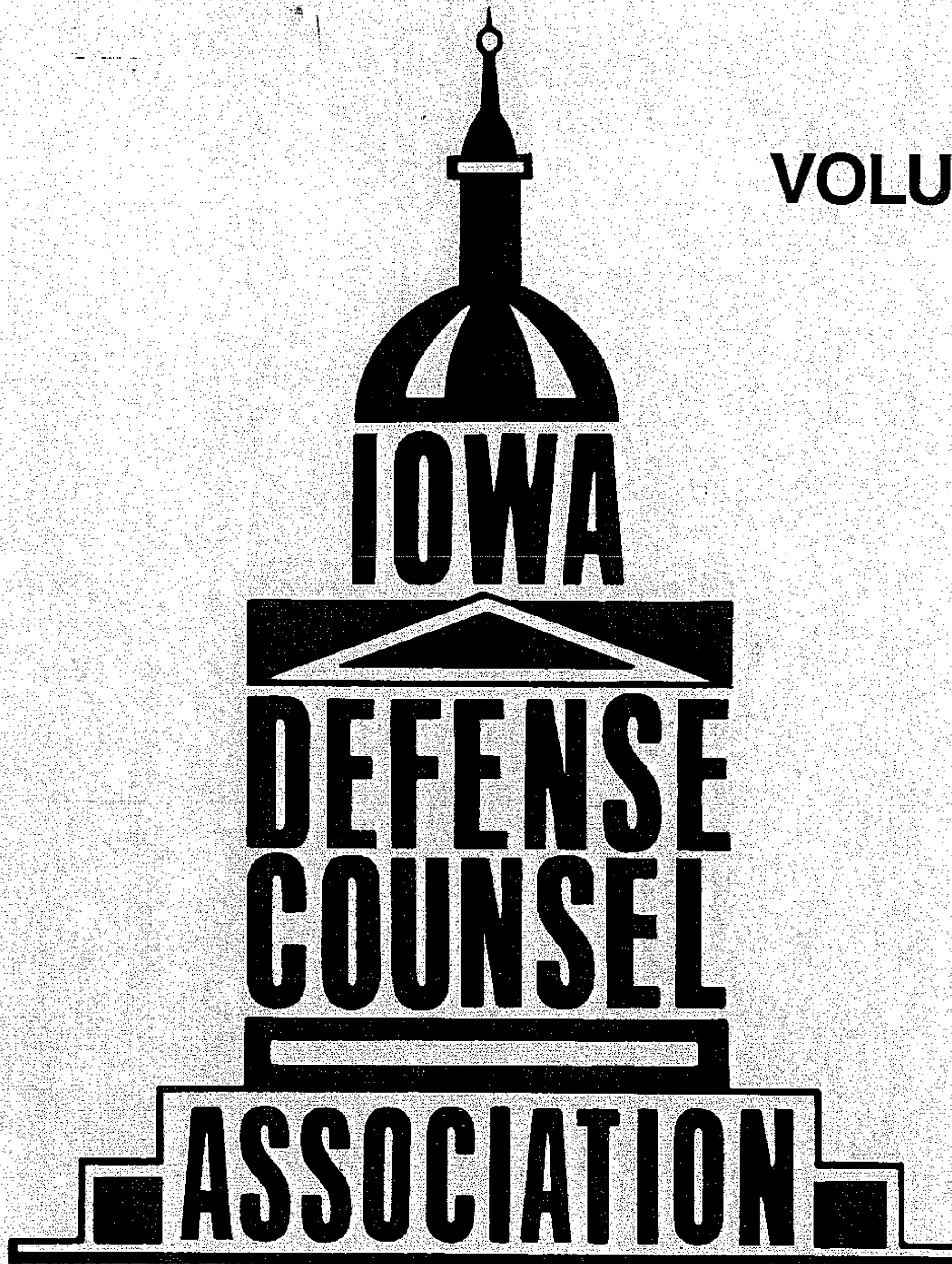
VOLUME I



1994
30th Anniversary
ANNUAL MEETING

SEPTEMBER 21, 22, & 23
EMBASSY SUITES HOTEL ON THE RIVER
101 EAST LOCUST STREET
DES MOINES, IOWA 50316

1994 IOWA DEFENSE COUNCIL ANNUAL MEETING & SEMINAR

WEDNESDAY, SEPTEMBER 21

9:00 a.m. Registration Desk Opens

11:00 a.m. Board of Directors Meeting

1:00 p.m. Introduction and Report of the Association

1:15 - 2:00 p.m. Annual Appellate Update, Part I
Steven L. Serck - Ahlers, Cooney, Dorweiler, Haynie, Smith & Allbee, P.C., Des Moines, IA.

2:00 - 2:45 p.m. Commercial Litigation
Stephen J. Holtman - Simmons, Perrine, Albright & Ellwood, L.L.P., Cedar Rapids, IA.

2:45 - 3:15 p.m. Rules Update
William H. Courter - Shuttleworth & Ingersoll, P.C., Cedar Rapids, IA.

3:15 - 3:30 p.m. Break

3:30 - 4:00 p.m. Trial by Visual Aid
David L. Riley - Lindeman, Yagla, McCoy & Riley, Waterloo, IA.

4:00 - 4:30 p.m. Premises/Interloper Liability
John Werner - Grefe & Sidney Des Moines, IA.

4:30 - 5:30 p.m. Tripartite Relationships
Client Relations Committee

6:00 - 11:00 p.m. 30th Anniversary Party
Des Moines Botanical Center
The Spirit of Des Moines Riverboat

THURSDAY, SEPTEMBER 22

8:30 - 9:00 a.m. Legislative Developments
Robert M. Kreamer - Whitfield & Eddy, P.L.C., Des Moines, IA.

9:00 - 10:15 a.m. Developments in the Restatement
Professor Michael D. Green - University of Iowa Law School, Iowa City, IA.

Robert L. Fanter - Whitfield & Eddy, P.L.C., Des Moines, IA.

10:15 - 10:30 a.m. Break

10:30 - 11:15 a.m. Daubert & Court Appointed Experts
Mark S. Olson - Oppenheimer, Wolff & Donnelly, Minneapolis, MN.

11:15 - 12:00 p.m. Product Liability Developments
Stephen E. Scheve - Shook, Hardy & Bacon, Kansas City, MO.

12:00 - 12:45 p.m. Lunch

12:45 - 1:15 p.m. Supreme Court Reports
Hon. Marsha K. Ternus - Justice, Iowa Supreme Court, Des Moines, IA.

1:15 - 2:30 p.m. Crashworthiness
Richard A. Stefani - Gray, Stephani & Mitvalsky, Cedar Rapids, IA.

Kevin M. Reynolds - Whitfield & Eddy, P.L.C., Des moines, IA.

Thomas M. Zurek - Nyemaster, Goode, McLaughlin, Voigts, West, Hansell & O'Brien, P.C., Des Moines, IA

2:30 - 3:15 p.m. Defending Emotional Distress Claims
Gregory C. Read - Sedgewick, Detert, Moran & Arnold, San Francisco, CA.

3:15 - 3:30 p.m. Break

3:30 - 4:15 p.m. Recent Developments in Medical Malpractice
Carol A. H. Freeman - Lane & Waterman, Davenport, IA.

4:15 - 5:00 p.m. Annual Appellate Update, Part II
Amy H. Snyder - Lane & Waterman, Davenport, IA.

5:00 - 5:15 p.m. Election of Officers and Directors and Annual Meeting of IDCA

6:00 - 7:30 p.m. Reception - Des Moines Club

7:30 p.m. Annual Banquet - Des Moines Club

FRIDAY, SEPTEMBER 23

7:30 - 8:30 a.m. Board of Directors Meeting

8:30 - 9:00 a.m. Workers' Compensation Update
Joseph M. Bauer - Reavely, Shinkle, Bauer, Scism & Reavely, Des Moines, IA

9:00 - 9:45 a.m. Uninsured/Underinsured
Ann Fitzgibbons - American Family Insurance Company, West Des Moines, IA.

9:45 - 10:15 a.m. Strategy and Discovery in Crop Damage Cases
Gregory G. Barnsten - Smith, Peterson, Beckman & Willson, Council Bluffs, IA.

10:15 - 10:30 p.m. Break

10:30 - 11:15 p.m. Offensive Defenses in Employment Litigation
Frank B. Harty - Nyemaster, Goode, Mclaughlin, Voigts, West, Hansell & O'Brien, P.C., Des Moines, IA.

11:15 - 12:00 p.m. Annual Appellate Update, Part III
Leonard T. Strand - Simmons, Perrine, Albright & Ellwood, L.L.P., Cedar Rapids, IA.

12:00 - 12:45 p.m. Lunch

12:45 - 1:15 p.m. Federal Court Report
Hon. Mark W. Bennett - District Judge United States District Court, Northern District Court of Iowa, Sioux City, IA.

1:15 - 2:15 p.m. Physicians in the Litigation Process
Hon. Donna L. Paulsen - Iowa District Court Judge, Des Moines, IA.

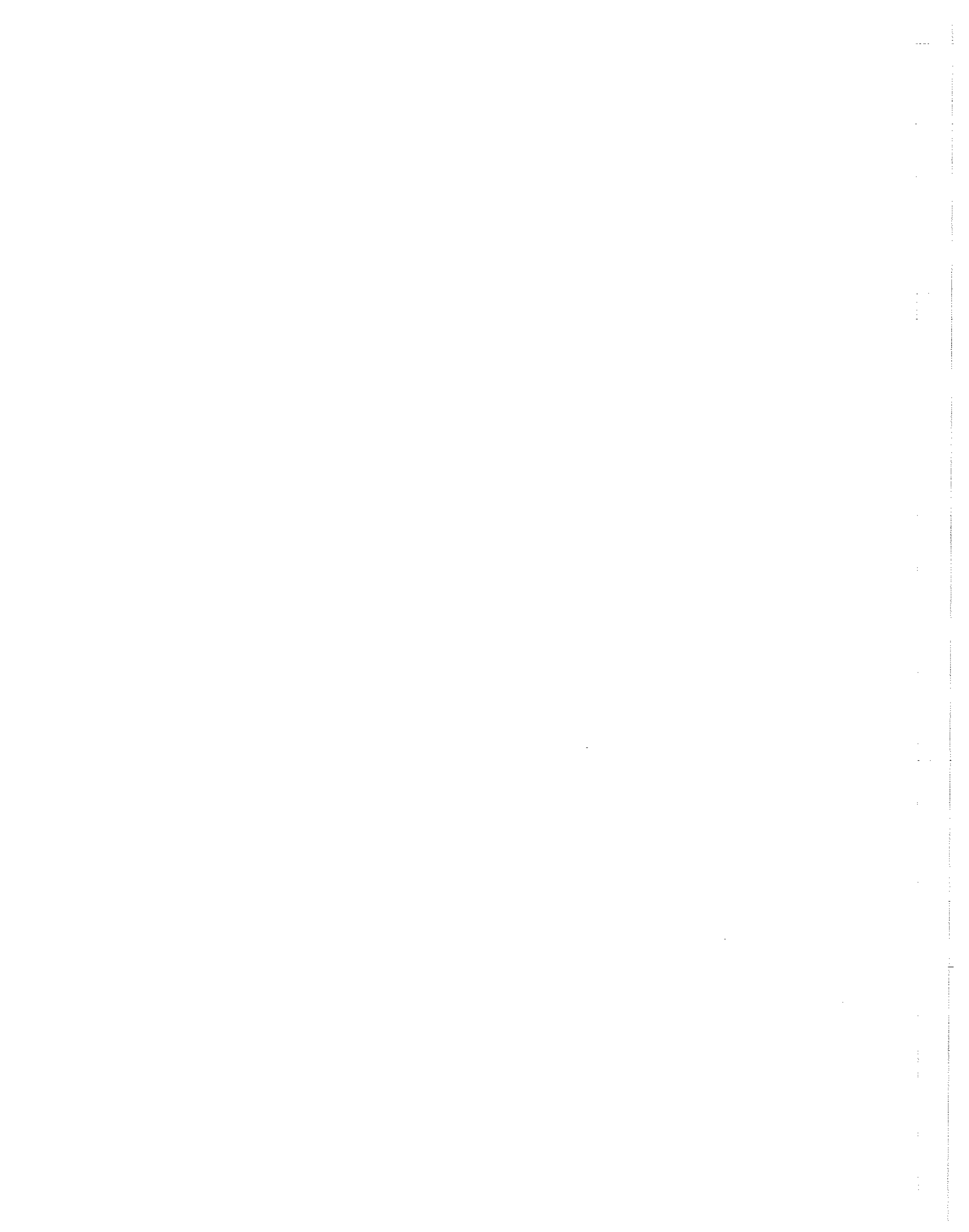
Diane Kutzko - Shuttleworth & Ingersoll, P.C., Cedar Rapids, IA.

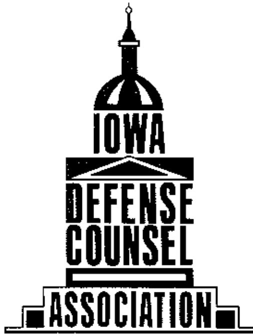
James Turner, M.D. - Iowa Medical Clinic, P.C., Cedar Rapids, IA.

Louis D. Rodgers, M.D. - Methodist Medical Plaza, Des Moines, IA.

2:15 - 3:00 p.m. Voir Dire
David W. Dutton - Dutton, Braun, Staack, Hellman & Iverson, P.L.C., Waterloo, IA.

Cynthia Fobian Willham - Starr Litigation Service, Des Moines, IA.





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1900 Hub Tower
Des Moines, IA , 50309

PRESIDENT-ELECT

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115 Third Street S.E., Suite 1200
Cedar Rapids, IA., 52401

SECRETARY

Charles E Miller
220 North Main Street, Suite 600
Davenport, IA., 52801-1987

TREASURER

DeWayne Stroud
5400 University Ave.
West Des Moines, IA , 50266

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(DATE IS TERM EXPIRATION DATE)

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P.O. Box 1953
Mason City, IA , 50401

DISTRICT III

Emmanuel S Bikakis - 1996
Suite 340, Insurance Center
Sioux City, IA , 51101

DISTRICT IV

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P.O Box 249
Council Bluffs, IA , 51502

DISTRICT V

Robert L. Fanter - 1996
317 Sixth Avenue, Suite 1200
Des Moines, IA , 50309-4110

DISTRICT VI

Robert D Houghton - 1994
P.O. Box 2107
Cedar Rapids, IA., 52406-2107

DISTRICT VII

Carole A. H. Freeman - 1996
220 North Main Street, Suite 600
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DISTRICT VIII

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317 Sixth Avenue, Suite 1200
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Michael W. Ellwanger - 1995
Suite 300, Toy National Bank Bldg.
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801 Grand Avenue, Suite 3700
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David L Brown - 1996
803 Flemming Bldg.
Des Moines, IA., 50309

James A. Pugh - 1996
5400 University Ave.
West Des Moines, IA , 50266

PAST PRESIDENTS

* Edward F. Seitzinger 1964 - 1965
* Frank W. Davis 1965 - 1966
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Harry Druker 1967 - 1968
* Phillip H. Cless 1968 - 1969
Phillip J. Willson 1969 - 1970
Dudley Weible 1970 - 1971
Kenneth L. Keith 1971 - 1972
Robert G. Allbee 1972 - 1973
Craig H. Mosier 1973 - 1974

Ralph W. Gearhart 1974 - 1975
Robert V.P. Waterman, Sr. 1975 - 1976
* Stewart H. M. Lund 1976 - 1977
* Edward J. Kelly 1977 - 1978
Don N. Kersten 1978 - 1979
Marvin F. Heidman 1979 - 1980
Herbert S. Selby 1980 - 1981
L.R. Voigts 1981 - 1982
Alanson K. Elgar 1982 - 1983
* Albert D. Vasey (Honarary) 1983

Harold R. Grigg 1983 - 1984
Raymond R. Stefani 1984 - 1985
Claire F. Carlson 1985 - 1986
David L. Phipps 1986 - 1987
Thomas D. Hanson 1987 - 1988
Patrick M. Roby 1988 - 1989
Craig D. Warner 1989 - 1990
Alan E. Fredregill 1990 - 1991
David L. Hammer 1991 - 1992
John B. Grier 1992 - 1993

IOWA DEFENSE COUNCIL FOUNDERS AND OFFICERS

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President

* D J Fairgrave
Vice-President

* Frank W. Davis
Secretary

Mike McCrary
Treasurer

William J Hancock

* Edward J Kelly

Paul D Wilson

ANNUAL MEETING CHAIRPERSONS

General Program - DeWayne Stroud
Ginger Plummer

Program Chair - Gregory M. Lederer

* Deceased

1993 ANNUAL MEETING
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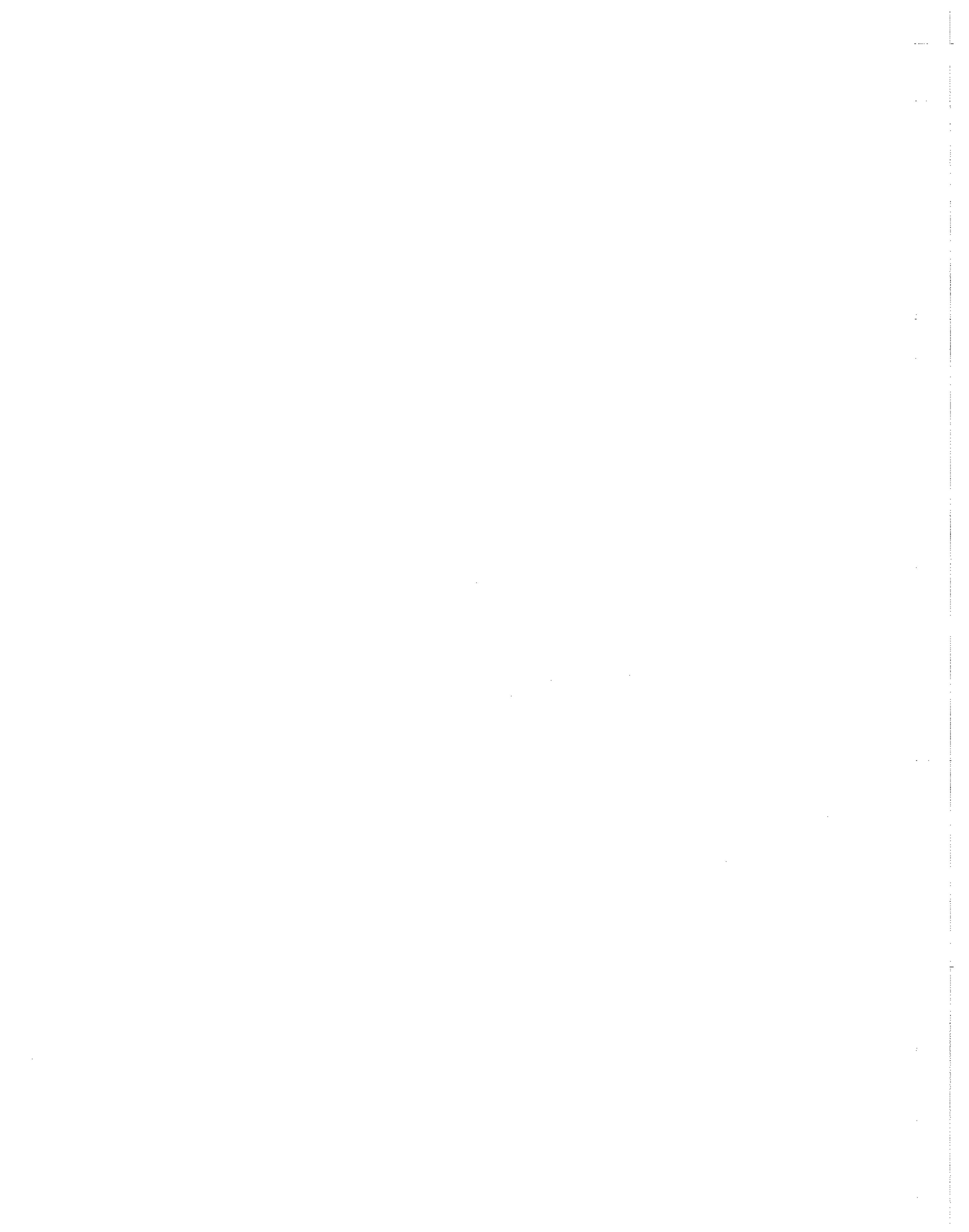

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ANNUAL APPELLATE DECISIONS REVIEW

September 1993 - August 1994
503 N.W.2d through 518 N.W.2d

By

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APPELLATE PROCEDURE

Amy Snyder

Hillrichs v. Avco Corporation, 514 N.W.2d 94 (Iowa 1994)

Applicable Law

This is a products liability action concerning a "new idea unisystem" cornpicker manufactured by defendant Avco Corporation and owned by the plaintiff, Hillrichs. While attempting to unplug the machine, Hillrichs caught his right hand between two rollers which continued to spin at about two to four revolutions per second for about 1800 seconds. The accident resulted in the eventual amputation of four fingers on Hillrichs' right hand. Hillrichs, his wife, and his children brought suit on theories of negligence, strict liability, and breach of implied warranties against Avco and the dealer that sold Hillrichs the base power unit for the cornpicker. A jury found Hillrichs to be 100% at fault for his injuries and judgment was entered against Hillrichs. Hillrichs appealed. In Hillrichs I, the Supreme Court affirmed in part but reversed and remanded the case for a new trial on the negligence claim with respect to Avco's liability for plaintiff's "enhanced injuries." Hillrichs claimed that Avco negligently failed to include an emergency stop device on the rear of the husking bed near the point where he caught his hand, and that this failure resulted in an unnecessary enhancement of his injuries. On remand, the jury found Avco 80% at fault and Hillrichs 20% at fault. The jury awarded Hillrichs compensatory and punitive damages. The district court set aside the punitive damage award and the award for future medical expenses. It entered judgment against Avco after deducting the 20% fault attributed to Hillrichs. Avco appealed and Hillrichs cross-appealed. Hillrichs contends that in light of the court's decision in Reed v. Chrysler Corp., 494 N.W.2d 224, 230 (Iowa 1992), his judgment should not be reduced by the fault attributed to him.

In Hillrichs I, 478 N.W.2d at 76, the court said:

> Although plaintiff suggests that any percentage of fault that might be assigned to him with respect to the initial entanglement in the machinery may not be assessed to him on the trial of his enhanced injury claim, we disagree with that contention. The fault of plaintiff, if any, in becoming entangled in the machinery would be a proximate cause of the enhanced injury as well as the initial injury. On retrial of a negligence claim, the jury should be so instructed.

On remand for retrial as to the plaintiff's enhanced injury claim, the district court followed the supreme court's direction in instructing the jury. The jury found plaintiff 20% at fault in causing his enhanced injury. Plaintiff made no objection

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to this procedure at the trial. In his cross-appeal, plaintiff nevertheless contends that the court should reverse the district court's apportionment of plaintiff Hillrichs' fault as a proximate cause of his enhanced injury, pointing to the recent decision in Reed v. Chrysler Corp., in which the court barred any consideration of plaintiff's initial negligence in an enhanced injury claim. Before the supreme court filed Reed, the district court in the present case had already entered judgment, deducting 20% from the total compensatory damages the jury awarded on behalf of the plaintiff.

HELD: When a case is retried under a rule that the supreme court dictates on appeal, that rule becomes law of that case. Therefore, the court's rule binds the trial court and supreme court even when that rule has been abandoned in decisions filed after the second trial but prior to the second appeal. The district court tried this case as the supreme court instructed, allowing plaintiff's initial fault in getting his hand entangled to be considered in connection with the cause of the alleged enhanced injury. Merely because the apportionment rule in Hillrichs I was overruled in Reed does not affect the record or the law in this case. The court properly reduced Hillrichs' award by his apportionment of fault.

Sterner v. Fischer, 505 N.W.2d 490 (Iowa, 1993)

Finality

Pursuant to local rule, district court imposed sanctions on plaintiff's counsel for counsel's failure to secure plaintiff's attendance at settlement conference. One year later, after jury returned verdict for plaintiff, she appealed to challenge the validity of the sanction ruling.

HELD: Like an appellate challenge to the imposition of sanctions under rule 80(a), the remedy is certiorari, not appeal. A petition for certiorari must be filed within 30 days of the challenged judicial action. Plaintiff's challenge is untimely and must be dismissed.

State, ex rel., Iowa Department of Natural Resources v. Shelley, 512 N.W.2d 579 (Iowa App. 1993)

Finality

The Shelleys owned property in rural Guthrie County, Iowa. In June, 1989, the Iowa DNR determined the Shelleys were dumping solid waste on their property in violation of Iowa Code Section 445B.307(1). The Shelleys objected to the charges against them. The DNR issued an administrative order in December, 1990.

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The Shelleys did not appeal this order. Neither did they comply with the order. The DNR then referred the matter to the attorney general, and the state filed a petition in district court to enforce the administrative order. Shelleys appeared at the trial and attempted to raise several issues concerning the validity of the administrative order. The district court determined the order should be enforced. The Shelleys appealed.

HELD: A final adjudicatory decision of an administrative agency is entitled to res judicata effect as if it were a judgment of the court. The administrative order here was a final order because the Shelleys did not appeal, although Section 445B.308 provides a procedure for such an appeal.

Johnson v. State Farm Auto. Ins. Co., 504 N.W.2d 135 (Iowa App. 1993)

Preservation

The court granted State Farm's motion in limine to exclude evidence of plaintiff's settlement with King, that State Farm consented to the settlement, that the suit was being brought under an underinsurance provision, and evidence pertaining to the bad faith claim. Plaintiff contends the district court should have denied State Farm's motion in limine.

HELD: Generally, a ruling sustaining a motion in limine is not a ruling on the evidence; the ruling merely adds a procedural step to the offer of evidence. If the evidence is not offered, there is nothing preserved to review on appeal. Here, plaintiff did offer the evidence excluded by the motion in limine.

Cerro Gordo Hotel v. City of Mason City, 505 N.W.2d 509 (Iowa App. 1993)

Preservation

Plaintiff cannot challenge the constitutionality of Iowa Code Section 613A.4(11) for the first time on appeal. Matters not raised in the trial court, including constitutional questions, cannot be effectively asserted for the first time on appeal.

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Bond v. Cedar Rapids Television Co., 518 N.W.2d 352 (Iowa 1994)

Preservation

The Dubuque Television Limited Partnership ("DTV") bought an ABC affiliate television station, KDUB-TV. Thomas Bond is DTV's general partner. At the time, the Dubuque cable system was authorized by the FCC to provide KDUB with non-duplication protection. Cedar Rapids Television Co. ("CRTV") owned KCRG-TV, an ABC affiliate on the system that was subject to the blackout. Bond chose not to seek extension of the FCC order when it expired, however, DTV persuaded the cable system to retain the blackout. The cable system was purchased by TCI Cablevision, which announced it would terminate protection but move KCRG to a higher channel. Prior to this announcement, DTV entered into an agreement to sell KDUB to Sage Broadcasting Corporation. The agreement contained a clause which stated: "pursuant to a verbal agreement with the local cable company, the said cable company blacks out station KCRG-TV, Cedar Rapids, Iowa, whenever said station's programming is identical with that of this station." CRTV filed a petition with the FCC to deny DTV's application to transfer its license. DTV filed an opposition to the petition. The FCC issued a memorandum opinion and order denying the petition and allowing the transfer.

Shortly after the FCC final ruling, DTV countered by filing a petition seeking revocation of CRTV's license. The FCC rejected an abuse of process argument and found that CRTV raised colorable allegations of uncompetitive conduct. The proposed transfer of KDUB to Sage collapsed after an agreed deadline passed. DTV then filed this action, alleging CRTV tortiously interfered with the transfer contract. The jury awarded $2.1 million on the interference claim and $10,000 to Bond individually for his emotional distress. CRTV appealed and DTV cross-appealed.

The issue in this case is the applicability of the *Noerr Doctrine* which provides that civil liability may not be imposed on a party for exercising the right, under the First Amendment to the United States Constitution, to petition for governmental action. Eastern R.R. Presidents Conf. v. Noerr Motor Freight, Inc., 365 U.S. 127 (1961). Defendant CRTV contends this doctrine covered its activities before the FCC immunized it from liability. CRTV raised the *Noerr Doctrine* in its motion for directed verdict, motion for judgment notwithstanding the verdict, and motion for new trial. CRTV also objected to the district court's refusal to include a Noerr-based jury instruction. CRTV did not, however, raise the doctrine in its answer or in a motion for summary judgment. In the belief that the doctrine is an affirmative defense, the plaintiffs contend CRTV did not preserve error on the question in accordance with Iowa Rule of Civil Procedure 101.

HELD: Under Iowa Rule of Civil Procedure 101, these matters must be specially pleaded, and a motion for directed

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verdict or a motion for judgment notwithstanding the verdict do not qualify as special pleadings. Without such a pleading, the question may not be entertained on appeal. Further, mere denials of specific paragraphs in plaintiffs' petition are insufficient to raise affirmative defenses. Although plaintiffs contend otherwise, the *Noerr Doctrine* is not an affirmative defense, but rather an element of plaintiffs' recovery in an action of this kind. The burden is clearly on the plaintiffs to raise and negate Noerr immunity.

The Noerr Doctrine is not an affirmative defense and the issue was preserved.

State v. Deases, 518 N.W.2d 784 (Iowa 1994)

Preservation

Defendant Deases was convicted after a jury trial of first degree murder. Deases appeals, arguing that the district court erred in failing to instruct the jury on the credibility of two defense witnesses who were convicted felons. The state argues that Deases did not preserve error on this issue because he did not object to the final instruction.

HELD: To preserve error, counsel must make a specific objection to the instructions in their final form. In the absence of such an objection, any alleged error in the instruction is waived. Deases objected to the court's proposed instruction concerning the credibility of witnesses. The court then revised the instruction and read it to Deases' counsel. Counsel made no objection to the revised instruction and the court submitted it to the jury. In the absence of an objection to the new instruction, the court was justified in assuming Deases had abandoned any objection.

Johnson v. State Farm Auto. Ins. Co., 504 N.W.2d 135 (Iowa App. 1993)

Waiver

An issue included in a party's appellate brief is deemed to be waived on appeal if no authority is cited on that issue in the brief. Iowa Rule of Appellate Procedure 14(a)(3).

Ladeburg v. Ray, 508 N.W.2d 694 (Iowa 1993)

Waiver

Plaintiff, Helen Ladeburg, was struck by a semi trailer driven by defendant Ray. Plaintiff filed a negligence action. Plaintiff asserted in her motion for new trial that "the court should have properly instructed the jury that the defendant was negligent as a matter of law."

HELD: Plaintiff did not object to the court's instructions and the verdict forms submitting the question of the defendants' negligence to the jury. Not until plaintiff filed her motion for new trial did she claim that the court should have instructed the jury that the defendants were negligent as a matter of law. Error, if any, in the court's instructions was waived.

ATTORNEYS

Steve Serck*

King v. Armstrong, 518 N.W.2d 336 (Iowa 1994)

Fees

The Wagner Law Firm agreed to represent the employees of Armstrong's, Inc. against the estate of Robert C. Armstrong under a 50 percent contingency fee contract. The parties eventually agreed to a $65,000 settlement. An intervenor objected to the application for attorney fees. The district court awarded fees pursuant to the 50 percent provision, reasoning that it was a very complex case and there was a great risk that no recovery would be obtained.

HELD: The district court did not abuse its discretion. Wagner's client was free to negotiate at arm's-length.

Committee v. Carty, 515 N.W.2d 32 (Iowa 1994)

Discipline

Carty was charged with a conflict of interest in a series of transactions with his client, Venghaus Brothers, Inc. In 1979 the Venghauses asked Carty to form a corporation to be the purchaser of a 160 acre farm from the Criles. A few months after the purchase, Venghaus Brothers decided it needed to get out from under the obligation. At the same time, Carty planned to sell at public auction a 43 acre tract of land in Virginia that he had

*I thank Jill Stevenson, Beth Grob, and Doug O'Brien for assistiing me with portions of the outline.

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inherited. Carty proposed a like-kind exchange of his Virginia land for the Crile contract.

The like-kind exchange agreement was completed in May of 1979. Carty agreed to lease the Crile land to the Venghaus Brothers on a crop-share basis.

In 1985 Carty offered to buy another farm for the Venghauses to rent provided that the Venghauses would allow Carty to reassign the Crile contract to the Venghaus' corporation. After seeking counsel from another attorney, the Venghauses agreed to the reassignment.

The corporation did not make the September 1, 1985 payment on the Crile contract. Rather than forfeit the contract, the Criles brought suit in 1986 against the corporation, the Venghauses, and Carty. Settlement was made at the Venghauses insistence and contrary to outside counsel's recommendation.

In December of 1991 the Venghauses filed a complaint against Carty with Iowa State Bar Association. The Committee found that Carty violated a disciplinary rule and two ethical considerations with respect to the reassignment of the land contract in 1985. It also found Carty should have required separate counsel for the defense of the Crile litigation. The Committee found that Carty violated DR 5-104(A).

HELD: We hold that Ethical Considerations ("EC's") will no longer support disciplinary action in Iowa. EC's will serve only to illuminate the disciplinary rules.

We affirm the Committee's finding. To establish that Carty violated DR 5-104(A), it was necessary to show that his interest and the client's interest differed in the transaction, that his client expected him to exercise his professional judgment for the client's protection, and that the client consented to the transaction without full disclosure. By reassigning the Crile contract to the corporation, Carty was attempting to absolve himself from further liability under the contract. When the property was first assigned to him he agreed to make the contract payments and to hold the corporation harmless. His interest in the transaction was clearly contrary to that of the Venghauses.

We agree with the Commission's finding that suspension of Carty's license is not warranted. We believe the sanction of a public reprimand is appropriate.

Committee v. Garretson, 515 N.W.2d 25 (Iowa 1994)

Discipline

Attorney Garretson agreed to represent Robert Dompkosky in an OWI case before Dompkosky telephoned Garretson and told him he had decided to employ a public defender and would no longer need Garretson's services. Garretson claimed a minimal fee of $273; Dompkosky demanded to be sent a fee schedule showing what work had been done. No fee schedule was sent and Dompkosky refused payment.

After each party filed small claims actions against the other, Dompkosky filed a complaint against Garretson with the Committee. In a meeting in which the two parties discussed their dispute, Dompkosky equipped himself with a hidden tape recorder and recorded the conversation. It was put into evidence at the disciplinary hearing for the purpose of supporting the Committee's charge that Garretson tried to buy off the ethics complaint. The conversation suggested that Garretson would be willing to settle on his small claims action if Dompkosky would drop the ethics charges.

The Commission found that Garretson violated DR9-102(b)(3) under which a lawyer shall render accountings to his client. A further violation was found by the Commission of EC2-25 whereby a lawyer "should be zealous in efforts to avoid controversies over fees with clients and should attempt to resolve amicably any differences on the subject." The violation of the disciplinary rule, when considered in the context of the minimal services rendered, convinces us that the appropriate sanction is a public reprimand.

Garretson's conduct in relation to interfering with the disciplinary proceeding is suspect but that ethics violation has not been proved by a convincing preponderance of the evidence.

Committee v. Kaufman, 515 N.W.2d 28 (Iowa 1994)

Discipline

Attorney Kaufman pleaded guilty to nine counts of drug offenses--most of which were felonies. Following his convictions, Kaufman was held in contempt of court for refusing to testify against his supplier. As to the convictions, the Commission recommended suspension of Kaufman's license to practice law indefinitely with no possibility of reinstatement until the latter of (1) a period of two years, or (2) Kaufman's release from prison. As to the contempt charge, the Commission recommended a public reprimand. Mitigating factors in support of the Committee's recommendation are as follows: First, this was his first violation of the law. Second, he did not injure the rights of any client by his conduct. Third, he has admitted to personal addiction to

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marijuana and the Commission believes that the addiction has affected his ability to act responsibly. Fourth, the respondent's voluntary attempt to complete a treatment for his addiction should be favorably considered in the Commission's recommendation.

HELD: Upon our de novo review we hold that Kaufman's license to practice should be revoked. In fixing an appropriate sanction, we are not insensitive to the mitigating factors the Commission listed. These factors, however, cannot overcome our clear responsibility to the public and the profession. Kaufman's transgressions, in addition to being tragic for him, were extreme and represent an unacceptable danger to the public we are sworn to protect.

Committee v. Jacobsen, 511 N.W.2d 611 (Iowa 1994)

Discipline

Jacobsen was asked to be a defacto trustee for some unspecified period of time for the Wyth Family Trust. Two of the beneficiaries of the trust, Ross and Johnson, asked Jacobsen to invest the escrowed funds and pay Johnson $600 per month, Johnson became dissatisfied with Jacobsen's accounting of trust transactions. Johnson sought another attorney's assistance in having the funds transferred to a bank as corporate trustee. Jacobsen was lax in providing records to this second attorney. Jacobsen was charged with violation of DR 6-101(a)(3) in failing to make prompt and complete accounting to Johnson and Ross.

Also, at the request of his client Johnson, Jacobson participated in the creation of a sham mortgage on land owned by Johnson in the hope that it would discourage others from filing new liens.

HELD: While they are certainly open to criticism, Jacobsen's actions as trustee did not rise to the level of an ethical violation. The transactions involved were not detailed and followed a pre-determined course.

However, regarding the sham mortgage, Jacobsen's license shall be suspended for 30 days because he violated Code of Professional Responsibility, DR 1-102(a)(4) (a lawyer shall not engage in fraud, dishonesty, deceit or mispresentation).

Committee v. Ramey, 512 N.W.2d 569 (Iowa 1994)

Discipline

During a trial, Ramey offered $1,000 cash as a state exhibit. Opposing counsel objected on the ground that a complete chain of custody had not been established. Ramey assured the court that the money had been inventoried and each and every serial

number written down. He further stated that he personally compared the serial numbers on the bills in question against the list. Foundational testimony by a witness showed that the first bill in the exhibit was not included on the serialized list.

Ramey conceded that he never personally compared the bills with the list. He recalled being informed of the discrepancy but states it was only one time, more than four months before trial. The presiding judge referred the matter to the Grievance Commission. The Commission found that the false statement was made in reckless disregard of the true facts so as to call for not less than license suspension.

In the same case, Ramey failed to produce exculpatory evidence as the defense requested and as the Iowa Code requires.

HELD: Upon consideration of all the circumstances we agree with the recommendation of the Commission majority. Ramey's license is to be suspended indefinitely, with no possibility for reinstatement for three months from the date of this opinion.

Committee v. Morris, 505 N.W.2d 194 (Iowa 1993)

Discipline

Morris became successor trustee for a trust and used his own social security number on the bank accounts. The IRS later seized funds from one of the accounts to satisfy Morris' personal income tax obligation. Morris was also found to be delinquent in filing reports for the trust. In a separate routine audit, his accounting procedures for trust assets were found deficient. Committee unanimously recommended public reprimand.

HELD: Affirmed committee's recommendation and directed an audit of his trust account be performed at his expense.

Committee v. Iverson, 505 N.W.2d 494 (Iowa 1993)

Discipline

Iverson accepted Feldman as a client and received $2,000 from her. The only legal service he provided beyond the initial consultation was a demand letter written to the party Feldman was contemplating suing. Iverson also accepted $1,000 in prepaid fees from Kalen. Iverson was to file a motion to quash a child support order, but he did not do so. Iverson abandoned his law practice without notice to either client. Iverson also failed to respond to notices from disciplinary authorities.

HELD: Affirmed Committee's recommendation to suspend Iverson's license to practice law indefinitely.

Sterner v. Fischer, 505 N.W.2d 490 (Iowa 1993)

Sanctions

Scieszinski, attorney for plaintiff, Sterner, was assessed $249.28 in attorney fees as a sanction for violating a local rule. The rule required personal attendance of the parties at any settlement conference, unless excused by the settlement conference judge. The case proceeded to trial and the plaintiff obtained a judgment. Scieszinski appealed the sanction order.

HELD: The remedy when an attorney is sanctioned for a violation of an Iowa Rule of Civil Procedure is certiorari, not appeal. The attorney, who is not a party to the underlying case, is not affected by the final judgment. Considering the notice of appeal as a writ of certiorari, the challenge to the sanction was not timely. This court, therefore, has no jurisdiction to consider it.

Committee v. Pracht, 505 N.W.2d 196 (Iowa 1993)

Discipline

Pracht took on four estates to probate. His practice of law focused on real estate. Pracht admitted to the Committee that he charged no fee to probate the estates because he was using them as an educational tool. He used delinquency notices from the court to inform him as to the next step of the probate process.

HELD: Commission's recommendation of a public reprimand was affirmed. Neither lack of time nor expertise excuses attorneys from completing legal matters entrusted to them on a timely basis. The court further emphasized that failure to cooperate with an ethics investigation is an independent act of misconduct.

Mississippi Valley Broadcasting, Inc. v. Mitchell, 503 N.W.2d 617 (Iowa Ct. App. 1993)

Fees

Mitchell and her former employer MVB were in a dispute over Mitchell's covenant not to compete and unpaid wages following her resignation. A court-appointed referee awarded Mitchell $862.49 in unpaid wages. Mitchell then claimed $7,872.50 in attorney's fees related to the wage dispute. The district court awarded $692.58 in attorney fees, stating that no evidence was presented as to the usual and ordinary nature of the fees.

HELD: The district court did not abuse its discretion in determining Mitchell had failed to prove up her attorney fees. The only evidence presented was the professional statement of Mitchell's counsel at trial. No evidence was presented to show why

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this unpaid wage claim was so costly in legal fees, i.e., how the fees were "usual and necessary." The district court was not required to provide an exact accounting of how its fee award was computed.

In re Marriage of Roerig, 503 N.W.2d 620 (Iowa Ct. App. 1993)

Fees

Custodial parent filed for a modification to increase child support. Custodial parent voluntarily dismissed her petition on the first day of trial. District court denied non-custodial parent's request for $1,200 in attorney fees.

HELD: Non-custodial parent became the prevailing party when custodial parent voluntarily dismissed her action. The district court abused its discretion in denying the non-custodial parent attorney fees. The non-custodial party was entitled to $600 of trial attorney fees plus one-half of appellate attorney fees.

Committee v. Hutcheson, 504 N.W.2d 898 (Iowa 1993)

Discipline

Hutcheson represented Borrego's estate. He obtained an ex parte order fixing fees for the estate in excess of those permitted by law. He ignored the interests of two minor children by placing all net proceeds in a conservatorship for a third minor daughter. A settlement check was made payable to, and spent by, family members rather than being placed in the conservatorship. As a notary public, Hutcheson falsely certified documents in the estate and testified it was his practice to notarize documents and then give them to clients to obtain the necessary signatures.

HELD: The mishandling of probate matters violated DR 1-102(A)(1), DR 2-106(A) and EC 9-6 of the code of professional responsibility. Hutcheson was suspended previously for one year for an unrelated matter. He had not applied for readmission. Additional one-year suspension recommended by the grievance commission affirmed.

3 S Inc. v. Zarek, 504 N.W.2d 153 (Iowa Ct. App. 1993)

Fees

3 S Inc. sued for interference with the use of the property under lease. Zarek counterclaimed for nonpayment of rent. The district court denied 3 S Inc.'s motion to submit Zarek's claim for attorney fees to the jury as an issue of damages. Following a hearing on the issue of attorney fees, the court awarded Zarek $4,903 in attorney fees.

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frivolous if it is made for the purpose of harassing or maliciously injuring a person.

Schettler v. Dist. Ct. for Carroll Cty., 509 N.W.2d 459 (Iowa 1993)

Appellant challenges the district court's failure to sanction appellee's attorney for signing the original petition in a fraud action.

HELD: Affirmed. Rule of Civil Procedure 80(a) sanctions for filing a frivolous pleading, motion, or other paper are imposed on persons signing, the represented party, or both. Rule 80(a) imposes no continuing duty on the signer to dismiss the action if the signer later learns the client has no case. When deciding whether to impose sanctions, the district court must view the reasonableness of the signer-attorney's judgment at the time the paper in question was filed. The test is reasonableness under the objective circumstances and the standard used is a reasonably competent attorney admitted to practice before the district court. Although Appellee's attorney brought diametrically opposed actions against Appellee, the attorney's conduct did not warrant imposition of sanctions because there had been no decision by any court in a companion action which would have judicially estopped the fraud action.

Committee v. Shepler, No. 223/94-517 (Iowa July 27, 1994)

Discipline

In 1984 Attorney Shepler and his wife purchased a small farm on contract from Opal Truby who was then 78 years old. Truby was represented by an attorney in the transaction. At the closing, her attorney and her daughter, Connie Squire, were present to assist her. Squire told Shepler and his wife that Truby would not agree to subordinate her interest in the real estate to any financial institution from whom the Sheplers might obtain financing in the future. Squire also told the Sheplers they should not contact Truby directly on any business matter because she was elderly and had only an 8th grade education. Despite that fact, Shepler obtained Truby's signature on three separate subordination agreements in 1986 and 1988. In these agreements Truby subordinated her interest in the real estate to the mortgage interest of a bank that had lent money to the Sheplers. Shepler did not contact Truby's attorney or children before having Truby sign the subordination agreements. Predictably, Sheplers defaulted on their notes to the bank and on their contract with Truby. As a result, Truby suffered a financial loss when the Sheplers defaulted, and the Sheplers have not attempted to repay Truby the sums she lost.

The Ethics Committee filed a complaint against Shepler which he did not answer. Shepler also failed to respond to a

request for admissions served by the committee and did not attend the hearing even though he had received proper notice. The Grievance Commission recommended disbarment. Shepler did not appeal.

HELD: The standard for Shepler's conduct is heightened because Truby suffered from progressive dementia and had less than full mental capacity. Shepler intentionally took advantage of an elderly woman with diminished mental capacity to obtain financial advantage for himself and his wife. This conduct is particularly reprehensible because Shepler had specifically been told that Truby would not subordinate her interest in the property and had been directed to contact Truby's lawyer or daughter concerning any business dealings. This is considered an extremely serious violation of a lawyer's duty because lawyers do not shed their professional responsibility in their personal lives. The Commission's recommendation that disbarment is appropriate is affirmed. Shepler's license to practice law in Iowa is revoked.

CIVIL PROCEDURE

Amy Snyder

Bond v. Cedar Rapids Television Co., 518 N.W.2d 352 (Iowa 1994)

Affirmative Defense

An affirmative defense is defined as "one resting on facts not necessary to support plaintiff's case." Under Iowa R.Civ.P. 101, these matters must be specially pleaded and a motion for a directed verdict or a motion for judgment notwithstanding the verdict do not qualify as special pleadings. Mere denials of specific paragraphs in plaintiff's petition, are insufficient to raise affirmative defenses.

Porter v. Good Eavespouting, 505 N.W.2d 178 (Iowa 1993)

Amendments

Porter was injured in a construction accident. With his statute of limitations less than two months away, an insurance adjuster purporting to represent Good Eavespouting and Good Construction Company offered to settle by sending a draft with a release. One year and 364 days after his accident, Porter sued Good Eavespouting d/b/a Good Construction Company. Several months later, defendant answered by, among other things, claiming that defendant was not a legal entity. Defendant moved for summary judgment on the same ground and submitted an affidavit from Larry Good. Good stated that he conducts businesses know as Good's Construction Co., Good's Eavespouting, Co., Good's L-S Storage

otherwise acted illegally. The court of appeals will take jurisdiction in certiorari proceeding in which an attorney sought review of a trial court order prohibiting the attorney from ever making a motion for judgment of acquittal, and where attorney is threatened with contempt for making future motions for judgment of acquittal, even though the threat had not yet ripened into injury. Under such circumstances, and where the attorney's motion is not frivolous, the attorney is entitled to certiorari relief.

City of Dubuque v. Iowa Trust, ___ N.W.2d ___ (Iowa, June 22, 1994)

Class Action

This case is before the court following two preliminary rulings issued in an action to recover damages stemming from the conversion of municipalities' funds invested in the Iowa Trust. The issues pertain to plaintiffs' cause of action against counsel for the trust. Counsel challenges the court's refusal to dismiss the action on standing grounds and its certification of the suit as a class action. Counsel contends that the court's findings on impracticability of joinder and adequacy of representation under Iowa Rules of Civil Procedure 42.1 and 42.2 lack evidentiary support and are contrary to applicable law. Counsel also asserts the court erroneously failed to make express written findings with respect to each criteria listed in Rule 42.3.

HELD: The trial court is vested with broad discretion to assess the weight, if any, to be accorded class certification criteria. Reversal is appropriate only when the record reveals that the court's decision was based on clearly untenable or unreasonable grounds. There was no abuse of discretion in the certification of the class.

Cummings v. Schafer, 511 N.W.2d 888 (Iowa App. 1993)

Compulsory Counterclaim

Plaintiff (Robert Cummings) seeks to recover for damages he allegedly sustained in an automobile accident that occurred on December 24, 1988 when plaintiff was driving an automobile that collided with an automobile owned and operated by defendant Schafer. At the time of the collision, plaintiff's sister, Christine Cummings, was a passenger in his car. Christine was the first to sue for injuries sustained in the December 24 accident. She and her parents filed suit against Schafer on February 12, 1990. Schafer cross-claimed in Christine's lawsuit against plaintiff here (Robert Cummings). This plaintiff (Robert Cummings) answered Schafer's cross-claim on August 21, 1990, but did not make claim against Schafer. Rather, on December 14, 1990, while Christine's suit was still pending, the plaintiff (Robert Cummings)

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Rental. Good stated that there is no corporation known as Good Construction Company and that he has never done business as Good Eavespouting or Good Construction Company. Porter resisted the motion with his own affidavit about the insurer's conduct, and moved for leave to amend to add Larry Good and Sandra Good as individual defendants. District court denied Porter's motion and granted defendant's motion for summary judgment.

HELD: Porter cannot satisfy rule 89's relation-back requirements, which apply to misnomers as well as actual changes in parties. Good did not receive notice within the prescribed limitations. District court should not have sustained defendant's motion for summary judgment, however. Defendant did not raise the limitations defense in its answer. "Because the limitations defense was not raised, the defendant waived it." Moreover, the names used by Porter in his petition to identify the defendant are so similar to the names actually used by Good in his business "as to create no confusion as to the identity of the defendant. As such, the business or trade name is a legal entity..."

Cohen v. Iowa District Court for Des Moines County, 508 N.W.2d 78 (Iowa App. 1993)

Certiorari

A preliminary complaint was filed in Iowa District Court for Des Moines County accusing Garrett of the crime of intoxication in violation of the Burlington City Code. Garrett appeared in court with her attorney, Cohen, the plaintiff here and pleaded not guilty to the charge. Trial was had to a jury and she was found guilty and was later sentenced. At the close of the City's case, defense attorney Cohen made a motion for judgment of acquittal. One ground of the motion was that the City failed in its duty to plead and prove the municipal ordinance it was accusing Garrett of violating. Defense counsel urged that such duty be imposed by Iowa Code Section 622.62. He argued that, because the ordinance had not been properly plead or proved, Garrett could not be convicted of its violation. The trial judge pointed out to defense counsel that the issue generated by his motion had been addressed on many prior occasions and each time his motion had been overruled. Defense counsel argued that he had to make the motion to make a record for appeal. The trial judge directed Mr. Cohen never to make that motion again in his courtroom. The judge stated that, as far as he could tell, the motion was for the strict purpose of delaying and impeding the proceedings. He stated that if Cohen made the motion again, he would deem it contempt of court. Cohen sought a writ of certiorari.

HELD: A writ of certiorari may be sought when an inferior tribunal, board, or officer exercising judicial functions, is alleged to have exceeded its, his, or her proper jurisdiction or

filed this lawsuit as a separate action. The defendant answered. On June 17, 1991, Christine's case was tried. She recovered against Schafer and the cross-claims against this plaintiff (Robert Cummings) in Christine's action were dismissed.

After Christine's suit went to judgment, on November 22, 1991, the defendant for the first time sought to dismiss this suit contending any claims the plaintiff may have against him are barred because they were not brought as a claim in Christine's suit. The trial court found this action was a compulsory counterclaim in Christine's suit. Christine's claim had gone to judgment and the trial court found plaintiff's (Robert Cummings') claim barred. The trial court and parties agree that plaintiff's suit was a compulsory counterclaim in defendant's cross-claim against plaintiff in Christine's suit. Plaintiff on appeal contends that this suit should not have been dismissed because defendant waived the right to have this suit dismissed as a compulsory counterclaim by defending this suit until Christine's case went to judgment and the time was past for plaintiff to file a counterclaim in Christine's action. The question is: did defendant's election to treat this cause as a separate cause of action until a judgment was rendered in Christine's lawsuit preclude him from relying on the compulsory counterclaim as a bar to plaintiff's action.

HELD: Defendant, for nearly a year, treated this as a pending action. He answered and filed discovery, and the matter was set for a pre-trial conference and trial without objection from defendant. Defendant made no effort to consolidate or to dismiss. Reversed the summary judgment and remand for trial.

<u>Netteland v. Farm Bureau Life Insurance Co.</u>, 510 N.W.2d 162 (Iowa App. 1993)

<u>Continuance</u>

Trial courts have broad discretion in ruling on motions for continuance. A district court's ruling on a motion for continuance is presumptively correct and a party challenging the ruling has a heavy burden to overcome the presumption. The party requesting a continuance must show that substantial justice will be more narrowly obtained by granting a continuance.

<u>Ferguson v. Allied Mutual Insurance Company</u>, 512 N.W.2d 296 (Iowa 1994)

<u>Declaratory Judgment</u>

In a declaratory judgment action between two insurance companies over the coverage limits of a farm liability policy, the Supreme Court recognized the standard of review depends on whether

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the case was brought in equity or law, but that the distinction was inconsequential when reviewing a district court's entry of summary judgment. Consequently, the court's task was to determine, after reviewing the entire record, whether a genuine issue of material fact existed and whether the trial court correctly applied the law.

Vlotho v. Hardin County, 509 N.W.2d 350 (Iowa 1993)

Default

Vlotho sued the county, its board of supervisors and two board members alleging wrongful discharge and defamation of character. The county counterclaimed, seeking damages from Vlotho for the destruction of an old bridge. The county alleged that Vlotho acted outside his authority when he ordered the bridge demolished. Vlotho did not reply to the counterclaim within the time allowed. That prompted the county to secure a default from the clerk of district court. The district court denied Vlotho's motion to set aside the default, and Vlotho's application for interlocutory appeal was denied.

HELD: The clerk had no jurisdiction to enter the default and therefore, the default was void and without effect. Iowa Rule of Civil Procedure 231 governs how defaults are entered. According to Rule 231, the only defaults the clerk has authority to enter are those listed in Rule 230(a). Rule 230(a) states:

> A party shall be in default whenever that party: (a) fails to serve, and within a reasonable time thereafter file, a motion or answer as required in Rule of Civil Procedure 53 or 54, or, has appeared, without thereafter serving any motion or pleading as stated in Rule of Civil Procedure 87...

Rule 85(b), which governs the time limit for replies to counterclaims, is not mentioned in Rule 230(a). Consequently, the clerk has no jurisdiction to enter defaults on counterclaims. Counterclaim defaults are covered by the catchall language at the end of Rule 231: "All other defaults shall be entered by the court."

Central National Insurance Co. of Omaha v. Insurance Company of North America, 513 N.W.2d 750 (Iowa 1994)

Default

Central National Insurance Company of Omaha ("CNI") obtained a default judgment against parties insured by Insurance

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Company of North America ("INA") and Employers Reinsurance Corporation ("Employers"). When the judgment was not satisfied, CNI sued INA and Employers to recover on their policies under Iowa Code Chapter 516. Employers answered within the time allowed by the rule; INA did not. In due time, CNI obtained a default judgment against INA. Shortly thereafter, INA moved to set aside the default. INA alleged, among other things, that CNI's counsel failed to notify counsel for INA of his belief that INA was in default and provide INA the opportunity to appear in accordance with the custom and practice generally followed by attoneys practicing in Polk County. The district court granted INA's motion, finding that CNI had obtained the default in violation of local custom and practice.

HELD: The setting aside of a default judgment under Iowa Rule of Civil Procedure 236 is not appropriate unless there was an "unavoidable casualty" or "excusable neglect." Reliance upon local custom and practice would satisfy the requirement of an "unavoidable casualty", but the undisputed facts indicated that the defendant did not fail to answer the plaintiff's petition because of reliance on local custom and practice. Instead, the failure to answer the petition was caused by the defendants' failure to inform local counsel that the petition was filed. The case was remanded to the district court for the limited purpose of determining whether there was "excusable neglect", the following factors for the district court's analysis were provided: (1) Did the defaulting party actually intend to defend and move promptly to set aside the default judgment?; (2) Did the defaulting party assert a claim or defense in good faith?; (3) Did the defaulting party willfully ignore or defy the rules of procedure or was the default simply the result of a mistake?; and, (4) Whether relief is warranted should not depend on who made the mistake.

Note: The court recognized that there is no more troublesome problem to practicing lawyers today than the decision whether to take a default without notice to opposing counsel. The court recognized the ethical dilemma between professional courtesy and zealous representation, and called for the development of a professional courtesy code or amendment to Rule 236 which would require notice to opposing counsel before default is taken.

Embassy Tower Care, Inc. v. Tweedy, 516 N.W.2d 831 (Iowa 1994)

Default

Tweedy filed a petition to vacate default judgment entered against her for care and services provided by the plaintiff nursing home. Tweedy claimed that the default judgment should be vacated under Iowa Rule of Civil Procedure 252(f) because of "newly discovered" evidence, in addition to various "irregularities" under Rule 252(b). In particular, Tweedy contends she was not personally

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HELD: 3 S Inc. was not denied its constitutional right to a jury trial nor due process by the district court's refusal to submit the issue of attorney fees to the jury. In this case, the right to attorney fees is controlled by Iowa Code §625.22 which provides that the court shall determine reasonable attorney fees to be assessed when a judgment is based on a written contract that contains an agreement to pay attorney fees. The district court did not abuse its discretion in allocating only one-half of the total fees to Zarek. The case involved numerous claims and counterclaims. Trial courts have considerable discretion in awarding attorney fees under a statute.

Committee v. Rauch, 508 N.W.2d 628 (Iowa 1993)

Discipline

Rauch's law license was suspended for one year. Rauch thereafter failed to comply with court Rule 118.18 requiring him to give clients and opposing counsel written notification of suspension, deliver to all clients any papers or properties to which they are entitled, refund part of fees paid in advance that have not been earned, assist the client in finding substitute counsel and file copies of the notices sent and proof of complete performance of all previous requirements with the Committee.

HELD: Failure to comply in a timely fashion with the notice requirements after suspension does not automatically mean the attorney can never be reinstated. Rauch's failure to comply with Rule 118.18, however, demands some sanction be imposed. Therefore, the suspension should be extended another three months.

Cohen v. Iowa Dist. Court, 508 N.W.2d 78 (Iowa Ct. App. 1993)

Certiorari

Cohen is a defense attorney seeking certiorari review of the district court's order prohibiting Cohen from ever again moving for judgment of acquittal.

The district court held that the motion was repetitive of other motions made previously and was made only to delay and impede the proceedings.

HELD: Writ sustained. Cohen is entitled to make the motion because it was not frivolous in either the objective or subjective sense. Attorneys have certain duties and obligations to both the client and legal system; to represent the client zealously within the bounds of the law. In the "objective sense" a claim or defense is frivolous if the proponent can present no rational argument based on evidence or law in support of the claim or defense. In the "subjective sense", a claim or defense may be

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served the petition and Embassy did not read the petition to her despite her inability to read. The district court denied Tweedy's petition, and Tweedy appealed.

HELD: The "newly discovered" evidence rule applied only when evidence had been presented at trial. Furthermore, the court held that the default judgment should not be overturned because of "irregularities" since the plaintiff had no duty to read the petition to her and the defendant had actual knowledge of the petition's contents. Finally, the default judgment should not be vacated under Rule 252(c) because there was no evidence that the defendant was of unsound mind.

In the Matter of the Estate of Hettinga, 514 N.W.2d 727 (Iowa App. 1994)

Depositions

Brother of the decedent claimed one-half interest in the artifacts and antiquities in home owned by decedent and brother as tenants in common. The trial court allowed the deposition testimony of the decedent's former husband over the objection of the estate even though the former husband was available to testify.

HELD: The trial court erred in allowing the introduction of deposition testimony without making any findings with regard to the conditions precedent established by Iowa Rule of Civil Procedure 144(c) which permits the use of deposition testimony if the offeror is unable to procure the deponent's presence at trial. However, the deponent's testimony was cumulative. It merely corroborated other evidence in the record. Evidence which is cumulative does not constitute reversible error.

Johnson v. State Farm Auto. Ins. Co., 504 N.W.2d 135 (Iowa App. 1993)

Discovery

Plaintiff was rear-ended by another motorist, King. King admitted negligence in the accident. Her insurance policy limit was $20,000. In a settlement agreement, King's insurer agreed to pay Plaintiff $20,000. Plaintiff's insurer, State Farm, agreed to the settlement and paid plaintiff $5,000 for medical expenses. Plaintiff sued State Farm under the underinsured motorist provision claiming her damages exceeded the $20,000 received from King's insurer. She also filed a bad faith claim. State Farm defended the case on the ground that plaintiff's medical problems were not caused by the accident. State Farm admitted it would be liable if causation and damages were proven. Plaintiff filed a discovery request seeking her insurer's file which included the case file

from a previous suit she had against State Farm in 1983. The district court examined the file in camera, determined it was prepared in anticipation of trial, and ruled it was not subject to discovery.

HELD: A routine investigation of an accident by a liability insurer is conducted in anticipation of litigation for purposes of pre-trial discovery. Iowa Rule of Civil Procedure 122(c). The insured was not entitled to discovery of the file from the insured's previous suit against the carrier where the file was prepared in anticipation of litigation, and insured did not allege substantial need or undue hardship.

Ladeburg v. Ray, 508 N.W.2d 694 (Iowa 1993)

Discovery

Plaintiff, Helen Ladeburg, was struck by a semi trailer driven by defendant Ray. Plaintiff filed a negligence action which ultimately resulted in a jury verdict for the defendants. Plaintiff argued that the district court erred when it allowed defendant to use computer-generated evidence which had not been timely disclosed.

HELD: Plaintiff is precluded from maintaining that defendants' computer-drawn diagrams of the accident should not have been admitted into evidence, even though the defendants' attempt to use the drawings had not been communicated to plaintiff within the time constraints imposed by procedural rules. The parties had informally agreed to proceed with discovery beyond deadlines imposed by procedural rules and a scheduling order. Further, the drawings were not prejudicial to plaintiff because the data had been put into the computer by defendants' expert, who was available for cross-examination, and the computer was simply a drawing tool.

Pierce v. Nelson, 509 N.W.2d 471 (Iowa 1993)

Discovery

Plaintiff Pierce sued defendants for personal injuries he sustained in an automobile collision. The defendants sought to depose Dr. Johnson, an orthopedic surgeon who had treated Pierce for his injuries. Dr. Johnson advised defense counsel that his fees for deposition testimony would be $500 per hour. Defendants wrote Dr. Johnson requesting that he reduce his fee to $250 per hour. Pierce's attorney applied for a protective order to direct defendants to advance the fee demanded. At the hearing on the motion, counsel for Pierce simply reiterated his assertion that the doctor's fee was reasonable. Defendants responded by submitting evidence supporting their challenge to the fee. The district

court, apparently relying primarily on prior personal experience with expert witness fees, determined that the fee was not "totally outrageous" and ordered its payment. The defendants' application for interlocutory appeal was granted. Defendants contend on appeal that the district court abused its discretion when it failed to make an independent finding of reasonableness under Iowa Rule of Civil Procedure 125(f) and improperly concluded the $500 per hour fee was reasonable.

HELD: Iowa Code Section 622.72, which caps the daily compensation for expert trial testimony at $150, is not controlling, because it does not apply to deposition fees. When a court is asked to determine the reasonableness of a fee demanded under Rule 125(f), it should measure that request by the factors cited with approval in Jochims v. Isuzu Motors, Ltd., 141 F.R.D. 493 (S.D. Iowa 1992). In the case of a treating physician, that fee should ordinarily be commensurate with the reasonable compensation lost by virtue of the doctor's required participation in the legal proceedings. Rule 125(f) requires that an expert's deposition fee be measured by a standard of reasonableness. The court's ruling plainly rested on a finding that the fee was not "totally outrageous." By requiring the defendants to meet this higher standard, the court misapplied the rule. Moreover, the court erred in placing the burden of proof on defendants in the first instance. Because Pierce applied for the protective order, it was his burden to prove that the fee was reasonable and customary under Rule 125(f). The court's failure to make an independent finding of reasonableness constitutes an abuse of discretion. The ruling was reversed and remanded for further proceedings.

McMaster v. Iowa Board of Psychology Examiners, 509 N.W.2d 754 (Iowa 1993)

Discovery

The Iowa Board of Psychology Examiners subpoenaed the records of a patient from a psychologist who was not under investigation. The patient had previously been a patient of a psychologist whom the Board was investigating. The district court entered an order enforcing the subpoena pursuant to Iowa Code Section 258A.6. In challenging the order, the patient raises three questions for the court to decide. First, does the mental health professional-patient privilege under Iowa Code Section 622.10 bar disclosure? Second, does Section 258A.6 authorize the Board to subpoena a mental health professional's medical records pertaining to a patient where the professional is not under investigation? Third, would disclosure violate the patient's right to privacy?

HELD: Section 622.10 does not bar disclosure because the subpoena did not compel disclosing confidential communications by

the giving of testimony. Section 258A.6 is broad enough to reach the records in the possession of the psychologist not under investigation. The right of privacy should extend to the patient records of mental health professionals. Reversed and remanded to allow the Board to make a showing that its need for the records outweighs the patient's right to privacy.

Hillrichs v. Avco Corporation, 514 N.W.2d 94 (Iowa 1994)

Discovery

In a products liability action for injuries sustained by a farmer who got his hand caught in the husking rollers of a corn picking machine, the defense appealed the exclusion of a model of the subject equipment. The defendant's failure to produce the model prior to the stipulation and settlement conference a week prior to trial unfairly surprised and prejudiced the plaintiff. The model was correctly excluded.

Moyer v. City of Des Moines, 505 N.W.2d 191 (Iowa 1993)

Dismissal

Moyer held an option to develop condominiums on properly zoned property. Des Moines refused to permit the development for failure to satisfy density requirements and for failure to comply with a setback requirement. Moyer commenced an action to seek a writ of mandamus and to recover damages. District court sustained defendant's motion to dismiss Moyer's claim for damages, on grounds that the municipality's failure to perform a discretionary function rendered defendant immune from suit under section 613A.4(3). District court sustained defendant's motion for summary judgment against the mandamus request on the same grounds.

HELD: Moyer's petition, taken as true, states a claim for damages on which relief may be granted. Defendant's motion to dismiss should have been overruled. Immunity relates not to subject matter jurisdiction but to the substantive issue of liability. Defendant's motion to dismiss must be tested by rule 104(b) instead of (a), and defendant cannot challenge the truth or accuracy of the petition being assailed by a rule 104(b) motion.

COMMENT: Before 1987, defendant could raise subject matter jurisdiction in advance of an answer by special appearance, which then could be supported with affidavits and other evidentiary showings. Court amended rules in 1987 to extinguish special appearances and to regulate pre-answer jurisdictional challenges with rule 104(a). Court also notes in dicta that a 104(a) motion to dismiss can be supported with affidavits and other evidentiary showings, just as with the special appearance.

Tiffany v. Brenton State Bank, 508 N.W.2d 87 (Iowa App. 1993)

Dismissal

Jack and Donna Tiffany contend the district court erred in dismissing their action and denying their motion for reinstatement pursuant to Iowa Rule of Civil Procedure 215.1. The history of this case shows various continuances, failures to comply with discovery requests, and failure to act in a timely manner. The final rule 215.1 notice provided the case must be tried before September 1, 1991. The district court determined the case had been dismissed pursuant to Rule 215.1 because the case was not tried before September 1, 1991. Tiffany's application for reinstatement was denied and Tiffanys appealed.

HELD: Substantial evidence supports the district court's conclusion that Tiffanys failed to prove oversight or mistakes sufficient to warrant mandatory reinstatement. The record also supports the district court's denial of discretionary reinstatement. Tiffany's case was filed November 25, 1987 and was not automatically dismissed until September 1, 1991. During the 33 months between commencement of this action and dismissal, Tiffanys filed numerous motions for continuances, failed to cooperate with their attorney, and took no action for 15 months.

Rohovit v. Mecta Corp., 506 N.W.2d 449 (Iowa 1993)

Dismissal

Plaintiff filed a tort action against Mecta Corporation, the State of Iowa, and physicians at the University of Iowa Hospitals and Clinics. Defendants moved for a change of venue under Iowa Rule of Civil Procedure 175 and plaintiff did not resist the motion. The Polk County district court ordered the transfer of the case to Johnson County, but the case files were not transferred to Johnson County for over 25 days. Defendants filed a motion to dismiss because the files had not been transferred within 20 days as required by Iowa Rule of Civil Procedure 175(b). The district court denied the motion for dismissal, and defendants appealed.

HELD: District court clerk's error in failing to complete timely transfer of case files after court ordered change of venue did not compel dismissal of petition.

Smith v. Smith, 513 N.W.2d 728 (Iowa 1994)

Dismissal

Pamela Smith filed a pro se petition under the domestic abuse statute for temporary and permanent protective orders against Michael Smith, her former husband. After a non-evidentiary hearing, the district court granted Michael's motion to dismiss because the plaintiff failed to properly plead a claim of domestic abuse.

HELD: Pamela's petition gave Michael "fair notice" of her claim for domestic abuse and informed him of the incidents giving rise to her claim (threats, abuse, hitting, shoving, shaking). The court noted that this case underscores their disapproval of rushing to judgment by way of a pre-answer motion to dismiss. There is even more reason to disapprove of such a practice when the target of such a motion is a pro se petition for domestic abuse.

Landes v. Women's Christian Ass'n, 504 N.W.2d 139 (Iowa App. 1993)

Experts

Plaintiff entered the hospital for purpose of out-patient arthroscopic surgery on his right knee. He underwent surgery at or about 8:30 a.m. Anesthetic agents were administered. Plaintiff remained in the recovery room until approximately 10:35 a.m. Plaintiff was then released to post operative accommodations. At about 12:15 p.m., a nurse took plaintiff to the bathroom but left him alone there. Plaintiff fell while in the bathroom. Plaintiff filed a petition against the Women's Christian Association alleging the hospital negligently and carelessly failed to observe him and protect him until the effects of the anaesthetic and surgery had worn off, and the hospital negligently and carelessly failed to provide an attendant to prevent him from falling. In interrogatory answers, plaintiff identified medical doctors who had been plaintiff's treating and attending physicians, as expert witnesses. Plaintiff did not subsequently supplement his answers to specifically designate anyone as an expert witness. The hospital filed a motion for summary judgment arguing plaintiff was precluded from producing expert witnesses because he failed to designate an expert within 180 days of its answer, as required by Iowa Code Section 668.11. The hospital argued plaintiff was thus barred from disputing the hospital had met the applicable standard of care. The court sustained the hospital's motion for summary judgment and dismissed the case with prejudice.

Plaintiff contends expert testimony is not required to establish negligence in the exercise of routine care by a hospital,

and therefore, summary judgment for failure to designate an expert was improper.

HELD: Expert testimony is not required to prove standard of care in negligence suit against hospital when alleged negligent action involves non-medical, administrative, ministerial, or routine care. Action is not a professional liability action for purposes of Iowa Code §668.11, which applies to professional liability cases brought against a licensed professional.

United States Borax & Chemical Corp. v. Archer-Daniels-Midland Co., 506 N.W.2d 456 (Iowa App. 1993)

Experts

The owner of products stored in railroad cars near grain elevator filed suit against grain elevator for damages caused by explosion of grain elevator. During trial, an expert witness for plaintiff testified regarding standards for hazardous grain dust accumulation after he had stated that there were no standards in existence during his deposition. Defendants objected to the expert's testimony on the basis that the expert's testimony exceeded the scope of his testimony during discovery.

HELD: The expert witness had provided sufficient notice of the content of his testimony during his deposition since he had stated that there were no adopted standards, but there were several *proposed standards*. Plaintiff did not have a duty to supplement the discovery proceedings under Iowa Rule of Civil Procedure 125(c), and the district court did not abuse its discretion in admitting the expert's testimony.

Pierce v. Nelson, 509 N.W.2d 471 (Iowa 1993)

Experts

Plaintiff brought action against defendant for personal injuries arising out of automobile accident. A protective order was issued compelling defendant to pay an expert fee of $500 per hour for an orthopedic surgeon's deposition testimony.

HELD: In Jochims v. Isuzu Motors, Ltd., 141 F.R.D. 493 (S.D. Iowa 1992), the court adopted a framework for analyzing fee controversies. The court observed that the goal of Federal Rule 26(b)(4)(C) is to compensate experts for their participation in litigation, while preventing opposing parties from obtaining the expertise free of cost. Reviewing the limited authority on the point, the court adopted the following factors by which to determine whether an expert witness fee is reasonable within the meaning of the Rule: 1.) The witness's area of expertise; 2.)The

education and training required to provide the expert insight which is sought; 3.) The prevailing rates of other comparably respected available experts; 4.) The nature, quality, and complexity of the discovery response provided; 5.) The fee actually being charged to the party who retained the expert; 6.) Fees traditionally charged by the expert on related matters; and,

7.) Any other factor likely to be of assistance to the court in balancing the interests implicated by Rule 26. Allowing treating physicians to set litigation fees greatly in excess of fees received in their daily practice raises the specter of a troublesome "whatever the market will bear" approach to deposition testimony. Neither Pierce nor Dr. Johnson submitted competent evidence of the fee's reasonableness. The court's ruling on the fee cannot be supported under the record.

Humiston Grain v. Rowley Interstate Transportation Co., 512 N.W.2d 573 (Iowa 1994)

Experts

In an action between owners of trucks involved in an accident, truck owner filed third party complaint against an insurance agent for negligence in failing to provide proper insurance coverage. The district court entered judgment for the truck owner based on the insurance agent's failure to thoroughly read a lease agreement and educate himself on the truck owner's insurance needs. The insurance agent appealed, claiming that the record was legally and factually insufficient to support the district court's judgment.

HELD: The district court erred in permitting recovery on a claim of professional negligence without requiring expert testimony concerning the standard of care for insurance agents. Standard of care and its breach must be established through expert testimony, except when professional's lack of care is so obvious as to be within the comprehension of a lay person. In this case, the court found that the district court had no legal basis to fault the insurance agent for failing to read and interpret a contract without expert testimony that such conduct would be expected of an agent under these circumstances of this case.

Kirk v. Union Pacific Railroad, 514 N.W.2d 734 (Iowa App. 1994)

Experts

Lawsuit by temporary worker for damages resulting when railroad car rolled over plaintiff's leg. Judgment was entered on jury verdict finding railroad 85% at fault for plaintiff's injuries. Railroad appealed, arguing that the district court

improperly excluded testimony of defendant's accident reconstruction expert.

HELD: The admissibility of expert opinion testimony is a matter committed to the sound discretion of the court. The general rule is that expert testimony is liberally admitted, but the aggregate effect of the expert's numerous failures to account for potential variable differences between actual accident and simulation of accident, coupled with his inability to verify the impact speed of the train cars, and engagement of the brakes, revealed foundational failure of evidence to assist trier of fact in accurately determining the facts at issue. Iowa Rule of Evidence 702.

Hutchison v. American Family Mutual Insurance Co., 514 N.W.2d 882 (Iowa 1994)

Experts

Plaintiff was injured when her car was rear-ended by another vehicle. Plaintiff's insurer denied claim for underinsured motorist [UIM] benefits for injuries in excess of other driver's policy limits. Plaintiff filed suit against her insurer to recover UIM benefits claiming various mental and emotional problems stemming from a closed-head injury that occurred during the accident. A jury found that the plaintiff had not proven that her total damages exceeded the limits of the other driver's policy. Plaintiff appealed the district court judgment, arguing that the district court erred in admitting the testimony of the insurance company's expert witness who was incompetent to testify on issues of medical causation since he was a neuropsychologist and not a medical doctor.

HELD: A neuropsychologist was competent to testify regarding the medical causation of plaintiff's closed-head injury. The expert witness's lack of board certification should go to the weight to be given to his testimony, and not to its admissibility. The district court properly admitted the expert witness's testimony even though the witness relied upon hearsay evidence, including other doctors' neuropsychological reports, in forming his opinion regarding the plaintiff's injuries. An expert may rely upon hearsay evidence in giving an opinion to the jury.

Milks v. Iowa Oto-Head & Neck Specialists, P.C., ___ N.W.2d ___ (Iowa, July 27, 1994)

Experts

Plaintiff, Gloria Milks, brought this medical malpractice action against defendants, Dr. Gonzales and his professional

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corporation. Milks alleged that Gonzales' negligence in performing throat surgery caused permanent damage to her vocal cords. At trial, a pathologist (Dr. Wyatt) testified, as an expert witness for Gonzales, that the tissue was "not consistent" with tissues originating from the true vocal cord. Milks objected on grounds that the opinion testimony was not within the fair scope of the pathologist's prior deposition testimony. She asked that the objection precede the new opinion testimony and that the testimony be stricken. The district court sustained Milks' objection. After the objection was sustained, Gonzales adopted a hypothetical approach. He twice asked the pathologist what he would expect if the muscle tissue came from the true vocal cord area. The district court overruled Milks' objection to the questions. At the next recess, Milks moved to strike the opinion testimony. The district court noted that the answers given could be construed as different from the deposition testimony, but the questions were not improper and the objections were properly overruled. The motion to strike also was overruled. On January 26, 1993, the jury returned a verdict in Gonzales' favor. Milks filed a notice of appeal on April 7. Milks contends that the district court erred in refusing to strike Dr. Wyatts' testimony at trial given during a morning session and overruling her objections to defendants' counsel's questions during his afternoon trial testimony. She asserts that this testimony was inconsistent with Dr. Wyatts' deposition testimony and therefore was inadmissible due to Iowa Rule of Civil Procedure 125(d). In its order denying plaintiffs' motion for a new trial, the district court concluded that 1) plaintiffs' motion to strike and objections failed to provide the court with the procedural vehicle to remedy any defect contained in defendants' direct examination of Dr. Wyatt; 2) Dr. Wyatt's testimony, although "subtly different" from his deposition testimony, was not so inconsistent as to deprive plaintiff of a fair trial under the circumstances of the case; and, 3) plaintiff was not denied a fair trial because substantial justice was effectuated and plaintiff suffered no unfair prejudice.

HELD: The plaintiff failed to make timely motions to strike Dr. Wyatt's testimony. With respect to the initial testimony, plaintiff's objection and motion to strike were not made at the time the grounds for them first became apparent. With respect to the later testimony, plaintiff made her objections prematurely. Even if the answers to these questions were excludable under Iowa Rule of Civil Procedure 125(d), the trial court had no opportunity to make such a ruling because plaintiff made no motion to strike immediately following each answer.

The trial court was within its discretion in admitting Dr. Wyatt's testimony over plaintiffs' Rule 125(d) objection. The pathologist's claimed change of testimony was not inconsistent with his deposition testimony for purposes of 125(d). Plaintiff Milks was not unfairly prejudiced or surprised by Dr. Wyatt's testimony.

Johnson v. State Farm Auto. Ins. Co., 504 N.W.2d 135 (Iowa App. 1993)

New Trial

Plaintiff, insured by State Farm, was rear-ended by another motorist, King. Plaintiff, who had considerable medical history prior to the accident in 1989, complained of shoulder and neck pain at the time of the accident and had surgery for a ruptured disc in her back following the accident. She also had chiropractic treatment for her back. Plaintiff's insurance policy with State Farm included an underinsured motorist provision. Plaintiff sued State Farm under this provision claiming her damages from the accident exceeded the $20,000 she had already received from King's insurer. State Farm defended the case on the ground that plaintiff's medical problems were not caused by the accident. The case was tried before a jury and the jury, by special interrogatory, found the accident with King was not the proximate cause of plaintiff's injuries.

Plaintiff filed a motion for a new trial on several grounds. One ground was her claim she was denied a fair trial by the inclusion of the records of another woman with the same name as plaintiff's throughout the trial.

HELD: Plaintiff was entitled to a new trial because records relating to another woman's medical history were included in her medical file, the carrier's experts relied on the other woman's records, and incorrect records were included in exhibits presented to the jury. In ruling upon the motion for a new trial, broad but not unlimited discretion is vested in the trial court.

3S Inc., Co. v. Zarek, 504 N.W.2d 153 (Iowa App. 1993)

New Trial

Plaintiff, 3S Inc., and cross-defendant, Brown, appeal from a judgment of the district court which awarded the defendant, Bill Zarek, partial attorney's fees, overruled 3S Inc.'s motion for new trial, and dismissed additional claims filed against Zarek. Prior to the case's submission to the jury, 3S Inc. requested Zarek's claim for attorney fees be submitted to the jury as an issue of damages. The district court denied the motion. The district court awarded Zarek costs and ordered a hearing be held on the issue of attorney fees. 3S Inc. and Brown filed a motion for new trial. They argued the district court should have submitted the issue of attorney fees to the jury. They also allege the jury had engaged in misconduct by considering exhibits not introduced into evidence. During the hearing on the issue of attorney fees, 3S Inc. called three jurors who testified that several jurors had requested help in reading a portion of exhibit 1, the lease. The

portion which was illegible was ¶ 27, which dealt with attorney fees and costs. As a result, the bailiff and the clerk's office enlarged the lease on a copy machine. The jury also attempted to get a magnifying glass to aid in reading the lease. Another juror testified the bailiff had brought the jury a blank lease form. Upon discovering the blank form was not the same as exhibit 1, the jury then requested the enlargements.

HELD: The district court has considerable discretion in determining whether to grant or refuse a new trial based on jury misconduct. In order to justify a new trial on the basis of misconduct of jurors, it must appear the misconduct was calculated to, and it is reasonably probable it did, influence the verdict. In this case, there was no evidence the enlargements or the blank lease form influenced the jury's decision in any way. The jury was advised by the court that attorney fees and costs were for the court to decide and were not to be addressed in their deliberations.

In the Matter of the Estate of John W. Hughbanks, 506 N.W.2d 451 (Iowa App. 1993)

New Trial

Plaintiff appealed a district court ruling, following a jury trial, denying her claim for $208,000 for services rendered as housekeeper to decedent, Hughbanks. Plaintiff argues that the district court erred in failing to grant a new trial after the jury used a dictionary to look up the definition of the words "family" and "management."

HELD: Misconduct of the jury is not a ground for a new trial unless it materially affects substantial rights of the aggrieved party or prevented the movant from having a fair trial. There is no showing the dictionary definitions were different than the jurors' common knowledge of the terms. The trial court did not abuse its discretion in overruling plaintiff's motion for a new trial based on jury misconduct.

Spaur v. Owens-Corning Fiberglas Corp., 510 N.W.2d 854 (Iowa 1994)

New Trial

Robert and Marilyn Spaur brought suit against Owens-Corning Fiberglas Corp. ("OCF") and several other defendants to recover damages for personal injury resulting from the husband's exposure to defendants' asbestos-containing products. By the time the case went to the jury, all the defendants except OCF either settled with the Spaurs or were dismissed. The jury awarded compensatory damages, and loss of consortium damages in the amount

of $70,000 for past loss of consortium and $730,000 for future loss of consortium. OCF argues the award was clearly a result of passion and prejudice and not supported by substantial evidence. The Spaurs were married over 34 years and have three grown children. Robert Spaur was a devoted husband and father and took an active role in household tasks, repairs, and improvements. They enjoyed many activities together outside of the home. In the years following his retirement, they were able to spend even more time together and had travel plans for the future. His life expectancy at the time of death was estimated at approximately 16 years.

HELD: The jury award relating to loss of consortium damages was not flagrantly excessive.

Benn v. Thomas, 512 N.W.2d 537 (Iowa 1994)

New Trial

Motorist with a history of coronary disease died of a heart attack six days after suffering a bruised chest and fractured ankle in a motor vehicle accident caused by defendant's negligence. The decedent's estate filed suit against the other driver, and the jury returned a verdict for the estate with damages for the decedent's injuries but no damages for his death. The estate appealed, arguing that the trial court erred in refusing to instruct the jury on the "eggshell plaintiff" rule. The court of appeals reversed the judgment of the district court, and the defendant appealed.

HELD: When jury instructions contain material misstatement of the law, the trial court has no discretion to deny a motion for a new trial. Iowa R.Civ.Proc. 244(h). The district court's refusal to instruct on the "eggshell plaintiff" rule constituted a failure to apply the applicable law. The court abused its discretion in failing to give this instruction.

Clarey v. K-Products, Inc., 514 N.W.2d 900 (Iowa 1994)

New Trial

Former employee brought a wrongful termination action against her employer alleging that she was discharged in retaliation for filing workers' compensation claims. The district court ruled in favor of the employee. Employer argues that the court abused its discretion in refusing to grant a new trial under Iowa Rule of Civil Procedure 244 on the ground that the damages totaling $364,146 were excessive and the result of passion on the part of the jury. There was evidence that the plaintiff became suicidal as a result of a discharge and was placed in an

institution. She was denied employment by several potential employers and produced evidence of reduced future earnings.

HELD: There was sufficient evidence of damages to support the award.

Biddle v. Sartori Memorial Hospital, 518 N.W.2d 795 (Iowa 1994)

New Trial

Sandra Biddle, after being treated at the emergency room of Sartori Hospital in Cedar Falls, died. Biddle was admitted as a possible cardiac patient however, was treated for gastroenteritis. She died of heart failure approximately four hours later after she was released from the hospital. Thomas Biddle, Sandra's husband and the administrator of her estate, sued the physician, Sartiori, and the City of Cedar Falls for alleged negligence in Sandra's diagnosis and treatment. Prior to trial, Biddle reached a settlement with the physician and his malpractice carrier. Trial proceeded against the remaining defendants and the jury returned a defense verdict.

In post trial motions, Biddle asserted that the jury's verdict for the hospital was contrary to the evidence, thus entitling him to a new trial as a matter of law. The district court disagreed, conceding it might have reached a different result but nevertheless finding support in the record for the jury's decision. The proof at trial was sharply controverted.

HELD: When evidence is in conflict, such as it was here, the weighing of testimony and decisions about the credibility of witnesses is entrusted to the jury. The judgment rendered upon the jury's verdict was affirmed.

Milks v. Iowa Oto-Head & Neck Specialists, P.C., ___ N.W.2d ___ (Iowa, July 27, 1994)

New Trial

Plaintiff, Gloria Milks, brought this medical malpractice action against defendants, Dr. Gonzales and his professional corporation. Milks alleged that Gonzales' negligence in performing throat surgery caused permanent damage to her vocal cords. On January 26, 1993, the jury returned a verdict in Gonzales' favor. On January 27, the verdict forms were filed with the clerk of court and the district court entered judgment in favor of defendants. The district court incorrectly noted that the jury returned its verdict on January 27. On February 8, Milks' moved for a new trial. The court overruled the motion on March 5. Milks filed a notice of appeal on April 7. Gonzales filed a motion to dismiss

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the appeal, contending for the first time that plaintiffs' motion for a new trial had been untimely and thus did not extend the time for filing a notice of appeal.

HELD: The time for filing a motion for new trial, under Iowa Rule of Civil Procedure 247, commences upon the filing of the jury's verdict with the clerk of court. Because Milks filed her motion for new trial within ten days of the date that the jury verdict was filed, her motion was timely and extended her time to appeal to thirty days following the district court's ruling on the motion. Defendants' motion to dismiss the appeal is overruled.

Biddle v. Sartori Memorial Hospital, 518 N.W.2d 795 (Iowa 1994)

Pleading

Sandra Biddle, after being treated at the emergency room of Sartori Hospital in Cedar Falls, died. Biddle was admitted as a possible cardiac patient. Following an examination by a physician, however, she was treated for gastroenteritis. Later, after expressing a desire to go to her motel room, she was discharged. She died of heart failure approximately four hours later. Thomas Biddle, Sandra's husband and the administrator of her estate, sued the physician, Sartori, and the City of Cedar Falls for alleged negligence in Sandra's diagnosis and treatment. Prior to trial, Biddle reached a settlement with the physician, Dr. Watts, and his malpractice carrier. Biddle's settlement with Dr. Watts prompted a pre-trial controversy over the Hospital's remaining liability, if any, for the doctor's negligence, separate and apart from any independent acts of negligence that could be proven against the hospital or its staff. In a motion to adjudicate law points, the hospital noted that Biddle's petition, with one division devoted to Dr. Watts' negligence and a second devoted to claims against hospital personnel, asserted no claim of vicarious liability. Nor did Biddle's answers to interrogatories claim or infer an employment relationship between the doctor and hospital that would support a claim of respondeat superior. Aside from this alleged insufficiency in the pleadings, the hospital argued that any liability premised on Dr. Watts' negligence would have been discharged upon Biddle's settlement with him. The district court agreed on both counts, ruling as a matter of law that the issue of the hospital's vicarious liability for the acts of Dr. Watts had not been pled and, in any event, settlement with the doctor released the hospital from any vicarious liability based on the doctor's negligence.

HELD: The plaintiff's pleadings were insufficient to raise the issue of Sartori's vicarious liability.

<u>3S Inc., Co. v. Zarek</u>, 504 N.W.2d 153 (Iowa App. 1993)

<u>Offer to Confess Judgment</u>

An offer to confess judgment was made prior to trial. 3S Inc. contends the district court abused its discretion in awarding Zarek's claim for attorney fees and costs. 3S Inc. argues the fact that an offer to confess judgment was made prior to trial eliminated Zarek's attorney fees claims under Iowa Code Chapter 677. 3S Inc. argues a claim for attorney fees cannot be supported because the verdict resulted in a judgment for an amount less than the amount claimed by Zarek as part of the breach of contract action.

HELD: The document which 3S Inc. contends constituted an offer to confess judgment pursuant to Section 677.4 was a written document mailed to the district court judge and to Zarek's attorney. This document was never filed with the clerk of court. The court noted papers filed with a judge may be transmitted to the clerk of court pursuant to Iowa Rule of Civil Procedure 82(e). However, in this case, Rule 82(e) was not followed. As a result, neither the district court nor this court will consider this document to be an offer to confess judgment. Chapter 677 is inapplicable.

<u>Counts v. Hospitality Employees, Inc.</u>, 518 N.W.2d 358 (Iowa 1994)

<u>Rule 8</u>

Jimmie Counts, Jr., the 19 year old son of the plaintiffs, Jimmie D. and Sandra Counts, had been drinking at a lounge in Mount Pleasant. While driving home alone, he apparently passed out and his vehicle sheered off an electric pole. He was thrown from the car and suffered a spinal injury resulting in quadriplegia. The Counts filed this petition under the Iowa Dram Shop Act against defendant seeking damages resulting from the intoxication of their son. The claimed damages included expenses for remodeling their home to make it handicapped accessible, and for assorted medical expenses. They also sought loss of consortium. The district court granted summary judgment against the Counts, concluding they suffered no cognizable injuries under Iowa's Dram Shop Act. The court determined as a matter of law that the Counts sustained no damages because it found they had no duty to support their 19 year old son and therefore assumed all expenses voluntarily.

HELD: The trial court was correct in holding the Counts had no legal obligation to support their adult injured son. Because Jim Jr. was 19 at the time of the accident, also because he had become emancipated, his parents have no right of action for loss of consortium under Iowa Rule of Civil Procedure 8.

<u>In re Marriage of Kinnard</u>, 512 N.W.2d 821 (Iowa App. 1993)

<u>Rule 252</u>

On November 23, 1988, the trial court dissolved the 17 year marriage of James and Connie Kinnard. The court awarded property and assets worth $113,135 to Connie and property valued at $248,327 to James. Connie was awarded alimony and child support. Between Wednesday, November 23, and Sunday, November 27, 1988, James proposed he and Connie remarry. They remarried on November 27, 1988. In October, 1990, the district court dissolved this marriage. Connie was awarded property worth less than one third of the amount of property she received under the 1988 decree. No alimony was awarded. Connie filed an application to modify the decree, a petition to vacate the 1990 dissolution decree pursuant to Civil Procedure Rule 252, and a petition for declaratory judgment. She alleged James induced her to remarry so he would avoid the financial obligations imposed on him by the 1988 decree and he depleted their assets soon after their remarriage. The trial court denied Connie's application and petitions, finding James had not acted fraudulently or intentionally depleted the parties' assets. Connie appealed.

HELD: The findings of the trial court are not supported by substantial evidence. Rule 252 allows a court to vacate a final judgment if fraud was practiced upon the court. James' actions immediately before and after the second marriage support a finding of fraud. James testified he went to the courthouse and obtained a copy of the decree on November 23, 1988. Copies were sent to the parties' attorneys on that date. The courthouse was closed Thursday, November 24, through Sunday, November 27, for the Thanksgiving holiday. During this time, James proposed remarriage to Connie and never revealed the provisions of the decree to her. Based on James' promises that he would quit seeing his girlfriend and attend counseling and Connie's fear she was unable to support their children, Connie agreed to marry James. Evidence indicates James failed to keep his promises. James quickly dissipated the assets after the remarriage. He made a $12,000 cash payment to his parents for prior education, sold his chiropractic practice for $60,000, and sold an airplane. During the 1990 dissolution trial, James also undervalued his other chiropractic practice by $50,000. The 1990 dissolution decree must be set aside on the ground James acted fraudulently. The 1990 decree was vacated and the 1988 decree was reinstated.

<u>Schettler v. District Court for Carroll County</u>, 509 N.W.2d 459 (Iowa 1993)

<u>Sanctions</u>

During the discovery process in Jane and Elmer Schettler's modification action, Jane's attorney ("attorney one") obtained financial statements that he felt raised a sufficient basis for filing a shareholder fraud action on Jane's behalf. "Attorney one" filed a petition alleging claims against Elmer for fraud and breach of fiduciary duty and against Elmer's accountant and Jane's dissolution attorney for complicity in the fraud. On the same day of the modification judgment, "attorney two" entered his appearance as lead counsel for Jane in the fraud case. "Attorney one" remained of counsel in the case. "Attorney two" filed an amended petition adding SSFI (a family-owned corporation) as a defendant. "Attorney one" did not sign this document. The defendants filed separate motions for summary judgment and adjudication of law points. The district court sustained these motions. One month later, Elmer and SSFI filed a motion for sanctions against "attorney one." About a week later, Jane appealed from the district court's adverse summary judgment ruling. The district court entered an order holding in abeyance a final ruling on the motion for sanctions until Jane's appeal was decided. The court of appeals affirmed the district court ruling. Jane's application for further review was denied and procedendo issued. The district court denied the motion for sanctions. Elmer and SSFI appealed.

HELD: 1.) The challenge to the district court's refusal to sanction "attorney one" should be treated as a petition for writ of certiorari. The writ was granted. 2.) Because the motion for sanctions did not decide any issue in the underlying fraud action, the district court had jurisdiction even though procedendo had issued. The trial judges should decide motions for Rule 80(a) sanctions as soon as is reasonably practicable to allow the appellate court to consider the record on such motions along with the appeal of the underlying action. 3.) The rule permitting imposition of sanctions for filing of frivolous pleadings, motions, or other paper does not impose continuing duty on the signer to dismiss the action if signer later learns the client has no case. 4.) The record amply supports the district court's conclusion that this shareholder fraud action was well-grounded in fact. 5.) "Attorney one" did not sign the pleading adding SSFI as a party defendant. Rule 80(a) therefore does not apply to "attorney one" as to this document. The district court did not abuse its discretion in denying Rule 80(a) sanctions against "attorney one." Therefore, the writ was annulled.

Landes v. Women's Christian Ass'n, 504 N.W.2d 139 (Iowa App. 1993)

Summary Judgment

Plaintiff entered the hospital for purpose of out-patient arthroscopic surgery on his right knee. He underwent surgery at or about 8:30 a.m. Anesthetic agents were administered. Plaintiff remained in the recovery room until approximately 10:35 a.m. Plaintiff was then released to post operative accommodations. At about 12:15 p.m., a nurse took plaintiff to the bathroom but left him alone there. Plaintiff fell while in the bathroom. Plaintiff filed a petition against the Women's Christian Association alleging the hospital negligently and carelessly failed to observe him and protect him until the effects of the anaesthetic and surgery had worn off, and the hospital negligently and carelessly failed to provide an attendant to prevent him from falling.

In interrogatory answers, plaintiff identified medical doctors who had been plaintiff's treating and attending physicians as expert witnesses. Plaintiff did not subsequently supplement his answers to specifically designate anyone as an expert witness. The hospital filed a motion for summary judgment arguing plaintiff was precluded from producing expert witnesses because he failed to designate an expert within 180 days of its answer, as required by Iowa Code Section 668.11. The hospital argued plaintiff was thus barred from disputing the hospital had met the applicable standard of care. The court sustained the hospital's motion for summary judgment and dismissed the case with prejudice.

Plaintiff contends expert testimony is not required to establish negligence in the exercise of routine care by a hospital, and therefore, summary judgment for failure to designate an expert was improper.

HELD: Summary judgment was inappropriate in this case. Summary judgment is seldom appropriate in a negligence case, however summary judgment may be appropriate in an instance in which expert testimony is required to establish negligence and expert testimony is unavailable, because there is no genuine issue of fact which can be proved. In this case, plaintiff was not required to present expert testimony in order to establish negligence.

Glen Haven Homes v. Mills County, 507 N.W.2d 179 (Iowa 1993)

Summary Judgment

Appellant, Glen Haven, claims that the board of review's motion for summary judgment was flawed because it failed to set forth a "separate, short and concise statement of the material facts as to which the moving party contends there is no genuine

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issue to be tried" as required by Iowa Rule of Civil Procedure 237(h). The separate statement that is to accompany a summary judgment motion under Iowa Rule of Civil Procedure 237(h), except as it may carry with it express stipulations concerning the anticipated ruling, does not constitute a part of the record from which genuine issues of material fact may be determined. It is intended on the contrary, to be a mere summary of claims that must rise or fall on the actual contents of the "pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any." The omission, although not condoned, in no way prejudiced Glen Haven.

McKiness Excavating v. Morton Buildings, 507 N.W.2d 405 (Iowa 1993)

Summary Judgment

The district court held as a matter of law that 614.1(11) barred all of plaintiff's claims. Defendant appealed.

HELD: Summary judgment is proper only when the entire record before the court shows there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. While negligence actions are seldom capable of summary adjudication, no fact question exists if the only dispute concerns the legal consequences flowing from undisputed facts. In this case, the question presented was the application of 614.1(11). Because this is a pure question of law, the question is ripe for summary disposition.

Estate of Oswald v. Dubuque County, 511 N.W.2d 637 (Iowa App. 1993)

Summary Judgment

The estate of motorist brought suit against County for personal injury and death caused by accident in which motorist fell through space where decking had been removed from bridge undergoing repair. District court granted summary judgment for the County and estate appealed.

HELD: The court of appeals reversed and remanded, holding that the district court made determinations about disputed facts which should have been left for the fact finders' determination. The court of appeals found that genuine issues of material fact existed regarding whether or not the "road closed" sign was present at the scene at the time of the accident, and if present, whether it was misleading, so summary judgment was not appropriate.

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Parson v. Procter & Gamble Mfg. Co., 514 N.W.2d 891 (Iowa 1994)

Summary Judgment

Plaintiff sued manufacturer for injuries suffered while working as a temporary worker in manufacturer's plant. The manufacturer filed a motion for summary judgment, contending that the plaintiff was an "employee" and that the Iowa Workers' Compensation statutes barred the plaintiff's tort suit against it. The district court granted summary judgment and plaintiff appealed.

HELD: Summary judgment was improper since there was an issue of material fact as to whether the plaintiff was an employee of the manufacturer under the five-factor employment test established in Henderson v. Jenny Edmundson Hospital, 178 N.W.2d 429 (Iowa 1970).

Loyd v. Federal Kemper Life Assurance Company, 518 N.W.2d 374 (Iowa 1994)

Time

Statute providing that, when the time period's final day is Sunday, the time period is extended so as to include the whole of the following Monday, applies only in construction of statutes, and does not apply to unambiguous insurance contract.

Rohovit v. Mecta Corp., 506 N.W.2d 449 (Iowa 1993)

Venue

Plaintiff filed a tort action against Mecta Corporation, the State of Iowa, and physicians at the University of Iowa Hospitals and Clinics. Defendants moved for a change of venue under Iowa Rule of Civil Procedure 175 and plaintiff did not resist the motion. The Polk County district court ordered the transfer of the case to Johnson County, but the case files were not transferred to Johnson County for over 25 days. Defendants filed a motion to dismiss because the files had not been transferred within 20 days as required by Iowa Rule of Civil Procedure 175(b). The district court denied the motion for dismissal, and defendants appealed.

HELD: District court clerk's error in failing to complete timely transfer of case files after court ordered change of venue did not compel dismissal of petition.

COMMERCIAL LAW
Steve Serck

Production Credit Assn. v. Farm & Town Indus., No. 93-915 (Iowa June 22, 1994)

Secured Transactions

McGraw Farms granted PCA a perfected security interest in its crops and proceeds thereof. In August of 1991 McGraw contracted with Farm & Town Industries (FTI) to sell corn then growing. In September PCA sent written notice of its security interest in McGraw's crops to FTI. McGraw delivered the corn to FTI in October. In January 1992, McGraw filed for bankruptcy under Chapter 12. PCA filed a motion to dismiss the bankruptcy case. While the case was still pending, McGraw filed a motion for authority to obtain credit or to incur debt under Section 364 of the Bankruptcy Code. The bankruptcy court authorized FTI to extend credit to McGraw and granted FTI a "first security interest in the 1992 crop and any proceeds thereof". In June the bankruptcy court dismissed McGraw's case. PCA subsequently filed a motion for partial summary judgment against FTI asserting that its security interest in both McGraw's 1992 and 1991 crops and proceeds took priority over FTI's claims. FTI opposed, but the court found that the bankruptcy court's dismissal of McGraw's Chapter 12 case vacated FTI's security interest in the 1992 crop, and that PCA's interest in the 1991 proceeds was prior and superior to FTI's unsecured claims. FTI appeals.

HELD: Although Section 394(b)(3) of the Bankruptcy Code effectively reinstated PCA's prior security interest in the 1992 crop, we find that it would be inequitable to deprive a secured creditor of an interest otherwise enforceable under state law. Under Iowa Code §554.9312(2) FTI's purchase money security interest in the 1992 crop takes priority over PCA's security interest.

As to the 1991 crop, FTI did not take the crop proceeds free of PCA's security interest. Accordingly, we affirm the court's grant of partial summary judgment concerning the 1991 proceeds.

Citizen Sav. Bank v. Miller, 515 N.W.2d 7 (Iowa 1994)

Secured Transactions

A purchase money security interest (PMSI) creditor and prior perfected secured creditor both had judgments against debtor and sought to foreclose on collateral. On cross-motions for summary judgment, the district court granted summary judgment for prior perfected creditor, and PMSI creditor appealed. In its appeal the PMSI creditor points to Iowa Code § 554.9312(4) which states "a purchase money security interest in collateral other than

inventory has priority over a conflicting security interest in the same collateral or its proceeds. . . ."

The collateral in question was 15 dairy cows purchased in 1983. The district court held that no genuine issue existed regarding the fact that the cattle comprising the herd in 1992 were not those acquired in 1983, nor were they "proceeds" of the cattle in which the creditor once held a PMSI.

HELD: We agree that this is a sufficient basis upon which to grant the prior perfected secured creditor judgment as a matter of law. The cattle presently under dispute are neither the original collateral cattle nor the proceeds of the original cattle. Therefore, the PMSI creditor no longer has priority.

Haupt v. Miller, 514 N.W.2d 905 (Iowa 1994)

Corporate Officer Liability

Taldine executed a written guaranty of her son's $90,000 debt. A vice-president of Citizens State Bank ("CSB") orally assured Taldine that she was guarantying only $90,000 worth of debt and that the written guaranty instrument would be returned to her or destroyed when the debt was paid. However, after the debt was satisfied the written guaranty was neither returned to Taldine nor destroyed. Subsequently, CSB was declared insolvent and the FDIC purchased the guaranty. The Supreme Court affirmed the district court's order sustaining the FDIC's motion for summary judgment against Taldine's estate in the amount of $414,000.

Haupt, executor of Taldine's estate, sued the CSB officers involved in the guaranty transaction on theories of negligent breach of contract, negligent misrepresentation, and fraudulent misrepresentation. The defendants all filed motions to dismiss. The district court dismissed all the claims except the claim for fraudulent misrepresentation. The issue is whether corporate officers are individually liable for their regardless of whether they acted within or without the scope of their employment.

HELD: We hold corporate officers can be held liable for negligence if they take part personally in the commission of a tort against a third party. We join the modern trend of jurisdictions applying the general negligence standard. The district court erred in dismissing the claims of negligent breach of contract and negligent misrepresentation. Those persons responsible for the preparation and custody of these documents had a duty to exercise reasonable care to assure that they accurately reflected the true nature of the guarantor's obligation.

COMMENT: Four justices concurred in part and dissented in part. In the dissent, the justices disagreed with the majority's conclusion that a cause of action based on negligence is

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available to the plaintiff. They stated that the majority failed to state the specific duty any of the defendants had to Taldine which was independent of the agreement between Taldine and CSB.

Sieg Co. v. Kelly, 512 N.W.2d 275 (Iowa 1994)

Valuation of Dissenter Stock

The Kelly brothers owned shares in subsidiaries of the Sieg Company. Sieg planned to merge its subsidiaries into the parent company and notified the Kellys that it would pay them certain amounts for their shares. Kellys deposited their shares and demanded payment pursuant to the offer. After Kellys received payment from Sieg, they demanded the difference between what Sieg paid them and what they claimed the stock was worth. After the lower court's assessment of the fair value of the stock, it found that Sieg still owed Kellys a substantial amount of money. Sieg appealed the court's assessment of the stock's value.

HELD: The evidence supported the trial court's assessment. No one perfect formula exists for measuring stock value. However, three popular approaches are (1) market value, (2) investment value and (3) net asset value. Trial courts should consider "all relevant factors that may influence valuation" including the rate of dividends paid, security offered that they will be regularly paid, a corporation's prospects for the future and the selling price of stocks of like character.

Citizen's Sav. Bank v. Wild, 512 N.W.2d 799 (Iowa Ct. App. 1993)

Foreclosure

Citizen's Savings Bank (CSB) brought this foreclosure action against the Wilds as owners of real estate and personal property, based on an indebtedness secured by two deeds of trust and a blanket agricultural security agreement. The Wilds counterclaimed for fraudulent misrepresentation. The district court ruled in favor of CSB and ordered the foreclosure of Wilds' property.

HELD: Affirmed. The Wilds failed to establish the existence of a fiduciary or confidential relationship. A confidential relationship exists between parties to a transaction wherein one of the parties is duty bound to act with the utmost good faith for the benefit of the other party. The evidence contained in the record does not support Wilds' contention that a special trust and confidence existed between them and the bank president.

The Wilds also failed to prove their claim of fraudulent misrepresentation. The elements of fraudulent misrepresentation include falsity, materiality, scienter, intent to deceive,

reliance, and resulting injury and damages. The Wilds contend that the bank had no intention of financing Wilds' farming operation; rather that the bank's true intention was to obtain title to the real estate. However, the record reveals CSB continued to finance Wilds' farming operation by loaning them additional money and charging them a lower interest rate. No demand was made for interest payments although the Wilds were one year late.

Carson v. Roediger, 513 N.W.2d 713 (Iowa 1994)

Mechanics Liens

The Roedigers contracted with Pinckney for the construction of a home. Plaintiff Carson became a subcontractor by delivering construction materials to the site. By reason of faulty construction by Pinckney, the Roedigers stopped payment under the contract. Carson then filed a mechanic's lien on the Roedigers' property. The Roedigers then cross-claimed against Pinckney for the breach of contract.

The district court found that the contract price, with the extras ordered by Roedigers, totaled $129,000. Of that total, $108,000 had been paid, so $21,000 was due. The court found that the cost for repairing defects in construction amounted to $25,000. The district court looked to Iowa Code section 572.14(2) which states that a mechanic's lien on an owner occupied dwelling is only enforceable "to the extent of the balance due from the owner to the principal contractor." The district court found that Roedigers owed nothing to Carson because Roedigers owed nothing to the contractor.

HELD: We conclude that the trial court correctly interpreted Iowa Code section 572.14(2). The term "balance due" in that section means the amount the owner is obligated to pay the principal contractor. Before a subcontractor can recover on a mechanic's lien, the subcontractor must prove the homeowner is indebted to the principal contractor for the work in which the subcontractor's materials were used.

Ross v. Playle, 505 N.W.2d 515 (Iowa Ct. App. 1993)

Piercing Corporate Veil

Ross was a broker in a printing business. Playle was the sole shareholder, director and officer of Playle Publications, Inc. which was incorporated in 1985. Prior to 1985, Playle operated as a sole proprietor. From 1987 through 1990, Playle placed several orders through Ross, signing purchase orders without reference to Playle's corporation. Following a trial before the court, the court awarded Ross $116,432.64 for outstanding invoices. The judgment was against Playle Publications, Inc. The district court

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refused to pierce the corporate veil and hold Playle personally liable.

HELD: Affirmed. The factors to be considered in deciding whether to pierce the corporate veil include whether the corporation formalities are followed. While purchase orders were not issued in the corporate name, evidence presented at the district court indicated Ross knew Playle was buying for the corporation. No intent to defraud creditors was shown. Another factor to consider is whether individual obligations are paid by the corporation. While Ross contended on appeal that Playle's personal obligations were paid by the corporation, no evidence was presented to the court that Playle's corporate salary or the rent the corporation paid to him for a building were excessive or unreasonable.

Cambron v. Moyer, No. 209/92-1805 (Iowa July 27, 1994)

UCC Statute of Frauds

The jury determined that a contract existed between plaintiff's decedent and defendant for purchase of the stock of DJNB, Inc. Plaintiff's defense to the alleged contract was Iowa Code § 554.8319 (statute of frauds for sales of securities). The trial court refused to instruct the jury on § 554.8319.

HELD: The trial court erred in failing to instruct the jury on plaintiff's defense that the contract alleged by Moyer was a contract for the sale of securities under Iowa Code § 554.8102 and therefore unenforceable under the statute of frauds provision contained in § 554.8319. We join the majority of jurisdictions holding that shares in a closely held corporation fall within the scope of Article VIII of the UCC.

Lange v. Lange, No. 109/93-127 (Iowa July 27, 1994)

Stock/Corporate Opportunity

In the early 1970s, Jean and Elmer Lange acquired a majority interest in the Union State Bank. They formed a bank holding company in which Elmer owned 51.84 percent and Jean owned 48.16 percent. Despite the imbalance in stock ownership, the brothers treated one another as equal partners. In 1983 the brothers executed a buy-sell agreement to provide for disposition of company stock on the death of either of them. The agreement was signed by Elmer, Jean and their wives and gave the surviving brother an option to purchase common and preferred stock from the deceased brother's wife. In 1985 Elmer set out to formally restore the 50-50 partnership. Elmer agreed to sell Jean 600 shares of preferred stock for $60,000. The transfer was never completed, however. In 1990 Elmer died, leaving one-half of his estate to his widow and the other half equally to his two daughters. These heirs

soon learned of the disparity in stock ownership. Elmer and Jean's long-time attorney, John Schulte, drafted an agreement acknowledging Jean and Elmer's intentions in proposing Jean's purchase of 600 shares of preferred stock at $100 per share. Jean's family signed the agreement but Elmer's did not, expressing their desire to retain majority ownership of the company. Jean then appointed his son, Gene, director of the company to assume the position vacated by Elmer. The directors authorized the issuance of 2,000 shares of common stock to Jean in exchange for existing debt. In August and September of 1991, Jean made an individual purchase of 10 percent of the bank's 4000 outstanding common shares. In April of 1991 plaintiffs filed suit alleging Jean had breached his fiduciary duty to the corporation shareholders by causing the issuance of 2000 shares of common stock to himself and by attempting to redeem portions of Elmer's common and preferred stock. Defendants counterclaimed, seeking specific performance of the agreement for the sale of 600 preferred shares from Elmer's estate.

Following a bench trial, the court found the 1990 agreement drawn by Schulte represented a valid exercise of Jean's option to purchase under the 1983 buy-sell agreement. Thus, Elmer's estate was ordered to transfer 600 shares of preferred stock to Jean in exchange for $60,000. The court voided the issuance of the 2000 additional common stock shares because the action taken by Jean was for the wrongful purpose of acquiring control of the company. It found the attempted redemption of 1750 shares of Elmer's preferred stock technically and legally valid but voided the transaction as an inequitable attempt by Jean to upset the balance in ownership between the two families. The court rejected plaintiffs' amended post-trial claim that Gene usurped a "corporate opportunity" by individually buying 400 additional shares of bank stock.

HELD: <u>Specific performance of the 1983 buy-sell agreement</u>. Specific performance should not ordinarily be decreed unless contractual terms are so expressed the court can reasonably determine the duty of each party and the conditions under which performance is due. Although the 1983 agreement may be characterized as confusing and inartfully drawn, the terms are not so obscure as to make the agreement unenforceable. When a contract is not ambiguous a court is obliged to enforce it as written. Because the duties of each party and the conditions under which performance is due may be reasonably ascertained from the agreement, the district court made no mistake in enforcing it.

<u>Corporate opportunity</u>. Plaintffs argue that Jean's purchase of bank stock for his own account and that of his personal holding company amounted to usurpation of a corporate opportunity. As a fiduciary, a corporate director may not secure a business opportunity that in all fairness should belong to the corporation. The general rule regarding corporate opportunity recognizes that

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> if there is presented to a corporate officer or director a business opportunity which (1) the corporation is financially able to undertake, (2) is, from its nature, in the line of the corporation's business and is one of practical advantage to it, (3) is one in which the corporation has an interest or a reasonable expectancy, and by embracing the opportunity, the self-interest of the officer director will be brought into conflict that of his corporation, the law will not permit him to seize the opportunity for himself.

There is insufficient proof that Jean took unlawful advantage of a corporate opportunity. The shares Jean purchased in no way jeopardized the company's significant majority ownership of the bank and the company did not need the stock for the conduct of its business because it had already surpassed the 80 percent ownership threshold necessary to obtain the tax benefits for which it was formed. Also, the company was not financially able to purchase the shares itself. As long as the acquisition was not made with corporate funds, Jean was entitled to treat the opportunity as his own.

Avoidance of redemption of Elmer's shares. Equity avoids giving one party an unfair, oppressive, or inequitable advantage over the other. The district court properly invalidated the partial redemption of 1,750 of Elmer's shares by Jean, not only because to do so would upset the equal balance of power, but because partial redemption would disrupt that balance without full compensation for the minority shareholders.

Issuance of 2,000 shares. The district court found that issuance of the 2,000 additional shares was undertaken solely for the personal advantage of Jean's family to obtain control of the corporation and the record does not support the notion that the actions were motivated by a legitimate corporate purpose. The district court correctly voided the issuance.

Engstrand v. West Des Moines State Bank, 516 N.W.2d 797 (Iowa 1994)

Secured Transactions

Plaintiff and several members of his family owned wholesale and retail boat companies which were financed by West Des Moines State Bank. The companies fell on hard times and defaulted on their loan so the bank began collection proceedings, including the liquidation of the companies' inventory. Plaintiff alleged that West Bank was negligent in its lending relationship with the plaintiff, negligent in failing to allow the plaintiff an active role in the liquidation, and negligent in failing to dispose of the collateral in a commercially reasonable manner. The plaintiff also alleged the bank breached a fiduciary duty to the plaintiff. The district court found that, as a matter of law, the bank did not owe

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a fiduciary duty to the plaintiff nor did it owe a "special duty" to the plaintiff shareholders to allow them to sue for alleged wrongs committed against the corporation.

HELD: The banking-customer relationship does not automatically create a fiduciary duty. Here, the bank agreed to make a loan on certain conditions, and the plaintiff agreed to accept the loan with those conditions. The bank acted on its own behalf and not on behalf of the plaintiff in a confidential or trust relationship. No evidence was admitted showing the bank was acting as an advisor to the plaintiffs or that it exercised any influence over the plaintiff's business except to enforce its loan agreement. Thus, the evidence is not sufficient to create a fiduciary relationship between the plaintiff and the defendant.

Also, the bank owed no special duty to the plaintiff which would permit direct suit for unreasonable disposition of collateral because it is the corporation that has suffered direct injury, and any damage resulting to the stockholders is merely indirect. Because the evidence fails to establish a special duty to permit this action on behalf of the shareholders and is insufficient to establish a fiduciary relationship between the plaintiff and defendant, the district court decision is affirmed.

West Des Moines State Bank v. Ralph's Dist. Co., 516 N.W.2d 801 (Iowa 1994)

Secured Transactions

The defendant alleges that: 1) the bank was not entitled to foreclose because the defendant was not in default; 2) the bank did not dispose of the defendant's collateral in a commercially reasonable manner; and 3) the bank acted with "unclean hands."

HELD: The bank submitted evidence showing that defendant was indebted approximately $900,000 to a floorplan creditor, it was engaged in check kiting and defendant had defaulted by missing a note payment to the bank. Although the bank incurred liquidation expenses that were grossly excessive, the district court reduced the amount of judgment entered against the defendant by the amount it concluded was excessive. Thus, the remedy fashioned by the district court was adequate to cure the problem, and the bank is entitled to foreclose its mortgage and not lose any right to a deficiency judgment. Accordingly, we affirm.

COMPARATIVE FAULT

Len Strand

Shams v. Carney, 518 N.W.2d 366 (Iowa 1994)

Assured Clear Distance

Shams was a pedestrian crossing a frontage road, at an intersection, when he was struck and injured by a car driven by Carney. The frontage road was "protected." The jury found no fault on the part of defendant Carney and Shams appealed. The court of appeals reversed due to alleged errors in the instructions concerning Carney's duty of care in approaching the intersection and a requested "assured clear distance" instruction. The Supreme Court granted further review.

HELD: Decision of court of appeals vacated, judgment of district court affirmed. There is a three-part test for determining whether or not to give an assured clear distance instruction: (1) the object with which the operator collided was located ahead of him in his lane of travel; (2) the object was reasonably discernable; and (3) the object was either (a) stationary or static, (b) moving ahead of the operator in the same direction or (c) came into his lane of traffic within the assured clear distance ahead at a point sufficiently distant ahead of him to have made it possible to bring his vehicle to a stop and avoid a collision. The evidence in the record demonstrates that elements 2 and 3 did not exist. The accident occurred at dusk with Shams wearing dark clothing, making him less than reasonably discernable. Further, Shams stepped directly and suddenly into Carney's path of travel when Carney's vehicle was just feet away. He did not enter Carney's lane at an assured clear distance ahead of Carney. Thus, the district court did not err in refusing to give an assured clear distance instruction.

Hillrichs v. Avco Corp., 514 N.W.2d 94 (Iowa 1994) (Hillrichs II)

Enhanced Injury

Hillrichs was operating a cornpicker manufactured by Avco when it became plugged. He attempted to unplug the machine without turning it off. His hand became caught between two rollers, which continued to rotate. Hillrichs' hand was stuck in the operating machine for 30 minutes until an assistant discovered him and turned the machine off. The four fingers on his right hand were amputated as a result of the incident.

Hillrichs sued Avco on various product liability theories, claiming that Avco should have installed an emergency stop device within reach of the location in which his hand became caught. The first trial ended in a finding that Hillrichs was 100%

at fault. The Supreme Court reversed and remanded for a new trial on Hillrichs' negligence claim with respect to whether Avco was liable for Hillrichs' enhanced injury--additional injuries that Hillrichs incurred because his hand was caught in the machine for such a lengthy period of time. See Hillrichs v. Avco Corp., 478 N.W.2d 70 (Iowa 1991).

The second jury found for Hillrichs on a negligent design claim, assessing 20% of fault to him and awarding $919,541.60 in actual damages and $1 million in punitive damages. The district court set aside the punitive damages award and reduced the actual damages by Hillrichs' 20% fault. The district court also reduced the actual damages by $50,000 due to a lack of evidence of future medical expenses. Both parties appealed.

HELD: Affirmed in all respects. First, Hillrichs presented sufficient evidence to establish a negligent design claim. He demonstrated that Avco knew, when it manufactured the machine, that farmers often try to unplug the machine while it is operating. He further demonstrated that a stop device would have cost only $50 and that other machines with rollers, such as printing presses, included such safety devices at the time Avco manufactured the cornpicker. This evidence was sufficient to submit Hillrichs negligent design claim to the jury.

Second, Hillrichs presented ample evidence that he suffered an enhanced injury due to the lack of a stop device. Several experts testified that his injuries were more serious because of the extended length of time in which his hand was caught in the moving rollers.

Third, the district court did not err in reducing Hillrichs' damages by the 20% fault attributed to him. In Hillrichs I the Supreme Court directed the district court to reduce any damage award by the amount of Hillrichs' fault. The district court, at the conclusion of the second trial, entered judgment accordingly. It was only after entry of judgment that the Supreme Court decided, in Reed v. Chrysler Corp., 494 N.W.2d 224 (Iowa 1992), that the plaintiff's fault should not be used to reduce the amount of enhanced injury damages. Because Hillrichs I was the law of the case, and because judgment in the second trial was entered prior to Reed, the district court acted properly in reducing the damage award by Hillrichs' 20% fault. If Reed had been decided prior to the second trial, then the district court would have had to follow the new rule of law set forth in Reed.

Kirk v. Union Pacific Railroad, 514 N.W.2d 734 (Iowa Ct. App. 1994)

Failure to Mitigate

Kirk was a temporary employee of Alter Trading Company. He was assigned the task of removing visible non-metal scrap from loaded gondola rail cars. Kirk's supervisor asked him to work on two cars located on track three--a track that Union Pacific uses to build its trains. Kirk was working on one of the gondola cars when four empty cars bumped into the stationary cars, causing Kirk to fall. A loaded car rolled over his leg. He suffered a broken finger and had to have his right leg amputated above the knee.

Kirk sued Alter and Union Pacific, settling with Alter prior to trial. The jury assessed 15% fault against Alter and 85% against Union Pacific, awarding damages of over $750,000. On appeal, Union Pacific alleged that the district court erred in rejecting instructions as to its various theories of defense, including failure to mitigate.

HELD: Affirmed. Union Pacific's claimed that Kirk failed to mitigate damages by returning to work or undergoing vocational training. The district court correctly found a lack of evidence to support a mitigation instruction. Kirk was not medically permitted to perform any work for a year after the accident. Kirk's vocational rehabilitation counselor testified that finding employment for Kirk would be a major effort and that Kirk would need rehabilitation assistance in order to improve his employment prospects. Kirk's physical therapist testified that Kirk was cooperative with regard to physical therapy. The defendant's rehabilitation expert could only testify that Kirk would "do well" to enroll in some form of adult education program. Under these circumstances, a mitigation instruction was unwarranted.

Freeman v. Ernst & Young, 516 N.W.2d 835 (Iowa 1994)

Fault

Freeman bought a video rental business from Neenan. Neenan represented that the business was worth $225,000, that it was profitable and that it would "care" for Freeman for the rest of her life. Prior to agreeing to Neenan's terms Freeman and Neenan met with Neenan's accountant, who was employed by Ernst & Young. The accountant, Brems, told Freeman that the business was worth $225,000, that it was a good deal for her and that it would generate sufficient profits to generate a salary for Freeman and pay the contract installment amounts that Freeman would owe Neenan. Freeman agreed to the proposed terms and made a $30,000 down payment.

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The business did not turn out to be profitable. Ultimately, Freeman defaulted on her installment contract and transferred the business back to Neenan. As part of this transfer, she agreed to release Neenan from any liability for initial transaction. She then sued Ernst & Young for negligence. After a bench trial, the district court assessed 25% of fault against Ernst & Young and 75% against Neenan as a released party. Judgment was entered against Ernst & Young in the amount of 25% of Freeman's total damages. Freeman appealed, alleging that no fault should have been allocated to Neenan and that all fault should have been allocated to Ernst & Young.

HELD: Reversed. Neenan was a released party under chapter 668. Fault can be assessed against a released party. The issue, however, is whether Neenan's alleged conduct was "fault" as defined by § 668.1. The district court did not identify the theory of liability that caused it to assess fault against Neenan. Freeman claims that Neenan's misconduct was fraud, which is not "fault" under § 668.1. Ernst & Young claims that Neenan committed negligent misrepresentation, which may be fault under § 668.1. Under the facts of this case, however, Neenan could not have committed the tort of negligent misrepresentation. This tort "applies only to those defendants in the profession or business of supplying information or opinions." Neenan was the seller of a business. His representations were made in the course of negotiating an arms-length contract for the sale of his business. Freeman could not have recovered against Neenan on a negligent misrepresentation theory. Thus, Neenan committed no tort that constitutes "fault" under chapter 668 and the district court erred in assigning any fault to Neenan. Ernst & Young is liable for the entire amount of Freeman's damages.

Shams v. Carney, 518 N.W.2d 366 (Iowa 1994)

Jury Instructions

Shams was a pedestrian crossing a frontage road, at an intersection, when he was struck and injured by a car driven by Carney. The frontage road was "protected." The jury found no fault on the part of defendant Carney and Shams appealed. The court of appeals reversed due to alleged errors in the instructions concerning Carney's duty of care in approaching the intersection and a requested "assured clear distance" instruction. The Supreme Court granted further review.

HELD: Decision of court of appeals vacated, judgment of district court affirmed. The district court rejected an instruction proposed by the plaintiffs concerning Iowa Code § 321.288. This instruction provided that a driver, in approaching an intersection, must reduce his or her speed to a reasonable and proper rate when approaching an intersection. The plaintiffs

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claimed that it was error to refuse this instruction. This instruction, however, applies only to unprotected intersections. It does not apply when the driver is approaching an intersection for which he has the right of way. A driver approaching a protected intersection has no duty to decrease his or her speed unless it appears that another person has proceeded onto the protected roadway. Because Carney was approaching a protected intersection, the district court was not required to give the plaintiffs' proposed instruction.

The plaintiffs also alleged error in the district court's failure to give an "assured clear distance" instruction based on Iowa Code § 321.285. There is a three-part test for determining whether or not to give such an instruction: (1) the object with which the operator collided was located ahead of him in his lane of travel; (2) the object was reasonably discernable; and (3) the object was either (a) stationary or static, (b) moving ahead of the operator in the same direction or (c) came into his lane of traffic within the assured clear distance ahead at a point sufficiently distant ahead of him to have made it possible to bring his vehicle to a stop and avoid a collision. The evidence in the record demonstrates that elements 2 and 3 did not exist. The accident occurred at dusk with Shams wearing dark clothing, making him less than reasonably discernable. Further, Shams stepped directly and suddenly into Carney's path of travel when Carney's vehicle was just feet away. He did not enter Carney's lane at an assured clear distance ahead of Carney. Thus, the district court did not err in refusing to give an assured clear distance instruction.

Kirk v. Union Pacific Railroad, 514 N.W.2d 734 (Iowa Ct. App. 1994)

Jury Instructions

Kirk was a temporary employee of Alter Trading Company. He was assigned the task of removing visible non-metal scrap from loaded gondola rail cars. Kirk's supervisor asked him to work on two cars located on track three--a track that Union Pacific uses to build its trains. The supervisor testified that he "vaguely" remembered informing a Union Pacific employee that an Alter employee would be working on track three. The Union Pacific employee denied being warned.

Kirk was working on one of the gondola cars when four empty cars bumped into the stationary cars, causing Kirk to fall. A loaded car rolled over his leg. He suffered a broken finger and had to have his right leg amputated above the knee. Kirk sued Alter and Union Pacific, settling with Alter prior to trial. The jury assessed 15% fault against Alter and 85% against Union Pacific, awarding damages of over $750,000. On appeal, Union Pacific alleged that the district court erred in rejecting instructions as to its various theories of defense.

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HELD: Affirmed. The first rejected defense that Union Pacific complains of is a defense that it had no duty to look for an Alter employee because it had not been informed that any Alter employee would be working on track three. According to Union Pacific, this rendered Kirk an "unknown trespasser" to whom Union Pacific owed no duty. The district court correctly refused to submit this defense because Union Pacific had undisputed knowledge that Alter employees sometimes worked on track three.

Union Pacific's second rejected defense was failure to mitigate damages by returning to work or undergoing vocational training. Again, the district court correctly found that insufficient evidence existed to support this proposed instruction. Kirk was not medically permitted to perform any work for a year after the accident. Kirk's vocational rehabilitation counselor testified that finding employment for Kirk would be a major effort and that Kirk would need rehabilitation assistance in order to improve his employment prospects. Kirk's physical therapist testified that Kirk was cooperative with regard to physical therapy. The defendant's rehabilitation expert could only testify that Kirk would "do well" to enroll in some form of adult education program. Under these circumstances, a mitigation instruction would have been unwarranted.

Finally, Union Pacific contends that the district court erred in rejecting its proposed instructions containing specifications of Kirk's and Alter's fault. These proposed instructions included specifications of fault for Kirk's failure to maintain a proper lookout and for Alter's failure to implement a warning system to alert Union Pacific when Alter employees are on the track. These concepts were adequately conveyed in the instructions actually given and thus no error occurred.

Ladeburg v. Ray, 508 N.W.2d 694 (Iowa 1993)

Jury Instructions

Plaintiff was involved in a traffic accident with a semitrailer owned and operated by the defendants. She sought to recover on a negligence theory. The district court included a comparative fault instruction concerning the plaintiff's alleged failure to maintain a proper lookout. After a defense verdict, the plaintiff asserted on appeal that the district court erred in giving such an instruction.

HELD: Any error was harmless. The jury answered special interrogatories and expressly found that the defendants were not at fault. As a result, the jury made no findings concerning the plaintiff's fault. Because the jury found no fault on the part of the defendants, any error in the

instructions concerning plaintiff's own fault could not have been prejudicial.

Spaur v. Owens-Corning Fiberglas Corp., 510 N.W.2d 854 (Iowa 1994)

"Party"

Spaur was employed at the Iowa Power Plant in Des Moines for twenty-five years, until the plant closed in 1985. In 1990 he was diagnosed with mesothelioma, a form of lung cancer. He died in 1992. His estate and surviving spouse sued several manufacturers of asbestos products, including Owens-Corning ("OCF") and the Manville Trust ("Manville"), claiming that Spaur's exposure to these products during his years of employment caused his death.

All defendants except Owens-Corning ("OCF") settled with the plaintiffs or were dismissed prior to trial. OCF filed a cross-petition against Manville for contribution. The plaintiffs dismissed Manville without prejudice during trial. OCF sought to include Manville as a party on the verdict form. The district court refused. Manville, because of the multitude of claims against it, structured a mandatory, non-opt-out class settlement as part of its bankruptcy case. The bankruptcy court, in 1991, permanently enjoined all judicial proceedings against Manville arising out of asbestos exposure. OCF contended that the bankruptcy court's class settlement rendered Manville a released party pursuant under chapter 668, mandating Manville's inclusion on the verdict form. OCF also contended that its cross-petition against Manville survived the plaintiffs' dismissal of Manville, rendering Manville a third-party defendant subject to inclusion on the verdict form.

OCF further complained that four settling suppliers and installers of asbestos products were wrongfully excluded from the verdict form. OCF alleged that these settling defendants, while not manufacturers of the asbestos products, owed duties to Spaur.

HELD: Manville is not a released party because the plaintiffs have not released Manville from any liability. No document of release and settlement has been signed. The bankruptcy proceedings, at this point, simply provide a possible structure for settlement, not an actual settlement. Further, OCF's third-party claim for contribution against Manville presently is subject to the bankruptcy court's injunction, meaning that OCF has no right to pursue such a claim. Finally, including Manville as a party would create a risk of "siphoning off" a portion of fault because the plaintiffs have no hope of enforcing a judgment against Manville. "[T]he potential insolvency of a codefendant should be borne by the solvent defendants, not by the plaintiffs." The district court did not err in refusing to include Manville as a party on the verdict form.

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Likewise, the district court did not err in excluding the four settling suppliers from the verdict form. The evidence at trial was insufficient to establish any possible liability on a duty to warn or strict liability claim. No evidence was presented as to the suppliers' knowledge of the dangers of asbestos products or, for that matter, as to which supplier distributed which products. Further, no duty arose under § 392 of the Restatement (Second) of Torts because the suppliers had no continuing business interest in the customer's continued use of the products. Because there was no legal or evidentiary basis for the submission of claims against the settling suppliers, the district court did not err in excluding them from the verdict form.

COMMENT: This decision appears to suggest that a verdict form should not include a line for any party against whom a judgment would be uncollectible.

Ethyl Corp. v. BP Performance Polymers, Inc., ___ F.2d ___ (8th Cir., August 22, 1994)

Warranty Claims

Ethyl sold plastic film wrap to General Mills for use in the packaging of a food product. In 1987, General Mills received complaints about the product and determined that the film wrap supplied by Ethyl was contaminated. General Mills had to recall the product. Ethyl and General Mills ultimately settled General Mills' claim by payment of $8.96 million from Ethyl to General Mills.

Ethyl then sued BP, the company that supplied a chemical compound that Ethyl used in the plastic wrap. The case was tried on express and implied warranty theories. There was no dispute that the BP compound caused the contamination. BP claimed, however, that it did not know that Ethyl intended to use the compound to make food packaging. The jury found that BP breached an express warranty to supply Ethyl with uncontaminated compound and that Ethyl suffered $9.367 million in damages. The jury also found, however, that Ethyl was 70% at fault. The district court rejected Ethyl's claim that Iowa Code chapter 668 is inapplicable to warranty claims based on purely economic loss and dismissed Ethyl's complaint because Ethyl was found to be over 50% at fault. Ethyl appealed.

HELD: Reversed. The Iowa Supreme Court has not addressed the issue of whether chapter 668 applies to warranty claims concerning only economic loss. While section 668.1(1) defines "fault" to include "breach of warranty," the policies behind comparative fault and Iowa's case law indicate that chapter 668 is intended to apply only when the breach of warranty results in personal injury or property damage. The Iowa Supreme Court has

held that chapter 668 does not apply to claims that are purely contractual in nature. It also has held that claims for purely economic loss are recoverable only in contract, not in tort. Thus, a breach of warranty claim involving only economic loss is a claim sounding only in contract and is not subject to chapter 668.

CONSTITUTIONAL LAW

Steve Serck

Matter of Luloff, 512 N.W.2d 267 (Iowa 1994)

Condemnation

A landlocked property owner, Luloff, sought to condemn an access route to a public road over adjacent privately owned property. The adjacent property owner, Lichty, sought to enjoin proposed condemnation.

Lichty made a constitutional challenge stating that since Luloff is most likely to be the only one that would use the route, the taking would be for private use and not public as required by the state and federal constitutions.

HELD: The character of a route, whether it is public or private, is determined by the extent of the right to use it, and not by the extent to which the right is exercised. This route would be for public use because the public had a right to use it, even though they may not choose to exercise that right.

Borschel v. City of Perry, 512 N.W.2d 565 (Iowa 1994)

Public Employees

Borschel was hired as a police officer for the City of Perry in 1987. The employment agreement was oral and for an unspecified term. In 1991, Borschel was arrested and charged with sexual abuse. Borschel was suspended with pay pending further investigation. Prior to termination of Borschel's employment, the police chief and mayor read depositions from the allegedly abused child and mother. Borshel was then fired.

Two months later, a jury found Borschel not guilty of sexual abuse. At a hearing before the City Council it upheld the termination. The district court entered summary judgment for the city.

On appeal, Borschel argues the constitutional protection of due process coupled with a statutory presumption of innocence

express a clear public policy prohibiting discharge of employees merely because criminal charges are filed against them.

HELD: Affirmed. The due process requirement is satisfied where the employee is notified of the reasons for discharge and furnished the opportunity of a name clearing hearing. A post-termination hearing is sufficient.

Exira Com. Sch. Dist. v. State, 512 N.W.2d 787 (Iowa 1994)

Open Enrollment

The Exira Community School District filed a petition for declaratory judgment and injunctive relief against the state and two larger school districts. Exira sought to prohibit transfer of property tax revenues to larger school districts to pay charges for students who had transferred under the open enrollment statute. Exira did not challenge the constitutionality of the open enrollment law per se. Rather, it argued that Iowa Code § 282.18(8) is unconstitutional as applied because it is unconstitutional to require local real estate tax revenues for open enrollment students to follow those students to the receiving districts. Exira believes that the due process clause of both the state and federal constitutions has been violated in that taxpayers of the Exira Community School District are deprived of property without due process of law. Exira also looks to the equal protection clause claiming that the open enrollment statute resulted in a substantial disparity in funds available for education between Exira and the surrounding school districts.

The district court held that the school district had no standing and that the open enrollment statute was constitutional.

HELD: Affirmed. The school district, as a political subdivision of the state, lacks standing to mount a constitutional attack against the state statute, because a school district is a legislative creation, rather than a "person." However, the individual taxpayers and their children who were also plaintiffs were real parties in interest and were fully capable of raising due process and equal protection challenges that were asserted.

As to the due process challenge, appellants do not allege that the open enrollment law infringes upon a fundamental right or creates a suspect class, either of which would trigger a strict scrutiny analysis. The standard for review then is the rational basis test for both the due process and the equal protection challenges. The reasonableness of the statute's nexus to its purported end, that is to permit a wide range of educational choices, is at least fairly debatable, so it must be allowed to stand.

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As to the equal protection challenge, the U.S. Supreme Court has rejected such a challenge in a case in Texas where there was even greater financial disparity between two school districts. The Supreme Court found a rational basis in that the system assured a basic education for every child and the system permitted a large measure of local participation, and control of, each district's schools. San Antonio Ind. Sch. Dist. v. Rodriguez, 411 U.S. 1, 93 S.Ct. 1278 (1973). The Iowa open enrollment statute serves both of these purposes.

3 S Inc. v. Zarek, 504 N.W.2d 153 (Iowa Ct. App. 1993)

Right to Jury

3 S Inc. leased farm land from Zarek. 3 S Inc. sued for interference with the use of the property under lease. Zarek counterclaimed for nonpayment of rent. The district court denied 3 S Inc.'s motion to submit Zarek's claim for attorney fees to the jury as an issue of damages. Following a hearing on the issue of attorney fees, the court awarded Zarek $4,903 in attorney fees.

HELD: 3 S Inc. was not denied its constitutional right to a jury trial nor due process by the district court's refusal to submit the issue of attorney fees to the jury. In this case, the right to attorney fees is controlled by Iowa Code §625.22 which provides that the court shall determine reasonable attorney fees to be assessed when a judgment is based on a written contract that contains an agreement to pay attorney fees. A statute is presumed constitutional. Any invalidity must be clearly shown. 3 S Inc. did now show the unconstitutionality of the statutory assignment to the court of the duty to allocate attorney fees.

Hunziker v. State, No. 176/93-302 (Iowa July 27, 1994)

Taking

Plaintiffs own a large tract of land which they had platted for residential purposes. In May 1990, plaintiffs sold Lot 15 for $50,000 to Doctor Fleming, who planned to build a home on the lot. In April 1991, the state archeologist learned that Lot 15 has a Native American burial ground on it. Under Iowa Code § 305A.9, he prohibited disinternment of the burial ground and required a buffer zone around the mound to insure its protection. Because of these restrictions, it was no longer feasible for Doctor Fleming to build a home on the lot, and the city refused to issue a building permit. Plaintiffs refunded the purchase price and brought this mandamus action alleging the state's actions amounted to a regulatory taking without compensation. Both parties moved for summary judgment, and the district court granted the state's motion.

HELD: Affirmed. The state may resist payment of compensation in those instances where the property owner's "bundle of rights" never included the right to use the land in the way the regulation forbids. Here, the statutes protecting ancient human remains were in existence at least ten years before plaintiffs purchased the land in question. Thus, the "bundle of rights" the plaintiffs acquired did not include the right to use the land contrary to the statutes. There was no taking when the state archeologist made the find and took the action denying permission to disinter the human remains.

DISSENT by Justice Snell: The Fifth through Fourteenth Amendments provide that the government shall not take private property for public use without just compensation. The statute giving the state archeologist authority to deny permission to disinter human remains is not a self-executing one creating a covenant running with the land. There is no indication from the language of these statutes that the legislature intended to take property for historical or scientific purposes without paying for it. The district court should be reversed.

Fisher v. Bd. of Optometry Examiners, 510 N.W.2d 873 (Iowa 1994)

Overbreadth and Vagueness

Gary Fisher is a licensed Iowa optometrist accused of "engaging in unethical conduct or practice harmful or detrimental to the public," language taken verbatim from Iowa Code § 147.55(3). He conducted scoliosis examinations with the patient nude from the waist up, and mostly on young women without a third person in the room. The Board found Fisher had been prompted by a wish to help his patients and found him innocent of unethical conduct. The Board, however, found his conduct "harmful and detrimental to the public" in violation of Iowa Code § 147.55(3), because it was an unreasonable intrusion on his patients' expectation of privacy. The Board placed Fisher on three years probation.

HELD: Affirmed. Fisher challenges the Iowa Code provision as vague and overbroad both on its face and as applied to him. A statute is overbroad if it attempts to achieve a governmental purpose to control or prevent activities constitutionally subject to state regulation by means which sweep unnecessarily broadly and thereby invade the area of protected freedoms. This analysis is applicable only when First Amendment rights are implicated. Since Fisher did not claim any First Amendment violations he lacks standing to assert an overbreadth challenge either facially or as applied to him.

A civil statute is unconstitutionally vague under the due process clause only when its language does not convey a sufficiently definite warning of prescribed conduct as measured by common understanding or practice. Vagueness exists when persons

must necessarily guess at the meaning of a statute and its applicability and a party attacking the constitutionality of a statute must overcome a presumption of constitutionality by negating every reasonable basis on which the statute can be sustained. A degree of indefiniteness is necessary to avoid unduly restricting the applicability of the proscribing rule. The statute holds optometrists to minimally acceptable standards of care accepted in optometry and an optometrist would be deemed on notice of such standards. Scoliosis procedures are outside the realm of minimally competent care for an optometrist and therefore the statute's proscription of practices that are harmful or detrimental to the public was sufficient to inform Fisher he should not conduct the tests.

Covia v. Robinson, 507 N.W.2d 411 (Iowa 1993)

Personal Jurisdiction

Frederick Robinson's wife, Diana, was killed in a plane crash in Sioux City, Iowa while traveling from Colorado to Illinois in the course of her employment with Covia. Covia is headquartered in Illinois. Frederick applied for worker's compensation benefits in Iowa. Covia challenged the jurisdiction of Iowa's Industrial Commissioner under Iowa Code § 85.3. Robinson alleges Covia unreasonably delayed payments and should be penalized pursuant to § 86.13. The Industrial Commissioner ruled Covia failed to present "fairly debatable" questions of fact or law to justify the delay and imposed a penalty. The district court reversed the ruling.

HELD: Section 85.3 is a long-arm statute authorizing the exercise of personal jurisdiction by the Iowa Industrial Commissioner over non-resident defendants. As is true regarding any exercise of personal jurisdiction, the court must first determine if the exercise of personal jurisdiction is authorized by statute. Next, the court must determine if the exercise of personal jurisdiction over the parties is constitutional under the limits of due process. This is done by determining if Covia maintained the requisite "minimum contacts with the forum state such that the maintenance of the suit does not offend traditional notions of fair play and substantial justice."

Here, the issue of whether Covia was subject to Iowa jurisdiction was fairly debatable. Therefore, the district court correctly overturned the penalty imposed on Covia.

Rinard v. Polk County, 516 N.W.2d 822 (Iowa 1994)

Public Employment

Plaintiff unsuccessfully applied for the position of Deputy Sheriff in Polk County on four separate occasions beginning in 1986. Plaintiff's name was never placed on the list of eligible

candidates. Plaintiff claims the reason he was not placed on the list was because of pressure exerted by the Sheriff. Plaintiff filed this suit under 42 U.S.C. § 1983, claiming due process violations and breach of implied contract. Defendant's motion for summary judgment was granted by the district court because the court concluded that a protected property interest had not been infringed on.

HELD: Affirmed. The statutes governing civil service for deputy sheriffs do not create entitlement to employment, and presence on the list of eligible candidates for civil service employment is not a protected property interest. Thus, plaintiff has no due process property interest in connection with placement on the certification list.

Spaur v. Owens-Corning Fiberglas Corp., 510 N.W.2d 854 (Iowa 1994)

Punitive Damages

Robert and Marilyn Spaur brought suit against Owens-Corning Fiberglas Corporation (OCF), and several other defendants to recover damages for personal injuries resulting from Robert's exposure to OCF's asbestos-containing products. The jury awarded compensatory damages, loss of consortium damages, and punitive damages against OCF. Because OCF has been assessed punitive damages in other asbestos cases in which it was a defendant, OCF claims awarding punitive damages in this case is unconstitutional because it has already been punished and would therefore be subject to "multiple" punitive damage awards.

HELD: On post-verdict review, a trial court can use a general standard of reasonableness or look to the following factors to determine if a punitive damage award should be upheld: (1) the defendant's degree of culpability; (2) duration of the conduct; (3) the defendant's awareness or concealment; (4) the existence of similar past conduct; (5) the likelihood the award will deter the defendant or others from like conduct; (6) the profitability of the wrongful conduct and the desirability of removing that profit; (7) the financial position of the defendant; (8) all the costs of litigation; (9) imposition of criminal sanctions; and (10) the existence of other civil awards against the defendant for the same conduct. However, the court's primary focus should be on the relationship between the punitive damage award and the wrongful conduct of the offending party.

To ensure the punitive damage award is reasonable and rational, an appellate court's review of damages should find punitive damages reasonable in their amount and rational in light of their purpose to punish and deter the conduct.

Even though punitive damage verdicts had already been assessed against OCF, OCF failed to show the aggregate award

against it was sufficient to punish and deter the conduct and OCF did not show that a punitive damages award would threaten its corporate existence. Courts may consider, however, past awards actually paid by a defendant, the defendant's ability to satisfy future punitive damage awards, and whether the defendant's financial status will allow future claimants to collect even compensatory damages because of the limited pool of resources available when assessing punitive damages. Thus, the imposition of punitive damages on OCF did not violate due process.

McMaster v. Board of Psychology Examiners, 509 N.W.2d 754 (Iowa 1993)

Privacy of Patient Records

The district court ordered a psychologist to turn a patient's records over to the Board for their investigation of another psychologist.

HELD: The right of privacy is implicit in the 14th Amendment's concept of personal liberty and therefore restricts state action. The constitutional right of privacy extends to patient records of mental health professionals. However, the privacy interest is a qualified privilege rather than absolute. To determine if the privilege attaches, a balancing test must be applied; the privacy interest must always be weighed against public interests, like the societal need for information allowing a compelling need for information to override the privacy interest. Thus, the Board could not subpoena the records unless it showed its need for the records outweighed the patient's right to privacy. The district court's decision is reversed and an in-camera hearing with a protective order prohibiting disclosure of evidence presented is directed so the Board can show its need for the records outweigh the patient's privacy interest.

McKiness Excavating v. Morton Bldgs., 507 N.W.2d 405 (Iowa 1993)

Constitutionality of Statute of Repose

Morton constructed buildings in 1971 and 1974 for McKiness Excavating and Grading, Inc. One building collapsed in 1991 and McKiness alleged breach of an implied warranty of merchantability, negligence in design and construction, strict liability and non-disclosure or misrepresentation. Morton claims the 15 year statute of limitations for improvements to real property precluded McKiness relief. The district court found McKiness' claim barred by the statute and McKiness challenged the constitutionality of Iowa Code § 614.1(11).

HELD: The district court did not err in concluding as a matter of law that § 614.1(11) barred all claims pleaded by McKiness. Enacted statutes are given a strong presumption of

constitutionality by the court. Once a cause of action accrues, plaintiff has a vested property right that cannot be destroyed by legislative action. By enacting a statute of repose the legislature can lawfully prevent a cause of action from arising.

Taylor v. Trans-Action Associates, Inc., 509 N.W.2d 501 (Iowa Ct. App. 1993)

Personal Jurisdiction

Defendants are an Illinois corporation and a Louisiana corporation. Taylor, their employee, was injured while working in Louisiana and brought suit against them. The suit was settled, and defendants mailed the settlement payments to Taylor who was residing in Iowa. The companies eventually defaulted on the agreement so Taylor resumed prosecution of his suit. A judgment was eventually entered against the companies, and Taylor filed an action in Iowa to collect the judgment. Both companies filed a motion to dismiss for lack of personal jurisdiction. The trial court found Taylor failed to show either defendant had the minimum contacts necessary to allow the court to exercise jurisdiction over them because the companies were dissolved in the mid-1980s and their only contact with Iowa was mailing the settlement payments to Taylor.

HELD: Affirmed. Due process considerations for assertion of personal jurisdiction over non-residents require minimum contact with the forum state by a defendant sufficient to satisfy traditional notions of fair play and substantial justice. The Iowa courts apply the constitutional standard on a case-by-case basis. In applying the standard, we consider: (1) quantity of contact; (2) the nature and quality of the contact; (3) the source and connection of the cause of action with these contacts; (4) interest of the forum state; and (5) convenience of the parties. For a state to constitutionally exercise personal jurisdiction, a litigant's conduct relative to the forum state must be such that the litigant should "reasonably anticipate being hailed into court there." Some act must exist by which a defendant purposely avails itself of the privilege of conducting activities in the forum state, thereby invoking the benefits and protections of its laws. Merely entering into an agreement with a forum resident does not provide the requisite contacts between defendant and the forum state to satisfy the minimum contacts test.

City of Wapello v. Chaplin, 507 N.W.2d 187 (Iowa Ct. App. 1993)

Equal Protection

The City of Wapello filed a petition to enjoin the Chaplins from operating a wrecking and towing service out of their residence, a non-conforming use in a residential zone. The Chaplins argued the city selectively enforced its ordinance because the city allowed others to operate similar non-conforming

businesses without objection. The district court found the Chaplins' business violated the city's zoning ordinance but the city selectively enforced the zoning ordinance and dismissed the city's petition.

HELD: The unequal application of a statute fair on its face, is not a denial of equal protection unless intentional or purposeful discrimination is shown. The Chaplins did not meet this burden so the district court's decision is reversed.

State Ex Rel Lankford v. Mundie, 508 N.W.2d 462 (Iowa 1993)

Legislative Nullification

The state's first attempt to establish Mundie's paternity was unsuccessful because the claim was time barred. The second attempt was unsuccessful because of res judicata. This time the state is attempting to establish Mundie's paternity because of new legislation intending to nullify these defenses. The trial court disallowed the third action.

HELD: The legislature lacks power to change a valid judgment after it is entered and any legislative attempt to do so is unconstitutional and invalid. The court's decision that the statute of limitations barred the paternity claim could not be changed by subsequent legislation.

CONTRACTS

Steve Serck

Hunter v. Union State Bank, 505 N.W.2d 172 (Iowa 1993)

Implied Contract

The Hunters owned land mortgaged by Union State Bank. Following foreclosure, the Bank sold the land, in parcels, to several buyers. The Bank gave notice to the Hunters of their right to repurchase the land. Hunters did not respond and the land was sold. Hunters claimed the repurchase provision of Iowa Code §524.910(2) created an implied contract which required the Bank to offer the entire parcel to the Hunters in one piece. The district court dismissed the petition.

HELD: Affirmed. There is no implied contract within the repurchase provision requiring the bank to offer the Hunters the land in one parcel. The Bank enjoyed no unjust enrichment at the expense of the Hunters.

Water Development Co. v. Lankford, 506 N.W.2d 763 (Iowa 1993)

Illegality

Lankford entered into a contract with Water Development Company (WDC) to supply him household water for 50 years. Later, when his land was annexed by Des Moines, Lankford contracted with the Des Moines Water Works for water service. Trial court found Lankford breached the WDC contract. On appeal, Lankford contended the contract was unenforceable because it was illegal. The illegality stemmed from WDC's failure to get State Department of Transportation permits for its water lines. Lankford also alleged on appeal that the contract was unenforceable due to frustration of the purpose of the WDC contract.

HELD: Affirmed the district court judgment for the plaintiff, WDC. The WDC contract was enforceable. The contract was not found void for illegality. The existence of the WDC water mains was approved by the Polk County Board of Supervisors. The public suffered no harm from WDC's operations. Further, the purpose of Lankford's contract with WDC was not frustrated. The purpose, to obtain water, was achieved. Lankford chose to obtain his household water from Des Moines Water Works.

Tyler v. Percell, 506 N.W.2d 805 (Iowa Ct. App. 1993)

Tortious Interference

Tyler was purchasing real estate, including six apartments, under an installment contract from Percell. The apartment rentals were used to pay the installment contract. Tyler contracted with the other three defendants to manage the apartments for her. Tyler alleged Percell conspired with the defendant apartment managers to withhold rental payments, causing Tyler to miss installment contract payments which led to forfeiture of the contract. Trial court entered directed verdict in favor of Percell on Tyler's tortious interference with contract claim because Percell was a party to the installment contract.

HELD: Reversed trial court's ruling and remanded for a new trial. We distinguish this case from Klooster v. North Iowa State Bank, 404 N.W.2d 564 (Iowa 1987). In Klooster, the Iowa Supreme Court held there could be no cause of action when the claim involves only the two parties to the contract.

In this case, the defendant Percell, a party to the contract with plaintiff Tyler, conspired with third parties to withhold rent. The involvement of third parties distinguishes the case from Klooster. As a result, Percell is not insulated from liability simply because he was a party to the contract.

Cambron v. Moyer, No. 209/92-1805 (Iowa July 27, 1994)

UCC Statute of Frauds

The jury determined that a contract existed between plaintiff's decedent and defendant for purchase of the stock of DJNB, Inc. Plaintiff's defense to the alleged contract was Iowa Code § 554.8319 (statute of frauds for sales of securities). The trial court refused to instruct the jury on § 554.8319.

HELD: The trial court erred in failing to instruct the jury on plaintiff's defense that the contract alleged by Moyer was a contract for the sale of securities under Iowa Code § 554.8102 and therefore unenforceable under the statute of frauds provision contained in § 554.8319. We join the majority of jurisdictions holding that shares in a closely held corporation fall within the scope of Article VIII of the UCC.

Farmers & Merchants Sav. Bank v. Vandenberg Chevrolet-Buick, Ltd., 172/93-677 (Iowa July 27, 1994)

Dealer Agreement

In February 1988, Vandenberg sold to the bank a note and security agreement bearing the signatures of Tom J. Manning and Betty J. Coyle as co-makers. It is undisputed that Betty Coyle did not sign either the promissory note or security agreement. Instead, her name was placed on those documents by Manning. The fact was not known to the bank when it purchased the note. When a default was not cured, the bank repossessed and sold the car and sued Manning and Coyle for the deficiency. A judgment against Coyle was set aside and the claim against her dismissed by the bank based on her assertion that she had not signed the note. The bank commenced this action against the dealership. It alleged that because Coyle's signature on the note was not genuine, the dealership had breached its written agreement that all deferred payment obligations assigned by it to the bank would not be subject to any disputes, set offs or counterclaims. The bank claimed damages for the unpaid balance of the note. The trial court found in favor of the bank and the dealership appealed.

HELD: Affirmed. The dealership warranted the deferred payment obligations would be free from "dispute" as to their genuineness. This language constitutes an assurance that there would be an absence of challenge to the genuineness of the assigned documents. The master dealer agreement expressly provides that a breach by the dealership makes it liable to the bank for any unpaid balance on the note.

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Tebben v. State, No. 219/93-1015 (Iowa July 27, 1994)

Public Employees

The IDOT verbally offered Tebben employment and confirmed the verbal offer by letter stating the starting salary was $38,001.60. After Tebben accepted the offer and began work, IDOT set Tebben's salary at $31,336.40. One week later Tebben received a letter from the IDOT indicating his salary would be increased to $35,235.20 and the IDOT intended to compensate him for the difference between his actual salary and the original offer. The department later told Tebben nothing could be done to make up the difference because of the pay freeze on all state employees. Tebben filed the present action seeking declaratory relief, alleging a negligence action against all defendants, and seeks damages amounting to the difference between the $38,001.60 offer and the actual salary of $35,325.20. The district court granted defendants' motion for summary judgment.

HELD: The government has no immunity to breach of contract claims. We do not share the district court's view that the IDOT's alleged breach, failure to pay the $38,001.60 annual salary, was agency action limiting Tebben to a remedy for judicial review under Iowa Code chapter 17A. We reverse that part of the district court's decision granting summary judgment in favor of IDOT.

Bradley v. West Sioux Bd. of Educ., 510 N.W.2d 881 (Iowa 1994)

Public Employees/Oral Contract

In March, 1991, the school board began proceedings to terminate Bradley. Because the termination proceedings threatened to become protracted, the Board began negotiating a settlement with Bradley. The proposed settlement agreement would have extended Bradley's contract for one year. The Board's attorney submitted a draft of the settlement and two Board members then made significant changes. Bradley rejected this offer and, alleging an enforceable oral agreement existed, brought an action for damages. He also sought to compel the Board to perform the alleged oral contract. The Board filed a motion for summary judgment contending no enforceable agreement existed.

HELD: Affirmed. Iowa Code § 279.23 provides that employment contracts with school administrators must be in writing, signed by the president of the school board and the administrator, and filed with the secretary of the board. An oral contract is unenforceable where a statute requires it in writing. However, when the terms of an agreement are definitely fixed so that nothing remains except to reduce them to writing an oral contract will be upheld unless the parties intended not to be bound until the

agreement was reduced to writing. The terms here were not definitely fixed. Even if the oral agreement was a modification of Bradley's one year written employment contract with the Board, any modification by mutual agreement must meet the writing and approved signature requirements of § 279.23.

Netteland v. Farm Bureau Life Ins. Co., 510 N.W.2d 162 (Iowa Ct. App. 1993)

Oral Contract/Statute of Frauds

Farm Bureau began negotiating with Netteland to operate a day-care facility at one of Farm Bureau's offices. Negotiations began to break down because they could not agree on rates to be charged. When Netteland refused to respond to an inquiry, Farm Bureau contracted with another provider. Netteland brought suit alleging breach of contract and fraudulent misrepresentation. The district court directed a verdict for Farm Bureau on the fraudulent misrepresentation claim, but the jury found for Netteland on the breach of contract claim and awarded it $125,000 in lost profits.

HELD: The trial court properly submitted to the jury the issue of whether a contract existed and whether it had been breached. Netteland need only show a reasonable certainty an oral contract existed, which means the terms must be sufficiently definite. The terms of an agreement are sufficiently definite if the court can determine with reasonable certainty the duty of each party and the conditions relative to performance. Here, a corporate officer of Farm Bureau testified it had an oral contract with Netteland, Farm Bureau knew Netteland was advertising the day-care center facilities and Farm Bureau sought Netteland's assistance with the design and construction of the day-care center.

Because Netteland partially performed the agreement, it may avoid the impact of the statute of frauds. Therefore, the district court properly admitted parole evidence.

DISSENT: By Sackett, J. The statute of frauds precludes the enforcement of a five year oral contract. The parties clearly intended to ultimately be bound by a written document since a number of drafts of a contract passed between the parties. There was only an agreement contingent on reaching an agreement. There is no evidence of a meeting of the minds on the price that would be charged.

DeVetter v. Principal Mut. Life Ins. Co., 516 N.W.2d 792 (Iowa 1994)

Public Policy Exception

Principal provided a group long-term disability insurance policy to plaintiff's employer. Plaintiff became totally disabled due to a mental ailment. Pursuant to the terms of the policy, because plaintiff's Social Security benefits exceeded 60 percent of his monthly income, plaintiff was only entitled to a minimum benefit of $50 per month for the 60 month benefit period. Plaintiff contends the disability benefits should have started six months prior to the onset of his disability and should run for the 60 months thereafter during which Social Security benefits did not accrue, thus entitling him to an additional $30,000. Principal filed a motion for summary judgment which the district court sustained. The court of appeals reversed the district court's holding because the provision violated public policy and worked a forfeiture on mentally disabled persons.

HELD: The power to invalidate a contract on public policy grounds must be used cautiously and exercised only in cases free from doubt. For a court to strike down a contract on these grounds, it must conclude the preservation of the general public welfare demands invalidation so as to outweigh the weighty societal interest in the freedom of contract. There is no clearly articulated public policy of Iowa which prohibits the use of a limitation provision in a group disability policy. Public policy, however, favors providing low cost group disability insurance to citizens through predictable underwriting and premium structures. Also, the policy terms do not work a forfeiture because no pre-existing right was taken away from plaintiff. The decision of the court of appeals is vacated, and the judgment of the district court is affirmed.

COURTS

Amy Snyder

Kirk v. Iowa District Court for Jefferson County, 508 N.W.2d 105 (Iowa App. 1993)

Contempt

If there is jurisdiction of the parties and the legal authority to make an order, it must be obeyed, however erroneous or improvident.

In the Interest of B.C.A.K., 508 N.W.2d 738 (Iowa App. 1993)

Contempt

B.C.A.K. and C.C.A.K. were determined to be children in need of assistance on June 29, 1990. Their mother, J.K., was given custody of the children. The juvenile court entered an order on January 2, 1992 providing C.K. should have weekly two-hour supervised visitation with the children. The ongoing case worker was on leave until January 10, 1992. She could not find a suitable agency to supervise visitations until February 18, 1992. C.K. filed an application on January 28, 1992 to have the case worker found in contempt for failing to follow the court order regarding his visitation. The juvenile court found there was no willful or deliberate violation of the court order and dismissed the application. C.K. appealed.

HELD: C.K. failed to show beyond a reasonable doubt that the case worker willfully violated a court order. She made a good faith effort to comply with the court order and should not be held in contempt. A contempt proceeding is essentially criminal in nature and each element must have been established beyond a reasonable doubt. Only willful disobedience of a court order will justify conviction of contempt.

In re Marriage of Worthington, 504 N.W.2d 147 (Iowa App. 1993)

Judges

Marc appeals a dissolution decree, contending he did not receive a fair trial because of the partiality of the district court judge. He specifically points to the fact the court interrupted his witnesses and his cross-examination of his wife Michele's witnesses on numerous occasions. He points to several comments made by the court during the pendency of trial. He argues the court was "overzealous" in protecting Michele.

HELD: There is a substantial burden imposed upon one who seeks to prove the district court judge was not impartial. In order to constitute the prejudice necessary to necessitate a different judge, the alleged bias must stem from an extrajudicial source and result in an opinion on the merits on some basis other than what the judge learned from his participation in the case. The judge acted impartially and Marc was not denied a fair trial.

State v. Mann, 512 N.W.2d 528 (Iowa 1994)

Judges

Defendant was convicted of first-degree kidnapping and attempted murder, and post conviction relief was denied. After the trial, and prior to the post conviction hearing, Mann's counsel wrote to the trial judge to verify information the lawyer had obtained after the trial regarding the judge's alleged sexual victimization as a child. The judge believed that he had been impartial in Mann's trial. He stated that he did not give his own experience any thought as the Mann trial approached. Nevertheless, the trial judge recused himself from hearing the post conviction action. There is a constitutional right to have a neutral and detached judge. Canon 3(D)(1) of the Code of Judicial Conduct provides that "[a] judge should disqualify himself or herself in a proceeding in which the judge's impartiality might reasonably be questioned." Mann asserts that, under this canon, the trial judge should have disqualified himself, or at least revealed the details of his background before trial so Mann could ask the judge to recuse himself, or
make a more informed decision on whether to waive the jury.

HELD: There are no Iowa cases applying Canon 3(D)(1) under similar circumstances, but federal cases lend some insight. The test is not whether the judge self-questions his own imparitality, but whether a reasonable person would question it. An objective test is substituted for a purely subjective one. A reasonable, objective person, knowing all of the circumstances, would not have questioned the judge's impartiality.

Muzingo v. St. Luke's Hospital, 518 N.W.2d 776 (Iowa 1994)

Judges

In May, 1990, Dr. Whitters, a psychiatrist, was appointed by the district court pursuant to Iowa Code Chapter 229 to examine Glen Muzingo for purposes of an evaluation for an involuntary commitment to St. Luke's Hospital. Muzingo was released one day later on the recommendation of Whitters and the chief medical officer of St. Luke's Hospital. In September, 1990, Muzingo's wife, Terri, was seriously injured when a bomb placed in her car by Muzingo exploded. Terri filed an action against Whitters and St. Luke's Hospital, alleging that Whitters' and the Hospital's negligence in their treatment and discharge of her husband proximately caused her injuries. Terri additionally asserted that Whitters and the Hospital should have taken steps to protect the Muzingo family knowing Glen had contemplated murder. Whitters and the Hospital filed a motion to dismiss, claiming that Terri had failed to state a claim upon which relief could be granted. The district court ruled that both Whitters and the Hospital were

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acting in a quasi-judicial capacity. The district court concluded that Whitters and the Hospital were entitled to quasi-judicial immunity and dismissed the petition.

HELD: When psychiatrists and other mental health providers are appointed by the court and render an adversary opinion regarding an individual's mental condition, they are acting as an arm of the court and should be protected from suit by absolute quasi-judicial immunity. Otherwise, the threat of liability could undermine objectivity and independence in the professional's willingness to accept court appointments. The district court's judgment was affirmed.

Rohovit v. Mecta Corp., 506 N.W.2d 449 (Iowa 1993)

Pre-Trial Procedure

Plaintiff filed a tort action against Mecta Corporation, the State of Iowa, and physicians at the University of Iowa Hospitals and Clinics. Defendants moved for a change of venue under Iowa Rule of Civil Procedure 175 and plaintiff did not resist the motion. The Polk County district court ordered the transfer of the case to Johnson County, but the case files were not transferred to Johnson County for over 25 days. Defendants filed a motion to dismiss because the files had not been transferred within 20 days as required by Iowa Rule of Civil Procedure 175(b). The district court denied the motion for dismissal, and defendants appealed.

HELD: District court clerk's error in failing to complete timely transfer of case files after court ordered change of venue did not compel dismissal of petition.

Hunter v. Union State Bank, 505 N.W.2d 172 (Iowa 1993)

Successor Judge

After trial to court but before judge could issue decision, he died. Successor judge decided case by relying on law clerk's report of deceased judge's intentions. Iowa supreme court reversed and remanded for purposes of complying with rule 367(b). See Hunter v. Union State Bank, 468 N.W.2d 456 (Iowa 1991).

On remand, a new successor judge reviewed transcript and briefs and received oral argument, and then rendered decision without recalling witnesses or receiving new evidence. Losing party appealed on grounds that successor judge should have either ordered a new trial or at least recalled some witnesses, due to the passage of time and the importance of witness credibility in deciding the litigated issues.

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HELD: District court did not abuse its discretion in refusing to order a new trial and in refusing to recall witnesses. Passage of time works both ways; on recall, witnesses' memories may have eroded as well. After reviewing the record, district court believed that decision rested not on witness credibility but on application of law to relatively undisputed facts.

DAMAGES

Steve Serck

Rick Miller Const., Inc. v. Meseraull, 515 N.W.2d 723 (Iowa Ct. App. 1994)

Construction Contract

Miller, a construction contractor, filed a mechanic's lien and petition to enforce the lien against Meseraull, arising from Miller's restoration and remodeling cost on Meseraull's home. Meseraull counterclaimed for damages, alleging defects in performance. The district court entered judgment for Miller.

On appeal, Meseraull claims that the district court should have awarded her three types of damages: damages for defects and incompletions of work, medical expenses of both Meseraull and her daughter and punitive damages.

HELD: We affirm the district court's findings on damages. On the matter of the alleged defects and incompletions we agree with the district court that Meseraull has not met her burden in establishing these defects. Meseraull offered no expert testimony regarding the major defect of basement leakage.

Meseraull also seeks reimbursement of her and her daughter's medical expenses. She testified that she incurred $2,300 in medical expenses due to the stress caused by Miller's actions. Meseraull also claims she incurred $18,000 in medical expenses when her daughter, who suffers from cystic fibrosis, developed respiratory problems as a result of negligent repairs by Miller. However, Meseraull made no effort to repair the defects and, therefore, made no effort to mitigate the medical expenses. Meseraull offered no medical records or bills to support her claim. She offered no expert testimony linking her or her daughter's medical expenses to acts or omissions by Miller.

Meseraull seeks emotional, economic and punitive damages for Miller locking her out of her home and converting her personal belongings. The district court found Miller to be more credible on this issue. Meseraull was not entitled to damages, punitive or otherwise, for the lockout.

<u>White v. Northwestern Bell Tele. Co.</u>, 514 N.W.2d 70 (Iowa 1994)

<u>Punitive Damages for Contract Breach</u>

White claimed to have incurred a work related back injury, and sought workers' compensation benefits. U.S. West disputed both the source of White's injury and the degree of his disability. Eventually, the parties negotiated a compromise settlement pursuant to Iowa Code § 85.35. Under the settlement, U.S. West agreed to furnish future medical care to the claimant of the same kind and to the same degree as would be required of the employer under the Iowa Workers' Compensation Act.

Beginning in 1985, U.S. West refused to pay certain medical bills incurred by White. In March 1990, White brought an action before the Industrial Commissioner. The Industrial Commissioner ruled that it lacked jurisdiction to resolve the disputes pursuant to Iowa Code § 85.35. White then filed an original action in district court. The district court denied U.S. West's motion to dismiss for lack of subject matter jurisdiction. The court found that U.S. West breached the settlement and awarded White $8,900 plus interest for unpaid medical and pharmaceutical bills. It also ruled that U.S. West's breach was intentional and wrongful and awarded White $50,000 in punitive damages. U.S. West appeals.

HELD: U.S. West challenges the district court's award of punitive damages. It contends that because White's claim rests on nothing more than breach of contract, the court's award was improper. We hold that while U.S. West's failure to pay White's claims constituted a breach of its contractual obligations, its conduct furnished no basis for an intentional tort claim premised on insurer bad faith. This claim is based on a settlement agreement and not an insurance agreement. Because U.S. West's breach of contract did not meet the threshold requirement of also constituting an independent tort, the allowance for punitive damages was inappropriate.

<u>Kirk v. Union Pacific Railroad</u>, 514 N.W.2d 734 (Iowa Ct. App. 1994)

<u>Mitigation</u>

Kirk was injured by a railroad car. The jury found the railroad was 85 percent at fault. The trial court refused to submit defendant's proposed instructions regarding the plaintiff's duty to mitigate damages. Defendant contends the plaintiff failed to mitigate his damages by either seeking or accepting employment or by undergoing vocational training following the amputation of his leg.

HELD: We agree with the trial court that the proposed instruction was not warranted by substantial evidence. In

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determining whether a party has failed to mitigate damages, the defendant has the burden of demonstrating that the failure to mitigate was unreasonable under the circumstances. The evidence indicated that Kirk was not medically permitted to work for approximately the first year after his accident. Thereafter, he was released by his doctor for light work, if possible. Kirk's rehabilitation counselor concluded that "getting this gentleman back to work would be a major effort". Regarding Kirk's recovery, his physical therapist testified that Kirk was consistent in coming to physical therapy and always attempted everything the physical therapist asked him to do. Thus, the defendant did not meet the burden of demonstrating that the failure to mitigate was unreasonable under the circumstances.

Barske v. Rockwell Intern. Corp., 514 N.W.2d 917 (Iowa 1994)

Interest

Fifty-four former employees of Rockwell who were hired in 1987 and 1988 and then laid off in 1989 sued Rockwell claiming breach of pre-employment agreements and negligent misrepresentation concerning duration of employment. The jury returned a verdict in the plaintiffs' favor on the negligent misrepresentation claims and awarded each plaintiff compensatory damages. The court directed the clerk to enter judgment against Rockwell with interest at the statutory rate from the date of filing. Rockwell then filed a renewed motion for summary judgment, motion for judgment notwithstanding the verdict, and an alternative motion for order on prejudgment interest. The court granted Rockwell's motion n.o.v. and set aside the judgment, concluding that plaintiffs' claims were preempted by the Labor Management Relations Act. On appeal, the Supreme Court reversed the district court's ruling on preemption and returned the case to the district court.

HELD: Because of the district court's decision on the pre-emption issue, it was not necessary for that court to address Rockwell's motion for an order directing that no prejudgment interest be allowed. In its motion, Rockwell argued that interest may not be assessed on damages before they occur and plaintiffs failed to show when their damages occurred.

Iowa Code § 535.3 (1989) provides that interest shall be allowed on all judgments and decrees and it "shall accrue from the date of the commencement of the action." Rockwell is correct in pointing out that there is no right to prejudgment interest on transactions or injuries which occur after the litigation has commenced. This is not such a case. Plaintiffs were injured when they were laid off. Therefore, the court did not submit any claim for future damages to the jury.

Clarey v. K-Products, Inc., 514 N.W.2d 900 (Iowa 1994)

Excessiveness

Clarey was discharged from her job with K-Products and brought this action for wrongful termination. The jury awarded her $364,000 in damages. K-Products argues that the court abused its discretion in refusing to grant a new trial under Iowa Rule 244 on the ground that the damages were excessive and the result of passion on the part of the jury. There was evidence that the plaintiff became suicidal as a result of a discharge and was placed in an institution. She was denied employment by several potential employers and produced evidence of reduced future earnings.

HELD: We affirm. In passing on the alleged excessiveness of damages, we need to determine only whether there was substantial evidence to support the verdict. We have noted that the trial court is generally in a better position to determine whether the evidence was sufficient to justify an award. There was sufficient evidence of damages to support the award.

Clark-Peterson v. Independent Ins. Assn., 514 N.W.2d 912 (Iowa 1994)

Emotional Harm/Punitive

Plaintiff Clark-Peterson purchased a liability policy from defendant. Plaintiff was later sued for wrongful discharge. Defendant initially denied coverage, but eventually provided defense, reserving the right to deny coverage if damages were awarded. The suit was eventually settled with plaintiff and defendant agreeing to pay 50 percent with each side reserving its right to litigate coverage questions in a declaratory judgment action. Plaintiff brought a declaratory judgment action and was granted summary judgment. Defendant promptly reimbursed plaintiff for the 50 percent it previously paid in the discrimination suit.

The district court denied plaintiff's claim for severe emotional distress which arose from defendant's various alleged breaches. Plaintiff appeals.

HELD: On the basis of the pleadings and other filed documents, it is clear that defendant's acts did not even approach the outrageous conduct required to grant emotional distress damages. To recover under such a theory plaintiffs must show outrageous conduct that was so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious, and utterly intolerable in a civilized community.

The district court also denied plaintiff's claim for punitive damages.

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HELD: We affirm. Punitive damages are not allowed in breach of contract claims in the absence of malice, fraud, or other illegal acts. A showing of wrongful conduct committed or continued with willful or reckless disregard for another's rights is sometimes sufficient to show legal malice. But it is apparent that the claims here do not rise to such a level.

Benn v. Thomas 512 N.W.2d 537 (Iowa 1994)

Eggshell Plaintiff Rule

Lorus was rear-ended by defendant and suffered a bruised chest and a fractured ankle. Loras had a history of coronary disease and insulin dependent diabetes. Six days after the accident, he died of a heart attack. The plaintiff's medical expert testified that he viewed "the accident that Loras was in and the attendant problems that it caused in the body as the straw that broke the camel's back" and the cause of Loras' death. The jury returned a verdict for the estate in the amount of $17,000 for Loras' injuries but nothing for his death. In the special verdict, the jury determined the defendant's negligence in connection with the accident did not proximately cause Loras' death.

The estate claims that the court erred in failing to include, in addition to its proximate cause instruction to the jury, a requested instruction on the eggshell plaintiff rule. Such an instruction would advise the jury that it could find that the accident aggravated Loras' heart condition and caused his fatal heart attack. The trial court denied this request, submitting instead a general instruction on proximate cause. The court of appeals reversed, concluding that the trial court erred in refusing to specifically instruct an eggshell plaintiff doctrine.

The defendant appealed the court of appeals' reversal.

HELD: We reverse the judgment of the district court, affirm the decision of the court of appeals, and remand the case to the district court for a new trial which would include the eggshell plaintiff rule in the jury instructions.

Lara v. Thomas, 512 N.W.2d 777 (Iowa 1994)

Punitive Damages

After working for Thomas for several years, Lara asked Thomas for an increase in wages and benefits. Lara alleged that Thomas agreed to double her salary and to provide her with insurance benefits and paid vacations. However, Thomas failed to honor the agreement. Instead, he reduced her hours. As a result of the reduction in work hours, Lara applied for partial unemployment benefits. Shortly after she began receiving benefits,

Lara claimed Thomas began committing various acts of retaliation. Lara was finally discharged.

