VOLUME I

IOWA
DEFENSE
COUNSEL
ASSOCIATION

1998
Annual Meeting
September 23, 24, & 25

Embassy Suites Hotel
101 Locust Street
Des Moines, Iowa 50309

1998 IOWA DEFENSE COUNSEL ANNUAL MEETING & SEMINAR

WEDNESDAY, SEPTEMBER 23, 1998

9:00 a.m. Registration
11:00 a.m. Board of Directors Meeting
1:00 p.m. Welcome and Report of Association
- IDCA President, Jaki Samuelson
  Whitfield & Eddy, P.L.C., Des Moines, IA

1:15 - 1:45 p.m. Supreme Court Update
- Honorable Marsha K. Ternus
  Justice, Iowa Supreme Court

1:45 - 2:15 p.m. Consortium Claims
- Mike Galligan
  Galligan, Tully, Doyle & Reid, P.C., Des Moines, IA
- Alan Fredregill
  Heidman, Redmond, Fredregill, Patterson, Plaza & Dykstra, L.L.P., Sioux City, IA

2:15 - 3:15 p.m. Proving and Disproving Intoxication in the Civil Case
- Kermit Dunahoo
  Dunahoo Law Firm, Des Moines, IA

3:15 - 3:30 p.m. BREAK
3:30 - 4:00 p.m. Evaluation of the Closed Head Injury
- Rick Cornfeld
  St. Louis, MO

4:00 - 4:30 p.m. Work Comp Update
- Iris Post
  Iowa Industrial Commissioner

4:30 - 5:15 p.m. Employment Law Claims – Damages
- Gordon Fischer
  Bradshaw, Fowler, Proctor & Fairgrave, P.C., Des Moines, IA

5:15 - 8:00 p.m. Cocktails - Embassy Suites Hotel
(Dinner on your own in Des Moines)

THURSDAY, SEPTEMBER 24, 1998

8:30 - 9:00 a.m. Ethics and Settlement
- Phil Willson
  Wilson & Pechacek, P.L.C., Council Bluffs, IA

9:00 - 9:45 a.m. The Lawyer's Obligation to Third Parties - Recent Revisions to Restatement Section 215 – Ethical Considerations and Obligations
- William T. Barker
  Sonnenschein, Nath & Rosenthal, Chicago, IL

9:45-10:15 a.m. Ethics
- Megan M. Antenucci
  Whitfield & Eddy, P.L.C., Des Moines, IA

10:15-10:30 a.m. BREAK
10:30-11:30 a.m. Analyzing Low Impact Collisions
- C. Bradley Price
  DeVries, Price & Davenport, A.P.C., Mason City, IA
- Scott Palmer
  Biodynamic Research Corp., San Antonio, TX

11:30-12:00 a.m. Handling Chiropractic Testimony
- Guy Cook
  Grefe & Sidney, P.L.C. Des Moines, IA

12:00-12:30 p.m. LUNCH
12:30-1:00 p.m. Views from the Federal Bench
- Hon. Robert Pratt
  Judge, United States District Court

1:00 - 1:30 p.m. Defending the Sexual Harassment Claim
- Iris E. Muchmore
  Simmons, Perrine, Albright, & Ellwood, P.L.C., Cedar Rapids, IA

1:30 - 2:15 p.m. Recent Developments in Restatement of Torts
- Kevin Reynolds
  Whitfield & Eddy, P.L.C., Des Moines, IA

2:15 - 3:15 p.m. When and How to Use Accident Reconstruction
- Rich Fay
  Fay Engineering Corp., Denver, CO
- John Werner
  Grefe & Sindey, P.L.C., Des Moines, IA

3:15 - 3:30 p.m. BREAK
3:30 - 4:00 p.m. Iowa Court of Appeals Update
- Justice Mark Cady

4:00 - 4:30 p.m. What Does It Mean To Be Judgment Poof
- Paul Drey
  Bradshaw, Fowler, Proctor & Fairgrave, P.C., Des Moines, IA

4:30 - 5:00 p.m. Election of Officers and Directors, and Annual Meeting of IDCA
6:30 - 9:00 p.m. Reception and Banquet
Glen Oaks Country Club
6:30 - 7:30 Reception 7:30-Banquet

FRIDAY, SEPTEMBER 25, 1998

7:30 - 8:30 a.m. Board of Directors Meeting
8:30 - 9:00 a.m. Liability of HMO's for Medical Malpractice
- John Lorentzen
  Nyemaster, Goode, Voigts, West, Hansell & O'Brief, A.P.C., Des Moines, Iowa

9:00 - 9:45 a.m. Cross Examination Goes to Hollywood
- Jim Semple, Wilmington, DE

9:45 - 10:15 a.m. Mediation and Court Ordered Settlement Conferences
- Judge Art Gamble
  Chief Judge, 5th Judicial District
- Paul C. Thune
  Peddicord, Wharton, Thune and Spencer A.P.C, Des Moines, IA

10:15 - 10:30 a.m. BREAK
10:30 - 10:45 a.m. What's New With DRI
- Tim Schimberg
  Fowler, Schimberg & Flanagan, Denver, CO

10:45 - 11:00 a.m. Legislative Update
- Robert Kreamer
  IDCA Legislative Lobbyist, Des Moines, IA

11:00 - 11:30 a.m. Uninsured and Underinsured Motorist Coverage
- Sharon Greer
  Cartwright, Druker & Ryden, Marshalltown, IA

11:30 - 12:00 p.m. Evaluating Wrongful Death Claims
- Steven J. Pace
  Shuttleworth & Ingersoll, P.C., Cedar Rapids, IA

12:00 - 12.30 p.m. LUNCH
12:30 - 1:00 p.m. Committee Report
1:00 - 1:45 p.m. Case Law Update and Review of Ethics Decisions
- Dannette Kennedy
  Whitfield & Eddy, P.L.C., Des Moines, IA
- Sean O'Brien
  Bradshaw, Fowler Proctor & Fairgrave, P.C., Des Moines, IA
- Webb Wassmer
  Simmons, Perrine, Albright & Ellwood, Cedar Rapids, IA

1:45 - 2:30 p.m. Analyzing Insurance Coverage Issues
- Michael J. Weston
  Moyer & Bergman, P.L.C., Cedar Rapids, IA

OFFICERS AND DIRECTORS
1997 - 1998

PRESIDENT

Jaki K. Samuelson
1300 First Interstate Bank Bldg
Des Moines, IA 50309

PRESIDENT-ELECT

Mark L. Tripp
801 Grand Ave., Suite 3700
Des Moines, IA 50309

SECRETARY

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

TREASURER

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

BOARD OF DIRECTORS
(DATE IS TERM EXPIRATION DATE)

DISTRICT I

Marion L. Beatty - 1999
301 W Broadway
Decorah, IA 52101

DISTRICT II

Stephen G. Kersten - 2000
P.O Box 957
Fort Dodge, IA 50501

DISTRICT III

Emmanuel S. Bikakis - 1999
Suite 340, Insurance Exchange Bldg.
Sioux City, IA 51101

DISTRICT IV

Gregory G. Barntsen - 2000
P O Box 249
Council Bluffs, IA 51502

DISTRICT V

Richard G Santi - 1999
100 Court Ave., Suite 600
Des Moines, IA 50309

DISTRICT VI

Terry J Abernathy
P.O. Box 74170
Cedar Rapids, IA 52407

DISTRICT VII

John D. Stonebraker - 1998
3432 Jersey Ridge Road
Davenport, IA 52809

DISTRICT VIII

Wendy N. Munyon - 1998
P O Box 790
Grinnell, IA 50112

AT LARGE

J. Michael Weston - 1999
2720 First Avenue
Cedar Rapids, IA 52406

Michael W. Ellwanger - 1998
Suite 300, Toy National Bank Bldg
Sioux City, IA 51101

Michael W Thrall - 2000
699 Walnut Street, Suite 1900
Des Moines, IA 50309

David L Brown - 1999
803 Fleming Bldg.
Des Moines, IA 50309

David L. Riley - 1998
327 E 4th Street, Suite 300
Waterloo, IA 50704

PAST PRESIDENTS

* Edward F. Seitzinger 1964 - 1965
* Frank W. Davis 1965 - 1966
Donald J Goode 1966 - 1967
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 (Honorary) 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
Richard J. Sapp 1993 - 1994
Gregory M Lederer 1994-1995
Charles E. Miller 1995-1996
Robert A Engberg 1996-1997

IOWA DEFENSE COUNCIL FOUNDERS AND OFFICERS

* Edward F. Seitzinger
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 - James A. Pugh
Ginger Plummer

Program Chair - Mark L. Tripp

* Deceased

1998 ANNUAL MEETING

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APPELLATE COURT UPDATE

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Danette L. Kennedy

Whitfield & Eddy, P.L.C.

Des Moines, Iowa

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Employment

Dico, Inc. v. Iowa Employment Appeal Bd., et al.,
576 N.W.2d 352 (Iowa 1998)

Dico appealed an award of unemployment benefits to its former employees claiming the employees were disqualified for benefits because they failed to accept offers of employment made by Dico's parent company, Titan. The Iowa Employment Appeal Board rejected Dico's claim of disqualification because the job offers were made prior to Dico's termination of the Claimants' employment pursuant to Iowa Code § 96.5(3). In this case, the Claimants filed for unemployment benefits in early August, after Dico's termination of their employment. The Claimants' "benefit year" began that week, in early August. Titan's offer of employment expired in late July and was not within the Claimants' benefit year. Consequently, the Claimants' refusal of Titan's offer did not disqualify them for benefits. Dico also argued that a member of the Iowa Employment Appeal Board should have disqualified himself from the case due to a conflict of interest. However, that issue was not raised at any stage of the proceeding before the agency and first mentioned the Board Member's possible conflict of interest at the district court level.

HELD: Claimants were not disqualified from receiving benefits and Dico had not preserved error on the Board Members potential conflict of interest issue.

Fuller v. Iowa Dept. of Human Services,
576 N.W.2d 324 (Iowa 1998)

Fuller's disability discrimination petition was dismissed by the district court based on its finding that she was not permanently disabled. Fuller, an employee of the Iowa Department of Human Services ("**DHS**"), was responsible for determining correct welfare benefits, including ADC, food stamps and Medicaid for clients. Her duties included maintaining two files, including a hard copy paper file and information in the computer. In 1992 Fuller fell behind in completing her files. Her supervisor inventoried the files in her office and found that seven files assigned to her were not located in her office as required. In August 1992, Fuller began receiving treatment from a psychiatrist who diagnosed her condition as depression. In September Fuller took leave-of-absence from work pursuant to her psychiatrist's recommendation and was hospitalized for approximately seven to ten days. Fuller's cases were distributed to other employees and it was determined that 83 of 192 cases assigned to Fuller could not be located within the office. After a search for the missing files was conducted, 67 files remained missing and had to be reconstructed. On March 1, 1993, Fuller's psychiatrist released her to work with the condition that she work part time. On March

17, 1993, Fuller was released to work full time without any restrictions. In April, 1993, DHS scheduled a meeting with Fuller to discuss the whereabouts of the missing files. Fuller's psychiatrist was told he would not be allowed in the meeting. The psychiatrist demanded that the meeting be postponed until Fuller was medically capable of handling the discussion regarding the "potentially serious situation of the missing files." DHS placed Fuller on sick leave until it received clarification from her psychiatrist regarding her ability to handle job responsibilities. In August 1993, Fuller requested a 90 day medical leave without pay which DHS approved. Fuller's leave expired on November 29 and she responded by requesting reinstatement to her position, again requesting the accommodation of having a family member present during any investigation regarding the missing files. In the alternative, she requested a 90 day leave without pay. DHS rejected Fuller's requested leave and advised her that she would be removed from the DHS payroll effective December 9, 1993. DHS' rejection letter explained that Fuller's request for medical leave-of-absence was denied because "her position had been non-productive since September 4, 1992."

Plaintiff filed an administrative complaint with the Iowa Civil Rights Commission alleging discrimination in employment. After receiving a right-to-sue letter, Fuller filed a petition in district court against DHS alleging disability discrimination. Fuller's psychiatrist testified that Fuller suffered from depression and would continue to do so throughout her life and that her mental condition was biological in nature and exacerbated by work-related stressors. A DHS' expert witness testified that Fuller was not impaired.

In a matter of first impression before the court, the case turned on whether and to what extent, the mitigating effects of medication and other assistive devices may be considered in analyzing a disability discrimination claim. The court noted without medication, Fuller's depression would substantially limit her ability to work or care for herself, in which case she would not be able to perform the essential functions of her job and thus would not be qualified for her position. However, with the assistance of medication, Fuller's depression did not substantially limit her ability to work or care for herself and thus she was not disabled.

HELD: Fuller's depressive condition qualified as a "mental impairment" under the ICRA for purposes of a disability claim, irrespective of the testimony presented at trial concerning Fuller's predisposition to depressive episodes. It was proper for the district court to consider the mitigating effects that medication had on her mental impairment. Fuller failed to prove her depression substantially limited a major life activity based on her ability to control her disability through medication.

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Lockhart v. Cedar Rapids Comm. Sch. Dist.,
577 N.W.2d 845 (Iowa 1998)

The Plaintiff was an employee of the Cedar Rapids Community School District until his termination in 1996. Iowa Code § 20.7(3) states that public employers shall have the right to suspend or discharge public employees for proper cause. On a certified question from the United States District Court for the Northern District of Iowa, the Court reviewed whether Iowa Code § 20.7(3) negates the presumption of at will employment for all public employees covered under this provision of the Iowa Public Employment Relations Act.

HELD: The Legislature did not intend to establish a just-cause limitation on the right of a public employer to discharge an employee. Section 20.7(3) serves the useful purpose of granting school districts the necessary power to suspend and terminate employees. That power is co-existive with the common law right of employers to terminate at-will employees for any reason not inconsistent with public policy. Section 20.7(3) does not change the common law presumption that public employees are employed at will.

Sievers v. Iowa Mut. Ins. Co.,
__ N.W.2d __ (Iowa 1998)

Sievers worked for Iowa Mutual Insurance Company from 1974 until May 1995, when she resigned at age 54. In May of 1995 Sievers requested time off to accompany her adult daughter who suffered from seizures, to South Dakota for chiropractic treatment. Sievers' supervisor reacted angrily to the request for time off but granted it. Sievers did not make the trip and the following Monday told her supervisor that perhaps Sievers should transfer to another department. Sievers met with the personnel director who provided Sievers four options: 1) transfer, 2) resign, 3) stay until she qualified for early retirement the following August at which time her employment would be terminated, or 4) stay in her current department. Sievers also met with her supervisor and another employee wherein Sievers was presented only two options: Sievers could resign immediately, or wait until August for early retirement. Sievers then signed a letter-of-resignation. Sievers claims her supervisor denied her request for time to consider the options. Iowa Mutual stated that it terminated Sievers' employment because "she drew a line in the sand," and Iowa Mutual believed its supervisor deserved to be supported in the power struggle between Sievers and the supervisor. In July, a 34 year-old employee transferred into Sievers' position and assumed approximately 60% of Sievers' prior work load.

Sievers sued Iowa Mutual for age discrimination under the Iowa Civil Rights statute and the federal ADEA. Iowa Code Chapter 216 (1993); 29 U.S.C. §§ 621-34 (1994). In addition, Sievers alleged

that Iowa Mutual violated the federal Family Medical Leave Act (FMLA) by discouraging her from taking time off to accompany her daughter to South Dakota and forcing her to resign because of her requested time off. 29 U.S.C. § 2615(a). At issue was whether the FMLA covers chiropractic treatment under the circumstances of this case. Sievers also challenged jury instructions related to her age discrimination claim.

HELD: Sievers failed to generate a genuine issue of material fact on whether she was eligible for leave "to care for" an adult daughter with a "serious health condition." Sievers neglected to produce any evidence her daughter's chiropractic care qualified as one "capable of providing health care services" under the circumstances of this case.

Dubuque Policemens' Protective Ass'n v. City of Dubuque,
__ N.W.2d __ (Iowa 1998)

The Plaintiff, Thomas Fessler, is a police officer for the Defendant, the City of Dubuque, (City) and was a member of the Dubuque Policemens' Protective Association (Association). The City and the Association have a collective bargaining agreement. In 1993, Fessler was hospitalized with chest pains and was discharged later that day. He did not miss any work because he was not on duty that weekend. Pursuant to doctor's orders, Fessler returned to the hospital on July 6 for a stress test and did not return to work that day pursuant to doctor's orders. Fessler was charged with one day of sick leave, although the City had no objection to his absence from work for the test. After additional exploratory surgery and corrective surgery, Fessler missed Friday and Monday, July 16 and July 19, and the City charged him two more days of sick leave for these absences. No absences were charged to undertake further tests, all of which were normal. The trial court thought the case turned on a distinction between diagnostic and corrective procedures.

HELD: Under provisions of Iowa Code § 411.6(5)(b) and (c), a member in service or the chief-of-police or fire department becomes incapacitated as a result of injury to the heart or illness from heart disease. He or she is entitled to receive full pay and allowances for the period of incapacity, which means that no charge can be made against the member's sick leave. Section 411.6(5)(c) provides a statutory presumption that the heart disease was contracted while on active duty, and therefore, the actual contracting source of the disease, whether on active duty or not, has no bearing on this matter. No charge against Officer Fessler's sick leave may be made as a result of his absence from work due to illness occasioned by heart disease.

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Clay v. City of Cedar Rapids,
577 N.W.2d 862 (Iowa Ct. App. 1998)

Clay was a Cedar Rapids firefighter since 1988. Clay was discharged in January 1994 for refusing to obey a direct order of her station lieutenant to enter his office. Clay, a female, received an oral reprimand in June of 1991 for violating department sick leave policy for calling in two minutes after the deadline. In August 1992, Clay was put on daily evaluation as a disciplinary measure for failing to place a magnetic shield designating her station number on her helmet. In May 1993, Clay was suspended for one day for addressing an assistant fire chief in a disrespectful manner by written letter. In August 1993, she was suspended for three days for violating the department's sick leave policy. When asked to sign a disciplinary report regarding the suspension, Clay refused, asked for union representation and when this was denied, she stated in the presence of the station chief, "this is just another way for you guys to F[---] me over." This lead to Clay's ten-day suspension. In January 1994, Lieutenant Santana, Clay's supervisor at the time, called her into his office, closed the door, seated himself in a chair next to her, and touched her arm, and grabbed her knee while saying, "trust me, trust me, I just want to help you get through this." Two days later Santana told Clay to come into his office to sign her daily evaluation form. Clay refused. Santana directed her into his office a second time and she refused. As a result, she was discharged. Santana had previously been disciplined for inappropriate sexual conduct toward other female firefighters.

HELD: Under the circumstances, Clay's refusal of Santana's order to enter his office was justified and cannot be classified as "misconduct" under Iowa Code § 400.19 (1997). Defendant's argue it would be detrimental to public policy if Clay did not follow orders and pursuant to the statute, would constitute misconduct warranting termination. The question is not if Clay's behavior in other instances would be detrimental to the public. The question is whether failing to go to Santana's office when he directed her to was detrimental to the public. It was not.

Murillo v. Blackhawk Foundry,
571 N.W.2d 16 (Iowa 1997)

Murillo was injured while working as a welder for Defendant, Blackhawk Foundry (Blackhawk). Murillo broke his hip and sustained a compression fracture in his lower back. He was released to return to work with a 50 pound lifting restriction. Murillo later reinjured his back on the job but soon returned to light work. He could no longer work as a welder because of his physical limitations and Blackhawk provided him with another job as a core cleaner. Murillo received approximately the same hourly wage as he had received when he was welding and was able to put in longer hours. The court analyzed whether in fixing the extent of the

employee's industrial disability the Commissioner inappropriately relied upon earnings from a substitute job provided to the employee after his injury prevented him from performing his regular job.

HELD: The transferability of workers' skills is a factual question to be decided by the Commissioner, but it must be based upon evidence of wages available from those skills in the open market. The proper rule should be that an employer's accommodation for an injured worker can be factored into the award determination to the limited extent that the work in the newly created job discloses that the worker has a discerned earning capacity. To qualify as discernable, it must appear that the new job is not just "make work" provided by the employer, but is also available to the injured worker in the competitive market.

George A. Hormel and Co. v. Jordan,
569 N.W.2d 148 (Iowa 1997)

Hormel hired Jordan in 1984 as a meat processing plant laborer. Jordan worked on the receiving docks where he unloaded boxes with meat weighing 60 to 80 pounds. He also pushed 500 pound carts of meat. On September 15, 1988, Jordan was diagnosed with a partially dislocated shoulder. Jordan lost no time from work due to his shoulder injury, however, he was constantly stiff and sore. For the next three years Jordan saw employer authorized physicians and therapists who concurred in the diagnosis but offered no effective treatment. Hormel issued a check to Jordan representing 60 weeks of permanent partial disability benefits. Jordan responded by requesting approximately $4,700.00 in interest dating back to September 15, 1988.

HELD: The date of injury is found by a two-part test: the date on which the claimant, as a reasonable person, would be plainly aware of (1) the injury and (2) the causal relationship between the injury and the claimant's employment. The claimant was not aware until October 1, 1991 that he had sustained a permanent impairment to his shoulder nor did he realize the causal impact that injury would have on his job with Hormel until said date. The fact that Jordan gained knowledge of his condition on prior medical visits is not dispositive in fixing the date on injury.

Jones v. Lake Park Care Center, Inc.,
569 N.W.2d 369 (Iowa 1997)

Plaintiff, Jones, claims the Defendant, Lake Park Care Center (Lake Park) breached its employment contract. Jones reviewed miscellaneous employee handbooks and written personnel policies received from various prior employers and selected provisions to include in a rough draft of a proposed employee handbook for Lake Park. The facility operator reviewed the proposed handbook, made some changes and returned it to Jones with instructions to print it in final form and distribute it to the employees. Each employee

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was asked to sign a return or receipt to the administrator to acknowledge their receiving of the handbook. In July 1992, Jones received a disciplinary warning identifying specific incidents demonstrating poor employee relations. She was placed on probation with a review in one month and a second review at the end of two months. Jones received psychiatric counselling for depression at Ms. Rogers', the licensee, suggestion and at Lake Park's expense. Jones' attitude and behavior improved in 1992 after receiving the warning and counselling. However, her relationship with the Director of Nursing, Gail, remained poor. The Iowa Department of Inspections and Appeals commenced its annual inspection of the Lake Park on July 26. Jones was required to compile a list of Lake Park's closed files for the past six months. Jones requested information regarding the status of the closed files from the Director of Nursing, Gail. Gail indicated that not all of the closed files had been completed and that Jones should give the inspector a list of the files that had been completed. Jones interpreted Gail's response as a request that she misrepresent the status of the closed files to the inspector. Subsequently, an internal review of the Annual Inspection procedures claimed that Jones had sacrificed Lake Park's performance during the inspection in an effort to make Gail look incompetent. On August 6 Jones was told her employment was terminated based on her "inability to provide continuity in the facility by failure to provide effective leadership."

When determining whether the language of an employee handbook creates a contract, the key determination is whether a reasonable employee upon reading the handbook would believe they had been guaranteed certain protections by their employer. In this case the handbook stated it was "to be regarded as binding on both the employee and management." The handbook also included progressive discipline policies and specific actions to be taken for different levels of violations. No disclaimer was included in the handbook to defeat the creation of an implied contract.

HELD: The employment handbook created a contract between Jones and Lake Park.

Bridgestone/Firestone, Inc. v. Employment Appeal Bd., 570 N.W.2d 85 (Iowa 1997)

Issue: whether a letter the employer sent striking workers' notifying them that they were being permanently replaced severed the employment relationship between the employer and these claimants.

HELD: There was substantial evidence to support the Board's finding that (1) Bridgestone severed the employment relationship as to those claimants who received the replacement letter, and (2) this action - rather than the labor dispute and its consequent work stoppage - was the cause of their unemployment. The case was

remanded to the Board for a determination of when the work stoppage had ended as to those claimants who did not receive the replacement letter.

Bearshield v. John Morrell and Co.,
570 N.W.2d 915 (Iowa 1997)

The Plaintiff sued her employer, John Morrell and Co., claiming disability discrimination. Since 1989 the Plaintiff had worked at Defendant's meat packing plant in Sioux City, Iowa, trimming fat from small pieces of ham passing on an assembly line. The Plaintiff suffered from degenerative arthritis in both knees for several years but her condition did not prevent her from performing her job until 1994. In January 1994 and February 1994 the Plaintiff fell on or twisted her knees on three separate occasions: once inside the plant, once in the plant parking lot, and once at home.

HELD: Summary judgment was proper where Plaintiff had failed to show that her arthritis did not substantially limit one or more of her major life activities. [Plaintiff's claims that (1) she has a disability because her impairment substantially limits her ability to work without reasonable accommodations, and (2) John Morrell regards the Plaintiff as having a disability, were allowed to proceed to trial.]

Nelson v. Agro Globe Engineering, Inc.,
578 N.W.2d 659 (Iowa 1998)

Nelson began working for Agro Globe Engineering (AGE) in November, 1990. In 1994, AGE's parent company was faced with financial problems and needed to recoup funds loaned to AGE. Six individuals invested a combined total of $166,000 in AGE based on the condition that Nelson sign a new employment contract securing his continued affiliation with AGE. The new Agreement, signed in December 1994, did not contain a covenant not to compete, however, Nelson's previous Agreement did contain a covenant not to compete. Instead, the 1994 Agreement had a clause restricting Nelson's activities during the term of the Agreement which lasted until December 31, 1998. Nelson resigned his position with AGE effective October 31, 1995, which was within the employment term of the 1994 Agreement. Nelson sought declaratory judgment seeking reformation of the restrictive covenant in the 1994 Agreement on the basis that it was unreasonable in both its geographical and temporal limitations.

Covenants not to except employment with another company during the contract term should be more broadly enforced than covenants to prevent competition. The mischief thought to be prevented by examining the reasonableness of post-employment covenant not to compete looms less threatening where the restrictive covenant merely limits an employee from competing with the employer during

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the term of the contract. AGE asserts that Nelson had unique contacts in the seed facility project management arena and claims he was initially hired for these contacts and experience in the business. Evidence was also presented that the investors in AGE would not have made their investment unless Nelson continued his employment with AGE.

HELD: Decision vacated and remanded to district court to determine whether Nelson's skills are unique and if so whether AGE will suffer irreparable damage for loss of the services.

Iowa Supreme Court Bd. of Professional Ethics & Conduct v. Bribriesco,
573 N.W.2d 37 (Iowa 1987)

Respondent was hired to obtain a criminal defendant's release from jail and was provided $10,000.00 in cash by the friend of the criminal defendant. Respondent had no written fee agreement or engagement letter. Respondent put the cash into his office safe and later took some of the cash home and hid it in his private residence. At approximately the same time, Respondent received an additional $10,000.00 to be used for a cash bond for the criminal charges. These funds were from Respondent's trust account and were not at issue in this decision. Respondent also received a third cash bond in the amount of $6,000.00 to be used as bail money on pending criminal charges in Illinois. This bail money was not routed through Respondent's trust account, but rather was directly posted in the Illinois court. A portion of the bail money was refunded and later released back to Respondent. The refunded bail money was not routed through the Respondent's trust account.

Respondent claims the initial $10,000.00 was not a retainer and therefore he was not required to place the funds in his trust account. The court noted that Respondent was an apparently "honest lawyer with an outrageously inadequate fiscal operation."

HELD: Respondent was reprimanded for failing to comply with DR 9-102 of the Code of Professional Responsibility for Lawyers.

Iowa Supreme Court Bd. of Professional Ethics & Conduct v. Hoffman,
572 N.W.2d 904 (Iowa 1997)

Respondent entered into a contingent fee contract to represent Ms. Jahde in her attempt to recover damages arising from the death of her husband. The attorney fee agreement was intended to cover all claims arising out of Mr. Jahde's death. Respondent determined that Mr. Jahde's death was covered under his workers' compensation policy and proceeded to file an original notice for workers' compensation benefits with the Iowa Industrial Commissioner. At this time, Mr. Jahde's workers' compensation carrier acknowledged its compensability. In essence, Respondent had spent only 20 hours on the workers' compensation claim and sought $37,000.00 in attorney's fees via the partial commutation petition. Respondent later filed a petition for partial commutation and assessed a fee of 33% of the workers' compensation recovery and requested a partial commutation in order to obtain that fee.

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HELD: While the fee agreement entered into by Respondent and Ms. Jahde may have been reasonable at the time of its inception, changes in the matter created circumstances so by the time the petition for partial commutation was filed a 33% contingent fee was unreasonable and excessive. Respondent violated DR 2-106 and his license to practice law was suspended indefinitely with no possibility of reinstatement for six months.

Iowa Supreme Court Bd. of Professional Ethics & Conduct v. Apland, 577 N.W.2d 50 (Iowa 1998)

Respondent represented Mr. Vonnahmey who was charged with operating while intoxicated (OWI). Respondent agreed to represent Mr. Vonnahmey for a flat fee of $5,000.00. Vonnahmey's wife delivered the entire fee in cash to Respondent. Respondent placed the $5,000.00 in what he described as a "portfolio" and agreed to pay all expenses out of the fee. After pleading guilty to the OWI charge, Vonnahmey also demanded a return of part of the fee because the case did not go to trial. Vonnahmey also requested an accounting. After refusing to provide an accounting, Respondent returned $2,000.00 of the fee to Vonnahmey. Respondent was charged with several ethical violations. The court found the $5,000.00 was a "special retainer."

HELD: Attorneys must deposit all advanced fee payments into a client trust account consistent with DR 2-110(A)(3). This rule requires an attorney to refund to the client the amount of unused client fees upon counsel's withdrawal. Because Vonnahmey paid Respondent $5,000.00 as a special retainer in advanced of Respondent's performing the services, the fee was an advanced fee payment and the money still belonged to the client. For that reason, DR 9-102(A) required Respondent to deposit the fee in the client trust account. Respondent took the fee before it was earned, and thus he misappropriated the client's funds in violation of DR 1-102(A)(3),(4),(5), and (6). The misappropriation, however, was not intentional given the uncertainty at the time about whether such fees were subject to the trust account requirements.

An attorney is allowed to keep a general retainer fee regardless of whether the attorney performs services for the client. As to special retainers, fees are refundable notwithstanding any agreement to the contrary. In cases where the general/special retainer distinction is less clear cut, the court will presume that the arrangement is a special retainer. Respondent also violated DR 9-102(B)(3) for his failure to provide Vonnahmey an accounting for the fee. Respondent received a public reprimand.

Iowa Supreme Court Bd. of Professional Ethics & Conduct v. Hovda,
578 N.W.2d 673 (Iowa 1998)

Respondent was charged with several ethical violations arising out of a significant number of probate delinquencies and subsequent failure to respond to inquiries by the Board concerning them. Within a six year period, Respondent had received 82 probate delinquency notices from three different counties, involving 18 cases.

Held: Respondent violated DR 1-102(A)(5) (conduct prejudicial to the administration of justice); DR 1-102(A)(6) (conduct adversely reflecting on fitness to practice law; and DR 6-101(A)(3) (neglect of client's business). Respondent's license was suspended for 60 days. Upon any application for reinstatement, the Respondent was ordered to furnish evidence that he would either refrain from accepting probate matters in the future or that he will associate in each probate case with a probate lawyer, approved by the Chief Judge, to assist.

Iowa Supreme Court Bd. of Professional Ethics & Conduct v. Kelley,
577 N.W.2d 648 (Iowa 1998)

Respondent agreed to represent Ms. Toedter in the modification of her dissolution decree. Approximately two months after Respondent had been retained, he filed for the modification. The court set a hearing date which Respondent missed.

Held: Respondent's neglect of the legal matter intrusted to him violated DR 6-101(A)(3) and Respondent was publicly reprimanded.

Iowa Supreme Court Bd. of Professional Ethics & Conduct v. Hill,
576 N.W.2d 91 (Iowa 1998)

Hill was charged with violating disciplinary rules during his handling of an interstate adoption in 1995. Respondent prepared Missouri documents governing the relinquishment of parental rights and consent to adoption. Hill failed to respond to any of the formal proceedings filed against him by the Commission. In 1989 Respondent was found guilty of unethical and unprofessional conduct and his license was suspended with no possibility of reinstatement for three months. In 1990 Respondent received a pubic reprimand for mishandling an appeal. Additionally, in 1993 Respondent failed to appear and show cause why his license should not be temporarily suspended for abandonment of his practice. Respondent left the State of Iowa in April of 1993 to take a teaching position in the State of Washington. The Respondent did not return to Iowa until

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October 1994. In 1995 Respondent's license to practice law was suspended for 12 months.

HELD: Respondent's license to practice law is revoked.

Iowa Supreme Court Bd. of Professional Ethics & Conduct v. Alexander,
__ N.W.2d __ (Iowa 1998)

Respondent was charged with violating the Disciplinary Rules of Iowa Code of Professional Responsibility for Lawyers based upon two separate representations of clients in divorce cases. Respondent submitted to the court a modification order which incorrectly indicated it was an order agreed upon by both parties without notifying opposing counsel in violation of DR 7-110 (B) and DR 1-102(A)(4). Respondent also offered a falsely dated letter in her professional statement in a contempt hearing that included a false statement of fact after the date of the letter's mailing which violated DR 7-102(A). Respondent's false statements contained in her professional statement and in her letter reporting contact by a Bloomfield police office was deemed conduct involving dishonesty or misrepresentation.

HELD: Respondent violated DR 7-110(B), DR 1-102(A)(4), DR 7-102(A), and DR 1-102(A)(4). Respondent's license to practice law was suspended with no possibility of reinstatement for 180 days.

Iowa Supreme Court Bd. of Professional Ethics & Conduct v. Erbes,
573 N.W.2d 269 (Iowa 1998)

Respondent represented an individual in connection with an application to modify the dissolution decree. The application to modify the decree was filed in April of 1992. Respondent did not contact his client during 1993, 1994, or 1995. Respondent did not return his client's phone calls nor did he respond to written correspondence from his client. The client hired another lawyer who completed the modification in 1996, approximately four (4) years after Respondent had filed the modification. Respondent was charged with violating DR 6-101(A)(3) by neglecting a legal matter entrusted to him in connection with the modification.

HELD: The neglect shown in connection with the handling of the modification, as well as Respondent's inattention to inquiries from the Board, requires a pubic reprimand.

Iowa Supreme Court Bd. of Professional Ethics & Conduct v. Mears,
569 N.W.2d 132 (Iowa 1997)

Respondent maintains an office in Iowa City and employs several attorney associates and staff. Respondent specialized in

prisoner relief cases including post-conviction relief and civil rights actions.

HELD: Respondent's violations in this case and the Respondent's prior disciplinary record concerning neglect of client matters warranted a public reprimand.

Iowa Supreme Court Bd. of Professional Ethics & Conduct v. Smith,
569 N.W.2d 499 (Iowa 1997)

Respondent was charged with violating probate rules, misleading the court regarding his claim for compensation, and taking an excessive fee. Respondent represented an elderly woman concerned with putting her affairs in order prior to her death. In November 1994 Respondent transferred $2,000.00 of his client's assets to his client trust account as a cash reserve for the client's miscellaneous expenses. The client died in December and Respondent submitted her will for probate and received court permission to act as both executor and attorney. On the same day of his appointment, Respondent withdrew the $2,000.00 held in his trust account and paid the sum to himself for executor and attorney fees. On February 6, 1995, Respondent paid himself another $1,000.00 from estate funds. Respondent admits that neither of these payments complied with the Iowa Statutory and Probate Rules governing the compensation of fiduciaries. Respondent's Application for Compensation of Executor and Attorney, filed in May 1995, contradicted Respondent's Final Report which indicated a $2,000.00 payment (made in December 1994) as the last entry on the accounting when chronologically, it was the first disbursement. Respondent admitted to filing the Iowa Fiduciary Return of Income which erroneously listed the disbursement date of the $2,000.00 fee as "May 1995". This conduct was characterized as a negligent misrepresentation.

HELD: Respondent's lack of candor, both in his accounting practices and his representations to the court, violated the bond of trust which is so essential to the effective functioning and public respect for the legal profession and the judicial branch. Respondent's license to practice law in the state was revoked indefinitely, with no possibility of reinstatement for 30 days. Upon application for reinstatement, Respondent shall furnish proof that he has complied with the notification and disengagement requirements.

Iowa Supreme Court Bd. of Professional Ethics & Conduct v. Polson,
569 N.W.2d 612 (Iowa 1997)

Respondent's primary emphasis of his practice was in securities and corporate finance. A single client accounted for 85-90% of his billings. His client hired other counsel and

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Respondent subsequently began increasing his use of alcohol and encountered personal problems. Respondent completed programs for substance abuse. On October 30, 1995, Respondent, after having moved out of the family home, returned to the home intoxicated, and grabbed his wife by the neck. On January 25, 1996 Respondent plead guilty to domestic abuse causing injury. Respondent was charged with violations of the following rules: DR 1-201(A)(3) (engaging in illegal conduct involving moral turpitude), DR 1-102(A)(5) (engaging in conduct prejudicial to the administration of justice), DR 1-102(A)(6) (engaging in any other conduct adversely reflecting unfitness to practice law), and DR 7-106(A) (disregarding a standing rule of a tribunal or a ruling of a tribunal made in the course of a proceeding).

HELD: Respondent's license was suspended for a minimum of two years from the date of the temporary suspension on December 19, 1996.

Iowa Supreme Court Bd. of Professional Ethics & Conduct v. Wherry,
569 N.W.2d 822 (Iowa 1997)

Respondent was admitted to practice in 1991 and maintains a general practice in Davenport, Iowa. Respondent has consistently advertised his practice in the area of bankruptcy, domestic relations, wills and Social Security appeals. Respondent has never filed a report showing his eligibility to indicate areas of practice with the Commission or continuing legal education as required by DR 2-105(A)(4). Respondent claimed his advertise-ments were allowed as they were the subject of commercial free speech. Respondent raises several constitutional arguments in relation to his alleged violations.

HELD: Iowa government has a clear responsibility to protect the public interest in informed selection of legal representation. DR 2-105(A)(4) is an attempt to protect the public interest in making this informed decision. Respondent was reprimanded for his unprofessional conduct in violating DR 2-105(A)(4). For any future violations, the court will take into consideration Respondent's admonition and his reprimand.

Iowa Supreme Court Bd. of Professional Ethics & Conduct v. Kirlin,
570 N.W.2d 643 (Iowa 1997)

Respondent's disciplinary charges arise from ads placed in the Des Moines telephone directory for years 1994-1995 and 1995-1996. Respondent listed several areas of primary practice and stated that he was a member of several professional organizations providing specialized education in those areas. Respondent attacked the constitutionality of the rules DR 2-101 and DR 2-105 as invalid on their face and as applied because they impermissibly restrict his

communications with the perspective clients in violation of the First and Fourteenth Amendments to the United States Constitution and Article I, Section 7 of the Iowa Constitution. Under a three-part test set forth in Florida Bar v. Went-for-It, Inc., 515 U.S. 618 (1995), the court has stated:

> Iowa government, particularly its judicial branch, has a clear responsibility to protect the public interest in informed selection of legal representation. False claims of expertise are a real danger to those who need and are searching for legal services. (Citations omitted)
>
> Under the second part of the *Florida Bar* test, the question is whether the government's restriction on commercial speech directly and materially advances the state's interest.

HELD: Government protection of public interest in informed selection of an attorney was upheld. Failure of lawyer to comply with the disciplinary rules regarding advertising will subject the lawyer to sanctions. Respondent had previously been admonished for violations of the advertising rules and Respondent was publicly reprimanded.

Iowa Supreme Court Bd. of Professional Ethics & Conduct v. Mayer,
570 N.W.2d 647 (Iowa 1997)

Respondent was hired to obtain a modification of a 1980 divorce decree reflecting custody arrangements and terminating child support obligation. Respondent prepared a stipulation that authorized the district court to modify the 1980 dissolution decree so as to grant custody of the party's child, then age 10, to Loren Wessels and to terminate his child support obligation retroactive to June 13, 1986. The stipulation was signed by both Loren and Jamie Wessels in September 1986. Respondent delayed seeking the court's approval of the Stipulation and Modification of the Decree for more than 10 years.

HELD: Respondent's license was suspended indefinitely with no possibility of reinstatement for three months.

Iowa Supreme Court Bd. of Professional Ethics & Conduct v. Scheetz,
568 N.W.2d 663 (Iowa 1997)

Respondent was charged with failure to cooperate with the Board of Professional Ethics & Conduct in connection with client complaints. The dilemma confronting the court regarding an appropriate sanction "is the reality that, except for one instance of failure to respond to the Board's inquiries, the operative facts

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that constitute the ethical violations in the present case annotate the imposition of sanctions on Respondent in June 1996." The court was not convinced that it would have imposed any greater sanctions in June 1996 had it been aware of the present violations.

HELD: Respondent was publicly reprimanded.

Iowa Supreme Court Bd. of Professional Ethics & Conduct v. Miller, 568 N.W.2d 665 (Iowa 1997)

Respondent was employed as the attorney for Gekko International, LLC from May 1, 1992 to January 22, 1993. In December 1993 Respondent, while acting as attorney for Gekko, discovered that a marketing agent for Gekko may have been defrauding the company and that perhaps some of the principals in Gekko were involved. As compensation for her services, Respondent received membership units which are the equivalent of corporate shares in a limited liability company. At a membership meeting in December 1993, Respondent disclosed the information over the objection of a Gekko officer. Respondent suggested that the members may have a right of recision of their membership interest, based on fraud. Gekko immediately terminated Respondent's services as an attorney. After Respondent's termination by Gekko, Gekko's new attorney filed an ethics complaint against Respondent alleging she held some of Gekko's documents as security for payment for her attorney's fees. Respondent subsequently contacted the new attorney for Gekko and requested that Gekko repurchase her 60,000 units and 15-20,000 units owned by her friends at $5.00 each. She also demanded that a disciplinary charge then pending against her be dismissed. Respondent told Gekko's new attorney that if her demands were not met by a certain date she would file a complaint with the Securities and Exchange Commission (SEC) regarding her discovery of the apparent improprieties at Gekko and that she would pursue actions for sexual harassment and trade libel.

HELD: Respondent acted properly in pointing out the apparent fraud involving Gekko. However, her attempts to capitalize on that information by demanding a premium price for her units and her attempt to secure the dismissal of the disciplinary charges against her violated the Code of Professional Conduct. Respondent's license was suspended with no possibility of reinstatement for 60 days.

Commercial Law

Clinton National Bank v. Saucier,
__ N.W.2d __ (Iowa 1998)

The Defendant, Larry Saucier, is the President of Computer Alternatives, Inc. (CA). Saucier, on behalf of CA, executed several promissory notes with the Plaintiff, Clinton National Bank (Bank). CA defaulted on those notes. The Bank filed an action to collect on the promissory notes and CA and Saucier filed a counterclaim asserting breach of a contract on an alleged oral agreement between Saucier and the Bank. CA claims the Bank agreed to honor overdrafts so long as the total amount was less than the amount of accounts receivable certified to the Bank. The Bank was granted summary judgment based on Iowa Code § 535.17(1) which requires that any alleged agreement to honor overdrafts be in writing.

The relationship between a bank and its customer is based on contract. Iowa has adopted provisions of Article IV Use of the Uniform Commercial Code (UCC) governing bank deposits and collections. Absent an express agreement of the parties to the contrary, Article IV provides that bank deposits and collections are made express provisions of the depositor's contract with the bank. According to the terms of the Agreement Saucier and CA entered into with the Bank, the Bank had no duty to honor CA overdrafts, but could do so at its discretion.

Iowa Code § 535.17 enacted in 1990, which specifically states that a credit agreement including the honoring of overdrafts, must be in writing to be enforceable. When Iowa adopted section 535.17 it chose to impose a more stringent requirement concerning a bank's duty to honor overdrafts then called for by Article IV of the UCC. Iowa chose to require any duty to honor overdrafts be made agreed to in writing. The alleged oral statements of the Bank concerning this issue are immaterial. Pursuant to Iowa Code § 535.17(2) Saucier and CA never had an enforceable "credit agreement" with the Bank and therefore the Bank did not have to give Defendants notice that any alleged oral agreement to honor overdrafts was unenforceable.

HELD: Iowa Code § 535.17 requires that any alleged agreement with the bank to honor overdrafts must be in writing to be enforceable.

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Constitutional Law

State of Iowa v. Sharkey,
__ N.W.2d __ (Iowa 1998)

Sharkey operated a salvage yard near Dubuque. He was convicted of unlawful disposal of hazardous waste and unlawful storage of hazardous waste. Sharkey appealed on the grounds of double jeopardy and collateral estoppel because earlier he had been found guilty of contempt and sentenced for violating injunctions relating to his storage activities. Sharkey argued that he was convicted on the criminal charges with the same evidence and witnesses used in the contempt proceeding and that the convictions arose from the same events.

HELD: The elements of contempt and the criminal charges were so dissimilar that even the broadest application of the double jeopardy test could not support Sharkey's argument.

Darrow v. Quaker Oats Co.,
570 N.W.2d 649 (Iowa 1997)

Darrow alleged he suffered a psychological injury resulting from stress related to his job as an insulator/asbestos worker for Quaker Oats. Darrow claims Iowa Code § 85.21(1) which requires that a proceeding for benefits must be "commenced within two years from the date of the incurrence of the injury for which the benefits are claimed" is unconstitutional because the legislature has unlawfully discriminated between citizens injured on the job and citizens injured in other ways, in violation of the equal protection principals.

HELD: The Plaintiff misperceived the nature of the constitutionally protected rights he asserted. No equal protection violation occurs if the challenged law operates equally upon those persons or classes of persons intended to be affected by the legislation. Because the Workers' Compensation legislation is designed to benefit workers and their dependents, according to the statutory requirements the equal protection comparison must be confined to those persons classified as entitled to seek benefits under the statutory scheme.

Utilicorp United Inc. v. Iowa Utilities Bd.,
570 N.W.2d 451 (Iowa 1997)

The Plaintiff, Utiliticorp, is a local natural gas distribution company and brought action against the Utilities Board seeking declaratory judgment that the statutory amendment prohibting non-utility use of equipment paid for by gas and electric utility customers violated state constitutional provisions. Utiliticorp offers its utility customers non-utility services in

the form of appliance repair and protection plans called Service Guard. Utiliticorp uses its employees and equipment to perform these non-utility services.

At issue are the constitutional effects of Section 12 of the Senate File 2370. At the request of both parties, Judge Harold Vietor certified the following three questions to the Iowa Supreme Court on July 31, 1996: 1) does section 12 of the State Senate File 2370 violate the single-subject and title requirement of Article III, Section 29 of the Iowa Constitution?; 2) do the classifications contained in Section 12 of the Senate File 2370 violates the Privileges and Immunities clause of Article I, Section 6 of the Iowa Constitution?; and 3) does Section 12 of Senate File 2370 constitute a "special law" in violation of Article III, Section 30 of the Iowa Constitution? All provisions of Senate File 2370 relate to various provision in Iowa Code Chapter 476 which is an act to authorize the Iowa Utilities Board to regulate the rates and services of public utilities. Chapter 476 also defines public utilities to include those engaged in the furnishing of electricity, gas, water or communication services to the public for compensation. Chapter 476 also provides for appeals from orders and decisions of the Iowa Utilities Board. Senate File 2370 amended several of the sections contained in Iowa Code Chapter 476.

HELD: Section 12 of Senate File 2370 does not violate the single subject and title requirements of the Iowa Constitution. The act encompasses one general topic, public utilities, and amends nothing other than various provisions in the public utility chapter. The court found that the act does not encompass two or more dissimilar or discoordinate subjects that have no reasonable connection or relation to each other and that no violation occurred because these matters are relevant to some single more broad stated subject. The classifications contained in Section 12 of Senate File 2370 do not violate the Privileges and Immunities Clause of the Iowa Constitution because Section 12 does not create a classification and such classification would not be arbitrary. Utiliticorp is not singled out and Section 12 has impacted alike on all public gas and electrical companies, a group logically targeted for effecting energy efficiency. Section 12 promoted a legitimate governmental interest because energy efficiency is a legitimate governmental interest. Likewise Section 12 of Senate File 2370 does not constitute a "special law."

Goodenow v. City Counsel of Maquoketa,
574 N.W.2d 18 (Iowa 1998)

The Goodenow Family Trust owned property consisting of approximately 300 acres, 200 of which are located within the city limits of Maquoketa, Iowa. In 1995 the city of Maquoketa amended its city code and placed the duty to mow weeds growing in city-owned ditches upon the abutting property owner. The city served the Plaintiff, on behalf of the Trust, with a note to abate,

advising that the high grass and weeds in the city-owned ditch abutting the Trust property constituted a nuisance in violation of the city code and ordered him to mow the ditch an alleviate the nuisance. The city ordinance was created pursuant to Iowa Code § 364.12(2)(c) which grants the city the power to establish an ordinance requiring abutting property owners to maintain certain city-owned property. Plaintiff alleges that forcing it to mow grass and weeds growing on city-owned property, at its expense, constitutes a taking of its property for public use, in violation of the Fifth and Fourteenth Amendments and Article I, Section 18 of the Iowa Constitution. The Plaintiff essentially contends that the ordinance is a special tax assessed against them to pay for a public benefit, and that said ordinance violates constitutional provisions requiring uniformity and equality of taxation by creating a burden which does not bear upon all citizens alike.

HELD: Iowa Code § 364.12(2)(c) and the city ordinance constitute valid exercises of police power and do not effectuate a constitutional taking of Plaintiff's property. The Code section and city ordinance promote and protect the public health, safety, and welfare of persons who travel the city streets, and that the enactments are reasonably related to achieving those goals. Additionally, Iowa's Constitution includes the "home rule amendment" which grants municipal corporations authority to regulate matters of local concern.

Bellon v. Monroe County,
577 N.W.2d 877 (Iowa Ct. App. 1998)

The Plaintiff purchased a piece of property in 1993. Access to said property was a county roadway classified as a "B" service area. A road classified "B" has limited maintenance and is not available for vehicular travel about 25% of the year. Monroe County (County) refused to upgrade the road to an "A" classification which would require the county to maintain the road. The Plaintiff claims inverse condemnation based on the County's failure to upgrade or maintain the road. The Fifth Amendment, which is made binding on the states through the 14th Amendment, provides a private property shall not be taken for public use without just compensation. Plaintiff claims the County's failure to upgrade or maintain the road substantially deprives him of the use and enjoyment of his property or a portion thereof thus requiring the County pay just compensation to Plaintiff for said taking.

HELD: The road was a "B" classification prior to Plaintiff's purchase of the land. The "bundle of rights" he acquired by his purchase did not include the right to access other than a road with a reduced level of maintenance.

Norland v. Grinnell Mut. Reinsurance Co.,
576 N.W.2d 312 (Iowa 1998)

Norland purchased automobile insurance from Grinnell Mutual Reinsurance Company (Grinnell). Through a Grinnell program, Norland received lower insurance rates because he had no at-fault accidents or moving violations within the previous four years. His coverage was not renewed under this program when Grinnell determined that he was disqualified because of a speeding conviction Norland had received for less than 10 miles over the limit in a 65 mph speed zone. The speeding conviction did not disqualify Norland from obtaining other coverage from Grinnell at a higher rate but did disqualify him from the elite program. Norland claimed Iowa Code § 516B.3(1), which prohibits insurers from considering certain speed violations when establishing rates, violates the Equal Protection Provisions of the federal and state constitutions. Although the statute governs speeding violations which occur in speed zones regulated at 35-55 mph, Norland was granted standing to challenge the statute by stating that if the classification is stricken insurers will not be allowed to consider the speed violations of 10 mph or less regardless of the posted limits. Norland contends that during discovery neither Grinnell nor the insurance institute was able to produce any publication which established that speeding violations of 10 mph or less in a 35-55 mph speed zone posed less risk than similar violations in other speed zones. Norland claims that the lack of evidentiary support for the classification indicates the legislature had no such objective data to support the classification when it was adopted.

HELD: The legislature could have believed that minor speeding infractions within those speed limits were less dangerous than similar violations in higher speed zones. The legislature could reasonably have assumed that speeding violations, even minor violations of less than 10 mph, pose a greater risk in posted speed zones of less than 35 because of the prevalence of children and pedestrians in school and residential areas. The legislature follows similar classification with respect to whether the Department of Transportation can consider minor speeding violations for the purpose of a license suspension. Therefore, Iowa Code § 516B.3(1) was upheld.

Sherman v. Pella Corp.,
576 N.W.2d 312 (Iowa 1998)

The Plaintiff, Sharon Sherman, has worked almost exclusively since 1972, for the Defendant, Pella Corporation. Sherman began suffering from headaches, wrist and elbow pain, and was diagnosed with carpal and cubital tunnel syndrome in both her right and left arms. On July 8, 1993 Sherman was diagnosed as suffering from a three percent permanent partial impairment of the right hand and no impairment of the left based on the AMA Guides to the Evaluation of

Permanent Impairment (Guides). Sherman sought additional medical treatment and filed for Workers' Compensation benefits. Her claims were heard in June 1994. Using the Guides, the Deputy found that Sherman suffered a 28% loss of her right arm and a 19% loss of her left arm. The combined loss was equivalent to a 26% impairment of the whole person under the combined value charts found in the Guides. Sherman contends: (1) the Iowa scheduled member system is unconstitutional; (2) she is entitled to industrial disability for unscheduled injuries; and (3) the Commissioner erred in determining her benefits. Sherman contends the scheduled member benefits are generally smaller than unscheduled benefits which violates the Equal Protection clause of the 14th Amendment and Equal Protection provision of the Iowa Constitution. Iowa Code § 85.34(2), the scheduled member injury statute, is gender-neutral on its face. The only record evidenced bearing on the question of "discriminatory purpose" is Dr. Neff's testimony that studies show carpal tunnel syndrome is more prevalent in women then in men because of psychological differences between the two sexes. Sherman argued the scheduled injury system together with the use of the Guides violates the equal protection clause.

HELD: Sherman failed to show that the scheduled member injury statute reflects a purpose to discriminate on the basis of sex. The Iowa Workers' Compensation Act does not mandate that functional impairment for scheduled injury purposes be determined solely from the Guides. Sherman failed to show how the scheduled injury system together with the use of the Guides denied her equal protection.

United Fire & Casualty Co. v. Victoria, 576 N.W.2d 118 (Iowa 1998)

Mabel Victoria purchased an insurance policy from United Fire with a policy term of October 29, 1993 to April 29, 1994. Mabel Victoria moved from Goldfield, Iowa, to Colorado in January 1994. Mrs. Victoria wrote to her United Fire agent in Iowa, told him of her new Colorado address, and informed him that one of their vehicles should be deleted from the policy because it had been transferred to the Victoria's son. Mrs. Victoria inquired about receiving a refund for that vehicle and stated that the Colorado branch of United Fire no longer issued personal lines. She stated that in April the Victoria's would be changing car insurance companies. On April 25, 1994, Mrs. Victoria applied for coverage with State Farm through a Colorado agent. State Farm bound insurance coverage as of that date. Between April 25 and April 29, 1994, the Victorias were covered by both United Fire and State Farm policies. On April 28, 1994, Mr. and Mrs. Victoria and their son, Roger, who was driving, collided head on with a car driven by Mr. Hatting. Hatting was injured, and Mrs. Victoria was killed. Initially, United Fire and State Farm treated the claims as being subject to proration because of the apparent existence of coverage under both of the policies. Mr. Hatting made a claim against the Victoria's, United Fire, and State Farm which was negotiated with

Hatting's insurance company with a view toward prorating his claims as well. United Fire currently argues it has no coverage under its policy. United Fire relies on its automatic termination clause which states:

> If you obtain other insurance on "your covered auto," any similar insurance provided by this policy will terminate as to that auto on the effective date of the other insurance.

The United Fire policy does not define "similar." United Fire's policy provided liability coverage of $250,000 per person and $500,000 per accident. State Farm's limits were $100,000 per person and $300,000 per accident.

The United Fire policy also provided:

> We do not provide liability coverage for any person for "bodily injury" to you or "family member."

The Victorias allege that because Mr. and Mrs. Victoria were residents of Colorado at the time of the accident, any policy written by United Fire must conform to Colorado law which does not permit said exclusion.

To an average policy buyer, a policy with substantially lower limits would not likely be viewed as "similar." An insured should be informed as to what constitutes "similar" coverage when the consequences of buying a similar policy are serious as to cause an automatic termination. The American Heritage dictionary defines similar as same, identical or showing some resemblance; related in appearance or nature; alike though not identical. American Heritage dictionary 1206 (1979). In addition, the State Farm policy provides no fault coverage and emergency road service while United Fire's policy does not. There was also question as to whether State Farm's policy provided underinsured motorist coverage.

HELD: State Farm's policy and United Fire's policy are not "similar" for purposes of the automatic termination clause. The Victorias failed to request novation and an insured is not automatically entitled to reform a policy when moving to another state. Victorias also failed to prove that Colorado law would prohibit such an exclusion. When foreign law is not plead or proven it is presumed to be the same as Iowa's Law and under Iowa law such an exclusion is valid. The court erred in ordering reformation or novation of the insurance policy to remove the family exclusion.

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Mel Frank Tool & Supply, Inc., v. Di-Chem Co.,
__ N.W.2d __ (Iowa 1998)

The Plaintiff leased a storage and distribution facility in Council Bluffs, Iowa to Di-Chem. Di-Chem is a chemical distributor. The leased document is an Iowa State Bar Association form #164. The lease limited Di-Chem's use of the premises to "storage and distribution." Some of the chemicals Di-Chem distributes are considered "hazardous materials." The lease required Di-Chem to "make no unlawful use of the premises and ... to comply with all ... city ordinances."

On July 21, 1995 the city's fire chief and several other city authorities inspected the premises and found several code deficiencies. The Plaintiff and Di-Chem both testified that they understood correspondence from the city's fire chief to mean that if these deficiencies were eliminated, Di-Chem could continue to store hazardous materials on the premises. However, Di-Chem informed the plaintiff of its intention to re-locate as soon as possible to avoid civil and criminal proceedings at the hands of the city. Di-Chem also stated its intent to pay the rental for the month of August and vacate the premises by September 1. The Plaintiff sued for breach of the lease and for damages to the property.

There was evidence that the city ordinances had changes after Di-Chem had commenced its lease of the premises. The court noted that subsequent governmental regulations may prohibit a tenant from legally using the premises for its originally intended purpose. Under said circumstances, the tenant's purposes are substantially frustrated thereby relieving the tenant from any further obligation to pay rent. The tenant is not relieved from the obligation to pay rent if there is a serviceable use still available and consistent with the use provisions in the lease. The fact that the use is less valuable, less profitable, or unprofitable does not mean the tenant's use has been substantially frustrated. The city's actions were not shown to deprive Di-Chem of the beneficial enjoyment of the property for other uses. In addition, Di-Chem contends that it was not able to conduct its business on the premises as covered in the Lease Agreement which it claims constituted a total destruction of business use pursuant to the Lease language.

HELD: Di-Chem produced no evidence that all of its inventory of chemicals consisted of hazardous material. Di-Chem presented no evidence as to the nature of its inventory and what percentage of the inventory consisted of hazardous materials. Di-Chem failed to show what its lost profits, if any, would be without the hazardous materials. The total destruction of business use provisions in the Lease do not cover the situation where subsequent governmental regulation prohibits the use of the premises for one of several purposes specified in the Lease.

Damages

Olson v. Nieman's, Ltd.,
579 N.W.2d 299 (Iowa 1998)

The Plaintiff, Andrew Olson, was awarded $650,000 against the Defendant, Nieman's Ltd., for the company's alleged misappropriation of Olson's idea, which Olson claims was a trade secret. Olson developed an idea for "break-away hazard lights." His device would activate flashing lights on a trailer if the trailer disconnected from the transporting vehicle. Olson's damage expert calculated damages based on three assumptions. The damage expert assumed the following: 1) the relevant market was recreational vehicles; 2) in the first year Olson would sell the device manufactured by Nieman to 10% of the recreational vehicle market; and 3) a steady increase in the percentage of sales over the 17-year life would be life of the would-be patent. Iowa Code Chapter 550 governing trade secrets recognizes "reasonable royalty" as a measure of damages.

HELD: the district court allowed considerable leeway on speculation involving the damages for trade secret misappropriation. The legislature has implicitly approved such leeway by allowing use of reasonable royalty measure of damages.

Midland Mut. Life Ins. Co. v. Mercy Clinics, Inc.,
579 N.W.2d 823 (Iowa 1998)

Mercy Clinic leased space from the Future Development Corporation (FDC). FDC in turn sought financing from Midland. After various disputes arose, the parties signed a Modification Agreement which provided for a lump-sum payment by FDC to Midland and an execution of a new promissory note to cover interest that had accrued as a result of delinquent payments. The court reviewed various agreements signed by the parties and calculated damages accordingly.

HELD: There was not substantial evidence to support the jury's award of damages based on the court's recalculations of damages using a different theory than used by the Court of Appeals. As a matter of law, Mercy could not have sustained damages as a result of the breach until it declared FDC to be in default and exercised its rights under the assignment clause.

Gabelmann v. NFO, Inc.,
571 N.W.2d 476 (Iowa 1997)

NFO is a non-profit corporation that provides marketing services and information to its farmer members. Gabelmann began working for NFO in 1973. Gabelmann's responsibilities with NFO grew and he was required to move from Garner, Iowa, to Spencer, Iowa. Gabelmann asked his supervisor, Grahn, if NFO would pay for the move. Grahn told Gabelmann that NFO would not pay for the first move but it would pay for subsequent moves. In 1975 Gabelmann began working in NFO's Corning, Iowa, offices. Pursuant to an agreement authorized by NFO's President, NFO agreed to pay Gabelmann's moving expenses and an $80.00 per month housing allowance. Gabelmann lived in the motel in Corning during the week and traveled to Spencer on weekends while Gabelmann's family remained in Spencer until his son finished high school that following May. In the fall of 1975, Grahn left NFO and Roger Slottach took Grahn's place as Director of Field Operations. Grahn relied on Slottach to complete the necessary internal paperwork to carry out the commitment to pay Gabelmann's moving expenses and housing allowance. The original requisitions for moving expenses and housing allowance could not be located and only copies remained. The requisitions were not initialed by NFO's President's as was his ordinary practice. Grahn returned to NFO later in 1976 and Gabelmann asked him about the outstanding payments. In 1982 Gabelmann's moving expenses and housing allowance had not yet been paid. Grahn, who had again left and then returned to NFO, said he could not authorize payment at that time because NFO was financially strapped. In May of 1986 Gabelmann filed a requisition form asking for $689.00 in moving expenses and $10,640 in accrued housing allowance. NFO took no action. In June 1993 NFO dismissed Gabelmann telling him they had to cut back and that he was old enough to retire anyway. Gabelmann made written demand on NFO for moving expenses and housing allowance in the total amount of $40,339.69. NFO refused to pay.

HELD: NFO, through its President's conduct and statements, led Grahn to reasonably believe he had the authority to offer Gabelmann a housing allowance and thus a contract existed for the payment of said housing allowance. Stanley, as President of NFO, was obligated to approve the requisition once made and the fact that the requisition documents did not contain Stanley's initials was of no consequence.

Continental Western Ins. Co. v. Stenstrom,
576 N.W.2d 638 (Iowa Ct. App. 1998)

The Defendant, Doris Stenstrom, was an employee and shareholder of Stenstrom Construction Company. As a supervisor, Doris drove to and from job sites in a pick-up owned by the company which was provided for her use while on the job. After arriving at a particular job site, Doris stepped out of the vehicle. She was approximately 25 feet away from the pick-up when she was struck by a passing motorist. Continental Western Insurance (Continental) filed a declaratory judgment action claiming Doris was not an insured under its commercial insurance policy issued to Stenstrom Construction. The court interpreted the policy language defining who was an insured.

HELD: Doris was not doing anything connected with the operation of the pick-up at the time she was struck. The "use" of the vehicle was to transport Doris to and from home and between job sites. Said use had ceased when she went about her supervisory duties. At the time of injury Doris was inspecting the operations of a machine in an area 25 feet away from the pick-up and these duties were not related to the use of the pick-up. Doris was not entitled to coverage under the general liability policy and was therefore not covered under the underinsured motorist provision.

Iowa Comprehensive Petroleum Underground Storage Tank Fund Bd. v. Farmland Mut. Ins. Co.,
568 N.W.2d 815 (Iowa 1997)

Gasoline contamination to the soil and underground water occurred as a result of seeping steel underground storage tanks located at a former retail gasoline station in Ventura, Iowa. The leaking underground tanks were removed in 1988 but the gasoline contamination to soil and groundwater at the site was not discovered until May 1990. The property has been owned and operated as a retail gas station by Hancock County Cooperation (Co-op) since the 1930s. The storage tanks were releasing gasoline into the environment during years in which Farmland Mutual Insurance Company (Farmland) had issued comprehensive general liability policies to Coop. The Plaintiff filed its declaratory judgment action asking the court to interpret the "sudden and accidental" language in Farmland's policy.

HELD: The term "sudden" is not ambiguous and the exception to the Pollution-Exclusion provision requiring that the event be "sudden and accidental" was not met, as a matter of law. While the occurrence of the first drop of leakage might have been "sudden," the ground contamination, was not.

A

Etchen v. Holiday Rambler Corp.,
574 N.W.2d 355 (Iowa Ct. App. 1997)

The Plaintiff purchased a motor home from the Defendant, Holiday Rambler. The rear axle was manufactured by a second defendant, Drexter Axle. In 1993, while driving a motor vehicle, the Plaintiff heard a thump underneath the motor home and in the rearview mirror saw a piece fly out from underneath the motor home. As he brought the vehicle to a stop, he heard the tire blow and then realized that the rear tire had erupted in flames. While extinguishing the fire, the Plaintiff noticed there was a piece of brake drum caught between the axle assembly and the tire. The portion of the brake drum was on fire and soon the entire motor home was consumed in flames. Holiday Rambler, who manufactured the motor home, warrantied the vehicle for the first 12 months or 12,000 miles. Dexter Axle's warranty was for one year from the date of purchase. At the time of the fire, the motor home had 3,400 miles and was owned for less than 10 months. Both Defendants refused to perform their warranties. At trial all experts agreed that the origin of fire was in the vicinity of the left rear tag axle bearing housing system. They agreed the cause of the bearing failure and tire was improper adjustment to the bearing assembly, known as improper "preload." This meant that the adjusting nut on the end of the spindle under the retainer and the end cap had been torqued too much causing increased friction.

HELD: Holiday Rambler and Dexter Axle failed to fulfill its promise as created by their express warranties to the Plaintiffs. Defendants failed to show the product was substantially modified or changed by alteration.

Timms v. Clement,
574 N.W.2d 368 (Iowa Ct. App. 1997)

Clement sold a portion of property to Timms in 1990 and retained an abutting piece of property. Clement was aware at the time of the sale that there was one underground storage tank on the property. At closing, Clement signed a groundwater hazard statement stating there was no underground storage tanks or hazardous waste on the property sold to Timms. In 1992 both Clement and Timms were notified by the Iowa Department of Natural Resources (DNR) that the underground storage tank must be removed from the property. When the tank was removed in April of 1992, another underground storage tank was discovered on the property. The second tank was also removed. Soil tested on Clement's and Timms' property indicated petroleum contamination. Clement argued the representations made on the Groundwater Hazard Statement were true because the underground storage tanks were not on Timms property, but next to it, and that the petroleum contamination present in Timms' soil is not "hazardous waste" as defined by Iowa and federal law. However, the location of the storage tanks was

never established and it was possible that the underground storage tanks were on a portion of Timms' property.

HELD: The assertion that the petroleum contamination on Timms' property would not be considered "hazardous waste" subject to Federal Hazardous Waste regulations does not mean that the petroleum contamination is not hazardous waste pursuant to the meaning of Timms' and Clement's contract. Although the Code does not specifically define petroleum contamination as "hazardous waste" it does include petroleum products in the definition of hazardous substance in the Iowa Administrative Code.

LeMars Mut. Ins. Co. v. Joffer,
574 N.W.2d 303 (Iowa 1998)

The Defendants were involved in a two-car accident in South Dakota in 1993. The driver of the other vehicle was determined to be at fault but the driver did not have automobile insurance. The Joffers were insured by two separate policies with LeMars Mutual. At the time of the accident the Joffers were conducting farm business - obtaining supplies for the fall harvest - but were unable to drive the International truck which was insured under the business policy. The vehicle the Joffers were driving, a Buick, was insured under a separate policy. LeMars denied coverage under the business automobile policy stating that the Buick was not covered under said policy. The business automobile policy provided uninsured motorist coverage with a limit of $500,000 compared to the Buick policy which provided uninsured motorist coverage with a limit of $25,000 per person and $50,000 per accident. The court reviewed the policy language to determine who was an insured for the purposes of a temporary substitute provision of the policy. Because the policy stated an insured was anyone else occupying a covered auto covered or temporary substitute for the covered auto. The term "anyone else" was not defined by the policy.

HELD: Had LeMars intended for the temporary substitute clause to apply to the Joffers it had several options: it could have left out the word "else," making the temporary substitution clause applicable to anyone; include the clause in every paragraph; or separated the paragraphs by commas, indicating that the clause should apply to each paragraph. The dictionary meaning of "anyone" and "else" was correctly applied. These terms, as used in the insurance policy, were intended to mean anyone not previously named and thus did not include the Joffers. In addition, the language of the owned-but-not-insured exclusion in the LeMars' policy shows the intent of the insurer not to provide coverage for injuries which occur in vehicles which are not insured under the applicable policy. The owned-but-not-insured exclusion contained in the underinsured motorist policy is a valid exclusion and prevents Joffers from recovering the higher limits available under the business policy.

A

Flom v. Stahly, 569 N.W.2d 135 (Iowa 1997)

Stahlys began construction of their home in 1981 in Plymouth County. In 1981 the Floms became interested in the property, visited the property, walked through the house, reviewed numerous photographs taken during construction, had eight or nine construction professionals inspect assessable areas of the house, and determined it would cost $75,000 to $100,000 to finish the home. Floms took possession of the property in June 1991 and undertook the completion of the house. In the course of completion, a foreman found extensive areas of rotten wood and structural unsoundness along portions of exterior walls and support beams leading therefrom. The total purchase price of the house was $255,000 with a down payment of $110,000 and the remainder payable in installments. Because the amount expended by the Floms to repair the home exceeded the balance due on the Flom's indebtedness to the Stahlys, the Floms discontinued their installment payments and requested that the Stahlys release them from the outstanding obligation. The Stahlys served the Floms with a notice to secure the delinquency and the Floms brought their payments up-to-date. At the time of trial the current balance due from Floms to Stahlys was $130,000. On appeal the Stahlys challenged that the theory of express warranty does not apply to the sale of realty. In addition, the Stahlys assert that even if such a theory does apply to the sale of realty, the contract between the Stahlys and the Floms did not contain any express warranties.

HELD: The theory of express warranty can apply to specific representations or warranties contained in contracts for the sale of real estate. Written statements by the Stahlys regarding the construction of the exterior walls and duct work for the heating system constituted express warranties. Words such as "warranty" or "guarantee" need not be used to create an express warranty. In this case, parties deliberately chose to make statements concerning the manner in which the walls and heating system were constructed part of their contract indicating that the statements could be believed and relied upon by the Floms.

Advanced Elevator Co., Inc. v. Four State Supply Co., 572 N.W.2d 186 (Iowa Ct. App. 1997)

The Defendant, Four State Supply Company (Four State) owned a warehouse equipped with a freight elevator. The elevator needed repair and renovation and Four State entered into a written contract and work order with the Plaintiff, Advanced Elevator, to do the renovation, repairs and maintenance on the elevator. The work order, a single piece of paper with writing on both sides, contained exculpatory language in which Four State agreed to "waive any and all rights of recovery arising as a matter of law or otherwise which it might now or thereafter have against Advanced Elevator Company, Inc." The document contained no language on the

front which referred to the language on the back of the document. While working on the elevator, Advanced damaged the roof of the warehouse when the elevator came in contact with it. Advanced denied responsibility for the damage and Four State subsequently refused to pay for the repairs to the elevator. Advanced filed a Mechanic's Lien, followed by a Petition at Law requesting judgment against Four State. Four State filed a counterclaim for damages alleging negligence and breach of contract. In response to the counterclaim, Advanced claimed the exculpatory language in the work order prohibited the counterclaim by Four State.

Generally contracts which exempt parties from liability for their own negligence are generally enforceable. A party is charged with notice of the terms and conditions of a contract if the party is able or has had the opportunity to read the agreement. A party cannot avoid the terms of the contract simply because a harsh result may occur from the failure to read the contract. On the other hand, these principles have been modified when contract terms appear on the back of a contract. Two rules have emerged to determine whether a party is bound by terms found on the reverse side of a written contract. If contract language on the front of the contract refers to the language on the back of the contract, the parties are usually bound by the agreement. However, when language on the front of the contract contains no reference to the language on the back, and the draft of the contract does not bring the language on the back of the contract to the attention of the other party, a disclaimer on the back of the contract has no legal effect. Advanced introduced no evidence at trial that alerted Four State to the presence of the clause on the reverse side of the work order by making the language visibly conspicuous or by some direct reference.

HELD: The evidence was insufficient to support a finding that the exculpatory clause was a term of the Contract.

Hickman v. IASD Health Services Corp.,
572 N.W.2d 165 (Iowa Ct. App. 1997)

The Plaintiff's son, Kent Hickman, had several teeth displaced, lost, and fractured when he was struck by a baseball on May 26, 1993. Kenneth Hickman had a group medical insurance policy with Defendant, a/k/a Blue Cross-Blue Shield of Iowa. The insurance covered Hickman's son, Kent. The policy excluded dental coverage with limited exceptions including accidental dental injuries "treated within 72 hours of the injury . . . ." Blue Cross paid for the dental treatment rendered to Kent within 72 hours after the accident but refused to pay for further dental treatment rendered more than 72 hours after the accident. Hickman contends the policy should be read to include coverage for treatment commenced within 72 hours of injury and any subsequent treatment which relates back to the original injury. Blue Cross argues the

terms require any claim for treatment rendered more than 72 hours after the accidental injury be excluded.

HELD: The policy language is clear and explicit. Kent was not covered for dental care except for accidental injuries treated within 72 hours of the injury. Because the exclusion is clear and not contrary to the document as a whole, dental services performed more than 72 hours after the accidental injury occurred were not covered pursuant to the terms of the contract.

Thornton v. Hubill, Inc.,
571 N.W.2d 30 (Iowa Ct. App. 1997)

In 1994 the parties entered into a written settlement agreement arising from a personal injury action wherein the Plaintiff sustained substantial injuries. The settlement agreement included three documents: an actual settlement agreement and release, an assignment of obligation to make periodic payments, and an acceptance of annuity contract and assignee. The Plaintiff, Thornton, and his attorney signed all three of the above listed documents.

HELD: The plain unambiguous language of the Settlement Agreement documents express the parties intent to extinguish Defendants' legal obligations to Thornton and to completely release the Defendants of all liability. The terms of the Settlement Agreement are clear and unambiguous and the Contract will be enforced as written.

Okoboji Camp Owners Co-op. v. Carlson,
578 N.W.2d 652 (Iowa 1998)

The Plaintiff, the Cooperative, is an organization formed by the property owners within a sub-division for the purpose of acquiring all streets, alleys and common areas within the sub-division and to assume responsibility and control of various functions, including the sanitary sewer system and the water system. The Cooperative maintains the park area, common, playground equipment, fishing and boating docks, swimming beach, and the tennis, volleyball, and basketball courts within the sub-division. There is no express agreement between the parties requiring payment of fees for services performed by the Cooperative. The court therefore looked to the principles of quasi contract which involves duties founded on considerations of justice and equity.

HELD: The Cooperative conferred substantial benefits on each of the Defendant property owners. The testimony by Defendants that they do not avail themselves of the recreational facilities that the Cooperative offers was pertinent, however, the availability of these facilities benefits both Defendants by conferring added value to their properties. When persons are beholden to a cooperative

service provider for major services such as water, sewer and solid waste removal, and that provider offers other services, the users may not be in a position to pick and chose the services they will accept. Billing for all services as a package was not unreasonable.

Magina v. Bartlett,
__ N.W.2d __ (Iowa 1998)

Magina and Bartlett agreed to acquire and develop the air rights over the Grounds Transportation Center in downtown Cedar Rapids. The plan was to develop the air rights by building a 10 to 15 story high rise office building under a condominium concept whereby individual floors or one-quarter section of floors would be presold as condominium units. Magina and Bartlett were to be equal partners in the project. As work on the development progressed the relationship between Magina and Bartlett deteriorated. Magina and Bartlett eventually terminated their business relationship on September 22, 1980, pursuant to a document entitled "Settlement Agreement." Magina contends Bartlett breached the 1980 Settlement Agreement by failing to pay Magina one-half of the value of the fourth floor as required by paragraph one (1) of that agreement. The Settlement Agreement contained three possible contingent forms of consideration wherein Magina would receive payment from Bartlett when Bartlett transferred his air rights to a third party.

HELD: Magina'a share of the proceeds from the development were dependent or contingent upon Bartlett's further business dealings with third parties. Paragraph 1 required Bartlett to pay Magina upon receiving cash payments in exchange for the transfer of his interest. Bartlett at no time received cash or cash payments concerning the transfer of the air rights and the purchase of the fourth floor. Thus Bartlett had no duty under the Settlement Agreement to pay Magina any money. Bartlett did receive the fourth floor of the development in exchange for the transfer of air rights leased to a third party. Under paragraph three of the Settlement Agreement, Magina is only entitled to 10% of the net sale proceeds upon Bartlett's sale of the fourth floor. In this case, Bartlett received no cash concerning the transfer of interest under the air right's lease in exchange for the fourth floor of the development. Bartlett again had no duty to pay Magina one-half of the value of the four. Magina failed to establish Bartlett had breached any of the terms of the 1980 Settlement Agreement.

Whicker v. Goodman,
576 N.W.2d 108 (Iowa 1998)

Johnny Whicker (Whicker) was injured while trying to install a lifestock rack on his pick-up. Whicker parked his pick-up next to his grandfather's truck and later moved his grandfather's truck back a few feet in order to facilitate installing the stock rack. Approximately three to five minutes after Whicker had moved his

grandfather's pick-up, a vehicle driven by the Defendant and owned by the second Defendant struck Whicker's pick-up severely injuring Whicker. Neither Defendants had insurance coverage and Whicker filed suit seeking uninsured motorist benefits under the policies covering his pick-up and his grandfather's pick-up. Auto Owners Insurance Company (Auto Owners) denied coverage under the policy issued to Whicker's grandfather. Whicker then filed suit and appealed the court's determination that Whicker was not entitled to coverage under the Auto Owner's policy. Citing the language contained in Auto Owners policy defining an "insured," Whicker was determined not to be an insured under the uninsured motorist's coverage of the Auto Owner's policy. The policy required Whicker to be "in, upon, entering or alighting from" his grandfather's pick-up at the time of the accident to be considered an "insured."

HELD: Although Whicker was in close proximity to his grandfather's pick-up when he was injured, his use of that vehicle had ceased prior to the accident. When Whicker was injured, he was putting a stock rack on the back of his own vehicle. That activity had no connection with the pick-up insured by Auto Owners. Because Whicker was injured several minutes after he moved his grandfather's pick-up, he was not an insured under the liability coverages of the owner's policy with respect to the activities occurring after he stopped using his grandfather's pick-up. It cannot be said that Whicker was an insured at the time of the accident simply because he had qualified as an insured earlier in connection with an activity that had ceased at the time of the injury.

Dico, Inc. v. Employer's Ins. of Wausau,
__ N.W.2d __ (Iowa 1998)

Dico is an industrial manufacturer in Des Moines facing clean-up costs imposed by the Environmental Protection Agency (EPA) under the Comprehensive Environmental Response, Compensation and Liability Act of 1980 (CERCLA). Dico claims that under its comprehensive general liability policies issued by Wausau that coverage is owed on property damaged for which Dico is responsible pursuant to the CERCLA action. Wausau claims Dico's late notice of the indemnity claim precluded Wausau's obligations under the policies. The court analyzed two initial questions: was notice a condition precedent to coverage under the Wausau policy and, if so, did Dico substantially comply with the notice requirement? Wausau contends that correspondence between the EPA and Dico in 1981 and 1983 concerning the ground contamination were "claim letters." No petition had been filed against Dico before Wausau received notice of Dico's claim. Although "claim" is not defined in the policy, the court interpreted the term as meaning the pursuit of a legal obligation.

HELD: District Court could not, as a matter of law, determine that Dico had failed to comply with the notice requirements of Wausau's policy. Case remanded for further proceedings.

Government

State of Iowa v. Allen,
569 N.W.2d 143 (Iowa 1997)

The City of Mingo, an incorporated municipality with the population of approximately 250 people, is located in Jasper County. Mingo has not had a law enforcement officer for several years and instead has relied upon the Jasper County Sheriff for police protection. After a dispute arose between Mingo and the Jasper County Sheriff concerning compensation for the services provided by the Jasper County Sheriff, the Jasper County Attorney requested the Mayor of Mingo, Garrett Allen, either enter into an inter-governmental agreement to pay for the county's police services or to hire a police chief for Mingo

HELD: Chapter 368 of the Iowa Code requires a city or proposed city to provide police protection to its residents. It is the city's duty to provide the residents of Mingo with police protection; it is not the duty of Jasper County. The manner in which police services are to be provided to a city's residents is left to the judgment of the city counsel. The counsel can enter into an intergovernmental agreement with another governmental entity to obtain police protection or it can chose to hire its own law enforcement officer. If the counsel decides to employ a police chief, it can do so pursuant to civil service procedures by adopting such procedures, or it can direct the mayor to make the appointment. Once the mayor is authorized by the counsel to appoint the police chief, the mayor has the obligation to do so.

Stanley v. Michael L. Fitzgerald, Treasurer of the State of Iowa,
__ N.W.2d __ (Iowa 1998)

Stanley asserts the delaying of payment of some school aid appropriations due in one fiscal year until the beginning of the following fiscal year created a "core": a floating debt in violation of Iowa's Constitution. Stanley urges the timing of the payments combined with the issuing of tax and revenue anticipation notes (TRANs) allows the state to maintain a deficit.

HELD: In light of the legislative finding of Iowa Code § 12.25, the use of cash raised from the sale of TRANs to make payments held over from the previous fiscal year is consistent with legislative intent. While such an action is not prudent financial policy, it is not the court's position to instruct the State on this matter.

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Hiskey v. Mary Maloney, Polk County Treasurer,
__ N.W.2d __ (Iowa 1998)

Hiskeys were alleged to be or to have been owners of certain real property located in Polk County. The Polk County Treasurer brought an action claiming Hiskeys were personally liable for delinquent real estate taxes on that property. The Hiskeys claimed that Iowa Code § 445.3 and § 446.20, which were enacted in April 1992, and allow the Treasurer to seek a personal judgment for the payment of delinquent real estate taxes, may not be applied retroactively to taxes levied prior to the effective date of the legislation. The Hiskeys state these statutes assert a new personal obligation where none had existed before.

HELD: The preference for retroactive application of statutes pertaining to remedies and procedures does not extend to statutes creating new rights or imposing new obligations. The legislative act of labeling a statute "remedial" does not override the statutory presumption of perspective application when the statute in question creates a new personal liability for the payment of tax that had not previously existed. In this case, both of the tax sales certificates involved were acquired by Polk County in 1990, the statutes do not render the Hickeys personally liable for payment of the delinquent taxes.

Petersen v. Harrison Co. Bd. Of Supervisors,
__ N.W.2d __ (Iowa 1998)

Petersens own land in rural Harrison County and submitted a proposal in 1995 to the Defendant Board asking the Board to designate portions of their property as agricultural pursuant to Iowa Code Chapter 352. The property surrounds the unincorporated Village of Beebeetown, Iowa, on three sides. At a public hearing concerning Petersen's proposal for an agricultural designation, the primary concern was that granting Petersen's proposal would allow or encourage the establishment of an animal feeding operation or livestock consignment facility in the area. The Board rejected Petersen's proposal stating that it would adversely affect the value of property in Beebeetown and the property value of land surrounding the proposed agricultural area.

HELD: The preserving of private rights outweigh the policies favoring Petersen's proposal for an agricultural area.

Rathmann v. Board of Dir. Of the Davenport Comm. School Dist.,
__ N.W.2d __ (Iowa 1998)

The Davenport Community School Board (Board) members requested review of the Davenport Community School District's records. The court analyzed whether a school district can charge a fee for reviewing public records requested under Iowa's open records law. Raftman, a school board member, was told by the Superintendent that

she would be charged approximately $138.53 to cover the cost of locating and retrieving the requested records relating to the school district's "administrative structure review team." The Superintendent alone decided to consult legal counsel concerning the general school district matters and said private counsel provided both legal advise and legal representation to the school district.

HELD: A school district may not charge a Board member a retrieval fee associated with the Board member's request for record that the Board member has a right to see. A school district may hire private counsel to provide legal representation concerning school district matters, whether it be in response to pending litigation or simply providing a legal opinion.

Bernau v. Iowa Dept. of Transportation, __ N.W.2d __ (Iowa 1998)

Certain property owners in Floyd County opposed the Iowa Transportation Commission's (Commission) route for the Highway 218 Charles City bypass. The section of the bypass at issue in this appeal is commonly referred to as the "south tie-in." The original route for the south tie-in ran into some complications during the design phase when the Iowa Department of Transportation (IDOT) encountered a number of problems. The original alignment encroached on a quarry and landfill site posing construction difficulties and environmental concerns. In addition, the route traversed a creek area which created property access problems and required a more expensive bridge. As a result, the IDOT explored alternative routes. The route which became known as "Alternative C" would save $2,000,000 in constructions costs, eliminate the need to acquire several residents, and eliminate an encroachment on a historical site. After several public hearings considerable objection, principally from affected land owners, became apparent. However, the Commission approved Alternative C for the bypass. The Plaintiff's contend the Commission's decision violated the Iowa Code § 306.9 (1993).

The Legislature has empowered the Highway Division of IDOT to make initial recommendations regarding locations of highway and has empowered the Commission to make decisions regarding which of the alternatives proposed should be adopted. Iowa Code §§ 307.10, 307A.2(1),(2). Section 603.9 provides:

> It is the policy of the State of Iowa that relocation of primary highways through cultivated land shall be avoided to the maximum extent possible. . . .

The Plaintiff's contend that the Commission's selection of Alternate C rather than Alternate A or B clearly violates § 306.9 because the Commission considered the protection of farm land as just one of a number of factors rather than the primary factor.

A

Pursuant to the court's standard of review, the court stated it would not reverse the Commission's decision unless the Plaintiff's establish that the Commission's decision was arbitrary or capricious, meaning the action was taken without regard to the law or facts.

HELD: The Commission used sound engineering principles to reason a practical decision thus satisfying the feasibility requirement of its decision. The Commission acted in a manner consistent with that of a reasonable, well-informed officer, taking into account everything important that matters. Eagle Foundation v. Dole, 813 F.2d 798 (7th Cir. 1987). The Commission engaged in lengthy public debate over alternatives including nearly four years of study.

Goodell v. Humboldt County, Iowa, 575 N.W.2d 486 (Iowa 1998)

In October of 1996 the Humboldt County Board of Supervisors adopted four ordinances regulating large livestock consignment feeding facilities. The ordinances identically defined "large livestock consignment feeding facilities." When considering the validity of the County's ordinances, the court relied on two concepts: (1) the County's home rule authority, and (2) the State's power to abrogate or preempt local action. Iowa Const. art. III, Section 39A (added by Amend. 37 in 1978).

Counties have the power to determine their local affairs and government only to the extent those determinations are not inconsistent with the laws of the General Assembly. The court rejected the Plaintiff's assertion that livestock consignment feeding operation is a matter of statewide concern and thus not the proper subject of local regulation. However, characterizing the County's four ordinances as a "local affair" does not prevent the legislature from imposing uniform regulations throughout the state. On this premise the court examined whether the state has preempted local authorities from regulating livestock feeding operations. Iowa Code Chapter 335 limits a county's zoning power of agricultural land and structures by stating:

> No ordinance adopted under this chapter applies to land, farm houses, farm barns, farm out buildings or other buildings or structures which are primarily adapted, by reason of nature and area, for use for agriculture purposes, while so used.

The county claims the ordinances were enacted pursuant to the home rule authority granted in Chapter 331. The County also asserts the ordinances were intended to protect the health, safety and welfare of Humboldt County residents as an exercise of the County's police power. However, the court stated that any zoning regulation is, by definition, an exercise of the County's police power. Montgomery

v. Bremer Bd. of Supervisors, 299 N.W.2d 687,692 (Iowa 1980). Iowa Code § 335.4 also allows a county to regulate and restrict construction or use of buildings, structures or land.

HELD: The Humbold County ordinances do not regulate land use by district, and therefore they are not an exercise of the County's zoning power under Chapter 335. Subsequently, the ordinances are not subject to the agricultural exemption of section 335.2. The court goes on to analyze whether the ordinances are inconsistent with state law and thus constitute an implied preemption of the ordinances validity. The court found all four ordinances conflicted with state law. The ordinance requiring a permit conflicted with Iowa Code § 455B.10; the ordinance requiring financial assurance conflicted with state permitting requirements; the groundwater protection ordinance conflicted with 455B.172(5), which grants the DNR exclusive jurisdiction to regulate disposal of confinement animals' waste; and the ordinance regulating toxic air emissions conflicted with § 657.11 which regulates nuisance suits against animal feeding operations. All four ordinances were held invalid.

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IOWA APPELLATE COURT UPDATE - PART II

INDEMNITY

NEGLIGENCE

TORTS

WEBB L. WASSMER
Simmons, Perrine, Albright & Ellwood, P.L.C.
Cedar Rapids, Iowa

A

INDEMNITY

Indemnity - Contractual

Modern Piping, Inc. v. Blackhawk Automatic Sprinklers, Inc., No. 155/96-1878 (Iowa Supreme Court July 29, 1998)

Veterans Administration hired general contractor to construct addition to building. General contractor subcontracted with Modern Piping for piping. Modern Piping subcontracted with Blackhawk for installation of sprinkler system. Several months after Veterans Administration gave final acceptance and took possession, sprinkler pipes broke and damaged property and equipment. General contractor paid damage claim and withheld amount from retainage due Modern Piping. Modern Piping sued Blackhawk for indemnity under its contract with Blackhawk and for breach of warranty.

Jury found for Blackhawk. Affirmed.

HELD: Although it was error for the trial court to submit the question of the interpretation of the indemnity clause to the jury, Modern Piping is not entitled to indemnity as a matter of law. (NOTE: Court decided case on basis which Court expressly acknowledged was not considered by the District Court or raised by the parties in their briefs). The key language in the indemnity clause is that indemnity must be for a claim "arising out of or resulting in whole or in part from or in any manner connected with, the execution of the Work under this Subcontract." The key issue is the scope of that clause. The Supreme Court agreed with the analysis of the Court of Appeals in Campbell v. Mid-America Construction Co., 567 N.W.2d 667 (Iowa Ct. App. 1997), that this type of clause requires indemnity only while the work is in progress and does not provide coverage for injuries occurring after the work is completed.

Indemnity - Common Law

State ex rel. Miller v. Philip Morris, Inc., 577 N.W.2d 401 (Iowa 1998)

State sued tobacco companies on various claims, including claim for common law indemnity. State asserted that it had incurred substantial health care costs and other damages related to smoking related diseases.

District Court granted defendants' motions to dismiss common law indemnity and other counts. Affirmed.

HELD: Iowa Code § 249A.6 provides the State with a lien on all monetary claims which Medicaid recipients may have against third parties. Because there was no right to recover Medicaid costs from recipients or third parties under common law, § 249A.6 provides the State's exclusive remedy. "[C]ommon law indemnity is limited to circumstances where there is an express contract, vicarious liability, or a breach of an independent duty of the indemnitor to the indemnitee."

NEGLIGENCE

Comparative Fault

Kemin Industries, Inc. v. KPMG Peat Marwick LLP, 578 N.W.2d 212 (Iowa 1998)(see also discussion under Malpractice - Accountant below)

Kemin sued Peat Marwick alleging that Peat Marwick's failure to discover and disclose certain irregularities regarding a large account receivable had caused Kemin to delay intensive collection efforts until after the account receivable had become uncollectible.

The jury found for Kemin and awarded $2.95 million. Reversed and remanded for a new trial.

HELD: Kemin pled claims in both contract and tort. Kemin argued that the trial court should have entered judgment on its contract unreduced by Kemin's comparative fault as found by the jury on the negligence claim because either: (1) Iowa Code Chapter 668 does not apply to actions that seek recovery only for economic loss; or (2) Kemin is entitled to separate verdicts on each count.

Section 668.1(1) defines fault, inter alia, as an act or omission negligent towards the "property" of another. The specifically identified account receivable at issue in this case is a chose in action which is "property" under this definition.

A claim that a professional has failed to meet the standard of care is a negligence cause of action. Although a contract for services is involved, that contract merely helps to establish the duty element of the negligence claim. The District Court properly dismissed the contract claim. To hold

otherwise would render inapplicable the provisions of Chapter 668 specific to professional negligence actions (such as § 668.11 on experts).

Intervening/Superseding Cause
Proximate Cause

Hayward v. P.D.A., Inc., 573 N.W.2d 29 (Iowa 1997)

P.D.A. sold alcohol to Christensen, who was killed in a collision. While investigating that accident, Polk County Sheriff's Deputy Hayward was killed by another intoxicated motorist, Smith. Hayward's executor sued P.D.A under the dramshop act.

District Court granted summary judgment for bar, finding that bar's sale of alcohol to Christensen did not proximately cause Hayward's death. Affirmed.

HELD: A defendant's conduct is not a proximate cause of harm to the plaintiff if it is superseded by later-occurring independent forces or conduct. Smith's negligent act of driving while intoxicated and striking Hayward was an intervening/superseding act which relieves P.D.A. of liability as a matter of law. Hayward's death was not a proximate, foreseeable result of P.D.A. selling alcohol to Christensen.

TORTS

ADEA

Sievers v. Iowa Mutual Ins. Co., No. 167/97-388 (Iowa Supreme Court July 29, 1998)

Sievers, age 54, worked at Iowa Mutual Insurance Company until she resigned. Sievers claimed that she had been forced to resign after she began working for a new supervisor who allegedly preferred younger employees.

Jury found for defendant. Affirmed.

HELD: (1) The instructions of the trial court correctly stated the burden shifting framework of McDonnell Douglas.

(2) The trial court correctly instructed the jury that Sievers had to prove that she "was replaced by a younger person after the discharge." In reaching that conclusion, the Iowa

Supreme Court rejected a line of cases from other jurisdictions and followed the position of the Eighth Circuit.

Bad Faith - First Party

Sampson v. American Standard Insurance Co., No. 168/97-1098 (Iowa Supreme Court July 29, 1998)

Sampson sued insurer for bad faith failure to pay benefits under uninsured motorist and medical coverage provisions. Sampson had been involved in accident with uninsured driver.

District Court granted summary judgment. Affirmed.

HELD: The extent of Sampson's injuries was fairly debatable. The medical records that Sampson provided to the insurer suggested that Sampson had a previous medical condition and that her claimed chiropractic treatment may not be related to the accident. Additionally, the insurer had a right to decline to pay the full limits pending the insurer's investigation of the claim.

Civil Rights - Disability

Fuller v. Iowa Dep't of Human Services, 576 N.W.2d 324 (Iowa 1998)

Fuller was employed by the Iowa Department of Human Services ("DHS") as an income maintenance worker. Fuller was under treatment for depression. Fuller fell behind in maintaining her file load and it was subsequently discovered that sixty-seven of her files could not be found. After allowing several medical leaves, DHS rejected her request for additional medical leave and terminated her for nonproductivity.

District Court entered judgment for DHS. Affirmed.

HELD: The burden shifting framework of McDonnell Douglas may be used in a claim for disability discrimination. A "disability" is an physical or mental impairment which substantially limits one or more of the major life activities of the claimant. Fuller's depression is a mental impairment. The Iowa Supreme Court has not previously addressed whether, and to what extent, the mitigating effects of medication or other assistive devices may be considered in analyzing a disability discrimination claim. The Court held that:

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> a fact finder *may not consider* the mitigating effects of medication or assistive devices in determining *the existence of an impairment*, but that the mitigating effects of medication or other assistive devices *may be considered* in determining whether *the impairment substantially limits a major life activity*.

Fuller's depression does not substantially limit one or more of her major life activities because her depression is controllable by medication.

Bearshield v. John Morrell & Co., 570 N.W.2d 915 (Iowa 1997)

Bearshield sued employer for disability discrimination. Bearshield suffered from degenerative arthritis in both knees, aggravated by falls. Physician released Bearshield to work, subject to restrictions. John Morrell refused to allow Bearshield to work because of John Morrell's policy requiring a full release before allowing an employee to return to work. After Bearshield filed complaint with Iowa Civil Rights Commission, John Morrell allowed Bearshield to return to work with accommodation of allowing her to use a stool.

District Court granted summary judgment for defendant, finding that Bearshield was not disabled under either American with Disabilities Act or Iowa Civil Rights Act. Affirmed in part, reversed in part, and remanded for further proceedings.

HELD: (1) Because of the common purposes of the ADA and the ICRA's prohibition of disability discrimination and similar language, Court will look to the ADA and underlying federal regulations in developing standards under the ICRA for disability discrimination claims.

(2) Bearshield's knee condition does not substantially limit her major life activities of caring for herself or walking. Although Bearshield is completely prevented from squatting or twisting, those are not major life activities.

(3) A fact question exists on whether Bearshield's knee condition substantially limits her major life activity of working. A fact finder could conclude that Bearshield is unable to perform production line work unless the employer accommodates her restriction on prolonged standing. "The determination of an individual's ability to work in a class of jobs or a broad range of jobs must be made without regard to

the possibility of accommodation." "Production line work" qualifies as a class of jobs.

(4) There is also a fact question as to whether John Morrell perceived Bearshield as having an impairment that substantially limits her ability to work. John Morrell's "100% healed" policy appears based on John Morrell's fear of employees reinjuring themselves and higher workers' compensation costs rather than on the individualized assessment required by the ADA and the ICRA.

Falczynski v. Amoco Oil Co., 567 N.W.2d 447 (Iowa Ct. App. 1997)

Amoco terminated Falczynski for excessive absenteeism. Falczynski sued claiming disability discrimination based on her asthma.

District Court found for defendant. Affirmed.

HELD: Evidence that Falczynski produced regarding the effect of her asthma on the major life activity of breathing was insufficient to prove disability. Medical opinions were that Falczynski would have difficulty breathing when exerting herself. However, Falczynski had a desk job that would not require exertion. The trial court's finding is supported by substantial evidence.

Conspiracy

Robbins v. Heritage Acres, 578 N.W.2d 262 (Iowa Ct. App. 1998)

Robbins sued nursing home and others for conspiracy and negligence following his expulsion as patient.

District Court dismissed the petition on motion. Affirmed in part and reversed in part.

HELD: "A civil conspiracy requires proof of an agreement or understanding to effect a wrong against another. A conspiracy is a combination of two or more persons to accomplish, through concerted effort, an unlawful end or a lawful end by unlawful means." Robbins alleges that the defendants conspired to deprive him of necessary medical and nursing home care. The Court cannot say that Robbins cannot sustain a conspiracy or negligence claim under any set of facts under the petition.

[Affirmed as to the claims regarding the legality of Robbins' involuntary expulsion as those claims were litigated and resolved against Robbins' in a claim before the Iowa Department of Inspections and Appeals]

Constructive Trust

Berger v. Cas' Feed Store, Inc., 577 N.W.2d 631 (Iowa 1998)

Feed store's customers sued bank for constructive trust after bank set-off feed store's bank account (containing prepayments for agricultural products) against delinquent bank loans.

Trial court found constructive trust in favor of customers and against bank. Reversed and remanded.

HELD: A constructive trust is an equitable remedy designed to provide restitution and prevent unjust enrichment. Circumstances justifying the imposition of a constructive trust include fraud, "bad faith, duress, coercion, undue influence, abuse of confidence, or any form of unconscionable conduct or questionable means by which one obtains the legal right to property which they should not in equity and good conscience hold."

In this case, both the customers and the bank had a good faith claim to the money in the feed store's account. The money constituted pre-payments by the customers. The bank had a legal right of set-off. The bank's debt was secured, while the customers' was not. There is no clear, satisfactory, and convincing proof that the bank enriched itself inequitably or unconscionably at the expense of the customers.

Consumer Fraud Act - Private Cause of Action

Molo Oil Co. v. River City Ford Truck Sales, Inc., 578 N.W.2d 222 (Iowa 1998)

Molo purchased a truck from River City. River City represented that the engine had been overhauled and that the truck had 186,000 miles on the odometer. The truck did not work to Molo's satisfaction and Molo sued for, inter alia, a violation of Iowa's consumer fraud statute, Iowa Code § 714.16(2)(a).

District Court dismissed this claim. Affirmed.

HELD: There is no private cause of action under the Iowa Consumer Fraud Act.

Duty

Bohan v. Hogan, 567 N.W.2d 234 (Iowa 1997)

Investors sued printing company for negligently printing certificates of deposit which securities broker used to defraud investors. Claim was that printing company failed to ascertain what authority local securities broker had to arrange for printing contract on behalf of large Chicago bank.

District Court dismissed on motion. Reversed and remanded.

HELD: (1) District Court dismissed on the basis that the claim alleged a duty to control the conduct of third persons. That is not the basis of the claim. The claim is that circumstances existed which should have suggested to the printing company that a risk of harm to others existed from printing certificates at the request of an individual having no apparent relationship to the bank involved. That is an assertion of active neligence on the part of the printing company, not a claim of failure to control.

(2) District Court also reasoned that negligence claims that may be maintained in the absence of a special duty are harms that are a direct, not an indirect, consequence of the actor's negligence. However, "[w]hen the claim does not involve the failure of an actor to protect another person or to control the conduct of a third party, the elements of the cause of action for negligence . . . do not include a discrete determination of legal duty." A state of facts could exist that would establish that the printing company was negligent.

Duty - Ambulance Driver

Hoffert v. Luze, 578 N.W.2d 681 (Iowa 1998)

Hoffert was injured in intersection collision with ambulance.

Jury found for plaintiff. Reversed and remanded for entry of judgment for defendants.

HELD: An ambulance engaged in emergency response may only be held liable to the extent that liability is imposed by Iowa Code § 321.231. At issue is the language of § 321.231(5) which states that "[t]he foregoing provisions shall not relieve the driver of an authorized emergency vehicle from the duty to drive with due regard for the safety of all persons, nor shall such provisions protect the driver from the consequences of the driver's reckless disregard for the safety of others." Plaintiff argued that the "duty to drive with due regard for the safety of all persons" language imposed a negligence standard of care. The Court found that the standard of care is to drive with due regard for the safety of others, but that an injured party may only recover if the driver is reckless. Accordingly, the trial court erred in instructing the jury on a standard of negligence, rather than a standard of recklessness. Because plaintiff did not appeal the trial court's grant of summary judgment on the claim for recklessness, reversed and remanded for entry of judgment for defendants.

Bell v. Community Ambulance Service Agency for Northern Des Moines County, 579 N.W.2d 330 (Iowa 1998)

Bell was injured in intersection collision with ambulance. Trial court instructed that jury must find that ambulance driver's conduct was reckless.

Jury found for plaintiff. Trial court granted defendants' motion for judgment notwithstanding the verdict, finding that no substantial evidence supported jury's verdict. Affirmed.

HELD: As held in Hoffert, the standard of care is recklessness. The primary issue regarding recklessness is "the driver's mental attitude as disclosed by his acts and conduct immediately prior to and at the time of the accident." There is insufficient evidence that the ambulance driver acted recklessly in this case.

Duty - Nondelegable

Lane v. Coe College, No. 8-097/97-0935 (Iowa Ct. App. April 24, 1998)

Lane was employed by Marriott. Marriott had a contract with Coe to provide food service. The contract between Marriott and Coe placed the duty of maintenance on Coe. Lane was injured when a steam kettle spilled boiling water on her due to a faulty latching mechanism. Trial court refused to

give Lane's proffered instruction that "Persons who hire an independent contractor and who are under a duty to provide specified safeguards or precautions for the safety of others by contract cannot escape responsibility by delegating it to an independent contractor."

Jury found for Coe. Reversed and remanded for a new trial.

HELD: The trial court erred in refusing the instruction on nondelegable duty. The contract placed a nondelegable duty on Coe to maintain the food service equipment, which subsumes a duty to inspect the equipment. Lane was entitled to have that theory submitted to the jury. Prejudice resulted because "[i]t is probable the result of this case could have been different had the jury known Coe was not able to delegate their duty to maintain the equipment of the food service facility to Marriott."

Duty to Warn

Ries v. Steffensmeier, 570 N.W.2d 111 (Iowa 1997)

Ries was injured while operating a skid loader at his sister's farm. The jury found Ries 25% at fault, the farm owners 25% at fault, and the skid loader manufacturer (with whom Ries had settled prior to trial) 50% at fault. The jury also answered "no" to the question of whether Ries was Steffensmeier's employee.

District Court denied Steffensmeier's motion for judgment notwithstanding the verdict. Reversed, with directions to dismiss the claim against Steffensmeier.

HELD: The sole theory against Steffensmeier was that, as Ries' employer, Steffensmeier failed to warn regarding the proper use of the skid loader. The threshold issue in negligence is the existence of a duty. In the failure to warn context, there must be a duty to warn before there can be a failure to warn. When the plaintiff's claim rests on a failure to protect the plaintiff from harm, there must be a special relationship giving rise to a duty on the part of the defendant to protect the plaintiff. Here, the jury found no employment relationship and, thus, there is no special reliationship giving rise to a duty to protect.

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Employer Liability

Ries v. Steffensmeier, 570 N.W.2d 111 (Iowa 1997)

Ries was injured while operating a skid loader at his sister's farm. The jury found Ries 25% at fault, the farm owners 25% at fault, and the skid loader manufacturer (with whom Ries had settled prior to trial) 50% at fault. The jury also answered "no" to the question of whether Ries was Steffensmeier's employee.

District Court denied Steffensmeier's motion for judgment notwithstanding the verdict. Reversed, with directions to dismiss the claim against Steffensmeier.

HELD: The sole theory against Steffensmeier was that, as Ries' employer, Steffensmeier failed to warn regarding the proper use of the skid loader. The threshold issue in negligence is the existence of a duty. In the failure to warn context, there must be a duty to warn before there can be a failure to warn. When the plaintiff's claim rests on a failure to protect the plaintiff from harm, there must be a special relationship giving rise to a duty on the part of the defendant to protect the plaintiff. Here, the jury found no employment relationship and, thus, there is no special reliationship giving rise to a duty to protect.

Family Medical Leave Act

Sievers v. Iowa Mutual Ins. Co., No. 167/97-388 (Iowa Supreme Court July 29, 1998)

Sievers worked at Iowa Mutual Insurance Company until she resigned. She sued under the Family Medical Leave Act (FMLA), claiming that the Company had discouraged her from taking time off to accompanying her daughter for chiropractic treatment for seizures and forcing her to resign because of that request.

