation is not "fair". *Penn Central Transportation Co. v. New York City*, 438 U.S. 104, 124-125 (1978). In some limited circumstances, services may constitute "property". *Butler v. Perry*, 240 U.S. 328 (1916); Green, "Court Appointment of Attorneys in Civil Cases: The Constitutionality of Uncompensated Legal Assistance", 81 Columbia L. Rev. 366 (1981). However, an expectation that he

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[41] His position is made inconsistent by his apparent concession that the language of 42 U.S.C. 2000e-5(f)(1) allows compulsory appointment. Similarly, if compensation for service is made, but at a reduced rate limited by statute, then "just compensation" as constitutionally required has been denied for a portion of those services. *See* 18 U.S.C. § 3006A. A taking cannot be made constitutionally permissible, solely because accomplished by statute.

will never be called upon to represent an indigent civil litigant cannot reasonably be gleaned from this Court's holdings.

Hurtado v. United States, 410 U.S. 578 (1973) reaffirmed the established principle that "the Fifth Amendment does not require that the Government pay for the performance of a public duty it is already owed." *Id.* at 588. The *Hurtado* case involved the financial losses suffered during pretrial detention by a material witness, compensated by statute at only one dollar a day. The Court noted that there is "a public obligation to provide evidence," and that "this obligation persists no matter how financially burdensome it may be." *Id.* at 589.[42]

In rejecting this constitutional challenge, the *Hurtado* court cited with approval *United States v. Dillon*, 346 F.2d 633 (9th Cir.), *cert. denied*, 382 U.S. 978 (1965), as one of several examples of compulsory public service. *Hurtado*, 410 U.S. at 589. In *Dillon* the Ninth Circuit was confronted with the claim of a lawyer who, having earlier been "conscripted" to represent a prisoner in a proceeding under 28 U.S.C. § 2255, then applied to the court for compensation, arguing that failure to compensate would run afoul of the just compensation clause.

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[42] In a footnote, the Court quoted Professor Wigmore: "[I]t may be a sacrifice of time and labor, and thus of ease, of profits, of livelihood. This contribution is not to be regarded as a gratuity, or a courtesy, or an ill-required favor. It is a duty not to be grudged or evaded. Whoever is impelled to evade or to resent it should retire from the society of organized and civilized communities, and become a hermit. He who will live by society must let society live by him when it requires to." *Hurtado*, 410 U.S. at 589, n. 10, citing 8 J. Wigmore, Evidence § 2192, p. 72 (J. McNaughton rev. 1961).

In a much-quoted passage, the Ninth Circuit stated:

> An applicant for admission to practice law may justly be deemed to be aware of the traditions of the profession which he is joining, and to know that one of these traditions is that a lawyer is an officer of the court obligated to represent indigents for little or no compensation upon court order. Thus, the lawyer has consented to, and assumed, this obligation and when he is called upon to fulfill it, he cannot contend that it is a 'taking of his services.' 346 F.2d at 635.

The *Dillon* court drew support from *Powell v. State of Alabama*, 287 U.S. 45 (1932), in which this Court described the symbiotic responsibilities. "The duty of trial court to appoint counsel in such circumstances is clear . . . ; and its power to do so even in the absence of statute cannot be questioned. Attorneys are officers of the court, and are bound to render service when required by such an appointment." *Powell*, 287 U.S. at 73.

In rejecting the just compensation argument, the *Dillon* court held that there was no "taking", obviating any consideration of whether the lawyer's services had constituted "private property," *Dillon*, 346 F.2d at 636, although the analysis applies equally to both. Mallard knew upon entering the legal profession and the Bar of the United States District Court for Iowa in particular that some measure of public claim would be made upon his skilled services. Any expectation to the contrary is unreasonable and those services are, to that extent, not "*private* property."[43]

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[43] Application for bar memberships has been construed as consent to appointment. In a factually similar case, *Lewis v*

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This representation without compensation can be a taking only if the government interferes with "reasonable investment-backed expectations." *United States v. Locke*, 471 U.S. 84, 107 (1985); *Andrus v. Allard*, 444 U.S. 51, 65-66 (1979). See Brief of Amicus State Bar of California, pp. 27-28. All attorneys who take seriously their ethical obligation expect that a portion of their "stock-in-trade" will be given up for *pro bono* work. Any investment decision is based upon the inclusion of that time, not its exclusion. Only the exceptional case would be so great a burden as

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Lane, 816 F.2d 1165 (7th Cir. 1987), counsel upon learning of his appointment immediately asked the magistrate to be relieved, alleging incompetency and lack of time. In his denial, the magistrate "indicated that his membership in the southern district bar might be terminated if he declined the assignment." *Id.* at 1166. "Although Adams (counsel) was a reluctant appointee, he did validly consent to represent the plaintiffs." *Id.* at 1168. *See also Branch v. Cole*, 686 F.2d 264, 267 (5th Cir. 1982) ("If the court continues to have difficulty in obtaining the voluntary service of counsel despite their ethical responsibilities, it may wish to limit the compensated practice by members of its bar to those willing to accept their share of indigent cases."); *Family Div. Trial Lawyers v. Moultrie*, 725 F.2d 695, 699 (D.C. Cir. 1984) (" . . . the judges of the superior court repeatedly warn attorneys that they will not be appointed to [statutory] compensated cases if they do not also agree to represent indigent parents in neglect [non-compensated] cases."); Shapiro, "The Enigma of the Lawyers' Duty to Serve, 55 N.Y.U. L.Rev. 735, 746, n. 48 (1980), describing similar analysis in England in 1471.

to run counter to the expectation.[44] There is nothing in this record to even suggest that extraordinary burden on Mallard.

There is no taking where there is an exchange of benefits. *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393 (1922); *Penn Central Transportation Co. v. New York City*, 438 U.S. 104 (1978). Mallard derives the benefits of an esteemed, lucrative and exclusive profession, but he seeks to evade one of its most vital duties. This Court's approach in *Hurtado* rejecting such a position is controlling.

IV. PETITIONER MADE NO SHOWING THAT HIS APPOINTMENT WAS UNREASONABLE UNDER THE CIRCUMSTANCES

As an exercise of section 1915(d) discretion or of inherent power, the question might remain whether the appointment of Mallard, in the circumstances prevailing, constituted an abuse of discretion. What record there is cannot support a finding of abuse but supports the action of the district court. *Roche v. Evaporated Milk Association*, 319 U.S. 21, 32 (1943) (mandamus will not lie where the district court has acted within its jurisdiction and rendered a decision which, even if erroneous, involved no abuse of power).

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[44] *See Family Division of Trial Lawyers v. Moultrie*, 725 F.2d 695, 705 (D.C. Cir. 1984) ("some pro bono requirements do not constitute a 'taking', we think it equally clear that an unreasonable amount of required uncompensated service might so qualify").

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B

V. THE PERCEPTION OF JUSTICE AS EQUALITY BEFORE THE LAW IS AT ISSUE

The American system of justice espouses and is predicated upon equality of the adversaries before the law. It is the expectation that each party possesses an equal opportunity for presentation of its case to the impartial factfinder, from which presentations, truth will out. Inequality of opportunity[52] affects the validity of the decision, the respect for law and ultimately the very concept of justice itself.

". . . Some way of providing legal services to those in need must be found. In the absence of those services the adversary process, whatever its shortcomings when all

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[52] Some inequality of presentation above a minimal level of competence, according to the skill of the advocate, is presumed by the system. This is a difference of degree in what is a recognized presumption of equality of opportunity.

interests are represented adequately, is especially vulnerable. We may disagree on when the "need" is sufficient, and on the ultimate means of eliminating that need, but the basic proposition remains." Shapiro, The Enigma of the Lawyers' Duty to Serve, 55 N.Y.U.L.Rev. 735, 780 (1980).

The issue of effective access "affects more than just the parties or the bar. It affects all citizens, for the cost of inefficient court proceedings prolonged by unrepresented parties is enormous." Amicus State Bar of California Brief, p. 19. These costs are both direct and indirect. Petitioner and Amici assert that the "solution of the unmet legal needs of the least among us cannot rest solely on the backs of private attorneys". *Id.* at 19. Conversely, neither can a workable, partial solution be discarded because it is only partial. Those other complementary solutions suggested by Amici and the commentators must be concurrently explored, both by the legislative and the judicial branch. "As the Cahns so aptly put it, 'the market is not for legal services: the market is for Justice.' " Cahn and Cahn, Power to the People or to the Profession? – The Public Interest in Public Interest Law, 79 Yale Law J. 1005, n. 16 (1970), quoted in Shapiro, The Enigma of the Lawyers' Duty to Serve, 55 N.Y.U.L.Rev. 735, 780 (1980).

The practice of law is more than a business. Whatever the validity of the assertion of contemporary "deprofessionalism", or the "shrinking nature of the lawyer's special preserve", Shapiro, *Id.* at 771, the practice of law is still imbued with a responsibility for the quality of

justice, which special relationship is possessed by no other profession.[53]

Justice Holmes when admonished by Learned Hand to "Do justice!" retorted: "That is not my job. My job is to play the game according to the rules." (Learned Hand, in Dillard, Irving, *The Spirit of Liberty*, 3rd Ed.; New York: Alfred A. Knopf, 1960, pp. 306-307.) There is nothing in those rules which calls upon the Eighth Circuit to mandate the Federal District Court in Iowa refrain from engaging Petitioner in a cooperative effort to work toward justice.

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[53] "The moral position of the advocate is here at stake. Partisan advocacy finds its justification in the contribution it makes to a sound and informed disposition of controversies. Where this contribution is lacking, the partisan position permitted to the advocate loses its reason for being. The legal profession has, therefore, a clear moral obligation to see to it that those already handicapped do not suffer the cumulative disadvantage of being without proper legal representation, for it is obvious that adjudication can neither be effective nor fair where only one side is represented by counsel." Lon Fuller, John Randall, Professional Responsibility: Report of the Joint Conference, ABA Journal, Vol. 44, 1159, 1216 (Dec. 1958).

C

DISCOVERY IN THE BUSINESS INTERRUPTION CASE

by Stephen G. Morrison
Columbia, South Carolina

ACCOUNTING FOR LOST PROFITS

This document is designed to provide the practitioner with information necessary to properly depose an economic expert or accountant concerning lost profits. It is divided into three major sections. The first is a general discussion of the law of lost profits. The second is designed to provide the practitioner with basic fundamentals for deposing an economic expert. The last section discuss various areas of an expert's deposition testimony the practitioner must approach with caution. However, this is only a guide and each deposition must be approached on a case by case basis. Personal experience and information gathered from defense counsel's accountant or economic expert must also be used in preparing for plaintiff's expert's deposition.

I. Lost Profits Law

A. Generally

Generally, lost profits are defined as the unrealized profits which a non-breaching or injured party reasonably expects to garner from a transaction in either tort or contract settings. However, the general rules which govern the right to recover lost profits are the same for either tort or contract actions. See, e.g., Knightsbridge Marketing Services, Inc. v. Promociones Y. Proyectos, S.A., 728 F.2d 572 (1st Cir. 1984); Norris v. Bovina Feeders, Inc., 492 F.2d 502 (5th Cir. 1974); Cook Industries, Inc. v. Carlson, 334 F.Supp. 809 (D.C.Miss. 1971). These principles are:

1. Lost profits are recoverable only if their loss is proven with a reasonable degree of certainty;

2. Lost profits are allowed if the court is satisfied that the wrongful act of the defendant caused the loss; and

3. In a contract action, lost profits are allowed if the loss was reasonably within the contemplation of the breaching party.

22 Am.Jur.2d §625 (1988).

B. Certainty

It is universally recognized that lost profits may be recovered if they are proven with a reasonable degree of certainty. However, damages may not be recovered if they are remote, speculative, or based on conjecture. Morris v. Homco International, Inc., 853 F.2d 337 (5th Cir. 1988); National Controls Corp. v. National Semiconductor Corp., 833 F.2d 491 (3d Cir. 1987);

Cashman v. Allied Products Corp., 761 F.2d 1250 (8th Cir. 1985); National Farmers' Organization, Inc. v. Kinsley Bank, 731 F.2d 1464 (10th Cir. 1984). The loss need not be proven with absolute certainty but must be based on actual facts which enable the trier of fact to make a fair and reasonable finding with a reasonable degree of certainty. Handi Caddy, Inc. v. American Home Products Corp., 557 F.2d 136 (8th Cir. 1977). See also 22 Am. Jur. 2d Damages §626 (1988). In addition, each claim must be viewed on a case by case basis. See American Anodco, Inc. v. Reynolds Metals Co., 743 F.2d 417 (6th Cir. 1984) (The law does not require impossibilities; and cannot therefore, require a higher degree of certainty than the nature of each case requires).

C

1. New Business Ventures

According to early common law, recovery of lost profits from new businesses or ventures was barred because the lost profits were recognized as being to speculative, remote, and uncertain. Coastland Corp. v. Third National Mortgage Co., 611 F.2d 969 (4th Cir. 1979); Greenwood County v. Duke Power Co., 107 F.2d 484 (4th Cir. 1939) cert. denied, 309 U.S. 667 (1940). More recently, a national trend developed whereby the courts created exceptions to the per se rule of nonrecoverability or rejected the rule altogether. See McDermott v. Middle East Carpet Co., Associated, 811 F.2d 1422 (5th Cir. 1987); Walgreen Arizona Drug Co. v. Levitt, 670 F.2d 860 (9th Cir. 1982); Handi Caddy, Inc. v. American Home Products Corp., 557 F.2d 136 (8th Cir. 1977) (rejecting per se rule); Drew Co. v. Ledwith-Wolfe Associates, 296 S.C. 207, 371 S.E.2d 532 (1988) (rejecting per se rule); Chung v. Kaonohi Center Co., 62 Haw. 594, 618 P.2d 283 (1980) (rejecting per se rule); Fera v. Village Plaza, Inc., 396 Mich. 639, 242 N.W.2d 372 (1976) (rejecting per se rule). See also R. Dunn, Recovery of Damages for Lost Profits §4.2 (3d ed. 1987); Note, The New Business Rule and the Denial of Loss Profits, 48 Ohio St. L.J. 855 (1987). But see Golden Bear Distributing System of Texas, Inc. v. Chase Revel, Inc., 708 F.2d 944 (5th Cir. 1983).

A majority of courts now hold damages for lost profits may be recovered for a new business or venture as long as the damages are shown by competent evidence and with reasonable certainty. Miller Industries v. Caterpillar Tractor Co., 733 F.2d

813 (11th Cir. 1984) reh'g denied, 738 F.2d 451 (11th Cir. 1984); Machine Maintenance & Equipment Co., Inc. v. Cooper Industries, Inc., 634 F.Supp. 367 (E.D. Mo. 1986). However, the plaintiff in a lost profit new business situation faces a higher burden of proof requiring more specific evidence to support the claim for lost profits. Handi Caddy, Inc. v. American Home Products Corp., 557 F.2d 136 (8th Cir. 1977). See, e.g., Center Chemical Co. v. Avril, Inc., 392 F.2d 289 (5th Cir. 1968) (An accountant's testimony concerning lost profits was insufficient to support the claim because the jury had to rely on speculation and conjecture in arriving at a verdict); Olivetti Corp. v. Ames Business Systems, Inc., 319 N.C. 534, 356 S.E.2d 578 (1987) reh'g denied. 320 N.C. 639, 360 S.E.2d 92 (1987) (No evidence existed concerning alternative ventures which showed with reasonable certainty that profits would be realized); Drew Co. v. Ledwith-Wolfe Associates, 296 S.C. 207, 371 S.E.2d 532 (1988) (A restaurant owner's projection of gross profits based on profits from subsequent operation without also presenting corresponding operating costs was speculative and unsupported by any standard or fixed method of establishing profits and could not provide a basis for a jury verdict).

2. Established Businesses

When proving lost profits, established businesses do not suffer from the inherent uncertainty accorded a new business or venture. Since existing businesses have an established profit history, all that is required for recovery is that the lost profits projections be reasonable, ascertainable, and not based on speculation or conjecture. Golden Bear Distributing System of Texas, Inc. v. Chase Revel, Inc., 708 F.2d 944 (5th Cir. 1983); Fields Engineering & Equipment, Inc., v. Cargill, Inc., 651 F.2d 589 (8th Cir. 1981).

3. Uniform Commercial Code

Recovery of lost profits in a sales transactions setting is also covered by the Uniform Commercial Code (the "UCC"). The UCC however, rejects any doctrine of certainty which requires mathematical precision when proving the amount of loss. UCC §2-715 comment 4. In addition, Section 1-106 limits consequential (lost profits) or special damages to

situations covered in the UCC and by other rules of law. See generally R. Dunn, Recovery of Damages for Lost Profits §2.1 et seq (3d ed. 1987).

C. Lost Volume Seller.

C

The seller of goods may recover damages for a buyer's breach of a sales agreement. UCC §2-706. In addition, Section 2-708 provides for recovery of lost profits if the normal contract damage measures are inadequate. UCC §2-708, comment 2. The contract damage measures are particularly inadequate when the seller is a "middleman-seller" or "lost-volume-seller." The rational behind allowing recovery of lost profits in this situation is that the seller could supply the market and make a profit on each sale. If the seller is required to mitigate his loss by selling to an additional purchaser, he has lost the benefit of the profit from the first sale. Accordingly, the seller is not in the same position he would have been had the buyer completed the sale. See Tri-State Petroleum Corp. v. Saber Energy, Inc., 845 F.2d 575 (5th Cir. 1988); Famous Knitwear Corp. v. Drug Fair, Inc., 493 F.2d 251 (4th Cir. 1974); Neri v. Retail Marine Corp., 30 N.Y.2d 393, 334 N.Y.S.2d 165 (1972). Therefore, to make the seller whole, lost profits, generally measured by the difference between the contract price and the original purchase price, are awarded to assure the seller the benefit of his bargain. Neri v. Rental Marine Corp, 30 N.Y.2d 393, 334 N.Y.S.2d 165 (1972). See also Geotz & Scott, Measuring Seller Damages: The Lost Profit Puzzle, 31 Stan. L.Rev. 323 (1979); Note, Seller's Recovery of Lost Profits For a Breach of a Sales Contract: Uniform Commercial Code Section 2-708(2), 11 Wm. Mitchell L. Rev. 227 (1985).

D. Causation

Lost profits damages will be allowed only if the wrongful acts of the defendant caused the loss. Cashman v. Allied Products Co., 761 F.2d 1250 (8th Cir. 1985); Nika Corp. v. City of Kansas City, Missouri, 582 F.Supp. 343 (D.C.Mo. 1983).

E. Future Profits

Prospective profits prevented or interrupted by a tort or breach of contract are generally recoverable under the same rules applicable to the recovery of past lost profits. See §I(B), supra. See, e.g., U.S. for Use of Morgan & Son Earthmoving, Inc. v. Timberland Paving & Construction Co., 745 F.2d 595 (9th Cir. 1984);

American Anodco, Inc. v. Reynolds Metals Co., 743 F.2d 417 (6th Cir. 1984); Center Chemical Co. v. Avril, Inc., 392 F.2d 289 (5th Cir. 1968). The complaining party must first show with reasonable certainty that he has lost profits as a result of defendant's activity and only then may the amount of damages be determined. Grantham & Mann, Inc. v. American Safety Products, Inc., 831 F.2d 596 (6th Cir. 1987); Cashman v. Allied Products Corp., 761 F.2d 1250 (8th Cir. 1985); Republic National Life Insurance Co. v. Red Lion Homes, Inc., 704 F.2d 484 (10th Cir. 1983); Gardner v. The Calvert, 253 F.2d 395 (3d Cir. 1958). Once the trier of fact has determined that the lost profits were caused by the defendant's activities, uncertainty or a difficulty in determining the amount of lost profits will not prevent recovery if the trier of fact has sufficient facts and evidence to reasonably determine the extent of the loss. Story Parchment Co. v. Patterson Parchment Paper Co., 282 U.S. 555 (1931); Cashman v. Allied Products Corp., 761 F.2d 1250 (8th Cir. 1985); Republic National Life Insurance Co. v. Red Lion Homes, Inc., 704 F.2d 484 (10th Cir. 1983).

F. Methods of Proving Lost Profits

Numerous techniques for proving lost profits have been suggested and accepted under different scenarios.

1. Lost profit damages may be established with reasonable certainty with the aid of expert testimony, economic and financial data, market surveys and analysis, and business records of similarly situated enterprises. Restatement (Second) of Contracts §352 comment b (1981).

2. Tabulations, graphs, charts and schedules produced by an expert may support recovery of lost profits. However, for the exhibits to be admissible, the data underlying the summarized documents must be available for review. Canada Dry Corp v. Nehi Beverage Co., Inc. of Indianapolis, 723 F.2d 512 (7th Cir. 1983); Flame Coal Co. v. United Mine Workers, 303 F.2d 39 (6th Cir. 1962) cert. denied, 371 U.S. 891 (1962).

3. Evidence of sales and profits during a corresponding period of a previous year under similar conditions may form the basis for recovery of loss profits. Palmer v. Connecticut Railway & Lighting Co., 311 U.S. 544 (1941).

4. In cases involving new business ventures, proof of future lost profits based on marketing forecasts by employees specializing in economic forecasting may support recovery of lost profits. Upjohn v. Rachelle Laboratories, Inc., 661 F.2d 1105 (6th Cir. 1981).

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5. Feasibility studies and financial arrangements indicating a profitable venture coupled with evidence that a competitor utilized the location for a profit may support a recovery. Schwartz v. United States Fire and Insurance Co., 375 So.2d 718 (La.App. 1979).

6. A favorable comparison of the projected revenue of the damaged entity with another similar business in a similar location may support recovery. Petty v. Weyerhauser Co., 288 S.C. 349, 342 S.E.2d 611 (1986).

7. Several additional methods were proffered in Note, The New Business Rule and the Denial of Lost Profits, 48 Ohio St. L.J. 855 (1987):

   a. Comparison of profit performance with businesses of similar size, value and location;

   b. Comparison of profit history with a successor;

   c. Comparison of profitability with a similar business owned by the injured party; and

   d. Use of economic and financial data and expert testimony.

   See also Drew Co. v. Ledwith-Wolfe Associates, 296 S.C. 207, 371 S.E.2d 532 (1988).

8. The plaintiff's economic expert's testimony may be excluded or limited, even though supported by documents or data under certain situations. Not all cases listed below deal with lost profits, but they may provide insight on how to exclude the plaintiff's expert's testimony.

   a. United States v. Burton, 737 F.2d 439 (5th Cir. 1984) (A tax professor's testimony concerning the defendant's plausible understanding of the tax laws was properly excluded because it was not relevant to the explanation of statutory language and defendant's understanding or state of mind

was within the province of the jury to determine).

b. United States v. Young Brothers, Inc., 728 F.2d 682 (5th Cir. 1984) cert. denied, 469 U.S. 881 (1984) (The trial court properly excluded defendant's accountant's testimony on the reasonableness of construction bids for a highway construction project because he was not qualified as an expert in the field of highway construction estimation. He had never worked as an estimator, never studied the area, and his only knowledge on the subject was gained by preparing to testify). See also Kohatsu v. United States, 351 F.2d 898 (9th Cir. 1964) cert. denied, 384 U.S. 1011 (1966) reh'g denied, 385 U.S. 891 (1966) (Plaintiff's accountant's testimony concerning mistakes in plaintiff's record keeping was properly excluded because it went beyond the scope of his competence and qualifications and was not relevant to the income tax evasion charges).

c. Fineberg v. United States, 393 F.2d 417 (9th Cir. 1968) (The accountant's testimony concerning Fineberg's ability to survive in the record business was properly excluded because the basis for the accountant's opinion was within the jury's realm of experience requiring no special study or skill. The accountant was not familiar with Fineberg's particular contracts or with the record business and his opinions were based on Fineberg's unsupported theories and expectations).

d. Center Chemical Company v. Avril, Inc., 392 F.2d 289 (5th Cir. 1968) (Plaintiff's accountant's testimony relating to loss of future profits from a breached requirements contract was properly rejected because the contract price which was based on market conditions was uncertain, the quantity of required goods was uncertain, and the contract's duration was indefinite. Therefore, any verdict or award would be based on pure speculation and conjecture).

e. Wolfe v. United States, 261 F.2d 158 (6th Cir. 1958) (The trial court properly excluded exhibits prepared by the accountant depicting

Wolfe's corporate and personal income because he had no personal knowledge of the facts or data surrounding the exhibits, the exhibits were prepared from data not related to the alleged crimes, and the events depicted occurred long after the alleged crimes were committed. The question of fact at issue was whether certain prior expenditures were properly charged to the corporation and not whether Wolfe's personal income was properly calculated).

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f. Terrell v. Duke City Lumbar Company, Inc., 86 N.M. 405, 524 P.2d 1021 (1974) (The plaintiff's accountant's testimony concerning lost profits from a lumber mill operation was properly excluded because the lost profits projection, based on various dynamic factors including quantity, grade and seasoning, was speculative and therefore, a definite amount could not reasonably be ascertained).

G. Computation of Lost Profits

1. Generally, any expenses saved because the complaining party does not have to perform his obligations must be deducted from the lost profits projection. Restatement (Second) of Contracts §347 (1981); J.D. Hedin Construction Co. v. F.S. Bowen Electric Co., 273 F.2d 511 (D.C. Cir. 1960). As a result, the recovering party is only entitled to its net profits, Noland Co. v. Garver Tank and Manufacturing Co., 301 F.2d 43 (4th Cir. 1962); Martin Motor Sales, Inc. v. Saab-Scania of America, Inc., 452 F.Supp. 1047 (D.C.N.Y. 1978) aff'd, 595 F.2d 1209 (2d Cir. 1979); Cecil Corley Motor Co., Inc. v. General Motors Corp., 380 F.Supp. 819 (D.C.Tenn. 1974), which has been defined as gross profits minus direct and variable costs or indirect expenses. Buono Sales, Inc. v. Chrysler Motor Corp., 449 F.2d 715 (3d Cir. 1971); Cook Industries, Inc. v. Carlson, 334 F.Supp. 809 (D.C. Miss. 1971). See also P. Frank & M. Wagner, Computing Lost Profits and Reasonable Royalties, 15 AIPLA Q. J. 391 (1987). However, gross profits may be recovered if the injured party incurs no added cost or expense in completing the particular transaction. Distillers Distributing Corp. v. J. C. Millett Co., 310 F.2d 162 (9th Cir. 1962).

2. Direct costs avoided, such as expenditures for labor and materials, must be deducted from the

contract price. Cook Industries, Inc. v. Carlson, 334 F.Supp. 809 (D.C.Miss. 1971).

3. Indirect costs such as rent, general and administrative salaries, utilities and other overhead costs may, in some states, be deducted from the contract price to determine net profits. Rich v. Eastman Kodak Co., 583 F.2d 435 (6th Cir. 1978). See also 22 Am. Jur. 2d Damages §645 (1988). However, if the overhead or indirect costs are fixed and not affected by the defendant's wrongful activities, generally no deduction will be made in calculating lost profits. Universal Power Systems, Inc. v. Godfather's Pizza, Inc., 818 F.2d 667 (8th Cir. 1987); Edwin K. Williams & Co., v. Edwin K. Williams & Co. - East, 542 F.2d 1053 (9th Cir. 1976) cert. denied, 433 U.S. 908 (1977); Buono Sales, Inc. v. Chrysler Motor Corp., 449 F.2d 715 (3d Cir. 1971). See also Speidel & Clay, Seller's Recovery of Overhead Under UCC Section 2-708(2); Economic Cost Theory and Contractual Remedial Policy, 57 Cornell L. Rev. 681 (1972).

4. If the loss of value of a company and lost profits are intertwined and the loss of value is based on the lost future profits, recovery may be allowed for only one claim to avoid double recovery. American Anodco, Inc. v. Reynolds and Metals Co., 743 F.2d 417 (6th Cir. 1984).

5. Any amount of lost future profits must be reduced to present value. Palmer v. Connecticut Railway & Lighting Co., 311 U.S. 544 (1941); O'Byrne v. St. Louis Southwestern Railway Co., 632 F.2d 1285 (5th Cir. 1980); Moore v. Townsend, 577 F.2d 424 (7th Cir. 1978). The purpose of discounting lost future profits to present value is to give the injured party an amount of money which, if invested wisely, will grow over time to the amount actually lost and is also designed to avoid over-compensation. O'Shea v. Riverway Towing Co., 677 F.2d 1194 (7th Cir. 1982); Moore v. Townsend, 577 F.2d 424 (7th Cir. 1978). The proper interest, inflation, and discount rates to be used will depend on various factors but it is clear that a "total offset method" for reducing lost future profits to present value is no longer an accepted practice. Jones & Laughlin Steel Corp. v. Pfiefer, 462 U.S. 523 76 L.Ed.2d 768, 103 S.Ct. 2541 (1983). For a basic discussion of the theory behind, and a method of, discounting to present

value see O'Shea v. Riverway Towing Co., 677 F.2d 1194 (7th Cir. 1982).

6. Any profits received from sources not otherwise available to the injured party but for defendant's actions will mitigate the injured party's loss and must be deducted from the gross profits to fairly represent the party's loss. Sierra Wine & Liquor, Inc. v. Heublein, Inc., 626 F.2d 129 (9th Cir. 1980). Further, the injured party is also required to take reasonable steps to cut its losses, but need not mitigate if he is not financially able. Urico v. Parnell Oil Co., 708 F.2d 852 (1st Cir. 1983). In any event, to be entitled to a mitigation of damages and reduction of the award, defendant is required to prove that the injured party's actions in mitigating his loss, if any, were unreasonable. Larsen v. A. C. Carpenter, Inc., 620 F.Supp 1084 (E.D.N.Y. 1985) aff'd, 800 F.2d 1128 (2d Cir. 1986).

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II. Basic Fundamentals of Deposing Economic Experts

A. Generally

As the above discussion indicates, the use of economic experts in determining and verifying lost profit awards is essential. Use of a defense accountant or economic expert to assist defense counsel in case preparation may be justified depending on the size and the complexity of the action. If retained, the defense expert's familiarity with a variety of accounting concepts including analyses of production costs, fixed or variable costs, sales patterns, inventory evaluation, labor costs, inflation and interest rates and/or discount rates will provide invaluable assistance in reviewing and/or verifying the plaintiff's expert's testimony and methodology. In addition, he will be extremely helpful in developing a trial or settlement strategy. For a discussion of the use of a defense expert, see Expert Witnesses and Litigation, 93 Case and Comment 32 (May-June 1988); Utilizing the CPA in Litigation, 92 Case and Comment 8 (Nov.-Dec. 1987).

It is also clear that a thorough examination of the plaintiff's economic expert is vital to a defense attorney understanding the expert's report. As a result, proper discovery in the form of interrogatories and depositions is essential to providing information that can be used to guide preparation for trial or settlement. See generally D. Suplee & M. Woodruff, Deposing Experts, 33 The Practical Lawyer 69 (Oct. 1987).

B. Strategy

Taking a deposition of the plaintiff's economic expert or accountant should be treated as a learning experience. One commentator opined that for the sake of understanding the plaintiff's expert's position, the expert's answers should be accepted without challenge. See G.D. Martin, How to Question the Plaintiff's Economist Through Interrogatories, Deposition and Cross Examination, DRI, The Economic Expert in Litigation: 1984 40 (1984). It was further suggested that defense counsel should not restrict the expert's answers but should allow him to expand on his assumptions and premises so as to commit to a position he cannot retreat from at trial. Finally, it was suggested that defense counsel should not call attention to the expert's errors or incorrect methodology; instead, he should reserve these attacks for trial.

There is one caveat to the above advice. If there is reasonable certainty that the case will be settled prior to trial, defense counsel should present all counter arguments to the accountant or economic expert and indicate that a peer will verify his report and may testify concerning errors at trial. This tactic may cause the expert to revise his theories, assumptions, and calculations and may, in fact, reduce the plaintiff's settlement value of the case.

When deposing plaintiff's expert, the following areas should be explored:

1. Expert's Qualifications.

The first major area of concern to defense counsel is determining if the plaintiff's economic expert is qualified to testify on the particular subject matter in dispute. Questions concerning the economic expert's qualifications and prior testimony may provide a basis for excluding his testimony or for attacking his creditability. Caution should be used however, if the expert's qualifications are suspect so as not to qualify him through deposition testimony.

To qualify as an expert, the witness must be experienced in a particular area through knowledge, skill, expertise, training or education in that field and he must demonstrate that his opinion will aid the trier of fact in resolving the dispute. Fed. R. Evid. 702; Lakota Girl Scout

Council Inc. v. Harvey Fund-Raising Management Inc., 519 F.2d 634 (8th Cir. 1975). To testify, the expert need not be certain of a particular outcome but must have an unbiased professional opinion that his results are more likely than not to occur. U.S. v. Hardrich, 707 F.2d 912 (8th Cir. 1983) cert. denied, 464 U.S. 991 (1983); Dunn v. Sears Roebuck and Company, 639 F.2d 1171 (5th Cir. 1981) corrected 645 F.2d 511 (5th Cir. 1981). See also S. Katsh, Ethical Considerations in the Use of Economists in Antitrust Cases: A Lawyers Perspective 48 Antitrust L.J. 1869 (1980). Finally, to be admissible, the expert's testimony must relate to areas normally not within the experience of the jurors. Price v. Jacobs, 387 So.2d 172 (Ala. 1980).

2. Expert Fees

Inquiry concerning the fees charged by the expert may provide ammunition for attacking the nature of the expert's opinions. The fee amount and the number of times the plaintiff's counsel has used the expert may indicate to the jury that the expert has a financial interest in the plaintiff's success.

3. Data and Information Gathered

A complete understanding of all information and data the economic expert has collected is vital to defense counsel. Unless the expert is personally involved with the injured party, he will probably seek the necessary data by means of a questionnaire directed to the plaintiff. Care must be taken to watch for two problem areas which may surface in this questionnaire. First, it should be scrutinized for questions not asked, i.e. no breakdown of expense items by category. Second, questions concerning the plaintiff's attorney's opinion of damages should be reviewed and may provide ammunition to show the economic expert's evaluation is not totally fair or unbiased. G. D. Martin, How to Question The Plaintiff's Economist Through Interrogatories, Deposition and Cross-examination, DRI, The Economic Expert in Litigation: 1984 40 (1984). In addition, discovering the identity of the parties supplying the information is important in determining its reliability.

It is also important to have the expert bring his entire file to the deposition. This allows for marking the files as exhibits and will prevent the

expert from altering his methodology and estimates prior to trial with impunity. This approach will also help defense counsel decide if he needs to retain a defense expert, if not already done, especially if the information received in deposition is complex or unclear.

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The following are areas of particular concern when seeking information concerning lost profits.

a. Assumptions

(1) A determination of past lost profits for established businesses is fairly straight forward and few assumptions need to be made. A detailed analysis of the expenses and costs required to complete the transaction will provide deductions which necessarily must be removed from the expected recovery. In addition, any other factors which would have produced the expected profits should be explored before accepting any lost profits prediction. However, caution must be taken to assure that the projection is not speculative or uncertain.

Assumptions relating to a new business venture's past lost profits are more important. However, even in this scenario the importance of assumptions are limited and recovery is more a matter of reasonable proof than projections.

(2) Assumptions made to determine lost future profits are more important. Therefore, the plaintiff's expert should be questioned to see if he assumed:

(a) No wage increases;

(b) No recession or depression;

(c) No future economic slow down;

(d) No increased material cost;

(e) No increased competition;

(f) No increased employment cost, i.e. pension, health insurance, fringe benefits, etc.;

(g) No increased operating expenses;

(h) No fluctuation or change in market trends;

(i) No increases in inflation rates;

(j) No change in tax laws;

(k) No change in company size;

(l) No change in business status including relocation, changes in management, changes in accounting procedure, etc.;

(m) No increased liability insurance cost;

(n) No liabilities for lawsuit judgments.

Caution: This list is not all inclusive; other assumptions with particular relevance to your case should be explored.

b. Expenses and Costs

When determining both past and future lost profits the economic expert is required to deduct expenses and costs which will effect the net profit. See §II(F)(2) and (3), supra; Rich v. Eastman Kodak Company, 583 F.2d 435 (6th Cir. 1978); Cook Industries Inc. v. Carlson, 334 F.Supp 809 (D.C.Miss. 1971). See also Glossary of Accounting Terms, Exhibit A, infra. The expert should be vigorously questioned concerning costs included in his calculations and costs he ignored and/or failed to include. He should also be queried as to whether he increased the future value of these costs and expenses due to inflation. However, since each case will vary, defense counsel must determine prior to the deposition the general expense and cost requirements applicable to the disputed transaction for effective examination.

c. Tax Question

Recovery of lost profits damages is generally taxable as income. Sager Glove Corp. v. Commissioner, 311 F.2d 210 (7th Cir. 1962) cert. denied, 373 U.S. 910 (1963). However, whether tax benefits are deductible from gross profits is still an open question. There is a split of authority on this issue and in some states taxes may not be deducted in arriving at net lost profits. See Orchard Container Corp. v. Orchard, 601 S.W.2d 299 (Mo. App. 1980). Defense counsel should therefore, review local state law to determine the importance of this area of questioning.

d. Inflation and Productivity Factors

In calculating future lost profits, the economic expert normally increases the future yearly lost profit figures to compensate for inflationary trends. The expert's assumptions and data employed in determining the applicable inflation factors should be detailed and all elements of those factors should be explained. In addition, his information sources should be meticulously reviewed.

The expert will probably admit that his projection is based on an average for the industry or business. If so, he should be questioned concerning his particular knowledge of the entity in suit and asked to explain whether the company is "average" or not. The expert should also be questioned concerning the general geographic location of the company. Finally, counsel should determine if any inflationary study of the general locality was undertaken to arrive at the experts inflation rate.

e. Discount Rates, Present Value

The exact discount rate used to reduce lost profits to present value should be firmly established. The expert should be questioned concerning interest and current government bond rates. Tax free bond, municipal fund, and investment rates should also be explored. Defense counsel should establish the expert's reasons for ignoring or rejecting certain rates and using others. Finally, the

economic expert's source of information and his assumptions, i.e., interest rates will not increase even if inflation increases, must be explored. For a discussion of discount and inflation rates see Culver v. Slater Boat Co., 688 F.2d 280 (5th Cir. 1982) appeal after remand 722 F.2d 114 (5th Cir. 1984) cert. denied, 467 U.S. 1252 (1984) cert. denied, 469 U.S. 819 (1984).

f. Caution.

As explained earlier, the deposition is generally not the place to challenge the factors, sources, or assumptions employed by the economic expert. Therefore, counsel should use the deposition to understand the plaintiff's expert's assumptions and findings and to pin down his proposed testimony. The deposition should not be used as a forum for presenting defendant's case.

g. Attached Exhibit.

Attached to this outline as Exhibit B is a set of questions which should serve as a guide during the deposition of an economic expert. However, the questions should be adapted or discarded to meet your individual case situation. This list was adapted from a personal injury deposition outline set forth in G. D. Martin, How to Question the Plaintiff's Economist Through Interrogatories, Deposition, and Cross-Examination, DRI, Economic Expert in Litigation: 1984 40 (1984). Also attached is a basic list of documents you should request from plaintiff's economic expert.

III. Accounting Testimony: Areas of particular concern

A. Generally

Defense counsel may decide to hire an outside expert to assist in deposition and trial preparation. There is a tendency however to rely too heavy on the expert when counsel has insufficient background to evaluate the plaintiff's expert's accounting procedures. This practice may lead to ineffective trial preparation and will place counsel at a disadvantage when cross-examining the expert. Defense counsel should therefore, develop his own independent understanding of accounting practices and procedures.

It is not necessary to be concerned with day-to-day accounting procedures. What is important is an understanding of the items which appear on a financial statement or balance sheet and their underlying concepts which form the foundation of the economic expert's opinions. J. Kempner, The Basic Concepts of Accounting, 30 Mont. L.Rev. 1 (1968); J. Adler, Using Accounting Principles in Litigation, 34 The Practical Lawyer 43 (April 1988).

B. The following areas are of particular concern to defense counsel.

1. Terminology

Terms and jargon used by accountants and economists appear to be major contributors to the confusion surrounding damage estimates and projections. Without a clear understanding of a terms meaning, neither party can clearly communicate or establish its position or negotiate a viable settlement. Therefore, defense counsel should get the plaintiff's expert to define various terms and use those definitions in your evaluation. Attached is a short glossary of terms which may be helpful in understanding an economic expert's testimony. Exhibit A, infra. See generally P. Walgenbach, Financial Accounting an Introduction (2d Ed. 1980); D. McNairn, The Many Meanings of "Cost", 20 The Practical Lawyer 75 (May 1974).

2. Concepts

Understanding the basic concepts surrounding accounting principles will provide defense counsel with a firm foundation from which to depose plaintiff's expert. The following are basic concepts which in combination will provide a conceptual understanding of accounting principles. For a more in depth discussion see J. Kempner, The Basics of Accounting, 30 Mont. L.Rev. 1 (1968).

a. Entity Concept

The entity concept looks at the corporation as a single entity and only the obligations and income of the company are considered when determining its financial position. Income or obligations of the equity owners are not considered.

b. Dual-Aspect Concept

This concept requires the company's financial position to be shown by the balance sheet. This concept, also called a dual-entry system, requires that the resources or assets of the company appear on one side of the balance sheet and claims against those assets on the other. Under this concept, the total assets of the company must always equal the total liabilities. A simplified formula depicting this principle is: Assets = liabilities + owner's equity (stocks, etc.).

c. Going Concern Concept

This concept assumes a company will continue to operate indefinitely. Therefore, in applying this concept, the economic expert assumes continued viability and does not predict termination or market slowdown. The assumptions made under this concept may provide a basis for claiming that the plaintiff's expert's projections are speculative or uncertain.

d. Cost Concepts

This concept focuses on the cost of an asset and not on its market value. The use of cost provides an objective basis for assigning value to the assets of a going concern. This idea also allows for a determination of the company's financial status by comparing the revenues earned with the costs incurred in producing the revenue. Since the cost of acquiring an asset is fixed, the company can realistically determine its financial viability at any moment. Items which are valued at cost include raw materials, labor costs, supervisors salaries, insurances, taxes, supplies, inventories, and work-in-progress.

e. Accrual Concept

This concept recognizes that revenues from and costs incurred in appropriating assets do not occur during the same time frame. The accrual concept allocates the revenues in the accounting period earned and the costs when they occur and is not based solely on cash

received. This results in the company being able to determine at the end of an accounting period the net income or profit it has realized.

3. GAAP.

GAAP stands for generally accepted accounting procedures. They represent a consensus concerning practices and procedures used by accountants to determine assets, liabilities, equities, revenues, and expenses and encompass accepted accounting conventions, rules, and procedures. Any deviation by an accountant from these accepted practices must be documented and justified. Defense counsel should therefore, generally understand how a particular accounting procedure is performed to assure himself that no deviations from the accepted practice have occurred. Understanding the procedures will not make reviewing lost profit calculations easier but will provide insight into the formulation of the projections building blocks; costs, expenses and revenues. See J.R. Adler, Using Accounting Principles in Litigation, 34 The Practical Lawyer 43 (April 1988).

4. Evaluation of Future Lost Profits: Inflation, Interest and Discount Rates.

Inflation rates will have an affect on the value of a stream of future lost profits. Plaintiff's expert will therefore, attempt to apply an inflation rate to increase plaintiff's recovery to account for the awards reduced future buying power. The applicable inflation rate has at times been determined by applying an average derived from historical trends. Courts and commentators have however generally rejected this method because it is unreliable and speculative. Bach v. Penn Central Transportation Co., 502 F.2d 1117 (6th Cir. 1974); P. Formuzis and D. O'Donnell, Inflation and Evaluation of Future Economic Losses, 38 Mont. L.Rev. 297 (1977).

In a commercial lost profits context a party may not need the use of inflationary factors. Since lost profits are comprised of revenues received reduced by the costs of producing the revenues, it can reasonably be argued that inflation will affect each category equally and no increase should be allowed. See Freeport Sulfur Co. v. S/S Hermosa, 526 F.2d 300 (5th Cir. 1976) (Wisdom, J.

concurring). In any event, defense counsel should approach plaintiff's expert's inflationary predictions and calculations with caution. See generally R. Dunn, Recovery of Damages for Lost Profits §6.9 (3d ed. 1987).

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Once an value for lost future profits has been established, the damages must be reduced to present value. Palmer v. Connecticut Railway & Lightning Co., 311 U.S. 544 (1941); Lee v. Joseph E. Seagram & Sons, 552 F.2d 447 (2d Cir. 1977). The basic formula used to discount X dollars earned T years from now is $(1/(1+i)^t)$ where i is the appropriate discount rate. See R. Dunn, Recovery of Damages for Lost Profits §9.2 (3d ed. 1987). Interest and discount rates used to reduce the award to present value will vary depending on the assumptions underlying the expert's evaluation. Determining what rate was used for each year of future lost profits, and why, is therefore, extremely important.

The discount rate is usually determined through the use of risk-free investments. Fitzpatrick & Doucette, The Economic Evaluation of Lost Earnings, DRI, The Economic Expert in Litigation: 1984 13 (1984). These investments will include rates of return which are comprised of two elements: the inflation rate and the "real interest rate." See Jones & Laughlin Steele Corp. v. Pfeifer, 462 U.S. 523 (1983). The actual discount rate applied will depend on the method of reducing the award to present value applied by plaintiff's expert.

Three general methods of discounting to present value have developed over time. The discount rate may approximate the total interest rate applicable to the investments. Alternatively, the award may be discounted by only the real interest rate component of the investment rate, thereby ignoring any inflationary trends. If this method is used however, the stream of future lost profits may not be increased by the inflation rate. O'Shea v. Riverway Towing Co., 677 F.2d 1194 (7th Cir. 1982).

Finally, the "total off-set method" or "Alaska method" may be used whereby inflation rates and discount rates are deemed to be equal and, therefore, no discounting to present value is allowed. This final method has, however, been criticized by the United States Supreme Court in a

personal injury action. See Jones & Laughlin Steel Corp. v. Pfeifer, supra. But, Judge Wisdom of the Fifth Circuit Court of Appeals has suggested that the total off-set method is appropriate in a commercial setting. Freeport Sulfer Co. v. S/S Hermosia, 526 F.2d 300 (5th Cir. 1976). Therefore, defense counsel is advised to be familiar with the various discounting methods and be prepared to discuss with the plaintiff's expert his approaches and assumptions relating to his chosen method.

Finally, of particular importance to defense counsel is the present value date used by plaintiff's expert to calculate plaintiff's damages. If lost future profits are sought, the expert's lost profit projection will be divided into two parts; past lost profits and lost future profits. Therefore, at deposition, establishing an early present value date is important since any lost future profit award will be reduced to the present value on that date. Establishing an early value date should lower the total award by reducing a greater portion of the award to present value and, thereby, reducing the actual judgment.

5. Going Concern Opinion

Counsel is also advised to review what is called the accountant's "going concern" opinion in the company's audit report when researching a company's viability. The accountant is required by GAAP to express an opinion concerning the company's future viability. An accountant will generally qualify his opinion and explain any problem he foresees in that financial picture of the plaintiff company. This information may prove invaluable, in addition to providing the original auditor's express doubts, if plaintiff's expert is different from the company's auditor since the expert may make assumptions for calculation purposes which are inapplicable when compared to the company's current financial status.

6. Ethical Considerations.

a. Ethical considerations concerning ex parte contacts with plaintiff's expert may be important to defense counsel. Generally, Rule 26(b)(4) allows discovery of the expert's facts and opinions developed in anticipation of litigation or trial but only by specified means. Rule 26(b)(4)(A) allows for discovery

of the opinions of experts who will testify at trial through interrogatories or other means authorized by court order. There are however, no express provisions in the Rules which allow experts to be deposed; but, it is generally recognized that expert witnesses who will testify at trial are subject to oral depositions. See, e.g., Quadrini v. Sikorski Aircraft Div., United Aircraft Corp., 74 F.R.D. 594 (D.Conn. 1977); Conners, A New Look at an Old Concern - Protecting Expert Information From Discovery Under the Federal Rules, 18 Duquesne L. Rev. 271 (1980).

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There is also clearly no provision which expressly or implicitly allows ex parte communications with plaintiff's experts. However, there is a split of authority among courts as to whether or not ex parte discussions constitute an ethical violation.

(1) Cases denying ex parte communications.

(A) Durflinger v. Artiles, 727 F.2d 888 (10th Cir. 1984) (By contacting an expert on an ex parte basis, defendants circumvented the rules and perverted the principles of fairness).

(B) Campbell Industries v. M/V Gemini, 619 F.2d 24 (9th Cir. 1980) (Defendant's ex parte contact with plaintiff's expert is a flagrant violation of the rules governing discovery of expert witnesses).

(C) Weaver v. Mann, 90 F.R.D. 443 (N.N.D. 1981) (Defendant cannot engage in private conversations with the plaintiff's expert because it is not contemplated by the rules).

(2) Cases allowing ex parte contact.

(A) Doe v. Eli Lilly Co., 99 F.R.D. 126 (D.D.C. 1983). (The rules do not preclude the use of informal ex parte discovery when the witness is willing to speak with defense counsel).

b. Ex parte communications may also be unethical under Disciplinary Rule 7-104(A)(1) which forbids an attorney from communicating with a party he knows to be represented by an attorney in that matter concerning the subject of that representation. Generally, the disputes which arise center on the term "party" and the term's scope.

A majority of courts hold that the meaning of the term "party" in DR 7-104(A)(1) is restrictive and applies generally to the named parties in a suit. See, e.g., Meat Price Investigators Assoc. v. Spencer Foods, 572 F.2d 163 (8th Cir. 1978); Ceramco v. Lee Pharmaceuticals, 510 F.2d 268 (2d Cir. 1975); Vega v, Bloomsburgh, 427 F.Supp. 593 (D. Mass. 1977); Frey v. Dept. of Health & Human Services, 106 F.R.D. 32 (E.D.N.Y. 1985). However, an unpublished opinion from the United States District Court for the District of Nevada held that plaintiff's outside expert and former employee contacted by defense counsel was a party within the meaning of DR 7-104(A)(1) and that ex parte contact violated DR 7-104 and Cannon 9 of the Disciplinary Code. MGM Grande Hotel - Las Vegas v. Insur. Co. of No. America, No. CV-LV 82-96(HEC)(D. Nev. 1983). The Ninth Circuit Court of Appeals affirmed this decision but later withdrew its opinion. Therefore, since this district court opinion has questionable precedent value, it appears that generally "party" is a restrictive term which does not apply to plaintiff's expert. As a result, ex parte communications should not constitute a violation of DR 7-104(A)(1).

c. Cannon 9 referred to in MGM also may be violated by ex parte contacts. Generally, in order for such violations to exist there must be a reasonable possibility that some specific impropriety occurred, such impropriety must be recognized by all persons, and the impropriety must affect the public's view of the judicial system and the court. In re Coordinated Pretrial Proceedings, 658 F.2d 1355 (9th 1981). However, this standard has not to date been applied to ex parte contacts with expert witnesses.

7. Technical Accounting Issues Relative to Lost Profits

Counsel is advised to check the following areas for financial information about a company's financial status.

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a. Company Generated Documents

Various company documents will provide valuable information for trial preparation. Deposition review of the documents with plaintiff's experts will be helpful. The following documents should therefore, be closely evaluated:

(1) Audit reports;

(2) Company reviews;

(3) Compilations and summaries of financial information; and

(4) Written revisions to the reports.

b. Annual Reports

Annual reports to shareholders may also provide information useful in defending lost profits actions. The reports are generally designed to explain the company's current financial viability to its owners. These reports are usually limited in scope and will not provide in-depth data. However, general trends of the company and inflated projections may provide ammunition to attack the credibility of the plaintiff's lost profit figures.

c. Agency Information

Various federal and state agencies also gather information on a company's viability. Public corporations must provide these agencies various reports demonstrating their financial status to protect the shareholders and creditors through governmental oversight. Agencies which warrant investigation when gathering information include:

(1) SEC - Stock prices and reports protecting prospective buyers may indicate problems.

(2) FCC - Reports, including a detailed 10-K report, will be on file and will describe the company's reported financial status.

(3) Secretary of State - Annual reports must be filed to continue operation and will provide information on the company's viability.

(4) Tax Departments - Payment of taxes or delinquency may indicate viability. Usually, however, the IRS or state tax office will not provide tax returns and production must come from the plaintiff.

8. International Sales: Uniform Laws Under the United Nations Convention

When deposing plaintiff's economic expert concerning lost profits in an international sales transaction, counsel should be aware of the United Nations uniform law on sales transactions. In 1980, nations attending the United Nations' Vienna Sales Convention adopted the United Nation Convention On Contracts For International Sale of Goods (the "Convention") which is similar to the United States' Uniform Commercial Code. A copy of the adopted Convention is attached for your review. See Exhibit C. Numerous nations signed, ratified, and approved the Agreement subject to specific individual limitations. A table of the signators is also attached. See Exhibit D. In November 1986, President Reagan ratified the agreement and agreed on behalf of the United States to bind its citizens to the Convention's terms.

It is clear that under the terms of the Convention recovery of lost profits from a breached international sales agreement is allowed. Article 74 of the Convention provides that damages from a breach of contract consist of a sum equal to the loss incurred "including loss of profits." Article 77 however, requires the injured party to mitigate all his damages, "including loss of profits."

While as a general principle loss of profits may be recovered under International law, many questions remain unanswered by the Convention's Enactment. Several important questions include: Does the Convention cover lost volume sellers? Does recovery of lost profits include those in fact suffered, those which could have been suffered, or an average profit expected at a certain time or place? One commentator, recognizing these inherent dilemmas, stated that since the Convention did not provide specific rules covering these situations, it should be assumed that the injured

party may recover under any of the above theories. C. Bianca and N. Bonell, Commentary on the International Sales Law, the Vienna Sales Convention 544 (1987). As a result, since the Convention is similar to the UCC, counsel involved with international sales transactions may be well advised to use the interpretations of the Uniform Commercial Code and federal law as guides for assessing his situation.

Also absent from the Convention and subsequent commentary are discussions of authorized or recognized methods of ascertaining the extent of lost profits. The requirements of certainty and foreseeability of damages were however incorporated in the Convention; so it would seem that conventional techniques for establishing lost profits would be adequate. Therefore, when deposing plaintiff's economic expert, counsel should generally proceed in the same fashion discussed in Section II, supra.

For a more detailed discussion of the Convention, several sources are suggested. See R. Kathrein and D. Magraw, The Convention for the International Sale of Goods: A Handbook of Basic Materials (1987) (ABA publication); C. Bianca and M. Bonell, Commentary on the International Sales Law, The 1980 Vienna Sales Convention (1987); J. Honnold, Uniform Law for International Sales Under the 1980 United Nations Convention (1982); E. A. Farnsworth, Damages and Specific Relief, 27 Am .J. Comp. L. 247 (1979).

EXHIBIT A
GLOSSARY OF ACCOUNTING TERMS

This list was compiled from Barron's, Dictionary of Finance and Investment Terms (2d ed. 1987); R. Anthony, Essentials of Accounting (3d ed. 1984); B. Graham & C. McGolrick, The Interpretation of Financial Statements (2nd Rev.Ed. 1963); and W. McNairn, The Many Meanings of "Cost", 20 The Practical Lawyer 75 (May 1974).

Accrual Accounting	A method of accounting which accounts for revenues in the period in which they are earned and for expenses in the periods in which they are incurred.
Cash Accounting	A method of accounting that does not use the accrual basis; it records only cash receipts and payments. (This is not a generally accepted accounting procedure and is usually not an accepted basis of accounting).
Cost Accounting	The process of identifying and accounting for manufacturing costs and assigning them to goods in the manufacturing process.
Gross Profits	The amount remaining after deducting the cost of goods sold from the revenues received. Gross Profits = Revenues-Production Cost.
Net Profits	The amount remaining after deducting indirect cost, or overhead, from gross profits. Net Profits = Gross Profits-indirect costs.
Expenses	The portion of an asset consumed in an attempt to realize revenues; resources used up or consumed during an accounting period. This term is more restrictive than "Cost."
Liability	A claim of a creditor.
Revenue	An increase in a corporation's assets usually resulting from a sale of goods or services.
Cost	An expenditure made to acquire assets. There are many different types of costs and each should be viewed separately.

Fixed Cost	A cost that does not change as the volume of output increases or decreases. (i.e., rent.)
Variable Cost	A cost that increases or decreases in direct proportion to the increase or decrease in output. (i.e., raw material costs).
Semi-variable Cost	A cost that increases or decreases with output but not in direct proportion to the increase or decrease in output. (i.e., lighting).
Manufacturing Cost	A cost incurred as a responsibility of the manufacturing function of an organization. (i.e., repairs to machinery).
General and Administrative Cost	A cost incurred as the responsibility of the general administrative function of an organization. (i.e., secretarial and support salaries).
Selling Cost	A cost incurred as a responsibility of the selling function of an organization. (i.e., advertising costs).
Past Cost	A cost applicable to past outputs or accomplishments.
Current Cost	A cost applicable to outputs or accomplishments in the present accounting period.
Future Cost	A cost applicable to outputs or accomplishments that can normally be expected to be achieved in a future accounting periods.
Direct Cost	A cost that can be directly identified with a specific output or accomplishment. (i.e., component parts).
Indirect Cost	A cost that is not directly identifiable with a specific output or accomplishments. (i.e., lights, heating, supplies).
Material Cost	The cost incurred to obtain materials.
Labor Cost	A cost incurred to obtain labor.

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Supply Cost	A cost incurred to obtain supplies.
Service Cost	A cost incurred to obtain services. (i.e., building maintenance).
Actual Cost	A cost expressed in total dollars and cents incurred in obtaining a specific output or accomplishment. It includes all material, labor, supply and service costs, whether direct or indirect, connected with the manufacturing or producing of a product.
Standard Cost	A cost expressed in dollars and cents that has been calculated to represent the amount required which a specific output or accomplishment should cost when obtained according to prescribed standard procedures and from prescribed standard materials and supplies. This may also be referred to as expected costs.
Average Cost	A cost expressed in dollars and cents that has been calculated to represent the average amount required to obtain specific outputs and accomplishments.
Paid Cost	A cost incurred and paid in the past.
Accrued Cost	A cost incurred in the past but not yet paid.

EXHIBIT B

GENERAL DEPOSITION CHECKLIST
FOR ECONOMIC EXPERTS AND ACCOUNTANTS IN A LOST PROFIT SITUATION

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1. Obtain a current curriculum vitae or resume of the plaintiff's economic expert.

2. Obtain a detailed list of the expert's writings and speeches, particularly those dealing with lost profits evaluations.

3. Determine where, and how many times, the expert has testified for plaintiffs or defendants and obtain transcripts or appraisals if possible.

4. Has the expert's testimony ever been disallowed, disqualified or impeached?

5. What are the expert's fees? How often has he been retained by opposing counsel?

6. Obtain a copy of the questions the expert submitted, either verbally or in writing, to plaintiff or plaintiff's attorney concerning the company's lost profits.

7. Request a copy of the answers to the questions referred to in six (6). Determine the identity of the answer's source.

8. Determine all other information received by the expert, whether solicited or not, from the plaintiff, plaintiff's attorney, other experts or the company's employees, agents, or officers.

9. Obtain a copy of any report, summary or relevant correspondence prepared for the action including any notes or work sheets in the experts file. Obtain a copy of plaintiff's financial statements, audit reports, annual reports, Finance Committee Meeting Minutes and all other financial documents generated by the company for the last five (5) years.

10. Determine what assumptions were made in projecting future lost profits? Did the expert assume: no wage increases; no recession or depression; no strikes or economic slowdowns; no increase in material cost; no increase in competition; no increase in employment cost; no increase in operating expenses; no market fluctuation or market trend changes; no increase in inflation rates; no change in tax laws; no change in company size; no change in business status; no increase in liability insurance cost; no liabilities for lawsuit judgments; or other assumptions the expert has made.

11. Determine the expenses, including but not limited to labor and material costs, which must be deducted from the gross profit. Determine if this same percentage of the total loss was deducted each year. Determine what percentage changes were made and why.

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12. Determine all fixed and variable costs which the plaintiff incurs in his business. Determine which of these costs are incorporated as deductions in the experts calculations. Seek an explanations of all costs excluded. Determine if cost increases were programed into the expert's calculation of future loss profit. Determine the basis for the described increases.

13. Determine the projected growth rate and earnings of the company. How was the rate determined? What mathematical or statistical methods were used? Is that rate based on the inflation rate? What time periods were used? Who provided the information? Was it in summary form or did it consist of raw data?

14. Determine what "average business" market was used for comparison including the geographic area. Determine the parameters of the comparison group including size, budget, degree of mechanism, management style, public versus private ownership, unionization, or any other relevant factors.

15. Determine how long the company has been in business. Determine if the claimed lost profits are from a new venture. Determine if that factor was included in the experts calculations.

16. Were any liability adjustments made to the lost profit projection. If so, which elements of loss were adjusted? What tax rates were used to adjust lost future profits? What tax rates were used to estimate taxes payable on interest earned on the investment of an award? Identify the source of any tax rates used. What mathematical formula or techniques was employed for the income tax calculations? What was the source of that information or data?

17. What discount rate was used? How frequently did compounding (discounting) occur? Was it computed on an annual or quarterly basis?

18. How was the discount rate chosen? What securities or investments were the discount rate based on? What is the source of information used to select the discount rate? What was the time period covered and the mathematical and statistical techniques used to determine the discount rate?

19. What specific investments did the expert assume the plaintiff would make with any award given? If an award is made, how is it to be invested to duplicate the stream of future lost profits?

20. What date was used as the present value date?

21. For each year that a loss is assumed, list the undiscounted value of the loss, both for the job lost and for any job undertaken in mitigation of those losses.

22. For each year that a loss is assumed, list the discount value of the loss for that year.

23. Did the expert incorporate in his calculations any income received from other sources. Was this amount received from sources not otherwise available but for the defendant's conduct or breach?

24. Are any other assumptions not previously mentioned being used? If so, what are they? Are there any other sources of information used? If so, what are they?

25. Obtain a list of all documents, reports, letters, forecasts, studies and statistical data or compilations that will be used to substantiate the expert's opinion. Request copies of those items that will be introduced into evidence and are not readily available from public sources.

26. Obtain mathematical calculations, formulas, equations, worksheets, charts, and computer printouts used in both projecting future losses and discounting those losses to present value.

27. If a computer was used in making calculations, request a listing of the computer program source, including the main program and any subroutines, the documentation explaining how data is placed into the program, and a copy of the printout. Ask what language the program is written in, on what type or model computer the program was run, where the computer is located and who owns it.

28. Learn if any visual displays, or exhibits are to be used at trial. Determine the brand name and model of the calculator, if any, plaintiff's expert will have available for use in court?

29. Determine if the expert's evaluation is final or if it will be changed prior to trial. If the evaluation is to be changed, determine what changes will be made and why? Be sure to request copies of all changes prior to trial.

30. Determine if the plaintiff in this action receives an award, whether the expert, or any firm or business the expert is associated with , will participate in any way, directly or indirectly, in the investment or management of all or part of the award.

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31. Determine whether any factors not previously mentioned played a role in the expert's analysis or final findings.

ATTACHMENT A
(Oliver Wood Notice)

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1. All documents and/or information provided to Oliver Wood by plaintiff, its employees, directors, officers, agents, and/or attorneys.

2. All documents and/or information made available to Oliver Wood in connection with plaintiff's prosecution of this case whether or not reviewed by Wood.

3. All textbooks, treatises, papers, articles, or other writings or information on which Wood relies in formulating his opinion, performing his analysis, or rendering his opinion or to which he has referred.

4. Curriculum vitae for Dr. Wood along with a current list of his publications.

5. All reports - preliminary, draft, and final - prepared in connection with this case, whether provided to plaintiff or plaintiff's counsel or not.

6. All working papers, notes, computer printouts, calculator/adding machine tapes or other reviewed, prepared documents and/or information resulting from deponent's review analysis, preparation for testimony or preparation for consultation with plaintiff or plaintiff's counsel.

7. All correspondence, memoranda, or other documents related to, concerning, or resulting from deponent's having conferred, consulted, talked to, questioned or discussed with any individual the facts and/or legal issues related to this action.

8. All documents stating or evidencing the terms of deponent's employment by plaintiff or plaintiff's counsel, instructions or directions provided to deponent concerning the results expected from him, and documents specifying the scope of his work and/or analysis.

UNITED NATIONS CONVENTION ON CONTRACTS FOR THE INTERNATIONAL SALE OF GOODS

THE STATES PARTIES TO THIS CONVENTION,

BEARING IN MIND the broad objectives in the resolutions adopted by the sixth special session of the General Assembly of the United Nations on the establishment of a New International Economic Order,

CONSIDERING that the development of international trade on the basis of equality and mutual benefit is an important element in promoting friendly relations among States,

BEING OF THE OPINION that the adoption of uniform rules which govern contracts for the international sale of goods and take into account the different social, economic and legal systems would contribute to the removal of legal barriers in international trade and promote the development of international trade,

HAVE AGREED as follows:

PART I

SPHERE OF APPLICATION AND GENERAL PROVISIONS

Chapter I

SPHERE OF APPLICATION

Article 1

(1) This Convention applies to contracts of sale of goods between parties whose places of business are in different States:

(a) when the States are Contracting States; or

(b) when the rules of private international law lead to the application of the law of a Contracting State.

(2) The fact that the parties have their places of business in different States is to be disregarded whenever this fact does not appear either from the contract or from any dealings between, or from information disclosed by, the parties at any time before or at the conclusion of the contract.

(3) Neither the nationality of the parties nor the civil or commercial character of the parties or of the contract is to be taken into consideration in determining the application of this Convention.

Article 2

This Convention does not apply to sales:

(a) of goods bought for personal, family or household use, unless the seller, at any time before or at the conclusion of the contract, neither knew nor ought to have known that the goods were bought for any such use;

(b) by auction;

(c) on execution or otherwise by authority of law;

(d) of stocks, shares, investment securities, negotiable instruments or money;

(e) of ships, vessels, hovercraft or aircraft;

(f) of electricity.

Article 3

(1) Contracts for the supply of goods to be manufactured or produced are to be considered sales unless the party who orders the goods undertakes to supply a substantial part of the materials necessary for such manufacture or production.

(2) This Convention does not apply to contracts in which the preponderant part of the obligations of the party who furnishes the goods consists in the supply of labour or other services.

Article 4

This Convention governs only the formation of the contract of sale and the rights and obligations of the seller and the buyer arising from such a contract. In particular, except as otherwise expressly provided in this Convention, it is not concerned with:

(a) the validity of the contract or of any of its provisions or of any usage;

(b) the effect which the contract may have on the property in the goods sold.

EXHIBIT C

Article 5

This Convention does not apply to the liability of the seller for death or personal injury caused by the goods to any person.

Article 6

The parties may exclude the application of this Convention or, subject to article 12, derogate from or vary the effect of any of its provisions.

Chapter II

GENERAL PROVISIONS

Article 7

(1) In the interpretation of this Convention, regard is to be had to its international character and to the need to promote uniformity in its application and the observance of good faith in international trade.

(2) Questions concerning matters governed by this Convention which are not expressly settled in it are to be settled in conformity with the general principles on which it is based or, in the absence of such principles, in conformity with the law applicable by virtue of the rules of private international law.

Article 8

(1) For the purposes of this Convention statements made by and other conduct of a party are to be interpreted according to his intent where the other party knew or could not have been unaware what that intent was.

(2) If the preceding paragraph is not applicable, statements made by and other conduct of a party are to be interpreted according to the understanding that a reasonable person of the same kind as the other party would have had in the same circumstances.

(3) In determining the intent of a party or the understanding a reasonable person would have had, due consideration is to be given to all relevant circumstances of the case including the negotiations, any practices which the parties have established between themselves, usages and any subsequent conduct of the parties.

Article 9

(1) The parties are bound by any usage to which they have agreed and by any practices which they have established between themselves.

(2) The parties are considered, unless otherwise agreed, to have impliedly made applicable to their contract or its formation a usage of which the parties knew or ought to have known and which in international trade is widely known to, and regularly observed by, parties to contracts of the type involved in the particular trade concerned.

Article 10

For the purposes of this Convention:

(a) if a party has more than one place of business, the place of business is that which has the closest relationship to the contract and its performance, having regard to the circumstances known to or contemplated by the parties at any time before or at the conclusion of the contract;

(b) if a party does not have a place of business, reference is to be made to his habitual residence.

Article 11

A contract of sale need not be concluded in or evidenced by writing and is not subject to any other requirement as to form. It may be proved by any means, including witnesses.

Article 12

Any provision of article 11, article 29 or Part II of this Convention that allows a contract of sale or its modification or termination by agreement or any offer, acceptance or other indication of intention to be made in any form other than in writing does not apply where any party has his place of business in a Contracting State which has made a declaration under article 96 of this Convention. The parties may not derogate from or vary the effect of this article.

Article 13

For the purposes of this Convention "writing" includes telegram and telex.

PART II

FORMATION OF THE CONTRACT

Article 14

(1) A proposal for concluding a contract addressed to one or more specific persons constitutes an offer if it is sufficiently definite and indicates the intention of the offeror to be bound in case of acceptance. A proposal is sufficiently definite if it indicates the goods and expressly or implicitly fixes or makes provision for determining the quantity and the price.

(2) A proposal other than one addressed to one or more specific persons is to be considered merely as an invitation to make offers, unless the contrary is clearly indicated by the person making the proposal.

Article 15

(1) An offer becomes effective when it reaches the offeree.

(2) An offer, even if it is irrevocable, may be withdrawn if the withdrawal reaches the offeree before or at the same time as the offer.

Article 16

(1) Until a contract is concluded an offer may be revoked if the revocation reaches the offeree before he has dispatched an acceptance.

(2) However, an offer cannot be revoked:

(a) if it indicates, whether by stating a fixed time for acceptance or otherwise, that it is irrevocable; or

(b) if it was reasonable for the offeree to rely on the offer as being irrevocable and the offeree has acted in reliance on the offer.

Article 17

An offer, even if it is irrevocable, is terminated when a rejection reaches the offeror.

Article 18

(1) A statement made by or other conduct of the offeree indicating assent to an offer is an acceptance. Silence or inactivity does not in itself amount to acceptance.

(2) An acceptance of an offer becomes effective at the moment the indication of assent reaches the offeror. An acceptance is not effective if the indication of assent does not reach the offeror within the time he has fixed or, if no time is fixed, within a reasonable time, due account being taken of the circumstances of the transaction, including the rapidity of the means of communication employed by the offeror. An oral offer must be accepted immediately unless the circumstances indicate otherwise.

(3) However, if, by virtue of the offer or as a result of practices which the parties have established between themselves or of usage, the offeree may indicate assent by performing an act, such as one relating to the dispatch of the goods or payment of the price, without notice to the offeror, the acceptance is effective at the moment the act is performed, provided that the act is performed within the period of time laid down in the preceding paragraph.

Article 19

(1) A reply to an offer which purports to be an acceptance but contains additions, limitations or other modifications is a rejection of the offer and constitutes a counter-offer.

(2) However, a reply to an offer which purports to be an acceptance but contains additional or different terms which do not materially alter the terms of the offer constitutes an acceptance, unless the offeror, without undue delay, objects orally to the discrepancy or dispatches a notice to that effect. If he does not so object, the terms of the contract are the terms of the offer with the modifications contained in the acceptance.

(3) Additional or different terms relating, among other things, to the price, payment, quality and quantity of the goods, place and time of delivery, extent of one party's liability to the other or the settlement of disputes are considered to alter the terms of the offer materially.

Article 20

(1) A period of time for acceptance fixed by the offeror in a telegram or a letter begins to run from the moment the telegram is handed in for dispatch or from the date shown on the letter or, if no such date is shown, from the date shown on the envelope. A period of time for acceptance fixed by the offeror by telephone, telex or other means of instantaneous communication, begins to run from the moment that the offer reaches the offeree.

(2) Official holidays or non-business days occurring during the period for acceptance are included in calculating the period. However, if a notice of acceptance cannot be delivered at the address of the offeror on the last day of the period because that day falls on an official holiday or a non-business day at the place of business of the offeror, the period is extended until the first business day which follows.

Article 21

(1) A late acceptance is nevertheless effective as an acceptance if without delay the offeror orally so informs the offeree or dispatches a notice to that effect.

(2) If a letter or other writing containing a late acceptance shows that it has been sent in such circumstances that if its transmission had been normal it would have reached the offeror in due time, the late acceptance is effective as an acceptance unless, without delay, the offeror orally informs the offeree that he considers his offer as having lapsed or dispatches a notice to that effect.

Article 22

An acceptance may be withdrawn if the withdrawal reaches the offeror before or at the same time as the acceptance would have become effective.

Article 23

A contract is concluded at the moment when an acceptance of an offer becomes effective in accordance with the provisions of this Convention.

Article 24

For the purposes of this Part of the Convention, an offer, declaration of acceptance or any other indication of intention "reaches" the addressee when it is made orally to him or delivered by any other means to him personally, to his place of business or mailing address or, if he does not have a place of business or mailing address, to his habitual residence.

PART III

SALE OF GOODS

Chapter I

GENERAL PROVISIONS

Article 25

A breach of contract committed by one of the parties is fundamental if it results in such detriment to the other party as substantially to deprive him of what he is entitled to expect under the contract, unless the party in breach did not foresee and a reasonable person of the same kind in the same circumstances would not have foreseen such a result.

Article 26

A declaration of avoidance of the contract is effective only if made by notice to the other party.

Article 27

Unless otherwise expressly provided in this Part of the Convention, if any notice, request or other communication is given or made by a party in accordance with this Part and by means appropriate in the circumstances, a delay or error in the transmission of the communication or its failure to arrive does not deprive that party of the right to rely on the communication.

Article 28

If, in accordance with the provisions of this Convention, one party is entitled to require performance of any obligation by the other party, a court is not bound to enter a judgement for specific performance unless the court would do so under its own law in respect of similar contracts of sale not governed by this Convention.

Article 29

(1) A contract may be modified or terminated by the mere agreement of the parties.

(2) A contract in writing which contains a provision requiring any modification or termination by agreement to be in writing may not be otherwise modified or terminated by agreement. However, a party may be precluded by his conduct from asserting such a provision to the extent that the other party has relied on that conduct.

Chapter II

OBLIGATIONS OF THE SELLER

Article 30

The seller must deliver the goods, hand over any documents relating to them and transfer the property in the goods, as required by the contract and this Convention.

Section I. Delivery of the goods and handing over of documents

Article 31

If the seller is not bound to deliver the goods at any other particular place, his obligation to deliver consists:

(a) if the contract of sale involves carriage of the goods - in handing the goods over to the first carrier for transmission to the buyer;

(b) if, in cases not within the preceding subparagraph, the contract relates to specific goods, or unidentified goods to be drawn from a specific stock or to be manufactured or produced, and at the time of the conclusion of the contract the parties knew that the goods were at, or were to be manufactured or produced at, a particular place - in placing the goods at the buyer's disposal at that place;

(c) in other cases - in placing the goods at the buyer's disposal at the place where the seller had his place of business at the time of the conclusion of the contract.

Article 32

(1) If the seller, in accordance with the contract or this Convention, hands the goods over to a carrier and if the goods are not clearly identified to the contract by markings on the goods, by shipping documents or otherwise, the seller must give the buyer notice of the consignment specifying the goods.

(2) If the seller is bound to arrange for carriage of the goods, he must make such contracts as are necessary for carriage to the place fixed by means of transportation appropriate in the circumstances and according to the usual terms for such transportation.

(3) If the seller is not bound to effect insurance in respect of the carriage of the goods, he must, at the buyer's request, provide him with all available information necessary to enable him to effect such insurance.

Article 33

The seller must deliver the goods:

(a) if a date is fixed by or determinable from the contract, on that date;

(b) if a period of time is fixed by or determinable from the contract, at any time within that period unless circumstances indicate that the buyer is to choose a date; or

(c) in any other case, within a reasonable time after the conclusion of the contract.

Article 34

If the seller is bound to hand over documents relating to the goods, he must hand them over at the time and place and in the form required by the contract. If the seller has handed over documents before that time, he may, up to that time, cure any lack of conformity in the documents, if the exercise of this right does not cause the buyer unreasonable inconvenience or unreasonable expense. However, the buyer retains any right to claim damages as provided for in this Convention.

Section II. Conformity of the goods and third party claims

Article 35

(1) The seller must deliver goods which are of the quantity, quality and description required by the contract and which are contained or packaged in the manner required by the contract.

(2) Except where the parties have agreed otherwise, the goods do not conform with the contract unless they:

(a) are fit for the purposes for which goods of the same description would ordinarily be used;

(b) are fit for any particular purpose expressly or impliedly made known to the seller at the time of the conclusion of the contract, except where the circumstances show that the buyer did not rely, or that it was unreasonable for him to rely, on the seller's skill and judgement;

(c) possess the qualities of goods which the seller has held out to the buyer as a sample or model;

(d) are contained or packaged in the manner usual for such goods or, where there is no such manner, in a manner adequate to preserve and protect the goods.

(3) The seller is not liable under subparagraphs (a) to (d) of the preceding paragraph for any lack of conformity of the goods if at the time of the conclusion of the contract the buyer knew or could not have been unaware of such lack of conformity.

Article 36

(1) The seller is liable in accordance with the contract and this Convention for any lack of conformity which exists at the time when the risk passes to the buyer, even though the lack of conformity becomes apparent only after that time.

(2) The seller is also liable for any lack of conformity which occurs after the time indicated in the preceding paragraph and which is due to a breach of any of his obligations, including a breach of any guarantee that for a period of time the goods will remain fit for their ordinary purpose or for some particular purpose or will retain specified qualities or characteristics.

Article 37

If the seller has delivered goods before the date for delivery, he may, up to that date, deliver any missing part or make up any deficiency in the quantity of the goods delivered, or deliver goods in replacement of any non-conforming goods delivered or remedy any lack of conformity in the goods delivered, provided that the exercise of this right does not cause the buyer unreasonable inconvenience or unreasonable expense. However, the buyer retains any right to claim damages as provided for in this Convention.

Article 38

(1) The buyer must examine the goods, or cause them to be examined, within as short a period as is practicable in the circumstances.

(2) If the contract involves carriage of the goods, examination may be deferred until after the goods have arrived at their destination.

(3) If the goods are redirected in transit or redispatched by the buyer without a reasonable opportunity for examination by him and at the time of the conclusion of the contract the seller knew or ought to have known of the possibility of such redirection or redispatch, examination may be deferred until after the goods have arrived at the new destination.

Article 39

(1) The buyer loses the right to rely on a lack of conformity of the goods if he does not give notice to the seller specifying the nature of the lack of conformity within a reasonable time after he has discovered it or ought to have discovered it.

(2) In any event, the buyer loses the right to rely on a lack of conformity of the goods if he does not give the seller notice thereof at the latest within a period of two years from the date on which the goods were actually handed over to the buyer, unless this time-limit is inconsistent with a contractual period of guarantee.

Article 40

The seller is not entitled to rely on the provisions of articles 38 and 39 if the lack of conformity relates to facts of which he knew or could not have been unaware and which he did not disclose to the buyer.

Article 41

The seller must deliver goods which are free from any right or claim of a third party, unless the buyer agreed to take the goods subject to that right or claim. However, if such right or claim is based on industrial property or other intellectual property, the seller's obligation is governed by article 42.

Article 42

(1) The seller must deliver goods which are free from any right or claim of a third party based on industrial property or other intellectual property, of which at the time of the conclusion of the contract the seller knew or could not have been unaware, provided that the right or claim is based on industrial property or other intellectual property:

(a) under the law of the State where the goods will be resold or otherwise used, if it was contemplated by the parties at the time of the conclusion of the contract that the goods would be resold or otherwise used in that State; or

(b) in any other case, under the law of the State where the buyer has his place of business.

(2) The obligation of the seller under the preceding paragraph does not extend to cases where:

(a) at the time of the conclusion of the contract the buyer knew or could not have been unaware of the right or claim; or

(b) the right or claim results from the seller's compliance with technical drawings, designs, formulae or other such specifications furnished by the buyer.

Article 43

(1) The buyer loses the right to rely on the provisions of article 41 or article 42 if he does not give notice to the seller specifying the nature of the right or claim of the third party within a reasonable time after he has become aware or ought to have become aware of the right or claim.

(2) The seller is not entitled to rely on the provisions of the preceding paragraph if he knew of the right or claim of the third party and the nature of it.

Article 44

Notwithstanding the provisions of paragraph (1) of article 39 and paragraph (1) of article 43, the buyer may reduce the price in accordance with article 50 or claim damages, except for loss of profit, if he has a reasonable excuse for his failure to give the required notice.

Section III. Remedies for breach of contract by the seller

Article 45

(1) If the seller fails to perform any of his obligations under the contract or this Convention, the buyer may:

(a) exercise the rights provided in articles 46 to 52;

(b) claim damages as provided in articles 74 to 77.

(2) The buyer is not deprived of any right he may have to claim damages by exercising his right to other remedies.

(3) No period of grace may be granted to the seller by a court or arbitral tribunal when the buyer resorts to a remedy for breach of contract.

Article 46

(1) The buyer may require performance by the seller of his obligations unless the buyer has resorted to a remedy which is inconsistent with this requirement.

(2) If the goods do not conform with the contract, the buyer may require delivery of substitute goods only if the lack of conformity constitutes a fundamental breach of contract and a request for substitute goods is made either in conjunction with notice given under article 39 or within a reasonable time thereafter.

(3) If the goods do not conform with the contract, the buyer may require the seller to remedy the lack of conformity by repair, unless this is unreasonable having regard to all the circumstances. A request for repair must be made either in conjunction with notice given under article 39 or within a reasonable time thereafter.

Article 47

(1) The buyer may fix an additional period of time of reasonable length for performance by the seller of his obligations.

(2) Unless the buyer has received notice from the seller that he will not perform within the period so fixed, the buyer may not, during that period, resort to any remedy for breach of contract. However, the buyer is not deprived thereby of any right he may have to claim damages for delay in performance.

Article 48

(1) Subject to article 49, the seller may, even after the date for delivery, remedy at his own expense any failure to perform his obligations, if he can do so without unreasonable delay and without causing the buyer unreasonable inconvenience or uncertainty of reimbursement by the seller of expenses advanced by the buyer. However, the buyer retains any right to claim damages as provided for in this Convention.

(2) If the seller requests the buyer to make known whether he will accept performance and the buyer does not comply with the request within a reasonable time, the seller may perform within the time indicated in his request. The buyer may not, during that period of time, resort to any remedy which is inconsistent with performance by the seller.

(3) A notice by the seller that he will perform within a specified period of time is assumed to include a request, under the preceding paragraph, that the buyer make known his decision.

(4) A request or notice by the seller under paragraph (2) or (3) of this article is not effective unless received by the buyer.

Article 49

(1) The buyer may declare the contract avoided:

(a) if the failure by the seller to perform any of his obligations under the contract or this Convention amounts to a fundamental breach of contract; or

(b) in case of non-delivery, if the seller does not deliver the goods within the additional period of time fixed by the buyer in accordance with paragraph (1) of article 47 or declares that he will not deliver within the period so fixed.

(2) However, in cases where the seller has delivered the goods, the buyer loses the right to declare the contract avoided unless he does so:

(a) in respect of late delivery, within a reasonable time after he has become aware that delivery has been made;

(b) in respect of any breach other than late delivery, within a reasonable time:

(i) after he knew or ought to have known of the breach;

(ii) after the expiration of any additional period of time fixed by the buyer in accordance with paragraph (1) of article 47, or after the seller has declared that he will not perform his obligations within such an additional period; or

(iii) after the expiration of any additional period of time indicated by the seller in accordance with paragraph (2) of article 48, or after the buyer has declared that he will not accept performance.

Article 50

If the goods do not conform with the contract and whether or not the price has already been paid, the buyer may reduce the price in the same proportion as the value that the goods actually delivered had at the time of the delivery bears to the value that conforming goods would have had at that time. However, if the seller remedies any failure to perform his obligations in accordance with article 37 or article 48 or if the buyer refuses to accept performance by the seller in accordance with those articles, the buyer may not reduce the price.

Article 51

(1) If the seller delivers only a part of the goods or if only a part of the goods delivered is in conformity with the contract, articles 46 to 50 apply in respect of the part which is missing or which does not conform.

(2) The buyer may declare the contract avoided in its entirety only if the failure to make delivery completely or in conformity with the contract amounts to a fundamental breach of the contract.

Article 52

(1) If the seller delivers the goods before the date fixed, the buyer may take delivery or refuse to take delivery.

(2) If the seller delivers a quantity of goods greater than that provided for in the contract, the buyer may take delivery or refuse to take delivery of the excess quantity. If the buyer takes delivery of all or part of the excess quantity, he must pay for it at the contract rate.

Chapter III

OBLIGATIONS OF THE BUYER

Article 53

The buyer must pay the price for the goods and take delivery of them as required by the contract and this Convention.

Section I. Payment of the price

Article 54

The buyer's obligation to pay the price includes taking such steps and complying with such formalities as may be required under the contract or any laws and regulations to enable payment to be made.

Article 55

Where a contract has been validly concluded but does not expressly or implicitly fix or make provision for determining the price, the parties are considered, in the absence of any indication to the contrary, to have impliedly made reference to the price generally charged at the time of the conclusion of the contract for such goods sold under comparable circumstances in the trade concerned.

Article 56

If the price is fixed according to the weight of the goods, in case of doubt it is to be determined by the net weight.

Article 57

(1) If the buyer is not bound to pay the price at any other particular place, he must pay it to the seller:

(a) at the seller's place of business; or

(b) if the payment is to be made against the handing over of the goods or of documents, at the place where the handing over takes place.

(2) The seller must bear any increase in the expenses incidental to payment which is caused by a change in his place of business subsequent to the conclusion of the contract.

Article 58

(1) If the buyer is not bound to pay the price at any other specific time, he must pay it when the seller places either the goods or documents controlling their disposition at the buyer's disposal in accordance with the contract and this Convention. The seller may make such payment a condition for handing over the goods or documents.

(2) If the contract involves carriage of the goods, the seller may dispatch the goods on terms whereby the goods, or documents controlling their disposition, will not be handed over to the buyer except against payment of the price.

(3) The buyer is not bound to pay the price until he has had an opportunity to examine the goods, unless the procedures for delivery or payment agreed upon by the parties are inconsistent with his having such an opportunity.

Article 59

The buyer must pay the price on the date fixed by or determinable from the contract and this Convention without the need for any request or compliance with any formality on the part of the seller.

Section II. Taking delivery

Article 60

The buyer's obligation to take delivery consists:

(a) in doing all the acts which could reasonably be expected of him in order to enable the seller to make delivery; and

(b) in taking over the goods.

Section III. Remedies for breach of contract by the buyer

Article 61

(1) If the buyer fails to perform any of his obligations under the contract or this Convention, the seller may:

(a) exercise the rights provided in articles 62 to 65;

(b) claim damages as provided in articles 74 to 77.

(2) The seller is not deprived of any right he may have to claim damages by exercising his right to other remedies.

(3) No period of grace may be granted to the buyer by a court or arbitral tribunal when the seller resorts to a remedy for breach of contract.

Article 62

The seller may require the buyer to pay the price, take delivery or perform his other obligations, unless the seller has resorted to a remedy which is inconsistent with this requirement.

Article 63

(1) The seller may fix an additional period of time of reasonable length for performance by the buyer of his obligations.

(2) Unless the seller has received notice from the buyer that he will not perform within the period so fixed, the seller may not, during that period, resort to any remedy for breach of contract. However, the seller is not deprived thereby of any right he may have to claim damages for delay in performance.

Article 64

(1) The seller may declare the contract avoided:

(a) if the failure by the buyer to perform any of his obligations under the contract or this Convention amounts to a fundamental breach of contract; or

(b) if the buyer does not, within the additional period of time fixed by the seller in accordance with paragraph (1) of article 63, perform his obligation to pay the price or take delivery of the goods, or if he declares that he will not do so within the period so fixed.

(2) However, in cases where the buyer has paid the price, the seller loses the right to declare the contract avoided unless he does so:

(a) in respect of late performance by the buyer, before the seller has become aware that performance has been rendered; or

(b) in respect of any breach other than late performance by the buyer, within a reasonable time:

(i) after the seller knew or ought to have known of the breach; or

(ii) after the expiration of any additional period of time fixed by the seller in accordance with paragraph (1) of article 63, or after the buyer has declared that he will not perform his obligations within such an additional period.

Article 65

(1) If under the contract the buyer is to specify the form, measurement or other features of the goods and he fails to make such specification either on the date agreed upon or within a reasonable time after receipt of a request from the seller, the seller may, without prejudice to any other rights he may have, make the specification himself in accordance with the requirements of the buyer that may be known to him.

(2) If the seller makes the specification himself, he must inform the buyer of the details thereof and must fix a reasonable time within which the buyer may make a different specification. If, after receipt of such a communication, the buyer fails to do so within the time so fixed, the specification made by the seller is binding.

Chapter IV

PASSING OF RISK

Article 66

Loss of or damage to the goods after the risk has passed to the buyer does not discharge him from his obligation to pay the price, unless the loss or damage is due to an act or omission of the seller.

Article 67

(1) If the contract of sale involves carriage of the goods and the seller is not bound to hand them over at a particular place, the risk passes to the buyer when the goods are handed over to the first carrier for transmission to the buyer in accordance with the contract of sale. If the seller is bound to hand the goods over to a carrier at a particular place, the risk does not pass to the buyer until the goods are handed over to the carrier at that place. The fact that the seller is authorized to retain documents controlling the disposition of the goods does not affect the passage of the risk.

(2) Nevertheless, the risk does not pass to the buyer until the goods are clearly identified to the contract, whether by markings on the goods, by shipping documents, by notice given to the buyer or otherwise.

Article 68

The risk in respect of goods sold in transit passes to the buyer from the time of the conclusion of the contract. However, if the circumstances so indicate, the risk is assumed by the buyer from the time the goods were handed over to the carrier who issued the documents embodying the contract of carriage. Nevertheless, if at the time of the conclusion of the contract of sale the seller knew or ought to have known that the goods had been lost or damaged and did not disclose this to the buyer, the loss or damage is at the risk of the seller.

Article 69

(1) In cases not within articles 67 and 68, the risk passes to the buyer when he takes over the goods or, if he does not do so in due time, from the time when the goods are placed at his disposal and he commits a breach of contract by failing to take delivery.

(2) However, if the buyer is bound to take over the goods at a place other than a place of business of the seller, the risk passes when delivery is due and the buyer is aware of the fact that the goods are placed at his disposal at that place.

(3) If the contract relates to goods not then identified, the goods are considered not to be placed at the disposal of the buyer until they are clearly identified to the contract.

Article 70

If the seller has committed a fundamental breach of contract, articles 67, 68 and 69 do not impair the remedies available to the buyer on account of the breach.

Chapter V

PROVISIONS COMMON TO THE OBLIGATIONS OF THE SELLER AND OF THE BUYER

Section I. Anticipatory breach and instalment contracts

Article 71

(1) A party may suspend the performance of his obligations if, after the conclusion of the contract, it becomes apparent that the other party will not perform a substantial part of his obligations as a result of:

(a) a serious deficiency in his ability to perform or in his creditworthiness; or

(b) his conduct in preparing to perform or in performing the contract.

(2) If the seller has already dispatched the goods before the grounds described in the preceding paragraph become evident, he may prevent the handing over of the goods to the buyer even though the buyer holds a document which entitles him to obtain them. The present paragraph relates only to the rights in the goods as between the buyer and the seller.

(3) A party suspending performance, whether before or after dispatch of the goods, must immediately give notice of the suspension to the other party and must continue with performance if the other party provides adequate assurance of his performance.

Article 72

(1) If prior to the date for performance of the contract it is clear that one of the parties will commit a fundamental breach of contract, the other party may declare the contract avoided.

(2) If time allows, the party intending to declare the contract avoided must give reasonable notice to the other party in order to permit him to provide adequate assurance of his performance.

(3) The requirements of the preceding paragraph do not apply if the other party has declared that he will not perform his obligations.

Article 73

(1) In the case of a contract for delivery of goods by instalments, if the failure of one party to perform any of his obligations in respect of any instalment constitutes a fundamental breach of contract with respect to that instalment, the other party may declare the contract avoided with respect to that instalment.

(2) If one party's failure to perform any of his obligations in respect of any instalment gives the other party good grounds to conclude that a fundamental breach of contract will occur with respect to future instalments, he may declare the contract avoided for the future, provided that he does so within a reasonable time.

(3) A buyer who declares the contract avoided in respect of any delivery may, at the same time, declare it avoided in respect of deliveries already made or of future deliveries if, by reason of their interdependence, those deliveries could not be used for the purpose contemplated by the parties at the time of the conclusion of the contract.

Section II. Damages

Article 74

Damages for breach of contract by one party consist of a sum equal to the loss, including loss of profit, suffered by the other party as a consequence of the breach. Such damages may not exceed the loss which the party in breach foresaw or ought to have foreseen at the time of the conclusion of the contract, in the light of the facts and matters of which he then knew or ought to have known, as a possible consequence of the breach of contract.

Article 75

If the contract is avoided and if, in a reasonable manner and within a reasonable time after avoidance, the buyer has bought goods in replacement or the seller has resold the goods, the party claiming damages may recover the difference between the contract price and the price in the substitute transaction as well as any further damages recoverable under article 74.

Article 76

(1) If the contract is avoided and there is a current price for the goods, the party claiming damages may, if he has not made a purchase or resale under article 75, recover the difference between the price fixed by the contract and the current price at the time of avoidance as well as any further damages recoverable under article 74. If, however, the party claiming damages has avoided the contract after taking over the goods, the current price at the time of such taking over shall be applied instead of the current price at the time of avoidance.

(2) For the purposes of the preceding paragraph, the current price is the price prevailing at the place where delivery of the goods should have been made or, if there is no current price at that place, the price at such other place as serves as a reasonable substitute, making due allowance for differences in the cost of transporting the goods.

Article 77

A party who relies on a breach of contract must take such measures as are reasonable in the circumstances to mitigate the loss, including loss of profit, resulting from the breach. If he fails to take such measures, the party in breach may claim a reduction in the damages in the amount by which the loss should have been mitigated.

Section III. Interest

Article 78

If a party fails to pay the price or any other sum that is in arrears, the other party is entitled to interest on it, without prejudice to any claim for damages recoverable under article 74.

Section IV. Exemptions

Article 79

(1) A party is not liable for a failure to perform any of his obligations if he proves that the failure was due to an impediment beyond his control and that he could not reasonably be expected to have taken the impediment into account at the time of the conclusion of the contract or to have avoided or overcome it, or its consequences.

(2) If the party's failure is due to the failure by a third person whom he has engaged to perform the whole or a part of the contract, that party is exempt from liability only if:

(a) he is exempt under the preceding paragraph; and

(b) the person whom he has so engaged would be so exempt if the provisions of that paragraph were applied to him.

(3) The exemption provided by this article has effect for the period during which the impediment exists.

(4) The party who fails to perform must give notice to the other party of the impediment and its effect on his ability to perform. If the notice is not received by the other party within a reasonable time after the party who fails to perform knew or ought to have known of the impediment, he is liable for damages resulting from such non-receipt.

(5) Nothing in this article prevents either party from exercising any right other than to claim damages under this Convention.

Article 80

A party may not rely on a failure of the other party to perform, to the extent that such failure was caused by the first party's act or omission.

Section V. Effects of avoidance

Article 81

(1) Avoidance of the contract releases both parties from their obligations under it, subject to any damages which may be due. Avoidance does not affect any provision of the contract for the settlement of disputes or any other provision of the contract governing the rights and obligations of the parties consequent upon the avoidance of the contract.

(2) A party who has performed the contract either wholly or in part may claim restitution from the other party of whatever the first party has supplied or paid under the contract. If both parties are bound to make restitution, they must do so concurrently.

Article 82

(1) The buyer loses the right to declare the contract avoided or to require the seller to deliver substitute goods if it is impossible for him to make restitution of the goods substantially in the condition in which he received them.

(2) The preceding paragraph does not apply:

(a) if the impossibility of making restitution of the goods or of making restitution of the goods substantially in the condition in which the buyer received them is not due to his act or omission;

(b) if the goods or part of the goods have perished or deteriorated as a result of the examination provided for in article 38; or

(c) if the goods or part of the goods have been sold in the normal course of business or have been consumed or transformed by the buyer in the course of normal use before he discovered or ought to have discovered the lack of conformity.