The jury found that Thomas had violated minimum wage and overtime laws and awarded Lara actual damages in the amount of the underpayment. The jury further awarded $6,500 for defendant's misrepresentation on the conditions of employment, $10,000 actual damages and $15,000 punitive damages for the tortious discharge in violation of public policy, and $10,000 general damages and $7,500 punitive damages on the slander claim.

The district court set aside the retaliatory discharge punitive damage award of $15,000 because the filing of an unemployment claim had not been previously recognized as a violation of recognized public policy in the state of Iowa. The court determined the awards for tortious discharge and misrepresentation of employment conditions were duplicative and set aside the $6,500 award for actual damages on the misrepresentation claims.

HELD: Affirmed. Punitive damages should not be awarded when a new cause of action for retaliatory discharge is recognized. All other damage awards affirmed.

<u>Hillrichs v. Avco Corp.</u>, 514 N.W.2d 94 (Iowa 1994)

<u>Punitive Damages/Enhanced Injury</u>

Hillrichs brought suit for injury sustained when his hand was caught in husking rollers of a corn picker. At the first trial, he was found to be 100 percent at fault. On appeal, the Supreme Court affirmed in part, but reversed and remanded for a new trial on negligence claims with respect to the manufacturer's liability, if any, for Hillrichs' "enhanced injuries." On the second trial, the jury returned a verdict finding Avco 80 percent at fault and Hillrichs 20 percent at fault. The jury awarded Hillrichs $920,000 in compensatory damages. It also awarded $1,000,000 in punitive damages against Avco. In ruling on defendant's post-trial motions for judgment notwithstanding the verdict and for a new trial, the district court set aside the punitive damages award, concluding that the plaintiff failed to prove that defendant Avco acted with willful and wanton disregard for the rights of another. Avco appealed. Hillrichs cross-appealed, contending that the district court erred in setting aside the jury's punitive damages award.

HELD: We affirm the district court's finding that punitive damages were not appropriate in this case. There was no clear, convincing, and satisfactory evidence that the acts of the defendant were unreasonable in disregard of a risk that was so great as to make it highly probable that harm would follow.

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Hillrichs contends that we should reverse the district court's apportionment of Hillrichs' fault as a proximate cause of his enhanced injury. We disagree. When this case was first presented to the Supreme Court, we ruled that on remand the district court should instruct the jury that the fault of the plaintiff in becoming entangled in the machinery would be a proximate cause of the enhanced injury as well as the initial injury. Plaintiff points to a later recent decision, Reed v. Chrysler Corp., 494 N.W.2d 224, 230 (Iowa 1992), in which we barred any consideration of the plaintiff's initial negligence in an enhanced injury claim. However, because we decided Reed after the first Hillrichs decision we conclude that it established the law of the case on this point.

Sunrise Developing Co. v. Iowa Dept. of Transp., 511 N.W.2d 641 (Iowa Ct. App. 1993)

Condemnation

Sunrise's land was taken by the DOT for use as a burrow pit. The Compensation Commission appraised Sunrise's damages at $124,750. Sunrise appealed to the district court in which the jury returned a verdict finding Sunrise's damages to be $200,000. Sunrise filed a motion for a new trial which the trial court denied. Sunrise now appeals.

Sunrise first claims it should have been able to present evidence to the jury concerning the amount of dirt to be taken from the land and the per unit value of the dirt taken.

HELD: Affirmed. The so-called "unit rule," which considers the amount of a material to be taken from the land and the per unit value of the material taken, should not be used as a measure of damages unless there is no evidence of market value. In this case, there was evidence of market value of the land.
Sunrise believes the award of damages was inadequate and necessitates a new trial.

Sunrise also claims the award of damages was inadequate.

HELD: A condemnation case is one in which the amount allowed is peculiarly within the province of the trier of fact, and unless the damages are shown to be so extravagant or penurious as to be wholly unfair and unreasonable, we will not interfere with the award on the appeal.

U.S. Borax & Chemical Corp. v. Archer-Daniels-Midland Co., 506 N.W.2d 456 (Iowa Ct. App. 1993)

Measure of Damages

A fire at ADM's elevator damaged 600 tons of plaintiff's borax. Jury instructions provided for damages based on the fair and reasonable market value of the borax before the fire. Market value was nearly double replacement cost. The jury returned a $64,745.92 verdict for plaintiff for the damaged borax.

HELD: Reversed and remanded for a limited trial on the issue of damages. Prior to this case, Iowa courts had not considered the measure of damages for a chemical product when the replacement cost and fair market value were so disproportionate to each other. The purpose of damages is to place the injured party in as favorable position as though no wrong had been committed. Because both measures of damages would achieve this purpose, the measure that is less expensive to the defendant should be adopted. The measure of damages should have been replacement cost.

Freeman v. Ernst & Young, 516 N.W.2d 835 (Iowa 1994)

Comparative Fault Act

Plaintiff began negotiating with Emmett Neenan to purchase his video rental business. Neenan suggested plaintiff talk to his accountant Jim Brems about the business. Brems advised plaintiff the business would pay for itself and generate a salary for Freeman. Plaintiff agreed to purchase the business for $30,000 down plus monthly payments. The business did not prove as profitable as plaintiff had been told to expect, and finally collapsed. Plaintiff transferred the business back to Neenan and released him from liability.

The district court found Brems was negligent in making the representations to plaintiff concerning the business' worth and its cash flow. The court determined plaintiff suffered $180,900 in damages, including: 1) $30,000 down payment; 2) $96,000 in monthly payments; 3) $7,000 for corporate expenses plaintiff contributed; 4) $2,900 for expenses incurred when the business collapsed; and 5) $45,000 in lost wages. The district court found Neenan (a released party) was 75 percent at fault and Brems 25 percent at fault so it entered judgment against defendant for 25 percent of the total damages or $45,225.

HELD: The trial court erred in apportioning any fault to Neenan. Neenan was not in the business of supplying information so plaintiff could have no claim for negligent misrepresentation against him. The only theory of recovery available against Neenan was fraud, which is not encompassed within the definition of "fault" in § 668.1. Remanded to the district court for entry of

judgment against defendant for the entire amount of damages, $180,900.

Spaur v. Owens-Corning Fiberglas Corp., 510 N.W.2d 854 (Iowa 1994)

Loss of Consortium

Robert and Marilyn Spaur, husband and wife, brought suit against Owens-Corning Fiberglas Corporation (OCF), and several other defendants to recover damages for personal injuries resulting from Robert's exposure to OCF's asbestos-containing products. The jury awarded compensatory damages, loss of consortium damages, and punitive damages against OCF.

HELD: Affirmed. The jury's award to Marilyn Spaur in the amount of $70,000 for past loss of consortium and $730,000 for future loss of consortium is not excessive. Consortium claims embrace tangible as well as intangible elements. Even though the consortium damage awards were more than double Robert's annual income, damages for consortium compensate for the loss of intangible elements as company, cooperation, affection and aid.

Hockenberg Equip. v. Hockenberg's E. & S., 510 N.W.2d 153 (Iowa 1993)

Injunction/Punitive/Attorney Fees

Hockenberg's Equipment & Supply Company is based out of Omaha, Nebraska (Omaha Hockenberg's) and Hockenberg Equipment Company is based out of Des Moines, Iowa (Des Moines Hockenberg's). The Omaha Hockenbergs began doing business in central Iowa causing confusion among the Des Moines Hockenbergs' customers. The Des Moines Hockenbergs filed a lawsuit alleging common law tradename infringement and seeking a temporary and permanent injunction to prohibit the Omaha Hockenbergs from doing business under the Hockenberg name. The suit was resolved through a settlement agreement and mutual release. The Omaha Hockenbergs agreed they would no longer do business in central Iowa using the word "Hockenberg" or "Hockenberg's." If the Omaha Hockenbergs mailed any promotional materials into Iowa from Nebraska, they would include a disclaimer in a specified typeface disclaiming affiliation with the Des Moines Hockenbergs. The Omaha Hockenbergs further agreed that any breach of the agreement would result in "great and irreparable harm" to the Des Moines Hockenbergs and such a breach would leave the Des Moines Hockenbergs with no adequate remedy at law and therefore entitle them to injunctive relief. Despite this agreement, the Omaha Hockenbergs continued to send materials into central Iowa using the Hockenberg name without the proper disclaimer.

The jury found that the Omaha Hockenbergs' breached their contract with the Des Moines Hockenbergs and awarded them $1.00 in

compensatory damages and $5,000 in punitive damages. The district court also issued a permanent injunction against the Omaha Hockenbergs forbidding them from breaching the terms of the settlement agreement. Because of the jury's finding of willful and wanton conduct, the district court awarded attorney's fees to the Des Moines Hockenbergs.

HELD: The Omaha Hockenbergs' conceded they breached the settlement agreement which provided that the breach would result in irreparable harm to the Des Moines Hockenbergs and entitle them to a permanent injunction. A party is entitled to a permanent injunction if proof exists the injunction would prevent irreparable harm and if the party has no adequate remedy at law. In addition to irreparable harm, the Des Moines Hockenbergs established they had no remedy at law. Such a showing exists when the defendant has threatened repeated misconduct. Therefore, the trial court properly issued the permanent injunction.

An award of punitive damages will only be upheld when the conduct breaching a contract also constitutes an intentional tort, committed maliciously, meeting the standards of § 668A.1. Substantial evidence supports the award of punitive damages. The jury found the Omaha Hockenbergs intentionally interfered with the Des Moines Hockenbergs' prospective business advantage and the Omaha Hockenbergs' tortuous conduct amounted to the willful and wanton disregard of the rights of another. The Omaha Hockenbergs not only breached the settlement agreement but also violated the district court's temporary injunction.

The determination of an attorney fee award lies within the equitable power of the court. In the absence of a statutory or written contractual provision allowing an attorney fee award, a party generally has no claim for attorney fees. A rare exception exists, however, when a losing party has acted in bad faith vexatiously, wantonly or for oppressive reasons. The Des Moines Hockenbergs, therefore, must show the culpability of the Omaha Hockenbergs' conduct exceeded willful and wanton disregard for the rights of another which rises to the level of "oppression or connivance to harass or injure another." Here, the Omaha Hockenbergs' conduct was not "oppressive" or "conniving misbehavior" and did not warrant an award of attorney fees. Therefore, the trial court's award of attorney fees to the Des Moines Hockenbergs is reversed.

Jackson v. Roger, 507 N.W.2d 585 (Iowa Ct. App. 1993)

Collateral Source Rule

Jackson sued Roger for $46,000 in damages resulting from their two-car collision. Roger introduced evidence that Jackson's past medical expenses were paid by her insurance. The jury apportioned 51 percent of the fault to Roger and 49 percent to

Jackson. The jury awarded Jackson $3,401 in damages for past and future pain and suffering and past and future medical expenses. It awarded no damages for loss of full body. One question on the verdict form asked the jury to "state the extent to which you reduced your damage award, if any, due to evidence [Jackson's] medical bills had been paid by insurance." The jury answered "$42,599." Jackson contended inconsistencies in the jury's response entitled her to a new trial. The court noted the addition of the total award, $3,401, and the amount in the question, $42,599, equalled $46,000 and accepted the verdict. Jackson appeals the district court's order denying her a new trial.

HELD: Affirmed. The district court did not err in refusing to grant a new trial. The jury answered the questions posed to it as required by § 668.14. There is no evidence plaintiff would suffer a double reduction from her recovery being reduced while at the same time having to repay her insurance company. Damages awarded should be commensurate with the injury and sufficient to correct the wrong done to the injured party. A jury cannot reasonably award damages for medical bills without also awarding damages for some injury that necessitated the medical care.

Also, it was not inconsistent for the jury to award medical expenses and pain and suffering damages but no "loss of full body" damages.

Vlotho v. Hardin County, 509 N.W.2d 350 (Iowa 1993)

Destruction of Bridge

Vlotho is a former county engineer who was fired for the unauthorized destruction of a historic bridge. Vlotho brought a wrongful termination and defamation claim against the county and the county asserted a counterclaim for damages sustained when the bridge was torn down. Following a bench trial, the district court found against Vlotho and for the county. The district court awarded $115,600 based on the actual value of the bridge.

HELD: Damages for the destruction of a public structure like a bridge cannot be determined by reference to market value. A bridge has no market value because a willing buyer or willing seller cannot be imagined. Actual or real value is the correct measure. Relevant evidence includes original cost, the age of the property, its use and utility, its condition, and the cost of restoration or replacement. The district court used the correct damage measure and it is affirmed on that issue.

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Netteland v. Farm Bureau Life Ins. Co., 510 N.W.2d 162 (Iowa Ct. App. 1993)

Lost Profits

Farm Bureau began negotiating with Netteland to operate a day-care facility at one of Farm Bureau's offices. Negotiations began to break down because they could not agree on the rates to be charged. When Netteland refused to respond to an inquiry in a satisfactory manner, Farm Bureau contracted with another provider of day-care services. Netteland brought suit alleging breach of contract and fraudulent misrepresentation. The district court directed a verdict for Farm Bureau on the fraudulent misrepresentation claim, but the jury found for Netteland on the breach of contract claim and awarded it $125,000 in lost profits.

HELD: To recover for lost profits, damages may not be overly speculative and must be shown with reasonable certainty. Netteland explained the source of the facts on which he relied in calculating lost profits and also explained how his lost profits were determined. Therefore, a factual basis existed from which Netteland could calculate his lost profits with reasonable certainty and the evidence in the record was sufficient to submit the issue to the jury.

Federal Land Bank v. Woods, 168/93-113 (Iowa July 27, 1994)

Attorney Fees

Defendants appeal the award of $34,354.00 in attorney fees to the Bank pursuant to the terms of a note that defendants defaulted on.

HELD: Affirmed. The sum allowed by the court appears to have been based on a reasonable hourly rate for efforts found reasonably to be required by the pending litigation. This matter is now before the supreme court for the seventh time. The district court has broad discretion in establishing the amount of attorney fees that may be recovered under Iowa Code § 625.22. In addition, as a result of the present appeal, the bank is entitled to recover additional fees; and, rather than remanding the case to the district court for yet another evidentiary hearing, we order an additional sum of $15,172 be added to the judgment.

EVIDENCE

Amy Snyder

Kirk v. Union Pacific Railroad, 514 N.W.2d 734 (Iowa App. 1994)

Admission

Union Pacific Railroad appeals a jury verdict finding it 85% at fault for damages resulting from a railroad car which rolled over Kirk's right leg. Union Pacific argues the district court erred in excluding Kirk's original petition which Union Pacific alleges contains a significant admission as to Alter's (settling party) negligence.

HELD: The district court did not err in prohibiting the defendant from reading certain excerpts of the plaintiff's original petition at law, which the defendant alleged contained a significant admission regarding settling parties' (Alter's) negligence. The excerpts only included factual allegations and did not constitute an admission on the part of the plaintiff. The plaintiff's original petition at law, alleging that the sole and/or concurring proximate cause of plaintiff's injuries was negligence of the settling defendant Alter was not an admission regarding the settling defendant's negligence and thus, the non-settling defendant is not entitled to read that excerpt of the original petition at trial.

Matter of Property Seized from DeCamp v. State of Iowa, 511 N.W.2d 616 (Iowa 1994)

Admission by Party-Opponent

DeCamp appeals from a district court order forfeiting his truck, a 1978 Freightliner tractor, because the truck was allegedly used to facilitate drug sales. DeCamp challenges the order because he thinks the district court impermissibly admitted into evidence statements attributed to alleged coconspirators. Iowa Rule of Evidence 801(d)(2)(E) provides that a statement is not hearsay "if the statement is offered against a party and is a statement by a coconspirator of a party during the course and in furtherance of the conspiracy." Before such a statement is admissible, the district court must find by a preponderance of the evidence that a conspiracy to commit a crime existed involving the declarant and the non-offering party. The evidence relied on to establish the conspiracy must include some proof independent of the coconspirator's statement.

HELD: There was substantial evidence to support the district court's finding that a conspiracy existed between the declarants of the challenged statements and DeCamp. The challenged statements were therefore not hearsay. The district court properly

admitted and relied on such statements in the forfeiture proceedings.

Johnson v. State Farm Auto. Ins. Co., 504 N.W.2d 135 (Iowa App. 1993)

Compromise and Offers to Compromise

Plaintiff was rear-ended by another motorist, King. King admitted negligence in the accident. Her insurance policy limit was $20,000. In a settlement agreement, King's insurer agreed to pay Plaintiff $20,000. Plaintiff's insurer, State Farm, agreed to the settlement and paid plaintiff $5,000 for medical expenses. Plaintiff wanted to prove State Farm had admitted the issue of causation by agreeing to the settlement with King and by paying her $5,000.

HELD: Under Iowa Rule of Evidence 408, evidence of a compromise should be excluded if it is offered to show liability. Plaintiff admitted she wanted to introduce this evidence to show State Farm's liability. Thus, the settlement with King and the fact that State Farm agreed to the settlement was properly excluded from evidence.

United States Borax & Chemical Corp. v. Archer-Daniels-Midland Co., 506 N.W.2d 456 (Iowa App. 1993)

Compromise and Offers to Compromise

The owner of products stored in railroad cars near grain elevator filed suit against grain elevator for damages caused by explosion of grain elevator. During trial, one of plaintiff's officers testified regarding his negotiations with the defendant's insurance agent, and stated that the defendant's insurance carrier had made an offer of $110,000 to settle the claim. Defendant's attorneys immediately objected and moved for a mistrial. The trial court admonished the witness, and struck the subject testimony, but refused to grant a mistrial.

HELD: The fact that defendant had placed mitigation of damages in issue did not provide an exception to Iowa Rule of Evidence 408, under which offers to comprise a controversy are inadmissible as an admission of liability. However, the failure to grant a mistrial on the basis of one inadmissible statement in a trial which consumed 600 pages of testimony does not constitute an abuse of discretion.

Ladeburg v. Ray, 508 N.W.2d 694 (Iowa 1993)

Exhibits

Plaintiff, Helen Ladeburg, was struck by a semi trailer driven by defendant Ray. Plaintiff filed a negligence action which ultimately resulted in a jury verdict for the defendants. Plaintiff argued that the district court erred when it allowed defendant to use computer-generated evidence which had not been timely disclosed.

HELD: Plaintiff is precluded from maintaining that defendants' computer-drawn diagrams of the accident should not have been admitted into evidence, even though the defendants' attempt to use the drawings had not been communicated to plaintiff within the time constraints imposed by procedural rules. The parties had informally agreed to proceed with discovery beyond deadlines imposed by procedural rules and a scheduling order. Further, the drawings were not prejudicial to plaintiff because the data had been put into the computer by defendants' expert, who was available for cross-examination, and the computer was simply a drawing tool.

Johnson v. State Farm Auto. Ins. Co., 504 N.W.2d 135 (Iowa App. 1993)

Foundation

Plaintiff complained of shoulder and neck pain at the time of an accident in which she was rear-ended by another motorist. After the accident, she had surgery for a ruptured disc in her back and has had chiropractic treatment for her back since the time of the accident. Plaintiff had a considerable medical history prior to the accident in 1989. All of plaintiff's medical records were admitted into evidence, even though no one testified concerning most of them. Plaintiff objected to this wholesale introduction of her medical records.

HELD: Medical records are inadmissible if there is insufficient foundation to prove they were made by a person with knowledge of the events recorded. In this case, there was no foundation to show the origin of most of the medical records. On remand of this case, the medical records should not be admitted into evidence unless the foundational requisites for business records have been established.

<u>Hutchison v. American Family Mutual Insurance Co.</u>, 514 N.W.2d 882 (Iowa 1994)

<u>Foundation</u>

Plaintiff brought action against automobile insurer seeking underinsured motorist ("UIM") benefits for damages above the coverage limits of the policy carried by the other driver. At trial, plaintiff attempted to introduce a videotape containing a computer simulation of how a closed-head injury, such as the type claimed by plaintiff, can affect the brain. The insurer objected to the introduction of the videotape on the grounds that plaintiff's physician lacked sufficient knowledge of the accident to authenticate it as a genuine representation of plaintiff's injury.

HELD: The exclusion of the videotape was upheld. The treating physician's lack of knowledge of the speeds and forces involved in the accident prevented the laying of a proper foundation for the evidence, and "afforded manifold opportunities for fabrication and distortion."

<u>Benn v. Thomas</u>, 512 N.W.2d 537 (Iowa 1994)

<u>Hearsay</u>

In an action brought by motorist's estate for injuries and death caused by motor vehicle accident, the supreme court held that objections to hearsay testimony during a deposition do not need to be made during the deposition or prior to the offer of the deposition testimony at trial.

<u>State v. Deases</u>, 518 N.W.2d 784 (Iowa 1994)

<u>Hearsay</u>

Deases was an inmate of the Fort Madison Penitentiary. He and another inmate, Joseph Perea, fought in the penitentiary cafeteria. The fight ended when Deases fatally stabbed Perea with a shank (a knife-like instrument). Deases was charged with first degree murder. He claimed self-defense. There was conflicting evidence about who initiated the fight. There was also conflicting evidence concerning whether it was Deases or Perea who brought the shank into the cafeteria. Inmate Spencer Pierce testified in behalf of Deases that he spoke with Perea the morning of the fight and Perea said he was going to confront someone. Pierce also testified that when he was in the penitentiary cafeteria, he saw Perea take the shank out of his pants and start the fight. On cross examination, the state asked Pierce if he had told a different account of the fight to the division of criminal

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investigation. The state questioned Pierce about specific statements he had allegedly made. Pierce denied making any of the statements. In rebuttal, the state called a DCI agent who testified to three prior statements made by Pierce: 1) that Pierce saw Deases coming towards Perea with a metal object; 2) that if the agent knew why Perea was in protective custody he would know why Perea was killed; and, 3) that Pierce thought Deases killed Perea for someone else. The district court overruled Deases' objections to this testimony. Deases contends on appeal that the agent's testimony was inadmissible hearsay and that Pierce lacked personal knowledge of the statements concerning the motivation for Perea's motive. The state contends that the agent's testimony concerning Pierce's prior inconsistent statements is not hearsay.

HELD: The state cannot rely on Iowa R.Evid. 801(c) because Pierce's statements to the DCI agent were not given under oath, at a trial, hearing, deposition, or other proceeding. The trial court abused its discretion in admitting the DCI agent's testimony.

State v. Havemann, 516 N.W.2d 26 (Iowa App. 1994)

Impeachment

Defendant Havemann was charged with two counts of burglary in the second degree and one count of theft in the third degree. Danny confessed to taking several items from the home of his parents. In his confession, Danny stated he had been aided in the burglaries by Havemann. Havemann denied the charges and stated that, while he drove Danny to Danny's parents' house, he did not know Danny intended to take the items that did not belong to him. Havemann's trial counsel attempted to impeach Danny by presenting evidence of a prior incident in which Danny had sought to implicate Havemann of a crime he had actually committed. The attorney argued the evidence was admissible under Iowa Rule of Evidence 404(b). The district court ruled the evidence was not admissible under Rule 404(b) and the evidence was not presented to the jury. Havemann contends that he did not receive effective assistance of counsel during the trial. In particular, he states that his counsel attempted to introduce the impeachment evidence against Danny under the wrong Rule of Evidence. The state agrees that the evidence should have been admissible under Rule 608 and that defense counsel did not attempt to introduce the evidence under this Rule.

HELD: A witness's credibility is placed in issue when that witness mistestifies. Therefore, a defendant may question the credibility of a state's witness by attempting to impeach the witness by proper cross-examination. Under Iowa Rule of Evidence 608(b), a witness may be questioned on cross-examination within the discretion of the court, concerning his or her character for truthfulness or untruthfulness.

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Jackson v. Roger, 507 N.W.2d 585 (Iowa App. 1993)

Juror Affidavit

In his resistance to a new trial, Roger submitted an affidavit from the jury foreperson stating that the jury unanimously found Jackson's damages totaled $3,401 and the jury had understood question seven of the verdict form to ask for the amount it reduced the damages figure from the amount claimed. Jackson filed a motion to exclude consideration of the affidavit in ruling on the motion for a new trial. The district court cited the affidavit in its order denying a new trial.

HELD: Iowa Rule of Evidence 606(b) limits a juror's testimony or affidavit about the validity of a verdict to the question of the influence of extraneous prejudicial information or outside influence. The Supreme Court has interpreted 606(b) to allow juror testimony that an error in recording the verdict was made or to support reforming a verdict which was inaccurately rendered even though facially consistent. A court may consider an affidavit of the jury foreman on consideration of a motion for a new trial, where the affidavit is used to show how heavily the jury was influenced by the fact that plaintiff's medical bills had been paid by insurance.

Bray v. Hill, 517 N.W.2d 223 (Iowa App. 1994)

Opinion

In 1986, Dr. Gregory had been placed on probation for three years and fined $1,000 due to an incident in which a physician's assistant, who was employed by Dr. Gregory, had provided services beyond his qualifications. Plaintiff, Juanita Bray, stated that she would not have consented to having surgery performed by Dr. Gregory if she had known he was on probation at the time. Plaintiffs contend the district court abused its discretion in refusing to allow Rita Bennett, a nurse and Juanita's daughter, to give her opinion that other physicians usually hold a pre-surgical conference.

HELD: Plaintiff's daughter was not qualified to give an expert opinion as to the prevailing standard of care for physicians. The district court did not abuse its discretion in refusing to allow Bennett to give her opinion of the defendant's standard of care.

DISSENT: Rita is a licensed registered nurse. She graduated from the University of Iowa in 1986, and worked until 1989 at the University of Iowa Hospital and Clinics and then worked in a variety of hospitals. Rita was asked what observations she

had made during her hospital experiences. Her proffered testimony was relevant to the issues in this case and she was clearly competent to testify as to her observations.

Clarey v. K-Products, Inc., 514 N.W.2d 900 (Iowa 1994)

Oral Statements

Former employee brought a wrongful termination action against her employer alleging that she was discharged in retaliation for filing workers' compensation claims. The district court ruled in favor of the employee, and the employer appealed arguing that the district court erred in allowing testimony by the company doctor that paraphrased a statement made by a company official.

HELD: The paraphrased oral statement was admissible since verbal precision is not required in proving oral utterances, and the substance or fact of the actual words spoken will suffice.

Clarey v. K-Products, Inc., 514 N.W.2d 900 (Iowa 1994)

Other Crimes, Wrongs or Acts

A former employee brought a wrongful termination action against her employer alleging that she was discharged in retaliation for filing workers' compensation claims. The district court ruled in favor of the employee, and the employer appealed arguing that the district court erred in allowing testimony of four former employees who testified about the attitude of the employer towards workers' compensation claimants.

HELD: The district court was correct in admitting the evidence under Iowa Rule of Evidence 404(b), which permits evidence of other acts in order to prove motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident. The court held that the testimony of the former employees, all of whom had been harassed after filing workers' compensation claims, tended to establish a pattern of conduct and was admissible to show motive, intent, plan, or absence of mistake.

Johnson v. State Farm Auto. Ins. Co., 504 N.W.2d 135 (Iowa App. 1993)

Payment of Expenses

Under Iowa Rule of Evidence 409, evidence of advance payments is inadmissible to show liability.

State v. Spilger, 508 N.W.2d 650 (Iowa 1993)

Privilege

It was appropriate for a therapist and social worker to testify against defendant, even though defendant claimed that such testimony was barred as privileged because defendant had employed the therapist in a prior dissolution proceeding. The testimony was not barred because defendant had not hired the therapist as a mental health professional within the meaning of Iowa Code Section 622.10, because no counselling or treatment was involved.

State v. Deases, 518 N.W.2d 784 (Iowa 1994)

Privilege

Defendant Edward Deases was convicted after a jury trial of first degree murder. Deases appeals arguing that the court erred in admitting the testimony of a nurse because this evidence was protected by the professional communications privilege.

HELD: A professional relationship existed between Deases and Nurse Hull and any information she learned from him was acquired during this relationship. Deases' statement regarding where the weapon came from was privileged because it was information necessary for Deases' treatment. The presence of correctional officers during an otherwise confidential communication did not destroy the privilege because their presence was necessary for Deases to be treated. The district court erred in admitting the testimony of Nurse Hull into evidence.

Bray v. Hill, 517 N.W.2d 223 (Iowa App. 1994)

Relevance

In 1986, Dr. Gregory had been placed on probation for three years and fined $1,000 due to an incident in which a physician's assistant who was employed by Dr. Gregory, had provided services beyond his qualifications. Plaintiff, Juanita Bray, testified that she would not have consented to having surgery performed by Dr. Gregory if she had known he was on probation at the time. Plaintiffs contend the district court should not have allowed Laura Hewitt, a nurse employed by Dr. Gregory, to give rebuttal testimony that Dr. Gregory was a caring surgeon. The evidence was admitted after Juanita testified that Dr. Gregory ignored her and made her feel abandoned.

HELD: The determination of the relevance of evidence rests within the sound discretion of the trial court and will be

reversed only upon a showing that such discretion has been abused. The plaintiffs raised the issue by testimony that Dr. Gregory was uncaring towards his patients. The district court did not abuse its discretion in allowing evidence to rebut this testimony. Hewitt testified about Dr. Gregory's attitude towards his patients; Hewitt did not testify about a physician's standard of care to patients.

Netteland v. Farm Bureau Life Insurance Co., 510 N.W.2d 162 (Iowa App. 1993)

Statute of Frauds

Defendant, Farm Bureau, contends plaintiff, Nettleland, was barred from introducing evidence supporting an oral contract because the statute of frauds applied. Farm Bureau bases it claim upon Iowa Code § 622.32(4), contending the contract being negotiated was for a five year period. Iowa Code § 622.32 provides in part:

> Except when otherwise specially provided, no evidence of the following enumerated contracts is competent, unless it be in writing and signed by the party charged or by the party's authorized agent: (4) those that are not to be performed within one year.

HELD: The statute of frauds is a rule of evidence, not of substantive law, and relates to the manner of proof but does not render oral contracts invalid. Plaintiffs could avoid the impact of the statute of frauds and properly introduce evidence of the oral contract. The court based this on Gardner v. Gardner, 454 N.W.2d 361 (Iowa 1990), which held that it is well-established that a party who partially performs under the agreement may avoid the impact of the statute of frauds and introduce evidence of the oral contract. Id. at 363. Courts have recognized any conduct, acts, or circumstances offered to show "performance" in order to bring a case within the exception of the statute of frauds must be referable exclusively and unequivocally to the contract. In this case, the acts were done by Netteland in accordance with the agreement which constitutes partial performance by the parties. Therefore, the statute of frauds is not applicable because the partial performance was sufficient to avoid the impact of the statute of frauds and allow the admission of parol evidence.

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Glen Haven Homes v. Mills County, 507 N.W.2d 179 (Iowa 1993)

Testimony

Deposition testimony of a corporate taxpayer's managing agent in an action challenging property tax determination was a vicarious admission binding on the taxpayer unless altered or withdrawn. Court applied Iowa Rule of Evidence 801(d)(2)(D).

Sunrise Developing Co. v. Iowa Department of Transportation, 511 N.W.2d 641 (Iowa App. 1993)

Unfair Prejudice

In an action challenging damages awarded by compensation commission in a condemnation proceeding, the court of appeals held that otherwise relevant evidence is not admissible if its probative value is substantially outweighed by the danger of unfair prejudice. Iowa R. Evid. 403.

Bray v. Hill, 517 N.W.2d 223 (Iowa App. 1994)

Unfair Prejudice

Plaintiffs appeal a judgment entered upon a jury verdict for defendant in a medical malpractice action. Plaintiffs contend the district court erred in excluding evidence that defendant Dr. Gregory failed to disclose his probationary status with the Iowa Board of Medical Examiners as it relates to informed consent. Plaintiffs argued this evidence was relevant to the issue of informed consent, in that Juanita Bray would not have consented to having surgery performed by Dr. Gregory if she had known he was on probation at the time. In 1986, Dr. Gregory had been placed on probation for three years and fined $1,000 due to an incident in which a physician's assistant, who was employed by Dr. Gregory, had provided services beyond his qualifications.

HELD: The district court did not abuse its discretion. A physician has a duty to disclose only those material risks involved in the medical procedure. Because Dr. Gregory's probationary status was due to the activity of a physician's assistant in his employ and did not relate to Dr. Gregory's qualifications as a surgeon, nor did it bear on any material risks involved in the medical procedure, unfair prejudice from its admission would have substantially outweighed its probative value.

DISSENT: This information is a necessary consideration for a patient contemplating major surgery in order to make an informed and intellectual decision. The fact of a three year probation and a $1,000 fine for permitting an assistant to perform

an unauthorized medical service goes to the heart of the informed consent.

GOVERNMENT

Steve Serck

Tebben v. State, No. 219/93-1015 (Iowa July 27, 1994)

Public Employees

The IDOT verbally offered Tebben employment and confirmed the verbal offer by letter stating the starting salary was $38,001.60. After Tebben accepted the offer and began work, IDOT set Tebben's salary at $31,336.40. One week later Tebben received a letter from the IDOT indicating his salary would be increased to $35,235.20 and the IDOT intended to compensate him for the difference between his actual salary and the original offer. The department later told Tebben nothing could be done to make up the difference because of the pay freeze on all state employees. Tebben filed the present action seeking declaratory relief, alleging a negligence action against all defendants, and seeks damages amounting to the difference between the $38,001.60 offer and the actual salary of $35,325.20. The district court granted defendants' motion for summary judgment.

HELD: The government has no immunity from breach of contract claims. We do not share the district court's view that the IDOT's alleged breach, failure to pay the $38,001.60 annual salary, was agency action limiting Tebben to a remedy under Iowa Code Chapter 17A. We reverse that part of the district court's decision granting summary judgment in favor of IDOT.

Vlotho v. Hardin County, 509 N.W.2d 350 (Iowa 1993)

Public Employees

Vlotho is a former county engineer who was fired for the unauthorized destruction of a historic bridge. Vlotho brought a wrongful termination and defamation claim against the county and the county asserted a counterclaim for damages sustained when the bridge was torn down. Following a bench trial, the district court found against Vlotho and for the county. The district court found Vlotho acted outside the performance of his "duties," so he was not entitled to indemnity pursuant to § 613A.8.

HELD: Iowa Code § 613A.8 requires a governing body to defend, save harmless, and indemnify an employee against any tort arising out of an alleged act or omission occurring within the scope of the employee's employment or duties. The obligation to indemnify means the county's right to recover damages because of Vlotho's actions is eliminated if Vlotho was acting within the

scope of his employment or duties. By ordering the bridge demolished, Vlotho was acting outside the scope of his official <u>duties</u>. However, a finding of fact is needed to determine if Vlotho acted outside the scope of his <u>employment</u> as well before the trial court can determine if Vlotho is entitled to indemnity on the tort claim for damages by the county. Remanded.

<u>Polk County Conference Board v. Sarcone</u>, 516 N.W.2d 817 (Iowa 1994)

<u>County Government</u>

In 1991, the Polk County Conference Board approved the hiring of special counsel to represent the county assessor and board of review in tax assessment appeal cases. John Sarcone, Polk County Attorney, indicated to the Board that as County Attorney he should chose the special counsel. Nevertheless, the Board hired William Lillis to act as special counsel for assessment appeals. Thereafter, Montgomery Ward filed an assessment appeal, and attorney Lillis filed an answer. Sarcone also filed an answer on behalf of the Board. Sarcone never approved payment of any part of Lillis' bills. The Board brought this declaratory judgment action alleging that Sarcone interfered with the Board's power to employ and utilize special counsel. The Board also asked the court to declare that the County Attorney must approve a bill for Lillis' services.

HELD: Under Iowa Code § 441.41, "the Conference Board may employe special counsel." This language is dispositive of this issue and gives the hiring authority solely to the Conference Board. Because Iowa Code § 441.41 provides that the county attorney represent the assessor in all litigation dealing with assessments, and because the special counsel's role is to assist the county attorney, the legislature intended that the county attorney have control over the use and activities of the special counsel. The Board is liable for the fees incurred by the special counsel. Should the county attorney arbitrarily refuse to authorize payment of special counsel, a court of equity could appoint a special official to replace the county attorney to give that order.

<u>Rinard v. Polk County</u>, 516 N.W.2d 822 (Iowa 1994)

<u>Public Employment</u>

Plaintiff unsuccessfully applied for the position of Deputy Sheriff in Polk County on four separate occasions beginning in 1986. Plaintiff's name was never placed on the list of eligible candidates. Plaintiff claims the reason he was not placed on the list was because of pressure exerted by the Sheriff. Plaintiff filed this suit under 42 U.S.C. § 1983, claiming due process violations and breach of implied contract. Defendant's motion for summary judgment was granted by the district court

because the court concluded that a protected property interest had not been infringed on.

HELD: Affirmed. The statutes governing civil service for deputy sheriffs do not create entitlement to employment, and presence on the list of eligible candidates for civil service employment is not a protected property interest. Thus, plaintiff has no due process property interest in connection with placement on the certification list.

Mastbergen v. City of Sheldon, 515 N.W.2d 3 (Iowa 1994)

Police

Mastbergen owns a jewelry store which has a silent alarm system monitored by the police department. During a robbery of the store, the police responded and after some contact with the robbers, they got away.

Mastbergen brought this action for damages against the City, alleging that the City was negligent in failing to prepare an adequate plan to respond to the merchant's silent alarms. The jury returned a verdict for Mastbergen. The district court entered judgment notwithstanding the verdict, concluding as a matter of law that the City owed Mastbergen no special duty beyond the general duty to investigate a crime.

On appeal, Mastbergen argues that the payment of a fee created a special relationship between the City and the merchants with silent alarms, from which arose a duty of "professional response."

HELD: We affirm. The police promptly investigated Mastbergen's activated silent alarm and thus fulfilled their general duty of protection. No special relationship existed between Mastbergen and City law enforcement creating some more particularized duty.

Borschel v. City of Perry, 512 N.W.2d 565 (Iowa 1994)

Public Employees

Borschel was hired as a police officer for the City of Perry in 1987. The employment agreement was oral and for an unspecified term. In 1991, Borschel was arrested and charged with sexual abuse. Borschel was suspended with pay pending further investigation. Prior to termination of Borschel's employment, the police chief and mayor read depositions from the allegedly abused child and mother. Borschel was then fired.

Two months later a jury found Borschel not guilty of sexual abuse. At a hearing before the City Council it upheld the

termination. The district court entered summary judgment for the City.

On appeal, Borschel argues the constitutional protection of due process coupled with a statutory presumption of innocence express a clear public policy prohibiting discharge of employees merely because criminal charges are filed against them.

HELD: Affirmed. The due process requirement is satisfied where the employee is notified of the reasons for discharge and furnished the opportunity of a name clearing hearing. A post-termination hearing is sufficient.

Hicks v. Franklin County Auditor, 514 N.W.2d 431 (Iowa 1994)

Notice of Improvements

Landowners in drainage district brought action against county auditor, board of supervisors, and drainage district board of trustees. The district court held that: (1) county substantially complied with statutory notice requirement; (2) proposed project was "repair" rather than "improvement"; and (3) landowners failed to prove their equitable claims.

HELD: Affirmed. When notice of a proposed drainage ditch repair is required, it is sufficient notice if the county board of supervisors substantially complies to the extent necessary to assure that the reasonable objectives of the statute are met. Here, the auditor substantially complied with the published notice of the proposed ditch repair and mailed notice to 41 "primary" landowners as shown by the transfer books.

The facts and circumstances surrounding this project support a finding that the work was a "repair," which may include any action necessary to restore or maintain efficiency or capacity of the drainage district or even to prolong its useful life. Iowa Code § 468.126(1)(A). On the other hand, an "improvement" goes beyond maintenance or restoration. This project was clearly not intended as a substitute for the original ditch and drainage plan. Although this project increased the waterway capacity beyond that which existed for the original improvements, no additional lands are drained by the project and this work was substantially connected to the original improvement and not merely a substitute for the original plan or design.

IBP Inc. v. City of Council Bluffs, 511 N.W.2d 413 (Iowa Ct. App. 1993)

Governmental Functions

In 1986, before reopening a meat packing plant in Council Bluffs, IBP and Council Bluffs entered into an agreement providing that the City would treat the plant's waste water at reduced rates.

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Pertinent language from contract: "Surcharge rates and base rates shall be fixed for three years, then the rates established herein are subject to increase at the same percentage rate of increase as all other users." After a rate increase, IBP sued the City.

HELD: To the extent that the percentage increase of IBP's rates were much greater than the general users' rates, Council Bluffs violated the clear language of the 1986 agreement.

Council Bluffs asserts that the 1986 agreement was unenforceable because the discounted rates violate Iowa Code § 388.6 (1991) which states: "A city utility or a combined utility system may not provide use or service at a discriminatory rate, except to the city or its agencies, as provided in § 384.91". However, Iowa Code § 384.84 authorizes the governing body of a city utility to set rates and to enter into contracts for utility services with "persons whose type or quantity of use or service is unusual." Iowa Code § 384.84(2)(a)(b). Council Bluffs, therefore, had the authority to enter into the agreement with IBP.

Council Bluffs next asserts that the rate limitation cannot be enforced because Council Bluffs cannot bind itself in the future performance of its governmental functions. However, owning and operating a public utility is a corporate, not governmental function. The power of cities to fix utility rates is statutory, and the legislature may allow municipalities to enter into contracts which would bind future city councils.

Moyer v. City of Des Moines, 505 N.W.2d 191 (Iowa 1993)

Discretionary Functions

Moyer, a residential developer, sought money damages from the City and City Council members for denying approval of a site plan for a condominium development. The district court dismissed this claim based on Iowa Code §670.4(3) which grants council members immunity when performing discretionary functions. Moyer also sought a writ of mandamus to compel site plan approval. The district court granted a motion for summary judgment denying the writ on the ground that the actions of the City were discretionary and could not be compelled via mandamus.

HELD: Summary judgment denying the writ was inappropriate because no affidavits were filed to support the discretionary nature of the council's approval. The district court's ruling on the writ of mandamus issue is vacated and the case was remanded for an order dismissing the issue as moot. This issue was moot by the date of the court's ruling because Moyer's option on the land had expired. The motion to dismiss was improperly granted. The grounds for a motion to dismiss must be based on the pleadings. The pleadings did not establish that

approval of the site plan was a discretionary action. In light of Moyer's allegations of bad faith and willful conduct, dismissal of the money damages claim was error.

Des Moines Metropolitan Area Solid Waste Agency v. Branstad, 504 N.W.2d 888 (Iowa 1993)

Legislature

Solid waste agencies brought declaratory judgment action, alleging the transfer of money from a groundwater fund to the State's general fund was illegal. Iowa Code §455E.11(1) created a groundwater protection fund. Plaintiffs alleged the language of this statute restricts the use of groundwater protection fund to environmental uses. The plaintiffs further alleged the fund was a special fund from which the legislature had no authority to transfer funds. The district court sustained the defendant's motion for summary judgment. The court found the legislature had the power and authority to make the transfer.

HELD: Affirmed district court's grant of summary judgment to the defendants. Legislature possessed the authority to transfer the funds to the general fund.

INDEMNITY

Len Strand

Vlotho v. Hardin County, 509 N.W.2d 350 (Iowa 1993)

Public Employees

Vlotho, the county engineer, ordered the destruction and removal of a historic bridge--allegedly because it was dangerous. While bridge removal and replacement was within the scope of Vlotho's duties, he had not received approval from the board of supervisors to remove this particular bridge. Indeed, he instructed his staff to keep the removal quiet. Removal of the historic bridge violated a federal funds agreement between the county and the federal government, an agreement that Vlotho himself had signed several years earlier.

The board terminated Vlotho's employment due to the bridge incident. Vlotho sued for wrongful termination and defamation. The county responded with a counterclaim for the value of the bridge and punitive damages. Vlotho argued that the county had no right to damages because, as his employer, it was required to indemnify him from all liability arising out of his employment pursuant to Iowa Code § 613A.8.

The district court entered judgment for the county on both Vlotho's claims and the county's counterclaim. The court

awarded damages to the county in the amount of $115,600. On appeal, Vlotho relied on his purported right of indemnification under § 613A.8.

HELD: Remanded for further consideration. Section 613A.8's indemnification right arises only if the employee was acting within the scope of the employee's "employment or duties." The district court correctly found that unauthorized destruction of a bridge was not an act within the scope of Vlotho's duties. The district court made no finding, however, as to whether Vlotho's conduct was within the scope of his employment. Although the conduct was not within the scope of Vlotho's duties, it possibly was within the broader scope of his employment. The destruction of dangerous bridges was within the general scope of Vlotho's employment as county engineer. However, Vlotho's unilateral action exceeded his authority, violated past practices and caused the county to be in breach of an agreement with the federal government. The district court must make fact findings as to whether Vlotho acted within the scope of his employment.

INSURANCE

Len Strand

Employers Reinsurance Corp. v. Mutual Medical Plans, Inc., 504 N.W.2d 885 (Iowa 1993)

Coverage

Beaty and Kelly are insurance agents in Burlington. Burlington and Des Moines County created a self-funded health care plan with Beaty's and Kelly's assistance. The city and county retained Mutual Medical to be the third-party administrator (TPA). Beaty and Kelly later formed Employee Benefits Systems (EBS) to also serve as a TPA. When complaints from employees about the timeliness and adequacy of Mutual Medical's performance of its obligations as TPA arose, Beaty and Kelly met with Mutual Medical. Beaty and Kelly later recommended to the city and county that it not renew Mutual Medical's contract. Beaty and Kelly also offered EBS as a substitute. City and county terminated Mutual Medical and contracted with EBS. Mutual Medial sued Beaty and Kelly for tortious interference with contract, and alleged that they "wrongfully induced the board to terminate and breach the contractual relationship between Mutual Medical and the group, and to shift this business to EBS."

Employers Reinsurance insured Beaty with a "insurance agents and brokers professional liability insurance policy." The policy promises to pay on behalf of Beaty "such loss ... sustained by the insured by reason of liability imposed by law for damages caused by any negligent, act or omission of the insured."

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Employers Reinsurance commenced a declaratory judgment action in which it contested coverage and its duty to defend.

HELD: Employers Reinsurance has no coverage and, therefore, no duty to defend. Mutual Medical has not alleged that Beaty committed a negligent act, an error, or an omission. Mutual Medical alleges deliberate acts, which are not covered.

AMCO Ins. Co. v. Rossman, 518 N.W.2d 333 (Iowa 1994)

Coverage

AMCO issued a homeowner's policy to the Atkinsons. The policy covered loss caused by fire and covered the Atkinsons and any relative of either of them if that relative was a "resident" of the Atkinson household. Defendant Steve Rossman had lived with his parents off and on since 1985 and permanently since 1990. In May 1991, his parents' home was damaged by a fire. This forced Rossman to stay with his sister, Ms. Atkinson. He brought with him all of his clothing and personal effects, except for some furniture that he stored. While staying at his sister's residence, Rossman had complete access to and from the house, ate occasional meals with his sister's family, and did minor repairs and baby-sitting for the Atkinsons. He maintained his own post office box for a mailing address.

On July 26, 1991, the Atkinson house was damaged by a fire. Rossman's clothes and personal effects were destroyed. He moved back in with his parents for a short time, but ultimately purchased his own residence. He sought coverage for his loss under the Atkinsons' AMCO policy, claiming that he was covered as a "resident" of the Atkinson household at the time of the fire. AMCO denied coverage.

AMCO filed a declaratory judgment action to determine the coverage issue. The action was tried to a jury, resulting in a judgment for AMCO that no coverage existed. Rossman appealed, challenging the court's jury instruction that defined "resident."

HELD: Affirmed. This is the first time that the Iowa Supreme Court has been asked to construe the term "resident" in an insurance policy. Construction of an insurance policy is a matter for the court. Likewise, interpretation of an insurance policy is a matter for the court unless it depends upon extrinsic evidence. When words are undefined in a policy, the court must give them the meaning that a reasonable person would give. The district court's jury instruction was based on cases from other jurisdictions that establish a three-part test for determining if a person is a "resident" of a household: (1) whether the person is living under the same roof, (2) whether there is a close, intimate and informal relationship, and (3) whether the

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intended duration of the stay is likely to be substantial if it is consistent with the informality of the relationship, and from which it is reasonable to conclude that the parties would consider the relationship in contracting about such matters as insurance or in their conduct and reliance thereon. These criteria are sound and the district court properly applied them in its instructions to the jury.

Loyd v. Federal Kemper Life Assurance Co., 518 N.W.2d 374 (Iowa 1994)

Coverage

Billy Loyd purchased life insurance through Federal Kemper. His wife, Barbara, was beneficiary. The policy provided a 31 day grace period for premium payments. There was a premium payment due August 1, 1991. While Billy had authorized Federal Kemper to make automatic withdrawals from his bank account to pay the premium, Barbara stopped payment on the premium due August 1, 1991, because Billy had obtained insurance from another source. She stopped the payment on August 9, 1991.

Thirty-one days after August 1, 1991, was Sunday, September 1, 1994. Billy died on Monday, September 2, 1991. Barbara requested death benefits under the policy. Federal Kemper denied coverage, stating that the policy had lapsed. Barbara sued, and the parties submitted the claim to the district court on a set of stipulated facts. The court ruled that there was no coverage under the policy on September 2, 1991. Barbara appealed, claiming that a grace period cannot end on a Sunday.

HELD: Affirmed. The policy is silent as to any "Sunday rule." It provides that if the insured dies during the 31 day grace period, the unpaid premium will be deducted from the death benefit. This language supplies automatic coverage for 31 days after the premium due date. Contrary to Barbara's position, the policy is not ambiguous. It unambiguously sets a 31 day grace period, "no more, no less." Barbara also argues that it is part of the common law of Iowa to apply the time computation rule contained in Iowa Code § 4.1(34) to the computation of time in private contracts. This rule states that when the last day of a period falls on a Sunday, the period is extended to include Monday. This rule, however, applies only to statutes. While parties may choose to adopt section 4.1(34) in their private contracts, this rule does not automatically apply to all private contracts. Billy died after the unambiguous grace period expired. His death was not compensable under the policy.

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Gracey v. Heritage Mutual Ins. Co., 518 N.W.2d 372 (Iowa 1994)

Coverage

Eleven-year-old Justin Putnam was using his aunt's and uncle's riding mower to cut his grandparents' grass. He accidently ran over the foot of a friend, twelve-year-old James Belt. James' mother, Connie Gracey, sued Justin and his parents. Heritage, Justin's parents' homeowner's insurer, refused to provide a defense. A consent judgment was entered in the amount of $100,000 with Justin's parents assigning to Gracey their claim against Heritage.

Gracey then sued Heritage on this coverage claim. Justin was an insured under the policy. The policy excluded coverage for injuries arising from the use of "vehicles" or "motorized land conveyances" except for those "not subject to motor vehicle registration" which are used "to service an insured's residence." The district court, in reliance on this exclusion, decided on stipulated facts that the Heritage policy did not cover James' injuries. Gracey appealed, claiming that the district court erred in finding that a riding mower was a "motorized land conveyance."

HELD: Affirmed. Interpretation and construction of the motorized land conveyance exclusion is a matter for the court unless the parties offer extrinsic evidence. When terms are not defined in a policy they must be given their ordinary meanings. A riding mower is motorized and is used on land. While its purpose may be to cut grass, it transports or conveys its operator while doing so. A riding mower thus is a "motorized land conveyance" under the terms of the policy and coverage was properly denied because it was not being used to service the insured's residence.

Ferguson v. Allied Mut. Ins. Co., 512 N.W.2d 296 (Iowa 1994)

Coverage

Barnhill Associates, Inc., (Barnhill) advanced funds to Hays for Hays to invest in the hog market. Hays was to purchase forty feeder pigs, fatten them, sell them, and pay the proceeds of the sale back to Barnhill. Hays arranged with Ferguson to care for the hogs. When Barnhill requested that Hays sell the hogs, Barnhill discovered that there were no hogs to sell. Hays could not account for the loss.

Barnhill had obtained a fiduciary responsibility policy from Aetna to cover its investment with Hays. Further, Ferguson had a policy issued by Allied which covered farm liability. Aetna paid Barnhill $140,000 under its fiduciary responsibility policy and then, as Barnhill's subrogor, sued Hays and Ferguson for

negligence and fraud. The district court found that Hays and Ferguson were parties to a joint venture and granted summary judgment for Aetna on its claims against Hayes. The court, however, denied summary judgment for Aetna on its claims against Ferguson.

Ferguson then filed a declaratory judgment action against Aetna and Allied, seeking a declaration that his Allied farm liability policy would cover any judgment that Aetna may be able to obtain against him. Aetna cross-claimed against Allied, also seeking a declaration that its claim against Ferguson was covered by the Allied farm liability policy.

Allied moved for summary judgment on Ferguson's and Aetna's claims in the declaratory judgment case. The district court granted partial summary judgment for Allied on these claims, holding (1) that the Allied farm liability policy covered only losses to "tangible" property, while Barnhill's loss was one of intangible property, (2) that a provision of the Allied policy excluded coverage for damage to property "in the care of the insured" and (3) that Ferguson's Allied policy did not cover Hays' liability because Hays was not a named insured. Ferguson and Allied appealed from these holdings.

HELD: Affirmed. The policy unambiguously excluded coverage for property damage to property "in the care of" the insured. An endorsement that specifically covered the "incidental activity" of a "custom livestock feeding operation" did not nullify this express coverage exclusion. Because of this exclusion, the Allied policy does not, as a matter of law, cover Aetna's subrogation interest. As a result, there is no need to address the district court's other holdings.

Jensen v. Jefferson County Mutual Ins. Assoc., 510 N.W.2d 870 (Iowa 1994)

Coverage

Jensen was the only named insured on a homeowner's policy issued by the defendant. She lived in the home with her husband, Ehrmann. Jensen asked Ehrmann to move out after the couple experienced some marital difficulties. She left Ehrmann alone at the home to remove his belongings. While she was away, Ehrmann set the home on fire. Jensen sought benefits under the policy. The policy excluded coverage for loss "if **you** create or know of a condition that increases the chance of loss arising from a covered peril." The policy defined "you" as "the Insured named in the Declarations and spouse if living in the same household."

HELD: Jensen is entitled to benefits under the policy. Iowa follows the contract interpretation rule when

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innocent, co-insured spouses seek coverage. Here, the policy defined "you" as the Insured (Jensen) "and" (not "or") her spouse. Plugging this definition into the relevant exclusion renders the exclusion applicable only if both Jensen and her spouse created the condition. Because only the spouse created the condition, the exclusion does not apply and Jensen is entitled to coverage.

Huebner v. MSI Insurance Co., 506 N.W.2d 438 (Iowa 1993)

Coverage

A fourteen year old boy was struck and severely injured by a vehicle as he walked along a highway. He and his parents settled with the driver of the vehicle for $100,000, the limits of the driver's liability policy. They then sought underinsured motorist coverage under a policy issued to the employer of the victim's father. The father, who used his personal vehicle as part of his employment, was listed as an additional "interest hereinafter named as an insured" on his employer's automobile insurance policy. Item 1 of the policy, however, listed only the employer as the "named insured."

The policy stated that three classes of persons were insured under the policy. The only relevant class, under the facts presented, was "You or any family member." The policy defined "you" as the named insured in Item 1 of the policy. As such, the employer (rather than the father) was "you" for coverage purposes.

The plaintiffs argued that because the "you" was a corporation, and because a corporation cannot have "family members," the only way to give effect to the phrase "any family member" is to extend coverage to the corporation's employees and their family members.

HELD: Summary judgment for the insurer affirmed. Iowa does not follow authorities from other jurisdictions indicating that a the term "you or any family member" extends coverage to employees when the "you" is a corporation. Further, the fact that the father was named as an additional "interest hereinafter named as an insured" does not extend coverage to the father's family members. Only the father was named as an "interest hereinafter named." Family coverage was not contemplated.

Hasbrouck v. St. Paul Fire and Marine Casualty Co., 511 N.W.2d 364 (Iowa 1993)

Coverage

St. Paul issued a claims-made policy to Dr. Jarasviroj. Coverage began on September 23, 1985, and was renewed semiannually until September 23, 1990. In October 1990, St. Paul mailed Jarasviroj a notice of cancellation for nonpayment of premium. The notice stated that the policy would be canceled on October 23, 1990, unless the premium was paid by that date. The premium was not paid. On November 15, 1990, St. Paul mailed Jarasviroj a letter offering "reporting endorsement" coverage which would cover claims made after the cancellation but based on acts occurring prior to the cancellation. Jarasviroj did not respond.

On August 31, 1990, before the cancellation date, Hasbrouck filed a malpractice action against Jarasviroj. Rather than reporting this claim to St. Paul, Jarasviroj simply retained counsel who filed an answer to the lawsuit. It was not until December 1990, after the cancellation, that Jarasviroj and his counsel wrote St. Paul to inform it of the claim and request coverage. St. Paul denied coverage. The district court granted summary judgment for St. Paul, holding as a matter of law that there was no coverage for the claim because it was not reported during the policy period.

HELD: Affirmed. A claims made policy covers only those claims made during the policy period. The policy stated that a claim is made "on the date you first report an incident or injury to us or our agent." This language is not ambiguous. This requirement is not satisfied, on a "constructive notice" theory, by the plaintiff's mere act of filing a claim against Jarasviroj with the clerk of court.

Clark-Peterson Co. v. Independent Insurance Assocs. Ltd., 514 N.W.2d 912 (Iowa 1994)

Damages for Denial of Coverage

Clark-Peterson obtained a liability insurance policy from Cincinnati Insurance Co. through Independent Insurance Associates (IIA). Clark-Peterson claims it was told that the policy would cover employment discrimination claims. Clark-Peterson was sued by a former employee alleging wrongful discharge based on a disability. Cincinnati denied coverage, causing Clark-Peterson to obtain private counsel. Cincinnati then decided to provide a defense under a reservation of rights. The discrimination case ultimately was settled, with Cincinnati and Clark-Peterson each agreeing initially to provide half of the settlement amount. Both

parties reserved the right to litigate the coverage issue at the conclusion of the settlement.

Clark-Peterson and its owners then filed a declaratory judgment action, seeking a declaration that it was entitled to coverage under the policy and seeking reimbursement for the one-half share that it contributed to the settlement. The action also contained a host of tort and contract claims based on Cincinnati's refusal to provide coverage and alleged representations at the time the policy was sold. The declaratory judgment action was tried first, with the district court and Supreme Court both agreeing that the policy provided coverage under the doctrine of reasonable expectations. Cincinnati then reimbursed Clark-Peterson for its half of the settlement amount. The plaintiffs then sought trial on its remaining tort and contract claims against Cincinnati and the agent. The district court granted summary judgment for the defendants on these claims. Clark-Peterson appealed.

HELD: Affirmed as modified. Most of Clark-Peterson's remaining claims are based on alleged promises or representations, at the time the policy was sold, that the policy provided coverage for employment discrimination claims. While Clark-Peterson initially denied such coverage, it ultimately provided the coverage and paid the entire settlement amount once the Supreme Court found that the coverage existed under the reasonable expectations doctrine. Clark-Peterson, then, has not been injured because Cincinnati did, in fact, provide the coverage that it allegedly promised.

Clark-Peterson and its owners also assert claims for emotional distress. As a matter of law, Cincinnati's conduct in denying coverage clearly did not reach the extreme level of outrageousness necessary to support an independent emotional distress claim. Nor can emotional distress damages be recovered for in an ordinary breach of contract action. Such damages are available only in unique circumstances in which the breach is of such a nature that emotional distress is a particularly likely result. The facts here do not fall into this exception.

Clark-Peterson is entitled to certain attorney fees arising from the initial, discrimination action. It is entitled to recover its attorney fee expense for the period of time in which Cincinnati refused to provide a defense. Clark-Peterson is not, however, entitled to reimbursement for its attorney fees arising from the declaratory judgment action. Such fees are recoverable by the insured only if the denial of coverage is in bad faith or if the insurer is "stubbornly litigious." Neither situation exists here.

Finally, Clark-Peterson is entitled to proceed to trial on certain of its claims against the agent. There is an issue of

fact as to whether the agent erred in failing to obtain requested coverage. Clark-Peterson would be entitled to recover from the agent any attorney fees from the declaratory judgment action caused by the agent's failure to obtain proper, requested coverage. A trial is required on this claim.

<u>West Bend Mutual Insurance Co. v. Iowa Iron Works, Inc.</u>, 503 N.W.2d 596 (Iowa 1993)

<u>Duty to Defend</u>

Iowa Iron Works' operation of a steel foundry requires it to replace the sand it uses in the manufacturing process with new sand from time to time. A quarry owner asked Iowa Iron to deliver its used sand to his property for use in filling and landscaping an old quarry. Iowa Iron Works did so. DNR sued the quarry owner and Iowa Iron Works for depositing a solid waste at a place other than an approved sanitary disposal project. Iowa Iron Works tendered defense to West Bend, who had issued a liability insurance policy to Iowa Iron Works. West Bend commenced a declaratory judgment action on the issues of duty to defend and coverage. District court declined to decide the coverage question until the DNR litigation concluded. District court determined, however, that West Bend had a duty to defend. West Bend obtained permission to appeal this interlocutory ruling.

West Bend excludes coverage for claims resulting from "discharge, disbursal, release or escape of pollutants." The policy defines "pollutants" as

> (a) any solid, liquid, gaseous or thermal irritant or contaminant, including smoke, vapor, soot, fumes, acids, alkalis, chemicals and waste. Waste includes materials to be recycled, reconditioned or reclaimed.

DNR posited its action on a violation of section 455B.307, Code of Iowa, which proscribes the depositing of a solid waste at any place other than a sanitary disposal project. Section 455B.301(15) defines solid waste as follows:

> Garbage, refuse, rubbish, and other similar discarded solid or semi-solid materials, including but not limited to such materials resulting from industrial, commercial, agricultural, and domestic activities. ... However, this division does not prohibit the use of dirt, stone, brick, or similar inorganic material for fill, landscaping, excavation or grading

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> **at places other than a sanitary disposal. <u>Solid waste does not include hazardous waste as defined in section 455B.411</u>. ...**

(emphasis added) The Iowa Code defines hazardous waste in section 455B.411(4)(1) as follows:

> waste .... that, because of its quantity, concentration, biological degradation, leeching from precipitation, or physical, chemical, or infectious characteristics, has either of the following effects:
>
> (1) Causes, or significantly contributes to an increase in mortality or an increase in serious irreversible, or incapacitating reversible, illness.
>
> (2) Poses a substantial present or potential hazard to human health or the environment when improperly treated, stored, transported, or disposed of, or otherwise managed. "Hazardous waste" may include but is not limited to wastes that are toxic, corrosive or flammable or irritants, strong sensitizers or explosives.

HELD: West Bend has a duty to defend. DNR is proceeding against Iowa Iron Works for its handling of solid waste, not hazardous waste. Given the statutory definitions of solid waste and hazardous waste and the policy's definition of pollutants, it is at least possible that the liability asserted by DNR against Iowa Iron Works does not fit entirely within the exclusion.

West Bend also argued that Iowa Iron Works acted intentionally in transferring its used sand to the quarry. Iowa Iron Works' "depositing of the sand, although intentional, is an occurrence ... unless Iowa Iron intended 'some injury.'" West Bend offered no evidence that Iowa Iron Works intended to injure anything or anyone by hauling used sand to the quarry.

Essex Insurance Co. v. The Fieldhouse, Inc., 506 N.W.2d 772 (Iowa 1993)

Duty to Defend

Insurer sued the Fieldhouse, a restaurant and lounge, for a declaration that it had no duty to defend or indemnify under a liability policy. The policy included an exclusion for "bodily injury or property damage arising out of assault and battery or out of any act or omission in connection with the prevention or suppression of such acts, whether caused by or at the instigation or direction of the insured, his employees, patrons or any other person." An endorsement also excluded "claims, accusations or charges of negligent hiring, placement, training or supervision arising from any of the foregoing....."

The dispute arose from an incident at the Fieldhouse in which one patron caused injury to another by striking her with a glass beer pitcher. The injured patron asserted two types of claims against the Fieldhouse, a dram shop liability claim (which was not relevant to the coverage dispute) and various negligence claims. The insurer denied any duty to defend or indemnify on grounds that the victim's injuries arose from assault and battery and thus fell within the policy's exclusions. The Fieldhouse appealed from a grant of summary judgment for the insurer.

HELD: Summary judgment affirmed. The plaintiff's claims, though founded on allegations of negligence, arose out of an assault and battery and thus were excluded by the policy. Further, the exclusions were not ambiguous. The Court also rejected the Fieldhouse's contention that unsigned policy endorsements are not enforceable. As a result, the insurer was held to have neither a duty to defend nor a duty to indemnify.

Jalas v. State Farm Fire & Casualty Co., 505 N.W.2d 811 (Iowa 1993)

Excess

Excess or "umbrella" policies are not required by chapter 516A to carry uninsured or underinsured motor vehicle coverage. Iowa statutory provisions that define or use the terms "automobile liability" or "motor vehicle liability" insurance policies apply, pursuant to section 321A.21(7) to the portions of such policies that provide the minimum financial responsibility limits.

Stahl v. Preston Mutual Ins. Assoc., 517 N.W.2d 201 (Iowa 1994)

Limitations of Actions

Allen Stahl and his wife Gloria owned a homeowner's policy issued by Preston. Their home was destroyed by fire in 1990. Because their marriage was ending, they each filed separate claims for the fire loss. Preston approved Gloria's claim, totalling about 50% of the policy limits, but denied Allen's claim because he allegedly had misrepresented material facts relating to the extent of loss. A provision of the policy stated that the entire policy is void if an insured person "has intentionally concealed or misrepresented any material fact or circumstance relating to this insurance."

Allen's attorney demanded a further explanation from Preston. On September 28, 1990, Preston submitted a list of items which were not found in the debris of the fire but for which Allen had claimed loss. No further contact took place for over one year.

In February 1992 Allen filed suit against Preston, alleging breach of contract and bad faith. Preston moved for summary judgment in reliance on a one-year limitation of action clause contained in the policy. Allen resisted, arguing (1) that a claim of bad faith denial of benefits is not an action on the policy and thus is not barred by the policy's limitations clause and (2) that Preston was estopped from relying on the policy's limitations clause because it already had declared the policy void. The district court granted Preston's motion for summary judgment. Allen appealed.

HELD: Affirmed. Iowa law allows insurance policies to contain terms that shorten the general statutes of limitations for claims. There is a split of authority from other jurisdictions as to whether bad faith claims are subject to such a contractual limitations period. There also is an important distinction between bad faith claims which are merely disguised attempts to recover on the policy and bad faith claims based on conduct other than the mere denial of coverage. In this case, Preston's alleged bad faith lies only in its denial of coverage. Allen's bad faith action is simply a disguised effort to determine whether Preston's denial of coverage was proper or improper. It is thus an action "on this policy" and is subject to the policy's limitations clause.

NOTE: The Court also rejected Allen's claim that Preston was estopped from relying on the limitations clause, holding that none of the required elements of estoppel were present.

Douglass v. American Family Mut. Ins. Co., 508 N.W.2d 665 (Iowa 1993)

Limitations of Actions

Plaintiff was injured in 1984 when her vehicle was struck by an uninsured driver. In 1991, after her collection efforts against this driver failed, she sued her insurer for uninsured motorist coverage. Her policy included a provisions stating that the insurer may not "be sued under the Uninsured Motorist coverage on any claim that is barred by the tort statute of limitations." The insurer denied coverage based on this contractual limitation.

HELD: The district court correctly granted summary judgment for the insurer. The policy provision effectively reduced the statutory ten year period for actions on written contracts to two years. General contract law principles permit the parties to agree to such reductions. The Court rejected two arguments that the plaintiff asserted in an effort to depart from these principles. First, the plaintiff claimed that the two year limitation was inappropriate because more than two years passed before the plaintiff even discovered that the tortfeasor was judgment proof. In rejecting this argument, the Court noted that exhaustion of all remedies against the tortfeasor is not a prerequisite to filing suit for uninsured motorist benefits. Thus, the plaintiff could sued the insurer before determining that the tortfeasor was judgment proof. Second, the plaintiff argued that no statute authorizes insurers to include reduced limitations clauses in their policies. The Court rejected this argument by reference to a series of its prior decisions recognizing the right of insurers to limit the time for claims.

Farm & City Ins. Co. v. Anderson, 509 N.W.2d 487 (Iowa 1993)

Newly Acquired Vehicles

Anderson had an automobile insurance policy with Farm and City. The policy covered Anderson's existing vehicle and included a clause covering newly acquired vehicles "if you ask us to insure it within 30 days after you became the owner." Anderson took title to a different vehicle on April 16, 1992. On May 16, 1992, Anderson was involved in a collision while driving the newly acquired vehicle. He had not notified the insurer of this new acquisition or requested coverage. The insurer denied coverage on grounds that Anderson had failed to comply with the newly acquired vehicle clause's notice requirement.

HELD: The district court erred in granting summary judgment for Anderson and holding that the policy automatically covered newly acquired vehicles for thirty days, regardless of notice. While the district court followed the

majority rule, no compelling justification exists for the rule. The particular policy language at issue in this case clearly and unambiguously required a request for coverage within thirty days as a condition of such coverage. Therefore, there is no basis for Anderson to contend that this coverage was automatic. The "clear language of the policy dictates this result."

Motor Club of Iowa Ins. Co. v. Iowa Mutual Ins. Co., 508 N.W.2d 634 (Iowa 1993)

"Other Insurance" Clauses

The insured was a passenger who sustained injuries while riding in an underinsured motor vehicle that he did not own and that was not listed as an insured vehicle in any policy in which the insured had an interest. After exhausting the liability coverage of the vehicle owner's insurance, the insured sought underinsured benefits from two policies in which he had an interest. One policy covered his own vehicle while the other covered his father's vehicles. The insured was a member of his father's household and thus was covered under his father's policy.

The two insurers reached an agreement with the insured by which they each would pay $45,000 to him and then seek a declaratory judgment as to which insurer would face ultimate liability for the total settlement of $90,000. The underinsured limits of each policy exceeded $90,000. Each insurer argued that the "other insurance" clause in its policy rendered its coverage excess only, meaning that it would have to pay only to the extent that the "other insurance" included limits below $90,000.

The district court found the Iowa Mutual policy unambiguous but found the Motor Club policy's "other insurance" clause ambiguous as to whether it provided only excess coverage under the circumstances. The district court construed the ambiguity against the Motor Club and held that the Motor Club was liable for the entire $90,000 underinsured settlement. The Motor Club appealed.

HELD: Motor Club's policy is not ambiguous. As a result, both policies provide that their coverage is merely excess in nature when other insurance covered the loss. When "mutually repugnant" excess clauses are at issue, each insurer is liable for a pro rata share of the liability. The liability is allocated based on the combined underinsured limits of the two policies. Because the Motor Club policy had limits of $300,000 while the Iowa Mutual policy limits were $100,000, the Motor Club was responsible for 75% of the $90,000 settlement.

Chia v. Irons, 509 N.W.2d 492 (Iowa 1993)

"Owned-but-not-Insured"

The insured, Chia, was injured in an accident involving the motorcycle he was driving and a vehicle driven by Irons. Chia recovered $20,000 in underinsured motorist coverage under the automobile policy that covered his motorcycle. Chia also sought underinsured coverage under American Family policies that covered two other vehicles that he owned. These American Family policies did not cover the motorcycle. American Family denied coverage in reliance on an "owned but not insured" exclusion.

HELD: The district court properly granted summary judgment for American Family. A line of prior decisions affirms the validity of "owned but not insured" exclusions. A 1991 amendment to Iowa Code § 516A.2 did not overrule these prior cases. The 1991 amendment did not remove language allowing exclusions designed to avoid duplicate benefits and clearly was intended instead to validate antistacking clauses.

Walter v. Kinsey, 518 N.W.2d 370 (Iowa 1994)

"Owned-but-not-Insured"

Justin Walter was seriously injured while riding as a passenger on his father's motorcycle. The motorcycle was struck by an underinsured driver. Justin was insured under a State Farm policy covering the motorcycle, with underinsured limits of $20,000, and under a separate State Farm policy covering his father's automobile, with underinsured limits of $100,000. The parties stipulated that Justin's damages were $145,000. Justin recovered $25,000 from the underinsured driver. Justin and his parents claimed entitlement to underinsured benefits of $20,000 under the motorcycle policy and $100,000 under the automobile policy. State Farm agreed that the motorcycle policy applied but denied coverage under the automobile policy, relying on an "owned-but-not-insured" clause contained in that policy. The district court granted summary judgment for State Farm, finding no right to coverage under the automobile policy. The insureds appealed.

HELD: Affirmed. "Owned-but-not-insured" clauses are valid in Iowa. The insureds' reliance on Veach v. Farmers Ins. Co., 460 N.W.2d 845 (Iowa 1990) is misplaced. Veach found that a "not-owned-but-insured" exclusion was void as against public policy because it caused the insured to forfeit existing coverage under one policy by purchasing insurance that covered a non-owned vehicle. An "owned-but-not-insured" clause causes no such forfeiture of otherwise existing benefits. It thus does not present the public policy concerns that arise with a "not-owned-but-insured" clause.

<u>DeVetter v. Principal Mutual Life Ins. Co.</u>, 516 N.W.2d 792 (Iowa 1994)

<u>Public Policy</u>

Insured sought declaration that a clause of a group disability insurance policy was void as against public policy. The clause provided that disability benefits could accrue retroactively on a date no earlier than six months preceding the date that the insurer is furnished with a written proof of claim. The plaintiff had left his employment in 1980 due to a mental ailment. He did not file a disability claim until 1987. The parties agreed that the policy provided the plaintiff with a maximum of 60 months disability benefits. The issue between the plaintiff and Principal became one of when these benefits accrued. The plaintiff argued that the six month clause was void and that he was entitled to 60 months of benefits beginning in 1980. Principal, relying on the clause, argued that the benefits did not accrue until six months prior to the filing of the claim in 1987.

While a total of six months worth of benefits ultimately would accrue regardless of the start date, the start date was important because the <u>amount</u> of benefits depended on the insured's social security benefits. By 1987, the plaintiff was receiving social security payments in such an amount that the policy benefits would be just $50 per month. From 1980 until 1982, however, the plaintiff received no social security benefits. Thus, if his disability policy benefits arose in 1980, the amount of the policy benefits would be significantly higher.

The district court rejected the plaintiff's public policy arguments and found for Principal. The court of appeals reversed, finding that the six month retroactive clause violated public policy and thus was unenforceable. The Supreme Court granted further review.

HELD: District court affirmed, court of appeals decision vacated. The court of appeals found that the clause would work an unconscionable forfeiture on mentally disabled persons who, due to their ailment, are unable to file their disability claim on a timely basis. The power to strike contractual clauses as contrary to public policy must be exercised only in cases free from doubt. If anything, Iowa's public policy supports the challenged clause. Iowa has a public policy in favor of low cost group disability insurance. This can be provided only through predictable premium and underwriting structures. The clause at issue allows such predictability and applies evenhandedly to all insureds and all claims. Further, Iowa's public policy supports provisions, such as statutes of limitations, that ensure the reliability and availability of evidence. The challenged clause supports this policy by encouraging insureds to present their claims on a timely basis.

NOTE: The Court also rejected an ambiguity argument concerning the six month retroactive clause and noted that federal courts have upheld one-year retroactive limitations on the recovery of social security disability benefits.

Essex Insurance Co. v. The Fieldhouse, Inc., 506 N.W.2d 772 (Iowa 1993)

Reasonable Expectations

Insurer sued the Fieldhouse, a restaurant and lounge, for a declaration that it had no duty to defend or indemnify under a liability policy. The policy included an exclusion for "bodily injury or property damage arising out of assault and battery or out of any act or omission in connection with the prevention or suppression of such acts, whether caused by or at the instigation or direction of the insured, his employees, patrons or any other person." An endorsement also excluded "claims, accusations or charges of negligent hiring, placement, training or supervision arising from any of the foregoing....."

The dispute arose from an incident at the Fieldhouse in which one patron caused injury to another by striking her with a glass beer pitcher. The injured patron asserted two types of claims against the Fieldhouse, a dram shop liability claim (which was not relevant to the coverage dispute) and various negligence claims. The insurer denied any duty to defend or indemnify on grounds that the victim's injuries arose from assault and battery and thus fell within the policy's exclusions. The Fieldhouse appealed from a grant of summary judgment for the insurer.

HELD: The plaintiff's claims, though based on allegations of negligence, arose out of an assault and battery and thus were excluded by the policy. The exclusions were not ambiguous. The reasonable expectations doctrine does not apply when policy exclusions are clear and unambiguous and there is no evidence of other circumstances, such as policy negotiations, that could have caused the insured to form a reasonable expectation of coverage.

Allgood v. Grinnell Mut. Reins. Co., 509 N.W.2d 486 (Iowa 1993)

Subrogation Against Dram Shop Recovery

After a sixteen-year-old boy was struck and killed by an intoxicated, uninsured driver, his estate recovered the $100,000 uninsured motorist limits under his father's Grinnell Mutual automobile policy. The estate then settled a dram shop claim against the tavern in which the driver had been drinking for another $100,000. Upon learning of this second settlement,

Grinnell Mutual sought reimbursement of $66,667, the net amount of the estate's dram shop recovery.

HELD: The district court correctly ordered the requested reimbursement. There is an important distinction between uninsured and underinsured motorist coverage. Uninsured coverage is intended to guarantee a minimum recovery. Underinsured coverage, however, is intended to provide full compensation, at least to the extent of the policy limits. In light of the purpose of uninsured coverage, Grinnell Mutual was entitled to be reimbursed for its uninsured motorist coverage payments to the extent of the insured's net dram shop recovery.

Jalas v. State Farm Fire & Casualty Co., 505 N.W.2d 811 (Iowa 1993)

Uninsured/Underinsured

Excess or "umbrella" policies are not required by chapter 516A to carry uninsured or underinsured motor vehicle coverage. Iowa statutory provisions that define or use the terms "automobile liability" or "motor vehicle liability" insurance policies apply, pursuant to section 321A.21(7) to the portions of such policies that provide the minimum financial responsibility limits.

Wetherbee v. Economy Fire & Cas. Co., 508 N.W.2d 657 (Iowa 1993)

Underinsured

The plaintiff's husband was killed in a 1982 car accident. The plaintiff and her children settled with the other driver for the amount of that driver's policy limits. No estate ever was opened for the husband. Nine years later, in 1991, the plaintiff discovered that she had been the named insured under an automobile insurance policy in effect at the time of the accident. She made a demand on the insurer for underinsured motorist benefits. The insurer refused to pay. The insurer claimed that only the administrator of a decedent's estate has standing to bring a claim for spousal consortium. Since no estate was opened, and since the deadline for opening an estate had long passed, the insurer argued that the plaintiff no longer was "legally entitled to recover damages" from the tortfeasor and thus was not, under Iowa Code § 516A.1, eligible for UIM benefits.

HELD: The district court erred in granting summary judgment for the insurer favor on the claim for UIM coverage. The insurer confused the concept of standing to sue with the concept of entitlement to receive damages. Although an administrator of an estate may be the only person with standing to assert a consortium claim, the surviving spouse is the person who actually receives any damages that are awarded. The only elements

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of a UIM claim are (1) that the insured has suffered damages caused by the fault of an underinsured motorist and (2) that the insured is entitled to receive those damages. The plaintiff is entitled to a trial on the merits of these elements.

The district court did, however, correctly grant summary judgment for the insurer on the bad faith claim, holding that the issue of the plaintiff's entitlement to recover damages was fairly debatable.

Hornick v. Owners Ins. Co., 511 N.W.2d 370 (Iowa 1993)

Underinsured

Estella Hornick was struck by an underinsured motorist while she walked in a parking lot. She was the named insured under an automobile policy, issued by Milwaukee Guardian, covering a vehicle that she owned. Her husband Merrill was the named insured under an automobile policy issued by Owners and covering four vehicles that Merrill owned jointly with Estella. Owners claimed that Estella had no underinsured motorist coverage under Merrill's policy because of an policy exclusion limiting such coverage only to the named insured (Merrill) and "any relative living with [Merrill] who does not own a car." The district court disagreed, finding the exclusion to be invalid, and pro rated the underinsured liability between Milwaukee and Owners. Owners appealed.

HELD: Reversed. The parties appeared to agree that underinsured motorist coverage follows the person, not the vehicle, and thus offers coverage for injury by an underinsured motorist if the insured is in a vehicle, walking on the street or, as one court stated, "on a pogo stick." Thus, the fact that Estella was a pedestrian does not affect her right to underinsured motorist coverage. The Owners policy, however, expressly provided this coverage only to Merrill and to any relative living with him "who does not own a car." This is a form of a "owned but not insured" exclusion. Such exclusions are permissible with regard to underinsured motorist coverage. Because Estella owned a vehicle of her own that was not insured by Owners, she was not entitled to underinsured coverage under the Owners policy. The district court should not have pro rated the underinsured liability between Milwaukee and Owners.

JUDGMENT

Amy Snyder

Mississippi Valley Broadcasting v. Mitchell, 503 N.W.2d 617 (Iowa App. 1993)

Attorney Fees

Where a litigant seeks attorney's fees under Iowa Code Section 91A.8 (1991), it must be shown that the attorney's fees incurred were usual and necessary. If a litigant fails to provide evidence that the fees sought are usual and necessary, it is not an abuse of discretion to deny an award of attorney's fees. Determination of attorney's fees is a matter entrusted to the discretion of the trial court, and an appellate court will reverse for an abuse of discretion only when such discretion was exercised on grounds or for reasons clearly untenable or to an extent clearly unreasonable.

<u>3S Inc., Co. v. Zarek</u>, 504 N.W.2d 153 (Iowa App. 1993)

<u>Attorney Fees</u>

Attorney fees generally are not recoverable as damages in the absence of a statute or a provision in a written contract. In this case, the right to attorney fees is controlled by Iowa Code Section 625.22 which provides in relevant part: "When judgment is recovered upon a written contract containing an agreement to pay an attorney fee, the <u>court</u> shall allow and tax as part of the costs a reasonable attorney's fee to be determined by the court." Iowa trial courts have considerable discretion in awarding attorney fees under a statute. Matters to be considered by the trial court in fixing fees include the time spent, the nature and extent of the service, the amount involved, the difficulty of handling an importance of issues, responsibility assumed, and the results obtained.

<u>In re Marriage of Higgins</u>, 507 N.W.2d 725 (Iowa App. 1993)

<u>Attorney Fees</u>

An award of attorney fees is not a matter of right, but rests within the court's discretion and the parties' financial positions. For purposes of an award of attorney fees on appeal, the appellate court must consider the needs of the party making the request, the ability of the other party to pay, and whether the party making the request was obligated to defend the trial court's decision on appeal.

Hockenberg Equipment v. Hockenberg's E. & S., 510 N.W.2d 153 (Iowa 1993)

Attorney Fees

After a series of commercial transformations, two groups emerged out of the old Hockenberg Company. The first consisted of the defendant, "Omaha Hockenberg's." The second was plaintiff Hockenberg Equipment Company "Des Moines Hockenberg's." When the Omaha Hockenberg's began doing business in central Iowa, some of the customers confused them with the Des Moines Hockenberg's. Des Moines Hockenberg's filed a lawsuit alleging common law trade name infringement and the parties entered into a settlement agreement in which Omaha Hockenberg's agreed that they would no longer do business in central Iowa using the words "Hockenberg" or "Hockenberg's" as any part of the business name. They also agreed to include a disclaimer in any materials mailed into Iowa. They agreed that any breach would result in "great and irreparable harm" entitling the Des Moines Hockenberg's to injunctive relief. Despite this agreement, the Omaha Hockenberg's continued to send materials into central Iowa using the Hockenberg name without the proper disclaimer. The Omaha Hockenberg's continued to violate the terms of the agreement even after a temporary injunction was entered.

After trial, the jury found the Omaha Hockenberg's breached the contract and awarded plaintiff $1.00 in compensatory damages. The jury further found that the defendant's conduct constituted willful and wanton disregard of the rights of another but that the defendants did not direct this conduct specifically at the plaintiff. The district court later set aside this portion of the verdict, ruling that any wrongful conduct was directed specifically at the plaintiff. The jury awarded, and the court granted judgment to the plaintiffs for $5,000 in punitive damages. The district court also issued a permanent injunction forbidding the Omaha Hockenberg's from breaching the terms of the settlement agreement. The district court awarded attorney's fees to the plaintiff.

HELD: The recovery of common law attorney's fees requires a showing of culpability beyond that required for punitive damages under Iowa Code Chapter 668A. A plaintiff seeking such fees must prove the defendant's conduct rose to the level of oppression or connivance to harass or injure another. This court held the defendants did not engage in oppressive or conniving behavior. The trial court erred in awarding attorney's fees in this case.

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Johnson v. State Farm Auto. Ins. Co., 504 N.W.2d 135 (Iowa App. 1993)

Preclusion

Plaintiff was injured when she was rear-ended by another motorist, King. King's insurance policy limit was $20,000. In a settlement agreement, King's insurer agreed to pay plaintiff $20,000. Plaintiff's insurer, State Farm, agreed to the settlement and paid plaintiff $5,000 for medical expenses. Plaintiff contends her settlement with King should be considered res judicata by issue preclusion on the issue of causation in the present case.

HELD: The four elements of issue preclusion are: 1. the issue concluded must be identical in the two actions; 2. the issue must be raised and litigated in the prior action; 3. the issue must be material and relevant to the disposition of the prior action; and, 4. the determination made of the issue in the prior action must be necessary and essential to the judgment. Here there was no prior litigation and it is not even clear the issue of causation was discussed during the settlement negotiations. The doctrine of res judicata does not apply here.

Palmer v. Tandem Management Services, 505 N.W.2d 813 (Iowa 1993)

Preclusion

Landlord brought forcible entry and detainer action against tenant in small claims court. Tenant counterclaimed for, among other things, retaliatory conduct under section 562B.32. Small claims court found for landlord and against tenant on all claims. District court affirmed. Iowa Supreme Court dismissed tenant's appeal. Tenant commenced separate action against landlord for, among other things abuse of process. Tenant alleged that landlord used FED case "to intimidate him and as retaliation for his complaints and prior small claims action." Jury awarded damages to tenant.

HELD: "Because the claim of retaliatory eviction was already decided adversely to [tenant], ... he could not base his abuse-of-process action on an allegation of retaliatory eviction as an improper purpose."

Stanley v. Fitzgerald, 509 N.W.2d 454 (Iowa 1993)

Preclusion

Tax payers challenged the legality and constitutionality of our state government's fiscal practices. In February, 1991, plaintiffs brought a petition for declaratory judgment and

injunctive relief against the state executive council and its individual members alleging a violation of Article VII, Section 2 of the Iowa Constitution. The action was dismissed, however, upon the state's motion that because the executive council was a state agency, plaintiffs had failed to exhaust their administrative remedies under the Iowa Code Chapter 17A. The court also ruled that the petition's general allegations against the individual council members were insufficient to state a cause of action against them. Plaintiffs took no appeal from this decision; instead, they filed two petitions for declaratory rulings under Iowa Code Section 17A.9, one with the treasurer and one with the auditor.

The petition sought rulings from the treasurer on the constitutionality and legality of hypotheticals posed concerning the treasurer's borrowing authority and repayment obligations under the Iowa Code. The treasurer declined to rule on plaintiffs' petition. His decision rested on two main grounds. First, he expressed belief that a declaratory ruling would be an inappropriate vehicle for addressing the issues raised. Second, he ruled that a controversy over the legality of state budget practices would be better resolved in a forum in which all relevant state agencies could contribute. Plaintiffs did not seek traditional review but instead filed an original action in district court which urged that their administrative remedies had been exhausted or were inadequate. The petition sought declaratory and injunctive relief on the same issues raised at the administrative level. The treasurer filed a motion to dismiss, asserting the plaintiffs were barred by the doctrine of issue preclusion from pursuing their claim. The district court summarily dismissed the action on issue preclusion grounds. Plaintiffs appealed.

HELD: The district court's ruling on the exhaustion issues did not resolve the merits of plaintiffs' initial declaratory judgment action against the executive council and its members; it merely steered plaintiffs toward the appropriate administrative forum. Consideration of the issues raised before the treasurer was not barred because they had yet to be litigated. The treasurer's discretionary decision not to rule on plaintiffs' declaratory judgment petition triggered plaintiffs' right to proceed in district court on the merits of the controversy. The question in district court will be whether the plaintiffs are entitled to the declaratory and injunctive relief they seek. The district court erred when it dismissed the petition on issue preclusion grounds.

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State, ex rel., Iowa Department of Natural Resources v. Shelley, 512 N.W.2d 579 (Iowa App. 1993)

Preclusion

Robert and Sally Shelley owned property in rural Guthrie County, Iowa. In June, 1989, the Iowa DNR determined the Shelleys were dumping solid waste on their property in violation of Iowa Code Section 445B.307(1). The Shelleys objected to the charges against them. The DNR issued an administrative order in December, 1990 ordering the Shelleys to cease the disposal of solid waste on their property, to remove the solid waste already on their property, and pay a penalty of $1,000. The Shelleys did not appeal this order. Neither did they comply with the order. The DNR then referred the matter to the attorney general, and the state filed a petition in district court to enforce the administrative order. Shelleys appeared at the trial and attempted to raise several issues concerning the validity of the administrative order. The district court determined the order should be enforced. The Shelleys appealed.

HELD: A final adjudicatory decision of an administrative agency is entitled to res judicata effect as if it were a judgment of the court. The administrative order here was a final order because the Shelleys did not appeal, although Section 445B.308 provides a procedure for such an appeal. The administrative order had a res judicata effect in the enforcement proceedings. Shelley's claims are barred by the doctrine of claim preclusion.

Bond v. Cedar Rapids Television Co., 518 N.W.2d 352 (Iowa 1994)

Preclusion

DTV bought an ABC affiliate television station, KDUB-TV. Bond is DTV's general partner. At the time, the Dubuque cable system was authorized by the FCC to provide KDUB with non-duplication protection. CRTV owned KGRG-TV, an ABC affiliate on the system that was subject to the blackout. Bond chose not to seek extension of the FCC order when it expired, however, DTV persuaded the cable system to retain the blackout. The cable system was purchased by TCI Cablevision, which announced it would terminate protection but move KCRG to a higher channel. Prior to this announcement, DTV entered into an agreement to sell KDUB to Sage Broadcasting Corporation. The agreement contained a clause that stated pursuant to a verbal agreement with the local cable company, the cable company blacks out station KCRG-TV whenever the station's programming is identical with that of the station. CRTV filed a petition with the FCC to deny DTV's application to transfer its license. DTV filed an opposition to the petition.

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The FCC issued a memorandum opinion and order denying the petition and allowing the transfer. Shortly after the FCC's final ruling, DTV countered by filing a petition seeking revocation of CRTV's license. The FCC rejected an abuse of process argument and found the CRTV raised colorable allegations of uncompetitive conduct. DTV filed this action alleging CRTV tortiously interfered with the transfer contract. CRTV contends the FCC determination bound the district court through the doctrine of issue preclusion. The four prerequisites to application of a doctrine are (1) the issue precluded must be identical; (2) the issue must have been raised and litigated in the prior action; (3) the issue must have been material and relevant to the disposition of the prior action; and, (4) the determinations made of the issue in the prior action must have been necessary and essential to the resulting judgment. Only the first and second elements are in dispute here.

The "identical issue" prerequisite is disputed on the claim that differing standards of proof are implicated. Plaintiffs contend their burden before the agency was greater than a preponderance of the evidence, the standard for this litigation in district court. The FCC determination involved plaintiff DTV's allegations before the FCC that CRTV's actions before that commission constituted an abuse of process warranting sanctions. Authorities make it clear that DTV's burden was to establish its claim only by a preponderance of the evidence.

HELD: CRTV has established identity of issues and the FCC determination bound the district court through the doctrine of issue preclusion.

Plaintiffs also contend the second prerequisite for issue preclusion (previously litigated) was not met. Plaintiffs note that the FCC order was a denial of hearing with respect to their abuse of process claim. Because no hearing was held, the plaintiffs argue they could not have "litigated" the issue.

HELD: The FCC order was essentially summary judgment on the pleadings and papers submitted. Plaintiffs did not appeal so the order became a final agency determination. The plaintiffs had a chance to further litigate the question, but declined. They are barred from relitigating this in the same manner as any party subject to summary judgment.

CRTV's motions for directed verdict should have been sustained.

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Barske v. Rockwell International Corp., 514 N.W.2d 917 (Iowa 1994)

Pre-judgment Interest

Former employees brought this action in state court against Rockwell, claiming breach of pre-employment agreements and misrepresentations concerning the duration of their employment. A jury returned a verdict in favor of plaintiffs on the claims of negligent misrepresentation. The district court set aside the damage awards ruling plaintiffs' claims were pre-empted by § 301 of the Labor Management Relations Act because any representations made by Rockwell would be inconsistent with the collective bargaining agreement provisions. Rockwell filed a motion for an order directing that no pre-judgment interest be allowed because interest may not be assessed on damages before they occur, and plaintiffs failed to show when their damages actually occurred.

HELD: Plaintiffs are entitled to pre-judgment interest because they were injured at the time they were laid off, even though their damages were not yet fixed in specific sums. The district court order granting Rockwell's motion for judgment notwithstanding the verdict was reversed and the case was remanded to the district court for entry of judgment against Rockwell.

JURISDICTION

Amy Snyder

Covia v. Robinson, 507 N.W.2d 411 (Iowa 1993)

Minimum Contacts

Diana Robinson died in the July 19, 1989 crash of United Flight 232 in Sioux City. She was en route from Denver to Rosemont, Illinois. Robinson was traveling in the course of her employment with Covia, a computer firm headquartered in Rosemont, Illinois. Her husband, Frederick, filed for workers' compensation benefits both in Colorado and in Iowa. Benefits were immediately paid to him in Colorado, however Covia challenged the jurisdiction of the Iowa Industrial Commissioner exercised pursuant to a long arm statute; Iowa Code Section 85.3. Frederick in turn alleged Covia unreasonably delayed payment of death benefits under the Iowa Workers' Compensation Act. Frederick contends, on appeal, that Covia's jurisdictional arguments present no fairly debatable questions of law. Consequently, he argues that Covia should be penalized for their delay pursuant to Iowa Code Section 86.13. Covia is a travel agency and computer support firm. It is a partnership based in Delaware. Of its 3,000 employees, two resided in the state of Iowa. Approximately 1.8% of Covia's revenue was generated in Iowa. Iowa was never a place of destination for Robinson.

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In determining whether a defendant maintains certain minimum contacts with a foreign state, the court must consider five factors: (1) the quantity of contacts; (2) the nature and quality of the contacts; (3) the source and connection of the cause of action with those contacts; (4) the interest of the foreign state; and, (5) convenience. A court must determine such issues on a case-by-case basis.

HELD: Where a computer firm's only contact with Iowa was the death of one of its employees in an airplane crash in Iowa while traveling on business, and the employment of two employees within the state of Iowa, it can reasonably be argued that the firm's contacts fall within the realm of random, fortuitous and attenuated contacts as contemplated by the Supreme Court in World-Wide Volkswagen v. Woodson. On the other hand, it could reasonably be argued that Covia's contact with Iowa rose to the level of being "continuous and systematic" subjecting Covia to the general jurisdictional power of the state. Helicopteros Nacionales De Columbia, S.A. v. Hall, 466 U.S. 408. In these situations it has been held a non-resident corporation's forum contact need not be related to the cause of action. Where a defendant's contact with a foreign forum can be characterized as "continuous and systematic" it is presumptively not unreasonable to require him to submit to the burdens of litigation in their forum as well.

The court declined to resolve the jurisdictional issue, however found the issue debatable since there are viable arguments in favor of either party. Covia should have been able to raise these arguments without being penalized under § 86.13.

Taylor v. Trans-Action Associates, Inc., 509 N.W.2d 501 (Iowa App. 1993)

Minimum Contacts

Plaintiff Taylor appeals the district court's ruling dismissing its cause of action for lack of jurisdiction over defendants Trans-Action Associates, Inc. and Louisiana Midland Railway Company. Trans-Action was an Illinois corporation, and Louisiana Midland was a Louisiana corporation. Craig Burroughs owns both corporations. In 1977, Taylor was a joint employee of defendants. He suffered a broken leg while working in Louisiana for Louisiana Midland. Taylor brought a federal lawsuit in Louisiana for damages. Taylor and Burroughs negotiated, in Illinois, a settlement of this lawsuit and other disputes between the parties in 1980. Louisiana Midland made and mailed monthly settlement payments to Taylor, who was residing in Iowa. When defendant defaulted, Taylor obtained a judgment in a Louisiana federal district court for damages against Louisiana Midland. Taylor filed this action in Iowa seeking to collect on the judgment against Louisiana Midland. He alleges Trans-Action should be held

liable for judgments against Louisiana Midland, or Louisiana Midland had sufficient contact with Iowa to trigger jurisdiction.

HELD: In determining whether minimum contacts exist, the court considers the source and connection of this cause of action with Trans-Action's previous contacts with Iowa. Trans-Action purchased a steel bridge spanning the Mississippi from Illinois to Iowa and relocated a locomotive to Iowa. Taylor testififed Trans-Action intended to establish a rail line into Iowa. However, Trans-Action's contacts with Iowa are not related to the suit in question. Furthermore, evidence shows at no time did Louisiana Midland send an employee to Iowa, maintain offices in Iowa, or conduct business in Iowa. Taylor admitted he never conducted business in Iowa for Louisiana Midland. Trans-Action's activities do not subject Midland to the jurisdiction of Iowa courts. There is no evidence Trans-Action's activities in Iowa were conducted on behalf of Louisiana Midland. In this case, the mailing of settlement payments is not sufficient minimum contacts so to justify jurisdiction. Taylor has failed to meet his burden to show that either defendant had sufficient minimum contacts with Iowa. In the absence of such a showing, the court will not exercise jurisdiction over a non-resident defendant.

Barske v. Rockwell International Corp., 514 N.W.2d 917 (Iowa 1994)

Pre-emption

Former employees brought this action in state court against Rockwell, claiming breach of pre-employment agreements and misrepresentations concerning the duration of their employment. A jury returned a verdict in favor of plaintiffs on the claims of negligent misrepresentation. The district court set aside the damage awards ruling plaintiffs' claims were pre-empted by § 301 of the Labor Management Relations Act because any representations made by Rockwell would be inconsistent with the collective bargaining agreement provisions. Plaintiffs appealed.

HELD: State courts have concurrent jurisdiction over claims under the Labor Management Relations Act for violations of collective bargaining agreement. None of the elements of negligent misrepresentation are substantially dependent upon analysis of the collective bargaining agreement. Employees covered by collective bargaining agreements are entitled to assert legal rights independent of that agreement. Pre-emption is unnecessary unless consideration of a defense also substantially depends on construction of the collective bargaining agreement. Though Rockwell may have had the right to lay off the plaintiffs under the terms of the collective bargaining agreement, it had no absolute right to escape tort liability for pre-employment

misrepresentation. The district court erred in setting aside the jury verdict.

Kirk v. Iowa District Court for Jefferson County, 508 N.W.2d 105 (Iowa App. 1993)

Subject Matter

The district court dissolved the marriage of Bill and Beverly Kirk in March of 1990. The court divided the parties' assets and debts, ordered Beverly to pay a property settlement, and ordered Bill to pay child support. The courts also awarded Beverly sole custody of the parties' two children and established a visitation schedule for Bill. Beverly appealed the child support and other economic provisions of the decree, which was affirmed, but neither party appealed the custody or the visitation provisions. Bill attempted to exercise his visitation, but Beverly refused to cooperate. Beverly eventually moved from the parties' hometown of Fairfield, Iowa to Springfield, Nebraska and refused to allow officials of the school in Nebraska to communicate with Bill and refused to send copies of the children's school progress to him. On September 18, 1991, Bill filed an application for finding of contempt pursuant to Iowa Code Section 598.23. The district court found that Bill proved that Beverly was in willful contempt because of her failure to allow court ordered visitations. Rather than enter a sanction for Beverly's contempt, the district court scheduled a second hearing to determine the best interests of the children. Beverly's first assignment of error is that the district court lacked subject matter jurisdiction to hear the contempt action. At the time Bill filed the contempt action against Beverly, the appeal of their dissolution decree was still pending before the court.

HELD: Ordinarily, the filing of a notice of appeal from a final decision divests the district court of jurisdiction until some part of the case is remanded. However, a trial court, after a party appeals, retains jurisdiction to proceed on issues collateral to and not affecting the subject matter of the appeal. Additionally, a trial court may enforce a decree while its correctness is being appealed, unless a supersedeas bond is filed or a stay is entered by the court. Therefore, it was appropriate for the district court to hold the custodial parent in contempt for violation of a visitation order, even though the child support and other economic provisions of the decree were the subject of an appeal, because neither party appealed the custody or visitation provisions.

<u>Schettler v. District Court for Carroll County</u>, 509 N.W.2d 459 (Iowa 1993)

<u>Subject Matter</u>

During the discovery process in Jane and Elmer Schettler's modification action, Jane filed a shareholder fraud action against Elmer and other defendants. The defendants filed motions for summary judgment and adjudication of law points. The district court sustained these motions. Elmer then filed a motion for sanctions against Jane's attorney. About a week later, Jane appealed the district court's adverse summary judgment ruling. The district court entered an order holding in abeyance a final ruling on the motion for sanctions until Jane's appeal was decided. The court of appeals affirmed the district court ruling. Jane's application for further review was denied, and procedendo issued. The district court denied the motion for sanctions. Elmer appeals. Jane contends that, once the procedendo was issued in the underlying fraud action, the district court lacked jurisdiction to rule on the motion for sanctions. Elmer argues that the motion concerns an issue collateral to the subject matter of the underlying fraud action.

HELD: Once a notice of appeal is filed, the district court loses jurisdiction. There is an exception. The district court "retains jurisdiction to proceed as to issues collateral to and not affecting the subject matter of the appeal." The motion for sanctions did not decide any issue in the underlying fraud action, therefore the district court had jurisdiction to hear and decide the motion even though the procedendo had issued in the underlying action.

<u>Hartig v. Francois</u>, ___ N.W.2d ___ (Iowa, July 27, 1994)

<u>Subject Matter</u>

A homeowner, Richard Hartig, appeals from a summary judgment in favor of one of the defendants in a suit for alleged negligence in the construction of a retaining wall. Judge Curnan had considered the summary judgment motion and heard the arguments of counsel. He apparently then dictated a proposed order, but did not sign it. He left for vacation and Judge Pearson was assigned to try the case. As the time for trial approached, Judge Pearson was advised that there was an unsigned order on summary judgment motion. He located the order and signed it. The action of Judge Pearson was not inconsistent with that of Judge Curnan, but rather was in furtherance of it.

HELD: Hartig's argument that Judge Pearson lacked jurisdiction to sign a summary judgment order dictated, but not signed, by Judge Curnan before he left for vacation was rejected.

LIMITATIONS OF ACTION

Amy Snyder

Brown v. Liberty Mutual Insurance Co., 513 N.W.2d 762 (Iowa 1994)

Accrual

The United States District Court for the Northern District of Iowa certified two questions rising out of a suit for bad faith failure to pay workers' compensation benefits:

(1.) When does a cause of action for bad faith failure to pay workers' compensation benefits accrue - the date the claim is denied by the insurer, the date the industrial commissioner first determines that the injury and/or disability is compensable under the Iowa Workers' Compensation Act, or at some other time?;

(2.) What limitation period applies to the bringing of such a cause of action - the two-year period of Iowa Code Section 614.1(2), the five-year period of Section 614.1(4), or some other period?.

HELD: (1) A cause of action for bad faith failure to pay workers' compensation benefits accrues upon receipt of notification that carrier has denied claim, and (2) The five-year limitation period of Iowa Code 614.1(4) governing "other actions not otherwise provided for" applies to actions based on bad faith failure to pay workers' compensation benefits.

Hawkeye Bank v. State of Iowa, 515 N.W.2d 348 (Iowa 1994)

Amended Complaint

Estate of child killed in playground accident filed suit against State, alleging several negligence theories. Original petition was filed in the name of the decedent's estate, and was amended to name the decedent's personal representative as the plaintiff over two years after the accident. The defendants argued that the petition failed to correctly designate the plaintiff entitled to sue within the period of statute of limitations contained in Iowa Code Section 25A.13.

HELD: An amendment changing the name of the plaintiff related back to the filing of the initial complaint, and thus satisfied the statute of limitations.

<u>Porter v. Good Eavespouting</u>, 505 N.W.2d 178 (Iowa 1993)

<u>Amendments</u>

Porter was injured in a construction accident. With his statute of limitations less than two months away, an insurance adjuster purporting to represent Good Eavespouting and Good Construction Company offered to settle by sending a draft with a release. One year and 364 days after his accident, Porter sued Good Eavespouting d/b/a Good Construction Company. Several months later, defendant answered by, among other things, claiming that defendant was not a legal entity. Defendant moved for summary judgment on the same ground and submitted an affidavit from Larry Good. Good stated that he conducts businesses know as Good's Construction Co., Good's Eavespouting, Co., Good's L-S Storage Rental. Good stated that there is no corporation known as Good Construction Company and that he has never done business as Good Eavespouting or Good Construction Company. Porter resisted the motion with his own affidavit about the insurer's conduct, and moved for leave to amend to add Larry Good and Sandra Good as individual defendants. District court denied Porter's motion and granted defendant's motion for summary judgment.

HELD: Porter cannot satisfy rule 89's relation-back requirements, which apply to misnomers as well as actual changes in parties. Good did not receive notice within the prescribed limitations. District court should not have sustained defendant's motion for summary judgment, however. Defendant did not raise the limitations defense in its answer. "Because the limitations defense was not raised, the defendant waived it." Moreover, the names used by Porter in his petition to identify the defendant are so similar to the names actually used by Good in his business "as to create no confusion as to the identity of the defendant. As such, the business or trade name is a legal entity..."

<u>Hegg v. Hawkeye Tri-County Rec</u>, 512 N.W.2d 558 (Iowa 1994)

<u>Continuing Wrong</u>

Plaintiffs are dairy farmers who received their electricity from the defendant electric company. Plaintiffs discovered stray voltage which was affecting their dairy herd in 1982. Plaintiffs filed suit against electric company in 1985, claiming that the electric company negligently delivered electricity to their farm in a manner that caused stray voltage and damage to their dairy herd. The suit was dismissed in 1988 for lack of prosecution. Plaintiffs filed suit again in 1991, claiming that the electric company failed to correct the problem and forced the plaintiffs to procure their own electronic grounding system. The electric company moved for summary judgment, contending that

the five year statute of limitations for bringing actions based on injury to property had run. The district court granted the motion, holding that plaintiffs' claim was untimely. Plaintiffs appealed, arguing that the electric company's negligent acts were ongoing, and that their action did not accrue until the last date on which the negligence occurred.

HELD: The damages resulting from the stray voltage were recurring, and the plaintiffs may recover for damages occurring within the five-year period preceding the filing of the lawsuit.

Vachon v. State of Iowa, 514 N.W.2d 442 (Iowa 1994)

Discovery Rule

Plaintiff was struck by a car and injured in 1987. He was initially treated at Broadlawns Hospital in Des Moines, and subsequently transported to the University of Iowa Hospital for treatment. During treatment at the University of Iowa Hospital, plaintiff was diagnosed with "compartment syndrome" requiring amputation below the knee. In 1989, plaintiff sued Broadlawns Hospital and treating physicians for medical malpractice, alleging that the Broadlawns doctors were negligent in failing to diagnose, care, and properly treat the "compartment syndrome." This lawsuit resulted in a jury verdict in favor of the defendants. Plaintiff then sued the State in July, 1991 alleging the same cause of action against the University of Iowa Hospital. The district court entered a summary judgment in favor of the State, ruling that the plaintiff's suit was time-barred under the Iowa State Tort Claims Act, Iowa Code Section 669.13.

HELD: The claims against the State must be made in writing to the State Appeal Board within two years under Iowa Code Section 669.13. The discovery rule applies to actions filed under the State Tort Claims Act. The period of limitations began when the plaintiff knew all the facts needed to investigate and determine the existence of a cause of action, more than two years prior to filing the suit.

McKiness Excavating v. Morton Building, 507 N.W.2d 405 (Iowa 1993)

Fraud

Generally, if an action is one at law for money damages, Section 614.4, which provides that a fraud action is not deemed to have accrued until a fraud has been discovered, does not apply.

Stahl v. Preston Mutual Insurance Association, 517 N.W.2d 201 (Iowa 1994)

Insurance Contract

Stahl brought suit against Preston Mutual, his homeowner's insurer, for breach of the insurance contract and for bad faith in denying his claim for alleged losses caused by fire. Preston Mutual filed a motion for summary judgment claiming the one-year limitation of action provision in the fire insurance policy constituted a complete defense. Stahl's resistance claimed that a bad faith claim was not an action for a breach of contract for purposes of the limitations clause. The district court granted summary judgment in favor of Preston Mutual based on the policy's contractual one year limitation on the filing of an action.

HELD: The policy provision requiring suit to be brought within one year of the loss was a valid limitation provision. Stahl's bad faith claim is a disguised attempt to resolve a dispute as to Preston Mutual's liability for his loss and is therefore an action "on this policy." Stahl's cause of action for bad faith is fundamentally a claim on the policy and is therefore time-barred.

Hasbrouck v. St. Paul Fire & Marine Insurance Co., 511 N.W.2d 364 (Iowa 1993)

Negligence

Plaintiff brought declaratory judgment action against treating physician, professional corporation, and insurer, seeking determination of coverage for malpractice claim under "claims made policy." The policy covered all claims first made during the policy period and required the insured to report such claims to the insurer within such period. Plaintiff sued the doctor on the plaintiff's tort claim within the policy period, but the doctor failed to report the suit to his insurer until after the policy had lapsed. In sustaining the insurer's summary judgment motion, the district court determined there was no coverage for the plaintiff's tort claim against the doctor and dismissed the declaratory judgment action.

HELD: Statutes of limitations modify the characteristics of "claims made" and "occurrence" policies. Under the "negligence rule", the statute of limitations begins to run when the negligence occurs, so the negligence rule limits insureds' exposure under both "claims made" and "occurrence" policies. In contrast, the statute of limitation under the "discovery rule" begins to run when the injured party discovers the cause of action and greatly expands liability and coverage under both types of policies. The undisputed facts show that the doctor did not report the

plaintiff's suit until after the policy had expired. The district court properly sustained the insurance company's motion for summary judgment.

Estate of Montag v. T H Agriculture & Nutrition Co., Inc., 509 N.W.2d 469 (Iowa 1993)

Personal Injury

Montag was exposed to agent orange in the early 1960s. In 1979, Montag was diagnosed with liposarcoma and in 1986, Montag asked his doctor if there might be a connection between agent orange and his cancer. The doctor said he was not aware of any association but that "it could be looked into further." In 1991, Montag filed this toxic tort suit against defendants related to his exposure to agent orange. The district court granted the defendant summary judgment on the ground that the suit was time-barred by the two-year statute of limitations. Montag appeals.

HELD: If a plaintiff is unaware of his injury within the time provided by the statute of limitations, the plaintiff may extend the time for suit under the "Delayed Discovery Rule." Montag however, had enough information to put him on notice by 1986. The district court's finding that the 1991 suit was time-barred was affirmed.

Doe v. Cherwitz, 518 N.W.2d 362 (Iowa 1994)

Sexual Abuse

Jane Doe alleges that she was sexually assaulted in 1973 by her physician during a pelvic examination. In 1992, Doe, with her husband and children, sued her physician and the clinic in federal court. The defendants moved to dismiss based on Iowa's two-year statute of limitations. In resisting the motion, plaintiffs rely on Iowa Code § 614.8A and the common law "discovery rule." The federal district court certified several questions. The following is a list of questions certified to the Iowa Supreme Court (only those questions relevant to Limitations of Action are listed):

1. Is a person who is 18 years old on June 1, 1973, the date of this alleged event, a "person who was a child" within the meaning of Iowa Code § 614.8A?

2. If the answer to question 1 is "yes," does Iowa Code § 614.8A apply retroactively to revive a claim that may have been barred by Iowa Code § 614.1(2)?

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3. If the answers to both questions 1 and 2 are "yes," does the phrase "an action for damages or injuries suffered as a result of sexual abuse" in § 614.8A encompass claims other than a direct claim of sexual abuse, i.e., would it include such claims as negligent infliction of severe emotional distress, negligence, respondeat superior, and premises liability as included in the plaintiffs' complaint?

4. If the answer to either question 1 or 2 is "no," is the "discovery" rule of Chrischilles v. Griswold, 150 N.W.2d 94 (1967), and its progeny available to show that these claims did not "accrue" until the victim's January, 1991 flashbacks?

HELD: (1) A person 18 years old on June 1, 1973, was not a "person who was a child" under Iowa Code § 614.8A. The term "child" is to be defined in terms of the criminal code and means "one under the age of 14." (2) The discovery rule of Chrischilles is applicable in this case. The claim accrued for statute of limitation purposes when the alleged victim discovered the injury or, in the exercise of reasonable care, should have discovered it.

McKiness Excavating v. Morton Building, 507 N.W.2d 405 (Iowa 1993)

Statute of Repose

In November, 1970, plaintiff McKiness entered into a written agreement with the defendant, Morton Buildings, to construct a steel and wood "pole" building for equipment storage. The building was completed in 1971 and in 1973 McKiness entered into a new contract with Morton for a similar building that was completed in 1974. The first building collapsed under snow and ice in January of 1991 resulting in damage to the building and the equipment stored in the building.

McKiness filed an action for damages in October of 1991. The amended petition alleged breach of implied warranty of merchantability, negligence, strict liability and nondisclosure or misrepresentation. Morton raised a statute of limitations defense and moved for summary judgment claiming that the fifteen year statute of limitations for improvements to real property founded on tort and implied warranty, Iowa Code § 614.1(11), precluded relief. McKiness challenged the application and constitutionality of 614.1(11).

HELD: Iowa Code Section 614.1(11), limiting the actions arising out of unsafe or defective conditions in improvements to real property to fifteen years after the date on which occurred the act or omission of defendant, is a statute of repose and not a statute of limitation. A statute of limitation bars, after a

certain period of time, the right to prosecute an accrued cause of action. A statute of repose terminates any right of action after a specified period of time, regardless of whether or not there has yet been an injury. Therefore, the cause of action accrues on the date of the allegedly wrongful act of the contractor or other person who is making the improvement. The discovery rule, which provides that causes of action accrue when the plaintiff has in fact discovered that he has suffered injury or by exercise of reasonable diligence should have discovered it, does not apply to those causes of action which fall within Iowa Code Section 614.1(11). The district court did not err in concluding as a matter of law that 614.1(11) barred all claims pleaded by McKiness.

NEGLIGENCE

Amy Snyder

Landes v. Women's Christian Ass'n, 504 N.W.2d 139 (Iowa App. 1993)

668.11

Plaintiff entered the hospital for purpose of out-patient arthroscopic surgery on his right knee. He underwent surgery at or about 8:30 a.m. Anesthetic agents were administered. Plaintiff remained in the recovery room until approximately 10:35 a.m. Plaintiff was then released to post operative accommodations. At about 12:15 p.m., a nurse took plaintiff to the bathroom but left him alone there. Plaintiff fell while in the bathroom. Plaintiff filed a petition against the Women's Christian Association alleging the hospital negligently and carelessly failed to observe him and protect him until the effects of the anaesthetic and surgery had worn off, and the hospital negligently and carelessly failed to provide an attendant to prevent him from falling. The court sustained the hospital's motion for summary judgment.

HELD: This action is not a professional liability action. Plaintiff's action is based on non-medical, routine care by the hospital. Section 668.11 does not apply in this case.

Mastbergen v. City of Sheldon, 515 N.W.2d 3 (Iowa 1994)

Special Relationship

Merchant brought action against city for damages arising from robbery of merchant's jewelry store. The district court set aside a jury verdict in merchant's favor on grounds that the payment of a $5.00 monthly monitoring fee for a silent alarm system to city did not create a special relationship between the city and merchant. Merchant appealed.

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HELD: The payment of a monthly fee to the city for monitoring of silent alarm system did not create a special relationship between the city law enforcement personnel and merchant from which a more particularized duty of protection could arise. Law enforcement agencies may be liable for damages when there is a special relationship such as the police creating a situation that places a citizen's life in jeopardy, or when the police take a citizen into custody and control. Finally, the court concluded that the "public is better served by a policy that encourages the police to provide extra citizen protection without the fear of incurring liability for mistakes."

Landes v. Women's Christian Ass'n, 504 N.W.2d 139 (Iowa App. 1993)

Standard of Care

Plaintiff entered the hospital for purpose of out-patient arthroscopic surgery on his right knee. He underwent surgery at or about 8:30 a.m. Anesthetic agents were administered. Plaintiff remained in the recovery room until approximately 10:35 a.m. Plaintiff was then released to post operative accommodations. At about 12:15 p.m., a nurse took plaintiff to the bathroom but left him alone there. Plaintiff fell while in the bathroom. Plaintiff filed a petition against the Women's Christian Association alleging the hospital negligently and carelessly failed to observe him and protect him until the effects of the anaesthetic and surgery had worn off, and the hospital negligently and carelessly failed to provide an attendant to prevent him from falling. The court sustained the hospital's motion for summary judgment.

HELD: The proper standard of care for non-medical, administrative, ministerial, or routine care by hospitals is such reasonable care as the patient's known mental or physical condition may require.

Cerro Gordo Hotel v. City of Mason City, 505 N.W.2d 509 (Iowa App. 1993)

Sufficiency of Evidence

Plaintiff, Cerro Gordo Hotel Company, owned two buildings located in Mason City. The buildings had been in a state of disrepair prior to June of 1988. An earlier nuisance action brought by the City of Mason City against Cerro Gordo Hotel had resulted in a stipulation between the parties. They agreed Cerro Gordo Hotel had to take down the buildings by March of 1989. On June 25, 1988, the roof of one of the buildings partially collapsed. Several attempts were made to contact the owners, officers or agents of Cerro Gordo Hotel but they were unsuccessful.

Defendant Charles McGreavy, the inspection services director for Mason City, inspected the buildings on June 25, 1988. McGreavy did not consult with an engineer but considered the possibility of collapse an emergency to the public outside the building. McGreavy subsequently consulted with Bob McKiness of defendant McKiness Excavating and Grading Inc. concerning the condition of the buildings. The decision to conduct the demolition was made on that evening. On June 22, 1990, Cerro Gordo Hotel filed its petition asserting a 42 U.S.C. § 1983 claim, trespass claim, and negligence claims against Mason City, Charles McGreavy, and McKiness as well as other defendants. The case proceeded to a jury trial. Plaintiff presented evidence indicating the buildings were structurally sound and argued the demolition was unnecessary. Plaintiff had proposed a jury instruction on its claim defendants were negligent in determining an emergency existed and in determining the situation required the demolition pursued by the City. The court refused to instruct on the negligence issues, granting defendants a directed verdict on those issues. The case went to the jury on the remaining issues and the jury rendered a verdict for defendants. Plaintiff appealed, contending the district court erred in failing to submit defendants' liability to the jury under a theory of negligence.

HELD: Parties to a lawsuit have a right to have their legal theories submitted to the jury so long as the theories are supported by substantial evidence in the record. To give a proposed jury instruction, the evidence must be sufficient to warrant submission to the jury. Plaintiff's negligence claim was not supported by evidence. The record did not reveal testimony regarding the standard of care upon which the jury could judge the conduct of McKiness. The trial court properly refused to submit the issue against McKiness.

<u>Morgan v. Perlowski</u>, 508 N.W.2d 724 (Iowa 1993)

<u>Sufficiency of Evidence</u>

Plaintiff, Matthew Morgan, received injuries when he was a guest at a party hosted by defendant Steven Perlowski. The jury returned a verdict finding the guest had been injured as a result of the host's negligence. The court denied the host's motion for judgment notwithstanding the verdict and a new trial. On appeal, Perlowksi claims he had no duty to protect Morgan from the acts of third parties and urges the trial court failed to properly instruct the jury on premises liability principles.

HELD: Where a teenager living in his parent's home hosts a party without his parent's knowledge or consent, and the third party attends the party and assaults another guest, that guest has an action in negligence. The host will owe a duty to the guest even though normally a person does not have a duty to aid or

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protect another, nor does a person have a duty to control the conduct of a third person to prevent that person from causing physical harm to another. It also does not save the defendant that he was not the owner of the home at issue. The duty to control the conduct of licensees arises out of the existence of a special relationship between a possessor of land and a licensee on the property. Where the defendant hosted a party in his parent's home without their knowledge or consent, he was the possessor of the home. The trial court did not err in denying the defendant's motion for directed verdict and the post-trial motion for judgment N.O.V.

Spaur v. Owens-Corning Fiberglas Corp., 510 N.W.2d 854 (Iowa 1994)

Sufficiency of Evidence

Plaintiff brought suit against asbestos manufacturer and several other defendants to recover damages for injuries resulting from the exposure to asbestos-containing products. All defendants except the named defendant settled with plaintiff or had claims dismissed before the case went to trial. The jury awarded compensatory damages, loss of consortium damages, and punitive damages to the plaintiff. Defendant appealed, arguing that plaintiff failed to demonstrate that defendant's product was a substantial contributing cause of plaintiff's injury.

HELD: The test set forth in Lohrmann v. Pittsburg Corning Corp., 782 F.2d 1156, 1163 (4th Cir. 1986) requires evidence of exposure to a specific product on a regular basis over some extended period of time in proximity to where the plaintiff actually worked. It is not a rigid test with a minimum threshold level of proof required under each element. Instead, the Lohrmann test is used to analyze sufficiency of evidence needed to satisfy the substantial factor requirement. There was sufficient evidence in the record to raise a reasonable inference of plaintiff's exposure to defendant's product, and that such exposure was a substantial factor in his injury. The evidence was sufficient to avoid a directed verdict and a judgment N.O.V.

Humiston Grain v. Rowley Interstate Transportation Co., 512 N.W.2d 573 (Iowa 1994)

Sufficiency of Evidence

In an action between owners of trucks involved in an accident, truck owner filed third party complaint against an insurance agent for negligence in failing to provide proper insurance coverage. The district court entered judgment for the truck owner based on the insurance agent's failure to thoroughly read a lease agreement and educate himself on the truck owner's

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insurance needs. The insurance agent appealed, claiming that the record was legally and factually insufficient to support the district court's judgment.

HELD: The district court erred in permitting recovery on a claim of professional negligence without requiring expert testimony concerning the standard of care for insurance agents. The Supreme Court held that standard of care and its breach must be established through expert testimony, except when professional's lack of care is so obvious as to be within the comprehension of a lay person. In this case, the court found that the district court had no legal basis to fault the insurance agent for failing to read and interpret a contract without expert testimony that such conduct would be expected of an agent under these circumstances of this case.

Hillrichs v. Avco Corporation, 514 N.W.2d 94 (Iowa 1994)

Sufficiency of Evidence

In a products liability action concerning a "new idea unisystem" cornpicker manufactured by defendant Avco Corporation and owned by the plaintiff, Hillrichs, while attempting to unplug the machine, caught his right hand between two rollers which continued to spin at about two to four revolutions per second for about 1800 seconds. The accident resulted in the eventual amputation of four fingers on Hillrichs' right hand. Hillrichs, his wife, and his children brought suit on theories of negligence, strict liability, and breach of implied warranties against Avco and the dealer that sold Hillrichs the base power unit for the cornpicker. A jury found Hillrichs to be 100% at fault for his injuries and judgment was entered against Hillrichs. In Hillrichs I, the court affirmed in part but reversed and remanded the case for a new trial on the negligence claim with respect to Avco's liability for plaintiff's "enhanced injuries." Hillrichs claimed that Avco negligently failed to include an emergency stop device on the rear of the husking bed near the point where he caught his hand, and that this failure resulted in an unnecessary enhancement of his injuries. On remand, the jury found Avco 80% at fault and Hillrichs 20% at fault. The jury awarded Hillrichs compensatory and punitive damages. The district court set aside the punitive damage award and the award for future medical expenses. It entered judgment against Avco after deducting the 20% fault attributed to Hillrichs. Avco appealed and Hillrichs cross-appealed.

Avco contends that there was insufficient evidence to support submission of the enhanced injury claim. Avco argues that the injuries that led to the amputation of Hillrichs' four fingers occurred within a few seconds of his hand getting caught in the husker bedrollers. Hillrichs offered into evidence the deposition of an orthopedic surgeon who stated that he had no doubt that

Hillrichs suffered greater injuries by having his hand caught in the moving rollers for 1800 seconds than he would have suffered if he had been able to shut off the rollers by means of an emergency stop device. This statement was corroborated by the testimony of an engineer as well as the plaintiff's own treating physician. In addition, Hillrichs testified that he felt and experienced more damage to his hand the longer it remained entangled in the husker rollers.

Avco also contends there was insufficient evidence to support a design defect claim. Hillrichs put on evidence that Avco knew, at the time it manufactured the husking bed, that farmers often attempted to unplug the husking rollers while they were operating. Expert testimony supported Hillrichs' contention that the defendant could have installed an emergency stop device for less than $50 and that at the time Avco designed the unisystem, such devices appeared on other machines that incorporated rollers, such as printing presses. Avco argues that its design comported with the farm implement industry's custom and practice in the manufacturing of corn pickers, noting that husking beds have never had emergency stop devices.

HELD: Sufficient evidence on these issues existed for the jury's consideration. The district court properly overruled defendant's motion for directed verdict and for judgment notwithstanding the verdict as to these assignments of error.

<u>Regan v. Denbar, Inc.</u>, 514 N.W.2d 751 (Iowa App. 1994)

<u>Sufficiency of Evidence</u>

Bar patrons who were injured in an altercation outside the bar after they had been asked to leave by the bartender brought action against bar, claiming that bar had a duty to protect them from criminal acts of patrons who assaulted them. The district court granted defendant's motion for directed verdict following the presentation of plaintiffs' evidence at trial, ruling that the plaintiff failed to present any evidence that their assailants had a reputation for violence or concerning any past fights inside or outside the tavern.

HELD: There was sufficient evidence of the foreseeability of the incident to avoid a directed verdict and the issue should go to the jury.

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Hawkeye Bank v. State of Iowa, 515 N.W.2d 348 (Iowa 1994)

Sufficiency of Evidence

Personal representative brought action against the state for the death of a first grade student who was asphyxiated when her scarf caught on the railing of a slide in playground. The issue of the state's liability was submitted to a jury on theories of *res ipsa loquitur* as well as specific theories of negligence that included the failure to properly supervise the playground, the failure to promptly respond to the decedent's absence after the class returned from the playground, failure to instruct the decedent concerning the proper use of the equipment, and the failure to provide safe playground equipment for children on the playground. The jury returned a verdict in favor of the plaintiff, and the state appealed.

HELD: The district court erred in submitting the case to the jury on the theory of *res ipsa loquitur* since the court was unable to agree that the accident was of a nature that would not have occurred in the ordinary course of things had ordinary care been employed. In addition, the trial court erred in submitting the theory of failure to provide safe playground equipment to the jury since there was no evidence of any defect in the design of the playground equipment in question. Finally, the trial court erred in submitting the theory that the state was negligent for failure to instruct the child concerning the proper use of the playground equipment since there was no evidence that special instruction was needed in order to avoid some hazard specifically attributable to the piece of playground equipment involved in the injury.

Fiala v. Rains, ___ N.W.2d ___ (Iowa, July 27, 1994)

Sufficiency of Evidence

Andy Fiala filed a negligence suit against Lori Rains after he was physically beaten by a third person (Moeller) in her home. The trial court granted Rains' motion for a directed verdict. Fiala appeals requesting a determination of whether Rains owed Fiala a duty of care. Fiala contends Rains owed him a "duty to not expose him to a danger she knew, or should have known, when she invited him into her house."

HELD: The threshold has not been reached with the evidence in this case to establish a legal duty of care so that the issue of foreseeability was submissible to the jury. No evidence was presented of threats to Fiala by Moller or any known actions by Moeller immediately preceding the assault that would alert Rains to a pending danger. Moreover, the record is void of any evidence suggesting a special relationship existed between Fiala and Rains

triggering a duty on the part of Rains to prevent Moeller from harming Fiala. The directed verdict was affirmed.

TORTS

Len Strand

Palmer v. Tandem Management Services, Inc., 505 N.W.2d 813 (Iowa 1993)

Abuse of Process

Landlord brought forcible entry and detainer action against tenant in small claims court. Tenant counterclaimed for, among other things, retaliatory conduct under section 562B.32. Small claims court found for landlord and against tenant on all claims. District court affirmed. Iowa Supreme Court dismissed tenant's appeal. Tenant commenced separate action against landlord for, among other things abuse of process. Tenant alleged that landlord used FED case "to intimidate him and as retaliation for his complaints and prior small claims actions." Jury awarded damages to tenant.

HELD: "Because the claim of retaliatory eviction was already decided adversely to [tenant], ... he could not base his abuse-of-process action on an allegation of retaliatory eviction as an improper purpose."

Reedy v. White Consolidated Industries, Inc., 503 N.W.2d 601 (Iowa 1993)

Bad Faith

The claim for bad-faith failure to pay benefits due an injured employee, first recognized as a valid cause of action against a workers' compensation insurer in Boylan v. American Motorist Insurance Co., 489 N.W.2d 742 (Iowa 1992), applies as well to self-insured employers. Also, adjudication of the workers' compensation claim and exhaustion of all appellate remedies is not a prerequisite to the commencement of such a bad-faith action. Although it usually will be helpful for the compensation liability to have been adjudicated conclusively before the trial of a bad-faith action, district courts can accommodate this interest simply by delaying trial of the bad faith claim until the workers' compensation claim has been completed.

Doe v. Cherwitz, 518 N.W.2d 362 (Iowa 1994)

Consortium

Doe claims that Dr. Cherwitz sexually assaulted her during an examination in 1973, when she was 18 years old. She, along with her husband and children, sued Cherwitz and the Davenport Clinic in federal court in 1992. The defendants moved to dismiss based on Iowa's two-year statute of limitations. The plaintiffs resisted, relying on the common law discovery rule and the special limitations provision contained in Iowa Code §614.8A. The federal district court certified eight questions to the Iowa Supreme Court, mostly concerning statute of limitations issues. Two of the questions, however, concerned consortium claims. The first was whether the spouse of a person sexually abused before the marriage has a claim for loss of spousal consortium. The second was whether the minor children of a person sexually abused prior to the conception and birth of the minor children have claims for loss of parental consortium.

HELD: The answer to both consortium questions is "no." While some jurisdictions allow a spouse to maintain a consortium claim based on events that occur prior to marriage, if the injury is not discovered until after the marriage, Iowa does not adopt this rule. The discovery rule presumes that the claimant had a valid cause of action at the time of the event but, for some reason, was unaware of it. When the event occurs prior to marriage (and prior to the birth of minor children), the consortium claimants have no cause of action arising out of the event. The discovery rule cannot create a cause of action that never existed. Thus, the husband cannot maintain a consortium claim based on events occurring prior to the marriage and the children cannot maintain a consortium claim based on events occurring prior to conception and birth.

Tate v. Derifield, 510 N.W.2d 885 (Iowa 1994)

Consortium

Tate's husband plead guilty to drug charges and was incarcerated. Tate then filed a civil action against the confidential informant and a joint law enforcement drug task force, alleging that the informant supplied false information that led to her husband's arrest. Tate demanded compensatory and punitive damages based on loss of consortium due to her husband's incarceration. The district court dismissed the petition on grounds that Tate's consortium claim was derivative in nature and could not proceed because her husband had no cause of action against the defendants.

HELD: Affirmed on different grounds. A consortium claim is not derivative. However, a consortium claim based on lawful incarceration of a spouse is barred by public policy.

Counts v. Hospitality Employees, Inc., 518 N.W.2d 358 (Iowa 1994)

Consortium

Iowa does not recognize a right of parental consortium on account of injury or death to adult children.

Robert's River Rides, Inc. v. Steamboat Development Corp., ___ N.W.2d ___ (Iowa, July 27, 1994)

Conspiracy

Civil conspiracy itself is not actionable. It is the acts causing injury undertaken in furtherance of the conspiracy that give rise to a civil cause of action.

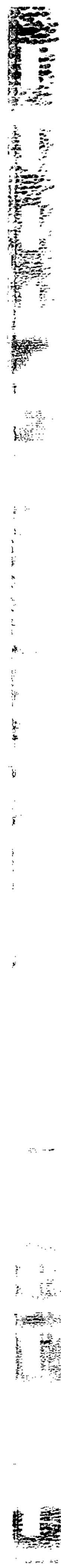
Lara v. Thomas, 512 N.W.2d 777 (Iowa 1994)

Defamation

Lara was employed by Thomas beginning in 1984. Thomas began reducing Lara's work hours after January 1, 1990. As a result, Lara applied for and received partial unemployment benefits. She alleged that Thomas retaliated against her for seeking these benefits and that this retaliation culminated in the termination of her employment in March 1990. She also alleged that Thomas made derogatory statements and inquiries about her both before and after terminating her employment. A jury found for Lara on several counts, including her slander claim.

HELD: All aspects of the judgment affirmed. With regard to the slander claim, Lara alleged that Thomas made several false statements about her both before and after he terminated her employment. The jury was instructed that truth is a complete defense and also was given a qualified privilege instruction. Substantial evidence supported the jury's verdict for Lara on this claim. Lara introduced testimony that Thomas inquired of others as to whether Lara had a drug or alcohol problem. Lara also submitted evidence that Thomas called Lara's subsequent employer to report that Lara was unreliable.

The form of the statement (question or assertion) is not dispositive. The issue is whether the statement was slanderous per se or, in the alternative, was slanderous and caused actual harm to Lara's reputation. The jury could have found that the



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Robert's River Rides, Inc. v. Steamboat Development Corp., ___ N.W.2d ___ (Iowa, July 27, 1994)

Defamation

Robert's River Rides operated non-gambling excursion boats on the Mississippi River in Bettendorf beginning in 1984. It leased riverfront park property from the City of Bettendorf for docking and customer parking, and leased the adjacent riverbed from the State. Its riverfront lease with the City expired at the end of 1990, while its riverbed lease with the State continued through 1994. Iowa authorized riverboat gambling in 1989. Steamboat was chosen to operate a riverboat casino in Bettendorf. The City elected not to renew Robert's lease at the end of 1990 in order to allow Steamboat to dock its boat at the former Robert's location.

Robert's removed its boat from the riverfront in 1991, at which time Steamboat docked its boat at the site. Robert's, however, claimed continuing leasehold rights to the adjacent riverbed pursuant to its lease with the State. It alleged that Steamboat, by docking its boat at the site, was trespassing on Roberts' lease rights. The City attempted, unsuccessfully, to convince the State to terminate Robert's riverbed lease. The city attorney indicated that Robert's had made misrepresentations on its lease renewal application. Ultimately, Robert's filed a multi-count action against Steamboat and the City for trespass, conversion, conspiracy, misrepresentation, implied contract, interference with contract, slander and libel. The district court sustained the defendants' motion for summary judgment on all counts.

HELD: Affirmed. In its defamation claim, Robert's alleged that the city attorney made defamatory statements to the effect that Robert's had made misrepresentations on a lease renewal application. "A qualified or conditional privilege encompasses
communications made in good faith on any subject matter in which the person communicating has an interest, or in reference to which that person has a right or duty, if made to a person having a corresponding interest or duty in a manner and under circumstances fairly warranted by the occasion." The qualified privilege is lost where actual malice is demonstrated. Here, the claimed defamatory statements were made to State officials for their consideration in performing their statutory duties. The statements thus were privileged unless made with actual malice. As a matter of law, Robert's failed to demonstrate actual malice.

Teleconnect Co. v. U.S. West Communications, Inc., 508 N.W.2d 644 (Iowa 1993)

Defenses

U.S. West erroneously informed Teleconnect in 1983 that a particular U.S. West service was available for Teleconnect to resell. In fact, a tariff on file expressly stated that this service was obsolete and could not be extended to new customers. When Teleconnect discovered the error, it sued U.S. West on various tort and contract theories to recover damages it incurred in reliance on U.S. West's misstatement. U.S. West appealed from the district court's refusal to grant its motion for summary judgment.

HELD: Reversed. The filed tariff doctrine conclusively presumes that a utility and its customers know the contents of published tariffs. No cause of action exists when a utility misquotes or misstates the contents of such a tariff. Further, any contract that contradicts the terms of a filed tariff is void and unenforceable. Because the applicable tariff expressly stated that the CENTREX system was obsolete and could not be extended to new customers, Teleconnect was presumed to know that it would not be able to resell CENTREX service. Teleconnect is not entitled to contract, tort or reliance damages arising from U.S. West's error.

Bond v. Cedar Rapids Television Company, 518 N.W.2d 352 (Iowa 1994)

Defenses

Plaintiffs, operators of a television station, obtained a $2.1 million verdict against the defendant on a tortious interference with contract theory. The claim was based on the defendant's filing of a petition that asked the FCC to deny the proposed transfer of plaintiffs' station to a third party. The petition triggered FCC proceedings that resulted in delay and, allegedly, caused the sale of the station to fall through. On appeal, the defendant alleged that the Noerr doctrine immunized it from civil liability for its FCC petitioning.

HELD: Reversed. The Noerr doctrine provides that a party may not be held liable for exercising its First Amendment right to petition for government action. While Noerr arose in the context of federal antitrust claims, state and federal courts have expanded the doctrine to tort law, including claims for interference with contract. Under Noerr a defendant cannot be liable for governmental petitioning unless the petitioning was a sham. A sham is petitioning that is both objectively baseless and subjectively intended to interfere directly with the business relationships of a competitor. Here, in a prior administrative proceeding, the FCC already determined that the defendant's petition was not objectively baseless. This

determination is binding under issue preclusion principles. Thus, as a matter of law, the defendant is immune from civil liability for its FCC filings.

Counts v. Hospitality Employees, Inc., 518 N.W.2d 358 (Iowa 1994)

Dramshop

Nineteen year old Jimmie Counts was drinking at the defendant's lounge in Mt. Pleasant in 1991. While driving home he passed out and hit a utility pole. He suffered a spinal injury causing quadriplegia. He has lived with his parents since the accident. His parents have had to remodel their home, purchase a special van and pay certain medical bills while caring for Jimmie. They brought a dramshop action against the lounge seeking damages to compensate them for these expenses.

The district court granted summary judgment for the lounge, finding that Jimmie's parents suffered no cognizable injuries under the Dram Shop Act. They appealed.

HELD: Affirmed. Jimmie's parents have no legal duty to support him. He was a fully employed adult prior to the accident. Until two months before the accident he had been living on his own. At that time, he moved back in with his parents for financial reasons. He had not been listed as a dependent on his parents 1990 tax returns. While parents are jointly and severally liable for necessary expenses in caring for their minor children, they are not legally liable to pay the expenses of adult children. The only exception to this rule applies when the child is disabled prior to reaching the age of majority. In that case, the parents' obligations continue even after majority. This exception does not apply when the child's disability arises after becoming an adult. Because the Counts have no legal duty to support their adult son, they have no cause of action for expenses they choose to incur in providing such support and care.

The Counts also argue that the age of majority is 21 for purposes of dramshop claims. Under this argument, they would have a right to sue under I.R.C.P. 8 for damages arising from injury to a "minor" child. The legislature, however, has specified that majority occurs at age 18. There is no logical reason to fix a different age for rule 8 dramshop claims. The Counts have no rule 8 claims.

Summerhays v. Clark, 509 N.W.2d 748 (Iowa 1994)

Dramshop

Steve Kayser owned Kayser, Inc., a liquor licensee that operated a restaurant and lounge in Waterloo. James Clark was an employee of the corporation. In January 1990, Kayser hosted a belated holiday party for the establishment's employees and their guests. The party was held at the restaurant. All food and drink was provided by the corporation, and attendance was voluntary. The restaurant was closed to the public for the event.

Clark served drinks from behind the open bar for much of the evening. He served six or seven beers to himself as well as about ten to his wife. The Clarks then left the party about 10 p.m. to pick up Clark's stepson. Clark drove because he believed his wife was too intoxicated. After picking up the stepson, the Clarks headed toward their home. Clark lost control of the vehicle and drove into the ditch. The stepson was killed in the accident. Testing later established that Clark was legally intoxicated.

The stepson's father brought a wrongful death claim against Clark, also asserting dramshop and common law claims against Kayser and Kayser, Inc. Kayser and Kayser, Inc. successfully moved for summary judgment on all claims. They argued (1) that Iowa's dramshop law, Iowa Code § 123.92, preempts all common law claims against Kayser, Inc., as the liquor licensee, (2) that no dramshop cause of action could lie against Kayser, Inc. under § 123.92 because Kayser, Inc. did not sell and serve alcoholic beverages to Clark, (3) that no §123.92 cause of action existed against Kayser, individually, because he was not the liquor licensee, and (4) that Kayser, individually, was immune from liability as a social host under Iowa Code § 123.49(1)(a). The father appealed.

HELD: Affirmed. Section 123.92 is the sole and exclusive cause of action available against Kayser, Inc. as the dramshop licensee. Kayser, Inc., by providing alcohol free of charge at a holiday party for its employees, did not engage in a "sale" of alcoholic beverages. The intangible goodwill fostered by an employee party did not constitute consideration that passed to Kayser, Inc. in exchange for the alcohol. As such, Kayser, Inc. had no liability under §123.92.

Dramshop liability could not attach to Kayser, personally, because he was not the liquor licensee. Only the named licensee or permittee can face dramshop liability. Finally, §123.49(1)(a) immunizes Kayser from civil liability as a social host.

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Davis v. Kwik-Shop, Inc., 504 N.W.2d 877 (Iowa 1993)

Duty

Assailants initially gathered at the Hy-Vee and its employee's parking lot and disclosed themselves to Hy-Vee personnel to be dangerous characters in the mood to harm "some guys" they could see at the Kwik-Shop premises. The assailants then walked to the Kwik-Shop premises, engaged in an altercation with Davis and his friends, and seriously injured Davis. Davis sued Kwik-Shop, who filed a third-party action against Hy-Vee. Davis amended his petition to assert a direct claim against Hy-Vee. Hy-Vee filed a motion for summary judgment on grounds that it owed no duty of care to Davis. District court sustained Hy-Vee's motion.

HELD: Hy-Vee had no duty to protect Davis from harm committed by invitees who left Hy-Vee property before assaulting Davis, who had never been on Hy-Vee property. Restatement section 314A provides that the duties owed by a possessor of land no longer apply once the invitee departs.

Regan v. Denbar, Inc., 514 N.W.2d 751 (Iowa Ct. App. 1994)

Duty

The Regan brothers were at a bar owned by the defendant in Davenport when they became involved in an altercation with another group. One of the brothers was hit in the face. The bartender asked the Regans to leave. They expressed fear that they would be attacked outside and requested that the bartender call the police. He refused to do so and escorted the Regans out the back door. Wilcox, a member of the other group, was waiting outside, but he told the bartender that he was just "cooling off." The bartender then went back inside. Wilcox then attacked the Regans and was joined by other members of the group. The Regans suffered injuries. Three members of the other group were convicted of assault. The Regans sued the bar, claiming that it had a duty to protect them from the criminal acts of the assailants both inside and outside the bar. The district court directed a verdict for the defendant at the close of the Regans' evidence.

HELD: Reversed and remanded. While one person generally has no duty to protect another from harm caused by a third person, this rule is not applicable under certain circumstances. Section 344 of the Restatement (Second) of Torts provides that the possessor of land who holds it open to the public for his business purposes is liable for harm caused by a third party if the possessor fails to exercise reasonable care to discover that such acts are likely to be done or to give an adequate warning to protect against the harm. Here, the Regans testified that the bartender broke up the first fight, asked the Regans to leave, refused their request for police protection and

sent them out the back door with knowledge that a member of the adverse group was present. This testimony was sufficient to raise a jury issue as to whether the defendant failed to exercise reasonable care to prevent foreseeable harm caused by third persons.

NOTE: Judge Sackett dissented, stating that she would affirm the directed verdict.

Kirk v. Union Pacific Railroad, 514 N.W.2d 734 (Iowa Ct. App. 1994)

Duty

Kirk was a temporary employee of Alter Trading Company. He was assigned the task of removing visible non-metal scrap from loaded gondola rail cars. Kirk's supervisor asked him to work on two cars located on track three--a track that Union Pacific uses to build its trains. The supervisor testified that he "vaguely" remembered informing a Union Pacific employee that an Alter employee would be working on track three. The Union Pacific employee denied being warned.

Kirk was working on one of the gondola cars when four empty cars bumped into the stationary cars, causing Kirk to fall. A loaded car rolled over his leg. He suffered a broken finger and had to have his right leg amputated above the knee.

Kirk sued Alter and Union Pacific, settling with Alter prior to trial. The jury assessed 15% fault against Alter and 85% against Union Pacific, awarding damages of over $750,000. On appeal, Union Pacific alleged that the district court erred in rejecting instructions as to its various theories of defense, including a defense that it had no duty to look out for Kirk.

HELD: Affirmed. Union Pacific claims that it had no duty to look for an Alter employee because it had not been informed that any Alter employee would be working on track three. According to Union Pacific, this rendered Kirk an "unknown trespasser" to whom Union Pacific owed no duty. The district court correctly refused to submit this defense because Union Pacific had undisputed knowledge that Alter employees sometimes worked on track three.

Fiala v. Rains, ___ N.W.2d ___ (Iowa, July 27, 1994)

Duty

Lori Rains was involved in a stormy, sometimes violent relationship with Matthew Moeller. She also became acquainted with Andy Fiala. One night Rains broke off a date with Moeller and went

with friends to a local bar, where she ran into Fiala. Rains and Fiala ultimately ended up at Rains home. Moeller, upset about being stood up, was lurking outside Rains home when the two arrived. He broke in the front door and, ultimately, beat and kicked Fiala into unconsciousness. Fiala sued Moeller and Rains, settling with Moeller before trial. The district court then granted Rains motion for directed verdict at the close of Fiala's evidence, finding that Rains owed no legal duties to Fiala.

HELD: Affirmed. Fiala asserted duties based on Rains alleged knowledge of a dangerous situation and on a premises liability theory. Fiala claims that Rains had a duty to warn him of the fact that she had broken off a date with Moeller because, given Moeller's history of violence, it was foreseeable that Moeller would respond as he did. There was no evidence, however, from which a jury could find that Rains could have foreseen that Fiala was in danger. Moeller had made no threats to Rains concerning Fiala. Further, no "special relationship" existed upon which to base liability for mere nonfeasance by Rains.

As for premises liability, Fiala relies on Restatement (Second) of Torts § 344, a section concerning possessors of land who hold that land open to the public for business purposes. This section does not apply to social hosts. The duty of social hosts, found at § 318, is much narrower. Fiala does not contend that § 318 applies under these facts. The district court correctly granted a directed verdict on Fiala's premises liability claim.

Morgan v. Perlowski, 508 N.W.2d 724 (Iowa 1993)

Duty

The defendant, a 19 year old, held a beer party at his mother's home while she was away. The plaintiff, age 21, was one of the invited guests. Six uninvited males arrived at the party and began causing trouble. On several occasions the plaintiff suggested to the defendant that he take action to either end the party or force the six men to leave. The defendant refused to take action. The defendant's refusal to act continued even after a fight erupted between the six men and some other guests. Shortly thereafter, the plaintiff saw the six men punching another guest and attempted to intervene. One of the six men struck the plaintiff with a pool cue, causing permanent eye injuries.

The plaintiff originally sued on a basic premises liability theory, alleging that the defendant failed to protect him from a hidden, dangerous condition on the property. As ultimately submitted to the jury, however, his claim was based on Restatement (Second) of Torts § 318. This section generally states that when a possessor of property allows another to use that property, the possessor must exercise reasonable care to control the conduct of

this person and prevent injury to others if the possessor knows or has reason to know that he or she has the ability, opportunity and necessity to control such conduct. The defendant appealed from an adverse judgment based on this theory.

HELD: Judgment affirmed. The Supreme Court rejected the defendant's argument that the case should be analyzed as a simple premises liability claim. Harm caused by the physical condition of property (or by the acts of the possessor) is distinct from harm caused by licensees of the possessor. The Court adopted the principles of section 318 and held that a possessor of property, when present, has a "limited" duty to control the conduct of social guests. The Court went on to find that plaintiff had generated a jury issue as to whether the defendant knew or should have known that he had the ability, opportunity and need to control the behavior of the six men. The plaintiff's own knowledge of the danger was not a bar to recovery, but rather was a matter to be considered under comparative fault principles.

Mastbergen v. City of Sheldon, 515 N.W.2d 3 (Iowa 1994)

Duty

Mastbergen owned a jewelry store in Sheldon. In the 1970's he entered into a contract with the city whereby a silent alarm system would be installed and monitored by the police department in return for a monthly fee. Mastbergen paid a $5 monthly fee for this service.

In 1987 two men committed an armed robbery of the store. The silent alarm was activated and noted by the police dispatcher. She placed a call to the store and dispatched two officers after receiving no response. The officers covered the front and back doors of the business. The assailants fled out the front door, knocked down one officer and took his service revolver. They were able to escape with a substantial amount of inventory. Few of the stolen items ever were recovered.

Mastbergen sued the city for damages, claiming that the officers responded negligently to the alarm. He presented expert testimony indicating that the officers' manner of response was too casual and unprofessional. The jury returned a verdict for Mastbergen.

The district court entered judgment for the city notwithstanding the verdict, holding that the city owed no duty to Mastbergen other than the general duty to investigate a crime. Mastbergen appealed.

HELD: Affirmed. No person has a duty to act for the protection of another unless a "special relationship" exists. This rule extends to law enforcement personnel. The $5

monthly fee that Mastbergen paid the city for the silent alarm service did not create a "special relationship." Law enforcement personnel owe special duties to citizens only if (1) they create the situation that puts the citizen's life in danger or (2) they take the citizen into their custody and control. Neither exception applies here.

Edmunds v. Mercy Hospital, 503 N.W.2d 877 (Iowa Ct. App. 1993)

Employment

Edmunds was a nurse in Mercy Hospital's substance abuse treatment unit from early 1989 until her resignation in March 1990. After resigning, she brought suit against the Hospital and her former supervisor, Marsh. The case was tried to the court. At the close of her evidence, the court directed a verdict against Edmunds on her claim for intentional infliction of emotional distress. Later, after hearing all evidence, the court found against Edmunds on her sexual harassment claim and dismissed her petition. She appealed.

HELD: Affirmed. Edmunds' claim was a "hostile environment" claim, requiring proof of sexual harassment that was so severe and pervasive that Edmunds had to choose between enduring an unreasonably offensive work environment or quitting her job. The district court found that Marsh never made sexual overtures to Edmunds, nor did he discuss sexual matters with her. Marsh admitted hugging Edmunds twice, but claimed that this was at Edmunds' request. Other employees of the unit testified that hugging was common in the unit. While Marsh required Edmunds to attend more one-on-one meetings with him than were required of other employees, the evidence indicated that this occurred only after other employees complained that Edmunds' clothing, make-up and open relationship with a co-worker were hurting patient care. Finally, when Edmunds met with hospital administrators before her resignation to discuss these matters, she did not complain of any sexual harassment by Marsh. Substantial evidence supported the district court's conclusion that nothing of a sexual nature occurred between Marsh and Edmunds.

Borschel v. City of Perry, 512 N.W.2d 565 (Iowa 1994)

Employment

Borschel was a police officer for the city of Perry. The employment agreement was oral and for an unspecified term. In 1991 Borschel was arrested and charged with third degree sexual abuse. The state alleged that Borschel sexually abused his daughter during the spring and summer of 1988.

Borschel was suspended with pay pending further investigation. The Perry City Attorney's office obtained depositions and minutes of testimony relating to the criminal action. Perry's mayor and chief of police read these materials. They then terminated Borschel's employment for reasons of misconduct. Specifically, the termination letter stated that Borschel had allegedly committed third degree sexual abuse and that his continued employment would be detrimental to the city. Borschel requested a hearing to review his termination.

Borschel was acquitted of the criminal charge on October 4, 1991. On October 7, 1991, the city counsel conducted a public hearing regarding Borschel's employment and upheld his termination. He then sued the City, its mayor and police chief for wrongful discharge in violation of public policy and for breach of an implied contract. The district court granted the defendants' motion for summary judgment, finding that Borschel was an at-will employee and, further, that no public policy exception applied to prevent his termination. On appeal, Borschel abandoned the implied contract claim and argued solely that public policy prevents termination of an at-will employee on grounds that the employee has been accused of a crime.

HELD: Summary judgment affirmed. The right of due process and the presumption of innocence in a criminal proceeding do not create a public policy prohibiting the termination of an at-will employee on grounds that a criminal charge has been filed against that employee. Because the termination violated no well-recognized and defined public policy of the state, it was not wrongful.

<u>Clarey v. K-Products, Inc.</u>, 514 N.W.2d 900 (Iowa 1994)

<u>Employment</u>

Clarey was discharged from her position at K-Products and sued for wrongful termination. She had injured her neck on the job and was unable to work for a period of time. She attempted to return to work but was sent home by the company physician, who told her that her injury was not yet healed. She was informed of her termination while she was receiving healing period benefits. While she admitted that she was an at-will employee, her lawsuit alleged that she was terminated in retaliation for seeking workers compensation benefits and, therefore, in violation of public policy.

The jury awarded damages for lost past wages, lost future wages and past and present emotional distress. K-Products appealed. Clarey cross-appealed from rulings denying punitive damages and attorney fees.

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HELD: Affirmed on both appeals. An employer may not discharge an at-will employee in retaliation for seeking workers compensation benefits. Clarey submitted substantial evidence that K-Products took an unkind view toward workers seeking such benefits. This evidence included a history of tardy benefit payments, disparaging comments concerning workers compensation claims and testimony from other workers who had been harassed following the assertion of workers compensation claims. Further, K-Products gave inconsistent reasons for Clarey's discharge. This evidence raised a jury issue as to whether Clarey's discharge was retaliatory.

Lara v. Thomas, 512 N.W.2d 777 (Iowa 1994)

Employment

Lara was employed by Thomas beginning in 1984. Her wages always were less than minimum wage. In 1987 she asked Thomas for a pay increase and benefits. In 1989, Thomas allegedly agreed to double her $3.35 hourly wage and provide her with insurance and paid vacations beginning January 1, 1990. He also allegedly promised Lara continued employment until Thomas's retirement. Instead of honoring the alleged agreement, however, Thomas began reducing Lara's work hours after January 1, 1990. As a result, Lara applied for and received partial unemployment benefits. She alleged that Thomas retaliated against her for seeking these benefits, and that this retaliation culminated in the termination of her employment in March 1990.

Lara sued Thomas for violation of wage laws, violations of equal pay requirements, violations of various fair employment statutes, fraudulent misrepresentation of wage obligations, fraudulent misrepresentation of an agreement for higher wages, higher benefits and continued employment, tortious discharge and slander. The jury found for Lara on several counts, finding that Thomas failed to pay required minimum wage and overtime amounts, that Thomas misrepresented the conditions of employment, that Thomas tortiously discharged Lara in violation of public policy, and that Thomas slandered Lara. For compensatory damages the jury awarded the actual amount of the wage underpayments, plus $6500 for misrepresentation, $10,000 for tortious discharge and $10,000 in general damages for slander. The jury awarded punitive damages of $7500 on the misrepresentation claim, $15,000 on the tortious discharge claim and $7500 on the slander claim. The jury rejected Lara's claims based on statutory equal pay requirements.

The district court, in ruling on post-trial motions, found that the actual damages awarded for misrepresentation and tortious discharge were duplicative. The court thus set aside the $6500 misrepresentation award. The court further set aside the $10,000 punitive damages award for tortious discharge because such

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a claim, based on retaliation for filing a claim for unemployment benefits, had not previously been recognized in Iowa. The court upheld the jury's rejection of the equal pay claim and awarded Lara attorney fees in the amount of $14,560 under Iowa's wage payment act. Both parties appealed.

HELD: All aspects of the judgment affirmed. With regard to the tortious discharge claim, the court held that Iowa's public policy does prohibit the retaliatory discharge of an employee who seeks unemployment benefits. To hold otherwise, the court stated, would permit an employer to intimidate an employee into waiving statutory rights. Because this is the first case to recognize such a cause of action in Iowa, the district court correctly set aside the punitive damages award.

Hillrichs v. Avco Corp., 514 N.W.2d 94 (Iowa 1994) (Hillrichs II)

Enhanced Injury

Hillrichs was operating a cornpicker manufactured by Avco when it became plugged. He attempted to unplug the machine without turning it off. His hand became caught between two rollers, which continued to rotate. Hillrichs' hand was stuck in the operating machine for 30 minutes until an assistant discovered him and turned the machine off. The four fingers on his right hand were amputated as a result of the incident.

Hillrichs sued Avco on various product liability theories, claiming that Avco should have installed an emergency stop device within reach of the location in which Hillrichs hand became caught. The first trial ended in a finding that Hillrichs was 100% at fault. The Supreme Court reversed and remanded for a new trial on Hillrichs' negligence claim with respect to whether Avco was liable for Hillrichs' enhanced injury--additional injuries that Hillrichs incurred because his hand was caught in the machine for such a lengthy period of time. See Hillrichs v. Avco Corp., 478 N.W.2d 70 (Iowa 1991).

The second jury found for Hillrichs on a negligent design claim, assessing 20% of fault to him and awarding $919,541.60 in actual damages and $1 million in punitive damages. The district court set aside the punitive damages award and reduced the actual damages by Hillrichs' 20% fault. The district court also reduced the actual damages by $50,000 due to a lack of evidence of future medical expenses. Both parties appealed.

HELD: Affirmed in all respects. Hillrichs presented ample evidence that he suffered an enhanced injury due to the lack of a stop device. Several experts testified that his injuries were more serious because of the extended length of time in which his hand was caught in the moving rollers. The district court did not err in reducing Hillrichs' damages by the 20% fault

attributed to him. In Hillrichs I the Supreme Court directed the district court to reduce any damage award by the amount of Hillrichs' fault. The district court, at the conclusion of the second trial, entered judgment accordingly. It was only after entry of judgment that the Supreme Court decided, in Reed v. Chrysler Corp., 494 N.W.2d 224 (Iowa 1992), that the plaintiff's fault should not be used to reduce the amount of enhanced injury damages. Because Hillrichs I was the law of the case, and because judgment in the second trial was entered prior to Reed, the district court acted properly in reducing the damage award by Hillrichs' 20% fault. If Reed had been decided prior to the second trial, then the district court would have had to follow the new rule of law set forth in Reed.

Lara v. Thomas, 512 N.W.2d 777 (Iowa 1994)

Equal Pay

To prevail on an equal pay claim, a plaintiff must establish that the employer pays different wages to employees of the opposite sex for equal work on jobs requiring equal skill, effort and responsibility and which are performed under similar working conditions. If the plaintiff establishes these elements, then the burden shifts to the employer to show that one of four exceptions applies.

Lara did not meet the initial burden because she failed to prove that she performed work substantially equal in terms of skill, effort and responsibility to that of Thomas's male employee. Unlike Lara, the male employee was a licensed veterinary technician with formal education. The male employee testified that his duties exceeded those of Lara and that, in fact, he supervised much of her work. Substantial evidence thus supported the jury's rejection of Lara's equal pay claim.

Lenstra v. Menard, Inc., 511 N.W.2d 410 (Iowa Ct. App. 1993)

False Arrest

Orin Lenstra and his wife were shopping at a Menard store in Dubuque. Orin took several items, including a $1.29 baseball cap, to the checkout line. The cashier did not charge Orin for the cap, which Orin allegedly had placed on the counter a foot to a foot and one-half behind the other items. Orin left the store with the cap and got into his vehicle. A security officer followed Orin out. Orin exited the vehicle as the security officer approached. Orin agreed with the officer that he had not been charged for the cap and stated an intention to return to the store to pay for it. The officer would not allow Orin to do so. Instead, he required Orin to wait in a room at the store for a police officer, who charged Orin with shoplifting. Orin was acquitted of the charges.

Orin sued Menard and the security officer for false arrest and for violation of 42 U.S.C. § 1983. The district court granted summary judgment for the defendants on both claims, finding as a matter of law that the defendants were entitled to immunity under Iowa Code § 808.12. The court found that the defendants had probable cause to detain Orin because he had placed the cap behind the other items on the counter. The district court also found that there was no basis for the § 1983 claim because the defendants were not acting under color of state law. Orin appealed.

HELD: Reversed and remanded. There is a dispute in the record as to how far Orin placed the cap behind the other items on the counter. There is thus a material issue of fact as to whether the placing of the cap on a counter, where the clerk had access to it, provided probable cause to believe that Orin was attempting to conceal the cap. Further, because the security officer refused to allow Orin to pay for the cap or to leave the store, a finder of fact could find that an arrest occurred. This creates a fact issue as to whether the defendants were acting under color of state law for purposes of the § 1983 claim.

<u>Lange v. Lange</u>, ___ N.W.2d ___ (Iowa, July 27, 1994)

<u>Fiduciary Duty</u>

Brothers Jean and Elmer owned all of the stock of a holding company that was the majority owner of a local bank. Elmer had a 52% to 48% edge in ownership because Jean assigned some debt to the company at the time it was formed. The brothers acted as equal partners, however, during the course of their ownership and expressed intent, on several occasions, to equalize the ownership disparity. Several attempts to do so were postponed due to the corporation's financial difficulties. In 1986 or 1987, Elmer agreed to sell Jean 600 shares of Elmer's stock to bring about equalization. However, this transfer never formally occurred.

Upon Elmer's death, Jean attempted to go through with the contemplated purchase of 600 shares. Elmer's family, however, decided that they would prefer to retain majority control. Jean, who had managed the corporation over the years, feared that the corporation would suffer if Elmer's family took over management responsibilities. Thus, as the sole surviving board member, Jean appointed his own son to fill Elmer's vacant seat as director and passed a resolution by which the corporation redeemed many shares of Elmer's family's stock. He also caused the corporation to issue additional shares to himself. He then purchased 400 shares of the bank's stock from a minority shareholder of the bank.

Elmer's family sued, claiming that Jean violated fiduciary obligations by issuing shares to himself and causing the corporation to redeem Elmer's family's shares. The family also

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claimed that Jean usurped a corporate opportunity by purchasing the 400 shares of bank stock for his own account. The district court set aside the corporation's issuance of shares to Jean and the redemption of shares from Elmer's family, but found that Jean breached no duty by purchasing shares in the bank for his own account. The district court also held that a 1983 agreement between Jean and Elmer allowed Jean to purchase 600 shares from Elmer's family. Both parties appealed.

HELD: Affirmed in part and reversed in part. The redemption was properly set aside because the bylaws allowed only total, not partial, redemption upon the death of one of the brothers. Jean did not usurp any corporate opportunity by purchasing 400 shares of the bank's stock from a minority shareholder because the corporation already had firm majority ownership of the bank and the corporation had no financial ability to purchase those shares itself. Finally, the issuance of corporate stock to Jean was improper because it furthered no legitimate business purpose and instead served only to enrich Jean and provide him with majority control of the corporation.

Citizens Savings Bank v. Wild, 512 N.W.2d 799 (Iowa Ct. App. 1993)

Fiduciary Duty

CSB had a banking relationship with the Wilds for nearly thirty years. During the 1980's, the Wilds' farming operation began to lose money. Over a period of several years, CSB and the Wilds restructured the Wilds' significant debt, with CSB ultimately receiving a liens on much of the Wilds' real and personal property. Finally, in 1988, CSB informed the Wilds that it could not loan additional funds to them. CSB filed foreclosure actions in two counties. The Wilds counterclaimed for breach of contract, breach of fiduciary duty, fraud, misrepresentation, failure of consideration and punitive damages. The district court found for CSB, foreclosed the liens and denied recovery on the Wilds' counterclaim. On appeal, the Wilds contended that the district court erred in finding that they failed to carry their burden of establishing fraud. They further claimed that a fiduciary relationship existed and imposed upon CSB a burden of proving that the transactions were fair and voluntary.

HELD: Affirmed. No fiduciary relationship existed between the Wilds and CSB's president, Ernie Buresh. The evidence was insufficient to establish that Buresh and the Wilds had a close, personal relationship of trust and confidence. As such, the burden remained on the Wilds to establish fraud.

Engstrand v. West Des Moines State Bank, 516 N.W.2d 797 (Iowa 1994)

Fiduciary Duty

Engstrand and his family owned several boat companies, each of which was financed by West Des Moines State Bank. When the companies defaulted, the Bank commenced collection proceedings and began liquidating inventory. The Engstrands sued, claiming negligent disposition of collateral and breach of fiduciary duties against the Bank and against a corporation that had been set up to conduct the liquidation. The district court directed a verdict in favor of the liquidation corporation but allowed the case to go to the jury as against the Bank. The jury returned a substantial verdict for the Engstrands but the district court granted judgment notwithstanding the verdict for the Bank.

HELD: Affirmed. The banker-customer relationship is not a relationship that automatically generates fiduciary obligations. Here, the Bank and the customer agreed to a loan with certain terms and conditions. The Bank was acting on its own behalf, not on behalf of the plaintiffs as part of a confidential or trust relationship. There is no evidence that the Bank was acting as an advisor to the plaintiffs or that the Bank exercised any control over their business. As a matter of law, there was no fiduciary relationship.

Citizens Savings Bank v. Wild, 512 N.W.2d 799 (Iowa Ct. App. 1993)

Fraud

CSB had a banking relationship with the Wilds for nearly thirty years. During the 1980's, the Wilds' farming operation began to lose money. Over a period of several years, CSB and the Wilds restructured the Wilds' significant debt, with CSB ultimately receiving a liens on much of the Wilds' real and personal property. Finally, in 1988, CSB informed the Wilds that it could not loan additional funds to them. CSB filed foreclosure actions in two counties. The Wilds counterclaimed for breach of contract, breach of fiduciary duty, fraud, misrepresentation, failure of consideration and punitive damages. The district court found for CSB, foreclosed the liens and denied recovery on the Wilds' counterclaim. On appeal, the Wilds contended that the district court erred in finding that they failed to carry their burden of establishing fraud. They further claimed that a fiduciary relationship existed and imposed upon CSB a burden of proving that the transactions were fair and voluntary.

HELD: Affirmed. No fiduciary relationship existed between the Wilds and CSB's president, Ernie Buresh. The evidence was insufficient to establish that Buresh and the Wilds had a close, personal relationship of trust and confidence. As

such, the burden remained on the Wilds to establish fraud. They claimed that CSB fraudulently obtained liens on their property by promising to provide future financing of their farm operation when in fact CSB had no intention of doing so and instead desired only to obtain title to the property. CSB did, however, provide significant, additional financing after obtaining the liens and further passed up many earlier opportunities to foreclose the liens due to the Wilds' defaults. The evidence does not support the fraud claim.

Babbe v. Peterson, 514 N.W.2d 726 (Iowa 1994)

Immunity

Babbe was charged with arson. He provided bail by conveying two parcels of real estate to the clerk of court. An order of forfeiture was entered against him, after he was convicted, because he failed to show for a hearing on post-trial motions. Later, after he was incarcerated, the state filed a quiet title action with regard to the two parcels. The court appointed Peterson as Babbe's guardian ad litem due to his incarceration. Peterson filed a general denial on Babbe's behalf but did not resist the state's subsequent, successful motion for summary judgment.

Babbe then filed a legal malpractice claim against Peterson. Peterson moved for, and received, summary judgment on grounds that guardians appointed under Rules of Civil Procedure 13 and 14 are immune from liability. Babbe appealed.

HELD: Affirmed. The majority rule is that a guardian ad litem appointed by the court performs quasi-judicial functions and thus is entitled to judicial immunity. Iowa adopts this majority rule. While the court may set aside a judgment obtained under circumstances in which the guardian ad litem failed to act, the guardian ad litem is not subject to malpractice liability.

Muzingo v. St. Luke's Hospital, 518 N.W.2d 776 (Iowa 1994)

Immunity

Dr. Whitters, a Cedar Rapids psychiatrist, was appointed by the court in 1990 to examine Glenn Muzingo for purposes of evaluation for an involuntary commitment to St. Luke's Hospital. Muzingo was released one day later on the advice of Whitters and the Hospital's chief medical officer.

Four months later Muzingo placed a bomb inside the car of his wife, Terri. The bomb exploded, causing serious injuries to

Terri. She filed suit against Whitters and the Hospital, claiming that they were negligent in the treatment and discharge of her husband and that they failed to protect the Muzingo family despite knowing that Glenn had contemplated murder. The defendants filed motions to dismiss, claiming that a court-appointed psychiatrist is entitled to absolute quasi-judicial immunity. The district court agreed, granting the motions.

HELD: Affirmed. Iowa already has expanded the doctrine of quasi-judicial immunity to other nonjudicial officers whose actions are integral to the judicial process. The focus is on the nature of the functions performed. Other jurisdictions have held that a court-appointed psychiatrist performs quasi-judicial functions as an "arm of the judge." Iowa follows this reasoning. When psychiatrists and other mental health providers are appointed by the court and render an advisory opinion regarding an individual's mental condition, they are acting as an arm of the court and are protected from suit by absolute quasi-judicial immunity. Absent such protection, the threat of liability could undermine objectivity and independence and the professionals' willingness to accept court appointments.

Bond v. Cedar Rapids Television Company, 518 N.W.2d 352 (Iowa 1994)

Interference

Bond was general partner of Dubuque T.V. Limited Partnership (DTV), owner of station KDUB in Dubuque. KDUB was an ABC network affiliate, as was station KCRG in Cedar Rapids. For several years, the FCC permitted the Dubuque cable television system to protect KDUB by blacking out KCRG's programming when both stations were showing the same ABC programs. While this FCC-approved protection expired in 1986, the Dubuque cable system continued to black out KCRG's programming over KCRG's objections.

In the meantime, DTV entered into a contract to sell KDUB to Sage Broadcasting. DTV had to obtain FCC approval to transfer its operating license to Sage. DTV filed a copy of the sales agreement with the FCC. KCRG obtained a copy of the agreement and noted that it referenced a "verbal agreement" between DTV and the cable system to continue blacking out KCRG's programming. This "verbal agreement" language caused KCRG to file a petition with the FCC to deny DTV's proposed license transfer to Sage on grounds that the "verbal agreement" violated both FCC rules and the antitrust laws. DTV opposed this petition. A bureau of the FCC ruled in DTV's favor. KCRG's unsuccessfully appealed this ruling to the FCC Commissioners. DTV then filed a petition to deny renewal of KCRG's license, arguing that KCRG was unfit to remain a licensee because its filings against DTV were an abuse of process. The FCC rejected DTV's argument and found that KCRG had raised "colorable allegations" of anticompetitive conduct.

The proposed sale of KDUB to Sage fell through after a deadline passed. DTV then filed suit against KCRG, claiming that KCRG had tortiously interfered with the Sage contract by filing the petition to deny with the FCC. Judgment was entered, based on a jury verdict, in the amount of $2.1 million for DTV and $10,000 in emotional distress damages for Bond individually. KCRG appealed.

HELD: Reversed. DTV's allegations gave rise to the Noerr doctrine, which provides that a party may not be held liable for exercising its First Amendment rights to petition for government action. While Noerr arose in the context of federal antitrust claims, state and federal courts have expanded the doctrine to tort law, including claims for interference with contract.

Under Noerr, KCRG cannot be liable for governmental petitioning unless the petitioning was a sham. A sham, according to the United States Supreme Court, is a petition that is both objectively baseless and subjectively intended to interfere directly with the business relationships of a competitor. Here, KCRG's petitioning was not a sham because it was not objectively baseless. The FCC previously determined, in response to DTV's abuse of process allegations against KCRG, that KCRG's filings raised "colorable allegations" and did not suffer from an "absence of any reasonable basis." These findings, under the doctrine of issue preclusion, are binding on DTV in this action. Thus, as a matter of law, KCRG's FCC filings were not objectively baseless and do not fall within the sham exception to Noerr. KCRG is immune from civil liability for its FCC filings.

Fischer v. UNIPAC Service Corp., ___ N.W.2d ___ (Iowa, July 27, 1994)

Interference

Fischer took out student loans during medical school. UNIPAC serviced the loans. He obtained a one year deferment upon graduation to participate in an internship program. He then asked for another deferment to complete the program. This request was denied. Fischer and his attorney continuously requested reconsideration. In the meantime, Fischer defaulted on his loan payments, which were now due because the deferment had been denied. UNIPAC declared him to be in default and made a default report to a credit agency. Fischer filed a six count complaint, including claims based on state and federal debt collection acts and two intentional tort claims: interference with prospective business relationships and defamation. He appealed from a district court order granting summary judgment for the defendants on all counts.

HELD: Affirmed. With regard to the interference claim, Fischer must establish "improper" interference

in order to prevail. In another portion of the opinion the Court found that Fischer had no entitlement to a second year of deferment. Thus, he was properly declared to be in default. It is not "improper" for a party to do what that party has a right or obligation to do. The reporting of a bad debt is permissible under state and federal law. Further, a lender is required, by federal law, to report unpaid debts to credit agencies when the debt is federally insured. As a matter of law, the defendants' conduct was not improper.

<u>Hockenberg Equip. Co. v. Hockenberg's Equip. & Supply Co.</u>, 510 N.W.2d 153 (Iowa 1993)

<u>Interference</u>

Plaintiff, the "Des Moines Hockenbergs," and defendant, the "Omaha Hockenbergs," were parties to a prior lawsuit concerning the Omaha Hockenbergs' marketing practices in Central Iowa. A settlement agreement in the prior lawsuit prohibited the Omaha Hockenbergs from using promotional material in Iowa that did not include a disclaimer indicating that the Omaha Hockenbergs were not affiliated with the Des Moines Hockenbergs. The Omaha Hockenbergs violated the agreement by continuing to use promotional material in Iowa without the required disclaimer.

The Des Moines Hockenbergs sued for damages and injunctive relief. A jury awarded one dollar in actual damages, finding that the Omaha Hockenbergs breached the settlement agreement and interfered with the Des Moines Hockenberg's prospective business advantage. The jury also awarded $5000 in punitive damages. The Omaha Hockenbergs appealed.

HELD: Punitive damages award affirmed. Punitive damages are not appropriate for a mere breach of contract, but the jury found that the Omaha Hockenbergs committed the tort of interference with prospective business advantage. Because the Omaha Hockenbergs engaged in tortious conduct, the jury was permitted to consider the Des Moines Hockenbergs' request for punitive damages.

<u>Robert's River Rides, Inc. v. Steamboat Development Corp.</u>, ___ N.W.2d ___ (Iowa, July 27, 1994)

<u>Interference</u>

Robert's River Rides operated non-gambling excursion boats on the Mississippi River in Bettendorf beginning in 1984. It leased riverfront park property from the City of Bettendorf for docking and customer parking, and leased the adjacent riverbed from the State. Its riverfront lease with the City expired at the end

of 1990, while its riverbed lease with the State continued through 1994. Iowa authorized riverboat gambling in 1989. Steamboat was chosen to operate a riverboat casino in Bettendorf. The City elected not to renew Robert's lease at the end of 1990 in order to allow Steamboat to dock its boat at the former Robert's location.

Robert's removed its boat from the riverfront in 1991, at which time Steamboat docked its boat at the site. Robert's, however, claimed continuing leasehold rights to the adjacent riverbed pursuant to its lease with the State. It alleged that Steamboat, by docking its boat at the site, was trespassing on Roberts' lease rights. The City attempted, unsuccessfully, to convince the State to terminate Robert's riverbed lease. Ultimately, Robert's filed a multi-count action against Steamboat and the City for trespass, conversion, conspiracy, misrepresentation, implied contract, interference with contract, slander and libel. The district court sustained the defendants' motion for summary judgment on all counts.

HELD: Affirmed. In its interference claim, Robert's alleged that the City and Steamboat interfered with Robert's performance of its lease with the State. Interference is actionable only if it is improper. Iowa courts apply a seven factor test to determine if interference is improper. As a matter of law, Robert's failed to raise a fact issue as to improper conduct.

Tyler v. Percell, 506 N.W.2d 805 (Iowa Ct. App. 1993)

Interference

Plaintiff was contract vendee of an apartment complex who, upon being forfeited out of the contract for nonpayment, sued the vendor and the three apartment managers for tortious interference with her real estate contract. By the time of trial, two of the three managers had filed for bankruptcy and had been dismissed from the case. The case went to trial with the vendor and the remaining manager as defendants. The district court granted a directed verdict for both defendants at the close of the plaintiff's evidence. With regard to the manager, the district court found insufficient evidence of interference as a matter of law. As for the vendor, the district court held that a party to a contract cannot face liability for interference with that contract. The plaintiff appealed.