District Court granted summary judgment for Defendant. Affirmed.

HELD: For chiropractic treatment to qualify for leave under the FMLA (based on the express language of the Act), the employee must establish that:

> (1) the chiropractor performing the treatment is authorized to practice in the state in which the treatment is performed;

(2) the treatment is within the scope of the chiropractor's practice as defined under the law in the state where the chiropractor is practicing;

(3) the treatment must consist of manual manipulation of the spine to correct a subluxation [misalignment of spinal segments]; and

(4) X-rays must demonstrate the existence of the subluxation.

The Court found that Sievers had failed to produce evidence supporting any of these elements.

Fraud

Molo Oil Co. v. River City Ford Truck Sales, Inc., 578 N.W.2d 222 (Iowa 1998)

Molo purchased a truck from River City. River City represented that the engine had been overhauled and that the truck had 186,000 miles on the odometer. The truck did not work to Molo's satisfaction and Molo sued for, inter alia, fraudulent statement on the odometer statement, which was off by 6,000 miles.

Jury found for River City. Affirmed.

HELD: The District Court held that the truck was exempt from the disclosure requirements pursuant to regulation. However, that regulation is inconsistent with the federal statute and no exemption is justified. River City violated the odometer statement requirements. However, Molo did not prove that River City had an "intent to defraud." At best, the evidence shows only negligence, particularly given the fact that the discrepancy is only 6,000 miles.

Additionally, the negligent misrepresentation claim fails as a matter of law. This was an arms-length transaction.

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Fraudulent Misrepresentation

Arthur v. Brick, 565 N.W.2d 623 (Iowa Ct. App. 1997)

Purchasers filed suit arising from real estate contract. After basement flooded, a drain that was illegally and improperly connected to the sanitary sewer was discovered.

District Court granted judgment for defendant. Affirmed.

Held: For a claim of fraudulent misrepresentation in the context of a sale of real estate, a plaintiff must show the seven elements of fraudulent misrepresentation, as measured in conjunction with the standards of disclosure set forth in Iowa Code Chapter 558A. Seller had disclosed both that water had previously been in basement and that remodeling without city permits had been done. The seller testified that he did not know of any problems with the drain connection. The seller did not misrepresent any facts.

Interference with Contract

Jones v. Lake Park Care Center, Inc., 569 N.W.2d 369 (Iowa 1997)

Jones sued her former employer for breach of contract and the employer's sole shareholders and officers for intentional interference with contract.

Trial court, following bench trial, found for Jones and awarded damages. Affirmed.

HELD: Generally a party to a contract cannot be liable for intentional interference with the contract. A director or officer of a corporation acts as an agent of the corporation when acting in good faith to protect the interests of the corporation. When acting as an agent, the director or officer is considered a party to the contract. However, if the director or officer acts beyond the scope of his or her qualified privilege, he or she is no longer acting as an agent of the corporation and can be personally liable. Substantial evidence supports the trial court's finding that the shareholders/officers were acting beyond the scope of their agency.

Interference with Rights

Below v. Skarr, 569 N.W.2d 510 (Iowa 1997)

Below was injured while making a delivery to a grocery store. Below applied for and received workers' compensation benefits. He sued his employer on the theory that the employer had interfered with his right to pursue a claim for workers' compensation, alleging that the employer had threatened to fire him for making the claim. The employer never actually terminated Below.

District Court dismissed case. Affirmed.

HELD: Below was an employee-at-will. The Court has previously held that a public policy is violated when an employer discharges an employee for exercising his rights under the workers' compensation statute. However, because Below received benefits and did not suffer any adverse employment action, he cannot state a claim. The Court also expressed the concern that recognizing this type of claim would lead to a proliferation of common law suits by workers' compensation claimants alleging that they had been threatened or harassed for filing workers' compensation claims. The Court left open the possibility that a claim could be stated if the conduct of the employer was so egregious as to amount to a constructive termination.

Malpractice (Accountant)

Kemin Industries, Inc. v. KPMG Peat Marwick LLP, 578 N.W.2d 212 (Iowa 1998)

Kemin sued Peat Marwick alleging that Peat Marwick's failure to discover and disclose certain irregularities regarding a large account receivable had caused Kemin to delay intensive collection efforts until after the account receivable had become uncollectible.

Jury found for Kemin and awarded $2.95 million. Reversed and remanded for a new trial.

HELD: (1) With respect to certain claims, Peat Marwick cannot be held to be negligent in failing to report matters known to Kemin's officers and employees whose duties were to act on those matters. However, with respect to one allegation, the only officer or employee with knowledge of the falsity of the assertion was the officer who made the false assertion to

the corporation. That officer's knowledge of the falsity is not imputed to the corporation.

(2) While failure to comply with the Generally Accepted Auditing Standards and the Generally Accepted Accounting Principles formulated by the American Institute of Certified Public Accountants may support a claim for professional negligence, they are not the only measure of professional negligence with respect to auditing activities. The trial court correctly instructed the jury that conformity or non-conformity with those standards was relevant, but not conclusive. Accountants must use the skill, judgment and learning ordinarily possessed and exercised by other accountants under similar circumstances.

(3) In order to prevail, Kemin had to establish that the account receivable was collectible. Based on the evidence, the jury appears to have awarded damages based on a time when the account was not fully collectible. On retrial, the jury's verdict must be more tightly channeled to a time when the account is demonstrated to be collectible.

Malpractice (Legal)

Huber v. Watson, 568 N.W.2d 787 (Iowa 1997)

Huber was diagnosed with pleural mesothelioma, which is caused by exposure to asbestos. Several defendants were dismissed from the underlying suit for failure to demonstrate that Huber had been exposed to their products. In the legal malpractice suit, evidence was produced that Huber's disease was caused by exposure to asbestos manufactured by some of those defendants.

Following jury verdict for plaintiff, trial court granted judgment notwithstanding the verdict for defendant. Reversed and remanded for trial court's consideration of motion for new trial.

HELD: When the claim of malpractice involves the handling of a lawsuit, the plaintiff must establish that, but for the lawyer's negligence, the underlying suit would have been successful. In this case, the evidence offered was sufficient to show that Huber's exposure to asbestos could be linked to the defendants dismissed in the underlying suit.

The Court also rejected the argument that the state-of-the art defense would have precluded liability on the part of the

asbestos defendants. Iowa Code § 668.12 does not apply to the claim that the manufacturers breached their duty to warn based on subsequently acquired knowledge regarding their products.

Troendle v. Hanson, 570 N.W.2d 753 (Iowa 1997)

District Court dismissed action for failure to comply with discovery. Affirmed.

HELD: "In summary, the actions of the plaintiffs' attorney in the case before us constituted *flagrant* violations of the rules of civil procedure and the district court's orders. The defendants were entitled to full and prompt discovery responses and a reliable trial date; despite the efforts of their attorney and the district court, the defendants were deprived of both. Plaintiffs placed their case in the hands of their attorney and must bear responsibility for his actions in the conduct of their case. Their remedy lies in an action against that attorney, not in shifting the consequences of their attorney's conduct to their opponent."

Holsapple v. McGrath, 575 N.W.2d 518 (Iowa 1998)

Decedent DeVoss signed three quitclaim deeds and a will in the presence of Attorney McGrath. The deeds quitclaimed DeVoss' interest in farms to the Holsapples and Randolph, long-time tenants. The deeds were signed, but not dated, notarized, recorded, or delivered. McGrath placed the deeds in his office safe. The will contained no provision conveying the farms to the Holsapples or Randolph. The Holsapples and Randolph sued McGrath alleging that he was negligent in the execution of the deeds and in preparing the will.

District Court granted summary judgment for defendant. Affirmed as to the will and reversed as to the deeds.

HELD: An attorney ordinarily owes a duty only to his or her client. One exception involves the preparation of testamentary instruments. Another allows intended beneficiaries of non-testamentary instruments to recover if: (1) he or she was specifically identified as an object of the grantor's intent and (2) the expectancy was lost or diminished as a result of professional negligence.

With respect to the deeds, it is clear that DeVoss intended to give the property to the Holsapples and Randolph. If McGrath failed to advise DeVoss of the consequences of

failing to complete the deeds or to provide that the farms would go to the Holsapples and Randolph in the will, that failure would constitute negligence. A fact dispute precluding summary judgment exists on this claim.

With regard to the will, a beneficiary may recover only if the testator's intent as expressed in the will is frustrated by professional negligence. The will made no provision for the Holsapples and Randolph and DeVoss' intent cannot be supplied by extrinsic evidence. Summary judgment was properly granted on this claim.

Malpractice (Medical) - Lost Chance of Survival

Wendland v. Sparks, 574 N.W.2d 327 (Iowa 1998)

Wendland suffered from various diseases, including fibrotic lung disease and multiple myeloma. While hospitalized, she suffered cardiorespiratory arrest. Her physician, Sparks, decided to not to attempt resuscitation, apparently because the chance of a successful resuscitation was small and because Wendland's prospects for a quality life were not good. Dr. Sparks was aware that Wendland's family desired that resuscitation attempts should be made.

District Court granted summary judgment on the basis that plaintiff could not prove that the failure to resuscitate was a proximate cause of Wendland's death. Reversed and remanded.

HELD: (1) The loss of chance theory is not limited to a claim of negligent diagnosis. It applies to the facts of this case.

(2) Damages are recoverable for a lost chance of less than fifty percent. Even though "the chances of successful resuscitation were questionable and any recovery for wrongful death would be severely limited because of the patient's preexisting condition, even a small chance of survival is worth *something*."

Malpractice (Medical) - Need for Expert Testimony

Bazel v. Mabee, 576 N.W.2d 385 (Iowa Ct. App. 1998)

Bazel sued health care providers for using Betadine as a disinfectant during artery bypass graft surgery. Plaintiff alleged that she had an allergic reaction to the Betadine.

District Court granted summary judgment for defendants on basis that plaintiff failed to produce sufficient expert testimony. Reversed and remanded.

HELD: Expert testimony was not needed to generate a jury question on breach of the applicable standard of care. Plaintiff informed Defendants that she was allergic to Betadine. Because of that, Defendants are required to show a compelling reason for using Betadine.

Expert's interrogatory answer that a Betadine allergy would inhibit wound healing was sufficient to create a jury question on proximate cause.

Graeve v. Cherny, No. 142/97-653 (Iowa Supreme Court July 1, 1998)

HELD: The rules applicable to medical malpractice cases, including the need for expert testimony on standard of care, breach of the standard, and causation, apply in small claims actions for medical malpractice. Because the plaintiff failed to produce any expert testimony that the defendant breached any standard of care, reversed and remanded for dismissal of petition.

Negligence - Sale of Land

Timm v. Clement, 574 N.W.2d 368 (Iowa Ct. App. 1997)

Clement sold property to the Timms, which was near other property owned by Clement that contained underground gasoline storage tanks. The property sold by Clement to the Timms was contaminated with petroleum. Clement did not disclose the contamination or the presence of the nearby storage tanks to the Timms.

Jury found for the Timms on claims of negligence and breach of contract. Affirmed.

HELD: The Timms asserted that Clement was negligent in failing to register the underground storage tanks as required by regulation and was negligent in maintaining, removing, using, and closing the underground storage tanks.

The primary issue is duty. "It is a long-established rule of law that one who sells real estate knowing of a soil defect, patent to him, latent to the purchaser, is required to disclose

such defect." Additionally, a duty may be imposed by statute. Clement violated Department of Natural Resources regulations requiring that tanks that have been out of service more than twelve months be closed. Those regulations are designed to reduce the risk of contamination and the Timms are in the class of persons the regulation is designed to protect. The Timms have also demonstrated proximate cause. If Clement had complied with the regulations, it is possible that the contamination might not have occurred.

Premises Liability

Sheets v. Ritt, Ritt, & Ritt, Inc., No. 64/96-1981 (Iowa Supreme Court July 1, 1998)

Sheets was injured when she fell in a shower area in ladies' locker room at motel. Jury returned verdict for defendant. Affirmed.

NOTE: This decision is 4-4 with one justice dissenting.

OPINION BY JUSTICE HARRIS: It is time to abrogate distinction between invitees and licensees. The trial court instructed based on Iowa Civil Jury Instruction No. 900.1 (essentials for recovery - condition of premises - duty to invitees). Justice Harris suggested that the Court should adopt a standard of "duty of reasonable care under all attendant circumstances which the landowners owe to all lawful visitors." Justice Harris suggested that the instructions proposed by plaintiff were appropriate:

> A. Plaintiff, Donna Sheets, claims the defendant was at fault because of defendant's negligence.
>
> In order for the plaintiff, Donna Sheets, to recover she must prove all of the following propositions:
>
> 1. The defendant was negligent in one or more of the following ways:
>
> a. In failing to maintain the shower area in a safe condition;
>
> b. In failing to warn of the dangers in the shower area.

2. The negligence was a proximate cause of the damage to plaintiff.

3. The nature and amount of damage.

B. The defendant in this case, as the possessor of the premises where plaintiff was injured, owes a duty of reasonable care under all attendant circumstances existing at the time and place of the injury.

A violation of this law is negligence.

Even thought Justice Harris found the jury was incorrectly instructed, he concluded that the error was harmless because the jury would have come to the same result even if plaintiff's proposed instructions had been given.

OPINION BY JUSTICE TERNUS: Justice Ternus concurred in the result but stated that she was not "convinced at this time that it is prudent to abandon the traditional classifications employed in premises liability cases to define a property owner's duty of care."

NOTE: Since this is a 4-4 decision, it is difficult to predict how the District Court judges will interpret it and whether they will instruct in premises liability cases as suggested by Justice Harris or in accordance with the uniform instructions.

Products Liability - Failure to Warn

Lamb v. Manitowoc Company, Inc., 570 N.W.2d 65 (Iowa 1997)

Lamb was injured while replacing a wire rope on a crane manufactured by defendant. Lamb and his co-workers were using a method for replacing the rope approved by his foreman and the contractor. They were not using the method that defendant asserted was the generally accepted method in the industry.

Jury found for plaintiff and trial court denied defendant's motion for judgment notwithstanding the verdict. Reversed and remanded for entry of judgment for defendant.

HELD: Supreme Court has adopted the standard set forth in section 388 of the Restatement (Second) of Torts regarding failure to warn of a product's dangerous propensities. The duty to warn arises from the reasonable foreseeability of

danger to users of the product. A manufacturer does not have a duty to warn if it did not and should not have known of the danger.

The evidence was insufficient to show that the crane manufacturer knew or should have known of the danger. Defendant produced evidence that no similar injuries had ever occurred in the industry. A reasonable jury could not have found for plaintiff.

Remoteness Doctrine

State ex rel. Miller v. Philip Morris, Inc., 577 N.W.2d 401 (Iowa 1998)

State sued tobacco companies on various claims, including claims for civil liability for deception, voluntary assumption of a special duty, and common law indemnity. The State asserted that it had incurred substantial health care costs and other damages related to smoking related diseases.

District Court granted defendants' motions to dismiss claims. Affirmed.

HELD: "The remoteness doctrine is not based upon a factual inquiry to determine whether the damages claimed were foreseeable or whether they were a proximate cause; rather it is a legal doctrine incorporating public policy considerations." The State cannot recover the damages sought because the injuries are derivative and too remote.

RICO

Midwest Heritage Bank v. Northway, 576 N.W.2d 588 (Iowa 1998)

Lender commenced foreclosure. Borrower counterclaimed for RICO violation.

District Court granted summary judgment on RICO claim and dismissed claim. Affirmed.

HELD: (1) State courts have concurrent jurisdiction over RICO claims.

(2) The defendant in a RICO suit must be different than the RICO enterprise. Northway claims that Midwest is both the enterprise and the defendant. Accordingly, Northway does not meet this element of the test.

(3) A RICO claim requires a "pattern" of at least two predicate acts, although two acts may not be sufficient to state a RICO claim. Additionally, the predicate acts must be related and meet the test of continuity. The predicate acts alleged were: (a) misrepresentations in a September 1993 loan guarantee application by Midwest to the FmHA; (b) misrepresentations by Midwest regarding Northway's assets and liabilities in a November 1993 financial statement provided to the FmHA by Midwest; and (c) the use of proceeds from the February 1995 loan guarantees to pay pre-existing debts allegedly in violation of federal law and the loan agreement. The Court found that these acts were not sufficiently related nor had Northway shown the requisite continuity. In fact, the Court noted that Northway's allegation was basically that the business of banking is racketeering.

Trade Secrets

Olson v. Nieman's, Ltd., 579 N.W.2d 299 (Iowa 1998)

Inventor sued for misappropriation of his idea for "breakaway hazard lights" that would activate flashing lights on a trailer if the trailer disengaged from the transporting vehicle. Olson disclosed a prototype and diagrams to Nieman for possible development and pursuant to a confidentiality agreement. Nieman consulted with an independent electrical engineer, Sloan, who determined that Olson's idea would not work. Nieman told Olson that they were not interested. Sloan developed his own version of the idea that Nieman subsequently demonstrated at a trade show (albeit unsuccessfully when Nieman's device malfunctioned). Once Olson learned that Nieman had publicly displayed the device, he filed suit.

Jury awarded $650,000. On appeal, defendant contended (among other evidentiary issues) that insufficient evidence supported jury verdict on misappropriation claim. Affirmed.

HELD: The claim for misappropriation of trade secrets arises under Iowa Code Chapter 550. Nieman argued that Olson's device was generally known and readily ascertainable by proper means, did not have any economic value from not being generally known, and that Olson did not make reasonable efforts to maintain secrecy and, thus, the "breakaway hazard lights" idea was not a trade secret.

There was substantial testimony from a patent expert that Olson's idea was patentable and not generally known or obvious to one of ordinary skill in the art.

There was substantial evidence the idea had economic value as a secret. Olson could have patented the device and/or sold the idea to a manufacturer for a flat fee or royalties.

Even though Olson disclosed the idea to another potential manufacturer, that disclosure was also pursuant to a confidentiality agreement. Olson took reasonable steps to maintain secrecy.

Nieman also argued that there was no misappropriation because the device Nieman displayed at the trade show was not an exact replica of Olson's device. However, the evidence is that Nieman, through Sloan, developed the device based on Olson's diagram. Minor modifications do not insulate Nieman from misappropriation of Olson's idea.

Wrongful Termination - Public Policy Exception

Graves v. O'Hara, 576 N.W.2d 625 (Iowa Ct. App. 1998)

Truck driver brought suit against trucking company, alleging that he had been fired for pursuing worker's compensation claim. Employer stated that Graves had been terminated for excessive absenteeism, insubordination, and declining job performance.

Jury verdict for plaintiff. Reversed.

HELD: Employment in Iowa is presumed to be "at will." An exception is when an employee is discharged in violation of a well recognized and public policy of the state. Graves must prove that his protected conduct was a determining factor in the decision to fire him.

Discharge in retaliation for seeking workers' compensation benefits violates public policy. However, termination based on pursuing a workers' compensation claim must be distinguished from termination based on absenteeism occasioned by a work related injury. In this case, the undisputed determining factor in the discharge decision was absenteeism. The employer did not contest the workers' compensation claim and accommodated absences for medical care until the history of absences became disruptive to the business' operations.

IOWA APPELLATE COURT UPDATE - PART III

APPELLATE PROCEDURE

CIVIL PROCEDURE

COURTS, JURISDICTION, AND TRIAL

EVIDENCE

INSURANCE

JUDGMENT AND LIMITATION OF ACTIONS

WORKERS COMPENSATION

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The author would like to thank Michael L. Mock, a fellow associate at Bradshaw, for preparing the Workers Compensation Portion of this outline.

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APPELLATE PROCEDURE

Hyde v. Anania, 578 N.W.2d 647 (Iowa 1988)

Limitations Period for Perfecting Appeals

Hyde filed a small claims action against Anania alleging fraudulent misrepresentation in connection with the purchase of a motor vehicle. Anania appeared pro se and filed an answer denying the allegation. Following a hearing, the district associate judge took the matter under advisement. The judge later entered judgment against Anania and awarded Hyde $2,400 in compensatory damages and $1,600 in punitive damages. The clerk did not notify Anania of the judgment until the time for filing an appeal under Iowa Code § 631.13 had run. Five days after receiving notice, Anania appeared through counsel and filed a motion to vacate or modify pursuant to Iowa R. Civ. P. 252(a). The district associate judge issued a memorandum ruling on the order and held that the small claims court had no jurisdiction regarding the matter. Anania appealed, and the district court reached the same conclusion and further rejected Anania's procedural due process claim. Anania appealed again, and the Supreme Court granted discretionary review and affirmed.

HELD: Rule 252 allows the court to correct, vacate or modify a final judgment because of mistake, neglect or omission of the clerk. The small claims court has no jurisdiction to hear post-trial motions - and more specifically Rule 252 motions - regardless of the grounds. Moreover, the law is clear that a failure to give a party to an action notice of the filing of the judgment entry does not deny the party's due process. The justification for such a conclusion appears to be that once the trial court properly asserts jurisdiction over a party, that party is expected to keep themselves informed of the proceedings and judgments rendered in the case.

HELD: In addition, nothing in Iowa Code ch. 631 (small claims court) requires the clerk to furnish notice of a judgment entry. All that is required under § 631.12 is that the clerk "immediately enter the judgment in the small claims docket and district court lien book, without recording." The reason for not requiring the clerk to give such notice lies in § 631.13. That provision allows a party to appeal "by giving oral notice to the court at the conclusion of the hearing or by filing a written notice of appeal with the clerk within 20 days after the judgment is rendered." Apparently, the legislature thought the small claims court generally would render a decision upon completion of a case, allowing the party to appeal immediately. In these circumstances, a clerk's notice of entry of judgment would be redundant. In those circumstances where the court takes the case under advisement and renders judgment later, the legislature easily could have provided that the appeal time would run from the time the clerk gives notice of the judgment. The fact that it chose not

to do so leads one to conclude the legislature intended to impose no duty on the clerk to give such a notice. Anania's due process claim necessarily must fail.

Advance Elevator Company, Inc. v. Four States Supply Co., 572 N.W.2d 186 (Iowa App. 1997)

Preservation of Error

Plaintiff elevator company sued defendant building owner for breach of contract to perform renovation, repair and maintenance work on a freight elevator. The defendant building owner filed a counterclaim seeking damages to the elevator shaft allegedly negligently inflicted during the repairs, and for breach of contract. The district court awarded plaintiff elevator company damages for its repair services but denied its claim for attorneys fees. The court also found on the cross claim that the plaintiff elevator company was negligent, but an exculpatory clause contained in the work order barred the owners negligence claims. The defendant building owner appealed. The plaintiff elevator company did not cross appeal, but it did seek to argue the district court (1) erred in finding it was negligent in servicing the elevator, and (2) erred in failing to award attorneys fees. In response, the owner claimed the elevator company failed to preserve these issues for appellate review.

HELD: Concerning the district court's finding of negligence, although plaintiff elevator company did not cross appeal from the trial court's ruling, the issue is preserved for appellate review. A successful party is not required to cross appeal to preserve error on a ground urged but rejected by the district court.

HELD: Concerning the matter of attorneys fees, this issue has not been preserved for appellate review. The rule that a successful party at trial need not cross appeal to preserve error on the ground urged but ignored or rejected by the trial court exists because a successful party cannot appeal from a favorable ruling. Although plaintiff elevator company was the successful party at trial on the counter claim brought by the building owner, it was not entirely successful on its own claim because it did not receive a favorable ruling on its request for attorneys fees. Thus, it failed to preserve error on that issue.

Pollmann v. Bellplaine Livestock Auction, Inc., 567 N.W.2d 405 (Iowa 1997)

Preservation of Error

A former employee brought an action against his former employer for breach of contract and negligent misrepresentation, alleging that he was terminated after completing only one year or a three year employment contract. In response to special verdict forms,

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the jury found the employee proved both claims. The jury awarded damages for the breach of contract claim, but, in accordance with the trial court's instructions, did not determine damages under the negligent misrepresentation theory. The district court entered judgment for the employee on the contract claim but not on the negligent misrepresentation claim, and the employer appealed arguing the statute of frauds barred the contract's claim. The employer also argued for the first time that the tort of negligent misrepresentation had no applicability to promises of long term employment because an employer owes no duty to an at-will employee with respect to such representations, and that the damages recoverable for the tort of negligent misrepresentation are different from the damages recoverable for breach of contract. The Supreme Court affirmed in part and reversed in part.

HELD: Because the defendant failed to raise the issue at the district court level, the Court cannot now consider the issue on appeal. The defendant makes an novel suggestion that the Court remand the present case to allow it to raise its lack of duty to plaintiff in the district court. The Court knows of no authority that a party should be given a second chance to raise an issue by remanding a case to the trial court, and it declines to create such authority here.

Matter of Estate of DeTar, 572 N.W.2d 178 (Iowa App. 1997)

Sanctions on Appeal

The appellant, one of decedent's eight children and an heir at law, appealed from the trial court's approval of the administrator's final report in the decedent's estate. The record revealed an extreme amount of bitterness between the appellant and two of her sisters. Appellant filed a number of objections throughout the probate proceedings, including attacks on the appointment of the administrators, the actions of the judges, and the work of both attorneys for the estate and those involved in other matters. In particular, appellant wrote a letter to an attorney for the estate which contained the following statement: "You have chosen to ignore me so now you get to pay the price. I am prepared to keep this tied up in the court indefinitely. I don't need the pennies the administrators decided the heirs could divide so there is no reason why I should care if my mother's estate ever closes." The district court approved the final report, the appellant appealed, and the court of appeals affirmed and imposed sanctions.

HELD: Our review of the issues appellant raises on appeal convinces us she has utilized the appeal process for an improper purpose. She represents herself in these proceedings. We determined sanctions should be accessed against her and we enter judgment against her for $500 to be taxed as costs.

Falczynski v. Amoco Oil, 567 N.W.2d 447 (Iowa App. 1997)

Standard of Review - Substantial Evidence

An employee who was terminated as a result of excessive absenteeism brought an action against her employer alleging national origin discrimination, disability discrimination, and breach of contract. The district court found the employee was not disabled or qualified for her position and entered judgment for the employer on all claims. The former employee appealed, contending the trial court's decision was not supported by substantial evidence.

HELD: When, as in this case, the trial court denied recovery because a party did not meet its burden of proof, the judgment will stand unless we find the party carried its burden as a matter of law. We will so find only when evidence is so overwhelming that only one reasonable inference on each critical fact issue can be drawn.

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CIVIL PROCEDURE

Morris-Rosdail v. Schechinger, 576 N.W.2d 609 (Iowa App. 1998)

Designation of Expert Witnesses

The plaintiff was involved in a motor vehicle accident and initially sought treatment for her injuries with a chiropractor. When these treatments were unsuccessful, she sought care from a medical doctor, Jerome Bashara. Dr. Bashara opined the plaintiff suffered a condition caused by the motor vehicle accident and referred her to Dr. Lynn Lindaman, a pediatric orthopedic surgeon. Dr. Lindaman initially treated the plaintiff with medication and physical therapy, but he indicated surgery would be necessary if the conservative measures failed. Indeed, approximately one month prior to trial, Dr. Lindaman performed a spinal fusion operation.

Meanwhile, in response to interrogatories for the defendant, the plaintiff indicated Drs. Bashara and Lindaman would testify as experts at trial. No opinions or other information, however, were ever provided except a patient's waiver allowing the defendants to obtain all medical records. The defendants sought a continuance based on the recent surgery and also sought to exclude the expected testimony of the treating physicians concerning any permanent impairment or the need for future surgery. The trial court denied the continuance but granted the motion to limit the scope of the testimony from the treating physicians. The plaintiff made an offer of prove that Dr. Bashara would have testified to the existence of a permanent impairment rating between 9% and 12%, and that there would likely be a need for additional surgery in the future. There was no indication, however, whether a similar offer was made regarding Dr. Lindaman. The jury returned a $50,000 verdict for the plaintiff, but it awarded no damages for future pain and suffering or loss of future earning capacity. The plaintiff appealed, and the Iowa Court of Appeals reversed.

HELD: Although the disclosure requirements of Rule 125 are generally limited to physicians retained for purposes of litigation and exclude treating physicians, the application of the rule does not necessarily depend on the label or role of the physician. Instead, it hinges on the reason and time frame in which the underlying facts and opinions were acquired by the physician.

HELD: In this case, Dr. Bashara examined the patient on one occasion nine months before the lawsuit was commenced. He was clearly a treating physician at that point in time. There was no evidence developed in the record to support a finding his opinions were subsequently acquired or developed in anticipation of trial.

HELD: Additionally, Dr. Lindaman was an active treating physician at the time of the trial. Absent evidence to the contrary, it is reasonable to presume the focus of his inquiry and opinions about his patient were medical. Furthermore, it would be usual medical care for a doctor to express opinions to a patient concerning a permanent impairment resulting from a particular surgery, as well as the need for future surgeries, before performing the surgery. As with Dr. Bashara, there was no evidence to support a finding that excluded the facts and opinions of Dr. Lindaman were acquired or developed for trial.

Olson v. Nieman's Ltd., 579 N.W.2d 299 (Iowa 1998)

Designation of Expert Witnesses

The plaintiff/inventor brought an action for misappropriation of a trade secret against the defendant company that he had contacted with concerning an idea for a device that activated flashing lights on a trailer when the trailer disengaged from the transporting vehicle. The district court entered a pre-trial scheduling order pursuant to Iowa R. Civ. P. 136 that established deadlines for disclosure of expert witnesses. Two months after the expert witness disclosure deadline had passed but more than 30 days before trial, the defendant company moved for an extension to name an additional expert. The district court denied the motion, the case proceeded to trial, and the jury returned a verdict for the plaintiff/inventor. The defendant company appealed contending, among other things, that the district court abused its discretion in denying its request for an extension of its expert witness designation deadline. The Supreme Court affirmed.

HELD: Iowa R. Civ. P. 125(c) requires the party to "supplement discovery as to experts as soon as practical, but in no event less than 30 days prior to the beginning of trial, except by leave of court." In turn, Iowa R. Civ. P. 136 gives the district court power to impose scheduling orders with alternative time limits. When the two conflict, Rule 136 trumps Rule 125(c). The Rule 136 power to impose scheduling orders with alternative time limits is especially important in complex cases such as this one. Designating an expert witness 30 days before trial may cause extreme prejudice to the opposing party, who then may be compelled to depose the expert and obtain experts to refute the proper testimony. In these circumstances, the district court then may be compelled to allow a continuance of a trial that may have been set months previously. The district court did not abuse its discretion when it denied defendant/company's request to extend the expert disclosure deadline.

Slade v. M.L.E. Investment Co., 566 N.W.2d 503 (Iowa 1997)

Frivolous Lawsuits

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A borrower, whose debt to her lender had been secured by a real estate contract on a first parcel of land and by a mortgage on his second parcel of land, sued the lender and other parties alleging they wrongfully obtained foreclosure on the mortgage and were unjustly enriched. The plaintiff had brought eight actions against the defendants in less than five years, and five of the actions were dismissed. After a bench trial, the court dismissed the action and imposed sanctions on the borrower by requiring her to furnish a surety bond in the amount of $10,000 before prosecuting any further actions against the defendants. The borrower appealed claiming, among other things, that sanctions were improper. The Iowa Supreme Court agreed and reversed.

HELD: Under Iowa Rule of Civil Procedure 80(b), if a party commencing an action has in the proceeding five year period unsuccessfully prosecuted three or more actions, the court may, if it deems the actions have been frivolous, stay the proceedings until that party furnishes surety for all costs including reasonable attorney fees. The language referring to a party "commencing an action" and authorizing the court to "stay the proceedings" clearly indicates the rule is designed to provide relief in actions that have already been filed rather than in possible future lawsuits. The district court's ruling, therefore, was premature.

Bellach v. IMT Insurance Co., 573 N.W.2d 903 (Iowa 1998)

Limitations Period for Filing an Appeal

Michael and Sandra Bellach were insureds under a homeowners policy with IMT. IMT excluded coverage for losses arising from an act committed at the direction of an insured "and with the intent to cause a loss." After Sandra burned down the family house and committed suicide, IMT denied Michael coverage citing the intentional act exclusion. Michael then brought this action to assert a contractural right to recover under the policy. The fighting issue at trial was whether, given her major depressive disorder, Sandra intended to "cause a loss" or rather merely intended to kill and cremate herself. IMT moved for a directed verdict, but the district court reserved ruling pending the outcome of the jury's deliberations. By way of special verdict, the jury found Sandra did not "intent to set the fires and cause any damage." IMT filed filed combined post trial motions renewing its request for a directed verdict and alternatively seeking a JNOV. The court denied all motions, and, nine days later, IMT moved under Iowa Rule of Civil Procedure 179(b) for an enlargement or amendment of the court's ruling. Five months later, the court denied the motion. IMT then filed its notice for appeal. The notice came within 30 days after the court's ruling on IMT's Rule 179(b) motion but, as previously mentioned, some five months after the court's denial of the post trial motions. Michael moved to quash the appeal asserting that IMT's Rule 179(b) motion failed to toll the time for filing an appeal under Iowa Rule of Appellate Procedure 5. The Supreme Court granted the motion and dismissed the appeal.

HELD: Under Iowa Rule of Civil Procedure 179(b), "appeals to the supreme court must be taken within, and not after, 30 days from the entry of the order, judgment or decree, unless a motion for new trial or judgment notwithstanding the verdict . . . or a motion as provided in R.C.P. 179(b), is filed, and then within 30 days after the entry of the ruling on such motion." A motion to enlarge or amend the trial court's findings and conclusions lies only when addressed to a ruling made upon trial of an issue of fact without a jury. Not every motion to reconsider will extend the time for appeal. If IMT's rule 179(b) motion had challenged an issue of fact tried by the court without a jury or sought an amendment or enlargement of a legal issue reached by the court in that context, then its motion would have properly tolled the time for appeal. Here, however, IMT's motion amounted to no more than a rehash of legal issues raised and decided adversely to it by way of prior motions. It is axiomatic that the determination of whether a party is entitled to judgment as a matter of law is a legal question, not a matter of factual resolution. The only thing accomplished by IMT's post trial motion was a five month delay in entry of judgment on the jury's verdict. In short, neither the language of Rule 179(b) nor are cases interpreting it support IMT's use of the rule to toll the time for appeal. The appeal must be dismissed.

Boham v. City of Sioux City, 567 N.W.2d 431 (Iowa 1997)

Preservation of Error

The parents of an elementary school student who suffered fatal injuries when she was struck by a pickup truck while crossing the street brought an action against the school district, the adult crossing guard who had instructed the student that she could cross the street, and the city. The case went to trial, and plaintiffs requested damages for, among other things, the child's pre-death mental anguish and pre-death loss of function of mind and body. Defendants objected to an instruction setting forth these elements of damages, Instruction No. 39, as follows:

> Since this is the final time that I can make any record, initially I want to again renew the motions I made at the close of plaintiffs case and all the evidence. We don't think that this [case] should be submitted against my clients at all.
>
> Instructions No. 15, 18, 19 and 20 generally are specifications of fault against my client. We don't think there is sufficient evidence in the record to generate a jury question on those issues, *and I would add that Instructions No. 39 and 41, which are the damages instructions. We don't think there is sufficient evidence in the record to engender jury questions on these points.*

The court submitted Instruction No. 39, and the jury awarded damages. On appeal, defendants argued the child was unconscious from the time she was struck by the pickup truck until the time of her death, and the instruction was therefore improper because the child had no conscious awareness of her situation. The Supreme Court affirmed.

HELD: Iowa Rule of Civil Procedure 196 requires that a party specify the matter to which the party objects and the grounds for the objection. The rule requires an objection to be sufficiently specific to alert the trial court to the basis of the complaint so that if error does exist the court may correct it before placing the case in the hands of the jury. There is nothing in the general objection made to Instructions 39 and 41 that would have alerted the trial court to the arguments made on appeal. The insufficient evidence objection had nothing to do with pre-death damages and the recoverably when the victim is unconscious from the time of injury until death. The defendants did not adequately identify the specific portion of Instruction 39 that was not supported by the evidence or the specific deficiency in the evidentiary support for that instruction.

Tausz v. Clarion-Goldfield Community School District, 569 N.W.2d 125 (Iowa 1997)

Privileged Communications

This defamation action arose out of a public statement by the Clarion-Goldfield Community School District in connection with its acceptance of an offer to settle other litigation in which it was the plaintiff and Tausz Financial Corporation was one of the defendants. In that action, the school district charged that a certain health insurance plan for the district's employees was being improperly administered by Tausz, the local agency through the district had secured the health insurance plan in question, and American Medical Security (AMS), the benefit provider.

Several days prior to an arbitration hearing on the district's claims, AMS offered the sum of $116,000 in full settlement of all claims against it and Tausz. Acting in accordance with Iowa Code § 21.5(1)(c), the district's board of directors convened in closed session to consider the offer. Also present at the closed session was the district attorney, the district superintendent, and a certified public accountant who had been retained to advise the district concerning the financial implications of the offer with respect to the perceived inadequacies of the health insurance plan. The closed session produced a consensus that the offer should be accepted. After the session concluded, the board, in open session, passed a unanimous resolution to accept the offer and attribute a portion of it to AMS and a portion of it to Tausz based on the financial data that had been furnished to the board.

In the present action, Tausz contended it was defamed by the resolution because it falsely implied that it had acted improperly in its business dealing with the school district and caused the district to sustain financial loss. Tausz sought discovery of transcript of the closed session through a pretrial motion, which the district court denied based on attorney-client privilege. The case proceeded to trial and the jury returned a verdict for the school district. Tausz appealed, contending it was prejudiced by the district court's pretrial ruling on the discovery motion.

HELD: Because the presence of an accountant or financial advisor can be essential for the rendition of the legal opinion, the presence of such persons at attorney-client conferences does not destroy a privilege otherwise existing.

HELD: It is appropriate to recognize an attorney-client privilege with respect to some communications between public agencies and public officials and their lawyers. The privilege must be carefully circumscribed, however, so as to prevent an abuse of utilizing closed sessions when public sessions are required by statute.

HELD: Based on the Court's *in camera* review of transcript, most of the colloquy that took place in the closed session was protected by the attorney-client privilege. There was a brief discussion concerning the subject matter of the resolution to be offered in open session, however, that the Court is less certain was privileged. Some redaction of this transcript might have been possible so as to allow plaintiffs to view the discussions concerning the proposed resolution without destroying the privilege with respect to other conversations, but the Court is satisfied that the circumstances here provide no basis for reversal of judgment.

HELD: In order to provide the basis for reversal of judgment, the appellant must provide the court with enough of the record from trial that it may be determined whether the allegedly erroneous ruling was prejudicial. Here, the appellant's elected not to provide the court with a transcript of any of the evidence offered at trial with respect to the school district's explanation of the challenge resolution. Because appellants failed to do so in the present case, they must suffer the consequences.

Troendle v Hanson, 570 N.W.2d 753 (Iowa 1997)

Sanctions

The plaintiffs filed this action against the defendants seeking damages arising from an automobile accident. Plaintiffs failed to respond to defendants' standard discovery requests. When plaintiffs failed to provide adequate responses following two motions to compel and the imposition of monetary sanctions, defendants filed a third motion to compel approximately a month prior to the trial date seeking the ultimate sanction:

dismissal. At a hearing scheduled on the motion, plaintiffs then attorney made an oral motion to withdraw, and the clients appeared with alternative counsel. The district court granted dismissal of the case, and the plaintiffs appealed. The Supreme Court affirmed.

HELD: In order to justify dismissal or judgment by default under Iowa Rule of Civil Procedure 134(b), the party's noncompliance with the court's discovery orders must be the result of willfulness, fault, or bad faith. Dismissal was an appropriate sanction here because the failure of plaintiffs' counsel to comply with three court orders requiring responses to defendants' discovery requests suggests that the noncompliance was willful. Even though counsel had an entire year to comply with the discovery requests, the compliance was still not complete two days before trial. Furthermore, although the client's were allegedly unaware of counsel's noncompliance until a few days before hearing on the motion for sanctions, they were bound by the actions of their lawyer. The plaintiffs' remedy here lies in a legal malpractice action, not in a rule that would make the defendants suffer the consequences of the misconduct of plaintiffs' attorney.

Harris v. Iowa District Court for Johnson County, 570 N.W.2d 772 (Iowa App. 1997)

Sanctions

Harris, an attorney and plaintiff in this certiorari proceeding, filed a pro se action against Bray, another attorney, asserting claims of legal malpractice and intentional infliction of emotional distress. Harris alleged Bray revealed information protected by the attorney-client privilege to her husband's attorneys during and after his representation of her in a dissolution of marriage proceeding. The information concerned an agreement reached between Harris, Bray, and Harris' husband's attorneys that Bray would take possession of certain guns owned by Harris and inform the husband's attorneys in advance if he intended to return the guns. Bray eventually withdrew as counsel and was called as a witness in the dissolution proceeding. The testimony revealed that Bray informed the husband's attorneys that he held the firearms belonging to Harris, but he never disclosed any statements made by Harris. In the presence of Harris, the trial court in the dissolution proceeding ruled that Bray's testimony to the possession of the firearms described non-testimonial facts and was not prevented by the assertion of the attorney-client privilege.

Harris eventually dismissed her petition without prejudice, and Bray moved for sanctions. The district court sustained the motion and entered judgment against Harris for $1,000 which represented the deductible Bray was obligated to pay under the terms of his malpractice insurance policy when the insurer undertook its duty to defend. Harris appealed, and the court of appeals affirmed.

HELD: Iowa Rule of Civil Procedure 80(a) requires certification that a signer (1) has read the motion, pleading, or other papers; (2) has concluded after reasonable inquiry into the facts and law that there is adequate support for the filing; and (3) is acting without any improper motive. Each duty is independent of the other, meaning a breach of any one constitutes a violation of the rule. The duty to make a reasonable inquiry requires the signer to certify, to the best of his or her knowledge, information and belief, formed after a reasonable inquiry, the pleading, motion, or other paper is (a) well grounded on the facts and (b) warranted either by existing law or by a good faith argument for the extension, modification, or reversal of existing law. The reasonableness of the inquiry is measured at the time the paper was filed and is measured by an objective standard. Under the facts here, Harris had to know at the time and under the circumstances of the events complained of that the attorney-client privilege did not exist or had been waived. We find no abuse of discretion in the district court's award of sanctions.

Boughton v. McAllister, 576 N.W.2d 94 (Iowa 1998)

Service of Original Notice

Plaintiff filed a personal injury action against the defendants, but defendants were not served until more than 150 days after suit had been filed. The defendants moved to dismiss, claiming the delay in service was abusive and unjustified, and the district court granted the motion. Plaintiff filed two motions to reconsider under Iowa Rule of Civil Procedure 179(b), which were denied. This appeal followed, with plaintiff's notice of appeal coming 30 days from the court's ruling on the second motion, but 53 days from the court's ruling on the first. The defendants urged plaintiff's notice of appeal was untimely. The Iowa Supreme Court agreed and dismissed the appeal.

HELD: Multiple motions to reconsider under Rule 179(b) are permitted if they are not successive or repetitive of an earlier motion. Here, the second motion was primarily a restatement of the arguments made in the first Rule 179(b) motion with one exception: For the first time, plaintiff alleged there had been an agreement between counsel and the defendants' insurer to delay service. The plaintiff's second motion to reconsider was improper. The plaintiff's first motion to reconsider was denied and the original judgment remained in effect and unchanged. Although the second motion was not identical, it addressed the same issue – the completeness of the factual record before the court when it ruled on the defendants' motion to dismiss. A party should not be able to extend the time for appeal indefinitely by filing successive motions that address the same issue, even if the party is able to articulate a new argument in support of her position. A party is entitled to only one bite at the apple.

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Henry v. Shober, 566 N.W.2d 190 (Iowa 1997)

Service of Original Notice

In this action arising from an automobile accident, the plaintiffs retained counsel to negotiate a settlement with the tortfeasors' insurance carrier. When it appeared that no settlement would be reached before the expiration of the two year statute of limitations, the plaintiffs filed a petition four days before the statute expired. Anticipating a settlement in the near future, the plaintiffs withheld service. The defendants were eventually served 169 days after the date of filing and after the trial court gave notice for trial setting conference. Defendant filed a motion to dismiss alleging plaintiff failed to comply with Iowa Rule of Civil Procedure 49 (original notice). The district court granted the motion, and the Supreme Court affirmed.

HELD: Even though the Iowa Rules of Civil Procedure do not specify when service must be made, the case law requires dismissal of an action if there is an unjustified, abusive delay in completing service. Here, the plaintiffs 169 day delay in serving defendant was both intentional and presumptively abusive. Settlement negotiations, even if done in good faith, do not constitute an adequate justification or good cause for delaying service.

NOTE: A recent amendment to the rules of civil procedure mandates that service be made within 90 days after filing the petition or the petition will be dismissed without prejudice unless the petitioner shows good cause for the failure of service. Iowa Rule of Civil Procedure 49(f).

Mokhtarian v. GTE Midwest, Inc., 578 N.W.2d 666 (Iowa 1998)

Service of Original Notice

On December 30, 1993, plaintiff was injured while installing telephone cable at the GTE offices in Lucas, Iowa. Plaintiff resided in Minnesota at the time of the accident, and later moved to Maryland. He retained a Maryland attorney to assist him in proceedings against GTE. When a settlement agreement could not be reached prior to the statute of limitations deadline, the Maryland attorney filed an Iowa lawsuit.

The Maryland attorney then attempted to "serve" GTE with original notice by sending a copy of the petition, via certified mail, to the individual with whom he had been negotiating--GTE's Missouri corporate counsel. The Maryland attorney never received the certified mail receipt, but the record indicated that GTE's legal department received the documents on or about January 16, 1996. GTE did not file an answer or respond to any of the documents in district court. The Maryland attorney attempted a second service via mail on June 6, 1996, but the documents were returned unopened.

Finally, The Maryland attorney had an authorized agent of GTE in Missouri personally served with private process on July 30, 1996, some seven months after the petition was filed. On August 23, 1996, GTE moved to dismiss the case, asserting that service of the original notice and petition by certified mail did not comply with the personal service requirement under Iowa R. Civ. P. 56.1(f) and that the seven month delay in service of the original notice was abusive under Iowa R. Civ. P. 49(a). The district court granted the motion and plaintiff appealed. The supreme court affirmed.

HELD: Plaintiff's seven months in delay in service of the original notice on defendant after filing his negligence action was presumptively abusive.

HELD: Plaintiff failed to show adequate justification for the seven month delay. Plaintiff provided no explanation for the delay in proper service, but simply asserted that the defendant suffered no prejudice from the delay because defendant knew a petition had been filed. Plaintiff's previous unsuccessful attempt at service by mail was not adequate justification for the seven month delay in service because such attempts had no legal significance. Counsel's lack of knowledge, misunderstanding or ignorance of the Iowa Rules of Civil Procedure were no excuse for the delay.

Hunke v. Veach, 572 N.W.2d 548 (Iowa 1997)

Small Claims Court

Following an inspection which revealed violations of the city's housing code and a dispute about the landlord's obligation to make repairs, the tenants withheld rent payments and eventually vacated the premises. The landlord filed a small claims action seeking unpaid rent and clean up expenses. The tenants filed an appearance and answer, and, three days before the scheduled hearing date, served the landlord with a counterclaim. The district associate judge awarded the landlord $1,200 for unpaid rent and clean up expenses but found the tenants were entitled to $2,100 in damages for their damage deposit, rent, and utility refunds. The court thus awarded a judgment against the landlord for the difference. The landlord appealed the decision to the district court. The district court determined the damage amounts were correctly determined, but it concluded the tenants' counterclaim was untimely under Iowa Rule of Civil Procedure 29. The tenants filed an application for discretionary review, and the supreme court reversed.

HELD: The compulsory counterclaim provisions of Iowa Rule of Civil Procedure 29 do not apply in small claims actions. The district court is to decide small claims appeals without regard to technicalities or defects which have not prejudiced the substantial rights of the parties. The landlord was aware of the counterclaim before trial and was able to present responsive evidence regarding that claim. The district court erred in disallowing the counterclaim.

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COURTS, JURISDICTION, AND TRIAL

Reagan v. Petersen, 569 N.W.2d 390 (Iowa App. 1997)

Continuance

The plaintiff instituted this action for personal injuries arising from an accident wherein she was struck by a grain auger which broke loose from a grain truck driven by the defendant. Approximately on month before trial Plaintiff moved for a continuance contending she had recently been examined by a neuropsychiatrist who discovered a previously undiagnosed closed head injury. Additional tests and a complete neuropsychological evaluation were scheduled just days before trial. Defendant did not resist the motion, and the trial court rescheduled the trial for June 5, 1995. Despite repeated requests, defendants did not receive the neuropsychiatrist's medical records and report until April 28, 1998. The defendants then deposed the neuropsychiatrist on May 9, 1995. Next, on May 19, 1995, defendants filed a motion to continue the trial so that an IME could be obtained. The trial court found a further continuance was not warranted because defendants could have used legal process to obtain the records and employed their own independent medical expert at an earlier date. The case proceeded to trial, and the jury returned a verdict for the plaintiff and awarded over one million dollars in damages. The defendants filed a motion for a new trial, the district court denied the request, and the defendants appealed. The Court of Appeals reversed.

HELD: Under Iowa Rule of Civil Procedure 183(a), a continuance may be allowed for any cause not growing out of the fault or negligence of the applicant, which satisfies the court that substantial justice will be more nearly obtained. A defense attorney's decision to delay a request for an IME until the plaintiff's medical information on the particular injury has been disclosed constitutes negligent or fault for the purposes of determining whether to grant a continuance. The Court also declines to find fault because the defendant failed to resort to court process to obtain the medical information prior to the time this information was voluntarily disclosed. The discovery process is intended to be self executing. The concepts of civility and professionalism permit attorneys to accede to reasonable requests and encourage courtesy in interacting with opposing counsel. The defendant attempted to obtain the needed information in a manner consistent with these precepts and should not be faulted for not pursuing more aggressive tactics.

HELD: In denying the continuance, the trial court indicated the case had been pending longer than the time standards promulgated by the supreme court, and further pointed out defendant neglected to identify a medical expert who could rebut the neuropsychiatrist's testimony. The case processing standards are not mandatory, and must not be applied in a mechanical fashion, detached from the overall notion of justice. Moreover, the

resulting prejudice of forcing the defendants to proceed to trial without any responsive medical testimony is obvious and overwhelming. It chills the notions of fair play and substantial justice. The trial court abused its discretion when it denied the motion for continuance.

Neumann v. Service Parts Headquarters, 572 N.W.2d 175 (Iowa App. 1997)

Inconsistent Verdicts

A car driven by an employee of the defendant struck a car driven by the plaintiff. Plaintiff, who had a history of back and shoulder problems for over a decade, subsequently claimed back and shoulder injuries as a result of the accident. At trial, she claimed to have incurred $24,000 in medical expenses and $18,000 in lost wages due to these injuries. The jury found the defendant 90% at fault, and then awarded plaintiff $11,000 for past medical expenses and $7,000 for past loss of wages. The jury failed to award plaintiff anything, however, for past and future pain and suffering and loss of function or for future medical expense. Plaintiff filed a motion for a new trial asserting the jury's verdict was inconsistent, and the trial court denied the motion. Plaintiff appealed, and the court of appeals reversed and remanded.

HELD: Under Iowa Rule of Civil Procedure 244, a verdict will not be set aside or altered unless it is (1) flagrantly excessive or inadequate; or (2) so out of reason as to shock the conscious or sense of justice; or (3) raises a presumption that it is the result of passion, prejudice or other ulterior motives; or (4) is lacking in evidential support. Where the verdict is within a reasonable range as indicated by the evidence, the court should not interfere with what is primarily a jury question. There is no inflexible rule that every verdict awarding only damages for medical expenses in a personal injury action is inadequate as a matter of law. The trial court's denial of a new trial in such circumstances is more likely to be affirmed in cases where the cause or extent of the injury is disputed. Here, plaintiff's injuries and treatments were disputed. Her complaints of pain were subjective. The jury did not award the full amount of her claimed medical expenses and lost wages. Yet, a total failure to award her any amount for pain and suffering is not consistent. The trial court should have ordered a new trial.

Delaney v. Gansemer, 567 N.W.2d 664 (Iowa App. 1997)

Inconsistent Verdicts

A motorist who was stopped at an intersection sued the motorist who struck her from behind. The jury returned a special verdict finding the defendant at fault but determining the defendants were not the proximate cause of damage to the plaintiff. The district court sua sponte entered a JNOV awarding plaintiff property damages, but denied

an award for personal injury damages. Plaintiff appeal, contending the judgment that the accident proximately caused property damages but not personal injuries, was not consistent.

HELD: A jury's verdicts are to be liberally construed to give effect to the intention of the jury and to harmonize the verdicts if it is possible to do so. When the verdicts can be reconciled in any reasonable manner consistent with the evidence and its fair inferences the trial court has the discretion to do so. Only when the verdicts are so logically and legally inconsistent that they cannot be reconciled will they be set aside. Here, the issue of whether plaintiff suffered personal injuries in the accident was highly contested. The jury's determinations were not inconsistent and the trial court's award of property damages but not personal injury damages does not necessitate a new trial.

Bangs v. Pioneer Janitorial of Ames, Inc., 570 N.W.2d 630 (Iowa 1997).

Inconsistent Verdicts

Juror Affidavits

Plaintiff's store employee brought a negligence action against the defendant janitorial company that was waxing the store floor at the time she slipped and fell. The case proceeded to trial. The jury returned a verdict assessing 50% fault to each party, awarding over $240,000 in damages for pain and suffering, loss of function, and loss of earning capacity, but allowing nothing for medical expenses despite undisputed evidence that they exceeded $68,000. Defendant moved for JNOV and for a new trial, and plaintiff moved to enlarge or modify the verdict award to include medical expenses. In support of its motion, the plaintiff submitted an affidavit from counsel that stated a juror had told him that it was the feeling of the jury that most likely the medical expenses had been paid and, therefore, they awarded nothing. The district court denied defendant's motion but granted plaintiff's motion and ordered an additur of 50% of the undisputed medical expenses. Defendant appealed, the Court of Appeals affirmed, and, on further review, the Supreme Court reversed and remanded.

HELD: The affidavit clearly dealt with a "matter or statement occurring during the course of the jury's deliberations or to the effect of anything upon the juror or any other juror's mind or emotions as influencing him" and therefore was inadmissible under Iowa Rule of Evidence 606(b).

HELD: Because there was no admissible evidence tending to show the reason for the jury's omission of an undisputed element of damages (i.e., medical expenses), the district court erred by ordering the additur. If a verdict is inconsistent, as was this one, and there is no way to determine the jury's intent, the proper remedy is a new trial

Matter of Lake City, Inc. v. Hiners, 576 N.W.2d 592 (Iowa 1998)

Jury Instructions - Failure to Submit a Theory of Recovery

A nursing home brought an action against a resident and her son, individually and in his capacity as trustee of a family trust, for payment for nursing home services. The district court entered judgment in favor of the nursing home, and the resident and son appealed. In a prior decision, the Supreme Court affirmed in part, reversed in part, and remanded for entry of judgment in favor of the son on the nursing home's claim of personal liability. On remand, the district court discovered that the verdict form submitted to the jury on the claim against the son did not differentiate between his status individually and his status as trustee. The jury instruction provided:

> The sole issue which you must decide is whether Dean Hiners has breached a contract with the plaintiff. He denies any personal liability under the agreement for payment of his mother's nursing home bill and claims that he signed the agreement solely as her power of attorney.

In turn, the verdict form read:

> QUESTION 1: Did Dean Hiners breach a contract with the plaintiff?
>
> QUESTION 2: Did defendant's breach cause the plaintiff any damages?
>
> QUESTION 3: To what amount is plaintiff entitled as a result of the defendant's breach?

The court presumed that the jury considered the son's conduct in both his individual and trustee capacities, and therefore entered judgment in favor of the nursing home on that claim. The son appealed, and the Supreme Court reversed.

HELD: The district court rendered two generous a reading of the instruction and verdict, which clearly omitted any theory of recovery against the trustee. It was not the responsibility of the son to point out that the nursing home's claim should be submitted to the jury in both capacities. It is always the responsibility of a claimant's counsel to shepherd a claim through trial to submission. Because the nursing home's counsel failed to do so here, the nursing home's judgment against the son as trustee must be dismissed.

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Wooldridge v. Central United Life Insurance Co., 568 N.W.2d 44 (Iowa 1997)

Leave to Amend

In August 1993, the plaintiff, a former corporate president, brought an action against the defendant, his former employer, seeking recovery for breach of a severance agreement and for wages recoverable under the Wage Payment Collection Law. The court established a discovery deadline and set a February 14, 1995 trial date. In December of 1994 the trial date was continued until April 1995. In January 1995 defendant requested leave to amend its answer to state a counterclaim that alleged the plaintiff caused it damage by leaking sensitive data to a person or persons outside the company and by neglecting his normal duties as president of the company. The court denied the request as untimely. Then, on March 6, 1995, the defendant sought leave to amend its answer to allege the substance of the proposed counterclaim as an affirmative defense. The court also denied that request. Soon after its efforts to file a counterclaim were denied, the defendant commenced a second action against the plaintiff to obtain substantially the same relief that was so sought in the counterclaim. The trial court entered judgment in favor of the former president in the first action and dismissed the former employer's separate action. The former employer appealed contending, among other things, that the district court erred in refusing its application to add a counter claim and affirmative defenses.

HELD: The trial court acted within its discretion in denying defendant's requests to amend it answer to assert a counterclaim and affirmative defenses, where such requests were made over sixteen months after the action had been filed, the matters raised in the counterclaim and affirmative defenses have been know to the defendant almost from the inception of litigation, and there had already been one continuance of the original trial date.

Grace Hodgson Trust v. McClannahan, 569 N.W.2d 397 (Iowa App. 1997)

Leave to Amend

In this action, plaintiff landowner sought an injunction against defendant adjoining landowners for interfering with the natural flow of surface waters between their respective properties. The trial court entered a scheduling order which gave the parties 90 days to file amendments to the pleadings. Approximately 120 days later, defendants filed a motion to amend their answer to assert several affirmative defenses. The trial date was seven months away, and plaintiffs did not resist. Nevertheless, the district court denied the motion, and it eventually granted partial summary judgment for plaintiffs. Defendants appealed, and the Iowa Court of Appeals reversed.

HELD: Leave to amend under Iowa Rule of Civil Procedure 88 shall be freely given when justice so requires, and amendments are the rule and denial the exception. The purpose of the leave of court requirement is to give the other side the right to object to amendments which might affect their preparation for trial. Since that was not the case here, the trial court abused its discretion in denying the motion.

In re Marriage of Ihle, 577 N.W.2d 64 (Iowa App. 1998)

Limitations on the Length of Trial

In this dissolution proceeding, the district court imposed a four day limitation on the length of the trial. After using all of her allotted time, the wife requested additional time to present further witnesses. The district court denied the motion and entered a decree of dissolution awarding primary care of the parties' son to the husband. The wife appealed the decree contending, among other things, that she was denied due process of law when the district court imposed rigid time limitations on the length of the hearing. The Court of Appeals affirmed.

HELD: It is generally recognized that matters relating to the course and conduct of a trial, not regulated by statute or rule, are within the discretion of the trial judge. Iowa has not enacted any statutes or rules explicitly addressing the authority of a district court to place limitations on the length of a trial, but rules exist which seem to embody the concept. Iowa Rule of Evidence 403 authorizes trial courts to exclude even relevant evidence from trial if the evidence is needlessly cumulative or would cause undue delay or waste of time. Similarly, Iowa Rule of Evidence 102 instructs that the rules of evidence are to be construed to secure fairness and elimination of unjustifiable expense and delay. Arbitrary, inflexible time limits are disfavored. They will, in many instances, support a finding of abuse of discretion and require a new trial. Judges should impose time limits only when necessary, after making an enlightened analysis of all available information from the parties. In the present matter, however, the Court cannot conclude any substantial rights have been affected and prejudice resulted. From the record on appeal, the trial court did not view its discretion in denying the wife's motion for additional time to present further witnesses.

State ex rel. Miller v. Grodzinsky, 571 N.W.2d 1 (1997)

Personal Jurisdiction - Corporate Shield Doctrine

The attorney general sued two corporate officers and their employers for alleged violations of Iowa consumer fraud laws. Defendant Grodzinsky was director and president of the defendant Mondea Corporation, and defendant Grande was president and sole director of defendant ADMI, Inc. Mondea and AMDI are closely related

corporations. Grodzinsky's duties entailed reviewing and approving the design and structure of a number of Mondea direct mail contest and sweepstakes. Grande's duties entailed overseeing ADMI's financial status and participation in the design and creation of the contests in question. All the defendants were residents of Nevada. The individual defendants moved to dismiss the suits against them for a lack of personal jurisdiction under the "corporate shield" doctrine and asserting a lack of sufficient contacts with Iowa. The district court denied the motion, and the Supreme Court affirmed.

HELD: The appellate court applies a two step analysis to determine whether the district court appropriately exercised personal jurisdiction: (1) whether a statute or rule authorizes the exercise of jurisdiction, and (2) whether the exercise of jurisdiction would offend the due process principles of the United States Constitution. Iowa's "long arm" statute, Iowa Code § 613.3, allows an expansive exercise of jurisdiction over foreign parties, and Iowa Rule of Civil Procedure 56.2 provides for the broadest expanse of personal jurisdiction consistent with due process. The corporation shield doctrine, however, provides a due process limitation on the exercise of personal jurisdiction. Under this doctrine, a person's mere association with the corporation that causes injury in the foreign state is not sufficient in itself to permit the forum to exercise jurisdiction over the agent. The rationale for the doctrine is that exercising jurisdiction over a corporate agent solely on the court's jurisdiction over the corporation itself would offend traditional notions of fair play and substantial justice. Any reading of the case law that would apply the corporate shield to an employee merely because his or her association with a corporation is specifically disproved. To immunize a defendant from jurisdiction merely because the defendant is associated with the corporation would allow the corporate shield to be used as a sword.

HELD: Here, Iowa courts had personal jurisdiction over the individual defendants even though they claimed that the activities in question were conducted on behalf of the corporations which employed. The alleged fraudulent activities were undertaken directly by the individuals, including mailing materials to Iowa, in their status as controllers of the corporations. The corporate shield doctrine does not insulate an agent under false circumstances; the agent is still subject to personal jurisdiction of the court if the agent is a primary participant in an alleged wrongdoing intentionally directed at the forum state's residents, and jurisdiction over him or her would be proper on that basis.

EVIDENCE

Bell v. Community Ambulance Service Agency, 579 N.W.2d 330 (Iowa 1998)

Expert Testimony

A motorist brought an action against an ambulance driver, the ambulance service, and the townships which utilize the service for injuries sustained in a collision with the ambulance while it was responding to an emergency situation. The case proceeded to trial. Plaintiff sought to offer expert opinion testimony from a law enforcement officer who taught safe emergency driving classes that under the circumstances of the accident the ambulance driver's actions were highly dangerous and likely to cause injury. Objections by defendant that the testimony improperly mixed questions or law and fact and called for legal conclusions were sustained by the court. The jury returned a verdict for the plaintiff, but the district court granted defendant's motion for a JNOV. Plaintiff appealed contending, among other things, that the district court's failure to allow the proper testimony constitutes reversible error. The supreme court affirmed.

HELD: In general, an expert witness is not permitted to state a legal conclusion. This rule is modified somewhat if a legal issue is raised in such a way so as to become a necessary operative fact. When the legal conclusion is a rule of decision to be applied by the judge or jury in deciding the case, however, it is not a proper subject for expert testimony. Here, the trial court did not abuse its discretion by excluding the proffered expert testimony. When taken in context, the testimony would have stated a legal conclusion and, moreover, would not have changed the result of the decision to grant the JNOV.

City of Oelwein v. Board of Trustees of the Municipal Fire and Police Retirement System of Iowa, 567 N.W.2d 237 (Iowa App. 1997)

Expert Testimony

A police officer claimed the hepatitis C virus rendered him unable to continue his job, and he filed for accidental disability benefits under the municipal fire and police retirement system provided in Iowa Code chapter 411. The criminal, a former IV drug user, was never tested for hepatitis C, but the criminal's former wife tested positive for the ailment. The police officer had a chronic nail biting problem that resulted in cuts and abrasions on the ends of his fingers. The evidence also indicated the officer had surgery prior to the diagnosis, and that hepatitis C is a widespread problem and can be carried on improperly cleaned surgical instruments. The police officer's treating physician testified he most likely contracted the disease during the arrest. The board of trustees awarded the

police officer benefits, and the city appealed contending, among other things, that the treating physician's opinion should have been excluded.

HELD: For an expert's opinion to be competent, sufficient data must presented on which an expert judgment can be made. The facts must support a conclusion more than mere conjecture and speculation. Here, the expert here did not express his opinion with absolute certainty. The lack of certainty goes to weight the fact finder will give the opinion, not its admissibility.

Johnson v. Knoxville Community School District, 570 N.W.2d 633 (Iowa 1997)

Expert Testimony

Parental Immunity

Damages

Brian Johnson, age 10, fell and hit his head on the playground at East Elementary School in Knoxville while attempting to dunk a basketball by jumping off the back of another student. He was taken to the hospital, where he was diagnosed with a closed head injury. Brian remained at the hospital for three days for treatment and observation. In the months following his discharge, he experienced frequent and severe headaches, symptoms of obsessive-compulsive disorder (OCD), and other behavioral problems.

Brian's parents filed a petition against the school district seeking damages for Brian's injuries and for loss of consortium. During discovery, defendants retained Dr. Gaylord Nordeen, a neuropsychiatrist, to conduct an IME. Pursuant to the parties agreement, Brian's father was present at the examination to observe and help Brian answer questions. Dr. Nordeen also reviewed Brian's medical records, which included the details of five previous head injuries, and a journal kept by Brian's father that chronicled the child's behavioral problems.

The case proceeded to trial. The school district stipulated Brian's accident was the result of its negligence, but denied that such negligence was the proximate cause of his injuries. Over plaintiffs' objection, Dr. Nordeen opined that the OCD symptoms exhibited by Brian could not have been caused by the playground accident because the temporal relationship between the injury and the onset of symptoms was too long. Dr. Nordeen felt that Brian's behavorial problems show he is a boy under stress in his life, and that Brian's OCD features were naturally occurring and related to family characteristics. The jury returned verdict for the school district, and the district court denied plaintiffs' motion for a new trial. Plaintiffs appealed, contending the trial court erred by (1) allowing Dr. Nordeen to testify according to the principles set for in *Daubert*

v. Merrell-Dow Pharmaceuticals, Inc., 509 U.S. 579 (1993); (2) allowing testimony pertaining to Brian's five previous head injuries because, although the prior injuries were relevant to determining whether a Brian had a preexisting condition, their admission was prejudicial because the school district stipulated to liability; (3) allowing testimony by Dr. Nordeen concerning Brian's family situation and its relation to the OCD disorder because the testimony violated Iowa's parental immunity doctrine; and (4) the jury's verdict ran contrary to the evidence.

HELD: Several principles govern the admissibility of expert testimony under Iowa Rule of Evidence 702. First, the testimony must aid the jury in resolving a disputed issue. Second, the testimony must be reliable. This requirement necessarily flows from the first because unreliable testimony cannot assist a trier of fact. Third, the amount of foundation necessary to establish reliability depends on the complexity of the testimony and the likely impact of the testimony on the fact-finding process. Fourth, there is no requirement that the expert be able to express an opinion with absolute certainty. A lack of absolute certainty goes to the weight of the expert's testimony, not to its admissibility.

HELD: In contrast to our rule 702 guidelines, *Daubert* suggests the trial judge must determine at the onset, pursuant to Rule 104(a), 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. This entails a preliminary assessment of whether the reasoning or methodology underlying the testimony is scientifically valid and of whether that reasoning or methodology properly can be applied to the fact in issue. In making this determination the trial judge should consider whether the theory or technique (a) can be (and has been) tested, (b) has been subject to peer review and publication, (c) is generally accepted within the relevant scientific community, and (d) has a known or potential rate of error.

In *Mensick v. American Grain*, 564 N.W.2d 376 (Iowa 1997), this Court the view that *Daubert*, applies only to novel scientific testimony and is simply not applicable to technical or other specialized knowledge. The dictionary defines "technical" as anything "pertaining to or connected with the mechanical or industrial arts and the applied scientists." The dictionary defines one who "specializes" as one who pursues "some special line of study, work, etc." Scientific knowledge differs from technical and specialized knowledge in that it is a validation. Scientific knowledge is the process of formulating a hypothesis and then engaging in experimentation or observation to verify or falsify that hypothesis. It is this knowledge garnered from experimentation and observation that was offered as evidence in *Daubert*. *Daubert* has no other application for use in the expert field of engineering, as well as the fields of generalized medical issues, real estate, auto mechanics, accountants, attorneys, DEA agents, IRS agents, and the like.

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Based on these principles, the Court holds that the *Daubert* analysis was not applicable to the instant case. Applying the Iowa principles governing expert testimony, Dr. Nordeen's testimony regarding Brian's OCD traits was sufficiently established as reliable in the record.

HELD: Under Iowa Rule of Evidence 403 relevant evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice. Rule 403 is applied sparingly, and in this case the district court correctly determined that any possible prejudicial effect Dr. Nordeen's testimony may have had did not render it inadmissible. It was within the province of the jury to decide what weight to give such testimony in light of the expert testimony offered by the plaintiffs in support of their position.

HELD: The testimony concerning Brian's five previous injuries was not introduced to show fault on the part of Brian or that his alleged recklessness contributed to the accident. Instead, it was introduced to dispute the causal link between the injury and Brian's OCD and other behavioral problems. The trial court did not abuse is discretion when it admitted this evidence.

HELD: A parent is immune from liability for alleged negligent acts emanating from the parent-child relationship if the act involves an exercise of (1) parental authority over the child, or (2) parent discretion in respect to the provision of food, clothing, shelter, education, medical and dental services, and other care. The district court correctly noted that the testimony in this case by Dr. Nordeen did not in any way implicate legal liability on the part of Brian's parents. Rather, the testimony of Dr. Nordeen was presented in an attempt to prove that Brian's condition may have had other causes and is not solely the result of the subject fall. The defendant presented the evidence solely to dispute the element of causation, a use that does not infringe upon the judicially-created parental immunity doctrine.

HELD: The jury's failure to award any damages, in light of the defendant's admission of negligence and the record made that some damages were proximally caused by that negligence, necessitates a new trial. The defendant stipulated that medical costs incurred by Brian for visits to his doctor since the injury and for the original hospitalization amounted to $10,000, and agreed that the amount was fair, reasonable, and necessary. The jury's failure to award any damages was contrary to the evidence and does not effect substantial justice.

HELD: Under the special interrogatory submitted by the trial court, the jury was not required to make a separate determination of proximate cause as to each item of damage. Presumably, the jury could have found that the defendant's negligence was a proximate cause of some, but not all, of the plaintiff's claimed injuries. Because damages must be

itemized in this case, at the new trial the jury should be given verdict forms that properly connect the issue of proximate cause to each item of damage claimed by the plaintiffs.

Ichelson v. Wolfe Clinic, P.C., 576 N.W.2d 308 (Iowa 1998)

Intervening Acts

Plaintiff suffered from a congenital eye defect known as bilateral lens dislocation. When he developed cataracts, plaintiff consulted with the defendant physician. Although the congenital problem was unrelated to the cataracts, that condition did cause the defendant physician to recommend a different type of cataract surgery then the norm: anterior intra-ocular lens implant. This procedure is relatively rare and, according to some of the medical evidence, is more likely to cause complications than the normal cataract surgery.

The physician performed surgery on both of the plaintiff's eyes. Soon thereafter, plaintiff began to have problems with slippage of the artificial lenses which were implanted during the surgery. This condition was characterized by the doctors as "jiggly lenses," and the defendant physician conceded the implanted lenses were too small for the plaintiff's eyes. Unhappy with the surgical results, the plaintiff went to the John Hopkins Retinal Clinic. There, a retinal specialist performed surgery on plaintiff's eyes in four stages. First, she removed the jiggly lenses implanted by the defendant physician. Second, she removed plaintiff's natural cataracted lenses, (which had not been removed during the original surgery). Third, the doctor performed a vitrectomy, removing the vitreous gel from plaintiff's eyes to facilitate the implantation. Fourth, she implanted posterior chamber lenses.

Plaintiff filed a medical malpractice action against the defendant physician for the first surgery. Plaintiff alleged he developed cystoid macular edema (CME), and one of the causes of that condition is inflammation caused by surgical intervention in the eyes. By way of several pretrial motions, plaintiffs sought to exclude any evidence of the treatment by Johns Hopkins urging that if the plaintiff's treatment by the defendant physician required corrective treatment at Johns Hopkins, the defendant physician must bear the risk of that treatment, including any additional eye damage resulting therefrom. The district court overruled the motions, and the jury returned a verdict finding no negligence on the part of the defendant. Plaintiff appealed contending, among other things, he was prejudiced by the jury's consideration of the treatment by Johns Hopkins. The Supreme Court affirmed.

HELD: Under Iowa case law and Restatement (Second) of Torts § 475, injuries resulting from treatment necessitated by the defendant's original acts of negligence may be disregarded in assessing liability. In the present case, however, it is clear that the last

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three steps of the Johns Hopkins treatment were not necessitated by the original surgery by the defendant physician. The last three steps were intended to improve plaintiff's vision. While the last three steps in the Johns Hopkins procedure apparently would not have been as likely as the original surgery to cause CME or other problems, there was other evidence that they in fact could have caused that problem. In fact, when plaintiff was first examined at Johns Hopkins after the original surgery, no CME was apparent. It was proper for the court to allow evidence to be produced by the defendants regarding all the Johns Hopkins procedures in order to allow the jury to sort out what effect, if any, those procedures had on the plaintiff's condition. Moreover, the plaintiffs cannot complain they were prejudiced by the jury's consideration of the intervening acts by Johns Hopkins because the jury found no negligence on the part of the defendant physician. The rule of Restatement § 457 presupposes that the intervening acts are necessitated by a wrongful act of the original actor.

INSURANCE

United Fire & Casualty Co. v. Victoria, 576 N.W.2d 118 (Iowa 1998)

Automatic Termination Provision

Family Member Exclusion

While residents of Goldfield, Iowa, Victor and Mabel Victoria purchased an automobile insurance policy from United Fire. When Victor and Mabel moved to Colorado, they purchased another automobile policy of insurance from State Farm. United's policy provided liability coverage of $250,000 per person and $500,000 per accident, while State Farm's limits were $100,000 and $300,000 respectively. The policies overlapped for five days. During that period, Mabel, Victor, and their son Roger, who was driving, were involved in a head on collision. Victor and Roger were injured, and Mabel was killed. The United Fire policy contained an "automatic determination" clause which provided: "If you obtain other insurance on your covered auto, any similar insurance provided by this policy will terminate as to that auto on the effective date of the other insurance." In addition, the policy contained a "family exclusion" provision that provided "we do not provide liability coverage for any person for bodily injury to you or any family member." In turn, the policy defined "family member" as "a person related to you by blood, marriage, or adoption who is a resident of your household . . . ." United Fire filed a declaratory judgment action claiming each of these exclusions precluded coverage. The district court ruled against United Fire on both issues, and it appealed. The Supreme Court affirmed in part, reversed in part, and remanded.

HELD: United Fire argues that, while the policies are different in some respects, they are nevertheless "similar" for purposes of the automatic termination clause because the policies cover the same vehicle and provide the same general type of coverage. It might well be the understanding of an insurance professional that the policies are similar. However, to an average policy buyer, a policy with substantially lower limits would not likely be viewed as "similar." When the consequences of buying a similar policy are so serious as to cause an automatic termination, an insured should be informed of what constitutes "similar" coverage. "Similar" is not defined by the policy, and the dictionary definition explains the term may be used in the English language to mean the "same" or "identical" as well as "showing some resemblance, related in appearance or nature, alike though not identical." This inherent vagueness renders the term ambiguous, and the ambiguity must be construed in favor of the insured.

In addition to the disparate limits of liability, the State Farm policy provides no-fault coverage and emergency road services, while the United Fire policy does not. The

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United Fire policy includes UIM coverage, which the State Farm policy apparently does not. The coverage purchased under the State Farm policy is not "similar" for purposes of the automatic termination clause.

HELD: Under the family exclusion, all family members would be precluded from recovery. We have upheld a similar "family exclusion" in our prior cases. The Victorias contends that, because Mabel and Victor were residents of Colorado at the time of the accident, any policy written by the United Fire must conform to Colorado law, which they say does not permit such exclusions. The rule is that when foreign law is not pled or proven, it is presumed to be the same as Iowa's. Here, the Victorias failed to prove that Colorado law would prohibit such an exclusion, although some of the witnesses suggested that might be so. We conclude the court erred in ordering reformation or innovation of the insurance policy to remove the family exclusion.

Illinois National Insurance Co. v. Farm Bureau, 578 N.W.2d 670 (Iowa 1997)

Competing Excess or Escape Clauses

Larry Boughn sustained injuries in a fall from a pickup truck owned by Steven Crozier and operated by Steven's brother, Gary Crozier. The accident occurred on Gary's farm. Steve carried insurance with National Assurance Association for $20,000 in coverage limits. Gary carried automobile liability insurance with Illinois National with $25,000 coverage limits. Gary also had farm liability insurance through Farm Bureau with policy limits of $300,000.

Larry settled the tort action against Gary for $72,000. As the primary insurer, National Assurance paid its policy limits of $20,000. Although Farm Bureau and Illinois National agreed to pay the remaining portion of damages as excess insurers, a dispute arose concerning their contributions under their "other insurance" clauses. Farm Bureau's provision provided:

> This insurance is excess over any other valid and collectible insurance, except insurance written specifically to cover as excess over the limits of liability that apply in this policy.

Illinois National's provision provided:

> If there is other applicable liability insurance, we will pay only our share of the loss. Our share is the pro ration that our limit of liability bears to the total of all applicable limits. However, any insurance we provide for a vehicle you do not own shall be excess over any other collectible insurance.

A declaratory judgment action ensued. Illinois National contended it should only pay a pro rata ($1/13^{th}$) share of the unsatisfied settlement. Farm Bureau, on the other hand, contended that Illinois, as an automobile insurer, was the primary excess insurer, so Farm Bureau should not be liable for any amount of the settlement until Illinois National had exhausted its $25,000 policy limits. The district court found for Farm Bureau and, in doing so, adopted the "closer to the risk" analysis followed in Illinois Farmers Insurance Co. v. Depositor's Insurance Co., 480 N.W.2d 657 (Minn. Ct. App. 1992). Illinois National appealed, and the Iowa supreme court reversed and remanded.

HELD: Iowa case law holds that when confronted with mutually repugnant excess or escape clauses, such as the clauses here, the loss must be pro rated between the insurers in accordance with the policy limits. In contrast, the "closer to the risk" rule focuses on the coverage contemplated by the policies and the premiums paid for them as the primary consideration in assessing the responsibility in this type of dispute. Three factors are considered in determining which policy is closer to the risk: (1) which policy specifically described the accident-causing instrumentality; (2) which premium is reflective of the greater contemplated exposure; and (3) does one policy contemplate the risk and use of the accident-causing instrumentality with greater specificity than any other policy. Although something may be said for the Minnesota rule, the Court nevertheless prefers to apply the Iowa. It would be easier for the insurers to assess the risks and the appropriate premiums involved than for the courts to process the disputes among the insurers under the "closer to the risk" doctrine. We reverse and remand to the trial court to pro rate the loss between Illinois National and Farm Bureau.

Continental Western Insurance Co. v. Stenstrom, 567 N.W.2d 638 (Iowa App. 1998)

Coverage - Definition of "Use"

This action arises from injuries sustained by Doris Stenstrom, an employee and shareholder of Stenstrom Construction Company, while she was supervising a road project for the company. On the day of the accident, Doris drove to the job site in a pickup truck owned by the company and provided for her use while on the job. After arriving at the job site and stepping out of and approximately 20 feet away from the pickup truck, she was struck by a passing motorist. The company carried a policy of insurance with Continental Western that provided both liability and underinsured motorist coverage. The policy states as follows:

1. WHO IS AN INSURED?
   The following are "insured:"
   a. You for any covered "auto."
   b. Anyone else while using with your permission a covered "auto" you own, hire or borrow . . . .

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Doris, with the consent of Continental, settled with the motorist for the motorist's liability policy limits of $25,000. Continental then brought this declaratory judgment action and stipulated that Doris had damages in excess of $25,000. Continental argued Doris was not an "insured" under the policy, and the district court granted summary judgment. Doris appealed, and the Court of Appeals affirmed.

HELD: Doris was not doing anything connected with the operation of the pickup truck at the time she was struck. The pickup's only utility was to transport Doris to and from home and between job sites. Once on the job site, Doris' "use" of the pickup ceased and she went about her supervisory duties. At the time she was injured, Doris was inspecting the operations of a machine in an area approximately 25 feet away from the pickup. Her job site duties were not related to the use of the pickup. Because Doris was not engaged in an act essential to the use of the covered vehicle at the time of the injury, she was not an insured under the policy.

Hickman v. IASD Health Services Corp., 572 N.W.2d 165 (Iowa App. 1997)

Coverage - Health Care Insurance

Reasonable Expectations Doctrine

Kenneth Hickman had a family group medical insurance policy with Blue Cross Blue Shield. The policy excluded dental coverage with limited exceptions:

> **Dental Care.** You are not covered for dental care except those services listed in the section BENEFITS . . . .
>
> [BENEFITS]
>
> **Accidental Injuries** treated within 72 hours of the injury.

Hickman's son, Kent, was struck in the mouth with a baseball resulting in displacement, fracture, and loss of several teeth. Within 72 hours of the accident, Kent was treated for soft tissue lacerations. Misalignment of his teeth prevented immediate dental treatment, however, and such treatment was not rendered until two weeks later when the pain and inflammation subsided.

A coverage dispute arose in the aftermath of the accident. Hickman contends the terms of the policy should be interpreted to mean that if the insured commences treatment for an accident injury within 72 hours of the injury, the policy should cover that treatment and the treatment rendered more than 72 hours after the injury which relates back to the

original injury. In the alternative, Hickman urges the doctrine of reasonable expectations should provide coverage in this instance. Blue Cross argues the terms should be interpreted to mean any treatment rendered more than 72 hours after the accidental injury occurred is excluded from coverage. The district court entered summary judgment in favor of Blue Cross, and Hickman appealed. The court of appeals affirmed.

HELD: The words "you are not covered for dental care except . . . [for] [a]ccidental [i]njuries treated within 72 hours of the injury" are clear and explicit. There is not more than one reasonable interpretation. Because the policy is not ambiguous, the exclusion must be given effect.

HELD: To be awarded coverage under the doctrine of reasonable expectations, Hickman must prove: (1) an ordinary layperson would misunderstand the policy's coverage or there are circumstances attributable to the insurer which foster coverage expectations; *and* (2) the exclusion is bizarre or oppressive; *or* (3) the exclusion eviscerates explicitly agreed to terms; *or* (4) the exclusion eliminates the dominant purpose of the transaction. Even if the conditions of (1) are satisfied, coverage does not follow unless the conditions of (2), (3), or (4) are also satisfied. Here, the treatment of Kent's accidental injuries could not be completed within 72 hours for valid medical reasons. It is not unusual for dentists to render initial treatment following a traumatic injury and then require a patient to return several days later to complete treatment. The coverage afforded allows accidental injuries to be stabilized within 72 hours. It is not bizarre or oppressive in light of the purpose of the agreement which is to provide it medical insurance. There are not explicitly agreed to terms the exclusion eviscerates. It was not error for the trial court to deny Hickman relief under the doctrine of reasonable expectations.

Iowa Mutual Insurance Co. v. McCarthy, 572 N.W.2d 537 (Iowa 1997)

Coverage - Employee Exclusion

Consent to Settlement Clause

Standing Under the Direct Action Statute

A farm liability insurer brought this declaratory judgment action against its insured, McCarthy, and the estate of a worker killed in an accident on the insured's farm, Kelly, to determine coverage for a wrongful death claim filed by the estate. The policy of insurance excluded coverage for bodily injuries sustained by "any employee . . . as a result of his or her employment by the insured." The evidence revealed the following facts. Kelly and McCarthy were personal friends. Kelly maintained full time employment with a trucking company, but also performed general farming services for McCarthy. Kelly had previously farmed and was very experienced in the tasks assigned

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to him by McCarthy. Kelly's services included operating a combine, equipment maintenance, cleaning, running errands, and purchasing materials. Although McCarthy directed what work was to be done, Kelly worked without supervision or further direction. If parts or supplies were needed for Kelly's work, Kelly purchased what was needed, and he provided some of his own tools. Kelly kept track of his hours and out of pocket expenses. At the end of the year, McCarthy reimbursed Kelly for his services and paid him $6 an hour by transferring grain. Although McCarthy deducted amounts from federal taxes and social security from wages paid to his other employees, he did not withhold similar sums from McCarthy's compensation. McCarthy testified he knew the penalties for not complying with federal tax laws, but stated he did not consider Kelly to be an employee. Additionally, McCarthy did not file a report of injury following Kelly's death, as employers are required to do under Iowa Workers Compensation Law.

At the conclusion of trial, the district court submitted an instruction to the jury on the indicia of an independent contractor. The jury returned a verdict finding Kelly was not McCarthy's employee. The trial court entered a JNOV in favor of the insurer, however, ruling Kelly was McCarthy's employee as a matter of law. Based on this ruling, the district court entered a declaratory judgment that the insurance policy provided no coverage for the claim made by Kelly's estate against McCarthy, and the estate appealed.

In the interim, McCarthy settled the estate's wrongful death action over the insurer's objections. Pursuant to the settlement agreement, McCarthy confessed judgment for $507,500. This offer of judgment was accepted by the estate and the district court entered a judgment against McCarthy in the stipulated amount. McCarthy paid $7,500 to the estate and obtained a partial satisfaction of judgment. The estate agreed it would collect the balance of the judgment from the insurer, not McCarthy. In addition, McCarthy assigned its rights against the insurer to the estate.

On appeal, the insurer argued (1) the unauthorized settlement rendered the appeal moot because McCarthy breached the cooperation and settlement clauses of the policy, (2) the estate lacked standing to pursue the appeal and the estate could not proceed through right of assignment because McCarthy himself did not appeal, and (3) the trial court erred in submitting the independent contractor instruction. The estate argued the district court erred in reversing the jury verdict and entering a JNOV in favor of the insurer.

HELD: Although the events transpiring since the trial court's declaratory ruling have the potential of rendering the current appeal moot, the affect of McCarthy's settlement on Iowa Mutual's obligation to pay the stipulated judgment has yet to be litigated. The Court therefore rejects Iowa Mutual's mootness claim, and proceeds to determine the issues presented in this appeal.

HELD: Iowa's direct action statute gives an injured party, such as the estate, a cause of action against the insurer if the injured party obtains a judgment that he cannot collect by execution against the insured. Even though the estate was not a necessary party to the action, it was a proper party. Consequently, the estate has an interest in McCarty's insurance coverage, and it has standing to pursue this appeal.

HELD: The evidence clearly established some type of mutual arrangement whereby Kelly would perform services for McCarthy. The issue here concerns the nature of that relationship: Was it that of an employer/employee or was Kelly an independent contractor? In cases presenting a choice between characterizing a person as an employee or an independent contractor, the primary focus is on the extent of control by the employer over the details of the alleged employee's work. Many factors are relevant when examining a person's status as an independent contractor: (1) the existence of a contract for the performance by a person of a certain piece or kind of work at a fixed price; (2) independent nature of his business or of his distinct calling; (3) his employment of assistants, with the right to supervise their activities; (4) his obligation to furnish necessary tools, supplies, and materials; (5) his right to control the progress of the work, except as to the final results; (6) the time for which the workman is employed; (7) the method of payment, whether by time or by job; and (8) whether the work is part of the regular business of the employer. Kelly's right to control the physical details of his work for McCarthy, especially when combined with the evidence showing the parties did not intend to create an employee/employer, constitutes substantial evidence supporting the jury's finding that Kelly was not McCarthy's employee. Although there was certainly sufficient evidence of which the jury could have made a contrary finding, it is not the court's role to reweigh the evidence. Because the jury's verdict was supported by substantial evidence, the trial court erred in entering a JNOV.

HELD: Any evidence tending to show the employers intent is relevant to determining a person's status as an employee or an independent contractor. Our prior cases have implicitly considered an alleged employer's conduct in complying with federal tax laws as probative of the employer's intent to create an employer/employee relationship, and the same rule applies to the requirement under the Workers Compensation Law that an employer file a report of any injury to an employee. Because the challenged evidence was probative of McCarthy's intent to create an employer/employee relationship, the trial court did not abuse its discretion in finding the evidence relevant.

HELD: Given the issue in this case, it was appropriate for the court to instruct the jury on the test for determining whether Kelly was an independent contractor. The trial court did not err in doing so.

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Whicker v. Goodman, 576 N.W.2d 108 (Iowa 1998)

Coverage - Occupation Requirement

Plaintiff went to the home of his uncle to install a stock rack on the plaintiff's pickup truck. To facilitate access to the stock rack, plaintiff moved his grandfather's pickup truck a few feet, and then proceeded to move the stock rack and position it on the back of his truck. Approximately three minutes later, a vehicle driven by the defendant struck plaintiff's pickup truck. At the time of the accident, plaintiff was holding one end of the stock rack upright while the other end rested against the side of his truck. The force of the collision threw plaintiff against his grandfather's pickup truck. The defendant driver had no insurance.

Plaintiff sought UM benefits under the policies covering his pickup and his grandfather's pickup. There was no dispute that plaintiff's damages exceeded the combined limits of these policies. The grandfather's insurance carrier denied coverage, however, claiming because plaintiff was not "in, upon, entering or alighting" the grandfather's pickup at the time of the accident, he was not an insured under the UM coverage of the policy. The plaintiff filed suit, the insurer moved for summary judgment, and the district court granted the motion. The plaintiff appealed, and the Iowa Supreme Court affirmed.

HELD: In the *United States Fidelity & Guaranty Co.*, 562 N.W.2d 672 (Iowa 1997), the Court held a policy nearly identical to the one at issue here extended UM coverage to anyone (1) in close proximity to the covered auto and (2) engaged in an activity related to the use of the covered auto. Although plaintiff was in close proximity to his grandfather's pickup when he was injured, his use of the vehicle had ceased prior to the accident. When the defendant's vehicle struck plaintiff's pickup, plaintiff was putting a stock rack on the back of his own vehicle. That activity had no connection with the pickup insured by the grandfather's insurance carrier. Consequently, plaintiff was not engaged in an activity relating to the use or maintenance of his grandfather's pickup at the time he was injured.

Iowa Comprehensive Petroleum Underground Storage Tank Fund Board v. Farmland Mutual Insurance Co., 568 N.W.2d 815 (Iowa 1997)

Extrinsic Evidence

Pollution Exclusion

Due to gradual corrosion over a number of years, the steel underground storage tanks of a former retail gasoline station began to release gasoline into the surrounding soil

and groundwater. This pollution occurred during one or more years in which a comprehensive general liability insurance policy issued by Farmland Mutual Insurance Company remained in force. The Iowa Comprehensive Underground Storage Tank Fund Board (the Board) took remedial action at the contamination site and, as the gasoline station's assignee, made demands on Farmland for its costs. The policy of insurance contained the following standard pollution exclusion:

> (b) Exclusions. Insurance does not apply to: . . .
> (6) bodily injury or property damage arising out of the discharge, disbursal, release or escape of smoke, vapors, soot, fumes, acids, alkalies, toxic chemicals, liquids or gases, waste materials or other irritants, contaminants or pollutants into or upon water, the atmosphere or any water course or body or water; but this exclusion does not apply if such discharge, disbursal, release or escape is *sudden and accidental*.

The Board filed a declaratory judgment action asking the court to interpret the "sudden and accidental" language in the policy. Farmland argued the term "sudden" was unambiguous, that it had a temporal requirement, and that it was synonymous with the word "abrupt." The Board, on the other hand, argued that "sudden" was ambiguous because it could also mean unforeseeable or unexpected. The district court granted summary judgment for Farmland, and the Board appealed. The Supreme Court affirmed.

HELD: The term "sudden" as used in the sudden and accidental exception to the standard pollution exclusion clause, includes a temporal aspect requiring an abrupt event. In *Weber v. IMT Insurance Co.*, 462 N.W.2d 283 (Iowa 1990), the Court interpreted the term "accidental" in a similar exclusion broadly as an unexpected and unintended event. Thus, the interpretation of "sudden" as merely unforeseen or unexpected would render either the term "accidental" or "sudden" redundant.

HELD: The leak that occurred over more than ten years did not fall within the sudden and accidental exception to the pollution exclusion clause.

HELD: The Board attempts to use extrinsic evidence of events that took place in the insurance industry in Iowa in the 1970s to create an ambiguity in the policy language. This evidence must be rejected because there was no showing that the parties to the action at issue had any understanding about whether a temporal element was a part of the pollution exclusion, or that it was a consideration in the purchase of the insurance policies in question.

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Dolan v. State Farm Fire & Casualty Co.

Intentional Act Exclusion

Res Judicata

Dolan, a golf pro shop employee, filed a negligence action against an irate and intoxicated golfer who assaulted him in the course of a dispute over the location of the golfer's clubs. The golfer carried a homeowners insurance policy with State Farm, and State Farm provided a defense under a reservation of rights to contest coverage. The golfer filed for bankruptcy, and after the automatic stay order from the bankruptcy action was lifted, the case proceeded to trial solely on a theory of negligence. The jury returned a verdict for Dolan, but the damages he was awarded were subsequently discharged in the golfer's bankruptcy proceedings. Dolan then proceeded directly against State Farm under Iowa Code § 516.1 (the direct action statute). In that action, Dolan claimed the underlying suit was res judicata against State Farm. The district court ruled (1) res judicata did not apply because the issue of whether the golfer had committed an intentional act had not been litigated in the prior suit, and (2) in any event, the golfer had committed an intentional act which precluded any coverage under the State Farm policy for the underlying damage award. Dolan appealed, and the Supreme Court affirmed.

HELD: Before issue preclusion may be employed, four prerequisites must be established: (1) the issue must be identical; (2) the issue must have been raised and litigated in the prior action; (3) the issue must have been material and relevant to the disposition of the prior action; and (4) the determination made of the issue in the prior action must have been necessary and essential to the resulting judgment. Negligence and intentional torts are not mutually exclusive concepts. The jury's finding of negligence or fault did not exclude a subsequent finding of an intentional assault. Here, where the victim of an assault sues the wrongdoer only for negligence, the liability insurer, who defends under a reservation of rights to contest coverage based on the intentional acts exclusion, is not precluded from raising the policy defense.

HELD: The State Farm policy issued to the golfer excluded coverage for intentional acts by providing "liability coverage and medical payments to others do[es] not apply to . . . [b]odily injury or property damage . . . which is either expected or intended by an insured." The district court found the golfer's acts, even though done while intoxicated, do not make his intentional act unintentional. A person who voluntarily becomes intoxicated cannot claim the results of his or her actions are unexpected or intended. The Court declines to create a situation where the more drunk an insured can prove himself to be, the more likely he will have insurance coverage. Because the golfer could not have

enforced the claim against State Farm, Dolan has no right to enforce the judgment against the insurer.

Hoth v. Iowa Mutual Insurance Co., 577 N.W.2d 390 (Iowa 1998)

Res Judicata

Consent to Settlement CLause

Hoth, an insured of Iowa Mutual and USF&G, was killed when the vehicle in which she was a passenger was struck by a vehicle operated by Sexton. Hoth's administrator commenced a wrongful death action against Sexton and ultimately accepted an offer to confess judgment for the sum of $350,000. The liability limits of Sexton's policy were $650,00. Prior to the acceptance of the offer to confess judgment, defendant USF&G informed the administrator it would not consent to the settlement in accordance with the consent to settle clause in its policy. Defendant Iowa Mutual had no such clause in its policy. The administrator then filed separate actions and Iowa Mutual and USF&G seeking to recoup additional damages from the decedent's UIM coverage. Both insurers moved for summary judgment on the ground that the amount of the estate's damages was conclusively established by the judgment obtained against the tortfeasors by confession. In addition, USF&G moved for summary judgment on the ground that the administrator had breached the consent to settle clause in its policy. The district court granted the motion for summary judgment on issue preclusion grounds, and the administrator appealed. The Supreme Court reversed and remanded.

HELD: Under the doctrine of claim preclusion, consent judgments are binding on the parties thereto with respect to the subject of a judgment consented to. They are also binding on parties claiming through and on behalf of the prior litigant. Here, although the judgment by confession is binding between the parties and their privies under principles of claim preclusion, it does not avail USF&G or Iowa Mutual of a viable claim of issue preclusion in the present litigation. An essential element of issue preclusion is absent, i.e., the requirement that the issue actually be litigated in the prior litigation.

HELD: When a UIM insurer claims prejudice from the insured's release of a potential subrogation claim, the insurer must establish not only that the claim has been released, but also that it was collectible and establish within a reasonable approximation of the dollar amount that might be collected. In seeking to obtain summary judgment in the present matter, USF&G relied on deposition testimony and other discovery revealing the extent of the Sextons nonexempt personal assets. The fact that these assets exist does not establish USF&G's right to summary judgment. The factual issue remains as to the amount that could be realized from these assets towards the satisfaction of a subrogation judgment USF&G might obtain had the administrator not released the insurer's

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subrogation rights. That is the amount that, along with the $300,000 unexhausted limits of the Sextons' insurance, should be applied as a *pro tanto* reduction of USF&G's liability for the administrator's damages above $350,000. For this reason, the case must be remanded for further proceedings.

Waits v. United Fire & Casualty Co., 572 N.W.2d 565 (Iowa 1997)

Res Judicata

Evidence of Amount of Settlement in UIM actions

Waits was injured when the vehicle she was driving was struck by a car driven by Theresa Fay. The accident occurred shortly before 1 a.m. on a residential street. Waits observed Fay's vehicle coming toward her in her lane of traffic, and in an attempt to avoid a collision, drove her car over the curb and onto the sidewalk. Despite this evasive maneuver, Fay struck Waits' vehicle on the driver's side. There was extensive damage to Waits' automobile and she sustained a low back injury.

At the time of the collision, Fay was insured with Allied Mutual Insurance Company. Waits carried insurance with United Fire under a policy providing underinsured motorist benefits in the amount of $100,000. Waits reached a settlement with Allied, who agreed to pay its remaining policy limits, $90,000, to settle Waits' claim against Fay. United Fire consented to the settlement. Waits then brought this action to recover the United Fire policy's UIM benefits. United Fire stipulated that (1) Fay was 100% at fault in causing the accident, (2) Waits received the full amount available to her under Fay's insurance policy, and (3) Waits was covered by a policy of insurance issued by United Fire containing $100,000 in UIM coverage.

At trial, Waits testified that she had injured her back several years in a work-related injury. Her physician offered conservative treatment, and she eventually returned to her assembly line job asymptomatic. After the subject accident, however, Waits immediately experienced low back pain. When conservative measures proved unhelpful, she had surgery to remove a herniated disk. Waits' treating physician also testified that Waits' work-related injury involved a herniated disk at the same level, but that it had healed. He explained that it was possible that Waits would be asymptomatic following her work related injury, but that such injury would make her more susceptible to a back injury in the subject accident. He added that surgery was not inevitable after the work related injury, and in the majority of cases involving similar injuries the patient will heal without surgery.

Prior to trial, United Fire filed a motion in limine to exclude evidence of Allied's policy limits and the settlement amount paid by Allied to Waits on behalf of Fay,

claiming the information was irrelevant and prejudicial. The trial court ruled the challenged evidence was admissible. Additionally, the trial court stated the amount of the settlement three separate times in its instructions to the jury.

In response to a special interrogatory, the jury found Waits had sustained damages of $178,000 as a result of the accident. After reducing the verdict in an amount equal to the settlement received by Waits from the underinsured motorist, the court entered judgment against United Fire for $88,000 and interest. United Fire appealed, claiming the trial court erred or abused its discretion in several ways: (1) in striking United Fire's affirmative defense of release and satisfaction; (2) in admitting testimony regarding how the accident occurred; (3) in admitting evidence of an instruction from the jury regarding the amount of Waits' settlement with the underinsured motorist; and (4) in giving an "eggshell plaintiff" instruction. The Iowa Supreme Court reversed and remanded for a new trial.

HELD: In *Leuchtenmacher v. Farm Bureau Mutual Insurance Co.*, 461 N.W.2d 291 (Iowa 1991), the administrator of the insured's estate brought suit against the decedent's underinsured motorist carrier to recover UIM benefits. Prior to trial, the plaintiff settled with the tortfeasor for the tortfeasor's liability limits of $55,000. The Court held evidence of the insurance limits was admissible in that case to prove the existence of the insurance contract and its terms. We said any direct claim against an insurer on a contract dispute necessarily involves introduction of the insurance policy and its terms. This case is distinguishable from *Leuchtenmacher* because United Fire did not contest the existence of the policy or its terms or the fact that Waits was entitled to recover the amount by which her damages, as determined by the jury, exceeded the tortfeasor's payment. Thus, the payment made by Allied was not relevant to any disputed issue of fact upon which the jury was to make a determination. Furthermore, even if the Court assumes the evidence had some relevancy to disputed factual issues in the case, any relevancy was substantially outweighed by the likelihood of unfair prejudice. The evidence served no purpose other than to inform the jury that it must return a verdict in excess of $90,000 in order for Waits to recover under her UIM coverage. An insurer should be able to avoid such prejudice by stipulating to any matters to which the tortfeasor's liability limits and/or settlement payments would be relevant. That is what United Fire did here, and the trial court's admission of the evidence of Allied's payment was an abuse of discretion.

HELD: United Fire points out Waits gave Fay a full and complete release and did not reserve any claim for UIM benefits It suggests Waits could have provided Fay with the covenant not to sue if they desired to settle with them without acknowledging full satisfaction of their claim. As a consequence of the settlement, United Fire contends Waits could not meet the UIM policy requirement that she be "legally entitled to recover" damages from the underinsured motorist that were not fully compensated by the

underinsured motorist's liability insurer. The phrase "legally entitled to recover" must be given a liberal, not a literal, interpretation. It simply requires the insured to prove the damages he or she would have been entitled to recover had a suit against the underinsured motorist been taken to judgment. Any technical distinction between a release and a covenant not to sue that goes to the underinsured motorist's ongoing liability to the injured party is irrelevant. Consequently, Waits release of Fay is not a defense to Waits' UIM claim.

HELD: United Fire claims the evidence of how the accident occurred is not relevant to the only issues submitted to the jury, namely, the extent of Waits' damages. We think the way in which the accident occurred is relevant to two factual issues: (1) whether the accident caused any injuries to Waits; and (2) the nature and extent of any such injuries. Evidence of the force of impact, Waits position in the vehicle, and the location extent of the damage to her vehicle is probative of these issues. These issues, in turn, are probative of the amount of damages sustained by Waits as a result of Fay's fault. If the evidence of the accident itself were excluded, the jury would have to determine if Waits were seriously injured in the accident without knowing whether the accident was a light tap to the bumper or a more violent and forceful collision. In addition, although Fay's reckless conduct may tend to arouse the jury's instinct to punish, we think the probative value of this evidence weighs heavily in favor of its admissibility and should not be excluded on grounds of prejudice.

HELD: The trial court properly instructed the jury on both the eggshell plaintiff rule and the aggravation rule. There was evidence to support giving the eggshell plaintiff instruction and the instructions were not mutually exclusive. The trial court erred, however, in failing to explain to the jury how it was to decide which instruction was applicable under the facts of this case. The jury should have been told the aggravation rule excluded liability for pain and disability existing prior to the accident and the eggshell plaintiff rule made any pain and disability arising after the accident compensible, provided the pain and disability resulted from the accident.

LeMars Mutual Insurance Co. v. Joffer, 574 N.W.2d 303 (Iowa 1998)

Temporary Substitute Vehicle Clause

Owned But Not Insured Clause

Reasonable Expectations Doctrine

The Joffers carried two separate automobile policies with LeMars Mutual. The first policy covered the Joffers personal vehicles providing them with UM coverage with limits of $25,000 per person and $50,000 per accident. The second policy, a business

automobile policy which covered their 2 ton pickup truck which they used in connection with their farming operation, provided UM coverage with a limit of $500,000. The pertinent portion of the business policy provided:

> B. Who is an insured.
> 1. You.
> 2. If you are an individual, any "family member".
> 3. Anyone else "occupying" a covered "auto" or a temporary substitute for a covered "auto". The covered "auto" must be out of service because of its breakdown, repair, servicing, loss or destruction. ...
>
> C. Exclusions. This insurance does not apply to any of the following: ...
> 4. "Bodily injury" sustained by you while "occupying" or struck by any vehicle owned by you which is not a covered "auto".

The Joffers were involved in a two car accident while using their personal automobile. At the time of the accident, the Joffers were conducting farm business but were unable to drive the 2 ton pickup truck because it was inoperable. The driver of the other car involved in the accident was determined to be a fault, but he did not have automobile insurance. LeMars paid the Joffers the limits of the UM coverage pursuant to the personal automobile policy, but it denied claim their for benefits under the business policy on the basis of the owned but not insured clause and filed a declaratory judgment action. The district court granted LeMars' motion for summary judgment. The Joffers appealed arguing the district court erred: (1) in interpreting the temporary substitute clause is not applicable to them; (2) in finding that the owned-but-not-insured exclusion applied because application of the exclusion would invalidate the temporary substitute vehicle clause and this inconsistent result rendered the coverage illusory; and (3) in declining to find the doctrine of reasonable expectations afforded coverage on the basis of the an insurance agent's statement that they were "fully covered." The Iowa Supreme Court affirmed.

HELD: Applying a standard dictionary definition, the term "anyone else," as used in the temporary substitute clause of the business automobile insurance policy was intended to mean anyone not previously listed as covered, and thus did not include the insureds.

HELD: The owned-but-not-insured exclusion contained in the UM motorist policy here was a valid exclusion and prevents the Joffers from recovering the higher limits available under the business policy. The potential for duplication of benefits is clear (i.e. the insureds would have recovered duplication of benefits previously paid under their

personal automobile policy) and enforcing the exclusion does not leave the insureds without coverage equal to the statutorily required minimum amount. Enforcing the exclusion does not render the temporary substitute clause illusory. Paragraph B(3) provides coverage in a situation which could be vitally important to a business owner. Under this paragraph, any business associate or employee utilizing the 2 ton pickup truck or a temporary substitute for the truck not owned by the Joffers would be covered by the policy. Significantly the owned but not insured clause applies only to "you," meaning the named insured. This exclusion does not apply to persons covered under the temporary subsitute clause, i.e., "anyone else." Thus, the exclusion does not take away any coverage provided by the temporary substitute clause because the exclusion and the clause apply to two different classes of insureds. The two policies work together to ensure that the Joffers were always covered by insurance, regardless of which vehicle they were driving. With regard to the discrepancy in the amount of UM coverage between the two policies, we note that the Joffers were in control of the amount of the coverage they obtained and could have carried higher limits on their personal automobile policy. While the Joffers may regret not having obtained this higher coverage, the Court will not required LeMars to provide the higher coverage in the face of clear, applicable exclusion.