Article 83

A buyer who has lost the right to declare the contract avoided or to require the seller to deliver substitute goods in accordance with article 82 retains all other remedies under the contract and this Convention.

Article 84

(1) If the seller is bound to refund the price, he must also pay interest on it, from the date on which the price was paid.

(2) The buyer must account to the seller for all benefits which he has derived from the goods or part of them:

(a) if he must make restitution of the goods or part of them; or

(b) if it is impossible for him to make restitution of all or part of the goods or to make restitution of all or part of the goods substantially in the condition in which he received them, but he has nevertheless declared the contract avoided or required the seller to deliver substitute goods.

Section VI. Preservation of the goods

Article 85

If the buyer is in delay in taking delivery of the goods or, where payment of the price and delivery of the goods are to be made concurrently, if he fails to pay the price, and the seller is either in possession of the goods or otherwise able to control their disposition, the seller must take such steps as are reasonable in the circumstances to preserve them. He is entitled to retain them until he has been reimbursed his reasonable expenses by the buyer.

Article 86

(1) If the buyer has received the goods and intends to exercise any right under the contract or this Convention to reject them, he must take such steps to preserve them as are reasonable in the circumstances. He is entitled to retain them until he has been reimbursed his reasonable expenses by the seller.

(2) If goods dispatched to the buyer have been placed at his disposal at their destination and he exercises the right to reject them, he must take possession of them on behalf of the seller, provided that this can be done without payment of the price and without unreasonable inconvenience or unreasonable expense. This provision does not apply if the seller or a person authorized to take charge of the goods on his behalf is present at the destination. If the buyer takes possession of the goods under this paragraph, his rights and obligations are governed by the preceding paragraph.

Article 87

A party who is bound to take steps to preserve the goods may deposit them in a warehouse of a third person at the expense of the other party provided that the expense incurred is not unreasonable.

Article 88

(1) A party who is bound to preserve the goods in accordance with article 85 or 86 may sell them by any appropriate means if there has been an unreasonable delay by the other party in taking possession of the goods or in taking them back or in paying the price or the cost of preservation, provided that reasonable notice of the intention to sell has been given to the other party.

(2) If the goods are subject to rapid deterioration or their preservation would involve unreasonable expense, a party who is bound to preserve the goods in accordance with article 85 or 86 must take reasonable measures to sell them. To the extent possible he must give notice to the other party of his intention to sell.

(3) A party selling the goods has the right to retain out of the proceeds of sale an amount equal to the reasonable expenses of preserving the goods and of selling them. He must account to the other party for the balance.

PART IV

FINAL PROVISIONS

Article 89

The Secretary-General of the United Nations is hereby designated as the depositary for this Convention.

Article 90

This Convention does not prevail over any international agreement which has already been or may be entered into and which contains provisions concerning the matters governed by this Convention, provided that the parties have their places of business in States parties to such agreement.

Article 91

(1) This Convention is open for signature at the concluding meeting of the United Nations Conference on Contracts for the International Sale of Goods and will remain open for signature by all States at the Headquarters of the United Nations, New York until 30 September 1981.

(2) This Convention is subject to ratification, acceptance or approval by the signatory States.

(3) This Convention is open for accession by all States which are not signatory States as from the date it is open for signature.

(4) Instruments of ratification, acceptance, approval and accession are to be deposited with the Secretary-General of the United Nations.

Article 92

(1) A Contracting State may declare at the time of signature, ratification, acceptance, approval or accession that it will not be bound by Part II of this Convention or that it will not be bound by Part III of this Convention.

(2) A Contracting State which makes a declaration in accordance with the preceding paragraph in respect of Part II or Part III of this Convention is not to be considered a Contracting State within paragraph (1) of article 1 of this Convention in respect of matters governed by the Part to which the declaration applies.

Article 93

(1) If a Contracting State has two or more territorial units in which, according to its constitution, different systems of law are applicable in relation to the matters dealt with in this Convention, it may, at the time of signature, ratification, acceptance, approval or accession, declare that this Convention is to extend to all its territorial units or only to one or more of them, and may amend its declaration by submitting another declaration at any time.

(2) These declarations are to be notified to the depositary and are to state expressly the territorial units to which the Convention extends.

(3) If, by virtue of a declaration under this article, this Convention extends to one or more but not all of the territorial units of a Contracting State, and if the place of business of a party is located in that State, this place of business, for the purposes of this Convention, is considered not to be in a Contracting State, unless it is in a territorial unit to which the Convention extends.

(4) If a Contracting State makes no declaration under paragraph (1) of this article, the Convention is to extend to all territorial units of that State.

Article 94

(1) Two or more Contracting States which have the same or closely related legal rules on matters governed by this Convention may at any time declare that the Convention is not to apply to contracts of sale or to their formation where the parties have their places of business in those States. Such declarations may be made jointly or by reciprocal unilateral declarations.

(2) A Contracting State which has the same or closely related legal rules on matters governed by this Convention as one or more non-Contracting States may at any time declare that the Convention is not to apply to contracts of sale or to their formation where the parties have their places of business in those States.

(3) If a State which is the object of a declaration under the preceding paragraph subsequently becomes a Contracting State, the declaration made will, as from the date on which the Convention enters into force in respect of the new Contracting State, have the effect of a declaration made under paragraph (1), provided that the new Contracting State joins in such declaration or makes a reciprocal unilateral declaration.

Article 95

Any State may declare at the time of the deposit of its instrument of ratification, acceptance, approval or accession that it will not be bound by subparagraph (1)(b) of article 1 of this Convention.

Article 96

A Contracting State whose legislation requires contracts of sale to be concluded in or evidenced by writing may at any time make a declaration in accordance with article 12 that any provision of article 11, article 29, or Part II of this Convention, that allows a contract of sale or its modification or termination by agreement or any offer, acceptance, or other indication of intention to be made in any form other than in writing, does not apply where any party has his place of business in that State.

Article 97

(1) Declarations made under this Convention at the time of signature are subject to confirmation upon ratification, acceptance or approval.

(2) Declarations and confirmations of declarations are to be in writing and be formally notified to the depositary.

(3) A declaration takes effect simultaneously with the entry into force of this Convention in respect of the State concerned. However, a declaration of which the depositary receives formal notification after such entry into force takes effect on the first day of the month following the expiration of six months after the date of its receipt by the depositary. Reciprocal unilateral declarations under article 94 take effect on the first day of the month following the expiration of six months after the receipt of the latest declaration by the depositary.

(4) Any State which makes a declaration under this Convention may withdraw it at any time by a formal notification in writing addressed to the depositary. Such withdrawal is to take effect on the first day of the month following the expiration of six months after the date of the receipt of the notification by the depositary.

(5) A withdrawal of a declaration made under article 94 renders inoperative, as from the date on which the withdrawal takes effect, any reciprocal declaration made by another State under that article.

Article 98

No reservations are permitted except those expressly authorized in this Convention.

Article 99

(1) This Convention enters into force, subject to the provisions of paragraph (6) of this article, on the first day of the month following the expiration of twelve months after the date of deposit of the tenth instrument of ratification, acceptance, approval or accession, including an instrument which contains a declaration made under article 92.

(2) When a State ratifies, accepts, approves or accedes to this Convention after the deposit of the tenth instrument of ratification, acceptance, approval or accession, this Convention, with the exception of the Part excluded, enters into force in respect of that State, subject to the provisions of paragraph (6) of this article, on the first day of the month following the expiration of twelve months after the date of the deposit of its instrument of ratification, acceptance, approval or accession.

(3) A State which ratifies, accepts, approves or accedes to this Convention and is a party to either or both the Convention relating to a Uniform Law on the Formation of Contracts for the International Sale of Goods done at The Hague on 1 July 1964 (1964 Hague Formation Convention) and the Convention relating to a Uniform Law on the International Sale of Goods done at The Hague on 1 July 1964 (1964 Hague Sales Convention) shall at the same time denounce, as the case may be, either or both the 1964 Hague Sales Convention and the 1964 Hague Formation Convention by notifying the Government of the Netherlands to that effect.

(4) A State party to the 1964 Hague Sales Convention which ratifies, accepts, approves or accedes to the present Convention and declares or has declared under article 92 that it will not be bound by Part II of this Convention shall at the time of ratification, acceptance, approval or accession denounce the 1964 Hague Sales Convention by notifying the Government of the Netherlands to that effect.

(5) A State party to the 1964 Hague Formation Convention which ratifies, accepts, approves or accedes to the present Convention and declares or has declared under article 92 that it will not be bound by Part III of this Convention shall at the time of ratification, acceptance, approval or accession denounce the 1964 Hague Formation Convention by notifying the Government of the Netherlands to that effect.

(6) For the purpose of this article, ratifications, acceptances, approvals and accessions in respect of this Convention by States parties to the 1964 Hague Formation Convention or to the 1964 Hague Sales Convention shall not be effective until such denunciations as may be required on the part of those States in respect of the latter two Conventions have themselves become effective. The depositary of this Convention shall consult with the Government of the Netherlands, as the depositary of the 1964 Conventions, so as to ensure necessary co-ordination in this respect.

Article 100

(1) This Convention applies to the formation of a contract only when the proposal for concluding the contract is made on or after the date when the Convention enters into force in respect of the Contracting States referred to in subparagraph (1)(a) or the Contracting State referred to in subparagraph (1)(b) of article 1.

(2) This Convention applies only to contracts concluded on or after the date when the Convention enters into force in respect of the Contracting States referred to in subparagraph (1)(a) or the Contracting State referred to in subparagraph (1)(b) of article 1.

Article 101

(1) A Contracting State may denounce this Convention, or Part II or Part III of the Convention, by a formal notification in writing addressed to the depositary.

(2) The denunciation takes effect on the first day of the month following the expiration of twelve months after the notification is received by the depositary. Where a longer period for the denunciation to take effect is specified in the notification, the denunciation takes effect upon the expiration of such longer period after the notification is received by the depositary.

DONE at Vienna, this day of eleventh day of April, one thousand nine hundred and eighty, in a single original, of which the Arabic, Chinese, English, French, Russian and Spanish texts are equally authentic.

IN WITNESS WHEREOF the undersigned plenipotentiaries, being duly authorized by their respective Governments, have signed this Convention.

I hereby certify that the foregoing text is a true copy of the United Nations Convention on contracts for the sale of goods, concluded at Vienna on 11 April 1980, the original of which is deposited with the Secretary-General of the United Nations.

For the Secretary-General:
The Legal Counsel

United Nations, New York
12 May 1980

Je certifie que le texte qui précède est une copie conforme de la Convention des Nations Unies sur les contracts de vente internationale de marchandises, conclue à Vienne le 11 avril 1980, dont l'original se trouve déposé auprès du Secrétaire général de l'Organisation des Nations Unies.

Pour le Secrétaire général :
Le Conseiller juridique

Organisation des Nations Unies, New York,
Le 12 mai 1980

TABLE 1
PARTIES AND ACCOMPANYING RESERVATIONS OR DECLARATIONS, TO MAY 1987

STATE	DATE OF RATIFICATION, APPROVAL, OR ACCESSION	RESERVATIONS & DECLARATIONS
Argentina	19 July 1983 (Ac)	Art. 11 & 29 and Part II are reserved
Egypt	6 Dec. 1982 (Ac)	
France	6 Aug. 1982 (Ap)	
Hungary	16 June 1983 (R)	Art. 11 & 29 and Part II are reserved. Declaration: 'It [Hungary] considers the General Conditions of Delivery of Goods between Organizations of the Member Countries of the Council of Mutual Economic Assistance/GCDCMEA, 1968/75, version of 1979/to be subject to the provisions of Article 90 of the Convention.'
Italy	11 Dec. 1986 (R)	
Lesotho	18 June 1981 (R)	
People's Republic of China	11 Dec. 1986 (Ap)	Art. 1(1)(b) & 11 are reserved
Syrian Arab Republic	9 Oct. 1982 (Ac)	
United States of America	11 Dec. 1986 (R)	Art. 1(1)(b) is reserved
Yugoslavia	27 Mar. 1985 (R)	
Zambia	6 June 1986 (Ac)	

Ac = Acceded directly to convention
Ap = Approval
R = Ratification
Source: Treaty Section
Office of Legal Affairs
United Nations
New York, NY 10017
(June 12, 1987)

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EXHIBIT D

TABLE 2
SIGNATORIES AND ACCOMPANYING INDICATIONS OF RESERVATIONS, TO MAY 1987*

STATE	DATE OF SIGNATURE	INDICATION THAT FINAL ACCESSION, RATIFICATION, ETC. WILL BE SUBJECT TO A RESERVATION
Austria	11 Apr. 1980	
Chile	11 Apr. 1980	
Czechoslovakia	1 Sept. 1981	
Denmark	26 May 1981	Part II
Finland	26 May 1981	Part II
Federal Republic of Germany	26 May 1981	
France	27 Aug. 1981	
German Democratic Republic	13 Aug. 1981	
Ghana	11 Apr. 1980	
Hungary	11 Apr. 1980	
Italy	30 Sept. 1981	
Lesotho	18 June 1981	
The Netherlands	29 May 1981	
Norway	26 May 1981	Part II
People's Republic of China	30 Sept. 1981	
Poland	28 Sept. 1981	
Singapore	11 Apr. 1980	
Sweden	26 May 1981	Part II
United States of America	31 Aug. 1981	
Venezuela	28 Sept. 1981	
Yugoslavia	11 Apr. 1980	

*Argentina, Egypt, Syrian Arab Republic, and Zambia are not included in this table as they acceded directly to the Convention. *See* Table 1, *supra*.

Source: Treaty Section
Office of Legal Affairs
United Nations
New York, NY 10017
(June 12, 1987)

"THE PROBLEM OF UNRELIABLE EXPERT WITNESS TESTIMONY"

D

BY THOMAS M. CRISHAM

President, The Defense Research Institute, Inc.

Hinshaw, Culbertson, Moelmann, Hoban & Fuller
222 North LaSalle Street, Suite 300
Chicago, Illinois 60601-1081

"THE PROBLEM OF UNRELIABLE EXPERT WITNESS TESTIMONY"

I. INTRODUCTION What the main problems are:

A. Truly venal experts -- those who would literally say anything they're paid to say

1. not a widespread problem, though

2. no specific examples, but I'm sure they exist

B. Those who are essentially advocates for the party on whose behalf they're testifying -- just as a good attorney becomes an advocate for his or her client, genuinely believing the client's side of the story

1. financial incentive may make problem unavoidable under our current system

2. greater use of court-appointed experts may help alleviate this problem

C. Experts who may believe their methods and reasoning are sound, but whose scientific or other relevant community does not support such methods or reasoning as sound

1. good example is the anthropologist who claimed she could determine not only a person's height and weight, but even that person's race and socioeconomic status by examining a person's footprint!

2. most courts agree that opinion testimony which is not based on accepted principles or methods by the expert's peers should not be admitted (Fed.R.Evid. 703, Frye v. United States)

D. Related problem of experts testifying on novel scientific theories which may in time be easily proven or disproven, but which are now nearly impossible to prove or disprove

1. recent example is cancer causation cases, such as Ferebee v. Chevron, 736 F.2d 1529 (D.C. Cir. 1984)("battle of the experts")

2. older example is lie detectors, the "novel" scientific method at issue in Frye v. U.S. 293 F.1013 (D.C.Cir. 1923)

3. As Buffy Cohen postulated (at DRI's Conference in June), wouldn't Galileo's testimony that the earth is round have been kept out under the Frye rule and the Federal Rules of Evidence, since few others of this day believed that the earth was not flat?

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II. DRI RECENTLY CONVENED A NATIONAL CONFERENCE TO ADDRESS THESE PROBLEMS (June 22-23, 1989, in Chicago)

A. Invitees included not just defense attorneys and plaintiff's attorneys, but also judges, legal scholars, experts themselves, and other interested persons.

B. Speakers reflected this diversity, presenting several points of view

C. This conference was just the beginning of DRI's efforts to address these problems

III. WHAT THE DRI CONFERENCE SPEAKERS SAID

A. Buffy Cohen, the DRI member from Indianapolis who was the driving force behind the DRI Conference, feels there is clearly a problem

1. no peer review

   a. as Judge Higginbotham said at the Conference, people get up on the witness stand as experts and say things that they would never consider saying if they were making a presentation to their peers

   b. no code of conduct governing experts

2. many unreliable experts testify in hundreds of cases, multiplying the problem

   a. these are professional witnesses, not professionals who occasionally testify on matters which they regularly study or work with

   b. logistically, it's difficult to know who has testified how in previous litigation, and some experts virtually contradict themselves in later litigation but are not found out

[but, you, who are DRI members can counteract this problem by utilizing DRI's Expert Witness Index, by which members can get copies of prior testimony given by a particular adverse expert]

3. financial incentive (JIM MORRIS also mentioned this as a big problem)

   a. again, many experts earn more testifying as expert witnesses than they do by practicing their profession

   b. at fees of $300 - $500 per hour, who can blame the experts?

   c. the more marginal or far-out the testimony, the higher the fee an expert can command

   d. many courts refuse to allow cross-examination on the issue of how much money the expert earns testifying as an expert witness

4. cross examination doesn't always work well, especially when the expert is articulate, attractive and well-educated

B. PAUL RHEINGOLD, a plaintiff's attorney from New York, questioned whether changing the system would benefit both sides equally (in other words, a problem for whom?--which Indiana Supreme Court Justice BRENT DICKSON also asked)

1. defense attorneys have more resources and are able to get the cream-of-the-crop experts, those who work in the exact field of expertise at issue in the case

2. plaintiffs' attorneys, on the other hand, are often lucky to get an expert in any field even close to the field of expertise involved at trial

3. therefore, it is somewhat unfair, he says, for defense lawyers to complain that the plaintiff's expert is not adequately qualified and should, therefore, be precluded from testifying at trial

4. the system has worked fairly well for quite a while now and should not be changed much without considering the consequences to all of

the parties involved

5. defense attorneys and others questioning the current system regarding expert witnesses should remember that while scientists strive for scientific certainty, courts require only a reasonable certainty (in other words, peer review may not really be called for in courtroom settings)

C. PROF. RONALD ROTUNDA of the University of Illinois, spoke on ethical considerations

1. he also saw part of the problem as caused by no peer review, great financial incentive, and difficulty in exposing the financial incentive on cross examination

2. legal standards for receiving expert testimony (namely, the Federal Rules of Evidence) are vague and left to court's determination as to what should be let into evidence

3. many experts exaggerate, and act more like advocates than unbiased experts, but any stringent rules would end up benefitting the less-ethical experts who would skirt the rules

D. JUDGE JACK WEINSTEIN, the federal district judge from New York whose Agent Orange Litigation contains an excellent discussion of problematic expert testimony, was part of a panel discussion on whether the existing rules are adequate

1. run-of-the-mill cases present little problem under the current system, and the Federal Rules of Evidence (especially Rule 403 - relevancy) seem to work well as guidelines

2. problems arise in high-tech cases where laymen simply cannot understand the issues without experts

3. in areas of new scientific matters, it would help everybody involved to get the scientific groups more involved in research and reporting of findings

4. special masters, who could take to educate themselves on particular technical matters, would help, but how could we afford that?

5. systemic reform is desirable; for instance,

providing full disability insurance with caps on pain and suffering damages

6. overall, experts help more than hinder litigation and justice, so let's not pitch the whole thing

E. ATLA President, BILL WAGNER, feels that the system works "pretty well" now

1. jurors are often smarter than we give them credit for, and can see through most charlatans

2. hard work (especially by plaintiffs' attorneys) and self-restraint (especially by defense attorneys) will help a lot

3. taking Buffy Cohen's Galileo example, remember that many scientific discoveries looked insupportable and downright crazy at first, and we must allow room for novel scientific evidence to be presented

4. don't fine tune the system so much that it no longer works

F. DRI Past President and current Chairman of the Board, JIM MORRIS, had the final word as he presented the defense viewpoint

1. the expert witness system is not something seriously wrong, but it is increasingly problematic

2. cross-examination is not always successful in weeding out improper experts

3. the jury should not have full responsibility for deciding very technical issues -- they need some assistance

4. the system would work better if judges would study up on the topics being litigated, as Judge Weinstein did in the Agent Orange Litigation and Judge Rubin of Cincinnati did in the Bendectin cases

5. though the Federal Rules of Evidence, 701-705, do provide some guidelines for admissibility of expert testimony, remember that Rule 403 still applies in every case, and irrelevant testimony should be kept out under Rule 403

IV. NEWS ARTICLES COVERING OUR EXPERT WITNESS CONFERENCE

A. National Law Journal -- front-page article by Andrew Blum, includes photographs of Jim Morris and Buffy Cohen

B. Wall Street Journal -- small article by Milo Geyelin (not glowing)

C. Chicago Daily Law Bulletin -- decent write-up

D. Atlanta Constitution -- August, 1989 -- decent article

E. possibly U.S. News & World Report - soon

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so, obviously, it's a concern to many people, as these were not all legal publications.

V. AGAIN, THIS IS JUST THE BEGINNING OF DRI'S EFFORTS

A. the defense bar, in general, should be concerned about this and should work toward improving the system

B. we'd like to have a "bi-partisan" effort with the plaintiffs' bar, but so far, ATLA has not shown interest beyond participating in the Conference itself

The late Louise Robbins with cast of a shoeprint

THE BOOT

The Second District Illinois Appellate Court has given a swift kick to the controversial theories of the late Louise Robbins, "queen of quackery" in the shoeprint identification business.

Robbins, a "forensic anthropologist" affiliated with the University of North Carolina at Greensboro, built a lucrative career around her claim that shoe-wear patterns are as distinctive as fingerprints, making it possible for her to determine, by looking at the soles, if a pair of ski boots in Aspen and a pair of flip-flops in Malibu were worn by the same person.

Although there was no scientific foundation for her seemingly outlandish claims, she was nonetheless permitted to testify in courts around the country. At the urging of prosecutors, two DuPage County Circuit Court Judges, Edward W. Kowal and John J. Bowman, allowed her to testify before juries in potential capital cases. In the case before Kowal, the defendant against whom she testified, Stephen Buckley, was acquitted. But in the case before Bowman, her testimony was the principal basis for the conviction of Dennis J. Ferguson of murder.

In the Ferguson case, Robbins examined three pairs of the defendant's shoes and plaster casts and photographs of shoeprints found in the soil outside the home of the victim, Andrea Young, in Elmhurst. Ferguson had become a suspect in the murder because he had made long-distance telephone calls from his home and charged the calls to an Illinois Bell calling card taken in another Elmhurst residential burglary a few days earlier.

Bowman allowed Robbins to testify despite the fact that she acknowledged during a voir dire examination that she was the only anthropologist in the world who subscribed to her theories on the uniqueness of shoe wear patterns.

It was apparent that none of Ferguson's shoes actually made the prints outside Young's home, but Robbins was permitted to tell the jury that the same person who wore the shoes seized from Ferguson wore the shoes that left the prints — "J O X" brand athletic shoes sold by Thom McAn stores.

The only other physical evidence against Ferguson was a "J O X" shoe box found in a closet he shared with his brother. The brother testified that he had found the box and used it to carry a pair of track cleats lent to him by his track coach.

The jury found Ferguson guilty, and Bowman sentenced him to natural life in prison.

The appellate court held that Bowman abused his discretion by allowing Robbins to testify, and remanded the case to the DuPage County Circuit Court for a new trial.

In a unanimous opinion, Judge Lawrence D. Inglis noted that expert testimony can be admitted in Illinois courts only if the theory from which it is deduced has gained "general acceptance" in the expert's scientific field.

"By her own testimony," Inglis wrote, "Robbins stands alone in the anthropological community regarding the belief that an identification can be made solely by measuring and analyzing the wear patterns on the soles of shoes. . . .

"Despite Robbins' singularity of opinion, the trial court found her testimony reliable. . . . [S]ince Robbins stands alone in the anthropological community . . . it cannot be said that her theory has been generally accepted in the scientific community to which she belongs.

"We hold that the trial court abused its discretion in allowing Robbins to testify as an expert in this case. Robbins' . . . conclusion that the defendant wore the shoes that made the shoeprints at the scene may have so influenced the jury that defendant was denied a fair trial."

Since Robbins died last year, the main effect of the ruling is likely to be to make it more difficult for someone else to exploit her crackpot theory for profit in the courts.

National Invitational Conference on Unreliable Expert Witness Testimony

June 22-23, 1989
Chicago, Illinois

THURSDAY June 22

Drake Hotel, Walton Room

6:30-9:00 PM	Cocktail Reception, Dinner and Opening Remarks	Thomas M. Crisham, DRI President
9:00-9:45 PM	Keynote Address	Judge Patrick E. Higginbotham

D

FRIDAY June 23

Northwestern University School of Law, Lincoln Hall

Part One: Discussing the Problem

8:30-10:00	Is Unreliable Expert Witness Testimony Really a Problem? --Panel Discussion	Max Wildman, Chairman Justice Brent E. Dickson James A. Freeman, III Paul D. Rheingold Victor E. Schwartz Judge Richard L. Williams, Jr.
10:00-10:20	Break (Loudon Hall)	
10:20-11:00	What Constitutes Unreliable Expert Testimony? Defining the Problem	Ralph A. Cohen
11:00-11:35	Ethical Considerations in Using or Not Using Experts Whose Testimony May Be Unreliable: Are Lawyers Part of the Problem?	Professor Ronald D. Rotunda
11:35-1:00	Lunch–Discussion Groups (Lake Shore Club)	
1:00-2:45	Are Existing Rules Adequate? Are Changes Needed, and If So, What Changes? --Panel Discussion	Frank C. Woodside, III, Chairman George S. Frazza David R. Gross Harry M. Philo Judge Carl B. Rubin Judge Jack B. Weinstein
2:45-3:00	Break (Loudon Hall)	

Part Two: Solving the Problem

3:00-3:20	The Plaintiffs' Bar Proposes	Bill Wagner
3:20-3:40	The Defense Bar Proposes	James W. Morris, III
3:40-4:30	Open Discussion: Remarks from Attendees; Closing Remarks	Ralph A. Cohen, Program Chairman

4:30 PM Adjourn

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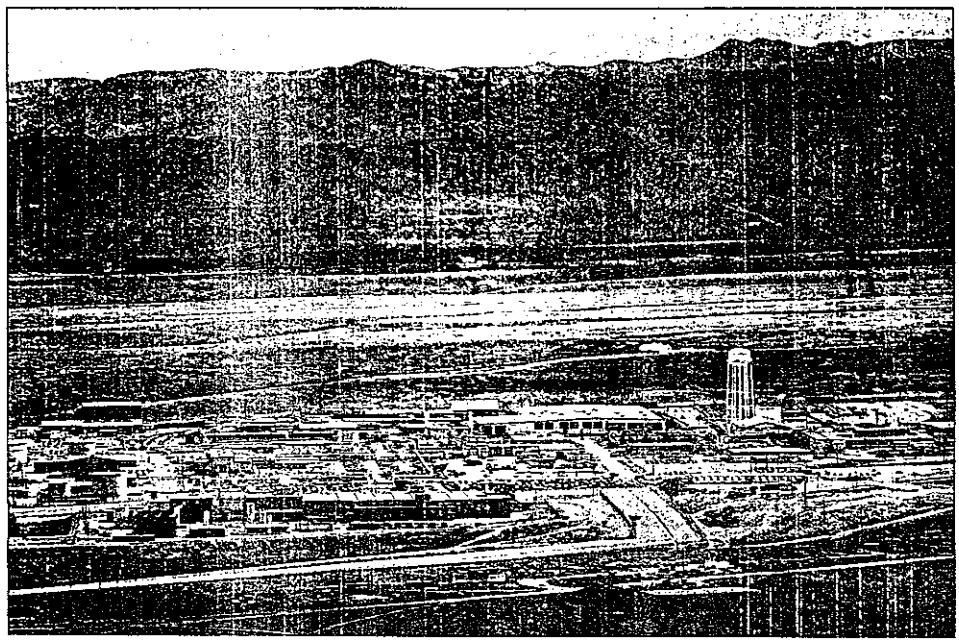

Brian Brainerd/Denver Post

TROUBLE AT ROCKY FLATS

It took a political tide change and 70 agents of the federal government itself to crack the wall of secrecy the United States had built around a nuclear weapons plant. The same wall had thwarted Colorado citizens and their lawyers for years.
By Marianne Lavelle, Page 34.

Experts: How Good Are They?

Lawyers for plaintiffs, defense try to decide.

By Andrew Blum
National Law Journal Staff Reporter

CHICAGO — Are they hired guns? Merchants of evidence? Or just junk scientists?

Those are some of the questions plaintiffs and defense attorneys were discussing at a recent national conference on unreliable expert testimony. The meeting marked a rare get-together of the plaintiff and defense bar, which normally agree on very few things.

Everyone, it seemed, had an opinion on how to stem the growing population of expert witnesses and ensure that reliable and authentic testimony reaches the jurors, regardless of which side is picking up the expert's tab.

Defense attorneys called for changes in evidentiary rules and asked judges to take a more active role in determining an expert's reliability. Plaintiffs' attorneys jumped on the conference title, The National Invitational Conference on Unreliable Expert Witness Testimony, saying conference organizers had prejudged the issue. And judges shared the methods they use to deal with experts — from allowing jurors to ask the experts questions to in some cases, selecting the experts.

Experts defended their honor saying they adhere to established standards in the profession and stay within their areas of expertise. Others say the issue may presage another attack against runaway verdicts and could highlight the need for alternate dispute resolution.

But attorneys, jurists and experts agree that the system of expert witnesses needs some sort of revamping. The next step after the conference could be the establishment of a task

Continued on page 38

HIGHLIGHTS

Sometimes the U.S. Just Says 'No'

'Non-acquiescence' bedevils lawyers.

By Marianne Lavelle
National Law Journal Staff Reporter

WASHINGTON — Sick and elderly people scraping for the Social Security money they need to survive, frequently face a bureaucratic nightmare that goes by the vague and neutral name "non-acquiescence."

The same horror haunts corporate directors who would like to keep secret certain kinds of merger negotiations, even when the courts have agreed these talks can remain quiet. Federal regulators say no; the government refuses to acquiesce to the courts.

People with disputes over their income tax may be intimidated by the spectre of non-acquiescence. And some say non-acquiescence has led to a face-off between government and industry in one of the hottest issues in collective bargaining today — health care unions.

Non-acquiescence is a technical legal maneuver with an array of real life consequences. By simply opting not to follow the law of the district and circuit courts the federal government can throw a wild card into the process of justice for any person who relies on Uncle Sam for benefits or any enterprise that must live under federal government regulations.

The harshest critics from the bench and private bar say non-acquiescence is nothing more than lawlessness. Agencies and their supporters howev-

Continued on page 36

Experts: Hired Guns — or Just Junk Scientists?

Continued from page 1

force to study the issue further.

The conference was held on June 23, sponsored by the Defense Research Institute at Northwestern University Law School. The plaintiffs' bar was represented by members of the Association of Trial Lawyers of America.

Like a Chess Game

"What's the fuss about?" asks defense attorney Victor E. Schwartz of Washington, D.C.'s Crowell & Moring. "They can do things ordinary witnesses can't," he says, comparing the abilities of experts to rooks or queens in chess saying "because of that we have to be concerned."

Ralph A. Cohen, the program chairman, says the problem of experts has gotten out of hand. "Lawsuits involving millions of dollars will often be decided based on expert opinion and we must recognize that expert testimony is not always reliable," he says.

Mr. Cohen of Indianapolis' Ice, Miller, Donadio & Ryan says he knows of at least one expert who admits to having given more than 1,000 depositions, a figure he considers to be extraordinary. And many experts earn more testifying than they do working, in the $300 to $500 per hour range — numbers that are symptomatic of a problem that is a far cry from, say 25 years ago.

Back then he adds, there used to be doctors the lawyers would jokingly dub "Dr. P." and "Dr. D." who would testify to anything the respective sides wanted. "We used to laugh at this kind of testimony," says Mr. Cohen, noting lawyers now must take the issue more seriously.

Today, Mr. Cohen contends, experts have influenced cases involving a variety of products — including contraceptive devices, vaccines and machinery. "The issue transcends plaintiff-defense rivalry," he adds.

Mr. Cohen says one problem with such testimony is lack of peer evaluation, giving experts license to say almost anything. Referring to one case he uncovered in research involving a complicated brain-injury damage issue, he says the psychiatrist's testimony was so off the wall that the "witness would have been laughed off the stage" by peers.

> Experts defended their honor, saying that they adhere to established standards and stay in their areas of expertise.

Experts on Everything

Another problem he cites is the expert's jargon — something that can be used to fend off a potential attack during cross-examination and ends up confusing jurors. In a case involving the testimony of a pediatrician concerning an allegedly defective vaccine, Mr. Cohen says he is still confused: "I've reread [a deposition] for the umpteenth time and I still don't think it makes any sense."

Mr. Cohen says the standard for the admission of such testimony should be that evidence is unreliable when it is not based on or supported by foundation evidence that would be considered as valid in the discipline involved to support the opinion.

While federal rules of evidence, adopted by most state courts, allow experts to give qualified testimony on "scientific technical, or other specialized knowledge" the defense bar believes that trend has had a significant impact on the number and quality of experts, says Max Wildman of Chicago's Wildman, Harrold, Allen & Dixon.

Mr. Wildman says from 1965 to 1974, the Jury Verdict Reporter listed 188 testifying experts in Cook County. Today, there are more than 3,100 — a 1,540 percent increase. And according to the Administrative Office of Illinois Courts, Cook County averaged at least one expert per trial in 1987.

In addition, he says in a recent survey of 28 experimental psychologists testifying as experts 24 reported testifying in more than 200 cases in the decade before the study. One testified eight times in three months.

Yet another expert, Mr. Wildman adds advertised his areas of expertise: He's an expert in brakes, lumbering, ditching, oil field production, power saws and airline support equipment.

It was DRI Chairman James W. Morris III who proposed the task force idea. He says the growth of expert witnesses has been "one of the most significant changes" in his 33 years of practice.

"Of course there's a problem," asserts Mr. Morris of Richmond, Va.'s Browder Russell Morris & Butcher. It behooves us to find the answer.

"If we could cooperate it may be a step towards a continuation of this process," says Mr. Morris, who shared the speaker's table with ATLA President Bill Wagner.

Mark M. Hagland

SHARED TABLE: ATLA President Bill Wagner listened as DRI Chairman James W. Morris III proposed a task force to study the topic of expert witnesses. The meeting marked a rare get together of the plaintiff and defense bars.

WORRIED: Attorney Ralph A. Cohen thinks problems involving expert witnesses have gotten out of hand.

ATLA Cooperation?

The exact scope, membership, size and financing of the task force has yet to be determined. Mr. Wagner, having only learned of the proposal the day before, forwarded the challenge to ATLA colleagues but he is nearing the end of his term, so he expects the new leadership to discuss the matter at ATLA's annual convention this month.

In a follow-up letter to Mr. Morris, Mr. Wagner requested more information on the task force. "In order for us to make a reasonably intelligent presentation of this matter, I would have to be able to present a reasonably intelligent program for evaluation," he wrote.

Judging from the traditional adversary relations between the two sides, it's anybody's guess as to what might come of the task force idea, especially because the plaintiffs' bar sees less of a problem with experts.

Before agreeing to join the task force, Mr. Wagner says ATLA wants to determine what other groups may be involved. He says that if it is only DRI, then ATLA might not be as interested in participating.

But Mr. Morris stresses that this issue should not be viewed as an internal debate in the legal community. He says the problem also needs attention because a "public perception is creeping into this."

A Laughingstock?

Alluding to experts in the so-called Twinkie defense in the murder trial of former San Francisco supervisor Dan White, Mr. Morris says, "Once the public laughs at us, we have a serious problem. We can't allow the system to be a laughingstock."

The solution, he notes, is something between extremes — and he called on judges to take a more active role in screening unreliable expert testimony. "Let's give the judges one more chance," Mr. Morris adds.

Judging from past experience at least, says Mr. Cohen, the judiciary has its work cut out. In a Lexis search of 21 federal cases concerning experts, he found 20 appeals courts affirmed district court rulings upholding experts.

The exception was a ruling by Judge Patrick E. Higginbotham of the 5th U.S. Circuit Court of Appeals, a conference speaker, who questioned the basis of an economist's findings in a case — a ruling cited as a model for judges in dealing with unreliable expert testimony. *In re Air Crash Disaster at New Orleans*, 795 F.2d 1230.

> Attorneys, jurists and experts seem to agree that the expert witness system may be ready for some sort of revamping.

Other judges at the conference, though, say there are different ways to deal with the issue. U.S. District Chief Judge John F. Grady of the Northern District of Illinois, for instance, says he has allowed jurors to ask questions of experts in civil cases since last year with "remarkable" results.

Judge Grady says attorneys in the four to five cases where he has used the approach have not objected. He notes the jurors may even challenge the expert and can get an understanding of the issues involved. "The trier of the facts is able to determine [reliability] earlier if they understand it."

U.S. District Chief Judge Carl B. Rubin of the Southern District of Ohio says he believes that he has taken certain measures when necessary. For example, in a case involving Bendectin a morning sickness drug, he set aside a day before trial for all sides to explain the scientific issues that would arise.

It was 80 asbestos cases that took him into the realm of court-appointed experts. He says he did so because he thought the cases resembled a minuet.

Continued on page 40

Plaintiff, Defense Bars Debate Use of Experts

Continued from page 38

with all the steps choreographed in advance.

"I was sick and tired of the same experts," the judge notes. Some always found there was asbestosis; some never found there was."

In 60 cases he named court-appointed experts, coming up with a panel of 10 to 12. Five were called to testify; they found no evidence of asbestosis and the jury ruled for the defense in all five cases.

Explaining his rationale to lawyers, Judge Rubin says: "I don't give a damn who wins. I represent the public. You don't."

Plaintiffs: System Works

Plaintiffs' attorney Paul D. Rheingold, meanwhile, cautioned the conferees about moving too far and too fast in making any changes having to do with experts. He also wondered if the meeting, by its title, hadn't pre-judged the issue.

"Plaintiffs are able to find experts qualified enough. Manufacturers are unhappy about that," says Mr. Rheingold of New York's Rheingold & McGowan. "The system has worked very well."

Mr. Wagner, noting that he had heard speakers say the system works well, remarked that, 'Contrary to what I thought would happen, I did not see plaintiff-bashing. I hope ATLA and DRI can work together in the future."

However, he says, the issue was being overblown. Sooner or later most of the charlatans are found out," says Mr. Wagner of Tampa, Fla.'s Wagner, Cunningham, Vaughan & McLaughlin. "Most lawyers don't hire them.

"I recognize there is a problem — in some circumstances, a significant problem," he adds. "However, I think the current system — if lawyers and judges will work at it — has the means to handle it."

Mr. Wagner says he, too, is worried that proposed solutions might go to extremes, such as barring testimony on manufacturing issues except from professionals with five years experience in the field.

"I'm very concerned about hard-line rules that are going to apply across the board," he says, adding that could hurt both defendants and plaintiffs.

Instead of rule changes, Mr. Wagner proposed more diligence and more self-restraint in choosing experts and in case selection.

Witnesses, naturally, disagreed with the conferees' criticism.

The Twinkie Defense

Martin Blinder, a San Anselmo, Calif., psychiatrist who testifed for Mr. White in the Twinkie defense case, says the role of an expert should be to present just the facts.

"As a consequence, I can give the same testimony, irregardless of the side," he says. "I have no investment in the legal outcome. My investment is that it be clinically accurate to withstand the slings and arrows of the adversary process and remain intact when I'm done.

> 'It seems [if] an expert stays in his clinical area, you are going to find 99 percent reliability,' one psychiatrist stated.

TOOK ACTION: U.S. District Chief Judge Carl B. Rubin says he has taken action when necessary on experts.

It seems to me as long as an expert stays in his clinical area you are going to find about a 99 percent degree of reliability," notes Mr. Blinder.

It is when the expert tries to explain things outside the clinical facts — such as what do the facts mean — that reliability drops.

The White trial held up as an example of experts overstepping their bounds, was anything but that, claims Mr. Blinder, noting the media erred in compressing complex testimony into the phrase, "Twinkie defense."

Instead, Mr. Blinder says he testified about a variety of forces in Mr. White's life that led him to kill: rigidity, impulsiveness and depression, mixed in with some junk food. (Mr. White was acquitted of murder charges in the slayings of San Francisco Mayor George Moscone and supervisor Harvey Milk but convicted of lesser charges in the 1978 incident.)

One expert who attended the conference, Marvin M. Specter of the Hawthorne, N.Y.-based National Academy of Forensic Engineers, says his group requires members to be objective and accurate in their work and to testify without bias. His organization has a code of ethics it encourages its members to follow.

But other experts say the need for such a conference stemmed in part from a pattern in recent years of warfare between doctors and lawyers. "I get a feeling some folks — particularly in the defense — would like to find a way to exculpate some of the plaintiffs' experts from that process," says one expert, who asked not to be identified.

"I think this conference is part of that trend in the defense community to do everything [they] can to try to hold down awards," he adds.

To Chicago economist Stanley V. Smith, meanwhile, the attack on experts came as no surprise as his hedonic damages theory has been described as 'damages from wonderland' by Mr. Morris. (NLJ, April 17.)

Mr. Smith says the conference was held in part "in response to what's called trial by experts." His work is becoming accepted, he says, but it is generally true that as use of experts increases, trials get longer and more expensive. But, he notes, it is up to judges and lawyers to deal with the validity of experts.

"It [the criticism] doesn't concern me," Mr. Smith says. But he adds the issue points up the need to look at alternate dispute resolutions — such as mediation — as more efficient alternatives.

"I'm in favor of anything that leads to more efficiency, even if it means economists looking for work in fields other than litigation support."

Wall Street Journal
July 7, 1989

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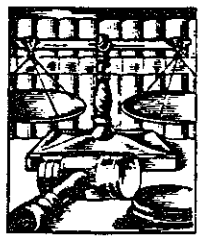
LEGAL BEAT / By Milo Geylein and Wayne E. Green

Few Expert Witnesses Manage To Offer Expertise, Lawyers Say

EXPERT WITNESSES often cloud the truth, trial lawyers agree.

Joked a Chicago trial lawyer at a recent conference, there are three kinds of liars: "the common liar, the didactic liar and the scientific expert."



The conference at Northwestern University College of Law focused mostly on why experts are often unreliable. One obvious reason, lawyers said, is that experts are paid by litigants to enhance one version of the truth over another.

But, beyond the monetary issue, hired experts sometimes exaggerate their findings in the heat of a courtroom battle because they identify with their side and want it to win. Other times, lawyers said, experts overstate their findings to advance their careers or to give credence to unsettled scientific theories. Sometimes, of course, the expert is simply wrong.

A major problem is that there's no system of peer review for expert witnesses. Testimony that would be considered nonsense by the scientific community can be presented as truth to a jury.

A possible solution, lawyers said, might be to establish panels of peers to refute unreliable testimony and bar offenders from testifying again. Libel concerns would complicate that approach.

* * *

TEXAS LAWYERS overcome apathy to approve their first new ethics code in 18 years.

There has been little controversy over the new rules, which mainly clarify minimum ethical standards on matters ranging from legal fees to conflicts of interest. The most radical proposal was to ban contingency fees in domestic-relations cases, but this was watered down to a mere observation that such fee arrangements in family disputes are "rarely justified."

One change that made its way into the package lessens a lawyer's role as a whistleblower if he discovers a client has committed a fraud during the course of the representation. The new code simply requires the lawyer to make "reasonable efforts" to persuade the client to take corrective action, but doesn't require the lawyer to turn the client in.

State Bar of Texas leaders were worried about generating enough interest to get the required 51% of Texas's 51,000 licensed lawyers to vote on the changes. Ultimately, 54% did vote, and about 84% of those cast their ballot in favor of the new code.

* * *

E. ROBERT WALLACH trial prosecutors worry that jurors will be swayed by a reversal of Lyn Nofziger's conviction.

Both cases, though unrelated, involve Wedtech Corp., a New York defense contractor. In a trial in progress in federal court in Manhattan, Mr. Wallach has been charged with receiving illegal cash payments to influence federal officials on behalf of the now-defunct Wedtech.

Mr. Nofziger, who once served as political director of the Reagan White House, was convicted in 1988 on three counts of improperly trying to influence White House aides as a Wedtech lobbyist after leaving government. A U.S. appeals court in Washington overturned his conviction.

In light of Mr. Nofziger's appeal, the prosecutors in the Wallach case asked Judge Richard Owen to remind jurors that the cases aren't related.

Judge Owen told the jurors that if they heard any news report that seemed related to the case, "You are to put it aside. Pay no attention to anything."

'Prevalent' problem of unreliable expert witnesses to be considered by lawyers

By TERESA SULLIVAN
Law Bulletin staff writer

Defense and plaintiffs' lawyers are joining together to form a task force to study ways to combat the increasing problem of unreliable expert witness testimony.

The task force is being formed by Defense Research Institute and the Association of Trial Lawyers of America to provide recommendations to attorneys and judges about ways to ensure that unreliable expert witness testimony is eliminated from trials, according to DRI president Thomas Crisham.

The task force has not yet been assembled and will act only as an advisory group, Crisham said.

Crisham was joined here last Friday by other attorneys, judges and members of academia at the first "National Invitational Conference on Unreliable Expert Witness Testimony" held at Northwestern University School of Law and sponsored by DRI.

The day-long conference featured discussions and lectures on identifying and resolving the unreliable expert witness testimony problem within the legal community.

The conference was held so that participants could "brainstorm" about solutions and situations unique to this "prevalent" problem, said Crisham, a partner with Hinshaw, Culbertson, Moelmann, Hoban & Fuller. No other solutions were formulated at the conference aside from the decision to form the task force.

"Anyone who works in this profession knows it [unreliable witness testimony] is prevalent," said Crisham.

When these witnesses' testimony is allowed "the entire legal system suffers," said Crisham. "It's a fraud on the jury system."

Currently there are no specific guidelines for judges or attorneys to consult when trying to decide if a witness is an expert in his or her field, Crisham said.

Crisham said guidelines are needed so that people are not able to portray themselves as experts solely based on their being a member of the field that the attorney needs an testimony in.

"Just because somebody has a degree in mechanical engineering does not make him an expert in anything mechanical," said Crisham.

James W. Morris, III, a past president of DRI, presented the defense bar's proposal for changes and Bill Wagner, president of ATLA, presented the plaintiffs' bar proposal.

Both proposals presented agree that the jury system is basically sound and that juries are usually able to ferret out unreliable testimony. However, both Morris and Wagner urged more participation from both attorneys and judges as a way to assure that unreliable testimony is not allowed at trial.

"We don't want to eliminate the jury system," said Morris, a partner with Browder, Russell, Morris & Butcher in Richmond, Va.

"The jury system works," said Morris. "If lawyers and judges do their job correctly rules will work with modest changes."

Morris advocates that judges and attorneys work more closely together to ensure that preclaimed experts are experts.

For example, Morris said, a "real effort" needs to be made by judges to consult with experts in scientific areas to ensure that they will have a grasp on scientific developments. This knowledge might assist the judge in ruling on whether someone's testimony should be allowed as expert testimony, Morris added.

Wagner, like Morris, agrees that juries are generally able to differentiate between expert and non-expert testimony.

Wagner sees two areas of problems with so-called expert witnesses.

One problem with expert witnesses, particularly young physicians, is that they want to find the patient in a condition most helpful to the side that hired them. It's an economic considerations because a favorable finding could mean that the attorney or insurance company

Continued on page 14
EXPERTS

Experts

Continued from page 1

will funnel business to physician, said Wagner. "It's [the physician's opinion] extremely subjective and it's almost impossible to cross-examine," said Wagner.

Another problem is finding an expert to comment on the safety of an unusual product because there are usually no safety standards for that product, said Wagner.

One example Wagner presented to illustrate the problem of expert witnesses was 16th century astronomer and physicist Galileo's contention that the sun was the center of the universe.

At that time it was widely believed that the Earth was the center of the universe. Galileo was ostracized from the Catholic Church for his theory which was later proved true.

Wagner said that a then-expert would have testified that Galileo's contention was false. The same type of misconceptions exist today which is why this problem is difficult to combat, Wagner said. What one expert says might not agree with another expert because much depends on methodology and theories, Wagner said.

Wagner advocates continued "aggressive cross-examination" of witnesses as a way to ensure that a witness is an expert. Wagner also sees a need for judges and attorneys to work harder during the discovery phase so that more will be known about whether the witness is an expert.

"Most lawyers don't want an expert to look foolish," said Wagner, a Tampa, Fla., lawyer.

Most judges like to sit on the "sidelines" throughout the case without actively getting to know the case, Wagner said.

"Judges need to spend a lot of time getting to know the case," he said.

Wagner disagreed with Indianapolis defense attorney Ralph A. "Buffy" Cohen's idea to have professional associations deem someone an expert in the field on the ground that persons within the associations can be biased also.

Chicago Daily Law Bulletin
June 28, 1989

The Atlanta Journal and Constitution
Thursday, Aug. 3, 1989

Experts on Experts Debate Value Of Technical Witnesses in Court

By Michelle Hiskey
Staff Writer

The day the space shuttle Challenger blew up, so did Sonja Jones's television set, and she sued the manufacturer for the subsequent fire that burned down her Decatur house.

She testified in federal court last week that she saw the TV set on fire, and a former firefighter — paid by her lawyer — said a defect in the set's wiring caused the fire.

But that evidence wasn't as convincing to jurors as the videotape the defense showed. It starred a forensic chemist who, for a fee, unsuccessfully tried to blowtorch a similar TV set.

"He had a lot of education, a lot of experience," one juror said of the chemist, Barker W. Davie of Fort Wayne, Ind. "He seemed more convincing."

As civil litigation has increased steadily in the past decade, paid expert witnesses have become courtroom fixtures. While they are often called upon to explain technical evidence to the jury — on subjects as diverse as Astroturf injuries, tire blowouts, jail suicides and dog bites — critics say that many experts are "hired guns" who will offer any opinion for a price.

"Anyone can get on the witness stand and say anything," said Ralph A. Cohen of the Defense Research Institute, a national organization of defense lawyers. "A doctor can get up there and say it's normal to have six fingers on each hand. They'll say things they would never say at a meeting of their peers, and often it's because of their financial interest."

Experts are sometimes university professors, consultants or retired professionals, and they can command hundreds of dollars an hour for their testimony.

"There are more experts now because there's a lot of money in it," said David C. Whitman, the lawyer for NAP Consumer Electronics Corp., the company that made the Philco TV set in last week's case. "Lawyers pay someone to go out and say what you want them to say — if they have the right credentials."

As lawyers scramble to keep up with the competition, an increasing number of cases are turning into tugs of war between experts who draw opposite conclusions from the same set of evidence.

"If one attorney gets an expert, the other one will call and say, 'I think I'm going to have an expert too,'" said Gary E. Melickian, the president of Expert Witness Network, a Washington firm that feeds lawyers from a data base of 1,500 expert witnesses. Their fees range from $75 to $250 an hour.

Mr. Cohen and others worry that fees — sometimes double what an expert makes at his or her regular business — tempt experts to slant their testimony. Another problem are the "professional witnesses" who testify full time.

> 'There are more experts now because there's a lot of money in it. Lawyers pay someone to go out and say what you want them to say.'
>
> **— Lawyer David C. Whitman**

"They're guided only by the person who hires them, and those folks have a negative connotation," said William Q. Bird, president of the Georgia Trial Lawyers Association. "I think the jury system is good at weeding out the ones who aren't credible."

The fire experts at last week's trial agreed that their profession has taken a lot of heat lately, mostly because of a lack of ethics.

"Unfortunately, too many people are coming out of the woodwork who haven't crawled on a floor under the flames," said David F. Zwick of Doraville, a former firefighter and investigator for 30 years.

Mr. Davie, who has chalked up 800,000 frequent flier miles to and from cases, said one mercenary fire expert can ruin the reputation of the entire field. "It's like Ivan Boesky making stockbrokers look bad."

The value of expert testimony is such that nowadays there are even experts to the experts. A new service offered by an Atlanta public relations and advertising firm, called "Off the Record," helps experts turn their technical jargon into English.

"Very often a case is lost, or at the very least adversely affected, by a witness's inability to testify effectively," said Brenda Fontaine, the firm's president.

The role of experts became widely publicized a decade ago in the successful "Twinkie defense" of Dan White, who was charged with killing San Francisco Mayor George Moscone and Supervisor Harvey Milk. A psychiatrist testified that White's diet of junk food — including sugary Hostess Twinkies — caused a chemical imbalance that led him to kill. White was acquitted of murder but convicted on lesser charges.

Lawyers admit an expert can make or break a case. Mr. Bird recalled a claim for injury from a poorly constructed wheelchair ramp.

"I got this fellow who had laid concrete for 25 years, and he came into court with overalls on and concrete under his fingernails," he said. "We won the case, and the judge later commented how credible he was."

Expert witnesses long have been used in criminal trials as well.

Last month in Chicago, lawyers debated the topic at the National Invitational Conference on Unreliable Expert Witness Testimony. There is talk of a task force to consider policing expert witnesses, said Mr. Cohen, who organized the conference. Other measures may include forming peer review panels that have the power to sanction unreliable experts or the appointment of expert witnesses by judges.

For now, the credibility of experts is left up to the jury. In the TV case, U.S. District Judge Richard C. Freeman cautioned the jurors before they deliberated that "the ultimate weight being given to an expert is given by you."

After the verdict was returned an hour later, the five women and one man said the experts helped them better understand such technical language as "hot spots," "burn patterns" and "area of origin."

"If it wasn't for them," said one juror, "it would be just one lawyer against another. They gave us more to work with."

E

EXTRA CONTRACTUAL DAMAGES

IOWA EASES THE BURDEN

TIMOTHY J. WALKER

WHITFIELD, MUSGRAVE & EDDY

DES MOINES, IOWA

I. EXTRA CONTRACTUAL AWARDS HISTORICALLY

A.

1. Beyond the Four Corners

The right to recover extra contractual damages has existed in Iowa and in other states for a number of years. Claims on insurance policies have traditionally been limited in the first party context to what the policy provides in coverage, that is, the contract claim. In the past in Iowa an extension of recovery beyond the contractual coverage required the Plaintiff to assume a rather onerous burden in establishing the "TORT OF OUTRAGE," that is, "one who by extreme and outrageous conduct intentionally or recklessly causes severe emotional distress to another is subject to liability for such emotional distress, and if bodily harm results from it for such bodily harm." American Law Institute Restatement (2nd) of Torts, §46(1)(1965).

The Doctrine of the Intentional Infliction of Emotional Distress was applied against insurers in a number of separate settings. See, for example, Eckenrode v. Life of America Insurance Co., 490 F.2d 1 (Ca. 7 1972); Davis v. First National Bank of Arizona, 124 Ariz. 458, 605 P.2d 37 (1979). (Iowa cite).

2. The Change

The appellate courts, beginning with those in California in an apparent effort to ease the significant burden imposed by proof of the "Tort of Outrage" posted the right of recovery on the concept of the implied covenant of good faith and fair dealing which arises from the existence of a valid contract. Egan v. Mutual of Omaha Insurance Co., 24 Cal.3d 809, 169 Cal. Rptr. 691, 620 P.2d 141 (1979); Pistorius v. Prudential Insurance Co., 123 Cal.App.3d 541, 176 Cal. Rptr. 660 (1981); Sparks v. Republic National Insurance Co., 132 Ariz. 529, 647 P.2d 1127 (1982). In each of those cases the Plaintiff was allowed to recover on a life, medical, or disability policy sums beyond those specified in the insurance contract compensation for emotional distress and such further economic loss as might be proved by preponderance of the evidence and suffered as a result of the insurer's unreasonable rejection of a valid claim.

3. Iowa Today

In the case of Dolan v. Aid Insurance Company, (Iowa, 1988) 431 N.W.2d 790, the Iowa court in an opinion authored by Justice Snell placed its imprimatur on the cause of action in tort against an insurer for bad faith conduct in the first party setting. The court had page 794 of the opinion in summary concluded that traditional damages will not always adequately compensate an insured for an insurer's bad faith (wrongful) conduct.

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Chapter 507B although in all likelihood a significant deterrent to all bad faith conduct on the part of insurers provides slight consultation to an aggrieved insured.

An insured should not be required to establish severe emotional distress in order to recover extra contractual damages/the "Tort of Outrage" is an inadequate remedy.

The first party tort of bad faith will, in fact, provide an adequate remedy for an insurer's wrongful conduct.

B. THE TORT DEFINED

1. Iowa/the Test

In order to establish a claim for bad faith the Plaintiff must establish:

a) The absence of a reasonable basis for denying benefits; and

b) the Defendant's knowledge or reckless disregard of the lack of a reasonable basis for denying the claim.

This test has been dubbed the "Wisconsin Test" as adopted by the Wisconsin Supreme Court in the case of Anderson v. Continental Insurance Company, 85 Wis.2d 675, 271 N.W.2d 368, 376 (1978). See also, Mordecai v. Blue Cross/Blue Shield of Alabama, 474 So.2d 95 (Ala. 1985); Chavers v. National Security Fire & Casualty Company, 405 So.2d 1 (Ala. 1981); Travelers Insurance Company v. Savio, 706 P.2d 1258 (Colo. 1985); Blue Cross/Blue Shield of Kentucky, Inc. v. Whitaker, 687 S.W.2d 557 (1985) (requires intentional, willful, or reckless disregard); Bankers Life & Casualty v.

Crenshaw, 483 So.2d 254 (Miss. 1985) (requires an intentionally wrongful breach of the insurance contract); Champion v. United States Fidelity & Guar. Co., 399 N.W.2d 320 (S.D. 1987); Simkins v. Great West Casualty Company, 831 F.2d 792, 793 (8th Cir. 1987).

Close note should be taken to the language contained in all of those cases of the use of the term "fairly debatable." That is where a claim is fairly debatable the insurer is entitled to debate it whether the debate concerns a matter of fact or law. The court indicates this creates an objective standard and makes clear the intentional nature of the tort.

2. California/Arizona Test

Precautionary note at this point requires clear distinction to be made between the test adopted by Iowa and the test applied in California, Arizona, and a number of other courts. The question of whether an insurer has breached its duty of good faith in California is tested on a simple negligence principle or a "reasonableness" theory. As noted in Egan v. Mutual of Omaha Insurance Co., supra, at p. 695, the standard is that the insurer "must give at least as much consideration to the [insured's] interest as it does its own. The California test can be stated as follows: What would a reasonable insurance company do in the same similar circumstances? This is also the test applied in Arizona in the case of Rawlings v. Apodaca, which in essence states that an insurer may not deprive the insured of the very security for which he bargained or expose him to the catastrophe from which he sought protection.

Although the distinction may be subtle, it appears to be critical to the jury instructions which should be insisted upon when applying the Wisconsin test.

C. EXPOSED COVERAGES

1. Vulnerable Recoverages

As can be seen by the cases, the coverages available for application of first party treatment are only limited by the creative imagination of Plaintiff's counsel in convincing the court that the Plaintiff is in that contractual _____ with the insurer to be accorded such right. Examples of vulnerable coverages:

All coverages in the life and health area are

vulnerable:

(a) Life - Frazier v. Metropolitan Life Insurance Co., 169 Cal.App.3d 90 214 Cal. Rptr. 883 (1985);

(b) Medical - Silberg v. California Life Insurance Co., 11 Cal.3d 452, 113 Cal. Rptr. 711, 521 P.2d 1103 (1974); Higgins v. Blue Cross, 319 N.W.2d 332, 236 (Iowa 1982);

(c) Disability - Egan v. Mutual of Omaha Insurance Co., 24 Cal.3d 809, 169 Cal. Rptr. 691, 620 P.2d 141 (1979);

(d) Group Insurance - Sparks v. Republic National Insurance Co., 132 Ariz. 529, 647 P.2d 1127 (1982).

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2. Other Coverages

Obviously, any first party contract and some contracts not traditionally viewed as first party coverages are also vulnerable to attack:

(a) Workers Compensation - Champion v. United States Fidelity & Guaranty Co., 399 N.W.2d 320 (S.D. 1987); Savio v. Travelers Insurance Company, 678 P.2d 549 (Colo. 1983);

(b) Catastrophic Events - Pillsbury Company v. National Union Fire Insurance Company of Pittsburgh, 425 N.W.2d 244 (Minn. 1988) (court failed to adopt bad faith tort, however, assuming existence of tort coverage vulnerable);

(c) Fire, theft, et al. - Amco Insurance Company v. Stammer, 411 N.W.2d 709 (Iowa App. 1987); Anderson v. Continental Insurance Company, 85 Wis.2d 675, 271 N.W.2d 368 (1978). Amsden v. Grinnell Mutual Reinsurance Co., 203 N.W.2d 252 (Iowa, 1972).

2. Legal Theories

As has been indicated earlier and just by way of brief reiteration, the legal theories which have been applied by the courts include:

(a) Breach of the Covenant of Good Faith and Fair Dealing - Sparks v. Republic National

Insurance Co., supra; Egan v. Mutual of Omaha, supra; Dolan v. Aid Insurance Co., supra;

(b) Fraud by the Insurer at the Sales Level - Miller v. National American Life Insurance Co. 54 Cal.App.3d 331, 126 Cal. Rptr. 731 (1976);

(c) Fraud by the Insurer at the Claims Level - Wetherbee v. United Insurance Co. of America, 265 Cal.App.2d 921, 71 Cal Rptr. 764 (1968);

(d) Intentional Infliction of Emotional Distress (put in Iowa Case); Amsden v. Grinnell Mutual Reinsurance Co., Supra; Higgins v. Blue Cross, 319 N.W.2d 232 (Iowa, 482).

(e) Statutory Violation - Royal Globe Insurance Co. v. Superior Court, 23 Cal.3d 880, 153 Cal. Rptr. 42, 592 P.2d 329 (1979); Overruled Moradi-Shalal v. Fireman's Fund Insurance Companies, (1988) 46 Cal.3d 287, Moradi applied to first party claims. Zephyr Park, Ltd. v. Superior Court of the State of California and Allstate Insurance Company, 89 Daily Jour. D.A.R. 11085, Cal. Ct. App., 4th App. Dist., August 30, 1989;

(f) Possible Breach of Fiduciary Duty - Egan v. Mutual of Omaha Insurance Company, supra; Kane v. Connecticut General Life Insurance Company, 607 F. Supp. 899 (C.D. Cal. 1985) (to date no first party insurer has been held liable for breach of fiduciary duty in a strict sense, however, the references continue to appear).

Although the Iowa court in the case of Seaman v. Liberty Mutual Insurance Co. at page 43 held that §507B.4(9)(f) does not form the basis of an independent cause of action, i.e. create a private right of action against an insurer for the conduct proscribed therein; it does not answer the question concerning whether or not the violation of the statutory provision may formulate a measuring stick against which the conduct of the insurer will be measured in ascertaining whether or not an insurer is guilty of "bad faith." That is whether or not their conduct was reasonable under all of the circumstances. I would anticipate the issue of "bad faith/negligence per se" or the violation of statute

being evidence of reasonableness will be one of the issues with which the Supreme Court will be presented in subsequent review of bad faith cases. As a practical matter experts testifying for the Plaintiff in a number of areas of the country utilize the Fair Claims Practices Act as a codified. barometer against which to measure an insurer's conduct and being well "instructed" in the applicability or nonapplicability of the standard as a standard of care, call it legislative enactment of "industry standards." As has been said before, "a rose by any other name."

E

II. INSURER'S DUTIES

A. DUTY TO INVESTIGATE AND EVALUATE AND PAY

1. Investigation

The insurer has an affirmative duty and in reality probably the foremost duty to investigate all aspects of the claim. Good faith dictates thorough and complete investigation of the claim, whether it be a health claim, disability claim, workers compensation claim, fire claim, etc. See, for example, Egan, supra; Anderson, supra; Seaman, supra; Grundberg v. Aetna Insurance Company, 9 Cal.3d 566, 108 Cal. Rptr. 480, 510 P.2d 1032 (1973).

2. Prompt Payment

An insurer is required to make expeditious payment. Recovery can be had for unreasonable delay in payment. The wrongful delay in payment of claim is obviously a variant of wrongful denial. Although the insurer has a right to conduct a reasonable investigation and is required to conduct such an investigation in order to ascertain the validity of the claim once the liability carrier's exposure becomes reasonably clear, it is required to make payment.

The failure of the insurer or delay for whatever reason is at the insurer's own peril.

3. Bad Faith on Bad Faith

This has resulted in California in a theory of "bad faith" upon "bad faith". So that at any time, even after the legal process has begun, the California court has held that payment is required and therefore, the insurer can be guilty of bad faith if during the discovery process it or its counsel

ascertains that payment of the underlying benefits is required. That is, that the claim is no longer "fairly debatable". The question, thus, is whether at any time enough evidence has been acquired so that it would be unreasonable for an insurance company to refuse to pay the claim. See, for example, McCormick v. Sentinel Life Insurance Company, 153 Cal.App.3d 1030, 200 Cal. Rptr. 732, 741 (1984); Kanne v. Connecticut General Insurance Company, 607 F. Supp. 899 (C.D. Cal. 1985). This obviously has led to what might be termed excesses in a litigation context and a discovery context in California wherein Plaintiff's counsel seeks the confidential memos and reports of attorneys and also seek to depose the attorneys representing the insurer in the bad faith context.

4. Threats/Innuendo

I would again point you to the traditional cases of "outrageous conduct", considering the burden under the tort or "bad faith," the nature of the conduct necessary to constitute a threat or implied threat, or innuendo giving rise to ill will may well be significantly less. See, for example, Mustachio v. Ohio Farmers Insurance Co., 44 Cal.App.3d, 118 Cal. Rptr. 581 (1975).

5. Exploitation

An implication in a particular file, for instance, that the insurer in its settlement negotiations and/or in its negotiations and treatment of the insured is attempting to exploit the insured's economic misfortune. For example, Neal v. Farmers Insurance Exchange, 21 Cal.3d 910, 148 Cal. Rptr. 389 (1978) and Eckenrode v. Life of America Insurance Co., 470 F.2d 1 (1972).

6. Conditioning Payment of One Claim Upon Settlement of an Undisputed Claim

Although an insurer may make a package offer to settle both a disputed and undisputed claim. See, Croft v. Economy Fire & Casualty Co., 572 F.2d (7th Cir. 1978). The settlement of a dispute claim predicated upon the payment of an undisputed claim may be evidence of bad faith. See, Neal v. Farmers Insurance Exchange, supra.

7. Insurer's Misrepresentations and Misinterpretations

Deliberate Misinterpretation of the policy language or perceived deliberate misinterpretation of the policy provisions in order to deny coverage. See, Beck v. State Farm Mutual Auto Insurance Co., 54 Cal.App.3d 347, 126 Cal. Rptr. 602 (1976); Fletcher v. Western National Life Insurance Co., 10 Cal.App.3d 376, 89 Cal. Rptr. 78 (1970). Although the insurer may obviously pursue a reasonable interpretation of the policy provisions, even if the majority of jurisdiction reject the insurer's position. Johnson v. National Union Fire Insurance Co., 338 S.E.2d (1985). FORGET NOT the Doctrine of Reasonable Expectation so well accepted in Iowa that citation is unnecessary.

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8. Concealment of Facts or Rights under the Policy

9. Other Conduct

(1) Ignoring the insured - Delgado v. Heritage Life Insurance Co., 157 Cal.App.3d 262, 203 Cal. Rptr. 672 (1984);

(2) Requiring Excessive Information - Davis v. Allstate Insurance Co., 101 Wis.2d 1, 303 N.W.2d 596 (1981);

(3) Destruction of Evidence - Timmons v. Royal Globe Insurance Co., 653 P.2d 907 (Okla. 1982);

(4) Failure to Follow Attorney's Advice - Betts v. Allstate Insurance Co., 154 Cal.App.3d 688, 201 Cal. Rptr. 528 (1984);

(5) Marketing Practices - Delos v. Farmers Insurance Group, 93 Cal.App.3d 642, 155 Cal. Rptr 843 (1979);

(6) Wrongful Cancelation - Waldon v. Cotton Sates Mutual Insurance Co., 481 So.2d 340 (Ala. 1985).

To say that the list is endless would be an obvious exaggeration to say that it is limited only by the creative imagination of Plaintiff counsel would in all probability be more accurate.

B. AN OUNCE OF PREVENTION

Some may think the following are not only redundant but in each presentation I feel compelled, however, to repeat the obvious from day to day. Violation of

the simple rules of good claim handling appear in the files which we are asked to defend. Often referred to as the do's and don'ts of claim handling in first party seminars really come down to nothing more than "do unto others, . . ."

1. The insurer should be prompt, knowledgeable and fair in all aspects of its claim handling of an insured's claim.

2. The insurer should conduct a timely, reasonable and fair investigation of each claim made and the facts should be evaluated in an impartial, objective manner; weighing both the facts in support as well as not supporting the claim decision to be made.

3. A claim should never be denied until the investigation has been completed.

4. All delays in processing the claim should be avoided. A prompt evaluation of the claim should be made.

5. The insurer must make a reasonable interpretation of its policy and consider other reasonable interpretations, favorable or unfavorable, in evaluating the claim. This may require the intervention of outside counsel or house counsel in evaluating the law of a particular jurisdiction.

6. The insurer should always be amenable to additional inquiry should new information indicate that additional investigation is required even though a denial has already been made.

7. A thorough investigation may include a medical investigation, an inquiry into the legal principles, and review of the applicable policy provisions, including an independent review of the medical information received.

8. Although not limited to health, disability, and life cases, never forget underwriting in the recision or application misrepresentation setting to it. Given the true facts, what would the underwriting decision have been with respect to writing the coverage? This may be particularly important depending on the requirement of "prejudice". That is, the foundational requirements for recision.

9. Never call your insured names, or cast dispersions on his honesty, character or credibility. Personal comments, not relevant to the claim about the insured should never be placed in the company's files.

Simply stated, company personnel from the Grand Puba to the lowliest serf should be instructed never to memorialize comments such as, "the claimant is a jerk and shouldn't get a penny," "the claimant is a couch potato," "this guy is a "freeloader" or other such memorable yet devastating comments.

10. Like it or not ambiguity must be in light of the law construed in favor of the insured. A particular policy exclusion in an Arizona health policy was so long and complex that the sole question proposed in interrogatories by the Plaintiff's lawyer was "please parse the exclusion." A decision was made that the combined efforts of the English Departments at Harvard, Yale and Stanford with utilization of a super computer might complete the task by 2001.

11. Never threaten the insured with litigation in an attempt to reduce the settlement amount. Never propose settlements that appear to the reasonable claim examiner as coercive.

12. Last but not least, claims personnel should always keep an open mind; if a decision has been made and further investigation or information changes the actual picture on which the decision was based, a reasonably prompt re-evaluation should be effected.

C. LESS OBVIOUS, BUT EQUALLY NECESSARY TO GOOD CLAIMS HANDLING

1. Never write a letter that you would not want read to a jury. Denial letters should be clear, unambiguous, and set forth each and every ground upon which the denial is posited.

2. Never write a memorandum on an internal basis which you would not want read to a jury. Compare and contrast the brochure provided to the insured in the sales (primarily group) with the contract, it may well vary from the insurance contract itself.

3. Never blindly follow the claims manual, compare and contrast the dictates of the claim manual with the contract of insurance.

4. Memorialize all steps taken to evaluate the claim to demonstrate your fairness and cooperation to clearly show the foundation of your settlement negotiations and that you have at all levels given the interest of the insured the same consideration as the companies. A failure to investigate the law, a misstatement, or misapplication of the law should be avoided even if it requires (heaven forbid) the assistance of outside

counsel. If in doubt, be sufficiently humble to seek advice.

5. Expeditious response to an insured's inquiry is an effective means of preventing a claim for extra contractual damages. A failure to communicate, in an effective response can trigger a claim for bad faith.

6. Pay what you owe, deny what you don't. Some claims may be valid in part and the valid portion of the claim should be promptly paid. The invalid portion of the claim, on an even scale, should be promptly denied.

7. It has been said before but I have to say it again, race, creed, color, nationality, marital status, living arrangements, personal appearance, or any other such reference must be assiduously avoided. They are not relevant to the claim and are more explosive in a bad faith context then nitroglycerine in the Arizona desert being transported in a conestoga wagon.

8. If the denial is based on an insured's wrong doing, do not send a copy of your letter to anyone other than the insured. Do not communicate privileged information to any other person who would not be within the scope of the waiver provided by the insurer in order for the insured to obtain such privileged information. Libel, Libel think about Libel!

III. POTENTIAL DEFENSES.

Although there may be more, again, the defenses are limited only by the creative imagination of counsel for the Defendant insurer, let me suggest to you four general categories which I think are of primary importance.

A. ERISA

The Employee Retirement Income Security Act of 1974 has created a significant curtailment of extra contractual and punitive damage suits based upon state common law causes of action against life and health insurers for claims handling and denials. (See, Pilot Life Insurance Company v. Dedeaux, 481 U.S. 41 (1987). ERISA preempts common law causes of action and remedies. Thus, individual are no longer able to assert various tort claims or seek massive punitive damage awards for certain wrongful or improper benefit denials. See also, Valasco v. WKP Wilson & Son, 833 F.2d 277 (11th

Cir. 1987); Bruenn v. Aetna Life Insurance Co., 243 Cal. Rptr. 262 (Cal. App. 1987); Riley v. Blue Cross/Blue Shield, United Wis. 846 F.2d 416 (7th Cir. 1988), cert denied.

In the case of Dueringer v. General American Life Insurance Co., 842 F.2d 127 (5th Cir. 1988). The court held that the insurer was too late to pursue an ERISA preemption for the first time on appeal. The court held that the ERISA preemption defense was an affirmative defense which must be plead at the trial court level. To the contrary, however, see, Hughes v. Blue Cross of Northern California, 245 Cal. Rptr. 273 (Cal. App.) review granted 248 Cal. Rptr. 172 (Cal. 1988). In reality, however, it is like "chicken soup." What can it hurt to raise the defense? My suggestion is that it be asserted in the proper circumstances with the initial answer as an affirmative defense and that as the facts develop the appropriate motion practice be engaged to resolve the defense. The ERISA question is a seminar in and of itself and this suggestion is solely to highlight the potential. Lest again, "Mohammad forbid" you forget to raise the defense.

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B. COMPARATIVE BAD FAITH

It appears clearly that the tort of "bad faith" although extensively requiring "intent" of again a fault based theory, as such, the defense of comparative fault should be raised as an affirmative defense as required by Chapter 668 of the Iowa Code in the defense of any bad faith case. The cases in support of the doctrine are not legion, however, the theory has been adopted and accepted in California jurisdictioned wherein one would least expect, not only its appearance but its acceptance. See, Flemming v. Safeco Insurance Company of America, 160 Cal.App. 31, 206 Cal. Rptr. 313 (1984); California Casualty General Insurance Company v. Superior Court, 173 Cal.App.3d 274, 218 Cal. Rptr. 817 (1985).

Although the precise application or parameters of this defense are impossible to define at this time, based upon the lack of precedent it seems clear that where an insured is guilty of conduct which of its nature contributes to the insurer's failure to properly investigate a claim by, for example, providing misleading information or a refusal to provide any information whatsoever or by providing improper authorizations or release of information, or where the insured relies upon improper advise of his own attorney, such conduct should be compared and

contrasted to the fault of the insurer in arriving at its decision to deny the claim.

In a practical context, an attorney for an insured in California made a demand upon an insurer for settlement in response to a letter from the attorney for the insurer which essentially misstated the California law on conditional receipts and their effect in California on life coverage. The lawyer for the insurer had failed to properly research the California law, however, the California counsel for the insured failed to advise the insurer's counsel wherein he was, needless to say, totally off base in his denial. A jury in Orange County held the insured responsible for her lawyer's conduct and reduced the award by 50%.

C. ADVICE OF COUNSEL

Again, somewhat like comparative fault an untested doctrine in the first party context. It has, however, been applied in the third party area. See, for example, Beck v. State Farm Mutual Automobile Insurance Company, 54 Cal.App.3d 347, 126, Cal. Rptr. 602 (1976). It must be kept in mind, however, that we are looking at a standard of "reasonableness" and that any action taken by the company not only in arriving at the decision to reject the claim, but in further negating the issues of malice may be helpful in defense of a first party claim. A review of this defense is contained in Ashley, Bad Faith Actions Liability and Damages §7.13 (Callaghan & Company 1984). This defense can be two edged and must be used with caution.

D. STATUTE OF LIMITATIONS

Space prohibits the lengthy analysis of the applicable Iowa Statue of Limitations under Chapter 614 of the Iowa Code 1989. However, suffice it to say that this author believes that Section 614.1(2) providing a two year statute of limitation is the applicable statute of limitations in a bad faith context as versus section 614.1(5) which provides a limitation period of ten years for actions founded on written contract. See, for example, Bender v. Time Insurance Company, 286 N.W.2d 489 (N.D. 1979); Plant v. Illinois Employers Insurance of Wausau, 20 Ohio App.2d 485 N.E.2d 773 (1984); Lewis v. Farmers Insurance Company, 681 P.2d 67 (Okla. 1983).

An integral part of this analysis, however, clearly requires a review of Rodgers v. Pennsylvania Life

Life Insurance Company, 169 Cal.App.3d 9214 Cal. Rptr. 883 (1985) held that the two year statute governing torts was applicable to the first party tort of bad faith. Frazier, however, allowed the potential recovery of emotional distress although it clearly ruled out the issue of recovery for punitive damages. The reasoning allowing recovery of damages for emotional distress i.e. the inclusion in the breach claim is highly suspect.

IV. INSTRUCTIONS/BY NO MEANS UNIFORM

By way of suggestion, I am attaching hereto certain requested instructions which I have requested in various jurisdictions throughout the country. I believe they represent a fairly honest application and explanation of the law which should be submitted to the jury when utilizing the Wisconsin test. Suffice it to say, I have not always been successful in obtaining precisely these instructions, however, as you can see from the instruction the concept of "intent" is of foremost importance in jury presentation. I have not gone into the area of punitive damages in this outline, however, would suggest that two areas demand your attention by way of motion in limine and jury instruction. The first being exclusion of any reference to the wealth of the company of punitive damages until such time as Plaintiff has established a prima facie right to recovery of punitive damages. The second being pursuing the giving of an instruction other than that contained in the uniform instruction which required Defendant to be guilty of conduct consistent with the existence of a "evil mind."

V. DAMAGES

It is suggested that the Plaintiff will be looking for instructions relating to any economic loss which they can prove by the required standard resulting to Plaintiff as a result of the alleged "bad faith" of the insurer. Such damages would include impairment of credit, emotional distress, attorneys' fees under appropriate circumstances, and obviously, the contractual benefits which allegedly were originally due and owing. As stated above, punitive damages are always an element in any bad faith case. Obviously, the constitutional arguments relative to punitive damages should be at the forefront in your legal presentation to the court of any "bad faith" case.

VI. CONCLUSION

It is difficult to draw any conclusions at this point concerning how the Iowa Court in Dolan, supra will address many of the unanswered questions. The Dolan decision leaves a significant number of issues yet to be decided.

Respectfully submitted,

Timothy J. Walker

Instruction No. _____

In every worker's compensation claim there is an obligation that the employer's insurance company exercise good faith in considering and acting on the claim. If the insurance company engages in bad faith conduct in handling the claim, such party is liable for any actual damages resulting therefrom.

If a claim is fairly debatable, the employer or its insurance company, or both, are entitled to debate it and the denial of such claim would not be in bad faith.

Good faith consideration of a claim requires that the claim properly investigated and that the results of that investigation subjected to a reasonable evaluation.

A defendant acts in bad faith when it denies or refuses to pa claim at a time when it either knows or should know that there is reasonable basis for doing so. Bad faith requires that the defendant's act be intentional.

Instruction No. _____

WILLFUL MISCONDUCT

You are instructed that willful misconduct means something more than a mistake in judgment and requires more than a mere failure on the part of an insurer to pay a claim presented to it. It describes conduct which must transcend ordinary mistakes in judgment or the mere intent to perform a particular act, and is different in kind and characteristics. It describes conduct which partakes to some appreciable extent; though not entirely, of the nature of a deliberate and intentional wrongful act. To bring the conduct of the defendant within the meaning of this instruction, the jury must find as a fact that defendant intentionally did something which it should not have done or intentionally failed to do something which it should have done under the circumstances so that it can be said that defendant consciously realized that his conduct would, in all probability, as distinguished from possibly, produce the precise result which it did produce and would bring harm to the plaintiff.

Instruction No. _____

One who has suffered injury to his person or property through the oppression, fraud or malice of another, may recover, in addition to his actual damage, damages for the sake of example and by way of punishing such other party.

In order to find a party guilty of malice, it is necessary that his conduct be intentional, done with an evil mind and wish to injure another; but such malice may be either actual or presumed from all of the material facts.

Oppression means subjecting a person to cruel and unjust hardship in conscious disregard of his rights.

Fraud as used in this instruction means an act or trickery or deceit, intentional misrepresentation, concealment or nondisclosure committed for the purpose of causing injury or depriving a person of his property or his legal rights.

If you find that punitive damages should be allowed, then in determining the amount, you should consider all of the attendant circumstances, including the nature, extent and enormity of the wrong, and intent of the party committing it, the amount allowed as actual damages, and, generally, all of the circumstances attending the particular act involved, including any mitigating circumstances which may operate to reduce without wholly defeating punitive damages.

Instruction No. _____

The term "emotional distress" is often described by other terms, such as mental distress, mental suffering or mental anguish. It includes all highly unpleasant mental reactions, such as fright, horror, grief, shame, humiliation, embarrassment, anger, chagrin, disappointment, and worry.

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The law does not permit recovery of damages for transitory and trivial emotional distress. In order to recover for mental distress, it must be severe.

In this case, Gary Scheurenbrand cannot recover for emotional distress caused by his back injury he because he has been fully compensated therefore. You must only consider sever mental distress caused by the acts of the defendant as set out in other instructions herein.

A FRESH LOOK AT VOIR DIRE

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I. Introduction

During jury selection the lawyers control the fate of the prospective jurors. A few days later, the jury controls the fate of the lawyers and their clients. With this in mind, how do we improve the chances that our fate will be a happy one?

We need to start by remembering what the Greek orators knew so well in their time, and the television news producers know today: the perception of the person imparting the message is almost as important as the message itself. Your duty as an advocate is to create and exploit every ethical advantage you can on behalf of your client. Since this is so, how can we take advantage of this principle of human nature during jury selection?

First, a couple of disclaimers. What follows is not intended to be an exhaustive approach to selecting a jury. What I hope to do is to give you a few new ideas to try out and adapt to your own individual style.

Second, I will leave the human behavioral and "body language" aspects of jury selection to Tom Sannito, Sonja Hamelin and others.

Have you ever taken a long hike or perhaps a bike ride with some people you don't know very well? You generally make the trip with someone you find interesting--someone you like right away. And you stay with that person for the rest of the trip. A jury trial is very similar. You are starting off on a long journey with these jurors. It is your goal to get as many of them to walk with you as you can. And you start this process with jury selection.

How many of us have watched a ball game or other athletic contest played by two teams we don't care about? If your nature is at all competitive, you probably decide <u>within a few minutes</u> to root for one team or the other. Your reasons are subjective, irrational, and maybe a little silly. And once you have made up your mind, you stay with your choice for the balance of the contest unless something very serious happens to change your allegiance. I believe this is part of human nature. I also believe it is something a good trial lawyer can't ignore or ignores at his peril.

As Hamelin says, people entering the jury box are disenfranchised adults. For the day, at least, they are not in control of their lives. They have been forced to come to court today. They have probably been shuttled in and out of strange rooms like a herd of cattle. They have had to wait. They know there will be questions and well-intentioned probes into the background, interests and biases. They know that they will either pass or fail, depending upon what the lawyers decide. They may be embarrassed sitting next to someone with a more successful life story. They probably don't like lawyers in the first place, and certainly don't trust them. There may be a few veniremen looking forward to jury duty in a perverse sort of way, but they aren't many in number.

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With their vulnerabilities exposed in this way, it is easy for you to be patronizing. It is easy to emphasize the gulf between your life and theirs. What you must do, however, is to eliminate that gulf and replace it with trust. Jury selection is the time to do it.

II. Pretrial Investigation of Panel

III. Preliminary Considerations

(A) Your conduct

1. Speech

2. Fairness

3. Personal Standing

(B) Your client's conduct

1. Note taking

2. Pay attention

3. Consult with client before making selections

IV. Goals of Jury Selection

(A) White Hat Effect

(B) Communicate your theme

(C) Introduce and neutralize weaknesses

(D) De-select least desirable jurors

(E) Win it

V. Challenges

(A) Panel challenge: I.R.C.P. 187(d)

> Before any juror is sworn, either party may challenge the panel, in writing, distinctly specifying the grounds, which can be founded only on a material departure from the statutory requirements for drawing or returning the jury. On trial thereof, any officer, judicial or ministerial, whose irregularity is complained of, and any other persons, may be examined

concerning the facts specified. If the court sustains the challenge it shall discharge the jury, no member of which can serve at that trial.

(B) Individual juror: I.R.C.P. 187(f)

A juror may be challenged by either party for any of the following causes: . . . (9) when it appears the juror has formed or expressed an unqualified opinion on the merits of the controversy or shows a state of mind which will prevent him from a just verdict . . .

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VI. A Few Do's and Don'ts

(A) Speak English

1. "Client" vs. Joe
2. "Prior" vs. before
3. "Indicated" vs. said
4. "Vehicle" vs. car
5. "Voir Dire" vs. jury selection
6. "Exited" vs. left

(B) Expose your weaknesses

(C) Tailor your questions to the case

(D) Pay attention to wallflowers

(E) Laugh at yourself

(F) Listen to tones and qualifiers

(G) Avoid gamesmanship - be fair

(H) Don't mention the burden of proof unless you bear it

(I) Consider asking risky open-ended questions, but be ready with a good reply to a bad response

(J) Communicate your theme

(K) Neutralize your opponent's efforts at personal standing if you must

(L) Elicit promises

VII. Conclusion

Jury selection is easy to overlook and underrate. It may be the last thing you prepare before the trial starts, which may give you too little time to devote to the subject. You may pull out an old list of questions from another case, ask the same old questions in the same old way, get through it without any major hitches and feel as though you have done a pretty good job. What you have missed is the first, and best, opportunity to begin the multi-faceted process of persuasion: persuasion by communicating your theme, exposing your weaknesses and, most important, establishing your personal standing with the jury. One caveat though: it is easy to overdo the latter. If you have, the overriding impression may be that you are probably a nice person, but you are being nice to get their vote. If you have really blown it, the impression

will be that you are nothing more than an apple polisher. If you have done your job just right, you will be seen as a nice guy (or gal) who is just lucky enough to be on the right side of the case. You have erased the socio-ecomonic wall that separates lawyers from real people. Because you have done so, you have taken a giant step toward acceptance of your side of the evidence, and the interpretations and inferences you draw from the evidence in closing argument.

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DEFENSE OF TOXIC TORT CASES

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Annual Meeting
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GENERAL PRINCIPLES AND ISSUES

A. DEFINITION AND SCOPE

1. "Toxic tort" is the common label given to any case where injury is alleged as a result of exposure to a toxic substance. By definition, it includes claims arising from any injury due to an exposure to any toxic substance, but arguably is most pertinent to cases where the mechanism of injury is alleged to be metabolic, biochemical, and/or genetic rather than an observable physical reaction. It has, however, come to be applied to any case where the body adversely reacts to a hazardous substance (e.g., asbestos cases).

2. The scope of toxic tort litigation is increasingly broad, encompassing claims involving not only commonly recognized "hazardous" substances (e.g., toxic gases), but also reactions to generally accepted and commonly encountered substances which may be "toxic" only in limited or unusual circumstances (e.g., paint, cosmetics, gasoline fumes, household cleaners, etc.).

B. UNIQUE ISSUES IN TOXIC TORT CASES

1. Perhaps the most notable aspects of toxic tort litigation are the unique issues which emerge as to liability, damages, evidentiary standards of proof and causation. These unique issues have required

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the courts to reexamine some of the most fundamental and longstanding tenets of the common law, especially as to causation, standards of proof, scope of the duty to warn, recovery for latently manifested damages or conditions, and even the ultimate question of whether a lay jury is capable of properly determining the complex medical issues in these cases. See, Brock v. Merrell-Dow Pharmaceuticals, Inc., 874 F.2d 307, 309 (5th Cir. 1989) (recognizing toxic tort cases raise special problems and challenges to traditional ideas regarding role of the jury).

2. Many of these issues are individually worthy of law review treatment and can only be generally discussed here. A full review of the cases cited throughout this outline is highly recommended, as many contain in-depth analyses of these issues and reveal how the courts are struggling to arrive at consistent conclusions. See, e.g., Part V C, infra, concerning damages for the "fear" of increased risk of disease, even where an actual increased risk of harm cannot be established within a reasonable degree of medical probability.

3. The unique issues in toxic tort cases derive from several factors:

a. The injury resulting is often an alleged biologic or genetic reaction, not an immediate, visible, or easily identifiable trauma.

b. The injury is often characterized or masked by symptoms which are also commonly experienced throughout the general population which has not been exposed to the toxin.

c. The event which produces the alleged injury is not a sudden, identifiable event, but may involve alleged long term, low level exposure to substances over time.

d. The toxic substances allegedly involved may not be easily identifiable, and the "exposure" may have been to many different substances rather than just one.

e. The onset of the injury or the condition for which recovery is sought may be subtle; its origins not easily identifiable or not identifiable at all, with damages only being latently manifested. The latter issue raises particularly interesting issues as to statutes of limitations.

4. The foregoing also raise further issues bearing on liability:

a. Identification of the alleged toxic agent and the source of the agent (air, water, soil, or other materials).

b. Identification of the party or parties responsible for the agent.

c. "Proximity", i.e., sufficient relation of plaintiff to the agent to achieve toxic exposure.

5. Liability for the alleged toxic substance may involve questions as to whether responsibility will be imposed for consequences which were unknown or unknowable at the time the substance was used/sold. Compare, e.g., Beshada v. Johns-Manville, 447 A.2d 539 (N.J. 1982) (finding failure to warn liability, imputing to manufacturer knowledge of all risks), with Moore v. Vanderloo, 386 N.W.2d 108 (Iowa 1986) (manufacturer of birth control pill not liable for side effects resulting from contemporaneous chiropractic care where the effects were unknown to medical science at the time).

C. TOPICS EXCLUDED, REFERENCES

1. Excluded is discussion of administrative regulation and enforcement of environmental statutes and administrative remedies.

2. Procedural issues affecting class actions and "mass tort" litigation involving environmental injury

claims. See, e.g., Environmental Defense Fund, Inc., v. Hardin, 428 F.2d 1093 (D.C. Cir. 1970) (conservation interests giving rise to right to sue on behalf of private citizens); Sierra Club v. Morton, 405 U.S. 727 (1972) (private citizen suffering no personal injury lacks standing to sue). See also, Snyder v. Harris, 394 U.S. 332 (1969) (under federal class action rule 23, restricting class actions by requiring each plaintiff must meet the jurisdictional amount).

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3. In-depth analysis of applicable scientific principles of toxicology is beyond the scope of this outline (and the abilities of this author). For general reference of relevant principles applicable to these cases, however, see:

   a. Hayes, Toxicology of Pesticides, Waverly Press, Inc., Baltimore (1975).

   b. Hayes, Pesticides Studied in Man, Williams and Wilkins Co., Baltimore (1982).

   c. Casarett & Doull, Toxicology: The Basic Science of Poisons, McMillan (3d ed. 1986).

   d. Ames, et al., "Ranking Carcinogenic Hazards", Science 236 (April 1987).

   e. Federal Register, Part II, "Chemical Carcinogens: A Review of the Science and Its Associated Principles" (March 14, 1985).

f. International Agency for Research on Cancer, IARC Monographs on the Evaluation of the Carcinogenic Risk of Chemicals to Humans, Vol. 39, Lyon France (1985).

g. Office of Technology Assessment, "Assessment of Technologies for Determining Cancer Risks From the Environment", Washington, DC (June 1981).

h. Efron, E., The Apocalyptics: Cancer and the Big Lie, Simon & Schuster, New York (1984).

i. Terr, Clinical Ecology, Insights in Allergy, Vol. II, No. 5 (November 1987).

j. American Academy of Allergy and Immunology, "Position Statements: Clinical Ecology", Journal of Allergy and Clinical Immunology (August 1986).

k. California Medical Association Scientific Board Task Force on Clinical Ecology, "Clinical Ecology - A Critical Appraisal", The Western Journal of Medicine, Vol. 144, No. 2 (February 1986).

l. Brodsky, "Allergic to Everything: A Medical Subculture", Psychosomatics, Vol. 24, No. 8 (August 1983).

D. LIABILITY AND DAMAGES ISSUES - IN GENERAL

1. In addition to factual issues relevant to the exposure and the primary issue of medical causation,

discussed in Part II B, infra, ultimate liability in a toxic tort case usually hinges on one or more key legal issues.

2. In non-product liability cases:

   a. Responsibility for the toxic agent; specifically including issues of intent, knowledge or negligence in regard to the release and/or presence of the alleged toxic substance.

   b. In cases of premises liability or negligence, the degree of knowledge that the agent was potentially harmful. See, e.g., Anderson v. W. R. Grace and Co., 628 F.Supp. 1219 (D. Mass. 1986), aff'd sub nom, Anderson v. Cryovac, Inc., 862 F.2d 910, 914 (1st Cir. 1988) (discussing failure of negligence claims in the absence of notice on the part of defendant of toxic wastes and absence of special relationship imposing duty to warn).

   c. Failure to meet an applicable legal standard of care in regard to exposing the plaintiff to the agent with such knowledge. See, e.g., Sterling v. Velsicol Chemical Corp., 855 F.2d 1188 (6th Cir. 1988) (affirming liability for operation of toxic dump site which contaminated local water supply).

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3. Liability in non-product liability cases may be established on one or more of the following theories:

   a. Negligence. Part III E, infra. See, e.g., Sterling v. Velsicol, supra.

   b. Abnormally dangerous activity (strict liability). Part III D, infra. See, e.g., Restatement (Second) Torts, § 519.

   c. Nuisance. Part III F, infra.

   d. Trespass. Part III F, infra.

4. In product liability cases, the key elements are:

   a. Sale or supply of the product, product identification, and defendant identification. See, e.g., Senn v. Merrell-Dow Pharmaceuticals, Inc., 305 Ore. 256, 751 P.2d 215 (1988); Mulcahy v. Eli Lilly, 386 N.W.2d 67 (Iowa 1986).

   b. Whether the product was defective and unreasonably dangerous, the key determination being whether or not comment j or comment k of Restatement § 402A is applied as the test of "unreasonably dangerous" and the scope of the duty to warn.

   c. Where the defect is alleged to be a failure to warn, as in most toxic tort cases, whether the risk of harm was known or knowable at the time

the product was sold, including allegations of failure to test as bearing on the duty to warn.

d. Whether the injury was a generally expected reaction (i.e., toxic) among the general population or whether it was due solely to an idiosyncratic or hypersensitive plaintiff. (See pp. 21, 37-42, infra.) How the court treats this issue in large part determines whether the product will be found "unreasonably dangerous."

5. Note that a finding of a duty to warn against an unknown, idiosyncratic reaction or as to a condition of the product which was unknown and unknowable at the time of sale results in virtual absolute liability on the part of defendant. See, e.g., Beshada v. Johns-Manville Corp., supra.

6. Damages.

a. Whether or not the plaintiff suffers from a definable, present injury.

b. Whether the exposure and known properties of the chemical establish the capability of the agent to cause the harm alleged.

c. Cause in fact and legal causation: Did the exposure to the agent in fact cause the specific condition complained of?

d. Can a plaintiff recover for increased risk of future disease, e.g., cancer?

e. Can plaintiff recover for emotional distress ("cancerphobia"), i.e., the "fear" of contracting disease in the future?

II. MEDICAL CAUSATION

A. MEDICAL CAUSATION - IN GENERAL

1. Perhaps even more than questions of liability, many toxic tort cases invariably hinge on the question of medical causation, i.e., was plaintiff's alleged condition in fact the result of exposure to the toxic substance?

2. Medical causation in toxic tort cases is essentially a two-step inquiry. First, was the plaintiff's exposure adequate and is the toxic agent capable of producing the alleged harm under such conditions? Second, did the agent in fact cause the harm alleged to the particular plaintiff?