HELD: Reversed and remanded for a new trial as to both remaining defendants. A party to a contract may be liable for interference with that contract if he or she is part of a conspiracy involving third parties to so interfere. The plaintiff produced sufficient evidence that the vendor and managers

conspired to interfere with the plaintiff's performance of the contract by reducing her rental income from the property.

Citizens Savings Bank v. Wild, 512 N.W.2d 799 (Iowa Ct. App. 1993)

Lender Liability

CSB had a banking relationship with the Wilds for nearly thirty years. During the 1980's, the Wilds' farming operation began to lose money. Over a period of several years, CSB and the Wilds restructured the Wilds' significant debt, with CSB ultimately receiving a liens on much of the Wilds' real and personal property. Finally, in 1988, CSB informed the Wilds that it could not loan additional funds to them. CSB filed foreclosure actions in two counties. The Wilds counterclaimed for breach of contract, breach of fiduciary duty, fraud, misrepresentation, failure of consideration and punitive damages. The district court found for CSB, foreclosed the liens and denied recovery on the Wilds' counterclaim. On appeal, the Wilds contended that the district court erred in finding that they failed to carry their burden of establishing fraud. They further claimed that a fiduciary relationship existed and imposed upon CSB a burden of proving that the transactions were fair and voluntary.

HELD: Affirmed. No fiduciary relationship existed between the Wilds and CSB's president, Ernie Buresh. The evidence was insufficient to establish that Buresh and the Wilds had a close, personal relationship of trust and confidence. As such, the burden remained on the Wilds to establish fraud. They claimed that CSB fraudulently obtained liens on their property by promising to provide future financing of their farm operation, when in fact CSB had no intention of doing so and instead desired only to obtain title to the property. CSB did, however, provide significant, additional financing after obtaining the liens and further passed up many earlier opportunities to foreclose the liens due to the Wilds' defaults. The evidence does not support the fraud claim.

Engstrand v. West Des Moines State Bank, 516 N.W.2d 797 (Iowa 1994)

Lender Liability

Engstrand and his family owned several boat companies, each of which was financed by West Des Moines State Bank. When the companies defaulted, the Bank commenced collection proceedings and began liquidating inventory. The Engstrands sued, claiming negligent disposition of collateral and breach of fiduciary duties against the Bank and against a corporation that had been set up to conduct the liquidation. The district court directed a verdict in favor of the liquidation corporation but allowed the case to go to

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the jury as against the Bank. The jury returned a substantial verdict for the Engstrands but the district court granted judgment notwithstanding the verdict for the Bank. The Engstrands appealed on two grounds. First, they claimed that the district court erred in finding no fiduciary relationship as a matter of law. Second, they claimed that the district court erred in finding that there was no "special duty" owing from the to the Engstrands, individually, that would allow the Engstrands to sue for torts allegedly committed against their corporations.

HELD: Affirmed. The banker-customer relationship is not a relationship that automatically generates fiduciary obligations. Here, the Bank and the customer agreed to a loan with certain terms and conditions. The Bank was acting on its own behalf, not on behalf of the plaintiffs as part of a confidential or trust relationship. There is no evidence that the Bank was acting as an advisor to the plaintiffs or that the Bank exercised any control over their business. As a matter of law, there was no fiduciary relationship.

The district court also was correct in ruling that the Engstrands, as individuals, had no right to sue for torts committed against their corporations. The plaintiffs were shareholders in one company, which in turn owned two corporations that operated retail businesses. The Bank's alleged torts injured the assets of the corporations. The plaintiffs claimed that a special duty existed, allowing them to sue for these torts, because (1) they had personally guaranteed the corporations' debts to the Bank and (2) the Bank allegedly promised that the plaintiffs would be personally involved in the disposition of the collateral. Neither of these alleged facts creates a special duty that allows the plaintiffs to sue on the torts asserted in this case.

Humiston Grain Co. v. Rowley Interstate Transportation Co., 512 N.W.2d 575 (Iowa 1994)

Malpractice (Insurance Agent)

Under Iowa law, when an insurance agent is alleged to have breached a professional duty, other than the simple duty to procure coverage expressly requested and paid for, expert testimony is necessary to establish breach of the standard of care. The claimed negligence in this case involved an allegation that the agent should have thoroughly read the insured's lease agreement to educate himself as to the insured's insurance needs. The insured admitted, however, that the lease was complex and that even most attorneys would be hard-pressed to understand it. Given this record, expert testimony was required to support a finding that the agent acted negligently in failing to procure appropriate insurance coverage.

<u>Babbe v. Peterson</u>, 514 N.W.2d 726 (Iowa 1994)

<u>Malpractice (Legal)</u>

Babbe was charged with arson. He provided bail by conveying two parcels of real estate to the clerk of court. An order of forfeiture was entered against him, after he was convicted, because he failed to show for a hearing on post-trial motions. Later, after he was incarcerated, the state filed a quiet title action with regard to the two parcels. The court appointed Peterson as Babbe's guardian ad litem due to his incarceration. Peterson filed a general denial on Babbe's behalf but did not resist the state's subsequent, successful motion for summary judgment.

Babbe then filed a legal malpractice claim against Peterson. Peterson moved for, and received, summary judgment on grounds that guardians appointed under Rules of Civil Procedure 13 and 14 are immune from liability. Babbe appealed.

HELD: Affirmed. The majority rule is that a guardian ad litem appointed by the court performs quasi-judicial functions and thus is entitled to judicial immunity. Iowa adopts this majority rule. While the court may set aside a judgment obtained under circumstances in which the guardian ad litem failed to act, the guardian ad litem is not subject to malpractice liability.

<u>Muzingo v. St. Luke's Hospital</u>, 518 N.W.2d 776 (Iowa, June 22, 1994)

<u>Malpractice (Medical)</u>

Dr. Whitters, a Cedar Rapids psychiatrist, was appointed by the court in 1990 to examine Glenn Muzingo for purposes of evaluation for an involuntary commitment to St. Luke's Hospital. Muzingo was released one day later on the advise of Whitters and the Hospital's chief medical officer.

Four months later Muzingo placed a bomb inside the car of his wife, Terri. The bomb exploded, causing serious injuries to Terri. She filed suit against Whitters and the Hospital, claiming that they were negligent in the treatment and discharge of her husband and that they failed to protect the Muzingo family despite knowing that Glenn had contemplated murder. The defendants filed motions to dismiss, claiming that a court-appointed psychiatrist is entitled to absolute quasi-judicial immunity. The district court agreed, granting the motions. Terri Muzingo appealed.

HELD: Affirmed. Iowa already has expanded the doctrine of quasi-judicial immunity to other nonjudicial officers whose actions are integral to the judicial process. The focus is on the nature of the functions performed. Other jurisdictions have held that a court-appointed psychiatrist performs quasi-judicial functions as an "arm of the judge." Iowa follows this reasoning. When psychiatrists and other mental health providers are appointed by the court and render an advisory opinion regarding an individual's mental condition, they are acting as an arm of the court and are protected from suit by absolute quasi-judicial immunity. Absent such protection, the threat of liability could undermine objectivity and independence and the professionals' willingness to accept court appointments.

Manno v. McIntosh, ___ N.W.2d ___ (Iowa Ct. App., April 26, 1994)

Malpractice (Medical)

Decedent's estate sued physicians for medical malpractice in the form of failure to diagnose and abandonment of treatment. During trial the district court directed a verdict for the defendants on the abandonment claim and also excluded certain deposition testimony as inadmissible hearsay. Jury found decedent 78% at fault but district court ordered new trial, deciding that its directed verdict on abandonment was incorrect and that its evidentiary rulings likewise were in error. The defendants appealed from the new trial order.

HELD: Reversed and remanded with directions to dismiss. The district court's initial evidentiary rulings were not erroneous. As for abandonment, this claim requires a showing that the physician left the patient in a critical stage of a disease without reason or sufficient notice to enable him to procure another physician. This claim was asserted against both Dr. McIntosh and Dr. Dusdieker. Dr. McIntosh testified that he accepted the patient with the understanding that Dr. Dusdieker would take over treatment when he returned to town. When Dr. Dusdieker returned, Dr. McIntosh discussed the patient's case with him and he agreed to take over the patient's care. The decedent's daughter testified that she understood that Dr. Dusdieker took over the decedent's care. There is thus no basis for an abandonment claim against Dr. McIntosh.

The abandonment claim against Dr. Dusdieker is based on the fact that he attended an out-of-town conference for several days after taking over the decedent's care. Dr. Dusdieker arranged for an associate, Dr. Voights, to care for the decedent during this period. There is no evidence to suggest that Dr. Voights was not a competent substitute. In addition, other physicians also examined and cared for the decedent during Dr. Dusdieker's absence.

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The plaintiff failed to raise a fact issue as to any abandonment by Dr. Dusdieker.

NOTE: The court of appeals also rejected plaintiff's claim that the district court erred in failing to instruct on an agency theory. The court held that one doctor who simply recommends another doctor, or procures a substitute doctor during the doctor's absence, is not liable for the other doctor's negligence unless the recommendation itself was negligent.

Bray v. Hill, 517 N.W.2d 223 (Iowa Ct. App. 1994)

Malpractice (Medical)

Bray was diagnosed with cervical cancer and consented to a hysterectomy performed by Dr. Gregory. After the surgery, she filed a medical malpractice claim against Dr. Gregory and other providers, alleging that the surgery caused permanent injuries. One claim that Bray asserted was a lack of informed consent. This claim was based on the fact that Dr. Gregory, at the time of the surgery, was on probationary status with the Iowa Board of Medical Examiners. The probation arose from an incident in which Dr. Gregory allowed his physician's assistant to perform services beyond his qualifications. Bray claimed that she would not have consented to having Dr. Gregory perform the surgery if he had disclosed his probationary status to her.

The district court excluded evidence of Dr. Gregory's probationary status at trial under Iowa Rule of Evidence 403. Bray appealed this ruling after a defense verdict.

HELD: Affirmed. Negligence based on failure to obtain informed consent requires the following elements: (1) a material risk unknown to the patient, (2) failure to disclose that risk, (3) disclosure would have led a reasonable patient to reject the procedure and choose a different course of treatment and (4) injury. Not all undisclosed risks are significant enough to generate a jury question. The undisclosed probationary status in this case did not relate to Dr. Gregory's qualifications as a surgeon, as that status arose from his supervision of an assistant who was not involved in Bray's procedure. Thus, this probationary status did not constitute a material risk that Dr. Gregory was required to disclose to Bray. The district court did not abuse its discretion in rejecting evidence of Dr. Gregory's probationary status at trial.

NOTE: 4 to 2 ruling with Judges Donielson and Sackett dissenting. Judge Donielson would have reversed on the informed consent issue while Judge Sackett's would have reversed because of a separate evidentiary ruling.

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<u>Haupt v. Miller</u>, 514 N.W.2d 905 (Iowa 1994)

<u>Negligent Breach of Contract</u>

Haupt, the executor of the estate of Taldine Thies, appealed from the district court's dismissal of negligent misrepresentation and negligent breach of contract claims against the former officers and directors of Citizens State Bank (CSB). The action alleged that Taldine had executed a guaranty of her son's indebtedness to CSB with an understanding that the guaranty was limited to $90,000. The guaranty document itself contained no such limit. Taldine's son paid the $90,000 debt but CSB did not destroy the guaranty document or return it to Taldine as allegedly promised. Instead, upon Taldine's death, CSB filed a claim against her estate for over $400,000 based on the guaranty. CSB then went insolvent. The FDIC purchased the guaranty and obtained a judgment against the estate for the full amount claimed.

The estate then sued CSB's former directors for fraud, negligent misrepresentation and negligent breach of contract. The district court granted the defendants' motion to dismiss on all counts except for the fraud claim against defendant Ruigh. The estate appealed from this ruling.

HELD: Reversed in part and remanded. As a general rule, corporate officers and directors are individually liable for the torts they commit, even if committed in their corporate capacity. While prior Iowa cases are unclear as to whether or not this rule applies only to intentional torts, Iowa now joins the trend in favor of applying this individual liability to all torts, intentional or negligent. Corporate officers can be held liable for negligence if they take part personally in the commission of the tort against a third party.

The estate claims that the directors committed a negligent breach of contract. There are circumstances in which conduct that breaches a contract may also give rise to an independent tort action. The estate claims that the defendants negligently failed to carry out their duty to destroy the guaranty or return it to Taldine once her son repaid the $90,000 that Taldine allegedly agreed to guaranty. It is alleged that this failure caused the guaranty to be among CSB's papers when it became insolvent, and ultimately allowed the FDIC to obtain a judgment against the estate for the remainder of her son's indebtedness. Because federal banking laws eliminate nearly all factual defenses to a guaranty, the duty to properly draft and dispose of a guaranty is one that may exist even apart from general contract law obligations. At this early stage of the pleadings, it cannot be said as a matter of law that the estate does not have a viable negligent breach of contract action against the defendants. The district court should not have dismissed this claim.

Doe v. Cherwitz, 518 N.W.2d 362 (Iowa 1994)

Negligent Infliction of Emotional Distress

Doe claims that Dr. Cherwitz sexually assaulted her during an examination in 1973, when she was 18 years old. She, along with her husband and children, sued Cherwitz and the Davenport Clinic in federal court in 1992. The defendants moved to dismiss based on Iowa's two-year statute of limitations. The plaintiffs resisted, relying on the common law discovery rule and the special limitations provision contained in Iowa Code §614.8A. The federal district court certified eight questions to the Iowa Supreme Court, mostly concerning statute of limitations issues. One of the questions, however, asked whether Iowa recognizes a cause of action for negligent infliction of emotional distress.

HELD: No. Iowa recognizes emotional distress as an element of damage but does not recognize Restatement (Second) of Torts § 313 as an independent ground of liability. The independent tort of negligent infliction of emotional distress does not exist in Iowa.

Freeman v. Ernst & Young, 516 N.W.2d 835 (Iowa 1994)

Negligent Misrepresentation

Freeman bought a video rental business from Neenan. Neenan represented that the business was worth $225,000, that it was profitable and that it would "care" for Freeman for the rest of her life. Prior to agreeing to Neenan's terms Freeman and Neenan met with Neenan's accountant, who was employed by Ernst & Young. The accountant, Brems, told Freeman that the business was worth $225,000, that it was a good deal for her and that it would realize sufficient profits to generate a salary for Freeman and pay the contract installment amounts that Freeman would owe Neenan. Freeman agreed to the proposed terms and made a $30,000 down payment.

The business did not turn out to be profitable. Ultimately, Freeman defaulted on her installment contract and transferred the business back to Neenan. As part of this transfer, she agreed to release Neenan from any liability for initial transaction. She then sued Ernst & Young for negligence. After a bench trial, the district court assessed 25% of fault against Ernst & Young and 75% against Neenan as a released party. Judgment was entered against Ernst & Young in the amount of 25% of Freeman's total damages. Freeman appealed, alleging that no fault should have been allocated to Neenan and that all fault should have been allocated to Ernst & Young.

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HELD: Affirmed. Neenan was a released party under chapter 668. Fault can be assessed against a released party. The issue, however, is whether Neenan's alleged conduct was "fault" as defined by § 668.1. The district court did not identify the theory of liability that caused it to assess fault against Neenan. Freeman claims that Neenan's misconduct was fraud, which is not "fault" under § 668.1. Ernst & Young claims that Neenan committed negligent misrepresentation, which may be fault under § 668.1. Under the facts of this case, however, Neenan could not have committed the tort of negligent misrepresentation. This tort "applies only to those defendants in the profession or business of supplying information or opinions." Neenan was the seller of a business. His representations were made in the course of negotiating an arms-length contract for the sale of his business. Freeman could not have recovered against Neenan on a negligent misrepresentation theory. Thus, Neenan committed no tort that constitutes "fault" under chapter 668 and the district court erred in assigning any fault to Neenan. Ernst & Young is liable for the entire amount of Freeman's damages.

<u>Haupt v. Miller</u>, 514 N.W.2d 905 (Iowa 1994)

<u>Negligent Misrepresentation</u>

Haupt, the executor of the estate of Taldine Thies, appealed from the district court's dismissal of negligent misrepresentation and negligent breach of contract claims against the former officers and directors of Citizens State Bank (CSB). The action alleged that Taldine had executed a guaranty of her son's indebtedness to CSB with an understanding that the guaranty was limited to $90,000. The guaranty document itself contained no such limit. Taldine's son paid the $90,000 debt but CSB did not destroy the guaranty document or return it to Taldine as allegedly promised. Instead, upon Taldine's death, CSB filed a claim against her estate for over $400,000 based on the guaranty. CSB then went insolvent. The FDIC purchased the guaranty and obtained a judgment against the estate for the full amount claimed.

The estate then sued CSB's former directors for fraud, negligent misrepresentation and negligent breach of contract. The district court granted the defendants' motion to dismiss on all counts except for the fraud claim against defendant Ruigh. The estate appealed from this ruling.

HELD: Reversed in part and remanded. The estate claims that the directors committed negligent misrepresentation. Under Iowa law, however, this claim arises only if the defendant was in the business of supplying guidance to others. It does not arise where the parties are dealing at arm's length. The pleadings here do not demonstrate that the directors were in the business of supplying guidance to Taldine. Thus, the

district court correctly granted the motion to dismiss as to this claim.

Barske v. Rockwell International Corp., 514 N.W.2d 917 (Iowa 1994)

Negligent Misrepresentation

Fifty-four former Rockwell employees sued after their employment was terminated, claiming breach of contract, fraud and negligent misrepresentation. Rockwell hired them in 1987 and 1988, allegedly representing that it had enough orders on hand at that time to last for the next five years. They allegedly were promised that their employment would last three to five years, at minimum. Some of the employees moved to Cedar Rapids from Massachusetts, Texas and Arkansas to accept the positions. Rockwell laid them off in September 1989.

The employees' positions were within a bargaining unit covered by a collective bargaining agreement (cba) between Rockwell and a labor union. All but four of them had signed an employment application including a disclaimer stating that the employment would be of indefinite duration.

Rockwell claimed that the employees' claims were preempted by section 301(a) of the Labor Management Relations Act of 1947. Rockwell also claimed that the application disclaimer barred all but four of the plaintiffs from proceeding with their action. The district court rejected Rockwell's motion for summary judgment on these issues and conducted a jury trial. The jury found against the plaintiffs on the fraud and contract claims but found in their favor on the negligent misrepresentation claim, awarding compensatory damages to each plaintiff. The district court then adopted Rockwell's preemption arguments, reasoning that the plaintiffs' claims were preempted because the alleged misrepresentations were inconsistent with the terms of the cba. The court thus set aside the plaintiffs' verdicts. The plaintiffs appealed.

HELD: Reversed and remanded for entry of judgment against Rockwell. Federal law (section 301(a)) preempts all disputes involving alleged violations of the cba or requiring interpretation of the cba. Congress did not intend to preempt state rules that establish rights and obligations independent of the cba. Thus, the negligent misrepresentation claim is preempted unless it confers a right independent of rights established by the cba. The tort does not depend on the existence of a contractual relationship, nor does it require interpretation of any contract. Thus, claims for negligent misrepresentation are not preempted by section 301(a). The district court erred in setting the verdict aside on this basis.

Rockwell's reliance on the disclaimer, as an alternative basis for upholding the district court's judgment, is unavailing. The jury was instructed as to the disclaimer defense with regard to the reliance element of negligent misrepresentation. The jury was entitled to decide whether or not the disclaimer negated any claimed reliance by the plaintiffs on the alleged misrepresentations. Thus, Rockwell was not entitled to judgment as a matter of law because of the disclaimer.

Regan v. Denbar, Inc., 514 N.W.2d 751 (Iowa Ct. App. 1994)

Premises Liability

The Regan brothers were at a bar owned by the defendant in Davenport when they became involved in an altercation with another group. One of the brothers was hit in the face. The bartender asked the Regans to leave. They expressed fear that they would be attacked outside and requested that the bartender call the police. He refused to do so and escorted the Regans out the back door. Wilcox, a member of the other group, was waiting outside, but he told the bartender that he was just "cooling off." The bartender then went back inside. Wilcox then attacked the Regans and was joined by other members of the group. The Regans suffered injuries. Three members of the other group were convicted of assault. The Regans sued the bar, claiming that it had a duty to protect them from the criminal acts of the assailants both inside and outside the bar. The district court directed a verdict for the defendant at the close of the Regans' evidence.

HELD: Reversed and remanded. While one person generally has no duty to protect another from harm caused by a third person, this rule is not applicable under certain circumstances. Section 344 of the Restatement (Second) of Torts provides that the possessor of land who holds it open to the public for his business purposes is liable for harm caused by a third party if the possessor fails to exercise reasonable care to discover that such acts are likely to be done or to give an adequate warning to protect against the harm. Here, the Regans testified that the bartender broke up the first fight, asked the Regans to leave, refused their request for police protection and sent them out the back door with knowledge that a member of the adverse group was present. This testimony was sufficient to raise a jury issue as to whether the defendant failed to exercise reasonable care to prevent foreseeable harm caused by third persons.

NOTE: Judge Sackett dissented, stating that she would affirm the directed verdict.

Morgan v. Perlowski, 508 N.W.2d 724 (Iowa 1993)

Premises Liability

The defendant, a 19 year old, held a beer party at his mother's home while she was away. The plaintiff, age 21, was one of the invited guests. Six uninvited males arrived at the party and began causing trouble. On several occasions the plaintiff suggested to the defendant that he take action to either end the party or force the six men to leave. The defendant refused to take action. The defendant's refusal to act continued even after a fight erupted between the six men and some other guests. Shortly thereafter, the plaintiff saw the six men punching another guest and attempted to intervene. One of the six men struck the plaintiff with a pool cue, causing permanent eye injuries.

The plaintiff originally sued on a basic premises liability theory, alleging that the defendant failed to protect him from a hidden, dangerous condition on the property. As ultimately submitted to the jury, however, his claim was based on Restatement (Second) of Torts § 318. This section generally states that when a possessor of property allows another to use that property, the possessor must exercise reasonable care to control the conduct of this person and prevent injury to others if the possessor knows or has reason to know that he or she has the ability, opportunity and necessity to control such conduct. The defendant appealed from an adverse judgment based on this theory.

HELD: Judgment affirmed. The Supreme Court rejected the defendant's argument that the case should be analyzed as a simple premises liability claim. Harm caused by the physical condition of property (or by the acts of the possessor) is distinct from harm caused by licensees of the possessor. The Court adopted the principles of section 318 and held that a possessor of property, when present, has a "limited" duty to control the conduct of social guests. The Court went on to find that plaintiff had generated a jury issue as to whether the defendant knew or should have known that he had the ability, opportunity and need to control the behavior of the six men. The plaintiff's own knowledge of the danger was not a bar to recovery, but rather was a matter to be considered under comparative fault principles.

Hawkeye Bank v. State, 515 N.W.2d 348 (Iowa 1994)

Products Liability

Jessica Smith was a six year old student at the Iowa School for the Deaf. Her first grade teacher noticed that she was missing after her class returned from an outside recess period. She was found hanging by her scarf from the railing of a spiral

slide on the playground. She died of asphyxiation as a result of the incident.

Her estate sued the state, making various allegations of negligence. The case was submitted to the jury on a res ipsa loquitur theory, along with various specifications of negligence. Judgment was entered for the estate in the amount of the jury's verdict, $480,000. The state appealed on several grounds.

HELD: Reversed and remanded for a new trial. The district court erred in instructing the jury as to two specifications of negligence not supported by evidence in the record. First, the court instructed on a theory of failure to provide safe playground equipment. Proof of an alternative safer design that is practicable under the circumstances is necessary in order to raise a jury issue on this claim. While the estate's expert criticized the design of the spiral slide, he did not testify that any safer design was practicable under the circumstances. Second, the court instructed on a theory of negligent failure to instruct Jessica concerning proper use of the slide. This theory arises only upon proof that special instruction was needed in order to avoid some hazard specifically attributable to this particular slide. There is no evidence suggesting that Jessica's death was caused by any hazard inhering in the slide itself. The only possible admonition or instruction that could have addressed Jessica's incident would have been a general warning to "be careful." Failure to give such a general warning does not raise an issue of negligent instruction.

Hillrichs v. Avco Corp., 514 N.W.2d 94 (Iowa 1994) (Hillrichs II)

Products Liability

Hillrichs was operating a cornpicker manufactured by Avco when it became plugged. He attempted to unplug the machine without turning it off. His hand became caught between two rollers, which continued to rotate. Hillrichs' hand was stuck in the operating machine for 30 minutes until an assistant discovered him and turned the machine off. The four fingers on his right hand were amputated as a result of the incident.

Hillrichs sued Avco on various product liability theories, claiming that Avco should have installed an emergency stop device within reach of the location in which Hillrichs hand became caught. The first trial ended in a finding that Hillrichs was 100% at fault. The Supreme Court reversed and remanded for a new trial on Hillrichs' negligence claim with respect to whether Avco was liable for Hillrichs' enhanced injury--additional injuries that Hillrichs incurred because his hand was caught in the machine for such a lengthy period of time. See Hillrichs v. Avco Corp., 478 N.W.2d 70 (Iowa 1991).

The second jury found for Hillrichs on a negligent design claim, assessing 20% of fault to him and awarding $919,541.60 in actual damages and $1 million in punitive damages. The district court set aside the punitive damages award and reduced the actual damages by Hillrichs' 20% fault.

HELD: Affirmed in all respects. Hillrichs presented sufficient evidence to establish a negligent design claim. He demonstrated that Avco knew, when it manufactured the machine, that farmers often try to unplug the machine while it is operating. He further demonstrated that a stop device would have cost only $50 and that other machines with rollers, such as printing presses, included such safety devices at the time Avco manufactured the cornpicker. This evidence was sufficient to submit Hillrichs negligent design claim to the jury.

Smith v. Air Feeds, Inc., ___ N.W.2d ___ (Iowa Ct. App., April 26, 1994)

Products Liability

Smith works for Putco. He was injured at work while operating a Komatsu punch press. The press was connected to a feeder manufactured by Air Feeds. Putco purchased the feeder after it purchased the press. Air Feeds supplied a circuit design to help Putco connect the feeder to the press. When this did not work adequately, Air Feeds recommended that Putco consult with Mullins, an engineer at D.J. Engineering. Mullins designed circuitry that allowed the feeder controls to override the controls on the press. Air Feeds advised Putco that this design was unsafe and recommended that Putco install point guarding to protect the user. Putco did not do so.

While Smith had his hand in the press, he reached to flip a switch on the feeder. He hit the wrong switch. Because of the circuitry design, this switch activated the press and severed his hand. Smith and his family sued several parties, including Air Feeds, on various products liability theories. The district court granted Air Feeds' motion for summary judgment. The court found that Mullins was not acting as an agent of Air Feeds when he modified the circuitry, that Air Feeds was not strictly liable because the defect arose from a post-sale modification, and that Air Feed was not negligent. Smith appealed.

HELD: Reversed and remanded. Smith's claims against Air Feeds do not arise only from the post-sale modifications, but rather from Air Feed's placement of switches on its feeder. Air Feed's placed nearly identical switches next to each other on the feeder. Air Feeds manufactured the feeder to be integrated with nonspecific existing presses. Thus, the end user must connect the feeder to a press. It is possible for the

installer to connect the feeder in such a manner that the feeder's controls will operate the press. Under these circumstances, it is for the jury to decide if Air Feeds should have foreseen such a use and designed its controls accordingly. The modification does not automatically shield Air Feeds from liability.

As for agency, there is an issue of fact as to whether Mullins was acting as Air Feeds' agent. Putco believed that Mullins was Air Feeds' engineer. Mullins believed that Air Feeds was his customer. Mullins became involved at Air Feeds' request. The jury must decide if Air Feeds is liable for Mullins' conduct on an agency theory.

Benn v. Thomas, 512 N.W.2d 537 (Iowa 1994)

Proximate Cause

Thomas was the driver of a semi-tractor and trailer that rear-ended a van in which Loras Benn was a passenger. Loras suffered a bruised chest and broken ankle. Loras died of a heart attack six days later. His estate sued Thomas (and the truck's owner and lessee) for damages arising from Loras' injuries and death. The estate's medical expert testified that Loras had a history of heart disease and diabetes. He further testified that the accident and injuries were the "straw that broke the camel's back" and caused Loras' death. Other medical evidence indicated to the contrary.

The estate, relying on its expert's testimony, requested an "eggshell plaintiff" instruction. The district court rejected this request. The jury awarded the estate $17,000 for Loras' injuries but nothing for his death. The estate appealed. The court of appeals reversed, finding that the district court erred in refusing the requested instruction. The Supreme Court granted the defendant's request for further review.

HELD: District court judgment reversed and remanded. A tortfeasor whose act, superimposed on a prior latent condition, results in injury may be liable for the full disability. The injury, and not the latent condition, is the proximate cause of the ultimate harm. While this "eggshell plaintiff" rule has been incorporated into the Iowa Uniform Jury Instructions (UJI 200.34) as a rule of damages, it is equally a rule of proximate causation. The estate's medical expert's testimony was sufficient to warrant a specific eggshell plaintiff instruction. The standard proximate cause instructions that the court gave to the jury did not adequately convey the applicable law.

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Sumpter v. City of Moulton, ___ N.W.2d ___ (Iowa Ct. App., April 26, 1994)

Proximate Cause

Sumpter, a 67 year old, received a notice from the city requiring him to mow weeds on his property. He became angry and informed the city that he would not mow until the city fulfilled its obligation to clean ditches that surround the property. Later, however, he set out to clean the ditches himself. He suffered a heart attack. He sued the city, claiming that its failure to clean the ditches was the proximate cause of his heart attack. The district court gave an intervening cause instruction which allowed the jury to find that Sumpter's own over-exertion was an intervening cause that discharged the city from liability for its negligence. The jury found that the city was negligent but that this negligence was not the proximate cause of Sumpter's injuries. Sumpter appealed.

HELD: Reversed and remanded. The district court should not have given an intervening cause instruction. Generally, the doctrine of intervening cause refers to the conduct of a third party or outside force, not the conduct of the plaintiff. Further, an intervening cause does not break the chain of proximate causation if it is a foreseeable consequence of the defendant's negligence. While it is possible that a plaintiff's own conduct could be such an unforeseeable result of the defendant's negligence that it may constitute an intervening cause, this doctrine should be applied with caution because it completely releases the defendant from liability. When the plaintiff's own conduct is at issue, that conduct normally should be addressed by a comparison of fault rather than under principles of intervening causation. In this case, the plaintiff's effort to clean the ditches was a foreseeable consequence of the city's negligence. The district court erred in giving an intervening cause instruction. Plaintiff is entitled to a new trial.

NOTE: The court also held that the district court erred in rejected the plaintiff's proposed pre-existing condition ("eggshell plaintiff") instruction. Judge Sackett dissented from the court's ruling and would have affirmed the judgment.

State v. Murray, 512 N.W.2d 547 (Iowa 1994)

Proximate Cause

This is a criminal case of potential interest because of its application of civil tort causation principles.

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Murray was convicted of first degree murder in the death of Blanche Gloe. Murray robbed and beat Gloe, partially wrapping her in a piece of carpet and leaving her for dead. Gloe was alive, although comatose, when discovered. She remained comatose until her death, although after some treatment her condition improved enough to allow her to breathe without a respirator.

Gloe made no neurological improvement. Her physicians determined that she had no functioning in the cerebral hemisphere. They further informed Gloe's family that she would never improve and that she would eventually die from pneumonia or a bladder infection. The family authorized the physicians to terminate, over a period of time, nutrition and medication. Gloe died over eight months after she was attacked.

Murray alleged at trial and on appeal that he could not be guilty of murder because he was not the legal cause of Gloe's death. He instead alleged that the physicians' conduct of withholding nutrition was the legal cause of death.

HELD: Conviction affirmed. Tort law causation principles apply to causation issues arising in criminal cases. Murray's attack was the legal cause of Gloe's death if (1) death would not have occurred but for the act and (2) the act made the death more likely. The jury could have found, from the evidence, that both of these propositions were true. Further, the physicians' actions were not a superseding cause that absolved Murray from responsibility because the intervention of a force that is a <u>normal consequence</u> of the actor's conduct is <u>not</u> such a superseding cause. The issue of whether an event is a superseding cause is for the court, not for the jury. Here, the medical decisions to eliminate medication and nutrition were, under the circumstances, normal consequences of the situation that Murray created. Thus, Murray is not absolved of responsibility for the ultimate outcome.

<u>Spaur v. Owens-Corning Fiberglas Corp.</u>, 510 N.W.2d 854 (Iowa 1994)

<u>Proximate Cause</u>

Spaur was employed at the Iowa Power Plant in Des Moines for twenty-five years, until the plant closed in 1985. In 1990 he was diagnosed with mesothelioma, a form of lung cancer. He died in 1992. His estate and surviving spouse sued several manufacturers of asbestos products, claiming that Spaur's exposure to these products during his years of employment caused his death.

All defendants except Owens-Corning ("OCF") settled with the plaintiffs or were dismissed prior to trial. A jury found actual damages of $1,857,159.20, assessing 67% of fault to OCF. The jury also assessed $1.5 million in punitive damages against

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OCF. OCF appealed, arguing that the plaintiffs failed to establish proximate causation.

HELD: Judgment affirmed. Iowa applies a substantial factor test for proximate causation. In an asbestos case, this requires a plaintiff to produce sufficient evidence to raise an inference of exposure to the defendant's product and sufficient evidence that this exposure was a substantial factor in the plaintiff's disease. The plaintiffs in this case presented evidence that OCF's products were installed at the place of Spaur's employment, that the lengthy installation process produced large amounts of airborne dust, and that Spaur was repeatedly exposed to OCF's asbestos product in the years after installation. This evidence supported an inference that Spaur's exposure to OCF's product was more than de minimis. In addition, the plaintiffs presented medical expert testimony that Spaur's lungs contained large quantities of asbestos bodies and that asbestos exposure is almost exclusively the cause of mesothelioma. The plaintiffs were not required to prove exactly how much OCF's product actually contributed to the progression of Spaur's disease. They simply had to produce sufficient evidence "from which a reasonable jury could conclude that OCF's product was a substantial contributing cause of Spaur's injury and resulting death."

Hawkeye Bank v. State, 515 N.W.2d 348 (Iowa 1994)

Res Ipsa Loquitur

Jessica Smith was a six year old student at the Iowa School for the Deaf. Her first grade teacher noticed that she was missing after her class returned from an outside recess period. She was found hanging by her scarf from the railing of a spiral slide on the playground. She died of asphyxiation as a result of the incident.

Her estate sued the state, making various allegations of negligence. The case was submitted to the jury on a res ipsa loquitur theory, along with various specifications of negligence. Judgment was entered for the estate in the amount of the jury's verdict, $480,000. The state appealed on several grounds.

HELD: Reversed and remanded for a new trial. The district court should not have submitted the case under the res ipsa doctrine. The doctrine applies only if (1) the defendant had exclusive control of the instrumentality involved in the injury and (2) the accident was of such a nature that it would not have occurred had ordinary care been employed. Even assuming the presence of the first element, the second element does not exist in this case. The Supreme Court long has recognized that "the potential for young children to act out in unpredictable and freakish ways precludes any presumption of negligence by supervising authorities when this occurs." While there is

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circumstantial evidence in this case from which a finding of negligence could be made, the foundation for application of the res ipsa doctrine must be established without regard to the facts of the particular case. Because the circumstances of Jessica's death do not give rise to the elements of res ipsa loquitur, the district court erred in submitting the case on this theory.

205 Corporation v. Brandow, 517 N.W.2d 548 (Iowa 1994)

Trade Secrets

205 Corporation hired Brandow to manage The Tavern, a restaurant that it owns in West Des Moines. Brandow was provided with secret recipes for The Tavern's pizza sauce, pizza crust and grinder sandwiches. The recipes for the sauce and sandwiches were known only to 205's president and its former owner. Several employees knew the recipe for the pizza crust.

205 later terminated Brandow's employment. He then provided pizza and grinder sandwich recipes to his new employer, Mustards Restaurant. 205 sued Mustards and Brandow for misappropriation of trade secrets under Iowa Code chapter 550. 205 also asserted a claim against Brandow for breach of the duty of loyalty and against Mustards for inducing this breach. The jury returned verdicts against Brandow and Mustards for misappropriation of trade secrets and for breach of duties.

HELD: Affirmed as modified as to damages. Under chapter 550, a trade secret is information that (1) derives independent economic value by not being generally known nor ascertainable and (2) is the subject of reasonable efforts to maintain that secrecy. Mustards argues that the evidence was insufficient to support either of these elements. However, 205 produced evidence that the recipes were the most valuable assets that it owned, that it would take prohibitively expensive chemical analysis to ascertain the precise recipes used in The Tavern's pizza and grinders, and that The Tavern's food had won several local food awards. This evidence was sufficient to satisfy the first element of the trade secret claim. As for the second element, Mustards alleged that the crust recipe, in particular, was not kept sufficiently secret. Crust, however, must be prepared daily. As such, it was necessary to disclose the recipe to several employees. Chapter 550 simply requires secrecy efforts that are reasonable under the circumstances. 205 produced sufficient evidence of such efforts.

NOTE: The Court, in another part of the opinion, held that chapter 550 is not the sole and exclusive remedy for claims arising from the misappropriation of trade secrets.

Estate of Oswald v. Dubuque County, 511 N.W.2d 637 (Iowa Ct. App. 1993)

Traffic Device Immunity

Judith and LeRoy Oswald were killed when their vehicle fell through a hole in a bridge under repair. The evidence suggested that a barrier and "Road Closed" sign had been moved aside prior to the accident. The estates sued the county. The district court granted summary judgment for the county, finding that the plaintiffs failed to support their resistance with specific facts or testimony. The district court also found that the county was immune from liability under Iowa Code § 668.10, which precludes assignment of fault to the state or a municipality for failing to erect or install a traffic sign or device. The estates appealed from the entry of summary judgment.

HELD: Reversed and remanded. In deciding a motion for summary judgment, the court must consider the entire record, not just materials specifically identified by resisting party. The record clearly contained fact issues concerning whether or not the warning sign was visible and/or misleading. Likewise, the county was not entitled to § 668.10(1) immunity as a matter of law because the plaintiffs' theories encompassed each of three exceptions to this statutory provision. First, as the statute provides, the state or municipality is not immune from claims for failure to maintain a sign or device. Second, no immunity exists if a sign is found to be misleading. Third, a possible exception to the usual immunity exists if circumstances are such that the exercise of ordinary care would require the state or municipality to warn of a dangerous condition by way of something other than an inanimate device. The record was sufficient to allow the estates to proceed to trial on these exceptions to § 668.10(1) immunity.

NOTE: This was a 2 to 1 ruling, with Judge Habhab dissenting on grounds that no genuine issues of material fact existed in the record.

Hurley v. Youde, 503 N.W.2d 626 (Iowa Ct. App. 1993)

Trees and Shrubs

The Hurleys and Youde own adjoining residential lots in Des Moines. Many years ago a hedge row was planted on the property line. Over the years the hedge became overgrown and tangled with dead branches, small trees and waste materials. Youde attempted to improve the hedge by cleaning it out and cutting it to within six inches of the ground. He claimed that he was simply following the advice of others in cutting the hedge. Hurleys filed suit against Youde under Iowa Code § 658.4, seeking treble damages for the

"willful injuring" of a shrub. The district court, following trial to the court, dismissed the petition. The Hurleys appealed.

HELD: Affirmed. Substantial evidence supported the district court's finding that Youde acted with intent to improve the shrub and that, in fact, Youde's actions did improve the shrub. "Willful" conduct is conduct undertaken wantonly without reasonable excuse. Youde did not "willfully" injure the shrub.

Robert's River Rides, Inc. v. Steamboat Development Corp., ___ N.W.2d ___ (Iowa, July 27, 1994)

Trespass

Robert's River Rides operated non-gambling excursion boats on the Mississippi River in Bettendorf beginning in 1984. It leased riverfront park property from the City of Bettendorf for docking and customer parking, and leased the adjacent riverbed from the State. Its riverfront lease with the City expired at the end of 1990, while its riverbed lease with the State continued through 1994. Iowa authorized riverboat gambling in 1989. Steamboat was chosen to operate a riverboat casino in Bettendorf. The City elected not to renew Robert's lease at the end of 1990 in order to allow Steamboat to dock its boat at the former Robert's location.

Robert's removed its boat from the riverfront in 1991, at which time Steamboat docked its boat at the site. Robert's, however, claimed continuing leasehold rights to the adjacent riverbed pursuant to its lease with the State. It alleged that Steamboat, by docking its boat at the site, was trespassing on Roberts' lease rights. The City attempted, unsuccessfully, to convince the State to terminate Robert's riverbed lease. Ultimately, Robert's filed a multi-count action against Steamboat and the City for trespass, conversion, conspiracy, misrepresentation, implied contract, interference with contract, slander and libel. The district court sustained the defendants' motion for summary judgment on all counts.

HELD: Affirmed. In its trespass claim, Robert's alleged that Steamboat, with the City's assistance, trespassed on Robert's exclusive right to use the State's riverbed and profited by the use of various improvements to the adjacent riverfront. This claim requires an analysis of the true nature of Robert's riverbed rights. Under Iowa law, the State's "lease" of a portion of its riverbed to a private concern is more akin to a license. The public trust doctrine allows the State to permit use of a riverbed for specified purposes, subject to the right of navigation vested in the federal government. Robert's right to use the riverbed was in connection with its access to the City's riverfront. When Robert's right to use the riverfront expired, so

too did the purpose of Robert's riverbed lease. Robert's lease, in effect, was a license that was conditioned upon Robert's continued access to the riverfront.

Further, Robert's must show that it was in actual or constructive possession of the property at the time of the alleged trespass in order to maintain a cause of action for trespass. Robert's removed its boat from the riverbed once its lease of the riverfront expired. While Robert's continued to pay rent to the State under its riverbed lease, the payment of rent alone is insufficient to establish actual possession. As for constructive possession, Robert's cannot establish this form of possession because it was a mere licensee. The district court correctly granted summary judgment on Robert's trespass claim.

Parson v. Procter & Gambel Mfg. Co., 514 N.W.2d 891 (Iowa 1994)

Workers' Compensation

Plaintiffs were injured while working as temporary employees at P & G's Iowa City plant. They had been retained through Kelly Temporary Services. Under P & G's contract with Kelly, P & G simply paid Kelly an hourly rate for each worker utilized. Kelly selected which workers to send to P & G and was responsible for paying the workers' wages, payroll taxes and workers' compensation insurance premiums.

Plaintiffs sued P & G for their injuries, alleging that they were not subject to the exclusive remedy provisions of Iowa Code § 85.20 because P & G was not their employer. The district court granted summary judgment for P & G, finding that P & G was the employer as a matter of law. The plaintiffs appealed.

HELD: Reversed on a 5-4 vote. Justice McGiverin wrote for the majority and found that fact issues existed as to whether an implied contract of employment existed between P & G and the plaintiffs. He noted that P & G's contract with Kelly demonstrated a clear intent by P & G not to be considered the plaintiffs' employer. The plaintiffs, and other Kelly workers employed at P & G, also testified that they did not consider themselves to by P & G employees. The district court should not have granted summary judgment for P & G.

DISSENT: Justice Harris wrote the dissent. He relied on the five factor employment test set forth in prior Iowa cases. This test considers the following factors in considering if an employment relationship exists: (1) the right to select workers, (2) the responsibility for payment of wages, (3) the right to discharge or terminate the relationship, (4) the right to control the work, and (5) the party sought to be held as the employer is the party in charge of the work or the party for whose benefit the

work is performed. Under this test, Justice Harris stated that the question was not even a close call. According to Justice Harris, P & G had the right to reject employees proposed by Kelly, P & G paid the workers (through Kelly), P & G had the right to demand that Kelly reassign a worker to another Kelly account, P & G clearly controlled the workers' hours and the type of work that they performed, and the work obviously was performed for P & G's benefit. Justice Harris warned that the Court should not establish a precedent for allowing employers to disclaim "employer" status when using temporary employees, because future cases may involve employers trying to escape workers' compensation responsibilities.

Fletcher v. Apache Hose & Belting Co., ___ N.W.2d ___ (Iowa Ct. App., May 26, 1994)

Workers' Compensation

This is another exclusive remedy case decided by the court of appeals just one month after the Supreme Court's Parson decision, above.

Fletcher approached Kelly Services and specifically requested employment with Apache. Apache accepted Fletcher. Fletcher had worked at Apache for about two months when he was injured while operating machinery at the plant. He received workers' compensation benefits from Kelly and filed a negligence claim against Apache. The district court granted Apache's motion for summary judgment, finding that Apache was Fletcher's employer and that, therefore, Fletcher was barred from asserting a negligence claim against Apache. Fletcher appealed. Parson was decided while Fletcher's appeal was pending.

HELD: Summary judgment affirmed. As in Parson, there was no express contract of employment between Fletcher and Apache. Unlike Parson, however, there is no issue of fact as to whether an implied contract of employment was formed. The evidence is clear that Fletcher intended to enter into an employment relationship with Apache and Apache intended to enter into an employment relationship with Fletcher. Fletcher testified that he first contacted Apache about employment and was told to inquire through Kelly. He then went to Kelly and specifically requested employment at Apache. He testified that, by the time he went to Kelly, he already had his job at Apache "lined up." Kelly obtained Apache's approval of Fletcher and then complied with the parties' wishes by assigning Fletcher to Apache. Fletcher admitted that it was Apache, not Kelly, that made the decision to accept Fletcher as a worker at Apache's plant. Further, Apache supervised Fletcher's work and retained the right to terminate an assigned worker at any time. Apache itself treated Kelly workers as its own employees. Indeed, Apache ultimately offered Fletcher a position upon his recovery. Under these facts, Fletcher had a clear intent

to enter into an employment relationship with Apache and thus is barred from asserting a negligence claim.

TRIAL
Amy Snyder

Mississippi Valley Broadcasting v. Mitchell, 503 N.W.2d 617 (Iowa App. 1993)

Attorney Fees

Where a litigant seeks attorney's fees under Iowa Code Section 91A.8 (1991), it must be shown that the attorney's fees incurred were usual and necessary. If a litigant fails to provide evidence that the fees sought are usual and necessary, it is not an abuse of discretion to deny an award of attorney's fees. Determination of attorney's fees is a matter entrusted to the discretion of the trial court, and an appellate court will reverse for an abuse of discretion only when such discretion was exercised on grounds or for reasons clearly untenable or to an extent clearly unreasonable.

Spaur v. Owens-Corning Fiberglas Corp., 510 N.W.2d 854 (Iowa 1994)

Directed Verdict

Robert and Marilyn Spaur brought a suit against Owens-Corning Fiberglas Corp. ("OCF"), and several other defendants to recover damages for personal injury resulting from the husband's exposure to defendants' asbestos-containing products. At the time the case went to the jury, all defendants except OCF either settled with the Spaurs or were dismissed. The jury awarded compensatory damages, loss of consortium damages, and punitive damages against OCF.

OCF claims the trial court erred in failing to grant its motion for a directed verdict and for a judgment notwithstanding the verdict on the ground that there was insufficient evidence. Specifically, OCF contends that the record fails to provide competent evidence that its product, Kaylo, was the proximate cause of Spaur's disease, that the medical evidence failed to pinpoint Kaylo's exact role and contribution to the disease process, and that the court incorrectly used a "substantial factor" test for proximate cause rather than a "frequency, regularity and proximity" test. The district court held that the causation evidence was sufficient to generate a jury question on proximate cause and that the substantial factor test was the appropriate test for causation in Iowa.

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HELD: The substantial factor test is the appropriate test for causation in Iowa. There was sufficient evidence in the record from which a reasonable jury could conclude that OCF's product was a substantial contributing cause of Spaur's injury and resulting death. The evidence was sufficient to avoid a directed verdict and a judgment N.O.V.

Morgan v. Perlowski, 508 N.W.2d 724 (Iowa 1993)

Judgment Notwithstanding the Verdict

Plaintiff, Matthew Morgan, received injuries when he was a guest at a party hosted by defendant Steven Perlowski. The jury returned a verdict finding the guest had been injured as a result of the host's negligence. The court denied the host's motion for judgment notwithstanding the verdict and a new trial. On appeal, Perlowksi claims he had no duty to protect Morgan from the acts of third parties and urges the trial court failed to properly instruct the jury on premises liability principles.

HELD: In the supreme court's review of the district court's ruling on a motion for judgment N.O.V., it is limited to the grounds urged in the motion for a directed verdict. The supreme court considers the evidence in the light most favorable to the non-moving party.

3S Inc., Co. v. Zarek, 504 N.W.2d 153 (Iowa App. 1993)

Jury

3S Inc. contends it was denied its right to trial by jury and procedural due process by the district court's refusal to submit the claim for attorney fees to the jury.

HELD: The right to a jury trial is not a fundamental right in proceedings created by statute. Attorney fees generally are not recoverable as damages in the absence of a statute or a provision in a written contract. Therefore, a right to recover attorney fees as costs does not exist as a right under common law. In this case, the right to attorney fees is controlled by Iowa Code Section 625.22 (1991). Section 625.22 provides, in relevant part: "When judgment is recovered upon a written contract containing an agreement to pay an attorney's fee, the court shall allow and tax as part of the cost a reasonable attorney's fee to be determined by the court."

In the Matter of the Estate of John W. Hughbanks, 506 N.W.2d 451 (Iowa App. 1993)

Jury

Plaintiff was involved in a romantic relationship with the decedent for almost 40 years, lived with the decedent for 30 years, but plaintiff and decedent never married. During this period, plaintiff provided daily care to decedent's grandson and mother, provided housekeeping services, and paid for her own vehicle, clothing, groceries and furniture. Upon decedent's death, plaintiff filed a claim against the estate for services rendered as the decedent's housekeeper. Jury denied plaintiff's claim and plaintiff appealed, arguing that the district court erred in failing to grant a new trial after the jury used a dictionary to look up words during deliberations.

HELD: The jury's reference to Webster's Dictionary during deliberations was not misconduct requiring a new trial.

Jackson v. Roger, 507 N.W.2d 585 (Iowa App. 1993)

Jury

Jackson sued Roger and his employer for damages resulting from a two car collision. Jackson introduced evidence of $745 in past medical expenses. Roger introduced, without objection, evidence that Jackson's medical expenses were paid by her insurance. In closing argument, Jackson asked for $46,000 in damages. Following a 2½ day trial, the court submitted the case on special verdict forms requiring the jury to answer several interrogatories. The jury apportioned 51% of the fault to Roger, and 49% to Jackson. Question six of the verdict form asked the jury to make specific findings about Jackson's damages. The jury answered that her past and future medical expenses were $401, her past and future pain and suffering were $3,000, and she was found to have sustained $0 in damages for past and future loss of full body, for total damages of $3,401. Question seven asked: "State the extent to which you reduced your damage award, if any, due to evidence that plaintiff's medical bill had been paid by insurance." The jury answered: "$42,599." The court noted that the total award of $3,401 when added to the amount referred to in question seven, $42,599, totaled the amount requested, $46,000. The court therefore accepted the verdict, released the jury, and entered a judgment for plaintiff of $1,734.51 ($3,401 reduced by plaintiff's 49% comparative fault).

The morning after the jury returned its verdict, Jackson contended inconsistencies in responses to questions six and seven entitled her to have the jury recalled or a new trial. Attached to Roger's resistance to a new trial was an affidavit from the jury

foreperson stating that the jury found unanimously Jackson's damages totaled $3,401 and the jury had understood question seven to ask for the amount it reduced that damages figure from the amount claimed.

HELD: It was not error for the court to enter judgment in accordance with the jury's answers to special interrogatories, where jury found damages for future pain and suffering but failed to find damages for future loss of full body.

State v. Neuendorf, 509 N.W.2d 743 (Iowa 1993)

Jury

Scott David Neuendorf and David Oltrogge were each charged with second degree sexual abuse. David Oltrogge was tried separately and convicted. In the selection of the jury for Neuendorf's trial, a prospective juror indicated she knew of the facts surrounding the case, including Oltrogge's conviction. She stated this knowledge led her to believe Neuendorf was guilty as well. The court denied defendant's challenge of the juror for cause. This forced defendant to use a peremptory challenge to remove her from the jury. Neuendorf was subsequently convicted of second degree sexual abuse. Neuendorf appealed, challenging, among other things, the district court's denial his challenge of the prospective juror. The court of appeals determined forcing the defendant to use a peremptory challenge in this situation was reversible error.

HELD: Although the challenge for cause should have been sustained, a reversal of defendant's conviction is not warranted. The rule expressed in State v. Beckwith, 242 Iowa 228, 46 N.W.2d 20 (1951), that error in denying a challenge for cause is not obviated by the fact that the juror in question is otherwise removed by exercise of a peremptory challenge, has been abandoned. Partiality of a juror may not be made the basis for reversal in instances in which that juror has been removed through exercise of a peremptory challenge. Any claim that the jury that did serve in the case was not impartial must be based on matters that appear of record. Based on this standard, the showing made by defendant is insufficient to warrant a reversal based on juror prejudice.

Hillrichs v. Avco Corporation, 514 N.W.2d 94 (Iowa 1994)

Jury

Defendant in a products liability action for injuries received by farmer who had his hand caught in the rollers of a corn picking machine appealed the jury verdict on the basis that the jury foreman was a friend of the plaintiff. The district court

rejected defendant's motion for a new trial for lack of evidence of any misconduct or improper jury influence. The decision was affirmed. The defendant discovered during voir dire that the jury foreman knew the plaintiff and was satisfied with the juror's statement that he could remain fair and impartial.

State v. Rhomberg, 516 N.W.2d 803 (Iowa 1994)

Jury

Rhomberg appeals from his conviction of first degree murder. Rhomberg challenges his jury selection process. One jury commissioner abandoned the random selection required by statute and hand-picked names of black people for the master list to include a fair representation of minorities. Rhomberg does not allege and the record is devoid of proof, that white citizens, like himself, were substantially underrepresented on the list.

HELD: His claim of an equal protection violation is meritless. While the court does not approve of the commissioner's act, no prejudice has been shown to affect Rhomberg's jury as a result of the deviation from the statutory process.

Cerro Gordo Hotel v. City of Mason City, 505 N.W.2d 509 (Iowa App. 1993)

Jury Instructions

Plaintiff, Cerro Gordo Hotel Company, owned two buildings located in Mason City. The buildings had been in a state of disrepair prior to June of 1988. An earlier nuisance action brought by the City of Mason City against Cerro Gordo Hotel had resulted in a stipulation between the parties. They agreed Cerro Gordo Hotel had to take down the buildings by March of 1989. On June 25, 1988, the roof of one of the buildings partially collapsed. Several attempts were made to contact the owners, officers or agents of Cerro Gordo Hotel but they were unsuccessful. Defendant Charles McGreavy, the inspection services director for Mason City, inspected the buildings on June 25, 1988. McGreavy did not consult with an engineer but considered the possibility of collapse an emergency to the public outside the building. McGreavy subsequently consulted with Bob McKiness of defendant McKiness Excavating and Grading Inc. concerning the condition of the buildings. The decision to conduct the demolition was made on that evening. On June 22, 1990, Cerro Gordo Hotel filed its petition asserting a 42 U.S.C. § 1983 claim, trespass claim, and negligence claims against Mason City, Charles McGreavy, and McKiness as well as other defendants. The case proceeded to a jury trial. Plaintiff presented evidence indicating the buildings were structurally sound and argued the demolition was unnecessary.

Plaintiff had proposed a jury instruction on its claim defendants were negligent in determining an emergency existed and in determining the situation required the demolition pursued by the City. The court refused to instruct on the negligence issues, granting defendants a directed verdict on those issues. The case went to the jury on the remaining issues and the jury rendered a verdict for defendants. Plaintiff appealed, contending the district court erred in failing to submit defendants' liability to the jury under a theory of negligence.

HELD: Parties to a lawsuit have a right to have their legal theories submitted to the jury so long as the theories are supported by substantial evidence in the record. To give a proposed jury instruction, the evidence must be sufficient to warrant submission to the jury. Plaintiff's negligence claim was not supported by evidence. The record did not reveal testimony regarding the standard of care upon which the jury could judge the conduct of McKiness. The trial court properly refused to submit the issue against McKiness.

In the Matter of the Estate of John W. Hughbanks, 506 N.W.2d 451 (Iowa App. 1993)

Jury Instructions

Plaintiff was involved in a romantic relationship with the decedent for almost 40 years, lived with the decedent for 30 years, but plaintiff and decedent never married. During this period, plaintiff provided daily care to decedent's grandson and mother, provided housekeeping services, and paid for her own vehicle, clothing, groceries and furniture. Upon decedent's death, plaintiff filed a claim against the estate for services rendered as the decedent's housekeeper. Jury denied plaintiff's claim and plaintiff appealed, arguing that the district court erred in failing to adopt proposed jury instructions and overruling her objections to certain jury instructions.

HELD: Jury instruction that a "family" is a "group of people living in the same household under one management," derived directly from the Iowa Civil Jury Instructions, 2600.6, accurately reflects Iowa law.

Ladeburg v. Ray, 508 N.W.2d 694 (Iowa 1993)

Jury Instructions

Plaintiff, Helen Ladeburg, was struck by a semi trailer driven by defendant Ray. Plaintiff filed a negligence action which ultimately resulted in a jury verdict for the defendants. Plaintiff argued that the district court erred when it (1)

submitted instructions on plaintiff's comparative fault in failing to maintain a proper lookout; and, (2) refused to grant a new trial on the basis that the court incorrectly submitted the issue of defendants' fault to the jury.

HELD: Trial court's instructions on comparative fault could not have been prejudicial to the plaintiff, because the case was submitted to the jury on special interrogatories, the jury found that defendants were not at fault, and consequently did not answer the interrogatories concerning plaintiff's fault.

Morgan v. Perlowski, 508 N.W.2d 724 (Iowa 1993)

Jury Instructions

Plaintiff, Perlowski, submitted 26 proposed jury instructions to the court. He objected to the court's refusal to submit two requested instructions regarding premises liability. The court submitted a marshalling instruction which Perlowski complained did not set out the elements of liability under the Restatement for a premises liability type of case, and instead, is simply a general instruction incorporating general negligence principles without listing the very elements which must exist before premises liability may attach. Both of Perlowski's proposed instructions on premises liability and his objection to instruction 12 raise the same issue. He insisted the court must include instructions requiring Morgan to prove traditional essentials for recovery based upon a condition on the premises involving unreasonable risk of injury.

HELD: The requested instructions were not applicable to the issues. The trial court did not err in declining to give the requested instructions predicated on premises liability law. Nor was it error to overrule the objection to instruction 12 urging the same challenge.

Spaur v. Owens-Corning Fiberglas Corp., 510 N.W.2d 854 (Iowa 1994)

Jury Instructions

Robert and Marilyn Spaur brought suit against Owens-Corning Fiberglas Corp. ("OCF") and several other defendants to recover damages for personal injury resulting from the husband's exposure to defendants' asbestos-containing products. By the time the case went to the jury, all the defendants except OCF either settled with the Spaurs or were dismissed. The jury awarded compensatory damages, loss of consortium damages, and punitive damages against OCF. OCF claims the trial court erred in failing to properly instruct the jury on the level of proof necessary to show husband's exposure to Kaylo, its asbestos-containing product.

The jury was instructed on the concept of concurrent causation. The instruction on concurrent causation provided:

> It applies whenever two or more parties' separate fault combine, so that, when viewed as a whole, the fault proximately caused plaintiff's injuries. In such cases, the separate fault of each of those parties may be a proximate cause even though individually the party's separate fault would not have alone produced plaintiff's injuries, if the party's separate fault substantially contributed to plaintiff's injuries.

No objection was made to this instruction. On the issue of proximate cause, the jury was further instructed that Spaur must prove he "inhaled asbestos fibers as a result of being exposed to an asbestos-containing product manufactured and/or sold by OCF; the mere possibility that plaintiff may have been exposed to OCF's product is not enough."

HELD: The instructions as a whole adequately embodied the applicable law and the court did not err in overruling OCF's objection to the causation instruction.

<u>Sunrise Developing Co. v. Iowa Department of Transportation</u>, 511 N.W.2d 641 (Iowa App. 1993)

<u>Jury Instructions</u>

The submission of instructions which clearly overemphasize one party's theory of the case is error.

<u>Benn v. Thomas</u>, 512 N.W.2d 537 (Iowa 1994)

<u>Jury Instruction</u>

Motorist with a history of coronary disease died of a heart attack six days after suffering a bruised chest and fractured ankle in a motor vehicle accident caused by defendant's negligence. The decedent's estate filed suit against the other driver, and the jury returned a verdict for the estate with damages for the decedent's injuries but no damages for his death. The estate appealed, arguing that the trial court erred in refusing to instruct the jury on the "eggshell plaintiff" rule. The court of appeals reversed the judgment of the district court, and the defendant appealed.

HELD: Plaintiff was entitled to an "eggshell plaintiff" instruction since there was sufficient evidence for a jury to

determine that the decedent's heart attack and death were the direct result of the injury, thoroughly chargeable to the defendant's negligence.

Clarey v. K-Products, Inc., 514 N.W.2d 900 (Iowa 1994)

Jury Instructions

A former employee brought a wrongful termination action against her employer alleging that she was discharged in retaliation for filing workers' compensation claims. The district court ruled in favor of the employee, and the employer appealed arguing that the district court erred in failing to instruct the jury that the discharge was not retaliatory if the employee's injury created a situation preventing employee from performing regular duties, and that a discharge of an employee prior to a medical release to return to work is a matter to be considered by the Iowa Industrial Commissioner in determining the size of a workers' compensation award.

HELD: The district court properly denied the employer's proposed jury instruction when there was no factual basis or medical evidence that the plaintiff was unable to return to work at the time she was fired. In addition, the proposed instruction on whether the Iowa Industrial Commissioner should consider the employee's discharge when determining the size of the award under the Workers' Compensation Act would only serve to confuse the jury.

Shams v. Carney, 518 N.W.2d 366 (Iowa 1994)

Jury Instructions

Shams was struck while crossing a street by an automobile driven by John Carney. At the time, Carney was traveling on a "favored" street approaching an intersection. A jury found no negligence on the part of Carney, and the plaintiff appealed the resulting judgment. The court of appeals reversed, and the Supreme Court granted further review. Shams contends the trial court should have instructed the jury on the doctrine of assured-clear distance.

HELD: The instruction is based on Iowa Code § 321.285. There is a three-part test for determining when to give this instruction: a jury question on the issue exists where there is substantial evidence: (1) that the object with which the operator collided was located ahead of him in his lane of travel; (2) that the object was reasonably discernible; and, (3) that the object was a.) static or stationary, b.) moving ahead of him in the same direction as such operator, or c.) came into his lane of travel within the assured-clear distance ahead at a point sufficiently

distant ahead of him to have made it possible to bring his vehicle to a stop and avoid a collision. Under the facts of this case, it was not error for the district court to deny the assured-clear distance instruction.

State v. Deases, 518 N.W.2d 784 (Iowa 1994)

Jury Instructions

Defendant Deases was convicted after a jury trial of first degree murder. Deases appeals, arguing that the district court erred in failing to instruct the jury on the credibility of two defense witnesses who were convicted felons. The state argues that Deases did not preserve error on this issue because he did not object to the final instruction.

HELD: To preserve error, counsel must make a specific objection to the instructions in their final form. In the absence of such an objection, any alleged error in the instruction is waived. Deases objected to the court's proposed instruction concerning the credibility of witnesses. The court then revised the instruction and read it to Deases' counsel. Counsel made no objection to the revised instruction and the court submitted it to the jury. In the absence of an objection to the new instruction, the court was justified in assuming Deases had abandoned any objection.

Hillrichs v. Avco Corporation, 514 N.W.2d 94 (Iowa 1994)

Motion in Limine

In a products liability action for injuries sustained by a farmer who got his hand caught in the husking rollers of a corn picking machine, the defense attempted to submit a model of the husking rollers of a new 1966 corn picker. The defense first showed the model to plaintiff's attorney the day before trial started. Plaintiff filed a motion in limine to exclude defendant's model after the time required by a local rule (2.4(8)), which states that motions in limine are to be filed by the Friday before trial. The district court reasoned that "a motion in limine can scarcely be expected to be made until the basis for it is known to the movant. The attorneys for the plaintiffs never saw the proposed exhibit until after the Friday before trial, so their failure to make the motion before they saw the model is understandable."

HELD: The motion in limine was properly sustained.

Jackson v. Roger, 507 N.W.2d 585 (Iowa App. 1993)

Special Verdicts

Iowa Rule of Civil Procedure 205 provides that any party not demanding submission of an issue before the jury retires, waives jury trial thereof, and the court may find upon it; failing which, it shall be deemed found in accord with the judgment on the special verdict.

Spaur v. Owens-Corning Fiberglas Corp., 510 N.W.2d 854 (Iowa 1994)

Verdict Form

In a products liability action against multiple asbestos manufacturers, the defendant asbestos manufacturer asserted a cross-petition against the Manville Trust for contribution. Plaintiffs had dismissed Manville Trust from the case without prejudice during trial, and the court denied defendant's request to include Manville Trust as a party on the verdict form, precluding allocation of fault to Manville Trust under Iowa Code 668.3.

HELD: The third party defendant was properly omitted from the verdict form for allocation of fault since the third-party plaintiff can pursue its right of contribution in a separate action against third-party defendant and because the Manville Trust was not a released party because no document of release or settlement was exchanged. Further, the injunctions ordered by the bankruptcy court precluded any litigation against Manville Trust.

Spaur v. Owens-Corning Fiberglas Corp., 510 N.W.2d 854 (Iowa 1994)

Verdict Form

In a products liability action against multiple asbestos manufacturers, plaintiff settled with all except one defendant prior to trial. The defendant argued that the trial court erred in refusing to list four settling suppliers or installers of asbestos-containing products in the jury's instructions and on the verdict form for apportionment of fault.

HELD: Suppliers and installers of asbestos which previously settled products liability suit were not "parties" which should have been included on the jury's verdict form for allocation of fault. There was no legal or evidentiary basis for a submission of the suppliers' liability.

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<u>State v. Smith</u>, 508 N.W.2d 101 (Iowa App. 1993)

<u>Witness</u>

Normally, it is for the jury to determine the credibility of witnesses. However, the testimony of a witness may be so impossible and absurd and self-contradictory that it should be deemed nullity by the court.

<u>State v. Havemann</u>, 516 N.W.2d 26 (Iowa App. 1994)

<u>Witness</u>

Defendant Havemann was charged with two counts of burglary in the second degree and one count of theft in the third degree. Danny (a witness) confessed to taking several items from the home of his parents. In his confession, Danny stated he had been aided in the burglaries by Havemann. Havemann denied the charges and stated that, while he drove Danny to Danny's parents' house, he did not know Danny intended to take the items that did not belong to him. Havemann's trial counsel attempted to impeach Danny by presenting evidence of a prior incident in which Danny had sought to implicate Havemann of a crime he had actually committed. The attorney argued the evidence was admissible under Iowa Rule of Evidence 404(b). The district court ruled the evidence was not admissible under Rule 404(b) and the evidence was not presented to the jury. Havemann contends that he did not receive effective assistance of counsel during the trial. In particular, he states that his counsel attempted to introduce the impeachment evidence against Danny under the wrong rule of evidence. The state agrees that the evidence should have been admissible under Rule 608 and that defense counsel did not attempt to introduce the evidence under this Rule.

HELD: Where a case is close on the facts, failure to allow questions relating to a witness's credibility must be presumed prejudicial. The present case is not close on the facts. There was substantial evidence in the record for the jury to find defendant guilty. The impeachment evidence in question was cumulative to other evidence of Danny's character and credibility. Defendant has not shown he was prejudiced by counsel's failure to introduce the evidence.

<u>State v. Rhomberg</u>, 516 N.W.2d 803 (Iowa 1994)

<u>Witness</u>

Rhomberg appeals from his conviction of first degree murder. Rhomberg contends the state should not have been allowed

to present rebuttal testimony from a psychiatrist his counsel had employed while jurisdiction was in the juvenile court.

HELD: Because Rhomberg sought the psychiatrist for litigation purposes, the physician-patient privilege did not apply. Also, the privilege does not attach when the defendant, as here, gives notice of the defense of insanity or diminished responsibility.

WORKERS' COMPENSATION

Amy Snyder

Parson v. Procter & Gamble Mfg. Co., 514 N.W.2d 891 (Iowa 1994)

Independent Contractors

Kelly Temporary Services furnished workers, including plaintiffs, to serve as temporary workers at Proctor & Gamble. Plaintiffs were injured and received workers' compensation benefits from Kelly's insurer. Plaintiffs later brought this tort suit against P&G based on the same injuries. The district court granted summary judgment for P&G finding that plaintiffs were employees of P&G and that Iowa Code § 85.20 barred plaintiffs' claims.

HELD: If, as a matter of law, P&G is plaintiffs' employer, tort recovery is barred by the exclusive workers' compensation remedy provision of Iowa Code § 85.20. If a genuine issue of fact exists as to whether plaintiffs remained employed only by Kelly and were not employed by P&G, summary judgment for P&G should not have been granted.

There is an issue of material fact as to whether employees of Kelly could be deemed employees of P&G. P&G's contract with Kelly suggested that P&G intended not to be an employer. The contract provided that P&G undertook no obligation of any sort to Kelly's employees. It also provided that Kelly would comply with and be responsible for all requirements of federal, state and local laws and regulations, including workers' compensation. The district court improperly granted the motion for summary judgment.

DISSENT: Four justices dissented, believing that the Henderson five factor test was essentially met and established an employer-employee relationship between P&G and plaintiffs. See Henderson v. Jenny Edmundson Hospital, 178 N.W.2d 429, 431 (Iowa 1970). Under this test, the factors by which to determine whether an employment relationship exists are: (1) the right to selection, or to employ at will; (2) responsibility for the payment of wages

by the employer; (3) the right to discharge or terminate the relationship; (4) the right to control the work; and (5) the party sought to be held as the employer's the responsible authority in charge of the work or for whose benefit the work is performed.

White v. Northwestern Bell Tele. Co., 514 N.W.2d 70 (Iowa 1994)

Worker's Comp Settlement

White claimed to have incurred a work related back injury, and sought workers' compensation benefits. U.S. West disputed both the source of White's injury and the degree of his disability. Eventually, the parties negotiated a compromise case settlement pursuant to Iowa Code § 85.35 (1979). Under the settlement, U.S. West agreed to furnish future medical care to the claimant of the same kind and to the same degree as would be required of the employer under the Iowa Workers' Compensation Act.

Beginning in 1985, U.S. West refused to pay certain medical bills incurred by White. In March 1990, White brought an action before the Industrial Commissioner. The Industrial Commissioner ruled that it lacked jurisdiction to resolve the disputes pursuant to Iowa Code § 85.35. White then filed an original action in district court. The district court denied U.S. West's motion to dismiss for lack of subject matter jurisdiction. The court found that U.S. West breached the settlement and awarded White $8,900 plus interest for unpaid medical and pharmaceutical bills. It also ruled that U.S. West's breach was intentional and wrongful and awarded White $50,000 in punitive damages. U.S. West appeals.

HELD: We affirm the district's court finding that it possessed subject matter jurisdiction. U.S. West points out that under Iowa Code § 85.20 an employee's rights and remedies arising from a job-related injury are governed exclusively by the Workers' Compensation Act under the jurisdiction of the Industrial Commissioner. The exclusivity principal of the Act, however, is limited to matters surrounding a job-related injury. U.S. West disputed whether White's back injury arose out of a job as a telephone installer. The case was settled before the Industrial Commissioner ever had an opportunity to find that the injury was definitely work related. Approval of a contested case settlement terminates the Industrial Commissioner's jurisdiction.
We also agree with the district court's finding that U.S. West breached the settlement agreement.

<u>Brown v. Liberty Mut. Ins. Co.</u>, 513 N.W.2d 762 (Iowa 1994)

<u>Limitation of Actions</u>

Questions of law were certified in claimant's action based on bad faith payments of workers' compensation benefits. The first issue is when does a cause of action for bad faith failure to pay workers' compensation accrue--the date the claim is denied by the insurer, or the date the Industrial Commissioner first determines that the injury is compensable under the Workers' Compensation Act?

HELD: A claimant's cause of action for bad faith failure to pay workers' compensation accrues upon receipt of notification that the carrier has denied the claim. Because an action for bad faith focuses on the carrier's pre-denial conduct--not benefit eligibility--the Industrial Commissioner's ultimate decision should not control the target date for accrual purposes.

The second question is what limitation period applies to bringing such a cause of action--the two year period of Iowa Code section 614.1(2) or the five year period of Section 614.1(4)?

HELD: The five year limitation of subsection (4) applies to actions based on bad faith non-payment of workers' compensation benefits. Brown's bad faith claim rests on Liberty Mutual's alleged breach of its statutory good faith obligation to pay benefits in advance of a specific directive by the Industrial Commissioner. Given the choices before us, we believe suits of this nature fall within the "other actions" category found in subsection (4).

<u>Reedy v. White Consolidated Industries</u>, 503 N.W.2d 601 (Iowa 1993)

<u>Bad Faith</u>

Certified questions addressed (1) whether Iowa recognizes an action against a self-insured employer for a bad-faith failure to pay a workers' compensaion claim for medical benefits and (2) whether the employee must litigate his workers' compensation claim before the Iowa Industrial Commission and exhaust all appeals before such a bad-faith action may be brought.

HELD: Iowa recognizes an action against a self-insured employer for a bad-faith failure to pay a workers' compensation claim.

The statutory exhaustion of remedy doctrine contained in Iowa Code § 17A does not apply to a bad faith cause of action. However, it would be "clearly preferable" to have the extent of the employer's workers compensation liability determined prior to initiation of a bad faith claim in district court. Therefore, the

courts should adopt a discretionary abstention policy to permit the tort case to remain on the docket while awaiting the administrative determination.

Christensen v. Pocket Lounge, Inc., No. 212/93-656 (Iowa July 27, 1994)

Indemnity

Christensen owns and is employed as a bartender at Pocket Lounge. While tending bar he was injured in an attempt to evict a drunken patron. Christensen claimed workers' compensation benefits and also brought a tort action against the patron and a dram shop that had served the patron alcohol earlier in the evening. Pocket Lounge and its workers' compensation carrier, United Fire & Casualty Company, contested Christensen's entitlement to workers' compensation benefits and filed a notice of workers' compensation lien under Iowa Code § 85.22, against any potential recovery by Christensen from the third-party tort feasors. In Christensen's petition for arbitration of the benefits dispute, the Deputy Industrial Commissioner ruled he was entitled to past and future benefits. As United's administrative appeal was pending, Christensen settled his suit with both third-party tort feasors and filed a motion to quash United's notice of lien on the ground that United had made no benefit payments by the time of settlement. By answer, United admitted that no benefits had yet been paid so Christensen moved for summary judgment alleging the statutory lien was invalid as a matter of law.

The district court ruled in favor of Christensen, relying on Fisher v. Keller Industries. It reasoned that Iowa Code § 85.22 grants workers' compensation carrier a lien with respect to payments "so made," but not with regard to payments it may be liable for in the future.

HELD: Similar to the Shirley v. Pothast, which was decided while this case was pending on appeal, United asserts its right to a lien, not a credit, to secure reimbursement for benefit payments it has yet to make. It is irrelevent that United has yet to make a single payment. United's potential liability to Christensen has been fixed. By its terms, the lien authorized by § 85.22 gives security for payment of benefits for which an indemnitor "is liable," whether such benefits have already been distributed or not. Thus, United's notice of lien was valid to secure reimbursement from any settlement recovery and future workers' compensation benefits ultimately made to Christensen. The district court's ruling is therefore reversed.

Covia v. Robinson, 507 N.W.2d 411 (Iowa 1993)

Personal Jurisdiction

Frederick Robinson's wife, Diana, was killed in a plane crash in Sioux City, Iowa while traveling from Colorado to Illinois in the course of her employment with Covia. Covia is headquartered in Illinois. Frederick applied for worker's compensation benefits in Iowa. Covia challenged the jurisdiction of Iowa's Industrial Commissioner under Iowa Code § 85.3. Robinson alleges Covia unreasonably delayed payments and should be penalized pursuant to § 86.13. The Industrial Commissioner ruled Covia failed to present "fairly debatable" questions of fact or law to justify the delay and imposed a penalty. The district court reversed the ruling.

HELD: Section 85.3 is a long-arm statute authorizing the exercise of personal jurisdiction by the Iowa Industrial Commissioner over non-resident defendants. As is true regarding any exercise of personal jurisdiction, the court must first determine if the exercise of personal jurisdiction is authorized by statute. Next, the court must determine if the exercise of personal jurisdiction over the parties is constitutional under the limits of due process. This is done by determining if Covia maintained the requisite "minimum contacts with the forum state such that the maintenance of the suit does not offend traditional notions of fair play and substantial justice."

Here, the issue of whether Covia was subject to Iowa jurisdiction was fairly debatable. Therefore, the district court correctly overturned the penalty imposed on Covia.

Shirley v. Pothast, 508 N.W.2d 712 (Iowa 1993)

Indemnity

Pothast struck Shirley's vehicle while Shirley was in the course of his employment. Shirley is receiving workers' compensation benefits from Aetna and commenced a third-party tort action against Pothast. Aetna filed a Notice of Lien pursuant to Iowa Code § 85.22(1). Shirley and Pothast agreed on a settlement whereby Shirley was to receive $170,000 and his wife and children were to receive $345,000 for their loss of consortium claims. Aetna objected to the settlement structure as an attempt to avoid its lien. Pothast withdrew his offer and tendered to the Shirleys an Offer to Confess Judgment for $500,000 provided the Shirleys have judgments entered in their respective favors setting forth which portion of the offered judgment each is entitled to receive. The district court discharged Aetna's lien and entered judgment in favor of the Shirleys for $515,000 with Shirley receiving $345,000 and his wife receiving $125,000 and each child $15,000. Aetna intervened and contends the court lacked subject matter jurisdiction and Pothast's Offer to Confess Judgment is tantamount

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to a settlement offer requiring the Industrial Commissioner's approval to be effective. Aetna also contends the district court erred in ordering its lien discharged on the condition it be reimbursed for benefits paid to date -- an attempt to distinguish Fisher v. Keller Industries.

HELD: The trial court lacked subject matter jurisdiction to enter judgment pursuant to Pothast's offer to confess judgment. The judgment possessed the qualities of a settlement because the only issue to be litigated was the proper allocation of the judgment. Therefore, the approval of the settlement by the Industrial Commissioner was required pursuant to Iowa Code § 85.22(3). Also, the district court erred in discharging Aetna's lien. In Fisher we held only that indemnitors are not entitled to a credit for future payments at the time a settlement is made. However, § 85.22(1) provides for a lien which provides security for all future benefit payments, even those accruing after disposition of the action against the third party.

H & W Motor Exp. v. Christ, 516 N.W.2d 912 (Iowa Ct. App. 1994)

Oral Contract

At a meeting held for the purpose of settling his worker's compensation claim the company offered Christ $10,000 in full settlement. Although the company's representatives at the meeting claimed they believed they had reached an oral agreement, Christ testified he planned on waiting until he received the written contract before deciding what to do. After seeking the advice of an attorney, Christ ultimately refused to sign the agreement. The company subsequently filed this action for a specific performance.

The distrct court found the parties intended not to be bound until the written document was signed and dismissed the company's petition.

HELD: Affirmed. The evidence shows Christ lacks sophistication as to business affairs and intended not to be bound until after he revived a proposed written contract. The plaintiff's burden in a suit for specific performance is to prove by clear, satisfactory, and convincing evidence the terms of the contract declared on in his or her pleadings. When the terms of an agreement are definitely fixed so nothing remains except to reduce them to writing, an oral contract will be upheld unless the parties intended not to be bound until the agreement was reduced to writing.

1994 IOWA DEFENSE COUNCIL ANNUAL MEETING & SEMINAR

WEDNESDAY, SEPTEMBER 21

9:00 a.m. Registration Desk Opens

11:00 a.m. Board of Directors Meeting

1:00 p.m. Introduction and Report of the Association

1:15 - 2:00 p.m. Annual Appellate Update, Part I
Steven L. Serck - Ahlers, Cooney, Dorweiler, Haynie, Smith & Allbee, P.C., Des Moines, IA.

2:00 - 2:45 p.m. Commercial Litigation
Stephen J. Holtman - Simmons, Perrine, Albright & Ellwood, L.L.P., Cedar Rapids, IA.

2:45 - 3:15 p.m. Rules Update
William H. Courter - Shuttleworth & Ingersoll, P.C., Cedar Rapids, IA.

3:15 - 3:30 p.m. Break

3:30 - 4:00 p.m. Trial by Visual Aid
David L. Riley - Lindeman, Yagla, McCoy & Riley, Waterloo, IA.

4:00 - 4:30 p.m. Premises/Interloper Liability
John Werner - Grefe & Sidney Des Moines, IA.

4:30 - 5:30 p.m. Tripartite Relationships
Client Relations Committee

6:00 - 11:00 p.m. 30th Anniversary Party
Des Moines Botanical Center
The Spirit of Des Moines Riverboat

THURSDAY, SEPTEMBER 22

8:30 - 9:00 a.m. Legislative Developments
Robert M. Kreamer - Whitfield & Eddy, P.L.C., Des Moines, IA

9:00 - 10:15 a.m. Developments in the Restatement
Professor Michael D. Green - University of Iowa Law School, Iowa City, IA.

Robert L. Fanter - Whitfield & Eddy, P.L.C., Des Moines, IA.

10:15 - 10:30 a.m. Break

10:30 - 11:15 a.m. Daubert & Court Appointed Experts
Mark S. Olson - Oppenheimer, Wolff & Donnelly, Minneapolis, MN

11:15 - 12:00 p.m. Product Liability Developments
Stephen E. Scheve - Shook, Hardy & Bacon, Kansas City, MO.

12:00 - 12:45 p.m. Lunch

12:45 - 1:15 p.m. Supreme Court Reports
Hon. Marsha K. Ternus - Justice, Iowa Supreme Court, Des Moines, IA.

1:15 - 2:30 p.m. Crashworthiness
Richard A. Stefani - Gray, Stephani & Mitvalsky, Cedar Rapids, IA.

Kevin M. Reynolds - Whitfield & Eddy, P.L.C., Des moines, IA.

Thomas M. Zurek - Nyemaster, Goode, McLaughlin, Voigts, West, Hansell & O'Brien, P.C., Des Moines, IA.

2:30 - 3:15 p.m. Defending Emotional Distress Claims
Gregory C. Read - Sedgewick, Detert, Moran & Arnold, San Francisco, CA.

3:15 - 3:30 p.m. Break

3:30 - 4:15 p.m. Recent Developments in Medical Malpractice
Carol A. H. Freeman - Lane & Waterman, Davenport, IA.

4:15 - 5:00 p.m. Annual Appellate Update, Part II
Amy H. Snyder - Lane & Waterman, Davenport, IA.

5:00 - 5:15 p.m. Election of Officers and Directors and Annual Meeting of IDCA

6:00 - 7:30 p.m. Reception - Des Moines Club

7:30 p.m. Annual Banquet - Des Moines Club

FRIDAY, SEPTEMBER 23

7:30 - 8:30 a.m. Board of Directors Meeting

8:30 - 9:00 a.m. Workers' Compensation Update
Joseph M. Bauer - Reavely, Shinkle, Bauer, Scism & Reavely, Des Moines, IA

9:00 - 9:45 a.m. Uninsured/Underinsured
Ann Fitzgibbons - American Family Insurance Company, West Des Moines, IA.

9:45 - 10:15 a.m. Strategy and Discovery in Crop Damage Cases
Gregory G. Barnsten - Smith, Peterson, Beckman & Willson, Council Bluffs, IA.

10:15 - 10:30 p.m. Break

10:30 - 11:15 p.m. Offensive Defenses in Employment Litigation
Frank B. Harty - Nyemaster, Goode, Mclaughlin, Voigts, West, Hansell & O'Brien, P.C., Des Moines, IA.

11:15 - 12:00 p.m. Annual Appellate Update, Part III
Leonard T. Strand - Simmons, Perrine, Albright & Ellwood, L.L.P., Cedar Rapids, IA.

12:00 - 12:45 p.m. Lunch

12:45 - 1:15 p.m. Federal Court Report
Hon. Mark W. Bennett - District Judge United States District Court, Northern District Court of Iowa, Sioux City, IA.

1:15 - 2:15 p.m. Physicians in the Litigation Process
Hon. Donna L. Paulsen - Iowa District Court Judge, Des Moines, IA.

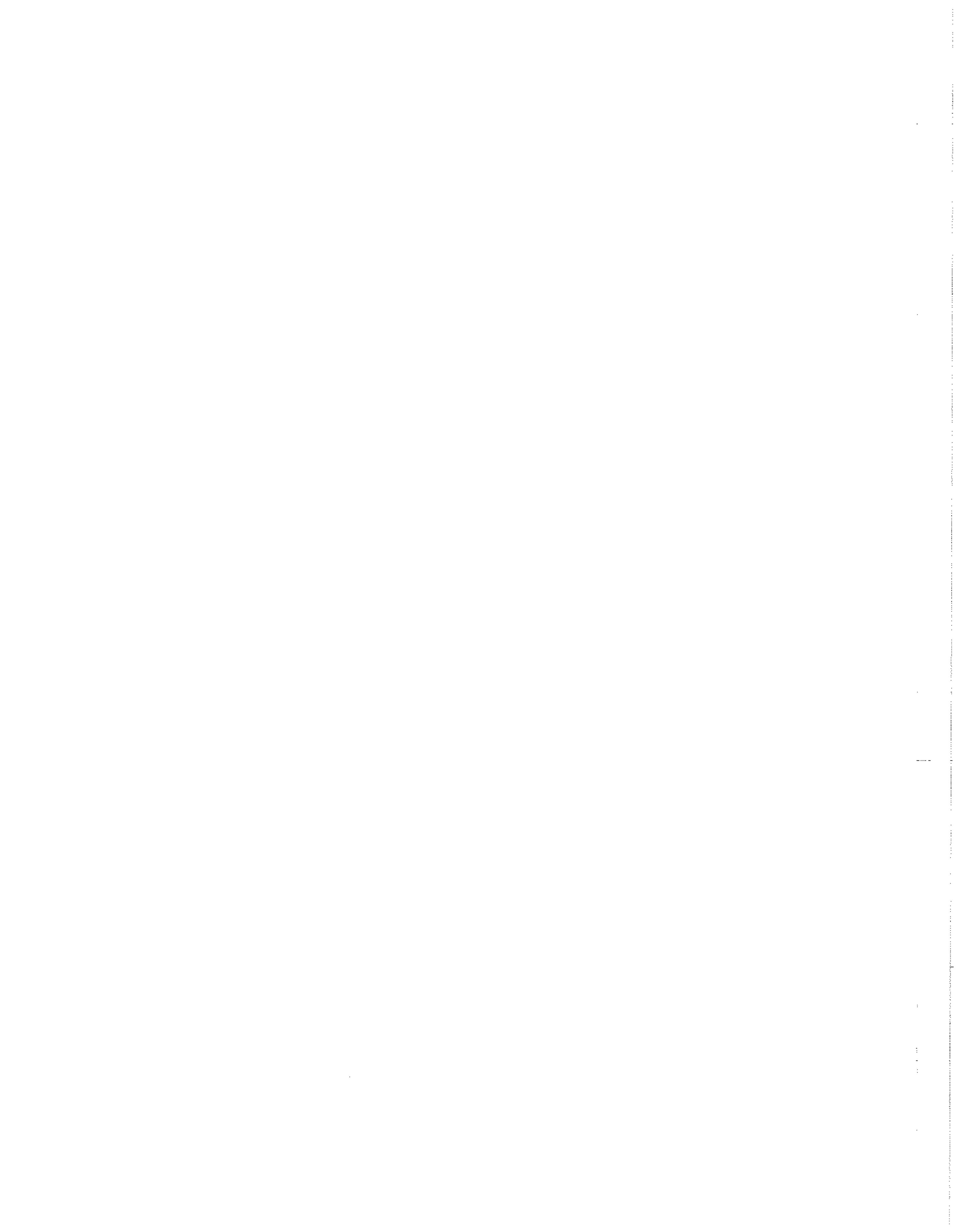
Diane Kutzko - Shuttleworth & Ingersoll, P.C., Cedar Rapids, IA.

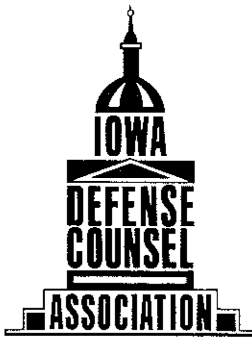
James Turner, M.D. - Iowa Medical Clinic, P.C., Cedar Rapids, IA.

Louis D. Rodgers, M.D. - Methodist Medical Plaza, Des Moines, IA.

2:15 - 3:00 p.m. Voir Dire
David W. Dutton - Dutton, Braun, Staack, Hellman & Iverson, P.L.C., Waterloo, IA.

Cynthia Fobian Willham - Starr Litigation Service, Des Moines, IA.





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1993 ANNUAL MEETING
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INTRODUCTION

This outline will address legal issues that typically arise in commercial disputes. Commercial lawsuits generally involve disputes arising between parties to a contract. Thus, contract law issues (whether controlled by common law or by the Uniform Commercial Code) are almost always present. In addition, it is becoming more and more common for commercial plaintiffs to assert one or more tort claims along with the traditional contract claims. Commercial plaintiffs sometimes even assert personal injury claims based on alleged emotional distress. Thus, what appears at first glance to be a simple contract dispute often evolves into a multi-count lawsuit presenting a host of contract and tort issues.

I. BREACH OF CONTRACT CLAIMS

A. Introduction

Nearly all commercial disputes include a claim for breach of contract. Often the plaintiff, faced with unfavorable contract terms, will seek to avoid the express terms of a written contract by alleging such matters as oral modification, ambiguity or unconscionability. In many cases, the result of these efforts will determine the outcome of the dispute.

B. Elements

The elements of a breach of contract case are familiar: (1) the parties were capable of contracting, (2) the existence of a contract, (3) the consideration, (4) the terms of the contract, (5) the plaintiff has performed or has been excused from performance, (6) the defendant has breached the contract, and (7) the amount of damages. See Iowa Civil Jury Instruction 2400.1.

C. Issues and Defenses

1. **Does the UCC apply?** Article 2 of the UCC contains codified principles of contract construction and enforcement that may be useful to the defendant in a contract action. It applies to "transactions in goods." Iowa Code § 554.2102. Some contracts obviously are contracts for the sale of goods, while others are not so clear. If the contract is mixed, meaning that it covers both the sale of goods and the rendition of services, then the UCC applies if the sale of goods is the "predominant factor" of the

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contract, with labor only incidentally involved. Bonebrake v. Cox, 499 F.2d 951 (8th Cir. 1974).

1a. **Dealer and distributor agreements.** In disputes concerning a manufacturer's agreements with its dealers or distributors, the question as to applicability of the UCC sometimes arises. Several federal courts have predicted that Iowa will follow the majority rule that a manufacturer's agreements with its dealers or distributors are governed by Article 2. Ralph's Distributing Co. v. AMF, Inc., 667 F.2d 670, 673 n.6 (8th Cir. 1981); Corenswet, Inc. v. Amana Refrigeration, Inc., 594 F.2d 129, 134-35 (5th Cir.), cert. denied, 444 U.S. 938 (1979); Blalock Machinery & Equip. Co. v. Iowa Manf. Co., 576 F. Supp. 774, 777 (N.D. Ga. 1983).

2. **What State's law applies?** Written contracts often include a choice of law clause. The UCC provides that these clauses are enforceable if the transaction bears a "reasonable relation" to the chosen state. Iowa Code § 554.1105. A similar analysis presumably applies in non-UCC cases. See Restatement (Second) of Conflict of Laws § 187 (1971).

3. **Is contract written, oral or both?** The key issue in many disputes is "what is the contract?" Typically, the defendant claims that the entire contract is set forth in a signed writing. The plaintiff, on the other hand, often alleges that the contract also consists of various "other" terms that the parties did not put in writing. Sometimes, of course, the contract is both written and oral.

3a. **If written, is it integrated?** If a written agreement is integrated, it will be more difficult (though not impossible) for either party to claim that there are additional or contrary terms. See, e.g., Anderson v. Aspelmeier, Fisch, Power, Warner & Engberg, 461 N.W.2d 598, 600 (Iowa 1990) (extrinsic evidence may not be used to modify or enlarge contract terms); Tamm, Inc. v. Pildis, 249 N.W.2d 823 (Iowa 1976) (trial court properly barred the extrinsic evidence as an impermissible attempt to add a new provision to the written agreement). The issues related to application of the parol evidence rule are complex, and could themselves be the subject of a separate outline. The UCC's parol evidence rule, at Iowa Code § 554.2202, can be helpful to the defense of a claim that the parties agreed to something other than what was set forth in writing.

3b. **If oral, does the statute of frauds apply?** Iowa's "common law" statute of frauds is codified at Iowa Code § 622.32. This provides, with some exceptions, that no evidence of certain contracts is admissible unless those contracts are in the form of a writing signed by the party to be charged. This provision addresses contracts such as contracts for the creation or transfer of an interest in real estate and contracts that are not

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to be performed within one year. It is important to remember that the UCC contains its own statutes of frauds that may be helpful in particular circumstances. Iowa Code § 554.2201 states, generally, that a contract for the sale of goods for $500 or more must be in writing. Likewise, Iowa Code § 554.8319 contains a statute of frauds applicable to contracts for the sale of "securities."

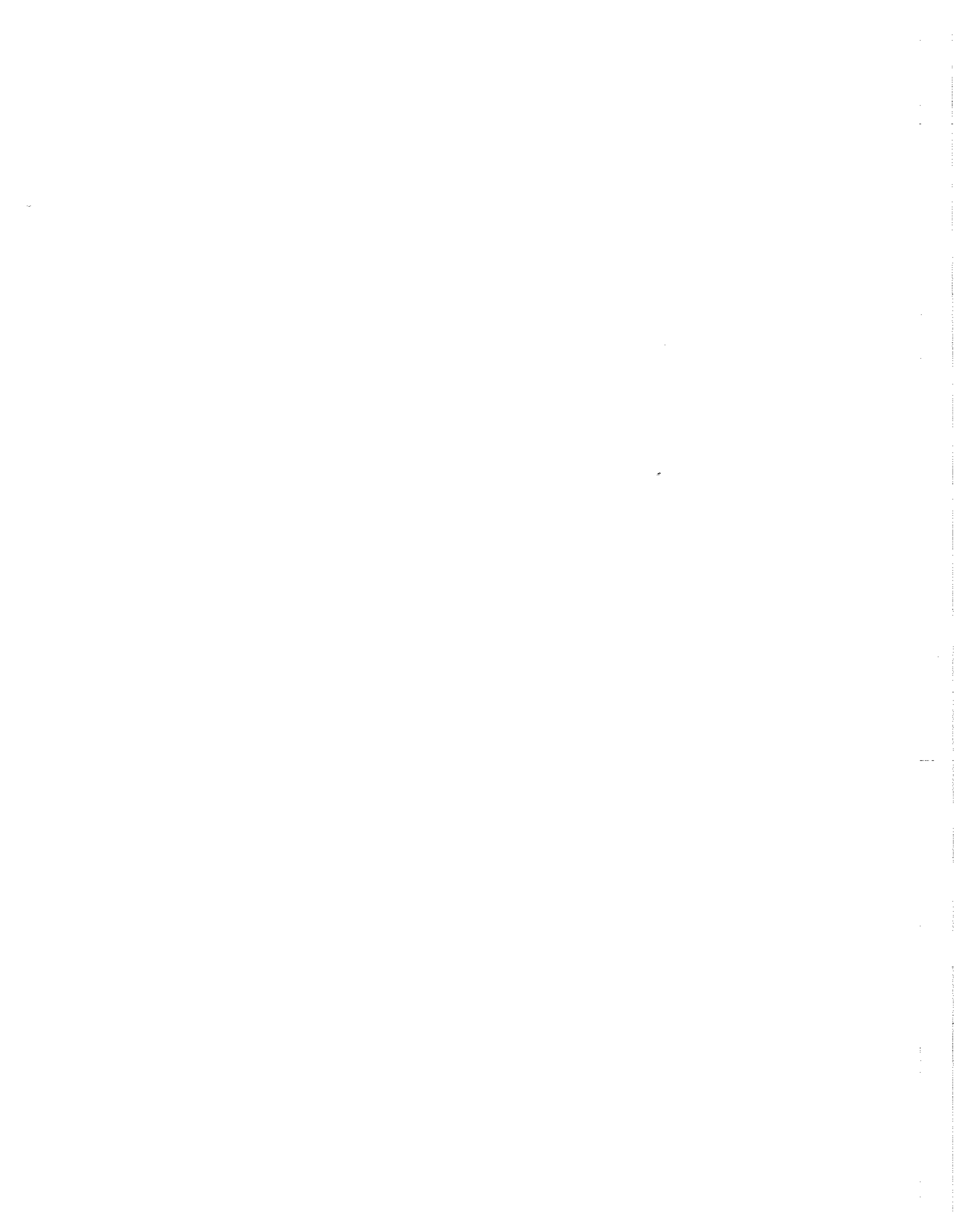
4. **Does the contract contain helpful disclaimers?** The UCC provides that contracts for the sale of goods carry various implied warranties from the seller to the buyer, including the implied warranty of merchantability and, when applicable, the implied warranty of fitness for a particular purpose. The parties may, however, agree to disclaim these warranties. Iowa Code § 554.2316. A well-drafted disclaimer of warranties can be useful in obtaining at least partial summary judgment. Likewise, the UCC permits contracting parties to agree to limited remedies, Iowa Code § 554.2719(2), and agree to limit or exclude liability incidental or consequential damages. Iowa Code § 554.2719(3). A contractual exclusion of consequential damages, if upheld, often can reduce the plaintiff's potential recovery significantly.

5. **Is the statute of limitations applicable?** Unlike most states, Iowa has not adopted the UCC's standard four year statute of limitations for actions based on contracts governed by Article 2. Instead, Iowa has retained its general five year (oral) and ten year (written) statutes of limitations for all contracts, UCC or non-UCC. Iowa Code §§ 554.2725 and 614.1. These lengthy limitations periods reduce the likelihood of a valid statute of limitations argument in a contract action. Iowa's UCC does, however, permit the parties to contractually reduce the limitations period to not less than one year. Iowa Code § 554.2725(1).

5a. **Discovery rule.** In UCC cases, the statute of limitations generally begins to run at the time of breach, regardless of the date the breach is discovered. See Iowa Code § 554.2725(2). Under Iowa common law, the discovery rule applies to claims based on breach of express and implied warranties. Brown v. Ellison, 304 N.W.2d 197, 201 (Iowa 1981).

6. **What avoidance arguments, if any, does the plaintiff rely upon?** In many cases the plaintiff seeks to maintain a cause of action that appears to be contrary to the express terms of a written agreement. A distributor, for example, may claim that the manufacturer's termination of the distributor agreement was wrongful despite language permitting either party to terminate at any time for any reason. Some of the avoidance theories that commonly arise include the following:

6a. **Ambiguity.** Any contract clause that appears, on its face, to defeat the plaintiff's claim is likely to be assailed as ambiguous. Even terms such as "all claims" and "non-exclusive" can be challenged as ambiguous. Under Iowa law, a



modifications be in the form of a writing. Iowa Code § 554.2209(2). The UCC further provides that if the contract, as modified, is subject to the UCC's statute of frauds, then the requirements of that statute of frauds must be satisfied. Iowa Code § 554.2209(3). The Code goes on, however, to state that an attempted modification that does not satisfy the contractual or statutory requirements of a writing nonetheless can operate as a waiver. Iowa Code § 554.2209(4). In other words, while an alleged oral modification may be unenforceable, as a modification, in the face of a no-oral-modification clause, it still may be considered as an act constituting an estoppel or waiver. Iowa common law is in accord with the UCC in this regard. Humiston Grain Co. v. Rowley Interstate Transp. Co., 483 N.W.2d 832, 834 (Iowa 1992).

6e. **Implied Covenant of Good Faith and Fair Dealing.** Iowa law provides that every contract includes an implied covenant between the parties of good faith and fair dealing. Fogel v. Trustees of Iowa College, 446 N.W.2d 451, 456 (Iowa 1989); Iowa Code § 554.1203. It is not clear what this implied covenant means in the context of a lawsuit. A plaintiff may rely on this covenant in an effort to impose duties on the defendant in addition to, or even contrary to, the express terms of the contract. In non-UCC cases, the Iowa Supreme Court has held that there is no separate cause of action for breach of the implied covenant of good faith and fair dealing when no express term of the contract has been breached. See, e.g., French v. Foods, Inc., 495 N.W.2d 768, 771 (Iowa 1993) (no cause of action for breach of the implied covenant of good faith and fair dealing in employment contracts); Porter v. Pioneer Hi-Bred Int'l, Inc., 497 N.W.2d 870, 871 (Iowa 1993) (no cause of action for breach of the implied covenant of good faith and fair dealing in contract between company and independent sales representative). Further, at least two federal courts, in construing Iowa law, have held that the UCC's implied covenant of good faith and fair dealing does not override express contract terms. Corenswet, Inc. v. Amana Refrigeration, Inc., 594 F.2d 129, 138 (5th Cir.), cert. denied, 444 U.S. 938 (1979) (Iowa law) (implied covenant does not prevent defendant from terminating agreement that expressly allows termination at any time for any reason); Blalock Machinery & Equip. Co. v. Iowa Manf. Co., 576 F. Supp. 774 (N.D. Ga. 1983) (Iowa law).

6f. **Unconscionability.** Unconscionability is sometimes a "last resort" argument made by a plaintiff who has no other way to avoid the express terms of a contract. A plaintiff may claim, for example, that a contractual termination without cause clause is void as unconscionable. Under the UCC, unconscionability exists if (1) the plaintiff had no meaningful choice but to deal with the defendant and to accept the offered terms and (2) the challenged terms of the contract are unreasonably one-sided and favorable to the defendant. Corenswet, Inc. v. Amana Refrigeration, Inc., 594 F.2d 129, 139 n.12 (5th Cir.), cert. denied, 444 U.S. 938 (1979) (Iowa law). A contract term is not

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unconscionable simply because it was included in an "adhesion" contract. Home Fed. Sav. & Loan Asso. v. Campney, 357 N.W.2d 613, 619 (Iowa 1984). Many courts have recognized that it should be particularly difficult for a commercial entity to establish unconscionability because the doctrine exists primarily for the protection of unsophisticated consumers. See, e.g., Steffl v. J.I. Case Co., 862 F.2d 692, 695 (8th Cir. 1988); Golden Reward Mining Co. v. Jervis B. Webb Co., 772 F. Supp. 1118, 1123-25 (D.S.D. 1991); Gershman v. International Business Mach. Corp., 619 F. Supp. 1530, 1533 (E.D. Pa. 1985).

C. Damages

1. **General Measure of Damages.** Under the UCC, the general measure of damages is the expectancy measure (difference between market price and contract price) plus any incidental damages and, if the aggrieved party is the buyer, consequential damages. Iowa Code §§ 554.2708 through 554.2715. Consequential damages include personal or property damage caused by any breach of warranty plus any losses arising out of any of the buyer's requirements or needs that the seller had reason to know of at the time of contracting. Iowa Code § 554.2715(2). In non-UCC cases, Iowa's common law measure of damages appears to be the same. The plaintiff is entitled to expectancy damages plus any foreseeable consequential damages. See, e.g., Macal v. Stinson, 468 N.W.2d 34, 35-36 (Iowa 1991).

2. **Lost Profits.** Consequential damages for breach of contract can include lost profits. Lost profits that are speculative, contingent, conjectural, remote or uncertain are not recoverable. Shinrone, Inc. v. Tasco, Inc., 283 N.W.2d 280, 286 (Iowa 1979). Nonetheless, lost profits appear to be subject to the general rule that if it is clear that damages have been incurred, recovery will not be denied simply because the amount of damages cannot be proven with scientific certainty. Bangert v. Osceola County, 456 N.W.2d 183, 190 (Iowa 1990); Palmer v. Albert, 310 N.W.2d 169, 174 (Iowa 1981).

3. **Contractual Limitations.** The UCC permits contracting parties to establish limited remedies and to disclaim liability for incidental or consequential damages. See discussion at paragraph C(4) above.

4. **Punitive Damages.** Plaintiffs often request punitive damages based on a theory of intentional or negligent breach of contract. Iowa has held firm to the rule that punitive damages are not available for breach of contract, even intentional breach, unless the breaching conduct also constitutes an independent tort and was committed maliciously within the meaning of chapter 668A. See White v. Northwestern Bell Telephone Co., 514 N.W.2d 70, 77 (Iowa 1994).

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5. **Emotional Distress Damages.** Iowa continues to follow the rule that emotional distress damages are not available for breach of contract unless the breach was of such a nature that emotional distress is a particularly likely result. Clark-Peterson Co. v. Independent Insurance Assocs. Ltd., 514 N.W.2d 912 (Iowa 1994).

II. PROMISSORY ESTOPPEL CLAIMS

A. Introduction

Promissory estoppel often appears as a separate count in a commercial dispute, particularly when the plaintiff's contract claims are suspect.

B. Elements

The elements of a promissory estoppel claim are (1) that a clear and definite promise was made, (2) that the party seeking to enforce the promise reasonably and detrimentally relied on the promise and (3) that the equities support the enforcement of the promise. National Bank of Waterloo v. Moeller, 434 N.W.2d 887, 889 (Iowa 1989).

B. Issues and Defenses

1. **Jury trial?** It does not appear to be settled, under Iowa law, whether there is a right to jury trial on a promissory estoppel claim. The third element of the cause of action refers to whether the "equities" support enforcement of the promise. This suggests that promissory estoppel is a claim for the court to decide. Courts in some jurisdictions specifically have held that promissory estoppel is an equitable claim that does not give rise to a right to jury trial. See, e.g., C & K Engineering Contractors v. Amber Steel Co., 23 Cal. 3d 1, 11, 151 Cal. Rptr. 323, 587 P.2d 1136 (1978).

2. **Lack of consideration necessary to support claim?** Some courts have held that a promissory estoppel claim may arise only when no consideration was given for the alleged promise. See, e.g., Walker v. KFC Corp., 728 F.2d 1215, 1220 (9th Cir. 1984). Under this theory, if consideration was given for the promise then the plaintiff's remedy is breach of contract, not promissory estoppel. "Promissory estoppel is not a doctrine designed to give a party to a negotiated commercial bargain a second bite at the apple in the event it fails to prove a breach of contract." Walker, 728 F.2d at 1220. It does not appear that any reported Iowa case addresses this issue.

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C. Damages

The remedies available on a promissory estoppel theory are those remedies, such as an award of damages or an order of specific performance, that would bring about enforcement of the promise. Restatement (Second) of Contracts § 34, comment d and § 90.

III. FRAUD CLAIMS

A. Introduction

Common law fraud allegations, whether couched in terms of actual misrepresentation or failure to disclose, find their way into many commercial disputes.

B. Elements

The elements of fraud are (1) a material misrepresentation, (2) made knowingly, (3) with intent to induce the plaintiff to act or refrain from acting, (4) upon which the plaintiff justifiably relies and (5) damages. Air Host Cedar Rapids, Inc. v. Cedar Rapids Airport Commission, 464 N.W.2d 450, 453 (Iowa 1990). Concealment of material facts can constitute fraud in Iowa if the defendant was under a duty to disclose the facts to the plaintiff. Cornell v. Wunschel, 408 N.W.2d 369, 374 (Iowa 1987). A duty to disclose such facts may arise if a confidential (fiduciary) relationship existed or if the plaintiff establishes that the defendant had superior knowledge of the facts represented. Id. at 375-76.

C. Issues and Defenses

1. **Statute of Limitations.** This is one of the few affirmative defenses available in a fraud case. The statute of limitations for fraud is five years. Iowa Code § 614.1(4). Section 614.4 contains a special discovery rule for claims based on fraud, but the Iowa Supreme Court has held that this discovery rule does not apply to claims at law for money damages. McKiness Excavating & Grading, Inc. v. Morton Buildings, Inc., 507 N.W.2d 405, 409 (Iowa 1993). Absent application of section 614.4, a cause of action for fraud accrues when the fraud is consummated, unless the defendant fraudulently conceals the cause of action. Woods v. Schmitt, 439 N.W.2d 855, 861 (Iowa 1989).

2. **Contract defense?** One issue that does not seem to be addressed by any published Iowa authority is whether a written contract might provide a defense to a fraud claim. There is authority in some jurisdictions that a party to a contract cannot justifiably rely on an alleged promise that directly contradicts a term of the contract. See, e.g., Davis v. Gulf Oil Corp., 572 F. Supp. 1393, 1401 (C.D. Cal. 1983); Continental Airlines, Inc. v.

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McDonnell Douglas Corp., 216 Cal. App. 3d 388, 264 Cal. Rptr. 779, 795-96 (1989). This would prevent a plaintiff from bringing a fraud claim based on alleged promises that contradict a written contract. Such a defense would be worth pursing in an appropriate situation.

3. **Burden of proof.** Iowa continues to apply a higher, "preponderance of clear, convincing and satisfactory evidence" burden of proof to fraud claims. See Iowa Civil Jury Instruction 810.1.

D. Damages

1. **Actual Damages.**

1a. **Benefit of the Bargain.** Iowa generally follows the "benefit of the bargain" measure of damages in fraud cases, allowing the successful plaintiff to recover the benefit of the bargain plus consequential damages. Cornell v. Wunschel, 408 N.W.2d 369, 380 (Iowa 1987). This is intended to place the defrauded party in the same financial position he or she would have been in had the fraudulent misrepresentation been true. Bates v. Allied Mutual Ins. Co., 467 N.W.2d 255, 260 (Iowa 1991).

1b. **Out of Pocket.** In cases involving contracts for the sale or transfer of property, or in situations where the "benefit of the bargain" measure will not make the plaintiff whole, there is authority in Iowa for application of the "out of pocket" measure of damages. Bates v. Allied Mutual Ins. Co., 467 N.W.2d 255, 260 (Iowa 1991); Air Host Cedar Rapids, Inc. v. Cedar Rapids Airport Commission, 464 N.W.2d 450, 453 (Iowa 1990). This measure, in general, allows the plaintiff to recoup the net amount that he or she lost as a result of the transaction on the theory that the transaction would not have occurred if the true facts had been disclosed. Bates v. Allied Mutual Ins. Co., 467 N.W.2d 255, 260 (Iowa 1991).

1c. **Lost Profits.** According to the Iowa Supreme Court, "lost profits can be claimed in certain fraud cases, but it is far from automatic." Air Host Cedar Rapids, Inc. v. Cedar Rapids Airport Commission, 464 N.W.2d 450, 453 (Iowa 1990). Presumably, if the "out of pocket" measure of damages applies, then a lost profits award would be inappropriate. Cornell v. Wunschel, 408 N.W.2d 369, 381-82 (Iowa 1987). However, if the "benefit of the bargain" rule applies, then the plaintiff likely will be entitled to recover lost profits as a form of consequential damages.

1d. **Emotional Distress.** Damages for emotional distress are not allowed for fraud. Fraud is an economic tort that only protects pecuniary losses. Bates v. Allied Mutual Ins. Co., 467 N.W.2d 255, 260 (Iowa 1991).

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2. **Punitive Damages.** Punitive damages are available in a fraud case in accordance with chapter 668A. Cf. Cornell v. Wunschel, 408 N.W.2d 369, 382 (Iowa 1987).

IV. NEGLIGENT MISREPRESENTATION CLAIMS

A. Introduction

Because of the difficulty inherent in proving actual fraud, the claim of negligent misrepresentation serves as a convenient fall-back claim in many commercial cases. As will be discussed below, however, the Iowa Supreme Court continues to limit the applicability of this cause of action in such a way as to make summary judgment a strong possibility in many disputes.

B. Elements

The elements of negligent misrepresentation are (1) the defendant supplied information to the plaintiff, (2) the information was false, (3) the defendant failed to exercise reasonable care in communicating or obtaining the information, (4) the defendant was in the business or profession of supplying information or opinions, (5) the plaintiff was the person, or was within a class of persons, to whom the defendant intended to supply the information, (6) the defendant knew that the plaintiff intended to rely on the information, (7) the plaintiff did, in fact, rely on the information, (8) the plaintiff's reliance was justified and (9) the plaintiff suffered damages as a result of the reliance. Meier v. Alfa-Laval, Inc., 454 N.W.2d 576, 581-82 (Iowa 1990); Restatement (Second) of Torts § 552.

C. Issues and Defenses

1. **"In the business or profession...."** The key limitation on this tort is the requirement that the defendant is "in the business or profession of supplying information or opinions." The Supreme Court has, so far, adhered to its statement in Alfa-Laval that this tort does not apply against a defendant who simply dealt with the plaintiff in an arm's length transaction. See Freeman v. Ernst & Young, 516 N.W.2d 835 (Iowa 1994) (no negligent misrepresentation claim against seller of a business who allegedly supplied incorrect information to buyer); Haupt v. Miller, 514 N.W.2d 905 (Iowa 1994) (no negligent misrepresentation claim against bank directors who dealt with decedent at arm's length in obtaining loan guaranty). Alfa-Laval itself holds that there is no negligent misrepresentation claim available by a buyer of goods against the seller of those goods. This "in the business" limitation should provide solid grounds for summary judgment or directed verdict in many cases.

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D. Damages

The Restatement (Second) of Torts, at section 552B, rejects the benefit of the bargain measure of damages for negligent misrepresentation and provides that the out of pocket measure, plus consequential reliance damages, is the only appropriate measure of damages for this tort. The out of pocket measure is discussed at paragraph III(D)(1b), above, as part of the discussion of fraud damages. Punitive damages should not normally be available for mere negligent misrepresentation, as this cause of action does not involve malice within the meaning of chapter 668A.

V. TORTIOUS INTERFERENCE CLAIMS

A. Introduction

Tortious interference claims seem to appear in an increasing number of commercial disputes. The claim of interference with prospective business advantage, in particular, is vague enough that it is difficult for the defendant to prevail by way of summary judgment or directed verdict.

B. Elements

B1. **Existing contract.** The elements of a claim for interference with existing contract are (1) plaintiff had a contract with a third party, (2) defendant knew of the contract, (3) defendant intentionally and improperly interfered with the contract, (4) the interference caused the third party not to perform or made performance more burdensome or expensive and (5) the plaintiff suffered damages. Burke v. Hawkeye National Life Ins. Co., 474 N.W.2d 110, 114 (Iowa 1991).

B2. **Prospective business relations.** The elements of a claim for interference with prospective contract, or prospective business relations, are (1) the plaintiff had a prospective contract or business relationship with a third party, (2) defendant knew of the prospective contract or relationship, (3) defendant intentionally and improperly interfered with the prospective contract or relationship, (4) the interference caused the third party not to enter into the contract or relationship or prevented the plaintiff from continuing with the relationship and (5) the plaintiff suffered damages. This tort, unlike interference with existing contract, also requires a showing that the defendant acted with intent to injure or destroy the plaintiff financially. Burke v. Hawkeye National Life Ins. Co., 474 N.W.2d 110, 114 (Iowa 1991).

C. Issues and Defenses

1. **What is "improper?"** A key element of both torts is the requirement that the defendant intentionally and "improperly"

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interfered with the plaintiff's contract or prospective contract. The fighting issue often will be one of whether the defendant's admitted conduct was "proper" or "improper." Iowa has relied upon the Restatement (Second) of Torts, and its various comments, in setting the guidelines for "proper" conduct. See, e.g., Toney v. Casey's General Stores, Inc., 460 N.W.2d 849, 852-53 (Iowa 1990). Section 767 of the Restatement provides a seven-factor test, including such matters as the actor's motives, the interests the actor sought to advance, and the nature of the actor's conduct, for determining if interfering conduct is "improper." The comments to section 767 focus on such matters as the actor's intent and whether or not the actor's conduct fell within recognized standards of business ethics and customs. The Toney Court found no "improper" conduct as a matter of law on grounds that the defendant's conduct was "fair and reasonable under the circumstances" and driven by a "legitimate business purpose." 460 N.W.2d at 854. More often than not, however, the question of "proper" or "improper" will be a question of fact.

2. **At-Will Contract.** In a prior Toney opinion, the Iowa Supreme Court held that a third party may be held liable for interference with a contract even if that contract was an at-will contract, terminable at any time by either party. Toney v. Casey's General Stores, Inc., 372 N.W.2d 220, 222 (Iowa 1985).

3. **Affirmative defenses.** It is unclear, under Iowa law, whether arguments such as "privilege" or "justification" are affirmative defenses or, instead, simply arguments addressed to the issue of "improper" conduct. The Restatement has identified three privileges that are said to justify the defendant's conduct in an interference case. These are the right to compete, the existence of a financial interest on the part of the defendant in the business of the party induced and the right to give truthful information or honest advice. See Restatement (Second) of Torts §§ 768, 769 and 772. The Iowa Defense Counsel Association has drafted proposed jury instructions on these defenses. See IDC Proposed Instructions 1200.9 through 1200.14.

4. **The Noerr-Pennington doctrine.** The Iowa Supreme Court recently has recognized Noerr-Pennington immunity in the context of a tortious interference claim. Bond v. Cedar Rapids Television Company, ___ N.W.2d ___ (Iowa 1994). The Noerr-Pennington doctrine provides that a party cannot be held liable for its genuine efforts to petition the government. Thus, a party who asks an administrative agency to block a proposed transaction, or who asks a zoning board to deny a proposed zoning change, cannot be held liable for interference with contract. There is an exception to this immunity that applies with regard to petitioning efforts that are objectively baseless and undertaken with the subjective intent to interfere directly with the business of a competitor.

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D. Damages

The general measure of damage for torts in Iowa is the amount of loss that the plaintiff sustained as a direct and proximate result of the tort. See, e.g., R.E.T. Corporation v. Frank Paxton Co., 329 N.W.2d 416, 420 (Iowa 1983). Lost profits, if properly proved, are recoverable on a tortious interference theory. Petersen v. First National Bank, 392 N.W.2d 158 (Iowa Ct. App. 1986).

VI. EMOTIONAL DISTRESS CLAIMS

A. Introduction

It is not uncommon to find emotional distress claims asserted in what otherwise appears to be a purely commercial dispute. The individual owners of the plaintiff-business may claim that the defendant's alleged conduct caused them to suffer emotional injury of some sort. The Iowa Supreme Court has rejected the argument that damages for emotional distress should not be allowed as part of a purely commercial dispute. See Nesler v. Fisher and Co., 452 N.W.2d 191, 200 (Iowa 1990). There are two ways, in Iowa, for a plaintiff to seek emotional distress damages in the context of a commercial dispute. One is an independent claim for intentional infliction of emotional distress. The other is as an element of damage in a tort or contract claim. A third possible method of recovering emotional distress damages, bystander emotional distress, is not likely to arise in the context of a commercial dispute.

B. Elements

1. **Intentional Infliction of Emotional Distress.** The elements of this claim are (1) the defendant engaged in outrageous conduct, (2) the defendant intended to cause, or acted with a reckless disregard of the probability of causing, emotional distress, (3) the plaintiff suffered severe or extreme emotional distress, (4) the actual and proximate cause of the emotional distress was the defendant's outrageous conduct, (5) the plaintiff suffered damage and the extent of damage. Tomash v. John Deere Industrial Equip. Co., 399 N.W.2d 387, 392 (Iowa 1987); Iowa Civil Jury Instruction 2000.1; IDC Proposed Instruction 2000.1.

2. **Emotional Distress as an Element of Damage in a Negligence Action.** Ordinarily, emotional distress damages can be assessed in a negligence case only if the plaintiff sustained some physical injury. Oswald v. LeGrand, 454 N.W.2d 634, 639 (Iowa 1990). There is an exception to this rule when the relationship between the parties is such that there arises a duty to exercise reasonable care to avoid causing emotional harm. Id. This exception can arise in the performance of contractual services that

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are likely to cause deep emotional responses in the event of a breach. Id. Examples include services attendant to childbirth, services relating to funerals and burials, etc. Under such circumstances, emotional distress damages are recoverable even absent physical harm. Id.

3. **Negligent Infliction of Emotional Distress.** Iowa has, so far, refused to recognize a completely separate tort of negligent infliction of emotional distress. Doe v. Cherwitz, ___ N.W.2d ___ (Iowa 1994). Thus, absent intentional conduct, emotional distress damages should be recoverable only under those circumstances set forth in subparagraph 2, above.

C. Issues

1. **Outrageous conduct.** To constitute "outrageous" conduct for purposes of satisfying the elements of intentional infliction of emotional distress, the conduct must have been so extreme as to go beyond all possible bounds of decency and to be regarded as atrocious and utterly intolerable in a civilized community. See Clark-Peterson Co. v. Independent Insurance Associates, Ltd., 514 N.W.2d 912, 916 (Iowa 1994).

2. **Severe or extreme emotional distress.** As noted above, the plaintiff must demonstrate "severe or extreme" emotional distress in order to maintain a cause of action for intentional infliction of emotional distress. Complaints that the plaintiff became "grouchy," "nervous," or "upset," or complaints that the plaintiff's sex life deteriorated, are insufficient to meet the "severe or extreme" standard. Vaughn v. Ag Processing, Inc., 459 N.W.2d 627, 636 (Iowa 1990). Iowa typically requires a showing of either physical symptoms of the distress or a "notably distressful mental reaction" caused by the distress in order to satisfy this standard. Steckelberg v. Randolph, 448 N.W.2d 458, 462 (Iowa 1989).

3. **Expert testimony as to causation.** In Vaughn, the plaintiff claimed that the emotional distress brought on by the defendant's alleged conduct him caused him to suffer from various physical ailments such as loss of significant body weight, bloody stools, etc. He presented no expert medical testimony as to causation, however. The Supreme Court held that this omission was fatal to the plaintiff's cause of action. Vaughn, 459 N.W.2d at 637.

D. Damages

As with any personal injury, there is no formula for precisely measuring the amount of damages caused by emotional distress. Thus, the appropriate measure of damages is "left to the sound judgment of the fact finder, based on the evidence." Schnebly v. Baker, 217 N.W.2d 708, 725 (Iowa 1974).

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VII. OVERVIEW OF STATUTORY CLAIMS

A. Franchise laws

Many states, including Iowa, have protective statutes that may override the terms of contracts between franchisors and franchisees. Some of these statutes arguably apply beyond the typical "McDonald's" type franchise relationships, possibly even applying to the relationships between manufacturers and their dealers or distributors.

Iowa Code chapter 523H contains the Iowa Franchise Act. The Act imposes limits on the rights and powers of a "franchisor" with regard to a "franchisee"--limits that apply regardless of the terms of the parties' contract. Generally, chapter 523H limits the "franchisor's" right to terminate or to refuse to renew the franchise agreement, to appoint new franchisees near an existing franchise and to require the franchisee to obtain certain goods and supplies from the franchisor. Violations of the Act give rise to private actions for money damages, attorneys fees and injunctive relief.

B. Federal Antitrust Laws

While substantive antitrust law is beyond the scope of this outline, the antitrust statutes most often invoked by plaintiffs in commercial disputes will be briefly addressed here:

1. **Sherman Act sections 1 and 2.** Sections 1 and 2 of the Sherman Act, 15 U.S.C. §§ 1-2, sometimes are invoked in commercial disputes. In general, section 1 prohibits the formation of any "contract, combination ... or conspiracy, in restraint of trade." Section 2 makes it unlawful for any person to "monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States...." Section 1 claims may allege that the defendant conspired with competitors (horizontally) to restrain trade in a relevant market, or that the defendant conspired with other links in its chain of product distribution (vertically) to restrain trade. It is sometimes alleged that a manufacturer imposed vertical price restraints on its dealers or distributors, limiting the price at which the dealer or distributor may charge its own customers for the manufacturer's product. Vertical price restraints are per se violations of section 1. A common section 2 claim is a claim of predatory pricing, which generally is defined as pricing below one's cost in hopes of driving competitors out of business and creating monopoly conditions. Remedies for violation of the Sherman Act may include treble damages and attorneys fees. 15 U.S.C. § 15.

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2. **Robinson-Patman Act.** The Robinson-Patman Act, 15 U.S.C. § 13, prohibits a seller from discriminating in price between different purchasers of "commodities of like grade and quality," if the effect of such discrimination would be "substantially to lessen competition or tend to create a monopoly in any line of commerce...." The statute allows variances which make due allowance for "differences in the cost of manufacture, sale, or delivery resulting from the differing methods or quantities in which such commodities are to such purchasers sold or delivered." Subsection (d) of section 13 prohibits the payment of consideration or compensation to customers for services or facilities furnished by the customer in connection with the processing, handling or sale of the commodities unless the consideration is made available on equal terms to all customers competing in the distribution of the commodity. Other provisions of the Act address discrimination in rebates, discounts, etc.

C. Iowa Competition Law

Iowa Code chapter 553 contains the Iowa Competition Law, a series of statutes that are to be construed in harmony with federal antitrust laws. Iowa Code § 553.2. Sections 553.4 and 553.5 mirror sections 1 and 2 of the Sherman Act. The remainder of the chapter contains provisions for enforcement by the Iowa attorney general and by private action. Remedies under the Act include injunctions, actual damages, attorneys fees and exemplary damages not to exceed twice the amount of actual damages. Note also that Iowa Code chapter 551 addresses "unfair competition" and is, essentially, Iowa's state law counterpart to the Robinson-Patman Act.

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RECENT CHANGES IN THE FEDERAL RULES OF CIVIL PROCEDURE AND IN THE LOCAL RULES OF THE NORTHERN AND SOUTHERN DISTRICTS OF IOWA

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I. RECENT CHANGES IN THE FEDERAL RULES OF CIVIL PROCEDURE

A. INTRODUCTION

The amendments became law on December 1, 1993.

B. RULE 11: Signing of Pleadings, Motions, and other Papers; Representations to Court; Sanctions

1. Rule 11(d) - Inapplicability to Discovery

- Rule 11 now expressly does not apply to discovery disputes.
- Rules 26(g) and 37 now exclusively govern sanctions for abusive or frivolous discovery practice including disclosures, requests, responses, objections and motions.

2. Rule 11(c) - Sanctions

- Sanctions are discretionary.

- If a Court determines that Rule 11 has been violated, it may, but need not, impose an appropriate sanction. This is true whether the motion for sanctions is initiated by a party or by the Court.

<u>KEY</u>: Under the old Rule 11, issuance of a sanction for violation of Rule 11 was mandatory. Under the revised Rule 11, issuance of a sanction is only discretionary.

3. Rule 11(c)(1)(A) - How to initiate Motion for Sanctions.

- A motion for sanctions shall be made separately from other motions and shall describe the specific conduct alleged to violate Rule 11(b).

- <u>Safe Harbor Provision</u>
  A party intending to file a motion for sanctions must give twenty-one (21) days advanced notice to the opponent of an intent to file the motion. During this time period, the party being served has the opportunity to correct the violation. If the party corrects

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the violation within this time, the sanctions motion must be withdrawn. The purpose of the revision is to provide litigants a "safe harbor" by giving them a last chance to avoid sanctions by withdrawing the offending motion or paper.

- To stress the seriousness of a motion for sanctions, the revised Rule provides that the 21-day "safe harbor" provision begins to run only upon service of the motion. The motion for sanctions is not to be filed until at least 21 days after being served.

4. **Rule 11(c)(1)(B) - On Court's Initiative**

- The Court retains the power to initiate sanctions sua sponte. A Court, however, must now do so on an order to show cause, thereby giving the party an opportunity to respond and to be heard. When a sanction is Court-initiated, the Court can only order that monetary sanctions be paid to the Court; it cannot award attorneys' fees and expenses to the other side. Furthermore, the Court cannot initiate monetary sanctions after parties have voluntarily dismissed a case.

5. **Rule 11(c)(2) - Nature of Sanction - Limitation**

- Sanctions shall be limited "to what is sufficient to deter repetition of such conduct or comparable conduct by others similarly situated."

- Sanctions may be monetary or non-monetary.

- Monetary sanctions may include an award to a party of reasonable expenses and attorneys' fees expended as a direct result of a violation.

- Monetary sanctions can also take the form of payment of a penalty to the Court.

- Since the purpose of Rule 11 sanctions is to deter rather than to compensate, the amended Rule provides that, if a monetary sanction is

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imposed, it should ordinarily be paid to the Court as a penalty. However, under unusual circumstances, particularly for (b)(1) violations (presented only to harass or to cause unnecessary delay or needless increase in the cost of litigation), the Court, if requested in a motion and if warranted, may award attorneys' fees to another party.

Committee Notes: The revised Rule does not enumerate the types of non-monetary sanctions that may be imposed. The Committee listed, by way of example, the following non-monetary sanctions: striking the offending paper; issuing an admonition, a reprimand or a censure; requiring participation in seminars or other educational programs; or referring the matter to disciplinary authorities.

6. **Rule 11(c)(1)(A) - Sanctions Against Whom**

- Absent exceptional circumstances, a law firm shall be jointly responsible and liable for conduct of its attorneys, associates, and employees.

Committee Notes: Since a Rule 11 sanctions motion may be filed only if the offending paper is not withdrawn or corrected within 21 days after service of the motion, it is appropriate that the law firm ordinarily be viewed as jointly responsible under established principles of agency law. This new provision is designed to remove the restrictions of the former rule. Pavelic & LeFlore v. Marvel Entertainment Group, 493 U.S. 120 (1989) (1983 version of Rule 11 did not permit sanctions against law firm of attorney signing groundless complaint).

- Sanctions may be imposed upon any attorney, law firm, or party that has failed to comply with Rule 11.

- Monetary awards may not be awarded against a represented party unless the party is determined to be responsible for the violation.

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- Sanctions cannot be imposed upon the client for an erroneous legal decision.

<u>Committee Notes</u>: Sanctions that involve monetary awards such as a fine or an award of attorneys' fees may not be imposed on a represented party for causing a violation of Rule 11(b)(2) involving frivolous contentions of law.

- If the Court imposes a sanction, it <u>must</u>, unless waived, state its reasons in a written order or on the record.

- The standard in reviewing a denial or an imposition of sanctions is abuse of discretion.

- The amended Rule does not specify a time period within which a motion for sanctions must be filed after the occurrence of the objectionable conduct.

C. **<u>RULE 29</u>:** **<u>Stipulations Regarding Discovery Procedure</u>**

- The revised Rule encourages parties to avoid court involvement by agreeing to written stipulations when the parties want to alter the disclosure and discovery requirements, both in the initial schedule and throughout the discovery period. The Court, by order or local rule, retains the power to limit or override the stipulations.

<u>Committee Notes</u>: This Rule is revised to give greater opportunity for litigants to agree upon modifications to the procedures governing discovery. Counsel are encouraged to agree on less expensive and less time-consuming methods to obtain information, as through voluntary exchange of documents, use of interviews in lieu of depositions, etc. Under the revised rule, counsel ordinarily are not required to obtain the Court's approval of the stipulations. Court approval <u>must</u> be obtained if a stipulation to extend the 30-day period for responding to interrogatories, request for production, or request for admissions would interfere with dates set by the Court for

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completing discovery, for hearing on a motion, or for trial.

D. **RULE 30: Depositions Upon Oral Examination**

1. **Rule 30(a) - When depositions may be taken; when leave required.**

- Unless parties have entered into a written stipulation, leave of Court must be obtained when:

  (i) A proposed deposition would result in more than ten depositions being taken by the party's side (i.e., if the party is a Plaintiff, by all Plaintiffs; if the party is a Defendant, by all Defendants);

  or

  (ii) The person to be examined has already been deposed in the case. This does not apply to continued depositions - only to depositions that have been concluded.

- Parties may simply agree by stipulation to take more than the 10 depositions permitted by Rule 30(a). Courts, however, maintain the power to override the stipulations.

KEY: Only 10 depositions per party, unless parties stipulate otherwise or obtain leave of court.

Committee Notes: One objective of this revised Rule is to emphasize that counsel have a professional obligation to develop a mutual cost-effective plan for discovery in the case. In multi-party cases, the parties on any side are expected to confer and agree as to which depositions are most needed, given the presumptive limit on the number of depositions they can take without leave of Court.

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- Rule 30(a)(2)(B) is new and states that leave of Court is not required if a deposition is temporarily recessed for convenience of counsel of the deponent or to enable additional materials to be gathered before resuming the deposition. If significant travel costs would be incurred to resume the deposition, parties should consider conducting the remainder of the examination by telephone.

2. **Rule 30(b)(2) and (3) - Notice of Examination**

- Litigants no longer need to enter into a written stipulation to record a deposition by a means other than stenography unless ordered by a Court. Otherwise, a deposition may be recorded by stenographic, audio, or audio and visual means.

- The party taking the deposition need only state in the Notice of Deposition what recording means will be used.

- Any party may arrange for a transcription to be made from a non-stenographic recording.

- With prior notice to the parties, any party may designate an additional means of recording the deposition to the one specified in the notice. The party wishing the additional recording must pay for it.

- If the deposition is ultimately to be offered at trial or in a summary judgment motion, a transcript must be provided for depositions recorded by non-stenographic means.

Committee Notes: The primary change in Rule 30(b) is that parties are now authorized to record deposition testimony by non-stenographic means without first having to

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obtain permission from the Court or agreement from other counsel.

3. **Rule 30(d) - Motion to Terminate or Limit Examination**

- Under Rule 30(d)(1) any objections made during a deposition must be made in a "non-argumentative and non-suggestive manner."

- A Party may instruct a deponent not to answer only in the following three situations:

    - To preserve a privilege (i.e., work product); or

    - To enforce an evidentiary limitation directed by a Court; or

    - To present a motion that the deposition is being conducted in bad faith or to annoy, embarrass, or oppress.

4. **Rule 30(e) - Review by Witness; Changes; Signing.**

- Under Rule 30(e), the deponent no longer is required to review and sign the transcript taken stenographically. A deponent is required to review and sign before filing the transcript <u>only</u> if requested by the deponent or by any party before the deposition is completed. If signing is requested, the deponent has 30 days to review, correct, and sign the transcript or recording.

- A party that terminates a deposition now has the obligation to promptly seek a protective order.

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E. **<u>RULE 31</u>: <u>Depositions Upon Written Questions</u>**

- These depositions count toward the 10 deposition provision in Rule 30(a).

- Total time for developing questions for cross, re-direct, and re-cross examination has changed from 15 to 28 days.

F. **<u>RULE 32</u>: <u>Use of Depositions in Court Proceedings</u>**

- A deposition may not be used at trial against a party who is unable, through the exercise of diligence, to obtain counsel at the deposition.

- A deposition may also not be used at trial against a party who receives fewer than <u>11 days notice</u> of the deposition, provided that the party promptly moves for a protective order requesting that the deposition not be held or that it be held at a different time and place. This limitation is intended to protect parties who have motions for protective orders pending at the time their deposition is held.

<u>Committee Notes</u>: If a party receives less than 11 days notice of a deposition and promptly files a motion for a protective order, the party will be spared the risks resulting from nonattendance at the deposition. This revised Rule applies in situations where the Court has not ruled on its motion for protective order before the scheduled deposition.

- Although Rule 32(a) covers only the risk that the deposition could be used against the non-appearing movant, it should follow that, when the proposed deponent is the movant, the deponent should have "just cause" for failing to appear for purposes of Rule 37(d)(1).

- Depositions for use at trial may be presented in non-stenographic means, such as by audio or by video tape, without special leave of the Court or the other parties, subject to these requirements:

  - Court can order otherwise;
  - Transcripts must accompany any non-stenographic testimony offered;
  - In a jury trial, any party can request that deposition testimony, presented for purposes other than impeachment, be offered in a non-stenographic form if available. This change parallels the changes to Rule 30 which allow for non-stenographic means of recording depositions.

G. **RULE 33**: **Interrogatories to Parties**

- Number of written interrogatories is limited to 25 per person, including "all discrete sub-parts."

- Parties can stipulate or obtain leave of Court to file more interrogatories.

H. **RULE 36**: **Request for Admissions**

- Parties may stipulate in writing without the leave of Court to extensions of time in which to file Responses.

I. **RULE 37**: **Failure to Make Disclosure or Cooperate in Discovery: Sanctions**

- This Rule now governs the procedures and sanctions available for failure to provide the mandatory disclosure as well as for failure to cooperate in discovery.

J. **RULE 45**: **Subpoena**

1. **Rule 45(a)** - Form; Issuance

- Attorneys as officers of the Court may issue subpoenas.

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- Attorneys issuing subpoenas must sign the subpoenas.

- Any attorney authorized to practice in a federal court where the case is pending, including attorneys admitted pro haec vice, may sign and issue subpoenas.

- A subpoena for attendance of a deposition shall issue from the Court in which the deposition or production would be compelled. Accordingly, a Motion to Quash must be presented to the Court for the district in which the deposition would occur. Likewise, the Court in whose name the subpoena is issued is responsible for its enforcement.

- In order to relieve attorneys of the need to secure the appropriate seal to affix to a subpoena issued as an officer of a distant court, the requirement that a subpoena be under seal is abolished.

- Subpoenas can be issued to non-parties to produce documents without the need for a deposition.

- A person subject to the subpoena is required to produce materials in that person's control whether or not the materials are located within the district or within the territory within which the subpoena can be served.

- All subpoenas must include a statement of the rights and duties of witnesses by setting forth in full the text of the new subdivisions Rule 45(c) and (d).

- Rule 45 authorizes the issuance of a subpoena to compel the inspection of premises in the possession of a non-party.

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2. **Rule 45(b) - Service**

- Any non-party 18 years or older may serve a subpoena.

- A person whose attendance is required for testimony is entitled to a witness fee plus mileage. No witness fee or mileage if person is only producing documents.

- Attorneys must serve parties with prior notice for pretrial subpoenas for production of documents or inspection of premises

Committee Notes: The purpose of this Rule is to afford other parties an opportunity to object to the production or inspection or to serve a demand for additional documents or things. Such additional notice is not needed with respect to a deposition because of the requirement of notice imposed by Rule 30 or Rule 31.

3. **Rule 45(c) - Protection of Persons Subject to Subpoenas**

- The Court on behalf of which the subpoena was issued can quash or modify or set conditions including compensation.

KEY: This provision is new and specifies the rights of witnesses.

4. **Rule 45(d) - Duties in Responding to Subpoena**

- A person responding to a subpoena to produce documents must produce the documents as kept in the regular course of business or must organize and label the documents according to the demand.

- A party that claims privilege or work-product protection must provide a description sufficient to enable the demanding party to contest the claim.

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KEY: This provision is new and extends to non-parties the duty imposed on parties by the last paragraph of Rule 34(b).

K. **RULE 54**: **Judgments; Costs**:

- Rule 54(b): Motions for attorneys' fees must be made within 14 days after entry of judgment. The motion must state the basis for the award of fees and must provide a fair estimate of the fees sought. Evidentiary support need not accompany the motion.

- This Rule does not apply to attorneys' fees that are recoverable as an element of damages, such as when sought under a contract. This Rule also does not apply to an award of attorneys' fees when awarded as sanctions.

Committee Notes: The purpose of the 14 day rule after final judgment is to assure that the opposing party is informed of the claim before the time for appeal has elapsed. Prior law did not prescribe any specific time limit on claims for attorneys' fees. White v. New Hampshire Dept. of Employment Securities S.E.C., 455 U.S. 445 (1992). In many non-jury cases, the Court will want to consider attorneys' fee issues immediately after rendering its judgment on the merits of the case.

Committee Notes: This revised Rule does not require that the motion be supported at the time of filing with evidentiary material supporting the fee. What is required is the filing of a motion sufficient to alert the adversary and the Court that there is a claim for fees and the amount or a fair estimate of such fees.

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L. **RULE 58**: **Entry of Judgment**:

Committee Notes: This revised Rule permits the Court to delay entry of a final judgment until the dispute over attorneys' fees is decided or to defer consideration of the claim for attorneys' fees until after the appeal of the underlying judgment is resolved.

KEY: Motions for attorneys' fees will not delay the entry of judgment or the time to appeal unless the Court orders the same.

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II. RECENT CHANGES IN THE LOCAL RULES OF THE UNITED STATES DISTRICT COURT FOR THE NORTHERN AND THE SOUTHERN DISTRICTS OF IOWA

NOTE: In order to clarify the recent changes in the Local Rules, the old provision of each Rule is struck out and the amendment replacing that provision is designated by "red lining" or highlighting the new language. Only those Rules that have been amended are included in this outline.

CIVIL RULES

A. RULE 1: SCOPE AND EFFECTIVE DATE OF THE AMENDED RULES

1. **Rule 1(b) - Effective Date**

   - Amended Rules became effective July 1, 1994.

2. **Rule 1(e) - Sanctions**

   - A failure to comply with a local Rule may be sanctioned by any appropriate means necessary to protect the parties in the interest of justice. These sanctions shall include excluding evidence, preventing a witness from testifying, striking of pleadings or papers, refusing oral argument, imposing attorneys' fees, or any other appropriate sanction.

B. RULE 5: ATTORNEYS

1. **Rule 5(c)(4) - Fees**

   - Admission fee of $50 shall be paid to the Clerk prior to admission.

   - Admission fee increased from $30 to $50.

2. **Rule 5(d)(4) - Form of Appearance and Withdrawal**

   - ~~An attorney making an appearance shall, either by filing written appearance or by signature to the first pleading filed, cause the Clerk's record to~~ Any attorney who did not sign the first pleading on behalf of a party shall file

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a formal "Notice of Appearance" in pleading form with the clerk's office. This notice shall ~~clearly~~ reflect the name of counsel, law firm, office address, telephone number and facsimile number of the attorney and the name of the party for whom appearance is made. Attorneys who have appeared are responsible for keeping the court informed of all changes regarding counsel for each case in which they are involved.

KEY: Fax numbers are now always required on filed documents.

C. **RULE 6: GENERAL PROCEDURE AND JURY TRIALS**

1. **Rule 6(i) - Contacts with Jurors**

- Except by leave of Court, no party, or any investigator, attorney or other person acting for a party, shall contact, interview, examine, or question any grand or trial juror, or potential juror, while such person is subject to call or recall during the juror's term of service. Nothing in this Rule prohibits Federal law enforcement authorities from contacting jurors in extraordinary circumstances without Court approval pursuant to a jury tampering or other related criminal investigation. In such an extraordinary circumstance, the government shall notify the Court as soon as possible.

KEY: A juror's term of service has been reduced from 6 months to 2 months. Some Iowa federal Judges permit attorneys to talk with jurors after the verdict. Other Iowa federal Judges prohibit any contact with jurors until their term of service has ended.

D. **RULE 10: FILINGS**

1. **Rule 10(b) - Form**

- All filings shall be legibly type-written or reproduced without erasers or interlineations materially defacing the documents. Exhibits

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attached to pleadings shall be similarly typed, printed, duplicated or otherwise reproduced in clear, legible and permanent form, immune to unusual fading or deterioration. The page number shall be placed at the bottom of each page. Filings shall not be bound except for transcripts. If the filing or exhibit is voluminous, it shall be fastened at the top with a 2-pronged metal clip with 2-3/4 inch center.

2. **Rule 10(d) - Signatures**

- All filings must be signed by a party or the attorney for the party and the name, address, telephone number, and facsimile number of the signer must be typed or printed under the signature.

  KEY: Fax numbers are now always required on all filed documents.

3. **Rule 10(e) - Copies**

- Except as otherwise required, parties shall supply the Clerk with:

Northern District	
Western Division	Original + 2 copies
Central Division	Original + 2 copies
Cedar Rapids Division	Original
Eastern Division	Original
Southern District	
All Divisions	Original + 1 copy

4. **Rule 10(g) - Papers that Do Not Appear to be in Compliance with Rules of Procedure**

- Pursuant to Federal Rule of Civil Procedure 5(e), the Clerk will accept for judicial review, all papers which appear not to be in compliance with Rules of Procedure. A judicial officer will then promptly determine whether this material shall be filed.

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KEY: This new local Rule was adopted to comply with Federal Rule of Civil Procedure 5(e) which states that the Clerk cannot refuse to file any documents.

5. **Rule 10(h) Facsimile transmission.**

- No filing by facsimile transmission is allowed. Material may be sent to the Clerk by facsimile transmission in limited emergency situations only after express authorization by a judicial officer.

  Each facsimile transmission shall be accompanied by a facsimile cover page which states the date of the transmission, the name and facsimile telephone number of the person to whom the paper is being transmitted, the name and telephone number of the person transmitting the paper, the docket number and title of the case to which the paper relates, the name of the paper, and the number of pages, excluding the cover page, being transmitted.

KEY: This new Local Rule codified an Administrative Order that has been in effect for the past 2 years.

E. **RULE 14: MOTIONS AND OTHER REQUESTS FOR COURT ACTION**

1. **Rule 14(d) - Briefs on Motions**

- The moving party shall serve and file with the motion a brief written statement of the reason in support of the motion and a list of citations of any authorities on which counsel relies. The statement must be filed as a separate document and cannot be attached to the motion. No briefs are required for motions to amend a scheduling order, for continuances, to file overlength briefs or to extend a deadline.

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2. **Rule 14(i) - Resistance to Summary Judgment -- Continuance**

- Any request under Federal Rule of Civil Procedure 56(f) for a continuance to resist a Motion for Summary Judgment in order to complete discovery, shall be by separate motion and the deadline for filing such Rule 56(f) motion shall be fourteen (14) days after the motion for summary judgment is filed.

3. **Rule 14(j) - Dispositive Motion Deadline**

- The deadline for filing dispositive motions must be at least ninety (90) days prior to the ready for trial date contained in the Rule 16(b) scheduling order.

4. **Rule 14(l) - Motions to Amend Pleadings**

- The motion to amend a pleading shall specifically state in the motion what changes are sought by the amendment. Any party submitting a motion to amend shall attach to the motion the original of the proposed amended and substituted pleading. Any amendment to a pleading, whether filed as a matter of course or upon a motion to amend, must, except by leave of court, reproduce the entire pleading as amended, and may not incorporate any prior pleading by reference. If the motion is granted, the Clerk shall then attach the amended and substituted pleading and file it when the order granting the motion to amend is filed.

5. **Rule 14(m) - Expedited Relief**

- Any pleading or motion requesting expedited relief by the court must indicate in the caption that expedited relief is requested. Counsel shall also be responsible for hand-delivering a copy of the expedited pleading or motion to the chambers of the judicial officer assigned to rule on the pleading requesting expedited relief or otherwise alerting the judicial officer so assigned that a pleading

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or motion seeking expedited relief has been filed.

6. **Rule 14(n) - Constitutional Challenges**

- In any action in which a party is challenging the constitutionality of a federal law and the United States or an agency, officer and employee thereof is not a party, or where a party is challenging the constitutionality of a state law and the state, agency, or employee thereof is not a party, the party asserting the claim shall immediately notify the Court by filing a separate notice that such a constitutional challenge is being made so the Court may certify such fact to the Attorney General of the United States or the Attorney General of a State, as required by 28 U.S.C. §2403 and Federal Rule of Civil Procedure 24(c).

F. **<u>RULE 15</u>: <u>DEPOSITIONS AND INTERROGATORIES</u>**

1. **Rule 15(c) - Interrogatories and Requests for Admissions**

<u>KEY</u>: Parties are now limited to 25 interrogatories, including "all discrete subparts." The parties may stipulate in writing to extend the time for responding.

G. **<u>RULE 18</u>: <u>EXHIBITS</u>**

1. **Rule 18(a) - Marking of Exhibits**

- Prior to trial or evidentiary hearing, counsel for each party shall mark all exhibits (except those to be offered in rebuttal or impeachment) for identification. Plaintiff shall use numbers and Defendants shall use letters unless approval is obtained from the trial judge for a different exhibit identification scheme. Exhibits such as plats or photographs may have endorsed thereon such a data or legend as will assist a viewer to identify the matter illustrated. ~~Stickers for marking may be obtained from the Clerk.~~ Prior

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to trial or evidentiary hearing, counsel shall place page numbers at the bottom of each exhibit.

<u>KEY</u>: No more free exhibit stickers.

H. **<u>RULE 22</u>: <u>CLAIMS FOR ATTORNEYS' FEES</u>**

1. **Rule 22(a) - Time and content**

- All post-judgment motions for an award of attorney fees shall be filed within the time required by Federal Rule of Civil Procedure 54(d)(2)(B).

  <u>KEY</u>: Iowa federal Judges used to allow motions for attorney fees to be filed within thirty (30) days after judgment. Rule 54(d)(2)(B) now states that motions for attorneys' fees <u>shall</u> be filed within fourteen (14) days after entry of judgment.

<u>CRIMINAL RULES</u>

A. **<u>RULE 25</u>: <u>MOTIONS</u>**

1. Rule 25(b) - Superseding Indictment

- When a superseding indictment is filed, counsel for the government shall file a brief statement describing the differences between the original indictment and the superseding indictment.

B. **<u>RULE 31</u>: <u>EXHIBITS - WITHDRAWAL OR DESTRUCTION AFTER FINAL JUDGMENT</u>**

- After judgment in a criminal case has become final, unless the Court orders otherwise, exhibits shall be claimed and withdrawn by the party to whom they belong. Any exhibits not claimed and withdrawn within sixty (60) days after judgment has become final after appeal

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or otherwise may be destroyed or otherwise disposed of by the Clerk after giving to the attorneys of record in the case ten (10) days prior notice thereof.

KEY: The period of time in which to claim exhibits after a judgment in a criminal case was increased from 30 days to 60 days.

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RULE 16. PRETRIAL PROCEDURE

a. Pretrial Discovery.

1. **Fed. R. Civ. P. 26(a)(1) Initial Disclosures.** The initial disclosure provisions of Fed. R. Civ. P. 26(a)(1)(A), (B), (C) & (D) shall not apply to civil cases in the Northern and Southern Districts of Iowa.

2. **Fed. R. Civ. P. 26(a)(2) Disclosure of Expert Testimony.** The provisions for disclosure of expert testimony in Fed. R. Civ. P. 26(a)(2)(B) & (C) shall not apply to civil cases in the Northern and Southern Districts of Iowa. The disclosure of expert witnesses provided for in Rule 26(a)(2)(A) shall be controlled by the Rule 16(b) Scheduling Order and Rule 26(f) Discovery Plan.

3. **Fed. R. Civ. P. 26(a)(3) Pretrial Disclosures.** The pretrial disclosure provisions required by Fed. R. Civ. P. 26(a)(3) shall apply to civil cases in the Northern and Southern Districts of Iowa. Rule 26(a)(3)(i) & (ii) shall not apply to civil cases in the Northern and Southern Districts of Iowa.

4. **Fed. R. Civ. P. 26(a)(4) Filing.** The witness and exhibit lists required by Rule 26(a)(3)(A) & (B) shall be served on opposing counsel and a copy shall be delivered to the judicial officer at the final pretrial conference. The witness and exhibit lists shall not be filed.

5. **Fed. R. Civ. P. 26(f) Meeting of Parties; Planning for Discovery.** The provisions of Rule 26(f) shall apply to all civil cases in the Northern and Southern Districts of Iowa. However, the "disclosures required by subdivision (a)(1)" referred to in Rule 26(f) shall not apply. The attorneys of record and all unrepresented parties who have appeared in the case are jointly responsible for arranging the Rule 26(f) meeting of the parties.

6. **Commencement of Discovery.** The requirement of Fed. R. Civ. P. 26(d) that parties may not seek discovery prior to the Fed. R. Civ. P. 26(f) meeting shall not apply to civil cases in the Northern and Southern Districts of Iowa. However, the parties are encouraged to hold their mandatory Fed. R. Civ. P. 26(f) meeting of the parties as soon as practicable.

b. Fed. R. Civ. P. 16(b) Scheduling Order and Rule 26(f) Discovery Plan.

1. **Timing of Rule 16(b) Scheduling Order and 26(f) Discovery Plan.** As soon as practicable, and within one hundred twenty (120) days after the filing of the complaint, counsel for the parties shall confer and submit a proposed Rule 16(b) Scheduling Order and Rule 26(f) Discovery Plan for approval by a

magistrate judge. The proposed Rule 16(b) Scheduling Order and Rule 26(f) Discovery Plan shall be submitted in the form supplied by the Clerk's office and shall contain all information requested by the form. The attorneys of record and all unrepresented parties who have appeared in the case are jointly responsible for preparing and submitting the proposed Rule 16(b) Scheduling Order and 26(f) Discovery Plan.

2. **Dismissal for Failure to Timely File the Rule 16(b) Scheduling Order and Rule 26(f) Discovery Plan.** Failure to submit the proposed Rule 16(b) scheduling order and Rule 26(f) discovery plan as required may result in dismissal under the terms of Local Rule 19.

3. **Cases Not Subject to Rule 16(b) Scheduling Order and Rule 26(f) Discovery Plan.** A proposed Rule 16(b) scheduling order and Rule 26(f) discovery plan shall be submitted in all civil actions except when the lawsuit involves or is premised upon the following: social security disability review, petition seeking habeas corpus relief, complaint based on 42 U.S.C. § 1983 filed by a person confined in a penal institution, collection of student loans, civil forfeitures, foreclosure actions filed by the United States, review of administrative actions, IRS summons enforcement actions or any other class of cases designated by order of the court.

4. **Rule 16(b) Scheduling Order and Rule 26(f) Discovery Plan; Scheduling Conference.** After review of the proposed Rule 16(b) scheduling order and Rule 26(f) discovery plan, the judicial officer may set a scheduling conference or issue a Rule 16(b) scheduling order and Rule 26(f) discovery plan, without a conference. Nothing contained in this rule shall preclude counsel from requesting a conference with the magistrate judge concerning the Rule 16(b) scheduling order and Rule 26(f) discovery plan.

5. **Extensions of Rule 16(b) Scheduling Order and Rule 26(f) Discovery Plan.** The deadlines established by the Rule 16(b) scheduling order and Rule 26(f) discovery plan may be extended by a judicial officer only upon written motion and upon a showing of good cause. Any request for an extension of deadlines must include the existing deadlines and whether and when the case is presently set for a final pretrial conference and trial. The motion for an extension of a discovery deadline shall also be accompanied by a statement describing: (a) what discovery remains to be completed; (b) what discovery has been completed; (c) why all discovery has not been completed; (d) how long it will take to complete discovery; and (e) whether there is any resistance to the motion.

6. **Notification of Rule 16(b) Scheduling Order and Rule 26(f) Discovery Plan.** The Clerk shall notify the parties of the requirement of this rule by handing or mailing a copy of the rule and a Rule 16(b) scheduling order and Rule 26(f) discover

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form to plaintiff or his representative within seven (7) days from the time an action is filed and as to other parties by attaching copies of the rule and a Rule 16(b) scheduling order and Rule 26(f) discovery plan form to the complaint and summons, when served. Any failure of the Clerk to provide a party with a copy of this rule and a Rule 16(b) scheduling order and Rule 26(f) discovery plan form shall not relieve a party from compliance with this rule.

c. **Final Pretrial Conference.**

1. **Final Pretrial Conference.** Upon expiration of the discovery deadline set in accordance with the above, the judicial officer may order a final pretrial conference to be held at a convenient time and place with reasonable notice thereof mailed by the Clerk to counsel for all parties.

2. **Representation at Final Pretrial Conference.** All parties, not proceeding pro se, must be represented at the final pretrial conference by counsel familiar with the facts, who have full authority to act on behalf of their clients and who will participate in the trial.

3. **Final Pretrial Conference Procedure.** Prior to the final pretrial conference, counsel for all parties shall meet, prepare and sign a proposed order in the form supplied by the Clerk and submit the same to the court at least three (3) days prior to the time of the conference unless otherwise ordered. Plaintiff's counsel shall have the responsibility for the initiation of the meeting to prepare the proposed final pretrial order. All counsel shall have a duty to see that the purpose of the final pretrial conference is fulfilled. In the absence of agreement, the meeting of attorneys will be held in the office of counsel for the plaintiff if said office is located in the city wherein the district court for the division is situated; otherwise, it shall be held in the office of the attorney located in the city nearest the division of the district court in which the case is pending. The final pretrial conference may, with prior permission from the judicial officer holding the final pretrial conference, be conducted by telephone where counsel have submitted a proposed order in compliance with the form provided and make this request known to the court at least three (3) days prior to the final pretrial conference.

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IN THE UNITED STATES DISTRICT COURT
FOR THE ________________ DISTRICT OF IOWA
________________ DIVISION

______________________________,	:	
	:	
Plaintiff(s),	:	NO. ________________
	:	
vs.	:	
	:	
______________________________,	:	**SCHEDULING ORDER and**
	:	**DISCOVERY PLAN**
Defendant(s).	:	

Counsel of record and any unrepresented parties have met pursuant to Fed. R. Civ. P. 16 and 26(f), as amended on December 1, 1993,[1] and Local Court Rule 16, have included the following topics in their discussion, agreed on the following deadlines and arrived at the following discovery plan:[2]

A. **SCHEDULING DEADLINES. As a general rule, the scheduling deadlines should progress in the following sequence:** motions for adding parties, motions to amend, disclosure of expert witnesses, the close of discovery and, finally, dispositive motions.

1. **PLEADINGS:**

a. The deadline for adding parties under Fed. R. Civ. P. 13, 14 and 19-20 will be ____________________________.
(insert date)

b. The deadline for motions to amend under Fed. R. Civ. P. 15 will be ____________________________.
(insert date)

2. **EXPERT WITNESSES:** If expert witnesses will be used at trial, the experts will be designated by: (in applicable cases the parties shall use the deadlines set forth in Iowa Code § 668.11 (1993).

Plaintiff's experts: ____________________________;
(insert date)

Defendant's experts: ____________________________.
(insert date)

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1 On December 1, 1993, comprehensive amendments to twenty-nine of the Federal Rule of Civil Procedure became effective. These include significant changes to Rule 26.

2 This plan shall be filed within ten (10) days of Rule 26(f) discovery meeting.

3. **DISCOVERY**: The parties agree that all discovery, will be completed (not propounded) by ______________________________.
(insert date)

4. **DUTY TO SUPPLEMENT**: Rule 26(e) imposes a continuing duty to supplement discovery responses as soon as practicable -- but by this order in no event later than *sixty (60) days prior to the close of discovery*.

5. **DISPOSITIVE MOTIONS**: The deadline for filing dispositive motions must be *at least ninety (90) days prior to the ready for trial date*. The deadline for filing dispositive motions shall be ______________________________.
(insert date)

6. **TRIAL READINESS**: This case will be ready for trial on ______________________________.
(insert date)

7. **PRETRIAL DISCLOSURES**: The pretrial disclosures required by Fed. R. Civ. P. 26(a)(3) (witness and exhibit lists) shall be completed *at least thirty (30) days prior to the final pretrial conference*.

B. **RULE 26(f) DISCOVERY PLAN**

1. The parties certify that pursuant to Fed. R. Civ. P. 26(f) we met on the ______ day of ________________, (199___), and discussed the following:

   (a) the nature and basis of the parties' claims and defenses;

   (b) the possibilities for a prompt settlement or resolution of the case; and

   (c) to develop the following discovery plan.

2. Discovery will be needed on the following subjects:

   ____

   ____
   (a brief description of the subjects in which discovery will be needed).

3. Discovery should be:

   (a) conducted in phases:

   __________ Yes __________ No

   (b) limited to or focused upon particular issues:

   __________ Yes __________ No

If yes to (a) or (b), then discovery shall proceed as follows: (include discussion of phases or limitations to particular issues and dates for completion of discovery).

____

____

4. Do the parties desire to make changes in the limitations on discovery imposed by the Federal Rules of Civil Procedure or Local Rule?

__________ Yes __________ No

If yes, include what changes the parties agree to make (e.g., stipulation regarding more than ten depositions by each party). Fed. R. Civ. P. 30(a)(2)(A)).

____

____

C. **OTHER MATTERS**

1. **CONSENT TO MAGISTRATE JUDGE JOHN A. JARVEY**: We unanimously ____will ____will not (check one) consent to trial, disposition and judgment by a United States Magistrate Judge with appeal to the Eighth Circuit Court of Appeals pursuant to 28 U.S.C. § 636(c)(3).[3] You may consent in either a jury or non-jury case.

2. **ALTERNATIVE DISPUTE RESOLUTION**: We have considered the following Alternative Dispute Resolution techniques and request that the court explore these options further with us at an early opportunity:

		YES	NO
a.	Court sponsored settlement conference	____	____
b.	Private mediation	____	____
c.	Private arbitration	____	____
d.	Summary jury trial	____	____
e.	Summary bench trial	____	____
f.	Other ______________	____	____

3. **JURY DEMAND**: A jury has been demanded.

__________ Yes __________ No

[3]Cases consented to the United States Magistrate Judge will be set for trial on a date certain. They will not be placed on a trailing calendar or continued due to the press of other civil or criminal matters.

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4. **ESTIMATED LENGTH OF TRIAL**: The parties estimate that this litigation will take ________ trial days, including opening statements, closing arguments and instructions. **In order to properly schedule trials, an accurate estimate of trial length is imperative.** If circumstances change, the parties shall notify the court no later than the trial readiness deadline as to their new estimated length of trial.

5. **PROTECTIVE ORDERS**: The parties agree that discovery in this case shall be governed by a protective order:

__________ Yes __________ No

If yes, the parties will submit a proposed protective order by ______________________________.
(insert date)

____
Attorney for Plaintiff(s)
Address
Telephone
Facsimile

____
Attorney for Defendant(s)
Address
Telephone
Facsimile

____
Attorney for Third-Party Defendant
Intervenor
Other
Address
Telephone
Facsimile

JUDGE'S REVISIONS

The deadline in Paragraph __________ is changed to ______________________.

The deadline in Paragraph __________ is changed to ______________________.

The deadline in Paragraph __________ is changed to ______________________.

IT IS ORDERED that the above Rule 16(b) Scheduling Order and Rule 26(f) Discovery Plan is approved and adopted by this court.

DATED this _______ day of ________________, 199____.

____
UNITED STATES MAGISTRATE JUDGE

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Rule 19
DISMISSAL OF ACTIONS

a) VOLUNTARY DISMISSALS: Special attention is directed to voluntary dismissals, wherein action may be dismissed without order of Court, pursuant to FRCP 41:

1) by the plaintiff, by filing a notice of dismissal at any time before service by the adverse party of an answer or of a motion for summary judgment, whichever first occurs, or

2) by filing a stipulation of dismissal signed by all parties who have appeared in the action.

b) INVOLUNTARY DISMISSALS:

1) Civil actions shall be dismissed by the Clerk without prejudice:

A) Where service has not been made on any defendant within one hundred and twenty days (120) after the filing of the complaint, and plaintiff has failed to file a statement in writing within one hundred and twenty-seven (127) days after the filing of the complaint setting forth good cause why service has not been made.

B) As to a particular defendant where service has been made upon that defendant and neither answer nor request for other action has been filed as to that defendant within thirty (30) days after the date answer was due.

C) Where a default has been entered and motion for entry of judgment by default has not been made in accordance with FRCP 55 within thirty (30) days after the entry of default. An action will not be dismissed under this rule if plaintiff states that further court action is necessary before default judgment can be sought.

D) Where a deadline set for the performance of any act required by the Federal Rules of Civil Procedure, these Rules or Order of any Federal Court has been exceeded by more than thirty (30) days and an extension of time has been neither requested nor granted.

2) At least ten (10) days prior to the expiration of any of the times specified above, the Clerk shall mail to all counsel of record a copy of this rule and a notice that the action will be dismissed unless within the time allowed herein the action required is taken or good cause for not dismissing the action is shown.

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c) **Dismissal of Settled Cases.** Upon written notice to the court than an action has been settled, counsel shall file within thirty (30) days thereafter, such papers as are required to terminate the action; upon failure to do so, the court may order dismissal of the action without further notice and without prejudice to the right of either party to secure reinstatement of the case within sixty (60) days after the date of said order by making a showing of good cause as to why settlement was not in fact consummated.

d) **Requests for Dismissals.** Any motion for dismissal filed by plaintiff or by the parties jointly will be deemed to request dismissal with prejudice unless the application states otherwise.

012194StJ
MISC/Admin.14

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF IOWA

IN RE:	)	ADMINISTRATIVE ORDER 1213
CLERK OF COURT AUTHORITY TO GRANT UNRESISTED MINISTERIAL MOTIONS	)	

In this court's Civil Justice Reform Act Plan dated October 7, 1993, this court adopted at the recommendation of the Civil Justice Reform Act Committee in which the Committee suggested that the Clerk of Court ought to have the authority to grant certain unresisted ministerial motions. Upon this recommendation and pursuant to this court's Civil Justice Reform Act Plan,

IT IS ORDERED

That the Clerk of Court for the Northern District of Iowa shall have the authority to grant unresisted motions:

a. For leave to file an overlength brief (with a ten additional page limitation);

b. To file a reply brief;

c. To withdraw as counsel of record where another attorney has already entered an appearance;

d. For extension of time to file a stipulation for dismissal;

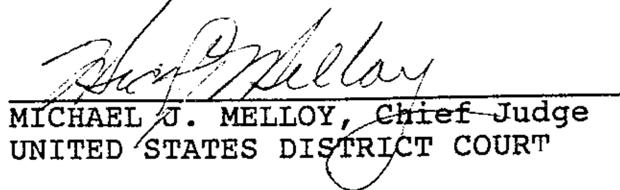
e. For extension of time within which to file a brief;

f. For leave to amend pleadings prior to the filing of a scheduling report;

g. For appointment of counsel in <u>habeas corpus</u> cases involving prisoners in state custody

h. To appear <u>pro hac vice</u>;

i. To extend time to file an answer.



MICHAEL J. MELLOY, ~~Chief~~ Judge
UNITED STATES DISTRICT COURT

FILED
CEDAR RAPIDS HDQTRS OFFICE
NORTHERN DISTRICT OF IOWA
JAN 31 1994
3:35 pm
WILLIAM J. KANAK Clerk

AO 398 (12/93)

NOTICE OF LAWSUIT AND REQUEST FOR WAIVER OF SERVICE OF SUMMONS

TO: (A) ____

as (B) ______________________ of (C) ______________________

A lawsuit has been commenced against you (or the entity on whose behalf you are addressed.) A copy of the complaint is attached to this notice. It has been filed in the United States District Court for the (D) ______________________ District of ______________________ and has been assigned docket number (E) ______________ .

This is not a formal summons or notification from the court, but rather my request that you sign and return the enclosed waiver of service in order to save the cost of serving you with a judicial summons and an additional copy of the complaint. The cost of service will be avoided if I receive a signed copy of the waiver within (F) ________ days after the date designated below as the date on which this Notice and Request is sent. I enclose a stamped and addressed envelope (or other means of cost-free return) for your use. An extra copy of the waiver is also attached for your records

If you comply with this request and return the signed waiver, it will be filed with the court and no summons will be served on you. The action will then proceed as if you had been served on the date the waiver is filed, except that you will not be obligated to answer the complaint before 60 days from the date designated below as the date on which this notice is sent (or before 90 days from that date if your address is not in any judicial district of the United States.)

If you do not return the signed waiver within the time indicated, I will take appropriate steps to effect formal service in a manner authorized by the Federal Rules of Civil Procedure and will then, to the extent authorized by those Rules, ask the court to require you (or the party on whose behalf you are addressed) to pay the full costs of such service. In that connection, please read the statement concerning the duty of parties to waive the service of the summons, which is set forth at the foot of the waiver form.

I affirm that this request is being sent to you on behalf of the plaintiff, this __________ day of ______________________ , ______________

____
Signature of Plaintiff's Attorney
or Unrepresented Plaintiff

A — Name of individual defendant (or name of officer or agent of corporate defendant)
B — Title or other relationship of individual to corporate defendant
C — Name of corporate defendant if any
D — District
E — Docket number of action
F — Addressee must be given at least 30 days (60 days if located in foreign country) in which to return waiver

AO 85 (Rev 10/93)

NOTICE OF AVAILABILITY OF A MAGISTRATE JUDGE TO EXERCISE OF JURISDICTION AND APPEAL OPTION

In accordance with the provisions of Title 28, U S C 636(c), and Fed R Civ P. 73 you are hereby notified that a United States magistrate judge of this district court is available to exercise the court's jurisdiction and to conduct any or all proceedings in this case including a jury or nonjury trial, and entry of a final judgment Exercise of this jurisdiction by a magistrate judge is, however, permitted only if all parties voluntarily consent

You may, without adverse substantive consequences, withhold your consent, but this will prevent the court's jurisdiction from being exercised by a magistrate judge If any party withholds consent, the identity of the parties consenting or withholding consent will not be communicated to any magistrate judge or to the district judge to whom the case has been assigned

An appeal from a judgment entered by a magistrate judge may be taken directly to the United States court of appeals for this judicial circuit in the same manner as an appeal from any other judgment of a district court Alternatively, upon consent of all parties, an appeal from a judgment entered by a magistrate judge may be taken directly to a district judge Cases in which an appeal is taken to a district judge may be reviewed by the United States court of appeals for this judicial circuit only by way of petition for leave to appeal

Copies of the Form for the "Consent to Exercise of Jurisdiction by a United States Magistrate Judge and Order of Reference" are available from the clerk of the court

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UNITED STATES DISTRICT COURT

______________________ District of ______________________

Plaintiff

v.

Defendant

CONSENT TO EXERCISE OF JURISDICTION BY A UNITED STATES MAGISTRATE JUDGE AND ORDER OF REFERENCE

Case Number:

CONSENT TO EXERCISE OF JURISDICTION BY A UNITED STATES MAGISTRATE JUDGE

In accordance with the provisions of 28 U S.C 636(c) and Fed R Civ P. 73, the parties in this case hereby voluntarily consent to have a United States magistrate judge conduct any and all further proceedings in the case, including the trial, and order the entry of a final judgment

Signatures	Date
______________________	__________
______________________	__________
______________________	__________
______________________	__________

Unless otherwise indicated below, any appeal shall be taken to the United States court of appeals for this circuit, in accordance with 28 U S.C 636(c) and Fed R Civ P 73(c)

ELECTION OF APPEAL TO A UNITED STATES DISTRICT JUDGE

(DO NOT EXECUTE THIS PORTION OF THE FORM IF THE PARTIES DESIRE THAT THE APPEAL LIE DIRECTLY TO THE COURT OF APPEALS.)

The parties in this case further consent, by signing below, to take any appeal to a United States district judge, in accordance with 28 U.S C 636(c)(4) and Fed R Civ P 73(d)

______________________	__________
______________________	__________
______________________	__________
______________________	__________

ORDER OF REFERENCE

IT IS HEREBY ORDERED that this case be referred to the Honorable ______________________, United States Magistrate Judge, for all further proceedings and the entry of judgment in accordance with 28 U S.C. 636(c), Fed.R.Civ P. 73 and the foregoing consent of the parties

__________ Date

______________________ United States District Judge

NOTE: RETURN THIS FORM TO THE CLERK OF THE COURT <u>ONLY IF</u> ALL PARTIES HAVE CONSENTED <u>ON THIS FORM</u> TO THE EXERCISE OF JURISDICTION BY A UNITED STATES MAGISTRATE JUDGE

JS 44
(Rev 07/89)

CIVIL COVER SHEET

The JS-44 civil cover sheet and the information contained herein neither replace nor supplement the filing and service of pleadings or other papers as required by law except as provided by local rules of court. This form, approved by the Judicial Conference of the United States in September 1974 is required for the use of the Clerk of Court for the purpose of initiating the civil docket sheet (SEE INSTRUCTIONS ON THE REVERSE OF THE FORM)

I (a) PLAINTIFFS

DEFENDANTS

(b) COUNTY OF RESIDENCE OF FIRST LISTED PLAINTIFF ________
(EXCEPT IN U S PLAINTIFF CASES)

COUNTY OF RESIDENCE OF FIRST LISTED DEFENDANT ________
(IN U.S. PLAINTIFF CASES ONLY)
NOTE: IN LAND CONDEMNATION CASES USE THE LOCATION OF THE TRACT OF LAND INVOLVED

(c) ATTORNEYS (FIRM NAME ADDRESS AND TELEPHONE NUMBER)

ATTORNEYS (IF KNOWN)

II. BASIS OF JURISDICTION (PLACE AN × IN ONE BOX ONLY)

☐ 1 U.S. Government Plaintiff
☐ 3 Federal Question (U S Government Not a Party)
☐ 2 U.S. Government Defendant
☐ 4 Diversity (Indicate Citizenship of Parties in Item III)

III. CITIZENSHIP OF PRINCIPAL PARTIES (PLACE AN × IN ONE BOX FOR PLAINTIFF AND ONE BOX FOR DEFENDANT)

(For Diversity Cases Only)

	PTF	DEF		PTF	DEF
Citizen of This State	☐ 1	☐ 1	Incorporated *or* Principal Place of Business in This State	☐ 4	☐ 4
Citizen of Another State	☐ 2	☐ 2	Incorporated *and* Principal Place of Business in Another State	☐ 5	☐ 5
Citizen or Subject of a Foreign Country	☐ 3	☐ 3	Foreign Nation	☐ 6	☐ 6

IV. CAUSE OF ACTION (CITE THE U.S. CIVIL STATUTE UNDER WHICH YOU ARE FILING AND WRITE A BRIEF STATEMENT OF CAUSE. DO NOT CITE JURISDICTIONAL STATUTES UNLESS DIVERSITY.)

V. NATURE OF SUIT *(PLACE AN × IN ONE BOX ONLY)*

CONTRACT
- ☐ 110 Insurance
- ☐ 120 Marine
- ☐ 130 Miller Act
- ☐ 140 Negotiable Instrument
- ☐ 150 Recovery of Overpayment & Enforcement of Judgment
- ☐ 151 Medicare Act
- ☐ 152 Recovery of Defaulted Student Loans (Excl. Veterans)
- ☐ 153 Recovery of Overpayment of Veteran's Benefits
- ☐ 160 Stockholders' Suits
- ☐ 190 Other Contract
- ☐ 195 Contract Product Liability

REAL PROPERTY
- ☐ 210 Land Condemnation
- ☐ 220 Foreclosure
- ☐ 230 Rent Lease & Ejectment
- ☐ 240 Torts to Land
- ☐ 245 Tort Product Liability
- ☐ 290 All Other Real Property

TORTS

PERSONAL INJURY
- ☐ 310 Airplane
- ☐ 315 Airplane Product Liability
- ☐ 320 Assault, Libel & Slander
- ☐ 330 Federal Employers Liability
- ☐ 340 Marine
- ☐ 345 Marine Product Liability
- ☐ 350 Motor Vehicle
- ☐ 355 Motor Vehicle Product Liability
- ☐ 360 Other Personal Injury

PERSONAL INJURY
- ☐ 362 Personal Injury—Med Malpractice
- ☐ 365 Personal Injury—Product Liability
- ☐ 368 Asbestos Personal Injury Product Liability

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- ☐ 370 Other Fraud
- ☐ 371 Truth in Lending
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- ☐ 385 Property Damage Product Liability

CIVIL RIGHTS
- ☐ 441 Voting
- ☐ 442 Employment
- ☐ 443 Housing/Accommodations
- ☐ 444 Welfare
- ☐ 440 Other Civil Rights

PRISONER PETITIONS
- ☐ 510 Motions to Vacate Sentence Habeas Corpus:
- ☐ 530 General
- ☐ 535 Death Penalty
- ☐ 540 Mandamus & Other
- ☐ 550 Other

FORFEITURE/PENALTY
- ☐ 610 Agriculture
- ☐ 620 Other Food & Drug
- ☐ 625 Drug Related Seizure of Property 21 USC 881
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- ☐ 640 R.R & Truck
- ☐ 650 Airline Regs
- ☐ 660 Occupational Safety/Health
- ☐ 690 Other

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- ☐ 720 Labor/Mgmt Relations
- ☐ 730 Labor/Mgmt Reporting & Disclosure Act
- ☐ 740 Railway Labor Act
- ☐ 790 Other Labor Litigation
- ☐ 791 Empl. Ret. Inc Security Act

BANKRUPTCY
- ☐ 422 Appeal 28 USC 158
- ☐ 423 Withdrawal 28 USC 157

PROPERTY RIGHTS
- ☐ 820 Copyrights
- ☐ 830 Patent
- ☐ 840 Trademark

SOCIAL SECURITY
- ☐ 861 HIA (1395ff)
- ☐ 862 Black Lung (923)
- ☐ 863 DIWC/DIWW (405(g))
- ☐ 864 SSID Title XVI
- ☐ 865 RSI (405(g))

FEDERAL TAX SUITS
- ☐ 870 Taxes (U.S. Plaintiff or Defendant)
- ☐ 871 IRS—Third Party 26 USC 7609

OTHER STATUTES
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- ☐ 410 Antitrust
- ☐ 430 Banks and Banking
- ☐ 450 Commerce/ICC Rates/etc
- ☐ 460 Deportation
- ☐ 470 Racketeer Influenced and Corrupt Organizations
- ☐ 810 Selective Service
- ☐ 850 Securities/Commodities/Exchange
- ☐ 875 Customer Challenge 12 USC 3410
- ☐ 891 Agricultural Acts
- ☐ 892 Economic Stabilization Act
- ☐ 893 Environmental Matters
- ☐ 894 Energy Allocation Act
- ☐ 895 Freedom of Information Act
- ☐ 900 Appeal of Fee Determination Under Equal Access to Justice
- ☐ 950 Constitutionality of State Statutes
- ☐ 890 Other Statutory Actions

VI. ORIGIN *(PLACE AN × IN ONE BOX ONLY)*

☐ 1 Original Proceeding
☐ 2 Removed from State Court
☐ 3 Remanded from Appellate Court
☐ 4 Reinstated or Reopened
☐ 5 Transferred from another district (specify)
☐ 6 Multidistrict Litigation
☐ 7 Appeal to District Judge from Magistrate Judgment

VII. REQUESTED IN COMPLAINT:

CHECK IF THIS IS A **CLASS ACTION** ☐ UNDER F R C P 23

DEMAND $

Check YES only if demanded in complaint:
JURY DEMAND: ☐ YES ☐ NO

VIII. RELATED CASE(S) (See instructions): IF ANY

JUDGE ________ DOCKET NUMBER________

DATE

SIGNATURE OF ATTORNEY OF RECORD

UNITED STATES DISTRICT COURT

C

INSTRUCTIONS FOR ATTORNEYS COMPLETING CIVIL COVER SHEET FORM JS-44

Authority For Civil Cover Sheet

The JS-44 civil cover sheet and the information contained herein neither replaces nor supplements the filings and service of pleading or other papers as required by law except as provided by local rules of court This form approved by the Judicial Conference of the United States in September 1974, is required for the use of the Clerk of Court for the purpose of initiating the civil docket sheet Consequently a civil cover sheet is submitted to the Clerk of Court for each civil complaint filed The attorney filing a case should complete the form as follows:

I. (a) Plaintiffs - Defendants. Enter names (last, first, middle initial) of plaintiff and defendant. If the plaintiff or defendant is a government agency use only the full name or standard abbreviations If the plaintiff or defendant is an official within a government agency identify first the agency and then the official giving both name and title.