HELD: The agent's general statements regarding coverage are insufficient to foster coverage expectations such as those alleged by the Joffers. Nor do we think the ordinary layperson would misunderstand the meaning of the owned-but-not-insured exclusion, even when read in light of the temporary substitute clause. The doctrine of reasonable expectations cannot be used here to invalidate the exclusion.

JUDGMENT AND LIMITATION OF ACTIONS

Penn v. Iowa State Board of Regents, 577 N.W.2d 393 (Iowa 1998)

Res Judicata

Statute of Limitations

This case arises from the following timeline of events. On May 10, 1989, a female student, Cole, filed a sexual harassment complaint with the University of Northern Iowa (UNI) against Professor Penn. On May 24, 1989, following a hearing, a university committee found Penn guilty of harassment and Penn appealed. On September 22, 1989, the Board of Regents accepted the committee's findings, and Penn filed a petition for judicial review with the district court. On November 14, 1990, while this petition was pending, the board reversed its decision. On December 12, 1990, the district court granted the board's motion to dismiss the petition for judicial review as moot.

On December 20, 1991, Penn filed a complaint in federal court against the board, UNI, various university personnel, and Cole seeking recovery for depravation of his constitutional and civil rights under 42 U.S.C. §§ 1983 and 1985. In that regard, Penn alleged the defendants conspired to discredit him and treated him differently than other professors. No state claims were alleged, and Cole was never served with a complaint and did not litigate her interests. On April 9, 1992, the federal court granted the defendant's motion to dismiss the suit based on the running of the two year statute of limitations under Iowa Code § 614.1(2) (personal injuries), and Penn appealed. On July 9, 1993, the 8th Circuit found the last act of deprivation of due process and equal protection occurred on September 22, 1989, the date the board upheld the president's decision, more than two years prior to filing of the complaint. The 8th Circuit also determined the complaint failed to state a claim for malicious prosecution under Iowa law because probable cause existed for the investigation of Cole's complaint.

On November 16, 1992, while the federal case was on appeal, Penn filed a petition in state court against Cole and the university alleging (1) constitutional violations, (2) malicious prosecution, (3) abuse of process, (4) slander, (5) invasion of right of privacy, and (6) intentional infliction of emotional distress. The university was dismissed from the case because Penn failed to comply with the statutory requirements of Iowa Code chapter 669 (Tort Claims Act), and only Cole remained as a defendant. On November 19, 1993, Penn filed another action against the university alleging the same factual allegations and six counts as contained in his petition against Cole and added a seventh count: breach of contract. On June 16, 1995, the district court granted both the university and Cole summary judgment. Penn appealed both cases, and they were

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consolidated on appeal. The Supreme Court affirmed as to the university, and affirmed in part and reversed in part and remanded as to the student.

HELD: Issue preclusion, or collateral estoppel, prevents a party to a prior action in which a judgment has been rendered from re-litigating in a subsequent action issues raised and resolved in the previous action. Four prerequisites must be established for issue preclusion to apply (1) the issue determined in the prior action and the present action are identical; (2) the issue was raised and litigated in the prior action; (3) the issue was material and relevant to the prior action's disposition; and (4) the determination made of the issue in the prior action was necessary and essential to the resulting judgment. Additionally, a status test must be met: there must be privity between the party against whom issue preclusion is invoked and the party against whom the issue was decided in the first action. The status test does not apply, however, where issue preclusion is invoked defensively if the party against whom the issue preclusion is invoked was so connected in interest with one of the parties in the former action so as to have a had full and fair opportunity to litigate the relevant claim or issue and be properly bound by its resolution. In contrast to issue preclusion, claim preclusion bars not only matters actually determined in an earlier action but also all relevant matters that could have been determined. In other words, claim preclusion requires a party to litigate all matters growing out of the claim.

HELD: Cole cannot assert claim preclusion to bar Penn's claims because she was never served with the federal complaint and did not participate in the federal litigation.

HELD: Concerning Cole's claim of issue preclusion, Penn is bound by the federal court's final determination that the constitutional claims accrued on September 22, 1989. Because Penn's petition was not filed against Cole until September 16, 1992, his constitutional claims are barred by the two year statute of limitations.

HELD: Cole cannot use issue preclusion to bar the malicious prosecution claim against her because that issue was never actually litigated in the federal litigation, a fundamental requirement in the issue preclusion analysis. Similarly, the remaining state law claims were not also raised in the federal court, and the federal court did not specifically address the statute of limitations for each of those claims. Therefore, issue preclusion does not apply to those claims.

HELD: Concerning Penn's state law claims against Cole, Iowa Code § 614.1(2) establishes a two year the statute of limitations for such claims. Penn's petition alleges acts which occurred in both 1989 and 1990. He argues the abuse of process and malicious prosecution claims accrued on December 12, 1990, the date of the dismissal of the judicial review petition. All of Cole's alleged conduct occurred in 1989, however, and Penn did not allege any specific act by her after the May 24, 1989 hearing. Because

of this fact, the claims for slander, invasion of privacy, and intentional infliction of emotional distress are barred by the statute of limitations. Turning to the abuse of process claim, we note that the general rule is that the statute of limitations commences from the termination of the acts which constitute the abuse complained of, and not from the completion of the action in which the process issued. The date Cole committed her last alleged act constituting abuse of process was when she testified at the hearing on May 24, 1989. Because Penn did not file his petition until November 16, 1992, his abuse of process claim is also barred. A malicious prosecution claim, on the other hand, does not accrue until the proceedings upon which the action is based are terminated in favor of the defendant. Although the board voluntarily dismissed the claim against Penn and expunged the records on November 14, 1990, the petition for judicial review challenging the board's initial determination was not dismissed until December 12, 1990. Therefore, Penn's malicious prosecution claim was timely filed.

HELD: Concerning Penn's claims against the university, in the federal suit he raised § 1983 and § 1985 constitutional claims based upon the same malicious prosecution of the sexual harassment complaint. In the state action, Penn raises numerous claims based upon the same facts – the prosecution of the sexual harassment claim. All of these claims stem from the same facts and evidence alleged in the federal lawsuit. Claim preclusion applies to Penn's state law claims because he should have raised them in the federal action and requested the federal court to exercise supplemental jurisdiction. Although it is unknown whether the federal court would have exercised supplemental jurisdiction, any doubts concerning the federal court's exercise of supplemental jurisdiction should be resolved in favor of joinder. Thus, Penn's claims against the university are barred by claim preclusion.

Robbins v. Heritage Acres, 578 N.W.2d 262 (Iowa App. 1998)

Res Judicata

Robbins, a former nursing home patient, sued Heritage Acres, the Department of Inspection and Appeals, and eight Heritage Acres employees following administrative proceedings and judicial review affirming the involuntary discharge of Robbins from Heritage. Robbins alleged Heritage acted negligently in several specifics concerning actions that led to his discharge, and that a conspiracy existed to get him discharged. Heritage moved for dismissal, and the district court held any claims regarding Robins' discharge were barred by the doctrine of res judicata. Robins appealed and the court of appeals affirmed in part, reversed in part, and remanded for further proceedings.

HELD: Robins' petition indicates that he was involuntarily discharged from Heritage because he was a threat to the safety and welfare of other patients and himself. The petition also indicates that Heritage's decision to discharge Robins for the reasons stated

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was affirmed by the Iowa Department of Inspection and Appeals and subsequent judicial review. No issues other than the legality of Robins' involuntarily discharge from Heritage were raised, litigated, or finally resolved in the collateral proceedings. Therefore, the preclusive effect of the collateral proceedings is limited to the issue of the legality of Robins' involuntary discharge from Heritage because he presented a danger to others. The judgment of the district court is affirmed to the extent this precludes further litigation of the that issue. The judgment of the district court dismissing Robins' claims is reversed and the case remanded for further proceedings.

Diggan v. Cycle Sat, Inc., 576 N.W.2d 99 (Iowa 1998)

Res Judicata and Statute of Limitations in Intellectual Property Actions

Cycle Sat operates a satellite communication network used to transmit commercials to television stations nationwide. Michael Diggan, an independent computer programmer, developed software in May 1987 to command the "cycle cypher," a downlink system for capturing television commercials sent over satellite. Cycle Sat eventually hired Diggan to work for the company, and Diggan thereafter made modifications and enhancements to the downlink software. A dispute arose concerning Diggan's royalties for the software he had developed, leading to Diggan's resignation on January 18, 1990. On February 5, 1990, Diggan demanded Cycle Sat to cease using the software.

Based on these facts, Diggan commenced a suit for copyright infringement in federal court. A jury found, by special verdict, that Diggan owned the copyright to the disputed program, but it awarded no damages because it found Cycle Sat prevailed on its affirmative defense of implied license. Whether Diggan was entitled to compensation for Cycle Sat's use of the license, a state law claim, remained unanswered in this litigation.

Five years to the date after Diggan demanded Cycle Sat to cease using his software, he filed suit in state court asserting: (1) breach of implied contract to pay for software development; and (2) breach of implied license to use the software. Cycle Sat moved for summary judgment, claiming (a) the jury's verdict in the copyright litigation precluded any further action by Diggan to collect compensation from Cycle Sat; and (b) Diggan's action was barred by the five year limitation period of Iowa Code § 614.1(4) (unwritten contracts). The district court granted the motion based on the former ground, and Diggan appealed. The Iowa Supreme Court affirmed in part, reversed in part, and remanded.

HELD: The Court adopts the reasoning of *Effects Associates, Inc. v Cohen*, 908 F.2d 555 (9th Cir. 1990), and holds the federal copyright action did not preclude Diggan from seeking compensation under state law contract theories for Cycle Sat's use of the license.

Copyright ownership is comprised of a bundle of rights, and by granting a nonexclusive license to Cycle Sat, Diggan gave up only one stick from the bundle – the right to sue Cycle Sat for copyright infringement. Diggan retains the right to sue in state court on a variety of other grounds, including breach of contract.

HELD: Diggan's breach of implied contract cause of action accrued on the last day that he could have provided services arising under the implied contract, the date of his termination. We conclude the district court properly granted summary judgment to Cycle Sat on Diggan's claim for remuneration and royalties during the employment period, which predated by over five years the filing of his petition.

HELD: It is beyond dispute that permission for use of the software terminated with Diggan's demand of February 5, 1990, five years before suit was commenced. Thus, Diggan's claim for breach of implied license to use the software was timely. Because questions remain concerning the extent of use of the software following Diggan's resignation, where we remand for a factual determination of that issue.

Jarnagin v. Fischer Controls, International, Inc., 573 N.W.2d 34 (Iowa 1997)

Statute of Limitations - Improvements to Real Property

In February 1994, Brian Jarnagin was injured when he had attempted to re-light the pilot on the LP gas furnace located in his home. The furnace received LP gas from a line connected to an LP tank located on Jarnagin's property outside of the home. The gas system consisted of a first stage regulator attached to the gas tank and a second stage regulator attached to the gas line running to the home. Jarnigan commenced an action against the defendants, manufacturers of the regulators, and the defendants moved for summary judgment asserting Jarnigan's action was barred by the 15 year statute of repose contained in Iowa Code § 614.1(11). The district court granted summary judgment to the defendants, and the plaintiff appealed. The Supreme Court affirmed.

HELD: To be an improvement a product must be either a permanent addition to or a betterment of real property that enhances its capital value. Permanence is not an absolute requirement of an improvement but one of two alternative requirements, nor must the owner have the intent to make an improvement permanent for it to be considered permanent. Here, the regulators were a permanent addition. Furthermore, the regulators were a betterment because, as part of a properly working furnace, they increased the home's value by making it more comfortably inhabitable in cold temperatures. Finally, the regulators were an improvement even though they were located outside the home because they were still an improvement to "real property."

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McClendon v. Beck, 569 N.W.2d 382 (Iowa 1997)

Statute of Limitations - Continuous Treatment Doctrine

Statute of Limitations - Fraudulent Concealment of Condition

The plaintiff patient sued the defendants hospital and surgeons for medical malpractice in connection with a series of back surgeries. The plaintiff suffered from a congenital deformity of the spine known as spondylolisthesis. A series of four operations was performed during the years 1988 through 1989. In November of 1989, the defendant surgeon furnished a written discharge summary to the plaintiff's family physician indicating she was doing well and predicted she would have a good outcome. The plaintiff's problems persisted, however, and the defendant physicians performed a fifth operation in August 1990 and administered post operative care until December 1990. Plaintiff did not consult with the physician's during 1991 or 1992, but returned in May 1993 with continued complaints of chronic pain. Finally, in June 1994, plaintiff filed a medical malpractice action against the defendants. Defendants filed for summary judgment on statute of limitation grounds. Plaintiff resisted and contended the suit was not time barred because (1) the defendants fraudulently concealed her true condition, and (2) she remained in defendants' "continuous care" and was unaware that her condition would not improve until May 1993. The district court granted summary judgment. The court of appeals reversed, and, upon further review, the Supreme Court vacated the court of appeals decision and affirmed the judgment of the district court.

HELD: In order to toll the statute of limitations under the fraudulent concealment doctrine, the plaintiff in a medical malpractice action carries the burden of proving either (1) the defendant affirmatively concealed facts on which the plaintiff would have predicated the cause of action, or (2) a confidential or fiduciary relationship existed between the person concealing the cause of action and the aggrieved party, combined with proof the defendant breached the duty of disclosure. There was nothing in the summary judgment record here to support the plaintiff's assertion that the defendants attempted to hide facts material to her cause of action. Rather, plaintiff concedes she endured constant pain and enjoyed no improvement following her surgeries in 1988, 1989 and 1990, and yet she waited until 1994 to sue the defendants.

HELD: Several courts have held that when a plaintiff receives continuing care for the same injury from a negligent actor whose malpractice is at issue, the statute of limitations may be tolled until the treatment ceases. This Court declined to adopt the continuous treatment doctrine under the facts in *Langner v. Simpson*, 533 N.W.2d 511 (Iowa 1995), and the Court also declines here because there was no evidence of an ongoing treatment relationship with defendants following plaintiff's post operative consultation in December 1990.

Kulish v. Ellsworth, 566 N.W.2d 885 (Iowa 1997)

Summary Judgment - Additional Time to Respond

Plaintiff, administrator of patient's estate, filed a medical malpractice suit against the county, county hospital, county ambulance service, and county employees who provided emergency care to the deceased patient. Defendants asserted the affirmative defense of governmental immunity for acts or omissions related to an emergency response. On September 1, 47 days prior to the scheduled trial date, defendants filed a motion for summary judgment. On September 5th, Plaintiffs received their copy of the motion and an order setting a hearing date of September 19. Plaintiffs requested additional time under Iowa Rule of Civil Procedure 237(c) to oppose the motion, and defendants resisted. Plaintiffs then supplemented their resistance to the motion, requesting additional time to file affidavits in accordance with Iowa Rule of Civil Procedure 237(f). Plaintiffs argued that because the case was complex and involved over 20 expert and lay witnesses, with six more depositions yet to be taken, extra time was required to prevent prejudice to their case. The district court conducted the hearing as scheduled and rejected plaintiffs' requests for a continuance. The district court then granted defendants summary judgment. Plaintiffs appealed contending, among other things, that the court abused its discretion in denying them additional time to prepare their resistance.

HELD: Iowa Rule of Civil Procedure 237(c) provides that the time fixed for hearing on a motion for summary judgment should not be less than 20 days after the filing of the motion, unless a shorter time is ordered by the court. Although the court set the matter for hearing 18 days after defendants filed their motion, rather than the 20 days indicated by rule 237(c), plaintiffs have failed to establish that the two day variance was clearly untenable or unreasonable given the circumstances facing the court. The court's temporal resources are limited and constrained by a heavy docket. It is apparent here that allowing more time prior to the hearing would have crowded the time remaining before the scheduled trial date.

HELD: Plaintiffs can make no persuasive claim to the protection afforded by rule 237(f) because they furnished no reasons, by affidavits or otherwise, supporting their claimed need for additional time to respond. Plaintiffs expressed need for more time to gather affidavits from witnesses rings hollow where the controversy at issue – governmental immunity – raised legal, not factual questions.

WORKERS COMPENSATION

U.S. West Communications, Inc. v. Overholser, 566 N.W.2d 873 (Iowa 1997).

Industrial Disability — Accommodation by Employer

Review-Reopening — Change in Economic Condition

Overholser sustained a work-related back injury in 1987. She returned to her same position without restrictions. As a result of a separate injury, she was subsequently transferred to a less strenuous position which paid approximately 35% more than her prior position. In December 1991, the parties entered into an agreement for settlement related to her back injury for 5% industrial disability. In July 1993, Overholser was laid-off as part of a corporate downsizing. The lay-off was conducted pursuant to a union contract and was based primarily on seniority. Overholser filed for review-reopening, claiming that the lay-off was a change in economic condition not anticipated by the parties at the time of the original settlement. Overholser admitted that there had been no change in her physical condition. At hearing, the deputy industrial commissioner held that U.S. West's "accommodation" was a substantial factor in the original agreement for settlement, and consequently, Overholser's subsequent lay-off from that job was a substantial change in economic condition. The deputy's decision was affirmed on appeal to the industrial commissioner, but reversed by the district court on judicial review. Overholser appealed to the supreme court.

HELD: Affirmed. The supreme court first determined that an employer's accommodation of an employee's restrictions cannot be used to decrease an award of industrial disability. Rather, the industrial commissioner is to determine the impact the injury has had on the employee's ability to compete in the labor market. However, in the present case, there was no evidence the agreement for settlement reflected any employer accommodations as Overholser had returned to her same job without restrictions. Further, Overholser's lay-off was not connected to her original injury. Consequently, her change in economic condition was likewise not causally related to her back injury.

George A. Hormel & Co. v. Jordan, 569 N.W.2d 148 (Iowa 1997).

Cumulative Injuries — Appropriate Date of Injury

Jordan first visited a company doctor on September 15, 1988 for complaints of shoulder pain. Jordan was diagnosed with a subluxated shoulder and continued to treat with company doctors for ongoing symptoms for the next three years, but never missed any time from work because of the injury. On October 1, 1991, Dr. Misol examined Jordan and indicated Jordan had a 30% impairment of the right arm. Hormel retained a

physical therapist who rated Jordan's impairment at 24% of the arm. Hormel voluntarily paid permanent disability benefits in January, 1992 based on the lower rating. Jordan then demanded interest on the benefits which was denied by Hormel. Jordan brought a workers' compensation action citing alternative injury dates of September 15, 1988 and October 1, 1991. Jordan asserted the 1991 injury date reflected the first time he had knowledge that his injury was compensable. Hormel argued that Jordan merely pled the1991 injury date to avoid problems with notice and the statute of limitations. The deputy industrial commissioner found that Jordan's injury was cumulative in nature and set the injury date as October 1, 1991. This decision was affirmed on appeal by the industrial commissioner and district court.

HELD: Affirmed. The supreme court reviewed prior cumulative injury cases which analyzed how to determine the appropriate date of injury. The court applied a two-part manifestation test that set the date of injury as "the date on which the claimant, as a reasonable person, would be plainly aware of (1) the injury and (2) the causal relationship between the injury and claimant's employment." The court specifically rejected Jordan's assertion that he must also have been aware that his injury was compensable. Nonetheless, the supreme court determined the commissioner's decision regarding the manifestation of the injury was supported by substantial evidence.

Below v. Skarr, 569 N.W.2d 510 (Iowa 1997).

Retaliatory Discharge — Interference with Workers' Compensation Claim

Below was injured when he slipped and fell while working as a delivery person for Continental Baking Co. Below applied for and received workers' compensation benefits and also brought actions against the store responsible for maintaining the sidewalk and against Continental asserting that Continental had threatened to terminate his employment if he pursued his workers' compensation claim. The district court dismissed the case against Continental because Below was not actually terminated.

HELD: Affirmed. The supreme court noted that prior case law permits an employee to bring an action for retaliatory discharge if he or she is terminated for pursuing a workers' compensation claim. The court declined, however, to extend this cause of action to include mere threats of retaliatory discharge. In the present case, Below actually received workers' compensation benefits and also remained employed by Continental. Consequently, Below had no cause of action.

Darrow v. Quaker Oats Co., 570 N.W.2d 649 (Iowa 1997).

Statute of Limitations — Tolling for Mental Disability

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Darrow reported alleged work-related mental stress injuries to Quaker Oats, claiming injury dates of July 10, 1990 and June 15, 1991. These claims were investigated and denied by Quaker Oats as not being work-related. Claimant was subsequently involuntarily hospitalized from June 28, 1991 to June 1, 1994 for treatment of serious mental illness. Claimant filed workers' compensation petitions for each alleged injury date on November 15, 1994. Quaker Oats resisted, asserting the claims were barred by the two-year statute of limitations in Iowa Code § 85.26(1). The industrial commissioner dismissed the claims on that basis, and was affirmed on judicial review by the district court.

HELD: Affirmed. Iowa Code § 85.26(1) does not contain any provision tolling the statute during periods of mental disability. Section 614.8 contains a general tolling provision for mental disabilities (as well as for minority), but that section does not apply to statutes of limitation outside chapter 614 (raising an inference that § 85.26(1) is not tolled on account of minority, either). The supreme court also rejected Darrow's constitutional arguments based on equal protection and due process.

Murillo v. Blackhawk Foundry, 571 N.W.2d 16 (Iowa 1997).

Industrial Disability — Accommodation by Employer

Penalty Benefits — Amount of Penalty

Murillo injured his back while working as a welder. Following treatment, Murillo was unable to return to work as a welder, so Blackhawk Foundry provided a different job as a core cleaner. Murillo made the same pay as in his welding job and also was able to work more hours. The deputy industrial commissioner awarded 65% industrial disability and 44 weeks of penalty benefits (apparently Blackhawk denied Murillo had sustained any industrial disability based solely on their accommodation of his injury). On appeal, the industrial commissioner decreased the industrial disability to 25% and reduced the penalty benefits to 25 weeks. On judicial review, the district court reversed the industrial commissioner on the grounds that Blackhawk's accommodation could not be considered in establishing industrial disability, and that the reduction in penalty benefits was arbitrary and capricious. This decision was reversed by the court of appeals.

HELD: Reversed and remanded. The supreme court held that "an employer's special accommodation can be factored into the award determination to the limited extent the work in the newly created job discloses that the worker has a discerned earning capacity. To qualify as discernible, it must appear that the new job is not just 'make work' provided by the employer, but is also available to the injured worker in the competitive

market." The case was remanded to allow the employer to demonstrate the requisite showing of the nature of the accommodation.

HELD: A reduction in industrial disability does not automatically require a reduction in penalty benefits. Rather, the industrial commissioner must give reasons supporting any reduction in penalty benefits, based on length of delay, information available to the employer, and prior penalties. The case was remanded for additional findings by the industrial commissioner.

Iowa Supreme Court Bd. of Prof'l Ethics & Conduct v. Hoffman, 572 N.W.2d 904 (Iowa 1997).

Ethics — Excessive Contingent Fee

Richard Jahde died in April, 1994 from injuries sustained while working for Sioux Feed Co. Sioux Feed's workers' compensation carrier, Farmland Insurance Co., investigated the claim and determined the claim was compensable. Farmland commenced benefits on June 1, 1994.

During the time period while Farmland was investigating the claim, attorney Hoffman entered into a contingent fee agreement with Richard's widow, Elaine Jahde, to investigate and pursue all claims arising out of Richard's death. Hoffman served a petition for workers' compensation benefits on June 2, 1994 while Farmland's commencement letter was still in the mail. Farmland contacted Hoffman on June 3, 1994 to inform him of their prior decision to commence benefits. Hoffman proceeded to file the petition with the industrial commissioner on June 7, 1994, apparently in an attempt to use the workers' compensation claim as a method of obtaining discovery on other potential claims (an approach successfully resisted by Sioux Feed).

Hoffman eventually filed a petition for partial commutation with the industrial commissioner on September 2, 1994. The statement of need asserted that the commutation was necessary for payment of a 1/3 contingent fee (Hoffman requested a total fee exceeding $37,000). Farmland resisted on the basis that the attorney fee was excessive. At hearing, a deputy commissioner ruled that Hoffman was only entitled to a reasonable hourly fee insofar as the workers' compensation recovery had been obtained independent of any action by Hoffman. The deputy also referred the matter to the Grievance Commission which investigated and recommended a six-month suspension of Hoffman's license to practice law based on Hoffman's attempt to obtain an excessive and inappropriate contingent fee.

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HELD: Affirmed. The supreme court agreed that a contingent fee was inappropriate and excessive where Hoffman had spent fewer than 20 hours working on the workers' compensation claim prior to Farmland's voluntary payment of benefits.

City of Cedar Rapids v. Board of Trustees, 572 N.W.2d 919 (Iowa 1998).

Mental Injuries — Standard of Proof

Cornish had worked as a police officer in Cedar Rapids for nearly 24 years when he began to receive treatment for post-traumatic stress disorder, as well as anxiety and depression. Cornish's psychiatrist related these mental conditions to three specific stressful work events: a motor vehicle accident in which Cornish watched two teenage boys burn to death, a confrontation with an armed suspect, and a confrontation with an armed, suicidal citizen. Cornish filed an application for permanent disability benefits under Iowa Code chapter 411 (the police and firefighter retirement system). Cornish was initially awarded "ordinary" disability benefits, but upon appeal within the agency, he was eventually awarded "accidental" disability benefits. The City of Cedar Rapids sought district court review of the agency decision by way of a writ of certiorari. The district court sustained the writ and annulled the award of benefits. Cornish and the agency appealed.

HELD: Reversed and remanded. The supreme court reaffirmed that mental injuries under chapter 411 must meet the same standards for proving mental injuries as apply to workers' compensation claims. See Dunlavey v. Economy Fire & Cas. Co., 526 N.W.2d 845 (Iowa 1995); Moon v. Board of Trustees, 548 N.W.2d 565 (Iowa 1996). Specifically, the court held that a claimant must prove both causation in fact (medical causation) and legal causation. To show legal causation, a claimant must demonstrate that the mental injury was caused by "'workplace stress of greater magnitude than the day-to-day mental stresses experienced by other workers employed in the same or similar jobs,' regardless of their employer." In the present case, the court determined that, although a police officer is exposed to significant day-to-day stress, the three stressful events that occurred to this particular officer could be considered "unusual" and "extraordinarily traumatic." Although the agency could have ruled the other way based on the same evidence, see Moon, supra, the court held that substantial evidence supported the agency's finding of "unusual stress."

Bailey v. Batchelder, 576 N.W.2d 334 (Iowa 1998).

Exclusive Remedy Provision — Third Party Action Against Co-employee

Subject Matter Jurisdiction — Third Party Action Against Co-employee

In the Course of Employment — The "Going and Coming Rule" and the "Premises Exception"

Bailey and her husband were both employed by Amana Refrigeration. On February 9, 1994, the Baileys arrived at work approximately 50 minutes early to retrieve a videotape from Bailey's father's car and to obtain a parking space close to the plant entrance (Amana employs a large number of workers, and arriving closer to the start of a shift could result in parking several blocks from the entrance, rather than a few yards). Batchelder was also looking for a parking space when his vehicle and the Baileys' vehicle collided. Bailey brought suit against Batchelder in district court, asserting ordinary negligence.

Batchelder subsequently moved for summary judgment, asserting that, because the accident occurred on the employer's premises, Bailey's injury occurred in the course of her employment and Batchelder was protected by the exclusive remedy provision of Iowa Code § 85.20 (stating an employee must prove "gross negligence" to maintain a claim against a co-employee for any work-related injury). Bailey responded by claiming that the exclusivity provision was an affirmative defense that must be pled pursuant to Iowa Rule of Civil Procedure 101 (it should be noted that the motion for summary judgment was filed after the statute of limitations had run on Bailey's potential workers' compensation claim). Bailey further asserted that the accident fell within the "going and coming" rule, and consequently, the injury was not work-related and the suit was not barred by the exclusivity provision.

The district court first determined that the exclusive remedy provision created a question of subject matter jurisdiction which could be raised at any time. The district court then determined that an injury occurring on an employer's parking lot was covered by the Worker's Compensation Act. Consequently, Batchelder was protected by the exclusive remedy provision from a suit for ordinary negligence, and the district court sustained the motion for summary judgment. Bailey appealed to the supreme court.

HELD: Affirmed. The supreme court first determined that the exclusive remedy provision raised a question as to subject matter jurisdiction, an issue that may be raised at any time and need not be pled as an affirmative defense. The court then continued by analyzing the "premises exception" to the "going and coming rule." The court specifically held that "once an employee reaches the premises of the employer, the Workers' Compensation Act governs." The court also rejected Bailey's argument that the fact that she arrived early and also was in the parking lot on personal business removed her from the scope of her employment. The court held that, as Bailey's actions were actions that could reasonably be expected from any employee, the facts did not demonstrate that she had "abandoned the employment."

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Sherman v. Pella Corp., 576 N.W.2d 312 (Iowa 1998).

Equal Protection — Scheduled Member Injuries to Women

Equal Protection — Use of the *A.M.A. Guides to Impairment*

Nature and Extent of Disability — Substantial Evidence

Sherman has worked for Pella Corp. from 1972 through the present. In 1992, Sherman was diagnosed with work-related bilateral carpal and cubital tunnel syndromes. Following surgery, Sherman returned to work, but continued to complain of ongoing symptoms in her arms, shoulders, neck, and head. The treating physician, Dr. Neff, found no objective basis for Sherman's complaints, and gave her a 3% permanent impairment to the right arm based on the *A.M.A. Guides to the Evaluation of Permanent Impairment*. Sherman's expert physician, Dr. Kienker, diagnosed thoracic outlet syndrome and rated Sherman's impairment at 64% impairment to the whole person. Dr. Neff disagreed with Dr. Kienker's findings because he had performed an objective test for thoracic outlet syndrome which was negative; Dr. Kienker had not performed any objective testing.

After a hearing, a deputy industrial commissioner entered an arbitration decision awarding Claimant 26% permanent partial disability of the whole person, and awarding additional benefits related to the thoracic outlet condition. The deputy's award was based on his own reading of the *A.M.A. Guides* rather than either physician's rating. Both parties appealed to the industrial commissioner who entered an appeal decision finding that, based on Dr. Neff's opinions which were supported by objective testing, Sherman's injuries were scheduled injuries and she had a permanent partial disability of 3% of her right arm. Sherman sought judicial review in district court, and also sought to have the scheduled member provisions of the Iowa Workers' Compensation Act declared unconstitutional (Iowa Code § 85.43(2)). Sherman argued that women suffer scheduled carpal tunnel injuries more frequently than men, while men suffer more unscheduled back injuries than women, which unfairly makes it more common for men to receive industrial disability benefits rather than being limited to the schedule. Sherman also argued that the use of the *A.M.A. Guides* violated the equal protection clause.

HELD: Affirmed. The supreme court held that there was no evidence the legislature enacted the scheduled member statute for the purpose of discriminating on the basis of gender, and consequently, the statute did not violate equal protection. The court also held that, because the industrial commissioner merely used the *A.M.A. Guides* as guides rather than as the sole determining factor in assessing permanent disability, Sherman had failed to prove any equal protection violation in the use of the *A.M.A. Guides*. Finally, the court held that substantial evidence supported the industrial commissioner's findings that

Sherman had not proven a work-related thoracic outlet condition and that her disability was limited to 3% impairment to the arm.

Bergen v. Iowa Veterans Home, 577 N.W.2d 629 (Iowa 1998).

Statute of Limitations — Discovery Rule

Bergen sustained a back injury in August 1990 while employed by the Iowa Veterans Home. Bergen received weekly benefits until December 10, 1990. Bergen's back condition worsened, and in 1993 she was diagnosed with bulging discs in her lumbar spine. Bergen was eventually terminated from her job because she was unable to perform her job duties. Bergen then filed a petition with the industrial commissioner on February 14, 1994 seeking additional benefits for her 1990 injury. The industrial commissioner dismissed her petition as it had not been filed within three years of the date of last payment of weekly benefits as required by Iowa Code § 85.26(1). Bergen sought judicial review, arguing that the discovery rule should extend the statute of limitations in her case. The district court affirmed the industrial commissioner's dismissal of the claim, and Bergen appealed to the Iowa supreme court.

HELD: Affirmed. The supreme court determined there was no basis for applying the discovery rule to Iowa Code § 85.26(1) because the discovery rule runs from the date of injury while the limitation period in section 85.26(1) runs from the date of last payment of benefits. The supreme court noted the same conclusion had been reached in a prior case, Whitmer v. International Paper, 314 N.W.2d 411 (Iowa 1982), which held that the discovery rule did not apply to the three year statute of limitations for review-reopening proceedings.

Danker v. Wilimek, 577 N.W.2d 634 (Iowa 1998).

Election of Remedies — Filing Tort Action Against Uninsured Employer

Wilimek sustained a serious injury to his left arm in September 1989 while in the course of his employment with Danker Farms. At the time of the injury, Danker did not have worker's compensation insurance as required by statute. In January 1991, Wilimek filed a tort action in district court against Danker. In September 1991, Wilimek also filed a petition with the industrial commissioner for workers' compensation benefits. Danker moved to dismiss the workers' compensation petition, arguing that Wilimek had elected his remedy for his injury pursuant to Iowa Code § 87.21 by filing the tort suit in district court. The deputy industrial commissioner declined to dismiss the workers' compensation petition, and, following a hearing, the deputy awarded Wilimek workers' compensation benefits. Both parties appealed to the industrial commissioner, raising numerous issues. The industrial commissioner entered an appeal decision addressing all

issues raised, and both parties sought judicial review in district court. The district court determined the workers' compensation action should have been dismissed because Wilimek had elected his remedy under Iowa Code § 87.21 by filing a tort action in district court. Wilimek appealed to the Iowa supreme court.

HELD: Reversed and remanded. The supreme court held that merely filing an action is insufficient to constitute an election of remedies. Rather, the court held that, although section 87.21 allows "only one bite at the apple", an employee could file both claims and choose to pursue either claim until a final result is obtained in one of the actions.

Ganske v. Spahn & Rose Lumber Co., ___ N.W.2d ___, No. 96-865, 1998 WL 351873 (Iowa July 1, 1998).

Exclusive Remedy Provision — Occupational Disease Claims

From 1959 to 1985, Ganske worked for numerous employers whose work sites allegedly exposed him to asbestos. Ganske was diagnosed with mesothelioma in 1994. He brought suit in district court against his various employers, alleging the asbestos exposure caused his mesothelioma. The employers filed various motions to dismiss, arguing the exclusive remedy provision of Iowa Code § 85.22 barred the action. Ganske argued that, as his cancer was not diagnosed until 1994, he was prevented by the statute of limitations for occupational disease claims (Iowa Code § 85A.12) from bringing a workers' compensation claim. Consequently, Ganske argued that, because he had no workers' compensation remedy, his district court action should be allowed to proceed. The district court granted the various motions to dismiss, and Ganske appealed.

HELD: Affirmed. The supreme court first noted Ganske's claim was, in fact, barred by the statute of limitations for occupational disease claims as the mesothelioma had not manifested within the one or three year period prescribed by Iowa Code § 85.22. Further, the discovery rule does not apply to occupational disease claims. Finally, the supreme court held that the quid pro quo which is the basis for the exclusive remedy provision is not an individual concept. Rather, the exclusive remedy provision is based on the concept that workers and employers as general classes have given up certain rights. Consequently, Ganske's claim was compensable only under the occupational disease statute, and the district court actions were properly dismissed.

Weishaar v. Snap-On Tools Corp., ___ N.W.2d ___, No. 96-1718, 1998 WL 426508 (Iowa July 29, 1998).

Res Judicata — Successive Cumulative Trauma Claims

Compensation Rate — "Customary Hours"

Weishaar was employed by Snap-On Tools between 1978 and 1991. In 1985, she began to experience hand, shoulder, and back pain, and underwent carpal tunnel surgery. She brought workers' compensation claims against Snap-On Tools alleging several injury dates, including a cumulative injury date of April 29, 1986. The industrial commissioner determined Weishaar had not sustained any permanent injury to her shoulders and back as of April 29, 1986. This finding was affirmed on appeal. See Weishaar v. Snap-On Tools Corp., 506 N.W.2d 786, (Iowa Ct. App. 1993).

In July 1989, Weishaar filed ten new petitions, nine alleging specific dates of injury and the tenth alleging a cumulative injury. Snap-On Tools argued the new petitions involved facts and issues which had been argued and decided in the prior proceedings. The industrial commissioner affirmed the deputy commissioner's decision dismissing the first nine petitions pursuant to principles of res judicata, although limited benefits were awarded for the tenth petition for the cumulative injury claim. Weishaar sought judicial review, and the district court reversed and remanded on the res judicata issue for the first nine petitions. The district court affirmed the commissioner's decision in the tenth claim, but remanded for a determination of the proper rate of compensation. Snap-On Tools appealed the res judicata and rate issues to the supreme court. Weishaar cross-appealed on the rate issue and on the issue of the extent of permanent disability attributable to her cumulative injury.

HELD: Affirmed in part, reversed in part, and remanded. On the res judicata issue, the supreme court affirmed the district court's decision that Weishaar's claims were not barred and remanded those claims for a hearing on the merits. The present claims allege new injury dates and cannot be barred under a theory of claim preclusion. Also, issue preclusion cannot apply because, although there might be a substantial overlap in the evidence considered by the industrial commissioner in the prior claims and in the present claims, the petitions allege that additional cumulative trauma occurring after April 29, 1986 caused or contributed to Weishaar's present disability.

With respect to the rate issue, Weishaar had appealed the commissioner's and district court's determination that overtime hours were to be excluded from computing her rate of compensation. Relying on industrial commissioner rule 873 I.A.C. 8.2(85), the supreme court held that overtime hours were to be included, but calculated at the normal hourly ("straight time") rate.

Snap-On Tools had appealed the district court's reversal of the industrial commissioner's determination that the prorper compensation rate was to be calculated by simply taking the average weekly wage earned in the prior thirteen weeks. Weishaar argued two of the weeks were not "customary" as she had worked only twenty-four and nineteen hours in those weeks. Weishaar also testified that her "customary" work week

was forty hours. Relying on Thilges v. Snap-On Tools Corp., 528 N.W.2d 614, 619 (Iowa 1995), the supreme court held that, if an employee's "customary" work week is forty hours, weeks less than forty hours must be excluded from calculation of the employee's compensation rate.

Finally, Weishaar had appealed the industrial commissioner's determination that she had not sustained any industrial disability as a result of her new cumulative trauma claim. The basis for this determination was that Weishaar's physical condition had not changed substantially since her hearing on her prior claims. Weishaar contended the industrial commissioner had not considered other evidence of increased industrial disability, including the loss of her job and a 75% decrease in earnings in her subsequent employment as an alcohol rehabilitation counselor. The supreme court remanded this claim for consideration of this other evidence in making a new determination of Weishaar's industrial disability.

Ranney v. Parawax Co., ___ N.W.2d ___, No. 96-2004, 1998 WL 426315 (Iowa July 29, 1998) (en banc).

Statute of Limitations — Latent Injuries, Discovery Rule, and Inquiry Notice

Ranney worked for Parawax from 1975 through 1981, during which time he was exposed to toxic chemicals. In 1985, Ranney was diagnosed with Hodgkin's disease. Ranney's first medical examination for his condition noted his exposure to various chemicals at work, and also stated that Ranney suspected there might be a connection between his exposure and his condition. However, none of Ranney's treating physicians would commit to such a causal relationship. In 1987 or 1988, Ranney's wife, who was in law school, read about cases where chemical exposure had caused occupational diseases. Ranney testified this caused him to connect his chemical exposure and his disease. Ranney did not actually ask any doctor about this possible connection until 1991, at which time his treating physician confirmed this theory of causation. Ranney brought a claim for workers' compensation benefits, arguing that the discovery rule had extended the statute of limitations. The industrial commissioner rejected this argument and granted Parawax's motion for summary judgment on that issue. Ranney sought judicial review and the district court affirmed the commissioner's ruling. Ranney then appealed to the supreme court.

HELD: Affirmed. Pursuant to the "discovery rule", Ranney had two years from the date he knew of the "probable compensable nature of his claim" in which to bring an action. In analyzing the discovery rule in the present case, the supreme court first determined that Ranney's condition was not a "latent injury" because the condition had been diagnosed in 1985. Consequently, the court determined the "inquiry notice" rule applied to the case. The court determined that by 1987 or 1988, Ranney knew his condition was "possibly"

caused by exposure to chemicals at work. This triggered a duty to further investigate to determine whether the condition was "probably" compensable. The court rejected Ranney's argument that he was not on "inquiry notice" until 1991 when a physician confirmed his suspicions about the cause of his condition. The court held that the lack of an expert opinion, or the mere fact that the medical community is uncertain or divided on an issue of causation, does not delay the commencement of the limitations period. Consequently, the statute of limitations began to run in 1988 at the latest, and Ranney's claim was barred.

It should be noted this case was considered en banc, and four of the justices dissented in part. The dissent agreed with the legal framework set out by the majority, but disagreed with its application to the facts in the present case. The dissent asserted Ranney had made a reasonable inquiry into the causes of his condition, but was unable to determine that his condition was "probably" compensable until 1991 when a doctor first confirmed the causal connection between the chemical exposure and his condition. The dissent emphasized there did not appear to be any way Ranney could have discovered the probable cause of his condition any earlier than he actually did, and applying the inquiry notice rule in the manner adopted by the majority was unfair.

It should also be noted that Ranney had sought benefits under both chapter 85 (for a work-related injury) and under chapter 85A (for an occupational disease). The occupational disease claim was dismissed on the basis that the disease did not manifest within one year of the last exposure as required by chapter 85A. Ranney did not appeal that decision. The parties also did not raise any issue as to whether Hodgkin's disease was an occupational disease for purposes of chapter 85A.

1998 IOWA DEFENSE COUNSEL ANNUAL MEETING & SEMINAR

WEDNESDAY, SEPTEMBER 23, 1998

9:00 a.m. Registration
11:00 a.m. Board of Directors Meeting
1:00 p.m. Welcome and Report of Association
- IDCA President, Jaki Samuelson
  Whitfield & Eddy, P.L.C., Des Moines, IA

1:15 - 1:45 p.m. Supreme Court Update
- Honorable Marsha K. Ternus
  Justice, Iowa Supreme Court

1:45 - 2:15 p.m. Consortium Claims
- Mike Galligan
  Galligan, Tully, Doyle & Reid, P.C., Des Moines, IA
- Alan Fredregill
  Heidman, Redmond, Fredregill, Patterson, Plaza & Dykstra, L.L.P., Sioux City, IA

2:15 - 3:15 p.m. Proving and Disproving Intoxication in the Civil Case
- Kermit Dunahoo
  Dunahoo Law Firm, Des Moines, IA

3:15 - 3:30 p.m. BREAK
3:30 - 4:00 p.m. Evaluation of the Closed Head Injury
- Rick Cornfeld
  St. Louis, MO

4:00 - 4:30 p.m. Work Comp Update
- Iris Post
  Iowa Industrial Commissioner

4:30 - 5:15 p.m. Employment Law Claims – Damages
- Gordon Fischer
  Bradshaw, Fowler, Proctor & Fairgrave, P.C., Des Moines, IA

5:15 - 8:00 p.m. Cocktails - Embassy Suites Hotel
(Dinner on your own in Des Moines)

THURSDAY, SEPTEMBER 24, 1998

8:30 - 9:00 a.m. Ethics and Settlement
- Phil Willson
  Wilson & Pechacek, P.L.C., Council Bluffs, IA

9:00 - 9:45 a.m. The Lawyer's Obligation to Third Parties - Recent Revisions to Restatement Section 215 – Ethical Considerations and Obligations
- William T. Barker
  Sonnenschein, Nath & Rosenthal, Chicago, IL

9:45-10:15 a.m. Ethics
- Megan M. Antenucci
  Whitfield & Eddy, P.L.C., Des Moines, IA

10:15-10:30 a.m. BREAK
10:30-11:30 a.m. Analyzing Low Impact Collisions
- C. Bradley Price
  DeVries, Price & Davenport, A.P.C., Mason City, IA
- Scott Palmer
  Biodynamic Research Corp., San Antonio, TX

11:30-12:00 a.m. Handling Chiropractic Testimony
- Guy Cook
  Grefe & Sidney, P.L.C. Des Moines, IA

12:00-12:30 p.m. LUNCH
12:30-1:00 p.m. Views from the Federal Bench
- Hon. Robert Pratt
  Judge, United States District Court

1:00 - 1:30 p.m. Defending the Sexual Harassment Claim
- Iris E. Muchmore
  Simmons, Perrine, Albright, & Ellwood, P.L.C., Cedar Rapids, IA

1:30 - 2:15 p.m. Recent Developments in Restatement of Torts
- Kevin Reynolds
  Whitfield & Eddy, P.L.C., Des Moines, IA

2:15 - 3:15 p.m. When and How to Use Accident Reconstruction
- Rich Fay
  Fay Engineering Corp., Denver, CO
- John Werner
  Grefe & Sindey, P.L.C., Des Moines, IA

3:15 - 3:30 p.m. BREAK
3:30 - 4:00 p.m. Iowa Court of Appeals Update
- Justice Mark Cady

4:00 - 4:30 p.m. What Does It Mean To Be Judgment Poof
- Paul Drey
  Bradshaw, Fowler, Proctor & Fairgrave, P.C., Des Moines, IA

4:30 - 5:00 p.m. Election of Officers and Directors, and Annual Meeting of IDCA
6:30 - 9:00 p.m. Reception and Banquet
Glen Oaks Country Club
6:30 - 7:30 Reception 7:30-Banquet

FRIDAY, SEPTEMBER 25, 1998

7:30 - 8:30 a.m. Board of Directors Meeting
8:30 - 9:00 a.m. Liability of HMO's for Medical Malpractice
- John Lorentzen
  Nyemaster, Goode, Voigts, West, Hansell & O'Brief, A.P.C., Des Moines, Iowa

9:00 - 9:45 a.m. Cross Examination Goes to Hollywood
- Jim Semple, Wilmington, DE

9:45 - 10:15 a.m. Mediation and Court Ordered Settlement Conferences
- Judge Art Gamble
  Chief Judge, 5th Judicial District
- Paul C. Thune
  Peddicord, Wharton, Thune and Spencer A.P.C, Des Moines, IA

10:15 - 10:30 a.m. BREAK
10:30 - 10:45 a.m. What's New With DRI
- Tim Schimberg
  Fowler, Schimberg & Flanagan, Denver, CO

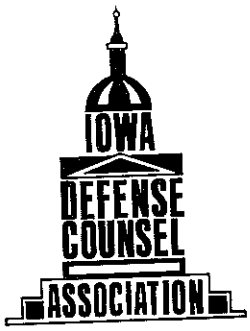
10:45 - 11:00 a.m. Legislative Update
- Robert Kreamer
  IDCA Legislative Lobbyist, Des Moines, IA

11:00 - 11:30 a.m. Uninsured and Underinsured Motorist Coverage
- Sharon Greer
  Cartwright, Druker & Ryden, Marshalltown, IA

11:30 - 12:00 p.m. Evaluating Wrongful Death Claims
- Steven J. Pace
  Shuttleworth & Ingersoll, P.C., Cedar Rapids, IA

12:00 - 12.30 p.m. LUNCH
12:30 - 1:00 p.m. Committee Report
1:00 - 1:45 p.m. Case Law Update and Review of Ethics Decisions
- Dannette Kennedy
  Whitfield & Eddy, P.L.C., Des Moines, IA
- Sean O'Brien
  Bradshaw, Fowler Proctor & Fairgrave, P.C., Des Moines, IA
- Webb Wassmer
  Simmons, Perrine, Albright & Ellwood, Cedar Rapids, IA

1:45 - 2:30 p.m. Analyzing Insurance Coverage Issues
- Michael J. Weston
  Moyer & Bergman, P.L.C., Cedar Rapids, IA



OFFICERS AND DIRECTORS
1997 - 1998

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Jaki K. Samuelson
1300 First Interstate Bank Bldg
Des Moines, IA 50309

PRESIDENT-ELECT

Mark L. Tripp
801 Grand Ave , Suite 3700
Des Moines, IA 50309

SECRETARY

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

TREASURER

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

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(DATE IS TERM EXPIRATION DATE)

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Decorah, IA 52101

DISTRICT II

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Sioux City, IA 51101

DISTRICT IV

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Council Bluffs, IA 51502

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Des Moines, IA 50309

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P O. Box 74170
Cedar Rapids, IA 52407

DISTRICT VII

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3432 Jersey Ridge Road
Davenport, IA 52809

DISTRICT VIII

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P O Box 790
Grinnell, IA 50112

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Cedar Rapids, IA 52406

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Suite 300, Toy National Bank Bldg
Sioux City, IA 51101

Michael W Thrall - 2000
699 Walnut Street, Suite 1900
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803 Fleming Bldg
Des Moines, IA 50309

David L. Riley - 1998
327 E. 4th Street, Suite 300
Waterloo, IA 50704

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Charles E. Miller 1995-1996
Robert A Engberg 1996-1997

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Paul D Wilson

ANNUAL MEETING CHAIRPERSONS

General Program - James A. Pugh
Ginger Plummer

Program Chair - Mark L. Tripp

* Deceased

1998 ANNUAL MEETING
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IN

CONSORTIUM CLAIMS

MIKE GALLIGAN
Galligan, Tully, Doyle & Reid, P.C.
Des Moines, IA

ALAN FREDREGILL
Heidman, Redmond, Fredregill, Paterson, Plaza & Dykstra, L.L.P.
Sioux City, IA

LOSS OF CONSORTIUM

by Michael J. Galligan
Galligan, Tully, Doyle & Reid, P.C.
300 Walnut, The Plaza, Suite 5
Des Moines, IA 50309

Definition:

Consortium, in Iowa, has been limited to the relationship of husband-wife, parent-child, and child-parent. Madison v. Colby, 348 N.W.2d 202, 207 (Iowa 1984).

"Spousal consortium is the fellowship of husband and wife and the right of each to the intangible benefits of company, cooperation, affection, and aid of the other in every marital relationship. Spousal consortium also includes the tangible benefits of general usefulness, industry, and attention within the home and family." Gail v. Clark, 410 N.W.2d 662, 667. (Iowa 1987).

"Parental consortium .... is the relationship between parent and child and the right of the child to the intangible benefits of companionship, comfort, guidance, affection, and aid of the parent in every parental relationship .... [P]arental consortium also includes the tangible benefits of general usefulness, industry, and attention within the home and family ...." Gail at 668.

"A parent, or the parents, may sue for the expense and actual loss of services, companionship and society resulting from injury to or death of a minor child." Iowa Rule of Civil Procedure, Rule 8. Companionship and society includes an "association as companions; fellowship .... This is a highly personal relationship .... decided on a case-by-case basis. .... It takes into consideration .... the character, age, intelligence, interests and personality of the child [and] also those same factors as they are possessed or not possessed, by the parent ... [I]t is the parent's loss which is being appraised, and the extent to which he [she] has been deprived of the company of his [her] minor child ..." Pagitt v. City of Keokuk, 206 N.W.2d 700, 703 (Iowa 1973).

See also Iowa Uniform Instructions 200.19-200.21C and 200.28-200.31 attached.

Property Right

Consortium is a "valuable property right." Gail at 669. Madison at 206.

Procedure

Lawyers are sometimes unsure about the procedural process for bringing consortium claims: who brings the claim? Who is entitled to the recovery? Reference to two Iowa cases provides the answers. Audubon-Exira Ready Mix, Inc. v. Illinois Central Gulf Railroad Company, 335 N.W.2d 148 (Iowa 1983) and Madison, supra.

B

1. Claims arising out of an injury (but not death) of a spouse or parent.[1]

   a. Spouse - deprived person. The deprived spouse brings the claim in his or her name. Audubon at 153. Madison at 208-209.

   b. Child - deprived person. The injured person brings the claim on behalf of the child. Madison at 209.

2. Claims involving the death of the injured person.

   a. Spouse's claims - pass to the administrator of the injured person's estate. The Administrator brings the claim on behalf of the deprived spouse. Audubon at 153. Madison at 209.

   b. Child's claims - brought by the Administrator of the injured person's estate. Madison at 209.

   See copy of p. 209. Madison and chart.

3. Joinder of claims.

   The court in Madison made it clear that "consortium actions should be joined with the action for the injury or death of the injured person. .... [W]e hold that consortium claims must be joined with the injured person's or administrator's action wherever feasible. If brought separately, the burden will be on the consortium claimant to show joinder was not feasible." Madison at 209 (emphasis added).

4. Verdict Forms or Court's Findings.

   Since the consortium recovery belongs to the deprived person - spouse, parent, or child - there must be a separate finding of the consortium damages sustained by each deprived person. Loss of consortium damages are awarded to the person who suffered the loss. Audubon at 153, Madison at 208.

5. Time Limitation.

   Since consortium is based on the relationship of the injured person and the deprived person, damages are limited to period that relationship would have existed. That period is the shorter of the

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[1]This paper will use the terminology in Madison. An "injured person" is the person who suffered the bodily harm (or mental) through the defendants wrongful conduct. The person who suffered a loss of consortium is the "deprived person." See Madison at 207.

life expectancies of the injured and deprived persons. Audubon at 153.

6. Time Limitation - children as deprived persons.

Iowa law recognizes the importance that parents play in the lives of their children. Both minor and adult children have a right to the benefit of parental advice, guidance, counsel, care, love, and affection, companionship and fellowship. See Audubon at 150. The law recognizes the injury to adult children which accompanies the loss of a parent and provides for compensation.

7. Time limitation - parents as deprived persons.

Current Iowa law holds that the right of a parent to recover for a parent's consortium losses from the injury or death of a child is grounded in Iowa Rule of Civil Procedure, Rule 8, which by its terms is limited to "injury to or death of a minor child." Parents have not been permitted to recover consortium damages for adult children, those who have reached the age of majority - 18 years. Miller v. Wellman Dynamics, 419 N.W.2d 380 (Iowa 1988); Kulish v. West Side Unlimited Corporation, 545 N.W.2d 860 (Iowa 1996). There is no common law right to recover loss of consortium damages for injury or death of a child. Kulish at 863. The Kulish court seemed to leave open possible consideration of an argument that §613.15 violates equal protection.

See 77 ALR 4th 411, Recovery of Damages for Loss of Consortium Resulting From Death of Child - Modern Status, §§8a and b.

8. Attribution of the injured person's fault to the deprived person.

Until this year, the deprived person was not charged with the fault of the injured person. Childers v. McGee, 306 N.W.2d 778 (Iowa 1981); Fuller v. Buhrow, 292 N.W. 672 (Iowa 1980); Handeland v. Brown, 216 N.W.2d 574 (Iowa 1974). Nor could the tortfeasor seek contribution from the injured person for consortium liability. McIntosh v. Barr, 397 N.W.2d 516 (Iowa 1986).

This past legislative session saw the adoption of House File 693. Section 10 thereof amends Section 668.3(1) by adding:

> "(b) Contributory fault shall not bar recovery in an action by a claimant to recover damages for loss of services, companionship, society, or consortium, unless the fault attributable to the person whose injury or death provided the basis for the damages is greater in percentage than the combined percentage of fault attributable to the defendants, third-party defendants, and persons who have been released pursuant to section 668.7, but any damages allowed shall be

B

> diminished in proportion to the amount of fault attributable to the person whose injury or death provided the basis for the damages."

This new legislation has not been tested in court. However, it clearly interferes with a "property right" of an innocent person(s). The courts have recognized the foreseeability of consortium injuries. Furthermore, "claims for consortium are not derivative to the injured spouse's personal injury claim:" Fuller at 676. [Consortium is the separate property right of each spouse; it is an independent non-derivative claim(s). Huber v. Hovey, 501 N.W.2d 53, 57 (Iowa 1993).

> "To deny a consortium claim because of the injured spouse's negligence would, in fact, create a new kind of unfairness. It would force the [consortium] plaintiff, who was free from fault, to assume the full burden of damages caused by the negligence of others. It would also unjustly permit the negligent tortfeasor to escape liability altogether merely because of the fortuitous negligence of another." Fuller at 676.

It is hard to justify this new legislation in terms or justice. Here, it seems clear that justice has fallen victim to power. A far better and fairer approach may well have been to give the tortfeasor a right of contribution from the injured person. As it now stands, innocent spouses and children are forced to bear the burden of losses caused by negligent tortfeasors.

9. An injured person's release given to the tortfeasor is not binding on the deprived person.

Huber v. Hovey, 501 N.W.2d 53 (Iowa 1993). See also: 29 ALR 5th 1200.

10. Is it necessary that there be a physical injury to the injured person to support a deprived person's consortium claim?

See 16 ALR 4th 537. It would appear that in Dunlavey v. Economy Fire and Cas. Co., 526 N.W.2d 845 the Iowa court recognized the mental illness constituted a personal injury under §85.3(1). There is no reason not to extend this recognition, arising as it does out of modern medical and scientific knowledge to consortium claims. A mental injury is often more devastating to spousal and parent-child relations than a purely physical injury.

RELATIONSHIP	PRE-DEATH LOSS CLAIM	POST-DEATH LOSS CLAIM
Spousal	Deprived spouse	Administrator (recovery for deprived spouse)
Parent-child	Deprived parent	Deprived parent
Child-parent	Injured parent (recovery for deprived child)	Administrator (recovery for deprived child)

200.19 Services - Spousal Consortium. The present value of the services which (decedent) would have performed for [his] [her] spouse, but for [his] [her] death. This is also known as loss of spousal consortium.

"Spousal consortium" is the fellowship of a husband and wife and the right of each to the benefits of company, cooperation, affection, the aid of the

other in every marital relationship, general usefulness, industry and attention within the home and family. It does not include loss of financial support from the injured spouse, nor mental anguish caused by the spouse's death.

Damages for spousal consortium are limited in time to the shorter of the spouse's or (decedent)'s normal life expectancy.

Authority

Iowa Code section 613.15
Gail v. Clark, 410 N.W.2d 662 (Iowa 1987)
Madison v. Colby, 348 N.W.2d 202 (Iowa 1984)
Audubon-Exira Ready Mix, Inc. v. Illinois Central Gulf Railroad Company, 335 N.W.2d 148 (Iowa 1983)

Comment

Caveat. Predeath loss of services is not an item recoverable by the Estate. See Madison v. Colby, 348 N.W.2d 202 (Iowa 1984)

Note. The Iowa Civil Jury Instructions refer to "present value" in the consortium instructions. Consortium damages may be economic or noneconomic or both. In actions filed on or before July 1, 1997, the instructions may need to be modified accordingly. See Brandt v. Bockholt, 532 N.W.2d 801 (Iowa 1995). In actions filed after July 1, 1997, future damages must be adjusted to reflect the present value of the sum. Iowa Code section 624.18(1A), 668.3(b), overturning Brandt v. Bockholt, 532 N.W.2d 801 (Iowa 1995)

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200.20 Services - Parental Consortium. The present value of the services which (decedent) would have performed for [his] [her] children, but for [his] [her] death. This is also known as loss of parental consortium.

"Parental consortium" is the relationship between parent and child and the right of the child to the benefits of companionship, comfort, guidance, affection and aid of the parent in every parental relationship, general usefulness, industry and attention within the family. It does not include the loss of financial support from the injured parent, nor mental anguish caused by the parent's death.

A child is not entitled to damages for loss of parental consortium unless the parent's death has caused a significant disruption or diminution of the parent-child relationship.

Damages for loss of parental consortium are limited in time to the shorter of the child's or (decedent)'s normal life expectancy.

Authority

Iowa Code section 613.15
Gail v. Clark, 410 N.W.2d 662 (Iowa 1987)
Madison v. Colby, 348 N.W.2d 202 (Iowa 1984)
Audubon-Exira Ready Mix, Inc. v. Illinois Central Gulf Railroad Company, 335 N.W.2d 148 (Iowa 1983)

Comment

Caveat: Predeath loss of services is not an item recoverable by the Estate. See Madison v. Colby, 348 N.W.2d 202 (Iowa 1984)

Note: The Iowa Civil Jury Instructions refer to "present value" in the consortium instructions. Consortium damages may be economic or noneconomic or both. In actions filed on or before July 1, 1997, the instructions may need to be modified accordingly. See Brandt v. Bockholt, 532 N.W.2d 801 (Iowa 1995). In actions filed after July 1, 1997, future damages must be adjusted to reflect the present value of the sum. Iowa Code section 624.18 (1A), 668.3(b), overturning Brandt v. Bockholt, 532 N.W.2d 801 (Iowa 1995)

10/97

200.21 Considerations - Loss Of Value Of The Estate - Loss Of Consortium [Spousal And Parental] - Loss Of Support.

C. If Instruction 200.19 or 200.20 is given, you may want to include the following:

In determining the present value of the services (decedent) would have provided as a [parent] [spouse], item _____, [Instruction No. _____], you may consider:

1. The circumstances of [his] [her] life.

2. [His] [Her] age at the time of [his] [her] death.

3. [His] [Her] health, strength, character, life expectancy [and that of the spouse].

4. [His] [Her] capacities, abilities and efficiencies in performing duties as a [spouse] [parent]

5. [His] [Her] skills and abilities in providing instruction, guidance, advice and assistance to the [spouse] [children].

6. [Spouse's] [Children's] respective needs.

7. All other facts and circumstances bearing on the present value of services.

Authority

Iowa Des Moines National Bank v. Schwerman Trucking Co., 288 N.W.2d 198 (Iowa 1980)
Ehlinger v. State, 237 N.W.2d 784 (Iowa 1976)
Schmitt v. Jenkins Truck Lines, Inc., 170 N.W.2d 632 (Iowa 1969)

200.28 Elements - Death Of A Minor - Rule 8 Claim. If you find (father and/or mother) is entitled to recover damages as the result of the death of

(minor), it is your duty to determine the amount. In doing so you shall consider the following items:

1. The reasonable value of the past loss of services, which include loss of companionship and society of the child, from the date of the death to [the present time] [the date the child would have [reached age eighteen years] [married]] minus the probable cost of the child's board and maintenance during that time period.

2. The present value of the future loss of services, which include loss of companionship and society of the child from the present time until the child would have [reached age eighteen years] [married] minus the present value of the probable cost of child support and maintenance during that same time period.

3. The interest on the reasonable burial expenses of the child from the time of death until the time those expenses would normally be paid. The amount cannot exceed the reasonable cost of the burial.

4. The reasonable value of necessary [hospital charges] [doctor charges] [prescriptions] [other medical services] from the date of injury to the time of death.

Items 1 and 2 include [loss of earnings of child] [the economic or monetary value of the child's labor where the child is not employed], as well as the parent's right to the intangible benefits of companionship, cooperation and affection of the child. They do not include the parent's mental anguish caused by the child's death.

In determining loss of companionship and society, you may consider the circumstances of the life of the child including:

1. The child's age, health, strength, intelligence, character, interests and personality.

2. Activities in the household and community.

3. All other facts and circumstances bearing on the issue.

The amount you assess for loss of services in the past and future cannot be measured by any exact or mathematical standard. You must use your sound judgment based upon an impartial consideration of the evidence.

Your judgment must not be exercised arbitrarily, or out of sympathy or prejudice, for or against the parties. The amount you assess for any item of damages must not exceed the amount caused by the defendant(s) as proved by the evidence.

A party cannot recover duplicate damages. Do not allow amounts awarded under one item of damage to be included in any amount awarded under another item of damage. [Similarly, damages awarded to one party shall not be included in any amount awarded to another party.]

The amounts, if any, you find for each of the above items will be used to answer the special verdicts.

Authority

Gookin v. Norris, 261 N W 2d 692 (Iowa 1978)
Wardlow v. City of Keokuk, 190 N W 2d 439 (Iowa 1971)
Iowa Rule of Civil Procedure 8

Comment

Caveat *Predeath loss of services is not an item recoverable by the Estate. See Madison v. Colby, 348 N W. 2d 202 (Iowa 1984)*

Note. *The Iowa Civil Jury Instructions refer to "present value" in the consortium instructions. Consortium damages may be economic or noneconomic or both. In actions filed on or before July 1, 1997, the instructions may need to be modified accordingly. See Brandt v. Bockholt, 532 N W 2d 801 (Iowa 1995). In actions filed after July 1, 1997, future damages must be adjusted to reflect the present value of the sum. Iowa Code section 624.18 (1A), 668.3(b), overturning Brandt v. Bockholt, 532 N W 2d 801 (Iowa 1995).*

10/97

200.29 Elements - Injury To A Minor - Rule 8 Claim. If you find (father and/or mother) is entitled to recover for damage sustained by [him] [her] as the result of the injury to (minor), it is your duty to determine the amount. In doing so you shall consider the following items:

1. The reasonable value of the past loss of services, which include loss of companionship and society of the child, from the date of the child's injury to [the present time] [the date the child [reaches age eighteen years] [marries]], minus the probable cost of the child's board and maintenance during that time period.

2. The present value of the future loss of services, which includes loss of companionship and society of the child, from the present time until the child [reaches age eighteen years] [marries] minus the present value of the probable cost of child support and maintenance during that same time period.

3. The reasonable value of [hospital charges] [doctor charges] [prescriptions] [other medical services] from the date of injury to the present time.

4. The present value of reasonable and necessary [hospital charges] [doctor charges] [prescriptions] [other medical services] which will be incurred for the child's injuries from the present time until the child [reaches age eighteen years] [marries].

Items 1 and 2 include [loss of earnings of the child] [the economic or financial value of the child's labor where the child is not employed] as well as the parents right to the intangible benefits of companionship, cooperation and affection of the child. They do not include mental anguish by the parent caused by the injury to the child.

In determining loss of companionship and society, you may consider the circumstances of the life of the child including:

1. The child's age, health, strength, intelligence, character, interests and personality.

2. Activities in the household and community

3. All other facts and circumstances bearing on the issue.

The amounts, if any, you find for each of the above items will be used to answer the special verdicts.

Authority

Gookin v. Norris, 261 N W 2d 692 (Iowa 1978)
Wardlow v. City of Keokuk, 190 N W 2d 439 (Iowa 1971)
Iowa Rule of Civil Procedure 8

Comment

Caveat Predeath loss of services is not an item recoverable by the Estate See Madison v. Colby, 348 N W 2d 202 (Iowa 1984)

IOWA CIVIL JURY INSTRUCTIONS

Note. The Iowa Civil Jury Instructions refer to "present value" in the consortium instructions. Consortium damages may be economic or noneconomic or both. In actions filed on or before July 1, 1997, the instructions may need to be modified accordingly. See Brandt v. Bockholt, 532 N.W.2d 801 (Iowa 1995). In actions filed after July 1, 1997, future damages must be adjusted to reflect the present value of the sum. Iowa Code section 624.18 (1A), 668.3(b), overturning Brandt v. Bockholt, 532 N.W.2d 801 (Iowa 1995).

10/97

200.30 Elements - Injured Parent's Claim For Deprived Child's Loss Of Parental Consortium. "Parental consortium" is the relationship between parent and child and the right of the child to the benefits of companionship, comfort, guidance, affection, the aid of the parent in every parental relation, general usefulness, industry and attention within the family. It does not include the loss of financial support from the injured parent, nor mental anguish caused by the parent's injury.

If you find, (parent) as [parent and next friend] [guardian] of (child) is entitled to recover damages on behalf of the child, it is your duty to determine the amount. In doing so you shall consider the following items:

1. The reasonable value of loss of parental consortium which (parent) would have performed for [his] [her] [child] [children] from the date of injury until the present time.

2. The present value of loss of parental consortium which (parent) would have performed for [his] [her] [child] [children] in the future

A child is not entitled to damages for loss of parental consortium unless the injury to the parent has caused a significant disruption or diminution of the parent-child relationship. Damages for loss of parental consortium are limited in time to the shorter of the child's or parent's normal life expectancy.

In determining the value for loss of parental consortium, you may consider:

1. The circumstances of the injured parent's life.

2. [His] [Her] age at the time of [his] [her] injury.

3. The health, strength, character and life expectancy of the injured parent and child.

4. The injured parent's capabilities and efficiencies in performing the duties as a parent.

5. The injured parent's skills and abilities in providing instruction, guidance, advice and assistance to the children.

6. The children's respective needs.

7. All other facts and circumstances bearing on the issue.

The amount you assess for loss of parental consortium [past] [future] cannot be measured by any exact or mathematical standard. You must use your sound judgment based upon an impartial consideration of the evidence. Your judgment must not be exercised arbitrarily, or out of sympathy or prejudice, for or against the parties. The amount you assess for any item of damage must not exceed the amount caused by the defendant(s) as proved by the evidence.

A party cannot recover duplicate damages. Do not allow amounts awarded under one item of damage to be included in any amount awarded under another item of damage. [Similarly, damages awarded to one party shall not be included in any amount awarded to another party.]

The amounts, if any, you find for each of the above items will be used to answer the special verdicts.

Authority

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

Weitl v. Moes, 311 N W 2d 259 (Iowa 1981)

Comment

Caveat. Predeath loss of services is not an item recoverable by the Estate. See Madison v. Colby, 348 N W 2d 202 (Iowa 1984)

Note. The Iowa Civil Jury Instructions refer to "present value" in the consortium instructions. Consortium damages may be economic or noneconomic or both. In

actions filed on or before July 1, 1997, the instructions may need to be modified accordingly. See Brandt v. Bockholt, 532 N W 2d 801 (Iowa 1995). In actions filed after July 1, 1997, future damages must be adjusted to reflect the present value of the sum Iowa Code section 624.18 (1A), 668.3(b), overturning Brandt v. Bockholt, 532 N W 2d 801 (Iowa 1995)

10/97

200.31 Elements - Spousal Consortium - Spouse's Damage. "Spousal consortium" is the fellowship of a husband and wife and the right of each other to the benefits of company, cooperation, affection, the aid of the other in every marital relationship, general usefulness, industry and attention within the home and family. It does not include loss of financial support from the injured spouse, nor mental anguish caused by the spouse's [injury] [death].

If you find (spouse) is entitled to recover damages, it is your duty to determine the amount. In doing so, you shall consider the following items:

1. The reasonable value of loss of spousal consortium which (injured party) would have performed for plaintiff from the date of injury until [the present time] [death].

2. The present value of loss of spousal consortium which (injured party) would have performed in the future.

Damages for loss of spousal consortium are limited in time to the shorter of the spouse's or (decedent)'s normal life expectancy.

In determining the value for loss of spousal consortium you may consider:

1. The circumstances of spouse's life.

2. [His] [Her] age at the time of [his] [her] injury.

3. [His] [Her] health, strength, character and life expectancy.

4. The spouse's capabilities and efficiencies in performing the duties of a spouse.

5. The spouse's skills and abilities in providing instructions, guidance, advice and assistance.

6 The spouse's respective needs.

7. All other facts and circumstances bearing on the issue.

The amount you assess for loss of spousal consortium [past] [future] cannot be measured by any exact or mathematical standard. You must use your sound judgment based upon an impartial consideration of the evidence. Your judgment must not be exercised arbitrarily, or out of sympathy or prejudice, for or against the parties. The amount you assess for any item of damage must not exceed the amount caused by the defendant(s) as proved by the evidence.

A party cannot recover duplicate damages. Do not allow amounts awarded under one item of damage to be included in any amount awarded under another item of damage. [Similarly, damages awarded to one party shall not be included in any amount awarded to another party.]

The amounts, if any, you find for each of the above items will be used to answer the special verdicts

Authority

Gail v. Clark, 410 N.W 2d 662 (Iowa 1987)
Madison v. Colby, 348 N.W 2d 202 (Iowa 1984)
Audubon-Exira Ready Mix, Inc. v. Illinois Central Gulf Railroad Company, 335 N.W 2d 148 (Iowa 1983)
Fuller v. Buhrow, 292 N.W 2d 672 (Iowa 1980)
Acuff v. Schmit, 248 Iowa 272, 78 N.W 2d 480 (1956)

Comment

Caveat: Predeath loss of services is not an item recoverable by the Estate. See Madison v. Colby, 348 N.W 2d 202 (Iowa 1984).

Note: The Iowa Civil Jury Instructions refer to "present value" in the consortium instructions. Consortium damages may be economic or noneconomic or both. In actions filed on or before July 1, 1997, the instructions may need to be modified accordingly. See Brandt v. Bockholt, 532 N.W.2d 801 (Iowa 1995). In actions filed after July 1, 1997, future damages must be adjusted to reflect the present value of the sum. Iowa Code section 624.18 (1A), 668.3(b), overturning Brandt v. Bockholt, 532 N.W.2d 801 (Iowa 1995).

10/97

EVALUATION OF CONSORTIUM CLAIMS
The Defense Perspective

Alan E. Fredregill
Sioux City, Iowa

ELEMENTS OF CONSORTIUM
IOWA CIVIL JURY INSTRUCTIONS

The elements of a consortium claim are well-known in Iowa. They are fully set out in the applicable Iowa Civil Jury Instructions:

200.19 Services - Spousal Consortium. The present value of the services which (decedent) would have performed for [his] [her] spouse, but for [his] [her] death. This is also known as loss of spousal consortium.

"Spousal consortium" is the fellowship of a husband and wife and the right of each to the benefits of company, cooperation, affection, the aid of the other in every marital relationship, general usefulness, industry and attention within the home and family. It does not include loss of financial support from the injured spouse, nor mental anguish caused by the spouse's death.

Damages for spousal consortium are limited in time to the shorter of the spouse's or (decedent)'s normal life expectancy.

Authority

Iowa Code section 613.15
Gail v. Clark, 410 N.W.2d 662 (Iowa 1987)
Madison v. Colby, 348 N.W.2d 202 (Iowa 1984)
Audubon-Exira Ready Mix, Inc. v. Illinois Central Gulf Railroad Company, 335 N.W.2d 148 (Iowa 1983)

Comment

Caveat: Predeath loss of services is not an item recoverable by the Estate. See Madison v. Colby, 348 N.W.2d 202 (Iowa 1984)

Note: The Iowa Civil Jury Instructions refer to "present value" in the consortium instructions. Consortium damages may be economic or noneconomic or both. In actions filed on or before July 1, 1997, the instructions may need to be modified accordingly. See Brandt v. Bockholt, 532 N.W.2d 801 (Iowa 1995). In actions filed after July 1, 1997, future damages must be adjusted to reflect the present value of the sum. Iowa Code section 624.18 (1A), 668.3(b), overturning Brandt v. Bockholt, 532 N.W. 2d 801 (Iowa 1995).
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200.20 Services - Parental Consortium. The present value of the services which (decedent) would have performed for [his] [her] children, but for [his] [her] death. This is also known as loss of parental consortium.

"Parental consortium" is the relationship between parent and child and the right of the child to the benefits of companionship, comfort, guidance, affection and aid of the parent in every parental relationship, general usefulness, industry and attention within the family. It does not include the loss of financial support from the injured parent, nor mental anguish caused by the parent's death.

A child is not entitled to damages for loss of parental consortium unless the parent's death has caused a significant disruption or diminution of the parent-child relationship.

Damages for loss of parental consortium are limited in time to the shorter of the child's or (decedent)'s normal life expectancy.

Authority

Iowa Code section 613.15
Gail v. Clark, 410 N.W.2d 662 (Iowa 1987)
Madison v. Colby, 348 N.W.2d 202 (Iowa 1984)
Audubon-Exira Ready Mix, Inc. v. Illinois Central Gulf Railroad Company, 335 N.W.2d 148 (Iowa 1983)

Comment

Caveat: Predeath loss of services is not an item recoverable by the Estate. See Madison v. Colby, 348 N.W.2d 202 (Iowa 1984)

Note: The Iowa Civil Jury Instructions refer to "present value" in the consortium instructions. Consortium damages may be economic or noneconomic or both. In actions filed on or before July 1, 1997, the instructions may need to be modified accordingly. See Brandt v. Bockholt, 532 N.W.2d 801 (Iowa 1995). In actions filed after July 1, 1997, future damages must be adjusted to reflect the present value of the sum. Iowa Code section 624.18 (1A), 668.3(b), overturning Brandt v. Bockholt, 532 N.W. 2d 801 (Iowa 1995).
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200.31 Elements - Spousal Consortium - Spouse's Damage. "Spousal consortium" is the fellowship of a husband and wife and the right of each other to the benefits of company, cooperation, affection, the aid of the other in every marital relationship, general usefulness, industry and attention within the home and family. It does not include loss of financial support from the injured spouse, nor mental anguish caused by the spouse's [injury] [death].

If you find (spouse) is entitled to recover damages, it is your

duty to determine the amount. In doing so, you shall consider the following items:

1. The reasonable value of loss of spousal consortium which (injured party) would have performed for plaintiff from the date of injury until [the present time] [death].
2. The present value of loss of spousal consortium which (injured party) would have performed in the future.

Damages for loss of spousal consortium are limited in time to the shorter of the spouse's or (decedent)'s normal life expectancy.

In determining the value for loss of spousal consortium you may consider:

1. The circumstances of spouse's life.
2. [His] [Her] age at the time of [his] [her] injury.
3. [His] [Her] health, strength, character and life expectancy.
4. The spouse's capabilities and efficiencies in performing the duties of a spouse.
5. The spouse's skills and abilities in providing instructions, guidance, advice and assistance.
6. The spouse's respective needs.
7. All other facts and circumstances bearing on the issue.

The amount you assess for loss of spousal consortium [past] [future] cannot be measured by any exact or mathematical standard. You must use your sound judgment based upon an impartial consideration of the evidence. Your judgment must not be exercised arbitrarily, or out of sympathy or prejudice, for or against the parties. The amount you assess for any item of damage must not exceed the amount caused by the defendant(s) as proved by the evidence.

A party cannot recover duplicate damages. Do not allow amounts awarded under one item of damage to be included in any amount awarded under another item of damage. [Similarly, damages awarded to one party shall not be included in any amount awarded to another party.]

The amounts, if any, you find for each of the above items will be used to answer the special verdicts.

Authority
Gail v. Clark, 410 N.W.2d 662 (Iowa 1987)
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Audubon-Exira Ready Mix, Inc. v. Illinois Central Gulf Railroad Company, 335 N.W.2d 148 (Iowa 1983)
Fuller v. Buhrow, 292 N.W.2d 672 (Iowa 1980)
Acuff v. Schmit, 248 Iowa 272, 78 N.W.2d 480 (1956)
Comment
Caveat: Predeath loss of services is not an item recoverable by the Estate. See Madison v. Colby, 348 N.W. 2d 202 (Iowa 1984).

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Note: The Iowa Civil Jury Instructions refer to "present value" in the consortium instructions. Consortium damages may be economic or noneconomic or both. In actions filed on or before July 1, 1997, the instructions may need to be modified accordingly. See Brandt v. Bockholt, 532 N.W.2d 801 (Iowa 1995). In actions filed after July 1, 1997, future damages must be adjusted to reflect the present value of the sum. Iowa Code section 624.18 (1A), 668.3(b), overturning Brandt v. Bockholt, 532 N.W.2d 801 (Iowa 1995). 10/97

VALUING THE CONSORTIUM CLAIM

Consortium claims may be among the most difficult injuries to accurately value for both the plaintiff and defense lawyer.

From the plaintiff perspective, it is difficult to know at the outset of a case enough to justify not asserting a consortium claim even though there may be genuine doubts about value. Malpractice avoidance dictates a philosophy of "file now, we can dismiss it later if we have to."

From the defense perspective, it sometimes seems that consortium claims are appended to every lawsuit even though it's obvious that most have no real value. Plaintiffs' lawyers, in an apparent abundance of caution, often seem to include them irrespective of their merit. For example, while the loss of a spouse's consortium in the "golden years" can certainly be a compensable event in the right case, it is questionable to assert that loss when the injured spouse already has one foot in the grave and the other on the proverbial banana peel.

The poster-child case for this blind-assertion-irrespective-of-worth mentality is found in Grodt v. Darling, 472 N.W.2d 845 (Iowa App. 1991). This was a 60/40 defense verdict on the underlying claim of the injured spouse, coupled with a defense verdict on the consortium claim. The Schwennen rule was in effect at the time, and consequently, the contributory fault of the injured spouse was no bar to a full recovery on the consortium claim. Plaintiff argued on appeal that the consortium verdict was contrary to the evidence. The Court of Appeals found as a matter of law, however, that the spouse was not entitled to damages for loss of consortium. The verdict was supported by evidence that the plaintiff's 69-year-old husband had been suffering from progressive hereditary spastic paraparesis at the time of the accident, had given up many activities prior to accident, used forearm walkers prior to the accident, and had complained of neck pain and incontinence prior to accident. The Court of Appeals said:

> A reasonable jury could find . . . that the claimant's loss was insufficient to support a money award.

Id. at 847.

On the other hand, a review of some of the consortium verdicts at the conclusion of this article demonstrates that, even in older plaintiffs, significant value can attach to a consortium claim. At this end of the spectrum is the $800,000 consortium award to Mrs. Spaur, whose 61-year-old husband died of mesothelioma after asbestos exposure. Spaur v. Owens-Corning Fiberglas Corporation, 510 N.W.2d 854(Iowa 1994). No doubt the consortium award was influenced by the jury's dislike of the defendant as shown by the $1.5 million punitive award that was also included in the verdict.

Consortium awards defy any attempt to quantify them as a percentage of compensatory damages. Again, a review of the illustrative table at the conclusion of the article shows a range that varies from 0-80% within the cases cited therein. The author is personally acquainted with a six figure 15-year-old consortium award, not included in the table, that even doubled the compensatory damage award of the spouse who was falsely arrested. As noted in the citation that precedes the table, "a comparison of verdicts, however, is of little value . . . ." Beeck v. Aquaslide 'N' Dive Corp., 350 N.W.2d 149, 168 (Iowa 1984).

"TALKING POINTS" TO REDUCE VALUE OF CONSORTIUM CLAIM

NO MORE FULL RECOVERY WHEN THERE IS CONTRIBUTORY FAULT
(This is HUGE!)

Until recently, defense counsel were also faced with the inequitable prospect of paying a consortium claim even though the underlying claim of the physically-injured plaintiff would be barred by contributory negligence.

A long series of Iowa cases, both pre-and-post comparative fault, held that the contributory negligence of the injured party would not bar or diminish the consortium claim of the spouse, parent or child.

See, e.g., Schwennen v. Abell, 430 N.W.2d 98 (Iowa 1988)(Third-party tort-feasor may not assert comparative fault of injured spouse in defense of deprived spouse's loss of consortium claim. Deprived spouse has independent cause of action for loss of consortium that is not derivative of injured spouse's claim. No cause of action for loss of consortium lies between deprived spouse and injured spouse.); Fuller v. Buhrow, 292 N.W.2d 672, 675 (Iowa 1980)

Facts: Mary Abell's husband William was injured in a car accident with Schwennen, who was killed. Schwennen sued Abell, and Abell counterclaimed. Mary brought an independent action for her loss of consortium against the Schwennen estate that was consolidated with the Schwennen action, at which time she also cross-claimed against her husband for causing her to lose his consortium. At page 100 is the following quote:

B

> In the trial of Mary's consortium claim, the jury found that she had been damaged in the amount of $85,000. It apportioned fault among the defendants as follows: William [Abell], 63%; the Schwennen defendants, 27%; and Floyd County, 10%. Because the fault against William was more than 50% of the aggregate, judgment was entered against him for the full amount of the verdict. The other defendants were adjudged only to be liable in proportion to the share of fault ascribed to them.
>
> The Supreme Court held, however, that
>
> the contributory fault of an injured spouse does not provide a defense to a loss of consortium claim brought on behalf of the deprived spouse against a third-party tort feasor.

Id. at 101.

Furthermore, McIntosh v. Barr, 397 N.W.2d 516 (Iowa 1986) had not been decided by the Supreme Court at the time Mary Abell made her claim for lost consortium against her husband. McIntosh held that there was no right between spouses inter se for loss of consortium. The Supreme Court then said:

> Because no legally sustainable theory of recovery may be predicated on William's fault toward Mary, his fault should not have played a role in the apportionment of aggregate fault under section 668.3(2)(b).

Id. at 103.

Consequently, William Abell's fault should not have been included in the apportionment of fault on her consortium claim. The Supreme Court then remanded Mary's consortium claim for retrial for "purposes of establishing the proper apportionment of causal fault." Schwennen at 104.

See also, Sorensen v. Morbark Industries, Inc., 153 F.R.D. 144, reversed In re Sorensen, 43 F.3d 674 (N.D. Iowa 1993)(Injured spouse's negligence does not bar or reduce consortium claim brought by deprived spouse under Iowa law.); Baedke v. John Morrell & Co., 748 F.Supp. 700 (N.D. Iowa 1990)(Under Iowa law, consortium claim is not derivative, and negligence of injured spouse or parent does not reduce or bar recovery by noninjured spouse or child.)

The apparent inequity of permitting a windfall recovery to the spouse of the person found to be 2/3 responsible for the accident was lost on the majority of the Supreme Court. The dissent consisting of Justices Harris, McGiverin and Snell, however, said:

> [C]onsortium awards against those whose negligence

contributed to an injury should be reduced by the fault assigned to the injured spouse.

This great idea finally caught on with the Iowa Legislature, and consortium claims under Chapter 668 are now subject to comparative fault for all actions filed after July 1, 1997:

> 668.3(1)(a): Contributory fault shall not bar recovery in an action by a claimant to recover damages for fault resulting in death or in injury to person or property unless the claimant bears a greater percentage of fault than the combined percentage of fault attributed to the defendants, third-party defendants and persons who have been released pursuant to section 668.7, but any damages allowed shall be diminished in proportion to the amount of fault attributable to the claimant.
>
> (b) Contributory fault shall not bar recovery in an action by a claimant to recover damages <u>for loss of services, companionship, society, or consortium,</u> unless the fault attributable to the person whose injury or death provided the basis for the damages is greater in percentage than the combined percentage of fault attributable to the defendants, third-party defendants, and persons who have been released pursuant to 668.7, but any damages allowed shall be diminished in proportion to the amount of fault attributable to the person whose injury or death provided the basis for the damages.
>
> 668.3(2)(b) The percentage of the total fault allocated to each claimant, defendant, third-party defendant, person who has been released from liability under section 668.7, and injured or deceased person whose injury or death provides a basis for a claim to recover <u>damages for loss of consortium, services, companionship, or society.</u> For this purpose the court may determine that two or more persons are to be treated as a single party.
>
> [emphasis supplied]

It took 103 years, but we've now come full circle (thanks to the continued lobbying efforts of the Iowa Defense Counsel Association). An early federal case recognized the wisdom of this new statutory rule. See <u>Chicago, B.&Q.R.Co. v. Honey</u>, 83 F. 39 (8th Cir. 1894)(Contributory negligence of wife is a valid defense to an action by the husband for loss of her services.)

NO CONSORTIUM FOR ADULT CHILDREN

Iowa has never permitted parents to recover for the death or injury of their adult children. Likewise as to the siblings of the injured party. <u>Ruden v. Parker</u>, 462 N.W.2d 674 (Iowa 1990)(Iowa's statutory scheme excludes the parent's right of action for loss of

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consortium from a deceased adult child. The scheme is not an unconstitutional violation of equal protection clauses of US and Iowa Constitutions.)
At 675

> Iowa rule of civil procedure 8 expressly limits a parent's right to maintain an action for loss of companionship and society to injury or death of a minor child. See, Miller v. Wellman Dynamics Corp., 419 N.W.2d 380, 383 (Iowa 1988).

See also, Kulish v. West Side Unlimited Corp., 545 N.W.2d 860, 862 (Iowa 1996): Iowa Code § 613.15 (1993) is specifically limited to recovery of the value of services and support as a spouse or parent, not for an adult child who was killed while riding a bicycle hit by defendant's truck. IRCP 8 is specifically limited to minors. There is no basis to recognize parental consortium rights for the loss of adult children.

The case expressed no opinion on whether § 613.15 violates equal protection by allowing adult children to recover for loss of parental consortium while denying a corresponding right in parents of adult children to recover damages upon the child's death or injury.

See also Voss v. State, 553 N.W.2d 878 (Iowa 1996).

HF 335 passed the 1991 session of the Iowa Legislature but was vetoed by Governor Branstad. The bill would have allowed recovery of consortium damages for the death of an adult child.

NO CONSORTIUM FOR DIVORCEES

Iowa Code § 598.20:

> When a dissolution of marriage is decreed the parties shall forfeit all rights acquired by marriage which are not specifically preserved in the decree. This provision shall not obviate any of the provisions of section 598.21.

A loss of consortium is a right acquired by marriage and, unless specifically preserved, is forfeited upon divorce. In re Marriage of Plasencia, 541 N.W.2d 923 (Iowa App. 1995); Beeck v. Aquaslide 'N' Dive Corp., 350 N.W.2d 149 (Iowa 1984); In re Marriage of Grandinetti, 342 N.W.2d 876 (Iowa App. 1983); Ohlen v. Harriman, 296 N.W.2d 794 (Iowa 1980); Michael v. Harrison County Rural Elec. Co-op., 292 N.W.2d 417 (Iowa 1980):

> These principles lead us to conclude that [the wife's] right of action against the defendant for loss of consortium during her marriage with [the husband] was forfeited when the final dissolution of marriage decree

was entered without specifically preserving in the decree that cause of action.

However, the precise words "the loss of consortium claim is specifically preserved" need not be used as long as the decree does specify an intent to preserve the loss of consortium claim. See Beeck ($65,000 award).

NO CONSORTIUM FOR CONCUBINES

The consortium claimant must be married at the time of injury to claim a loss of consortium. Frideres v. Schiltz, 540 N.W.2d 261 (Iowa 1995)(Sexual abuse case. Spouse has no claim for abuse occurring during childhood and prior to marriage. See also, Claus v. Whyle, 526 N.W.2d 519 (Iowa 1994). Neither spouse nor children has a claim for loss of consortium for injury occurring prior to marriage. Doe v. Cherwitz, 518 N.W.2d 362 (Iowa 1994) in answer to certified question at 894 F.Supp. 344. Even a "stable and significant relationship" does not provide consortium rights to an unmarried cohabitant. Claimant must establish a common-law marriage, which requires intent to be married. Laws v. Griep, 332 N.W.2d 339 (Iowa 1983).

NO CONSORTIUM FOR CRIMINALS

Public policy barred a spousal claim for loss of consortium of the incarcerated spouse. The criminal conduct of the incarcerated spouse was the direct cause of his injury, not the drug task force informant's false information that led to an illegal search warrant that provided the evidence to support husband's guilty plea. Tate v. Derifield, 510 N.W.2d 885 (Iowa 1994). See also, Cole v. Taylor, 301 N.W.2d 766 (Iowa 1981): Husband of murderer had no consortium cause of action against her psychiatrist for negligently failing to prevent her from murdering her ex-husband. Pappas v. Clark, 494 N.W.2d 245 (Iowa App. 1992), the court of appeals held that a spouse could not recover on a consortium claim arising out of her husband's illegal drug addiction and related death. Both cases were based on public policy grounds.

NO CONSORTIUM FOR WRONG PARTY

Consortium claim belongs to personal representative of deceased's spouse, not the spouse. Madison v. Colby, 348 N.W.2d 202 Iowa 1984). Personal representative of deceased child must bring claim for loss of consortium. Ruden v. Parker, 462 N.W.2d 674 (Iowa 1990).

Ruden at 675:

> Parents lack standing to bring a cause of action under those statutes [Iowa Code §§ 611.20 and 613.15] because the statutes require that a cause of action under them must be brought by the administrator of the

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decedent's estate.

See also, Audubon-Exira Ready Mix, Inc. v. Illinois Central Gulf Railroad Company, 335 N.W.2d 148 (Iowa 1983)(Surviving child was wrong party to bring action for loss of parental consortium under 613.15; in case of parent's death, child's claim for loss of parental consortium should be brought by decedent's administrator, and in case of parent's injury, injured parent is proper party to recover for child.)

But predeath loss of consortium claim is that of the surviving spouse and not the injured person. Swizdor v. U.S., 581 F.Supp. 10 (S.D. Iowa 1983).

NO CONSORTIUM FOR TARDY CLAIMANTS

Gail v. Clark, 410 N.W.2d 662, 668 (Iowa 1987)(Both consortium claims must be joined with the injured person's action whenever feasible . . . .)

NO CONSORTIUM FOR FAILURE TO EXHAUST ADMINISTRATIVE REMEDIES

Bloomquist v. Wapello County, 500 N.W.2d 1 (Iowa 1991)(No jurisdiction for consortium claims because those claims were not first submitted to the State Appeal Board. Claims dismissed after jury had made awards to children for loss of parental consortium.)

NO CONSORTIUM FOR LAST CLEAR CHANCE

Sonnek v. Warren, 522 N.W.2d 45(Iowa 1994)(last clear chance rule not applicable to consortium claims, either. Abolished in Bokhoven v. Hull, 474 N.W.2d 553, 556-57 (Iowa 1991).)

NO CONSORTIUM FROM OCCURRENCE LIMIT

A frequent question in any case, including one where consortium is claimed, is the amount of liability insurance available to satisfy the claims of the plaintiffs. In Eagles v. Illinois Casualty Co., 364 N.W.2d 218 (Iowa 1985), it was held that the per person, not the per occurrence limit, applies to a consortium claim of a non-injured party. This was a dramshop case, alleging a loss of parent-child consortium, when the child was killed by an allegedly intoxicated person.

NO CONSORTIUM FROM PROPERTY DAMAGE LIMIT

Even though a right of consortium is a "property right," the property damage coverage of a liability policy does not apply. See Felder v. State Farm Mutual Auto Ins. Co., 494 N.W.2d 704 (Iowa 1992). A consortium claim does not fall within the definition of property damage in an auto liability policy.

> Despite our characterization of claims for loss of consortium as property claims in dramshop cases, we **do not believe they constitute property damage** for purposes of an automobile liability policy if those claims arise solely out of a personal injury. To hold otherwise would mean that a policy such as this provides two separate coverages for the same loss.

NO CONSORTIUM FOR LACK OF DIRECT ACTION

Where defendant is not liable for direct claims by one spouse, a loss of consortium claim cannot be maintained under Iowa law. Noble v. Monsanto, 973 F.Supp. 849 (S.D. Iowa 1997); Jansen v. Harmon, 164 N.W.2d 323 (Iowa 1969); Ziegler v. U.S. Gypsum Co., 251 Iowa 714, 102 N.W.2d 152 (1960)(Work comp-no consortium claim available to spouse where worker has compensation claim.)

NO CONSORTIUM FOR COMPENSATION CLAIMANT'S FAMILY

Johnson v. Farmer, 537 N.W.2d 770, 773 (Iowa 1995). Plaintiff sued her employer and co-employee for gross negligence. She had already accepted workers' compensation benefits, however, and the court held that this receipt was an election of remedies that precluded her from maintaining the gross negligence action. The exclusive remedy provisions of § 85.20 preclude loss of consortium claims. Summary judgment was affirmed in favor of the employer and co-employee:

> III. Exclusive Remedy Bar to Loss-of-Consortium Claims.
>
> As a final issue, we must consider the claims of Donna's husband and children that their loss-of-consortium claims are not subject to the exclusive-remedy provisions of section 85.20. We are unable to accept that contention. As the district court noted in its decision dismissing the loss-of-consortium claims, section 85.20 expressly provides that the workers' compensation remedies "shall be the exclusive and only rights and remedies of such employee, the employee's personal or legal representatives, dependents, or next of kin, at common law or otherwise, on account of such injury." The exclusive remedy provisions of section 85.20 serve to preclude the loss-of-consortium claims as well as Donna's bodily injury claim.

"TALKING POINTS" THAT WON'T REDUCE THE VALUE OF THE CLAIM

Defense ideas that, while "legally accurate," haven't sold.

Ingenious defense lawyers have long sought ways to ameliorate the harsh rules that have allowed consortium verdicts even where the injured spouse was primarily responsible for the injury. It is

obvious that most of these defense ideas have the appeal of logic, but that logic seems to have escaped the attention of the Iowa courts.

CONTRIBUTION FROM INJURED SPOUSE

For instance, joint-tort-feasors often are asked to share responsibility for the injury to a third-party. So, why not require the negligent spouse to contribute to the damage award received by his spouse? To the claim-weary defense counsel, the concept has instant appeal. Unfortunately, that theory hasn't been successful in Iowa. See, e.g., McIntosh v. Barr, 397 N.W.2d 516 (Iowa 1986)(Reasoning that, there can be no independent claim for loss of consortium by one spouse against the other, because no actionable duty is breached. Consequently, husband cannot be required to contribute to judgment in favor of his wife and against third-party tort-feasor arising out of husband's injury due in part to his own negligence, because there can be no independent claim for loss of consortium by one spouse against the other.)

INDEMNITY FOR COMPENSATION CARRIER FROM CONSORTIUM AWARD

Another great defense idea that got no legs from the Supreme Court on consortium claims is indemnity by the compensation carrier from the spouse's consortium award. As we all know, indemnity is just an extreme form of contribution, and it can be based on a number of theories (express contract, vicarious liability, and breach of independent duty). In Sylvester v. Cinncinnati Insurance Company, 559 N.W.2d 285(Iowa 1997), the indemnification claim was based on the independent duty provided by vicarious liability and statute whereby the worker's compensation carrier sought indemnification from a compensation claimant who had made a recovery from the third party. By virtue of Iowa Code section 85.22(1), compensation carriers have that right:

> If compensation is paid the employee or dependent or the trustee of such dependent under this chapter, the employer by whom the same was paid, or the employer's insurer which paid it, shall be indemnified out of the recovery of damages to the extent of the payment so made . . . . [emphasis supplied]

However, as we also know,

> . . . the insurer's right of indemnity under section 85.22(1) is against the worker's recovery. Sourbier v. State, 498 N.W.2d 720, 721 (Iowa 1993); Fisher v. Keller Indus., Inc., 485 N.W.2d 626, 627 (Iowa 1992). . . . A loss-of-consortium claim asserts a child's or spouse's own cause of action for physical, psychological, and emotional pain and anguish. . . "It is well established that consortium is the separate property right of each spouse; it is an independent, nonderivative claim."

> Huber, 501 N.W.2d at 57; Schwennen v. Abell, 430 N.W.2d 98, 101 (Iowa 1988). "The deprived spouse, not the injured person, has the right to sue for and recover for the predeath loss of consortium." Madison v. Colby, 348 N.W.2d 202, 209 (Iowa 1984).

Sylvester at *

Consequently, the Supreme Court reasoned that, since worker's compensation doesn't pay for loss of consortium, and because the carrier's right is only against the payment made to the worker, and because the consortium claim belongs to somebody else, no indemnity can be claimed from the consortium payment. Sylvester at *.

RELEASE BY INJURED SPOUSE

If it's true than an essential element of a consortium claim is a tort committed against the injured spouse, and if it's also true that a release extinguishes the right to sue for a tort, doesn't it follow that a release which extinguishes the injured spouse's claim also bars the consortium claim? No, said the Iowa Supreme Court in Huber v. Hovey, 501 N.W.2d 53, 57(Iowa 1993):

> V. Next, we consider whether Dale's release also bars Karen's consortium claim. . . . The defendants rely on Conradt v. Four Star Promotions, Inc., 45 Wash. App. 847, 728 P.2d 617 (1986). The Conradt court observed that an essential element of a consortium claim is a tort committed against the injured spouse. Id. at 853, 728 P.2d at 621. It then concluded that the injured spouse, by signing the release, "abandoned the right to complain if an accident occurred." Id., 728 P.2d at 622. Without a duty owed to the injured party, the court reasoned, no actionable negligence exists. Id., 728 P.2d at 622. Without an underlying tort, the court held the consortium claim fails. Id., 728 P.2d at 622. . . . Contrary to the view held by the court in Conradt, we are not persuaded that the injured party's release erases the underlying tort. The tort was still committed, and it still caused harm to the nonreleasing spouse, whether the injured spouse's claim has been abandoned or not.

The Supreme Court simply didn't buy it. It held:
One spouse's signature on a release is not imputed to the other spouse any more than is one spouse's negligent act.

OFFSETS TO UNINSURED MOTORIST BENEFITS FROM CONSORTIUM RECOVERY

Fort Madison Bank & Trust Co. v. Farm Bureau Mutual Ins. Co., 543 N.W.2d 591 (Iowa 1996)(Drunk husband killed himself and his wife in a car accident; minor son collected dramshop consortium

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settlement; Farm Bureau cannot offset its UM coverage with the consortium money; son, while an insured under the policy, is a separate legal entity for this purpose. (However, Farm Bureau was entitled to offset amounts received by wife's estate from the judgment against her husband from the UM payments Farm must make to wife's estate. This was not a consortium recovery.)

CONCLUSION

Life is much better for the Defense Lawyer now that Chapter 668 has been amended to permit reduction of a consortium award in proportion to the injured-person's contributory fault. Beware of new Legislative attempts by the Plaintiffs' Bar to reverse that change or to permit consortium recovery for the loss of adult children and siblings!

ILLUSTRATIVE VERDICTS

"A comparison of verdicts, however, is of little value in determining whether an award in a particular case is excessive or inadequate." Beeck v. Aquaslide 'N' Dive Corp., 350 N.W.2d 149, 168 (Iowa 1984). It must also be borne in mind that all these verdicts pertained to claims prior to the amendment to Chapter 668 for reduction of the award for contributory fault.

Date	Jurisdiction	Type of Case & Meds	Compens.	Consortium
1997	Grundy County	Farm product-male-67 $283,000 meds	1,157,000	400,000 spouse
1996	N.D.Iowa	Premises-male-63	712,053	135,000 spouse
1996	Clinton County	Car-female $9700 meds	132,675	6,000 spouse
1996	Shelby County	Car-male-$77K meds $14,000 wages	381,700	25,000 spouse
1996	Wapello County	Defamation-male 50-atty;$2M puni.	230,000	150,000 spouse
1996	N.D.Iowa	Products-car seat $350,000 meds	2,100,000	100,000 parent 100,000 parent
1996	Marion County	Slip&fall-male-67 $25K meds;$17K wage	82,566	5,000 spouse
1996	Woodbury Co.	Car-female-40 50/50 intersect.	24,364.66	-0- spouse

1996	Pottowattamie	Premises-male-45 $95K meds; $625K wages	1,108,000	220,000 spouse
1995	Polk County	Work-male-44-$29K meds & $60K wages	401,089	25,000 spouse
1995	S.D. Iowa	Premises-male-53 Death-IBP plant	350,000	200,000 spouse 60,000 minor 60K/3 each adult
1995	Scott County	Slip & fall $22.5K meds;$900 wage	155,947	4,000 spouse
1995	Warren County	Premises $29K meds; $21K wages	124,968	5,000 spouse
1994	Woodbury	Horse bucked-male $49,000 meds	51,000	1000 spouse 300 child
1994	Kossuth Co.	Car-death-male-26	607,000	150,000 spouse
1994	Woodbury	Slip&fall-male	21,666	4,000 spouse
1993	Boone County	UIM Death-Male-63	252,700	150,000 spouse 30,000 ad. child 30,000 ad. child
1993	Polk County	Premises-Male-62 $65,067.83 meds	463,244	100,000 spouse
1993	Woodbury Co.	Contract-defamation	375,000	50,000 spouse
1993	Lee County	Pool death-male-7	285,285	177,500 parental
1993	Black Hawk	Car/motorcycle- male 41; female 34 $13,000 meds/each	75,427 45,751	1000 spouse 1000 spouse 500 child 500 child
1992	Linn County	Products-male-26 $30,165 meds	236,822	-0- spouse 2400/each ch.
1992	Dallas Co.	Car-female-36 $17,000 meds	119,892	1000 child 300 child
1992	Lee County	Car-female-30 $6150 meds	72,000	3000 spouse
1992	Lee County	Truck/pedestrian $246,000 meds.	3,359,346	316,800 spouse
1992	Polk County	Asbestos-male-61 $42K meds; $1.5M puni.	1,057,159	800,000 spouse

INTOXICATION ISSUES IN IOWA CIVIL LITIGATION

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I. BANKRUPTCY

Federal Bankruptcy Code sections 11 U.S.C. 523(a)(9) and 11 U.S.C 1328(a)(2) were amended in 1990 to prohibit the discharge of any debt arising from **a death or personal injury** caused by a debtor's use of alcohol, drugs, or other (undefined) "substances" under both Chapter 7 and Chapter 13.

A. Collateral Estoppel. If the issues of the debtor's intoxication and liability for the debt in question have been previously determined in a state judicial proceeding, the doctrines of collateral estoppel and res judicata preclude retrial of these issues in the bankruptcy court. See In re Tyler, 98 BR 396 (N.D. Ill. 1989).

However, the party seeking to assert collateral estoppel has the burden of establishing all of the elements of collateral estoppel: identical issues in the two cases,

judgment on the merits in the prior adjudication, same party in both cases, and full and fair opportunity for litigation in the prior adjudication. **Id.**

B. Dramshop Defendant. Section 523(a)(9) is not broad enough to apply to a debt owed by a bar owner under a dramshop statute for the sale of alcohol to a patron who later drove while intoxicated and caused a vehicular accident. See In re Taneff, 172 BR 744 (W.D.N.Y. 1994)

C. Imputed or Vicarious Liability. Debts based upon imputed or vicarious liability for driving while intoxicated are not protected from discharge by sec. 523(a)(9). See In re Lewis, 77 BR 972 (S.D. Fla. 1987) (OWI-related debt caused by debtor's daughter was dischargeable.)

D. "Intoxication". A bankruptcy court must apply state law, including the state's blood-alcohol (BAC) presumption levels for establishing intoxication, in determining whether the bankruptcy debtor was intoxicated at the time of the injury or property damage. Whitson v. Middleton, 898 F.2d 950 (4th Cir. 1990).

E. Judgment. Neither the existence of a judgment against the debtor nor even a lawsuit on file is required in order for the pending debt to be listed in a bankruptcy and be discharged.

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F. "Motor Vehicle". Because the term "motor vehicle" is not defined in the Bankruptcy Code, most courts look to state law for definitional guidance.

G. Nondischargeablitiy. To prevail in a section 523(a)(9) dispute, a creditor must establish each element of nondischargeability by a preponderance of the evidence. See In re Race, 198 BR 740 (W.D. Mo. 1996).

H. Property Damage. The nondischargeablity of OWI-related damages is expressly limited to "death or personal injury" in the specific OWI provision, at 11 U.S.C. sec. 523(a(9), thus rendering OWI-related property damage dischargeable.

However, property damage debts arising from a debtor's intoxicated driving may nevertheless be nondischargeable under companion section 11 U.S.C. sec. 523(a)(6) (non-dischargeability of debts arising out of willful and malicious conduct), **if** the required showing of willfulness and maliciousness can be made. See In re Dale, 199 BR 1014 (S.D. Fla. 1995) and In re Chapin, 155 BR 323 (W.D.N.Y. 1993). Nondischargeability may be difficult to prove under sec. 523(a)(6), however, because it is generally held that OWI-related property damage debts are not **per se** non-dischargeable under sec. 523(a)(6).

I. Proximate Cause. Some bankruptcy courts have held that a creditor is not required to prove that the debtor's intoxication "caused" the accident. Instead, nondischargeability under section 523(a)(9) may be established upon a mere showing that the debtor was driving while intoxicated at the time of the accident. See In re Dale, 199 BR 1014 (S.D. Fla. 1995) and In re Hodak, 119 BR 516 (W.D. Pa. 1990).