3. Recognition of this two-level inquiry on causation can be the crucial distinction between recovery and nonrecovery. See, e.g., Sterling v. Velsicol Chemical Corp., 855 F.2d 1188, 1200-01 (6th Cir. 1988) (finding district court did not abuse discretion in determining there was proximate cause between Velsicol's chemical dumping operations and resulting contamination of plaintiff's water supply, but finding the district court erred in finding all

of the plaintiff's alleged injuries to be the result of drinking the contaminated water).

4. Injuries or conditions alleged in toxic tort cases often present questions which medical science admits are not yet answerable, e.g., causes of cancer, causes of immune system reactions, effects of long-term exposures to low-levels of environmental agents, etc. While this is one of the unique aspects of toxic tort litigation, it is also one of the most troubling elements of these cases, as the admission of questionably reliable expert testimony may permit recoveries which are directly contrary to generally accepted scientific fact.

5. The Fifth Circuit, observing the difficulty presented by novel scientific evidence, has recently stated:

> ""The first problem is that there is often no consensus in the medical community regarding whether a given substance is teratogenic; this is the case with Bendectin. Moreover, while we now recognize some of the many factors which can cause birth defects, medical science is now unable, and will undoubtedly remain unable for the foreseeable future, to trace a known birth defect back to its precipitating cause. The second problem, in addition to the problem of unknowability, is that juries are asked to resolve these questions, upon which even our brightest medical minds disagree, in order to resolve the case at hand and decide whether the plaintiff is entitled to recovery, and in so doing must necessarily resort to speculation." Brock v. Merrell-Dow Pharmaceuticals, 874 F.2d 307, 309 (5th Cir. 1989).

6. QUERY: How is a lay jury expected to objectively, logically, and accurately decide that an exposure to a particular environmental agent was in fact the cause of plaintiff's disease in a case where medicine and science generally recognize the cause of the particular condition is unknown and presently unknowable? See, Brock v. Merrell-Dow Pharmaceuticals, supra (toxic tort cases "present special problems and challenges to traditional ideas regarding the role of the jury as a decisionmaker"). 874 F.2d at 309. This is precisely the fighting issue in most cases where plaintiff's expert's opinions are claimed to be outside of the mainstream of scientific and medical thought. See Part IV, infra.

7. Unfortunately, some courts are permitting submission of issues which, translated, amounts to the following test: Although medical science does not know what causes this condition, and modern medicine is incapable of determining what caused this condition in the particular plaintiff, the jury will nevertheless be permitted to decide whether there is causation, because plaintiff's expert has expressed his or her opinion that such was the case. If this sounds extreme, consider the following holding of the Sixth Circuit, affirming a portion of damages

awarded to various plaintiffs exposed to contaminated water in Sterling v. Velsicol Chemical Corp., supra:

> While Dr. Rhamy [plaintiff's expert] conceded that "[n]o. . . .one knows what causes cancer of the kidney", his testimony that [plaintiff's] environmental exposure to carbontetrachloride was the reasonable and probable cause for his kidney cancer constitutes sufficient medical proof. 855 F.2d 1188, 1203 (emphasis supplied).

8. Such speculative proof is particularly characteristic of claims for "increased risk" of contracting future disease. See Part V, infra. The failure of many courts to distinguish between the cause of an initial injury or condition versus the traditional recovery allowed for future consequences of a presently identifiable injury is in part to blame for some of the ill-reasoned judicial opinions which have cropped up in this area.

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B. MEDICAL CAUSATION - FACTUAL AND LEGAL ISSUES

1. Risk/Exposure Analysis and the Dose/Response Relationship

a. The dose/response relationship is a fundamental principle of toxicology. Virtually any substance is a "poison" if administered in sufficient dose. The following age-old quote of Paracelsus (1493-1541) is still cited in toxicology texts:

> "All substances are poisons; there is none which is not a poison. The right dose

differentiates a poison and a remedy." Casarett & Doull, Toxicology, supra (title page).

b. In order to scientifically approach toxic tort cases, it is necessary to determine whether the facts support a finding that the plaintiff received a sufficient "exposure" or dose, in order to cause the harm claimed. By application of the physical facts surrounding the alleged exposure, and consideration of the known scientific data on the substance, it is possible to come to some scientific and objective estimation as to whether the alleged exposure of the plaintiff was sufficient to produce the symptoms alleged.

c. Defending exposure allegations.

(1) Define the toxic agent with particularity and the specific chemical alleged to have caused the injury. Of course, most substances are comprised of numerous "chemicals", and even chemicals with similar chemical structures produce substantially different effects and vary greatly in toxicity.

(2) Define the exposure, i.e., was it by inhalation, dermal absorption, or ingestion? The route of exposure greatly influences

the toxicity of the substance in most cases.

(3) Force the plaintiff and plaintiff's expert to quantify the exposure and identify factual proof in support of the quantification.

(4) Be alert to efforts by plaintiff's expert to assume the demonstrable symptoms were caused by the agent and "work backwards" to arrive at a plausible exposure level which fits plaintiff's theory of causation, i.e., an approach which is opposite of the "scientific method".

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2. Pertinent terms and concepts.

a. In vitro testing. In vitro tests are test tube experiments of isolated cells. The significance toxicologically is that the testing of the substance in vitro removes it from the detoxifying effects of other bodily fluids and chemicals present in the intact bodily system. While in vitro testing is utilized for some scientific and regulatory purposes (mainly as an indication of whether further study is necessary), it has been held by the courts to be of questionable relevance as to causation of human disease in toxic tort cases. See, e.g.,

Richardson v. Richardson-Merrell, Inc., 857 F.2d 823, 830 (D.C. Cir. 1988) (value of such studies as a predictor of human teratogenicity is "meager" and "in the realm of suspicion"; such tests alone are not a satisfactory basis for opinions on causation in humans); see also, Lynch v. Merrell-National Laboratories, 646 F.Supp. 856 (D. Mass 1986), aff'd, 830 F.2d 1190 (1st Cir. 1987).

b. In vivo testing. In vivo testing refers to testing of intact laboratory animals. While not inadmissible per se, the validity of animal studies has also been sharply questioned by several courts in terms of relevancy as to causation in humans. See, e.g., In Re Agent Orange, 611 F.Supp. 1223, 1241 (E.D. N.Y. 1985), aff'd, 818 F.2d 145 (2d Cir. 1987) ("of so little probative force" and "so potentially misleading" as to be inadmissible); Richardson v. Richardson-Merrell, Inc., supra at 830 (cannot furnish sufficient foundation for causal conclusion especially in the face of overwhelming contradictory epidemiological evidence); Lynch v. Merrell-National Laboratories, supra. See also, Vertibo v. Dow Chemical Co., 826 F.2d 420, 424 (5th Cir. 1987)

(animal testing not sufficient to predict causation in humans in view of differing effects of chemicals between humans and rats).

c. LD50. This is a standard measurement used in the field of toxicology which refers to the acute toxicity of a given substance as to test animals. Specifically, it refers to an ascribed numerical quantity of a substance necessary to kill one-half of the test animals. Thus, the "lethal dose" of a substance in 50 percent of the animals is commonly referred to as the LD50. The higher the LD50, the lower the toxicity of the substance.

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d. TLV (threshold limit value). Threshold limit value, or TLV, is a term ascribed to various substances by the American Conference of Governmental Industrial Hygienists (ACGIH). It is used for regulatory purposes in developing safe exposure levels primarily in industrial environments. ACGIH defines TLVs in terms of airborne concentrations of substances that represent conditions under which it is believed nearly all workers may be exposed day after day without adverse effect, and data is developed in three basic categories: (1) time-weighted average (TWA), which is a value for a normal 8-

hour work day and a 40-hour work week; (2) short-term exposure limit (STEL), a value for a short period of time (usually fifteen minutes); and (3) ceiling (TLV-C), a value that should not be exceeded even briefly. Casarett and Doull, Toxicology, The Basic Science of Poisons, p. 637 (3d ed. 1986). In a proper case, the TLV of the agent can be used to construct a "worst case" scenario, and usually demonstrate that plaintiff's exposure was still many times less than the TLV.

e. Epidemiologic studies. Epidemiology is the science of dealing with occurrence and distribution of diseases in the human population. If properly done and relevant, they are generally regarded as more reliable than animal data or similar regulatory tests. Most courts have viewed them as more probative than animal or in vitro tests in terms of assessing causation in humans. See, In Re Agent Orange, 611 F.Supp. 1223, 1239 (epidemiologic studies on causation of "critical importance"); Richardson v. Richardson-Merrell, Inc., 857 F.2d 823, 830 (D.C. Cir. 1988) ("very important" on causation and rejecting contrary in vitro and animal studies).

3. Diagnosis and medical causation.

a. The defense must force the plaintiff and plaintiff's doctor to define the disease or particular condition which has allegedly resulted:

(1) Is it a recognized disease or syndrome? Is it defined in any recognized medical diagnostic manual?

(2) Are there demonstrable clinical symptoms?

(3) Are the symptoms consistent with what is reported in the literature as the symptoms resulting from exposure to the toxin?

(4) Is the timing of the reported symptoms and their clinical course consistent with what is reported?

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b. Differential diagnosis: Did plaintiff's doctor properly go through a differential diagnosis and eliminate alternative explanations for the symptoms, e.g., are the symptoms common maladies that occur spontaneously throughout the general population?

c. If plaintiff's proof demonstrates no more than general, non-specific symptomology and exposure levels which can be generally expected throughout the general population at random, such may be insufficient as a matter of law to permit recovery. See, e.g., In Re Paoli Railroad Yard

PCB Litigation, 706 F.Supp. 358, 375 (E.D. Pa. 1988).

d. Determine "cause in fact" when multiple agents are involved:

(1) Separate the cause of an alleged condition, e.g., headaches, fatigue, etc., claimed as a result of a toxic exposure from the innumerable other causes of such common ailments in the course of everyday living (to the extent the "cause" of these conditions can be determined at present).

(2) Distinguish between the "but for" test of causation and the "substantial factor" test. Both are usually required. See, Prosser and Keeton, The Law of Torts (5th ed. 1984), pp. 26-27; Owens v. Bourn's Inc., 766 F.2d 145 (4th Cir. 1985); Manne v. Celotex Corp., 861 F.2d 1453 (10th Cir. 1988) (but suggesting a revised "group but for" test may be necessary in toxic tort cases, citing Prosser and Keeton).

(3) In Iowa, the "but for" component remains an element of proximate cause. See, prior Uniform Jury Instruction 2.6 (test of proximate cause includes element "if it had not been for such act or omission",

and cases there cited); Winter v. Honeggers and Co., Inc., 215 N.W.2d 316, 320 (Iowa 1974) (defining proximate cause under substantial factor test of Restatement (Second) Torts, § 431); Restatement (Second) Torts, § 431, comment a ("but for" component is an element of test of legal cause). See, e.g., Mulcahy v. Eli Lilly, 386 N.W.2d 67 (Iowa 1986) (rejecting market share and enterprise liability theories against multiple DES defendants based on failure of plaintiffs to show any particular defendant's DES causally related).

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4. Hypersensitive or allergic reactions.

a. Oftentimes plaintiffs will attempt to skirt the "exposure" problem by alleging that the particular plaintiff was "hypersensitive" to the substance or unusually "allergic" or "susceptible", and offer this condition as an explanation for why the particular plaintiff reacted to the substance in a much smaller dose than would be expected.

b. First, it should be recognized that allergic reactions are quite specific and are nevertheless accompanied by a known set of signs and

symptoms. Second, it should be noted that allergic and hypersensitive reactions are still dose related, albeit at much smaller doses. Thus, even an allergic reaction is a true toxic response and is dose related. Casarett and Doull, supra at p. 15.

c. On the issue of alleged hypersensitivity or allergy, the plaintiff's medical history is of vital importance. Is there a history of allergy or sensitivity to a given substance? Technically, to be "sensitized" means to have an increased reaction because of a prior exposure to the substance or a similar substance. Does the subsequent clinical course reveal consistent instances of "allergic" or sensitized responses?

d. As to the common claim that plaintiff's "immune system" has been damaged, the same searching inquiry of the plaintiff's medical history is required. Is there other evidence of an immune "disfunction", i.e., is there a history of plaintiff suffering from an unusual number of infections or other immune problems? Is there a history of other immune reactions, i.e., hypersensitivity?

e. On the issue of legal causation, defendant should distinguish between cause in fact and legal causation. See, pp. 20-21, supra.

f. Finally, the combination of the foregoing factual circumstances bearing on causation should be measured against the scientific validity of the theory of causation put forth by plaintiff's expert - is it generally accepted within the fields of science and medicine? Is it consistent with a generally accepted explanatory method? Is it consistent with what is reported in the literature concerning exposure to the particular toxin?

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g. Only by careful consideration of all of the foregoing circumstances can the defense hope to present to the jury an objective picture of the alleged exposure and plaintiff's allegations of injury as a result of the exposure.

5. Combatting "Junk Science" - Clinical Ecology.

a. "Clinical ecology" is a medical "subculture" which ascribes environmental causes to virtually unlimited sets of symptoms as the result of exposure to synthetic chemicals in the course of everyday living. Clinical ecology is also referred to by its proponents as "environmental illness" (EI), "chemical

hypersensitivity syndrome", or "20th Century allergy". Doctors who subscribe to the principles of clinical ecology refer to themselves as "clinical ecologists".

b. Clinical ecology is not a recognized medical specialty nor a discipline taught in U. S. medical schools. Terr, "Clinical Ecology", Insights in Allergy, Vol. II, No. 5, November 1987.

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c. The principles of clinical ecology have not been accepted in the fields of science and medicine. See, "Position Statement: Clinical Ecology", American Academy of Allergy and Immunology:

> "The theoretical bases for ecologic illness in the present context has not been established as factual, nor is there satisfactory evidence to support the actual existence of 'immune system disregulation or maladaptation'. There is no clear evidence that many of the symptoms noted above are related to allergy, sensitivity, toxicity, or any other type of reaction from foods, water, chemicals, pollutants, viruses, and bacteria in the context presented....
>
> An objective evaluation of the diagnostic and therapeutic principles used to support the concept of clinical ecology indicates that it is an unproven and experimental methodology. It is time consuming and places severe restrictions on the individual's lifestyle. Individuals who are being treated in this manner should be fully informed of its experimental nature.

> Advocates of this dogma should provide adequate clinical and immunologic studies supporting their concepts, which meet the usually accepted standards for scientific investigation."

Position Statement, supra, Journal of Allergy and Clinical Immunology, August, 1986, p. 270. See also, "Clinical Ecology - A Critical Appraisal", Task Force on Clinical Ecology of the Scientific Board of the California Medical Association, Western Journal of Medicine (February 1986), which concluded clinical ecology is "experimental" and that no evidence was found to support the hypothesis and treatments proposed by clinical ecologists. Id. p. 243.

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d. Clinical ecologists believe exposure to an extremely broad range of chemical substances can cause disease in a non-dose dependent fashion, and that this exposure renders the patient increasingly more sensitive to other environmental substances. Terr, supra.

e. The most common term ascribed by clinical ecologists to their patients is "chemically induced immune disregulation". Because proponents of clinical ecology do not offer a precise definition of this "disease", or even a consistent set of diagnostic criteria and

clinical signs and symptoms, almost any subjective physical complaint can be made to fit into the diagnosis. Terr, supra. This is the principle difficulty confronting defense counsel where a claim under clinical ecology is put forth.

f. The seductive illogic of clinical ecology is that it avoids the particular plaintiff having to "fit" within a particular set of clinical symptoms which are characteristic of the toxic agent's usual effects. By making broad-ranging allegations under such labels as "sensitization" and "immune disregulation", the clinical ecologist is able to fit virtually any set of symptoms into the exposure, including numerous symptoms which are commonly experienced spontaneously throughout the general population, e.g., headaches, fatigue, anxiety, irritability, etc. This results in virtually any person becoming a clinical ecology plaintiff, since within any given geographic area in proximity to the alleged "exposure" there will be persons with these broad-ranging symptoms, such that the plaintiff's clinical ecology expert can then take the symptoms and "work

backwards" and fit the symptoms into the alleged "exposure".

g. The "attraction" of clinical ecology to the patients themselves is that it offers them an acceptable external explanation for their various illnesses, i.e., it is "those chemicals".

h. The nature of treatment prescribed by clinical ecologists to their patients is sometimes bizarre, usually including substantial restrictions on lifestyle (such as wearing masks when outdoors to avoid "chemicals", removing carpeting from the house because of the chemical "gasses" which arise from the carpet fibers, etc.). A full discussion of the clinical analysis of these patients and the treatment prescribed is beyond the scope of this outline. But see, generally, Terr, supra; Position Statement of the American Academy of Allergy and Immunology, supra; "Clinical Ecology - A Critical Appraisal", supra; and Brodsky, "Allergic to Everything: A Medical Subculture", Psychosomatics, Vol. 24, No. 8, p. 731 (August 1983).

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i. Not surprisingly, much of the thrust of the "clinical ecology" movement is founded in toxic

tort litigation ("clinical ecologists" are frequent testifiers), and in political efforts by clinical ecology groups to influence public regulatory policy.

j. The tenets of clinical ecology have been rejected as unproven medical theory in at least two federal circuit court cases: Vertibo v. Dow Chemical Co., 826 F.2d 420 (5th Cir. 1987); Sterling v. Velsicol Chemical Corp., 855 F.2d 1188 (6th Cir. 1988). But see Elam v. Alcolac, Inc., 765 S.W.2d 42 (Mo. App. 1988) (while holding the use of the term "chemical AIDS" to be improper prejudicial closing argument, the court otherwise permitted evidence based on clinical ecology).

k. Perhaps due to its harsh reception by the medical profession, the scientific community, and in the courts, and the stigma associated with "clinical ecology", the Society for Clinical Ecology recently renamed itself the "American Academy of Environmental Medicine". For anyone involved in the defense of a claim involving clinical ecology, it is highly recommended that counsel obtain representative copies of the newsletter "The Human Ecologist", a publication of the Human Ecology Action

League (HEAL), the primary organizational voice of the clinical ecology movement. These newsletters make for entertaining reading and tremendous cross-examination material.

III. LIABILITY

A. IN GENERAL

1. In toxic tort cases, the liability theories most commonly asserted are negligence, strict liability in tort (in products cases), abnormally dangerous activity (strict liability), nuisance, and trespass. There have been isolated cases where other imaginative theories have been pled. See, e.g., Mink v. University of Chicago, 460 F.Supp. 713 (N.D. Ill. 1978) (women who were unknowingly subjects of a medical experiment and were administered DES had a cause of action for "battery"); Teklinsky v. Ottawa Silica Corp., 583 F.Supp. 31 (E.D. Mich. 1984) (cause of action for fraudulent concealment where defendant concealed plaintiff's medical condition and records which would have revealed harm from asbestos exposure). Negligence, products liability, abnormally dangerous activity, and the duty to warn are specifically discussed, infra.

2. In products liability cases, liability of a defendant for the sale or control of such products will invariably hinge on which test of "unreasonably

dangerous" the court applies under § 402A of the Restatement, i.e., the objective test of whether the product is "dangerous to an extent beyond that which an ordinary consumer would appreciate" or whether the court will follow the newly constructed "risk/ utility test", adopted in jurisdictions such as California which have abandoned the unreasonably dangerous requirement. This basically permits a jury to make a "social judgment" as to whether a product is of benefit to society.

3. One of the unique aspects of modern toxic tort litigation is the increasing trend to attempt to place legal responsibility for harm caused by generic, common, or "socially-accepted" substances which have been used in society for a long time, e.g., alcohol, cigarettes, gasoline, lead paint.

4. Recent case filings which have claimed such common, ubiquitous substances are "toxic" for purposes of imposing liability include Hon v. Stroh Brewing Co., Case No. 87-5155 (filed Dec. 2, 1987) (3d Cir.), involving cases where alcohol-related injuries have been brought against brewing companies alleging failure to warn of the dangers of alcoholism, etc. In Hon, despite its previous decision in Cippolone v. Liggett Group, Inc., 789 F.2d 181 (3d Cir. 1986) (denying recovery for failure to warn in cigarette

case), the Third Circuit has permitted the alcohol cases to go forward, citing as the main distinction from the cigarette cases the absence of a mandatory label on alcohol, whereas in the cigarette situation, the packages all carry clear labels mandated by the federal government.

5. Lead paint products liability cases have also been recently filed in Massachusetts against five manufacturers which produced virtually all the lead paint sold in the United States. Santiago v. Sherwin Williams, et al., Case No. 87-27-99T (U.S. District Court, Boston).

6. The concerns of liability surrounding "common substances" has also lead to some interesting legislative developments. In California, the legislature adopted Civil Code § 1714.45, which provides immunity from suit if the product is "inherently unsafe" and is known to be so, e.g., cigarettes, American Tobacco v. Superior Court, Case No. 80141641, 1st D. Ct. App. (filed Feb. 6, 1989), or if the substance is "a common consumer product", such as sugar, alcohol, or butter.

B. PRODUCT LIABILITY - IN GENERAL

1. The elements of strict liability in tort are well-established in Iowa. See, e.g., Kleve v. General Motors Corp., 210 N.W.2d 568 (Iowa 1973); Hughes v.

Magic Chef, Inc., 288 N.W.2d 542 (Iowa 1980). The Iowa Supreme Court has generally followed the elements of strict liability set forth in section 402A, and extensive discussion of these elements is not pertinent here.

2. One element of strict liability which is the subject of some confusion, and is crucial to the determination of liability in toxic tort cases, however, is the test of "unreasonably dangerous" set forth in Restatement § 402A, comment i, specifically adopted by the Iowa Supreme Court in Kleve, supra. The supreme court has at least twice confirmed this "consumer expectations" test of unreasonably dangerous in the face of direct plaintiff challenges to it. Aller v. Rodgers Machinery Mfg. Co., Inc., 268 N.W.2d 830 (Iowa 1978); Eickelberg v. Deere & Co., 276 N.W.2d 442 (Iowa 1979). But see, Chown v. U. S. M. Corp., 297 N.W.2d 218 (Iowa 1980), and recently-promulgated Iowa Civil Jury Instruction 1000.4 (suggesting that the "risk utility" test of unreasonably dangerous is appropriate). This premise is subject to serious question, as discussed at pp. 36-39, infra.

C. PRODUCTS LIABILITY - DUTY TO WARN

1. Defendant Identification

a. Most courts have continued to reject broad-based "market share" liability and have required some causal condition be demonstrated between the product manufactured by the particular defendant and the product to which the plaintiff was exposed. See, e.g., Senn v. Merrell-Dow Pharmaceuticals, Inc., 305 Ore. 256, 751 P.2d 215 (1988). In Senn, the court barred recovery under an alternative liability theory, where the plaintiff alleged one of the two defendants manufactured the DPT vaccine which caused the injuries at issue. The court held this was not enough, citing the trend of authority, including Martin v. Abbott Labs, 102 Wash. 2d 581, 689 P.2d 368 (1984).

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b. In Mulcahy v. Eli Lilly, 386 N.W.2d 67 (Iowa 1986), the Iowa Supreme Court likewise rejected broad-based market share liability theories with respect to the manufacture and sale of DES.

c. The difficulty of product identification and defendant identification has also led to some interesting statutory developments in certain jurisdictions. For example, New York in 1986 passed a statute that specifically "revived" a one-year statute of limitations as to

previously time-barred cases involving five substances - DES, asbestos, tungsten-carbide, chlordane, and polyvinyl chloride. The constitutionality of this statute has been upheld by the New York Court of Appeals. Hymowitz v. Eli Lilly, 73 N.Y.2d 487, 539 N.E.2d 1069, 541 N.Y.S.2d 941 (Ct. App. 1989).

d. Whether the plaintiff had sufficient contact with defendant's toxic agent to result in harm has been treated under the concept of "proximity" in the asbestos cases. See, e.g., Lohrmann v. Pittsburgh Corning Corp., 782 F.2d 1156 (4th Cir. 1986) (directed verdict granted to defendants due to insufficient proof of contact by plaintiff with defendant's asbestos products; whether plaintiff can successfully generate a fact issue on causation depends upon "the frequency of the use of the product and the regularity or extent of the plaintiff's employment in proximity thereto"; mere proof that the plaintiff and a certain asbestos product were at the place of employment at the same time, without more, insufficient to prove exposure to the product and causation). Id. at 1162; Blackston v. Shook & Fletcher Insullation Co., 764 F.2d 1480 (11th Cir. 1985) (rejecting

argument that court should adopt judicial presumption that plaintiff was exposed to asbestos in defendant's product simply by showing he worked at a job site when defendant's asbestos-containing products were used; defendant's summary judgment affirmed where plaintiff's evidence could not support finding that plaintiff worked in close proximity to defendant's products). Id. at 1481.

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2. Duty to Warn

a. Most toxic tort product liability cases, whether pled in strict liability or negligence, will turn on the duty to warn. In Iowa, the Iowa Supreme Court has essentially drawn no distinction between the elements of breach of the duty to warn in strict liability versus negligence, applying Restatement § 388 in both circumstances. See, e.g., Moore v. Vanderloo, 386 N.W.2d 108 (Iowa 1986). Section 388 provides that liability is imposed if the seller: (1) knows or has reason to know that the product is likely to be dangerous, and (2) has no reason to believe that the user will realize the dangerous condition, and (3) fails to exercise reasonable care to inform the user of the dangerous condition. Whether a warning is

required is to be determined by standards of reasonable care. Henkel v. R & S Bottling Co., 323 N.W.2d 185, 188 (Iowa 1982) citing Cooley v. Quick Supply Co., 221 N.W.2d 763, 771 (Iowa 1974).

b. Comment i of Restatement § 402A sets forth the test of "unreasonably dangerous", and defines what is commonly called the "consumer expectations test", i.e., the product must be dangerous to an extent beyond which the ordinary consumer would recognize. This "consumer expectations" test is the test of unreasonably dangerous in Iowa. Aller v. Rodgers Machinery Mfg. Co., Inc., 268 N.W.2d 830 (Iowa 1978); Eickelberg v. Deere & Co., 276 N.W.2d 442 (Iowa 1979).

(1) NOTE: A recent revision to the Iowa Civil Jury Instructions suggests that the risk/utility test is appropriately instructed as a definition of "unreasonably dangerous" in Iowa. Instruction 1000.4, as amended, November 1988. It is respectfully submitted that this is an incorrect statement of Iowa law, statements in Chown v. U.S.M. Corp., 297 N.W.2d 218 (Iowa 1980), notwithstanding. The Iowa Supreme

Court has specifically rejected at least two direct challenges in the past to the "consumer expectations" test which is the essential component of the unreasonably dangerous test of comment i of the Restatement § 402A. Aller v. Rodgers Machinery Mfg. Co., Inc., supra; Eickelberg v. Deere & Co., supra. Plaintiffs throughout the country over the last several years have attempted to displace the consumer expectations test with the "risk/utility" test, most notably in California. See, e.g., Barker v. Lull Engineering, Inc., 20 Cal.3d 413, 143 Cal. Rptr. 225, 573 P.2d 443 (1978). In Chown v. U.S.M. Corp., the court, even though this specific issue was not before it, and after first recognizing the "consumer expectations" test of unreasonably dangerous under Aller, went on to state that "another test" of unreasonably dangerous was whether the risk of the product outweighed its utility, citing Barker v. Lull Engineering, supra. What the court failed to recognize or explain in Chown is that the risk/utility test is an alternative to

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the consumer expectations test which has been adopted, for the most part, in jurisdictions which have abandoned the unreasonably dangerous requirement, as recognized previously in Eickelberg v. Deere, supra, 276 N.W.2d at 444. See, e.g., Barker v. Lull, supra ("unreasonably dangerous" not a required element of plaintiff's proof). Chown's citation to Barker is indeed questionable, in view of Barker's directly conflciting position on the unreasonably dangerous component of strict liability. To suggest, as newly revised Instruction 1000.4 does, that the "risk/utility" test may appropriately be submitted as an alternative to the traditional consumer expectation test of unreasonably dangerous, it is submitted, is not an accurate restatement of Iowa law as formulated by the Iowa Supreme Court over the last eleven years. At most, the presence of the risk/utility factor in Iowa product liability law can be regarded as one factor which the jury takes into account in product design cases in weighing whether the product is defective

and unreasonably dangerous under the traditional consumer expectations test. See, Aller v. Rodgers Machinery Mfg. Co., Inc., 268 N.W.2d at 835.

c. Whether a defendant will be liable for failure to warn under strict liability will in large part be determined by whether the court applies Restatement § 402A comment j as the test of the duty to warn, or comment k, dealing with "unavoidably unsafe products".

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d. At the outset, it is important to recognize that most courts and commentators (consistent with what the Iowa Supreme Court has done on the issue of warnings) find that the warning standard of comment j creates what is essentially a negligence standard, even under § 402A strict liability cases. See, Prosser and Keeton, Handbook of the Law of Torts (5th ed. 697) (1984) ("[b]ut not withstanding what a few courts have said, a claimant who seeks recovery on this basis [strict liability] must, according to the generally accepted view, prove that the manufacturer-designer was negligent").

e. Restatement § 402A comment j provides that in order to prevent the product from being unreasonably dangerous (comment i), the seller

may be required to give warnings, but also provides the seller is not required to warn against common allergies under the assumption that those with allergies will be aware of them. The comment states further, however:

> "Where, however, the product contains an ingredient to which a substantial number of the population are allergic, and the ingredient is one whose danger is not generally known, or if it is known it is one which the consumer would reasonably not expect to find in the product, the seller is required to give warning against it, if he has knowledge, or by the application of reasonable, developed human skill and foresight should have knowledge, of the presence of the ingredient and the danger." (emphasis supplied)

The foregoing statement from comment j is particularly important in the area of toxic torts which involve allegations by plaintiffs of "hypersensitivity" or "idiosyncratic" reaction.

f. If the defendant's duty is measured by comment j, which it should be except in the cases of unavoidably unsafe products (paragraph h, infra), defendant should not be liable for failure to warn in a "hypersensitivity" case unless two circumstances exist: (1) the danger is unreasonable and extends to a substantial number of the population; and (2) the defendant has knowledge or should have knowledge of the danger (Restatement § 402A, comments i and j).

g. It is apparent that analysis of the duty to warn under Restatement § 402A, comment j, leads to what is essentially a negligence standard even under strict liability cases. Jurisdictions which reject the two required elements of knowledge on the part of the manufacturer and the "substantial number of allergic consumers" essentially impute knowledge of all dangers to the seller, which results in virtual absolute liability for the defendant. See, Beshada v. Johns-Manville Products Corp., 447 A.2d 539 (N.J. 1982).

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h. Comment j should be distinguished from comment k, which pertains to "unavoidably unsafe products". Comment k is applied to products such as drugs and vaccines, which in the present state of human knowledge, are incapable of being made safe for their intended and ordinary use. Where a product is classified as unavoidably unsafe, the sole basis for potential liability for the defendant is failure to warn.

i. The primary distinction between comment j and comment k is that unavoidably unsafe products under comment k are almost exclusively drugs and vaccines, and are known to cause some

reactions in users even if used with all due care. Conversely, comment j should be applied to products which present an unreasonable risk of harm only if used improperly (with the exception of hypersensitive or allergic reactions). As to the latter reactions, liability under comment j for failure to warn will be determined by the two-part test identified in paragraph f above.

j. Although courts seldom compare the two comments, those which take a broad view of the scope of strict liability cite comment k for support, and courts seeking to limit the scope of strict liability rely upon comment j. Presbrey v. Gillette Co., 434 N.E.2d 513 (Ill. App. 1982); Oakes v. Geigy Agricultural Chemicals, 272 Cal. App.2d 645 (1969).

k. It appears that the American Law Institute in drafting section 402A and the accompanying comments intended to embody the common law rule against recovery for idiosyncratic reactions in comment j; thus no recovery should be permitted under this comment for hypersensitive reactions unless the seller of the product has knowledge or should have knowledge of the danger, and a

substantial number of the population are allergic to the product.

1. As observed above, the Iowa Supreme Court has essentially drawn no distinction between the standard of the duty to warn in negligence cases versus strict liability cases under Restatement § 402A. See, Cooley v. Quick Supply Co., 221 N.W.2d 763, 769 (Iowa 1974) (under dual theories of negligence and strict liability, the court separated its analysis of duty to warn but made no attempt to distinguish the two standards, and applied the same analysis to each theory). Henkel v. R & S Bottling Co., 323 N.W.2d 185 (Iowa 1982), wherein the court, dismissing alleged errors in the lower court's treatment of the strict liability failure to warn claim, cited its earlier analyses of negligent failure to warn as being conclusive of its dismissal of the duty to warn count under strict liability as well. Finally, in Moore v. Vanderloo, 386 N.W.2d 108 (Iowa 1986), the court held there was no duty to warn on the part of the pharmaceutical manufacturer of unknown and unknowable risks. It cited as precedent West v. Broderick and Bascum Rope Co., 197 N.W.2d 202 (Iowa 1972), a negligent

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failure to warn case under Restatement § 388, and Bonowski v. Revlon, Inc., 100 N.W.2d 5 (Iowa 1959), the only Iowa case to expressly deal with an idiosyncratic reaction, finding no duty to warn of such reaction.

m. In Bonowski, plaintiff was injured because of reaction she had to defendant's suntan lotion. The evidence was that plaintiff's complaint was the only one received by the company in four years of marketing the product, during which over 5-million bottles of the suntan lotion had been sold. The evidence also demonstrated plaintiff's reaction was due to some unusual or abnormal condition of her skin. Finding no liability on the part of the manufacturer for failure to warn, the court adopted what it then termed the "overwhelming" majority rule that:

> "[On the issue of whether] a manufacturer, who places a product on the market, knowing that some unknown few, not in an identifiable class which could be effectively warned, may suffer allergic reactions or other isolated injuries not common to the ordinary normal person, must respond in damages...we think the prevailing and better rule is that injured persons in such cases cannot prevail." Id. at 8, 9.

Given the pronouncement of Bonowski, and the Iowa Supreme Court's subsequent merger of strict liability principles with negligence

standards in duty to warn cases, a compelling argument can be made that Iowa law does not require a duty to warn against unanticipated idiosyncratic reactions. Moore v. Vanderloo, supra.

n. Despite the pronouncement of the Iowa Supreme Court in Moore v. Vanderloo, Henkel v. R & S Bottling Co., and Cooley v. Quick Supply, supra, it is obvious that the Eighth Circuit Court of Appeals does not like the Iowa Supreme Court's interpretation of Iowa law. Even after Moore v. Vanderloo was decided, the Eighth Circuit denied the government's petition for rehearing in Brazzell v. United States, 788 F.2d 1352 (8th Cir. 1986), vacated and remanded on motion for rehearing. Brazzell was handed down the same day as Moore, but was wrong in its prediction of Iowa law. Brazzell had applied a purely strict liability test on the warning issue, finding liability regardless of the defendant's knowledge of the potential danger. Despite the contrary result reached by the Iowa Supreme Court in Moore v. Vanderloo, the Eighth Circuit refused to grant rehearing, although remanding to the district court for

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"reconsideration in light of Moore v. Vanderloo". Id. at 1361.

o. Additionally, the Eighth Circuit in Kehm v. Proctor & Gamble Mfg. Co., 724 F.2d 613 (8th Cir. 1983), purporting to apply Iowa law, rejected the Bonowski rule precluding liability for idiosyncratic reactions as not applying to strict liability claims under section 402A. It should be noted that Kehm and Brazzell, supra, were decisions premised under comment k to the Restatement § 402A, which as observed, supra, applies a higher standard than comment j. These cases demonstrate the comment pursuant to which the court chooses to analyze the duty to warn issue will largely determine the outcome of the case.

p. In summary, despite decisions of panels of the Eighth Circuit which reach seemingly contrary results, the Iowa Supreme Court's decision in Moore v. Vanderloo signals implicit acceptance of the defense of "idiosyncratic reaction" by holding no duty to warn exists where knowledge of the danger was not known or knowable at the time of the injury.

D. ABNORMALLY DANGEROUS ACTIVITIES

1. Strict liability for release of a toxic agent has sometimes been imposed on the basis of the defendant conducting an "abnormally dangerous activity". Liability under this doctrine is strict liability, i.e., liability without proof of negligence. The principles of liability on this basis are set forth in Restatement (Second) Torts § 519-520. The doctrine stems from the famous English case of Rylands v. Fletcher, 3 H. and C. 774 (1865), rev'd L.R. 1 Ex. 265 (1866), aff'd, L.R. 3 HL 330 (1868).

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2. Section 519 Restatement (Second) Torts states:

> General principle.
> (1) One who carries on an abnormally dangerous activity is subject to liability for harm to the person, land, or chattels of another resulting from the activity, although he has exercised the utmost care to prevent the harm.
> (2) This strict liability is limited to the kind of harm, the possibility of which makes the activity abnormally dangerous.

3. The doctrine of abnormally dangerous activities as a form of strict liability has been adopted in Iowa. See, e.g., Lubin v. City of Iowa City, 257 Iowa 383, 131 N.W.2d 765 (1964); Watson v. Mississippi River Power Company, 174 Iowa 23, 156 N.W. 188 (1916); Monroe v. Razor Construction Co., 252 Iowa 1249, 110 N.W.2d 250 (1961). As stated by the Iowa Supreme Court in Davis v. L & W Construction Co., 176 N.W.2d 223, 225 (1970):

> "...If one engages in an activity on his own land of such hazardous nature as to involve a risk of harm to the person, land, or chattels of neighboring parties, he is liable for the consequences proximately resulting therefrom without regard to degree of care, the scientific manner it which it was done, the purpose or motive." [citing authorities]

See also, Stockdale v. Agrico Chemical Co., 340 F.Supp. 244, 266 (S.D. Iowa 1972) (applying Iowa law). Compare McGuire v. Pabst Brewing Co., 387 N.W.2d 565, 568 (Iowa 1986) (distributing alcoholic beverages is not an abnormally dangerous activity within § 519).

4. The key in determining whether this basis of liability applies is whether or not the activity is in fact "abnormally dangerous" as determined by the factors delineated in Restatement § 520:

> (a) The existence of a high degree of risk of some harm; (b) the likelihood that the harm that results will be great; (c) inability to eliminate the risk by the exercise of reasonable care; (d) extent to which the activity is not a matter of common usage; (e) inappropriateness of the activity to the place where it is carried on; and (f) the extent to which its value to the community is outweighed by its dangerous attributes. Restatement § 520.

5. For an activity to be "abnormally dangerous" so as to impose strict liability, it not only must create a danger of physical harm to the others, but the danger must be an abnormal one. Generally, abnormal dangers arise only from activities that are in themselves unusual or from unusual risks. Whether the risk is so unusual as to impose liability on this basis depends on its magnitude and the circumstances surrounding it so as to justify as a matter of policy the imposition of strict liability, even though the activity is carried on with all reasonable care. Restatement § 520, comment f.

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6. Another important element of this basis of liability is determining whether the danger is so abnormal that it is impossible to eliminate the risk by the exercise of reasonable care. Ordinary activities which can be made safe by taking reasonable precautions are not within the purview of this doctrine. Restatement § 520, comment h. Only when safety cannot be attained by the exercise of all due care is the activity to be regarded as abnormally dangerous, comprising an unavoidable risk even though all reasonable precautions have been taken in advance.

7. As indicated, liability for abnormally dangerous activity has been adopted in Iowa. In National

Steel Service Center v. Gibbons, 319 N.W.2d 269 (Iowa 1982) (answering certified questions posed), the court noted that it was committed to "a broader application of the strict liability doctrine of Rylands v. Fletcher than is reflected in the Restatement", and that the doctrine is not limited to "ultrahazardous" activity. 319 N.W.2d at 273. The distinctions between "ultrahazardous" activity and "abnormally dangerous" activity are beyond the purview of this outline, but see Healey v. Citizens Gas & Electric Co., 199 Iowa 82, 201 N.W. 118 (1924); Restatement § 520, comment h (combination of factors listed in § 520 makes the activity "ultra-hazardous"); Gibbons, supra.

8. Liability for conducting an abnormally dangerous activity has been imposed in other jurisdictions in toxic tort cases. See, e.g., Sterling v. Velsicol Chemical Corp., 647 F.Supp. 303 (W.D. Tenn. 1986), aff'd in part, rev'd in part, 855 F.2d 1188 (6th Cir. 1988), holding, among other bases of liability, that operation of a chemical dump site constituted an "abnormally dangerous activity" sufficient to impose strict liability.

E. NEGLIGENCE

1. Negligence is available as a theory of recovery in toxic tort cases under the traditional standard,

failure to exercise ordinary care. It is not used frequently in toxic tort circumstances because of the availability of strict liability as a theory either in the products area or for engaging in what are deemed to be "ultrahazardous activities", to which strict liability applies, such as operating a chemical disposal site.

2. The best illustration of the application of negligence principles is accomplished by reference to specific cases. For example, in Sterling v. Velsicol Chemical Corp., 647 F.Supp. 303 (W.D. Tenn. 1986) aff'd in part, rev'd in part, 855 F.2d 1188 (6th Cir. 1988), plaintiffs were residents who lived near a landfill owned and operated by Velsicol. Plaintiffs brought a class action for personal injury damages alleging that hazardous chemicals had leaked from the landfill and contaminated the local water supply, asserting theories of negligence as well as strict liability, trespass, and nuisance. Plaintiffs' allegations of negligence included Velsicol's selection of the site, the manner in which the chemical waste was containerized, its burial procedures, negligence in allowing chemical waste to escape from the burial site and infiltrate into the water system, and failure to conduct hydrogeologic studies to determine if the waste site

was suitable on top of a water aquifer. 647 F.Supp. at 308.

3. The district court found Velsicol liable on plaintiffs' negligence counts, as well as strict liability, trespass, and nuisance. The district court's opinion contains extensive discussion of the legal theories upon which recovery was permitted at 647 F.Supp. 303, 311-324, and review of that decision is commended. The district court opinion was substantially modified as to damages on appeal, however, 855 F.2d 1188 (6th Cir. 1988).

4. One common circumstance under which negligent liability in respect to toxic agents could arise is as a possessor of land, even if a strict liability standard is not applied because the elements of abnormally hazardous activity are not met. The liability of possessors of land for dangerous conditions existing on their land is set forth in Restatement (Second) Torts, §§ 328E, et seq. The Restatement essentially provides that a possessor of land is liable if (a) he knows or has reason to know of an unreasonably dangerous condition of the premises; and (b) he fails to exercise reasonable care to make the conditions safe or to warn about the condition. Restatement § 342, 343.

5. Negligent liability for duty to warn is essentially consistent with the standard of the Restatement (Second) § 343, as to premises liability, and with respect to the negligent sale of a dangerous product, Restatement § 388, discussed supra, at pp. 35-36. Other cases which have imposed liability on the basis of negligence in connection with toxic agents include Knabe v. National Supply Div., Armco Steel Corp., 592 F.2d 841 (5th Cir. 1979) (negligence for pollution of water supply to plaintiff's dairy business); Bangor v. Ship Fernview, 455 F.Supp. 1043 (D. Md. 1978) (chemical manufacturer negligent in producing chemical emissions from its plant which obstructed visibility at a nearby pier, causing collision of cargo vessel).

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F. TRESPASS AND NUISANCE

1. The theories of trespass and nuisance may also be available in a toxic tort situation. Trespass is an intentional harm, and where there is no intentional act, there is no trespass. Sterling v. Velsicol Chemical Corp., supra, 647 F.Supp. 303, 317.

2. Some courts have applied Restatement (Second) Torts, § 165, which imposes liability for trespass which is the result of reckless or negligent conduct, or abnormally dangerous activities. See, Sterling v. Velsicol, supra, at 318.

3. Liability may also be imposed on a defendant in a toxic tort case under the doctrine of nuisance, which again is an "intentional" interference, in that defendant has created the condition causing the nuisance with full knowledge that harm to the plaintiff's interest is bound to follow. See, Stockdale v. Agrico Chemical Co., 340 F.Supp. 244, 266 (S.D. Iowa 1972) (applying Iowa law, and discussing distinctions between liability for conducting an abnormally dangerous activity and nuisance).

4. As observed by the court in Stockdale, supra, the elements of nuisance are more difficult to apply in many toxic tort circumstances, and it is likely that a common law negligence theory or strict liability for conducting an abnormally dangerous activity is a more likely theory to be encountered.

IV. STANDARDS OF PROOF AND ADMISSIBILITY OF EXPERT TESTIMONY ON CAUSATION

A. FRYE V. UNITED STATES - WHETHER THE THEORY OR METHOD IS GENERALLY ACCEPTED

1. Under the rule announced in the landmark case of Frye v. United States, 293 F. 1013 (D.C. Cir. 1923), the opinions of an expert which are based on scientific theories or principles which have not gained general acceptance in the particular field must be excluded. This rule requiring "general

scientific acceptance" is traced to the rejection of expert testimony in Frye concerning a "systolic blood pressure deception test", a predecessor of the polygraph. In discussing the degree to which "general scientific acceptance" should be a foundational predicate to the admissibility of expert testimony, the D.C. Circuit Court of Appeals set forth the following, now frequently-cited, statement:

> "Just when a scientific principle or discovery crosses the line between the experimental and demonstrable changes is difficult to define. Somewhere in this twilight zone the evidential forces of the principle must be recognized, and while courts will go a long way in admitting expert testimony deduced from a well-recognized scientific principle or discovery, the thing from which the deduction is made must be sufficiently established to have gained general acceptance in the particular field in which it belongs. Frye, supra at 1014 (emphasis supplied).

2. Frye has been criticized by some commentators and courts as too restrictive and not in accord with the liberal parameters of Federal Rule of Evidence 702. It has also been criticized as imposing requirements of "general acceptance" not imposed on other types of expert opinion testimony. See, McCormick, Handbook of the Law of Evidence, § 203, pp. 488-89 (2d ed. 1972).

3. Proponents of the Frye test, however, view it as an important safeguard against the unreliability of novel, untested scientific evidence or theory.

4. Resolving this Frye "dilemma" has been a central issue in many toxic tort cases. It has also been the subject of several proposals for reform of the Federal Rules of Evidence. See, Lederer, "Resolving the Frye Dilemma - A Reliability Approach", Proposals for a Model Rule on Admissibility of Scientific Evidence (ABA Section of Science and Technology Symposium) 115 F.R.D. 84 (1987).

5. The Iowa Supreme Court has specifically rejected blanket application of the Frye rule of "general acceptance" as a requirement for admissibility, where "the reliability of the evidence is otherwise established". State v. Hall, 297 N.W.2d 80 (Iowa 1980). It also held, however, that "general scientific acceptance" is one test of "reliability" and the extent of foundation necessary will depend on the complexity of the subject matter. Id. at 85.

6. In Hall, the supreme court rejected across-the-board application of the rule based in part on the fact that "acceptance in the scientific community" is a nebulous concept, and expressed concern that the court cannot surrender to a "vote of scientists" the

determination of admissibility of the evidence. Id. at 85.

7. In Hall, a murder case where the defendant was accused of stabbing the victim, the court admitted expert testimony based on a "blood spatter pattern" theory of a criminalist who had spent years studying and doing experiments on the "flight characteristics" of blood. While the theory was not shown to have gained "general acceptance" in the field, the court found the testimony reliable because (a) the study of blood characteristics is "relatively uncomplicated"; (b) the theory is based primarily on commonly understood principles of physics and mathematics; (c) it involved observations "based on common sense" and which lie "close to the ken of an average layman"; (d) the "inherent" understandability of the evidence provided sufficient basis for its admission. State v. Hall, supra at 83-86.

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8. A close reading of State v. Hall and other Iowa Supreme Court cases dealing with technical or scientific evidence, however, demonstrates that the foundational showing of reliability remains essential. The test which emerges from State v. Hall, supra, is as follows:

> "...The rationale of Frye should apply insofar as it bears upon the reliability of the proffered evidence. Accordingly, we do not believe that "general scientific acceptance" is

> a prerequisite to admission of evidence, scientific or otherwise, if the reliability of the evidence is otherwise established." (emphasis supplied) Hall, supra at 85.

9. The court in Hall thus recognized that the complexity of the subject matter will influence the foundational showing of reliability necessary for admission, and notes, as examples, the foundation for such subject matters as neutron activation analysis, United States v. Stifel, 433 F.2d 431, 441 (6th Cir. 1970), requires greater input from the scientific community. Hall, supra at 85.

10. See also, Henkel v. Heri, 274 N.W.2d 317 (Iowa 1979) (rejecting opinion testimony as to vehicle speed based on method not scientifically reliable); State v. Conner, 241 N.W.2d 447 (Iowa 1976) (rejecting polygraph evidence).

11. Thus, the crucial issue is whether the proffered evidence is in fact reliable, and acceptance in the scientific community is one factor to be considered on this important issue.

12. As applied to the toxic tort context, cases which involve technically complex matters of science or medicine should be distinguished from the court's "inherent understandability" type of evidence discussed in State v. Hall.

13. Even jurisdictions which reject blanket application of the Frye test employ some alternative test of admissibility designed to require some showing of reliability of the theory or technique, such that the expert opinion based thereon is not prejudicial or misleading. Some courts, not content to reject proffered evidence solely on the test of whether it is "generally accepted" in the scientific community, have instead undertaken in-depth analysis of the underlying data upon which the expert testimony rests to determine its reliability, either pursuant to a motion for summary judgment or F.R.E. 104(a) permitting pretrial determinations of admissibility of evidence. See, e.g., In Re Agent Orange, supra at 1239; Brock v. Merrell-Dow Pharmaceuticals, Inc., 874 F.2d 307, 309-311 (5th Cir. 1989).

14. The federal circuit courts of appeals are split on the question of whether scientific evidence must meet the Frye test of general acceptability. Compare, U.S. v. Solomon, 753 F.2d 1522, 1526 (9th Cir. 1985) (narcoanalysis of defendant inadmissible in arson case under Frye); Barrel of Fun, Inc., v. State Farm Fire & Casualty, 739 F.2d 1028, 1031 (5th Cir. 1984); Osburn v. Anchor Laboratories, Inc., 825 F.2d 908 (5th Cir. 1987) (adopting a "modified" Frye approach, holding opinion need not be generally

accepted in the scientific community but must be based upon methods which are well-founded and utilized by other experts in the field); U.S. v. McBride, 786 F.2d 45, 49 (2d Cir. 1986) with United States v. Downing, 753 F.2d 1224 (3d Cir. 1985) (rejecting Frye, substituting three-factor test of reliability and relevance); U.S. v. Gould, 741 F.2d 45, 49 (4th Cir. 1984) (whether evidence has "substantial" acceptance in the relevant discipline is sufficient); Ellis v. International Playtex, Inc., 745 F.2d 292, 304 (4th Cir. 1984); Sprynczynatyk v. General Motors, 771 F.2d 1112, 1122 (8th Cir. 1985) cert. den'd sub nom McQueen v. Garrison, 108 S.Ct. 332 (1987) (applying a "flexible rule", post-hypnotic testimony permitted on a "case by case basis" if "properly conducted").

15. The United States Supreme Court has declined to resolve the split in the federal circuits on the application of Frye. Mustafa v. United States, 479 U.S. 953 (1986).

16. A review of decisions in various cases across the country demonstrates that while Frye has been a "formidable barrier" to the admission of novel scientific evidence, its "restrictiveness" has been entirely justified in most cases by excluding evidence shown to be unreliable but permitting evidence

which meets sufficient tests of reliability. Starrs, "Frye v. United States, Restructured and Revitalized: A Proposal to Amend Federal Evidence Rule 702", Symposium on Rules for Admissibility of Scientific Evidence, 115 F.R.D. 92, 95 (1987). It has been observed that there are few decisions where evidence was ruled inadmissible that, in the hindsight of technological developments, should have been admitted. Spaeth, "Proposed Amendment to the Federal Rules on Admissibility of Scientific Evidence: A Judge's Perspective", 115 F.R.D. 112, 118-119 (1987).

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17. The risk of potential prejudice where an unwary court steps into the scientific controversy, and mistakenly allows admission of questionable scientific evidence, has been aptly demonstrated in certain criminal cases. While the consequences may not be as dramatic, the risk of prejudice is equally great in toxic tort civil cases. See, e.g., United States v. Williams, 583 F.2d 1194 (2d Cir. 1978) cert. den'd, 439 U.S. 1117 (1979). Refusing to adopt the Frye rule, the court permitted evidence of voice analysis. One year after the decision the National Academy of Sciences, asked to evaluate use of spectrograms for voice identification by the FBI, concluded that "the technique of voice

identification is a practical methodology that is rather widely used, but that lacks a solid theoretical basis of answers to scientific questions concerning the foundations of voice identification." Committee on Evaluation of Sound Spectrograms, National Research Council, On the Theory and Practice of Voice Identification 10 (1979).

18. Similarly, a decision of the Ohio Supreme Court, State v. Williams, 4 Ohio St.3d 53, 446 N.E.2d 444 (1983), allowed admission of voice spectrographic evidence. One commentator, referring to the result as "wretched", has noted that the opinion not only cited as authority a superceded edition of an authoritative text (which seriously questioned the voice print's validity), but also wholly omitted the above-referred to National Academy of Science's 1979 study. Starrs, supra, 115 F.R.D. 92, 100 (1987).

19. As State v. Williams, supra, demonstrates, the courts and juries are often ill-equipped to make judgments as to the scientific validity of evidence in complex areas such as toxic tort cases. See, Brock v. Merrell-Dow Pharmaceuticals, 874 F.2d 307, 309 (5th Cir. 1989), where the Fifth Circuit Court of Appeals recently stated:

> "...[In toxic torts there is] a growing realization among academics, lawyers, and judges that cases such as this present special problems and challenges to traditional ideas

regarding the role of the jury as a decision-maker." Brock v. Merrell Dow Pharmaceuticals, Inc., 874 F.2d 307, 307 (5th Cir. 1989).

See also, Puhl v. Milwaukee Automobile Ins. Co., 8 Wis. 2d 343, 99 N.W.2d 163 (1959) (applying Frye court's wisdom in rejecting opinions of plaintiff's experts that trauma caused Down's Syndrome confirmed by later medical studies confirming Down's Syndrome is caused by chromosomal imbalance and not trauma from accidents).

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20. In Brock, supra, the Fifth Circuit reversed a jury verdict in favor of plaintiffs against Merrell-Dow, manufacturer of the drug Bendectin, holding that the lack of sufficient scientific (epidemiologic) proof was fatal to the element of causation as a matter of law, and to permit the jury to determine causation in the face of strong contradictory scientific evidence would be a resort to speculation. 874 F.2d at 309.

21. As might be expected, whether the Frye test is applied to the proffered expert testimony in many toxic tort cases is largely determinative of the outcome of the case. The following are examples:

    a. In Re Agent Orange, 611 F.Supp. 1223 (E.D. N.Y. 1985) aff'd, 818 F.2d 145 (2d Cir. 1987). In a treatise-like opinion, Judge Weinstein granted summary judgment to the manufacturers of Agent

Orange in opt-out claims from the In Re Agent Orange class action. Judge Weinstein held that while the medical principles underlying plaintiffs' case need not have been shown to be "generally accepted" by the scientific community, the court was obligated to independently review the reliability of the underlying data upon which the experts relied. He further held that in view of mounting epidemiologic studies that have been unable to demonstrate any connection between Agent Orange and various illnesses such as alleged by plaintiffs, the affidavits of plaintiffs' experts in resistance to the motion for summary judgment were insufficient. Among other things, the court found that reliance on animal data was inappropriate ("at most, they collectively have the probative force of a scintilla of evidence", 611 F.Supp. at 1238), and conclusory allegations that plaintiffs' symptoms were "consistent with" exposure to Agent Orange, without ability to so state within reasonable medical certainty, and account for the myriad of other causes or possible explanations of plaintiffs' conditions, were insufficient as a matter of law. In Re Agent Orange, at 1237-38.

b. Judge Weinstein's conclusion from Agent Orange is that whether the "general acceptability" test controls or not, when either the expert's qualifications or the testimony lie at the periphery with what the scientific community considers acceptable, special care should be used in evaluating the reliability and probative worth under Rule 703. 611 F.Supp. at 1242.

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c. In Re Paoli Railroad PCB Litigation, 706 F.Supp. 358 (E.D. Pa. 1988) (expert opinions alleging plaintiff's diseases caused by exposure to PCBs inadmissible where based solely on results of animal tests, and which were contrary to epidemiologic studies, as lacking in reliability, and even if questionably reliable, more prejudicial than probative; specifically citing failure of plaintiff's experts to provide differential diagnoses, or scientific or medical support for their conclusions).

d. Johnston v. United States, 597 F.Supp. 374 (D. Kansas 1984) (in case alleging injury from radioactive aircraft instruments, plaintiffs' expert's mathematical exposure calculations "flawed", and conclusions were not supported by

any fact other than exposure to radiation and each plaintiff had cancer; such data is inaccurate, incomplete, "rank speculation", and unreliably assessed).

e. Sterling v. Velsicol Chemical Corp., 855 F.2d 1188, 1207 (6th Cir. 1988) (rejecting clinical ecology theories of immune system damage where principles relied upon by plaintiff's experts were not in conformity to a generally accepted explanatory theory, and citing "scientific acceptance" test of Frye as bearing on whether the methodology is in conformity to an accepted explanatory theory).

f. Richardson v. Richardson-Merrell, Inc., 857 F.2d 823 (D.C. Cir. 1988) (plaintiff's expert's theory of causation, contrary to substantial epidemiologic evidence to the contrary, insufficient evidence of causation as a matter of law).

g. Brock v. Merrell Dow Pharmaceuticals, Inc., 874 F.2d 307 (5th Cir. 1989) (reversing jury verdict and ordering dismissal of Bendectin case due to lack of conclusive epidemiologic proof, as "fatal" to plaintiff's claims, and re-affirming its view of the "very limited

usefulness of animal studies" on questions of human toxicity, 874 F.2d at 313).

h. But see, Peteet v. Dow Chemical Co., 868 F.2d 1428 (5th Cir. 1989) (permitting expert testimony as to the cause of plaintiff's cancer where underlying methodology of plaintiff's expert's diagnosis found consistent with methods generally approved in the medical field, including scientific literature). It should be noted that the Fifth Circuit is among a minority of circuits which defer solely to the expert to determine what sort of data is "reasonably relied upon by experts in the field", and thus not permitting the court to undertake an independent inquiry as to the reliability of the underlying data. See, Peteet at 1432, citing, In Re Japanese Electronic Products Antitrust Litigation, 723 F.2d 238, 277 (3d Cir. 1983) rev'd on other grounds, 475 U.S. 574 (1986); Contra, In Re Agent Orange, supra (court undertakes detailed inquiry into the reliability of expert's underlying data, and is not bound by expert's statement that the data is "of a type reasonably relied upon" in the field).

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i. See also, Villari v. Terminix Intern. Inc., 692 F.Supp. 568 (E.D. Pa. 1988) (permitting admissibility of animal studies, noting the Third Circuit's "liberal approach" to permitting experts to base their opinions on data reasonably relied upon by experts in the field, and noting that animal data is relied upon for various purposes in the scientific community, distinguishing In Re Agent Orange, supra, and Lynch v. Merrell National Laboratories, 646 F.Supp. 856, 865-67 (D. Mass. 1986) aff'd, 830 F.2d 1190 (1st Cir. 1987) (finding animal data not capable of proving causation in humans).

22. In view of the importance of expert opinion to determination of causation in toxic tort cases, and the complexity of the subjects which are involved in this inquiry, a recent statement of the Fifth Circuit Court of Appeals is worthy of note and should be urged in any case where the court is asked to "police" the latitude given to "experts" who intend to predict the cause of diseases such as cancer:

> "We expect that our decision here [dismissing plaintiff's claims] will have a precedential effect on other cases pending in this circuit which allege Bendectin as the cause of birth defects. Hopefully, our decision will have the effect of encouraging district judges faced with medical and epidemiologic proof in subsequent toxic tort cases to be especially vigilant in scrutinizing the bases, reasoning,

and conclusiveness of studies presented by both sides." Brock, supra, 874 F.2d at 315.

B. GOVERNMENT STANDARDS - RELEVANCE; REGULATORY SCIENCE VERSUS PURE SCIENCE; QUALITATIVE ANALYSIS VERSUS QUANTITATIVE ANALYSIS

1. By reason of the fact that many toxic substances are now extensively regulated by state and federal governments, any personal injury case involving toxic tort claims will likely involve questions of admissibility or relevance of government standards, regulatory studies, etc.

2. For defense counsel to address these issues, it is important that counsel understand the difference between standards underlying government regulation, and the purposes of the same (regulatory science), versus pure science principles in terms of whether causation in fact in the particular plaintiff can be scientifically established.

3. It is important to recognize that government standards on toxic substances are based on a federal regulatory policy, political in its origins, which is designed to create an extensive "margin of safety" for the nation's population in terms of toxic substances. It is based on what is known as "qualitative" risk assessment. Qualitative risk assessment is the use by regulatory agencies of animal tests, similarity in chemical structure, and

epidemiologic studies to arrive at a conclusion that the substance has the potential to be carcinogenic in humans.

4. A more controversial form of analysis, and the one which has direct impact on proof of toxic tort cases, is "quantitative" analysis, or the attempt to extrapolate by mathematical models the risk assessment from animal studies to arrive at an estimate of "risk" to humans, i.e., to predict which individuals will contract cancer at a given exposure level. Quantitative risk assessment is controversial, fraught with questionable assumptions, and generally regarded by science as unreliable as a predictor of future disease in humans. Consider the following comments of the district judge in Arnett v. The Dow Chemical Co., file no. 729586, Calif. Super. Ct. County of San Francisco, Memorandum Decision on Fear of Cancer and Risk of Cancer Claims (filed March 21, 1983), after noting assessment of cancer risk in humans is the subject of "intense debate" in the scientific community:

> "Quantitative assessment of risk of cancer in humans is only in an early stage of development, and given the present status of knowledge, provides only a crude estimate of individual risk; while such estimates may be useful in setting priorities for assessing public health problems, extrapolations of individual risk are only at the "frontiers of science" due to the great number of uncertainties involved." Id. p. 9.

5. Such extrapolations to arrive at estimates of human risk are highly suspect for numerous reasons beyond the scope of this outline; some of the questionable assumptions upon which the extrapolations are based include: (a) that chemicals behave similarly in humans and test animals, for example, rats or mice; (b) that the massive doses usually fed or induced into test animals are realistically indicative of human exposure; (c) that data compiled on "short lived" test animals, e.g., rats, is relevant to "long life" humans.

6. According to the National Academy of Sciences, there are more than fifty uncertain assumptions which form the basis for federal regulatory policy in regard to carcinogens. See, Managing the Process: Risk Assessment in the Federal Government, Washington, DC (1983).

7. See also, "Chemical Carcinogens: A Review of the Science and its Associated Principles", Federal Register, Part II (March 14, 1985), wherein the Office of Science and Technology Policy asserts that low dose risk estimations based on mathematical extrapolations contain many components which lack definitive scientific basis, and that "human cancer risk assessment is still in an evolutionary state".

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8. A report by the Interagency Regulatory Liaison Group (IRLG), a task force composed of the U.S. Consumer Protection Agency, U.S. Environmental Protection Agency, U.S. Food and Drug Administration, and U.S. Occupational Health and Safety Administration, concluded:

> "...while a close qualitative similarity has been established in the nature of the response of laboratory animals and of humans to carcinogenic substances, the quantitative correlation is more uncertain because of the marked variation of susceptibility in different animal species and among individuals in the human population." IRLG, Scientific Bases for Identifying Potential Carcinogens and Estimating Their Risks (1979).

9. An additional uncertainty about attempting a quantitative assessment of human risk based on animal data is the question of the dose-response curve as to low level exposures: Is the curve linear, or is there a threshold, i.e., a dose below which a carcinogen is safely metabolized by the body? See, Gaylor & Shapiro, "Extrapolation and Risk Estimation for Carcinogenesis", 1 New Concepts in Safety Evaluation, Part 2, 65 (1979).

10. In the defense of toxic tort cases, understanding the foregoing principles of quantitative risk assessment and "regulatory" science versus pure science and cause in fact is important. Such regulatory data is of questionable relevance and

reliability as proof of causation in the particular plaintiff.

11. Several courts which were willing to closely examine the underlying reliability of plaintiff's evidence have recognized the questionable relevance of such data, and found such proof insufficient to carry plaintiff's burden on causation. See, In Re Agent Orange, supra, 611 F.Supp. 1223, 1241 (finding animal studies to be of "little probative force" and "misleading" in attempting to predict causal relationship between exposure to Agent Orange and human disease); Richardson v. Richardson-Merrell, Inc., 857 F.2d 823, 830 (D.C. Cir. 1988) (chemical, in vitro and animal studies cannot provide sufficient foundation of causation; studies of this kind, "singly or in combination, are not capable of proving causation in human beings"); Vertibo v. The Dow Chemical Co., 826 F.2d 420, 424 (5th Cir. 1987) (rat studies not sufficient to support plaintiff's expert opinion of human causation); Lynch v. Merrell National Laboratories Division of Richardson-Merrell, Inc., 646 F.Supp. 856 (D. Mass. 1986), aff'd, 830 F.2d 1190 (1st Cir. 1987) (animal studies not sufficient evidence of causation in humans due to difference in species and unreliability of

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extrapolation from large dose studies to human exposure).

12. Even where evidence of violation of federal regulatory standards (e.g., OSHA) is admitted, the defense must remember that such does not establish causation. See, e.g., Stites v. Sundstrand Heat Transfer, Inc., 660 F.Supp. 1516, 1525 (W.D. Mich. 1987), where plaintiff's risk exposure expert calculated the "carcinogenic hazard to humans" of TCE in drinking water based upon government regulatory standards. Finding plaintiff's expert's affidavit insufficient to defeat defendant's motion for summary judgment, the court stated:

> "Dr. Lapp's concerns, however, are based on regulatory standards, not the Michigan legal standard of reasonable certainty. Plaintiffs may well have been exposed to TCE in amounts greatly exceeding those considered safe in either a domestic or a workplace environment. The court, however, is not concerned with regulatory standards in this case, important as they are, but rather must base its decision on the Michigan legal standard." (emphasis supplied)

13. For further discussion of use of animal tests as evidence, see, Gleeson, "Exclusion of Animal Data as Evidence of Chemically Induced Disease", 29 For The Defense 25 (October 1987). For an excellent exposé of the fallacies underlying federal regulatory policy concerning cancer and toxic substances, see

Efron, The Apocalyptics: Cancer and the Big Lie (1984).

C. PROCEDURAL CHALLENGES TO EXPERT TESTIMONY

1. For the reasons set forth in the foregoing cases and discussion, testimony of plaintiff's expert may be subject to pretrial challenge. While the traditional motion in limine is available for this purpose, as are motions for summary judgment, consideration should be given to use of Federal Rule of Evidence 104, adopted in Iowa as Iowa Rule of Evidence 104, pursuant to which the court has the inherent power to decide questions of admissibility of evidence. Rule 104(a) has been specifically relied upon by some courts as a basis for pretrial inquiry into the reliability of the underlying data upon which plaintiff's expert's opinions rest. See, e.g., In Re Agent Orange Products Liability Litigation, 611 F.Supp. 1223, 1246 (E.D. N.Y. 1985), aff'd, 818 F.2d 145 (2d Cir. 1987).

2. It should be noted that the Committee comments to Iowa Rule of Evidence 702 specifically encouraged the use of Rule 104 to test the admissibility of plaintiff's expert testimony. See, Committee Comment Rule 702 (1983):

> "By adopting Rule 104(a)...the court has an additional tool to use in determining whether the scientific or technical knowledge will assist the trier of fact to understand the

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> evidence or determine an issue and whether the proffered witness is so qualified....Consistent with State v. Hall, 297 N.W.2d 80 (Iowa 1980), the scientific or specialized body of knowledge or discipline need not be one that is generally recognized in the scientific community, provided it meets the threshold test set forth in State v. Hall, supra. Through the liberal use of 104(a), it is anticipated that the court will have all the necessary proof before it so as to enable it to make this threshold decision". (emphasis supplied)

3. Seeking a determination under Rule 104 prior to trial as to the admissibility of plaintiff's expert testimony has several advantages, with little commensurate downside risk to the defense. The most obvious advantage is that a favorable ruling excluding such testimony may for practical purposes be dispositive of the entire case.

4. While pretrial challenges may be made by the traditional motion in limine, specific reliance on Rule 104 is preferable since it permits a challenge to the unreliability of the underlying data or basis as a factual matter, and the admissibility of opinions based thereon, and is not limited to seeking exclusion of prejudicial evidence.

5. Rule 104(c) expressly provides that the court may hold an evidentiary hearing on such preliminary matters of admissibility. See, Notes of Advisory Committee, Federal Rule 104(a) (rule contemplates that the judge will of necessity receive "evidence

pro and con" on the factual issue which is to be determined).

6. It should also be noted that while much of the text of Rule 104, and the case law applying the rule in the federal courts, apply to criminal cases, the rule also clearly applies to determination of preliminary questions of admissibility in civil cases. See, Notes of Committee on the Judiciary, House Report No. 93-650 (104(c) permitting evidentiary hearings was construed by the Judiciary Committee "as applying to civil actions").

7. It should also be noted that determination of preliminary questions of admissibility in toxic tort cases may come within the type of complex case wherein evidentiary matters are appropriately determined at the pretrial stage for purposes of efficiency. See, Manual for Complex Litigation, Second, § 21.642 (West 1985). For cases where pretrial challenges to expert testimony have been successful for defendants, see, e.g., In Re Agent Orange, supra; Stites v. Sundstrand Heat Transfer, Inc., 660 F.Supp. 1516 (W.D. Mich. 1987); In Re Paoli Railroad Yard PCB Litigation, 706 F.Supp. 358 (E.D. Pa. 1988). See also, Sapp, "Pretrial Challenges to Expert Testimony in Toxic Tort Cases", For The Defense (June 1989).

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V. DAMAGES

A. DAMAGES - IN GENERAL

1. The latency of the onset of symptoms represents a unique issue in terms of recovery.

   a. When did the "injury" occur? Did it occur when the body first became "susceptible" to future disease, i.e., did the body suffer "subcellar" injury? Or did the injury occur when the disease first appeared symptomatically?

   b. Consider the discovery rule and statute of limitations problems with respect to the foregoing question.

2. "Risk of future injury" claims represent a unique issue addressed by the courts in the toxic tort area. The problem is largely determining whether and when an "injury" has yet occurred. Has the injury occurred in fact, especially if the future disease alleged is only a "possibility"? The policy question presented is whether the courts will allow legal recovery of present compensation for a condition that might never occur in the future. This should be distinguished from the allowance of the traditional recovery for future consequences of a present identifiable injury. See, Anderson v. W. R. Grace and Co., 628 F.Supp. 1219, 1231 (D. Mass.

1986), aff'd sub nom Anderson v. Cryovac, Inc., 862 F.2d 910 (1st Cir. 1988).

3. Should damages be permitted for purely "emotional" injury, such as "fear" of contracting cancer in the future due to the alleged toxic exposure?

4. Should damages be permitted for "medical monitoring", i.e., medical expenses incurred in monitoring the plaintiff's health for the possibility of future disease, even in the absence of a present, identifiable malady or injury?

B. DAMAGES - RECOVERY FOR INCREASED RISK OF DISEASE IN THE FUTURE

1. The threshold issue on this question is whether there is an identifiable present injury as a result of the alleged exposure.

2. Because the latent manifestation of disease, e.g., cancer, may be a characteristic of toxic injury, one of the major issues being litigated across the country is whether a presently "exposed", asymptomatic plaintiff can recover for "increased risk" of contracting disease in the future. That is, the issue is whether an "increased risk" of future disease is by itself a separately compensable present injury. See, e.g., Amendola v. Kansas City Southern Railway Co., 699 F.Supp. 1401, 1404 (W.D. Mo. 1988).

3. Plaintiffs often characterize this claim in terms of alleged increased "susceptibility" to future disease following an exposure to a toxic agent. See, e.g., Amendola, supra.

4. An initial key determination which must be made, and the one upon which most appellate decisions have turned, is whether the plaintiff has in fact proven a present physical injury, as opposed to whether the "increased risk" is the only injury shown.

5. The Iowa Supreme Court, as with most emerging issues in the toxic tort area, has not specifically addressed the question of increased risk of contracting future disease. The Eighth Circuit decision in Laswell v. Brown, 524 F.Supp. 847 (W.D. Mo. 1981) aff'd, 683 F.2d 261 (8th Cir. 1982) cert. den'd, 459 U.S. 1210 (1983), discussed infra, arose out of Missouri and applied Missouri law.

6. The vast majority of courts have consistently rejected claims for increased risk of disease where the plaintiff was unable to demonstrate present physical injury. The following statements are representative of the majority position:

   a. Amendola v. Kansas City Southern Railway Co., 699 F.Supp. 1401 (W.D. Mo. 1988). In Amendola, railroad employees who came into contact with asbestos sought recovery under FELA for

increased "susceptibility" to asbestos-related diseases in the future and "mental anguish" resulting from their fear of contracting such diseases. In granting defendant's motion to dismiss for failure to state a claim, the court stated in part:

> "...the precise issue presented...[is] whether plaintiffs' alleged increased risk of contracting asbestos-related diseases in the future, absent a manifestation of physical injury, constitutes a sufficient present injury compensable under the FELA.... The courts have dealt squarely with the question of whether increased susceptibility to future disease is by itself a compensable present injury.... These courts have consistently rejected "increased risk claims" that are not accompanied by allegations of physical injury." Amendola at 1404.

b. Brafford v. Susquehanna Corp., 586 F.Supp. 14 (D. Colo. 1984), involving claims by plaintiffs for increased risk of cancer stemming from exposure to high levels of radiation, where the court stated:

> "It is the law in the Tenth Circuit as well as in other jurisdictions that an increased risk of cancer without an accompanying present physical injury is insufficient to state a claim for strict liability.... Accordingly in order to recover future damages for enhanced cancer risks, plaintiffs must have suffered a definite, present physical injury. This requirement is premised in the principle of tort law that the plaintiff must establish an injury that is not speculative in order to recover damages." Brafford at 17.

7. Much of the appellate law concerning the compensability of "increased risk" of future harm has developed in the asbestos litigation. The clear majority of these decisions have denied recovery for increased risk of developing cancer, or other diseases, in the absence of present physical injury and sufficient proof of reasonable probability that the future disease will occur. See, e.g., Dartez v. Fibreboard Corp., 765 F.2d 456 (5th Cir. 1985) (plaintiff must establish reasonable medical probability that such diseases would appear in the future); Lohrmann v. Pittsburgh Corning Corp., 782 F.2d 1156 (4th Cir. 1986) (plaintiff with asbestosis not permitted to introduce evidence of enhanced cancer risk where he could not establish a reasonable probability that cancer would develop); Herber v. Johns Manville Corp., 785 F.2d 79 (3d Cir. 1986) (evidence of risk of future cancer properly excluded where plaintiff could not establish that pleural thickening of his lungs would more likely result in cancer in the future). Compare, Gideon v. Johns Manville Sales Corp., 761 F.2d 1129 (5th Cir. 1985) (plaintiff with asbestosis permitted to present evidence of increased cancer risk because reasonable medical probability of developing cancer established); Jackson v. Johns Manville Sales Corp., 781

F.2d 394 (5th Cir.) cert. den'd, 478 U.S. 1022 (1986) (plaintiff suffering from asbestosis permitted to recover for increased risk of developing cancer where evidence showed he had a greater that fifty percent chance of contracting cancer).

8. The reasoning of the appellate courts in the asbestos area has been followed as to other toxic tort claims.

9. Most courts have also held that inhalation of asbestos fibers alone does not represent an actionable, present physical injury. See, e.g., Amendola v. Kansas City Southern Railway Co., supra, 699 F.Supp. 1401, 1403, n. 3.

10. A question arising both in asbestos cases and other toxic tort cases has been whether the mere "exposure" to the toxin has resulted in a "subcellar" injury, which the plaintiff claims satisfies the "present injury" requirement. See, e.g., Brafford v. Susquehanna Corp., 586 F.Supp. 14 (D. Colo. 1984) (defendant's summary judgment motion denied where plaintiffs' expert claimed plaintiffs had suffered present "chromosomal" damage which was a "trigger" of future cancer that had been "cocked"). Id. at 18.

11. Most courts, however, have held that "subcellar" or "subclinical" alleged injury, prior to manifestation

of symptoms, is insufficient "present injury" to permit submission of a claim for increased risk of future disease. See, e.g., Schweitzer v. Consolidated Rail Corp., 758 F.2d 936 (3d Cir. 1985); Jackson v. Johns Manville Sales Corp., 781 F.2d 394 (5th Cir. 1986).

12. Non-asbestos toxic tort cases where the courts have denied recovery for increased risk of disease without presently demonstrable injury include:

a. Stites v. Sundstrand Heat Transfer, 660 F.Supp. 1516 (W.D. Mich. 1987).

b. Anderson v. W. R. Grace and Co., 628 F.Supp. 1219 (D. Mass. 1986), aff'd sub nom, Anderson v. Cryovac, Inc., 862 F.2d 910 (1st Cir. 1988).

c. Amendola v. Kansas City Southern Railway Co., 699 F.Supp. 1401 (W.D. Mo. 1988).

d. In Re Paoli Railroad Yard PCB Litigation, 706 F.Supp. 358 (E.D. Pa. 1988).

e. Laswell v. Brown, 524 F.Supp. 847 (W.D. Mo. 1981) aff'd, 683 F.2d 261 (8th Cir. 1982) cert. den'd, 459 U.S. 1210 (1983).

In Laswell, a wrongful death action based on exposure of plaintiff's decedent to low-level radiation while in the military, the children of decedent claimed that their father's exposure had exposed them to an increased risk of disease and genetically

inherited cellular damage. Laswell, 524 F.Supp. at 850. In rejecting plaintiff's claims, the district court stated in part:

> "The complaint is conspicuously void of any allegations that the children have sustained any damage other than the exposure to a higher risk of disease and cellular damage. A lawsuit for personal injuries cannot be based upon the possibility of some future harm." Laswell, 524 F.Supp. at 850 (emphasis in original).

The Eighth Circuit affirmed the district court's opinion, Laswell v. Brown, 683 F.2d 261 (8th Cir. 1982) cert. den'd, 459 U.S. 1210 (1983). The Eighth Circuit agreed that absent allegations of present physical injury, recovery for increased susceptibility of future disease would not be permitted. Id.

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13. The rationale of the Third Circuit in Schweitzer v. Consolidated Rail Corp., 758 F.2d 936, 942 (3d Cir. 1985), is typical of the logic applied for denying claims based only on "subcellar" (non-manifested) injury:

    a. Workers who never manifested any injury or illness would still have a claim for damages simply because they were "exposed".

    b. Damages to be awarded would by definition be speculative.

    c. Persons who never became ill would receive a windfall.

d. Because not all future disease is equally disabling, determination of disability effects before manifestation of the disability would also be speculative. Schweitzer, supra at 942.

Similarly, as stated in the unreported opinion of Arnett v. Dow Chemical Corp., No. 729586, Calif. Super. Ct. (filed March 21, 1986), [cited in Anderson v. W. R. Grace and Co., 628 F.Supp. 1219, 1232 (D. Mass. 1986)], "to award damages based on a mere mathematical probability would significantly undercompensate those who actually do develop cancer and would be a windfall to those who did not".

14. Distinguish: Determination of whether a present injury has occurred for purposes of tort recovery, supra, and determination of when a "first injury" arises for purposes of insurance coverage, as the applicable tests will be different. See, e.g., Insurance Co. of North America v. Forty-Eight Insulations, Inc., 657 F.2d 814, 816 (6th Cir. 1984) (exposure alone to asbestos sufficient to impose duty to defend on insurance company).

15. It should be further noted that a claim that any "subcellar" or chromosomal change in itself is a link to cancer is not scientifically supported. See, e.g., Gotts, "Medical Causation and Expert Testimony", 6 Regulatory Toxicology and

Pharmacology, 95-102 (1986); Gotts, "The Science of Medical Causation: Its Application in Toxic Tort Litigation", Toxic Tort Litigation (DRI Monograph, 1986).

16. In addition to the requirement of "present injury", a second, equally important requirement on risk of future disease claims is that the plaintiff prove that it is reasonably probable or reasonably certain (depending on the jurisdiction) that the plaintiff will in fact suffer the particular disease in the future. IMPORTANT: It is crucial to distinguish a claim for increased risk of disease from recovery for the future consequences of a present injury. The following are representative cases and explanatory statements of the courts:

a. Ayers v. Jackson, 189 N.J. Super. 561, 461 A.2d 184 (1983) (damages not recoverable where plaintiff's proof did not establish likelihood of future injury to a reasonable degree of medical certainty, the court noting that plaintiffs' expert could not formulate a quantitative measure to a reasonable medical certainty of the excess cancer risk, and it was therefore left to speculation as to the possible consequences of their ingestion of the alleged carcinogens).

b. Hagerty v. L & L Marine Services, Inc., 788 F.2d 315 (5th Cir.), reconsideration den'd, 797 F.2d 256 (5th Cir. 1986) (en banc) (plaintiff who was drenched with chemicals containing known carcinogens sought damages for increased risk of developing cancer, recovery denied on the basis that plaintiff did not allege with medical certainty that the cancer would develop, and that plaintiff's increased risk was not presently compensable because he could not show the exposure would more probably than not lead to cancer).

c. Devlin v. Johns Manville Sales Corp., 202 N.J. Super. 556, 495 A.2d 495 (1985) (denying plaintiff's claims for enhanced risk of cancer from asbestos exposure where plaintiff's expert was unable to state with a reasonable degree of medical certainty that plaintiff would contract cancer in the future).

d. Sterling v. Velsicol Chemical Corp., 855 F.2d 1188 (6th Cir. 1988) (increased risk of cancer claim denied where estimated increased risk was only 25 to 30 percent, the same not constituting "reasonable medical certainty, but rather a mere possibility or speculation". 855 F.2d at 1205.

e. Stites v. Sundstrand Heat Transfer, 660 F.Supp. 1516 (W.D. Mich. 1987), (plaintiffs alleging exposure to TCE failed to prove reasonable certainty of acquiring cancer; the court specifically noted that its standard of "reasonable certainty" test is a higher standard than "reasonable probability".

17. Despite the majority position, supra, some courts have been less than clear. See, e.g., Hagerty v. L & L Marine Services, 788 F.2d 315 (5th Cir. 1986), modified, 797 F.2d 256 (1986). In Hagerty, the Fifth Circuit initially held that plaintiff could recover for "cancerphobia" "with or without physical injury or impact". 788 F.2d at 318. While denying a petition for rehearing en banc, the Fifth Circuit issued a modifying opinion in which the court stated:

> "We said in our prior writing that a plaintiff may recover damages for serious mental distress "with or without physical injury.... This assumed an actionable injury and we intended no opinion as to the nature of the injury required to give rise to an actionable claim."

Several justices who dissented from the denial of petition for rehearing en banc issued a concurring opinion to the modification order which stated:

> "The panel's modification of the original opinion eliminates potential ambiguity by expressly holding that there must be an actionable injury.... This change means that [plaintiff] must show either a traumatic event

> giving rise to physical injury or mental injury, or physical injury resulting from the incremental effect of harmful substances. The modification eliminates the possibility that [plaintiff] may recover for cancerphobia, without showing either physical injury or a traumatic event...." 797 F.2d at 256. (emphasis supplied)

18. Even courts which have denied defendants' summary judgment or dismissal motions where plaintiffs have claimed "subcellar" damages have often recognized the concern that such an allegation leads to a conclusion that mere exposure to the toxin is enough to constitute an actionable claim. See, Brafford v. Susquehanna Corp., supra, 586 F.Supp. at 17-18.

19. Thus, as to the initial issue of the existence of present injury, the vast majority of cases require (a) that there be such a present injury before increased risk of disease can be considered, and (b) the "present injury" must be more than an allegation of "subcellar" or "subclinical" damages, i.e., a claim that "the chemical is in my body" is insufficient. See, e.g., In Re Paoli Railroad Yard PCB Litigation, 706 F.Supp. 358 (E.D. Pa. 1988). In Paoli, the district court rejected plaintiff's claim that the presence of PCBs "in their body" was sufficient present injury, holding that unless the amount of PCBs was "unusually high and [plaintiffs] could demonstrate that they have been more heavily exposed

to PCBs than the general population, plaintiffs cannot recover". In Re Paoli at 375.

20. As demonstrated in such cases as Stites, supra, and Ayers v. Township of Jackson, supra, plaintiffs' experts must be able to do more than simply testify that there is an "increased risk" ... there has to be some medical proof quantifying that risk, i.e., testimony that the future disease is reasonably probable or reasonably certain to manifest itself. QUERY: Whether this is scientifically possible in the modern state of medical knowledge.

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21. A recent decision of the New Jersey Supreme Court, denying recovery for increased risk of cancer, has addressed these issues and synthesized the law in New Jersey. Mauro v. Raymark Industries, 1989 N.J. Lexis 100 (S.Ct. N.J. 1989).

22. In denying future risk claims, the courts have relied in part on the inability of modern science to sufficiently quantify the specific risk to a particular plaintiff (quantitative analysis) as opposed to an ability to generally equate disease in a statistical number of test animals, and then extrapolating that data to a conclusion that a substance is a potential carcinogen to affect humans (qualitative analysis). In Re Paoli Railroad Yard

PCB Litigation, 706 F.Supp. 358, 373-374 (E.D. Pa. 1988).

23. One of the few reported district court opinions to permit recovery for an increased risk of future harm was reversed in part and substantially modified on later appeal. Sterling v. Velsicol Chemical Corp., 647 F.Supp. 303 (W.D. Tenn. 1986) aff'd in part, rev'd in part, 855 F.2d 1188, 1205 (6th Cir. 1988) (district court's finding of increased probability of future disease of less than fifty percent insufficient to constitute reasonable medical certainty).

C. DAMAGES - EMOTIONAL DISTRESS - RECOVERY FOR FEAR OF CONTRACTING FUTURE DISEASE - MEDICAL MONITORING EXPENSES

1. One anomalous result recurring in toxic tort cases is permitting recovery for emotional distress for fear of contracting future disease even in a case where plaintiff is unable to prove increased risk of the disease within the required reasonable degree of probability. See, e.g., Mauro v. Raymark Industries, Inc., ___ N.J. ____ (1989 N.J. Lexis 100) (N.J. S.Ct., decision filed August 1, 1989) (permitting recovery for emotional distress based on reasonable concern of contracting future disease, while denying plaintiff's claim for enhanced cancer risk due to inability of plaintiff's expert to

quantify the risk or state that it was reasonably probable plaintiff would contract cancer).

2. Such claims for emotional distress or fear of contracting future disease are often referred to as "cancerphobia" claims. Some courts have regarded cancerphobia as merely a specific type of mental anguish which is recoverable where there is a present and existing injury due to the exposure. See, e.g., Sterling v. Velsicol Chemical Corp., 855 F.2d 1188, 1206 (n. 24), (6th Cir. 1988); see also Hagerty v. L & L Marine Service, 788 F.2d 315 (5th Cir.), rehearing den'd, 797 F.2d 256 (5th Cir. 1986) (en banc).

3. As with many issues in the toxic tort context, it is important to precisely define the specific claim being made. Most claims for fear of increased risk of cancer or other diseases are essentially claims for unintentional infliction of emotional distress. Thus, allowance of recovery may be determined under the existing law of the particular jurisdiction as to recovery for negligent infliction of emotional distress, including, e.g., whether the emotional distress must be severe and whether it must be accompanied by physical injury.

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4. The status of the law in general on this issue is summarized in Prosser and Keeton, The Law of Torts, § 54, p. 361 (5th ed. 1984):

> "...where the defendant's negligence causes only mental disturbance, without accompanying physical injury, illness, or other physical consequences, and in the absence of some other independent bases for tort liability, the great majority of courts still hold that in the ordinary case there can be no recovery."

5. Consistent with the above statement, most cases in the toxic tort area dealing with "cancerphobia" claims turn on the issue of whether plaintiffs have in fact suffered accompanying physical injury. See, Mauro v. Raymark Industries, supra (allowing emotional distress recovery for plaintiff who had sustained physical injury because of exposure to toxic chemicals based on reasonable concern of enhanced risk of further disease, despite disallowance of the enhanced risk claim for insufficient evidence); Sterling v. Velsicol Chemical Corp., supra (mental distress consisting of fear of increased risk of cancer allowed where "fear" results from "already existent injury" which may lead to future onset of disease). 855 F.2d at 1206.

6. As illustrated by Mauro and Sterling, supra, the anomalous result which may occur is the allowance of recovery for emotional distress for fear of a future disease even though recovery is denied for the risk

of future disease itself. The Sixth Circuit in Sterling rationalized this anomaly as follows:

> "...The central focus of a court's inquiry in such a case is not on the underlying odds that the future disease will in fact materialize. To this extent, mental anguish resulting from a chance that an existing injury will lead to the materialization of a future disease may be an element of recovery even though the underlying future prospect for susceptibility to a future disease is not, in and of itself, compensable inasmuch as it is not sufficiently likely to occur." 855 F.2d at 1206.

7. It must be emphasized that in both Sterling and Mauro, supra, there was proof of present physical injury (although in Mauro it apparently was not symptomatic). In Mauro, the New Jersey Supreme Court stated:

> "We need not and do not reach the question of whether exposure to toxic chemicals without physical injury would sustain a claim for emotional distress damages based on a reasonable fear of future disease...." 1989 N.J. Lexis 100, 19. (emphasis supplied)

8. In contrast to Sterling and Mauro, see Amendola v. Kansas City Southern Railway Co., 699 F.Supp. 1401 (W.D. Mo. 1988); In Re Paoli Railroad Yard PCB Litigation, 706 F.Supp. 358 (E.D. Pa. 1988); Anderson v. W. R. Grace and Co., 628 F.Supp. 1219 (D. Mass. 1986), aff'd sub nom, Anderson v. Cryovac, Inc., 862 F.2d 910 (1st Cir. 1988).

9. In Amendola, supra, the court denied plaintiffs' claims for mental anguish resulting from fear of

contracting asbestos-related diseases in the future. The court found that since plaintiffs did not allege either a precipitating physical injury which caused the mental anguish, or that physical consequences had been caused by the mental anguish, recovery would not be permitted. Id. at 1407. After extensive discussion of authorities, notably Payton v. Abbott Labs, 386 Mass. 540, 437 N.E.2d 171 (1982) (cataloging extensive list of jurisdictions requiring physical harm as a precondition to recovery for emotional distress), the court in Amendola concluded:

> "...A claim under the FELA for emotional distress, negligently caused, must be accompanied by allegations of physical harm which either caused or was caused by the emotional distress." 699 F.Supp. at 1409.

10. Similarly, in In Re Paoli, supra, the court denied plaintiff's claim for emotional distress and increased risk of disease in the absence of present physical injury:

> "...Plaintiffs must point to some health problem that they have or they are out of court under Pennsylvania law. If the best they can do is possibility of future harm, fear of future harm, emotional distress, or the mere fact that they have PCBs in their body, then those plaintiffs cannot recover." 706 F.Supp. at 375.

11. The facts of Anderson v. W. R. Grace and Co., supra, are also illustrative of this issue:

a. In Anderson, plaintiffs were the legal representatives of deceased children who died of leukemia and immediate family members. Plaintiffs alleged the leukemia was caused by exposure to contaminated water which had infiltrated drinking wells in the community. Plaintiffs sued under various theories, including nuisance. Plaintiffs sought damages for surviving family members for "emotional distress" in "witnessing" the deaths of their children.

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b. Defendant's motion for summary judgment was denied in part because plaintiffs also alleged "physical harm", albeit non-objective, supported by affidavits of their expert, Alan S. Levin (a "clinical ecologist", see pp. 23-29, supra).

c. On the issue of emotional distress for "witnessing the death of their children", however, the court held there was insufficient "temporal" relationship and denied recovery. The court found that there was "no dramatic traumatic shock" causing "immediate" emotional distress such as required to allow recovery. 628 F.Supp. 1219, 1230.

d. The court held there could be no recovery for purely emotional distress which was built up over time because of a child's prolonged illness. Id.

12. It should be further noted that the court in Anderson rejected plaintiff's alleged increased risk of future harm claim, requiring proof of "reasonable probability" that harm would occur in the future as opposed to a mere possibility. The court also considered whether the future claim are part of "present injury claims" if the future claims are not of the same type of conditions from which plaintiff presently suffers and is seeking recovery. 628 F.Supp. at 1231. The court stated:

> "The question thus becomes whether, upon the manifestation of one or more diseases, a cause of action accrues for all prospective diseases so that a plaintiff may seek to recover for physically distinct and separate diseases which may develop in the future.... The record is insufficient to determine whether leukemia and other cancers are part of the same disease process as the other illnesses alleged to have resulted from exposure to the contaminated water. If they are part of the same disease process, then plaintiffs may seek recovery for their future illness in this action by showing a "reasonable probability" that they will occur." 628 F.Supp. at 1231.

13. The Iowa Supreme Court has long adhered to the rule in negligence cases that no recovery is permitted for emotional distress or mental anguish unless there is an accompanying physical injury. Wambsgans

v. Price, 274 N.W.2d 362, 365 (Iowa 1979); Niblo v. Parr Mfg. Inc., ___ N.W.2d ___ (filed August 16, 1989), slip op. at p. 7. The supreme court has permitted recovery for emotional distress absent physical injury in the case of a bystander who suffered mental distress caused by witnessing negligent infliction of serious injury to a close relative. Barnhill v. Davis, 300 N.W.2d 104, 108 (Iowa 1981).

14. The court in Niblo, supra, gave lip service to the distinction between a tort involving willful or unlawful conduct (where mental distress recovery is permitted despite the lack of physical injury) and the general rule against such recovery in negligence actions. Given the court's willingness to focus on the theory of recovery, and "equate" a defendant's conduct to an "intentional" tort or some conduct above negligence, it is a short further step to permitting recovery for fear of negligent infliction of emotional distress.

15. QUERY: Whether the recent decision of the Iowa Supreme Court in Niblo v. Parr Mfg. Inc., supra, signals the possibility that the court might allow damages for emotional distress without a showing of accompanying physical injury, proof that the emotional distress was severe, or that infliction of

the distress was intentional. In Niblo, the court permitted recovery for emotional distress damages to an employee who was found to have been wrongfully discharged from employment in retaliation for threatening to file a workers' compensation claim, i.e., the discharge was in violation of public policy. The supreme court permitted recovery for emotional distress as an separate element of damages even without an accompanying physical injury and without requiring plaintiff prove that the emotional distress was severe. Slip op. at pp. 7, 15. The court rationalized its decision on considerations of public policy for the retaliatory discharge, equating the same to an intentional wrong which should support emotional distress recovery even without accompanying physical injury.

16. The position of New Jersey perhaps signals another emerging issue in this area. In Mauro, supra, the court apparently permitted the emotional distress claim on the basis that the emotional distress itself caused plaintiff's physical injury, and that this was sufficient to satisfy the "physical injury" requirement. A prior decision of the New Jersey court, Devlin v. Johns Manville Corp., 495 A.2d 495 (N.J. Super. Law Div. 1985), permitted recovery for emotional distress for fear of cancer where there

was no accompanying physical injury, except a diagnosed emotional distress for fear of cancer.

17. Other jurisdictions have been more restrictive, and expressly require the existence of physical injury before allowance of such "cancerphobia" claims to be permitted. See, Plummer v. Abbott Labs, 568 F.Supp. 920 (R.I. 1983); Eagle-Picher Industries, Inc., v. Cox, 481 So.2d 517, rehearing den'd, 492 So.2d 1331 (Fla. 1986). At least one jurisdiction has denied such recovery for fear of future harm as a matter of public policy. Howard v. Mt. Sinai Hospital, 217 N.W.2d 383, rehearing den'd, 219 N.W.2d 576 (Wis. 1974).

18. As to predicting the Iowa position on a "cancer-phobia" claim in the absence of physical injury, it can only be noted that the majority of decisions have imposed some sort of physical injury requirement before permitting this claim. See, Amendola, supra; Anderson v. W. R. Grace, supra. Even courts which have not required proof of physical injury as an element of fear of future disease claim, e.g., Bennett v. Mallinckrodt, Inc., 698 S.W.2d 854 (Mo. App. 1985) cert. den'd, 106 S.Ct. 2903, require that the fear be both reasonable and serious. In Bennett, supra, the court required that the claim be "medically diagnosable and medically significant"

even though physical injury was not required. But see, Niblo v. Parr Mfg., supra.