(b) County of Residence. For each civil case filed, except U.S. plaintiff cases, enter the name of the county where the first listed plaintiff resides at the time of filing. In U.S. plaintiff cases, enter the name of the county in which the first listed defendant resides at the time of filing (NOTE: In land condemnation cases, the county of residence of the "defendant" is the location of the tract of land involved).

(c) Attorneys. Enter firm name, address, telephone number, and attorney or record. If there are several attorneys list them on an attachment noting in this section "(see attachment)".

II. Jurisdiction. The basis of jurisdiction is set forth under Rule 8 (a) F.R.C.P. which requires that jurisdictions be shown in pleadings Place an "X" in one of the boxes. If there is more than one basis of jurisdiction precedence is given in the order shown below

United States plaintiff (1) Jurisdiction is based on 28 U.S.C. 1345 and 1348 Suits by agencies and officers of the United States are included here

United States defendant (2) When the plaintiff is suing the United States its officers or agencies, place an X in this box.

Federal question. (3) This refers to suits under 28 U.S.C. 1331 where jurisdiction arises under the Constitution of the United States, an amendment to the Constitution, an act of Congress or a treaty of the United States In cases where the U.S. is a party the U.S. plaintiff or defendant code takes precedence, and box 1 or 2 should be marked.

Diversity of citizenship. (4) This refers to suits under 28 U.S.C. 1332, where parties are citizens of different states. When Box 4 is checked, the citizenship of the different parties must be checked. (See Section III below; federal question actions take precedence over diversity cases.)

III. Residence (citizenship) of Principal Parties. This section of the JS-44 is to be completed if diversity of citizenship was indicated above. Mark this section for each principal party.

IV. Cause of Action. Report the civil statute directly related to the cause of action and give a brief description of the cause.

V. Nature of Suit. Place an "X" in the appropriate box If the nature of suit cannot be determined, be sure the cause of action, in Section IV above, is sufficient to enable the deputy clerk or the statistical clerks in the Administrative Office to determine the nature of suit If the cause fits more than one nature of suit select the most definitive.

VI. Origin. Place an "X" in one of the seven boxes.

Original Proceedings (1) Cases which originate in the United States district courts.

Removed from State Court. (2) Proceedings initiated in state courts may be removed to the district courts under Title 28 U.S.C., Section 1441. When the petition for removal is granted, check this box.

Remanded from Appellate Court. (3) Check this box for cases remanded to the district court for further action. Use the date of remand as the filing date.

Reinstated or Reopened. (4) Check this box for cases reinstated or reopened in the district court. Use the reopening date as the filing date

Transferred from Another District. (5) For cases transferred under Title 28 U.S.C. Section 1404(a). Do not use this for within district transfers or multidistrict litigation transfers.

Multidistrict Litigation. (6) Check this box when a multidistrict case is transferred into the district under authority of Title 28 U.S.C. Section 1407. When this box is checked, do not check (5) above.

Appeal to District Judge from Magistrate Judgment. (7) Check this box for an appeal from a magistrate's decision.

VII. Requested in Complaint. Class Action Place an "X" in this box if you are filing a class action under Rule 23, F.R.Cv.P.

Demand. In this space enter the dollar amount (in thousands of dollars) being demanded or indicate other demand such as a preliminary injunction

Jury Demand Check the appropriate box to indicate whether or not a jury is being demanded.

VIII. Related Cases. This section of the JS-44 is used to reference relating pending cases if any If there are related pending cases insert the docket numbers and the corresponding judge names for such cases

Date and Attorney Signature. Date and sign the civil cover sheet

(rev. 07/89)

D

TRIAL BY OVERHEAD PROJECTOR

Presented By:
DAVID L. RILEY
Lindeman, Yagla, McCoy & Riley
327 E. 4th Street, Suite 300
Waterloo, IA 50704

D

TRIAL BY OVERHEAD PROJECTOR

D

I. ADVANTAGES AND DISADVANTAGES

A. Cost

1. Projector

2. Screen

3. Transparencies

B. Portability

1. Projector

2. Screen

3. Transparencies

C. Courtroom Logistics

D. Use of Existing Office Equipment

1. Computer and printer

2. Copy machine

II. THINGS TO CONSIDER PUTTING ON TRANSPARENCY

A. Opening Statement

B. Deposition Testimony

1. From case at issue

2. From other cases

C. Testimony from Other Trials or Proceedings

D. Medical Records

E. Medical Illustrations

F. Drawings Made at Depositions and Marked as Exhibits

G. Contracts

H. Letters and Reports

I. Articles

D

J. School Records

K. Interrogatory Answers

L. Critical Testimony as it is Given

M. Calculations With Economists

N. Jury Instructions

O. Verdict Forms

P. Closing Argument

III. USES AT TRIAL

A. Opening Statement

1. Outline entire case

a. Liability
b. Damages

2. Details on dates and facts

3. If favorable preexisting medical is available, review it in detail, and make sure jury understands sequence.

4. Preview cross? Let them know how much plaintiff's physician makes for testifying, and how many times per week he testifies.

a. Introduce him as a witness so jury has an impression of him before he takes the stand or before his deposition is played.

B. Cross Examination

1. Have other portions of deposition testimony that are favorable to your case on transparency for use in cross examination of witness. Use that testimony with the deponent when the deponent testifies at trial.

2. Consider using Plaintiff's testimony in Plaintiff's deposition, which is admissable for any purpose, to cross examine other witnesses.

3. For doctors that are well known, consider using their prior testimony from other trials or from depositions in other cases.

4. Medical records. Use them against:

   a. Plaintiffs
   b. Doctor making the record
   c. Other doctors
   d. Lay witnesses

5. Articles and other prior publications by experts.

6. School records. Use against:

   a. Plaintiffs
   b. Physicians and Psychologists testifying about closed head injuries.
   c. Lay witnesses.

7. Interrogatory answers

8. Calculations

C. Closing

1. Use some of the transparencies made during the cross examination of certain witnesses. Jurors will recognize those transparencies, and recall the testimony.

2. Outline closing argument

3. Use the records that are already admitted as exhibits.

4. Review calculations that you confirmed with economist.

5. Review critical jury instructions, and apply them to the evidence as it came in.

6. Put up the verdict form, and show them how they ought to fill it out, given the evidence they heard.

7. If damages are going to be awarded, make suggestions, and support those suggestions with reference to the record.

IV. PRACTICE POINTERS

A. Try to get foundational objections for medical records and other exhibits that you want to use at trial waived at Final Pre-Trial Conference.

B. If Plaintiff offers in hundreds of pages of medical exhibits, mark the handfull of pages that make your point separately as defense exhibits.

C. Start on closing argument early. Outline before case is over, and modify it as you go.

D. Remember you can make a transparency anywhere there is a copy machine. If Verdict Form is changed three or four times while making the record on instructions, wait until it is in final form, and then have a copy made at the Clerk's Office. Your visual aid can be made within moments of when you get the Verdict Form, or critical instruction, in its final form.

F. Be creative.

PREMISES / INTERLOPER LIABILITY: THE DUTY OF A POSSESSOR OF LAND TO CONTROL OR PROTECT THIRD PERSONS.

BY
JOHN WERNER
DEBRA L. SCORPINITI

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I. INTRODUCTION

This outline considers the species of premises liability involving the duty of a possessor of land to control a third person or protect someone from a third person.[1] Premises/Interloper cases present a trap for the unwary. This species of liability presents a deviation from premises liability. There is a growing trend of courts to consider such cases under general negligence principles of Restatement (Second) Torts §§ 315-19, rather than under traditional premises liability concepts. The basic ramifications of such treatment are somewhat slackened elements and no alleviation of duty for dangers that are open and obvious.

II. A LEGAL DUTY IS A PREREQUISITE TO ESTABLISHING LIABILITY.

A legal duty is a prerequisite to establishing a cause of action for negligence. Shaw v. Soo Line Railroad Co., 463 N.W.2d 51, 53 (Iowa 1993). The existence of such a duty is always a matter of law for the court and is properly considered in the form of a motion for summary judgment or a motion for directed verdict. Martinko v. H-N-W Assocs., 393 N.W.2d 320, 321 (Iowa 1986). Prior to Morgan, the general rule had been, "a person has no duty to prevent a third person from causing harm to another."

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[1] This outline does not consider circumstances under which the landowner is immune from suit for acts of third persons by virtue of the Recreational Use Immunity Statute, Iowa Code Ch. 461C. Landowners are immune for suit arising out of the use of land for recreational purposes. The statute is not limited to conditions, but extends to use, structure, or activities. Therefore, there is no liability of landowners for acts of third persons occurring in the context of a recreational purpose on land where no fee is charged. Example: Farmer A allows pheasant hunters on land. One pheasant hunter shoots another. Farmer A is immune from suit.

A. GENERALLY, A PERSON DOES NOT HAVE A DUTY TO AID OR PROTECT ANOTHER.

Iowa does not recognize a good-Samaritan obligation to prevent the perpetration of a tort. Husker News Co. v. South Ottumwa Savings Bank, 482 N.W.2d 404, 407-08 (Iowa 1992) (Super Valu, a customer of Husker News, had no duty to prevent Husker's employee from committing a tort upon Husker); Restatement (Second) Torts § 314; Anthony v. State, 374 N.W.2d 662, 668 (Iowa 1985) (State had no duty to warn plaintiffs of a prisoner's history of sex crimes absent any threat to plaintiffs). The general rule at common law is that a person has no duty to prevent a third person from causing harm to another.

B. EVEN UNDER GENERAL NEGLIGENCE PRINCIPLES, THEIR IS NO DUTY TO PROTECT OR CONTROL ANOTHER ABSENT FACTS JUSTIFYING IMPOSITION OF SUCH A DUTY.

Two city council members were shot at a Mount Pleasant city council meeting by a citizen who was disgruntled about his sewer bill. The unarmed off-duty police officer left the room after shots rang out to get his gun in his car, until he realized that he did not have the keys to the vehicle with him. The city attorney eventually tackled the assailant, but not before two councilmen were shot and the mayor was killed. The plaintiffs sued the off-duty police officer. The court found no duty because of the absence of a special relationship under Restatement § 315. There is no duty of an off-duty police officer who happened to be present at a city council meeting to protect the council members from a gun shot. Since the officer was off-duty, his duty was examined as any

other private citizen. Sankey v. Richenberger, 456 N.W.2d 206 (Iowa 1990).

In Patzwald v. Krey, 390 N.W.2d 920 (Minn.App. 1986), a former boyfriend of the bride "crashed" a wedding reception held in the bride's parents' lawn and fired a .22 caliber rifle indiscriminately into the crowd killing one and injuring others. The court found no duty to warn the guests that the intruder might commit a criminal act. The bride was aware of her former boyfriend's erratic behavior as she had been harassed by him since their break up. However, the court found the attack to be unforeseeable where the host lacked the special relationship to intruder because she had neither the means nor ability to control the intruder's conduct and had no idea that the guests were in danger.

C. LIABILITY OF PERSONS CHARGED WITH CARE OF A POTENTIALLY DANGEROUS PERSON.

A person does not ordinarily have a duty to control the conduct of third persons to prevent harm to another. Leonard v. State, 491 N.W.2d 508, 509-10 (Iowa 1992); Restatement (Second) Torts § 315. An institution, physician, psychiatrist, law enforcement agency, or like entity usually has no duty to protect persons of the general public from persons within its care, at least absent facts demonstrating a particularized threat.

John Leonard was seriously injured in an assault by a recently discharged mental patient. Leonard sued the institution alleging that it was negligent in its treatment and its decision to discharge the patient. The patient was hospitalized for less than one month with bipolar affective disorder, manic type with alcohol

dependency and suicidal ideation. The patient underwent lithium therapy. After one month the institution released the patient and he returned to work as a demolition contractor. He hired Leonard to work for him. One evening after drinks, the patient beat Leonard severely without provocation.

The court found a duty under Restatement § 315 to control the patient under the general rule that a psychiatrist has a duty to protect persons injured by a patient who has been under his care. However, this duty did not extend to the general public, but only to foreseeable victims. Leonard, as an employee, was not in a class more endangered by the patient's release then the general public and there being no specific threats as to Leonard, he was not a foreseeable victim. No duty was owed to him.

The scope of persons to whom a psychiatrist owes a duty under Restatement § 315 is limited by public policy concerns about unlimited liability when one's decisions affect the general public. Leonard v. State, 491 N.W.2d 508, 509-10 (Iowa 1992)

Neither the State, nor its parole officers were liable to victim injured by parolee--there being an absence of a special relationship between public officials and injured parties. Fitzpatrick v. State, 439 N.W.2d 663, 667 (Iowa 1989). Accord, Smith v. State, 324 N.W.2d 299 (Iowa 1982) (no cause of action for negligent investigation of crime by law enforcement officers); Callahan v. State, 385 N.W.2d 533 (Iowa 1986) (no cause of action for social worker malpractice in the negligent placement of children).

III. DISTINCTIONS BETWEEN PREMISES LIABILITY PRINCIPLES AND NEGLIGENCE BASED UPON THE DUTY TO CONTROL/PROTECT WITH RESPECT TO THIRD PERSONS.

A. UNDER PREMISES LIABILITY PRINCIPLES, REASONABLE CARE ON THE PART OF THE POSSESSOR OF LAND DOES NOT ORDINARILY REQUIRE PRECAUTIONS OR WARNING REGARDING DANGERS WHICH ARE KNOWN OR ARE SO OBVIOUS THAT THE INVITEE OR LICENSEE MAY BE EXPECTED TO DISCOVER THEM. Schnoor v. Deitchler, 482 N.W.2d 913, 917 (Iowa 1992); see infra, Morgan.

B. CHARACTERIZATION OF THE PERSON WHO ENTERS UPON LAND AS EITHER A TRESPASSER, LICENSEE, OR INVITEE IS RELEVANT ONLY IN THE CONTEXT OF PREMISES LIABILITY.

An invitee is a person who enters or remains on land open to the public by invitation or permission. An invitee is owed the highest standard of care. Schnoor, 482 N.W.2d at 917-918. Restatement (Second) Torts § 332.

A licensee is a person who enters or remains on land with the possessor's consent. Reasoner v. Chicago, Rock Island & Pac. R.R. Co., 251 Iowa 506, 511, 101 N.W.2d 739, 742 (1960); Restatement (Second) Torts § 330. A social guest in a private party given in one's home is a licensee. Morgan, 508 N.W.2d at 727.

A trespasser is a person who enters or remains on land without a privilege to do so or without the possessor's consent. Restatement (Second) Torts § 329.

The Iowa Court of Appeals has declined to abrogate the common law distinction between invitees and licensees. However, it held that the duty of care to each should be the same--reasonable care under all attending circumstances. Devilbiss v. Brenton National Bank, 451 N.W.2d 198, 199-200 (Iowa Ct.App. 1989). Therefore, an occupier of land is under a duty of reasonable care to keep the

premises in a reasonably safe condition for licensees (social guests) as well as invitees.

C. CHARACTERIZATION OF PERSONS ENTERING OR REMAINING ON LAND UNDER GENERAL NEGLIGENCE PRINCIPLES.

Morgan applies Restatement § 318, but interestingly categorizes the plaintiff as a licensee without demonstrating the significance of such a classification outside the context of traditional premises liability. It would appear to have no significance. Either a person is within a special relationship or he is not. Restatement §§ 315-319 make no reference to invitees, licensees, and trespassers, and such distinctions are generally reserved to the premises liability context.

IV. PREMISES LIABILITY--APPLICATION OF RESTATEMENT § 344 GOVERNING LIABILITY OF POSSESSORS OF BUSINESS PREMISES FOR ACTS OF THIRD PERSONS VIS-A-VIS RESTATEMENT § 343 GOVERNING LIABILITY OF POSSESSORS OF LAND FOR CONDITIONS ON LAND.

The Iowa Supreme Court applied Restatement § 344, rather than § 343, in a case wherein a golfer was injured on a golf course by a golf ball. Young v. Gregg, 480 N.W.2d 75, 79 (Iowa 1992). Restatement § 343 is the basis of the traditional premises liability instructions and imposes liability upon a possessor of land only when the plaintiff proves "the defendant knew, or in the exercise of reasonable care, should have known that there was a condition on the premises that involved an unreasonable risk of injury to the plaintiff." This is applicable in premises liability cases involving "some inanimate object on the premises or some defect in the condition of the premises."

E

However, where the accidental, negligent, or intentional harmful acts of third persons or animals is involved, the possessor may be negligent in failing discover such acts are being done or likely to be done or failing to warn or otherwise protect visitors against it. The plaintiff need not prove that the possessor knew or should have known there was a condition on the premises that presented a risk of harm to the plaintiff. Restatement § 344. Therefore, the court held that in cases involving actions by third persons instead of conditions upon land, the jury instructions contained in Iowa Civil Jury Instructions 900 et seq. are improper as they are modeled after 343 not 344.

Interestingly, § 344 by its terms applies only to "a possessor of land who holds it open to the public for entry for his business purposes." It does not apply to a social host by its terms. It is questionable whether the drafters of the Restatement intended that liability be imposed upon a social host for acts of third parties. It would seem to be similar to § 344, yet there is no such provision there. The language of § 318 is broad enough to include liability of possessors of land for a third person's use of land or chattels. However, one must wonder whether the "use" of land contemplated is that of a guest at a social party. The examples given in § 318 involve the operation of motor vehicles entrusted to a third person and the conducting of "highly dangerous" activity upon the land. Restatement § 318, comments a-c. It is possible that the drafters contemplated that simply being a social host is insufficient to create a special relationship under §§ 315-319,

especially since the drafters of the Restatement had the opportunity to provide specifically for the circumstance when they drafted § 344. See also, Galloway v. Bankers Trust Co., 420 N.W.2d 437, 438 (Iowa 1988) (applying principles of § 344 to a suit in which a customer alleged a mall failed to protect him from a homosexual rape in a mall restroom).

V. A DUTY MAY ARISE UNDER GENERAL NEGLIGENCE PRINCIPLES WHEN THERE IS A "SPECIAL RELATIONSHIP" BETWEEN THE PERSONS INVOLVED. Kelly v. Sinclair Oil Corp., 476 N.W.2d 341, 354 (Iowa 1991); Restatement (Second) Torts § 315, comment c.

Under Restatement Section 315, there are two circumstances under which a "special relationship" may arise: (a) when a special relationship exists between the actor and the third person which imposes a duty upon the actor to control the third person's conduct, or (b) a special relationship exists between the actor and the other which gives to the other a right to protection.

The special relationship requirement arose out of a common law distinction between misfeasance and nonfeasance, action and inaction. A misfeasance, affirmative wrong, resulted in liability regardless of the relationship between the parties. On the other hand, nonfeasance, or inaction, confined liability to instances where a special relationship existed wherein the party had a duty to take action for the aid or protection of the plaintiff. Keller v. State, 475 N.W.2d 174, 179 (Iowa 1991) (holding state bureau of labor had duty to employee who was injured when wearing an inadequate protective mask during application of lead based spray as state gave affirmative approval to its use--such was misfeasance). Restatement § 314, comment c.

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VI. RESTATEMENT §§ 315 THROUGH 319 ARE INTERPRETED NARROWLY AND TURN ON THE FORESEEABILITY OF HARM TO THE INJURED PERSON. Leonard, 491 N.W.2d at 511.

Under Restatement § 318, in order to have a duty to intervene or control the actions of a third person, a right to control that person must exist. Kinsey v. Bray, 596 N.E.2d 938, 942 (Ind.App. 1992). The mere fact that an activity is conducted upon land is not sufficient to make the possessor liable. However, when the actor uses the land with permission of the possessor, this gives the possessor a "peculiar ability," to control the manner in which the land is used. Id., citing Restatement (Second) Torts § 318, comment a.

VII. FORESEEABILITY IS AN OBSTACLE THAT MUST BE OVERCOME UNDER EITHER PREMISES LIABILITY PRINCIPLES OR UNDER RESTATEMENT §§ 315-319.

It is a fundamental rule of negligence law that the relationship giving rise to a duty of care must be premised on the foreseeability of harm to the injured person. Sankey, 456 N.W.2d at 209-10. A shooting spree at a city council meeting by a citizen disgruntled over his sewer bill was not foreseeable.

A defendant is not required to take precautions against a sudden attack from a third person which he has no reason to anticipate. Restatement (Second) Torts § 314A, comment e.

A shopping mall owner owes no duty of care to a victim murdered in the mall parking lot, because the murder was not reasonably foreseeable to the mall owner. Martinko v. H-N-W Assocs., 393 N.W.2d 320, 321 (Iowa 1986). There was no evidence that the mall owners should have expected the violent attack.

Evidence of violent attacks at defendant's other malls was inadmissible as irrelevant to foreseeability of attack at the mall in question.

In order to prove foreseeability of a homosexual rape at a defendant mall, the plaintiff could demonstrate all crimes occurring at the mall, although crimes against persons would make a stronger case of foreseeability. Galloway, 420 N.W.2d at 440. Plaintiff generated a jury issue on foreseeability by demonstrating that these incidences occurred with the following frequency at the mall in 1988, a representative year: 29 shoplifting; 4 trespass; 3 beer in parking lot; 2 vandalism; 1 robbery; 1 open door; 1 medical emergency.

A landlord owes a duty to protect tenants by providing working locks for the doors because it was reasonably foreseeable that without one, break-ins would occur. Brichacek v. Hiskey, 401 N.W.2d 44, 47 (Iowa 1985).

Attack on wedding guests was not reasonably foreseeable. Attacker had previously threatened host, but attack on guests was not foreseeable. Patzwald, 390 N.W.2d at 922 (Minn.App. 1986).

Girlfriend not liable for attack on boyfriend in her home by a former boyfriend who shot him in her home. Fontenot v. Bolfa, 549 So.2d 924, 926 (La.Ct.App. 1989). Criminal acts are generally unforeseeable and the girlfriend did not have an opportunity to intervene.

Social host owed no duty to guest who was attacked with a knife. Husband v. Dubose, 531 N.E.2d 600, 602-03 (Mass.App.Ct.

1988). Social hosts are ordinarily not expected to anticipate violent attacks by another guest. "[H]osts should not be charged, at the risk of liability, to furnish security at social gatherings or to call the police every time a guest becomes unruly."

VIII. A POSSESSOR OF LAND HAS NO DUTY TO CONTROL THE CONDUCT OF THIRD PERSONS ONCE THEY HAVE LEFT THE POSSESSOR'S PREMISES. Davis v. Kwik-Shop, Inc., 504 N.W.2d 877, 879 (Iowa 1993).

Davis was beaten and stabbed by individuals who had been on the premises of Hy-Vee Food Stores. The assailants had shoved a customer attempting to enter Hy-Vee. The assailants continued their threatening behavior by trying to initiate confrontations in the Hy-Vee parking lot against some off-duty Hy-Vee employees. One such employee heard the assailants say they were going over to the neighboring Kwik-Shop to see what "some guys" were doing or "kick their ass."

The court dismissed Hy-Vee on its summary judgment motion there being no duty under Restatement §§ 315 and 318 to control an invitee once he ceased to be an invitee. The court relied upon Kelly v. Sinclair Oil Corp., 476 N.W.2d 341 (Iowa 1991) (tavern held not liable for injuries to plaintiffs caused by an intoxicated minor whom it ordered off the premises and who subsequently ran a stop sign and hit the plaintiffs' car).

IX. THE IOWA SUPREME COURT ADOPTS AND APPLIES RESTATEMENT (SECOND) TORTS § 318, TO THE DUTY OF A LANDOWNER TO A LICENSEE TO CONTROL CONDUCT OF THIRD PERSONS TO PROTECT LICENSEE FROM HARM, AND EXPRESSLY REJECTED APPLICABILITY OF PREMISES LIABILITY PRINCIPLES. MORGAN V. PERLOWSKI, 508 N.W.2D 724 (IOWA 1993).

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The Iowa Supreme Court adopted Restatement (Second) Torts § 318 and applied it to the situation where a social guest was injured in the host's home, when he was assaulted by a third person who was uninvited but allowed to remain on the premises. The court declined to apply Restatement (Second) Torts §§ 342, et seq., the traditional principles of premises liability. The significance of this holding is that the plaintiff's knowledge or obviousness of the danger does not eliminate the landowner's duty to the plaintiff.

Steven Perlowski held a party at his home on December 25, 1988. Perlowski made arrangements for alcoholic beverages to be available for the party, even though he was underage at the time, aged nineteen, and some of the guests were also underaged. Approximately, 50 to 100 people attended the party, including, twenty-one-year old Matthew Morgan.

During the course of the evening, a group of six uninvited males entered the party. There was some thought that these uninvited guests looked intimidating. Morgan inquired of Perlowski whether they should be asked to leave and Perlowski decided to do nothing at that point. The uninvited guests engaged in some menacing behavior including blocking doorways, bumping into guests, and generally seemed to invite some trouble. There is evidence that

Perlowski was aware of a fight which erupted in the basement but took no action to "remove or control the guests."

A second fight erupted in the basement and Morgan attempted to intervene and was struck in the head with a pool cue by one of the uninvited guests. Morgan sustained permanent impairment to his left eye.

The court submitted the case to the jury under Restatement § 318, rather than the premises liability instructions contained in Iowa Civil Jury Instructions 900 et seq. and elucidated in Restatement §§ 342, 343, 343A.

Restatement § 318 applies to harm from persons on land, not from a condition on land or activities of the possessor. Section 318 is under the general negligence chapter of the Restatement, rather than the premises liability chapter. The court found it appropriate to impose the duty of the more limited § 318, rather than the broader premises liability principles of § 342 et seq., stating, "[a]s a matter of public policy, it is reasonable to impose a limited duty upon a possessor of land, who is present on the land, to control the conduct of social guests." The court denominates the § 318 duty as narrower, and perhaps it is factually, but the effect is to impose a duty on the landowner for conditions (unruly social guests) of which the invitee has knowledge or which are obvious.

Thus, the case was properly submitted to the jury under Restatement § 318, the court found a jury issue as to whether "Perlowski knew or should have known he had the ability to control

the person or persons causing injury, and whether he knew of the necessity and opportunity to exercise such control." Moreover, the court held questions of foreseeability would not be resolved as a matter of law.

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X. MORGAN FOLLOWED BY THE IOWA SUPREME COURT IN REJECTING PREMISES LIABILITY CAUSE OF ACTION IN SUIT FOR INJURIES INFLICTED BY JILTED BOYFRIEND ON NEW SUITOR AT GIRLFRIEND'S HOME. FIALA V. RAINS, NO. 93-337 (IOWA FILED JULY 27, 1994).

A. FACTS

Matthew Moeller and Lori Rains had an on-again-off-again tumultuous romantic relationship which had culminated in the past in many physically abusive incidents. Rains met Andy Fiala in April 1990, at a tavern and danced with him. Moeller sent an envoy to threaten Fiala and a scuffle ensued. Moeller later apologized.

On October 6, 1990, Moeller expected to go out with Rains for the evening, but she went out with her girlfriends to a bar instead. Rains ran into Fiala and she invited Fiala and several other friends to her home. Fiala was the only one who showed up, but it is undisputed that no intimacies were exchanged.

Five minutes after Fiala arrived at Rains home, Moeller feeling stood up and assuming the two were going to engage in intimacies, broke down the Rains' door. Moeller beat Fiala unconscious and caused severe head injuries.

Fiala sued Rains and Moeller, settling his claims against Moeller and pursued Rains at trial under negligence and premises liability theories. The district court granted Rains' motion for directed verdict. The Iowa Supreme Court affirmed.

B. HOLDING AND REASONING

The duty owed to an individual depends upon two things (a) the relationship between the individuals; and (b) the foreseeability of harm.

Generally, a person has no duty to prevent a third person from causing harm to another. citing Morgan. A legal duty exists only if there is a special relationship. Restatement § 314. Fiala argued that the facts fit within the concept of Restatement §§ 302 and 302B which provide a cause of action for negligence where there a negligent act presents an unreasonable risk of harm to another through the foreseeable action of another.

The court found no evidence of a special relationship and in so holding blended the analysis with that of foreseeability. There was no evidence of threats to Fiala by Moeller or any action that would alert Rains to pending danger to Fiala.

Citing Morgan, the court rejected Fiala's argument that the case fell under premises liability theory and Restatement § 344. The court did not consider the applicability of Restatement § 318, because Fiala had not argued it. However, one could conclude that if there were an absence of special relationship as to §§ 302 and 302B, there would also be an absence of special relationship under § 318.

XI. RECENT CASES FROM OTHER JURISDICTIONS

A. SCOTT V. PACK, 607 SO.2d 738 (La.Ct.App. 1992): A STUDY IN CONTRAST FROM MORGAN.

Then minor, Alfred James Adler, was throwing a beer party at his parents home, with his parents present. Invitation was by word

of mouth and many uninvited persons attended. Some of the uninvited guests included the rival gangs the Smurfs and the Banks. The Smurfs were finally asked to leave the residence, but even so loitered outside. Neither Adler nor his parents called the police because of fear of retribution. Scott, one of the party-goers exited the party and was shot by a Smurf.

The court found that no legal duty was breached. The criminal attack was not foreseeable. In so holding, the court did not rely upon or cite to any section of the Restatement. Neither did the court analyze whether there was a special relationship, but instead based its decision on the simple lack of foreseeability precluding the existence of a duty. Many courts have done this--reached a decision on foreseeability without cluing in the reader as to whether it is following negligence or premises liability principles. As can be seen by the cases that follow, this contributes to the confusion as to when premises liability principles apply and when negligence principles apply.

In this case there was no duty, because the act was not foreseeable. There was no knowledge the Smurfs possessed firearms. The violence might have occurred in spite of the utmost of security. Moreover, the guests were aware of what had transpired and had equal knowledge of the events unfolding as did the social hosts. The plaintiff increased the risk of harm to himself by going outside into the potential trouble area. The fact that alcohol was served to minors was neither a cause-in-fact nor a

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legal cause of plaintiff's injuries. The facts of the case did not justify an imposition of a duty upon the landowner social hosts.

B. RESTATEMENT § 344, ESTABLISHING A DUTY TO CONTROL OR PROTECT THIRD PARTIES IN THE BUSINESS CONTEXT, DOES NOT PRECLUDE SUCH A DUTY IN THE PRIVATE CONTEXT.

Roger Apolinar was housesitting when he was criminally attacked by a third person. The court did not concern itself with foreseeability, but only whether a duty existed. The landowner argued that Restatement § 344, imposed a duty upon a possessor of a business establishment to protect or control third parties. Furthermore, since there is no parallel for private establishments, he owed no duty to protect the plaintiff who was housesitting in his home. The court rejected this argument finding no policy reason for such a distinction and no Texas case so holding. The court found there was a duty, but did not state under what Restatement section it would fall. Apolinar v. Thompson, 844 S.W.2d 262 (Tex.Ct.App. 1992).

C. RESTATEMENT § 344 APPLIES TO IMPOSE A DUTY ON STORE OWNER TO PROTECT CUSTOMERS FROM PURSE SNATCHERS.

Janis Erichsen was injured as a result of being dragged by a car during an attempted purse-snatching in the parking lot of No-Frills' Grocery store. The court found sufficient evidence of foreseeability to impose a duty under Restatement § 344 to protect the customer from crime. There were ten occasions within a sixteen month period of similar crimes, including theft, robbery, and purse snatching in and around the parking lot of the store. This provided sufficient foreseeability to engender a jury question. The court left open the question as to the specific measures the

store would be required to employ in exercising reasonable care. Erichsen v. No-Frills Supermarkets of Omaha, Inc., 518 N.W.2d 116 (Neb. 1994).

D. A SOCIAL HOST OWES NO DUTY TO CONTROL PAROLEE CHILD MOLESTER RESIDING IN HIS HOME NOR TO WARN OTHERS REGARDING HIS PRESENCE.

The minor child Eugene Willis was sexually assaulted by parolee Bruce Apple. Apple was staying with his friend Peter Tracy who lived approximately one-half mile from the Willis home. The court assumed for the purposes of considering whether a duty existed that the host knew the conviction was for sexually assaulting a child.

Like Scott, supra, the court did not cite to a particular section of the Restatement, nor did it state whether it was relying upon negligence or premises liability principles. Instead, the court relied upon prior case law that a social host has no duty to protect others from his social guest absent facts that would lead a reasonable host to anticipate danger.

A reasonable host would not anticipate danger from someone who had been released on probation or parole, after all the institution felt when it released the individual that he was safe to the public. As to the duty to warn the neighbors that a parolee sex offender was staying with them, the court held that such a duty would present troubling implications in ostracizing persons who are trying to live their life free of crime and would hinder rehabilitation and is akin to the "scarlet letter."

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The court noted the ever present risk of recidivism and refused to impose a duty upon a social host of a parolee absent some fact occurring after release from prison which would create an anticipation of harm. One might say he got "one bite at the apple." Apple v. Tracy, 613 N.E.2d 928 (Mass.Ct.App. 1993).

E. HOTEL HAD NO DUTY TO MINOR CHILDREN WHO WERE BROUGHT UP TO THE HOTEL AND MOLESTED BY A REGULAR GUEST.

Robert Mims took six minor boys to the Overlook Mountain Lodge in Alabama and on several occasions over a years time sexually molested them. Mims became familiar with the hotel staff, gave false information when registering, and always asked for an end room. Usually the boys would wait in the truck while Mims registered. However, on one occasion the boys accompanied Mims to the check-in desk. The parents of the minors sued the hotel alleging that the hotel was negligent in failing to verify the information provided by Mims and in failing to investigate the signs that Mims was molesting boys.

The hotel failed to investigate despite Mims' frequent visits, the presence of young boys with him and in and about the hotel, drinking, smoking, and calls to the police. Moreover, the young boys had been questioned by various hotel staff as to which room they were in, to which they would report Mims' room number.

Again, this court did not cite to the Restatement, nor indicate under what legal theory it was analyzing the existence of a duty. Rather, the court held that Mims' criminal conduct was not foreseeable. Other criminal acts at the hotel included thefts,

attempted suicide, and domestic violence, but none involved sexual crimes. Moreover, none of the boys ever complained or indicated that something was awry in Mims' room and some boys returned on Mims' subsequent trips. "Not all problems of a complex society can be solved in civil litigation." [Mims is serving a life sentence].

F. **OWNER AND OPERATOR OF AUTOMATED TELLER MACHINE (ATM) OWED NO DUTY TO CUSTOMER WHO WAS ROBBED WHILE USING SAID MACHINE.**

So says New York in Dyer v. Norstar Bank, N.A., 588 N.Y.S.2d 499 (N.Y.App.Div. 1992). Dyer was robbed at gunpoint at an ATM after he had withdrawn $200 from the machine. Dyer sued the owner and operator of the ATM alleging negligent failure to provide reasonable security precautions at the ATM. The Appellate Division reversed the trial court's denial of summary judgment. The fact that a person may be subject to a robbery when using an ATM is conceivable, but this does not mean it is foreseeable. The court held as a matter of law the robbery was not foreseeable. The court did not cite to the Restatement nor indicate whether it was following negligence or premises liability principles.

XII. CONCLUSION

There is no unifying principle or rationale for excepting the third-person cases from any other condition or circumstance upon the premises. Other jurisdictions often do not discuss the classification of the particular case as one of negligence or one of premises liability because the case is often decided strictly on foreseeability grounds. The Morgan decision was a fact-driven decision which creates analytical problems in reconciling Iowa's

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premises liability doctrine and the far more stringent duty imposed by applying Restatement § 318 to some premises-based cases.

The plaintiffs' bar is resolute in its effort to narrow the range of cases applying premises liability principles and to dilute the open and obvious "defense" which has served so well for so long as a bar to frivolous suits against owners and possessors of land in Iowa.

APPENDIX

Restatement of Torts, Second

TITLE A. DUTY TO CONTROL CONDUCT OF THIRD PERSONS

§ 315. General Principle

There is no duty so to control the conduct of a third person as to prevent him from causing physical harm to another unless

(a) a special relation exists between the actor and the third person which imposes a duty upon the actor to control the third person's conduct, or

(b) a special relation exists between the actor and the other which gives to the other a right to protection.

§ 316. Duty of Parent to Control Conduct of Child

A parent is under a duty to exercise reasonable care so to control his minor child as to prevent it from intentionally harming others or from so conducting itself as to create an unreasonable risk of bodily harm to them, if the parent

(a) knows or has reason to know that he has the ability to control his child, and

(b) knows or should know of the necessity and opportunity for exercising such control.

§ 317. Duty of Master to Control of Servant

A master is under a duty to exercise reasonable care so to control his servant while acting outside the scope of his employment as to prevent him from intentionally harming others or from so conducting himself as to create an unreasonable risk of bodily harm to them, if

(a) the servant

(i) is upon the premises in possession of the master or upon which the servant is privileged to enter only as his servant, or

(ii) is using a chattel of the master, and

(b) the master

(i) knows or has reason to know that he has the ability to control his servant, and

(ii) knows or should know of the necessity and opportunity for exercising such control.

§ 318. Duty of Possessor of Land or Chattels to Control Conduct of Licensee

If the actor permits a third person to use land or chattels in his possession otherwise than as a servant,

he is, if present, under a duty to exercise reasonable care so to control the conduct of the third person as to prevent him from intentionally harming others or from so conducting himself as to create an unreasonable risk of bodily harm to them, if the actor

(a) knows or has reason to know that he has the ability to control the third person, and

(b) knows or should know of the necessity and opportunity for exercising such control.

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§ 319. Duty of Those in Charge of Person Having Dangerous Propensities

One who takes charge of a third person whom he knows or should know to be likely to cause bodily harm to others if not controlled is under a duty to exercise reasonable care to control the third person to prevent him from doing such harm.

§ 320. Duty of Person Having Custody of Another to Control Conduct of Third Persons

One who is required by law to take or who voluntarily takes the custody of another under circumstances such as to deprive the other of his normal power of self-protection or to subject him to association with persons likely to harm him, is under a duty to exercise reasonable care so to control the conduct of third persons as to prevent them from intentionally harming the other or so conducting themselves as to create an unreasonable risk of harm to him, if the actor

(a) knows or has reason to know that he has the ability to control the conduct of the third persons, and

(b) knows or should know of the necessity and opportunity for exercising such control.

TITLE D. SPECIAL LIABILITY OF POSSESSORS OF LAND TO LICENSEES

§ 342. Dangerous Conditions Known to Possessor

A possessor of land is subject to liability for physical harm caused to licensees by a condition on the land if, but only if,

(a) the possessor knows or has reason to know of the condition and should realize that it involves an unreasonable risk of harm to such licensees, and should expect that they will not discover or realize the danger, and

(b) he fails to exercise reasonable care to make the condition safe, or to warn the licensees of the condition and the risk involved, and

(c) the licensees do not know or have reason to know of the condition and the risk involved.

TITLE E. SPECIAL LIABILITY OF POSSESSORS OF LAND TO INVITEES

§ 343. Dangerous Conditions Known to or Discoverable by Possessor

A possessor of land is subject to liability for physical harm caused to his invitees by a condition on the land if, but only if, he

(a) knows or by the exercise of reasonable care would discover the condition, and should realize that it involves an unreasonable risk of harm to such invitees, and

(b) should expect that they will not discover or realize the danger, or will fail to protect themselves against it, and

(c) fails to exercise reasonable care to protect them against the danger.

§ 343 A. Known or Obvious Dangers

(1) A possessor of land is not liable to his invitees for physical harm caused to them by any activity or condition on the land whose danger is known or obvious to them, unless the possessor should anticipate the harm despite such knowledge or obviousness.

(2) In determining whether the possessor should anticipate harm from a known or obvious danger, the fact that the invitee is entitled to make use of public land, or of the facilities of a public utility, is a factor of importance indicating that the harm should be anticipated.

§ 344. Business Premises Open to Public: Acts of Third Persons or Animals

A possessor of land who holds it open to the public for entry for his business purposes is subject to liability to members of the public while they are upon the land for such a purpose, for physical harm caused by the accidental, negligent, or intentionally harmful acts of third persons or animals, and by the failure of the possessor to exercise reasonable care to

(a) discover that such acts are being done or are likely to be done, or

(b) give a warning adequate to enable the visitors to avoid the harm, or otherwise to protect them against it.

GUIDELINES FOR INSURER - DEFENSE COUNSEL RELATIONS

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INTRODUCTION

Much has been written lately about the increasing tension between insurance companies and their hired defense counsel. While everyone remains interested in the efficient and cost effective defense of lawsuits against insureds, many different approaches have been suggested as to how best to achieve that goal while providing a competent and effective defense. Often times, the lack of communication between the defense bar and insurance carriers leads to distrust and misunderstanding concerning the goals of each. Lawyers feel that they bear the brunt of "fee compression". Insurance companies believe that when a case is assigned to defense counsel, that they lose control over the decision-making process in litigation. The tension is heightened at a time when many insurance companies have consolidated their casualty and claims departments, reduced

staffs, and moved toward regionalized or national claims management. The personal relationships between claims representatives and defense counsel have been broken by this consolidation which makes meaningful communication more difficult.

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With this as a backdrop, the Client Relations Committee of the Iowa Defense Counsel Association met to discuss mutual concerns and aspirations of insurance companies and the defense bar of insurance companies under the defense bar. Recently, committee members received the *Principles of Cooperation for Attorneys and Physicians* which has been widely circulated and approved by the Iowa Medical Society and Iowa State Bar Association. With those guidelines in mind, the committee promulgated its own guidelines for insurer -- defense counsel relations. These guidelines are designed to improve and enhance the relationship between insurers and defense counsel. They are intended to be suggestions, rather than rules. The common theme is the importance of communication between the parties.

1. The insured is entitled to the protection afforded under his or her contract of insurance.
2. The insurer retains control over the defense of its insured.
3. The insurer in controlling the defense should allow defense counsel to proceed in a manner which will allow for a viable cost effective defense of the insured. The insurer and

defense counsel should share in decisions regarding defense strategy.

4. The insurer is also a client of the attorney.
5. The claim representative and defense counsel who are in charge of the case should be identified so that a clear line of communication can be maintained.
6. Defense counsel should comply with any internal case management protocol established by the insurer.
7. Neither defense counsel nor claims personnel assigned to the defense of an insured should discuss the merits of any coverage issues involving that insured.
8. The insurer and defense counsel should candidly exchange their respective evaluations of the case as it develops. Defense counsel should ensure that the insurer is provided with information about significant developments in the case on a timely basis.
9. The insurer and defense counsel should pursue the judicious use of ADR as a means of resolving cases.
10. The insurer should receive billings at mutually agreeable intervals which sufficiently describe the services rendered and the basis upon which the bill is calculated.
11. Insurance companies should recognize the quality of service and tenure of relationship with defense counsel when entering into fee arrangements with them.

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ETHICAL AND BAD-FAITH CONSIDERATIONS REGARDING

COST CONTAINMENT IN INSURANCE DEFENSE

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ETHICAL AND BAD-FAITH CONSIDERATIONS REGARDING COST CONTAINMENT IN INSURANCE DEFENSE

I - THE TRIPARTITE RELATIONSHIP

In the context of a traditional liability insurance policy, the primary liability insurer assumes two important, but distinct, duties to the insured under the insurance contract:

1. The duty to defend the insured; and

2. The duty to indemnify the insured for covered losses.

In recent years, the insurance industry has expressed concern that defense costs have escalated more rapidly than premium increases can accommodate. The insurer's desire to control and contain litigation costs raises issues regarding the insurer's and defense attorney's responsibilities to the insured. This paper will address the ethical and bad-faith considerations regarding cost containment in the context of the duty to defend the insured under a liability-insurance contract.

The liability-insurance contract expressly or impliedly authorizes the insurer to delegate performance of this duty to defend the insured to an attorney. However, unless the insured would agree otherwise, the delegation of the performance of such duty to defend does not discharge any duty or liability of the insurer. See Restatement (Second) of Contracts, §318(3).

The resulting "tripartite" relationship of the insured, the insurer and the defense counsel generates a complex mixture of contractual, fiduciary and ethical obligations.

The tripartite relationship has been described as one containing "rife possibility of conflict." Atlanta Int'l Ins. Co. v. Bell, 475 N.W.2d 294, 297 (Mich. 1991). One Court described the ethical dilemma imposed on the insurer-retained defense attorney as one which "would tax Socrates." Hartford Accident & Indem. Co. v. Foster, 528 So. 2d 255, 273 (Miss. 1988). This paper will describe the various duties arising in this tripartite relationship with general reference to cases from other jurisdictions but with a primary focus on Iowa law. This area of the law is not well-developed and is further complicated by differing, and sometimes ambiguous, definitions of such phrases as "good faith", "fiduciary duty", etc.

This paper will attempt to identify the responsibilities of the insurer and defense attorney to the insured/client and

attempt to correlate these responsibilities with cost-containment issues.

A. THE RELATIONSHIPS AMONG THE PARTIES.

1. INSURER-INSURED: This relationship is based upon, and generally defined by, the insurance contract. Certain courts have found a special fiduciary relationship between the insurer and the insured and held the insurer to a heightened standard of care. See Center Foundation v. Chicago Ins. Co., 227 Cal. App. 3d 547, 278 Cal. Rptr. 13, 21 (1991) (selection of independent counsel); L & S Roofing Supply Co. v. St. Paul Fire & Marine Ins. Company, 521 So. 2d 1298, 1304 (Ala. 1987) (defense with reservation of rights).

- IOWA: The insurer-insured relationship in Iowa is based upon, and generally defined by, the insurance contract. See Essex Ins. Co. v. Fieldhouse, Inc., 506 N.W.2d 772, 775 (Iowa 1993); A.Y. McDonald Indus. v. INA, 475 N.W.2d 607, 618-19 (Iowa 1991).

However, beyond the express obligations of the insurance contract, the Iowa Supreme Court has recognized an implied legal duty of good faith and fair dealing. See Kooyman v. Farm Bureau Mut. Ins. Co., 315 N.W.2d 30, 33 (Iowa 1982); Amsden v. Grinnell Mut. Reins. Co., 203 N.W.2d 252, 254-55 (Iowa 1972).

This duty of "good faith" may denote different obligations in different situations:

> "... 'good faith' is used in a variety of contexts, and its meaning varies somewhat with the context. Good faith performance or enforcement of a contract emphasizes faithfulness to an agreed common purpose and consistency with the justified expectations of the other party; it excludes a variety of types of conduct characterized [in other contexts] as involving 'bad faith' because they violate community standards of decency, fairness or reasonableness."

Restatement (Second) of Contracts §205, Comment (a) (1981), quoted in Kooyman v. Farm Bureau Mut. Ins. Co., 315 N.W.2d 30, 34 (Iowa 1982). This implied covenant of good faith in an insurance contract is a reciprocal agreement between the insurer and insured that "neither party will do anything to injure the rights of the other in receiving the benefits of the agreement." See Kooyman v. Farm Bureau Mut. Ins. Co., 315 N.W.2d 30, 33 (Iowa 1982).

Black's Law Dictionary (Rev. 4th ed. 1968), at 822,

defines "good faith", inter alia, as an honest intention to abstain from taking unfair advantage of another. The Iowa Uniform Commercial Code defines "good faith" as "honesty in fact and the observance of reasonable commercial standards of fair dealing in the trade." See Iowa Code Section 554.2103(b). Iowa cases have suggested that "good faith" requires that the insurer give equal consideration to the interests of itself and of the insured. See Kooyman v. Farm Bureau Mut. Ins. Co., 315 N.W.2d 30, 34 (Iowa 1982); Koppie v. Allied Mut. Ins. Co., 210 N.W.2d 844, 848 (Iowa 1973).

Therefore, the insurer's covenant of good faith to the insured might be described as honesty in fact with the insurer giving equal consideration to the interests of, and not unfairly taking advantage of, the insured.

Although the Iowa Supreme Court recognizes a covenant of good faith between the insurer and the insured in the context of a first-party claim (insured v. insurer) and in the context of a third-party claim (third person v. insured), there are significant differences.

In a first-party situation, the insurer-insured relationship is recognized as an arms-length relationship. See North Iowa State Bank v. Allied Mut. Ins. Co., 471 N.W.2d 824, 828 (Iowa 1991); Pirkl v. Northwestern Mut. Ins. Ass'n, 348 N.W.2d 633, 635 (Iowa 1984). In such a first-party situation, the Supreme Court has adopted a "fairly debatable" standard for an insurer's conduct in denying an insured's claim; that is, the insurer is not responsible for bad faith in a first-party claim if the claim is fairly debatable. See North Iowa State Bank v. Allied Mut. Ins. Co., 471 N.W.2d 814, 828-29; Kiner v. Reliance Ins. Co., 463 N.W.2d 9, 12 (Iowa 1990); Dolan v. Aid Ins. Co., 431 N.W.2d 790, 794 (Iowa 1988).

In contrast, in a third-party situation, the Iowa Supreme Court has adopted a heightened duty standard for the insurer to the insured due to the insurer's position as a professional defender of claims and due to the insurer's control of the defense process. See Kooyman v. Farm Bureau Mut. Ins. Co., 315 N.W.2d 30, 33 (Iowa 1982).

This heightened standard of care has been described in question form as follows:

> "Did the insurer exercise that degree of skill, judgment, and consideration for the welfare of the insured which it, as a skilled professional defender of lawsuits having sole charge of the investigation, settlement, and trial of the suit may have been expected to utilize?"

7C J. Appleman, Insurance Law & Practice, Section 4712, at 425-26 (1979), quoted in Kooyman v. Farm Bureau Mut. Ins. Co., 315 N.W.2d 30, 33 (Iowa 1982). See also, Iowa Uniform Civil Jury Instruction No. 1400.2 before and after the 1992 revisions. (Note: "Negligence" does not equal "bad faith", and, therefore, errors and mistakes which do not demonstrate or infer indifference or disregard for the interests of the insured are irrelevant to a claim of "bad faith." See Ferris v. Employers Mut. Cas. Co., 122 N.W.2d 263, 266 (Iowa 1963)).

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Beyond the heightened-duty standard of care of an insurer in defending a third-party claim against the insured, the Iowa Supreme Court has also suggested possible fiduciary obligations of an insurer in defending such third-party claims. See Wierck v. Grinnell Mut. Reins. Co., 456 N.W.2d 191, 194-95 (Iowa 1990). See also, North Iowa State Bank v. Allied Mut. Ins. Co., 471 N.W.2d 824, 829 (Iowa 1991) (dicta); Pirkl v. Northwestern Mut. Ins. Ass'n, 348 N.W.2d 633, 635 (Iowa 1984) (dicta). Although the "fiduciary" duty of the insurer to the insured is not well-developed or well-defined under Iowa law, it appears that such duty may be triggered by potential exposure of the insured to unreasonable risk. See Wierck v. Grinnell Mut. Reins. Co., 456 N.W.2d 191, 194-95 (Iowa 1990). See also, North Iowa State Bank v. Allied Mut. Ins. Co., 471 N.W.2d 824, 828 (Iowa 1991).

Fiduciary duties normally denote an obligation to act primarily for the benefit of another. See Restatement (Second) of Agency, §13, Comment (a). Black's Law Dictionary (Rev. 4th ed. 1968), at 753, defines "fiduciary" as follows:

> The term is derived from the Roman law, and means (as a noun) a person holding the character of a trustee, or a character analogous to that of a trustee, in respect to the trust and confidence involved in it and the scrupulous good faith and candor which it requires. ... A person having duty, created by his undertaking, to act primarily for another's benefit in matters connected with such undertaking.... As an adjective it means of the nature of a trust; having the characteristics of a trust; analogous to a trust; relating to or founded upon a trust or confidence. (Citations omitted).

Fiduciary duties would appear to require that the fiduciary (insurer) act primarily, but not necessarily solely, for the benefit of the beneficiary (insured).

- Note: If Iowa has, in fact, adopted a fiduciary (or enhanced good-faith) standard for the insurer, such standard would increase the insurer's obligation to the insured which, in older Iowa cases, was described as rendering "equal consideration" to the interests of the insurer and insured.

See Kooyman v. Farm Bureau Mut. Ins. Co., 315 N.W.2d 30, 34 (Iowa 1982); Koppie v. Allied Mut. Ins. Co., 210 N.W.2d 844, 848 (Iowa 1973).

- Note: In Iowa, not only is there a question when, or in what circumstances, an insurer's fiduciary (enhanced good-faith) duty arises, but there is also a question of what such fiduciary (enhanced good-faith) duty requires. When such fiduciary (enhanced good-faith) duty arises, Iowa law appears to require the insurer to take whatever action is necessary to protect the interests of the insured. See North Iowa State Bank v. Allied Mut. Ins. Co., 471 N.W.2d 824, 828 (Iowa 1991); Pirkl v. Northwestern Mut. Ins. Ass'n, 348 N.W.2d 633, 635 (Iowa 1984).

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Possible evidence of bad faith and/or a violation of fiduciary duty has been described by courts in other states as follows:

1. failure to keep the insured fully informed of all developments in the claim or suit that could reasonably affect the interests of the insured;

2. failure to inform the insured of all settlement offers that do not fall within the policy limits;

3. failure to solicit a settlement offer or initiate settlement negotiations when warranted under the circumstances;

4. failure to accept a reasonable compromise offer of settlement when the facts of the case or claim indicate obvious liability and serious injury;

5. rejection of a reasonable offer of settlement within the policy limits;

6. undue delay in accepting a reasonable offer to settle a potentially dangerous case within policy limits where the verdict potential is high;

7. an attempt by the insurer to coerce or obtain an involuntary contribution from the insured to settle within policy limits;

8. failure to make a proper investigation of the claim prior to refusing an offer of settlement within the policy limits;

9. disregarding the advice or recommendation of an adjuster or attorney;

10. serious and recurrent negligence by the insurer;

11. refusal to settle a case within policy limits following an excessive verdict when the chances of reversal on appeal are slight or doubtful; and

12. failure to take an appeal following a verdict in excess of the policy limits where there are reasonable grounds for such an appeal, especially where trial counsel so recommended.

K. Bowdre, "Conflicts of Interest Between Insurer and Insured: Ethical Traps for the Unsuspecting Defense Counsel", 17 American Journal of Trial Advocacy 101, 137-38 (1993).

- Query: If the insured is not exposed to an excess judgment, would the insurer's duty to an insured be more accurately described as good faith and fair dealing and not as a fiduciary duty? If the insured is not exposed to an excess judgment, should the insurer be allowed to pursue the least expensive resolution of the claim?

2. INSURER-DEFENSE COUNSEL: This is a contractual relationship usually of on-going duration. There has been substantial dispute whether this relationship should be recognized as an attorney-client relationship, an employer-employee (independent contractor) relationship or some other type of relationship. See Atlanta Int'l Ins. Co. v. Bell, 475 N.W.2d 294, 297 (Mich. 1991); Nandorf, Inc. v. CNA Ins. Cos., 479 N.E.2d 988, 991 (Ill. 1985). See also, S. Machanic, "Insurance Defense Counsel: Who is the Client?" 43 Fed. Ins. Corp. Counsel Quarterly 45-52 (Fall 1992); N. DeMarco & E. Swartz, "The Role of Defense Counsel in the Tripartite Relationship", 42 Fed. Ins. Corp. Counsel Quarterly 381, 391-92 (Summer 1992). A recent journal, citing non-Iowa authority, has stated that, absent a conflict of interest, the defense attorney hired by the insurer represents both the insurer and the insured. K. Bowdre, "Conflicts of Interest Between Insurer and Insured: Ethical Traps for the Unsuspecting Defense Counsel", 17 American Journal of Trial Advocacy 101, 109 (1993). See, contra, Wunnike, "The Eternal Triangle Revisited: The Insurance Defense Lawyer and Conflicts of Interest", For The Defense, 20-27 (Nov. 1993).

Certainly, in the context of any conflict between the insurer and the insured in a third-party situation, the attorney must conduct himself or herself as if the insured is

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the only client. See K. Bowdre, "Conflicts of Interest Between Insurer and Insured: Ethical Traps for the Unsuspecting Defense Counsel", 17 American Journal of Trial Advocacy 101, 111 (1993). The fact that the insurer pays the defense attorney directly, rather than reimbursing the insured for such expense, does not change the fact that the attorney is representing the insured. See Atlanta Int'l Ins. Co. v. Bell, 475 N.W.2d 294, 301 (Mich. 1991) (dissenting opinion); Henke v. Iowa Home Mut. Cas. Co., 87 N.W.2d 920, 923 (Iowa 1958).

- IOWA: In Henke v. Iowa Home Mut. Cas. Co., 87 N.W.2d 920, 923 (Iowa 1958), the insurer denied that there was an attorney-client relationship between the defense attorney and the insured in a third-party situation and argued that the defense attorney was actually the insurer's attorney. The Supreme Court found that the defense attorney was, indeed, in an attorney-client relationship with the insured. Id. In that opinion, the Supreme Court referenced the defense attorney as representing the insured and insurer as joint clients. Id. at 923-24. The Court advised, however, that the attorney should not attempt to represent both parties if a conflict develops. Id. at 925.

In light of the increased sensitivity of conflicts of interest between the insurer and insured, and with the defense attorney's obligation to provide unimpaired, independent representation to the insured, the continued viability of the Henke description of a defense attorney, as the "joint" attorney of the insurer and insured, is questionable (at least in regard to the traditional type of attorney-client relationship). See, e.g., Atlanta Int'l. Ins. Co. v. Bell, 475 N.W.2d 294, 297 (Mich. 1991). See Iowa Code of Professional Responsibility for Lawyers, Disciplinary Rule 5-107(B) ("A lawyer shall not permit a person who recommends, employs, or pays him to render legal services for another to direct or regulate his professional judgment in rendering such legal services.")

In Petersen v. Farmers Cas. Co., 226 N.W.2d 226, 227-28 (Iowa 1975), the claimant (Coleman) recovered an excess judgment against the insured (Petersen), and the insured (Petersen), in turn, sued the insurer (Farmers Casualty Co.) because the defense attorney (Culver) did not perfect an appeal. The insured (Petersen) did not claim any independent negligence on the part of the insurer (Farmers Casualty Co.), but claimed that the negligence of the defense attorney (Culver) should be vicariously imputed to the insurer (Farmers Casualty Co.). Id. at 228-29. The insurer (Farmers Casualty Co.) argued that the defense attorney (Culver) was an independent contractor, and that the insurer, as an employer

of an independent contractor, should not be held liable for the attorney's negligence. Id. at 228.

In Petersen, the Iowa Supreme Court noted that there was a split of authority in other jurisdictions whether the defense attorney retained by the insurer is an independent contractor (for whom the insurer would not be vicariously liable) or an agent/employee of the insurer (for whom the insurer would be vicariously liable). Id. at 228-29.

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The Petersen Court held as follows:

> Limiting our conclusion to the facts before us and expressing no opinion as to the vicarious liability of an insurer to the insured for negligence of the insurer's attorney in the defense of a claim under the policy provisions which reserve that right to the insurer, we hold Farmers Casualty is liable for failing to perfect an appeal from the judgment rendered in favor of Coleman against plaintiff and that the negligence of Attorney Culver is imputable to Farmers Casualty.

Id. at 231.

The reason for the Court's decision was stated as follows:

> We hold when Farmers Casualty decided to appeal (which it was not obligated to do) and when it advised plaintiff it would take that course, thereby lulling plaintiff into a sense of security, it cannot later claim immunity because its lawyer negligently failed to perfect the appeal.

Id. at 230.

The Petersen Court distinguished between the insurer's contractual duty to defend (which was recognized as a mandatory policy duty) and the failure to appeal an adverse judgment (which was recognized as a voluntary obligation assumed separate from the policy). Id. at 229. In other words, the Court found the insurer vicariously liable for the defense attorney's negligence to perfect an appeal because the insurer represented to the insured that the insurer would appeal and the insured detrimentally relied on this representation. As noted above, the Court strictly confined its opinion to the facts of that case. Id. at 231. Although the issue was raised, the Court indicated that it did not need to decide the specific relationship between the insurer and defense attorney (independent contractor v. agent/employee) because the company lulled plaintiff into a sense of security

by representing it would appeal the decision. Id. at 228-30. (Query: If the Court imputed the negligence of the defense attorney to the insurer without any independent negligence on behalf of the insurer, did not the Court implicitly recognize the insurer as an agent/employee of the insurer?)

-Note: Compare Petersen v. Farmers Cas. Co., 226 N.W.2d 226 (Iowa 1975) with Atlanta Int'l Ins. Co. v. Bell, 475 N.W.2d 294 (Mich. 1991).

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As noted above, in Iowa, the insurer-defense counsel relationship is not well-defined. Attorneys may be concerned that, if the insurer-defense counsel relationship is recognized as an attorney-client relationship, defense counsel is subject to inherent conflicts of interest which would preclude unimpaired representation of the insured. Insurers may be concerned that, if the insurer-defense counsel relationship is not an attorney-client relationship (at least in the context of situations in which there is no conflict with the insured), the (pecuniary) interests of the insurer will not be zealously protected.

- Query: If an attorney is required to provide full disclosure to a client and to provide independent, unimpaired judgment to a client, can the attorney realistically consider the insurer a client when the insurer has retained the attorney to represent the interests of the insured?

Assuming, arguendo, that the insurer is not a "client" of the defense attorney in a traditional attorney-client relationship, Iowa law would still impose duties on the defense attorney to the insurer based upon the employment contract by which the insurer retains the defense attorney to represent the insured.

Arguably the insurer's employment of the defense attorney would impose the same type of covenants on the defense attorney as assumed by the insurer under the liability policy, that is, the duty of "good faith" (honesty in fact) and "fair dealing" (compliance with the heightened duty standards of a claims professional maintaining control of the defense).

These duties of good faith and fair dealing would include the duty to properly investigate and defend the claim, the duty to fully and fairly advise the insurer of relevant facts and proposed courses of action and the duty to do nothing to injure the rights of the insurer, subject only to the predominate ethical duties of the attorney to the insured, as defined by the Iowa Code of Professional Responsibility for Lawyers.

Therefore, even if the defense attorney does not

of an independent contractor, should not be held liable for the attorney's negligence. Id. at 228.

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Therefore, even if the defense attorney does not

represent the insurer in a traditional attorney-client context, there are important duties owed to the insurer (restricted only by the attorney's ethical obligations to the insured) which should permit the insurer to fulfill its own good-faith/fiduciary duties to the insured and to protect its own pecuniary interests.

If there is a disagreement between the insurer and defense attorney regarding the nature and extent of the duty to defend the insured, the duties of good faith and fair dealing would require that the parties attempt to resolve the differences of opinion between themselves in accordance with the insurer's and attorney's good-faith, fiduciary and ethical obligations to the insured.

If an impasse is reached, the insured must be advised, and, if the attorney feels that he or she cannot properly continue to represent the insured, the attorney should withdraw. See Iowa Code of Professional Responsibility for Lawyers, Disciplinary Rule 5-105(C), (D). (A recent journal article notes that, in the context of insurance defense, an attorney's withdrawal is not always a practical solution. If one attorney withdraws, the insurer must hire another attorney who will face the same conflict. Withdrawal because of a conflict of interest may also alert the carrier about a potential coverage defense, which may be detrimental to the insured, in violation of the duty of loyalty the attorney owes the insured. See K. Bowdre, "Conflicts of Interest Between Insurer and Insured: Ethical Traps for the Unsuspecting Defense Counsel", 17 American Journal of Trial Advocacy 101, 107-08 (1993)).

Although the insurer-defense attorney relationship is not well-defined under Iowa law, arguably the relationship should be recognized as the insurer's employment of a professional with the good-faith, fair-dealing, and heightened-duty obligations described in the context of the insurer-insured's contract. The duties of the defense attorney to the insurer arising from this employment relationship would appear to adequately meet the information needs of the insurer to perform its obligations under the liability policy and to protect its own pecuniary interests without exposing the defense attorney to a myriad of conflict issues by suggesting that the insurer and insured are "joint clients". (It should be noted that, of course, the insurer would be the "client" if the attorney was actually representing the interests of the insurer as a party and not retained by the insurer to represent the interests of the insured).

The recognition of the insurer as the employer of, but not the client of, the defense attorney in a third-party situation is reflected in Opinion No. 90-48 of the Committee

on Professional Ethics and Conduct of the Iowa State Bar Association (5/24/91), a copy of which is attached hereto, marked as Appendix "A", which distinguishes between an attorney previously representing the insurer and an attorney previously representing parties insured by the insurer.

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- Note: Defense counsel's representation of the insured would appear to justify reasonable reliance of the insurer on the opinion of defense counsel regarding the value of the case, whether the case should be tried or settled, etc. See Ferris v. Employers Mut. Cas. Co., 255 Iowa 511, 518, 122 N.W.2d 263, 267 (1963) (it was reasonable for the insurer to rely on the advice of its defense counsel that the case against its insured could be successfully defended). However, the opinion of defense counsel has been considered only one factor in the insurer's decision whether to settle. Other factors include the anticipated range of an adverse verdict, the strengths and weaknesses of all evidence, the history of similar cases in the particular geographic region and the relative appearance and persuasiveness of the parties and witnesses. See K. Bowdre, "Conflicts of Interest Between Insurer and Insured: Ethical Traps for the Unsuspecting Defense Counsel", 17 American Journal of Trial Advocacy 101, 138 (1993).

- Note: The insurer cannot absolve itself from legal responsibility to the insured merely by retaining competent defense counsel. The insurer maintains its legal duty of good faith and fair dealing to the insured by retention of control of the defense under the policy and by retention of the indemnity power (when to settle). The insurer and attorney owe simultaneous duties to the insured.

3. INSURED-DEFENSE COUNSEL: This is generally considered an attorney-client relationship in every respect. See Allstate Ins. Co. v. Keller, 149 N.E.2d 482, 486 (Ill. 1958); K. Bowdre, "Conflicts of Interest Between Insurer and Insured: Ethical Traps for the Unsuspecting Defense Counsel", 17 American Journal of Trial Advocacy 101, 112-13 (1993). Thus, the defense attorney is subject to all fiduciary and ethical obligations to the client/insured as if the client/insured had personally hired the attorney. When a conflict arises, the insured/client must be the attorney's principal concern. See Tank v. State Farm Fire & Cas. Co., 715 P.2d 1133, 1137 (Wash. 1986).

- Note: There is an excellent article by Brooke Wunnicke in the November 1993 issue of "For the Defense" which addresses the complex issue of who is the insurance-defense attorney's client: Is it only the insured or is it both the insured and the insurer? Wunnicke, "The Eternal Triangle Revisited: The Insurance Defense Lawyer and Conflicts of

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- Note: The insurer cannot absolve itself from legal responsibility to the insured merely by retaining competent defense counsel. The insurer maintains its legal duty of good faith and fair dealing to the insured by retention of control of the defense under the policy and by retention of the indemnity power (when to settle). The insurer and attorney owe simultaneous duties to the insured.

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Interest", For The Defense (Nov. 1993). Ms. Wunnicke references ABA Formal Opinion 282 (1950) which states that:

> "(1) A lawyer may ethically undertake the dual representation of the insurer and the insured in the defense of a third-party action against the insured; and (2) the lawyer so employed "shall represent the insured as his client with undivided fidelity".

Id. at 21. Ms. Wunnicke notes that the ABA Opinion approves the lawyer's undertaking of dual representation because the insured and insurer, at least at the outset, have a "community of interest" growing out of the liability insurance contract. Ms. Wunnicke notes that ABA Formal Opinion 282 (1950) is still in effect, and ABA Informal Opinion 1476 (1981) confirms that "when a liability insurer retains a lawyer to defend an insured, the insured is the lawyer's client". Id. Ms. Wunnicke notes that there is a perceptible national trend that only the insured is the attorney's client and not the insurer. Id. at 21, 27.

- NOTE: Atlanta Int'l Ins. Co. v. Bell, 438 Mich. 512, 475 N.W.2d 294 (1991): Herbert Harvey (claimant) sued Security Services (insured) claiming negligence of Security Services. Atlanta International (insurer of Security) retained Attorney Bell (defense attorney) to defend Security (insured) in this claim. Following a judgment against Security Services (insured), Attorney Bell (defense attorney) was sued for legal malpractice by Atlanta International (insurer). Attorney Bell (defense attorney) admitted in a pre-trial deposition that his failure to plead contributory negligence in the underlying action did not conform to the requisite standard of care for an attorney. Id. at 296. The Supreme Court of Michigan held that there was no attorney-client relationship between defense counsel and the insurer and recognized the "general rule of law" that an attorney cannot be held liable for negligence to someone other than the client in the absence of special circumstances. Id. at 296-97. However, the Michigan Supreme Court reasoned that this case presented special circumstances because the case did not present a conflict of interest between the insured and the insurer and that the basis for the malpractice claim was a technical procedural error by defense counsel and not any perceived error of trial strategy. Id. at 297-99. Therefore, the insurer could maintain a legal malpractice action against the defense counsel retained to defend its insured under the doctrine of "equitable subrogation" when there was no conflict of interest between the insurer and its insured. Id. (See Appendix "C").

- Query: The traditional prohibition against

malpractice actions against lawyers by nonclients apparently is intended to protect the attorney's independent (discretionary) judgment on behalf of the client (insured). Is Bell attempting to recognize attorney liability for nondiscretionary legal fault which arguably constitutes breach of the implied contract with the insurer?

- IOWA: In Iowa, the defense attorney-insured relationship is recognized as an attorney-client relationship, except that the Court has recognized that the attorney may communicate information to the insurer (at least when it is not prejudicial to the insured). See Henke v. Iowa Home Mut. Cas. Co., 87 N.W.2d 920, 923 (Iowa 1958).

In an attorney-client relationship, an attorney is required to act in good faith and to exercise a reasonable degree of care, skill and diligence in performing services for a client. See Baker v. Beal, 225 N.W.2d 106, 112 (Iowa 1975).

This duty requires attorneys to use the knowledge, skill, prudence and diligence ordinarily exercised by attorneys in similar circumstances. See Martinson Mfg. Co. v. Seery, 351 N.W.2d 772, 775 (Iowa 1984); Millwright v. Romer, 322 N.W.2d 30, 32 (Iowa 1982); Kurtenbach v. TeKippe, 260 N.W.2d 53, 56 (Iowa 1977).

An attorney is not an insurer of the successful outcome of litigation unless the attorney makes a special contract to that effect. See Lundy, Butler & Lundy v. Bierman, 398 N.W.2d 212, 215 (Iowa App. 1986). See also, Martinson Mfg. Co. v. Seery, 351 N.W.2d 772, 775 (Iowa 1984).

A lawyer is not liable for an error in judgment so long as the lawyer makes the judgment in good faith after exercising due care. See Martinson Mfg. Co. v. Seery, 351 N.W.2d 772, 775 (Iowa 1984); Baker v. Beal, 225 N.W.2d 106, 112 (Iowa 1975).

In order to maintain a lawyer malpractice action, the plaintiff must establish the existence of an attorney-client relationship with respect to the particular act or omission on which the malpractice claim is based. See Kurtenbach v. TeKippe, 260 N.W.2d 53, 56 (Iowa 1977). Absent special circumstances, it generally is held that an attorney can be liable for consequences of professional negligence only to a client. See Brody v. Ruby, 267 N.W.2d 902, 906 (Iowa 1978).

Relevant ethical obligations of the defense attorney are attached hereto, marked as Appendix "B". Canon 4 (A lawyer should preserve the confidences and secrets of a client) and Canon 5 (A lawyer should exercise independent professional judgment on behalf of a client).

- Query: If the defense attorney independently represents the insured, should the insurer be immune from vicarious liability for the attorney's negligence and only be held liable for breach of an independent duty to the insured? That is, should "control" determine "liability"?

B. POTENTIAL SOURCES OF CONFLICT

1. Reservation of Rights/Coverage Defenses: Defending under a reservation of rights (policy breach) or preservation of coverages defenses (claim not covered by policy). This is the most frequent source of litigation among the "triad."

a. San Diego Navy Federal Credit Union v. Cumis Ins. Society, Inc., 162 Cal. App. 3d 358, 370, 208 Cal. Rptr. 494, 502 (1984), held that "[a] conflict arises once the insurer takes the view [that] a coverage issue is present." In such a conflict situation the insured is entitled to independent counsel at the insurer's expense (unless the insured gives informed consent to the continued representation by the attorney retained by the insurer). 162 Cal. App. 3d at 375; 208 Cal. Rptr. at 506. This counsel has become known as "Cumis Counsel".

b. Some jurisdictions hold that not all cases defended under a reservation of rights create a conflict of interest which requires independent Cumis counsel. These jurisdictions impose a higher standard of good faith on insurers when defending such cases. L & S Roofing Supply Co. v. St. Paul Fire & Marine Ins. Co., 521 So. 2d 1298, 1304 (Ala. 1987); Tank v. State Farm Fire & Cas. Co., 105 Wash.2d 381, 715 P.2d 1133, 1137 (1986). Breach of this enhanced obligation of good faith creates a rebuttable presumption of harm and the insurer is estopped from denying coverage. Safeco Ins. Co. v. Butler, 118 Wash. 2d 383, 823 P.2d 499, 506 (1992).

c. A number of cases have held that, if the reservation of rights arises because of coverage issues related to conduct of the insured, then a conflict arises and independent Cumis counsel is required. But, if the coverage dispute is independent of the issues in the underlying case, Cumis counsel is not required. See Blanchard v. State Farm Fire & Cas. Co., 2 Cal. App. 4th 345, 2 Cal. Rptr. 2d 884, 887 (1991); Foremost Ins. Co. v. Wilks, 206 Cal. App. 3d 251, 253 Cal. Rptr. 596, 602 (1988). See also, Fireman's Fund Ins. Co. v. Waste Management of Wisconsin, Inc., 777 F.2d 366 (7th Cir. 1985).

d. Right to Independent Counsel: See CHI of Alaska, Inc. v. Employers Reinsurance Corp., 844 P.2d 1113 (Alaska 1993): Insurer's reservation of rights regarding allegedly noncovered claims created a conflict of interest, and Alaska Supreme Court found that the insured was entitled to independent counsel of the insured's own choosing, subject to the insured's implied covenant of good faith and fair dealing. (See Appendix "D").

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Query: Is the insured's duty of good faith and fair dealing sufficient to assure selection of a reasonably competent defense attorney? The insured may have insufficient expertise to evaluate defense counsel. See Part 5 infra.

2. Defense of Alternate Claims, One with Coverage and the Other With No Coverage. In this situation, conflict is based on the premise that the insurer's interest would be in steering liability toward the noncovered claim or not vigorously defending the noncovered claim. The insurer's duty to defend is triggered if the petition alleges any cause of action within, or potentially within, coverage of the policy. Mutual Serv. Cas. Ins. Co. v. Luetmer, 474 N.W.2d 365, 368 (Minn. App. 1991); Maryland Cas. Co. v. Peppers, 64 Ill. 2d 187, 355 N.E.2d 24, 28 (1976); Economy Fire & Cas. Co. v. Iverson, 445 N.W.2d 824, 826 (Minn. 1989). In a conflict where there are alternate claims, some of which are covered while others are not, the attorney must fully disclose the conflict and how it would impact the insured.

a. See First Newton Nat'l Bank v. General Cas. Co. of Wisc., 426 N.W.2d 618, 630 (Iowa 1988) (presence of at least one covered claim in suit gave rise to duty to defend on all counts).

b. Iowa: Insurer's duty to defend is separate from and broader than its duty to indemnify. See Essex Ins. Co. v. Fieldhouse, Inc., 506 N.W.2d 772, 775 (Iowa 1993); West Bend Mut. v. Iowa Iron Works, 503 N.W.2d 596, 601 (Iowa 1993); A.Y. MacDonald Indus., Inc. v. Insurance Co. of North America, 475 N.W.2d 607, 627 (Iowa 1991).

3. Defense of Claims for Damages in Excess of Policy Limits. The conflict in this situation arises because the insurer sometimes has no incentive to accept a settlement within policy limits creating the risk of litigation resulting in an unfavorable verdict which would subject the insured to liability in excess of his or her coverage. The possibility of liability exceeding policy limits does not, in itself, trigger a conflict of interest. See Littlefield v. McGuffey, 979 F.2d 101, 108 (7th Cir. 1992). Jurisdictions differ in

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what degree of consideration the insurer must give to settlement offers within policy limits when there is a danger of an excess verdict. Some hold that the insurer should consider the settlement offer as though its liability was unlimited. See Voccio v. Reliance Ins. Co., 703 F.2d 1, 2 (1st Cir. 1983). Other jurisdictions take the position that it is sufficient for the insurer to give the insured's interests consideration equivalent to its own. See National Serv. Ind. v. Hartford Accident & Indem. Co., 661 F.2d 458, 461 (5th Cir. 1981).

- See Kooyman v. Farm Bureau Mut. Ins. Co., 315 N.W.2d 30, 34 (Iowa 1982); Koppie v. Allied Mut. Ins. Co., 210 N.W.2d 844, 848 (Iowa 1973). (The test is whether the insurer has approached the matter of settlement as if there were no policy limits. When it does so, it views the claim objectively and renders equal consideration to the interests of itself and of the insured).

4. Defense of Multiple Insureds. Generally, multiple insureds can be defended jointly unless their interests truly conflict. Spindle v. Chubb/Pacific Indem. Group, 89 Cal. App. 3d 706, 152 Cal. Rptr. 776, 781-82 (1979). A conflict of this nature exists when the joint representation renders the attorney's representation of one insured to be less effective by reason of his representation of the other. Id. at 780. The insurer must disclose to each insured enough information to allow a "intelligent, informed decision regarding the ... joint representation." Id.

5. Regarding the issue whether an insurer has a duty to pay for the cost of hiring an independent counsel to represent the interests of its insured when a conflict arises between the insured and insurer, see "Duty of Insurer to Pay for Independent Counsel When Conflict of Interest Exists Between Insured and Insurer", 50 A.L.R.4th 932 (1986). An interesting issue arises in determining who is an "independent" counsel. Is "independent" counsel an attorney instructed by the insurer to represent only the insured and not the insurer, an attorney who has had no prior connection with the insurer, or an attorney of the insured's choice? See K. Bowdre, "Conflicts of Interest Between Insurer and Insured: Ethical Traps for the Unsuspecting Defense Counsel", 17 American Journal of Trial Advocacy 101, 119-21 (1993) (Selection of independent counsel varies among jurisdictions. For an example of an insured's abuse of the "right" to seek the insured's own independent counsel, see Center Found. v. Chicago Ins. Co., 227 Cal. App. 3d 547, 560, 278 Cal. Rptr. 13, 17-18 (1991)).

- Note: The Washington Supreme Court noted that, rather than paying the insured's independently-retained counsel, the insurer may retain counsel to represent the

insured despite a reserved coverage issue, if the insurer meets the following heightened standard of good faith:

(1) The insurer must perform a thorough investigation and retain competent counsel for the insured.

(2) Both the insurer and defense counsel must understand that only the insured is counsel's client.

(3) The insurer must keep the insured fully informed of all developments on the coverage and liability issues, including all settlement demands and offers.

(4) The insurer must refrain from any action indicating a greater concern for the insurer's monetary interest than for the insured's.

Also, the Tank court noted the following requirements for defense counsel:

(1) Be clear that counsel's representation is of the insured only.

(2) Disclose all potential conflicts between the insured and the insurer.

(3) Communicate to the insured all relevant information concerning the defense.

(4) Disclose all offers of settlement.

Id. at 1137.

II - BAD-FAITH CONSIDERATIONS

A. TORT OF BAD FAITH: THIRD-PARTY CLAIM.

1. When an insured is sued by a third party, standard liability insurance policies give control over the settlement and defense of the claim to the insurer, at least up to the policy limits. See Kooyman v. Farm Bureau Mut. Ins. Co., 315 N.W.2d 30, 32-33 (Iowa 1982). This control begets legal responsibility. The insurer must pay for the defense of the suit regardless of the claim's size. Id. The insurer appears also to owe a fiduciary duty to the insured to act responsibly in settlement negotiations when the claim might exceed policy limits. See North Iowa State Bank v. Allied Mut. Ins. Co., 471 N.W.2d 824, 828 (Iowa 1991)(dicta).

2. Iowa has long recognized the right of an insured to sue its insurer for bad faith in refusing to settle a third-party claim within policy limits. See, e.g., Kooyman v. Farm

Bureau Mut. Ins. Co., 315 N.W.2d 30 (Iowa 1982); Koppie v. Allied Mut. Ins. Co., 210 N.W.2d 846 (Iowa 1973). Bad faith in this context does not imply fraud or positive misconduct of a malicious, illegal or immoral nature. See Kooyman v. Farm Bureau Mut. Ins. Co., 315 N.W.2d at 34. It refers rather to a breach of the implied covenant of good faith which derives from the insurance contract and runs from the insurer to the insured. Id.; see Long v. McAllister, 319 N.W.2d 256, 261 (Iowa 1982). This requires that the insurer give as much consideration to the insured's interests as it does to its own. See Long v. McAllister, 319 N.W.2d 256, 262 (Iowa 1982). The test for determining whether the insurer has fulfilled this duty is whether it acted as if there were no policy limits so that it, too, would be liable for the full judgment should the claim be tried. See Kooyman v. Farm Bureau Mut. Co., 315 N.W.2d 30, 34 (Iowa 1982).

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3. The right to sue in tort for the insurer's breach of this duty belongs to the insured. Iowa does not recognize a cause of action by the third party against an insurer for the insurer's bad faith refusal to settle the third party's claim against the insured. See Long v. McAllister, 319 N.W.2d 256, 262 (Iowa 1982). However, Iowa does recognize a cause of action by an employee against the employer's worker's compensation insurance carrier for bad faith refusal to pay benefits. See Boylan v. American Motorists Ins. Co., 489 N.W.2d 742, 744 (Iowa 1992).

4. Duty to Investigate: As a result of the insurance contract and obligation of good faith, the insurer has the duty to investigate the third-party claim and take whatever actions are necessary to protect the insured's interests. See North Iowa State Bank v. Allied Mut., 471 N.W.2d 824, 828 (Iowa 1991). Inadequate investigation of the claim by the insurer can support a finding of bad faith. See Kooyman v. Farm Bureau Mut. Ins. Co., 315 N.W.2d 30, 35 (Iowa 1982). The Kooyman court found that a jury question on this issue was generated where the following facts were present:

1. insurer's attorneys took only one witness statement despite the presence of numerous witnesses to the accident;

2. insurer's counsel attended depositions arranged by co-defense counsel, but did not arrange for their own depositions;

3. insurer's attorneys refused to help co-defendants pay for deposition of a critical expert medical witness;

4. insurer's attorneys elicited damaging testimony from their own witnesses at trial; and

5. insurer's attorneys moved for a mistrial or a continuance after the co-defendants settled, arguably because they were unprepared to try the suit themselves.

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5. Duty to Negotiate: Conduct in settlement negotiations can also support a finding of bad faith. In Kooyman, the court pointed to evidence that the insurer's attorneys failed to inform the insured of a new settlement offer. Such a failure was indicative of bad faith. Id. at 36. Also, their failure to advise the insured in detail of the probable consequences of his refusal to settle could be indicative of bad faith. Id. On the other hand, to succeed with this tort an insured must show that a settlement offer was in fact extended to, and was rejected by, the insurer in bad faith. If no settlement offer was made, there can be no bad faith tort. See Wierck v. Grinnell Mutual Reins. Co., 456 N.W.2d 191, 195 (Iowa 1990).

B. TORT OF BAD FAITH: FIRST-PARTY CLAIM.

1. When It Arises: The tort of bad-faith refusal to settle a third-party claim in part "A" above arises in liability cases where coverage of the third-party claim is not in dispute. See, e.g., Kooyman v. Farm Bureau Mut. Ins. Co., 315 N.W.2d 30 (Iowa 1982) (insurer never disputed liability coverage). When the insurer does dispute coverage of the third-party claim, different standards of good/bad faith apply as to the insured's (first-party) claim for coverage. See, e.g., North Iowa State Bank v. Allied Mut. Ins. Co., 471 N.W.2d 824 (Iowa 1991) (insurer disputed coverage of third-party claim for disposition of collateral in other than a commercially reasonable manner). These different standards also apply in casualty insurance cases where the insurer disputes either actual coverage of the first-party claim or the amount of the first-party claim. See, e.g., Kiner v. Reliance Ins. Co., 463 N.W.2d 9 (Iowa 1990) (involving bad-faith tort suit against worker's compensation insurer for denying claim on grounds that medications sought were for drug addiction, not injuries); Dirks v. Farm Bureau Mut. Ins. Co., 465 N.W.2d 857 (Iowa 1991) (involving bad faith tort suit against insurer for refusal to pay limits on Plaintiff's underinsurance coverage).

2. Distinct From Third-Party Tort: The insured and the insurer have an arm's length relationship with first-party claims. See Pirkl v. Northwestern Mut. Ins. Ass'n, 348 N.W.2d 633, 635 (Iowa 1984); North Iowa State Bank v. Allied Mut. Ins. Co., 471 N.W.2d 824, 829 (Iowa 1991). The contractual

relationship which gives rise to the bad-faith tort does not involve the same fiduciary duties in first-party cases as in third-party cases. See Dolan v. AID Ins. Co., 431 N.W.2d 790, 794 (Iowa 1988). The two parties, insurer and insured, are on opposite sides of the issue, rather than on the same side as with a third-party claim. See Pirkl v. Northwestern Mut. Ins. Ass'n, 348 N.W.2d 633, 635 (Iowa 1984).

3. Two-Part Test: The Iowa Supreme Court first recognized the tort for bad-faith refusal to recognize a first-party claim in Dolan v. AID Ins. Co., 431 N.W.2d 790 (Iowa 1988). The Dolan court approved a test which was subsequently modified by Kiner v. Reliance Ins. Co., 463 N.W.2d 9 (Iowa 1990). Presently, an insured must prove both an objective and a subjective element of a two-part test in order to establish that the insurer denied or delayed a claim in bad faith:

1. No reasonable basis existed for the insurer's denial of the insured's claim.
2. The insurer denied the claim knowing or having reason to know that denial was without reasonable basis.

See Wetherbee v. Economy Fire & Cas. Co., 508 N.W.2d 657, 661-62 (Iowa 1993). The first element of the test is not satisfied if the claim is fairly debatable, since, in that event, the insurer is entitled to debate it, and no bad faith could exist. See Dolan v. AID Ins. Co, 431 N.W.2d 790, 794 (Iowa 1988). The Court has defined "fairly debatable" as requiring an insured to prove that the insurer's refusal to recognize a claim was not based on an honest and informed judgment. See Nassen v. National States Ins. Co., 494 N.W.2d 231, 236 (Iowa 1992). The insurer's actions are to be judged by evidence available at the time it repudiated the award. See Central Life Ins. v. Aetna Cas. & Sur., 466 N.W.2d 257, 263 (Iowa 1991).

4. Duty to Investigate: With a first-party claim, the insurer has no clearly defined duty of investigation. See Pirkl v. Northwestern Mut. Ass'n, 348 N.W.2d 633, 635 (Iowa 1984). The insurer may request adequate proof of loss from the insured before paying the claim. Id. However, the manner in which the insurer investigates or evaluates a first party claim will play an important part in determining liability under the two-part test. An insurer's intentional, reckless or negligent failure to investigate or evaluate a first-party claim is an element toward proving the objective first part of the test. See Reuter v. State Farm Mut. Auto Ins. Co., 469 N.W.2d 250, 254 (Iowa 1991). Such a failure to investigate or evaluate is also significant in establishing the subjective

second part of the test. In fact, subjective bad faith may be inferred from a flawed investigation standing alone. Id. The objective element may not be proved by a lack of investigation alone, however, so that more is needed to establish a first-party bad-faith tort. Id. The Supreme Court has suggested that a third-party bad-faith tort could be established by lack of investigation standing alone. See Kooyman v. Farm Bureau Mut. Ins. Co., 315 N.W.2d 30, 35 (Iowa 1982).

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5. Examples Where Recovery Denied.

1. In Dolan, while the supreme court recognized the existence of the tort, the court found against the insured. Certain injuries which predated the accident in question raised a fairly debatable issue as to whether the damages sought by the Plaintiff arose from the accident. The court found that this justified the insurer's refusal to proffer a settlement. The court also pointed to the investigation made by the insurer and the fact that no unreasonable delay occurred in this investigation. Dolan v. AID Ins. Co., 431 N.W.2d 790, 794 (Iowa 1988).

2. In Dirks, an underinsurance case, the court again found in favor of the insurer based on several facts. It was unclear whether the insurer knew the tort feasor was insured, or the amount of the coverage. It was also unclear whether the amount of the damages or even liability had been established at the time. When the Plaintiffs later reasserted their claim, there was still conflicting evidence as to who was at fault, thus justifying the insurer's continued refusals to pay the policy limits. Dirks v. Farm Bureau Mut. Ins. Co., 465 N.W.2d 857 (Iowa 1991).

3. The vast majority of first-party bad faith claims in Iowa have been decided in favor of the insurer. See, e.g., Wetherbee v. Economy Fire & Cas. Co., 508 N.W.2d 657 (Iowa 1993); Central Life Ins. v. Aetna Cas. & Sur., 466 N.W.2d 257 (Iowa 1991); Reuter v. State Farm Mut. Auto Ins. Co., 469 N.W.2d 250 (Iowa 1991); Wierck v. Grinnell Mut. Reins. Co., 456 N.W.2d 191 (Iowa 1990).

6. Recovery Allowed.

1. In Nassen, the supreme court allowed the jury

verdict against an insurer to stand. The court found that the insurer had ignored crucial information concerning the Plaintiff's claim for nursing home insurance, and shunned other information offered by the Plaintiff's representatives. Evidence indicated the insurer stalled in processing the claim. The insurer's own files had information which should have resolved any suspicions it had about the claim. Under these circumstances, the court found that the question of bad faith was for the jury. Nassen v. National States Ins. Co., 494 N.W.2d 231 (Iowa 1992). Punitive damages were awarded.

2. In Kiner, a worker's comp case, the supreme court also found that the evidence of bad faith was sufficient for a jury to decide the issue. A resonable factfinder could find that Reliance failed to "exercise an honest and informed judgment." Kiner v. Reliance Ins. Co., 463 N.W.2d 9 (Iowa 1990). See also Reedy v. White Consol. Indus., Inc., 503 N.W.2d 601 (Iowa 1993).

III - SYNTHESIS OF TRIPARTITE DUTIES

A. INSURED'S DUTIES:

(a) To the Insurer:

1. Contract Duties: Pay premiums and cooperate in defense.

2. Covenant of Good Faith (First-Party and Third-Party Claims): Honesty in fact.

3. Fair Dealing (Third-Party Claims): Neither party will do anything to injure the rights of the other in receiving the benefits of the agreement.

(b) To Defense Attorney (Third-Party Claim):

1. Good faith/fair dealing: noted above.

B. INSURER'S DUTIES:

(a) To Insured:

1. Contract Duties: Duty to defend and duty to indemnify for covered claims.

- Heightened duty standard: Claims professional

2. First-Party Claim: Duty of "good faith": honesty in fact.

3. Third-Party Claim:

a. Duty of "good faith": honesty in fact.

b. Fair Dealing: Neither party will do anything to injure the rights of the other in receiving the benefits of the agreement.

1. Heightened Duty of Care: Claims professional and control of defense.

2. Unreasonable Risk to Insured: Fiduciary duty (primary focus: best interests of insured).

(b) To Attorney:

1. Good Faith: honesty in fact.

2. Duty of Fair Dealing: claims professional.

C. ATTORNEY'S DUTIES:

(a) Duty to Insured:

1. Good Faith/Fair Dealing/Heightened Standard of Care.

2. Iowa Code of Professional Responsibility for Lawyers.

(b) Duty to Insurer (Third-Party Claim):

1. Good Faith: honesty in fact.

- Caveat: Confidential client communications adverse to the insured (ex. coverage issues)

2. Duty of Fair Dealing.

- Caveat: Iowa Code of Professional Responsibility for Lawyers.

D. PROBLEMS:

1. Iowa Code of Professional Responsibility for Lawyers

does not clearly identify ethical standards that are applicable to the unique tripartite relationship. The tripartite relationship is evolving. The insurer's contractual duties of good faith and fair dealing are evolving to a heightened-duty standard and fiduciary duties. The "insurer's attorney" is evolving into the "insured's attorney." Unless ethical and good-faith standards are adopted for the sui generis tripartite relationship, the triad proceeds at their own risk.

- NOTE: See "Liability Insurer Guiding Principles," approved by the House of Delegates of the American Bar Association on February 7, 1972, and rescinded in August, 1980 (Appendix "E"), set forth in S. Machanic, "Insurance Defense Counsel: Who is the Client?" 43 Federation of Ins. & Corp. Counsel 45, 53-56. See also, Minnesota Rule of Professional Conduct 1.7, 1985 Comment, which states, in part, as follows:

> A lawyer may be paid from a source other than the client, if the client is informed of that fact and consents and the arrangement does not compromise the lawyer's duty of loyalty to the client.... For example, when an insurer and its insured have conflicting interests in a matter arising from a liability insurance agreement, and the insurer is required to provide special counsel for the insured, the arrangement should assure the special counsel's professional independence....

2. Even though the tripartite relationship is the basic structure for insurance defense, the judicial decisions are so fact-specific and define the tripartite relationship so generally that it provides little guidance for defense practitioners. Different justices define "good faith" and "fiduciary duties" differently.

IV - COST-CONTAINMENT CONSIDERATIONS

A. OVERVIEW:

In accordance with the above-noted authorities, it appears that an attorney may cooperate with the insurer to minimize costs in the defense of the insured unless it would impede proper representation of the insured. It is not

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collusion for the attorney and insurer to attempt to agree on a reasonable course of defense. Such communication only degenerates to collusion when the interests of the insured are not properly addressed and protected. In other words, concern for the insurer's monetary interest should be subordinate to concern for the insured's financial risk. See Tank v. State Farm Fire & Cas. Co., 715 P.2d 1133, 1137 (Wash. 1986).

If cost containment would impede the proper representation of the insured, the attorney, in accordance with his or her ethical obligations, would be required to attempt to resolve the conflict with the insurer, and, if unable to do so, should disclose the conflict to the insured and/or withdraw as legal counsel.

Although such a potential "conflict" would suggest an adversarial relationship between the insurer and defense counsel, actually the duties to the insured of the insurer and defense attorney are very similar, although distinct, in a third-party claim. The mutual and reciprocal obligation of "good faith" in the tripartite relationship, along with the insurer's and defense attorney's joint and simultaneous interest in the protection of the insured, would appear to normally permit a consensus of trial strategy.

Depending on the issues involved in a particular case, there may be some discretion involved in the amount of investigation, the number of depositions, whether to use expert testimony, etc. Therefore, even if the insurer and defense counsel can reach a consensus, it would appear advisable for the defense attorney to keep the insured advised of all "trial strategy" in order to hopefully obtain the insured's approval not only to comply with ethical obligations to the insured, but to hopefully avoid hindsight second-guessing. See, e.g., Kohlstedt v. Farm Bureau Mut. Ins. Co., 139 N.W.2d 184, 186 (1965); Loudon v. State Farm Mut. Auto. Ins. Co., 360 N.W.2d 575, 583 (Iowa App. 1984).

The insurer's contractual right to control the defense of a claim should not be confused with the control of the defense attorney. The defense attorney is still required to exercise independent, unimpaired judgment to protect the interests of the insured.

By ignoring the legal and ethical obligations to the insured/client, the defense attorney exposes himself or herself to disciplinary action and/or malpractice claims and exposes the insurer to bad-faith claims. See K. Bowdre, "Conflicts of Interest Between Insurer and Insured: Ethical Traps for the Unsuspecting Defense Counsel", 17 American Journal of Trial Advocacy 101, 106 (1993).

In the event that a particular attorney unreasonably incurs expenses within the defense of the insured, the ultimate, and apparently most effective, means for the insurer to avoid the problem is to retain a different attorney.

The reality of insurance defense is that the insurer and defense attorney need each other and need to be sensitive to each party's interests and duties, or division within the tripartite relationship will cause all to fall.

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B. COST CATEGORIES:

As noted above, the amount of control the insurer may exert over the defense depends on whether the issue has a significant impact upon the defense attorney's representation of the insured. Defense costs may be broken down into general cost categories.

1. General Expenses: Examples of general expenses over which the insurance carrier would be entitled to exert substantial direction are as follows:

a. Selection of Defense Counsel: The insurer normally has the right to select insurance defense counsel. However, the insurer is obligated to exercise reasonable care in the selection of adequate and experienced defense counsel. See State Farm Fire & Casualty Co. v. Gandy, 1994 WL 70390 (Tex. App. - Texarkana 1994) (Insurer negligent in hiring criminal attorney with no civil experience to handle civil suit).

b. Format of Bill: The insurer has the right to ask for reasonable identification of persons performing activities on the case and itemization of any activities and expenses.

c. Fee and Expense Rates: The insurance carrier is entitled to negotiate reasonable fee and expense rates with defense counsel including what services are billable and the rates for such services, as long as it does not unreasonably interfere in defense counsel's representation of the insured/client.

2. Case-Specific Costs: These costs would include the amount of case investigation, depositions and expert testimony. Since these costs would have a significant impact upon the defense of the insured, the attorney would be ethically required to render an unimpaired, independent opinion regarding what expenses should be incurred. Such opinion should be communicated to the insurer who would

evaluate such recommendations in accordance with its contractual and legal duties to the insured.

V - COMMITTEE COMMENTS AND OTHER CONSIDERATIONS

F

1. There may be a difference between the insured's definition of "winning" (best possible verdict) and the insurer's definition of "winning" (resolving a claim at minimal expense).

2. The cost in resolving a claim involves two fundamental factors:

(a) Defense costs and

(b) Settlement or judgment. See H. Reske, "Stingier Jurors Doling Out Fewer Awards", 80 ABA Journal, at 20 (Sept. 1994).

Proper cost containment should reference both factors.

3. The insurer wants the defense attorney to obtain superior results at a reasonable cost.

4. In planning defense trial strategy, the insurer does not want the defense attorney to "build a battleship to cross a creek."

5. The defense law firm, and not the insurer, should assume the expense of training inexperienced attorneys.

6. Insurers appreciate early and accurate claim evaluation from defense attorneys. Insurers do not like to pay substantial defense costs upon defense counsel's initial evaluation that the claim is defensible and then be told on the eve of trial that the case should be settled.

7. Defense attorneys appreciate a clear line of communication with the decision-maker within the insurance carrier in order to discuss, and hopefully agree upon, trial strategy.

8. Due to the multiple variables in a third-party action, it is very difficult to draft fee guidelines which would be properly applicable to all cases.

9. A number of the adversarial problems in the tripartite relationship have not been experienced in Iowa

because the parties in that relationship have attempted to cooperate.

10. Only matters significant to the end result in litigation should be performed in the defense of the insured.

11. The insurer should develop uniform case-management procedures to facilitate compliance by defense counsel and to avoid unnecessary complexity and confusion.

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90-48 May 24, 1991

CONFLICT: REPRESENTING INSURED VS. INSURER WHICH HAS ASSIGNED FIRM TO DEFEND OTHER INSUREDS.

You state you have in the past been assigned by an insurer to defend its insureds. You now are representing an insured at his request and may need to litigate against this insurer on coverage issues. Insurer has assigned other counsel to represent the insured under reservation of rights. You have not represented insurer in legal matters.

The committee has dealt with the conflict involved in the assignment of in-house counsel to defend insureds. See Formal Opinion 87-16 (February 12, 1988) and 88-14 (January 12, 1989). In those opinions representation of the insurer by in-house counsel presented the conflict which made the representation improper. You state you have not represented the insurer and do not now. Thus the conflict does not exist.

It is the opinion of the committee that it would not be improper for you to continue to represent the insured.

However the committee further is of the opinion you should discuss fully all implications involved including the possibility that at some future time the client might feel some concern about your past relationship with insurer and get written consent thereafter if he determines continuing to retain your firm.

Appendix "A"

CANON 4

A LAWYER SHOULD PRESERVE THE CONFIDENCES AND SECRETS OF A CLIENT

ETHICAL CONSIDERATIONS

EC 4–1

Both the fiduciary relationship existing between lawyer and client and the proper functioning of the legal system require lawyers to preserve the confidences and secrets of those who employ or seek to employ them. Clients must feel free to discuss whatever they wish with their lawyer and lawyers must be equally free to obtain information beyond that volunteered by their clients. A lawyer should be fully informed of all the facts of the matter being handled in order for the client to obtain the full advantage of our legal system. It is for the lawyer in the exercise of independent professional judgment to separate the relevant and important from the irrelevant and unimportant. The observance of the ethical obligation of a lawyer to hold inviolate the confidences and secrets of a client not only facilitates the full development of facts essential to proper representation of the client but also encourages laypersons to seek early legal assistance.

[Effective July 1, 1993.]

EC 4–2

The obligation to protect confidences and secrets obviously does not preclude a lawyer from revealing information when a client consents after full disclosure, when necessary to perform professional employment, when permitted by a disciplinary rule, or when required by law. Unless the client otherwise directs, a lawyer may disclose the affairs of a client to partners or associates of the lawyer's firm. It is a matter of common knowledge that the normal operation of a law office exposes confidential professional information to nonlawyer employees of the office, particularly secretaries and those having access to the files; and this obligates a lawyer to exercise care in selecting and training employees so that the sanctity of all confidences and secrets of the client may be preserved. If the obligation extends to two or more clients as to the same information, a lawyer should obtain the permission of all before revealing the information. A lawyer must always be sensitive to the rights and wishes of a client and act scrupulously in the making of decisions which may involve the disclosure of information obtained in a professional relationship. Thus, in the absence of consent of a client after full disclosure, a lawyer should not associate another lawyer in the handling of a matter; nor should the lawyer, in the absence of consent, seek counsel from another lawyer if there is a reasonable possibility that the identity of the client or the client's confidences or secrets would be revealed to such lawyer. Both social amenities and professional duty should cause a lawyer to shun indiscreet conversations concerning clients.

[Effective July 1, 1993.]

Appendix "B"

90-48 May 24, 1991

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Appendix "A"

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Appendix "A"

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[Effective July 1, 1993.]

EC 4-5

A lawyer should not use information acquired in the course of the representation of a client to the disadvantage of the client and a lawyer should not use, except with the consent of the client after full disclosure, such information for the lawyer's own purposes. Likewise, a lawyer should be diligent in efforts to prevent the misuse of such information by employees and associates. Care should be exercised by a lawyer to prevent the disclosure of the confidences and secrets of one client to another, and no employment should be accepted that might require such disclosure.

[Effective July 1, 1993.]

F

DISCIPLINARY RULES

DR 4-101. PRESERVATION OF CONFIDENCES AND SECRETS OF A CLIENT

(A) "Confidence" refers to information protected by the attorney-client privilege under applicable law, and "secret" refers to other information gained in the professional relationship that the client has requested be held inviolate or the disclosure of which would be embarrassing or would be likely to be detrimental to the client.

(B) Except when permitted under DR 4-101(C), a lawyer shall not knowingly:

(1) Reveal a confidence or secret of a client.

(2) Use a confidence or secret of a client to the disadvantage of the client.

(3) Use a confidence or secret of a client for the advantage of the lawyer or of a third person, unless the client consents after full disclosure.

(C) A lawyer may reveal:

(1) Confidences or secrets with the consent of the client or clients affected, but only after a full disclosure to them

CANON 5

A LAWYER SHOULD EXERCISE INDEPENDENT PROFESSIONAL JUDGMENT ON BEHALF OF A CLIENT

ETHICAL CONSIDERATIONS

EC 5-1

The professional judgment of a lawyer should be exercised, within the bounds of the law, solely for the benefit of the client and free of compromising influences and loyalties. Neither personal interests, the interests of other clients, nor the desires of third persons should be permitted to dilute a lawyer's loyalty to a client.
[Effective July 1, 1993.]

INTERESTS OF MULTIPLE CLIENTS

EC 5-14

Maintaining the independence of professional judgment required of a lawyer precludes the acceptance or continuation of employment that will adversely affect the lawyer's judgment on behalf of, or loyalty to, a client. This problem arises whenever a lawyer is asked to represent two or more clients who may have differing interests, whether such interests be conflicting, inconsistent, diverse, or otherwise discordant.
[Effective July 1, 1993.]

EC 5-15

If a lawyer is requested to undertake or to continue representation of multiple clients having potentially differing interests, the lawyer must weigh carefully the possibility that the lawyer's judgment may be impaired or loyalty divided if the employment is accepted or continued. The lawyer should resolve all doubts against the propriety of the representation. A lawyer should never represent in litigation multiple clients with differing interests; and there are few situations in which a lawyer would be justified in representing in litigation multiple clients with potentially differing interests. If a lawyer accepted such employment and the interests did become actually differing, the lawyer would have to withdraw from employment with likelihood of resulting hardship on the clients; and for this reason it is preferable that the employment be refused initially. On the other hand, there are many instances in which a lawyer may properly serve multiple clients having potentially differing interests in matters not involving litigation. If the interests vary only slightly, it is generally likely that the lawyer will not be subjected to an adverse influence and that the lawyer can retain independent judgment on behalf of each client; and if the interests become differing, withdrawal is less likely to have a disruptive effect upon the causes of the lawyer's clients.
[Effective July 1, 1993.]

EC 5-16

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

[Effective July 1, 1993.]

EC 5-17

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

[Effective July 1, 1993.]

EC 5-19

A lawyer may represent several clients whose interests are not actually or potentially differing. Nevertheless, the lawyer should explain any circumstances that might cause a client to question the lawyer's undivided loyalty. Regardless of the lawyer's belief that multiple clients may be properly represented, the lawyer must defer to a client who holds the contrary belief and withdraw from representation of that client.

[Effective July 1, 1993.]

Appendix "B"

F

Desires of Third Persons

EC 5-21

The obligation of a lawyer to exercise professional judgment solely on behalf of a client requires that the lawyer disregard the desires of others that might impair free judgment. The desires of a third person will seldom adversely affect a lawyer unless that person is in a position to exert strong economic, political, or social pressures upon the lawyer. These influences are often subtle, and a lawyer must be alert to their existence. A lawyer subjected to outside pressures should make full disclosure of them to the client; and if the lawyer or client believes that the effectiveness of the lawyer's representation has been or will be impaired thereby, the lawyer should take proper steps to withdraw from representation of the client.

[Effective July 1, 1993.]

EC 5-22

Economic, political, or social pressures by third persons are less likely to impinge upon the independent judgment of a lawyer in a matter in which the lawyer is compensated directly by the client and the lawyer's professional work is exclusively with the client. On the other hand, if a lawyer is compensated from a source other than the client, the lawyer may feel a sense of responsibility to someone other than the client.

[Effective July 1, 1993.]

EC 5-23

A person or organization that pays or furnishes lawyers to represent others possesses a potential power to exert strong pressures against the independent judgment of those lawyers. Some employers may be interested in furthering their own economic, political, or social goals without regard to the professional responsibility of the lawyer to the individual client. Others may be far more concerned with establishment or extension of legal principles than in the immediate protection of the rights of the lawyer's individual client. On some occasions, decisions on priority of work may be made by the employer rather than the lawyer with the result that prosecution of work already undertaken for clients is postponed to their detriment. Similarly, an employer may seek, consciously or unconsciously, to further its own economic interests through the actions of the lawyers employed by it. Since a lawyer must always be free to exercise professional judgment without regard to the interests or motives of a third person, the lawyer who is employed by one to represent another must constantly guard against erosion of professional freedom.

[Effective July 1, 1993.]

Appendix "B"

DR 5-105. REFUSING TO ACCEPT OR CONTINUE EMPLOYMENT IF THE INTERESTS OF ANOTHER CLIENT MAY IMPAIR THE INDEPENDENT PROFESSIONAL JUDGMENT OF THE LAWYER

(A) In no event shall a lawyer represent both parties in dissolution of marriage proceedings whether or not contested or involving custody of children, alimony, child support or property settlement.

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

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

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

(E) If a lawyer is required to decline employment or to withdraw from employment, no partner or associate of the lawyer or the lawyer's firm may accept or continue such employment

[Effective July 1, 1993.]

DR 5-107. AVOIDING INFLUENCE BY OTHERS THAN THE CLIENT

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

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

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

(B) A lawyer shall not permit a person who recommends, employs, or pays the lawyer to render legal services for another to direct or regulate the lawyer's professional judgment in rendering such legal services.

(C) A lawyer shall not practice with or in the form of a professional corporation or association authorized to practice law for a profit, if:

(1) A nonlawyer owns any interest therein, except that a fiduciary representative of the estate of a lawyer may hold the stock or interest of the lawyer for a reasonable time during administration;

(2) A nonlawyer is a corporate director or officer thereof; or

(3) A nonlawyer has the right to direct or control the professional judgment of a lawyer.

[Effective July 1, 1993.]

Appendix "B"

F

that could be prosecuted under the common-law offense of misconduct in office.[6] I would find defendant's alleged conduct analogous to acts that have been prosecuted as misconduct in office. For example, in *Commonwealth v. Miller*, 94 Pa.Super. 499 (1928), the Pennsylvania Superior Court found that a state trooper was a public officer subject to prosecution for malfeasance in office for wrongfully causing the withdrawal of an information against a person accused of driving while intoxicated. In *Robbins v Commonwealth*, 232 Ky. 115, 22 S.W.2d 440 (1929), the court affirmed the conviction of "malfeasance in office" where a county judge was found guilty of issuing a warrant without a proper affidavit and without foundation. In affirming the conviction, the court commented, "We can conceive of no greater abuse of the power vested in an officer to issue warrants of arrest." *Id.*, p. 119, 22 S.W.2d 440. A similar abuse is evidenced by the falsification of a police report by a police officer. Instead of upholding the rule of law as required by duty, the defendant ⌊462 sought to subvert that rule by his alleged corrupt act.

I concur in affirmance of the Court of Appeals because the information charging defendant with violation of M.C.L. § 750.505; M.S.A. § 28.773 described the offense as "obstruction of justice," and, as the majority concludes, defendant's conduct does not constitute common-law obstruction of justice. However, defendant may still be properly charged with violation of M.C.L. § 750.505; M.S.A. § 28.773 on the basis of his commission of acts constituting the common-law offense of malfeasance in office.[7]

Conclusion

I agree that the existence of the statutory misdemeanor of failure to uphold the law, M.C.L. § 752.11; M.S.A. § 28.746(101), did not preclude charging defendant under M.C.L. § 750.505; M.S.A. § 28.773, because defendant's conduct involved affirmative acts. I further concur in the conclusion that defendant's acts do not constitute common-law obstruction of justice. However, I would conclude that defendant's conduct constitutes an offense indictable at common law, and that defendant could properly be charged with violation of M.C.L. § 750.505; M.S.A. § 28.773.

RILEY, J., concurs.

438 Mich 512

⌊512 **ATLANTA INTERNATIONAL INSURANCE COMPANY, a New York Corporation, Plaintiff–Appellant,**

v.

John W. BELL, David C. Hertler, Bell & Hertler, P.C., and Bell, Hertler & Winiemko, P.C., jointly and severally, Defendants–Appellees.

Docket No. 87914.
Calendar No. 6, Jan. Term, 1991.

Supreme Court of Michigan.

Argued Jan. 9, 1991.
Decided Sept. 18, 1991.

Insurer brought legal malpractice action against attorneys which it had hired to defend its insured. The Wayne Circuit Court, Henry J. Szymanski, J., granted summary judgment in favor of attorneys and appeal was taken. The Court of Appeals, 181 Mich.App. 272, 448 N.W.2d 804, affirmed. On appeal, the Supreme Court, Brickley, J., held that: (1) attorney-client

6. A defendant cannot be convicted of misconduct in office absent a "corrupt intent," Perkins & Boyce, *supra*, p. 542. A corrupt intent is not necessarily an intent to profit oneself; "[t]he word 'corruption' as an element of misconduct in office, is used in the sense of depravity, perversion or taint." *Id.*

7. Informations may be freely amended, and any amendment not prejudicial to the defendant may be allowed. M.C.L. § 767.76; M.S.A. § 28.1016; *People v. Watson*, 307 Mich. 596, 601–602, 12 N.W.2d 476 (1943).

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relationship did not exist between insurer and attorneys, and (2) insurer could maintain action under doctrine of equitable subrogation.

Affirmed in part and reversed in part.

Boyle, J., filed concurring opinion.

Michael F. Cavanagh, C.J., filed dissenting opinion in which Mallett and Levin, JJ., joined.

1. Attorney and Client ⇐26

Generally, only person in special privity of attorney-client relationship may sue attorney for malpractice.

2. Attorney and Client ⇐64

Attorney-client relationship does not exist between insurer and attorney which insurer hired to defend its insured.

3. Subrogation ⇐1

"Equitable subrogation" is legal fiction that permits one party to stand in shoes of another.

See publication Words and Phrases for other judicial constructions and definitions.

4. Attorney and Client ⇐26

Doctrine of equitable subrogation permits malpractice action by insurer against counsel insurer hired to defend insured.

⌊514Dise, Gurewitz & Irving, P.C. by John H. Dise, Jr., Detroit, for plaintiff-appellant.

Plunkett & Cooney, P.C. by John P. Jacobs, Patrick M. Barrett, Christine⌊515 M. Oldani, Detroit, for defendants-appellees.

Kerr, Russell and Weber by C. Kenneth Perry, Jr., Edward C. Cutlip, Jr., Janice A. Furioso, Detroit, for amicus curiae.

Constantine N. Kallas, Kallas, Lower, Henk & Treado, P.C., Bloomfield Hills, for amicus curiae, Michigan Ass'n of Ins. Companies' and American Ins. Association's in support of plaintiff-appellant.

Garan, Lucow, Miller, Seward, Cooper & Becker, P.C. by James G. Gross, Detroit, for amici curiae.

Collins, Einhorn & Farrell, P.C. by Noreen L. Slank, Southfield, for amicus curiae MDTC.

OPINION

BRICKLEY, Justice.

This case presents an issue of first impression: whether defense counsel retained by an insurance company to defend its insured can be held answerable to the insurer for professional malpractice. The Court of Appeals held that defense counsel may not be sued by the insurer for malpractice.

We agree with the analysis of the dissent articulated in section (I)(B) that principles of common-law negligence do not generally require imposition of third-party liability in the malpractice context. We also agree with the dissent that something less than a plenary attorney-client relationship exists between a defense counsel and an insurer. However, we would reverse the decision of the Court of Appeals and would hold that in this case the doctrine of equitable subrogation permits a malpractice action against defense counsel under the facts presented.[1]

⌊516This opinion contains three sections. Section I recites the facts and the procedural history of the case. Section II demonstrates the inadequacy of denying liability purely because the relationship between the insurer and retained counsel for the insured comprises a mere contractual relationship rather than an attorney-client relationship. Section III outlines the doctrine of equitable subrogation and explains why equitable subrogation particularly applies for policy reasons under these facts.

I

On August 31, 1977, Herbert H. Harvey went to work as a tilesetter at a construction site, now Lakeside Mall in Sterling

1. We pause here to stress that the application of equitable subrogation should and must proceed on the case-by-case analysis characteristic of equity jurisprudence. As we noted in *Solo v. Chrysler Corp. (On Rehearing)*, 408 Mich. 345, 353, 292 N.W.2d 438 (1980): "Whether a given case falls within equity jurisdiction is a question different from whether the case is one in which the relief peculiar to that jurisdiction should be granted."

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Heights. At the construction site, Security Services, Inc., was employed to safeguard the premises. As Mr. Harvey entered the premises, he passed two departing Security Services' employees, and, approximately 120 feet into the construction site, fell into a 20 × 20 foot hole. Mr. Harvey died from his injuries.

In September of 1980, the administrator of Mr. Harvey's estate brought an action against numerous parties, including Security Services. The plaintiff, Atlanta International Insurance Company, insured Security Services. As part of Atlanta's contractual obligation, Atlanta retained John W. Bell, David H. Hertler, and Bell & Hertler, P.C. (hereinafter defendants) to represent Security Services in the suit. Defendants answered the complaint, but failed to raise comparative negligence ⌊517 as a defense.[2] A judgment was subsequently entered against Security Services, which Atlanta, as Security Services' primary insurer, was required to satisfy.

Atlanta then filed this suit, alleging that these defendants committed legal malpractice by failing to raise comparative negligence as a defense. After discovery, Atlanta filed a motion for partial summary disposition on the issue whether an attorney-client relationship existed between Atlanta and the defendants. Atlanta also filed a motion to amend its original complaint to add a breach of contract claim. The defendants countered with a motion for summary disposition, alleging that no attorney-client relationship existed between Atlanta and the defendants. The circuit court denied Atlanta's motions and granted the defendants' motion for summary disposition. Atlanta sought reversal in the Court of Appeals.

The Court of Appeals affirmed, stating: "No attorney-client relationship exists between an insurance company and the attorney representing the insurance company's insured.... Rather, an attorney's sole loyalty and duty is owed to the client alone, the client being the insured, not the insurance company." 181 Mich.App. 272, 274, 448 N.W.2d 804 (1989). The Court of Appeals also affirmed the denial of Atlanta's motion to amend its complaint.

⌊518 II

[1] The general rule of law implicated in this case dictates that "an attorney will be held liable for ... negligence only to his client, and cannot, in the absence of special circumstances, be held liable to anyone else."[3] This Court flatly refused to extend malpractice liability against opposing counsel by a party-opponent in *Friedman v. Dozorc*, 412 Mich. 1, 24–25, 312 N.W.2d 585 (1981).

Friedman held:

> The creation of a duty in favor of an adversary of the attorney's client would create an unacceptable conflict of interest which would seriously hamper an attorney's effectiveness as counsel for his client. Not only would the adversary's interest interfere with the client's interest, the attorney's justifiable concern with being sued for negligence would detrimentally interfere with the attorney-client relationship.

Traditional legal doctrine thus mandates that only a person in the special privity of the attorney-client relationship may sue an attorney for malpractice. This rule exists to ensure the inviolability of the attorney's duty of loyalty to the client. Allowing third-party liability generally would detract from the attorney's duty to represent the client diligently and without reservation. The essential purpose of the general rule against malpractice liability from third-parties is thus to prevent conflicts from derailing the attorney's unswerving duty of loyalty of representation to the client.

2. In defendant Bell's deposition he stated:

Q. Based on your experience as an attorney since 1949, do you believe that you met the standard of care required of a practicing attorney in the Metropolitan Detroit area in failing in the motion to plead comparative negligence prior to the motion in May of 1984?

A. I would have to admit that I did not conform to the standard of care that I should have.

3. 7 Am.Jur.2d, Attorneys at Law, § 232, p. 274.

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However, the relationship between the insurer and the retained defense counsel, while less than a client-attorney relationship, unquestionably differs ⌊519from the relationship between a defense counsel and a party-opponent. The relationship differs because "[l]iability insurance policies typically include provisions that both obligate the insurer to provide the insured with a defense and entitle the insurer to control the defense ...[;] the insurer has both a 'duty' and a 'right' in regard to the defense of the insured ...." [4] It has been appropriately recognized that "[defense counsel] occupies a fiduciary relationship to the insured, as well as to the insurance company ... [and] implicitly, if not explicitly, represents to the insured the ability to exercise professional competence and skill in conducting the insured's defense." [5] Furthermore, because the insurance company, not the client, is required to satisfy a judgment arriving from a defense counsel's malpractice, the client has no real incentive to sue defense counsel.

At the same time, courts and commentators recognize universally that the tripartite relationship between insured, insurer, and defense counsel contains rife possibility of conflict.[6] The interest of the insured and the insurer frequently differ. Accordingly, courts have consistently held that the defense attorney's primary duty of loyalty lies with the insured, and not the insurer.

[2] The entire structure of the relationship between the insurance company, the insured, and the attorney rests on the twin pillars of duty of loyalty to the insured by defense counsel and conflict of ⌊520interest prevention. The case at bar reveals the inadequacy of predicating the analysis of malpractice liability solely on the lack of an attorney-client relationship between the insurer and defense counsel. The instant case does not present a conflict between the interests of the insurer and the public policy of ensuring undiluted loyalty by counsel to the insured. The nature of the insurer-defense counsel relationship thus presents the special circumstances alluded to by the dissent that removes this case from the general rule against the imposition of third-party liability.[7] For these reasons, the case is most efficiently and justly resolved by the principle of equitable subrogation.

The issue whether an attorney hired by an insurer to defend its insured *may be liable* for professional malpractice to the insurer cannot be adequately resolved without determining whether defense counsel *should* be held liable to the insurer and without vindicating public policy rationale that undergirds the attorney-client relationship in the insurance defense context.[8]

To hold that an attorney-client relationship exists between insurer and defense counsel could indeed work mischief, yet to hold that a mere commercial relationship exists would work obfuscation and injustice. The gap is best bridged by resort to the doctrine of equitable subrogation to allow recovery by the insurer. Equitable subrogation best vindicates the attorney-client relationship and the interests of the insured, properly imposing the social costs of malpractice where ⌊521they belong. Allowing the insurer to stand in the shoes of the insured under the doctrine of equitable subrogation best serves the public policy underlying the attorney-client relationship.

4. Keeton & Widiss, Insurance Law, p. 822.

5. *Id.* at 835–836.

6. See, e.g., Mallen & Levit, Legal Malpractice, § 263, pp. 356–357, recognizing that "[t]here is great temptation [for defense counsel] to favor [the insurance company] who pays the bills and will send further business, and where long-standing personal relations may exist ...." Keeton & Widiss, *supra* at 829–830: "An attorney employed by an insurer to represent an insured may be confronted with serious conflicts of interest issues almost from the very outset of the relationship."

7. P. 302, citing *Savings Bank v. Ward,* 100 U.S. 195, 200, 25 L.Ed. 621 (1879).

8. *Friedman* vindicated the public policy of maintaining "a vigorous adversary system [which] outweighs the asserted advantages of finding a duty of care to an attorney's legal opponent." 412 Mich. at 25, 312 N.W.2d 585. Obviously, the unique tripartite insurance con-

III

Subrogation, simply defined, involves "the substitution of one person in the place of another with reference to a lawful claim or right."[9] Subrogation has been described by courts as flexible and elastic equitable doctrine, and hence "the mere fact that the doctrine of subrogation has not been previously invoked in a particular situation is not a prima facie bar to its applicability."[10] Two types of subrogation exist in the insurance context: "conventional [subrogation, the] product of an agreement by the parties [and legal subrogation,] the creation of the law (or more accurately of equity.)"[11]

[3] Equitable subrogation has been described as a "legal fiction" that permits one party to stand in the shoes of another.[12] The doctrine is eminently applicable under the facts of this case. A rule of law expanding the parameters of the attorney-client relationship in the defense counsel-insurer ⌊522 context might well detract from the attorney's duty of loyalty to the client in a potentially conflict-ridden setting. Yet to completely absolve a negligent defense counsel from malpractice liability would not rationally advance the attorney-client relationship. Moreover, defense counsel's immunity from suit by the insurer would place the loss for the attorney's misconduct on the insurer. The only winner produced by an analysis precluding liability would be the malpracticing attorney. Equity cries out for application under such circumstances.[13]

The defense counsel-insurer relationship is unique. The insurer typically hires, pays, and consults with defense counsel. The possibility of conflict unquestionably runs against the insured, considering that defense counsel and the insurer frequently have a longstanding, if not collegial, relationship.

In a malpractice action against a defense counsel, however, the interests of the insurer and the insured generally merge. The client and the insurer both have an interest in not having the case dismissed because of attorney malpractice. Allowing recovery for the insurer on the basis of the failure of defense counsel to adhere to basic norms of duty of care thus would not "substantially impair an attorney's ability to make decisions that require a choice between the best interests of the insurer and the best interests of the insured." ⌊523 (Dissent, pp. 303–304) The best interests of both insurer and insured converge in expectations of competent representation.[14]

Defense counsel is not being held accountable to the insurer for malpractice over perceived errors of trial strategy in which a different situation would be presented.[15] However, this alleged con-

text presents an analytically different public policy.

9. 73 Am.Jur.2d, Subrogation, § 1, p. 598.

10. *Id.*, p. 602. Thus, the reality that no case has applied the doctrine under dissimilar facts does not bar its application under these particular facts.

11. Kimball & Davis, *The extension of insurance subrogation,* 60 Mich.L.R. 841 (1962).

12. *Commercial Union Ins. Co. v. Medical Protective Co.*, 426 Mich. 109, 117, 393 N.W.2d 479 (1986). It has been noted that "[a] legal fiction may be benign in one context, and dangerous and brutal in another." Harmon, *Falling off the vine: Legal fictions and the doctrine of substituted judgment,* 100 Yale L.J. 1, 61 (1990). In this case, the application of equitable subrogation is not only benign, but clearly beneficial compared to the mechanical application of the governing legal rule prohibiting liability absent a formal attorney-client relationship.

13. See, e.g., Keeton & Widiss, n. 4 *supra*, pp. 220–221:

"Courts also tend to favor subrogation if it appears that a third party tortfeasor would likely escape financial responsibility if the insurer were not accorded a subrogation right. Thus, subrogation often is appropriately viewed as an important technique for serving the ends of justice by placing the economic responsibility for injuries on the party whose fault caused the loss ...."

14. See Mallen & Levit, n. 6 *supra* at 356–357: "The duty of the attorney is to defend the insured. A successful defense is the common goal of all and is consonant with the interests of [all] parties."

15. Here courts must certainly recognize that "in some circumstances the conflicting interest [between insurance companies and defense counsel regarding tactical decisions] are so intense that

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duct, if true, comprised serious professional malpractice. In such cases the attorney-client relationship, the interests of the client, the interest of the insurer, and ultimately the public, which otherwise would absorb the costs of the malpractice, all benefit from exposure to suit. The dissent erroneously asserts that no clear persuasive public policy reasons exist to support the right of subrogation for the insurer.[16]

[4] For the foregoing reasons, we approve the remedy of equitable subrogation—a less sweeping, less rigid solution than creation of an attorney-client relationship between the insurer and defense counsel, but a more flexible, more equitable solution than absolution from liability for professional malpractice.[17]

⌊524ROBERT P. GRIFFIN and RILEY, JJ., concur.

BOYLE, Justice (concurring).

For the reasons set forth in Chief Justice Cavanagh's dissent, I would unequivocally decline to recognize a direct cause of action by the insurer for legal malpractice. I would go beyond the majority's observation that "something less than a plenary attorney-client relationship exists between a defense counsel and an insurer," and clearly state that no attorney-client relationship exists between a defense counsel and an insurer. The attorney-client relationship is with the insured only.

I concur in Justice Brickley's reasoning and conclusion that the doctrine of equitable subrogation is appropriately applied to the circumstances of this case. On this record, I perceive no divergence between the interests of the insurer and those of the insured. Nor is there any evident threat to the interests protected by the attorney-client relationship. However, because the trial court record indicates that the parties did not focus on equitable subrogation, we can only speculate regarding the effect of the privilege and the extent to which a court, in recognition of the privilege, may sustain an objection to testimony or evidence, that would effectively preclude the case from going forward. MCR 2.116(C)(8), (10); MCR 2.504(B)(2); MCR 2.515.

Thus, while I agree on this record with the abstract proposition that the action in equitable subrogation may go forward, this conclusion is subject to reexamination when the record in this case or another more fully presents the basis for a claim that public policy in support of the interests protected by the attorney-client relationship requires barring such a cause of action

⌊525MICHAEL F. CAVANAGH, Chief Justice (dissenting).

We accept the majority's statement of facts and limit our analysis to the three arguments of Atlanta.[1] Since the majority permits Atlanta to proceed under a theory of equitable subrogation, we dissent.

I

Atlanta's first argument is that there is an attorney-client relationship between the insurer and the attorney for the insured when the interest of the insurer and the insured do not conflict. Atlanta's second argument is that even if there is not an attorney-client relationship, this Court should extend legal malpractice liability to

no accommodation is possible between the views as to which of the possible tactics should be employed." Keeton & Widiss, *supra* at 820–821. This case in no way presents such a circumstance.

16. The law of professional malpractice itself provides an inherent limitation on unwarranted lawsuits brought by an insurer to the extent that a showing of malpractice essentially requires a showing that but for the attorney's error, the plaintiff would have prevailed in the action.

17. The application of equitable subrogation here thus represents the most principled use of the legal fiction: "[N]o fiction shall extend to work an injury; its proper operation being to prevent a mischief, or remedy an inconvenience, that might result from the general rule of law." 3 Blackstone, Commentaries, ch. 4, p. 43.

1. For purposes of convenience, all arguments, whether made by Atlanta or supporting amici curiae, will be referred to as having been made by "Atlanta."

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all foreseeable parties. Atlanta's third argument is that this Court should find the defendants liable under a theory of equitable subrogation. We will address Atlanta's arguments seriatim.

A

Atlanta asserts that when an attorney is hired by the insurance company to represent its insured an attorney-client relationship exists with both the insured and the insurer. Atlanta recognizes that conflicts between the insurer and the insured can arise involving reservation of rights, defense of alternative claims, coverage, policy limits, and defense of multiple clients. If a conflict arises, the primary obligation of the attorney is to the insured. In this case, however, no conflict of interest arose. According to Atlanta, the interests of the insured and the insurer throughout the entire underlying lawsuit were exactly the same—to limit their exposure as much as possible. Since ⌊526 there was no conflict of interest between the insured and the insurer, a concurrent attorney-client relationship existed between the attorney and the insured and the insurer.

Atlanta relies on the model code promulgated by the American Bar Association and the Michigan Rules of Professional Responsibility.[2] Specifically, the American Bar Association Formal Opinion No. 282, issued in 1950, p 622, provides:

> "From an analysis of their respective undertakings it is evident at the outset that a community of interest exists between the company and the insured growing out of the contract of insurance with respect to any action brought by a third person against the insured within the policy limitations. The company and the insured are virtually one in their common interest."

Plaintiff also cites Ethical Consideration EC 5-17 of the American Bar Association Model Code[3] and Michigan Rule of Professional Responsibility, DR 5-105(C).[4] According to Atlanta, these rules contemplate ⌊527 the existence of an attorney-client relationship between the attorney and the insured and the insurer, contrary to the decision of the Court of Appeals.[5]

2. We note that the Code of Professional Responsibility, adopted by this Court on October 4, 1971, was superseded by the Michigan Rules of Professional Conduct on October 1, 1988. The Code of Professional Responsibility, however, governs conduct occurring before October 1, 1988.

3. EC 5-17 provides:

"Typically recurring situations involving potentially differing interests are those in which a lawyer is asked to represent co-defendants in a criminal case, co-plaintiffs in a personal injury case, an insured and his insurer, and beneficiaries of the estate of a decedent. Whether a lawyer can fairly and adequately protect the interests of multiple clients in these and similar situations depends upon an analysis of each case."

4. DR 5-105(C) provides:

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

5. See also Informal Ethics Opinion CI-1146 which provides:

"It is of social value and ethically permissible for an attorney employed by an insurance company to also represent the insured, provided that the interests of the insurer and the insured do not conflict. If improper influences are exerted by the employer-insurer, which interfere with the independent judgment of the employee-attorney which, if complied with, would result in an attorney having to violate the Code of Professional Responsibility, the attorney must withdraw as counsel for the insured."

In addition, MRPC 1.7, which was adopted after this suit was initiated, provides:

"Conflict of Interest: General Rule

"(a) A lawyer shall not represent a client if the representation of that client will be directly adverse to another client, unless:

"(1) the lawyer reasonably believes the representation will not adversely affect the relationship with the other client; and

"(2) each client consents after consultation.

"(b) A lawyer shall not represent a client if the representation of that client may be materially limited by the lawyer's responsibilities to another client or to a third person, or by the lawyer's own interests, unless:

"(1) the lawyer reasonably believes the representation will not be adversely affected; and

"(2) the client consents after consultation. When representation of multiple clients in a single matter is undertaken, the consultation shall include explanation of the implications of

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We agree that a special relationship exists between the attorney and the insured and the insurer. The relationship, however, does not exist by the unilateral acts of either the attorney or the insurer. The special relationship results from the consent of the insured. When the insured enters ⌊528into a contract for insurance, the insured by consent waives certain rights normally provided by the Rules of Professional Responsibility. For instance, the attorney for the insured is required to disclose to the insurer offers of settlement. Normally, disclosure of an offer of settlement by the attorney to a third party would be a violation of the attorney's duty of confidentiality to the client.[6] The reason, however, for allowing the attorney to make disclosures to the insurance carrier is not that there is an attorney-client relationship between the insurer and the attorney, but that the client waives this confidentiality with regard to ⌊529the insurance carrier and agrees to cooperate in the defense of a claim upon signing the contract of insurance.[7] Thus, it is the insurance contract that creates a special relationship between the attorney, the insured, and the insurer. This unique relationship, however, does not rise to the status of an attorney-client relationship. We agree with the Court of Appeals when it stated:

> "Indeed, the insurance company's relationship is, in reality, with its insured; that is, the insurance company is obligated to pay the attorney fee incurred by its insured in defending litigation covered by an applicable insurance policy. The fact that an insurance company may directly pay the attorney fee rather than merely reimbursing its insured does not affect the nature of the attorney-client relationship nor does it change the fact that the attorney represents the insured client and only owes a duty to that insured client." *Id.*, 181 Mich.App. pp. 274–275, 448 N.W.2d 804.[8]

B

This Court is next urged to extend malpractice liability to all foreseeable parties. Relying on *Moning*⌊530 *v. Alfono*, 400 Mich. 425, 254 N.W.2d 759 (1977), Atlanta argues

the common representation and the advantages and risks involved."

6. Canon 4, DR 4–101 of the Michigan Rules of Professional Responsibility (now MRPC 1.6) provided:

"(A) 'Confidence' refers to information protected by the attorney-client privilege under applicable law, and 'secret' refers to other information gained in the professional relationship that the client has requested be held inviolate or the disclosure of which would be embarrassing or would be likely to be detrimental to the client.

"(B) Except when permitted under DR 4–101(C), a lawyer shall not knowingly:

"(1) Reveal a confidence or secret of a client.

"(2) Use a confidence or secret of his client to the disadvantage of the client.

"(3) Use a confidence or secret of a client for the advantage of himself or of a third person, unless the client consents after full disclosure.

"(C) A lawyer may reveal:

"(1) Confidences or secrets with the consent of the client or clients affected, but only after full disclosure to them.

"(2) Confidences or secrets when permitted or required under Disciplinary Rules or required by law or court order.

"(3) The intention of his client to commit a crime and the information necessary to prevent the crime.

"(4) Confidences or secrets necessary to establish or collect his fee or to defend himself or his employees or associates against an accusation of wrongful conduct.

"(D) A lawyer shall exercise reasonable care to prevent his employees, associates, and others whose services are utilized by him from disclosing or using confidences or secrets or a client, except that a lawyer may reveal the information allowed by DR 4–101(C) through an employee."

7. Under this policy, Atlanta and the insured agreed as follows:

"[T]he company shall have the right and duty to defend any suit against the insured seeking damages on account of such bodily injury or property damage, even if any of the allegations of the suit are groundless, false or fraudulent, and may make such investigation and settlement of any claim or suit as it deems expedient. . . ."

8. See *Continental Casualty v. Pullman*, 929 F.2d 103 (CA 2, 1991).

"Even though trial counsel is selected by and looks to an insurer for compensation, and although he keeps the insurer informed about the progress of the case, we do not find those factors to be conclusive. 'An attorney's allegiance is to his client, not to the person who happens to be paying for his services.'" *Pullman* at 108 (citations omitted).

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that a cause of action should arise for every injured person in the class of persons likely to be injured and states:

> "In this circumstance, it can hardly be argued that the insurance carrier who will have to pay any judgment is not within the foreseeable class of persons who will be harmed by the negligent acts of counsel in defense of the insured. Clearly, the entity most likely to be harmed in this circumstance is the insurance carrier. While it is true that the insured also is a person who may be harmed by the malpractice, in this case, and in most other similar cases, it is the insurance company who will suffer the most if not all of the harm."

In *Moning*, 400 Mich. at 438–439, 254 N.W.2d 759, this Court stated that "[d]uty is essentially a question of whether the relationship between the actor and the injured person gives rise to any legal obligation on the actor's part for the benefit of the injured person." The relationship that gives rise to the duty in a legal malpractice case is the attorney-client relationship. This general requirement of an attorney-client relationship in a legal malpractice claim was articulated over one hundred years ago in *Savings Bank v. Ward*, 100 U.S. 195, 200, 25 L.Ed. 621 (1879).

> "Beyond all doubt, the general rule is that the obligation of the attorney is to his client and not to a third party, and unless there is something in the circumstances of this case to take it out of that general rule, it seems clear that the proposition of the defendant must be sustained.... An attorney is not liable to an action for negligence, at the suit of one between whom and himself the relation of attorney and client does not exist, for giving, in ⌊531answer to a casual inquiry, erroneous information as to the contents of the deed."

This Court addressed an attorney's duty to a third party in *Friedman v. Dozorc*, 412 Mich. 1, 312 N.W.2d 585 (1981), holding that an attorney owed no legal duty to an adversary.[9] Atlanta attempts to distinguish this case from *Friedman* on the ground that in this case the insurer and the insured were not adversaries, and in fact had identical interests in disposing of the case.[10] We find, however, that this is a distinction without a difference.

Conflicts of interest are matters of degree.[11] In ⌊532every case where an attorney is hired by an insurer to represent the insured, the attorney embarks down a road

9. We recognize that in *Rosenberg v. Cyrowski*, 227 Mich. 508, 513, 198 N.W. 905 (1924), this Court held that "'[a]n attorney's liability does not end with being answerable to his client. He is also liable to third persons who have suffered injury or loss in consequence of fraudulent or tortious conduct on his part.'" Citing 1 Thorton, Attorneys at Law, § 295, p. 523. We distinguish *Rosenberg* on the ground that in *Rosenberg* the plaintiffs were alleging that the attorney's conduct amounted to fraud. In this case, however, it is undisputed that the attorney's action amounted to no more than mere negligence.

10. See also *American Employers' Ins. Co. v. Medical Protective Co.*, 165 Mich.App. 657, 660, 419 N.W.2d 447 (1988), in which the Court stated:

> "Although the plaintiff excess insurer may be characterized as an equitable subrogee of the insured physician, it may not sue the insured's defense attorney for legal malpractice. To hold otherwise would in our judgment acknowledge a direct duty owed by the insured's attorney to the excess insurer and would be tantamount to saying that insurance defense attorneys do not owe their duty of loyalty and zealous representation to the insured client alone. Such a holding would contradict the personal nature of the attorney-client relationship, which permits a legal malpractice action to accrue only to the attorney's client."

11. We stated in *Friedman*, 412 Mich. at p. 24, n. 10, 312 N.W.2d 585:

> "'Most if not all questions of conflict of interest are questions of degree. As noted above, minor and inevitable conflicts inherent in client-lawyer relationships necessarily must be tolerated. On the other hand, a conflict of interest may be so sharp as to preclude the lawyer from representing a particular client. For example, under no circumstances could a lawyer properly represent both the plaintiff and the defendant in a contested litigation, or represent parties to a negotiation whose interests are fundamentally antagonistic to each other. When it is plain that prejudice to the client's interest is likely to result, the lawyer should not undertake the representation even with the consent of the client. A client's consent does not legitimate a lawyer's abuse of professional office.'"

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laden with potential conflict.[12] According to Canon 5, a lawyer is required to "exercise independent professional judgment on behalf of a client." To recognize a separate duty to the insurer might significantly interfere with the attorney's ability to choose the most appropriate course of action for the insured.[13] We, therefore ⌊533 decline to extend an attorney's duty to the insurer.

C

Atlanta's third argument, and the crossroad between the majority and this dissent, is that it should be allowed to recover under a theory of equitable subrogation. Relying on *Smith v. Sprague*, 244 Mich. 577, 222 N.W. 207 (1928), Atlanta argues that "[t]he doctrine of equitable subrogation is properly applied where no legal [principles] exist upon which to grant Plaintiff relief, but justice requires that some form of recovery be permitted."[14] In essence, Atlanta claims that as a matter of equity, since Security Services has chosen not to sue the defendants, it should be allowed to stand in Security Services' shoes to prosecute this malpractice claim. Agreeing with Atlanta, the majority reasons that "the attorney-client relationship, the interests of the client, the interests of the insurer, and ultimately the public, which otherwise would absorb the costs of the malpractice, all benefit from exposure to suit." P. 297. We disagree that it is in the best interest of the attorney-client relationship to expose the attorney to liability to the insurer, and, simply stated, we ⌊534 believe that the "shoes" of Security Services do not fit Atlanta.

As stated by the majority, subrogation has two forms: conventional (arising out of contract), and legal (arising out of equity). See *Machined Parts Corp. v. Schneider*, 289 Mich. 567, 574, 286 N.W. 831 (1939).[15]

Applying equitable subrogation requires this Court to balance the public policy concerns associated with the attorney-client relationship against the liability of the attorney to an insurer for negligence. Balancing the policy concerns, we disagree with the majority and would find that the policy reasons in favor of the former outweigh the latter. In so finding, we agree with the majority that the cornerstone of

12. MRPC 5.4(c) provides:

"A lawyer shall not permit a person who recommends, employs, or pays the lawyer to render legal services for another to direct or regulate the lawyer's professional judgment in rendering such legal services."

13. We note that the State Bar of Michigan has twice addressed this issue in informal ethics opinions CI-866 and CI-876.

Informal Ethics Opinion CI-866 provides:

"The obligation of the attorney runs to the insured party rather than the insurer in such case as the attorney has appeared for and represents the insured in pending litigation, notwithstanding that the insurer is paying for such representation.

"If the interest of the insurer and the insured in such case are in conflict, the attorney must advocate and represent the interest of the insured in accordance with the Code of Professional Responsibility or withdraw. Canon 7 of the Code of Professional Responsibility; DR 5-105; Informal Ethics Opinion CI-309; and Ethical Consideration, EC-17. (2-10-83.)"

In addition, Informal Ethics Opinion CI-876 states:

"An attorney retained by an insurance company to defend a legal claim under a policy of insurance has an attorney-client relationship with the insured, and is ethically obligated to promptly communicate any significant settlement offer to the insured and otherwise keep the client reasonably informed concerning the progress of the matter. (6-9-83)"

14. See *Commercial Union Ins. Co. v. Medical Protective Co.*, 426 Mich. 109, 117, 393 N.W.2d 479 (1986), where we stated:

"Equitable subrogation is a legal fiction through which a person who pays a debt for which another is primarily responsible is substituted or subrogated to all the rights and remedies of the other. It is well-established that the subrogee acquires no greater rights than those possessed by the subrogor, and that the subrogee may not be a 'mere volunteer.'" Citing to *Foremost Life Ins. Co. v. Waters*, 88 Mich.App. 599, 603, 278 N.W.2d 688 (1979), rev'd on other grounds 415 Mich. 303, 329 N.W.2d 688 (1982); *Smith v. Sprague, supra*, 244 Mich. at pp. 579-580, 222 N.W. 207.

15. Conventional subrogation, or what otherwise might be termed an assignment of a cause of action (in this case a legal malpractice claim), although never addressed by this Court, has been found to be against public policy by the Court of Appeals. See *Joos v. Drillock*, 127 Mich.App. 99, 104, 338 N.W.2d 736 (1983). See also *Goodley v. Wank & Wank, Inc.*, 62 Cal. App.3d 389, 133 Cal.Rptr. 83 (1976).

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the attorney-client relationship is an attorney's duty of loyalty to the client At 296 The majority, however, meddles in this relationship by allowing the insurer to indirectly recover a contractual debt Although the majority attempts to limit its holding to the facts of this case, we dissent from this view because we believe that a prophylactic rule is required to guide the attorney down a road ladened with potential conflicts. To hold an attorney, whose sole loyalty runs to the client, liable to the insurer either directly, on the basis of negligence, or indirectly, on the basis of equitable subrogation, could substantially impair an attorney's ability to make decisions that require a choice between the best interests of the insurer and the best interests of the insured

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Although this case involves the unique relationship between an insurer, an insured, and an attorney hired to represent the insured, a standard principle applies: Those to whom the negligent party owes a duty may maintain a cause of action. In the context of this case, unlike the majority, we find that the cause of action rests with the insured and not the insurer For all the above reasons, we dissent.

MALLETT and LEVIN, JJ., concur

438 Mich. 536

536Joe **SWICKARD, Plaintiff-Appellee,**

v.

WAYNE COUNTY MEDICAL EXAMINER, Defendant-Appellant.

Docket No. 89602.

Calendar No. 6, March Term, 1991.

Supreme Court of Michigan

Argued March 6, 1991

Decided Sept. 19, 1991

Newspaper reporter brought action under the Freedom of Information Act to compel the county medical examiner to disclose autopsy report and toxicology test results regarding deceased district court judge. The Wayne Circuit Court, Roland L. Olzark, J., ordered disclosure and appeal was taken. The Court of Appeals, 184 Mich App. 662, 459 N.W.2d 92, affirmed and appeal was taken. The Supreme Court, Riley, J., held that: (1) disclosure of information would not amount to a "clearly unwarranted invasion of privacy" of the deceased or his family; (2) physician-patient privilege does not attach to situation where doctor, in performance of autopsy, acquires information about the deceased; and (3) there was no need for evidentiary hearing in trial court

Affirmed.

Levin, J., filed separate opinion

Mallett, J., filed dissenting opinion

1. **Records** ⚷65

When public body refuses to disclose document request under the Freedom of Information Act, and the requester sues to compel disclosure, the public agency bears the burden of proving that the refusal was justified. M.C.L.A. §§ 15.231(2), 15.233(1), 15.240(1), 15.243.

2. **Records** ⚷53

Freedom of Information Act is intended primarily as pro disclosure statute and exemptions to disclosure are to be narrowly construed. M.C.L.A. §§ 15.231(2), 15.233(1), 15.240(1), 15.243.

3. **Records** ⚷51

County coroner's office is a "public body" under the Freedom of Information Act. M.C.L.A. § 15.232(b)(iii).

See publication Words and Phrases for other judicial constructions and definitions.

4. **Records** ⚷54

Autopsy report and toxicology test results prepared by the county medical exam-

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North Star has failed to show the property was treated unequally when its taxable value was not reduced for economic obsolescence.

AFFIRMED.

CHI OF ALASKA, INC., Appellant,

v.

EMPLOYERS REINSURANCE CORPORATION, Appellee.

No. S-4323.

Supreme Court of Alaska.

Jan. 15, 1993.

Insured brought action against liability insurer for declaratory relief regarding its entitlement to select independent counsel in action against insured being defended at insurer's expense. The Superior Court, Third Judicial District, Anchorage, Dana Fabe, J., granted summary judgment for insurer, and insured appealed. The Supreme Court, Matthews, J., held that: (1) insurer's reservation of rights to disclaim coverage gave insured right to retain independent counsel; (2) two-counsel scheme proposed by insurer did not satisfy insured's right to independent counsel; and (3) insured had unilateral right to select independent counsel, subject to implied covenant of good faith and fair dealing.

Reversed and remanded.

Moore, J., filed concurring and dissenting opinion.

Compton, J., filed dissenting opinion.

1. Insurance ⚷514.15

Liability insurer's reservation of rights to disclaim coverage gave insured right to retain independent counsel in action against insured

2. Insurance ⚷514.9(1)

Liability insurers have separate duties to defend and to indemnify their insureds.

3. Insurance ⚷397.1

Liability insurer wishing to preserve policy defenses and still provide defense to insured can preserve those options by defending insured under reservation of rights to later disclaim coverage if reservation of rights is acquiesced in by insured.

4. Insurance ⚷397.1

Liability insurer can preserve its coverage defense and fulfill its duty to defend by defending under reservation of rights to later disclaim coverage if liability is attributable to excluded theory

5 Attorney and Client ⚷21.5(5)

Merely because insurer and insured have divergent interests when insurer seeks to defend under reservation of rights to assert either policy or coverage defenses does not necessarily mean that appointed counsel also has conflicting interests.

6. Insurance ⚷514.15

Insured has right to independent counsel where liability insurer defends insured under reservation of rights to assert coverage defense, in light of conflicts of interests, particularly, that insurer may offer mere token defense, insurer may steer result to judgment under uninsured theory of recovery, and insurer may gain access to confidential or privileged information which it may later use to its advantage.

7. Insurance ⚷514.15

Insured's right to independent counsel, arising in connection with liability insurer's defense of action under reservation of rights to assert coverage defense, was not satisfied by proposed two-counsel scheme under which insured's personal attorney would handle only noncovered claim; even if issues as to which conflict of interest existed could be subsequently relitigated between insured and insurer, that would not alleviate access of appointed counsel to information in possession of insured which might have been used against insured in subsequent coverage litigation, and opportunity to direct case might have afforded

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dispositive advantage in subsequent coverage litigation.

8. **Insurance** ⚖514.15

Insured whose liability insurer is defending under reservation of rights to assert coverage defense has unilateral right to select independent counsel, but that right is subject to implied covenant of good faith and fair dealing, requiring insured to select attorney who is, by experience and training, reasonably thought to be competent to conduct insured's defense.

9. **Insurance** ⚖514.14

Liability insurer is only required to pay reasonable cost of insured's defense; this provides measure of protection for insurers against overbilling and overlitigating by independent counsel.

Brett von Gemmingen, Anchorage, for appellant

Michael N. White, Nicole R. Faghin, Preston, Thorgrimson, Shidler, Gates & Ellis, Anchorage, for appellee.

Before RABINOWITZ, C.J., and BURKE, MATTHEWS, COMPTON and MOORE, JJ.

OPINION

MATTHEWS, Justice.

A seaman aboard a vessel owned by Oceanic Research Services, Inc. (Oceanic) accidentally sustained serious injuries. Oceanic believed it was insured against the loss by a $500,000 bodily injury insurance policy it purchased through CHI of Alaska, Inc. (CHI). That policy, however, actually had a bodily injury limit of only $100,000. Oceanic sued CHI, asserting contract and negligent tort claims, as well as a claim that CHI had intentionally misrepresented that the policy coverage was $500,000. Oceanic sought compensatory and punitive damages.

CHI tendered the defense of this suit to its liability insurer, Employers Reinsurance Corporation (Employers). Employers agreed to defend CHI, conditional on reserving its rights to disclaim coverage with respect to Oceanic's claim of intentional misconduct. Employers claimed that intentional misconduct would be excluded under the policy if such misconduct was ratified by CHI.

CHI objected, noting that the reservation of rights created a conflict of interest between Employers and CHI, and demanded independent counsel paid for by Employers and selected by CHI. CHI stated that it wanted its personal attorney Brett von Gemmingen to defend it. Employers expressed reservations about von Gemmingen's experience in handling claims of this nature and suggested that CHI provide the names of other attorneys with more experience who might be retained by Employers to defend CHI. This was not acceptable to CHI. Next Employers offered to pay von Gemmingen to defend that portion of the lawsuit pertaining to the intentional misconduct claim while retaining the law firm of Hughes, Thorsness, Gantz, Powell & Brundin to act as co-counsel for CHI with responsibility for the defense of all claims. CHI declined this offer. CHI then brought the present action for declaratory relief, seeking vindication of its position that it is entitled to select independent counsel. In the meanwhile, the Oceanic case has been jointly defended by Hughes Thorsness and von Gemmingen.

CHI and Employers each moved for summary judgment in the present case. CHI contended that there was necessarily a conflict of interest between CHI and Employers respecting the defense of Oceanic's claim because Employers could win either by defeating all claims of liability or by establishing that CHI is liable for intentional misconduct. Given this conflict of interest, CHI contended that Employers should have no role in the selection of defense counsel because any attorney selected by an insurance company "will attempt to help his real client, the insurance company, at the expense of the insured." CHI argued that the retention of von Gemmingen "to defend claims as they are pushed outside the policy coverage does not resolve the conflict." Instead, dual representation, according to CHI, would still permit the at-

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torney hired by the insurance company to work against the interests of the insured and in addition would cause confusion concerning who is to control various litigation decisions In response and in support of its motion for summary judgment, Employers argued that potential conflicts were eliminated by allowing CHI to have its personal attorney handle the non-covered claim at Employers' expense

The superior court granted Employers' motion for summary judgment. The court ruled that Employers' offer to allow CHI to retain counsel of its choice to defend it on the intentional tort claim adequately resolved potential conflicts of interest. In addition, the court stated that if CHI contends at the conclusion of the Oceanic lawsuit "that a conflict existed despite Employers' action in allowing it to retain its own counsel to defend uncovered claims, then it can raise this issue at the coverage trial." Following the order granting Employers' motion for summary judgment, a final judgment was entered which contained no explicit declaration. CHI has appealed from this judgment.

There are three issues on appeal:

1. Did Employers' reservation of rights to disclaim coverage give CHI a right to retain independent counsel?
2. Does the two-counsel scheme proposed by Employers and approved by the superior court satisfy CHI's right to independent counsel?
3. Does CHI have the unilateral right to select independent counsel?

We turn to a discussion of these issues

1. *Did Employers' reservation of rights to disclaim coverage give CHI a right to retain independent counsel?*

[1] We answer this question in the affirmative.

[2] Liability insurers have separate duties to defend and to indemnify their insureds [1] In order to discharge their duty to defend, insurers hire counsel to conduct the defense of their insureds.[2] Often there is no conflict of interest between the interests of the insurers and the interests of the insureds. Both wish to successfully defend and, if that is not possible, minimize damages

[3] Sometimes, however, the insurer claims that the policy has been breached by the insured. These are so-called policy defenses [3] of which the insured's failure to give notice or to cooperate are typical examples. The insurer may wish to preserve its policy defenses and still provide a defense to the insured By doing so it may be able to avoid paying the underlying claim either by succeeding in its defense of the insured or, failing that, by successfully asserting its policy defense. The insurer can preserve these options by defending the insured under a reservation of rights to later disclaim coverage if the reservation of rights is acquiesced in by the insured *Continental Ins. Co. v. Bayless & Roberts, Inc.*, 608 P.2d 281, 288 (Alaska 1980)

[4] Similarly the insurer may claim that although no condition of the policy has been breached by the insured, a particular claim made by the plaintiff does not come within the coverage of the policy Such defenses are called coverage defenses The most typical example is the coverage defense in this case where alternative theories of negligent and intentional tort are plead and negligent acts are covered by the policy but intentional acts are not [4] In such cases the insurer's duty to defend may require it to defend even if the most likely theory of recovery is one for which there is no insurance coverage.[5] The insur-

1. *Sauer v. The Home Indemnity Co.*, 841 P.2d 176, 180 (Alaska 1992); *Alaska Pac. Assur. Co. v Collins,* 794 P.2d 936, 945 (Alaska 1990); *National Indem. Co. v. Flesher,* 469 P.2d 360, 366 (Alaska 1970); *Theodore v. Zurich Gen Accident & Liab Ins. Co.* 364 P.2d 51, 55 (Alaska 1961)

2. In this opinion we will refer to such counsel as appointed counsel

3. *Continental Ins. Co. v. Bayless & Roberts, Inc.*, 608 P.2d 281, 288-89 (Alaska 1980)

4. *See Continental,* 608 P.2d at 289.

5. The duty to defend arises "if the complaint *on its face* alleges facts which, standing alone, give rise to a possible finding of liability covered by the policy" *Afcan v. Mutual Fire, Marine &*

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er can preserve its coverage defense and fulfill its duty to defend by defending under a reservation of rights to later disclaim coverage if liability is attributable to the excluded theory.

In cases where an insurer asserts either policy or coverage defenses, and defends its insured under a reservation of rights, there are various conflicts of interest between the insurer and the insured. We identified three of these in *Continental*. First, if the insurer knows that it can later assert non-coverage, or if it thinks that the loss which it is defending will not be covered under the policy, it may only go through the motions of defending: "it may offer only a token defense ... [I]t may not be motivated to achieve the lowest possible settlement or in other ways treat the interests of the insured as its own." *Id.* at 289. Second, if there are several theories of recovery, at least one of which is not covered under the policy, the insurer might conduct the defense in such a manner as to make the likelihood of a plaintiff's verdict greater under the uninsured theory. *Id.* Third, the insurer might gain access to confidential or privileged information in the process of the defense which it might later use to its advantage in litigation concerning coverage. *Id.* at 291.

[5] Merely because the insurer and the insured have divergent interests when the insurer seeks to defend under a reservation of rights does not necessarily mean that appointed counsel also has conflicting interests. If appointed counsel makes it clear at the outset of his engagement that he is going to be involved only in the defense of the liability claim, not in coverage issues, and that his client is the insured, not the insurer, conflicts should be rare.[6] A number of authorities hold that this is the appropriate role of appointed counsel. For example, the Arizona Supreme Court held that appointed counsel who in the course of representing the insured gains access to information which may give rise to a policy defense is prohibited from communicating that information to the insurance company. *Farmers Ins. Co. of Arizona v. Vagnozzi*, 138 Ariz. 443, 448, 675 P.2d 703, 708 (1983): "We emphasize that the attorney who represents the insured owes him an undeviating allegiance whether compensated by the insurer or the insured and cannot act as an agent of the insurance company by supplying information detrimental to the insured." Employers agrees with this view, noting that counsel has "an absolute duty of fidelity to the insured over the interests of the insurer."

Other authorities, however, take the view that appointed counsel represents both the insured and the insurer. A former president of the Defense Research Institute has written that appointed counsel has an obligation to disclose to the insurance company information detrimental to the insured. Thomas A. Ford, *The Insurance Contract: The Conflicts of Interest it Breeds*, Ins. Couns.J. 610, 620 (Oct. 1969):

> In order for the attorney to perform his role properly, he must never lose sight of the fact that he is working for two different and distinct parties—the insured and the insurer. He must fully disclose to both parties the information he has obtained as a result of his unique relationship with them.

See also Shafer v. Utica Mutual Ins. Co., 248 A.D. 279, 289 N.Y.S. 577, 587 (1936) (appointed attorney acted properly in disclosing to insurer information which enabled insurer to disclaim liability); Alaska Code of Professional Responsibility EC 5–17 (stating that one typically recurring situation involving potentially different interests is dual representation of insured and insurer).

Where there is a conflict between insurer and insured, appointed counsel may tend to

Inland Ins. Co., 595 P.2d 638, 645 (Alaska 1979); or, if the complaint does not contain such allegations, where "the true facts are within, or potentially within, the policy coverage and are known or reasonably ascertainable to the insurer." *National Indem. Co. v. Flesher*, 469 P.2d 360, 366 (Alaska 1970).

6. Ronald E. Mallen, *A New Definition of Insurance Defense Counsel*, Ins.Couns.J. 108, 108–109 (Jan. 1986).

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favor the interests of the insurer primarily because of the prospect of future employment. *United States Fidelity & Guar. Co. v Lewis A Roser Co.*, 585 F.2d 932, 938 n 5 (8th Cir.1978) ("Even the most optimistic view of human nature requires us to realize that an attorney employed by an insurance company will slant his efforts, perhaps unconsciously, in the interest of his real client—the one who is paying his fee and from whom he hopes to receive future business—the insurance company."); *San Diego Navy Fed Credit Union v. Cumis Ins Soc'y, Inc.*, 162 Cal.App 3d 358, 208 Cal.Rptr 494, 498 (1984) ("'A lawyer who does not look out for the carrier's best interest may soon find himself out of work'" (quoting the trial court)); Michael A Berch and Rebecca W Berch, *Will the Real Counsel for the Insured Please Rise?*, 19 Ariz St L.J 27, 29–30 (1987) ("[T]he attorney's economic interests weigh heavily in favor of the insurer, which, after all, may retain his services in other cases; yet the rules of professional responsibility tip the scales toward the insured."); Arthur P. Berg, *Losing Control of the Defense—The Insured's Right to Select His Own Counsel*, 26 For the Defense 10, 15 (July 1984) ("Although [some] courts seem to trust the insurer and attorney to act in the best interests of the insured, the more common view is that the longstanding ties that defense counsel has with the insurer will inevitably influence his conduct of the case."); Sampson A. Brown and John L Romaker, Cumis, *Conflicts and the Civil Code. Section 2860 Changes Little*, 25 Cal. W.L.Rev. 45, 54 (1988) ("The attorney, wishing to maintain the insurer's business, does not want to aggravate the company."); Mark A. Saxon, *Conflicts of Interest: Insurers' Expanding Duty to Defend and the Impact of "Cumis" Counsel*, 23 Idaho L.Rev. 351, 353 (1987) (Insurance counsel's "relationship with the insurer is contractual, usually ongoing, supported by strong financial interests, and often strengthened by sincere friendships.").[7] In recognition of this, most courts hold that in conflict situations the insured has the right to independent counsel to conduct its defense and the insurance company has the obligation to pay the reasonable value of the defense conducted by independent counsel.[8]

[6] In dicta in *National Indemnity Co v Flesher*, 469 P.2d 360, 367 n 22 (Alaska 1970), we recognized the right of the insured to independent counsel under circumstances involving a coverage defense: "In such circumstances, the insurer must provide the insured with independent counsel." Ten years later in *Continental Insurance Co. v. Bayless & Roberts, Inc.*, 608 P.2d 281 (Alaska 1980), we recognized the right

7. In addition at least two of our reported cases demonstrate that appointed counsel sometimes favor the interest of the insurer over those of the insured. *Continental*, 608 P.2d at 294 ("it is quite apparent that both [appointed counsel] and Continental believed that [appointed counsel's] first loyalty was to Continental, and that throughout the course of the litigation he acted for and on behalf of the insurance company"); *Bohna v Hughes, Thorsness, Gantz, Powell & Brundin*, 828 P.2d 745, 749–50 (Alaska 1992) (appointed counsel proposed to put insured through bankruptcy in order to reduce insurer's liability to plaintiff).

8. "The prevailing view is that the presence of a coverage issue enables the insured to reject appointed counsel, select his own lawyer and control the defense at the expense of the insurer." Mallen, *supra*, at 113; *see, e.g.*, *American Family Life Assur Co v United States Fire Co.*, 885 F.2d 826, 831 (11th Cir 1989) (interpreting Georgia law); *Rhodes v Chicago Ins Co.*, 719 F.2d 116, 120–21 (5th Cir.1983) (interpreting Texas law); *Previews Inc v. California Union Ins. Co.*, 640 F.2d 1026 (9th Cir 1981) (interpreting California law); *San Diego Navy Fed. Credit Union v. Cumis Ins. Soc'y*, 162 Cal.App.3d 358, 208 Cal.Rptr 494, 501–02 (1984); *Maryland Casualty Co. v Peppers*, 64 Ill.2d 187, 355 N.E.2d 24 (1976); *Illinois Masonic Medical Ctr v. Turegum Ins. Co.*, 168 Ill.App.3d 158, 118 Ill.Dec. 941, 522 N.E.2d 611 (1988); *Prashker v United States Guar Co.*, 1 N.Y.2d 584, 154 N.Y.S.2d 910, 915, 136 N.E.2d 871, 876 (1956); *Allstate Ins. Co. v Noorhassan*, 158 A.D.2d 638, 551 N.Y.S.2d 942, 944 (1990); *Gorman v. Pattengell*, 145 A.D.2d 411, 535 N.Y.S.2d 402, 404 (1988); *see also* Todd R Smyth, Annotation, *Duty of Insurer to Pay for Independent Counsel When Conflict of Interest Exists Between Insured and Insurer*, 50 A.L.R.4th 932, 938 (1986). A minority of courts hold that the insured has no right to independent counsel. Mallen, *supra*, at 113. They rely on appointed counsel to resolve conflicts in favor of the insured. *Id.*; *see, e.g.*, *Federal Ins. Co. v X-Rite, Inc.*, 748 F.Supp 1223, 1229 (W.D.Mich 1990)

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of the insured to independent counsel in cases involving policy defenses. However, we reserved the question whether the insured had the same right in coverage defense cases *Id.* at 289

In *Continental* the insurer claimed that the insured had breached the cooperation clause of the policy, but offered to defend the insured under a reservation of rights. *Id.* at 283 The insured rejected the insurer's offer of a conditional defense and demanded a defense without a reservation of rights. *Id* at 286 This the insurer refused to do *Id.* Subsequently, the insured's personal counsel took over the defense of the case and entered into a settlement which resulted in a consent judgment against the insured. *Id.* In the ensuing litigation between the insured and the insurer, the insurer contended that the insured had breached the insurance policy by refusing to accept the insurer's offer to defend under a reservation of rights *Id.* at 288. We held that the insured did not breach the policy and that it was within its rights to require the insurer to defend unconditionally or withdraw from the defense. *Id.* at 291. We also affirmed the jury's award which included $4,000 expended by the insured as its defense costs. *Id* at 296 n. 28.

In reaching this result, we expressed and adopted in policy defense cases the general rule that the insurer must surrender its right to control the defense to the insured if the insured refuses to accept a defense under a reservation of rights:

> [T]he general rule is that, if an insured refuses to accede to the insurer's reservation of rights, the carrier must either accept liability under the policy and defend unconditionally or surrender control of the defense. ...

Id at 288. We explained in some detail the types of conflicts of interests which arise when the insurer asserts a right to later contest its liability. *Id* at 289–90. We noted that these conflicts might be avoided if the insured were offered the right to retain independent counsel:

> The possibility of a conflict might be avoided in such cases if the insurance company were to offer its insured the right to retain independent counsel to conduct his defense, and agree to pay all the necessary costs of that defense. In that event, it would seem that the company should be entitled to reserve the right to later litigate an alleged policy defense.

Id. at 291 n. 17. As already stated, the holding in *Continental* was limited to policy defenses; the question as to whether the same rules should apply where coverage defenses are involved was reserved *Id* at 289

All three general types of conflicts of interests between insurer and insured which we identified in *Continental*—the insurer may offer mere token defense, the insurer may steer result to judgment under an uninsured theory of recovery, the insurer may gain access to confidential or privileged information which it may later use to its advantage—apply in coverage defense cases. However, the second reason does not apply in policy defense cases Policy defenses, such as lack of notice or noncooperation, involve facts which are generally irrelevant to the litigation between the plaintiff and the insured Therefore, appointed counsel has no opportunity to "covertly frame [a] defense to achieve a verdict based upon [a theory under which no coverage would result] so that [the insurer] could later assert that the defense was not covered. ..." *Id.* at 289. Thus, the need for independent counsel is, if anything, greater in coverage than in policy defense cases[9] We conclude that the right to independent counsel recognized in *Continental* should also apply to cases involving coverage defenses.[10] We thus adhere to the

9. *See also* Berch & Berch, *supra*, at 38 ("[policy defense] cases do not present the same dangers [of conflicting interests] that coverage cases present").

10 We have recently recognized the application of the right to independent counsel expressed in *Continental* in the context of a coverage defense case in *Sauer v. The Home Indemnity Co.*, 841 P.2d 176, 182, 183 (Alaska 1992), where we stated:

> However, if the insured does not consent to a non-waiver agreement, or to a defense under a reservation of rights, then the insurance

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dicta contained in *National Indemnity*, which we noted above

2. *Does the two-counsel scheme proposed by Employers and approved by the superior court satisfy CHI's right to independent counsel?*

[7] We answer this question in the negative.

The trial court was of the view that neither CHI nor Employers was bound by any determination of fact made in the underlying tort suit concerning whether CHI's conduct was negligent or intentional. From this the trial court concluded that Employers' two-counsel scheme would solve the conflict of interest between the insurer and the insured.[11] The view that issues determined in the initial action as to which a conflict of interest exists between insurer and insured may be subsequently relitigated appears to be sensible and in accordance with a number of authorities.[12] That view, however, does not resolve all conflicts of interest between insurer and insured. It does not alleviate the access of appointed counsel to information in possession of the insured which may be used against the insured in subsequent coverage litigation:

> This solution overlooks the fact that, during the initial litigation, the insured may transmit information to counsel that the insurer could use in subsequent litigation to the insured's disadvantage. A heavy burden of silence falls on the attorney the insurer selects to defend the insured.

Berch & Berch, *supra*, at 32 n. 23. The fact that personal counsel for CHI is acting as co-counsel with counsel appointed by the insurer also does not eliminate this conflict. Appointed counsel has and should have full access to the client so that the defense may be effectively conducted.

Moreover, even where the facts in conflict may be relitigated, the opportunity to direct a case through witness selection, interrogation, and discovery may afford a dispositive advantage in subsequent litigation:

> In such cases, the insured's attorney has the opportunity to develop the facts through discovery and to shape the case for, and present the evidence at, the trial. So even though the insured or the insurer may relitigate the coverage issue in a subsequent proceeding, controlling the

company must choose whether it wishes to defend unconditionally or pursue other options. One such option is to permit the insured to exercise its right to reject the defense offered by the insurer and to obtain substitute counsel at the insurer's expense. In the event the defense is conducted by substitute counsel, the insurance company retains the right to later contest policy coverage. *See Continental Ins. Co. v. Bayless & Roberts, Inc.*, 608 P.2d 281, 291 n. 17 (Alaska 1980).

11. As noted earlier, Employers offered to pay CHI's personal attorney, von Gemmingen, to defend against the noncovered claims.

12. *See Theodore v. Zurich Gen. Accident & Liab. Ins. Co.*, 364 P.2d 51, 56 (Alaska 1961) (issues determined in initial action as to which interests of insurer and insured were not conflicting held to be binding on insurer); *Farmers Ins. Co. v. Vagnozzi*, 138 Ariz. 443, 448, 675 P.2d 703, 708 (1983); *Ferguson v. Birmingham Fire Ins. Co.*, 254 Or. 496, 460 P.2d 342, 349 (1970); Restatement (Second) of Judgments § 58 (1982). Section 58 of Restatement (Second) of Judgments provides:

Effect of Judgment Against Indemnitee on Indemnitor Who Has Independent Duty to Defend Indemnitee

(1) When an indemnitor has an obligation to indemnify an indemnitee (such as an insured) against liability to third persons and also to provide the indemnitee with a defense of actions involving claims that might be within the scope of the indemnity obligation, and an action is brought against the indemnitee involving such a claim and the indemnitor is given reasonable notice of the action and an opportunity to assume its defense, a judgment for the injured person has the following effects on the indemnitor in a subsequent action by the indemnitee for indemnification:

(a) The indemnitor is estopped from disputing the existence and extent of the indemnitee's liability to the injured person; and

(b) The indemnitor is precluded from relitigating those issues determined in the action against the indemnitee as to which there was no conflict of interest between the indemnitor and the indemnitee.

(2) A "conflict of interest" for purposes of this Section exists when the injured person's claim against the indemnitee is such that it could be sustained on different grounds, one of which is within the indemnitor's obligation to indemnify and another of which is not.

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defense in the main proceeding could be critical. Testifying under oath in the main proceeding may freeze in the witnesses' minds one version of the facts. Very little latitude may remain in subsequent proceedings to mold the evidence bearing upon coverage.

Id. at 37–38 [13]

We conclude therefore that the two-counsel solution does not satisfactorily resolve the conflicts which have given rise to the right to independent counsel.

3. *Does CHI have the unilateral right to select independent counsel?*

[8] We answer this question in the affirmative.

Most cases which recognize the right to independent counsel express the view that the insured has the right to select independent counsel of its choice. *American Family Life Assur. Co. v. United States Fire Co.*, 885 F.2d 826, 831 (11th Cir.1989) (if insured had rejected conflicted counsel, insurer "would have been obligated to pay" for defense conducted by insured) (interpreting Georgia law); *Rhodes v. Chicago Ins. Co.*, 719 F.2d 116, 120–21 (5th Cir.1983) ("When a reservation of rights is made ... the insured may ... pursue his own defense [and the] insurer remains liable for attorneys' fees") (interpreting Texas law); *Previews Inc. v. California Union Ins. Co.*, 640 F.2d 1026 (9th Cir.1981) ("the insurer's obligation to defend extends to paying the reasonable value of the legal services and costs performed by independent counsel selected by the insured") (interpreting California law); *San Diego Navy Fed. Credit Union v. Cumis Ins. Soc'y*, 162 Cal.App.3d 358, 208 Cal.Rptr. 494, 501–02 (1984) ("the insurer must pay the reasonable cost for hiring independent counsel by the insured"); *Maryland Casualty Co. v. Peppers*, 64 Ill.2d 187, 355 N.E.2d 24, 31 (1976) (The insured "has the right to be defended ... by an attorney of his own choice who shall have the right to control the conduct of the case"); *Illinois Masonic Medical Ctr. v. Turegum Ins. Co.*, 168 Ill.App.3d 158, 118 Ill.Dec. 941, 943, 522 N.E.2d 611, 613 (1988) ("where a conflict of interest exists the insured, rather than the insurer, is entitled to assume control of the defense of the underlying action; ... the insurer must underwrite the reasonable costs incurred by the insured in defending the action with counsel of his own choosing"); *Prashker v. United States Guar. Co.*, 1 N.Y.2d 584, 154 N.Y.S.2d 910, 915, 136 N.E.2d 871, 876 (1956) ("the selection of the attorneys to represent the assureds should be made by them rather than by the insurance company, which should remain liable for the reasonable value of the services"); *Allstate Ins. Co. v. Noorhassan*, 158 A.D.2d 638, 551 N.Y.S.2d 942, 944 (1990) (the insured "should be permitted to select their own attorney [and the insurer] is liable for the reasonable value of the services"); *Gorman v. Pattengell*, 145 A.D.2d 411, 535 N.Y.S.2d 402, 404 (1988) (the insured "is entitled to retain, at her insurer's expense, an attorney with no business connection to her insurance carrier and who will defend solely her interests"); *see also* Mallen, *supra*, at 118 ("The right to independent counsel means an attorney of the insured's choice."); Smyth, *supra*, at 938 ("Most courts appear to allow the insured to select independent counsel when a conflict of interests arises"). Under this line of authority the insurance company is obligated to pay the "reasonable cost for hiring independent counsel by the insured." *Cumis*, 208 Cal.Rptr. at 506; *see also* Mallen, *supra*, at 120.

A recent California case, *Center Foundation v. Chicago Insurance Co.*, 227 Cal.App.3d 547, 278 Cal.Rptr. 13 (App.1991), has noted that the insured's right to select independent counsel is subject to the implied covenant of good faith and fair dealing. In context, this means that the insured must act reasonably to select an attorney who is capable of presenting an effective defense and who will bill reason-

13. CHI also notes that there are unresolved problems of which of the two counsel is to control discovery and trial strategy. One commentator has noted: "The role of a second lawyer with clearly antagonistic coverage interests to the insured is uncertain and seems inappropriate." Mallen, *supra*, at 119.