Note, however, that this interpretation flies squarely in the face of the statutory language in 11 U.S.C. sec 523(a)(9): "death or personal injury **caused** by the debtor's operation of a motor vehicle" (emphasis added).

J. Restitution. Iowa Code Sec. 910.1(2) has been interpreted as authorizing an Iowa trial court in a criminal case to order restitution for damages already discharged in bankruptcy. State v. Angle, 353 N.W. 2d 421 (Iowa 1984).

There no longer is a cap on the amount of restitution that can be awarded by the criminal court following an OWI conviction under Iowa law.

II. INSURANCE QUESTIONS

Various issues have arisen concerning the role that insurance coverage will play in a lawsuit involving the tortious actions of an intoxicated person.

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A. Automobile Liability Insurance: Permissive User.

In a case involving a permissive use issue similar to those arising under Iowa Code sec. 321.493, the Third Circuit Court of Appeals has held that a drunk driver was not using a vehicle with the consent of its owner when the owner had expressly conditioned use of the car upon the driver promising not to take drugs or consume alcohol. Thus, the owner of the vehicle could not be found liable for injuries sustained by the plaintiff, who was injured as a result of the driver's intoxication. Hall v. Wilkerson, 976 F.2d 311 (3rd Cir. 1991).

B. Homeowner's Liability Insurance: Bodily Injury.

The bodily-injury exclusion in a homeowner's liability insurance policy has been held in the State of Washington not to apply to a stabbing inflicted while the insured tortfeasor was severely drunk (.240 BAC). After a toxicologist testified that the tortfeasor was "temporarily deprived of reasoning, judgment, cognition, perception, and discrimination," the trial court properly found that the tortfeasor's "mental capacities were temporarily eliminated at the time of the stabbing and that he did not intend to stab anyone." Long v. Coates, 806 P.2d 1256 (Wash. Ct. App. 1990).

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C. Life Insurance: Intoxication Exclusion.

1. Reasonable Expectations. A life insurance policy exclusion for death resulting from "an injury occurring while the [insured} is intoxicated" does not violate the reasonable expectations doctrine, particularly because the term "intoxication" is defined by Iowa law. Benavides v. J.C. Penney, 539 N.W.2d 352 (Iowa 1995).

2. "Intoxication." The Iowa Supreme Court has rejected an insurer's argument that the term "intoxicated" (which was not defined in the life insurance policy) means having the per se .10 BAC under Iowa's OWI statute, designating the being "under the influence" alternative instead. In determining intoxication, the focus is on "the insured's reasoning and mental abilities, judgment, emotions and physical control. Many facts are potentially relevant, only one of which is the accused's blood alcohol level." Benavides, supra.

3. Causation. Error was not preserved in Benavides, supra, on the policy holder's estate's claim that the insurance company had to establish a causal connection between the intoxication and the death before recovery would be barred under the intoxication exclusion provision. However, the trial court had been presented with, but ignored, this issue and the express policy

language did not require causation (instead excluding death resulting from "an injury occurring while the [insured] is intoxicated"). Benvides, supra.

D. Restitution

1. Causation. In State v. Johnson, 473 N.W.2d 236 (Iowa Ct. App. 1991), the trial court erred in awarding restitution to the other driver in the amount of $75,000 without first establishing: (1) the causal connection between the conduct for which the defendant was convicted and the damages claimed by the victim, and (2) whether insurance proceeds had, in fact, been paid to him.

2. Subrogation. An insurer expressly is not a "victim" under Iowa's victim restitution law, Iowa Code sec. 910.1(1), and thus does not have a right of subrogation.

E. Uninsured Motorist Insurance: Subrogation. Zurn v. State Farm, 482 N.W.2d 923 (Iowa 1992) held that dramshop recovery by an accident victim should be deducted from that person's total damages and not from the policy limits of his underinsured motorist coverage. Thus, where the plaintiff was found to have incurred $125,000 in damages, a dramshop award of $50,000 was to be deducted from that amount, leaving $75,000 in damages to be paid by the underinsured motorist carrier.

The insurer "is entitled to be reimbursed for its uninsured motorist coverage payments from the insured's net recovery from [a] dramshop settlement," whether or not "the insured has been fully compensated." (Here, plaintiff's estate recovered $100,000 in uninsured motorist coverage and obtained an uncollectable $300,000 judgment against the tortfeasor. The uninsured motorist insurer recovered from the estate the 2/3 net proceeds of a $100,000 dramshop action settlement.) In re Estate of Allgood v. Grinnell Mutual Reins Co., 509 N.W.2d 486 (Iowa 1993).

III. TORT LIABILITY (STATUTORY)

A. Dramshop Law

1. Related Provisions. Related Code provisions include sec. 123.93 (imposing a six-month statute of limitations period by which notice must be given to a dramshop or its insurer of the injured party's intent to bring an action under sec. 123.92) and sec. 123.94 (precluding an insurer of an intoxicated person from seeking contribution or indemnity from the dramshop under sec. 123.92).

2. The Parties: Who's Suing Who?

a. Plaintiffs. As the broad language of Code sec. 123.92 suggests, Iowa's dramshop law seeks to provide an additional avenue of recourse to nearly any

person or entity that has been harmed in some way by the tortious actions of an intoxicated person (except for the tortfeasor himself or herself). Thus, the broad statutory language should be **liberally construed** in order to discourage the selling of excess liquor. Thorp v. Casey's General Stores, Inc., 446 N.W.2d 457, 467 (Iowa 1989). The protection of innocent parties is central to the dramshop act and one should look to the innocence of the plaintiff in determining whether a cause of action exists and what defenses may be anticipated. See Slager v. HWA Corp., 435 N.W.2d 349 (Iowa 1989).

While it is clear that anyone who is directly injured by an intoxicated tortfeasor may bring an action under Code sec. 123.92, Iowa law also recognizes a dramshop claim brought by those who were dependent upon the intoxicated person for support when that person injured himself. See Rigby v. Eastman, 217 N.W.2d 604 (Iowa 1974). Similarly, in Atkins v. Bauer, 432 N.W.2d 6 (Iowa 1988), the parents of an intoxicated minor were allowed to recover his medical expenses as a property loss. But see Nutting v. Zieser, 482 N.W.2d 424 (Iowa 1992) (dismissing a dramshop action brought by a minor who was injured after being served alcohol).

Other jurisdictions with dramshop statutes similar to the Iowa provision have also recognized the extent to which innocent victims may be allowed to recover. For instance, a New York appellate court has held that an individual who was merely living with a person killed by a drunk driver may sue the tavern that served the driver alcohol. For purposes of determining whether the individual was injured in "means of support," it was not necessary for the plaintiff to show that the decedent was under a legal duty to support the injured person. Soto v. Montanez, 578 N.Y.S.2d 758 (App. Div. 1991).

b. Defendants. Concerning who may be sued under the Iowa Dramshop Act, it is clear that only the **liquor licensee or permittee** may be directly liable to the plaintiff. Cochran v. Lovelace, 209 N.W.2d 130 (Iowa 1973). However, the court in Haafke v. Mitchell, 347 N.W.2d 381 (Iowa 1984) indicated that it may be permissible to name the **manager** of the establishment in such an action where this person is found to be "standing in the place" of the licensee.

c. Contribution. Other parties may be brought into a dramshop action by the tavern on a theory of contribution, however. Such parties may include the intoxicated tortfeasor, his or her employer, the owner of

the vehicle driven by the tortfeasor, his or her employer, the owner of the vehicle driven by the tortfeasor, as well as other dramshops. Schrier v. Sonderleiter, 420 N.W.2d 821 (Iowa 1988).

d. Out-of-State Establishments. Code sec. 123.92 was amended in 1992 to create a cause of action against out-of-state liquor, wine, or beer licensees or permittees. The amendment had the effect of overruling Meyers v Kallestead, 476 N.W.2d 65 (Iowa 1991) which affirmed dismissal of an Iowa dramshop action where the nonresident defendant tavern lacked minimum contacts within the state.

e. Previous Owners. The **Idaho** Supreme Court has extended dramshop liability to a bar's previous owners who continued to hold the bar's liquor license in their name. Liability arose even though they "exercised no control over the operation of the tavern." The current unlicensed owners also were held liable. Fisher v. Cooper, 351 P.2d 482 (Idaho 1989).

3. "Sold and Served": The Convenience Store Exclusion. In 1986, Iowa's dramshop act was amended to extend liability only to cases where liquor is "sold and served." The effect of this change has been a series of decisions in which the Iowa Supreme Court has found that

establishments selling liquor for off-premises consumption are not subject to a dramshop action.

The first such case was Kelly v. Sinclair Oil Corp., 476 N.W.2d 341 (Iowa 1991), in which the court expressly held that non-tavern establishments, such as gas stations and convenience stores, that do not sell and serve alcohol for on-premises consumption are excluded from liability under Code sec. 123.92.

Likewise, summary judgment in favor of the convenience store was upheld in Eddy v. Casey's General Store, Inc., 485 N.W.2d 633 (Iowa 1992) where there had been no showing that the liquor purchased by the intoxicated person was consumed in the store or on the store premises.

Finally, in Paul v. Ron Moore Oil Co. d/b/a Jiffy Mart, 487 N.W.2d 353 (Iowa 1992), the court reaffirmed its position by holding that a convenience store is not subject to a dramshop action where the intoxicated person removes the alcohol from the premises for consumption and returns to purchase more alcohol. Thus, summary judgment in favor of the convenience store was appropriate even when it was undisputed that the intoxicated person had entered the store on "three or four occasions" to purchase forty-ounce bottles of beer during the course of the night and, on each occasion, carried the beer to a neighboring service sta-

where it was consumed. Thus, "before a permittee or licensee may be exposed to liability under the dramshop act, Iowa code section 123.92, a plaintiff must prove that the permittee or licensee both sold and served alcohol to an intoxicated person with the intent that the alcohol be consumed on the premises." Kelly v. Sinclair Oil Corp., supra.

4. Care of Adult Child (19). The parents of an emancipated 19-year old child cannot recover under Iowa's dramshop act for care they furnish on account of his intoxication-caused injuries. (This lawsuit apparently was an attempt to get around the statutory rule that the tortfeasor has no standing to sue under the dramshop act.). Counts v. Hospitality Employees, Inc., 518 N.W.2d 358 (Iowa 1994).

5. Equal Protection. Iowa's dramshop act does not violate equal protection even though it treats similarly-situated victims differently "depending upon whether the intoxicated consumer purchased beer or intoxicating liquor in a tavern as opposed to a non-tavern." Nor is equal protection violated by the statutory distinction Code sec. 123.92 makes between permittees and licensees which sell and serve alcohol for on-premises

consumption and those which sell it for off-premises consumption. Kelly v. Sinclair Oil Corp., supra.

6. Exclusivity of Dramshop Action. Because strict liability of licensees and permittees is provided for in Code sec. 123.92, this provision is the exclusive remedy available to dramshop plaintiffs against the drinking establishment. Snyder v. Davenport, 323 N.W.2d 225 (Iowa 1982). Accordingly, sec. 123.92 preempts an action against the tavern based upon a violation of sec. 123.47 (prohibiting the sale of alcohol to a minor). See Fuhrman v. Total Petroleum, Inc., 398 N.W.2d 807 (Iowa 1987).

An exception to this rule is that a plaintiff may bring a common law tort claim against the establishment based upon failure to maintain adequate security when that person has been the innocent victim of an assault by an intoxicated person. Golden v. O'Neill, 366 N.W.2d 178 (Iowa 1985).

The dramshop law does not preclude a common law action against a person or entity that is not a licensee or permittee. Haafke v. Mitchell, 347 N.W.2d 381 (Iowa 1984). Thus, a claim may be brought against a bartender or waiter based upon common law tort, as such a person would not be considered a licensee or permittee under sec. 123.92.

C

There is no common law action in negligence against a non-tavern alcohol seller. Thus, the district court erred in denying defendant's motion for summary judgment for a convenience store on a count of alleging common law negligence based upon "selling beer, in violation of Iowa Code section 123.49(1), to an intoxicated [adult], who later entrusted his truck [to his 20-year old companion], whose use of it in turn injured the plaintiffs." The district court held that a plaintiff "may maintain a common law claim against a licensee or permittee who is not otherwise covered by the dramshop act." Reversing, the supreme court instead held that, "as a matter of law, " [the convenience store's} conduct in selling [the adult] alcohol was not a proximate cause of plaintiffs injuries. "Even assuming it may be reasonably foreseeable that intoxicated persons such as [the adult] who purchase liquor from non-tavern permittees may in turn provide instrumentalities to third parties such as [the 20-year old], we do not believe this justifies imposing liability upon permittees, such as [this] convenience store or other grocery stores, that sell alcohol exclusively for off-premises consumption. Such a holding would result in imposing liability upon permittees for the conduct of non-patrons occurring weeks, months, or even years after the

initial sale of the alcohol, thus making such permittees liable for acts over which they have absolutely no control whatsoever." [Without deciding the jurisdictional issue, the supreme court noted that it had often said that "the dramshop act provides the exclusive remedy against those covered by the act" and had "never said that a common law negligence action may be maintained against a licensee or permittee that provides alcohol to an intoxicated person in violation of Iowa code sec. 123.49(1)."] Kelly v. Sinclair Oil Corp., 476 N.W.2d 341 (Iowa 1991).

7. Knowledge of Intoxication. The Iowa Supreme Court has upheld the denial of a new trial for a plaintiff in a dramshop action where the trial court submitted a marshalling instruction that required the plaintiff to prove that the defendant sold and served beer or liquor to the decedent when it knew or should have known he was intoxicated. The terms "knew or should have known" as used in Code sec. 123.92 do not create an affirmative duty upon dramshop licensees and permitees comparable to that owed by a possessor of land to an invitee. In a dramshop action, the duty is upon the plaintiff to prove the defendant's knowledge of the patron's intoxication, by either a subjective or objective standard.

(Here, the trial court refused to give plaintiff's requested instruction which further explained "knew or should have known" with great specificity as it related to intoxication, but did give a different, general instruction defining the terms "knew or should have known." The Supreme Court held that the terms "knew or should have known" have not acquired a peculiar and appropriate meaning in law which precludes understanding its meaning in Code sec. 123.92). Hobbiebrunken v. G & S Enterprises, Inc., 470 N.W.2d 19 (Iowa 1991).

8. Minority Age. A "minor" for purposes of the dramshop act is subject to the general rule that minority terminates at age 18, even though the legal drinking age is 21. Thus, the parents had no cause of action under Iowa R. Civ. P. 8 (allowing a parent to sue for damages arising out of the injury or death of a "minor" child). Counts v. Hospitality Employees, Inc., 518 N.W.2d 358 (Iowa 1994).

9. Minors: Recipients Excluded. The Iowa Supreme Court has reaffirmed its prior holdings rejecting common-law liability of licensees for furnishing alcohol beverages to minors. It affirmed dismissal of a dramshop claim by a minor who was injured after being served intoxicating beverages by a liquor licensee.

Because of legislative preemption, "the sole basis for a tort action against [licensees]" is under Iowa Code sec. 123.92 (the dramshop statute). The Court also rejected plaintiff's contention that "because the recipients of alcoholic beverages from liquor licensees are not themselves granted a right of recovery under the dramshop legislation contained in section 123.92, claims by those persons are outside the scope of the statutory scheme and thus free of any preemption attributable thereto." Nutting v. Zieser, 482 N.W.2d 424 (Iowa 1992)

10. Restaurant: Employees' Party. The district court properly found as a matter of law that a restaurant did not meet the "sold and served" requirement triggering liability under Iowa's dramshop statute where the underlying drinking occurred at a belated holiday party for the establishment's employees. The party was hosted by the owner of the restaurant which was incorporated. The corporation-restaurant was an Iowa liquor licensee. The corporation supplied all the food and beverages. An employee who became intoxicated at the party caused a fatal accident on his way home afterwards.

a. Corporation. The corporation was not liable, as a matter of law, because it did not **sell** and serve alcohol to its intoxicated employee who caused the

accident. Plaintiff unsuccessfully argued that "the employee goodwill fostered by a holiday party constitutes a sufficient quid pro quo to qualify as consideration--and hence a "sale"--under the statute.

b. Owner. The owner could not be held personally liable under Code sec. 123.92 since the dramshop statute expressly "extends liability only to liquor licensees and permittees." Plaintiff unsuccessfully argued that the owner, as an employee or agent of the corporation, was liable on common-law negligence under the theory of respondent superior. However, the alcohol was furnished by the corporation, not by the owner. Moreover, the intoxicated employee served himself.

Nor could the owner be held liable under Iowa Code sec. 12.49(1)(a) as the host of the party. This statute abrogated "social host" liability in 1986,"thereby reinstating the common-law rule that consumption of alcohol, rather than the serving of it, is the proximate cause for injury inflicted on another by an intoxicated person." Summerhays v. Clark, 509 N.W.2d 748(Iowa 1993)

11. Superseding Cause. Summary judgment for defendant bar was affirmed in a dramshop action where a police officer was killed by an intoxicated driver (Christensen) while investigating a fatal accident caused

by another intoxicated driver (Smith) who had been served beyond a state of intoxication by defendant bar. The Supreme Court held, as a matter of law, that defendant's conduct in serving Christensen alcohol was not a proximate cause of [the officer's] death. Smith's illegal and negligent act of driving while intoxicated constituted an intervening superseding cause which relieved defendant of liability." Moreover, Smith's act (of fatally striking the police officer) did not "fall squarely within the scope of the original risk" caused by defendant-bar in serving the intoxicated Smith. Hayward v. P.D.A., Inc., 573 N.W.2d 2 (Iowa 1997).

B. Furnishing Alcohol to Minors.

1. Delivery. Sponsorship of a "help yourself" kegger party constitutes the requisite affirmative delivery of alcohol in the prohibition against furnishing alcohol to minors under Iowa Code sec. 123.47. "The fact that [defendant-sponsor] did not personally fill his guests' beer glasses does not minimize his affirmative conduct" (of buying the beer, providing the cups, and knowingly joining in an underage drinking party). Fullmer v. Tague, 500 N.W.2d 432 (Iowa 1993).

2. Minor as Defendant. The prohibition against furnishing alcohol to minors in Iowa Code sec. 123.47

applies to minors also, thus permitting civil liablity for damages arising out of an alcohol-related accident where alcohol had been furnished by a minor to the minor who caused the accident. "The legislature intended to prevent minors, as well as adults, from unlawfully supplying an underage person." Fullmer v. Tague, 500 N.W.2d 432 (Iowa 1993).

3. "Otherwise Supply." To prevail on a cause of action under Iowa code sec. 123.47 for unlawfully furnishing alcoholic beverages to a minor, plaintiff "must prove the defendant's knowing and affirmative delivery of [alcohol] to the underaged person . . . . The statutory term 'otherwise supply' means more than merely permitting or allowing beer to be consumed on a defendant's premises."

The district court properly found as a matter of law here that defendant could not be liable for any injuries arising out of a kegger party thrown by her underaged son at a location other than defendant's home. The only evidence connecting defendant was her check which her son used to pay for the keg. Fullmer v. Tague, 500 N.W.2d 432 (Iowa 1993).

IV. TORT LIABILITY (COMMON LAW)

A. Bartender: Negligence. The district court correctly granted summary judgment for the bartender on a

negligence claim based upon his ordering an intoxicated 20-year old out of the tavern's parking lot and onto the public roadway. The bartender breached "no legally recognized duty" to either the 20-year old or to the subsequent accident victims. The relationships, if any, between them "fall into none of those 'special' relationships outlined in the **Restatement (Second) of Torts** sec. 314A, 314B, 316-20." Kelly v. Sinclair Oil Corp., 476 N.W.2d 341 (Iowa 1991.

B. Motor Vehicle Personal Injury Actions

1. Driver Inference. The inference in personal injury-automobile accident lawsuits that the owner or principal user of the automobile who is in the automobile at the time of the fatal accident was the driver has been modified "to require that evidence sufficient to rebut the inference[to] be objective in character." Anderson v. Miller, 559 N.W.2d 29 (Iowa 1997).

Here, the estate of an occupant of a pickup truck who was killed in a one-vehicle accident sued both the non-occupant truck's owner and the other occupant of the truck who was the principal user of the truck. The surviving occupant-defendant testified that he was not driving at the time of the accident, but this non-objective evidence was held on appeal to not rebut the inference since the

testimony was likely to be motivated by self-interest. It was error for the trial court to grant summary judgment for defendants, since plaintiff raised a genuine issue of material fact through testimony by a friend of decedent that he did not like to drive and other testimony that the other occupant-defendant usually drove his own truck.

C

2. Negligent Entrustment.

a. General rule. The general rule on negligent entrustment is as follows: "One who entrusts a motor vehicle to a person who is intoxicated, under circumstances charging him with knowledge of that condition, is, as a matter of reasonable prudence and experience, liable for injury or damage proximately resulting." 7A Am. Jur. 2d Automobiles & Highway Traffic sec. 646, quoted in Anderson v. Miller, 559 N.W.2 29, 33 (Iowa 1997).

b. Criminality exception. The so-called criminality exception to the negligent entrustment doctrine arises through the general principle that "a person cannot maintain an action if, in order to establish his cause of action, he must rely, in whole or in part, on an illegal or immoral act or transaction to which he is a party, or to maintain a claim for damages based on his own wrong or caused by his own neglect, . . . or where he must base his

cause of action, in whole or in part, on a violation by himself of the criminal or penal laws." Anderson, supra.

3. Passenger Liability: Aiding and Abetting Drunk Driving. Iowa recognizes the tort of aiding and abetting drunk driving, whereby passengers can be liable to an injured third party when "they actively encourage an intoxicated driver to continue his or her drug or alcohol use where such encouragement causes the accident and injury." In such a lawsuit, in order to overcome a defendant-passenger's motion for directed verdict, plaintiff has to produce substantial evidence that the passenger "substantially assisted or encouraged [the driver] to drive while drunk by actively encouraging him to (1) drink or (2) continue drinking after he was already intoxicated." Heick v. Bacon, 561 N.W.2d 45 (Iowa 1997).

Substantial evidence of such aiding and abetting was lacking where the passenger had partied with the driver before knowingly accompanying him while he was driving drunk. "Her mere presence, however, is not substantial evidence that she assisted or encouraged this unlawful activity. The fact that she made no effort to prevent his unlawful conduct is not--standing alone--aiding and abetting.

Her admonition for the driver to "keep going" when the driver had temporarily stopped because of the snow just a mile from the fatal accident was "some evidence of encouragement, but not enough . . . to rise to the level of substantial assistance or encouragement." Heick, supra.

4. Passenger: Duty to Protect Another Passenger From Drunken Driver. A non-custodial adult passenger riding in a vehicle being driven by an intoxicated driver owed no special legal duty to protect a child passenger from being injured in a one-car accident. Specifically, this adult passenger did not have a legal duty either to prevent the intoxicated driver from driving her own vehicle or to remove or prevent [the child passenger who was killed in the accident] from entering the van while [an intoxicated driver] was at the wheel." Clark v. Mincks, 364 N.W.2d 226 (Iowa 1985).

5. Passenger Liability: Joint Enterprise. Iowa law follows the majority rule on joint enterprise in requiring a mutual "right of control" over the operation of the vehicle (or "an equal right in the passenger to be heard as to the manner in which it is driven" in order to impute the negligence of the driver to the passenger in a vehicle accident.

In determining whether a relationship gives the right of control there must be a common pecuniary interest by the passenger and the driver in the objective of the journey. . . .Without the common pecuniary interest element, the mutual right of control does not exist and consequently a joint enterprise does not exist." Heick v. Bacon, 561 N.W.2d 45 (Iowa 1997)

6. Punitive Damages. Affirming the trial court's order denying plaintiff's motion for new trial in a lawsuit arising out of an automobile accident, the Iowa Supreme Court held that the jury was within its power to not award punitive damages even though it found that defendant's conduct in driving while intoxicated was wanton and willful. Crooks v. Borlaug (Iowa Sup. Ct. No. 93-1002, 12/94) (per curiam).

C. Police Liability: Failure to Arrest Possible Drunk Driver---Follow up Accident

1. Common Law Duty. The Iowa Supreme Court has refused to recognize a common law tort of a peace officer's allegedly negligent failure to detect a motorist's intoxicated condition and protect that person from harm. Thus, summary judgment for a police officer (and his municipal employer) was affirmed in Hildebrand v. Cox, 369 N.W.2d 411 (Iowa 1985), a wrongful death action based upon

the police officer's failure to arrest or place plaintiff in protective custody after investigating a one-car accident shortly before a follow up fatal accident after the arguably intoxicated motorist was released on a traffic citation (for failure to maintain control). The peace officer "did not create the condition which placed [the motorist's] life in jeopardy and did not take [him] into his custody or control at any time."

2. Statutory Duty. No statutory duty was breached in these same circumstances. Neither the OWI criminal statute (then Code sec. 321.281) nor the statute authorizing peace officers to involuntarily transport an intoxicated person to a treatment facility (Code sec. 125.34) imposes on peace officers any mandatory duty to take suspected intoxicated persons into custody. Instead, the legislative intent was to provide several options for peace officers, without legislatively impinging on inherent police discretion. Id.

D. Social Host Liability. Social host liability was abrogated in Iowa by virtue of Iowa code sec. 123.49(1)(b). Thus, a party host may no longer be held liable for injuries caused by an intoxicated guest, even though the host served the guest to the point of intoxication.

1. Minors. Unlike the exclusivity rule relating to dramshop actions under Iowa Code sec. 123.92, a plaintiff is not precluded from bringing a common law action against a social host for injuries sustained as a result of supplying alcohol to a minor. Bauer v. Dann, 428 N.W.2d 658 (1988). Further, even the minor may sue a social host for injuries that he or she sustained as a result of being served alcohol by the host. Sage v. Johnson, 437 N.W.2d 582 (Iowa 1989).

2. Knowledge: A social host must have knowledge of the act of supplying alcohol or beer to a minor in order to be found civilly liable in a common-law negligence action based upon violation of Iowa Code sec. 123.47 (a criminal statute prohibiting furnishing of alcohol or beer to minors). Because proof of general criminal intent is required in a criminal prosecution under sec. 123.47, "proof of knowledge [of the alcohol-furnishing transaction] is also a required element in a common-law negligence action based on a violation of section 123.47."

C

Liability cannot be based simply on being hosts of a party where drinking occurred, but instead plaintiffs must show that alcohol was knowingly furnished by the hosts. (Here, "[t]he primary factual issue was whether Scott had consumed beer at [defendants'] party.") 467 N.W.2d 221 (Iowa 1991).

3. Permission vs. Supplying. The potential exposure in this area does not appear to be without limit, however, as the court in DeMore v. Dieters, 334 N.W.2d 734 (Iowa 1983) has held that merely giving permission to a minor to consume alcohol on one's property does not expose the host to liability for injuries that result from the minor's intoxication.

E. Tavern: Evicting Unconscious Drunk. A special relationship was found to exist between a tavern owner and its patron who died of the cold and exposure after being expelled from the tavern, late at night, in a drunken and unconscious condition. The defendant-tavern owner created the dangerous circumstances confronting the patron and thus owed plaintiff a legal duty of reasonable care to protect him from the dangerous circumstances created by defendant--no matter how great decedent's negligence may have been in allowing himself to become intoxicated. Weymire v. Wolfe, 52 Iowa 533, 3 N.W.2d 541 (1879).

V. WORKERS' COMPENSATION

A. Intoxication Exclusion. Iowa's workers' compensation statute, Iowa Code sec. 85.16(2), bars recovery if intoxication was "a substantial factor in causing the injury," provided that the intoxication "did not rise out of and in the course of [the] employment."

C

B. "Intoxication". The term "intoxication" is not defined in the statute. Recognizable evidence of intoxication has included blood alcohol levels with expert witness interpretation thereof, number of drinks, claimant's conduct prior to the injury, and with lesser weight, the claimant's reputation as a heavy drinker. See Lawyer & Higgs, IOWA WORKERS' COMPENSATION: LAW AND PRACTICE sec. 7.3 (Harrison Co., 2d ed. 1991).

C. Drugs. Intoxication is not limited to being caused by alcohol but also "narcotic, depressant, stimulant, hallucinogenic, or hypnotic drug[s] not prescribed by an authorized medical practitioner."

D. Affirmative Defense. Claimant's intoxication is an affirmative defense that must be established by a preponderance of the evidence. Reddick v. Grand Union Tea Co., 230 Iowa 115, 296 N.W.800 (1941).

E. Substantial Factor. By statute, claimant's intoxication need only have been a substantial factor in causing the work-related injury, instead of being the sole proximate cause (the statutory standard until 1983).

F. Estoppel. An employer is not estopped from raising intoxication as a defense even if the employer had knowledge of claimant's drinking habits and condoned claimant's drinking in solicitation of business. Drinking

is one thing; drunkenness is another. Walsh v. Kay Dee Feed co., I-1 Iowa Indust. Comm'r Dec. 252 (1984); Lawyer & Higgs, supra.

VI. MISCELLANY

A. Discovery: Physician-Patient Privilege. A trial court erred in granting plaintiff's request in a personal injury/automobile accident case to take the deposition of the physician who treated defendant in the hospital emergency room immediately following an automobile accident and ordering production of defendant's medical records to show defendant's state of intoxication.

The patient-litigant exception to the physician-patient privilege under Iowa Code sec. 622.10 requires the medical condition be an element or factor of the claim or defense of the person claiming the privilege. Even though defendant denied he was intoxicated, his intoxication remained an element or factor in plaintiff's claim. The physician-patient privilege thus applied, rendering such privileged information not subject to discovery. Chung v. Legacy Corp., 548 N.W.2d 147 (Iowa 1996).

B. Products Liability: Crashworthiness. Evidence of the driver's and passenger's intoxication was inadmissible in a products liability/defective design case. The crashworthiness doctrine "focuses alone on the enhancement

of resulting injuries. [It] 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."

Overruling Hillrichs v. Avco Corp., 478 N.W.2d 70 (Iowa 1991), as to this point, the supreme court held that a plaintiff's comparative fault should not be assessed against him in a claim for enhanced injuries in a crashworthiness case "unless it is shown to be a proximate cause of the enhanced injury."

Any negligence by the driver or the passenger, "in connection with the original crash cannot be used by the manufacturer in defending against [this] enhancement claim. Evidence of intoxication should have been excluded." Reed v. Chrysler Corp., 494 N.W.2d 224 (Iowa 1992).

Medicolegal Aspects of Head Injury

27

D

Carl L. Rowley
Richard S. Cornfeld

Virtually all attorneys who prepare for and try lawsuits call on the services of experts, medical and other kinds, for advice and for testimony. Similarly, many physicians, psychologists, and other medical providers become involved in litigation in one way or another, voluntarily or not. This chapter explains the essential, typical elements of that involvement.

CONSULTATION AND TESTIMONY IN LITIGATION

Physicians, psychologists, scientists, and other experts serve two purposes in litigation: as "consultants" (providing advice to attorneys that will help them represent their client more effectively) and as witnesses (educating and drawing inferences for the judge or jury through live or recorded testimony). Experts who are retained for the purpose of testifying usually also provide consultation in the cases in which they have been retained. Experts retained exclusively for consultation are not expected to testify.

Role as Consultant Generally

In lawsuits that present comparatively simple medical and scientific issues, most attorneys can prepare adequately for trial simply by studying the applicable literature and questioning experts who already are involved in the litigation, such as treating physicians. In other cases, attorneys seek the advice of experts retained or hired specifically for the purpose of consultation because the comparative complexity of the issues renders self-study an inefficient means of preparing for trial.

Functions Served by Consultant; Importance to Attorney and Client

An expert's role as a consultant may vary from limited participation in the lawsuit or other dispute (providing a general familiarization with medical or scientific issues that are expected to arise in the case) to active, sometimes day-to-day involvement (developing evidence that may support or negate issues such as causation, injury, and extent of disability). The typical advantages of serving as a consultant as opposed to participating as a witness include likely anonymity, at least to the extent that most jurisdictions do not require a party to disclose to the opposing side its consultants' identities or even the fact that a consultant has been hired. Thus, the communications between a nontestifying consultant and an attorney can usually remain confidential with respect to opposing parties. Ironically, it frequently is the expert who has

the least interest in testifying who can render the most valuable service in rebutting the testimony of the opposing experts. Experts who have no interest in giving testimony (with its often hostile cross-examination and accompanying professional scrutiny) can be indispensable in determining the truth and in helping the attorney to establish it as fact at trial or during other proceedings such as administrative hearings.

Discoverability of Consulting Expert's Work Product

Just as the identity of the consulting expert in litigation may remain confidential, the tangible results of his* efforts (e.g., notes, reports, summarizations of literature, and correspondence with counsel) usually also may remain private as between the consultant, the retaining lawyer, and his client. In the jargon of attorneys, the consultant's "work product" is not "discoverable" by the opposing side in most courts under most circumstances. By contrast, the work product of experts who are expected to testify may be compelled to be produced, to a varying extent depending on the jurisdiction, to the opposing party.

This limitation on required disclosure for nontestifying consultants can lead to a more informal (and occasionally more productive) working relationship between the lawyer and the expert because there is less need for concern that matters committed to writing might later be taken out of context during an examination at deposition or at trial or that those materials might otherwise be used to prejudice the intended beneficiary of the expert's advice.

Role as Trial Witness

Although the number of experts used in the typical lawsuit has burgeoned over the past few decades, most witnesses at trials and depositions are still "fact" or lay witnesses, not experts. Fact witnesses testify about what they saw or heard or did. Their testimony must arise from their own observations. They generally cannot give opinions even if they have them. Experts or "opinion witnesses," however, are permitted to testify to opinions that laypersons, including the jury, do not have the expertise to reach for themselves.

Functions Served; Importance to Attorney and Client

Although testifying experts usually do draw inferences and express them to the jury as professional opinions during their testimony, they may also testify as experts without rendering opinions. The rules of court that describe the circumstances under which medical evidence may be presented to the jury almost always permit experts to educate jurors on relevant scientific principles, while leaving it to the jury to reach its own conclusions by applying those principles to the evidence. When the desired inference is sufficiently obvious, this tactic can be even more effective than the more blunt approach of presenting opinion testimony.

Opinion testimony is not always permitted on every subject. The matters on which opinions may be rendered at trial differ according to the law of the jurisdiction in which the case is pending. Rule 702 of the Federal Rules of Evidence, applicable in federal courts, is representative of a standard that commonly is used to determine whether a matter can properly be the subject of expert testimony:

> **If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify in the form of an opinion or otherwise.**

Thus, typically, a medical opinion, to be admissible, must be based on scientific knowledge and must assist the jury in understanding a fact or determining an issue in the case. Opinions on matters of common knowledge usually are not permitted, regardless of the identity or qualifications of the witness.

Expert testimony is essential in cases in which complex inferences must be drawn in order for the jury to decide the issues. Few lawsuits of any importance are tried today without testimony from one kind of expert witness or another.

In nearly every profession, there are now expert witnesses who are known to be willing to "say anything" for a price. Many such "experts" make their main living from testifying. The U.S. Court of Appeals for the Seventh Circuit in *Stoleson v. United States* has, in fact, observed that "there is not much difficulty in finding an expert witness to testify to virtually any

* Narrative illustration usually requires reference to hypothetical persons and thus to particular third-person pronouns. Because the use of masculine gender pronouns in these situations has historically been considered gender-neutral, the authors use them throughout this chapter as well.

theory of medical causation short of fantastic." Testimony by reputable, honest experts who are willing to expose these witnesses' invalid methods and conclusions is of critical importance to the just resolution of disputes in our courts.

Records and Documents from Counsel/Reports by the Expert

Participation in litigation by physicians and other professionals invariably requires the collection, generation, and exchange of written documents. Simple practicality often requires exchanges of correspondence between lawyer and witness. In a personal injury case, prior and subsequent records reflecting medical treatment, together with school, employment, and military records, must be compiled and given to the expert for his review. Unless the expert has a photographic memory, he will take notes and dictate reports on the progress of his findings and, eventually, his conclusions.

Because the opposing party may eventually attempt to use these documents in a manner that was not intended at the time of their creation, many lawyers prefer to communicate with their expert witnesses orally, by telephone or in person. They may request that their experts refrain from reducing their opinions to writing until a specified time. For example, it is usually a good idea not to express an opinion until after reviewing all the evidence; otherwise, the expert may be portrayed as biased and overly eager to jump to a conclusion.

There are legitimate reasons for these concerns. Expert witnesses are expected to come under serious attack at trial. Use of an expert's own words against him, in context or out, fairly or not, can render him ineffective. Even a seemingly innocent communication from the lawyer may be portrayed as an attempt to sway the witness's objectivity.

It therefore is prudent for opinion witnesses always to assume (absent being told otherwise by the sponsoring lawyer) that anything committed to writing in the course of consultation can be obtained by the opposing attorneys, whose job it may be to discredit the expert's opinions regardless of their validity or apparent unassailability.

Lawyers who retain experts in litigation generally do not represent one of their expert witnesses regarding events related to the litigation in which the witness is to testify; joint representation of the expert and client would create a conflict of interest. Thus, an expert witness should not think of the sponsoring lawyer as his own. If the need for legal advice arises, an independent lawyer who is not involved in the litigation should be consulted.

Physical Examinations and Reports/Disclosures of Opinions

Treating physicians often become involved in litigation not at the special request of an attorney but rather as a result of simply treating patients. Their credibility may be greater, all other things being equal, than that of a "retained" expert who has been selected by counsel. The treating physician's report may be even more persuasive to a jury if the conclusions expressed in it were reached without prior consultation with counsel or even without knowledge or anticipation of a lawsuit.

In addition to the treating physician's examination, many courts allow the defendant in a personal injury case to arrange for the plaintiff to be examined and tested by a physician of the defendant's choice. The rationale for permitting these examinations, which usually are called independent medical examinations (IMEs), is simple fairness. The plaintiff's treating physician may hold certain biases because of his relationship with the plaintiff, his family, or the plaintiff's lawyer or his law firm. Thus, the jury is permitted to hear from an independent expert to get both sides of the story.

If the independent expert's opinions are not supported by his own physical examination or tests, he may, depending on the circumstances, be at a disadvantage when rendering his testimony. Consider the likely effect on a jury of an affirmative answer to this question: "Sir, you have told the jury that Mr. Smith does not have brain damage, the opposite of what his family doctor of 25 years has said, and yet you have never talked with, met, or even laid eyes on Mr. Smith?" However, an IME may not be necessary when the scope of the expert's testimony is limited or when existing records provide an adequate basis for the opinions under the circumstances.

Defendants usually are limited to one IME of a plaintiff, unless he complains of more than one "injury" in the lawsuit. If, for example, a plaintiff claims that he suffered brain damage from head trauma and that he has depression as a result of the injury, the defendant might seek one IME regarding the supposed brain damage and another regarding the plaintiff's psychological condition.

In a typical clinical setting, absent unusual circumstances, the patient's motivation in making his complaints usually is not questioned or even considered by the physician. Most people go to a physician because they are sick and want to feel better. When, however, a patient has filed a lawsuit in which the amount of money that he will receive may depend on the existence and severity of his symptoms, motivation assumes greater importance and should be considered together with all other relevant medical factors (see Ch. 1). The IME physician may be the only physician who considers motivation in examining the plaintiff and in formulating his opinions for trial.

With respect to experts retained specifically for litigation, many courts require that a report that summarizes expected opinions and their bases be produced before they testify. Others require that "disclosures" that contain similar information, generally written by counsel, be provided in advance of depositions or trial testimony. The expert should discuss with the attorney precisely what will be required in a report generated for the litigation before he begins writing it. The safest practice is to assume that any "drafts" that are sent to counsel in advance of the "final" report may be produced to the other parties in the litigation. If changes are made in the "draft" after the attorney has reviewed and discussed it with the witness, the opposing lawyer will be in a position to argue that the changes were made at the insistence or suggestion of counsel, thereby calling into question the witness's objectivity and possibly the validity of his conclusions

An expert's destruction of drafts, notes, or even writings such as telephone messages may lead to the inference that those documents contained entries that were unfavorable to the sponsoring party. Thus, the destruction of any document that relates to the litigation, regardless of its apparent insignificance, should be discussed with counsel before it occurs. Quite simply, it is impossible to demonstrate that the content of a document was trivial or unimportant once that document has been destroyed.

Theories of Liability

As with all testimony and other evidence, expert opinions must be relevant to an ultimate issue in the case. This means that the opinions must make it more likely than not that a proposition the jury will be asked to decide is true. There are certain prescribed propositions, called "elements," regarding which the plaintiff generally must present "substantial evidence" before his case can even be submitted to a jury. One example is the fact of negligence on the part of a defendant in a negligence case. If the plaintiff fails to present substantial evidence on any element, the defendant prevails without the necessity of presenting any of its own evidence. Generally, evidence regarding a particular element or issue is substantial when it is of sufficient force to cause reasonable minds to differ as to the proper resolution of that issue.

Many theories of recovery are available to plaintiffs in civil actions, depending on the facts of the case. The most frequently invoked theories in personal injury cases are negligence and strict liability in tort.

Negligence

In a negligence case, the elements on which the plaintiff is required to adduce substantial evidence are (1) a breach of a duty owed to the plaintiff through the defendant's failure to use the amount of care that an ordinary person in the same or similar circumstances would have used; (2) causation between the negligent act or omission and the injury; and (3) damages such as medical expenses, lost wages, or pain and suffering. Expert medical testimony usually is required on the issue of causation and typically is relevant on the issue of damages. Expert testimony from other professionals, such as engineers, may be relevant to the issue of liability or negligence.

Strict Liability

Briefly, the doctrine of strict liability in tort allows plaintiffs to recover damages in cases without demonstrating negligence (the failure to use ordinary care) on the part of the defendant. Strict liability cases usually are predicated on proof that the defendant marketed a product that was "defective" in that it was "unreasonably dangerous" when used as intended. As in negligence cases, plaintiffs in strict liability lawsuits must present substantial evidence regarding causation and damages, both of which usually involve expert testimony. Other professionals typically testify on the issues of product defect (engineers, human factors experts), the dollar value of plaintiff's financial losses (economists), and the like.

Depositions and Trial Testimony

Although their purpose often is the same, the experiences of deposition and trial testimony differ dramatically. One might think that because depositions

are held outside of the courtroom (usually in a private office), typically with fewer people present, they might provide a more relaxed atmosphere for a witness's testimony. During depositions, however, particularly those that are not videotaped, lawyers sometimes engage in behavior that they would not exhibit while in the presence of a judge and jury at trial. Occasionally, "special masters" (temporary judges of sorts) are appointed to observe and keep order during depositions. These aberrations are unfortunate but infrequent.

Depositions

A deposition is a formal session held outside of the courtroom, almost always in advance of trial, during which a witness's sworn answers to an attorney's questions are recorded stenographically by a court reporter and, under some circumstances, on videotape (Ziskin and Faust, 1988)

It may be helpful to consider depositions as being of two general types: those taken for "discovery" purposes, and those taken for "evidentiary" purposes. Discovery depositions, as their name implies, are examinations of an opposing party's expert, conducted at least in part to gather information regarding his opinions. Evidentiary depositions are taken by the party who has endorsed or identified the witness as an expert. They serve the purpose of preserving the witness's testimony for later presentation to the judge or jury.

In some jurisdictions (Illinois, for example), the rules of court draw a clear distinction between the two types of depositions, with different permissible uses for each. In other jurisdictions (such as the federal courts), the distinction is not a formal one but instead is simply a shorthand way of identifying the party who will conduct the primary examination of the witness and his main purpose in doing so.

Discovery Depositions

Attorneys take discovery depositions of experts to learn the bases of their opinions and to lay a foundation for rebuttal of those opinions at trial. In most courts in the United States, an attorney who has retained an expert for the purpose of giving testimony must identify the witness to the other parties in the lawsuit in writing within a prescribed period before trial. This "disclosure" or "endorsement" typically also must provide at least some information regarding the substance of the expert's opinions. Thus, in most lawsuits, the examining lawyer already has learned, long before the discovery deposition of the expert, the substance of the opinions that are expected to be rendered. Also, many jurisdictions require that the documents (medical records, literature, and the like) on which the expert has relied in forming his opinions be identified or produced before the deposition takes place.

Obtaining a Discovery Deposition. A competent attorney in an important case will have very little "discovering" of the expert's opinions and their bases to perform by the time the expert's discovery deposition is taken. He already will know what opinions will be rendered, the general bases for those opinions, and how he intends to rebut them. The main purpose in taking so-called discovery depositions in many cases is to force the witness to commit to his testimony (i.e., to "lock him in" or "tie him down")—and to obtain what seemingly are inconsequential admissions or concessions for later use, perhaps in ways that are unforeseen by the witness, at trial.

Preparation for Discovery Depositions. An expert witness should be as prepared for a discovery deposition as he is for trial testimony or a deposition taken for evidentiary purposes. In fact, if the examining lawyer does his job, the expert's trial testimony, including his opinions and their weaknesses, will be set in stone at the conclusion of the discovery deposition.

Scope of Testimony The scope of the opinions that an expert is expected to render must be determined in advance of the discovery deposition and adhered to during it. Will you simply teach the important medical and scientific principles to the jury, or will you render opinions? Will you testify regarding the existence or extent of plaintiff's injuries or solely as to diagnosis? Or causation? If an expert witness testifies regarding an issue to which he has not given sufficient thought or analysis, the other opinions that he gives may be rendered suspect by implication.

Adequacy of Foundation for Opinions. Although lawyers occasionally forget it, jurors tend to expect a certain degree of civility between professionals, including testifying experts and the lawyers who cross-examine them. Both presumably have been the beneficiaries of valuable educations and have been fortunate in their professional lives. Thus, direct, personal attacks on expert witnesses by cross-examining lawyers are rarer than one might expect, although they are used both legitimately and effectively against some "ex-

perts." On balance, it is far less risky for an attorney to attack the foundation of an expert's opinions rather than the expert himself.

Examination of All Relevant Evidence and Other Materials. One of the simplest and frequently most effective means of challenging an expert's conclusions consists of demonstrating, through the witness's own testimony, that, at the time he reached his conclusion for the litigation, he was misinformed or was given only half the facts (McQueen, 1979). The examining witness may even seek to imply through his questions and the answers that they evoke that information was purposefully withheld from the expert by the opposing lawyer solely because it was detrimental to his case. To avoid embarrassment, an expert witness must assure himself that he has been provided with all records and information that could conceivably affect the opinions he expects to give. This must be done before he commits his opinions to writing and before his discovery deposition commences.

Prior medical records and reports of other examinations in the litigation. When purported victims of personal injuries file lawsuits seeking money damages for those injuries, they place their medical condition at issue and thus, to some extent, compromise the confidentiality afforded by the physician-patient privilege. The extent to which the privilege is waived varies among jurisdictions. At a minimum, counsel for the defendant is entitled to obtain records of examination and treatment that are related to the injury at issue. The "discoverability" of records, however, may vary, depending on their type (APA, 1992; Tranel, 1994).* In some jurisdictions, the privilege is lost completely or "waived" with respect to typical, clinical records, allowing the opposing lawyer to contact and communicate with treating physicians and other medical providers concerning the injury or condition at issue.

One of the first things that lawyers who litigate personal injury lawsuits do in preparing cases for trial is to compile every medical record they can find that reflects examination or treatment of the plaintiff, regardless of the reason for that examination or treatment. The importance of a review of all those records by any expert who expects to provide opinions on diagnosis, causation, or other issues cannot be overstated.

In a recent lawsuit that we defended, the plaintiff claimed that he had suffered hearing loss and intolerable tinnitus while working for the defendant. His causation expert testified that virtually all the plaintiff's hearing loss and tinnitus was caused on the job. With some persistence, we obtained old records from an out-of-town Veteran's Administration Hospital that reflected the plaintiff's admission for psychiatric observation because "this constant ringing in my ears is making me crazy. I need to be on disability." That hospitalization occurred more than 4 years before the plaintiff first worked for the defendant. It was not necessary to question the plaintiff's causation expert, who was unaware of the prior hospitalization, about that record specifically during his discovery deposition. He did admit, in the abstract, that no accident can cause symptoms to manifest themselves 4 years earlier, but even that self-evident proposition need not have been established to lay a sufficient foundation for cross-examination at trial.

School and employment records. School and employment records are no less important than medical records, particularly in cases that involve claims of brain injuries (see Ch. 25). If, for example, a plaintiff claims that he is "unemployable" because he is no longer able to perform his most recent "heavy industrial labor," prior successful work in a sedentary occupation may disprove that claim. Standardized tests that may have been administered in advance of or during the plaintiff's primary, secondary, technical, or college education may be the best indicator of employability in the light of his claimed injury, particularly when those results are combined with other evaluations contained in his school records.

Our firm defended what remains the longest jury trial in U.S. history, involving injuries that were alleged to have been caused by dioxin exposure. One of the plaintiffs' medical experts testified that one plaintiff, a high school student, had been rendered "a markedly and pervasively deviate child." Investigation revealed that the plaintiff's accomplishments included his election as president of his class and as a member of the National Honor Society (presumably the deviate wing). The expert had not bothered to look at the plaintiff's high school yearbook, and plaintiff's lawyer had not thought to get it for him.

Depositions of other witnesses, including plaintiff and treating physicians. Physicians nearly always rely on a plain-

* Care should be taken in the release of any patient records, even when an authorization for release is executed by the patient. This is particularly important with respect to "raw" psychological data and other sensitive materials

tiff's medical history in rendering a diagnosis and opinions on such matters as causation. Just as statements made by the plaintiff before and during examination yield information about that history, so does his deposition. It should be considered no less important than the history that he gave to other physicians. In fact, because depositions are recorded in the plaintiff's own words, under oath and with counsel present, they make a more reliable source of historical data than notes made by a physician incident to examination or treatment.

Similarly, just as review of the plaintiff's prior medical records and his deposition may be indispensable in rendering valid opinions, the depositions of his treating physicians and other experts may be just as valuable.

Use of Authoritative Literature and "First-Hand" Experts. Attorneys frequently ask experts if certain literature is "authoritative" or relied on by members of the expert's specialty or field in carrying out their profession. Literature that is sufficiently reliable and established and that contradicts statements made by an expert in a lawsuit generally may be used to confront him during cross-examination (Perr, 1977). Some expert witnesses attempt to avoid impeachment by authoritative literature by refusing to admit that any literature is authoritative; that approach may detract from their credibility, depending on how widely known the literature is and what the other experts in the case say about it. It would seem odd, even to the average juror, for a medical expert to testify that he does not know whether the *Journal of the American Medical Association* or the *New England Journal of Medicine* are authoritative and relied on. The expert should remember that, by conceding that literature is authoritative, he is not vouching for everything in it. If confronted by literature that seems to contradict his testimony, the expert should be prepared to explain the reason for the apparent contradiction and perhaps to present other literature that agrees with him.

In brain damage cases, various diagnostic studies and tests, including neuropsychological batteries, often are administered by medical experts who seek to establish or rebut issues such as medical causation. The tests sometimes are administered, scored, or interpreted erroneously. The physicians, psychologists, neuropsychologists, and other scientists who actually developed the various tests occasionally are called on to testify in cases in which one of the opposing experts seeks to use the developer's testing methods improperly or for purposes that were not intended. Thus, it is imperative in litigation for the expert to assure himself that any tests on which he plans to rely have been administered precisely as prescribed, scored correctly, and used solely for the purpose for which they were developed.

In one case, a testifying expert had arranged for blood tests to be performed by a national laboratory. He then misinterpreted the results and claimed that the plaintiff was deathly ill: "The plaintiff's muscle damage is revealed by his abnormally low CPK." The pathologist at the well-known laboratory who had actually performed the test testified during his deposition that there was no disease known to medical science that results in a "low CPK" and that a low CPK was a "sign of good health." After a similar experience with another national laboratory, the expert stopped testifying against that defendant.

Inadequacy of Foundation for Opinions. Federal Rule of Evidence 703, which relates to the permissible bases of an expert's opinions, provides that

> **The facts or data in the particular case upon which an expert bases an opinion or inference may be those perceived by or made known to him at or before the hearing. If of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject, facts or data need not be admissible in evidence.**

Also, the Supreme Court (*Daubert v. Merrell Dow Pharmaceuticals, Inc.*), requires courts to examine the validity of the methodology used in reaching the opinion:

> **The inquiry envisioned by Rule 702 is, we emphasize, a flexible one. Its overarching subject is the scientific validity—and thus the evidentiary relevance and reliability—of the principles that underlie a proposed submission. The focus, of course, must be solely on principles and methodology, not on the conclusions that they generate. . . .**
>
> **We recognize that in practice, a gatekeeping role for the judge, no matter how flexible, inevitably on occasion will prevent the jury from learning of authentic insights and innovations. That, nevertheless, is the balance that is struck by Rules of Evidence designed not for the exhaustive search for cosmic understanding but for the particularized resolution of legal disputes. . . .**
>
> **To summarize: "general acceptance" is not a necessary precondition to the admissibility of scientific evidence under the Federal Rules of Evidence, but 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. Pertinent evidence based on scientifically valid principles will satisfy those demands.

Attorneys would prefer to render all adverse opinion testimony in their cases inadmissible—or at least neutralize it in the jury's eyes—on the basis of inadequate foundation. Unless there are favorable entries in their records (e.g., "I think Mr. Smith is malingering"), the depositions of treating physicians, for example, often are taken by defendants as a "preemptive strike." The attorney hopes to demonstrate that the physicians are not qualified to give causation testimony or that their bases for reaching their conclusions on causation are inadequate (Ziskin and Faust, 1988). The latter objective may be preferable in some cases, because it appears less like an attack on the physician himself. The former objective usually is reserved for the expert who flaunts his disrespect for science, law, or both.

In a recent case defended by our firm, analysis of the medical literature on which the plaintiff's expert claimed to rely in reaching his causation opinions revealed that the literature did not support those opinions. During his discovery deposition, taken after he had formed and expressed his causation opinions in a formal disclosure, the expert testified that he did not know whether the first article on which he claimed to rely "would indicate one way or the other whether" the occurrences "would be capable of causing long-term brain or nerve effects," the injury claimed by the plaintiff. The second study was insufficient to support his opinions, because "they didn't look at chronic effects," such as those allegedly suffered by the plaintiff. Similarly, the third study on which he said he relied did not deal with "long-term brain or nerve effects." As it turned out, none of the literature was applicable.

Inaccuracy of Foundation for Opinions To avoid embarrassment, the assumptions or foundation for the opinions that an expert expects to provide should be verified to the extent possible by the expert himself, through a review of all available written documentation. If important assumptions are shown at trial to be inaccurate, the soundness of the reasoning applied to them will not matter.

In a case in which the plaintiff sought to recover for purported brain damage, his expert witness testified that the plaintiff's score on a neuropsychological test (a test called the "Writing to Dictation Test") was abnormal. In the sentence "Do you want to go out for a walk?" the plaintiff wrote his U's backward. Implicit in the conclusion that this response was caused by the occurrence at issue in the lawsuit was the assumption that the plaintiff began writing his U's backward after the occurrence. Examination of his school records, however, revealed backward U's on a form that he had filled out in college, 25 years before his supposed brain injury. The expert had not bothered to ask that those records be obtained before he formed and formally expressed his opinions.

Purpose and Propagation of Evidentiary Depositions

Evidentiary depositions are the equivalent of trial testimony, except that they are taken outside of the courtroom, usually in the same setting as discovery depositions, and are recorded stenographically for later presentation to the jury.

Evidentiary depositions are generally conducted by the lawyer who retained the witness and who seeks to preserve the testimony of that witness because of his unavailability for trial or for some other reason. These depositions frequently are videotaped so that the presentation at trial will be closer in character to live testimony, with the jury observing the witness's demeanor, hearing his tone of voice, and so on.

The previous discussion regarding discovery depositions as well as the following discussion on trial testimony should be kept in mind when preparing to give an evidentiary deposition.

Trial Testimony

It is generally accepted that "live" witnesses, ones who personally appear in the courtroom, are more effective than those who appear on videotape or whose testimony is read to the jury by one of the lawyers (Balabanian, 1980). Although the quality of videotaped depositions, and therefore their effectiveness, has improved throughout the years, the jury obviously is still in a better position to observe the witness when he is present. The witness can direct his testimony straight to the jury, can observe them, and in turn, can respond to their reactions. The purposes of live testimony are identical to those served by evidentiary depositions. Thus, all the matters discussed in this chapter regarding discovery and evidentiary depositions should be considered in preparing for live testimony at trial.

What to Expect

The stage of litigation at which an expert can expect to testify depends on whether he will be called as a witness by the plaintiff or the defendant. At the very least, by the time the expert is called to testify, the jury will have heard a summary of the most important aspects of the evidence from counsel for each party delivered in the form of opening statements. If the expert's testimony is sufficiently important, counsel will describe during opening statement the opinions he expects to elicit from the expert. Thus, in most cases, the jury already will be familiar, if only in a general way, with how the testimony or opinions relate to the issues in the case and to the other evidence that the lawyers expect to adduce.

Direct Examination

"Admissibility" of Opinions. The "admissibility" of medical and scientific opinions (i.e., the determination, made by the judge, as to whether the jury will be permitted to hear them) often is challenged in lawsuits, particularly when the theory on which the opinion is based is novel or controversial. One objective of discovery depositions may be to elicit testimony from the expert witness that will support an argument to the judge that the jury should not be allowed to hear his opinions. Thus, an expert who is expected to provide opinions during his testimony should be familiar with the standard by which their admissibility will be measured. Unfortunately, this standard also differs from court to court.

One widely used standard examines whether the scientific principle or methodology "from which the deduction is made" is "sufficiently established to have gained general acceptance in the particular field in which it belongs" (*Frye v. United States*). This standard questions the dependability, trustworthiness, certainty, scientific precision, or accuracy of the principle on which the inference to be presented to the jury is based

With the increasing number of experts who seek to render scientifically questionable opinions at trial, the courts are increasingly willing to examine the validity or reliability of those opinions and to exclude from the evidence questionable or unsupported opinions. However, the U.S. Supreme Court recently held that, in the federal courts, scientific opinions are not necessarily limited to evidence that is "generally accepted" in the fields to which they belong (*Daubert v. Merrell Dow Pharmaceuticals*).

Testifying experts should be prepared for questions, particularly during discovery-type depositions, whereby the attorney will seek to establish that the methodology used in forming the opinions were unreliable, unscientific, or speculative. When the expert relies on epidemiologic studies in determining whether a causal connection exists between an accident or exposure and a particular condition or symptom, questioning may seek to establish the following for purposes of attempting to persuade the court that the opinions are not admissible because their bases are unreliable:

1. Even the most scientifically valid study can establish only an association between a disease and an exposure or occurrence, not a causal relationship. The proof required in a civil case is of causation, not mere association. The relative risks evinced by the studies relied on by the expert are not statistically significant or sufficiently strong to warrant an inference of causation. (A relative risk that includes a number close to one, for example, or a confidence interval of less than 95 percent would render the study subject to plausible challenge.)
2. There are persuasive, valid studies that show no statistically significant elevated relative risk.
3. The designs of the studies that show no statistically significant relative risk were better than the designs of the studies that the expert claims show such a relative risk.
4. The studies on which the expert relies were poorly designed in that inappropriate control group data were used when either a more appropriate data set was available or no sufficient control data existed.
5. The studies do not demonstrate a dose response and thus cannot be shown to be relevant to the plaintiff's exposure.
6. The studies did not account for variations in individual susceptibility to the condition at issue.
7. The studies were not peer-reviewed or otherwise held out for critical comment.

Even if the expert's testimony on these points does not result in the exclusion of his opinions at trial, they often will provide an effective basis for cross-examination.

Form of Questions. Lawyers conducting trials are not permitted to testify for their witnesses. They are not permitted, on direct examination of their own

witness, to "lead" that witness's testimony with questions that suggest the response sought by the lawyer. Although cross-examination is said to be more difficult, many trial lawyers prefer it to direct examination precisely because "leading" questions, and the control that they provide over the interrogation, are allowed during cross but not during direct (Costello, 1981).

There are essentially two methods of conducting direct examinations, both of which involve different forms of questions. Before he testifies, as part of the preparation process, an expert witness should be told which method the interrogating attorney plans to use in asking his questions on direct examination.

The first method of conducting direct examinations uses questions that call for mostly unguided "narrative" responses by the witness. Attorneys prefer this method when conducting a direct examination of a witness in whom they have confidence, usually one who has experience on the witness stand or who has been prepared extensively. General questions such as "what was the next step?" or "what happened next?" call for narrative responses. When this method is used, a persuasive witness's testimony can be rendered even more convincing, because it goes unguided and therefore does not appear manipulated or controlled by the lawyer.

The second method of conducting direct examination uses fact-specific questions ("what, if any, weight did you give the Taylor study in reaching your opinion?") and gives the witness less control over the presentation of his testimony. This method may result in a more complete and better-structured examination. During actual examinations of witnesses, most lawyers blend the two methods, relying more heavily on one or the other depending on the strength of the witness and his familiarity with the issues in the lawsuit.

Diagnosis and Causation. A plaintiff in a lawsuit involving bodily injury is required to prove that a causal connection existed between the conduct at issue (e.g., negligence) or the condition at issue (e.g., defect in a product that renders it unreasonably dangerous) and the injuries for which he seeks compensation. He must, of course, first establish that he suffers from the condition complained of, which also usually involves expert testimony in the form of a medical diagnosis.

In all but the simplest of cases and in virtually all American jurisdictions, expert medical testimony is required to support the inference of causation. One exception is the so-called sudden onset rule whereby the jury may infer a causal connection between a defendant's conduct or defective product and an injury based on common experience and a showing of a temporal relationship (when, for example, the plaintiff is hit in the arm with a baseball bat, testifies that he felt pain immediately afterward, that there was no pain before the incident, and when a diagnosis of fracture is made shortly thereafter with no intervening trauma).

Causation opinions usually must come from a physician (or, in some cases, another professional who by training or experience is qualified to render a diagnosis and exclude, in a scientifically valid way, other possible causes) and usually must be expressed "to a reasonable degree of certainty" within the expert's field. The definition of that phrase can differ from jurisdiction to jurisdiction, depending on the circumstances, and may include opinions that basically are meaningless ("might or could") or essentially speculative ("greater than 50 percent probability"). Some experts assume, often incorrectly, that the standard for "reasonable degree of medical certainty" in the context of testimony in a lawsuit always is "more probable than not." An expert who expects to provide causation testimony in support of a plaintiff's claim should always consult with counsel who retained him regarding the extent of certainty on the issue of causation that will be required in that particular case, given the condition at issue and the law of the jurisdiction in which the lawsuit is pending.

Damages. Medical experts are in a unique position to provide evidentiary support for the dollar amount of a plaintiff's damage claim. Physicians, for example, often testify regarding the likelihood that future surgery or other treatment will be required and of its cost. They describe the extent to which the plaintiff's pain or discomfort is expected to improve or worsen. Also, medical experts frequently testify regarding a plaintiff's ability to hold gainful employment, thereby providing a basis for an award of future lost wages and benefits.

As with all other issues, the expert witness should not stray from the area of his expertise in giving testimony that relates to damages. It is, for example, one thing for a physician to opine that a plaintiff's injuries prevent him from returning to his previous employment (if a sufficient foundation on which to base that opinion is provided) but quite another to

state that he is "unemployable." Expression of the latter opinion would require expertise in such matters as vocational rehabilitation and training, the prevailing job market, and other matters that are likely to be far outside the scope of a physician or other provider's discipline.

Cross-Examination

There are two principles of cross-examination with which most nonlawyers are familiar: ask leading questions, and never ask a question to which you do not know the answer. An expert testifying at trial or during an evidentiary deposition should expect a competent cross-examiner to adhere, more or less, to these principles.

Form of Questions

Questions on cross-examination typically are not questions at all but statements. ("You were denied board certification seven times because you failed the test, am I right?" "Doctor, you reached your opinions in this case without even having seen this record, didn't you?") The ability to respond effectively and appropriately to cross-examination often is the difference between a good witness and a bad one.

Jurors usually are able to discern when a witness is being evasive and do not like witnesses who refuse to answer questions. Argument and advocacy by an expert witness during cross-examination may call his objectivity into question, showing that he is biased to such an extent that he does not want the jury to know the truth. Also, attempts to argue with essentially correct statements posed during cross-examination based on the implications that they might raise can backfire by underscoring both the statement and the inference. Thus, the best option often is to simply acknowledge that the statements are correct during cross and then to explain during redirect examination why, notwithstanding their accuracy, those things do not matter.

Use of Discovery Deposition at Trial

Lawyers take discovery depositions with later cross-examination in mind. If, during trial, the expert contradicts his deposition testimony, he can expect to be confronted with that testimony, in the most dramatic fashion possible, in front of the jury. It therefore is of critical importance that the expert be thoroughly familiar with all his prior testimony, including testimony rendered on similar issues in other cases, before he testifies at trial.

QUALIFICATIONS FOR EXPERT TESTIMONY

Plaintiff's lawyers often hope to obtain their expert testimony regarding diagnosis, causation, prognosis, and damages from one of plaintiff's treating physicians whom plaintiff saw before he filed his lawsuit. In contrast with an expert who has been selected by the plaintiff's lawyer, the treating physician is likely to appear more independent and trustworthy.

Similarly, defense lawyers prefer to elicit opinion testimony favorable to their clients from treating physicians rather than from their own experts. In fact, favorable testimony from a treating physician for the defendant can be even more persuasive than favorable testimony for the plaintiff, because treating physicians often are seen as having developed some loyalty, albeit in a clinical context, to their patients. If a treating physician supports a defense lawyer's case, he may be the most important defense witness in the lawsuit.

Even when favorable opinions are not likely, experienced defense lawyers often take the treating physician's deposition to eliminate him as a potential causation witness before the plaintiff's lawyer has a chance to adduce the testimony. Before the doctor states his opinions (and perhaps before he has even formed them), defense counsel may seek to convince him that he does not know enough to support a causation or even a diagnostic opinion to a reasonable degree of medical certainty (often the standard that those opinions must meet to be presented to the jury).

In one of our recent cases, plaintiff claimed that he developed leukemia from exposure to benzene. It was possible that if his treating oncologist's deposition were taken by the plaintiff's lawyer first, he might testify as to a causal connection between the exposure and the pathology. Thus, we sought to eliminate this physician as a causation witness through a discovery deposition. This abbreviated version of the testimony is representative of what is asked when this tactic is used:

Q: Doctor, you are an oncologist. Do you have a background in toxicology?

A: Nothing in particular except for medical school.

Q: Do you have a background in epidemiology?

A: Again, I studied it in medical school 30 years ago and I read studies in journals

Q: Do you attend seminars in toxicology or epidemiology?

A: Not specifically, no.

Q: Are you familiar with the principles that scientists use in evaluating toxicologic and epidemiologic studies?

A: As I said, I read studies in the journals, but I cannot say that I am an expert in evaluating them in those fields more than most others.

Q: For example do you know what they mean when they talk about an "odds ratio?"

A: I think it relates to risk, but I would have to check the books to be more precise.

Q: And regarding animal studies, do you know which animal species are most like humans when it comes to causation of acute lymphoblastic leukemia?

A: All I know is that they usually study it in rats and mice.

Q: So if a chemical causes leukemia in rats but not in mice, do you know whether that would be better than if it caused it in mice and not in rats in terms of risk to humans?

A: I don't know.

Q: Do you know what scientific flaws in the benzene literature have drawn criticism, or whether there even has been such criticism?

A: I am not familiar enough with it to say.

Q: Are the benzene levels that are discussed in the literature more or less than the plaintiff claims to have had?

A: I don't know.

Q: Do you keep up with the literature pertaining to the toxic effects of benzene?

A: No.

Q: I take it then, Doctor, that the determination of whether benzene had caused any particular person's leukemia would be a matter for a different specialty than yours and that you would not be able to express an opinion to a reasonable degree of medical certainty that benzene had caused someone to develop leukemia?

A: No, I couldn't do that. I can only give a diagnosis of leukemia; I don't know for sure what caused it.

Q: Determining whether benzene caused someone's leukemia would be a matter for someone of a different specialty than yours?

A: Yes.

Had the last two questions been asked first instead of last, the attorney would run the risk of this response:

> **I am not a toxicologist or an epidemiologist, but I am a medical doctor and I know that exposure to benzene is a risk factor for leukemia from literature that I have reviewed. I know that Mr. Smith has leukemia and apparently he was exposed to quite a dose of benzene, at least that's what he told me. Since I am not aware of any other risk factors from Mr. Smith's history, it was likely the benzene that caused the leukemia.**

This type of reasoning can be challenged quite easily, but the point is that the first set of answers rendered challenge unnecessary because the expert disqualified himself from giving any opinions as to causation.

Technical Requirements/Challenges to Credentials

The general technical qualifications that are necessary to render expert testimony are usually that the witness is qualified as an expert by knowledge, skill, experience, training, or education. The type and amount of knowledge, skill, etc., required depends on the subject matter of the opinion and the facts of the lawsuit.

The expert should expect the opposing attorneys to investigate the accuracy of every credential he claims. They do so not only for the purpose of laying a foundation for the exclusion of his opinions but for use during cross-examination at trial if the opinions are admitted into evidence. Experts who exaggerate their credentials risk their credibility. In one of our cases, an expert for the opposing party claimed on his C.V. to have been an adjunct professor at a community college. That is obviously a credential of only marginal importance, but it became significant when we took the deposition of the registrar of the college, who testified that the expert had taught only one class for 3 hours on one night a decade before and was not considered a member of the faculty.

The "Jack of All Trades" Problem

Some witnesses will claim to be experts on almost any topic. One expert in St. Louis frequently is cross-examined with a list of 26 largely unrelated subjects on which he has testified. The list is reviewed one item at a time, with a different subject for each of the letters "A to Z."

We know from reviewing prior deposition transcripts that one of the experts we have encountered has changed his area of specialization to fit the current lawsuit. In a case that involved immunology, he said that he held a Ph.D. in microbiology, was a professor of immunology and ran a university laboratory called the "Laboratory of Immuno-Parasitology." In an earlier case, where the issues related to biochemistry, he testified that his Ph.D. was in biochemistry, that he was a professor of biochemistry, and that he headed a university laboratory called, not surprisingly, the "Laboratory of Biochemical-Parasitology." Jurors, of course, do not react favorably to such revelations.

FEES

Experts who are perceived by jurors as "hired guns" are less likely to persuade them than experts who have been paid primarily for treatment or for other reasons unrelated to litigation. Every expert should expect to be questioned about the amount of time that he has spent on the case and the dollar amount that he charged. Furthermore, the inquiry is not always limited to fees paid in the case for which the deposition is being taken.

Excessive hourly fees may give the appearance that the witness is interested mainly in money and that he has been "bought off." Also, reluctance on the part of litigants to pay excessively high fees has led to the practice of requesting that the court place reasonable limits on the hourly rate that an opposing expert can charge for his time during his discovery deposition. These and similar requests frequently are granted by the courts, even when the request is made after the deposition has been concluded.

How much should an expert witness charge for his time? One reasonable and relatively safe means of setting a fee is to determine the opportunity cost of testifying. If the expert can legitimately say that for every hour he spends on a litigation-related matter he loses a certain number of dollars from his clinical practice, a jury is likely to accept that hourly rate as reasonable under the circumstances. Experts who do nothing professionally but testify obviously cannot use this method. Jurors may be prone to conclude that an expert who testifies for a living was overpaid for his time (regardless of the amount that he charged) and that his opinions are biased, simply because he has no real job.

Some institutions, including several universities, are now issuing standardized guidelines for use by their faculties and staffs in setting hourly rates for consultation. Rates calculated pursuant to such guidelines may be easier to justify to a jury than some arbitrary hourly fee that bears no relationship to the opportunity cost of testifying.

Many experts believe that the hostility that they may be required to endure as a witness justifies an hourly rate in excess of the amount that they earn pursuing the typical activities of their profession. Jurors are unlikely to accept this justification unless they actually observe in the courtroom the hostility that serves as the basis for the fee. As we discuss above, that circumstance is rarer than one might expect.

It would be unethical for an attorney to pay an expert in litigation a percentage of the plaintiff's recovery or to otherwise link the expert's fee to the "result" in the case, even though that result may have been obtained in part as a consequence of the expert's testimony. This ethical principle is probably superfluous because such a fee arrangement, once disclosed, would destroy any expert's credibility in the eyes of reasonable jurors. Similarly, attempting to justify an inflated hourly rate by reference to the comparative "size" or "importance" of the particular litigation in which the expert is involved is likely to have the same undesired effect on the jury.

CONCLUSION

When an expert chooses to become involved in lawsuits by rendering testimony, the importance of preparation and investigation, which must be fully completed before any opinions are committed to writing in any form, cannot be overstated. He must be sure that the foundation for his opinions is solidly based in the scientific method, and he must anticipate, in advance of presenting his testimony, the bases on which those opinions will be challenged. Also, the expert must understand fully the scope of

his expected testimony and limit his opinions to the subjects on which he has been designated to testify.

Expert testimony can be indispensable to the just resolution of lawsuits. The increasing willingness on the part of a few witnesses to "say anything" for a price (and the continued willingness on the part of many courts to allow them to do so) merely underscores the critical importance of involvement in litigation by reputable, honest experts who base their testimony on generally accepted medical and scientific principles and on strict adherence to scientifically valid methodologies. Experts who do not wish to subject themselves to the hostility and professional scrutiny that testifying occasionally entails can still contribute to keeping the process "honest" by participating in litigation on a consulting basis.

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WORKERS' COMPENSATION UPDATE

E

Iris J. Post
Workers' Compensation Commissioner

September 23, 1998

PUBLISHED SUPREME COURT AND COURT OF APPEALS ON JUDICIAL REVIEW OF WORKERS' COMPENSATION COMMISSIONER

AND

FINAL AGENCY ACTION / APPEAL DECISIONS

IOWA DEFENSE COUNSEL ASSOCIATION

1998 ANNUAL MEETING AND SEMINAR

PUBLISHED SUPREME COURT AND COURT OF APPEALS ON JUDICIAL REVIEW OF WORKERS' COMPENSATION COMMISSIONER

E

CUMULATIVE INJURY - DATE OF INJURY

George A. Hormel & Co. v. Jordan, 569 N.W.2d 148 (Iowa 1997).

Hormel hired Gary Jordan in 1984 as a meat processing plant laborer. The daily routine of heavy lifting and pushing eventually took its toll on Jordan's right shoulder. Jordan first visited a company physician on September 15, 1988. He was diagnosed as having a subluxating shoulder. While Jordan lost no time from work due to his shoulder injury, he testified that he was constantly stiff and sore. Over the next three years, Jordan saw a series of employer-authorized physicians and therapists, all of whom concurred in the subluxation diagnosis. Dr. Sinesio Misol examined Jordan's shoulder on October 1, 1991. The orthopedist was the first to rate Jordan's injury. Thereafter a licensed physical therapist hired by Hormel rated Jordan's work-related disability.

Relying on the physical therapist's rating, Hormel issued a check to Jordan on January 14, 1992 representing 60 weeks of permanent partial disability benefits. Jordan responded with a request for interest dating back to September 15, 1988. Hormel contested its liability for interest.

Jordan sought arbitration over the interest dispute. Although his claim for interest cited an injury date of September 15, 1988, his original notice and petition filed

with the industrial commissioner alleged an injury date of October 1, 1991. The industrial commissioner affirmed a deputy industrial commissioner's decision that found Jordan suffered a work-related cumulative injury which manifested itself on October 1, 1991 when he first learned that his injury was permanent; that Hormel had actual notice of the injury; that Jordan's claim had been filed within the two-year statutory period; that Jordan's industrial disability was 20 percent; and that interest began accruing on October 1, 1991—at the onset of permanency.

The supreme court found that substantial record evidence supports the conclusion that not until October 1, 1991 did Jordan have knowledge of the permanent impairment to his shoulder, nor did he realize the causal impact that injury would have on his job with Hormel. Jordan first learned from his visit to Dr. Misol on October 1, 1991 that he would not recover from the cumulative injury to his shoulder, and that permanent restrictions on his work activities would be required. The court rejected Jordan's invitation to add a third element of "compensability" to the *Tasler* manifestation test, namely that a workers' compensation injury does not occur until the claimant has received a permanency rating.

The court also found that the date of cumulative injury was fixed by the industrial commissioner at October 1, 1991. As a result Jordan's claim fell squarely within the two-year statutory period.

The court further found that the record revealed that Hormel had actual notice of the developing injury within the time required by Iowa Code section 85.23. Hormel's managers were continually apprised of Jordan's shoulder problem. Hormel's plant manager accommodated Jordan by

assigning tasks that limited strenuous overhead lifting and pushing of heavy tubs. Also significant to the question of notice of cumulative injury was the finding that Hormel authorized a series of physicians to examine Jordan's shoulder from 1988 to 1991. In fact, Dr. Misol's October 1 memorandum on which Jordan based his claimed date of injury contained a signed notation that it was mailed to Hormel on November 22, 1991.

Lastly, the court found that although the many medical opinions considered by the fact finders were not unanimous in their causation conclusions, substantial evidence supported the overall finding that cumulative work-related trauma caused Jordan's shoulder to subluxate, resulting in permanent partial impairment.

DISABILITY, EXTENT OF INDUSTRIAL DISABILITY--EMPLOYER'S ACCOMMODATION

Murillo v. Blackhawk Foundry, 571 N.W.2d 16 (Iowa 1997).

Jose Murillo was injured while working as a welder for Blackhawk Foundry. Murillo injured his hip and back and later re-injured his back on the job. When, because of his physical limitations, Murillo could no longer work as a welder, Blackhawk provided him with another job as a core cleaner. In this new position Murillo received approximately the same hourly wage he had received as a welder, and was able to put in longer hours.

The supreme court noted that the industrial commissioner in determining the extent of Murillo's industrial disability had discussed that the severity of claimant's industrial disability was mitigated by the fact that the employer that had fully accommodated any and all of the claimant's work restrictions. Murillo contended the

commissioner's decision was in conflict with *Thilges v. Snap-On Tools Corporation*, 528 N.W.2d 614 (Iowa 1995), a decision filed shortly after the industrial commissioner filed his decision. The court discussed *Thilges* and *Quaker Oats Co. v. Ciha*, 557 N.W.2d 143 (Iowa 1996) and concluded that they did not decide whether the industrial commissioner could consider whether the newly-furnished job--and the injured worker's ability to function in it--cast light on the injured worker's ability to earn a living in the market place.

The court announced that the proper rule should be that an employer's special accommodation for an injured worker can be factored into the award determination to the limited extent the work in the newly created job discloses that the worker has a discerned earning capacity. To qualify as discernible, it must appear that the new job is not just "make work" provided by the employer, but is also available to the injured worker in the competitive market. The court acknowledged that the rule, like many others, is easier to state than it is to apply. There was no indication in the record here that core cleaner positions are available in the labor market or that Murillo's pay was comparable to that of other core cleaners. In short, the record was inadequate for determining the issue.

The court thought the record here called for a remand for additional evidence. The case was remanded to accord the employer the opportunity to make an appropriate showing on the accommodation question.

DISABILITY; EXTENT OF SCHEDULED MEMBER DISABILITY--CONSTITUTIONALITY OF SCHEDULE--NATURE

Sherman v. Pella Corp., 576 N.W.2d 312 (Iowa 1998).

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Apart from a two-year hiatus in the late 1970s, Sharon Sherman, since 1972, worked exclusively for Pella Corporation or its predecessor, Rolscreen. For the past 13 years Sherman suffered severe headaches. In the early 1990s, wrist and elbow pain also began to plague her. In October 1992, an orthopaedic surgeon diagnosed her condition as carpal and cubital tunnel syndrome in both right and left arms. In December 1992 and January 1993 surgery was performed on both arms. Although her condition improved somewhat, she continued to have complaints of debilitating pain in her wrists, arms, shoulder, neck and head.

In June 1993 Sherman returned to the treating surgeon. Over time, he performed various tests to assess Sherman's condition. He determined that Sherman suffered some residual effects of carpal tunnel syndrome in her right arm but that her left arm had healed. Based on the tests he performed, he could find no objective proof to explain the cause of Sherman's pain. In particular, one of the tests showed no signs of claudication, a manifestation of thoracic outlet syndrome.

On July 8, 1993 the treating surgeon referred her to a physical therapist for an impairment rating evaluation. Utilizing the AMA *Guides to the Evaluation of Permanent Impairment (Guides)*. The physical therapist concluded Sherman suffered a three percent permanent partial impairment of the right hand but no impairment of the left hand or of either arm. The three percent impairment of the

right hand was attributed to decreased range of motion and sensory loss. Relying on the *Guides*, the treating surgeon agreed with the three percent impairment rating.

On advice of her attorney, Sherman sought treatment from a board certified specialist in physical medicine and rehabilitation. After seeing Sherman on October 1, this doctor's impression was that Sherman suffered from thoracic outlet syndrome, myofascial neck pain, and headaches which "appear to be related to her work activities" and gave Sherman impairment ratings considerably higher than those of the physical therapist and the treating surgeon.

In February 1993 Sherman filed for workers' compensation benefits. On appeal to the industrial commissioner the commissioner found that Sherman suffered carpal tunnel syncrome and cubital tunnel syndrome, both of which were work-related. However, the commissioner refused to find that these conditions were such as to extend Sherman's impairment into a body as a whole disability. Rather, the commissioner determined these conditions were scheduled injuries.

As to these scheduled injuries, the commissioner considered the *Guides* as the "best evidence" of an appropriate impairment rating and accepted the treating surgeon's and physical therapist's ratings because "they are consistent with the objective findings, restrictions and other evidence in this case."

On appeal to the supreme court Sherman contended (1) the Iowa scheduled member system was unconstitutional, (2) she was entitled to industrial disability for unscheduled injuries, and (3) the commissioner erred in determining her benefits.

Sherman argued that women suffer carpal tunnel syndrome, a scheduled injury, more frequently than men do. Men, she asserted, suffer back injuries, a *nonscheduled* injury, more commonly than women do. Thus, she concluded women's injuries are more often scheduled and men's unscheduled. Because she believed scheduled member benefits are generally smaller than unscheduled benefits, Sherman asserted section 85.34(2) violates all women's equal protection rights as well as her own.

The Iowa Supreme Court examined a 1979 United States Supreme Court decision to address the equal protection challenge to the statute based on gender. Here, the only record evidence bearing on the question of "discriminatory purpose" was the treating surgeon's testimony that studies show carpal tunnel syndrome is more prevalent in women than in men because of physiological differences between the two sexes. There was no similar record evidence that a loss of a finger, hand, arm, leg, toe, eye or disfigurement of the face or head is more prevalent in women than in men.

Given this state of the record, the court did not reach the question whether, when the legislature enacted or re-enacted the scheduled member injury statute, it was aware the statute adversely affected more women than men. The court held that Sherman had simply failed to show that the scheduled member injury statute "reflects a purpose to discriminate on the basis of sex." The court also concluded that Sherman had failed to show how the scheduled injury system together with the use of the *Guides* denied her equal protection.

The treating surgeon noted that the results of Doppler screening studies, a noninvasive objective test, were normal, ruling out intermittent claudication. He therefore

concluded there was no objective support for a thoracic outlet syndrome diagnosis. In addition, he believed repetitive work activity such as Sherman was doing cannot cause thoracic outlet syndrome. Although he agreed that Sherman did exhibit some symptoms that were consistent with thoracic outlet syndrome, he ruled out that diagnosis because there was no objective proof of an abnormality, only symptoms.

The commissioner gave greater weight to the treating surgeon's opinion because it was consistent with objective testing that showed the underlying condition of claudication was not present. The commissioner similarly found Sherman failed to prove the myofascial neck pain and headaches were causally related to her work. The commissioner found that the physical medicine specialist based her opinions on subjective complaints from Sherman and not on objective tests. In addition, the commissioner found that this doctor attributed the problems to both work and nonwork conditions and that it was unclear whether she had an accurate history of Sherman's 13-year history of headaches. The commissioner explained why he accepted the treating surgeon's opinion that Sherman's conditions were not work-related rather than the opinion of the physical medicine specialist. The court found substantial record evidence supported the commissioner's explanation. The court held that because Sherman failed to prove the thoracic outlet syndrome, the myofascial neck pain, and headaches were work-related, she failed to prove the scheduled injuries affected her nervous system, an unscheduled member.

The commissioner determined that Sherman had established a disability of three percent of the right

hand. He also determined she had not established a disability to the left hand or arm. In effect, the commissioner accepted the ratings of the physical therapist that arrived at this determination utilizing the *Guides*. The treating surgeon concurred in the disability rating.

Citing to rule 873 IAC 2.4 the court noted that when relying on medical evidence, the commissioner may use the *Guides* for determining the disability of a scheduled member. The court held that the commissioner was on solid ground in considering the *Guides* when assessing the medical evidence before him. The commissioner found the ratings of the physical therapist and treating surgeon were consistent with the objective findings, restrictions and other evidence in the case.

Although Sherman and her husband testified that her injuries rendered her incapable of performing basic household chores and caused her pain, the court found that it could not say the scheduled injury ratings the commissioner came to lacked substantial record evidence.

ELECTION OF REMEDIES

Danker v. Wilimek, 577 N.W.2d 634 (Iowa 1998).

On September 17, 1989 Wilimek was operating a truck used to transport seed corn to a processing plant. While the corn was being unloaded, Wilimek's left upper extremity became caught in a conveyor belt used to facilitate the unloading. Wilimek suffered a severe injury and incurred substantial medical expenses.

At the time of the accident, Danker Farms did not have workers' compensation liability insurance. On January 9, 1991 Wilimek filed a tort action against Danker in Tama

County district court. The following September Wilimek filed a workers' compensation petition in arbitration with the industrial commissioner. Danker moved to dismiss the claim, asserting the action warranted dismissal because Wilimek had elected to proceed with his tort action in district court.

On November 29, 1995 the industrial commissioner filed an appeal decision addressing several issues including whether the filing of the district court tort action preempted the workers' compensation claim. The sole issue before supreme court was at what point is the employee deemed to have made the election given to him or her under Iowa Code section 87.21. The question before the court involved statutory interpretation of Iowa Code section 87.21.

The court thought there was no election under the circumstances here. In keeping with the decision in *Stroup v. Reno*, 530 N.W.2d 441 (Iowa 1995) and the court's rules for interpreting workers' compensation statutes, the court held that up to the point the employee receives a result from the option selected under Code section 87.21, he or she is free to change his or her mind and pursue the other alternative.

The court agreed with the commissioner's reasoning that Wilimek's workers' compensation proceeding should not be dismissed. The case was remanded to the district court for further proceedings.

PENALTY

Murillo v. Blackhawk Foundry, 571 N.W.2d 16 (Iowa 1997).

Murillo filed for workers' compensation benefits. The industrial commissioner, reversing a higher industrial disability finding by his deputy, found a 25 percent industrial disability and also awarded (likewise a reduction of his deputy's allowance) penalty benefits at 25 weeks under Iowa Code section 86.13. Although the industrial commissioner reduced the number of weeks of penalty benefits from 44 to 25, the commissioner increased the percentage of benefits in relation to the industrial disability benefits from 13.5 percent to 20 percent. This was so because the number of permanency benefits decreased from 325 to 125 weeks.

The defendant employer contended Iowa Code section 86.13 prohibits penalty benefits in excess of fifty percent of the amount of the delayed benefits, and argued that this is an indication that the legislature thought penalty benefits were to be calculated by taking a percentage of the industrial disability benefits. The court rejected that contention and found that Code section 86.13 does not call for an automatic reduction in penalty benefits just because there is a reduction of permanency benefits. Rather, in determining the amount of the penalty, the court thought the commissioner should also consider other factors such as "the length of the delay, the number of the delays, the information available to the employer regarding the employee's injuries and wages, and [any] prior penalties imposed against the employer under section 86.13." *Robbennolt v. Snap-On Tools Corp.*, 555 N.W.2d 229, 238 (Iowa 1996). The court also noted in a footnote that case

law does not indicate how the industrial commissioner is to compute penalty benefits. The court noted it was unclear whether the commissioner calculates them as a percentage of permanency benefits or whether the calculation is made on some other basis.

The court found that the commissioner's order decreasing Murillo's penalty benefits lacked the requisite detail required under *Terwilliger v. Snap-On Tools Corp.*, 529 N.W.2d 267, 274 (Iowa 1995) and remanded the case to the industrial commissioner to explain his reasons for the reduction.

PSYCHOLOGICAL INJURY - SUICIDE

Frye v. Smith-Doyle Contractors, 569 N.W.2d 154 (Iowa App. 1997).

Robert Frye suffered an injury to his back while at work. He was treated and diagnosed with herniated lumbar discs. He underwent surgery with little success. Subsequently, Frye was seen by a number of physicians and underwent a series of treatments which included prescription medications and physical therapy. He was paid workers' compensation and these benefits ceased in January 1993.

On May 3, 1993, Frye jumped to his death from a bridge into the Des Moines River. The record reveals Frye had a long history of depression and substance abuse. Further, he had been incarcerated about half the time since his graduation from high school. He had a very limited work history.

At the time of Frye's death, the workers' compensation proceedings were pending. After his death, Frye's spouse

amended Frye's pending claim for additional workers' compensation benefits to also seek death benefits.

Dr. Rose and Dr. Gallagher both gave testimony. Both seemingly agreed Frye's suicide was a result of his depression. However, Dr. Rose opined Frye's back injury caused the depression resulting in his suicide. Dr. Gallagher concluded Frye's depression was caused by a multitude of factors. He stated it was possible one of these factors may have been his back injury. Although he suggested the back injury was an aggravating factor, he explained it was not necessarily the causal factor. He noted Frye had a long history of depression prior to the injury and could not state with a reasonable degree of medical certainty that prior injury was a probable cause of Frye's depression and ultimate suicide.

The industrial commissioner relied on the opinion of Dr. Gallagher in denying death benefits. The court found there was substantial evidence supporting the findings of the industrial commissioner that Frye's spouse had not met her burden of showing the work-related injury was a substantial factor in bringing about Frye's suicide.

RES JUDICATA

Weishaar v. Snap-On Tools Corp, ___ N.W.2d ___ (Iowa 1998).

Claim preclusion does not apply where the claims involved distinctly different injury dates. The issues were not identical where the alleged an injuries to the whole body for a different period of time.

REVIEW-REOPENING

U.S. West v. Overholser, 566 N.W.2d 873 (Iowa 1997).

Frances Overholser began working for U.S. West Communications, Inc. in August 1984. On October 29, 1987 she sustained an injury to her back, arising out of and in the course of her employment. In 1989 she transferred to a different position at U.S. West that did not require repetitive use of her upper extremities, as recommended by treatment prescribed for another injury unrelated to this action. Overholser continued to work without restriction relating to her back injury.

On December 6, 1991 Overholser and U.S. West entered into an agreement for settlement, pursuant to section 86.13 of the Iowa Code. The approved agreement provided that Overholser sustained a permanent partial disability of five percent to the body as a whole, and she received 25 weeks of permanent partial disability benefits.

In July 1993 Overholser was among 72 employees laid off by U.S. West as a result of downsizing within her department. The layoffs were made pursuant to the union contract and Overholser's relative lack of seniority as compared to her co-workers necessitated that she lose her job.

In October 1993 Overholser filed a petition to reopen the settlement agreement, seeking additional benefits because of her layoff. The parties agreed, however, that her medical condition had not changed since the settlement. Overholser claimed that the 1993 layoff was a substantial change in her employment condition not contemplated by the parties in their initial 1991 settlement.

The supreme court noted that when a settlement is reached in a workers' compensation case, the injured's loss of earning capacity is properly viewed "in terms of the injured workers' present ability to earn in the competitive job market without regard to the accommodation furnished by one's present employer." *Thilges v. Snap-On Tools Corp.*, 528 N.W.2d 614, 617 (Iowa 1995). Accordingly, the disability award must not be adjusted downward because the worker is receiving sheltered employment or merely because the employer modifies its job requirements in light of an employee's disability.

Overholser admitted that her physical condition had not worsened, nor was it a factor in U.S. West's decision to terminate her employment. Instead, she contended that a rewriting of the settlement agreement was warranted solely because she had suffered a change in her economic condition subsequent to the 1991 settlement agreement.

The court found that there was no evidence that Overholser's disability rating was "adjusted downward" because of accommodation by U.S. West. After her initial injury, Overholser's conditions of employment were unchanged. In fact, she was able to perform her same job and duties despite her five percent disability rating. She remained at that same position until well after the time of her injury and only transferred from it when she suffered a non-related impairment to her upper extremities.

The court was not convinced that U.S. West actually accommodated her original injury. Accommodation, if any actually existed, only occurred after Overholser was subsequently injured in another incident unrelated to this appeal. The record did not support the contention that her work was modified in any way to accommodate her injury or

that she received sheltered employment which distorted her true earning capacity.

The court found that Overholser's physical condition remained unchanged and her earning capacity decreased solely because of factors outside of the settlement with U.S. West including her subsequent injuries, the downsizing by U.S. West, her lack of seniority, and her job seeking skills. Her inability to secure employment after the layoff was not due to her back injury, but to other factors not at issue in this case. Overholser failed to prove by a preponderance of evidence that her decreased earning capacity was proximately caused by her initial injury.

STATUTE OF LIMITATIONS

Bergen v. Iowa Veterans Home, 577 N.W.2d 629 (Iowa 1998).

During work on or about August 8, 1990, while bending over, Bergen heard a "pop" and began feeling back and leg pain. Following the injury the employer, the State of Iowa voluntarily paid Bergen weekly workers' compensation benefits which terminated on December 10, 1990.

In 1993 Bergen's back pain worsened. An MRI scan was taken on December 13, 1993. Bergen's doctors then determined that her back condition was more severe with bulging L4-5 and L5-S1 discs. As a result of her condition, Bergen was unable to perform her job duties and she was eventually terminated from employment.

Bergen filed an arbitration petition with the industrial commissioner on February 14, 1994 seeking permanent partial disability benefits. The industrial commissioner determined on appeal that Bergen's claim was barred by the statute of limitations because Bergen did not

file her petition within three years from the date of her last benefits payment.

The supreme court concluded that the discovery rule does not extend the limitations period in this case. The three-year statute of limitations in Iowa Code section 85.26(1) runs from the date of the last payment of weekly compensation benefits, not from the date the injury occurred. There was consequently no basis for applying the discovery rule. The court agreed with the district court and the commissioner that Bergen's claim was similarly barred by Iowa Code section 85.26(1).

Darrow v. Quaker Oats Co., 570 N.W.2d 649 (Iowa 1997).

Gary Darrow alleged he suffered psychological injury resulting from stress related to his job as an insulator/ asbestos worker. He reported injury dates of July 10, 1990 and June 15, 1991. The employer investigated both claims and denied benefits based on its conclusion that Darrow's mental illness, if any, was not work related. Subsequently, Darrow was involuntarily hospitalized for treatment of serious mental impairment. His commitment extended from June 28, 1991 to June 1, 1994.

Darrow did not commence contested proceedings against his employer until November 15, 1994. The employer moved for summary judgment on the ground the action was time barred.

Darrow conceded that his three-year mental commitment did not automatically establish that he was operating under a legal disability at the time his claim accrued.

The supreme court noted an absence of exceptions to the Iowa Code section 85.26(1) two-year time period for commencing actions for workers' compensation benefits. The

court held that a worker's involuntary mental commitment did not toll the two-year statute of limitations for filing a workers' compensation claim.

The court also rejected the claimant's equal protection and due process challenges to the statute.

Ranney v. Parawax Co., ____ N.W.2d ___ (Iowa 1998).

The two year statute of limitations begins to run when an injured employee knows or should know that his condition is possibly compensable.

SELECTED

WORKERS' COMPENSATION COMMISSIONER

FINAL AGENCY ACTION / APPEAL DECISIONS

E

AGRICULTURAL EXEMPTION

Clapper v. Darwin Larson, File No. 1056367 (January 30, 1998).

Defendant employer who alleged he was exempted from coverage pursuant to the agricultural exemption of Iowa Code section 85.1(3) was not successful in his argument. The evidence established that the employer owned a llama, a saddle horse and two miniature horses, and ten acres of tillable farmland which he cash rented, which did not make him engaged in agriculture for purposes of the statute. Defendant employer had never filed a farm tax return nor had he ever worked as a farmer in his life. Claimant was injured when she was thrown from a horse she was teaching to pull a buggy and subsequently underwent knee surgery and back surgery.

ALTERNATE MEDICAL CARE

Cordell v. Westside Transport, File No. 1164763 (September 4, 1997).

Authorized care deemed inappropriate as no physician was designated in the state of North Carolina where claimant resided.

Hawk v. Pallister Pallets, File No. 1177543 (September 2, 1997).

Care offered was deemed inappropriate for three reasons: 1) interference in treatment and referrals made by authorized physicians; 2) transfer to a care provider more than 80 miles

from claimant's residence; and 3) too frequent changes in authorized physicians. Claimant was assigned to three different physicians within a six week period.

Kunzman v. Armour Swift-Eckrich, File No. 1168872 (October 13, 1997).

Defendant unreasonably required claimant to travel 150 miles, one-way, to receive care. Local care was ordered.

Mobayed v. AMS Services, Inc., File No. 1168048 (May 20, 1997).

Claimant's petition for alternate care was dismissed as the alternate care requested had already been performed by a nonauthorized physician. These speedy 10 day proceedings are only available to order prospective care, not reimbursement for prior care. Claimant will have to initiate regular proceedings to secure reimbursement for past medical care.

Norbeck v. Bluffs Toyota, Inc., File No. 1167568 (April 15, 1997).

Employer's change of care from chiropractor who treated claimant 85 times over six months without significant improvement held reasonable and appropriate.

Ordonez v. IBP, Inc., File No. 1142178 (April 24, 1997).

The employer's authorized treating physician declined to provide care to the claimant and suggested that the claimant obtain a different physician. Despite having knowledge of that occurrence the employer would not authorize any different physician. Claimant's requested physician of choice was ordered to be the authorized physician.

APPORTIONMENT OF DISABILITY

Ancell v. Titan Tire, File No. 1105180 (February 20, 1998).

E

The employer objected to being held liable for what the physicians referred to as 40 years of injurious repetitive work claimant engaged in at a tire manufacturing plant which changed ownership several times over that span of time. Claimant only worked for defendant employer a couple of months before his retirement.

Apportionment was denied on ground that any prior disability was not ascertainable and that under the full responsibility rule the employer was responsible for the entire disability. The full responsibility rule is not limited to a single employer. Such a holding was felt to be consistent with the supreme court rulings in other cumulative trauma cases as well as occupational injury cases which hold the employer fully liable at the time of the last injurious exposure to the work hazard.

ARISING OUT OF/ACTIVITIES INDIRECTLY RELATED TO EMPLOYMENT

Hudson v. Archer Daniels Midland Company, File No. 1080690 (June 30, 1998).

Claimant, who suffered from arthritis in the knee, stepped down from a step exacerbating the condition. The physician rendering a causal connection opinion was not aware that for weeks prior to the incident, claimant had been walking on his toes and could not straighten his knee due to his severe degenerative condition. Held that the alleged incident was not

a work injury and that claimant's knee replacement was not causally connected to a work injury but was merely further manifestation of claimant's preexisting condition.

ARISING OUT OF EMPLOYMENT

Wills v. Koehler Electric, File No. 1056704 (October 31, 1997).

Claimant fell off a ladder while at work from a height of 4-5 feet. The cause of his fall was alcohol withdrawal (possible delirium tremens). He struck his head which bled badly, and shoulder in the fall. Claimant's injury arose out of his employment.

CAUSAL CONNECTION

Fazio v. Sheraton Inn a/k/a 35th Street Corporation, File No. 1029650 (July 25, 1997).

Decedent, who was a janitor at a hotel, was stung by a bee. He had an allergic reaction and was treated at a local medical clinic. The next day decedent suffered a stroke which, after a few days of treatment, ultimately resulted in his death. Claimant argued that the bee sting was the medical cause of the precipitating factor of the stroke. There were conflicting expert medical opinions. The greater weight of the evidence supported the defendants' contention that the medical evidence failed to prove by a preponderance of the evidence that the bee sting was actually the cause of the decedent's stroke. Thus, claimant took nothing.

Hermance v. Weissman Iron & Metal, Inc., File No. 1036111 (May 30, 1997).

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Claimant had posttraumatic stress disorder and major depressive disorder symptoms that predated his injury. His behavior both before and after the injury was basically unchanged. Claimant failed to prove that his head injury also caused a brain injury. Claimant failed to prove his work injury was the cause of a permanent disability.

King v. Montgomery Ward, File No. 1056609 (November 25, 1997).

Claimant failed to prove that his exposure to Dursban, an organophosphate, caused any permanent disability. Claimant had no permanent physical disability caused by the exposure. Claimant's psychological condition and symptoms predated his injury. Claimant had no permanent psychological disability caused by the exposure.

Wagner v. Firestone Tire & Rubber Co., File Nos. 792237/701911 (December 31, 1997).

Claimant failed to prove that her decedent husband's injuries in 1982 and 1985 were the cause of a fatal pulmonary embolism in September 1993. Claimant failed to prove that there was a chain of causation between the work injuries, a fall at home resulting in quadriparesis and the fatal embolism. Convincing expert medical opinion established that the fatal embolism was the result of malignant lymphoma.

DEPENDENTS

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Sanchez v. Iowa Erosion Company, File No. 1058141 (April 30, 1997).

One who is actually dependent upon the deceased worker need not also be "physically or mentally incapacitated from earning" in order to receive survivor's benefits. Benefits are paid for so long as the recipient is incapacitated from earning. The claim of the mother of the deceased worker who was from Mexico but living in Iowa was granted, as she was shown to be actually and wholly dependent upon her son at the time of his death.

EVIDENCE

Fritz v. Wells Dairy, Inc., File No. 1056924 (September 23, 1997).

Relying upon *Schoenfeld v. FDL Foods, Inc.*, 560 N.W.2d 595 (Iowa 1997) the testimony at hearing of doctor on the issue of causation was allowed despite claimant's failure to comply with hearing assignment order.

EVIDENCE--SURVEILLANCE

Bradley v. The Des Moines Register, File No. 1091930 (March 31, 1998).

Defendants refused to disclose surveillance evidence not used at hearing citing attorney work product privilege. It was held that these surveillance tapes were attorney work product under the Iowa Rules of Civil Procedure 122(c). Claimant could obtain them by making a showing that he had a substantial need of the materials or that he was unable, without undue hardship, to obtain the substantial equivalent of the material by other means.

Jackson v. Alter Company, File No. 1043313 (July 23, 1997).

Thirty-minute "summary" tape of five hours of surveillance taping was held admissible in that claimant's counsel was not surprised nor prejudiced and knew tape had been edited. Edited tape was evidence a reasonably prudent person would rely on.

INDEPENDENT MEDICAL EXAMINATION--NOTICE OF PETITION

Brammer v. Glenwood State Hospital School, File No. 1035917 (October 2, 1997).

Claimant was aware that defendants had counsel of record. It was a denial of due process to grant a petition for independent medical examination where claimant sent notice of the petition to the employer and not to defendants' attorney, especially when claimant had served original petition in arbitration on both the employer and the attorney. The employer interpreted the second petition as an informative copy and did not contact the attorney. Defendants were entitled to notice and an opportunity to be heard.

INDUSTRIAL DISABILITY

Steeve v. Kimberly Press, Ltd., File No. 1044058 (December 31, 1997).

Claimant awarded 35 percent industrial disability. Held that full responsibility rule was not applicable as the first work-related injury was not for this employer. Nor was the claimant's disability a result of the prior disability and the present injury as the prior injury did not result in any disability. Apportionment also was not applicable as the prior

injury did not independently produce some degree of industrial disability prior to the second injury.

IN THE COURSE OF -- EMPLOYEE'S PERSONAL COMFORT AND CONVENIENCE

Jepsen v. Jeaco Manufacturing and Machine, File No. 1056724 (May 22, 1998).

Claimant sustained burns to 59 percent of his body as a result of an explosion and fire on defendant-employer's premises. The explosion occurred during normal business hours. At the time, claimant was welding on a 55-gallon metal drum which was brought on site by a co-employee. The metal drum was to be used for the personal convenience of the co-employee. However, it was permissible for employees to work on private projects so long as they paid defendant-employer for the materials and labor used. Held that claimant's injury arose out of and in the course of his employment.

It was determined that claimant had a 75 percent permanent partial disability as a result of the work injury. Claimant sustained third degree burns on his face, neck, chest, abdomen, shoulders, arms, hands and fingers. Claimant was 18 at the time of the work injury. He had no work experience other than working as a farmhand.

Caldwell v. Dick McCoid /McCoid Transportation, File No. 1058714 (May 11, 1998).

E

Claimant proved an injury in the course of employment when he picked up a tractor-trailer a day before he was to begin work. Claimant was loading the tractor with his personal belongings and hooking it to a trailer so that he would not need to start so early on the next day. The employer authorized claimant to perform the work a day early.

LIABILITY ISSUES--IOWA CODE § 85.21

Employers Mutual Casualty Company v. Vanwyngarden & Abrahamson, File Nos. 1059572/1059573/1059574/1011165 (June 20, 1998).

Petitioner insurance company filed a petition for reimbursement from a second insurance company for benefits paid to claimant under Iowa Code section 85.21. Respondents moved for summary judgment in that the payments were made before an order under section 85.21 was obtained.

Held that under Barglof and Bromert appeal decisions, were an insurance company seeks and obtains a section 85.21 order prior to the adjudicatory hearing, they may be entitled to reimbursement for payments made both before and after the order.

MEDICAL BENEFITS--UNAUTHORIZED CARE

Fritz v. Wells Dairy, Inc., File No. 1056924 (September 23, 1997).

Claimant's unauthorized medical treatment was not the employer's responsibility where employer admitted liability for injury but was not given an opportunity to reject the care chosen by claimant.

Hogan v. Ready Mixed Concrete, File Nos. 1058983/1058982 (August 29, 1997).

Defendants were not liable for unauthorized medical care. After claimant visited the company physician he chose treatment by his own physician. He also chose his own personal health insurance benefits to pay for that treatment. In Iowa the employer has the right and responsibility to chose the care. The employer provided claimant with suitable care and claimant did not apply for alternative care.

Swain v. Midwest Ready Mix, File No. 934823 (January 29, 1998).

Defendants were liable for that treatment related to claimant's work injury. The care was unauthorized but defendants were offered the opportunity to provide the care prior to the treatment. The unauthorized care improved claimant's condition. Defendants were liable only for that portion of the treatment related to work injury.

ODD-LOT

Frausto v. Louis Rich, Inc., File No. 1063389 (May 22, 1997).

It was held that in order to obtain benefits for permanent total disability using the odd-lot doctrine it is necessary for

the individual to make reasonable efforts to be as employable as the circumstances permit. The workers' compensation system exists to pay for disability that results from workplace injuries. It is not intended to reward self-imposed limits on employability.

The claimant is in this case claimed to be permanently, totally disabled and relied upon the odd-lot doctrine. The only activity restrictions were upon the claimant's left upper extremity as a result of mild chronic rotator cuff tendonitis. She declined to work with a vocational consultant offered by the employer. Claimant awarded 40 percent permanent partial disability.

Stropes v. IBP, Inc., File No. 1043050 (June 5, 1997).