19. Another anomalous recovery permitted by courts even where plaintiffs have failed to establish a risk of future disease within a reasonable degree of probability, is the allowance of "medical monitoring" expenses. See, Mauro, supra, where the court, while denying plaintiff's claim for increased risk of cancer, permitted recovery for future medical expenses for "medical surveillance". Stated the court:

> "We hold that the cost of medical surveillance is a compensable item of damages where the proofs demonstrate...that such surveillance to monitor the effect of exposure to toxic chemicals is reasonable and necessary...this holding is thoroughly consistent with our rejection of plaintiffs' claim for damages based on their enhanced risk of injury". Id. 1989 N.J. Lexis 100, 16.

Compare, In Re Paoli Railroad Yard PCB Litigation, 706 F.Supp. 358, 376 (E.D. Pa. 1989), where the court rejected plaintiff's medical monitoring claim where plaintiff's proof was insufficient to establish a risk of future injury within a reasonable degree of probability.

COMPARATIVE FAULT UPDATE

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I. HISTORICAL REASONS FOR UNIFORM COMPARATIVE FAULT ACT

A. To address problems with the harsh all or nothing rule of contributory negligence at common law.

B. To prevent one party or the other from being treated unfairly.

C. Address the problems with contributory negligence and provide for the best solution.

D. Provide the opportunity for creating a desirable uniformity throughout the country. Comparative fault has been adopted in various forms throughout 43 states.

E. Iowa Supreme Court in Goetzman v. Wichern, 327 N.W.2d 742 (Iowa 1983) stated: "That comparative negligence is a fairer system. It diminishes but does not defeat the right to recover damages caused by another parties' fault. . . Under a system of comparative negligence, the keystone to fairness is proportionate responsibility for fault, not the relative severity of injuries." The Court adopted pure comparative negligence.

F. On July 1, 1984 the Iowa Legislature's Comparative Fault Act became effective and provided for a modified comparative fault act denying recovery where the plaintiff is 51% or greater at fault.

G. Chapter 668 of the Iowa Code broadened the application of the comparative fault concept from only negligent behavior to a defined class of acts and omissions which constitute fault as follows.

II. TO WHAT CASES IS CHAPTER 668 APPLICABLE?

A. Claims involving the fault of more than one party to the claim. Iowa Code Section 668.3(2). Johnson v. Junkmann, 395 N.W.2d 862 (Iowa 1986).

B. If the fault of more than one party is involved, the comparative fault act applies even if the plaintiff is blameless. Johnson v. Junkmann, 395 N.W.2d 862 (Iowa 1986).

C. Where more than one party is at fault in cases including the following species of fault:

1. Negligence;

2. Recklessness;

3. Strict liability;

4. Breach of warranty;

5. Unreasonable assumption of risk;

6. Misuse of a product;

7. Unreasonable failure to avoid an injury;

8. Unreasonable failure to mitigate damages;

D. Gross Negligence Actions

1. The Court has not ruled and the Act does not expressly provide that gross negligence is covered.

2. However, gross negligence is only a "greater degree of negligence" and not a "different kind of negligence." Sechler v. State, 340 N.W.2d 759, 763 (Iowa 1983).

3. The phrase ". . .in any measure negligent" in Section 668.1 would seem to contemplate and justify the inclusion of gross negligence actions within the Act.

4. The comments to the Uniform Comparative Fault Act suggest that "in any measure" is intended to cover all degrees and kinds of negligent conduct without the need of listing them specifically."

E. Misuse of the Product

1. Before the adoption of comparative fault, the Iowa Supreme Court held that misuse of the

product was not an affirmative defense, but proof of forseeable use was an element of the plaintiff's strict liability case. Hughes v. Magic Chef, 288 N.W.2d 542 (Iowa 1980).

2. Under Chapter 668.1 definition of "fault" misuse of a product for which the defendant otherwise would be liable is to be considered.

3. The comments to the Uniform Act support the interpretation that the Act only applies to forseeable use and therefore does not apply to a misuse giving rise to a danger that could have reasonably been anticipated and guarded against by the manufacturer.

4. Consequently, the language of Section 668.1, in light of the comments to Section 1 of the Uniform Act, indicates that unforseeable misuse remains a complete defense. This view is supported by the Supreme Court's past discussions of unforseeable misuse. See, Henkel v. R & S Bottling Co., 323 N.W.2d at 192 and Hedgwood v. General Motors Corp., 286 N.W.2d at 31.

5. The new jury instructions on this issue point out that the Jury Instruction Committee is not taking a position on this issue.

III. CASES IN WHICH COMPARATIVE FAULT ACT DOES NOT APPLY

A. Dram Shop Actions

1. Comparative fault is not a defense to a dram shop action. Slager v. HWA Corporation, 435 N.W.2d 349 (Iowa 1989).

FACTS: Co-conservators and co-guardians of a man shot and seriously injured by a minor who had been served intoxicating beverages brought a dram shop action against a liquor establishment and asserted an affirmative defense of comparative fault.

HELD: Comparative fault is not a defense to a dram shop action for the following reasons:

a. The dram shop statute is to protect the innocent;

b. Contributory negligence was not a defense to a dram shop action;

c. Under Goetzman, pure comparative fault was not a defense to a dram shop action;

d. Strict tort liability imposed by Section 123.92 is not common law strict tort liability to which Section 668.1(1) refers. Dram Shop Act, §123.92, provides the plaintiff may recover "all damages actually sustained, severally or jointly, against any licensee or permittee." This is contrary to Chapter 668.

e. The dram shop defense of complicity which is unique to dram shop liability is not included in Chapter 668.

f. The policy of Section 123.92 provides protection to innocent parties even though contributorily negligent in respects unrelated to the intoxication.

g. The court rejected the dicta in the Schreier v. Sonderleiter, 420 N.W.2d 821 (Iowa 1988) which seemed to imply that Chapter 668 would apply to contribution between two dram shop defendants.

NOTE: There was a dissent filed by Justices McGiverin, Harris and Neuman which indicates possible changes in the future.

2. The earlier case of Martin v. Heddinger, 373 N.W.2d 486 (Iowa 1985) was consistent with the Slager holding. It held that comparative fault concepts allowing plaintiff's negligence to reduce rather than bar recovery did not apply to complicity or assumption of risk defenses in a dram shop action.

B. Punitive Damage Claims - Comparative fault principals are not applicable to reduce awards of punitive damages. Godbersen v. Miller, 439 N.W.2d

206 (Iowa 1989). This was based on the following reasoning:

1. The object of punitive damages is deterrence and not proportional recovery.

2. Application of comparative fault would penalize the plaintiff for conduct over which he had no control while letting the defendants outrageous conduct go unpunished.

C. Acts or omissions which are not in any measure negligent or reckless towards the person or property of others such as:

1. Intentional acts;

2. Breach of warranty, not involved in personal injury or damage but which would come under the Uniform Commercial Code.

3. Breach of contract. Blue Earth Enterprises, Inc. v. Chauncy, _____ N.W.2d ____ (Iowa 1989 No. 88-453)

HELD: Section 668 does not apply to contract law because "contract law is generally based on recovery of what was contracted and contract law does not determine fault."

4. Assumption of the risk based on an enforceable express consent (in other words express contract).

D. Furnishing Alcohol to a Minor

FACTS: A minor was seriously injured in a diving accident which he claims was the result of his own intoxication. He and his parents sued the host of the party attended by the plaintiff on the night of the accident. The suit against the social host was based on their furnishing beer to him when he was under the legal age of 21. The District Court dismissed the suit against the defendants on the ground that social host liability had been abrogated by an amendment to the Iowa Code Section 123.49 (1987). This was reversed and remanded by the Supreme Court.

HELD: At the time the District Court dismissed the social host claim, the Supreme Court had not decided Bleze v. Weisbrod, 424 N.W.2d 451 (Iowa 1988) or Bauer v. Dann, 428 N.W.2d 658 (Iowa 1988) which held that the amendment to Section 123.49 was inapplicable to suits based on furnishing alcohol to an underaged consumer. The Court held that this case was based on the common law theory that a cause of action arises out of the violation of a criminal statute and not the dram shop statute so that the comparative fault statute should cover such an action.

III. WHO ARE CONSIDERED PARTIES UNDER SECTION 668.2?

A. Under 668.2 a party is defined as the following:

1. A claimant;

2. A person named as a defendant;

3. A person who has been released pursuant to Section 668.7;

4. A third-party defendant.

B. Person named as a party but not served with process is not a party under Section 668 and their fault cannot be considered. Collier v. General Inns Corp., 431 N.W.2d 189 (Iowa 1988)

C. No action lies between spouses for a loss of consortium claim and contributory fault of an injured spouse does not provide a defense to a loss of consortium claim on behalf of the deprived spouse against a third-party tortfeasor. Schwennen v. Abell, 430 N.W.2d 98 (Iowa 1988)

D. God is not considered a party under Section 668 so that acts of God defenses cannot be assigned a percentage of fault. Renze Hybrides, Inc. v. Shell Oil Company, 418 N.W.2d 634 (Iowa 1988)

1. Section 668.1 defines fault in terms of duties owed to and violated by human factors.

2. Acts of God are not contained in that definition of fault.

3. Suit involved Seed Corn Grower against an insecticide producer for breach of implied warranty of fitness alleging the insecticide failed. Defendant appealed for failure to allow Act of God to be an assignment for percentage of fault.

E. Under Section 668.2 the statutory definition of "party" does not include persons not sued by plaintiff until after the expiration of the statute of limitations. Betsworth v. Morey's and Raymond's, 423 N.W.2d 196 (Iowa 1988).

FACTS: The plaintiff was injured as she left a store in a city mall. She brought a negligence action against the store for failure to remove accumulations of ice and snow. After the statute of limitations had run the plaintiff amended the Petition to include the City arguing that the "unless otherwise required" language of Section 668.2 allowed suit against the party whose identity is not known until there is discovery.

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HELD: The "unless otherwise required" language does not include a party which is not sued until after the expiration of the statute of limitations. However, there is "always" the possibility, of course, that such a defendant might be brought in as a third-party defendant, and in that case the statute of limitations would not be a barrier. See Reese v. Werts, 379 N.W.2d 1(5) Iowa 1985.

F. "Party" does not include a party who has been dismissed from the case. Payne Plumbing and Heating Co. v. Bob McKiness Excavating and Grading, Inc., 382 N.W.2d 156 (Iowa 1986).

G. A "party" does not include a person who had helped create a hazard causing an injury, but who was unidentified. Baldwin v. City of Waterloo, 372 N.W.2d 486 (Iowa 1985).

H. Known parties to an occurrence from who no relief was sought are not "parties". Peterson v. Pittman, 391 N.W.2d 235, 238 (Iowa 1986).

I. Unnamed parties who may be at fault are not indispensable parties under Chapter 668. Selchert v. State, 420 N.W.2d 816 (Iowa 1988).

FACTS: The plaintiff seriously injured in an automobile accident sued the driver of the other vehicle in the dram shop covering a verdict. The verdict was uncollectible so she then sued Interstate Power Company, the State of Iowa and the City of Dubuque. The defendants alleged that the judgment and the allegations of fault made by the jury operated as a bar to plaintiff's claims in their litigation. They moved for summary judgment claiming the doctrine of res judicata when read with Iowa's Comparative Fault Act and the rules of Civil Procedure compelled dismissal of suit since they should have been "indispensable parties."

COURT HELD: The Iowa Comparative Fault Act does not require bringing in all of the parties who may be at fault to one lawsuit and that if they are not named parties or settling parties in the lawsuit the fault may not be attributed to them. The Court upheld its previous decisions strictly interpreting the definition of "party" under 668.2 limiting parties to named defendants, persons released pursuant to settlement or third-party defendants.

J. A defendant can urge a non-party's negligence is a proximate cause without pleading it as an affirmative defense so as to allow the jury to apportion fault to them. Blue Earth Enterprises, Inc., et al v. Chauncey, et al., _____ N.W.2d _____ (Iowa 1989).

FACTS: Plaintiff sued defendants in negligence and breach of contract arising out of the construction of a building for a pizza franchise. Plaintiffs were awarded damages on both negligence and breach of contract counts. Plaintiffs had also sued the owner of the land in a separate lawsuit and that was settled. The Trial Court refused to allow the fault of the landowner to be be compared to the fault of the plaintiffs and defendants in the present case.

COURT HELD: The Supreme Court held that a defendant can urge a non-party's negligence as a proximate cause without pleading it as an affirmative defense since it seeks to negate an element of the defendant's case instead of asserting new facts and avoidance of the claim. Because of this

the Court found that Section 668.2 concluded the landowner is a settling party so that the landowner's fault should have been compared with that of the plaintiffs and defendants.

IV. EFFECTIVE RELEASE IS NEEDED TO OBTAIN CONTRIBUTION UNDER 668.5

A. Under §668.6 Contribution - the person bringing the action for contribution must have discharged the liability of the person from whom contribution is sought.

B. If this is to be proved by relying upon a release agreement settling all claims, it is necessary under §668.7 to have an effective release.

C. In the case of AID Ins. Co. v. Davis County, 426 N.W.2d 631 (Iowa 1988), the insurance company settled the claim of its motorcycle driver made by the injured passenger. The plaintiff concluded that the defendant, Davis County, was negligent in the maintenance of its road and sued for contribution. The release purported to discharge "all other persons, firms, or corporations, known or unknown, who are, are might be claimed to be liable..." The defendant argued that the release did not discharge their liability since they were not specifically named. They relied on the "unless it (the release) so provides" language of the statute.

HOLDING: The Iowa Supreme Court held that the lease did not discharge the liability of Davis County as they were not sufficiently identified as tortfeasors to be discharged based on the following reasoning:

1. Requiring specific identity of the released parties will clarify their respective rights and will minimize the possibility of mistake regarding the release's effect.

2. It will eliminate the ambiguity factor.

Under the terms of the release the released parties must be "sufficiently identified in a manner that the parties to the release would know who was to be benefitted."

Considering the parties to this action and the facts of this case, it would appear the Court leaned toward protecting the interest of the municipality over the insurance company.

V. INDEMNITY AND CONTRIBUTION UNDER COMPARATIVE FAULT ACT

A. The doctrine of indemnity based on active-passive negligence does not fit within comparative fault and is abandoned. American Trust and Savings Bank v. United States Fidelity & Guaranty Company, 439 N.W.2d 188.

FACTS: A bank sued its accounting firm on its failure to discover embezzlement at the bank. The accounting firm sought indemnity or contribution from the bank's current and past members of the Board of Directors claiming a breach of their duty of ordinary care owed the bank. The claim arose out of an officer's embezzlement of a substantial sum of money over a number of years. The accounting firm had conducted annual examinations of the bank and failed to conduct them properly so as to uncover the embezzlement. The directors moved to dismiss the third party action against them and this was sustained by the District Court. The accounting firm appealed claiming that if it is liable at all, it is a common liability with the directors.

HOLDING: Under §668.6(1), contribution may be recovered only for the amount paid in excess of the party's proportionate share of damages. Since a bank acts through its officers and directors, any fault assessed against the directors will reduce the accountant's liability to the bank under the principles of comparative fault. Consequently, the accounting firm could not make a claim for contribution in excess of their own equitable share so the District Court correctly dismissed the contribution action.

Under the principles of comparative fault, liability should be assessed and apportioned according to fault with each party bearing its own share of the loss. Since indemnity shifts the entire loss of the passively negligent party to the actively negligent party and it is difficult to decide what constitutes active negligence versus passive negligence, the comparative fault principles more

accurately apportion the loss to the responsible party and the Court abandons indemnity based on active-passive negligence.

NOTE: There were no allegations the directors acted in bad faith towards the accountants, rendered knowing assistance to the embezzling officer, or participated in the embezzlements but merely that they breached the duty of ordinary care to the bank.

B. Defendant cannot obtain contribution under §668.5 against the plaintiff's employer.

1. Section 668.5(1) provides that "A right of contribution exists between or among two or more persons who are liable upon the same indivisible claim for the same injury..."

2. Contribution is available between concurrent tortfeasors only when they share a common liability to the injured party. McIntosh v. Barr, 397 N.W.2d 516 (Iowa 1986).

3. No common liability is shared between a third party tortfeasor and a plaintiff's employer whose liability is limited by §85.20 of the Worker's Compensation Act. Iowa Power and Light Co. v. Abild Construction Co., 134 N.W.2d 303 (Iowa 1966).

4. An employer's negligence cannot be considered by a jury to reduce a third party tortfeasor's liability to the plaintiff. See Speck v. Unit Handling Div. v. Litton Sys., Inc., 366 N.W.2d 543 (Iowa 1945).

5. Correspondingly, a defendant cannot sue the plaintiff's employer for contribution under §668.5(1). Mermigis v. Service Master Industries, Inc., 437 N.W.2d 242 (Iowa 1989).

C. Release under §668.7 provides for pro rata set off. Thomas v. Solberg, 442 N.W.2d 73 (Iowa 1989);

FACTS: In the Thomas case, the plaintiff received a $75,000.00 partial settlement with two of the three defendants and the jury ultimately found the settling defendants liable for less than that

amount. Judgment was entered against the nonsettling defendant based upon fault allocated to her by the jury. The nonsettling defendants requested an order requiring full satisfaction of judgment based on allocation of the dollar-for-dollar credit for settlement against total damages. The District Court denied the motion of the nonsettling defendant appeal.

HOLDING: The Supreme Court held that the proportionate credit rule would be applied in all partial settlements of comparative fault cases regardless of whether plaintiff negotiated partial settlement that ultimately resulted in her receiving more than the jury or Court award. In this case the plaintiff made a good settlement with one of the defendants and received $22,008.47 more than the judgment. However, if it was a bad settlement, they could receive less under this pro rata rule.

BASIS OF DECISION: Section 668.7 provides "the claim of the releasing person [plaintiff] against other persons [nonsettling defendants] is reduced by the amount of the released person's [settling defendants] equitable share of the obligation, as determined under 668.3, subsection 4. "The equitable share of the obligation is a percentage of fault assigned to the settling defendant by the trier of fact."

EXAMPLE:

Jury Verdict of $100,000.00

Settling defendant pays $50,000.00 and is only 25% at fault.

Remaining defendant 75% at fault is liable to pay $75,000.00.

Plaintiff recovers total of $125,000.00.

VI. GOVERNMENTAL EXEMPTIONS UNDER SECTION 668.10

A. Section 668.10 Governmental Exemption

In any action brought pursuant to this Chapter, the State or municipality shall not be assigned a percentage of fault for any of the following:

1. The failure to place, erect, or install a stop sign, traffic control device, or other regulatory sign as defined in the Uniform Manual for Traffic Control Devices adopted pursuant to §321.252. However, once a regulatory device has been placed, created or installed, the State or municipality may be assigned a percentage of fault for its failure to maintain the device.

2. The failure to remove natural or unnatural accumulations of snow or ice, or to place sand, salt or other abrasive material on a highway, road or street if the State or municipality establishes that it has complied with its policy or level of service for snow and ice removal or placing sand, salt or other abrasive material on its highways, roads or streets.

3. For contribution unless the party claiming contribution has given the State or municipality notice of the claim pursuant to §§25A.13 and 613A.5.

B. Case Citations

1. Saunders v. Dallas County, 420 N.W.2d 468 (Iowa 1988)

FACTS: The passenger on a motorcycle brought an action against the County for injuries sustained when the motorcycle went off a secondary road, alleging the County was negligent in its placement of reverse curve sign which warned of curves on the road. The plaintiff was negligent in:

a. Placement of a reverse curve sign at an inappropriate distance from the highway curve;

b. In the placement of only one reverse curve sign instead of two curve signs; and

c. In failure to post one or more advisory speed plates.

FACTS: The sign was not positioned at the proper distance from the curve according to the manual on Uniform Traffic Control Devices. The County's position was that positioning of a sign is nothing other than a "failure to place, erect or install, that sign a correct distance from the curve and, under the statute this failure can be no basis for liability." Plaintiff contended that Section 668.10(1) only applied when the municipality completely failed to place, erect, or install a traffic control device.

HOLDING:

i. Failure to post speed signs is an engineering choice which is a matter plainly within the scope of immunized negligence.

ii. This case comes down to a decision about whether or where to place traffic signs and negligent decisions of this kind are precisely the ones Section 668.10(1) immunizes from liability.

iii. A decision whether to replace the sign, to move it, or to supplant it with one or more other signs, is not a matter of maintenance under the statute.

iv. The decision in Hershberger v. Buena Vista County, 391 N.W.2d 217, is limited to complaints about the execution of a plan to place signs. (It is difficult to reconcile this decision with the Hershberger decision discussed below.

2. Hershberger v. Buena Vista County, 391 N.W.2d 217 (Iowa 1986).

FACTS: A County placed a right turn sign upon a road which turned left.

HOLDING: The immunity provision of 668.10(1) did not apply because the Petition alleged, not a failure to install the device, but rather alleged it was installed in a negligent manner not in accordance with the plan.

3. Prell v. Wood, 386 N.W.2d 89 (Iowa 1986).

FACTS: An injured automobile passenger sued the County for failure to install rumble strips at an intersection. The District Court dismissed the case and the Supreme Court affirmed.

HOLDING: In construing Section 668.10, the Court found that a rumble strip was a "traffic control device" and pursuant to that Section the County was immune from suit. The Court held that a traffic control device may be an object other than a sign. The Court held that whether a rumble strip is a traffic control device is a legal, not factual, issue which the trial court could properly determine.

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4. Metier v. Cooper Transport Co., Inc., 378 N.W.2d 907 (Iowa 1985).

FACTS: Plaintiff sued for injuries after she collided with a truck owned by the defendant. Plaintiff had swerved on the highway to avoid a deer colliding with the defendant. The plaintiff alleged the State of Iowa was negligent for failing to put a deer crossing in an area they knew deers crossed and accidents had occurred.

HOLDING: The Court found that a deer crossing sign was a traffic control device within the meaning of Section 668.10(1). Therefore, the State was not at fault and was exempt from suit.

VII. APPELLATE REVIEW CONCERNING APPORTIONMENT OF FAULT IS SUBSTANTIAL EVIDENCE RULE

A. Cook v. State, 431 N.W.2d 800 (Iowa 1988)

FACTS: The District Court heard this case involving an accident on a state highway. The Court

found in favor of the plaintiff on the liability issue and provided that the plaintiff was 10% at fault. Among other things, the state appealed claiming that the evidence was insufficient to support a finding of the state's negligence and proximate cause and the allocation of fault.

HOLDING: On appellate review the Supreme Court will follow the same principles on apportionment of fault that have been applied to the determination of negligence and causation - the substantial evidence rule. If the Court or jury's findings are supported by substantial evidence "when a reasonable mind would accept it as adequate to reach a conclusion" then the decision will be upheld.

VIII. CASES INVOLVING AFFIRMATIVE DEFENSES

A. The plaintiff's failure to mitigate damages by consulting a doctor on a regular basis is a defense. Miller v. Eichorn, 426 N.W.2d 641 (Iowa App. 1988).

FACTS: The plaintiff filed an action against the defendant for damages sustained as a result of an automobile collision. The defendants said that the plaintiff failed to mitigate her damages by using due care and following her doctor's advice.

HOLDING: The Court held that under 668.1 [fault] also includes. . ., unreasonable failure to avoid an injury or to mitigate damages. The Court held there is a duty for a person to use ordinary care in consulting a physician. In order for the Court to submit that issue there must be evidence showing that consultations with a physician on a regular basis would have mitigated damages. Since there was testimony by one of the plaintiff's doctors that additional chiropractic treatments would have helped Connie's condition that was sufficient to support the submission of the issue to the jury for them to find she did not use due care in following her doctor's advice.

B. Failure to give sudden emergency instruction did not prejudice plaintiff because issue of her reacting to the sudden movement of plaintiff's vehicle was sufficiently before the jury by virtue of other instructions. Miller v. Eichorn, supra.

1. The Court indicated that the purpose of sudden emergency instruction when dealing with the fault of two competing parties become somewhat hazy when viewed in the comparative negligence context. The emergency doctrine is a reiteration of the reasonable man standard since when an actor who is forced by exigencies, makes less than optimal decisions, the trier of facts should not necessarily find negligence but rather should consider the emergency and, accordingly the reasonableness of the actor's conduct.

2. Iowa has retained the sudden emergency instruction even with the adoption of comparative fault but it is not err to give it where the instructions given were that the plaintiff was required to be reasonable under the circumstances.

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IX. PROCEDURAL REMINDERS AND THOUGHTS ON COMPARATIVE NEGLIGENCE

A. Require the Court to review the verdict and special interrogatories before discharging the jury so as to correct any inconsistencies. Section 668.3(6).

B. Designate expert witnesses in liability cases involving licensed professionals within 180 days of the defendants answer if you are the plaintiff or 90 days of plaintiff's certification if your the defendant. Section 668.11.

1. Obtain extension of time of disclosure but not ex parte.

2. This does not apply to Court appointed experts or to rebuttal experts called with the approval of the Court.

C. Plead and prove state of art defense to avoid assignment of fault. Section 668.12.

D. Introduce evidence of previous payment or future right of payment in personal injury cases. Section 668.14.

1. Determine whether this is wise under the facts.

2. Only applies to payment of actual economic losses incurred or to be incurred as a result of the personal injury for necessary medical care, rehabilitation services, and custodial care except the extent that the previous payment or future right of payment is pursuant to a state or federal program or from assets of the claimant or members of the claimant's family.

3. Consider attempting to introduce evidence as to payment for compensation as well and to argue that the collateral source doctrine would no longer apply based on legislative intent set forth in this section and medical malpractice section of the code.

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E. Requested Instructions

1. Request special interrogatories requiring jury to separate past damages and future damages to limit interest on future damages. Section 668.13.

2. Require special interrogatories regarding amounts awarded for medical care, rehabilitation services, custodial care, economic loss, etc. in order to limit subrogation rights. Section 668.5(3) provides that recoveries for subrogation losses "shall not exceed that portion of the judgment or verdict specifically related to such losses as shown by itemization of the judgment or verdict rendered under Said 668.3(8).

3. Under Section 668.5(3) subrogated persons "shall be responsible for a pro rata share of the legal and administrative expenses incurred in obtaining the judgment or verdict.

4. Under Section 668.5(4) subrogation payment restrictions imposed pursuant to subsection 3 apply to settlement recoveries but only to the extent that the settlement was reasonable.

F. Petition the Court for Determination of Appropriate Payment Method of Judgment. Section 668.3(7).

1. This Section allowed the defendant to ask the Court to order that a payment method for all or part of the judgment be structured, periodic or other nonlump-sum payments.

2. The Court may not do so if the following are true:

   a. The payment method would be inequitable.

   b. The payment method provides insufficient guarantees of future collectability of the judgment or award.

   c. Payments made under the payment method could be subject to other claims, past or future, against the defendant or the defendant's insurer.

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X. ISSUES TO THINK ABOUT

A. Has the plaintiff obtained full recovery where he does not sue a third party who is assessed a percentage of fault? Following are possibilities:

   1. The plaintiff loses that proportionate share of the damages assessed against the third party because he chooses not to sue them. The result would be similar to the effect which occurs when a party settles for too little money with a defendant and is not able to recover the difference.

   2. The plaintiff could move to amend to sue the third party defendant after the verdict or bring an independent action against the third party defendant claiming res judicata.

   3. In the interest of fairness it is believed the Court would allow the plaintiff to recover from the third party defendant that was not sued.

B. Who pays the judgment in the comparative fault case involving a dram shop?

   1. Since comparative fault does not apply to a dram shop and they are strictly liable assuming there is no complicity or assumption of the risk defense defeating the claim, the

dram shop carrier will probably liable for the total judgment.

2. This would allow for recovery on the part of the plaintiff even though there may have been assessment of fault as between the other defendant and the plaintiff.

XI. APPORTIONMENT OF FAULT CHECKLIST

A. *Fault of auto passenger

1. Failure to Keep a Lookout.

2. Momentary Forgetfulness.

3. Failure to Warn Driver or Control Driver Based on the Following Type of Relationship:

a. Co-owners.

b. Principal and agent.

c. Owner and licensee.

d. Entrustor and entrustee.

e. Seller and customer.

f. Spouses.

h. Parent and child.

i. License-holder and permit-holder.

j. Instructor and learner.

k. Employer and employee.

l. Joint venturers.

4. Failure to Use Care For Own Safety.

5. Interference With Driver.

a. Giving alcohol or drugs to driver.

b. Grabbing and turning steering wheel.

c. Stepping on brake or accelerator or hindering driver's attempt to brake or accelerate.

d. Turning off ignition.

e. Diverting driver's attention from road.

f. Impeding driver's view.

g. Giving driver go-ahead to proceed despite oncoming vehicle.

h. Agreeing to keep a lookout and not doing so.

i. Inciting or asking driver to drive too fast or in other wise illegal or unsafe manner.

j. Pushing driver out of way.

6. Riding With a Driver Who Lacks Experience or Proficiency.

7. Acquiescence, Encouragement or Ratification by Passenger of Manner of Operation by Host.

8. Riding With Driver Who is Sleepy, Ill or Who has a Defect.

9. Riding With Driver Who has been Drinking.

10. Failure to Leave Car.

11. Failure to Exercise Care for his own Safety by Attempting to Control Negligent Third Person.

12. Unreasonable Choice.

13. Failure to Use Care.

14. Riding in Car Known to be Defective.

15. Failure to Warn or Control Driver as Follows:

a. Letting driver under the influence of alcohol or drugs drive.

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b. Letting sleepy driver fall asleep at wheel.

c. Failing to warn of dangerous conditions.

d. Allowing inexperienced driver to engage in difficult maneuver in area accommodating limited mobility.

e. Permitting inexperienced driver to drive in congested traffic.

f. Letting driver drive at excessively fast, unlawful or otherwise dangerous speed.

g. Failing to take hold of steering wheel and guide vehicle safely in appropriate emergency situation.

h. Failing to apply hand or foot brake in appropriate emergency situation.

*See 50 POF2d 50-677

B. Fault of Car Owner or Employer of Driver (See Prosser 5th Edition p. 569)

1. Providing Defective Equipment.

2. Failure to Furnish Seatbelts.

3. Lack of Care in Hiring or Retaining.

4. Failure to Properly Train.

5. Negligent Entrustment.

C. Fault of Car Driver

1. When driving a car with defective equipment.

2. Failure to make such preparations as a reasonable person would regard as necessary to enable plaintiff to avoid a possible future danger.

3. Failure to make investigation that a reasonable person would recognize as necessary.

(Constructive notice) (Proceeding in known ignorance.)

4. Failure to wear a seatbelt.

5. Driving while intoxicated.

6. Failure to follow rules of the road (see Uniform Jury Instructions).

7. Driving while sleepy.

8. Driving under dangerous conditions such as in a snow storm or thunder storm.

9. Driving with passenger who distracts your attention.

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D. Other Contributory Fault

1. Permitting child to be unattended.

2. Failing to use extra care to compensate for disability or impairment.

3. Failure of parent to control child.

4. Imputed contributory negligence.

5. Imputed fault.

6. Passenger's right to control.

7. Failure to keep a lookout.

8. Failure to pay reasonable attention.

9. Failure to apply ordinary community knowledge.

10. Failure to use superior knowledge.

11. Failure to anticipate conduct of others.

12. Plaintiff failed to follow custom and practice.

13. Failure to properly train employees.

14. Failure to warn user of chattel.

15. Failure to inspect and evaluate safety.

16. Failure to require use of seatbelt.

17. Failure to mitigate damages.

18. Assumption of the risk.

19. Failure to take alternative safe route.

20. Failure to use care to avoid risk.

21. Putting one's self in a position of danger.

22. Failure to avoid injury.

XII. *ISSUES TO CONSIDER, PROVE, AND ARGUE TO ASSIST JURY IN APPORTIONING FAULT

A. Remember that in analyzing a comparative negligence case, one of the most important objectives involves developing all available evidence which has a tendency to reduce the percent of fault that might be allocated to our side of the case, and to increase the percent of fault that might be assigned to others. In allocating fault subjective criteria are probably most important since fault is an evaluative judgment. The term fault indicates that moral components are involved. Thus, the quality of the fault must be considered. Fairness is the rationale for adopting comparative negligence. Fault is the basis for apportionment of damages.

B. The following are things to consider in arguing how fault should be apportioned.

1. Likelihood of harm resulting from conduct.[1]

2. Magnitude of risk created by the conduct. Number endangered. Potential seriousness of injury.[2].

3. Whether the fault endangers only the actor or others. Would a reasonable person take more or less precaution for the safety of others than for his own safety? Was the risk of

*Developed by Philip Willson

harm to others more apparent, or apparently more serious, than the risk of harm to the actor? Did the actor have reasonable confidence in his own awareness of the risk and his ability to avoid it? Did the actor undertake a responsibility toward another which required him to exercise an amount of care for the protection of the other which he would not be required to exercise for his own safety.[3]

4. Did fault of plaintiff (such as excessive speed or failure to wear seatbelt) increase damages. See Prosser 5th Ed. re avoidable consequences. p. 458 Benefits to plaintiff from defendant's tort used to reduce recovery by plaintiff on the issue of mitigation of damages. Restatement §920

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5. Proceeding in the face of known ignorance, i.e. may know enough that should conduct an intelligent inquiry as to what he does not know. Prosser, 84, 5.

6. Extent to which actor could reasonably assume the awareness of the risk by the injured person or the ability of the injured person to avoid the risk.[4]

7. Whether inadvertence or awareness of danger involved. Would a reasonable person have recognized the risk?[5] Failure to look or failure to perceive what is present.

8. Significance of what actor was seeking to attain by conduct.[6] Utility of the actor's conduct.

9. Were there more reasonable ways to accomplish? Alternate safe route, etc? Alternate designs?[7]

10. Burden of adequate precautions. E.g., product guards, warnings.

11. Is there a lack of competence (ability or capacity to use care) involved or lack of attention and caution in the use made of that competence, or both? If a trade or profession is involved, is there a lack of skill?[8]

12. Particular circumstances. Emergency.[9]

13. Elements contained in policy causing rule or law to be adopted in the first place.

14. Is the act dangerous intrinsically or because of manner of performance, or both?[10]

15. Is want of preparation involved?[11]

16. Should a warning have been given?[12]

17. To what extent a reasonable person would have anticipated forces of nature, the conduct of an animal[13], or others -- including third persons.

18. Reasonableness of reliance on others to take precautions.[14]

19. Whether there has been a failure to follow a general custom, a person's habit, or rules of a party.[15]

20. Did the actor have superior attention, perception of the circumstances, memory, knowledge of other pertinent matters, intelligence or judgment[16]

21. Any failure to fix in mind those matters which would make an impression on a reasonable person, and, unless startled or distracted for sufficient reasons, bear them in mind a reasonable length of time. Prosser p. 182.

22. Did the actor have inferior capacities as a child or from physical disability?[17]

23. Prior knowledge and experience of actor, or warnings to the actor that would help realization of risk. Cf. elements of assumption of risk.[18]

24. Closeness of the cause to the event. Cf., elements of last clear chance.

25. The comparison is not determined by the kind or character or number of elements of negligence but by the degree of contribution.[19]

26. Most authorities hold that both causation of the accident and causation of damages are to be compared. Some would limit consideration to fault causing damage.[20]

27. Courts may consider failure to mitigate damages as a separate defense or may merely submit it as one element in the apportionment.[21]

FOOTNOTES

[1]Restatement Torts Second, §§289(a), 298, Comment b. Prosser, Law of Torts (4th Ed.), p. 150.

[2]Restatement Torts, §§291, 293, 294, 295, 298, Comment b.

[3]Comment f, Restatement Torts, Second, §464.

[4]Comment f, supra.

[5]Comment a, Restatement Torts Second, §§298; 289(a); 290; Prosser p. 182.

[6]Restatement Torts Second, §§292, 299, Comment b.

[7]Restatement Torts Second, §292(c).

[8]Restatement Torts Second, Comment a to §§298, 299, 299A.

[9]Restatement Torts Second, §§296, 299, Comment e; Prosser, Law of Torts (4th Ed.), pp. 168-170.

[10]Restatement Torts Second, §§297, 298, Comment c.

[11]Restatement Torts Second, §300.

[12]Restatement Torts Second, §301.

[13]Restatement Torts Second, §§290, 302, 203A.

[14]Prosser, Law of Torts (5th Ed.), pp. 203-205, 635 f at 85.

[15]Prosser, Law of Torts (4th Ed.), pp. 166-168; Restatement Torts Second, 295A; 635 f 67(15).

[16]Restatement Torts Second, §§289(b), 298, Comment c, 299, Comment f; Prosser, Law of Torts (4th Ed.), pp. 157-166; 635 Comment f 67(11).

[17]Restatement Torts Second, §§283A, 283B, 283C; Prosser, Law of Torts (4th Ed.), pp. 151-157.

[18]Anno: 16 A.L.R.4th 700.

[19]Lovesee v. Allied Development Corp., 45 Wis.2d 340, 173 N.W.2d 196, 199, 200 (1970).

[20]Woods; Comparative Fault, §5.5 Fietzer v. Ford Motor Co., 7th Cir. 1980) 622 F.2d 281, 286-288; Anno: Failure to use automobile seatbelt, 92 A.L.R.3d 9; Woods, supra, §5.6.

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[21]Le Mons v. Regents of the Univ. of Col. (1978) 21 C3d 869, 874, 148 CR 355, 358; CEB, Comparative Fault Practice, program material Aug./Sep. 1981, pp. 23, 24; Anno: Nonuse of seatbelt as failure to mitigate damages, 80 A.L.R.3d 1033.

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RELEASES OF FEWER THAN ALL PARTIES AND FEWER THAN ALL CLAIMS

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I.

SETTLEMENT AGREEMENTS GENERALLY

The vast majority of personal injury claims that arise in Iowa are resolved by some form of compromise or settlement agreement, either before or after trial. The document which culminates and evidences that agreement is generally entitled a release, although it may also take the form of a covenant not to sue, 1/ a loan-receipt agreement, 2/ a high-low agreement, 3/ or some other form of agreement between the parties. Settlement agreements, whatever their substantive provisions, all must contain certain common elements.

A. Contractual Requirements

A release, by definition, is the "relinquishment, concession, or giving up of a right, claim, or privilege, by the person in whom it exists or to whom it accrues, to the person against whom it might have been demanded or enforced." Blacks Law Dictionary 1159 (5th ed. 1979).

A settlement agreement, or release, is a contract. 4/ It requires consideration, 5/ voluntariness, and contractual capacity. 6/

To create a contract, there must be a definite offer and acceptance, with the resulting meeting of the minds as to the contract terms. A contract of compromise and settlement requires these same elements. 7/ A party may not take advantage of an obvious unilateral mistake by the opposition to form a contract. Where the terms of an offer raise a presumption of error, the offeree may not be able to create a valid contract by "snapping up" an offer that "is too good to be true." 8/ On the other hand, a unilateral mistake alone may not be enough to avoid a release. 9/

1. Consideration

The consideration exchanged in the standard release agreement consists of a sum of money paid by the defendant, in exchange for the relinquishment of certain claims by the plaintiff. However, the consideration may take the form of an agreement by the defendant, a co-defendant or a third party to waive any claims he or she may have against the plaintiff. In Minnesota, it has also been held that an agreement reducing a potential claim against plaintiff to an amount within the plaintiff's own liability insurance coverage constituted sufficient consideration for plaintiff's release of his personal injury claims. 10/ The consideration may also take the form of payment to a party other than the releasing party. Minnesota has held that payment to a husband in exchange for a release of both the husband's and the wife's claims (including not only the wife's derivative claim, but her direct claim for her own personal injuries) constitutes sufficient consideration for the release of all claims by the wife. 11/

Sufficiency of consideration is generally not an issue in determining the validity of a release, except as it may reflect overreaching, fraud or mutual mistake. Inadequate consideration constitutes but one of several factors examined by the courts in determining whether or not a release is effective. (See discussion, infra, concerning avoidance of releases.) Where the "consideration" has no value at all, and, for example, amounts to nothing more than the discharge of a pre-existing obligation or the compromise of a baseless claim, the release may be invalid for inadequate consideration. 12/ Iowa law is well settled that an agreement which "compromises a bona fide dispute concerning duties and obligations under a subsisting contract, is supported by valid consideration and is enforceable." 13/

The important element in any release agreement is that the consideration, whether money or relinquishment of rights, be clearly identified,

and clearly constitute something of value over and above any prior obligation.

2. Capacity

Lack of competence or capacity to execute a release is a ground for setting aside that release. 14/ It is fundamental that a release, being a contract, can only be entered into by one having the legal capacity to enter into a contract. "Competency" is, by definition, the power to make a contract. 15/

Generally the question of contractual capacity arises in cases involving minors, and persons who suffer from mental disability caused by either age or injury. 16/ Capacity will be presumed, and the party seeking to set aside a release on the ground of lack of capacity must establish that fact. 17/

The Iowa Rules of Civil Procedure specifically provide for appointment of a guardian ad litem when a party to an action is an infant or incompetent. 18/ The rules further provide that a minor may sue by a next friend if he does not have a guardian. 19/ Releases negotiated on behalf of a minor by either guardian or next friend are governed by provisions of Iowa Code § 599.02. The Iowa code provides that a minor is bound by contracts made during minority unless they are disaffirmed within a reasonable time after attaining majority. In order to disaffirm a contract, the minor must restore to the other party all money or property received by virtue of the contract, which remains within his control at any time after attaining majority.

A release signed by a minor, and not disaffirmed or rejected within a reasonable time after reaching the age of majority, is a binding contract of release, even without court approval. 20/ The question of whether the minor, by action or inaction, ratified the agreement of release after reaching the age of majority is a

question of fact, to be submitted to the finder of fact for consideration and resolution. 21/

Form 2 in the Appendix of Forms is an example of the documents necessary to consummate a court approved minor settlement. With slight modification, they can serve as the forms for gaining court approval of a settlement of a claim brought by a guardian ad litem on behalf of an incompetent person.

3. Form of Release - Written Document

There is no requirement under the statute of frauds 22/ that a release be in writing. The only possible exception to this general rule is in the case of structured settlement agreements, which by their terms are not to be completed within one year. There is no requirement that the release be signed by any of the parties to it. However, releases are generally signed by the plaintiff as proof of his assent to the agreement. The claimant's performance in entering into a release agreement is the relinquishment of his rights to assert certain claims. A written agreement, with the claimant's signature, constitutes the best evidence of the claimant's performance of his portion of the settlement agreement. There is generally no need for the defendant to sign the agreement, where his only obligation under the release is to make a payment of money, because the defendant's performance is payment, and a canceled check is proof of the defendant's performance.

The benefit to both parties of a written settlement agreement, even if signed by only one party, is obvious. It not only resolves any question as to whether or not a settlement was reached, 23/ but, if properly drafted, the release agreement states conclusively which claims are compromised, and which parties are discharged by the release. In the absence of such an agreement, or in the instance where handwritten language is added to a printed release form, without a full statement of the intent of the parties, confusion can occur. 24/

The vast majority of release agreements are preprinted forms, or forms using stock phrases or "boilerplate." Generally this "boilerplate" is cast in the broadest possible language. Counsel representing a party to a release agreement must be certain that the language of the release agreement comports with the intention of the parties. There is a vast difference between releasing a claim for unknown or future consequences of a known injury, and releasing claims for consequences of known and unknown injuries. Unknown and unexpected consequences of a known injury, later discovered, are not grounds for setting aside a release. 25/ Even unknown consequences of unknown injuries will not, under Iowa law, constitute a mistake sufficient to set aside a release. 26/ But the latter claim may be barred if the release language specifically contemplates extinguishment of that particular claim.

As a general rule, claimants in a personal injury action are free to enter into a release without permission or approval of the court. Form 1 of the appendix of forms is a typical personal injury release. It recites the contract between the parties, and contains their mutual covenants -- plaintiff relinquishes his or her claim, in exchange for a present payment of money by, or on behalf of, the defendant. The agreement is effective upon receipt by the claimants of the payments called for under the release.

The effect of a release agreement depends upon the intent of the parties, determined from all of the circumstances. However, one of the most compelling of all circumstances surrounding the effect and construction of a release is its plain language. 27/ The intent of the parties is determined in Iowa from what they did; if the instrument is clearly one thing or the other, a covenant not to sue, or a full release, there is no room for construction. Intent may be so clearly shown by the instrument that there is no room for construction. 28/ It is very difficult

to impeach the language of a release, particularly when the release is executed by a plaintiff represented by counsel. Review of the language of the release agreement, even though boilerplate, is important so that the client understands specifically what is involved in the release agreement, and the language of the release is no broader than is necessary to truly express the intent of the parties.

4. Authority of Attorney to Settlement Claims

The decision to settle is, and must always be, the decision of the client. An attorney, without express consent of his client, has no authority to bind that client to settlement. 29/ Moreover, the attorney has an ethical obligation to fully advise his client as to the legal consequences of any settlement agreement. 30/

This is particularly true in the case of a settlement with fewer than all tortfeasors or fewer than all claims, because of the relative uncertainty of the consequences of such a settlement. The client must be fully aware of the potential dangers, as well as the potential benefits, of such a settlement agreement, before he is advised to enter into the agreement. In the end, the settlement agreement must result from the client's own informed decision.

Even if an attorney does not have express authority from his client, that authority may be implicit in the facts and circumstances. 31/ Failure by the client to disavow the settlement may result in an enforceable settlement. 32/

B. Avoidance of Releases

Although releases are generally to be treated the same as other contracts, 33/ releases may not be avoided upon showing of any ordinary mistake; 34/ rather, the mistake must be mutual, material, and it must be concerned with a present

or past fact. 35/ In determining if a mistake is mutual, several factors should be considered. They are:

> 1. Whether the settlement amount was based on an item-by-item computation or was a lump sum payment for damages sustained;
>
> 2. Whether the question of liability was compromised as part of the settlement; and
>
> 3. Whether the amount paid was so inadequate as to indicate the matter of settling future or unknown damage was not within the contemplation of the parties. 36/

The Iowa Supreme Court has held that, where a compromise and settlement is shown, it is presumed to be fair, valid, and correct. The burden of proving mistake, fraud, or other facts relied on to avoid the release is on the person who seeks to do so. 37/

While courts may set aside releases because of mutual mistakes of fact, 38/ a unilateral mistake of law is generally not a sufficient ground for setting aside a release. 39/ However, where a claimant is not represented by counsel, and the insurer undertakes to advise the insured of his rights, a fiduciary relationship may be created, and a misrepresentation of law may be elevated to the status of a misrepresentation of fact, making a settlement between the parties voidable.

For example, in Jacobs v. Farmland Mut. Ins. Co., 40/ the Minnesota Supreme Court recognized as a ground for setting aside a release "unconscionable overreaching," where an adjuster made an admittedly unreasonable settlement with an unsophisticated, functionally illiterate claimant. The Court recognized a duty on the part of the insurer to bargain fairly, at least under the

circumstances presented. Perhaps as significant, the Court held that because the release was rescinded, no damages were awardable for the claimed misconduct. The parties were simply returned to their status quo, and in the absence of compensatory damages, no punitive damages were recoverable.

Although it is much more difficult to prove, a release may also be avoided on the basis of fraud. 41/ Although the cases set out a number of specific elements which must be established by a party seeking to avoid a release for fraud, they amount basically to a showing that the representations were false in fact, were known to be false, and were made with the intent that they be acted upon, and in truth they are relied upon. The intent to deceive is also required; however, this element can be implied or presumed. 42/

II.

RELEASE OF FEWER THAN ALL PARTIES

A. General Principles

Although many cases can be settled by standard release agreements given to a single defendant, a significant number of cases involve multiple defendants, and/or multiple plaintiffs. This obviously complicates the settlement process. One or more defendants may be amenable to settlement, while one or more of the remaining defendants may not be.

Numerous settlement alternatives are available to counsel for plaintiff or defendant in multi-party litigation. All have the essential elements of any contract of release -- capacity, voluntariness and consideration -- but each may vary significantly from the standard release with respect to the consideration exchanged. The rules generally applicable to releases must be observed, but the effect of releases on non-settling parties

may be such that special rules will apply with respect to the consequences of the releases, and their impact on the litigation process.

The historical rule in Iowa, now greatly eroded, is that the release of one joint tortfeasor releases all tortfeasors. Therefore, a general release, if it results in full compensation to the plaintiff of all damages sustained, acted to release all responsible parties. 43/ It was later held that agreements of settlement, no matter what form they took, would act to discharge all joint tortfeasors only if it appeared to be the intention of the parties; if there was only partial compensation to the plaintiff, then the plaintiff remained free to pursue his or her remedy against other joint tortfeasors. 44/ The intention of the parties was generally determinative on the question of whether the release of one joint tortfeasor released the other. 45/ More recently, Iowa adopted a close parallel to the Uniform Comparative Fault Act, codified at Chapter 668. In addition to enacting comparative fault as a basis for assigning liability among several tortfeasors, § 668.7 established that a plaintiff's claim is reduced by the settling defendant's equitable share of the obligation.

> A release, covenant not to sue, or similar agreement entered into by a claimant and a person liable discharges that person from all liability for contribution, but it does not discharge any other persons liable upon the same claim unless it so provides. 46/

However, the intention of the parties is not controlling where, for some other reason, the legal effect of releasing one tortfeasor is to destroy the liability of another tortfeasor. 47/

A reservation of the right to sue other joint tortfeasors is not essential in order for an agreement to constitute something less than an unqualified or absolute release of all parties,

although such a reservation may be important in determining the intention of the parties where the other language of the instrument leaves doubt as to their true intention. 48/

B. Pierringer Releases

A common device by which a plaintiff reaches a settlement with fewer than all joint tortfeasors is the so-called "Pierringer Release." 49/ Iowa appellate courts have not yet addressed the use of Pierringer-type releases, although their use has been specifically approved by the Wisconsin, Michigan, and North Dakota Supreme Courts. 50/ A Pierringer-type release, although not called as such, was enforced by federal district court in Estate of Bruce v. BCD, Inc., 396 F. Supp. 147 (S.D. Ia. 1975). The essential features of a Pierringer release are that:

> 1. Plaintiff releases the settling tortfeasor, and agrees to satisfy and discharge that defendant's percentage or proportion of causal fault or responsibility as may be determined by subsequent trial or other means;
>
> 2. Plaintiff reserves the balance of his or her cause of action against the non-settling defendant or defendants; and
>
> 3. Plaintiff agrees to indemnify the settling defendant against any claim of contribution or indemnity made by the non-settling defendants, and to satisfy any judgment which plaintiff might obtain against the non-settling defendants to the extent of the liability or fault of the settling defendant.

For an excellent discussion of the provisions, terms and effect of the Pierringer-type settlement, see Simonett, Release of Joint Tortfeasors: Use of the Pierringer Release in Minnesota. 51/

Iowa's comparative fault statute, Iowa Code § 668.7, operates to discharge a single party in a manner very similar to the Pierringer release. The plaintiff releases the settling party, reserves the balance of the cause of action against other parties who might be liable upon the same claim. However, unlike the Pierringer Release, § 668.7 discharges the settling party from any liability for contribution, and then reduces the plaintiff's ultimate damages by the amount attributable to the released party's fault. 52/ Unlike § 668.7, Pierringer releases may be used in any type of case, not merely cases filed under the comparable fault statute.

Before a Pierringer release is entered into, the plaintiff must fully appreciate the potential consequences of his agreement. The Pierringer release, by its terms, releases and satisfies whatever percentage or proportion of causal responsibility is ultimately attributed to the settling defendant. In exchange for this agreement, plaintiff receives a sum of money in payment. In evaluating whether a Pierringer release should be entered into, counsel for the plaintiff must weigh the likely range of damages, and the likely allocation of causal responsibility on the settling defendant. If the attorney is wrong in his judgment as to the likely result of a trial, the situation may arise where a large percentage of a valuable claim has been settled for a relatively nominal amount. For example, in one case, 53/ plaintiff gave a Pierringer release to one defendant for $15,000. At trial, the jury found this defendant 60% responsible for the accident, and two other defendants a total of 40% responsible. Damages of $81,000 were awarded. However, because of the release, plaintiff recovered only $32,400 from the non-settling defendants (40% of $81,000) plus the $15,000 received in settlement, or $47,400, instead of the $81,000 verdict.

In another case, 54/ plaintiff's attorney settled on a Pierringer basis with one of three

defendants for $20,000. At trial, plaintiff obtained a verdict of $800,000, with the jury allocating fault 8% to plaintiff, 12% to defendant-one, 40% to defendant-two and 40% to the settling defendant. But for the Pierringer release, plaintiff would have recovered 92% of his damages, or $736,000. Two unusual facts prevented this. Not only did the Pierringer release mean that for $20,000, plaintiff had satisfied 40% of his claim, or $320,000, but defendant-two's 40% of the judgment was uncollectable. Relying on an earlier decision construing the provisions of Minn. Stat. § 604.02, Subd. 2, 55/ the Minnesota Supreme Court held that the uncollectable 40% of the verdict must be re-allocated among the plaintiff, defendant-one and the settling defendant, with these resulting percentages: plaintiff--13-1/3%, defendant-one--20% and settling defendant--66-2/3%. Because of the Pierringer release, 66-2/3% of the case was settled for $20,000 and the plaintiff recovered only $160,000 of the $800,000 verdict.

The Pierringer release destroys joint and several liability between the settling defendants and the non-settling defendants. As to the non-settling defendants, however, joint and several liability remains. 56/ The non-settling defendants remain liable, jointly and severally, only for their percentage of the causal responsibility for the total damages assessed by the jury. 57/ "Where it appears comparative fault among parties is highest with the defendant who can least pay and lowest with the defendant who can best pay, plaintiff's counsel, keeping in mind that a Pierringer destroys a joint liability and preserves only the several liability of the non-settlers, may well be disinclined to use the release." 58/

Another consequence of a Pierringer release is the loss of claims of vicarious liability arising out of the liability of the released defendant. The federal district court in Iowa has held that the release of primarily liable tort-

feasor also releases any party who has vicarious liability for the wrongful act of the primary tortfeasor. 59/ Despite the fact that the release may contain an express reservation of the plaintiff's right to pursue all non-settling defendants, the indemnity provision of the standard Pierringer release effectively bars the claims against the vicariously liable party. A party having only vicarious liability, would have a common law indemnity claim back against the primary tortfeasor. 60/ Under the Pierringer release provisions, the tortfeasor is entitled to indemnification from the plaintiff, so that any claim that the plaintiff successfully brought against the vicariously liable party would ultimately fall back on the plaintiff himself. Consequently, the Pierringer release bars any further claims. 61/.

Iowa, unlike Minnesota, has addressed the converse situation and concluded the release of the principal does not release the agent. 62/ Authorities are split in other jurisdictions which recognize the Pierringer-type releases; the recent trend, however, seems to be that release of the principal does not operate to release the agent tortfeasor. 63/ The problem of circuitry of litigation that is present when the primary tortfeasor is released is not present when the vicariously liable party is released.

> [S]ince in the case it is the principal whose liability has been released by the covenant not to sue, there is no possibility that the suit by the plaintiffs against the agent . . . will cause the principal . . . to lose the benefit of this agreement with the plaintiff. 64/

The right to indemnity held by the non-releasing party may not arise solely by operation of common law. Contracts may provide for indemnity, as well as statutes. For example, Minn. Stat. § 466.07, subd. 1a (1980) provides that a municipality (such as a school district) shall indemnify and provide a defense for any employee,

employer or officer against tort claims arising out of an act or omission occurring within the scope of employment. Similarly, the Minnesota Business Corporations Act 65/ provides that the bylaws of a corporation may provide for mandatory indemnity of its employees. A release of a principal who has an indemnity obligation may release the agent as well.

The specific language used in a release can also affect the right of indemnity. For example, the Minnesota Court of Appeals has held that the language of the release may be such that only those claims against the agent which are not subject to indemnity are released. 66/

Another problematic consequence of a Pierringer release is the affect on the liability of the non-settling party. Iowa has eliminated pro tanto reductions in favor of proportionate reductions under the comparative negligence statute, 67/, but whether such reductions would be imposed in other settings is unclear.

Form 3 in the appendix of forms is an example of a standard Pierringer release. Numerous other types of settlement agreements, containing some or all of the Pierringer-type release provisions, can be used to effectuate settlements with fewer than all joint tortfeasors. Each agreement is unique, and poses its own special advantages, and problems.

C. Covenants Not To Sue

It is axiomatic that any release which destroys the ability of a non-settling defendant to obtain contribution from a settling defendant will have the effect of destroying the non-settling defendant's obligation to be jointly liable with the settling defendant for the entire award. To avoid this result, or consequences of the rule in pre-comparative negligence cases that the release of one joint tortfeasor releases all, counsel have resorted to covenants not to sue.

A true covenant not to sue is just that -- the plaintiff, in exchange for a payment by the defendant, dismisses the action pending against the defendant, and covenants not to sue that defendant, or proceed against the defendant further. There is no agreement to release generally contained in the covenant not to sue. In the absence of such agreement, there is no protection for the settling defendant from the claims for contribution from non-settling defendants.

At common law, there was no right among joint tortfeasors to obtain contribution from one another and plaintiff was free to sue one or more joint tortfeasor, recovering the entire verdict without regard to the joint or concurrent fault of other tortfeasors. 68/ In certain jurisdictions, this rule has continued until recent times, 69/ and in such a jurisdiction, a covenant not to sue would obviously have great value to a defendant.

The value of a mere agreement not to sue may be minimal, however, in jurisdictions where contribution actions are freely allowed, as is the case in Iowa. 70/ A defendant may prefer, for tactical reasons, to be sued as a third party defendant rather than a direct defendant, but the experience is not likely to be significantly different in Iowa.

The inclusion in the covenant not to sue of any language releasing or discharging the settling defendant by plaintiff, or an agreement by the plaintiff to indemnify or hold defendant harmless from contribution or indemnity claims, converts the covenant not to sue into a release with Pierringer characteristics. Under the circumstances, the distinction between a covenant not to sue and a release will be entirely artificial, and without difference. 71/ Form 4 is a covenant not to sue, with covenants of indemnity. The cost to the plaintiff of a release of joint and several liability may be too great, making a covenant not to sue of limited utility.

D. Loan Receipts

Another antecedent of the Pierringer Release is the loan receipt agreement. As originally developed, loan receipts were devices used between insurers and insureds to pursue the insurer's subrogation interest in the name of the insured. 72/ The insurer, a fire insurer for example, would be obligated to pay its insured under a policy of casualty insurance. It would then be entitled to assert a subrogation claim, which would be brought in its own name. As an alternative, the practice of a "loan" from the insurer to the insured developed, to be repaid out of the proceeds of any recovery the insured may make by pursuit of third-party tortfeasors allegedly responsible for the loss. 73/ A later use developed for loan receipt agreements as a means whereby one joint tortfeasor would gain de facto contribution from another joint tortfeasor by means of a "loan" to the plaintiff in exchange for plaintiff's agreement to pursue his claim against another joint tortfeasor, and to repay the "lender" out of the recovery. 74/ This is one interpretation of the loan receipt set forth in Bolten v. Ziegler, 111 F. Supp. 516 (No. Dist. Iowa 1953), although the court ultimately determined that the two defendants were not joint tortfeasors.

It is but a short step from the device of a straight loan receipt to obtain contribution to a loan receipt which acts to place a limit on the liability of the lender, guarantee the plaintiff a minimum recovery, yet allow plaintiff to pursue other tortfeasors to maximize his recovery.

Example:

Plaintiff is injured in an accident under circumstances which may give rise to a claim for damages against defendant 1 or defendant 2. Plaintiff and defendant 1 are able to agree on the value of plaintiff's claim, but both feel that

defendant 2 is substantially liable. Defendant 2 is not interested in any settlement agreement. Defendant 1, recognizing the possibility of a high verdict, cognizant of the expenses of litigation, and aware of the possibility that defendant 1 will be held solely responsible for a jury, offers the following settlement agreement to the plaintiff: In exchange for a Pierringer Release, defendant 1 will pay outright the sum of $1,000 to the plaintiff, and will "loan" to the plaintiff the additional sum of $5,000. The loan is to be repaid out of the recovery, if any, which plaintiff obtains from defendant 2. Plaintiff is now assured of a $6,000 recovery -- if defendant 2's percentage share of liability for plaintiff's entire damage is greater than $5,000, then plaintiff will recover an amount in excess of $6,000; if there is no liability on the part of defendant 2, plaintiff keeps the $5,000 he has been loaned, plus the $1,000 payment.

Such agreements are infinite in their variety. As an added incentive to the plaintiff, defendant 1 may agree that the loan is to be repaid on the basis of $1 out of every $2 recovered from defendant 2. Under these facts, if defendant 2's percentage liability for all of plaintiff's damages was $5,000, plaintiff would receive the $1,000 paid outright with the settlement, $5,000 by way of a loan, and $2,500 net recovery from defendant 2 after repaying defendant 1 per the agreement. Plaintiff would realize a recovery of $8,500.

As with covenants not to sue, the true loan receipt contains no protection for the "lender" against claims asserted by other potential defendants, for contribution or indemnity, and thus is of limited value in jurisdictions which allow contribution actions. Form 5 is an example of a loan receipt agreement with covenants of indemnity.

E. Mary Carter Agreements

High-low agreements, and similar loan receipt agreements, have been subject to enormous legal debate. 75/ Such agreements are often referred to as "Mary Carter" agreements.

> The term arises from the agreement popularized by the case of Booth v. Mary Carter Paint Co., 202 So.2d 8 (Fla. Dist. Ct. App. 1967) and now appears to be used rather generally to apply to any agreement between the plaintiff and some (but less than all) defendants whereby the parties place limitations on financial responsibility of the agreeing defendants, the amount of which is variable and usually in some inverse ratio to the amount of recovery which the plaintiff is able to make against the non-agreeing defendant or defendants. 76/

The prospects of such settlement agreements "skewing" the adversarial process are so great, that legal commentators have castigated their agreements as pure perversion despite the fact that they promote and encourage settlement. 77/

> Like a lady of the night, she has many aliases.
>
> In Florida she is called "Mary Carter", but in Arizona she is known as "Gallagher." She has been branded a "painted lady" in Florida, but she has been popular with those who use her. Some in New York have wished her a hasty death, and her presence has been decried as "unfair and unnecessary" in headline in Texas. Judges in Nevada and Wisconsin had banned her from their borders.

> Who is this sleazy lady? She is a living character in the law, best described as the "guaranteed verdict agreement." Such agreements are unholy alliances arising in cases that involve a single plaintiff and multiple co-defendants. 78/

One of the most commonly complained of aspects of such agreements is secrecy. Where the agreements are not disclosed, it is argued that they pervert the adversary system, and amount to a fraud on the court. 79/ Some courts 80/ and commentators 81/ have gone so far as to say that secret guaranteed verdict agreements are unethical. The American Bar Association Committee on Ethics and Professional Responsibility has issued an informal opinion 82/ stating that concealment of settlement agreements which creates a misleading or deceptive posture may violate the lawyer's ethical obligations.

There are subtle differences between a true Mary Carter agreement, and more traditional loan receipt or high-low agreements:

> A Mary Carter agreement is a conditional or partial settlement between some of the parties involved in multi-party litigation. In substance, it is a secret or semi-secret agreement between a plaintiff and one or more, but not all, of several defendants. Three specific provisions make up its unusual character. The first is a guarantee clause, which provides that the plaintiff will receive a stated sum from the agreeing defendants even if plaintiff loses the case or recovers a verdict less than the agreed sum. In return for a guaranteed recovery, the plaintiff promises to collect the amount of any verdict from the non-agreeing defendants. Thus, the agreeing defendant hopes for a large recovery -- larger than his guarantee. . . .

> The second provision of the basic Mary Carter agreement is the agreeing defendant's promise to remain in the litigation as an active party until a judgment is granted or until the plaintiff consents to his dismissal by the court. The third provision is the secrecy clause, which involves mutual promises by the parties to keep the agreement hidden from the knowledge of the court, jury, and non-agreeing parties. . . .
>
> Variations of the basic Mary Carter agreement -- Mary Carter hybrids -- can be achieved by replacing the guarantee clause with other, more traditional settlement devices. Under one alternative clause, similar to a loan receipt agreement, the agreeing defendant lends the plaintiff a stated sum to be returned if the plaintiff recovers that sum or more from the non-agreeing defendants. Another alternative involves the plaintiff's promise to limit the agreeing defendant's liability to a stated sum should a judgment be rendered in favor of the plaintiff. 83/

Form 6 is an example of a cousin of the loan receipt, the "hi-lo" agreement. It differs from the loan receipt in that there is no "loan," but rather an agreement as to how any judgment will be satisfied.

Another commentator has concluded, "The modern loan receipt is distinguishable from a Mary Carter agreement only in form, and not substance." 84/ The objection to such agreements is that the settling party remains as a participant in the litigation, threatening the balance of the adversary system.

In Pacific Indemnity Co. v. Thompson-Yaeger, Inc. 85/, the Minnesota Supreme Court specifically addressed the propriety of loan receipt agreements fixing a defendant's liability, contingent on the liability of a co-defendant, and held that, where (a) no secrecy surrounded the agreement, (b) no prejudice occurred to the rights of non-settling parties, and (c) an opportunity existed for argument to the jury of the effect of the release, such an agreement was not objectionable.

III.

RELEASE OF FEWER THAN ALL CLAIMS

Even in cases involving a single plaintiff and a single defendant, claims asserted by the plaintiff may be susceptible to partial settlement. The claims may be divisible according to the nature of the damages sought, or by reference to the source of funds to satisfy those claims. The traditional prohibition against splitting a cause of action may be waived by the defendant's consent 86/, creating additional flexibility in the resolution of claims.

A. Naig Releases

Minnesota courts have recognized that in the context of a personal injury action with rights of subrogation asserted by a workers' compensation carrier, the cause of action of the plaintiff may be divided, and a plaintiff may proceed to litigate or settle that part of his claim which is not subject to the subrogation claims of the workers' compensation carrier under Minn. Stat. § 176.061, preserving for direct resolution between a workers' compensation carrier and the alleged third-party tortfeasor the balance of the employees cause of action which is subject to subrogation. 87/ Such releases are typically referred to as "Naig" releases, after the first case expressly recognizing such settlements, Naig v. Bloomington Sanitation. 88/

A Naig release operates by definition--all claims not subject to the workers' compensation carrier's subrogation rights, without specifically being listed, are settled; all claims subject to the subrogation rights are preserved. An essential element in addition to the definition of the claims settled and preserved is notice to the workers' compensation insurer. Lack of notice gives rise to a presumption of prejudice to the insurer. 89/ If that prejudice is not rebutted, the proceeds of the settlement are deemed to be subject to the carrier's subrogation interest.

Once a Naig release is consummated, the case proceeds for resolution of the remaining workers' compensation carrier's subrogation claim. Despite a number of appellate decisions addressing the validity of Naig releases, there is little guidance as to how the balance of the claim is to be tried. 90/ Because of the unique nature of a workers' compensation carrier's obligation (there is an ongoing obligation to pay medical expenses, and a workers' compensation carrier's liability is never totally reduceable to a current value figure), the effect of a Naig settlement is uncertain. Does the action continue on in the plaintiff's name, or in the name of the insurer? Is the case submitted to the jury for an assessment of damages as though the plaintiff were still a party, with the subsequent application of the workers' compensation subrogation statute? 91/

The problems of a Naig settlement rest principally with the settling defendant, and the workers' compensation carrier. However, the defendant gains the advantage of an upper limit on its potential liability, and also is left with a claim that can, in all likelihood, be reasonably compromised. The workers' compensation carrier may well prefer that situation, despite the uncertainty of how its case will be presented to the jury, because the plaintiff and plaintiff's attorney probably no longer are entitled to share in the subrogation recovery under the provision of the

subrogation statute that requires the workers' compensation carrier to pay a fair share of the cost of collection. 92/ On balance, the benefits of a Naig settlement most often outweigh the negative consequences, and the release is a valuable settlement alternative. Form 7 is an example of a Naig release.

B. Galajda and Similar First Party Subrogation

The Minnesota Supreme Court was quick to appreciate the usefulness of Naig principles in cases beyond those involving workers' compensation subrogation. Naig principles are applicable to nearly every liability case where first party subrogation issues exist. In Jones v. Fisher, 93/ the Supreme Court, on its own initiative, suggested the use of the Naig-type release for settlement of dram shop cases with claims of no-fault subrogation asserted. In State Farm Ins. Co. v. Galajda, 94/ the Supreme Court specifically approved a Naig-type release of plaintiff's liability claim, which specifically reserved the subrogation claim of plaintiff's uninsured motorist carrier. No prejudice resulted to the uninsured motorist carrier, as the terms of the release specifically preserve the uninsured motorist carrier's right to pursue its own subrogation claim. 95/

There is no specific form of a Galajda-type settlement agreement. Galajda settlements are patterned largely after Naig releases (Form 7) with reference to the contractual or common law right of subrogation of the uninsured motorist carrier 96/ replacing references to the statutory subrogation rights of the workers' compensation carrier. Galajda-type releases should be appropriate in nearly every first-party insurance coverage context, including no-fault subrogation, health and accident subrogation, disability and first-party property insurance claims.

C. Primary/Excess Liability Coverage

Frequently, a single plaintiff has one claim against a sole defendant with no problems of subrogation, etc. The defendant, however, may have several sources of compensation available to satisfy plaintiff's claims, including primary and excess liability insurance, as well as personal assets. Often more than one insurer will be involved. In such a situation, it is not uncommon for a dispute to result among the insurers and the insured as to who should pay what amount in satisfaction of the claims of the plaintiff. The dispute may result from overlapping or gapping coverages, or from a simple disagreement over the settlement value of the plaintiff's claims. For example:

> Plaintiff suffers personal injuries in an accident. It appears that the accident is primarily the defendant's responsibility. There is serious dispute, however, as to plaintiff's damages. Plaintiff claims to be totally disabled as a result of the accident, but the medical opinions are split as to whether he is in fact disabled and whether any disability is causally related to the accident. It is clear, however, that if plaintiff's damage claim is believed by a jury, the damage award is likely to exceed one million dollars.
>
> The defendant is insured under a primary liability policy with bodily injury limits of $100,000 and under an umbrella policy with bodily injury limits of $500,000. Plaintiff's attorney has submitted a settlement demand of $750,000. Neither insurer is anxious to pay on the claim because of the questionable damage claim. The excess insurer is also steadfast in its refusal to even consider settlement until the primary carrier pays it limits.

> Plaintiff's attorney is anxious to ensure some recovery for his client, but not so anxious that he is willing to settle for nuisance value. (A high-low agreement is a possibility here, if all of the parties can reach an agreement). Defendant's personal attorney is anxious to have the case settled on any basis that fully protects the defendant from personal liability.

In such situations, a settlement that satisfies both parties' concerns, and the primary carrier's obligations under its policy is possible. The vehicle for a partial settlement of plaintiff's claim is a release that discharges the defendant's personal liability, and the liability of the primary insurer, yet preserves the bulk of plaintiff's claim. The essential terms of such a "layered" settlement agreement are these:

> 1. The primary carrier will pay to the plaintiff on behalf of the defendant, under the example given, $75,000 of its $100,000 coverage.
>
> 2. Plaintiff will credit and partially satisfy his damages claim in the amount of $100,000, the primary policy limit. All claims for damages in excess of that amount are preserved by the plaintiff and will be pursued.
>
> 3. Plaintiff further agrees that in the event that he obtains a judgment against defendant in excess of $100,000, he will refrain from executing on any assets of defendant, save and except the assets of the excess liability policy.

By this agreement, plaintiff receives the immediate benefit of a cash settlement, in exchange for a relatively modest discount off the available coverage. The plaintiff also has limited his claim to the remaining insurance coverage, but under the facts of this case, the plaintiff would be satisfied with a total recovery of $575,000. On the other hand, the defendant has eliminated his personal exposure, and the primary carrier has discharged its duty of good faith towards its insured.

Courts are divided on the effect of agreements of this type. Excess carriers can be expected to strenuously oppose such settlements. In United States Inc. Co. v. Lay, 97/ an agreement with similar operative terms as the example was held to relieve the excess carrier from any further liability, because the insured could not, by definition, have any liability under the agreement to the defendant. On the other hand, in Allstate Ins. Co. v. Riverside Ins. Co., 98/, the court upheld the agreement and the ongoing liability of the excess carrier.

In Wisconsin, this type of agreement was approved in Loy v. Bunderson. 99/ The court held that even though the agreement between the plaintiff and the primary carrier released the insured, the excess carrier still had a duty to defend and to indemnify. Loy was upheld and extended in Teigen v. Jelco of Wisconsin, Inc. 100/, which approved the use of Loy-type agreements even in situations where the excess carrier was not liable until after the primary carrier's policy limits were exhausted. 101/

Layered settlements probably present the greatest risk for plaintiff, with relatively little risk for the defendant. One consequence of the settlement agreement may be to void a liability carrier's obligation leaving plaintiff without a source to satisfy a judgment; the release will remain valid as between plaintiff and defendant, however, as it is supported by the consideration

of the cash payment by the liability carrier. The plaintiff must decide whether cash in hand is worth the risk.

Form 8 is an example of a layered settlement agreement.

D. Spouse's Claims

The Iowa Supreme Court has recognized a spousal claim for loss of consortium. 102/ The Court has placed certain limits on that claim, however, including that (a) the injured spouse must also recover from the same tortfeasor, because the claim is derivative, (b) the consortium claim must be joined with the claim of the injured spouse to avoid double recovery, and (c) the judgment will, unless specifically requested, be a part of the judgment of the injured spouse. 103/

More recently, Iowa has recognized that spousal consortium claims represent claims for separate and distinct injuries, and a tortfeasor cannot assert the comparative fault of the injured spouse to reduce the claim for consortium. 104/ That fact notwithstanding, because the loss of consortium claim is for damage to the marital relationship, separate trials generally would not provide an accurate portrayal of the loss. Thus, failure to join an available consortium claim in the trial of a personal injury action will result in the claim being lost. Where, however, the personal injury claim is settled before trial, without including specifically the spousal consortium claim, the settlement will not bar a subsequent claim by the non-injured spouse. 105/

As with releases of fewer than all parties, releases of fewer than all claims are flexible alternatives that promote settlements, often to the mutual benefit of the parties. The absence of legal prejudice to any nonparticipant, and prompt notice to both the nonparticipating parties and the court are essential to the validity of such agreements.

E. Trial Treatment

In Frey v. Snelgrove, 106/ the Minnesota Supreme Court established certain guidelines for the treatment of partial settlement agreements:

1. The trial court and other parties must be promptly notified of the consummation of such an agreement;

2. Terms of the agreement must be made part of the record;

3. The Court should advise the jury of the fact of the settlement;

4. Under most circumstances, the settlement agreement itself will not be admitted into evidence, particularly the amount of money paid under the agreement; and

5. In the final analysis, the treatment of the release is left to the discretion of the trial court. 107/

Where the "settling" party remains an active participant in the litigation, additional safeguards are required to ensure that the rights of the non-settling defendants are protected. Disclosure of the settlement to the court and parties may not be enough. Disclosure to the jury, use of the agreement in cross-examination, and limitations on the right of counsel for the settling defendant to participate in direct and cross-examination and argument all may be necessary.

The most important step in protecting the rights of non-settling defendants was noted by the Supreme Court in Frey, that "[t]he jury should be given those facts [concerning the settlement] necessary to arrive at a fair verdict." 108/ In Johnson v. Moberg, 109/ the Supreme Court discussed the impact that such a partial settlement may have on the course of litigation.

> This kind of settlement can affect the motivation of the parties and, indeed, the credibility of witnesses, and only by bringing these settlements into the open can a trial proceed in a fair and proper adversarial setting. The overwhelming majority of courts that have considered the issue have required that the trier of fact be apprised promptly of any such agreements. 110/

If the jury is never advised of the substantive terms of the settlement and that the settling defendant may share in plaintiff's recovery from the non-settling defendants, the normal scheme of the adversarial process is altered without the jury's knowledge. If the terms of the settlement agreement are given to the jury, it will change the jury's perception of the evidence, and modify the presentation of the evidence, cross-examination, and final argument of the parties. It may be proper, for example, to cross-examine witnesses based upon the settlement agreement, to establish bias or prejudice:

> [Defendant's] concern that the jury did not have the facts necessary to consider the indemnity agreement is a concern that the jury could not properly weigh the credibility of witnesses. Counsel could have impeached any witness as this court noted in the Frey case: '[A] release agreement is admissible under Rule 408 of the Rules of Evidence where it is offered for a purpose such as proving bias or prejudice of a witness . . .' 111/

The Court may also refuse to allow a settling defendant to participate in cross-examination or argument with respect to issues which are the subject of the settlement. Such a rule would prevent occurrences such as took place in Degan v. Bayman 112/, where counsel for the settling defendant argued as follows:

> I have no doubt, ladies and gentlemen, that in this case you are going to give Billy Degan a verdict and believe me, in this argument and particularly in a case like this, I think the attorneys have the real responsibility to be candid with the jury, and I'm trying to be with you because this is a very serious case. There isn't any doubt in my mind but what you're going to give Billy Degan a verdict. There isn't any doubt in my mind that it's going to be a substantial one.

The impact of the agreement may vary depending upon the stage of the trial when settlement is reached. In Peterson and Frey, the bulk of plaintiff's case had already been presented before the settlement agreement was reached. In each case, the supreme court held that any error committed by the trial court was not prejudicial under those circumstances. The situation is clearly different when the agreement is reached before the jury is selected, or before testimony begins. 113/ At the very beginning of the case, it is clear that the trial court's refusal to disclose the details of the settlement, and to afford counsel for the non-settling defendants an opportunity to present to the jury the full impact of the settlement, can be highly prejudicial and may amount to an abuse of discretion.

Minnesota has adopted a strong policy of prompt disclosure of partial settlement agreements. Adherence to this policy removes many of the objectionable aspects of such settlement agreements complained of so vociferously in other jurisdictions. However, prompt disclosure alone does not remedy all of the problems such agreements create for the non-settling defendants. When confronted with a partial settlement agreement that contemplates the settling defendant's continued participation in the litigation and perhaps sharing in the fruits of plaintiff's

recovery, the non-settling defendant should ask the trial court to consider taking the following actions:

1. The agreement must be made a part of the record.

2. The trial court should advise the jury of the fact of the settlement.

3. While the settlement agreement itself should rarely be admitted into evidence, the jury should be advised of the existence of the agreement, and in general terms, the impact of the settlement on the relative positions of the parties.

4. The court should consider reasonable requests to use the settlement agreement to cross-examine witnesses, for the purpose of showing bias or prejudice.

5. Where appropriate, counsel for the settling defendant should be restricted from participation in cross-examination or argument with respect to issues which are the subject of the settlement.

Through these steps, partial settlement agreements can be turned into two-edged swords. A plaintiff and defendant who enter into such arrangements will be forced to weigh carefully the impact their agreement might have on the course of the trial. Non-settling defendants will be able to lessen the prejudice that flows from the unnatural alliance of previously adverse parties.

Even if the settlement agreement is disclosed to the jury, great care must be exercised to ensure that the basic right of the litigants to a fair trial is not affected. Perhaps the admonition of the Federal District Court Judge in Daniel v. Penrod Drilling Company 114/ is most apropos:

> Courts are not merely arenas where games of counsel's skill are played. Even in football we do not tolerate point shaving. It is perhaps because the trial is adversary that each side is expected to give its best, without secret equivocation. Counsel have no duty to seek ultimate truth in a system where the lawyer's duty is primarily to represent his client. But even if the lawyer has no duty to disclose the whole truth, he does have a duty not to deceive the trier of fact, and obligation not to hide the real facts behind a facade.

CONCLUSION

Releases, and settlement agreements, are contractual in nature. The parties to such agreements are free to draft them as they wish, provided that their agreements are fully disclosed to the court, do not prejudice the rights of persons not parties to the agreement, and do not subvert the adversary judicial process. Drafting of agreements can best be accomplished by using clear, and concise language. There is no "form" for any agreement, and there is only one rule of drafting--say what you mean, as simply and as clearly as possible, keeping in mind the requirements of a contract, the desired effect of the settlement, and the legal consequences of such an agreement.

> It is not proper or desirable for this court to condone or condemn types of settlement agreements generically. Rather, we must examine them on a case-by-case basis and assess their validity and effect. If there is no secrecy surrounding a settlement, and if it does not act to prejudice the rights of the non-agreeing parties, then we see no

general prohibition against such agreements. 115/

FORM 1

FULL AND FINAL
RELEASE
OF ALL CLAIMS

IN CONSIDERATION of the payment of $_____ to me/us in hand paid by _____ INSURANCE CORPORATION, I/we do hereby release and forever discharge _____, and _____ Insurance Corporation, their heirs, representatives, successors, assigns and all other persons, firms and corporations from any and all liability, actions, causes of action, claims and demands, known and unknown, upon and by reason of any damage, loss or injury which heretofore have been or which hereafter may be sustained by me in consequence of the accident which occurred on _____.

I/We understand that the injury may be permanent and progressive, and recovery may be uncertain, and I/we rely on my/our judgment only in making this Release and do not rely on any other person in any manner whatsoever.

IT IS FURTHER AGREED AND UNDERSTOOD that said payment is not to be construed as an admission of liability and is a compromise of a doubtful and disputed claim.

IT IS FURTHER AGREED AND UNDERSTOOD that this Release and the payment made pursuant hereto is not to be construed as a waiver by or as an estoppel of any parties hereby released to prosecute a claim or cause of action against any other person, firm or corporation for damages sustained as a result of the said accident hereinabove referred to, or to deny liability to and defend against any claim or action brought by any person, firm or corporation as a result of the accident hereinabove referred to.

This Release contains the ENTIRE AGREEMENT between the parties hereto and the terms of this Release are contractual and not a mere recital.

_____

_____

DATED: _____, 198_

FORM 2

(TYPE VENUE--MINOR SETTLEMENT PACKAGE)
PETITION FOR APPROVAL OF MINOR'S SETTLEMENT

AA respectfully represents and shows to the Court that:

I.

He is the father and natural guardian of BB, a minor. BB is _____ years of age, having been born on _____.

II.

(FACTS OF ACCIDENT)

III.

(INJURIES RECEIVED, INCLUDING REFERENCE TO ATTACHED MEDICAL REPORTS)

IV.

(FINAL PROGNOSIS)

V.

As a result of said accident, your petitioner incurred medical and incidental expenses. All of said medical and incidental expenses have been paid for by insurance, and your petitioner makes no claim for reimbursement of the same, and no subrogation rights to any settlement obtained on behalf of BB are held by any insurer.

VI.

The insurer for CC, while denying liability, has now offered to settle the claim of BB by paying to said minor, as damages for the bodily injuries he sustained, the sum of $_____. It

is contemplated that this settlement shall be concurrent with and effective upon the approval of the District Court. The settlement proposed is intended to be in full payment and satisfaction of all claims of all of the parties, including known or unknown injuries or unforeseen consequences of known injuries arising out of the accident.

VII.

The proposed settlement is, in the opinion of your petitioner, justified, and the amount is proper and reasonable considering the extent of the minor child's injury. In making this determination, your petitioner has relied upon his own judgment and the judgment and representations of the physicians by whom BB has been attended.

VIII.

Your petitioner believes that the proposed settlement is for the best interest of said minor, and should be accepted pursuant to the approval of the this Court rather than impose upon said minor the consequence, burden, expenses, delay and uncertainty of litigation in trial of said claim, including the contingency of an adverse verdict.

IX.

(Optional Paragraphs)

(A) The entire of sum of $_____ to be paid in settlement of the minor's claim is available for the benefit of said minor.

(B) To assist your petitioner in commencing and prosecuting this claim, the service of the law firm of _____ have been retained. A settlement has been negotiated between your petitioner's attorneys, _____, and representatives of CC, and it is as a result of said settlement negotiations that CC, while denying liability, has offered to pay the total sum of $_____ in settlement of this cause of

action. Your petitioner has agreed to pay to the firm of _____ one-third of any sums paid in settlement or compromise of this matter, after deduction of actual disbursements. The firm of _____ has made disbursements in the amount of #10 subtracting these from the sum of $_____, leaves a balance of $_____, one-third of which is $_____. Your petitioner intends to pay to the firm of _____ the sum of $_____ for disbursements and $_____ as and for attorneys' fees.

WHEREFORE, your petitioner prays for an Order of this Court as follows:

1. Authorizing him to accept on behalf of said minor the sum of $_____ in full settlement of all claims for bodily injuries of said minor arising out of the aforedescribed accident, and to execute a full and complete release thereof, and to do all things necessary to accomplish a full and final disposition and settlement of the claim of said minor; and

2. In lieu of the filing of a bond, that petitioner be directed to deposit to the account of BB, a minor, as a savings account in the _____ bank the sum of $_____, representing

(OPTIONAL PARAGRAPHS)

(A) the full amount of the settlement.

(B) the balance of the settlement after deducting disbursements and attorneys' fees, together with a copy of the Court's Order herein; and directing that the deposit book evidencing said account be filed with the Clerk of District Court, _____ County, Minnesota; said funds to be paid to said minor on or subsequent to _____, the day on which he obtains his 18th birthday, without further order of this Court; and

that, otherwise, said funds shall be subject to withdrawal only upon order of this Court.

Dated this _____ day of _____, 19__.

_____
AA

STATE OF MINNESOTA)
) ss.
COUNTY OF)

AA, being first duly sworn, states that he is the petitioner in the above entitled proceedings; that he has read the foregoing petition and knows the contents thereof, and that the same are true of his own knowledge, except as to matters therein stated on information and belief, and as to those matters he believes them to be true.

_____
AA

Subscribed and sworn to before me this

_____ day of _____, 19___.

_____
Notary Public

(TYPE VENUE--MINOR SETTLEMENT PACKAGE)
ORDER APPROVING SETTLEMENT

Upon the foregoing petition and upon all of the files, records and proceedings herein, the above named minor having appeared personally before the undersigned, the Court having made inquiries of said minor and his parents, and having duly considered all of the foregoing,

IT IS ORDERED:

That the petitioner, AA, the father and natural guardian of BB, the minor, be, and hereby is, authorized to accept on behalf of said minor the sum of $_____ in full settlement and satisfaction of all claims of said minor, to execute a release discharging CC from any and all liability to said minor for claims which said minor may now have or may in the future have for personal injuries or damages occasioned by said accident, whether said injuries or damage be known or unknown, or unforeseen consequences of known injuries, at the present, and to execute such additional instruments as may be necessary for the full, final and complete release of said minor's claims against the defendants, and each of them.

(Optional Paragraph)

IT IS FURTHER ORDERED that petitioner is authorized and directed to pay from said sum the amount of $_____ for disbursements, and $_____ as and for attorneys' fees to the law firm of _____.

IT IS FURTHER ORDERED that in lieu of the filing of a bond by AA herein, that this Court hereby authorizes and directs said AA to deposit to the account of AA, as father and natural guardian of BB, a minor, as a savings account in the _____ bank, the sum of $_____, together with a copy of the Order of this Court and file the deposit book therein with the Clerk

of this Court; the funds therein to be subject to withdrawal by said minor on or after _____, when he reaches full legal age, or, otherwise, only upon further order of this Court.

THIS ORDER IS MADE UPON THE CONDITION THAT THE DRAFT TO BE DEPOSITED FOR THE MINOR'S BENEFIT BE MADE PAYABLE TO THE FINANCIAL INSTITUTION MENTIONED HEREINABOVE.

Dated this _____ day of _____, 19__.

_____
Judge of District Court

(TYPE VENUE--MINOR SETTLEMENT PACKAGE) RELEASE FOR MINOR OF ALL CLAIMS

RELEASE FOR MINOR OF ALL CLAIMS, KNOWN AND UNKNOWN, AUTHORIZED BY COURT ORDER

KNOW ALL MEN BY THESE PRESENTS that I, AA, as parent and natural guardian of BB, a minor, and individually, and in consideration of the sum of _____ Dollars, paid in accordance with the Court Order dated _____, receipt and sufficiency of which is hereby acknowledged, hereby release CC, his heirs, executors, and assigns, and all other persons, firms and corporations, of and from any and all claims and demands of every kind, including all claims and demands for personal injuries and death, whether said injuries be known or unknown, including the known and unknown consequences of said injuries, which have or will be suffered and sustained by me and BB, a minor, as a result of an accident which occurred on or about _____, at _____.

This release is executed and entered into by AA, individually and as natural guardian of BB, by authority of an Order of the District Court of _____ County, Minnesota, dated _____, authorizing and directing settlement of the claims and causes of action herein referred to.

This settlement is made without any admission of liability on the part of said CC, and it is understood that liability is denied by CC, and that the payment of said sum is made only for the purposes of compromise and avoidance of the expense of litigation; and, to induce the acceptance of this release and the payment of said consideration, I, AA, warrant that I am the parent and natural guardian of BB, a minor, and that this release is executed and entered into individually and on behalf of said minor without influence, representation or coercion on the part of said CC,

and is my free act and deed, authorized by said Court Order.

IN WITNESS WHEREOF, the undersigned has hereunto set his hand this _____ day of _____, 19__.

In the Presence of:

_____
Witness

_____
AA,
as parent and natural guardian of BB, a minor, and individually

_____
Witness

STATE OF MINNESOTA)
) ss.
COUNTY OF _____)

AA, being first duly sworn, deposes and says that he/she is the person who made and executed the above release, and that he/she has read the same and knows the contents thereof and executes the same as his/her free act and deed.

_____
AA

Subscribed and sworn to before me this

_____ day of _____, 19___.

_____
Notary Public

discharged from _____ liability, if any, for contribution or indemnity with respect to the claim for damages of AA, and the claims of AA are satisfied to the extent of that percentage of AA's total claim for damages against BB arising out of the accident of accident of _____, 19__, which shall hereafter, by further trial or other disposition of this or any other cause of action, be determined to be the percentage of causal fault or causal responsibility, if any, whether for negligence or any other liability, for which BB is found to be liable.

This payment by BB is not intended as full compensation for damages claimed by AA arising from the accident of _____, 19__. However, by this covenant AA settle and satisfy that percentage of AA's total claim for damages against all parties arising out of the accident of _____, 19__, which shall hereafter by further trial or other disposition of this or any other action be determined to be the percentage of causal fault or causal responsibility whether for negligence, or any other liability for which BB is found to be liable. It is the intention of AA and BB, by the language contained in this document, to extinguish any potential liability on the part of BB for contribution or indemnity which might be claimed by CC.

BEFORE SIGNING BELOW, CONSULT YOUR ATTORNEY ON THE EFFECT OF THIS RELEASE.

Witness my hand this ____ day of _____, 198_.

IN THE PRESENCE OF:

_____ _____

AA

_____

STATE OF MINNESOTA)
) ss.
COUNTY OF)

On this _____ day of _____, 198_, before me, a Notary Public, appeared AA, to me personally known, who acknowledged and executed the foregoing Pierringer Release as _____ free act and deed for the consideration set forth therein.

_____
Notary Public

FORM 4

COVENANT NOT TO SUE

KNOW ALL MEN BY THESE PRESENTS:

That I, John Doe, for and in consideration of the sum of Ten Thousand and No/100 Dollars ($10,000.00), which will apply to all of my claims, including bodily injury claims, property damage claims, derivative claims and consequential claims, the receipt of which sum is hereby acknowledged, do hereby covenant and expressly agree with Dan Defendant not to prosecute any suit for damages against Dan Defendant, and to forever refrain from instituting any action or making any demand or claim of any kind against Dan Defendant for damages sustained by me as a result of an accident which occurred on or about August 3, 1982, on Highway ___, West of _____, Minnesota, in the County of _____.

This covenant not to sue or make any claims against Dan Defendant is not entered into, nor in any way intended, to release any claim or cause of action by me against Tom Tortfeasor, or any other person, for damages sustained as a result of the accident of August 3, 1982, said claims and causes of action being specifically reserved and retained.

I hereby specifically agree to hold Dan Defendant harmless, and specifically agree to indemnify him from any claims, demand or cause of action by Tom Tortfeasor, or any other person, for apportionment by way of contribution, whether such claim for contribution is alleged to arise by reason of judgment, settlement or otherwise.

The payment to be received by me from Dan Defendant is not intended as full compensation for damages claimed by me arising out of the accident of August 3, 1982. It is recognized by the parties to this agreement, that my claim for damages is in excess of the amount paid hereunder, and that any payments received by me constitute

only a partial and incomplete satisfaction of my claim for damages arising out of the accident of August 3, 1982.

Dated this _____ day of _____, 19__.

_____
John Doe

STATE OF MINNESOTA)
) ss.
COUNTY OF HENNEPIN)

On this _____ day of _____, 198__, before me, a Notary Public, appeared John Doe, to me personally known, and to acknowledge the execution of the foregoing Covenant Not to Sue as his free act and deed for the consideration set forth therein.

_____
Notary Public

FORM 5

LOAN RECEIPT AND CONTRACT FOR RELEASE

This agreement, made and entered into this _____ day of _____, 1983, by and between Paul Plaintiff, and Dan Defendant.

WHEREAS, on September 17, 1982, on Highway ____, North of _____, Minnesota, in _____ County, a collision occurred between a motor vehicle owned and operated by Dan Defendant, and a motor vehicle owned and operated by Tom Tortfeasor, in which Paul Plaintiff was a passenger; and

WHEREAS, it is claimed that said collision resulted in injuries to Paul Plaintiff, and that a cause of action exists against Dan Defendant, and others whose conduct allegedly caused or contributed to the injuries of Paul Plaintiff; and

WHEREAS, Dan Defendant, while denying all liability, has offered to pay to Paul Plaintiff the amount hereinafter set forth in order to settle and compromise this disputed claim; and

WHEREAS, Paul Plaintiff desires to accept the sum to be paid pursuant to this agreement, in satisfaction of his claims against Paul Plaintiff, but to preserve and pursue his claims against all other persons who have legal liability for the injuries suffered by Paul Plaintiff;

NOW, THEREFORE, it is agreed by and between the parties as follows:

1. Dan Defendant shall pay, concurrent with the execution of this agreement, the sum of $1,000.00 to Paul Plaintiff, in full satisfaction of Paul Plaintiff's claims against Dan Defendant.

2. In further consideration of the release of the claims of Paul Plaintiff against Dan Defendant, Dan Defendant will pay to Paul Plaintiff, concurrent with the execution of this agreement, the sum of $5,000.00, as a loan, repayable in the event that Paul Plaintiff makes a recovery, either by verdict, judgment or otherwise, from Tom Tortfeasor, or any other person, firm or corporation, whose conduct is found to have caused or contributed to, or who may in any way be legally liable for the damages, or any part thereof, suffered by Paul Plaintiff. This loan will be repaid out of the proceeds of any such recovery, as follows: for each $2.00 recovered by Paul Plaintiff from any person or entity other than Dan Defendant, the loan from Dan Defendant to Paul Plaintiff shall be repaid by $1.00, until the entire amount of $5,000.00 has been repaid.

3. In consideration of the payment to be made pursuant to this agreement, and the loan to be made by Dan Defendant to Paul Plaintiff, Paul Plaintiff hereby releases and forever discharges Dan Defendant from any and all claims or causes of action for damages of every kind, nature and description, past, present or future, known or unknown, as sustained by Paul Plaintiff as a result of the accident of September 17, 1982. Paul Plaintiff agrees that the amount to be paid by Dan Defendant as consideration for this agreement (not including the amount to be loaned to Paul Plaintiff by Dan Defendant) shall fully satisfy that portion of the total amount of damages which may be attributed to Paul Plaintiff in any trial or other proceeding, and he hereby credits and satisfies that portion of the total amount of damages, if any, which were caused by the fault, if any, of Dan Defendant, as may hereinafter be determined by trial or any other proceeding.

4. In further assurance to Dan Defendant that he will not, by reason of the pursuit of any claims against Tom Tortfeasor, or any other person, by Paul Plaintiff, be required to pay, either

directly or indirectly more than the amount paid in consideration of this agreement, Paul Plaintiff agrees to indemnify and hold harmless Dan Defendant from liability to Tom Tortfeasor, or any other person for contribution or indemnity because of a determination in their favor, by suit or otherwise, that Dan Defendant is chargeable with a larger fraction, portion or percentage of the total damages sustained by Paul Plaintiff in the accident of September 17, 1977, than is represented by the payment to be made pursuant to this agreement. This agreement is specifically intended to release any claim for contribution or indemnification which may be brought against Dan Defendant by any party, including, but not limited to, Tom Tortfeasor.

5. It is expressly understood that the consideration to be paid pursuant to this agreement (exclusive of the loan) is only a partial and incomplete satisfaction of the damages suffered by Paul Plaintiff, and Paul Plaintiff expressly reserves the right to continue any action or claim against Tom Tortfeasor, or any other person whose conduct may have caused or contributed to the accident of September 17, 1982.

IN WITNESS WHEREOF, I have hereunto set my hand this _____ day of _____, 19__.