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ably for his or her services. The court stated:

> In our view, the duty of good faith imposed upon an insured includes the obligation to act reasonably in selecting as independent counsel an experienced attorney qualified to present a meaningful defense and willing to engage in ethical billing practices susceptible to review at a standard stricter than that of the marketplace. Conduct arguably acceptable in the ordinary attorney-client relationship where the latter pays the former from his own pocket is not necessarily appropriate in the tripartite context created when independent counsel undertakes to represent the insured at the expense of the insurer.

Center Foundation, 278 Cal.Rptr. at 21 (footnote omitted).

A few cases support Employers' argument that it should have the right to approve of CHI's choice for independent counsel. In *Employers' Fire Insurance Co. v. Beals*, 103 R.I. 623, 240 A.2d 397, 404 (1968), the court approved of the solution suggested in *Prashker*, that the insured should be allowed to select independent counsel. However, the *Beals* court added the proviso that counsel selected by the insured should be approved by the insurer and that "[s]uch approval, however, should not be unreasonably withheld." *Id.* 240 A.2d at 404. *Fireman's Fund Insurance Co. v. Waste Management of Wisconsin*, 777 F.2d 366 (7th Cir.1985) (apparently interpreting Wisconsin law), involves an atypical fact pattern. The question whether the insurer should have approval rights for independent counsel was not the issue; however, the case does contain dicta which states that giving the insurer the right to approve or disapprove of independent counsel selected by the insured is "fair, sensible and reasonable." *Id.* at 370.

[9] We conclude that the insured should have the unilateral right to select independent counsel and that this right should be subject to the implied covenant of good faith and fair dealing.[14] In our view the covenant of good faith and fair dealing in this context requires that the insured select an attorney who is, by experience and training, reasonably thought to be competent to conduct the defense of the insured. Such a result, in our view, fairly balances the interest of the insured—being defended by competent counsel of undivided loyalty—with the interests of the insurer—having the defense of the insured conducted by competent counsel. The insurer is only required to pay the reasonable cost of the defense. *See, e.g., Turegum*, 118 Ill.Dec. at 943, 522 N.E.2d at 613 ("insurer must underwrite reasonable costs incurred by the insured in defending the action"); *Noorhassan*, 551 N.Y.S.2d at 944 (same). This provides a measure of protection for insurers against overbilling—and overlitigating—by independent counsel.

In the present case the record is unclear as to whether it is reasonable for CHI to select von Gemmingen as independent counsel. On remand, a hearing should be conducted promptly in order to determine this question. If the trial court finds that von Gemmingen is a reasonable selection, a declaration should be entered that he may conduct the defense of CHI as independent counsel. If the court finds that he is not a reasonable selection, the court should so declare and CHI should proceed to select qualified counsel.

For the above reasons the judgment of the superior court is REVERSED and this case is REMANDED for further proceedings and entry of a declaration in accordance with this opinion.

MOORE, J., concurs in part and dissents in part.

COMPTON, J., dissents.

MOORE, Justice, concurring in part and dissenting in part.

In its decision today, the court holds that an insured has the right to reject the counsel appointed by the insurer and to unilat-

14. We have held that the implied covenant of good faith and fair dealing is inherent in all contractual relationships including the insured-insurer relationship. *Guin v. Ha*, 591 P.2d 1281, 1291 (Alaska 1979).

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erally select replacement counsel whenever dual representation creates a potential conflict of interest. Under the guise of balancing the interests of the insured and the insurer, the court completely abrogates the insurer's right to participate in the insured's defense. Neither existing case law nor sound policy mandates such a drastic curtailment of the insurer's contract rights. Although I agree that the insured is entitled to select independent counsel in conflict of interest situations, I believe the insurer retains the right of reasonable approval. Such a rule accommodates both the important interest of the insured in controlling the litigation and the legitimate interest of the insurer in assuring that the defense will be competently handled by qualified counsel in a cost-effective manner.

Most courts agree that an insured may reject insurer-selected counsel when the insurer assumes the defense under a reservation of rights because of a coverage question.[1] *See* Ronald E. Mallen, *A New Definition of Insurance Defense Counsel,* 53 Ins.Couns.J. 108, 113 (Jan. 1986). Most courts also conclude that the presence of a conflict of interest does not relieve an insurer of its obligation to pay defense costs under its duty to defend. *See Babcock & Wilcox Co. v. Parsons Corp.*, 430 F.2d 531, 538 (8th Cir.1970). The critical issue, which few courts have identified, is whether, in this context, an insured has the *unilateral* right to select replacement counsel when the insurance agreement gives the insurer the right to defend the insured. This is a matter of first impression in Alaska.[2] I would hold that the insurer has the right to approve the counsel selected by the insured, but that the insurer may not unreasonably withhold such approval.[3]

The court simply fails to recognize that Employers has both a contractual right as well as the contractual duty to defend CHI.[4] An insurer's right to control the defense is "a valuable one in that it reserves to the insurer the right to protect itself against unwarranted liability claims and is essential in protecting its financial interest in the outcome of litigation." 7C John A. Appleman, *Insurance Law and Practice* § 4681 (Walter F. Berdal ed., rev.

1. The mere reservation of rights in response to a third party complaint alleging covered and uncovered conduct does not in and of itself create a conflict of interest warranting withdrawal of counsel selected by the insurer. Because the liberal rules of pleading permit third party plaintiffs to allege a variety of legal theories, the pleading alone should not be permitted to precipitate a conflict of interest between an insurer and the insured requiring withdrawal of the attorney chosen by the insurer. Nor should the mere fact that an attorney has previously been utilized by an insurer have this effect. Clearly under the circumstances of this case, an attorney has an obligation to make the insured and the insurer aware of the potential for conflict and to proceed with the representation only with the consent of both. Alaska Code of Professional Responsibility DR 5-105. This is a continuing duty so the appropriateness of representation will have to be constantly monitored by counsel.

2. CHI, citing *National Indem. Co. v. Flesher,* 469 P.2d 360, 367-68 n. 22 (Alaska 1970) and *Continental Ins. Co. v. Bayless & Roberts, Inc.*, 608 P.2d 281, 291 n. 17 (Alaska 1980), contends that we have previously held that an insured has a right to select independent counsel in a conflict of interest situation. Neither of the passages cited by CHI constitutes a holding of this court as the issue the court decides today was not before us in either *Continental* or *Flesher*. These passages are thus not dispositive of this issue.

3. Other alternatives also balance the interests of the insurer and the insured. For example, the insured could agree to proceed with an attorney of its choice to serve as co-counsel to the insurer-selected attorney. Here, because CHI rejected this alternative, I limit my discussion to the approach to be taken when the insured rejects the co-counsel approach.

4. Section II of the contract of insurance between CHI and Employers provides that

> [Employers] in Insured's name and behalf, shall have the right to investigate, defend and conduct settlement negotiations in any claim or suit.
>
> . . . .
>
> The Insured shall not admit liability for, or make any voluntary settlement, or incur any costs or expenses in connection with any claim involving payment by [Employers], except with the written consent of [Employers].

Section III obligates Employers to pay "all expenses incurred in the defense of any claim or suit against Insured" alleging acts covered by the policy.

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ed 1979) Such an important right should not be ignored in the analysis Although the insurer's right to control the litigation must yield to the insured's right to independent representation when a conflict arises, this does not mean that the insurer's right to defend is completely extinguished.

Although the court purports to align itself with what it considers to be the "majority view," an analysis of the cases it relies on reveals that most courts which have recognized the insured's "right to independent counsel" have not explicitly analyzed the scope of this right or fully considered its impact on the rights of the insurer

Two cases cited by the court, while speaking of a "right to independent counsel," implicitly recognize the right of an insurer to participate in the defense of its insured The courts in both *American Family Life Assur. Co. v U.S. Fire Co.*, 885 F.2d 826 (11th Cir.1989), and *San Diego Navy Fed. Credit Union v. Cumis Ins. Soc'y, Inc.*, 162 Cal.App.3d 358, 208 Cal Rptr. 494 (1984), required an insurer to pay the cost of "independent counsel" selected by the insured to act as co-counsel with an attorney selected by the insurer.[5] Neither case stands for the proposition that an insured has a unilateral right to select exclusive defense counsel when a coverage dispute creates a conflict of interest.[6] In fact, *American Family Life* includes a partial quote from Appleman which recognizes the right of an insured "to refuse to accept an offer of counsel appointed by the insurer," 885 F.2d at 831 (citing 7C Appleman, *supra*, § 4685.01), but omits that part of the sentence which recognizes the insurer's

5. In *American Family Life*, the court affirmed an award of attorneys fees to an insured who hired co-counsel to "monitor and aid in the defense" provided by the insurer 885 F.2d at 831. In *Cumis*, the court held that the insurer must pay the fees of an attorney retained by the insured to act as co-counsel to the attorney selected by the insurer 208 Cal.Rptr at 497, 506.

6. The other cases cited for the "majority view" do not hold that an insured has the unilateral right to select defense counsel to the exclusion of any right of the insurer to participate in the defense

In *Rhodes v. Chicago Ins Co.*, 719 F.2d 116 (5th Cir.1983), an insured rejected the insurer's tender of a defense under a reservation of rights and pursued its own defense. The party injured by the insured sued the insurer to collect damages assessed against the insured under a settlement approved by the state court. The Fifth Circuit reversed the grant of summary judgment for the insurer, finding unresolved issues of material fact. The right to "independent counsel" was not even an issue in the case; rather, the issue was whether the insurer had breached a duty to defend, and if so, the consequences of the breach. *Id.* at 119.

In *Previews, Inc. v. California Union Ins Co.*, 640 F.2d 1026, 1028 (9th Cir 1981), the court, interpreting California law, concludes with little discussion that a conflict existed, that the insured "was entitled to engage outside counsel," and that the insurer was responsible for "reasonable value of the legal services and costs performed by independent counsel selected by the insured"

In *Maryland Casualty Co. v. Peppers*, 64 Ill.2d 187, 355 N.E.2d 24, 30–32 (1976), the court held that an insured had the right to select independent counsel and control the case in cases of potential conflict of interest. However, the court also explicitly recognized the insurer's right to have its attorney participate "in all phases of [the] litigation subject to the control of the case by [the insured's] attorney." *Id* 355 N.E.2d at 31.

In *Illinois Masonic Medical Ctr. v. Turegum Ins. Co*, 168 Ill.App.3d 158, 118 Ill.Dec 941, 948–49, 522 N.E.2d 611, 618–19 (1988), the court held that, under *Maryland Casualty*, an insured may select its own attorney and control its defense in conflict situations. The court also held that it was within the discretion of the replacement counsel to determine to what extent the counsel appointed by the insurer and rejected by the insured could also participate in the defense *Id.*

In *Prashker v. U.S. Guar. Co.*, 1 N.Y.2d 584, 154 N.Y.S.2d 910, 136 N.E.2d 871 (1956), the question of the right of the insured to select independent counsel was not directly before the court The court stated in *dicta* that in a conflict of interest situation, the insured, rather than the insurer, should select defense counsel. *Id.* 154 N.Y.S.2d at 915, 136 N.E.2d at 876 The court provided no analysis, reasoning, or authority to support its statement.

In *Gorman v. Pattengell*, 145 A.D.2d 411, 535 N.Y.S.2d 402, 404 (1988), the court summarily concluded, citing *Prashker*, that the insured is entitled to independent counsel at the insurer's expense where there is a conflict of interest.

In *Allstate Ins. Co. v. Noorhassan*, 158 A.D.2d 638, 551 N.Y.S.2d 942, 944 (1990), the court stated without explanation or analysis that an insured has the right to select independent counsel and the insurer has the duty to pay for this defense whenever a potential conflict of interest arises

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right to approve of substitute counsel.[7]

Some courts and commentators recognize that cases permitting an insured to select "independent counsel" do not define what is meant by that term *See, e.g., Federal Ins. Co. v X-Rite, Inc.*, 748 F.Supp 1223, 1228 n. 1 (W.D.Mich 1990) ("'Independent Counsel' is a term which has not been defined in the case law."); Allan D. Windt, *Insurance Claims and Disputes—Representation of Insurance Companies and Insureds* § 4 20 at 179 (2d ed 1988) Courts have used the phrase in a variety of contexts,[8] some of them diametrically opposed Commentators have stated that "[t]he right to independent counsel means an attorney of the insured's choice" Ronald E. Mallen & Jeffrey M. Smith, *Legal Malpractice* § 23 16 at 418 (3d ed 1989) On the other hand, courts have also recognized "a right in the insurer to determine whether to provide independent counsel of its choosing or to reimburse the insured for counsel of its choice" *Federal Ins Co*, 748 F.Supp at 1228 (citing nine cases for this proposition). Because there is disagreement as to what the right to independent counsel entails, and because many cases recognize the insurer's right to select replacement "independent counsel," or at a minimum, to participate in the defense of the insured alongside counsel selected by the insured, it is questionable whether the view espoused by the court represents a "majority view," statements by courts and commentators to that effect notwithstanding.

However, if, as the court apparently believes, an insured's interest in fair representation requires the complete abrogation of an insurer's right to participate in the defense, the insurer's right should at least be addressed in terms of established principles of contract law In interpreting a contract, a court must give effect to the reasonable expectation of the parties. *Peterson v. Wirum*, 625 P.2d 866 (Alaska 1981); *Fairbanks N. Star Borough v. Tundra Tours, Inc*, 719 P.2d 1020 (Alaska 1986) (in order to give effect to the parties' reasonable expectations, a court should look to the contract language, relevant extrinsic evidence and case law interpreting similar provisions) Clearly, the insurance agreement here gave Employers a reasonable expectation that it would have some control over the defense. Even if the right to defend provision is deemed ambiguous and is therefore construed against the insurer, *see Puritan Life Ins Co v. Guess*, 598 P.2d 900 (Alaska 1979), it is not necessary to extinguish the right entirely. Rather, the right to defend provision can and should be interpreted in a way which balances the interests of both the insurer and the insured.

As one court has stated when considering the scope of an insurer's contractual right to defend in conflict situations:

> Unless "right to defend" is to be deemed mere surplusage, . it must be viewed as conferring upon [the insurer] some prerogative with respect to the defense beyond simply paying expenses. This prerogative cannot, in a conflict of interest situation, include an absolute right to control the litigation On the other hand, [the insured's] apparent presumption that the conflict of interest, posing a potential of prejudice to its interests, automatically and completely negated all prerogative, is not reasonable.
>
> . [The] "right to defend" can hardly be deemed to contemplate anything less

7. The full sentence from Appleman reads:

> But it has been held that where a conflict of interest exists between the insurer and the insured in the conduct of the defense of the action brought against the insured, the insured has the right to refuse to accept an offer of the counsel appointed by the insurer and insurer's desire to control the defense must yield to its obligation to defend the policyholder; and where a conflict of interest exists *the engagement of independent counsel to represent the insured should be approved by the insurer to assure the employment of competent counsel Such approval should not be unreasonably withheld*

7C Appleman, *supra*, § 4685 01 (emphasis added) (footnotes omitted)

8. The "right to independent counsel" could be read narrowly to mean the right to reject an insurer's choice of attorney It could be read more broadly to encompass the right to select substitute or replacement counsel either unilaterally or subject to the approval of the insurer

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> than participation in selection of counsel, which contractual right ought to be enforced unless contrary to public policy.

Federal Ins. Co., 748 F.Supp. at 1229; *see also New York State Urban Dev. Corp. v. VSL Corp.*, 738 F.2d 61, 65–66 (2d Cir. 1984). Here, Employers' right to participate in CHI's defense should encompass, at a minimum, the right to have a role in the selection of defense counsel.

Courts which have recognized the right of the insurer to participate in the selection of substitute counsel do not agree as to the latitude an insurer should have. In *Federal Ins. Co.*, the court concluded that, under Michigan law, an insurer is entitled to select replacement counsel, but its selection must be made with the utmost of good faith. 748 F.Supp. at 1229. On the other hand, in *Employers' Fire Ins. Co. v. Beals*, 240 A.2d 397 (R.I. 1968), the court held that an insured may elect to choose its own counsel, but that the insurer has a right to approve of the counsel selected by the insured. The *Beals* court stated:

> Because the insurer has a legitimate interest in seeing that any recovery based on finding of negligence on the part of its insured is kept within reasonable bounds, and since the total expense of this defense is to be assumed by the insurer under its promise to defend, we believe that .... the engagement of an independent counsel to represent the insured should be approved by the insurer. Such approval, however, should not be unreasonably withheld.

240 A.2d at 404; *see Fireman's Fund Ins. Co. v. Waste Management of Wis. Inc.*, 777 F.2d 366, 370 (7th Cir. 1985) (approving parties' agreement to allow insured to select replacement counsel subject to insurer's approval as the most "fair, sensible, and reasonable way for both parties to terminate [conflict of interest] dispute and to get on with trial of the [cases against insured] on their merits"). This approach is also recommended by a noted commentator on insurance law who stated:

> [W]here a conflict of interest exists between the insurer and the insured in the conduct of the defense of the action brought against the insured, the insured has the right to refuse to accept an offer of the counsel appointed by the insurer and insurer's desire to control the defense must yield to its obligation to defend the policyholder; and where a conflict of interest exists the engagement of independent counsel to represent the insured should be approved by the insurer to assure the employment of competent counsel. Such approval should not be unreasonably withheld.

7C Appleman, *supra*, § 4685.01 (footnotes omitted).

The majority dismisses these authorities without analysis, summarily concluding that the insurer's interests are sufficiently protected by the implied covenant of good faith and fair dealing inherent in all contracts. Principally relying on a recent California court of appeals decision, *Center Found. v. Chicago Ins. Co.*, 227 Cal.App.3d 547, 278 Cal.Rptr. 13 (1991), the majority observes that the covenant of good faith and fair dealing requires that the insured "select an attorney who is, by experience and training, *reasonably thought to be competent to conduct the defense of the insured*."[9] (emphasis added). The majority asserts that the implied covenant "provides a measure of protection for insurers against overbilling—and overlitigating—by independent counsel."

Unfortunately, the majority fails to specify by whose standards the competency of replacement counsel should be measured.

9. In *Center Foundation*, the insureds filed a claim for breach of contract against the insurer after the insurer refused to accept the independent counsel selected by the insureds when the insurer reserved the right to contest coverage. 278 Cal.Rptr. at 15–16. Under the California law operative at the time of the litigation, the court of appeals held that the implied covenant of good faith and fair dealing required the insured to act reasonably in selecting independent counsel. *Id.* at 21. The court concluded that the insurer therefore did not breach its obligations to the insured by asserting a right to approve the counsel they selected provided that such approval was not unreasonably withheld. *Id.* The *Center Foundation* court cited with approval the *Beals* decision and explicitly recognized the insurer's right to approve the replacement counsel selected by the insured. *Id.* at 21 & n. 12.

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In the absence of any objective criteria by which to judge whether replacement counsel is "reasonably competent," I believe that this "measure of protection" is both inadequate and unworkable.

Although I have found no cases discussing what constitutes an insurer's reasonable withholding of approval of substitute counsel chosen by the insured, I believe that an insurer should approve of an insured's selection of counsel where the attorney is qualified to handle the case and where there is no reason to expect that the attorney will be unable to maintain a professional working relationship with the insurance company.

In ascertaining whether an attorney is qualified, it may be useful to look to the statute of a state which has turned to the legislature to resolve this issue. California Civil Code Section 2860(c)[10] provides in part:

> When the insured has selected independent counsel to represent him or her, the insurer may exercise its right to require that the counsel selected by the insured possess certain minimum qualifications which may include that the selected counsel have (1) at least five years of civil litigation practice which includes substantial defense experience in the subject at issue in the litigation, and (2) errors and omissions coverage.

While I would not adopt this standard as a *per se* rule in Alaska, I believe that section 2860(c) provides reasonable guidance as to whether an insurer must approve of its insured's selection of substitute counsel.

Here it is undisputed that attorney Von Gemmingen graduated from law school in May, 1985. When this dispute arose in late 1989, he had been practicing law for approximately four years. Nothing in the record indicates that he had substantial defense experience in the types of disputes at issue in the suit against CHI. For these reasons, I would hold that Employers did not unreasonably withhold its approval of CHI's choice of attorney.

Apparently, the court believes that any participation by the insurer in the appointment of independent counsel automatically taints the outcome. However, it is far from clear that the scope of the conflict of interest problem in the defense context is so broad and the frequency of harm to the insured so great as to warrant such a drastic curtailment of the insurer's contract rights. None of the authorities cited by the court address the prevalence of the problem in quantifiable terms, nor do they address effectiveness of malpractice actions, disciplinary actions, or insurance bad faith actions in remedying the problem. As one commentator has noted, "[t]he validity of the assumption that there exists a severe risk that an insurer will favor its coverage interests over the insured's liability has not been critically examined." Mallen, *supra*, at 108. The same can be said of the assumption that there is a severe risk that defense attorneys will favor the interests of the insurer over the insured.[11] Assuming without conceding that these

10. California Civil Code § 2860 was a legislative response to the flood of litigation spawned by the California court of appeals decision in the case of *San Diego Navy Fed. Credit Union v. Cumis Ins. Soc'y, Inc.*, 162 Cal.App.3d 358, 208 Cal.Rptr. 494 (1984). *See* Sampson A. Brown & John L. Romaker, *Cumis, Conflicts and the Civil Code: Section 2860 Changes Little,* 25 Cal. W.L.Rev. 45 (1988). The *Cumis* court held that an insurer who assumed a defense under a reservation of rights must pay the reasonable cost of "independent counsel" hired by the insured. 208 Cal.Rptr. at 506. The *Cumis* decision created considerable confusion, led to abuses by insurers and attorneys selected by insureds, and probably had an adverse economic impact on the public. Brown & Romaker, *supra,* at 63–68.

The majority opinion is likely to have similar effects in Alaska and will probably require legislative intervention to ultimately bring fairness and order to this complex area of law.

11. It seems an equally probable danger that an "independent" attorney selected by the insured would have an interest in favoring the insurer in the hope of establishing a continuing relationship with the insurer, while his relationship with the insured is likely to be transitory. After all, it is the insurer who pays "independent" counsel's fees, too. The rule adopted by the majority does not address this danger and is a radical step which will be of doubtful effectiveness in resolving a problem which may be more pervasive in the minds of academicians than in the real world.

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risks are great, conflict of interest concerns would be a compelling policy reason for permitting an insured to reject counsel selected by the insurer. They would also be a reason for allowing the insured to select a new attorney at the insurer's expense. But it goes too far to ignore the insurer's contractual right to defend and to hold that these perceived dangers warrant allowing an insured to unilaterally select substitute counsel regardless of the attorney's qualifications

In *Continental Ins Co. v Bayless & Roberts, Inc.*, 608 P 2d 281, 288–91 (Alaska 1980), we discussed the conflicts which can arise between the interests of the insured and the insurer where coverage may be an issue and the insurer defends under a reservation of rights We noted that when an insurer knows it can assert a coverage defense, it may only offer a token defense of the insured *Id* at 289 We further noted that where coverage depends on which theory of recovery in the suit against the insured is successful, an insurer might conduct the defense in a way which steers the case toward liability based on an uncovered theory. *Id.* The situations discussed in *Continental* represent two distinct areas of conflict—those between an insured and its insurer and those between the insured and its attorney. When this important distinction is made, an attorney's ethical obligations in these situations are clearly delineated by the Alaska Code of Professional Responsibility

A potential conflict of interest between the insurer and the insured arises when, as in this case, a plaintiff brings an action against an insured which is based on both covered and uncovered theories of liability. When the complaint alleges both negligent conduct, which is covered under the policy, and intentional conduct, which is not covered, it would be in the best interest of the insurer if liability were ultimately found based on intentional conduct. In such a case, an attorney selected by the insurer to defend the insured would be under an ethical obligation to disclose the effect of this conflict "on the exercise of [the attorney's] independent professional judgment on behalf of each" Alaska Code of Professional Responsibility DR 5–105 Unless "it is obvious that [the attorney] can adequately represent the interest of each" and "each consents to the representation after full disclosure," the attorney would be required to decline the employment.[12] *Id.* Whether the attorney declines, accepts, or withdraws from the employment, he would be obligated to preserve the confidences of the insured. Alaska Code of Professional Responsibility DR 4–101

The conflict between the insured and the insurer is to be distinguished from that which arises between the insured and the attorney under these circumstances As commentators have stated:

> In this situation, separate counsel retained by the insurance company is under the less-than-subtle influence of the insurance company Insurance companies concentrate their legal representation into a few firms. The attorney, wishing to maintain the insurer's business, does not want to aggravate the company. Furthermore, the insurance counsel has close ties and a long-term relationship with the insurer, while he has only a transient relationship with the insured. These factors could, unconsciously, dilute the loyalty of the most honest attorney

Sampson A Brown & John L. Romaker, *Cumis, Conflicts and the Civil Code: Section 2860 Changes Little,* 25 Cal W L.Rev 45, 54 (1988) (footnotes omitted) Here again, the attorney's duties are clear. If

12. DR 5–105 applies to the situation in which a lawyer represents two clients In the circumstances discussed here. the attorney has but one client, the insured. *See Tank v. State Farm Fire & Casualty Co.,* 105 Wash.2d 381, 715 P 2d 1133, 1137 (1986) ("Both retained defense counsel and the insurer must understand that only the *insured* is the client"). Nonetheless, DR 5–105 is applicable by virtue of the obligations the attorney has toward the insurer as a result of the insurance agreement between insurer and insured While we need not decide the scope of that obligation here, at a minimum it encompasses a duty to communicate with the insurer. to share non-confidential and unprivileged information regarding the case with the insurer. and to cooperate with the insurer in efforts to settle the case

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the exercise of the attorney's professional judgment on behalf of the insured may be affected by these interests, an attorney can only accept the employment if the client consents after full disclosure Alaska Code of Professional Responsibility DR 5–101(A). Furthermore, the attorney is prohibited from permitting the insurer to "direct or regulate his professional judgment" in representing the insured. Alaska Code of Professional Responsibility DR 5-107(B) A breach of these ethical obligations may subject an attorney to disciplinary actions and may serve as the basis for a legal malpractice action, thus serving as a deterrent to the kinds of abuses which concern the court Absent a showing that the Code of Professional Responsibility and the threat of legal malpractice actions are ineffective in preventing such abuses, the broad prophylactic rule adopted by the court seems superfluous.[13]

In further support of its conclusion, the majority voices its concern over the danger that an insurer might gain access to information not otherwise available to it which could be used to its advantage in the coverage dispute. In *Continental* we discussed this danger in the policy defense context. 608 P.2d at 291. However, in the context of a coverage dispute, I believe this danger to be more imagined than real It is difficult to imagine a case or set of facts where information tending to defeat coverage would be unavailable to the insurer Under most insurance agreements, the insured has a duty to cooperate with the insurer.[14] "The duties of the insured have been held to require a fair, frank and truthful disclosure of information reasonably demanded by the insurer, for the purpose of enabling it to determine whether or not there is a genuine defense." 8 John A. Appleman & Jean Appleman, *Insurance Law and Practice* § 4774 (1981). In addition, facts tending to defeat coverage will most likely be developed in the liability trial and will be discoverable by the insurer in subsequent coverage litigation.[15] Even confidential attorney-client communications may be discoverable by an insurer under certain circumstances *See, e.g., Glacier Gen Assur. Co v. Superior Court,* 95 Cal.App.3d 836, 157 Cal.Rptr. 435 (1979). *See generally* John P. Ludington, Annotation, *Insured–Insurer Communications As Privileged,* 55 A.L.R. 4th 336, 354–59 (1987).

Of course this does not mean the insured's attorney is free to share any confidential or privileged information with the insurer Regardless of whether defense counsel is selected by the insured or the insurer, the attorney is bound by the same ethical duties regarding confidentiality. *See* Alaska Code of Professional Responsibility DR 4-101 In those rare cases where such a breach of confidentiality actually occurs, the law affords adequate protection and recourse to the insured An attorney who breaches a client's confidentiality may be subject to discipline for a violation of his professional responsibility or to a suit by the insured for legal malpractice. Of more significance to the insured, an insurer who relies on breach of confidentiality by defense counsel to assert non-coverage may be subsequently estopped from denying coverage based on policy exclusion *See Parsons v. Continental Nat'l Am. Group,* 113 Ariz. 223, 228, 550 P.2d 94, 99 (1976). Such remedies serve as adequate protection of the insured and as a strong disincentive

13. While that case did not involve the same type of conflict of interest present here, this court's recent decision in *Bohna v. Hughes, Thorsness, Gantz, Powell & Brundin,* 828 P.2d 745 (Alaska 1992) suggests that existing law is adequate to remedy the abuses of attorneys and insurers who compromise the interest of the insured

14. The agreement between CHI and Employers provided:

[CHI] shall cooperate with [Employers], and upon [Employers] request, shall attend hearings and trials and shall assist in effecting settlements securing and giving evidence obtaining the attendance of witnesses and in the conduct of suits

15. In the typical coverage dispute case where the party suing the insured alleges both intentional and negligent conduct, the plaintiff has a strong interest in developing facts indicating intentional conduct, as this enhances the strength of the plaintiff's case and may be a basis for an award of punitive damages Such facts would be discoverable by the insurer in subsequent coverage litigation with the insured.

to both insurers and defense counsel to compromise the insured's interest

Other considerations prevent me from supporting the rule adopted today. First, "[t]ypically, the coverage issue [and resulting conflict of interest are] not created by the insurer but by the allegations of the claimant Often those allegations bear little relationship to reality." Mallen & Smith, *supra*, § 23.16. In light of this, a rule which operates to deprive an insurer of its contractual right to participate in the defense whenever the insurer reserves its rights unnecessarily penalizes the insurer. Second, an insurer may be required to issue a reservation of rights letter or risk its right to later challenge coverage of the claim under the policy *See Continental Ins Co v. Bayless & Roberts, Inc.*, 608 P.2d 281, 289 n 13 (Alaska 1980). The insurer should not be forced to sacrifice its right to participate in the selection of counsel in order to preserve its right to subsequently contest coverage. Third, because an insurer, under agency principles, may be subject to liability for the malpractice of the attorney which represents the insured, *see* Mallen & Smith, *supra*, § 23 6, it is fair and reasonable that the insurer should have a role in selection of counsel. Finally, the rule adopted by the court today presupposes that no counsel selected or approved of by an insurer can represent an insured without consciously or unconsciously compromising the insured's interests in favor of those of the insurer My confidence in the integrity of the members of the Alaska Bar will not allow me to support the adoption of a rule of law based on such an assumption.

In summary, I would hold that CHI was within its rights to reject the tender of a defense by Employers and was entitled to select replacement counsel, subject to the reasonable approval of Employers Here, Employers' approval of Von Gemmingen was not unreasonably withheld Nonetheless, because I conclude that the insured has the right to select replacement counsel subject to the reasonable approval of the insurer, CHI cannot be forced to proceed with defense counsel selected by Employers. Accordingly, I concur in the reversal but dissent from the court's reasoning and the rule of law which it adopts

COMPTON, Justice, dissenting.

I agree with Justice Moore's analysis of the court's opinion While I prefer his solution to that selected by this court, I believe a third alternative selected by the superior court is preferable to either. Also, I wish to emphasize what I find particularly disturbing with the court's solution.

Since the court abrogates entirely a contractual right, the language of the insurance contract ought at least be reviewed. It provides:

> SECTION II
>
> DEFENSE AND SETTLEMENTS The *Corporation,* in the Insured's name and behalf, *shall have the right to* investigate, *defend* and conduct settlement negotiations in *any* claim or *suit*.
>
> The Corporation shall not settle any claim without the consent of the Insured. Should the Insured refuse to consent to any settlement recommended by the Corporation and elect to contest the claim, or continue any legal proceedings in connection with such claim, the Corporation's liability for the claim shall not exceed the amount in excess of the Insured's deductible for which the claim could have been so settled, or the applicable limit of liability, whichever is less, plus the costs and expenses incurred with its consent up to the date of such refusal
>
> The *Insured shall not* admit liability for, or *make any voluntary settlement,* or incur any costs or expenses in connection with any claim involving payment by the Corporation, *except with the written consent of the Corporation.*

(Emphasis supplied)

The court holds that the insurer forfeits the right even to participate in the selection of counsel, encompassed in the insurer's right to defend, (1) despite its contractual right to do so; and (2) despite the fact that as to covered claims, it is undisputed that

Appendix "D"

the insurer's money is at risk, not the insured's.[1]

Justice Moore has highlighted the flaw in the court's effort to legitimize its result by proclaiming the result to be in keeping with the "majority view." As the result is not dictated by case law, what compels the court to hold that the insurer has forfeited its contractual right to select counsel to defend covered claims for which its money is at risk?

The court points to perceived problems with selection of counsel hired by insurers to conduct the defense of their insured. These "appointed" counsel may tend to favor the insurer's interests, not the insured's, because of longstanding ties between the insurer and counsel. Appointed counsel may consciously or subconsciously 'slant' efforts in favor of the insurer to receive future business from the insurer. Ongoing contractual relationships, strong financial ties, and sincere friendships between the insurer and appointed counsel will influence counsel's conduct.

To cure this problem, the court first implies a contractual right in the insured to select "independent" counsel to represent the insured on both covered and reserved claims. To modify this implied right, the court then applies the implied covenant of good faith and fair dealing. The insured must "select an attorney who is, by experience and training, reasonably thought to be competent to conduct the defense of the insured." "[T]hought" by whom to be competent? The court does not give an answer.

I do not doubt the potential for conflict of interest problems to intrude into relationships between the insurer, the insured and appointed counsel. Yet given the court's view of the willingness of counsel to follow the dollar and not the Code of Professional Responsibility, why does the court not apply the same standard to independent counsel selected by the insured? If counsel selected by the insured 'slants' efforts in favor of the insured, is this a less disturbing result? If ongoing contractual relationships, strong financial ties, and sincere friendships between the insured and independent counsel influence counsel's conduct, is this a less disturbing result? Worse, if an insured does not happen to be a significant factor in independent counsel's financial wellbeing, counsel selected by the insured may (consciously or subconsciously) curry favor with the insurer in order to establish an ongoing contractual, financially rewarding relationship with the insurer. Is this a less disturbing result? The dollar still comes out of the same pocket. Once the Code of Professional Responsibility is discarded as setting ethical guidelines for the profession, no attorney/client relationship is safe from manipulation.

The alternative suggested by Justice Moore, but rejected by the court, *does not* contemplate selection of counsel by an insurer. The insured would select counsel, subject to the insurer's approval. Approval could not be unreasonably withheld. Counsel would be paid for by the insurer. Yet in the court's view, permitting the insurer to approve independent counsel selected by the insured would still taint counsel.

In my view the interests of both the insurer and insured would be better served if this court, the insurer, and the insured acknowledged the irremedial conflict created when reserved claims are asserted against the insured. The insured should be entitled to select counsel, paid for by the insurer, to represent it on the reserved claims, subject only to the insured's contractual obligation to cooperate with the

1. Interestingly the court affords CHI a right which it did not believe it had, and which it claimed not to be asserting if it did. In a letter from Lee Houston of Clement-Houston Insurance, Inc (CHI of Alaska, Inc.) to counsel initially selected by Employers, Houston remarks:

> I said, as I am repeating here, that we preferred having our own lawyer. Now—you are twisting this around to indicate we have terminated you. This is not true. I doubt the policy gives us authority to unilaterally dismiss counsel . and we are not going to try to do so.

Houston doubted too much. Not only did CHI have the right to unilaterally dismiss counsel selected by Employers, but also it had the unfettered right to unilaterally select counsel regardless of its policy with Employers

Appendix "D"

insurer.[2] The insurer will thereby satisfy its obligation to defend the insured against any claim, while at the same time exercising its contractual right to defend against covered claims for which its money is at risk. The insured will be assured of the loyalty of its counsel. Counsel will not have to wonder whether their client is the insurer or insured. We do not need to strip the insurer of its contractual right to defend covered claims because of a jaded view of an industry.[3]

While the court is correct in pointing out the potential for conflicts when multiple counsel cooperate in a single defense, such conflicts are not unique to insurance defense litigation. Problems of cooperation and strategy are present whenever there are multiple defendants. In this case there are two real parties in interest; the insurer for the covered claims, and the insured for the reserved claims. There is no reason to treat insurance defense litigation differently than other multiple defendant litigation.

I am disturbed that the court is willing to embrace a solution that abrogates entirely a contractual right. This is particularly so because the court rejects reasonable alternatives which would give some effect to the contractual provision. Neither case law nor reason provides more than token support for the court's solution. The court determines what it perceives to be the necessary result, apparently on the basis of its view of an industry. It reforms the contract accordingly. Contract law does not give a court such license. I would affirm the superior court.

In the Matter of the ESTATE OF Ruth McCOY, Deceased.

Hugh CANNON, Appellant,

v.

Rozena STONEFIELD, Appellee.

No. S-4888.

Supreme Court of Alaska.

Jan. 22, 1993.

Decedent's sister brought will contest alleging that will was product of undue influence exercised by decedent's friend who was named sole beneficiary of will. The Superior Court, Fourth Judicial District, Fairbanks, Niesje J. Steinkruger, J., entered judgment in favor of sister, and friend appealed. The Supreme Court, Compton, J., held that: (1) undue influence instruction which improperly shifted risk of nonpersuasion to friend as proponent of will did not constitute plain error, and (2) attorney who drafted will at friend's request was properly disqualified from representing friend.

Affirmed.

1. Wills ⟹332

Standing alone, undue influence instruction stating that if jury found that there was confidential relationship between maker of will and supporter and that supporter took active part in making of will, jury had to return verdict for challenger, unless it found that despite these facts it was more probable than not that there was no undue influence improperly shifted risk of nonpersuasion to supporter of will, despite fact that instruction came directly out of pattern jury instructions; although shift was subtle, jury may have believed that

2. Section X of the insurance contract provides in part:
The Insured shall cooperate with the Corporation, and, upon the Corporation's request, shall attend hearings and trials and assist in effecting settlements, securing and giving evidence, obtaining the attendance of witnesses and in the conduct of suits.

3. This is not to say that there must be multiple counsel. The insurer may accept the insured's choice of counsel to represent its interests, or the insured may accept the insurer's choice of counsel to represent its interests. This would be a matter of choice, not contract.

Appendix "D"

APPENDIX
LIABILITY INSURER
GUIDING PRINCIPLES[26]

I. GENERAL STATEMENT

Under a policy providing liability insurance, the company has a direct financial interest in any claim presented against its insured which the company may be obligated to defend or pay, and in any suit on such claim, whether or not the company is named as a party. The company has the right to have a counsel of its own choice to defend this interest. So long as no conflict of interests exists, that counsel also represents the insured. If and when representation of the company by its attorney conflicts with the interest of the insured, the company and its attorney are under a duty to inform the insured of such conflict and to invite him to retain his own counsel at his own expense.

II. CLAIM OR SUIT IN EXCESS OF LIMITS

In any claim where there is a probability that the damage will exceed the limits of the policy and the company has retained counsel to defend the claim, or in any suit in which the prayer of the complaint exceeds the limit of the policy, or in which there is an unlimited or indefinite prayer for damages and a probability that the verdict may exceed the coverage limit, the company or its attorney should timely inform the insured of the danger of exposure in excess of the limit of the policy. The insured should be invited to retain additional counsel at his own expense to advise him with respect to that exposure. So long as the financial interest of the company in the outcome of the litigation continues, the company retains the exclusive right to control and conduct the defense of the case, in good faith, subject to the right of the insured or such additional attorney to participate.

III. SETTLEMENT NEGOTIATIONS IN CLAIMS OR SUITS WITH EXCESS EXPOSURE

In any claim where there is a probability that the damage will exceed the limit of the policy and the company has retained counsel to defend the claim, or in any suit in which it appears probable that an amount in excess

[26]The House of Delegates of the American Bar Association on February 7, 1972 approved "Guiding Principles" previously adopted by the National Conference of Lawyers and Liability Insurers on May 22, 1969. Between that time and the end of 1971, the "Guiding Principles" were accepted by each of the major casualty and liability insurance companies in the United States. Action of the ABA House of Delegates followed on February 7, 1972.

of the limit of the policy is involved, the company or its attorney should inform the insured or any additional attorney retained by the insured at his own expense of significant settlement negotiations, whether within or beyond the limits of the policy. Upon request, the insured, or such additional attorney, shall be entitled to be informed of all settlement negotiations. The company shall, upon request, make available to the insured or such additional attorney all pertinent factual information the company and its attorney may have for evaluation by the insured or such additional attorney.

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IV. CONFLICTS OF INTEREST GENERALLY - DUTIES OF ATTORNEY

In any claim or in any suit where the attorney selected by the company to defend the claim or action becomes aware of facts or information which indicate to him a question of coverage in the matter being defended or any other conflict of interest between the company and the insured with respect to the defense of the matter, the attorney should promptly inform both the company and the insured, preferably in writing, of the nature and extent of the conflicting interest. In any such suit, the company or its attorney should invite the insured to retain his own counsel at his own expense to represent his separate interest.

V. CONTINUATION BY ATTORNEY EVEN THOUGH THERE IS A CONFLICT OF INTERESTS

Where there is a question of coverage or other conflict of interest, the company and the attorney selected by the company to defend the claim or suit should not thereafter continue to defend the insured in the matter in question unless, after a full explanation of the coverage question, the insured acquiesces in the continuation of such defense.

If the insured acquiesces in the continuation of the defense in the pending matter following a reservation of rights by the company or under an agreement that the rights of the company and the insured as to the coverage question are not waived or prejudiced, the company retains the exclusive right to control and conduct the defense of the case in good faith, subject to the right of the insured or the additional attorney acting at the expense of the insured to participate.

If the insured refuses to permit the insurance company and the attorney selected by the company to defend the claim or suit to continue the defense of the pending matter while reserving the rights of the company and of the insured as to the coverage question, or if the full protection of the separate interests of the insured and the company requires inconsistent contentions which cannot be presented in a common defense of the

pending matter, the insurance company or the insured should seek other procedures to resolve the coverage question.

If facts or information indicating to the attorney a lack of coverage for the insured should first come to the attention of the attorney after the trial of the lawsuit has begun, the attorney should at the earliest opportunity inform and advise the insured and the company of the possible conflicting interests of the insured and the company. The attorney should further seek to provide both the insured and the company with time and the opportunity to consider the possible conflict of interests and to take appropriate steps to protect their individual interests.

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VI. DUTY OF ATTORNEY NOT TO DISCLOSE CERTAIN FACTS AND INFORMATION

Where the attorney selected by the company to defend a claim or suit becomes aware of facts or information, imparted to him by the insured under circumstances indicating the insured's belief that such disclosure would not be revealed to the insurance company but would be treated as a confidential communication to the attorney, which indicate to the attorney a lack of coverage, then as to such matters, disclosures made directly to the attorney, should not be revealed to the company by the attorney nor should the attorney discuss with the insured the legal significance of the disclosure or the nature of the coverage question.

VII. COUNTERCLAIMS

In any suit where the company or the attorney selected by the company to defend the suit becomes aware that the insured may have a claim for damages against another party to the lawsuit, which is likely to be prejudiced or barred unless it is asserted as a counterclaim in the pending action, the insured should be advised that the pending suit may affect or impair such claim; that the insurance policy does not provide coverage for any legal services or advice as to such claim; and that the insured may wish to consult an attorney of his choice with respect to it.

VIII. SUIT INVOLVING MORE THAN ONE INSURED IN THE SAME COMPANY

If the same company insures two or more parties to a lawsuit, whose interests are diverse, the complete factual investigation made by the company should be made available to each insured or his attorney with the exception that any statement given by one insured or his employees shall not voluntarily be given to any other party to the litigation whose interest may be adverse to such insured or to any attorney representing such other party.

The company should employ separate attorneys not associated with one another to defend each insured against whom any suit is brought, if the interest of one such insured is diverse from or in conflict with that of any other insured; and all insureds should be informed by the company of the fact that it insures the liability of the others and the method being employed to handle the litigation.

IX. WITHDRAWAL

In any case where the company or the attorney selected by the company to defend the suit decides to withdraw from the defense of the action brought against the insured, the insured should be fully advised of such decision and the reasons therefor; and every reasonable effort should be made to avoid prejudice to or impairment of the rights of the insured.

X. UNINSURED MOTORIST COVERAGE

The company should employ separate attorneys not associated with one another to defend the company against a claim by the insured under the Uninsured Motorist Coverage, and to defend the insured in any suit brought against the insured arising out of the same accident. If the controversy regarding the Uninsured Motorist Coverage has been disposed of before a lawsuit has been commenced against the insured, the same attorney who defended the company in the first instance could represent the insured in the later lawsuit.

Any statement made by the insured to the company with respect to the defense of any claim made against him arising out of the same accident should not be used against the insured in order to defeat the insured's claim under the uninsured motorist coverage.

NOTE: This coverage is a part of the automobile liability policy and pays the insured (the owner or operator of the insured car) for damages for bodily injury that he would be entitled to recover from an uninsured motorist. Any dispute between the insured and the company regarding negligence, contributory negligence and damages under this coverage is subject to arbitration, unless arbitration is barred by local law. If a suit arising out of the same accident is pending against the insured while the insured is at the same time seeking a recovery from the company under the Uninsured Motorist Coverage, the company is faced with a conflict of interest because in order to defeat the insured's claim, the company may wish to contend that the insured was guilty of negligence or contributory negligence while at the same time in order to defeat the claim against the insured, the company may wish to contend that the insured was blameless. Such a conflict arises out of the very nature of the combination of coverages.

1994 LEGISLATIVE REPORT

By

ROBERT M. KREAMER

The 1994 Legislative session, like the 1993 session was marked by its inability to break the partisan and philosophical gridlock. The Iowa Senate was under Democrat control by a vote of 27-23 and the Iowa House of Representatives was controlled 51-49 by the Republicans Couple the closeness of partisan control, the fact that almost one-third of the legislators were freshman and that 1994 is an election year with both parties having primary elections for the office of Governor, and it is easy to see why gridlock was so prevalent for most legislative issues Because of this gridlock, there was no debate on issues of consequence to the defense bar since there was a recognition that bills supported in one chamber probably would not be supported in the other.

Legislation introduced in the 1994 legislative session of interest to the defense bar included the following bills:

SENATE FILE 2002 Protective Orders. This so called "sunshine" legislation creates a presumption that all court records in civil actions are open to public unless access is restricted by law.

HOUSE FILE 2016 Comparative Fault Failure to Mitigate This legislation provides that failure to avoid aggravating an injury or to mitigate damages is not contributory fault and is not to be considered in determining the percentage of fault of any claimant, but shall be used to reduce damage awards.

SENATE FILE 2047 An act relating to jury instructions. This bill provides that juries in cases in which the state or one of its political subdivisions is a party may make a finding regarding the law applicable in the case as well as the facts.

SENATE STUDY BILL 2154 (Later became Senate File 2222) Health care reform legislation. Included in this legislation were provisions to cap noneconomic damages at $250,000, reducing the statute of limitations for minors to bring medical malpractice actions, and establishing complete defenses for medical practitioners who meet certain practice parameters. In the House of Representatives this legislation was known as **House Study Bill 744 and later as House File 2431**

I am pleased to report that 1994 was a good year for the Iowa Defense Counsel Association in that no legislation of an adverse nature won legislative approval. An additional positive is that I continue to be well received and looked to for leadership by legislators, lobbyists and interest groups sharing our legislative perspective.

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I would like to thank the members of the Iowa Defense Counsel Association for the opportunity to have represented them this past year. A special thank you to the Legislative Committee and its chairman, Mark Tripp, for the support and assistance given to me at every request during the session. I look forward to working with you in the days ahead. Thank you!

RMK/jk

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FILED JAN 1 0 1994

SENATE FILE 2002

BY DIELEMAN

Passed Senate, Date ____________ Passed House, Date ____________

Vote: Ayes ______ Nays ________ Vote: Ayes ______ Nays ________

Approved ______________________________

A BILL FOR

1 An Act relating to public access to court records and providing
2 for the Act's applicability.
3 BE IT ENACTED BY THE GENERAL ASSEMBLY OF THE STATE OF IOWA:
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S.F. 2002 H.F. ________

1 Section. 1. NEW SECTION. 624B.1 TITLE -- DEFINITIONS.
2 1. This chapter shall be known as the "Sunshine in
3 Litigation Act."
4 2. For the purposes of this chapter, unless the context
5 otherwise requires, "court records" means any of the
6 following:
7 a. All documents of any nature filed in connection with
8 any matter before any civil court, except any of the
9 following:
10 (1) Documents filed with a court in camera, only for the
11 purpose of obtaining a ruling on the discoverability of such
12 documents.
13 (2) Documents in court files to which access is otherwise
14 restricted by law.
15 b. Settlement agreements, not filed of record, that seek
16 to restrict disclosure of information concerning matters that
17 have a probable adverse effect upon the general public health
18 or safety, the administration of public office, or the
19 operation of government.
20 c. Discovery, not filed of record, concerning matters that
21 have a probable adverse effect upon the general health or
22 safety, the administration of public office, or the operation
23 of government, except discovery not filed of record in cases
24 originally initiated to preserve bona fide trade secrets or
25 other intangible property rights.
26 Sec. 2. NEW SECTION. 624B.2 SEALING RECORDS.
27 A court order or opinion issued in the adjudication of a
28 case shall not be sealed. Other court records are presumed to
29 be open to the general public but may be sealed only upon a
30 showing pursuant to the procedures of this chapter and all of
31 the following:
32 1. A specific, serious, and substantial interest which
33 clearly outweighs the presumption of openness and any probable
34 adverse effect that sealing will have upon the general public
35 health or safety.

1 2. No less restrictive means than sealing the records will
2 adequately and effectively protect the specific interest
3 asserted.
4 Sec. 3. NEW SECTION. 624B.3 COERCION.
5 A person shall not offer an inducement to a party to a
6 civil action designed to influence that party in regard to the
7 sealing of any court record. Violation of this section is
8 punishable as a contempt of court.
9 Sec. 4. NEW SECTION. 624B.4 NOTICE.
10 Court records may be sealed only upon a party's written
11 motion, which shall be open to public inspection. The person
12 seeking to have court records sealed shall post a public
13 notice in the manner that notices for meetings of county
14 governmental bodies are required to be posted. The notice
15 shall contain the content of the motion, identify the case in
16 which the motion has been filed, and state that a hearing will
17 be held in open court on the motion and that any person may
18 intervene and be heard concerning the motion. The notice
19 shall also contain the date and time of the hearing and a
20 brief but specific description of the nature of the case, the
21 court records sought to be sealed, and the identity of the
22 person seeking to have court records sealed. A verified copy
23 of the notice shall be filed by the person seeking to have
24 court records sealed with the clerk of the supreme court.
25 Sec. 5. NEW SECTION. 624B.5 HEARING.
26 A hearing shall be held in open court on a motion to seal
27 court records as soon as practicable but not less than
28 fourteen days after notice is posted pursuant to section
29 624B.4. Nonparties may intervene as a matter of right for the
30 limited purpose of participating in the proceedings which will
31 determine whether court records are sealed. The court may
32 inspect records in camera.
33 Sec. 6. NEW SECTION. 624B.6 TEMPORARY SEALING ORDER.
34 A temporary sealing order may issue upon motion and notice
35 to any parties who have answered in the case, upon a showing

1 of compelling need from specific facts shown by affidavit or
2 by verified petition that immediate and irreparable injury
3 will result to a specific interest of the movant before notice
4 can be posted and a hearing held. A temporary sealing order
5 shall set forth the time for the hearing required by section
6 624B.5 and shall direct the person seeking to have court
7 records sealed to give the notice required by section 624B.4.
8 The court may modify or withdraw any temporary order upon
9 motion by any party or intervenor, following notice to all
10 parties and a hearing conducted as soon as practicable.
11 Issuance of a temporary order shall not reduce the burden of
12 proof of the party seeking to seal court records.

13 Sec. 7. NEW SECTION. 624B.7 ORDER ON MOTION TO SEAL
14 COURT RECORDS.

15 A motion relating to sealing or opening court records shall
16 be decided by written order, open to public inspection, which
17 shall state the style and number of the case, the specific
18 reasons for finding and concluding whether the showing
19 required by section 624B.2 has been made, the specific court
20 records or portions of court records which are to be sealed,
21 and the period of time the records are to be sealed. The
22 order shall not be included in any judgment or other order but
23 shall be a separate document in the case. However, failure to
24 comply with this requirement shall not affect the
25 appealability of the order.

26 Sec. 8. NEW SECTION. 624B.8 CONTINUING JURISDICTION.

27 Any person may intervene as a matter of right at any time
28 before or after judgment to seal or open court records. A
29 court that issues an order sealing court records retains
30 continuing jurisdiction to enforce, alter, or vacate that
31 order. An order sealing or opening court records shall be
32 reconsidered on motion of any party or intervenor, who had
33 actual notice of the hearing preceding issuance of the order,
34 without first showing changed circumstances materially
35 affecting the order. The circumstances need not be related to

1 the case in which the order was issued. However, the burden
2 of making the showing required by section 624B.2 shall be on
3 the party seeking to seal records.
4 Sec. 9. NEW SECTION. 624B.9 APPEAL.
5 An order or a portion of an order, relating to sealing or
6 opening court records, shall be deemed to be severed from the
7 case and a final adjudication of that issue, and may be
8 appealed by any party or intervenor who participated in the
9 hearing preceding issuance of the order. The appellate court
10 may abate the appeal and order the trial court to direct that
11 further public notice be given, to hold further hearings, or
12 to make additional findings.

13 Sec. 10. NEW SECTION. 624B.10 APPLICABILITY DATE.
14 Access to documents in court files not defined as court
15 records by this chapter remains governed by existing law.
16 This chapter does not apply to any court records sealed in an
17 action in which a final judgment has been entered before July
18 1, 1994. This chapter applies to cases pending on July 1,
19 1994, only with regard to court records filed or exchanged on
20 or after July 1, 1994, and any motion filed on or after July
21 1, 1994, to alter or vacate an order restricting access to
22 court records issued before July 1, 1994.
23 EXPLANATION
24 This bill provides a presumption that all court records in
25 civil actions are open to the public unless access is
26 restricted by operation of other law. The bill also provides
27 a mechanism for hearings on motions to seal court records and
28 for appeal of orders relating to the sealing of court records.
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JAN 1 1 1994
Judiciary & Law Enforcement

HOUSE FILE 2016
BY McNEAL

Passed House, Date ____________ Passed Senate, Date ____________
Vote: Ayes _______ Nays _______ Vote: Ayes _______ Nays _______
Approved ______________________________

A BILL FOR

1 An Act to require that unreasonable failure to avoid an injury or
2 to mitigate damages be considered only for purposes of
3 determining damage amounts under comparative fault.
4 BE IT ENACTED BY THE GENERAL ASSEMBLY OF THE STATE OF IOWA:
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TLSB 3023HH 75
lh/sc/14

S.F. ________ H.F. 2016

1 Section 1. Section 668.3, subsections 1, 2, and 3, Code
2 1993, are amended to read as follows:
3 1. Contributory fault shall not bar recovery in an action
4 by a claimant to recover damages for fault resulting in death
5 or in injury to person or property unless the claimant bears a
6 greater percentage of fault than the combined percentage of
7 fault attributed to the defendants, third-party defendants and
8 persons who have been released pursuant to section 668.7, but
9 any damages allowed shall be diminished in proportion to the
10 amount of fault attributable to the claimant. The
11 unreasonable failure of a claimant to avoid aggravation of an
12 injury or to mitigate damages subsequent to the acts or
13 omissions which gave rise to the claimant's cause of action is
14 not contributory fault for purposes of this section.
15 2. In the trial of a claim involving the fault of more
16 than one party to the claim, including third-party defendants
17 and persons who have been released pursuant to section 668.7,
18 the court, unless otherwise agreed by all parties, shall
19 instruct the jury to answer special interrogatories or, if
20 there is no jury, shall make findings, indicating all of the
21 following:
22 a. The amount of damages each claimant will be entitled to
23 recover if contributory fault is disregarded. For purposes of
24 this paragraph, the amount of damages to which a claimant will
25 be entitled is equal to the total damages incurred less any
26 amount of damages attributable to the claimant's unreasonable
27 failure to avoid aggravation of an injury or to mitigate
28 damages.
29 b. The percentage of the total fault allocated to each
30 claimant, defendant, third-party defendant, and person who has
31 been released from liability under section 668.7. For this
32 purpose the court may determine that two or more persons are
33 to be treated as a single party.
34 3. In determining the percentages of fault, the trier of
35 fact shall consider both the nature of the conduct of each

1 party and the extent of the causal relation between the
2 conduct and the damages claimed. In determining the
3 percentages of fault, the trier of fact shall not, however,
4 consider a claimant's unreasonable failure to avoid
5 aggravation of an injury or to mitigate damages subsequent to
6 the acts or omissions which gave rise to the claimant's cause
7 of action.

8 EXPLANATION

9 This bill provides that although unreasonable failure to
10 avoid aggravating an injury or to mitigate damages is fault
11 under the comparative fault statutes, it is not contributory
12 fault and is not to be considered in determining the
13 percentage of fault of any claimant. Unreasonable failure to
14 avoid aggravating an injury or to mitigate damages is to be
15 considered and is to be used under the bill to reduce damage
16 awards by reducing the amount of damages to which a claimant
17 potentially may be entitled absent contributory fault. After
18 the amount of potential damages is calculated, the actual
19 award is to be determined under the bill by reducing the
20 potential damage entitlement of a claimant by the percentage
21 of the damage amount which is attributable to the claimant's
22 contributory fault.
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FILED JAN 24 1994

SENATE FILE 2047
BY BARTZ

Passed Senate, Date ____________ Passed House, Date ____________
Vote: Ayes ______ Nays _______ Vote: Ayes ______ Nays _______
Approved ______________________________

A BILL FOR

1 An Act relating to jury instructions.
2 BE IT ENACTED BY THE GENERAL ASSEMBLY OF THE STATE OF IOWA:
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TLSB 3550SS 75
mk/cf/24

S.F. 2047 H.F. ________

1 Section 1. Rule of civil procedure 196, Iowa court rules,
2 third edition, is amended by adding the following new
3 unnumbered paragraph:
4 NEW UNNUMBERED PARAGRAPH. If the state or a political
5 subdivision of the state is a party in a trial by jury, the
6 jurors may be informed, without contradiction by the court,
7 that each juror has an inherent right to vote on the verdict,
8 in the direction of mercy, according to the juror's own
9 conscience and sense of justice.
10 The court shall allow a party to present to the jury
11 information about each juror's right to judge both the facts
12 of the case and the law in reaching a verdict, evidence and
13 testimony relating to the motives and circumstances of the
14 defendant and the extent to which the defendant actually
15 harmed another person, and arguments relating to the spirit,
16 intent, merits, and constitutionality of the law itself and
17 the applicability of the law to the parties to the case.
18 A potential juror shall not be disqualified from serving on
19 a jury for expressing a willingness to consider such
20 information, evidence, or argument, to evaluate the law or its
21 application, or to vote on the verdict according to the
22 juror's conscience and sense of justice.
23 Failure to abide by this rule is grounds for mistrial.
24 EXPLANATION
25 This bill provides that juries in cases in which the state
26 or one of its political subdivisions is a party may make a
27 finding regarding the law applicable in the case as well as
28 the facts. The bill also provides that a potential juror
29 shall not be disqualified for expressing a willingness to
30 judge both the facts and the law of a case.
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LSB 3550SS 75
mk/cf/24

Szymoniak - Chair
Judge
Kramer

SSB - 2154
Human Resources

SENATE/HOUSE FILE ______
BY (PROPOSED GOVERNOR'S BILL)

Passed Senate, Date ________ Passed House, Date ________
Vote: Ayes ______ Nays ______ Vote: Ayes ______ Nays ______
Approved ____________________

A BILL FOR

1 An Act relating to health care reform, legal process changes,
2 regulation of insurance and health care plan providers, income
3 tax credits for certain physicians, establishing certain
4 employer and individual requirements, establishing fees, and
5 providing effective dates and applicability provisions.
6 BE IT ENACTED BY THE GENERAL ASSEMBLY OF THE STATE OF IOWA:
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S.F. ________ H.F. ________

1 Section 1. Section 8.6, Code 1993, is amended by adding
2 the following new subsection:
3 NEW SUBSECTION. 16. HEALTH ACCOUNTING SYSTEM. To
4 establish a statewide health accounting system in coordination
5 with the department of public health, the department of human
6 services, the department of elder affairs, the department of
7 employment services, and the insurance division of the
8 department of commerce. The department of management shall
9 have access to all data, as deemed by the department to be
10 necessary, in electronic format from the community health
11 management information system established in chapter 144C.
12 Sec. 2. Section 18.133, subsection 2, Code Supplement
13 1993, is amended to read as follows:
14 2. "Private agency" means an accredited nonpublic ~~schools~~
15 ~~and~~ school, nonprofit ~~institutions~~ institution of higher
16 education eligible for tuition grants, hospital licensed
17 pursuant to chapter 135B, or physician clinic.
18 Sec. 3. Section 18.136, Code Supplement 1993, is amended
19 by adding the following new subsection:
20 NEW SUBSECTION. 13A. Hospitals licensed pursuant to
21 chapter 135B and physician clinics shall be offered access to
22 the network for diagnostic, clinical, consultative, data, and
23 educational services for the purpose of developing a
24 comprehensive, statewide telemedicine network.
25 Sec. 4. NEW SECTION. 135.27 INCOME TAX CREDIT PROGRAM
26 FOR PHYSICIANS ESTABLISHED.
27 1. For the purposes of this section, unless the context
28 otherwise requires:
29 a. "Physician" means a person licensed under chapter 148,
30 150, or 150A to practice medicine and surgery, osteopathy, or
31 osteopathic medicine and surgery in Iowa.
32 b. "Small, rural community" means a city in Iowa that has
33 less than ten thousand residents according to the most recent
34 decennial census and which is not included in a metropolitan
35 statistical area as defined by the United States department of

1 commerce, bureau of the census.
2 c. "Primary care" means the medical practice of family
3 practice, general practice, internal medicine, pediatrics,
4 obstetrics, or gynecology.
5 2. The director shall establish within the department a
6 program to provide a credit against state individual income
7 tax imposed by chapter 422, division II, for physicians
8 establishing practices in small, rural communities. A
9 physician seeking participation shall apply with the
10 department. The department, in consultation with the
11 department of revenue and finance, shall adopt rules to
12 implement the income tax credit program which shall include,
13 but are not limited to, the following:
14 a. Procedures for receiving applications from physicians
15 seeking participation.
16 b. Criteria for determining the eligibility of the
17 applicants. Credit shall not be allowed to a physician who is
18 practicing in a small, rural community on July 1, 1994.
19 Credit shall not be granted unless the physician provides
20 full-time clinical services based on the definition by the
21 national health service corps, United States public health
22 services. Credit shall not be allowed to a physician whose
23 license to practice is restricted by a medical regulatory
24 authority of any jurisdiction of the United States, or other
25 nation or territory.
26 c. The eligible physician shall provide primary care and
27 reside in a small, rural community during the tax year in
28 which the tax credit is applied. At least seventy-five
29 percent of the physician's total practice during the tax year
30 in which the tax credit is applied shall be comprised of
31 providing primary care to persons in a small, rural community
32 in which the physician has established a place of practice.
33 This section shall not prohibit a physician from practicing
34 primary care in multiple communities. For purposes of meeting
35 the requirements under this paragraph, the tax year for the

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1 1994 calendar year is considered to begin July 1, 1994, and
2 end December 31, 1994.
3 d. The state individual income tax credit shall not exceed
4 the physician's state tax liability and shall be for a sum of
5 up to ten thousand dollars per tax year. Any credit in excess
6 of the tax liability for the tax year shall not be carried
7 over to another year. A credit may be claimed for a maximum
8 of ten tax years.
9 3. This section takes effect July 1, 1994, for tax years
10 ending after that date, subject to subsection 4. The
11 department shall, immediately upon enactment of this section,
12 commence the adoption of rules required under this section.
13 4. This section is repealed on December 31, 1999, for the
14 granting of tax credits for physicians qualifying in tax years
15 beginning after that date. However, physicians who qualified
16 for the tax credit for the 1999 tax year may continue to
17 receive the credit until the end of the applicable ten-year
18 period or until the physician no longer qualifies, whichever
19 occurs sooner.
20 Sec. 5. NEW SECTION. 135.110 ACCOUNTABLE HEALTH PLAN
21 DEFINED.
22 An accountable health plan is an entity which does all of
23 the following:
24 1. Pays for and provides health care services.
25 2. Is responsible for delivering the full range of health
26 care services covered under a standard health benefit plan as
27 established in chapter 513B.
28 3. Meets established solvency standards and complies with
29 established underwriting standards, including modified
30 community rating methods, for all beneficiaries served.
31 4. Is accountable to the public for the cost, quality, and
32 access of the services which the accountable health plan
33 provides and for the effects of its services on the health of
34 those who are provided such services.
35 5. Is eligible for operation based on financial, quality

1 of care, and structural qualifications.
2 6. Satisfies data reporting and collection standards.
3 Sec. 6. NEW SECTION. 135.111 RULES.
4 1. The director shall adopt rules relating to the
5 establishment and regulation of accountable health plans. The
6 rules shall allow significant flexibility in the structure and
7 organization of an accountable health plan, including the
8 flexibility to permit alternative structures for accountable
9 health plans developed in rural areas of the state in response
10 to the needs, preferences, and conditions of rural
11 communities. Such plans shall utilize, to the greatest extent
12 possible, existing health care providers and hospitals.
13 2. Rules adopted pursuant to this section shall include,
14 at a minimum, all of the following:
15 a. Procedures for licensing accountable health plans as
16 provided in section 135.112.
17 b. Procedures to sanction cooperative arrangements
18 involving health care providers or purchasers in forming an
19 accountable health plan, upon a finding by the director that
20 the arrangement will improve quality, access, or affordability
21 of health care, but which arrangement might be a violation of
22 antitrust laws if undertaken without government direction and
23 approval.
24 c. Procedures to assure ongoing supervision of
25 arrangements sanctioned under paragraph "b" in order to assure
26 that the arrangements do in fact improve the quality, access,
27 or affordability of health care. The sanctioning of any
28 arrangement by the director may be withdrawn on a prospective
29 basis at the discretion of the director if necessary to
30 enforce the intent to improve quality, access, or
31 affordability.
32 d. Standards applicable to the plan of operation of an
33 accountable health plan and which must be met for licensure of
34 the plan. Such standards shall include standards related to
35 the quality of health care provided.

1 e. A requirement that a plan of operation include
2 guaranteed access and rating practices no more restrictive
3 than those required in the applicable state-regulated
4 insurance market segment.
5 f. Procedures to collect information, directly or by other
6 means as determined by the department, from the accountable
7 health plan for purposes of monitoring quality, cost, and
8 access standards. The department may access data collected
9 through the community health management information system for
10 purposes of implementing this division at a cost not to exceed
11 the actual costs of reproducing the information for the
12 department.
13 g. A method or methods to facilitate and encourage the
14 appropriate provision of services by midlevel health care
15 practitioners and allied health care practitioners.
16 h. Procedures to assure that all health carriers,
17 including health maintenance organizations, insurers, and
18 nonprofit health service plan corporations are subject to the
19 same rules, to the extent the health carrier is operating an
20 accountable health plan or is a participating entity in an
21 accountable health plan.
22 i. Solvency standards to assure an accountable health
23 plan's ability to deliver required services. The director may
24 enter into an agreement with the insurance division of the
25 department of commerce to conduct such solvency oversight.
26 The insurance division shall assess the costs of a solvency
27 examination against the entity being examined in the same
28 manner and on the same terms as provided for insurance
29 companies under section 505.7.
30 j. Publication and dissemination of statewide and
31 localized expenditure targets relevant to each accountable
32 health plan, as appropriate.
33 k. Provide for the identification of essential community
34 providers within the service area of each accountable health
35 plan. "Essential community providers" means those health care

1 providing organizations which the director deems to be vital
2 to a local health care delivery system to ensure that all
3 citizens of this state have reasonable access to health care.
4 Accountable health plans must establish working relationships
5 with essential community providers and include them within the
6 plan's plan of operation in delivering health care within the
7 plan's service area. This paragraph is repealed effective
8 July 1, 1999.

9 l. Provisions for the identification of market areas to be
10 serviced by each accountable health plan. Rules developed
11 pursuant to this paragraph shall promote expansion of
12 accountable health plans into all geographic areas of the
13 state.
14 m. The director shall make, or cause to be made,
15 inspections as it deems necessary in order to determine
16 compliance with section 135.110, this section, and sections
17 135.112 and 135.113, and applicable rules.
18 3. This section and rules adopted pursuant to this section
19 are intended to provide immunity from federal antitrust law
20 under the state action doctrine exemption.
21 Sec. 7. NEW SECTION. 135.112 LICENSING REQUIRED.
22 1. An accountable health plan shall not operate unless the
23 plan is licensed by the department. The director shall adopt
24 rules as provided in section 135.111 establishing a licensing
25 procedure. A license shall not be issued by the department
26 unless the director finds that the accountable health plan
27 satisfies, at a minimum, all of the following:
28 a. The ability to be responsible for the full continuum of
29 required health care and related costs for the defined
30 population that the accountable health plan will serve.
31 b. Financial solvency.
32 c. The ability to satisfy established standards related to
33 the quality of care provided.
34 d. The ability to fully comply with the provisions of this
35 section and all applicable rules.

1 2. The department shall establish by rule a reasonable
2 filing fee to be submitted with a license application and each
3 renewal application. A license shall be renewed annually. A
4 license issued pursuant to this section expires on December 31
5 of the calendar year for which the license was granted. Fees
6 received by the department shall be retained by the department
7 to offset costs associated with the administration of this
8 chapter.
9 3. An accountable health plan may be organized and
10 licensed as a nonprofit or for-profit plan.
11 Sec. 8. NEW SECTION. 135.113 DEFINITIONS.
12 For purposes of sections 135.110 through 135.113, unless
13 the context otherwise requires:
14 1. "Hospital" means as defined in section 135B.1.
15 2. "Health care provider" or "provider" or "practitioner"
16 means a person licensed or certified pursuant to chapter 147,
17 148, 148A, 148C, 149, 150, 150A, 151, 152, 153, 154, 154B, or
18 155A, to provide professional health care services in this
19 state to an individual during the individual's medical care,
20 treatment, or confinement.
21 Sec. 9. NEW SECTION. 144C.1 SHORT TITLE.
22 This chapter shall be cited as the "Community Health
23 Management Information System Act".
24 Sec. 10. NEW SECTION. 144C.2 LEGISLATIVE FINDINGS.
25 The general assembly finds that the development of a
26 community health management information system will result in
27 a more efficient and cost-effective health care transaction
28 process; provide an efficient mechanism for the exchange of
29 medical and transactional information among providers and
30 other interested entities; provide communities with
31 information on cost, appropriateness, and effectiveness of
32 health care providers; and provide information to employers
33 and researchers which will allow for benefit plan analysis,
34 severity of illness and outcomes analysis, and related
35 studies. The general assembly finds that the exchange of such

1 medical and transaction information, while vital in the effort
2 to control health care administrative costs and in analyzing
3 benefit plans and medical outcomes, must be accomplished in a
4 manner which protects and assures patient confidentiality;
5 that authorized users of the system must keep such information
6 confidential; and that the privacy rights of individuals must
7 not be violated as a result of the exchange of such
8 information. The general assembly also finds that the
9 implementation of such a system will result in a reduction of
10 the number of paper transaction forms that need to be
11 completed, a reduction in the error rate on transaction
12 submissions, an improvement in the overall data communication
13 among affected parties, and a reduction in health care
14 administrative costs. The general assembly also finds that
15 there shall be only a single community health management
16 information system in this state.

17 Sec. 11. NEW SECTION. 144C.3 DEFINITIONS.

18 As used in this chapter, unless the context otherwise
19 requires:

20 1. "Board" means the community health management
21 information system governing board established in section
22 144C.5.

23 2. "Commissioner" means the commissioner of insurance.

24 3. "Community health management information system" or
25 "system" means an integrated electronic health management
26 information system for transmittal and selected storage of
27 data related to transactions and other health care-related
28 information.

29 4. "Consumer" means an employer, labor union, an
30 individual representing an employer or labor union, a
31 representative of state government, or a member of the general
32 public. "Consumer" does not include a provider, payor, an
33 employee of a provider or payor, or other person with a
34 fiduciary interest in the provision of or payment for health
35 care.

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1 5. "Data repository" means the community health management
2 information system data repository for the storage and
3 transmittal of data related to transactions and other health
4 care-related information.
5 6. "Division" means the insurance division.
6 7. "Interface" means the ability to communicate
7 electronically according to standards and communication
8 formats established by the board.
9 8. "Outcomes measurement" means a method established by
10 the board for determining the quality of health care provided
11 to consumers based upon the data received and transmitted on a
12 transaction network.
13 9. "Payor" means a person who provides for the payment of
14 health care benefits including a third party administrator
15 subject to chapter 513A; an insurer issuing a group accident
16 or sickness insurance policy on an expense incurred basis; a
17 person issuing a group hospital or medical service contract
18 pursuant to chapter 509, 514, or 514A; a group health
19 maintenance organization operating pursuant to chapter 514B;
20 or a self-insured plan.
21 10. "Provider" means a hospital licensed pursuant to
22 chapter 135B; a health care facility licensed pursuant to
23 chapter 135C, 135G, 135H; a hospice program licensed under
24 chapter 135J; a health related professional licensed under
25 chapters 147 through 154, and chapters 154B and 155A.
26 11. "Self-insured plan" means a plan which retains the
27 risk of loss or payment of claims related to the payment of
28 accident and health benefits or medical, surgical, or hospital
29 benefits as determined by the person establishing such plan.
30 12. "Severity of illness" means the clinical measurement
31 of the relative medical condition of a patient.
32 13. "Severity of illness risk adjustment" means a
33 reporting methodology used to adjust various statistics based
34 upon severity of illness which is approved by the board.
35 14. "Transaction" means an electronic claim or encounter

1 as defined by the board pursuant to section 144C.5.
2 15. "Transaction network" means an electronic network
3 which the board has certified and with which the board has
4 entered into an agreement for receiving and transmitting data
5 as provided in this chapter between health care providers,
6 payors, the data repository, and any other persons the board
7 deems necessary.
8 Sec. 12. NEW SECTION. 144C.4 COMMUNITY HEALTH MANAGEMENT
9 INFORMATION SYSTEM ESTABLISHED -- DATA REPOSITORY.

10 1. A community health management information system is
11 established and shall be organized as a nonprofit corporation
12 pursuant to chapter 504A. The system shall operate subject to
13 the control and direction of the community health management
14 information system governing board.
15 2. A data repository is established which is subject to
16 the control and direction of the board. The data repository
17 shall collect health care data and provide patients,
18 physicians, hospitals, purchasers, payors, government
19 agencies, and researchers with information on which to base
20 decisions on the quality, effectiveness, and appropriateness
21 of care.
22 Sec. 13. NEW SECTION. 144C.5 COMMUNITY HEALTH MANAGEMENT
23 INFORMATION SYSTEM GOVERNING BOARD ESTABLISHED -- DUTIES.
24 1. A community health management information system
25 governing board is established and shall consist of twelve
26 members, including the following:
27 a. Four individuals representing providers including two
28 individuals representing hospitals as defined in chapter 135B,
29 and two individuals representing physicians as defined in
30 chapters 148 and 150A.
31 b. Six individuals representing consumers of which at
32 least two individuals shall be employment-based purchasers
33 representing nongovernmental entities purchasing group health
34 plans on behalf of other individuals.
35 c. Two individuals representing payors other than a self-

1 insured plan.
2 2. The members of the board shall be appointed by the
3 governor, subject to senate confirmation. Members shall serve
4 three-year staggered terms beginning and ending as provided in
5 section 69.19. Appointments to the board are subject to
6 sections 69.16, 69.16A, and 69.19. Removal of a member of the
7 board and the filling of a vacancy on the board are governed
8 by chapter 69. The members of the board shall be reimbursed
9 from funds collected by the system for actual and necessary
10 travel and related expenses incurred in the discharge of
11 official duties. A member of the board shall be considered an
12 official for purposes of chapter 68B, relating to conflicts of
13 interest of public officers and employees.
14 3. The commissioner shall cooperate with the board in the
15 implementation of this chapter and shall review the procedures
16 and operation of the system as provided in section 144C.6.
17 4. The board shall develop all public policy positions and
18 operational policies and procedures related to the system.
19 The board shall adopt written policies and procedures
20 necessary to implement and administer this chapter. Policies
21 and procedures adopted by the board are subject to the review
22 of the insurance division.
23 5. The board shall do all of the following:
24 a. Define a reporting methodology for the types of
25 information, including severity of illness and outcomes,
26 gathered by the community health management information
27 system, applicable to all Iowa hospitals and hospital
28 discharges, and outpatient and ambulatory care. For purposes
29 of this chapter, data related to severity of illness shall
30 include a severity of illness risk adjustment, patient average
31 length of stay, patient mortality, and average total patient
32 charges. Upon implementation of the severity of illness and
33 outcomes reporting methodology as authorized in this section,
34 the board, through its data advisory committee, may continue
35 to review alternative severity of illness and outcomes

1 measures which may be recommended to the board for use in the
2 data plan.
3 b. Establish and implement functions as appropriate for
4 the operation of the system consistent with the implementation
5 of the system as provided in section 144C.9.
6 c. Appoint appropriate advisory committees as necessary
7 including, but not limited to, an ethics and confidentiality
8 review committee, a data advisory committee, a technical
9 advisory committee, and a communications and education
10 committee to provide technical assistance regarding the
11 operation of the system, policies and contractual agreements,
12 and other functions within the authority of the system.
13 d. Establish a certification process for transaction
14 networks. The board shall only contract with certified
15 transaction networks for purposes of this chapter.
16 e. Establish an appropriate network certification fee and
17 any other fees as necessary to maintain the efficient
18 administration of the system and for the repayment of any
19 indebtedness incurred by the board pursuant to this chapter.
20 f. Establish standards for the electronic transaction
21 submission format, transactions networks, supplemental
22 information requirement transaction forms, computer software,
23 and any other information or procedures necessary to effect
24 the purpose of this chapter.
25 6. The board may do any of the following:
26 a. Enter into contracts as necessary to administer the
27 provisions of this chapter.
28 b. Borrow money to effect the purposes of the system,
29 except that the board shall not have the authority to directly
30 issue any notes or bonds for indebtedness and shall not have
31 the authority to pledge the credit or taxing power of this
32 state.
33 c. Employ legal counsel and other staff as necessary to
34 effect the purpose of this chapter.
35 d. Assist health care providers and payors, as needed in

1 obtaining necessary equipment and skills to access the system
2 and in implementing the necessary procedures to effect the
3 purpose of this chapter.
4 e. Enter into agreements consistent with and furthering
5 the intent and purpose of this chapter with similar entities
6 created in other states.
7 7. The board shall file a written report with the general
8 assembly on or before January 15 of each year concerning the
9 operation of the system. In addition to any other information
10 contained in the report, the board shall include any
11 legislative recommendations which the board believes are
12 necessary and which further the purposes of this chapter.
13 Sec. 14. NEW SECTION. 144C.6 INSURANCE DIVISION
14 RESPONSIBILITIES.
15 1. The division shall enforce this chapter. All policies
16 and procedures adopted by the board are subject to review and
17 approval by the division. The division shall review such
18 policies and procedures adopted by the board and determine
19 whether such policies and procedures comply with the
20 provisions and purpose of this chapter. Written notice of a
21 policy or procedure which is not approved by the division
22 shall be provided to the board stating the reason such policy
23 or procedure is not approved. The board may amend and
24 resubmit for review and approval any policy or procedure which
25 is not approved by the division. The board shall not
26 implement a policy or procedure prior to the approval of the
27 division.
28 2. The division may impose a civil penalty against a
29 payor, provider, transaction network, the data repository, or
30 the board for failure to comply with this chapter or rules
31 adopted pursuant to this chapter. The civil penalty imposed
32 shall not exceed five hundred dollars for each offense. Each
33 day of noncompliance constitutes a separate offense. However,
34 the division shall not impose a civil penalty for a technical,
35 nonsubstantive violation or if the payor or provider required

1 to provide information makes a good faith effort to comply
2 with the requirements of this chapter.
3 The division shall notify the noncomplying party of the
4 division's intent to impose a civil penalty. The notice shall
5 be sent by certified mail to the party's last known address
6 and shall state the nature of the party's actions leading to
7 the charge of noncompliance, the specific statute or rule
8 involved, and the amount of the proposed penalty. The notice
9 shall advise the party that upon failure to pay the civil
10 penalty, the penalty may be collected by civil action. The
11 party shall be given the opportunity to respond to the
12 imposition of the penalty in writing, within a reasonable time
13 as established by rule of the division.
14 The division may reduce or void a civil penalty imposed
15 under this section, as appropriate. A party upon whom a civil
16 penalty is imposed may appeal the action of the division
17 pursuant to chapter 17A. Moneys collected from the civil
18 penalties shall be deposited in the general fund of the state.
19 3. The division shall adopt rules pursuant to chapter 17A
20 necessary to carry out the division's role related to the
21 system and to assure that the system operates consistent with
22 this chapter. In addition to any other rules adopted, the
23 division shall specifically develop rules under which the
24 board shall develop policies and procedures for the
25 certification of transaction networks for operation in the
26 system.
27 The rules shall establish procedures to sanction agreements
28 between payors, providers, transactions networks, the data
29 repository, and the board, upon a finding by the commissioner
30 that the agreement will assist in the implementation of this
31 chapter, but which agreement might be a violation of antitrust
32 laws if undertaken without government direction and approval.
33 The rules shall assure that the purposes of this chapter
34 are implemented and that patient confidentiality is protected.
35 Sec. 15. NEW SECTION. 144C.7 CONFIDENTIALITY OF

1 INFORMATION.
2 1. The transactions data and other data collected and
3 transmitted through the system shall be kept confidential.
4 The confidentiality of patient information shall be protected
5 and the laws of this state which relate to patient
6 confidentiality apply.
7 2. The board shall establish policies and procedures
8 consistent with this chapter and rules adopted by the division
9 which ensure the confidentiality of information in the system,
10 provide access to qualified individuals or organizations
11 requesting access, establish a review process for denials of
12 access to information in the system, and establish penalties
13 for violations of these policies and procedures. Policies and
14 procedures adopted by the board pursuant to this section are
15 subject to the review and approval of the division.
16 3. The board shall establish an ethics and confidentiality
17 review committee to administer this section.
18 Sec. 16. NEW SECTION. 144C.8 TRANSACTION PROCEDURE --
19 NETWORK -- INFORMATION TO BE SUBMITTED.
20 1. A provider submitting a health claim in this state
21 shall file the claim electronically and use a standardized
22 electronic transaction submission format as provided in this
23 section. The electronic transaction submission format shall
24 use the American national standards institute form for data
25 submission and reporting to the data repository. A payor
26 offering health care coverage in the state shall accept
27 transaction data submissions, provide remittance, and transmit
28 eligibility electronically as provided by the board. A
29 transaction network shall have the ability to accept all
30 transactions processed electronically through the system and
31 transmit such transaction data to the appropriate network or
32 payor, interface with other networks or payors, provide
33 electronic eligibility for all payors, and provide for
34 electronic remittance for claims and concurrently transmit
35 data to the data repository.

1 2. The board shall review annually all transaction
2 networks and their effectiveness, and provide for additional
3 electronic filing requirements as necessary and feasible.
4 3. The system shall use identification numbers as follows:
5 a. A patient identification number shall be the
6 individual's social security number, or, upon request of the
7 patient, a random identification number.
8 b. A provider identification number system shall be
9 established by the board including the unique physician
10 identification number, the medicare provider number, and other
11 identifying numbers as provided by the board for providers who
12 do not have a unique physician identification number or
13 medicare provider number.
14 c. Such other identification numbers as determined by the
15 board to be necessary to assure efficient and accurate
16 transmittal and receipt of data through the system.
17 4. The system shall contain a data repository consistent
18 with section 144C.9 which shall maintain claims information
19 and other information as determined by the board.
20 5. A person shall not engage in any transaction between
21 health care providers, payors, and the data repository unless
22 certified by the board.
23 Sec. 17. NEW SECTION. 144C.9 SYSTEM IMPLEMENTATION.
24 The board shall implement the system as follows:
25 1. Phase I of the system shall be operational no later
26 than July 1, 1996. For purposes of this chapter, "phase I"
27 means the collection and submission of data including a
28 patient identifier; a provider identification number; data
29 elements included in the uniform billing-1992 form for
30 hospitals; data elements included in the federal health care
31 financing administration's 1500 form for physicians; an
32 outpatient pharmacy code as determined by the board; data on
33 all currently required discharges provided to the health data
34 commission; and severity of illness and outcomes measurement,
35 a measure of consumer health behavior, health status, and

1 satisfaction with services provided as determined by the
2 board.
3 2. Phase II of the system shall be operational no later
4 than July 1, 1999. For purposes of this chapter, "phase II"
5 means the collection and submission of data including clinical
6 data sets; laboratory tests, X-ray results, and inpatient
7 pharmacy codes; measures of functional outcomes; and provider
8 activity records for both organized delivery systems and
9 providers not participating in an organized delivery system.
10 The board shall develop more complete definitions of these
11 items and submit these definitions to the general assembly for
12 enactment as a part of this chapter no later than January 1,
13 1999.
14 3. Phase III of the system shall be implemented only after
15 implementation of phase I and phase II, and upon approval of
16 the general assembly. For purposes of this chapter, "phase
17 III" means the development of a totally automated patient
18 records including all data elements included in phase I and
19 phase II, and other data elements as determined by the board.
20 4. The board shall submit a status report regarding the
21 development of an electronic system for the transmission of
22 payments related to claims submitted to the system to the
23 general assembly no later than January 1, 1995.
24 Sec. 18. NEW SECTION. 147.145 LIMITATION ON NONECONOMIC
25 DAMAGES.
26 In any action for personal injury or wrongful death against
27 any physician and surgeon, osteopath, osteopathic physician
28 and surgeon, dentist, podiatrist, optometrist, pharmacist,
29 chiropractor, or nurse licensed under this chapter or against
30 any hospital licensed under chapter 135B, based upon the
31 alleged negligence of the licensee in the practice of that
32 profession or occupation, or upon the alleged negligence of
33 the hospital in patient care, in which liability is admitted
34 or established, the present value of the damages awarded for
35 noneconomic losses incurred or to be incurred in the future by

1 the plaintiff by reason of personal injury or death shall not
2 exceed two hundred fifty thousand dollars.
3 Sec. 19. Section 422.7, Code Supplement 1993, is amended
4 by adding the following new subsection:
5 NEW SUBSECTION. 29. Subtract, to the extent not otherwise
6 deducted in computing adjusted gross income, the amounts paid
7 by the taxpayer for the purchase of health insurance for the
8 taxpayer or taxpayer's spouse or dependent.
9 Sec. 20. Section 422.7, Code Supplement 1993, is amended
10 by adding the following new subsection:
11 NEW SUBSECTION. 30. Subtract, to the extent included, the
12 amount of contributions made on behalf of the taxpayer to a
13 medical care savings account and interest earned on moneys in
14 the account if not otherwise withdrawn.
15 Sec. 21. Section 422.12, Code 1993, is amended by adding
16 the following new subsection:
17 NEW SUBSECTION. 4. A physician tax credit for practicing
18 in a small, rural community to the extent provided under the
19 program established pursuant to section 135.27.
20 Sec. 22. Section 505.7, subsection 1, Code Supplement
21 1993, is amended to read as follows:
22 1. All fees and charges which are required by law to be
23 paid by insurance companies, ~~and~~ associations, and other
24 regulated entities shall be payable to the commissioner of the
25 insurance division of the department of commerce or department
26 of revenue and finance, as provided by law, whose duty it
27 shall be to account for and pay over the same to the treasurer
28 of state at the time and in the manner provided by law for
29 deposit in the general fund of the state.
30 Sec. 23. Section 505.7, Code Supplement 1993, is amended
31 by adding the following new subsection:
32 NEW SUBSECTION. 8. The commissioner may assess the costs
33 of an audit or examination to a health insurance purchasing
34 cooperative authorized under section 514I.1, in the same
35 manner as provided for insurance companies under sections

1 507.7 through 507.9, and may establish by rule reasonable
2 filing fees to fund the cost of regulatory oversight.
3 Sec. 24. Section 505.8, Code 1993, is amended by adding
4 the following new subsection:
5 NEW SUBSECTION. 6. The commissioner shall supervise all
6 health insurance purchasing cooperatives providing services or
7 operating within the state and the organization of domestic
8 cooperatives. The commissioner may admit nondomestic health
9 insurance purchasing cooperatives under the same standards as
10 domestic cooperatives. Health insurance purchasing
11 cooperatives are subject to rules adopted by the commissioner
12 pursuant to section 514I.1.
13 Sec. 25. Section 509A.6, Code 1993, is amended by adding
14 the following new unnumbered paragraph:
15 NEW UNNUMBERED PARAGRAPH. The governing body may also
16 enroll in and contract with a health insurance purchasing
17 cooperative authorized pursuant to section 514I.1.
18 Sec. 26. NEW SECTION. 509A.16 USE OF STATE GROUP
19 INSURANCE RESERVES.
20 1. Notwithstanding section 509A.5, the director of the
21 department of management may approve expenditures of up to
22 three hundred thousand dollars per fiscal year, from that
23 portion of the employer share of the state group insurance
24 reserves which consists of moneys appropriated from the
25 general fund of the state but which is not needed to fund
26 incentive programs, for the purposes of health reform
27 activities.
28 2. This section is repealed effective July 1, 1996.
29 Sec. 27. Section 513B.2, subsection 16, Code Supplement
30 1993, is amended to read as follows:
31 16. "Small employer" means a person actively engaged in
32 business who, on at least fifty percent of the employer's
33 working days during the preceding year, employed not less than
34 two and not more than ~~twenty-five~~ fifty full-time equivalent
35 eligible employees. In determining the number of eligible

1 employees, companies which are affiliated companies or which
2 are eligible to file a combined tax return for purposes of
3 state taxation are considered one employer.
4 Sec. 28. Section 513B.4, Code Supplement 1993, is amended
5 by adding the following new subsection:
6 NEW SUBSECTION. 1A. Notwithstanding subsection 1, there
7 shall be no variance in premium rates for a basic or standard
8 benefit plan offered pursuant to this chapter for any of the
9 factors as provided for in subsection 1.
10 Sec. 29. Section 513B.4, subsection 2, unnumbered
11 paragraph 2, Code Supplement 1993, is amended by striking the
12 paragraph and inserting in lieu thereof the following:
13 Case characteristics other than age, geographic area,
14 family composition, and group size shall not be used by a
15 small employer carrier without the prior approval of the
16 commissioner. Case characteristics which may be used with the
17 prior approval of the commissioner include but are not limited
18 to health choices.
19 Sec. 30. Section 513B.4, Code Supplement 1993, is amended
20 by adding the following new subsection:
21 NEW SUBSECTION. 5. Notwithstanding subsection 1, the
22 commissioner may by order reduce or eliminate the allowed
23 rating bands provided under subsection 1, paragraphs "a", "b",
24 and "c", or otherwise limit or eliminate the use of experience
25 rating.
26 Sec. 31. Section 513B.37, subsection 1, paragraph a, Code
27 Supplement 1993, is amended to read as follows:
28 a. What benefits or direct pay requirements must be
29 minimally included in a basic or standard benefit coverage
30 policy or subscription contract.
31 Sec. 32. Section 513B.38, Code Supplement 1993, is amended
32 by adding the following new subsections:
33 NEW SUBSECTION. 4. Upon the determination of the
34 commissioner pursuant to section 513B.37, subsection 1,
35 paragraph "a", to include expanded preventative care services

1 and mental health and substance abuse treatment coverage as
2 recommended by the Iowa health reform council, the
3 commissioner shall do all of the following:
4 a. Adopt by rule, with all due diligence, requirements for
5 the provision of expanded coverage for benefits for expanded
6 preventative care services.
7 b. Adopt by rule, with all due diligence, requirements for
8 the provision of limited coverage for benefits for mental
9 health and substance abuse services.
10 NEW SUBSECTION. 5. A policy of accident and sickness
11 insurance, a health maintenance organization contract, an
12 accountable health plan contract, or other policy of health
13 insurance shall not provide a lifetime maximum limit of
14 coverage.
15 Sec. 33. NEW SECTION. 513C.1 SHORT TITLE.
16 This chapter shall be known and may be cited as the
17 "Individual Health Insurance Market Reform Act".
18 Sec. 34. NEW SECTION. 513C.2 PURPOSE.
19 The purpose and intent of this chapter is to promote the
20 availability of health insurance coverage to individuals
21 regardless of their health status or claims experience, to
22 prevent abusive rating practices, to require disclosure of
23 rating practices to purchasers, to establish rules regarding
24 the renewal of coverage, to establish limitations on the use
25 of preexisting condition exclusions, to provide for the
26 development of a core group of basic or standard health
27 benefits to be offered to all individuals, and to improve the
28 overall fairness and efficiency of the individual health
29 insurance market.
30 Sec. 35. NEW SECTION. 513C.3 DEFINITIONS.
31 As used in this chapter, unless the context otherwise
32 requires:
33 1. "Actuarial certification" means a written statement by
34 a member of the American academy of actuaries or other
35 individual acceptable to the commissioner that an individual

1 carrier is in compliance with the provision of section 513C.5
2 which is based upon the actuary's or individual's examination,
3 including a review of the appropriate records and the
4 actuarial assumptions and methods used by the carrier in
5 establishing premium rates for applicable individual health
6 benefit plans.
7 2. "Affiliate" or "affiliated" means any entity or person
8 who directly or indirectly through one or more intermediaries,
9 controls or is controlled by, or is under common control with,
10 a specified entity or person.
11 3. "Basic or standard health benefit plan" means the core
12 group of health benefits developed pursuant to section 513C.8.
13 4. "Block of business" means all the individuals insured
14 under the same individual health benefit plan.
15 5. "Carrier" means any entity that provides individual
16 health benefit plans in this state. For purposes of this
17 chapter, carrier includes an insurance company, a group
18 hospital or medical service corporation, a fraternal benefit
19 society, a health maintenance organization, an accountable
20 health plan, and any other entity providing an individual plan
21 of health insurance or health benefits subject to state
22 insurance regulation.
23 6. "Commissioner" means the commissioner of insurance.
24 7. "Eligible individual" means an individual who is a
25 resident of this state and who either has qualifying existing
26 coverage or has had qualifying existing coverage within the
27 immediately preceding thirty days, or an individual who has
28 had a qualifying event occur within the immediately preceding
29 thirty days.
30 8. "Established service area" means a geographic area, as
31 approved by the commissioner and based upon the carrier's
32 certificate of authority to transact insurance in this state,
33 within which the carrier is authorized to provide coverage.
34 9. "Filed rate" means, for a rating period related to each
35 block of business, the rate charged to all individuals with

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1 similar rating characteristics for individual health benefit
2 plans.
3 10. "Health choices" means behaviors or activities that
4 are actually a matter of choice, can be actuarially determined
5 to affect the cost of insurance, and are objectively
6 determinable. Health choices, subject to the prior approval
7 of the commissioner may include, but are not limited to,
8 smoking and participation in wellness programs.
9 11. "Individual health benefit plan" means any hospital or
10 medical expense incurred policy or certificate, hospital or
11 medical service plan, or health maintenance organization
12 subscriber contract sold to an individual, or any
13 discretionary group trust or association policy providing
14 hospital or medical expense incurred coverage to individuals.
15 Individual health benefit plan does not include a self-insured
16 group health plan, a self-insured multiple employer group
17 health plan, a group conversion plan, an insured group health
18 plan, accident-only, specified disease, short-term hospital or
19 medical, hospital confinement indemnity, credit, dental,
20 vision, medicare supplement, long-term care, or disability
21 income insurance coverage, coverage issued as a supplement to
22 liability insurance, workers' compensation or similar
23 insurance, or automobile medical payment insurance.
24 12. "Premium" means all moneys paid by an individual and
25 eligible dependents as a condition of receiving coverage from
26 a carrier, including any fees or other contributions
27 associated with an individual health benefit plan.
28 13. "Qualifying event" means any of the following:
29 a. Loss of eligibility for medical assistance provided
30 pursuant to chapter 249A or medicare coverage provided
31 pursuant to Title XVIII of the federal Social Security Act.
32 b. Loss or change of dependent status under qualifying
33 previous coverage.
34 c. The attainment by an individual of the age of majority.
35 14. "Qualifying existing coverage" or "qualifying previous

1 coverage" means benefits or coverage provided under either of
2 the following:
3 a. Any group health insurance that provides benefits
4 similar to or exceeding benefits provided under the standard
5 health benefit plan, provided that such policy has been in
6 effect for a period of at least one year.
7 b. An individual health insurance benefit plan, including
8 coverage provided under a health maintenance organization
9 contract, a hospital or medical service plan contract, or a
10 fraternal benefit society contract, that provides benefits
11 similar to or exceeding the benefits provided under the
12 standard health benefit plan, provided that such policy has
13 been in effect for a period of at least one year.
14 15. "Rating characteristics" means demographic or other
15 objective characteristics of individuals which are considered
16 by the carrier in the determination of premium rates for the
17 individuals and which are approved by the commissioner.
18 16. "Rating period" means the period for which premium
19 rates established by a carrier are in effect.
20 17. "Restricted network provision" means a provision of an
21 individual health benefit plan that conditions the payment of
22 benefits, in whole or in part, on the use of health care
23 providers that have entered into a contractual arrangement
24 with the carrier to provide health care services to covered
25 individuals.
26 Sec. 36. NEW SECTION. 513C.4 APPLICABILITY AND SCOPE.
27 This chapter applies to an individual health benefit plan
28 delivered or issued for delivery to residents of this state on
29 or after July 1, 1994.
30 1. Except as provided in subsection 2, for purposes of
31 this chapter, carriers that are affiliated companies or that
32 are eligible to file a consolidated tax return shall be
33 treated as one carrier and any restrictions or limitations
34 imposed by this chapter shall apply as if all individual
35 health benefit plans delivered or issued for delivery to

1 residents of this state by such affiliated carriers were
2 issued by one carrier.
3 2. An affiliated carrier that is a health maintenance
4 organization having a certificate of authority under section
5 513C.5 shall be considered to be a separate carrier for the
6 purposes of this chapter.
7 Sec. 37. NEW SECTION. 513C.5 RESTRICTIONS RELATING TO
8 PREMIUM RATES.
9 1. Premium rates for any block of individual health
10 benefit plan business issued on or after July 1, 1994, by a
11 carrier subject to this chapter are subject to the composite
12 effect of all of the following:
13 a. After making actuarial adjustments based upon benefit
14 design, rating characteristics, and health choice factors, the
15 filed rate for any block of business shall not exceed the
16 filed rate for any other block of business by more than twenty
17 percent.
18 b. The filed rate for any block of business shall not
19 exceed the filed rate for any other block of business by more
20 than thirty percent due to factors relating to rating
21 characteristics.
22 c. The filed rate for any block of business shall not
23 exceed the filed rate for any other block of business by more
24 than thirty percent due to factors relating to health choices.
25 d. The carrier shall not apply gender or industry
26 classification rating characteristics.
27 e. Experience rating characteristics other than age,
28 geographic area, family composition, and group size shall not
29 be used by a carrier without the prior approval of the
30 commissioner. Experiencing rating characteristics which may
31 be used with the prior approval of the commissioner include
32 but are not limited to health choices.
33 f. Premium rates for individual health benefit plans shall
34 comply with the requirements of this section notwithstanding
35 any assessments paid or payable by the carrier pursuant to any

1 reinsurance program or risk adjustment mechanism.
2 g. An adjustment, not to exceed fifteen percent annually
3 due to the claim experience or health status of a block of
4 business.
5 h. For purposes of this subsection, an individual health
6 benefit plan that contains a restricted network provision
7 shall not be considered similar coverage to an individual
8 health benefit plan that does not contain such a provision,
9 provided that the differential in payments made to network
10 providers results in substantial differences in claim costs.
11 2. Notwithstanding subsection 1, the commissioner may by
12 order reduce or eliminate the allowed rating bands provided
13 under subsection 1, paragraphs "a", "b", "c", and "g", or
14 otherwise limit or eliminate the use of experience rating.
15 3. A carrier shall not transfer an individual
16 involuntarily into or out of a block of business.
17 4. The commissioner may suspend for a specified period the
18 application of subsection 1, paragraph "a", as to the premium
19 rates applicable to one or more blocks of business of a
20 carrier for one or more rating periods upon a filing by the
21 carrier requesting the suspension and a finding by the
22 commissioner that the suspension is reasonable in light of the
23 financial condition of the carrier.
24 5. A carrier shall make a reasonable disclosure at the
25 time of the offering for sale of any individual health benefit
26 plan of all of the following:
27 a. The extent to which premium rates for a specified
28 individual are established or adjusted based upon rating
29 characteristics.
30 b. The carrier's right to change premium rates, and the
31 factors, other than claim experience, that affect changes in
32 premium rates.
33 c. The provisions relating to the renewal of policies and
34 contracts.
35 d. Any provisions relating to any preexisting condition.

1 e. All plans offered by the carrier, the prices of such
2 plans, and the availability of such plans to the individual.
3 6. A carrier shall maintain at its principal place of
4 business a complete and detailed description of its rating
5 practices, including information and documentation that
6 demonstrate that its rating methods and practices are based
7 upon commonly accepted actuarial assumptions and are in
8 accordance with sound actuarial principles.
9 7. A carrier shall file with the commissioner annually on
10 or before March 15, an actuarial certification certifying that
11 the carrier is in compliance with this chapter and that the
12 rating methods of the carrier are actuarially sound. The
13 certification shall be in a form and manner and shall contain
14 information as specified by the commissioner. A copy of the
15 certification shall be retained by the carrier at its
16 principal place of business. Rate adjustments made in order
17 to comply with this section are exempt from loss ratio
18 requirements.
19 8. A carrier shall make the information and documentation
20 maintained pursuant to subsection 5 available to the
21 commissioner upon request. The information and documentation
22 shall be considered proprietary and trade secret information
23 and shall not be subject to disclosure by the commissioner to
24 persons outside of the division except as agreed to by the
25 carrier or as ordered by a court of competent jurisdiction.
26 Sec. 38. <u>NEW SECTION</u>. 513C.6 RENEWAL OF COVERAGE.
27 1. An individual health benefit plan is renewable at the
28 option of the individual, except in any of the following
29 cases:
30 a. Nonpayment of the required premiums.
31 b. Fraud or misrepresentation.
32 c. The insured individual becomes eligible for medicare
33 coverage under Title XVIII of the federal Social Security Act.
34 d. The carrier elects not to renew all of its individual
35 health benefit plans in the state. In such case, the carrier

1 shall provide notice of the decision not to renew coverage to
2 all affected individuals and to the commissioner in each state
3 in which an affected insured individual is known to reside at
4 least ninety days prior to the nonrenewal of the health
5 benefit plan by the carrier. Notice to the commissioner under
6 the paragraph shall be provided at least three working days
7 prior to the notice to the affected individuals.

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8 e. The commissioner finds that the continuation of the
9 coverage would not be in the best interests of the
10 policyholders or certificate holders, or would impair the
11 carrier's ability to meet its contractual obligations.
12 2. A carrier that elects not to renew all of its
13 individual health benefit plans in this state shall be
14 prohibited from writing new individual health benefit plans in
15 this state for a period of five years from the date of the
16 notice to the commissioner.
17 3. With respect to a carrier doing business in an
18 established geographic service area of the state, this section
19 applies only to the carrier's operations in the service area.
20 Sec. 39. NEW SECTION. 513C.7 AVAILABILITY OF COVERAGE.
21 1. A carrier issuing an individual health benefit plan in
22 this state shall issue a basic or standard health benefit plan
23 to an eligible individual who applies for a plan and agrees to
24 make the required premium payments and to satisfy other
25 reasonable provisions of the basic or standard health benefit
26 plan. An insurer is not required to issue a basic or standard
27 health benefit plan to an individual who meets any of the
28 following criteria:
29 a. The individual is covered or is eligible for coverage
30 under a health benefit plan provided by the individual's
31 employer.
32 b. An eligible individual who does not apply for a basic
33 or standard health benefit plan within thirty days of a
34 qualifying event or within thirty days upon becoming
35 ineligible for qualifying existing coverage.

1 c. The individual is covered or is eligible for any
2 continued group coverage under section 4980b of the Internal
3 Revenue Code, sections 601 through 608 of the federal Employee
4 Retirement Income Security Act of 1974, sections 2201 through
5 2208 of the federal Public Health Service Act, or any state-
6 required continued group coverage. For purposes of this
7 subsection, an individual who would have been eligible for
8 such continuation of coverage, but is not eligible solely
9 because the individual or other responsible party failed to
10 make the required coverage election during the applicable time
11 period, is deemed to be eligible for such group coverage until
12 the date on which the individual's continuing group coverage
13 would have expired had an election been made.
14 2. A carrier shall issue the basic or standard health
15 insurance benefit plan to an individual currently covered by
16 an underwritten benefit plan issued by that carrier at the
17 option of the individual. This option must be exercised
18 within thirty days of notification of a premium rate increase
19 applicable to the underwritten benefit plan.
20 3. A carrier shall file with the commissioner, in a form
21 and manner prescribed by the commissioner, the basic or
22 standard health benefit plan to be used by the carrier. A
23 basic or standard health benefit plan filed pursuant to this
24 subsection may be used by a carrier beginning thirty days
25 after it is filed unless the commissioner disapproves of its
26 use.
27 The commissioner may at any time, after providing notice
28 and an opportunity for a hearing to the carrier, disapprove
29 the continued use by a carrier of a basic or standard health
30 benefit plan on the grounds that the plan does not meet the
31 requirements of this chapter.
32 4. a. The individual basic or standard health benefit
33 plan shall not deny, exclude, or limit benefits for a covered
34 individual for losses incurred more than twelve months
35 following the effective date of the individual's coverage due

1 to a preexisting condition. A preexisting condition shall not
2 be defined more restrictively than any of the following:
3 (1) A condition that would cause an ordinarily prudent
4 person to seek medical advice, diagnosis, care, or treatment
5 during the twelve months immediately preceding the effective
6 date of coverage.
7 (2) A condition for which medical advice, diagnosis, care,
8 or treatment was recommended or received during the twelve
9 months immediately preceding the effective date of coverage.
10 (3) A pregnancy existing on the effective date of
11 coverage.
12 b. A carrier shall waive any time period applicable to a
13 preexisting condition exclusion or limitation period with
14 respect to particular services in an individual health benefit
15 plan for the period of time an individual was previously
16 covered by qualifying previous coverage that provided benefits
17 with respect to such services, provided that the qualifying
18 previous coverage was continuous to a date not more than
19 thirty days prior to the effective date of the new coverage.
20 5. A carrier is not required to offer coverage or accept
21 applications pursuant to subsection 1 from any individual
22 residing in the carrier's established geographic access area.
23 6. A carrier shall not modify a basic or standard health
24 benefit plan with respect to an individual or dependent
25 through riders, endorsements, or other means to restrict or
26 exclude coverage for certain diseases or medical conditions
27 otherwise covered by the health benefit plan.
28 Sec. 40. NEW SECTION. 513C.8 HEALTH BENEFIT PLAN
29 STANDARDS.
30 The commissioner shall adopt by rule the form and level of
31 coverage of the basic health benefit plan and the standard
32 health benefit plan for the individual market which shall be
33 the same as provided for under chapter 513B with respect to
34 small group coverage.
35 Sec. 41. NEW SECTION. 513C.9 STANDARDS TO ASSURE FAIR

1 MARKETING.
2 1. A carrier issuing individual health benefit plans in
3 this state shall make available the basic or standard health
4 benefit plan to residents of this state. If a carrier denies
5 other individual health benefit plan coverage to an eligible
6 individual on the basis of the health status or claims
7 experience of the eligible individual, or the individual's
8 dependents, the carrier shall offer the individual the
9 opportunity to purchase a basic or standard health benefit
10 plan.
11 2. A carrier or an agent shall not do either of the
12 following:
13 a. Encourage or direct individuals to refrain from filing
14 an application for coverage with the carrier because of the
15 health status, claims experience, industry occupation, or
16 geographic location of the individuals.
17 b. Encourage or direct individuals to seek coverage from
18 another carrier because of the health status, claims
19 experience, industry occupation, or geographic location of the
20 individuals.
21 3. Subsection 2, paragraph "a", shall not apply with
22 respect to information provided by a carrier or an agent to an
23 individual regarding the established geographic service area
24 of the carrier or the restricted network provision of the
25 carrier.
26 4. A carrier shall not, directly or indirectly, enter into
27 any contract, agreement, or arrangement with an agent that
28 provides for, or results in, the compensation paid to an agent
29 for a sale of a basic or standard health benefit plan to vary
30 because of the health status or permitted rating
31 characteristics of the individual or the individual's
32 dependents.
33 5. Subsection 4 does not apply with respect to the
34 compensation paid to an agent on the basis of percentage of
35 premium, provided that the percentage shall not vary because

1 of the health status or other permitted rating characteristics
2 of the individual or the individual's dependents.
3 6. Denial by a carrier of an application for coverage from
4 an individual shall be in writing and shall state the reason
5 or reasons for the denial.
6 7. A violation of this section by a carrier or an agent is
7 an unfair trade practice under chapter 507B.
8 8. If a carrier enters into a contract, agreement, or
9 other arrangement with a third-party administrator to provide
10 administrative, marketing, or other services related to the
11 offering of individual health benefit plans in this state, the
12 third-party administrator is subject to this section as if it
13 were a carrier.

14 Sec. 42. NEW SECTION. 513D.1 EMPLOYER REQUIRED TO
15 PROVIDE ACCESS TO HEALTH CARE COVERAGE -- PENALTIES.
16 1. An employer doing business within this state shall
17 offer each employee, at a minimum, access to health insurance.
18 The requirement contained in this section may be satisfied by
19 offering any of the following:
20 a. Health care coverage through an insurer or health
21 maintenance organization authorized to do business in this
22 state.
23 b. Access to health benefits through a health benefits
24 plan qualified under the federal Employee Retirement Income
25 Security Act of 1974.
26 c. Enrollment in an Iowa-licensed health insurance
27 purchasing cooperative. A cooperative may require payroll
28 deduction of employee contributions and direct deposit of
29 premium payments to the account of the cooperative.
30 2. An employer is not required to financially contribute
31 toward the employee's health plan.
32 3. A violation of this section may be reported to the
33 consumer and legal affairs bureau in the insurance division.
34 The division may issue, upon a finding that an employer has
35 failed to offer an employee access to health insurance, any of

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1 the following:
2 a. A cease and desist order instructing the employer to
3 cure the failure and desist from future violations of this
4 section.
5 b. An order requiring an employer who has previously been
6 the subject of a cease and desist order to pay an employee's
7 reasonable health insurance premiums necessary to prevent or
8 cure a lapse in health care coverage arising out of the
9 employer's failure to offer as required.
10 c. An order upon the employer assessing the reasonable
11 costs of the division's investigation and enforcement action.
12 Sec. 43. NEW SECTION. 514C.8 PROVIDER ACCESS UNDER
13 MANAGED CARE HEALTH PLAN OR INDEMNITY PLAN WITH LIMITED
14 PROVIDER NETWORK.
15 A managed care health plan or indemnity plan with a limited
16 provider network shall provide patients direct access to
17 providers licensed under chapter 148, 150, 150A, or 151.
18 Access to such provider shall not be made conditional upon a
19 referral by a provider licensed under another chapter.
20 Referral to a specialist may be conditioned upon referral by a
21 primary care provider licensed under the same chapter. Access
22 to a class of providers licensed under one chapter shall not
23 be subject to a copayment, deductible, or premium rate
24 different than provided for access to a class of providers
25 licensed under another chapter. Access to a specialist may be
26 subject to a different copayment or deductible than access to
27 a primary care provider. Access to a nonparticipating
28 provider may be restricted; may be subject to different
29 copayments, deductibles, or premium rates; or may be excluded.
30 For purposes of this section, "managed care health plan or
31 indemnity plan with a limited provider network" means a health
32 maintenance organization, accountable health plan, preferred
33 provider organization, exclusive provider organization, point
34 of service plan, or similar health plan.
35 This section does not apply if an employer offers employees

1 a choice of health plans, either directly or indirectly
2 through a health insurance purchasing cooperative, provided
3 that the offered choices include at least one indemnity plan
4 with unrestricted choice of provider, or at least one managed
5 care health plan or indemnity plan with a limited provider
6 network which provides access as defined in this section.
7 Sec. 44. NEW SECTION. 514I.1 HEALTH INSURANCE PURCHASING
8 COOPERATIVES.
9 1. The commissioner of insurance shall adopt rules and a
10 licensing procedure for authorizing the establishment of a
11 health insurance purchasing cooperative. The rules shall
12 include, at a minimum, all of the following:
13 a. Procedures to sanction voluntary agreements between
14 competitors within the service region of a health insurance
15 purchasing cooperative, upon a finding by the commissioner
16 that the agreement will improve the quality of, access to, or
17 affordability of health care, but which agreement might be a
18 violation of antitrust laws if undertaken without government
19 direction and approval.
20 b. Procedures to assure ongoing supervision of contracts
21 sanctioned under this subsection, in order to assure that the
22 contracts do in fact improve health care quality, access, or
23 affordability. Approval may be withdrawn on a prospective
24 basis at the discretion of the commissioner if necessary to
25 improve health care quality, access, and affordability.
26 c. A requirement to review the plan of operation of a
27 health insurance purchasing cooperative, and standards for
28 approval or disapproval of a plan.
29 d. A requirement that a plan of operation include
30 guaranteed access and rating practices no more restrictive
31 than those required of competitors within a market segment,
32 such as small group health insurers regulated under chapter
33 513B, or individual or large group insurers regulated under
34 chapter 514A or 514D. The commissioner shall regulate all
35 health plans and health insurance purchasing cooperatives to

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1 assure that to the greatest extent possible all health
2 insurance or health benefit marketing channels within a market
3 segment are subject to the same rules of access, underwriting,
4 risk spreading, and rate regulation.
5 e. An annual report to be submitted to the general
6 assembly no later than February 1, describing the operations
7 of all health insurance purchasing cooperatives, and
8 permitting review of the success of health insurance
9 purchasing cooperatives in furthering the goals of improved
10 health care quality, access, or affordability. The report
11 shall include any recommendations on whether additional health
12 insurance purchasing cooperatives should be established.
13 2. This section does not prevent the development of any
14 other health insurance or pooled purchasing arrangements
15 otherwise permitted by law.
16 3. This section and rules adopted pursuant to this section
17 are intended to provide immunity from federal antitrust law
18 under the state action doctrine exemption.
19 Sec. 45. Section 614.8, Code 1993, is amended to read as
20 follows:
21 614.8 MINORS AND MENTALLY ILL PERSONS.
22 1. ~~The~~ Except as provided in subsection 2, the times
23 limited for actions ~~herein~~, except those brought for penalties
24 and forfeitures, ~~shall be~~ are extended in favor of minors and
25 mentally ill persons, so that they ~~shall~~ have one year from
26 and after the termination of ~~such~~ the disability within which
27 to commence ~~said~~ an action.
28 2. The times limited for actions brought for medical
29 malpractice are extended in favor of minors up to the day of
30 their sixth birthday so that they have until their eighth
31 birthday to commence an action.
32 Sec. 46. PRIMARY CARE INITIATIVE -- PHYSICIAN RESPITE
33 PROGRAM. The department, in cooperation with the university
34 of Iowa college of medicine and the university of osteopathic
35 medicine and health sciences, shall develop and establish a

1 primary care initiative. The primary care initiative shall,
2 at a minimum, focus on the expansion of the family practice
3 residency program and the development of a physician respite
4 program in the rural areas of Iowa. The department shall
5 submit a written report to the general assembly no later than
6 January 9, 1995, concerning the status of the development of
7 the primary care initiative, and include any legislative
8 recommendations necessary to complete implementation of the
9 initiative.
10 Sec. 47. HEALTH INSURANCE COST DEDUCTION -- CONTINGENT
11 EFFECT. Section 19 of this Act, which amends section 422.7 by
12 adding a new subsection 29, is effective upon the enactment of
13 a federal individual income tax provision authorizing the
14 deduction in computing federal adjusted gross income of one
15 hundred percent of the cost of the purchase of health
16 insurance. Section 19 of this Act applies to tax years
17 designated in the federal enactment of the health insurance
18 cost deduction.
19 Sec. 48. MEDICAL CARE SAVINGS ACCOUNT CONTRIBUTIONS --
20 CONTINGENT EFFECT. Section 20 of this Act, which amends
21 section 422.7 by adding a new subsection 30, is effective upon
22 the enactment of a federal individual income tax provision
23 authorizing the deduction or exclusion in computing federal
24 adjusted gross income of contributions made on behalf of the
25 taxpayer to a medical care savings account. Section 20 of
26 this Act applies to tax years designated in the federal
27 enactment related to contributions to a medical care savings
28 account.
29 Sec. 49. NOTICE OF EFFECTIVENESS. The director of revenue
30 and finance shall notify the governor, the chairpersons and
31 ranking members of the senate and house ways and means
32 committees, the Iowa Code editor, and the legislative fiscal
33 bureau when section 19 or section 20, which amend section
34 422.7, of this Act becomes effective.
35 Sec. 50. FINANCING STUDY -- ANNUAL REPORT TO GENERAL

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1 ASSEMBLY.
2 It is the intent of the general assembly that health care
3 coverage be obtained by all Iowans on a voluntary basis. If
4 the state has not achieved a level of individuals without
5 health care coverage of less than three percent of total
6 population through voluntary means, it is the intent of the
7 general assembly that the state shall consider the imposition
8 of a financing mechanism to provide guaranteed coverage to all
9 citizens of this state. The division shall annually provide a
10 written report to the governor and general assembly no later
11 than the third Monday of each regular session of the general
12 assembly indicating the percentage of individuals in this
13 state who do not have any health care coverage, and
14 summarizing progress toward the goal of three percent.
15 Sec. 51. ALTERNATIVE MEDICAL MALPRACTICE DISPUTE
16 RESOLUTION PROCEDURES -- MEDICAL SCREENING PANELS -- STUDY.
17 The supreme court, in cooperation with the department of
18 public health and the insurance division, shall initiate a
19 study concerning the development and use of alternative
20 medical malpractice dispute resolution procedures and medical
21 screening panels. The study shall include, at a minimum, a
22 review of existing alternative dispute resolution procedures
23 and medical screening panels and provide for a comprehensive
24 review of existing statutes and court decisions in an effort
25 to maximize the benefits of alternative medical malpractice
26 dispute resolution procedures that have been successful while
27 assuring procedural protections and fair access to the court
28 system. The study shall also include any recommendations on
29 implementing alternative medical malpractice dispute
30 resolution procedures and medical screening panels in the
31 state along with a corresponding cost benefit analysis related
32 to each recommendation.
33 Sec. 52. INITIAL APPOINTMENTS TO THE BOARD. Initial
34 appointments to the board established in 144C.5 shall be as
35 follows:

1 1. One provider, one payor, and two consumers shall be
2 appointed for a term of one year.
3 2. Two providers and two consumers shall be appointed for
4 a term of two years.
5 3. One provider, one payor, and two consumers shall be
6 appointed for a term of three years.
7 Sec. 53. INSURANCE DIVISION STUDIES.

8 1. The insurance division shall review, develop, and
9 submit a plan for the establishment of an individual health
10 coverage reinsurance program. The division shall submit a
11 written report to the general assembly no later than January
12 9, 1995, including the division's plan.
13 2. The insurance division shall review, study, and make
14 recommendations to the general assembly concerning the Iowa
15 comprehensive health insurance association established under
16 chapter 514E, with the intent to merge the Iowa comprehensive
17 health insurance program with an individual health reinsurance
18 program. The division shall submit a written report to the
19 general assembly no later than January 9, 1995, including the
20 division's findings and recommendations.
21 Sec. 54. APPLICABILITY. Notwithstanding the provisions of
22 sections 513C.4 and 513C.5, chapter 513C, as enacted in this
23 Act, is not applicable to an individual health benefit plan
24 delivered or issued for delivery in this state or to a block
25 of individual health benefit plan business until such time as
26 rules implementing the chapter have been adopted by the
27 insurance division pursuant to chapter 17A.
28 Sec. 55. EFFECTIVE DATE. Section 42 of this Act, which
29 creates new section 513D.1, is effective January 1, 1995.
30 Sec. 56. Section 145.1A, Code 1993, is amended to read as
31 follows:
32 145.1A REPEAL.
33 This chapter is repealed effective July 1, ~~1994~~ 1996.
34 EXPLANATION
35 Section 8.6 is amended and authorizes the director of the

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1 department of management to establish a statewide health
2 accounting system in coordination with the department of
3 public health, the department of human services, the
4 department of elder affairs, the department of employment
5 services, and the insurance division of the department of
6 commerce. The department of management is granted access to
7 all information necessary from the community health management
8 information system created in chapter 144C.
9 Sections 18.133 and 18.136 are amended to provide that
10 hospitals licensed pursuant to chapter 135B and physician
11 clinics are to be offered access to the Iowa communications
12 network for diagnostic, clinical, consultative, data, and
13 educational services for the purpose of developing a
14 comprehensive, statewide telemedicine network.
15 New section 135.27 is created which would establish a state
16 individual income tax credit for physicians starting primary
17 care practices in nonmetropolitan statistical area communities
18 of less than 10,000 residents. This income tax credit would
19 be for an amount up to $10,000 per year for a maximum of 10
20 years.
21 Eligible physicians would be a medical or osteopathic
22 doctor establishing a new primary care practice which includes
23 family practice, general practice, internal medicine,
24 pediatrics, obstetrics, or gynecology. Although at least 75
25 percent of the physician's practice would have to be serving
26 residents of small, rural communities, the physician would be
27 allowed to establish clinics in more than one community.
28 Physicians that are currently practicing in communities of
29 less than 10,000 would not be eligible. The tax credits would
30 be implemented for tax years ending after July 1, 1994. The
31 department of public health, in consultation with the
32 department of revenue and finance, would establish rules to
33 implement the tax credits. The tax credit program would
34 sunset December 31, 1999.
35 New sections 135.110 through 135.113 are created and relate

1 to establishing and licensing accountable health plans in this
2 state.
3 New section 135.110 is created which defines an accountable
4 health plan as an entity which pays for and provides for the
5 delivery of health services within a defined area, and is
6 accountable to the public for the cost and quality of such
7 services.
8 New section 135.111 is created and directs the Iowa
9 department of public health to adopt rules relating to the
10 establishment, licensure, and regulation of accountable health
11 plans. The rules are to allow flexibility in the structure of
12 such plans to permit the development of alternative structures
13 in rural areas of the state in response to the needs,
14 preferences, and conditions of rural communities.
15 New section 135.112 is created and establishes licensing
16 requirements for accountable health plans.
17 New section 135.113 defines terms used in sections 135.110
18 through 135.113.
19 New chapter 144C is created relating to the development and
20 implementation of a community health management information
21 system.
22 Section 144C.1 provides the title of the chapter.
23 Section 144C.2 sets forth the legislative findings relating
24 to the development of a community health management
25 information system.
26 Section 144C.3 sets forth the definitions of terms used in
27 the chapter.
28 Section 144C.4 establishes the community health management
29 information system and a data repository. The system is
30 established as a nonprofit corporation under chapter 504A.
31 The data repository is established for the collection of
32 health care data and to provide patients, physicians,
33 hospitals, purchasers, payors, government agencies, and
34 researchers with information on which to base decisions on the
35 quality, effectiveness, and appropriateness of care.

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1 Section 144C.5 establishes a community health management
2 information system governing board and sets forth the board's
3 duties. The board consists of 12 members appointed by the
4 governor, subject to senate confirmation. The board is to
5 develop all public policy positions and operational policies
6 and procedures related to the system. The board is to file a
7 written report with the general assembly on or before January
8 15 of each year concerning the operation of the system. In
9 addition to any other information contained in the report, the
10 board is to include any legislative recommendations which the
11 board believes are necessary and which further the purposes of
12 this chapter.
13 Section 144C.6 establishes the responsibilities of the
14 insurance division. The division is directed to enforce the
15 provisions of this chapter and all policies and procedures
16 adopted by the board are subject to the review and approval of
17 the division. The division is granted authority to impose a
18 civil penalty of up to $500 against a payor, provider,
19 transaction network, the data repository, or the board for
20 failure to comply with the provisions of the chapter or rules
21 adopted pursuant to the chapter.
22 Section 144C.7 provides that transactions data and other
23 data collected and transmitted through the system is to be
24 kept confidential.
25 Section 144C.8 establishes the transaction procedure and
26 identifies the information to be submitted.
27 Section 144C.9 provides for the implementation of the
28 system in 3 phases. Phase I is to be implemented no later
29 than July 1, 1996. Phase II is to be implemented no later
30 than July 1, 1999. Phase III is to be implemented upon
31 approval of the general assembly after the implementation of
32 Phases I and II.
33 Section 147.145 is amended to establish a cap on
34 noneconomic damages of $250,000 in a medical malpractice
35 action.

1 Sections 422.7 and 422.12 are amended to implement the
2 individual income tax credit for physicians established in new
3 section 135.27, and the tax credit for individual medical
4 savings accounts. This bill allows the deduction of 100
5 percent of health insurance costs from adjusted gross income
6 in computing state individual income tax and allows a
7 deduction for amounts of contributions to a medical care
8 savings account. In addition, the bill allows a deduction
9 from adjusted gross income for the interest earned on a
10 medical care savings account to the extent not withdrawn.
11 Section 505.7 is amended to grant the insurance
12 commissioner authority to assess a health insurance purchasing
13 cooperative audit and examination costs.
14 Section 505.7 is also amended by adding a new subsection
15 which provides that the commissioner may assess the costs of
16 an audit or examination to a health insurance purchasing
17 cooperative in the same manner as provided for insurance
18 companies under sections 507.7 through 507.9.
19 Section 505.8 is amended to provide that the commissioner
20 is given jurisdiction to supervise all health insurance
21 purchasing cooperatives.
22 Section 509A.6, which relates to group insurance for public
23 employees, is amended to provide that a governing body may
24 enroll in and contract with a health insurance purchasing
25 cooperative.
26 Section 509A.16 is amended to provide that the director of
27 the department of management may approve expenditures of up to
28 $300,000 per fiscal year, from the surplus portion of the
29 general fund portion of the employer share of the state group
30 insurance reserves not needed to fund incentive programs, for
31 the purposes of health reform activities. This section is
32 repealed July 1, 1996.
33 Section 513B.2 is amended to provide that a small employer
34 is a person who employs not less than two and not more than 50
35 full-time employees. Currently, a small employer is defined

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1 as a person who employs not less than two and not more than 25
2 full-time employees.
3 Section 513B.4 is amended to add a new subsection providing
4 that the premium adjustment factors contained in subsection 1
5 do not apply to a standard or basic health benefit plan.
6 Section 513B.4, subsection 2, is amended by striking
7 language related to the case characteristics which may be used
8 to adjust health insurance premiums for small groups and
9 inserting language that case characteristics other than age,
10 geographic area, family composition, and group size are not to
11 be used by a small employer carrier without the prior approval
12 of the commissioner.
13 Section 513B.4 is amended to add a new subsection providing
14 that the commissioner may by order reduce or eliminate allowed
15 rating bonds as provided in subsection 1 of that section.
16 Section 513B.37 is amended to provide that the commissioner
17 is to determine what benefits or direct pay requirements must
18 be minimally included in a standard health benefit plan.
19 Section 513B.38 is amended to provide that the commissioner
20 may extend standard benefits to include preventative care
21 services and mental health and substance abuse treatment
22 coverage.
23 New chapter 513C is created relating to individual health
24 coverage. New section 513C.1 provides the title, the
25 Individual Health Insurance Market Reform Act.
26 New section 513C.2 states the purpose of the chapter.
27 New section 513C.3 establishes the definitions of key terms
28 used in the chapter.
29 New section 513C.4 provides that the chapter applies to an
30 individual health benefit plan delivered or issued for
31 delivery to residents in this state on or after July 1, 1994.
32 New section 513C.5 establishes restrictions relating to
33 premium rates for individual health benefit plans. Among
34 those factors, the carrier is not to apply gender or industry
35 classification rating characteristics, and experience rating

1 characteristics only apply when an individual who is obtaining
2 health coverage does not currently have qualifying coverage,
3 as defined in the chapter. Certain other restrictions apply
4 relating to the transfer of an individual into and out of a
5 block of business, and required disclosures relating to the
6 coverage are enumerated.
7 New section 513C.6 relates to the renewal of an individual
8 health benefit plan. Such plan is renewable at the option of
9 the individual, except under certain enumerated circumstances.
10 The section also provides that a carrier that elects not to
11 renew all of its individual health benefit plans in this state
12 shall be prohibited from writing new individual health benefit
13 plans in this state for a period of five years from the date
14 of the notice required to be provided to the commissioner of
15 such election.
16 New section 513C.7 provides that a carrier issuing
17 individual health benefit plans must issue such plan to an
18 individual applying for the plan except under certain defined
19 circumstances.
20 New section 513C.8 provides that the commissioner is to
21 adopt rules relating to the form and level of coverage of the
22 basic and standard health benefit plan for the individual
23 market.
24 New section 513C.9 establishes standards to assure fair
25 marketing of individual basic and standard health benefit
26 plans. Restrictions are also established relating to carrier
27 and the agent concerning the marketing of such plans.
28 New section 513D.1 is created which establishes a
29 requirement that an employer provide an employee access to
30 group health insurance. The employer is not required to
31 financially contribute toward such insurance. The insurance
32 division is given enforcement authority with respect to this
33 requirement, which includes monetary penalties necessary to
34 cure the failure to offer access to group coverage, as well as
35 charging enforcement costs to the offending employer.

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1 New section 514C.8 is created which provides that a managed
2 care health plan or indemnity plan with a limited provider
3 network must provide patients direct access to providers
4 licensed under chapter 148, 150, 150A, or 151. The section
5 does not apply if an employer offers employees a choice of
6 health plans, either directly or indirectly through a health
7 insurance purchasing cooperative, provided that the offered
8 choices include at least one indemnity plan with unrestricted
9 choice of provider, or at least one managed care health plan
10 or indemnity plan with a limited provider network which
11 provides access as defined in this section.
12 New section 514I.1 is created which codifies a substantial
13 portion of 1993 Iowa Acts, chapter 158, section 2, which
14 directs the insurance commissioner to adopt rules and a
15 licensing procedure for establishing a health insurance
16 purchasing cooperative.
17 Section 614.8 is amended to provide that a minor up to age
18 six has until the minor's eighth birthday to bring an action
19 for medical malpractice.
20 The bill directs the department of public health, in
21 cooperation with the university of Iowa medical school and the
22 university of osteopathic medicine and health sciences, to
23 develop and establish a primary care initiative. The
24 department is required to submit a written report to the
25 general assembly no later than January 9, 1995, concerning the
26 status of the development of the primary care initiative.
27 The bill provides that the tax deductions established in
28 new section 135.17 and chapter 422 are effective on the date
29 that similar federal legislation is enacted and made effective
30 for federal individual income tax purposes.
31 The bill provides that it is the intent of the general
32 assembly that health care coverage be obtained by all Iowans
33 on a voluntary basis. The insurance division is directed to
34 report annually on the percent of individuals in this state
35 who do not have health care coverage.

1 The bill directs the supreme court, in cooperation with the
2 department of health and the insurance division, to initiate a
3 study concerning the development and use of alternative
4 medical malpractice dispute resolution procedures and medical
5 screening panels.
6 The bill provides for the initial appointments to the
7 community health management information system governing board
8 established in section 144C.5.
9 The bill directs the insurance division to review, develop,
10 and submit a plan for the establishment of an individual
11 health coverage reinsurance program. The division is also to
12 review, study, and make recommendations concerning the Iowa
13 comprehensive health insurance association established in
14 chapter 514E.
15 The bill provides that new section 513D.1 is effective
16 January 1, 1995.
17 Section 55 extends the repeal of chapter 145, which
18 establishes the health data commission, from July 1, 1994, to
19 July 1, 1996.
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THE RESTATEMENT (THIRD) OF TORTS PROCESS

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The Restatement (Third) of Torts began with the decision of the American Law Institute's Council that a revision of the Restatement (Second) of Torts was due. That judgment seems unassailable: the Restatement (Second) was published in 1965, nearly thirty years ago. Strict products liability has gone from infancy to maturity during that period, and comparative fault has been adopted in virtually every United States jurisdiction during the same period.

Before continuing with the evolution of the Restatement (Third), a brief outline of the ALI's organization may be useful. The ALI consists of no more than 2,000 members, who are lawyers, jurists, and academics.[1] Any final publication of the Institute must be approved by the membership at the Annual Meeting. The Council of the ALI, numbering approximately 60 prominent members of the ALI, manages the affairs of the Institute, decides what projects the Institute should pursue, approves the appointment of Reporters and members of the Advisory Committee, and plays a significant role in the evolution of those projects. The Director of the ALI, currently Professor Geoffrey Hazard, plays a critical role overseeing the ALI's ongoing projects.

In the Spring of 1992, two invitational planning meetings were held. One of those meetings addressed the scope, order, and process of producing a Restatement (Third) of Torts. The other, concerned the possible development of a Restatement of Products Liability and reflected a decision that the Restatement (Third) of Torts would be conducted in a series of discrete projects and that Products Liability would be the first of those projects to proceed. The three day meeting addressed the potential scope of a Products Liability Restatement and priorities for coverage. Shortly after that meeting, Professors James Henderson and Aaron Twerski, two leading Products Liability scholars, were named co-Reporters for the Restatement (Third) Torts: Products Liability.[2] Reporters are responsible for all drafts

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[1] Much of the description of the ALI and its entities is drawn from Michael Greenwald, *American Law Institute*, 79 Law Lib. J. 297 (1987). Greenwald is Deputy Director of the ALI.

[2] Coincidentally, Professors Henderson and Twerski had just completed writing an article proposing improvements to section 402A of the Restatement (Second) of Torts. James A. Henderson & Aaron D. Twerski, *A Proposed Revision of Section 402A of the Restatement (Second) of Torts*, 77 Cornell L.

of a Restatement project and meeting with and taking account of the advice of the Council, Advisors, ALI membership, and the Members Consultative Group. A twenty member Advisory Committee, consisting of lawyers, judges, and academics with special expertise in Products Liability was also appointed.

What precisely is a Restatement? In the words of Geoffrey Hazard:

> A Restatement is not a model code or statute. Thus, in drafting Restatement formulations, [the ALI is] not as free as a legislature might be to write on a clean slate. That said, it is also true that [the ALI is] not required to adhere to the majority rule regardless of whether it stands up to reasoned analysis, particularly in the light of changing conditions. A certain tension between stating what the law is and what it ought to be exists in all Restatement work. In the words of former Institute Director and Columbia law professor Herbert Wechsler, [the ALI] is "obliged in [its] deliberations to weigh all of the considerations relevant to the development of common law that our polity calls on courts to weigh in theirs." The judicial function requires courts to give due respect to precedent, but also to make reasoned choices between conflicting precedents, to disapprove unsound rules even when the cases may not yet be in substantial conflict, and to rule on issues for which there is little or no precedent. Professor Wechsler's formulation of Restatement policy was unanimously approved by the Institute's Council in 1968 and remains valid today.

A Restatement consists of black letter provisions, comments, and Reporters' Notes. The black letter provisions, organized in sections and the explanatory comments thereto are the responsibility of the Institute. The commentary contained in the Reporters' Notes are the responsibility of the Reporters and are not officially approved by the Institute.

A preliminary meeting of the Reporters and Advisors for the Restatement (Third) of Torts: Products Liability was held in September 1992. Materials distributed for the meeting included a draft of the article by Professor Henderson & Twerski cited above in note 2. Seven months later,

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Rev. 1512 (1992).

the initial draft of several core provisions of the Restatement was distributed in April, 1993 as "Preliminary Draft No. 1."

The Advisory Committee conducts the initial review of Preliminary Drafts. This review for the Products Liability Preliminary Draft occurred during June 1993. In addition to two days of meetings with the Advisors, the Reporters met with the Members Consultative Group and with representatives of several organizations that make up a Liaison Group for the Products Liability Restatement. The Members Consultative Group consists of ALI members who volunteer to participate in reviewing and discussing the various drafts of a particular Restatement. The Liaison Group for the Products Liability Restatement consists of representatives from four organizations: the American Bar Association, the Defense Research Institute, the American Trial Lawyers Association, and the Products Liability Advisory Council. Liaison Groups are not regularly constituted for Restatement projects, rather their existence is on an ad hoc basis where deemed appropriate.

Based on the June 1993 meetings, Preliminary Draft No. 1 was revised into Council Draft No. 1, which was reviewed by the ALI Council in the fall of 1993. That review generated another Council Draft, Council Draft No. 1A that was resubmitted to the Council in March 1994. At that meeting, the Council approved a modestly modified version of Council Draft No. 1A to become "Tentative Draft No. 1."

In the past, Preliminary and Council Drafts were kept confidential and were not generally available to the public. Because of intense interest in a number of recent Restatement projects, the ALI has increasingly made earlier drafts available to the public. For example, members of the Liaison Group for the Products Liability Restatement have received Preliminary and Council Drafts at the same times as the Advisory Committee.

Because Preliminary and Council Drafts do not have the approval of the ALI Council nor of the entire membership they are not considered authoritative statements of the ALI. Since they used to be kept confidential, they were rarely cited. However, because of the public availability of Preliminary and Council Drafts for the Products Liability Restatement, they have received much more public scrutiny and have even been critiqued in

legal periodicals.[3] However, a LEXIS search as of mid-April 1994 found no instance of a court citing the Preliminary or Council Drafts of the Products Liability Restatement. The ALI's official position is that until a draft receives the approval of the Council, and becomes a Tentative Draft, it does not have official sanction of the ALI and is not citable as such.[4]

Ultimately, no Restatement is finalized without approval of the membership at the ALI's annual meeting.[5] Tentative Draft No. 1 will be submitted to the membership at the ALI's annual meeting on May 18-19, 1994. A number of different actions might be taken. The Tentative Draft may be approved, in which case it would await completion of the remaining portions of the Products Liability Restatement (explained below). Approval might be subject to revisions that emerge at the annual meeting. Approval might exclude certain provisions of the Tentative Draft, or the entire Draft might be returned to the Reporters for further work. By the time of the DRI Seminar, the outcome of Tentative Draft No. 1 at the ALI annual meeting should be known. In any case, a written record of action taken by the membership is published in the Annual Proceedings of the Institute, following the annual meeting.

Restatements typically consume several years from start to finish. Any draft only represents a portion of the whole project, and approved Tentative Drafts await completion of remaining portions of that Restatement. The Restatement of the Law Governing Lawyers is currently at the stage of Tentative Draft No. 7. The entire Restatement (Second) of Torts went through 23 Tentative Drafts over a period of 22 years.

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[3] See, e.g., Hildy Bowbeer, *The ALI's Restatement on Products Liability: Some Early Concerns and Suggested Revisions*, Toxics L. Rep., July 14, 1993, at 177.

[4] Bylaw VI. 5. of the ALI provides: "No publication using the name of the Institute shall be made without the authorization of the Council."

[5] Bylaw V. 1. provides: "No restatement, model code, or recommended revision of the law shall be published as representing the position of the Institute unless authorized by the membership of the Institute and approved by the Council. Use of the name of the Institute in connection with other publications may be authorized by the Council without specific approval of their contents by the membership or the Council."

The Reporters for the Products Liability Restatement are finishing work on another Preliminary Draft that will address a variety of issues that were not dealt with in the initial drafts. There are several additional topics to consider, including boundary problems, such as leases, sales of used products and real property, liability of nonmanufacturers in the chain of distribution, economic loss, and contribution and indemnity questions. The precise scope of the Products Liability Restatement Project remains uncertain at this time.

It may be well to mention that the second project in the Restatement (Third) of Torts has also begun. After a planning meeting in the Summer of 1993, the Council authorized a Restatement (Third) of Torts: Apportionment. This project will address comparative fault, comparative contribution, joint and several liability, and other issues related to the apportionment of liability among multiple tortfeasors and the plaintiff. Professor William Powers was appointed as the Reporter and Professor Michael Green was appointed the Associate Reporter for the Apportionment Restatement. An initial meeting with a 23 member Advisory Committee will be held in June 1994. Thus, the Apportionment Project is approximately two years behind the Products Liability Project.

There will, no doubt, be additional projects that will become a part of the Restatement (Third) of Torts. At the present time, however, it is unclear what those projects will be or in what order they will occur.

H

EXPERT TESTIMONY IN THE EIGHTH CIRCUIT AFTER *DAUBERT V. MERRELL DOW PHARMACEUTICALS, INC.*

I

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EXPERT OPINION AFTER *DAUBERT v. MERRELL DOW PHARMACEUTICALS*, INC.

I. INTRODUCTION

Junk science. Fringe experts. Unreliable expert testimony. "Hired guns." "Saxophones." "Paladins." Call it what you want - the growing misuse of expert testimony has become a key issue in many areas of litigation, including product liability and toxic tort litigation. One commentator noted that "scientific experts often obscure more than they illuminate and triers of fact frequently render decisions at variance with mainstream scientific opinion." Bernstein, *Out of the Frying Pan and Into the Fire: The Expert Witness Problem in Toxic Tort Litigation,* 10 The Review of Litigation 117 (1990).

The junk science debate reached the United States Supreme Court in *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 113 S.Ct. 2786 (1993). The specific issue for decision was whether Federal Evidence Rule 702 had superseded the long-standing *Frye* rule or "general acceptance" standard for admitting expert testimony, drawn from *Frye v. United States,* 293 F. 1013, 1014 (D.C. Cir. 1923). In a ruling that left both sides claiming partial victory, the Court held that Rule 702 replaced the *Frye* rule, but also emphasized the gatekeeper role of the trial judge applying the rule.

It is too early to say with certainty what effect *Daubert* will have on the Eighth Circuit's approach to admitting expert opinions.[1] The general approach has traditionally

1. For a good discussion of federal appellate, federal district court, and state court cases applying *Daubert*, see, Hoffman, A Briefcase and an Opinion: Post-'*Daubert*' Expert Testimony -- A Major Shift, BNA Product Safety and Liability Reporter, April 8, 1994 at p. 379 ("roughly two-thirds of the reported cases since *Daubert* excluded expert testimony"); and an updated version of the article, Hoffman, Expert Testimony Since *Daubert*: A Major Shift, BNA Toxics Law Reporter, August 3, 1994 at p. 252 ("more than half the reported cases since *Daubert* excluded expert testimony and courts have increased scrutiny of such testimony in other ways, struggling to define circumstances in which marginal expert testimony should be treated as admissible but insufficient to support a verdict"). See also, Mack, Scientific Testimony After *Daubert*: Some Early Returns from Lower Courts, Trial, August 1994 at p. 23.

treated concerns about validity of expert testimony as issues of "weight, not admissibility." In cases involving experimental procedures such as DNA testing, polygraph testing and hypnosis, the Eighth Circuit while not rejecting the *Frye* test, has taken a unique approach in conforming Rule 702 to the *Frye* standard.

The first few post-*Daubert* decisions we have do not appear to suggest sweeping changes. For the present, at least, counsel arguing the admissibility of expert testimony will build arguments about the proper application of *Daubert* from the existing body of Eighth Circuit law.

II. THE EIGHTH CIRCUIT APPROACH TO EXPERT TESTIMONY BEFORE *DAUBERT*

A. The Expert Must be Qualified as an Expert by Knowledge, Skill, Experience, Training or Education.

An expert witness must be qualified by knowledge, skill, experience, training, or education, which as been interpreted to include all fields of "specialized knowledge," not just scientific and technical knowledge. Practical experience can substitute for formal, academic training, as the following cases highlight:

- In *Fox v. Dannenberg*, 906 F.2d 1253 (8th Cir. 1990), the court found that even though an engineer had no formal medical training during his 12 years of accident reconstruction, he necessarily acquired some knowledge of the medical aspects of traffic injury patterns and was qualified to testify as an expert witness;

- In *Hurst v. United States,* 882 F.2d 306 (8th Cir. 1989), the government's river hydraulics "expert" was permitted to testify as to the cause of flooding even though he had visited the site on only one occasion two years after the flooding;

- In *Loudermill v. Dow Chemical Co.*, 863 F.2d 566 (8th Cir. 1988), a toxicologist was permitted to testify as an expert on the relationship between halogenated hydrocarbons and liver injuries.

The court's rationale for this liberal approach is that cross-examination of a purported expert is a sufficient safeguard.

B. Expert Testimony Should be Beyond the Knowledge of the Average Juror and Should Assist the Trier of Fact.

Expert testimony is generally admitted if the subject is one that a juror could not understand by relying on personal knowledge or experience. *See Williams v. Wal-Mart Stores, Inc.*, 922 F.2d 1357 (8th Cir. 1990) (any doubt whether the expert's causation testimony would be useful to the jury should be resolved in favor of admissibility.) The Eighth Circuit does, however, impose some limits. It refused, for example, to permit an expert witness to give an opinion on the ultimate question of the adequacy of warnings. *Harris v. Pacific Floor Machine Mfg. Co.,* 856 F.2d 64 (8th Cir. 1988). While an expert may explain the criteria by which he would form such an opinion, applying the criteria to the facts of the case is for the jury. *See Justice v. Carter*, 972 F.2d 951 (8th Cir. 1992) (expert testimony that a different bankruptcy reorganization plan would have been approved properly excluded in legal malpractice case); and *Williams v. Pro-Tec, Inc.,* 908 F.2d 345, 348 (8th Cir.) (expert witness precluded from testifying as to the truthfulness of an advertisement).

C. An Expert May Not Testify to Conclusions of Law

Generally the Eighth Circuit does not permit an expert witness to testify on the meaning of the law. *Police Retirement Sys. v. Midwest Inv. Advisory Services, Inc.,* 940 F.2d 351 (8th Cir. 1991). However, the Eighth Circuit's opinions on this point have not been entirely consistent. For example, the court permits testimony that embraces legal conclusions provided it will assist the trier of fact to understand the evidence. *See Johnson Group, Inc. v. Beecham, Inc.*, 952 F.2d 1005 (8th Cir. 1991) (real estate broker

permitted to testify that defendant should have and must have known certain facts that were case determinative) and *United States v. Battle,* 859 F.2d 56 (8th Cir. 1988) (no abuse of discretion in trial court's admission of expert testimony that the defendant, from whom scales common in drug or heroin operations were seized, was involved in the distribution of cocaine).

Testimony which simply supplies the jury with no other information than what the witness believes the verdict should be is excluded. *Williams v. Wal-Mart,* 922 F.2d at 1360-61; *Strong v. E.I. DuPont de Nemours Co.,* 667 F.2d 682, 686 (8th Cir. 1981) (adequacy of warnings and instructions and "unreasonably dangerous" conditions of product "not the kind of issue on which expert assistance is essential for the trier of fact."). *See also, United States v. Ness*, 665 F.2d 248 (8th Cir. 1981) (exclusion of expert testimony whether defendant had the necessary intent to misapply bank funds).

Thus, whether an expert is testifying to a conclusion of law remains a murky issue. The most convincing argument to exclude expert evidence will thus include allegations that the proposed testimony embraces ultimate legal conclusions and provides no additional factual support to the jury.

D. Expert Testimony is Excludable Where its Probative Value is Outweighed by its Prejudicial Effect

As a general rule, the Eighth Circuit liberally applies Rule 403 to permit expert opinion testimony. The court has repeatedly stated that the weaknesses of an expert's opinion go to weight not to admissibility. In special circumstances involving governmental reports, however, the court has found that the probative value of the evidence may be outweighed by the prejudicial effect of the "aura of special reliability and trustworthiness" of governmental reports. *Gehl v. Soo Line Railroad Co.,* 967 F.2d 1204 (8th Cir. 1992).

In *Gehl, the* excluded scientific evidence was a government safety assessment report concerning the general safety record of a defendant railroad company which was offered to show that the railroad negligently operated a train. *Id.* at 1208. *See also Tanzler v. Burlington Northern*, 608 F.2d 796 (8th Cir. 1979) (economist permitted to testify concerning projected inflationary trends).

E. Expert Testimony Must be Based on Reliable Scientific Principles.

1. Eighth Circuit Application of the *Frye* Test

Before the Federal Rules of Evidence, trial courts screened purported scientific evidence according to whether it had "general acceptance in the scientific community." This became known as the *Frye* rule, or the "general acceptance test," after the decision in which lie detector evidence was held inadmissible under the following rationale:

> Just when a scientific principle or discovery crosses the line between the experimental and demonstrable state is difficult to define. Somewhere in this twilight zone the evidential force 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 v. United States, 293 F.1013, 1014 (D.C. Cir. 1923).

Admissibility of scientific expert testimony in the Eighth Circuit has generally depended on whether the evidence relies on novel scientific and mechanical *techniques* or whether the evidence is based on a new scientific *theory*. The court is apt to apply the *Frye* test, and thereby more carefully scrutinize the reliability and trustworthiness of evidence if the offered expert testimony relies upon novel scientific and mechanical techniques. In a limited number of cases involving DNA testing, polygraph testing, and hypnosis, the court has taken a unique approach in conforming Rule 702 to the *Frye* test.

If, however, a novel scientific *theory* is the basis for an expert's testimony, the court is more willing to allow all expert testimony and permit the fact finder to sift and sort through the evidence.

2. Application of the *Frye* Test to Novel Scientific and Mechanical Techniques.

The Eighth Circuit has applied the *Frye* test in criminal cases for many years. *See United States v. Alexander*, 526 F.2d 161, 163-64 (8th Cir. 1975) (polygraph testing was held inadmissible until greater scientific reliability was established) and *Gardiner v. Meyers,* 491 F.2d 1184, 1189 (8th Cir. 1974) (blood tests were held inadmissible unless foundational evidence established that the testing procedures were reliable). It was not until 1985 in *Sprynczynatyk v. General Motors Corp.,* 771 F.2d 1112 (8th Cir. 1985), *cert. denied,* 475 U.S. 1046 (1986), however, that the court applied the *Frye* test in a civil dispute.

In *Sprynczynatyk,* the plaintiff alleged that GM negligently designed the car's brakes, causing them to lock and the car to spin. The plaintiff/passenger of the car attempted to introduce hypnotically-induced testimony from the driver of the car concerning his application of the brakes. The Eighth Circuit adopted the *Frye* rule and required trial courts, in cases where testimony is hypnotically enhanced, to make a threshold determination of admissibility on a case-by-case basis through a pretrial hearing in which the proponent of the evidence bears the burden of proof.

Two years later, in *Little v. Armontrout,* 819 F.2d 1425 (8th Cir. 1987) *cert. denied,* 487 U.S. 1210 (1988), the Eighth Circuit announced a four-part test to be applied in determining the admissibility of post-hypnotic testimony: (1) Whether and to what degree procedural safeguards have been utilized; (2) The appropriateness of using hypnosis;

(3) Whether there is any evidence to corroborate the hypnotically enhanced testimony; and (4) Whether its probative value outweighs its prejudicial effect.

Id. at 1432.

3. Application of the *Frye* Test to Novel Scientific Theory.

In 1990, the Eighth Circuit faced the DNA evidence controversy and rejected the government's argument that Rule 702 created a liberal rule of admissibility which superseded *Frye*.

> We read it differently. The *Frye* Court stated that scientific evidence should be distinguished according to whether it was in an experimental or demonstrative state. In discussing the admissibility of DNA evidence, we find *Frye* and Rule 702 both require that a proper foundation be laid for any scientific testing or laboratory procedure.

United States v. Two Bulls, 918 F.2d 56, 60 (8th Cir. 1990). (The Eighth Circuit granted a rehearing en banc and vacated the *Two Bulls* panel opinion. Then, upon suggestion of death of appellant, the Court vacated the scheduled en banc hearing and ordered that the appeal be dismissed. 925 F.2d 1127 (8th Cir. 1991).)

In language that foreshadowed some of the Supreme Court's discussion in *Daubert*, the court further held that neither rule should permit speculative and conjectural testing which fail the normal foundational requirements for admissibility of scientific testimony or opinion. *Id.* Thus, under *Frye* or Rule 702 the court is required to satisfy itself that all three of the following elements have been met:

(1) the scientific theory or test (here DNA identification) must be generally accepted by the scientific community;

(2) techniques or laboratory methods used must be generally accepted by the scientific community and be capable of producing reliable results; and

(3) a pretrial hearing must be held to determine whether accepted techniques or methods were used to yield results reliable enough to be admitted as a question of fact for the jury.

Id.

Because the trial court in *Two Bulls* admitted the DNA evidence without determining whether the testing procedures the FBI laboratory used were conducted properly, the Eighth Circuit vacated the defendant's conviction, remanded the case to the district court, and ordered the trial court to hold a pre-trial hearing on the admissibility of the DNA evidence.

Two Bulls implied that the combined three-step *Frye*/Rule 702 approach should be used whenever novel scientific techniques or methods are challenged on the basis of both acceptability and reliability. Certainly, the court's combined analysis in *Two Bulls* and *Sprynczynatyk* provides fertile ground for creating arguments that new scientific methods or techniques can be challenged under Rule 702 as unreliable and unaccepted in the scientific community.

III. *DAUBERT*

The enactment of the Federal Rules of Evidence in 1975 cast doubt on the continued applicability of the *Frye* standard, which the Rules did not mention or even recognize. The result was much controversy and confusion, with some jurisdictions abandoning the *Frye* rule and others continuing to apply it.

The state of the law before the Supreme Court's decision in *Daubert* was that federal courts were divided on the appropriate standard to determine the admissibility of expert testimony. Examples of this patchwork include:

- *United States v. Jakobetz,* 955 F.2d 786 (2d Cir.), *cert. denied,* 113 S.Ct. 104 (1992) - the court rejected the *Frye* test, allowing expert testimony regarding the connection between paraquat and pulmonary fibrosis;

- *Daubert v. Merrell Dow Pharmaceuticals, Inc.,* 951 F.2d 1128 (9th Cir. 1991), *cert. granted* (Oct. 13, 1992) - applying the *Frye* test, the court rejected expert testimony based on epidemiological studies in Bendectin litigation;

- *United States v. Smith,* 869 F.2d 348 (7th Cir. 1989) - the court allowed expert testimony regarding spectrographic voice analysis applying the *Frye* test; and

- *Sterling v. Velsicol Chem. Corp.,* 855 F.2d 1188 (6th Cir. 1988) - the court excluded expert testimony regarding damage to plaintiffs' immune system resulting form contaminated water because experts had no "widely accepted medical basis for [their] conclusions."

I

Under these varying standards, courts either chose the *Frye* test, rejected the *Frye* test, relied on various sections of the Rules of Evidence, or fashioned a composite of the various approaches.

On June 23, 1993 the United States Supreme Court issued its opinion in *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, and expressly held that the *Frye* rule has been superseded by the Federal Rules of Evidence. Based on a narrow reading of the *Daubert* decision, it would appear that the case is a plaintiff's victory. However, from a closer analysis and a broader reading of *Daubert*, it is evident that there is ample ammunition in the opinion to exclude unreliable expert testimony.

A. Background

The case began in 1984 when Jason Daubert's and Eric Schuller's parents filed suit against Merrell Dow, alleging that the severe and permanent limb-reduction birth defects their son suffered had been caused by the company's anti-nausea drug Bendectin which each child's mother had taken during the first trimester of pregnancy.

Merrell obtained summary judgment based on an expert's affidavit that concluded, after reviewing extensive published scientific literature on the subject, that maternal use of Bendectin had not been shown to be a risk factor for human birth defects. The plaintiffs countered with testimony of eight other well-credentialed experts who concluded that Bendectin can cause birth defects, based on animal studies, chemical structure analyses, and unpublished "reanalysis" of previously published human statistical studies. The trial rejected the plaintiffs' evidence under the "general acceptance" standard. The Ninth Circuit affirmed, also citing *Frye*.

B. The Supreme Court's Opinion.

The U.S. Supreme Court rejected Merrell Dow's argument that the *Frye* test had not been superseded by the Federal Rules of Evidence. Applying traditional rules of statutory construction, the Court noted that the Federal Rules' basic standard of relevance was a liberal one. Because there is a specific rule, Rule 702, that deals with the contested issue (the admissibility of expert testimony), the Court focused on the specific language of Rule 702 and held that nothing in the text of the rule establishes "general acceptance" as an absolute prerequisite to admissibility. Moreover, the Court looked at the drafting history of the rule and found that there was no mention of *Frye*. The Court also noted that a "rigid general acceptance" requirement would be at odds with the "liberal thrust" of the Federal Rules and their "general approach of relaxing the traditional barriers to 'opinion testimony.'"

The Court also, however, emphasized the function of the trial judge to "ensure that any and all scientific testimony or evidence admitted is not only relevant, but reliable." Reliability, according to the Court, is part of the "scientific . . . knowledge" that is allowed

as expert evidence under Rule 702, because "scientific knowledge" must be "derived by the scientific method" and "supported by appropriate validation." Thus, the requirement that an expert's testimony pertain to "scientific knowledge" establishes a standard of evidentiary reliability. The requirement that expert evidence "assist the trier of fact to understand the evidence or to determine a fact in issue" is essentially a relevance inquiry.

While not setting specific rules, the Court offered general observations about the application of Rule 702. The trial judge must be a "gatekeeper" and at the outset, pursuant to Rule 104(a), determine whether the expert is proposing to testify to (1) scientific knowledge that (2) will assist the trier of fact to understand or determine a fact in issue.

The following factors are among the considerations in determining whether evidence passes the reliability and relevance tests:

1. Whether the evidence can or has been tested;
2. Whether the evidence has been subjected to peer review and publication;
3. The known or potential rate of error;
4. The degree to which the theory or technique has been generally accepted in the scientific community.

The Court attempted to allay the business community's fears that abandoning the "general acceptance" test would result in a "free-for-all" in which "befuddled juries are confounded by absurd and irrational pseudoscientific assertions." The Supreme Court stressed that vigorous cross-examination, presentation of contrary evidence and careful instruction on the burden of proof, as well as JNOV and summary judgment, are the traditional and appropriate means of attacking shaky but admissible evidence.

Unfortunately, the Court did not address the concern that using these screening methods will require lengthy, expensive and time-consuming efforts - and use of scarce judicial resources.

In the short term, courts will struggle with exactly what *Daubert* means. For courts previously timid about scrutinizing "junk science," the opinion gives advocates new tools to urge tougher standards. For advocates whose cases depend on novel theories and methods, *Daubert* may provide more room for "creativity" than a strict application of *Frye*.

IV. POST-*DAUBERT* EIGHTH CIRCUIT DECISIONS

A. *Martinez*

The Eighth Circuit's first opportunity to consider the impact of *Daubert* came in September 1993 when Judge Larson, sitting by designation, addressed the effect of the ruling on DNA "fingerprinting" evidence. *U.S. v. Martinez*, 3 F.3d 1191 (8th Cir. 1993). Martinez was convicted by a jury in South Dakota for aggravated sexual abuse and sexual abuse of a minor. In a pretrial hearing to determine the admissibility of DNA evidence, the district court determined that:

(1) DNA typing is generally accepted by the scientific community;

(2) The testing procedures used in this case are generally accepted as reliable;

(3) The FBI protocol was properly followed in this case; and

(4) The evidence was not more prejudicial than probative in this case.

The trial court decided, however, that the statistics used to determine the probability of any other individual having the same genetic characteristics as the defendant were more prejudicial than probative under Rule 403. Thus, the trial court

admitted the DNA profiling analysis evidence and the results of the testing in the case, but declined to allow the jury to hear the evidence of statistical probability with regard to Martinez.

At the outset, the Eighth Circuit noted that the issue of DNA profiling is "unsettled and complex". *Id.* at 1193. DNA profiling is a relatively new forensic tool and "has been the subject of heated controversy in both the legal and scientific communities". *Id.* at 1194. However, "it is generally conceded that the principle of DNA profiling is recognized as reliable and that the procedures are not so new or novel as to warrant disagreement," *Id.* citing *People v. Castro*, 144 Misc. 2nd 956, 545 N.Y.Supp.2d 985 (N.Y. Sup. Ct. 1989). Even though DNA profiling was recognized as reliable, concern persisted over possible error and ambiguity in controlling the experimental conditions of the analysis and interpretation of the results. Coupled with these concerns was the effect of the evidence in a criminal trial where there was a "danger that evidence accepted quickly and uncritically will later prove less reliable than promised." *Id.* at 1195.

Emphasizing the role of the district court as a "gatekeeper" for the admission of novel scientific evidence, Judge Larson stated that *Daubert* did not "sanction the wholesale abandonment of standards for admission of expert opinion based upon a scientific evidence or knowledge." *Id.* at 1198. Quoting directly from the *Daubert* opinion, Judge Larson applied a two-step test, indicating that the court must conclude, pursuant to Rule 104(a) of the Federal Rules of Evidence, that the proposed testimony constitutes (1) *scientific knowledge* that (2) will *assist the trier of fact* to understand or determine a fact in issue.

Judge Larson then turned to the scientific knowledge/reliability issues surrounding DNA evidence. Relying on the Second Circuit decision in *United States v. Jakobetz*, 955 F.2d 786 (2nd Cir. 1992), which he noted had taken a reliability approach to Rule 702 similar to that used in *Daubert*, Judge Larson concluded:

> "The Second Circuit's conclusions as to the reliability of the general theory and techniques of DNA profiling are valid under the Supreme Court's holding in *Daubert*, and hold that *in the future courts can take judicial notice of their reliability*. (emphasis added).

3 F.3d at 1197.

Judge Larson was quick to point out that although courts may take judicial notice of the reliability of DNA profiling techniques, expert testimony concerning DNA profiling is not automatically admissible under *Daubert*. Once reliability is established, the focus of the inquiry then shifts to "whether the expert properly performed the techniques involved in creating the DNA profiles." *Id.* at 1197. While the Second Circuit held that whether the protocols were properly performed went to the "weight rather than the admissibility of the evidence", earlier Eighth Circuit case law, *United States v. Two Bulls*, 918 F.2d 56, (8th Cir. 1990) (same), *vacated and dismissed as moot*, 925 F.2d 1127 (8th Cir. 1991) and the New York decision in *Castro*, *supra*, had held that the admissibility of DNA evidence was conditioned on a finding that the profiling had been done properly. Concluding that *Daubert* did not remove the requirement for a showing of proper technique, the court stated:

> "....the reliability inquiry set forth in *Daubert* mandates that there be a preliminary showing that the expert properly performed a reliable methodology in arriving at his opinion..... the inquiry extends beyond simply the reliability of the principles or methodologies in the abstract. In order to determine whether scientific *testimony* is reliable, the court must conclude that the testimony was derived from the application of a reliable methodology or principle in the particular case."

Id. at 1197-98.

Thus, the trial court should make an initial inquiry into an expert's application of the scientific principle or methodology in question, and should "require the testifying expert to provide affidavits of testing that he properly performed the protocols involved in DNA profiling." *Id.* To the extent that an opponent of the evidence challenges the application of the protocols in a particular case, the trial court must determine whether the expert erred in applying the protocols, and if so, whether such error so infected the procedure as to make the tests unreliable.

Judge Larson noted that the inquiry is "of necessity a *flexible one*." *Id.* (emphasis added). He noted that not every error in the application of a particular methodology should warrant exclusion. Only if the error "negates the basis for the reliability of the principle itself" should the opinion be excluded." *Id.* He went further to agree with the Third Circuit in *Re Paoli R. R. Yard PCB Litig.*, 916 F.2d 829 (3rd. Cir. 1990) when it held that an allegation of failure to properly apply a scientific principle should justify exclusion of an expert opinion only if "a reliable methodology was so altered [by a particular expert] as to skew the methodology itself...." 916 F.2d at 858.

Based on these standards, the trial court's decision to admit DNA evidence was upheld. The appellate court noted that the trial court undertook a broad inquiry, considered the correct factors, and applied the *Castro* test, which was "at least as stringent" as the *Daubert* standard.

B. Other Eighth Circuit Criminal Cases Citing *Daubert*

Daubert has been cited by three additional criminal decisions in the Eighth Circuit. In *United States v. Jenkins*, 7 F.3d 803 (8th Cir. 1993), the Court noted that "federal courts

must interpret the federal rules of evidence as they would any statute". *Id.* at 807. In *United States v. Evanoff*, 10 F.3d 559, (8th Cir. 1993), the Court stated that the trial judge has the task of ensuring that an expert's testimony rests on a reliable foundation. *Id.* at 4-5, n. 4.

In *Johnson v. Williams*, __ F.3d ___, 1994 W.L. 324016 (8th Cir. (Neb.) July 11, 1994) the defendants were convicted of conspiracy to distribute cocaine base and two other defendants were further convicted of knowingly engaging in continuing criminal enterprise, and three were convicted of money laundering. Judge Magill, writing for the panel, affirmed the convictions. The defendants claimed that the government's first witness, an unindicted co-conspirator and member of a gang, should not have been allowed to testify generally about the business of drug trafficking and gang membership. The defendants claimed that the district court should have held a hearing pursuant to Federal Rule of Evidence 104 to determine if Johnson was qualified to testify as an expert; and that the evidence should have been excluded under Rule 403 because of its prejudice.

Judge Magill noted that the district court, under Rule 702, is required to act as a "gatekeeper" for the admission of novel scientific evidence. Even though a formal Rule 104 hearing was not held, the district court nevertheless made a preliminary determination required by that rule based upon Johnson's foundational testimony before the jury. The Court found that Johnson had extensive experience in the business of drug trafficking and that his testimony would be "helpful" to the jury's understanding of the evidence.

Finally, the Court held that there was significant probative value to Johnson's gang-related testimony because it served to clarify the connections between some of the

defendants and did not substitute for evidence of actual participation in the drug distribution ring. Thus, it was not substantially more prejudicial than probative and there was not an abuse of discretion in the admission of the testimony into evidence.

C. Eighth Circuit Civil Cases Citing *Daubert*

In a complex trade secret case involving allegations of misappropriation of the genetic make-up of certain seed corn, the Eighth Circuit addressed a defendant's assertion that the district court committed error in admitting scientific evidence relating to electrophoresis, liquid chromatography, and growout testing. *Pioneer Hi-Bred International v. Holden Foundation Seeds, Inc., et al.*, ___ F.3d ___, 1994 W.L. 328600 (8th Cir. (Iowa), July 12, 1994). Pioneer was awarded over $46 million in damages by the district court for Holden's misappropriation of trade secrets relating to the genetic make-up of certain seed corn. One of the technical scientific issues in the case was whether or not the defendant had developed a line of seed corn from Pioneer's trade secrets. The district court relied on evidence from a court-appointed expert, Dr. Charles F. Lewis and expert testimony from both parties.

Holden argued that the scientific evidence from the three tests failed to meet the "general acceptance" requirements of *Frye* and *Two Bulls*. After the case had been briefed on appeal, *Daubert* was decided. The Eighth Circuit noted that the focal point of Holden's admissibility argument had been removed. Nevertheless, the Court was convinced that the district court considered the factors discussed in *Daubert* and committed no error in admitting the evidence.

The Court noted that the three tests rested on basic principles of genetics and horticulture which was considered by the district court which acknowledged that the tests

were widely used in the industry, conducted by qualified experts, and considered helpful enough to be relied upon by both parties in their attempt to support their respective positions. Holden further argued that the tests should not have been admitted because they could not conclusively show derivation of the seed corn lines. The Eighth Circuit rejected the argument because *Daubert* required only scientific validity for admissibility, not scientific precision.

The Eighth Circuit then undertook an extensive discussion of the specific tests and tests results that had been presented to the district court and analyzed each of the tests and their results. The Court noted that, while each of the three tests had its own set of limitations and inadequacies, and while none of them could conclusively prove the parentage of the alleged misappropriated seed corn line, all of the tests, when taken as a whole, contributed to the trial court's finding that the defendant's story was highly unlikely, and Pioneer's theory of parentage was more likely.

In addressing the liquid chromatography tests, the Court noted that while the application of the test to corn is relatively new, the methodology is "well established in testing other cereal grains." While it could not determine the precise parentage of the disputed seed corn line, it could only exclude certain possibilities. Thus, the Eighth Circuit was satisfied with the trial court's analysis and application of Rule 702 even though the trial court did not have the benefit of Justice Blackman's discussion of the various factors in the *Daubert* Opinion.

Three weeks later, in early August 1994, the Eighth Circuit, in *Sorensen, et al. v. Shaklee Corporation, et al.*, ___ F.3d ___, 1994 W.L. 395196 (8th Cir. (Iowa), August 2, 1994), addressed the issue of whether the plaintiffs presented relevant admissible

evidence to establish a jury question on causation. At issue in the case was whether or not the mental retardation of two children was caused by their parent's ingestion, prior to the children's conception, of alfalfa health food tablets produced and distributed as a Shaklee product. The alfalfa tablets had been treated with a chemical that left a chemical residue on the tablets. The defendants moved for summary judgment and the district court granted the motion for failure of proof of causation.

In reviewing the record pertaining to the testimony of plaintiffs' experts, the Court noted the following facts:

1. No published scientific literature reported mental retardation in any species at any dose level resulting from exposure to the chemical;

2. No expert designated to testify on plaintiffs' behalf had submitted his or her conclusions that the chemical can cause birth defects for peer review;

3. There was no evidence of a statistically significant association between the ingestion of the tablets and mental retardation;

4. None of the plaintiffs' experts could identify either the number of mutagenic agents or the amount of such agents to which plaintiffs' parents were exposed prior to plaintiffs' births;

5. None of the plaintiffs' experts could distinguish the effects of the chemical from the alleged alfalfa tablets from other substances to which plaintiffs' parents may have been exposed.

Plaintiffs submitted the testimony of a number of experts, including a medical doctor who considered himself to be an expert in "medical genetics, internal medicine and medical oncology"; an epidemiologist and clinical microbiologist; a geneticist; and a physician who was a professor of pediatrics and director of the clinical toxicology program at the University of Nebraska. The defendants presented affidavits from four witnesses who were experts in the respective fields of toxicology and pharmacology,

epidemiology, clinical psychiatry and pediatrics. All of the defense experts concluded, to a reasonable degree of scientific certainty, based on the facts and scientific methodology appropriate to their respective disciplines, that the parent's ingestion of the chemical, via the alfalfa tablets, could not have caused plaintiffs' mental retardation.

The Eighth Circuit noted that the plaintiffs' experts testified that the chemically treated alfalfa tablets were a "possible cause" of the mental retardation. After a thorough discussion of *Daubert*, the Court noted that the expert testimony proposed by the plaintiffs in the case failed to qualify for admissibility as "relevant". Plaintiffs produced no evidence showing or providing a reliable inference that the tablets taken by the parents contained any chemical residue. The Court also considered the "scientific validity" of the plaintiffs' submission and examined the non-exhaustive factors specified in *Daubert*:

1. Whether the theory can be and has been tested --- the Court noted that the plaintiffs' experts failed to address the absence of animal studies demonstrating the incidence of food products specifically treated with this chemical and mental retardation;

2. Whether the theory had been subjected to peer review and publication --- plaintiffs' experts had not subjected their theories to peer review or publication;

3. General acceptance --- no evidence had been presented of any general acceptance of either the theory or methodology presented by the plaintiffs' experts.

The Court noted that the hypothesis presented by plaintiffs' experts followed no scientific principles and in fact, the inference relied on by the experts "turned scientific analysis on its head." The Court noted: "Instead of reasoning from known facts to reach a conclusion, the experts here reason from an end result in order to hypothesize what needed to be known but what was not." Finally, the Court noted that one of plaintiffs' experts made several assumptions that were not supported in the record and therefore

his process or technique was subject to a great potential for error. The Court then went on to discuss several cases decided since *Daubert* and stressed the "gatekeeper" function of the trial court in reviewing expert scientific testimony.

Finally, at footnote 15 of the opinion, the Court included a broad survey of federal appellate and state court decisions addressing expert testimony under *Daubert*.[2]

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2. In April 1994, the Iowa Supreme Court affirmed a trial court's ruling allowing a defense clinical neuropsychologist to give expert testimony regarding the causation of a plaintiff's head injury and in doing so, commented on *Daubert*. In Hutchinson v. American Family Mutual Insurance Co., 514 N.W.2d 882 (Iowa 1994), Ms. Hutchinson, her husband and children sought underinsured motorist (UIM) benefits from their insurer for injuries sustained when her car was rear-ended by another car. Hutchinson claimed damages for various mental and emotional problems stemming from a closed-head injury that she claimed occurred during her car accident. Her experts testified that she suffered from partial complex seizure syndrome, an orbital frontal cortex injury, posttraumatic headaches, and an exacerbation and worsening of depression.

   American Family called a clinical psychologist and neuropsychologist, Dr. Raymond Moore, to testify that Hutchinson's injuries were pre-existing and that she suffered no traumatic brain injury from the motor vehicle accident. Dr. Moore had never examined the plaintiff and he based his opinions on the medical records, data and other information generated by all of her experts. The jury found that the Hutchinsons had not established that their total damages exceed $20,000, the amount of the policy limits of the tortfeasor driver.

   On appeal, the Hutchinsons contended that Dr. Moore was not competent to testify regarding her head injury. They first contended that Dr. Moore lacked board certification and therefore was not competent to testify. Second, the Hutchinsons claimed that a clinical psychologist should not be allowed to express opinions regarding the medical causation of head injuries.

   The Supreme Court began its analysis with Iowa Rule of Evidence 702 and the advisory committee comments and noted that the Rule codified Iowa's existing "liberal rule on the admission of opinion testimony" and cited *Daubert* as having reaffirmed this approach.

   The Court easily disposed of the certification issue noting that an expert need not be a specialist in a particular field of medicine to give an expert opinion and the fact that he lacked board certification in neuropsychology went to the "weight of
   (continued....)

I

V. CONCLUSION

The Eighth Circuit does not appear to treat *Daubert* as shifting the focus for the admission of expert testimony from the modified *Frye* test previously announced. The Court has highlighted the "gatekeeper" function of the trial court and emphasized the necessity of a Rule 104 preliminary hearing to rule on the admissibility of novel or scientific expert testimony. However, the Court appeared comfortable with continued application of the basic principles which had guided its decisions addressing issues of novel or scientific expert testimony before *Daubert*. As more cases involving novel expert

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2.(...continued)
his testimony, not its admissibility." 514 N.W.2d at 886.

On the causation issue, the Court noted that a psychologist may testify as to the existence of a brain injury, or at least the condition of the brain in general, but that courts around the country had split over the question of whether a psychologist could give expert testimony regarding the causation of the brain injury. The Court refused to impose barriers to expert testimony other than the basic requirements of Rule 702 and those described by the Supreme Court in *Daubert*. The Court rejected the plaintiffs' contention that the restrictions of the practice of psychology in the Iowa Code or the Iowa Administrative Code placed limits on the competence of psychologist to testify as experts beyond the limits in the Rules of Evidence. Instead, the Court noted that the task was to assess "whether the reasoning or methodology underlying the testimony is scientifically valid and .... whether that reasoning or methodology properly can be applied to the facts in issue." 514 N.W.2d at 888, citing *Daubert*, 113 S.Ct. at 2796.

The Court reviewed the evidence in the record relating to Moore's qualifications and found that an ample basis existed for admission of his testimony. In addition, the Court echoed the *Daubert* court in indicating that numerous safeguards to the admission of expert testimony were available such as vigorous cross examination and the use of summary judgments or directed verdicts.

With regard to the contention that Moore relied on hearsay testimony to form his opinion, the Court cited Iowa Rule of Evidence 703 which permits such reliance and found that the material Moore relied on was a type reasonably relied upon by experts in his field in forming their opinions.

testimony find their way to the Eighth Circuit, we can expect to get a better view and insight of how the Court will apply *Daubert*.