Claimant who dropped out of special education classes in the tenth grade and who is now limited to sedentary work with a requirement for changing positions frequently held to be permanently and totally disabled under the odd-lot doctrine. She had looked for work but found none except a job for which she could not qualify because she could not make change.

Treinen v. Packers Sanitation Service, File No. 859406 (March 31, 1998).

Claimant was deemed to be an odd-lot employee and thus permanently and totally disabled in a review-reopening proceeding. Claimant had been previously found to be entitled to a 65 percent permanent partial disability. In the prior appeal decision, the commissioner wrote in relevant portion:

There are jobs available in claimant's community that claimant could perform, and employers willing to hire him. Claimant is not permanent totally disabled.

Evidence presented in the review-reopening proceeding indicated there had been a change of economic conditions. At the time of the prior appeal decision, there was an expectation of employment. At the time of the review-reopening hearing, claimant had been unemployed for four years despite many efforts to obtain employment. Defendants were unable to find suitable employment for claimant. Defendants could not even find job openings which were within claimant's FCE. Claimant needed a job coach in order to handle most part-time employment.

PENALTY

Bunner v. M. Harper, Ltd., File No. 1052838 (August 21, 1997).

Claimant awarded penalty benefits where claimant had sustained a previous injury with the same employer that was covered by another insurance carrier and the medical evidence established that claimant's current problems could have come from either injury. Defendant employer was liable to claimant in either case, and the insurance carrier should have utilized Iowa Code section 85.21 rather than withholding benefits from claimant.

Hanna v. Fleetguard, Inc., File No. 1019228 (June 25, 1997).

On remand, applied *Robbennolt* and imposed 50 percent penalty where 47 of 47 payments were from 2 to 15 days late and at the wrong rate.

Meyers v. Holiday Express Corporation, File Nos. 881251/913214 (December 31, 1997).

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On remand from the supreme court, penalty and interest pursuant to *Robbennolt* and *Christensen* were awarded. Where defendants consistently made late payments, paid at an incorrect rate, and failed to add interest to late payments, the maximum 50 percent penalty on all benefits awarded was made.

PENALTY/INTEREST/COSTS

Hentges v. Kofab, a/k/a Kossuth Fabricators Inc., File Nos. 1045457/1056668/1056667 (June 29, 1998)

Claimant was 35 years old at the time of the hearing. He had a work-related hernia that resulted in surgery and an eventual 30 percent impairment rating. He had no medically imposed restrictions. Claimant returned to work for defendant employer. Claimant later switched jobs and was making a higher hourly wage than before the injury. Claimant had a variety of perceived and real physical problems, most not related to the work injury. Claimant was found to have a 20 percent industrial disability.

Claimant was awarded 25 weeks of penalty benefits where no permanent disability benefits were paid until more than two years after the injury. Defendants were ordered to pay interest. Claimant was ordered to pay witness fees and mileage for six lay witnesses that were his witnesses. Those witnesses

offered only cumulative, repetitive testimony regarding claimant's physical activities and abilities.

PERMANENT PARTIAL DISABILITY/INDUSTRIAL DISABILITY

Bryant v. Omaha Standard Inc., File No. 1059125 (May 20, 1998).

Claimant awarded 30 percent industrial disability as a result of the combined effects of a prior bilateral carpal tunnel syndrome incurred with the same employer and a current left shoulder injury which resulted in permanent disability to the body as a whole. Citing to Second Injury Fund of Iowa v. Nelson, 544 N.W.2d 258 (Iowa 1995). Claimant had significant impairment to the upper extremities caused by the prior carpal tunnel syndrome which resulted in a combined effect of significant industrial disability.

PERMANENT TOTAL DISABILITY

Sisk v. IBP, Inc., File Nos. 1043160/1064742 (September 30, 1997).

Claimant was 30 years old with prior cognitive mental deficiencies that seriously affected her intellectual qualifications. Her work injury resulted in chronic cervical pain and a five percent permanent impairment rating and 20-25 pound limitation on lifting, pulling, or pushing and recommendation to avoid flexion or extension of her neck. She held sporadic jobs as a nurses aide prior to the work injury. She could no longer do that job. She could not count money and

failed at attempts to be a telemarketer. Claimant was found to be permanently and totally disabled.

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PSYCHOLOGICAL INJURY--SUICIDE

Blanchard v. Belle Plain/Vinton Motor Supply Company, File No. 1048262 (May 19, 1997).

Claimant, surviving spouse of employee who committed suicide, failed to prove either medical or legal causation pursuant to *Dunlavey*. Decedent was in process of selling business to a larger competitor and became fixated with the idea that the sale of the business would fall through. Claimant was suffering from depression at time he took his own life. The most persuasive psychiatric opinions determined that claimant's depression was endogenous and his false fixed ideas were a symptom of depression. Claimant also failed to prove legal causation. Claimant did not establish that stress decedent was under was of an equal or greater magnitude of similarly situated employees, regardless of employer.

Domeyer v. Interstate Power Company, File No. 1056268 (December 31, 1997).

Claimant failed to prove by a preponderance of the evidence that decedent's suicide was work-related.

Fleming v. Humboldt Community Schools, File No. 1051965 (April 25, 1997).

The greater weight of evidence in this case showed that the decedent's work was the proximate cause of his mental condition (depression). The depression was the result of job stress of greater magnitude than the day-to-day stresses routinely experienced by superintendents of schools in Iowa. The unusual

stress was from a community controversy over the district's plans to implement a new program called "outcome based education." Christian fundamentalists nationally opposed this program and claimant's husband was subjected to personal threats and attacks and even attacks on his Christian beliefs, which caused him extreme stress. Seven other school superintendents in Iowa testified that although they had experienced similar controversies, all agreed that the stress experienced by claimant's husband was unusual compared to the day-to-day routine stress of being a school superintendent.

The persuasive medical opinions and the facts of this case showed that there was a direct chain of causation between the decedent's depression and his suicide. Claimant, as surviving spouse, was entitled to workers' compensation benefits.

RATE

Kuhns v. Winterset Community School District, File No. 1035557 (September 30, 1997).

Claimant's earnings as an independent life insurance salesman were determined to be as an independent contractor and not included in the rate calculation.

REVIEW-REOPENING

Roberts v. Second Injury Fund of Iowa, File No. 958248 (July 25, 1997).

Claimant failed to prove his physical condition had changed. Claimant voluntarily quit the job he held at the time of the arbitration hearing. He quit his job for employment security reasons. He subsequently found work at several other employers. Claimant failed to prove a nonphysical change of

condition that was caused by his work injuries. Claimant took nothing in this proceeding from defendant Second Injury Fund.

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SECOND INJURY FUND

Hilpipre v. Care Initiatives, File No. 1057894 (September 29, 1997).

On appeal it was determined that summary judgment should be granted. Claimant's alleged work injury had been settled in a compromise special case settlement. As a matter of law when claimant's alleged injury in this case was settled pursuant to Iowa Code section 85.35, claimant could not seek benefits from the Second Injury Fund alleging this injury was a qualifying "second injury."

STATUTE OF LIMITATIONS

Moffitt v. Super Valu Stores, File No. 1059425 (June 19, 1998).

Company policy called for payment of regular salary during absences of salaried employee, regardless of whether absence was due to work injury. Such salary payments made where the employer knew the injury was work related and as a substitute for workers' compensation benefits and the three-year statute of limitations applied.

Although claimant's action was not barred by the statute of limitations, claimant failed to show her depressive condition was caused by workplace stress.

STIPULATION

Clapper v. Darwin Larson, File No. 1056367 (January 30, 1998).

Claimant and defendant had stipulated that claimant's industrial disability was seven percent. It was improper to allow claimant to insert extent of industrial disability as an issue in mid-hearing, as doing so resulted in unfair surprise and prejudice to defendant.

THIRD PARTY LIABILITY

Brown v. Star Seeds, Inc., File No. 1065681 (January 30, 1998).

Claimant's hand was caught in a corn picking machine and severely crushed and eventually amputated. Employer and workers' compensation insurance carrier admitted liability for the injury and began payment of medical and weekly benefits. Claimant filed suit in federal district court against two third party defendants, the manufacturers of the machine.

Claimant and his wife each received separate offers of settlement from the third party defendants. Claimant was offered $150,000 to settle all of his claims against the third party defendants. Claimant's wife was offered $200,000 to settle her loss of consortium claim against the third party defendants.

Workers' compensation insurance carrier and employer objected on the grounds that the settlement offer to the claimant was too small and that the offer to claimant's wife for her loss of consortium claim was too large and that the settlement offers had been structured to defeat the third party lien filed by the workers' compensation insurance carrier and employer.

The workers' compensation insurer and employer's argument that the industrial commissioner has no right to approve or disapprove loss of a consortium claim is correct, but it was held that the industrial commissioner could examine total offers made to determine if the loss of consortium claim was made in part as consideration for the claimant dismissing his action against the third party defendants.

Here, it was determined that the totality of the evidence supported approval of the settlement agreement based on claimant's own actions, contributory fault and the fairness and adequateness of the settlement offer made to claimant.

"PLEASE FIRE ME!"
Evaluating Damages in Employment-Related Claims

By: Gordon R. Fischer
Bradshaw, Fowler, Proctor & Fairgrave, P.C.

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I. SIX RULES IN EVALUATING EMPLOYMENT-RELATED CLAIMS

A. Wheat and chaff

Perhaps even more than other types of litigation, employment-related claims usually sound in multiple counts. Defense counsel must carefully scrutinize the petition/complaint and determine how many claims will actually make it to trial.

B. All or nothing

In employment-related litigation, parties tend to win all or nothing. For example, the jury will either believe that your client fired the plaintiff because she was a bad employee, or the jury will believe the plaintiff's argument that she was fired because she was disabled. There is very little, if any, middle ground for the jury.

C. Motions for Summary Judgment

Because of the burden-shifting framework used by courts, motions for summary judgment are relatively common in employment-related litigation. Evaluations of claims must of course include an assessment of the likelihood of success of such a motion.

D. Expensive

As discussed more fully below, plaintiffs in employment-related lawsuits have a wide variety of remedies available, and damages can be quite high

E. Emotional

Perhaps like dissolution of marriage cases, parties in employment-related lawsuits take the case very personally.

F. Uncertainty

Because so many statutes in this area are relatively new, there are many unsettled questions in employment law. Very fundamental issues -- for example, the effect of mitigating measures in ADA cases -- have split the courts, and no clear resolution is in sight. Such uncertainty must be considered in evaluating claims.

II. AVAILABLE REMEDIES

A. Reinstatement

1. Presumptively Appropriate

Generally speaking, the purpose of civil rights statutes is to restore victims of discrimination to the position they would have been in but for the illegal conduct. Therefore, in most cases, an award of reinstatement (or instatement) to the position originally denied is presumptively appropriate. Franks v. Bowman Transp. Co., 424 U.S. 747 (1976).

2. Exceptions

While reinstatement is presumptively appropriate, it is not always granted. First, a court may refuse to order reinstatement if the employer can show that legitimate reasons existed which would have caused it to reach the same employment decision in absence of a discriminatory motive, even if the employer did not learn of the reason(s) until after the employment action was taken. McKennon v. Nashville Banner Pub. Co., 513 U.S. 352 (1995). (This is known as the "after-acquired evidence" doctrine, and is discussed more fully below). More commonly, an employer will escape an order requiring reinstatement because of workplace hostility making reinstatement impracticable, if not impossible. Compare Padilla v. Metro-North Commuter Railroad, 92 F.3d 117 (2d Cir. 1996) (reinstatement unworkable where employer-employee relationship "irreparably damaged by animosity associated with the litigation"), cert. denied, 117 S. Ct. 2453 (1997) with Philipp v. ANR Freight Sys., Inc., 61 F.3d 669 (8th Cir. 1995) (reinstatement order not abuse of discretion where current supervisor not employed at time of adverse employment actions, and supervisors who allegedly discriminated against plaintiff were no longer employed). Finally, cases exist where reinstatement was deemed inappropriate because the plaintiff was simply not capable of performing the job in question, through no fault of the employer. Thurman v. Yellow Freight Sys., Inc., 90 F.3d 1160 (6th Cir. 1996) (court properly denied reinstatement to employee who was incapable of performing job because of injury suffered after he left his job with employer-defendant). A rebuttable presumption exists, however, that a successful plaintiff is qualified to perform the job. See, e.g., Doane v. City of Omaha, 115 F.3d 624 (8th Cir. 1997).

B. Back Pay

1. Typical Remedy

Again, anti-discrimination statutes are designed to make persons whole for injuries resulting from illegal employment discrimination. This goal is typically accomplished through back pay awards.

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2. Calculation of Back Pay

The back pay period normally runs from the date of the questioned employment decision until the court's final judgment. See, e.g., Sands v. Runyon, 28 F.3d 1323 (2d Cir. 1994). The amount of back pay is calculated based upon the salary which plaintiff was receiving at the time of the adverse employment action, plus any increases plaintiff would have received absent the adverse action. Id.

3. Perks Included

Lost bonuses, and fringe benefits such as social security entitlements, lost pension or retirement benefits, 401(k) contributions, car allowances, and mileage expenses, which an employer would have paid in the normal course of business, are all included in back pay awards. See, e.g., Gaworski v. ITT Comm. Finance Corp., 17 F.3d 1104 (lost employer 401(k) contributions); Partington v. Broyhill Furniture Indus., Inc., 999 F.2d 269 (7th Cir. 1993) (lost profit sharing allowances).

4. Reduction of Back Pay Awards

Back pay awards can also be reduced under several circumstances, such as when plaintiff has earned income in the interim, or conversely, failed to mitigate her damages. These potential offsets are discussed below as defenses.

C. Front pay

1. When Awarded

"Front pay" may be awarded in situations where plaintiff demonstrates a loss of future earnings. See Simpson v. Ernst & Young, 100 F.3d 436 (6th Cir. 1996). The intent of front pay is to compensate the victim for the continuing future effects of discrimination until the victim can be made whole. Carter v. Sedgwick County, 36 F.3d 952 (10th Cir. 1994). For example, if a plaintiff is terminated at age 60, she may argue that it will be difficult for someone at that age to find new employment, and that she

therefore should be awarded front pay even beyond the date of the court's final judgment

2. Calculation of Front Pay

The period for which a court will award front pay varies depending upon the circumstances of each case. Courts have looked to a variety of factors, including the employability of plaintiff, efforts to mitigate damages, and the employee's work and life expectancy. See, e.g., Rhodes v. Guiberson Oil Tools Co., 82 F.3d 615 (5th Cir. 1996) (front pay award calculated to compensate plaintiff for period between date of judgment and plaintiff's expected retirement date); Hukkanen v. International Union of Operating Engineers, Hoisting & Portable Local No. 101, 3 F.3d 281 (8th Cir. 1993) (front pay for 10 years awarded where plaintiff unable to obtain job with pay and responsibilities equal to former job); Wulach v. Bear, Stearns & Co., 52 Fair Empl. Prac. Cas. (BNA) 1022 (S.D.N.Y. 1990) (limiting front pay to two years where plaintiff's experience indicated that comparable employment could be obtained within that time).

3. Retirement and Beyond

Front pay generally ends at retirement age. See MacDissi v. Valmont Indus., 856 F.2d 1054 (8th Cir. 1988). Awards have been granted that go beyond "normal" retirement age, however, when plaintiff produced substantive evidence that she planned to continue working. See, e.g., Curtis v. Electronics & Space Corp., 113 F.3d 1498 (8th Cir. 1997) (plaintiff's testimony that she was in good health, that her husband had died and had left her with little money, and that she continued to look for positions after she was fired was sufficient to support finding that she would not have retired before age 70).

III. DAMAGES: COMPENSATORY, PUNITIVE, AND LIQUIDATED

A. Compensatory Damages

1. When Available

Compensatory damages are available under Title VII, the ADA, and Section 501 of the Rehabilitation Act (federal employees). 42 U.S.C. section 1981a. Compensatory damages are not available under the Age Discrimination in Employment Act (ADEA) and the Equal Pay Act (EPA). See, e.g., Fiedler v. Indianhead Truck Line, 670 F.2d 806 (8th Cir 1982) (ADEA); Lippa v. General Motors Corp., 760 F. Supp. 1062 (W.D.N.Y. 1990) (EPA). Compensatory damages are also probably not available under the Family and Medical Leave Act.

2. Meaning of "Compensatory Damages"

The purpose of compensatory damages is to reimburse plaintiff for injuries shown to have been caused by illegal discrimination. Such injuries may include mental distress, injury to professional standing, character, reputation, and credit standing, and other nonpecuniary losses. See 42 U.S.C. section 1981a(b)(3); see also EEOC Policy Guidance No. 915,002 (July 14, 1992).

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3. "Eggshell Plaintiff" Rule Applicable

The fact that plaintiff is unusually sensitive or particularly vulnerable does not absolve the employer from responsibility for emotional harm caused by its illegal discrimination. See, e.g., Turic v. Holland Hospitality, Inc., 85 F.3d 1211 (6th Cir. 1996) (lower court did not err in considering emotional and economic sensitivity of plaintiff, who had just discovered she was pregnant when she was terminated).

B. Punitive Damages

1. When Available

Via the 1991 Civil Rights Act, punitive damages are available under Title VII, the ADA, and Section 501 of the Rehabilitation Act against employers other than a government, government agency, or political subdivision. 42 U.S.C. section 1981a(b)(1). The ADEA, the EPA, and the FMLA allow for liquidated damages, but not punitive damages.

2. Standard

The 1991 Civil Rights Act requires plaintiffs to demonstrate that the employer acted "with malice or with reckless indifference to the federally protected rights of an aggrieved individual" in order to obtain punitive damages. 42 U.S.C. section 1981a(b)(1).

3. Statutory Caps for Compensatory and Punitive Damages

The amount of compensatory and punitive damages which may be recovered by plaintiff depends upon the number of employees the defendant-employer had in each of 20 or more calendar weeks during the current or preceding year:
(1) $50,000 if more than 14 but fewer than 101 employees;
(2) $100,000 if more than 100 but fewer than 201;
(3) $200,000 if more than 200 but fewer than 501; and
(4) $300,000 if more than 500.

C. Liquidated Damages

The ADEA, the EPA, and the FMLA provide for liquidated, or double, damages in cases of "willful" violations. 29 U.S.C. sections 206(d)(3), 216(b) & 626(b).

IV. DEFENSES

A. Unconditional Offer of Reinstatement

An employer may toll the accrual of potential front pay and back pay liability by extending an unconditional offer of a position identical or substantially equivalent to the position plaintiff sought. Ford Motor Co., 458 U.S. 219. The employer has the burden to prove the adequacy of the offer of reinstatement. Smith v. World Ins. Co., 38 F.3d 1456 (8th Cir. 1994). The burden is also on the employer to prove that plaintiff's rejection of the offer was objectively unreasonable. Id.

B. Mitigation

Plaintiff must mitigate damages. Ford Motor Co., 458 U.S. 219.

C. Offsets

Wages earned in the period after discharge but before judgment that, but for the discrimination, could not have been earned, will be offset against claimed back pay. Chesser v. State of Illinois, 895 F.2d 330 (7th Cir. 1990). Funds received from a collateral or third party source, however, are generally not deductible from any back pay award. Consequently, courts usually do not deduct unemployment compensation benefits, disability benefits, social security benefits, and pension or retirement benefits from plans separate and distinct from the employer. See, e.g., Arneson v. Callahan, 128 F.3d 1243 (8th Cir. 1997); Thurman, 90 F.3d 1160.

D. After Acquired Evidence Doctrine

The after acquired evidence doctrine applies after the employee has been terminated (or not hired), and the employer discovers evidence of employee misconduct which would have led the employer to terminate (or not hire) the plaintiff had it known earlier of the misconduct. McKennon, 513 U.S. 35. The burden of proof is on the employer to show that the misconduct was serious enough to have warranted the adverse employment decision. Id. The doctrine does not go to liability, but affects potential damages. When applicable, the after acquired evidence doctrine precludes the remedies of front pay or reinstatement Furthermore, the doctrine acts to limit back pay awards to the period from the date of the illegal action to the date the new information was discovered. Id.

V. ATTORNEYS FEES

A. Private Attorney General Concept

Although the precise wording differs, anti-discrimination statutes all adopt the concept that a prevailing plaintiff in employment-related litigation acts in the role of a private attorney general and "should ordinarily be awarded attorneys' fees unless special circumstances would render such an award unjust." Albemarle Paper Co. v. Moody, 422 U.S. 405 (1975).

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B. Prevailing Plaintiff

A party "prevails" when "actual relief on the merits of his claim materially alters the legal relationship between the parties by modifying the defendant's behavior in a way that directly benefits the plaintiff." Farrar v. Hobby, 506 U.S. 103 (1992) (plaintiff who recovered only nominal damages after litigating several years on alleged $17 million claim was nevertheless "prevailing party"). A plaintiff who obtains a judgment "in any amount, whether compensatory or nominal," is a prevailing party. Id.; see also Bridges v. Eastman Kodak Co., 102 F.3d 56 (2d Cir. 1996) (court found employer liable, but awarded no monetary relief whatsoever to avoid duplication under state law claim, plaintiff entitled to attorneys fees). A plaintiff who procures permanent injunctive relief against future violations is also a prevailing party. Hashimoto v. Dalton, 118 F.3d 671 (9th Cir. 1997)

C. Calculation of Attorneys Fees

Courts use the "lodestar" concept which takes a reasonable amount of hours worked and multiplies it by a reasonable hourly pay rate. In establishing an appropriate rate of pay, the party seeking fees must show that the "requested rates are in line with those prevailing in the community for similar services by lawyers of reasonably comparable skills, experience, and reputation." Blum v. Stenson, 465 U.S. 886 (1984). The United States Supreme Court has additionally outlined certain factors which must be considered in determining a reasonable amount for a fee award. Hensley v. Eckerhart, 461 U.S. 424 (1983). The factors include the amount of time expended on the case, the novelty and complexity of the issues involved, the customary fee, whether the parties agreed to a fixed or contingent fee arrangement, the amount at stake, and fee awards in similar cases. Id. These factors can act to either enhance or reduce the lodestar amount.

ETHICS IN SETTLEMENT

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HYPOTHETICAL

Assume that you are an outside defense attorney hired by an insurer to defend a personal injury action. You have been given $75,000.00 settlement authority. You have offered $50,000.00 to the plaintiff's attorney. The plaintiff's attorney asks you "Is that all they will pay?", or "Is that all of your authority?", or "Is that the final offer?", and you say "Yes." The plaintiff then accepts your offer of $50,000.00.

Shortly thereafter, plaintiff, or plaintiff's attorney, learns that you, in fact, had $75,000.00 of authority. Plaintiff's attorney may have learned about this from bragging on the part of you, or other attorneys in your office, the insurer, or from a disgruntled ex-staff member. A lawsuit is then filed against you personally for the other $25,000.00.

You tell the insurer and assume that it will stand behind you since it did extend that much authority. The insurer says that they have closed the file and that you are on your own.

You begin to get more concerned about the case and discuss it with your partners and tell them that the claim is frivolous because that is the way negotiations have always been done. Someone suggests that you had better check the law, and when you do, you come across Iowa Civil Jury Instruction 810.1 (set out at Appendix p. 17). At that point, you get very concerned because the claim seems to fit within 810.1.

You decide that even though things look bad, at least your malpractice carrier will take of it and you report it to your insurer. The malpractice carrier says that the claim involves an intentional act of fraudulent misrepresentation, therefore, it is not covered.

You conclude that things cannot get any worse, but at least you can afford to pay the $25,000.00. Therefore, you pay the money and get the case dismissed and try to forget about the experience.

However, the original plaintiff is very angry and the plaintiff asks the plaintiff's attorney to report you to the Ethics Committee. Plaintiff's attorney calls you and tells you what the plaintiff claims. You tell plaintiff's lawyer that your statement was within the customary practices in settlement negotiations and that everyone knows that statements during negotiations cannot be taken at face value and that you will take it personally if an ethics violation is reported. Plaintiff's attorney tells the plaintiff that this could happen to any attorney and that he cannot afford to make a lifetime enemy by reporting you to the Ethics Committee. Plaintiff then files a Complaint with the Ethics Committee and the Ethics Committee files charges against you based on the following:

"DR 1-102. MISCONDUCT

(A) A lawyer shall not:

. . . .

(4) Engage in conduct involving dishonesty, fraud, deceit, or misrepresentation.

(5) Engage in conduct that is prejudicial to the administration of justice.

(6) Engage in any other conduct that adversely reflects on the fitness to practice law.

DR 7-102. Representing a Client Within the Bounds of the Law

(A) In the representation of a client, a lawyer shall not:

. . . .

(5) Knowingly make a false statement of law or fact."

In Iowa Supreme Court Board of Professional Ethics and Conduct v. Hohnbaum, 554 N.W.2d 550 (Iowa 1996), the Court suspended an insurance defense lawyer for three months based on the above sections for making misleading statements to the Court. In Committee on Professional Ethics and Conduct of Iowa State Bar Ass'n v. Roberts, 245 N.W.2d 298 (Iowa 1976), the Court cited DR 1-102 in support of the following proposition: "It is unethical for a lawyer to engage in conduct involving dishonesty and misrepresentation."

In Committee on Professional Ethics and Conduct of the Iowa State Bar Ass'n v. McCullough, 468 N.W.2d 458 (Iowa 1991), the Court held that the attorney was liable for sanctions for an additional reason of "attempting to negate another lawyer's obligation to report ethical violations." 468 N.W.2d at 458.

Incidentally, ethical charges were also filed against plaintiff's lawyer for failing to report your ethical violations, based on the following duty set out in DR 1-103:

"(B) A lawyer possessing unprivileged knowledge or evidence concerning another lawyer or a judge shall reveal fully such knowledge or evidence upon proper request of a tribunal or other authority empowered to

investigate or act upon the conduct of lawyers or judges."

See, also, In Re Himmel, 533 N.E.2d 790 (Ill. 1988), in which an Illinois lawyer was suspended for one year for failure to report another attorney for conversion of client's settlement.

I. THE DUTY OF A LAWYER TO TRY TO SETTLE A LAWSUIT.

Abraham Lincoln's Notes for Law Lecture in 1850 state:

> "Discourage litigation. Persuade your neighbors to compromise whenever you can. Point out to them how the nominal winner is often the real loser-in fees, expenses, and waste of time. As a peacemaker, the lawyer has a superior opportunity of being a good man. There will still be business enough. Never stir up litigation." Quoted in Jackson v. Philadelphia Housing Auth., 858 F.Supp. 464, 467 (E.D. Pa. 1994).

There does not seem to be any specific provision in the Iowa Code of Responsibility requiring lawyers to initiate settlement negotiations. Canon 6 states that a lawyer should represent a client competently. E.C. 7-8 states: "A lawyer should exert the best efforts to ensure that decisions of a client are made only after the client has been informed of relevant considerations. A lawyer ought to initiate this decision-making process if the client does not do so." It can be argued that in order to practice law competently and in order that a client is informed of relevant considerations, a lawyer in most situations should initiate with the client considerations relating to settlement possibilities of litigation.

In the context of issues relating to whether there was a settlement and the terms of the settlement, the Iowa Supreme Court has said many times that the law favors settlement of controversies. The following portion of Wright v. Scott, 410 N.W.2d 247, 249 (Iowa 1987), is an example:

> "The law favors settlement of controversies. A settlement agreement is essentially contractual in nature. Wong v. Bailey, 752 F.2d 619, 621 (11th Cir. 1985); Linn County v. Kindred, 373 N.W.2d 147, 149-50 (Iowa App. 1985); Jallen v. Agre, 264 Minn. 369,

> 373, 119 N.W.2d 739, 743 (1963); 15A C.J.S. Compromise and Settlement §1, at 170 (1967). The typical settlement resolves uncertain claims and defenses, and the settlement obviates the necessity of further legal proceedings between the settling parties. We have long held that voluntary settlements of legal disputes should be encouraged, with the terms of settlements not inordinately scrutinized. See, e.g., Bakke, 242 Iowa 612, 618-19, 47 N.W.2d 813, 817 (1951); Messer v. Washington Nat'l Ins. Co., 233 Iowa 1372, 1380, 11 N.W.2d 727, 731-32 (1943)."

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Since the law favors settlements, it could be contended that the failure to explore settlement constitutes a violation of DR 1-102(A)(5) which states that a lawyer shall not "engage in conduct that is prejudicial to the administration of justice," and a violation of DR 6-101 by failing to act competently or neglecting a legal matter. Committee on Professional Ethics and Conduct of Iowa State Bar Ass'n v. Morris, 505 N.W.2d 194 (Iowa 1993).

In Jackson v. Philadelphia Housing Auth., 858 F.Supp, 464, 471, 472 (E.D. Pa. 1994), the Court reviewed cases holding that attorney fees can be denied where the case could have been settled without filing a lawsuit, and quotes from another Judge who said:

> "[W]e think that neither Congress nor the Supreme Court intended that private attorneys general need be encouraged to make mountains out of molehills."

The Jackson Court stated that ordinarily attorney fees would be denied if there was a willful failure to make an effort to settle before litigation. In support of this position, the Court said:

> "The Code of Professional Responsibility does not explicitly require an attorney to attempt to settle a dispute before filing a lawsuit. Nonetheless, as officers of the court, lawyers not only owe allegiance to their clients, but have a duty to spare the courts from unnecessary litigation. *See*, H. Drinker, *Legal Ethics* 63-64 (1953). When

> possible, they should serve as 'gatekeepers' to the legal process by diverting disputes 'into mediative channels rather than translating them into adversary claims.' *See* Galanter, *Reading the Landscape of Disputes*, 31 UCLA L.Rev. 4, 19 (1983)."

In Mutuelles Unies v. Kroll & Linstrom, 957 F.2d 707 (9th Cir. 1992), an insurer sued its supervising attorneys for legal malpractice. The insurer claimed negligence in the handling of settlement negotiations. Judgment was entered against the law firm for the difference between the amounts the claimants were willing to accept (which was also recommended by the Trial Judge) and the amount of the verdict, which was three times as much. The supervising attorney died a few months before the malpractice trial. California law applied. In the opinion, the Court states:

> "Jury instruction 29 provided: 'The lawyer's duty to the client includes the obligation to attempt to effectuate reasonable settlement of the action where the general standards of professional care require that the most reasonable manner of disposing of the action is by settlement.' The jury instruction generally conforms with Lysick v. Walcom, 258 Cal.App.2d 136, 65 Cal.Rptr. 406 (1968). It complies with California law.
>
> . . . .
>
> A law firm is liable for legal malpractice when it breaches its duty to exercise the same skill, prudence and diligence possessed by other members of the bar. Blain v. The Doctor's Co., 222 Cal.App.3d 1048, 272 Cal.Rptr. 250, 258 (1990)."

Therefore, there is a substantial risk that if a lawyer does not raise the subject of settlement with a client or does not meet the standard of care in the evaluation and handling of settlement negotiations, there could be a finding of legal malpractice. Iowa Civil Jury Instruction 1500.3 states that "An attorney must use the degree of skill, care and learning ordinarily possessed and exercised by other attorneys in similar circumstances." In Loudon v. State Farm Mut. Auto., 360 N.W.2d 575, 580 (Iowa App. 1984), the Court of Appeals, in a bad faith

action against the insurer, was very critical of what they considered to be an inadequate discussion by the insurer's attorney of the excess risks and the effects on the insured. Without any discussion, the Court apparently assumed that the outside defense attorney was acting as agent for the insurer and stated: "The evidence we have summarized above supports the finding that State Farm did not adequately advise Hill of the expected consequences of failing to settle. Failure to advise the probable effects of the resulting excess liability is indicative of bad faith. Kooyman, 315 N.W.2d at 36."

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Incidentally, in Wierck v. Grinnell Mut. Reinsurance Co., 456 N.W.2d 191, 195 (Iowa 1990), the Iowa Supreme Court takes the position that it is the responsibility of the insured to make a specific demand within the policy limits in order to have a foundation for bad faith claim.

In Mid-America Bank v. Commercial Union Ins., 587 N.E.2d 81 (Ill. App. 5 Dist. 1992), an insurer was sued for bad faith failure to settle. The insurer brought a third party claim against its attorney. The insurer had given the attorney settlement authority up to its policy limits. Plaintiff offered to settle for the policy limits, but for a long period of time the attorney did not offer the limits and then at the last minute offered the limits and they were rejected. The attorney was held liable for 25% of the verdict. An expert testified that settlement negotiations were mishandled.

II. IS LYING PERMITTED IN NEGOTIATIONS?

There are many articles dealing with ethics in the negotiation process. There is a comprehensive article by Gerald B. Wetlaufer, *The Ethics of Lying in Negotiations*, 76 Iowa Law Review 1219. A copy of the Table of Contents of the article is attached as Appendix pp. 18 and 19. The Table of Contents shows various distinctions, excuses, and justifications given for lies. Courts do not seem very receptive to efforts to avoid responsibility for lies. In Committee on Professional Ethics and Conduct of Iowa State Bar Ass'n v. Roberts, 312 N.W.2d 556 (Iowa 1981), a lawyer representing a wife had a deadline for filing his client's financial statement, but could not reach his client to get her signature. The lawyer asked the opposing lawyer if he had any objection to the lawyer signing his client's name and the husband's lawyer agreed. The Affidavit was filed, but the Court was not told the signature was false. The lawyer had a fee dispute with the wife and sued for his fees. She found out about the Affidavit and made an ethics complaint. The lawyer was reprimanded for misleading the

Court by filing an Affidavit with a false signature on it stating, "It is no defense that he was seeking to further his client's interests, and she was not harmed." The court cited the Crary case and said it is prejudicial to the administration of justice to use untruthful means even to accomplish a lawful purpose. It is beyond the scope of this presentation to deal with those issues in detail. One of the major issues is how to reconcile the duty to represent clients zealously with a lawyer's status as officer of the Court. There are also questions as to whether there are ethical duties outside of the Code of Professional Responsibility. The Iowa Supreme Court's Standards for Professional Conduct, adopted April 10, 1996, state:

> "After reading these standards, one can easily discern that most familiar golden rule: do unto others as you would have them do unto you. If all of us can abide by this most ancient and cherished rule of conduct, we can and will provide a ready answer to the critics of our profession."

Samuel Johnson, responding to the question why a lawyer can be an advocate for an unjust cause stated:

> "Sir, you do not know [a cause] to be good or bad till the judge determines it....An argument which does not convince yourself may convince the judge to whom you urge it; and if it does convince him, why then, sir, you are wrong and he is right."
>
> Boswell, *The Life of Johnson* 47 (Hill ed., 1887)."

If all lawyers were to abide by the Golden Rule, the plaintiff's lawyer would disclose the lowest amount the plaintiff would accept and the defense lawyer would disclose the extent of authority. However, this would breach the ethical duties to maintain confidences of the client, and the lawyer-client privilege would become meaningless to that extent.

It is clear that a misrepresentation of fact in settlement negotiations can be the basis for fraudulent misrepresentation. See, ICJI 810.1 at Appendix p. 17.

This section will concentrate on the extent to which an attorney can give an opinion during negotiations.

DR 7-102(A)(5) states that a lawyer cannot "knowingly make a false statement of law or fact." DR 1-102(A)(4) states that a lawyer shall not make a misrepresentation.

Articles dealing with professional ethics tend to assume that there would be no ethical violation involved relating to opinions. The articles recognize the difficulty of distinguishing between a fact and an opinion. An article by Guernsey, *Truthfulness in Negotiation*, University of Richmond Law Review Vol. 17:99, refers to McCormick's analysis that the distinction is "the clumsiest of all tools . . . . it is clumsy because its basic assumption is an illusion, and the distinction is based merely on how "concrete" the statement is. "Facts" require fewer inferences for interpretation than do "opinions." McCormick's Handbook on the Law of Evidence 23(E. Cleary 2.Ed. 1972, pp. 22-26).

In determining whether information is an opinion and entitled to first amendment protection, the Iowa Supreme Court in Jones v. Palmer Communications, Inc., 440 N.W.2d 884, 891 (Iowa 1989), used the following criteria:

1. The precision and specificity of the disputed statement.
2. Verifiability.
3. Literary context.
4. Social context, i.e., focus on the category of publication.
5. Public context or political arena in which the statements were made.

This analysis lends some support to the proposition that the context of statements must also be considered. Some writers argue that there is more latitude in making untruthful remarks in settlement negotiations. A Judge has remarked that he gives more credibility to statements made by lawyers outside the Courtroom than those inside the Courtroom. However, the substantive law allows recovery for misrepresentation in the form of an opinion in some circumstances. If the ethical prohibition on misrepresentation includes misrepresentations that are actionable, then the substantive law of misrepresentation must be considered. Chapter 800 of the Iowa Civil Jury Instructions sets out the substantive law of

misrepresentation. The instructions deal with the supplying of "information." ICJI 800.2 contains the following definition:

> "'Information' means any word or conduct asserting the existence of a fact. Information includes opinions based on facts equally well known to the defendant and the person who receives the information."

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Therefore, it is possible for a lawyer to have civil liability for a negligent misrepresentation of an opinion. However, it is assumed that an unintentional negligent misstatement of opinion would not be an ethical violation. However, it might violate other ethical rules requiring competent representation. A copy of ICJI 800.1 (negligent misrepresentation) is attached as Appendix p. 20.

However, a fraudulent misrepresentation, as set out in ICJI 810.1, attached as Appendix p. 17, includes as an element that defendant knew the representation was false. This means that civil liability for fraudulent misrepresentation would presumably be grounds for an ethical charge for violating DR 1-102(A)(4) by making a "misrepresentation." For purposes of fraudulent misrepresentation, the jury instruction on reliance on opinions, in ICJI 810.9, provides:

> "Concerning proposition No. 6 of Instruction No. [810.1] [No. 7 of Instruction No. [810.2], the plaintiff is justified in relying on the defendant's representation of opinion only if one or more of the following situations exist:
>
> 1. The defendant has or claims to have special knowledge of the matter that the plaintiff does not have.
> 2. The defendant has a fiduciary or other similar relation of trust and confidence with the plaintiff.
> 3. The defendant has successfully tried to gain the plaintiff's confidence.
> 4. The defendant knows of some special reason to expect that the plaintiff will rely on the opinion."

Therefore, a lawyer must be very careful about giving opinions in settlement negotiations. EC 7-4 allows an advocate to urge "any permissible construction of the law favorable to a client, without regard to the lawyer's professional opinion as to the likelihood that the construction will ultimately prevail. A lawyer's conduct is within the bounds of the law, and therefore permissible, if the position taken is supported by the law or is supportable by a good faith argument for an extension, modification, or reversal of the law. However, a lawyer is not justified in asserting a position in litigation that is frivolous." A lawyer should be cautious in making statements about the law during settlement negotiations. So long as the opinion has some basis and is not in the category of being reckless, it is probably safe to give opinions about what a jury is likely to do in a certain situation. Remember that the primary criteria for distinguishing between fact and opinion are the precision, specificity, and verifiability of the statement.

ICJI 810.5 describes the conditions under which a jury can make a finding that the representation was false. ICJI 810.5 is set out in the Appendix at page 21. Actual knowledge of falsity is not required. Reckless disregard of the truth can be a basis. A false statement of the basis for the statement can also show falsity. A representation can be found to be false because unfavorable information was omitted. The context can also be considered by the jury. Under some circumstances, the failure to determine whether the statement is true can create liability. Therefore, anyone who is negotiating settlements needs to be familiar with the entire Chapter 800 of the Iowa Civil Jury Instructions in order to determine what is permissible during settlement negotiations and especially the criteria for a finding that a representation was false.

III. DUTY TO MAKE DISCLOSURES DURING SETTLEMENT NEGOTIATIONS.

Since DR 1-102(A)(4) states that a lawyer shall not engage in fraud, it is necessary to consider under what circumstances the failure to disclose information may be found to be fraudulent.

ICJI 810.2 sets out the essentials for recovery for fraudulent non-disclosure. A note to the instruction indicates that non-disclosure constitutes fraud only where special circumstances exist which give rise to a duty to communicate the concealed fact. The note cites the cases of Cornell v. Wunschel, 408 N.W.2d at 374; Kunkle Water & Elec., Inc. v. City of Prescott, 374 N.W.2d at 653.

In Cornell v. Wunschel, 408 N.W.2d 369, 374 (Iowa 1987), Attorney Wunschel who had represented the lessor vendor in negotiating a lease purchase was held liable for misrepresentation in failing to disclose information. Attorney Wunschel disclosed documents relating to the financial condition of the business, but failed to disclose that he had made large cash contributions to the business, there was a negative cash flow during certain periods, and a net operating loss for one year. The Court held that in response to an inquiry about the motel's profitability, the attorney had a duty to make a disclosure and the jury could find that insufficient evidence was disclosed.

In Kunkle Water & Elec., Inc. v. City of Prescott, 347 N.W.2d 648, 653 (Iowa 1984), a water company sued the City to collect a delinquent account for repairs to the City water system. The City defended on the ground that there was fraud in inducing the City to contract immediately for repair costs estimated at $3,500.00 which were eventually billed at $67,038.19. The Court held that misrepresentation can occur when one with superior knowledge dealing with inexperienced persons who rely on him or her, purposely suppresses the truth respecting a material fact in the transaction.

In Virzi v. Grand Trunk Warehouse & Cold Storage Co., 571 F.Supp. 507 (E.D. Mich. 1983), the plaintiff in a personal injury case died from unrelated causes after a settlement was reached during a mediation hearing and before the settlement was finalized. At the time the settlement was made, plaintiff's attorney did not know that his client had died. The Court set aside the settlement because opposing counsel was not told of the death of the plaintiff. The Court relied upon DR 7-102(A) which provides that a client shall not (3) conceal or knowingly fail to disclose that which he is required by law to reveal and shall not (5) knowingly make a false statement of law or fact. The Court also referred to EC 7-27 which prohibits a lawyer from suppressing evidence that he or his client has a legal obligation to reveal or produce. The Court found that the plaintiff would have made an effective witness and assumed that the defendant might not have settled if the defendant had known that the plaintiff had died. The Court held that "candor and honesty" was required and that such a significant fact as the death of ones client must be disclosed and that zealous representation does not justify withholding this information. The Court held the information should have been disclosed both to the Court and opposing counsel before the agreement was finalized and, therefore, set aside the settlement. The Virzi Court relied in part on the Minnesota case of Spaulding v.

Zimmerman, 263 Minn. 346, 116 N.W.2d 704 (1962), in which defendant's doctor found a condition that had escaped notice of the other doctors. Defendant settled the case without disclosing this condition. Two years later, plaintiff learned about the condition that had been discovered by defendant's doctor and brought an action resulting in the vacation of the earlier settlement. The Minnesota Court found that there was no duty to make the disclosure during the settlement negotiations when the parties were in an adversary relationship, but that the duty to disclose arose once the parties reached the settlement and sought the Court's approval.

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IV. ETHICAL PROBLEMS WITH ALTERNATIVE FEE AGREEMENTS AND DEFENSE GUIDELINES.

EC 5-1 states that a lawyer should exercise judgment solely for the benefit of the client and free from compromising influences and loyalties.

EC 5-21 requires a lawyer to disregard the desires of others that might impair free judgment and that these influences are often subtle. Therefore, a lawyer must be alert to their existence. EC 5-21 further provides:

> "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."

DR 5-107(B) states, "A lawyer shall not permit a person who recommends, employs, or pays the lawyer . . . . to direct or regulate the lawyer's professional judgment in rendering such legal services."

EC 5-23 provides that even though a person or organization that pays or furnishes lawyers has a potential power to exert strong pressures. The "lawyer must always be free to exercise professional judgment without regard to the interests or motives of a third person. . . ."

Attached is an ethics opinion 93-2, September 2, 1993, stating that fixed or flat fee arrangements are permitted subject to the duty to avoid violation of other ethics considerations.

In American Insurance Association v. Kentucky Bar Association, 917 S.W.2d 568 (Ky. 1996), the Kentucky Supreme Court upheld a ruling of the Kentucky Bar Association that a lawyer may not contract with a liability insurer to do all of the insurer's defense work for a set fee. Under the Model Rule, the Court held that such a contract would apply pressure that would interfere with the defense counsel's independent professional judgment and would make the defense attorney's interest in the outcome clash with the attorney's duties to the insureds.

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There is a discussion in the Fall 1996 issue of *Tort & Insurance Law Journal*, Vol. 32, No. 1, dealing with alternative fee arrangements at page 80 and outside counsel guidelines at page 82.

At page 83, the article indicates that four jurisdictions have held insurer's vicariously liable for the malpractice of their defense counsel and two jurisdictions have held otherwise. However, even if the insurer is liable for the malpractice of their outside defense counsel, they would no doubt make an indemnity claim, or at least a contribution claim, on the ground that the attorney had the duty to avoid malpractice even if the insurer placed limitations in its guidelines.

EC 5-21 states that "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."

If an insured's company defense lawyer is sued for malpractice, the presence of guidelines will make it more difficult for the defense of the lawyer, especially if they were not disclosed as required by EC 5-21.

The more risk there is of an excess verdict, the more carefully the defense attorney should document the file giving reasons for the defense strategy that is being followed and the reasons for not doing other things in connection with the file. If anything requires prior approval and is not being done, it is advisable to have letters explaining that they were considered and set out the reasons as to why they were not done.

V. SETTLEMENT DOES NOT NECESSARILY BAR MALPRACTICE.

An article in *Tort & Insurance Law Journal*, Vol., No. 2, Winter 1998, beginning at page 650, points out that there is an increasing tendency of clients who are dissatisfied with their settlements to blame their lawyers. There is an increasing tendency for Courts to hold that judicial estoppel will not prevent claims of legal malpractice in connection with settlements. Legal malpractice claims based on an attorney's recommendation of an inadequate settlement have been allowed in three recent cases. See, e.g., Grayson v. Wofsey, Rosen, Kweskin and Kuriansky, 646 A.2d 195 (Conn. 1994); McCarthy v. Pedersen, 621 N.E.2d 97 (Ill. App. Ct. 1993); Malfabon v. Garcia, 898 P.2d 107 (Nev. 1995). Nebraska has held that a Court-approved settlement did not bar a legal malpractice claim. McWhirt v. Heavey, 550 N.W.2d 327 (Neb. 1996). The 2d Circuit allowed a malpractice claim after settlement of a lawsuit even though the client was a lawyer. Barry v. Liddle, O'Connor, Finkelstein & Robinson, 98 F.3d 36 (2d Cir. 1996).

EC 7-7 states that it is for the client to decide whether to accept a settlement offer.

One of the common themes that shows up in cases where lawyers have ethical problems is the lack of communication. One would assume that lawyers are good communicators. However, lawyers do not seem to do a very good job of keeping their clients informed. Another problem is that the information is not timely. It is common in bad faith cases for the settlement evaluation and settlement negotiations occurs so close to the trial that the parties cannot give proper consideration to settlement.

In the future, it appears there will be more pressure on attorneys to keep clients informed and to do so on a timely basis and to give clients information "of relevant considerations" as required by EC 7.8.

In all cases, it is now important to explore settlement as soon as feasible. If the demand exceeds the limits or there otherwise appears to be a risk of excess exposure, the defense attorney should become more active in urging settlement negotiations and, if necessary, mediation. This should be done on a timely basis since last minute negotiations prevent adequate time for communications and decisions.

It is advisable to document that settlement has been discussed and to also document the considerations that were discussed in making the decision. If a settlement is reached, it is important to document the terms of the settlement and document the authority for the terms of the settlement and to also document the record if the client rejects the settlement offer.

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VI. NEGOTIATION GUIDELINES

1. CONSIDER WHETHER THERE ARE ANY CONFLICTS YOU HAVE A DUTY TO DISCLOSE.

2. INITIATE SETTLEMENT DISCUSSIONS AS SOON AS FEASIBLE.

3. ADVISE CLIENT ABOUT TIMING OF NEGOTIATIONS AND ISSUES AND RISKS IN SETTLEMENT v. TRIAL.

4. TRY TO COMPLETE SETTLEMENT NEGOTIATIONS BEFORE THE LAST MINUTE.

5. DOCUMENT EVERYTHING. Efforts, decisions, terms of settlement, etc.

6. DOCUMENT WHAT IS BEING DONE AND NOT DONE AND WHY

7. NEVER MAKE A MISSTATEMENT OF FACT.

8. CAREFULLY CONSIDER OPINIONS BEFORE YOU GIVE THEM AND MAKE CERTAIN YOU HAVE A PERMISSIBLE BASIS FOR THEM.

9. CAREFULLY CONSIDER WHETHER YOU ARE CONCEALING OR KNOWINGLY FAILING TO DISCLOSE THAT WHICH YOU ARE REQUIRED BY LAW TO REVEAL. DR 7-102(A)(3).

10. COMMUNICATE. Keep client informed.

NOTE: If the client gives settlement authority in increments, the attorney can negotiate more effectively and there will be less chance of a claim of an ethical violation or a claim of a misrepresentation.

810.1 Fraudulent Misrepresentation - Essentials For Recovery. The plaintiff must prove the following propositions by a preponderance of clear, satisfactory and convincing evidence:

1. The defendant on or about the _____ day of _____, 19___, made a representation to [plaintiff] [plaintiff as one of a class of persons] that [set forth the representation made].

2. The representation was false.

3. The representation was material.

4. The defendant knew the representation was false.

5. The defendant intended to deceive [plaintiff] [plaintiff as one of a class of persons].

6. The plaintiff acted in reliance on the truth of the representation and was justified in relying on the representation.

7. The representation was a proximate cause of the plaintiff's damage.

8. The amount of damage.

If the plaintiff has failed to prove any of these propositions, the plaintiff cannot recover damages. If the plaintiff has proved all of these propositions, the plaintiff is entitled to recover damages in some amount. [If an affirmative defense is submitted, delete the second sentence and insert the following: If the plaintiff has proved all of these propositions, you will consider the defense of _____, as explained in Instruction No. _____.]

Authority

Beeck v. Kapalis, 302 N.W.2d 90 (Iowa 1981)
Restatement (Second) of Torts, Section 525 (1977)

The Ethics of Lying in Negotiations†

*Gerald B. Wetlaufer**

1990

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*Associate Professor, University of Iowa. A.B. 1967, Princeton University; J.D. 1972, Yale University. I wish to express my thanks to Eric G. Andersen, Mary Louise Fellows, Martin Klammer, Susan Koniak, David Luban, Richard Matasar, Aviam Soifer, Alan I. Widiss, and, of course, Huston Diehl; to Robert L. Wald, Thomas C. Matthews, Donald H. Green, and the others who comprised the Washington, D.C., firm of Wald, Harkrader & Ross; and to the interdisciplinary community of scholars at The University of Iowa. This project has benefitted from the generous support of the University of Iowa Law Foundation and the Center for Advanced Studies at the University of Iowa. It is dedicated to the memory of Wallis C. Wetlaufer.

The problem of lying in negotiations is central to the profession of law. We lawyers are generally counted as successful in the degree to which we are effective at producing instrumental results through our strategic speaking. Much of our speaking, perhaps even most, takes place in the arenas of negotiation. That is where we reach almost all of our agreements and settle almost all of our differences. Most lawsuits end in negotiated settlements. Those that do not may nevertheless entail a wide range of negotiations over both the possibility of settlement and the conduct of the litigation. Outside the realm of litigation, many lawyers spend great portions of their time negotiating agreements of one kind or another. And finally, of course, we are constantly involved in diverse negotiations with our clients, our colleagues, our staff and all of those with whom we interact in the course of the day.

If it is true that lawyers succeed in the degree to which they are effective in negotiations, it is equally true that one's effectiveness in negotiations depends in part upon one's willingness to lie. As Professor James J. White has written:

> Like the poker player, a negotiator hopes that his opponent will overestimate the value of his hand. Like the poker player, in a variety of ways he must facilitate his opponent's inaccurate assessment. The critical difference between those who are successful negotiators and those who are not lies in this capacity both to mislead and not to be misled.
>
> Some experienced negotiators will deny the accuracy of this assertion, but they will be wrong. I submit that a careful examination of the behavior of even the most forthright, honest, and trustworthy negotiators will show them actively engaged in misleading their opponents about their true position. To conceal

800.1 Negligent Misrepresentation - Where No Public Duty To Give Information Exists - Essentials For Recovery. The plaintiff must prove the following propositions:

1. The defendant on or about the ____ day of _____, 19___, negligently supplied (set forth in detail the information supplied) to [plaintiff] [plaintiff as one of the limited group of persons] which was false.

2. The defendant had a financial interest in supplying the information.

3. a. The defendant intended to supply the information for the benefit and guidance of [plaintiff] [plaintiff as one of the limited group of persons]; or

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b. The defendant knew the person who received the information intended to supply the information for the benefit and guidance of [plaintiff] [plaintiff as one of the limited group of persons].

4. a. The defendant intended the information to influence [the transaction for which the information was supplied] [a transaction substantially similar to the transaction for which the information was supplied]; or

b. The defendant knew that the person who received the information intended the information to influence [the transaction for which the information was supplied] [a transaction substantially similar to the transaction for which the information was supplied].

5. The plaintiff acted in reliance on the truth of the information supplied and was justified in relying on the information.

6. The negligently supplied information was a proximate cause of the plaintiff's damage.

7. The amount of damage.

If the plaintiff has failed to prove any of these propositions, the plaintiff cannot recover damages. If the plaintiff has proved all of these propositions, the plaintiff is entitled to recover damages in some amount. [If an affirmative defense is submitted, delete the second sentence and insert the following: If the plaintiff has proved all of these propositions, you will consider the defense of _____, as explained in Instruction No._____.]

Authority

Restatement of Torts (Second), Section 552 (1977)
Beeck v. Kapalis, 302 N.W.2d 90 (Iowa 1981)
Larsen v. United Federal Savings & Loan Association of Des Moines, 300 N.W.2d 281 (Iowa 1981)
Ryan v. Kanne, 170 N.W.2d 395 (Iowa 1969)

Comment

Note: Use 3a or 3b, 4a or 4b depending on the evidence.

Caveat: The elements of the marshalling instruction are taken from Restatement (552, including "justifiable reliance" in paragraph 5 of the section. In discussing the necessary proof for this tort, the Iowa Supreme Court quoted (552 verbatim in Meier v. Alfa-Laval, Inc., 454 N.W.2d 576, 581 (Iowa 1990). Nevertheless, because the specific issue was not addressed in the case, the Committee cannot take a definitive position and this Instruction and Instruction 800.8 should be used with this admonition in mind

810.5 Fraudulent Misrepresentation - Knowledge Of Falsity (Scienter) - Definition. Concerning proposition [No. 4 of Instruction No. [810.1]] [No. 5 of Instruction No. 810.2]], the defendant knew the representation was false if any of the following situations existed:

1. The defendant actually knew or believed the representation was false.

2. The defendant made the representation without belief in its truth or in reckless disregard of whether it was true or false.

3. The defendant falsely stated or implied that the representation was based on [his] [her] personal knowledge or investigation.

4. The defendant made a representation which [he] [she] knew or believed was materially misleading because it left out unfavorable information.

5. The defendant stated [his] [her] intention to do or not to do something when [he] [she] did not actually have that intention.

6. The defendant knew the representation could be understood in both a true and false manner, and made the representation (a) intending that it be understood in the false sense, (b) having no belief as to how it would be understood, or (c) in reckless disregard of how it would be understood.

7. The defendant's [special relationship of trust and confidence to the plaintiff] [special source of information] made it the defendant's duty to know whether the representation was true or false.

Authority

Beeck v. Kapalis, 302 N.W.2d 90 (Iowa 1981)
Mills County State Bank v. Fisher, 282 N.W.2d 712 (Iowa 1979)
B & B Asphalt Co., Inc. v. T. S. McShane Co., 242 N.W.2d 279 (Iowa 1979)
Grefe v. Ross, 231 N.W.2d 863 (Iowa 1975)
Hall v. Wright, 261 Iowa 758, 156 N.W.2d 661 (1968)
Restatement (Second) of Torts, Section 526, Comments c , d, e and f, and Sections 527, 529 and 530 (1977)

Comment

Note: Use only those portions of the instruction supported by the evidence.

THE TRIPARTITE RELATIONSHIP: WHO IS THE CLIENT AND TO WHOM DOES THE ATTORNEY OWE ETHICAL DUTIES

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THE TRIPARTITE RELATIONSHIP: WHO IS THE CLIENT AND TO WHOM DOES THE ATTORNEY OWE ETHICAL DUTIES

By William T. Barker*

The past several years have been ones of controversy, uncertainty, and change for insurance defense lawyers attempting to know and comply with their ethical obligations. Some courts have rejected or questioned the traditional

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He is a member of the American Law Institute. He is Chair of the Extracontractual Liability Subcommittee of the Insurance Coverage Litigation Committee of the Tort & Insurance Practice Section ("TIPS") of the American Bar Association and a former Co-Chair of the Subcommittee on Bad Faith Litigation of the ABA Section of Litigation Insurance Coverage Litigation Committee. He is a past Chair of the TIPS General Committee Board and of the TIPS Appellate Advocacy Committee.

He is a Contributing Editor of Bad Faith Law Report, Editor Emeritus of Covered Events (newsletter of the Defense Research Institute ("DRI") Insurance Law Committee), a member of the editorial boards of Insurance Litigation Reporter and Defense Counsel Journal, and a member of the DRI Insurance Law Publications Board. He moderates the Illinois Insurance forum and co-moderates the Insurance Law (General) forum on Counsel Connect, an on-line service for lawyers.

He is a member and past Chair of the Chicago Council of Lawyers Committee on Ethics and Professional Responsibility, a member of the IADC Special Committee on Professional Responsibiliity and the Chicago Bar Association Committee on Professional Responsibility. He is also a member of his firm's Ethics Committee. (See Jonathan M. Epstein, *The In-House Ethics Advisor: Practical Benefits for the Modern Firm*, 7 Geo. J. Legal Ethics 1011 (1994).)

understandings of the ethical duties of defense lawyers.[1] A draft Restatement of the Law Governing Lawyers has threatened to overturn some of those understandings.[2] The ABA Standing Committee on Ethics and Professional Responsibility issued its first opinion on the subject in decades.[3] And discussion of these issues, once almost the sole domain of practitioners has become a hot subject of debate among law professors.[4]

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1 *E.g. American Ins. Ass'n v. Kentucky State Bar*, 917 S.W.2d 568 (Ky. 1996) (counsel defending insureds under liability insurance policies may not be employees of insurer or agree to flat fee arrangements); *Atlanta Int'l Ins. Co. v. Bell*, 475 N.W.2d 294 (Mich. 1991) (insurer which retains counsel to defend its insured is either not a client of that counsel or is something less than a full client).

2 *See* RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS, § 215 (Tent. Dr. No. 4 April 10, 1991); RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS, § 215 (Proposed Final Draft No. 1 March 29, 1996). Neither of these drafts of this section was ever approved by the membership of the American Law Institute, though almost all of the rest of Proposed Final Draft No. 1 was approved.

3 ABA STANDING COMMITTEE ON ETHICS AND PROFESSIONAL RESPONSIBILITY, FORMAL OP. 96-403 (APRIL 19, 1997) ("OP. 96-403").

4 Charles Silver & Kent Syverud, *The Professional Responsibilities of Insurance Defense Lawyers,* 45 Duke L.J. 255 (1995); Charles Silver, *Does Insurance Defense Counsel Represent the Company or the Insured?,* 72 Tex. L. Rev. 1583 (1994) (*"Client Identity"*); Charles Silver & Michael Sean Quinn, *Wrong Turns on a Three Way Street: Dispelling Nonsense About Insurance Defense Lawyers*, Coverage, Vol. 5, No. 6, at 1 (Nov./Dec. 1995); Charles Silver & Michael Sean Quinn, *Are Liability Insurers Second-Class Clients? No, but They May Be Soon--A Call to Arms Against the Restatement (Third) of the Law Governing Lawyers,* Coverage, Vol. 6, No. 2, at 21 (Mar/April 1996) (*"Call to Arms"*); Thomas D. Morgan & Charles D. Wolfram, *Lawyers Retained by Liability Carriers to Represent Insureds in the Restatement of the Law Governing Lawyers*, Coverage Vol. 6, No. 2, at 44 (Mar/April 1996); Tom Baker, *Liability Insurance, Conflicts, and Defense Lawyers: From Triangles to Tetrahedrons*, 4 Conn. Ins. L.J. 101 (1997-98); David A. Hyman, *Professional Responsibility, Legal Malpractice, and the Eternal Triangle: Will Lawyers or*

(continued...)

In an attempt to address both these developments and long-standing problem areas, the IADC and the DRI undertook a special study of the professional responsibilities of insurance defense counsel.[5] The Illinois Assocation of Defense Trial Counsel convened a special full-day symposium on "Who Is the Client: The Tripartite Relationship," held January 24, 1997. Other organizations have included segments on these issues in regular CLE programs or have issued publications.

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It is impossible in a short article to cover all that has happened or all of the things that defense counsel and the insurers that retain them need to know. So I shall try to concentrate on the most important and those I consider the least

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[4](...continued)
Insurers Call the Shots?, 4 Conn. Ins. L.J. 353 (1997-98); Robert H. Jerry, II, *Consent, Contract, and the Responsibilities of Insurance Defense Counsel*, 4 Conn. Ins. L.J. 153 (1997-98); Nancy J. Moore, *The Ethical Duties of Insurance Defense Lawyers: Are Special Solutions Required?*, 4 Conn. Ins. L.J. 259 (1997-98); Thomas D. Morgan, *What Insurance Scholars Should Know About Professional Responsibility*, 4 Conn. Ins. L.J. 1 (1997-98); Stephen L. Pepper, *Applying the Fundamentals of Lawyers' Ethics to Insurance Defense Practice*, 4 Conn. Ins. L.J. 27 (1997-98); Charles Silver, *Flat Fees and Staff Attorneys: Unnecessary Casualties in the Continuing Battle Over the Law Governing Insurance Defense Lawyers*, 4 Conn. Ins. L.J. 205 (1997-98); Kent D. Syverud, *What Professional Responsibility Scholars Should Know About Insurance,* 17 (1997-98).

The papers published in the Connecticut Insurance Law Journal were produced for a symposium at the 1997 Annual Meeting of the Association of American Law Schools. I was honored to join the professors as a token practitioner. William T. Barker, *Insurance Defense Ethics and the Liability Insurance Bargain*, 4 Conn. Ins. L.J. 75 (1997-98).

[5] The first phase of that study produced Charles Silver & Kent Syverud, *supra* note 5. A second phase is now underway, with Prof. Ellen Pryor replacing Dean Syverud as co-reporter.

understood. Because I will be describing events in which I played a role, and because I am a partisan in ongoing controversies, I will address these topics in the first person, attempting to separate my own positions from settled law.

I. THE RESTATEMENT

A. History & Status

The drafting of the Restatement has both drawn attention to the legal issues surrounding the tripartite relationship and itself served as a focus of controversy. It is also the source of the latest news (at least as this article is prepared). So it is with the Restatement I will start.[6]

1. Initial Efforts at Persuasion

For some years, the American Law Institute ("ALI") has been preparing a Restatement of the Law Governing Lawyers. This first addressed the tripartite relationship in a draft circulated in 1991.[7] Though little noticed at the time, that draft seemed to suggest that a liability insurer is not a client of

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[6] For more information and other perspectives on the development of the Restatement provisions discussed here, see William T. Barker, *Lobbying and the American Law Institute: The Example of Insurance Defense,* 26 Hofstra L. Rev. 573 (1998); Lawrence J. Fox, *Leave Your Clients at the Door,* 26 Hofstra L. Rev. 595 (1998); Charles Silver, *The Lost World: Of Politics and Getting the Law Right,* 26 Hofstra L. Rev. 773 (1998); Charles W. Wolfram, *Bismarck's Sausages and the ALI's Restatements,* 26 Hofstra L. Rev. 817 (1998). These articles are part of a Symposium on the American Law Institute: Process, Partisanship, and the Restatements of the Law.

[7] See note 2, *supra*.

defense counsel it appoints to defend its insured and cast serious doubt on such an insurer's right to control the defense.[8] I ran across this provision in the course of my work and began sounding the alarm.[9]

Part of the response of the defense bar was the initiation by the IADC and the DRI of their joint study of the duties of insurance defense counsel. As this work developed, our Reporters, Profs. Silver and Syverud, used its results to urge the ALI Reporters to reconsider their positions and to recognize the long-established nature of the tripartite relationship and the rights and duties flowing from it. Additionally, both insurance industry representatives and the organized defense bar communicated directly with the ALI Reporters.[10]

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They were persuaded to modify or clarify their positions on some issues of concern, notably by acknowledging that an insurer could be a client under the same standards as govern the formation of attorney-client relationships in

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8 *E.g.*, William T. Barker, *ALI Draft Questions Insurer's Right to Control Defense,* 60 Def. Coun. J. 611 (1993).

9 *Id.*

10 I also brought this issue to the attention of the Council of the ABA Tort & Insurance Practice Section ("TIPS"), an organization not limited to the defense bar, at the 1993 ABA Annual Meeting. This resulted in a study by the TIPS Professionalism Committee and a report supportive of the traditional tripartite relationship. This report was approved by the TIPS Council and its substance was transmitted to the ALI Reporters by Hugh Reynolds, then Chair of TIPS.

other areas. But the draft submitted to the ALI Council in late 1995 was still seriously unsatisfactory.[11]

2. The Call to Battle

Efforts to persuade the Reporters having apparently reached impasse, the only recourse seemed to be a fight on the floor of the ALI. But it was unclear how such a fight might be waged. After the subject was discussed at the DRI Insurance Law Committee in December, Lyn Lemaire, then of Financial Indemnity Company, provided me with a set of the transcribed proceedings of the ALI on this Restatement. Review of these disclosed that the ALI had a regularized procedure whereby members could offer amendments to proposed Restatements at the ALI Annual Meetings at which those Restatements were offered for approval.

At my suggestion, a subcommittee of the American Insurance Association looking for a way to address the Restatement problem agreed that this would be the appropriate method. The AIA enlisted the National Association of Independent Insurers and the Alliance of American Insurers. Janet Bachman of the AIA spearheaded an effort to obtain lists of as many names and addresses of ALI members as possible, both to assist insurers in identifying potential friends

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[11] *See* Charles Silver & Michael Sean Quinn, *Call to Arms, supra* note 4.

who might be enlisted to support an amendment and to permit a mailing of any proposed amendment to ALI members before the Annual Meeting.

The Restatement and the likely effort to amend it were discussed in the IADC Special Committee on Professional Responsibility at the IADC meeting in February, 1996. We agreed that it would be desirable to have any amendment presented by someone not seen as personally interested and of some distinction in the field. I suggested Judge Robert Keeton, formerly a leading academic authority and one whose writings indicated fundamental agreement with our point of view. Dick Neumeier knows Judge Keeton somewhat and agreed to contact him. Prof. Silver agreed to draft an amendment and supporting statement based on his existing critical analysis of the pending draft. The IADC Executive Committee and the leadership of the DRI undertook to begin quietly organizing members of the defense bar within the ALI. The DRI sent an "open letter" to the ALI requesting further study, and copies were later distributed at the ALI Annual Meeting.

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In March, I took Prof. Silver's draft amendment and supporting statement and prepared a new version, focusing more precisely on the matters of greatest concern and gearing the arguments to appeal to the expected audience. As modified in light of the comments by others, this ultimately became the

amendment submitted to the ALI by Ron Mallen. Dick Neumeier provided a draft to Judge Keeton, seeking to enlist him as leader of the effort. Judge Keeton declined to undertake that role, pleading the press of his judicial duties. But he spoke to Prof. Geoffrey Hazard, Director of the ALI, at a meeting of Massachusetts ALI members in April. At that time, Judge Keeton suggested that there were problems with the treatment of insurance defense counsel and that the draft might better omit discussion of this topic unless further study were undertaken. He followed up with a memo to the Reporters saying the same thing. This was the same as the most important proposal in our draft amendment. It was our first real breakthrough.

3. The Apparent Settlement

When the Proposed Final Draft was distributed to the ALI members in early April,[12] I noted some changes designed to accomodate some of our concerns. These suggested to me a new understanding of the Reporters views, which might offer more flexibility than previously encountered if our practical concerns were addressed within the Reporters theoretical framework (instead of trying to get them to reconsider the framework). I prepared a set of revisions

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[12] A copy of the relevant provisions is attached as Exhibit A.

to the Restatement along these lines as a possible basis for discussion with the Reporters.

Prof. Hazard responded to Judge Keeton's communication by saying that he would consider whether the subject should be dropped or deferred. Meanwhile, IADC Executive Director Dick Hayes had been exchanging messages with Prof. Hazard, whom he had known for some time. Dick mentioned that I had prepared materials on this issue. Prof. Hazard and I have previously worked together on behalf of my firm, and he expressed a desire to see what I had prepared.

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Prof. Hazard passed my draft revisions on to Prof. Charles Wolfram, the chief Reporter for the Restatement. Prof. Wolfram found these a significant improvement on the prior draft and prepared a revised version of the Restatement based on them. After some modest tinkering, this became the Proposed Movants'-Reporters' Text, submitted to the ALI Annual meeting as a substitute for both the original draft and the Mallen amendment.

There was considerable confusion engendered by the last-minute substitution of a new draft on this subject. There was also resistance by some to the extent of the acceptance of our positions by the Reporters. An amendment was offered by Larry Fox, then-incoming Chair of the ABA

Standing Committee on Ethics, to modify the draft in a way hostile to the traditional nature of the tripartite relationship. The amendment was defeated 110-80. Section 215 was then referred back to the Reporters for further study and to be subjected to further review under the usual ALI process for drafts.

4. The Renewed Effort at Persuasion

In the aftermath of this effort, I became a member of the ALI. While the Reporters had intended to circulate a new draft of § 215 in the summer of 1996, other matters took priority, and no new draft emerged until August, 1997. At that time, the Reporters circulated Preliminary Draft No. 13 to the Advisers and the Members Consultative Group for the Restatement, in preparation for their scheduled September meetings. Preliminary Draft No. 13 largely reverted to the unsatisfactory language in Proposed Final Draft No. 1, abandoning most of the improvements in the Proposed Movants'-Reporters' Text.

At the September 5, 1997, Members Consultative Group meeting, which I attended, the comments on § 215 were largely hostile to the traditional arrangements, even in forms modified to provide better assurance of informed consent by the insured. Starting before that meeting and continuing through most of September, I directed a series of lengthy letters to the Reporters

(copying numerous interested parties, including leading critics of the positions I advocated). In these letters, I argued for corrections of the objectionable provisions in the Preliminary Draft and responded to the various arguments marshalled against my positions.

The Reporters, after considering all of the input received on Preliminary Draft No. 13, prepared a revised version, Council Draft No. 13, which was submitted to the ALI Council at its meeting in late October. We had feared, based on Preliminary Draft No. 13, that it would be necessary to seek amendments from the Council before submission to the membership. But analysis of the Council Draft revealed that, while not ideal, it had removed most of the significant practical problems and that the ones which remained looked hard to fight successfully. After consultation with various interested parties, I so advised the Reporters, though requesting some "technical corrections."

5. Current Status

The Council took no action to amend § 215, but the Reporters were authorized to make revisions in light of the discussions at its meeting. The result was embodied in Proposed Final Draft No. 2, which came before the

membership at the ALI Annual Meeting, May 11-14, 1998.[13] All of my suggestions for technical corrections were either accepted or mooted by other changes. The Reporters Note (which speaks only for the Reporters and is not subject to approval by the Council or the membership) is much improved, notably by its greater emphasis on the role of insurance law in resolving the issues.

At the Annual Meeting, Larry Fox proposed two amendments to Proposed Final Draft No. 2. Both were adopted, and the entire Restatement, as amended, received final approval from the ALI membership, subject to a specially extensive editorial process which seems certain to continue until the ALI Council meeting in December and might not be complete until the Annual Meeting in May, 1999. No substantive changes can be made without returning to the membership, which everyone seems determined not to do.

The more important of the Fox amendments revised the "black letter" of § 215, the statement of the rule which is then explicated in the comments.[14] As it appeared in Proposed Final Draft No. 2, the "black letter" read as follows:

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[13] A copy of this draft is attached as Exhibit B.

[14] The other amendment revised comment b. to § 215. It is described in the more detailed analysis, *infra*.

(1) A lawyer may not represent a client under circumstances in which someone other than the client will wholly or partly compensate the lawyer for the representation, unless the client consents under the limitations and conditions provided in § 202, with knowledge of the circumstances and conditions of the payment.

(2) A lawyer's professional conduct on behalf of a client may be directed by someone other than the client when:

(a) the direction is reasonable in scope and character, such as by reflecting obligations borne by the person directing the lawyer; and

(b) the client consents to the direction under the limitations and conditions provided in § 202.

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The first Fox Amendment added a further condition to subdivision (2)(b): the third-party direction must not "interfere with the lawyer's exercise of independent professional judgment." In debate, he pointed out this requirement is imposed by the ABA Model Rule on third-party payment, specifically Rule 1.8(f)(2). If the Reporters proposed to eliminate this requirement, he would oppose that. If they intended to retain it, that should be made clear.

Prof. Morgan responded on behalf of the Reporters. He pointed out that the "independent professional judgment" formulation had been applied to all conflict problems by the ABA Model Code, predecessor to the model rules. That formulation was dropped from all of the Model Rules except 1.8(f). It

gives no useful guidance in resolving the significant issues in the third-party payor relationship. So the Reporters sought to address the specifics without repeating the unclear formula from the Model Rule. They did not believe that they were repudiating the requirement. Rather, they were clarifying and explaining its meaning. The issues are complicated, but the Reporters believed they had managed to get the competing demands resolved correctly.

Section 215 was the very last issue reached in the debate, and consideration of the Restatement had already gone more than an hour beyond the time allotted in the meeting schedule. The debate was brief and I was the only opposing speaker (other than Prof. Morgan). I expressed the concern that the "independent professional judgment" formula can be misleading unless very carefully explained. In particular, it commonly leads lawyers to think of themselves as decision-makers, entitled to decide what steps should be taken, rather than as agents, obliged to implement client decisions.

I also pointed out that misunderstanding of the "independent professional judgment" requirement is particularly dangerous if a lawyer has two clients, one of whom is paying all the bills. (I believe that insurance defense usually fits that description.) Any decision regarding the representation of one client necessarily affects that of the co-client. It simply *cannot* be right to say that the

paying client is forbidden to influence that client's own representations. I agreed that the Reporters had gotten the specifics essentially right, and I urged that courts and lawyers not be confused by a potentially misleading generality.

The motion was nonetheless adopted by a solid vote.[15] The Reporters must now adapt the comments, but I am told that they will maintain the position taken in debate: that the existing comments properly expound the meaning of added condition. On this basis, the amendment should have no substantive effect.

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On this understanding, I am content with the final product, and others in the insurance defense community appear to agree on that point. While the language could be improved, it provides a workable basis for addressing practical issues.

B. Content

In general, where the Restatement discusses insurance defense it assumes, explicitly or implicitly that the insurance policy authorizes the insurer to control

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15 The chair was in doubt after both a voice vote and a standing vote, so a teller vote was held. Because members interested in the scheduled discussions of real property servitudes and donative transfers were entering the room, the final vote may have been less close than the initial ones.

the defense of claims for which it may be liable. That will also be my assumption throughout this discussion.[16]

1. Client Identity

a. The Standard: Intent

The perennial question in insurance defense is whether the insurer is considered a client. The current draft says that this is a question of fact:

> It is clear . . . that the lawyer designated to defend the insured has a client-lawyer relationship with the insured. The insurer is not, simply by the fact that it designates the lawyer, a client of the lawyer. Whether a client-lawyer relationship also exists between the lawyer and the insurer is determined under § 26.[17]

Section 26, in turn, prescribes the following test:

> A relationship of client and lawyer arises when:
>
> (1) a person manifests to a lawyer the person's intent that the lawyer provide legal services for the person; and either

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[16] Prof. Jerry has observed that the traditional understanding that the policy has this effect arose under older, and generally more complicated policy language than is now in use. Robert H. Jerry, II, *supra* note 4. He suggests that, in making the forms more "readable," the language creating this effect may have been omitted, especially from the commonly used forms for personal lines policies While one can argue whether the problem is as great as he suggests, caution would indicate that insurers should look closely at the possibility of improving the language to remove any doubts on this score. I am informed that some insurers are already considering this.

[17] RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS, § 215, comment *f* (Proposed Final Draft No. 2 April 6, 1998).

(a) the lawyer manifests to the person consent to do so; or

(b) the lawyer fails to manifest lack of consent to do so, and the lawyer knows or reasonably should know that the person reasonably relies on the lawyer to provide the services.[18]

b. Intent in Insurance Representations

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In the normal course of events, the attorney-client relationships are formed as a result of the insured tendering the defense to the insurer and the insurer retaining counsel pursuant to that tender. The insured's tender authorizes the insurer to retain counsel on behalf of the insured.[19] Of course, the insurer could ask the lawyer to provide legal services only for the insured, in which case it would not be a client. But the insurer's own interests are at stake in litigation of a claim where it may be called upon to indemnify, so it has reason to want the lawyer to perform legal services for itself as well. Insurers whose policies entitle them to control the defense generally wish to exercise that right, and that exercise is facilitated if the insurer is also a client.

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18 *Id.* § 26 (Proposed Final Draft No. 1 March 29, 1996).

19 Charles Silver & Kent Syverud, *supra* note 5, 45 Duke L.J. at 280-83; *Countryman v. Breen*, 263 N.Y.S. 603, 605-08 (N.Y. Sup. Ct. 1933), *rev'd on other points*, 271 N.Y.S. 744 (N.Y. App. Div. 1934), *aff'd* 198 N.E. 536 (N.Y. 1935); *Moritz v. Medical Protective Co.*, 428 F. Supp. 865, 871-72 (W.D. Wis. 1977); ABA COMM. ON PROF. ETHICS & GRIEVANCES, FORMAL OP. 282 (1950).

In particular, there would at least be a question whether communications between insurer and attorney would be privileged if the insurer were not a client, while there would be no doubt if the insurer is a client.

When an insurer with these interests calls upon a lawyer to defend an insured, one would expect that the insurer desires legal services for itself as well as for the insured. Doubts as to the existence of an attorney-client relationship are generally construed against the attorney, who bears the burden of clarifying ambiguity (as illustrated by subdivision (1)(b) of § 26). So even if it is not explicit that the insurer intends to be a client, that should be the result unless either the insurer or the lawyer specifically indicates otherwise.

c. The Objection: Need for Prior Informed Consent of Insured to Joint Representation

The contrary argument is that the lawyer may not undertake a joint representation without first having the informed consent of both clients. Neither the insurance policy nor the tender of the defense assures that the insured has consented to a joint representation or that any such consent is informed. Moreover, it is suggested, once properly informed, the insured

ought normally to refuse consent, thereby preventing the insurer from being a co-client.[20]

d. The Rejoinder: Informed Consent May Be Deferred and, When Requested, Must Be Given

I offer a two-step response.[21] First, I challenge the proposition that informed consent is required before commencement of the representation. Suppose an insured tenders defense of a claim to an insurer on the eve of a potential default. The insurer calls a lawyer seeking to have an appearance entered to prevent a default. The lawyer sees a potential for conflict which would arise upon filing an answer. But there is no conflict as to the filing of the appearance itself. I suggest that the lawyer could properly undertake a joint representation of insurer and insured (if that were requested), so long as the insurer were advised of the problem and of the potential need for substitution of other counsel if the conflict problem is not resolved prior to the time at which an answer must be filed.[22] After the appearance is filed, the problem could be

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20 This argument is developed in Stephen L. Pepper, *supra* note 4.

21 William T. Barker, *supra* note 4.

22 In the example given, joint representation is probably unnecessary in terms of either protecting the insured or minimizing claim costs. But if professional responsibility rules do not forbid such representation, it should not matter that it is not strictly necessary. Besides, (continued...)

explored and, if it proved genuine, both clients could be consulted about any necessary consent (if consent were otherwise appropriate). If consent were necessary and not available, the joint representation could be terminated and new counsel obtained.

Second, I challenge the proposition that the insured is free (once consultation about the risks of joint representatation does occur) to refuse that consent, except at the cost of jeapordizing the right to indemnification. The insurer's promise of indemnification is based on the insured's cession of the right to control the defense and agreement to cooperate with that defense. Joint representation facilitates the insurer's exercise of these rights. At least unless joint representation endangers some interest of the insured which the insured has not agreed to forego, I would argue that refusal of consent breaches both the express terms of the contract and the insured's duty of good faith, not to gratutitously render the insurer's performance more difficult or expensive.

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[22](...continued)
the example is deliberately unrealistic, and more complicated examples could be constructed where (initial) joint representation would serve claim cost minimization purposes.

e. The Restatement on Initial Consent

On the latter point, the Restatement takes no position. It properly points out that it addresses only the law governing a lawyer representing an insured person, not the law governing the relationship between insurer and insured.[23]

But Proposed Final Draft No. 2 does say:

> In insurance representations, when there appears to be no substantial risk that a claim against a client-insured will not be fully covered by an insurance policy pursuant to which the lawyer is appointed and to be paid, consent other than that implicit in the action of the insured in forwarding the claim to the insurer is not required. The lawyer should either withdraw or consult with the client-insured (*see* § 202) when a substantial risk that the client-insured will not be fully covered becomes apparent (*see* § 201, Comment *c(iii)*). In an emergency situation in which the lawyer must take action to protect the interests of the client, as in filing an answer to avoid default, the lawyer may take such action even if a conflict appears to exist, but must also promptly take action to address the conflict.[24]

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23 RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS, § 215, Comments *a, f* (Proposed Final Draft No. 2 April 6, 1998). I regard this point as an important one. I have previously argued that many of the problems in dealing with the tripartite relationship stem from an misconceived effort to protect insureds against all forms of mishandling of the defense of claims against them through the law of professional responsibility, when many of those problems are better handled by insurance law. William T. Barker, *The Tripartite Relationship and Protection of the Insured: Beyond Professional Responsibility,* 18 Ins. Litig. Rptr. 528 (1996). And, as explained in the preceding paragraph, insurance law may solve some of those problems by obliging the insured to give some of the consents required by the law of professional responsibility.

24 *Id.* Comment *b*

The second Fox amendment revised the first sentence of the quotation. Mr. Fox argued that a consent "implicit" in the tender of defense would rarely be an informed consent. The amendment substituted a consent implicit in the insured's acquiescence after receiving a short informative letter explaining the relationship. This formulation was designed to codify one aspect of ABA Formal Opinion 96-403.[25]

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While I think sending a letter of this type soon after retention is usually required and always good practice, I think requiring it in all cases slightly "overcodifies" Opinion 96-403. Because the sentence deals with cases where "there appears to be no substantial risk that a claim against a client-insured will not be fully covered," I argued that it was unnecessary to be this intrusive in prescribing the timing of the disclosures necessary to informed consent. The amendment was adopted on an overwhelming voice vote.

But the Fox amendment left untouched the key improvement made in the wake of Council Draft No. 13. Like earlier drafts, it had problematic language stating that the insured's informed consent is a "precondition" to the representation. With the removal of this language, I think the Restatement analysis is now fully consistent with my own on this point. Because the Fox

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[25] See text at notes 44-46.

amendment simply compels what I agree would be good practice, it does not create any inconsistency with my views.

2. Are Insurers Second-Class Clients?

a. The Primary Client Rule v. the No Subordination Rule

It is fairly common for judicial opinions and state or local bar ethics opinions to assert that, even if the insurer is a client, defense counsel owes primary loyalty to the insured and may disregard the insurer's interests if they conflict with those of the insured.[26] This "Primary Client Rule" ("PCR") has become the conventional wisdom among insurance defense practitioners. But it has been cogently argued that all of the judicial statements to that effect are both ill-considered and mere dicta, unnecessary for resolution of the issues before the courts pronouncing them.[27] Those issues could have been resolved in the same ways by application of the uncontroversial rule that a lawyer with two or more clients cannot subordinate the interests of one client to those of another without the informed consent of the client whose interests are to be subordinated.

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26 *E.g. Montanez v. Irizarry-Rodriguez,* 641 A.2d 1079, 1084 (N.J. App. Div. 1994), *quoting* Brooke Wunnicke, *The Eternal Triangle: Standards of Ethical Representation by the Insurance Defense Lawyer, in* FOR THE DEFENSE, Feb. 1979, at 7, 9.

27 Charles Silver & Kent Syverud, *supra* note 5, 45 Duke L.J. at 335-41.

If this "No Subordination Rule" ("NSR") adequately handles the interests of the affected parties (as I think it does), then there is no real justification for a unique rule applicable nowhere but in the insurance defense context. Moreover, the "Primary Client Rule" is troubling in that it seems to authorize the lawyer to cease protecting insurer's interests, while leaving the insurer under the mistaken impression that those interests are being protected.

b. The Restatement Position

The Restatement is somewhat equivocal on this topic, beginning by appearing to endorse PCR, but then qualifying that endorsement by seeming to endorse NSR to at least some extent. The pertinent portion reads as follows:

> When there is a question whether a claim against the insured is within the coverage of the policy, a lawyer designated to defend the insured may not reveal adverse confidential client information of the insured to the insurer concerning that question (*see* § 112) without explicit informed consent of the insured (*see* § 114). That follows whether or not the lawyer also represents the insurer as co-client and whether or not the insurer has asserted a "reservation of rights" with respect to its defense of the insured (*compare* § 112, Comment *l* (confidentiality in representation of co-clients in general)).
>
> With respect to events or information that creates a conflict of interest between insured and insurer, the lawyer must proceed in the best interests of the insured, consistent with the lawyer's duty not to assist client fraud (*see* § 151 [Chapter 6]) and, if applicable, consistent with the lawyer's duties to the insurer as co-client (*see* § 112, Comment *l*). If

> the designated lawyer finds it impossible to so proceed, the lawyer must withdraw from the representation of both clients as provided in § 44 (*see also* § 112, Comment *l*).[28]

c. The Restatement Analyzed

If the insurer is a co-client, the lawyer's duties to it should prevent the lawyer from proceeding in a manner contrary to its interests, absent informed consent. Thus, if the insured's interests require proceeding in such a way, the last quoted sentence will require the lawyer to withdraw, absent informed consent from one client or the other to subordination of that client's interests. Because this is precisely the result one would reach under NSR, the endorsement of PCR may be more apparent than real, except as it concerns the sharing of information concerning the representation.

Similarly, the provisions on disclosure of confidential information look both ways. Section 112, Comment *l*, provides that the usual rule is that all information concerning the representation will be shared with both clients. It further points out that this is something about which they must be warned if there is any conflict between them.[29]

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28 RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS, § 215, Comment *f* (Proposed Final Draft No. 2 April 6, 1998).

29 *Id.* § 112, Comment *l* (Proposed Final Draft No. 1 March 29, 1996).

If there is no explicit agreement about the handling of confidential information, and if one client discloses information which is manifestly intended to be kept confidential from the other, that may create a conflict, because the lawyer can neither disclose nor proceed without disclosure. When withdrawing under such circumstances, the lawyer has discretion to warn the other client that "a matter seriously and adversely affecting that person's interests has come to light, which the other client refuses to permit the lawyer to disclose."[30] The lawyer even has discretion to disclose the specific communication "if, in the lawyer's reasonable judgment, the immediacy and magnitude of the risk to the affected co-client outweigh the interest of the communicating client in continued secrecy."[31]

Because the quoted passage from § 215, Comment *f*, partially adopts and partially overrides § 112, Comment *l*, it is important to see in what respects it does the latter. It appears that the points on which § 112 may be overridden are those (1) presumptively permitting disclosure of information concerning the representation which is (a) adverse to the insured's coverage interests but (b) was received from a source other than the insured and (2) conferring discretion

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30 *Id.*

31 *Id.*

to disclose, in connection with withdrawal, adverse information derived from the insured if the insurer's need for disclosure outweighed the insured's need for continued secrecy.

None of these problems arise where the lawyer receives information bearing on coverage but not on the asserted liability of the insured. Because the defense representation is concerned only with the latter subject, information on the former is outside the scope of the representation and there is no duty to disclose it. So the problem concerns only receipt of information bearing on both coverage and the underlying liability. That problem is rare, and the combined provisions of the Restatement appear consistent with protection of the legitimate interests of both parties.

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That is especially so when one considers that the insured would seem obliged by the duty of cooperation to provide the insurer with all information bearing on the asserted liability. Silence when there is an obligation to make disclosure is a form of fraud, which (as § 215, Comment *f* points out) the lawyer may not assist.

Moreover, at least as to information received from sources other than the insured, the problem ought to be avoidable by having an explicit understanding that all information bearing on the asserted liability will be shared with both

insurer and insured. Because the insurer requires such information to handle the defense properly and because the insured is obliged to cooperate in that defense, I would argue that the insured is obliged to agree to this sort of information sharing.

On this premise, the Restatement appears to permit one to structure the relationship in a way which treats the insurer as a fundamentally equal client, perhaps subject to some assymetries with respect to the lawyer's duties to communicate information to one client received from the other.

3. Insurer Direction of Defense Counsel

a. The Basic Rule

The central issue in this controversy (from the standpoint of the defense bar and the insurance industry) has been the ability of defense counsel to accept direction from the insurer. The Restatement begins addressing that topic with the premise that no third person can direct the lawyer's judgment, except that a third person can do so "in the circumstances and to the extent stated in Subsection (2)."[32] The latter permits direction, with informed consent, when "the direction is reasonable in scope and character, such as by reflecting obligations borne by the person directing the lawyer." Apparently, directions

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32 *Id.* § 215, comment *d* (Proposed Final Draft No. 2 April 6, 1998).

not meeting the latter requirement must be non-consentable. That premise makes little sense, as the lawyer presumably would have to obey the same directions coming from the non-paying client, even if given at the request of the payor. But the point should have little significance, as one would hope that the insurance policy and the insurer's legitimate rights and interests under that policy would validate the types of direction customary in insurance representations.

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After the reference to Subsection (2), the first paragraph of the comment continues:

> When the conditions of the Subsection are satisfied, the client has, in effect, transferred to the third party the client's prerogatives in directing the lawyer's activities (see § 32(2)). The third party's directions must allow for the effective representation of the client and the client must give informed consent to the exercise of the power of direction by the third party. The direction must be reasonable in scope and character, such as by reflecting obligations borne by the person directing the lawyer. Such directions are reasonable in scope and character if, for example, the third party will pay any judgment rendered against the client and makes a decision that defense costs beyond those designated by the third party would not significantly change the likely outcome.[33]

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33 *Id.*

b. Insurer Cost Controls Broadly Permissible

One of the key interests of insurers in having the right to direct defense counsel is in the ability to exercise discretion as to the cost-effectiveness of various defense efforts. The last sentence takes care of most cost-control problems in full coverage cases. From an insurer viewpoint, it is a major improvement on the prior version, which expressly authorized the payor only to "reasonably limit the cost of the lawyer's services by requiring the lawyer to adhere to a reasonable budget for the case." In theory, the first sentence still presents a problem for insurers by authorizing (and requiring) the lawyer to make a determination whether the directions permit "effective representation," a requirement that cannot be excused even by client consent. But the cost-control authority granted to the payor by the last sentence will mitigate the consequences of the "effective representation" requirement.

That point should be considered in conjunction with parallel material in Illustration 5:

> Insurer, a liability insurance company, has issued a policy to Policyholder under which Insurer is to provide a defense and otherwise insure Policyholder against claims covered under the insurance policy. A suit filed against Policyholder alleges that Policyholder is liable for a covered act and for an amount within the policy's monetary limits. Pursuant to the policy's terms, Insurer designates Lawyer to

> defend Policyholder. Lawyer believes doubling the number of depositions taken, at a cost of $5000, would somewhat increase Policyholder's chances of prevailing and Lawyer so informs Insurer and Policyholder. If the insurance contract confers authority on Insurer to make such decisions about the expense of defense, and Lawyer reasonably believes that the additional depositions can be foregone without violating the duty of competent representation owed by Lawyer to Policyholder (*see* § 74 [Chapter 4]), Lawyer may comply with Insurer's direction that taking the depositons would not be worth the cost.[33]

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c. The Objection to Insurer Cost Controls

This Illustration, then designated Illustration 4 (and with a different statement of the circumstances in which Lawyer could accept Insurer's direction) was a subject of heated debate at the Members Consultative Group. The proponents of broad rights for insureds supplemented the hypothetical by assuming that the insured had reputational interests in the lawsuit, which interests would be advanced by taking the additional depositions. Their argument was that, if protection of the insured's reputation would be advanced by an additional deposition, the lawyer would be obliged to take that deposition, even if the insurer could not be charged for it.

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33 *Id.* Comment *f*, Illus. 5.

d. The Response: Resource Commitment Is an Issue of the Objectives of the Representation, for Decision by the Client, After the Lawyer Advises on Costs and Benefits of Alternative Courses of Action, Not a Matter or Ethics or Competence

My response is that neither the standard of care nor any other aspect of the law of lawyering truly requires a particular commitment of resources to the representation. It merely requires the lawyer to advise the client(s) of the benefits of additional work and the risks of omitting that work, after which the client(s) decide whether the work is worthwhile.

(1) Resource Decisions in Uninsured Representations

To test the supposed ethical duty to take the additional deposition, suppose one were dealing with an uninsured defendant paying for his own defense. The lawyer explains that two depositions will minimize the probable claim cost (the sum of the defense costs and the judgment or settlement) but that an additional deposition would improve the protection of the insured's reputation. The insured responds that he is really worried about the reputational problems, but he either can't afford the extra deposition or simply feels he has more important uses for his money. Is the lawyer really required

to go ahead anyhow? Or is the client entitled to limit the objectives of the representation to those which the available funds will support?

It is no answer to say that the lawyer must take the deposition and not charge for it. If the lawyer can forsee the need or possible need for an uncompensated deposition, the lawyer will either inflate the costs of the other services to cover the value of the time consumed by such a depostion or (unless the lawyer regards the client as an object of charity) will decline the representation in favor of a client who can and will pay for all services which that client requires. For this reason, other portions of the Restatement[34] clearly permit the client, after consultation, to limit the objectives of the representation and forego the extra protection of his reputation.

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(2) Resource Decisions in Insured Representations: What Does the Policy Require?

Now let us return to the insured claim. If the insurance policy requires the insurer to provide a defense which fully protects the insured's reputation, then the insurer acts wrongfully in refusing to allow the extra deposition. The insured could pay the lawyer to take it and recover the cost or the lawyer could presumably take it and recover the cost directly from the insurer.

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34 *Id.* § 30 & comment *c* (Proposed Final Draft No. 1 March 29, 1996).

Those asserting the obligation to take the deposition may be relying on a reading of the insurance policy along these lines. Arguments of this sort frequently rely on an implicit assumption that the insurer and/or defense counsel is somehow obliged to provide, at no expense to the insured, the fullest possible defense which a defendant might choose were the claim uninsured and were cost no object. But the insurance buying public may not wish to pay the premiums implied by so broad a duty, so the market may have arrived at a more limited duty. In any event, the scope of the required defense is a question of insurance policy construction or insurance law (to the extent that the law may impose broader duties irrespective of contract). It is not a matter for the Restatement to resolve.

Moreover, even if current policies impose such a duty on the insurer, that result can be reversed simply by making it clear that the policy does not require the insurer to provide such a defense. (I believe that standard policies now in effect already have that meaning, but that is beside the point here.) I argue that the Restatement ought not to take a view dependent on a particular interpretation of insurance policy language which is subject to change at any time, and it surely ought not to do so without making that dependence clear.

(3) Resource Decisons Where the Policy Does Not Require More

Because the proponents of the view that the extra deposition must be taken freely conceded that the insurer might not be obliged to pay for the deposition, such a reading of the insurance policy does not appear to be the sole basis of their position. Apparently, they would not be moved even if the policy clearly and explicitly disclaimed any obligation of the insurer to protect the insured's reputation. So let us assume such a policy.

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Defense counsel, cognizant of the risk that an extra deposition will be required to protect reputational interests (either in this case specifically or in some percentage of cases), must consider how to handle that risk. Once again, one response would be to inflate the prices for other services to cover that risk. Taking that course would nullify the limitations of the insurance policy, as the insurer will be required to pay for the extra deposition, though the method of payment would be indirect.

Alternatively, just as with the person paying for his own defense, the lawyer can explain that sometimes an extra deposition will improve protection of reputation. But, the lawyer continues, the insurer will not pay for such a deposition and apparently cannot be made to do so. Accordingly, lawyer proposes to limit the objective of the representation to exclude protection of the

insured's reputation. The lawyer will, however, advise the insured when a situation arises in which an extra deposition would be useful for this purpose. If the insured is then willing and able to pay for such a deposition, the lawyer will take it (expanding the objectives of the representation to that extent). If the insured is willing, after consultation, to accept the defense on that basis, that is entirely proper.

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If those arguing for the duty to take the extra deposition are not relying on a supposed right based on their reading of standard insurance policies, they must be assuming that there is an obligation on the part of the lawyer to honor some reasonable expectation as to the extent of the defense being provided. But any such expectation can be negated by an early consultation in which the limits of the defense offered by the insurer can be explained. The insured can reject such a limited defense. The insured cannot, however, successfully demand more, if the policy promises no more. Faced with the alternative of no insurer-paid defense at all (and possible loss of indemnity coverage) if he rejects a limited defense (with the option of any supplementation the insured is willing and able to pay for), the insured presumably will accept the defense offered.

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defend their insureds.[36] Though sometimes forgotten, this opinion is a foundational document for the traditional understanding of the tripartite relationship.

For a very long time thereafter, the ABA said nothing further of any consequence about insurance defense ethics. The Canons were replaced by the Model Code of Professional Responsibility, which themselves were replaced by the Model Rules of Professional Responsibility. But no significant ethics opinions addressed the problems of the tripartite relationship. The long silence ended with issuance of Formal Opinion 96-403 in August, 1996.

A. The Issue: Acceptance of Insurer Instructions To Settle

The opinion assumes that an insurer has issued a policy which authorizes it to settle claims against the insured in its sole discretion and without consulting the insured. It inquires whether counsel designated by the insurer to defend the insured may follow the insurer's instructions to settle without first consulting the insured. What disclosures to the insured are required if the

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[36] ABA COMMITTEE ON PROFESSIONAL ETHICS, FORMAL OP. 282 (1950), in ABA, OPINIONS OF THE COMMITTEE ON PROFESSIONAL ETHICS 621, 622-23 (1967).

lawyer expects to follow such instructions? How should counsel respond if the insurer proposes to settle but the insured objects?[37]

The opinion takes no postion on whether the insurer is a client, noting that this depends on the agreement of the parties. It concludes that the questions posed do not turn on that issue, so it need not be directly considered. The critical point is that the insured is a client and the lawyer's responsibilities to the insured are not defined by the policy.[38]

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B. Defining the Objectives of the Representation

The opinion treats the question of settlement authority as one of defining the objectives of the representation.[39] That is, is the attorney employed simply to seek resolution of the matter at the least cost (as the insurer presumably desires) or is the attorney also to consider reputational and other interests of the insured which might be injured by what the insured might consider an improvident settlement. If only the monetary stakes are to be considered, that is a representation whose objectives are limited.

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37 OP. 96-403, at 1-2.

38 *Id.* at 2-3.

39 *Id.* at 3-4.

Model Rule 1.2(a) requires a lawyer to follow client decisions about the objectives of the representation, including acceptance of settlements.[40] But limitations of the objectives require not only client consent, but prior "consultation,"[41] in which the client must receive "information sufficient to permit the client to appreciate the significance of the matter in question."[42]

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1. Manner of Required Disclosure

So, "[i]f the lawyer is to proceed with the representation of the insured at the direction of the insurer, the lawyer must make appropriate disclosure sufficient to apprise the insured of the limited nature of his representation as well as the insurer's right to control the defense . . . ."[43] Even though the insurer's rights to control the defense and settle at its discretion are set forth in

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40 (a) A lawyer shall abide by a client's decisions concerning the objectives of representation, subject to paragraph[] (c) . . ., and shall consult with the client as to the means by which they are to be pursued. A lawyer shall abide by a client's decision whether to accept an offer of settlement of a matter. . . .

* * *

(c) A lawyer may limit the objectives of the representation if the client consents after consultation.

MODEL R. PROF. COND. 1.2.

41 *Id.*

42 *Id.* Definitions.

43 OP. 96-403, at 3.

the insurance policy, the opinion found that the lawyer cannot "assume that the insured understands or remembers, if he ever read, the insurance policy, or that the insured understands that his lawyer will be acting on his behalf, but at the direction of the insurer without further consultation with the insured."[44] Accordingly, these points must be covered in the lawyer's consultation with the insured.

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The opinion expressed the view that this disclosure need not be unduly formal, presumably because it thought that "in the vast majority of cases the insured will have no objection to proceeding in accordance with the terms of his insurance contract."[45] Specifically, it concluded that oral communication was unnecessary and the necessary information could be communicated in a short letter.[46] In its view, "[t]he insured manifests consent to the limited representation by accepting the defense offered by the insurer after being advised of the terms of the representation offered."[47]

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44 *Id.* at 4.

45 *Id.*

46 *Id.*

47 *Id.*

Critics of the opinion focus especially on this point. They argue that one cannot be confident that the insured will read or understand a letter or will be aggressive enough to seek clarification from the lawyer of anything the insured does not understand. Even if insureds will generally be willing to abide by the terms of their contracts, they argue that the Rule requires that any agreement to the terms of the representation be both affirmative and informed. Only in this way can those insureds who might object to the terms proposed by the insurer and defense counsel have a proper opportunity to assert their objections.

Regardless of whether this is truly required, it may well be prudent for defense counsel to cover this information in an oral consultation, rather than relying on a letter. The extra cost of such consultations may well produce greater savings by protecting the conduct of the representation from later challenge by an insured claiming that there was never an adequate consent.

2. Content of Required Disclosure

The letter contemplated by the opinion would state "that the lawyer intends to proceed at the direction of the insurer in accordance with the terms of the insurance contract and what this means to the insured."[48] All that is necessary is "that the insured be clearly apprised of the limitations of the

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[48] *Id.*

representation offered by the insurer and that the lawyer intends to proceed in accordance with the directions of the insurer."[49]

There is one problem with the opinion's description of the disclosure. It assumes that there is no doubt about what the rights and obligations of the parties are under the insurance policy. While I agree with the views implicitly or explicitly taken at various points as to what the standard forms should be read to mean, those views are not necesarily beyond dispute.[50]

If counsel represents both insurer and insured, counsel cannot advise either regarding the rights and duties between them. The two clients have inherently conflicting interests in any such advice. Thus, even if it were entirely clear that the insured is obliged to consent to everything which is presented in a particular situation, counsel could not take that position in advising the insured about such consent.[51]

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49 *Id.*

50 *See, e.g.* Robert H. Jerry, II, *supra* note 4, discussed in note 13, *supra*.

51 If it were clear that the insured need not give such consent and must be provided with independent counsel upon request, knowledge of that would seem to be necessary to a valid consent to joint representation. Should the insurer wish to seek such a consent (rather than simply agreeing to independent counsel), it probably would have to consent to having counsel so inform the insured. But, if the issue is at all doubtful, joint counsel (with a personal interest) is not the best person to provide an evaluation.

The cure for this problem, however, is simple: counsel can communicate to the insured the terms of the representation offered by the insurer without commenting on whether those terms conform to the terms of the policy. Counsel can state the substance of the insurer's position on any potentially disputed issue, can state that counsel cannot advise the insured on that issue, can note the possible utility of consulting other counsel about the subject, and can indicate that any disagreements must be resolved between insurer and insured without involving defense counsel. (The desirability of having a defined insurer position for counsel to communicate is a hitherto unnoted reason why it is desirable for insurers to have standardized retainer agreements and guidelines for defense counsel.) Alternatively, information about the insurer's positions on such matters might be included in a letter from the insurer to the insured sent when the insured tenders a claim or suit for defense. The implications of those positions (but not their correctness) could them be one of the subjects of the initial consultation between the insured and defense counsel.

3. Timing of Required Disclosure

"A prudent lawyer hired by an insurer to defend an insured will communicate with the insured concerning the limits of the representation at the

earliest practicable time."[52] The opinion suggests that some of this information "reasonably could be incorporated as part of any routine notice to the insured from the lawyer advising the insured that the lawyer has been retained to represent him."[53] But, so long as it is done reasonably promptly, "the lawyer may wait until there is some other reason for communicating with the insured in connection with the claim, such as developing relevant facts, answering a complaint, responding to interrogatories, or scheduling a deposition."[54]

This is probably a more relaxed view of the required timing than that taken by the Restatement.[55] But, as the opinion notes, delay in providing this information and obtaining the insured's consent to the terms of the representation is dangerous:

> Failure to make the appropriate disclosures near the outset of the representation may generate wholly unnecessary, but difficult, problems for the insured, the insurer, and the lawyer. Thus, if the lawyer fails to advise the insured of the limited nature of the representation and his intention to proceed in accordance with the directions of the insurer early

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52 OP. 96-403, at 4.

53 *Id.* at 4-5.

54 *Id.* at 5.

55 See discussion at notes 21-22, *supra*.

> in the representation, the lawyer may find himself trying to advise the insured of a proposed settlelement at the last minute under short time constraints, when the insured will have little practical opportunity to reject the defense offered by the insurer and assume responsibility for his own defense.[56]

The opinion does not point out, but might have, that these problems may be especially difficult for the lawyer. The lawyer may have duties to the insurer which cannot be carried out without violating duties to the insured. Had the insured been properly advised earlier, then either consent could have been obtained or the insured's refusal to consent would have triggered a dispute between insurer and insured, with the representation placed on hold pending resolution of that dispute. Consequently, early disclosure to the insured is a critical means of keeping defense counsel from being caught in the middle of such disputes when there is no longer a way to obtain timely resolution.

C. What If There Is a Later Disagreement?

"[I]n the vast majority of cases, an insured doubtless will be delighted at the prospect of resolving litigation against him, provided only that the proposed settlement is within policy limits."[57] So long as the insured has properly

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56 *Id.*

57 *Id.* at 6.

consented at the outset, the lawyer may act on the insurer's instructions to settle without consulting the insured.

But the insured's informed consent at the outset does not mean that the insured may not later object to a settlement which the insurer proposes to make. The opinion concludes that, if counsel learns that the two disagree as to "whether a proposed settlement is acceptable and, moreover, who has the right to decide that question, the lawyer may consult with his client or clients as to the likely consequences of a proposed course of conduct."[58] The consultation should not address the specific dispute, for that would be outside the scope of a purely defense representation and would entail a conflict if both insurer and insured were clients. Rather, the consultation would concern the lawyer's evaluation of what would occur if the settlement were refused.

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But the opinion (incorrectly, in my view) contemplates the lawyer "remind[ing] the insured that the policy gives the insurer the right to control the defense and settle the claim without the consent of the insured or that rejecting a proposed settlement might result in a forfeiture of his rights under the policy."[59] Fortunately, as before, the error is easily corrected. Instead of

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58 *Id.* at 5.

59 *Id.*

advising the insured what rights the policy gives the insurer, the lawyer could state that the insurer takes the position that the policy gives it such rights and that, if the insurer is correct, the insured might forfeit coverage by rejecting the settlement. The insured could then be advised that it might be useful to retain personal counsel to advise on whether the insurer's position is correct.