_____
Paul Plaintiff

Subscribed and sworn to before me this

_____ day of _____, 19___.

_____
Notary Public

FORM 6

HI-LO AGREEMENT

On August 8, 1982, on Highway _____, North of _____, Minnesota, an accident occurred involving vehicles operated by Paul Plaintiff, Dan Defendant and Tom Tortfeasor.

Paul Plaintiff has commenced a lawsuit in _____ County District Court against Dan Defendant and Tom Tortfeasor, alleging that Dan Defendant and Tom Tortfeasor are, either jointly or severally, liable for the injuries and damages sustained by Paul Plaintiff in the accident of August 8, 1982.

It is the claim of Paul Plaintiff, and the opinion of Dan Defendant, that the injuries and damages sustained by Paul Plaintiff have a value in excess of $50,000.00.

Having in mind the above facts, Paul Plaintiff enters into the following agreement with Dan Defendant, but it is expressly agreed that this agreement is null and void unless this matter is tried to a conclusion, and the jury awards damages. Further, this agreement does not destroy or limit the right of contribution among the parties to the above-mentioned lawsuit.

Paul Plaintiff covenants and agrees with Dan Defendant that:

(a) In the event of a damages award less than $50,000.00, Dan Defendant will pay his apportioned share of said award, and, in addition, will pay the difference between said award and $50,000.00; and

(b) In the event of a damages award equal to or in excess of $50,000.00, Dan Defendant will pay

his apportioned share of $50,000.00, and as to any damages award in excess of $50,000.00, the claims of Paul Plaintiff are satisfied and released to the extent of that percentage of the total claim for damages in excess of $50,000.00 which shall be determined to be the causal fault, if any, for which Dan Defendant is found liable, and the claim of Paul Plaintiff against Dan Defendant for such amount in excess of $50,000 shall be satisfied and released.

This agreement does not and is not intended to limit Paul Plaintiff's recovery to $50,000.00. It does not guarantee a payment by Dan Defendant of $50,000.00, but rather limits the maximum payment of Dan Defendant to $50,000.00, and guarantees a payment of at least $50,000.00 to Paul Plaintiff.

_____
Paul Plaintiff

Subscribed and sworn to before me this

_____ day of _____, 19___.

_____
Notary Public

_____
Dan Defendant

Subscribed and sworn to before me this

_____ day of _____, 19___.

_____
Notary Public

NOTES

1. Savery v. Kist, 234 Ia. 98, 11 N.W.2d 23 (1943).

2. Annot., 13 A.L.R. 3d 42, § 3 (1967).

3. See Notes 72 through 80, infra.

4. Stetzel v. Dickenson, 174 N.W.2d 438 (Ia. 1970).

5. Kellogg v. Iowa State Traveling Men's Ass'n, 239 Ia. 196, 29 N.W.2d 559 (1948).

6. Messer v. Washington Nat. Ins. Co., 233 Ia. 1372, 11 N.W.2d 727 (1943).

7. In re Thornwall's Estate, 233 Ia. 626, 10 N.W.2d 35 (1943).

8. Speckel v. Perkins, 364 N.W.2d 890 (Minn. Ct. App. 1985). In Iowa, fraud or misrepresentation may result in a mistake of law that may be a ground for invalidating a settlement agreement. Wright v. Scott, 410 N.W.2d 247 (Iowa 1987). See Kelly v. Chicago Rock Island & Pacific Railway Co., 138 Iowa 237, 114 N.W. 536 (1908).

9. Wright v. Scott, 410 N.W.2d 247 (Ia. 1987).

10. Schoenfield v. Buker, 262 Minn. 122, 114 N.W.2d 560 (1962).

11. Hanson v. Northern States Power Co., 198 Minn. 24, 268 N.W. 642 (1936); West v. Kidd, 184 Minn. 494, 239 N.W. 157 (1931).

12. Pennebaker v. North American Life Ins. Co. of Chicago, 226 Ia. 314, 284 N.W. 147 (1939).

13. Anderson v. Ciba-Geigy Corp., 490 F.2d 438, 441 (1974).

14. Syester v. Banta, 257 Ia. 613, 133, N.W. 2d 666 (1965).

15. 17 Am. Jur. 2d Contracts § 16.

16. See, Syester v. Banta, 257 Ia. 613, 133 N.W. 2d 666 (1965).

17. Id.

18. Iowa Rules of Civil Procedure Rule 14.

19. Iowa Rules of Civil Procedure Rule 12.

20. In Re Guardianship of Fisher, 226 Ia. 596, 284 N.W. 821 (1939).

21. Id.

22. Iowa Code § 622.32.

23. See, e.g., Williams v. Boyer, 306 N.W.2d 147 (Minn. 1981).

24. See, e.g., Danelski v. King, 314 N.W.2d 818 (Minn. 1981).

25. McCollough v. Campbell Mill & Lumber Co., 406 N.W.2d 812 (Ia. Ct. App. 1987).

26. Id.

27. Aronovitch v. Levy, 238 Minn. 237, 56 N.W.2d 570 (1953); Jeffries v. Gillitzer, 302 Minn. 402, 225 N.W.2d 17 (1975).

28. Pedersen v. Bring, 117 N.W.2d 509 (Iowa 1962); Rich v. Dyna Technology, Inc., 204 N.W.2d 867 (Iowa 1973)(a release must be construed according to its terms).

29. Dillon v. City of Davenport, 366 N.W.2d 918 (Ia. 1985).

30. Ethical canon 7-7 of the Iowa Code of Professional Responsibility for lawyers provides that: "In certain areas of legal representation not affecting the merits of the cause or substantially prejudicing the rights of a client, a lawyer is entitled to make decisions on his own. But otherwise the authority to make decisions is exclusively that of the client and, if made within the framework of the law, such decisions are binding on his lawyer. As typical examples in civil cases, it is for the client to decide whether he will accept a settlement offer...".

31. Rosenberg v. Townsend, Rosenberg & Young, Inc., 376 N.W.2d 434 (Minn. Ct. App. 1985); Wiltgen v. Hartford Accident & Indemnity Co., 634 F.2d 398 (8th Cir. 1980).

32. Skalbeck v. Agristor Leasing, 384 N.W.2d 209 (Minn. Ct. App. 1986).

33. Jordan v. Brady Transfer & Storage Co., 226 Ia. 137, 284 N.W. 73 (Ia. 1939).

34. Wieland v. Cedar Rapids and Iowa City Ry. Co., 46 N.W.2d 916 (Ia. 1951).

35. Stetzel v. Dickenson, 174 N.W.2d 438 (Ia. 1970).

36. Id.

37. Bergman v. Bergman, 247 Ia. 98, 73 N.W.2d 92 (1955).

38. Stetzel v. Dickenson, 174 N.W.2d 438 (Ia. 1970).

39. Wright v. Scott, 410 N.W.2d 247 (Ia. 1987).

40. 377 N.W.2d 441 (Minn. 1985).

52. Thomas v. Solberg, 442 N.W.2d 73 (Ia. 1989).

53. Lange v. Schweitzer, 295 N.W.2d 387 (Minn. 1986).

54. Frederickson v. Alton M. Johnson Co., 402 N.W.2d 794 (Minn. 1987).

55. Hosley v. Armstrong Cork Co., 383 N.W.2d 289 (Minn. 1986).

56. Hoerr v. Northfield Foundary & Machine Co., 376 N.W.2d 323 (N.D. 1985).

57. Id.

58. Simonett, Release of Joint Tortgeasors: Use of the Pierringer Release in Minnesota, 3 William Mitchell L. Rev. 1, 34 (1977).

59. Bruce v. BCD, Inc., 396 F. Supp. 157 (S.D. Ia. 1975). The same result has been reached in Minnesota. Pischke v. Kellen, 384 N.W.2d 201 (Minn. Ct. App. 1986) (release of employee releases employer); Hoffman v. Wiltscheck, 411 N.W.2d 983 (Minn. Ct. App. 1987) (release of driver releases owner).

60. Bruce, supra. Also Hendrickson v. Minnesota Power and Light Co., 258 Minn. 368, 104 N.W.2d 843 (1960).

61. This rule is followed in other jurisdictions but is not universally accepted. See, Annot., 23 A.L.R. 4th 541 (1983), entitled "Release of, or Covenant Not to Sue, One Primarily Liable for Tort, But Expressly Reserving Rights Against One Secondarily Liable, As Bar To Recovery Against the Ladder".

62. Moose v. Rich, 253 N.W.2d 565 (Ia. 1977).

63. Lincoln v. Gupta, 370 N.W.2d 312 (Mich. Ct. App. 1984); Bartrand v. Chesapeake and Ohio Ry Co., 274 N.W.2d 822 (Mich. Ct. App. 1979).

64. Jakubs v. Fruehauf Corp., 435 F. Supp. 908 908 (N. D. Ill. 1977) (emphasis in original).

65. Section 302A.521, subd. 2 (1986).

66. Reedon of Faribault Inc. v. Fidelity and Guaranty Ins. Underwriters, Inc., 387 N.W.2d 441 (Minn. Ct. App. 1986).

67. Thomas v. Solberg, 442 N.W.2d 73 (Ia. 1989).

68. W. Prosser, Handbook of The Law of Torts, (4th ed., 1971) Section 46-50. Until the adoption of either statutory or judicially recognized rights of contribution, and at the merger of the courts of law and equity, and certain jurisdictions contribution actions were not allowed between joint tortfeasors. 18 Am. Jur. 2nd Contribution § 5 (1965).

69. See 19 Ariz. L. Rev., 863, 865 (1977).

70. Lang v. Siddall, 218 Ia. 263, 254 N.W. 783 (1934).

71. Levi v. Montgomery, 120 N.W.2d 383 (N.D. 1963).

72. Tober v. Hampton, 178 Neb. 858, 136 N.W.2d 194 (1965).

73. Blair v. Espeland, 231 Minn. 444, 43 N.W.2d 274 (1950); Jostens, Inc. v. Mission Ins. Co., 387 N.W.2d 161 (Minn. 1986).

74. Annot., 13 A.L.R. 3d 42, § 3 (1967).

75. Annot., 62 A.L.R. 3d 1111 (1972), entitled "Validity and Effect of 'Loan Receipt' Agreement Between Injured Party and One Tortfeasor, for Loan Repayable to Extent of Injured Party's Recovery from a Co-Tortfeasor"; Annot., 65 A.L.R. 3d 602 (1972), entitled "Validity and Effect of Agreement with One Co-Tortfeasor Settling His Maximum Liability and Providing for Reduction or Extinguishment Thereof Relative to Recovery Against Nonagreeing Co-Tortfeasor"; Annot. 24 A.L.R.4th 547 (1983), entitled "Release of, or Covenant Not to Sue One Primarily Liable For Tort, But Expressly Reserving Rights Against One Secondarily Liable, As Bar to Recovery Against Latter." Scoby, Loan Receipts and Guarantee Agreements, 10 Forum 1300 (1975); Finz, A Trial Where Both Sides Win, 59 Judicature 41 (1975); Lagson, Guarantee and Loan Receipt Agreements in Multi-Party Litigation, 43 Insurance Counsel Journal 409 (1976). Miller, Mary Carter Agreements, 32 S.W.L.J. 779 (1978).

76. Maule Indus., Inc. v. Rountree, 264 So. 2d 445, 446, n.1 (Fla. Dist. Ct. App. 1972), rev'd, 284 So. 2d 389 (Fla. 1973).

77. Herndon, "Mary Carter" Limitation on Liability Agreements Between Adversary Parties: A Painted Lady is Exposed, 28 U. Miami L. Rev. 988 (1974); Freedman, The Expected Demise of "Mary Carter": She Never Was Well, 633 Ins. L. J. 602 (1975); Grant, The Mary Carter Agreement -- Solving the Problems of Collusive Settlements in Joint Tort Actions, 47 S. Cal. L. R. 1393 (1973-74); Miller, Mary Carter Agreements: Unfair and Unnecessary, 32 SW. L. J. 779 (1978-79).

78. Bodine, The Case Against Guaranteed Verdict Agreements, 29 Def. L. J. 233 (1980) (footnotes omitted).

79. Trampe v. Wisconsin Telephone Co., 214 Wis. 210, 252 N.W. 675 (1934).

80. Lum v. Stinnett, 87 Nev. 402, 488 P.2d 347 (1971).

81. Carson, Are Gallagher Covenants Unethical?: An Analysis Under the Code of Professional Responsibility, 19 Ariz. L. Rev. 863 (1977).

82. Informal Opinion 1386, June 2, 1977.

83. Comment, Blending Mary Carter's Colors: A Tainted Covenant, 12 Gonz. L. Rev. 266-268 (1977) (footnotes omitted).

84. Miller, Mary Carter Agreements: Unfair and Unnecessary, 32 SW. L. J. 784 (1978).

85. 260 N.W.2d 548 (Minn. 1977).

86. Vineseck v. Great No. Ry. Co., 136 Minn. 96, 161 N.W. 494 (1917); See also Wolverine Ins. Co. v. Klomparens, 273 Mich. 493, 263 N.W. 724, 92 A.L.R.2d 102 (1935) 13 A.L.R.3d 140 (1967) and 24 A.L.R.4th 646 (1983). The Minnesota Supreme Court has expressly recognized this principal in Travelers Indemnity Co. v. Vaccari, 245 N.W.2d 844, 847 (Minn. 1976).

87. Naig v. Bloomington Sanitation, 310 Minn. 97, 258 N.W.2d 891 (1977); Paine v. Waterworks Supply Co., 269 N.W.2d 725 (Minn. 1978); Rascop v. Nationwide Carriers, 281 N.W.2d 170 (Minn. 1979); Henning v. Wineman, 306 N.W.2d 550 (Minn. 1981); Haase v. Haase, 369 N.W.2d 311 (Minn. Ct. App. 1985).

88. 310 Minn. 97, 258 N.W.2d 891 (1977).

89. Easterlin v. State, 330 N.W.2d 704 (Minn. 1983).

90. The Minnesota Supreme Court has noted that the trial of the remainder of a personal injury claim after a Naig release has been given creates uncertainty as to what claim exactly is left to the employer. "The answer to this question presents a number of theoretical and practical problems." Easterlin v. State, 330 N.W.2d 704, 708 (Minn. 1983). Unfortunately, to date those questions have not been answered.

91. Minn. Stat. § 176.061, subd. 6.

92. Note 67, supra.

93. 309 N.W.2d 726 (Minn. 1981).

94. 316 N.W.2d 564 (Minn. 1982).

95. A Pierringer/Galadja release may, however, limit the insured's recovery from the uninsured motorist carrier to that portion of damages attributable to the uninsured motorist. State Farm Mut. Auto. Ins. Co. v. Galloway, 354 N.W.2d 527 (Minn. Ct. App. 1984).

96. Flanery v. Total Tree, Inc., 332 N.W.2d 642 (Minn. 1983) (even in absence of statute, uninsured motorist carrier has common law subrogation right).

97. 577 F.2d 421 (7th Cir. 1978).

98. 509 F. Supp. 43 (E.D. Mich. 1981).

99. 107 Wis.2d 400, 320 N.W.2d 175 (1982).

100. 124 Wis.2d 1, 367 N.W.2d 806 (1985).

101. In Loy the "excess" carrier would have been liable from dollar one except for the presence of another policy that was primary. See Ghiardi and Ferris, Excess Insurer

Beware -The Primary Insurer Has Found The Back Door, 28 Vol. No. 2 For the Defense 12 (Feb. 1986).

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

103. Berghammer v. Smith, 185 N.W.2d 226 (Ia. 1971). (Iowa adopts Minnesota's conditional recovery for a claim for loss of consortium. See Thill v. Modern Erecting Co., 284 Minn. 508, 170 N.W. 2d 865 (1969)).

104. Schwennen v. Abell, 430 N.W.2d 98 (Ia. 1988).

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

106. 269 N.W.2d 918 (Minn. 1978).

107. Id., at 923. See, Magnuson, Loan Receipts and Other Fancy Settlement Agreements: Making Them Into Two-Edged Swords, Minn. Defense (Spring, 1986).

108. Chunko v. LeMaitre, 159 N.W.2d 876 (Mich. Ct. App. 1968).

109. 334 N.W.2d 411 (Minn. 1983).

110. Id., at 415.

111. Peterson v. Little Giant-Glencoe Port Elev. Co., 366 N.W.2d 11, 115 (Minn. Ct. App. 1985). See, also, Riewe v. Arnesen, 381 N.W.2d 448 (Minn. Ct. App. 1986).

112. 86 S. D. 598, ___, 200 N.W.2d 134, 139 (1972).

113. Riewe v. Arnesen, 381 N.W.2d 448, 452 (Minn. Ct. App. 1986).

114. 393 F. Supp. 1056, 1060-61 (E.D. La. 1975).

115. Pacific Indemnify Co. v. Thompson-Yaeger, Inc., 260 N.W.2d 548, 558 (Minn. 1977).

RULE 125, IOWA RULES OF CIVIL PROCEDURE

AND DISCOVERY SANCTIONS

J

CONNIE M. ALT
SHUTTLEWORTH & INGERSOLL
CEDAR RAPIDS, IOWA
September 24th, 1989

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I. RULE 125, IOWA RULES OF CIVIL PROCEDURE.

(a) Expert who is expected to be called as a witness. In addition to discovery provided pursuant to R.C.P.133, discovery of facts known, mental impressions, and opinions held by as expert whom the other party experts to call as a witness at trial, otherwise discoverable under the provisions of 122(a), and acquired or developed in anticipation of litigation or for trial may be obtained as follows:

(1) a party may through interrogatories require any other party to state the name and address of each person whom the other party expects to call as an expert witness at trial and to state, with reasonable particularity:

(A) The subject matter on which the expert is expected to testify;

(B) The designated person's qualifications to testify as an expert on the subject; and

(C) The mental impressions and opinions held by the expert and the facts known to the expert (regardless of when the factual information was acquired) which relate to, or form the basis of, the mental impressions and opinions held by the expert.

J

Nothing in this rule shall be construed to preclude a witness from testifying as to (1) knowledge of the facts obtained by the witness prior to being retained as an expert or (2) mental impressions or opinions formed by the witness which are based on such knowledge.

In the case of an expert retained in anticipation of litigation or for trial, answers to interrogatories asking for the qualifications of the person expected to testify as an expert, the mental impressions and opinions held by the expert, and the facts known to the expert shall be separately signed by the designated expert witness. If the party serving such interrogatories believes that the answers were required to be signed by the expert and they Were not so signed, the party may object on that basis and move for an order compelling discovery. An objection based on the failure of such answers to be signed by the designated expert shall be asserted within thirty days of service of such answers; otherwise the objection is waived.

(2) Discovery by other means is available without leave of court in lieu of or in addition to interrogatories:

(A) A party may take the deposition of any person identified by any other party as a person expected to be called as an expert witness at trial;

(B) A party may also obtain discovery of documents and tangible things including all tangible reports, physical models, compilations of data, and other

material prepared by an expert or for an expert in anticipation of the expert's trial and deposition testimony. The disclosure of material prepared by an expert used for consultation is required even if it was prepared in anticipation of litigation or for trial when it forms a basis, either in whole or in part, of the opinions of an expert who is expected to be called as a witness.

(C) if the discoverable actual observations, tests, supporting data, calculations, photographs, or opinions of an expert who will be called as a witness have not been recorded and reduced to tangible form, the court may order these matters be reduced to tangible form and produced within a reasonable time before the date of trial.

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(b) Expert who is not expected to be called as a witness. The disclosure of the same information concerning an expert used for consultation and who is not expected to be called as a witness at trial is required if the expert's work product forms a basis, either in whole or in part, of the opinions of an expert who is expected to be called as a witness. Otherwise, a party may discover the identity of and facts known, or mental impressions and opinions held, by an expert who has been retained or specially employed by another party in anticipation of litigation or

preparation for trial and who is not expected to be called as a witness at trial only as provided by R.C.P. 133, or upon a showing of exceptional circumstances under which it is impracticable for the party seeking discovery to obtain facts or opinions on the same subject by other means.

(c) Duty to supplement discovery as to experts. If a party expects to call an expert witness when the identity or the subject of such expert witness' testimony has not been previously disclosed in response to an appropriate inquiry directly addressed to these matters, such response must be supplemented to include the information described in subdivisions (a)(1)(A)-(C) of this rule, as soon as practicable, but in no event less than thirty days prior to the beginning of trial except on leave of court. If the identity of an expert witness and the information described in subdivisions (a)(1)(A)-(C) are not disclosed in compliance with this rule, the court in its discretion may exclude the testimony of such expert, or make such orders in regard to the nondisclosure as are just.

(d) Expert testimony at trial. To the extent that the facts known, or mental impressions and opinions held, by an expert have been developed in discovery proceedings under subdivisions (a)(1) or (2) of this rule, the experts direct testimony may not be inconsistent with or go beyond the fair scope of the expert's

testimony in the discovery proceedings as set forth in the expert's deposition, answer to interrogatories, separate report, or supplement thereto. However, the expert shall not be prevented from testifying as to facts or mental impressions and opinions on matters with respect to which the expert has not been interrogated in the discovery proceeding.

(e) Court's discretion to compel disclosure of experts. The court has discretion to compel any party to make the determination and the disclosures whether an expert is expected to be called as a witness and shall do so to ensure that determination and the disclosures required by this rule within a reasonable and specific time before the date of trial. Upon motion or at a discovery conference held pursuant to R.C.P. 124.2. or on its own initiative, the court may prescribe the sequence in which the parties make the determination and disclosures provided for under this rule.

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(f) Expert fees during discovery. Unless manifest injustice would result, the court shall require that the party seeking discovery pay the expert reasonable fee for time spent in responding to discovery under subdivisions (a)(2) and (b) of this rule. With respect to discovery obtained under subdivision (a)(2) of this rule the court may require, and with respect to discovery obtained under subdivision (b) of this rule the court shall require the party seeking discovery to pay the other party a fair portion of the fees

and expenses reasonably incurred by the latter party in obtaining facts and opinions from the expert. Any fee which the court requires to be paid shall not exceed the expert's customary hourly or daily fee; and, in connection with a party's deposition of another party's expert, shall include the time reasonably spent in travel to and from the deposition, but excluding time spent in preparation.

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II. SUMMARY OF RULE 125 AND ISSUES RAISED BY RULE.

A. The rule requires opinions to be stated with reasonable particularity. If you receive insufficient answers, however, you have an obligation to move to compel more complete answers.

B. Experts retained in anticipation of trial, which generally excludes the treating physician, must separately sign the interrogatory answers concerning subject matter of testimony, qualifications, mental impressions, opinions and facts known which relate to or form the basis of the mental impressions and opinions.

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C. If you believe the expert should have signed the interrogatories and has not, you must object within 30 days or be held to have waived the objection. Because there have been no cases on this issue for guidance, the safest procedure is to make a good faith attempt to seek compliance with the rule immediately, and file a written objection to the interrogatory before the expiration of thirty days if you are unable to get voluntary compliance.

D. Without court order you may take the expert's deposition and request documents, reports, models, compilations of data, and other material prepared by the expert or for the expert in anticipation of the expert's deposition or trial testimony despite the fact that it may be otherwise considered work product. This may include for example a medical chronology prepared by counsel for the expert's aid in reviewing the medical records, or raw data and notes the expert either generated or was provided, so long as they form a basis either in whole or in part of the opinions of the expert.

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E. You may also obtain a court order under subsection (a)(2)(C) requiring the expert to reduce to tangible form his factual observations, opinions and supporting data if the expert will be called as a witness at trial and has not previously prepared such a report. Note the rule only allows this if the expert will be called at trial as an expert. See subsection (b) of the rule for experts not expected to testify at trial.

F. Subsection (c) requires supplementation of interrogatories regarding experts "as soon as practicable" but "in no event less than thirty days prior

to trial without leave of court." The subsection also explicitly grants the court discretion to exclude or limit testimony of an expert where the identity of an expert, the subject matter of testimony, qualifications, mental impressions, opinions and facts known which relate to or form the basis of the mental impressions and opinions are not disclosed as soon as practicable, or later than 30 days before trial.

G. If the court has entered an order directing that experts be disclosed by a certain date, violation of the order may result in sanctions including exclusion of the witness under Rule 134 in addition to the remedies under Rule 125.

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H. Subsection (d) prevents the expert witness from testifying at trial inconsistently or beyond the fair scope of his or her prior testimony in discovery proceedings. The rule specifically notes, however that the expert is not prevented from testifying on matters which he or she had not been asked in the discovery proceedings.

I. Subsection (e) provides that the court may compel a party to disclose experts and states that the court "shall do

so to ensure that the determination and the disclosures required by this rule within a reasonable and specific time before the date of trial." Under this provision the court regularly sets the deadline for disclosure of experts. The mere disclosure of the expert's identity at a date certain is frequently insufficient to allow defense counsel to determine if experts are necessary and to disclose experts. While a deposition of plaintiff's expert may solve the problem if there is sufficient time to depose prior to defendant's deadline for disclosure of experts, frequently plaintiff's expert is not yet prepared to render final opinions. Frequently motions extending the deadline for disclosure of defendant's experts are filed at this stage because the defendant has no idea what plaintiff's expert will testify, and defendant cannot determine if an expert is necessary or who the expert should be without the benefit of plaintiff's expert's testimony. One possible solution is to ask the court at the scheduling conference to set the deadline for plaintiff's disclosure of experts and final opinions. The defense should then be allotted an additional 60 to 90 days to disclose experts and opinions. It can be argued that the language of subsection (e) gives the court authority to do just that.

III. IOWA CASE LAW REGARDING RULE 125, AND VIOLATION OF DISCOVERY RULES RESULTING IN SANCTIONS.

Rule 125 was last amended effective September 1, 1988. Case law is limited with regard to the new portions of the rule, but there are several cases which should be cited when confronted with issues addressed by the rule.

A. DISCLOSURE OF EXPERTS WITHIN 30 DAYS OF TRIAL.

1. Kilker v Mulry, 437 N.W.2d 1, 4 (Iowa 1988). In Kilker, the Court of Appeals interpreted the current version of Rule 125(c). The plaintiff formally disclosed expert witness Moon 14 days before trial by filing supplemental interrogatory answers. Plaintiffs had been in possession of a report from the expert for approximately 7 months. The Trial Court excluded the testimony of expert Moon based on plaintiff's late disclosure and plaintiff appealed from an adverse jury verdict citing the exclusion of Moon as error. The plaintiff argued that defendants knew of the expert though he was not formally disclosed. The Court of Appeals held the Trial Court did not abuse its discretion in excluding Moon and stated:

> Rule 125 is a discovery rule. Its purpose is to avoid surprise to the litigants and to allow the parties to formulate their positions and as much evidence as is available. . . The rule itself provides that if the identity of an expert witness is not disclosed in the

manner prescribed, the court in its discretion may exclude the testimony of such expert. . .

B. EXPERT TESTIMONY WHICH GOES BEYOND OPINIONS PREVIOUSLY DISCLOSED.

1. Bratton v Bond, 408 N.W.2d 39 (Iowa 1987). In Bratton, the plaintiff filed interrogatory answers disclosing expert's opinions, and the expert was subsequently deposed by the defense. Through this discovery defendant learned the expert would testify that the defendant doctor failed to utilize recognized diagnostic methods under the circumstances. At deposition the expert testified he could not say that any of the diagnostic methods would have resulted in a different outcome. At trial, plaintiff's counsel attempted to elicit testimony from the expert regarding longevity and improved quality of life had other medical procedures been used. The Trial Court sustained defendant's objection to the testimony as beyond the scope of the disclosed opinions of the expert. The Supreme Court affirmed holding the Trial Court did not abuse its discretion in limiting the expert's testimony to the matters designated in the interrogatory answer where neither the deposition or supplemental interrogatory answer alerted the defendant that the expert would testify regarding longevity and quality of life. The Court also noted, however, that other experts at trial testified on the same matter without

matter without objection so that even if the Trial Court was in error, no prejudice resulted.

2. **Hoekstra v Farm Bureau Mutual Insurance Co., 382 N.W.2d 100 (Iowa 1986).** In Hoekstra, the Court limited the defendant's expert's testimony on the same basis - the opinion proffered at trial went beyond the opinion previously disclosed in discovery. The court rejected defendant's arguments that (1) it was not required to supplement responses because the expert had not submitted an additional report. (The evidence showed that defense counsel did not know the expert would testify on the matter until one week before trial) and (2) any surprise resulted from plaintiff's lack of pretrial preparation in not deposing the expert. The court held that neither the failure to depose an expert, nor the expert's failure to provide supplemental reports excuses a party from supplementing discovery responses.

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3. **White v Citizens National Bank of Boone, 262 N.W.2d 812, (Iowa 1978).** In White, the plaintiff brought an action in trespass against an adjoining landowner and contractor to recover damages resulting from excavation work which removed earth supporting plaintiff's building. In response to an interrogatory regarding the extent of damages claimed, plaintiff supplied information provided by her architect that the total damages were $4,900.00. As the Supreme Court noted, "the

architect's estimate contained several escape clauses, including a statement that his estimate was the best he could make 'at this time' and another that 'further inspection of the property will be necessary at some future date'". The interrogatory answers were not supplemented. At trial it became apparent that plaintiff intended to have her architect testify that the damages exceeded $25,000.00 and defendant immediately objected on the ground that plaintiff had violated rule 125 and asked that the testimony be limited to the amount stated in interrogatory answers. The Trial Court sustained the defendants objection and the Supreme Court affirmed stating:

> The purpose of the rule is to avoid surprise and to permit the issues to become both defined and refined before trial. This allows litigants to prepare for the actual matters they will ultimately confront. Faced with a claim for $25,000.00, defendant quite reasonably might have engaged in more investigation, might have themselves hired experts, and might have been prepared to meet plaintiff's evidence with additional rebutting testimony of their own. They were effectively denied this opportunity by plaintiff's failure to supplement interrogatory answers.

The court noted that the court had inherent power under rule 125(a)(2) to impose sanctions and held the Trial Court did not abuse its discretion.

4. **<u>But See</u>, <u>Hubby v State</u>, 331 N.W.2d 690, 697 (Iowa 1983)**, where the Supreme Court held the Trial Court was within its discretion in refusing to limit the State's expert's testimony at trial because the expert's testimony did not go beyond the opinions

trial because the expert's testimony did not go beyond the opinions disclosed during discovery. The court held that the expert's deposition testimony was "closely allied" with the trial testimony. Unfortunately, the Court's opinion does not disclose sufficient information to explain the similarity in testimony.

The common thread in all four cases is that the Trial Court was given broad discretion in its determination of violations of the rule, and in each case the Trial Court's decision was upheld. The court has consistently held that the standard of review is abuse of discretion and finds an "abuse of discretion when such discretion is exercised on grounds or for such reasons clearly untenable or to an extent clearly unreasonable". Id.

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In each of these cases the Court relied on former Rule 125(a)(2), requiring a party to seasonably supplement discovery responses regarding expert witnesses, and held that such sanctions were inherent in Rule 125 despite the lack of a previous court order and therefore the inapplicability of Rule 134. Now Rule 125(c) and (d) explicitly provide that the party is obligated to supplement discovery responses and the court has discretion to limit or exclude expert testimony which goes beyond that previously disclosed.

C. CO-DEFENDANT DISCLOSED EXPERTS AND YOUR LEFT HOLDING THE BAG

1. Lambert v Sisters of Mercy Health Corp., 369 N.W.2d 417 (Iowa 1985). In Lambert, the plaintiff sued several physicians and the hospital alleging malpractice in treating an expectant mother. The physicians disclosed Dr. Zlantnick as an expert who would testify that he found no evidence of fetal distress in review of the fetal monitor tracing. There was no claim that the physicians' disclosure was insufficient. Defendant hospital did not disclose Zlantnick, nor any expert not a party to the suit who would testify on this issue. When the defendant doctors moved for directed verdict, the plaintiff did not oppose the motions because they did not want to confront Dr. Zlantnick. The defendant hospital sought to call Dr. Zlantnick and the plaintiff objected that he had not been disclosed as an expert witness by the hospital. The Trial Court sustained the objection and refused to allow the Doctor to testify. On appeal the Supreme Court held:

> The purpose of rule 125 is to avoid surprise to litigants and to allow the parties to formulate their positions on as much evidence as is available. In this case the expert in question had been properly designated by the defendant doctors and his testimony regarding the fetal strip had been summarized. The Lamberts could not claim surprise. Additionally, the Lamberts had adequate opportunity to depose the expert prior to trial had they chosen to do so. We conclude that the purpose of rule 125 had been fulfilled and that the Lamberts would not be prejudiced had Dr. Zlantnick been allowed to testify.
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> . . . The Lamberts did not employ the rule as a shield when a previously unidentified witness was "sprung" on them at trial whom they could not previously have

> deposed. They used the rule tactically as a sword to eliminate a feared witness of whom they were previously aware. This is a reversion to the former sporting theory of trial as opposed to a search for truth. We hold that after the doctor defendants left the case and the hospital designated Dr. Zlantnick, the Trial Court should have given the Lamberts a recess of a reasonable duration during the trial if requested and should have permitted the hospital to call Dr. Zlantnick as a witness.

Where possible it is a good idea to list the co-defense counsel's experts in addition to your own. Further, many final pretrial orders provide that each counsel may call the witnesses of all other parties without the necessity of listing those witnesses.

D. SANCTIONS UNDER RULE 134 FOR FAILURE TO DISCLOSE EXPERTS

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1. **Wernimont v International Harvester Corp. 309 N.W.2d 137, 143-44 (Iowa App 1981)** involved a products liability action based on defective design. On defendant's motion, the Trial Court ordered plaintiff to provide a list of expert witnesses by April 12th in response to defendant's interrogatories propounded two years earlier. Plaintiff's did not file a response until April 16th. Defendant then moved to exclude plaintiff's experts as a sanction for plaintiff's failure to abide by the court's order. The Trial Court granted the motion, striking the interrogatory answer and prohibiting plaintiff form calling any expert witness at trial with respect to liability. On appeal the

Court of Appeals began with an analysis of rule 134(b)(2) which provides in pertinent part:

> If a party . . . fails to obey an order to provide or permit discovery, including an order made under subdivision "a" of this rule or rule 132, the court in which the action is pending may make such orders in regard to the failure as are just, and among others the following:
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> * * * * * *
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> (B) An order refusing to allow the disobedient party to support or oppose designated claims or defenses, prohibiting him from introducing designated matters in evidence.

The Court of Appeals held that plaintiff failed to preserve error by failing to offer proof of the intended testimony at trial. Then on the merits, the Court rejected plaintiff's argument that the disobedience must be willful in order to bring about sanctions and held that the Trial Court did not abuse its discretion despite the fact that the ruling effectively precluded the plaintiff from engendering a jury issue on liability.

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E. NICE GUYS FINISH LAST, OR PITFALLS THAT COULD HAPPEN TO YOU

1. Fox v Stanley J. How and Associates, Inc.

309 N.W.2d 520 (Iowa App 1981). In Fox, counsel for the defendant deposed plaintiff's expert three days before the discovery deadline. At the deposition defense counsel learned plaintiff's expert was not prepared to render final opinions. Defense counsel

requested the expert to be prepared to render final opinions in two weeks. The expert indicated that he would try to be ready by that time. Defense counsel did not make a motion to compel discovery of the expert's opinions prior to the discovery deadline. Approximately five weeks later, and within a week of trial, plaintiff's counsel apprised the defense that the expert was prepared to render final opinions. The next day the expert's deposition was taken and he disclosed his opinions regarding the standard of care. At the trial one week later, defense counsel moved in limine to exclude the testimony of the plaintiff's expert disclosed after the discovery deadline. The Trial Court granted the motion and subsequently granted a motion for directed verdict in favor of the defendant. On appeal the Court of Appeals noted that the defendant

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a. voluntarily requested a continuance of plaintiff's expert's deposition,

b. failed to seek protection from the court before the second deposition,

c. conducted the second deposition after the discovery deadline established by the court, and

d. failed to request a continuance.

The court held that sanction of excluding the expert's testimony was inappropriate under these circumstances and reversed the Trial Court.

2. Sullivan v Chicago & Northwestern Transportation, 326 N.W.2d 320 (Iowa 1982). In Sullivan, the defendant had "initially decided not to hire a crossing expert, at least until after it had deposed plaintiff's expert". The defendant repeatedly sought to depose plaintiff's expert but the Trial Court disallowed the taking of the deposition (under the prior rule requiring court order to depose opposing experts). The defendant set out to locate an expert following the court's order disallowing deposition and finally located one three weeks before trial. It then promptly identified the expert and gave the substance of his testimony to plaintiff. The Trial Court, however, held that the railroad had consciously withheld the identity of the expert and excluded the expert's testimony as an abuse of discretion. The Supreme Court held:

> We find no abuse. The railroad learned in September of 1980 that the plaintiff had retained an expert to testify that the crossing was extra-hazardous. lt waited, according to its own version of facts, until January of 1982 (three weeks before trial) to retain its own expert. In the meantime it continually sought to depose plaintiff's expert.
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> We cannot say that the Trial Court abused its discretion in rejecting [defendant's claim that plaintiff was not prejudiced] either. Three weeks, while not the eve of trial, is a relatively short period when contrasted with the long period discovery had taken. Plaintiff had expended considerable efforts in trial preparation. We cannot say the Trial Court was wrong in refusing to compel plaintiff to risk changing trial strategy so long in preparation. The railroad should have shown its hand during the period of discovery ad the plaintiff showed his.[1]

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[1] The Sullivan Court's language quoted in text is frequently cited by the Court limiting or excluding expert testimony. Despite the fact that the case is in the defendant's loss column, the

In the same opinion, the court held that the Trial Court failed to exercise discretion in refusing defendants motion for production of documents prepared by plaintiff's experts who would testify at trial. The Trial Court held that defendant failed to show need or hardship. The Supreme Court held that under prior rule 122(d), that the court had discretion to order other discovery and the need or hardship standard did not apply. Rule 125(a)(2)(B) now provides such discovery may be obtained without leave of court.

F. YOU WILL KNOW IT WHEN YOU SEE IT

1. Krugman v Palmer College of Chiropractic, 422 N.W.2d 470 (Iowa 1988).

Krugman is an example of a case in which sanctions are inevitable and the only question is the extent. In Krugman, Plaintiff filed a Petition in September of 1982 claiming chiropractic treatments led to her stroke. Defendant served Interrogatories including an interrogatory requesting information on expert witnesses. The Plaintiff responded that the interrogatories could not be answered because no expert had been retained. Over the next six months Defendants made repeated attempts to get Plaintiff to supplement interrogatory answers concerning medical experts.

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language is quite helpful to bolster a motion founded on rule 125(c) to exclude late disclosed experts or opinions.

On Motion by Defendant, the Court entered an Order requiring Plaintiff to list experts and answer the interrogatories before filing a Trial Certificate. Because the case came up under 215.1, however, Plaintiff filed a Trial Certificate without disclosing experts and answering interrogatories as the Court ordered. Again on motion of Defendants, Plaintiff was ordered to list experts on a date specified which was approximately two months prior to the trial date. In response Plaintiff disclosed some experts but did not file written answers to the interrogatories.

Defendant again filed a Motion to Compel Answers to Interrogatories and within a month before trial the Court entered an Order compelling Plaintiff to supplement her answers in three days and to make her experts available for deposition or risk sanctions under Rule 134(b). Plaintiff mailed supplemental interrogatory answers on the date they were due, arriving one working day late. Plaintiff's counsel then filed a Motion for Continuance stating for the first time that he was involved in another case and the trials would overlap and he would be unable to attend the trial, then less than three weeks away. The Motion to Continue trial was overruled by the Court.

Subsequently Defendants moved to exclude Plaintiff's experts as a sanction for failing to meet the Court's deadline and Plaintiff's counsel simultaneously moved that the Court reconsider her Motion to Continue. At the hearing on these pending motions, the Trial Court again denied the Motion to Continue and ordered

Plaintiffs to have experts present for deposition on the date scheduled for trial. On the date scheduled for trial the Defendants, their counsel, the jury panel, and the Judge were prepared to proceed. Plaintiff was not present. Her attorney who had done the bulk of the work on the file and who had the conflicting trial, was not present. Another person from his firm appeared but was not prepared to try the case. The Trial Court then ordered Plaintiff's experts barred from testifying and dismissed Plaintiff's Petition as sanctions for violation of previous Court Orders pursuant to Rule 134(b). This appeal resulted.

The Iowa Supreme Court held under the circumstances of this case, where Plaintiff violated several Court Orders, dismissal was appropriate. Of particular note in this case, the Court discussed the Motion for Continuance and stated:

> As we have cautioned before, continuances are to be discouraged, and attorneys should not take responsibility for more litigation and legal work than they can reasonably handle. Where possible, more than one attorney should be versed in pending litigation. Where the other attorneys of record in this case may not have been experts in chiropractic malpractice claims, their help might at least have been used in depositions if not at trial.
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> We regret that the sanction in this case visits the sins of counsel on his client. But '[a] litigant chooses counsel at his own peril, and here, as in countless other contacts, counsel's disregard of his professional responsibilities can lead to extinction of his client's claim'.

While a case with such blatant conduct of Plaintiff's counsel does not come along frequently, it is worthwhile to note the case from the standpoint that Defendants were able to posture the case so that the Court was fully aware of the circumstances by use of discovery motions and requests for sanctions. The language cited above regarding the request for a continuance should be noted by counsel. The Court looks with disfavor upon such a request made when counsel is ill-prepared for trial or when there is a conflict in trial schedules which could have been prevented.

G. IS THIS EXPERT TESTIMONY?

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1. M-Z Enterprises v Hawkeye-Security Ins. Co., 318 N.W.2d 408 (Iowa 1982) involved defendants denial of coverage for damages caused by the tipping of a crane. The Trial Court excluded one of defendant's witnesses on the basis that he was not disclosed in answer to an interrogatory requesting the names of expert witnesses. Defendant contented the witness was not an expert and therefore it was not required to disclose him as such. The Court found that the witness was an engineer employed by the manufacturer of the damaged crane and found he was called to testify to establish a business records exception to the hearsay rule and to explain the nature of the tests which the manufacturer performed in order to determine the capacity of their cranes. The

Supreme Court cited the following as the appropriate test to be used to determine if the subject of testimony is for an expert:

> Whether the situation is a proper one for the use of expert testimony is to be determined on the basis of assisting the trier. "There is no more certain test for determining when experts may be used that the common sense inquiry whether the untrained layman would be qualified to determine intelligently and to the best possible degree the particular issue without enlightenment from those having a specialized understanding of the subject involved in the dispute." Ladd, Expert Testimony, 5 Vand.L.Rev. 414,418 (1952).

The Court then held that rule 125 allows sanctions for violation of the duty to supplement discovery responses without regard to rule 134, held the test to be applied to whether the Trial Court abused its discretion, and summarily held that it did not. The Court did not discuss application of the above "test" to the facts presented.

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H. OTHER SANCTIONS UNDER RULE 134

There are numerous cases under Rule 134 regarding the imposition of sanctions for disobeying discovery orders. A brief synopsis of the more recent cases is as follows:

1. Request for Production of Documents

a. <u>Marine American State Bank vs. Lincoln</u>, 433 N.W.2d 709 713 (Iowa 1988). In <u>Marine</u>, the Defendant in a bank foreclosure action filed a Request for Production of Documents

in 1985. The first documents produced in response to the request were provided by the bank about one week before trial and more documents were provided during trial. The Defendants had not filed a Motion for an Order compelling discovery under Rule 134(a) nor did they move for a continuance because of the late filing. The Trial Court assessed attorneys' fees of $300 as costs against the bank. On appeal, Defendants argued that the appropriate sanction should have been to strike the bank's claim for personal judgment under Rule 134(d). The Iowa Supreme Court held that the appropriate standard was abuse of discretion. The Court then reviewed Rule 134(d) and held the sanctions allowed under that subsection applied only when a party totally neglects to respond to a Request for Production. The Court found it relevant that Defendant had not filed a Motion for Sanctions prior to the bank's filing its response nor did Defendant secure a Court Order to compel production. The Supreme Court held that the Trial Court had no authority to impose the sanctions requested by Defendant. Apparently the bank had not responded whatsoever to the request for production of documents. The Court's opinion suggests that Defendant should have moved to compel a response.

b. Renze Hybrids, Inc. v. Shell Oil Company, 418 N.W.2d 634, 640-41 (Iowa 1988). In Renze, plaintiff had long standing interrogatories to Defendant. On the Friday before trial Defendant first produced the directions for the use of the product

involved in this suit. The directions produced included an express limitation of warranties. Defendant offered the document at trial as both evidence of the directions and in support of its exclusion of the warranty defense. Plaintiffs objected to the warranty portion of the document on the basis that it was an untimely response to a request for all documents relating to defendants defense. The Trial Court allowed Defendant to use the exhibit but blocked out the warranty paragraph of the exhibit. Defendant appealed this ruling. On appeal, the Supreme Court held that the Trial Court determined that Defendant's production of the document was untimely and imposed sanctions pursuant to Rule 134. Again the Court cited the Trial Court's wide discretion in imposing discovery sanctions. The Court found no abusive discretion in the exclusion.

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2. Failure to Supplement Interrogatory Answers.

a. Kendall/Hunt Publishing Company v Rowe, 424 N.W.2d 235 (Iowa 1988) In Kendall/Hunt, Plaintiff claimed the District Court erred in setting aside a default judgment entered against Defendant Waveland for failure to comply with the Court's discovery order. The order required Defendant Waveland to answer its interrogatories and request for production of documents. Defendant Waveland did not comply with the deadline established by the Court Order. The default judgment was entered by the Court but was subsequently set aside. On appeal from the Order setting aside

the default the Supreme Court held that the District Court's duty when faced with a violation of a discovery order is as follows:

> Prior to dismissal or entering a default judgment, fundamental fairness should require a District Court to enter an Order to show cause and hold a hearing, if deemed necessary, to determine whether assessment of costs and attorney's fees or even an attorney's citation for contempt would be a more just and effective sanction. Dismissal and entry of a default judgment should be the rare judicial act. When non-compliance is the result of dilatory conduct by counsel, the Court should investigate, the attorney's responsibility as an officer of the Court and, if appropriate, impose on the client sanctions less extreme than dismissal or default, unless it is shown that the client is deliberately or in bad faith failing to comply with the Court's Order. Citing Edgar v. Slaughter, 548 F.2d 770, 772 (8th Cir. 1977)]

The Supreme Court then held that the Order setting aside the default as Defendant Waveland was not afforded a hearing prior to the entry of default.

3. Failing to Appear at Deposition.

a. Postma v. Sioux Center News, 393 N.W.2d 314 (Iowa 1986). In Postma, plaintiff Postma failed to appear at a deposition scheduled and noticed pursuant to the rules. Defendant moved to compel discovery and for attorneys fees and expenses. The motion was granted and the Court ordered Plaintiff to appear for the taking of a deposition at a date and time stated in the order. Plaintiff did not appear for the deposition pursuant to the Court's

Order. Defendant then moved for dismissal as a sanction for failure to abide by the discovery order of the Court pursuant to Rule 134. The Court granted the dismissal and Plaintiff subsequently filed a Motion to Set Aside the dismissal. That motion was set for hearing and the motion to set aside the dismissal was overruled after hearing. On appeal, the Supreme Court held that under the circumstances of this particular case it was within the Trial Court's discretion to order dismissal. It should be noted that the Courts made note of the fact that Plaintiff was a former County Attorney and was well aware of the Court rules.

b. Suckow v. Boone State Bank & Trust Company, 314 N.W.2d 421 (Iowa 1982). In Suckow the Trial Court dismissed Plaintiffs' Petition for Plaintiffs' failure to attend their own deposition after being served with notice. The Order dismissing the Petition was entered pursuant to Rule 134(d). On appeal the Supreme Court surveyed recent discovery sanction cases and classified them into two classes: (1) violations of a Trial Court discovery order; and (2) violations solely of a Rule of Civil Procedure relating to discovery. After review of nine cases the Court concluded that dismissal is a discovery sanction generally used only when a party has violated a Trial Court's Order. The Court held "when no Trial Court Order has been disobeyed, a lesser

sanction may be indicated. It was an abuse of discretion to dismiss Plaintiff's Petition under this record".

I. DISCLOSURE OF EXPERT WITNESSES IN LIABILITY CASES INVOLVING LICENSED PROFESSIONALS

Iowa Code §668.11, applicable to cases filed on or after July 1, 1986, provides in pertinent part:

> 1. A party in a professional liability case brought against a licensed professional pursuant to this chapter who intends to call an expert witness of their own selection, shall certify to the Court and all other parties the expert's name, qualifications and the purpose for calling the expert within the following time period:
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> a. The Plaintiff within 180 days of the Defendant's answer unless the Court for good cause not ex parte extends the time of disclosure.
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> b. The Defendant within 90 days of Plaintiff's certification.
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> 2. If a party fails to disclose an expert pursuant to sub-section (1) or does not make the expert available for discovery, the expert shall be prohibited from testifying in the action unless leave for the expert's testimony is given by the Court for good cause shown.

There is no question that this section is very important and must be noted. It should also prove helpful in cases not involving professionals as it provides a good argument that defendant should be allotted 90 days past the date plaintiff discloses experts and the opinions of the expert to disclose defense experts.

Operator's Manual For A Witness Chair

A defense trial lawyer guides the reader through the experience of testifying at a deposition. This checklist for the witness (and his lawyer) is especially pertinent to the expert witness or the witness who is an employee of a defendant.

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The Deposition Chair

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The Witness Chair

My first adventure in the witness chair convinced me that it was as unstable as a one-wheeled rickshaw on a downhill course, with two steering controls manned by lawyers intent upon veering the contraption in opposite directions at every fork in the road, while a judge alternately stomped on an unreliable accelerator and an unpredictable brake. It took a number of trips back to witness stands and years as a trial lawyer before I realized that each witness chair comes equipped with a stabilizer control. It is a control easily within the reach of every witness — the lever marked "truth."

Over the years I have seen innumerable books and articles explaining the workings of the trial lawyer's chair and even a few books which describe the operation of a judge's chair. I have found that it is time someone told the witness how his chair works. Therefore, the purpose of this article is to explain your role as a witness; to explain your rights, obligations and options as a witness and to help you be a better witness.

Your first experience as a witness may well be in a deposition. Don't say "just a deposition." Believe me, many a lawsuit has been won or lost because of the testimony in a single deposition. Your deposition is sufficiently important that I have written this entire article about it.

What is a Deposition?

A deposition is a legal proceeding conducted in accordance with certain court rules for the purpose of preserving the testimony of a witness for use in court. It is usually held in a lawyer's office, although any reasonably comfortable quiet room can be used. The persons present are: (1) you, the witness; (2) a notary public to administer an oath; (3) a court reporter to record your testimony (the reporter is usually a notary); (4) lawyers for all the parties in the lawsuit; (5) the parties themselves or their representatives, who have a right to attend the deposition but seldom appear.

The procedure is simple. After everyone is seated and ready, the notary public will ask you to raise your right hand and take the standard witness oath (or ask you to affirm that you will tell the truth if your religious beliefs do not permit you to take an oath). The lawyers in the room will then take turns asking you questions. A lawyer may take more than one turn or may skip his turn. The court reporter will record everything said by the lawyers and witness; these notes will later be typed and bound in a book called a "transcript" or a "deposition."

Depositions are relatively informal. The participants smoke (unless someone objects), drink coffee or coke, take off their suit coats, and occasionally get up and move around the room. The lawyers sometimes trade side comments or wisecracks. But don't let this informality mislead you — depositions are vitally important to a lawsuit and the attorneys are deadly serious.

The Important Purposes of a Deposition

Simply stated, lawyers take depositions to discover what a witness's testimony will be and to preserve testimony for use in trial. It is important for you to know what the lawyers are trying to do in a deposition if you want to understand what is going on. Let's assume that you are an employee of the defendant and plaintiff's attorney is taking your deposition. What is the plaintiff's lawyer looking for?

First, the objective of the plaintiff's attorney will usually be to discover what you know concerning the matters involved in the case. In this respect, he is legitimately searching for evidence.

Second, he is looking for evidence favorable to plaintiff's case. For instance, in a personal injury case, he would like to have you admit facts that establish that your employer was careless. His strategy may be to attempt to maneuver you into making his client's case against your employer.

Third, his purpose is to commit you to statements under oath. If you have testified under oath in deposition that the company truck ran a red light, then you are committed to that point. If you attempt to change your testimony later, the lawyer can read that portion of the deposition to the jury during trial.

Fourth, plaintiff's counsel may be looking for ways to discredit your testimony or to discredit the testimony of other defense witnesses through you. Lawyers call the process of discrediting a witness "impeaching the testimony of a witness." He may try to get you to make conflicting statements or statements which conflict with the testimony of other witnesses in the case. Minor conflicts are inevitable in every case. However, major conflicts in the testimony of witnesses can seriously affect a case.

Fifth, he will attempt to learn what your employer's defenses are in the lawsuit. It is common for plaintiff's lawyers to start off litigation on the basis of one claim and, upon discovering the defenses, to shift plaintiff's claim to a wholly new and different theory. For this reason, defendant's

lawyers do not like to expose their defenses any more than the court's rules require

Sixth, in some cases a lawyer may take a deposition to preserve the testimony for trial. If the witness is ill or otherwise unavailable, his testimony may be read to the jury

These are the legitimate objectives of a deposition. It is not a legitimate purpose of a deposition to harass or embarrass a witness or to increase expense. While witnesses are occasionally inconvenienced by depositions, very, very few depositions are taken for improper purposes. Before your deposition is taken, you and your attorney should thoroughly discuss your knowledge of the facts in the case and the subjects on which you may expect to be examined.

Your Obligation as a Witness

Your first duty as a witness is to tell the truth. This is your obligation even if the truth will hurt your case, your employer's case or your relative's case. This is your obligation regardless of whether you have an interest in the outcome of the lawsuit. If you tell the truth to the lawyers who are trying the case and to the court and jury who are hearing the case, then you can leave the courtroom with the satisfaction that you have fulfilled your obligation not only to our system of justice but also to yourself.

Your second obligation as a witness is to be fair. The first time I took the witness stand I was awed by the sheer power in the hands of a witness. I knew what lawyers on both sides hoped I would say. I realized that the fortunes of the case could turn upon not only what I said but also the way in which I said it. When you face this responsibility, be as fair as you can. That doesn't mean that you have to give each side an equal number of points. Your testimony may favor one party entirely. It means that you shouldn't color the facts in favor of one party or overstate your testimony. For instance, a number of years ago a plaintiff's attorney's organization put out a publication implying that plaintiffs could make more money out of their lawsuits if they described their injuries more graphically; it suggested that plaintiffs drop such expressions as "I have a dull ache in my back" in favor of "It feels like someone is twisting a dagger in my back." You have an obligation as a witness to avoid such exaggeration. Just tell it like it is

Your third obligation as a witness is to be accurate. You are the prism through which the judge and jurors see the facts. If you distort those facts, the court and jury may not see them clearly enough to render justice. Therefore, you must concentrate on being accurate.

Ideas for Dealing with Lawyers

Life would be simple if one could obtain justice by merely appearing in the courtroom and telling the truth. The trouble is that the fellow on the other side of the case is going to come in and tell a different story. What's more, he has hired a lawyer who may attempt to convince the judge and the jury that his story is true and your testimony is either false or erroneous. Further, if he is the plaintiff, he may even have agreed to pay his lawyer a cut of your money if the jury buys his story.

Now you must deal with a lawyer who may well emphasize the strong points of your opponent's story, ignore your opponent's weak points, ridicule your story and contrive ways to suggest to the jury that you are not telling the truth. Indeed, a number of lawyers work hard to develop skills for just such tactics. Moreover, the process will commence in the deposition.

How do you deal with an opposing lawyer? (The rules don't allow you to punch him out.) You may want to consider ideas which may reduce the chance that the opposing attorney will take advantage of you or treat you unfairly. Here are 21 simple thoughts which may help you. Read them over and then discuss them with your lawyer.

Idea Number 1: Remember the Name of the Game

If you are the defendant or are employed by the defendant, then you can rest assured that plaintiff's attorney's purpose in taking your deposition will be to enhance his case against you or your employer. In short, the name of the game is money and it is defendant's money that he is after.

The atmosphere in the deposition room may be casual and even friendly; it's still money he is after. Plaintiff's attorney may be charming and personable; he can afford to be on defendant's money.

Idea Number 2: Never Volunteer

The most important advice a lawyer can give his client before a deposition is to tell him never to volunteer information. More damage is done to a lawsuit by a "helpful" witness than any other source. *I cannot over-emphasize this point.* I knew an old country lawyer who often told defendants: "Look, every question the plaintiff's attorney asks is designed to open the safe to get at your money; if you volunteer the combination and politely open the safe door with every answer don't be surprised if

your safe is empty at the end of the trial."

This is an extremely hard rule for any witness to learn. Most of us want to be helpful. Doctors spend much of their day explaining symptoms to their patients. Engineers daily exchange and volunteer information to each other in a team effort to design or manufacture a product. Executives are in the habit of volunteering information within their business.

If the question can be answered with a simple "Yes" or "No", do not volunteer a further answer unless the simple yes or no leaves your testimony in an unfavorable light. If the interrogator asks you for an example, do not volunteer a second or a third example. If the opposing attorney does not understand the subject well enough to phrase his questions, you are not required to take it upon yourself to explain the subject matter sufficiently to permit him to ask intelligent questions; in other words, if his gun isn't loaded, don't give him the ammunition and help him pull the trigger.

Do not volunteer information of any kind. If you are asked if you have a certain file, you need not answer with the words "No, Mr. Smith in my office has that file." A simple "no" would have been sufficient, but volunteering reference to Mr. Smith guarantees that his deposition will be taken soon. The same result will occur if you volunteer substitutes. If asked whether you have the research file, you answer with the words "No, I don't have that file but I do have a maintenance file," you have just insured that the opposing attorney is going to ask to see your maintenance file. A simple "no" would have been sufficient.

It is by no means suggested that you should hide any information. If the question calls for fact X, then state fact X fully and concisely. However, do not volunteer facts Y and Z as a part of your answer. Let the lawyer ask his own questions; that is his job.

Idea Number 3: Make Sure You Understand the Question.

Never answer a question unless you fully understand it. First, make sure that you hear the entire question. Some lawyers have a habit of dropping their voices toward the end of a sentence. Sometimes noises outside of the deposition room interfere with your ability to hear the question. If this happens, insist that the full question be repeated to you.

If the question is long and complicated you may ask the attorney or court reporter to repeat it for you. A question may not make sense. Lawyers have been known to ask a great number of unintelligbile questions. If you do not understand the question you should immediately say so. The attorney should then rephrase his question. If he restates the question and it is still unclear, you may again state that you do not understand the question. Indeed, you should continue this process until he has stated the question in such terms as to make it clear.

You have a right to ask for clarification of a question at any time. Indeed, you *should* ask for clarification of some questions. If, for instance, a witness attended three meetings and is asked "What did you say at the meeting?", the witness may respond with "Which meeting do you mean?"

Occasionally a question may not make sense because the attorney does not understand the technical details of the subject of his inquiry. You should not guess at the meaning of the question; you should tell him frankly that you do not understand his question.

This is not to imply that you should be overly technical or picky about the question. If the question is understandable, then answer it. However, if the question is ambiguous, confusing or unintelligible, then you should insist that the question be restated in terms you can understand.

Idea Number 4: Take Time to Think.

First, listen to the whole question. Never answer before the lawyer finishes his question; the last word of his question may change its whole meaning.

Second, consider the question carefully.

Third, think through your answer. Take as much time as you need to phrase your answer. Finally, state your answer concisely.

Never rush this process. Remember that your answers are more important than finishing by noon or catching the next plane home. Like the long distance runner, set a pace where you are comfortable and hold to that pace. It should be a pace which gives you time to think.

Idea Number 5: Never Guess.

If you do not know the answer to a question, say so. "I don't know" is a full and complete answer. You would be amazed at the number of people who refuse to admit that they do not know everything. Sometimes, the higher the executive, the harder it is for him to come out with a simple "I don't know."

Certainly, if you know the answer to the question, you must answer it. But if you do not know the answer, then rest assured that it is a sign of wisdom (perhaps even genius) to admit simply that you do not know.

You may be called upon to give reasonable estimates concerning information within your knowledge. For instance, you might be a reasonable judge of the length of the table or the height of the ceiling in the deposition room. If so, it is proper to answer with the qualification that your answer is an estimate. However, if you do not know the size of an object or if you have difficulty estimating distances, then you may state that you have no estimate or that you simply do not know. Opposing counsel is not entitled to require you to guess and you should decline to guess Occasionally, attorneys will say "I don't want you to guess; I just want your best judgment." If your best judgment is still a guess, then state that you have no judgment beyond a guess

Do not be intimidated into thinking that you should know the answer to a question or that you might appear foolish for not knowing. Don't let the interrogator play on your pride If he tries, zap him with the three word weapon "I don't know "

Idea Number 6: Remember Sometimes You Can't Remember.

There will be times when you can't remember important facts. All of us have this shortcoming; the computers between our ears sometimes short circuit and refuse to recall data stored in a certain section. Many persons are unable to recall the dates of their children's birthdays or addresses of their childhood residences. If this happens, do not be afraid to say: "I can't remember "

It is extremely dangerous for a witness to testify from assumption rather than memory. I remember a witness who testified in great detail that he had warned a co-worker not to start certain machinery because the plaintiff was in the danger area. After the deposition I asked him how he remembered the conversation in such detail when he could not even recall the conversation before the deposition. "Oh!" he said, "I still don't remember, but I assume that is what I said because that is what I would normally say." It was later shown that the witness had stayed home sick that day and that the conversation could not possibly have taken place. Yet by testifying from assumption rather than memory, he created extremely damaging evidence.

There is no rule which says you have to remember if you don't. On the other hand, if you do remember, you are obliged to testify Keep in mind that a witness who pretends not to remember important facts in deposition may be discredited if he later tries to convince a jury that he can remember the facts at trial

Idea Number 7: Be Patient.

A common mistake of executives and professional men is to assume that if they quickly spit out all of the facts they know about the subject, the deposition will end sooner and they can get back to work on matters that seem more important or profitable to them. This works in about one deposition out of twenty-five The reason it doesn't work in the other twenty-four depositions is that the witness has been so helpful that the lawyer is encouraged to continue indefinitely. After all, why should the lawyer stop if he is getting the information he wants? Moreover, the witness has suggested so many avenues of inquiry that the lawyer can spend hours asking for details. Don't make the "let's get it over with" mistake.

Occasionally some lawyers intentionally drag out a deposition to wear the witness down mentally and physically. Recognize this tactic for what it is and do not let impatience interfere with your testimony. Further, if you are getting tired and feel that your testimony may be affected, call for a break and talk it over with your lawyer.

Idea Number 8: Never Lose Your Temper.

Some lawyers intentionally work on a witness's emotions. They know that an angry witness is a bad witness. Any good athlete will tell you that an angry player makes mistakes in the game The same principle applies in depositions. If you recognize that someone is trying to make you mad so that you will make a mistake, you can avoid anger You may also avoid a costly mistake.

Idea Number 9: Be Polite but Firm.

A witness seldom impresses a judge or a jury with flippant, sarcastic or cute answers. Coarse and vulgar language has no place in a deposition or courtroom. A witness seldom comes out ahead in a shouting match with an opposing lawyer A polite witness is more effective.

However, good manners do not require a witness to back away from the truth. Don't let an opposing counsel talk you out of the facts or bully you away from the truth. If you believe in your testimony, then stick to your guns. Remain polite but firm in your testimony

Idea Number 10: Speak Clearly.

Remember that the court reporter must write your answer (unless your deposition is being taken by videotape). Therefore, you should avoid nonverbal answers In other words, say "Yes" or "No" instead of nodding or shaking your head. If you point

to an object or a place or if you hold up your hands to indicate a distance, you will find that most experienced trial attorneys follow with a statement somewhat like: "Let the record reflect that the witness is indicating approximately three feet."

While we are on the subject, I also urge you to answer with a clear yes or no. Avoid Uh-Huh, Huh-Uh, Yea, Yep, Nah, and other similar substitutes. The trouble is that the substitutes can be misunderstood by the court reporter with the result that your answer might be recorded as just the opposite of what you intended.

Idea Number 11: Always Finish Your Answer.

A skillful trial lawyer can sometimes cut a witness off in the middle of the witness's answer by quickly interjecting another question designed to lead the witness off in another direction. This takes less skill if the witness is answering slowly and methodically with appropriate pauses to phrase his answer. The incompleted answer may be very misleading and come back to haunt the witness when read back to him during trial.

Always complete your answer. If opposing counsel attempts to interrupt, you may wait until he has finished and then say: "I am sorry sir; you interrupted my last answer before I had finished. Let me finish that answer and then I will come to your next question. As I was saying before the interruption . . ." Few attorneys would have the temerity to attempt to cut you off again. Occasionally an attorney will attempt to block a continuation of the answer by suggesting that you move on to a new subject. You may refuse to answer another question until he gives you an opportunity to complete your answer to the partially unanswered question. Of course, your attorney should and undoubtedly will require the opposing attorney to permit you to complete your answer.

Idea Number 12: Correct Your Answer.

You may discover during the deposition that you have given an incorrect or inaccurate answer. You have a right to correct your prior answer at any time. You can simple speak up and say:

> "I'm sorry, but I didn't understand your question a moment ago when you asked the color of the signal for east-west traffic. My answer should have been green instead of red."
>
> Or
>
> "Pardon me, I didn't mean to say that I should have answered yes to the question before last."
>
> Or
>
> "If I gave that answer a few moments ago then I must have been confused because the correct answer is . . ."

Don't be afraid to correct your prior answer. It is far better to correct the answer before the deposition is over than to have to explain an incorrect answer from the witness stand in the courtroom perhaps months or years later.

Idea Number 13: Always Read the Fine Print.

Documents often form the central evidence of a lawsuit; therefore, they can be the proper subject for questions in a deposition. It is not unusual for an attorney to ask a witness if he is familiar with a certain document and, if the witness acknowledges that he is familiar with the document, to ask detailed questions concerning its contents. It is also not unusual for a lawyer to read a portion of a document to a witness and then to ask him questions concerning the document. If this occurs, a few rules of the road will be helpful:

First, never testify as to the contents of the document if you are not fully familiar with the document, unless it is before you and you have been given a full opportunity to read it

Second, read the document again carefully before testifying about it. Insist upon keeping the document in your hands while you are being questioned concerning it. If the lawyer needs the document in order to phrase his question, then insist that he return it to you before phrasing your answer.

Third, if the lawyer suggests to you that the document states a certain fact, always check first to see whether the document does state that fact in those terms before you answer the question. Sometimes inadvertently and sometimes intentionally a lawyer may read too much or too little into a document.

Fourth, insist that the lawyer provide you with a complete copy of the document and not just those portions which he feels are helpful to his case

Fifth, take your time and read at whatever speed is comfortable for you.

Lawyers often use documents to attack the credibility of an expert witness by pointing out that the expert's opinion is in conflict with opinions of authorities on the subject. During the course of a deposition a witness may well be asked whether he recognizes a certain publication as an authority or learned treatise on the subject of his testimony. In some instances, he may also be asked whether he agrees or disagrees with the contents of the document. Mere publication does not establish recognition of the validity of a document nor vouch for it as an authority. Be judicious in your recognition of

documents as authorities. It is wise to discuss this area with your attorney before the deposition.

Idea Number 14: Listen to the Objections.

Lawyers occasionally object to questions in depositions If a lawyer objects, stop and wait for him to finish. The court reporter will note the objection for later ruling by the court. The witness is usually expected to answer. Occasionally a lawyer will instruct a witness that he should not answer. You should follow your lawyer's advice.

If your attorney objects to a question, you should listen very carefully to the objection, because it may point out to you that the opposing counsel is asking an unfair question.

For instance, your attorney may object on the grounds that the question is vague, ambiguous, confusing or misleading. If such an objection is made, you should be careful to make sure that you fully understand the question or have properly clarified it before you answer

Your attorney may object on the grounds that the question misquotes your prior testimony. If your testimony is misquoted, point out the opposing attorney's error before you attempt to answer.

Your attorney may object on the ground that the question is redundant or repetitious. That means that the other lawyer has already asked you the same question in perhaps a slightly different form. In some instances, it is considered good deposition strategy for a lawyer to ask the same question in many different forms. He will occasionally get conflicting answers from an unwary witness. He will then use these conflicting answers in an effort to impeach the witness during trial.

Your lawyer may object on the ground that his opponent has asked you a double question (two questions posed as one, such as "Did you sleep well last night and hit your wife before breakfast?") You can respond by asking that the question be restated or answer "Yes to your first question and no to your second question."

Frequently, an objection is made on the grounds that the question asks the witness to resort to speculation, conjecture and guesswork As stated above, you should never guess.

Idea Number 15: Don't Fall for the Lawyer's Style.

Some lawyers may seem to play personality games. In many cases it is just a matter of style. In other instances, it is a calculated subterfuge. While these personality games take a variety of forms, the following are usually the easiest to detect:

The poor country boy. This game starts off with questions like "Doctor, I am just a poor country boy and don't understand this technical medical stuff. Could you tell me . . ." Don't kid yourself; that poor country boy spent the last week before your deposition in medical libraries, doctors' offices and operating theaters preparing for your deposition.

The hurt hound dog. This affectation is a particular favorite of some plaintiffs' lawyers They appear personally hurt by every objection posed by defense counsel. They put on an act of patient suffering at every answer you give. If things don't go their way, they seem to mutter "Why me, Lord?" and look constantly for your sympathy They are also looking for your money.

The good 'ole boy. This type of lawyer wants to make sure that you have a good time during your deposition. He makes every effort to disarm you with smiles, encouragement and charm. The witness drops his guard in the deposition. By doing so he also drops a bundle of money in the jury room.

The prosecutor. A few lawyers adopt an accusing tone of voice and phrase their questions so as to suggest that the witness is on trial for some heinous crime. Don't be intimated by such cheap theatrics. Lawyers who resort to name-calling and finger pointing often do so because they do not have the facts to support their own cases. Ignore such tactics and you will usually find that opposing counsel either abandons them or makes a fool of himself in front of the jury.

Idea Number 16: The Theory of Relativity.

Just how precise should your answers be? I can only give you an imprecise answer to the question. Don't be overly technical. If you understand the question, then you should give a full, fair and honest answer rather than hide behind a narrow technicality of wording. On the other hand, if the opposing lawyer fails to ask the right question, you need not supply information not requested.

Moreover, your answer sometimes should be as precise as the question. Consider the cross-examination of a radiologist who has just testified at length concerning the X-rays showing a broken bone The opposing lawyer may ask: "Doctor, have you ever seen an X-ray of a fracture exactly like this one?" The radiologist knows that every fracture is slightly different Therefore he could accurately answer in the negative. However, this would permit the opposing attorney to infer that the witness was not qualified to testify concerning this type of fracture. Therefore, the doctor might answer: "Well

in all my years of practice I have probably seen between 400 and 500 fractures similar to this one, but I can't say that any of them were precisely like this one, because no two fractures are exactly alike."

Idea Number 17: Check Your Baggage.

Always ask your lawyer in advance what documents you should bring to the deposition. Chances are he will suggest that you leave all your documents at home. In most instances, opposing counsel has a right to inspect any documents you bring into the deposition room. Some of those documents may be harmful to your case. Some may not be subject to discovery. Check first or you may pay later.

Idea Number 18: Never Assume Falsely.

When lawyers call an expert witness to testify, they often ask hypothetical questions In such questions the lawyers asks the expert to assume certain facts to be true and then asks the expert to render an opinion based upon the assumed facts Such questions are almost always prepared ahead of time so that the expert and the lawyer know what to expect.

Occasionally the lawyer on the other side will ask a witness to assume certain facts to be true and then call upon the witness to express an opinion, render a conclusion or deduce a result. In this event the witness should carefully consider the facts presented. If the facts are unacceptable to the witness either because they submit an impossible premise or because the witness knows that they are contrary to known physical facts and scientific principles, then he should decline to answer the question on the basis that he cannot accept the premise. The testimony might proceed as follows:

Q Mr. Gilmore, I would like to ask you to assume that a herd of elephants was seen flying a few feet above the roof level just before the building collapsed and that, notwithstanding a weather bureau report to the contrary, there were no winds that day. Assuming these facts to be true, wouldn't it be reasonable to conclude that the weather was not a factor in the collapse of the roof of the building?

A. I am sorry, but I cannot accept your premise that such statements are true when I know they are not

Q I am not asking that you accept the premise. I am merely asking you to assume that these facts are true and, if so, weather wouldn't be a factor, would it?

A I can't assume something to be true if I know it is not true

Q. Just answer the question

A. I cannot give you a rational answer to a question based upon irrational assumptions.

Idea Number 19: Be Consistent.

Some lawyers will ask the same question ten different ways and then ask it once more prefaced by the words "I can't remember if I've asked you this but . . .". The tactic of repetitious questions is usually employed for one of two reasons:

First, a lawyer may ask you the same question over and over again in slightly different form because he does not like your answer and he is trying to get a different answer by changing the form of his question or the approach of his line of inquiry. If he can get you to change your answer once out of ten times he will ignore your other nine responses at trial.

Second, the opposing lawyer may believe your answer helps his case and, therefore, is asking the question repeatedly so that if you attempt to change your story later, he can point out to the jury that you repeatedly testified differently in your deposition.

How then does one handle these repetitious questions? Give these repetitious questions your careful consideration. If your answers are accurate, then stick to your guns and remain consistent in the face of repetitious questions. Don't change your answer simply because the question has changed. If, on the other hand, after some reflection you note that your original answer was incorrect, then give the correct answer and point out that your earlier testimony was mistaken. In other words, be consistent

Idea Number 20: Be Comfortable.

You have a right not to be made uncomfortable. If the deposition room is too warm or too cold, you may request that reasonable changes be made. If your chair is situated where the sunlight shines in your eyes or the air-conditioner blows directly on you, you may change chairs. If the chairs are uncomfortable, you may ask for a more comfortable chair. Do not hesitate to ask for a drink of water if lengthy testimony has caused your throat to be dry.

Lawyers sometimes let depositions run on for extended periods of time without a break If you need a short recess, do not hesitate to suggest one. If you become tired and feel that your testimony may be affected, let the attorneys know If you feel ill, you may insist upon a recess of the deposition. If the deposition has extended beyond the time anticipated and is interfering with an important matter.

you should bring this to the attention of the attorneys.

In most instances, I have found that attorneys on both sides are considerate of a witness's needs. If they forget considerations, you may remind them and insist upon reasonable treatment.

Idea Number 21: Don't Fear Fear.

Some people will tell you that they would rather sit in a dentist chair than a witness chair. What are they afraid of? Ninety-nine percent of them are afraid that some fast-talking, smart-question, know-it-all lawyer is going to make fools of them.

I'll let you in on a secret. Most trial lawyers are afraid that some fast-talking, smart-answer, know-it-all witness is going to make fools of them — or worse, is going to blow their cases out of the water. A seasoned trial lawyer may not appear nervous — but most live with butterflies in their stomachs.

Remember, you are on better footing than the questioner. He can only ask questions; if you know the answers and keep your head you are in control. If you tell the truth and stand up for what you believe in, you need not fear the witness stand.

The Diagnosis and Treatment of Trick Questions

Most lawyers take depositions in a straightforward direct manner and seldom resort to tricks or gimmicks. However, a few lawyers can't seem to ask straight questions. If you understand a trick question, you will have little trouble in dealing with it. The following are typical examples of tricky questions:

1. The shell game question. In this ploy the lawyer attempts to shift dates, places or subjects without advising the witness. If the lawsuit involves two transactions, he may start the witness talking about transaction number one and then, without alerting the witness, skillfully weave in a few questions which could only relate to transaction number two. For instance, if the lawyer wants to imply that the witness had knowledge of a weakness in a bridge before the bridge collapsed, he may start with questions concerning a conversation which took place before the collapse, and then skillfully work in questions concerning the witness's knowledge of the weakness after the collapse, without reference to the time lapses. You may respond to such questions with a request for clarification of the time, place or subject, or you may answer the questions pointing out the difference in time.

2. The sham question. This question sounds something like this: "You know, of course, that product X is dangerous." This is not a question but a statement made so emphatically that the witness is almost compelled to agree. Product X may not be dangerous at all. Indeed, it may be the safest product of its kind in the market. The proper answer to this question might be: "No, I don't believe it is dangerous at all."

This is a form of leading question. A leading question is one in which the lawyer suggests the answer he wants. It usually appears as more of a statement than a question: "You didn't actually see the accident very clearly, did you?" Remember to think for yourself. Don't let the question put words in your mouth. Your reply may be: "I saw it very clearly."

3. The vain Caesar question. This question plays on the witness's vanity and sounds something like: "As chief engineer, didn't you know that cracks could form in the edge of product X?" The inference is that the witness is a bad engineer because he didn't know the condition. You would be amazed at the number of people who readily admit to knowing non-existent facts for vanity's sake. The correct answer might have been "no" or "No, cracks will not form in the edge."

4. The "you said it" question. Sometimes lawyers misquote witness's prior testimony. Misquoting a witness can be intentional or unintentional. In either event, the witness should immediately correct the lawyer in a polite but firm manner such as: "I am sorry, you must have misunderstood me, because I certainly did not say that your client had a green light; on the contrary, I am absolutely certain that he entered the intersection on a red light." Oftentimes misquotations are more subtle. You may have testified that you observed plaintiff's car traveling at 50 to 60 miles an hour. Plaintiff's attorney may later ask: "Tell us where you were standing when you saw plaintiff's car traveling down the road at 50 miles an hour." The lawyer nicely shaved 10 miles an hour from your estimate. You may, if you choose, add the 10 miles an hour back in your answer.

Watch out for questions which appear to summarize or sum up your testimony. The lawyer's summary may be incomplete. A doctor may have testified that he found a number of conditions which persuaded him not to operate on the patient. After lengthy testimony the lawyer may ask: 'Well now

Dr. Smith, is it your testimony that you decided not to operate because the patient was in shock?" No, that wasn't the doctor's testimony, and if that question and answer were read out of context to the jury it would suggest that the doctor failed to operate for only one reason. The witness can protect against the chance that a jury will be misled by answering: "That is one of the reasons I decided not to operate." Beware of summary questions which start out with such words as:

"Is it your testimony that . . ."

"If I understand you then, you are saying . . ."

"Are you telling us that . . ."

Make sure that your testimony is properly quoted. Correct the attorney if he misquotes you.

5. The "have you talked to anybody about this case" question. The lawyer who pulls this antique trick out of the hat usually puts on his most accusing manner and asks: 'Have you discussed this case with your lawyer?" The answer to that question should be "Certainly I have." Every juror knows that it would take a mighty stupid lawyer not to talk to a witness before putting him on the witness stand. The next question usually comes up: "Did he tell you what to say to the jury?" The witness: "He told me to tell the truth and to be as fair and accurate as I could be."

6. The "how much are you getting paid" question. This question is usually directed toward expert witnesses and professional people who may be hired by an attorney to do research, conduct tests and appear in court. However, it can be directed to any witness. The question may be asked like this: "Doctor, how much did they pay you to come in here and testify that in your opinion Mrs. Jones was not hurt in this accident?' The tricky part of this question is that the witness was paid for his time but not to testify in a certain manner. The correct answer to the question might be: "I wasn't paid a penny to testify that Mrs. Jones wasn't hurt; that is my sincere and honest opinion; I was simply paid to examine her and for my time in appearing here to give the jury, as best I can, the results of my examination."

7. The "how high is up" question. Beware of open-ended comparisons. By that I mean a question which asks: "Was it long?" A simple yes or no answer may lead to difficulty later on. Long is a relative word. Long compared to what? A witness can respond by asking for clarification or he may simply state: "It was about 3 feet long."

8. The "have you stopped beating your wife" question. This is the classic "trick question" known to everyone. Of course, you cannot answer either yes or no without running into difficulty. The question can be asked in a variety of forms such as: "Doctor, is it still your practice to use a surgical procedure which has been criticized by most authorities in the field?", or in another context, "Mr. Engineer, is your company still manufacturing defective drill presses of the type which injured Mr. Plaintiff?" Of course, the attorney calling you should object to the question. However, if no objection is interposed or if you are compelled to answer, the appropriate answer might be: "I cannot accept the premise of your question because that surgical procedure is the one recommended by the most reputable authorities in the field and certainly is not criticized by most of the authorities in the field." Or "The drill press which you described is one of the best designs on the market and certainly was not defective."

9. The "you could have done better" question. Plaintiff's lawyers know that no matter how skillfully and carefully the defendant has acted, there is always room for a higher degree of skill and care. If a doctor applied seven sutures to the wound, there is always the argument that it should have been eight. If the manufacturer installed a failsafe feature on the product, there is always the argument there should have been a backup failsafe feature . . . or two . . . or three. Such issues can be faced in a straightforward series of questions and answers. However, some attorneys insist upon trying to put the witness in a box with argumentative questions such as "Really, Mr. Witness, couldn't you have designed a better safety shield to protect consumers of your product?" If the safety shield performed well under the conditions, don't be afraid to stand up for it. For example, a witness might say: "I don't know how you are using the word 'better' but I think our safety shield is a good and proper one."

10. The impossible question. There is an interesting difference between scientists and lawyers when they consider the word "impossible." To start with, scientists (engineers, doctors, etc.) think in terms of precise rules of physical behavior and mathematical possibilities. Lawyers, on the other hand, often think in terms of how the evidence may appear to the jury. An engineer will seldom say that anything is impossible; rather he tends to say that a phenomenon is so mathematically remote that it does not bear consideration. To a lawyer, a phenomenon is either possible or impossible. The following result is not unusual:

Q Well, Mr. Jones, are you saying that it would be impossible for you to design a car which would have permitted this plaintiff to sur-

vive the 100 mile an hour crash into the brick wall?

A. Well, I don't know that I would say impossible

Q. Well, if it wasn't impossible, as you have just said, Mr. Jones, then tell the jury why your company failed to protect this poor innocent plaintiff against the expected hazards of such a crash?

Mr. Jones could have avoided the lawyer's trick if he had answered: "I certainly don't know of any way one could design a car to permit passengers to withstand that kind of crash; as far as I'm concerned it would be impossible."

But there is another side to the "impossible question." In 1960 a leading London gambling parlor would give you 1000 to 1 odds that man would not set foot on the moon within the decade; they paid off a few bets. The witness who emphatically states that a phenomenon is impossible leaves himself open to attack on his credibility if the opposing counsel can demonstrate that the proposition is not only possible but workable. Therefore, it is sometimes better to answer in terms of: "I do not believe that it would be possible to . . ." or even in terms of: "I believe with the technology available today one would be able to . . ."

11. The "please forget" question. Lawyers find that if they add the words "if you remember" to the beginning or the end of a question, very often the witness will not remember. There are times when a lawyer would prefer that the witness not remember. Sometimes the lawyer will add the phrase "if you remember" because it may suggest to the witness that he does not remember.

12. The "double negative" question. Occasionally a lawyer will inadvertently phrase a question with two negatives such as: "You're not telling us that you didn't see the accident?" Obviously such questions can create considerable confusion. In this instance you should not answer with a simple "yes" or "no." One may state "I didn't see the accident" or ask the attorney to rephrase the question in a more understandable form.

13. The "knowledge" question. The phrases "to your knowledge . . ." and "as far as you know . . ." present a special hazard when tacked onto a question. The witness may be induced to make an answer which implies something he does not intend. Consider the question: "To your knowledge, did the company consider these safety procedures before the accident?" The witness may not know whether such procedures were considered but is induced by the form of the question to respond with: "Not to my knowledge." This answer suggests that such procedures were not considered. The witness should have answered: "I don't know."

14. The Primrose Path questions. The Primrose Path is a tactic in which a witness is asked whether he agrees with carefuly worded, very broad and over-simplified statements which, on their surface appear undeniably true. The witness is led into voicing his agreement to one statement after another, until he suddenly finds that he is trapped into a conclusion which he knows to be dead wrong.

The technique has been employed in different forms against engineers, physicians, and business and professional men. Here is an example used by plaintiffs' attorneys in product liability cases involving design defects:

Q. Mr. Engineer, would you agree that it is one of the primary obligations of design engineering to identify the hazards associated with the use of the product? (If the witness says no, the lawyer follows with a line of questions implying that the witness is grossly negligent and willfully careless in disregarding the injuries which could occur to the consumer. If the witness answers affirmatively, the next question proceeds as follows):

Q. Is is fair to say that the hazards we are talking about are the potential of a product to produce injury or death?
(If the witness answers no, then he will be asked to define hazard and will likely be led back to something quite similar to plaintiff's attorney's definition; if the answer is affirmative, the questions will continue):

Q. Would you also agree that it is basic to the design engineer's job to attempt to foresee the severity of the consequences in the event that one of these hazards is realized?
(The witness must either agree again or stand the criticism of not caring how severely his product may injure others or how many deaths it may cause. If he agrees, then the question follows):

Q. Would you also agree, Mr. Engineer, that if reasonable means are available to eliminate or reduce the hazardous potential and prevent an injury or death, it is the designer's responsibility to employ those means?
(Most professional persons will agree that the statement sounds reasonable)

At this point the witness is firmly in the trap and plaintiff's attorney may choose his own time and means for destroying the witness's testimony. Plain-

tiff's attorney may simply read the foregoing questions and answers into the record and then have his own expert testify that any junior grade project engineer could have foreseen the injury and designed a 37 cent safety shield which would have precluded the accident. Plaintiff's attorney may lead defendant's witness through the same questions and answers in trial and then rub his nose in the lack of any action to prevent the very injury which occurred to the plaintiff in the lawsuit.

Many lawyers feel that these are objectionable questions. Some lawyers may instruct witnesses not to answer these questions. The reason is that these questions really call for the witness to render a legal opinion as to the duty of a professional person. Note such questions use the words duty, obligation or responsibility. The lawyer will insist that he is only setting "professional standards" but when he gets to court he will read the question and answer to the jury and argue that the witness or his employer has violated a legal duty. Almost very Primrose Path question needs to be clarified. A request for clarification might proceed as follows:

Q: Mr. Engineer, would you agree that it is one of the primary duties of design engineering to identify the hazards associated with the use of the product?

A: I don't know if you are referring to a legal duty but if you are I don't know. I'm not a lawyer.

Q: No, I'm asking about professional duties.

A: What do you mean by a "professional duty?"

Q: Are you now asking me for "professional standards" instead of "primary duties?"

Q: Yes.

A: I do not presently recall any particular engineering standard that is worded in just that manner.

Another reason that Primrose Path questions are objectionable is that they are almost always too broad to relate to the accident involved in the lawsuit. The following answers are not suggested as stock answers for you to give but are shown because they illustrate the unreasonable nature of the attorney's questions:

Q: Mr. Engineer, would you agree that it is one of the primary obligations of design engineering to identify the hazards associated with the use of the product?

A: No. The concept that you have stated is far too general. I agree that design engineers should identify the types of hazards which one would reasonably expect to be associated with the normal use of his products. However, that is not to say that he should identify all hazards however remote they might be or anticipate all of the unusual uses which might be made of the product. For instance, in this case I don't think that it would be reasonable to assume that the design engineer should be held to foresee that the consumer will bypass two safety switches, remove a safety shield and place his hands into the moving machinery.

Q: Is it fair to say that the hazards we are talking about are the potential of a product to produce injury or death?

A: No. I don't think we can agree on that definition if you apply it to your last question because it is entirely too broad. There is no way for a design engineer to foresee all of the different ways a person may injure himself with a product. The engineer must be reasonable in his evaluation of the product, but it is not reasonable to ask him to identify every injury that might possibly occur.

Q: Would you agree that it is basic to the design engineer's job to attempt to foresee the severity of the consequences in the event that one of these hazards is realized?

A: No. I think you are asking for the impossible. The same product used in the same manner by the same person under slightly different circumstances could produce death to one user while another user might be totally unharmed. The papers are full of accidents where one passenger in a car dies while the passenger next to him is unscratched. Further, every product made by man is capable of producing death under certain circumstances.

Q: Would you agree, Mr. Engineer, that if reasonable means are available to eliminate or reduce the hazardous potential and prevent and injury or death, that it is the designer's responsibility to employ these means?

A: No. I can't agree with that the way you have stated it because your statement is entirely too broad. For instance, under your definition the manufacturer of a knife can foresee that this product may cut someone and he knows it would be feasible to reduce this hazard by producing a dull knife. That gets you back to a question of what is reasonable which, of course, differs from product to product and circumstance to circumstance.

Certainly, if you monkey around enough with the definition of the word "reasonable," you can criticize almost every product in the world. But the fact remains that I firmly believe that we made a very reasonable product with adequate safety devices, and all of these word games won't change my opinion and belief.

Q: Well I am certainly not playing word games with you. Let's simplify this. If a design engineer can see that his product has a potential for injuring someone and can see that this is an economical and feasible means of preventing that injury, then wouldn't you agree that he has an obligation to employ those means?

A: Well now you see you've changed the words but you haven't simplified the premise. You're still talking in broad terms. If a hammer manufacturer foresees that his product could produce injury in the hands of a lunatic, he obviously does not have an obligation to pad the hammer. You have to get back to the actual facts.

The foregoing dialogue is not presented to suggest answers to you, but merely to point out the fallacies inherent in the Primrose Path tactics employed by a number of attorneys. If you are faced with such tactics by a persistent attorney, you will simply need to respond as best you can and stand your ground.

15. The silent treatment. This is a subtle form of intimidation in which the lawyer, by silence, suggests that the witness should make another or a further answer. The lawyer may simply stare at the witness after the witness has answered a question. The witness may become uncomfortable or assume that his answer is incomplete; faced with an awkward silence many witness feel compelled to commence a defensive explanation of their answer. Some lawyers encourage the witness with silent signals (expressions of interest, tilted head, raised eyebrows, hand extended with palm upward) while other lawyers may stare with a look of incredulous disbelief.

Do not be intimidated by these tactics. When you have answered a question, you should stop and wait for the next question. If the lawyer wants further information or a more detailed explanation, he will ask for it. If he employs the "silent treatment" you may ignore his tactics. If the lawyer sees that you are not afraid of silence he will move on to the next question.

16. The end of the line question. Lawyers should properly ask whether they have obtained all of the information a witness may have on a particular subject. For instance, an attorney may ask: "Is that all of the conversation which you have with the plaintiff there at the scene of the accident?" This is not a trick question; the attorney has a right to discover all of the admissions his client may have made in conversation with the witness. However, this presents a problem for the witness inasmuch as he may not remember all of the details of the conversation with such particularity that he can relate them during his deposition. The witness would like to leave the door open to the possibility that he will recall further details as time goes on. Under the circumstances, be as fair as you can. If you are certain that you have related all of the information you know, then say so. However, if you are uncertain, then it is permissible to answer stating: "I have told you about all of the conversations I can remember at this time."

17. The punch after the bell question. This is a tactic employed by counsel to persuade the witness to drop his guard before the end of the deposition. A lawyer may well say: "I think that's all of the questions I have; let me have a moment or two to review my notes." The lawyer may then study his notes for a few moments, close his notebook and give a weary look as if to say "well, we're through." The witness senses that the deposition has concluded and relaxes. Then, WHAM! the lawyer spends the next hour asking in rapid fire the toughest questions of the deposition. Remember, the deposition is not over until everyone leaves. Stay alert.

Tricks Witnesses Play on Lawyers

A word about playing tricks on lawyers: *Don't!* It is unwise. If you disrespect the minority of lawyers who play tricks on witnesses, then don't become a part of the disrespected minority of witnesses who play tricks on lawyers. Further, a witness who plays tricks often loses his credibility. The following are examples of conduct which is not acceptable:

1. The wounded bird ploy. When a bird sees that a predator is dangerously near its nest, it will attempt to distract the enemy by pretending to be hurt and will create a commotion to lead the predator away from the nest. Witnesses can lead lawyers off on wild goose chases in depositions. Inexperienced lawyers may be led astray. However, astute trial lawyers will follow the false scent to its

end and then go right back to the question which they were asking when the witness started diversionary tactics.

2. **The non-answer answer.** A common failing of less capable trial counsel and an occasional failing of all trial counsel is to forget to listen to the witness's answer. Witnesses can sometimes get by with wholly unresponsive and evasive statements. Sometimes, of course, this is purely unintentional on the part of the witness; other times the witness intentionally avoids the question. Experienced trial lawyers will ask the question as many times as is necessary to get a clear answer.

3. **The delay routine.** If the witness knows that the lawyer has an afternoon plane to catch to get home, he can thwart justice by slowing the deposition down to a snail's pace. He can pause, pretending to concentrate on every answer, and stretch out his words. A lawyer can retaliate by stating for the record that the witness is apparently having difficulty answering, because of the excessive delays. If the deposition is important, the witness's tactics will likely fail because the lawyer will recess the deposition and stay over another day.

A deposition is not a game — don't try to turn it into one by tricks.

What Happens after the Deposition?

Under court rules, a witness has a right to read the transcript of his deposition and to correct mistakes on a separate form, and will then be asked to sign his deposition and the separate form. Sometimes the attorneys waive this process and may ask the witness to do so as well. You should discuss this procedure with your attorney and take his advice on the matter.

Let's Finish Where We Started

We started with the premise that you have an obligation as a witness to tell the truth, to be fair and to be as accurate as you can. If you can walk away from the witness chair knowing that you have fulfilled that obligation, then you have been a good witness.

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REMINDERS AND SUGGESTIONS ON THE USE AND NONUSE OF DEPOSITIONS UNDER THE IOWA RULES

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A. The Basic Rules

1. When may a deposition be taken?

Rule 140(a):

"After commencement of the action, any party may take the testimony of any person, including a party, by deposition upon oral examination. Leave of court, granted with or without notice, must be obtained only if the plaintiff seeks to take a deposition prior to the expiration of ten days after the date for special appearance, motion or answer for any defendant, except that leave is not required:

(1) If a defendant has served a notice of taking deposition or otherwise sought discovery, or

(2) If special notice is given as provided in subdivision 'b'(2) of this rule. The attendance of witnesses may be compelled by subpoena as provided in R.C.P. 155. The deposition of a person confined in prison may be taken only by leave of court on such terms as the court prescribes."

2. The timing and methods of taking a deposition.

Rule 140(b):

"(1) A party desiring to take the deposition of any person upon oral examination shall give reasonable notice in writing to every other party to the action. The notice shall state the time and place for taking the deposition and the name and address of each person to be examined, if known, and, if the name is not known, a general description sufficient to identify the person or the particular class or group to which the person belongs. If a subpoena duces tecum is to be served on the person to be examined, the designation of the materials to be produced as set forth in

the subpoena shall be attached to or included in the notice.

(2) Leave of court is not required for the taking of a deposition by plaintiff if the notice

(A) States that the person to be examined is about to go out of the state and will be unavailable for examination unless the person's deposition is taken before expiration of the thirty-day period, and

(B) Sets forth facts to support the statement. The plaintiff's attorney shall sign the notice, and the attorney's signature constitutes a certification by the attorney that to the best of the attorney's knowledge, information, and belief the statement and supporting facts are true.

If a party shows that upon being served with notice under this subdivision "b"(2) the party was unable through the exercise of diligence to obtain counsel to represent him or her at the taking of the deposition, the deposition may not be used against that party.

(3) The court may for cause shown enlarge or shorten the time for taking the deposition.

(4) <u>The court may upon motion order that the testimony at a deposition be recorded by other</u> than stenographic means, in which event the order shall designate the manner of recording, preserving, and filing the deposition, and may include other provisions to assure that the recorded testimony will be accurate and trustworthy. If the order is made, a party may nevertheless arrange to have a stenographic transcription made at that party's own expense. <u>Leave of court is not required to record testimony by nonstenographic means if the deposition is also to be recorded stenographically.</u>

(5) The notice to a party deponent may be accompanied by a request made in compliance with R.C.P. 129 and 130 for the production of documents and tangible things at the taking of the deposition. The procedure of R.C.P. 130 shall apply to the request."

3. Telephone depositions.

Rule 140(d):

"Any deposition permitted by these rules may be taken by telephonic means. A party desiring to take the deposition of any person upon oral examination by telephonic means shall give reasonable notice thereof in writing to every other party to the action. Such notice shall contain all other information required by paragraph "b"(1) herein and shall state that the telephone conference will be arranged and paid for by the initiating party. No party of the expense for telephone service shall be taxed as costs.

The person reporting the testimony shall be in the presence of the witness unless otherwise agreed by all parties.

If any examining party desires to present exhibits to the witness during the deposition, copies shall be sent to the deponent and the parties prior to the taking of the deposition.