FEDERAL RULE OF EVIDENCE 706
THE USE OF COURT-APPOINTED EXPERTS

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I. INTRODUCTION

The propriety of court-appointed experts has been the subject of numerous articles, studies and commentaries, yet relatively few reported judicial opinions. The universe of civil litigation may be simplistically divided into categories of issues both within and without "traditional" judicial competence. Historically, courts have relied on the adversarial model to supplement traditional judicial or jury competence, necessitating the retention and proffer of expertise by the litigating parties. Court appointment of experts was viewed as an unwarranted intrusion into the adversarial model, reinforced by the parties' distaste for an unretained, unknown and potentially uncontrollable influence on the merits of the case. Only in extreme cases where the parties proffered utterly divergent expert evidence, or failed to develop expert evidence necessary to dispose of the case, were experts appointed by the court.

Recent developments, however, may be operating to chart a new course for Federal Rule of Evidence 706 and its state counterparts and there are strong indications that resort to court-appointed experts is on the rise for that segment of civil litigation perceived to require supplemental expert participation. First, the increasing burden on federal dockets which has fostered the growth of various forms of alternative dispute resolution will likely increase the propensity of courts to seek supplemental assistance in managing, adjudicating and administering litigation, including the use of court-appointed experts. Secondly, the costs of litigation and the public and scholarly perceptions that the traditional "battle of the experts" distorts and subverts the truth-seeking process has increased discussion and awareness of court-appointed experts, including an explosion of academic literature and several studies commissioned through the Federal Judicial Center. Third, recent reported federal and state decisions reveal heightened awareness

of court-appointed experts and numerous actual appointments of experts which have been affirmed at the federal circuit level. Fourth, the U.S. Supreme Court's decision in *Daubert* expanded the responsibility of federal judges to evaluate and manage scientific evidence and expressly noted the availability of Federal Rule of Evidence 706 as a potentially valuable tool. Finally, greater awareness and discussion of the procedural safeguards relating to the appointment and management of court experts has to some extent mitigated fears of unwarranted intrusion into the traditional adversarial process.[1]

These recent developments and the forseeably greater use of court-appointed experts are expected to yield tremendous systemic benefits relating to the economy, efficiency and credibility of the truth-seeking process. However, this "centralization" of fact finding and adjudication has important implications for the partisan interests of the adverse litigants, requiring proactive involvement and strategic advanced planning from anticipating the possibility of court appointment through the discovery process to the expert's identification and testimony at trial. Assuming that the institutional pressures will ultimately lead to greater incidence of court appointment of experts, certain unavoidable risks are necessarily inherent with the presence of an unretained third party. What will be addressed here, after a brief introduction to Federal Rule of Evidence 706, are the risks that can be managed through thoughtful planning and active participation in the identification and exercise of the court-appointed expert's role, and the benefits that will be realized by a party embracing the utilization of Rule 706 in an appropriate circumstance.

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1. The Federal Judicial Center is expected to release in late 1994 a new reference manual for judges on managing scientific evidence.

II. FEDERAL RULE OF EVIDENCE 706

A. Text

The text of Federal Rules of Evidence 706 states as follows:

Rule 706. Court-appointed Experts

(a) Appointment. The court may on its own motion or on the motion of any party enter an order to show cause why expert witnesses should not be appointed, and may request the parties to submit nominations. The court may appoint any expert witnesses agreed upon by the parties, and may appoint expert witnesses of its own selection. An expert witness shall not be appointed by the court unless the witness consents to act. A witness so appointed shall be informed of the witness' duties by the court in writing, a copy of which shall be filed with the clerk, or at a appointed shall advise the parties of the witness' findings, if any; the witness' deposition may be taken by any party; and the witness may be called to testify by the court or any party. The witness shall be subject to cross-examination by each party, including a party calling the witness.

(b) Compensation. Expert witnesses so appointed are entitled to reasonable compensation in whatever sum the court may allow. The compensation thus fixed is payable from funds which may be provided by law in criminal cases and civil actions and proceedings involving just compensation under the fifth amendment. In other civil actions and proceedings the compensation shall be paid by the parties in such proportion and at such time as the court directs, and thereafter charged in like manner as other costs.

(c) Disclosure of appointment. In the exercise of its discretion, the court may authorize disclosure to the jury of the fact that the court-appointed the expert witness.

(d) Parties' experts of own selection. Nothing in this rule limits the parties in calling expert witnesses of their own selection.

B. Historical Development

Under common law, federal courts had inherent power to appoint expert witnesses in civil cases as incident to the decision-making function.[2]

In 1946, Congress first provided for court-appointed experts in criminal proceedings with the adoption of Rule 28 of the Federal Rules of Criminal Procedure. In 1975, Congress codified in Rule 706 the inherent authority of courts to appoint expert witnesses in all cases.

The impetus for Rule 706 was threefold: (1) mitigate the practice of shopping for experts; (2) neutralize the venality of some experts; and (3) facilitate involvement in litigation of reputable experts.[3] The Advisory Committee presumed that the possibility of a court-appointed expert would create a "sobering effect" on retained experts and on the parties using their services. Thus, it was thought, the mere availability and express procedure for appointing experts would in large measure obviate the need for courts to do so.[4]

C. Empirical Data: How Often Do Courts Appoint Experts?

1. Pre-1986.

Before 1986, federal courts exercised both their inherent discretion and their express appointment authority under Rule 706 sparingly. Only 45 reported decisions even

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2. *See, e.g., Ex Parte Peterson*, 253 U.S. 300, 40 S.Ct. 543 (1920); *United States v. Green*, 544 F.2d 138, 145 (3d Cir. 1976); *cert. denied,* 430 U.S. 910 (1977); *Danville Tobacco Assn. v. Bryant-Buckner Assocs., Inc.*, 333 F.2d 202, 208-09 (4th Cir. 1964); *Scott v. Spanjer Bros., Inc.*, 298 F.2d 928, 930-31 (2d Cir. 1962).

3. Rule 706, Advisory Committee Notes.

4. *Id.*

mentioned Rule 706, and only 37 of those contained any extensive discussion.[5] In approximately only 17 reported federal decisions did courts exercise the power to appoint experts. A summary and analysis of these pre-1986 decisions is presented in Appendix A. Courts generally limited the exercise of their discretion to appoint experts to cases of extreme variation between the parties' own experts.[6] Even then, a court-appointed expert was not mandatory.[7]

Overall, the first decade of decisions under Federal Rule 706 produced remarkably few cases in which federal judges appointed expert witnesses.[8] While recognizing in some cases that a threat to appoint an expert witness might facilitate compromise and settlement,[9] many courts remained skeptical of the "mystic infallibility" a court-appointed expert could present to the trier of fact.[10]

2. Post-1986.

Since 1986, the use of Rule 706 has steadily increased. In reported cases, nine federal circuits and 18 federal district courts have appointed (or affirmed the appointment

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5. Willging, *Court-Appointed Experts* at p.3, n.11 (Federal Judicial Center 1986) (hereinafter "Willging").

6. *See, e.g., Students of Cal. School for the Blind v. Honig*, 736 F.2d 538, 548-49 (9th Cir. 1984), *vacated on other grounds*, 471 U.S. 148, 105 S. Ct. 1820 (1985); *Eastern Airlines v. McDonnell Douglas Corp.*, 532 F.2d 957, 999 (5th Cir. 1976).

7. *See, e.g., Georgia Pacific Corp. v. United States*, 640 F.2d 328, 333-35 (Ct. Cl. 1980).

8. *See* Willging at 3; Weinstein & Berger, *Weinstein's Evidence* ¶ 706-11 (1985).

9. *See, e.g., American Export Lines, Inc. v. J. & J. Dist. Co.*, 452 F. Supp. 1160, 1165 (D.N.J. 1978).

10. *See, e.g., United States v. Addison*, 498 F.2d 741, 744 (D.C.Cir. 1974); *Kian v. Mirro Aluminum Co.*, 88 F.R.D. 351, 356 (E.D.Mich. 1980).

of) expert witnesses in a variety of settings. A summary and analysis of these post-1986 federal decisions is contained in Appendix B.

A recent study by the Federal Judicial Center indicates that as of January 1988, a total of 58 reported cases had mentioned Rule 706, including 47 reported cases in which an appointment was made or discussed extensively.[11] A mail survey of federal judges conducted beginning in January 1988 indicated that in excess of 225 appointments had been made, far exceeding the published opinions discussing Rule 706 and leading Cecil and Willging to conclude that reported cases likely underestimate the degree of appointment activity since reported cases address only disputed issues.

Even though Rule 706 is more frequently used, the judicial view of court-appointed experts remains conservative, as exemplified by in the First Circuit decision in *Reilly v. United States*[12]:

> We concur wholeheartedly that such appointments should be the exception and not the rule, and should be reserved for truly extraordinary cases where the introduction of outside skills and expertise, not possessed by the judge, will hasten the just adjudication of a dispute without dislodging the delicate balance of the juristic role. . . .
>
> We wish to emphasize our strongly-held view that the appointment of a technical advisor must arise out of some cognizable judicial need for specialized skills. Appropriate instances, we suspect, will be hen's-teeth rare. The modality is, if not a last, a near-to-last resort, to be engaged only where the trial court is faced with problems of unusual difficulty, sophistication, and complexity, involving something well beyond the regular questions of fact and law with which judges must routinely grapple.

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11. Cecil and Willging, *Court Appointed Experts:* Defining the Rule of Experts Appointed under Federal Rule 706 at 7 (Federal Judicial Center 1993) (hereafter "Cecil and Willging").

12. 863 F.2d 149, 156-57 (1st Cir. 1988).

> Although a technical advisor can be valuable in an appropriate case, the judge must not be eager to lighten his load without the best of cause.[13]

The recent United States Supreme Court opinion in *Daubert v. Merrell Dow Pharmaceuticals,* 113 S. Ct. 2786 (1993) may counter the conservatism with a signal to federal courts that Federal Rule 706 can play a stronger role in policing expert evidence to ensure reliability and relevance:

> [A] judge assessing a proffer of expert scientific testimony under Rule 702 should also be mindful of other applicable rules..... Rule 706 allows the court at its discretion to procure the assistance of an expert of its own choosing.[14]

The U.S. Supreme Court's favorable reference in *Daubert* to Rule 706, the growing number of federal circuit decisions endorsing the use of court-appointed experts and recent federal decisions discussing Rule 706 in the post-*Daubert* era[15] have heightened both awareness and potential resort to Rule 706.

D. Case Illustrations

A comprehensive analysis of every case in which a court appointed an expert witness or panel is beyond the scope of this article, but recent circuit court decisions provide a sample of the varied circumstances in which judges appoint experts.

- ***United States v. Bond***, 12 F.3d 540 (6th Cir. 1993), affirmed a magistrate's appointment of a DNA expert in a federal criminal firearm and conspiracy prosecution. In its Report and Recommendations, the magistrate had recognized the "pre-eminent" status of the court-appointed expert and his reservations about the

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13. *See also Mallard Bay Drilling, Inc. v. Bessard*, 145 F.R.D. 405, 406 (W.D.La. 1993) (citing and concurring with the *Reilly* standards).

14. Id. at 2797-98.

15. *See, e.g., De Angelis v. A. Tarricone, Inc.*, 151 F.R.D. 245, 246-47 (S.D.N.Y. 1993) (citing *Daubert's* new flexible standard as applied to Rule 706); *Contini v. Hyundai Motor Co.*, 149 F.R.D. 41, 41-42 (S.D.N.Y. 1993).

FBI's methods, but concluded that the parties' experts were more likely to reflect an accurate understanding of the view of the scientific community, than sole reliance on the appointed expert's testimony. The Sixth Circuit approved the magistrate's reliance on both the parties' experts and its own appointed expert to assess the DNA data.

- *In Re Joint E. & So. Dist. Asbestos Litigation*, 982 F.2d 721 (2d Cir. 1992), modified in, 993 F.2d 7 (1993), approved the use of a court-appointed experts to supervise a panel of court-appointed experts in evaluating the administration of a proposed mass tort settlement trust. The experts appointed by the bankruptcy court were charged with the task of estimating future claims against the trust and arriving at a proper allocation of reserves for such future claims. The Second Circuit noted that the bankruptcy court was "fully entitled to avail itself of expert advice on the difficult matter of estimating future claims against the trust" and expressed "no doubt that the role of the experts is within the broad authority of Rule 706." Id. at 750.

- *Computer Associates Intern., Inc. v. Altai, Inc.*, 982 F.2d 693 (2d Cir. 1992), involved a copyright infringement claim in which the district court appointed and relied on an expert in computer science to aid the judge's understanding of computer software and the infringement allegations. The Second Circuit affirmed the discretionary expert appointment to evaluate and explain the highly technical nature of the computer programs at issue as "instrumental in dismantling the infracus of the computer science so the court can formulate and apply an appropriate rule of law." Id. at 714-15. The Second Circuit noted that, in the final analysis, the judge remained the trier of fact and did not abdicate his role by seeking expert assistance. Id. at 715.

- In *Renaud v. Martin Marietta Corp., Inc.*, 972 F.2d 304 (10th Cir. 1992), a Colorado community alleging injuries due to contaminated water brought a toxic tort action against a missile manufacturer. The trial court granted summary judgment to the manufacturer on the issue of causation, based on the opinions of three court-appointed experts who stated that the plaintiffs' evidence of contamination was obtained and evaluated by "unsound scientific practices." Id. at 308. Significantly, in affirming the district court's denial of discovery of the court's appointed expert, the Tenth Circuit characterized the court-appointed expert as more of a technical advisor that an expert witness, id. at 308 n.8, even though the expert had apparently been appointed by the district court under Rule 706. *Renaud*, 749 F. Supp. 1545, 1548 (D.Colo. 1990).

- ***Reilly v. United States***, 863 F.2d 149 (1st Cir. 1988), involved a medical malpractice claim under the Federal Tort Claims Act resulting from a physician's negligence in an infant's birth. Id. at 152-53. The First Circuit, while expressing the conservative view that court-appointed experts are a last resort, found the complex economic theories involved in the damages calculation to be outside the mainstream of traditional judicial competence. Id. at 156-57. Important considerations supporting the appointment were the divergence of expert valuations, the one-sidedness of the damage evidence, and the government's failure to come forward with more than "feeble" expert assistance to the court. Id. at 157.

- In ***Webster v. Sowders***, 846 F.2d 1032 (6th Cir. 1988), the Sixth Circuit affirmed the appointment of a corporate expert on asbestos removal in a civil rights action brought by prisoners allegedly exposed to asbestos in the prison facilities. Id. at 1033-34. The appointment was justified by the need for an "independent view" of the asbestos-removal federal regulations and whether they were being complied with because a captive prisoner population was potentially exposed to a life-threatening substance. Id. at 1039.

- Finally, in ***Good v. Austin***, 800 F. Supp. 557 (E.D.Mich. 1992), the court sought the expert advice of a cartographer and demographics expert in litigation challenging the constitutionality of state political districting. Id. at 558-59. The expert was charged with the task of analyzing and evaluating plans submitted by the parties, particularly whether they "complied with the constitutional, statutory, and secondary criteria established by the United States Supreme Court for judicial approval of congressional districting schemes." Id. at 559 and 563. The expert's role thus involved not only fact finding and technical advice, but also legal conclusions on the propriety of the respective plans. Id. at 563-64.

E. State Adoption

As of 1992, five states had adopted the entire language of Federal Rule 706 verbatim and another eighteen states and Puerto Rico had enacted variations on Federal

Rule 706. Variations in the federal rule range from nonsubstantive to entirely different provisions regulating court-appointed expert witnesses.[16]

Fourteen states have adopted Federal Rule 706(a) without substantive change. Eleven states have adopted Federal Rule 706(b) either verbatim or without substantive change. The remaining states altered the source or method for compensating experts, commonly providing that compensation for the expert be paid in a proportion as directed by the court. Federal Rule 706(c) has been adopted by eighteen states without any change and all but two states have adopted Federal Rule 706(d) verbatim.[17]

In addition, California permits court-appointment of expert witnesses by statute and Illinois Supreme Court Rules authorize court-appointment of medical experts in cases where the physical or mental condition of party or person in custody is in controversy.[18]

Aside from the express authority for court-appointed experts in state enactments of Federal Rule 706, state court judges have inherent power to appoint expert witnesses of their own choosing.[19] Most recently, the Supreme Court of Delaware has recommended that the Court of Chancery avail itself of court-appointed experts "whenever it believes a more objective presentation of evidence is required, particularly in valuation

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16. *See, generally, Evidence in America* § 55.1 et seq. (1992) (compiling and reproducing state legislation and decisions on court-appointed experts). Wolf, *Evidence*, § 706 et seq. (1988) (same).

17. Id.

18. *See* Cal. Rev. Stat. §§ 730-734; Ill. Sup. Ct. Rule 215.

19. *See, e.g., Alexander v. Farmers Mut. Auto. Ins. Co.*, 131 N.W.2d 373 (Wis. 1964); *Ramsey v. Mading*, 217 P.2d 1041 (Wash. 1950); *Kamahalo v. Coelho*, 24 Haw. 689 (1919); *State v. Horne*, 88 S.E. 433 (N.C. 1916).

matters."[20] The source of authority for such future appointments was held to be inherent in the Delaware Court of Chancery.[21]

Like federal courts, state courts have generally been reluctant to exercise their inherent and express powers to appoint their own expert witnesses.[22] Whether the court will appoint an expert witness is dependent upon the court's perception of whether the parties' experts will present testimony fairly and understandably to the jury.[23] Thus, the power of the court to appoint experts has historically been used sparingly and only when the traditional adversarial system fails to bring forth the evidence to resolve a disputed issue. Examples and analyses of affirmative state court-appointment of experts are summarized in Appendix C.

Notwithstanding the general reluctance of state courts to use their inherent power or the express procedures for court appointment of experts, recent state adoption of legislation, experience with court-appointed experts, and the Delaware Supreme Court decision in *Matter of Shell Oil* may represent an increasing trend towards more liberal use of the state versions of Rule 706.

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20. *Matter of Shell Oil Co.*, 607 A.2d 1213, 1223 (Del. 1992).

21. Id. at 1222.

22. *Evidence in America* at 7.

23. Id.

III. WHY ARE COURTS RELUCTANT TO USE RULE 706?

The infrequent use of court-appointed experts has been the subject of numerous commentaries. One commentator has identified five general objections which weigh against court-appointments:

1. In jury cases, the expert deprives the parties of their constitutional right to a trial by a jury.

2. Court-appointment of experts substitutes an inquisitory approach for the traditional adversary system in which the responsibility for developing facts lies with the parties.

3. If there is more than one school of thought about the subject of the expert testimony, or the subject involves theoretical approaches as well as factual material, it is impossible to obtain a neutral expert.

4. A court-appointed expert - especially if the funds for compensation are limited - may do "a kind of routine job" instead of the job in depth that a party's expert would produce.

5. In the federal system, procedural uncertainties may have contributed to a reluctance to appoint experts. The appointment of experts overlaps to some degree with examinations by experts and discovery of experts, and it was not always clear to what extent rules dealing with these topics affected the judges right to appoint.[24]

A recent survey of 537 judges conducted by Cecil and Willging for the Federal Judicial Center echoes these objections. The survey identified six common reasons for not appointing an expert, in order of their frequency, as follows:

1. Infrequency of Cases Requiring Extraordinary Assistance: Cases most identified by the surveyed judges as both rare and unusually demanding, and thus potentially warranting court-appointed expertise included patent, product liability, antitrust trademark securities trust, employment discrimination and voting rights actions.

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24. *Evidence* Rule 706 - Court-Appointed Experts ¶ 706[01] (citing several other commentators on Rule 706).

2. Respect for the Adversarial Systems: Surveyed judges professed a commitment to the adversarial process and the ability of juries to assess difficult evidence and indicated they would appoint an expert only where the adversarial process had failed. The judges also indicated deference to objections by parties tendering the analysis and testimony of their own experts.

3. Difficulty in Identifying an Expert Suitable for Appointment: Several judges noted the practical difficulty, if not impossibility of selecting a "truly neutral" expert.

4. Securing Compensation for the Expert: Appointment of a court expert necessitates an order of payment by the parties and supervision of the billing practices of the expert. In addition to the administrative burden, judges expressed distaste for assessing parties the cost of an expert, especially without consent, when the parties' experts are already costing the clients significant sums and when the court-appointed expert may not assist their case.

5. Lack of Early Recognition that Appointment is Needed: Several judges indicated that the need for a potential appointed expert did not become apparent until too late in the litigation.

6. Lack of Awareness of the Procedure: The relatively low incidence of court-appointments and information concerning the process has contributed to a general lack of familiarity of judges with court-appointments and an aura of distrust.[25]

An additional survey by Cecil and Willging of 21 judges who have not appointed experts under Rule 706, indicates that courts have found several alternatives when confronted with special circumstances or difficult issues of expert opinion. Among the alternatives cited were pretrial screening of expert testimony and requiring the parties to explicitly identify by stipulation or otherwise the assumptions and conclusion on which the experts agree or disagree, in an effort to narrow the issues at trial. In addition, judges have employed various techniques to enhance the jury's understanding of expert

25. *Cecil and Willging* at 18-23.

testimony, including directing the parties to use plain demonstrative exhibits, plain language, and special verdict forms.[26]

Appointment by a court of an expert witness may pose substantial risk from a tactical point of view and requires careful attention to the judge's perceptions and procedure for appointment.[27] While there may be no way to ultimately control a court's decision to appoint its own expert, there are several strategic points relating to the appointment process which must be anticipated and carefully managed.

Notwithstanding the objections, reservations and alternatives to Rule 706 noted above, judges are willing to appoint an expert witness or panel to assist in understanding highly technical or complex issues necessary for decision making. The parties' inability or unwillingness to present credible evidence, or diametrically opposed conclusions and analysis from competent experts are important factors weighing in the decision to seek independent expertise. Finally, complex administrative and technical fact gathering tasks may also weigh in favor of expert appointments, which may save judicial resources and prevent duplicative and costly presentation of evidence by the parties. The court must always, of course, retain ultimate oversight over the expert's ancillary role and responsibility for conclusions regarding the merit of the dispute.

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26. Id.

27. *See also* Dombroff, "Court Appointment Can Resolve Battle of Experts," *Legal Times* (April 8, 1985).

IV. STRATEGIC MANAGEMENT OF THE COURT APPOINTMENT PROCESS

As Court appointment of expert witnesses under Rule 706 is here to stay and there are persuasive indications that its use of court-appointed experts will likely increase. Some of the strategic management issues involved in Rule 706 are discussed below.

A. Appointment Decision

The decision to appoint a court expert witness turns on the parties' and court's perception of the needs of the case as the litigation unfolds. The timing of the appointment depends on the contemplated role of the court-appointed expert and the stage of litigation in which the expertise would be used. Specific procedures for identifying the need and prescribing the process for appointing an expert are left to the judge. Traditionally the parties themselves have rarely initiated the request for an appointment.[28] The court's ability to predict the need for a court-appointed expert turns on awareness of the needs for special expertise. The Federal Rules of Civil Procedure, with their emphasis on early disclosures and tighter judicial management, may enable courts to spot the potential benefit of court-appointed experts earlier on.

Where issues in a particular case fall outside the traditional competence of judges or juries, the possibility of a court-appointed expert must be considered and should be affirmatively addressed by the court early in the pre-trial proceedings. While there is substantial risk inherent in appointment of an expert who is not truly neutral, appointment of an expert late in discovery with limited opportunity for the parties to plan strategy and affect the process poses far greater risks. Significantly, exploring the prospect of a court-appointed expert with a judge early in the litigation enables a party to assist the court in

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28. *See* Cecil and Willging at 25-30.

devising a methodology for identifying, nominating and selecting an expert from an appropriate pool.[29]

Where court appointment of an expert is reasonably foreseeable, a proactive approach will permit ample time to seek agreement from the parties on the identity and duties of the court-appointed expert, to obtain the expert's consent to participate in the litigation and to communicate the expert's analysis and findings in sufficient time to permit full discovery prior to trial.

B. Selection

Rule 706(a) provides that "[t]he court may appoint any expert witnesses agreed upon by the parties, and may appoint expert witnesses of its own selection." While the court retains the power to appoint an expert witness or panel without regard to the parties recommendations, courts frequently seek agreement from the parties either directly, or through nominations.[30]

The court could potentially call on professional organizations and academic groups to provide a list of qualified, willing and available persons to assist in litigation.[31] However, identifying which "groups" should be certified or otherwise identified as an appropriate pool of "expertise" is problematic, and the recent judicial survey indicates that judges are uncertain where to find such pools of experts in order to start the process.[32]

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29. *Cf.* Johnson, *Court Appointed Securities Expert Witnesses*: Unfettered Expertise, 2 High Tech. L.J. 249 (Fall 1987) (discussing criteria for expertise).

30. Willging at 6; *Murphy*, 984 F.2d at 198.

31. Willging at 6.

32. Cecil and Willging at 22, 31-34.

As a practical matter, an appointed expert will seldom be imposed without providing the parties an opportunity to participate in the selection.[33]

Finally, it is critical that the appointment is expressly made under Rule 706 or a state equivalent to preserve the procedural safeguards of full discovery and disclosure throughout the expert's participation in the case. Express appointment under Rule 706 ensures access and discovery concerning the appointed expert's activities, analysis and conclusions --- access that may not be available if the appointment is characterized as a technical advisor, special master or court examiner.[34]

C. Function

Court-appointed experts fill a wide variety of roles depending on the needs of a particular case, including pre-trial investigation and evaluation, trial testimony and post-trial activities,. Willging has identified several functions which court-appointed experts have performed:

1. Investigating factual issues;
2. Examining physical evidence;
3. Examining a criminal defendant's competence;
4. Evaluating, documents evidence, preparing a written report and participating in pre-trial motion practice;

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33. *See, e.g., Reilly*, 863 F.2d at 159-60 (discussing procedural safeguards); *DeAngelis*, 151 F.R.D. at 247; *Asbestos Litigation*, 830 F. Supp. at 689.

34. *See, e.g., Renaud*, 972 F.2d at 307-08; *Reilly*, 863 F.2d at 155-60; *Matter of Baldwin United Corp.*, 46 B.R. 314, 316 (Bkrtcy. S.D. Ohio 1985); *In re Landscaping Services, Inc.*, 39 B.R. 588, 591 (Bkrtcy. E.D. N.C. 1984).

5. Administering pretrial testing or examinations;

6. Inspecting/evaluating an institution;

7. Facilitating settlement;

8. Testifying at trial;

9. Assessing postjudgment damages or rendering an accounting; and

10. Facilitating implementation of a settlement or remedial decree.[35]

The court will prescribe the specific duties the appointed expert will be required to perform. Party participation in setting the expert's duties is critical. Submitting a proposed order to the court is one way of influencing the final terms of the appointment. Depending on the chosen expert's potential predisposition on the issues, the expert may be charged with ministerial and administrative duties or may be assigned quasi-judicial functions that go to the heart of the litigation. Thus, the risk of a court's appointing a potentially hostile witness can be mitigated by carefully forming the expert's duties and responsibilities.[36] Thus, the court-appointed expert's responsibilities would primarily be to frame the issues for the court, rather than directly offering an opinion on an ultimate question of law or fact. This approach maximizes the benefit of a court-appointed expert's facilitating role, while leaving ultimate resolution of legal and factual issues to the judge or jury.

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35. Willging at 19-2. *See also* cases cited in Appendices.

36. *See, e.g.*, Fortenberry, *Antitrust Litigation and the Court-Appointed Economic Expert:* A Modest Proposal (1987).

D. Compensation

In land condemnation cases and criminal actions, Rule 706 and related statutes authorize compensation of court-appointed experts from public funds. Otherwise the compensation is to be paid "by the parties in such a proportion and at such time as the court directs, and thereafter charged in like manner as other costs."[37]

By its own terms, Rule 706(b) enables a court to apportion costs between the parties and require payment, including advances, according to the dictates of the case. Factors influencing the court's exercise of discretion include the indigency of a party, the parties ability to pay, whether the parties mutually consented to the appointment, and whether one or both parties intended to present their own experts. At the extreme, a court has discretion to order one party to prepay the full cost of the appointment.[38]

Most judges require the parties to split the expert's fees, permitting reimbursement at the conclusion of the litigation to the prevailing party as taxable costs.[39]

The compensation of the court-appointed expert is an issue that should be raised from the time the appointment is contemplated, together with an appropriate schedule of payment. The potential use of payment bonds could ensure that experts will be paid and reduces the need for advances from the parties prior to trial.

E. Ex Parte Communication

Rule 706 also does not address the permissibility of ex parte communication between the parties and the expert. As the expert is often intimately involved in the

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37. Rule 706(b).

38. *See, e.g., McKinney*, 924 F.2d at 1511; *Sowders*, 846 F.2d at 1038.

39. *See* Cecil and Willging at 57-65.

decision making process, court-appointed experts are generally regarded as quasi-judicial for the purpose of communication.[40]

Because of the high correlation between the outcome of litigation and the testimony and advice of court-appointed experts,[41] the expert's activities should expressly address the order of judicial appointment, including specific identification of permissible times and modes of communication with the expert.

Judicial communication with an appointed expert, on the other hand, serves the functions of establishing a record of the terms and conditions of the appointment, defining the issue the expert will address, clarifying the respective roles of the expert and judge, and establishing procedures for performing the assigned tasks and communicating with the parties. In practice, judges communicate with the expert in a variety of formal and informal methods, but almost always in the presence of the parties to the litigation. While Rule 706 does not expressly address ex parte communication between the expert and judge, case law and judicial ethics discourage such off-the-record contacts.[42] While the educational function of a court-appointed expert would appear to contemplate such communications, courts generally prefer the procedural safeguards of conducting this "expert education" with full knowledge and participation of the parties.[43]

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40. Cecil and Willging at 43; *Leesona Corp. v. Varta Batteries, Inc.*, 522 F.Supp. 1304, 1312 n.18 (S.D.N.Y. 1981).

41. *See* Cecil and Willging at 34.

42. Cecil and Willging at 40. *See, e.g., Bradley v. Milliken*, 620 F.2d 1143, 1158 (6th Cir. 1980), cert. denied, 449 U.S. 870 (1980).

43. Cecil and Willging at 41.

Nonetheless, the order of judicial appointment should address how the court will communicate with the expert, both in the presence of the parties and, if necessary, procedures for communicating with the expert directly. The obvious benefit is that both parties will have greater confidence in having full access to and disclosure of the appointed expert's activities as they relate to the case.

F. Discovery of Court-appointed Expert

The court-appointed expert is under a duty to advise the parties of any findings and submit to pretrial deposition by any party. Rule 706(a) experts will invariably be required to submit reports to the parties and will often confer informally with the parties to discuss the findings and conclusions or recommendations.[44] A few judges have required preliminary reports and then directed the expert to modify them as needed, taking into account the reports of the parties' experts.[45]

The survey of judges conducted by the Cecil and Willging indicate depositions of court-appointed experts were taken only in 25% of the cases in which expert appointments were made relating to issues at trial. The clear inference is that the reporting requirements often imposed on the expert obviate the need for further discovery of the expert's findings and opinions.

The scope and deadlines for a court appointed expert's preliminary, modified or final findings and conclusions and the timing of the court-appointed expert deposition, if necessary, should also be addressed in the order of judicial appointment.

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44. Cecil and Willging at 46.

45. *Id.*

G. Trial Testimony

Testimony at trial by a court-appointed expert strikes at the heart of concerns for preserving the adversarial process and the fact-finder's ability to independently resolve the dispute. Not surprisingly, trial testimony by court-appointed experts is more frequent in bench trials, than in jury trials.[46] Where a court-appointed expert testifies, the opportunity for full cross-examination is permitted.[47]

Disclosure to the jury of the court-appointed status of the expert is a delicate issue. On the one hand, the presumptive validity of a court-appointed expert raises the possibility that the jury will be over-deferential to those views. On the other hand, the court retains the power, as with any evidence, to manage the testimony through cautionary instructions or motions in limine and to cast the expert's role in an appropriate light. Whether the jury will be told of the "court-appointed" status of the expert should be addressed well in advance of trial.

Cautionary instructions notwithstanding, the perception of undue influence on the jury's credibility assessments remains a significant concern for which there is no readily available resolution. Both reported cases and the results of the judicial survey by Cecil and Willging evidence a strong correlation between appointed expert's advice and testimony and the outcome of the issue or case.[48] The surveyed judges expressed great respect for the experts chosen, and in jury trials the judges generally acknowledged

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46. Cecil and Willging at 48.

47. *Holland*, 835 F.2d at 676.

48. Cecil and Willging at 52.

that the testimony of the court-appointed expert dominated the proceedings.[49] Such a result may not be surprising in lieu of the original needs of the case giving rise to the appointment: lack of credible testimony or a void of evidence on a critical issue.[50]

The reported cases and survey evidence of Cecil and Willging leave no doubt that appointed experts influence on the outcome of issues -- but as the authors note, whether such influence is appropriate is a different question. If this high correlation results from failure of the traditional adversarial process, Rule 706 may be persuasive incentive for the parties to fully develop and address issues requiring expertise.[51] On the other hand, if the parties have not done so, appointment of experts should not be prejudicial. In addition, the burden appropriately falls on the parties to ensure that express procedural safeguards are incorporated into the order of judicial appointment.

V. CONCLUSION

The systemic benefits of court-appointed experts are potentially compelling for litigation which involves highly complex or technical subjects. Rule 706 should be a supplement to the traditional adversarial model, not an abandonment. Where the prospect of a court-appointed expert arises, strategic management of the expert's selection and role in the judicial process is required to ensure an appropriate level of access and critique of the expert's position on the merits. Party involvement in the process, in close consultation with a party's retained expert, will minimize the possibility

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49. *Id.* at 54.

50. *Id.* at 554-55.

51. *Id.*

of prejudice to a party's position, while accommodating Rule 706's intended role in facilitating judicial administration and dispute resolution.

APPENDIX A

PRE-1986 FEDERAL COURT APPOINTMENTS OF EXPERTS

	TYPE OF CASE	TYPE OF EXPERT APPOINTED	ISSUE
FEDERAL CIRCUIT DECISIONS:			
United States Marshalls Serv. v. Means, 741 F.2d 1053, 1058-60 (8th Cir. 1984)	illegal occupation of federal forest lands	Indian religious, cultural and educational experts	proprietary of administrative denial of special use permit
Students of Cal. School for the Blind v. Honig, 736 F.2d 538, 548-49 (9th Cir. 1984), vacated on other grounds, 471 U.S. 148, 105 S. Ct. 1820 (1985)	education safety under Federal All Handicapped Children Act and Rehabilitation Act	seismic testing expert	safety of proposed school for the blind site
United States v. Moss, 544 F.2d 954, 961 (8th Cir. 1976), cert. denied 429 U.S. 1077 (1977)	criminal robbery	optometrist	evaluate defendant's visual accuracy and defense relating to allegedly poor eyesight
United States v. Green, 544 F.2d 138, 145 (3d Cir. 1976)	criminal air piracy	psychologist	defendant's competancy to stand trial
Danville Tobacco Assoc. v. Bryant-Buckner Assocs., Inc., 333 F.2d 202, 208-09 (4th Cir. 1964)	federal antitrust	tobacco industry expert	advice and evaluation of tobacco industries practices
Scott v. Spanjer Bros., Inc., 298 F.2d 928, 930-31 (2d Cir. 1962)	personal injury	neuropsychiatrist	evaluate nature and extent of injury
Smith By and Through Smith v. Armontrout, 604 F.Supp. 840, 843-45 (W.D.Mo. 1984)	criminal murder/habeas corpus	psychiatrist/psychologist	competency to waive legal rights and make litigation decisions
Grothusen v. National R.R. Passenger Corp., 603 F.Supp. 486, 489-90 (E.D.Pa. 1984)	personal injury/workplace safety under Federal Employer's Liability Act	medical expert	evaluation of injury and damages

	TYPE OF CASE	TYPE OF EXPERT APPOINTED	ISSUE
Lora v. Board of Educ., 587 F.Supp. 1572, 1573 (E.D.N.Y. 1984)	personal injury	medical expert	evaluate nature and extent of injury damages
Fund of Anmials, Inc. v. Florida Game & Fresh Water Fish Comm'n, 550 F.Supp. 1206, 1208 (S.D.Fla. 1982)	federal environmental statutory compliance	environmental experts/scientists	evaluate environmental changes in conservation area
Leesona Corp. v. Varta Batteries, Inc., 522 F.Supp. 1304, 1310-12 (S.D.N.Y. 1981)	intellectual property	chemical engineer	patent infringement of electrochemical cells
Stickney v. List, 519 F.Supp. 617, 619-21 (D. Nev. 1981)	constitutional/prison conditions	former director of state department of corrections	evaluation of prison conditions and compliance with Eighth Amendment
Lightfoot v. Walker, 486 F.Supp. 504, 507 (S.D.Ill. 1980)	constitutional/prisoners' rights	medical experts	evaluation of state prison practices and procedures
United States v. Articles, 425 F.Supp. 228, 231 (D.N.J. 1977), subsequent opinion, 74 F.R.D. 126, 126-27 (D.N.J. 1977)	food safety under Federal Food, Drug, and Cosmetic Act	chemical and biological expert	contamination of animal feed
United States Ex Rel. T.V.A. v. 109 Acres of Land, 404 F.Supp. 1392, 1392-93 (E.D.Tenn. 1975)	condemnation	appraiser	valuation of real property
United States v. Ridling, 350 F.Supp. 90, 92 (E.D.Mich. 1972)	federal criminal perjury	polygraph expert	evaluate veracity of defendant's previous testimony
United States v. Cancellieri, 5 F.R.D. 313, 314 (E.D.N.Y. 1946)	federal criminal nonmailing	mental health physician	post-verdict, pre-sentencing competency

APPENDIX B

POST-1986 FEDERAL COURT APPOINTMENTS OF EXPERTS

	TYPE OF CASE	TYPE OF EXPERT APPOINTED	ISSUE
FEDERAL CIRCUIT DECISIONS:			
United States v. Bonds, 12 F.3d 540, 551 (6th Cir. 1993)	federal criminal fire arm offenses and conspiracy	DNA expert	identification of crimonal defendant based on blood sample
B.H. By Pierce v. Murphy, 984 F.2d 196, 198 (7th Cir. 1993), cert. denied, 113 S.Ct. 2930 (1993)	federal constititional and Adoption Assistance and Child Welfare Act	juvenile specialists, social scientists and medical experts	assessment and recommendations of state agency proceeding in furtherance of settlement
In Re Joint E. & So. Dist. Asbestos Litigation, 982 F.2d 721, 750 (2d Cir. 1992)	mass-toxic tort (asbestos)/ bankruptcy settlement	actuarial experts	prediction and present valuation of future claims and allocation of settlement proceeds
Computer Associates Intern., Inc. v. Altai, Inc., 775 F.Supp. 544, 559-60 and 575 (E.D.N.Y. 1991), affirmed, 982 F.2d 693, 712-14 (2d Cir. 1992)	intellectual property	computer software expert	copyright infringement of competing computer programs
Renaud v. Martin Marietta Corp., Inc., 972 F.2d 304, 307-08 (10th Cir. 1992)	toxic tort (water contamination)	epidemiology expert	evaluate plaintiff's evidence of causation
Ross v. Kelly, 784 F.Supp. 35, 42 (W.D.N.Y.), affirmed, 970 F.2d 896 (2d Cir. 1992), cert. denied, 113 S.Ct. 828 (1992)	42 U.S.C. § 1983/prisoner medical rights	orthopedic surgeon	evaluation of allegedly neglected physical injuries and damages
McKinney v. Anderson, 924 F.2d 1500, 1510-11 (9th Cir. 1991)	toxic tort (environmental tobacco smoke)	enviornmental toxicolist	qualification of exposure levels and causation

	TYPE OF CASE	TYPE OF EXPERT APPOINTED	ISSUE
In Re Fibreboard Corp., 893 F.2d 706, 712 (5th Cir. 1990) (discussed in Mullenix, Beyond Consolidation: Post Aggregative Procedure in Asbestos Mass Tort Litigation, 32 WM and M.L. Rev. 474, 546-50 (Spring 1991)	mass-toxic tort (asbestos)	economics professor with previous experience as special master in asbestos litigation	develop a methodology for determining consolidated class damages and evaluate intra-class samples based on categories of disease presented by class
Reilly v. United States, 863 F.2d 149, 155-160 (1st Cir. 1988)	medical malpractice under Federal Tort Claims Act	economist/accountant	damages calculations of future-care expenditures and lost earnings
Webster v. Sowders, 846 F.2d 1032, 1035 (6th Cir. 1988)	toxic tort/prisoners' rights	corporate asbestos removal expert	monitor exposure levels and compliance with federal regulations
Holland v. C.I.R., 835 F.2d 675, 675-76 (6th Cir. 1987)	federal criminal tax evasion	handwriting	authenticity identification of documents and defendant
FEDERAL DISTRICT DECISIONS:			
DeAngelis v. A. Tarricone, Inc., 151 F.R.D. 245, 246-48 (S.D.N.Y. 1993)	personal injury/gasoline vapor exposure	medical expert	evaluate physical and psychological injury and damages
In Re Joint E. & S. Dists. Asbestos Litigation, 830 F.Supp. 686, 689-94 (E. & S.D.N.Y. 1993)	mass-toxic tort (asbestos)/ bankruptcy settlement	actuarial experts	prediction and present valuation of future claims and allocation of settlement proceeds
United States v. Marvans, 803 F.Supp. 1378, 1378 (N.D. Ind. 1992)	criminal tax violations	psychiatrist	competency of defendant to exercise right against self-incrimination
Good v. Austin, 800 F.Supp. 557, 558-59 (E. & W.D.Mich. 1992)	constitutional/political districting	geography, cartography and computer-based legislative districting expert	analysis and evaluation of settlement plans and compliance with constitutional, statutory and secondary criteria

	TYPE OF CASE	TYPE OF EXPERT APPOINTED	ISSUE
Jordano By and Through Jordano v. Steffers, 787 F.Supp. 886, 887-88 (D.Minn. 1992)	funding and community-based placement of mentally retared under Social Security Act	clinical psychologist	placement of mentally retarded person
In Re DES Ccases, 1991 U.S. Dist. Lexis 18263 at **6-9 (E.D.N.Y 1991)	mass-tort (diethylstilbestrol)	economic and medical experts	economic analysis of data on market share and resources of DES manufacturers and producers; medical analysis of individual class member causation disputes
Beaver et al. v. Board of County Commissioners of Gooding County, 1991 U.S. Dist. Lexis 20506 at **1-7 (D.Idaho 1991)	constitutional/42 U.S.C. § 1983/prisoners' rights	health and sanitation engineers and corrections expert	jail conditions and constitutional and administrative compliance
Gartner v. Roderick Hendeix, et al., 1991 U.S. Dist. Lexis at **1-8 (E.D.La. 1991)	personal injury	medical expert	history, medical condition and prognosis of plaintiff
Great Plains Resources, Inc., v. L.F. Tomlison, 1991 U.S. Dist. Lexis 19848 at **1-8 (S.D.Ill. 1991)	mineral rights	economist/accountant	mineral valuation and damages calculation
Torch Inc. v. Theriot, 727 F.Supp. 1048, 1049 (E.D.La. 1990)	employer liability for surgery proposed by employer	medical expert	causation and necessity of proposed surgery
San Francisco NAACP v. San Francisco Unified School District, 695 F.Supp. 1033, 1034-35 (N.D.Cal. 1988), rev. on other grounds, 896 F.2d 412 (9th Cir. 1990)	desegregation under federal and state constitutions	education and administrative financing experts	administration and financing of desegregation plan for state school district
Martin v. Mabus, 700 F.Supp. 327, 331 (S.D.Miss. 1988)	Voting Rights Act/ constitutional/political districting	demographics expert	evaluation of compliance with federal statutes in challenged political redistricting

	TYPE OF CASE	TYPE OF EXPERT APPOINTED	ISSUE
U.S. v. State of Mich., 680 F.Supp. 928 (W.D.Mich. 1987)	Civil Rights of Institutionalized Persons Act	prison administration experts	evaluation and administration of state prison reorganization
Hemstreet v. Burroughs Corp., 666 F.Supp. 1096, 1099 n.2 (N.D.Ill. 1987)	intellectual property	engineer	patent infringement of scanning technology
Unique Concepts Inc. v. Brown, 659 F.Supp. 1008, 1011 (S.D.N.Y. 1987)	intellectual property	engineer	patent infringement of wall covering products
Aminoil USA, Inc. v. OKC Corp., 629 F.Supp. 647, 649-54 (E.D.La. 1986)	mineral rights	accountant	mineral valuation and damage calculation

APPENDIX C

STATE APPOINTMENTS OF EXPERTS

	TYPE OF CASE	TYPE OF EXPERT APPOINTED	ISSUE
Lauderdale County DHS v. T.H.G., 614 S.3d 377 (Miss. 1992)	parental rights termination	psychotherapist	evaluation of parental guardian
MMOE v. MJE, 841 P.2d 820 (Wyo. 1992)	marital dissolution/ custody/allegations of sexual abuse	psychologist	evaluation of child's behavioral patterns
Bryan v. Holzer, 589 So.2d 648 (Miss. 1991)	conservator mismanagement	auditor/accountant	propriety of previous conservator's management of estate
Tallman v. Tallman, 396 S.E.2d 453 (W.Va. 1990)	marital property division	appraiser	real estate valuation
Moore v. Snohomish County, 774 P.2d 1218 (Wash. 1989)	marital dissolution/custody	psychiatrist	evaluate competing custody claims by divorcing parents
Hudspeth v. State Highway Com'n, 534 So.2d 210 (Miss. 1988)	condemnation	appraiser	valuation of real property
Shaw v. Bourn, 615 So.2d 466 (La. Ct. App. 1993)	insurance coverage	psychiatrist	evaluation of injury and damages arising from child molestation
People v. Bush, 466 N.W.2d 736 (Mich. Ct. App. 1991)	criminal felony-murder and felony firearm	doctor/medical expert	determination of cause of death
Grand Blanc Landfill v. Swanson Env. Inc., 463 N.W.2d 234 (Mich. Ct. App. 1990)	toxic tort (landfill see page)	corporate environmental remediation expert	evaluation nature and extent of contamination
Merriam v. Merriam, 799 P.2d 1172 (Utah Ct. App. 1990)	custody	clinical social worker expert	evaluate competing parental custody claims

	TYPE OF CASE	TYPE OF EXPERT APPOINTED	ISSUE
Matter of Sanders, 773 P.2d 1241 (N.M. Ct. App. 1989)	guardianship termination	psychologist	mental health evaluation of treatment guardian
Durbin v. Bonanza Corp., 716 P.2d 1124 (Colo. Ct. App. 1986)	real property boundary dispute	surveyor	physical boundary determination
Pekarek v. Pekarek, 362 N.W.2d 394 (Minn. Ct. App. 1985)	marital dissolution	economist/accountant	valuation of limited partnership tax shelter investments
State v. Doe, 642 P.2d 201 (N.M. Ct. App. 1982)	juvenile criminal offenses	psychologist	competency of juvenile to be tried as an adult
Wilson v. Kemp, 644 S.W.2d 306 (Ark. Ct. App. 1982)	probate	handwriting expert	identification/authenticity of holographic will
People v. Fisher, 274 N.W.2d 788 (Mich. Ct. App. 1978)	criminal second-degree murder	forensic psychologist	post-conviction examination and evaluation of defendant asserting insanity defense

THE PROPOSED RESTATEMENT (THIRD) AND ITS IMPACT UPON LITIGATION INVOLVING PRESCRIPTION DRUGS AND MEDICAL DEVICES*

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*. This paper is based on the Tentative Draft of Section 4 of the ALI's Restatement (Third) of Torts, as of September 1, 1994. A revised tentative draft is expected on or before September 14, 1994. While no changes are expected with respect to the provisions impacting upon litigation involving prescription drugs and medical devices, to the extent changes are made, they will be addressed during the oral presentation.

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I. INTRODUCTION

Section 402A of the Restatement (Second) of Torts is a 24-year-old fixture of Iowa law. The Iowa Supreme Court adopted the oft-cited products liability provision in Hawkeye Security Insurance v. Ford Motor Co., 174 N.W.2d 672, 684 (Iowa 1970) and reaffirmed in Osborn v. Massey-Ferguson, Inc., 290 N.W.2d 893, 901 (Iowa 1980). The Restatement (Second) once did, but perhaps no longer does, set forth and explain existing and evolving law. Recognizing as much, the American Law Institute ("ALI") -- three years ago -- began work on what will become the Restatement (Third) of Torts: Products Liability. Law Professors James A. Henderson, of Cornell, and Aaron D. Twerski, of Brooklyn Law School, are serving as the new document's chief architects.

This Paper will examine the key aspects, as well as the perceived strengths and weaknesses, of the section of the proposed Restatement (Third) that addresses liability for manufacturers of prescription drugs and medical devices. The text of Section 4 of the proposed Restatement (Third) is attached as Appendix A. To the extent possible, the Paper will focus on the ways in which the section would impact traditional products liability law in general

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and Iowa law in particular.** The Paper will also examine an issue that, while not addressed in the proposed Restatement (Third), is nonetheless significant in drug products litigation: preemption of state law tort claims in cases involving medical devices and prescription drugs.

A. A Separate Section for Drugs and Medical Devices

The black-letter language of Section 402A of the existing Restatement (Second) contains no reference to prescription drugs or medical devices. In recognition of the fact that prescription drugs and medical devices are -- in many ways -- sufficiently unlike other products, the proposed Restatement (Third) appropriately places drugs and devices in a separate section. The change is more than cosmetic. The separate section clarifies -- in black-letter language, rather than in the comments -- that prescription drugs and medical devices are not to be assessed under the same liability standards that govern other everyday products.

B. Old Law in a New Restatement

Section 4 of the proposed Restatement (Third) establishes standards of liability for prescription drugs and medical devices that are: (1) defectively manufactured; (2) defectively designed;

**. This paper does not focus on the Restatement (Third) standards for over-the-counter drugs and blood products. Section 4A of the proposed Restatement (Third) deals with standards of liability for over-the-counter drugs and the text is attached as Appendix B. Section 4B deals with blood products and the text is attached as Appendix C.

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or (3) defective due to inadequate warnings or instructions.[1] Not all proposed provisions stray from existing law. For instance, under subsection 4(b)(1), product defectiveness will be established if the prescription drug or medical device -- at the time of sale -- contained a manufacturing defect. Adoption of subsection 4(b)(1) would not effectuate a change in the law.

Manufacturing defects differ from design defects in that they do not involve an allegation that the entire product line was unreasonably dangerous. A defectively manufactured product is simply one that mistakenly differs from others in the product line. In the context of prescription drugs, manufacturing defects usually involve a claim of impurity e.g. a claim that a particular batch of drug was contaminated at the time it left the control of the manufacturer. Courts uniformly hold that strict liability, i.e. liability without regard to fault, can and should be imposed for manufacturing defects. See e.g. Gottsdanker v. Cutter Laboratories, 182 Cal. App. 2d 602, 6 Cal. Rptr. 320 (1960); Abbott Laboratories v. Lapp, 78 F.2d 170 (7th Cir. 1935); McCall v. Batson, 329 S.E.2d 741 (S.C.1985).

The number of products that will enter the marketplace with manufacturing defects is not entirely unpredictable.[2] Thus, imposition of liability without regard to fault in this context is perhaps more tolerable due to the possibility that a company might insure against occasional manufacturing defects.

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II. THE LEARNED INTERMEDIARY DOCTRINE AND THE DUTY TO WARN

A. Introduction

Under the almost universally accepted "learned intermediary doctrine", makers of prescription drugs and medical devices discharge their duty of care to patients by warning physicians. The rule assumes that it is reasonable for a manufacturer to rely upon the prescribing physician to forward to the patient -- who ultimately uses the product -- any warnings involving possible adverse side effects. The Eighth Circuit has stated:

> There are several arguments supporting the application of the [learned intermediary rule] to prescription drug products. First, medical ethics and practice dictate that the doctor must be an intervening and independent party between patient and drug manufacturer. Second, the information regarding risks is often too technical for a patient to make a reasonable choice. Third, it is virtually impossible in many cases for a manufacturer to directly warn a patient.

Hill v. Searle Laboratories, 884 F.2d 1064, 1070 (8th Cir. 1989). Though with little discussion and perhaps somewhat implicitly, courts applying Iowa law have embraced the learned intermediary doctrine. See, e.g., Petty v. United States, 740 F.2d 1428, 1440 (8th Cir. 1984) (applying Iowa law and suggesting that warnings can be provided to a "learned intermediary," rather than to the actual recipient of the product, in cases not involving mass immunizations.)

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B. **The Proposed Version of the Learned Intermediary Doctrine**

Under subsection 4(b)(2) of the proposed Restatement (Third), liability would be imposed in instances where reasonable warnings regarding foreseeable risks are not provided to prescribing and "other health care providers" who are in a position to reduce the risks of harm. The subsection thus sets forth a version of the learned intermediary doctrine that essentially has been adopted in Iowa and many other jurisdictions. The proposed subsection, however, appears to engraft an unwarranted and disturbing appendage onto the learned intermediary rule by stating that warnings may have to be given to "other health care providers." Manufacturers provide written warnings to prescribing physicians. They have no control over prescribing physicians who delegate treatment duties to "other health care providers." Accordingly, the law previously has not required manufacturers to warn unascertainable health care providers. See e.g. Kirk v. Michael Reese Hosp. & Med. Center, 513 N.E.2d 387, 395 (Ill. 1987) ("The drug companies are not required to warn hospital personnel because they do not select the proper drugs for the patient and prescribe them.")

Under subsection 4(b)(2), foreseeable risks are the only risks about which physicians and other health care providers must warn. This, too, comports with existing Iowa law.[3] In Moore v.

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Vanderloo, 386 N.W.2d 108, 116 (Iowa 1986), the Iowa Supreme Court concluded that an oral contraceptive manufacturer had no duty to warn when it did not know, and should not have known, of the danger. "The contention that plaintiffs urge would impose a duty on a manufacturer to warn of unknown dangers, and we do not adopt such a requirement." Id.[4]

A contrary conclusion was reached in Brazzell v. United States, 788 F.2d 1352, 1357-58 (8th Cir. 1986), where the Eighth Circuit stated -- while applying Iowa law -- that "regardless of whether the manufacturer knew of the particular risk involved or whether the risk was foreseeable, knowledge of the risk would be imputed to the manufacturer under a strict liability theory." The Eighth Circuit vacated in light of the Iowa Supreme Court's Moore opinion. That Moore is the law in Iowa is now clear. See Brazzell v. United States, 880 F.2d 84, 86-87 (8th Cir. 1989) ("[T]he Iowa Supreme Court has stated in very explicit terms that a manufacturer has no duty to warn of unforeseeable risks associated with its product.").[5]

C. **The Proposed Exception for Mass Immunizations**

The current draft of the new Restatement (Third) proposes one exception to the learned intermediary rule. Under subsection 4(b)(3), manufacturers of prescription drugs and medical devices would be liable if reasonable warnings were not given directly to the patient in instances where the manufacturer knew or had reason

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to know that no health care provider would be in a position to reduce risks in accordance with the warnings. The paradigm envisioned by the drafters of the Restatement (Third) is the mass inoculation situation, where drugs may be dispensed or administered to patients without individual evaluation or personal intervention by a physician. The mass immunization exception is already the law in Iowa. See Petty, 740 F.2d at 1440 (affirming the district court's ruling that, under Iowa law, a drug manufacturer's duty to warn extends to the "ultimate consumer" in mass-immunization cases). See also Brazzell, 788 F.2d at 1358, vacated on other grounds at 788 F.2d at 1361 (8th Cir. 1986) (requiring direct warnings to consumers in a mass-immunization setting because the doctors were acting more like "distributors" than "learned intermediaries.").

In support of the mass inoculation exception, the reporters cite Givens v. Lederle, 556 F.2d 1341 (5th Cir. 1977).[6] The fact that Givens was not a mass inoculation case illustrates a possible downside to the proposed exception. In Givens, plaintiff -- on three separate occasions -- took her daughter to the pediatrician for administration of the Sabin oral polio vaccine. Shortly thereafter, plaintiff developed polio. The package insert stated that, in some instances, paralytic disease had been reported in persons who had been in close contact with vaccine recipients.[7] The insert also stated that there was a one-

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in-three million chance of developing vaccine-associated paralytic disease. The pediatrician examined the package insert, but did not warn the plaintiff.

In Givens, there was no dispute that the vaccine had been administered by a private physician in a non-mass inoculation setting. The Fifth Circuit nonetheless held that the manufacturer was "responsible for taking definite steps to get the warning directly to the consumer."[8] The court reasoned that the way in which the vaccine was administered was "more like that at a small county health clinic, as in Reyes,[9] than by prescription."

Givens should be examined alongside two other cases cited by the reporters of the proposed Restatement. Admittedly, Davis v. Wyeth Laboratories, 399 F.2d 121 (9th Cir. 1968), was a mass immunization case. However, in Reyes v. Wyeth Labs., 498 F.2d 1264 (5th Cir.), cert. denied, 419 U.S. 1096 (1974), direct warnings were required even though the vaccine was administered -- not in a mass immunization setting -- but rather in a county health clinic. Finally, in Givens, direct warnings were required because the way in which the physician administered the vaccine was said to be similar to the manner in which the clinic had administered the vaccine. Thus, subsection 4(b)(3) creates a possible "slippery slope" problem.[10]

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D. Exceptions Stricken from the Current Draft

Two other exceptions to the learned intermediary rule were proposed, but then stricken, during the drafting process. Under a previously released draft of the proposed Restatement (Third), product defectiveness would have been established if reasonable warnings were not provided directly to the patient in the following situations: (1) the manufacturer advertised or otherwise promoted the prescription drug or medical device directly to consumers;[11] and (2) Food and Drug Administration regulations required that direct warnings be provided.[12]

III. LIABILITY FOR DESIGN DEFECTS

A. Design Defect Liability Under the Restatement (Second)

The overwhelming majority of pharmaceutical lawsuits are "inadequate warning" cases. Thus, it is not entirely surprising that the Iowa courts to date have not discussed "design defect" in a prescription or medical device context.

Comment k to § 402A of the Restatement (Second) created an "unavoidably unsafe product" exception to strict liability for design defect. The nearly uniform adoption of the "unavoidably unsafe product" exception to strict liability for design defect is due the universality of the public policy principles it embodies: manufacturers of products which are properly prepared and marketed with adequate warnings of knowable risks should not be held liable

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for having marketed a defectively designed product simply because the product necessarily and unavoidably poses some risks of harm.

While comment k to § 402A has been adopted as the law of almost every state, two different approaches have developed as to its application. The first and, from a manufacturer's perspective, the correct approach adopts immunity from strict liability for design defect for all FDA approved prescription drugs. Brown v. Superior Court, 44 Cal. 3d 1049, 245 Cal. Rptr. 412, 751 P.2d 470 (1988); Grundberg v. The Upjohn Company, 813 P.2d 89 (Utah, 1991); Stone v. Smith Kline & French, 447 So.2d 1301 (Ala. 1984).

The second approach holds that immunity from strict liability for design defect must be determined on a drug-by-drug, case-by-case basis. See e.g. Toner v. Lederle Laboratories, 732 P.2d 297 (Idaho 1987), cert denied, 485 U.S. 942 (1988); Pollard v. Ashbey, 793 S.W.2d 394 (Mo. App. 1990); Castriagno v. E. R. Squibb & Sons, Inc., 546 A.2d 775 (R.I. 1988); Hill v. Searle Labs, 884 F.2d 1064 (8th Cir. 1989) (applying Arkansas laws). None of the cases adopting the case-by-case approach agree, however, on the standard to be applied to determine whether a given drug is immune from strict liability for design defect. In Toner, supra, for example, the court requires that (1) the risk be unavoidable in that the product could not have been made more safely and there was then "no feasible alternative design which on balance accomplishes the subject product's purpose with a lesser risk," 732 P.2d at 306;

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and (2) the drug's benefits must "clearly appear at the time of distribution to outweigh their concomitant risks." Id. at 308.

Hill v. Searle Labs, supra, determined that "exceptional social need" for the product must also be shown. Castriagno v. E. R. Squibb and Sons, supra, by contrast, simply states that "the apparent benefits of the drug must exceed the apparent risks" to preclude design defect liability. 546 A.2d at 781.

Not only have the courts adopting the case-by-case approach not agreed on the standard for liability, but they have not agreed on whether the question presented is one of law, one of fact, or a mixed question of law and fact. Accordingly, they have not agreed on whether the question is decided by a judge or by jury; if decided by a judge, they have not agreed on whether it is decided within or without the presence of the jury. Castriagno v. E. R. Squibb and Sons, supra, wins the prize for equivocation. It holds that the issue is to be decided by the court in cases where the drug is clearly deserving of protection, but by the jury in "close cases".

B. An Overview of the New Proposed Standard

Subsection 4(b)(4) of the proposed Restatement (Third) would allow plaintiffs to recover under a design defect theory in cases involving prescription drugs and medical devices. Accordingly, the proposed Restatement (Third) rejects the Brown v. Superior Court, supra, line of cases which grant immunity from

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strict liability for design defect for all FDA approved prescription drugs.

However, the narrow nature of the new proposed design defect provision cannot be overemphasized. Under subsection 4(b)(4), manufacturers of prescription drugs and medical devices will be liable under a design defect theory only when the product's foreseeable risks are sufficiently great in relation to its therapeutic benefits, such that a reasonable medical provider would not have prescribed the product for any class of patients. Thus, the only drugs and devices that will be shouldered with design defect liability under subsection 4(b)(4) are those that provide no net benefit to any ascertainable patient class. As such, the Restatement (Third) also rejects the inconsistent standards adopted by the courts applying immunity on a case-by-case basis.

The proposed standard in the Restatement (Third) is far more sensible than that announced in Toner, supra, and its progeny of cases. Prescription drugs and medical devices -- because of the many differences inherent in those who use them -- come with unique risks and benefits. If a drug or device helps some persons under some circumstances, the manufacturer should -- and, under subsection 4(b)(4), does -- avoid liability unless the product is not accompanied with adequate warnings.

Appropriately, the drafters have not held prescription drugs and medical devices to a standard that contemplates

alternative designs.[13] Had they done otherwise, lay jurors would have been asked to engage in product comparisons. On the one hand would be the complained-of prescription drug -- a product that, after having been subjected to rigorous testing, was deemed safe and effective by the FDA. On the other hand would be, in some cases, an actual or hypothetical alternative drug never to have run the FDA gauntlet. Jurors could then impose liability if convinced that the untested alternative was superior to the FDA-approved product. The proposed subsection does not allow for such comparisons. However, the subsection still makes the mistake of seemingly allowing lay jurors to determine that a prescription drug or medical device was defectively designed.

C. The Meaning and Impact of a Jury's Design Defect Determination

The issue under subsection 4(b)(4) is whether it would have been reasonable to prescribe the prescription drug or medical device to any class of patients. If jurors determine that the product could not reasonably have been prescribed for any class of patients, they will have concluded, in effect, that the product should not have been marketed at all. Jurors should not make that determination. If jurors consider design defect liability for drugs and devices, they will be forced to engage in a risk-benefit analysis that has already been conducted -- and conducted far more thoroughly -- by the FDA.

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The FDA's approval process is extensive. Before filing an Investigational New Drug (IND) application, sponsors of such a drug must conduct animal testing.[14] This phase consumes significant time and money. After the compound earns IND status, human subjects are used to measure safety and efficacy. Clinical testing is divided into three phases and can take five years to complete. Upon completion of clinical testing, the sponsor files a New Drug Application (NDA) with the FDA.[15] The NDA contains everything from proposed labeling to safety and efficacy data.

New drugs are marketed only after having undergone extensive analysis by FDA reviewers. Central to the FDA approval process is a risk-benefit inquiry. FDA approval means that, in the opinion of the agency, the benefits of a particular drug -- when properly prescribed and accompanied by adequate warnings -- outweigh the risks. Medical devices are similarly scrutinized before being approved for marketing.[16]

If jurors engage in a risk-benefit test pursuant to subsection 4(b)(4), it will undoubtedly be inferior to the one previously completed by the FDA. Through no fault of their own, jurors cannot begin to view during one trial the amount of information that FDA experts examine during the approval process. In addition, jurors -- unlike FDA experts -- will rarely have any medical or scientific expertise. Lastly, jurors would be asked to conduct a risk-benefit analysis <u>after</u> a plaintiff has suffered

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injury. Such an analysis would likely be contaminated by emotional impact and hindsight.

In addition to the FDA inquiry, there is yet another risk-benefit test that screens prescription drugs and medical devices. Manufacturers provide warnings to physicians, who in turn make certain that drugs and devices are prescribed to the appropriate patients. Thus, a prescribing physician has necessarily determined that the product would be of some net benefit to that person. In other words, the physician -- much like the FDA -- has essentially determined that the product was not defectively designed. The law should not invite lay jurors to override a decision made by both the FDA and the prescribing physician.

D. Design Defect Liability: Lengthening the Life Span of Weak Claims

The proposed design defect standard -- its demanding nature notwithstanding -- poses a problem for manufacturers. Section 4 imposes liability for three types of product defects: manufacturing defects, design defects, and defects attributable to inadequate warnings. The great majority of prescription drug cases are based on the inadequate warning theory.[17] Plaintiffs lawyers, however, may view the three theories as equals. Accordingly, the complaints they file are almost certain to include a claim for design defect. Frivolous design defect claims will consume

litigation resources and, in some instances, will be submitted to juries. In a noble effort to keep that from happening, Comment f to Section 4 of the proposed Restatement states as follows:

> Given the very demanding standard that must be met before a case of defective design of a prescription drug or a medical device can be established, liability is likely to be imposed only under unusual circumstances. The court has the responsibility to determine that only cases that meet the demanding standard for defect reach the trier of fact.

E. **Eliminating Design Defect Liability**

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Striking the design defect standard from the proposed Restatement would not work an injustice on deserving plaintiffs. Under subsection 4(b)(4), manufacturers of drugs and devices would be liable on a design defect theory if the product's risks outweighed its benefits to such an extent that no reasonable medical provider would have prescribed it for any class of patients. Consider a product that, under the proposed subsection, is unable to avoid design defect liability. Even in the absence of a design defect theory, the injured plaintiff could seek to impose liability on an inadequate warning theory.

Consider the warning that would have to accompany a product unable to pass the design defect test in subsection 4(b)(4). The warning literature would have to advise doctors that the product's meager benefits were markedly outweighed by its risks. A weaker warning would be inadequate. No manufacturer

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would market a prescription drug or medical device -- only to inform physicians that, in all instances, the product's benefits would pale in comparison to its risks.[18] The point is this: any drug or device that would be saddled with design defect liability under subsection 4(b)(4) would also be deemed defective on an inadequate warning theory.[19]

IV. EXPRESS PREEMPTION UNDER THE MEDICAL DEVICE AMENDMENTS

The United States Supreme Court has recently reaffirmed that Congress is empowered to expressly preempt states from enacting any state laws or requirements in areas that Congress considers to be of particular national importance. See Cipollone v. Liggett Group, Inc., ___ U.S. ___, 112 S. Ct. 2608 (1992). Congress exercised this power when it enacted the Medical Device Amendments ("MDA") to the Federal Food, Drug and Cosmetic Act in 1976. This legislation greatly enhanced the FDA's authority to ensure that medical devices are safe and effective for their intended uses. Because Congress intended that the FDA regulate medical devices, it expressly preempted any competing state medical device requirements:

> [n]o state or political subdivision of a state may establish or continue in effect with respect to a device intended for human use any requirement --
>
> (1) which is different from, or in addition to, any requirement applicable under this chapter to the device, and

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(2) which relates to the effectiveness of the device other matter included in a applicable to the device chapter.

21 U.S.C. § 360k(a). This statute "reveals congressional objective to prohibit, by the preemption, the proliferation of multiple, divers device requirements." Stewart v. International F. Supp. 907, 909 (D.S.C. 1987).

Under the MDA, medical devices are genera three classes. Class I devices are subject only regulations applicable to all medical devices. Cl are subject to more specialized rules. Class II subject to the most stringent controls. All implan are Class III devices. A manufacturer may not market device without first obtaining premarket approval FDA. To obtain such approval the manufacturer extensive test data supporting the device's effectiveness and must submit proposed warnings to acc device. Once the FDA approves a PMA application, the man may not alter the specifications of the device or the accompanying it without FDA approval.

In the past year the Federal courts have been u in holding that the MDA expressly preempts state law tort

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> (1) which is different from, or in addition to, any requirement applicable under this chapter to the device, and

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> (2) which relates to the safety or effectiveness of the device or to any other matter included in a requirement applicable to the device under this chapter.

21 U.S.C. § 360k(a). This statute "reveals on its face the congressional objective to prohibit, by the doctrine of express preemption, the proliferation of multiple, diverse, state by state device requirements." Stewart v. International Playtex, Inc., 672 F. Supp. 907, 909 (D.S.C. 1987).

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Under the MDA, medical devices are generally grouped into three classes. Class I devices are subject only to general FDA regulations applicable to all medical devices. Class II devices are subject to more specialized rules. Class III devices are subject to the most stringent controls. All implantable devices are Class III devices. A manufacturer may not market a Class III device without first obtaining premarket approval (PMA) from the FDA. To obtain such approval the manufacturer must submit extensive test data supporting the device's safety and effectiveness and must submit proposed warnings to accompany the device. Once the FDA approves a PMA application, the manufacturer may not alter the specifications of the device or the warnings accompanying it without FDA approval.

In the past year the Federal courts have been unanimous in holding that the MDA expressly preempts state law tort claims

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involving Class III medical devices and some other medical devices. Important Federal appellate decisions include:

> Gile v. Optical Radiation Corp., 22 F.3d 540 (3d Cir. 1994) (plaintiff's claims for strict liability and negligence preempted);
>
> Mendes v. Medtronic, Inc., 18 F.3d 13 (1st Cir. 1994) (plaintiff's claims for negligence and breach of warranty preempted);
>
> Duncan v. Iolab Radiation Corp., 12 F.3d 194 (11th Cir. 1994) (one page per curiam decision adopting the Seventh Circuit's analysis in Slater);
>
> Stamps v. Collagen Corp., 984 F.2d 1416 (5th Cir.) (plaintiff's claims for strict liability and negligence preempted), cert. denied, 114 S. Ct. 86 (1993);
>
> King v. Collagen Corp., 983 F.2d 1130 (1st Cir.) (plaintiff's claims for strict liability, negligence, breach of express and implied warranty, and fraud preempted), cert. denied, 114 S. Ct. 84 (1993); and
>
> Slater v. Optical Radiation Corp., 961 F.2d 1330 (7th Cir. 1992) (plaintiff's claims for strict liability, negligence and breach of warranty preempted), cert. denied, 113 S. Ct. 327 (1992).

These rulings establish that the MDA can preempt all causes of action, including claims for fraud.

The federal courts have even extended the scope of MDA preemption to devices undergoing "Section 510(k)" approval. The MDA contains a "grandfather" provision stating that any device on the market in 1976 need not undergo the premarket approval process unless the FDA so orders. A manufacturer of a pre-1976 device (or any device "substantially equivalent" to a pre-1976 device) need only file a form notifying the FDA that the device will be

marketed. Despite this general lack of FDA oversight for such devices, one federal appellate court has ruled that the MDA preempts state law tort claims based upon alleged injuries caused by these devices. See Mendes, 18 F.3d at 18-19.[20]

V. PREEMPTION FOR FDA-APPROVED PRESCRIPTION DRUGS

Unlike the MDA, the provisions of the Federal Food, Drug and Cosmetic Act ("FDCA") applying to prescription drugs do not contain any express provision preempting state law. For this reason, the vast majority of courts to consider the issue have held that the FDCA does not preempt state law claims against the manufacturers of prescription drugs. See, e.g., Graham v. Wyeth Laboratories, 906 F.2d 1399 (10th Cir.) (holding that state failure to warn claims are not preempted under FDCA), cert. denied, 498 U.S. 981 (1990); Abbot v. American Cyanamid Co., 844 F.2d 1108 (4th Cir.) (same), cert. denied, 488 U.S. 908 (1988). Moreover, the Eighth Circuit has indicated in dicta that it would not apply preemption in the prescription drug context. See Hill v. Searle Laboratories, 884 F.2d 1064, 1068 (8th Cir. 1989) ("FDA approval is not a shield to liability. FDA regulations are generally minimal standards of conduct unless Congress intended to preempt common law, which Congress has not done in this area") (citations omitted).

Nonetheless, one Federal appellate court has held that the FDCA accords limited preemption in cases involving prescription

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drugs. In Hurley v. Lederle Laboratories, 863 F.2d 1173, 1179-80 (5th Cir. 1988), the Fifth Circuit held that because a drug manufacturer may provide with its products only the precise warnings approved by the FDA, any claims for failure to warn under state tort law are preempted. The court reasoned that "[i]t would be patently inconsistent for a state then to hold the manufacturer liable for including that precise warning when the manufacturer would otherwise be liable for not including it." Id. at 1179. Thus, in an appropriate jurisdiction Hurley provides at least some authority to suggest that preemption may be raised as a defense in prescription drug cases.***

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***. The proposed Restatement (Third) also has a provision dealing with the efforts of compliance and non-compliance with governmental product safety regulation. A copy of the text of Section 4E is attached as Appendix D.

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ENDNOTES

1. The liability standards under subsection 4(b) are the same for prescription drugs and medical devices.

2. See Escola v. Coca Cola Bottling Co., 150 P.2d 436, 440-41 (Cal. 1944) (Traynor, J., concurring) (stating, in a manufacturing defect case, that manufacturers can anticipate and insure against certain hazards.)

3. In addition, the "foreseeability" aspect is consistent with the existing Restatement. See Restatement (Second) of Torts, § 402A cmt. j (1965) (seller is required to warn against certain risks 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.").

4. Several other courts have rejected the argument that a drug manufacturer should be held strictly liable for failure to warn of risks inherent in a drug even though it neither knew, nor could have known, by the application of scientific knowledge available at the time of distribution, that the drug could produce the side effects suffered. For a list of cases so holding, see Brown v. Superior Court, 751 P.2d 470, 480 (Cal. 1988).

5. It has been said that holding a manufacturer liable for failure to warn of a danger about which it would be impossible to know would be akin to making the manufacturer a "virtual insurer" of the product. See Woodill v. Parke Davis & Co., 402 N.E.2d 194, 199 (Ill. 1980).

6. The reporters also cite Reyes v. Wyeth Labs., 498 F.2d 1264 (5th Cir.), cert. denied, 419 U.S. 1096 (1974), and Davis v. Wyeth Laboratories, 399 F.2d 121 (9th Cir. 1968).

7. Givens v. Lederle, 556 F.2d at 1343.

8. Id. at 1345.

9. In Reyes, Anita Reyes was fed two drops of Sabin oral polio vaccine at a Texas health clinic. On the warning issue, the Fifth Circuit first noted that the learned intermediary doctrine applies to prescription drugs. The court then conceded that the Sabin vaccine was licensed as a prescription

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drug. The conclusion seemed obvious. However, the court ignored the doctrine and required a direct warning based upon its determination that the vaccine -- while licensed for sale as a prescription drug --- was not administered as a prescription drug. Reyes, 498 F.2d at 1276.

10. See Brazzell, 788 F.2d at 1358, vacated on other grounds at 788 F.2d 1361 (8th Cir. 1986) (holding, under Iowa law, that doctor's actual intervention was not enough to dispel the manufacturer's duty to warn the ultimate consumer in a mass immunization setting where the doctor acted more like a distributor than a learned intermediary).

11. The proposed advertising exception to the learned intermediary doctrine was apparently stricken due to an absence of supporting case law.

12. The Michigan Supreme Court noted that a direct warning "could potentially cause undue interference with the doctor-patient relationship, cause patient confusion, and result in a hampering of the healing process." In re Certified Questions, 358 N.W.2d 873, 883 (Mich. 1984), quoted in Restatement (Third) of Torts: Products Liability § 103 cmt. b (reporters' notes) (Council Draft No. 1, Sept. 17, 1993). Moreover, direct warnings may be of little value. The complexities of medicine would make it virtually impossible to devise a warning that a layperson would not find cumbersome and painfully complicated. This problem would be exacerbated by the fact that, with direct warnings that would be directed to unidentified and unidentifiable patients, manufacturers would be forced to warn of all risks -- not just those to which that particular patient is susceptible.

13. The version of the Restatement released in April 1993 proposed a design defect standard that contemplated alternatives. It provided that product defectiveness would be established if the plaintiff proved that "the foreseeable risks of harm presented by the drug or medical device could have been reduced by the adoption of a reasonable, safer design that would have provided the same, or greater, therapeutic benefits at substantially reduced risks." Restatement (Third) of Torts: Products Liability § 103(1)(c) (Preliminary Draft No. 1, April 20, 1993).

14. 21 C.F.R. § 312.23(a)(8)

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15. 21 U.S.C. § 355(b); 21 C.F.R. Pt. 314.

16. See, e.g., 21 U.S.C. § 360.

17. See James A. Henderson, Jr., and Aaron D. Twerski, A Proposed Revision of Section 402A of the Restatement (Second) of Torts, 77 Cornell L. Rev. 1512, 1537 (1992).

18. In part because prescription drugs are discovered rather than designed, very few pharmaceutical lawsuits are classic design defect cases. With prescription drugs, there are oftentimes no optional features to add or set aside. The ingredient that makes the drug efficacious might be the same ingredient alleged to have caused the harm. Thus, an alternative design may be an impossibility. In those instances where a prescription drug can be redesigned, even the most minor formulation change can mean having to seek FDA approval for a new NDA or an NDA supplement. The process can be expensive and time-consuming. In some instances, the best way to "fix" an allegedly defective drug or device is to change the warning.

19. See James A. Henderson, Jr. & Aaron D. Twerski, A Proposed Revision of Section 402A of the Restatement (Second) of Torts, 77 Cornell L. Rev. 1512, 1545 (1992). ("[I]t would be unlikely indeed for a drug design declared unreasonably dangerous under a risk-utility standard not also to support a cause of action for failure to warn.")

20. Other courts are split on this issue. See English v. Mentor Corp., Civ. No. 93-2725 (E.D. Pa. June 13, 1994) (applying preemption to Section 510(k) device); but see Oja v. Howmedica, Inc., 848 F. Supp. 905 (D. Colo. 1994) (declining to follow Mendes); Larsen v. Pacesetter Systems, 837 P.2d 1273 (Hawaii 1992) (declining to apply preemption in the case of a Section 510(k) device).

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§ 4. Liability of Sellers for Harm Caused by Prescription Drugs and Medical Devices

(a) A manufacturer of a prescription drug or medical device who sells a defective product is subject to liability for harm to persons caused by the product defect. A prescription drug or medical device is one that may be sold legally only pursuant to a health care provider's prescription.

(b) For purposes of liability under Subsection (a), product defectiveness is established only if at the time of sale by the manufacturer:

(1) The drug or medical device contained a manufacturing defect as defined in § 2(a); or

(2) Reasonable instructions or warnings regarding foreseeable risks of harm posed by the drug or medical device were not provided to prescribing and other health care providers who were in a position to reduce the risks of harm in accordance with the instructions or warnings; or

(3) Reasonable instructions or warnings regarding foreseeable risks of harm posed by the drug or medical device were not provided directly to the patient when the manufacturer knew or had reason to know that no medical provider would be in the position described in Subsection (b)(2); or

(4) The foreseeable risks of harm posed by the drug or medical device were sufficiently great in relation to its therapeutic benefits as to deter a reasonable medical provider, possessing knowledge of such foreseeable risks and therapeutic benefits, from prescribing the drug or medical device for any class of patients.

(c) A retail seller of a prescription drug or medical device is subject to liability only if, at the time of sale:

(1) The drug or medical device contained a manufacturing defect as defined in § 2(a); or

(2) The retail seller failed to exercise reasonable care in preparing, packaging, labelling, instructing, or warning about the drug or medical device.

§4A. Liability of Sellers for Harm Caused by Adverse Allergic Reactions to Nonprescription Products 1 2

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One engaged in the business of selling nonprescription products is subject to liability for harm resulting from an adverse allergic reaction to such product when the product is defective at time of sale either because: 4 5 6 7

(a) the ingredient that causes the allergic reaction constitutes a manufacturing defect as defined in §2(a); or 8 9

(b) lack of adequate instructions or warnings renders the product not reasonably safe. Under this Section a product is defective because of inadequate instructions or warnings when: 10 11 12

(1) the ingredient that causes the allergic reaction is one to which a substantial number of persons are allergic; and 13 14

(2) the ingredient that causes the allergic reaction is one whose danger is not known to the general public; and 15 16

(3) the foreseeable risks of harm posed by the ingredient could have been reduced by the provision of reasonable instructions or warnings by the seller or a predecessor in the commercial chain of distribution. 17 18 19 20

§4B Liability of Sellers for Harm Caused by Human Blood Products or Human Tissue 1 2

3

A seller of human blood products or human tissue is subject to liability for harm to persons caused by product defects if, at the time of sale, the seller failed to exercise reasonable care in obtaining, processing or selling the blood product or tissue. 4 5 6 7

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§4E. Effects of Compliance and Noncompliance with Governmental Product Safety Regulations 1 2

In connection with a product seller's liability for defective design or inadequate instructions or warnings: 3 4

(a) the product's noncompliance at the time of sale with a relevant governmental product safety regulation raises an irrebuttable presumption of defectiveness with respect to the risks sought to be 5 6 7
reduced by the regulation; and 8

(b) the product's compliance at the time of sale with a relevant governmental product safety regulation is admissible as evidence of nondefectiveness with respect to the risks sought to be reduced by the regulation, but does not preclude a finding of product defect. 9 10 11 12

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CRASHWORTHINESS

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I. GENERAL PRINCIPLES AND ISSUES

A. Definition and Scope

1. "Crashworthiness" has been defined as "the relative ability of an automobile to protect its passengers during the second collision." Note, *Liability for Negligent Automobile Design*, 52 Iowa L. Rev. 953, 958 (1967). The "second collision" refers to contact between a vehicle occupant and the interior of the vehicle, after such vehicle has struck or been struck by something.

2. It has been said that automobile crashworthiness cases are at the forefront of product liability law. The legal principles are sophisticated; often misunderstood or misapplied by lawyers and courts alike. "Unlike orthodox product liability or negligence litigation," the crashworthiness case requires "a highly refined and almost invariably difficult presentation of proof. . . ." *Huddel v. Levin*, 537 F.2d 726, 737 (3d. Cir. 1976); see *Wittner, Crashworthiness Litigation: Principles and Proofs*, DRI Vol. 1992, No. 5.

3. The landmark case and foundation of crashworthiness law is *Larsen v. General Motors*, 391 F.2d 495 (8th Cir. 1968), which held that the manufacturer is under a duty to "use reasonable care in the design of its vehicle to avoid subjecting the user to an unreasonable risk of injury in the event of a collision." *Id.* at 502. This requires the manufacturer to "eliminate any unreasonable risk of foreseeable injury," and take

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"reasonable steps in design . . to minimize the injury producing effects of impacts." *Id.* at 503.

> Any design defect not causing the accident would not subject the manufacturer to liability for the entire damage, but the manufacturer should be liable for that portion of the damage or injury caused by the defective design *over and above the damage or injury that probably would have occurred* as a result of the impact or collision absent the defective design. *Id.*

4. In *Reed v. Chrysler Corp.*, 494 N.W.2d 224 (Iowa 1992), the Iowa Supreme Court acknowledged that the crashworthiness doctrine imposes liability on manufacturers for design defects which only enhance injuries rather than cause them. The doctrine is applicable when a design defect, not causally connected to the accident, results in injuries greater than those which would have resulted from the accident had there been no design defect. In other words, enhancement of injuries is the gist of crashworthiness cases, not the precipitating cause of the accident.

5. No doubt after *Reed v. Chrysler Corp.*, 494 N.W 2d 224 (Iowa 1992), an automobile manufacturer has a legal obligation in Iowa to design and produce a reasonably crashworthy vehicle. Some would argue that Iowa has enhanced the manufacturer's duty over and above what other states require. The scope of this presentation is to examine the

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principles of crashworthiness generally and compare those to what the Iowa Supreme Court has enunciated in *Reed*

II. ESSENTIAL ELEMENTS OF PROOF

A. To Prevail on a Claim of Crashworthiness, a Plaintiff at the Threshold Must Establish the Existence of a Design Defect.

1. This showing must include proof that the product was unreasonably dangerous. *Reed*, 494 N.W.2d at 226. See also, *Wernimont v. Int'l Harvester Corp.*, 309 N.W.2d 137, 142 (Iowa App. 1981). The evidence to establish design defect which is unreasonably dangerous is no different in this situation than it is in other product liability cases. It is, however, emphasized because unless you can establish the existence of a design defect, you do not proceed further under the crashworthiness doctrine.

2. To prevail, after making the threshold showing, a plaintiff must establish the following additional elements:

   (1) An alternative safer design, practicable under the circumstances;

   (2) The injuries which would have resulted had the alternative safer design been used; and

   (3) The extent of enhanced injuries attributable to the design defect.

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B. Safer Alternative Design.

1. A manufacturer cannot design against all potential dangers of collision and is only required to take reasonable steps, within the limitations of cost, technology and marketability, to design and produce a product that will minimize the unavoidable dangers *Wernimont*, 309 N.W.2d at 142. Three cases cited by *Wernimont* are significant and noteworthy in this area: *Huddell v. Levin*, 537 F.2d 726, 737-38 (3d. Cir. 1976); *Stonehocker v. General Motors Corp.*, 587 F.2d 151 (4th Cir. 1978); and *Wilson v. Piper Aircraft Corp.*, 282 Or. 61, 577 P.2d 1322 (1978).

2. Due to the technical nature of the issues in crashworthiness cases, the trial court is to determine, and to weigh in the balance, whether the proposed alternative design has been shown to be practicable The trial court should not permit an allegation of design defect to go to the jury unless there is sufficient evidence upon which to make this determination. "If liability for alleged design defects is to 'stop somewhere short of the freakish and the fantastic,' plaintiffs' prima facie case of a defect must show more than the technical possibility of a safer design." *Wilson*, 577 P.2d at 1326. See also. *Miller v. Todd*, 551 N.E.2d 1139, 1143 (Ind. 1990) which states that a plaintiff "should be able to demonstrate that a feasible, safer, more practicable product design would have afforded better protection".

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3. In evaluating the alternative, safer design, courts have required evidence with respect to the effect plaintiffs' proposed design would have upon the product's cost, economy of operation, maintenance requirements, overall performance, and safety in other respects to establish this element. *Wilson*, 577 P.2d at 1327-28. "It is not proper to submit such allegations to the jury unless the court is satisfied that there is evidence from which the jury could find the suggested alternatives are not only technically feasible but also practicable in terms of cost and the overall design and operation of the product. It is part of the required proof that a design feature is a 'defect' to present such evidence." *Wilson*, 577 P.2d at 1327.

4. If the alternative proposal would impair the product's utility or impart a new danger to users, the required proof of defective design has not been met. See, e.g., *Dreisonstok v. Volkswagenwerk A.G.*, 489 F.2d 1066, 1075 (4th. Cir. 1974).

5. Where plaintiff's claim is based on a manufacturer's failure to install an added safety device, liability does not necessarily attach simply because a feasible alternative would have rendered the product safer. See *Curtis v. General Motors*, 659 F.2d 808 (10th Cir. 1981). Sometimes, due to the special purpose of a vehicle, a less safe alternative provides the buyer with the option he prefers. For example, a convertible or fiberglass top. Where the buyer makes a

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deliberate choice to purchase a vehicle which, as a reasonable consumer, he should expect it not to be as safe as others on the market, the manufacturer will not be found liable. *Id.*, 659 F.2d at 811.

C. The Role of Expert Testimony.

1. The Iowa Court of Appeals in *Wernimont* indicated that expert testimony is required to demonstrate the existence and feasibility of an alternative safer design because such issues cannot be weighed properly solely on the basis of inference and knowledge. *Wernimont*, 309 N.W.2d at 141.

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2. In *Reed*, plaintiff offered two expert witnesses on the issues of crashworthiness. Neither expert addressed whether a metal top, as opposed to a fiberglass top, was practicable and feasible in terms of cost, economy of operation, maintenance requirements and other safety factors. One of the experts did not even address whether a metal hardtop was crashworthy or constituted a safer alternative design altogether. The other expert explained that, while he did not believe a fiberglass top was crashworthy, he had never tested a metal hardtop and was not in a position to say that it was an appropriate, safer alternative design for this particular vehicle, or that a metal top is crashworthy. Even after plaintiff introduced a 1967 test film showing a different model vehicle with a metal hardtop, plaintiff's expert still

could not say it was a safer alternative design: "I haven't looked at it [the metal hardtop] from the standpoint of is it sufficient I don't know that it is."

3 The Iowa Supreme Court said in *Reed* expert testimony was not necessary. The court pointed to this model Jeep as having the only plastic top sold in North America and found that, therefore, the state of the art was a metal top. The court also declared that the practicable and feasible differences between the fiberglass top and a metal top were not beyond the understanding of an average juror 494 N.W.2d at 228 Apparently, an expert's reluctance to scientifically endorse plaintiff's proposed safer alternative design is not necessarily fatal in Iowa.

4. While courts have almost uniformly required expert testimony to establish elements of crashworthiness, *Reed* suggests to the contrary. But see *Dillon v. Nissan Motor Co.*, 986 F.2d 263 (8th Cir. 1993)

D. <u>What Injuries Would Have Resulted With the Alternative Safer Design</u>

1. It is well recognized the "the burden is on the plaintiff--either to establish that he would have suffered no injury or the extent of the injury he would have suffered, had the vehicle been properly designed." *Stonehocker v. General Motors Corp.*, 587 F.2d 151. 158 (4th Cir 1978) (cited with approval in *Wernimont*, 309 N.W.2d at 141). Without proof to establish what injuries would have resulted from a non-defective

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product, the plaintiff cannot establish what injuries resulted from the alleged defect in the product. *Huddell v. Levin*, 537 F.2d 726, 738 (3rd Cir. 1976). See also *Craigie v. General Motors Corp.*, 740 F.Supp. 353, 358 (E.D. Pa. 1990).

2. In *Huddell*, the alleged defect was a head restraint which resulted in fatal skull fractures for the driver. The court held plaintiff failed to prove this second element:

> "[W]ithout proof to establish what injuries would have resulted from a non-defective head restraint, the plaintiff could not and did not establish what injuries resulted from the alleged defect in the head restraint. Without such proof, the jury could not have properly assessed responsibility . . . ."

537 F.2d at 758.

3. In *Caiazzo v. Volkswagenwerk A.G.*, 647 F.2d 241 (2nd Cir. 1981), plaintiffs claimed that a defective door latch caused the doors to open, ejecting plaintiffs during a rollover in which they suffered multiple, severe injuries. Plaintiffs' experts testified that various of the injuries could have been sustained either from the alleged design defects or from the primary collision. They presented no evidence as to what injuries would have resulted from the impact had there been no design defect:

> "We realize that a plaintiff's burden of offering evidence of what

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> injuries would have resulted absent the alleged defect, will be heavy in some instances and perhaps impossible in others. Where it is impossible, however, the plaintiff has merely failed to establish his prima facie case, i.e., that it is more probable than not that the alleged defect aggravated or enhanced the injuries resulting from the initial collision. Moreover, in those instances in which the plaintiff cannot offer any evidence as to what would have occurred but for the alleged defect, plaintiff has not established the fact of enhancement at all."

Caiazzo, 647 F.2d at 250-51.

4. In *Reed*, plaintiff did not offer any evidence as to what injuries would have resulted from the collision had there been no design defect. Nonetheless, the Iowa Supreme Court, contrary to other cases, finds that this is not fatal. Iowa adopts a liberal approach to damages not requiring any precision. If a plaintiff can show that some of his injuries would not have occurred with the safer alternative design, then he need not prove the extent of his injuries. Query: Under *Reed's* analysis, can a plaintiff recover for a badly injured right arm, even though he would have died from, or sustained severe, head injuries as a result of the safer alternative design?

E. Extent of Enhanced Injuries Attributable to the Design.

1. In order to establish this element, "it is absolutely necessary that the jury be presented with some evidence as to the extent of injuries, if any, which would have been suffered. . . had the plaintiff's hypothetical design been installed. . . ." *Huddell*, 537 F.2d at 737-38. Without such proof, a jury cannot properly assess responsibility against the manufacturer for plaintiff's enhanced injuries. It is insufficient for the plaintiff merely to offer proof that his injuries were enhanced. Plaintiff "must offer some method of establishing the extent of enhanced injuries attributable to the defective design." *Id.* *Accord, Cleveland v. Piper Aircraft Corp.*, 890 F.2d 1540, 1546 (10th Cir. 1989); *Caiazzo*, 647 F.2d at 250; *Craigie*, 740 F Supp. at 358; *Burgos v. Lutz*, 512 N.Y.S.2d 424, 426 (1987).

2. A plaintiff seeking to establish the extent of enhanced injury attributable to an allegedly defective design must present expert testimony in support of his claim. *Curtis v. General Motors Corp.*, 649 F.2d 808, 813 (10th Cir. 1981); *Caiazzo*, 647 F.2d at 250

3. The Iowa Supreme Court requires little to establish this element. If the plaintiff claims that his injury would not have occurred with the alternative design, he has proven the extent of enhanced injuries. *Reed*, 494 N.W.2d at 228

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4. There are two approaches which have been taken in determining the plaintiff's burden of proof in establishing enhanced injuries. The **first approach** adopted by *Huddell* and *Wernimont* requires the plaintiff to show the specific injuries attributable to the defective design of the vehicle and present an alternative design which would have prevented those injuries. Under this theory, the plaintiff must show that the defective design was the sole cause of the plaintiff's enhanced injuries. The **second approach** allows the plaintiff to recover where there is an "indivisible" injury, if it is shown that the design defect was a substantial factor in producing damages over and above those which were probably caused as a result of the original impact or collision. See, *Mitchell v. Volkswagenwerk A.G.*, 669 F.2d 1199, 1206 (8th Cir. 1982). Under this approach, the plaintiff is not required to prove what injuries he probably would have suffered in the collision absent the defect. Without proof of the injuries plaintiff would have suffered, however, there is no way to determine if an enhanced injury occurred. The second approach has recently gained momentum in favor with other courts. See, *Kudlacek v. Fiat S.p.A.*, 509 N.W.2d 603, 611 (Neb. 1994). Given the Iowa Supreme Court's liberal approach to the second and third elements, defense counsel must be concerned that the Supreme Court is moving towards the *Mitchell* approach.

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III. EVIDENTIARY ISSUES

A. Expert Witnesses.

1. Accident reconstructionists
2. Mechanical engineers
3. Biomechanics.
4. Treating physicians.

B. The Use of Seat Belts.

1. In *Reed*, Chrysler sought to introduce the availability of seat belts to permit the jury to consider evidence concerning the seat belt restraint system, along with all other relevant factors, in determining whether the vehicle was defective in design. There was no attempt by Chrysler to use the evidence as an element of fault against the plaintiff. The Iowa Supreme Court held such evidence was inadmissible because of the flat prohibition of seat belt evidence reflected in Iowa Code § 321.445

2. "[T]he presence of a seat belt system is at least *relevant* to the manufacturer's effort to show that he used due care (or, in the language of strict liability, did not design the care defectively) with regard to the danger of an occupant's being ejected in the event of an accident" *Barron v. Ford Motor Company of Canada Ltd.*, 965 F.2d 195, 200 (7th Cir.), *cert. denied*, 113 S. Ct. 605 (1992). In *Lowe v. Estate Motors Ltd.*, 410 N.W.2d 706, 710 (Mich. 1987), where the

identical seat belt statute was involved, the court recognized that, "an automobile's seat belt restraint system is directly relevant to that vehicle's safety design." See also, *Barnes v. Tools & Machinery Builders, Inc.*, 715 S.W.2d 518, 522-23 (Mo. 1986); *LaHue v. General Motors Corp.*, 716 F.Supp. 407 (W.D. Mo. 1989); *Jordan v. General Motors Corp.*, 624 F.Supp. 72, 75 (E.D. La. 1985); *Wilson v. Volkswagen of America, Inc.*, 445 F.Supp. 1368, 1371 (E.D. Va. 1978); *Siren v. Behan*, 539 A.2d 1244, 1248 (N.J. App. 1988).

3. The Iowa Supreme Court may reconsider this issue, particularly in light of the amended Iowa Code § 321.445. Compare also *McDonald v. General Motors Corp.*, 784 F.Supp. 486 (N.D. Tenn. 1992), where the court allowed the manufacturer to introduce evidence of non-use in regard to the issue of causation.

C. Comparative Fault

1. Plaintiff's comparative fault should not be assessed in a crashworthiness case unless it is shown to be a proximate cause of the enhanced injury. *Reed*, 494 N.W.2d at 230. Any negligence by the driver or the plaintiff in connection with the original crash cannot be used by the manufacturer in defending against plaintiff's enhancement claim.

2. The result of this decision encourages counsel to look for ways plaintiff or the driver directly contributed to the defect or enhancement of the

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injuries What if plaintiff is the driver and bears 100% responsibility for causing, for example, a single vehicle accident? *Reed* implies that the plaintiff/driver may not be at fault if plaintiff can establish a product defect.

3. In light of this decision, defense counsel defending a driver clearly at fault may need to consider whether a defect in the vehicle enhanced plaintiff's injuries.

4. Does *Reed* set precedence for the court to look for ways to excuse or ignore plaintiff's fault in other cases?

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PREVENTING NEGLIGENT PLAINTIFFS FROM HAVING "A SECOND BITE AT THE APPLE:" DEFENDING AGAINST ENHANCED INJURY CLAIMS IN EMERGENCY STOP DEVICE CASES

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INTRODUCTION

A recent development in products liability law is the use of the "crashworthiness" or "enhanced injury" theory of liability in cases that involve neither an automobile accident nor collision. For several years courts have applied the "crashworthiness" theory to products other than automobiles. *See, e.g., Meil v. Piper Aircraft Corp.*, 658 F.2d 787 (10th Cir. 1981) (airplanes); *Herbert v. Vice*, 413 So.2d 342 (La. Ct. App. 1982) (boats); *Owens v. Allis-Chalmers Corp.*, 326 N.W.2d 372 (1982) (forklifts); *Butler v. Pittway Corp.*, 770 F.2d 7 (2d Cir. 1985) (smoke detectors). When used outside the automotive or crashworthiness context, however, this doctrine is known exclusively as the "enhanced injury" theory.

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Recently this theory of recovery been applied in situations wherein a non-transportation related product is allegedly defective as a result of the failure to incorporate a "remote control" or so-called "emergency stop device" which would interrupt the power to a machine after an accident and injury have already occurred. *See Kutsugeras v. AVCO Corp.*, 973 F.2d 1341 (7th Cir. 1992)(cornpicker); *Hillrichs v. AVCO Corp.*, 478 N.W.2d 70 (Iowa 1991) (*Hillrichs I*), *appeal after remand*, 514 N.W.2d 94 (Iowa 1994) (*Hillrichs II*) (cornpicker); *Farrell v. Deere & Co.*, 443 N.W.2d 50 (Wis. App. 1989)(cornpicker); *see also Lenherr v. NRM Corp.*, 504 F. Supp. 165 (D. Kan. 1980) (tire building machine); *Bates v. John Deere Co.*, 195 Cal. Rptr. 637 (Cal. App. 1983) (cotton picker); *Tacke v. Vermeer Mfg. Co.*, 713 P.2d 527 (Mont. 1986) (hay baler).

An "enhanced injury" claim may permit recovery under circumstances wherein damages, due to the extent of the plaintiff's fault in causing the accident, would otherwise be precluded. If a claimant can prove the injury sustained was above and beyond that which would normally

be expected absent the claimed defect, recovery may be permitted, totally ignoring the fact (in some jurisdictions) that the plaintiff was initially either largely or totally responsible for the underlying accident. *See, e.g.*, *Andrews v. Harley Davidson, Inc.*, 796 P.2d 1092 (Nev. 1990) (defense verdict against an inebriated plaintiff was reversed and remanded for retrial because plaintiff's intoxication was irrelevant as to whether a design defect was the proximate cause of his injury; the court consciously disregarded the fact that, absent the plaintiff's intoxication, the underlying accident would not have transpired).

"Enhanced injury" claims present unique problems for a manufacturer defending a products liability case. Many jurisdictions utilize "modified," as opposed to "pure,"[3] comparative fault schemes whereby recovery is barred if the plaintiff bears or is assessed more than 50% of the fault for the subject accident. *See, e.g.*, *Iowa Code*, § 668 (1993); *Wis. Stat.*, § 895.045 (1991); *Mass. Gen. L.*, ch. 231, § 85 (1991). Even in light of such provisions (which often benefit manufacturing defendants), a plaintiff may, nevertheless, recover the full measure of damages for an enhanced injury, even if the plaintiff is found to be completely at fault for causing the initial accident sequence. *See, e.g.*, *Hillrichs v. AVCO Corp.*, 514 N.W.2d 94 (Iowa 1994) (*Hillrichs II*) (although jury found that farmer was 100% at fault for getting his hand caught in running cornpicker, which would normally bar any recovery under Iowa law,

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[3] Pursuant to a "pure" comparative fault or negligence system, each party is responsible for that portion of the fault that is assessed by the factfinder and any damages recoverable are reduced by the percentage of the plaintiff's fault. For example, if a claimant bears 80% of the responsibility for an accident, the plaintiff would be permitted to recover 20% of the total damages. Conversely, under a modified comparative fault scheme, a plaintiff's ability to recover is barred if his or her fault exceeds a predetermined threshold, typically 50%.

farmer was permitted to recover over $800,000 for a so-called "enhanced injury")[4] This development presents a strategic means for plaintiffs to recover potentially large verdicts from manufacturing defendants for accidents caused totally by the negligence of product users and consumers. For this reason alone, defending against an "enhanced injury" claim, allegedly resulting from the failure to equip a machine with an "emergency stop device," is potentially dangerous, fraught with traps for the unwary and worthy of closer analysis

"THE ORIGINS OF "ENHANCED INJURY."

The seminal decision discussing the "crashworthiness" liability theory, which has now become known more generically as "enhanced injury," was an automotive case. *Larsen v. General Motors Corp.*, 391 F.2d 495 (8th Cir. 1968) (applying Minnesota law). In *Larsen*, which involved a single-vehicle accident, the plaintiff claimed that the force of impact in an automobile collision caused a rearward thrust of the steering assembly into his head. Larsen did not assert that a defective design *caused the accident* -- only that the design *proximately caused injuries that he would not have otherwise sustained*, i.e. an "enhanced injury." *Id.* at 497.

As the crashworthiness theory developed, two discrete approaches emerged as to *which party* had the burden of proof (and thus the risk of non-persuasion) with respect to the existence of an "enhanced injury." These approaches are set forth in two leading cases which discuss this issue. *Mitchell v. Volkswagenwerk, AG*, 669 F.2d 1199 (8th Cir. 1982) (applying Minnesota law); *Huddell v. Levin*, 537 F.2d 726 (3rd Cir. 1976) (applying New Jersey law).

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[4] Iowa's modified comparative fault scheme bars recovery if the plaintiff's fault exceeds that attributable to all defendants (i.e., 50%). Iowa Code, § 668.3 (1993). This is typical under modified comparative fault regimes.

THE BURDEN OF PROOF: HUDDELL OR MITCHELL?

In *Huddell*, an automobile crashworthiness case involving the design of a headrest that allegedly exacerbated plaintiff's injuries, the court determined that *plaintiffs* must prove the existence of three elements to establish an enhanced injury claim: (1) an alternative safer design, practicable under the circumstances; (2) what injury would have occurred had the alternative safer design been used; and (3) the extent of injury attributable to the defective design. 537 F.2d at 737-38. Absent adequate proof of all the foregoing elements, plaintiff was not entitled to recover on a crashworthiness or enhanced injury theory.

In *Mitchell*, also an automobile accident case, the court found that, in order to escape liability for the entire harm caused by virtue of its role as a concurrent tortfeasor, the *defendant-manufacturer* must establish that the plaintiff's injury was divisible. 669 F.2d at 1208-09. This determination was premised upon common law joint and several liability principles, similar to the standard law-school example involving a person accidently shot by one of two hunters, but unable to determine which hunter fired the fateful bullet. *See Summers v. Tice,* 33 Cal.2d 80, 199 P.2d 1 (1948). Mitchell adopts the *Summers v. Tice* rule of joint and several liability among concurrent tortfeasors. Unless the manufacturer is able to demonstrate that the plaintiff's injury is divisible, it is responsible for the entire loss. In other words, when attempting to reduce liability by segregating the loss among tortfeasors, the defendant bears the burden of proof on enhancement. Failing to carry this burden, the defendant-manufacturer is responsible for all damages and injuries sustained in the accident.

Jurisdictions are split on whether the *Huddell* or *Mitchell* approach is appropriate. Thus far, the Iowa Supreme Court has chosen to follow the *Huddell* line of cases, as espoused in

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Wernimont and *Hillrichs I*, discussed *infra*. According to the American Law Institute (ALI), an organization that has recently considered this issue closely while formulating the new *Restatement (Third) of Torts: Products Liability, Mitchell* provides the majority standard. *See* Reporter's Note, Section 6, "Defect-related increases in harm," p. 126 (1994). This rule has, however, been subject to attack. *See* Frumer & Friedman, *Products Liability,* § 21.04[4], p. 21-47-8 (and footnote 85)(1990). This is a vital distinction. Pursuant to the *Mitchell* rule, to partially "extricate itself," the manufacturer must prove that a portion of plaintiff's injury was not attributable due to its design. Absent such proof, the manufacturer is liable for the entire injury. Under *Huddell*, *Wernimont*, and *Hillrichs I*, discussed *infra*, asserted here to be the more logical approach, the plaintiff must establish the requisite elements of an "enhanced injury" (in addition to, of course, the *prima facie* elements of a strict liability case). Otherwise, recovery for an alleged enhanced injury is precluded.

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"ENHANCED INJURY" AND THE "EMERGENCY STOP DEVICE:" FARRELL, KUTSUGERAS, AND HILLRICHS (I AND II).

Recently, plaintiffs have specifically utilized "enhanced injury" principles in product liability cases having absolutely no connection with a design which allegedly exacerbated a plaintiff's injury in an accident involving an automobile or other motorized conveyance. In particular, plaintiffs have employed the enhanced injury theory in cases wherein a so-called emergency stop or shut-off device would have allegedly reduced the injuries ultimately sustained. Decisions deserving meticulous analysis include *Farrell*, *Kutsugeras*, and *Hillrichs (I) and (II)*.

Each of the foregoing cases involved plaintiffs who became entangled in hazardous areas of agricultural machinery and suffered continued exposure to the mechanism over an extended

period of time. The thrust of plaintiff's *design defect claim* in each case was that there should have been a "remote control" or "safety shut-off device" in the area of the hazard, such that, at least theoretically, a person who became enmeshed in the running mechanism could activate or trigger the "device" to stop the machine and, allegedly, prevent further injury. This type of claim has been championed by one well-known plaintiff's expert, J. B. Sevart of Wichita, Kansas, for several years. Sevart was the primary liability expert for the plaintiffs in each of the foregoing cases. *See*, *e.g.*, J. B. Sevart, B. Klausmeyer, "Emergency Stop Devices for Agricultural Machinery," *Agricultural Engineering,* Sept. 1982.[5] This defect theory, however, is by no means limited to the agricultural setting or applicable only to farm equipment. The importance of this liability theory to products liability litigation as a whole is much broader. Clearly, there are innumerable other types of products in construction, industrial, mining and other contexts where similar claims could be advanced, enabling plaintiffs to avoid responsibility for causing the initial accident and permitting a substantial recovery.

In *Farrell*, the plaintiff, an experienced farmer, initially got his hand and arm entangled in the operating husking rollers of a John Deere cornpicker mounted to a tractor. Plaintiff could not recall if he disengaged the power take-off (PTO) mechanism that powered the unit prior to reaching inside the implement to unclog it. Once caught, Farrell was unable to extricate himself from the cornpicker. Moreover, while attempting to free his arm, his other arm and both legs became entrapped in the same mechanism. *Farrell*, 443 N.W.2d at 53. Farrell's injuries ultimately required amputation of both arms and legs. The injuries sustained by *Farrell*, both

[5] Note: The American Society of Agricultural Engineers ("ASAE") paper upon which this article is based was neither approved or endorsed by the ASAE nor peer-reviewed.

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initially and subsequently, were distinct and separate. Even so, the trial court permitted plaintiff's expert, Mr. Sevart, a mechanical engineer with no medical education, training, or experience, to testify that "80%" of plaintiff's injuries were caused by the lack of an accessible shut-off device. *Id.* at 59. [This testimony was permitted essentially without meaningful objection by the defense. It is doubtful that this testimony would be permitted in the post-*Daubert* era in the face of a timely, specific objection.] Based on the foregoing facts, the Wisconsin Court of Appeals affirmed a plaintiff's verdict, placing its imprimatur on a "two-tier" fault allocation approach, one allocation for the fault which resulted in Farrell's initial injuries, and a second fault allocation limited solely to the subsequent injuries, the "enhanced injuries."

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Although an enhanced injury frequently will not occur absent the plaintiff's or a third party's initial fault, this "two-tier" fault allocation approach requires that the factfinder completely ignore the initial fault which caused the underlying accident, even when significant or adequate to wholly bar recovery, thereby allowing plaintiffs to recover the full extent of an enhanced injury. This rather liberal view toward compensating injured claimants is by no means limited to injuries caused by agricultural machinery. In *Farrell*, despite Wisconsin's modified comparative fault scheme which completely bars recovery if a plaintiff's fault exceeds 50%, the plaintiff was allowed to recover even though his fault for the initial injury was assessed at 70%. 443 N.W.2d at 50. According to the court, the 70% fault finding merely precluded recovery for the initial or "non-enhanced" injuries, presumably the injury to the initial extremity that became ensnarled in the cornpicker.

In 1991, the Iowa Supreme Court decided *Hillrichs v. AVCO Corp.*, 478 N.W.2d 70 (Iowa 1991)(*Hillrichs I*), approving the "enhanced injury" theory in Iowa. *See also Wernimont*

v. International Harvester, Inc., 309 N.W.2d 137 (Iowa Ct. App. 1981); *Passwaters v. General Motors Corp.*, 454 F.2d 1270 (8th Cir. 1972)(design of "Ben Hur" type wheel cover enhanced injury of motorcyclist who collided with vehicle). The decision in *Hillrichs I* was premised largely upon *Farrell*. Both cases involved injuries allegedly occurring over a prolonged period of time as a result of entanglement in the mechanism of an agricultural harvester. In *Hillrichs I*, however, only a single extremity was caught: the farmer's right hand. Nevertheless, plaintiff asserted that the resulting injury (which resulted in surgical amputation of four fingers) was "enhanced" during the accident sequence. Although there were no eyewitnesses, Hillrichs claimed he was caught in the running cornpicker for approximately 30 minutes, until his helper returned to the field. Based upon the trial court's failure to submit enhanced injury to the jury in a two-tier fault allocation, similar to that utilized in *Farrell*, a new trial was ordered.

An important aspect of *Hillrichs I* was the jury's finding, at the initial trial (which was affirmed on appeal), that the farmer was 100% at fault for causing the accident which led to his injuries. *Id.* at 72. As previously mentioned, Iowa's modified comparative fault system wholly bars recovery if the plaintiff's fault exceeds 50%. Notwithstanding Iowa law, Kenneth Hillrichs, was *not* denied recovery, even though his fault was the *sole* cause of the accident. Instead, Hillrichs was merely denied recovery for a portion of his injuries, those injuries resulting from his initial contact with the machine.

A second, and perhaps more important, aspect of *Hillrichs I* was the court's determination that the farmer's fault in initially causing the accident (*i.e.* intentionally reaching almost 3 1/2 feet into an operating husking bed) was also a proximate cause of his enhanced injury. The Iowa Supreme Court stated as follows:

> Although plaintiff suggests that any percentage of fault that might be assigned to him with respect to the initial entanglement in the machinery may not be assessed to him on the trial of his enhanced injury claim, we disagree with that contention. The fault of the plaintiff, if any, in becoming entangled in the machinery would be a proximate cause of the enhanced injury as well as the initial injury. On retrial of the negligence claim, the jury should be so instructed.

Hillrichs I, 478 N.W.2d at 76. Although this determination was a victory for the defense, it was not a fait accompli. Only thirteen months later, the Iowa Supreme Court reversed its position on this causation issue, finding that a plaintiff's fault in causing the initial accident would not be considered when allocating fault for enhanced injuries, unless the manufacturer specifically demonstrates a connection between the initial fault and injury enhancement. *Reed v. Chrysler Corp.*, 494 N.W.2d 224 (Iowa 1992) (evidence that vehicle driver and passenger, involved in single-car rollover accident, were intoxicated was inadmissible to show comparative negligence in passenger's crashworthiness action against manufacturer, absent showing of how passenger's injuries were enhanced by driver's or passenger's intoxication). [Note: this position, that a plaintiff's fault is not to be considered on the "enhanced injury" portion of the claim, is contrary to the position taken by the ALI in the *Restatement (Third) of Torts: Products Liability*, Section 6, Comment f, Tentative Draft No. 1, discussed *infra*.]

In 1992, the United States Court of Appeals for the Seventh Circuit Court addressed this issue. *Kutsugeras v. AVCO Corp.*, 973 F.2d 1341 (7th Cir. 1992). In *Kutsugeras*, similar to both *Farrell* and *Hillrichs I*, a farmer brought suit for injuries sustained in a cornpicker accident. This accident, however, involved the cornhead mechanism at the front of the machine where the crop enters to be processed. After a plaintiff's verdict, the defendant-manufacturer appealed. The appellate court held that the trial court, which sent the jury a two-tier special verdict form

separating the cause of action into initial contact and enhancement phases, correctly bifurcated the damage issue. The trial court's finding that the manufacturer negligently failed to provide an "emergency stop device" on the cornpicker was found to be supported by sufficient evidence and, as a result, affirmed.

The fact pattern presented in both *Farrell* and *Kutsugeras* (*i.e.* involvement of multiple extremities, occurring at different times in the same accident sequence) is quite unusual. In contrast, both *Wernimont* and *Passwaters* consitute garden-variety, automotive crashworthiness cases in the traditional sense. As a result of the separate and distinct involvements with the machine, however, in both *Farrell* and *Kutsugeras*, the courts generally had no difficulty finding that the plaintiff's injuries were "divisible." In these unusual circumstances, a portion of the injuries were objectively identifiable as occurring during the initial contact, and other, separate and distinct injuries occurred subsequent to that time. These rather peculiar facts also render both *Farrell* and *Kutsugeras* distinguishable from *Hillrichs I,* and should limit their application in future cases, especially where the injuries at issue occurred at one time, or are not easily divisible or segregated into their "initial" and "subsequent" phases. Conversely, "indivisible injuries" would include death, paraplegia, paralysis, a broken leg or any single wound, and presumably any other types of injuries that are incapable of any logical, reasonable or practical division. *See* 2A Frumer & Friedman, *Products Liability,* Sec. 21.04[4], p. 21-49 (1990).

One of the most recent cases applying the "enhanced injury" doctrine is *Hillrichs v. AVCO Corp.*, 514 N.W.2d 94 (Iowa 1994)(*Hillrichs II*). *Hillrichs II* was the appeal after retrial of the enhanced injury claim alleged in *Hillrichs I.* Hillrichs had initially brought negligence, strict liability and warranty claims against AVCO, but the Iowa Supreme Court in *Hillrichs I*

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remanded only the negligence claim for enhanced injury for retrial, stating as follows:

> Although the issue is close, we conclude that plaintiff's enhanced injury claim should have been submitted to the jury in the present case. We believe, however, that application of the *Wernimont* standards [the elements of crashworthiness doctrine in Iowa] to the present fact pattern will make the strict liability claim depend on virtually the same elements of proof as are required to establish the negligence claim. [footnote omitted]. Consequently, we hold that only the negligence claim should be retried and only with respect to Avco's liability, if any, for the enhanced injuries [footnote omitted].

478 N.W.2d at 75-6 (Iowa 1991).

After a second trial, premised on negligence and for "enhanced injury" damages only, the jury found the manufacturer 80% at fault, awarding Hillrichs $919,541 in compensatory damages and $1 million in punitive damages. *Hillrichs II*, 514 N.W.2d at 97. The trial court set aside the punitive damages award on a defense motion for JNOV and reduced the final judgment to $869,541 to reflect Hillrichs' fault. Both parties appealed.

In *Hillrichs II*, the Iowa Supreme Court affirmed the submission of "enhanced injury," the compensatory damages award and the trial court's JNOV on punitive damages, specifically finding that a punitive award "is inappropriate when room exists for reasonable disagreement over the relative risks and utilities of the conduct and device at issue." *Hillrichs II*, 514 N.W.2d at 100. Perhaps realizing that it was a difficult task to explain how a manufacturer could be found *negligent, i.e. failed to have exercised ordinary or reasonable care,* for not making the design choice to include a so-called "emergency stop device," while the same court in the same case based on the same facts affirmatively found, as a matter of law, that "room exists for reasonable disagreement over the relative risks and utilities of the conduct and device at issue," the court noted that the punitive damages standard for liability was different than that for

compensatory damages.

Although the accident in *Hillrichs*, similar to *Farrell* and *Kutsugeras*, involved agricultural harvesting machinery, the *injury* in *Hillrichs* (the loss of four fingers on the right hand) was significantly different, because only a single extremity was involved. Nevertheless, the court found that an "enhanced injury" claim was established by the evidence.

PRACTICE POINTER: Notwithstanding some authority to the contrary, in cases wherein the alleged design defect is the absence of shut-off device near the hazard, defense counsel should insist that plaintiff's fault in becoming entangled within the machine be considered when weighing the various causes of the purported enhanced injury. The lack of a shut-off device as the basis for a design defect allegation does not fit the typical "enhanced injury" situation. In the standard enhanced injury scenario, the alleged design defect plays no part whatsoever in the underlying accident. *See, e.g., Czarnecki v. Volkswagen of America, Inc.*, 837 P.2d 1143 (Ariz. Ct. App. 1992)("A crashworthiness case is one in which the alleged manufacturing or design defect does not cause the accident"). The absence of a shut-off device, however, *would or could be proximately related to whether the accident occurred at the outset.* This is so since the user or consumer could certainly use this mechanism to shut the machine off prior to working on it. Further, plaintiffs often contend that the shut-off device could have been used simultaneously with the initial entanglement, precluding injury entirely. Therefore, the absence of an emergency stop or shut-off device, as plaintiff's claimed design defect in an enhanced injury a case, could play a causative rule in the initial accident sequence. As a result, it only makes sense that plaintiff's negligent conduct in causing the accident should also be

considered on the enhanced injury claim[6] Cases to the contrary are distinguishable on their facts.

THE "NEW AND IMPROVED" RESTATEMENT (THIRD) OF TORTS: PRODUCTS LIABILITY; SECTION 6, and COMMENT f.

The American Law Institute is in the process of formulating the successor to the Restatement (Second) of Torts, Section 402A, which will be known as "The Restatement of Torts, Third: Products Liability." A significant portion of Tentative Draft No. 1 of the Restatement (Third) of Torts: Products Liability [as presently formulated] deals with enhanced-injury liability. More specifically, section 6 of that document provides as follows:

Section 6. Defect-related increases in harm.

(a) When a product is defective within the meaning of Section 2 [essentially the risk-utility test of defect] and the defect is a substantial factor in increasing the harm suffered by the plaintiff beyond the harm that would have resulted from nondefect-related causes, the product's seller is subject to liability for the increased harm.

(b) If proof supports the apportionment of liability among responsible actors, the extent of the seller's liability is determined according to such proof and is limited to the increased harm.

(c) If proof does not support apportionment of liability, then the product's seller is liable for all of the harm suffered by the plaintiff from both the defect and the other causes.

(d) A seller of a defective product who is held liable for part of the harm

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[6] It should be noted that this strategy is not specifically limited to products liability cases wherein the alleged design defect, which purportedly caused an enhanced injury, is the absence of an emergency shut-off device. In any enhanced injury case, defense counsel should attempt to link plaintiff's negligence in causing the underlying or initial accident with the enhanced injury contentions. This should be accomplished through the "but for" prong of the proximate cause analysis employed in tort cases.

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> suffered by the plaintiff under the rule stated in subsection (b) or all of the harm suffered by the plaintiff under the rule stated in subsection (c), is jointly and severally liable with all other parties who bear legal responsibility for causing the harm, determined by applicable rules of joint and several liability.

Restatement (Third) of Torts: Products Liability § 6 (Tentative Draft No. 1, April 12, 1994) (emphasis added).

Under Section 6(a), the defect must be a substantial factor in causing increased harm, beyond that which would have been suffered by the plaintiff from non-defect related causes. Section 6(b) states that the manufacturer is liable only for the actual increase in harm. *The evidence or proof, however, must be such that the jury can make a finding regarding the extent to which the harm was increased by the alleged defect, as compared with the harm that would have been sustained if the product had not been defective.*

Section 6(c) adopts the position that, if there is no proof from which a jury can determine the actual amount of the increase in harm (i.e., enhanced injury), the *manufacturer* will be liable for the entire injury sustained by the plaintiff. Therefore, when allocating the burden of proof, Section 6(c) unfortunately adheres to the *Mitchell* rule, which is contrary to *Wernimont*, *Hillrichs I*, and *Reed*. Once a plaintiff proves that the product was defective and contributed to the injury, the burden of "apportioning" the injury between the defect and nondefect-related causes shifts to the defendant-manufacturer. This approach is contrary to *Huddell* and its progeny, which follow traditional tort doctrine requiring plaintiffs to prove the extent to which an alleged defect enhanced their injuries to state a *prima facie* "enhanced injury" claim

The Official Comments to Section 6 contain language that can be used by defense counsel when defending "enhanced injury" cases in the future. Comment f, as amended pursuant to the

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Addendum dated May 25, 1994, provides as follows:

> *f. Plaintiff fault in cases of increased harm.* Section 7 sets forth the rules governing plaintiff fault in products liability litigation. It provides that all forms of plaintiff fault are to be considered by a jury for the purposes of apportioning responsibility between the plaintiff and the product seller. The relative seriousness of plaintiff's fault should be taken into account by the trier of fact in allocating the appropriate percentages between the plaintiff and the product seller but should not serve automatically to absolve the plaintiff from fault or bar the plaintiff from recovery. *See* Section 7, Comment *d*. Accordingly, the contributory fault of the plaintiff in causing the accident that resulted in increased harm should be taken into account in apportioning responsibility. Similarly, the negligent failure of the plaintiff to wear protective devices that would have mitigated damages, such as safety goggles or a seat belt, is taken into account in apportioning responsibility between or among the parties.

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The fault of third parties who caused or contributed to the initial accident or harm will be compared with the role of the product in enhancing the harm, and the jury will allocate the percentages of fault among them. In addition, the plaintiff's fault in causing the accident at the outset, such as negligently reaching into a running machine or working on a machine without turning it off and "locking out" the power, will also be considered and may reduce any recovery against the manufacturer.

This position is contrary to that adopted by the Iowa Supreme Court in *Reed v. Chrysler*. 494 N.W.2d 224 (Iowa 1992) (plaintiff's fault in causing underlying accident will not be considered when apportioning fault for enhanced injuries absent specific evidence demonstrating an intrinsic connection between the initial fault and injury enhancement). Thus, when confronted with the *Reed* rule in future cases, every effort should be made by defense counsel to point out that this rule is contrary to the greater weight of authority, and is contrary to the position taken thus far by the Restatement Third In an appropriate case, this issue should be preserved for

appellate review for purposes of changing the *Reed* rule in the future.

Section 6 of the Restatement (Third) of Torts: Products Liability, Tentative Draft No. 1 is of particular concern to defense counsel engaged in defending product liability cases where an enhanced injury claim may be advanced. The Restatement (Third) shifts the burden of proof, requiring that the defendant-manufacturer prove the amount of injury enhancement. This result is contrary to logic and common sense. If the plaintiff is unable to prove that the nature and extent of an injury were enhanced, the plaintiff cannot prove that an "enhanced injury" occurred. Under those circumstances, this theory of recovery should be wholly precluded. Requiring a defendant-manufacturer to bear the burden of proof on this issue puts it to the Hobson's choice of having to elect between denying that any enhancement occurred (perhaps hoping to avoid liability altogether) or, on the other hand, *admitting that there was enhancement* so that it can attempt to prove the limited nature of that "enhanced injury."

As a result, in future enhanced injury cases governed by the Restatement (Third) of Torts: Products Liability, defense counsel should be prepared to present expert witness testimony (or other evidence) to *exonerate* the defendant-manufacturer from liability for that portion of plaintiff's injury that was *not* enhanced, or occurred prior to enhancement of the initial injury.

THE IMPLICATIONS OF DAUBERT V. MERRELL DOW IN DEFENDING THIS TYPE OF CASE.

The U.S. Supreme Court's decision in *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 113 S.Ct. 2786, 125 L.Ed.2d 469 (1993), may assist defense counsel when defending this type of "enhanced injury" claim in the future. *Daubert's* clear emphasis upon the trial judge's obligation to act as a "gatekeeper," screening out unreliable expert testimony, will foreseeably

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result in more pre-trial and post-trial challenges to the admissibility and sufficiency of expert evidence.

Although *Daubert* is binding precedent on federal courts only, *Daubert* has been recently cited and discussed with approval by the Iowa Supreme Court in *Hutchison v. American Family Mut. Ins. Co.*, 514 N.W.2d 882 (Iowa 1994)(clinical neuropsychologist could testify on medical causation of an alleged "closed head injury"). In *Hutchison*, a claim by an insured against its own insurance carrier for underinsured motorist benefits, the defendant insurance carrier called as a defense witness a clinical psychologist in an attempt to rebut plaintiff's claim of a closed head injury as the result of a relatively minor traffic accident. After a defense verdict at trial, plaintiffs raised on appeal the issue of whether a neuropsychologist could testify to medical causation. The Iowa Supreme Court found no error in the trial court's decision to permit this testimony. In the course of making this decision, *Daubert* was cited and discussed with approval. In referring to *Daubert,* the Iowa noted that:

> The Court stated that 'the Rules of Evidence--especially Rule 702--do assign to the trial judge the task of ensuring that an expert's testimony both rests on a reliable foundation and is relevant to the task at hand.'

514 N.W.2d 882, at 886. The Iowa court in *Hutchison* went on to say explicity that ". . .[W]e refuse to impose barriers to expert testimony other than the basic requirements of Iowa rule of evidence 702 *and those described by the Supreme Court in Daubert.*" [emphasis added] 514 N.W.2d 882, at 887. The court concluded its discussion of the issue as follows:

> We understand the concern that expert testimony regarding the causes of personal injury can fall 'wholly in the realm of conjecture, speculation, and surmise.' [citations omitted] Nevertheless, we agree with the *Daubert* Court that the trial court in its discretion and the jury in its deliberation provide the most effective determination of the

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admissibility and weight of expert psychological testimony. [footnote omitted.]

The expert has the task to assess 'whether the reasoning or methodology underlying the testimony is scientifically valid and . . . whether that reasoning or methodology properly can be applied to the facts in issue.' [citing *Daubert*.] We are confident that Iowa judges have the capacity of undertake this review.

* * *

Certainly we do not envision that everyone professing expertise on a subject should be allowed to testify in a trial. *Trial judges (and to a lesser extent) appellate courts should prevent witnesses who fail to meet the rule 702 standard from giving their opinions to the trier of fact.* In this case, however, we conclude that the trial court did not err in permitting a professionally trained neuropsychologist to testify as an expert as the nonexistence of [Plaintiff's] alleged head injury.
(emphasis added)

It is also interesting to note that the Frye rule was abandoned in Iowa back in 1980 in *State v. Hall,* 297 N.W.2d 80 (Iowa 1980), and therefore *Daubert* is consistent with the present state of Iowa law regarding the admissibility of expert witness testimony. Further, the Iowa Rules of Evidence originated directly from the Federal Rules of Evidence, and Federal Rule of Evidence 702 is worded exactly the same as Iowa Rule of Evidence 702. Thus, there is good reason to believe that the analysis set forth by the United States Supreme Court in *Daubert* will be persuasive to Iowa courts in the future, if it is has not already been expressly adopted as the standard for the admissibility of expert witness testimony in Iowa under the Iowa Rules of Evidence, pursuant to *Hutchison*.

Enhanced injury cases are particularly subject to abuse at the hands of "experts" proclaiming junk science. The nature of "enhanced injury" cases, in particular their specific engineering, medical causation and timing elements, lends itself to a "junk science" approach by unscrupulous plaintiffs' experts. The requisite elements of proof for an enhanced injury

claim include: (1) an alternative safer design, practicable under the circumstances; (2) what injury would have occurred absent the claimed defect; and (3) the extent of enhanced injury attributable to the defective design. *Hillrichs I*, 478 N.W.2d at 75 (Iowa 1991); *Huddell v. Levin*, 537 F.2d 726, 737-738 (3rd Cir. 1976). To prove the foregoing elements, as well as the foundational element of an *actionable defect* (essentially the elements of strict liability in tort), plaintiffs will likely require the services of expert witnesses.

In *Hillrichs I*, the Iowa Supreme Court found that there was adequate evidence from which a jury could calculate the extent of the alleged enhanced injury. The court noted: "Damages may be awarded . . . when the only dispute is the amount of damages and the evidence affords a reasonable basis for estimating the loss." *Hillrichs I*, 478 N.W.2d at 75. This language, though admittedly broad, clearly implies that *some basis for a reasonable apportionment of damages* is necessary in an "enhanced injury" case Although the Iowa court appears determined to not turn a plaintiff away because of the difficulties in proving the extent of increased harm, whether or not, in fact, an "enhanced injury" has occurred is the essence of the cause of action. Without such proof, an "enhanced injury" does not exist This issue is clearly distinct from the manner of estimating the amount of plaintiff's damages, an area wherein courts historically afford plaintiffs some latitude. If the plaintiff has difficulty or is unable to establish that an injury was enhanced by an alleged product defect, the claimant cannot recover based on an enhanced injury theory and there is no liability at all, as opposed to circumstances wherein liability is found, but plaintiff has difficulty in establishing the amount of damages

The primary lesson of *Daubert* in this context is that the trial court, in its "gatekeeping"

role, must assure itself that proffered scientific expert testimony is both *relevant* and *reliable*.[7] The concept of "reliability," with respect to scientific expert testimony, involves scientific validity based on: (1) whether the reasoning or methodology underlying the testimony has been tested; (2) whether it has been subjected to peer review and publication; (3) its potential rate of error; and (4) whether it has been generally accepted or rejected in a relevant scientific discipline. *Daubert*, 113 S.Ct. at ___, 125 L.Ed.2d at 483.

Several cases decided subsequent to *Daubert* have applied its test and ruled that proffered expert testimony was inadmissible. One commentator has noted:

> [R]oughly two-thirds of the reported cases since *Daubert* exclude expert testimony. This is a startling development, especially given the common perception that *Daubert* liberalized the standard for admission of expert testimony.

Hoffman, *A Briefcase and an Opinion: Post-Daubert Expert Testimony -- A Major Shift*, *BNA Product Safety and Liability Reporter*, April 8, 1994, pp. 379-390; *see, e.g.*, *Stanczyk v. Black & Decker*, 836 F. Supp. 565 (N.D. Ill. 1993) (*Daubert* standard applied to exclude testimony of plaintiff's expert witness in a guarding case involving a portable power saw).

The *Stancyzk* opinion can be extremely useful to defense counsel grappling with this type of enhanced injury case. In *Stancyzk*, the testimony of plaintiff's expert witness was excluded pursuant to *Daubert* in a garden-variety guarding case involving the design of a barrier guard for a portable power ("Skil") saw. In *Stancyzk*, Judge James B. Zagel of the United States District Court for the Northern District of Illinois wrote, in pertinent part, as follows:

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[7] At this time, it is unknown whether the limitations established in *Daubert* will be limited to scientific expert testimony. Federal Rule of Evidence 702, the basis for *Daubert*, also incorporates the adjectives "technical or other specialized knowledge . . . ."

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> *Daubert* teaches that I must consider certain factors. In my view (and I think the Court's) the most important factor is whether the technique (or theory) being advanced by the expert can be or has been tested. The answer here is that it can be and, to some extent, was, and it failed. Clark [plaintiff's expert] offered no testable design to support his concept. And the history of engineering and science is filled with finely conceived ideas that are unworkable in practice. There is a high potential rate of error for mechanical concepts offered without engineering analysis. And the evidence here is that Clark's design will not work

836 F. Supp. at 567. After noting that the proffered design had not been tested and was essentially nothing more than a concept or idea, Judge Zagel granted defendant's motion to exclude the expert testimony.

Another recent case applying *Daubert* in this manner is *Byrnes v. Honda Motor Co.*, 93-8239 (S.D. Fla., June 10, 1994), where the trial court precluded a plaintiff's expert witness from testifying about a "hypothetical" design for a leg-guarding device on a motorcycle. The court reasoned that the witness failed to meet the standards established for expert testimony in *Daubert*. The expert in *Byrnes* had not constructed or tested the "hypothetical" leg-guarding device, nor had the device ever been used in the motorcycle industry. The court further found that the expert witness had formulated certain hypotheses about safety equipment for motorcycles but had never tested those hypotheses in any recognizable, scientific manner. The court found the testimony and opinions inadmissible under the standards set for expert scientific evidence in *Daubert*.

Both *Stanczyk* and *Byrnes* are particularly helpful in defending against the first required element of an enhanced injury claim, i.e., that plaintiff prove the existence of an alternative, safer design, practicable under the circumstances. If, for example, plaintiff's expert witness proffers nothing more than the concept or idea of some type of a so-called "emergency shut-off

device" which has neither been actually tested, engineered or produced, such testimony is potentially excludable under the *Daubert* test as applied in *Stancyzk,* and more recently in *Byrnes*. As a result, plaintiff may lack proof for the first element of enhanced injury. The *Daubert* factors can also be used to determine whether the proffered device will actually make the product at issue "safer," or is simply the unsubstantiated' personal opinion of an expert advocate, bought and paid for by plaintiff's attorney.

THE ENGINEERING DEFENSE OF THE "EMERGENCY STOP DEVICE."

"Enhanced injury" cases outside the motor vehicle context will allege, as a "defect," the manufacturer's failure to design and/or install a so-called "emergency stop device" where plaintiff was injured.[8] In this kind of case, plaintiffs characteristically contend that the presence of a shut-off device, at the time of the accident, would have enabled the plaintiff to stop or deenergize the machine immediately, thereby avoiding injury entirely or preventing further or "enhanced" injuries.

PRACTICE POINTER: Although Iowa law is somewhat confusing on this point, the Iowa Supreme Court appears to apply a "mixed" test which includes aspects of both "the consumer expectations test" and the "risk-utility test" in order to define a product defect. *See e.g. Chown v. USM Corp.*, 297 N.W.2d 218 (Iowa 1980). Although this area of products liability law in Iowa needs to be clarified, the national trend seems to be in favor of a risk-utility test of product defect. Nevertheless, in those jurisdictions which define "defect" by the

[8] In addition, plaintiffs sometimes contend that the product itself should have been constructed differently, such that contact with the hazard would be "allegedly" less severe, *e.g.* incorporating an auger with "rubber," as opposed to steel, flighting at the intake.

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consumer expectations test, *see, e. g., Melton v. Deere & Co.*, 887 F.2d 1241 (5th Cir. 1989) (applying Mississippi law), the first line of defense should be that the absence of a shut-off device in the area of the hazard is readily observable, open and obvious, does not frustrate a consumer's expectations and, therefore, cannot constitute a "defect" as that term is defined. *See also Restatement (Second) of Torts* § 402A, comment g, *Defective condition* ("The rule stated in this Section applies only where the product is, at the time it leaves the seller's hands, *in a condition not contemplated by the ultimate consumer* . . . ."); comment i, *Unreasonably dangerous* ("The article sold *must be dangerous to an extent beyond that which would be contemplated by the ordinary consumer who purchases it*, with the ordinary knowledge common to the community as to its characteristics."). Nothwithstanding Iowa's apparent "mixed" test of product defect, there are cases in Iowa which have quoted from the foregoing Official Comments of the Restatement with approval. *See e.g. Kleve v General Motors Corp.*, 210 N.W.2d 568, 571(Iowa 1973). [Note: the new *Restatement (Third)* discards the consumer expectations test of defect in favor of the risk-utility test.] To conclude, in consumer expectations jurisdictions, every effort should be made to defeat this type of defect allegation since it makes no sense in the context of how the term-of-art "defect" is defined.

Defense counsel must remain cautiously aware of the simplistic jury appeal inherent in the "emergency shut-off device" argument and cognizant of the potentially serious and harmful, emotional impact of evidence that the plaintiff was "stuck" in the machine for several minutes, or in some cases, hours, without the means or ability to disengage the machine. The mere emotional repercussions of such evidence may render an enhanced injury case difficult, if not impossible, to win. The emotional and sympathetic aspects of this type of case, however, must

be confronted and dealt with headfirst by the defense. One means through which this can be accomplished effectively is to focus the defense effort and jury's attention on the engineering reasons militating against using remote control stop devices,[9] and the medical evidence,[10] forcing the jury to concentrate on these issues, rather than the emotional aspects of the accident itself.

There are several factors that must be considered when defending against an emergency stop device, enhanced injury claim. Most importantly, defense counsel must insist on strict proof of all necessary elements, and should be very careful before conceding that such a device is a *legitimate emergency or safety feature in the specific application at issue*. In addition, defense counsel may prefer to use the term "remote control," rather than "emergency stop device" or "safety stop device." This change in terms used can help avoid the obvious connotation that accompanies the use of the words "emergency" and "safety." In many cases, the proposed shut-off device will prove to be nothing more than a theoretical or conceptual idea in the mind of plaintiff's expert, "ginned up" for purposes of a lawsuit. Accordingly, the defense should always insist that plaintiff prove the feasibility and practicality of the proposed safety device. *See, e. g., Stancyzk v. Black & Decker, Inc.*, 836 F. Supp. 565 (N.D. Ill. 1993)

[9] Emergency stop devices can be impractical for two primary reasons. First, the presence of a shut-off device may give the machinery operator a false sense of security. The operator may believe that he or she will have ample time to reach the control if an entanglement occurs, causing the operator to undertake risks or pursue actions that would not have otherwise occurred. Second, it is impossible for manufacturers to place shut-off devices at all points on the machine. There will always be a location where users are subject to injury that cannot be adequately forecasted.

[10] Important medical evidence includes the actual mechanism of injury, the time necessary for injury to occur, plaintiff's reaction time (several factors have a bearing on this alone) and the effect of being able to disconnect the injury causing mechanism in the requisite period of time, factoring in the plaintiff's reaction time.

(testimony from plaintiff's expert regarding a proposed "concept" guard, without actual proof of feasibility or testing of the device, was stricken because it failed to meet the requirements established in *Daubert*). If the concept has not been written about, has any other manufacturer used it on this type of machine? If not, why not? Ordinarily there are a multitude of reasons why certain devices or concepts have not been adopted for particular types of machinery.

> One must consider whether there is peer review and publication of the technique. There is none, and the closest proxy for it, industry practice, produces no evidence of the use of gravity guards for this type of saw.

See Stanczyk v. Black & Decker, Inc., 836 F. Supp. at 567. Also, in many cases, the manufacturer's product may be favorably compared to those produced by competitors which do not incorporate an emergency stop or shut-off device. Obviously, to the extent a manufacturer's product is consistent with custom and practice in the industry, this will be a very helpful defense. The importance of this factor with the jury should never be underestimated. If the proposed safety device is, indeed, such a good idea, why has it never been incorporated into the type of machinery at issue?

Depending upon the type of product involved, you may find out that there is no hard data or engineering testing that has been performed which positively concludes that such a device does, indeed, provide *an additional level of safety* for users or consumers. Has this "theory" been tested by the actual construction and fabrication of prototype hardware on this kind of machine? If not, why? The fact that it may be costly for plaintiff's expert to do so is no excuse. *See Stancyzk*, 836 F. Supp. at 568. How was the testing performed and documented? Can plaintiff absolutely prove by the requisite burden of proof that the injury would have been less severe?

It must also be recognized that with respect to most types of machinery, a shut-off mechanism is *not* a "safety" device, *per se*, and may actually promote actions that are contrary to longstanding, well-recognized, entrenched and scientifically supported safety principles. For example, it is commonly taught, as a matter of common sense, that a machine should be turned-off before working on it. The presence of a so-called "emergency stop device," however, reinforces the opposite conduct, *i.e.* "I can now work on a machine without disconnecting the power source, and if a problem develops, I will simply hit the emergency stop supplied by the manufacturer." The mere presence of an emergency stop device tacitly indicates that it is proper conduct to work on the machine while it is running. If it is truly necessary to do so, perhaps other design alternatives should be considered. The so-called "emergency stop device" is often a band-aid approach championed by those who believe that "safety" is nothing more than a device, mechanism or gizmo that is "tacked on" at the end of the assembly line to make the machine "safe." If the machine was *not* running or operators disconnected the power source prior to working on the machine, the stop device would have neither function nor utility.

The mere availability of a remote stop device may encourage the type of behavior it is intended to protect, causing operators to assume risks they would otherwise avoid, perhaps believing that, if they get caught in the machine or "get into trouble," they can simply hit the emergency stop device to avoid injury, which may not be at all true. For most machines, there is a paucity of scientific data proving that injuries can be made less severe by utilizing such devices. Moreover, other people may be invited into hazardous areas while the machinery is running, whereas before they would have turned the mechanism off and "locked out" the power source, so that it could not be accidentally started. *See, e.g.*, Landsburg, *The Armchair*

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Economist: Economics and Everyday Life, The Free Press (1993) (there is evidence that seat belts actually increase the number of car accidents, because drivers feel safer and, as a result, tend to take more risks).

Finally, if there is an *engineering justification* for designing a remote control device for a specific area of a machine (*i.e.* the area involved in the accident which gave rise to the lawsuit), then the engineer, as a matter of logic and consistency, must consider other areas and hazards of the machine for similar "protection." These mechanisms (if warranted from an engineering judgment perspective) must stand or fall on their own merit, not on whether such a device could or would have been helpful to the particular plaintiff in the case at bar, ignoring other areas and potential hazards of the machine. On most machines it is physically and technically impossible to place a stop device at each and every location where a foolhardy person could become enmeshed, if they were to reach inside of or work on it while it was running. If the manufacturer chose to "guard" only one area of the machine with this kind of device, one need not be clairvoyant to understand what would happen if the *next plaintiff* got caught in an area of the machine that is not similarly "protected." Further, if a shut-off device was incorporated into the design, but because of the peculiarities of the particular accident the plaintiff could not reach it, the manufacturer would be criticized and sued for failing to place the device within the reach of that particular plaintiff. As a practical matter, it is virtually impossible to comply with a duty requiring manufacturers to place a stop device at any and all locations on a machine where a person could conceivably become entangled.

To conclude, the centerpiece of a successful defense effort in a non-automotive enhanced injury case entails setting forth, in convincing fashion, the engineering reasons why the

mechanism or concept advocated by plaintiff is impractical in the context of the particular machine or machine environment under consideration.

THE MEDICAL DEFENSE OF "ENHANCED INJURY."

To recover pursuant to an enhanced injury claim, in jurisdictions wherein plaintiffs bear the burden of proof, the plaintiff must prove, *inter alia*: (1) what injury would have occurred had the alternative safer design been used; and (2) the extent of injury due to the defective design. *Huddell v. Levin,* 537 F.2d 726, 737-8 (3d Cir. 1976). These two necessary elements portend the use of *medical* testimony to establish enhanced injury. Therefore, a critical portion of the defense effort will center upon plaintiff's medical testimony supporting the alleged enhanced injury claim. Accordingly, the defense may want to retain medical experts who can dispute the existence of an enhanced injury. Conversely, in jurisdictions where the burden of proof is on the defense, assistance by medical experts (pathologists, medical examiners or other qualified professions) may be imperative.

Plaintiffs will conceivably use medical experts from two areas: 1) treating physicians; or 2) medical experts specifically retained for the purpose of rendering an opinion on enhanced injury. Treating physicians are peculiarly susceptible to a well-prepared frontal attack by the defense. They are not typically familiar with the intricacies of the issues involved. If treating physicians are used, careful consideration should be given to their experience and qualifications to render an opinion on enhanced injuries. For example, the following questions might be pertinent:

1. Does the physician have any experience, education, or training specific to "mechanism of injury," or the manner and method by which certain injuries are

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sustained? *See, e.g. Hutchison v. American Family Ins. Co.*, 514 N.W.2d 882 (Iowa 1994).

2. Has the doctor done any research in this area?

3. Has the doctor published any articles in scholarly journals on this subject?

4. Has the doctor done any direct testing of the human body's ability to withstand direct physical trauma?

5. Has the doctor performed any testing or conducted research concerning the physical forces required to cause certain injuries, such as broken bones, lacerations or contusions?

6. Has the doctor done any research or testing on human reaction time? What are the various factors that bear on a person's reaction time? Has the doctor tested this person's reaction time?

7. What portions of the Plaintiff's body would be uninjured after ten seconds of direct physical contact with this mechanism? After five seconds?

8. Has the doctor ever worked full-time in the capacity of pathologist, medical examiner, or coroner, where a major responsibility of the position was an official determination of the cause of injury or death?

9. Has this doctor ever testified before, in court, regarding the existence of a so-called "enhanced injury?" Has this testimony ever been excluded by the court?

10. What books, treatises or reference sources does the doctor consider medically authoritative on the issue of "enhanced injury?"

11. What persons does the doctor consider authoritative on "enhanced injury?" What is the basis for this selection?

The answers to the foregoing and similar questions will provide the basis (if appropriate) for a *Daubert*-type attack on the admissibility of the treating physician's testimony in support of enhanced injury. The same kind of an approach can be made when questioning expert witnesses specifically retained by plaintiffs for the purpose of eliciting "enhanced injury" opinions. Keep in mind that the same kind of an attack can be levelled by plaintiff's counsel

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at *defense* witnesses. *See, e.g. Hutchison v. American Family Ins. Co.*, 514 N.W.2d 882 (Iowa 1994)(*Daubert*-type objection aimed at a defense expert, a neuropsychologist called to testify that a fender-bender accident was not severe enough to cause a claimed "closed head injury.") A close examination of the "hired gun" medical expert witness testimony proffered by plaintiff in support of an enhanced injury claim will provide the proper groundwork for pretrial (or trial) motions to exclude and/or limit the testimony to relevant and reliable matters.

CONCLUSION

The recent increase in "enhanced injury" claims outside the automotive or crashworthiness context in the mid-1990's, especially involving the lack of an "emergency shut-off device" as a claimed defect, must be met with creative new defense strategies and will require a wide variety of techniques. Defense counsel who can effectively synthesize the recent teachings of *Hillrichs, Reed, Daubert*, Section 6 of the forthcoming *Restatement (Third) of Torts: Products Liability*, and the various engineering and medical issues involved will be in the best position to succeed in these rather problematic cases in the future.

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ENHANCED INJURY CLAIMS

BY

THOMAS M. ZUREK

Enhanced Injury Liability

I. The Enhanced Injury Claim.

A. The Fundamental Concept:

With an enhanced injury claim, the plaintiff's cause of action is for the exacerbation of an injury occurring as a result of a design defect after the "initial" accident.

B. Damages:

The damage suffered by the plaintiff for an enhanced injury is damage which could have been prevented or lessened by an alternative safer design.

C. Liability:

Liability for an enhanced injury is calculated on the "enhancement" of the injury due to the alleged defect.

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II. The Iowa Decisions.

A. Hillrichs v. Avco Corporation (Hillrichs I), 478 N.W.2d 70 (Iowa 1991).

1. The Basic Rule:

The manufacturer of a product is liable for enhanced injuries when the manufacturer's product design caused an "enhanced" injury but was not necessarily the cause of the accident itself.

a. This basic rule follows the reasoning of the automobile product liability "crashworthiness" cases. The applicability of the rule to these cases is grounded in the idea that no fundamental difference exists between the duties imposed upon a manufacturer of an automobile or a manufacturer of

any other type of machinery where there is a reasonable foreseeability of injury to plaintiffs.

2. Determining Liability.

a. Enhanced injury claims can be submitted to the jury on a negligence theory.

b. The comparative fault of the plaintiff, if any, in causing the original injury is considered the proximate cause of the enhanced injury and may be considered when assessing comparative fault percentages against the plaintiff.

B. Reed v. Chrysler Corp., 494 N.W.2d 224 (Iowa 1992).

1. The Comparative Fault Assessment:

a. The Iowa Supreme Court in Reed, backed away from the comparative fault assessment it set forth in Hillrichs I. Accordingly, under Reed evidence is submitted only to the extent that the comparative fault is shown to be a proximate cause of the actual enhanced injury. The court stated,

> "The crashworthiness doctrine is a step removed from ordinary strict liability cases. The crashworthiness doctrine proceeds from the belief that a manufacturer has a duty to minimize the injurious effect of a crash, no matter how the crash was caused. [citations omitted]
>
> The theory, which presupposes the occurrence of accidents precipitated for myriad reasons, focuses alone on the enhancement of resulting injuries. The rule does not pretend that the design defect had anything to do with causing the accident. It is enough if the design defect increased the damages. So any participation by the plaintiff in bringing the accident about is quite beside the point.
>
> In adopting the crashworthiness doctrine in Hillrichs, we indicated a contrary

view, stating that the plaintiff's comparative fault could be assessed against him in a claim for enhanced injuries. 478 N.W. at 76. On reconsideration, for the reasons just stated, we think a plaintiff's comparative fault should not be so assessed in a crashworthiness case unless it is shown to be a proximate cause of the enhanced injury."

Reed, 494 N.W.2d at 230.

2. Liability for Enhanced Injury Based Upon Design Defect.

a. The test:

"To prevail on a claim of crashworthiness, a plaintiff at the threshold must establish the existence of a design defect. This showing must include proof that the product was unreasonably dangerous." Wernimont v. Int'l Harvestor Corp., 309 N.W.2d 137, 140 (Iowa App. 1981) (citing Chown v. USM Corp., 297 N.W.2d 218, 220 (Iowa 1980)). To prevail, after making the threshold showing, a plaintiff must then establish the following three elements:

(1) proof of an alternative safer design, practicable under the circumstances;

(2) what injuries would have resulted had the alternative safer design been used; and

(3) the extent of enhanced injuries attributable to the defective design. Wernimont, 309 N.W.2d at 140-41; Reed, 494 N.W.2d at 226.

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C. <u>Hillrichs v. Avco Corp. (Hillrichs II)</u>, 514 N.W.2d 94 (Iowa 1994).

1. The Court's Decision:

In <u>Hillrichs II</u>, the court affirmed the <u>Hillrichs I</u> decision. The court reviewed, among other issues, the evidence supporting the enhanced injury claim and the assessment of Hillrichs comparative fault in light of the <u>Reed</u> decision. (<u>See</u> II(B) above). With regard to the claim of enhanced injury, the court determined that sufficient evidence existed for the jury to hear the claim. In addition, the court stated that because <u>Hillrichs II</u> was "retried under a rule dictated on appeal", the comparative fault assessment would stand despite the <u>Reed</u> decision.

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III. Pursuing and Defending an Enhanced Injury Claim.

A. The Offensive Strategy.

1. To establish enhanced injury liability, the plaintiff must prove that the product is unreasonably dangerous. From a plaintiff's standpoint this is difficult to prove.

2. The plaintiff's attorney should also focus on the foreseeability aspect of the enhanced injury.

3. Finally, the plaintiff has the burden of establishing the remaining three elements of the enhanced injury test. (<u>See</u> II(B)(2)(a) above).

B. The Defensive Strategy.

1. To defend an enhanced injury claim, the focus should also be on whether the product was unreasonably dangerous. From a defense standpoint, the state of the art defense can be helpful in focusing the jury's attention on whether a product is unreasonably dangerous.

2. Attention should also be focused on the foreseeability of the enhanced injury, as the enhanced injury typically arises in a situation where the plaintiff is injured by a mechanism which initially causes an injury which is then

compounded when the plaintiff cannot remove himself or herself from the machinery or instrument of injury.

3. Finally, attention should be given to the remaining three prongs of the enhanced injury test. (<u>See</u> II(B)(2)(a) above).

IV. The Issue for the Future: How Far Can Enhanced Injury Liability Extend.

A. The Present Scope of <u>Hillrichs I</u>.

1. To date, the Iowa Supreme Court has only dealt with the availability of enhanced injury dangers as related to manufacturers of products. However, it seems an argument could be made to apply the enhanced injury theory to non-manufacturing situations as there is no limitation in the court's language as to the type of tortfeasor who could be liable for enhanced injury damage. In <u>Hillrichs</u>, the court stated,

> "We believe that the court of appeals' recognition of the enhanced injury doctrine in <u>Wernimont</u> was merely a correct application in a particular context of well-established elements of Iowa tort law that permit recovery of damages for injuries caused by the conduct of another that the law identifies as tortious. These principles mandate that an injured party's right of recovery extend to all injury or degree of injury that would have been prevented through the tortfeasor's exercise of the proper standard of care."

<u>Hillrichs I</u>, 478 N.W.2d at 75.

B. Future Possibilities for Enhanced Injury Liability.

1. Premises Owner to Business Invitee.

a. It could be argued that when a premises owner allows a business invitee to have access to the premises, and while on the premises the business invitee is injured through contact with some instrumentality owned and operated by the premises owner, that the premises owner should be liable for the enhanced

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injury suffered by the business invitee. Specifically, if the premises owner knew or should have known that the there was a design defect in the instrumentality which causes the injury, the question becomes whether or not the enhanced injury theory can be applied against the premises owner under a premises liability theory. It does not seem to be a great leap to suggest that if the premises owner installs an instrumentality or machine in its plant and a business invitee is injured, that an enhanced injury claim could be asserted against a premises owner who is not a manufacturer.

2. Proposed Jury Instructions:

Defendant was at fault for negligent maintenance of its business premises if you find all eight of the following propositions established by a preponderance of the evidence:

(1) Defendant knew or in the exercise of reasonable care should have known that the absence of emergency devices on the machine, where plaintiff could have reached them after he first became entangled in the machine constituted a condition on defendant's premises that involved an unreasonable risk to a person in plaintiff's position.

(2) The condition was one that a person in defendant's position should have expected would not have been discovered or realized by plaintiff or one that defendant should have expected that plaintiff would fail to protect himself from.

(3) Plaintiff did not know of or have reason to know of the condition and the risk involved.

(4) Defendant was negligent in failing to make the machine safe or warn plaintiff of the risk involved.

(5) Such negligence was a proximate cause of injury resulting from the inability of plaintiff to shut off the machine after

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he first became entangled. This inability caused what in these instructions is called "enhanced injury."

(6) An alternative practical, safer design was available.

(7) The nature and extent of the injuries which plaintiff would have incurred if the alternative design had been used.

(8) The defective design was a proximate cause of the enhanced injuries.

If you find all eight of these propositions proved by a preponderance of the evidence, use Verdict Form No. ____; otherwise, use Verdict Form No. ____.

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DEFENDING AGAINST THE EMOTIONAL DISTRESS CLAIM

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I. INTRODUCTION

A claim seeking substantial damages for emotional distress allegedly caused by trauma presents a unique challenge to the defense trial attorney. Mental disorders arising out of emotional distress are extremely subjective and cannot be objectively verified by x-ray, CAT scan, blood screen, electroencephalogram (EEG), electromyogram, or any other medical test. An emotional distress injury cannot be observed or touched by a physician, and the psychiatric diagnostic criteria for trauma-induced emotional distress appear both arbitrary and subject to considerable interpretation. These claims depend almost entirely on the subjective history given by the plaintiff and the seemingly speculative diagnosis by a psychologist or psychiatrist, who is often not a specialist in the field of trauma-induced emotional distress. An accurate and reliable determination of the severity of the condition or the expected prognosis often appears problematic at best.

On the other hand, claims for substantial sums of money based on emotional distress injuries are becoming more and more commonplace, and juries are willing to award large sums in appropriate cases.

The following is intended as a guide to some of the unique and practical issues which should be considered by defense counsel in the preparation and trial of an emotional distress case.

II. LEARN THE SUBJECT MATTER

In order to develop an effective strategy for handling an emotional distress claim, it is important to understand trauma-induced emotional distress and the more specific psychiatric diagnosis of Post-Traumatic Stress Disorder ("PTSD").

A. Review the Literature

As a starting point, become thoroughly familiar with the relevant sections of the American Psychiatric Association's *Diagnostic and Statistical Manual of Mental Disorders* (3rd Ed. — revised, 1987) (*DSM-III-R*). This diagnostic manual is currently used by

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virtually all reputable psychiatrists and psychologists, and contains the required diagnostic criteria for Post-Traumatic Stress Disorder, designated by the code 309.89.

Post-Traumatic Stress Disorder (PTSD) was first recognized as a specific diagnosis in *DSM-III*, published in 1980. It was then designated by two separate diagnostic codes: 308.30 (acute) and 309.81 (chronic or delayed). While some psychiatrists speak of PTSD as if it were a specific disease which the patient does or does not have, the diagnostic criteria indicate that it is a somewhat arbitrary constellation of subjective symptoms which, at least from a legal standpoint, appear to allow the psychiatrist a wide latitude in making the diagnosis. Compare the changes in the diagnostic criteria for PTSD between *DSM-III* and *DSM-III-R*.

Carefully review the Introduction of *DSM-III-R*, which explains the history of the manual, the development of the diagnostic criteria, and the application and limitations of these criteria. Take note of the "CAUTIONARY STATEMENT" at page xxix, which states in part:

> The clinical and scientific considerations involved in categorization of these conditions as mental disorders **may not be wholly relevant to legal judgments**, for example, that take into account such issues as individual responsibility, disability determination, and confidence.

(Emphasis added)

This "CAUTIONARY STATEMENT" also provides that "the proper use of these criteria requires specialized clinical training that provides both a body of knowledge and clinical skills."

The chart entitled "Severity of Psychosocial Stressors Scale: Adults," on page 11 of *DSM-III-R*, is critically important. The use and severity of these stressors are discussed at page 18-20 of the manual. This chart contains an itemization of numerous stressors, categorized from mild to catastrophic, which can cause or exacerbate a wide variety of mental disorders in a patient. "Moderate" stressors include "acute events" such as marriage, marital separation, loss of a job, retirement, or miscarriage, and "enduring

circumstances" such as serious financial problems, trouble with a boss, or being a single parent. "Severe" psychological stressors include divorce, the birth of a first child, unemployment, or poverty. "Extreme" stressors include death of a spouse, diagnosis of serious physical illness, victim of rape, serious chronic illness, or sexual abuse. "Catastrophic" stressors include death of child, suicide of spouse, devastating natural disaster, captivity as hostage, and concentration camp experience. The chart should be studied carefully and used as a guide in preparing written discovery and deposition questions for the plaintiff.

Even though *DSM-III-R* was published in 1987, a newer version of the manual, designated *DSM-IV*, is scheduled for publication in approximately May 1994. A booklet entitled *DSM-IV Draft Criteria* was published in 1993 and is available from the American Psychiatric Association or from most technical/medical book stores. This booklet contains the proposed *DSM-IV* criteria for Post-Traumatic Stress Disorder (designated Code 309.81) and a new diagnosis entitled "Acute Stress Disorder" (designated Code 308.3). Although it is necessary that the duration of specified systems last more than a month in order to diagnose Post-Traumatic Stress Disorder, the proposed new diagnosis of "Acute Stress Disorder" is made if the symptoms last for a minimum of two days and a maximum of four weeks. Apparently, the DSM-IV Task Force has decided to create a new disorder to describe patients who have had PTSD symptoms lasting for a short duration.

Note that the *DSM-IV* criteria for PTSD adds the following symptom which is not contained in the *DSM-III-R* criteria: "The disturbance causes **clinically significant** distress or impairment in social, occupational, or other important areas of functioning." (Emphasis added.)

Numerous legal and technical articles have been published which describe the onset, symptoms, diagnosis and treatment of trauma-induced mental distress and it is important to develop an understanding of this material early in the case. The attached Selected Bibliography identifies a significant number of legal and technical books and articles concerning PTSD and the handling of emotional distress claims. The following texts and articles referenced in the Bibliography are particularly useful: (1) Ziskin and Faust, *Coping with Psychiatric and Psychological Testimony*; (2) Faust and Ziskin,

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"Challenging Post-Traumatic Stress Disorder Claims"; (3) Almy, "Psychiatric Testimony: Controlling the 'Ultimate Wizardry' in Personal Injury Actions"; and (4) Hiers, "Defending Against Testimony of Psychiatrists and Psychologists in Civil Cases."

B. Retain A Well-Qualified Psychiatric Consultant Early In The Case

A knowledgeable and well-qualified psychiatric consultant is essential in these cases and it is recommended that such a consultant be retained early in the case. To be most effective, the consultant should be a specialist in PTSD or trauma-induced stress, who has a clinical practice in this area and has conducted specific research concerning stress related disorders. Although there are a relatively few number of true specialists in stress related disorders, *DSM-III-R* identifies 30 members of the Subcommittee on Post-Traumatic Stress Disorder who may be willing to work as consultants or to provide the names of other specialists in the field.

A PTSD specialist can educate defense counsel concerning the diagnosis and treatment of PTSD and other trauma-induced disorders, help the attorney prepare interrogatories and requests for production of documents and records, research technical literature relevant to the issues in the case, and help counsel prepare for plaintiff's deposition and the cross-examination of plaintiff's psychiatric expert in deposition or at trial.

When appropriate, this consultant can also conduct an independent psychiatric examination of plaintiff, administer (or arrange for) appropriate psychological tests to help determine whether malingering or compensation neurosis have contributed to plaintiff's claimed anxiety symptoms, or testify at trial.

III. USE THOROUGH INVESTIGATION AND DISCOVERY

Because of the uniquely subjective nature of an emotional distress claim, it is essential to use careful investigation and thorough discovery to obtain as much information as possible concerning plaintiff's education, personal background, prior medical and

psychiatric history, and the nature and significance of any stressors other than the accident which may have caused or contributed to the accident.

A. Carefully Investigate Background Of Plaintiff And Accident

A thorough investigation may provide a good deal of fruitful information concerning the subject traumatic event or plaintiff's emotional distress claim. The following checklist may be helpful:

(1) Carefully investigate plaintiff's ability to perceive the subject accident. Since an essential element of a PTSD diagnosis is that "the person has experienced an event that is **outside the range of usual human experience** and that would be **markedly** distressing to almost anyone" (*DSM-III-R* diagnostic criteria), it is essential to determine from all available information exactly what would have been seen, heard or felt by someone in plaintiff's position. For example, if plaintiff was involved in an aircraft incident, determine exactly what would have been experienced by someone in plaintiff's seat; if plaintiff's claims result from an explosion, determine exactly what would have been experienced by a person in plaintiff's location. If the traumatic event was experienced to some degree by many claimants, it is crucial to determine how the event would have been experienced by each claimant, depending on their proximity to, and ability to perceive, the event.

(2) Interview and statementize witnesses who experienced the event and/or were in a position to observe plaintiff's physical location and emotional reaction to the event.

(3) Obtain any and all photographs of the accident scene, with emphasis on those taken at or about the time of the accident. Photographs taken by news photographers, television crews, and law enforcement agencies are particularly good for this purpose.

(4) Obtain and review all national and local newspaper and magazine accounts of the event, along with videotapes of television news coverage, and obtain

all statements made by plaintiff to the press following the event. These statements are often contradicted by plaintiff during deposition or at trial, and a videotaped excerpt of a televised press conference depicting a smiling and perfectly lucid plaintiff can dramatically rebut plaintiff's claims of confusion, disorientation and mental distress immediately following an accident.

(5) Review any newspaper or television reports for the names of potential witnesses.

(6) Obtain any correspondence written by plaintiff to the defendant or its insurance carrier following the event which describe his experience, claim, or medical treatment.

(7) Prepare a diagram which depicts the location of all claimants and witnesses who experienced the event.

(8) If feasible, interview plaintiff's friends, co-workers or neighbors to determine if, and to what extent, the accident affected plaintiff's work or quality of life.

(9) Review applicable court records for documents concerning divorces, bankruptcies or other legal problems involving plaintiff which may constitute an emotional stressor.

(10) If the traumatic event was an aircraft accident, obtain plaintiff's airline mileage club records to establish the extent of plaintiff's post-accident airline travel and to rebut any fear of flying claim.

B. Prepare Case-Specific Written Discovery

1. Interrogatories

Interrogatories should be crafted to elicit specific and detailed information concerning plaintiff's background, employment and medical history. While this information is generally requested in every personal injury action, particular care must be taken to

follow up with regard to incomplete or nonresponsive answers. Seek specific information concerning:

(1) The name, address and phone number of each employer, as well as the name of plaintiff's supervisor at each job;

(2) The dates of any periods of unemployment;

(3) The dates and the places of all marriages and divorces, and the dates of birth and death of all close relatives (spouses, children and parents in particular);

(4) The full names and complete addresses of all schools attended, and dates of attendance;

(5) Specific and detailed information concerning plaintiff's medical and psychiatric background, including the full names and addresses of all medical practitioners visited and the conditions treated; the complete names and addresses of all hospitals where plaintiff received treatment; the dates of any psychological or psychiatric treatment or counseling, and the names and addresses of those rendering the treatment (it is particularly important to pursue details about out-of-state health care providers or hospitals);

(6) The title, court and file number of any bankruptcy proceeding, and dates of filing;

(7) The title, court, file number, and dates of any lawsuit in which plaintiff was a party; and

(8) The branch of any military service, dates of service, and complete title and location of each duty station.

2. **Requests For Production Of Documents**

Request production of the following documents:

(1) Newspaper articles or videotapes depicting any statement by plaintiff after the accident;

(2) Post-accident interviews or statements by plaintiff to anyone other than counsel;

(3) Photographs in the possession of plaintiff or plaintiff's attorneys depicting the accident scene immediately after the accident;

(4) Photographs depicting plaintiff immediately after the accident, or which were taken of plaintiff within several weeks of the accident (pictures of a smiling plaintiff on vacation taken shortly after the accident can be an extremely effective trial exhibit);

(5) All documents which support plaintiff's wage loss claim;

(6) Post-accident correspondence between plaintiff and any of the defendants;

(7) Diaries or personal calendars written by the plaintiff after the subject accident;

(8) Ticket coupons, boarding passes or other documents indicating plaintiff's seat assignment (if aircraft accident); and

(9) Each airline mileage club number and a copy of plaintiff's most recent statement from each mileage club (if aircraft accident).

C. Obtain All Available Records

It is crucial to subpoena, or obtain by consent, all available medical, psychiatric and employment records concerning plaintiff. Be aggressive; don't take "no" for an answer. Don't be satisfied with incomplete or nonresponsive discovery responses by plaintiff concerning the identity and location of these records. Do whatever is necessary to obtain out-of-state records. Be prepared to rebut arguments by treating psychiatrists that their records are confidential or privileged

The following records should be obtained:

1. Pre-Accident Medical Records

Obtain and review complete copies of **all** pre-accident medical and psychiatric records. It is extremely important to determine whether plaintiff has had other emotional problems in the past and to determine whether plaintiff has reported other psychological stressors which may have caused or contributed to plaintiff's current emotional problems.

2. Post-Accident Medical Records

Obtain and review all medical and psychiatric records concerning plaintiff's post-accident treatment. Establish when plaintiff first saw a physician for any claimed physical injury, and when plaintiff first saw a psychologist or psychiatrist regarding any alleged emotional distress problem. Determine if plaintiff's visit to any medical practitioner was at the suggestion of his or her attorney.

3. Employment Records

Obtain and review plaintiff's pre- and post-accident employment records. Determine if plaintiff was ever fired or demoted prior to the accident. Analyze whether these records confirm plaintiff's wage loss claim. Determine if plaintiff's supervisors have made any comments or complaints concerning plaintiff's post-accident work performance and whether the accident has had any apparent effect on plaintiff's employment status. Verify whether plaintiff took time off from work to visit medical practitioners

4. Military Records

Obtain complete copies of all military records, including all military medical and psychiatric records. If plaintiff served in Vietnam, or any other combat-related duty, these records become even more important. Military records often contain important information about potential stressors that may have had an adverse effect on plaintiff's mental health.

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5. School Records

School records often contain relevant information about psychological testing, intelligence testing, emotional problems, expulsions, and learning disabilities.

D. Conduct An Imaginative Plaintiff's Deposition

A carefully prepared and thorough deposition of plaintiff is essential to the defense of a mental distress claim. When a claim involves a specific diagnosis of PTSD, an accurate assessment is almost impossible without knowledge of all relevant facts. Statements made by plaintiff during a carefully crafted deposition may often contradict statements made to a treating physician, psychologist, or other witness, or which are contained in letters or other writings prepared by plaintiff after the accident. Plaintiff's deposition will help the defense expert evaluate the claim and help defense counsel prepare for cross-examination of plaintiff's expert. In any event, a thorough deposition will allow defense counsel to evaluate the merits of plaintiff's emotional distress claim early in the litigation.

1. Review PTSD Diagnostic Criteria

Before planning the deposition, carefully review the diagnostic criteria of Post-Traumatic Stress Disorder, and the accompanying description of the disorder, in *DSM-III-R* and the *DSM-IV Draft Criteria* (or *DSM-IV* when available in 1994).

DSM-III-R describes PTSD, at page 247:

> The essential feature of this disorder is the development of characteristic symptoms following a psychologically distressing event that is outside the range of usual human experience (*i.e.*, outside the range of such common experiences as simple bereavement, chronic illness, business losses, and marifal conflict). The stressor producing this syndrome would be markedly distressing to almost anyone, and is usually experienced with intense fear, terror, and helplessness. The characteristic symptoms involve reexperiencing the traumatic event, avoidance of stimuli associated with the event or numbing of general responsiveness, and

increased arousal. The diagnosis is not made if the disturbance lasts less than one month.

The most common stressors "involve either a serious threat to one's life or physical integrity; a serious threat of harm to one's children, spouse, or other close relatives and friends; sudden destruction of one's home or community; or seeing another person who has recently been, or is being, seriously injured or killed as the result of an accident or physical violence" (*DSM-III-R*, pages 247-248). Examples of stressors which produce this disorder include natural disasters (*e.g.*, floods, earthquakes), accidental disasters (*e.g.*, car accidents with serious physical injury, airplane crashes, large fires, collapse of physical structures), or deliberately caused disasters (*e.g.*, bombing, torture, death camps). According to *DSM-III-R*, some stressors, such as natural disasters or car accidents, cause PTSD "only occasionally." (*DSM-III-R*, p. 248)

DSM-III-R sets forth three general categories of symptoms that constitute the diagnostic criteria for PTSD: (1) persistent reexperiencing of the traumatic event, including recurrent and intrusive distressing recollections of the event, recurrent distressing dreams of the event, sudden feelings that the traumatic event were reoccurring (including hallucinations and flash-back episodes), or intense psychological distress at exposure to events that symbolize or resemble an aspect of the event; (2) persistent avoidance of stimuli associated with the trauma or numbing of general responsiveness (not present before the trauma), as indicated by at least three of seven separate symptoms set forth in the criteria; and (3) persistent symptoms of increased arousal which were not present before the trauma, as indicated by at least two of six specific symptoms set forth in the criteria.

These symptoms should be studied carefully and the deposition should be planned so that questions concerning each of these symptoms can be touched on at various times in the deposition in a random fashion which does not mirror the order of the symptoms in the diagnostic criteria.

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2. Meet With Consulting Psychiatrist

If possible, spend an hour or two with the defense consulting psychiatrist before taking plaintiff's deposition. This consultant can help the attorney better understand the diagnostic criteria for PTSD and the importance of other stressors, and provide subject areas which should be covered during the deposition.

3. Be Understanding But Thorough

It is our experience that an understanding and somewhat sympathetic approach by the defense attorney will most likely result in the most effective deposition. Put the witness at ease at the beginning of the deposition, and encourage the witness to speak freely by the way in which questions are framed, and by your tone of voice and body language. If plaintiff is indeed suffering from PTSD, the deposition will be a difficult and unpleasant experience, and you will be asking the witness to recall extremely unpleasant events and images. PTSD victims frequently feel great animosity toward defendants, and their attorneys, and you should make every effort to defuse this animosity and put the witness at ease with the process. This does not mean that you should avoid tough questions, or that vague, self-serving responses should be accepted without challenge. Rather, be courteous but thorough, polite but persistent.

If plaintiff is a malingerer, or exaggerates symptoms, a properly prepared deposition will allow counsel to later prove some statements false, or suggest that they are unbelievable, through the testimony of family members, treating physicians, co-workers and employer supervisors

Explore the following subjects during plaintiff's deposition:

(1) The nature and extent of plaintiff's claimed physical and mental injuries;

(2) All post-accident treatment by any psychologist, psychiatrist, medical practitioner, or hospital;

(3) Plaintiff's complete pre-accident medical and psychiatric history;

(4) The existence of all other potential psychological stressors (use the chart of psychological stressors in *DSM-III-R* as a guide);

(5) The identity of friends, co-workers, and supervisors who may be potential witnesses, or who may have intimate knowledge concerning plaintiff's claim;

(6) Correspondence between plaintiff and any defendant written after the accident;

(7) Written statements or descriptions of the accident prepared by the plaintiff after the accident;

(8) Diaries or personal calendars containing descriptions of the accident prepared by plaintiff (determine if any such diaries were prepared at the suggestion of plaintiff's attorney);

(9) Whether plaintiff has experienced the symptoms enumerated in the diagnostic criteria for PTSD, and the period of time that plaintiff experienced each such symptom (use non-leading questions as discussed below);

(10) Whether plaintiff's first visit to a psychologist or psychiatrist was after an attorney was retained and, if so, whether the visit was at the suggestion of the attorney;

(11) Whether plaintiff has received **treatment** by a psychologist or psychiatrist, as distinguished from an examination by a forensic psychiatrist for the purpose of litigation;

(12) Specific details, as opposed to conclusionary statements, as to how the alleged symptoms have adversely affected plaintiff's life, including its affect, if any, on work, personal relationships, sexual function, and the ability to cope with everyday activities; and

(13) The identity of all airline mileage club memberships and flights taken by plaintiff after the accident, and any fear-of-flying courses taken (if the traumatic event was an aircraft accident).

Plan the deposition so that non-leading questions can be asked in a random fashion about each of the diagnostic criteria identified in *DSM-III-R*. For example, instead of asking the witness whether he has had nightmares, ask the witness how he has been sleeping since the accident. If the witness says his sleep has been disturbed, ask how it has been disturbed. If the witness states that he wakes up in the middle of the night, ask how he feels when he wakes up or what he thinks about when he wakes up. In other words, ask sufficient questions concerning sleep disturbance for impeachment if plaintiff claims at trial that he has had many disturbing nightmares

Do not settle for conclusionary statements concerning plaintiff's symptoms. Ask for details concerning how the witness perceives each symptom, how often they occur, and under what circumstances. Seek the identity of witnesses who have observed plaintiff's behavior on any of these occasions or who can corroborate plaintiff's claimed symptoms.

If plaintiff is still working, determine whether plaintiff's work has been recently evaluated and whether he has received or not received expected promotions. Solicit the identity of all supervisors who may be in a position to evaluate plaintiff's work. If plaintiff is not working, ask detailed questions about the reasons the witness is not working and what the witness has been doing while off work. If, for example, plaintiff claims an inability to work due to lack of concentration, determine whether plaintiff has been involved in any activities while not working that require concentration.

Carefully observe the demeanor of plaintiff throughout the deposition and make an evaluation as to whether the witness will appear sincere and believable at trial. Many plaintiffs with PTSD will become extremely emotional and agitated, with outbursts of crying, during a deposition. Determine whether plaintiff will make an effective and sympathetic witness who will come across as someone whose life has been severely affected by the traumatic event, or whether the witness will appear normal and articulate while reciting a list of symptoms experienced since the accident.

Ask specific questions about other psychological stressors in plaintiff's life and how plaintiff has dealt with those stressors. Explore any history of prior psychological or psychiatric treatment, and whether plaintiff has ever taken any prescription drugs for a psychiatric problem.

Elicit specific details concerning plaintiff's activities in the days, weeks and months following the traumatic event. Establish if plaintiff took vacations following the event and identify any photographs which exist concerning that vacation. Ask if plaintiff participated in any press conferences following the accident and whether any statements were made by plaintiff to any news reporters. Determine if plaintiff has any news clippings concerning the event.

Determine whether plaintiff has experienced stressors subsequent to the accident which may have contributed to his present psychological condition. Find out if plaintiff is a substance abuser and whether this problem arose before or after the subject accident.