In any event, if the insured, after being properly advised, insists upon rejecting the settlement, counsel cannot act to effectuate it.[60] As a result, the lawyer may be obliged to withdraw from representation of both insurer and insured (if both were clients). Of course, that would not prevent the insurer from using some other agent to implement the settlement.[61]

III. THE NEW FOCUS: DISCLOSURE AND CONSENT

Both the Restatement and Opinion 96-403 emphasize the importance of a previously neglected topic: the consents which must be obtained from the insured at or near the outset of the representation and the disclosures necessary to obtain those consents. There are many limitations on the usual representation other than the one addressed in the Opinion. For example, another disclosure which would seem to be required, might go as follows:

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60 *Id.*

61 *Id.* at 6.

> [Insurer] has asked me to defend you against the claim asserted by [plaintiff]. You should understand that I will be working only to defeat or minimize that claim, and that is the only thing [insurer] has agreed to pay me to do. I will not be representing or advising either you or [insurer] as to any questions which may arise [or have arisen] regarding your respective rights and duties under the insurance policy. I also will not be representing or advising you as to any claim you may have against [plaintiff].
>
> When any question arises where I think you might find assistance of other counsel useful, I will point that question out to you and explain its significance and, if not apparent, the reasons you might wish to obtain such assistance. If you want me to, I will offer suggestions about who you might wish to consult. But, as I understand [insurer's] position, it will not agree to pay for the services of counsel you might consult on such issues. So you will either have to make arrangements to pay such counsel yourself or, if you think [insurer] is obliged to pay for such counsel, you will have to take that question up with [insurer] yourself, possibly with the assistance of counsel you personally retain.[62]

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In light of the heightened scrutiny now being applied to the protection of insureds in connection with representation by counsel selected by insurers, both insurers and the defense bar should develop and implement methods for

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62 If coverage issues or potential affirmative claims are (or later become) apparent, their existence and significance would need to be addressed specifically. For example, it would be necessary to point out the implications of statutes of limitation and compulsory counterclaim rules as they affect the timing of consultations with other counsel regarding affirmative claims regarding the events which are the subject of the tort action. Likewise, if there appears to be a "substantial" risk (in the sense used by the RESTATEMENT) of exposure in excess of the monetary policy limit, the risks associated with that would need to be discussed. *See generally* William T. Barker, *Defense Counsel & Policy Limits Settlement Offers: Another View*, 6 Bad Faith L. Rep. 141 (1990).

providing the disclosures and obtaining and memorializing the consents necessary to foreclose challenges to the propriety of the insurer's role in the direction of the defense.

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EXHIBIT A

Excerpts from Proposed Final Draft No. 1

§ 26. Formation of Client-Lawyer Relationship

A relationship of client and lawyer arises when:

(1) a person manifests to a lawyer the person's intent that the lawyer provide legal services for the person; and either

(a) the lawyer manifests to the person consent to do so; or

(b) the lawyer fails to manifest lack of consent to do so, and the lawyer knows or reasonably should know that the person reasonably relies on the lawyer to provide the services; or

(2) a tribunal with power to do so appoints the lawyer to provide the services.

Comment:

a. Scope and cross-references. This Section sets forth a standard for determining when a client-lawyer relationship begins. Nonetheless, the various duties of lawyers and clients do not always arise simultaneously. Even if no relationship ensues, a lawyer may owe a prospective client certain duties (see § 27; § 112 & Comment *d* thereto). A lawyer representing a client may perform services also benefiting another person, for example arguing a motion for two litigants, without owing the non-client litigant all the duties ordinarily owed to a client (see § 30(1)). Even if a relationship ensues, the client may not owe the lawyer a fee (see § 29 & Comment *b* thereto; § 50 & Comment *c* thereto; Restatement, Second, Agency § 16). When a fee is due, the person owing it is not necessarily a client (see § 215). Moreover, a client-lawyer relationship may be more readily found in some situations (for example, when a person has a reasonable belief that a lawyer was protecting that person's interests; see Comment *d* hereto) than in others (for example, when a person seeks to compel a lawyer to provide onerous services). In some situations — for example, when a lawyer agrees to represent a defendant without know-

ing that the lawyer's partner represents the plaintiff — a lawyer is forbidden to perform some duties for the client (continuing the representation) while nevertheless remaining subject to other duties (keeping the client's confidential information secret from others, including from the lawyer's own partner).

When a client-lawyer relationship arises, its scope is subject to the principles set forth in § 30(1), and its termination is governed by §§ 43 and 44. Agency and contract law are also applicable, except when inconsistent with special rules applicable to lawyers. The scope of responsibilities may change during the representation.

b. Rationale. The client-lawyer relationship ordinarily is a consensual one (see Restatement, Second, Agency § 15). A client ordinarily should not be forced to put important legal matters into the hands of another or to accept unwanted legal services. The consent requirement, however, is not symmetrical. The client may at any time end the relationship by withdrawing consent (see §§ 43, 44, & 52), while the lawyer may properly withdraw only under specified conditions (see §§ 43 & 44). A lawyer may be held to responsibility of representation when the client reasonably relies on the existence of the relationship (see Comment *d*), and a court may direct the lawyer to represent the client by appointment (see Comment *e*). Lawyers generally are as free as other persons to decide with whom to deal, subject to generally applicable statutes such as those prohibiting certain kinds of discrimination. A lawyer, for example, may decline to undertake a representation that the lawyer finds inconvenient or repugnant. Agreement between client and lawyer likewise defines the scope of the representation, for example, determining whether it encompasses a single matter or is continuing (see § 30(1); § 43(1)(e) & Comment *h*). Even when a representation is continuing, the lawyer is ordinarily free to reject new matters (see § 44, Comment *k*).

c. The client's intent. A client's manifestation of intent that a lawyer provide legal services to the client may be explicit, as when the client requests the lawyer to write a will.

The client's intent may be manifest from surrounding facts and circumstances, as when the client discusses the possibility of representation with the lawyer and then sends the lawyer relevant papers or a retainer requested by the lawyer. The client may hire the lawyer to work in its legal department. The client may demonstrate intent by ratifying the lawyer's acts, for example when a friend asks a lawyer to represent an imprisoned person who later manifests acceptance of the lawyer's services. The client's intent may be communicated by someone acting for the client, such as a relative or secretary. (The power of such a representative to act on behalf of the client is determined by the law of agency.) No written agreement is required in order to establish the relationship, although a writing may be required by disciplinary or procedural standards (see § 50, Comment *b*). The client need not necessarily pay or agree to pay the lawyer; and paying a lawyer does not by itself create a client-lawyer relationship with the payor if the circumstances indicate that the lawyer was to represent someone else, for example, when an insurance company designates a lawyer to represent an insured (see § 215).

The client-lawyer relationship contemplates legal services from the lawyer, not, for example, real estate brokerage services or expert witness services. A client-lawyer relationship results when legal services are provided even if the client also intends to receive other services. A client-lawyer relationship is not created, however, by the fact of receiving some benefit of the lawyer's service, for example when the lawyer represents a co-party. Finally, a lawyer may answer a general question about the law, for instance in a purely social setting, without a client-lawyer relationship arising.

A client-lawyer relationship can arise even if the client's consent to enter into the relationship is not fully informed. The lawyer should, however, consult with the client about such matters as the benefits and disadvantages of the proposed representation and conflicts of interest. On consultation in general, see § 31. A lawyer who fails to disclose such matters may be subject to fee forfeiture, professional discipline, mal-

practice liability, and other sanctions (see §§ 27, 31, 49, 71, 201, & 202).

d. Legally incompetent clients. Individuals who are legally incompetent, for example some minors or persons with mental incapacity, often require representation to which they are personally incapable of giving consent (see Restatement, Second, Agency § 20). A guardian for such an individual may retain counsel for the incapacitated person, subject in some instances to court approval. A court also may appoint counsel to represent an incompetent party without the party's consent. An incompetent person nevertheless may be able to consent to representation, and to become liable to pay counsel, under the doctrine of "necessaries" (see § 43, Comment *e*; § 51; Restatement, Second, Contracts § 12, Comment *f*). Representing an incompetent client is considered in § 35 (see also § 43, Comment *e* (client's incompetence does not automatically end lawyer's authority)).

e. The lawyer's consent or failure to object. Like a client, a lawyer may manifest consent to creating a client-lawyer relationship in many ways. The lawyer may explicitly agree to represent the client or may indicate consent by action, for example by performing services requested by the client. An agent for the lawyer may communicate consent, for example, a secretary or paralegal with express, implied, or apparent authority to act for the lawyer in undertaking a representation.

A lawyer's consent may be conditioned on the successful completion of a conflict of interest check or on the negotiation of a fee arrangement. The lawyer's consent may sometimes precede the client's manifestation of intent, for example when an insurer designates a lawyer to represent an insured (see § 215, Comment *f*) who then accepts the representation. Although this Section treats separately the required communications of the client and the lawyer, the acts of each often illuminate those of the other.

Illustrations:

1. Client telephones Lawyer, who has previously represented Client, stating that Client wishes Lawyer to handle a pending antitrust investigation, and asking Lawyer to come to Client's headquarters to explore the appropriate strategy for Client to follow. Lawyer comes to the headquarters and spends a day discussing strategy, without stating then or promptly thereafter that Lawyer has not yet decided whether to represent Client. Lawyer has communicated willingness to represent Client by so doing. Had Client simply asked Lawyer to discuss the possibility of representing Client, no client-lawyer relationship would result.

2. As part of a bar association peer support program, lawyer A consults lawyer B in confidence about an issue relating to lawyer A's representation of a client. This does not create a client-lawyer relationship between A's client and B. Whether a client-lawyer relationship exists between A and B depends on the foregoing and additional circumstances, including the nature of the program, the subject matter of the consultation, and the nature of prior dealings, if any, between them.

Even when a lawyer has not communicated willingness to represent a person, a client-lawyer relationship arises when the person reasonably relies on the lawyer to provide services, and the lawyer, who reasonably should know of this reliance, does not inform the person that the lawyer will not do so (see § 26(2)(b); see also § [73(2)] [Chapter 4]). In many such instances, the lawyer's conduct constitutes implied assent. In others, the lawyer's duty arises from the principle of promissory estoppel, under which promises inducing reasonable reliance may be enforced to avoid injustice (see Restatement, Second, Contracts § 90). In appraising whether the person's reliance was reasonable, courts consider that lawyers ordinarily have superior knowledge of what representation entails and that lawyers often encourage clients and potential clients to

rely on them. The rules governing when a lawyer may withdraw from a representation (see § 44) apply to representations arising from implied assent or promissory estoppel.

Illustrations:

3. Claimant writes to Lawyer, describing a medical malpractice suit that Claimant wishes to bring and asking Lawyer to represent Claimant. Lawyer does not answer the letter. A year later, the statute of limitations applicable to the suit expires. Claimant then sues Lawyer for legal malpractice for not having filed the suit on time. Under this Section no client-lawyer relationship was created (see § [72], Comment [c] [Chapter 4]). Lawyer did not communicate willingness to represent Claimant, and Claimant could not reasonably have relied on Lawyer to do so. On a lawyer's duty to a prospective client, see § 27.

4. Defendant telephones Lawyer's office and tells Lawyer's Secretary that Defendant would like Lawyer to represent Defendant in an automobile violation proceeding set for hearing in 10 days, this being a type of proceeding that Defendant knows Lawyer regularly handles. Secretary tells Defendant to send in the papers concerning the proceeding, not telling Defendant that Lawyer would then decide whether to take the case, and Defendant delivers the papers the next day. Lawyer does not communicate with Defendant until the day before the hearing, when Lawyer tells Defendant that Lawyer does not wish to take the case. A trier of fact could find that a client-lawyer relationship came into existence when Lawyer failed to communicate that Lawyer was not representing Defendant. Defendant relied on Lawyer by not seeking other counsel when that was still practicable. Defendant's reliance was reasonable because Lawyer regularly handled Defendant's type of case, because Lawyer's agent had responded to Defendant's request for help by asking Defendant to transfer papers needed for the pro-

ceeding, and because the imminence of the hearing made it appropriate for Lawyer to inform Defendant and return the papers promptly if Lawyer decided not to take the case.

The principles of promissory estoppel do not bind prospective clients as readily as lawyers. Clients who are not sophisticated about how client-lawyer relationships arise should not be forced to accept unwanted representation or to pay lawyers for unwanted services. Nevertheless, promissory estoppel may bind a person who has not requested a lawyer's services. That may occur, for example, when a person has regularly retained a lawyer to prepare and file certain reports, knows that the lawyer is preparing and filing the next report, and accepts the benefit of the lawyer's services without warning the lawyer that they are unwanted. Also, a person's knowing acceptance of the benefits of a lawyer's representation, when the person could have chosen not to accept them, may constitute consent by ratification. If an employer, for example, notifies an employee that it has arranged for a lawyer to represent the employee in a prosecution arising out of the employment, and the employee confers with the lawyer and takes no action when the lawyer purports to speak for the employee in court, the employee has ratified the relationship. The client may end the relationship by discharging the lawyer (see §§ 44 & 52).

f. Organizational, fiduciary, and class-action clients. When the client is a corporation or other organization, the organization's structure and organic law determine whether a particular agent has authority to retain and direct the lawyer. Whether the lawyer is to represent the organization, a person or entity associated with it, or more than one such persons and entities is a question of fact to be determined based on reasonable expectations in the circumstances (see Subsection (1)). Where appropriate, due consideration should be given to the unreasonableness of a claimed expectation of entering into a co-client status when a significant and readily apparent conflict of interest exists between the organization or other client

Introductory Note:

This Topic examines the effect on current clients of a lawyer's obligations to third persons that might affect the representation. The issue of a lawyer's responsibilities to other clients, both past and present, is considered in Topics 3 and 4.

Section 215 considers payment of compensation to a lawyer by a third person, including another client, whether pursuant to a contract between the client and the third person or because the third person is otherwise interested in the outcome of the proceeding. The Section also considers the extent to which a lawyer may enter into a relationship in which a third person will exercise the client's prerogative to direct the lawyer's provision of legal services for a client. Section 216 examines the effect of other non-client obligations of the lawyer, including service as a trustee, corporate director, or public official, on representation of the lawyer's clients.

§ 215. Compensation or Direction by Third Person

(1) A lawyer may not represent a client under circumstances in which someone other than the client will wholly or partly compensate the lawyer for the representation, unless the client consents under the limitations and conditions provided in § 202, with knowledge of the circumstances and conditions of the payment.

(2) A lawyer's professional conduct on behalf of a client may be directed by someone other than the client when:

(a) the direction is reasonable in scope and character, such as by reflecting obligations borne by the person directing the lawyer; and

(b) the client consents to the direction under the limitations and conditions provided in § 202.

Comment:

a. Scope and cross-references. This Section applies the general conflicts prohibition of § 201 to situations in which a third person pays a lawyer's fee for representing a client or directs a lawyer's work for a client. The third person might otherwise be a stranger to the matter, or be interested because of indemnification or similar obligations, such as a liability insurance company, or interested directly in the matter because a co-client, such as a corporation sued along with one or more of its employees (see § 212, Comment *e*). The risk of adverse effect on representation of the client is inherent in any such payment or direction. This Section accordingly requires informed consent of the client and imposes limitations on the control that a third person may exercise over the lawyer's work. With respect to liability insurance, see Comment *f*.

The prohibition imposed by this Section applies to all affiliated lawyers (see § 203). Sanctions and remedies listed in § 201, Comment *f*, can be imposed for violation of this Section. Where a violation of this Section has caused actionable harm to a client, the remedy of professional malpractice (see [Chapter 4]) is available.

Issues relating to payment of legal fees generally are considered in Chapter 3. Chapter 5 examines a lawyer's duty to protect confidential information of a client.

b. Initial client consent. Client consent pursuant to § 202 is a precondition to a lawyer's accepting either a third person's payment of the fee for a client or a third person's direction in a matter. In particular, the client must have knowledge of the circumstances and conditions under which the fee payment or direction is to be provided and any substantial risks to the client thereby created, such as risks of interference with the lawyer's independent judgment (see § 202, Comment *c*). When there is no significant risk to the client, as when a claim against a client will be fully covered by the insurance policy pursuant to which the lawyer is appointed and is to be paid, consent other than that implicit in the insurance agreement is not required.

c. Third-person fee payment. This Section accommodates two values implicated by third-person payment of legal fees. First, it requires that a lawyer's loyalty to the client not be compromised by the person paying the lawyer's fee. The lawyer's duty of loyalty is to the client alone. Second, however, the Section acknowledges that it is often in the client's interest to have legal representation paid for by another. Most liability insurance contracts, for example, provide that the insurer will provide legal representation for an insured who is charged with responsibility for harm to another (see also Comment *f* hereto). Lawyers paid by civil rights organizations have helped citizens pursue their individual rights and establish legal principles of general importance.

d. Third-person direction of representation. The principle that a lawyer must exercise independent professional judgment on behalf of the client generally requires that no third person control or direct a lawyer's professional judgment on behalf of a client. However, the third person may direct the lawyer's representation of the client in the circumstances stated in Subsection (2). The restrictions must allow for effective representation of the client, and the client must give informed consent to the restrictions. Such restrictions are reasonable in scope and character if, for example, they reasonably limit the cost of the lawyer's services by requiring the lawyer to adhere to a reasonable budget for the case. Informed client consent may be effective with respect to many forms of direction, ranging from informed consent to particular instances of direction, such as in a representation in which the client otherwise directs the lawyer, to informed consent to general direction of the lawyer by another, such as a designated agent of the client.

Illustration:

1. Resettle, a non-profit organization, works to secure better living conditions for refugees. Resettle's board of directors believes that a case should be filed to test whether a federal policy of detaining certain refugees is

legally justified. Client is a refugee who has recently been detained under the federal policy, and Resettle has offered to pay Lawyer to seek Client's release from detention. With the informed consent of Client, Lawyer may accept payment by Resettle and may agree to make nonfrivolous contentions that Resettle wishes to have tested by the litigation.

Just as there are limits to client consent in § 202, there are limits to the restrictions on scope of the representation permitted under this Section. In general, unless the third person who is paying the lawyer bears substantially all of the consequences of the result in litigation, the third person may not direct or restrict the lawyer's decisions except with the client's informed consent.

Illustration:

2. Client is charged with the crime of illegally selling securities. Client's employer, Brokerage, has offered to pay Lawyer to defend Client on the condition that Client agree not to implicate Brokerage or any of its other employees in the crimes charged against Client. Lawyer may not accept the representation on those terms. Whether to accept a plea bargain, for example, and whether to implicate others in the wrongdoing are matters about which the client, not the person paying for the defense, must have the authority to make decisions (see § 33).

e. Preserving confidential client information. Although a legal fee may be paid or direction given by a third person, a lawyer must protect the confidential information of the client. Informed client consent to the third-person payment or direction does not by itself constitute informed consent to the lawyer's revealing such information to that person. Consent to reveal confidential client information must meet the separate requirements of § 114.

Illustration:

3. Employer has agreed to pay for representation of Employee in defending a claim involving facts arguably arising out of pursuit of Employer's business. Employer asks Lawyer what Employee intends to testify about the circumstances of his actions. Without consent of Employee as provided in § 114, Lawyer may not give Employer that information.

f. Representing insured. A lawyer might be designated by an insurer to represent the insured under a liability insurance policy in which the insurer undertakes to indemnify the insured and to provide a defense. The lawyer represents the insured. The insurer is not, simply by the fact that it designates the lawyer, a client of the lawyer. Whether a client-lawyer relationship also exists between the lawyer and the insurer is determined under § 26. Whether or not such a relationship exists, communications between the lawyer and representatives of the insurer concerning such matters as progress reports, case evaluations, and settlement are communications with an agent of the client within the meaning of § 120. Similarly, because and to the extent that the insurer is directly concerned in the matter financially, the insurer has standing to assert a claim for appropriate relief from the lawyer for financial loss proximately caused by professional negligence or other wrongful act of the lawyer to the extent set forth in § [73] [Chapter 4].

The lawyer's acceptance of direction from the insurer is considered in Subsection (2) and Comment *d* hereto. The consent of the insured to direction of the lawyer by the insurer may be provided by a clause to that effect in the policy.

Illustration:

4. Insurer, a liability insurance company, has issued a policy to Policyholder under which Insurer is to provide a defense and otherwise insure Policyholder against claims covered under the insurance policy. A suit filed

against Policyholder alleges that Policyholder is liable for a covered act and for an amount within the policy's monetary limits. Pursuant to the policy's terms, Insurer designates Lawyer to defend Policyholder. Lawyer believes that doubling the number of depositions taken, at a cost of $5,000, would somewhat increase Policyholder's chances of prevailing and Lawyer so informs Insurer and Policyholder. If the insurance contract confers authority on Insurer to make such decisions about expense of defense, and Lawyer reasonably believes that the additional depositions can be forgone without violating the standard of care owed by Lawyer to Policyholder (see § [74] [Chapter 4]), Lawyer may comply with Insurer's direction that taking depositions would not be worth the cost.

Material divergence of interest might exist between a liability insurer and an insured, for example, when a claim in excess of policy limits is asserted against an insured with significantly exposed personal assets. If the lawyer knows or should be aware of such an excess claim, the lawyer may not prefer the interests of the insurer so as to put the insured at risk of excess liability. Similarly, when there is a question whether the claim against the insured is within the coverage of the policy, a lawyer designated to defend the insured may not reveal adverse confidential client information of the insured to the insurer concerning that question (see § 112) without explicit consent of the insured (see § 114). That follows whether or not the lawyer also represents the insurer as co-client and whether or not the insurer has asserted a "reservation of rights" with respect to its defense of the insured (compare § 112, Comment *l* (confidentiality in representation of co-clients in general)). On discretionary disclosure to prevent substantial financial loss, see § 117A(2); on a lawyer's duty not to assist client fraud, see § [151(3)(a)] [Chapter 6] and Comment *c* thereto.

With respect to events or information that create a conflict of interest between insured and insurer, the lawyer must proceed in the best interests of the insured, consistent with the

lawyer's duty not to assist client fraud (see § [151] [Chapter 6A]) and, if applicable, consistent with the lawyer's duties to the insurer as co-client (see § 112, Comment *l*). The designated lawyer may be precluded by duties to the insurer from providing advice and other legal services to the insured concerning such matters as coverage under the policy, claims against other persons insured by the same insurer, and the advisability of asserting other claims against the insurer. In such instances, the lawyer must inform the insured of the limitation on the scope of the lawyer's services and the importance of obtaining assistance of other counsel with respect to such matters. Liability of the insurer with respect to such matters is regulated under statutory and common-law rules such as those governing liability for bad-faith refusal to defend or settle. Those rules are beyond the scope of this Restatement.

REPORTER'S NOTE

Comment b. Rationale. The traditional rule on third-person fee payments is expressed in Rule 1.8(f) of the ABA Model Rules of Professional Conduct (1983):

A lawyer shall not accept compensation for representing a client from one other than the client unless:

(1) the client consents after consultation;

(2) there is no interference with the lawyer's independence of professional judgment or with the client-lawyer relationship; and

(3) information relating to representation of a client is protected as required by [the requirements of confidentiality].

See also ABA Model Code of Professional Responsibility, DR 5-107(A) and (B) (1969) (similar).

Comment c. Initial client consent. See, e.g., Arrington v. Nat'l Broadcasting Co., 531 F. Supp. 498 (D. D.C. 1982) (union may pay costs of lawsuit on behalf of its members seeking overtime compensation where full disclosure and consent shown). On consent in policyholder-insured relationships, see Comment *f*, Reporter's Note.

Comment d. Third-person direction of representation. On cases involving insurer control of litigation, see Comment *f*, Reporter's

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EXHIBIT B

Excerpts from Proposed Final Draft No. 2

TOPIC 5.
LAWYER'S OBLIGATION TO THIRD PERSON

Introductory Note:

This Topic examines the effect on current clients of a lawyer's obligations to or relationships with third persons that might affect the representation. The issue of a lawyer's responsibilities to other clients, both past and present, is considered in Topics 3 and 4.

Section 215 considers payment of compensation to a lawyer by a third person, including another client, whether pursuant to a contract between the client and the third person or because the third person is otherwise interested in the outcome of the proceeding. The Section also considers the extent to which a lawyer may enter into a relationship in which a third person will exercise the client's prerogative to direct the lawyer's provision of legal services for a client. Section 216 examines the effect of other non-client obligations of the lawyer, including service as a trustee, corporate director, or public official, on representation of the lawyer's clients.

§ 215. Compensation or Direction by Third Person

(1) A lawyer may not represent a client under circumstances in which someone other than the client will wholly or partly compensate the lawyer for the representation, unless the client consents under the limitations and conditions provided in § 202, with knowledge of the circumstances and conditions of the payment.

(2) A lawyer's professional conduct on behalf of a client may be directed by someone other than the client when:

(a) the direction is reasonable in scope and character, such as by reflecting obligations borne by the person directing the lawyer; and

(b) the client consents to the direction under the limitations and conditions provided in § 202.

Comment:

a. Scope and cross-references. This Section applies the general conflicts prohibition of § 201 to the various situations in which a third person pays a lawyer's fee for representing a client or directs a lawyer's work for a client. The third person might be interested as a relative or friend or have obligations to the client because of indemnification or similar arrangements, or be interested directly in the matter because of a co-client, such as a corporation sued along with one or more of its employees (see § 212, Comment *e*). The risk of adverse effect on representation of the client is inherent in any such payment or direction. Accordingly, this Section, following the standard rule of the lawyer codes, requires informed consent of the client and imposes limitations on the control that a third person may exercise over the lawyer's work.

While discussion in the following Comments (see Comment *f*) will consider issues of the law governing a lawyer representing an insured person, the relationship between the insured person and the insurer or indemnitor will be controlled by other law, such as the law of insurance or of contract. Similarly, other law may govern other relationships between a client and a third person who pays or directs the lawyer, such as when the government pays a lawyer to represent a client in a criminal or civil matter (see Comment *g*). Issues relating to all such relationships are beyond the scope of the Restatement.

The prohibition imposed by this Section applies to all affiliated lawyers (see § 203). Sanctions and remedies listed in § 4 [Chapter 1], are available for violation of this Section. Where a violation of this Section has caused actionable harm to a client, the remedy of professional malpractice (see [Chapter 4]) is available.

Issues relating to payment of legal fees generally are considered in Chapter 3. Chapter 5 examines a lawyer's duty to protect confidential information of a client.

b. Initial client consent. As stated in the Section, under § 202 a client must consent to a lawyer's accepting either a third person's payment of the fee for a client or a third person's direction in a matter. In particular, the client must have knowledge of the circumstances and conditions under which the fee payment or direction is to be provided and any substantial risks to the client thereby created (see § 202, Comment *c*). In insurance representations, when there appears to be no substantial risk that a claim against a client-insured will not be fully covered by an insurance policy pursuant to which the lawyer is appointed and is to be paid, consent other than that implicit in the action of the insured in forwarding the claim to the insurer is not required. The lawyer should either withdraw or consult with the client-insured (see § 202) when a substantial risk that the client-insured will not be fully covered becomes apparent (see § 201, Comment *c(iii)*). In an emergency situation in which the lawyer must take action to protect the interests of the client, as in filing an answer to avoid default, the lawyer may take such action even if a conflict appears to exist, but must also promptly take action to address the conflict.

c. Third-person fee payment. This Section accommodates two values implicated by third-person payment of legal fees. First, it requires that a lawyer's loyalty to the client not be compromised by the third-person source of payment. The lawyer's duty of loyalty is to the client alone, although it may also extend to any co-client when that relationship is either consistent with the duty owing to each co-client or is consented to in accordance with § 202. Second, however, the Section acknowledges that it is often in the client's interest to have legal representation paid for by another. Most liability

insurance contracts, for example, provide that the insurer will provide legal representation for an insured who is charged with responsibility for harm to another (see also Comment *f* hereto). Lawyers paid by civil rights organizations have helped citizens pursue their individual rights and establish legal principles of general importance. Similarly, lawyers in private practice or in a legal services organization may be appointed or otherwise come to represent indigent persons pursuant to arrangements under which their fees will be paid by a governmental body (see Comment g).

d. Third-person direction of representation. The principle that a lawyer must exercise independent professional judgment on behalf of the client generally requires that no third person control or direct a lawyer's professional judgment on behalf of a client, as the lawyer codes require. Consistent with that requirement, a third person may, with the client's consent and otherwise in the circumstances and to the extent stated in Subsection (2), direct the lawyer's representation of the client in the circumstances and to the extent stated in Subsection (2). When the conditions of the Subsection are satisfied, the client has, in effect, transferred to the designated third person the client's prerogatives of directing the lawyer's activities (see § 32(2)).The third person's directions must allow for effective representation of the client, and the client must give informed consent to the exercise of the power of direction by the third person. The direction must be reasonable in scope and character, such as by reflecting obligations borne by the person directing the lawyer. Such directions are reasonable in scope and character if, for example, the third party will pay any judgment rendered against the client and makes a decision that defense costs beyond those designated by the third party would not significantly change the likely outcome. Informed client consent may be effective with respect to many forms of

direction, ranging from informed consent to particular instances of direction, such as in a representation in which the client otherwise directs the lawyer, to informed consent to general direction of the lawyer by another, such as an insurer or indemnitor on whom the client has contractually conferred the power of direction (see Comment *f*).

Illustration:

1. Resettle, a non-profit organization, works to secure better living conditions for refugees. Resettle's board of directors believes that a case should be filed to test whether a federal policy of detaining certain refugees is legally justified. Client is a refugee who has recently been detained under the federal policy, and Resettle has offered to pay Lawyer to seek Client's release from detention. With the informed consent of Client, Lawyer may accept payment by Resettle and may agree to make contentions that Resettle wishes to have tested by the litigation.

Just as there are limits to client consent in § 202, there are limits to the restrictions on scope of the representation permitted under this Section. In general, unless the third person who is paying the lawyer bears substantially all of the consequences of the result in litigation, the third person may not direct or restrict the lawyer's decisions except with the client's informed consent.

Illustrations:

2. Client is charged with the crime of illegally selling securities. Client's employer, Brokerage, has offered to pay Lawyer to defend Client on the condition that Client agree not to implicate Brokerage or any of its other employees in the crimes charged against Client. Lawyer may not accept the representation on those terms. Whether to accept a plea bargain, for ex-

ample, and whether to implicate others in the wrongdoing are matters about which the client, not the person paying for the defense, must have the authority to make decisions (see § 33).

3. Same facts as stated in Illustration 2, except that Client consents to accept Lawyer's representation on the condition stated by Brokerage under the limitations and conditions provided in § 202, including knowledge that Brokerage has stated the condition, and except that there is no substantial factual or legal basis for implicating Brokerage or any of its other employees. Under such circumstances, Client's consent authorizes Lawyer to accept payment from Brokerage and adhere to the described conditions.

e. Preserving confidential client information. Although a legal fee may be paid or direction given by a third person, a lawyer must protect the confidential information of the client. Informed client consent to the third-person payment or direction does not by itself constitute informed consent to the lawyer's revealing such information to that person. Consent to reveal confidential client information must meet the separate requirements of § 114.

Illustration:

4. Employer has agreed to pay for representation of Employee in defending a claim involving facts arguably arising out of pursuit of Employer's business. Employer asks Lawyer what Employee intends to testify about the circumstances of his actions. Without consent of Employee as provided in § 114, Lawyer may not give Employer that information.

f. Representing insured. A lawyer might be designated by an insurer to represent the insured under a liability insurance policy in which the insurer undertakes to indemnify the in-

sured and to provide a defense. The law governing the relationship between the insured and the insurer is, as stated in Comment *a*, beyond the scope of the Restatement. Certain practices of designated insurance defense counsel have become customary and, in any event, involve primarily standardized protection afforded by a regulated entity in recurring situations. Thus a particular practice permissible for counsel representing an insured may not be permissible under this Section for a lawyer in non-insurance arrangements with significantly different characteristics.

It is clear in an insurance situation that a lawyer designated to defend the insured has a client-lawyer relationship with the insured. The insurer is not, simply by the fact that it designates the lawyer, a client of the lawyer. Whether a client-lawyer relationship also exists between the lawyer and the insurer is determined under § 26. Whether or not such a relationship exists, communications between the lawyer and representatives of the insurer concerning such matters as progress reports, case evaluations, and settlement should be regarded as privileged and otherwise immune from discovery by the claimant or another party to the proceeding. Similarly, because and to the extent that the insurer is directly concerned in the matter financially, the insurer should be accorded standing to assert a claim for appropriate relief from the lawyer for financial loss proximately caused by professional negligence or other wrongful act of the lawyer. Compare § 73, Comment g [Chapter 4].

The lawyer's acceptance of direction from the insurer is considered in Subsection (2) and Comment *d* hereto. On consent, see Comment *b* hereto.

Illustration:

5. Insurer, a liability insurance company, has issued a policy to Policyholder under which Insurer is to provide a defense and otherwise insure Policyholder against claims covered under the insurance policy. A suit filed against Policyholder alleges that Policyholder is liable for

a covered act and for an amount within the policy's monetary limits. Pursuant to the policy's terms, Insurer designates Lawyer to defend Policyholder. Lawyer believes that doubling the number of depositions taken, at a cost of $5,000, would somewhat increase Policyholder's chances of prevailing and Lawyer so informs Insurer and Policyholder. If the insurance contract confers authority on Insurer to make such decisions about expense of defense, and Lawyer reasonably believes that the additional depositions can be forgone without violating the duty of competent representation owed by Lawyer to Policyholder (see § 74 [Chapter 4]), Lawyer may comply with Insurer's direction that taking depositions would not be worth the cost.

Material divergence of interest might exist between a liability insurer and an insured, for example, when a claim substantially in excess of policy limits is asserted against an insured. If the lawyer knows or should be aware of such an excess claim, the lawyer may not follow directions of the insurer if doing so would put the insured at significantly increased risk of liability in excess of the policy coverage. Such occasions for conflict may exist at the outset of the representation or may be created by events that occur thereafter. The lawyer must address a conflict whenever presented. To the extent that such a conflict is subject to client consent (see § 202(2)(c)), the lawyer may proceed after obtaining client consent under the limitations and conditions stated in § 202.

When there is a question whether a claim against the insured is within the coverage of the policy, a lawyer designated to defend the insured may not reveal adverse confidential client information of the insured to the insurer concerning that question (see § 112) without explicit informed consent of the insured (see § 114). That follows whether or not the lawyer also represents the insurer as co-client and whether or not the insurer has asserted a "reservation of rights" with respect to its defense of the insured (compare § 112, Comment *l* (confidentiality in representation of co-clients in general)).

With respect to events or information that create a conflict of interest between insured and insurer, the lawyer must proceed in the best interests of the insured, consistent with the lawyer's duty not to assist client fraud (see § 151 [Chapter 6]) and, if applicable, consistent with the lawyer's duties to the insurer as co-client (see § 112, Comment *l*). If the designated lawyer finds it impossible so to proceed, the lawyer must withdraw from representation of both clients as provided in § 44 (see also § 112, Comment *l*). The designated lawyer may be precluded by duties to the insurer from providing advice and other legal services to the insured concerning such matters as coverage under the policy, claims against other persons insured by the same insurer, and the advisability of asserting other claims against the insurer. In such instances, the lawyer must inform the insured in an adequate and timely manner of the limitation on the scope of the lawyer's services and the importance of obtaining assistance of other counsel with respect to such matters. Liability of the insurer with respect to such matters is regulated under statutory and common-law rules such as those governing liability for bad-faith refusal to defend or settle. Those rules are beyond the scope of this Restatement.

g. Legal service and similarly funded representation. Lawyers who provide representation to indigent persons may do so pursuant to various arrangements under which their fees or other compensation will be paid by a governmental agency or similar funding organization. For example, a lawyer may represent clients as a staff attorney of a legal aid, military legal assistance, or similar organization, with compensation in the form of a salary paid by the organization. Lawyers in private practice may be appointed by a court, defender or legal-service organization, or bar association to represent a person accused of crime or a person involved in a civil matter (see § 26, Comment g), with the lawyer's fee to be paid by the government or organization, often pursuant to a schedule of fees. Certain for-profit legal service arrangements have also been approved, under which individual private practitioners

provide assistance to participants who pay a flat charge to the legal service organization for limited legal services. Regardless of the method of appointment, the form of compensation or the nature of the paying organization (for example, whether governmental or private or whether non-profit or for-profit), the lawyer's representation of and relationship with the individual client must proceed as provided for in this Section.

REPORTER'S NOTE

Comment b. Rationale. The traditional rule on third-person fee payments is expressed in Rule 1.8(f) of the ABA Model Rules of Professional Conduct (1983):

> A lawyer shall not accept compensation for representing a client from one other than the client unless:
>
> (1) the client consents after consultation;
>
> (2) there is no interference with the lawyer's independence of professional judgment or with the client-lawyer relationship; and
>
> (3) information relating to representation of a client is protected as required by [the duty of confidentiality].

See also ABA Model Code of Professional Responsibility, DR 5-107(A) and (B) (1969) (similar).

Comment c. Initial client consent. See, e.g., Arrington v. Nat'l Broadcasting Co., 531 F. Supp. 498 (D. D.C. 1982) (union may pay costs of lawsuit on behalf of its members seeking overtime compensation where full disclosure and consent shown). On consent in policyholder-insured relationships, see Comment *f*, Reporter's Note.

Comment d. Third-person direction of representation. On cases involving insurer control of litigation, see Comment *f*, Reporter's Note. Cases involving lawyers for public interest causes have proceeded on a different rationale, typically founded on the basic right of a public interest organization to provide legal services. In upholding that right, courts have implicitly sustained the right of the organizations to specify the legal issues to be tested. See, e.g., American Civil Liberties Union v. State of Tennessee, 496 F. Supp. 218 (M.D. Tenn. 1980) (state barratry statute, which forbade groups paying legal fees in public interest cases, ruled unconstitutional); In re Education Law Center, 429 A.2d 1051 (N.J. 1981) (general state rule

against corporate practice of law held not to apply to not-for-profit corporation representing persons without charge on issues relating to equal educational opportunity). But cf. In re Primus, 436 U.S. 412, 447-448 (1978) (Rehnquist, J., dissenting) (overreaching of private client can occur even if organization has best of motives).

The risk of outside control by third-person payers in criminal cases has led to results consistent with Illustration 2. See, e.g., United States v. Bernstein, 533 F.2d 775 (2d Cir.), cert. denied, 429 U.S. 998 (1976) (appropriate to require separate counsel where individual defendants might have tried to place blame for crime on corporation alone while corporation might have tried to blame crime on them); In re Abrams, 266 A.2d 275 (N.J. 1970) (lawyer reprimanded for accepting payment from illegal lottery organization to defend employees who might be charged with lottery violations). See also Wood v. Georgia, 450 U.S. 261 (1981) (when employer set up test case putting employees at risk and employees expected employers to pay fines as well, but they did not do so, case remanded for investigation of conflicts because of counsel's possible divided loyalties).

In some of the reported criminal cases, the government has succeeded in disqualifying a lawyer whose fee was being paid by someone else, asserting that the common payment scheme interfered with its investigation or with the rights of the defendants to turn state's evidence. See, e.g., Pirillo v. Takiff, 341 A.2d 896, opinion reinstated on rehearing, 352 A.2d 11 (Pa. 1975), appeal dism'd, 423 U.S. 1083 (1976) (proper to disqualify single lawyer being paid by police fraternal order and representing all 12 policemen called before grand jury investigating police department corruption). But see, e.g., In re Special Grand Jury, 480 F. Supp. 174 (E.D. Wis. 1979) (when target company was paying for lawyer for its past and present employees, government could show no reason why employer should be denied counsel of choice). Cf. Polk County v. Dodson, 454 U.S. 312 (1981) (although state that prosecutes also pays public defender, defender represents only defendant and thus no improper conflict of interest).

A similar issue can arise in civil cases. E.g., Purdy v. Pacific Auto Ins. Co., 203 Cal. Rptr. 524 (Cal. Ct. App. 1984) (when conflict arises over settlement strategy, insurer must provide new counsel for insured at insurer's expense); American Employers Ins. Co. v. Goble Aircraft Specialties, Inc., 131 N.Y.S.2d 393 (N.Y. Sup. Ct.

1954) (insurer seeking in settlement negotiations to shift greater portion of risk to parties other than insurer improperly put insured at higher risk of liability); see also Comment *f*, Reporter's Note.

Comment e. Preserving confidential client information. See Comment f, Reporter's Note.

Comment f. Representing insured. See generally 1 G. Hazard & W. Hodes, The Law of Lawyering § 1.8:700 (2d ed. 1990); R. Keeton & A. Widiss, Insurance Law 824-41, 846-47, 853-57 (1988) (consideration of multiple issues from perspectives of both insurance law and law governing lawyers); C. Wolfram, Modern Legal Ethics §§ 8.4, 8.8 (1986); Hazard, Triangular Lawyer Relationship: An Exploratory Analysis, 1 Geo. J. Leg. Ethics 15 (1987); Leubsdorf, Pluralizing the Client-Lawyer Relationship, 77 Cornell L. Rev. 825 (1992); Richmond, Lost in the Eternal Triangle of Insurance Defense Ethics, 9 Geo. J. Leg. Ethics 475 Neumier, Serving Two Masters: Problems Facing Insurance Defense Counsel, 77 Mass. L., Rev. 66 (1992); Hall, Confusion Over Conflicts of Interest: Is There a Bright Line for Insurance Defense Counsel?, 41 Drake L. Rev. 731 (1992). Statements in the Comment are limited to aspects of the "triangular relationship" set of problems that directly concern the legal constraints under which the designated defense counsel must operate. Nothing stated there about the substantive law of insurance necessarily reflects the policy of the Institute.

On whether a defense lawyer designated for an insured by an insurer represents only the insured or both insured and insurer as co-clients, compare, e.g., O'Malley, Ethics Principles for the Insurer, the Insured and Defense Counsel: the Eternal Triangle Reformed, 66 Tulane L. Rev. 511 (1991) (arguing for insured-as-sole-client position), with, e.g., Silver, Does Insurance Defense Counsel Represent the Company or the Insured?, 72 Tex. L. Rev 1583 (1994) (arguing for dual-client view). The Comment take the position that whether only the insured or the both insured and insurer (as co-clients) enter into a client-lawyer relationship with the designated lawyer is a question to be determined on the facts of the particular case, employing the approach indicated in § 26. For acceptance of such a view, see, e.g., ABA Formal Opin. 96-403, at 2, 3 (1996) ("... Provided there is appropriate disclosure, consultation, and consent, any of these arrangements would be permissible. . . . For purposes of this opinion, nothing fundamental turns on whether the lawyer represents the insured alone or both the insurer and the insured. . . ."); cf. Silver &

Syverud, The Professional Responsibilities of Insurance Defense Lawyers, 45 Duke L. J. 255 (1995). The requirements of third-party payor rules such as ABA Model Rule 1.8(f), quoted Note a, supra, apply whether or not the insurer is also regarded as a client. Cf., e.g., Wood v. Georgia, 450 U.S. 261 (1981) (conflict when lawyer, paid by co-client employer, represented employee); but see 3 R. Mallen & J. Smith, supra § 28.18, at 566 (asserting, without citation of authority, that Model Rule 1.9(f) is inapplicable when the third-party payor is a co-client). The role of designated defense counsel who is an employee of the insurer is considered in, e.g., Keeton & Widiss, supra at 827-28; see also Mallen, A New Definition of Insurance Defense Counsel, 1986 Def. Counsel J. 108. On judicial attitudes toward such arrangements, compare, e.g., In re Youngblood, 895 S.W.2d 322 (Tenn. 1995) (approving such arrangements when properly structured and operated); In re Allstate Ins. Co., 722 S.W.2d 947 (Mo. 1987); In re Rules Governing Conduct of Attorneys in Florida, 220 So.2d 6 (Fla. 1969) (same), with Gardner v. North Carolina St. Bar, 341 S.E.2d 517 (N.C. 1986) (lawyers may not enter such arrangements); American Ins. Ass'n v. Kentucky Bar Ass'n, 917 S.W.2d 568 (Ky. 1996) (same).

On application of the attorney-client privilege to communications between an insured and an agent of the insurer, see § 120, Comment g, Reporter's Note. On the ability of the insurer to maintain against insurance defense counsel an action for legal malpractice in the absence of a conflict with the insured, see, e.g., Unigard Ins. Group v. O'Flaherty & Belgum, 45 Cal. Rptr.2d 565 (Cal. Ct. App. 1995); see generally § 73, Comment g, Reporter's Note.

On consent by the insured to the lawyer's role, see, e.g., ABA Formal Opin. 96-403, at 3 (1996) ("If the lawyer is to proceed with the representation of the insured at the direction of the insurer, the lawyer must make appropriate disclosure sufficient to apprise the insured of the limited nature of [the lawyer's] representation as well as the insurer's right to control the defense in accordance with the terms of the insurance contract. . . ."); see also id. at 3-5 (appropriate disclosure and consent can be accomplished in short letter; client-insured's acceptance is sufficiently manifested by accepting defense after being advised of its limitations). As a matter of insurance law, courts have found policyholder consent to the role of the insurer in designating counsel and controlling the defense through execution of an insurance contract containing a duty-of-cooperation clause. E.g., Crum v. Anchor Ins. Co., 119 N.W.2d 703 (Minn. 1963) (insurer obliged to defend where pleadings showed incident

within terms of policy). Closer questions about the adequacy of consent arise when the complaint alleges one or more claims not covered by the policy, or when (for whatever reason) the insurer defends under a reservation of rights. As a matter of insurance law, the majority of jurisdictions hold that, if the insurer timely asserts noncoverage, either the insurer must pay for separate counsel for the insured or the insured must specifically give informed consent to defense by a lawyer selected by the insurer. E.g., N.Y. State Urban Dev. Corp. v. VSL Corp., 738 F.2d 61 (2d Cir. 1984) (insurer may participate in selection of the insured's independent counsel); San Diego Federal Credit Union v. Cumis Ins. Soc'y, Inc., 208 Cal. Rptr. 494 (Cal. Ct. App. 1984) (consent to insurer's choice of counsel deemed withdrawn when insured retained independent counsel); Nandorf, Inc. v. CNA Ins. Cos., 479 N.E.2d 988 (Ill. App. Ct. 1985) (insurer obliged to pay for separate counsel for insured).

Most of the case law on control of litigation strategy by the insurer turns on questions of who controls the decision to settle, particularly when the insured need not expect to bear the financial risk of loss. As a matter of insurance law, the ability of the insurer to control the defense is ceded by the insured under a policy so providing. E.g., Buchanan v. Buchanan, 160 Cal. Rptr. 577 (Cal. Ct. App. 1979) (insurer may assert claim of non-liability in face of insured's wish to concede liability to victim-relative); Feliberty v. Damon, 527 N.E.2d 261 (N.Y. 1988) (malpractice insurer not liable to doctor for settlement within policy limits despite adverse publicity). When a dispute between insured and insurer exists over settlement, the duties of a defense lawyer representing the insured are controlled, not by the policy, but by the lawyer's professional duties. See, e.g., ABA Formal Opin. 96-403, at 5-6 (1996) (dispute may require lawyer's withdrawal; thereafter, former-client conflict rule precludes lawyer from assisting insurer in reaching settlement objected to by insured); Rogers v. Robson, Masters, Ryan, Brummund & Belom, 407 N.E.2d 47 (Ill. 1980) (lawyers designated by medical-malpractice insurer to defend doctor had duty to tell insured doctor of insurer's intent to settle claim within policy limits contrary to doctor's insistence against settlement).

Decisions based on the law of insurance have resolved the settlement problem consistent with the rule in this Section in the case of an insurer's bad-faith refusal to settle within policy limits The insurance company is typically held liable for any damages awarded in excess of the policy limits. See, e.g., Parsons v. Continental Nat'l

American Group, 550 P.2d 94 (Ariz. 1976); Crisci v. Security Ins. Co., 426 P.2d 173 (Cal. 1967); Gibson v. Western Fire Ins. Co., 682 P.2d 725 (Mont. 1984). Where the lawyer behaves improperly in such cases, there is potential malpractice exposure to the insurer or the insured for any resulting loss. E.g., Lysick v. Walcom, 65 Cal. Rptr. 406 (Cal. Ct. App. 1968) (lawyer who failed to tell insurer of settlement offer within policy limits required to pay insurer amount by which eventual judgment exceeded settlement offer); Lieberman v. Employers Ins. of Wausau, 419 A.2d 417 (N.J. 1980) (in medical malpractice case settled after doctor had withdrawn consent, lawyer's duty was to insured, and malpractice claim lies against lawyer for so settling). See also Betts v. Allstate Ins. Co., 201 Cal. Rptr. 528 (Cal. Ct. App. 1984) (in case involving bad-faith refusal to settle, judgment against lawyer upheld for negligent infliction of emotional distress on insured).

Most of the decisions involving the question whether a lawyer designated by the insurer may use information obtained in the client-lawyer relationship against the interests of the client-insured (typically to enable the company to deny coverage) have arisen under the substantive law of insurance. They typically find such use impermissible. See, e.g., Parsons v. Continental Nat'l American Group, 550 P.2d 94 (Ariz. 1976) (when lawyer learned confidential medical information that child's assault had been intentional and thus not covered by the policy, lawyer was required to keep information confidential but should withdraw from representation; where lawyer used information to benefit insurance company, company was estopped to deny coverage); Employers Casualty Co. v. Tilley, 496 S.W.2d 552 (Tex. 1973) (because insurer did not tell insured that it might deny coverage and even interviewed insured's employees without revealing that it was building case against liability, prejudice to insured shown, so insurer estopped to deny coverage).

Comment g. Legal service and similarly funded representation. E.g., 42 U.S.C. § 2996e(b)(B)(3) (provision of Legal Services Corporation act prohibiting corporation from "interfer[ing] with any attorney in carrying out" professional responsibilities to client); cf., e.g., Ferri v. Ackerman, 444 U.S. 193 (1979) (defense counsel court-appointed in federal criminal trial not entitled to absolute immunity under federal law in subsequent state malpractice action by former client because, among other things, lawyer's primary allegiance is to client); Jackson v. Salon, 614 F.2d 15 (1st Cir. 1980), and authority

cited (defense counsel court-appointed in state criminal case not acting under color of state law for purposes of 28 U.S.C. § 1983 action; lawyer works primarily for benefit for and at the instruction of client and not that of state). On limited imputation of conflicts within a non-profit legal services agency, see § 203, Comment *d(v)*.

On for-profit legal service organizations, see, e.g., ABA Formal Opin. 87-355 (1987) (lawyer may practice in for-profit legal service plan under Model Rules, provided plan complies with guidelines in opinion relating to allowing participating lawyer to exercise independent professional judgment on behalf of individual client, to maintain client confidences, to avoid conflicts of interest, and to practice competently); Miss. Formal Opin 199 (1992) (following ABA opinion).

YOU BE THE JUDGE AND JURY: WHAT IS PROFESSIONAL AND ETHICAL WHEN UNDER FIRE?

I

Iowa Defense Council 1998 Annual Meeting

MEGAN M. ANTENUCCI
Whitfield & Eddy, P.L.C.
Des Moines, Iowa

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INTRODUCTION

This session is an interactive experience to learn from each other some of the keys to professionalism in the day to day practice of law. You will be presented with short situations that demand a decision based on ethical considerations and/or professionalism. Each scenario will be followed by a list of possible actions to take in response to the situation presented. After each scenario, we will take a show of hands vote on the alternative courses of action, and discuss the various positions taken by the group.

The purpose is to get a simulated real life reaction from the audience to a situation that demands a decision, and then discuss the pros and cons of those decisions.

Section II of this section of the seminar materials includes the Lawyers' Creed from Georgia and the Standards for Professional Conduct from Iowa. These are merely two samples of the many civility codes that have been promulgated across the nation, in both state and federal venues.

Finally, in Section III you will an article from the American Bar Association's **Teaching and Learning Professionalism Symposium**, sponsored by the ABA Section of Legal Education and Admissions to the Bar Professionalism Committee and the Standing Committees on Professionalism and Lawyer Competence of the ABA Center for Professional Responsibility. The article focuses on the challenges of small firms and solo practitioners in the area of professionalism.

PRIOR BAD ACTS

The following three excerpts from opinions related to discovery disputes highlight the antithesis of professionalism in our practice.

The first is an excerpt from a Ruling on Discovery Motions by Magistrate Celeste F. Bremer in Mercer v. Gerry Baby Products Company, No. 3-93-CV-10168, United

States District Court, Southern District of Iowa. The case involved the death of one child and injuries to another in a fire alleged to have been started by a Gerry baby monitor.

In this case, Magistrate Bremer appointed a discovery master to oversee discovery progress and disputes at the cost of the parties. She noted that such an appointment is an extraordinary event, but that it would result in greater efficiency and cost savings to all parties.

Reading between the lines, it would appear that the Federal Bench found it necessary to save the clients and the judicial system from the lawyers who had apparently lost sight of the primary purpose, which is to serve those who retain us and to pursue the just administration of the law.

> This set of motions is part of the ongoing discovery drama which has reflected the ill-will between counsel for Plaintiff and Defendant, and dragged the Third-Party Defendants along down the extensive and expensive road of depositions and document requests. Efforts by the Court to force counsel to take more responsibility for their own behavior have failed. Disagreements, large and small, have resulted in motions to compel, to stay discovery, and for protective orders. Counsel have called each other liars and been accused of fraud. Concepts of professionalism and civility have not been the lodestar of the discovery process. The process required by Local Rule 14(e) to personally confer to resolve or narrow disputes breaks down because of the animosity which exists. Depositions have been unilaterally set and cancelled. In short, this case is a mess because the lawyers are out of control. Whether this is merely a reflection of the clash of personalities involved or has been client-driven, it must stop now. . .
>
> This file is presently over 6 volumes, 30 pages of docketing and has more than 175 pleadings, many of which relate to discovery disputes. No fewer than 27 motions to compel or for protective orders have been filed. Spoliation of evidence has been alleged against parties, and fraud against counsel. Typically these motions include ad hominem attacks, and demonstrate counsel's inability to personally confer to resolve or narrow disputes. The depositions have been fraught with interruptions, instructions not to answer and unilateral time limitations. They have included great moments in legal oratory such as:

Mr. Wallace: "Please sit down, do not hover over the witness."
Mr. Gordon: "Stick it in your ear."

Neither the letter nor the spirit of the Code of Professionalism of the Iowa State Bar Association (copy attached) has been met.

Magistrate Bremer appointed a discovery master in another matter a few years earlier in a case where depositions were particularly acrimonious and could not be completed absent extensive objections and veiled instructions to the witness on how to answer by counsel. In that order, she stated:

> "The use of a discovery master is rare in this district. However, the acrimony which exists between these counsel does not serve their clients or the justice system. It necessitates the provision of day care for counsel who, like small children, cannot get along and require adult supervision. Although this is an added expense to the clients it will save time and money in the long run by the more efficient progress of discovery and the elimination of time spent in motions to compel."

Pilsum v. Iowa State University of Science and Technology, 152 F.R.D. 179 (S.D. Iowa 1993).

Finally, the following Order from Judge Wayne E. Alley is reported in full. No summary is required

IN THE UNITED STATES DISTRICT COURT FOR THE
WESTERN DISTRICT OF OKLAHOMA

EARVIN J. KRUEGER and EMMA MELINDA KRUEGER,	)	No. CIV-87-2385-A
Plaintiffs,	)	
v	)	
PELICAN PRODUCTION CORPORATION,	)	ORDER
Defendant.	)	

Defendant's Motion to Dismiss or in the Alternative to Continue Trial is denied. If the recitals in the briefs from both sides are accepted at face value, neither side has conducted discovery according to the letter and spirit of the Oklahoma County Bar Association Lawyer's Creed. This is an aspirational creed not subject to enforcement by this Court, but violative conduct does call for judicial disapprobation at least. If there is a hell to which disputatious, uncivil, vituperative lawyers go, let it be one in which the damned are eternally locked in discovery disputes with other lawyers of equally repugnant attributes

It is so ordered this 24th day of February, 1989

/S/
WAYNE E. ALLEY
United States District Judge

A LAWYER'S CREED
State of Georgia

To my clients, I offer faithfulness, competence, diligence, and good judgement. I will strive to represent you as I would want to be represented and to be worthy of your trust.

To the opposing parties and their counsel, I offer fairness, integrity, and civility. I will seek reconciliation and, if we fail, I will strive to make our dispute a dignified one.

To the courts, and other tribunals, and to those who assist them, I offer respect, candor, and courtesy. I will strive to do honor to the search for justice.

To my colleagues in the practice of law, I offer concern for your welfare. I will strive to make our association a professional friendship.

To the profession, I offer assistance. I will strive to keep our business a profession and our profession a calling in the spirit of public service.

To the public and our systems of justice, I offer service. I will strive to improve the law and our legal system, to make the law and our legal system available to all, and to seek the common good through the representation of my clients.

Aspirational Statement on Professionalism

The Court believes there are unfortunate trends of commercialization and loss of professional community in the current practice of law. These trends are manifested in an undue emphasis on the financial rewards of I practice, a lack of courtesy and civility among members of our profession, a lack of respect for the judiciary and for our systems of justice, and a lack of regard for others and for the common good. As a community of professionals, we should strive to make the internal rewards of service, craft, and character, and not the external reward of financial gain, the primary rewards of the practice of law. In our practices we should remember that the primary justification for who we are and what we do is the common good we can achieve through the faithful representation of people who desire to resolve their disputes in a peaceful manner and to prevent future disputes. We should remember, and we should help our clients remember, that the way in which our clients resolve their disputes defines part of the character of our society and we should act accordingly.

As professionals, we need aspirational ideals to help bind us together in a professional community. Many of the aspirational ideals of our community are contained within our Ethical Considerations. The Ethical Considerations contain the objectives towards which every member of the profession should strive. Our Ethical Considerations, however, also contain specific regulatory provisions, interpretative

guidance for our Directory Rules, and other matters that are not aspirational. This combining of different purposes makes the Ethical Considerations difficult to use as a statement of aspirational ideals. Some of our aspirational ideals are also found in "Duties of Attorneys," O.C.G.A. 15-19-4, but most of those ideals are limited to the role of attorney as an officer of the court. Our Directory Rules and Standards of Conduct set forth minimum standards. They are not intended as aspirational statements.

Accordingly, the Court issues the following Aspirational Statement setting forth general and specific aspirational ideals of our profession. This statement is a beginning list of the ideals of our profession. It is primarily illustrative. Our purpose is not to regulate, and certainly not to provide a basis for discipline, but rather to assist the Bar's efforts to maintain a professionalism that can stand against negative trends of commercialization and loss of community. It is the Court's hope that Georgia's lawyers, judges, and legal educators will use the following aspirational ideals to reexamine the justifications for their conduct. The Court feels that enhancement of professionalism can be best brought about by the cooperative efforts of the organized bar, the courts, and the law schools with each group working independently, but also jointly in that effort.

General Aspirational Ideals

As a lawyer, I will aspire:

(a) To put fidelity to clients and, through clients, to the common good, before selfish interests.

(b) To model for others, and particularly for my clients, the respect due to those we call upon to resolve our disputes and the regard due to all participants in our dispute resolution processes.

(c) To avoid all forms of wrongful discrimination in all of my activities including discrimination on the basis of race, religion, sex, age, handicap, veteran status, or national origin. The social goals of equality and fairness will be personal goals for me.

(d) To preserve and improve the law, the legal system, and other dispute resolution processes as instruments for the common good.

(e) To make the law, the legal system, and other dispute resolution processes available to all.

(f) To practice with a personal commitment to the rules governing our profession and to encourage others to do the same.

(g) To preserve the dignity and the integrity of our profession by my conduct. The dignity and the integrity of our profession is an inheritance that must be maintained by each successive generation of lawyers.

(h) To achieve the excellence of our craft, especially those that permit me to be the moral voice of clients to the public in advocacy while being the moral voice of the public to clients in counseling. Good lawyering should be a moral achievement for both the lawyer and the client.

(I) To practice law not as a business, but as a calling in the spirit of public service.

Specific Aspirational Ideals

<u>As to clients</u>, I will aspire:

(a) To expeditious and economical achievement of all client objectives.

(b) To fully informed client decision-making. As a professional, I should:

(1) Counsel clients about all forms of dispute resolution;
(2) Counsel clients about the value of cooperation as a means towards the productive resolution of disputes;
(3) Maintain the sympathetic detachment that permits objective and independent advice to clients;
(4) Communicate promptly and clearly with clients; and,
(5) Reach clear agreements with clients concerning the nature of the representation.

(c) To fair and equitable fee agreements. As a professional, I should:

(1) Discuss alternative methods of charging fees with all clients;
(2) Offer fee arrangements that reflect the true value of the services rendered;
(3) Reach agreements with clients as early in the relationship as possible;
(4) Determine the amount of fees by consideration of many factors and not just time spent by the attorney;
(5) Provide written agreements as to all fee arrangements; and
(6) Resolve all fee disputes through the arbitration methods provided by the State Bar of Georgia.

(d) To comply with the obligations of confidentiality and the avoidance of conflicting loyalties in a manner designed to achieve the fidelity to clients that is the purpose of these obligations.

As to opposing parties and their counsel, I will aspire:

(a) To cooperate with opposing counsel in a manner consistent with the competent representation of all parties. As a professional, I should:

(1) Notify opposing counsel in a timely fashion of any canceled appearance;
(2) Grant reasonable requests for extensions or scheduling changes; and,
(3) Consult with opposing counsel in the scheduling of appearances, meetings, and depositions.

(b) To treat opposing counsel in a manner consistent with his or her professional obligations and consistent with the dignity of the search for justice. As a professional, I should:

(1) Not serve motions or pleadings in such a manner or at such a time as to preclude opportunity for a competent response;
(2) Be courteous and civil in all communications;
(3) Respond promptly to all requests by opposing counsel;
(4) Avoid rudeness and other acts of disrespect in all meetings including depositions and negotiations;
(5) Prepare documents that accurately reflect the agreement of all parties; and
(6) Clearly identify all changes made in documents submitted by opposing counsel for review.

As to the courts, other tribunals, and to those who assist them, I will aspire:

(a) To represent my clients in a manner consistent with the proper functioning of a fair, efficient, and humane system of justice. As a professional, I should:

(1) Avoid non-essential litigation and non-essential pleading in litigation;
(2) Explore the possibilities of settlement of all litigated matters;
(3) Seek non-coerced agreement between the parties on procedural and discovery matters;
(4) Avoid all delays not dictated by a competent presentation of a client's claims;
(5) Prevent misuses of court time by verifying the availability of key participants for scheduled appearances before the court and by being punctual; and

(6) Advise clients about the obligations of civility, courtesy, fairness, cooperation, and other proper behavior expected of those who use our systems of justice.

(b) To model for others the respect due to our courts. As a professional I should:

(1) Act with complete honesty;
(2) Know court rules and procedures;
(3) Give appropriate deference to court rulings;
(4) Avoid undue familiarity with members of the judiciary;
(5) Avoid unfounded, unsubstantiated, or unjustified public criticism of members of the judiciary;
(6) Show respect by attire and demeanor;
(7) Assist the judiciary in determining the applicable law; and,
(8) Seek to understand the judiciary's obligations of informed and impartial decision-making.

As tc my colleagues in the practice of law, I will aspire:

(a) To recognize and to develop our interdependence;
(b) To respect the needs of others, especially the need to develop as a whole person; and,
(c) To assist my colleagues become better people in the practice of law and to accept their assistance offered to me.

As to our profession, I will aspire:

(a) To improve the practice of law. As a professional, I should:

(1) Assist in continuing legal education efforts;
(2) Assist in organized bar activities; and,
(3) Assist law schools in the education of our future lawyers.

(b) To protect the public from incompetent or other wrongful lawyering. As a professional, I should:

(1) Assist in bar admissions activities;
(2) Report violations of ethical regulations by fellow lawyers; and,
(3) Assist in the enforcement of the legal and ethical standards imposed upon all lawyers.

As to the public and our systems of justice, I will aspire:

(a) To counsel clients about the moral and social consequences of their conduct.

(b) To consider the effect of my conduct on the image of our systems of justice including the social effect of advertising methods.

(c) To provide the pro bono representation that is necessary to make our system of justice available to all.

(d) To support organizations that provide pro bono representation to indigent clients.

(e) To improve our laws and legal system by, for example:

(1) Service as a public official;
(2) Assisting in the education of the public concerning our laws and legal system;
(3) Commenting publicly upon our laws; and,
(4) Using other appropriate methods of effecting positive change in our laws and legal system.

STANDARDS FOR PROFESSIONAL CONDUCT[1]

State of Iowa

PREAMBLE

A lawyer's conduct should be characterized at all times by personal courtesy and professional integrity in the fullest sense of those terms. In fulfilling our duty to represent a client vigorously as lawyers, we will be mindful of our obligations to the administration of justice, which is a truth-seeking process designed to resolve human and societal problems in a rational, peaceful and efficient manner.

A judge's conduct should be characterized at all times by courtesy and patience toward all participants. As judges we owe to all participants in a legal proceeding respect, diligence, punctuality and protection against unjust and improper criticism or attack.

Conduct that may be characterized as uncivil, abrasive, abusive, hostile or obstructive impedes the fundamental goal of resolving disputes rationally, peacefully and efficiently. Such conduct tends to delay and often to deny justice.

The following standards are designed to encourage us, judges and lawyers, to meet our obligations to each other, to litigants and to the system of justice, and thereby achieve the twin goals of civility and professionalism, both of which are hallmarks of a learned profession dedicated to public service.

We expect judges and lawyers will make a mutual and firm commitment to these standards. Voluntary adherence is expected as part of a commitment by all participants to improve the administration of justice throughout the state.

Lawyers are alerted to the fact that, while the standards refer generally to matters which are in court, the same standards also apply to professional conduct in all phases of the practice of law.

These standards shall not be used as a basis for litigation or for sanctions or penalties. Nothing in these standards supersedes or detracts from existing

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[1]With the exception of rule 6 and rule 8 of the lawyers' duties to other counsel, the preamble and remaining rules are taken from the final report of the committee on civility of the seventh federal judicial circuit

These standards should be reviewed and followed by all judges and lawyers in the state Copies may be made available to clients to reinforce our obligation to maintain and foster these standards

disciplinary codes or alters existing standards of conduct against which lawyer negligence may be determined.

LAWYERS' DUTIES TO OTHER COUNSEL

1. We will practice our profession with a continuing awareness that our role is to advance the legitimate interests of our clients. In our dealings with others we will not reflect the ill feelings of our clients. We will treat all other counsel, parties and witnesses in a civil and courteous manner, not only in court, but also in all other written and oral communications.

2. We will not, even when called upon by a client to do so, abuse or indulge in offensive conduct directed to other counsel, parties or witnesses. We will abstain from disparaging remarks or acrimony toward other counsel, parties or witnesses. We will treat adverse witnesses and parties with fair consideration.

3. We will not encourage or knowingly authorize any person under our control to engage in conduct that would be improper if we were to engage in such conduct.

4. We will not, absent good cause, attribute bad motives or improper conduct to other counsel or bring the profession into disrepute by unfounded accusations of impropriety.

5. We will not seek court sanctions without first conducting a reasonable investigation and unless fully justified by the circumstances and necessary to protect our client's lawful interests.

6. We will cooperate in the transfer of files, wills, and other documents to another attorney when requested to do so, orally or in writing, by a person authorized to make that request. We will provide reasonable assistance in organizing and explaining items transferred, recognizing that such cooperation assists the client in receiving competent legal representation.

7. We will adhere to all express promises and to agreements with other counsel, whether oral or in writing, and will adhere in good faith to all agreements implied by the circumstances or local customs.

8. We will promptly acknowledge the receipt of contacts from other attorneys, whether those contacts are by telephone or in writing, and we will make an appropriate response to the subject matter of the contact as soon as reasonably possible.

9. When we reach an oral understanding on a proposed agreement or a stipulation and decide to commit it to writing, the drafter will endeavor in good faith to state the oral understanding accurately and completely. The drafter will provide the opportunity for review of the writing to other counsel. As drafts are exchanged between or among counsel, changes from prior drafts will be identified in the draft or otherwise explicitly brought to the attention of other counsel. We will not include in a draft matters to which there has been no agreement without explicitly advising other counsel in writing of the addition.

10. We will endeavor to confer early with other counsel to assess settlement possibilities. We will not falsely hold out the possibility of settlement as a means to adjourn discovery or to delay trial.

11. In civil actions, we will stipulate to relevant matters if they are undisputed and if no good faith advocacy basis exists for not stipulating.

12. We will not use any form of discovery or discovery scheduling as a means of harassment.

13. We will make good faith efforts to resolve by agreement our objections to matters contained in pleadings and discovery requests and objections.

14. We will not time the filing or service of motions or pleadings in any way that unfairly limits another party's opportunity to respond.

15. We will not request an extension of time solely for the purpose of unjustified delay or to obtain a tactical advantage.

16. We will consult other counsel regarding scheduling matters in a good faith effort to avoid scheduling conflicts.

17. We will endeavor to accommodate previously scheduled dates for hearings, depositions, meetings, conferences, vacations, seminars or other functions that produce good faith calendar conflicts on the part of other counsel. If we have been given an accommodation because of a calendar conflict, we will notify those who have accommodated us as soon as the conflict has been removed.

18. We will notify other counsel and, if appropriate, the court or other persons, at the earliest possible time when hearings, depositions, meetings or conferences are to be canceled or postponed. Early notice avoids unnecessary travel and expense of counsel and may enable the court to use the previously reserved time for other matters.

19. We will agree to reasonable requests for extensions of time and for waiver of procedural formalities, provided our clients' legitimate rights will not be materially or adversely affected.

20. We will not cause any default or dismissal to be entered without first notifying opposing counsel, when we know his or her identity.

21. We will take depositions only when actually needed to ascertain facts or information or to perpetuate testimony. We will not take depositions for the purposes of harassment or to increase litigation expenses.

22. We will not engage in any conduct during a deposition that would not be appropriate in the presence of a judge.

23. We will not obstruct questioning during a deposition or object to deposition questions unless necessary under the applicable rules to preserve an objection or privilege for resolution by the court.

24. During depositions we will ask only those questions we reasonably believe are necessary for the prosecution or defense of an action.

25. We will carefully craft document production requests so they are limited to those documents we reasonably believe are necessary for the prosecution or defense of an action. We will not design production requests to place an undue burden or expense on a party.

26. We will respond to document requests reasonably and not strain to interpret the request in an artificially restrictive manner to avoid disclosure of relevant and non-privileged documents. We will not produce documents in a manner designed to hide or obscure the existence of particular documents.

27. We will carefully craft interrogatories so they are limited to those matters we reasonably believe are necessary for the prosecution or defense of an action, and we will not design them to place an undue burden or expense on a party.

28. We will respond to interrogatories reasonably and will not strain to interpret them in an artificially restrictive manner to avoid disclosure of relevant and non-privileged information.

29. We will base our discovery objections on a good faith belief in their merit and will not object solely for the purpose of withholding or delaying the disclosure of relevant information.

30. When a draft order is to be prepared by counsel to reflect a court ruling, we will draft an order that accurately and completely reflects the court's ruling. We will promptly prepare and submit a proposed order to other counsel and attempt to reconcile any differences before the draft order is presented to the court.

31. We will not ascribe a position to another counsel that counsel has not taken or otherwise seek to create an unjustified inference based on counsel's statements or conduct.

32. Unless specifically permitted or invited by the court, we will not send copies of correspondence between counsel to the court.

LAWYERS' DUTIES TO THE COURT

1. We will speak and write civilly and respectfully in all communications with the court.

2. We will be punctual and prepared for all court appearances so that all hearings, conferences and trials may commence on time; if delayed, we will notify the court and counsel, if possible.

3. We will be considerate of the time constraints and pressures on the court and court staff inherent in their efforts to administer justice.

4. We will not engage in any conduct that brings disorder or disruption to the courtroom. We will advise our clients and witnesses appearing in court of the proper conduct expected and required there and, to the best of our ability, prevent our clients and witnesses from creating disorder or disruption.

5. We will not knowingly misrepresent, mischaracterize, misquote or miscite facts or authorities in any oral or written communication to the court.

6. We will not write letters to the court in connection with a pending action, unless invited or permitted by the court.

7. Before dates for hearings or trials are set, or if that is not feasible, immediately after such date has been set, we will attempt to verify the availability of necessary participants and witnesses so we can promptly notify the court of any likely problems.

8. We will act and speak civilly to court attendants, clerks, court reporters, secretaries and law clerks with an awareness that they too, are an integral part of the judicial system.

COURTS' DUTIES TO LAWYERS

1. We will be courteous, respectful and civil to lawyers, parties, and witnesses. We will maintain control of the proceedings, recognizing that judges have both the obligation and authority to ensure that all litigation proceedings are conducted in a civil manner.

2. We will not employ hostile, demeaning or humiliating words in opinions or in written or oral communications with lawyers, parties or witnesses.

3. We will be punctual in convening all hearings, meetings and conferences; if delayed, we will notify counsel, if possible.

4. In scheduling all hearings, meetings and conferences we will be considerate of time schedules of lawyers, parties and witnesses.

5. We will make all reasonable efforts to decide promptly all matters presented to us for decision.

6. We will give the issues in controversy deliberate, impartial and studied analysis and consideration.

7. While endeavoring to resolve disputes efficiently, we will be considerate of the time constraints and pressures imposed on lawyers by the exigencies of litigation practice.

8. We recognize that a lawyer has a right and duty to present a cause fully and properly, and that a litigant has a right to a fair and impartial hearing. Within the practical limits of time, we will allow lawyers to present proper arguments and to make a complete and accurate record.

9. We will not impugn the integrity or professionalism of any lawyer on the basis of the clients whom or the causes which a lawyer represents.

10. We will do our best to ensure that court- personnel act civilly toward lawyers, parties and witnesses.

11. We will not adopt procedures that needlessly increase litigation expense.

12. We will bring to lawyers' attention uncivil conduct which we observe.

JUDGES' DUTIES TO EACH OTHER

1. We will be courteous, respectful and civil in opinions, ever mindful that a position articulated by another judge is the result of that judge's earnest effort to interpret the law and the facts correctly.

2. In all written and oral communications, we will abstain from disparaging personal remarks or criticisms, or sarcastic or demeaning comments about another judge.

3. We will endeavor to work with other judges in an effort to foster a spirit of cooperation in our mutual goal of enhancing the administration of justice.

Competence, Ethics, and Civility as the Core of Professionalism: The Role of Bar Associations and the Special Problems of Small Firms and Solo Practitioners

Donald Hubert

It's the trade of lawyers to question everything, yield nothing, and to talk by the hour.

Thomas Jefferson

Lawyers who know how to think but have not learned how to behave are a menace and a liability not an asset to the administration of justice.... I suggest the necessity for civility is relevant to lawyers because they are the living exemplars — and thus teachers — every day in every case and in every court, and their worst conduct will be emulated . . . more readily than their best.

Warren E. Burger

Much interest has been generated over the topic of professionalism in the last few years. More and more articles appear in bar journals and law reviews about this important topic, as we try to grapple with the complex issues that exist in the modern-day practice of law. Concerns about professionalism among members of the bar have increased to such an extent that we have seen a proliferation across the country of articles and educational seminars addressing topics ranging from specific ethical issues in limited practice areas to larger ethical questions about the entire profession. This effort does not exist in a vacuum. It has been provoked by observations that civility in the law is decreasing, and that as the number of lawyers increases, the likely number of complaints against them also increases.

Note: Donald Hubert is the principal at Donald Hubert and Associates, where his practice includes the representation of respondents in lawyer disciplinary hearings. Formerly Chicago Lawyer Person of the Year, he is the current President of the Chicago Bar Association, a member of the Chicago Bar Association-Attorney Registration and Disciplinary Commission (CBA-ARDC) Law Office Management Committee, and the founder of the CBA-ARDC Liaison Committee.

It seems that our twentieth-century American lifestyle is not predisposed toward politeness and civility anymore, as people rush to compete for scarce resources and often struggle just to survive in their daily lives. The law, as a profession, is not immune to these modern-day tensions, and many lawyers feel as overwhelmed by the intensity of today's lifestyle as other members of society. Increased work loads leave many lawyers burned out with little time for family and other pursuits, increased pressure on judges to dispose of heavy caseloads takes the joy out of being a jurist, and many young lawyers struggle to find a niche in the practice of law that will allow them to survive. It is not surprising, therefore, that practicing lawyers often find little time to consider or be concerned about whether they are acting with the highest degree of professionalism.

Perhaps the first question to be addressed is why lawyers should be concerned about professionalism. As noted in a recent report on professionalism[2] some lawyers are not certain that the law is a lofty profession or calling. The professional goals characteristically identified with the practice of law by groups such as the American Bar Association may seem to many modern-day lawyers to be archaic and rooted in a cultural tradition that is not relevant in today's fast-paced, multicultural, multiracial society. Despite differing views on whether this is true,[3] there are a number of clear-cut and practical reasons why every lawyer should be concerned about professionalism and the general improvement of our legal profession. As lawyers, we have frequent contact with members of the public and our practices are held up to public scrutiny. We are a self-regulated profession, and every lawyer has a responsibility to make sure that our colleagues are behaving in an appropriate manner. A lawyer who holds the profession up to scorn or criticism because of improper conduct does a disservice to all dedicated professionals who are acting ethically. The public places trust in us, whether wisely or unwisely, and we have an obligation to return that trust by performing in a manner that inspires confidence not only in an individual lawyer, but in the legal system as a whole. In a democracy such as ours, the legal system is an essential feature that promotes and protects diversity, solves interpersonal disputes, and serves up justice. Society as a whole is diminished to the extent that we lose confidence in that system because of the bad behavior of those participating in it.

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[2] American Bar Association Section of Legal Education and Admissions to the Bar, Report of the Professionalism Committee, TEACHING AND LEARNING PROFESSIONALISM, (1996)

[3] For a provocative discussion on this topic, see Amy R. Mashburn, *Professionalism as Class Ideology: Civility Codes and Bar Hierarchy*, 28 Val. U.L. Rev. 657 (1994)

Finally, as a practical matter, an increase in trustworthy and ethical conduct will make the lives of those of us who practice a lot easier. Instead of litigation breeding mistrust and suspicion, imagine litigating against an opponent whose word was, in fact, as good as a written agreement: no delaying tactics, no dishonest or partial answers, no insulting or inflammatory remarks; instead, an honest commitment to seeking truth or the adjustment of differences. I think we all probably would sleep a little better at night litigating in that kind of a system.

From my perspective as president of the 22,000-member Chicago Bar Association, I would like to talk about what bar associations can and should be doing to improve professionalism, and consider one group of lawyers for whom this subject presents a slightly different set of issues-namely small firm or solo practitioners.

Why Should We Care?

Regardless of whether you adhere to the philosophical viewpoint that the law, as a profession, is a lofty calling imbued with a rich tradition of public service and commitment to higher values in society or whether you take a more pragmatic viewpoint on the role of lawyers in a society such as ours, there are a number of significant reasons why professionalism should concern you. We should first begin by talking about what the general concepts are behind the term "professionalism" that make it a relevant topic for today's discussion. The American Bar Association has used a definition of "professionalism" that is more traditional, and views the obligation of lawyers as one that not only includes representation of the clients' interests, but also entails a commitment to serving justice and the public good. The definition of professionalism is not always so clear-cut, however. As one author recently pointed out in his review of a book dealing with the concept of professionalism among lawyers, "professionalism" seems to encompass practically all concerns about what lawyers do and the way in which they do it.[4] It is suggested that the essays contained in Lawyer's Ideals advance different ideas about what professionalism is: one set seems to suggest that concepts of professionalism are really based upon normative values of the society in which we live, and that these concepts may change as our values change. Another implies that our traditional concepts of the core

[4] Peter A. Joy, *What We Talk About When We Talk About Professionalism*, 4 Georgetown Journal of Legal Ethics, Spring 1994, p. 987 (reviewing *Lawyer's Ideals/Lawyer's Practices--Transformation in the American Legal Profession*, Robert N. Nelson, David M. Trubek & Rayman L. Solomon, eds., 1992).

values of "professionalism" actually reflect concepts held dear to those elite lawyers who dominate the profession, particularly organized bar groups. In his book review, Peter Joy suggests that we will not be able to arrive at a satisfactory understanding of professionalism until we can begin to really examine what lawyer professionalism means to clients and the public, rather than what it means in the context of lawyer self-interest [5]

While it is not my purpose here to delve into the complex literature and philosophical orientation of these differing views of "professionalism," I think that there are some concepts that we can all agree upon that establish a framework for discussion. There are a number of components to this elusive concept, embodying both tangible results and more intangible ideals. The first set of concepts has to do with basic, lawyerly competence. Every lawyer should be able to produce a work-product that is not only satisfying to the client, but coherent and well-grounded in precedent. The public has a right to expect that lawyers have a certain knowledge base that will be used to further the clients' interests. Modern-day law practice, however, also involves a core set of competencies that are not strictly law related. In our fast-paced and highly competitive society, it is no longer enough to be merely a good legal scholar or litigator. One also must be a reasonably competent businessman or woman.[6] Both individual and business clients have an increasing interest in the "bottom line," and lawyers who are unable to deliver reasonably priced legal services that accomplish the client's objectives very shortly find themselves out of business or before a lawyer regulatory commission explaining their business practices. The term "competence" these days therefore refers not only to a lawyer's legal knowledge, but also to his or her business acumen. In fact, many of the complaints before lawyer regulatory agencies involve allegations that relate more to basic business type practices, such as failing to return phone calls to clients, than to more esoteric legal failings of lawyers. Anyone in business knows that you cannot stay in business unless you deliver a first-rate product to your client. Failing to return phone calls is a very basic violation of that fundamental truth.

Beyond the issue of lawyer competence in the legal and business arena, there are two other concepts that play a central role in the area of professionalism. While similar in some respects, each concept embodies a slightly different set of behaviors. The first

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[5] Id. at 1004.

[6] In fact, this observation was made by Joy as well, who notes "Society is demanding a quid pro quo of competent, affordable legal services in exchange for the elevated social status, the favored economic position, and the substantial freedom from external regulation that the legal profession enjoys." Id. at 1008.

is ethics, and the second civility. Lawyers, more so than other white collar occupations, are expected to behave in a particular way. Either because of superior training and education, or a superior knowledge base, or because of some ancient concept of fairness and equity, lawyers are expected to perform their duties and conduct their relationships not only competently, but ethically. This means that a lawyer must act with the greatest care to ensure that dealings with clients and opposing parties are fair and honest, and not characterized by improper practices. Out of this concept have arisen the ideas that lawyers should not enter into business dealings with clients since the lawyer may have an unfair advantage, and that clients' funds should not be commingled with those of the lawyer in order to avoid improper use of the funds by the lawyer. Civility, on the other hand, embodies the notion that there is a type of social behavior that is acceptable within the legal profession and a type that is not. Speaking to a judge disrespectfully is not unethical, but it is considered a violation of our basic code of professionalism. The same holds true for improper or insulting behavior to one's clients, or one's opponents. Courtesy, politeness, and respect are fundamental to our notions of civility in the practice of law.

Most of us would agree that over the years, there has been a decided decrease in civility, and an increase in some forms of unethical behavior. More lawyers are being admitted to practice every day, and competition between law firms for business has grown increasing tough. We need to focus on these issues of professionalism not only because of lofty ideals, but because professional conduct makes everyone's life easier, ensures that a better product is delivered to a client, and protects all of us from the generalized, negative view of lawyers that is so often held by the public.

How Can Bar Associations Improve the Level of Professionalism Among Practicing Lawyers?

Activities that improve the level of professionalism among practicing lawyers improve the image that the legal profession as a whole has in society in general and also work to alleviate the problems that may arise from improper conduct. It is, therefore, natural that Bar Associations would seek to develop programs that improve professionalism among their members. As president of the Chicago Bar Association, I feel that we have led the way in Illinois in developing a variety of support programs and opportunities to improve lawyer conduct in these areas. The CBA has a large number of

both service and practice committees,[7] staffed by volunteer lawyers, which work in a variety of areas to improve the knowledge base of practicing lawyers and to eliminate potential practice problems for lawyers and conflicts with clients. In addition to a wide variety of committees that focus on substantive practice areas and various service committees that do the business of the CBA, we have seven service committees that are specifically targeted toward improving professionalism among our members. Those committees are: The Lawyers' Management Assistance Committee, The Committee on Preventing Attorney Malpractice, The Committee on Lawyer Regulation, The Committee on Professional Responsibility, The Committee on Professional Fees, The Lawyer Referral Service, and The Committee on Unauthorized Practice. Each committee is staffed by volunteer lawyers, and does developmental and educational work on the areas described below

The Lawyers' Management Assistance Committee

This committee is a relatively new one for the Chicago Bar Association, having been in existence for about three years now. The committee deals with lawyers who are charged by the Attorney Registration and Disciplinary Commission with certain types of ethical violations, such as neglect or failing to return telephone calls. The committee recognizes the importance of one aspect of professionalism that I discussed earlier: that aside from legal competence, lawyers also need to have a basic level of business competence in this modern age. The program is activated when a lawyer receives a complaint filed with the Attorney Registration and Disciplinary Commission over a relatively minor problem, such as neglecting a client's case. If the lawyer is willing, he or she will be referred to the committee of volunteer lawyers who will work to improve management skills and law office management practices. This work generally takes the form of individualized counseling between the volunteer lawyer and the lawyer against whom the complaint has been filed, but also may involve the retention of experts who can advise on accounting issues and so forth. The purpose of the program is to undertake remedial action with attorneys who basically are good attorneys, but who have run into problems due to overwork, personal problems and/or lack of business experience. This program already has proved highly successful. Supporting practicing lawyers in this way

[7] Service committees, as the name implies, provide a forum for rendering service to the profession or to the public at large. Practice committees focus their efforts more on substantive areas of the law, with the intention of improving lawyers' practice skills.

provides an opportunity to prevent future malpractice and to provide attorneys with positive role models that will hopefully lead to their future success.

The Committee on Preventing Attorney Malpractice

This is a new Chicago Bar Association committee that has as its main mission the review of legal decisions and practices in the developing area of attorney malpractice. Unlike the Lawyers' Management Assistance Committee, this committee does not deal with lawyers who have been charged before the ARDC. Instead, it deals with issues of tortious neglect. An increasing number of attorneys are being sued for malpractice, and this committee is designed to address this developing area of the law. Lawyers handling both plaintiffs' and defendants' attorney malpractice cases have been invited to participate in this new effort. The committee will discuss and make recommendations on loss prevention and case management, as well as comment on new legal developments in the malpractice area.

The Committee on Lawyer Regulation

Unlike the previous two committees, which focus more on specific problems, the Committee on Lawyer Regulation takes a broader approach. It is designed to improve education among Illinois attorneys about the functioning of the ARDC, and to foster better relations between the ARDC and lawyers in general. It does not involve itself in particular disciplinary cases, but it does make overall recommendations about ways in which the self-regulatory process of lawyers in Illinois can be improved.

Although the Committee on Lawyer Regulation has been in existence for several years, it is undertaking a new initiative that should provide increased opportunities for the training of practicing lawyers in professionalism. Efforts are currently underway to establish the Illinois Professional Responsibility Institute in conjunction with the Attorney Registration and Disciplinary Commission (ARDC) of the Illinois Supreme Court. There are really two aspects to this new initiative: one is to run the institute so as to increase the knowledge that practicing lawyers have about how to practice law without getting into regulatory problems. The institute is patterned after a Virginia course on professionalism. The curriculum includes sections on managing a law practice as a business, getting and keeping clients, and ethics and civility issues.

There is also a broader purpose of the committee, and that is to bring together a group of professionals to develop innovative courses in specialized areas of ethics. There are some more complex ethics areas that are not presently being addressed in general ethics courses, such as resolution of conflicts issues and strategies to avoid putting on perjured testimony. This developmental aspect of the committee will, hopefully, provoke discussion among experienced members of the bar that will lead to seminars and courses addressing specific issues.

The Committee on Professional Responsibility

This is an existing committee of the CBA whose primary responsibility is to provide opinions on ethical practices in response to inquiries from the CBA Board of Managers or members of the bar in general. The committee does not investigate professional responsibility matters, but rather renders opinions based upon facts that are presented to it. Opinions that may be of general interest to members of the bar are published from time to time. This committee provides an opportunity for lawyers and the Board of Managers to obtain advice on ethical matters, without incurring the expense of hiring a private attorney. It also provides a necessary vehicle for both discussion and education of lawyers about ethical issues and opinions.

The Committee on Professional Fees

The Committee on Professional Fees works closely with the ARDC with respect to investigation of controversies over attorneys fees not only between lawyers and clients, but also between lawyers themselves. The committee even provides an arbitration service to parties who are willing to submit themselves to arbitration. Since fee disputes often can lead to litigation and termination of the lawyer-client relationship, this committee provides a vehicle for non-litigated resolution of problems that, hopefully, saves time and money for all parties concerned.

The Lawyer Referral Service

The Chicago Bar Association's Lawyer Referral Service is a long-standing commitment to the public. This committee has overall responsibility for the operation of

the service, which seeks to is match lawyers with clients looking for a specific type of lawyer. Any member of the public can call the service to find a lawyer, and lawyers who receive referrals through the program must demonstrate to the committee a certain level of competence in the topic area in which they are listed. While the CBA does not get involved in the business relationships between the clients and the lawyers, it does offer opportunities for both clients and lawyers to make a connection that will benefit both in the long run. This service is meeting a need for the general public by providing access to competent lawyers in the Chicago Metropolitan region.

Committee on Unauthorized Practice

Consistent with the overall viewpoint that lawyers should be self-regulating, this CBA committee reviews matters where the unauthorized practice of law may be involved. This committee provides a necessary, although generally not well-known, service to the public by seeking to ensure that those who hold themselves out as practicing law have the required skills and licensure to do so.

Overall Viewpoint on the Committees

In any organized bar association, there is always a need for and a desire to increase knowledge on the part of attorneys and generally improve their lot. The committees of the Chicago Bar Association attract practicing lawyers who work to develop specific ideas and recommendations in practice and service areas. These committees also interact with the various levels of the judicial branch to further the interests of the bar and the judicial system in general. From their interaction with members of the bench and bar, they develop specific ideas for educational opportunities that are developed into seminars and publications reaching out to the rest of the legal community.

These service committees also provide an important opportunity for remediation and education of practicing attorneys in the Chicago area and go a long way toward solving some of the problems identified as important from the viewpoint of improving professionalism. I think that we do need to develop additional programs with respect to ethics and civility that will induce our members to think about the importance of these two areas as well. While most lawyers are probably more willing to consider ethics issues

now that regulatory bodies take a strong stand on unethical behavior, far fewer lawyers are prepared to consider ways in which the overall civility in our profession can be improved. The Standards for Professional Conduct adopted by our own Seventh Circuit can provide important guidance to practicing attorneys with respect to the issue of civility.[8]

How Can We Increase Opportunities for Solo Practitioners or Small Firms to Increase Professionalism and Teach Their Attorneys and Staffs More about What Is Appropriate?

Many of the recommendations traditionally made by bar association groups about ways to improve professionalism among attorneys make perfect sense for larger law firms: working to establish committees to monitor certain aspects of a firm's practices, a commitment to pro bono activities, participation in continuing legal education courses, relief from minimum billing requirements or the establishment of billing requirements that are more realistic to reflect "quality of life" issues that are of concern to almost every lawyer. However, many of these suggestions do not make good sense or are not realistic when applied to a small law firm or solo practitioner. In an essay discussing the philosophical ideas behind the issue of lawyer morality and the obligation to client loyalty, one writer notes that "[i]n the context of legal ethics, the belief structure one brings to an inquiry exerts a kind of gravitational force upon the direction of the subsequent argument, influencing its path in predictable, but sometimes hidden, ways "[9] To the extent that our discussion of professionalism is, in fact, an outgrowth of or a reflection of the values and belief systems of practitioners operating pre dominantly in a big firm environment, we may be ignoring an essential part of the bar. The fact is that, oftentimes, small law firms and solo practitioners represent more middle class and poor clients than large law firms. They work with mainstream Americans, and often with those who need protection from unscrupulous practices the most. One article has suggested that such firms may be more susceptible to complaints before disciplinary commissions in part

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[8] For a general discussion of the Seventh Circuit rules, see Marvin Aspen, *The Search for Renewed Civility in Litigation*, 28 Val. U.L. Rev. 513 (1994).

[9] W. Bradley Wendel, Lawyers and Butlers: The Remains of Amoral Ethics, Georgetown Journal of Legal Ethics, Vol. IX, No. 1, Fall 1995, 161, 181

because they handle exactly the kinds of matters where complaints are most frequent: criminal law, personal injury, and family law.[10] Another writer points to research that suggests that small firms and solo practitioners may have less of a problem with professionalism, at least in the public's view, than larger firms.[11]

It is difficult for many small firms or solo practitioners to find the time to devote to ethics and professionalism issues. They often-times lack the integrated support systems and in-house training found in larger law firms, and many young lawyers may lack specific role models that they can emulate. For example, one large law firm that I know maintains a three-ring binder with rules and regulations regarding professional practice. Few small firms could or would spend time and energy creating such a resource and maintaining it regularly. Many professionalism codes suggest a commitment to pro bono work; while many lawyers believe in this value, such a commitment by a small law firm or solo practitioner often represents a much greater percentage of that firm's "bottom line" than it does for large law firms. As a result, this suggestion is frequently impractical for small firms or solo practitioners.

Some older practitioners may have graduated from law school at a time when legal ethics courses were not required, and therefore may not even be aware that some of their traditional business practices are inappropriate under the standards of today's legal profession. Due to lack of time, even practitioners who are interested in these issues may not be able to devote themselves to brushing up on ethics rules or paying any attention to issues about civility.

Reaching out to small firms and solo practitioners presents a unique problem. Often these lawyers, who could benefit the most from some of the CBA programs described above, have the least amount of time to devote to education and training of themselves or their staffs. Occupied with the press of business and the need to pay the rent, they do not often have the luxury of being able to take several days off from their practices in order to explore some of the more esoteric issues related to professionalism. Because they are also faced with the direct burdens of operating a business as well as practicing law, they may find that they even lack the time and resources to attend all-day

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[10] James M. McCormack "Good Ethics, Smart Tactics: Avoiding the Top 10 Grievance-Prone Mistakes," *Law Practice Management*, Sept. 1995, 22.

[11] See Mashburn, *supra* note 2. She also suggests that many of the norms established by most civility or professional codes reflect the value systems of white, male lawyers at large firms and therefore are class based.

seminars to improve their skills, both legal and ethical. Despite these hardships, there are a number of things that can be done by both small/solo practitioners and the bar associations to which they belong.

There are a number of really great lawyers who make the choice to practice in a small firm or solo practitioner situation. They are committed to serving their clients and their communities, and make every effort to be the very best lawyers they can be. There is a distinction, however, between the efforts that many lawyers will undertake when it comes to improving their professional competence, and the efforts they will undertake related to improving competence on ethical and civility issues. As a result, slightly different strategies may be needed for each.

Mandatory Programs Directly Addressing Certain Issues

As I mentioned earlier, it may be that the only way to get the attention of small firm and solo practitioners regarding professionalism issues is to require mandatory continuing legal education of, perhaps, three hours per year specifically addressing these issues. This is a relatively small burden for practitioners to bear, but could have potentially large positive results. Many lawyers can appreciate the importance of practice seminars because they can see direct benefits to their business in attending such seminars. The same is not true for seminars on ethics and civility: the market does not provide any incentives that would induce lawyers to attend such seminars.

The ARDC has also advocated a mandatory fee arbitration procedure for all firms, regardless of size, and this kind of program could also prove very beneficial to the profession. One of the difficult conflicts that can arise in the practice of law is the fee issue: have an obligation to zealously protect their client's interests, but find themselves forced to choose between the client's interests and the lawyer's interests when it comes to fees. This can seriously damage a lawyer-client relationship, and creating a fee system could alleviate this difficult problem. The fee dispute issue can be particularly acute in a small firm situation where lost fees might represent a greater proportion of a firm's income. The stakes are somewhat higher for small firms in this regard.

Shorter Seminars on Specific Topic Areas

One technique that has proved extremely successful for the Chicago Bar Association has been to offer regular, short seminars on specific subject areas of the law. These seminars are usually run at the CBA headquarters between the hours of 3:00 P.M. to 6:00 P.M., a time when many lawyers can make themselves available. The price is moderate, and discounts are offered for law students interested in attending. The topic areas cover everything from worker's compensation, to personal injury, to how to take a deposition, to how to handle a probate estate. The seminars are organized by CBA practice committees in those areas, and generally involve panels of practicing lawyers and judges. Written materials are provided at no additional cost. These seminars are extremely popular with the Chicago legal community, and many frequently sell out in advance. They are attended by new lawyers, old lawyers, small firm practitioners, and large firm practitioners. In short, they offer an inexpensive, non-time-consuming chance for lawyers to maintain a level of legal competence on a regular basis. Because they are short and occur at the end of the business day, many lawyers are able to make time in their schedules for these seminars.

These seminars go a long way toward addressing the issue of lawyer competence, but few of them address directly the other side of professionalism: ethics and civility. We need to devote more time and attention to developing specific programs that focus on these issues. There is a problem with them, however, in that many times lawyers who are perfectly willing to attend seminars in practice areas begin to head for the hills any time that ethics is mentioned. Some may feel that they don't need to be "preached" at, or that attending ethics seminars is simply not a good use of their time. Market forces do not encourage small firm and solo practitioners to take advantage of seminars in these areas, and as a result a mandatory program may be the only practical option.

Services That Speak to a Specific Need

Another area in which the CBA has been successful is in trying to offer programs that address the concerns of small firm and solo practitioners. These services, such as low-cost group health insurance and malpractice insurance, attract a wide variety of members. Once lawyers become members, they often make use of other bar association services that will help them to reduce their costs or improve their practices. I think that the CBA could focus even more on providing opportunities for small firm and solo

practitioners to educate themselves about some of these issues by developing targeted seminars and educational opportunities around specific subject areas, and offering them as low-cost meetings.

One important aspect of these service-oriented committees is that they begin with participation by individual lawyers who identify problem areas or articulate a specific need. Oftentimes, after discussion, members of the bench are brought in to interact with the committee to increase the level of dialogue on a particular problem. The issues are clarified and reformulated, and then disseminated to the members of the bar in a general way through publications, seminars, and various other interactive meetings. This provides a basis for lawyers to work directly for the betterment of the profession as a whole.

Internal Practices

The internal practices of a small firm or solo practitioner are also important in developing a better sense of professionalism. Each lawyer should have as his or her goal the desire to be the best lawyer that he or she can be. Lawyers, whether in large firms or small, need to understand that everyone on the staff is watching how the lawyer behaves in order to understand how they should behave. Each lawyer has to develop a philosophy that prizes competency and ethical behavior, and then articulate that philosophy for the staff. Lawyers have to internalize these values and understand that they will set the tone for how their staffs will interact with clients and the judicial system.

Sometimes small firms and solo practitioners can benefit just by knowing what is possible in the realm of internal education. While small firms do not have the access to the types of internal educational programs that larger firms do, there are always things that can be done to improve the level of knowledge and ethical behavior of even the smallest firm. It can be something as simple as centralizing key information so that all lawyers have access to the same knowledge base, or even undertaking to try and do some in-house training of lawyers and staff.

Networking

Invariably, there comes a time in every lawyer's life when he or she faces a question or situation that he or she cannot answer. Most of us learn about values and the

importance of issues such as competence by watching role models We often emulate what we see, consciously or unconsciously That is why I feel that developing positive associations with other lawyers is a very important ingredient for the success of small firms and solo practitioners Many of us think of networking when we think of trying to find a job, or when we need to refer a case to someone But networking can provide a valuable resource for small firm and solo practitioners to obtain all kinds of assistance and advice Developing contacts among lawyers who practice in specific practice areas can help small firms increase their services by association or straight referrals It can also provide an opportunity for informal learning, as firms share ideas about case management and ethical problems The biggest challenge often faced by a solo practitioner is not having a sounding board for problems that may be encountered in even the most routine cases Developing professional contacts that are maintained on a regular basis through social and bar activities can provide access to ideas about legal, business, and ethical issues that crop up occasionally After all, even a superstar like Michael Jordan needs a coach from time to time We all need advice on how to handle certain issues of practice, and we need to find ways to create support systems that will allow us to get our questions answered in a timely fashion before small problems become big ones No practicing lawyer ever has the answer to all questions, and we need to increase opportunities among small firms and solo practitioners for dialogue and information sharing

Professionalism for the Future

As practicing members of the bar, perhaps the most important thing that we can do — and we can do it immediately — is modify our own conduct to reflect a commitment to professionalism at every level That commitment should be evident in dealings with clients, judges, and opposing counsel, but should also be clear in dealings with younger staff members, secretaries, and even the lowest level and least senior office employee People do learn by observing Younger lawyers in a firm will emulate more senior lawyers in many respects, and not only with respect to legal issues If a senior attorney in a firm treats clients as though they were stupid, treats opposing counsel as though they were thieves, and treats office staff as though they were less than human, it is extremely difficult for that lawyer to argue credibly to anyone that he or she supports the concepts embodied in the phrase "professionalism " We all need role models to use as examples of how to handle our lives If our role models themselves do not espouse the highest degree of professional conduct, why should we expect younger lawyers to do

so? All of the ethical training in the world can be undone if the working environment in law firms or government agencies fosters inattention to these basic ideas.

A renewed commitment to the fundamental notions of fairness, justice, and civility will go a long way toward increasing professionalism at all levels of practice. As leaders of the organized bar, we must and should set an example for all to follow.

ANALYZING LOW IMPACT COLLISIONS

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BIOGRAPHY OF W. SCOTT PALMER

Scott Palmer is the President and Chief Executive Officer of Biodynamic Research Corporation or BRC. BRC is a consulting and research firm located in San Antonio, Texas specializing in the analysis of human injury events. Specifically, physicians who also hold engineering degrees forensically determine if an accident event caused claimed injuries and if so, how they were caused. BRC's physician-engineers are oftentimes designated as experts to provide analysis and testimony during litigation proceedings. At the present time, BRC is currently retained to analyze over 1,400 incidents, of which, approximately half involve low velocity collisions with soft tissue injury claims. In its 12 years of operation, it is estimated that BRC has evaluated over 15,000 incidents

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In the recent past, Scott has taught courses on the evaluation of low velocity collisions and their related claims for numerous insurance companies. Additionally, he has taught at the recent International Association of Special Investigation Units (IASIU) and Property Loss Research Bureau/Liability Insurance Research Bureau (PLRB/LIRB) annual conferences on this subject. He is also an instructor on this topic for the National Insurance Crime Bureau's Advanced Special Investigator Academy.

Scott joined BRC in 1987 as its Chief Operating Officer. In 1994, Scott was named as the company's President and Chief Executive Officer. Prior to joining BRC, Scott worked as a management consultant with KPMG Peat Marwick and an information systems consultant with what is now known as Andersen Consulting. Scott holds a B.S. in accounting from Louisiana Tech University and an M.B.A. from the University of Alabama.

Assessment of Injury Potential from Low Velocity Impacts/Collisions

W. S. Palmer

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September 23-25, 1998

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Note: Information contained herein is a supplement to and a subset of the information to be presented during the 1998 Iowa Defense Counsel Annual Meeting and Seminar, September 23-25, 1998 in Des Moines, Iowa.

I. INTRODUCTION

This discussion presents evaluation techniques and related data collection requirements necessary to objectively assess energy levels generated by low velocity collisions and resulting injury potential from accident forces. Emphasis will be placed on the potential for soft-tissue, temporomandibular joint (TMJ), and closed head injuries as a result of low velocity frontal and rear-end collisions. Relevant research, based on human subject testing, will also be presented. A glossary of some terms used herein and during the presentation is also provided.

Fundamentally, an evaluation of injury potential as a consequence of a low velocity collision should include the following steps:

- Accident Investigation;
- Impact Severity Analysis;
- Occupant Kinematics Analysis;
- Medical Analysis; and
- Injury Causation Analysis.

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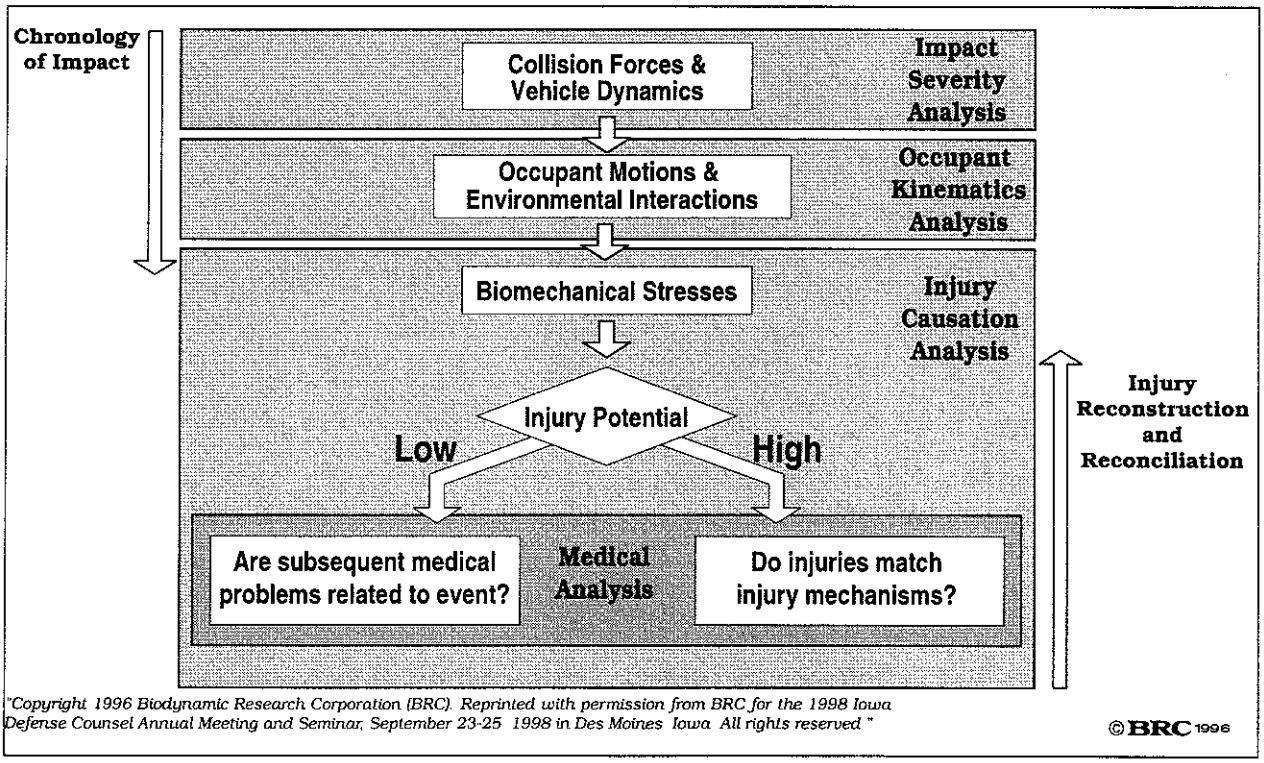
As an overview, the accident investigation generates information utilized in the impact severity, occupant kinematics and injury causation analyses. The interrelationships between these analyses and their related activities are illustrated in Figure 1 below.