Nothing in this rule shall prohibit a party or counsel from being in the presence of the deponent when the deposition is taken."

4. Use of depositions.

A. Under the Rule.

Rule 144:

"Any part of a deposition so far as admissible under the rules of evidence, may be used upon the trial or at an interlocutory hearing or upon the hearing of a motion in the same action against any party who appeared when it was taken, or stipulated therefor, or had due notice thereof, either:

a. To impeach or contradict deponent's testimony as a witness;, or

b. For any purpose if, when it was taken, deponent was a party adverse to the offeror, or was an officer, partner or managing agent of any adverse party which is not a natural person; or

c. For any purpose, if the court finds that the offeror was unable to procure deponent's presence at the trial by subpoena; or that deponent is out of the state and such absence was not procured by the offeror; or that deponent is dead, or unable to testify because of age, illness, infirmity or imprisonment.

d. <u>For any purpose, if it was taken of an expert witness specially retained for litigation; or the deponent was a health care practitioner offering opinions or facts concerning a party's physical or mental condition.</u>

e. On application and notice, the court may also permit a deposition to be used for any purpose, under exceptional circumstances making it desirable in the interests of justice; having due regard to the importance of witnesses testifying in open court."

B. Rights of the adversary.

Rule 145:

"a. If a party offers only part of a deposition, his adversary may require him to offer all of it relevant to the portion offered; and any other party may offer other relevant parts.

b. A party does not make deponent his own witness by taking his deposition or using it solely under R.C.P. 144 'a' or 144 'b'. A party introducing a deposition for any other purpose makes the deponent his witness, but may contradict his testimony by relevant evidence."

5. Notice of taking depositions.

Rule 147:

"a. Oral depositions may be taken only in this state, or outside it at a place within one hundred miles from the nearest Iowa point. But, on hearing, on notice, of a motion of a party desiring it, the court may order it orally taken at any other specified place, if the issue is sufficiently important and the testimony cannot reasonably be obtained on written interrogatories.

b. The party taking an oral deposition must first serve reasonable notice on all other parties except a party against whom a default has been entered, stating the time and place thereof and the name and address of the deponent, or if that is unknown, a description identifying him or the class or group to which he belongs. The court, on motion of any party so served, may for good cause enlarge or shorten the time.

c. No subpoena is necessary to require the appearance of a party for a deposition. Service on the party or his attorney of record of notice of the taking of the deposition of the party or of an officer, partner or managing agent of any p[arty who is not a natural person, as provided in 'b' hereof, is sufficient to require the appearance of a deponent for the deposition.

d. If the deponent is a party or the officer, partner or managing agent of a party which is not a natural person, the deponent shall be required to submit to examination in the county where the action is pending, unless otherwise ordered by the court.

e. A party may in his notice and in a subpoena name as the deponent a public or private corporation or a partnership or association or governmental agency and describe with reasonable particularity the matters on which examination is requested. In that event, the organization so named shall designate one or more officers, directors, or managing agents, or other persons who consent to testify on its behalf, and may set forth, for each person designated, the matters on which he will testify. A subpoena shall advise a nonparty organization of its duty to make such a designation. The persons so designated shall testify as to matters known or reasonably available to the organization. This paragraph does not preclude taking a deposition by any other procedure authorized in these rules."

6. Conduct of the deposition.

A. The Rules

Rule 148(a):

"Examination and cross-examination of witnesses

may proceed as permitted at the trial. The officer before whom the deposition is to be taken shall put the witness on oath and shall personally, or by someone acting under his direction and in his presence, record the testimony of the witness. The testimony shall be taken stenographically or recorded by any other means ordered in accordance with R.C.P. 140 'a'(4). If requested by one of the parties, the testimony shall be transcribed. All objections made at the time of the examination to the qualifications of the officer taking the deposition, or to the manner of taking it, or to the evidence presented, or to the conduct of any party, and any other objection to the proceedings, shall be noted by the officer upon the deposition. Evidence objected to shall be taken subject to the objections. In lieu of participating in the oral examination, parties may serve written questions in a sealed envelope on the party taking the deposition and he shall transmit them to the officer, who shall propound them to the witness and record the answers verbatim."

Rule 148(b):

"At any time during the taking of the deposition, on motion of a party or of the deponent and upon a showing that the examination is being conducted in bad faith or in such manner as unreasonably to annoy, embarrass, or oppress the deponent or party, the court in which the action is pending or the court in the district where the deposition is being taken may order the officer conducting the examination to cease forthwith from taking the deposition, or may limit the scope and manner of the taking of the deposition as provided in R.C.P. 123. If the order made terminates the examination, it shall be resumed thereafter only upon the order of the court in which the action is pending. Upon demand of the objecting party or deponent, the taking of the deposition shall be suspended for the time necessary to make a motion for an order. The provisions of R.C.P. 134'a'(4) apply to the award of expenses incurred in relation to the motion."

B. Objections

Rule 158:

"a. Notice. All objections to any notice of taking any depositions are waived unless promptly served in writing upon the party giving the notice.

b. Officer. Objection to the officer's qualification to take a deposition is waived unless made before such taking begins, or as soon thereafter as objector knows it or could discover it with reasonable diligence.

c. Interrogatories. All objections to the form of any written interrogatory served under R.C.P. 150 are waived unless the objector serves them on the interrogating party in the time allowed him for serving succeeding interrogatories and, as to the last interrogatories authorized, within three days after the service thereof.

d. Taking deposition. Errors or irregularities occurring during an oral deposition as to any conduct or manner of taking it, or the oath, or the form of any question or answer; and any other errors which might thereupon have been cured, obviated or removed, are waived unless seasonably objected to when it is taken.

e. Testimony. Except as above provided, testimony taken by deposition may be objected to at the trial on any ground which would require its exclusion if given by a witness in open court, and objections to testimony, or competency of a witness, need not be made prior to or during the deposition, unless the grounds thereof could then have been obviated or removed.

f. Motion to suppress. All objections to the manner of transcribing the testimony, or to preparing, signing, certifying, sealing, endorsing, transmitting, filing the deposition, or the officer's dealing with it, are waived unless made by motion to suppress it, or the part complained of, filed with reasonable promptness after the objector knows of, or could with reasonable diligence discover, the defect. No such motion shall be sustained unless the defect is substantial and materially affects the right of some party."

C. What is the standard stipulation and should it be used?

1. The typical standard stipulation is as follows:

STIPULATION

(The attorneys for the respective parties entered into the following stipulation:)

It is stipulated and agreed by and between the parties hereto, by their respective counsel, that the deposition of _____ may be taken at the offices of _____ at _____; on the _____ day of _____, 19___, commencing at or about _____ __.m., before _____, Certified Shorthand Reporter and Notary Public of the State of Iowa, acting as Commissioner; that notice of the taking of said deposition is hereby expressly waived by the parties; that said deposition is taken pursuant to the Iowa Rules of Civil Procedure and objections or exceptions may be reserved until the time of trial, except objections and exceptions relating to the form of the question and the responsiveness of the answer.

2. Compare this with Iowa Rule of Civil Procedure 158(e) which provides that:

"Objections to testimony or competency of a witness need not be made prior to or during the deposition unless the grounds thereof could then have been obviated or removed."

3. Isn't the standard stipulation set forth above a waiver of the requirements for objections during the course of the deposition based on those that "could have been obviated or removed"?

4. Is that the desired effect?

5. Is it wise to alter what is provided for in the Rules?

6. Suggested standard stipulation:

(The attorneys for the respective parties entered into the following stipulation:)

It is agreed that in accordance with, and pursuant to, the Iowa Rules of Civil Procedure, the deposition of _____ is taken at _____, _____, Iowa _____; on the ____ day of _____, 19___, commencing at _____ __.m., before _____, a Certified Shorthand Reporter of the State of Iowa.

D. Objections during the deposition

1. Should you instruct the witness not to answer?

2. The law

(a) Prior to the adoption of the Rules, the Iowa Supreme Court held that a witness cannot refuse to answer deposition questions simply because he deems them incompetent or irrelevant. Finn v. Winneshiek District Court, 145 Iowa 157, 165; 123 N.WE. 1066 (1909) (Since the adoption of the Iowa Rules of Civil Procedure, this case is of questionable authority.) But see, Dowagiac Manufacturing Company v. Lochren, 143 F.2d 211 (8th Cir. 1906); Further 23 Am Jur 2d, Depositions and Discovery, §153 at p. 476 provides:

"As a general rule, it is thus improper for counsel to direct a witness at a deposition not to answer the questions posed to him; instead, if counsel has any objection to the questions at a deposition, he should place the objection on the record, and the evidence will be taken or the deponent will be ordered to answer subject to such objection. This will reserve the question for

the court when the deposition is offered into evidence. Thus, during the taking of a deposition routine objections based on relevancy should be noted on the record and witnesses should thereafter answer the question."

However, the better reasoned opinions appear to be the following:

4A, Moore's Federal Practice, p. 37-331-4, ¶37.02(2) where it is stated:

"When a deponent wishes to assert an objection that the question seeks information that is privileged, or that it is not relevant to the subject matter of the pending action, his only course is to decline to answer."

See also, Herbert v. Lando, 411 U.S. 153, 99 S.Ct. 1635, 60 L.Ed.2d 115 (1979); Eggleston v. Chicago Journeymen Plumbers, 657 F.2d 890 (7th Cir., 1981)

The Federal Courts have dealt with this extensively and the Circuits appear to be in conflict. The 4th Circuit holds that deposition questions must be answered even if objection is made unless a claim of evidentiary privilege is raised. Ralston Purina Co. v. McFarland, 550 F.2d 967 (4th Cir. 1977); First Tennessee Bank v. Federal Deposit Insurance Corp., 108 F.R.D. 640 (E. D. of Tenn. 1985) A more flexible approach is advocated in the 7th Circuit. See Eggleston v. Chicago Journeyman Plumbers Local Union, 657 F.2d 890 (7th Cir. 1981) Except in the 4th Circuit, the Federal Courts appear to to have recognized that no hard and fast rule can be articulated. Some take the view that a deponent need not answer if he objection is that the question is irrelevant, argumentative or misleading. In Re Folding Carton

Antitrust Litigation, 83 F.R.D. 132 (N. D. of Ill. 1979); Kamens v. Horizon Corp., 81 F.R.D. 444 (S. D. of N.Y. 1979) However, most courts are taking a balanced approach as explained in the Eggleston case, supra, where the Court states:

"Rule 30(c), Fed.R.Civ.P., says the evidence should be taken subject to objection. Some questions of doubtful relevancy may be innocuous and nothing is lost in answering, subject to exception, except time. That is the general rule. Other irrelevant questions, however, may unnecessarily touch sensitive areas or go beyond reasonable limits.... In such an event, refusing to answer may be justified. ... There is no more need for a deponent to seek a protective order for every question when a dispute arises than there is need to seek a motion to compel an answer for each unanswered question. If a particular question is important or opens up a whole area of questionable relevance, or other serious problems develop which counsel cannot resolve themselves, then resorting to the court may be necessary."

(b) Query: When do you move for a protective order? When do you instruct not to answer? The practical solution, do both.

3. Preparation of the witness

A. Make sure the witness is familiar with the facts and the procedures. Don't be afraid to rehearse.

B. The basic rules

1. Yes.

2. No.

3. I don't know.

4. I don't remember.

C. The exceptions

D. I don't recall -- Not to the best of my recollection

E. The fifth Amendment and other refusals to answer

4. Strategies and goals

5. Basic rules for the examining attorney

A. Be prepared. How do you do it?

B. Set your goals and stick to them.

C. Ask yourself "Why" a lot.

D. Constantly ask yourself, "Is this something I would want read to a jury?"

ANNUAL APPELLATE DECISIONS REVIEW

October 1988 - October 1989
428 N.W.2d through 444 N.W.2d

By

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Judicial Review.

The Iowa Law Enforcement Academy (academy) refused to train and certify a sheriff's deputy selected through a local civil service commission and sent to the academy for training in accordance with chapter 80B. The deputy did not meet the academy's rules with respect to visual acuity. Deputy sued the academy and others for violating his civil rights with respect to employment discrimination based on disability. HELD: Section 17A.19's judicial review provisions are the exclusive means of challenging the academy's administrative action in enacting a rule with respect to visual acuity requirements.

Helmers v. Altruck Freight Systems, 436 N.W.2d 39 (Iowa 1989)

Judicial Review.

Injured employees who commenced review-reopening proceeding obtained an order of default from the deputy against the employer and insurer for failing to respond timely. The employer and insurer filed a motion to set aside the default in compliance with rule of civil procedure 236, which allows such a motion to be filed within 60 days of a final judgment or order. The industrial commissioner followed the agency's rules requiring a set-aside motion within 20 days, and concluded that the motion was not timely filed.

HELD: The industrial commissioner's ruling, even though it held that commissioner had no jurisdiction over the matter because

the motion to set aside the default was not timely filed, is nevertheless a final agency order from which the employer and insurer can seek judicial review. Rule 236 applies to the deputy's default order, even though agency rules provide that the deputy's decision becomes final if not challenged within 20 days.

Rodine v. Zoning Board, 434 N.W.2d 124 (Iowa App. 1988)

Ex Parte Contact.

Developer sought zoning variance and special use permit to construct private sewage treatment plant north of city. Board of Adjustment granted variance and permit. Interested parties filed a petition for writ of certiorari, claiming that ex parte contact between board members and interested parties had occurred in connection with the application. Because the property was subsequently annexed by the city and the developer had not acted on the variance and permit within six months, the variance and permit were voided by county zoning ordinances. HELD: Public interest exception requires that the district court not dismiss the certiorari petition on grounds of mootness. COMMENT: Without describing the ex parte allegations at all, the court of appeals discusses at length the need for strict allegiance to impartiality on the part of administrative agencies exercising adjudicatory power and the corresponding need to guard against ex parte contacts.

Feller v. Scott County Civil Service Commission, 435 N.W.2d 387 (Iowa App. 1988)

Open Meetings Law.

Person who requests closed meeting under provisions of section 21.5 that authorize an entity subject to the open meetings law to close a meeting may utilize the enforcement and remedy provisions of the open meetings law when such a request is improperly denied. Enforcement and remedy provisions do not apply only to closure of a meeting that should remain public.

AGENCY

Brown v. United Fire and Casualty Co., 432 N.W.2d 708 (Iowa App. 1988)

Brown sold tavern to Shank on contract. Tavern was destroyed by fire at the time when Shank still owed Brown under the contract. The insurer paid Shank, who then defaulted on contract. Brown sued insurer and adjuster, who told Brown that she was entitled to a portion of the proceeds and that her name would appear on the draft. HELD: Fact issues were generated as to whether adjuster was the insurer's agent and whether the insurer granted the adjuster authority to bind the insurer as to payment decisions, such that summary judgment was improper.

Mermigis v. Service Master Industries Inc., 437 N.W.2d 242 (Iowa 1989)

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Preservation.

Defense counsel objected during reported final argument to what counsel contended was a "golden rule" argument. Objection was sustained. HELD: Issue was waived by counsel's failure to raise it in motion for new trial. COMMENT: Issue was raised on appeal in context of defendant's claim that verdict was influenced by passion or prejudice, which was raised in motion for new trial.

First National Bank v. Turin, 431 N.W.2d 185 (Iowa 1988)

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Mortgagor's notice of appeal from deficiency judgment entered after judgment of foreclosure in same action permitted mortgagor to argue issues related to the foreclosure.

Martin v. Amana Refrigeration, Inc., 435 N.W.2d 364 (Iowa 1989)

Final Judgment.

An order certifying or refusing to certify an action as a class action is appealable as a matter of right.

Davis v. Ottumwa YMCA, 438 N.W.2d 10 (Iowa 1989)

Final Judgment.

One of three defendants was dismissed on motion for summary judgment 2-1/2 years before the remaining defendants obtained a favorable and final judgment. Plaintiff appealed as to all defendants. HELD: Appellate rule 5(b) controls and expressly authorizes appeal from order disposing of case as to third defendant at the time that the rest of the case is finally resolved.

Citizens State Bank v. Harden, 439 N.W.2d 677 (Iowa App. 1989)

Final Judgment.

A final possession order entered in a replevin action, which establishes the substantive rights of the parties with respect to the property, is final for purposes of appeal.

Smart-Way Truckin, Inc. v. Cota Industries Inc., 439 N.W.2d 162 (Iowa 1988)

Time.

Smart-Way served its notice of appeal within 30 days from the date of judgment and a copy of the notice was delivered to the clerk of the supreme court. The district court clerk, however,

showed no filing of a notice. Smart-Way commenced an action in rem pursuant to chapter 647 and obtained a judgment ordering the clerk of the district court to show that a notice of appeal was filed as of a date shortly after the date of service. HELD: The judgment pursuant to chapter 647 retroactively perfects this appeal by a timely filing. COMMENT: The supreme court offered two suggestions: "First, it is a good practice to obtain a file-stamped copy of filed papers. Second, an action to correct the record in the district court is a preferable procedure, rather than a similar attempt in appellate court."

Hearity v. Iowa District Court, 440 N.W.2d 860 (Iowa 1989)

Rule 80 Sanctions.

Lawyer against whom sanctions were imposed by district court pursuant to rule 80(a) appealed. HELD: "Review of a district court's order imposing sanctions is . . . by application for issuance of a writ of certiorari." Court did not dismiss but simply treated the notice of appeal as a petition for writ of certiorari, which was granted so that Hearity's complaints could be adjudicated. Relying on federal rule 11 cases and state certiorari cases, the court announced its standards of review for a rule 80 decision: The trial court's findings of fact are reviewed on a substantial-evidence test. Whether a violation occurred and whether sanctions are required is to be reviewed de novo. The sanction imposed is reviewed on an abuse-of-discretion basis.

M

ATTORNEYS

Committee v. Liles, 430 N.W.2d 111 (Iowa 1988)

Conflict of Interest.

Part-time county attorney shared office space with assistant county attorney Hansen. County attorney continued to represent tort claimant after the tort defendant was charged by assistant Hansen with drunk driving. County attorney also continued to represent a putative father who sought to establish paternity and obtain custody after assistant Hansen commenced proceedings against

the custodial mother to establish that the child was in need of assistance. The court admonished the county attorney to avoid representing clients after his public office institutes official action against his client's opposing parties.

Committee v. Postma, 430 N.W.2d 387 (Iowa 1988)

Conflict of Interest.

Lawyer who previously had represented complainant entered into business corporation with complainant under terms where lawyer was to handle the corporate and legal matters. Corporate papers did not disclose that lawyer was a shareholder, which was inaccurate. After dispute arose between complainant and lawyer, lawyer obtained ex parte order that he subsequently used to withdraw corporate funds. Court imposed a six-month suspension. COMMENT: Three justices disagreed that lawyer had entered into a conflict of interest, because lawyer had not done any legal work for complainant at the time of the incorporation or during the corporation's existence.

Committee v. Hill, 436 N.W.2d 57 (Iowa 1989)

Discipline.

Don't have sex with your client.

Committee v. McClintock, 442 N.W.2d (Iowa 1989)

Discipline.

Attorney in partnership retained 25% of fees earned and paid directly to him for court-appointment services in mental-health commitment proceedings without the consent or knowledge of his partners. When partnership discovered the discrepancy, which occurred over a 9-year period and involved $7,000.00, the attorney provided his partners with full restitution and reported the violation. HELD: Reprimand.

Committee v. Nadler, _____ N.W.2d _____ (Iowa, August 16, 1989)

Discipline.

Attorney failed to answer either the complaint or requests for admissions, some of which related to an assault that was the subject of a criminal prosecution. At the hearing before the commission, Nadler asserted for the first time under court rule 118.6 his privilege against self-incrimination, both with respect to testimony at the hearing and with respect to the requests for admission. HELD: Assertion of 118.6's protection against incrimination must be timely asserted and can be waived. Commission was justified in construing requests as admitted.

Attorney also had negotiated a settlement on behalf of a client who had been sued. When client brought funds to cover the settlement, attorney asked for payment on his fees as well. When client failed to provide additional monies, the attorney retained the funds for himself. HELD: Property or funds delivered by a client to his attorney for a special purpose could not be attached by an attorney's lien.

United Central Bank v. Kruse, 439 N.W.2d 849 (Iowa 1989)

Misrepresentation.

Kruse bought land on contract from Graham who borrowed the money from bank and ultimately assigned his interest in contract to bank as security. Graham defaulted on note and bank obtained a judgment against him. The bank notified Kruse, who then made payments directly to bank. Because Graham himself was purchasing the land on contract, and because he was in default, the original seller served notice of forfeiture, to which Kruse responded by making some direct payments. Graham had assigned his interest in this contract to bank as well. Bank and Kruse negotiated a new arrangement whereby original seller was paid off, Kruse received title, and Kruse mortgaged property to bank with relatively early balloon payment. Kruse defaulted and bank commenced action for foreclosure. Kruse presented affirmative defenses and counterclaims on theories of fraudulent and negligent misrepresentation and tortious interference with contractual relationship. The misrepresentation claims were premised on allegations that the bank made false legal representations to Kruse as to the effect of the judgment against Graham on the property and as to the effect of Kruse's direct payments to the original seller.

The evidence established that Kruse was represented by counsel throughout negotiations with the bank. The trial court instructed

"that knowledge possessed by an attorney is chargeable to his client." HELD: Instruction should not have been given. It "is sweepingly overbroad . . . . [C]lients do not possess all knowledge on all subjects which their attorneys possess. To so advise a jury can only create false impressions as to the consequences of being represented by an attorney. There may indeed be instances where a client is permitted to claim that he or she has been deceived by false representations even though an attorney representing that client was not similarly deceived." While a third party is entitled to assume that communications with the attorney are passed on to the client, there was no evidence of communications to the attorney but not Kruse. Kruse claims the misrepresentations were made directly to him. The bank denies the statements were made at all. "Consequently, there was no reason to have given the instruction."

COMMENT: The Court seems to acknowledge that there are instances where the involvement of an attorney militates against a claim of misrepresentation or fraud, but the opinion leaves little room for such an instruction and no guidance at all as to acceptable language or scope.

In re Guardianship of Hunter, 442 N.W.2d 94 (Iowa 1989)

Fees.

Hunter received treatment for injuries suffered in car accident. The hospital perfected a hospital lien in the amount of $111,000. Hunter's conservator commenced litigation against two dram shops, the other driver, and the state of Iowa. The driver took bankruptcy, the dram shop cases were settled for $15,000, and a jury decided in favor of the state. Pursuant to chapter 582, the district court ordered the conservator to pay an attorney fee and the expenses out of the $15,000, with the balance to be paid to the hospital.

Section 582.1 defines a hospital lien and provides that it "shall not in any way prejudice or interfere with any lien or contract which may be made by such patient . . . with any attorney . . . for handling the claim on behalf of such patient." HELD: Statute establishes that the attorney's fees and expenses have priority over hospital liens.

Des Moines v. District Court, 428 N.W.2d 292 (Iowa 1988)

Certiorari.

Court held that certiorari was proper method for challenging district court's failure/refusal to rule on motions requesting entry of default for failure to answer the petition.

Des Moines v. District Court, 428 N.W.2d 292 (Iowa 1988)

Default.

Court held that certiorari was proper method for challenging district court's failure/refusal to rule on motions requesting entry of default for failure to answer the petition, but found no illegal act by district court in refusing to enter defaults due to uncertainties as to jurisdiction, notice to defendants, and compliance with Rule 231's foundational requirements for entry of default. Although rules do not require that notice of hearing on motion for default be given to defendants who have not answered when properly served, rules do not preclude such notice. District court's requirement that such notice be issued prior to rulings on the motions for entry of default was not illegal.

Dew v. American Heritage Life Insurance Co., 431 N.W.2d 8 (Iowa App. 1988)

Default.

Employee sued health insurer as a result of dispute over proceeds of employee's settlement of personal injury claim. Employer intervened, claiming it fully funds the insurance benefits. Ten days later, employer obtained a default judgment for employee's failure to respond to the intervention petition within the seven days required by rule 75. Employee's attorney conceded that he did not read rule 75 and was not aware of the seven-day deadline.

HELD: No abuse of discretion in refusing to set aside default. COMMENT: Court also held that employee failed to

establish a good-faith defense to intervention petition. Analysis of facts may explain that merits of case influenced decision on default.

Ward v. Pohren, 436 N.W.2d 380 (Iowa App. 1988)

Default.

Dram shop defendants, who had been sued before, mistakenly assumed that because the original claim notice of plaintiff's intent to bring an action was served upon their insurer as well as themselves, that the original notice was likewise served upon the insurer and that they did not have to turn suit papers over to the insurer for defense. HELD: Defendants did not establish good cause for setting aside the default judgment that was entered after proper service of original notice.

Farm-Fuel Products Corp. v. Grain Processing Corp., 429 N.W.2d 153 (Iowa 1988)

Amendment.

In complex litigation, district court did not abuse its discretion in refusing to permit some of the plaintiffs to amend to assert a third-party beneficiary claim just six weeks before trial.

Davis v. Ottumwa YMCA, 438 N.W.2d 10 (Iowa 1989)

Amendment.

Davis, an employee of the YMCA, sued Blue Cross, the Y, and State Farm as a result of Blue Cross' denial of Davis' claims for health insurance benefits. The Y had allowed the Blue Cross policy to lapse for nonpayment of premium, and State Farm had taken over the group plan.

After Davis filed suit, United States Supreme Court decided Pilot Life Insurance Co. v. Dedeaux, 481 U.S. 41, 107 Supreme Court 1549, 95 L. Ed. 2d 39 (1987), which held that the Employee Retirement Income Security Act (ERISA) preempted civil actions that "relate to . . . employee benefit plan[s]." In response to Pilot, defendants filed motions for summary judgment and Davis filed a motion for leave to amend his petition to bring his allegations

within the remedial provisions of ERISA. Davis' motion was filed about four months before trial.

HELD: Davis' petition clearly relates to his employee benefit plan and is preempted by ERISA. Trial court abused its discretion, however, in rejecting Davis' request to amend so as to come within ERISA. Although ERISA existed before Davis commenced his action, defendants did not assert preemption until after Pilot was decided. Impossible to conclude that Davis was negligent in failing to seek amendment sooner. Amendment really changes only the legal theories rather than the factual allegations.

In re Marriage of Waggoner, 438 N.W.2d 850 (Iowa App. 1989)

Amendment.

Almost two years after entry of dissolution decree, George filed a petition to modify decree to terminate alimony because Ellen had entered into a live-in relationship. Ellen counter-claimed with a request to modify the decree's property award so as to consider Larry's pension plan, which had not been considered at all in the dissolution proceeding, allegedly because of "fraud, irregularity, or mistake." During trial, Ellen sought to amend her counterclaim to clarify that she was seeking an increase in alimony, based on the value of the pension plan, as opposed to the property award. Presumably this change in strategy occurred because the one year for vacating a judgment on the grounds alleged had already lapsed and because property awards cannot be changed by modification proceeding. HELD: Trial court did not abuse its discretion in refusing to grant in-trial amendment to counterclaim because the amendment "would substantially change the issue."

M

Guthrie County Board of Supervisors v. Frevert-Ramsey-Kobes, Architects-Engineers, Inc., 431 N.W.2d 768 (Iowa 1988)

Experts.

Section 668.11, which provides deadlines for designation of expert witnesses in professional liability cases, was adopted by 1986 Iowa Acts, Chapter 1211. The effective date language of this act provided:

> This act, being deemed of immediate importance, takes effect from and after its publication . . ., and unless otherwise specifically provided, applies to all cases filed on or after July 1, 1986.

Publication was completed on June 8. HELD: A case filed between June 8 and July 1 is not governed by section 668.11.

Iowa Electric Light & Power Co. v. Lagle, 430 N.W.2d 393 (Iowa 1988)

179(b).

Plaintiff obtained partial summary judgment against pro se customer. Customer then hired an attorney, who filed a "motion to reconsider." HELD: Although 179(b) may not be used as a basis for reconsidering entry of partial summary judgment, district court retains the power to correct its own perceived errors, as long as the court has jurisdiction of the case and the parties involved.

Easter Lake Estates, Inc. v. Polk County, 444 N.W.2d 72 (Iowa 1989)

179(b).

Litigant dissatisfied with ruling on a rule 105 application to adjudicate law points may not utilize rule 179(b) to obtain further review of same or to delay the time for appeal, even if the ruling disposes of the entire case.

Iowa Electric Light & Power Co. v. Lagle, 430 N.W.2d 393 (Iowa 1988)

Jury Demand.

Pro se defendant who did not demand a jury eventually hired an attorney, who filed a counterclaim and demanded a jury trial on all issues, including those raised by the petition. HELD: District court did not abuse discretion in granting defendant's request for jury trial on all issues. "The district court apparently concluded that, if the new issues were to be tried to a jury, they all should be tried that way."

Schmal v. Minnesota Mutual Life Insurance Co., 432 N.W.2d 695 (Iowa 1988)

Summary Judgment.

Insurer supported its motion for summary judgment in suit on life policy with affidavit by medical examiner that decedent had committed suicide and with court documents revealing that decedent was in danger of losing his farm by foreclosure. Widow resisted by submitting an affidavit that decedent died by accident because "he was outside stalking a mink" and because she had no prior indication of depression. Widow also submitted other "statements" by other witnesses that corroborated her position. HELD: Dispute as to manner of death is for the finder of fact. Summary judgment for insurer was error.

Prochaska v. Iowa State University, 433 N.W.2d 302 (Iowa 1988)

215.1.

Before 215.1 applied to plaintiff's case, her lawyer asked in a motion for continuance that the case be removed from the operation of 215.1. The court granted that request, as well as the continuance, and ordered that the case would be dismissed if not tried or disposed of prior to a date certain in the next calendar year. The case was not tried on that date and subsequent continuance orders did not purport to remove the case from the operation of 215.1. Thereafter, a 215.1 notice was timely issued and counsel obtained an order continuing the case beyond the operation of the rule to yet another date certain in the next calendar year. Nevertheless, 6 months after the first try-or-dismiss deadline, defendant moved to dismiss. HELD: Plaintiff's error did not accelerate the application of 215.1, and the failure to satisfy the first try-or-dismiss deadline was not a jurisdictional defect.

M

Holland Brothers Construction Co. v. DOT, 434 N.W.2d 902 (Iowa App. 1988)

215.1.

Chief Judge issued a district-wide procedure for responding to 215.1 notices. Court required the parties seeking relief from 215.1 to file a trial certificate or a motion for relief from 215.1, containing an explanation as to why a trial certificate cannot be filed. The order provided that as a result of complying

with the procedure, the court either would set trial within the calendar year or would continue the case past December 31.

Plaintiff responded to the 215.1 notice in this case by filing a trial certificate. At the trial setting conference, the parties and the administrator agreed to a trial date in January. Plaintiff made no motion to continue or to move the case from the effective 215.1, and the court did not order any relief from 215.1. The case was dismissed by operation of law, with a resulting notice, in January. Plaintiff immediately applied for reinstatement.

HELD: Plaintiff established oversight and mistake as the reason for the dismissal of the case that otherwise had been diligently prosecuted. Part of the problem was the court administrator's failure to cause the trial court to issue an order continuing the case into 1988 as agreed at the scheduling conference. Court "acknowledged modern court structure mandates [that] we recognize the extent of judicial administrative duties currently carried out by court administrators. . . . [A]ttorneys now place much more reliance on [the administrators]. . . . [P]laintiffs' actions were based upon misplaced confidence, however, we determine such confidence was not unreasonable to such an extent that it denotes gross neglect or willful procrastination."

Varner v. Schwann's Sales Enterprises, Inc., 433 N.W.2d 304 (Iowa 1988)

Class Action.

Defendant's route salesman sued for defendant's violation of section 91A.5(2)(c), which forbids employers from deducting losses for customer's default on credit from salesman's paycheck, absent proof of employee's willful or intentional disregard for the defendant's interest. Salesman sought class certification, which was denied. HELD: District court did not abuse its discretion in refusing to certify class. Salesman's one discovery request was resisted by defendant, and salesman did not move to compel. "The record also reflects that Varner's evidence in support of certification consisted primarily of his own testimony."

Martin v. Amana Refrigeration, Inc., 435 N.W.2d 364 (Iowa 1989)

Class Action.

Purchaser of combination gas furnace and water heater sued Amana for breach of implied warranty and sought certification on behalf of Des Moines metropolitan homeowners who purchased the same model. Plaintiff adduced testimony from a former distributor as to mineral build-up problems in a substantial portion of the furnaces and heaters sold by the distributor. Amana adduced testimony that it had warranty and extended service programs covering these products, that there was not a significant number of customers with unresolved complaints, and that the testifying distributor's customers all had been satisfied by Amana's response to their complaints.

HELD: Amana's argument goes to the merits of the complaints, not the existence of them. Plaintiff has established the existence of common complaints. Amana's argument that plaintiff failed to sustain her burden that joinder is impracticable likewise would require a claim-by-claim assessment of the merits of each individual claim. Plaintiff's claim is similar to those asserted by the rest of the class members, even though there were two types of product complaints.

Kramersmeier v. R.G. Dickinson & Co., 440 N.W.2d 873 (Iowa 1989)

Class Action.

Three in-state purchasers of municipal bonds issued by Dickinson in connection with restoration of an historic building owned by an Iowa partnership in Cedar Rapids sought to certify as a class the other 100 purchasers, many of whom were non-residents. Rule 42.6(a)(1) provides:

> A court of this state may exercise jurisdiction over any person who is a member of the class suing or being sued if:
>
> (1) A basis for jurisdiction exists or would exist in a suit against the person under the law of this state . . . .

Dickinson argued that the rule tests Iowa's jurisdiction over non-resident plaintiffs as if they were non-resident defendants. The plaintiffs relied on Philips Petroleum Co. v. Shutts, 472 U.S. 797, 808, 105 S. Ct. 2965, 2972, 86 L. Ed. 2d 628, 639 (1985), in which the Supreme Court permitted the exercise of jurisdiction

over non-resident members of a class in a much broader fashion than would be permitted over non-resident defendants, because of the different burdens faced by the different types of parties.

Because Philips interpreted a Kansas statute that contained no multi-state jurisdictional provision comparable to rule 46.6(a)(1), the court distinguished it. "Iowa has adopted the more narrow jurisdictional language of the Uniform Class Action Act, generally viewed by commentators as exceeding the necessary constitutional limits of due process by imposing a 'minimum contacts' standard even in the case of class action plaintiffs." Nevertheless, the court concluded that "these non-residents could reasonably contemplate the invocation of Iowa law to protect their interests." "[A]lthough the quality of contacts between the non-resident bond purchasers and the Iowa defendants is fairly low . . . , the quality and nature of those contacts are high, as is the source and connection of those contacts with . . . Iowa." Because the non-resident plaintiffs had minimum contacts, the Iowa court could exercise jurisdiction over them. There accordingly was no basis to reject the certification proposal on grounds that the court could not obtain jurisdiction over a substantial portion of the class.

Dickinson also complained that the three named plaintiffs could not "fairly and adequately . . . protect the interests of the class" because they could not "establish a crucial element of their case - reliance on the alleged misrepresentations in the prospectus." Discovery established a conflict in the evidence. Mrs. Kramersmeier denied having read the prospectus or relying on it except to the extent that the broker thought it was "a good buy." Her attorney and the broker both testified that the broker reviewed the prospectus with Mrs. Kramersmeier in considerable detail. The broker testified that his sole source of information about the offering was the prospectus.

The court reiterated that district courts should not attempt to adjudicate the merits of the plaintiffs' claims for purposes of determining whether or not to certify. "Nevertheless, a preliminary inquiry into the legal and factual sufficiency of the plaintiffs' claim is appropriate inasmuch as they seek to represent the interests of the entire class. . . . [T]he court must concern itself with whether [a defense peculiar to the representative plaintiffs] is likely to cause the plaintiffs' representation of the remainder of the class to suffer." Because the evidence as to the plaintiffs' reliance upon the prospectus was equivocal, and because "it is clear that Mrs. Kramersmeier did rely on the broker's oral statements and that he relied solely on the prospectus . . . , these plaintiffs share with other members of the class common questions of law and fact concerning what . . . Dickinson . . . knew or should have known concerning the validity

of the guarantee and whether the prospectus . . . misled the plaintiffs and other bond purchasers."

Some defendants resisted certification on grounds that the bond and trust indenture documents prohibit suit by the bondholders except upon refusal of the trustee to act in response to a request by 25% of the outstanding bonds. No such request had been made, but the trustee had commenced foreclosure proceedings and an action to recover under the guarantee. Because case law and section 502.506 permit actions other than a suit on the bond, in spite of such language in the bond and trust indenture documents, the court found this language to be no impediment to certification. "[R]eversal of the class action certification order could result in the commencement of 111 separate suits against these defendants. Given that alternative, the district court's ruling seems to us clearly within the bounds of its discretion."

Marine American State Bank v. Lincoln, 433 N.W.2d 709 (Iowa 1988)

Discovery.

Defendants-counterclaimants filed a request for production, to which plaintiff did not respond for an unarticulated but apparently extended period of time until just before trial. Documents were produced one week before trial and during trial. Defendants never moved to compel, but apparently moved for sanctions during or after trial. HELD: "Because [defendant] neither filed a motion for sanctions prior to [plaintiff's] filing of its response nor secured a court order to compel production, the court has no authority to impose the requested sanctions."

M

Kilker v. Mulry, 437 N.W.2d 1 (Iowa App. 1988)

Discovery.

Plaintiff in medical malpractice case sought to prove that hospital had altered medical records and attempted to present expert testimony on that issue. Trial was scheduled for February 10, 1987, but plaintiff did not disclose the records expert until January 27, when they filed supplemental answers in response to a motion in limine. Defendants established that plaintiffs had been in possession of a report from the expert for more than six months before disclosing the expert. HELD: Trial court did not abuse its discretion in excluding expert. COMMENT:

Opinion digests several appellate opinions on the subject of discovery sanctions for failure to timely disclose witnesses and experts.

Darrah v. Des Moines General Hospital, 436 N.W.2d 53 (Iowa 1989)

Rule 80.

Plaintiffs voluntarily dismissed medical malpractice cases before trial. Within 30 days of the dismissals, defendants sought sanctions under rule 80(a). HELD: The voluntary dismissal for trial does not terminate court's jurisdiction for purposes of ruling on a motion pursuant to rule 80(a) "made shortly after voluntarily [sic] dismissal which [is] based on filings made while the case was still pending. . . . [C]ounsel, or the trial court on its own motion, should request sanctions at the earliest time rule 80(a) violations occur to facilitate judicial economy and effective determination of the issues."

Hearity v. Board of Supervisors, 437 N.W.2d 907 (Iowa 1989)

Rule 80.

At conclusion of evidence in action against Board of Supervisors and private attorneys, trial court directed a verdict and entered judgment dismissing plaintiff's petition. Defendants filed motions pursuant to rule 80(a) anywhere from 12 to 27 days after entry of judgment. In the meantime, plaintiff appealed from the final judgment.

The trial court entered an order to the effect that it was without power to act on the motions for sanctions while the appeal was pending. The Supreme Court remanded to the district court for the limited purpose of permitting the court to rule on the motions for sanctions. Relying on Franzen v. Deere, 409 N.W.2d 672 (Iowa 1987), the trial court ruled that the motions were untimely.

Consistent with Darrah, 436 N.W.2d 53 (Iowa 1989), the Court held that the motions were timely filed. "The many considerations which confront an advocate seeking to protect the best interests of a client militate against requiring that a motion for rule 80(a) sanctions be filed within a time frame shorter than the expiration of the time for appeal from the final judgment." Filing of a notice of appeal does not cut off the right to file a motion for sanctions.

COMMENT: Does a rule 80 motion temporarily toll the time for appeal from the final judgment?

Citizens State Bank v. Harden, 439 N.W.2d 677 (Iowa App. 1989)

Rule 80.

In a replevin action by bank, pro se defendants filed a counterclaim, which is prohibited by section 643.2. HELD: Rule 80 sanctions were appropriate. The rule requires the signer to certify "after reasonable inquiry" that the paper "is well grounded in fact and is warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law." Hardens should have discovered section 643.2 upon reasonable inquiry. Because there was a violation of rule 80, the court is required to impose a sanction. COMMENT: The bank requested a remand for further sanctions due to the appeal. The Court agreed and remanded "for the limited purpose of establishing reasonable sanctions for this rule 80(a) violation."

Hearity v. Iowa District Court, 440 N.W.2d 860 (Iowa 1989)

Rule 80.

As counsel for plaintiffs in litigation against city and police officers, Hearity caused clerk to enter defaults against defendants under circumstances that caused the district court to find and conclude that Hearity's conduct was violative of rule 80(a). Because the defaults were entered before rule 80(a) was amended to provide the sanctions language, the Iowa Supreme Court set aside the imposition of sanctions.

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Hearity and his clients accepted the defendants' offer of $2,000.00 to settle. Before the documents were signed, the city attorney made remarks for publication in the local paper about the merits of the lawsuit, based on the amount of the settlement. Hearity repudiated the settlement agreement in writing "as a result of the gloating being done publicly" by the city attorney and agreed to settle for $48,000.00 plus an admission of liability and an apology "for the juvenile behavior of the city attorney of late and for the behavior which gave rise to the suit in the first place." The city moved to enforce the settlement. Hearity resisted, alleging that the city's insertion of a denial of liability in the release had altered the terms of the original settlement offer and thus relieved plaintiffs from any obligation to honor the original agreement.

The district court found that Hearity's clients "were humiliated by the published reports concerning the lawsuit and that their proffered reasons for refusing to sign the settlement papers were contrived in order to escape the publicized terms of the settlement agreement." The district court sustained the motion to enforce the settlement agreement and found Hearity's signature on the resistance to constitute a violation of rule 80(a). The court's financial sanctions related only to the fees incurred by defendants in setting aside the defaults, however.

Hearity appealed the sanctions. The court noted that the proper procedure for contesting an imposition of sanctions under rule 80(a) is to apply for a writ of certiorari, and proceeded to treat Hearity's appeal in that fashion. Relying on federal rule 11 cases and state certiorari cases, the court announced its standards of review for a rule 80 decision: The trial court's findings of fact are reviewed on a substantial-evidence test. Whether a violation occurred and whether sanctions are required is to be reviewed de novo. The sanction imposed is reviewed on an abuse-of-discretion basis.

The supreme court found substantial evidence for the findings, including the "finding" that a violation of rule 80(a) had occurred. Because the monetary sanctions all related to the defaults, which predated the rule, the court set aside the monetary sanction and simply affirmed the admonishment of counsel.

COMMENT: There seems to be an inconsistency in the opinion. When discussing standards of review, the court approves the federal rule that "whether a violation of the rule occurred and whether sanctions were required are reviewed de novo." At the end, however, the court tests the district court's finding of a violation by the substantial-evidence test.

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In re Estate of Lau, 442 N.W.2d 109 (Iowa 1989)

Rule 80.

Counsel's misrepresentation of prior order of district court in subsequent motion merited sua sponte imposition of $100 sanction. Attorney "either failed to make reasonable inquiry with respect to the [prior] ruling or falsely certified in his motion . . . that the information was well grounded in fact."

Hettinger v. Farmers and Merchants Savings Bank, 436 N.W.2d 377 (Iowa App. 1988)

Counterclaim.

Hettinger guaranteed a loan by bank to debtor. Debtor had given the bank a security interest in other property to secure the loan. The bank later made other loans, using the same collateral for security. When debtor defaulted, the bank sold the collateral but did not apply the proceeds to the particular loan that Hettinger had guaranteed. The bank sued Hettinger and obtained a judgment for the amount of the guarantee. Hettinger paid the judgment in full. Later, Hettinger sued the bank for fraud in its allocation of the sale proceeds to the various loans. HELD: Hettinger's claim was a compulsory counterclaim and is barred by the judgment in the first action.

Rattenborg v. Montgomery Elevator Co., 438 N.W.2d 602 (Iowa App. 1989)

Continuance.

Plaintiff injured on shopping-mall escalator sued mall and escalator manufacturer. She settled with mall just three days before trial. Manufacturer moved for a continuance, arguing that the settlement made continuance necessary. HELD: No abuse of discretion in denying continuance request.

Smart-Way Truckin, Inc. v. Cota Industries Inc., 439 N.W.2d 162 (Iowa 1988)

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Real Party In Interest.

Cota contracted with Smart-Way to ship its goods. The goods were shipped collect. The goods were damaged in transit, and Cota had to replace them. Cota then sued (actually counterclaimed) for damages. HELD: Although title to goods normally shifts from the consignor to the consignee when carrier takes possession, justified revocation of the goods by consignee revests title in the seller by operation of law. Cota owned the cause of action. The purpose of the real party in interest rule is to protect the defendant from a second action by a party actually entitled to recover. When Cota replaced the defective goods, the consignee no longer had any claim against Smart-Way.

Citizens State Bank v. Harden, 439 N.W.2d 675 (Iowa App. 1989)

Injunction.

Bank obtained temporary injunction and posted bond in accordance with the court's order and rule 327. Injunction was dissolved prior to entry of final judgment and bond was exonerated by the court. Hardens presented no evidence that they had suffered damage as a result of the temporary injunction, but argued that the bond should have been retained because of the possibility of damages occurring during the appeal process. HELD: The ruling that dissolved the injunction is not suspended by an appeal, and the appeal does not revive the injunction. Absent the injunction, there is no reason to maintain the bond.

Citizens State Bank v. Harden, 439 N.W.2d 677 (Iowa App. 1989)

Removal.

Bank filed petition for replevin on April 5, 1985. On May 20, before a final order of possession was entered, the Hardens filed a petition for removal to federal court. The petition did not show grounds for removal, and the bond was signed by the Hardens, who were insolvent at the time. HELD: Hardens' effort to remove was defective in two respects: timeliness and insufficiency of bond.

Woods v. Schmitt, 439 N.W.2d 855 (Iowa 1989)

Adjudication of Law Points.

Rule 105 provides that adjudicated points of law "shall not be questioned on trial or any part of the case of which it does not dispose." Well in advance of trial, the court adjudicated points of law with respect to elements of damage that Woods could recover, then reversed itself on portions of its ruling during trial. HELD: Language from rule does not negate general rule that trial court always retains the right to correct its own errors so long as it still has jurisdiction.

Brunson v. Winter, 443 N.W.2d 717 (Iowa 1989)

Adjudication of Law Points.

Plaintiff was injured when she was struck from behind by a vehicle owned by Robert Starr and driven by Donna Starr. Plaintiff settled with Donna Starr, and the release purported to preserve her claims against Robert Starr, even though his liability was strictly vicarious. Mr. Starr did not raise the impact of the release in his answer, but the issue was raised at pretrial, at which time the court stated that "a complete release" had been given to Donna Starr and directed the parties to litigate the matter by rule 105 adjudication of law points.

HELD: Absent timely objection, the court's finding in the pretrial order to the effect that Donna Starr had been given a complete release, and plaintiff's failure to raise factual issues in resisting an application for adjudication of law points, make a rule 105 application appropriate.

State v. Carriers Insurance Co., 440 N.W.2d 386 (Iowa 1989)

Subpoena.

Commissioner of insurance as liquidator utilized its subpoena power under section 507C.21(1)(e) in the liquidation proceeding to require an accountant for Carriers to produce all papers relating to audits of Carriers. No notice of this subpoena was given to Ruan, who was an officer of Carriers and was a defendant in a separate civil action commenced by the liquidator for mismanagement. The liquidator conceded that one of the purposes of the administrative subpoena was to obtain evidence for use in the lawsuit against Ruan.

HELD: When the liquidator seeks to obtain evidence in an administrative proceeding for use, in part, against a party in a pending civil action, reasonable notice must be given to the parties in the civil action.

Norton v. Adair County, 441 N.W.2d 347 (Iowa 1989)

Service.

Norton was hired by the sheriff as a jailer/dispatcher. After an election, the new sheriff terminated her. Norton's job was governed by a collective bargaining agreement that contained

a grievance and arbitration procedure and a good-cause provision for termination. The local filed a grievance, which the sheriff denied. The local did not request arbitration timely, which rendered her grievance settled under the agreement.

Norton sued the local and the international union for breach of its duty of fair representation. Norton attempted to acquire jurisdiction over the international by serving the local. HELD: The local's autonomy outweighed the international's control such that no agency relationship existed so as to permit the local to accept service for the international.

Life v. Best Refrigerated Express, Inc., 443 N.W.2d 334 (Iowa App. 1989)

Service.

Plaintiff sued Nebraska business whose truck was involved in an accident in Iowa with plaintiff. Plaintiff caused a sheriff in Nebraska to serve defendant personally. Defendant did not enter an appearance or an answer within the required time limit, and plaintiff obtained a default judgment. Defendant moved to set aside default, alleging that office manager served by Nebraska sheriff was not an officer "or [a] general or managing agent" as required by rule 56.1. Defendant submitted an affidavit to the effect that the office manager "was not a general or managing agent of [defendant]." HELD: Substantial evidence supported trial court's finding that it had jurisdiction over defendant. Plaintiff made prima facie showing of jurisdiction, and defendant failed to rebut. Affidavit was conclusory in content.

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In re Estate of Steinberg, 443 N.W.2d 711 (Iowa 1989)

Service.

Daughter of decedent filed a petition to set aside probate of will. Section 633.309 provides that such an action must be commenced within four months from the date of second publication of notice. Daughter filed petition within four months, but failed to provide an original notice with the petition. Executor moved to dismiss 37 days after the filing of the petition. HELD: Absent evidence of intentional delay or abuse of the service rules, rules 48 and 55 provide that filing of a petition commenced the action, notwithstanding the complainant's failure to comply with the service procedures in rule 49 immediately.

Slattery v. District Court, 442 N.W.2d 82 (Iowa 1989)

Venue.

Plaintiff, a Scott County resident, commenced an action in Johnson County for sexual harassment, defamation, intentional infliction of emotional distress, and tortious interference against Black Hawk and Jackson County defendants. Plaintiff alleged that the sexual harassment occurred in Jackson County and that the defamation, intentional infliction, and tortious interference occurred in Johnson County. Defendants filed a motion pursuant to Rule 175(a), alleging that the action was brought in the wrong county and asking that venue be changed to Jackson or Black Hawk County.

Defendants contended that plaintiff's claims were controlled by section 616.17, relating to personal actions, and could only be brought in a county where some of the defendants reside. Plaintiff countered that the tort actions invoked the venue provisions of section 616.18, which permit her to sue where the injury or damage is sustained. The trial court determined that both Jackson and Johnson Counties were proper venues, and defendants did not take issue with this finding on appeal.

HELD: Once plaintiff has sued in a "proper" county, rule 175(a) does not permit a change of venue to another "proper" county.

Brunson v. Winter, 443 N.W.2d 717 (Iowa 1989)

Pretrial.

Plaintiff was injured when she was struck from behind by a vehicle owned by Robert Starr and driven by Donna Starr. Plaintiff settled with Donna Starr, and the release purported to preserve her claims against Robert Starr, even though his liability was strictly vicarious. Mr. Starr did not raise the impact of the release in his answer, but the issue was raised at pretrial, at which time the court stated that "a complete release" had been given to Donna Starr and directed the parties to litigate the matter by rule 105 adjudication of law points. HELD: To whatever extent Starr's pleadings were defective for not raising release issue, this was resolved by the pretrial conference. A rule 138 order can operatively amend a pleading. Absent timely objection, the court's finding in pretrial order to the effect that Donna Starr had been given a complete release provided an undisputed fact for purposes of a rule 105 application.

Hamilton v. First Baptist Elderly Housing Foundation, 436 N.W.2d 336 (Iowa 1989)

Discrimination.

Mr. and Mrs. Hamilton were hired as a team to provide building superintendent and janitorial services at a housing project. They were required to live on the premises and were given reduced rent as partial compensation. At the time of her discharge, Mrs. Hamilton had performed her duties satisfactorily. Her husband was discharged for cause, however, and the board of directors terminated Mrs. Hamilton because her husband's termination "necessarily destroyed the team concept and thereby the couple's ability to provide twenty-four-hour service." Mrs. Hamilton sued for sex discrimination in violation of section 601A.6(1)(a).

HELD: Although Mrs. Hamilton established a prima facie case of discrimination, the board articulated a legitimate, non-discriminatory reason for her discharge. She then failed to prove by preponderance of the evidence that the reason articulated by the board was pretextual and that her sex was the motivating factor in the board's decision to terminate her.

The court also declined, on the strength of Northrup v. Farmland Industries Inc., 372 N.W.2d 193 (Iowa 1985), to recognize a public-policy exception to at-will employment that is based on sex discrimination. Northrup "preempts independent common law actions also premised on discrimination."

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Ladd v. Iowa West Racing Association, 438 N.W.2d 600 (Iowa 1989)

Discrimination.

Race track's "Ladies Day" promotion violates the Iowa Civil Rights Act.

Brumage v. Woodsmall, 444 N.W.2d 68 (Iowa 1989)

Immunity.

Plaintiffs held kennel license at Council Bluffs dog track. Kennel was closed by board of stewards on charges of race fixing,

but state racing commission eventually cleared plaintiffs of all charges. Nevertheless, the board of stewards terminated plaintiffs' contract and retained another kennel. Plaintiff sued the state, the commission, the board, and individual board members for intentional interference, abuse of process, malicious prosecution, intentional infliction of emotional distress, libel and slander, negligent investigation, violation of plaintiffs' civil rights, and interference with prospective business relations.

HELD: Because the stewards exercise prosecutorial as well as judicial powers, the limited safeguards provided by the administrative rules for the conduct of the hearing are not sufficient to grant the stewards absolute immunity. Because they are entitled only to qualified immunity, the district court correctly declined to dismiss the civil rights claim against them.

COMMERCIAL LAW

Iowa Supply Co. v. Gruhns & Co. Construction, Inc., 428 N.W.2d 662 (Iowa 1988)

Construction Contract.

General contractor, sub-contractor, and materialman in dispute over payments owed to materialman for materials supplied to sub. Because of concerns over solvency of sub, contractor and materialman agreed that contractor would issue checks payable jointly to sub and materialman. After sub claimed bankruptcy, materialman sought to recover from general the amounts retained from the joint payee checks by sub, to the extent of the amount still owed to the materialman. Dispute arose in a public works construction project.

Following its decision in a private construction project, Central Readymix Co. v. John G. Ruhlin Construction Co., 258 Iowa 500, 139 N.W.2d 444 (1966), the Court held that the materialman's endorsement of the joint payee check constitutes payment by the general to the materialman in the amount of the check, regardless of division of the proceeds by the joint payees. The Court acknowledged its and the legislature's different treatments of private and public construction projects, and declined to follow

federal decisions that do not release the general from its financial obligation to a materialman by the materialman's endorsement on a joint payee check.

Federal Land Bank v. Fuoss, 428 N.W.2d 287 (Iowa 1988)

Foreclosure.

Period of time available to FmHA, as junior mortgagee, in which to redeem after sheriff's sale is prescribed by 28 U.S.C.§ 2410(c), not Iowa law.

Although debtor could have redeemed each parcel of land separately if debtor had acted within six months of sheriff's sale (as required by Iowa law), FmHA's redemption with respect to all parcels imposes burden upon debtor, if he then chooses to redeem from FmHA, to pay the entire amount of FmHA's lien, not merely the portion attributable to a selected parcel.

Ackley State Bank v. Van Hove, 429 N.W.2d 777 (Iowa 1988)

Foreclosure.

Debtors borrowed from bank and assigned their interest as buyers in a real estate contract for security. HELD: "When a description includes land occupied as a homestead and the contract expressly provides that the entire tract is liable for the underlying debt," document complies with section 561.21(2), which requires a writing "expressly stipulating" that the homestead may be sold to satisfy the debt. COMMENT: Not published.

Federal Land Bank v. Reinhardt, 428 N.W.2d 672 (Iowa App. 1988)

Foreclosure.

Land bank's attorney failed to appear at sheriff's sale due to "calendaring miscues," and land valued at $50,000.00 was purchased for $500.00 by son of land bank's mortgagors.

HELD: Although unilateral mistake by mortgagee at foreclosure sale generally does not afford a basis for setting aside the sale, and although mere inadequacy of consideration generally does not afford such a basis, a "grossly inadequate" sale price can trigger

vacation of sale, especially when the only hardship is depriving the purchaser of an unconscionable bargain.

First National Bank v. Diers, 430 N.W.2d 412 (Iowa 1988)

Foreclosure.

Amendment to section 628.23 that permitted separate redemption of homestead when sold at sheriff's sale with other land that was mortgaged with homestead will not be applied retrospectively. Section 654.16 permits en masse sale of homestead and non-homestead property, and therefore permits en masse bidding when bids for non-homestead property are insufficient to satisfy judgment.

First National Bank v. Turin, 431 N.W.2d 185 (Iowa App. 1988)

Foreclosure.

Because mortgagor leased land and was not actively farming it, moratorium on collecting deficiency judgment, in section 654.6, was not applicable.

Wellman Savings Bank v. Roth, 432 N.W.2d 697 (Iowa App. 1988)

Foreclosure.

Mortgage of defendants' homestead granted bank the right to have a receiver appointed upon commencement of a foreclosure action. The court held that such provision is valid and enforceable during the time period before sheriff's sale, if the only property covered by the mortgage is the homestead. Sheakley v. Mechler, 199 Iowa 1390, 203 N.W. 929 (1925), is distinguished because property other than the homestead was covered by the mortgage.

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Norwest Bank v. Bruett, 432 N.W.2d 711 (Iowa App. 1988)

Foreclosure.

Defendants signed mortgage that permitted the court to appoint a receiver after commencement of foreclosure or during redemption period and that permitted receiver to take immediate possession of the property. HELD: Mortgagors waived their rights under section

628.3 to possession during the redemption period by consenting in the mortgage to the appointment of a receiver during the redemption period.

Hawkeye Bank & Trust v. Milburn, 437 N.W.2d 919 (Iowa 1989)

Foreclosure.

Iowa Redemption Statute, which precludes redemption upon debtor's use of bankruptcy stay to delay sheriff's sale, does not violate due process, equal protection, or the supremacy clause.

Metropolitan Life Insurance Co. v. DeKlotz, 437 N.W.2d 925 (Iowa 1989)

Foreclosure.

Court extended its opinion in Milburn, 437 N.W.2d 919, filed the same day, to provide that a stipulated waiver of the automatic stay in bankruptcy court did not revive the debtor's redemption rights.

Equitable Life Assurance Society v. Anderson, 438 N.W.2d 857 (Iowa App. 1989)

Foreclosure.

Plaintiff sued to foreclose land that Andersons allege includes a homestead. Sheriff failed to comply with section 561.5, which requires that the homestead be platted prior to sale (so as to protect homestead in the event the sale of the rest of the land would satisfy the mortgage debt). Sheriff also failed to offer the non-homestead property for sale properly but instead received bids and sold the entire property en masse. The highest bid, however, was for substantially less than the indebtedness. HELD: Andersons were not damaged. Their claimed right to deem the homestead separately during foreclosure proceedings is based on section 654.16, which cannot be applied retroactively. See Federal Land Bank v. Arnold, 426 N.W.2d 153, 161 (Iowa 1988). The Andersons made no effort to redeem the entire property.

Travellers Insurance Co. v. Tritsch, 438 N.W.2d 863 (Iowa App. 1989)

Foreclosure.

Where mortgage provides for the appointment of a receiver upon foreclosure with power to collect rents, profits, etc., Iowa case law does not require evidence of insolvency to precondition to appointment of receiver in a foreclosure proceeding. Such a requirement exists only when the mortgage does not contain a pledge of rents or profits or a stipulation regarding appointment of receiver.

PCA v. Ryan, 441 N.W.2d 379 (Iowa App. 1989)

Foreclosure.

PCA had security interests in certain collateral and a mortgage against certain land owned by Ryan to secure PCA's financing of Ryan's farming operation. With Ryan in default, PCA filed a foreclosure action. Ryans consented to entry of personal judgment in the amount of the debt owed and granting PCA the right to foreclose. PCA then filed a replevin action, to obtain possession of the collateral. HELD: PCA is entitled to judgment in the replevin action so as to take possession of the collateral, sell it, and apply the proceeds against the deficiency judgment separately entered.

Veninga v. Valley State Bank, 443 N.W.2d 721 (Iowa 1989)

Foreclosure.

Judgment creditor who follows statutory redemption procedures is a junior lien holder and, as such, is entitled to redeem homestead property.

Community State Bank v. Cottington, 444 N.W.2d 484 (Iowa 1989)

Foreclosure.

Cottington consented to a decree of foreclosure in which the bank agreed to waive any deficiency judgment left after the sheriff's sale and in which Cottington agreed to waive any rights to receivership funds, any preference in farming mortgaged property

beyond the current crop year, and in which Cottington's rights other than redemption were foreclosed. HELD: The consent decree deprives Cottington of exclusive possession and use of the land during the redemption period.

Federal Land Bank v. Sleister, 444 N.W.2d 504 (Iowa 1989)

Foreclosure.

Fair market value of homestead for purposes of redemption is not subject to reduction by amount of accrued real estate taxes. Debtor is required to pay taxes and interest that accrued since foreclosure sale in order to redeem.

Farm-Fuel Products Corp. v. Grain Processing Corp., 429 N.W.2d 153 (Iowa 1988)

Joint Venture.

Owner of ethanol distillery plant designed and constructed by ACR sued ACR and GPC for negligence and breach of warranty. Claim against GPC was based strictly on joint venture agreement between ACR and GPC. GPC conceded the existence of a limited joint venture, but denied that it was involved in ACR's design and construction of small distilleries, because of economy of scale. Court held that sufficient evidence was adduced to support the finding that GPC was involved in a joint venture, one purpose of which was the design and construction of small plants such as plaintiff's. Plaintiff adduced evidence that GPC "was reluctant" to participate in small facilities, but did not rule them out, and in fact was actively involved in plants similar in size to plaintiff's in other locations at about the same time that the contract with plaintiff was executed.

Court also held that jury instruction requiring jury to find an agreement to share profits or losses was not erroneous when the instructions as a whole focused on plaintiff's need to establish an agreement to share in the fortunes of the enterprise, whether good or bad.

Iowa Supply Co. v. Gruhns & Co. Construction, Inc., 428 N.W.2d 662 (Iowa 1988)

Mechanic's Lien.

"Piggy-backing" principle adopted in mechanic's lien case in Lumbermen's Wholesale Co. v. Ohio Farmers Insurance Co., 402 N.W.2d 413, 415 (Iowa 1987), is applied to action pursuant to chapter 573 on a public works project.

McGee v. Damstra, 431 N.W.2d 375 (Iowa 1988)

Forfeiture.

McGee sold land to Damstra on installment contract. Parties used standard bar form 21.2, but revised paragraph 10, "forfeiture and foreclosure," to prohibit seller from accelerating the unpaid balance on default and proceeding by foreclosure, with the apparent result that seller could seek only forfeiture as a remedy. When Damstra defaulted, McGee sought specific performance. District court admitted extrinsic evidence establishing that parties intended the revisions to paragraph 10 to limit McGee's remedy to forfeiture. District court found, nevertheless, that McGee had no such intent and that paragraph 10 did not exclude specific performance.

Court first distinguished between the use of extrinsic evidence to interpret the meaning of words used in agreement and its use to establish "the overall understanding of the parties within the context of the transaction." Next, the court held that in comparing conflicting interpretations, it should adopt the interpretation that one party should have known would be the other party's interpretation. Applying an objective standard, the court found that McGee had to be aware that Damstra intended the revision to limit McGee's remedy to forfeiture.

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First National Bank v. Frescoln Farms, 430 N.W.2d 432 (Iowa 1988)

Fraudulent Conveyance.

Debtor conveyed unencumbered property to family corporation in return for stock, and then gave stock to sons. Because transfer was without consideration, Court imposed burden on debtor to establish that he was solvent after transfers. Court also approves

use of test from Uniform Fraudulent Transfer Act, which excludes exempt property in totalling debtor's assets for determining solvency.

Tom Riley Law Firm, P.C. v. Padzensky, 430 N.W.2d 416 (Iowa 1988)

Mortgage.

Client mortgaged farm to law firm as security for fee agreement. Padzensky then obtained judgment against client. Client then gave warranty deed to law firm "in satisfaction of [mortgage]." HELD: No merger. Intent of mortgagee controls, even if contrary to language of document that expressly purports to discharge mortgage.

National Bank v. Moeller, 434 N.W.2d 887 (Iowa 1989)

Mortgage.

Moeller owned farm land mortgaged to PCA. The mortgages contained future advances clauses. Moeller wanted to buy an adjoining parcel owned by Pierce, who was purchasing it on contract, was in precarious financial position, and was facing a balloon payment. Bank was Pierce's financier, and held an assignment of Pierce's interest in the real estate contract as security. Accordingly, bank wanted Pierce to sell as much as Pierce.

Bank agreed to lend Moeller the full purchase price because Pierce (not Moeller) represented that PCA would subordinate its mortgages on Moeller's property. Bank did not discuss this representation with Moeller or PCA before making the loan commitment. Moeller became aware of it, however, and discussed it with PCA, who was willing to subordinate if Moeller would furnish substitute collateral from his other land holdings. PCA discussed proposed subordination with bank and wrote a confirming letter:

> PCA is agreeable to the substitution and we are currently in the process of accomplishing this. . . . Provided no unexpected problems arise, PCA will subordinate our position to the bank's mortgage sometime before the end of April.

Bank closed the Pierce/Moeller deal before April and disbursed funds. Moeller executed deeds of trust in favor of the bank. Contrary to usual procedure, however, bank did no title search to assure that it had priority. Bank also had no further

Iowa Supply Co. v. Gruhns & Co. Construction, Inc., 428 N.W.2d 662 (Iowa 1988)

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Court first distinguished between the use of extrinsic evidence to interpret the meaning of words used in agreement and its use to establish "the overall understanding of the parties within the context of the transaction." Next, the court held that in comparing conflicting interpretations, it should adopt the interpretation that one party should have known would be the other party's interpretation. Applying an objective standard, the court found that McGee had to be aware that Damstra intended the revision to limit McGee's remedy to forfeiture.

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Debtor conveyed unencumbered property to family corporation in return for stock, and then gave stock to sons. Because transfer was without consideration, Court imposed burden on debtor to establish that he was solvent after transfers. Court also approves

use of test from Uniform Fraudulent Transfer Act, which excludes exempt property in totalling debtor's assets for determining solvency.

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Client mortgaged farm to law firm as security for fee agreement. Padzensky then obtained judgment against client. Client then gave warranty deed to law firm "in satisfaction of [mortgage]." HELD: No merger. Intent of mortgagee controls, even if contrary to language of document that expressly purports to discharge mortgage.

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Moeller owned farm land mortgaged to PCA. The mortgages contained future advances clauses. Moeller wanted to buy an adjoining parcel owned by Pierce, who was purchasing it on contract, was in precarious financial position, and was facing a balloon payment. Bank was Pierce's financier, and held an assignment of Pierce's interest in the real estate contract as security. Accordingly, bank wanted Pierce to sell as much as Pierce.

Bank agreed to lend Moeller the full purchase price because Pierce (not Moeller) represented that PCA would subordinate its mortgages on Moeller's property. Bank did not discuss this representation with Moeller or PCA before making the loan commitment. Moeller became aware of it, however, and discussed it with PCA, who was willing to subordinate if Moeller would furnish substitute collateral from his other land holdings. PCA discussed proposed subordination with bank and wrote a confirming letter:

> PCA is agreeable to the substitution and we are currently in the process of accomplishing this. . . . Provided no unexpected problems arise, PCA will subordinate our position to the bank's mortgage sometime before the end of April.

Bank closed the Pierce/Moeller deal before April and disbursed funds. Moeller executed deeds of trust in favor of the bank. Contrary to usual procedure, however, bank did no title search to assure that it had priority. Bank also had no further

communication with PCA before closing deal and disbursing funds. PCA never subordinated because Moeller was unwilling to advance expenses for the substitution. Before bank discovered its predicament, PCA loaned Moeller additional monies.

HELD: PCA's advances after recordation of bank's deed of trust are superior to the rights of bank. No evidence that PCA had actual knowledge of bank's deed of trust. COMMENT: Holding is consistent with amendment to section 654.12A, passed in 1984 but not applicable to this case.

Blessing v. Norwest Bank Marion, 429 N.W.2d 142 (Iowa 1988)

Secured Transactions.

Plaintiff's son and daughter-in-law were indebted to Norwest and secured these debts in part with a used feed truck. Norwest's lien was noted on the certificate of title, which was in the possession of Norwest at all relevant times. Plaintiff's son borrowed money from her with the intent to pay off the feed-truck loan. He promised orally to give plaintiff the feed truck as collateral for her loan to him. The daughter-in-law paid off the truck loan, but Norwest declined to release the certificate, because the truck served as collateral for other loans as well. Later, the son signed a new security agreement with Norwest, which again listed the truck as security. Later still, the son signed a voluntary repossession agreement for the feed truck, and Norwest repossessed and sold the truck.

HELD: Because plaintiff did not perfect her lien or security interest in the truck by noting it on the certificate of title, she had no legally recognizable property interest in the vehicle, and could not sue Norwest for conversion.

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State Savings Bank v. Allis-Chalmers Corp., 431 N.W.2d 383 (Iowa App. 1988)

Secured Transactions.

In the course of the sale of a farm implement dealership, the new owners executed a security agreement with Allis-Chalmers (AC). The agreement covered AC replacement parts "now owned" by the dealership on the date of execution and placement parts acquired from AC after that date. The bank had a financing statement covering all of the dealership's parts inventory, but it was filed after AC's. HELD: Because the sale transaction was not closed

until after the date of AC's security agreement, the AC replacement parts that the new owners owned as of the sale could not have been "now owned" within the terms of the security agreement.

A.L.C. Financial Corp. v. Ray, 437 N.W.2d 593 (Iowa App. 1989)

Secured Transactions.

Ray personally guaranteed his corporation's performance on a lease of an auto body straightening and frame alignment system from plaintiff. Because of a dispute over whether all equipment was delivered, the corporation made no payments after the down payment. Plaintiff repossessed, sold the equipment back to itself, and then sold it to another shop for a profit.

The lease provides that plaintiff could repossess and sell at a public or private sale with or without notice to the corporation. Neither Ray nor his corporation signed any waiver of notice of sale after the default. HELD: Section 554.9504(3), which renders pre-default waivers of notification of sale ineffective, is applicable to guarantors as well as original debtors.

Estate of Schomer v. Piggot, 439 N.W.2d 190 (Iowa 1989)

Secured Transactions.

Farmer sold popcorn to Noble, who had given a security interest in his inventory, including after-acquired property, to bank. Noble did not pay for the popcorn upon delivery, but put it in his inventory. HELD: Farmer's claim that title never passed because he was not paid is expressly contradicted by the U.C.C.

C & J Leasing II v. Swanson, 439 N.W.2d 210 (Iowa 1989)

Secured Transactions.

Geneser was a farm implement dealer who came acquainted with investment brokers Swanson and Reilly (brokers) through his speculation in the commodity futures market. Geneser and the brokers engaged in a series of commercial transactions in which brokers would purchase farm machinery from Geneser, would finance those purchases over time, and then lease the equipment through Geneser to farmers. On the transaction resulting in litigation, however, Geneser committed fraud. Geneser sold machinery to Asset

Leasing, who in turn leased it to the brokers under terms that gave them the option to purchase for $1 at the end of the lease term. Section 554.1201(37) makes this transaction a purchase with the reservation of a security interest. Two years later, Geneser obtained the brokers' permission to refinance the machinery with Agri Financial Services. Unknown to brokers, however, Geneser instead sold Agri new machinery, which in turn was leased to the brokers under the same terms as before. Agri perfected its security interest. Geneser never followed up by leasing the equipment to farmers. Then, unknown to either Agri or the brokers, Geneser sold the machinery to C & J Leasing, who indisputably was a buyer in the ordinary course of business. C & J then "leased" machinery back to Geneser and perfected its security interest. Geneser defaulted and filed bankruptcy.

HELD: Section 554.9307(1) limits its protection to buyers in the ordinary course who purchase property encumbered by a lien "created by that person's seller." Geneser did not create the lien that harms C & J, so the literal language of section 9307 does not protect C & J. Because the literal interpretation does not advance the legislative intent, however, 9307 shall be interpreted to apply when "a dealer who is not a secured party has been instrumental in creating an encumbrance and the resulting priority conflict for an innocent buyer in the ordinary course."

Dallas County Implement, Inc. v. Harding, 439 N.W.2d 220 (Iowa App. 1989)

Secured Transactions.

Plaintiffs sold combine and cornhead to defendant and retained a security interest. Defendant defaulted and plaintiff repossessed. Plaintiff sold cornhead without notice in a private sale, along with an older combine than the one sold to defendant. The amount realized on this private sale would have satisfied defendant's entire indebtedness to plaintiff. The new buyer of the cornhead also defaulted and plaintiff repossessed again. Finally, plaintiff sold the combine and cornhead together, with notice to defendant, for an amount less than the defendant's indebtedness to plaintiff. Defendant presented evidence that a prospective purchaser who wanted to purchase a combine like that repossessed from defendant was never shown it or given the opportunity to purchase it. Defendant also established that plaintiff kept the combine for an extended period of time and even allowed it to be used by Living History Farms and prospective purchasers.

HELD: Method of sale was not commercially reasonable and defendant was not provided with adequate notice. The cornhead was

a significant portion of the collateral, and plaintiff is entitled to no credit on those portions of the collateral that were sold with proper notice.

Linn Cooperative Oil Co. v. Norwest Bank, 444 N.W.2d 497 (Iowa 1989)

Secured Transactions.

Plaintiff held a perfected security interest in grain grown by farmer. Bank held a security interest in farmer's assets, but not in grain. Farmer sold grain to elevator, who included bank as a joint payee as a result of bank's representation that it had a security interest in farmer's products. Farmer took elevator's checks to bank, where they were endorsed by farmer and bank and deposited into farmer's account. Farmer then wrote checks to bank in payment of antecedent obligation.

HELD: Plaintiff's security interest is not defeated simply by converting cash proceeds realized from sale of collateral into a checking account. Bank did not receive proceeds as payment in the ordinary course of business.

Corporate East Associates v. Meester, 442 N.W.2d 105 (Iowa 1989)

Securities.

Corporate East Associates was organized as a general partnership to purchase and develop an office building in Davenport. Seventy-two partnership units were sold to forty-four partners from several states. The agreement provided that the managing partner had exclusive authority to conduct ordinary business, including negotiating leases and refinancing of the building. Certain major decisions, such as acquisition of additional land or sale of assets, required the approval of two-thirds of the partners.

Meester, an Iowa resident who purchased two partnership units, refused to perform a cash call voted upon by the partnership. It sued him, and he contended that his partnership interest was a security within chapter 502. Chapter 502 provides that an agreement to purchase an unregistered security is unenforceable unless the transaction for the security is exempted.

The court adopts the federal definition of "investment contract," which is one of the definitions of "security" within

chapter 502. SEC v. W.J. Howey Co., 328 U.S. 293, 66 S.Ct. 1100, 90 L.Ed. 1244 (1946), provides a three-part test:

> (1) An investment of money,
> (2) In a common enterprise, and
> (3) On an expectation of profits to be derived solely from the efforts of individuals other than the investor.

The court also cited Williamson v. Tucker, 645 F.2d 404 (5th Cir. 1981), for the proposition that a partnership interest can be designated a security if the agreement "leaves so little power in the hands of the partner . . . that the arrangement in fact distributes power as would a limited partnership." Because Meester had been involved in other real estate investments and because the original manager had no unique abilities, the court had to rely on the quoted portion of Williamson to find a security. Because no exemption applied, Meester did not have to perform his agreement to purchase the partnership shares.

Marine American State Bank v. Lincoln, 433 N.W.2d 709 (Iowa 1988)

Equal Credit Opportunity Act.

Bank required spouses of shareholders in closely-held farming corporation to co-sign for a loan to the corporation, which was a violation of the anti-discrimination provisions of the ECOA. In foreclosure action, spouse counterclaimed under ECOA for damages. HELD: Before January 1, 1986, a co-signer was not an "aggrieved applicant" for purposes of the ECOA's creation of liability by a financial institution for discriminating on the basis of marital status. COMMENT: Regulations have been amended to provide that "aggrieved applicant" includes guarantors, co-signers, etc.

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National Bank v. Moeller, 434 N.W.2d 887 (Iowa 1989)

Promissory Estoppel.

Moeller owned farm land mortgaged to PCA. The mortgages contained future advances clauses. Moeller wanted to buy an adjoining parcel owned by Pierce, who was purchasing it on contract, was in precarious financial position, and was facing a balloon payment. Bank was Pierce's financier, and held an assignment of Pierce's interest in the real estate contract as security. Accordingly, bank wanted Pierce to sell as much as Pierce.

Bank agreed to lend Moeller the full purchase price because Pierce (not Moeller) represented that PCA would subordinate its mortgages on Moeller's property. Bank did not discuss this representation with Moeller or PCA before making the loan commitment. Moeller became aware of it, however, and discussed it with PCA, who was willing to subordinate if Moeller would furnish substitute collateral from his other land holdings. PCA discussed proposed subordination with bank and wrote a confirming letter:

> PCA is agreeable to the substitution and we are currently in the process of accomplishing this. . . . Provided no unexpected problems arise, PCA will subordinate our position to the bank's mortgage sometime before the end of April.

Bank closed the Pierce/Moeller deal before April and disbursed funds. Moeller executed deeds of trust in favor of the bank. Contrary to usual procedure, however, bank did no title search to assure that it had priority. Bank also had no further communication with PCA before closing deal and disbursing funds. PCA never subordinated because Moeller was unwilling to advance expenses for the substitution. Before bank discovered its predicament, PCA loaned Moeller additional monies.

On de novo review of the district court's findings favorable to bank on its claim of promissory estoppel, the court found no "clear and definite agreement," the first element of promissory estoppel. "[T]he crucial language of the letter is decidedly conditional, not definite." Bank does not suggest that PCA intended to subordinate unless and until it had substitute collateral. PCA was accommodating the bank, not vice versa.

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Cookies Food Products, Inc. v. Lakes Warehouse Distributing Inc., 430 N.W.2d 447 (Iowa 1988)

Corporate Fiduciary.

A corporate controller (officer, director, or majority shareholder) who engages in self-dealing must establish not only consent by disinterested controllers but "good faith, honesty, and fairness" in the controller's conduct. When self-dealing is demonstrated, the burden of proof shifts to the controller. Although corporate profitability due to self-dealing is not the sole criteria for testing fairness and reasonableness of controller's actions, it is a factor that may be considered in examining whether the price to the corporation for the self-dealing was fair and reasonable. Controller had no duty to disclose details of self-dealing to non-managerial stockholders, when

disinterested directors were well aware of controller's relationship with entities providing services to corporation.

Maschmeier v. Southside Press, 435 N.W.2d 377 (Iowa App. 1988)

Corporate Fiduciary.

Parents were sole officers and directors of Southside Press. Each owned 1,300 shares. They gave 1,200 shares to each of their sons as gifts. All parties were employed by Southside Press. As a result of family disagreements, Southside Press terminated the sons as employees. The parents created a new corporation, Midlands, which engaged in the same business as Southside Press. The parents were the only officers, directors, and shareholders of Midlands. As individuals, they had owned the land and building that Southside leased. They terminated the lease to Southside and made a new lease to Midlands. Southside then leased equipment, vehicles, etc., to Midlands. Southside continued to pay salaries to the parents, however, in amounts exceeding receipts. Parents offered to buy sons' shares of stock for $20 per share, which the sons regarded as inadequate.

Sons sued in equity under section 496A.94(1) to require majority shareholders to buy back the sons' shares of stock at a price determined in conjunction with the value of the corporation.

On de novo review, the court of appeals agreed with 99% of the trial judge's findings. The majority shareholders had engaged in oppressive conduct. The court cited cases from other states that defined oppressive conduct as "improper conduct which is neither illegal nor fraudulent, burdensome, harsh, and wrongful, lack of probity and fair dealing, a visual departure from the standards of fair dealing, and a violation of fair play on which every shareholder who entrusts his money to a company is entitled to rely." The court also cited language that oppressive conduct must be analyzed "in terms of fiduciary duties owed by majority shareholders to the minority shareholders and reasonable expectations held by minority shareholders in committing capital and labor to the particular enterprise." (emphasis added)

The articles of incorporation restricted transferability to require that stock first be offered for sale back to the corporation at the price agreed upon by the shareholders at the last annual meeting. Because the articles required that the shareholders agree upon the value of stock and in the absence of such agreement direct each shareholder to appoint an appraiser, because no shareholder appointed an appraiser after the last annual meeting, at which time shareholders had failed to agree on the

price, the majority shareholders' rights to rely on such method of valuation was waived. Accordingly, valuation was an issue to be decided at trial.

Hearity v. Board of Supervisors, 437 N.W.2d 903 (Iowa 1989)

Iowa Competition Law.

Iowa competition law, Ch. 553, does not apply to county's decision to contract with four attorneys, to the exclusion of others, for the provision of legal services to indigents charged with criminal offenses.

Equitable Life Assurance Society v. Anderson, 438 N.W.2d 857 (Iowa App. 1989)

Mediation.

Foreclosure action was filed in 1985, and the execution and levy occurred in April of 1986. Section 654A.6, which mandates mediation in foreclosures of agricultural property, became effective on May 29, 1986. Sheriff's sale took place in June of 1986. HELD: Statute requires mediation to occur before proceedings are initiated or before execution occurs. In this case, both occurred before the effective date, so the statute is inapplicable.

Travellers Insurance Co. v. Tritsch, 438 N.W.2d 863 (Iowa App. 1989)

Mediation.

Evidence that Travellers participated in mediation upon its own request, that Tritschs signed a mediation agreement that contains a release from mediation, and that mediation service notified the parties that mediation was closed, establishes that Travellers participated in mediation required by section 654A.6 prior to commencing foreclosure proceedings.

Smart-Way Truckin, Inc. v. Cota Industries Inc., 439 N.W.2d 162 (Iowa 1988)

Consignment.

Cota contracted with Smart-Way to ship its goods. The goods were shipped collect. The goods were damaged in transit, and Cota had to replace them. Cota then sued (actually counterclaimed) for damages. HELD: Although title to goods normally shifts from the consignor to the consignee when carrier takes possession, justified revocation of the goods by consignee revest title in the seller by operation of law. Cota owned the cause of action. The purpose of the real party in interest rule is to protect the defendant from a second action by a party actually entitled to recover. When Cota replaced the defective goods, the consignee no longer had any claim against Smart-Way.

Connell & Duffy, P.C. v. Veninga, 439 N.W.2d 203 (Iowa 1989)

Receiver.

Bank brought foreclosure action against Louis and William Veninga, seeking judgment on promissory notes and foreclosure on deed of trust covering farm land owned by the Veningas as tenants in common. The district court appointed a receiver to take possession of all rents and profits from the property. After trial, the district court found that the Veningas were jointly and severally liable as partners on the note, that the land was not partnership property, and that Louis had signed William's name to the bank's deed of trust without William's authorization. Court ordered foreclosure of the deed of trust as against Louis only and authorized that special execution be issued against his interest so that it could be sold to satisfy the judgment. Court authorized issuance of general execution against William's undivided interest in the real estate. Court ordered that rents and profits from the land be applied to satisfy the judgment only after return of the other executions authorized. Neither Louis nor William appealed.

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After return of the authorized executions, there still was a deficiency judgment. At that point, William's attorneys entered a confessed judgment against William in their favor for fees. The attorneys issued execution against William's property and served notice of garnishment on the receiver.

HELD: The unappealed judgment determined that the bank's rights to the rents and profits were superior to William's, once a deficiency was established. The attorneys' rights in those profits and rents are no greater than William's. Although the bank

had never levied on William's interest in the rents and profits, attorneys' levy was unauthorized. Levy of property and partnership, without consent of the court, is not permissible and in fact is punishable by contempt.

Black v. First Interstate Bank, 439 N.W.2d 647 (Iowa 1989)

Redemption.

Section 524.910(2) provides that state bank selling land conveyed to it in satisfaction of debt to bank "shall first offer the prior owner the opportunity to repurchase . . . on the [same] terms."

HELD: Although the statute is part of the creation of the Commerce Department's Division of Banking, the Superintendent of Banking, and the State Banking Board, it creates a private remedy for the prior owner. As such, it can be assigned such that a person other than "the prior owner" may exercise the statutory right to repurchase. Amendment that created the right of first refusal should be applied retrospectively to the bank's attempt to sell land acquired before the effective date, at least when the bank's attempt to sell it comes after the effective date. Because part of the bank's purchase price to the bankruptcy trustee caused a satisfaction and discharge of the bankrupts' mortgage to the bank, the statute applied.

Citizens State Bank v. Harden, 439 N.W.2d 677 (Iowa App. 1989)

Replevin.

Once court grants replevin, and absent any award of costs or damages against parties seeking replevin, replevin bond serves no useful purpose and should be exonerated.

United Central Bank v. Kruse, 439 N.W.2d 849 (Iowa 1989)

Banking.

Kruse bought land on contract from Graham, who borrowed money from bank and ultimately assigned his interest in contract to bank as security. Graham defaulted on note and bank obtained a judgment against him. The bank notified Kruse, who then made payments directly to bank. Because Graham himself was purchasing the land

on contract, and because he was in default, the original seller served notice of forfeiture, to which Kruse responded by making some direct payments. Graham had assigned his interest in this contract to bank as well. Bank and Kruse negotiated a new arrangement whereby original seller was paid off, Kruse received title, and Kruse mortgaged property to bank with relatively early balloon payment.

Kruse defaulted and bank commenced action for foreclosure. Kruse presented affirmative defenses and counterclaims on theories of fraudulent and negligent misrepresentation and tortious interference with contractual relationship. The misrepresentation claims were premised on allegations that the bank made false legal representations to Kruse as to the effect of the judgment against Graham on the property and as to the effect of Kruse's direct payments to the original seller.

12 U.S.C. § 1972 provides:

> A bank shall not . . . extend credit . . . or sell property . . . or vary the consideration for any of the foregoing on the condition or requirement . . . that the customer provide some additional credit, property, or service to such bank, other than those related to and usually provided in connection with the loan . . . .

Section 1975 provides for civil remedies with treble damages. Kruse contended that section 1972 was violated by the bank's requirement that they borrow more than $6,000.00 in additional funds to satisfy the indebtedness of another customer, in order to retain their interest in land purchased from Graham.

The Court held first that state courts could exercise jurisdiction over section 1972 actions concurrently with federal courts. The Court held that because a jury could have found a violation of section 1972, the failure to submit those claims to a jury required reversal and remand for new trial.

United Central Bank v. Kruse, 439 N.W.2d 849 (Iowa 1989)

RICO.

Kruse bought land on contract from Graham who borrowed money from bank and ultimately assigned his interest in contract to bank as security. Graham defaulted on note and bank obtained a judgment against him. The bank notified Kruse, who then made payments

directly to bank. Because Graham himself was purchasing the land on contract, and because he was in default, the original seller served notice of forfeiture, to which Kruse responded by making some direct payments. Graham had assigned his interest in this contract to bank as well. Bank and Kruse negotiated a new arrangement whereby original seller was paid off, Kruse received title, and Kruse mortgaged property to bank with relatively early balloon payment.

Kruse defaulted and bank commenced action for foreclosure. Kruse presented affirmative defenses and counterclaims on theories of fraudulent and negligent misrepresentation and tortious interference with contractual relationship. The misrepresentation claims were premised on allegations that the bank made false legal representations to Kruse as to the effect of the judgment against Graham on the property and as to the effect of Kruse's direct payments to the original seller. Kruse also filed a claim under, among other things, the Racketeer Influenced and Corrupt Organizations Act (RICO), 18 U.S.C. § 1961.

The Court noted that concurrent state-court jurisdiction likely existed under RICO, but held that RICO requires two transactions and the evidence established only one. The Court also doubted whether the fraud alleged against the bank constituted a racketeering activity as defined in section 1961.

Woods v. Schmitt, 439 N.W.2d 855 (Iowa 1989)

Assignment.

This is the fifth of five Moser opinions. Woods purchased farm from Schmitts, who previously had sold the farm to another. Between the two sales, Schmitts' mortgage was foreclosed and Thorp purchased the farm at the sheriff's sale. Woods obtained title by assignment of the sheriff's deed. The original vendees brought an action for specific performance and to quiet title and eventually prevailed.

Woods sued Thorp for bad faith in execution of the assignment. Thorp and Schmitts reached a settlement of Thorp's foreclosure action and Schmitts' counterclaims. As part of the settlement, Thorp was to deliver a blank assignment of the sheriff's deed, which Schmitts then filled out in favor of Woods.

In affirming the trial court's dismissal of the claims against Thorp, the Court held that "plaintiffs' claim is nothing more than a breach of warranty of title. . . . A sheriff's deed does not warrant title . . . ." The Court noted that "[Woods]

acknowledge[d] that Schmitts and their attorney, rather than Thorp, warranted that the sheriff's deed would provide them good title to the property."

Waukon Auto v. Farmers and Merchants Savings Bank, 440 N.W.2d 844 (Iowa 1989)

Commercial Paper.

Plaintiff's manager embezzled funds by endorsing customer checks either by hand or with the business' rubber stamp and then presenting them for cash at bank, where plaintiff had a checking account. The manager was not authorized to write checks on the account or to withdraw cash, but evidence established that bank employees had never checked the signature card on plaintiff's account and had never inquired into manager's authority to cash checks. Tellers testified that their normal practice was to allow anyone engaged in business locally to make cash transactions.

The court held that the bank was not a holder in due course under section 554.3302(1) and thus was responsible to plaintiff for the funds exchanged by the bank for the checks. Plaintiff had not granted its manager apparent authority. At best for bank, the lack of a restriction on plaintiff's rubber stamp showed that the manager's authority was ambiguous and needed to be confirmed. Manager's conversion of business funds into cash put bank on notice of the need to confirm manager's authority. Bank can avail itself of the "contributory negligence" defense under section 554.3406 only if it otherwise is a holder in due course, which it is not.

Plaintiff was able to recover some of the embezzled funds from its manager, and the district court allowed the bank a pro tanto credit for those amounts. Without explaining why, the supreme court noted that plaintiff's losses exceeded the amount attributable to checks cashed by the bank at the manager's request. Accordingly, the bank was not entitled to pro tanto credit for the amount recovered from the manager, because plaintiff still would not be fully compensated.

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Randall's International Inc. v. Hearing Board, 429 N.W.2d 163 (Iowa 1988)

Due Process/Equal Protection.

Beer and Liquor Control's suspension of liquor permit held by grocer as a consequence of a non-managerial employee's guilty plea to selling beer to a minor did not violate due process, even though the agency had no evidence of neglect or involvement on the part of the grocer.

Moritz v. Farm Bureau Mutual Insurance Co., 434 N.W.2d 624 (Iowa 1989)

Due Process/Equal Protection.

Passenger sued insurer of vehicle for uninsured motorist coverage when passenger was injured as a result of vehicle being forced off road by unknown vehicle and unidentified driver. HELD: Uninsured motorist statute as construed by Rohret, 276 N.W.2d 418 (Iowa 1979), requires physical contact between hit-and-run vehicle and insured vehicle in order to trigger uninsured motorist coverage. Statutory requirement of physical contact does not violate equal protection.

Hawkeye Bank & Trust v. Milburn, 437 N.W.2d 919 (Iowa 1989)

Due Process/Equal Protection.

Iowa Redemption Statute, which precludes redemption upon debtor's use of bankruptcy stay to delay sheriff's sale, does not violate due process, equal protection, or the supremacy clause.

Estate of Schomer v. Piggot, 439 N.W.2d 190 (Iowa 1989)

Due Process/Equal Protection.

Farmer who failed to retain security interest in popcorn sold to business that had given security interest in its inventory to bank argued that the U.C.C. denies equal protection "because it

favors financial institutions, who regularly work with the U.C.C., over farmers, who do not." HELD: The U.C.C. treats all parties the same. "Lay persons, even those who deal with professional persons, are charged with knowledge of the law."

Citizens State Bank v. Harden, 439 N.W.2d 677 (Iowa App. 1989)

Due Process/Equal Protection.

Section 643.2, which prohibits counterclaims from being asserted in an action for replevin, does not deny equal protection.

Conaway v. Webster City Products Co., 431 N.W.2d 795 (Iowa 1988)

Preemption.

Employees covered by a collective-bargaining agreement containing a just-cause discharge clause, and a grievance/arbitration procedure that applied to discharge, sued for retaliatory discharge, alleging that they had been terminated for filing workers' compensation claims. HELD: Because the retaliatory discharge claims can be adjudicated without resorting to interpretation of the collective-bargaining agreement, the claims are not preempted by section 301 of the Labor Management Relations Act (LMRA), 29 U.S.C. §185(a). COMMENT: Opinion follows Lingle v. Norge Division, 486 U.S. _____, 108 S.Ct. 1877, 100 L. Ed. 2d 410 (1988).

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Davis v. Ottumwa YMCA, 438 N.W.2d 10 (Iowa 1989)

Preemption.

Davis, an employee of the YMCA, sued Blue Cross, the Y, and State Farm as a result of Blue Cross' denial of Davis' claims for health insurance benefits. The Y had allowed the Blue Cross policy to lapse for nonpayment of premium, and State Farm had taken over the group plan.

After Davis filed suit, United States Supreme Court decided Pilot Life Insurance Co. v. Dedeaux, 481 U.S. 41, 107 Supreme Court 1549, 95 L. Ed. 2d 39 (1987), which held that the Employee Retirement Income Security Act (ERISA) preempted civil actions that "relate to . . . employee benefit plan[s]." In response to Pilot, defendants filed motions for summary judgment and Davis filed a

motion for leave to amend his petition to bring his allegations within the remedial provisions of ERISA. Davis' motion was filed about four months before trial.

HELD: Davis' petition clearly relates to his employee benefit plan and is preempted by ERISA. The ERISA preemption clause contains an exception for civil actions based on state statutes that regulate insurance companies. Davis' effort to base his action on section 509B.3, which requires all group policies to include conversion privileges, does not avoid preemption. Pilot requires such a state statute "[to] not just have an impact on the insurance industry, but [to] be specifically directed toward that industry." Section 509B.3 "only requires that group policies include conversion privileges; it does not deal with negligence or breach of contract by persons who allegedly lose their rights for their employees, as claimed here. Furthermore, the policy under which Davis thought he had coverage did include a conversion privilege." COMMENT: Then why isn't he getting coverage?

Teamsters Local 358 v. Des Moines Register, 438 N.W.2d 598 (Iowa 1989)

Preemption.

Union sought declaratory judgment that section 539.4, Code of Iowa, required newspaper to accept an employee's assignment of a portion of his wages to his union for payment of dues. Statute requires that employer agree in writing to accept and pay a wage assignment before such assignment is effective or binding, but also contains exclusionary language for wage assignments by employees to unions. HELD: To construe the statute either to require employers to accept wage assignments or to remove wage assignments entirely from the operation of the statute is to "impermissibly intrude into an area of collective bargaining Congress intended to leave to the free play of economic forces."

Rodine v. Zoning Board, 434 N.W.2d 124 (Iowa App. 1988)

Mootness.

Developer sought zoning variance and special-use permit to construct private sewage treatment plant north of city. Board of Adjustment granted variance and permit. Interested parties filed a petition for writ of certiorari, claiming that ex parte contact between board members and interested parties had occurred in connection with the application. Because the property was

subsequently annexed by the city and the developer had not acted on the variance and permit within six months, the variance and permit were voided by county zoning ordinances. HELD: Public interest exception requires that the district court not dismiss the certiorari petition on grounds of mootness.

State v. Hartog, 440 N.W.2d 852 (Iowa 1989)

Seatbelt Law.

Iowa's seatbelt law does not violate due process or the right to privacy under either constitution. Court relied on findings with respect to safety to others from the immobilization of an occupant in an accident and the savings to society from reducing injuries and deaths.

Jones v. Palmer Communications, Inc., 440 N.W.2d 884 (Iowa 1989)

First Amendment.

Plaintiff was hired by municipal fire department pursuant to consent decree issued in widely-publicized litigation over discriminatory hiring practices. Plaintiff then was dismissed for failing to pass an EMT examination. He had failed it on six different occasions, despite receiving tutorial assistance. Reporters learned of the dismissal and interviewed the fire chief, who stated that the plaintiff had a reading problem that led to his failure of the exam. The chief said that tests had determined that plaintiff read at a third-grade level. The chief also said that plaintiff had received special tutoring at taxpayer expense. The interview was broadcast on television.