Emotional distress plaintiffs will often claim that various post-accident problems, such as marital discord or break-up, alcohol or substance abuse, or problems at work, were caused by the traumatic event. It is important to ask questions which will help the defense psychiatrist or jury make a judgment as to whether these post-accident problems were caused by the subject accident or by pre-existing stressors having nothing to do with the accident.

E. Take An Aggressive Deposition Of Plaintiff's Psychiatric Expert

A successful deposition of plaintiff's psychiatrist has several important goals: (1) to determine whether or not the witness qualifies as a legitimate PTSD expert; (2) to establish a factual foundation for the witness's bias; (3) to obtain the witness's complete file and to explore the details of his or her psychiatric examination; (4) to determine the witness's diagnosis and all bases therefore; (5) to determine the witness's prognosis and estimate as to cost of treatment; and (6) to establish what the witness has not done. In general, the deposition should be structured to obtain the information necessary for an effective cross-examination of the witness at trial.

1. Prepare Carefully

Review *DSM-III-R* and *DSM-IV Draft Criteria* concerning the diagnostic criteria for Post-Traumatic Stress Disorder and associated stress-related mental disorders. Use the attached Bibliography to obtain and review relevant articles concerning the cross-examination of psychiatric experts, and prepare a check-list of subjects which should be covered. (A more detailed discussion of these issues is contained in Section V. B. 1.)

It is often helpful to consult with the defense psychiatric expert concerning an effective deposition strategy. If the plaintiff's psychiatric expert is a treating physician, the defense consultant can help examine and analyze the physician's records concerning plaintiff prior to the deposition. The consultant can also explain the qualifications and background necessary to be a legitimate expert in stress-related mental disorders and suggest appropriate questions on this subject.

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2. Determine The Witness's Qualifications

Request a complete copy of the expert's curricula vitae, including a list of all medical articles written by the expert. In addition to the expert's educational background, ask questions to determine whether the psychiatrist claims a specialty in Post-Traumatic Stress Disorder and, if so, the basis therefore. Explore the following areas: (a) whether the witness has done any research or specific clinical work as a specialist in stress-related mental disorders; (b) whether the witness has written any books, or book chapters, concerning PTSD or other stress-related disorders; (c) whether the expert has written any peer-reviewed medical articles concerning PTSD or trauma-induced stress (if so, obtain copies); (d) whether the witness participated in drafting the diagnostic criteria for PTSD; (e) whether the witness has participated in any advanced research or fellowships concerning this specialty and whether he or she has served on any national or international committees concerning traumatic stress reactions; (f) whether the witness has ever taught any medical courses concerning this specialty; (g) the approximate number of patients that the witness has examined and diagnosed with PTSD; (h) whether the witness has ever testified in deposition or at trial concerning a diagnosis of PTSD and, if so, the details concerning that testimony; (i) whether the

witness has ever conducted a literature review concerning PTSD; and (j) whether the expert utilizes a recognized course of treatment for patients with PTSD or other trauma-induced mental disorders.

3. Establish Bases For Potential Bias

Determine whether the witness is a true clinician who makes a living treating psychiatric patients, or whether the witness is primarily a forensic expert who makes a large income by conducting one-time examinations of plaintiffs for the purpose of litigation. In other words, establish if the witness is a "hired gun."

If the witness is a forensic expert, determine the number of examinations conducted per week or per month, and the average fee charged by the witness for these examinations and reports. Determine the number of times that the witness has testified in deposition or at trial in legal proceedings. Establish a factual foundation for estimating at trial the amount earned on an annual basis from forensic psychiatric examinations. Determine the witness's relationship and past associations with plaintiff's attorney. Ask whether plaintiff was referred to the witness by an attorney and the number of times that attorney has referred patients to this doctor for forensic examinations.

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4. Review Details Of Examination And Records

Obtain complete and readable copies of all records concerning plaintiff in the expert's possession, including in-take card, referral forms, all notes and reports, records or reports from other medical practitioners, correspondence to and from plaintiff's counsel, all psychological tests, correspondence to or from plaintiff, and billing records. Determine whether the expert has been paid for his examination or treatment and, if so, by whom.

Psychiatrist's notes are often sketchy and virtually illegible, and it may be necessary to have the psychiatrist read his notes into the record verbatim.

Explore the details of the witness's psychiatric examination of plaintiff, including the time spent on each session, whether the sessions were tape recorded, whether

handwritten notes were made during the examination or sometime after plaintiff left the office, and the process by which any typewritten notes were prepared.

Thoroughly review the entire history of the accident or traumatic event given to the witness by plaintiff. This history is often the most critical portion of the psychiatrist's chart because it can provide inconsistencies with the story plaintiff told in his deposition or will tell at trial, or establish that the psychiatrist made his diagnosis based on an incomplete or inaccurate history supplied by plaintiff.

5. Determine The Expert's Diagnosis And Bases Therefor

Determine whether the expert relied on *DSM-III-R* in making a diagnosis, and pin the witness down to each *DSM-III-R* diagnosis made, using the multiaxial system described in the manual.

If the expert has diagnosed Post-Traumatic Stress Disorder, use the diagnostic criteria for Code 309.89 to determine the specific factual basis for each of the required symptoms. This discussion should probably take place after the expert has identified all written notes and has read those notes into the record. Then determine whether the notes, as opposed to the doctor's recollection, reflect each required criterion. I. the required symptoms are not contained in the notes, the physician is subject to cross-examination at trial as to why the symptoms were not noted at the time of the examination.

Seek specific details. If the expert's notes reflect "recurrent dreams," for example, ask exactly what plaintiff said about the dreams, how often they occurred, the contents of the dreams, whether the dreams were always the same, etc. Make every attempt to show that plaintiff did not give a history of a given symptom or, if so, that the history was entirely conclusionary and that the expert did nothing to develop specific details concerning the symptom.

Question the expert about other diagnoses considered, why each diagnosis was ruled out, and the factual basis for each such decision

Ask about other psychological stressors disclosed by plaintiff. This is a win-win situation. If the expert did not inquire about other stressors, and blindly accepted plaintiff's claim that the traumatic event was the sole cause of his symptoms, then the expert will not appear objective. If plaintiff disclosed other stressors, then plaintiff's own expert can be used to provide the factual basis for alternative causes, or for mitigation of the damages caused by the accident.

6. Establish The Expert's Prognosis And Opinion As To Cost Of Treatment

Inquire about the expert's prognosis and any medical journal articles or other research which support such an opinion. Determine whether the expert has written or relied on any articles which discuss the expected course and proper treatment of PTSD or stress-related mental disorder.

If the expert specializes in the treatment of PTSD or stress-related disorders, ask if the witness uses a course of treatment which is expected to improve or eliminate such disorders. If the expert agrees that treatment is available which will substantially improve plaintiff's condition, establish the duration of that treatment and its reasonable cost.

7. Establish What The Expert Does Not Know

Cross-examine on those things the expert has not done. For example, establish that the expert has not read or relied on various records concerning plaintiff (medical, employment, school, military, etc.), or that the expert has not interviewed plaintiff's spouse, siblings, parents, or co-workers. Confirm that the expert has not read plaintiff's deposition or other statements given by plaintiff after the accident. Set-up the expert for an argument at trial that his or her diagnosis was based entirely on the subjective history given by plaintiff, who had every reason to fabricate or exaggerate his symptoms, and that the expert did nothing to obtain or review other available evidence which might either collaborate or contradict the history given by plaintiff during the examination. Hopefully, this testimony will be in sharp contrast to the careful review of all available information by the defense expert.

IV. WHEN APPROPRIATE, ARRANGE FOR A DEFENSE PSYCHIATRIC EXAMINATION

A defense psychiatric examination can be an extremely effective tool in the defense of a substantial mental distress claim. FRCP 35 sets forth the procedure for obtaining an examination of a person whose mental condition is in controversy. Generally, the court can order such an examination upon a showing of "good cause," or the parties can agree to the examination by stipulation. Most states have similar statutes. However, a decision as to whether to request a defense psychiatric examination should be made only after carefully weighing the advantages and disadvantages of such a procedure.

A. Weigh Advantages And Disadvantages

A defense psychiatric examination by a well-qualified expert has several distinct advantages:

(1) A mental examination of plaintiff is clearly the best method of evaluating plaintiff's claim, the validity of the diagnosis by plaintiff's expert, the severity and duration of any alleged mental disorder, an appropriate prognosis, and the efficacy of any proposed treatment protocol.

(2) Since FRCP 35 requires an **exchange** of reports, defense counsel may be able to obtain consultant reports from plaintiff's attorney which would otherwise have been privileged.

(3) Such an examination is almost a prerequisite to effective and believable trial testimony by the defense psychiatric expert

However, a defense mental examination has several distinct disadvantages:

(1) A complete psychiatric examination can be expensive ($750-$2,000), and defense counsel must evaluate whether the claim justifies this expense

(2) Like any defense medical examination, there is a risk that the report of the defense psychiatric expert may support, or even amplify, the diagnosis or other testimony by plaintiff's expert.

(3) If substantial time has elapsed between the traumatic event and the defense examination, it may be more difficult for the defense psychiatrist to make an accurate and reliable assessment of plaintiff's mental condition during the period prior to the examination.

B. Provide Defense Expert With All Relevant Information

Provide the defense psychiatric expert with all available and relevant information that might have any bearing on plaintiff's mental status. The consultant should review all available pre-accident and post-accident medical and psychiatric records, plaintiff's employment records, any school or military records, and plaintiff's answers to interrogatories. Plaintiff's deposition, and the depositions of any witnesses who observed plaintiff at the time of the accident, should also be provided to the consultant. In short, the defense psychiatrist should be in a position to base his opinions and conclusions on all available information.

However, some courts have stressed that such an examination is to be "independent," and at least one court has held that "no party to the litigation should provide the examining physician with information absent a request from the physician and approval of the court." *Ewing v. Ayres Corp.* (N.D. M.S. 1989) 129 FRC 137, 138. This issue should be researched in each jurisdiction before providing unrequested materials to the defense expert.

C. Consider Goals Of Defense Examination

A well-planned defense psychiatric examination should accomplish one or more of the following goals:

(1) Establish that plaintiff is a malingerer, or that plaintiff has greatly exaggerated the severity or duration of symptoms for the purpose of increasing the value of the claim;

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(2) Establish that the diagnosis of plaintiff's expert is incorrect because the required diagnostic criteria are not supported by the facts;

(3) Establish a diagnosis which is less severe and disabling than that made by plaintiff's expert;

(4) Establish that other pre-accident or post-accident stressors caused, contributed to, or exacerbated plaintiff's mental condition;

(5) Establish that plaintiff's diagnosed condition was of much less severity, or lasted for a much shorter time, than opined by plaintiff's consultant;

(6) Establish that a given treatment protocol would eliminate or substantially improve plaintiff's mental condition, and establish the cost of that treatment;

(7) Establish that plaintiff sought no psychiatric counseling until referred by plaintiff's attorney.

D. Be Wary Of Potential Pitfalls

There are several potential pitfalls of a defense psychiatric examination which should be evaluated by the defense attorney.

1. Report Required

FRCP 35 provides that, if requested, "the party causing the examination to be made shall deliver to the requesting party a copy of the detailed written report of the examiner setting out the examiner's findings, including results of all tests made, diagnoses and conclusions . . ." Therefore, the die is cast once the decision is made to conduct a defense psychiatric examination. The defense expert will be required to write a detailed report concerning all diagnoses and conclusions and a copy of that report will have to be provided to plaintiff's attorney. However, FRCP 35 also provides that there be an exchange of reports and plaintiff's attorney will therefore have to produce copies of all similar reports, even if those reports would otherwise have been privileged as work product

2. Examination Observers

Resist any attempts by plaintiff's attorney to attend the defense psychiatric examination, or to send another representative to observe. Case law recognizes the special need for rapport between the examiner and examinee during a mental examination, and courts have held that the presence of plaintiff's counsel or court reporters may impair the effectiveness of the examination. See, *e.g.*, *Edwards v. Superior Court* (1976) 16 C.3d 905, 910; *Vinson v. Superior Court (Peralta Comm. College Dist.)* (1987) 43 C.3d 833, 844-845; *Cline v. Firestone Tire & Rubber Co.* (S.D. W.V. 1988) 118 FRD 588.

However, some courts have permitted the party's attorney or doctor to be present upon a showing of good cause. See *Brandenberg v. El Al Israel Airlines* (S.D. N.Y. 1978) 79 FRD 543; *Klein v. Yellow Cab Co.* (N.D. Ok. 1944) 7 FRD 169.

3. Audio Recording

In California, Code of Civil Procedure section 2032(g)(2) provides "the examiner and examinee shall have the right to record a mental examination on audiotape." Thus, plaintiff is allowed to bring a tape recorder and tape the entire examination. Discuss any such requirement with the expert prior to the decision to conduct a defense psychiatric examination. Some psychiatrists are very reluctant to allow a mental examination to be tape recorded and this procedure may greatly hinder the examiner's ability to conduct an effective examination. If the examiner is not extremely skilled, such a recording might later be used by plaintiff's counsel to show bias or the absence of objectivity during the examination.

V. IMPLEMENT AN EFFECTIVE TRIAL STRATEGY

The most effective trial strategy will depend upon defense counsel's evaluation of the following factors: (1) the sophistication of the expected jury panel and an evaluation (perhaps based on jury research or focus groups) as to whether most prospective jurors will have a predisposition with respect to psychiatrists and psychotherapy; (2) plaintiff's overall demeanor and appearance as a witness; (3) the severity and duration of plaintiff's psychiatric disorder; (4) the qualifications and demeanor of

plaintiff's psychiatric expert; and (5) the qualifications and demeanor of the defense expert, and the diagnosis made by that consultant.

Although a great oversimplification, counsel should consider on a case-by-case basis whether to develop one of the following two inconsistent themes at trial:

(1) The "psychiatry is a bunch of hooey" theme. Under this approach, from the beginning of the trial to the end, defense counsel's strategy is to convince the jury that psychiatry is more art than science, which cannot be trusted or relied on by the jury. Attempt to introduce skepticism and distrust about psychiatry and psychiatrists throughout the trial. Vigorously cross-examine plaintiff's psychiatrist in a way which suggests that the witness is unqualified and ill-equipped to make any reliable diagnosis concerning plaintiff's mental condition, and that the diagnosis constitutes nothing more than unverifiable speculation.

(2) The "my psychiatrist is better than yours" theme. Under this approach, while at least impliedly accepting the proposition that psychiatry can provide reliable and useful information to the jury, counsel attempts to convince the jury that plaintiff's psychiatrist should not be believed because of bias, lack of qualification, improper examination technique, or failure to consider all relevant facts. At the same time, counsel attempts to persuade the jury that the well-qualified defense expert has made the correct diagnosis and prognosis, which constitutes a reliable basis for the jury's decision.

This overall strategy decision will, of course, shape the entire course of the trial.

A. Voir Dire Jury Re Psychiatric Issues

Particular care should be taken in selecting the jury for a substantial emotional distress case. Jurors tend to have strong biases and opinions concerning psychiatry and psychiatrists and these feelings must be explored with the jury panel during jury selection.

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A detailed written jury questionnaire, approved by counsel for both sides, is strongly recommended. To be most effective, the questionnaire should be completed by each member of the jury panel at least one day prior to the commencement of jury selection. Copies of the completed questionnaires can then be submitted to counsel for both sides for analysis prior to jury selection. A jury psychologist can be of great assistance in preparing such a questionnaire. In appropriate cases, questions may be based, at least in part, on information learned during focus group jury research.

The questionnaire should include questions designed to solicit information on the following subjects: (1) whether the juror, or anyone close to the juror, has ever suffered from an emotional condition which required professional counseling or psychotherapy; (2) whether the juror believes that psychotherapy or psychological counseling was helpful to them, or could be helpful to others; (3) the juror's attitude about someone who seeks psychological care for an emotional injury; (4) the juror's attitude toward psychologists and psychiatrists; (5) whether the juror has ever received any education or training in psychology or psychiatry; (6) whether the juror has ever held any occupation relating to psychiatry or psychology; (7) whether the juror, an immediate family member or a close friend has ever worked in a field that has given them personal experience with psychiatry, PTSD, crisis intervention, or medicine; (8) whether the juror has ever been on a jury in a case concerning mental distress or psychiatric issues; (9) whether the juror has ever taken prescription medication for any psychiatric condition; (10) whether the juror has ever been exposed to a life-threatening event beyond the normal human experience; and (11) whether the juror has any family members or close friends who are psychologists or psychiatrists.

Carefully voir dire the jury on these issues and attempt to explore in detail the jurors' attitudes and biases with respect to psychiatry, psychology and psychotherapy. Depending on defense counsel's trial strategy, the voir dire questions should begin laying the foundation for the defense themes in the case.

B. Conduct An Effective Cross-Examination Of Plaintiff's Psychiatrist

The most effective cross-examination of plaintiff's psychiatrist at trial will depend upon defense counsel's overall strategy, the background and qualifications of the psychiatrist, the thoroughness of the psychiatrist's examination and report, and counsel's evaluation of the witness's demeanor and ability to handle rigorous cross-examination. The following is intended as a guide to possible areas for fruitful cross-examination.

1. Careful Preparation Is Essential

Psychiatrists make difficult subjects for cross-examination. First of all, psychiatrists are talkers who are often very glib at answering questions with long-winded scientifically sounding explanations. Second, psychiatry is a field which is foreign to many trial attorneys and a rudimentary knowledge of this specialized field is essential for effective cross-examination.

a. Review Materials Re Cross-Examination

Numerous texts and legal articles are available concerning cross-examination of psychiatrists and psychologists. Many of these are cited in the Bibliography and contain both subject areas and actual questions for effective cross-examination. The three volume book, *Coping With Psychiatric and Psychological Testimony* (Ziskin and Faust, 4th ed. 1988, Law and Psychology Press), is a must for any defense attorney facing a substantial claim in this area. The authors set forth their goal in the first sentence of the introduction:

> It is the aim of this book to demonstrate that, despite the ever-increasing utilization of psychiatric and psychological evidence in the legal process, such evidence frequently does not meet reasonable criteria of admissibility and should not be admitted in a court of law or, if admitted, should be given little or no weight.

The authors rely on well over 1,400 references, most of them appearing within the past 10 to 15 years, to provide an endless supply of source material for framing objections to psychiatric and psychological evidence. There is a chapter on nearly every possible means by which a psychiatrist or psychologist can be challenged on the witness stand, from attacks on the expert's own training, certification and experience, to arguments concerning the validity of psychiatric and psychological tests, both generally and specifically. Chapter 9 (Volume III) is entitled "Cross-Examination in Personal Injury Cases," and contains an entire section, beginning at page 218, concerning cross-examination in cases involving Post-Traumatic Stress Disorder. Chapter 20 (Volume II) is devoted specifically to challenging Post-Traumatic Stress Disorder.

If this book is unavailable, similar cross-examination ideas are contained in Faust and Ziskin, "Challenging Post-Traumatic Stress Disorder Claims," 38 Defense Law Journal, 407-424 (1989). The articles by Hiers and Almy, cited in the Bibliography, are also recommended background reading.

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b. Study Expert's Chart and C.V.

Carefully review the witness's entire chart, including all written reports, notes, records, letters and billing records. Statements or notations in these records helpful to the defense case should be enlarged for use during cross-examination.

Do not neglect the psychiatrist's curricula vitae. Obtain and review copies of any publications by the expert concerning Post-Traumatic Stress Disorder or other stress-related mental disorder.

c. Consult Defense Expert

Analyze all of these materials with the defense psychiatric consultant and solicit the consultant's ideas about potential areas for effective cross-examination.

2. Challenge Psychiatry And Diagnostic Criteria

If counsel has elected the "psychiatry is a bunch of hooey" trial strategy, then at least part of the cross-examination should be designed to convince the jury that psychiatry

should be viewed with suspicion and skepticism, and that psychiatrists cannot be trusted to provide an accurate and reliable diagnosis and prognosis concerning plaintiff.

a. Psychiatry Is More Art Than Science

Ziskin's book is devoted almost entirely to the proposition that psychiatry is not sufficiently reliable to meet reasonable criteria of admissibility and that psychiatric testimony should be given little or no weight in the courtroom. The Supreme Court has stated that psychiatry is an inexact science and that "psychiatrists disagree widely and frequently about what constitutes mental illness, on the appropriate diagnosis to be attached to given behavior and symptoms [and] on cure and treatment."[1]

Questions in this area should focus on the lack of reliability and validity with respect to psychiatric diagnoses and conclusions. Reliability refers to the likelihood that other psychotherapists would come to the same conclusion or diagnosis about a particular patient given the same information.[2] Some studies are available which show that one can expect agreement between two psychiatrists in only about 60 percent of cases, and that the chances of a second psychiatrist agreeing with the diagnosis of the first psychiatrist are barely better than 50-50.[3]

The unreliability of psychiatric diagnoses is discussed by Almy as follows:

> A review of the literature shows that the validity of psychiatric diagnoses is low. One psychologist, after reviewing 212 relevant studies, concluded there was 'generally poor support for the validity of psychiatric diagnosis . . . .
>
> Studies vary on their estimates of psychiatry's reliability, but most agree upon 50 percent reliability. That is, there is about a 50/50 chance that any two psychiatric experts, given the same data, will agree on a diagnosis. However, some studies indicate a significantly lower reliability (33-1/3 percent).[4] (Footnotes omitted)

After discussing the reliability and validity of psychiatric diagnosis, Ziskin and Faust conclude "thus, the process of clinical judgment appears to rest upon some process that may be mystical or perhaps art, but clearly is not science."[5]

Validity, as distinguished from reliability, measures the accuracy of judgments or diagnoses.[6] As discussed at length in Ziskin's book, most of the subject matter of psychology and psychiatry remains unsubstantiated theory, not fact.

Ziskin's book contains a specific discussion concerning the reliability and validity of PTSD diagnoses.[7]

b. Psychiatrists Can Be Fooled

Through skillful cross-examination, counsel should be able to get plaintiff's expert to admit that psychiatrists can be fooled and that malingering is extremely difficult to detect. One famous study by Rosenhan[8] is particularly enlightening. This study involved eight people, leading normal lives and not suffering from any mental disorder, who were sent to 12 different mental hospitals, in 5 different states, to gain admission. At the Admissions Office, the pseudo-patient would complain about hearing voices that sounded like "Empty," "Hollow," and "Thud." Beyond falsifying these symptoms and altering their name, vocation and employment, no other changes were made by the pseudo-patients concerning their background. Significant events of the pseudo-patient's life history were represented as they had actually occurred. Relationships with parents, siblings, spouses, children and people at work or school were accurately described.

Immediately upon admission to the psychiatric ward, the pseudo-patient ceased simulating any symptoms of abnormality, and from then on exhibited normal behavior. However, the "patient" was not allowed to report that he or she was in a study program.

Despite their public shows of sanity, the pseudo-patients were never detected by the hospital staffs. Except in one case, all were admitted with a diagnosis of schizophrenia, and each was discharged with a diagnosis of "schizophrenia in remission." The

pseudo-patients remained hospitalized from 7 to 52 days, with an average of 19 days. It is interesting to note that it was quite common for other patients to detect the pseudo-patients' sanity and conclude that they were a journalist or professor checking up on the hospital. Counsel should obtain copy of this article and study it carefully for use in cross-examination.

Ziskin's book contains a detailed discussion of the Rosenhan study, including an in-depth analysis and rebuttal of several articles critical of the study.[9]

c. "Cookbook" Diagnostic Criteria Are Suspect

The diagnostic criteria of *DSM-III-R*, and draft *DSM-IV*, are subject to considerable controversy and criticism because of the classification system utilized. The diagnostic criteria of *DSM-III* and *DSM-III-R* are discussed at length by Ziskin and Faust, who conclude:

> The foregoing should be sufficient to make clear that the assessment and diagnostic systems utilized in psychiatry and clinical psychology do not rest upon any basis of soundly established scientific principles. This is well known to many lawyers who have had the frustrating experience of hearing different psychiatrists employ different diagnostic categories for an individual, although their diagnoses are based on the same clinical data. In other words, the data concerning the patient or subject do not dictate the conclusion as they must in any scientifically established discipline, but rather it is the manner in which the individual psychiatrist chooses to define the category and interpret the data that dictates the diagnosis.[10]

In a case involving a PTSD diagnosis, it is recommended that counsel have an enlargement made of the diagnostic criteria for PTSD and question the psychiatrists at length about why three (as opposed to two or four) of seven symptoms are required for "persistent avoidance of stimuli associated with trauma," while two (rather than one or three) out of six symptoms are required in order to find "persistent symptoms of increased arousal." Changes in the diagnostic criteria from *DSM-III* to *DSM-III-R*,

and to the proposed criteria for *DSM-IV*, may provide other fruitful areas for examination.

Counsel should also emphasize the subjective nature of these criteria, and how a psychiatrist could easily get a plaintiff to mention one or more of these symptoms through leading questions.

3. Challenge Plaintiff's Psychiatrist

Whether or not a direct attack is made on psychiatry or psychoanalysis, an effective cross-examination will most likely include an attack on plaintiff's psychiatrist, or on the diagnosis or bases for the diagnosis made by that psychiatrist.

a. Bias

Do everything possible to persuade the jury that plaintiff's psychiatrist is biased and that this testimony cannot and should not be trusted. Possible areas of cross-examination include the following:

(1) Establish that the expert is a forensic psychiatrist who makes all or most of his living from preparing psychiatric reports for the purposes of litigation;

(2) Demonstrate that the psychiatrist has often worked for plaintiff's attorney and/or that plaintiff was referred to the expert by the attorney;

(3) Ascertain the amount of money which the psychiatrist charged for the work he did on this case;

(4) Prove that the psychiatrist performed a forensic examination only and that he has never treated plaintiff for plaintiff's mental condition;

(5) Establish that the psychiatrist spent very little time interviewing the patient and that he basically accepted everything the patient said as true;

(6) Demonstrate that the psychiatrist is relying on several symptoms allegedly reported by plaintiff but which do not appear anywhere in the doctor's record; and

(7) Show that the psychiatrist does not make an objective appearance, that he is argumentative with the attorney, and that he appears to be an advocate for plaintiff's position.

b. Qualifications

Using the background established during the deposition of plaintiff's expert, show that this witness has no particular expertise or subspecialty in PTSD or stress-related mental disorders. In particular, show that the witness has **not**:

(1) Written any peer-reviewed articles concerning PTSD or stress-related mental disorders;

(2) Written any books or chapters on this subject;

(3) Conducted any clinical research in this area;

(4) Specialized in the clinical treatment of PTSD patients;

(5) Participated in drafting any of the diagnostic criteria for these disorders; or

(6) Conducted an analysis of the literature concerning the diagnosis and treatment of these disorders.

c. Examination And Report

Challenge the believability of the witness's testimony by showing, if appropriate, that the witness never made a complete *DSM-III-R* diagnosis in either his notes or written report. Demonstrate that the expert's report contains many facts which are not contained in the psychiatrist's notes. Establish that the length of examination was inappropriate for a complete and accurate diagnosis. Show that neither the notes nor the report contain sufficient factual bases for the diagnosis made.

4. Challenge The Diagnosis

Whether or not an attack on plaintiff's psychiatrist is successful, make every attempt to challenge the diagnosis made by the psychiatrist and the bases therefore.

a. Other Pre-Accident Or Post-Accident Stressors

Use plaintiff's expert, and his report and notes, to establish that plaintiff has reported other significant pre-accident or post-accident stressors which could have caused, contributed to, or exacerbated plaintiff's mental condition.

b. Factual Basis For Diagnosis

Show that the expert has no knowledge of relevant information obtained by counsel through other records and discovery. Demonstrate that some of the symptoms reported by plaintiff have been contradicted by other statements by plaintiff or by other records. Establish that the expert had no knowledge of other psychiatric treatment of plaintiff. Prove that plaintiff made only conclusionary statements to the psychiatrist about certain symptoms, and that the expert did nothing to get more complete and accurate information concerning those symptoms.

c. Possible Alternative Diagnoses

Using the diagnostic criteria for other disorders in *DSM-III-R*, attempt to get the witness to admit that other less severe and disabling diagnoses might be appropriate based on the information provided by plaintiff during the examination.

Determine whether the psychiatrist has considered malingering or compensation neurosis as a basis for plaintiff's claimed symptoms, and whether the psychiatrist can rule these out as potential causes for plaintiff's mental problems

5. Attack The Plaintiff

An effective cross-examination of plaintiff's psychiatrist can provide useful information for directly or indirectly attacking plaintiff. Pursue the following subjects:

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(1) Establish the entire history of the accident given to the expert by plaintiff. This history is often the most critical portion of the psychiatrist's chart because it can provide inconsistencies with the story told by plaintiff in his deposition, pre-trial statements, or during his trial testimony.

(2) Show that plaintiff cannot be trusted, by establishing through the expert that plaintiff did not reveal to the psychiatrist certain stressors or other significant facts which have been proven through other discovery.

(3) Demonstrate that plaintiff is more interested in a legal recovery than getting better, by showing that plaintiff has not sought any psychiatric or psychological counseling or treatment, and that plaintiff has refused or neglected to participate in a recommended treatment protocol.

6. Establish Cost Of Treatment

If you know the answer based on the witness's deposition testimony, get the psychiatrist to admit that plaintiff's mental condition could be eliminated, or greatly improved, with a prescribed course of treatment at a relatively low cost.

C. Present Testimony Of Well-Qualified Defense Psychiatrist

Under the appropriate circumstances, a well-qualified defense psychiatrist can be a great asset in a case where plaintiff is claiming substantial emotional distress damages. An articulate and believable defense psychiatrist can help convince the jury that the diagnosis of plaintiff's psychiatrist is wrong, that a less-severe and disabling alternative diagnosis is more appropriate, that the severity and duration of plaintiff's psychiatric disability is substantially less than opined by plaintiff's psychiatrist, that plaintiff has a much more hopeful and optimistic prognosis, and that plaintiff's condition can be eliminated or substantially improved by a relatively inexpensive course of treatment. Before deciding to use the defense psychiatrist at trial, carefully weigh the advantages and disadvantages of this testimony.

1. Consider Advantages And Disadvantages

As discussed at the beginning of this section, the decision as to whether to call a defense psychiatrist at trial should be made on a case-by-case basis, depending on numerous factors, and defense counsel's overall trial strategy. The following factors should be considered in making this decision:

(1) Is the defense psychiatrist a true specialist in PTSD or other stress-related mental disorders?

(2) Is the defense psychiatrist better qualified than plaintiff's psychiatrist?

(3) Does the defense psychiatrist have a good courtroom demeanor, which is both articulate and believable?

(4) Has the defense psychiatrist performed an appropriate psychiatric examination of plaintiff and reviewed all other information and records relevant to the psychiatric issues in the case?

(5) Is the defense psychiatrist prepared to provide useful testimony in one or more of the subject areas discussed below?

(6) Can the defense psychiatrist rebut any significant opinions expressed by plaintiff's psychiatrist?

(7) How successful was defense counsel in cross-examining plaintiff's psychiatric expert?

(8) Do the members of the jury appear receptive to psychiatric testimony?

(9) What kind of impression did plaintiff make on the jury while testifying?

(10) Will the defense psychiatrist ultimately verify or validate the opinions expressed, and methodology utilized by, plaintiff's psychiatric expert?

As a general rule, it is recommended that the testimony of a defense psychiatrist be presented in any large case if (a) the defense psychiatrist is well-qualified, articulate and believable, (b) the defense psychiatrist can present helpful testimony on one or more of the areas discussed below, and (c) the credibility of plaintiff's psychiatrist has not been substantially destroyed during cross-examination. Juries generally expect testimony from the defense on crucial issues in the case and juries generally want the imprimatur of an expert to confirm their collective common sense decision.

2. Conduct A Crisp Direct Examination

Like the direct examination of any expert, the direct examination of the defense psychiatrist should be well-planned and organized, and presented in a clear and crisp manner in order to maximize its impact on the jury. If the expert has been carefully selected, counsel should be able to establish very quickly that this witness is the most qualified and knowledgeable psychiatric expert who will testify during the trial, and that the expert has a demeanor and clarity of expression which commands the jury's attention. The expert must be prepared to back up all opinions with specific facts and an intimate knowledge of the clinical research and literature in this field. Although everyone in the courtroom knows the expert is being paid by the defense, the overall impression must be created that this expert was chosen because he or she was the best and most objective expert available.

An effective direct examination should accomplish one or more of the goals discussed below.

a. Establish An Alternative Diagnosis

Use this expert to explain to the jury in detail, using the *DSM-III-R* diagnostic criteria and all factual information available, why the diagnosis made by plaintiff's psychiatrist is inappropriate for this plaintiff. Show that plaintiff's psychiatrist has indeed made a "cookbook" diagnosis based on conclusionary statements by plaintiff. Demonstrate that plaintiff's psychiatrist arrived at an incorrect diagnosis because he or she did not have all the available facts or because the diagnostic criteria were misapplied or misinterpreted.

Use the defense expert to establish an alternative less-severe diagnosis which is supported by, and consistent with, the diagnostic criteria for that diagnosis and all available facts.

b. Dispute Severity Or Duration Of Plaintiff's Disability

Even in cases where the defense expert agrees with the diagnosis by plaintiff's expert, the defense expert can challenge the severity of plaintiff's condition as compared to other patients with the same disorder. Further, the defense expert may be able to establish that plaintiff had a diagnosed condition, such as PTSD, only for a short period of time, rather than the one to two years claimed by plaintiff's psychiatrist. The defense expert must be able to demonstrate, based on the medical history given by plaintiff and all other known facts, when plaintiff's condition stopped meeting the required diagnostic criteria.

c. Present More Optimistic Prognosis

In the large case, plaintiff's psychiatrist will most likely testify that plaintiff is suffering from a severe case of Post-Traumatic Stress Disorder which has significantly adversely affected plaintiff's ability to work, interpersonal relationships, and life in general, that this condition is extremely difficult to treat, and that plaintiff will likely suffer the "tormenting symptoms" of the disorder for many years. A defense specialist in PTSD will be able to establish that these disorders are treatable and that plaintiff's symptoms can be completely or substantially eliminated with a relatively short period of proper treatment. The well-qualified defense psychiatrist can support this opinion with his own research in the area, his clinical practice of treating hundreds of patients with these disorders, and with studies in the literature.

d. Establish Relatively Low Cost Of Effective Treatment

The defense expert should be able to establish that plaintiff's condition can be treated by a psychotherapy protocol lasting a matter of months and costing several thousand dollars. This testimony should provide the foundation for counsel to argue that a relatively small amount of money is all that is necessary to put plaintiff back in his pre-accident mental condition.

D. Plan A Persuasive Final Argument

Final argument in a pure (no physical injury) emotional distress case presents a unique challenge to the defense attorney. Emotional distress claims are by nature extremely subjective, difficult to describe, and virtually unquantifiable by dollar amount. These claims often involve a relatively small amount of special damages, and counsel for both sides therefore have a wide latitude in suggesting to the jury a number for general damages. Plaintiff's attorneys often ask juries to award several hundred thousand dollars to more than a million dollars for a substantial emotional distress claim, and a juror's life experience provides no guidelines as to the value of such a claim.

The following ideas may be useful in preparing a persuasive closing argument:

(1) Try to objectify plaintiff's complaints and treatment. Prepare a chart depicting the number of treatments received by plaintiff for his alleged emotional distress symptoms, emphasizing the length of time between the accident and the first treatment. Emphasize the dollar amount, if small, of plaintiff's actual special damages. Prepare a chronology which emphasizes how soon plaintiff returned to work after the accident.

(2) Use the "actions speak louder than words" argument. In response to plaintiff's tearful description of the accident and how it has ruined his life, remind the jury of all the objective evidence produced during trial which demonstrates that plaintiff's life has in fact continued relatively normally since the accident.

(3) Point out that plaintiff's claimed emotional distress symptoms all seem to start or intensify after plaintiff first retained an attorney.

(4) Emphasize the importance of the fact that plaintiff missed little or no time from work and that his salary and raises continued in a normal fashion from the date of the accident to the trial. Convince the jury that plaintiff's symptoms cannot possibly be as bad as his description when they have had little or no effect on his work.

(5) Establish firmly in the jurors' minds, if appropriate, that plaintiff's psychiatrist conducted only a forensic examination and diagnosis at the request of plaintiff's attorney, and that plaintiff has received no actual psychiatric treatment for his claimed emotional injuries.

(6) Remind the jury that plaintiff's demeanor during a televised press conference, or during his videotaped deposition in counsel's office, was considerably different than his emotional and tearful performance before the jury.

(7) In contrast to the totally speculative, pie-in-the-sky numbers suggested by plaintiff's counsel, try to focus the jury's attention on objective, quantifiable bases for an award (such as the cost for future psychiatric treatment, special damages, or some other objective number such as so many month's salary).

(8) If appropriate, emphasize the difference in qualification, background and experience between the defense and plaintiff experts.

Contrary to much conventional wisdom, it is recommended that defense counsel suggest a dollar amount to the jury in closing argument. It is our experience, after interviewing many jurors following emotional distress trials, that jurors have widely divergent views on the value of an emotional distress case and that they look to both attorneys for a suggested reasonable award and the bases for such an amount.

E. Be Prepared For Improper Jury Arguments

Good plaintiff's attorneys use imaginative and colorful arguments in emotional distress cases to convince juries to make large general damage awards. Be prepared to make timely objections to any improper arguments and to rebut these arguments if the objections are overruled.

For example, in *Quill v. Trans World Airlines, Inc.*,[11] the court found the following three metaphors used by plaintiff's attorney in closing argument to be improper, but not reversible error, in the absence of a timely objection or request for a curative instruction:

(1) the mental anguish of a Nazi prisoner watching a fellow prisoner being shot;

(2) the terror caused by someone putting a loaded gun to someone's head and pulling the trigger, once every second for the period plaintiff was involved in the traumatic event (aircraft hijacking); and

(3) being a prisoner in a North Viet Nam prisoner of war camp.

Be prepared to object to and rebut the "Golden Rule" argument (asking the jury to put themselves in plaintiff's shoes) and "per diem" argument (asking the jury to decide the value of a small unit, such as a second or minute or day, and to multiply that value times plaintiff's life expectancy or some other lengthy period). See "Propriety and Prejudicial Effect of Attorney's 'Golden Rule' Argument to Jury in Federal Civil Cases," 68 A.L.R. Fed. 333, and "Per Diem or Similar Mathematical Basis for Fixing Damages for Pain and Suffering," 3 A.L.R. 4th 940.

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VI. CONCLUSION

An emotional distress claim presents unique practical, legal and factual issues to defense counsel. As with most litigation, thorough preparation is the key to success.

ENDNOTES

1. *Ake v. Oklahoma*, 470 U.S. 68 (1985).

2. Ennis & Litwack, "Psychiatry and the Presumption of Expertise: Flipping Coins in the Courtroom," 62 Cal.L.Rev. 693 (1974).

3. *Id.* at 701.

4. Almy, "Psychiatric Testimony: Controlling the 'Ultimate Wizardry' in Personal Injury Actions," 19 Forum 233, 245, and footnotes 61-64.

5. Ziskin and Faust, *Coping With Psychiatric and Psychological Testimony*, Volume I, p. 108 (4th ed. 1988, Law and Psychology Press).

6. Ennis & Litwack, "Psychiatry and the Presumption of Expertise: Flipping Coins in the Courtroom," 62 Cal.L.Rev. 693 (1974).

7. Ziskin and Faust, *Coping with Psychiatric and Psychological Testimony*, Volume II, Chapter 20, at page 920.

8. Rosenhan, "On Being Sane in Insane Places," 179 *Science* 250-258 (1973).

9. Ziskin and Faust, *Coping With Psychiatric and Psychological Testimony*, Volume II, Chapter 17, "The Rosenhan Study," pages 828-849, and Chapter 18, "Challenging the Assessment of Malingering or Credibility," pages 850-876.

10. Ziskin and Faust, *Coping with Psychiatric and Psychological Testimony*, Volume I, Chapter 4, "Challenging Principles and Systems of Classification," pages 160-219. Also see Volume II, Chapter 20, "Challenging Post-Traumatic Stress Disorder," pages 915-932.

11. 361 N.W.3d 438 (1985)

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MEDICAL MALPRACTICE UPDATE

1994 IOWA DEFENSE COUNSEL ANNUAL MEETING

By

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RECENT CASES IN THE AREA OF MEDICAL MALPRACTICE

A. Abandonment.

Manno v. McIntosh, Iowa Court of Appeals, Docket No. 92-1536, filed April 26, 1994.

Plaintiff was referred to Dr. McIntosh on or about December 31. Dr. McIntosh accepted the patient with the understanding that his partner would assume the patient's care on January 3. Dr. McIntosh understood he was dismissed from the case on January 3. His partner, Dr. Dusdieker, took over the patient's care on January 3. On January 7, Dr. Dusdieker attended a medical meeting out of state. His associate, a board certified internist, cared for the plaintiff while Dr. Dusdieker attended the medical meeting. At least one well qualified physician associated with the defendants, McIntosh and Dusdieker, was always in charge of the plaintiff's care. The Court of Appeals in this case of first impression stated that, while generally a chosen physician may not substitute another without notice to or agreement with the patient, the doctor has not abandoned the patient if the doctor arranges for a competent substitute physician. Expert testimony is usually required to establish abandonment. Cox v. Jones, 470 N.W.2d 23 (Iowa 1991). The plaintiffs did not offer expert testimony on the issue of Dr. Dusdieker's alleged abandonment. The trial court granted a directed verdict on the claim of abandonment. The directed verdict was upheld on appeal.

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B. Burden of Proof.

Glowacki v. Board of Medical Examiners, 516 N.W.2d 881 (Iowa 1994).

An anesthesiologist was billing for intermittent care by calculating all of the time spent and writing down a "beginning of care" and an "end of care" time which matched his actual intermittent time spent. Because of this practice, time records showed that the doctor was in two places at once. Both the Board of Medical Examiners and the District Court found that the doctor's suspension was appropriate. On appeal, the Iowa Supreme Court found that the doctor's practice misled no one to his or her detriment. The court found that doctors attempting to bill using the form in question where unsure of proper uses of the form. According to the Supreme Court, the Board of Medical Examiners failed to meet its burden to offer substantial evidence, and the decision of the Board was reversed. (Justices Larson and Harris dissent.)

C. Causes of Action.

Doe v. Cherwitz, 518 N.W.2d 362 (Iowa 1994).

The case was decided on questions certified by the United States District Court for the Southern District of Iowa. The plaintiff claimed she was sexually assaulted by her physician in 1973, when she was 18. After the assault, she married and had children. She began to suffer flashbacks in 1991. On the certified questions, the Supreme Court ruled: 1) that the

MEDICAL MALPRACTICE UPDATE

INTRODUCTION

The subject of medical malpractice "reform" is under discussion at the state and national levels as this outline is being written. One of the proposals submitted to the House of Representatives during the national debate on health care reform included a federal preemption clause overturning existing tort reform in every state. (Gephart proposal.) Contingent fee limits, caps on non-economic damages, and mandatory ADR have been adopted in many states and included in various versions of proposed national health care legislation. In Iowa, the civil justice system continues to serve the needs of all involved without the "improvements" of so-called tort reform.

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One bill proposed this year in the Senate would make all of the information in the National Practitioner Data Bank available to the general public. (Mitchell Bill.) The data bank was intended to promote peer review, not to permit the publishing of information regarding claims and settlements. Mandatory reporting to the data bank must be considered in every discussion of settlement with the physician client. The threat of public disclosure of such reports would inevitably make those discussions more difficult. (Source: ATRA Legislative Watch, August 11, 1994.)

The Iowa Supreme Court and the Iowa Court of Appeals have examined a number of issues in medical malpractice cases in

the past year. While it is my impression as a practitioner that claims of malpractice involving counseling and mental health care have increased dramatically, those cases have not yet reached the appellate courts in Iowa in large numbers. It is too early to tell what will be the impact of § 228.9 Code of Iowa, approved May 5, 1994. That new code section reads as follows:

> "Except as otherwise provided in this section, a person in possession of psychological test material shall not disclose the material to any other person, including the individual who is a subject of the test. In addition, the test material shall not be disclosed in any administrative, judicial or legislative proceeding. However, upon the request of an individual who is the subject of a test, all records associated with the psychological test of that individual shall be disclosed to a psychologist licensed pursuant to Ch. 154(b) designated by the individual. An individual's request for the records shall be in writing and shall comply with the requirements of § 228.3, relating to voluntary disclosures of mental health information, except that the individual shall not have the right to inspect the test materials."

In cases involving claims of closed head injury, or claims of psychological or counseling malpractice, will the plaintiff now be required to direct the records to the defendant's consultant? Will defendant's experts be permitted to testify based upon testing performed by a prior treater? If psychological testing material cannot be disclosed in any judicial proceeding, what measure of damages will apply? The Iowa Supreme Court will undoubtedly have to address similar questions within the next year.

plaintiff was an adult for purposes of § 614.8(a) Code of Iowa at the time of the assault; 2) that the discovery rule applied under these circumstances, and the statute of limitations began to run when the plaintiff suffered her first flashback in 1991; 3) that the spouse and children of the plaintiff have no claim for loss of consortium when the assault occurred before the marriage and the birth of the children; and 4) that Iowa does not recognize a cause of action for "negligent infliction of severe emotional distress."

D. Discovery.

Vachon v. State, 514 N.W.2d 442 (Iowa 1994).

A claim accrues when a plaintiff discovers injury, or in the exercise of reasonable diligence should have discovered injury. The discovery rule applies to claims against the state, filed under the State Tort Claims Act, Callahan v. State, 464 N.W.2d 268 (Iowa 1990). Vachon's case was brought to the attention of an attorney in 1988, and records were sent to the attorney in 1989. By that time, according to the Supreme Court, the plaintiff knew all he needed to investigate and determine the existence of a cause of action against defendants, and his failure to do so in a timely manner barred his claims.

The plaintiff argued that he needed to retain an expert before filing suit to avoid the risk of Rule 80 sanctions. The court rejected that argument, noting that the plaintiff had

failed to establish that he had made reasonable inquiry, as required by the rule, after discovering his injury.

E. Trial Evidence.

Bray v. Hill, 517 N.W.2d 223 (Iowa App. 1994).

The defendant, Dr. Gregory, was on probation for allowing his physician's assistant to act beyond the scope of the P.A.'s qualifications. The doctor did not tell the plaintiff he was on probation. Plaintiff sought to admit that fact at trial, claiming she would not have had Dr. Gregory perform surgery if she had known he was on probation. The trial court found the suspension to be irrelevant. The trial court's decision was upheld on appeal. The Court of Appeals ruled that the physician was required to disclose only those material risks involved in the medical procedure he proposed to perform on the plaintiff, citing Doe v. Johnston, 476 N.W.2d 28 (Iowa 1991).

The trial court allowed rebuttal testimony that the doctor is a caring professional. The plaintiff had testified that the doctor was cold and uncaring, and that she felt abandoned by him. She challenged the admission of the rebuttal testimony. The Court of Appeals found no abuse of discretion under the circumstances, relying on Harris v. Jones, 471 N.W.2d 818 (Iowa 1991).

Milks v. Iowa Oto - Head & Neck Specialists, P.C., Iowa Supreme Court Docket No. 93-581, filed July 27, 1994.

The defendant's expert offered opinions at trial which the plaintiff claimed constituted surprise. The plaintiff claimed the testimony was inconsistent with the earlier deposition which the expert had given, invoking Iowa Rule of Civil Procedure 125(d). The plaintiff made a motion to strike the opinions after the expert had "rendered his opinion in response to one question, explained why his opinion differed from his deposition testimony in response to another question, and then was asked his opinion a second time." The trial court denied the motion to strike. The Iowa Supreme Court found the motion to strike was not timely, and later questions answered by the expert over objection were proper.

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F. Expert/Opinion Testimony.

Manno v. McIntosh, Iowa Court of Appeals Docket No. 92-1536, filed April 26, 1994.

The deposition testimony of a physician and family friend, who had arranged to testify as a lay witness and who had no personal knowledge of the plaintiff's condition, was offered by the plaintiff to prove that the friend's diagnosis was correct and the defendant doctor's diagnosis was in error. The deposition testimony was excluded as hearsay. After the jury returned a defense verdict, the trial court granted a motion for new trial, finding that the friend's testimony should have been

allowed under the "catch all" exception to Rule 803. The Iowa Supreme Court reversed the grant of a new trial and allowed the verdict in favor of the defendant to stand.

Bray v. Hill, 517 N.W.2d 223 (Iowa App. 1994).

The Plaintiff's daughter, a registered nurse educated at the University of Iowa, was not qualified to offer an opinion on the standard of care for physicians. The witness had been asked, during an offer of proof, what she had observed in hospitals where she had worked since her graduation from nursing school. This testimony was properly excluded.

Pierce v. Nelson, 509 N.W.2d 471 (Iowa 1993).

Plaintiff suffered a personal injury and was treated by his family doctor. The defendant sought the deposition of the treating doctor. The treating doctor quoted $500.00 per hour to give his deposition. The plaintiff filed a motion for protective order, seeking a ruling that the defendant was obligated to pay the $500.00 per hour fee. The Iowa Supreme Court cited with approval the decision of the United States District Court for the Southern District of Iowa in Jochims v. Isuzu Motors, Ltd., 141 F.R.D. 493 (S.D. Iowa 1992).

In Jochims, the United States District Court adopted the following factors by which to determine whether an expert's fee is reasonable:

1) the witness's area of expertise;

2) the education and training required to provide the expert the insight which is sought;

3) the prevailing rates of other comparably respected available experts;

4) the nature, quality, and complexity of the discovery responses provided;

5) the fee actually being charged to the party who retained the expert;

6) fees traditionally charged by the expert on related matters; and

7) any other factor likely to be of assistance to the court. Jochims v. Isusu Motors, Ltd., 141 F.R.D. 493, 495-6 (S.D. Iowa 1992); cited with approval, Pierce v. Nelson, 509 N.W.2d 471, 474 (Iowa 1993).

In Pierce, the Supreme Court stated that the trial court should have made the assessment that the fee charged was commensurate with the reasonable compensation which would be lost by the witness during the time he was required to give testimony. Section 622.72 Code of Iowa, the $150.00 per day "fee cap", was not controlling. The trial court should have determined whether the fee was reasonable, not whether the fee was "totally outrageous." In addition, the burden of proof was on the

plaintiff, as the party filing the protective order, to establish that the fee sought was reasonable under the circumstances.

G. Jury Verdicts.

Manno v. McIntosh, Iowa Court of Appeals Docket No. 92-1536, filed April 26, 1994.

The jury's notes on the back of a hand-written question sent to the judge during deliberations did not suggest a quotient verdict and were not adequate to support the argument that the jury may have reached a quotient verdict.

Milks v. Iowa Oto - Head & Neck Specialist, P.C., Iowa Supreme Court Docket No. 93-581, filed July 27, 1994.

The jury returned a defense verdict on Tuesday, January 26, at 8:30 p.m. The verdict was filed with the clerk on Wednesday, January 27. Plaintiff's motion for new trial was filed Monday, February 8. The motion for new trial was not timely if the ten day filing period began to run January 26, but was timely, and extended the 30 day period for appeal, if the time to file began to run January 27. The motion for new trial was denied March 5 and the notice of appeal was filed April 7. Iowa Rule of Civil Procedure 247 provides that a motion for new trial "must be filed within ten days after the verdict, report, or decision is filed, or the jury is discharged, as the case may be..."

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Finding that the phrase "as the case may be" adds nothing to the meaning of the rule, and recognizing that "[t]he determining date for the timeliness of a motion for new trial ordinarily is the date on which the jury rendered its verdict, not when the final judgment was entered", the Supreme Court nevertheless found the motion was timely. The Court reasoned that the date of filing the verdict was more reliably determined than the date of its rendition, and concluded "that the time for filing a motion for new trial commences upon the filing of the jury's verdict with the clerk of the court."

H. Insurance.

Hasbrouck v. St. Paul Fire and Marine Insurance Company, 511 N.W.2d 364 (Iowa 1994).

Plaintiff filed suit against Dr. Jarasviroj. The doctor had a claims made insurance policy with St. Paul Fire & Marine. Suit was filed within the policy period. The physician did not notify the carrier until the policy period had expired. The District Court granted summary judgment to St Paul. The summary judgment was upheld by the Supreme Court. The carrier will not be required to defend or indemnify the plaintiff's claims.

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I. Settlement.

Biddle v. Sartori Memorial Hospital, 518 N.W.2d 795 (Iowa 1994).

A settlement with the emergency room physician released the hospital from any liability based upon the negligence of that physician. Any liability of the hospital on that theory was extinguished by settlement with the emergency room physician.

J. Sanctions.

Fisher v. Iowa Board of Optometric Examiners, 510 N.W. 873 (Iowa 1994).

It was proper to sanction an optometrist for practicing outside of his field of expertise when the doctor asked all of his female patients to disrobe to the waist to allow him to check for scoliosis. The Iowa Supreme Court found that the sanctions were supported by substantial evidence in the record.

K. Subpoena.

McMaster v. Iowa Board of Psychological Examiners, 509 N.W.2d 754 (Iowa 1994).

In this case, the Board of Psychological Examiners was investigating a claim made by a patient against Dr. A. In the course of its investigation, the Board subpoenaed the patient's records from Dr. B. Dr. B was not a subject of the investigation. The case was remanded to allow the Board to establish the following:

1. A minimal showing that the subpoena was justified;

2. That the records were necessary in the disciplinary proceedings;

3. That the patient was notified and an effort was made to obtain the patient's voluntary release before the subpoena was served;

4. That adequate safeguards exist to prevent unauthorized disclosure of the plaintiff's mental health records; and

5. That an express statutory mandate, an articulated public policy, or other legitimate public interest exists which favors access to the records subpoenaed.

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Workers' Compensation Update

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CARPAL TUNNEL SYNDROME NOT AN OCCUPATION DISEASE

Noble v. Lamoni Products, 512 N.W.2d 290 (Iowa 1994).

In December 1986, Noble told her doctor about the numbness and pain she was experiencing in her hands. He referred her to a specialist who diagnosed her condition as "overuse syndrome" and recommended that the condition would improve if she rotated to a different position within the plant. She remained, however, at her job blocking ripcords. On July 2, 1987, Noble and about 20 other employees were laid off their jobs at Lamoni. Because the numbness in her hands persisted after the layoff, she was referred to yet another doctor who diagnosed her condition as bilateral carpal tunnel syndrome. The doctor also determined that the carpal tunnel syndrome was work-related. Noble underwent surgery for decompression of the right carpal and ulnar tunnels in October 1987, and the left carpal tunnel in December 1987. Although she was released to return to work in January 1988, no position was extended to her. The plant closed later that year.

Noble filed an arbitration petition with the Iowa Industrial Commissioner, alleging that her bilateral carpal tunnel syndrome was an occupational disease entitling her to compensation under Iowa Code chapter 85A. The court held that Noble's carpal tunnel syndrome caused by her repetitive traumatic work activity was not an occupational disease. The court agreed with the industrial commissioner that although the 1973 repeal of the disease schedule in the occupational disease statute may have broadened the definition of occupational disease, it does not follow automatically that carpal tunnel syndrome is compensable under chapter 85A.

The court noted that the industrial commissioner wisely observed that the statutory criteria upon which Noble relies presume the existence of a disease. The correctness of the commissioner's decision turns on the meaning of "disease" as that term is used in the statutory scheme. The court referred to the fact that the industrial commissioner cited several dictionary and medical definitions of "disease" and concluded that a disease is commonly understood to result when the body is invaded by outside agents such as bacteria, virus, poison, toxin, or germs. None of the common definitions trace the cause of disease to trauma. Because the industrial commissioner found that Noble's carpal tunnel syndrome was caused "not by an invasion of her body by an outside agent but by external traumatic forces," the commissioner ruled that Noble's condition was properly characterized as an injury, not a disease. The court found this reasoning sound and fortified by persuasive rulings in neighboring jurisdictions. The court found no error in the commissioner's characterization of Noble's condition as an injury, not a disease. The record supported his finding that her disorder resulted from repeated traumas to her wrist and hands.

The court found the rule favoring liberal construction of workers' compensation statutes to benefit workers did not help Noble's assertions. The fact that a claimant's injury is compensated under chapter 85 or chapter 85A may benefit the injured worker in some cases and act to that worker's detriment in others.

CAUSAL CONNECTION

Greenfield Equipment Co. v. Longfellow, No. 92-1866, filed November 24, 1993. Iowa Supreme Court (unpublished).

This is a per curiam decision by the Iowa Supreme Court. Claimant had sustained a back injury that arose out of and in the course of his employment on December 28, 1987. That injury occurred when claimant was lifting a thirty-pound, plowshare for attachment to a field cultivator manufactured by his employer. The initial diagnosis of claimant's condition following the December 28 injury was that claimant had sustained a severe lumbosacral strain. A January 5 CT scan showed no bulging. In July of 1988 claimant was diagnosed as having a herniated disc in the L3-L4 lumbar area that produced some permanent partial disability and caused claimant to incur corrective surgery.

At the arbitration hearing, various medical reports were included as part of the record. Some of the medical reports are instructive as to both objective and subjective manifestations of claimant's condition at various times, they do not speak directly to the essential question of legal causation. In an attempt to deal with that issue, claimant offered the testimony of Dr. Maurice Margules, the neurosurgeon who performed surgery on the herniated disc on July 27, 1988. Dr. Margules' testimony supported claimant's theory that the herniated disc discovered in July was a natural progression of the work-related injury sustained the preceding December. Greenfield Equipment sought to counter Dr. Margules' testimony with that of Dr. Morrison and Dr. Weber who had evaluated claimant in April of 1988.

The industrial commissioner found that there was no causal connection between claimant's herniated disc and his employment. The court found that the industrial commissioner's decision cannot be allowed to stand. The court stated the industrial commissioner either misinterpreted significant evidence concerning the causal connection between the

indicated that a significant improvement from the injury [was] not anticipated."

The court held that an anticipated improvement in continuing pain or depression, if medically indicated, may extend the length of the healing period if a substantial change in industrial disability is also expected to result. If, however, it is not likely that further treatment of continuing pain, however soothing to the claimant will decrease the extent of permanent industrial disability, then continued pain management should not prolong the healing period.

The court concluded that claimant's clinical history at the University of Wisconsin pain clinic constitutes substantial evidence in the record to support the industrial commissioner's finding that, after November 18, 1986, it was not medically indicated that he would obtain significant improvement in his industrial disability from future pain management programs. This conclusion is buttressed by the fact that it was not made clear just how the Columbia Hospital program would benefit claimant.

NATURE OF DISABILITY

Dowell v. Wagler, 509 N.W.2d 134 (Iowa Ct. App. 1993).

Schlena Dowell sustained an injury arising out of and in the course of her employment. She was putting meat through a meat grinder when her right hand and arm became caught in the grinder. Her right arm was amputated just below the elbow. She sustained a 90 percent functional impairment of her right upper extremity and was paid permanent partial disability benefits pursuant to the statutory schedule.

She filed an original notice and petition with the industrial commissioner seeking additional benefits. She argued that as a result of the amputation of her right arm, she sustained an injury to her central nervous

system. She suffers from phantom pain syndrome. When input from a limb is removed, as through amputation, the very loss of input from that limb stimulates a sense of pain localized at the lost limb's former situs. Treating physician, Dr. Marc Hines opined that due to the amputation and the phantom pain syndrome, she sustained a 67 percent impairment to the body as a whole.

The court found no prior Iowa cases which dealt specifically with the issue of phantom pain syndrome or phantom limb pain. The court noted Iowa classifies psychological, mental, and nervous conditions as unscheduled injuries compensable under Iowa Code section 85.34(2)(u). The court believed the phantom pain which sometimes occurs after amputation is more akin to these types of injuries than it is to a scheduled physical trauma.

The court held that phantom pain syndrome or phantom limb syndrome may be compensable under Iowa Code section 85.34(2)(u) as an unscheduled disability. Applying the industrial disability test to a given case will require a determination both of the functional loss to the body as a whole and of the change in earning capacity of the individual.

The court also noted that many pages of a doctor's curriculum vitae and medical records contained in the appendix filed with the court unnecessary to the consideration of the issues on appeal. The unnecessary pages amounted to approximately one-fourth of the total appendix. The claimant was directed to pay one-fourth of the cost of the appendix and appellee to pay the remaining costs of the appeal.

PENALTY

Covia v. Robinson, 507 N.W.2d 411 (Iowa 1993).

The sole issue on appeal was whether Covia's reasons for delay in paying Iowa workers' compensation benefits were supported by arguments presenting fairly debatable questions of law.

Diana Robins died in the July 19, 1989 crash of United Airline Flight 232 in Sioux City, Iowa. She was enroute from Denver, Colorado, to Rosemont, Illinois. It was undisputed that Robinson was traveling to Rosemont that day in the course of her employment with Covia. Covia is a computer firm headquartered in Rosemont, Illinois. Her husband, Frederick, filed for workers' compensation benefits both in Colorado and in Iowa. Benefits were immediately paid to Frederick Robinson in Colorado. However, Covia challenged the jurisdiction of the Iowa Industrial Commissioner exercised pursuant to Iowa Code section 85.3.

The court declined to resolve the issue of whether the Iowa law gives jurisdiction over this case. However, the court did discuss whether the issue of jurisdiction was fairly debatable. After discussing whether Iowa could have jurisdiction, the court found that the issue of jurisdiction was fairly debatable and the employer ought to be able to raise the issue without being penalized pursuant to Iowa Code section 86.13. The court found the issue was fairly debatable since "there are viable arguments in favor of either party." The court also found that imposition of a penalty pursuant to Iowa Code section 86.13 was not appropriate.

**PROCEDURE--STIPULATION--UNTIMELY ISSUE--
PENALTY--INTEREST--COSTS**

Weishaar v. Snap-On Tools Corp., 506 N.W.2d 786 (Iowa Ct. App. 1993).

Sandra Weishaar began working for Snap-On Tools in 1978 as a factory worker. Weishaar first experienced pain in her right hand on September 3, 1985. On December 18, 1985, Dr. DeBartolo diagnosed

before entering into the stipulation. The court found that the commissioner did not abuse his discretion in refusing to modify the stipulation.

The court also found that the commissioner and the district court correctly concluded the odd-lot doctrine issue was not timely raised and therefore could not be considered on appeal. Weishaar raised the issue in her post-hearing brief to the deputy commissioner. This did not afford her employer a fair opportunity to meet and rebut any evidence Weishaar might have presented to the deputy on this issue.

The court also held that Iowa Code section 86.13 does not support the allowance of penalties on late interest payments. The court further found that the commissioner did not abuse his discretion in determining the penalty award to be 25 percent instead of the maximum of 50 percent.

Weishaar next claimed the district court erred when construing the due and injury dates from which to make the interest calculations. The court rejected Weishaar's claim that Iowa Code section 85.30 and Farmers Elevator Co. v. Manning, 286 N.W.2d 174, 180 (Iowa 1979), are not the applicable law in determining interest on healing period compensation. The court held that the parties should determine whether there is a dispute about the interest amount owed, and then if an agreement cannot be reached, the aggrieved party can seek relief from the commissioner.

Last, the court held that the district court did not abuse its discretion in its assessment of costs since Weishaar was only successful on a fraction of her nine issues at the district court level.

PSYCHOLOGICAL CONDITION RELATING TO SCHEDULED MEMBER INJURY

Honeywell v. Allen Drilling, 506 N.W. 2d 434 (Iowa 1993).

bilateral carpal tunnel, severe in the right hand and mild in the left hand. On January 3, 1986 Weishaar underwent carpal tunnel surgery on her right hand. Weishaar returned to work on March 24, 1986. When Dr. DeBartolo examined Weishaar on April 29, 1986, Weishaar first complained of discomfort in the shoulder areas. On January 6, 1987 Dr. DeBartolo gave Weishaar a permanent partial impairment rating of 16 percent of the right extremity and 15 percent of the left extremity, for a combined rating of 29 percent or 17 percent of the whole person.

In 1987 Weishaar made numerous complaints of shoulder pain. Several different physicians examined her. All found Weishaar had full range of motion in her shoulders.

An arbitration hearing was held. The parties stipulated to Weishaar's entitlement to healing period benefits. On appeal to the industrial commissioner he rejected Weishaar's claim that the odd-lot doctrine applied and her claim for additional healing period benefits because they were not timely raised. On judicial review the district court taxed three-fourths of the cost to Weishaar.

The court found that the commissioner erred in refusing to consider whether the subsequent injuries were part of a cumulative neck/shoulder injury. However, this error was not prejudicial because the commissioner also found that even if Weishaar had shown that her alleged shoulder and back pain was caused by her cumulative injury or as a sequelae of her injury, Weishaar had failed to show her neck/shoulder was a permanent impairment.

The court noted the parties stipulated to healing period benefit dates. Weishaar clamed she was entitled to additional healing period benefits. There is no evidence that this information was not available to Weishaar

Roy Honeywell, II, suffered a complete amputation of his upper right arm at the mid-forearm on February 5, 1983, while employed by Allen Drilling Company. Although the arm of the twenty-two-year-old employee was successfully reattached, the injury caused permanent partial disability to his right arm. In May of 1986 Honeywell was hospitalized and treated for addiction to pain-killing drugs.

The court noted that if, as a result of a single accident, an employee receives both an injury to a scheduled member and an injury to parts of the body not included in the schedule, then compensation is based upon industrial disability, not the loss or impairment of the scheduled injury, citing to Mortimer v. Freuhauf Corp., 502 N.W.2d 12 (Iowa 1993).

The record showed that Honeywell had a preexisting personality disorder and substance abuse disorder. The commissioner found "psychological impairment and loss of earning capacity attributable to the aggravation had not been demonstrated." After reviewing the entire record, the court found no evidence to support the commissioner's findings and conclusion.

The commissioner's finding that the injury to Honeywell aggravated his preexisting substance abuse disorder and personality disorder is supported by substantial evidence. The court found that as a matter of law, Honeywell had established a psychological impairment and loss of earning capacity as a result of the work-related injury.

Mortimer v. Fruehauf Corp., 502 N.W. 2d 12 (Iowa 1993).

James D. Mortimer was employed by Fruehauf Corporation. In a work-related accident Mortimer sustained a crush injury resulting in the amputation of the first four toes of his left foot. Mortimer had a preexisting psychological condition. It is uncontroverted that Mortimer's preexisting

psychological condition was aggravated by the scheduled injury. All the medical experts agreed on this point.

The court stated that because the question in this case involved an interpretation of the Iowa Workers' Compensation law the question is one of law. The court held that a psychological condition caused or aggravated by a scheduled injury is compensable as an unscheduled injury. The court based its holding on the following. First, the language "for any and all personal injuries" in section 85.2(1) is all inclusive. There is no exclusion for a psychological condition caused or aggravated by a scheduled injury. And the court has interpreted "personal injuries" for purpose of workers' compensation coverage to include mental conditions. Second, the court has consistently held that when there is injury to some scheduled member and also to parts of the body not included in the schedule, the resulting disability is compensated on the basis of an unscheduled injury.

BAD FAITH--SELF INSURED EMPLOYERS

Brown v. Liberty Mutual Insurance Co., ____ N.W.2d ____ (Iowa 1994).

The court held that a claimant's cause of action for bad-faith failure to pay workers' compensation benefits accrues upon receipt of notification that the carrier has denied the claim. The court also held that the five-year limitation period of Iowa Code section 614.1(4) applies to actions based on the bad-faith nonpayment of workers' compensation benefits.

EXCLUSIVE REMEDY--BROKERED EMPLOYEES

Parson v. Procter & Gamble Mfg. Co., 514 N.W.2d 891 (Iowa 1994).

The court held in this case that under this record a labor broker's industrial customer failed to establish as a matter of law that there was an employment relationship between a labor broker's employees and the labor

broker's industrial customer. There were genuine issues of material fact regarding whether there was an employment relationship.

PRODUCT LIABILITY -- ASBESTOS

Spaur v. Owens-Corning Fiberglas Corp., 510 N.W.2d 854 (Iowa 1994).

The court decided a variety of issues and made several holdings including the following. The court would apply "substantial factor" test to question of proximate cause in asbestos litigation; under such test, the court would inquire as to whether plaintiff's exposure to manufacturer's product was substantial factor in his disease.

Asbestos manufacturer, which developed settlement plan following bankruptcy and against which suits could not be brought pursuant to injunction, was not party which should have been included on jury's verdict form for allocation of fault in plaintiff's action against second manufacturer.

The punitive damage award in this case did not violate the United States or Iowa constitutional protections of due process, double jeopardy, or excessive fines There was evidentiary support for the injury award for loss of consortium.

RETALIATORY DISCHARGE

Clarey v. K-Products, Inc., ____ N.W.2d ____ (Iowa 1994).

The court had several holdings including: There was sufficient evidence to support a jury finding that the employee was discharged in retaliation for filing a worker's compensation claim and because the employee was discharged before the court first recognized a claim for retaliatory discharge in Springer v. Weeks & Leo Co., 429 N.W.2d 558 (Iowa 1988) (Springer I), the employer could not be found guilty of a course of conduct so egregious as to give rise to punitive damages.

SPECIAL CASE SETTLEMENT -- BREACH OF CONTRACT

White v. Northwestern Bell, 514 N.W.2d 70 (Iowa 1994).

The court held the jurisdiction of the industrial commissioner terminated upon approval of a special case settlement; there was substantial evidence to support the district court's finding that the employer breached the settlement agreement with respect to the employee's claims for prescription drugs, physician consultations, and a contour chair; the employer was liable to the employee for the full amount of allowable medical care and not just the difference between the actual amount and the amount paid under the employer's health insurance; and while the employer's failure to pay the employee's claims constituted a breach of its contractual obligations, its conduct furnished no bias for an intentional tort claim premised on insurer bad faith and the allowance for punitive damages was inappropriate.

INDEMNIFICATION

Shirley v. Pothast, 508 N.W.2d 712 (Iowa 1993).

The court held that judgment entered by the district court pursuant to the terms of the third-party tortfeasor's offer to confess judgment was tantamount to a settlement. Iowa Code section 85.22(3) requires the approval of the industrial commissioner before any third party settlement involving a workers' compensation claimant becomes effective. The district court lacked the subject matter jurisdiction to enter judgment pursuant to this offer to confess judgment. The court also held that the language of Iowa Code section 85.22(1) provides employers/insurers a lien securing reimbursement for workers' compensation benefit payments they may make in the future.

Christensen v. Pocket Lounge, Inc.

While tending bar at the Pocket Lounge, Christensen was injured in an attempt to evict a drunken patron. Christensen claimed workers' compensation benefits and also brought a tort action against the patron and a dramshop that had served the patron alcohol earlier in the evening. Pocket Lounge and its workers' compensation carrier, United Fire and Casualty Company, contested Christensen's entitlement to workers' compensation benefits. United filed notice of a workers' compensation lien against any potential recovery by Christensen from the third-party tortfeasors. The deputy industrial commissioner ruled Christensen was entitled to healing period and permanent partial disability benefits as well as past medical benefits. United appealed the deputy's ruling to the industrial commissioner. While United's administrative appeal was pending, Christensen settled his suit with both third-party tortfeasors. He then filed a motion to quash United's notice of lien on the ground the carrier had made no benefit payments by the time of settlement. The district court granted summary judgment to Christensen, ruling that Iowa Code section 85.22(1) grants the workers' compensation carrier a lien with respect to payments "so made," but not against payments it may be liable for in the future. United appeals. OPINION HOLDS: As in Shirley v. Pothast, 508 N.W.2d 712 (Iowa 1993), United asserts its right to a lien, not a credit, to secure reimbursement for benefit payments it has yet to make. By its terms, the lien authorized by section 85.22(1) provides security for payment of benefits for which an indemnitor "is liable," whether such benefits have already been distributed or have yet to be paid. Thus United's notice of lien was valid to secure reimbursement, from any settlement recovery, for future workers' compensation benefits ultimately made to Christensen. The

district court's ruling to the contrary must be reversed and this case remanded for entry of judgment consistent herewith.

CREDIT FOR LONG TERM DISABILITY
JULY, 1994 DECISION SUPREME COURT

State v. Erbe. (Supreme Court, July 1994).

Virgil L. Erbe injured his back in 1984 while working as a groundskeeper for Iowa State University and underwent surgery. Erbe re-injured his back at work in 1986 and underwent two subsequent surgeries. He returned to work as a groundskeeper at Iowa State University in November 1990. The state voluntarily paid Erbe seventy-five weeks of permanent partial workers' compensation benefits in 1988 and 1989. As a totally disabled state employee, he also received long-term disability payments from April 1989 to October 1990 totaling $20,078.99. The Industrial Commissioner determined Erbe was entitled to recover 125 weeks of workers' compensation benefits, $12,074.50 more than the State had voluntarily paid him. The Commissioner also determined the State was not entitled to a credit for the long-term disability payments made to Erbe. On judicial review, the district court concluded the State was entitled to such a credit against the $12,074.50 in unpaid workers' compensation benefits. Erbe appeals claiming the State was not entitled to the credit. OPINION HOLDS: We believe Iowa Code section 85.38(2) (1989) was adopted for the purpose of avoiding a double recovery by a disabled employee who receives benefits under both workers' compensation and a group disability plan provided by the employer. We therefore agree with the district court that the State is entitled to a credit against the unpaid workers' compensation benefits.

BROKERED EMPLOYEES

Kimberly Quality Care v. Campbell, ___ N.W.2d ___ (Iowa 1994).

Rada Campbell is a certified nursing assistant. She was employed by Kimberly Quality Care on February 5, 1990, when she received an injury which arose out of and in the course of her employment. Kimberly was a labor broker. Campbell was free to pick and chose the assignments and hours to work. Campbell filed a claim for workers' compensation benefits. A Deputy Industrial Commissioner determined Campbell was a part-time employee and her benefits should be calculated under Iowa Code section 85.36(10). The Industrial Commission affirmed the deputy. The employer sought judicial review. The district court found the commissioner's decision was supported by substantial evidence. The employer appealed. OPINION HOLDS: We find there is substantial evidence in the record to show Campbell earned less than the usual weekly earnings of the regular full-time laborer in the industry of medical pools providing certified nursing assistants. The evidence shows Campbell was not working the full load of hours available from her employer and she was not earning as much as an employee working the full hours available. We conclude Campbell's workers' compensation benefits should be determined under section 85.36(10). We affirm the decisions of the district court and the Industrial Commissioner.

Fletcher v. Apache Hose & Belting.

In July 1990 Kelly Services hired Michael Fletcher and assigned him to work for Apache Hose and Belting Co., Inc. Fletcher sustained injuries while he was operating a machine at Apache Hose. Kelly Services paid workers' compensation benefits to Fletcher. Fletcher brought this negligence action against Apache Hose to recover for the injuries. The district court entered a ruling granting Apache Hose's motion for summary

judgment. Fletcher appeals. OPINION HOLDS: In Parson v. Proctor & Gamble Manufacturing Co., No. 92-797 (Iowa April 20, 1994), a five-to-four decision, our supreme court held under the record the employee of a labor broker could not, as a matter law, be deemed the employee of the labor broker's customer. The majority of other jurisdictions has held the worker may be an employee of the special employer, therefore the special employer is immune from an employee's negligence action under workers' compensation statutes. This court followed the majority rule in Jones v. Sheller-Globe Corp. Our supreme court in Parson found Jones was not controlling; however, the court did not overrule Jones. In Parson the supreme court acknowledged in many cases an express contract between an employee and a labor broker's customer will not exist, therefore courts look for evidence of the employee's consent to an employment relationship with the alleged special employer. An express contract between Fletcher and Apache Hose did not exist. Therefore, we look to the evidence to determine if Fletcher consented to an employment relationship with Apache Hose. We also consider Apache Hose's intent to enter into an employment relationship with Fletcher. Fletcher approached Kelly Services and specifically requested placement at Apache Hose. Fletcher not only consented to employment with Apache Hose but he specifically requested it. Kelly Services fulfilled Fletcher's specific request by assigning him to work at Apache Hose. It did so, however, only after receiving Apache Hose's approval and acceptance of Fletcher. Apache Hose could have rejected Fletcher but instead it accepted Fletcher. Fletcher admitted he knew Apache Hose had to approve him before he could work at the factory. Apache Hose not only initially accepted Fletcher but offered him a position after he was injured. Fletcher acknowledged Apache Hose could terminate

the employment of a Kelly worker at its business. In focusing on the relationship between the temporary worker and special employer, we conclude it is established as a matter of law for purposes of Iowa Code Section 85.61(11) Fletcher had a deliberate and informed intent to enter into an employment relationship with Apache Hose. Summary judgment in favor of Apache Hose was appropriate. We affirm the decision of the district court.

SECOND INJURY FUND MAY, 1994 DECISION

Second Injury Fund v. Shank (93-158).

The Second Injury Fund appeals from a district court ruling on judicial review upholding two decisions of the Iowa Industrial Commissioner awarding Fund benefits to claimant, Larry P. Shank. The court upheld the commissioner's rulings that (1) Shank sustained a prior loss of his left foot, (2) Shank was permanently and totally disabled, (3) considered Shank's visual impairment as a prior loss even though no such claim had been pleaded or urged by Shank, (4) Shank's visual impairment constituted a prior loss, and (5) Shank's visual impairment constituted a sixty percent impairment of the whole person. The Fund appeals. OPINION HOLDS: There was substantial evidence to support the commissioner's decision that Shank's left foot injury constituted a prior loss under Iowa Code section 85.64 and that Shank was permanently and totally disabled within the meaning of section 85.(43)(3). The commissioner's decision to treat Shank's visual impairment as a prior loss and assigning that impairment a sixty percent impairment of the whole person did not prejudice the Fund. So the District Court correctly upheld the commissioner's decision on all the issues the Fund raised. Accordingly, we affirm.

Timmerman v. Wilson (93-1236.

Respondents-appellants/cross-appellees Wilson Foods and Second Injury Fund of Iowa appeal a district court decision finding carpal tunnel syndrome was an occupational disease and remanding to the Industrial Commissioner for a determination of benefits. Petitioner-appellee/cross-appellant Marvin L. Timmerman cross-appeals the Industrial Commissioner's denial of second injury fund responsibility. We reverse the district court and affirm the Industrial Commissioner on the appeal. We remand to the trial court on the cross-appeal. OPINION HOLDS: After the trial court decision and before this appeal reached us, the Iowa Supreme Court filed Noble v. Lamoni Prods. and Liberty Mut. Ins. Co., 512 N.W.2d 290 (Iowa 1994). Noble found carpal tunnel syndrome was a work-related accident and not an occupational disease. We, therefore, reverse the trial court and affirm the Industrial Commissioner. The second question is whether Timmerman had a claim to the Second Injury Fund. The trial court failed to address this issue. We remand to the trial court for that purpose. We do not retain jurisdiction.

DEVELOPMENTS IN THE AREA OF

UNINSURED / UNDERINSURED MOTORIST LAW

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I. Background: History and Definitions

A. Uninsured Motorist (UM)

1. Policy provisions

2. Law

B. Underinsured Motorist (UIM)

1. Policy provisions

2. Law

II. Underinsured Motorist Law: New Developments

A. Insuring Agreement

1. "Legally entitled to recover": Wetherbee v. Economy Fire and Casualty Co., 508 N.W.2d 657 (Iowa 1993)

a. "Legally entitled to recover": The Iowa Supreme Court stated that the Plaintiff was not suing the UIM driver for damages, but rather her claim was against her own insurance company for policy benefits. Section 516A.1 provides that underinsured motorist coverage is "for the protection of persons insured under the policy who are legally entitled to recover damages from the owner of an underinsured driver". The Court concluded that the phrase "legally entitled to recover damages" means that the insured must have suffered damages caused by the fault of the UIM driver and be entitled to receive those damages under the policy. Justice McGivern wrote a concurrence to this portion of the decision in which he stated that he felt that the UIM claim was a melding of contract and tort and that the insurer should be able to defend an action just as a tortfeasor would.

b. "Bodily Injury": The Plaintiff's only claim was for her loss of consortium, since she wasn't involved in the auto accident. While the Supreme Court agreed that the Plaintiff could not establish that she suffered a bodily injury, it did

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say that Section 516A.1 doesn't require that, rather it requires only that there would be a bodily injury to a person which results in damage to the insured.

B. Additional Definitions

1. "Insured person": Huebner v. MSI Insurance Co. 506 N.W. 2d 438 (Iowa 1993)

a. The sole issue on appeal was whether or not the insured's son was an insured under the policy issued by MSI. The Plaintiff contended that he was an insured under the policy and that his son should be covered under the policy as a family member. The Court decided this issue solely by looking at the language of the business auto policy which defined an insured as: "You or any family member". The word "you" was further defined to mean "the person or organization named on the declaration page as the named insured". The named insured on the declaration page was the Plaintiff's employer, therefore, the Court found that since neither Plaintiff nor his son were identified as the named insured, neither of them qualified as "you" under the endorsement, and the insured's son could not recover UIM benefits.

The Court stated that it was not persuaded by decisions from other jurisdictions which found the provision ambiguous because of the "family member" language in the policy. The Court felt that this was a marketing practice so that the business auto policies could be written either for individual proprietorships or corporations.

2. "Underinsured Motorist Vehicle/Owned but not Insured"

a. Jones v. American Star Insurance Co., 501 N.W.2d 536 (Iowa 1993)

1. The Court found that voiding the exclusion would result in a duplication of benefits and it would convert underinsured motorist coverage into third-party liability insurance. As support, it pointed to its decision in the case of Kluiter v. State Farm Mutual Auto Insurance Co., 417 N.W.2d 74 (Iowa 1987) where the Court first gave effect to the "owned but not insured" exclusion, indicating that it was intended to avoid duplication of coverage, and in that case it further rejected claims that the exclusion violated public policy.

b. Ciha v. Irons, 509 N.W.2d 492 (Iowa 1993)

1. The Court again upheld the validity of the "owned but not insured" provision. The Cihas' argument was slightly different from that presented in Jones. The Cihas argued that before 1991, Section 516A.2 provided that UM/UIM coverage could include provisions designed to avoid duplication of benefits. In 1991, Section 516A.2 was amended by the Legislature to provide that when there is greater than one insurance policy involved, the insured can pick the highest limits. The Cihas went on to argue that this abrogates Kluiter.

The Court stated that in amending Section 516A.2, the Legislature intended to validate anti-stacking provisions and if it felt that the "owned but not insured" language was unjust, it could have remedied that at the same time. The Court went on to state that it believed that the legislative limitations on stacking showed an intent to limit rather than expand underinsured motorist benefits.

C. Other insurance

1. Motor Club of Iowa Insurance Co. v. Iowa Mutual Ins. Co.,

508 N.W.2d 634 (Iowa 1993)

a. With regard to the Iowa Mutual policy, the case involved a vehicle "you" do not own, therefore Iowa Mutual's policy was clearly an excess situation. With regard to the Motor Club policy, the Court stated that the key to understanding which provision controls lies in understanding the policy's use of the term "other similar insurance". With regard to the first paragraph, Randy suffered his injuries while occupying an automobile not owned by the named insured, his father, and because the other insurance was the excess provision of Iowa Mutual's policy, it is "other similar insurance" as to Motor Club's excess stipulation. The second paragraph of the Motor Club policy was a pro rata clause, and the Court held that a pro rata clause is not "other similar insurance" when compared to Iowa Mutual's excess stipulation. The Court was therefore left with two excess stipulations, and since the clauses are mutually repugnant, each company was obligated to share on a pro rata basis in the costs of the settlement.

D. Miscellaneous Developments

1. Civil Procedure

a. Motion to Sever Bad Faith/UIM Claims

1. Johnson v. State Farm Auto Ins. Co., 504 N.W.2d 135 (Iowa App. 1993) followed Handley v. Farm Bureau Mutual Ins. Co., 467 N.W.2d 247 (Iowa 1991) in finding that the district court did not abuse its discretion in severing the underinsured claim from the bad faith claim in this lawsuit.

b. Motion in Limine

1. Johnson v. State Farm Auto Ins. Co., supra.

The Court of Appeals cited Leuchtenmacherv. Farm Bureau Mutual Ins. Co., 461 N.W.2d 291 (Iowa 1990). In that case, the Court allowed evidence of the policy limits of the underinsured motorist policy and the tortfeasor's policy to be admitted into evidence. The Court concluded that any direct claim against an insurer on a contract dispute necessarily involved introduction of the insurance policy and its terms. In Johnson there was no contract dispute because State Farm admitted all of the terms of the policy, therefore there was no reason to introduce the insurance contract.

c. Discovery

1. Johnson v. State Farm Auto Insurance Co., supra.

The Court of Appeals cited Handley v. Farm Bureau Mutual Ins. Co., 467 N.W.2d 247 (Iowa 1991) in which the Iowa Supreme Court found that a Plaintiff bringing a bad faith claim was entitled to discovery of the insurer's file. The Court of Appeals did point out however that Handley did not discuss whether the files were prepared in anticipation of litigation. The Court of Appeals then went on to cite the case of Ashmead v. Harris, 336 N.W.2d 197 (Iowa 1983) which held that a routine investigation of an accident by a liability insurer is conducted in anticipation of litigation within the meaning of the Iowa Rules of Civil Procedure. The Plaintiff then has the burden of showing substantial need and undue hardship, and the Court has broad discretion in determining whether the showing has been made. The Court of Appeals concluded that Johnson did not make any allegations of substantial need or undue hardship, therefore it concluded that the district

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court did not abuse its discretion in determining that State Farm's investigative file was not subject to discovery, at least during the underinsured motorist portion of the suit.

d. Umbrella policies

1. Jalas v. State Farm Fire & Casualty Co., 505 N.W.2d 811 (Iowa 1993)

a. Coverage in excess of the minimum financial responsibility limits is not regulated by Section 321A.21, which regulated a motor vehicle liability policy. The Court stated that it had recently recognized the distinction between a primary insurance policy and an excess or umbrella policy in the case of LeMars Mutual Ins. Co. v. Farm & City Ins. Co., 494 N.W.2d 216 (Iowa 1992). The Court stated that umbrella policies are not regulated by Section 321A.21 or Section 516A.1. Primary insurance is purchased as the first tier of insurance coverage, while an umbrella policy is intended to cover only catastrophic losses exceeding the insured's required primary insurance limit. Therefore, Iowa does not require an insurer to offer uninsured and underinsured motorist coverage in an excess or umbrella liability policy.

e. Subrogation/Reimbursement

1. March v. Pekin, 465 N.W.2d 852 (Iowa 1991)

a. Workers' compensation subrogation lien provided by Section 85.22, The Code, does not extend to underinsured benefits received by an employee pursuant to a privately owned contract of insurance.

2. Continental Western Ins. Co. v. Krebill, 492 N.W.2d 405 (Iowa 1992)

a. An insurer is not entitled to be reimbursed for its payment of underinsured motorist benefits out of the insured's recovery from tortfeasor's, until insured has been fully compensated.

3. Elliott v. Farm Bureau Mutual Ins. Co., 494 N.W.2d 731 (Iowa App. 1992)

a. Insurer not entitled to credit against underinsured motorist benefits from sums personally paid by tort-feasor until the insured has been fully compensated.

f. Offsets/Credits

1. Zurn v. State Farm Mutual Auto Ins. Co., 482 N.W.2d 923 (Iowa 1992)

Dramshop recovery is deducted from total amount of damages, not underinsured policy limits in determining amount of underinsured benefits to be paid.

g. Interest

1. Farm Bureau Mutual Ins. Co. v. Milne, 424 N.W.2d 422 (Iowa 1988)

In a third party action against an insured, the obligation to pay the judgment plus prejudgment interest is limited by the liability limits, however post-judgment interest is recoverable in excess of the policy limits.

2. Houselog v. Milwaukee Guardian Insurance, 473 N.W.2d 52 (Iowa 1991)

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Prejudgment interest constitutes damages and is included in underinsured coverage for damages for bodily injury. If the prejudgment interest plus the judgment exceeds the liability carrier's limits, the underinsured carrier must pay the excess even if it is not a party to that action.

3. Vasquez v. LeMars Mutual Insurance Co., 477 N.W.2d 404 (Iowa 1991)

An underinsured motorist carrier is liable for prejudgment interest in a cause of action against it, even if the interest plus the judgment exceeds the policy limits. The amount of the interest is 10 percent from the date of filing the petition, in accordance with Section 535.3, The Code, not Section 668.13, The Code.

III. Uninsured Motorist Law: New Developments

A. Statute of Limitations

1. Douglas v. American Family Mutual Insurance Co., 508 N.W.2d 665 (Iowa 1993)

a. The Court stated that parties may agree to modify statutory time limitations unless the terms are unconscionable and unfair advantage has been taken of the weaker party. The reasonableness depends upon the circumstances of the case. The statute of limitations against the tortfeasor was two years, therefore the statute here was not unreasonable. The Court held that the two year statute in the policy was valid and enforceable.

B. Subrogation

1. Allgood v. Grinnell Mutual Reinsurance Co., 509 N.W.2d (Iowa 1993)

a. The Court noted the distinction between uninsured and underinsured motorist coverage and stated that the uninsured motorist coverage guaranties the minimum recovery while underinsured motorist coverage seeks to provide full compensation. The Court held that an insurer retains full subrogation rights for its uninsured motorist payments against an insured's dramshop recovery.

IV. Conclusion

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PART III - UNINSURED MOTORISTS COVERAGE

You have this coverage if Uninsured Motorists coverage is shown in the declarations

We will pay compensatory damages for **bodily injury** which an **insured person** is legally entitled to recover from the owner or operator of an **uninsured motor vehicle**. The **bodily injury** must be sustained by an **insured person** and must be caused by accident and arise out of the use of the **uninsured motor vehicle**.

If any suit is brought by you to determine liability or damages, the owner or operator of the **uninsured motor vehicle** must be made a defendant and you must notify **us** of the suit. Without **our** written consent we are not bound by any resulting judgment

ADDITIONAL DEFINITIONS USED IN THIS PART ONLY

1 **Insured person** means:
   a You or a **relative**
   b Anyone else **occupying your insured car**.
   c Anyone other than a person or organization claiming by right of assignment or subrogation, entitled to recover damages due to **bodily injury** to you, a **relative**, or another occupant of **your insured car**.

   But the following are not **insured persons**:
   a Any person other than a **relative**, using **your insured car** without **your** permission
   b Any person other than a **relative** using **your insured car** with **your** permission but who exceeds the scope of that permission
   c Any person using a vehicle without the permission of the person having lawful possession.
   d Any person using a vehicle with the permission of the person having lawful possession but who exceeds the scope of that permission

2 **Motor vehicle** means a land motor vehicle or a trailer. But it does not mean a vehicle:
   a Operated on rails or crawler-treads except a snowmobile while on public roads
   b Which is a farm-type tractor or equipment designed for **use** mainly off public roads, while so used.
   c Parked for camping or housekeeping purposes

3 **Uninsured motor vehicle** means a **motor vehicle** which is:
   a Not insured by a **bodily injury** liability bond or policy at the time of the accident
   b Insured at the time of the accident by a liability bond or policy with **bodily injury** liability limits below the minimum required by the financial responsibility law of the **state** in which **your insured car** is principally garaged
   c A hit-and-run vehicle whose operator or owner is unknown and which causes **bodily injury** to **you** or a **relative**. Physical contact with a hit-and-run vehicle is required.
   d Insured by a **bodily injury** liability bond or policy at the time of the accident but the company denies coverage or is or becomes insolvent within one year after the accident.

   Uninsured motor vehicle, however, does not mean a vehicle:
   a Owned by or furnished or available for the regular **use** of **you** or any resident of **your** household.
   b Owned or operated by a self-insurer as considered by any financial responsibility law, motor carrier law or similar law.
   c Owned or operated by a governmental unit or agency.

EXCLUSIONS

This coverage does not apply to **bodily injury** to a person:

1 While **occupying**, or when struck by a **motor vehicle** that is not insured under this Part if it is owned by **you** or any resident of **your** household.
2 Who makes or whose legal representative makes a settlement without **our** written consent.
3 While **occupying your insured car** when used to carry persons for a charge. This exclusion does not apply to shared-expense car pools or the charitable carrying of persons

This coverage does not apply to punitive or exemplary damages

Uninsured Motorists coverage shall not apply to the benefit of any insurer or self-insurer under any workers' compensation or disability benefits law or any similar law.

LIMITS OF LIABILITY

The limits of liabiliy of this coverage as shown in the declarations apply subject to the following:

1. The limit for "each person" is the maximum for all damages sustained by all persons as the result of **bodily injury** to one person in any one accident
2. Subject to the limit for "each person," the limit for "each accident" is the maximum for **bodily injury** sustained by two or more persons in any one accident

We will pay no more than these maximums no matter how many vehicles are described in the declarations or **insured persons**, claims claimants, policies or vehicles are involved.

The limits of liability of this coverage will be reduced by:

1 A payment made by the owner or operator of the **uninsured motor vehicle** or organization which may be legally liable
2. A payment under the Liability coverage of this policy
3. A payment made or amount payable because of **bodily injury** under any workers compensation or disability benefits law or any similar law.

OTHER INSURANCE

If there is other similar insurance on a loss covered by this Part we will pay **our** share according to this policy's proportion of the total limits of all similar insurance. But any insurance provided under this Part for an **insured person** while **occupying** a vehicle you do not own is excess over any other similar insurance

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This endorsement forms a part of the policy to which it is attached and replaces any Underinsured Motorists Coverage previously issued as a part of this policy You have this coverage if Underinsured Motorists Coverage is shown in the declarations.

We will pay compensatory damages for **bodily injury** which an **insured person** is legally entitled to recover from the owner or operator of an **underinsured motor vehicle** The **bodily injury** must be sustained by an **insured person** and must be caused by accident and arise out of the use of the **underinsured motor vehicle**.

You must notify us of any suit brought to determine legal liability or damages. Without **our** written consent we are not bound by any resulting judgment

We will pay under this coverage only after the limits of liability under any **bodily injury** liability bonds or policies have been exhausted by payment of judgments or settlements

ADDITIONAL DEFINITIONS USED IN THIS ENDORSEMENT ONLY

As used in this endorsement:

1. **Insured person** means:
   a. **You** or a **relative**.
   b. Anyone else **occupying your insured car**.
   c. Anyone, other than a person or organization claiming by right of assignment or subrogation, entitled to recover damages due to **bodily injury** to **you**, a **relative** or another occupant of **your insured car**.

   But the following are not **insured persons:**
   a. Any person, other than a **relative, using your insured car** without **your** permission.
   b. Any person, other than a **relative**, using **your insured car with your** permission, but who exceeds the scope of that permission
   c. Any person using a vehicle without the permission of the person having lawful possession
   d. Any person using a vehicle with the permission of the person having lawful possession, but who exceeds the scope of that permission.

2. **Motor vehicle** means a land motor vehicle or a trailer. But, it does not mean a vehicle:
   a. Operated on rails or crawler-treads except a snowmobile while on public roads.
   b. Which is a farm type tractor or equipment designed for **use** mainly off public roads, while so used
   c. Parked for camping or housekeeping purposes

3. **Underinsured motor vehicle** means a **motor vehicle** which is insured by a liability bond or policy at the time of the accident which provides **bodily injury** liability limits less than the limits of liability of this Underinsured Motorists coverage.

   Underinsured motor vehicle, however, does not mean a vehicle:
   a. Insured under the Liability coverage of this policy.
   b. Insured at the time of the accident by a liability bond or policy with **bodily injury** liability limits below the minimum specified by the financial responsibility law of the **state** in which **your insured car** is principally garaged.
   c. Owned by or furnished or available for the regular use of **you** or a **relative**.
   d. Owned or operated by a governmental unit or agency.
   e. Owned or operated by a self-insurer as considered by any financial responsibility law, motor carrier law, or similar law.
   f. Which is insured by a **bodily injury** liability bond or policy at the time of the accident, but the bonding or insuring company denies coverage or is or becomes insolvent

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EXCLUSIONS

This coverage does not apply for **bodily injury** to a person:

1. While **occupying**, or when struck by, a motor vehicle that is not insured under this policy, if it is owned by **you** or any resident of **your** household.
2. Who makes or whose legal representative makes a settlement without **our** written consent
3. While **occupying your insured car** when used to carry persons for a charge. This exclusion does not apply to shared-expense car pools or the charitable carrying of persons

This coverage does not apply to punitive or exemplary damages.
Underinsured Motorists Coverage shall not apply to the benefit of any insurer or self-insurer under any workers' compensation or disability benefits law or any similar law.

LIMITS OF LIABILITY

The limits of liability of this coverage as shown in the declarations apply, subject to the following:
1. The limit for each person is the maximum for all damages sustained by all persons as the result of **bodily injury** to one person in any one accident
2. Subject to the limit for each person, the limit for each accident is the maximum for **bodily injury** sustained by two or more persons in any one accident.

We will pay no more than these maximums no matter how many vehicles are described in the declarations, **insured persons,** claims, claimants or policies or vehicles are involved in the accident.

The coverage provided under this endorsement is excess over any collectible auto liability insurance.

The limits of liability of this coverage will be reduced by any payment made or amount payable because of the **bodily injury** under any workers compensation or disability benefits law or any similar law.

OTHER INSURANCE

If there is other similar insurance on a loss covered by this endorsement, **we** will pay **our** share according to this policy's proportion of the total limits of all similar insurance. But, any insurance provided under this endorsement for an **insured person** while **occupying** a vehicle **you** do not own is excess over any other similar insurance.

All other terms agreements, conditions, and provisions remain unchanged.

P

STRATEGY AND DISCOVERY IN CROP DAMAGE CASES

Presented to:

Defense Counsel Association
)94 Annual Meeting

Gregory G. Barntsen
SMITH PETERSON LAW FIRM
35 Main Place, P.O. Box 249
Council Bluffs, Iowa 51502
Telephone: (712) 328-1833

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Read "LIMIT OF WARRANTY AND LIABILITY" before reading or using the information which follows. If the terms are not acceptable, please return at once unopened.

LIMIT OF WARRANTY AND LIABILITY

This attorney warrants that this information may be used in defending property damage claims for XYZ Chemical Company and that it is reasonably fit for the purposes set forth in the outline when used in accordance with your own education, training, experience, knowledge and the COMMANDS, DIRECTIONS AND ORDERS of corporate counsel. NO OTHER EXPRESS OR IMPLIED WARRANTY OF FITNESS FOR A PARTICULAR PURPOSE OR MERCHANTABILITY IS MADE. This warranty is also subject to the following conditions and limitations.

This information must not be used in the defense of any claim or lawsuit of XYZ Chemical Company without a complete and detailed evaluation by qualified corporate counsel for XYZ Chemical Company to verify the suitability of this information for use in any given complaint or lawsuit. Information from this publication should be used only in conjunction with corporate counsel's direction and after consultation with expert witnesses. This attorney assumes no liability for failure resulting from the use of this information. The user is responsible for all loss or damage to the attorney's law firm or XYZ Chemical Company from use or handling which results from conditions beyond the control of this attorney, including but not limited to incompatibility with the using attorney's style, training, education, experience, ineptness, blundering, oversights, misuse, directions from corporate counsel or other unusual conditions outside the range of what is considered normal in the jurisdiction for the time period where the case is being tried.

There are no warranties or guarantees made that the use of this information will provide defense verdicts, settlements or proper trial techniques in any specific case. It is not meant to be all inclusive but merely as a tool for discussion at the 1994 Iowa Defense Counsel Association Seminar so as to share information between defense counsel so that each counsel can be better prepared to defend crop damage cases.

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Strategy and Discovery in Crop Damage Cases

Gregory G. Barntsen
Smith Peterson Law Firm
35 Main Place, P.O. Box 249
Council Bluffs, IA 51502

I. **TYPES OF CLAIMS**

A. Ineffective performance of herbicide causes a lack of weed control and loss of yields

B. Herbicide damage to the crop

II. **MEASURE OF DAMAGES**

A. To determine the loss of yield due to lack of weed control or due to damage to the crop, estimate the probable yield of the crop if it had not been damaged, destroyed or had competition from weeds; calculate the value of that yield and deduct the value and amount of labor and expense that would have been required but for their damage, to mature, care for and market the crop. Martin v. Jaekel, 188 N.W.2d 331 (Iowa 1971). In other words, the difference between the value the crop should have had and the value actually obtained, less any expenses.

B. Where the crop was damaged from the herbicide or is not as large as it should have been, the damage is categorized as property damage and not economic damage. Manning v. International Harvestor Co., 381 N.W.2d 376, 379 (Iowa App. 1985).

III. **THEORIES OF LIABILITY**

A. Breach of express warranty (UCC §2-313) based on

1. Labels

2. Advertisements

3. Oral statements by salesmen

4. Written product warranty

GGB/stracrop pag09 0194 2

B. Breach of implied warranties of merchantability and fitness for a particular purpose. UCC §2-314 and UCC §2-315.

C. Negligence

D. Strict liability

IV. **DEFENSES IN CROP DAMAGE CASES**

A. FIFRA (Federal Insecticide, Fungicide and Rodenticide Act of 1947) and the preemption defense

1. Subparagraph 1 of section 24(b) of FIFRA specifically says that a state "shall not impose or continue in effect any requirements for labeling . . . in addition to or different from those required by FIFRA.

2. The Supreme Court in <u>Cipollone v. Ligett Group, Inc.</u>, 112 S.Ct. 2608, 120 L.Ed.2d 407 (1992), addressed the issue of preemption as it related to the claims of breach of an express warranty on evidence consisting largely of statements made in the defendant's advertising. The Court found that the claim was not preempted and recognized that "a federally mandated warning does not preempt a state law remedy that is voluntarily undertaken."

3. Since the <u>Cipollone</u> decision, many courts in state and federal cases have construed the preemptive effect of FIFRA and concluded that FIFRA preempts state common law claims based on statements made or implied from agricultural product labeling. See <u>Worm v. American Cyanamid Co.</u>, 5 F.3d 744 (4th Cir. 1993); <u>King v. E.I. Du Pont de Nemouris and Co.</u>, 996 F.2d 1346 (1st Cir. 1993), et al. (see <u>Der Gazarian</u>, 1993 Westlaw 460539 at *5 n. 1, 2 (collecting cases).

4. Under <u>Cipollone</u>, implied warranty claims are preempted because implied warranties arise by operation of state law. See <u>Papas v. Upjohn Co.</u>, 985 F.2d 516, 519-20 (11th Cir. 1993); <u>Taylor Ag. Industries v. Pure-Grow</u>, 1993 W.L. 496678 (D. Ariz. 1993).

5. Express warranty claims were not preempted by FIFRA using the narrower four-justice plurality rationale. Welchert v. American Cyanamid (Magistrate Decision in U.S. District Court for the District of Nebraska in 1993).

B. State of the art defense

C. Statute of limitations

D. Disclaimer of warranty

E. Limitation of remedies provisions

F. Comparative fault

V. **DEFENSE STRATEGY**

A. Determine if a company representative such as a sales representative or product development representative has investigated the claim and if so, obtain the following from them if available:

1. A customer complaint form filled out setting forth the facts.

2. Determine if any notes were taken in addition to the complaint form.

3. Obtain any photographs he may have taken.

4. Determine the names and addresses of individuals he may have talked to while investigating the claim.

5. Obtain the exact location of the farm and the areas where the damages occurred.

6. Determine the names and addresses of the applicator and other persons involved in making the sale and application of the herbicide.

7. Determine if the company representative, applicator or salesman knows the lot number of the herbicide which was applied to the plaintiff's property.

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B. Gather facts to prove company's herbicide was not the cause of lack of weed control or crop damage. See Exhibit 2 for areas of inquiry.

C. Retain expert to assist in investigation, discovery and trial. Have him analyze claim using Exhibits 1 and 2.

D. Expert categories

1. Professors who teach in the plant and soil science department, agronomy department, field crops, crop science or horticulture who can help in cases involving herbicides, plant growth regulators, desiccants, defoliants, and soil fumigants.

2. Professors in departments of entomology or entomology combined with another discipline and help on cases involving insecticides, miticides, termiticides and structural or grade fumigants.

3. Professors or scientists in the departments of plant pathology or plant pathology combined with other disciplines that deal with problems concerning fungicides, bactericides, nematicides and sometime soil fumigants. Professors or scientists in the departments of wildlife or wildlife and fisheries and be of assistance in cases involving rodenticides and predicides.

4. Iowa State Extension agents or former Extension agents are often helpful

5. Employees of local cooperatives which sell and apply herbicides are often helpful

6. Iowa Independent Crop Consultants Association, Brad Buchanan, Crop Tech Services, 6801 Ely Road SW, Cedar Rapids, IA 52404, 319-848-7424

7. Nebraska Independent Crop Consultants Association, Norman Mieth, 1816 SW 17th, Lincoln, NE 68522, 402-474-2831

E. Obtain local weather data from:

1. Plaintiff or local farmers

2. Local weather stations

3. Iowa State University weather stations

4. NOAA, United States Department of Commerce, National Climatic Data Center, Federal Building, Asheville, NC 28801-2733

5. EROS Data Center which has satellite photographs. Call 800-367-2801

F. Take aerial photographs from plane which will allow you to show pattern of damage or lack of control if the crop is still in the field

G. Investigate the claim by sending expert and company representative to the farm to:

1. Take soil samples

2. Take photographs

3. Walk the fields and make observations

4. Talk to farmer and neighbors

5. Go to ASCS (Agricultural Stabilization Conservation Service) office to obtain information regarding fields in question and talk to personnel

6. Go to SCS (Soil Conservation Service) office to obtain soil maps

7. Check with Iowa State Extension Service regarding herbicide and other problems in the area

8. Obtain information from the dealer who sold or applied herbicide and talk to their employees

H. Obtain the invoices regarding the sale of the herbicide from the chemical company to the dealer and from the dealer to the farmer. Provide this information to the chemical company so they can attempt to locate the lot number of the chemical which was sold to the plaintiff and check the retained sample to prove it met manufacturer's specifications.

I. Check with farmer and dealer to determine if they kept any of the containers in which the product was sold in order to determine the lot number of the products. Also determine if they kept any sample of the herbicide.

J. If plaintiff had a multi-peril crop insurance or crop/hail insurance claim, obtain those records and interview the individual who investigated those claims to determine what bearing they may have on this claim.

K. Obtain a label of the herbicide which would have been on the product when it was sold and subsequent labels to the present time.

L. Learn about the product so you are familiar with its characteristics and how it performs. This will assist you in conducting discovery and handling the case.

M. Locate test data supporting the product's performance and showing it does not damage the crop if applied properly at the proper strengths

N. Develop videotape or slide presentation showing the company's quality control procedures to insure the fact the product meets specifications before leaving the plant

O. Develop exhibit list. See Exhibit 3 for examples.

1. Map of state

2. Rainfall charts for weather stations

3. Rainfall charts for damaged fields

4. Rainfall departure from norms

5. Section map with farm location

6. Blow-up of label

7. How herbicide works

P. Review Pesticide Litigation Manual by John M. Johnson and George W. Ware, published by Clark Boardman Calahan in 1992.

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Q. Obtain guides for herbicide use from the Iowa State or University of Nebraska Cooperative Extension Services

R. Evaluate the community in which the case is going to be tried to determine:

1. Whether the plaintiff will evoke a favorable response from them based on his reputation

2. Whether defendants are likely to have the sympathy of a jury as in cases where they employ a large number of people and have a good reputation

3. Whether the community has any reason to have prejudice for or against a large chemical company based on chemical spills, other environmental matters or employment by the company

S. Develop a "theme" to use when trying the case as discovery proceeds, such as

1. The farmer screwed up by improperly applying the chemical or choosing the wrong chemical, etc.

2. Defuse the idea that large companies don't care by presenting evidence to the contrary

3. Determine if the applicator or weather was the problem

T. File motion for summary judgment after discovery to narrow issues

VI. **DISCOVERY IN CROP DAMAGE CASES**

A. Interrogatories to plaintiff farmer -- See Exhibit 4 for list of proposed interrogatories

B. Request for Production to farmer -- See Exhibit 5 for suggested documents to request from farmer

C. Interrogatories to applicator and dealer -- See Exhibit 6 for proposed interrogatories

D. Request for Production to applicator or dealer -- See Exhibit 7 for documents to request from applicator and dealer

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E. Depose opposing party's experts and do the following

   1. Determine expert's basis for arriving at his opinion and whether or not it is scientifically sound

   2. Determine the facts and data on which the expert is relying and analyze whether it is accepted in the field

   3. If expert knows defendant's expert, have him vouch for defendant's expert's credibility

   4. Obtain copies of material obtained and relied on by expert

   5. Review photographs taken by expert and identify where they were taken and how they support his opinions

F. Depose plaintiff and his witnesses

G. Depose applicator and dealer

H. Line up witnesses to prove:

   1. Lot number of product applied to farmer's land

   2. That product was manufactured according to specifications

   3. That product works effectively when applied correctly under normal weather conditions

   4. Quality control

   5. Cause of lack of control or crop damage

   6. Damages less than claimed

   7. Poor farming practices

   8. Weather conditions

   9. Improper application

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VII. AREAS OF INQUIRY IN VOIR DIRE

A. Jurors' farming experience or knowledge

B. Jurors' knowledge or experience concerning the use of chemicals or herbicides to control weeds

C. Jurors' attitudes concerning the use of chemicals to control weeds in the environment

D. Jurors' attitudes toward large chemical companies

E. Obtain commitment from jurors that consumers and users of product have a responsibility to use them properly

F. Jurors' experience regarding quality control

G. Obtain promise from jurors to treat both parties equitably, even though one is a large company and one is a farmer

H. Obtain promise from jurors that consumers and users of product have a duty to read labels and observe the warnings

I. Jurors' experience working for manufacturing companies

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EXHIBIT 1

Analysis of Claim by Expert

Objective - Defend Against Allegation and Identify Causal Agents

1. Identification of "Problem" and Develop Major Scientific Direction.

2. Locate, Coordinate and Interact with Cooperators and Experts.

3. Development of Model Specifics and Use (With Experts)

    a. Symptom Analysis and Identification

        i. Major or Minor Fertilizer Deficiency - Physiological Implications

        ii. Cultural Problems - Deviations

        iii. Herbicide Injury - Physiological Implications

        iv. Insect Damage

        v. Fungus Damage

        vi. High Salt or Spray Injury

    b. Environment - Climate, Vegetation, Soils, Pests

        i. Identify Before and During Course of Alleged Problem

            (1) Air and Soil Temperature

            (2) Humidity

            (3) Rainfall - Amounts and Pattern

            (4) Wind - Direction and Speed

            (5) Cloud Cover

            (6) Vegetation Present (Crop, Weeds, Etc.)

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(7) Pests Observed (Pathogens, Insects)

(8) Soil - Series, Texture, Properties (pH, Drainage, Organic Matter)

c. Product(s)

i. Products Used - Formulation, Age, Lot #

ii. Application - Method, Spray Volume, Time of Day

iii. Sequence to Operations - Before or After Crop Planting or Emergence, Other Products

iv. Product Performance Properties - U.V. Light Breakdown, Volatility, Method of Application Needed for Maximum Performance, Interaction With Other Products

d. Crop(s), Weed(s) or Pest(s)

i. History of Cropping for Past 1-3 Years

ii. Tillage Practices, Cover Crops

iii. Pest History

iv. Local and State Recommendations

v. Varieties - Response to Local Conditions

e. Project Design and Execution

f. Translation of Technical Results

g. Assist Counsel With Preparation

EXHIBIT 2

Areas of Inquiry in Defending Property Damage Cases

1. Reasons For Lack of Control

   a. Low Rates, Wrong Spray Volumes - Patterns

   b. Improper Combinations - Chemicals, Fertilizers

   c. Wrong Soils (Multiple Soil Type Fields) or Pest Species

   d. Impacting Environmental Conditions

   e. Label Restrictions Ignored (i.e. - Weed Size)

   f. Cultural Practices

   g. Non-Chemical or Cultural Factors

2. Reasons for Crop/Property Damage

   a. Improper Spray Placement - Off Target Species

   b. Lack of Attention to Label Restrictions

   c. Poor Cultural Techniques

   d. Toxic Plants - Weeds Present

   e. Adverse Environmental Conditions

   f. Herbicide Carryover

   g. Varietal Sensitivity

   h. Non-chemical or Cultural Factors

3. Information to Obtain Re: Field Inspection - Patterns

   a. Size, Shape.

      i. Row Effects

      ii. Unusual Effects - Plants, Deficiencies, Pathogens

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iii. Drift Effects

iv. Seasonal Effects - Frost, High Temperatures, Hot Spots - Wind Damage.

v. Plant Symptoms - Deficiencies, Pathogens, Insects Herbicides

vi. Open Mind - Do Not Jump to Conclusions

b. Irregular Patterns

i. Spots

ii. Soil Change, Moisture

iii. Trashy Surface

iv. Low Areas

v. Soil Wash

c. Gradual Change in Pattern or Control

i. Incompatibility

ii. Pressure Drop

d. Even Distribution

i. Lack of Rainfall, Timely

ii. Lack of Rate and Organic Matter Match-up

iii. Fluffy Surface

iv. Leaching - Copious Rainfall

v. Too Deep Incorporation, Tardy Incorporation

vi. Wrong Herbicide, No Herbicide in Tank

e. Symptoms - Performance Inquiries

i. Streaks

ii. Well-defined Edges

(1) Plugged Nozzle

(2) Boom Too Low

(3) Boom Not Parallel To Soil

(4) Unmatched Nozzles

(5) Turn Too Wide - Swath

iii. Poorly-Defined Edges

(1) Incorporated - Diffused

(2) Soil Too Wet - Balls Up

(3) Slow Speed

(4) Too Deep

(5) Shanks Too Wide

4. <u>Questions to Ask About Expert or Investigator Background</u>

a. Knowledge

i. Property - Agronomic and Horticultural Crops, Non-Crop Areas, Ornamentals, Livestock, Others.

ii. Product(s) - Label, Performance - Mode of Action, Unique Features

iii. Climate - Environmental, Economic

iv. Resources Other Disciplines

b. Experience and Capabilities

i. Broad and Credible Experience

ii. Communication Skills

c. Management Direction and Policies

EXHIBIT 3a

NEBRASKA
Weather Stations

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EXHIBIT 3b

Bartlett Ne.

1 mile

2 miles

gravel road

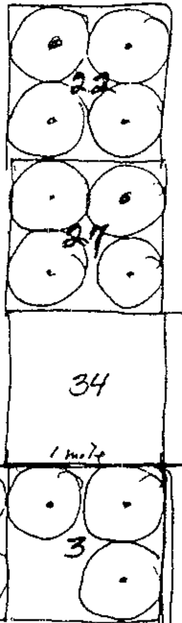
3 miles

7 miles

1 mile

1 mile

1 mile



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4

3

gravel road

Erickson ← 6 miles

BARTLETT 8 MI. NW
SPALDING 4 MI. SW

RAINFALL AT CONNER'S FIELDS, APRIL–JUNE 1986

RAINFALL (inches)

3.00
2.50
2.00
1.50
1.00
0.50
0.00

< Conner planted corn (Interrogatory) >
< Conner planted corn (Deposition) >
< Conner planted soybeans (Interrogatory) >
< Conner planted soybeans (Deposition) >

< Plant complaint form
< Lasso/Atrazine, Field #1; No problem, Field #1
< Lasso/Atrazine, Field #3
< Lasso/Atrazine, Field #3, #4
< Lasso/Atrazine, Field #5, #4
< Lasso/Atrazine, Harmon
< Lasso/Atrazine, Harmon
< Lasso/Atrazine, Harmon
< Farmer 1st observed weeds in corn (Interrogatory)
< 1st observed weeds (Deposition)
< Lasso/Lexone, Williams' Field #2
< Sales representative's visit
< Hail

27 APRIL, 30, 3 MAY, 6, 9, 12, 15, 18, 21, 24, 27, 30, 2 JUNE, 5, 8, 11, 14

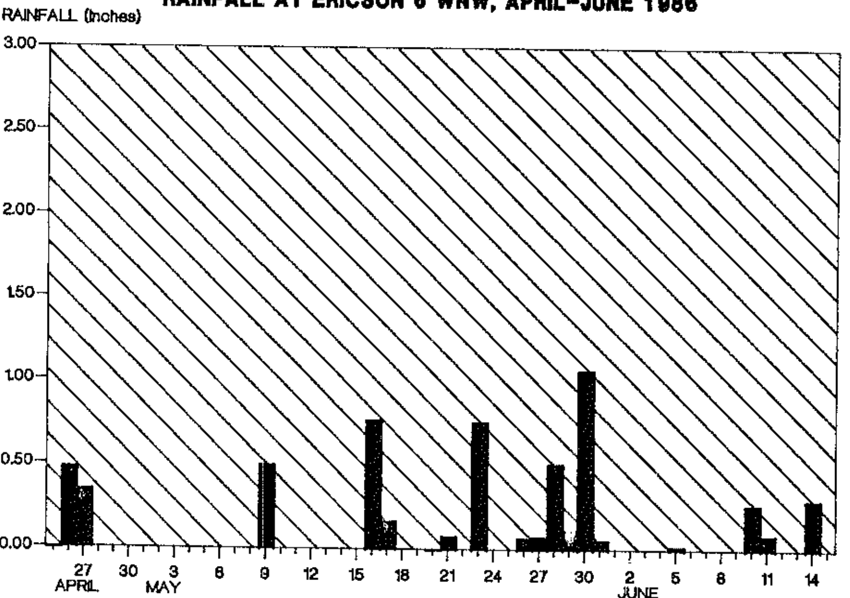
EXHIBIT 3d

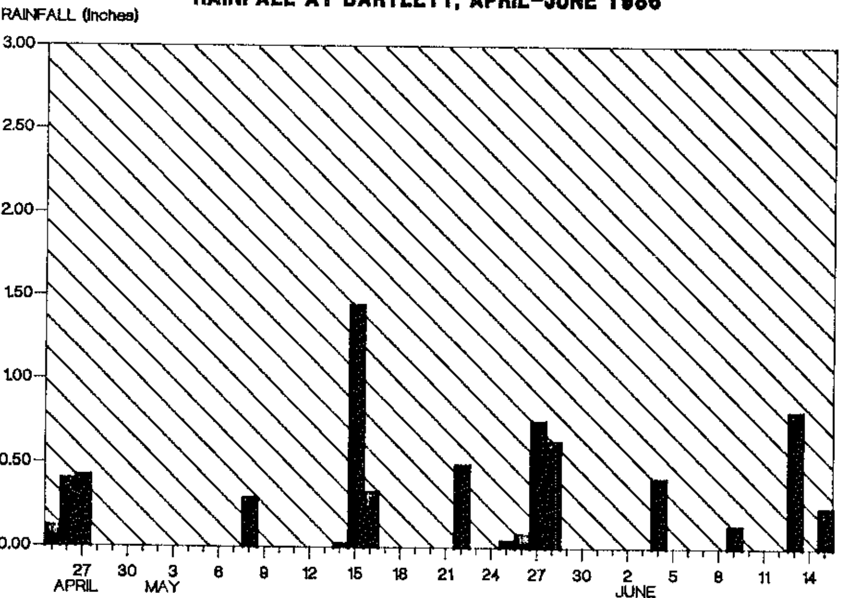
RAINFALL THROUGHOUT THE SEASON, CONNER'S FIELDS

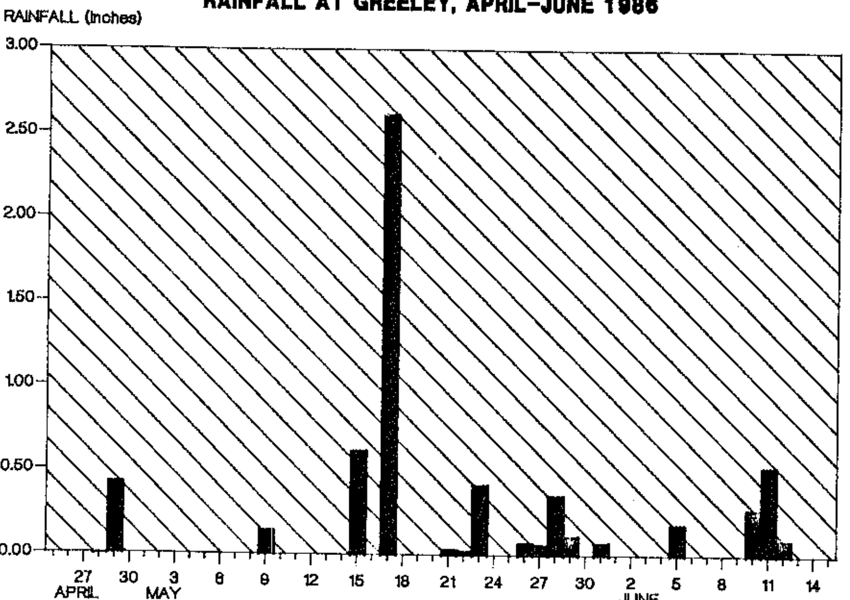
EXHIBIT 3e

RAINFALL AT CONNER'S FIELDS, APRIL–JUNE 1986

EXHIBIT 3f







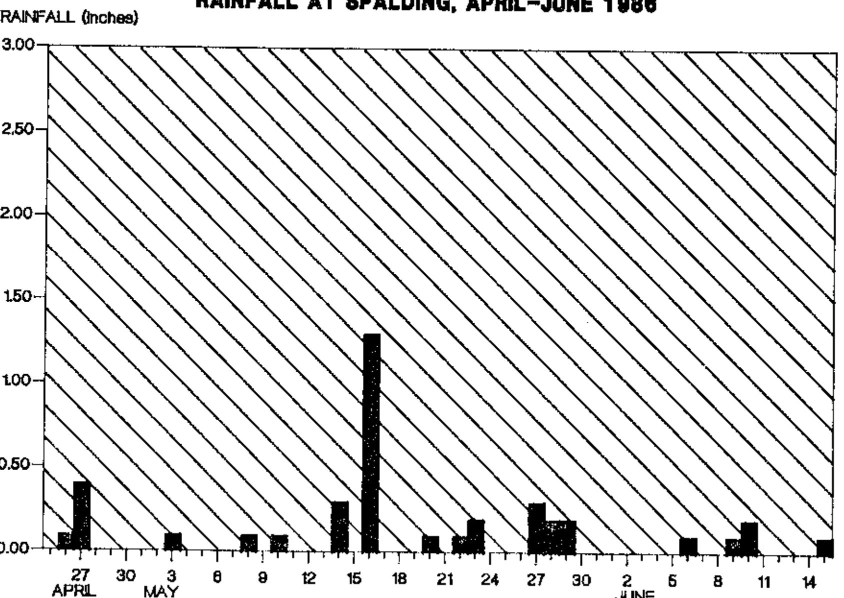


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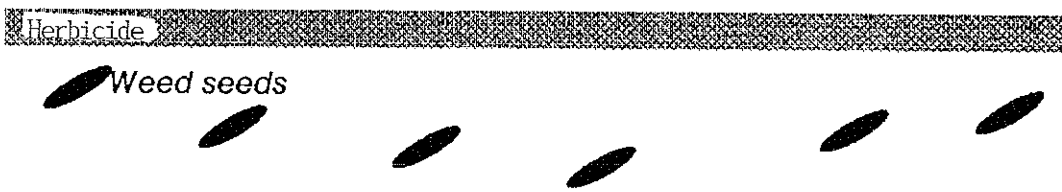
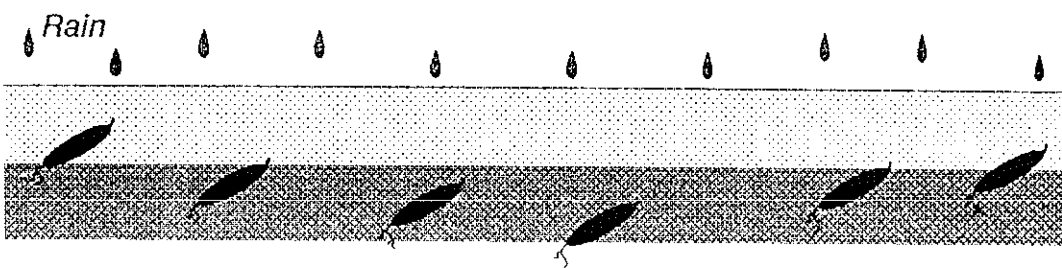
EXHIBIT 3g

HOW HERBICIDE WORKS ON WEEDS

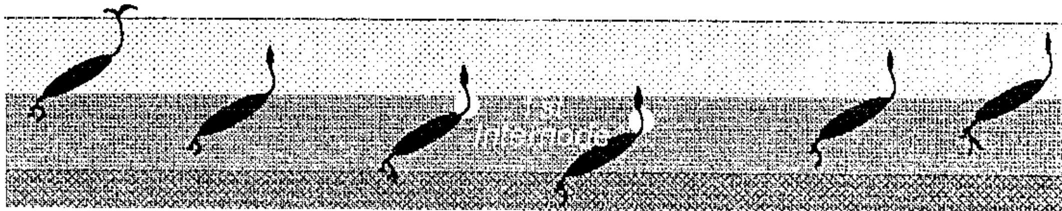
1. **Preemergent** Herbicide **applied.**



2. **1" rain.** Herbicide **moves down through soil. Weed seeds germinate.**



3. **Weed seeds develop.** Herbicide **enters weeds through 1st internode.**



4. **Weeds that received** Herbicide **through 1st internode die.**

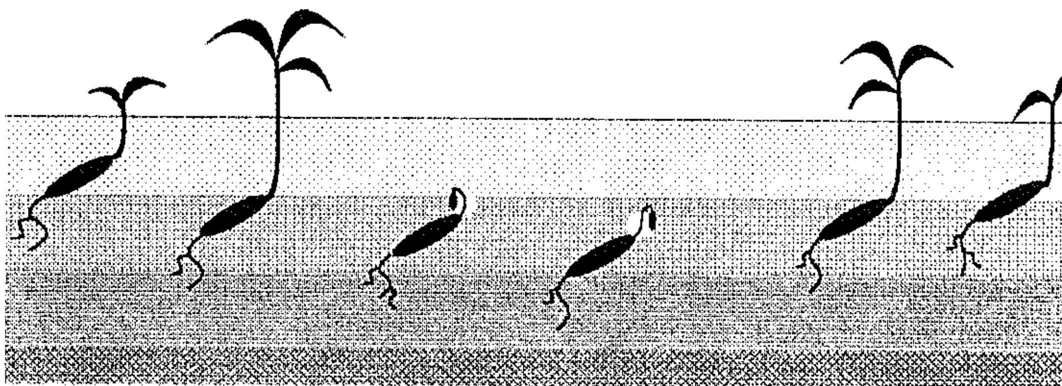


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EXHIBIT 4

Interrogatories to Plaintiff Farmer

1. State specifically the facts upon which you base your allegation that the chemical in question was defective and state the names and addresses of the individuals who have knowledge of those facts.

2. List the name and, if known, the address and telephone number of each individual likely to have information that bears significantly on any claim or defense presented by the pleadings in this case, including damages. Indicate briefly the general topics on which such persons have information. NOTE: By the use of the term "significantly" it is intended that there will be disclosure of those persons who, if their potential testimony were known, might reasonably be expected to be deposed or called as a witness by any of the parties.

3. Do you contend that any representatives of defendant have made any express or implied admission of liability? If so, please relate the person making same and the exact words of any such statement, the person to whom such statement was addressed, the time, date and place of the giving of any such statement, and if such statement was in writing or otherwise recorded, a description and the identity of all persons having custody thereof, and if such statement was oral, the name of each person present and what each person present said to each other person present.

4. State the names and addresses of all persons from whom statements as defined in the discovery rules were obtained by or for you or by a representative of you (including your attorney, consultant, surety, indemnitor, insurer or agent), and state the date of each and who has custody of each statement referred to in this answer.

5. a. Itemize the damages you are claiming (by type and field) and state your method of computing and arriving at those damages.

   b. State the total amount of damages claimed by you.

   c. Identify all documents which reflect, support, evidence or otherwise document any aspect of said damages.

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d. Identify all persons who have knowledge or information relating to the plaintiff's damages.

6. State whether or not you have made or are going to make a claim for crop hail insurance payments, multiple peril crop insurance payments, disaster payments or other type of relief for the loss of yield you claim to have suffered on the fields involved in this lawsuit. If so, state:

   a. Legal description of each field.

   b. The nature and amount of each claim or anticipated claim.

   c. The nature and amounts of any payments received by you or expected to be received by you.

   d. The name and address of each organization which has made such payments or is expected to make payments.

7. If you have knowledge of other persons or parties who have similar complaints about the effectiveness of the chemical in question, state the following:

   a. State the name and address of person and/or party.

   b. State when the person had a problem with said chemical.

   c. State the nature of the complaint, including the date of damage or loss complained of and the type of damage or loss suffered.

8. State any implied and/or express warranties you claim were made and breached by defendant and, in relation to each, state the following:

   a. Whether it was oral or written.

   b. When and how each warranty was made and by whom.

   c. Identify the document in which the written warranties appear and set forth the specific words being relied on.

9. With regard to the alleged non-performance of the chemical in question, state the following concerning each field involved in this lawsuit:

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a. The date that you first observed the symptoms of the alleged non-performance of the chemical in question.

b. The date that you first notified representatives of defendant of the alleged non-performance; the method of notification and to whom it was sent; the reason for delay in notification if your notification occurred more than five days following your observation of the alleged non-performance; and the response of defendant to your notification.

c. The names of others whom you notified regarding the alleged non-performance; the method of notification; the reason for delay in notification if your notification occurred more than five days following your observation of the alleged non-performance; and the response of each other person whom you notified.

d. The names and addresses of other individuals who observed the alleged non-performance and the dates they observed it.

e. What actions, if any, you took to correct the alleged non-performance.

f. Whether or not you took any pictures of the alleged non-performance and, if so, the dates those pictures were taken.

g. Type of weeds and grasses involved.

h. Weed and grass patterns in each field.

i. Density of the weeds and grasses per square foot in each field.

j. Density of weeds and grasses per square foot in nearby tilled areas (specifying if a herbicide was applied to these areas and, if so, designating the name, manufacturer, dates applied and rates of application for each herbicide applied).

k. Types of weeds and grasses in nearby non-tilled areas (specifying if a herbicide was applied to these areas and, if so, designating the name, manufacturer, dates applied and rates of application for each herbicide applied).

10. State the yield per acre on each field involved in this lawsuit for the years 1989-1992.

11. If you planted fields other than those involved in this lawsuit in 1991 with the same type of crop on which you used the chemical in question as a herbicide, state the following:

    a. What type of weed control did you have in comparison to the fields involved in this lawsuit?

    b. Did those fields receive the same amount of water by rainfall or irrigation as the fields involved in this lawsuit? If not, state specifically how the amounts differed in timing and volume?

    c. How did your farming practices differ between the fields involved in this lawsuit and the other fields as concerns such things as planting dates, dates the herbicides were applied, dates of other farming operations such as disking, cultivating and incorporation, equipment used and other such factors?

    d. Why do you believe that the chemical in question gave better control on the other fields than the field in question?

    e. What was the yield on each of the other fields?

12. If the chemical in question was applied to other fields you owned or farmed in 1991 where you had adequate weed control and/or no herbicide damage, state the following:

    a. Legal description of the field.

    b. Number of farmable acres in the field treated with the chemical in question.

    c. Name and address of the company or person who applied the chemical in question.

    d. Name and address of the company where the chemical was purchased.

    e. The date(s) and time(s) of application of the chemical.

    f. The total number of gallons of the chemical applied to each field.

    g. The purchase price of said product per gallon.

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h. Names and addresses of all persons who observed the application of the chemical.

i. Name and address of the person who mixed the chemical.

j. The soil type and the percentage of organic matter in each field.

13. With reference to other fields planted in 1991 with the same type crop as the fields involved in this lawsuit, on which the chemical in question was not applied, state the following:

a. Whether other herbicides were used and, if so, describe them and the dates of application.

b. The yields obtained on each of those fields.

c. A legal description of each of those fields.

d. Date of planting.

e. Date of last tillage.

14. Provide the name, and if not provided before, the address and telephone number of:

a. Each person whose testimony you expect to present at trial.

b. Each person whose testimony will be presented only if needed because of anticipated developments during trial.

c. Designate those witnesses whose testimony is expected to be presented by means of a deposition.

15. a. Attach a copy of, or furnish a description by category and location of, all documents, data compilations, and tangible things in your possession, custody of or control that are likely to bear significantly on any claim or defense.

b. Set out an appropriate identification of each document or other exhibit, separately identifying those which you expect to offer into evidence at trial and those which you may offer if the need arises.

16. State the facts upon which you base your claim that Monsanto negligently formulated, manufactured, tested,

marketed and sold Bullet to the plaintiff and state the names and addresses of the individuals with knowledge of those facts.

17. Identify all advertisements (including, but not limited to, television and radio commercials) on which you claim to have relied and all documents embodying such advertisements.

18. If an investigation or inspection was conducted concerning the cause of the alleged reduction of yield sustained on the crop in question, state the following:

    a. The date or dates the investigation or inspection took place.

    b. The names and addresses of the individuals who performed the investigation or inspection.

    c. The places where the investigation or inspection was conducted or performed.

    d. The nature of the investigation or inspection which took place.

    e. The conclusions arrived at after the inspection or investigation.

19. State whether you or your attorneys or agents expect to call any persons, in addition to those identified in other responses to Interrogatories, as expert witnesses at trial to testify as to expert opinions and, if so, as to each such witness state:

    a. The name, address and occupation of each such person.

    b. The subject matter on which the expert is expected to testify.

    c. The substance of the facts and opinions to which the expert is expected to testify and a summary of the grounds for each opinion.

    d. The dates on which each of your expert witnesses will have completed their preparation and have arrived at their final opinions so that meaningful depositions can be taken.

    e. Whether such person or persons have furnished any written reports and if so, the dates of each report.

EXHIBIT 5

Request for Production to Plaintiff Farmer

1. Invoices for the purchase and application of seed, insecticides, fungicides, herbicides, fertilizer and other chemicals to the fields involved in this lawsuit for the year 1990-1991.

2. Any notes, photographs, aerial photographs, videotapes, plats, drawings, reports, records or other evidentiary items made or obtained by you or on your behalf concerning the investigation or documentation of your claim against defendant.

3. ASCS records for the last five years showing the production history, farmable acres, soil maps, soil analysis, soil types, aerial photos, etc., as they relate to the fields involved in this action.

4. All diaries, calendars, books, notes or other documents showing information concerning your farming practices in 1990-91, such as the dates of planting, disking, plowing, cultivation, application of chemicals, harvesting, etc.

5. Any soil analysis reports or other records for the last five years showing chemicals, organic matter and PH of the soil on the fields which are the subject matter of this lawsuit.

6. Plaintiff's farming records kept by computer or otherwise showing dates of farming operations, equipment used on farming operations, information regarding harvest and sales, and other such records.

7. Brochures or other documents which show the maturity dates of the crops in this lawsuit and which show expected yields based on yield tests.

8. Documentation of sale of the crops involved in this lawsuit for the 1990-91 crop year.

9. Weigh tickets and settlement sheets for the crops involved in this lawsuit in 1990-91.

10. Rainfall and weather records showing the weather on the plaintiff's farm in 1990-91.

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11. Records showing dates and amounts of water that were applied to each field by irrigation system or by rain for 1991.

12. Purchase, maintenance or repair records for 1990-91 pertaining to plaintiff's irrigation equipment, if any.

13. All written materials which support your claim for loss of yield and damages in this case.

14. Any and all correspondence, letters, or other such documents between plaintiff and defendant or its authorized representatives.

15. All documents in your possession or under your control relating to any claims made by you or on your behalf or payments made by anyone else relating to any item for which claim is made herein.

16. Written statements taken of any employees, agents or representatives of the defendant.

17. Any diaries kept by you relative to your claims herein.

18. Any reports relating to your claims in this case.

19. Any documents or items you intend to introduce into evidence as exhibits in this case.

20. Any expert witness reports relating to this case and the claims you are making against defendant.

21. The resume of any expert whom you expect to call as a witness at trial of this action.

22. All documents identified in your answers to any and all interrogatories in this action.

23. Copies of plaintiff's state and federal income tax returns for the years 1988-1992.

24. All bills, brochures, packaging materials, advertising materials, sales meeting information or other pictures or documentation which you claim set forth express or implied warranties concerning the chemical in question.

25. Any written materials which support your claim that the chemical in question was defective in such a manner that it failed to control weeds or stunted the crop.

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26. Any materials received by you relating to the chemical in question at the time of purchase.

27. Any written warranties which the plaintiff contends applies to the chemical in question in 1990-91.

28. Test reports relating to the testing of the chemical in question used on plaintiff's property in 1990-91.

29. Any records pertaining to crop insurance for 1990-91, such as, but not limited to, applications for crop insurance, crop insurance policies, adjustment of crop insurance loss, checks for payment of crop insurance loss, etc.

30. All documents in your possession or under your control relating to any subrogation rights claimed arising out of the incident referred to herein.

31. 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; including material prepared by an expert used for consultation (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.

32. Any documents for crop year 1991 which show payments to the plaintiff for his loss of yield on the farms involved in this lawsuit or payments from crop insurance companies, federal government or other individuals, agencies or corporations.

33. Copies of plat maps, photographs and diagrams showing the location of plaintiff's farms which are the subject matter of this action.

34. Records and documents which describe the irrigation equipment located on plaintiff's farms which are the subject matter of this case.

35. Aerial photographs, plat maps or diagrams showing the location of all fields which you owned, leased or farmed in 1991.

EXHIBIT 6

Interrogatories to Dealer/Applicator

1. State what warranties were given by Coash, Inc. to the plaintiff regarding the use of Bullet in 1991.

2. State the name and address of the employee of Coash, Inc. who made the recommendation to the plaintiff concerning the herbicide to be used to control weeds on his farm ground in 1991 and state the recommendations which were made.

3. If Coash, Inc. investigated the alleged failure of Bullet to control weeds, state the following:

   a. The date on which the defendant's employee investigated the plaintiff's complaint of product failure.

   b. The name, address and telephone number of the employee who investigated on each occasion.

   c. The observations which were made by the defendant's employee on each occasion.

   d. Whether or not any notes, photographs or videotapes were taken of the observations.

   e. The name and address of the individuals who were present while the investigation was being conducted.

4. State whether or not the defendant claims that Bullet was defective and if so, state the facts upon which said claim is based and the names and addresses of the individuals who have knowledge of those facts.

5. State the names and addresses of employees at Coash who collected, mixed and applied Bullet to plaintiff's farm ground in 1991.

6. State what conversations defendant's employees had with Monsanto employees during the crop year 1991 regarding the use of Bullet on plaintiff's farms which are the subject matter of this lawsuit.

7. State what recommendations were made to the plaintiff concerning the plaintiff's controlling weeds and caring for his crop after the Bullet was applied and state the names

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and addresses of the individuals who have knowledge of those facts.

8. State the following regarding notice of the plaintiff's claim:

   a. When the defendant, Coash, Inc., received notice that Bullet allegedly did not work properly.

   b. State the name and address of the individual who received notice from the plaintiff that Bullet allegedly did not work properly.

   c. State when and if Coash, Inc. gave notice to Monsanto Company of the plaintiff's complaint.

   d. State the name and address of the individual from Monsanto to whom Coash, Inc. gave notice of the plaintiff's claim.

   e. State what was said and done by the Monsanto employee in response to the plaintiff's complaint that Bullet did not work properly.

9. State whether you or your attorneys or agents expect to call any persons, in addition to those identified in other responses to Interrogatories, as expert witnesses at trial to testify as to expert opinions and, if so, as to each such witness state:

   a. The name, address and occupation of each such person.

   b. The subject matter on which the expert is expected to testify.

   c. The substance of the facts and opinions to which the expert is expected to testify and a summary of the grounds for each opinion.

d. The date on which each of your expert witnesses will have completed their preparation and have arrived at their final opinions so that meaningful depositions can be taken.

e. Whether such person or persons have furnished any written reports and if so, the dates of each report.

10. State the name and address of the distributor or dealer from whom Coash, Inc. purchased the Bullet which was applied to plaintiff's property in 1991.

11. State the lot number or numbers of the Bullet which was applied to plaintiff's property in 1991.

12. If the plaintiff did have lack of weed control on ground where Bullet was applied, state the reason for said lack of weed control based on the observations made by defendant's employee, consultant or others who observed the property after application and state the names and addresses of individuals who have knowledge of those facts.

13. Was the same batch of Bullet used on other farmers' fields and if so, state the following:

    a. State the name, address and telephone number of the other farmers who had the same batch of Bullet applied to their property in 1991.

    b. State whether or not any of those farmers had a problem with weed control.

    c. State whether the rates of herbicide, soils, rainfall and farming practices were similar to the plaintiff's.

14. State whether Monsanto employees made any oral or written communications to the plaintiff or to the defendant's employees which they relied upon concerning the purchase and application of Bullet and if so, state:

    a. When the communications were made.

    b. The name and address of the Monsanto employee who made the communication.

    c. The names and addresses of the individuals who heard the communications.

    d. Describe the communications which were made.

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EXHIBIT 7

Request for Production to Dealer/Applicator

1. Copies of all written notes, invoices, documents, work logs, mixing sheets, reports, patron files, photographs or other materials concerning the sale and application of Bullet applied to plaintiff's property in 1991.

2. Copy of rainfall records which would indicate the rain which fell on the plaintiff's property which is the subject matter of this action.

3. Copies of records pertaining to the application equipment used to apply Bullet to the farmers' property in 1991 which show the equipment's care, upkeep and calibration prior to the application of Bullet to the plaintiff's property.

4. Records showing the purchase of Bullet which was applied to the plaintiff's property.

5. Copies of photographs or videotapes of the plaintiff's property which is the subject matter of this action.

6. Copies of any expert witness or consultant reports prepared concerning the investigation of the plaintiff's claim.

7. Copies of any tests analyzing a sample of the Bullet which was applied to plaintiff's property.

8. If the defendant's purchase of the Bullet which was applied to the plaintiff's property cannot be identified with one purchase from a distributor, then provide copies of the defendant's inventory records showing the sale and purchase of Bullet during 1991.

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OFFENSIVE DEFENSES: TURNING THE TABLE ON THE PLAINTIFF IN EMPLOYMENT LITIGATION

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OFFENSIVE DEFENSES: TURNING THE TABLE ON THE PLAINTIFF IN EMPLOYMENT LITIGATION

By Frank Harty
Nyemaster, Goode, McLaughlin, Voigts, West, Hansell & O'Brien, P.C.

I. Introduction. Contrary to what the plaintiff's bar would have the public believe, most modern employers are extremely careful to avoid wrongfully terminating an employee. They realize that even if they are "right" they are in for protracted and costly litigation that very seldom is funded by an insurance policy of any sort. Employers generally become very solemn and sober after defense counsel explains what can be expected in a discrimination or wrongful discharge suit. Likewise, there is nothing that makes an employer happier than to learn that, at an early stage in litigation, the claim has been "tossed out" by an enlightened member of the judiciary.

It seems that most employment defense lawyers file summary judgment motions in discrimination and wrongful discharge cases. Although this is actually wasteful the number of claims because the courts are very hesitant to grant summary judgment it makes a tremendous amount of sense in some cases. This outline discusses some "offensive defenses" to be considered in employment litigation. Like "sending the linebackers" or calling a "safety blitz," these defenses can leave a plaintiff empty handed and out in the cold.

PART ONE:
Preemption of Employment Claims under the National Labor Relations Act

I. Preemption by the National Labor Relations Act.

A. Where the conduct alleged as the basis of a state tort claim might form the basis of an unfair labor practice charge under Section 8 of the National Labor Relations Act, the federal act generally preempts the state tort claim. See Local 926, Operating Engineers v. Jones, 460 U.S. 669, 103 S. Ct. 1453 (1983); San Diego Building Trades Council v. Garmon, 359 U.S. 236, 79 S. Ct. 773 (1959).

B. Similarly, where a state tort suit is based on facts closely connected with a collective bargaining agreement or grievance procedure, the suit is preempted because of the congressional policy favoring arbitration of disputes under collective bargaining agreements. Bell v. Union Carbide Corp., 582 F. Supp. 824 (E.D. Tenn. 1984); Magnuson v. Burlington Northern, Inc., 576 F.2d 1367 (9th Cir. 1978), cert. denied, 439 U.S. 930, 99 S. Ct. 318 (1978).

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II. Preemption by § 301 of the Taft-Hartley Act.

A. Claims of an employee covered by a collective bargaining agreement may be preempted by § 301 of the Labor Management Relations Act. In such a case the grievance procedure of the collective agreement is the employee's exclusive remedy. Allis-Chalmers Corp. v. Lueck, 471 U.S. 202 (1985) (§ 301 preempts state tort claim alleging breach of a duty that arose out of contractual relationship); Scott v. Machinists Automotive Trades D. Lodge 190, 827 F.2d 589 (9th Cir. 1987).

B. Consequences of preemption: (1) internal grievance procedures must be exhausted, Hines v. Anchor Motor Freight, Inc., 424 U.S. 554, 563 (1976); (2) the six month limitation period may apply, Del Costello v. Int'l Brotherhood of Teamsters, 462 U.S. 151 (1983); (3) arbitration awards will be accorded binding effect, W.R. Grace & Co. v. Local 759, 461 U.S. 757 (1983); and (4) no punitive damages are allowed. Vaca v. Sipes, 386 U.S. 171 (1967).

III. Claims affected.

A. Defamation. Defamation claims arising out of collective bargaining agreements may be preempted by the National Labor Relations Act. Tucker v. Cincinnati Bell Telephone Company, 506 N.E.2d 944 (Ohio App. 1986) (defamation claim arising out of employer's marking of employee's employment record "discharged because of inadequate performance" was preempted by the National Labor Relations Act). But see Tellez v. Pacific Gas and Electric co., 817 F.2d 536 (9th Cir. 1987) cert. denied, 484 U.S. 908 (1987) (defamation claim relating to suspension letter charging employee with purchasing drugs on the job was not preempted by the NLRA); Krasinski v. United Parcel Service, Inc., 508 N.E.2d 1105 (Ill. App. 1987) appeal allowed, 116 Ill. 2d 559 (1987) (defamation claim alleging employer's statements that employee feloniously stole chain saw was not preempted by the NLRA). See also Linn v. United Plant Guard Workers, 383 U.S. 53 (1966) (defamation claim against union during organizational campaign not preempted).

B. Wrongful Discharge. See Costello v. UPS, 617 F. Supp. 123, 124 (E.D. Pa. 1984), aff'd without op., 774 F.2d 1150 (3d Cir. 1985); Garibaldi v. Lucky Food Stores, Inc., 726 F.2d 1367 (9th Cir. 1984), cert. denied, 471 U.S. 1099 (1985).

C. Retaliatory Discharge. Lingle v. Norge Division of Magic Chef, Inc., 486 U.S. 399 (1988). Claim for retaliatory

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discharge, on grounds prohibited by workers' compensation statute, not preempted under § 301 because not dependent "on the meaning of any provision of a collective bargaining agreement"; there may be state law-based rights and remedies that "although non-negotiable, nonetheless [turn] on the interpretation of the collective bargaining agreement" and these would be preempted under § 301. In Conaway v. Webster City Products Co., 431 N.W.2d 795 (Iowa 1988), the court held retaliatory discharge claim was not preempted, relying on Lingle.

D. Infliction of Emotional Distress. Magnuson v. Burlington Northern, Inc., 576 F.2d 1367 (9th Cir.), cert. denied, 439 U.S. 930 (1978).

PART TWO: ERISA Litigation and Preemption

I. Introduction

Fringe benefits including pension and welfare plan benefits are an ever-increasing part of the average employee's compensation package. With the increase of the importance of such "fringe benefits" there has been a concomitant growth in the amount of litigation involving pension and welfare benefits. Both labor lawyers and human resource professionals should become familiar with the common types of litigation involving ERISA. This outline will discuss ERISA litigation and offer the human resource professional suggestions on avoiding liability.

The Employee Retirement Income Security Act of 1974 (ERISA) was enacted by Congress to provide reasonable assurance that benefits promised to employees under a private employee benefit plan would be available when due. Employee benefit plans were governed by a hodge podge of state law prior to 1974. ERISA was designed to protect the interest of participants in employee benefit plans by establishing standards of conduct, responsibility, an obligation for fiduciaries of employee benefit plans, and by providing for remedies and sanctions.

Prior to the enactment of ERISA, an employer could very often "hold out" a pension plan without actually making a binding promise. The employer could, and very often did, reserve the right to terminate the plan at any time. Even after the plan termination, most employee rights were not "vested." Employees who had not retired could be completely deprived of pension benefits.

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Under ERISA an employer is legally obligated to provide a regular program of contributions to fund a pension or welfare plan. The employee's claim for benefits is "insured" up to a statutory maximum guarantee level by the Pension Benefit Guarantee Corporation. ERISA encompasses all "employee benefit welfare plans" and "welfare plans." All plans are included regardless whether any purchase of insurance is involved. The benefits covered by ERISA include medical, surgical, hospital care, sickness, accident, disability, death and unemployment.

Litigation under ERISA usually involves one or more of the following types of claims: (1) claims for benefits; (2) actions for funding, contributions or withdrawal liability; (3) challenges to voluntary terminations of overfunded plans; (4) actions involving termination of underfunded plans; (5) claims that fiduciary standards were breached; and (6) tax litigation.

II. Scope of ERISA

A. Generally.

An "employee benefit plan" under ERISA can be either an "employee welfare benefit plan," an "employee pension benefit plan," or both. ERISA § 3(3), 29 U.S.C. § 1002(3); Massachusetts v. Morash, 109 S.Ct. 1668, 1672 (1989). An ERISA plan is one that encompasses (a) a plan, fund or program, (b) established or maintained by an employer or employee organization, (c) for the purpose of providing medical, surgical, retirement, pension or related benefits, (d) to participants or their beneficiaries. ERISA § 3(1), 29 U.S.C. § 1002(1). See Metropolitan Life Ins. Co. v. Massachusetts, 471 U.S. 724, 733 (1985); Kanne v. Connecticut General Life Ins. Co., 859 F.2d 96, 98 (9th Cir. 1988) (per curiam), cert. denied, 109 S.Ct. 3216 (1989); Ed Miniat, Inc. v. Globe Life Ins. Group, Inc., 805 F.2d 732, 738 (7th Cir. 1986); cert. denied, 107 S.Ct. 3188 (1987).

B. Elements of the plan.

1. A formal written "plan" is not necessary for the creation of a plan governed by ERISA if from the surrounding circumstances a reasonable person can ascertain (a) the intended benefits, (b) the beneficiaries, (c) the source of funding, and (d) the procedures for receiving benefits, a plan will be held to exist.

2. A plan may exist even if the employer does not comply with administrative duties dictated by ERISA.

3. Not all employee benefits are covered by ERISA.

III. Benefits Actions

A. General.

Actions for benefits typically raise questions of fact, of plan interpretation, federal law and policy or a combination of such factors affecting entitlement to benefits. On the procedural side, two frequently-litigated issues are the scope of review of benefit determinations and the need to exhaust administrative procedures provided by the plan itself.

B. Scope of review.

1. Traditionally, plan administrator decisions were upheld by reviewing courts applying the "arbitrary and capricious" standard of review. In 1989, however, the Supreme Court said it was rejecting this standard in favor of "de novo" review unless the plan trustee or administrator was entitled to greater deference where the plan document gave the trustee "discretion." In such instances, said the Court, decisions would be reviewed for an "abuse of discretion." See Firestone Tire and Rubber Co. v. Bruch, 109 S.Ct. 948, 10 EBC 1873 (1989).

2. There will undoubtedly continue to be a lot of litigation involving the "abuse of discretion" standard. Until the new standard is clearly defined, plan sponsors seeking to avoid de novo review should ensure the plan document delegates discretion in the plan, giving the appropriate plan fiduciaries discretion, at least, to interpret the terms of the plan and to determine eligibility for, and the amount of, benefits.

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C. Exhaustion.

1. The traditional requirement of exhaustion of administrative remedies has a statutory underpinning in ERISA. The statute requires every plan to include a claims and claims appeal procedure (ERISA § 503), but does not expressly require that such administrative procedures be exhausted before litigation. Nonetheless, with exceptions, some courts have imposed the exhaustion requirement.

2. Exceptions to the exhaustion requirement.

a. the exhaustion requirement does not apply where:

i. administrative procedures are futile;

ii. the claimant has been denied access to plan procedures; or

iii. there is a threat of irreparable harm to the claimant.

D. Claims for interference with rights under welfare benefit plans.

ERISA protects "heavy claimers" of benefits from interference with their rights under welfare benefit plans. Where courts find a defendant was motivated by attempting to prevent an adverse economic impact on their ERISA plan, they find a cognizable claim under ERISA § 510. See Folz v. Marriott Corporation, 594 F. Supp. 1007, 5 EBC 2244 (W.D. Mo. 1984).

IV. Fiduciary Actions

A. Prohibitions on fiduciary conduct.

Section 406(b)(1) prohibits a fiduciary from dealing with plan assets in its own interest or for its own account. This section prohibits the most basic form of fiduciary self-dealing and has been applied in a number of cases presenting obvious abuses. See Lowen v. Tower Asset Management, Inc., 829 F.2d 1209, 1214 (2d Cir. 1987) (fiduciaries invested plan assets in companies in which they owned substantial equity interests); Marshall v. Kelly, 465 F. Supp. 341, 353 (W.D. Okla. 1978) (trustee decided to pay himself for gratuitous services to plan); Freund v. Marshall & Ilsley Bank, 485 F. supp. 629, 637-638 (W.D. Wis. 1979) (trustees subordinated interests of plan in transaction through which many of them personally benefited).

B. Who is a fiduciary.

1. The fiduciary responsibility provisions of part 4 of Title I apply to any employee benefit plan as defined in ERISA §§ 3(1) and 3(2). Exceptions in § 401(a) for:

a. a plan which is unfunded and is maintained by an employer primarily for the purpose of

providing deferred compensation for a select group of management or highly compensated employees, or

b. any agreement described in § 736 of the Code which provides payments to a retired partner or deceased partner or a deceased partner's successor in interest.

Any person who is a fiduciary for a covered plan must conform his conduct to the fiduciary standards of ERISA. Identifying who is a fiduciary is crucial to affixing responsibility.

2. Congress elected to use a functional approach to defining who is to be treated as a fiduciary. The term "fiduciary" is defined in Section 3(21)(a) of ERISA (and § 4975(e)(3) of the Code). A person or entity is a fiduciary with respect to an employee benefit plan to the extent the person exercises discretionary authority or control respecting management of such plan or its assets; renders investment advice for a fee; or has discretionary authority or responsibility in the administration of such plan.

3. Under the functional analysis test, board members, administrators and trustees may be considered fiduciaries. See Leigh v. Engle, 727 F.2d 113, 133. 4 EBC 2702, 2721 (7th Cir. 1984) ("It is clear that they performed fiduciary functions in selecting and retaining plan administrators."); Sandoval v. Simmons, 622 F. Supp. 1174, 6 EBC 2161 (C.D. Ill. 1985) (Corporation liable if fails to properly monitor performance of appointees). See Freund v. Marshall & Ilsley Bank, 485 F. Supp. 629, 635, 1 EBC 1898, 1910 (W.D. Wis. 1979) ("By the very nature of their positions, plan trustees and a plan administrator are fiduciaries with respect to a plan."); District 65, UAW v. Harper & Row Publishers, Inc., 696 F. Supp. 29 (S.D.N.Y. 1988); Shaw v. IAM Pension Plan, 563 F. Supp. 653, 657, 4 EBC 1737, 1741 (C.D. Cal. 1983) ("Officials of a company which sponsors a plan are themselves fiduciaries to the extent that they retain authority for selection and retention of plan fiduciaries because, to that extent, they have retained discretionary authority or discretionary control respecting management of the plan.").

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4. Ministerial Functions.

Persons who have no ability to make policy decisions or interpret the plan, but rather only perform administrative duties, are not fiduciaries. 29 U.S.C. § 2509.75-8. Such "administrative functions" include:

a. application of rules determining eligibility for participation or benefits;

b. calculation of services and compensation credits for benefits;

c. preparation of employee communications material;

d. maintenance of participants' service and employment records;

e. preparation of reports;

f. calculation of benefits;

g. orientation of new participants and advising participants of their right and options under the plan;

h. collection of contributions and application of contributions as provided in the plan;

i. preparation of reports concerning participants' benefits;

j. prccessing of claims; and

k. making recommendations to others for decisions with respect to plan administration.

C. Fiduciary Duties.

1. The fiduciary obligations of trustees to the participants and beneficiaries of a plan are the highest known to the law. Donovan v. Bierwirth, 680 F.2d 263, 272 n. 8 (2d Cir. 1982), cert. denied, 459 U.S. 1069 (1982).

2. ERISA requires fiduciaries to discharge their duties with respect to a plan "with an eye single to the interests of the participants and beneficiaries." Donovan v. Bierwirth, supra, 680 F.2d at 271.

3. ERISA imposes a duty on fiduciaries "to avoid placing themselves in a position where their acts as officers or directors of the corporation will prevent their functioning with the complete loyalty to participants demanded of them as [fiduciaries] of a pension plan." Donovan v. Bierwirth, supra, 680 F.2d at 271.

4. Duty of loyalty. A fiduciary must discharge his or her duty to a plan:

   a. solely in the interest of the participants and beneficiaries;

   b. "for the exclusive purpose of:

      i. providing benefits to participants and their beneficiaries, and

      ii. defraying reasonable expenses of administering the plan."

      29 U.S.C. § 1104(a)(1)(A).

   c. "With the care, skill, prudence, and diligence under the circumstances then prevailing that a prudent man acting in a like capacity and familiar with such matters would use in the conduct of an enterprise of a like character and with like aims." 29 U.S.C. § 104(a)(1)(B).

   d. "By diversifying the investments of the plan so as to minimize the risk of large losses, unless under the circumstances it is clearly prudent not to do so." 29 U.S.C. § 1104(a)(1)(C).

   e. In accordance with the documents and instructions governing the plan insofar as they are consistent with ERISA. 29 U.S.C. § 1104(a)(1)(D).

5. Prohibited transactions.

   a. Transactions between plan and a party in interest.

      i. "Party in interest" is defined in 28 U.S.C. § 1002(14) and includes, in part, any fiduciary, counsel, or employee of a plan; a person providing services to the plan; an employer or employee organiza-

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tion with employees or members covered by the plan; owners or persons or entities with control of the employer or employee organization, or relatives of such persons or the legal entities controlled by such persons.

ii. A fiduciary with respect to a plan shall not cause the plan to engage in a transaction if he or she knows or should know such transaction constitutes a direct or indirect:

(a) sale or exchange, or leasing, of any property between the plan and a party in interest (including a transfer subject to a mortgage or similar lien under certain circumstances) See 29 U.S.C. § 1106(c);

(b) furnishing of goods, services or facilities between the plan and a party in interest;

(c) transfer to, or use by or for the benefit of, a party in interest, of any assets of the plan; or

(d) acquisition, on behalf of the plan, of any employer security or employer real property in violation of 29 U.S.C.§ 1107(a).29 U.S.C. § 1106(1)(1a).

iii. A fiduciary who has the authority and discretion to control or manage the assets of a plan cannot permit the plan to hold employer security or employer real property he or she knows or should know is in violation of the percentage limitations of 29 U.S.C. § 1107. 29 U.S.C. § 1106(a)(2).

b. Transactions between plan and fiduciary.

i. self dealing - a fiduciary cannot deal with the assets of the plan in his or her own interest or for his or her own account. 29 U.S.C. § 1106(b)(1).

ii. conflicts - a fiduciary cannot act on behalf of a party in any transaction

involving the plan whose interests are adverse to the plan or its participants or beneficiaries.29 U.S.C. § 1106(b)(2).

iii. kickbacks - a fiduciary cannot receive any consideration for his or her own personal account from any party dealing with the plan in connection with a transaction involving plan assets. 29 U.S.C. § 1106(b)(3).

c. Exemptions from prohibited transactions. See U.S.C. § 1108

6. Violations or breaches by a co-fiduciary

a. A fiduciary can be held liable for breaches of fiduciary responsibility by another fiduciary to the same plan where the fiduciary: knowingly participates in the co-fiduciary breach, undertakes to conceal the co-fiduciary's breach, enables the co-fiduciary to commit a breach, or fails to make reasonable efforts under the circumstances to remedy a breach of which he has knowledge. 29 U.S.C. § 1105(a).

b. A trustee must use reasonable care to prevent a co-trustee from committing a breach. 29 U.S.C. § 1105(b).

i. if the assets are held in more than one trust, the trustee is liable only for failing to exercise reasonable care over the trust for which he or she is serving as trustee. 29 U.S.C. § 1105(b)(3)(A).

ii. the trustee can limit its liability by agreement, authorized by the trust instrument, allocating specific responsibilities, obligations, or duties among trustees. 29 U.S.C. § 1105(b)(1)(B).

iii. a trustee cannot be liable for following instructions under 29 U.S.C. § 1103(a)(1).

iv. a trustee can nevertheless be liable under the fiduciary rules set forth in 29 U.S.C. § 1105(a).

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c. Delegated acts.

i. A fiduciary can delegate fiduciary responsibility.

ii. A fiduciary is not liable for the breach by the person to whom duties or responsibilities were delegated unless

(a) the allocation or delegation itself, the procedure utilized, or the continued allocation constitutes a breach of fiduciary duty;

(b) the fiduciary would be otherwise liable under 29 U.S.C. § 1105(a).

D. Personal liability.

Fiduciaries are personally liable for breaches. 29 U.S.C. § 1109(a).

V. Contributions, funding and MPPAA withdrawal liability.

Actions affecting funding or contributions to a plan most frequently involve multiemployer plans, where contributions are governed by collective bargaining agreements, or where "withdrawal" triggers "withdrawal liability" in lieu of ongoing contributions.

VI. Pension plan terminations.

A. Litigation frequently involves challenges to voluntary plan terminations of overfunded plans, asset reversions of surplus, and similar issues. One of the most recent examples of this sort of controversy is seen in the Supreme Court's decision in Mead Corp. v. Tilley, 109 S.Ct. 2156, 10 EBC 2569 (1989), where the Court held that the priority allocation rules of ERISA § 4044(a) do not require a plan to pay unreduced early retirement benefits before giving the surplus back to the employer. The Court remanded the case to the Fourth Circuit, however, to consider whether, nonetheless, there may be liability for unreduced early retirement benefits under other theories.

B. With underfunded plans, litigation typically involves disputes over liability for contributions and "termination liability" in bankruptcy.

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VII. Related Claims

A. Very often other claims are included in an ERISA cause of action. These usually include Taft-Hartley claims and discrimination claims.

B. There has been quite a bit of litigation recently concerning ERISA and the Age Discrimination in Employment Act ("ADEA"). Under the ADEA, it is lawful to:

> observe the terms of ... any bona fide employee benefit plan such as a retirement, pension or insurance plan, which is not a subterfuge to evade the purposes of [ADEA] ....

29 U.S.C. § 623(f)(2). In Public Employees Retirement System of Ohio v. Betts, 109 S.Ct. 2854 (1989), the Supreme Court held that reducing benefits for older employees under a bona fide employee benefit plan was not a "subterfuge" to evade the ADEA where the benefit reduction was not cost justified. According to the Supreme Court, a "subterfuge to evade the ADEA" means a "scheme, plan, stratagem or artifice of evasion" which has the specific intent to discriminate on the basis of age. Because of the ambiguity surrounding the Betts decision, employers are well-advised to account for the direct relationship between benefit costs and age or provide the same level of benefits for all employees.

VIII. State law claims.

The assertion of a state claim almost inevitably generates an ERISA preemption defense. There are, however, statutory and common-law exceptions to preemption under ERISA § 514. The most common are claims under state insurance or banking laws, actions for legal malpractice against plan attorneys and state law actions for breach of contract.

In Bricker v. Maytag Company, 450 N.W.2d 839 (Iowa 1990), the Iowa Supreme Court allowed plaintiff employees to pursue their employer under the theory of equitable estoppel after they relied upon the incorrect advice of Maytag's pension specialist which cost them retirement benefits.

IX. Preemption of Wrongful Discharge Claims and Related Torts.

A. ERISA.

1. Wrongful discharge and related actions may be preempted by ERISA. See Coontz v. Gordon Jewelry Corp., 439 N.W.2d 223 (Iowa App. 1989).

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2. ERISA, § 514(a), 9 U.S.C. § 1144(a) provides:

> Except as provided in subsection (b) of this section, the provisions of this title and title IV shall supersede any and all state laws insofar as they may now or hereafter relate to any employee benefit plan described in Section 4(a) and not exempt under Section 4(b).

3. The Supreme Court has given a broad reading to the preemption provision. See Shaw v. Delta Airlines, Inc., 463 U.S. 85, 907 (1983) (preemption not limited to state laws directed at benefit plans; law "relates to" benefit plan if it "has a connection or reference to such a plan."); Metropolitan Life Ins. Co. v. Massachusetts, 471 U.S. 724, 739 (1985) ("[t]he preemption provision was intended to displace all state laws that fall within its sphere, even including state laws that are consistent with ERISA's substantive requirements.")

4. Severance Plans. Without regard to degree of formality, severance pay practices and programs are covered by ERISA. ERISA §§ 1002(1), 186(c); 29 C.F.R. § 2510.3-2(b); Donovan v. Dillingham, 688 F.2d 1367, 1370-73 (11th Cir. 1982) (en banc) (ERISA covers informal severance plan); Scott v. Gulf Oil Corp., 754 F.2d 1499, 1503-4 (9th Cir. 1985) (plan was "established" although not in writing).

5. Consequences of ERISA Coverage.

   a. Exhaustion. An employer properly providing appeal provisions within a severance plan conforming to ERISA may assert that administrative remedies must be exhausted before pursuit of civil actions. Wolf v. National Shopmen Pension Fund, 728 F.2d 182, 185-191 (3d Cir. 1984); Amato v. Bernard, 618 F.2d 559, 566-69 (9th Cir. 1980). The plaintiff may avoid the exhaustion requirement only on a demonstration of irreparable harm, futility of resorting to administrative remedies, or denial of meaningful access to the plan's appeal procedures. See Tomczyscyn v. Teamsters, Local 15 Health and Welfare Fund, 590 F. Supp. 211, 213 (E.D. Pa. 1984).

   b. Standard of Review. An "arbitrary and capricious" standard was traditionally used in

reviewing trustee's actions. The Supreme Court recently engaged in de novo review. Firestone Tire and Rubber Co. v. Bruch, 489 U.S. 101, 109 S.Ct. 948, 103 L.Ed.2d 80 (1989).

PART THREE:
Iowa Preemption Decisions

I. In Northrup v. Farmland Industries, Inc., 372 N.W.2d 193 (Iowa 1985), the court affirmed summary judgment for the employer on wrongful discharge and tortious infliction of emotional distress claims. The plaintiff alleged he was terminated for alcoholism. The court, noting that Consolidated Freightways, Inc. v. Cedar Rapids Civil Rights Commission, 366 N.W.2d 522 (Iowa 1985) held that alcoholism was a "disability" under the Iowa Civil Rights Act, ruled that the Act's procedures were exclusive.

II. Woodruff v. Associated Grocers of Iowa, 364 N.W.2d 215 (Iowa 1985) held that an arbitration award upholding termination barred plaintiff's wrongful discharge claim.

III. In Coontz v. Gordon Jewelry Corp., 439 N.W.2d 223 (Iowa App. 1989), the court held that a former employee's wrongful discharge action was preempted to the extent it involved claims referring to the employer's benefit plan.

IV. Conaway v. Webster City Products Co., 431 N.W.2d 795 (Iowa 1989): retaliatory discharge action was not preempted by § 301 of LMRA because it doesn't involve interpretation of collective bargaining agreement.

V. Brown v. Garman, 364 N.W.2d 566 (Iowa 1985) contains a good discussion of preemption principles. In Brown, a black union member brought suit against union officials for interference with contract and intentional infliction of emotional distress. The court held the interference with contract claim was preempted by the NLRA but the emotional distress claim was not. The court further held that Section 301 of LMRA was not applicable to the common law claims alleged by Brown.

VI. Walles v. Int'l Brotherhood of Electrical Workers, 252 N.W.2d 701 (Iowa 1977) (preemption found proper).

VII. Langrehr v. United Brotherhood of Carpenters, 236 N.W.2d 339 (Iowa 1975) (preemption found proper).

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VIII. Hollander v. Peck, 261 N.W.2d 507, 510 (Iowa 1978) (request for damages found to state arguable unfair labor practice under NLRA and was therefore preempted).

IX. In Hamilton v. First Baptist Elderly Housing, 436 N.W.2d 336, 337, 339 (Iowa 1989), an apartment building janitor alleged she was discharged because of sex discrimination. she and her husband had been hired together as a team. When he was fired for misconduct, the plaintiff was let go because the team concept of their employment had broken down. The court found this was a legitimate, nondiscriminatory reason for the plaintiff's discharge, and the plaintiff lost on her claim of sex discrimination, even though she had established a prima facie case. As an alternative theory of recovery, the plaintiff alleged that her discharge violated public policy. The court found that this claim was based on the same facts the plaintiff advanced in support of her discrimination claim. Because Iowa Code Chapter 601A pre-empts independent common law actions also premised on discrimination, the plaintiff lost on this count as well.

X. In Greenfield v. Fairtron Corp., 500 N.W.2d 36, 37 (Iowa 1993), an employee brought actions against her employer for sexual harassment, emotional distress and assault and battery. In her petition, the plaintiff alleged that a managerial employee subjected her to crude and demeaning language that included graphic descriptions of fantasized sexual conduct and the circulation of false rumors regarding a meretricious relationship. the plaintiff also alleged that the manager touched her inappropriate on six occasions. The issue in the case was the extent to which Iowa Code Chapter 601A, under which the plaintiff brought her sexual harassment claim, pre-empted her other claims.

A. Citing Grahek, 473 N.W.2d at 34, and Vaughn, 459 N.W.2d at 639, the court stated the pre-emption occurs unless the claims are separate and independent, and therefore incidental causes of action. If the other non-chapter 601A claims require proof of discrimination, they are not separate and independent. The test is whether, in light of the pleadings, discrimination is made an element of the alternative claims.

B. Because discrimination through sexual harassment was the "outrageous conduct" the plaintiff alleged in her claim for emotional distress, this claim was pre-empted by Chapter 601A. If the plaintiff were to fail to prove her claim of discrimination, she would necessarily fail her claim for intentional infliction of emotional distress. Under the same test, the plaintiff's claims for assault

and battery were not pre-empted. "The assault and battery claims . . . [were] complete without any reference to discrimination.

XI. Brotherhood of Maintenance of Way Employees v. Chicago and Northwestern Transportation Co., 514 N.W.2d, 90 (Iowa 1994) (holding Iowa legislation regarding general employee's rights to be in conflict with, and pre-empted by, federal drug testing policy for railroad workers).

PART FOUR:
AFTER-ACQUIRED EVIDENCE

I. Introduction. The federal courts have recently begun applying what they have called the "after-acquired evidence doctrine." This defense can literally negate an otherwise valid wrongful discharge or discrimination claim.

II. The After-Acquired Evidence Doctrine: Legal Discussion. The rationale behind the after-acquired evidence doctrine is rather straight-forward. If a plaintiff is found to have lied on a job application or stole from an employer or committed some other wrongful act that would have led to his or her termination in the first place, courts hold they are not entitled to any remedy for alleged subsequent discrimination or wrongful discharge.

As the court noted in Kristufek v. Hussmann Food Services, Inc., "[a]ny other result would reward [plaintiff's] deceit and fraudulent concealment." 1991 U.S. Dist. Lexis 14, 287 (N., 5) N.D. Ill. 1991).

A. The after-acquired evidence doctrine is commonly applied in "resume fraud" cases. See Johnson v. Honeywell Information Systems, Inc., 995 F.2d 406 (6th Cir. 1992). Court hold that lying about something important on a job application constitutes a material misrepresentation that merits the application of the after-acquired evidence doctrine. See Bonger v. American Waterworks, 58 F.E.P. Cases 1430 (D. Colo. 1992). (Summary judgment granted on Title VII discrimination and retaliation claims; employer demonstrated by affidavit that it would have discharged plaintiff had it known that she did not possess a college degree); Grzenia, 1991 U.S. Dist. Lexis para. 15,093, 13-15 (summary judgment granted on plaintiff's ADEA claim because plaintiff falsely stated he had attended college and also fabricated prior employment history); Kristufek v. Hussmann Food Services, Inc., 1991 U.S. Dist. Lexis 14287, 4-5 (judgment notwithstanding the verdict granted on ADEA claim because plaintiff lied about earning a college degree and about graduate courses taken).

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B. The first case to involve the after-acquired evidence doctrine was the 1988 Tenth Circuit Court of Appeals decision, Summers v. State Farm Mutual Automobile Insurance Co., 864 F.2d 700 (10th Cir. 1988). Summers involved a claim by a plaintiff that he had been discharged in violation of ADEA. The company moved for summary judgment after learning that the plaintiff had falsified numerous claim forms during his employment. This evidence was discovered after the age discrimination suit had been filed. The defendant claimed the plaintiff could not maintain his discrimination suit because he would have been discharged for falsification. The district court granted the motion and on appeal the Tenth Circuit Court of Appeals held that the plaintiff's suit was barred by virtue of the after-acquired evidence doctrine.

C. The Eighth Circuit Court of Appeals very recently adopted the Summers after-acquired evidence doctrine in Welch v. Liberty Machine Works, Inc., 23 F.3d 1404 (8th Cir. 1994) (See Attachment B). In Welch, the Eighth Circuit discussed the various lines of thought with regard to after-acquired evidence and adopted the most aggressive position, holding that, in the proper case, evidence of wrongdoing can completely bar a Plaintiff from recovery. The Welch court clearly held that when dealing with résumé fraud, the appropriate question is whether the employer, at the time the fraud occurred, would have hired the Plaintiff anyway even if it knew of the misrepresentation.

II. Other Cases

A. Dotson v. United States Postal Service, 977 F.2d 976, (60 FEP 139 (6th Cir.), cert. denied, 113 S.Ct. 263 1992) - Résumé fraud - dischargee alleged that discharge violated Rehabilitation Act - plaintiff had omitted prior health and employment information on several employment application forms, each of which stated that misinformation may be grounds for dismissal - he omitted prior employers, and lied about being currently free of back pain when in fact he was at that time being treated for back pain - summary judgment granted since postmaster stated that plaintiff would not have been offered employment had the omitted facts been known at time of hiring.

B. Milligan-Jensen v. Michigan Technological Univ., 975 F.2d 302, 59 FEP 1249 (6th Cir. 1992) - Résumé fraud - district court found plaintiff was victim of sex discrimination and retaliation and then held that résumé fraud (failure to disclose drunk driving conviction) should reduce remedy - Sixth Circuit holds because of

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résumé fraud victim of sex discrimination entitled to no relief whatsoever - issue is causation, not balancing of equities.

C. Washington v. Lake County, 969 F.2d 250, 59 FEP 989 (7th Cir. 1992) - After-acquired evidence if sufficiently job-related can bar relief - résumé fraud case - plaintiff had falsely denied having been convicted of criminal offenses - district court dismissed based on Tenth Circuit decision in Summers v. State Farm Mutual Auto. Ins. Co., 864 F.2d 700, 48 FEP 1107 (1988).

D. Wallace v. Dunn Construction Co., 968 F.2d 1174, 59 FEP 997 (11th Cir. 1992) - After-acquired evidence bars prospective remedy only - résumé fraud - employee lied about drug convictions - district court denied summary judgment but certified the issue for appeal - employee claimed that employer discovered false statements on applications of others and did not fire them - Eleventh Circuit hold that lying does not prevent her from obtaining back pay, nominal damages, and declaratory relief, but would bar reinstatement and front pay - letting an employer totally prevail based on résumé fraud would give employers the option to escape liability by rummaging through an unlawfully discharged employee's background for flaws - court rejects analogy to mixed-motive cases - reinstatement, front pay and injunctive relief are inappropriate because that would go beyond making discharged employee whole., - back pay period should not terminate prematurely unless employer proves it would have discovered the evidence prior to the end of the normal back pay period - district court erred in finding factual dispute as to whether after-acquired evidence would have caused employer to discharge her had it discovered the evidence - employee did not counter employer's evidence that employee handbook authorizes termination for drug use and falsification of records - partial summary judgment granted on prospective relief only - dissent would hold that plaintiff lacked standing since she would not have been hired if she had not lied - complete listing of after-acquired evidence cases contained in BAN Analysis at 141 LRR 39-48.