Figure 1: Evaluation Methodology



The impact severity analysis includes an assessment of collision forces and vehicle dynamics during an accident event. The occupant kinematics analysis then evaluates occupant movements and interactions both with the occupant compartment and any other environmental elements during a collision event. The medical analysis describes the nature and character of an individual's injury or medical problems as documented in post-accident medical records and assesses their potential relationship with pre-existing conditions, if any. An injury causation analysis combines the disciplines of biomechanics and medicine to determine if the subject collision generated stresses of a character, magnitude, direction and duration capable of producing the occupant's subsequent medical problems.

II. ACCIDENT INVESTIGATION

The scope of an accident investigation can vary. Investigations may include scene inspections, collection and analysis of glass samples collected at the accident scene, filament analysis of vehicle lights, paint analysis, etc. Many of these approaches are employed when evaluating the potential for a staged accident or assessing the accuracy of a described accident scenario. The accident investigation techniques discussed herein focus on the collection of data which facilitate an impact severity analysis and, subsequently, an injury causation analysis.

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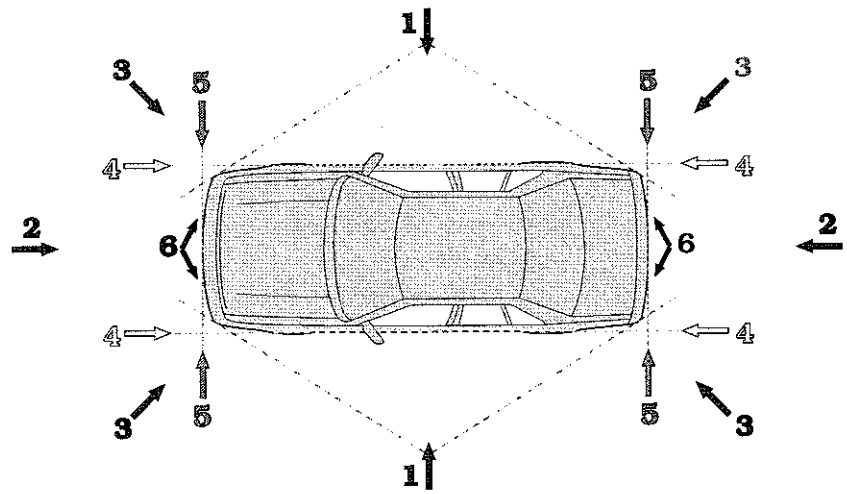
Photographic documentation of damage, preferably for all vehicles involved in a collision, is helpful in the conduct of impact severity, occupant kinematics and injury causation analyses. Photographs provide objective information on which to base an analysis and exhibit impact severity. Figure 2 offers guidelines which will facilitate thorough documentation of most exterior damage sustained by each vehicle involved in a low velocity collision.

Figure 2: Vehicle Photography Guidelines



7 Significant Damage in Detail

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Each number in Figure 2 represents a recommended type of photograph and each is described below.

1. Photograph the full side views of the vehicle. This documents the presence or absence of buckling in the quarter panels or other areas.

2. Photograph the front or rear views, as appropriate, of the vehicle. Bumper heights should be documented in these photographs by including a properly placed yard stick or tape measure.

3. Photograph oblique views of the vehicle from each relevant corner. The views should be taken from a distance such that a vehicle's side and its front/rear are both visible in the view. This photograph gives perspective to the documented damage.

4. Photograph each side of the vehicle as viewed from the front/rear, along the edge.

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5. Photograph the front/rear of the vehicle as viewed from each side, along the edge.

6. Photograph underneath struck bumpers to document any damage to energy absorbtion mechanisms or underlying structures. Also photograph the top view of struck bumpers to document angles of crush or damage due to collision offsets.

7. Photograph close-up views of any damage to the vehicle, especially if it has not been documented in another photograph.

Other recommended photographs include the following:

1. Any cracks, indentations, scuffs or other evidence of an occupant's physical contact with structures inside the occupant compartment (e.g., windshield, instrument panel, steering wheel, knee bolsters). Any evidence of blood, tissue, hair, or clothing fibers should also be documented.

2. The deployment or non-deployment of the vehicle's air bag(s).

3. The seating arrangement(s) of the subject vehicle with the doors open. Of particular significance is the seat in which the subject was sitting. In addition, photographs of the seat back and headrest (at its setting/positioning during the accident, if known, and at its maximum setting) are beneficial.

4. The manufacturer's plate which is typically found on the inside of the driver's side door. This plate usually contains the vehicle identification number (VIN). Alternatively, the VIN may also be found on the driver's side dashboard. This information may expedite an analysis especially when the VIN is improperly recorded in other documentation.

Use of a 35 mm camera is recommended to provide quality documentation. It is also recommended that a yard stick or tape measure be included in each photograph taken (except for VIN photographs) to give scale to the information documented. Thorough documentation of vehicle damage with high quality photographs will improve the quality of the impact severity analysis and, consequently, the quality of the injury causation analysis.

Additional information important to the impact severity analysis includes the following:

1. Make, model, year, VIN, and curb weight of the vehicle(s) involved.
2. The loads of the vehicle(s) involved. This includes the number and weights of the occupants, the weight of any cargo and fuel levels.
3. Nature and extent of vehicle damage which is not documented photographically. For example, the nature and extent of frame or suspension damage.

Sources of this information include accident participant/witness statements, police reports (if called to the accident scene), fire department reports (also if called to the accident scene), and damage repair estimates or billings.

A police report will typically provide supplemental information helpful to an impact severity analysis, such as the accident scenario, vehicle impact configuration, weather conditions at the time of the accident, and road surface type, grade, contour, and condition. If this information is not available from a police report, it should be compiled from accident participant/witness statements and/or documentation from a scene inspection.

III. IMPACT SEVERITY ANALYSIS

Utilizing information generated by the accident investigation, the impact severity analysis focuses on making the following assessments:

- What are the accident-related changes in velocity (ΔV) for the vehicles involved?
- What are the principal directions of forces applied to the vehicles involved?
- What are the accident-related motions and directions of travel of the vehicles involved?

These assessments are based on Newton's laws of motion which are illustrated in Figures 3, 4 and 5 on the following pages.

Figure 3: Newton's First Law

An object remains at rest or in uniform motion unless acted upon by a force.

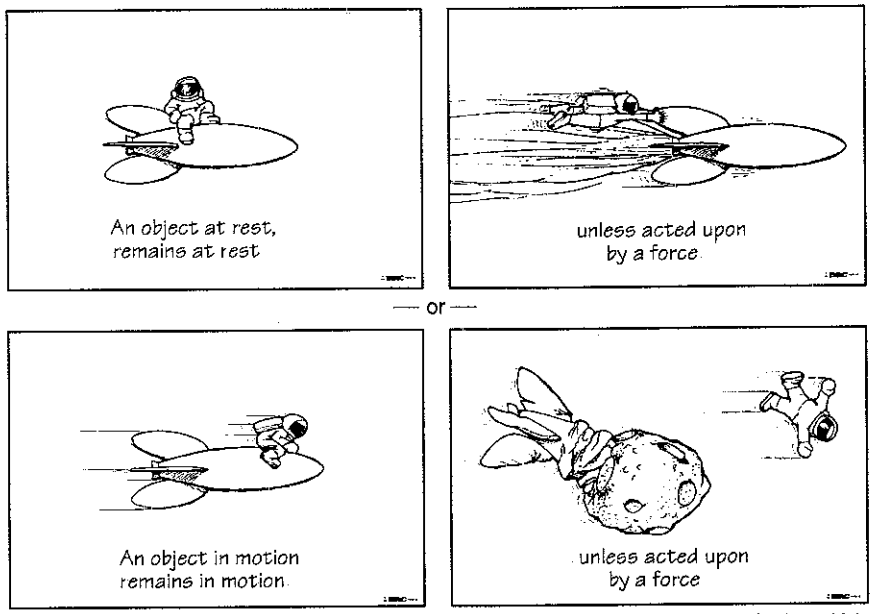


Figure 4: Newton's Second Law

Force (F) is equal to mass (m) times acceleration (a) or F = ma. Alternatively, an unbalanced force acting on an object will cause an acceleration of the object which is: (1) directly proportional to the magnitude of the force; (2) inversely proportional to the mass of the object; and (3) acts in the direction of that force.

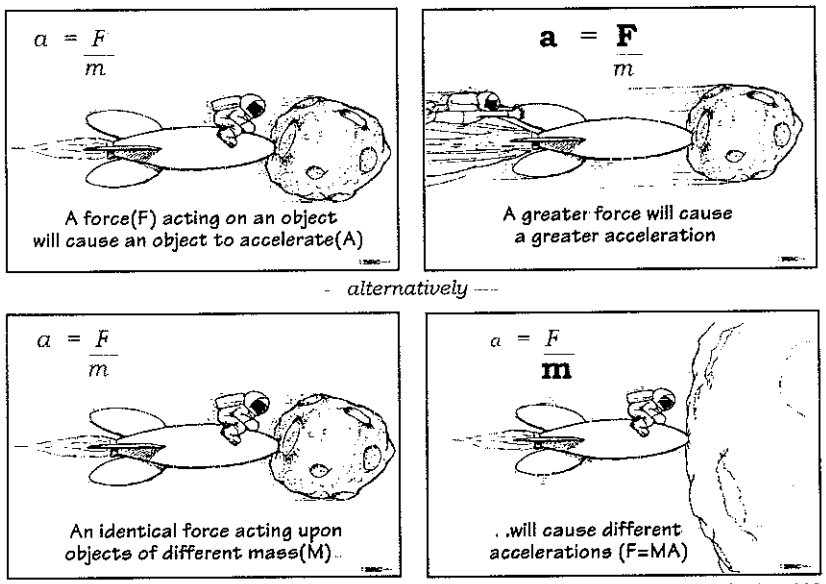
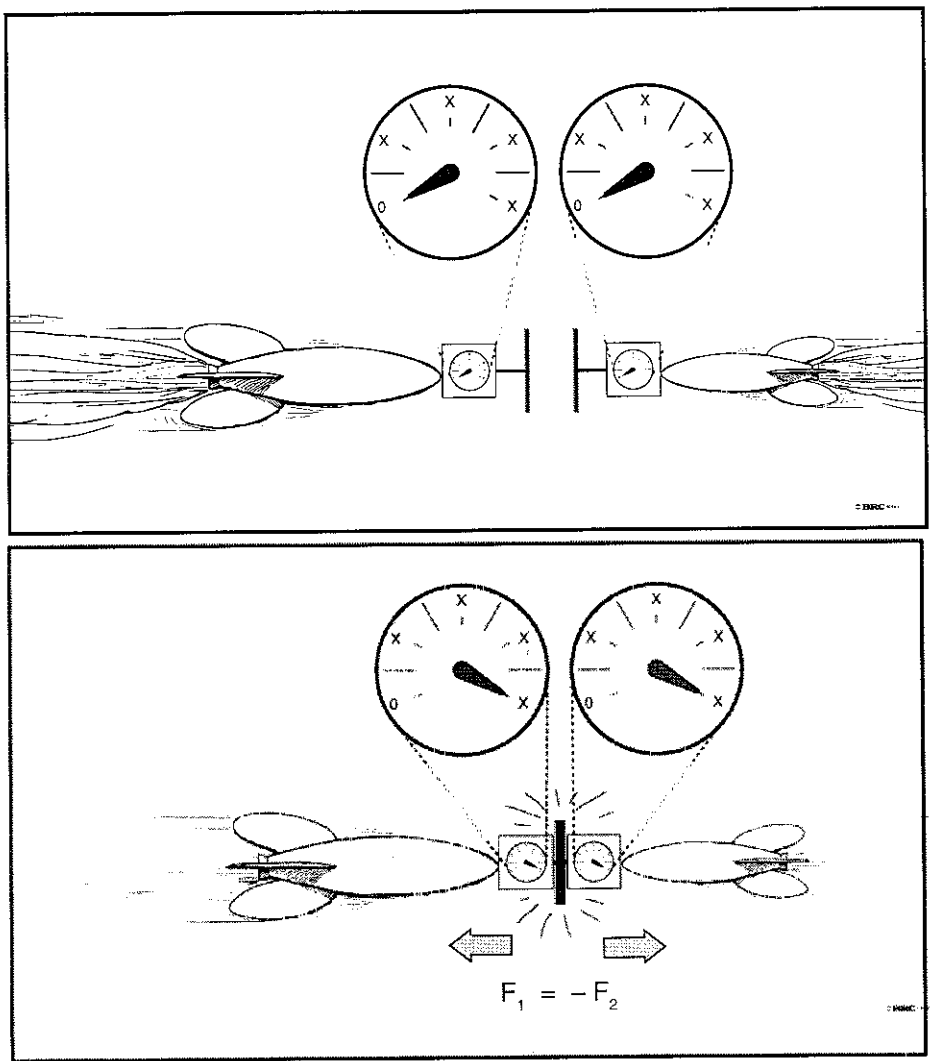


Figure 5: Newton's Third Law

To every action, there is an equal and opposite reaction. Alternatively, the forces between contacting bodies act along the same path, are equal in magnitude and opposite in direction.



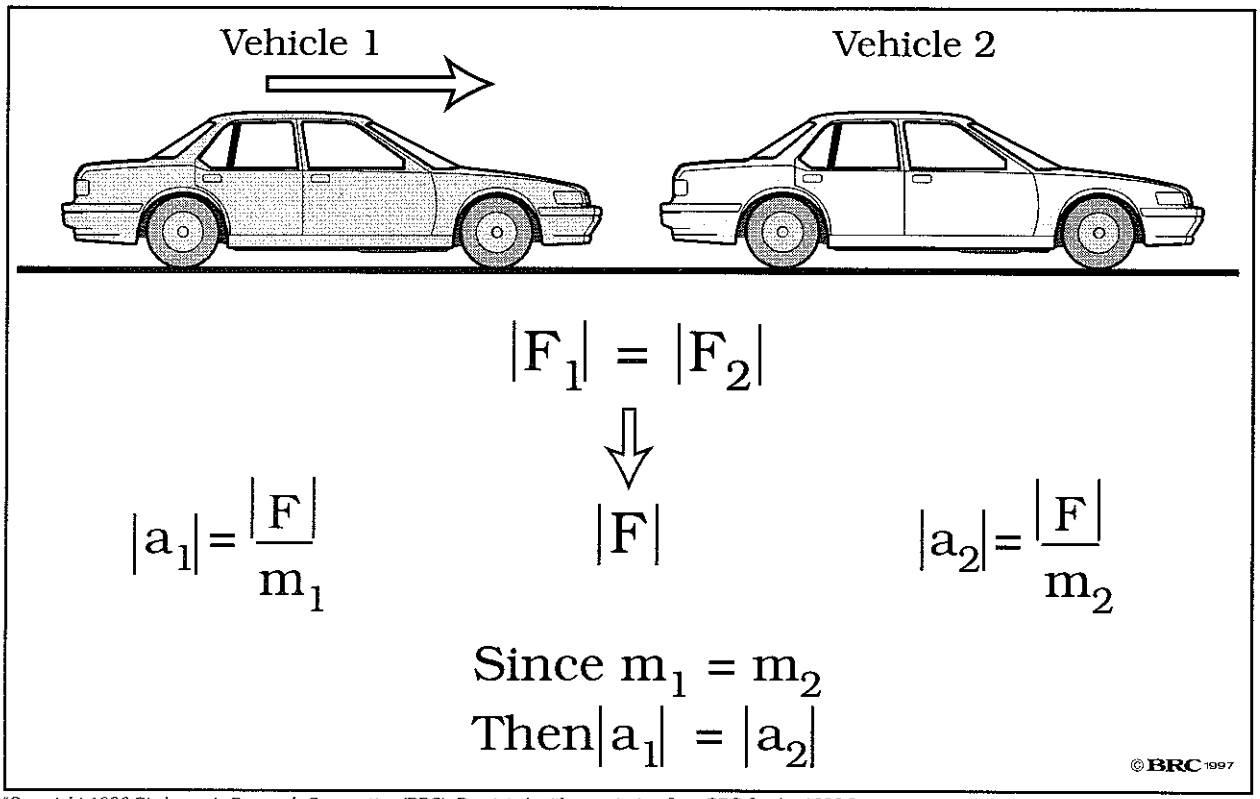
The aim of an impact severity analysis for the evaluation of injury potential is to determine the magnitude and direction of collision-related forces. The magnitude of the force is generally expressed in terms of the acceleration-time history of an impacted mass ($F = ma$). This acceleration pulse results in an impact-related change in velocity (ΔV). This is usually understood as the velocity change experienced over the period of time during which a collision occurs. The direction of collision forces is generally expressed as a principal direction of force (PDOF). This refers to the direction of the force vectors in a collision, typically taken as the overall result when forces vary during the collision.

The following examples demonstrate ΔV and PDOF determinations according to Newton's laws of motion:

EXAMPLE 1:

Vehicle (1) is traveling at a speed of 10 miles per hour and strikes vehicle (2) in the rear while stopped. Assume the vehicles have identical weights, there is no collision offset, there is no bumper over-ride or under-ride, there is no elasticity in the vehicles' bumper systems (i.e., no rebound effect after the collision), there is a level roadway grade, and no braking occurs prior to or after the collision. This collision scenario is depicted in Figure 6 below.

Figure 6: Example One



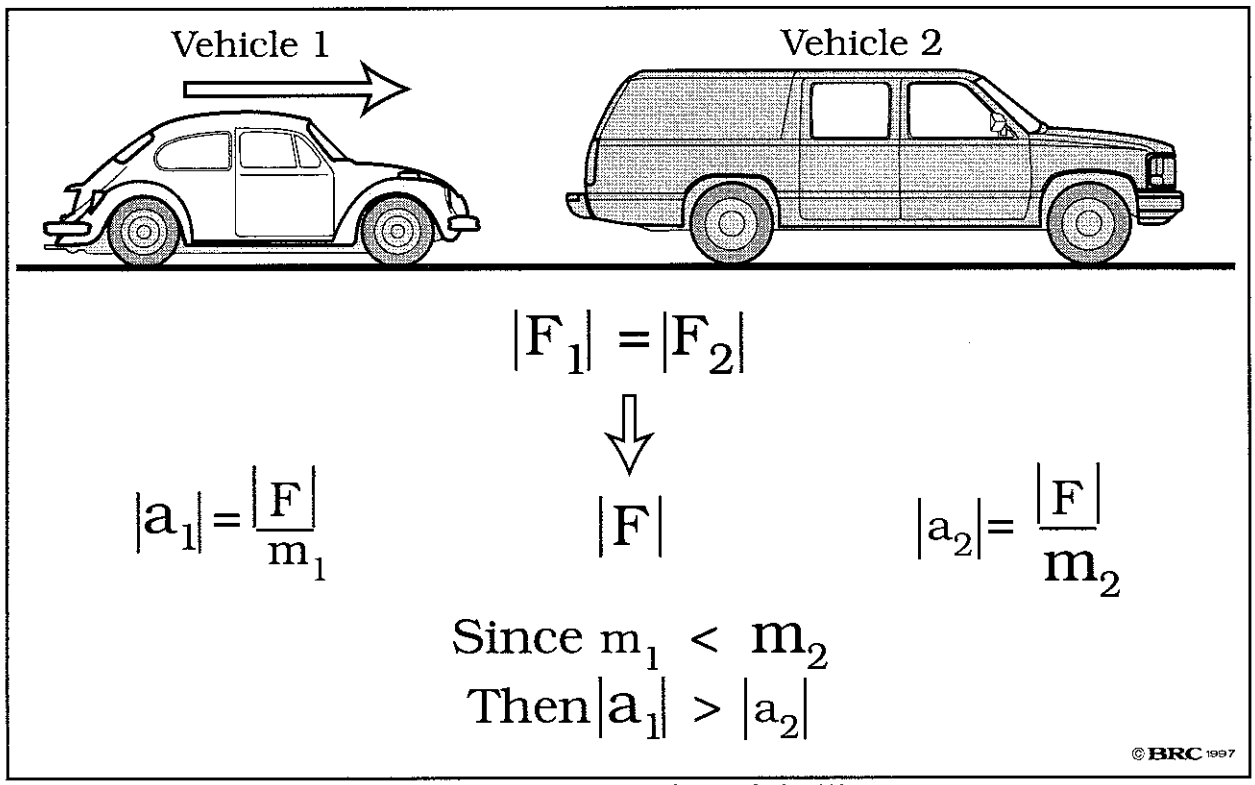
After impact, vehicle (2) will be accelerated to a velocity of five miles per hour in the same direction as the travel of vehicle (1). Vehicle (1) will be decelerated to a velocity of five miles per hour in the same direction. Both vehicles experience a change in velocity of 5 miles per hour as determined by a conservation of momentum analysis. Note that because the masses of the vehicles are the same, the magnitude of the acceleration changes must also be the same for the forces between the two vehicles to be equal and opposite. The PDOF for vehicle (1) is

directly rearward (generally expressed in clock face directions or as in this case, 12 o'clock). The PDOF for vehicle (2) is directly forward, or 6 o'clock.

EXAMPLE 2:

Vehicle (1) is traveling at a speed of 10 miles per hour and strikes vehicle (2) in the rear while stopped. Assume vehicle (2) weighs approximately 2.5 times that of vehicle (1), there is no collision offset, there is no bumper over-ride or under-ride, there is no elasticity in the vehicles' bumper systems, there is a level roadway grade, and no braking occurs prior to or after the collision. This collision scenario is depicted in Figure 7 below.

Figure 7: Example Two



After impact, based on a conservation of momentum analysis, vehicle (2) will be accelerated to a velocity of approximately 2.9 miles per hour in the same direction as the travel of vehicle (1). Vehicle (1) will be decelerated from ten miles per hour to 2.9 miles per hour in the same direction. The total change in velocity for vehicle (1) is 7.1 miles per hour. Since vehicle (2) has a greater mass than vehicle (1), the magnitude of the acceleration to vehicle (1) must be proportionately larger than the magnitude of the acceleration to vehicle (2) for the forces to be equal and opposite. As in the previous example, the PDOF for

vehicle (1) is directly rearward, or 12 o'clock. The PDOF for vehicle (2) is directly forward, or 6 o'clock.

Note that in the previous examples, as in all events involving interaction between objects, the conservation of momentum applies. Specifically, this principle states that the sums of the momentums (expressed as mass times velocity) of objects involved in a collision before the impact equal the sums of the momentums of the same objects after the impact. For the accident scenarios previously described, this can be expressed as follows:

$$\mathbf{m_1V_1 + m_2V_2 = m_1V_1' + m_2V_2'}$$

where:

$\mathbf{m_1}$	=	the mass of Vehicle 1
$\mathbf{m_2}$	=	the mass of Vehicle 2
$\mathbf{V_1}$	=	the pre-impact velocity of Vehicle 1
$\mathbf{V_2}$	=	the pre-impact velocity of Vehicle 2
$\mathbf{V_1'}$	=	the post-impact velocity of Vehicle 1
$\mathbf{V_2'}$	=	the post-impact velocity of Vehicle 2

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The application of the principle of conservation of momentum to vehicle collisions enables one to derive conclusions about pre- or post-collision velocities of a vehicle based on other known data. Also, it enables one to assess the reasonableness of accident descriptions, vehicle characteristics and collision velocity estimates since pre- and post-collision momentums must be equal. When pre- and post-collision momentums do not balance, the potential for variation in accident descriptions, vehicle characteristics and pre- and post-collision velocity estimates must be explored. It is very important to note, however, that the proper employment of a conservation of momentum analysis requires consideration of the amount of restitution or "bounce" in the collision as well as other factors such as braking, post impact skidding, etc. Discussion of these complicating factors is beyond the scope of this document.

In actual accident scenarios, a precise understanding of pre-impact velocities of all involved vehicles is rarely known and, therefore, accident related ΔV's must be derived from alternative methods. Once derived, these velocity changes can be utilized in a conservation of momentum analysis to ensure the conclusion results in equal momentums and balanced forces.

A commonly employed approach to derive ΔV is the use of bumper standards. Current bumper standards require the bumper to protect the vehicle's safety related equipment during impact into a barrier at 2.5 miles per hour. However, as a result of this impact, the bumper can withstand an unlimited amount of damage. Generally stated, a bumper standard approach is premised on the basis that a vehicle involved in a

collision with a bumper that shows little or no damage as a result of the collision must have experienced a ΔV less than its bumper standard. However, based on testing conducted by Biodynamic Research Corporation (BRC), it has been found that the absence of visible damage to a bumper system is not a good predictor of the velocity change experienced by a vehicle in a low velocity accident. Impact related ΔV's of over 8 mph were observed with no external damage to the vehicle's bumper system. Similar findings have been published by other researchers.[1,2]

The best available method to assess collision related ΔV is to compare actual vehicle damage to the damage experienced by the same or similar vehicle in crash tests. If the damage to the actual vehicle is less than that experienced in the crash test, then the upper bound to the ΔV of the actual accident can be established based on the ΔV of the crash tests. Sources of crash test data include the Insurance Institute for Highway Safety, Consumer Reports and private organizations such as BRC.

If crash test data can be found for only one of the vehicles involved in the accident event, it can be used to derive the ΔV for the other vehicle in a conservation of momentum analysis. For this reason, it is important to document the damage sustained by all vehicles involved in the collision. If the damage is defined for all vehicles involved in an accident event, the likelihood of obtaining previously existing crash test data for at least one of the vehicles involved is maximized.

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As previously noted, an impact analysis can be complicated by numerous factors. These not only include the restitution or "bounce" in the collision but also the following:

- *Pre- and post-impact braking/skidding and related vehicle dynamics*. These factors affect the collision and post-collision accelerations experienced by the vehicle and, consequently, its occupant(s).

- *Terrain and grade of the accident site*. These factors can influence vehicle and occupant accelerations in ways similar to pre- and post-impact braking/skidding.

- *The amount of collision offset*. Collision offset makes available crash test data less relevant and could impart post-collision rotation to a vehicle. This not only complicates the determination of accident related accelerations, but also resulting occupant motions.

- *The angle of impact*. Angled impacts can influence vehicle and occupant motions in ways similar to collision offset.

- *The existence of damage due to over-ride or under-ride conditions*. When a collision does not exclusively involve bumper-to-bumper contact such as in over-ride and under-ride conditions, the restitution or "bounce" in a collision is reduced and resulting damage will not resemble or be comparable to the available crash test data.

- *The existence of an optional bumper system.* Some late model vehicles provide bumper systems rated at 5 mph as an optional item. The presence of such a system should be factored into the impact analysis. For example, this information would affect the relevance of available crash test data.

Since each of the previously noted factors influence the impact analysis, the existence or absence of each in a given accident event should be documented.

IV. OCCUPANT KINEMATICS ANALYSIS

Collision events create forces which cause occupant displacements with respect to the vehicle. These movements may result in occupant contact/interactions with vehicle structures or the external environment. An occupant kinematics analysis refers to the study of an occupant's movements and interactions with the occupant compartment or other environmental elements during a collision event. As do vehicles, occupants also follow Newton's laws of motion during a collision event.

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The following example has been simplified to demonstrate occupant motions in frontal and rear-end low velocity collisions:

EXAMPLE 3:

Same fact scenario as Example 1.

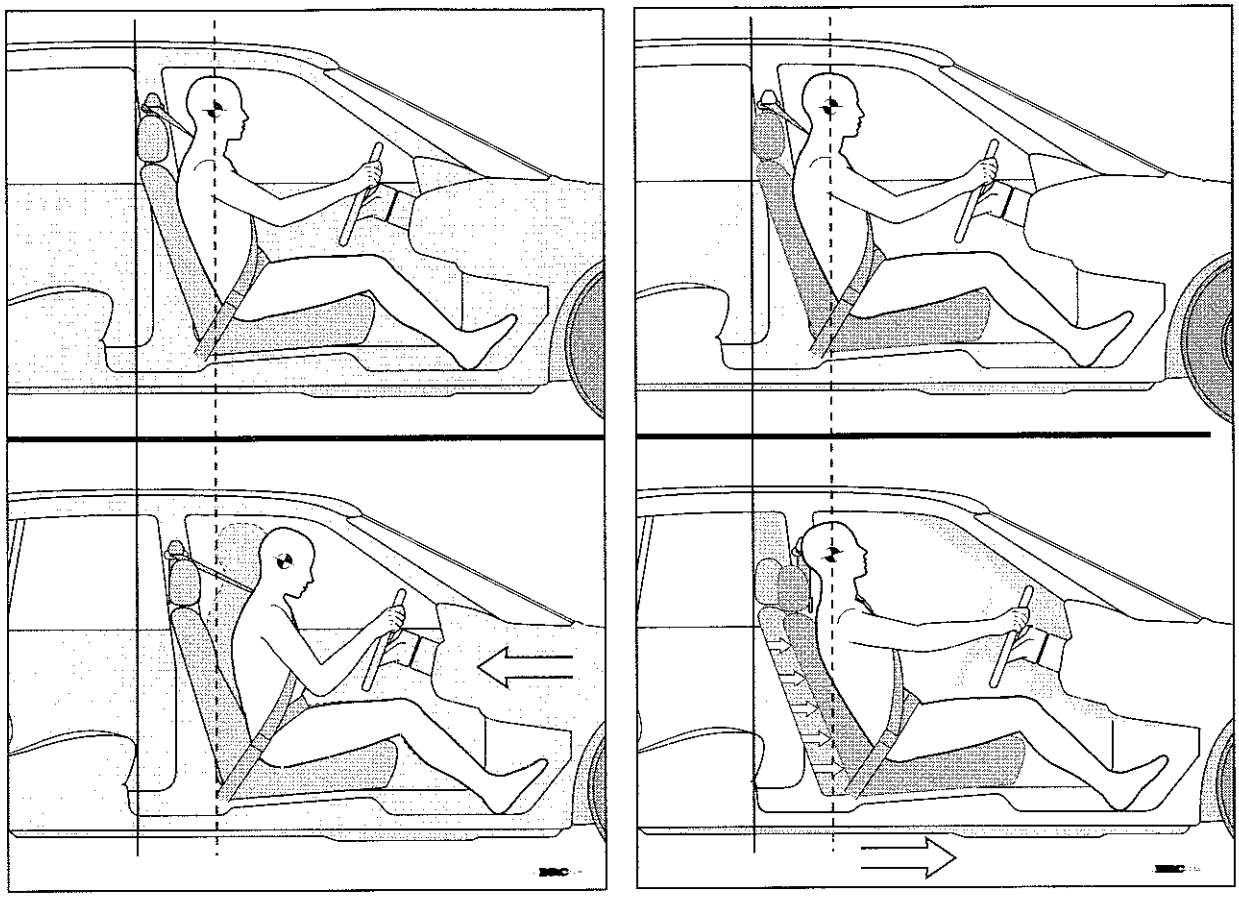
Subsequent to the collision, the driver of vehicle (1) (refer to Figure 8.a. on the following page) will follow Newton's first law and continue to travel in the same direction and speed (i.e., velocity) as prior to impact until the driver's bracing forces and forces of the restraint system decelerate the driver to the post impact direction and velocity of the vehicle. Note that the driver's head also follows Newton's first law and continues in the pre-impact direction until it is decelerated by the driver's neck.

The driver of vehicle (2) (refer to Figure 8.b. on the following page) will also follow Newton's first law and remain at rest (a velocity of zero) until accelerated forward by the force of the advancing seat back. Again note that the driver's head remains at rest until it is accelerated forward by the driver's neck and/or the head restraint system.

Figure 8: Occupant Kinematics

a. Frontal low velocity collision

b. Rear end low velocity collision



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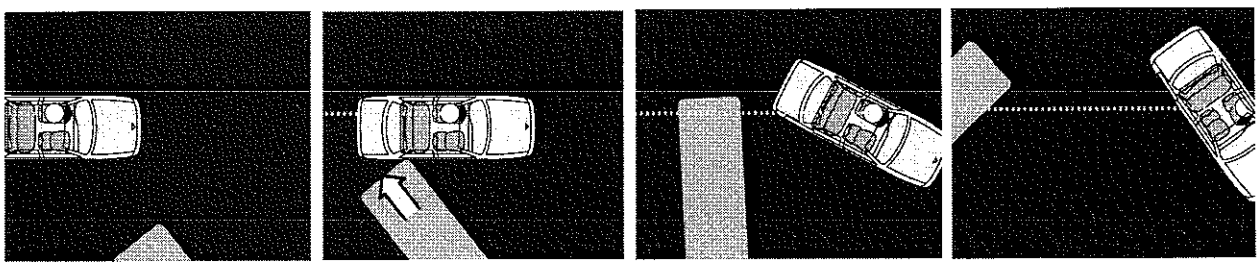
In the previous examples the occupants are moving, relative to the vehicle, towards the point of impact. This condition is sometimes true and a common misconception in the evaluation of occupant motions. Consider the example shown in Figure 9 of an unrestrained occupant.

Figure 9: Occupant Motions Not Moving to the Point of Impact



In this example, the unrestrained occupant does not move towards the point of the impact, but follows Newton's first law (i.e., the occupant remains in motion until acted upon by an outside force). In this case, the force of the door of the rotated vehicle alters the motion of the occupant. As a result, when occupant motions are being analyzed, Newton's laws should be rigorously applied in lieu of armchair observations.

The location and position of an occupant in a vehicle prior to the accident will affect his/her motions during a collision. The use or non-use of a restraint system will also affect an occupant's motions during a collision. Also, if a restraint system is used by an occupant, the type of restraint system (e.g., two point versus three point system and original versus after-market system) may affect the motion of an occupant. For these reasons, a subject's location and position in the vehicle prior to the accident, the use or non-use of any available restraint system, and the type of restraint system used should be documented.

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V. MEDICAL ANALYSIS

A medical analysis describes the nature and character of injuries or medical problems both before and after an accident event. As a result, a medical analysis should include a review of:

- Available pre-accident medical information; and
- Available post-accident medical information.

Types/sources of pre-accident medical information include the following:

1. Family physician medical records
2. Hospital records
3. Specialist medical records
4. Employment/military records
5. School records

Types/sources of post-accident medical information include the following:

1. Police and fire department reports
2. EMS/life flight/ambulance reports
3. Emergency room reports/records
4. X-rays/CT scans/MRI scans
5. Participants and witness statements
6. Treating physician reports/office notes
7. Hospital records
8. Independent medical examinations

Independent medical examinations (IME's) are frequently used to establish injury causation. This approach can create misconceptions and conflict because examining physicians often do not understand the physical basis for injury or are unfamiliar with the range of disciplines involved in an injury causation analysis. To avoid this problem, the issue of injury causation should be addressed separately. Only the medical condition of a subject should be addressed with an IME.

Without a medical analysis, the potential for injury to an occupant involved in a low velocity collision can only be assessed for an "average" individual who is capable of performing routine daily activities. The conduct of a medical analysis on a subject, however, facilitates a situation-specific and individual-specific determination of injury causation. The medical analysis may identify one or more pre-existing conditions that could reduce an individual's tolerance or threshold for injury (described in the subject section). Furthermore, the medical analysis provides greater definition to the injuries claimed so the assessment of injury causation can be more specifically developed.

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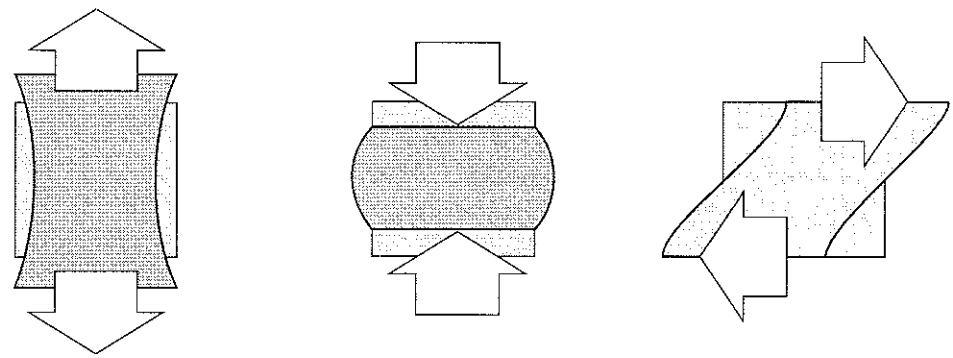
VI. INJURY CAUSATION ANALYSIS

Collision events not only cause an occupant to displace with respect to the vehicle and interact with the occupant compartment or other environmental elements, but also cause velocity differences to occur between the occupant and his/her occupant compartment. The interaction between the occupant and the occupant compartment and/or environmental elements then imposes stresses and strains on the occupant and can create injury mechanisms (physical processes which cause damage to a living body). The basic injury mechanisms are as shown and described in Figure 10 below.

Figure 10: Basic Injury Mechanisms



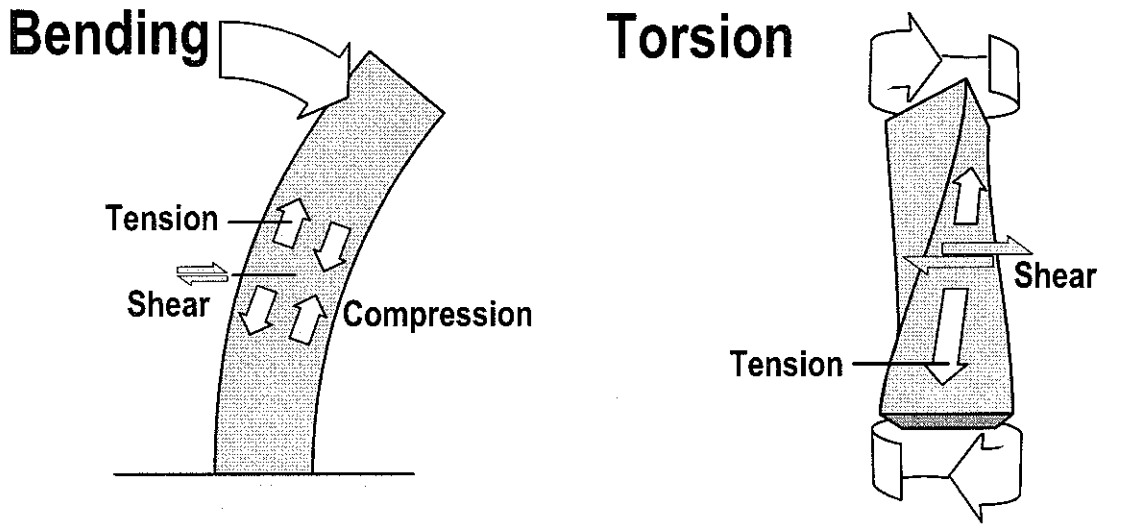
- **Tension** - stress produced by opposing forces acting along the same path which tend to increase the dimension of an object (e.g., pulling apart, extending)

- **Compression** - stress produced by opposing forces acting along the same path which tend to decrease the dimension of an object (e.g., pressing together, making more compact)

- **Shear** - stress produced by opposing forces acting along non-aligned but parallel paths (e.g., scissor-like action)

Additionally, the basic injury mechanisms can work together to create the more complex injury mechanisms illustrated in Figure 11 and described below.

Figure 11: Complex Injury Mechanisms



- **Bending** - a combination of compression, tension and shear stress.

- **Torsion** - a combination of tension and shear stress

Injuries occur when the above noted mechanisms are applied, either alone or in various combinations, to human tissue in a way that exceeds its tolerance. Factors influencing the potential for injury include the magnitude of the force or stress, the direction of application, the rate of onset, the duration, and the surface area over which the force or stress is applied. As previously noted, human tolerance can also be affected by the existence of medical conditions (e.g., disease or previous injury). Human tolerance to a given force or stress is also a function of the anatomical structures to which it is applied.

Human tolerance can be expressed via a number of methods. These include pounds per square inch, bending moments, the Gadd, Head Injury and Viscous Criteria, as well as linear and rotational velocity and acceleration thresholds. Because of the unique characteristics of these various methods, they should be applied discerningly.

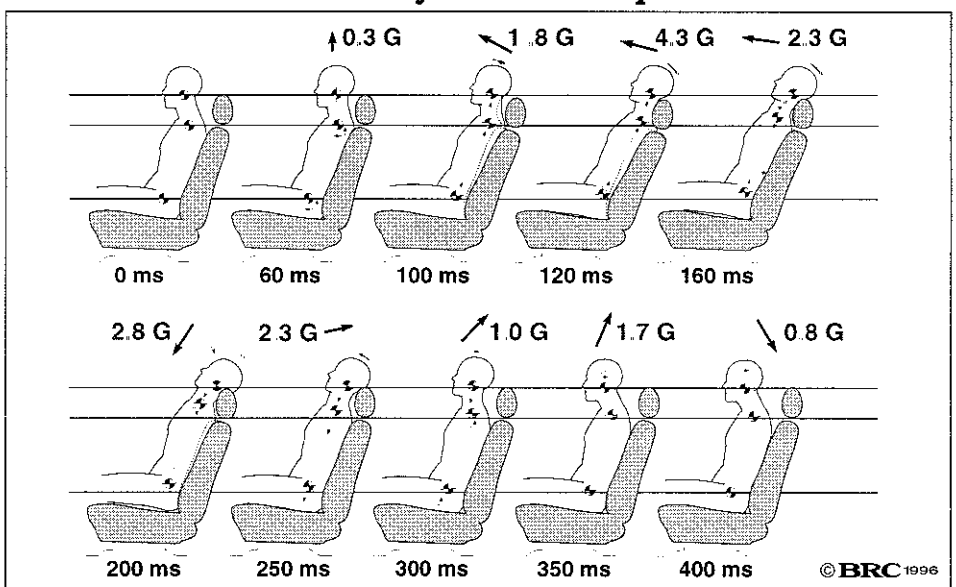
A common method of comparing forces involved in various events is to record the resulting acceleration in G's. One G is defined as the acceleration produced by the Earth's gravity. Examples of G's experienced in activities of daily living as experimentally measured by BRC are presented in Figure 12 below.

Figure 12

Examples of "G" Forces from Activities of Daily Living	G's
Braking to a stop (dry pavement)	0.7
Walking down stairs; stepping off a curb	1 - 3
Plopping into a chair	2.5 - 5
Hopping off a step	2.5 - 8
Bumper car impact	3 - 4
Roller coaster	3 - 4

Alternatively, G's experienced by an occupant in a rear-end collision are shown in Figure 13. These data reflect the various stages of an occupant's motions and non-gravitational forces experienced during a 5 mile per hour ΔV crash test conducted by BRC.[3]

Figure 13: Head, Neck and Trunk Responses to Low Velocity Rear End Impacts



Extreme care must be exercised in comparing forces from activities of daily living to those from a collision. The directions, magnitudes, duration, rate of onset, and area of application of the forces from a given collision should only be compared with these similar characteristics from activities of daily living. Please note these characteristics have not been addressed in the preceding presentation of G's resulting from activities of daily living and thus, they are not direct and appropriate comparisons to forces experienced by occupants in low velocity frontal and rear-end collisions.

VII. RESEARCH FINDINGS

Biodynamic Research Corporation has conducted two series of tests with human subjects to research injury potential from low velocity collisions. BRC's first study was conducted in February 1991 and involved four test subjects who were exposed to ten rear-end impact events. The velocity change for these events ranged from 2.5 to 5.0 miles per hour. Subsequently, a second test series was conducted in July 1993 involving seven test subjects (including three return volunteers from the first series) who represented a broader age and anthropometric range. These test subjects were exposed to fourteen rear-end impacts with the velocity change ranging from 3.6 to 6.8 miles per hour. Because some impact events involved multiple test subjects, there was a total of eighteen human rear-end impact exposures. Additionally, since the "bullet" test vehicles were operated by human drivers in both test series, a total of twenty-five human front end impact exposures (note one test was executed without a human subject in the struck vehicle) was observed with velocity changes ranging from 2.0 to 7.1 miles per hour. Data were collected using a variety of improved electronic and high speed film based-data collection methods. All testing was conducted in accordance with human test study protocols reviewed and approved by the University of Texas Health Science Center Institutional Review Board.[3,4]

Test Vehicles and Site

Four vehicles were used in the first test series. These vehicles were a 1986 Dodge 600 convertible, a 1984 Buick Regal Limited coupe, a 1984 Ford Club Wagon van, and a 1984 GMC 1500 pickup truck. Each vehicle was without evidence of collision- induced structural damage and was in road worthy condition with factory standard equipment and parts. The convertible and coupe had factory standard energy absorber bumper systems, and the truck and van bumper systems were rigidly mounted to the vehicle frame structure. Although each vehicle remained in stock condition to the maximum extent possible, the testing protocols required a number of modifications, including the removal of doors so the test subjects could be photographed. Each vehicle's original factory standard 3-point restraint system was used throughout the tests. Vehicles were checked prior to testing and any bumper assembly damage found was repaired with new parts.[3]

The test site was an unused section of paved road. A ramp was constructed and used to launch the "bullet" vehicle to the test protocol's desired impact speed. Although the "bullet" vehicle was operated by a human driver, human input was limited to steering and post-impact braking. All pre-impact speeds were generated by the launching ramp so they could be consistently predicted and repeated.[3]

In the second test series, the vehicles from the first test series, except the 1984 Ford Club Wagon van, were used. The 1984 pickup truck was primarily used as the "bullet" vehicle and the other two vehicles were the primary "target" vehicles. The pickup truck's front bumper was replaced by a steel reinforced and wood faced structure which better withstood the horizontal impact forces during repeated impacts with the struck cars. Since previous testing had shown that the struck vehicle had acquired most of its velocity change prior to any significant kinematic response of the occupant, the acceleration pulse shape variation anticipated because of this bumper modification was not expected to affect test subject kinematics. As in the first test series, each vehicle's original factory standard 3-point restraint system was used throughout the tests with the intentional exception for one test run when both human driver and right front seat passenger of the "target" vehicle were asked not to wear their restraint systems. Additionally, vehicles were checked prior to testing and any bumper assembly damage found was repaired with new parts.[4]

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Test Subjects

In the first test series, the four test subjects were healthy male volunteers, ranging in age from 45 to 56 years. Each completed pre-testing physical evaluations including radiographic imaging studies of their cervical, thoracic, and lumbar spines. All test subjects were exposed to rear-end and frontal collisions.[3]

In the second test series, the seven test subjects were healthy male volunteers, ranging in age from 32 to 59 years. Each completed a pre-testing medical history and physical evaluation, including cervical spine radiographic studies, and measurements of their maximum neck range of motion (extension and flexion) and normal upright head carriage angle. All test subjects in this series were exposed to rear-end and frontal collisions.[4]

Research Findings

Based on this research which involved 28 exposures of human subjects to multiple low velocity rear-end collisions and 25 exposures of human subjects to multiple low velocity frontal collisions, observations related to whiplash, low back, temporomandibular joint and closed head injury potential were made. These observations are presented in the following pages.

A. WHIPLASH

- In the second test series, no cervical hyperextension or hyperflexion was observed in any test subject occupying the "target" vehicle. Since neck motion was entirely within the normal range, no bony, ligamentous, or disc structures were subject to injury from exceeding that range.[4]

- In the second test series, peak accelerations were observed in the "target" vehicle test subjects while their necks were mostly erect and resisting principally transverse forces. This is the most likely time when muscle strain and possibly compressive irritation may occur.[4]

- For test subjects exposed to rear-end collisions, the injury threshold for mild cervical muscle strain appears to be at a ΔV of about 5 miles per hour.[4]

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- For single rear-end collision events above a ΔV of 5 miles per hour,the likelihood of transient acute neck and shoulder muscle strain injury and possible mild compressive irritation of the posterior neck may increase.[4]

- Based on observations in the second test series, muscular strain injury potential may be moderately increased for individuals in some low velocity rear-end collisions if their heads are turned.[4]

- No observed biomechanical events could have resulted in permanent cervical injury for occupants over a broad age range, and there have been no subsequent indicators of any persistent "soft tissue injury" symptoms in any of the test subjects (for rear-end or frontal collision events) [4]

B. LOW BACK INJURY

- Injury to the low back is unlikely in a low velocity rear-end collision due to the relative lack of low back differential motion because of the bracing provided by the advancing seat back.[4]

- During testing, no low back symptoms were observed and there have been no subsequent indicators of any low back "soft tissue injury" symptoms in any of the test subjects (for rear-end or frontal collision events).

C. TEMPOROMANDIBULAR JOINT INJURY

- Unless the mandible contacts a structure or object during a low velocity collision, sufficient forces are not available to injure the TMJ.
- In rear-end collisions, the mouth may open slightly but well within normal limits.

- During testing, no TMJ symptoms were observed and there have been no subsequent indicators of any TMJ symptoms in any of the test subjects (for rear-end or frontal collision events).

D. CLOSED HEAD INJURY

- Unless the head makes significant contact with a structure or object during a collision (other than the incidental contact expected with a head restraint system), sufficient forces are not available to create a closed head injury in a low velocity collision.

- During testing, no closed head injury symptoms were observed and there have been no subsequent indicators of any closed head injury symptoms in any of the test subjects (for rear-end or frontal collision events).

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These findings have been corroborated by 69 other published and 188 unpublished human exposures to low velocity rear-end collisions with collision severity reaching a ΔV of up to 8.5 mph. As a result of these human exposures (which included males and females), the vast majority had either negligible or no symptoms. Less than 20 test subjects reported minor symptoms (i.e., symptoms of 24 hours or more) with the longest period of complaint being 7 days.[5]

VIII. CONCLUSIONS AND RECOMMENDATIONS

No matter what type of accident event, objects will always obey the laws of motion. Also, injuries are caused by applying stresses and strains to tissue in a way that exceeds their injury tolerance. The methods described herein tie these two truths together in a way that provides an understanding of if and how injuries occur.

If a programmatic approach to evaluating the potential for injury from low velocity collisions is employed, the following practices discussed in this document should be emphasized:

1. Obtain quality photographs, as described herein, of damage sustained (or lack thereof) by all vehicles involved in an accident.

2. Obtain complete descriptions (e.g., make, model, year, VIN), cargo/load information and damage estimates or repair statements for all vehicles involved in an accident.

3. Document the existence of complicating factors such as:

   - Pre- and post-impact braking/skidding and related vehicle dynamics.
   - Terrain and grade of the accident site.
   - The amount of collision offset.
   - The angle of impact.
   - The existence of damage due to over-ride or under-ride conditions.
   - The existence of an optional bumper system.

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4. Do not base determinations of accident ΔV on vehicle bumper standards.

5. Document (a) the subject occupant's location and position in the vehicle prior to impact, (b) the subject occupant's use or nonuse of the available restraint system, (c) the type of available restraint system, and (d) if the occupant had any contact with the interior structures or objects in the vehicle during the collision event.

6. Take extreme care in the comparison of accelerations encountered in activities of daily living to those experienced in low velocity collisions.

7 Conduct a medical analysis to align scenario-specific and individual-specific assessments.

8. Conduct an injury causation analysis of an accident as a separate analysis from an independent medical examination which independently assesses the medical condition of an individual.

IX. REFERENCES

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5. Szabo, T. J.; Welcher, J. B. *"Human Subject Kinematics and Electromyographic Activity During Low Speed Rear Impacts."* Proceedings of the 40th Stapp Car Crash Conference, Albuquerque, NM, November 4-6, 1996 (P-305). Warrendale, PA, Society of Automotive Engineers,1996, pp. 295-315 (SAE Paper #962432).

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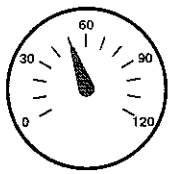
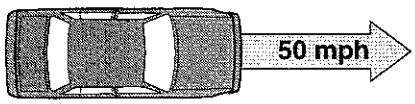
X. GLOSSARY OF TERMS

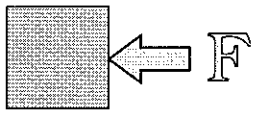
Scalar Quantity: A measure that has only magnitude, but no specific direc-tion (for example, moving at 50 mph).



Vector Quantity: A measure that has both magnitude and direction, (for example, moving east at 50 mph).



Force: A "push" or "pull" exerted on a body (usually expressed in pounds).



Mass: The measure of the quantity of matter that an object or body contains. That which causes a body to resist a change in its motion.

Speed: The rate of an object's motion with respect to some reference (usually expressed as feet per second or miles per hour).

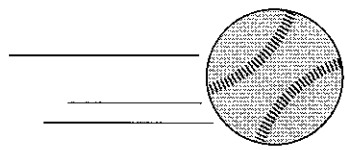
Velocity: An object's speed, but with a specified direction of movement.

Acceleration: The change in velocity (in direction and magnitude) per unit of time (usually expressed as feet per second, per second or ft/sec^2).

Momentum: The ability of an object to influence the outcome of a collision. (Defined as the product of the mass of an object and its velocity).

Energy: The ability to do work.

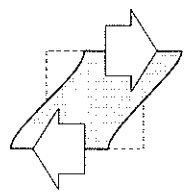
Kinetic energy: The energy an object has by virtue of its motion. (Defined as one half the mass of the object times its velocity squared).



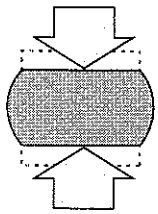
ΔV (delta-V): An impact-related change in velocity. Usually understood as the velocity change experienced over a period of time in which a collision occurs.

PDOF: Principal direction of force. Refers to the direction of the force vectors in a collision, typically the overall resultant direction of the force during a collision.

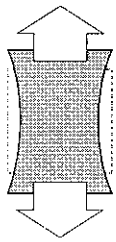
Shear: Stress produced by an oppositely directed, non-aligned but force couple which tends to produce an opposite but parallel sliding motion of the adjacent parts of an object (the effect of scissors).



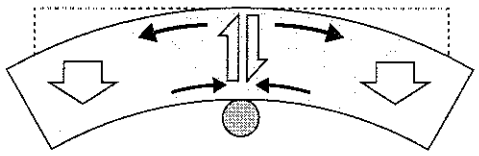
Compression: Stess produced by opposing and aligned forces which tend to decrease the dimension of an object between those forces (squeeze).



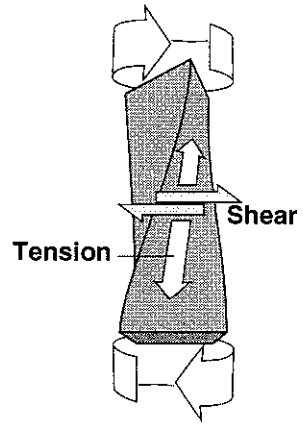
Tension: Stress produced by opposing and aligned forces which tend to increase the dimension of an object between those forces (stretch).



Bending: Stress resulting from applying forces in such a manner as to cause an object to change its curvature (this places the outer surface of the curve in tension, the inner surface in compression and creates internal shear as well.



Torsion: Stress resulting from applying forces in such a manner which twists the structure(s) of an object (this creates internal tension and shear forces).



Dynamics (Kinetics): The branch of mechanics that is concerned with the effects of external forces on the motion of an object. Biodynamics is the application of that science to living bodies.

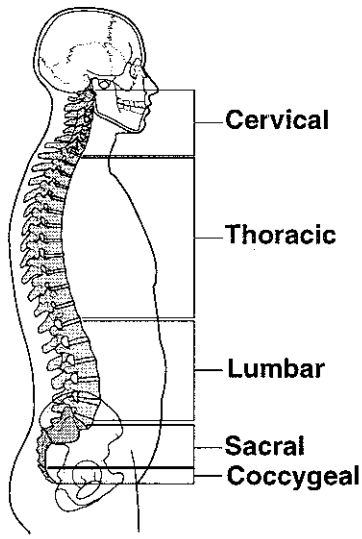
Kinematics: The branch of mechanics that studies the motion of a body without consideration of its mass or the forces acting on it (commonly used to define the motion of vehicle occupants with respect to various reference frames).

Biomechanics: The study of the mechanics of a living body, especially that of the forces exerted on the anatomical structure and the resulting stresses and strains within the structure.

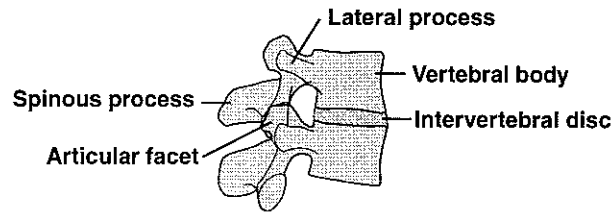
Injury Mechanism: A physical process which causes damage to a living body.

Injury Tolerance Levels: The exposure levels beyond which mechanical damage to anatomical structures is expected.

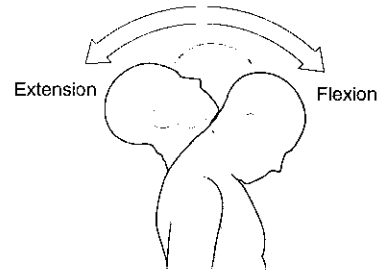
Regions of Spine: The spinal column includes the bony vertebrae, muscles, ligaments, and intervertebral discs that support the body weight and protect the spinal cord. The column can be divided into anatomic and functional regions. The cervical spine includes the seven vertebrae and supporting structures in the neck. The thoracic region includes the twelve vertebrae of the thorax, each of which is joined to a pair of ribs. The lumbar region includes the five vertebrae of the low back. The sacral segment is joined to the pelvis. The coccygeal segment is appended to the lower sacrum.



Lumbar Spine Segment: The lumbar spine is constructed from vertebral bodies and intervertebral discs, and gains additional strength from the supporting muscles and ligaments. The posterior elements include the spinous processes, laminae, pedicles lateral processes, and the articular facets.



Flexion/Extension: Terms used to describe the anatomic bending and straightening of joints. When applied to the movement of the neck, flexion describes the forward nodding of the head to look towards the floor; extension tilts the head back to view the ceiling. (hyper-flexion or hyper-extension describes motion beyond the physiological range of motion of a joint).



Temporomandibular Joint (TMJ): The temporomandibular joint is the interfacing joint between the jaw and the head. The TMJ allows for both the hinging and sliding motions required for biting and chewing. A cartilage disc provides cushioning between the bones of the joint. A joint capsule surrounds the joint complex and contains a lubricating fluid that facilitates joint motion.

LOW SPEED REAR IMPACT TEST SUMMARY - HUMAN TEST SUBJECTS

Compiled by G. P. Nielsen, J. P. Gough, D. M. Little, D. H. West, and V. T. Baker

OVERVIEW

The growing problem of insurance fraud has led to an increased interest in the subject of low speed (speed change, $\Delta V < 15$ km/h or 9 mph) impacts. Until recently little data has been available to aid the investigator/reconstructionist, as most government-sponsored crash tests are conducted in the 50 km/h (31 mph) speed range.

A critical issue is what injuries can reasonably be expected at low delta V's. In an attempt to answer that question engineers, biomechanics specialists, and others are conducting low speed crash tests with human volunteers occupying test vehicles. The database has grown rapidly since 1992. Table One summarizes from several reports available to the authors as of mid-1996. The Ono and Kanno report did not explicitly state the number of test runs, but they apparently conducted 63 impacts. Adding this figure into the total numbers from other studies gives a total database of 364 test runs. 38 of these tests involved female subjects. Collision severities ranged from 1.5 to 16.5 km/h (1 to 10.3 mph) delta V.

No symptoms or injuries were reported from the large majority of the tests. Most of the test subjects that reported injuries experienced multiple impacts. The symptoms were typically headaches and neck discomfort which resolved spontaneously, usually within hours. One subject who was leaning forward at impact reported a slight ache in the lumbar region.

The most severe injury was minor neck discomfort lasting one week. This 6'1", 33-year old male was subjected to 4 rear impacts of 5.2-12.8 km/h (3.2-8.0 mph) ΔV's while sitting in a vehicle with an inadequate head restraint. This subject was also exposed to four frontal impacts on the same day. These ΔV levels were 7.8, 9.8, 12.4, & 14.0 km/h (4.8 to 8.7 mph).

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TABLE ONE - LOW SPEED REAR IMPACT TEST SUMMARY - HUMAN TEST SUBJECTS

Vehicle	Test Subject Age	Sex	Impact Severity	Symptoms	Source	Notes
1981 & 1982 Ford Escorts	27	F	ΔV approx. 8 km/h (5 mph)	transient headache, neck stiffness (1 day)	Ref 1 Szabo	72 cm high seat back 168 cm subject
	48	M	ΔV approx. 8 km/h (5 mph)	transient headache		183 cm subject
	58	F	ΔV approx. 8 km/h (5 mph)	transient headache		165 cm subject
	28	M	ΔV approx. 8 km/h (5 mph)	none		191 cm subject
	58	F	ΔV approx. 8 km/h (5 mph)	transient headache		165 cm subject
	27	F	ΔV approx. 8 km/h (5 mph)	transient headache		168 cm subject
	31	M	ΔV approx. 8 km/h (5 mph)	transient headache		180 cm subject
Bumper cars	25	M	ΔV = 6.9, 7.2, 7.7, 7.6, 7.6 km/h (4.2 - 4.8 mph)	none	Ref 2	no head support/180 cm subject
	32	M	ΔV = 6.4, 5.8, 7.0 km/h (4.0 to 4.4 mph)	none	Siegmund	no head support/185 cm subject
1977 Chevrolet Caprice	?	M	ΔV = 3.7, 3.8, 4.4, 6.5, 7.0, 8.8 km/h (2.3 to 5.5 mph)	Subject dizzy for approx. 15 mins following 6.5 km/h impact	Ref 3 Siegmund	no info regarding stature of subjects or heights of headrests
1980 Toyota Corolla	?	M	ΔV = 1.7, 2.3, 2.9, 2.9, 3.0, 3.0, 3.2, 3.3, 3.3, 3.3, 3.6, 4.2, km/h (1 to 2.6 mph)	none		
1980 Toyota Corolla	?	F	ΔV = 2.3, 2.9, 2.9, 3.0, 3.1, 3.1, 3.2 km/h (1.4 to 2.0 mph)	none		
1986 Chevrolet Cavalier	?	M	ΔV = 3.5, 3.7, 3.8, 3.8, 4.1, 4.2, 4.3 km/h (2.2 to 2.7 mph)	none		
1992 Nissan pickup	?	M	ΔV = 2.3, 2.7, 3.6, 4.8, 5.2, km/h (1.4 - 3.2 mph)	none		
1984 Ford Club Wagon Van	45-56	M	ΔV = 3.5 km/h (2.2 mph)	none	Ref 4 McConnell	no headrest
1984 Ford Club Wagon Van	45-56	M	ΔV = 6.5 km/h (4.0 mph)	minor neck pain lasting 2 hours		no headrest
1984 GMC 1500	45-56	M	ΔV = 3.0 km/h (1.8 mph)	none		no headrest
1984 GMC 1500	45-56	M	ΔV = 6.7 km/h (4.2 mph)			no headrest
1980 Dodge 600 Convertible	45-56	M	ΔV = not measured	mild neck discomfort lasting 3 days after two tests		headrest raised
1980 Dodge 600	45-56	M	ΔV = 8.1 km/h (5.1 mph)			
1984 Buick Regal	45-56	M	ΔV = 7.8 km/h (4.9 mph)			headrest raised
1984 Ford Club Wagon Van	45-56	M	ΔV = 6.6 km/h (4.1 mph)	neck ache of 4 to 5 hours after three tests		no headrest
1984 Buick Regal	45-56	M	ΔV = 3.9 km/h (2.4 mph)			headrest raised
1984 GMC 1500	45-56	M	ΔV = 7.0 km/h (4.3 mph)	none		no headrest
1979 Plymouth Horizon	38	M	ΔV = 1.7, 2.7, 3.0, 4.4, 5.2, 5.7, 6.8, 6.8, 7.5, 8.2, 9.2, 10.9 km/h (1.1 to 6.8 mph)	none	Ref 5 West	81 cm headrest 183 cm subject
1977 Saab 99GL	28	M	ΔV = 4.4, 7.7, 8.1, 10.9, 13.4, 12.9, 15.5 km/h (2.7 to 9.6 mph)	none		81 cm headrest 169 cm subject
1975 Pontiac Ventura	30/42	M	EBS = 3.8, 5.0, 5.3, 6.0, 6.4, 7.8, 8.2, 9.0, 9.5, 10.0, 11.3 km/h (2.4 to 7.0 mph)	minor neck discomfort lasting one to two days		80 cm headrest, 183 cm RF occupant, 178 cm LF occupant
1981 Ford Granada	30	M	ΔV = 2.9, 5.8, 7.1, 7.5, 9.1, 10.0, 10.0, 12.1, 15.3, 16.5 km/h (1.8 to 10.3 mph)	none		71 cm headrest, except for 15.3 and 16.5 km/h impact speeds, where headrest was 80 cm, 169 cm subject
1984 Volvo 760	43	M	ΔV = 5.4, 9.8, 11.1, 14.0, 16.2 km/h (3.3-10.1mph)	none		78 cm headrest, 183 cm subject
1985 Dodge Aries	36	M	EBS = 1.7, 1.5, 2.3, 1.9, 1.9, 2.7, 3.6 km/h (1.0 to 2.2 mph)	none	BME demo	74 cm headrest 178 cm subject
1978 Toyota Celica	33	M	ΔV = 5.2, 7.1, 9.5, 12.8 km/h (3.2 to 8.0 mph)	minor neck discomfort lasting less than 1 week	BME demo	80 cm headrest, too low. 185 cm subject
1976 Ford Granada	31	M	EBS = 6.5, 5.7, 4.6, 4.4, 3.4 km/h (2.1-4.0 mph)	none	BME demo	71 cm headrest, 183 cm subject
1979 Chevrolet Chevette	36	M	EBS = 3.5, 1.9, 2.7, 4.1, 3.8, 4.1, 3.4 km/h (1.2 to 2.5 mph)	none	BME demo	72 cm headrest 178 cm subject
1977 Toyota Corona	34	M	ΔV = 5.2, 6.2, 6.5, 9.0 km/h (3.2 to 5.6 mph)	none	BME demo	183 cm subject
1980 Ford Mustang	46	M	ΔV = 1.8, 2.3, 3.6, 6.9, 6.7, 7.8 km/h (1.1 to 4.8 mph)	none	BME demo	183 cm subject, foot on brake at impact, vehicle displaced 1.1 m for ΔV = 3.6 km/h
1974 Plymouth	?	M	ΔV = 6.6, 8.3 km/h (4.1, 5.2 mph)	none	Ref 6 Severy	no headrest
1980 VW Rabbit	63	M	ΔV = 3.3, 7.8, 5.7 km/h (2.0 - 4.8 mph)	none	Ref 7	
1980 VW Rabbit	55	F	ΔV = 6.2 km/h (3.9 mph)	none	Rosenbluth	

Vehicle	Test Subject Age	Sex	Impact Severity	Symptoms	Source	Notes
1976 VW Rabbit	?	M	ΔV = 5.3, 5.8, 5.9, 6.4, 6.8 7.6, 8.3, 8.6, 8.8 km/h (3.3 to 5.5 mph)	none, except pain at back of head from from contact headrest, 8.8 kmh impact	Ref 8 Bailey	
1984 Toyota Tercel	?	M	ΔV = 6.3, 7.9 km/h (3.9 4.9 mph)	headache after 7.9 km/h		
1984 Toyota Tercel	?	F	ΔV = 3.1 4.4 5.8 km/h (1.9 - 3.6 mph)	headache after 5.8 km/h		
1987 VW GTI	?	M	ΔV = 3.3 km/h (2.0 mph)	none		
Honda Accord	?	M	ΔV = 4.0, 5.5 5.5, 5.5, 6.2, 6.9 km/h (2.5-4.3 mph)	none		
1991 Nissan P/U	?	M	ΔV = 2.1 2.6, 3.5 4.6 5.0 km/h (1.3 to 3.1 mph)	none		
Impact Sled	22-43	M	ΔV = 4.0 to 8.0 km/h (2.5 - 5.0 mph)	none reported	Ref 9 Ono	tests conducted with and without headrests, occupants both tensed and relaxed
Impact Sled	22-61 24-57	M F	ΔV = 2.7 to 5.0 km/h (1.7 - 3.1 mph) ΔV = 2.5 to 4.2 km/h (1.6 - 2.6 mph)	mild neck discomfort reported by 4 of 15 male subjects, resolved without treatment in 2 to 4 days. Mild low back discomfort reported by one forward leaning subject. No discomfort reported by female subjects.	Ref 10 Matsushita	tests conducted with subjects relaxed or tensed, facing forward or rotated, upright or leaning forward
1980 Dodge 600 1984 Buick Regal	32-59	M	ΔV = 5.8, 7.7, 7.7, 8.0, 8.0, 8.0, 8.2, 8.7, 8.7, 8.9, 8.9, 9.2, 9.2 10.0, 10.0, 10.3, 10.9, 10.9 km/h (3.6 to 6.8 mph)	mild headaches and neck pain lasting up to 4 days	Ref 11 McConnell	subjects 173 to 188 cm, 76 to 118 kg, tests conducted with subjects facing forward or head rotated
Impact Sled	20-60	M/F	ΔV = 6 to 12.0 km/h (3.7 - 7.3 mph)	none	ref 12 Geigl	initial head rotation in sagittal plane ± 15°, head restraint gaps 0 to 8 cm
91 Dodge Caravan 88 Chev Caprice 87 Chev Camaro 86 Buick Century 86 Plymouth Conquest	38-55 24	M F	ΔV = 3.4 to 9.1 km/h (2.1 - 5.7 mph) ΔV = 7.8 km/h (4.8 mph)	none none	Ref 13 SATAI	
84 Audi 4000 S	36	M	ΔV = 3.9 to 8.6 km/h (2.4 - 5.4 mph)	none	Ref 14 TEEX	brakes on for 7.2 km/h impact, subject braced for 8.6 km/h impact
76 Volvo 242DL	25-54 28	M F	ΔV = 7.5 to 10.0 km/h (4.7 - 6.2 mph) ΔV = 9.6 to 10.0 km/h (6.0 - 6.2 mph)	none recorded	Ref 15 STAPP	each subject experienced 2 impacts, second impact with modified head restraint
Honda Accord LX	28	M	ΔV = 1.3 to 5.5 km/h (0.8 - 3.4 mph)	none	Ref 16, BRT	
Dodge Shadow	28	F	ΔV = 0.6 to 8.8 km/h (0.4 - 5.5 mph)	posterior neck stiffness on day following 15 impacts	Ref 17 BRT	subject aware of impending impact and braced for 3.9 and 7.6 km/h impacts, full braking for 0.6, 1.5, 3.6, 5.9, and 6.7 km/h impacts, normal braking for 4.9 and 8.6 km/h impacts, no braking for 1.0, 3.0, 5.1 5.4, 7.2, and 8.8 km/h impacts.

Editor's Notes:

Readers will observe that in the above table, impact severity was quantified in some tests by ΔV (speed change) and other by EBS (equivalent barrier speed, a reflection of the energy absorbed by the impact). The differences, as they relate to low speed impact analysis, can best be understood by considering the following two scenarios:

Suppose a car hits a solid brick wall head-on at 5 mph and doesn't move after impact. The impact speed, ΔV, and EBS are all equal to 5 mph.

Now suppose, more realistically, that the car hits the brick wall head-on at 5 mph and bounces back at 2 mph. The ΔV would be 5 - (-2) = 7 mph. Since energy is a square function of speed, the EBS of this impact:

$$EBS = \sqrt{5^2 - 2^2} = \sqrt{21} = 4.6 \text{ mph}$$

In other words, to do the same damage to the vehicle, it would have to hit the brick wall at 4.6 mph and NOT move after impact. Some reconstructionists say that for this scenario, EBS is 5 mph and the 4.6 mph should be called equivalent energy speed.

Of course, real world vehicle-to-vehicle collisions are more complicated. A vehicle's ΔV and EBS can be much lower or even much higher than the vehicle's impact speed, depending on impact configuration, relative weight, etc.

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ACCIDENT RECONSTRUCTION JOURNAL

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WARRANTLESS BRAKE INSPECTION LAWFUL

The New York Court of Appeals has unanimously upheld that investigators do not need clearance from a judge in order to conduct a mechanical inspection of a vehicle involved in an accident.

In the case *People vs. James Quackenbush*, the defendant was charged with the misdemeanor of operating a vehicle with in adequate brakes. The charges stemmed from a fatal collision with a padalcyclist. Police impounded the car and a mechanic performing a safety inspection found "metal to metal contact" on the right rear brake. The defense argued that the brake inspection constituted an illegal search, comparing the inspection to warrantless searches allowed "where the activity or premises sought to be inspected is subject to a long tradition of pervasive government regulation..."

The appellate court ruled that police had "implicit" authority to impound the car under Vehicle & Traffic Law 8603, which requires the police to "immediately investigate the facts" of a personal injury accident. It said that the statute "implicitly grants the police the authority to impound a vehicle in furtherance of their administrative mandate."

The Court added that a driver's "minimal privacy expectation necessarily yields to the state's legitimate public safety interests in determining all of the circumstances surrounding the death and cause of the accident and in ensuring that the vehicle is not returned to the roadway in an unsafe condition." It also said that the inspection "is limited to the mechanical parts and does not extend to private areas of the vehicle" where personal effects would normally be

- *New York Law Journal*

APPEALS COURT REJECTS C/K CASE

The U.S. 6th Circuit Court of Appeals has ruled that Tennessee s 10-year statute of limitations for product liability cases blocks a wrongful death lawsuit involving a 20-year old pickup.

The suit was brought by the family of Walter Hayes, Sr. Mr. Hayes w driving his 1973 Chevrolet C10 pickup when it skidded into a light pole. A fuel tan ruptured and Hayes, who was trapped in the vehicle, died in the subsequent fire.

General Motors full-sized 1973-87 C/Kpickup were equipped with sid saddle fuel tanks, located outside the frame rails. Critics charged that the desig increased the likelihood that the trucks would catch fire in side impacts.

The family sued General Motors, claiming the fuel system was defectively designed, and that the automaker concealed information about the trucks. The automaker denied that the pickups were defectively designed or that it hid destroyed documents relative to the alleged problem.

A U.S. District Court judge in Memphis dismissed the suit. The appellate court upheld that decision, ruling that the 10-year limitations period began when the vehicle was purchased. It added that Tennessee law contains no extension of this tim frame, even if a manufacturer has fraudulently suppressed information about defective design.

- *Automotive News*

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CHIROPRACTIC TREATMENT - CRITICAL ANALYSIS

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CHIROPRACTIC TREATMENT - CRITICAL ANALYSIS

GUY R. COOK

I. INTRODUCTION

We have all seen it before. An unfortunate accident occurs which allegedly results in a plaintiff's continuing complaints of neck and back pain. Various medical professionals, including orthopaedic surgeons and radiologic physicians, have examined the plaintiff and find few or no objective signs and no disability. In spite of this, two years and semi-weekly chiropractic treatments later, the chiropractic special damages are $3,600.00 and climbing. Plaintiff's expert, a chiropractor, has established causation, permanent disability, inability to work, and continuing need for future chiropractic treatment. The chiropractor stands ready to testify at trial in support of this treatment.

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This outline will seek to provide an overview of chiropractor treatment and a critical analysis of said treatment for the purposes of evaluating a damage claim.

II. NATURE AND THEORY OF CHIROPRACTIC

Chiropractic is defined in the Iowa Code as the "treatment of human ailments by the adjustment of the neuromusculoskeletal structures, primarily, by hand or instrument, through spinal care." Iowa Code § 151.1(2). Under Iowa law the practice of chiropractic is specifically declared not to be the practice of medicine, surgery, or osteopathy. Iowa Code § 151.5.

> Chiropractors have defined their practice as follows: The science and art which utilizes the inherent recuperative powers of the body, and deals with the relationship

> between the nervous system and spinal column, including its immediate articulations, and the role of this relationship in the restoration and maintenance of health. The practice of chiropractic deals with the analysis of any interference of normal nerve transmission and expression, procedure preparatory to, and complimentary to the correction thereof, by an adjustment of the articulation of the vertebral column and its immediate articulations for the restoration and maintenance of health; includes the normal regimen and rehabilitation of the patient without the use of drugs or surgery.

American Chiropractic Association and International Chiropractors Association, *Opportunities in the Chiropractic Career*, Chapter 8 (1967).

Simply put, chiropractic is essentially premised upon three principles: (1) that disease may be caused by disturbance of the nervous system, (2) that disturbance of the nervous system may be caused by derangement of the musculoskeletal structure, and (3) that disturbances of the nervous system may cause or aggravate disease in various parts or functions of the body. U.S. Department of HEW, Independent Practices under Medicare: A Report to Congress 71 (1968).

The philosophy of chiropractic is said to be represented by the following statement: "Life is an expression of tone." Palmer, *The Science, Art and Philosophy of Chiropractic*, 1910. "Tone" is said to be the normal degree of nerve tension. Tone is expressed in "functions by normal elasticity, activity, strength and excitability of various organs as observed in the state of health [and] consequently, the cause of disease is any variation of tone--nerves too tense or too slack." *Id.*

III. ORIGIN OF CHIROPRACTIC

The chiropractic profession is said to have been "discovered" in August of 1885 by Mr. Daniel David Palmer, a Canadian immigrant to Iowa, who claimed to have cured a man who had been deaf for 17 years by manipulating his spine. Prior to that Palmer was a practitioner of "magnetic healing". Magnetic healing was an eclectic discipline, the practitioners of which had no formal training. Magnetic healing was part metaphysical and had its basis in spirituality. Because of his "discovery" Palmer began developing and teaching the art of spinal manipulation basing his concepts on metaphysical principles. This was also the period before universal acceptance of scientific methods regulating the practice of medicine. Fascination with the nervous system, led Palmer to found the first chiropractic school in the country, known as Palmer College of Chiropractic, Davenport, Iowa. He also later authored a book on chiropractic, entitled *The Science, Philosophy and Art of Chiropractic*, 1910.

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Palmer soon began teaching his new-found philosophy, art and science of disease, and shortly thereafter graduated several practitioners of chiropractic. Palmer had written and promoted that "displacements of the spinal column caused the contraction of muscles which in turn draw and then pinch nerves creating too much or not enough action of this disease." As the philosophy of chiropractic grew other chiropractic schools were developed. As chiropractic was based upon a philosophy, there was no standardization among the schools. Each chiropractic school was said to teach

its own brand or version of chiropractic and each course of instruction was without standardization. As chiropractic continued to grow, however, state legislatures began adopting rules and regulations governing the practice of chiropractic. Chiropractic has now evolved into a healing art licensed by all states.

IV. EXAMINATION AND TREATMENT

One would expect that a chiropractic examination would be similar to a medical, orthopaedic or neurological examination. Indeed, many of the same types of terms and some of the same types of tests are employed by the chiropractor in an examination. Of significant difference, however, is that the orthopaedic or neurological examination invariably involves a history-taking session or a review of prior physical examinations and medical records. Often, a chiropractor's history-taking session is nothing more than an application for treatment filled out by the patient and a brief dialogue with the patient. Many times chiropractors do not review and become acquainted with the prior medical treatment that a patient has undertaken.

Chiropractors do generally, however, perform various diagnostic tests, followed by a variety of treatment methods including chiropractic adjustment and manipulation, dietary and nutritional supplementation, and various physiotherapeutic measures. Various tests are often performed to determine the site of what is believed to be an abnormal articulation. The type of diagnostic tests commonly employed by chiropractors are listed or more fully described in the Appendix 1 to this outline.

A chiropractor's basic method of healing lies in adjustment and manipulation of the spine. According to chiropractic, when a nerve is irritated by the spinal subluxation, the transmission of nerve impulses is abnormal. Correcting subluxations is thought to remove the interference with normal nerve transmission and blood flow. The natural recuperative powers of the body are then allegedly relied upon to restore health. Marvin, *Chiropractic Malpractice*, 24 Am.Jur., POF 439, 448-49 (1970).

The primary procedure involves forcing the misaligned vertebrae back into place. A number of available chiropractic techniques exist to do so. Some of these techniques are set forth in the Glossary attached to this outline as Appendix 2. Many chiropractors also employ a variety of physiotherapeutic measures referred to as "conjunctive" or "adjunctive" therapy.

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It is important to note that several complications can exist relative to spinal manipulation and adjustment. They include vertebrobasilar insult from cervical adjustments, compression of the carotid artery, bleeding into the spinal cord, vertebral dislocation, disc herniation and disc prolapse in the lumbar region and cardiorespiratory arrest. Complications may arise from lack of skill or knowledge on the part of the chiropractor, or from inadequate diagnosis, or technique of implementation or inadequate history. In addition, applying spinal manipulation therapy too frequently or giving subsequent treatment before reactions of the previous one are extinguished can be detrimental. S. Haldeman,

Modern Developments in the Principles and Practice of Chiropractic, 272-95 (1980).

V. CHIROPRACTIC EDUCATION

In many states, admission to a chiropractic college has required merely a high school education or up to two years of college. In Minnesota, for example, before 1974, admission to the chiropractic college there required only a high school education. Thus, there are many practitioners who were not required to have an undergraduate college degree before commencing their practice and indeed have no undergraduate education.

At the present time, it is generally required that to obtain a degree from a recognized chiropractic school, a candidate must have a minimum of two years of undergraduate education, as well as four years of instruction in a chiropractic college.

While chiropractic education has improved over the years, as recently as 1968, the United States Department of Health, Education and Welfare criticized chiropractic education for the following "significant shortcomings": (1) lack of inpatient hospital training; (2) lack of adequately qualified faculty; (3) extremely low admission requirements for students; and (4) dissention within the profession as to the required accreditation elements.

Indeed, the U.S. Department of Health concluded: "These shortcomings raise serious doubts as to the qualifications of chiropractors generally to make an adequate diagnosis and effectively treat patients. The doubts are compounded when seen in the light of chiropractic philosophy, which has been shown to de-

emphasize proven factors in the causation of disease and the necessity for differential diagnosis and for therapy other than manipulation. Thus, it appears doubtful that improvement in the educational program can proceed, despite efforts in that direction until the need for differential diagnosis and forms of therapy other than manipulation is recognized and fully qualified specialized faculty are available to teach scientific courses. *HEW Report to Congress* (1968).

Chiropractors generally have no hospital admission or staff privileges. If a chiropractor testifies that he or she has hospital privileges, it is likely the privileges are restricted to require co-admission or consultation by an unrestricted health care professional such as a medical doctor or osteopath.

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While it is possible for a chiropractor to be "board certified", certification is not widespread throughout the chiropractic profession. Board certification requires completion of certain postgraduate courses and a period of residency training before the chiropractor is board eligible.

One principal distinction between the training received by chiropractors and that of medical doctors is the lack of a residency. The education of chiropractors takes place entirely within the chiropractic college, with no breaks in the education. Many chiropractors are sensitive to the distinction and the difference in their period of education and training with medical doctors and have developed an analysis of the class hours spent by medical doctors as compared with chiropractors to conclude that

chiropractors actually spend more time in the classroom than medical doctors. While this may be technically true, the analysis employed by chiropractors fails to acknowledge the substantial residency or internship training undertaken by medical doctors.

VI. STATUTORY PRACTICE LIMITATIONS

In most states, medical doctors may practice medicine without statutory practice limitations. Chiropractors, on the other hand, are subject to a significant scope of practice limitations. Virtually all states regulate chiropractic practice by statute. In Iowa, the practice of chiropractic medicine is codified in Iowa Code Chapter 551 and licensed by the Iowa Chiropractic Board.

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The scope of chiropractic care and the procedures which chiropractors may employ has been the subject of litigation in Iowa.

As early as 1911, George D. Corwin was indicted by the Poweshiek County Attorney charging that he "did willfully and unlawfully assume the duties of a physician, and make a practice of treating a persons afflicted with disease and did then and there willfully and unlawfully publicly profess to cure and heal persons afflicted with the disease by a system of treatment called chiropractic." *State v. Corwin*, 51 Iowa 420, 131 N.W. 659 (1911).

The Iowa Supreme Court, in upholding the conviction, found that Mr. Corwin was engaging in practices for which he had no training and "without such preparation, one might entertain a suspicion that the proposed healer is acting selfishly, and not from an intelligent conviction and his method was preferable to

others. While the State insists upon his qualification, and, when possessed of this and armed with a certificate so evidencing and duly recorded, a practitioner may follow any system of healing he may choose." *Id.* at 425.

In *State v. Boston*, 226 Iowa 429, 278 N.W.2d 291 (1938), the Iowa Supreme Court held that a chiropractor who prescribed courses of diet and who used a colonic irrigation in the treatment of patients engaged in the unlawful practice of medicine. The Court stated that in view of the fact that the practice of chiropractic was statutorily defined as the manual adjustment of articulations of the spine or other incidental adjustments, it was clear, that by using curative methods in question, the chiropractor was attempting to function outside the field of chiropractic as was defined by Iowa Code. The Court went on to state the fact that a statutory provision describing certain practices and procedures in which chiropractors were prohibited from engaging did not specifically mention the methods of treatment in question did not mean that their use was authorized. The Court stated that this was particularly true in view of the restrictive statutory definition of chiropractic.

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The Court ultimately upheld an injunction sought by the Attorney General enjoining Mr. Boston from professing to and treating persons outside the field of chiropractic. The defendant had held himself out, including the using of newspaper and telephone directory advertising as practicing physiotherapy, electrotherapy, colonic irrigation, and diet. In some advertise-

ments he designated himself as being a chiropractor and a physiotherapist. In his office in Davenport where he treated patients defendant had a number of mechanical appliances, some of which brought electric and galvanic currents into contact with the patient's body. Rays emanating from other machines or appliances raised the temperature of portions of the patient's body, while other appliances imparted a physical vibration on the part of the body with which it was connected. There was a "colonic irrigator" wherein about two gallons of water were used as an enema, the procedure lasting from 20 to 30 minutes. Defendant also advised patients with respect to diet. It was these modalities that the decree of injunction applied. *State v. Boston*, 226 Iowa at 431.

In *Lowman v. Kuecker*, 246 Iowa 1227, 71 N.W.2d 586 (1955), the Iowa Supreme Court recognized that the practice of chiropractic is a practice of medicine, "although in a restricted form." *Id.* at 588. The Court stated that the practice of chiropractic, although recognized as a branch of the healing art, is throughout held and considered to be only one form of practice, within well-defined limits of the science of healing." *Id.* at 588.

The Court in *Lowman* ultimately held that a chiropractor is competent in a personal injury action to express his opinion as to the probable effects and duration, permanence, future medical requirements, or the like, in connection with injury to or the physical condition of the injured person, if a proper foundation is laid and the matter relates to the profession and practice of chiropractic.

In *Correll v. Goodfellow*, 255 Iowa 1237, 125 N.W.2d 745 (1964), the Iowa Supreme Court held that the use of a ultrasonic machine on patients did not come under the limited definition of chiropractic but constituted a part of the practice of medicine and surgery for which chiropractors were not authorized. *Id.* 125 N.W.2d at 748.

Mr. Goodfellow was a chiropractor in Council Bluffs who undertook to treat Ms. Betty Correll's foot. Chiropractor Goodfellow undertook to use an ultrasonic machine which produced radiation to penetrate the tissue to cause internal vibrations and heat to treat the foot. When Chiropractor Goodfellow "plugged in" the machine plaintiff told him she did not know chiropractors used machines wherein he responded, "I am trying it out. I don't know anything about it yet, whether I want it or not. If it works, I am going to buy it. I won't buy it unless I know it works." *Correll v. Goodfellow*, 125 N.W.2d at 7417.

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Plaintiff alleged malpractice against Goodfellow for pain, a blister, and a burning sensation she felt in her foot after he made use of the ultrasonic machine.

In 1982, in the case of *State ex. rel. Iowa Department of Health v. Van Wyk*, 320 N.W.2d 599 (1982), the Supreme Court held chiropractors are not free to practice treatment outside carefully defined statutory limits and must practice within the statutory term of chiropractic. The Court further held that the statutory scheme under which chiropractors cannot perform acupuncture,

withdrawal of blood specimens, or give advice on diet, did not violate due process or the chiropractor's right to privacy.

As the above cases demonstrate, chiropractors often consider themselves competent to treat a wide variety of illnesses. This belief stems largely from their philosophy or approach to health care. As a result of this belief, chiropractors often do not limit their practice to the care of patients with musculosketetary problems but instead undertake treatment of other conditions representing a broad spectrum of diseases.

VII. CRITICISM OF CHIROPRACTIC

The practice of chiropractic has been criticized by the medical profession, the United States government, and the chiropractic profession itself. Not unexpectedly, organized medicine and organized chiropractic have engaged in continuous conflict since the "discovery" of chiropractic. Organized medicine has condemned chiropractic theory, practice, diagnosis, and education contending that the vertebral nerve interference is not responsible for all of the bodily disturbances chiropractors claim it is. American Academy Orthopaedic Surgeons, et al., *Status Report on Chiropractic Lawsuit*, 25 (1978). Organized medicine disputes the chiropractic view that:

> Diagnosis does not constitute, as it does for the medical doctor, a specific guide to treatment. It is not a major of the doctor of chiropractic to specifically name a disease. He does not look upon disease as an entity to be combatted. For him a disease is a process; it is physiology gone wrong. The problem is to ascertain why it has gone wrong, and what needs to be done to right the wrong. This is a goal not attainable by routing conventional, diagnostic methods.

American Chiropractic Association and International Chiropractors Association, *Opportunities in a Chiropractic Career*, Chapter 8 (1967).

Until the 1970's, the position of the American Medical Association concerning chiropractic care was stated as follows:

> It is the position of the medical profession that chiropractic is an unscientific cult whose practitioners lack the necessary training and background to diagnose and treat human disease. Chiropractic constitutes a hazard to rational health care in the United States because of the substandard and unscientific education of its practitioners and their rigid adherence to an irrational, unscientific approach to disease causation. ...Patients should entrust their health care only to those who have a broad scientific knowledge of diseases and ailments of all kinds, and who are capable of diagnosing and treating them with all the resources of modern medicine. The delay of proper medical care caused by chiropractors and their opposition to the many scientific advances in modern medicine, such as life-saving vaccines, often ends with tragic results.
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> In recent years, the AMA has retreated from that position, and its present policy concerning chiropractic is as follows:
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> The American Medical Association knows of no scientific evidence to support spinal manipulation and adjustment as appropriate treatment for human ailments such as essential hypertension, heart disease, stroke, cancer, diabetes, and infections. Accordingly, the Association will continue to warn the public of the hazards to health in entrusting the diagnosis and treatment of such conditions to practitioners who rely upon the theory that all disease is caused by misalignment of spinal vertebrae and can be cured by manual manipulation and adjustment of the spine.

American Academy of Orthopaedic Surgeons, et al., *Status Report on Chiropractic Lawsuits*, 25 (1978).

In 1968, the United States Department of Health, Education and Welfare concluded as follows with respect to chiropractic:

> 1. There is a body of basic scientific knowledge related to health, disease, and health care. Chiropractic practitioners ignore or take exception to much of

this knowledge despite the fact that they have not undertaken adequate scientific research.

2. There is no valid evidence that subluxation, it is exists, is a significant factor in disease processes. Therefore, the broad application to health care of a diagnostic procedure such as spinal analysis and a treatment procedure such as spinal adjustment is not justified.

3. The inadequacies of chiropractic education, coupled with a theory that de-emphasizes proven causative factors in disease processes, proven methods of treatment, and differential diagnosis, make it unlikely that a chiropractor can make an adequate diagnosis and know the appropriate treatment, and subsequently provide the indicated treatment or refer the patient. lack of these capabilities in independent practitioners is undesirable because: appropriate treatment could be delayed or prevented entirely; appropriate treatment might be interrupted or stopped completely; the treatment offered could be contraindicated; all treatments have some risk involved with their administration, and inappropriate treatment exposes the patient to this risk unnecessarily.

4. Manipulation (including chiropractic manipulation) may be a valuable technique for relief of pain due to loss of mobility of joints. Research in this area is inadequate; therefore, it is suggested that research that is based upon the scientific method be undertaken with respect to manipulation.

VIII. ANALYSIS OF CHIROPRACTIC TREATMENT AND CARE

When analyzing treatment and care provided by a chiropractor, it is essential to obtain all treatment records and determine exactly what treatment has been rendered. Often, that determination will be difficult because the chiropractic treatment records are generally very sketchy and sometimes largely involve cryptic statements on a billing record. Failure of a chiropractor to keep adequate treatment notes, consultation records may provide a fertile ground for questioning a chiropractic claim because the

chiropractor may not be able to determine exactly what service was performed.

Chiropractors should maintain proper patient data and progress records. A review of any chiropractic care should include an analysis of the progress record because it is difficult to determine regular patient progress without such an appropriate record. One should also determine whether the chiropractor as a matter of regular course refers a patient to a medical doctor and, if so, under what type of scenario does such a referral take place. In other words, does the chiropractor approach the initial examination only with the thought of chiropractic treatment in mind or is there some greater concern for treatment of the patient and referral to a medical doctor if the chiropractor's findings and treatment warrant such.

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It is often useful to visit the chiropractor's office to determine what pamphlets and statements about chiropractic health care are available to patients. In addition, the advertising or statements made to lure patients to his office can be useful in determining the chiropractor's level of skill and integrity.

Analysis should be made of any post-treatment advice the chiropractor has given to help the patient maintain the correction for which treatment was sought. In addition, consideration should be given to a review of the chiropractor's x-rays by a medical radiologist.

Finally, consideration should be given to determining whether the chiropractor has employed several tests available to determine whether the patient is a malingerer.

IX. ANALYSIS CHECK LIST

The following is a ten-point check list for consideration and review when evaluating a damage claim which is based upon chiropractic treatment and care:

1. Education -- preparatory and chiropractic.
2. Scope of practice.
3. Advertisements for patients.
4. Licenses/Certifications.
5. Nature of charges and bills.
6. Referrals to other medical professionals.
7. Degree of patient history.
8. Adequacy of treatment and progress records.
9. Chiropractic tests conducted.
10. Nature of treatment.

X. CONCLUSION

It is likely that chiropractic treatment and testimony will continue to increase in personal injury litigation and evaluation. If nothing else, the cost differential between chiropractors and other medical professionals will fuel this increase. If chiropractic care is the basis for a damage claim, careful consideration must be given in analyzing the claim. In order to adequately analyze the chiropractor's care, the principles set forth above should be considered.

APPENDIX 1

DIAGNOSTIC TESTS

Range of Motion. Limitations on range of cervical and lumbar motion from a defined norm may demonstrate existence and source of subluxation.

Romberg's Sign. Patient is asked to stand, close eyes, and balance with feet together; test is positive if the patient sways markedly. A positive sign suggests underlying brain disorder or disease.

Adam's Sign. Forward bending test to determine presence of scoliosis.

Lewin Sign. Spine palpated while patient stands and attempts to touch fingers to toes. Designed to determine lumbar subluxation.

Pinwheel Test. A pinwheel or sharp instrument is stroked along the spine and extremities to determine peripheral nerve sensitivity.

Cervical and Foramina Compression Tests. In erect position patient's head is forced downward. Cervical subluxation may exist if local or radiating pain into the upper extremities is produced.

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Adson's Maneuver. Designed to determine cervical subluxation. Presence of radial pulses is determined while patient holds breath and neck is extended fully and rotated. A decreased or absent pulse indicates compression.

Minor's Sign. Designed to determine lower extremity sciatica; patient rises from sitting position while placing one hand on the side of the back and balancing on the same side. Maneuver is then repeated while balancing on the other leg.

Lasegue Test. Straight leg raising test; in supine position patient's leg is raised to abdomen keeping leg straight. Low back pain or radiating pain suggests lumbosacral subluxation.

Braggard Test. Straight leg raising test; if pain is produced while performing Lasegue Test, the affected leg is lowered to the ease point and the affected foot is dorsiflexed. The test is positive if pain returns.

Fajersztajn Test. Same as Braggard Test except opposite foot is dorsiflexed.

Bilateral Leg Lowering Test. In supine position, patient lowers legs to 45 degrees. Test is positive if legs drop or pain is produced, indicating compression of lumbar disc.

APPENDIX 2

GLOSSARY

Chiropractic has a language of its own. Following are some common terms.

Acute conditions. Acute conditions result from injury to a previously normal joint or aggravation of a joint which had pre-existing problems but was asymptomatic. Acute treatment often involves frequent treatment followed by an abatement in treatment frequency with recovery expected in a short period of time.

Adjustment. A specific precision movement applying a controlled directional force to effect a partial or complete restoration of a subluxated structure to a more nearly normal position (i.e., a "dynamic thrust").

Articulation. Point of junction of two or more bones of the skeleton.

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Chronic conditions. Chronic conditions are generally viewed as permanent in nature, and treatment is rendered to reduce or relieve the condition. Chronic treatment usually is less frequent than acute treatment but it often extends over a longer period of time.

Fixation. Partial or complete limitation of movement of one vertebra in relation to an adjacent vertebra.

Kyphosis. An abnormal posterior bending of the spine.

Lesion. Subluxation.

Lordosis. An abnormal forward bending of the lumbar spine.

Manipulation. A general chiropractic maneuver designed to reduce fixation and to improve the range of motion without the use of a dynamic thrust.

Scoliosis. A lateral bending of the spine.

Spinography. Study of the radiograph of the spine to determine subluxation, distortion, and curvature condition of the spine.

Sprain. An overstretching or overextension of the ligaments of a joint.

Strain. An overstretching of muscle or tendinous structures.

Subluxation. Misplaced or off-centered vertebra, not including a dislocation or fracture.

Patrick's FABER Test. In supine position, patient's knee is flexed and foot is placed on the opposite knee. Limited range of motion or pain is indicative of hip joint pathology.

Babinski Sign. Pathological reflex test; the sole of the foot is scratched with a medium sharp object and test is positive if fanning of the toes and dorsiflexion of the great toe occurs.

Soto-Hall Test. In supine position, patient's head is flexed onto the chest while sternum is pressed downward. The pulling of the posterior spinous ligaments may produce localized pain at the level of a subluxated vertebra.

Ely's Test. Designed to determine lumbosacral subluxation; in prone position, patient's leg is flexed touching heel to buttocks.

Gaenslen's Test. Designed to determine lumbosacral subluxation; in supine position, patient flexes one knee and holds the flexed knee against chest as the opposite leg is dropped over the side of the table producing hyperextension strain.

Hibb's Test. Designed to determine lumbosacral subluxation; in prone position, patient's knee is flexed to a right angle and the ankle and foot are rotated laterally toward the floor causing an inward rotation of the hip.

Trendelenberg Test. Designed to determine muscular weakness in buttocks; with the patient standing, one leg is raised to 90 degrees with the knee flexed at right angles. The test is positive if the pelvis on the unsupported side descends.

APPENDIX 3

CHAPTER 151

PRACTICE OF CHIROPRACTIC

Enforcement, § 147.87, 147.90, 147.92
Penalty, § 147.86
Utilization and cost control review committees, § 514F.1

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151.1 "Chiropractic" defined.

For the purpose of this title the following classes of persons shall be deemed to be engaged in the practice of chiropractic:

1. Persons publicly professing to be chiropractors or publicly professing to assume the duties incident to the practice of chiropractic.

2. Persons who treat human ailments by the adjustment of the neuromusculoskeletal structures, primarily, by hand or instrument, through spinal care.

3. Persons utilizing differential diagnosis and procedures related thereto, withdrawing or ordering withdrawal of the patient's blood for diagnostic purposes, performing or utilizing routine laboratory tests, performing physical examinations, rendering nutritional advice, utilizing chiropractic physiotherapy procedures, all of which are subject to and authorized by section 151.8. However, a person engaged in the practice of chiropractic shall not profit from the sale of nutritional products coinciding with the nutritional advice rendered.

[C24, 27, 31, 35, 39, §**2555;** C46, 50, 54, 58, 62, 66, 71, 73, 75, 77, 79, 81, §151.1]

83 Acts, ch 83, §1, 2

151.2 Persons not engaged in.

Section 151.1 shall not be construed to include the following classes of persons:

1. Licensed physicians and surgeons, licensed osteopaths, and licensed osteopaths and surgeons, and physical therapists who are exclusively engaged in the practice of their respective professions.

2. Physicians and surgeons of the United States army, navy, or public health service when acting in the line of duty in this state, or to chiropractors licensed in another state, when incidentally called into this state in consultation with a chiropractor licensed in this state.

3. Students of chiropractic who have entered upon a regular course of study in a chiropractic college approved by the chiropractic examiners, who practice chiropractic under the direction of a licensed chiropractor and in accordance with the rules of said examiners.

[C24, 27, 31, 35, 39, §**2556;** C46, 50, 54, 58, 62, 66, 71, 73, 75, 77, 79, 81, §151.2]

151.3 License.

Every applicant for a license to practice chiropractic shall:

1. Present satisfactory evidence that the applicant possesses a preliminary education equal to the requirements for graduation from an accredited high school or other secondary school.

2. Present a diploma issued by a college of chiropractic approved by the chiropractic examiners.

3. Pass an examination prescribed by the chiropractic examiners in the subjects of anatomy, physiology, nutrition and dietetics, symptomatology and diagnosis, hygiene and sanitation, chemistry, histology, pathology, and principles and practice of chiropractic, including a clinical demonstration of vertebral palpation, nerve tracing and adjusting.

[C24, 27, 31, 35, 39, §**2557**; C46, 50, 54, 58, 62, 66, 71, 73, 75, 77, 79, 81, §151.3]

83 Acts, ch 83, §3

151.4 Approved college.

No college of chiropractic shall be approved by the chiropractic examiners as a college of recognized standing unless said college:

1. Requires for graduation or for the receipt of any chiropractic degree the completion of a course of study covering a period of four academic years totaling not less than four thousand sixty-minute hours in actual resident attendance

2. Gives an adequate course of study in the subjects enumerated in subsection 3 of section 151.3 and including practical clinical instruction.

3. Publishes in a regularly issued catalogue the requirements for graduation and degrees as herein specified

An approved college of chiropractic may include but is not limited to offerings of courses of study in procedures for withdrawing a patient's blood, performing or utilizing laboratory tests, and performing physical examinations for diagnostic purposes. A chiropractor, employed by an approved college of chiropractic and who has been trained to withdraw blood may withdraw blood and instruct, and supervise a student in the withdrawing of blood.

[C24, 27, 31, 35, 39, §**2558**; C46, 50, 54, 58, 62, 66, 71, 73, 75, 77, 79, 81, §151.4]

83 Acts, ch 83, §4

151.5 Operative surgery — drugs.

A license to practice chiropractic shall not authorize the licensee to practice operative surgery, osteopathy, nor administer or prescribe any drug or medicine included in materia medica.

[C24, 27, 31, 35, 39, §**2559**; C46, 50, 54, 58, 62, 66, 71, 73, 75, 77, 79, 81, §151.5]

151.6 Display of word "chiropractor".

Every licensee shall place upon all signs used by the licensee, and display prominently in the licensee's office the word "chiropractor".

[C24, 27, 31, 35, 39, §**2560**; C46, 50, 54, 58, 62, 66, 71, 73, 75, 77, 79, 81, §151.6]

Titles and degrees §147.72, 147.73

151.7 Probation — advertising restrictions.

The license of a chiropractor shall be placed on probation upon a showing at a hearing conducted by the board of chiropractic examiners that such licensee is guilty of advertising. For purposes of this section "advertising" is defined as a chiropractor publicizing the chiropractor, or the chiropractor's partner or associate as a chiropractor through newspaper or magazine advertisements, radio or television announcements, display advertisements in city or telephone directories, or other means of commercial publicity, or authorizing or permitting others to do so on the chiropractor's behalf. "Advertising" does not include a simple boldface listing in a phone directory, professional cards, letterheads, or professionally discreet lettering identifying premises where chiropractic is practiced. Any proceeding for the probation of a chiropractic license shall be conducted by the board of chiropractic examiners in a manner substantially in accord with the provisions of section 148.7.

[C73, 75, 77, 79, 81, §151.7]

151.8 Training in procedures used in practice.

A chiropractor shall not use in the chiropractor's practice the procedures otherwise authorized by law unless the chiropractor has received training in their use by a college of chiropractic offering courses of instructions approved by the board of chiropractic examiners.

Any chiropractor licensed as of July 1, 1974 may use the procedures authorized by law if the chiropractor files with the board of chiropractic examiners an affidavit that the chiropractor has completed the necessary training and is fully qualified in these procedures and possesses that degree of proficiency and will exercise that care which is common to physicians in this state.

A chiropractor using the additional procedures and practices authorized by this Act* shall be held to the standard of care applicable to any other health care practitioner in this state.

[C75, 77, 79, 81, §151.8]

83 Acts, ch 83, §5

*See 83 Acts, ch 83

151.9 Revocation or suspension of license

A license to practice as a chiropractor may be revoked or suspended when the licensee is guilty of the following acts or offenses:

1. Fraud in procuring a license.

2. Professional incompetency.

3. Knowingly making misleading, deceptive, untrue or fraudulent representations in the practice of the licensee's profession or engaging in unethical conduct or practice harmful or detrimental to the public. Proof of actual injury need not be established.

4. Habitual intoxication or addiction to the use of drugs.

5. Conviction of a felony related to the profession or occupation of the licensee or the conviction of any felony that would affect the licensee's ability to practice as a professional chiropractor. A copy of the record of conviction or plea of guilty shall be conclusive evidence.

6. Fraud in representations as to skill or ability.

7. Use of untruthful or improbable statements in advertisements.

8. Willful or repeated violations of the provisions of this Act.*

[C79, 81, §151.9]

*See 67GA ch 95 §17

151.10 Education requirements.

A person who is an applicant for a license to practice chiropractic shall only be required to be tested for the adjunctive procedures specified in section 151.1, subsection 3 which the person chooses to utilize. A person licensed to practice chiropractic shall only be required to complete continuing education requirements for the adjunctive procedures specified in section 151.1, subsection 3 which the person chooses to utilize. A person who is an applicant for a license to practice chiropractic or a person licensed to practice chiropractic shall not be required to utilize any of the adjunctive procedures specified in section 151.1, subsection 3 to obtain a license or continue to practice chiropractic, respectively.

83 Acts, ch 83, §6

151.11 Rules.

The board of chiropractic examiners shall adopt rules necessary to administer section 151.1, to protect the health, safety, and welfare of the public, including rules governing the practice of chiropractic and defining any terms, whether or not specified in section 151.1, subsection 3. Such rules shall not be inconsistent with the practice of chiropractic and shall not expand the scope of practice of chiropractic or authorize the use of procedures not authorized by this chapter. These rules shall conform with chapter 17A.

83 Acts, ch 83, §7

151.12 Temporary certificate.

The chiropractic examiners may, in their discretion, issue a temporary certificate authorizing the licensee to practice chiropractic if, in the opinion of the chiropractic examiners, a need exists and the person possesses the qualifications prescribed by the chiropractic examiners for the license, which shall be substantially equivalent to those required for licensure under this chapter. The chiropractic examiners shall determine in each instance those eligible for this license, whether or not examinations shall be given, and the type of examinations. No requirements of the law pertaining to regular permanent licensure are mandatory for this temporary license except as specifically designated by the chiropractic examiners. The granting of a temporary license does not in any way indicate that the person so licensed is eligible for regular licensure, nor are the chiropractic examiners in any way obligated to so license the person.

The temporary certificate shall be issued for one year and at the discretion of the chiropractic examiners may be renewed, but a person shall not practice chiropractic in excess of three years while holding a temporary certificate. The fee for this license shall be set by the chiropractic examiners and if extended beyond one year a renewal fee per year shall be set by the chiropractic examiners. The fees shall be based on the administrative costs of issuing and renewing the licenses. The chiropractic examiners may cancel a temporary certificate at any time, without a hearing, for reasons deemed sufficient to the chiropractic examiners.