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Plaintiff sued the television station for libel and false-light invasion of privacy. Defendants moved for summary judgment, raising numerous defenses and constitutional issues. The motions were denied in their entirety by the district court.

The court rejected defendants' suggestion that plaintiff was a public official, and declined to apply a "government affiliation" interpretation to the "public official" designation from New York Times v. Sullivan. The court also rejected the argument that plaintiff had achieved public-figure status by seeking employment with the fire department at a time when controversial and publicized litigation had resulted in a consent order, or by appealing his dismissal to the civil service board. The court also declined to adopt the public-interest privilege first articulated in

Rosenbloom v. Metromedia, Inc., 403 U.S. 29, 91 S. Ct. 1811, 29 L. Ed. 2d 926 (1971), as a basis for requiring plaintiff to establish actual malice. The court held that Iowa's fair-report privilege does not require the adoption of Rosenbloom because it relates only to public officials or public figures. Instead, the court adopted a negligence standard (authorized by Gertz) for determining liability of a media defendant to a private person for defamation in a matter of public interest or public concern. Applying that standard, the court could not state as a matter of law, absent the tape and transcript, that defendants comported with a professional standard of care.

The court did reverse with respect to the claims of punitive damages. The court held that sections 659.2 and .3, which place "a substantial portion of the burden of disproving fault on a media defendant," and which articulate punitive-damages standards "completely different from those standards articulated by the United States Supreme Court," are unconstitutional "Because the controversy is a matter of public concern, [plaintiff] must demonstrate actual malice to receive an award of punitive damages." This record could not support such a finding, and the court did not need the tape or transcript to confirm that.

CONTRACTS

Berryhill v. Hatt, 428 N.W.2d 647 (Iowa 1988)

Condition Precedent.

Hatt sold real estate to plaintiffs on contract. Property sold was rear part of lot. Agreement was conditioned upon Hatt splitting lot into two parcels and granting easement across front parcel to street. Board of Adjustment required Hatt to pave part of lot as condition to approving division of lot, and Hatt refused to pay for paving. when plaintiffs refused to close (and pay), Hatt rescinded.

HELD: Hatt breached contract by anticipatory repudiation.

Berryhill v. Hatt, 428 N.W.2d 647 (Iowa 1988)

Damages.

Breach of contract by anticipatory repudiation, absent conduct that constitutes an intentional tort or other wrongful act committed with legal malice, does not support an award of punitive damages.

Legal expense, including attorney fees, incurred by buyer in attempting to obtain seller's performance after seller breaches by anticipatory repudiation, is legitimate item of compensatory damages.

Berryhill v. Hatt, 428 N.W.2d 647 (Iowa 1988)

Interpretation.

Hatt sold real estate to plaintiffs on contract. Parties used preprinted "uniform purchase agreement" and filled in blanks, but some terms suggested that contract was conditioned on certain matters, which did not occur before Hatt "rescinded."

HELD: Because of ambiguities, issue of intent - whether executed document was a contract or a conditional offer - was for jury. Interpretation, which determines the meaning of the words used, is a jury question when extrinsic evidence is necessary.

Berryhill v. Hatt, 428 N.W.2d 647 (Iowa 1988)

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Specific Performance.

Hatt breached contract for purchase and sale of real estate by anticipatory repudiation. Buyers sued for damages and specific performance. Jury awarded compensatory damages.

HELD: Specific performance and compensatory damages are not necessarily mutually exclusive. Damages compensated plaintiffs for their efforts to obtain Hatt's performance, while specific performance resolves the rights and duties of the parties in the future. Buyers' improvement to property is sufficient to render property unique so as to permit extraordinary remedy.

Folkers v. Southwest Leasing, 431 N.W.2d 177 (Iowa App. 1988)

Parol Evidence.

Folkers purchased land from Southwest. Contract provided: "Seller shall provide for a road easement and a driveway from highway twenty." Road was not provided, and Folkers sued successfully for rescission. Evidence established that Folkers was in the trucking business, had to have roadway access to the land for his intended use of the land (which was known to seller), and that land was of little value to Folkers without roadway access. HELD: Court properly considered parol evidence in establishing the purpose of seller's contractual obligation.

Folkers v. Southwest Leasing, 431 N.W.2d 177 (Iowa App. 1988)

Rescission.

Folkers purchased land from Southwest. Contract provided: "Seller shall provide for a road easement and a driveway from highway twenty." Road was not provided, and Folkers sued successfully for rescission. Evidence established that Folkers was in the trucking business, had to have roadway access to the land for his intended use of the land (which was known to seller), and that land was of little value to Folkers without roadway access. HELD: Fact that Folkers performed (by paying for land) does not make rescission inappropriate. Lapse of time between his performance and suit for rescission, and resulting decline in land values, did not militate against rescission, because Folkers acted as soon as it appeared that seller could/would not perform. Because Folkers did not benefit from land while in his possession, he was entitled to interest on the purchase price from the date of its payment by Folkers.

McGee v. Damstra, 431 N.W.2d 375 (Iowa 1988)

Extrinsic Evidence.

McGee sold land to Damstra on installment contract. Parties used standard bar form 21.2, but revised paragraph 10, "forfeiture and foreclosure," to prohibit seller from accelerating the unpaid balance on default and proceeding by foreclosure, with the apparent result that seller could seek only forfeiture as a remedy. When Damstra defaulted, McGee sought specific performance. District court admitted extrinsic evidence establishing that parties intended the revisions to paragraph 10 to limit McGee's remedy to

forfeiture. District court found, nevertheless, that McGee had no such intent and that paragraph 10 did not exclude specific performance.

Court first distinguished between the use of extrinsic evidence to interpret the meaning of words used in agreement and its use to establish "the overall understanding of the parties within the context of the transaction." Next, the court held that in comparing conflicting interpretations, it should adopt the interpretation that one party should have known would be the other party's interpretation. Applying an objective standard, the court found that McGee had to be aware that Damstra intended the revision to limit McGee's remedy to forfeiture.

Robinson v. Norwest Bank, 434 N.W.2d 128 (Iowa App. 1988)

Accord and Satisfaction.

Corporation and its controllers were obligated to bank on loans to corporation. Efforts by corporation and bank to reduce debt by selling certain assets failed, and company went out of business. Bank looked to controllers for payment pursuant to their guarantees. Corporation and controllers reached settlement agreement with bank. Terms of agreement released corporation and controllers from further liability to bank pursuant to loans and guarantees, in consideration for payment of money and transfer of property. Agreement contained no language releasing any claims that corporation or controllers might have against bank.

Almost two years later, controllers sued bank for breach of fiduciary duty and intentional interference, and for negligence in supervision of the liquidation of the corporation's assets. Bank moved for summary judgment on grounds that the previous settlement agreement was an accord and satisfaction.

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The Court of Appeals reversed, because there were factual issues as to whether the settlement agreement constituted a release of the controllers' claims. The Court distinguishes several car accident cases in which one party pays for a release and subsequently is held to have compromised his own claim for injuries, absent any reservation in the release of his right to sue on his own claim. "The bank's claim for a judgment on the notes can exist at the same time claims can exist by plaintiffs for the breach of certain duties on the part of the bank. A judgment against each by the other, the bank against plaintiffs on the note and the plaintiffs against the bank for breach of fiduciary duty, while operating as a set-off one against the other, can co-exist." COMMENT: Cannot the same be said of conflicting

claims in a car accident case? This opinion simply cannot be read consistently with Brown v. Hughes, 251 Iowa 444, 99 N.W.2d 305 (1960), or Mensing v. Sturgeon, 250 Iowa 918, 97 N.W.2d 145 (1959).

Bergfeld v. Farm Credit Banks, 439 N.W.2d 217 (Iowa App. 1989)

Option.

Debtor transferred title in real estate to lender as part of loan settlement agreement. Agreement provided that if debtor obtained an offer on the land at a specific price, debtor "would be entitled to repurchase the land at the same price if they gave notice within 10 days of their intention to purchase it, together with a down payment of 25% of the purchase price, and if they shall thereafter consummate the purchase within 30 days."

Plaintiffs made an offer to purchase the real estate at the specific price. Lender gave notice to debtor, who timely provided notice of intent to repurchase with 25% being tendered timely. Plaintiffs' offer acknowledged the debtor's right of first refusal. Although debtor obtained a loan commitment, the transaction did not close within the 30 days due to abstracting problem attributed to debtor's lender. Plaintiffs sued for specific performance. HELD: Debtor complied with the terms of the right of first refusal. Upon exercising notice and tendering the down payment, their option became a contract of purchase. The delay was attributable to the bank, not debtor, so plaintiffs were not entitled to specific performance.

Casey's General Stores, Inc. v. Campbell Oil Co., 441 N.W.2d 758 (Iowa 1989)

Non-Compete Clause.

Casey's entered into franchise agreement with Campbell for a Casey's franchise in LeGrand. Agreement contained a non-compete clause that was unlimited geographically. Campbell later negotiated to obtain a Casey's franchise in Gilman, and purchased the Gilman property in anticipation of reaching an agreement. When the negotiations failed, Campbell's controllers, Les and Norma Campbell, bought the property from their corporation and operated a "look-alike" convenience store. Later, Les and Norma constructed and operated another "look-alike" in State Center. This second "look-alike" was located within a mile of another Casey's operated by an unrelated franchisee.

Casey's sought an injunction from Campbell and Les and Norma and money damages from Les and Norma for tortious interference with contract. The court affirmed an enforcement of the non-compete clause on a three-mile basis but held that Campbell was not operating either of the "look-alike" convenience stores and that Les and Norma were not subject to the non-compete clause. As controlling shareholders, the Campbells controlled the actions of the corporation rather than the corporation controlling them. As to the 3-mile geographical limitation, the court affirmed the district court's ruling that the limitation applied to any Casey's as opposed to just the LeGrand Casey's, an argument presented by Campbell.

Presto-X-Co. v. Ewing, 442 N.W.2d 85 (Iowa 1989)

Non-Compete Clause.

Ewing, pest-control technician who signed an employment agreement containing a non-compete clause was terminated for habitually bad driving. The restrictive covenant was two years in duration and provided that Ewing would not solicit business from or perform services for any customer of plaintiff for whom Ewing previously had performed services at the request of plaintiff. After being terminated, Ewing sent a note to each of his customers that announced that he was no longer employed by plaintiff, "although I am still certified by state of Iowa." The note contained his home address and telephone number. Ewing eventually began to provide pest-control services for some of his old customers.

Plaintiff sought an injunction and damages in the form of profits it had lost because of Ewing's breach of the restrictive covenant. On de novo review, the court found that Ewing's note violated the solicitation prohibition and that Ewing provided services, whether solicited or not, in violation of the covenant. The court found that an injunction was appropriate and that it should run for one year from the date of the appellate opinion, so as to avoid diminution of the value of the protection plaintiff had negotiated, due to the time involved in litigation. The court remanded for an accounting of lost profits.

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Hoffman v. National Medical Enterprises, Inc., 442 N.W.2d 123 (Iowa 1989)

Non-Compete Clause.

Respiratory therapists founded Pro-Lung, which provided oxygen equipment and services to persons outside hospitals. To facilitate expansion of their business, they negotiated with Medical Oxygen Service (MOS) to sell Pro-Lung while retaining their management duties. A stock purchase by MOS was agreed upon, with employment agreements for the therapists as well as covenants by therapists not to compete with Pro-Lung. One year later, representatives of MOS' parent companies forced the therapists out of the Pro-Lung business by terminating them and changing the locks. The representatives threatened to have the therapists prosecuted for Medicare fraud if they did not acquiesce in the separation.

The therapists sued for breach of the employment contracts, fraudulent misrepresentation, interference with contractual relations, and extortion. Because the trial court interpreted the covenants not to compete as applying to all areas in which MOS and its parent companies were in business, rather than just the business area served by Pro-Lung, the court determined the clause was unenforceably broad. HELD: Although the contract was between MOS and plaintiffs, the clause prohibits competition by plaintiffs only with Pro-Lung. On remand, court should determine the reasonableness of the restriction simply by examining the business areas covered by Pro-Lung.

Baker v. Stewarts' Inc., 433 N.W.2d 706 (Iowa 1988)

Waiver.

Patron at cosmetology school signed written waiver acknowledging that Stewarts' was a "student training facility" and that the price was correspondingly reduced, and promising that patron would not hold anyone liable for injuries resulting from the services rendered. HELD: In reversing entry of summary judgment for the school in an action asserting, among other things, negligent supervision by professional staff members, the court said:

> [W]e do not believe that it would be apparent to the casual reader asked to sign this form as a condition for receiving cosmetology services that its effect was to absolve the establishment from liability based upon the acts or omissions of its professional staff.

Korsmo v. Waverly Ski Club, 435 N.W.2d 746 (Iowa App. 1988)

Waiver.

Plaintiff entered a water skiing tournament. He signed the standard tournament entry form that contained a release. Plaintiff did not read the release before signing. Plaintiff then was injured during the tournament while being towed into position to make an attempt at a ski jump.

Court of appeals held that the release barred plaintiff's claim as a matter of law and affirmed entry of summary judgment. Use of the word release does not make the clause ambiguous. There is no ambiguity as to what tournament or competition is covered by the release. The use of the words "negligent acts" does not render the clause ambiguous. Application of the clause to conduct "before, during, or after" the competition was sufficiently specific and encompassing to cover the circumstances of plaintiff's injury. Plaintiff was an adult (albeit young) and entered the competition voluntarily. "The injuries that occurred were within the contemplation of the parties."

DAMAGES

Berryhill v. Hatt, 428 N.W.2d 647 (Iowa 1988)

Attorney Fees.

Legal expense, including attorney fees, incurred by buyer in attempting to obtain seller's performance after seller breaches by anticipatory repudiation, is legitimate item of compensatory damages.

Berryhill v. Hatt, 428 N.W.2d 647 (Iowa 1988)

Punitives.

Breach of contract by anticipatory repudiation, absent conduct that constitutes an intentional tort or other wrongful act

committed with legal malice, does not support an award of punitive damages.

State Savings Bank v. Allis-Chalmers Corp., 431 N.W.2d 383 (Iowa App. 1988)

Punitives.

Jury found that Allis-Chalmers (AC) committed conversion and fraud in connection with assets covered by conflicting securities agreements. In affirming a verdict for punitive damages, the court of appeals reviewed Iowa punitive damage law in commercial fraud cases. Court cited Holcomb v. Hoffschneider, 297 N.W.2d 210, 214 (Iowa 1980), for the proposition that punitives are not appropriate in every fraud case, because punitives require "some aggravating factors such as malice or outrageous conduct." Court of appeals reads Holcomb to be modified, however, by Kimmel v. Iowa Realty Co., 339 N.W.2d 374, 384 (Iowa 1983), to require proof only that the wrongful conduct "was committed or continued with the reckless disregard at another's rights." Because the evidence permitted this jury to find that AC's conduct was deliberate and in disregard of the Bank's rights, punitive verdict was supported by substantial evidence.

Dessel v. Dessel, 431 N.W.2d 359 (Iowa 1988)

Punitives.

Brothers and partners Jim and George jointly retained attorney to handle dissolution of partnership. Attorney negligently included a hold-harmless clause against the instructions of Jim and George. They subsequently and orally amended the dissolution agreement to provide George with a 6% commission on collections in return for Jim being relieved of any obligation to collect accounts receivable. Jim died, and his estate disputed the oral agreement. Attorney advised George to stop retaining the commission and to refund the amounts previously retained, and George complied. Nevertheless, the estate sued George over the collections and division of accounts receivable. Attorney represented the estate, and George filed a third-party claim against the attorney, who then withdrew. The estate's suit was dismissed, but George recovered his defense expenses, the commissions, and punitive damages from the attorney.

On appeal, the court found substantial evidence of negligence and proximate cause. The court reversed on the punitive damages

award, however, because there was no evidence of spite, hatred, or ill-will on the part of the attorney or of willful or wanton disregard for George's rights.

Woods v. Schmitt, 439 N.W.2d 855 (Iowa 1989)

Punitives.

This is the fifth of five Moser opinions. Woods purchased farm from Schmitts, who previously had sold the farm to another. Between the two sales, Schmitts' mortgage was foreclosed and Thorp purchased the farm at the sheriff's sale. Woods obtained title by assignment of the sheriff's deed. The original vendees brought an action for specific performance and to quiet title and eventually prevailed.

Woods sued their attorney, Johnson, for negligence in examining the abstract of title to the farmland. HELD: Because the evidence established at best that Johnson "merely made a mistake in a title opinion," punitive damages were not appropriate.

Parks v. City of Marshalltown, 440 N.W.2d 377 (Iowa 1989)

Punitives.

City employee sued for intentional infliction of emotional distress, violation of due process under 42 U.S.C. § 1983, and breach of employment contract. The jury awarded punitive damages against the city. Plaintiff proved that someone had altered the employment records of another employee who received a new job classification ahead of plaintiff, based on seniority.

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HELD: Because section 613A.4(5) bars punitive damages under the state tort claims act, plaintiff's punitive-damage claim must rest on breach of contract. Assuming without deciding that plaintiff could establish a "malicious breach" of contract, which would otherwise entitle him to recover punitives under Pogge v. Fullerton Lumber Company, 277 N.W.2d 916, 919-20 (Iowa 1979), punitive damages will no longer be allowed against a municipality, even if based on breach of contract. Though the legislature responded to Young v. City of Des Moines, 262 N.W.2d 612, 622 (Iowa 1978), and City of Cedar Rapids v. Northwestern National Insurance Co., 304 N.W.2d 228, 229-30 (Iowa 1981), by amending only a tort law, "there is no logical reason to protect a tortfeasor more than a person who breaches a contract." Young and City of Cedar Rapids are overruled.

Nachazel v. Miraco Manufacturing, 432 N.W.2d 158 (Iowa 1988)

Breach of Warranty.

Farmer purchased hog farrowing houses (Mirahuts) from defendant. Defendant guaranteed that use of Mirahuts would eliminate scours. Mirahuts did not work. Farmer sued manufacturer on breach of warranty and strict liability, and manufacturer appeals from judgment in favor of farmer on warranty claim. HELD: When buyer has accepted the goods and retains them, seeking damages under section 554.2714, interest expense incurred as a result of a purchase-money loan is not caused by the breach and is not recoverable. Buyer's remedy is limited to diminished value or use of the property and other consequential damages. Cost of installation, minus any remaining value or benefit resulting from the installation is recoverable as a consequential damage.

Woods v. Schmitt, 439 N.W.2d 855 (Iowa 1989)

Breach of Warranty.

This is the fifth of five Moser opinions. Woods purchased farm from Schmitts, who previously had sold the farm to another. Between the two sales, Schmitts' mortgage was foreclosed and Thorp purchased the farm at the sheriff's sale. Woods obtained title by assignment of the sheriff's deed. The original vendees brought an action for specific performance and to quiet title and eventually prevailed.

Woods sued Schmitts' attorney, Donohue, for breach of warranty of title. HELD: Measure of damages is the value of the property at the time the covenant was made as determined by the consideration paid, rather than land value at time of eviction. Damages also include interest, costs, and expense incurred in unsuccessfully defending title. Allegations of bad faith do not change the measure of damages for breach of warranty.

Woods v. Schmitt, 439 N.W.2d 855 (Iowa 1989)

Breach of Warranty.

This is the fifth of five Moser opinions. Woods purchased farm from Schmitts, who previously had sold the farm to another. Between the two sales, Schmitts' mortgage was foreclosed and Thorp purchased the farm at the sheriff's sale. Woods obtained title by assignment of the sheriff's deed. The original vendees brought an

action for specific performance and to quiet title and eventually prevailed. In plaintiffs' claims against several defendants for breach of warranty, the undisputed evidence established that Woods paid $90,000.00 for the land. Following Moser III, they received $33,000. They had borrowed money to finance a purchase, however, and had mortgaged the farm. Whether or not they owe on this loan is still under litigation. HELD: The uncertainty regarding the loan does not constitute a defense or even a set off for the breach-of-warranty defendants. On the other hand, receipt of money from the previous litigation should be credited against the purchase price.

McDonald v. Delhi Savings Bank, 440 N.W.2d 839 (Iowa 1989)

Breach of Warranty.

McDonald owned real estate, against which bank held a mortgage to secure loans to McDonald. McDonald sold real estate to investors and gave bank a security interest in McDonald's interest in the contract. Investors' real estate agent, Holmes, obtained an offer to buy the property. Holmes caused an attorney to prepare a title opinion, and the attorney erroneously concluded that bank, not McDonald, was the owner of legal title (presumably because the bank's security in McDonalds' interest in the real estate contract was established by a document entitled "assignment of equity in real estate contract."). Holmes then arranged for real estate agency to purchase bank's interests in the property and the real estate contract. Agency paid bank the amount McDonald owed on the original loan and obtained bank's release of the notes and a warranty deed conveying the property from the bank to the agency.

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McDonald sued the agency to recover the unpaid balance of the real estate contract, to foreclose the interests of the purchasers and their successors in interest, and to obtain a decree quieting title. McDonald amended its petition to add a claim against the bank, alleging breach of contract and negligence. Thereafter, McDonald dismissed with prejudice the quiet title action and consented to entry of decree that agency was owner of real estate.

The agency sought to recover against the bank for the agency's expenses in successfully defending its title. The warranty deed conveyed by the bank warranted that the bank held title in fee simple, that it had good and lawful authority to sell and convey, that the property was free and clear of all liens and encumbrances, and that the bank would defend against lawful claims. HELD: Because McDonald's claim against the agency ultimately failed, the bank did not breach any of the covenants in the warranty deed, and was not obligated to pay the agency's defense expenses.

Collier v. General Inns Corp., 431 N.W.2d 189 (Iowa App. 1988)

Excessiveness.

Plaintiff fell through plate glass window during an altercation. Verdict of $185,000.00 was not excessive or the result of passion or prejudice. "The facts as to plaintiff's condition or the pain suffered . . . are not substantially in dispute. Defendants do not claim that there was no injury, or that those injuries were not painful. Neither do they dispute that there will be at least some permanent scarring. They do not contend that the anxiety claimed by plaintiff does not in fact exist, or that it isn't important." The court of appeals did not give any further details as to the injuries or damages.

Burkis v. Contemporary Industries Midwest Inc., 435 N.W.2d 397 (Iowa App. 1988)

Excessiveness.

Dram shop plaintiff was struck in her lane by van travelling in excess of 60 miles an hour. Driver had a blood alcohol level .49. Plaintiff sustained broken ribs, multiple fractures to her pelvis, multiple facial lacerations, a partially amputated left ear, back injuries, left arm disfigurement, and foot injuries. She was in the hospital for 22 days, and her condition was critical for several days. She was subsequently rehospitalized for the back injuries for 10 days. She has seen a plastic surgeon. Before the accident and at the time of trial, she was employed as an EKG technician, "but now she faces termination." She has begun making mistakes and has become unreliable. She adduced evidence that she has suffered brain damage. She incurred past medical expense of $32,000 and lost income in the amount of $15,000. She adduced testimony with respect to future plastic surgery expense, future psychotherapy expense, and future new medical rehabilitative expense.

Court of appeals held that the verdict of $1.375 million was not excessive, was supported by substantial evidence, and was not the result of passion or prejudice.

Fish v. Carstens, 437 N.W.2d 589 (Iowa App. 1989)

Excessiveness.

Plaintiffs were struck by another car while they rode a motorcycle. The operator of the other vehicle admitted liability. Plaintiff Fish, 23, adduced evidence of a 5% impairment of one leg and the loss of six weeks of work as a cosmetologist. Past medicals were $3,500. Plaintiff Broders, 22, was treated only for an abrasion on his leg on the day of the accident. He went to a chiropractor the next day, however, and received treatment for aggravation of a congenital scoliosis. The treatments continued through the trial date. The chiropractor testified that Broders had suffered permanent partial disability between 5% and 10% of the whole body, with half of it attributed to the accident. His medical expense was $1,000, and he had no lost wages.

Verdicts for Fish in the amount of $28,000 and for Broders in the amount of $16,500 were reduced by the trial court by new trial conditioned upon remittitur to $17,000 and $9,000, respectively. On appeal, the court of appeals reversed, holding that the verdicts were not excessive.

Rattenborg v. Montgomery Elevator Co., 438 N.W.2d 602 (Iowa App. 1989)

Excessiveness.

A verdict of $500,000.00 for a high school student who suffered permanent disability to two fingers, disfigurement, and pain and suffering was not excessive. Plaintiff's fingers were caught in an escalator. It took a while to free her. Fingernails were ripped off, and bone was exposed. She had three open fractures and injuries to tendons. She was hospitalized for four days. She underwent three surgeries.

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Roquet v. Gervis E. Webb Co., 436 N.W.2d 46 (Iowa 1989)

Consortium.

In October of 1981, the court recognized a child's cause of action for loss of parental consortium. See Weitl v. Moes, 311 N.W.2d 259, 270 (Iowa). In Audubon-Exira, 335 N.W.2d 148, 152 (Iowa 1983), court modified Weitl by rejecting the "independent" aspect of the cause of action and by requiring that the cause of action be commenced by the injured parent or parent's estate. The

latter requirement has been tempered so as to permit the child's action independently if child can show that joinder was not feasible. See Madison v. Colby, 348 N.W.2d 202, 209 (Iowa 1984); Nelson v. Ludovissy, 368 N.W.2d 141, 146 (Iowa 1985).

In this case the court received certified questions from the Northern District. The father was injured while the child was a viable fetus. The father's injuries occurred before Weitl, and the father settled his claim before Weitl.

HELD: Weitl will not be applied retroactively when the injured parent's claims have been concluded by settlement or release on a date prior to the filing of the decision in Weitl. Although Weitl has been applied retroactively, see Beeck v. S.R. Smith Co., 359 N.W.2d 482, 485 (Iowa 1984), that application relates only to the parental consortium aspect. To allow the cause of action when the parent settled before Weitl permits double recovery, because the settlement with the father was made at a time when both parties operating under law that did not recognize independent consortium claim.

COMMENT: Does anybody have a road map?

Brunson v. Winter, 443 N.W.2d 717 (Iowa 1989)

Consortium.

Mrs. Brunson was involved in an automobile accident that resulted in an assessment of 40% against her and 60% against a defendant. The jury awarded no damages to Mr. Brunson, however, on his loss of consortium claim. Mr. Brunson was retired, had moved to Arizona before the accident for business purposes, and did not return to Iowa for his wife's surgery or during her convalescence. HELD: "[A] reasonable jury could have determined that his loss was insufficient to support a money award."

Woods v. Schmitt, 439 N.W.2d 855 (Iowa 1989)

Legal Malpractice.

This is the fifth of five Moser opinions. Woods purchased farm from Schmitts, who previously had sold the farm to another. Between the two sales, Schmitts' mortgage was foreclosed and Thorp purchased the farm at the sheriff's sale. Woods obtained title by

assignment of the sheriff's deed. The original vendees brought an action for specific performance and to quiet title and eventually prevailed.

Woods sued their own attorney, Johnson, for negligence in examination of the abstract of title to the farm. Plaintiffs claimed breach of contract as well as negligence. Trial court affirmed entry of judgment for contract damages that exceeded the jury verdict on the negligence count, which was reduced by 35% due to fault attributable to Woods. "[I]t was reasonably foreseeable that plaintiffs could be required to pay the rightful owner damages of rent for the use of the land. It was foreseeable that they might make improvements and not recover this expense. It also was foreseeable that they might be required to incur expenses in defending title to the real estate." COMMENT: It is not clear at all from the opinion why the negligence verdict amount and the contract verdict amount were different, other than the possibility of comparative fault.

Woods v. Schmitt, 439 N.W.2d 855 (Iowa 1989)

Farm Rent.

This is the fifth of five Moser opinions. Woods purchased farm from Schmitts, who previously had sold the farm to another. Between the two sales, Schmitts' mortgage was foreclosed and Thorp purchased the farm at the sheriff's sale. Woods obtained title by assignment of the sheriff's deed. The original vendees brought an action for specific performance and to quiet title and eventually prevailed.

In Woods' suit against several defendants for breach of warranty, plaintiffs sought damages incurred by paying rent. The rent paid was set forth in the damage instruction, but the jury awarded only a small portion of same. HELD: Instruction was not "an all-or-nothing" proposition. "[T]he jury should be allowed to take into account the evidence concerning [Woods'] use and income from the land for three years."

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Witte v. Vogt, 443 N.W.2d 715 (Iowa 1989)

Adequacy.

Plaintiff was struck from behind by defendant, who jury found was 100% at fault. Plaintiff's vehicle was knocked across highway and into ditch. Plaintiff was taken to hospital by ambulance for

emergency surgery due to internal bleeding. Plaintiff experienced severe abdominal pain and was in hypovolemic shock from excessive blood loss, which a surgeon testified was life-threatening. Plaintiff incurred $6,500.00 in medical expense, lost $4,500.00 in wages, and may have to undergo another surgery in the future.

The jury awarded plaintiff less than $1,000.00 over specials. The court held that this amount "bears no reasonable relationship to these elements of damages. . . . Considering [plaintiff's] injuries, the pain and suffering endured and likely to be endured, the permanency of the scar, and the chance of future medical problems and attendant costs, we think the jury in this case failed to properly evaluate these elements and thereby failed to do substantial justice."

EVIDENCE

Mermigis v. Service Master Industires Inc., 437 N.W.2d 242 (Iowa 1989)

Opinion Testimony.

Hospital employee suffered degenerative neurological damage when struck by a broken door. Although still employed by the hospital at the time of trial, a personnel officer testified that "she would soon be unable to perform at her position and would at that time lose her job." Several witnesses testified that her condition would render her unemployable in the near future. Plaintiff also adduced evidence of future costs and expenses of treatment. HELD: Without articulating the basis for defendant's objection that plaintiff's economist offered opinions that lacked foundation (other than to describe the objection as attacking the testimony as "based upon assumptions which were not supported by the record"), the court found no abusive discretion in permitting the testimony.

Farm-Fuel Products Corp. v. Grain Processing Corp., 429 N.W.2d 153 (Iowa 1988)

Opinion Testimony.

Principals of owner of ethanol distillery plant designed and constructed by ACR testified that when they negotiated with ACR, they believed they were actually negotiating with GPC. Plaintiff sued GPC on a theory of joint venture between ACR and GPC. HELD: Rule of Evidence 701, which provides for opinions by lay persons, permitted the testimony of the plaintiff's principals as to their opinions as to the identity of the persons with whom they were negotiating.

COMMENT: Plaintiff's witnesses were not claiming a misrepresentation by ACR's principals of their identities. The testimony was that they believed that they were negotiating with GPC, because ACR and GPC were, in their opinion, "one and the same." In contrast, the court found no error in the refusal to permit GPC to counter with opinion testimony by its president that there was no joint venture on plaintiff's project.

In re Estate of Dankbar, 430 N.W.2d 124 (Iowa 1988)

Opinion Testimony.

In will contest, lawyer expert testified regarding standards set by the canons and opined that the decedent's attorney (accused of undue influence in connection with the execution of the will being offered for probate) violated those standards. HELD: When an ethical canon does not set out a clear standard, expert testimony is admissible in order to interpret or clarify the standard of conduct. In addition, because the issue here was undue influence in a will contest as opposed to a legal malpractice action, expert testimony as to whether or not the standard was violated is admissible.

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United Central Bank v. Kruse, 439 N.W.2d 849 (Iowa 1989)

Opinion Testimony.

Kruse bought land on contract from Graham who borrowed the money from bank and ultimately assigned his interest in contract to bank as security. Graham defaulted on note and bank obtained a judgment against him. The bank notified Kruse, who then made payments directly to bank. Because Graham himself was purchasing

the land on contract, and because he was in default, the original seller served notice of forfeiture, to which Kruse responded by making some direct payments. Graham had assigned his interest in this contract to bank as well. Bank and Kruse negotiated a new arrangement whereby original seller was paid off, Kruse received title, and Kruse mortgaged property to bank with relatively early balloon payment. Kruse defaulted and bank commenced action for foreclosure. Kruse presented affirmative defenses and counterclaims on theories of fraudulent and negligent misrepresentation and tortious interference with contractual relationship. The misrepresentation claims were premised on allegations that the bank made false legal representations to Kruse as to the effect of the judgment against Graham on the property and as to the effect of Kruse's direct payments to the original seller.

At trial, Kruse sought to adduce expert testimony that the bank's statements of law were incorrect or false. The trial court refused the offer and instead instructed the jury as to the controlling legal principles, leaving to the jury to decide whether or a misrepresentation had occurred, based upon the instructions.

The Court reversed on other grounds, so this portion of the opinion was advisory. The Court likened this situation to the "case within a case" problem of a legal malpractice case where "it may be an issue of fact as to whether a lawyer's assessment of a legal proposition is correct. Arguably, the issue of the bank's misrepresentation of legal rights in the present case is presented within such a 'case within a case' context." The Court concluded that the expert testimony would have been admissible, but also found no abuse of discretion in precluding it. The use of instructions instead of permitting the expert testimony "was a permissible course of action and did not prejudice the Kruses' rights."

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COMMENT: The Court's opinion about the use of instructions instead of expert testimony assumes that the court's version of the law is the same as the expert's. What if it is not? In other words, what happens if the court rejects the proffered expert testimony during the trial and then the parties and the court cannot agree later in the trial as to how the instruction should read?

State v. Tonn, 441 N.W.2d 403 (Iowa App. 1989)

Opinion Testimony.

In a sexual abuse case, the court of appeals found no abuse of discretion in permitting expert testimony that children who are

victimized by sexual abuse take longer to report it than an adult would expect, because of their immaturity, lack of sophistication, and interaction with the abuser. "[T]he Iowa court has determined experts should not be allowed to give an opinion on matters that directly render an opinion on the credibility or truthfulness of the witness. But experts are generally allowed to express opinions on matters that explain relevant mental and physical symptoms present in sexually abused children. There is a fine but essential line between an opinion that is helpful to the jury and an opinion that merely conveys a conclusion concerning defendant's guilt."

Springer v. Weeks & Leo Co., 429 N.W.2d 558 (Iowa 1988)

Relevancy.

After employee at will who had allegedly suffered a work-related injury returned to work, she was discharged. Employee sued employer for wrongful discharge. At trial, employee adduced evidence from which jury could find that discharge was in retaliation for her exercise of statutory rights to compensation for work-related injuries. Trial court refused to permit employee to introduce letter written by employer's attorney to employee's attorney six days after termination, in which counsel for the employer said:

> "[I]f Mary now believes her injury was not caused by her job, the company would be willing to review this situation. Of course, she would have to return the money she's received from the insurance company."

Employer's objection was that the letter was irrelevant because it occurred after the termination. Employer also objected to post-discharge letters by employee's physicians to the effect that the injury was work-related.

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HELD: Letter by attorney is not irrelevant simply because it was written after termination. "Correspondence written after the happening of an event may be illuminating as to motives which prompted that event." Court declined to express an opinion "as to other objections that might be available" to the attorney's letter. The court also declined to express opinion as to admissibility of physician's letters, because trial ended (by directed verdict) before employer gave any reason for terminating employee. Unless and until employer claims that employee was terminated for misrepresenting the cause of her injury, the physician's letters are not relevant.

Farm-Fuel Products Corp. v. Grain Processing Corp., 429 N.W.2d 153 (Iowa 1988)

Relevancy.

In action by owner of ethanol distillery plant against designers for negligence and breach of warranty, plaintiff introduced into evidence a letter from plaintiff to defendant, written after the litigation, in which plaintiff said, "I am writing in an attempt to find a workable solution to avoid further court action in relation to our ethanol processing plant." Letter continued with a recap of the events leading to the contract and construction, and with a summary of the problems that followed.

HELD: Letter did not violate Rule of Evidence 408 regarding prohibition of evidence of compromise or settlement. "Although the language . . . could be construed as an offer to settle, it does not say so. . . . Of course, this statement could not be construed as an admission of liability, as we find in most settlement offers, because it was sent by the plaintiff--not the defendant.

COMMENT: In other words, plaintiffs can introduce a "Won't you please settle, so we don't have to sue?" letter with impunity.

Rattenborg v. Montgomery Elevator Co., 438 N.W.2d 602 (Iowa App. 1989)

Relevancy.

Non-settling defendant attempted to read into the record the allegations from plaintiffs' petition against the settling defendant, presumably for jury effect. HELD: "Since the non-settling defendant was permitted to introduce evidence of the settling defendant's negligence, the non-settling defendant has not shown it was prejudiced." COMMENT: Does this mean that it was error, albeit harmless?

Cook v. State, 431 N.W.2d 800 (Iowa 1988)

Similar Accidents.

Injured motorist who blew stop sign at intersection of two state highways sued state for improper placement of "stop ahead" signs. Plaintiff adduced testimony by school bus driver who passed through intersection more than once a day. Driver had observed that the barrel-mounted stop sign had been moved across the highway

from one side of the intersection to the other 8 to 10 times a year, that she had seen skid marks leading up to and through the normal position of the sign, and that she had notified the county of the movement of the barrel. HELD: Because the state apparently conceded that this testimony constituted evidence of prior accidents (as opposed to vandalism), the court found a sufficient foundational showing of similar circumstances. COMMENT: The court expressed some doubt as to whether the evidence related to prior accidents or simply related to notice of an allegedly dangerous condition. "[P]roof of similarity may be more relaxed when the offer is confined to notice."

Rattenborg v. Montgomery Elevator Co., 438 N.W.2d 602 (Iowa App. 1989)

Similar Accidents.

In lawsuit by shopping mall patron against escalator manufacturer for injuries suffered when patron's shoe became stuck in escalator and she was injured while trying to retrieve it, plaintiff adduced evidence of two subsequent accidents involving the same escalator. In one accident a shoe was caught in a comb plate on the left side of the escalator step. In another accident, a patron caught a sneaker on the left side of the escalator, and her toe was pinched between two leveling plates. In both instances the escalator did not shut down.

No abuse of discretion in admitting evidence of the two accidents. Plaintiff's claim was that the escalator was defective because of the failure of a comb plate safety device to automatically shut the escalator down when a shoe becomes jammed in the escalator. Any differences between these two accidents and plaintiff's go to weight rather than admissibility.

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Godbersen v. Miller, 439 N.W.2d 206 (Iowa 1989)

Similar Accidents.

Plaintiffs sued defendant for negligence and assault and battery in connection with a car-pedestrian accident. The evidence afforded a jury finding of either reckless driving or intentional acts. At trial, plaintiff adduced evidence a 10-year-old incident in which defendant intentionally rammed a police car. HELD: No abuse of discretion in admitting the evidence of the prior incident. Defendant attempted to give an innocuous explanation for his driving toward plaintiff. "A reasonable person could find

[defendant's] stated reason for driving towards [plaintiff] less probable with evidence of the prior incident than without it." As such, the evidence is relevant. Because defendant admitted chasing plaintiff with his car (but not for the purpose of striking him), the prejudicial impact of the earlier incident is outweighed by the probative value as to the issue of intent. "We perceive nothing about the lapse of 8 years that would minimize the connection between [defendant's] inclination to run people down in 1979 and his intent to do so today. Moreover, the pattern of intoxication, anger, and the vehicular assault is strikingly similar in both instances."

Cook v. State, 431 N.W.2d 800 (Iowa 1988)

Hearsay.

Plaintiff retained human-factors expert witness residing in California. Defendant deposed expert before trial. Plaintiff offered transcript of deposition at trial, as opposed to calling expert to testify live. HELD: Transcript was admissible. Rule of Civil Procedure 144(c) "create[s] its own exception to the hearsay rule" in civil litigation. The reference in rule 144 to admissibility under the rules of evidence "refers only to the other applicable rules of evidence but does not refer to an overall hearsay objection to the entire deposition."

COMMENT: At the time of this case, rule 144(c) provided:

> Any part of a deposition, so far as admissible under the rules of evidence, may be used . . .
>
> (c) For any purpose, if the court finds . . . that deponent is out of the state or more than 100 miles distant from the trial and such absence was not procured by the offeror . . . .

If the state argued that 144(c) should not be applied to an out-of-state expert witness retained by the offering party, who presumably paid the expert for his opinions and therefore presumably could pay for the expert's attendance at trial, the court did not mention it. This opinion may reflect court's view that the new interrogatory-answer requirement in rule 125 ought to limit or eliminate the need for depositions of experts, such that a litigant who wants to take a deposition of an expert is fairly assessed with the risk that it will be used in lieu of live testimony. See new rule 144(d).

Higgins v. Gordon Jewelry Corp., 433 N.W.2d 306 (Iowa App. 1988)

Hearsay.

In suit by wrongfully terminated retail store cashier for defamation, cashier was permitted to adduce testimony by persons other than the declarant as to statements made by other supervisory and non-supervisory employees about the reasons for the cashier's termination. HELD: Because the statements were offered to prove only that the statements had been made, as opposed to proving the truth of the assertions, the testimony was not hearsay. COMMENT: Court cautions "that evidence of repetition by others of the slander . . . without defendant's authority or request . . . is inadmissible . . . . Those who repeat slanderous statements make themselves liable therefore and such repetition cannot be considered a necessary or probable consequence of the original slander."

Echols v. State, 440 N.W.2d 402 (Iowa App. 1989)

Parol Evidence.

Commerce commission made written offer of employment to Echols, which he accepted and which provided: "We will also pay your moving expenses." HELD: State's moving expense policy is admissible as extrinsic evidence on the issue of what the parties meant by the use of the words "moving expenses."

PCA v. Ryan, 441 N.W.2d 379 (Iowa App. 1989)

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Settlement.

PCA and Ryan reached agreement whereby PCA would not foreclose if Ryan obtained additional financing so as to reduce his obligation to PCA and if he were to obtain a deed from his father covering additional land so that PCA could take a first mortgage on the additional land. Ryan obtained the deed, but his effort to obtain additional financing failed, and PCA filed a foreclosure action, to which a consent judgment was entered.

During the trial of Ryan's counterclaim for fraudulent misrepresentation, Ryan testified that he thought that lawyers Condon & Peavey were representing his interests. The lawyers testified that they were representing PCA in the transaction. Ryan sought to introduce evidence that Ryan's father had made a claim of legal malpractice against the same lawyers in connection with

his execution of the warranty deed to his son, which Ryan testified he obtained upon the advice of the lawyers so that PCA could take a first position on the additional collateral. Ryan also sought to introduce testimony that the lawyers settled that claim by his father. The court of appeals held that there was no abuse of discretion in refusing to admit the evidence. "Iowa rule of evidence 408 excludes evidence of compromise and offers to compromise if the evidence is to be used to prove liability."

FAMILY LAW

In re Marriage of Stogdill, 428 N.W.2d 667 (Iowa 1988)

Common-Law Marriage.

Pregnant woman's petition for dissolution of marriage alleged common-law marriage. HELD: After district court found no common-law marriage, it retains equity jurisdiction to determine paternity and to provide for support.

In re Marriage of Baculis, 430 N.W.2d 399 (Iowa 1988)

Interest.

Statute providing for prejudgment interest does not apply to property distribution award in dissolution decree.

In re Marriage of Berger, 431 N.W.2d 387 (Iowa App. 1988)

Property Division.

District court required medical resident to pay spouse $100,000 to account for his medical degree, earned while the parties were married. The court of appeals deleted the property settlement, because the value of the resident's medical degree was not yet certain. The uncertainty was due to the resident's expressed intention to engage in research as opposed to practice, with a corresponding limitation on his financial expectations. The

court provided that if he were to change his mind, "such facts would be a change in the circumstances considered by this court in determining the rate of alimony."

COMMENT: Compare this decision with In re Marriage of Wagner, 435 N.W.2d 372 (Iowa App. 1988), which approves $25,000 property settlement award to a wife who supported her family while her husband attended medical school, obtaining a degree just three months after the separation.

In re Marriage of Howell, 434 N.W.2d 629 (Iowa 1989)

Property Division.

Military pension should be treated as a marital asset. Non-military spouse is entitled to one-half of the pension times the ratio of the years spent in the military while married to the total years spent in the military.

In re Marriage of Martin, 436 N.W.2d 374 (Iowa App. 1988)

Property Division.

The value of growing crops may be considered in determining the assets of the marriage in dissolution, even though they are only an expectancy.

In re Marriage of Muelhaupt, 439 N.W.2d 656 (Iowa 1989)

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Property Division.

Stock representing a minority interest in a closely held corporation should be discounted once because it is minority stock and again because there is no ready market for selling it.

In re Marriage of Boehlje, 443 N.W.2d 81 (Iowa App. 1989)

Property Division.

Wife received substantial inheritance during marriage. HELD: Husband's acceptance of the responsibility for investment, management, and growth of money inherited by spouse does not

entitle him to division of inherited property at time of dissolution. "His investment activity was a courtesy service expected to be given by a marriage partner without acquiring a right of co-ownership."

In re Marriage of Mott, 444 N.W.2d 507 (Iowa App. 1989)

Property Division.

Pension benefits should be divided in accordance with its value as of the date of the dissolution and by use of a ratio determined by the length of the marriage over the length of the employment.

In re Marriage of Sjulin, 431 N.W.2d 773 (Iowa 1988)

Modification.

A dissolution degree that purports to retain jurisdiction to review the award of alimony after the passage of time but does not expressly provide that review can occur "without proof of a change of circumstances" does not adjudicate away the traditional burden imposed on a dissolution party who seeks modification.

In re Marriage of Downing, 432 N.W.2d 692 (Iowa 1988)

Modification.

Interference with former spouse's relationship with minor children constitutes a substantial change in circumstances for purposes of modification.

In re Marriage of Shepherd, 429 N.W.2d 145 (Iowa 1988)

Support.

Court reaffirms its previous refusals to permit retroactive decreases in support payments by modification of dissolution decree, and expressly overrules In re Marriage of Olive, 340 N.W.2d 792 (Iowa App. 1983).

In re Estate of Jones, 434 N.W.2d 130 (Iowa App. 1988)

Support.

Dissolution decree language that requires one spouse to pay the other alimony "until such time as [the other] dies or remarries" is not sufficient to extend the support obligation beyond the death of the paying spouse. The Court requires language that clearly and unambiguously evidences an obligation that "continues."

In re Marriage of Wegner, 434 N.W.2d 397 (Iowa 1988)

Support.

Wife worked at packing plant for 10 years. When she quit, she was making $10.00 an hour. She contended that she quit in an effort toward reconciliation. Husband contended that she had quit pursuant to a long-standing plan to work only long enough (10 years) to cause the retirement benefits to vest. At the time of the dissolution, the wife was earning only $3.65 an hour from other "lighter" employment. By a 5-4 vote, the court determined the husband's support obligation by considering, in large part, the wife's earning capacity as opposed to actual earnings.

COMMENT: The vigorous dissent ("Although I do so with great respect I vehemently protest the harsh manner in which the majority treats this appellee.") makes two points. The first relates to the unfairness of punishing the wife for working only so long at a physically demanding job as she and her husband ever intended. The second relates to the danger of over-exercising de novo review:

> [W]e have heretofore accorded more than passing deference to trial court findings, especially in matters in property division, awards, and allowances.
>
> This deference was grounded in wise public policy. These determinations are more apt to be just when the objective facts are squared with the judge's subjective impressions, gained from close personal observations. One who personally observes holds a clear advantage over us who learn the case from a cold record. The first-hand observer can translate that advantage into a more just disposition. It is not in the public interest for appellate courts to strain to seek out fine-tune adjustments in these matters. More litigants are harmed than helped when we fail to give real weight to trial court findings. This is because litigants will feel we have

been too enthusiastic in inviting them to seek review. They will do so because of our demonstrated proclivities to intermental unduly in matters which at the bottom are judgment calls. The total cost to the parties - and the public - of this increased appellate activity is appalling.

On those rare occasions when defense lawyers need ammunition for tempering the court's review of the trial court's findings, this language should help.

In re Marriage of Huss, 438 N.W.2d 860 (Iowa App. 1989)

Support.

Dissolution decree provided that child support was "to continue as long as the requirements of section 598.1(2) are met. Parties' child enrolled in college but carried three hours less than requirement for a full-time student. In the second semester, she qualified as a full-time student. During the first semester, she participated in an internship in the subject matter of her chosen future career. HELD: Child was a full-time student within the meaning of 598.1(2).

In re Marriage of Muelhaupt, 439 N.W.2d 656 (Iowa 1989)

Support.

Language terminating the spousal support obligation upon cohabitation "for any period in excess of two hours in any twenty-four hour period that cannot be shown to be purely social in plan, conduct, origin, and intent," is unreasonably restrictive and is stricken.

In re Marriage of Richards, 439 N.W.2d 876 (Iowa App. 1989)

Support.

Where spouses' respective financial resources were limited, decree should limit their obligation to pay for college expenses to the cost of attending a state-sponsored university in the children's state of residence.

In re Marriage of Francis, 442 N.W.2d 59 (Iowa 1989)

Support.

Marriage ended after husband obtained medical degree and while he was in residency program. Trial court awarded wife $100,000 lump-sum property award payable with interest in 10 annual installments, along with three-year rehabilitative alimony totalling $54,000. The supreme court modified the degree so as to render the $100,000 "reimbursement alimony" that is not subject to modification and by reducing the rehabilitative alimony by one year and increasing the amount to $1,000 per month. COMMENT: "[A]limony carries tax benefits to the payor and assurance to the payee that the award will not be discharged in bankruptcy."

In re Marriage of Pfeffer, 443 N.W.2d 92 (Iowa App. 1989)

Support.

Eight percent annual increase in child support obligation "to compensate for inflation and the increased expense of raising children as they become older" was not warranted by the record.

Sieren v. Bauman, 436 N.W.2d 43 (Iowa 1989)

Dissolution Decree.

In dissolution degree, Susan executed promissory note for $2,500 in favor of Martin, and Susan was awarded certain property. Susan defaulted on the note, and Martin sued. Susan counterclaimed, alleging Martin did not give her the property awarded to her in the dissolution degree. Trial court entered judgment in favor of both parties on portions of their claims. HELD: Trial court had jurisdiction to adjudicate merits of Susan's counterclaim, even if it required him to interpret the terms of the dissolution degree as it related to her claim that Martin had converted property awarded to her. Martin's claim that Susan's only remedy was to initiate further proceedings in the dissolution was without merit.

In re Estate of Lau, 442 N.W.2d 109 (Iowa 1989)

Judgment Lien.

Liens for property settlement and back child support are superior to and have priority over costs of administration and burial expense in former spouse's estate.

GOVERNMENT

Stennett Elevator, Inc. v. State, 430 N.W.2d 122 (Iowa 1988)

Duty.

Commerce commission suspended grain dealer and warehouse licenses issued to plaintiff elevator, who then went out of business. HELD: Because statutory duties of inspection and audit were enacted for the protection of customers, State does not owe actionable duty of care to licensees. "An intent to protect a particular party is a prerequisite to a claim of negligence based on violations of a statute."

Sheerin v. State, 434 N.W.2d 633 (Iowa 1989)

Duty.

State's decision to parole prison inmate is a discretionary function and does not give rise to liability under chapter 25A. Claim of negligent supervision of parolee constitutes criticism of the terms and conditions of parole, which likewise comes within discretionary function. Duty to warn requirement of Anthony, 374 N.W.2d 662, 669 (Iowa 1985), that requires "existence of a prior threat to a specific identifiable victim," is reaffirmed.

City of Des Moines v. Iowa District Court, 431 N.W.2d 764 (Iowa 1988)

Parking Tickets.

A "court-appearance-date" parking ticket, which takes on the look of a legal proceeding and purports to invoke the court's jurisdiction on an appearance date specified in the citation, requires the municipality to file the necessary charging documents before the specified appearance date.

Cook v. State, 431 N.W.2d 800 (Iowa 1988)

Sovereign Immunity.

In action by injured motorist who blew stop sign at intersection of two state highways, court held that state's location of a "stop ahead" sign and failure to place an identical sign on the left-hand side of the road as well were not conduct immunized by subsections 8 or 9 of section 25A.14. Those subsections retain immunity generally against claims for negligent design or specification or negligent construction or reconstruction of a highway that was constructed or reconstructed in accordance with a generally recognized engineering or safety standard, criteria, or design theory in existence at the time. "[P]laintiff does not assert that the State failed to upgrade or make improvements. Rather, he claims the placement of the signs was unreasonable and constituted negligent conduct. This conduct simply does not fall within the ambit of subsections 8 and 9."

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Scott v. State, 438 N.W.2d 834 (Iowa 1989)

Subrogation.

Parents of severely injured child, who received $250,000.00 in state medical assistance benefits, settled with all defendants for the total of their insurance limits: $625,000. The settlement agreement specified that only $88,750 of the settlement was for past medical expenses. The agreement also provided that a jury might have returned a verdict in excess of $1.8 million. An attorney representing the Department of Human Services participated in the settlement negotiations.

HELD: State's subrogation rights to settlement proceeds are determined by the agreement's allocation of proceeds toward medical

expenses and the formula provided in section 249A.6(4) ($88,750.00 minus attorney fee and pro-rata share of expenses and minus 1/3 to be paid to parents). State had the right to commence litigation on its own as opposed to rely upon the parents' litigation. Absence of department's written consent to the settlement does not permit state to recover more from the settlement. Section 249A.6(1) "merely preserves the department's right . . . to proceed directly against the tort feasor."

COMMENT: "We do not suggest that settling plaintiffs may ride roughshod over the department's rights of subrogation through collusion or by assigning unreasonable allocations to the medical share of settlements. It is significant that the department here was fully apprised of the settlement and that the settlement provided for court approval [which was obtained]."

Brumage v. Woodsmall, 444 N.W.2d 68 (Iowa 1989)

Tort Claims.

Plaintiffs held kennel license at Council Bluffs dog track. Kennel was closed by board of stewards on charges of race fixing, but state racing commission eventually cleared plaintiffs of all charges. Nevertheless, the board of stewards terminated plaintiffs' contract and retained another kennel. Plaintiff sued the state, the commission, the board, and individual board members for intentional interference, abuse of process, malicious prosecution, intentional infliction of emotional distress, libel and slander, negligent investigation, violation of plaintiffs' civil rights, and interference with prospective business relations. Plaintiffs did not file a claim with the state appeal board. The district court held that the board and commission were exempt from suit because they were state agencies. The district court held that the state was immune except as to the emotional distress, negligence, and civil rights claims. The state and individual board members appealed.

HELD: Because plaintiffs never contended that the actions of the board members were "beyond the scope of the stewards' employment . . . [or] outside their capacity as stewards," the claims are governed by chapter 25A. Because plaintiffs did not comply with the exhaustion requirements of section 25A.5, and with the exception of the civil rights claim, the district court should have dismissed all of plaintiffs' claims.

Swanger v. State, _____ N.W.2d _____ (Iowa, August 16, 1989)

Tort Claims.

Swanger was injured in accident involving state vehicle. State was insured on this accident, and it reported the accident to the insurer, who hired an adjuster to investigate. Swanger filed tort claim with the state appeal board, but withdrew the claim and filed suit before six months had elapsed and before the board had acted on the claim. Suit was filed longer than six months, however, after the adjuster first contacted Swanger.

Section 25A.20 provides:

> Whenever a claim or suit against the state is covered by liability insurance, the provisions of the . . . policy on defense and settlement shall be applicable notwithstanding any inconsistent provisions of this chapter.

The insurance policy provided:

> [Insurer] will not use, either in the adjustment of claims or in the defense of suits against the insured, the immunity of the insured by reason of its governmental corporate nature from tort liability.

HELD: State's purchase of insurance with "waiver" language does not constitute an abrogation of chapter 25A or a waiver of the state's right to insist that Swanger comply with the appeal-board exhaustion requirement prior to initiating litigation. The "defense and settlement" language in section 25A.20 was intended to permit the state's insurers to adjust and settle claims without following the procedures normally imposed upon the appeal board. Presentation of claims to the adjuster does not constitute filing of claims with the appeal board for purposes of triggering the six-month waiting period before suit is permissible.

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INDEMNITY

Folkers v. Southwest Leasing, 431 N.W.2d 177 (Iowa App. 1988)

Southwest, a partnership composed of Herman and Gray, sold land. Southwest then was incorporated, and its assets were transferred to the corporation. Herman then bought out Gray pursuant to stock redemption agreement, which provided indemnity by Herman and Southwest for Gray as to "any Company debt." HELD: Judgment against Southwest as seller for rescission of land contract and damages is a debt against which Gray was to be indemnified.

Daugherty v. Ankeny Construction Co., 433 N.W.2d 742 (Iowa 1988)

Dry-wall subcontractor's wife, who was on site to help husband work, fell at job site. She sued dry wall contractor (Naughton) and general contractor (Ankeny). Their claims against each other for contribution/indemnity were severed for trial. Naughton obtained a directed verdict. Jury put 2/3 of fault on Ankeny and 1/3 on wife. HELD: Even though a stipulated severance motion provided that the defendants had agreed to reserve litigation of cross-claims, the issue of Naughton's negligence to plaintiff was adjudicated in the first trial. A contractual obligation of Naughton to indemnify Ankeny is prefaced on Naughton being negligent, which was negated as a matter of law.

Smart-Way Truckin, Inc. v. Cota Industries Inc., 439 N.W.2d 162 (Iowa 1988)

Smart-Way contracted with Cota to transport Cota's products from Iowa to Ohio. Smart-Way leased transporting equipment from Equity. Jury found that driver Passmore became an employee of Smart-Way. HELD: Trial court's finding that Passmore was an employee of Smart-Way precludes Smart-Way's claim for indemnity from equity. There was no evidence that Equity's equipment malfunctioned. COMMENT: Although the opinion is silent on any detail, there must have been some factual basis, insubstantial or otherwise, for a claim that Passmore had some relationship with Equity.

American Trust and Savings Bank v. United States Fidelity and Guaranty Co., 439 N.W.2d 188 (Iowa 1989)

Indemnity based on active-passive negligence is inconsistent with comparative fault and did not survive the enactment of chapter 668.

INSURANCE

Opheim v. American Interinsurance Exchange, 430 N.W.2d 118 (Iowa 1988)

Preclusion.

Declaratory judgment proceeding between insurer and insured was held to be preclusive against personal-injury plaintiff, even though he was not made a party, because his and insured's interests in obtaining coverage were sufficiently connected. The test is whether the non-mutual party against whom preclusion is sought "has a community of interest with, and adequate representation by, the losing party in the first action."

COMMENT: Decision is not a per se rule and must be applied on case-by-case basis. "Although we can envision cases in which the intensity of the insured's interest in securing coverage is insufficient to say he has adequately represented the injured person's similar interest as well as his own, this is not such a case." The only facts relied upon by court in this case, however, were that the insured had retained counsel and had presented a vigorous defense.

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State v. Iowa National Mutual Insurance Co., 430 N.W.2d 420 (Iowa 1988)

Insolvency.

Senior executives' claims against insolvent insurer for deferred compensation benefits are general creditors and are not to be given priority treatment under section granting priority to claims under life insurance and annuity policies.

City of Marion v. National Casualty Co., 431 N.W.2d 370 (Iowa 1988)

Claims Made.

City fired and suspended police officers in 1981 and 1982 as a result of labor dispute. Officers instituted appellate proceedings and city and officers negotiated various temporary agreements in an effort to settle the entire dispute. Several agreements were executed in which the city waived the statute of limitations in return for the officers' postponement of filing litigation. Negotiations ultimately were unsuccessful, the appeals by the officers were successful, and they sued the city and obtained a settlement. The city sought indemnity from its various claims-made policies. City eventually settled with all insurers except National. National had issued a policy that covered 1985, which included the date on which the officers' appeals were finally resolved. The policy did not define "claims first made." HELD: Officers had made claims long before the effective date of National's policy. Fact that claims may not have "ripened" until final resolution of the appellate proceedings was irrelevant for purposes of determining coverage.

Dolan v. Aid Insurance Co., 431 N.W.2d 790 (Iowa 1988)

First-Party Bad Faith.

Even though the facts again failed to state a claim upon which relief could be granted, the court finally yielded to temptation and announced its recognition of a cause of action for first-party bad faith. The rationale for describing it before the court actually sees it was to provide guidance to the trial courts and to respond to the recurring issue. Although the court had repeatedly referred to the Anderson test, 85 W.2d 675, 271 N.W.2d 368 (1978), the court's recognition of the cause of action was not accompanied by proclamation of any test other than that previously adopted from Anderson:

> To show a claim for bad faith, a plaintiff must show the absence of a reasonable basis for denying benefits of the policy and defendant's knowledge or reckless disregard of the lack of a reasonable basis for denying the claim.

The court repeated that the standard was objective, that the tort is intentional, and that the insurer's investigation and evaluation of the claim were relevant inquiries. The court also reaffirmed its statements about punitive damages in Pirkl,348 N.W.2d 633, 636 (Iowa 1984).

Four justices concurred, without opinion, only in the result.

Hinners v. Pekin Insurance Co., 431 N.W.2d 345 (Iowa 1988)

Uninsured Motorist.

Insured's married daughter, living at home when her husband was injured in a motor vehicle accident with an uninsured motorist, sought uninsured motorist coverage from father's policy. Policy excluded coverage for husband because he was not a household member. HELD: Statute mandates coverage for damage suffered by covered person because of bodily injury to another, even when the injured person is not covered.

The Travellers v. Mays, 434 N.W.2d 133 (Iowa App. 1988)

Uninsured Motorist.

Primary auto liability policy provided $500,000 of uninsured motorist coverage. Standard umbrella policy provided $20 million in coverage limits, but did not mention uninsured motorist coverage. Injured parties entitled to collect under the uninsured motorist coverage in the primary policy sought to recover under the umbrella policy. HELD: Because the parties agreed that the named insured was not at fault in the accident, the umbrella policy, which agrees only "to indemnify the insured for all sums which the insured shall be obligated to pay by reason of liability," does not provide uninsured motorist coverage.

COMMENT: Court of appeals expressly declined to decide whether umbrella insurance ever provides uninsured motorist coverage when the underlying policy provides such coverage.

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Moritz v. Farm Bureau Mutual Insurance Co., 434 N.W.2d 624 (Iowa 1989)

Uninsured Motorist.

Passenger sued insurer of vehicle for uninsured motorist coverage when passenger was injured as a result of vehicle being forced off road by unknown vehicle and unidentified driver. HELD: Uninsured motorist statute as construed by Rohret, 276 N.W.2d 418 (Iowa 1979), requires physical contact between hit-and-run vehicle and insured vehicle in order to trigger uninsured motorist

coverage. Language in policy is not ambiguous and does not give rise to reasonable-expectations argument for expansion of coverage. Statutory requirement of physical contact does not violate equal protection.

Poehls v. Guaranty National Insurance Co., 436 N.W.2d 62 (Iowa 1989)

Underinsured Motorist.

Plaintiff was passenger in Burmeister's vehicle when it was involved in a 1-car accident. Guaranty's liability policy provided $20,000 liability coverage, $1,000 medical pay coverage, and $25,000 under-insured motorist coverage. The underinsured motorist endorsement provided that benefits would be reduced by payments made under the liability and medical pay coverages in the policy. Parties agreed that plaintiff was an insured person under the policy and that her damages were well in excess of $50,000.

Guaranty's position was that plaintiff was entitled to the $20,000 liability limits, the $1,000 med pay limits, but only $4,000 of the under-insured motorist coverage because of the deductions for the other payments. Plaintiff sought the limits of all three coverages, for a total of $46,000.

HELD: Although the court is committed to the "broad view" of underinsured motorist coverage, see Tollari, 362 N.W.2d 519 (Iowa 1985); McClure, 424 N.W.2d 448 (Iowa 1988), plaintiff's claim was inconsistent with section 517A.2, which permits an insurer to write exclusions and limitations into underinsured coverage that are designed to avoid duplication of insurance or other benefits. Plaintiff's interpretation in essence would convert Burmeister's underinsured motorist coverage into excess liability coverage, "a risk neither paid for by Burmeister nor contemplated by the contract of insurance."

In re Estate of Rucker, 442 N.W.2d 113 (Iowa 1989)

Underinsured Motorist.

Claimant settled liability claim with insurer who had $100,000 limits by accepting a structured settlement that, with up-front money, was valued at $85,000. Claimant's own policy provided $20,000 of underinsured motorist coverage. Claimant notified his insurer of the settlement offer and his intent to accept. His insurer notified claimant of his policy's requirement of full

exhaustion of the liability policy as a condition precedent to payment under the underinsured motorist coverage. Claimant accepted the settlement offer, sought underinsured benefits, and was denied them.

HELD: Underinsured motorist language that requires exhaustion of liability policy limits as a condition to payment of underinsured benefits "violates public policy and will not be enforced." For purposes of determining what portion of the underinsured benefits are necessary to compensate the insured for his damages, settlement below limits shall be construed to be a settlement for the liability limits. In other words, the insured may recover only the difference between the liability limit and the damages suffered, and then only up to the amount of the underinsured limit.

COMMENT: 6-3.

Moncivais v. Farm Bureau Mutual Insurance Co., 430 N.W.2d 438 (Iowa 1988)

Coverage.

Business-pursuit exclusion in homeowner's policy applied to insured's baby-sitting activities carried on in her home. Exemption to exclusion for activities "which are ordinarily incident to non-business pursuits," does not apply to activities "central to home day-care."

Becker v. Central States Health and Life Co., 431 N.W.2d 354 (Iowa 1988)

M

Coverage.

Health insurance policy provided that benefits were "payable on an 'expense incurred' basis. 'Expenses incurred' refers to those charges for which you are legally obligated to pay for in the absence of insurance." . . . Expense is considered incurred on the date treatment is provided while this policy is in force. Insured incurred brain-stem encephalitis and died, but not after incurring more than a million dollars in medical bills. Insurer refused to pay on grounds of pre-existing condition. Insured's family sought government assistance in the form of Medicaid, and the health providers eventually accepted less than half of the amount of bills

as full payment. Insured's estate sued for specific performance, and insurer did not appeal adverse findings on the issue of pre-existing condition.

HELD: Policy language is an agreement to pay rather than to indemnify, and benefits were triggered by the incursion of the expense. Discharge of those obligations by Medicaid is irrelevant and should not be used by the insurer to its advantage, when insurer improperly withheld benefits in the first place. Also, Medicaid is not "insurance" as that term is used in the policy language.

Grinnell Mutual Reinsurance Co. v. Voeltz, 431 N.W.2d 783 (Iowa 1988)

Coverage.

"Young married couple," still in their teens, made their first purchase of homeowner's liability insurance for a mobile home. Wife had been baby-sitting her niece and nephew and disclosed this to the agent when he asked her occupation. Agent did not disclose that insurer considered activities such as baby-sitting to fall within the business-pursuit exclusion, so long as the activity resulted in annual gross receipts in excess of $1,000. Infant was scalded while in insured's care. Suit against the insureds resulted in a tender of defense, which was denied, and this declaratory judgment action by the insurer.

The court apparently could have determined the matter on the insured's gross receipts from baby-sitting, because they did not exceed $1,000 in the year of the accident. Nevertheless, the court proceeded to affirm "the district court's interpretation that the business pursuit exclusion was ambiguous," which was resolved in favor of the insureds' reasonable expectations of coverage.

COMMENT: Moncivais was distinguished on the scope of the insured's business.

Krueger v. Iowa Rails to Trails, Inc., 435 N.W.2d 391 (Iowa App. 1988)

Coverage.

Krueger was an employee of Iowa Rails to Trails (IRTT), a volunteer organization providing labor for construction of the Cedar Valley Nature Trail. Krueger sustained a serious injury that

arose out of and in the course of his employment. IRTT did not have workers' compensation insurance. Krueger sued IRTT, Linn County, and the County Conservation Board for damages. Krueger added the county's general liability insurer in a declaratory judgment count that sought declaration that the insurer covered his accident.

At trial, the jury found plaintiff 50% at fault, IRTT 10%, county 20%, and the board 20%. IRTT was judgment proof. The trial court held that the general liability policy did not provide coverage, because the jury verdict established that Krueger was an employee of IRTT (which was preclusive in the declaratory judgment proceeding), because the insurance policy excluded coverage for bodily injury to an employee of an insured, and because IRTT was an insured under the policy.

Court of appeals held that the jury verdict in the tort action was preclusive and determined for the declaratory judgment proceeding that Krueger was an IRTT employee. The fact that IRTT is a volunteer organization of Linn County does not make Krueger, who received remuneration from IRTT for his services, was a volunteer of the county. The existence of workers' compensation coverage is not a condition precedent to the invocation of the employee exclusion clause in the general liability policy.

Midwest Office Technology, Inc. v. American Alliance Insurance Co., 437 N.W.2d 555 (Iowa 1989)

Coverage.

Midwest purchased a business-protection insurance policy with inventory-loss coverage up to $600,000. Midwest's inventory fluctuated, so it selected a policy that provided coverage corresponding to the amount of reported inventory. Premiums were determined from the inventory reports, which were to be made by Midwest on a monthly basis. Coverage clause provided that if at the time of the loss Midwest had failed to report, "this policy . . . shall cover . . . for not more than the amounts included in the last report . . . filed prior to the loss."

Midwest filed reports, but did not comply with the monthly requirement. Midwest had a fire and inventory valued at over $600,000 was lost. The insurer agreed to pay only the amount of Midwest's most recent report.

Section 515.101 provides:

> Any condition . . . in [a] . . . policy, . . . making the policy void before the loss occurs, shall not prevent recovery thereon by the insured, if it shall be shown . . . that the failure to observe such provision or the violation thereof did not contribute to the loss.

The parties agreed that the failure to report inventory "did not contribute to the loss." The court held, however, that the policy language merely describes the limits of coverage rather than abrogating the policy or depriving the insured of coverage.

Northwestern National Insurance Co. v. Kinney, 444 N.W.2d 107 (Iowa App. 1989)

Coverage.

Kinney owned and operated a mobile home park and purchased general liability insurance from plaintiff. Kinney sold park to purchaser who later discovered that the private water supply was contaminated. Purchaser sued Kinney for breach of express warranty, fraudulent concealment, and fraudulent misrepresentation. Kinney tendered defense to plaintiff, who defended under a reservation of rights and then commenced this declaratory judgment action.

HELD: The policy's definitions of "property damage" and "occurrence" and the exclusionary language are not ambiguous. The definitional clauses and the exclusionary language unequivocally exclude coverage for the claims asserted by the purchaser. Kinney is not assisted by the doctrine of reasonable expectations, even though he adduced testimony that his agents told him that the policy "covered everything other than intentional acts." Kinney did not read the policies, and is hard pressed to claim reasonable expectations without doing so, given his business experience and success. Sixty-day delay between hiring a lawyer to defend Kinney and issuing a reservation of rights letter does not constitute a waiver.

Schmal v. Minnesota Mutual Life Insurance Co., 432 N.W.2d 695 (Iowa 1988)

Life.

Insurer supported its motion for summary judgment in suit on life policy with affidavit by medical examiner that decedent had committed suicide and with court documents revealing that decedent

was in danger of losing his farm by foreclosure. Widow resisted by submitting an affidavit that decedent died by accident because "he was outside stalking a mink" and because she had no prior indication of depression. Widow also submitted other "statements" by other witnesses that corroborated her position. HELD: Dispute as to manner of death is for the finder of fact. Summary judgment for insurer was error.

Brown v. United Fire and Casualty Co., 432 N.W.2d 708 (Iowa App. 1988)

Adjusting.

Brown sold tavern to Shank on contract. Tavern was destroyed by fire at the time when Shank still owed Brown under the contract. The insurer paid Shank, who then defaulted on contract. Brown sued insurer and adjuster, who told Brown that she was entitled to a portion of the proceeds and that her name would appear on the draft. HELD: Fact issues were generated as to whether adjuster was the insurer's agent and whether the insurer granted the adjuster authority to bind the insurer as to payment decisions, such that summary judgment was improper.

Iowa Contractors Workers' Compensation Group v. Iowa Insurance Guaranty Association, 437 N.W.2d 909 (Iowa 1989)

Guaranty Association.

Pursuant to section 87.4, and with the approval of the Industrial Commissioner, a group of employers formed a workers' compensation "group" to fund their own workers' compensation benefits. For excess protection, they purchased an insurance policy from Mission that would be triggered once the group had to pay out in benefits more than 80% of its annual gross assessments. Mission went under. HELD: The mission policy was direct insurance, not reinsurance, and therefore the association must pay the claims that have gone unpaid as a result of Mission's insolvency. The group was not an insurer or an underwriting association (such status would have impacted on the Guaranty Association's obligation to pay).

Davis v. Ottumwa YMCA, 438 N.W.2d 10 (Iowa 1989)

ERISA.

Davis, an employee of the YMCA, sued Blue Cross, the Y, and State Farm as a result of Blue Cross' denial of Davis' claims for health insurance benefits. The Y had allowed the Blue Cross policy to lapse for nonpayment of premium, and State Farm had taken over the group plan.

After Davis filed suit, United States Supreme Court decided Pilot Life Insurance Co. v. Dedeaux, 481 U.S. 41, 107 Supreme Court 1549, 95 L. Ed. 2d 39 (1987), which held that the Employee Retirement Income Security Act (ERISA) preempted civil actions that "relate to . . . employee benefit plan[s]." In response to Pilot, defendants filed motions for summary judgment and Davis filed a motion for leave to amend his petition to bring his allegations within the remedial provisions of ERISA. Davis' motion was filed about four months before trial.

HELD: Davis' petition clearly relates to his employee benefit plan and is preempted by ERISA. The ERISA preemption clause contains an exception for civil actions based on state statutes that regulate insurance companies. Davis' effort to base his action on section 509B.3, which requires all group policies to include conversion privileges, does not avoid preemption. Pilot requires such a statute "[to] not just have an impact on the insurance industry, but be specifically directed toward that industry." Section 509B.3 "only requires that group policies include conversion privileges; it does not deal with negligence or breach of contract by persons who allegedly lose their rights for their employees, as claimed here. Furthermore, the policy under which Davis thought he had coverage did include a conversion privilege." COMMENT: Then why isn't he getting coverage?

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JUDGMENTS

Iowa Electric Light & Power Co. v. Lagle, 430 N.W.2d 393 (Iowa 1988)

Preclusion.

Informal administrative agency proceedings, in which utility customer did not have a hearing during which she could present

evidence and argument in support of her contentions and have a fair opportunity to rebut evidence and argument presented by the utility, did not result in a decision with preclusive effect, even though decision letter sent to customer advised her of the availability of formal proceedings in the event of dissatisfaction (which she did not pursue).

Gail v. Western Convenience Stores, 434 N.W.2d 862 (Iowa 1989)

Preclusion.

Gail received substantial verdict against Western, which was reduced on pro-tanto basis for amounts received by settlement with other defendants. Judgment entry awarded Gail interest, however, on entire amount of judgment, without deduction for pro-tanto credits. Defendant appealed, but did not challenge interest award. "While the prior appeal was pending and before it was submitted," court held in Duggan, 398 N.W.2d 175, 180 (Iowa 1986), that prejudgment interest should accrue only on the net recovery after pro-tanto credits are deducted. After the court affirmed Gail's judgment, defendant paid interest in compliance with Duggan and filed a motion for entry of satisfaction of judgment. HELD: Defendant's effort to reduce its interest obligation was a collateral attack on a valid and final judgment. Defendant cannot have the benefit of Duggan.

Krueger v. Iowa Rails to Trails, Inc., 435 N.W.2d 391 (Iowa App. 1988)

Preclusion.

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Krueger was an employee of Iowa Rails to Trails (IRTT), a volunteer organization providing labor for construction of the Cedar Valley Nature Trail. Krueger sustained a serious injury that arose out of and in the course of his employment. IRTT did not have workers' compensation insurance. Krueger sued IRTT, Linn County, and the County Conservation Board for damages. Krueger added the county's general liability insurer in a declaratory judgment count that sought declaration that the insurer covered his accident.

At trial, the jury found plaintiff 50% at fault, IRTT 10%, county 20%, and the board 20%. IRTT was judgment proof. The trial court held that the general liability policy did not provide coverage, because the jury verdict established that Krueger was an employee of IRTT (which was preclusive in the declaratory judgment

proceeding), because the insurance policy excluded coverage for bodily injury to an employee of an insured, and because IRTT was an insured under the policy.

Court of appeals held that the jury verdict in the tort action was preclusive and determined for the declaratory judgment proceeding that Krueger was an IRTT employee. The fact that IRTT is a volunteer organization of Linn County does not make Krueger, who received remuneration from IRTT for his services, was a volunteer of the county. The existence of workers' compensation coverage is not a condition precedent to the invocation of the employee exclusion clause in the general liability policy.

State v. Mundie, 436 N.W.2d 60 (Iowa 1989)

Preclusion.

District court had dismissed prior litigation filed by DHS on behalf of minor to establish paternity and recover support, on grounds that the 5-year statute of limitations was applicable and had not been tolled. Neither the state nor the minor appealed. Subsequently, the supreme court held that the statute of limitations for a chapter 252A proceeding was extended by section 614.8's 1-year window that commences with the minor attaining majority. See Stearns v. Kean, 303 N.W.2d 408 (Iowa 1981). As a result of Stearns, the state brought a new action. HELD: The prior unappealed dismissal constitutes an adjudication that is preclusive on the new claim for paternity and support.

Hettinger v. Farmers and Merchants Savings Bank, 436 N.W.2d 377 (Iowa App. 1988)

Preclusion.

Hettinger guaranteed a loan by bank to debtor. Debtor had given the bank a security interest in other property to secure the loan. The bank later made other loans, using the same collateral for security. When debtor defaulted, the bank sold the collateral but did not apply the proceeds to the particular loan that Hettinger had guaranteed. The bank sued Hettinger and obtained a judgment for the amount of the guarantee. Hettinger paid the judgment in full. Later, Hettinger sued the bank for fraud in its allocation of the sale proceeds to the various loans. HELD: Hettinger's claim was a compulsory counterclaim and is barred by the judgment in the first action.

Starks v. Fairbanks, 436 N.W.2d 657 (Iowa App. 1988)

Preclusion.

Mr. Starks was killed when the snowmobile he was operating struck a parked car and trailer owned by defendants. Mrs. Starks sued two dram shops where her husband had consumed alcohol before the accident, and recovered a substantial judgment. During the dram shop case, she asked for leave to amend her petition to assert a claim for loss of spousal support. The district court denied her request on the authority of Haafke v. Mitchell, 347 N.W.2d 381 (Iowa 1984). Before trial, however, the Iowa Supreme Court held that the dram shop law permits damages "for the economic and service elements of spousal consortium only." See Gail v. Clark, 410 N.W.2d 662 (Iowa 1987). Mrs. Starks apparently did not ask the district court to reconsider in light of Gail.

Meanwhile, Mrs. Starks also had sued defendants in a separate lawsuit, and defendants asserted the doctrines of claim and issue preclusion as affirmative defenses.

The court of appeals held that claim preclusion was not applicable because defendants had not been made parties to the dram shop action. "[W]e need not address the issue of whether the claim could have been litigated for if within the parameters of established rules a plaintiff is willing to bring multiple suits to obtain full recovery, he or she should be allowed to do so." Because the spousal consortium issue had not been litigated in the prior action, the court found no basis for applying issue preclusion.

Citizens State Bank v. Harden, 439 N.W.2d 675 (Iowa App. 1989)

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Preclusion.

With virtually no procedural history or factual recitation, the Court of Appeals held that Hardens' counterclaim relates to "the same operative facts and circumstances" that were the focus of another lawsuit in which Hardens sought recovery on tort theories of economic duress, interference with contractual relations and prospective business advantage, fraud, breach of fiduciary responsibility, and intentional infliction of emotional distress, and therefore was barred as a matter of law by claim preclusion, even though the counterclaim asserted only a breach of contract theory. It is not clear how the other case ended but the Court concluded with this remark:

The Hardens voluntarily withdrew their claims of fraud and economic duress. Such withdrawal operated as a dismissal with prejudice because it resulted in splitting Hardens' cause of action which is also prohibited under the theory of claim preclusion.

COMMENT: The next opinion in volume 439, at page 677, also involves Citizens and Hardens and refers to a counterclaim by Hardens without elaboration as to its contents. While one would conclude that this is the litigation in which Hardens sought recovery on the grocery list of claims described above, the Hardens' counterclaim in that case was dismissed, presumably without prejudice, because it was filed in response to a replevin petition.

Harrison v. State Bank, 440 N.W.2d 398 (Iowa App. 1989)

Preclusion.

Plaintiff and his parents were joint owners of a certificate of deposit. Father asked bank to issue a duplicate certificate because the original was lost, and asked that plaintiff's name be deleted from the duplicate certificate. Father then cashed the duplicate certificate and reinvested the proceeds in other certificates, on which plaintiff was not named as a joint owner. Parents then died. Plaintiff sued bank and the estates, alleging he was entitled to the proceeds of the second set of certificates because they were derived from funds of the original certificate, of which he was a joint owner. Bank filed a motion for summary judgment, which plaintiff did not resist. The district court granted the bank's motion and entered judgment accordingly.

Plaintiff sued bank again, alleging breach of contract based on the language of the original certificate and his status as a joint tenant. HELD: Second suit is barred by claim and issue preclusion.

In re Marriage of Baculis, 430 N.W.2d 399 (Iowa 1988)

Interest.

Statute providing for prejudgment interest does not apply to property distribution award in dissolution decree. COMMENT: Opinion contains detailed analysis and history of prejudgment-interest issues.

Gail v. Western Convenience Stores, 434 N.W.2d 862 (Iowa 1989)

Interest.

Gail received substantial verdict against Western, which was reduced on pro-tanto basis for amounts received by settlement with other defendants. Judgment entry awarded Gail interest, however, on entire amount of judgment, without deduction for pro-tanto credits. Defendant appealed, but did not challenge interest award. "While the prior appeal was pending and before it was submitted," court held in Duggan, 398 N.W.2d 175, 180 (Iowa 1986), that prejudgment interest should accrue only on the net recovery after pro-tanto credits are deducted. After the court affirmed Gail's judgment, defendant paid interest in compliance with Duggan and filed a motion for entry of satisfaction of judgment. HELD: Defendant's effort to reduce its interest obligation was a collateral attack on a valid and final judgment. Defendant cannot have the benefit of Duggan.

Mermigis v. Service Master Industries Inc., 437 N.W.2d 242 (Iowa 1989)

Interest.

Plaintiff filed her personal injury action on March 22, 1985. In September 1986, she moved for a continuance and for removal from the operation of 215.1. Defendant consented on the condition that prejudgment interest be suspended after December 1, 1987. HELD: 215.1 authorizes the district court to exercise discretion only as to whether or not to continue the case beyond the try-or-dismiss deadline. "If warranted, the proper sanction against a dilatory plaintiff under the rule is refusal to grant a continuance, not denial of pretrial interest." Nor can the court deny prejudgment interest as a way of assigning costs under the general continuance rules.

Woods v. Schmitt, 439 N.W.2d 855 (Iowa 1989)

Interest.

This is the fifth of five Moser opinions. Woods purchased farm from Schmitts, who previously had sold the farm to another. Between the two sales, Schmitts' mortgage was foreclosed and Thorp purchased the farm at the sheriff's sale. Woods obtained title by

assignment of the sheriff's deed. The original vendees brought an action for specific performance and to quiet title and eventually prevailed.

In their suit against various defendants, Woods sought to recover interest paid on loans taken out to finance their purchase of the farm. Woods did not object to jury instructions, however, that did not include such a theory of recovery. HELD: Asserting a right to interest as a consequential damage requires submission of appropriate instruction to the jury. Absent such a request, and if the jury otherwise determines that the amount due was liquidated, interest accrues as a matter of law under the statute. While liquidation ordinarily occurs on the date of judgment, it can occur earlier "when the damage is complete at a particular time . . . , although the damage has not been fixed in specific sum." Contrary to the situation presented by the typical personal-injury case, "the separate items of damages [in this breach of warranty case] are clear cut and readily ascertainable." Accordingly, interest may be allowed on an item-by-item basis before the entire damage is complete.

Cox v. Waudby, 433 N.W.2d 716 (Iowa 1988)

Execution.

Plaintiffs sued Mr. and Mrs. Waudby for fraud in connection with Mr. Waudby obtaining title to land owned by plaintiffs through fraudulent representations. Plaintiffs obtained a judgment against Mr. Waudby, but court found that Mrs. Waudby was unaware of Mr. Waudby's fraudulent activities and was not liable. Plaintiffs sought to execute against the Waudbys' homestead. The Waudbys had used proceeds from a loan against the fraudulently transferred property to pay off a mortgage on the homestead property. In other words, funds realized indirectly by Mr. Waudby's fraud increased the equity held by Mr. and Mrs. Waudby in their homestead. HELD: "[T]he homestead nature of property does not shield it from the right of a constructive trustee to trace proceeds" of fraudulent activity that created the constructive trust. Fact that property is held in joint tenancy with an innocent party does not bar plaintiff's claim, because a spouse cannot be a bona fide purchaser.

Midamerica Savings Bank v. Miehe, 438 N.W.2d 837 (Iowa 1989)

Execution.

Proceeds in a personal checking account that can be traced to wages that are exempt from execution and that have been received within 90 days of the levy continue to retain their exempt status. Burden to raise the issue and establish the continued status is on the judgment debtor, however, not the financial institution responding to a notice of garnishment.

Connell & Duffy, P.C. v. Veninga, 439 N.W.2d 203 (Iowa 1989)

Execution.

Bank brought foreclosure action against Louis and William Veninga, seeking judgment on promissory notes and foreclosure on deed of trust covering farm land owned by the Veningas as tenants in common. The district court appointed a receiver to take possession of all rents and profits from the property. After trial, the district court found that the Veningas were jointly and severally liable as partners on the note, that the land was not partnership property, and that Louis had signed William's name to the bank's deed of trust without William's authorization. Court ordered foreclosure of the deed of trust as against Louis only and authorized that special execution be issued against his interest so that it could be sold to satisfy the judgment. Court authorized issuance of general execution against William's undivided interest in the real estate. Court ordered that rents and profits from the land be applied to satisfy the judgment only after return of the other executions authorized. Neither Louis nor William appealed.

After return of the authorized executions, there still was a deficiency judgment. At that point, William's attorneys entered a confessed judgment against William in their favor for fees. The attorneys issued execution against William's property and served notice of garnishment on the receiver.

HELD: The unappealed judgment determined that the bank's rights to the rents and profits were superior to William's, once a deficiency was established. The attorneys' rights in those profits and rents are no greater than William's. Although the bank had never levied on William's interest in the rents and profits, attorneys' levy was unauthorized. Levy of property and partnership, without consent of the court, is not permissible and in fact is punishable by contempt.

Parks v. City of Marshalltown, 440 N.W.2d 377 (Iowa 1989)

Election of Remedies.

City employee sued for intentional infliction of emotional distress, violation of due process under 42 U.S.C. § 1983, and breach of employment contract. The jury awarded punitive damages against the city. Plaintiff proved that someone had altered the employment records of another employee who received a new job classification ahead of plaintiff, based on seniority. In addition to requesting monetary damages, Parks sought declaratory relief and an affirmative injunction requiring the city to promote him to the new job position or at least to reopen the bidding. HELD: Parks elected his remedy when he made a claim for loss of future earnings.

Brenton State Bank v. Tiffany, 440 N.W.2d 583 (Iowa 1989)

Merger.

Bank loaned Tiffany money on a note secured by a mortgage on farmland and a security interest in farm equipment and crops. After Tiffany defaulted, bank commenced a replevin action for possession of the collateral listed in the security agreement. Bank then initiated a separate action against Tiffany to foreclose on the real estate mortgage. It obtained a default judgment in the foreclosure, which it later caused to be set aside. Tiffany claimed in the replevin action that the default judgment constituted a merger, precluding bank from obtaining a second judgment on the same indebtedness in the replevin action.

HELD: Doctrine of merger does not apply. Bank could not have joined its foreclosure proceeding with the replevin action. Moreover, the same debt gave rise to both causes of action, but each sought a different portion of the benefit of the bank's bargain. Section 554.9501 gives a secured creditor who has security in both real and personal property the option to proceed against the collateral in separate actions.

Hager v. Doubletree, 440 N.W.2d 603 (Iowa 1989)

Insurance commissioner as liquidator for Iowa National sued Wyoming insurance companies (and their personal guarantors) who acted as agents in that state for Iowa National to recover premiums owed to Iowa National. Defendants challenged personal jurisdiction of the Iowa courts. Section 507C.4 purports to grant jurisdiction to Iowa courts over persons who are obligated to a domestic insurer "in any way as an incident to an agency or brokerage arrangement."

HELD: Construed to incorporate the requirement of minimum contacts, section 507C.4 is facially valid. Liquidator established minimum contacts with Wyoming residents who contracted, in Wyoming, to sell Iowa National business in that state. Although Iowa National initiated the contacts in Wyoming, it caused a continuing business relationship that involved regular and frequent, if not daily, contact between Cedar Rapids and Wyoming.

Bic, Inc. v. Schleisman, 443 N.W.2d 78 (Iowa App. 1989)

In 1979, Bic contracted with Schleisman d/b/a Bob's Tire & Auto Service for Schleisman to be a retailer and service agent for Bic products. In 1984, Schleisman sold his business to Lowell. Lowell continued to operate the business under the same name. Schleisman continued to work in the business as Lowell's employee until 1987. Lowell continued to serve as a retailer and service agent for Bic.

After Schleisman left Iowa in 1987, Bic sued Schleisman d/b/a Bob's Tire & Auto Service for failure to pay charges incurred after Schleisman's departure. Schleisman filed a motion to dismiss for lack of jurisdiction, arguing that Bic knew Schleisman was no longer involved, that Lowell had purchased the business, and that Lowell was the responsible party for charges incurred after Schleisman's departure.

HELD: Schleisman's contacts are insufficient to confer jurisdiction. COMMENT: Opinion reads like a decision on the merits of a lawsuit against Schleisman, rather than a decision as to whether he can be sued in Iowa.

Scott v. City of Sioux City, 432 N.W.2d 144 (Iowa 1988)

Inverse condemnation action must be brought within general 5-year period for actions brought for injuries to property.

Harden v. State, 434 N.W.2d 881 (Iowa 1989)

Minority.

The tolling provisions of Section 614.8 (statutes of limitations "shall be extended in favor of minors and mentally ill persons, so that they shall have one year from and after the termination of such disability within which to commence said action") do not apply to the limitation provisions in section 25A.13. Distinguishing Miller, 394 N.W.2d 776 (Iowa 1986), which struck down the 60-day notice provision in chapter 613A, the court held that the differing treatments given to minors and mentally ill persons by virtue of whom they were suing was not a violation of equal protection).

Altena v. Altena, 428 N.W.2d 315 (Iowa App. 1988)

Mental Illness.

Plaintiff sued relative for psychological injury resulting from sexual abuse. Suit was filed almost four years after the alleged incidents of abuse, and more than one year after plaintiff's discharge from hospital for psychiatric care. HELD: Evidence that plaintiff was depressed, had suicidal tendencies, and experienced emotional distress is insufficient to support a jury finding that plaintiff was "mentally ill" for purposes of extending the statute of limitations pursuant to section 614.8. Moreover, there was no evidence whatsoever that plaintiff suffered from any mental illness after the date of her discharge from the hospital, which was more than one year before the filing of the lawsuit.

Lawse v. University of Iowa Hospitals, 434 N.W.2d 895 (Iowa App. 1988)

Medical Malpractice.

Plaintiff donated kidney to his brother in 1973. Twelve years later, plaintiff sued for the wrongful taking of his kidney, claiming that he was coerced into donating it and that he was not provided with competent psychological preparation. HELD: While there may be a factual dispute as to whether or not his risk/consent claim should be barred by the two-year statute, the six year statute applies as a matter of law.

Iowa National Mutual Insurance Co. v. Granneman, 438 N.W.2d 840 (Iowa 1989)

Contribution.

Wheeler sued Stumme, who eventually added Granneman by cross-petition with a claim for contribution. Just before trial, Stumme and Wheeler settled on terms that released all defendants, even though Granneman did not contribute to the settlement. Stumme dismissed its contribution claim against Granneman without prejudice.

The settlement agreement was dated December 11, 1984. The agreement provided that it was not effective until all parties signed, and substantial evidence supported Stumme's contention that it did not sign until December 14.

Stumme filed a contribution action against Granneman on December 16, 1985, a Monday. HELD: Chapter 668's one-year statute of limitations for contribution actions applied to Stumme's contribution claim, even though it arose out of the settlement of a Goetzman suit, because a contribution claim was an action filed after July 1, 1984. Because the agreement stated that it was dated December 11, because Wheeler signed on that date, and because the up-front money of the structured settlement was paid on that date, the "date of agreement" for purposes of section 668.6(3)(b) was December 11. The insurer's contribution action was not filed timely.

Woods v. Schmitt, 439 N.W.2d 855 (Iowa 1989)

Fraudulent Concealment.

This is the fifth of five Moser opinions. Woods purchased farm from Schmitts, who previously had sold the farm to another. Between the two sales, Schmitts' mortgage was foreclosed and Thorp purchased the farm at the sheriff's sale. Woods obtained title by assignment of the sheriff's deed. The original vendees brought an action for specific performance and to quiet title and eventually prevailed.

Woods sued Schmitts' attorney, Donohue, for fraud. Donohue asserted the affirmative defense of statute of limitations, to which plaintiff asserted fraudulent concealment. Court affirmed trial court's conclusion that fraud was consummated at the time of the closing of the transaction between Woods and Schmitt, but held that plaintiff did not adduce substantial evidence of fraudulent concealment, which "requires proof of affirmative steps independent of, and in addition to, the original wrongdoing to prevent plaintiffs from discovering the wrong." Mere repetitions of the original fraudulent misrepresentation do not constitute new and independent acts. "In the absence of a fiduciary relationship [Donohue represented Schmitts, not Woods], mere silence by the wrongdoer does not constitute fraudulent concealment."

NEGLIGENCE

Slager v. HWA Corp., 435 N.W.2d 349 (Iowa 1989)

Ch. 668.

Comparative fault is not a defense to a dram shop action. COMMENT: 5-3 vote. Suggestion in Schreier v. Sonderleiter, 420 N.W.2d 821 (Iowa 1988), that contribution claim by one dram shop against another "should be tried according to our comparative fault provision," is inconsistent. Dissent finds that the historical treatment of dram shop actions as based on strict liability to be more than sufficient to bring dram-shop cases within the definition of fault in chapter 668, which includes strict liability.

Mermigis v. Service Master Industries Inc., 437 N.W.2d 242 (Iowa 1989)

Ch. 668.

Hospital contracted with Service Master "to manage the hospital's maintenance and construction operations." Service Master was to provide management functions, while actual maintenance work was to be conducted by hospital employees. Service Master provided an on-site manager who had to approve in advance all maintenance work. Hospital employee was injured by malfunctioning door.

Service Master asked the court to permit the jury to assess fault to the hospital. In affirming the trial court's refusal to do so, the court reiterated its series of cases starting with Abild, 259 Iowa 314, 322, 144 N.W.2d 303, 308 (1966), and ending with Speck, 366 N.W.2d 543, 548 (Iowa 1985).

Sage v. Johnson, 437 N.W.2d 582 (Iowa 1989)

Ch. 668.

A minor who claims to be injured as a result of his own intoxication from alcohol furnished in violation of section 123.47 may state a cause of action against the person who furnished the alcohol. Such a suit, however, is subject to the comparative fault provisions of chapter 668.

Godbersen v. Miller, 439 N.W.2d 206 (Iowa 1989)

Ch. 668.

Plaintiffs sued defendant for negligence and assault and battery in connection with a car-pedestrian accident. The evidence afforded a jury finding of either reckless driving or intentional acts. Jury assessed 50% of the fault, however, against plaintiff, and defendant sought proportionate reduction of the punitive damages award. HELD: An award of punitive damages shall not be reduced in accordance with the comparative fault principles of chapter 668.

Thomas v. Solberg, 442 N.W.2d 73 (Iowa 1989)

Ch. 668.

Thomas was injured in three-car accident and sued Solberg and White, the drivers of the other two cars. Before trial, Thomas settled with White for $75,000 and proceeded to trial against Solberg. Jury allocated 49% to White and 51% to Solberg and fixed damages at $108,117.31. District court entered judgment against Solberg for 51% of the damage figure, plus interest.

Solberg paid the difference between the damage figure and the White settlement, plus interest on the judgment figure as calculated by the court. In other words, Solberg sought a dollar-for-dollar, pro-tanto credit for the settlement. Thomas filed only a partial satisfaction and resisted Solberg's motion for entry of full satisfaction.

HELD: Trial court properly applied a "proportionate credit" for the White settlement, even though it permits Thomas to recover more than the damages fixed by the jury. Section 668.7 clearly articulates a "proportionate credit" rule in partial settlements of comparative-fault cases.