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E. Reed v. AMAX Coal Co., 971 F.2d 1295, 59 FEP 788 (7th Cir. 1992) - Summary judgment granted since employer in post-discharge discovery learned that discharged black employee had falsified employment application - in 1976 the employee was convicted of armed robbery, and two years later lied on a job application stating that he had never been convicted of a felony - summary judgment erroneously granted on this ground - employer must prove not only major falsification in application giving it

right to discharge employee but that had it discovered the falsification it would have discharged the employee -such proof is necessary to prevent employers from avoiding Title VII liability by pointing to minor misrepresentations which may technically subject employee to discharge but would in fact not have resulted in discharge - employer here never proved it would have fired employee - for example, it never showed other employees fired in similar circumstances - summary judgment nevertheless affirmed since employee found sleeping on job and did not submit any evidence that this was pretext for discrimiantion.

F. Johnson v. Honeywell Information Systems, Inc., 955 F.2d 409, 57 FEP 1362 (6th Cir. 1992) - Eight-year employee discharged - during discovery employer learned that she falsified her application in material respects, including claiming she was a college graduate when she was not.

G. McKennon v. Nashville Banner Publishing Co., 797 F.Supp. 604, 59 FEP 60 (M.D. Tenn. 1992) - Prior to discharge former confidential secretary copied and removed confidential documents - this was not known at the time of her termination but was learned during discovery - after-acquired evidence applies and bars ADEA action - removing confidential material in light of employee's status as confidential employee is severe enough to warrant discharge.

H. O'Day v. McDonnell Douglas Helicopter Co., 784 F.Supp. 1466, 58 FEP 535 (D. Ariz. 1992) - After-acquired evidence bars any relief under the ADEA - after a layoff the employer learned that the employee surreptitiously copied confidential management files and showed them to a co-worker - this was unquestionably grounds for discharge despite the employee's contention that he took the files to gain information needed to prepare his discrimination charge.

PART FIVE: Removal of Employment Cases

I. Introduction. Although lawyers may have an individual preference for state court, it usually makes sense to remove employment cases when possible. Without even comparing judges, juries and procedure, there are a number of reasons defense counsel should strongly consider removing a number of employment-related cases.

II. Preemption Decisions. It nearly always makes sense to remove a case in preemption under ERISA or the National Labor Relations Act may be a defense. For instance, as discussed

2. In an action against a person accused of sexual abuse, as defined in section 709.1, sexual assault, or sexual harassment, by an alleged victim of the sexual abuse, sexual assault, or sexual harassment, for damages arising from an injury resulting from the alleged conduct, evidence concerning the past sexual behavior of the alleged victim is not admissible.

C. Section 668.15 appears to be a complete bar to evidence of prior sexual conduct, regardless of its relevancy, probative value or the purpose for which it is offered. The provision arguably excludes evidence of the plaintiff's sexual conduct in the workplace. Furthermore, it appears to exclude even evidence that the plaintiff may have had a consensual sexual relationship with the alleged harasser and most importantly, it appears to bar cross-examination of the plaintiff's expert witness concerning prior sexual conduct and the relationship it may have played to the plaintiff's psychological condition and alleged psychological damage.

D. There is only one reported decision discussing Iowa Code Section 668.15. In Weiss v. Amoco Oil Co., 142 F.2d 311 (S.D. Iowa 1992). In Weiss a witness moved for a protective order to prohibit discovery into her sexual history. The plaintiff claimed he was wrongfully discharged after the witness made allegations of sexual harassment against him. Judge Bennett held that the former employee was permitted to depose the witness as the discovery was relevant in determining which conduct or action the employee would have thought welcome and whether the witness found the employee's conduct unwelcome. The court held that Section 668.15(1) did not apply under the circumstances because the plaintiff was not claiming sexual harassment.

E. There are a number of ways to avoid operation of Section 668.15. There are strong arguments to be made that it applies only in "an action against a person accused" of sexual abuse, assault or harassment and thus would not apply to an employer in cases such as a negligent-hiring claim. In addition, one can argue that certain evidence sought does not pertain to "sexual behavior." For an excellent discussion of this code section and possible ways to avoid its operation, see the article The Bar Against Evidence of Plaintiff's Sexual Conduct: Has Iowa Gone Too Far? by Thomas Walton to be published in the October issue of the Iowa Defense Counsel Update.

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above, the provisions of ERISA "supersede any and all state laws insofar as they may now or hereafter relate to any employee benefit plan ...." See 29 U.S.C. § 1144(a). It appears that the federal courts give a broader reading to this preemption language does the Iowa Supreme Court.

III. Defense counsel need only compare the Iowa Supreme Court decision in Bricker v. Maytag Company, 450 N.W.2d 839 (Iowa 1990) with Shaw v. Delta Airlines, Inc., 463 U.S. 85 (1983). In Bricker the Iowa Supreme Court allowed plaintiff employees to pursue their employer under the theory of equitable estoppel after they relied upon the incorrect advice of Maytag's pension specialist which cost them retirement benefits. The plaintiffs in essence sued for "lost retirement benefits." The Iowa Supreme Court gave a very narrow reading to the ERISA preemption provision. This interpretation should be compared with the broad reading given by federal court. See e.g. Metropolitan Life Insurance Co. v. Massachusetts, 471 U.S. 724 (1985).

IV. Sexual Harassment Cases.

A. There are a number of reasons to remove a sexual harassment case brought under Title VII (and usually Iowa Code Chapter 216 also). The federal law is far more well-developed than state law and there are a number of excellent resources to use in researching and preparing jury instructions etc. The most persuasive reason to remove sexual harassment claims, however, is Iowa Code Section 668.15.

B. Iowa Code 668.15 provides:

> **668.15 Damages resulting from sexual abuse - evidence.**
>
> 1. In a civil action alleging conduct which constitutes sexual abuse, as defined in section 709.1, sexual assault, or sexual harassment, a party seeking discovery of information concerning the plaintiff's sexual conduct with persons other than the person who committed the alleged act of sexual abuse, as defined in section 709.1, sexual assault, or sexual harassment, must establish specific facts showing good cause for that discovery, and that the information sought is relevant to the subject matter of the action and reasonably calculated to lead to the discovery of admissible evidence.

F. By far the surest way to avoid the operation of Section 668.15 is to remove a sexual harassment claim to federal court. Although there are no cases on point, it seems logical that the federal rules of evidence and discovery, rather than the Iowa rule, would be applied in an action litigated in federal court and based on a federal claim. See Hanna v. Plumer, 380 U.S. 460 (1965).

PART SIX:
CONCLUSION

When representing an employer in wrongful discharge or discrimination claim, counsel should review a checklist of possible complete defenses at an early juncture. Preemption and dismissal should be considered as early as possible. There is nothing that makes an employer happier than to learn that the plaintiff has been "sacked."

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(limiting awards for expenses to cases where insurance company denied coverage in bad faith, fraudulently, or was "stubbornly litigious.") This is because Wissink may have brokered the policy as agent for plaintiffs rather than representing himself as Cincinnati's agent. *See Smith v. State Farm Mut. Ins. Co.*, 248 N.W.2d 903, 906 (Iowa 1976) (stating that if agent accepts an order to insure, agent must exercise that reasonable skill and ordinary diligence fairly expected from an insurance agent in obtaining a policy.)

[14] Plaintiffs are entitled to recover any fees expended in the declaratory judgment portion of this action that resulted from Wissink's negligence or breach in failing to obtain the promised coverage. *See Kimmel v. Iowa Realty Co.*, 339 N.W.2d 374, 380 (Iowa 1983) (person who, because of another's tort, has been required to protect his or her interests by bringing an action against a third person entitled to recover expenses incurred).

Plaintiffs' claim for punitive damages and emotional distress against Wissink specifically are denied for the same reasons explained in discussing the same claims against Cincinnati in divisions IV and V.

The judgment of the trial court is affirmed in part, reversed in part, and the case remanded for trial on the claims for attorney fees as discussed in divisions III and VI. Tax costs three-fourths to appellants and one-fourth to appellees.

AFFIRMED IN PART, REVERSED IN PART, AND REMANDED.

Richard BARSKE, Mark A. Beisker, Daniel J. Brown, Pernell Bump, Mike Burns, Mark Cloos, Loren Coolahan, Dennis Crouse, Carmen S. D'Amico, Duane Ellis, Bruce Esmoil, Bart Fish, Greggory Fisher, Charles Franks, Bret Freeman, Larry Frantz, Russ Fritz, David Gansen, Richard Handel, Jerry Heinzel, Jeryl Hobson, Thomas Hobson, Ronald Houselog, George Hutchens, II, Howard Ihns, Dale Jaeger, Ronald Juett, William Kehrli, Jeffrey L. Leggins, Dean Maier, Michael T. McLaud, Eugene Palmerscheim, Clifford W. Pearcy, Milo Popp, Walter Rich, Mark Roling, Kevin Ropson, Charles Ruth, Randolph Schunk, Fredrick Simmons, Donald Skala, David Speth, Terry Stock, James Strader, William Stranger, George Tegeler, Robert Thomson, Cyril Terpkosh, Carl Tisher, Scott Weber, Richard White, David H. Williams, and Charles Williams, Appellants,

v.

ROCKWELL INTERNATIONAL CORPORATION, Appellee.

No. 93-192.

Supreme Court of Iowa.

April 20, 1994.

Rehearing Denied May 25, 1994.

Former employees brought action against employer claiming breach of preemployment agreements and fraudulent or negligent misrepresentation concerning duration of employment. The District Court, Linn County, William L. Thomas, J., set aside jury damages award in favor of employees on negligent misrepresentation claim, and employees appealed. The Supreme Court, Andreasen, J., held that state law claim for preemployment misrepresentation as to duration of employment was not preempted by Labor Management Relations Act.

Reversed and remanded.

1. Courts ⇐489(9)

State courts have concurrent jurisdiction over claims under Labor Management Relations Act for violations of collective bargaining agreement (CBA). Labor Management Relations Act, 1947, § 301(a), 29 U.S.C.A. § 185(a).

ATTACHMENT A

2. **Labor Relations** ⚬257.1, 264

Federal labor law principles must be employed to resolve disputes involving alleged violations of collective bargaining agreement (CBA) or requiring interpretation of provision or term of CBA. Labor Management Relations Act, 1947, § 301(a), 29 U.S.C.A. § 185(a).

3. **Labor Relations** ⚬758.1, 773.1

States ⚬18.46

Preemption under Labor Management Relations Act does not extend to every state law claim that in some manner relates to provision of collective bargaining agreement (CBA) or to parties covered by CBA. Labor Management Relations Act, 1947, § 301(a), 29 U.S.C.A. § 185(a).

4. **Labor Relations** ⚬758.1, 773.1

States ⚬18.46

Question of preemption under Labor Management Relations Act must necessarily be determined on case-by-case basis. Labor Management Relations Act, 1947, § 301(a), 29 U.S.C.A. § 185(a).

5. **Labor Relations** ⚬773.1

Employees covered by labor contracts may assert legal rights independent of labor contract as long as they do not rely on collective bargaining agreement (CBA). Labor Management Relations Act, 1947, § 301(a), 29 U.S.C.A. § 185(a).

6. **Fraud** ⚬31

States ⚬18.15

In determining whether former employees' negligent misrepresentation claims were preempted under Labor Management Relations Act, court must focus on whether tort of negligent misrepresentation conferred right independent of any right established by collective bargaining agreement (CBA) or instead whether evaluation of tort claim was inextricably intertwined with consideration of terms of labor contract, and must also ask whether tort action would frustrate federal labor law scheme established by Act. Labor Management Relations Act, 1947, § 301(a), 29 U.S.C.A. § 185(a).

7. **Fraud** ⚬13(3)

Tort of negligent misrepresentation does not depend on existence of contractual relationship.

8. **Fraud** ⚬31

States ⚬18.15

Elements of former employees' negligent misrepresentation claims based on preemployment representations as to duration of employment were not substantially dependent upon analysis of collective bargaining agreement (CBA), and, thus, claims were not preempted by Labor Management Relations Act. Labor Management Relations Act, 1947, § 301(a), 29 U.S.C.A. § 185(a).

9. **Labor Relations** ⚬758.1, 773.1

States ⚬18.46

For purposes of general rule that tort claim is preempted under Labor Management Relations Act if proof of elements of tort requires interpretation of collective bargaining agreement (CBA), "interpret" must be viewed narrowly. Labor Management Relations Act, 1947, § 301(a), 29 U.S.C.A. § 185(a).

10. **Labor Relations** ⚬773.1

States ⚬18.46

Preemption of tort claim under Labor Management Relations Act is unnecessary unless consideration of employer's defense under collective bargaining agreement (CBA) substantially depends on construction of CBA. Labor Management Relations Act, 1947, § 301(a), 29 U.S.C.A. § 185(a).

11. **Labor Relations** ⚬773.1

Although employer might have had right to lay off employees under terms of collective bargaining agreement (CBA), it had no absolute right to escape tort liability for preemployment misrepresentation. Labor Management Relations Act, 1947, § 301(a), 29 U.S.C.A. § 185(a).

12. **States** ⚬18.3

State law will not be preempted absent clear statement of congressional intent to occupy entire field, or unless it conflicts with federal law or would frustrate federal scheme.

13. Fraud ⚡64(1)

Jury question existed as to whether employer was liable under negligent misrepresentation theory for alleged preemployment representations regarding duration of employment despite disclaimer in employment application acknowledging that application was for employment of indefinite duration.

14. Interest ⚡47(1)

Generally, award of interest accruing from date of commencement of action is mandatory. I.C.A. § 535.3.

15. Interest ⚡39(2.40)

Prejudgment interest accruing from date of commencement of action was warranted for former employees' claim of negligent misrepresentation based on preemployment representations as to duration of employment, where trial court did not submit any claim for future damages, and employees were injured at time that they were laid off, even thought their damages were not yet fixed in specific sums. I.C.A. § 535.3.

16. Interest ⚡39(2.15)

Normally unliquidated damages become liquidated on date of judgment.

Robert F. Wilson, Robert W. Matias, Crystal L. Usher, and Edward J. Leff of Wilson, Matias, Usher & Leff, Cedar Rapids, for appellants.

D.G. Ribble, Wilford H. Stone, and Thomas D. Wolle of Lynch, Dallas, Smith & Harman P.C., Cedar Rapids, for appellee.

Considered by McGIVERIN, C.J., and LARSON, LAVORATO, NEUMAN, and ANDREASEN, JJ.

ANDREASEN, Justice.

The question before us is whether a state law claim for pre-employment misrepresentation is pre-empted by federal labor law. Former employees brought this action in state court against the employer claiming breach of pre-employment agreements and misrepresentations concerning the duration of their employment. A jury returned a verdict in favor of the plaintiffs on the claims of negligent misrepresentation. Following defendant's posttrial motion, the district court set aside the damage awards ruling that the plaintiffs' claims were pre-empted by federal law. We reverse.

I. *Background.*

Plaintiffs are fifty-four former employees of Rockwell International Corporation (Rockwell). Rockwell operates a plant in Cedar Rapids where it manufactures printing presses. In 1987 and 1988 Rockwell sought to expand its work force and utilized Job Service of Iowa to accept applications for machinist positions. The Job Service contact cards indicated that Rockwell was a very stable employer and had "enough orders on hand right now for the next five years." Each of the plaintiffs completed an employment application, passed a test, and interviewed with management personnel. All but four of the plaintiffs signed application forms which contained a disclaimer stating that their employment was of indefinite duration.

During the job interviews and at an orientation session plaintiffs claimed they were told their employment would be for a period of at least three to five years. They were assured that the company had sufficient orders on hand and the orders were secured by substantial down payments. After the orientation session each of the plaintiffs accepted employment with Rockwell. Though many of the plaintiffs were already living in Iowa, several moved to Cedar Rapids from Arizona, Massachusetts, and Texas. Plaintiffs worked at the plant during part of 1988 and 1989. All of the plaintiffs were laid-off on September 29, 1989.

The positions filled by the plaintiffs were within a bargaining unit which was covered by a collective bargaining agreement (cba) between Rockwell and the International Association of Machinists & Aerospace Workers, AFL-CIO, Harmony Lodge No. 831 (union). The cba governs employee wages, hours, and conditions of employment. It also mandates a grievance process for disputes involving the interpretation or application of the cba and for alleged violations of the cba.

On October 17, 1989, plaintiffs filed their original petition in Iowa district court alleg-

ing that Rockwell breached pre-employment agreements and fraudulently or negligently misrepresented the period of employment. Rockwell filed a notice of removal to federal district court on the ground that the plaintiffs' breach of contract claims required analysis and interpretation of the cba Plaintiffs filed a motion to remand. In June 1990 the federal court remanded the case to state court ruling that plaintiffs' contract claims were not completely pre-empted by section 301 of the Labor Management Relations Act (LMRA).

Plaintiffs filed an amended and substituted petition in June 1991. In August 1992 Rockwell filed a motion for summary judgment contending that (1) plaintiffs' claims were pre-empted by the cba; (2) plaintiffs failed to pursue their claims through the grievance process; and (3) the disclaimer on the application form barred suit by all but four of the plaintiffs The district court denied Rockwell's motion and the case proceeded to trial in September 1992. The jury found that the plaintiffs had not established their contract or fraudulent misrepresentation claims, but returned a verdict in their favor on the negligent misrepresentation claims and awarded each plaintiff compensatory damages.

After the court entered judgment on the verdict, Rockwell filed a renewed motion for summary judgment, motion for a judgment notwithstanding the verdict, and an alternative motion for order on prejudgment interest. The court granted Rockwell's motion and set aside the judgment concluding that plaintiffs' claims were pre-empted by the LMRA because any representations made by Rockwell would be inconsistent with provisions of the cba

On appeal plaintiffs argue that (1) their state law misrepresentation claims are independent of the cba; (2) the disclaimer does not bar their tort claims; and (3) prejudgment interest is allowed on the damage awards. Rockwell argues on cross-appeal that the court should have dismissed all but four of the misrepresentation claims based on the job application disclaimer.

This is an action at law therefore our review is for correction of errors at law Iowa R.App P. 4. We are not bound "by the trial court's application of legal principles or its conclusions of law." *Iowa Fuel & Minerals, Inc. v. Iowa State Bd of Regents,* 471 N.W.2d 859, 862 (Iowa 1991).

II. *Section 301 Pre-emption.*

A. General Principles

[1] Section 301(a) of the Labor Management Relations Act of 1947, 61 Stat. 156, 29 U.S.C. § 185(a) (1988) provides:

> Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce ... may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties.

The United States Supreme Court has ruled that section 301 does more than confer jurisdiction on federal courts; "it authorizes federal courts to fashion a body of federal law for the enforcement of these collective bargaining agreements ..." *Textile Workers Union of Am. v. Lincoln Mills of Alabama,* 353 U.S. 448, 451, 77 S.Ct. 912, 915, 1 L.Ed.2d 972, 977 (1957); *see also Conaway v. Webster City Prods Co.,* 431 N.W.2d 795, 797 (Iowa 1988). State courts have concurrent jurisdiction over section 301 claims. *Charles Dowd Box Co., Inc. v. Courtney,* 368 U.S. 502, 505–06, 82 S.Ct. 519, 521–22, 7 L.Ed.2d 483, 487–88 (1962).

[2] In analyzing the pre-emptive effect of section 301, the Supreme Court concluded that "Congress intended doctrines of federal labor law uniformly to prevail over inconsistent local rules." *Teamsters v. Lucas Flour Co.,* 369 U.S. 95, 104, 82 S.Ct. 571, 577, 7 L.Ed.2d 593, 600 (1962) Pre-emption is necessary to "ensure uniform interpretation of collective-bargaining agreements, and thus to promote the peaceable, consistent resolution of labor-management disputes." *Lingle v. Norge Div. of Magic Chef, Inc.,* 486 U.S. 399, 404 & n. 3, 108 S.Ct. 1877, 1880 & n. 3, 100 L.Ed.2d 410, 417 & n. 3 (1988). Thus federal labor law principles must be employed to resolve disputes involving alleged violations of the cba or requiring interpretation of a

provision or term of the cba. *See Conaway*, 431 N.W.2d at 797.

To effectuate congressional intent the Court has determined that the pre-emptive effect of section 301 must extend beyond contract suits. *Allis-Chalmers Corp. v. Lueck*, 471 U.S. 202, 210–11, 105 S.Ct. 1904, 1911, 85 L.Ed.2d 206, 215 (1985). The Court explained that

> [t]he interests in interpretive uniformity and predictability that require that labor-contract disputes be resolved by reference to federal law also require that the meaning given a contract phrase or term be subject to uniform federal interpretation. Thus questions relating to what the parties to a labor agreement agreed, and what legal consequences were intended to flow from breaches of that agreement, must be resolved by reference to uniform federal law, whether such questions arise in the context of a suit for breach of contract or in a suit alleging liability in tort. Any other result would elevate form over substance and allow parties to evade the requirements of § 301 by relabeling their contract claims as claims for tortious breach of contract.

Id. at 211, 105 S.Ct. at 1911, 85 L.Ed.2d at 215.

[3, 4] Yet at the same time the Court made it clear that section 301 pre-emption does not extend to every state law claim that in some manner relates to a provision of a cba or to parties covered by a cba. *Id.* at 211–12, 105 S.Ct. at 1911–12, 85 L.Ed.2d at 215–16. Section 301 pre-emption arises "when resolution of a state-law claim is substantially dependent upon analysis of the terms of an agreement made between parties in a labor contract. . . ." *Id.* at 220, 105 S.Ct. at 1916, 85 L.Ed.2d at 221. The question of pre-emption must necessarily be determined on a case-by-case basis. With these principles in mind, we turn to the question of whether the plaintiffs' claims of pre-employment negligent misrepresentation are pre-empted by section 301 of the LMRA.

The district court concluded that employees covered by a cba could not claim rights which conflict with rights provided under the cba. Because the cba set forth procedures governing probation periods and layoffs, any alleged representations of employment for a definite term necessarily conflicted with the provisions of the cba. The court found it irrelevant that the alleged representations were made before the plaintiffs were hired. We believe the court misapplied the standards for pre-emption.

The district court relied on *J.I. Case Co. v. NLRB*, 321 U.S. 332, 64 S.Ct. 576, 88 L.Ed. 762 (1944), to support its conclusion that individual employment contracts cannot be inconsistent with the terms of a cba. In *J.I. Case* the Court held that individual contracts could not be used to defeat or delay procedures prescribed by the NLRB, to limit or condition terms of a cba, or to waive any benefits provided under a labor contract. *Id.* at 337–38, 64 S.Ct. at 580, 88 L.Ed. at 767–68. The Court, however, left open the question of whether an individual contract could offer terms more advantageous than those under a labor contract. *Id.* at 339, 64 S.Ct. at 581, 88 L.Ed. at 768.

[5] More recently, in *Caterpillar Inc. v. Williams*, 482 U.S. 386, 396, 107 S.Ct. 2425, 2431, 96 L.Ed.2d 318, 329 (1987), the Court explained that "*J.I. Case* does not stand for the proposition that all individual employment contracts are subsumed into, or eliminated by, the collective-bargaining agreement." Employees covered by labor contracts may assert legal rights independent of the labor contract as long as they do not rely on the cba. *Id.* at 396, 107 S.Ct. at 2431, 96 L.Ed.2d at 329–30. However, in this case we need not decide if plaintiffs' breach of contract claims are pre-empted by section 301 because the jury rejected these claims.

B. Tort Actions.

[6] Although the Supreme Court has not addressed this specific issue, it has set forth certain principles to guide our analysis on the question of pre-emption of state tort actions. The Court has held that Congress did not intend to "pre-empt state rules that proscribe conduct, or establish rights and obligations, independent of a labor contract." *Lueck*, 471 U.S. at 212, 105 S.Ct. at 1912, 85 L.Ed.2d at 216. We must focus on whether

the tort of negligent misrepresentation confers a right independent of any right established by the cba, 'or, instead, whether evaluation of the tort claim is inextricably intertwined with consideration of the terms of the labor contract.'" *Id.* at 213, 105 S.Ct. at 1912, 85 L.Ed.2d at 216. We must also ask whether the tort action would frustrate the federal labor law scheme established by section 301. *Id.* at 209, 105 S.Ct. at 1910, 85 L.Ed.2d at 214; *Conaway,* 431 N.W.2d at 798.

In *Lueck,* the Court held that an action for bad faith handling of an insurance claim under a disability plan (included in the labor contract) was pre-empted by section 301 of the LMRA. 471 U.S. at 220–21, 105 S.Ct. at 1915–16, 85 L.Ed.2d at 220–21. The Court found that the duty of good faith and fair dealing was a right derived from the insurance contract itself, therefore the rights and obligations under the contract would involve interpretation of the cba. *Id.* at 217–19, 105 S.Ct. at 1914–15, 85 L.Ed.2d at 219–20. To allow a breach of contract claim to be characterized as a tort claim 'would cause arbitration to lose most of its effectiveness, ... as well as eviscerate a central tenet of federal labor-contract law under § 301 that it is the arbitrator, not the court, who has the responsibility to interpret the labor contract in the first instance.'" *Id.* at 220, 105 S.Ct. at 1915, 85 L.Ed.2d at 221.

Similarly in *International Brotherhood of Electric Workers v. Hechler,* 481 U.S. 851, 861–62, 107 S.Ct. 2161, 2168, 95 L.Ed.2d 791, 802–03 (1987), the Court found an employee's suit for failure to provide a safe workplace pre-empted by section 301. Because the union had assumed the duty of employee safety, determination of the nature and scope of that duty required construction of the cba. *Id.* at 862, 107 S.Ct. at 2168, 95 L.Ed.2d at 802–03. The Court emphasized that uniformity in the interpretation of labor contracts was paramount. *Id.,* 107 S.Ct. at 2168, 95 L.Ed.2d at 803.

The Court's most recent look at section 301 pre-emption involved an employee's action for retaliatory discharge. *Lingle,* 486 U.S. at 412–13, 108 S.Ct. at 1885, 100 L.Ed.2d at 422–23; *see also Conaway,* 431 N.W.2d at 800. The Court began its analysis by examining the elements of the tort of retaliatory discharge under state law and noted that "[e]ach of these purely factual questions pertains to the conduct of the employee and the conduct and motivation of the employer." *Lingle,* 486 U.S. at 407, 108 S.Ct. at 1882, 100 L.Ed.2d at 419. Further the defense of the claim also involved a purely factual inquiry. The Court concluded the tort action was not pre-empted because resolution of the claim did not require construction of the cba and it would not frustrate the goal of uniformity. *Id.* at 407, 108 S.Ct. at 1882, 100 L.Ed.2d at 419–20.

In *Lingle* the Court rejected the employer's argument that because a state court would perform the same analysis of the facts as if the plaintiff had brought an action for discharge without "just cause" under the cba it rendered the claim substantially dependent upon analysis of the cba. *Id.* at 408–10, 108 S.Ct. at 1882–83, 100 L.Ed.2d at 420–21. So "long as the state-law claim can be resolved without interpreting the agreement itself, the claim is 'independent' of the agreement for § 301 pre-emption purposes." *Id.* at 410, 108 S.Ct. at 1883, 100 L.Ed.2d at 421; *see also Conaway,* 431 N.W.2d at 799–800. The Court also rejected the argument that resolution of the plaintiffs' damage claims depended on the cba. *Lingle,* 486 U.S. at 413 n. 12, 108 S.Ct. at 1885 n. 12, 100 L.Ed.2d at 423 n. 12.

C. Misrepresentation Actions

Here, the parties point to decisions from a number of federal courts of appeals which have addressed the issue of section 301 pre-emption of fraud and misrepresentation claims. While all of the courts have agreed that such claims are only pre-empted to the extent they "substantially depend" on the interpretation of a cba, they have reached different results on the specific question of whether in fact there would be substantial dependence in the case before them.

Plaintiffs rely on decisions from the Third, Eighth, and Eleventh Circuits to support their arguments. In a case decided shortly after *Lueck,* the Eighth Circuit held that employees' claims of fraudulent misrepresentation were not pre-empted by section 301

Anderson v. Ford Motor Co., 803 F.2d 953, 959 (8th Cir.1986), *cert. denied*, 483 U.S. 1011, 107 S.Ct. 3242, 97 L.Ed.2d 747 (1987). The court explained in *Anderson* that the torts of fraudulent and negligent misrepresentation "arise in state common law and are measured by standards of conduct and responsibility completely separate from and independent of a collective bargaining agreement." *Id.* at 959. Resolution of the tort claims would not interfere with the rights and duties established by the cba because the tort obligations did not arise from the labor contract. *Id.* Essential to its decision was the fact that the alleged representations of permanent employment were made by the employer before hiring the plaintiffs. *Id.* The court also ruled that the parties were not required to submit to arbitration for matters not covered by the cba. *Id.* at 959.

In a later case involving a variety of tort claims the same court clarified the pre-emption analysis:

> The factual background of the entire case must be examined against an analysis of the state tort claim and a determination made whether the provisions of the collective bargaining agreement come into play.... Should affirmative defenses attempt to implicate the collective bargaining agreement, the district court should carefully analyze whether in actuality construction or interpretation of the collective bargaining agreement is required in considering such defenses.

Hanks v. General Motors Corp., 859 F.2d 67, 70 (8th Cir.1988).

Likewise the court of appeals in *Varnum v. Nu-Car Carriers, Inc.*, 804 F.2d 638, 640 (11th Cir.1986), held that an employee's claim of fraudulent misrepresentation of employment conditions was not pre-empted by section 301. The court noted the complaint focused on conduct occurring prior to when the plaintiff accepted employment and did not go to a term of employment covered by the cba. *Id.* The Third Circuit has also concluded that an employee's claims of fraudulent and negligent misrepresentation of job security are not pre-empted. *Berda v. CBS, Inc.*, 881 F.2d 20, 28 (3d Cir.1989). The court in *Berda* found that reference to the cba was not required to establish the elements of the employee's tort claims. Nor did he need to prove that the "oral promise made to him prior to his employment differed from the terms of the collective bargaining agreement in order to get relief." *Id.* at 27. *See also Milne Employees Ass'n v. Sun Carriers, Inc.*, 960 F.2d 1401, 1408–10 (9th Cir.1991); *White v. National Steel Corp.*, 938 F.2d 474, 480–82 (4th Cir.1991); *Wells v. General Motors Corp.*, 881 F.2d 166, 172–75 (5th Cir. 1989).

By contrast, Rockwell points to other decisions where courts have concluded that tort claims for fraud or misrepresentation do not escape the pre-emptive force of section 301. In *Bale v. General Telephone Co. of California*, 795 F.2d 775, 777–78 (9th Cir.1986), laid-off employees sought damages for breach of an oral contract and for misrepresentations concerning their employment status, both made at the time of hiring. The court determined that the state tort claims "'arose out of the same acts and conduct which formed the basis of' their section 301 claim." *Id.* at 780 (citation omitted). "In order to prove their fraudulent and negligent misrepresentation claims, [the employees] would be required to show that the terms of the collective bargaining agreement differed significantly from the individual employment contracts they believe they had made." *Id.* Under the *Lueck* standard, the court found that their claims were pre-empted. *Id.*; *see also Young v. Anthony's Fish Grottos, Inc.*, 830 F.2d 993, 997–98 (9th Cir.1987); *Stallcop v. Kaiser Found. Hosps.*, 820 F.2d 1044, 1048–49 (9th Cir.1987).

In *Smith v. Colgate-Palmolive Co.*, 943 F.2d 764, 765–66 (7th Cir.1991), laid-off employees brought a fraud action against the employer for allegedly inducing them to relocate with promises of extended employment. At the time of the employer's alleged promises the employees were employed in collective bargaining positions. *Id.* at 771. The union had modified the cba by ratifying a specific closure agreement which addressed plant closings. *Id.* at 765–66. Examining the elements of fraud under state law, the court determined that proof of the element of "reasonable reliance" would require interpre-

tation of the closure agreement. *Id.* at 766–67. *See also Talbot v. Robert Matthews Distrib. Co.,* 961 F.2d 654, 661–62 (7th Cir.1992); *Dougherty v. American Tel. & Tel. Co.,* 902 F.2d 201, 203–04 (2d Cir.1990); *Darden v. United States Steel Corp.,* 830 F.2d 1116, 1118–20 (11th Cir.1987).

Upon careful consideration of these decisions we are persuaded that the *Anderson* analysis is more consistent with the standards set forth in *Lueck* and *Lingle.* Plaintiffs in this case claim they were told during their employment interviews and at the orientation session that they could expect employment for a period of three to five years. Based on these assurances each accepted employment with Rockwell.

[7] The elements for the tort of negligent misrepresentation are:

> (1) One who, in the course of his business, profession or employment, or in any other transaction in which he has a pecuniary interest, supplies false information for the guidance of others in their business transactions, is subject to liability for pecuniary loss caused to them by their justifiable reliance upon the information, if he fails to exercise reasonable care or competence in obtaining or communicating the information.
>
> (2) ... [T]he liability stated in Subsection (1) is limited to loss suffered
>
> (a) by the person or one of a limited group of persons for whose benefit and guidance he intends to supply the information or knows that the recipient intends to supply it; and
>
> (b) through reliance upon it in a transaction that he intends the information to influence or knows that the recipient so intends or in a substantially similar transaction.

Larsen v. United Fed. Sav. & Loan Ass'n of Des Moines, 300 N.W.2d 281, 287 (Iowa 1981); Restatement (Second) of Torts § 552 (1977); *see also* 1 Iowa Civil Jury Instructions 800.1 (1991). This tort does not depend on the existence of a contractual relationship. *See generally Larsen,* 300 N.W.2d 281; *Ryan v. Kanne,* 170 N.W.2d 395 (Iowa 1969).

[8–10] We believe proof of these elements does not require interpretation of the cba. Instead, it turns on "purely factual questions pertain[ing] to ... the conduct and motivation of the employer." *Lingle,* 486 U.S. at 407, 108 S.Ct. at 1882, 100 L.Ed.2d at 419; *see also Anderson,* 803 F.2d at 957–59; *Conaway,* 431 N.W.2d at 799. The reliance factor is satisfied in part by showing that the employees accepted employment with Rockwell. In addition, plaintiffs must prove their reliance was justified under the circumstances. The jury was instructed to consider the plaintiffs' information and intelligence with regard to this issue. The jury found plaintiffs met their burden. In sum, we find that none of the elements of negligent misrepresentation is substantially dependent upon analysis of the cba.

Nevertheless, Rockwell argues that the cba does come into play because the plaintiffs must rely on the differences between what they were promised and what they were actually entitled to under the cba. *See Bale,* 795 F.2d at 780. We find the reasoning of the court in *Bale* unpersuasive. In this context the term "interpret" must be viewed narrowly. If a court were to dismiss a tort action merely because an employer raised the cba as an affirmative defense, the pre-emption doctrine "would swallow the rule that employees covered by collective bargaining agreements are entitled 'to assert legal rights *independent* of that agreement ....'" *Milne,* 960 F.2d at 1410 (citation omitted). Pre-emption is unnecessary unless consideration of a defense also substantially depends on construction of the cba. *See Hanks,* 859 F.2d at 70.

Additionally, Rockwell ignores a crucial factual distinction between this case and the decisions holding in favor of pre-emption. In each of those decisions, with the exception of *Bale,* the alleged misrepresentations were made while the plaintiffs were covered by the cba. *See Talbot,* 961 F.2d at 662; *Smith,* 943 F.2d at 771; *Dougherty,* 902 F.2d at 202–03; *Darden,* 830 F.2d at 1119. Moreover, in both *Smith* and *Darden* the subject matter of the claims was expressly set forth in the cba.

[11] In contrast, each of the decisions relied on by the plaintiffs involved situations

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where the representations were either made prior to employment or while the employees worked outside the bargaining unit. *See White*, 938 F.2d at 479; *Wells*, 881 F.2d at 172–73; *Berda*, 881 F.2d at 21; *Varnum*, 804 F.2d at 640; *Anderson*, 803 F.2d at 958. Though Rockwell may have had the right to lay-off the plaintiffs under the terms of the cba, we believe it had no absolute right to escape tort liability for pre-employment misrepresentation. *See Belknap, Inc. v. Hale*, 463 U.S. 491, 500–01, 103 S.Ct. 3172, 3177–78, 77 L.Ed.2d 798, 808 (1983) ("[I]t surely does not follow that the employer's otherwise valid promises of permanent employment are nullified by federal law and its otherwise actionable misrepresentations may not be pursued.").

[12] Further, we continue to adhere to the view that state law will not be pre-empted absent a clear statement of congressional intent to occupy an entire field or "unless it conflicts with federal law or would frustrate the federal scheme." *Conaway*, 431 N.W.2d at 797 (retaliatory discharge claim not pre-empted); *see also Brown v. Garman*, 364 N.W.2d 566, 573 (Iowa 1985) (claim for intentional infliction of emotional distress falls within the local interest exception to the pre-emption doctrine); *Lewis v. Aalfs Mfg., Inc.*, 489 N.W.2d 47, 49 (Iowa App.1992) (disability discrimination claim not pre-empted by LMRA). We therefore hold that the plaintiffs' misrepresentation claims are not pre-empted by section 301 of the LMRA. Consequently, the district court erred in setting aside the jury verdict.

III. *Disclaimer*

[13] On cross-appeal Rockwell asserts the court erred in not ruling as a matter of law that all but four of the plaintiffs' claims were barred by the disclaimer in the employment application. The application form set forth the following statements contained in a paragraph directly above the signature line:

> (3) I also acknowledge that this Application is for employment of indefinite duration that can be terminated with or without cause and notice at any time, either by Rockwell or me, except as otherwise provided by the terms of a collective bargaining agreement applicable to me. (4) I understand that no supervisor, manager, or other official or agent of Rockwell has authority to make any agreement (oral, written or implied) or other representations contrary to paragraph 3 above. However, an officer of the Corporation can do so in a written agreement signed by the officer and me.

Plaintiffs seek to avoid the apparent effect of this contractual disclaimer on the ground that it does not bar their tort claims. Rockwell counters by arguing that the disclaimer is specifically directed at representations of permanent employment and that the disclaimer somehow negates the falsity of the information later supplied to the plaintiffs.

Here the jury was instructed on Rockwell's disclaimer defense. This allowed them to consider the effect of the disclaimer with respect to the reliance element. We conclude the misrepresentation claims were properly submitted to the jury.

IV. *Interest*

On October 12, 1992, the court directed the clerk to enter judgment against Rockwell with interest at the statutory rate from the date of filing. Following entry of this order Rockwell filed a motion for an order directing that no prejudgment interest be allowed because interest may not be assessed on damages before they occur and the plaintiffs failed to show when their damages actually occurred. Because of the court's decision on the pre-emption issue, it was not necessary to address this claim. Although the interest issue was not addressed in Rockwell's brief or argument on appeal, we will address it here.

[14, 15] Iowa Code section 535.3 (1989) provides that interest shall be allowed on all judgments and decrees and it "shall accrue from the date of the commencement of the action." In general, an award of interest under section 535.3 is mandatory. *In re Marriage of Baculis*, 430 N.W.2d 399, 401 (Iowa 1988). We have identified certain exceptions to the application of the interest provision. *Id.* at 402–03. In *Rowen v. LeMars Mutual Insurance Co. of Iowa*, 347

N.W.2d 630, 641 (Iowa 1984), we held that there is no right to prejudgment interest on transactions or injuries which occur after the litigation has commenced. This is not such a case. The court instructed the jury upon the measure of damages based on net lost wages and consequential damages. Therefore, the court did not submit any claim for future damages to the jury.

[16] Here plaintiffs were injured at the time they were laid-off, even though their damages were not yet fixed in specific sums. *See Mercy Hospital v. Hansen, Lind & Meyer, P.C.*, 456 N.W.2d 666, 674 (Iowa 1990). Normally unliquidated damages become liquidated on the date of the judgment. *Woods v. Schmitt*, 439 N.W.2d 855, 870 (Iowa 1989). However, the plain language of the statute allows interest to accrue from the date of the commencement of the action. *Mercy Hospital*, 456 N.W.2d at 673–74. We reverse the district court order granting Rockwell's motion for a judgment notwithstanding the verdict and remand to the district court for entry of judgment against Rockwell.

REVERSED AND REMANDED.

and pay over at a future time or upon the happening of a specified event. The form contains no language indicating that McCarthy intended to impose a condition that Mary Quinn survive until all payments were made. The trustee's ability to choose to delay payments originated from a provision in the Amendment to the Profit Sharing Trust Agreement, not from the beneficiary designation form, and thus was not an expression of McCarthy's intent.

The judgment is affirmed.

Richard L. WELCH, Appellant,

v.

LIBERTY MACHINE WORKS, INC., a Missouri Corporation, Appellee.

No. 93-2670.

United States Court of Appeals, Eighth Circuit.

Submitted Jan. 13, 1994.

Decided May 6, 1994.

Terminated worker brought action against former employer alleging wrongful discharge in violation of ERISA and handicap discrimination in violation of Missouri Human Rights Act. The United States District Court for the Eastern District of Missouri, Donald J. Stohr, J., granted summary judgment in favor of employer, and worker appealed. The Court of Appeals, Beam, Circuit Judge, held that: (1) after-acquired evidence of employee misrepresentation on job application bars recovery for unlawful discharge if employer establishes that it would not have hired the employee had it known of misrepresentation, and (2) employer's president's affidavit was self-serving document and did not establish material fact that employer would not have hired worker but for misrepresentation.

Reversed and remanded.

Morris Sheppard Arnold, Circuit Judge, dissented and filed opinion.

1. Federal Courts ⇐776

Court of Appeals reviews district court's grant of summary judgment de novo. Fed. Rules Civ.Proc.Rule 56(c), 28 U.S.C.A.

2. Master and Servant ⇐30(1.20)

After-acquired evidence of employee misrepresentation on employment application bars recovery for unlawful discharge if employer establishes that it would not have hired employee had it known of misrepresentation.

3. Master and Servant ⇐40(1)

Employer alleging that employee's misrepresentation on employment application bars recovery for unlawful discharge because employer would not have hired employee had he known of misrepresentation bears substantial burden of establishing that policy of not hiring employees with alleged misrepresentation predated hiring and firing of employee in question and that policy constitutes more than mere contract or employment application boilerplate.

4. Master and Servant ⇐40(3.1)

For purposes of determining whether worker's misrepresentation on employment application barred recovery for unlawful discharge, corporation's president's statement that it would not have hired worker had it known of misrepresentation on employment application was insufficient to establish that corporation had settled policy of never hiring individuals similarly situated to terminated worker.

David M. Heimos, St. Louis, MO, argued, for appellant.

Henry F. Luepke, St. Louis, MO, argued (Michael A. Fisher and Henry F. Luepke, on the brief), for appellee.

ATTACHMENT B

Before BEAM, Circuit Judge, MORRIS SHEPPARD ARNOLD, Circuit Judge, and STROM,* Chief District Judge

BEAM, Circuit Judge

This case is one of first impression for this circuit and requires us to determine whether after-acquired evidence of an employee's misrepresentation on a job application bars recovery for discriminatory discharge. We find that it does, but that the district court improperly granted defendant's motion for summary judgment. We therefore reverse and remand to the district court.

On November 1, 1990, Liberty Machine Works, Inc. (Liberty) hired Richard L. Welch for a 90-day probationary period as a machinist. Immediately prior to being hired by Liberty, Welch worked as a machinist for a month at K & M Machine Works, Inc. (K & M). K & M fired Welch because of unsatisfactory performance. As part of its hiring process, Liberty requires applicants to complete an employment application, including an "accurate, complete full-time and part-time employment record." The application states that "any misstatement or omission of fact on this application shall be considered cause for dismissal." Unbeknownst to Liberty, Welch intentionally falsified his resume and his employment application: Welch did not inform Liberty of either his employment at K & M or that K & M fired him after only one month for unsatisfactory performance.

In early January 1991, Welch informed Liberty that he had developed a fistula requiring surgery. The surgery would have been covered under Liberty's employee benefit plan. Liberty, however, discharged Welch a week later, purportedly due to lack of work. Welch filed suit, alleging wrongful discharge in violation of ERISA and handicap discrimination in violation of the Missouri Human Rights Act. Welch contended that Liberty terminated him to avoid liability for his medical expenses. During discovery, Liberty deposed Welch and learned that Welch had intentionally omitted from his employment application and resume his work with, and subsequent firing from, K & M. Liberty then filed a motion for summary judgment, supported by an affidavit from its president, Kurt Maier. In his affidavit, Maier stated that "Liberty would never have hired Welch if he had disclosed to Liberty that his most recent employer, K & M Machinery, had just fired him after only one month because they were not satisfied with Welch's work as a machinist." In addition, Maier stated that Liberty would have terminated Welch for omitting this information from his application. Based on Maier's undisputed affidavit, the district court granted Liberty's motion for summary judgment. In so doing, the court adopted the proposition that an employee's serious misconduct bars recovery on a claim of discriminatory discharge. Welch timely appealed the district court's grant of summary judgment. On appeal, Welch argues that after-acquired evidence of employee misrepresentation should bar recovery only when the misrepresentation was material to the employee's qualifications for employment in the first instance.

[1] We review a district court's grant of summary judgment de novo. *Jones v. Coonce*, 7 F.3d 1359, 1362 (8th Cir. 1993). We examine the record in the light most favorable to the nonmovant, and affirm a grant of summary judgment when there is no dispute as to any genuine issue of material fact and the party is entitled to judgment as a matter of law. Fed.R.Civ.P. 56(c).

In granting Liberty summary judgment, the district court anticipated that we would adopt the rule from *Summers v. State Farm Mutual Automobile Insurance Co.*, 864 F.2d 700 (10th Cir.1988). In *Summers*, the plaintiff alleged that he was discharged because of his age and religion. *Id.* at 702. His employer asserted that it terminated Summers because of an unprofessional attitude with customers and co-workers. *Id.* at 701. The company had previously disciplined Summers for falsifying company documents and informed him that he would be fired for any future falsehoods, but his falsifications were not the basis for his subsequent termination

* The HONORABLE LYLE E. STROM, Chief Judge, United States District Court for the District of Nebraska sitting by designation.

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Id. at 702–03. However, during preparation for trial, the company learned that Summers had falsified additional documents after being disciplined *Id.* at 703 The Tenth Circuit granted the company summary judgment. The court held that while after-acquired evidence of fraud cannot be cause for the termination at issue, the evidence "preclude[s] the grant of any present relief or remedy." *Id.* at 708.

In reaching its decision, the court relied on the mixed motive analysis of *Mt Healthy City Sch. Dist Bd of Educ v. Doyle,* 429 U.S 274, 285–86, 97 S.Ct. 568, 575, 50 L.Ed 2d 471 (1977): "The constitutional principle at stake is sufficiently vindicated if such an employee is placed in no worse position than if he had not engaged in the [conduct for which he allegedly was discharged]" In finding that Summers was in no worse position because the company would have fired him anyway had it known of his additional falsification, the Tenth Circuit analogized that:

> The present case is akin to the hypothetical wherein a company doctor is fired because of his age, race, religion, and sex and the company, in defending a civil rights action, thereafter discovers that the discharged employee was not a "doctor" In our view, the masquerading doctor would be entitled to no relief and Summers is in no better position.

Id.

Several other circuits have followed *Summers* and adopted the rule that after-acquired evidence of an employee's misrepresentation bars recovery for a discriminatory discharge when the employer would not have hired, or would have fired, the employee had it known of the misconduct. *See Dotson v United States Postal Serv*, 977 F 2d 976 (6th Cir 1992); *Washington v. Lake County,* 969 F 2d 250 (7th Cir 1992).[1]

The Eleventh Circuit rejected the *Summers* rule that after-acquired evidence can be a defense to a Title VII claim, but acknowledged that after-acquired evidence is relevant to the issue of relief *Wallace v Dunn Const Co.,* 968 F.2d 1174, 1181 (11th Cir. 1992) Primary to the *Wallace* court was the concern that the *Summers* rule created a perverse incentive contrary to the purposes of Title VII *Wallace* feared that an employer would feel no need to avoid discriminatory conduct because it could escape liability for an unlawful discharge by rummaging through an employee's background after the fact to create "legitimate" reasons for the firing. *Id.* at 1180.

[2–4] Mindful of the concerns expressed by the *Wallace* court, we find that the *Summers* rule is the better rule In the application fraud context, therefore, we find that after-acquired evidence of employee misrepresentation bars recovery for an unlawful discharge, if the employer establishes that it would not have hired the employee had it known of the misrepresentation.[2] We do not believe that an employee should benefit from his or her misrepresentation However, in granting Liberty summary judgment, the district court relied on Maier's affidavit Allowing Liberty, in this instance, to establish a purported policy of this nature solely on the contents of Maier's affidavit seems to us to be contrary to the dictates of *Mt Healthy.* In *Mt Healthy,* the employer knew of both the legitimate and the illegal grounds for the firing decision at the time the decision was made. In the after-acquired evidence context, the employer knows only the presumed illegal ground for the discharge Therefore,

1 The *Washington* court examined the relationship between a "would not have hired" and the "would have fired" standard The court believed that this distinction was important because it envisioned situations when a company might be more reluctant to fire an individual who had proved able on the job *Washington* 969 F 2d at 254 The Seventh Circuit, drawing on mixed motive case law determined that, in an application fraud case when the employee was later fired for an unrelated reason, the appropriate inquiry is whether the employer would have fired the employee upon discovery of the falsehood *Id* at 256. The *Washington* court found that the "would have fired" standard "weakens the incentive for an employer to engage in a fishing expedition for minor falsehoods on the employee's resume or application *Id*

2 Our holding does not vitiate the would have fired prong of the *Summers* rule We simply do not need to discuss it under the circumstances of this appeal

we believe that the employer bears a substantial burden of establishing that the policy pre-dated the hiring and firing of the employee in question and that the policy constitutes more than mere contract or employment application boilerplate. Liberty presented no other evidence of its policies. By itself, Maier's affidavit is a self-serving document and does not establish the material fact that Liberty would not have hired Welch but for the misrepresentation. As the movant for summary judgment, Liberty bore the significant burden of establishing that it had a settled policy of never hiring individuals similarly situated to Welch. Because of our concerns about creating perverse incentives for employers, we find that Maier's affidavit alone is insufficient to establish this material fact.

We note that other circuits have upheld summary judgments in the application fraud context based primarily on employer affidavits. *See Johnson v. Honeywell Information Sys.*, 955 F.2d 409, 414 (6th Cir.1992); *Washington*, 969 F.2d at 256–57. We do not decide whether an undisputed employer affidavit could, in some circumstances, establish the requisite material fact of a particular employer's policy. Rather, we find merely that in this case, Maier's affidavit was not sufficient. We find, therefore, that Liberty has not established that no material facts are at issue and we remand to the district court for further proceedings consistent with this opinion.

MORRIS SHEPPARD ARNOLD, Circuit Judge, dissenting.

In my view, *Wallace v. Dunn Const. Co.*, 968 F.2d 1174 (11th Cir.1992) has the better of the argument on the issue of after-acquired evidence. The purpose of the relevant provisions of ERISA and the Missouri Human rights Act is to deter discriminatory acts and compensate those who have suffered from them. I respectfully suggest that the court errs in concluding that if defendant can show that it would never have hired Mr. Welch but for his misrepresentation, then Mr. Welch will be in no worse position than he would have been but for the alleged illegal act. The crucial points are that the defendant did hire him and did not know of the facts that might have led to Mr. Welch's discharge until it discovered them because suit was filed against it. The defendant might never have learned of those facts, or it might have learned of them fortuitously at some later time. Until it did so, those facts could hardly provide an excuse for termination, since they could not have provided any part of the defendant's motive. If Mr. Welch is not compensated for losses suffered between the time he was illegally fired and the time he would have been fired on account of the discovery of relevant facts, he is not in the same position he would have been in but for a wrong committed against him, and the purpose of the protective legislation is entirely lost.

Nor can I subscribe to the court's conclusion that my view of the matter would allow an employee to "benefit from his or her misrepresentation." Fraudulent activity, of course, gives rise to civil remedies for damages and rescission, and, in proper cases, even for criminal prosecution. For the sake of argument, let us assume that Mr. Welch was a tortfeasor: That fact could not possibly excuse the commission of a tort against him. I doubt that the court would allow the defendant, for instance, to justify a battery on Mr. Welch on the ground that he would not have been available for battering but for his misrepresentations. I cannot see how this case stands on a different footing. The plaintiff does not seek to benefit from his misrepresentation, if any. He seeks simply to have the law applied to him in an even-handed way. Under general tort principles, even a trespasser is entitled to the benefit of the rule that the offended landowner may not intentionally injure him.

In short, this case seems to me to involve a moral hazard similar to the one that T.S. Eliot had in mind when he wrote: "The last temptation is the greatest treason: To do the right deed for the wrong reason." I think that the objects of deterrence and compensation both require us to examine a defendant's mind for what it contained, not what it might have contained, to determine whether he has

committed a wrong I therefore respectfully dissent

UNITED STATES of America, Appellee,

v.

Ernest JONES, also known as Ernie, Omar Allen, Omar James Jones, and James Omar Jones, Appellant.

No 93-3995.

United States Court of Appeals, Eighth Circuit.

Submitted April 15, 1994.

Decided May 6, 1994

Defendant was convicted in United States District Court for the Western District of Missouri D. Brook Bartlett, J, of conspiracy to distribute cocaine base and use of firearm in connection with drug-trafficking offense Defendant appealed The Court of Appeals, Bowman, Circuit Judge, held that: (1) defendant's speedy trial rights were not violated, and (2) evidence supported convictions

Affirmed.

1. Criminal Law ⊂=1169.11

Detective's testimony that he found small amount of "green leafy substance" in defendant's pockets when officer searched defendant did not deny defendant fair trial, even though government had agreed, in response to motion in limine, not to introduce any evidence relating to marijuana; court promptly instructed jury to disregard that part of detective's testimony, and there was no further mention of matter.

2. Criminal Law ⊂=577.11(2)

Defendant's right to speedy trial was not violated by delay of approximately five years between time of indictment and his eventual apprehension and return to Missouri to face charges; delay was entirely attributable to defendant's own actions, and defendant was unable to show that his defense was prejudiced by delay U.S.C.A. Const.Amend 6.

3. Weapons ⊂=17(4)

Evidence supported conviction for use of firearm in connection with drug-trafficking offense; evidence showed that defendant and others sold crack cocaine from house in which defendant's initial arrest took place, that defendant sold cocaine to undercover officer in that house some 90 minutes before defendant's arrest, and that three firearms were found near part of house where drug distributions had occurred 18 U.S.C.A. § 924(c)

4. Conspiracy ⊂=47(12)

Evidence supported conviction for conspiracy to distribute cocaine base; undercover officer purchased cocaine base at house on three occasions, last of purchases being from defendant and, although officer had not previously seen defendant at house, all four named coconspirators were present at house when defendant was arrested and search warrant was executed Comprehensive Drug Abuse Prevention and Control Act of 1970, § 406, 21 U.S.C.A. § 846.

5. Conspiracy ⊂=47(1)

Evidence of conspiracy need not exclude every reasonable hypothesis except guilt; rather, verdict must be upheld if reasonable fact finder could have found guilt beyond reasonable doubt.

6. Conspiracy ⊂=24(1), 47(2)

Conspiracy requires proof that defendant entered into agreement with at least one other person to violate law; circumstantial evidence may suffice.

7. Criminal Law ⊂=805(1)

Eighth Circuit Model Jury Instructions operate merely as suggestions and are not binding on district courts of Eighth Circuit.

Steven G Sakoulas, Kansas City, MO, argued, for appellant

PHYSICIANS IN THE LITIGATION PROCESS

Hon. Donna Paulsen
Iowa District Court Judge
Fifth Judicial District
Des Moines, Iowa

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IN THE IOWA DISTRICT COURT FOR POLK COUNTY

LARRY PIERCE, Plaintiff, vs. CLYDE NELSON, JANICE NELSON and FARM BUREAU MUTUAL INSURANCE COMPANY, #42-0331872, Defendants.	)	CL 092-54493 RULING

On September 4, 1992, Plaintiff's Application for Protective Order came on for hearing. The Plaintiff was represented by attorney Michael H. Adams. The Defendants Clyde Nelson and Janice Nelson were represented by attorney Mark D. Sherinian and Kara P. Junkins. The Defendant Farm Bureau Mutual Insurance Company was represented by attorney David McNeil. After hearing arguments of counsel, examining the file and being fully advised in the premises, the Court finds and orders as follows:

1. The deposition of Dr. Johnson shall be taken at Dr. Johnson's office.

2. The time of the deposition shall be arranged at a time convenient for the Doctor and at a time agreed upon by counsel and arranged by Plaintiff's counsel.

3. The defendant shall pay to the witness the normal deposition fee for the witness for the time actually spent in the deposition. The Court has been advised that the Doctor's hourly fee for depositions for either attorney would be $500 per hour.

4. The defendants shall advise the witness in advance of the amount of time the witness should reserve for the deposition and the time reasonably expected to be necessary for the deposition

5. The Plaintiff shall pay any fees for the witness necessary for preparing for the deposition.

6. Any contact or communication by Defendant or Defendant's counsel with Plaintiff's experts including Dr. Johnson for purposes of arranging depositions or setting fees shall be done through Plaintiff's counsel. Defendant's counsel shall not directly communicate in writing or by telephone with Plaintiff's experts or their office concerning the deposition schedule or their fees.

IT IS THEREFORE ORDERED that Plaintiff's Application for Protective Order is granted to the extent ordered above. All other portions of Plaintiff's Application for Protective Order are denied. The Court declines at this time to award any sanctions or attorneys fees against Defendants so long as the provisions of this order are followed by the parties.

DONNA L. PAULSEN, Judge
Fifth Judicial District of Iowa

Copies mailed by the Court to:

Michael Adams
Mark Sherinian
David McNeil

1 IN THE IOWA DISTRICT COURT FOR POLK COUNTY

2 LARRY PIERCE,)
)
3 Plaintiff,) CL NO. 92-54493
)
4 vs.) TRANSCRIPT OF
) PROCEEDINGS
5 CLYDE NELSON, JANICE NELSON,)
and FARM BUREAU MUTUAL)
6 INSURANCE COMPANY,)
)
7 Defendants.)

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9 The above-entitled matter came on for hearing
on September 4, 1992, at 8:25 a.m., Room 308, Polk County
10 Courthouse, Des Moines, Iowa, before the Honorable
Donna L. Paulsen.

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12 APPEARANCES

13 For the Plaintiff: MICHAEL H. ADAMS
Attorney at Law
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15

For the Defendants
16 Clyde and Janice Nelson: MARK D. SHERINIAN
KARA D. JUNKINS
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18

For the Defendants
19 Farm Bureau Mutual Insurance: DAVID A. MCNEILL
Attorney at Law
20 5400 University Avenue
West Des Moines, IA 50265

21

22 JANIS BUSING GREEN
CERTIFIED SHORTHAND REPORTER
23 ROOM 211 POLK COUNTY COURTHOUSE
DES MOINES, IOWA 50309

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1 (The following record was made on September 4,
2 1992, at 8:25 a.m.)
3 THE COURT: Let the record reflect that we're
4 here in the case of Larry Pierce vs. Clyde Nelson, Janice
5 Nelson and Farm Bureau Mutual Insurance Company,
6 CL92-54493. A motion was filed by the plaintiff, an
7 application for protective order, under Iowa Rule of
8 Civil Procedure 123. That was filed July 31, 1992. The
9 defendants filed a resistance August 10, 1992. That
10 motion was set for hearing on today's date.
11 When I was reviewing the file yesterday, I
12 determined that there were several other motions in the
13 file that the clerk had not brought to our attention.
14 One was a motion to sever that was filed April 14, 1992,
15 and another was a motion in limine. Normally a motion in
16 limine would be taken up by the trial court at the time
17 of trial so we will not consider that motion at this
18 time.
19 The other motion, the motion to sever, I did
20 have my court attendant call counsel yesterday and asked
21 them if we could proceed to hear that motion today. So
22 at this time then if there's any oral argument that the
23 parties wish to make on either one of those two motions,
24 I will consider that at this time. Why don't we first
25 talk about the plaintiff's application for protective

1 order.

2 MR. ADAMS: Your Honor, with regard to the

3 motion to sever, the plaintiff has no objection to that

4 being granted. I realize there's no other issues.

5 MR. MCNEILL: Your Honor, my name is Dave

6 McNeill. I represent Farm Mutual Insurance Company. I

7 filed an additional motion as kind of a combination of

8 things that we requested, I think that the hearing be

9 continued initially, and in that motion I included a

10 request that the case be reassigned to the trial judge

11 partly because of the motion in limine and because of the

12 fact that in addition to that motion in limine, which we

13 think needs to be ruled on since it's been filed because

14 it will help us in determining what discovery needs to be

15 done, that there are additional matters including those

16 that are pending before the Court today which will result

17 in additional rulings being required to be made on

18 evidentiary matters by the trial judge.

19 And in order for us to proceed with discovery

20 and in order for the trial judge to have a record perhaps

21 that they are familiar with, since we anticipate there

22 will be a couple of things arising out of the pending

23 motions today, that it would be to the benefit of the

24 trial judge not to have to reconsider rulings that Your

25 Honor has already made on the issues.

1 For example, on some of the witnesses that
2 we're having trouble getting depositions scheduled for,
3 we may consider moving to have those witnesses' testimony
4 excluded by motion in limine. And if that is the case,
5 the fact that some of the rulings that are being made
6 now, the Court is going to have to reconsider what -- the
7 trial judge will have to reconsider what has already been
8 done. And I think it will be helpful for us when we get
9 ready to go to trial if the judge gets to reconsider --
10 or in considering those evidentiary rulings which involve
11 his discretion or -- I'm not sure. I think Judge
12 Critelli has been assigned -- that he will be dealing
13 with decisions he's already made. I think it will be
14 simple.
15 THE COURT: That would be a nice luxury but we
16 won't have that because you won't know until the morning
17 of the trial who will try the case -- or the day before.
18 This particular docket will be assigned to Judge Critelli
19 in January, but he may not necessarily try the case
20 because ten cases are scheduled each week for each judge,
21 and if some of those cases don't settle, then the other
22 judges try the cases that are on the docket of the other
23 judge. So I don't know who you would want to have this
24 reassigned to because Judge Critelli is on the criminal
25 docket right now and there really won't be anybody that

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1 we would guarantee that the case would be tried before at
2 this point in time. Your trial date is when?
3 MR. MCNEILL: January 4.
4 THE COURT: So at this time then if there's any
5 oral argument that anyone would like to make on the
6 application for protective order, and since it's the
7 plaintiff's motion, I'll let the plaintiff go first.
8 MR. SHERINIAN: Excuse me, Your Honor. May I
9 speak before the Court considers that?
10 THE COURT: Certainly.
11 MR. SHERINIAN: I want to apologize to the
12 Court for raising this issue before -- well, at this time
13 to have to raise it at all is very uncomfortable for me,
14 but I think I owe an obligation to my client to ensure
15 there's a fair and impartial consideration of this issue
16 and the issues before the Court at this time.
17 My concern is that I understand that the
18 Court's husband is the vice president of -- the CEO of
19 Health Care Preferred. Am I correct in that
20 understanding?
21 THE COURT: I couldn't tell you if it's the
22 vice president or exactly what he is, but, yes, he does
23 work with Health Care Preferred.
24 MR. SHERINIAN: It's for that reason that I
25 bring this issue to the Court because Dr. Johnson is a

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1 member of Health Care Preferred as one of the assigned
2 physicians, one of the participating physicians. My
3 understanding of HMO is that they are required to or they
4 attract and maintain physicians who are willing to agree
5 to a set fee schedule; and I think if I were in the
6 Court's position in this case, it would make me at least
7 uncomfortable if I were to decide to issue an order
8 cutting the doctor's fee. Knowing how small Des Moines
9 can be, that order or decision might get around the
10 medical community rather quickly; and given the Court's
11 husband's position, I think it might be a very
12 uncomfortable situation. And I guess what I'm asking the
13 Court to do is to recuse herself from this portion of the
14 case.
15 THE COURT: What is the basis of the request
16 for recusal?
17 MR. SHERINIAN: Because it creates the
18 appearance of impropriety, a potential conflict of
19 interest.
20 THE COURT: In what respect?
21 MR. SHERINIAN: Well, in the sense that because
22 of the economic relationship of the Court's spouse with
23 Dr. Johnson, that a decision by the Court contrary to
24 Dr. Johnson's position or in some way contrary to the
25 fees that he's obtaining would not be looked favorably

1 by Dr. Johnson and could therefore have an impact on his
2 participation in HMO. And I think from that basis it's
3 pretty clear that there might be a potential for
4 conflict. I think in some instances -- I mean, I can
5 imagine the Court wanting to do something that would not
6 harm that relationship, the relationship of the Court's
7 husband with Dr. Johnson. That's how I see the potential
8 conflict.
9 THE COURT: Let me state for the record that I
10 don't know Dr. Johnson. I don't even know if my husband
11 knows Dr. Johnson. There are hundreds of physicians in
12 Iowa that participate in Health Care Preferred. My
13 husband is employed by McNerney Heintz which is a
14 management company that manages health care programs
15 throughout the midwest. One of the programs that they
16 are involved in managing is Health Care Preferred and
17 also HMO Iowa. Both of these programs have contracts
18 with hundreds of physicians throughout the state. What
19 Dr. Johnson would receive by way of a fee for a
20 deposition would have no impact on his participation in
21 Health Care Preferred and none of that fee obviously
22 would have anything to do with going to Health Care
23 Preferred or HMO Iowa.
24 For me to recuse myself from every case
25 involving a fee issue related to a physician that might

1 be a participant in one of the companies that my husband
2 is involved in managing would make my docket very clear
3 and make many of the other judges in the courthouse very
4 upset if I recused myself from all cases involving
5 physicians or their fees or disputes related to other fee
6 issues

7 Recusal is a matter that is up to the Court,
8 and if the Court feels that for some reason there's an
9 appearance of impropriety or the Court would be unfair or
10 biased in any respect, then the Court is bound to recuse
11 itself. And in this situation, Mr. Sherinian, I really
12 don't feel in any way that the employment of my husband
13 would have anything to do with my ruling on this matter.

14 MR. SHERINIAN: I understand, and just for the
15 record, I have a copy of the listing of participating
16 providers in Health Care Preferred and Dr. Johnson is
17 listed in there as an orthopedic surgeon.

18 THE COURT: Have you counted up how many people
19 are listed in there, how many doctors?

20 MR. SHERINIAN: I can give the Court a copy of
21 this.

22 THE COURT: I mean, it's hundreds of
23 physicians, correct?

24 MR. SHERINIAN: I would say that is correct.

25 THE COURT: Probably about every physician in

1 Des Moines, actually not every physician, I would say a
2 majority of the physicians in Des Moines either
3 participate in Health Care Preferred or HMO Iowa.
4 MR SHERINIAN: Well, I appreciate and
5 understand the Court's decision and thank you.
6 THE COURT: I did have a chance to read the
7 file and review the motions and so this would be the time
8 then if there's any oral argument that the parties would
9 like to make related to the motions, and let's talk about
10 the application for protective order first.
11 MR. ADAMS: Thank you, Your Honor. The reason
12 this application was filed was based entirely on -- well,
13 not entirely, but in large degree on the July 28, 1992,
14 letter from Mr. Sherinian and Ms. Junkins to Dr. Rodney
15 Johnson, and I believe I've attached a copy of it to my
16 motion. I'm not going to belabor the point raised in the
17 motion. I think it speaks for itself, but I will say
18 that the plaintiff wants to get this case tried. He has
19 no opinion whether the defendants should be allowed or
20 shouldn't be allowed to take the doctor's deposition.
21 But I think we've engaged in enough sideshows and
22 nonsense in this case already that we need to put a stop
23 to it.
24 If the Court recalls, it was the same situation
25 with Dr. Koontz. There became a fee dispute. There was

1 a subpoena served. The doctor didn't show up. The
2 doctor was very upset. He was upset at all the lawyers
3 involved, not just defendants' counsel. And the Court
4 issued an order that basically said, "Let's do this
5 deposition thing so as to not inconvenience the doctors
6 because these folks have a livelihood and they have
7 patients that need to be seen and I see no sense in
8 dragging them through the gamut of the legal system just
9 so we can get a deposition out of it." If the Court
10 recalls, the plaintiff had a great deal of expense in
11 defending against the subpoenas.
12 There's a petition for writ of certiorari that
13 basically, Judge, we're just tired of it. If they want
14 to take the deposition, they can pay the fee. I don't
15 set the fee. The plaintiff doesn't set the fee. The
16 doctor sets the fee. I know in other cases I've been
17 requested to provide a $400 to $500 payment per hour for
18 a deposition for a doctor. That would be Dr. Bervara
19 here in Des Moines, and I don't believe Dr. Bervara is
20 involved in this case. But the claims that $120 an hour
21 or $250 per hour is customary, I think that needs to be
22 scrutinized.
23 I don't think we're in a position to tell a
24 doctor that they went through all the medical training,
25 all the specialized skill training and then tell them

1 their service is worth X amount of dollars. I think in
2 this case the fee that Dr. Johnson has requested, $500
3 an hour, is reasonable. I think that's the same fee that
4 Dr. Koontz requested, so I would ask the Court to issue
5 an order directing defendant or defendants' counsel, if
6 they desire to take a deposition of these doctors, to do
7 it at such a time, such a place that will be convenient
8 for the doctor and to pay his normal customary fee for
9 the deposition.
10 Thank you.
11 THE COURT: Mr. Sherinian.
12 MR. SHERINIAN: Thank you, Your Honor. First
13 of all, Your Honor, I believe that plaintiff's motion is
14 premature. The reason it's premature is because all we
15 did was simply ask the doctor whether he would be willing
16 to accept a fee of $250. Frankly, I think we have a
17 basic right to that communication with the doctor which
18 is not intended to harass him or in any way intimidate
19 him. And had the doctor written back and said, "No, I'm
20 not willing to accept a fee of $250 an hour," we would
21 have simply applied to the Court under Rule 125(f) for a
22 determination of what a reasonable fee would be. The
23 Court has that discretion under Rule 125(f), and it
24 indicates that in the Court's determination that that
25 reasonable fee shall not exceed the customary hourly or

1 daily fee, not that it has to be that customary fee.

2 Secondly, I believe that the application is

3 premature because of the fact that plaintiff's counsel

4 did not make an attempt to contact us prior to filing the

5 motion. Under Rule 122(e) he has that duty, and there

6 was no certificate and good faith effort to dissolve

7 these issues that had been made. Had counsel done that,

8 I think he would have understood and I would have

9 explained exactly what I just explained to the Court,

10 that we were simply going to communicate with the doctor.

11 If he determined that he was not going to accept that

12 fee, then we were not going to subpoena him but simply we

13 were going to make an application to the Court. I think

14 if plaintiffs had done that, it would have circumvented

15 this entire hearing and the motion. We still don't know

16 from Dr. Johnson what his position is. He has not

17 formally responded.

18 I believe in addition to this, Your Honor, that

19 a fee of $250 is reasonable in part because that is the

20 fee that I have seen a number of doctors charge.

21 Certainly there are doctors that charge more, as we've

22 attached to the resistance. We've shown one doctor's fee

23 schedule. We also have shown a court order in this court

24 by a different judge in which he determined that a fee

25 for a plastic surgeon should be $250. We would ask the

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1 Court to take judicial notice of that decision.

2 More importantly, Judge, and we've just been

3 able to develop these facts and information recently, we

4 will file this formally today, the AMA as well as a

5 publication called Medical Economics Journal have done

6 studies of the number of hours that a physician works,

7 the number of weeks a physician works and the gross

8 income that physicians make, and we have laid out for the

9 Court what that data is. And it shows that on an hourly

10 basis the hourly gross income of physicians is

11 considerably less than the $500 that we are being asked

12 to compensate this doctor.

13 In particular, it shows that all physicians

14 normally are compensated at a rate, a gross income rate

15 of $135. General surgeons are paid at a rate of $145.

16 And orthopedic surgeons, which is Dr. Johnson, get paid

17 at the rate of $253 an hour. And we calculated these

18 incomes giving every deference to the statistics. In

19 particular, the statistics show that doctors only work 46

20 weeks a year. Obviously, if we calculated it at 50 weeks

21 a year, the hourly rate would be less. We've used the

22 46-week number.

23 In addition, the data shows that doctors

24 normally work 59 to 60 hours a week. We haven't used

25 that number. We've used 40 hours a week because that is

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1 probably the number of office hours that a doctor would
2 have. Obviously, by using 40 it increases the fee as
3 well. But using all of these statistics, it's clear that
4 a reasonable fee for a doctor, if we're simply
5 compensating the doctor for the time that they have to
6 take away from their practice, is more appropriately $253
7 an hour, and that is the fee that we're suggesting that
8 Dr. Johnson be paid.
9 Your Honor, this is an issue that is not just
10 confined to this case. It's an issue that I feel very
11 strongly about and I know other members of the bar and
12 other members of the bench feel very strongly about as
13 well. It's not simply this case. It's unfortunate for
14 this plaintiff that these issues have to be brought up in
15 this particular litigation, but they have to be brought
16 up somewhere. And I think it's completely inappropriate
17 that doctors who are treating physicians, who are simply
18 witnesses and have some expertise can effectively bill
19 plaintiffs and defendants for what is a community
20 obligation, to testify in a case. And I think it's time
21 that the bench and the bar stand up and take a position
22 to bring these fees under control, and I would ask the
23 Court to do that in this case.
24 MR. MCNEILL: Your Honor, I would like to join
25 in those arguments and would like to add some additional

1 information.

2 With regard to the issue, I think this is

3 premature. In addition to the communications, that the

4 failure of communications pursuant to, I believe, 122(e)

5 to resolve this, I perceived the letter to the doctor as

6 an attempt by us to just resolve a dispute, a discovery

7 dispute. The doctor wanted $500 an hour. We believed

8 that was in excess of what the reasonable fee should be,

9 and I think that although we have provided evidence of

10 what we think are -- or Mr. Sherinian at least has

11 provided evidence of what a reasonable fee is, I don't

12 think that it's appropriate for the Court to rule on what

13 a reasonable fee is without having evidence of what this

14 doctor earns. If it's his practice to charge parties to

15 lawsuits, and as I'm sure they are aware since they get

16 the check from insurance companies, to charge insurance

17 companies a higher hourly rate for testifying about facts

18 that they have than they charge for the very patients

19 that they treat, to give those facts would indicate that

20 the fees requested are unreasonable.

21 Doctors in the same vein as attorneys, all they

22 have is their time and their expertise and all we're

23 talking about is what this doctor -- what he is paying

24 him for his time; and if he charges his patients at a

25 certain hourly rate for his time, I think that the

1 attorneys and the insurance companies who end up paying a
2 lot of these fees should be obligated to pay no more for
3 his time than he charges others for. And I think in
4 order to determine what his hourly fee should be absent
5 agreement, I think he needs to provide evidence of what
6 his income is, what he charges his patients for fees.
7 And absent an evidentiary basis of what he charges, I
8 don't think that you can determine what is reasonable
9 and, therefore, I think it's premature absent a hearing
10 pursuant to the rules or an application to determine what
11 the fees are. I think that a doctor should be a part of
12 that.

13 I also would point out and emphasize these are
14 treating physicians. The plaintiffs I think have
15 indicated in some fashion that these are his experts. To
16 the extent any discovery was going to be requested by my
17 client and the request I would have would be about, what
18 did you see when you examined the patient? What did the
19 patient say to you? What were your findings? And I'm
20 not particularly concerned about asking him what his
21 opinions are. The plaintiff may certainly want to ask
22 him for opinions about his testimony, but this is factual
23 discovery.

24 We want to know factual information from a fact
25 witness in a personal injury case, and we think we should

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1 only pay him what his reasonable hourly rate is and would
2 ask the Court to overrule the order for protective order
3 as premature. And if we can't work something out with
4 the doctor regarding his fees, I think that perhaps we
5 certainly would be willing to request a hearing on that
6 matter and have the doctor come in and put on some
7 evidence of what is reasonable based on what he's
8 earning.

9 MR. ADAMS: Your Honor, if I may respond. I
10 believe Dr. Johnson has been designated as an expert but
11 I think it's important to know that this letter, this
12 July 28 letter is virtually identical to the letter sent
13 to Dr. Koontz before. I think the names were changed and
14 the dates were changed. The body of the letter is
15 virtually word for word identical.

16 In talking with Dr. Koontz or Dr. Koontz'
17 right-hand advisor or secretary or whatever she was, the
18 doctor interpreted this letter as a slap in the face. In
19 talking to Dr. Johnson's office manager, Dr. Johnson
20 interpreted this as a slap in the face.

21 I guess perhaps this motion is premature in the
22 fact that we didn't allow Mr. Sherinian to subpoena
23 Dr. Johnson as he subpoenaed Dr. Koontz. I just didn't
24 want to put my witness through that. I don't think it's
25 fair to put him through that. I don't think he should be

1 required to go out and hire a lawyer or pay his lawyer to
2 tell him whether he needs to respond to a subpoena
3 commanding him to appear at somebody's office downtown
4 for a deposition at half his normal rate.
5 I guess what I wanted to do, Judge, was just
6 head off these problems before they occurred, before my
7 witness was subpoenaed. Based again on Dr. Koontz and
8 the discussions that I had with counsel at that time, it
9 was my impression that counsel was going to go through
10 the same route. I think we're out to set precedence for
11 all cases from now on and we're not really concerned
12 about what is happening to this particular plaintiff, to
13 this particular witness or doctor, and I don't think
14 that's right. And I'm asking the Court to set down an
15 order saying, "If you want to take these depositions and
16 inconvenience these people, then you pay them their
17 normal customary fee."
18 As for the statistics Mr. Sherinian provided, I
19 did receive a copy of that moments before the hearing
20 this morning. I have no idea other than where it says
21 these figures came from, where they came from. I have
22 some questions whether they interviewed Dr. Johnson for
23 this or if they interviewed Dr. Koontz or if they -- if
24 their statistics are comprised of doctors in Des Moines.
25 I don't think that -- I guess, Judge, we need to stop all

1 the sideshows and we need to get on to the case. And I
2 thank you for your time, and I've said enough on the
3 issue. Thank you.
4 MR. SHERINIAN: Your Honor, may I respond?
5 THE COURT: Certainly.
6 MR. SHERINIAN: I think the Court can
7 understand that I feel strongly about this and strongly
8 enough to apply it to the supreme court for an
9 examination of this issue in regard to the prior doctor.
10 And for some reason or another, it wasn't explained, the
11 Supreme Court declined the application. I assumed that
12 possibly the reason that they did that was that they, as
13 the Court, saw this issue was merely a question of where
14 the doctor was to be subpoenaed. Consequently, when we
15 had the same problem with Dr. Johnson, I decided that I
16 didn't want any of those procedural problems. I simply
17 wanted to bring the issue of the doctor's fee to the
18 Court for a proper examination; and had Mr. Adams simply
19 called, I would have explained that that was my intent.
20 That I had no intent of subpoenaing Dr. Johnson as we
21 have before, but merely was going to apply to the Court
22 for an appropriate decision under Rule 125(f). Thank
23 you.
24 MR. MCNEILL: Your Honor, if I may, briefly, I
25 would like to respond. One of the problems we have now

1 in this case and one of the comments Mr. Adams made which
2 I think is systematic of why we're here today is now the
3 doctors wonder why they have to do anything when they get
4 a subpoena. They ask an attorney, "I got a subpoena. Do
5 I have to go anywhere?" Well, Dr. Koontz didn't and now
6 we are concerned and my client which is in litigation as
7 an insurance company and as a party in these first party
8 cases on a regular basis and regularly charge fees that
9 we think are far above expense which we think is
10 reasonable and customary. As I read the rules I perceive
11 the procedure, although it's not outlined in there for a
12 dispute with an expert over his fees, it says you're
13 entitled to take their deposition according to the rules.
14 If you can't agree on a fee, then there is a procedure
15 where the doctor or perhaps the party who has hired that
16 expert may apply to the Court for a determination of
17 fees. And what we've wanted to do in this case is get
18 our discovery done and pay a reasonable fee; and the only
19 way we were going to be able to get this doctor's
20 deposition taken at that time was to subpoena him.
21 And the fact is these letters are similar
22 because we are trying to figure out a reasonable fee for
23 these doctors. He had indicated again that Dr. Koontz'
24 reasonable and customary fee is $500. There's never been
25 any evidence of that. His office manager has relayed

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1 that information to us but the fact that he charges that
2 amount doesn't -- even if he does doesn't necessarily
3 mean that he's paid that amount and that that's
4 reasonable. That might be as much as -- based on the
5 evidence or the studies that have been presented, that
6 may be as much as two or three times what he charges for
7 his normal hourly service.
8 I think we need an evidentiary hearing if we
9 are going to determine what a reasonable fee is, and it
10 has to be based on some facts. Therefore, I think this
11 is premature and should be overruled.
12 THE COURT: Anything else?
13 MR. ADAMS: I have nothing further, Judge.
14 Thank you.
15 THE COURT: Has the deposition of Dr. Koontz
16 ever been taken in this case?
17 MR. SHERINIAN: No, it hasn't, Your Honor.
18 THE COURT: That's the doctor that we had the
19 first go-around with?
20 MR. MCNEILL: We didn't quite get to the
21 go-around. We subpoenaed him.
22 THE COURT: Well, I spent a lot of time on that
23 particular issue myself and we had several hearings, I
24 believe. The deposition was never taken then?
25 MR. SHERINIAN: No, Your Honor, it was our

1 intent to simply have -- as allowed by the rules, have
2 the plaintiff simply answer the expert interrogatory and
3 we were going to proceed to trial on that. And I believe
4 there is an outstanding request for that answer.
5 THE COURT: And is there an expert witness
6 interrogatory request outstanding relating to Dr. Johnson
7 also?
8 MR. SHERINIAN: Well, the interrogatories are
9 outstanding. We had specifically requested in a letter
10 for Dr. Koontz to answer that interrogatory.
11 MR. ADAMS: I believe it's been sent to the
12 doctor. I don't know if it's come back from him yet. I
13 will check on that.
14 THE COURT: I might add if you're concerned
15 about cost and litigation, that is a very effective way
16 to get the opinions and testimony of the doctors, simply
17 ask under the rules to have the doctor complete those
18 questions. Also, have you supplied them with the medical
19 records of Dr. Johnson?
20 MR. ADAMS: Yes, I've supplied them with
21 everything they have asked for.
22 THE COURT: Do you have the medical records of
23 Dr. Johnson?
24 MR. SHERINIAN: I believe so, Your Honor.
25 THE COURT: Certainly if you're just interested

1 for factual information from a treating physician, that
2 is a relatively inexpensive way to get that. Usually the
3 medical records for orthopedics are fairly complete in
4 terms of examinations, diagnosis, treatment.
5 MR. MCNEILL: But, Your Honor, if I may, the
6 rule allows for us to take his deposition if they want
7 to and while there are various methods, sometimes the
8 deposition is the fastest and cheapest way to do it. And
9 rather than trying to comb through orthopedic records
10 which is time-consuming and very technical, a lot of
11 times a simple one-hour deposition to have them explain
12 what they found, what they said to them, what they didn't
13 find, what wasn't said to them, certainly would shortcut
14 a lot of this procedure. And we want to take his
15 deposition and he won't come to the deposition and that's
16 why we ended up where we are.
17 THE COURT: When you contacted the doctor's
18 office about the deposition fee, were you told that the
19 deposition fee whether you requested it or whether the
20 defendant requested it was the $500?
21 MR. ADAMS: It was the same, yes, Judge.
22 THE COURT: $500 an hour? He's not charging
23 more for the defendants?
24 MR. ADAMS: No, he's not. At some point if I
25 want to take his deposition, I'm going to be paying the

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1 same amount. I think that was indicated to counsel the
2 last time we were here.
3 THE COURT: All right. Okay. Anything else?
4 Anything you would like to add on this issue?
5 MR. SHERINIAN: No, Your Honor.
6 MR. ADAMS: No, Your Honor.
7 THE COURT: All right. Let's talk for a minute
8 about the motion to sever.
9 MR. MCNEILL: Your Honor, if I could, I've got
10 an order that I've used in other cases where we have
11 requested the same motion. Both of the other attorneys
12 have reviewed it, and I don't think either one of them
13 has any objection to it. I prepared it when I filed the
14 initial motion that was adjudged premature. Basically
15 what would happen would be we would proceed as if we were
16 going to a single trial and the insurance company just
17 will not participate in the trial. I assume that there
18 will be motions to keep mention of the insurance out of
19 the trial and the company will be bound by the
20 determination of damages in that trial so if the damages
21 exceed the liability limits, we will agree that's what
22 the damages are in the case.
23 THE COURT: Now, this is an underinsured claim?
24 MR. MCNEILL: That's correct.
25 THE COURT: Against the policy of the owner?

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1 MR. MCNEILL: Owner and the driver. I believe
2 everybody is insured by Farm Bureau, both the plaintiff
3 and the defendant, and the owner of the plaintiff's car.
4 There's a lot of Farm Bureau people involved.
5 THE COURT: Okay. But the case here that
6 you're asking to sever is the case against Farm Bureau
7 related to the underinsured coverage of the plaintiffs,
8 the auto he was driving --
9 MR. MCNEILL: That's correct.
10 MR. ADAMS: Yes, Judge, the only issue with
11 respect to the plaintiff against Farm Bureau is how much
12 coverage do we have.
13 MR. MCNEILL: I don't think there's a dispute
14 really that you can attack the policy. I don't think
15 anyone has disputed that since you filed it prior to the
16 amendment to the code, and it's just a question of what
17 is the dollar amount.
18 MR. ADAMS: That's the only issue. I don't
19 disagree that they should be severed out. That's fine.
20 MR. MCNEILL: And I wouldn't anticipate there
21 would be any additional trial on the insurance coverage
22 issues, as I understand right now, and I'm pretty
23 certain, correct me if I'm wrong, we haven't asserted any
24 policy defenses to any affirmative offenses to your
25 claim. I think we alleged comparative fault but that

1 will be decided liability and will both be determined in
2 that first case, and then just a question of whether
3 there's enough liability money to pay.
4 THE COURT: My question to you -- I think
5 you've already answered it. Let me make sure I've got it
6 straight for the record -- is that if these are severed,
7 Farm Bureau would be willing to be bound by the damage
8 amount that is by the Court or the jury in the first case
9 and by the percentage of fault finding and the proximate
10 cause finding of the first jury?
11 MR. MCNEILL: I think if you look at the order,
12 and I haven't looked at it today, I think it makes some
13 mention about a final nonappealable order so that if
14 there is an issue that is appealed on the damages between
15 them and the underlying case, we can wait until the
16 outcome of that until there's a final judgment rendered
17 rather than just what the trial attorney -- because
18 obviously the appellant court could reverse it, remand
19 it, lower or increase, any of those things, but it would
20 be the final nonappealable judgment determination of
21 liability and damages. We would be bound by that.
22 THE COURT: All right. Is that acceptable to
23 you?
24 MR. ADAMS: Yes, Your Honor.
25 THE COURT: Well, I will go ahead then and

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1 enter this order relating to severance. In terms of your
2 motion in limine, if that's something that is going to
3 help you resolve the case in some way, we can -- I mean,
4 I can hear that and decide that if you want, otherwise it
5 will just wait until like the morning of trial, but it's
6 up to you. If you would like to have that decided now, I
7 would be happy to hear any argument you have on that
8 motion and go ahead and rule on that motion.
9 MR. ADAMS: Judge, there's been so much back
10 and forth. I believe it related to the incident in
11 Indianola. I'm not prepared to argue it today.
12 MR. SHERINIAN: Nor I, Your Honor.
13 THE COURT: Okay.
14 MR. ADAMS: The motion in limine was related to
15 an arrest for burglary and a guilty plea to theft in the
16 second degree. A deferred judgment.
17 THE COURT: All right. If you want me to hear
18 that -- or I don't know if that is something that you
19 would necessarily need oral argument on, but if you want
20 me to go ahead and rule on that motion just -- if you can
21 both request that and just any other argument you want to
22 make, just put it in writing and we can go ahead and rule
23 on that rather than setting another hearing on the case.
24 MR. ADAMS: Okay. Great.
25 THE COURT: Otherwise we won't rule on it. On

1 the protective order issue I wanted to tell you what
2 we're going to do while you're here so you won't have any
3 miscommunications here. This to me, I understand -- and
4 I'm very familiar with, having been in practice for 17
5 years, of gouging at times by expert witnesses and
6 overcharging. This doesn't appear to me to be the test
7 case for gouging of an expert witness when you're having
8 an orthopedic surgeon charge $500 an hour for a
9 deposition which is certainly something I've seen many
10 times in the practice and it doesn't appear to me to be
11 totally outrageous.
12 Also, since you're talking about a treater, you
13 have the medical records. Again, as indicated, you could
14 rely on obtaining the expert designation if you were
15 concerned about the cost and the litigation. So the
16 order I'm going to enter will provide that if the
17 defendants do wish to take the deposition of Dr. Johnson,
18 that they are to pay his -- what has been represented as
19 his customary rate of the $500 per hour.
20 Now, I've had some situations where the expert
21 on one side will charge the side that hired them X amount
22 and charge the other side more, which I find offensive
23 and have indicated so, but that is not the situation we
24 have here where he's charging the same for both sides.
25 If you do want to take the deposition, it will

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1 be held at Dr. Johnson's office at a time to be arranged
2 by counsel, between counsel to be convenient to the
3 doctor and obviously to your schedules. Any fee the
4 doctor charges for preparation time for the deposition
5 will be paid by the plaintiff and you can advise the
6 doctor before the deposition how much time he should
7 schedule for the deposition, whether that would be an
8 hour or two hours or how much time you expect to take.
9 Also, are there any other expert witnesses that
10 you have in this case?
11 MR. ADAMS: The ones that we've listed, Judge.
12 I don't have it with me right here.
13 THE COURT: If there are any other expert
14 witnesses that plaintiff has designated in the case, any
15 contact with those experts or communications with those
16 experts is to be through plaintiff's counsel, including
17 any communication regarding scheduling of the deposition.
18 And I'm talking about experts, not just Dr. Johnson, any
19 other experts so that we can avoid this problem with
20 regard to other experts.
21 MR. SHERINIAN: Your Honor, for the record, we
22 have already scheduled the depositions of the other
23 experts designated by the plaintiff. I believe all of
24 them -- there may be one or two who they decided not to
25 use or whatever, but --

1 MR. ADAMS: Mr. Sherinian, did you schedule
2 that with my secretary? Okay. Then it's been done.
3 THE COURT: And particularly, when you're
4 dealing with the treaters, first of all, these doctors,
5 they don't want to be involved in the litigation to
6 begin with. They don't want to go to depositions. They
7 would just as soon everybody go away. But the plaintiff
8 is unfortunately usually in a position where they need to
9 have their testimony to prove their case, so I think it's
10 unfortunate when the doctors are upset or get letters
11 from counsel that create problems and that create
12 problems for the plaintiff in getting testimony necessary
13 to prove their case.
14 So that's why if you do intend to schedule
15 depositions of any of the other experts of the plaintiff,
16 including other treating physicians of plaintiff, please
17 contact the plaintiff's counsel and do that through them
18 rather than sending out these letters to the doctor or
19 contacting the doctor.
20 MR. SHERINIAN: We will do that, Your Honor. I
21 would note for the record that the other doctors have
22 chosen fees below $250 so we don't have disagreement with
23 any of them.
24 THE COURT: Anything further then we need to do
25 with regard to this record?

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1 MR. ADAMS: I don't believe so, Judge.

2 MR. MCNEILL: I don't believe so.

3 MR. SHERINIAN: No.

4 (Record closed at 9:12 a.m.)

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1 CERTIFICATE TO TRANCRIPT

2 The undersigned, one of the Official Court
3 Reporters in and for the Fifth Judicial District of Iowa,
4 which embraces the County of Polk, hereby certifies:

5 That she acted as such reporter in the above
6 entitled cause in the District Court of Iowa, for Polk
7 County, before the Judge stated in the title page
8 attached to this transcript, and took down in shorthand
9 the proceedings had at said time and place.

10 That the foregoing pages of typewritten matter is
11 a full, true and complete transcript of said shorthand
12 notes so taken by her in said cause, and that said
13 transcript contains all of the proceedings had at the
14 times therein shown.

15 Dated at Des Moines, Iowa, this 5th day of
16 November, 1992.

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20 Janis B. Green

Janis B. Green
21 Certified Shorthand Reporter
Fifth Judicial District

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ployer using certain solvents manufactured by Metalcraft, Inc. In 1973, Sparks began complaining of fever, chilling, and severe headaches that he thought might be caused by the solvents. He visited a doctor and took a can of the solvent with him. In 1977, Sparks again consulted a doctor and again took along a container of the solvent.

In September 1980, Sparks consulted a Dr. Carnow, who wrote a lengthy report setting forth his opinion as to the cause of Sparks' problems. In his report, the doctor informed Sparks that the symptoms appeared to be related to Sparks' sixteen-year exposure to the solvent.

Sparks filed his lawsuit in January 1985. Metalcraft moved for summary judgment on the ground that the suit was barred by the two-year statute of limitations in Iowa Code section 614.1(2)

Sparks resisted with an affidavit from Mrs. Sparks in which she stated that, while she and her husband suspected the solvents were causing his complaints, they did not obtain a definitive diagnosis until 1984. The district court in *Sparks* found as a matter of law that the actions were barred by the statute of limitations, and we affirmed *Sparks,* 408 N.W.2d at 352–53.

In *Sparks* as well as in *Franzen,* we relied on the New Jersey case of *Burd v. New Jersey Telephone Co.*, 76 N.J. 284, 291–92, 386 A.2d 1310, 1314 (1978) In *Burd,* a laborer sustained a heart attack while working in a trench gluing plastic pipe. He had experienced dizziness, lightheadedness, and personality changes before the heart attack, but these symptoms cleared up within an hour or so after he left work. A caution label on the glue advised the user to "avoid inhaling fumes."

While this information was available to Burd in 1971, he did not file suit against the manufacturer of the glue until May 16, 1974, which was beyond the two-year statute of limitations in New Jersey. Burd contended that the statute of limitations did not begin to run until October 1972, when his attorney received a medical report indicating a reasonable likelihood of a link between the glue and the heart attack.

The New Jersey court held as a matter of law that Burd's action was barred. The court noted:

> There is no suggestion in any of the leading cases in this area that accrual of the cause of action is postponed until plaintiff learns or should learn the state of the law positing a right of recovery upon the facts already known to or reasonably knowable by the plaintiff.

Id. at 291–92, 386 A.2d at 1314

[4] In the present case, Montag had enough information, more than two years preceding the filing of his lawsuit, to put him on notice that he should investigate. In fact, at least by 1986, he had already begun his investigation. We agree that no issue of material fact exists regarding Montag's inquiry notice in 1986

[5] We summarily reject, on preservation grounds as well as on its merits, the plaintiff's argument that Montag's death created a new cause of action and a new two-year period of limitations.

AFFIRMED.

Larry PIERCE, Appellee,

v.

Clyde NELSON, Janice Nelson, and Farm Bureau Mutual Insurance Company, Appellants.

No. 92–1558

Supreme Court of Iowa

Dec 22, 1993.

Plaintiff brought action against defendant for personal injuries arising out of automobile accident. The District Court Polk County Donna L. Paulsen, J., issued protective order compelling defendant to pay expert fee for orthopedic surgeon's deposition

testimony. Defendants were granted interlocutory appeal. The Supreme Court, Neuman, J., held that plaintiff did not produce sufficient evidence to support finding that expert's fee was reasonable.

Reversed and remanded.

1. Pretrial Procedure ⇐91

Statute which caps daily compensation for expert trial testimony at $150 does not apply to deposition fees requested during discovery, but deals only with recovery of court costs following litigation. I.C.A. § 622.72.

2. Pretrial Procedure ⇐19

Trial court is vested with wide discretion in rulings on discovery matters.

3. Appeal and Error ⇐961, 1024.3

Trial court's ruling on discovery matters may be reversed when court's ruling rests on grounds or for reasons clearly untenable or unreasonable, or when record lacks substantial evidence to support court's conclusion.

4. Witnesses ⇐28(1)

When court is asked to determine reasonableness of fee of expert witness, it should measure that request by following factors: witness' area of expertise; education and training required to provide expert insight which is sought; prevailing rates of other comparably respected available experts; nature, quality, and complexity of discovery responses provided; fee actually being charged to party who retained expert; fees traditionally charged by expert on related matters; any other factor likely to be of assistance to court in balancing interests in compensating experts for participation in litigation against interest in preventing opposing parties from obtaining expertise free of cost; and in case of treating physician, reasonable compensation for loss by virtue of physician's required participation in legal proceedings. Rules Civ.Proc., Rule 125(f).

5. Pretrial Procedure ⇐91

Treating physician's deposition fee should bear some reasonable relationship to physician's customary hourly charge for patient care and consultation. Rules Civ.Proc., Rule 125(f).

6. Pretrial Procedure ⇐91

Treating physician's deposition fee should compensate physician for inconvenience of giving deposition testimony, yet it also must bear some rational relationship to time spent away from other professional duties. Rules Civ.Proc., Rule 125(f).

7. Pretrial Procedure ⇐91

Ruling that expert orthopedic surgeon's $500 per hour fee for deposition testimony was "not totally outrageous" was an abuse of discretion; proper standard under rule was that fee be reasonable and party defending expert's fee did not produce sufficient evidence to support finding of reasonableness. Rules Civ.Proc., Rule 125(f).

Mark D. Sherinian and Kara D. Junkins of Hanson, Bjork & Russell, Des Moines, for appellants Clyde and Janice Nelson.

David A. McNeill of Morain, Burlingame, Pugh & Koop, West Des Moines, for appellant Farm Bureau Mut. Ins. Co.

Thomas R. Isaac and Michael H. Adams of Isaac & Adams Law Office, Des Moines, for appellee.

Richard J. Sapp and Eric P. Sloter of Nyemaster, Goode, McLaughlin, Voigts, West, Hansell & O'Brien, P.C., Des Moines, for amicus curiae Iowa Medical Soc.

Considered by HARRIS, P.J., and CARTER, LAVORATO, NEUMAN and ANDREASEN, JJ.

NEUMAN, Justice.

This interlocutory appeal stems from a dispute over a treating physician's fee for deposition testimony. At issue is the enforcement of a protective order compelling the payment of a $500 per hour fee. Because we believe the protective order cannot be justified under this record, we reverse and remand.

Plaintiff Larry Pierce sued defendants, Clyde and Janice Nelson for personal inju-

ries he sustained in an automobile collision.[1] During discovery, the defendants sought to depose Dr. Rodney Johnson, an orthopedic surgeon who had treated Pierce for his injuries. Dr. Johnson advised defense counsel that his fee for deposition testimony would be $500 per hour. Believing the fee was unreasonable, defendants wrote Dr. Johnson requesting that he reduce his fee to $250 per hour. They received no response. Pierce's attorney, apparently concerned about the tone of defense counsel's communication with the doctor, applied for a protective order to direct defendants to advance the fee demanded.

A hearing was held on the motion for protective order. Dr. Johnson did not appear. Counsel for Pierce simply reiterated his assertion that the doctor's fee was reasonable. Defendants responded by submitting—without objection from opposing counsel—three pieces of evidence supporting their challenge to the fee: a fee schedule from another of plaintiff's treating physicians showing a $250 per hour fee for deposition testimony; an order in an unrelated lawsuit that set a surgeon's deposition fee at $250 per hour; and two studies published in the September 1991 issue of *Medical Economics Journal* showing the average gross income of an orthopedic surgeon to be $466,070 per year, or $253 per hour.

The district court's oral ruling on the motion noted that treating physicians "don't want to be involved in the litigation to begin with." It then determined, based on its own experience, that a fee of $500 for the deposition testimony of an orthopedic surgeon was not "totally outrageous," and ordered its payment. Defendants sought an interlocutory appeal to challenge the ruling, which we granted. With our permission, the Iowa Medical Society (IMS) appears on Pierce's behalf as amicus curiae.

[1] Resolution of the controversy turns on the standard by which district courts should measure the reasonableness of expert witness deposition fees under Iowa Rule of Civil Procedure 125(f).[2] Defendants contend on appeal that the district court abused its discretion when it failed to make an independent finding of reasonableness under the rule, and reached the wrong result when it found the $500 per hour fee reasonable. After addressing our scope of review, we shall consider defendants' arguments in turn.

[2, 3] I. The district court is vested with wide discretion in rulings on discovery matters. *Hutchinson v. Smith Lab., Inc.*, 392 N.W.2d 139, 141 (Iowa 1986). That discretion is not unlimited, however. Reversal may be in order when the court's ruling rests on grounds or for reasons clearly untenable or unreasonable, *Rowen v. LeMars Mutual Insurance Co.*, 357 N.W.2d 579, 583 (Iowa 1984), or when the record lacks substantial evidence to support the court's conclusion. *Paige v. City of Chariton*, 252 N.W.2d 433, 437 (Iowa 1977).

II. Iowa Rule of Civil Procedure 125(f) governs the fees experts may exact during discovery. The rule states in pertinent part:

> Unless manifest injustice would result, the court shall require that the party seeking discovery pay the expert a reasonable fee for time spent in responding to discovery under subdivisions (a)(2) and (b) of this rule. ... Any fee which the court requires to be paid shall not exceed the expert's customary hourly or daily fee ...

Iowa R.Civ.P. 125(f).

Judging by the dearth of caselaw interpreting this provision, we surmise that most fee disputes resolve themselves without judicial intervention. Nevertheless, the dispute before us spotlights the rule's lack of guid-

1. Pierce also named Farm Bureau Insurance Company as a defendant due to a dispute over Pierce's underinsured motorist coverage.

2. At the outset we reject defendant Farm Bureau's contention that Iowa Code § 622.72 (1991), which caps the daily compensation for expert trial testimony at $150, is controlling. Section 622.72 does not apply to deposition fees requested during discovery but deals only with the recovery of court costs following litigation. *See Kendall v. Lowther*, 356 N.W.2d 181, 191 (Iowa 1984); *accord Weiss v. Bal*, 501 N.W.2d 478, 482 (Iowa 1993); *Coker v. Abell–Howe Co.*, 491 N.W.2d 143, 151 (Iowa 1992). As discussed elsewhere in this opinion, a $150 cap upon the reasonableness determination would frustrate rule 125(f)'s compensatory purpose.

ance for both litigants and judges faced with competing claims of reasonableness. Until recently, a similar situation existed with respect to the rule's federal counterpart, Federal Rule of Civil Procedure 26(b)(4)(C).[3] In *Jochims v. Isuzu Motors, Ltd.,* 141 F.R.D. 493 (S.D.Iowa 1992), however, the court adopted a framework for analyzing fee controversies that we believe merits our serious consideration.

Jochims involved a motor vehicle roll-over suit. The plaintiff's products liability expert—a professor with impressive credentials in aerodynamics and computer simulation—sought to charge the defendants a $500 per hour deposition fee. Defendants claimed the fee was unreasonable, particularly in view of the professor's willingness to charge the plaintiff less for his accident reconstruction and computer simulation services. Thus the court was asked to decide whether the higher fee was reasonable under the rule.

[4] The court observed that the goal of federal rule 26(b)(4)(C) is to compensate experts for their participation in litigation, while preventing opposing parties from obtaining that expertise free of cost. *Id.* at 494–95. It then noted that neither the rule nor its commentary defined reasonableness by any objective standard. *Id.* at 495. Reviewing the limited authority on the point, the court adopted the following factors by which to determine whether an expert witness fee is reasonable within the meaning of the rule:

(1) the witness's area of expertise;

(2) the education and training required to provide the expert insight which is sought;

(3) the prevailing rates of other comparably respected available experts;

(4) the nature, quality, and complexity of the discovery responses provided;

(5) the fee actually being charged to the party who retained the expert;

(6) fees traditionally charged by the expert on related matters; and

(7) any other factor likely to be of assistance to the court in balancing the interests implicated by rule 26.

See id. at 495–96.

Arguing against adoption of the *Jochims* factors, IMS asserts that the test does not account for circumstances particular to the medical profession. It claims the factors disregard the skill level of the treating physician, the disruption of being drawn into litigation, overhead costs, and the societal importance of the physician's practice. We agree these factors are relevant but believe IMS's argument fails to account for the "other factor" prong of the *Jochims* test. No test possibly can provide for every factual contingency. The "other factor" prong is broad enough to allow evidence pertinent to a reasonableness determination yet unique to the particular fee request.

That brings us to rule 125(f)'s additional requirement that the fee "shall not exceed the expert's customary hourly or daily fee." Although defendants urge an interpretation that would limit "customary fee" to the hourly or daily fee charged for patient care and consultation, we do not believe the rule contemplates such a limit for all experts. The rule has more universal application and only seeks, in fairness, to prevent an expert from charging more for deposition time to one side of the litigation than the other.

[5] We do believe, however, that a treating physician's deposition fee should bear some reasonable relationship to the physician's customary hourly charge for patient care and consultation. Unlike an expert retained only for litigation, a treating physician gains unique and firsthand knowledge through the doctor-patient relationship. When knowledge gained in that relationship bears on an issue in controversy, the treating physician assumes the obligation borne by all citizens to give relevant testimony.

Allowing treating physicians to set litigation fees greatly in excess of fees received in their daily practice raises the specter of a troublesome whatever-the-market-will-bear

3. Unless manifest injustice would result (i) the court shall require that the party seeking discovery pay the expert a reasonable fee for time spent in responding to discovery .... Fed.R.Civ.P. 26(b)(4)(C).

approach to deposition testimony. *See Jochims*, 141 F.R.D. at 496 n. 3. Rule 125(f) does not require that experts receive *less* than their customary fee from employment; but the rule should not be transformed into a vehicle for experts to avoid participation in legal actions. The rule must be interpreted to fairly accommodate the interests of all parties to discovery proceedings.

[6] An agreement reached between the Iowa State Bar Association and the Iowa Medical Society concerning such fees supports our reasoning. That document recites that a physician may

> expect reasonable compensation for testimony given as an expert or treating physician either by deposition or in court. It is reasonable that the compensation reflect the time away from medical practice....

Principles of Cooperation for Attorneys and Physicians (Iowa Medical Society and Iowa State Bar Association (1993)). In other words, the fee should compensate the physician for the inconvenience of giving deposition testimony, yet it also must bear some rational relationship to time spent away from other professional duties.

Thus we conclude that when a court is asked to determine the reasonableness of a fee demanded under rule 125(f), it should measure that request by the factors cited with approval in *Jochims* and hereby adopted by this court. In the case of a treating physician, that fee should ordinarily be commensurate with the reasonable compensation lost by virtue of the doctor's required participation in the legal proceedings.

[7] III. Applying this standard to the case before us, we are compelled to reverse the district court's ruling. Neither Pierce nor Dr. Johnson submitted competent evidence of the fee's reasonableness. In resistance to the request for a protective order, defendants presented evidence supporting their contention that the fee was unreasonable. Nonetheless, the court rejected defendants' allegations and ordered them to pay Dr. Johnson's fee. In so doing, the court stated:

> This doesn't appear to me to be the test case for gouging of an expert witness when you're having an orthopedic surgeon charge $500 an hour for a deposition which is certainly something I've seen many times in the practice and it doesn't appear to me to be totally outrageous.

As discussed earlier, rule 125(f) requires that an expert's deposition fee be measured by a standard of reasonableness. The court's ruling plainly rested on a finding that the fee was not "totally outrageous." By requiring the defendants, as the fee challengers, to meet this higher standard, the court misapplied the rule.

Moreover, the court erred in placing the burden of proof on defendants in the first instance. Because Pierce applied for the protective order, it was his burden to prove the allegations underlying the order; namely, that Dr. Johnson's fee was reasonable and customary under rule 125(f). *See Verschoor v. Miller*, 143 N.W.2d 385, 388 (Iowa 1966) (party who pleads and relies on affirmative of an issue must carry burden of proving it); 23 Am.Jur.2d *Depositions and Discovery* § 424 (1983) (burden of justifying protective order is on party requesting the order). Pierce's only evidence was his counsel's statement that Pierce was being charged the same fee as defendants for Dr. Johnson's deposition testimony. While the fee being charged to the expert's patient or client is one of the *Jochims* factors, this factor alone is insufficient to support a finding of reasonableness.

The court apparently grounded its order primarily on prior personal experience with expert witness fees. Based on the evidence before it, however, the court's conclusion was unfounded. This failure by the court to make an independent finding of reasonableness constitutes an abuse of discretion.

IV. *Disposition.* We are mindful of the stress, disruption and inconvenience physicians and others may encounter when asked to give deposition testimony in an adversarial setting. We also are aware that district courts previously have lacked guidelines when exercising their considerable discretion under rule 125(f). We conclude, however, that the court's ruling on the fee cannot be supported under this record. We therefore

reverse and remand for further proceedings not inconsistent with this opinion.

REVERSED AND REMANDED.

In re the Marriage of Lori A. QUIRK–EDWARDS and Kirk R. Edwards.

Upon the Petition of Lori A. Quirk–Edwards, Appellant,

And Concerning Kirk R. Edwards, Appellee.

No. 93–09.

Supreme Court of Iowa.

Dec. 22, 1993.

In dissolution proceeding, former husband moved to modify decree to change physical custody of child from former wife to former husband. The District Court, Muscatine County, James R. Havercamp, J., granted motion. Former wife appealed. The Supreme Court, Snell, J., held that efforts of mother, who had physical custody of child, to deprive father of court-ordered visitation, constituted permanent material change of circumstances, and physical custody would thus be changed from mother to father.

Affirmed.

1. **Parent and Child** ⚿2(17)

Factors which Supreme Court considers, in determining whether removal of child from jurisdiction by custodial parent should be prevented, include reason for removal, location, distance, comparative advantages and disadvantages of new environment, impact on children, and impact on joint custodial and access rights of other parent.

2. **Divorce** ⚿303(2)

Efforts of mother, who had physical custody of child to deprive father of court-ordered visitation, constituted permanent material change of circumstances, and physical custody would thus be changed from mother to father; evidence was overwhelming that mother sought to deprive father of court-ordered visitation and there was no evidence she had any interest in improving that condition. I.C.A. §§ 598.1, subd. 1, 598.41, 598.41, subds. 1, 3, par. b.

3. **Divorce** ⚿298(1)

Siblings in dissolution actions should be separated only for compelling reasons.

4. **Parent and Child** ⚿2(18)

If visitation rights of noncustodial parent are jeopardized by conduct of custodial parent, such acts could provide adequate ground for change of custody.

Richard H. Zimmerman of Zimmerman Law Office, Iowa City, for appellant.

John Wunder, Muscatine, and Kirk R. Edwards, pro se, for appellee.

Considered by McGIVERIN, C.J., and LARSON, CARTER, SNELL, and TERNUS, JJ.

SNELL, Justice.

This appeal is from a modification of a dissolution decree whereby the physical custody of the parties' child was changed from the mother to the father. We affirm. In this equity action, involving the modification of child custody, our review is de novo. Iowa R.App.P. 4.

Lori A. Quirk–Edwards and Kirk R. Edwards were married on June 22, 1990. In March 1991, their child Bryce was born. The marriage was dissolved by the court's decree entered on January 31, 1992. During the hearings on the dissolution of marriage, considerable animosity between Kirk and Lori was evident. A disagreement on naming their child culminated in a decision by our court filed on August 25, 1993. *See In re Matter of Quirk*, 504 N.W.2d 879 (Iowa 1993).

The dissolution court awarded joint legal custody and gave physical custody to Lori

IN THE IOWA DISTRICT COURT FOR POLK COUNTY

LARRY PIERCE, Plaintiff, vs. CLYDE NELSON and JANICE NELSON, Defendants.	))))))))))	LAW No. CL 92-54493 ORDER

On March 11, 1994, a hearing was held on the issue of the reasonableness of the deposition fee of Dr. Rodney Johnson pursuant to remand of the Iowa Supreme Court in Pierce v. Nelson, 509 N.W.2d 471 (Iowa 1993). Plaintiff was represented by attorneys Tom Isaac and Mike Adams; Defendants by attorney Mark Sherinian. Dr. Johnson was represented by attorney Debra Tharnish, and Intervenor, Iowa Medical Society, was represented by attorney Richard Sapp. The Court after hearing arguments of counsel, considering the testimony submitted, and reviewing the file finds and orders as follows.

MOOTNESS

The issue of mootness was initially presented to the Court. At the commencement of the hearing, Plaintiff's counsel announced that his client was willing to pay the additional $250 in dispute to Dr. Johnson in order to resolve this controversy. Defendants then indicated that their previous offer to pay $250 toward Dr. Johnson's fee was withdrawn. Plaintiff's counsel then offered to pay the entire $500 fee so the litigation could move

forward and additional delay and expenses disputing the $500 fee could be avoided. Defendants objected to the Court determining that the matter was thus moot and requested that the evidentiary hearing proceed. While the Court believes that there is merit to Plaintiff's argument that the issue is moot, the Court will address the issue of reasonableness of the fees as directed by the Iowa Supreme Court.

PROCEEDINGS

The Iowa Medical Society filed a Motion to Intervene on February 14, 1994, for purposes of participating in the hearing on the deposition fee issue only. Defendants resisted by Motion to Dismiss. The Court granted the Motion to Intervene and denied the Motion to Dismiss.

Dr. Johnson also filed a Motion to Quash Defendants' subpoena requiring the Doctor's presence for the March 11, 1994, hearing. The Court, because of other case assignments, was unable to consider this matter before the March 11 hearing. Dr. Johnson did personally appear to testify as requested by Defendants. He was present for most of the four-hour hearing personally; presumably without compensation but with his own retained attorney present.

Dr. Johnson filed a Motion to Quash Defendants' subpoenas demanding production of personal financial information such as tax returns, financial statements, and clinic income statements. The Court granted the Motion to Quash. Such an invasive inquiry

into the personal finances of a treating physician witness is not necessary in order for the Court to have an adequate record on which to judge the reasonableness of a deposition fee. Defendants' requests were burdensome, overbroad, and unreasonably oppressive.

Dr. Johnson filed a Motion to Quash a subpoena served on him to take his deposition on March 7, 1994. Defendants' counsel insisted that the deposition take place before the March 11, 1994, hearing claiming the Doctor should no longer "hold up" this litigation. The delay in the litigation, however, has been the result of Defendants' interlocutory appeal. The Court was unable to address this Motion to Quash before March 7, 1994. Consequently, the deposition was held as Defendants requested.

Assistant U.S. Attorney John Beamer appeared at the March 11, 1994, hearing and filed a Motion to Quash on behalf of Deborah Bejarno, a federal employee, who was subpoenaed by Defendants on March 9, 1994. Ms. Bejarno is prohibited from providing the testimony requested pursuant to 45 C.F.R. section 2.3(a). After informal discussions between counsel, the witness, Ms. Bejarno, was released.

Attorney David Jenkins appeared at the March 11, 1994, hearing along with Jo Ann Nemmers and filed a Motion to Quash a Subpoena Duces Tecum served by Defendants on March 9, 1994, on Ms. Nemmers. The subpoena directed Ms. Nemmers to appear with certain business records and to testify at this hearing held

forty-eight hours after service of the subpoena. Ms. Nemmers is an employee of Principal Health Care. The documents requested concern fees negotiated with health care providers for specific services. In essence, Defendants were attempting to obtain expert witness testimony from a business unrelated to this litigation without the agreement of the witness or reasonable notice. The Court sustained Mr. Jenkins' Motion to Quash.

The Court then proceeded to hear testimony for over four hours on the issue of the deposition fee. Dr. Rodney Johnson was subpoenaed to be present at this hearing by Defendants and was present throughout the bulk of the hearing. Dr. Johnson testified as well as Ronda Montgomery, the office manager for Dr. Johnson's group, the Iowa Institute of Orthopaedics.

Dr. Johnson's actual deposition was taken by agreement of the parties on March 7, 1994. The deposition commenced at 5:10 p.m. and adjourned fifty-eight minutes later. The deposition was taken based on the agreement of counsel that Defendants would advance $250 toward the deposition fee while reserving the issue of the reasonableness of the fee for the Court to determine at this hearing. The deposition itself was admitted as an exhibit along with the doctor's medical records as a treating orthopedic surgeon of the Plaintiff for injuries Plaintiff sustained in the automobile collision which is the subject of this litigation.

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FACTS

Dr. Johnson is a medical doctor and an orthopedic surgeon who has been in the practice of surgery for fifteen years. His total medical education, including residency training, completed in 1979 consisted of twelve years. Dr. Johnson works full-time either in his office or performing surgery. In addition, he is on call on weekends and evenings and when necessary conducts emergency surgery after normal work hours.

Dr. Johnson's testimony and his affidavit indicate charges for various surgical procedures range from $815 to $3,750. The charges for procedures are determined by procedure and not on a strictly hourly basis. Therefore, the value of time taken away from the medical practice cannot be correlated directly to "billable hours." If medical services are computed on an hourly basis, Dr. Johnson's charges per hour range from $160 to $700 per hour.

Dr. Johnson gives depositions on the average of two times per month. His fee for a deposition, regardless of which side requests the deposition, is $500 per hour. He testified this was the fee set by his medical clinic prior to his joining the clinic. This fee has been the same since 1988. Dr. Johnson further testified that he is familiar with deposition fees charged in the Des Moines orthopedic medical community and $500 is a reasonable and comparable fee to that charged by other orthopedic surgeons. Dr. Johnson charges $500 per hour for an

independent medical examination which usually takes one hour. Depositions typically last a minimum of 45 minutes and can extend two hours or more.

Ronda Montgomery, office manager of Dr. Johnson's medical clinic, testified and submitted a detailed affidavit as to the charges of the clinic for various procedures. She testified that the clinic has participated in Iowa surveys of other orthopedic surgeons. The survey results indicate that their clinic fees are generally below the median range when compared to other orthopedic surgeons. She testified that she is familiar with the deposition charges for other orthopedic surgeons in the Des Moines area, and that Dr. Johnson's fee is reasonable and customary. She further testified as to the substantial overhead of the clinic.

Defendants presented the testimony of Cooper Parker as an expert witness. Mr. Parker is a graduate of the Harvard Divinity School and has some experience with HMOs. He testified generally that doctors' charges do not represent the amounts doctors actually receive. He further testified that certain third-party payors, including insurance companies, Medicare and HMOs, typically pay doctors less than their normal charge for various procedures. He also testified that charges to certain patients who are uninsured are not collectable.

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APPLICABLE LAW

Iowa Rule of Civil Procedure 125(f) governs the fees experts may charge during discovery. The rule states in pertinent part as follows:

> Unless manifest injustice would result, the court shall require that the party seeking discovery pay the expert a reasonable fee for time spent in responding to discovery under subdivisions (a)(2) and (b) of this rule. . . Any fee which the Court requires to be paid shall not exceed the expert's customary hourly or daily fee. . . I.R.C.P. 125(f). .

Specific standards which govern this Court's determination of the reasonableness of this fee have now been set forth in Pierce v. Nelson, 509 N.W.2d 471 (Iowa 1993). The Iowa Supreme Court approved the several factors test identified in Jochims v. Isuzu Motors, Ltd., 141 F.R.D. 493 (S.D. Iowa 1992). Those factors are as follows:

> (1) the witness's area of expertise;
>
> (2) the education and training required to provide the expert insight which is sought;
>
> (3) the prevailing rates of other comparably respected available experts;
>
> (4) the nature, quality and complexity of the discovery responses provided;
>
> (5) the fee actually being charged to the parties who retained the expert;
>
> (6) fees traditionally charged by the expert on related matters;
>
> (7) any other factor likely to be of assistance to the court in balancing the interests implicated by Rule 26.

See Jochims, 141 F.R.D. at 495-96.

The Iowa Supreme Court in Pierce went on to state that the "other factor" prong of this test is broad enough to allow evidence concerning the skill level of the treating physician, the disruption of being drawn into litigation, overhead costs, and the societal importance of the physician's practice. 509 N.W.2d at 474. The court stated that a treating physician's deposition fee should bear some reasonable relationship to the physician's customary hourly charge for patient care and consultation. Id. The court further stated that the fee charged by a treating physician should ordinarily be commensurate with the reasonable compensation lost by virtue of the doctor's required participation in the legal proceedings. Id. at 475.

The Court has carefully analyzed the Supreme Court's directives in this case and has applied the factors outlined by the Supreme Court.

Defendant's first position in this case was that Dr. Johnson should receive $150 as he was originally subpoenaed to give his deposition. Defendants claimed under Iowa Code section 622.72 the witness's fee could not exceed $150. This section caps at $150 the daily compensation for trial testimony which can be taxed as court costs. The Supreme Court in its opinion in Pierce specifically rejected Defendants' contention. 509 N.W.2d at 473.

At the first hearing on this matter, Defendants argued that $250 was the reasonable fee for Dr. Johnson. For purposes of this second hearing Defendants are now arguing in post-trial pleadings that $100 is the reasonable fee.

In applying the Supreme Court's analysis to the present issue, the burden of proof is on the Plaintiff to establish the reasonableness of the fee because Plaintiff filed the original Motion for Protective Order.

The bulk of Defendants' evidence and argument goes to the issue of the ultimate "collectibility" of medical fees. Defendants assert that many HMOs, insurance companies, and other third-party payors reimburse doctors significantly less than their normal fee. Defendants suggest that the Court should only extrapolate from the fees charged for office practice to determine the deposition fee. Defendants' arguments on these issues are not persuasive.

<u>CONCLUSION</u>

Applying the factors enunciated by the Iowa Supreme Court to the evidence presented, the Court finds that a $500 deposition fee for Dr. Johnson for the deposition of March 7, 1994, of fifty-eight minutes is reasonable and supported by the evidence. This fee is commensurate with the reasonable compensation lost by reason of his required participation in the legal proceedings. Although the Court has carefully considered all of the evidence and applied all portions of the analysis set forth by the Supreme

Court, of particular significance to this Court are the following facts:

1) Dr. Johnson is a medical doctor and an orthopedic surgeon and has had extensive education and training in his area of expertise.

2) Dr. Johnson's office has charged the $500 deposition fee since at least 1988.

3) The fee is the same regardless of which side requests the deposition.

4) Dr. Johnson's deposition provided information about the Plaintiff's medical condition and Dr. Johnson's opinions as the treating physician.

5) As shown by the evidence, a $500 per hour fee for a deposition of an orthopedic surgeon is customary for orthopedic surgeons in the Des Moines, Iowa, area.

6) Dr. Johnson's fees on related matters include a $500 charge for a one-hour IME.

7) By prior order of this Court, Defendants were not obligated to pay for any time Dr. Johnson spent reviewing the records or preparing for his deposition.

8) Dr. Johnson was assisting in a surgery and left halfway through the procedure to give his deposition testimony at the time scheduled.

While the Court understands and is concerned about outrageous expert fees causing skyrocketing of litigation costs, this particular deposition fee is not an example of an abuse of the system. This fee was not set to discourage involvement in litigation or to be burdensome on Defendants.

If cost control is an objective, Defendants should examine the costs of these extensive legal proceedings concerning a dispute over $250. Proceedings included an interlocutory appeal, numerous hearings before the trial court, a four-hour hearing on

the deposition fee, issuing subpoenas for the Doctor's personal financial records, numerous motions and responses, retaining an expert to testify about the fee, and subpoenas on Ms. Nemmers and Ms. Bejarno.

Further, this fee dispute arose after a similar issue was addressed by the trial court concerning the deposition of another treating physician, Dr. Koontz. When the Doctor first refused to agree to Defendants' fee, he was subpoenaed to Defendants' attorney's office for a deposition. Defendants then filed a Motion to Show Cause seeking to have the Doctor held in contempt. The costs of all of these legal proceedings are substantial.

One may also want to examine whether all of Plaintiff's treating doctors need to be deposed by Defendants in every case. The medical records may normally supply most needed information as to the treatments and opinions of the witness. Requesting an expert witness designation signed by the Doctor and insisting on detailed answers to questions on causation and extent of permanent injury may also eliminate the need for a doctor's deposition. Many depositions consistent of numerous questions which show the examiner's lack of knowledge of medical tests and procedures. Self study and careful review by the attorney of medical records could eliminate the length of or need for many doctor's depositions.

Attorneys and physicians are urged to follow the "Principles of Cooperation" adopted by the Iowa State Bar Association and the

Iowa Medical Society rather than engaging in extensive legal proceedings.

ORDER

IT IS THEREFORE ORDERED that the Defendants shall pay to Dr. Rodney Johnson a fee for his deposition in the amount of $500. To the extent the Defendants have already paid a portion of this fee, they shall promptly pay the remainder of the fee as ordered herein within 10 days of this order. Plaintiff shall pay any fees for Dr. Johnson's time in reviewing the medical records and preparing for the deposition. Costs for this hearing are taxed to Defendants.

Dated this 19th day of May, 1994.

DONNA L. PAULSEN, Judge
Fifth Judicial District of Iowa

Copies to:

✓Mike Adams & Tom Isaac
✓Deborah Tharnish
✓Richard Sapp
✓Mark Sherinian

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PHYSICIANS IN THE LITIGATION PROCESS

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September 1994

PANEL: Physicians in the Litigation Process

Hon. Donna L. Paulsen
Iowa District Court Judge
Des Moines, IA

Diane Kutzko, J.D.
Shuttleworth & Ingersoll, P.C.
Cedar Rapids, IA

James Turner, M.D.
Iowa Medical Clinic, P.C.
Cedar Rapids, IA

Louis D. Rogers, M.D.
Methodist Medical Plaza
Des Moines, IA

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PHYSICIANS IN THE LITIGATION PROCESS[1]

The purpose of this outline is to identify and address several of the key issues that arise and cause friction when physicians (or other health care providers) are involved in the litigation process, either as treater or experts. These are as follows:

(1) When an attorney seeks records pursuant to a written release, what records must be produced?

(2) When records are subpoenaed, what records will be produced?

(3) Are ex parte contacts with a treating physician by defense counsel permitted when plaintiff puts his or her physical condition at issue?

(4) How much can a physician charge in giving testimony?

Much of the friction occurs because healthcare providers are bombarded by requests for medical information, from various sources -- e.g., Medicaid, Medicare, third party payors, as well as lawyers. Further, many of these recordkeeping/confidentiality issues are fairly new for physicians, and are becoming increasingly complex.

While medical records in some form have been in existence since the beginning of the practice of medicine, policies, statutes and regulations concerning the maintenance and release of such

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[1]Because a number of guidelines concerning these issues are not found in readily available sources, the following are attached in the appendix: (1) Principles of Cooperation for Attorneys and Physicians; (2) Iowa Medical Society's Physician's Guide to Medical Records (reproduced with the consent of the Iowa Medical Society); (3) American Health Information Management Association Guidelines (reproduced with the Association's consent); and (4) proposed H.F. 516 (1993).

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records have not. See generally, George B. Trubow, Privacy Law and Practice, Matthew Bender (1989) Sec. 7.01(1). Until recently, i.e., the 1970's, the medical record was basically considered a business record of the physician's office, owned by the physician. The patient did not have any right to access to the record. The policy that patients have a right of access to their charts has evolved primarily via the "Patient Bill of Rights" of the American Hospital Association and the policy making arms of other professional organizations.[2]

Requests for information tie up the physician and staff -- not only in copying, but in determining what in a medical record can be produced within the scope of whatever release has been provided. Further, there is much legal uncertainty -- many regulations,

[2]There is little legal precedent concerning the scope of a patient's access. The AMA and Iowa Medical Society have stated that while the physician owns the medical record, the patient has a right to a copy of that record. See Iowa Medical Society, "Physician's Guide to Medical Records," 1994, Exhibit 2. The physician is permitted to charge the patient a reasonable fee, but cannot deny the patient a copy if he or she is unable to pay. Further, a physician cannot hold the record hostage because of an unpaid bill. Id.

particularly in the context of "specially protected information"[3] -- with little case law interpreting them.

There is no one given legal definition of what constitutes a medical record.[4] Because there is little law on the issue, there is also a split among lawyers -- with trial lawyers focussing on the practicalities and exigencies of litigation and its cost, and lawyers representing providers focussing generally on patient confidentiality and potential liability for unwarranted disclosure of confidential information. Because of the legal uncertainty, the provider tends to get caught in the middle of these issues.

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[3]Mental health treatment, AIDS, and drug treatment records are specially protected under state and/or federal legislation. The laws are such that a recordkeeper, in the absence of a specific consent, should ideally go through a patient's chart to determine whether it contains such information before release, or identify such records in some manner that still preserves patient confidentiality within the office. <u>See</u> Chapter 141 Code of Iowa (AIDS); Chapter 228 Code of Iowa (mental health information); 42 CFR §§2.1-2.67, implementing 42 U.S.C.A. §290-3 (substance abuse records). Further there is much ambiguity as to what constitutes such protected records. E.g., Does anecdotal information concerning depression constitute mental health information under Chapter 228 Code of Iowa? Probably not -- although there is no case law. However, if the physician <u>treats</u> the patient for such symptoms -- e.g., prescribes an antidepressant, those records probably constitute mental health records under Chapter 228. These are difficult determinations for office staff to make.

[4]§22.7 Code of Iowa, Examination of Public Records (Open Records), defines as confidential records "Hospital records, medical records, and professional counselor records of the condition, diagnosis, care, or treatment of a patient or former patient or a counselee or former counselor, including patient." This section applies only to custodians of public records, i.e, the state and other governmental entities. Further, a patient's records may contain much extraneous information--divorce pleadings, employer information, and fragments of records from other providers, giving rise to the problem, discussed below, of what should be produced when a request for release of medical information is received.

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subpoena under the relevant federal regulations. 42 CFR §§2.1-2.67, implementing 42 U.S.C.A. §290-3. While the statute covering AIDS, Chapter 141 Code of Iowa, does not specifically address whether such records are subject to subpoena, because of the high confidentiality protection of such records in general under that statute, such records will generally not be produced by the physician unless the subpoena explicitly covers such records, or unless a court order is obtained. Chapter 228, Code of Iowa, provides that mental health treatment information may be disclosed without consent when the individual's mental health or emotional condition is offered as "an element of a claim or defense." Section 228.6(1)(4). As noted above, this puts the physician in a difficult position in that it apparently places the burden on the physician to verify that the patient's condition is indeed at issue (which may be disputed by the plaintiff/patient's counsel).

5. As with records produced pursuant to a written consent, there is some controversy as to what records should be produced pursuant to subpoena -- those of the provider or all records contained in that provider's chart. The American Health Information Management Association's guideline concerning redisclosure suggests the facility should produce only its own records pursuant to subpoena, and is probably contrary to Iowa law. See Exhibit 3. In Hampton Clinic v. Iowa District Court, 300 N.W. 646 (Iowa 1940) the Iowa Supreme Court held that the Clinic had the duty to produce hospital records contained in its chart pursuant to

a request to produce; presumably the duty would be the same pursuant to subpoena.

(3) Are ex parte contacts with a treating physician by defense counsel permitted when plaintiff puts his or her physical condition at issue?

The Iowa Supreme Court in Roosevelt Hotel Ltd. v. Sweeney, 394 N.W.2d 353 (Iowa 1986) held that a defendant did not have a right to compel ex parte communications with a treating physician. The Court in Sweeney did not hold that voluntary communications were prohibited.[7] The federal courts have taken a contrary position, basing the result on the fact that Plaintiff has placed his or her physical condition at issue. See e.g, Doe v. Eli Lilly & Co., Inc., 99 FRD 126 (D.C.D.C 1983). There have been several unreported federal district court decisions in Iowa upholding voluntary ex parte contacts. However, while there appears to be no legal or ethical prohibition for an attorney to contact a treating physician who voluntarily will communicate with the attorney, the concern among physicians is that there may be potential liability for breaches of confidential information.[8]

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[7]Sweeney arose in a non-worker's compensation context. Such contacts are expressly permitted in the worker's compensation setting to the extent the communication involves relevant judicial information. See Morrison v. Century Engin., 434 N.W.2d 874 (Iowa 1989).

[8]In the joint "Principles of Cooperation for Attorneys and Physicians" issued in 1993 by the Medical Society and the Bar Association, Exhibit 1, an attempt was made to balance these competing concerns. Paragraph 9 of the "Principles," provides in non-workers' compensation cases,

> "where the plaintiff's medical condition is at issue, although there is no legal prohibition against private

(4) How much can a physician charge in giving testimony?

This is probably the most volatile issue with regard to physician/attorney relationships.[9] Like many other issues in this area, until recently there was no Iowa law concerning this.[10] In Pierce v. Nelson, 509 N.W.2d 471 (Iowa 1993), the Iowa Supreme Court applied a test originally articulated by then Magistrate Bennett in Jochims v. Isuzu Motors, Ltd., 141 FRD. 493 (S.D. Iowa 1992) (a non-medical expert case). The relevant factors in determining a testifying physician's fee are: (1) the witness's area of expertise,; (2) education and training; (3) prevailing rates of other comparably respected available experts; (4) nature, quality and complexity of the discovery responses provided; (5) the fee actually being charged to the party who retained the expert; (6) fees traditionally charged by the expert on related matters.

> conversations between a physician and opposing counsel concerning the plaintiff's medical condition, the physician should exercise caution consistent with the physician's duty of confidentiality to the patient. Private conversations between the physician and opposing counsel should be limited to information related to the medical condition at issue."

This statement is currently being reevaluated because there is some concern that it does not give physicians enough guidance.

[9]With the possible exception of what constitutes a "reasonable" fee for producing medical records. In the 1993 legislative session, a bill was introduced which would have put a statutory cap on copying fees that a health care provider could charge. See H.F. 516, the relevant portion of which is attached as Exhibit 4. This was ultimately tabled with the hope that some consensus could be worked out on this issue without legislative intervention.

[10]This issue is addressed at length elsewhere in these materials by the Honorable Donna Paulsen, who was the trial judge in Pierce v. Nelson.

The Court in Pierce further relied with approval on the Principles of Cooperation, which provides that a physician may

> "expect reasonable compensation for testimony given as an expert or treating physician either by deposition or in court. It is reasonable that the compensation reflect the time away from medical practice. . ."

509 N.W.2d at 475.

The U.S. district court for the Southern District of Iowa has taken a similar approach. In Hose v. Chicago & Northwestern Transp., 145 F.R.D. 222 (S.D. Iowa 1994), then Magistrate Judge Bennett held that $800 per hour as a fee charged by a treating neurologist was grossly excessive. (The defendant stipulated it would pay $400 per hour; the court indicated that but for that agreement, it would have awarded a fee of $220 per hour, twice the fee the neurologist believed was appropriate for time spent reviewing medical records.) The court further found that the expert could charge a reasonable fee to defendant for preparation. This appears to be precluded under Iowa law by the express wording of Rule 125 I.R.C.P. (f).

CONCLUSION

The relationship between physicians and lawyers in the litigation process can be a difficult one, increasing expense both for the parties, and for physicians who often get caught in disputes between the parties concerning requests for medical information. Although it does not necessarily eliminate future expense in litigating these issues, the recent developing law in this area adds some measure of clarity.

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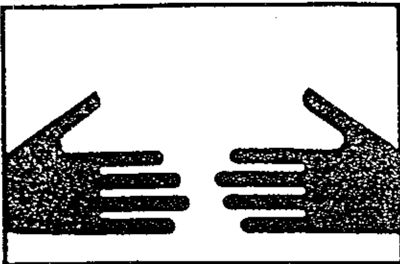

A guideline for
day-to-day
professional dealings

Approved by the
Iowa Medical Society
and the
Iowa State Bar Association

1993

PRINCIPLES OF COOPERATION

for

Attorneys and Physicians

Exhibit 1

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Joint Statement of Purpose

"The cooperation of physicians and attorneys in our day-to-day professional dealings is essential to the smooth operation of the legal system. It is also in the best interest of our patients and clients. In an effort to enhance cooperation and understanding between attorneys and physicians, the Iowa Medical Society and the Iowa State Bar Association have adopted the 17 principles contained in this document."

Approved by the Iowa Medical Society
and the Iowa State Bar Association

As a general proposition,

- a **physician** should understand that medical testimony is frequently indispensable to prove or disprove the nature and extent of injuries. Therefore, if litigation ensues, a physician has the responsibility to cooperate in the litigation process.

- an **attorney** has a corresponding duty to recognize that a physician providing information or testimony in either treating or expert capacity should be accommodated to the extent possible and with a minimum disruption to the physician's practice.

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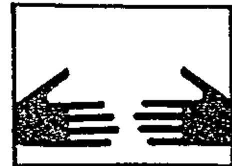
Medical Records and Reports



1 All requests for medical records and reports by attorneys and the furnishing of medical records and reports by physicians should be in compliance with applicable federal and state statutes, rules of civil procedure, case law, and ethical principles of both professions.

2 Except in worker's compensation cases where disclosure is automatically authorized by state law upon proper verification that a claim has been made, when medical records are requested by the patient's attorney or opposing counsel, the request must be in writing and must be accompanied by a legally sufficient written authorization from the patient, or the patient's legal representative. Specific consent must be given for mental health records, drug/alcohol treatment records, and HIV/AIDS-related records. If all records in the possession of the physician are requested, the signed written authorization must specifically address and authorize disclosure of the mental health records, drug/alcohol treatment records, and HIV/AIDS related records, in addition to the general request for any other medical records.

3 All original records of an attending physician made in connection with the treatment and care of the patient are the property of the physician, including radiographs and reports of diagnostic and therapeutic procedures. However, the patient is entitled to receive a copy of any or all of the patient's medical records upon request and in a timely manner.

4 A physician may assess a reasonable charge for providing the requested records or reports to either the patient's attorney or opposing counsel.

5 In the case of medical records, the reasonable charge should include only copying costs and a charge that reflects the actual time spent by the office staff and the physician in reviewing the records and processing the request.

6 In the case of medical reports, the reasonable charge should include compensation for the actual time spent by the physician in reviewing the records, formulating an opinion and drafting the report and the actual time spent by the physician's office staff in typing and processing the report.

7 Upon written request, the patient or the patient's attorney (as agent) is entitled to a prompt report from the attending or treating physician concerning the patient's history, physical examination, diagnostic studies, diagnosis, treatment and prognosis. The physician may assess a reasonable charge for this service in accordance with paragraphs 4 and 6

8 If a patient's attorney requests medical records or reports, the patient has the responsibility for payment to the physician, but the patient's attorney has the responsibility of seeing that the payment is promptly made. The physician may consider the patient's ability to pay in assessing the charge.

9 In worker's compensation cases, disclosure of patient medical records and informal contact between the physician and counsel for both the patient-employee and the employer is expressly permitted by statute and a written patient authorization is not required. However, in all other types of pending litigation where the plaintiff's medical condition is at issue, although there is no legal prohibition against private conversations between a physician and opposing counsel concerning the plaintiff's medical condition, the physician should exercise caution consistent with the physician's duty of confidentiality to the patient. Private conversations between the physician and opposing counsel should be limited to information related to the medical condition at issue.

PRINCIPLES OF COOPERATION FOR ATTORNEYS AND PHYSICIANS

1993

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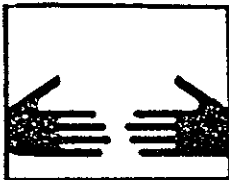
Medical Testimony



10 The physician has the right to expect reasonable compensation for testimony given as an expert or treating physician, either by deposition or in court. It is reasonable that the compensation reflect the time away from the physician's medical practice during both preparation and actual testimony. This is best accomplished by an hourly fee; however, should the physician wish to charge a flat fee, that fee must be based on a reasonable calculation of the anticipated overall time the physician will spend in preparation and testimony.

11 Ethically, payment of fees for medical testimony cannot be contingent upon the outcome of the litigation.

12 Upon reasonable notice, a physician should make himself or herself available to give oral testimony, either by deposition or in court. Physicians are encouraged to recognize the benefits to the judicial process provided by the live testimony of witnesses in evaluating requests of attorneys for their appearance at trial.

13 Attorneys and physicians should appreciate that each has continuing and often unpredictable responsibilities to their clients and patients. Further, the courts' dockets cannot be governed by the convenience of the litigants, attorneys or witnesses, includingphysicians. Recognizing these facts, physicians and attorneys should work to minimize delay and inconvenience in scheduling depositions and trial testimony.

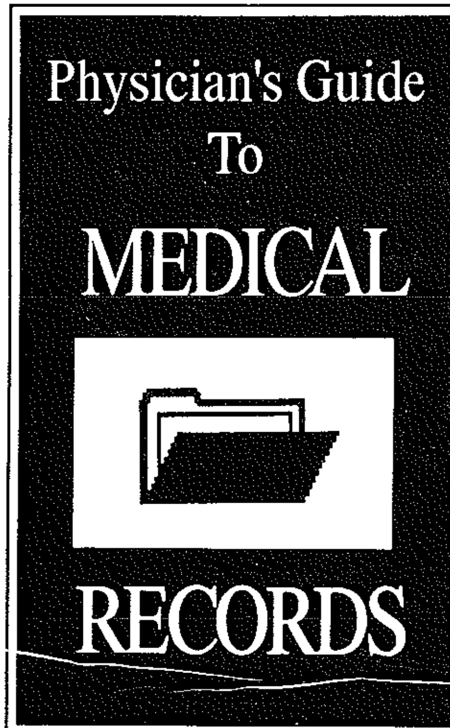
14 The physician should recognize the attorney's responsibility to prepare the client's case. Reasonable opportunity should be given for the patient's attorney to confer with the physician. In a case where there may be conflicting medical opinions, care should be taken that the physicians testifying not be in practice with each other.

15 If scheduled medical testimony is cancelled, the physician may be entitled to charge a fee. Such a charge should be reasonable under all the circumstances, including the reason for the cancellation.

16 If a subpoena is viewed as necessary or appropriate by the attorney, the physician, if practicable, should have reasonable advance notice that a subpoena will be served compelling the physician's testimony at some predetermined time and place.

17 Notwithstanding the foregoing, it is understood that physicians retain the sole right to set their own charges for the services they render. Nothing contained in these Principles of Cooperation shall be construed as authorizing or approving any other policy or cooperative statements concerning the charges or fees that may or may not be assessed by physicians for their services. There is no agreement, express or implied, between the Iowa Medical Society and the Iowa State Bar Association or any other organization, entity or individuals involved in developing or approving these Principles of Cooperation concerning the amount of such charges or the method for determining the same.

•Do medical records belong to me or my patients? •Do parents have unlimited access to a minor's records? •What about records containing HIV test results? •Should I get written authorization to release records? •What are the rules for mental health information? •Are there special rules for people under treatment for substance abuse? •What about notes made during treatment? •Can I release records for morbidity or mortality studies?



•When do I need to consult an attorney about my patient records? •How long should I keep medical records in my office? •Are there patients whose medical records pose special problems? •Is there a special procedure for destroying medical records?

Exhibit 2

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1994 Physician's Guide to Medical Records

An Iowa Medical Society Publication
Distributed through IMS SERVICES

This guide contains information for Iowa physicians covering certain legal and ethical implications of medical record management. The emphasis in this reference document is placed on two specific and important aspects of record administration: release of medical records and retention of medical records. There are additional key aspects in handling patient data which are important in medical practices — clarity, conciseness, timeliness of preparation, methods of recording, etc. The adoption and periodic review of record handling policy is recommended for all medial practices.

The statutes cited in this guide are those in effect as of January 1, 1993. Statutes or regulations can be misinterpreted when viewed in isolation and the full text of the relevant statutes or regulations must be considered. Statutes and regulations are subject to amendment and judicial interpretation. Federal laws may also need to be considered in a specific situation.

Physicians are advised to consult an attorney knowledgeable in health care law for answers to questions of special importance.

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#1 RELEASING MEDICAL RECORDS

What issues should Iowa physicians consider when a patient record is requested?

Physicians should be aware of legal and ethical considerations when supplying information from their records. The Iowa Medical Society Judicial Council has directed that this information be prepared for reference use by member physicians and others.

Release to Patient

There are two major areas of concern regarding release of medical records. One involves access by the patient to medical records. The second is the circumstances under which records may be released to a third-party.

Generally, medical records are recognized as the property of the physician or the health care facility. However, many states recognize the patient has a legitimate interest in the information contained in the records. Therefore, it is suggested that physicians ordinarily release a copy or a summary of a patient's records to the patient upon presentation of appropriate written authorization.

If a physician has sound reasons for believing access to the records would be injurious to the patient's health or well-being, direct patient access may be denied. It may be possible to provide the patient with a summary of the record which will meet his or her needs without causing harm; or the physician may provide copies of the medical record (with proper written authorization from the patient) to a designated representative of the patient, such as an attorney.

Records to Minors

A request for access to or release of a minor patient's records should be made by a parent or legal guardian. There are some circumstances, however, involving such matters as pregnancy, AIDS/HIV infection, sexually-transmitted disease or substance abuse, where a physician may be exposed to potential liability for releasing a minor's medical records to a parent or guardian. The physician should consult an attorney.

Nature of Written Authorization

A written authorization should be obtained before releasing records to a patient. It should indicate the patient has requested release of the records and be dated. It should be signed by the patient and indicate the portion or portions of the record authorized to be released, who the records are to be provided to and the name of the person who actually released the records to the patient with the date of the release. Only in exceptional circumstances should original records be given to the patient. In the usual case, copies should be provided.

Physicians may establish reasonable charges for the costs of copying, but a patient should not be denied copies because of inability to pay. Nor should access to the records be denied because of an unpaid bill for medical services. The records should be given to the patient within a reasonable time.

Release to Other Parties

Release of medical records to someone other than the patient is primarily a question of maintaining the confidentiality of the physician-patient relationship.

The AMA Judicial Council says a patient's medical record *"is a confidential document involving the physician-patient relationship and should not be communicated to a third-party without the patient's prior written consent, unless required by law or to protect the welfare of the individual or the community."* **Current Opinions of the Judicial Council of the American Medical Association, Section 7.02 (1992)**

Reports Required by Law

Records may be released to third parties without the patient's consent (without the parent's or guardian's consent in the case of a minor) in specific circumstances. Iowa's child abuse and dependent adult abuse laws require physicians and other mandatory reporters to cooperate with the Department of Human Services in investigation of abuse reports.

Physicians are immune from liability for cooperating in good faith with an investigation and may release records to a Department of Human Services investigator. **Iowa Code, Sections 232.67 et seq. and 235B.1 et seq. (1993)**

Only in exceptional circumstances should original records be given to the patient.

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Physicians are required by law to report cases of certain communicable diseases and sexually transmitted diseases. **Iowa Code, Sections 139.2 and 140.4 (1993) and 641 Iowa Administrative Code 1.2 et seq.**

Physicians are also required to report gunshot or stab wounds or other serious bodily injuries to a law enforcement agency. **Iowa Code, Section 147.111 (1993) as amended by Acts of the 75th General Assembly, HF 451.**

Aspects of Confidentiality

Iowa law recognizes the ethical duty of confidentiality in a statute which bars physicians from giving testimony which would disclose confidential communications unless the patient waives his right to nondisclosure or unless certain other specified requirements are met. **Iowa Code, Section 622.10 (1993)**

This statute, however, applies only to testimony. There is no law governing disclosure of non-public general medical records, although special provisions exist with regard to medical records involving AIDS/HIV infection, mental illness and substance abuse as described below.

Unauthorized release of a patient's records can subject a physician to license discipline by the Board of Medical Examiners.

The unauthorized release of a patient's records can subject a physician to license discipline by the Board of Medical Examiners and has been recognized by the courts in a number of states as the basis for imposing civil liability.

Prompt Consideration of a Request

When a patient requests that records be transferred to another physician, the request must be honored promptly. Again, the request should be made by the patient in writing unless a medical emergency exists. If the originals of the records are transferred, the physician should retain a complete copy of the records with a notation of the date the records were transferred and the name of the physician who received the records.

It is impossible to anticipate all circumstances under which a patient might request records be provided to a third-party. Typical situations include requests by insurance companies, employers, or attorneys. In all circumstances, absent a court order or medical emergency, the physician should obtain, prior to release of the records, a waiver signed by the patient designating the name of the party to receive the records. The records should be sent only to the party named in the release.

In the third-party situation, as in the case of direct patient access, a patient's request for release of records should never be denied because of an unpaid bill.

AIDS Information

A physician who has information which identifies a person who has been tested for HIV, or the results of the test, may not disclose the information in a manner which permits identification of the subject of the test, with the following exceptions:

1. The information may be provided to the subject of the test or the subject's legal guardian when the physician is carrying out his or her responsibility to notify the legal guardian of a minor when the test result is positive. **Iowa Code, Sections 141.23 (a) (a) and 141.22 (6) (1993)**

2. The information may be provided to any person who secures a written release of test results executed by the subject of the test or the subject's legal guardian. **Iowa Code, Section 141.23 (1) (b)**

3. The information may be provided to an authorized agent or employee of a health facility or health care provider if: (a) the health facility or health care provider ordered or participated in the testing, or (b) is otherwise authorized to obtain the test results, or (c) the agent or employee provides patient care or handles or processes specimens of body fluids or tissues and the agent or employee has a medical need to know such information. **Iowa Code, Section 141.23 (1) (c) (1993)**

4. The information may be provided to licensed medical personnel providing care to the subject of the test, when knowledge of the test results is necessary to provide care or treatment. **Iowa Code, Section 141.23(1) (d) (1993)**

5. The information may be provided to the Department of Public Health in accordance with statutory reporting requirements for an HIV-related condition. **Iowa Code Section 141.23 (1) (e) (1993)**

6. The information may be provided to a health facility or health care provider which procures, processes, distributes, or uses a human body part from a deceased person with respect to medical information regarding that person, or semen provided prior to July 1, 1988, for purposes of artificial insemination. **Iowa Code, Section 141.23 (1) (f) (1993)**

7. The information may be provided pursuant to a court order which was issued in compliance with statutory provisions. **Iowa Code, Section 141.23(1) (g) et seq. (1993)**

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8. The information may be provided to an employer, if the test is authorized to be required under provisions of law. **Iowa Code, Section 141.23 (1) (h) (1993) See Iowa Code, Section 216.6 (1) (d) (1993) for a possible example.**

9. The information may be provided to an emergency care provider who incurred a "significant exposure" and reported it to the physician if the patient was delivered to the physician's office or clinic and the patient consents in writing. **Iowa Code, Section 141.22A and 641 Iowa Administrative Code 11.45 et seq.**

A person to whom the results of an HIV-related test have been disclosed may not disclose the test results to another person unless pursuant to one of the exceptions listed above.

If disclosure is to be made pursuant to one of the exceptions, the disclosure must be accompanied by a statement in writing which includes the following or substantially similar language:

"This information has been disclosed to you from records whose confidentiality is protected by state law. State law prohibits you from making any further disclosure of the information without the specific written consent of the person to whom it pertains, or as otherwise permitted by law. A general authorization for the release of medical or other information is not sufficient for this purpose.

Oral disclosure must be accompanied or followed by a written notice within 10 days. **Iowa Code, Section 141.23 (3) (1993)**

Physicians must be particularly careful in releasing medical records containing HIV-related test results. The written authorization for the release of AIDS or HIV-related information by the subject of the test (or the subject's legal guardian) must be more than a general release form. It must specifically include approval for the release of HIV-related test information and must be accompanied by a written statement regarding redisclosure set out above.

Release of information authorized by law without a written consent requires absolute compliance with the law. It is recommended that you consult with an attorney with respect to specific cases.

To assure proper authorization for the release of medical records containing HIV-related test results, physicians are advised to have all patients sign separate authorization forms for the release of AIDS or HIV-related information when records are to be released, or utilize release forms which include clearly identified sections authorizing the release of AIDS or HIV-related information.

All patients whose records are to be released should sign these forms unless the physician has developed a safe, confidential system for identifying medical records which contain HIV-related test results. Such a system would alert the physician and medical records staff when authorization for release of AIDS or HIV-related information must be obtained.

Record Keeping System

The IMS Committee on AIDS has studied medical record keeping systems appropriate for identifying records which contain HIV test results. The committee believes information related to HIV testing should remain a part of the patient's full medical record. It has identified 2 record keeping options.

Option 1: Patient records which include HIV test results and related information can be specially tagged. To assure confidentiality, tags may be developed which are not visible until the file is opened.

Option 2: HIV test results and related information can be placed in a separate envelope or folder within the patient's medical record.

Releasing information pursuant to a general release form presented by a third-party and signed by a patient (where the medical record contains HIV-related test results) is a dilemma. By notifying the third-party that the records provided are not complete due to insufficient authorization under state law, the patient's right to confidentiality may be indirectly violated.

Instead, the physician should contact the patient and request him or her to sign a special authorization for the release of the AIDS or HIV-related information in order to fully comply with the request of the third-party. If the patient does not sign the release, the physician is prohibited by law from releasing that portion of the record.

The physician's legal counsel should be advised of the record keeping process and should review the authorization forms used for release of HIV-related test information.

Third Party Notification

Iowa law does allow physicians under specific and limited circumstances to notify third-parties directly or through the Department of Public Health who may have been exposed to HIV infection without the consent of the patient when the physician believes in good faith that there is imminent danger of infectious transmission to the third party and the

The committee believes information related to HIV testing should remain a part of the patient's full medical record.

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physician believes in good faith that the patient will not notify the third party. The law and applicable regulations must be strictly complied with.

It is strongly recommended that you consult with an attorney with respect to specific cases. **Iowa Code, Section 141.6 (1993) 641 Iowa Administrative Code 11.40 et seq.**

Mental Health Information

Iowa law protects the confidentiality of information relating to mental health patients, and the law on disclosure of mental health information is complicated.

Iowa physicians who must provide mental health information to third-parties should consult legal counsel to assure a proper process for administration of such disclosures.

Release of mental health information can be made pursuant to a voluntary written authorization

Disclosure of covered records is prohibited unless one of 3 broad exceptions exists. These exceptions include voluntary disclosures; administrative disclosures; and judicial and statutory disclosures.

Special procedures are also established for disclosure for claims administration and peer review, and for the release of some information on individuals who are hospitalized for mental illness in certain circumstances. **See Iowa Code, Chapter 228 (1993)**

Upon disclosure of mental health information pursuant to any of these exceptions, the person disclosing mental health information must enter and maintain a notation on the individual's mental health record stating the date of the disclosure and the name of the recipient of the mental health information.

The person disclosing mental health information must give the recipient of the information a statement that (1) disclosure may only be made pursuant to the written authorization of the individual or the individual's legal representative, (2) the unauthorized disclosure of mental health information is unlawful and (3) civil damages and criminal penalties may be applicable to the unauthorized disclosure of mental health information.

The recipient of the mental health information may not disclose the information except as specifically authorized by law.

The information may be transferred to another facility, physician, or mental health professional in cases of medical emergency, or if requested in writing by the patient or patient's legal representative, for the purpose of receiving medical or mental health professional services.

The person transferring the information must also note the transfer in the record and provide the cautionary statement to the recipient. **Iowa Code, Section 228.2 (1993)**

Exceptions

Voluntary Disclosures — Release of mental health information can be made pursuant to a voluntary written authorization which meets all the following requirements:

1. Is voluntarily signed by a patient who is 18 years of age or older or the patient's legal representative.

2. Specifies the nature of the information to be disclosed, the persons or types of persons authorized to disclose the information, and the purposes for which the information may be used both at the time of the disclosure and in the future.

3. Advises the individual of his/her right to inspect the disclosed information at any time.

4. States that the authorization may be revoked and the conditions of revocation.

5. Specifies the length of time for which the authorization is valid and whether the authorization is renewable.

6. Contains the date the authorization was signed.

A copy of the authorization must be given by the patient or the patient's legal representative and be placed in the patient's medical record. **Iowa Code, Section 228.3 (1993)**

Judicial and Statutory Disclosures — Iowa law authorizes certain disclosures to the extent necessary to comply with special requirements relating to involuntary hospitalization of a mentally ill person, reimbursement of services provided by state mental health institutes, preparation and approval of community mental health center budgets, submission of evidence in civil or criminal judicial proceedings relating to child abuse, juvenile court records, and compulsory disclosure or reporting requirements of other state or federal laws relating to the protection of human health and safety.

Mental health information may be disclosed pursuant to court rules by a physician who performs a court ordered examination. Mental health information may also be disclosed to the extent necessary to initiate or complete involuntary mental health

hospitalization commitment proceedings Further mental health information may be disclosed in a civil or administrative proceeding when the mental or emotional condition of an individual 18 years of age or older is offered by the individual or the individual's legal representative as evidence of the individual's mental or emotional condition as an element of a claim or defense. **Iowa Code, Section 228.6(1993)**

Administrative Disclosures — Certain administrative disclosures are allowed without written authorization.

In-house disclosures to employees or agents of the same mental health facility are permitted if and only "to the extent necessary to facilitate the provision of professional services." An individual or the individual's legal representative must be informed that information may be so disclosed. Disclosures to employees or agents of the same facility are otherwise prohibited.

Disclosure of administrative information necessary for the collection of a fee to a person or agency providing collection services is permitted after a patient 18 years of age or older or his or her legal representative has received written notification that a fee is due and has failed to arrange for payment of the fee within a reasonable time. "Administrative information" is limited to only the patient's name, ID number, age, sex, address, dates and character of services, fees, name and location of the facility, date of admission and the name of the attending physician

Disclosures are also permitted for scientific research, management audits, or program evaluations to persons who have demonstrated and provided written assurance they will comply with the law and not redisclose any patient identifying information they receive. Physicians making such disclosures should have a clear written agreement by the recipient to protect the confidentiality of the records. **Iowa Code, Section 228.5 (1993)**

Disclosure for Claims Administration and Peer Review — Mental health information may be disclosed to a third-party payer or to a peer review organization with prior written authorization of the patient or the patient's legal representative if the third party payer or peer review organization has filed a written statement with the Iowa Insurance Commissioner which complies with the statute The written authorization should include all information required for voluntary disclosure **Iowa Code, Section 228.7 (1993)**

Persons Hospitalized for Mental Illness

Records maintained by a hospital or other facility relating to the examination, custody, care and treatment of a hospitalized mentally ill person are confidential, except the chief medical officer must release information if (1) the person about whom the information is sought signs a written waiver for release of the information to a licensed physician, attorney, or advocate; (2) the information is sought by court order; or (3) the patient (or his guardian, if he is a minor or legally incompetent) signs an informed consent to release the information. In the latter case, the consent must designate specifically the person or agency to whom the information is to be sent.

The chief medical officer may release "appropriate information" during a consultation with the next of kin of a mentally ill patient if requested by the next of kin, and if the chief medical officer deems it to be in the best interest of the patient and the next of kin to do so **Iowa Code, Chapters 228 and 229 (1993)**

Substance Abuse Information

There are special laws on release of medical records pertaining to persons who have received treatment for substance abuse at a hospital or other facility. Although state [Iowa Code, Section 125.37 (1993)] and federal laws and regulations relating to release of substance abuse information are directed toward substance abuse treatment facilities, physicians are advised to include within their written authorizations language specifically permitting release of substance abuse information

Federal regulations require treatment facilities to include specific information in the patient's written authorization for the release of substance abuse information. This information includes: the name or general description of the program or person permitted to make the disclosure; name or title of the person or organization to which the disclosure is to be made; name of the patient; the purpose of the disclosure; how much and what kind of information is to be disclosed; a statement that the consent is subject to revocation at any time except to the extent that action has already been taken in reliance on it; a specification of the date, event or condition upon which the consent will expire without express revocation (the

> There are special laws on release of medical records pertaining to persons who have received treatment for substance abuse

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authorization should be valid no longer than necessary); the date the consent is signed; and the signature of the patient or person authorized to give when required for a minor or a patient who is incompetent or deceased. **42 Code of Federal Regulations, Section 2.31.**

In addition, any information disclosed by a facility must be accompanied by the following statement prohibiting redisclosure:

"This information has been disclosed to you from records, protected by Federal confidential rules (42 CFR Part 2). The Federal rules prohibit you from making any further disclosure of this information unless further disclosure is expressly permitted by the written consent of the person to whom it pertains or as otherwise permitted by 42 CFR Part 2. A general authorization for the release of medical or other information is NOT sufficient for this purpose. The Federal rules restrict any use of the information to criminally investigate or prosecute any alcohol or drug abuse patient." **42 Code of Federal Regulations, Section 2.32**

Medical reports should not be withheld because of an unpaid bill for medical services.

Morbidity and Mortality Studies

Iowa law provides that any person, hospital or other organization may provide information, interviews, reports, statements, memoranda or other data relating to the condition and treatment of any persons to the Iowa Department of Health, the Iowa Medical Society or any of its allied medical societies, the Iowa Osteopathic Medical Association or any in-hospital staff committee, to be used in the course of any study for the purpose of reducing morbidity or mortality.

If records are released to these groups for the purpose of such a study, no liability of any kind for damages or other relief can arise or be enforced against any person or organization by reason of having provided such information or material. **Iowa Code, Section 135.40 (1993).**

Caveat The specific provision of law and regulation concerning AIDS information, Iowa Code, Section 141.8, 141.10, 141.23A (1993); mental health information, Iowa Code, Section 228.5(3) (1993) and substance abuse, 42 Code of Federal Regulations 2.52 should be consulted.

Medical Records...AMA Opinions

The following are excerpts from the Current Opinions of the Judicial Council of the American Medical Association, (1992).

7.01 Records of Physicians: Availability of Information to Other Physicians. The interest of the patient is paramount in the practice of medicine, and everything that can reasonably and lawfully be done to serve the interest must be done by all physicians who have served or are serving the patient. A physician who formerly treated a patient should not refuse for any reason to make his records of that patient promptly available on request to another physician presently treating the patient.

Proper authorization for the use of records must be granted by the patient. Medical reports should not be withheld because of an unpaid bill for medical services. (IV)

7.02 Records of Physicians: Information and Patients. Notes made in treating a patient are primarily for the physician's own use and constitute his personal property. However, on request of the patient a physician should provide a copy or a summary of the record to the patient or to another physician, an attorney, or other person designated by the patient.

Several states have enacted statutes that authorize patient access to medical records. These statutes vary in scope and mechanism for permitting patients to review or copy medical records. Access to mental health records, particularly, may be limited by statute or regulation. A physician should become familiar with the applicable laws, rules or regulations on patient access to medical records.

The record is a confidential document involving the physician-patient relationship and should not be communicated to a third party without the patient's prior written consent, unless required by law or to protect the welfare of the individual or the community.

Medical reports should not be withheld because of an unpaid bill for medical services. Simplified, routine insurance reimbursement forms should be prepared without charge, but a charge for complicated or multiple reports may be made in conformity with local custom.

hospitalization commitment proceedings. Further mental health information may be disclosed in a civil or administrative proceeding when the mental or emotional condition of an individual 18 years of age or older is offered by the individual or the individual's legal representative as evidence of the individual's mental or emotional condition as an element of a claim or defense. **Iowa Code, Section 228.6(1993)**

Administrative Disclosures — Certain administrative disclosures are allowed without written authorization

In-house disclosures to employees or agents of the same mental health facility are permitted if and only "to the extent necessary to facilitate the provision of professional services." An individual or the individual's legal representative must be informed that information may be so disclosed. Disclosures to employees or agents of the same facility are otherwise prohibited.

Disclosure of administrative information necessary for the collection of a fee to a person or agency providing collection services is permitted after a patient 18 years of age or older or his or her legal representative has received written notification that a fee is due and has failed to arrange for payment of the fee within a reasonable time. "Administrative information" is limited to only the patient's name, ID number, age, sex, address, dates and character of services, fees, name and location of the facility, date of admission and the name of the attending physician.

Disclosures are also permitted for scientific research, management audits, or program evaluations to persons who have demonstrated and provided written assurance they will comply with the law and not redisclose any patient identifying information they receive. Physicians making such disclosures should have a clear written agreement by the recipient to protect the confidentiality of the records. **Iowa Code, Section 228.5 (1993)**

Disclosure for Claims Administration and Peer Review — Mental health information may be disclosed to a third-party payer or to a peer review organization with prior written authorization of the patient or the patient's legal representative if the third party payer or peer review organization has filed a written statement with the Iowa Insurance Commissioner which complies with the statute. The written authorization should include all information required for voluntary disclosure. **Iowa Code, Section 228.7 (1993)**

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If records are released to these groups for the purpose of such a study, no liability of any kind for damages or other relief can arise or be enforced against any person or organization by reason of having provided such information or material **Iowa Code, Section 135.40 (1993).**

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The record is a confidential document involving the physician-patient relationship and should not be communicated to a third party without the patient's prior written consent, unless required by law or to protect the welfare of the individual or the community.

Medical reports should not be withheld because of an unpaid bill for medical services. Simplified, routine insurance reimbursement forms should be prepared without charge, but a charge for complicated or multiple reports may be made in conformity with local custom.

#2 RETAINING MEDICAL RECORDS

An important aspect of medical record management is record retention. Each Iowa physician must consider his or her own situation as to the space, time and expense which can be devoted to medical records.

The physician's legal counsel should always be included when determining medical record policies.

Individual Retention Considerations

The care, maintenance and disposition of medical records must be addressed by all physicians. Factors to be considered include available space, expansion rates, endurance of the paper and folders and storage safety requirements. Microfilm, microfiche or computer storage may be considered.

A general suggestion is: If space considerations are not a problem, retain all records. There have been no cases where physicians have been faulted for retaining records—only cases where they have failed to do so properly.

The primary purpose for retaining medical records is delivering proper patient care. Records should be retained if there is a continuing medical need of them. A physician's duties do not cease upon the rendering of medical services.

Both the patient and the law recognize that making and retaining medical records are part of the services supplied to the patient. The physician should maintain the records in a manner that best serves the interest of the patient.

Records should also be retained to assist in defense of potential malpractice claims. Under Iowa law, malpractice actions must be commenced within 2 years after the date on which the patient knew or should have known of the injury or death, but in no event more than 6 years after the date of the act, omission or occurrence in question (except in cases in which a foreign object has been unintentionally left in the body). **Iowa Code, Section 614.1(9) (1993).**

If the patient dies during the sixth year, the time for commencing an action may be extended until one year after death, thus increasing the potential limitation period to 7 years. **Iowa Code, Section 614.9(1993).**

A logical period for retaining records would be 7 years after the last contact with the patient. Six years can be used if the likelihood of potential claims arising from the one-year extension is thought too remote to warrant the additional one year of record retention.

Two months should be added to the 6 or 7 year time to allow receipt of court papers in the event of an "eleventh-hour" court filing.

Special Retention Factors

Three categories of patients pose special problems in retention of medical records—minors, mentally ill patients and patients under experimental treatment or research.

Iowa law extends the period in which a patient may commence legal action for treatment of a minor until the minor's nineteenth birthday. **Iowa Code, Section 614.8 (1993)**

If the patient dies between his or her eighteenth and nineteenth birthdays, the time for commencing an action may be extended until one year after death, thus increasing the potential limitation period to the patient's twentieth birthday. **Iowa Code, Section 614.9 (1993)**

Two months should be added to allow for receipt of court papers.

For minors, records should ordinarily be retained until the patient's twentieth birthday plus 2 months, or 7 years plus 2 months after the physician's last treatment of the patient, whichever is longer.

In some cases, practical considerations may allow a shorter retention period as, for example, in the case of a patient seen only once at age 3 for a routine and uneventful checkup.

Mentally ill persons are also provided an extended period of limitations in which to commence a legal action. They are permitted to commence an action at any time within one year after they cease to be disabled, or within the normal 6-year limitations period, whichever occurs. **Iowa Code, Section 614.8 (1993**

A "mentally ill person" is broadly defined by statute to include mental retardates, psychotic persons, severely depressed persons and persons of unsound mind. **Iowa Code, Section 4.1(15) (1993)**

The safest policy is to retain records for

> The safest policy is to retain records for extended periods of time if a patient is, or may be, mentally ill.

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HOUSE FILE 516

S-3477

1 Amend House File 516, as amended, passed, and re-
2 printed by the House, as follows:
3 1. Page 1, by inserting before line 1, the
4 following:
5 "Section 1. NEW SECTION. 135.12 HEALTH CARE
6 PROVIDER RECORDS -- FEES.
7 A health care provider shall not charge more than
8 an initial ten dollars and an additional twenty-five
9 cents per page for certified duplicate health care
10 records requested by an attorney for possible
11 admission as evidence at a legal proceeding. In
12 addition, the health care provider may charge a fee
13 for the actual costs of the delivery of the records if
14 the requesting attorney has approved the means of
15 delivery prior to delivery. As used in this section,
16 "health care provider" means a person licensed to
17 practice a profession pursuant to chapter 147, a
18 hospital licensed pursuant to chapter 135B, or a
19 health care facility licensed pursuant to chapter
20 135C."
21 2. Page 2, by inserting after line 21, the
22 following:
23 "Sec. ___. Section 602.8102, Code 1993, is amended
24 by adding the following new subsection:
25 NEW SUBSECTION. 164A. Accept and file facsimile
26 copies of orders signed by a district judge, district
27 associate judge, or magistrate and the motion, if any,
28 requesting the order."
29 3. By renumbering as necessary.

By COMMITTEE ON JUDICIARY
AL STURGEON, Chairperson

S-3477 FILED APRIL 13, 1993

Exhibit 4

The Value of Effective Voir Dire

Cynthia Fobian Willham
Starr & Associates, Inc.
1201 Grand Avenue
West Des Moines, IA 50235

Although a judge might support only the first purpose of voir dire listed above, the trial lawyer should aim for effective voir dire, which fulfills all four purposes. The trial lawyer is designated an advocate and should therefore attempt to accomplish all four, without alienating the judge. The judge and the lawyer have different goals: The judge wants to force everyone to be fair and follow the law, while the lawyer wants to know who can't be fair, who doesn't like him/her and who doesn't like the case.

In addition, some believe that if the jurors are asked to be fair by the judge, they will be fair. Research shows, however, that the higher the authority figure asking the question, the more likely the answer to the question will be the socially acceptable response. If a judge asks potential jurors if they are biased against a defendant because the defendant makes a lot of money or because the defendant happens to be a lawyer, the potential jurors will say they are not. Outside the presence of the judge, however, the jurors will tell one another how they really feel.

B. What Makes Voir Dire Challenging

1. Loss of Control

Many have theorized that it is the lawyer's fear of losing control over the proceedings during voir dire that is the biggest challenge. For the inexperienced or apprehensive communicator, control of the process may be attempted by erroneously asking only closed-ended, self-serving and conditioning questions.

2. Fear of "Bad" Answers

Other lawyers shy away from voir dire out of fear that they will elicit a "bad" answer–one that will reveal a negative attitude that might contaminate other prospective jurors. Experienced trial lawyers, however, know this "bad" answer will show up later and influence the deliberations (when it's too late to do anything about it). Doesn't it make more sense to face these "bad" answers in voir dire, where the advocate can show their falseness or inaccuracy, rather than hearing about how they affected the deliberations after the trial is lost?

3. Last Minute Preparation

It is critically important to the case that voir dire be planned carefully, well before trial. Leaving preparation until the last minute is dangerous, because research shows voir dire can be the single most important factor determining the outcome of a case. The importance of the voir dire process cannot be over-stressed.

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II. PREPARING FOR VOIR DIRE

Lawyers should plan for voir dire as seriously as they plan any element of trial preparation. If a lawyer conducts a good voir dire, he/she will likely identify the undesirable jury panelists. If a lawyer conducts a great voir dire undesirable jury panelists will tell you who they are.

Once the critical significance of the voir dire process is accepted, what steps should be taken to improve voir dire skills and overcome voir dire jitters? Several basic, elemental steps can be taken to improve voir dire skills. First, ask yourself the following questions:

1) What is my client's position?

2) What are the plaintiff's themes likely to be?

3) What themes would address the plaintiff's themes and, at the same time, develop the defense themes?

4) What arguments must a jury believe if they are going to accept my themes and my client's position?

5) Who is likely to resist or reject these arguments and themes?

6) What is the most simple and tactful way to ask the jury panelists if they have difficulty accepting my themes and arguments?

Use the responses to these questions to develop effective and thorough voir dire questions.

Also, study everything that can be learned before trial about the panel of prospective jurors. This information could be anything from a simple list of names to a multi-page, court-supplied questionnaire or any lawyer-designed supplemental juror questionnaire. Prior knowledge of demographic information (name, occupation, education level, marital status) of the panel members removes these questions from the ones that must be asked during voir dire and allows for advance analysis of juror desirability. This advance analysis not only saves time, but also gives the advantage of identifying ahead of time who most likely will be struck from the panel or who needs to be carefully interviewed.

Jurors get frustrated if you waste their time; preparation will help avoid this.

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III. EFFECTIVE VOIR DIRE

Think of voir dire as an introductory conversation. The initial part of the interview involves establishing rapport. This can be done in voir dire by showing concern and sincerity for the jurors and their responses. Smile, be personable, briefly introduce yourself.

The purpose of this initial stage is to help the prospective jurors feel less inhibited and fearful in an unknown environment and free to answer voir dire questions fully. Attentiveness, respect, simplicity, courtesy and sincerity all help to create a good first impression as well as create rapport.

Another area for improving voir dire skills is the question-asking process itself. Many lawyers dread using open-ended questions during voir dire. However, it's better to know bias exists and be able to compensate for it than to allow a biased juror to sit because of fear of the answer. Open-ended questions are always the best way to get an accurate picture of potential jurors. Although it is possible that an undesirable response will be heard by all, the skillful advocate can turn a "bad" answer into an example that supports the lawyer's position, thereby winning jury approval for openness, honesty and courage.

Effective voir dire is:

- Extensive in scope
- Individualized
- Personalized

Voir dire is effective when the lawyer:

- Listens to what jurors say, probes appropriately
- Is sensitive, caring, concerned response to jurors
- Doesn't seek to commit jurors too soon
- Is more interested in what jurors have to say than notes, papers, etc.
- Saves discussion of damages until later in the voir dire

IV. FREQUENT VOIR DIRE ERRORS

Through our research in writing voir dire, conducting post-verdict studies and discussing the issues with focus groups, we have found problems that occur consistently in voir dire. The following is a list of common problems that arise in voir dire:

1. Using close-ended questions.
2. Formulating questions so that no response is the desired response.
3. Talking more than the jurors.
4. Being afraid to ask a real question.
5. Cross-examining the juror.
6. Embarrassing a "not-so-bright" juror.
7. Not knowing when to back off.
8. Making it uncomfortable for a juror to disagree with you.
9. Being afraid to let the juror expose personal bias against your case.
10. Ignoring theories of group dynamics and concentrating on one or two jurors.
11. Neglecting to voir dire on case weaknesses.
12. Not giving jurors feedback on their responses.
13. Using excessively correct vocabulary.
14. Thinking your case hasn't started until <u>after</u> the jury is picked.

V. SJQ: THE NEW VOIR DIRE AID

The supplemental juror questionnaire, a new form of written jury questionnaire, is the latest "best kept secret" in jury selection. It is designed to gain information that may be difficult to obtain during traditional voir dire, especially when voir dire is limited by time or number of questions. The SJQ goes beyond the basic demographic questions found in the typical court-supplied jury questionnaire. It delves into the prospective jurors' experiences, particularly those that may relate to the issues in the case and thereby influence jurors negatively.

Now accepted in all types of cases, the supplemental juror questionnaire was first designed for use in well-publicized cases. It has been found to be especially useful in cases involving sensitive or emotional issues such as drugs, child abuse, or toxic chemicals and in cases involving well-known persons.

Because it can be used to (1) evaluate in advance who should be excused or challenged, (2) identify incomplete or confusing answers that indicate a need for further voir dire questioning or follow-up in specific trouble areas, and (3) provide the information necessary to rate perspective jurors, the SJQ gives a lawyer a head start in the jury selection process and greatly refines the voir dire procedure. In lawsuits involving professional negligence, an SJQ might elicit responses potential jurors are reluctant to give when the question is posed by a lawyer.

Concerns voiced by those involved in the use of this questionnaire pertain to its misuse. Fears regarding attempts to ask irrelevant, leading or conditioning questions are legitimate. However, simple guidelines established and agreed upon by both parties and/or the court usually eliminate problems or concerns.

VI. CONCLUSION

Above all, no matter what the response, the lawyer must remain calm, courteous and in control of the situation. Never should prospective jurors be ridiculed or put down or embarrassed because of lack of knowledge or an opinion they hold. It is your duty to protect the jury.

Although the voir dire jitters affect many lawyers, more than one good reason exists for overcoming this problem. Voir dire can be the most crucial part of the trial process. Without the best decision makers, how can the best decisions be made?

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Outlines for annual meetings of 1970, 1972, 1973, and 1974 were unavailable at the time of this printing and no papers for those years are included in this Index.

Copies of specific presentations may be obtained by contacting:

Iowa Defense Counsel Association
c/o DeWayne Stroud
5400 University Avenue
West Des Moines, IA 50265
515/225-5608

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