COMMENT: The court notes that its earlier opinions described the rule it adopts in this case as a "pro rata" credit rule. The court noted that other jurisdictions use this title to refer to a different formula (reducing the non-settling defendants' liability by an amount equal to the number of settling defendants divided by the total number of defendants), and held that "proportionate credit" was the correct title to be used in the future.

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Collier v. General Inns Corp., 431 N.W.2d 189 (Iowa App. 1988)

Goetzman.

In a Goetzman case, a person named as a defendant but never served could not be allocated any percentage of negligence, following Baldwin v. City of Waterloo, 372 N.W.2d 486 (Iowa 1985).

Cook v. State, 431 N.W.2d 800 (Iowa 1988)

Apportionment of Fault.

At the intersection of two state highways, where the east-west traffic must stop, the east-west state highway ends and a county

highway begins. The county highway's centerline is offset 12 feet to the north, so that eastbound traffic jogs a bit to the left (north) as it passes through the intersection. The typography of the intersection is flat, with views unobstructed. On the afternoon of the accident giving rise to the litigation, visibility was good.

Eastbound motorist Cook blew the stop sign and collided with a semi. Cook left 41 feet of skid marks before the collision, but the skids started just 11 feet from the stop sign and were in the wrong lane. Cook tested at .158.

The state placed a "stop ahead" sign on the right side of the highway, 1,305 feet from the intersection. The "Manual on Uniform Traffic Control Devices" provides that "stop ahead" signs should be placed 750 feet in advance of the intersection "in rural areas," and as far as 1,500 feet or more "on high speed roads, and particularly on freeways." Cook produced evidence that barrel-mounted stop sign had been moved across the intersection and cars had left skid marks through the original location of the sign several times a year.

After bench trial, the court found the state 90% at fault and the motorist 10% at fault. The state challenged the findings of negligence, proximate cause, and allocation of fault. On appeal, the court held that appellate review of allocation of fault is tested by the substantial-evidence rule. Because the trial court failed to find statutory violations of failing to stop and failing to yield, which the evidence rendered incontrovertible, the verdict and judgment were reversed. In remanding for new trial, the court advised the district court to make specific findings as to the various particulars of fault asserted by <u>each</u> party.

COMMENT: Three justices expressly shared the majority's veiled "dismay" at the result, but found no basis on substantial-evidence review to overturn the verdict. In their eyes, the question was not whether the motorist blew the stop sign but why.

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<u>Schwennen v. Abell</u>, 430 N.W.2d 98 (Iowa 1988)

<u>Contribution</u>.

Mary and William are married. William was injured in a motor vehicle accident. Mary and William sued the Schwennens, who owned and operated the other vehicle, and Floyd County, where the accident occurred. Schwennens sued William for their injuries. Schwennens also sought contribution from William for any liability

they might have to Mary. After Schwennens sought contribution, Mary added a claim against William. Mary's claims against all parties were limited to loss of consortium.

Case was tried before Supreme Court issued McIntosh v. Barr, 397 N.W.2d 516 (Iowa 1986). Jury found William 63% at fault, the Schwennens 27% at fault, and Floyd County 10%. District court entered judgment against William and in favor of Mary for the entire amount of her damages. The court entered judgment against the Schwennens and Floyd County and in favor of Mary, but only for their percentage shares of the fault.

William appealed and Mary, perhaps cognizant of the brand new opinion in McIntosh, cross-appealed. Floyd County and Mary settled.

The Supreme Court unanimously applied McIntosh to the judgment against William and reversed. By a vote of 6 - 3, the majority held that Mary's recovery against the Schwennens and Floyd County should not be reduced by William's 63% of the fault. How the majority arrived at that conclusion is worth some explanation.

Because Mary's claims were filed before July 1, 1984, the court saw this as a Goetzman case. Because Goetzman overruled previous decisions only in those instances where "contributory negligence has previously been a complete defense," and because William's negligence - however manifest - would not have constituted a defense to Mary's contribution claims before Goetzman, the court finds no basis in Goetzman to reduce Mary's recovery due to William's negligence. The court re-exams the historical basis for holding that consortium claims are not derivative, see Fuller v. Buhrow, 292 N.W.2d 672 (Iowa 1980), and rejects the Schwennens' plea that this rule be changed in light of comparative negligence/fault.

The Schwennens argued that the joint and several liability provisions of section 668.4, which is applicable to Mary's claims, allows a portion of the aggregate causal fault to be allocated to William. The court rejected this argument because McIntosh does not permit her claim against William to be sustainable as a matter of law. Only those claims that are legally sustainable are to be submitted to the jury for purposes of allocating fault.

The Schwennens also argued that Mary elected to seek recovery from William in the district court, as opposed to arguing that her claim against the Schwennens and Floyd County should not be reduced by any fault allocated against William, a position that would have been supported by Fuller v. Buhrow and, eventually, by McIntosh. In other words, the Schwennens argued that Mary was arguing on her

cross-appeal a position she did not assert in district court. The Supreme Court acknowledged that Mary's tune had changed, but found (created?) an exception to the general rule:

> The record reflects that Mary was forced to claim against William as a direct consequence of the decision of the [Schwennens] to seek contribution from him for their liability to Mary. In the application of section 668.3(2)(b) the presence of a third-party defendant can result in siphoning off a portion of aggregate fault from the defendants against whom the plaintiff is claiming. This can result in a plaintiff who is not personally at fault receiving less than a full recovery.
>
> In order to protect one's self in such situations the plaintiff must, as did Mary, claim directly against the third-party defendant. Mary's application for leave to amend her petition made it clear that this was her reason for claiming against William. . . .
>
> As a result of the litigating position into which Mary was forced, she had no avenue for arguing in the alternative.

The court remanded for a new trial on the allocation between the Schwennens and Floyd County, but only on Mary's consortium claim. The court "assumed" that the jury's assessment of damages for this claim in the amount of $85,000 was not "corrupted" by the listing of William as one of the defendants, so damages would not be re-tried.

COMMENT: Three justices dissented. They would have held that because McIntosh correctly prevents one spouse from recovering from the other for tortious injury to the consortium interest, third-party defendants should not have "to answer for the [spouse's] fault" either. In other words, there are three votes for reducing a consortium plaintiff's recovery by the percentage of the spouse's fault.

Daugherty v. Ankeny Construction Co., 433 N.W.2d 742 (Iowa 1988)

Contribution.

Dry-wall subcontractor's wife, who was on site to help husband work, fell at job site. She sued dry wall contractor (Naughton) and general contractor (Ankeny). Their claims against each other for contribution/indemnity were severed for trial. Naughton obtained a directed verdict. Jury put 2/3 of fault on Ankeny and

1/3 on wife. HELD: Even though a stipulated severance motion provided that the defendants had agreed to reserve litigation of cross-claims, the issue of Naughton's negligence to plaintiff was adjudicated in the first trial. A contractual obligation of Naughton to indemnify Ankeny is prefaced on Naughton being negligent, which was negated as a matter of law.

Iowa National Mutual Insurance Co. v. Granneman, 438 N.W.2d 840 (Iowa 1989)

Contribution.

Wheeler sued Stumme, who eventually added Granneman by cross-petition with a claim for contribution. Just before trial, Stumme and Wheeler settled on terms that released all defendants, even though Granneman did not contribute to the settlement. Stumme dismissed its contribution claim against Granneman without prejudice.

The settlement agreement was dated December 11, 1984. The agreement provided that it was not effective until all parties signed, and substantial evidence supported Stumme's contention that it did not sign until December 14.

Stumme's insurer filed a contribution action against Granneman on December 16, 1985, a Monday. HELD: Chapter 668's one-year statute of limitations for contribution actions applied to Stumme's contribution claim, even though it arose out of the settlement of a Goetzman suit, because a contribution claim was an action filed after July 1, 1984. Because the agreement stated that it was dated December 11, because Wheeler signed on that date, and because the up-front money of the structured settlement was paid on that date, the "date of agreement" for purposes of section 668.6(3)(b) was December 11. The insurer's contribution action was not filed timely.

American Trust and Savings Bank v. United States Fidelity and Guaranty Co., 439 N.W.2d 188 (Iowa 1989)

Contribution.

A bank officer embezzled a substantial sum over a number of years. When a dispute as to the amount rose between the bank and its bonding company, the bank sued. The bonding company cross-petitioned against bank's accounting firm for failure to properly conduct annual examinations of the bank. The bank made its own

direct claim against the accounting firm as well. The accounting firm cross-petitioned against the bank's directors for contribution and/or indemnity. The district court dismissed the accounting firm's claim against the directors.

HELD: The bank will be responsible for its directors' negligence, such that any fault attributable to the directors will be attributable to the bank, thereby reducing any recovery the bank might have against the accounting firm. Because a contribution claim is premised on the claimant's being responsible for paying more than its fair share, the accounting firm's claim fails as a matter of law.

COMMENT: This case would appear to be authority for the proposition that no agent or employee of a party can be added as an additional defendant in a 668 case by a defendant for purposes of contribution. By the same token, the case establishes unequivocally that you need not add the agent or employee of the plaintiff as a party in order to assess percentages of fault to such persons. You are entitled to an instruction that any percentage of fault to be assessed against such an agent or employee is to be allocated to plaintiff, their principle.

McDonald v. Delhi Savings Bank, 440 N.W.2d 839 (Iowa 1989)

Contribution.

McDonald owned real estate, against which bank held a mortgage to secure loans to McDonald. McDonald sold real estate to investors and gave bank a security interest in McDonald's interest in the contract. Investors' real estate agent, Holmes, obtained an offer to buy the property. Holmes caused an attorney to prepare a title opinion, and the attorney erroneously concluded that bank, not McDonald, was the owner of legal title (presumably because the bank's security in McDonalds' interest in the real estate contract was established by a document entitled "assignment of equity in real estate contract."). Holmes then arranged for real estate agency to purchase bank's interests in the property and the real estate contract. Agency paid bank the amount McDonald owed on the original loan and obtained bank's release of the notes and a warranty deed conveying the property from the bank to the agency.

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McDonald sued the agency to recover the unpaid balance of the real estate contract, to foreclose the interests of the purchasers and their successors in interest, and to obtain a decree quieting title. McDonald amended its petition to add a claim against the bank, alleging breach of contract and negligence. Thereafter,

McDonald dismissed with prejudice the quiet title action and consented to entry of decree that agency was owner of real estate.

Bank filed cross-claim against new buyer and real estate agency for contribution. The court held that the consent decree constituted an adjudication of McDonald's claims against the agency and new buyer, which barred any subsequent liability to McDonald. Because the bank's liability alleged by McDonald related solely to the loans between the bank and McDonald, and because the agency and new buyer were not involved in that relationship or in those transactions, they owed no duty to McDonald that would generate common liability.

Urbandale v. Frevert-Ramsey-Kobes, 435 N.W.2d 400 (Iowa App. 1988)

Sufficiency of Evidence.

City sued architect for negligent design of indoor swimming pool. Architect asserted affirmative defense of comparative fault for city's improper operation of its ventilation system. Jury found each party 50% at fault. Architect argued on appeal that there was no substantial evidence of negligence in the design of the roof, and sought reversal as to damages relating to the cost of repairing or replacing it. The city cross-appealed and argued that its conduct had nothing to do with the building and the resulting damage.

HELD: Substantial evidence supported finding of negligent design of the roof. "There was testimony about observed streaks in the pre-cast panel switch resulted from water collecting on top of the roof and eventually working its way into the wall system. . . . [T]he roof had blisters which generally are caused by water getting under the roof. . . . The blisters on the roof and streaks down the walls are obvious defects in the roof. Whether these evidence a breach of the standard of care just by virtue of the fact that a well-designed structure would not have these problems is an issue on which reasonable minds could differ." Defendant adduced substantial evidence of negligent conduct by the city in maintaining it in operating its ventilation system.

Klein v. City of Keokuk, 438 N.W.2d 22 (Iowa 1989)

Proximate Cause.

Plaintiff sued city for negligence in reconstructing street, curb, and cul-de-sac, all of which allegedly caused a mud slide

onto plaintiff's property. Case was tried to the court, which found no proximate cause. Plaintiff contended that trial court misapplied the proximate-cause requirement by seeking to find that the construction work was a "substantial factor" in the mud slide. HELD: The "substantial factor" and "but for" tests are both to be met in determining proximate cause. COMMENT: Court also affirmed trial court's findings that mud slide was an act of God.

TORTS

Berryhill v. Hatt, 428 N.W.2d 647 (Iowa 1988)

Abuse of Process.

Hatt sold real estate to plaintiffs on contract. Plaintiffs had been leasing the premises and made improvements. A dispute over a condition precedent to closing arose, and plaintiffs refused to close. Hatt commenced forfeiture proceedings, which the court then enjoined. Plaintiffs sued Hatt for abuse of process, claiming that Hatt sought to use the judicial remedy for the purpose of gaining the benefit of the improvements.

HELD: Plaintiffs failed to adduce evidence of some improper act in the use of process. That Hatt intended to benefit from the forfeiture is a permissible purpose of initiating the process.

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Bauer v. Dann, 428 N.W.2d 658 (Iowa 1988)

Dram Shop.

After auto accident, Bauer sued social host for serving Dann, who was a minor and who gave Bauer ride home from party. On authority of Blesz v. Weisbrod, 424 N.W.2d 451 (Iowa 1988), court holds that 1986 amendment to §123.49(1), abrogating Clark v. Mincks, 364 N.W.2d 226 (Iowa 1985) on social-host liability, did not apply to the statutory prohibition against supplying liquor to minors, which formed the basis for common-law claim approved in Lewis v. State, 256 N.W.2d 181 (Iowa 1977). Court also reaffirms its rejection of the preemption argument in Haafke v. Mitchell, 347 N.W.2d 381 (Iowa 1984): Because dram shop liability statute seeks

to regulate liability of only licensees and permittees, it cannot be said to preempt the issue of liability of other persons. Court lastly declines to recognize a "social host" exception to the prohibition against providing alcohol to minors.

Slager v. HWA Corp., 435 N.W.2d 349 (Iowa 1989)

Dram Shop.

Comparative fault is not a defense to a dram shop action. COMMENT: 5-3 vote. Suggestion in Schreier v. Sonderleiter, 420 N.W.2d 821 (Iowa 1988), that contribution claim by one dram shop against another "should be tried according to our comparative fault provision," is inconsistent. Dissent finds that the historical treatment of dram-shop actions as based on strict liability to be more than sufficient to bring dram-shop cases within the definition of fault in chapter 668, which includes strict liability.

Sage v. Johnson, 437 N.W.2d 582 (Iowa 1989)

Dram Shop.

A minor who claims to be injured as a result of his own intoxication from alcohol furnished in violation of section 123.47 may state a cause of action against the person who furnished the alcohol. Such a suit, however, is subject to the comparative fault provisions of chapter 668.

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Iowa Supply Co. v. Gruhns & Co. Construction, Inc., 428 N.W.2d 662 (Iowa 1988)

Interference.

General contractor, sub-contractor, and materialman in dispute over payments owed to materialman for materials supplied to sub, who received money from general but who is bankrupt. In response to materialman's claim under chapter 573 (bond for public works), general counterclaimed for tortious interference with contract.

Court affirmed dismissal (after trial) of counterclaim, because materialman asserted, in good faith and on advice of counsel, a legally protected interest.

Casey's General Stores, Inc. v. Campbell Oil Co., 441 N.W.2d 758 (Iowa 1989)

Interference.

Casey's entered into franchise agreement with Campbell for a Casey's franchise in LeGrand. Agreement contained a non-compete clause that was unlimited geographically. Campbell later negotiated to obtain a Casey's franchise in Gilman, and purchased the Gilman property in anticipation of reaching an agreement. When the negotiations failed, Campbell's controllers, Les and Norma Campbell, bought the property from their corporation and operated a "look-alike" convenience store. Later, Les and Norma constructed and operated another "look-alike" in State Center. This second "look-alike" was located within a mile of another Casey's operated by an unrelated franchisee.

Casey's sought an injunction from Campbell and Les and Norma and money damages from Les and Norma for tortious interference with contract. Because the court first held that Campbell was not involved in either the State Center or Gilman "look-alike" stores, Campbell did not violate the non-compete clause at either site. Accordingly, Les and Norma could not be held liable for interference with the agreement with respect to Campbell's activities at either location. Moreover, the Gilman store lay outside of the three-mile geographic zone that the district court properly wrote into the non-compete clause in its injunction.

Blackhawk Building Systems, Ltd. v. Law Firm, 428 N.W.2d 288 (Iowa 1988)

Legal Malpractice.

In reversing a verdict for plaintiff against its former law firm for legal malpractice, the court held that plaintiff had not generated a jury issue on proximate cause. The jury could have found the following relevant facts.

Marcus Bergren was in the construction business, doing concrete work. Bergren did a great deal of business with the local Butler Buildings franchise for the five-county area near Burlington. Bergren then purchased the franchise. Jack Parsons had been working as the sales representative for the franchise and orally agreed with Bergren to become president, manager, and sales representative for Bergren. Bergren incorporated Blackhawk, showing Parsons as the incorporator. Parsons then entered into the franchise agreement on behalf of Blackhawk with Butler Manufacturing Company.

Thereafter, defendant lawyer advised Bergren that Blackhawk should have an employment agreement with Parsons. Lawyer drafted the contract, which provided that either party could terminate upon 90 days' notice, but which did not contain a non-compete clause. The agreement was signed. Business did not go well. Parsons left the business with notice. Butler terminated Blackhawk's franchise because Parsons had left. Parsons then bought the franchise from Butler. Blackhawk went out of business.

HELD: Plaintiff's proximate cause obligation in a legal malpractice action is to show that, but for the attorney's negligence, the loss would not have occurred. In this case, plaintiff had to prove that "Parsons would have signed a contract containing a covenant not to compete which would have effectively prevented the loss of the Butler franchise and the subsequent demise of Blackhawk." Because Bergren and Parsons agreed only upon a contract at will, with the right of either party to terminate upon 90 days' notice, the contract itself does not "substantiate an inference that Parsons would have agreed to a covenant not to compete." Evidence of Bergren's and Parsons' friendship and general goodwill at time of contract was insufficient to imply that Parsons would have agreed to an additional term that "was solely for Blackhawk's benefit and was detrimental to Parsons' interest."

COMMENT: Two justices dissented and said that whether Parsons would have agreed to a covenant not to compete "is a matter which is not susceptible of exact determination." Juries should be permitted, however, to determine retrospectively "how a person would have reacted in a situation never presented to that person . . . based on reasonable inferences which may be drawn from the circumstances of the transaction."

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Dessel v. Dessel, 431 N.W.2d 359 (Iowa 1988)

Legal Malpractice.

Brothers and partners Jim and George jointly retained attorney to handle dissolution of partnership. Attorney negligently included a hold-harmless clause against the instructions of Jim and George. They subsequently and orally amended the dissolution agreement to provide George with a 6% commission on collections in return for Jim being relieved of any obligation to collect accounts receivable. Jim died, and his estate disputed the oral agreement. Attorney advised George to stop retaining the commission and to refund the amounts previously retained, and George complied. Nevertheless, the estate sued George over the collections and division of accounts receivable. Attorney represented the estate, and George filed a third-party claim against the attorney, who then

withdrew. The estate's suit was dismissed, but George recovered his defense expenses, the commissions, and punitive damages from the attorney.

On appeal, the court found substantial evidence of negligence and proximate cause. The hold-harmless clause was the fundamental basis for the estate's suit against George. As to the other damages, "[i]t is difficult, if not impossible, to conceive that, if [the attorney] had not been counsel for the estate, he would have recommended to George that he pay back the commissions. [The attorney's] advice was clearly a substantial factor, indeed a decisive factor, in George's surrender of the commission he had earned and his failure to collect additional commissions to which he was entitled." The court reversed on the punitive damages award because there was no evidence of spite, hatred, or ill-will on the part of the attorney or of willful or wanton disregard for George's rights.

COMMENT: The Court did not discuss at all why George was unable to recover the commissions from the estate, but the facts suggested that the oral agreement had in fact occurred and was a valid basis for suit against the estate.

Woods v. Schmitt, 439 N.W.2d 855 (Iowa 1989)

Legal Malpractice.

This is the fifth of five Moser opinions. Woods purchased farm from Schmitt, who previously had sold the farm to another. Between the two sales, Schmitts' mortgage was foreclosed and Thorp purchased the farm at the sheriff's sale. Woods obtained title by assignment of the sheriff's deed. The first vendees brought an action for specific performance and to quiet title and eventually prevailed.

Woods sued their attorney, Johnson, for breach of contract and for negligence in connection with Johnson's examination of the abstract of title of the farm. Johnson knew of the pending specific performance and quiet title actions involving the first vendees, Schmitts, and Woods when he passed title. Johnson contends, however, that the fraud of Schmitts' attorney, Donohue, intervened.

HELD: While "Donohue's fraud may have misled him into believing [Thorp] had legal title," the jury could have found that Johnson was negligent in passing title in the face of pending litigation. "Little discretion is allowed when a lawyer knows that the real estate is involved in litigation to determine the title."

Johnson also alleged affirmatively that Woods' action was premature because they could recover against Donohue and/or their financier. HELD: Because Johnson raised this issue for the first time on post-trial motions, the error, if any, was waived. COMMENT: The Court hinted that Johnson should consider whether he has "an equitable action against Donohue or the [Woods' financier] or whether Johnson will become subrogated to plaintiffs' interests by satisfying the judgment."

Kieser Agricultural Chemicals v. Ottumwa PCA, 428 N.W.2d 681 (Iowa App. 1988)

Misrepresentation.

Kieser sold army supplies on credit to PCA's debtor only after being assured that PCA would make its usual annual loan to the debtor and that Kieser's credit limits would be covered. PCA failed to inform Kieser, however, that it had decided to make the loan contingent upon satisfaction of a projected cash flow, which was a new ingredient to the long business relationship experienced by PCA, the debtor, and Kieser. HELD: Jury verdict on negligent representation claim was supported by substantial evidence.

United Central Bank v. Kruse, 439 N.W.2d 849 (Iowa 1989)

Misrepresentation.

Kruse bought land on contract from Graham who borrowed the money from bank and ultimately assigned his interest in contract to bank as security. Graham defaulted on note and bank obtained a judgment against him. The bank notified Kruse, who then made payments directly to bank. Because Graham himself was purchasing the land on contract, and because he was in default, the original seller served notice of forfeiture, to which Kruse responded by making some direct payments. Graham had assigned his interest in this contract to bank as well. Bank and Kruse negotiated a new arrangement whereby original seller was paid off, Kruse received title, and Kruse mortgaged property to bank with relatively early balloon payment. Kruse defaulted and bank commenced action for foreclosure. Kruse presented affirmative defenses and counterclaims on theories of fraudulent and negligent misrepresentation and tortious interference with contractual relationship. The misrepresentation claims were premised on allegations that the bank made false legal representations to Kruse as to the effect of the judgment against Graham on the property and as to the effect of Kruse's direct payments to the original seller.

The evidence established that Kruse was represented by counsel throughout negotiations with the bank. The trial court instructed "that knowledge possessed by an attorney is chargeable to his client." HELD: Instruction should not have been given. It "is sweepingly overbroad . . . . [C]lients do not possess all knowledge on all subjects which their attorneys possess. To so advise a jury can only create false impressions as to the consequences of being represented by an attorney. There may indeed be instances where a client is permitted to claim that he or she has been deceived by false representations even though an attorney representing that client was not similarly deceived." While a third party is entitled to assume that communications with the attorney are passed on to the client, there was no evidence of communications to the attorney but not Kruse. Kruse claims the misrepresentations were made directly to him. The bank denies the statements were made at all. "Consequently, there was no reason to have given the instruction."

COMMENT: The Court seems to acknowledge that there are instances where the involvement of an attorney militates against a claim of misrepresentation or fraud, but the opinion leaves little room for such an instruction and no guidance at all as to acceptable language or scope.

Springer v. Weeks & Leo Co., 429 N.W.2d 558 (Iowa 1988)

Wrongful Discharge.

Employee at will who adduced substantial evidence that employer terminated her because she had pursued her statutory rights to compensation for work-related injuries presented a prima facie case of wrongful discharge. "We believe a cause of action should exist for tortious interference with the contract of hire when the discharge serves to frustrate a well-recognized and defined public policy of the state." Section 85.18, which provides that nothing shall operate to relieve the employer from any liability created by Chapter 85, is "a clear expression" of public policy "that an employee's right to seek the compensation which is granted by law for work-related injuries should not be interfered with regardless of the terms of the contract of hire."

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COMMENT: Court acknowledged that claims for interference "have ordinarily involved . . . an existing contract or future expectancy between the plaintiff and a third person." The court distinguished those circumstances from the employment-at-will relationship, apparently because "other adequate remedies are [not]

available." Why was it necessary to frame the wrongful discharge claim in terms of interference with contract? Someone is thinking ahead, but about what?

Decision was 6-3.

Conaway v. Webster City Products Co., 431 N.W.2d 795 (Iowa 1988)

Wrongful Discharge.

Employees covered by a collective-bargaining agreement containing a just-cause discharge clause, and a grievance/arbitration procedure that applied to discharge, sued for retaliatory discharge, alleging that they had been terminated for filing workers' compensation claims. HELD: Because the retaliatory discharge claims can be adjudicated without resorting to interpretation of the collective-bargaining agreement, the claims are not preempted by section 301 of the Labor Management Relations Act (LMRA), 29 U.S.C. §185(a). COMMENT: Opinion follows Lingle v. Norge Division, 486 U.S. _____, 108 S.Ct. 1877, 100 L. Ed. 2d 410 (1988).

Hamilton v. First Baptist Elderly Housing Foundation, 436 N.W.2d 336 (Iowa 1989)

Wrongful Discharge.

Mr. and Mrs. Hamilton were hired as a team to provide building superintendent and janitorial services at a housing project. They were required to live on the premises and were given reduced rent as partial compensation. At the time of her discharge, Mrs. Hamilton had performed her duties satisfactorily. Her husband was discharged for cause, however, and the board of directors terminated Mrs. Hamilton because her husband's termination "necessarily destroyed the team concept and thereby the couple's ability to provide twenty-four-hour service."

At the time of the Hamiltons' employment, they were given personnel policies which later were modified and incorporated into an employee handbook. The policies and handbook provided a disciplinary procedure triggered by employee misconduct and listed the various consequences of misconduct, which ranged from warning to termination. The procedure included a grievance process.

Mrs. Hamilton sued the housing entity for breach of employment, and argued that the employment policies and manual

elevated her to greater than at-will status. The district court, who did not have the benefit of Cannon, 422 N.W.2d 638 (Iowa 1988), or Young, 418 N.W.2d 844 (Iowa 1987), declined to give effect to the policies and manual in holding that she was an at-will employee.

HELD: Whether or not the written employment policies constituted a part of Mrs. Hamilton's employment contract was a fact question on which the district court understandably made no findings. Because other findings establish the reason for her termination, however, the issue is moot. The disciplinary procedure covers only misconduct, and Mrs. Hamilton was not terminated for misconduct. None of the policies or statements in the manual provided "that termination of employment could take place only for limited reasons or upon following specific procedure." Because she was discharged for "a non-disciplinary business necessity that went to the heart of the employment relationship," the Cannon-Young cases are of no assistance to her.

COMMENT: The court also declined, on the strength of Northrup v. Farmland Industries Inc., 372 N.W.2d 193 (Iowa 1985), to recognize a public-policy exception to at-will employment that is based on sex discrimination. Northrup "preempts independent common law actions also premised on discrimination."

Coontz v. Gordon Jewelry Corp., 439 N.W.2d 223 (Iowa App. 1989)

Wrongful Discharge.

Defendant terminated assistant manager, whose employment agreement protected him from discharge except for cause, for reasons that are in dispute. Plaintiff sued for wrongful discharge and intentional infliction of emotional distress. His companion litigation in federal court, alleging age discrimination under the age discrimination in Employment Act (ADEA) and under Employment Retirement Income Security Act (ERISA), was stayed until the state court case was resolved. The district court sustained defendant's motion for summary judgment on a holding that defendant's actions did not constitute outrageous conduct for purposes of the emotional distress claim and that ERISA preempted the wrongful discharge claim.

Court of appeals reversed on both grounds.

As to preemption, the possibility that some of plaintiff's damages would relate to the loss of employment benefits regulated by ERISA is not sufficient to trigger ERISA preemption. Because plaintiff alleges that one of the reasons for his discharge was to

prevent him from receiving pensions benefits, however, that portion of his wrongful-discharge claim is preempted.

As to emotional distress, evidence that plaintiff was not discharged for good cause and that defendant fabricated reasons for his dismissal was sufficient to satisfy the "outrageous conduct" requirement of intentional infliction of emotional distress for purposes of resisting a motion for summary judgment. COMMENT: Two of the six judges would have affirmed as to the intentional infliction claim, but only because the evidence as to fabrication was equivocal.

Norton v. Adair County, 441 N.W.2d 347 (Iowa 1989)

Wrongful Discharge.

Norton was hired by the sheriff as a jailer/dispatcher. After an election, the new sheriff terminated her. Norton's job was governed by a collective bargaining agreement that contained a grievance and arbitration procedure and a good-cause provision for termination. The local filed a grievance, which the sheriff denied. The local did not request arbitration timely, which rendered her grievance settled under the agreement.

Norton sued the county and county employees for breach of contract, interference with contractual relations, and violation of 42 U.S.C. § 1983. Norton added a claim against the local for breach of its duty of fair representation.

The local moved for summary judgment, contending that the Public Employment Relations Board (PERB) has exclusive jurisdiction over fair-representation claims. Following the federal doctrine of concurrent jurisdiction with respect to fair-representation claims in the private sector, the court held that the district court has concurrent jurisdiction with PERB over a public employee's action against a union that is based on the union's violation of a statutory duty of fair representation. The court departed from federal doctrine, however, in determining that a 90-day filing requirement with PERB under section 20.11(1) did not supply a statute of limitations for civil actions for violations of the fair-representation duty. The court held that the 5-year statute of limitations in section 614.1(4) is most appropriate, because it applies to legal malpractice cases. The court recognized the undesirable disparity between the 5-year period for public employees and the 6-month period for private sector employees, but invited the legislature to fix it.

The jury returned a verdict against the local, which moved for entry of judgment n.o.v. The court held that negligent and perfunctory handling of Norton's grievance, such that she lost the right to contest her termination, was a breach of the duty of fair representation. The court also held that the trial court did not abuse its discretion in admitting the decision by Job Service on Norton's application for unemployment benefits, because a finding that she had not engaged in misconduct was relevant to the good cause issue. Also, evidence of the relationship between the local and the international was relevant background information and was not shown by the local to constitute a prejudicial suggestion that the international, a deep pocket, would be liable to Norton. The trial court's definition of "arbitrarily," in instructing on the local's duty of fair representation, as "action taken without fair, solid, and substantial cause," and "which will not stand the test of reason or principal," was appropriate.

Departing again from federal precedent, the court held that a union member can recover punitive damages for a union's breach of a duty of fair representation. In this case, however, there was no evidence of actual or legal malice, so the trial court acted properly in refusing to give an instruction on punitives.

As to the county defendants, the court affirmed the order granting summary judgment. Iowa law authorized the sheriff to terminate Norton at any time for any reason, because it treated her as an employee at will. The bargaining agreement only reserved to the county the right to discharge for proper cause. Such language did not modify the statutory authority or make Norton anything other than an at-will employee. As such, she had no procedural due process protections that generated a section 1983 claim.

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Benishek v. Cody, 441 N.W.2d 399 (Iowa App. 1989)

Wrongful Discharge.

Cody discovered embezzlement and confronted Benishek and another employee. He gave them two weeks for one of them to come forward, or he would terminate both. Neither confessed, so Cody discharged both, telling them that the innocent one would be rehired if the guilty party could be established. Benishek sued for wrongful discharge, intentional infliction of emotional distress, and defamation.

In affirming the trial court's summary judgment, the court of appeals held that Benishek had not established that she was anything but an employee at will. Although she had worked for Cody

for 40 years, had provided numerous services for Cody without compensation, had worked overtime, and been a good employee, and even though she had anticipated employment for life, Benishek had not established the requisite consideration to change the status of her employment. The court of appeals also declined to recognize a "public policy" exception for these circumstances.

McBride v. City of Sioux City, 444 N.W.2d 85 (Iowa 1989)

Wrongful Discharge.

Sioux City hired McBride as assistant housing manager. The position had been advertised as non-civil service and, after a probation period, McBride was classified as a non-civil service employee. McBride's supervisor fired McBride after confronting him with evidence of backdating an applicant's application for low-income housing so as to expedite her entry into such housing.

McBride sued for declaratory judgment that he was a civil service employee entitled to discharge procedures provided under chapter 400 and for breach of employment. The district court entered summary judgment.

McBride sought to use two employment manuals in an effort to create an "implied contract" to protect him from discharge except "for cause." One manual's grievance procedures expressly applied only to certain portions of the manual, which did not include provisions for discipline or discharge. McBride's attempt to utilize those grievance procedures in contesting disciplinary action taken against him previously had been rejected by city. The other manual applied only to civil service employees and was not even distributed to employees such as McBride.

The court held that McBride had failed to adduce any substantial evidence of "mutual manifestation of assent by acts and deeds (rather than words)" to create an implied contract of employment with a "discharge for cause" provision. Court also held that the manuals did not constitute a unilateral amendment to the contract of employment. The court discussed but did not expressly adopt a three-part test for applying the unilateral contract theory:

> (1) the handbook must be sufficiently definite in its terms to create an offer,
> (2) the handbook must be communicated to and accepted by the employee so as to create acceptance, and

(3) the employee must continue working, so as to provide consideration.

Because the manuals made "no clear reference to grounds or procedures for termination," they did not meet test one. Because one of the manuals was not even distributed to employees such as McBride, it did not meet step two.

Niblo v. Parr Manufacturing, Inc., _____ N.W.2d ____ (Iowa, August 16, 1989)

Wrongful Discharge.

Plaintiff's employment required her to work with plastisol, a chemical used in manufacturing fuel filters. When she developed a skin condition on her face, she asked her supervisor about going to a doctor. "The supervisor ignored her first inquiry and responded to her second request by stating that he did not care what she did, but that defendant was not going to pay for her to go to a doctor." Plaintiff subsequently informed defendant's president of the dermatologist's opinion that her skin condition was work-related.

> When she told the president that she needed goggles, protective cream, and continued treatment, the president became irate. He told plaintiff that he was not going to pay workman's compensation or unemployment benefits and that he did not think that her skin problem was his fault or 'factory related'. He said that he was not going to pay to have plaintiff's face worked on at all. At the conclusion of this outburst, he fired plaintiff.

Plaintiff never testified that she wanted to or intended to file a worker's compensation claim, and she never did so.

HELD: Plaintiff adduced substantial evidence of a discharge that interfered with her right to seek compensation for work-related injuries. Plaintiff may recover emotional distress damages for a discharge in violation of public policy, and need not prove severe or serious emotional distress as a precondition to recovery.

Stennett Elevator, Inc. v. State, 430 N.W.2d 122 (Iowa 1988)

Duty.

Commerce commission suspended grain dealer and warehouse licenses issued to plaintiff elevator, who then went out of business. HELD: Because statutory duties of inspection and audit were enacted for the protection of customers, State does not owe actionable duty of care to licensees. "An intent to protect a particular party is a prerequisite to a claim of negligence based on violations of a statute."

Byers v. Evans, 436 N.W.2d 654 (Iowa App. 1988)

Duty.

Landlord has no duty of care with respect to the construction or maintenance, by tenant, of fences on leased farmland. Plaintiff established that fences were negligently constructed and/or maintained by tenant and that pigs escaped onto roadway, where they were struck by plaintiff. The court observed that the only control that the landlord even arguably had retained to exercise jointly with the lessee was over the land, which was not a factor in keeping the pigs off the road.

Mermigis v. Service Master Industries Inc., 437 N.W.2d 242 (Iowa 1989)

Duty.

Hospital contracted with Service Master "to manage the hospital's maintenance and construction operations." Service Master was to provide management functions, while actual maintenance work was to be conducted by hospital employees. Service Master provided an on-site manager who had to approve in advance all maintenance work. Plaintiff was injured by malfunctioning door.

HELD: Trial court properly assigned Service Master the duty and standard of care normally applicable to the owner of a premises. "Responsibility for safely maintaining the premises can be contractually assumed."

Ewoldt v. City of Iowa City, 438 N.W.2d 843 (Iowa App. 1989)

Duty.

Oppelt came to crisis center and asked to be taken to mental health institution. Oppelt had history of mental illness. He was advised to go to the police station to see if transportation could be arranged. Oppelt spoke with desk clerk at police station, but no officers were free and he was directed back to the crisis center. Oppelt left the crisis center dissatisfied and untreated and murdered plaintiff's decedent 24 hours later. Crisis center observed Oppelt to be "talking and moving slowly, his eyes were unfocused, and he was 'shaky' and 'out of it.'"

Section 229.22 provides:

> [A]ny peace officer who has reasonable grounds to believe that a person is mentally ill and because of that illness is likely to physically injure person's self or others, if not immediately detained, may without a warrant take or cause that person to be taken to the nearest available facility.

The Court of Appeals found no actionable duty of care owed to plaintiff's decedent to transport Oppelt to a care facility or to otherwise detain him. Absent special relationship between police and the victim, no jurisdiction recognizes a cause of action asserted by plaintiff.

COMMENT: The Court's closing comments to the effect that Oppelt "did not appear dangerous or violent" and that he was able to communicate were made for the purpose of disposing of plaintiff's argument that a criminal act by Oppelt was foreseeable. Does this mean that if plaintiff could have generated a fact question on foreseeability that the result would have been different?

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Fitzpatrick v. State, 439 N.W.2d 663 (Iowa 1989)

Duty.

Policy officer who was shot by parolee sued state, board of parole, parole officer, and parole officer's supervisor. HELD: Absent special relationship between the public officials and the victim, defendants owe no actionable duty of care to plaintiff to protect him from the criminal activity of the parolee. Plaintiff's claim is not actionable under 42 U.S.C. § 1983 either.

Arnold v. City of Cedar Rapids, 443 N.W.2d 332 (Iowa 1989)

Duty.

Plaintiff was spectator at softball game, and elected to sit in open bleachers along first base line rather than behind home plate, where she would have been protected by a screen. Plaintiff sued for injuries suffered when she was hit by a misthrown ball. HELD: "[T]he owner or operator of a ballpark fully discharges any obligation to protect spectators from thrown or hit balls by providing seating in a fully protected area. Where a spectator rejects the protected seating and opts for seating that is not, or is less, protected the owner or operator is not liable."

Mohr v. Midas Realty Corp., 431 N.W.2d 380 (Iowa 1988)

Nuisance.

In affirming defendant's motion for summary judgment, court held that adjoining land owner's lawful construction of building upon owner's land in a manner that blocked passing motorist's view of plaintiff's business was not actionable as nuisance.

State Savings Bank v. Allis-Chalmers Corp., 431 N.W.2d 383 (Iowa App. 1988)

Fraud.

In the course of the sale of a farm implement dealership, the new owners executed a security agreement with Allis-Chalmers (AC). The agreement covered AC replacement parts "now owned" by the dealership on the date of execution and placement parts acquired from AC after that date. The bank had a financing statement covering all of the dealership's parts inventory, but it was filed after AC's. HELD: Evidence that permitted jury to find that AC did not intend to pay Bank out of proceeds of parts but misled Bank in order to obtain financing for new buyers of dealership was sufficient to satisfy scienter element of fraud claim.

Hoffman v. National Medical Enterprises, Inc., 442 N.W.2d 123 (Iowa 1989)

Fraud.

Respiratory therapists founded Pro-Lung, which provided oxygen equipment and services to persons outside hospitals. To facilitate expansion of their business, they negotiated with Medical Oxygen Service (MOS) to sell Pro-Lung while retaining their management duties. A stock purchase by MOS was agreed upon, with employment agreements for the therapists as well as covenants by therapists not to compete with Pro-Lung. One year later, representatives of MOS' parent companies forced the therapists out of the Pro-Lung business by terminating them and changing the locks. The representatives threatened to have the therapists prosecuted for Medicare fraud if they did not acquiesce in the separation.

The therapists sued for fraudulent misrepresentation. The trial court's instructions on fraud permitted the jury to find that plaintiffs were justified in relying on defendants' representations by finding that there was a confidential relationship between plaintiffs and the defendants. On appeal, the court found insufficient evidence of a confidential relationship. "[T]he parties were businessmen negotiating the sale of Pro-Lung. Plaintiffs were represented by counsel . . . . There is nothing . . . to suggest inequality of the parties or dominance of plaintiffs by . . . MOS during the negotiations."

Chapman v. Craig, 431 N.W.2d 770 (Iowa 1988)

Fireman's Rule.

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By a 6-3 vote, the court refuses to abolish the fireman's rule, adopted in Pottebaum v. Hinds, 347 N.W.2d 642 (Iowa 1984). The court also holds that the rule does not violate equal protection. COMMENT: The court defeats the equal protection argument by defining the class as only those fire fighters or officers whose causes of action are based on the same conduct that initially created the need for the officer's presence in an official capacity, and then by announcing that the rule treats all members of that class equally. Such analysis would permit the court to uphold a rule that applies only to female fire fighters or police officers, since it is only those officers who are denied the right of recovery. There certainly is an argument to be made in support of the conclusion that the fireman's rule does not violate equal protection, this was not it.

Cook v. State, 431 N.W.2d 800 (Iowa 1988)

Sovereign Immunity.

In action by injured motorist who blew stop sign at intersection of two state highways, court held that state's location of a "stop ahead" sign and failure to place an identical sign on the left-hand side of the road as well were not conduct immunized by subsections 8 or 9 of section 25A.14. Those subsections retain immunity generally against claims for negligent design or specification or negligent construction or reconstruction of a highway that was constructed or reconstructed in accordance with a generally recognized engineering or safety standard, criteria, or design theory in existence at the time. "[P]laintiff does not assert that the State failed to upgrade or make improvements. Rather, he claims the placement of the signs was unreasonable and constituted negligent conduct. This conduct simply does not fall within the ambit of subsections 8 and 9."

Sheerin v. State, 434 N.W.2d 633 (Iowa 1989)

Sovereign Immunity.

State's decision to parole prison inmate is a discretionary function and does not give rise to liability under chapter 25A. Claim of negligent supervision of parolee constitutes a criticism of the terms and conditions of parole, which likewise comes within discretionary function. Duty to warn requirement of Anthony, 374 N.W.2d 662, 669 (Iowa 1985), that requires "existence of a prior threat to a specific identifiable victim," is reaffirmed.

Nachazel v. Miraco Manufacturing, 432 N.W.2d 158 (Iowa 1988)

Product Liability.

Farmer purchased hog farrowing houses (Mirahuts) from defendant. Defendant guaranteed that use of Mirahuts would eliminate scours. Mirahuts did not work. Farmer sued manufacturer on breach of warranty and strict liability, and manufacturer appeals from judgment in favor of farmer on warranty claim. HELD: When buyer has accepted the goods and retains them, seeking damages under section 554.2714, interest expense incurred as a result of a purchase-money loan is not caused by the breach and is not recoverable. Buyer's remedy is limited to diminished value or use

of the property and other consequential damages. Cost of installation, minus any remaining value or benefit resulting from the installation is recoverable as a consequential damage.

Higgins v. Gordon Jewelry Corp., 433 N.W.2d 306 (Iowa App. 1988)

Defamation.

Retail store cashier was fired on fabricated grounds relating to honesty. In truth, a regional manager discovered that cashier had been treated by a psychiatrist in the past and had used drugs, and wanted her terminated for that history. Store manager eventually disclosed real reason to plaintiff and others, but did so inaccurately to one degree or another.

In reversing jury verdict on defamation, the court of appeals held that the trial court should have submitted the defense of qualified privilege. Although the evidence would support a finding that defendant had abused the qualified privilege by excess publication, the record would not permit such a holding by the court as a matter of law. The record appeared to establish excessive publication to persons unnecessarily involved by defendant, but identical publications to those persons and others by cashier herself. Therefore, a new trial was necessary.

COMMENT: Court notes that while applicability of the qualified privilege in the first place normally is a matter for the court, "there may be circumstances where a factual dispute exists so that the issue of whether the privilege is qualified needs to be submitted to the jury for its consideration."

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Higgins v. Gordon Jewelry Corp., 433 N.W.2d 306 (Iowa App. 1988)

Defamation.

In suit by wrongfully terminated retail store cashier for defamation, cashier was permitted to adduce testimony by persons other than the declarant as to statements made by other supervisory and non-supervisory employees about the reasons for the cashier's termination. HELD: Because the statements were offered to prove only that the statements had been made, as opposed to proving the truth of the assertions, the testimony was not hearsay. COMMENT: Court cautions "that evidence of repetition by others of the slander . . . without defendant's authority or request . . . is inadmissible . . . . Those who repeat slanderous statements make

themselves liable therefore and such repetition cannot be considered a necessary or probable consequence of the original slander."

Jones v. Palmer Communications, Inc., 440 N.W.2d 884 (Iowa 1989)

Defamation.

Plaintiff was hired by municipal fire department pursuant to consent decree issued in widely-publicized litigation over discriminatory hiring practices. Plaintiff then was dismissed for failing to pass an EMT examination. He had failed it on six different occasions, despite receiving tutorial assistance. Reporters learned of the dismissal and interviewed the fire chief, who stated that the plaintiff had a reading problem that led to his failure of the exam. The chief said that tests had determined that plaintiff read at a third-grade level. The chief also said that plaintiff had received special tutoring at taxpayer expense. The interview was broadcast on television.

Plaintiff sued the television station for libel and false-light invasion of privacy. Defendants moved for summary judgment, raising numerous defenses and constitutional issues. The motions were denied in their entirety by the district court.

Because neither a tape nor a transcript of the broadcast was in the record, the court was unable to state as a matter of law that the broadcast was substantially true. Because the record established that plaintiff's tutoring was not entirely subsidized by taxpayers, and because his reading level was comparable with the lower third of junior college students, the court could not determine whether these matters were of secondary importance or were part of the "gist" or "sting" of the broadcast. For the same reason, the court also could not determine as a matter of law that the broadcast reflected only opinions rather than facts. The court observed, however, that the precision and specificity of the incorrect statements would suggest that they were factual in nature.

The absence of a tape and transcript also prevented the court from determining whether or not to extend a qualified privilege to statements by government officials which are necessary to the performance of official duties. Because the privilege can be defeated simply by excessive publication, the court needed "to determine whether the broadcast centered on an important civil rights issue or the plight of an individual fire fighter." The

court discussed the developing and controversial "neutral reporting" privilege but declined to adopt it or to determine whether it was applicable to plaintiffs' case, again for lack of the tape and transcript.

The court rejected defendants' suggestion that plaintiff was a public official, and declined to apply a "government affiliation" interpretation to the "public official" designation from New York Times v. Sullivan. The court also rejected the argument that plaintiff had achieved public-figure status by seeking employment with the fire department at a time when controversial and publicized litigation had resulted in a consent order, or by appealing his dismissal to the civil service board. The court also declined to adopt the public-interest privilege first articulated in Rosenbloom v. Metromedia, Inc., 403 U.S. 29, 91 S. Ct. 1811, 29 L. Ed. 2d 926 (1971), as a basis for requiring plaintiff to establish actual malice. The court held that Iowa's fair-report privilege does not require the adoption of Rosenbloom because it relates only to public officials or public figures. Instead, the court adopted a negligence standard (authorized by Gertz) for determining liability of a media defendant to a private person for defamation in a matter of public interest or public concern. Applying that standard, the court could not state as a matter of law, absent the tape and transcript, that defendants comported with a professional standard of care.

The court did reverse with respect to the claims of punitive damages. The court held that section 659.2 and .3, which place "a substantial portion of the burden of disproving fault on a media defendant," and which articulate punitive-damages standards "completely different from those standards articulated by the United States Supreme Court," are unconstitutional. "Because the controversy is a matter of public concern, [plaintiff] must demonstrate actual malice to receive an award of punitive damages." This record could not support such a finding, and the court did not need the tape or transcript to confirm that.

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Benishek v. Cody, 441 N.W.2d 399 (Iowa App. 1989)

Defamation.

Cody discovered embezzlement and confronted Benishek and another employee. He gave them two weeks for one of them to come forward, or he would terminate both. Neither confessed, so Cody discharged both, telling them that the innocent one would be rehired if the guilty party could be established. Benishek sued for wrongful discharge, intentional infliction of emotional distress, and defamation.

In affirming the trial court's summary judgment, the court of appeals held that Cody's statements were qualifiedly privileged and that Benishek had not adduced substantial evidence of actual malice.

McBride v. City of Sioux City, 444 N.W.2d 85 (Iowa 1989)

Defamation.

Sioux City hired McBride as assistant housing manager. The position had been advertised as non-civil service and, after a probation period, McBride was classified as a non-civil service employee. McBride's supervisor fired McBride after confronting him with evidence of backdating an applicant's application for low-income housing so as to expedite her entry into such housing. The supervisor expressed concern that McBride had been motivated by personal favor or monetary gain, and McBride gave no explanation or defense. McBridge told the applicant about the accusation, and the applicant called the supervisor, who repeated the accusation to the tenant and two of her friends.

McBride sued for slander. HELD: Regardless of whether the supervisor's statement about personal favors was slanderous, McBride published the statement to the witnesses before the supervisor was even given the opportunity to do so, which occurred only because of McBride's own publication.

Baker v. Stewarts' Inc., 433 N.W.2d 706 (Iowa 1988)

Waiver of Liability.

Patron at cosmetology school signed written waiver acknowledging that Stewarts' was a "student training facility" and that the price was correspondingly reduced, and promising that patron would not hold anyone liable for injuries resulting from the services rendered. HELD: In reversing entry of summary judgment for the school in an action asserting, among other things, negligent supervision by professional staff members, the court said:

> [W]e do not believe that it would be apparent to the casual reader asked to sign this form as a condition for receiving cosmetology services that its effect was to absolve the establishment from liability based upon the acts or omissions of its professional staff.

Sieren v. Bauman, 436 N.W.2d 43 (Iowa 1989)

Conversion.

In dissolution degree, Susan executed promissory note for $2,500 in favor of Martin, and Susan was awarded certain property. Susan defaulted on the note, and Martin sued. Susan counterclaimed, alleging Martin did not give her the property awarded to her in the dissolution degree. Trial court entered judgment in favor of both parties on portions of their claims. HELD: Trial court had jurisdiction to adjudicate merits of Susan's counterclaim, even if it required him to interpret the terms of the dissolution degree as it related to her claim that Martin had converted property awarded to her. Martin's claim that Susan's only remedy was to initiate further proceedings in the dissolution was without merit.

Moritz v. Maack, 437 N.W.2d 898 (Iowa 1989)

Vicarious Liability.

Defendant purchased car for his 17-year-old son, Brad, who contributed a small percentage of the purchase price and was responsible for maintenance and upkeep. Defendant was the sole registered titleholder. Brad was forbidden to allow any other person to drive the car, including siblings. The prohibition was repeated frequently and was enforced by denial of the use of the car at all when the rule was violated. On the evening of the accident, Brad visited a girlfriend. While there, another friend, Lisa, asked Brad if she could borrow his car. Although he told her he was not to permit anyone to drive it, he gave her the keys. Lisa and plaintiff left with the car. Later in the evening, Lisa returned to ask Brad if she could take the car to another town to a dance. He again gave her permission. Lisa and plaintiff were then involved in a one-car accident.

The Court affirmed summary judgment for defendant. The evidence established as a matter of law that defendant did not consent to Lisa's operation of the vehicle. On the only occasion that defendant knew of Brad's violation of the repeated prohibition, the prohibition was enforced. "[I]t is difficult to imagine what more [defendant] could have done to limit his liability." Plaintiff's alternative claim that Brad was the "equitable owner" failed first because Brad was not sued and second because the statute defines owner as "a person who holds legal title."

Van Zwol v. Branon, 440 N.W.2d 589 (Iowa 1989)

Vicarious Liability.

Louie Vajgrt volunteered to help his good friend Richard Allen haul railroad ties. Louie left his pick-up with Allen at Louie's farm, and departed in another vehicle. Allen's step-son then arrived at Louie's farm pursuant to his mother's suggestion that he help Allen gather the railroad ties. Allen directed step-son to take Louie's truck. While operating Louie's truck the step-son struck plaintiff. When Louie found out about the accident, he said, "What's he doing with my truck?"

HELD: Trial court had substantial evidence to support its finding that plaintiff did not establish that step-son operated Louie's vehicle with Louie's consent. "Initial permission" rule, which grants a consensual user power to entrust further use, is rejected.

Coontz v. Gordon Jewelry Corp., 439 N.W.2d 223 (Iowa App. 1989)

Intentional Infliction of Emotional Distress.

Defendant terminated assistant manager, whose employment agreement protected him from discharge except for cause, for reasons that are in dispute. Plaintiff sued for wrongful discharge and intentional infliction of emotional distress. The district court sustained defendant's motion for summary judgment on a holding that defendant's actions did not constitute outrageous conduct for purposes of the emotional distress claim and that ERISA preempted the wrongful discharge claim.

Court of appeals reversed on both grounds.

As to emotional distress, evidence that plaintiff was not discharged for good cause and that defendant fabricated reasons for his dismissal was sufficient to satisfy the "outrageous conduct" requirement of intentional infliction of emotional distress for purposes of resisting a motion for summary judgment. COMMENT: Two of the six judges would have affirmed as to the intentional infliction claim, but only because the evidence as to fabrication was equivocal.

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Intentional Infliction of Emotional Distress.

Cody discovered embezzlement and confronted Benishek and another employee. He gave them two weeks for one of them to come forward, or he would terminate both. Neither confessed, so Cody discharged both, telling them that the innocent one would be rehired if the guilty party could be established. Benishek sued for wrongful discharge, intentional infliction of emotional distress, and defamation.

In affirming the trial court's summary judgment, the court of appeals held that Benishek had not adduced evidence that would constitute outrageous conduct.

Hoffman v. National Medical Enterprises, Inc., 442 N.W.2d 123 (Iowa 1989)

Intentional Infliction of Emotional Distress.

Respiratory therapists founded Pro-Lung, which provided oxygen equipment and services to persons outside hospitals. To facilitate expansion of their business, they negotiated with Medical Oxygen Service (MOS) to sell Pro-Lung while retaining their management duties. A stock purchase by MOS was agreed upon, with employment agreements for the therapists as well as covenants by therapists not to compete with Pro-Lung. One year later, representatives of MOS' parent companies forced the therapists out of the Pro-Lung business by terminating them and changing the locks. The representatives threatened to have the therapists prosecuted for Medicare fraud if they did not acquiesce in the separation.

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The therapists sued for breach of the employment contracts, fraudulent misrepresentation, interference with contractual relations, and extortion. Plaintiffs sought emotional distress damages in their claim for extortion, and adduced evidence that they were "totally taken aback" and "flabbergasted" by the threats of prosecution. One plaintiff did not tell his wife of the threats because he did not want her to worry.

The court reviewed several cases in which emotional distress verdicts had been affirmed and then concluded that plaintiffs' injuries were insufficient to be compensable. "There is no evidence either plaintiff was emotionally upset by defendants' threats. Neither of them apparently had difficulty eating,

sleeping, or working after being threatened. They clearly found defendants' actions annoying and frustrating, but the record does not indicate they found them worrisome."

McClinton v. Iowa Methodist Medical Center, 444 N.W.2d 511 (Iowa App. 1989)

Intentional Infliction of Emotional Distress.

Medical technologist who ultimately was terminated for poor work performance sued hospital for intentional infliction of emotional distress. Evidence supported poor-performance findings, but also would support findings that plaintiff's supervisors engaged in a campaign to drive plaintiff either to quit or to perform poorly so as to justify dismissal. HELD: Plaintiff did not adduce sufficient evidence of outrageous conduct to permit recovery for intentional infliction of emotional distress.

United Central Bank v. Kruse, 439 N.W.2d 849 (Iowa 1989)

Consumer Fraud.

Kruse bought land on contract from Graham who borrowed the money from bank and ultimately assigned his interest in contract to bank as security. Graham defaulted on note and bank obtained a judgment against him. The bank notified Kruse, who then made payments directly to bank. Because Graham himself was purchasing the land on contract, and because he was in default, the original seller served notice of forfeiture, to which Kruse responded by making some direct payments. Graham had assigned his interest in this contract to bank as well. Bank and Kruse negotiated a new arrangement whereby original seller was paid off, Kruse received title, and Kruse mortgaged property to bank with relatively early balloon payment. Kruse defaulted and bank commenced action for foreclosure. Kruse presented affirmative defenses and counterclaims on theories of fraudulent and negligent misrepresentation and tortious interference with contractual relationship. The misrepresentation claims were premised on allegations that the bank made false legal representations to Kruse as to the effect of the judgment against Graham on the property and as to the effect of Kruse's direct payments to the original seller.

Because the Court found that the transaction was not primarily for personal, family, or household purposes, the Court properly dismissed all claims under the Iowa Consumer Credit Code and the Federal Truth and Lending Act.

Steinkuehler v. Brotherson, 443 N.W.2d 698 (Iowa 1989)

Dog.

Plaintiff's motorcycle collided with defendants' dog on county highway. After deposition discovery, defendants moved for summary judgment, contending that they had never had a problem with the dog roaming onto the roadways.

Section 351.28 originally provided:

> The owner of any dog . . . shall be liable . . . for all damages done by said dog . . . .

Before this accident, this statute was amended to provide:

> The owner of a dog shall be liable . . . for all damages done by the dog, when the dog is caught in the action of worrying, maiming, or killing a domestic animal, or the dog is attacking or attempting to bite a person . . . .

The court rejected defendants' claim that the amendment "was intended to insulate a dog owner from all liability for the acts of a dog other than those specified in the statute." Instead, the court held that the legislature intended "to relieve the dog owner from the strict liability imposed by section 351.28. This legislation was not designed to narrow dog owners' liability and claims based on negligence." Whether or not defendants were negligent in permitting their dog to run free, given the proximity of their home to the roadway and the potential for danger to motorists, was for the jury.

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TRIAL

Davis v. Department of Corrections, 441 N.W.2d 375 (Iowa App. 1989)

Iranian national who was educated in the United States and obtained a doctorate in library science was terminated by defendant from his job as librarian at the penitentiary, on grounds that he had slept on the job. Just before beginning of trial, Davis

renewed his request that the court permit his lawyer to withdraw. Court warned Davis that the trial would proceed immediately, as scheduled. Davis proceeded to participate pro se, and the court rendered assistance that went beyond the usual participation of a judge in many ways. HELD: Court did not abuse its discretion in assisting Davis, and did not abuse its discretion in granting Davis' request to remove his counsel or in failing to order, sua sponte, a continuance.

PCA v. Ryan, 441 N.W.2d 379 (Iowa App. 1989)

Examination.

PCA and Ryan reached agreement whereby PCA would not foreclose if Ryan obtained additional financing so as to reduce his obligation to PCA and if he were to obtain a deed from his father covering additional land so that PCA could take a first mortgage on the additional land. Ryan obtained the deed, but his effort to obtain additional financing failed, and PCA filed a foreclosure action, to which a consent judgment was entered.

During the trial on Ryan's counterclaim for fraudulent misrepresentation, counsel for Ryan attempted to elicit testimony from Ryan as to why he gave PCA a first mortgage on the land being purchased from his father. Ryan was unable to state that he did so in reliance upon a representation that PCA would not foreclose if it were granted a first position on the additional farm. In the process of repeating the questions in order to elicit the desired testimony, counsel drew objections, which resulted in colloquy between counsel and the court.

The court of appeals held that the trial court consistently and correctly ruled that Ryan could present testimony of statements on which he relied in obtaining a warranty deed from his father so that PCA could obtain a first mortgage. Counsel made an offer of proof from Ryan's pre-trial deposition, in which Ryan provided the necessary testimony. "The offer . . . is nothing more than an attempt to inject into the record testimony which examining counsel was unable to elicit from Mr. Ryan during his direct examination. Those questions were not objected to. We do not believe that an offer of proof should be used for this purpose. The court may refuse an offer when the proof would be contradictory of the witness's previous testimony.

Higgins v. Gordon Jewelry Corp., 433 N.W.2d 306 (Iowa App. 1988)

Cross-Examination.

Without even generally describing the course of plaintiff's cross-examination, the court of appeals held that defendant's presentation of expert testimony on plaintiff's prior medical history and its impact on her performance as an employee in the past and its likely impact on her working elsewhere in the future exposed the expert to cross-examination "on the subject of damages."

Strain v. Heinssen, 434 N.W.2d 640 (Iowa 1989)

Cross-Examination.

Plaintiff in medical malpractice trial attempted to cross-examine defense experts on the identity of the hiring entity, for the purpose of establishing that they had been hired on more than one occasion by a medical malpractice insurance company, St. Paul. Court of appeals reversed district court's refusal to permit such inquiry.

The supreme court vacated the opinion of the court of appeals and affirmed the district court. Rule of Evidence 411 continues the general hostility toward evidence of liability insurance. Although rule and common law permit evidence of insurance to show bias or prejudice, mere retention of expert by insurer is not sufficient to create bias or prejudice that can be explored by evidence of the identity of the hiring party. Under such circumstances, who paid for the experts' testimony was not important. The only relevant fact was that the testimony was procured by compensation.

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Burkis v. Contemporary Industries Midwest Inc., 435 N.W.2d 397 (Iowa App. 1988)

Rebuttal.

In dram shop trial arising out of two-car accident, plaintiff adduced rebuttal testimony from one of the occupants of the vehicle that struck plaintiff. The driver and another occupant had testified during plaintiff's case in chief as to who was the driver. There was some dispute about his identity, because the person identified as the driver was found in the back of the van, semi-conscious, after the accident. Defendant adduced expert

testimony during its case in chief that the purported driver, who tested at .49, would not have had the physical capacity to drive or to fake that he was passed out.

Plaintiff also adduced testimony by a physician who testified on rebuttal instead of in plaintiff's case in chief "because the defendant's pulmonologist was not retained by defendant nor offered for deposition until the eve of trial." The physician rebutted defendant's attack on another of plaintiff's physician's credibility and the substance of his testimony.

HELD: No abuse of discretion in permitting rebuttal testimony.

Kilker v. Mulry, 437 N.W.2d 1 (Iowa App. 1988)

Rebuttal.

Plaintiff in medical malpractice case sought to prove that hospital had altered medical records and attempted to present expert testimony on that issue. Trial was scheduled for February 10, 1987, but plaintiff did not disclose the records expert until January 27, when they filed supplemental answers in response to a motion in limine. Defendants established that plaintiffs had been in possession of a report from the expert for more than six months before disclosing the expert. Trial court precluded plaintiff from using expert in his case in chief as a discovery sanction.

During plaintiff's case in chief, plaintiff was permitted to adduce evidence relevant to his claim of document alteration, and defendant inquired into the authenticity of documents during its case in chief.

HELD: Trial court did not abuse its discretion in excluding expert, and did not abuse its discretion in concluding that defendant had not opened the door to rebuttal testimony by expert. COMMENT: Opinion digests several appellate opinions on the subject of discovery sanctions for failure timely to disclose witnesses and experts.

Kilker v. Mulry, 437 N.W.2d 1 (Iowa App. 1988)

Jury.

In medical malpractice case, juror forgot to mention her past service as a volunteer in the hospital's gift shop until after opening statements. HELD: No abuse of discretion in trial court's refusal to remove juror for cause or to grant mistrial. No evidence of juror misconduct.

United Central Bank v. Kruse, 439 N.W.2d 849 (Iowa 1989)

Instructions.

Kruse bought land on contract from Graham who borrowed the money from bank and ultimately assigned his interest in contract to bank as security. Graham defaulted on note and bank obtained a judgment against him. The bank notified Kruse, who then made payments directly to bank. Because Graham himself was purchasing the land on contract, and because he was in default, the original seller served notice of forfeiture, to which Kruse responded by making some direct payments. Graham had assigned his interest in this contract to bank as well. Bank and Kruse negotiated a new arrangement whereby original seller was paid off, Kruse received title, and Kruse mortgaged property to bank with relatively early balloon payment. Kruse defaulted and bank commenced action for foreclosure. Kruse presented affirmative defenses and counterclaims on theories of fraudulent and negligent misrepresentation and tortious interference with contractual relationship. The misrepresentation claims were premised on allegations that the bank made false legal representations to Kruse as to the effect of the judgment against Graham on the property and as to the effect of Kruse's direct payments to the original seller.

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The evidence established that Kruse was represented by counsel throughout negotiations with the bank. The trial court instructed "that knowledge possessed by an attorney is chargeable to his client." The court held that the instruction should not have been given. It "is sweepingly overbroad . . . . [C]lients do not possess all knowledge on all subjects which their attorneys possess. To so advise a jury can only create false impressions as to the consequences of being represented by an attorney. There may indeed be instances where a client is permitted to claim that he or she has been deceived by false representations even though an attorney representing that client was not similarly deceived." While a third party is entitled to assume that communications with the attorney are passed on to the client, there was no evidence of communications to the attorney but not Kruse. Kruse claims the

misrepresentations were made directly to him. The bank denies the statements were made at all. "Consequently, there was no reason to have given the instruction."

COMMENT: The Court seems to acknowledge that there are instances where the involvement of an attorney militates against a claim of misrepresentation or fraud, but the opinion leaves little room for such an instruction and no guidance at all as to acceptable language or scope.

The trial court also instructed that contract seller of real estate, who also was purchasing the same real estate by contract, retains an interest until the purchase price is paid, which interest is personal property that may be assigned if assignment is not prohibited by the terms of the contracts, and that a money judgment entered in a particular county is a lien against real estate owned by the judgment debtor in that county but is not a lien on personal property until further action is taken by the judgment creditor. These instructions were given for the sole purpose of providing the jury with guidance in determining whether or not alleged representations by the bank to Kruse were false or inaccurate, and were given in lieu of permitting Kruse to present expert testimony on the accuracy of the bank's statements

The court uneasily gave its approval to this method of guiding the jury in deciding whether the bank misrepresented Kruse's rights and obligations.

Hoffman v. National Medical Enterprises, Inc., 442 N.W.2d 123 (Iowa 1989)

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Instructions.

Respiratory therapists founded Pro-Lung, which provided oxygen equipment and services to persons outside hospitals. To facilitate expansion of their business, they negotiated with Medical Oxygen Service (MOS) to sell Pro-Lung while retaining their management duties. A stock purchase by MOS was agreed upon, with employment agreements for the therapists as well as covenants by therapists not to compete with Pro-Lung. One year later, representatives of MOS' parent companies forced the therapists out of the Pro-Lung business by terminating them and changing the locks. The representatives threatened to have the therapists prosecuted for Medicare fraud if they did not acquiesce in the separation.

The therapists sued for breach of the employment contracts, fraudulent misrepresentation, interference with contractual relations, and extortion. Trial court's instructions for breach

of contract and for interference of contract permitted the jury to award "an amount that shall place [plaintiffs] in the position they would have been had the employment contract been fully performed by Pro-Lung." The instructions for interference with contract went on to permit the jury to award to consequential damages as well. The jury returned a verdict of $300,000.00 on breach of contract and $15,000.00 on the interference claim.

In reversing and remanding for new trial, the court held that these instructions were not consistent. Because the interference instruction permitted recovery of damages for breach of contract as well as consequential damages,

> the damages for interference with contract must be at least equal to the damages for breach of contract . . . . Here, the damages for interference were far less than those for the breach.
>
> Plaintiffs contend this was the result of the jury only awarding consequential damages . . . for interference of contract. They assert the jury declined to award damages recoverable for breach of contract . . . because it had already awarded those damages . . . .
>
> This argument is premised purely on speculation. The jury was never instructed to avoid awarding overlapping or duplicative damages . . . . Nor is there any indication, other than perhaps the jury's findings themselves, that the jury attempted to avoid such duplication.

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Prendergast v. Smith Laboratories, Inc., 440 N.W.2d 880 (Iowa 1989)

Verdict Reformation.

In medical malpractice/products liability action, three of four defendants settled before trial, leaving only a products case against Smith. Trial court advised the jury as to the settlements (without disclosing the amounts) and instructed that the settling defendants were to be assigned their relative portions of fault along with Smith in interrogatory 14. Interrogatories 15 and 16 asked the jury to state the amount of the two plaintiffs' (the injured patient and his wife) damages. The instructions did not

inform the jury as to the impact of the percentages on plaintiffs' recovery, and plainitffs took no exception to that omission.

During deliberations, the jury asked if the percent assigned to Smith in 14 would be multiplied by the amounts given by the jury in 15 and 16. Without consulting counsel, the court instructed the jury that the percentage amounts in 14 were separate and distinct from the dollar amounts in 15 and 16 and that the court would perform any further necessary calculations. Then the jury asked what amounts would be awarded to each of the plaintiffs given 25% fault assessed against each defendant and $100,000.00 entered in answers to 15 and 16. Again without notice to counsel, the court advised the jury that it would make "this determination based on your findings and you should determine the amount of damages, if any, without regard to your findings of percentages." Still curious, the jury asked, "If we put amounts on lines 15 and 16 of the special form, are these the amounts the plaintiffs will receive?" Finally, the court alerted counsel and after conferring with them advised the jury, without objection, as follows:

> [T]he answer should be determinable by you through a careful reading of the instructions; wherein the liability percentages should be separately decided . . . and the damages should be separately decided . . . .

The jury then returned a verdict, assessing 15% against Smith and answering 15 and 16 with $500,000.00 and $50,000.00 respectively. Before the court entered judgment for Mr. Prendergast for $75,000.00 and for Mrs. Prendergast for $7,500.00, counsel for both sides interviewed the jury. "[T]he jurors indicated surprise that the plaintiffs' awards would be reduced from the amounts fixed in [15 and 16]. The jurors indicated that they had intended to answer the interrogatories so that [plaintiffs] would recover $500,000.00 and $50,000.00 . . . from . . . Smith."

Plaintiffs orally moved for mistrial. Plaintiffs recast their motion to request that the verdict be reformed or that a new trial be ordered. The court questioned each juror over Smith's objections, and each juror testified that his or her intent was to award 500,000 and 50,000 to the plaintiffs from Smith. The court determined that the jury never reached a unanimous decision as to the total amount of damages sustained by either plaintiff. The trial court ruled that Smith should be liable for damages of 500,000 and 50,000 and alternatively ruled that if the reformation was reversed on appeal, there should be a new trial on damages.

Rule of Evidence 606(b) provides:

> [A] juror may not testify as to any matter or statement occurring during the course of the jury's deliberations or to the effect of anything upon his or any other juror's mind or emotions as influencing him to assent to or dissent from the verdict . . . or concerning his mental processes in connection therewith . . . .

Relying upon federal interpretations of similarly-worded federal rule of evidence 606(b), the court has "adopt[ed] the federal rule which protects each of the components of deliberation including juror arguments, statements, discussions, mental and emotional reactions, votes, and any other feature of the process occurring in the jury room." Ryan v. Arneson, 422 N.W.2d 491, 495 (Iowa 1988) (juror affidavits not competent to establish use of quotient verdict).

Incredibly, the court acknowledged Arneson and the express language of rule 606(b), and then said: "This language does not suggest that juror testimony which aids in establishing that which was agreed upon by the jury is prohibited." Court cites cases both old and new and federal and state for the proposition "that juror testimony is competent to reveal a mistake in the rendition of an otherwise unanimous verdict." Because the jury did not make a finding as to total damages, the court had nothing on which to reform the verdict so as to give effect to the jury's actual finding.

The court acknowledged that it was moving "beyond the limits of those authorities which permit correction of a mistake in the rendition of the verdict agreed to by the jury" in considering juror testimony on the issue of whether a new trial should be granted based upon a failure of the jury to respond to one of the special interrogatories. "We must concede that an affirmative answer to this question produces noticeably more tension with the limitations contained in rule 606(b) than is the case with the questions of verdict reformation which we have previously discussed." The court also said: "If the issue were whether a verdict may be overturned because it was induced by the jury's misunderstanding of the court's instructions, rule 606(b) would render juror testimony inadmissible for purposes of achieving that result." Somehow, the court saw the problem in this case differently. "The flaw in the present case, as shown by juror testimony, was that the jury made no determination at all on the issue of total damages." (Emphasis added) Because the juror testimony established that the jury failed to answer 15 and 16 correctly (which the court determined exclusively from the testimony of the jurors) the court affirmed the alternative ruling of a new trial on damages.

Morrison v. Century Engineering, 434 N.W.2d 874 (Iowa 1989)

Claimant has no right to have counsel present when employer's counsel interviews treating physician. No abuse of discretion by industrial commissioner in admitting medical report signed by treating physician but authored by employer's counsel three months after meeting between counsel and physician.

Second Injury Fund v. Neelans, 436 N.W.2d 355 (Iowa 1989)

When employee sustains scheduled injury that, in conjunction with earlier scheduled injuries, causes disability to the body as a whole, the employer is not liable for a pro-rata share of the benefits payable on the whole-body disability.

Reid v. Hansen, 440 N.W.2d 598 (Iowa 1989)

Plaintiff is a resident of Nebraska, employed by a business with its principal place of business in Nebraska. Plaintiff was injured in a work-related accident in Iowa. Employee received compensation benefits under the Nebraska workers' compensation law. Nevertheless, plaintiff also filed an application for workers' compensation benefits in Iowa. When advised by employer's carrier that employer was not insured against claims in Iowa, plaintiff commenced a tort action under section 87.21. The court rejected contrary arguments in Larson and Reinstatement (Second) of Conflict of Laws § 184, and held that employee's tort action was not barred by the exclusive remedy provisions of the Nebraska law. Court also held that there was no applicable exception to the failure-to-insure requirements of the Iowa law.

Ewing v. George A. Hormel & Company, 428 N.W.2d 674 (Iowa App. 1988)

Jurisdiction.

Employee domiciled in Fort Dodge but transferred by Hormel from its closing Fort Dodge plant to Fremont, Nebraska, was injured in the course of his employment in Fremont. HELD: No Iowa jurisdiction.

French & Hecht v. Arlingdale, 432 N.W.2d 705 (Iowa App. 1988)

Commutation.

Employer filed petition for judicial review upon Industrial Commissioner's full commutation of employee's permanent and total disability payments. While the judicial review proceeding was pending, employer filed an application for review/reopening with the Industrial Commissioner. Employer then asked the district court to remand. HELD: Industrial Commissioner lacked jurisdiction due to the commutation, and the district court did not abuse its discretion in finding "new" evidence to have been simply evidence that "was always there and simply not obtained" by the employer in a timely manner.

Court also held that the commutation statute does not deny equal protection or due process. The equal protection argument was based on the statute's failure to require the commissioner to consider the hardship commutation places on the employer. The due process claim was based on evidence of claimant's reduced actual life expectancy due to disability, and the statute's exclusive reliance on standard life-expectancy tables.

Mermigis v. Service Master Industries Inc., 437 N.W.2d 242 (Iowa 1989)

Co-Employee.

Hospital contracted with Service Master "to manage the hospital's maintenance and construction operations." Service Master was to provide management functions, while actual maintenance work was to be conducted by hospital employees. Service Master provided an on-site manager who had to approve in advance all maintenance work.

A hospital employee was injured by a broken door that had been scheduled by the manager for maintenance. HELD: Although the Service Master contract uses the word "agent" in referring to Service Master, the evidence of the true relationship between the parties establishes as a matter of law that Service Master was an independent contractor. Plaintiff could sue Service Master for simple negligence, since it was not a co-employee.

Crees v. Chiles, 437 N.W.2d 249 (Iowa App. 1988)

Co-Employee.

Crees was an employee of Heideman Drywall, Inc., a corporation solely owned by Mr. and Mrs. Richard Heideman. Mr. Heideman also was employed by his corporation. Crees was injured when the company truck he had been driving rolled from where he parked it. Crees sued Mr. Heideman as a co-employee, and adduced evidence that Mr. Heideman had previously been warned of the truck's dangerous condition due to worn brakes and clutch. Mr. Heideman sought summary judgment on the ground that he was the corporation's alter ego and therefore Crees' employer. The district court found that Mr. Heideman ran the corporation as if he were a sole proprietor.

The court of appeals had previously decided "that an individual who is the sole shareholder of a corporation is in fact the alter ego of such a corporation and is protected as the 'employer' . . . by the exclusive remedy provision of Iowa Code Section 85.20, even though the shareholder was also an employee of the corporation." Pappas v. Hughes, 406 N.W.2d 459 (Iowa App. 1987). Partially overruling Pappas, the court holds that while Mr. Heideman may be the alter ego of his corporate entity, the fact that he also was an employee renders him liable in a co-employee lawsuit.

McMullin v. Department of Revenue, 437 N.W.2d 596 (Iowa App. 1989)

Compensability.

State revenue auditor based in Cleveland, Ohio, was injured while traveling from his home to the airport to pick up a co-employee returning from a personal visit in Iowa. Claimant intended to transport the fellow employee to the office garage to pick up that employee's state car, parked there as opposed to the airport because it would be more secure. Claimant then intended to go into the office to do some work before heading out of town by car. Claimant also intended to stop at the post office on the way back from the airport to pick up the office's mail, which was always held at the post office for pick-up. It was an office practice to pick up the two Cleveland employees and any official visitors from Iowa at the airport and take them to the office. HELD: Claimant's injury arose out of and in the course of employment.

Medical Associates Clinic, P.C. v. First National Bank, 440 N.W.2d 374 (Iowa 1989)

Compensability.

Surgeon who was employed by professional corporation was killed while on his way from home to work at the hospital. His employment contract required him to pay his own automobile and transportation expenses incurred in the course of his employment. He was "on call" for emergencies every other day and every other weekend, and was "on call" at the time of the accident. HELD: Accident arose out of and in the course of employment.

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STATUTORY LIMITATIONS ON AN EMPLOYER'S RIGHT TO DISCHARGE EMPLOYEES

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I. INTRODUCTION

This outline covers only statutory exceptions to the employment-at-will doctrine. There have been a number of Iowa Supreme Court cases recently in which the Court has adopted common law exceptions as well. E.g., Springer v. Weeks and Leo Co., Inc., 429 N.W.2d 558 (Iowa 1988) and Cannon v. National By Products, 422 N.W.2d 638 (Iowa 1988). Before advising any employer or employee concerning their respective rights, these cases should be reviewed.

II. MAJOR FEDERAL LAWS

Undoubtedly the most well-known limitations on an employer's right to terminate employees are found in federal and state civil rights laws. The primary federal laws are discussed below.

A. TITLE VII

Title VII, Civil Rights Act of 1964, 42 U.S.C. § 2000e-2(a) provides:

> (a) It shall be an unlawful employment practice for an employer--
>
> (1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or
>
> (2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of

employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.

Title VII covers private employers who have fifteen employees on each working day in each of twenty or more weeks in the current or preceding calendar year. 42 U.S.C. § 2000e(b). The statute also prohibits retaliation against employees for exercising their Title VII rights. 42 U.S.C. § 2000e-3(a).

Courts have generally held there is no right to a jury trial under Title VII. See Craft v. Metromedia, Inc., 766 F.2d 1205 (8th Cir. 1985), cert. denied, 106 S. Ct. 1285, 475 U.S. 1058, 89 L.Ed.2d 592 (1986). Remedies available include reinstatement of the employee, back pay and benefits, and attorneys fees. 42 U.S.C. § 2000e-5(g). Neither punitive damages nor pain and suffering damages are available. Shah v. Mt. Zion Hosp. & Medical Center, 642 F.2d 268 (9th Cir. 1981).

Employment discrimination under Title VII may involve either proof of disparate treatment or disparate impact. Disparate treatment requires proof of improper motive. See McDonnell-Douglas v. Green, 411 U.S. 792 (1973) and Texas Dept. of Community Affairs v. Burdine, 459 U.S. 248 (1981). Disparate impact, on the other hand, is proven by establishing "employment practices that are facially neutral in their treatment of different groups but in fact fall more harshly on one group than another and cannot be justified by business necessity." Griggs v. Duke Power Co., 401 U.S. 424 (1971).

In Iowa, Title VII complaints must be pursued by instituting a complaint with the State or local civil rights agency and filing a complaint with the Equal Employment Opportunity Commission within three hundred days after the alleged unlawful employment practice occurred. 42 U.S.C. § 2000e-5(e).

B. PREGNANCY DISCRIMINATION ACT

The Pregnancy Discrimination Act was adopted by Congress in 1978 as an amendment to Title VII. 42 U.S.C. § 2000(e)(k). It made clear the Congressional intent that the words "because of sex" or "on the basis of sex" in 42 U.S.C. § 2000e-2(a) include because of or on the basis of pregnancy, childbirth or related medical conditions. The Act thus prohibits discharge of an employee or other forms of discrimination solely on the basis of pregnancy. Pregnant employees who are temporarily unable to perform their job functions because of their pregnancy must be treated the same as other disabled workers. Policies and fringe benefits (e.g. leave of absence, reinstatement, doctor's certificates) which apply to disabled employees must also be applied to employees temporarily disabled by pregnancy. (But see, discussion in Section IV(A) herein regarding Iowa's laws which require special treatment for pregnancy leaves).

An employer may, of course, discipline or discharge a pregnant employee for legitimate, nondiscriminatory reasons. See, e.g., Reeves v. Brand-Name Fashion Outlet, 532 F.Supp. 32 (W.D. Tenn. 1982)

C. AGE DISCRIMINATION IN EMPLOYMENT ACT

The Age Discrimination in Employment Act of 1967 (ADEA), 29 U.S.C. §§ 621-634, prohibits discrimination in employment against those who are 40 years of age or more, with certain exceptions. In general, the ADEA applies to any employer who has twenty or more employees for each working day in each of twenty or more calendar weeks in the current or preceding calendar year. 29 U.S.C. § 630(b).

The statute of limitations for an ADEA suit is two years from the time the cause of action accrues, unless an employee can prove willful violations. The statute of limitations on willful

violations is three years. 29 U.S.C. § 626(e)(1). Filing of a timely complaint with the Equal Employment Opportunity Commission (29 U.S.C. § 626(d)) is a prerequisite to filing of suit. Jury trials are available under ADEA on any issue of fact even if equitable relief is also sought. 29 U.S.C. §626(c)(2).

Plaintiff in an ADEA case establishes a prima facie case by showing that (1) plaintiff is in the protected age group; (2) plaintiff was qualified for the job; and (3) plaintiff was adversely affected (e.g. discharged) by an employment decision. The employer must then produce a legitimate nondiscriminatory reason for the action, and ultimately plaintiff must "show that age was a determining factor in the actions taken by the employer". Cava v. Coca-Cola Bottling Company, 574 F.2d 958, 959-60 (8th Cir. 1978).

Damages under the ADEA include back wages and benefits, reinstatement or monetary damages in lieu of reinstatement and of course attorney fees. 29 U.S.C. § 626(b); Gibson v. Mohawk Rubber Company, 695 F.2d 1093 (8th Cir. 1982). Where an employer's action is willful, liquidated damages equal to the back pay can also be awarded. 29 U.S.C. § 626(b).

The ADEA specifically provides that it is not unlawful to discriminate based on age "where age is a bona fide occupational qualification reasonably necessary to the normal operation of the particular business . . ." 29 U.S.C. § 623(f)(1). This is known as the "BFOQ defense." It is extremely limited and narrowly applied by the courts. Western Airlines v. Criswell, 472 U.S. 400, 105 S.Ct. 2743, 86 L.Ed.2d 321 (1985). The requirements of a BFOQ are as follows:

(1) The age limit is reasonably necessary to the essence of the business;

(2) The employer has reasonable cause, i.e., a factual basis, for believing that all or substantially all

persons excluded because of the BFOQ would be unable to safely and efficiently perform the requisite duties of the job, or

(3) It would be impossible or impractical to deal with persons over the age limit on an individualized basis. Smallwood v. United Airlines, Inc., 661 F.2d 303, 307 (4th Cir. 1981).

The BFOQ defense has been asserted most often in cases where aspects of a particular job may impact upon public safety. For example, one court has recognized a BFOQ for a bus company which did not accept applications from individuals over 40, Usery v. Tamiami Trail Tours, Inc., 531 F.2d 224 (5th Cir. 1976), as well as for an airline that did not hire flight officers over age 40. Murnane v. American Airlines, Inc., 667 F.2d 98 (D.C. Cir. 1981), cert. denied, 102 S.Ct. 1770 (1982). The rationale in the American Airlines case was that the applicant would have to go through a ten to fifteen year program to become a captain and would be able to serve only briefly as a captain before being required by the FAA to retire at age 60.

D. NATIONAL LABOR RELATIONS ACT

Employee rights conferred by the National Labor Relations Act are found in Section 7 (29 U.S.C. § 157), which provides:

> Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities ...

Section 8 of the Act (29 U.S.C. § 158) delineates numerous actions by employers which are unfair labor practices, including any action "to interfere with, restrain, or coerce

employees" in the exercise of Section 7 rights. Obviously discharge comes within the scope of these prohibited practices. Section 8 also prohibits discrimination against employees to encourage or discourage membership in any labor organization (29 U.S.C. § 158(a)(3)) and prohibits discrimination against an employee because the employee has filed charges or given testimony in proceedings under the National Labor Relations Act. See 29 U.S.C. § 158(a)(4).

Although the rights established under the National Labor Relations Act are normally associated with union activity, they are not limited to the right to join or refrain from joining unions. The Act insulates activity for "other mutual aid or protection," and it has been applied to protect concerted activity unrelated to union organization. See Wheeling-Pittsburgh Steel Corp. v. N.L.R.B., 618 F.2d 1009 (3d Cir. 1980); Jim Causley Pontiac v. N.L.R.B., 620 F.2d 122 (6th Cir. 1980).

III. OTHER FEDERAL LAWS

A. Fair Labor Standards Act, 29 U.S.C. §§ 215(a)(3), 216(b) (prohibits discharge for exercising rights guaranteed by minimum wage and overtime provisions of the Act).

B. Bankruptcy Code, 11 U.S.C. § 525 (prohibits discharge or discrimination because the employee has filed a bankruptcy petition or been insolvent or has not paid a debt that is dischargeable or was discharged in bankruptcy).

C. Rehabilitation Act of 1973, 29 U.S.C. §§ 793, 794 (prohibits federal contractors or any program or activity receiving federal financial assistance from discriminating against handicapped persons).

D. Employee Retirement Income Security Act of 1974, 29 U.S.C. §§ 1140, 1141 (prohibits discharge of employees in order to prevent them from attaining vested pension rights).

E. Vietnam Era Veterans Readjustment Assistance Act, 38 U.S.C. §§ 2021(b)(1), 2024(c) (provides protection, for a limited period, against discharge without just cause of returning service people).

F. Energy Reorganization Act of 1974, 42 U.S.C. § 5851 (prohibits discharge of employees who assist, participate, or testify, or are about to do same, in any proceeding to carry out purposes of the Act or the Atomic Energy Act of 1954).

G. Clean Air Act, 42 U.S.C. § 7622 (prohibits discharge of employees who commenced, caused to commence, or testified at proceedings against employer for violation of the act).

H. Federal Water Pollution Control Act, 33 U.S.C. § 1367 (prohibits discharge of employees who institute or testify at a proceeding against the employer for violation of the Act).

I. Railroad Safety Act, 45 U.S.C. § 441(a), (b)(1) (prohibits railroad company from discharge of employees who filed complaints, instituted or caused to be instituted any proceeding under or related to enforcement of federal railroad safety laws, or testified, or are about to, at such proceeding; or who refuse to work under conditions they reasonably believe to be dangerous).

J. Consumer Credit Protection Act, 15 U.S.C. § 1674(a) (prohibits discharge of employees because of garnishment of wages for any one indebtedness).

K. Civil Service Reform Act of 1978, 5 U.S.C. § 7513(a) (permits removal of federal civil service employees "only for such cause as will promote the efficiency of the service").

L. Judiciary and Judicial Procedure Act, 28 U.S.C. § 1875 (prohibits discharge of employees for service on grand or petit jury).

IV. MAJOR STATE LAWS

A. IOWA CIVIL RIGHTS ACT

Iowa's civil rights law is found in Chapter 601A of the Iowa Code. It is wider in scope than Title VII in that it includes disabled persons within the protected groups, and it also contains more protection for pregnant employees. The basic provisions concerning employment practices are found in § 601A.6, which provides in part:

> 1. It shall be an unfair or discriminatory practice for any:
>
> (a) Person to refuse to hire, accept, register, classify, or refer for employment, to discharge any employee, or to otherwise discriminate in employment against any applicant for employment or any employee because of the age, race, creed, color, sex, national origin, religion or disability of such applicant or employee, unless based upon the nature of the occupation. If a disabled person is qualified to perform a particular occupation, by reason of training or experience, the nature of that occupation shall not be the basis for exception to the unfair or discriminating practices prohibited by this subsection.

This law does not apply to an employer "who regularly employs less than four individuals." Iowa Code § 601A.6(6)(a). Pursuit of a claim under Chapter 601A requires that an employee file a complaint with the Iowa Civil Rights Commission within one hundred eighty (180) days after the alleged discriminatory practice occurred. Iowa Code § 601A.15(12). A complaining party (but not the employer) has the option to withdraw the administrative complaint and file a lawsuit only if: (a) a timely complaint was filed with the Iowa Civil Rights Commission; (b) the complaint has been on file for at least one hundred twenty days; (c) the Commis-

sion has not made a finding of "no probable cause" on the complaint; (d) the Commission has issued an administrative release ("right to sue letter"); and (e) the complaining party files suit within ninety days after issuance of the administrative release. Iowa Code § 601A.16. Employees who make claims which are based on Iowa's civil rights law must follow these procedures; they cannot bypass the Commission and go straight to court. See Northrup v. Farmland Industries, 372 N.W.2d 193 (Iowa 1985).

The most significant substantive difference between Iowa's civil rights law and Title VII is that Iowa's law covers disabilities and Title VII does not. Further, Iowa specifically recognizes acquired immune deficiency syndrome and related conditions as disabilities. Section 601A.2(11) defines disability:

> "Disability" means the physical or mental condition of a person which constitutes a substantial handicap, and the condition of a person with a positive human immunodeficiency virus test result, a diagnosis of acquired immune deficiency syndrome, a diagnosis of acquired immune deficiency syndrome-related complex, or any other condition related to acquired immune deficiency syndrome. The inclusion of a condition related to a positive human immunodeficiency virus test result in the meaning of "disability" under the provisions of this chapter does not preclude the application of the provisions of this chapter to conditions resulting from other contagious or infectious diseases.

The term "substantially handicapped person," has been further construed by the Civil Rights Commission in its regulations. It means any individual "who has a physical or mental impairment which substantially limits one or more major life activities, has a record of such an impairment, or is regarded as having such an impairment." 161 Iowa Admin. Code § 8.26(1). Other regulations define "physical or mental impairment" and "major life activities." See Iowa Admin. Code § 8.26(2) and (3).

Probasco v. Iowa Civil Rights Commission, 420 N.W.2d 432 (Iowa 1988), contains an extensive discussion of the meaning of disability in Iowa, and holds: "An impairment that interferes with an individual's ability to do a particular job but does not significantly decrease that individual's ability to obtain satisfactory employment is not substantially limiting within the statute." 420 N.W.2d at 436.

It is important to be aware that alcoholism is recognized as a disability under Iowa law. Consolidated Freightways, Inc. v. Cedar Rapids Civil Rights Comm'n, 366 N.W.2d 522, 528 (Iowa 1985).

Employers are obligated under the Iowa law to make "reasonable accommodation" to the physical and mental impairments of an employee or applicant. Foods, Inc. v. Iowa Civil Rights Commission, 318 N.W.2d 162 (Iowa 1982). Pursuant to the regulations issued by the Iowa Civil Rights Commission:

> An employer shall make reasonable accommodation to the known physical or mental limitations of an otherwise qualified applicant or employee unless the employer can demonstrate that the accommodation would impose an undue hardship on the operation of its program.
>
> 161 Iowa Admin. Code § 8.27(6)

This statutory duty arises if the handicapped individual is qualified and could competently perform the essential duties of the particular job if given a reasonable accommodation. Reasonable accommodations must be further extended to employees who become disabled during the course of their employment, regardless of whether the impairment was job related or not.

The line between the statutory duty of reasonable accommodation of the handicapped and undue hardship on the employer is not clear, nor is it readily ascertained. As a practical matter, a disability may have some effect on an individual's job

performance and still be protected. In determining whether reasonable accommodation would cause undue hardship on the employer, factors such as the size of the employer, number of employees, the nature of the employer's business, and the cost are taken into consideration. See 161 Iowa Admin. Code § 8.27(b).

Under Iowa Code Section 601A.6(1)(a), an employer may refuse to hire any applicant or discharge any employee because of his/her disability, if "based upon the nature of the occupation." This exception is analogous to the bona fide occupational qualification exception found in the federal civil rights laws. Cedar Rapids Community School District v. Parr, 227 N.W.2d 486, 492 (Iowa 1975). Although this exception is narrowly construed, an employer may prevail by showing that particular mental or physical ability is reasonably necessary to the normal operation of the business. See 161 Iowa Admin. Code § 8.27(1). A swimming pool could, for example, refuse to hire as a lifeguard, a person with a back condition which might cause back spasms when confronted with a lifesaving situation. Dauten v. County of Muskegon, 340 N.W.2d 117 (Mich. App. 1983). Clearly the ability of a lifeguard to swim is "reasonably necessary to the normal operation" of the swimming pool and goes beyond mere convenience or employer preference.

Iowa's civil rights law has special provisions on pregnancy. Iowa Code § 601A.6(2). They preclude termination of employment "of a person disabled by pregnancy because of the employee's pregnancy." Iowa Code § 601A.6(2)(d). Most notably, they require an employer to grant a leave of absence to a person disabled by pregnancy, childbirth or related conditions for the period of the disability or for eight weeks, whichever is less. Iowa Code § 601A.6(2)(e).

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B. OCCUPATIONAL SAFETY AND HEALTH LAW

Chapter 88 of the Iowa Code contains Iowa's Occupational Safety and Health law. It contains the following significant protections for employees in § 88.9(3):

> Discrimination and discharge. A person shall not discharge or in any manner discriminate against an employee because the employee has filed a complaint or instituted or caused to be instituted a proceeding under or related to this chapter or has testified or is about to testify in any such proceeding or because of the exercise by that employee on behalf of the employee or others of a right afforded by this chapter. A person shall not discharge or in any manner discriminate against an employee because the employee, who with no reasonable alternative, refuses in good faith to expose the employee's self to a dangerous condition of a nature that a reasonable person, under the circumstances then confronting the employee, would conclude that there is a real danger of death or serious injury; provided the employee, where possible, has first sought through resort to regular statutory enforcement channels, unless there has been insufficient time due to the urgency of the situation, or the employee has sought and been unable to obtain from the person, a correction of the dangerous condition.

V. OTHER STATE LAWS

A. Drug testing, Iowa Code § 730.5. An employer cannot discharge an employee for refusing to submit to a drug test, or for positive results on a drug test, unless the employer has followed the provisions of this law.

B. Polygraph Examination, Iowa Code § 730.4. An employer cannot "request or require" an employee or applicant to submit to a polygraph examination. An employee who acts in good faith cannot be discharged for filing a complaint or testifying in any proceed-

ing involving violation of Iowa's Polygraph Examination law. Iowa Code § 730.4(4).

C. Jury Service, Iowa Code § 607.45. This law prohibits threatening, coercing or discharging an employee because of jury service.

D. National Guard, Iowa Code § 29A.43. An employer cannot discharge an employee because of being an officer or enlisted person of the military force of the state. It requires the employer to grant a leave of absence for temporary active duty.

E. Court-ordered drinking drivers course, Iowa Code § 321.283(8). No employer shall discharge an employee solely for the reason of work absence to attend a court-ordered drinking drivers course.

F. Wage Claim Dispute, Iowa Code § 91A.(a)(5). An employer cannot discriminate against any employee because the employee has been involved in an action under the Wage Payment Collection Act.

G. Labor Union Membership, Iowa Code Chapter 731. This law prohibits an employer from denying or refusing employment to any person because of association or refusal to associate with a labor union.

H. Delinquent Support Payments, Iowa Code § 252D.4. An employer is prohibited from discharging or refusing to hire a person because of the entry of an order for assignment of income to pay child support payments.

I. Retaliation by Health Care Facility, Iowa Code § 135C.46. A health care facility cannot discriminate against an employee who has initiated or participated in any way in a proceeding under Chapter 135C (generally relating to licensing, inspections, etc.)

J. Public Employees, Iowa Code §§ 79.28-79.29. This law prohibits discharge of an employee of the state or political subdivision for "whistleblowing".

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