When the chiropractic examiners cancel a temporary certificate they shall promptly notify the licensee by registered mail, at the licensee's last-named address, as reflected by the files of the chiropractic examiners, and the temporary certificate is terminated and of no further force and effect three days after the mailing of the notice to the licensee.

86 Acts, ch 1127, §1

Sexual Harassment:
Some Questions Answered; Some Questions Raised

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I. INTRODUCTION

Under Title VII of the Civil Rights Act of 1964:

> "[I]t shall be an unlawful employment practice for an employer ... to fail or refuse to hire or to discharge any individual, or otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's ... sex."

42 U.S.C. §2000e-2(a)(1).

Although written with clarity and simplicity, this section has raised many difficult and important questions. Should the term "any individual" be given a literal interpretation thereby protecting all employees from sexual discrimination regardless of the gender, sexual orientation and motivations of their harassers? Should an employee be able to sue her employer because a supervisor, with whom the employee has previously had a relationship, discriminated against her? Is an employer strictly liable for the harassing conduct of a supervisor whom it employs? Does the existence of an anti-harassment policy preclude an employer from liability due to the harassing conduct of supervisors? Questions such as these have troubled courts for years. The United States Supreme Court has recently answered some of these questions.

II. SAME-SEX HARASSMENT

Prior to a recent Supreme Court decision, the law was unclear regarding whether a Title VII claim could be brought by a victim of workplace sexual harassment who was the same sex as his/her harasser. The Supreme Court recently issued a decision in Oncale v. Sundowner Offshore Services, 523 U.S. __, 118 S. Ct. __, 140 L. Ed. 2d 201 (1998), which clarified the status of same-sex sexual harassment claims. In doing so, the Court extended Title VII's protection to plaintiffs who suffer from sexual harassment by members of their own sex. The Supreme Court also ended existing conflict among lower courts as to whether the inquiry into a harasser's sexual preference was an essential one in determining whether a plaintiff had a valid cause of action under Title VII. A brief look at the case law which faced the Supreme Court as it made its decision is helpful in understanding the importance and impact of the recent Oncale decision.

A. Pre-Oncale: Conflict Among the Courts

Prior to Oncale, various courts followed the EEOC's interpretation of Title VII as being a statute that does not exclusively protect victims from harassers that are of the opposite sex. These courts recognized that same-sex claims are actionable under title VII. Some courts reasoned that there should be no substantive difference in how sexual harassment is treated simply because the sexual orientation of the parties may differ from one situation to the next. See Yeary v. Goodwill Industries--Knoxville, Inc., 107 F.3d 443 (6th Cir. 1997). Other courts looked to the language of Title VII and observed that the wording of 42 U.S.C. §2000e2(a)(1) contains no suggestion that such an action is limited to opposite

gender contexts, therefore, it should not be so limited in its application. See Fredette v. BVP Management Associates, 112 F.3d 1503 (11th Cir. 1997).

Other courts allowed same-sex claims only when the harassing party was homosexual in his/her sexual orientation. Courts arrived at this conclusion by reasoning that the harasser's desire for sexual gratification had to be a motivating factor behind the decision to harass the victim. See McWilliams v. Fairfax County Board of Supervisors, 72 F.3d 1191 (4th Cir. 1996), Wrightson v. Pizza Hut of America, Inc., 99 F.3d 138 (4th Cir. 1996).

On the opposite end of the spectrum, pre-Oncale courts also held that same-sex claims were not protected by Title VII. These courts reasoned that the drafters of the statute did not intend for it to protect members of the same gender from each other and that the statutory language simply could not be stretched to include same-sex claims of sexual harassment. See Torres v. National Precision Blanking, 943 F. Supp. 952 (N.D.Ill. 1996).

Consistent with the recent Supreme Court decision, many lower courts prior to Oncale held that same-sex sexual harassment was actionable under Title VII and that claims did not have to be founded upon acts which are sexual in nature. These courts recognized that sexual harassment could occur in instances that were not motivated by sexual desires and therefore the orientation of the harasser was irrelevant. These courts held that the key inquiry to be considered in Title VII cases was whether members of one sex experience disadvantageous terms or conditions of employment to which members of the other sex are not exposed. See Quick v. Donaldson Co., Inc., 90 F.3d 1372 (8th Cir. 1996), Johnson v. Hondo, Inc, 940 F. Supp. 1403 (E.D.Wis. 1996), Miller v. Vesta, Inc., 946 F. Supp 697 (E.D.Wisc. 1996).

B. Supreme Court Renders Decision

Oncale v. Sundowner Offshore Services, Inc., 83 F.3d 118 (5th Cir. 1996), rev'd, 523 U.S. __, 118 S. Ct. __, 140 L. Ed. 2d 201(1998).

Through its holding in Oncale, the Supreme Court reversed a Fifth Circuit decision which held that same-sex sexual harassment claims are never actionable under Title VII. Plaintiff, Joseph Oncale, was employed by Sundowner on an offshore rig. During his employment, Oncale claimed that he was sexually harassed and on one occasion sexually assaulted, by his fellow male employees. Oncale's complaints to supervisory personnel produced no remedial action. In response, Oncale brought a Title VII sexual harassment claim against his co-employees and employer.

In the course of its decision, the Court issued four holdings of importance. First, the Supreme Court held that "nothing in Title VII necessarily bars a claim of discrimination 'because of ... sex' merely because the plaintiff and the defendant (or the person charged with acting on behalf of the defendant) are of the same sex." Id. at 207. The court relied on Casteneda v. Partida, 430 U.S. 482 (1977), for the proposition that human nature often provokes members of one sex to discriminate against members of the same sex. It also noted that neither statutory language nor Supreme Court precedents exclude same-sex claims. Based on these reasons, the Court concluded that it would be wrong to deny Title VII's protection to victims simply because they have been harassed by a member of their own sex.

Secondly, the Court held that harassing conduct under Title VII need not be motivated by sexual desire and offered two illustrations of how sexual harassment can occur without such desire. Id. at 208. The first example that the Court used was of a woman who is

subjected to sex-specific and derogatory terms by another woman only because the harasser has a general hostility towards the presence of women in the workplace and not because of any sexual desires that the harasser may have towards the victim. The victim is subjected to harassment solely because she is a woman in the workplace. The second example is a harasser who treats members of both sexes quite differently in a mixed-sex workplace. If a harasser clearly treats the sexes differently for no reason other than she dislikes one sex and favors the other, harassment on the basis of sex occurs. The significance of the fact that the Oncale case occurred in an all-male workplace was not a subject on which the Court commented. Could the defendant win by proving that if women had been there, they would have been treated in an equally abusive manner?

Thirdly, a same-sex victim of sexual harassment must prove that the questionable conduct was not merely "tinged with offensive sexual connotations" but actually constituted discrimination on the basis of sex. Id.

Lastly, the Court emphasized that Title VII forbids only behavior that is so objectively offensive as to alter the condition of the victim's employment. See Meritor Savings Banks, FSB v. Vinson, 477 U.S. 57 (1986), Harris v. Forklift Systems, Inc., 510 U.S. 17 (1993). Because of this, careful consideration must be taken of the social context in which the alleged same-sex sexual-harassment occurs. As an illustration of the "context" which must be considered, the Court offers the following:

> A professional football player's working environment is not severely or pervasively abusive, for example, if the coach smacks him on the buttocks as he heads onto the field-even if the same behavior would reasonably be experienced as abusive by the coach's secretary (male or female) back at the office. The

> real social impact of workplace behavior often depends on a constellation of surrounding circumstances, expectations, and relationships which are not fully captured by a simple recitation of the words used or the physical acts performed. Common sense, and an appropriate sensitivity to social context, will enable courts and juries to distinguish between simple teasing or roughhousing among members of the same sex, and conduct which a reasonable person in the plaintiff's position would find severely hostile or abusive.

140 L.Ed. 2nd at 208-209.

This language raises, perhaps unintentionally, the interesting possibility of a defense argument that an employee in one working environment (for example, a night club) must endure conduct which might be determined to violate Title VII in another environment (for example, a law office). "Common sense" might lead to that conclusion, but was that the Court's intent?

III. IMPORTANCE OF COMPREHENSIVE HARASSMENT POLICY REAFFIRMED

It is a well-established principle of sexual harassment law that an employer may only be held liable for sexual harassment perpetrated between fellow employees when the employer knew or should have known that the harassment was occurring. 29 C.F.R. §1604.11(d) (1986). In applying this principle, courts have consistently held that an employer who has implemented a comprehensive anti-harassment policy and an effective complaint procedure has taken sufficient action to procure knowledge of a non-supervisory employee's misconduct and is therefore insulated from liability for acts of co-workers of which the employer had no actual knowledge.

In the past, it has been equally well-accepted that an employer is liable for sexual harassment inflicted by a supervisory employee upon another employee "regardless of whether the employer knew or should have known" of the supervisor's misconduct. 29 C.F.R. §1604.11(c) (1986). Due to this standard of strict liability, an employer's implementation of a comprehensive anti-harassment policy and complaint procedure had consistently been found to be an ineffective shield from employer liability in such situations.

Recently, the Supreme Court issued two very similar decisions addressing this issue. Although these decisions state that the existence of a harassment policy is not a necessity as a matter of law, they also emphasize the importance of such policies as a safeguard to liability. The Supreme Court now allows employers to raise an affirmative defense to escape vicarious liability for a hostile environment created by a supervisor. The defense is comprised of two prongs that must be satisfied before liability is escaped. The first prong requires proof that the employer exercised reasonable care to prevent and correct sexually harassing behavior. In its recent holdings, the Court states that an employer's promulgation of a policy that is suitable to the employment circumstances will be helpful when litigating this element of the defense. The second element of this defense is proof that the plaintiff "unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer."

These recent decisions, Faragher v. City of Boca Raton, 1998 U.S. LEXIS 4216, 141 L. Ed. 2d 662 (1998) (Justice Souter), and Burlington Industries, Inc. v. Ellerth, 1998 U.S. LEXIS 4217, 141 L.Ed. 2d 633 (1998) (Justice Kennedy), recognize the general rule that an employer is strictly liable to an employee when a "supervisor's harassment culminates in a

tangible employment action, such as discharge, demotion, or undesirable reassignment." However, the Court shifts away from the imposition of strict liability in *all* circumstances of supervisory sexual harassment.

1. Burlington Industries v. Ellerth

In Ellerth, the Court describes the issue facing it as being: "whether, under Title VII ..., an employee who refuses the unwelcome and threatening sexual advances of a supervisor, yet suffers no adverse, tangible job consequences, can recover against the employer without showing the employer is negligent or otherwise at fault for the supervisor's actions." Ellerth alleged that her supervisor continually subjected her to offensive remarks and gestures. Although her supervisor threatened to deprive her of job benefits if she refused his advancements, she did not sustain any tangible retaliation despite her refusals. Ellerth was, in fact, promoted once. Ellerth did not notify anyone within the company of her supervisor's conduct despite knowing that Burlington had a policy against sexual harassment. Ellerth quit, then filed an EEOC complaint and sued her employer based on Title VII.

In Ellerth, the Court looks to § 219 of the Restatement (Second) of Agency (1957) (hereafter Restatement) for guidance as to when an employer should be vicariously liable for the sexually harassing behavior of a supervisor. Section 219 of the Restatement imposes liability on a master for the torts of his servants. That section states:

> (1) A master is subject to liability for the torts of his servants committed while acting in the scope of their employment.
>
> (2) A master is not subject to liability for the torts of his servants acting outside the scope of their employment, unless:

(a) the master intended the conduct or the consequences, or
(b) the master was negligent or reckless, or
(c) the conduct violated a non-delegable duty of the master, or
(d) the servant purported to act or to speak on behalf of the principal and there was reliance upon apparent authority, or he was aided in accomplishing the tort by the existence of the agency relation.

The Court recognizes that a supervising harasser is generally motivated by purely personal desires and does not act within the scope of his employment while engaged in harassing. Thus, there is no vicarious liability on the part of the employer under § 219(1). The Court gives examples of how an employer can be vicariously liable under § 219(2)when the supervisor is acting outside the scope of employment. The Court says that § 219(2)(a) applies to sexual harassment when an employer acts with tortious intent or when the supervisor's high rank within the company makes him the employer's alter ego. Because Ellerth's supervisor was only a mid-level manager, there was no contention that § 219(2)(a) applied. The Court states that an employer is negligent under § 219(2)(b)with respect to sexual harassment if it knew, or should have known, about the conduct and failed to stop it. Plaintiff Ellerth did not seek to impose liability, however, under the principles outlined in § 219(2)(a), (b) or (c). Instead, she contended that § 219(2)(d) applied, a principle which the court described as the "aided in the agency relation standard." The court ruled that in all cases where a supervisor takes a tangible employment action against the subordinate, § 219(2)(d) has been satisfied. It said, however, that whether the agency relation aids in commission of supervisor harassment which does not culminate in a tangible employment action is less obvious. In the latter cases, the court said:

> [A] defending employer may raise an affirmative defense to liability or damages, subject to proof by a preponderance of the

> evidence, see Fed. Rule Civ. Proc. 8(c). The defense comprises two necessary elements: (a) that the employer exercised reasonable care to prevent and correct promptly any sexually harassing behavior, and (b) that the plaintiff employee unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer or to avoid harm otherwise.

2. Faragher v. City of Boca Raton

In Faragher, the Court considers the more general question of when an employer is liable under Title VII for the acts of a supervisor when the supervisor's conduct creates a hostile work environment which results in discrimination. Plaintiff alleged that a hostile working environment was created when her supervisors repeatedly subjected her and other female lifeguards to uninvited touching, lewd remarks, and to talk of women in offensive terms. Faragher brought a Title VII claim against defendant. After a bench trial, the District Court found that harassment occurred and that it was sufficiently serious to alter the conditions of Faragher's employment. It found the City liable under traditional agency principles and awarded nominal damages to Faragher. The Supreme Court, relying on Meritor Savings Bank, FSB v. Vinson, 447 U.S. 57 (1986), recognized that working environments which subjected victims to sexual harassment that was severe or pervasive enough to alter conditions of the victim's employment violate Title VII. As the Court set out to answer the question of when an employer was liable for the existence of such an environment, it recognized that employers are clearly liable when they (1) have actual knowledge of the harassment but do nothing to stop the behavior and, (2) practice discrimination that includes a tangible result such as hiring, firing or promoting.

The Court again applies agency principles set forth in the Restatement. Plaintiff argued that an employer can reasonably anticipate the possibility of sexually harassing conduct occurring in the workplace, and the employer should automatically bear the burden of the behavior as a cost of doing business. The Court, however, rejects this argument. It reasons that supervisors do not typically act within the scope of their employment while they engage in harassing behavior but are instead motivated by personal desires. Thus, the employer should not be strictly liable for such action.

The Court recognizes that supervisors are always assisted in misconduct because of supervisory status, but gives effect to its prior holding in Meritor that an employer is not strictly liable for harassment by a supervisor in every situation. The court balances the arguments as follows:

> [T]here are good reasons for vicarious liability for misuse of supervisory authority. That rationale must, however, satisfy one more condition. We are not entitled to recognize this theory under Title VII unless we can square it with Meritor's holding that an employer is not "automatically" liable for harassment by a supervisor who creates the requisite degree of discrimination, and there is obviously some tension between that holding and the position that a supervisor's misconduct aided by supervisory authority subjects the employer to liability vicariously; if the "aid" may be the unspoken suggestion of retaliation by misuse of supervisory authority, the risk of automatic liability is high To counter it, we think there are two basic alternatives, one being to require proof of some affirmative invocation of that authority by the harassing supervisor, the other to recognize an affirmative defense to liability in some circumstances, even when a supervisor has created the actionable environment.

The Court reasons that allowing employers to raise an affirmative defense in order to escape liability will encourage employers to create anti-discrimination policies and effective

grievance mechanisms, which is consistent with the intent of Title VII. The Court recognizes the same two-pronged affirmative defense outlined in Ellerth, but rules that as a matter of law it is unavailable to the City in Faragher. This ruling is based on the undisputed record that the City failed to disseminate its policy against sexual harassment to employees such as Faragher, and that City officials made no attempt to keep track of the conduct of Faragher's supervisors. The Court added that the City's policy did not include any mechanism for bypassing the offending supervisor when making a sexual harassment complaint. Accordingly, the Court remands the case for reinstatement of the judgment in Faragher's favor.

IV. SEX DISCRIMINATION v. SEXUAL HARASSMENT-The Increasingly Blurring Line

In 29 C.F.R. §1604.11(a), the Equal Employment Opportunity Commission defines "sexual harassment" as "unwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature..." 29 C.F.R. §1604.11(a) (1986). Although this definition clearly states that sexual harassment results from conduct that is sexual in nature, courts overwhelmingly hold that *any* conduct which exposes one gender (and not the other) to disadvantageous employment conditions is sufficient to give rise to a sexual harassment claim. This interpretation of sexual harassment results in significant difficulty when one attempts to distinguish conduct giving rise to a sexual harassment claim from conduct giving rise to a more generic claim of sex discrimination.

The following cases provide examples of how courts have blurred the distinction between sexual harassment and other forms of sex discrimination by holding that causes of action for sexual harassment need not be based on conduct that is sexual in nature.

1. Smith v. St. Louis University, 109 F.3d 1261 (8th Cir. 1997).

Victorija Smith was an anesthesiology resident at St. Louis University's Hospital and Medical School. During her residency, Smith claimed that John Schweiss, the chairman of the Anesthesiology Department, often spoke derogatorily to Smith based upon her gender. Smith specifically cited instances where Schweiss would call her and other female residents by their first name while using the title "Doctor" with male residents. Smith felt that this was Schweiss's way of signaling that he did not believe she was deserving of recognition as a fellow professional. In addition, Smith claimed that Schweiss referred to her and other female residents as "anesthesia babes", asked why she went into medicine rather than nursing, and gave his opinion that women should be married and home nursing babies.

Smith complained to the Dean of Student Affairs and later brought action claiming she had been subject to sex discrimination and to sexual harassment. On appeal, the Eighth Circuit rejected the district court's finding that the harassment was not sufficiently severe to constitute sexual harassment despite the fact that the comments were not sexually explicit. The court relied upon the standard it employed in its earlier decision in Kopp v. Samaritan Health Systems, 13 F.3d 264 (8th Cir. 1993):

> The predicate acts which support a hostile environment sexual-harassment claim need not be explicitly sexual in nature.... Rather, the key issue is whether members of one sex are exposed to disadvantageous terms or conditions of

employment to which members of the other sex are not exposed. Smith, 109 F.3d at 1265.

Based upon this standard, the court concluded that "many of Schweiss's comments included gender-conscious terms, and therefore could reasonably be believed to have been directed at Smith because of her sex." Id. As a result, the Eighth Circuit reversed the district court's granting of the University's motion for summary judgment upon Smith's sexual harassment claim

2. Hall v. Gus Const. Co., Inc., 842 F.2d 1010 (8th Cir. 1988).

The court's holding in Smith has its roots in Hall wherein the Eighth Circuit first adopted the position that "the predicate acts underlying a sexual harassment claim need not be clearly sexual in nature." Id. at 1014. In Hall, three female plaintiffs brought a sexual harassment claim based upon verbal sexual abuse as well as the physical actions of some of their male co-workers.

In response to the plaintiffs claim of sexual harassment, the defendants argued that only the conduct which was sexual in nature could be considered by the court and that the other forms of harassment must be excluded. In support of their argument, the defendants cited 29 C.F.R. §1604.11(a) (1986), defining sexual harassment as "[u]nwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature." Id. at 1013. Based upon this definition, the defendants claimed that certain conduct was not relevant to the plaintiffs' claims of sexual harassment.

The court flatly rejected the defendants argument, citing similar decisions within other jurisdictions. The court specifically relied upon McKinney v. Dole, in which the D.C. Court of Appeals stated:

> We have never held that sexual harassment or other unequal treatment of an employee or group of employees that occurs Because of the sex of an employee must, to be illegal under Title VII, take the form of sexual advances or of other incidents with clearly sexual overtones. And we decline to do so now. Rather, we hold that any harassment or other unequal treatment of an employee or group of employees that would not occur but for the sex of the employee or employees may, if sufficiently Patterned or pervasive, comprise an illegal condition of employment under Title VII. Id. at 1014; McKinney, 765 F.2d 1129, 1139 (D.C.Cir 1985).

Therefore, the court found that all incidents of harassment carried out by the defendants against the plaintiffs could be considered by the court.

Decisions such as McKinney and Hall illustrate the melding of sexual harassment and other forms of sex discrimination. Although such a distinction may be largely academic in the end, it does raise the question whether there is any purpose served by separately identifying claims for "sexual harassment" as such from any other form of sex discrimination in the workplace.

V. SUPERVISOR-EMPLOYEE RELATIONSHIP--Working Relationship Following the Break-Up

There is sharp disagreement among courts today concerning the viability of a Title VII sexual harassment claim brought by an employee against a supervisor with whom the employee had a consensual sexual relationship. The following cases demonstrate the two positions most commonly taken by courts in response to this issue.

A. An Employee CAN Bring a Title VII Action Based Upon Abusive Conduct Received from a Jilted Supervisor

The following case demonstrates the position that sexual harassment by a supervisor constitutes grounds for a valid Title VII action regardless of the prior relationship between the harassed employee and the supervisor.

1. Schrader v. E.G. & G., Inc., 953 F.Supp. 1160 (D.Col. 1997).

Plaintiff, Michael Schrader, had a romantic relationship with his second-line supervisor, Janine Wilson, while working at E.G. & G. Inc. Approximately a year later, Schrader ended the romantic relationship with Wilson. Following the break-up, Wilson frequently went to Schrader's office to discuss the relationship, during which she often became emotional and angry.

Wilson's hostility increased when Schrader began dating another co-worker a few months later. Wilson would glare at Schrader at work and refuse to speak to him. Wilson then instituted a thorough investigation of Schrader's work activity and, as a result, Schrader was fired due to a falsified time card and a failure to disclose private enterprises in compliance with E.G. & G.'s policies.

Following his termination, Schrader brought action claiming sex discrimination and sexual harassment. The defendants then moved for summary judgment. The court denied summary judgment concerning Schrader's sexual harassment claim, reasoning that there was sufficient evidence that Wilson wanted to continue the intimate relationship and that Schrader's job would be in danger if he did not acquiesce to Wilson.

In addition, the court explicitly rejected the defendant's argument that Schrader "cannot maintain a sexual harassment claim based upon acts spurred by plaintiff's status as Wilson's lover rather than his gender." Id. at 1167. The court, in flatly rejecting all case law which adheres to such a principle, quoted the New York district court's decision in Babcock v. Frank:

> [T]o assume as a matter of law that the latter [conditioning benefits on the continuation of a relationship] is discrimination predicated not on the basis of gender, but on the basis of the failed interpersonal relationship is as flawed a proposition under Title VII as the corollary that 'ordinary' sexual harassment does not violate Title VII when the employer's asserted purpose is the establishment of a new interpersonal relationship. 729 F. Supp. 279, 287-288 (S.D.N.Y. 1990).

Therefore, the court found that both quid pro quo and hostile work environment sexual harassment may have taken place and the defendant's motion for summary judgment was denied.

B. An Employee CANNOT Bring a Title VII Action Based Upon Retaliatory Conduct Received from a Jilted Supervisor

The following case demonstrates the view that an employee who had engaged in a consensual sexual relationship with his/her supervisor may not raise a Title VII quid pro quo sexual harassment claim against the supervisor for the supervisor's subsequent retaliatory conduct within the workplace. However, even this position recognizes an action for sexual harassment if the supervisor explicitly conditions job benefits or detriments upon the employee's acquiescence to further sexual relations or creates a hostile work environment for the employee.

Campbell v. Masten, 955 F Supp. 526 (D.Md. 1997).

In February of 1993, the plaintiff, Susan Campbell, an employee of Wildlife International, Ltd., entered into a consensual sexual relationship with Jeffrey Masten. Although it was disputed whether Masten did in fact have a supervisory position over Campbell, the court assumed that he did for purposes of ruling upon the defendants motion for summary judgment.

A month after Campbell and Masten began their relationship, Campbell received a $5,000 raise, a raise which Masten claimed that he was responsible for. Then in July of 1993, Masten broke off the sexual relationship between he and Campbell and became engaged to another woman. Following the termination of the relationship, Campbell claimed that Masten criticized her work in front of co-workers and that this criticism made its way to Campbell's direct manager which eventually led to Campbell's firing. In response to her termination, Campbell raised a Title VII action of sexual harassment.

After considering Campbell's claim, the court held that Campbell had not been discriminated against "because of...sex", as required to state a viable sexual harassment claim, but merely as the result of a failed interpersonal relationship with Masten. Therefore, the court found that Campbell had failed to state a claim of sexual harassment, and accordingly granted summary judgment in favor of the defendants.

In reaching this conclusion, the court relied heavily upon the reasoning in Keppler v. Hinsdale Township High School Dist. 86, 715 F.Supp. 862 (N.D.Ill.1989). In Keppler, the court concluded that although prior consensual sex does *not* forfeit an employee's right to a quid pro quo sexual harassment claim in which the supervisor conditions job benefits or

detriments upon the employee's acquiescence to *further* unwanted sexual relations, it *does* preclude those claims in which the supervisor fires or demotes an employee in response to the ended sexual relationship.

In support of this conclusion, the Keppler court stated:

> [W]hen an employer penalizes an employee after the termination of a consensual relationship, a presumption arises that the employer acted not on the basis of gender, but on the basis of a failed interpersonal relationship--a presumption rebuttable only if the employee can demonstrate that the employer demanded further sexual relationships before taking the action he did. Title VII prohibits discrimination in the workplace. An employee has the right to work in an atmosphere free from sexual abuse, and to obtain the privileges and benefits of her employment without having to provide sexual favors to her employer. An employee who chooses to become involved in an intimate affair with her employer, however, removes an element of her employment relationship from the workplace, and in the realm of private affairs people do have the right to react to rejection, jealousy, and other emotions which Title VII says have no place in the employment setting.
>
> Such an employee, of course, always has the right to terminate the relationship and to again sever her private life from the workplace; when she does so, she has the right, like any other worker, to be free from a sexually abusive environment, and to reject her employer's sexual advances without threat of punishment. Yet, she cannot then expect that her employer will feel the same as he did about her before and during their private relationship. Feelings will be hurt, egos damages or bruised. The consequences are the result of sexual discrimination, but of responses to an individual because of her former intimate place in her employer's life. Keppler 715 F. Supp. at 869; Campbell, 955 F.Supp. at 528, 529.

Relying directly upon this line of reasoning, the Campbell court reached its conclusion that Campbell had failed to raise a valid Title VII claim because the harassment

that she received was due to her status as Masten's former paramour and was not the result of her gender.

VI. ADDITIONAL REFERENCE MATERIAL

1. Lindemann, Barbara and David D. Kadue. Sexual Harassment in Employment Law, The Bureau of National Affairs, 1992.

2. Rauch, Jonathan. "Offices and Gentlemen", The New Republic, June 23, 1997, p.22.

3. 29 C.F.R. § 1604 (1986).

THE RESTATEMENT (THIRD) OF TORTS: PRODUCTS LIABILITY AND IOWA LAW

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I. INTRODUCTION.

On May 20, 1997 the American Law Institute (ALI) and its diverse membership unanimously approved of the Restatement (Third) of Torts: Products Liability. For any practitioner in the products liability field the Restatement Third is a tremendous resource. However, the Restatement Third by itself is not law. It becomes law by reason of its adoption by courts in specific jurisdictions.

The published Restatement Third includes official "comments" which contain helpful, illustrative examples. "Reporters' Notes" discuss the primary case authority under each topic in detail, and for each jurisdiction. The Notes are so specific that the Restatement Third is virtually an encyclopedia of products liability law.

This paper synthesizes the Restatement Third and current Iowa products liability law. The Restatement provision is initially set forth, followed by an Iowa law primer on that issue. Where there are significant differences between the Restatement Third and substantive Iowa law, a special note will be made.

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II. DISCUSSION.

> **§ 1. Liability of Commercial Seller or Distributor for Harm Caused by Defective Products**
>
> **One engaged in the business of selling or otherwise distributing products who sells or distributes a defective produce is subject to liability for harm to persons or property caused by the defect.**

This section is generally in accord with Iowa law. See Hawkeye-Security Ins. Co. v. Ford Motor Co., 174 N.W.2d 672, 684 (Iowa 1970); Iowa Uniform Civil Jury Instruction (ICJI) No. 1000.1 (1991).

Immunity for product distributors. The term "seller" as used in the Restatement Third, as was true of the Restatement Second, § 402A, is relatively broad and includes retailers, wholesalers and distributors. This rule has been modified by a legislative response in Iowa, however, so that strict liability in tort and breach of the implied warranty of merchantability no longer apply to mere retailers, wholesalers, or distributors. See § 613.18 Code of Iowa (1997); see also Erickson v. Wright Welding Supply, Inc., 485 N.W.2d 82, rehearing denied (Iowa 1992); Bingham v. Marshall & Huschart Machinery Co., Inc., 485 N.W.2d 78 (Iowa 1992); and Hillrichs v. Avco Corp., 478 N.W.2d 70, rehearing denied (Iowa 1991).

§ 2. Categories of Product Defect

A product is defective when, at the time of sale or distribution, it contains a manufacturing defect, is defective in design, or is defective because of inadequate instructions or warnings. A product:

(A) contains a manufacturing defect when the product departs from its intended design even though all possible care was exercised in the preparation and marketing of the product;

(B) is defective in design when the foreseeable risks of harm posed by the product could have been reduced or avoided by the adoption of a reasonable alternative design by the seller or other distributor, or a predecessor in the commercial chain of distribution, and the omission of the alternative design renders the product not reasonably safe;

(C) is defective because of inadequate instructions or warnings when the foreseeable risks of harm posed by the product could have been reduced or avoided by the provision of reasonable instructions or warnings by the seller or other distributor, or a predecessor in the commercial chain of distribution, and the omission of the instructions or warnings renders the product not reasonably safe.

This Section makes it clear that true "strict liability" or liability without fault is applied only to manufacturing defects, and that design defects and warnings defect cases are fault-based claims. Although the Iowa Supreme Court has not stated this in clear fashion, this approach is consistent with Iowa law. At the very least, Iowa law is moving in this direction.

The Iowa Supreme Court has used the descriptive terms "manufacturing defect," "design defect," and "failure to warn," but (with few exceptions) the Court has not drawn significant legal distinctions among these different types of "defect." The most significant distinction that presently exists under Iowa law is that a "failure to warn" claim is one based on a negligence standard, and not strict liability. See Olson v. Prosoco, Inc., 522 N.W.2d 284 (Iowa 1994). Further, "the state-of-the-art" defense set forth in §668.12 does not apply as a defense in a failure to warn case. Id. The Court has held this notwithstanding the express language present in §668.12 which strongly suggests quite the opposite.

Manufacturing Defect. There are no reported Iowa cases which define "manufacturing defect." There is no reason to believe the definition in §2(A) of the Restatement Third would not be followed.

Design Defect. When a design defect is alleged, plaintiff must show that the product is unreasonably dangerous because the defendant failed to use reasonable care in its design. Wernimont v. International Harvester Corp., 309 N.W.2d 137, 140 (Iowa App. 1981), citing Chown v. USM Corp., 297 N.W.2d 218, 220 (Iowa 1980).

The Restatement Third, §2(B) uses a risk-utility test of defect. The Iowa Court has

used a so-called "hybrid" test, wherein consumer expectations is applied first, and then the risk-utility test is applied to the result. See, e.g., Aller v. Rodgers Machinery Mfg. Co., Inc., 268 N.W.2d 830, 834-35 (Iowa 1978)("The article sold must be dangerous to an extent beyond that which would be expected by the ordinary consumer. . . . Proof of unreasonableness involves a balancing process. On one side of the scale is the utility of the product and on the other side is the risk of its use"). See also ICJI No. 1000.4 and 100.5.

The *prima facie* elements of a strict liability design case are set forth in ICJI No. 1000.1. See also Osborn v. Massey-Ferguson, Inc., 290 N.W.2d 893, 901 (Iowa 1980); see also Chown, *supra*. If the design defect involves technical issues beyond the common knowledge and experience of a jury, the plaintiff must present expert testimony in order to engender a jury issue as to the existence of the design defect. Absent such testimony, a directed verdict for the defendant may be proper. James v. Swiss Valley Ag Service, 449 N.W.2d 886, 890 (Iowa App. 1989); Wernimont, *supra*, 309 N.W.2d at 142.

The Iowa Supreme Court has alluded to the fact that in a design case, a negligence standard may be the appropriate test, see Hillrichs v. Avco Corp., 478 N.W.2d 70, 75-6 (Iowa 1991), but it has yet to formally adopt this position. The Restatement Third may provide impetus in this direction.

Failure to Warn. A "failure to warn" claim is one based on a negligence standard, and not strict liability. See Olson v. Prosoco, Inc., 522 N.W.2d 284 (Iowa 1994). In warnings cases, Iowa uses the "reasonableness" standard set forth in Restatement Second of Torts, § 388 (1977); ICJI No. 1000.7 (1995). There is no practical difference between this standard and the one set in §2(C) of the Restatement.

There is no duty to warn of open and obvious dangers. Crow v. Manitex, Inc., 550 N.W. 175 (Iowa Ct. App. 1996). Where risks are known and obvious, there is no duty to warn. Sandry v. John Deere Co., 452 N.W.2d 616, 619 (Iowa App. 1989), citing Nichols v. Westfield Industries, Ltd., 380 N.W.2d 392, 401 (Iowa 1985). In Iowa, a supplier's duty is to warn of dangers which are not obvious with respect to use of the product in its condition as supplied to the user. A supplier need not give information as to means to ameliorate obvious dangers, even if the supplier is aware of these means and the party to whom the chattel is supplied is not. Nichols, 380 N.W.2d at 401. Where a danger resulting from product use is "sufficiently known to consumers at large" and forms the basis of a suit in strict liability for failure to warn, the action may be dismissed for failure to state a claim for which relief may be granted. Maguire v. Pabst Brewing Co., 387 N.W.2d 565, 570 (Iowa 1986).

The duty to warn requires an adequate warning, and the adequacy of a warning depends both upon its content and upon whether the person took reasonable care to inform the user of the possible danger of the product. Rowson v. Kawasaki Heavy Industries, Ltd., 866 F.Supp. 1221 (N.D. Iowa 1994). To prevail on a failure to warn claim in Iowa, plaintiff must prove that the manufacturer was negligent. Nassif v. National Presto Industries, Inc., 731 F.Supp. 1422 (S.D. Iowa 1990). "Failure to warn" as a theory of recovery must be submitted under a negligence theory, and not under a theory of strict liability in tort. Olson v. Prosoco, cited *supra*.

§3. Circumstantial Evidence Supporting Inference of Product Defect

It may be inferred that the harm sustained by the plaintiff was caused by a product defect existing at the time of sale or distribution, without proof of a specific defect, when the incident that harmed the plaintiff:

(A) was of a kind that ordinarily occurs as a result of product defect; and

(B) was not, in the particular case, solely the result of causes other than product defect existing at the time of sale or distribution.

This rule is similar to the common-law *res ipsa loquitur* rule. See ICJI No. 700.7 (1996). Most notably, this Section of the Restatement Third omits reference to the element of "exclusive control." It is also known as the "malfunction" rule.

Plaintiffs may take advantage of this theory if they cannot find an expert witness to support their theory of the case. There are no reported Iowa cases on this subject in the products liability context. For a discussion of the application of *res ipsa loquitur* in a products case although the claim at issue was made against a landowner, see Brewster v. U.S., 542 N.W.2d 524 (Iowa 1996).

In order to ameliorate the potentially harsh effects of this rule, a defendant may want to use the "circumstantial evidence" rule, i.e. if plaintiff's case is based solely on such evidence, then it is plaintiff's burden to prove that its theory of the case, more likely than not occurred, and that a "defect" is something more than a mere "possibility." See, e.g. Osborn v. Massey-Ferguson, Inc., 290 N.W.2d 893, 900-01 (Iowa 1980); Wernimont v. International Harvester, Inc., 309 N.W.2d 137 (Iowa App. 1981); and Bandstra v.

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

> **§ 4. Noncompliance and Compliance with Product Safety Statutes or Regulations**
>
> **In connection with liability for defective design or inadequate instructions or warnings:**
>
> **(A) a product's noncompliance with an applicable product safety statute or administrative regulation renders the product defective with respect to the risks sought to be reduced by the statute or regulation; and**
>
> **(B) a product's compliance with applicable product safety statute or administrative regulation is properly considered in determining whether the product is defective with respect to the risks sought to be reduced by the statute or regulation, but such compliance does not preclude as a matter of law a finding of product defect.**

Standards often present a "Hobson's Choice" for product liability defendants: if the product's design meets applicable standards, that does not provide the defendant with an absolute defense to liability. The standard is referred to as a mere "minimum" standard. On the other hand, if the product's design does not meet applicable regulatory standards, then a jury instruction on "negligence *per se*" may be in the offing. See, e.g., Reynolds and Kirschman, "Damned if You Do, Damned if You Don't: The Standards Dilemma Products Litigation," For the Defense, The Defense Research Institute, October 1996, pp. 22-28. The Restatement Third § 4 continues with prior law.

A trial court in Iowa may adopt a regulation or statute as a standard of conduct in determining negligence "when the injured party is a member of the class of persons likely to be exposed to the kind of harm the regulation was intended to prevent." Brichacek v.

Hiskey, 401 N.W.2d 44, 47 (Iowa 1987); see Wilson v. Nepstad, 282 N.W.2d 664, 667 (Iowa 1979); Koll v. Manatt's Transportation Co., 253 N.W.2d 265, 270 (Iowa 1977). Evidence of compliance constitutes evidence of the exercise of reasonable care. Evidence of a violation of a regulation is evidence of negligence in cases where the plaintiff is a member of the class to be protected by the statute. Koll, 253 N.W.2d at 270. See also ICJI Nos. 700.10 and 700.11 (1996).

Preemption in Iowa.

There is a relative paucity of Iowa decisions regarding preemptive effect of standards in the product liability context. See, e.g. Reutzel v. Spartan Chemical Co., 903 F.Supp. 1272 (N.D. Iowa 1995)(certain claims for failure to warn regarding labels in insecticide containers is preempted by FIFRA).

An Iowa District Court has held, in a well-reasoned (but nonpublished) opinion, that a "no airbag" claim is preempted under federal law, where a plaintiff claims that an automobile was defective because it did not have an airbag. See Meyer et al. v. General Motors Corp. et. al., Polk County Civil No. CL64957 (Judge Donna L. Paulsen) dated June 14, 1996.

State-of-the-Art in Iowa.

In strict products liability actions, if properly pleaded and proved, the state-of-the-art defense precludes the fact finder from assigning a percentage of fault to the defendant. Iowa Code §668.12. This statutory provision does not diminish the duty "to warn concerning subsequently acquired knowledge of a defect or dangerous condition that would render the product unreasonably dangerous for its foreseeable use or diminish the liability for failure

to so warn" after the product leaves the defendant's control. Id.

In negligence actions, state-of-the-art is a complete defense if proven. See also Fell v. Kewanee Farm Equipment Co., 457 N.W.2d 911 (Iowa 1990) (state-of-the-art is a complete defense against liability for design defects). The issue of state-of-the-art should be submitted by way of special verdict. Hillrichs v. Avco Corp., 478 N.W.2d 70, 76 (Iowa 1991); ICJI No. 11, comment (1995). State of the art includes more than mere technological or economic possibility. Hughes v. Massey-Ferguson, Inc., 522 N.W.2d 294 (Iowa 1994).

A troublesome aspect of the state-of-the-art defense in Iowa is the second sentence of §668.12, which might bring a claim of "continuing duty to warn" into the case. Post-sale duty cases can be difficult to defend, so defense counsel must weigh the benefits of this defense against the potential downside risk.

There are no reported Iowa decisions regarding the "government contractor defense."

§5. Liability of Commercial Seller or Distributor of Product Components for Harm Caused by Products Into Which Components are Integrated

One engaged in the business of selling or otherwise distributing product components who sells or distributes a component is subject to liability for harm to persons or property caused by a product into which the component is integrated if:

(A) the component is defective in itself, under §§ 1-4, and the defect causes the harm; or

(B)(1) the seller or distributor of the component substantially participates in the integration of the component into the design of the product; and

(2) the integration of the component causes the product to be defective as defined under §§1-4; and

(3) the defect in the product causes the harm.

The Restatement Third § 5 continues with prior law. The manufacturer of a defective component part is liable for that defect. A manufacturer of the entire machine (i.e., a product integrator) is also liable for any defective component parts. A component part manufacturer is not liable for defects in the completed product, except under special circumstances.

There are no reported Iowa decisions that discuss limits of the liability of a component part supplier. The Restatement Third states the predominant rule, and it is believed that this rule would be followed by the Iowa Supreme Court in an appropriate case.

In Iowa a manufacturer of a product is legally responsible for all the component parts of that product. Aller v. Rodgers Mach. Mfg. Co., 268 N.W.2d 830 Iowa 1978).

§6. Liability of Seller or Other Distributor for Harm Caused by Defective Prescription Drugs and Medical Devices

(A) A manufacturer of a prescription drug or medical device who sells or otherwise distributes a defective drug or medical device is subject to liability for harm to person caused by the defect. A prescription drug or medical device is one that may be legally sold or otherwise distributed only pursuant to a health care provider's prescription.

(B) For purposes of liability under Subsection (a), a prescription drug or medical device is defective if at the time of sale or other distribution the drug or medical device:

(1) contains a manufacturing defect as defined in § 2(a); or

(2) is not reasonably safe due to defective design as defined in Subsection (c); or

(3) is not reasonably safe due to inadequate instructions or warnings as defined in Subsection (d).

(C) A prescription drug or medical device is not reasonably safe due to defective design if the foreseeable risks of harm posed by the drug or medical device are sufficiently great in relation to its foreseeable therapeutic benefits that reasonable health care providers, knowing of such foreseeable risks and therapeutic benefits, would not prescribe the drug or medical device for any class of patients.

(D) A prescription drug or medical device is not reasonably safe because of inadequate instructions or warnings if reasonable instructions or warnings regarding foreseeable risks or harm are not provided to:

(1) prescribing and other health care providers who are in a position to reduce the risks of harm in accordance with the instructions or warnings; or

(2) the patient when the manufacturer knows or has reason to know that health care providers will not be in a position to reduce the risks of harm in accordance with the instructions or warnings.

Manufacturers of "ethical" (i.e. prescription) drugs may have products liability for defective manufacture, design and warning, as any other product supplier. In pharmaceutical or medical device cases, two particular issues may be present: (1) federal preemption, for example, under the Medical Device Amendments (MDA); or (2) application of the "learned intermediary" rule in warnings cases.

Iowa follows the traditional "learned intermediary rule" which holds that manufacturers of prescription drugs discharge their duty to care to patients by warning the health-care providers who prescribe and use the drugs to treat them. Moore v. Vanderloo, 386 N.W.2d 108, 115-16 (Iowa 1986); Petty v. U.S., 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). In Moore, 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.

A contrary conclusion was reached in Brazzell v. U.S., 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 that decision in light of the Iowa Supreme Court's decision in Moore, and Moore is clearly the law in Iowa. See Brazzell v. U.S., 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."). This position is also consistent with Olson v. Prosoco, Inc., cited *supra*.

Iowa has refused to follow a "market share" liability approach in a drug case. See Mulcahy v. Eli Lilly & Co., 386 N.W.2d 67, 74-76 (Iowa 1986).

The Iowa Supreme Court has recognized, in the context of a products liability action against a pharmaceutical manufacturer, that "certain prescription drugs, such as birth control pills, may cause side effects despite the fact they have been properly manufactured, [and] these drugs are deemed 'unavoidably unsafe products.'" Moore v. Vanderloo, 386 N.W.2d 108, 117 (Iowa 1986). Such products are not held to be defective or unreasonably dangerous "so long as they are accompanied by proper directions for use and adequate warnings as to potential side effects." *Id.* Restatement (Second) of Torts §402A, comment k.

> **§7. Liability of Commercial Seller or Distributor for Harm Caused by Defective Food Products**
>
> **One engaged in the business of selling or otherwise distributing food products who sells or distributes a defective food product under §2, §3, or §4 is subject to liability for harm to persons or property caused by the defect. Under §2(a) a harm-causing ingredient of the food product constitutes a defect if a reasonable consumer would not expect the food product to contain that ingredient.**

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No recent "unwholesome food" cases could be found in Iowa. It is likely that most cases of this type are resolved short of published appellate decision. Nevertheless, the rule of liability has generally been one of strict liability in tort.

As a practical matter a "strict liability" standard for unwholesome food was first recognized in Davis v. Van Camp Packing Co., 176 N.W. 382 (Iowa 1920). Since then the

Iowa Supreme Court has acknowledged that the genesis of strict liability in tort involved, at least initially, unwholesome food cases. See Schuver v. E.I. Du Pont de Nemours & Co., 546 N.W.2d 610, at 615 (Iowa 1996); Hawkeye Security Ins. Co. v. Ford Motor Co., 199 N.W.2d 373, at 380 (Iowa 1972). The Restatement Third sets forth the majority rule, and there is no reason to believe the Iowa Supreme Court would not follow this rule.

> **§8. Liability of Commercial Seller or Distributor of Defective Used Products**
>
> **One engaged in the business of selling or otherwise distributing used products who sells or distributes a defective used product is subject to liability for harm to persons or property caused by the defect if the defect:**
>
> **(A) results from the seller's failure to exercise reasonable care; or**
>
> **(B) is a manufacturing defect under §2(a) or a defect that may be inferred under §3 and the seller's marketing of the product would cause a reasonable person in the position of the buyer to expect the used product to present no greater risk of defect than if the product were new; or**
>
> **(C) is a defect under §2 or §3 in a used product remanufactured by the seller or a predecessor in the commercial chain of distribution of the used product.**
>
> **A used product is a product that, prior to the time of sale or other distribution referred to in this Section, is commercially sold or otherwise distributed to a buyer not in the commercial chain of distribution and used for some period of time.**

Under Iowa law, a dealer is used goods is not strictly liable for a latent defect in a component it has sold. Grimes v. Axtell Ford Lincoln-Mercury, 403 N.W.2d 781, 785 (Iowa 1987). In Grimes, the court held that strict liability did not apply to a used goods

seller who did not rebuild or recondition the product, but merely installed a used axle from a salvage yard into a Ford van. The court specifically left open the question as to whether it would apply strict liability to a used product seller under other circumstances.

It is likely that if the Iowa Court were faced with a case wherein a product re-manufacturer or re-conditioner, working in that business on a day-to-day basis, were involved, the Court would find that strict liability would apply to a defect created in the re-conditioning or re-manufacturing process.

§9. Liability of Commercial Product Seller or Distributor for Harm Caused by Misrepresentation

One engaged in the business of selling or otherwise distributing products who, in connection with the sale of a product, makes a fraudulent, negligent, or innocent misrepresentation concerning the product is subject to liability for harm to persons or property caused by the misrepresentation.

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Iowa has no reported decisions applying a misrepresentation analysis to a products liability case. However, in Tratchel v. Essex Corp., 452 N.W.2d 171, 176-78 (Iowa 1990), the court analyzed a products case from a "fraud" angle in the context of a punitive damages award. In Tratchel the manufacturer of a gas valve failed to warn consumers after learning of a manufacturing defect in its valves it had previously sold. The reference to fraud in Tratchel could be problematic if the holding in that case were to be extended to any "garden-variety" failure to warn case.

Iowa has adopted a "negligent misrepresentation" theory of recovery in certain limited situations. See ICJI No. 800.1 et. seq. Iowa has never adopted a theory known as "innocent" misrepresentation, although the legal theory known as "breach of the implied

warranty of fitness for a particular purpose" is quite similar, and could fall within this class of cases.

> §10. Liability of Commercial Product Seller or Distributor for Harm Caused by Post-Sale Failure to Warn
>
> (A) One engaged in the business of selling or otherwise distributing products is subject to liability for harm to persons or property caused by the seller's failure to provide a warning after the time of sale or distribution of a product when a reasonable person in the seller's position would provide such a warning.
>
> (B) A reasonable person in the seller's position would provide a warning after the time of sale when:
>
> (1) the seller knows or reasonably should know that the product poses a substantial risk of harm to persons or property; and
>
> (2) those to whom a warning might be provided can be identified and may reasonably be assumed to be unaware of the risk of harm; and
>
> (3) a warning can be effectively communicated to and acted on by those to whom a warning might be provided; and
>
> (4) the risk of harm is sufficiently great to justify the burden of providing a warning.

Judicial recognition of the post-sale duty or so-called "continuing duty to warn" is a relatively new development nationally. In Iowa, no reported appellate decisions have yet defined the scope of such a duty. The Iowa Supreme Court has recognized that the "state-of-the-art" defense may not apply if a manufacturer learns of the existence of a defect after sale of the product. See Fell v. Kewanee Farm Equip. Co., 457 N.W.2d 911, 920-21 (Iowa

1990). More recently, in Tucker v. Caterpillar Co., 564 N.W.2d 410 (Iowa 1997), the court noted that a post-sale duty to warn theory was being pursued in that case, but the scope of that duty was not an issue on appeal. Finally, ICJI No. 1000.12 (June 1994) sets forth only general language regarding a post-sale duty to warn, and the jury instruction itself notes that "[I]t may be necessary to give an additional instruction explaining the scope of the continuing duty to warn." (emphasis added). The Iowa Supreme Court has never adopted or approved UCJI No. 1000.12 as proposed (and in its incomplete form) by the jury instructions committee of the bar.

Presently on appeal to the Iowa Supreme Court is Lovick v. TIC United Corp., Sup. Ct. No. 97-1484, which raises significant appeal issues regarding the scope and limits of the "continuing duty to warn" under Iowa law. A decision in Lovick is expected in the Fall of 1998.

Since Iowa presently has no law regarding the scope of this duty, it is likely that the Restatement Third, § 10 would be looked to for guidance in this area. Before any such claim is presented to a jury, the jury should be given specific guidance regarding the factors to consider and the limits on the scope of this duty.

§11. Liability of Commercial Product Seller or Distributor for Harm Caused by Post-Sale Failure to Recall Product

One engaged in the business of selling or otherwise distributing products is subject to liability for harm to persons or property caused by the seller's failure to recall a product after the time of sale or distribution if:

(A)(1) a statute or other governmental regulation specifically requires the seller or distributor to recall the product; or

(2) the seller or distributor, in the absence of a recall requirement under Subsection (1), undertakes to recall the product; and

(B) the seller or distributor fails to act as a reasonable person in recalling the product.

Plaintiff's experts like to "opine" that a certain product was so defective that "it should have been recalled by the manufacturer years ago." However, unless an administrative agency has affirmatively ordered a product recall, or unless a manufacturer has undertaken a voluntary recall of defective products, no such "duty" exists under the law.

There is Iowa law to support this position. A federal case, interpreting Iowa law, has held that there is no duty to recall or retrofit a product, and this is in accord with the Restatement Third, § 11. See Burke v. Deere & Co., 6 F.3d 497 (8th Cir. 1993), rehearing and suggestion for rehearing denied, 114 S.Ct. 1063, 127 L.Ed.2d 383 (1993). This is consistent with the majority rule. See Reynolds, "The 'Duty' to Recall or Retrofit a Product," For the Defense, October, 1992, pp. 11-18.

§12. Liability of Successor for Harm Caused by Defective Products Sold Commercially by Predecessor

A successor corporation or other business entity that acquires assets of a predecessor corporation or other business entity is subject to liability for harm to persons or property caused by a defective product sold or otherwise distributed commercially by the predecessor if the acquisition:

(A) is accompanied by an agreement for the successor to assume such liability; or

(B) results from a fraudulent conveyance to escape liability for the debts or liabilities of the predecessor; or

(C) constitutes a consolidation or merger with the predecessor; or

(D) results in the successor's becoming a continuation of the predecessor.

The Restatement Third declines to adopt the so-called "product line" exception to the general rule of non-liability of successor corporations. This is consistent with Iowa law.

The general rule is that where one company sells or otherwise transfers all of its assets to another company, the purchasing company is not liable for the debts and liabilities of the transferor. There are four exceptions to the general rule. Successor liability may be incurred if any of the following four circumstances exist: (1) there is an agreement to assume such debts or liabilities; (2) there is a consolidation of the two corporations; (3) the purchasing corporation is a mere continuation of the selling corporation; or (4) the transaction was fraudulent in fact. DeLapp v. Xtraman, Inc., 417 N.W.2d 219, 220 (Iowa 1987). The Iowa Supreme Court has expressly rejected the "product line" theory of

successor liability. DeLapp, 417 N.W.2d at 222-23. The "continuity of enterprise" concept in Iowa has also been rejected. Pancratz v. Monsanto Co., 547 N.W.2d 198 (Iowa 1996). Also, the ownership by a parent corporation of the stock of another corporation (the subsidiary) does not create an identity of corporate interests between the two corporations so as to render the acts of one to be the acts of another. Schnoor v. Deitchler, 482 N.W.2d 913 (Iowa 1992). The Restatement Third, § 12 is in accord with Iowa law.

§13. Liability of Successor for Harm Caused by Successor's Own Post-Sale Failure to Warn

(A) A successor corporation or other business entity that acquires assets of a predecessor corporation or other business entity, whether or not liable under the rule stated in §12, is subject to liability for harm to persons or property caused by the successor's failure to warn of a risk created by a product sold or distributed by the predecessor when:

(1) the successor undertakes or agrees to provide services for maintenance or repair of the product or enters into a similar relationship with purchasers of the predecessor's products giving rise to actual or potential economic advantage to the successor, and

(2) a reasonable person in the position of the successor would provide a warning.

(B) A reasonable person in the position of the successor would provide a warning when:

(1) the successor knows or reasonably should know that the product poses a substantial risk of harm to persons or property; and

(2) those to whom a warning might be provided can be identified and can reasonably be assumed to be unaware of the risk of harm; and

(3) a warning can be effectively communicated to and acted upon by those to whom a warning might be provided; and

(4) the risk of harm is sufficiently great to justify the burden of providing a warning.

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Iowa has no reported decisions on the scope of a post-sale duty to warn, much less the duty of a corporate successor to issue warnings post-sale. As a result, the Restatement Third may provide the "rule of decision" for any future cases that raise this issue.

§14. Selling or Otherwise Distributing as One's Own a Product Manufactured by Another

One engaged in the business of selling or otherwise distributing products who sells or distributes as its own a product manufactured by another is subject to the same liability as thought he seller or distributor were the product's manufacturer.

If Maytag builds a washing machine that is marketed under the Kenmore (Sears) brand name, then Sears is liable as if they were the designer and manufacturer of the product. Maytag is also liable for any defective products that it sells. It is likely that these types of commercial relationships (and the potential liabilities flowing therefrom) is taken care of contractually by the parties involved. Although there are no reported Iowa cases on this issue, this is the majority rule governing "apparent" manufacturers, and is merely a continuation of the rule addressed in the Restatement (2d) of Torts, §400 (1965).

§15. General Rule Governing Causal Connection Between Product Defect and Harm

Whether a product defect caused harm to persons or property is determined by the prevailing rules and principles governing causation in tort.

The issues of product misuse, alteration and modification often relate to the issue of causation in a products case, so those issues will be discussed here. The Iowa Comparative Fault Act did not eliminate the need for a plaintiff to prove causation, and both of its elements of cause in fact and legal or proximate cause. See § 668.1(2) Code of Iowa (1997).

Misuse of Product/Unanticipated or Unintended Use in Iowa.

It is unclear whether "product misuse" is an affirmative defense in an Iowa products case. In 1980, the Iowa Supreme Court held that evidence of product misuse is "treated in connection with the plaintiff's burden of proving an unreasonably dangerous condition and legal cause." Hughes v. Magic Chef, Inc., 288 N.W.2d 542, 546 (Iowa 1980). This means that the element of "reasonably foreseeable use" must be proven by plaintiff. In 1986, however, the Iowa Legislature adopted §668.1(1) as a part of the Iowa Comparative Fault Act. That section explicitly states that "misuse of a product for which the defendant otherwise would be liable" is to be considered "fault" under the Act. This conundrum was identified by the Iowa Supreme Court in Fell v. Kewanee Farm Equip. Co., A Div. Of Allied Products Corp., cited *supra*, but the question was not answered in Fell because it was not germane to any issue raised in that case. Irrespective of whether a defendant has pleaded product misuse, the plaintiff bears the burden of proving by a preponderance of the evidence that the use of the product was reasonably foreseeable. If the defendant's evidence of product misuse prevents the plaintiff from proving that the product was used in a reasonably foreseeable fashion, the defendant is entitled to a directed verdict. Hughes, 288 N.W.2d at 548.

Unforeseeable Use in Iowa.

Under Hughes, plaintiff must prove, as an element of its case, that the product was used in a reasonably foreseeable manner; or if the product was misused, plaintiff must prove that such misuse was reasonably foreseeable. See Hughes v. Magic Chef, Inc., 288 N.W.2d 542 (Iowa 1980).

Alteration of a Product in Iowa.

If a product is altered, the defendant can still be held liable, but only if the plaintiff is able to show that it was foreseeable that the alteration would be made and the change does not unforeseeably render the product unsafe. Hardy v. Britt-Tech Corp., 378 N.W.2d 307, 309 (Iowa App. 1985). See also, Alberg v. Hardin Marine Corp., 387 N.W.2d 779 (Iowa App. 1987), citing Aller v. Rodgers Machinery Manufacturing Co., 268 N.W.2d 830, 838 (Iowa 1978). "The determinative question is whether the intervening alteration can be characterized as a substantial change such that it would be the superseding cause of the injuries." Alberg, 387 N.W.2d at 781. Iowa recognizes that strict liability is inappropriate where a product undergoes a "substantial change in condition" before it is received by a consumer. "The rule is that 'strict liability in tort should not extend to injuries which cannot be traced to the product as it reached the market.'" Duggan v. Hallmark Pool Manufacturing Co., 398 N.W.2d 175, 178 (Iowa 1986).

"Passive alteration," which does not constitute a substantial change in the condition of the product, does not provide the manufacturer with a defense Fell v. Kewanee Farm Equipment Co., 457 N.W.2d 911 (Iowa 1990). An example of a "passive alteration" was the situation present in Fell, where a guard allegedly fell off a piece of farm equipment due to a defectively-designed means of attachment.

§16. Increased Harm Due to Product Defect

(A) When a product is defective at the time of sale and the defect is a substantial factor in increasing the plaintiff's harm beyond that which would have resulted from other causes, the product seller is subject to liability for the increased harm.

(B) If proof supports a determination of the harm that would have resulted from other causes in the absence of the product defect, the product seller's liability is limited to the increased harm attributable solely to the product defect.

(C) If proof does not support a determination under Subsection (b) of the harm that would have resulted in the absence of the product defect, the product seller is liable for all of the plaintiff's harm attributable to the defect and other causes.

(D) A seller of a defective product who is held liable for part of the harm suffered by the plaintiff under Subsection (b), or all of the harm suffered by the plaintiff under Subsection (c), is jointly and severally liable with other parties who bear legal responsibility for causing the harm, determined by applicable rules of joint and several liability.

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The Restatement Third takes an approach in this area which is markedly different than that chosen thus far by the Iowa Supreme Court. Iowa law differs in two significant respects: (1) Iowa follows the Huddell rule, and not the Fox-Mitchell rule; and (2) in Iowa, any fault of a plaintiff that causes an accident is not a proximate cause of the alleged enhanced injury. It will be interesting to see how this tension between Iowa law and the Restatement Third is resolved in the coming years.

Iowa has several recent and important decisions regarding "crashworthiness" or "enhanced injury." Iowa has adopted the "crashworthiness defect" theory of liability. See Wernimont v. International Harvester Corp., 309 N.W.2d 137, 140 (Iowa App. 1981); and Reed v. Chrysler Corp., 494 N.W.2d 224 (Iowa 1992)(fiberglass top of Jeep that rolled over

fractured, causing an "enhanced injury" to arm of passenger, ruled a "crashworthiness defect"). Iowa has extended the "enhanced injury" theory to a situation where a "crashworthiness" claim was not involved. See Hillrichs v. Avco Corp., 478 N.W.2d 70, appeal after remand, 514 N.W.2d 94 (Iowa 1994)(failure of cornpicker to have an emergency shut off at rear of machine might cause an "enhanced injury" to a farmer who reached inside the machine to unplug while it was running).

As noted above, Iowa follows Huddell v. Levin, 537 F.2d 726 (3rd Cir. 1976) (the "Huddell" rule). The Huddell rule requires that plaintiff has the burden to show: (a) a reasonable alternative design, practicable under the circumstances; (b) what injury would have occurred absent the defect; and (c) the extent of plaintiff's enhanced injury. See ICJI No. 1000.2 (1993).

In contrast, the Restatement Third follows the Fox-Mitchell rule, which holds that a *defendant* has the burden of apportionment regarding an enhanced injury claim, and absent carrying that burden, *is responsible for the entire injury!* As you might imagine, this rule turns the burden of proof on its head, and places the risk of non-persuasion on the defendant, instead of the plaintiff, where it belongs.

Second, in Iowa a plaintiff's fault that causes the accident is not a proximate cause of the "enhanced injury." Reed v. Chrysler, cited *supra*. Reed was a particularly egregious factual situation, where the court held that *even the intoxication of the driver was not relevant, and therefore, not admissible*, in the trial of a crashworthiness case. This was a 180-degree change from the prior rule announced in Hillrichs I, that any fault that caused the accident to occur "would be" a proximate cause of any enhanced injury as well. Hillrichs

I, *supra*, 478 N.W.2d at 76.

Regarding causation, the Restatement Third holds that any fault causing the accident at the outset is a proximate cause of the "enhanced injury." It is respectfully submitted that this is the correct rule. Under no circumstances can it be said that a driver's intoxication (as in Reed v. Chrysler, for example) was not a "substantial factor" in causing an accident that lead to an injury, whether enhanced or not. Thus, if the Restatement Third provision had been applied in Reed, the driver's intoxication would have been admissible into evidence on the issue of causation and fault, and dismissal of the case in the trial court would have likely been affirmed.

Although Iowa follows the Huddell rule and places the burden of proof on plaintiff to show an enhanced injury (as it should be), neither Hillrichs nor Reed confront this question directly. No Iowa case thus far has presented arguments to persuade the Court to adopt the Fox-Mitchell approach, and abandon Huddell. Further, this burden appears to be rather low. In Hillrichs the court noted that "[D]amages may be awarded. . .when the only dispute is the amount of damages and the evidence affords a reasonable basis for estimating the loss." 478 N.W.2d at 75. In Reed, the court said that "[W]here some damages appear, recovery should not be denied merely because of difficulty in fixing an exact amount." 494 N.W.2d at 228. Notably, the commentators for the Restatement Third state as follows in comment d to § 16:

> One cannot be certain whether, if the Iowa court were faced with a case in which apportionment could not be reasonably determined, even by a relaxed standard of proof, the court would deny recovery. The language of Hillrichs would seem to imply that some reasonable apportionment is necessary. However, the Iowa court appears determined not to turn a plaintiff away because of the difficulties in proving the extent of the increased harm.

(emphasis added)

Comment d, pp. 309-10. As a result, although Iowa follows Huddell, it has such a "relaxed" or "liberal" standard of proof that placing the burden upon plaintiffs to apportion the injury is a "pyrrhic victory" for defendants.

Seat Belts - Failure to Use in Iowa.

Evidence of failure to wear a seat belt is not considered evidence of comparative fault. Iowa Code §321.445(4)(b). If a defendant first introduces substantial evidence that failure to wear a seat belt contributed to plaintiff's injuries, the trier of fact may find that the plaintiff's failure to wear the seat belt "contributed to the plaintiff's claimed injury or injuries, and may reduce the amount of plaintiff's recovery by an amount not to exceed five percent of the damages awarded after any reductions for comparative fault." Iowa Code §321.445(4)(b)(1) and (2).

This statute was found to be constitutional in Duntz v. Zeimet, 478 N.W.2d 635 (Iowa 1991). However, that case did not involve the trial of a products liability, crashworthiness claim, where it was alleged that the failure to wear an available seatbelt caused plaintiff's "enhanced injury."

Evidence of a person's failure to put their child in a child safety seat is not admissible as evidence in a civil action. §321.446(6) Code of Iowa (1997). The Iowa Supreme Court has never determined how (if at all) it would apply these rules in a case where a crashworthiness defect claim was being made against a motor vehicle manufacturer, and the manufacturer claimed that the injuries were caused by the failure to wear an available seat belt.

§17. Apportionment of Responsibility Between or Among Plaintiff, Sellers and Distributors of Defective Products, and Others

(A) A plaintiff's recovery of damages for harm caused by a product defect may be reduced if the conduct of the plaintiff combines with the product defect to cause the harm and plaintiff's conduct fails to conform to generally applicable rules establishing appropriate standards of care.

(B) The manner and extent of the reduction under Subsection (a) and the apportionment of plaintiff's recovery among multiple defendants are governed by generally applicable rules apportioning responsibility.

These rules are in general agreement with Iowa law. Iowa has had comparative negligence since 1984, and comparative fault since 1986. "Rules apportioning responsibility" are set forth in Chapter 668, the Iowa Comparative Fault Act.

Strict Liability. Comparative fault is a defense to an action premised upon strict liability in tort. §668.1 Code of Iowa (1997). A plaintiff's comparative fault should be alleged as an affirmative defense. §619.17 Code of Iowa (1997). "[F]ault means one or more acts or omissions that are in any measure negligent or reckless toward the person or property of the actor or others, or that subject a person to strict tort liability." §668.1(1) Code of Iowa (1997). Specifically included within the statutory definition of "fault" are the following: (1) breach of warranty; (2) unreasonable assumption of risk not constituting an enforceable express consent; (3) misuse of a product for which the defendant otherwise would be liable; and (4) unreasonable failure to avoid an injury or to mitigate damages.

Negligence. Comparative fault is also a defense to an action grounded in negligence. §668.1 Code of Iowa (1997). A plaintiff's comparative fault should be alleged as an affirmative defense. §619.17 Code of Iowa (1997). If the plaintiff's negligence exceeds that of

all the defendants combined, then the plaintiff is barred from recovery. §668.3(1) Code of Iowa (1997). However, the jury is advised as to the effect of their answers to special interrogatories. §668.3(5) Code of Iowa (1997). This is unfortunate, because it is believed that telling the jury the "effect" of their findings may unnecessarily skew the factual finding toward a plaintiff's verdict.

Warranty. Liability based on warranty theory is also covered under the Iowa Comparative Fault Act. § 668.1(1) Code of Iowa (1997). However, it is ordinarily not proper to submit both strict liability and breach of implied warranty theories in a products case. See Hawkeye Security Ins. Co. v. Ford Motor Co., 174 N.W.2d 672 (Iowa 1970).

Assumption of Risk in Iowa.

Iowa courts initially recognized two distinct meanings of the term "assumption of risk." The "primary meaning" of the term is an alternate expression for the simple proposition that the defendant was not negligent; i.e., owed no duty, or did not breach any duty owed. The "secondary meaning" arises when the injured person acted unreasonably in assuming a particular risk; this definition of assumption of risk is the same as the defense of contributory negligence. Nichols v. Westfield Industries, Ltd., 380 N.W.2d 392, 399 (Iowa 1985), citing Rosenau v. City of Estherville, 199 N.W.2d 125, 131 (Iowa 1972). The Rosenau court abolished the "secondary meaning" of assumption of risk. It was no longer available as a separate defense in cases where contributory negligence was an available defense. 199 N.W.2d at 133.

"Primary" assumption of risk was retained as an affirmative defense. Chapman v. Craig, 431 N.W.2d 770, 771 (Iowa 1988). After the enactment of Iowa Code §668.1,

assumption of risk in its primary meaning is properly classified as a type of "fault" to be compared with the fault of other parties, and thus is not a complete defense in all cases. Arnold v. City of Cedar Rapids, 443 N.W.2d 332, 333 (Iowa 1989). See also ICJI No. 1000.9. The defense of assumption of risk in its primary meaning remains a viable concept. The Iowa Supreme Court has suggested, for purposes of accuracy and clarity, however, that the issue be framed "in terms of whether a duty is owed." Arnold, 443 N.W.2d at 333.

Assumption of risk is a separate and distinct defense, and defendant is entitled to a jury instruction on it in a case where liability is premised on strict liability in tort. Coker v. Abell-Howe Co., 491 N.W.2d 143 (Iowa 1992); Burke v. Deere & Co., 6 F.3d 497, rehearing and suggestion for rehearing denied, 114 S.Ct. 1063, 127 L.Ed.2d 383 (1993).

Failure to Mitigate Damages in Iowa.

Unreasonable failure to mitigate damages constitutes "fault" under Iowa's Comparative Fault Act. §668.1 Code of Iowa (1997). Pursuant to Iowa Code §§619.7 and 619.8, failure to mitigate is an affirmative defense which ordinarily must be pleaded. See also Tanberg v. Ackerman Investment Co., 473 N.W.2d 193 (Iowa 1991). A plaintiff's unreasonable failure to mitigate damages is properly considered by the fact-finder in determining the percentages of fault to be assessed against the parties. Miller v. Eichhorn, 426 N.W.2d 641, 643 (Iowa App. 1988); §668.1(1) Code of Iowa (1997).

Fault of Others in Iowa.

No third-party action for contribution is permitted between a defendant in a products liability case and the plaintiff's employer, since there is no common liability between the manufacturer and employer by reason of the exclusive remedy bar of the

worker's compensation law. Speck v. Unit Handling Division of Litton Systems, Inc., 366 N.W.2d 543 (Iowa 1985). In order for the jury to assess a percentage of fault against an entity, that entity must be made a party to the case. See §668.3(2) Code of Iowa (1997). The "empty chair" argument -- that some third person, not a party to the action, was the sole cause of the plaintiff's injuries -- is permissible under the argument of "sole proximate cause" notwithstanding the fact that the third person is not a party. Chumbley v. Dries & Krump Mfg. Co., 521 N.W.2d 192 (Iowa App. 1993); ICJI No. 700.5. The defense of "sole proximate cause" does not have to be pleaded in order to be entitled to an instruction on it; rather, a general denial that a defendant's acts were a proximate cause of plaintiff's injury will suffice. Sponsler v. Clarke Elec. Cooperative, Inc., 329 N.W.2d 663 (Iowa 1983).

The court may not allocate fault to a person, formerly a party to the action, who has been voluntarily dismissed from the action (without prejudice) and was not released from liability. Fell v. Kewanee Farm Equipment Co., 457 N.W.2d 911 (Iowa 1990).

§18. Disclaimers, Limitations, Waivers, and Other Contractual Exculpations as Defenses to Products Liability Claims for Harm to Persons

Disclaimers and limitations of remedies by product sellers or other distributors, waivers by product purchasers, and other similar contractual exculpations, oral or written, do not bar or reduce otherwise valid products liability claims against sellers or other distributors of new products for harm to persons.

This section is consistent with current Iowa law.

In Iowa, it is possible for a disclaimer to limit liability for negligence. It is not against public policy for parties to contract to exempt liability. Manning v. International

Harvester Co., 381 N.W.2d 376, 379 (Iowa App. 1985), citing Weik v. Ace Rents, Inc., 87 N.W.2d 314, 317 (Iowa 1958). Where limitation language in a disclaimer is ambiguous, the language will be strictly construed against the party claiming to be insulated from liability. Manning, 381 N.W.2d at 380.

§19. Definition of "Product"

For purposes of this Restatement:

(A) A product is tangible personal property distributed commercially for use or consumption. Other items, such as real property and electricity, are products when the context of their distribution and use is sufficiently analogous to the distribution and use of tangible personal property that it is appropriate to apply the rules stated in this Restatement.

(B) Services, even when provided commercially, are not products.

(C) Human blood and human tissue, even when provided commercially, are not subject to the rules of this Restatement.

There are no reported Iowa decisions on this subject. This definition is analogous and consistent with the definition of "goods" in the Uniform Commercial Code (UCC) at §554.2105 Code of Iowa (1997).

The Iowa Supreme Court has never held that human blood given in a transfusion is not a "product" within the context of strict liability in tort, although apparently a claim of this type was made (but not decided) in Doe v. Johnston, 476 N.W.2d 28, reh den. (Iowa 1991).

§20. Definition of "One Who Sells or Otherwise Distributes" For purposes of this Restatement:

(A) One sells a product when, in a commercial context, one transfers ownership thereto either for use or consumption or for resale leading to ultimate use or consumption. Commercial product sellers include, but are not limited to, manufacturers, wholesalers, and retailers.

(B) One otherwise distributes a product when, in a commercial transaction other than a sale, one provides the product to another either for use or consumption or as a preliminary step leading to ultimate use and consumption. Commercial nonsale product distributors include, but are not limited to, lessors, bailors, and those who provide products to others as a means of promoting either the use or consumption of such products or some other commercial activity.

(C) One also sells or otherwise distributes a product when, in a commercial transaction, one provides a combination of products and services and either the transaction taken as a whole, or the product component thereof, satisfies the criteria in Subsection (a) or (b).

This section is consistent with Iowa law. There are no reported Iowa cases regarding whether a commercial lessor of a product may be subject to strict liability. However, the majority rule does apply strict liability to commercial lessors.

Previous reference has been made to the limitation on the liability of retailers, wholesalers and distributors under §613.18 Code of Iowa (1997). Reference is made to the discussion of this subject under §1, supra. With regard to component part manufacturers, reference is made to the discussion at §5, supra.

§21. **Definition of "Harm to Persons or Property:" Recovery for Economic Loss**

For purposes of this Restatement, harm to persons or property includes economic loss if caused by harm to:

(A) the plaintiff's person;

(B) the person of another when harm to the other interferes with a legally protected interest of the plaintiff; or

(C) the plaintiff's property other than the defective product itself.

This section is consistent with Iowa law.

Damages for economic loss are not recoverable under a product liability theory. See Nebraska Innkeepers, Inc. v. Pittsburgh-Des Moines Corp., 345 N.W.2d 124, 126 (Iowa 1984); Nelson v. Todds Ltd., 426 N.W.2d 120 (Iowa 1988)(doctrine applied to preclude butcher's recovery for spoiled meat caused by defective meat curing agent). A federal court in Iowa has held that under Iowa law "a strict liability claim will not arise absent allegations of personal injury or damage to property other than the product itself, with the possible exceptions where (1) the parties are of unequal bargaining position or (2) where the plaintiff seeks recovery in addition to 'loss of the bargain' and concomitant commercial/economic losses that result only from loss of the bargain...." Sioux City Community School District v. International Telephone & Telegraph Corp., 461 F.Supp. 662, 665 (N.D.Iowa 1978).

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WHEN & HOW TO USE ACCIDENT RECONSTRUCTION

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Mr. Werner and Mr. Fay will show how an accident reconstruction is presented in court using the methodology developed by Mr. Fay.

WHEN AND HOW TO USE ACCIDENT RECONSTRUCTION

John Werner and Mark Schultheis

The litigator's decision to seek out an accident reconstruction expert will be governed by these seven variable considerations:

1. Client resources
2. Client exposure
3. Likelihood of trial
4. Future litigation
5. Time constraints
6. Importance of the testimony
7. **DOES THE OTHER SIDE HAVE ONE?**

The following outline tells you how to apply the rules of evidence to admit or exclude expert testimony in Iowa for purposes of accident reconstruction testimony.

FOUNDATIONAL REQUIREMENTS FOR
AN
ACCIDENT RECONSTRUCTIONIST EXPERT WITNESS

I. RELEVANCE -- THE ADMISSIBILITY OF ANY EVIDENCE IS GOVERNED BY THE BASIC RULES OF RELEVANCE AND ITS LIMITS.

Iowa R.Evid. 401 defines relevant evidence:

"Relevant evidence" means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.

Relevant evidence may be excluded under Rule 403 if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, among other reasons. Rule 403 may be employed to exclude testimony from an accident reconstructionist, as more fully discussed below.

II. THE THRESHOLD DETERMINATION OF ADMISSIBILITY -- IOWA R.EVID. 104(a)

The threshold determination of admissibility is a preliminary question for the court to determine pursuant to Iowa R.Evid. 104(a) which provides:

> Preliminary questions concerning the qualification of the person to be a witness, the existence of a privilege, or the admissibility of evidence shall be determined by the court....

The court must first determine that any expert witness testimony meets the threshold requirements of Iowa R.Evid. 702 and 703, each of which are discussed more fully, below.

"The admissibility of expert opinion testimony is a matter committed to the sound discretion of the district court." Kirk v. Union Pacific R.R., 514 N.W.2d 734, 738 (Iowa 1994) (citing Poyzer v. McGraw, 360 N.W.2d 748, 752 (Iowa 1985)); see also Hyler v. Garner, 548 N.W.2d 864, 868 (Iowa 1996) ("Whether a witness is sufficiently qualified to testify as an

expert is within the court's discretion.") (citing Tappe v. Iowa Methodist Medical Center, 477 N.W.2d 396, 402 (Iowa 1991); Ganlud v. Smith, 206 N.W.2d 311, 314 (Iowa 1973)). "However, the general rule is one of liberality in admission." Kirk, id. (quoting Hunter v. Board of Trustees, 481 N.W.2d 510, 519 (Iowa 1992) (citing State v. Halstad, 362 N.W.2d 504, 506 (Iowa 1995)).

The particular witness's ability to testify as an expert is determined in reference to the topic under examination. Hyler, 548 N.W.2d at 868 (citing In Re O'Neal, 303 N.W.2d 414, 420 (Iowa 1981)). "The witness must be qualified to answer the particular question propounded." Hyler, id. (citing Wick v. Henderson, 485 N.W.2d 645, 648 (Iowa 1992)).

If, pursuant to Iowa R.Evid. 104(a), the court is satisfied that the threshold requirements have been met, the witness should be allowed to testify. All further inquiry regarding the extent of his qualifications goes to the weight that the fact finder can give such testimony under Rule 104(e). Hutchison, 514 N.W.2d 882, 885 (Iowa 1994) (quoting Committee Comment to Rule 702).

A. Rule of Evidence 702

Rule of Evidence 702 provides:

> If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education may testify thereto in the form of an opinion or otherwise.

See also State v. Dinkins, 553 N.W.2d 339, 341 (Iowa App. 1986). Rule 702 codifies Iowa's liberal approach to the admission of opinion testimony. Hutchison, 514 N.W.2d at 885 (citing Ganlud, 206 N.W.2d at 314).

The expert must be qualified, and the court must make this determination.[1] Although licensing in a particular field carries a presumption of qualification to testify within that field, "learning and experience may provide the essential

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[1] "Iowa Rule of Evidence 702 does not require the trial court to enter findings that a witness is qualified as an expert, absent an objection by opposing counsel." State v. Truesdell, 511 N.W.2d 429, 533 (Iowa App. 1993).

elements of qualification." Hutchison, 514 N.W.2d at 886 (multiple citations omitted); see e.g. Stumpf v. Reiss, 502 N.W.2d 620, 624 (Iowa App. 1993) (police officer who did not consider himself an expert was allowed to offer expert opinion testimony based upon his skill and training in accident investigation.) The court must essentially determine that the expert possesses the skill and experience necessary to assist the trier of fact in determining an issue in dispute.

In determining the admissibility of the expert's testimony, the court must first determine whether scientific, technical, or other specialized knowledge will assist the trier of fact. Johnson v. Knoxville Comm. School Dist., 570 N.W.2d 633, 637 (Iowa 1997); Williams v. Hedican, 561 N.W.2d 817, 823 (Iowa 1997). This has been described as merely a test of relevancy. Williams, 561 N.W.2d 817, 824 (Iowa 1997) (citing Daubert v. Merrell Dow Pharmaceuticals, Inc., 509 U.S. 579, 591 113 S.Ct. 2786, 2796, 125 L.Ed.2d 469, 481 (1993). The testimony must also be reliable. Johnson, 570 N.W.2d at 637. Reliability is intertwined with the first determination because unreliable testimony cannot assist the trier of fact. Id. "[T]he amount of foundation necessary to establish reliability depends on the complexity of the testimony and the likely impact of the testimony on the fact-finding process." Id. (citing Williams, 561 N.W.2d at 823.

An expert's opinion need not be expressed with absolute certainty. Johnson, 570 N.W.2d at 637 (citing Williams, 561 M.W.2d at 823). The lack of certainty goes to the weight of the testimony rather than the admissibility. Johnson, id.

SPECIAL NOTE:

> In the Hutchison case, the Iowa Supreme Court stated, "We 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." Hutchison, 514 N.W.2d at 887.
>
> The Iowa Supreme Court went through a detailed analysis of the Daubert principles in the Williams case. The court cited several federal district court decisions which post-date Daubert which held that the Daubert principles apply only to novel scientific testimony and are not applicable to technical or other specialized knowledge. Id. at 825-827. Then, in Mensink v. American Grain, 564 N.W.2d 376 (Iowa 1997), the Iowa Supreme Court refused to apply Daubert to a determination of whether expert testimony on lightning safety was admissible. Id. at 381. The court cited with

approval Thornton v. Caterpiller, Inc., 951 F.Supp. 575 (D.S.C. 1997). Id. at 380-81. The court has now clearly held that Daubert principles apply only to "scientific" expert testimony. Johnson v. Knoxville Comm. School Dist., 570 N.W.2d 633, 639 (Iowa 1997). Under this approach, an accident reconstructionist's testimony should not be subject to the principles of Daubert, but would merely face the scrutiny of Rules 702 and 703. See Johnson, 570 N.W.2d at 638; Williams, 561 N.W.2d at 826.

B. Rule of Evidence 703

Iowa Rule of Evidence 703 provides:

> The facts or data in the particular case upon which an expert bases an opinion or inference may be those perceived by or made known to him at or before the trial or hearing. If of a type reasonably relied upon by experts in the particular field and forming opinions or inferences upon the subject, the facts or data need not be admissible in evidence.

Here the court must make the threshold determination that the expert's opinions are based upon sufficiently complete factual data. Kirk, 514 N.W.2d at 739. The court must determine whether the underlying evidence was reasonably relied upon. Hutchison, 514 N.W.2d at 889. The underlying factual data must not be based upon mere speculation or conjecture. Kirk, 514 N.W.2d at 739.

III. OTHER CONSIDERATIONS

A. The expert's opinions are also governed by Rule 704 -- Opinion On Ultimate Issue.

> Testimony in the form of an opinion or inference otherwise admissible is not objectionable because it embraces an ultimate issue to be decided by the trier of fact.

Iowa R.Evid. 704.

The committee comment to Rule 704 explains:

> Experts are not to state opinions as to legal standards. On this basis, questions such as whether X was negligent or whether a product was unreasonably dangerous may be excluded. Aller v. Rod-

gers Machinery Mfg. Co., Inc., 268 N.W.2d 930 (Iowa 1978).

See Dinkins, 553 N.W.2d at 341; Terrell v. Reinecker, 482 N.W.2d 428, 430 (Iowa 1992) ("In general an expert witness is not permitted to state a legal conclusion. This rule is modified somewhat if a legal issue is raised in such a way as to become a necessary operative fact; when however the legal conclusion is a rule of decision to be applied by the judge or jury in deciding the case, it is not a proper subject for expert testimony.") (multiple citations omitted); Bornn v. Madagan, 414 N.W.2d 646, 649 (Iowa App. 1987).

B. Rule 403 -- The restrictions of Iowa R.Evid. 403 also may come into play.

"Rule 403 allows the trier of fact to exclude relevant evidence. Because it does so, courts should apply the rule sparingly." Williams, 561 N.W.2d at 832 (citing Hendrix v. Raybestos-Manhattan, Inc., 776 F.2d 1492, 1502 (11th Cir. 1985); Villari v. Terminix International, Inc., 692 F.Supp. 568, 572 (E.D.Pa. 1988)). It is generally recognized that the tools of cross-examination and the ability to present contrary evidence from one's own expert should usually be used in lieu of Rule 403. Williams, 561 N.W.2d at 832; Stumpf, 502 N.W.2d at 624.

WHAT DOES IT MEAN TO BE JUDGEMENT PROOF

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WHAT DOES IT MEAN TO BE JUDGMENT PROOF

Whenever people consider litigation against another party, the first consideration is generally what are my chances of success - will I win the lawsuit. This is an important consideration, but one cannot stop there. A second question must also be asked. The second question is if judgment is entered in my favor, what are my chances of collecting the judgment. If one obtains a judgment, but is unable to collect that judgment, then that judgment still has very little value. It is very important to determine whether the party you plan to sue is judgment proof; i.e., whether that party has any non-exempt assets, upon which you would be able to execute. This outline will: 1) discuss the distinction between non-exempt assets and exempt assets; 2) set forth the available exemptions in Iowa and examine a few particular exemptions, i.e. annuities and homesteads, which have been hot areas of law recently, 3) discuss the conversion of non-exempt assets to exempt assets; and 4) address the issue of garnishments in Iowa.

1) **Non-exempt vs. Exempt Assets**. "Assets" are defined as "property of all kinds, real and personal, tangible and intangible, including, *inter alia*, for certain purposes, patents and causes of action which belong to any person including a corporation and the estate of a decedent. The entire property of a person, association, corporation, or estate that is applicable or subject to the payment of his or her or its debts." Black's Law Dictionary 117 (6th ed. 1990). In order to determine if one will be able to collect on a judgment after the court has entered it, one must determine what assets the debtor has.

Once all of the assets have been discovered, then one must determine whether those assets are exempt or non-exempt assets. "Exempt" is defined as: "To release, discharge, waive, relieve from liability. . . . To relieve certain classes of property from liability to sale on execution, or

from taxation, or from bankruptcy or attachment." Black's Law Dictionary 571 (6th ed. 1990) A party/debtor may have a great deal of assets, but if those assets are exempt assets, then a victorious plaintiff will still be unable to reach those assets. A victorious plaintiff is able to collect on the judgment by executing, attaching, levying against, and garnishing non-exempt assets. One thus needs to turn to Iowa law to determine if the assets of a debtor are exempt or non-exempt in nature.

2) **Exemptions Available in Iowa**. In a general debtor/creditor situation, the Iowa Code sets forth the specific exemptions, which are available to a debtor. Similarly in a bankruptcy setting, Iowa has opted out of the federal exemptions, which are set forth in section 522 of the Bankruptcy Code by operation of Iowa Code §627.10. Thus, in a bankruptcy setting, the debtor is entitled to the exemptions, which Iowa law allows. Iowa Code § 627.6 generally sets forth the exemptions which are available in the State of Iowa. These exemptions include:

1) Wearing apparel in an amount up to $1000.00;

2) Wedding or engagement rings;

3) Shotgun and rifle or musket;

4) Books, bibles, portraits, and pictures up to $1000.00;

5) Interest in a burial plot not to exceed one acre;

6) Household furnishings up to $2000.00;

7) Life insurance policies, although limited to $10,000.00 for interest acquired within two years of claimed exemption;

8) Professionally prescribed health aids;

9) Benefits, pensions, annuity or similar plans;

10) Musical instruments, vehicle, up to $5,000.00;

11) Tools of the trade not to exceed $10,000.00;

12) Farm equipment, livestock and feed;

13) Cash or other funds not to exceed $1000.00; and

14) Up to $500.00 in rental deposits, utility deposits, or prepaid rent.

(See Iowa Code §627.6, hereto attached, which sets forth these exemptions in detail).

Other separate Iowa Code sections also establish certain specific exemptions. Iowa Code §627.8 provides that a pension from the U. S. government shall not be subject to execution. Iowa Code §627.13 exempts payments due or that may become due under Chapter 85 of the Iowa Code concerning workers' compensation. Iowa Code §509.12 provides that a policy of group insurance or its proceeds is also exempt from execution and attachment. Iowa Code §509A.9 extends such exemption to group insurance for public employees as well. Under Iowa Code §411.13, the Code exempts pensions, annuities, and retirement plans of police officers and firefighters established under this chapter from execution. Similarly, Iowa Code §294.10B extends this exemption to annuities, pensions, and retirement plans due teachers under this chapter, and section 97A.12 extends this exemption to pensions, annuities, or retirement allowances due to public safety peace officers. Iowa Code §179.5A provides that refunds due to persons for various agricultural endeavors are exempt. These are refunds, which result under Iowa Code chapters 179, 181, 182, 183A, 184A, 185, or 185C. Iowa Code §97B.39 provides that a person's interest in Iowa Public Employees' Retirement System (IPERS) are exempt. In addition, Iowa's homestead exemption is governed by Iowa Code §561.16. This list sets forth the majority of the exemptions allowed by statute in Iowa.

Courts have held that statutes of exemption should receive liberal construction and they are to be construed in favor of those claiming the benefits. Frudden Lumber Company v. Clifton,

183 N.W.2d 201 (Iowa 1971). However, Courts have also found that they should not ". . . depart substantially from the expressed language of the exemption statute or extend the legislative grant." Matter of Knight, 75 B.R. 838, 839 (Bankr. S.D. Iowa 1987). In analyzing these exemptions, the law can be quite complicated and unsettled. The Courts have recently addressed some of these exemption issues, and these include the issues surrounding annuities and homesteads. In regard to annuities, "[t]he exemptibility of annuities under Iowa Code §627.6(8)(e) is an ill-defined area of law of comparatively recent origin." Eilbert v. Pelican, 212 B.R. 954, 957 (8th Cir. BAP 1997).

a) **Annuities.**

Iowa Code § 627.6(8)(e) provides, in pertinent part:

> A debtor who is a resident of this state may hold exempt from execution the following property:
>
> . . . .
>
> 8. The debtor's rights in:
>
> . . . .
>
> e. A payment or a portion of a payment under a pension, annuity, or similar plan or contract. . . .

Iowa Code § 627.6(8)(e) (1997). The language in Iowa Code Section 627.6(8)(e) arguably requires a two-tier analysis. The first tier of the analysis is whether an annuity resulting from the liquidation of assets constitutes a "pension, annuity, or similar plan or contract" pursuant to Iowa Code § 627.6(8)(e). "First, the bankruptcy court must determine if the claimed exempt asset belongs to the class of exempt investments enumerated in Iowa Code § 627.6(8)(e)." Eilbert v. Pelican, 212 at 958. "Determining whether an asset satisfies the 'similar plan or contract' language is a peculiarly factual inquiry." Id. at 958. If the annuity is found to be an exemptible

asset, then the annuity must also meet the second tier of the analysis. The second tier of the analysis requires the annuity to meet the "on account of" test pursuant to Iowa Code Section 627.6(8)(e). Id. at 959.

As mentioned above, the law is unsettled and some would argue that since the investment vehicle is termed an "annuity", then it automatically is within the statute and the first tier of analysis is not applicable. This argument appears flawed for at least two reasons. First, to argue that any plan, no matter what the terms or provisions, is exemptible so along as it is called an "annuity" fails to give any meaning to the Code section. Secondly, this interpretation reads the word "annuity" in isolation and not in the context of the words around it in the statute. The statute states, "pension, annuity, or similar plan or contract". Iowa Code §627.6(8)(e). The term "annuity" must be given its meaning based upon the context in which it is found in the statute. While previous courts have not labeled it as such, Iowa courts have understood that these words must be read together. When you read the word "annuity" as it is used in this statute in the context of the words around it, it becomes apparent that "annuity" has a specific meaning. The Bankruptcy Courts of Iowa have viewed this language as a comparison mechanism and have tried to derive the similarities which are important. See Matter of Pettit, 55 B.R. 394 (Bkrtcy. S.D. 1985) and Matter of Midkiff, Case No. 93-01444-W-J, (Bankr. S.D. Iowa) filed April 22, 1994, *aff'd* Case No. 1-94-CV-80024, U.S. District Court for the Southern District of Iowa, filed August 10, 1994. Thus, the meaning is arguably that "pension and annuity" are to provide a standard of comparison for other plans. In other words, there must be some particular meaning and base requirement to the meaning of "pension and annuity".

In order to determine whether a plan or a contract is similar to a pension or an annuity as required by section 627.6(8)(e), Courts have devised a four part test. See Matter of Pettit, 55

B.R. 394 (Bankr. S.D. Iowa 1985); *aff'd* 57 B.R. 362 (S.D. Iowa 1985); Matter of Midkiff, Case No. 93-01444-WJ, Chapter 7. The four part test is as follows:

> A formal plan or fund established for the benefit of the debtor, usually as part of a relationship with an employer or employee organization.
>
> The benefits of the plan or fund are of a nature "akin to future earnings" of the debtor and intended as retirement income or at least income deferred during the debtor's employment to provide future support for the debtor.
>
> Access and control of the plan or fund in the hands of someone other than the debtor with strong limitations on withdrawal or distribution expressed in the formal plan or fund for the purpose of providing retirement or deferred income.
>
> That payment under the plan or contract is to be on account of illness, disability, death, age, or length of service.

Matter of Pettit, 55 B.R. 394 (Bankr. S.D. Iowa 1985). The four prongs identified above are the common factors, which the Court has identified between a pension and an annuity. Since the Court delineated these factors from a comparison between a pension and an annuity, one rational conclusion would be that in order for a pension or an annuity to be exempt, it must meet these factors.

In Eilbert v. Pelican, the Bankruptcy Appellate Panel ("Panel") identified four additional factors, which it considered in its determination. The Panel recognized that these were not the only factors and specifically stated, "We mention a number of factors to be considered but none are necessarily dispositive nor is it a matter of counting the factors on either side." Eilbert v. Pelican, 212 at 958. The factors, which the Panel set out, all appear to follow the reasoning of the Iowa courts in trying to give some meaning for comparison to the terms "pension, annuity or similar plan or contract" under Iowa Code section 627.6(8)(e).

The Panel identified the "contributions over time factor" as the first factor. Id. at 958. The second factor that the Panel considered was "contribution by others." Id. at 959. The Panel stated, "Investments which are purchased in isolation, outside the context of workplace contributions, are less likely to qualify as exempt under Iowa Code § 627.6(8)(e)." Id. The third factor that the Panel reviewed was "return on investment." Id. at 959. The Panel found, "... investments which compute payments based on the participant's estimated life span, but which terminate upon the participant's death or the actual life span, more closely resemble the exempt investments enumerated in Iowa Code § 627.6(8)(e)." Id. Finally, the fourth factor is "control over the annuity." Id. at 959.

If the debtor is able to meet the first-tier requirements, the debtor must also show the second tier, the "on account of" requirement is met. The primary issue in meeting the "on account of' requirement is what is the interpretation of this expressed language in Iowa Code § 627.6 (8)(e) and how does it apply to a debtor's annuity. The answer to this question has already been settled in the Eighth Circuit in the case of In re Huebner, 141 B.R. 495 (N.D. Iowa 1992), *aff'd*. 986 F.2d 1222 (8th Cir. 1993), *cert. denied*, ___ U.S. ___, 114 S.Ct. 272, 126 L.Ed. 2d 223 (1993).

The Courts in In re Huebner reviewed the "on account of" language. This particular language was also present in the prior statue, which provided, that an exemption for "the debtor's rights in ... (payment under a pension, annuity, or similar plan or contract on account of illness, disability, death, age, or length of service." (emphasis added). See Iowa Code § 627.6(8)(e) (1991). The Court in In re Huebner specifically looked at the meaning and interpretation of "on account of", and the opinion noted that this language could mean "triggered by" or "based on". In re Huebner, 141 B.R. at 406. The Courts in In re Gilbert, 74 B.R. 1 (N.D. Iowa 1985), In re

McCabe, 74 B.R. 119 (N.D. Iowa 1986), and Matter of Lilienthal 72 B.R. 277 (S.D. Iowa 1987), adopted the "based on" interpretation. Huebner acknowledged that the Gilbert, Lilienthal, and McCabe line of cases stood for the proposition that since an annuity is payable during the debtor's retirement years, then it satisfies the "on account of" requirement of § 627.6(8)(e), but refused to continue to follow this proposition. In re Huebner, 141 B.R. at 408. The Court stated that "on account of" was to be interpreted as "triggered by" and as a result a triggering event needs to occur. Id. at 409; 986 F.2d at 1225. This conclusion disagreed with the prior rulings. See Id. at 409; 896 F.2d at 1224-25. The Court found that this interpretation would prevent a policy that was subject to the annuitant's intent, and, thereby, assured that it was not manipulated by the annuitant. Id. at 408. The type of annuity, which the Courts in Huebner, attempted to prevent, was one in which "the terms of the annuity were entirely self-directed" by the debtor.

The "triggered by" interpretation adopted by this Circuit meant that there had to be an event which caused the payments under the annuity. The Iowa Code is very specific as to what constitutes a triggering event, i.e. "illness, disability, death, age, or length of service." See Iowa Code § 627.6(8)(e) (1997).

Iowa Bankruptcy Courts have specifically followed the Huebner mandate in Matter of Midkiff, Case No., 93-01444-W-J, (Bankr. S.D. Iowa) filed April 22, 1994, *aff'd* Case No. 1-94-CV-80024, U.S. District Court for the Southern District of Iowa, filed August 10, 1994 and Matter of Kemp, Case No. 94-1763-CH, (Bankr. S.D. Iowa) filed May 1, 1995. In Matter of Midkiff, the United States Bankruptcy Court for the Southern District of Iowa dealt with whether an annuity from a Worker's Compensation settlement on a wrongful death from a previous spouse was exempt. In an unpublished decision, the Court analyzed whether the structured settlement underlying the annuity constituted a "similar plan or contract" under Iowa Code § 627.6(8)(e). In

making this analysis, the Court dealt with the "on account of" language. The Court found that prior to In re Huebner, the term "on account of" was equated with "based on", not with "triggered by". The Court cited to both In re McCabe and In re Gilbert. The Court pointed out, however, "[C]hanges in controlling case law and statutory language mandate a different analysis today." Id. at p. 7. The Court then proceeded to analyze the case in light of the holdings in In re Huebner. The Court also noted the amended language of Iowa Code § 627.6(8)(e) and stated, "The revised statute seemingly supports the 'triggered by' interpretation." Id. at p. 9. The Court thus held the settlement agreement up to the "triggered by" test, and found that there was no triggering event. Id. at p. 9. On appeal, the decision of the Bankruptcy Court was affirmed.

Similarly, in Matter of Kemp, the United States Bankruptcy Court for the Southern District of Iowa dealt with whether a USF&G annuity was exempt pursuant to Iowa Code § 627.6(8)(e). Specifically, the Court examined the "on account of" language in the statute. "The Debtor argue[d] that the language 'on account of' should be interpreted to include annuities based on personal injury settlements." Id. at p. 3. The trustee argued that the annuity arose from a "settlement of a personal injury action and [wa]s, therefore, not 'on account of illness, disability, death, age, or length of service' so as to be exempt under Iowa Code § 627.6 (8)(e)." Matter of Kemp, at p. 2. The Trustee argued that the statute required the annuity to be "triggered by" illness, disability, death, age or lack of service. Id. The trustee further argued that the ". . . injury to the debtor only formed the basis for a negligence claim. The settlement resulted in the right to an annuity." Id. at p. 2.

The Court, after reviewing In re Huebner and the analysis found in Matter of Midkiff, found that the "interpretation of the term 'on account of' is relevant to a structured settlement termed as an 'annuity', as well." Id. The Court held that "[i]n this case, the annuity in question,

regardless of debtor's right to access or control, was not triggered by an event contemplated by Iowa Code § 627.6(8)(e)." Id.

As mentioned above, the law surrounding the exemption of annuities is somewhat unsettled. The Eighth Circuit Bankruptcy Appellate Panel dealt with this issue in Eilbert v. Pelican, 212 B.R. 954. The Eighth Circuit Court recently heard this case on appeal. The Eighth Circuit has not decided this case at this time, but the outcome will have an impact on how this issue is handled. In the Eilbert case, the Eighth Circuit Court may expound on what "triggered by age" means and what is required in order to claim the exemption based on this requirement. The decision in the Eilbert case may also further explain what the retirement age is and how that age is determined and what effect it has on this exemption. This issue should be revisited after the outcome of the Eighth Circuit Court's decision in the Eilbert v. Pelican case.

b) Homestead Exemption.

In addition, Iowa Code § 561.16 provides for a homestead exemption, and states:

> The homestead of every person is exempt from judicial sale where there is no special declaration of statute to the contrary. Persons who reside together as a single household unit are entitled to claim in the aggregate only one homestead to be exempt from judicial sale.

Iowa Code §561.16. Iowa courts have also held that under Iowa Code §561.20, a Debtor has a reasonable time to invest the proceeds from the sale of a homestead in a new homestead, before the proceeds lose their exempt character. Blakeslee v. Paul, 212 Iowa 1385, 238 N.W. 447 (1931). "Where a party claims that a present homestead was procured with the proceeds of a prior homestead, the burden of proof in establishing this claim is upon him." Crail v. Jones, 221

N.W. 467 (Iowa 1928), citing First national Bank of Davenport v. Baker, 57 Iowa 197, 10 N.W. 633 (1881).

Iowa law has not specifically stated what time period is reasonable, but Iowa law has found a period less than twenty-one (21) months to be unreasonable. In Peninsular Stove Co. v. Roark, the owner sold his home and then purchased a subsequent home in a time period which could have at most been twenty-one months. The Court in Peninsular Stove Co. v. Roark found,

> It may be conceded that Defendants, at the time they sold the first homestead, intended at sometime to acquire a new one of about the value of the old, but, instead of doing this within a reasonable time, the Defendant, H.C. Roark, with the knowledge and consent of the wife, invested the money in business, and used it for many months as a part of his investment, in the firm of which he was a member. (Emphasis added).

Peninsular Stove Co. v. Roark, 63 N.W. 326, 327 (Iowa 1895). The Iowa Supreme Court has found a period of 7 ½ months to be "reasonable" in Richards v. Orr, 118 Iowa 724, 92 N.W. 655 (1902).

The Iowa Courts have analyzed many of these exemptions and through their interpretations have either broadened or shrunk these exemption privileges. When a party claims an exemption or is in a position to possibly claim an exemption, then each of the exemptions provided under Iowa law should be considered carefully. Further, if evidence or unusual circumstances exist which raise questions in regard to a potentially exempt asset, then an attorney dealing specifically in this area of law should be consulted.

3) Converting Non-exempt Assets to Exempt Assets. Another area of law which is very important for a party seeking to collect on a judgment to understand is that area of law dealing with a debtor's ability to convert non-exempt assets into exempt assets.

Creditors often become upset when they learn that a debtor has converted a non-exempt asset into an exempt asset and thereby put it out of the reach of the creditor.

In a bankruptcy setting, it is well settled law that the debtors' desire to convert non-exempt assets into exempt assets for the purpose of placing the property out of the reach of creditors is not prohibited by federal law unless there is extrinsic evidence showing that the debtors intended to defraud creditors. Matter of Armstrong, 931 F.2d 1233, 1237 (8th Cir. 1991); In re Johnson, 880 F.2d 78,81 (8th Cir. 1989); Norwest Bank Nebraska, N.A. v. Tveten, 848 F.2d 871, 873-874 (8th Cir. 1988), and Hanson v. First National Bank in Brookings, 848 F.2d 866, 868 (8th Cir. 1988). Moreover, "[t]he courts have stated that the doing of that which is legal should not be penalized. Thus, the simple act of converting non-exempt property into exempt property on the eve of bankruptcy is not a fraud upon creditors. Such a conversion will not, in and of itself, deprive the debtor of his right to the exemptions or bar his discharge." In re Ellingson, 63 B.R. 271, 278 (Bkrtcy. N.D. 1986).

"Nevertheless, this rule is not absolute. Where the debtor acts with actual intent to defraud creditors, his exemptions will be denied. (citations omitted)." Hanson, 848 F.2d at 868. The Ellingson Court found, "The burden of proof is upon the objecting creditor to show actual fraud." Ellingson, 63 B.R. at 279. "Since fraudulent intent rarely is susceptible of direct proof, courts long have accepted extrinsic evidence of fraud. Absent extrinsic evidence of fraud, however, the debtor's mere conversion of non-exempt property to exempt property, even while insolvent is not evidence of fraudulent intent as to creditors." Hanson, 848 F.2d at 868.

In Tveten, the Eighth Circuit Court cited to the United States House and Senate Reports regarding a debtor's right to claim exemptions which state:

> As under current law, the debtor will be permitted to convert non-exempt property into exempt property before filing a bankruptcy petition. The practice is not fraudulent as to creditors, and permits the debtor to make full use of the exemptions to which she is entitled under the law.

Tveten, 848 F.2d at 874 (citations omitted). In Johnson, the Eighth Circuit Court provided guidance to lower courts on the issue and stated:

> We remind the lower courts that there is nothing fraudulent per se about making even significant use of legal exemptions. Ultimately, fixed dollar limits on the use of exemptions must be set by legislatures . . . . In light of the danger that judges will inadvertently fix inconsistent or arbitrary limits on the statutory exemptions, we must err in favor of the debtor.

Johnson, 880 F.2d at 83-84. The Johnson court further noted the debtor in that case had made a conscious, if selfish, effort to fully avail himself of the full range of debtor protections afforded by the Minnesota State Legislature, and the fact that his actions and their results "were wholly self-serving is immaterial because the debtor did nothing more than exercise a prerogative that was fully his under law." Id. at 80.

The crux of the issue is whether there is extrinsic evidence to establish that the debtors acted with the intent to defraud their creditors. Hanson, 848 F.2d at 868. A number of courts have attempted to address the various indices of fraud that could satisfy the denial of an exemption. See Johnson, 880 F.2d at 80. (evidence of fraud includes kiting of assets between various locations and forms of ownership and character, accompanied by overt misrepresentations and fraudulent concealment); Armstrong, 931 F.2d at 1230 (evidence of fraud includes conduct intentionally designed to materially

mislead or deceive creditors about the debtor's position, use of credit to buy exempt property and conveyance for less than adequate consideration). In In re Krantz, 97 B.R. 514 (Bankr. N.D. Iowa 1989), Judge Melloy set forth an extensive list of badges of fraud for courts to consider in denying an exemption and stated:

> Fraud may, and usually must be, proved by circumstantial evidence. Circumstances are usually inconclusive and attacked separately may be blown away. The circumstances must ordinarily be considered together, and the force and weight to be given them are that of them in combination . . .
>
> Because intent to hinder, delay or defraud is so difficult to prove directly, the Iowa Supreme Court relies on "badges or indices of fraud" to determine the debtor's intent.

Krantz, 97 B.R. at 522-523.

In Johnson, the Eighth Circuit Court noted there was nothing fraudulent per se about making even significant use of legal exemptions. The Eighth Circuit Court further noted that fixed dollar limits on the use of exemptions must be set by state legislatures. Id. The Johnson case was decided after the Tveten case in which the Eighth Circuit Court first noted that the size of the claimed exemption could be considered in determining a debtor's intent. In Johnson, Johnson was a doctor, who after consulting with an attorney, converted some of his assets into exempt assets. Id. at 79. Johnson used proceeds from the sale of assets and his professional income to pay off $175,000.00 in debts secured against his home, a $100,000.00 first mortgage and a second mortgage and a marriage dissolution lien in favor of his ex-wife. Id. The value of Johnson's home is $285,000.00 with one remaining encumbrance of undetermined value. Id. He also converted income and assets into annuities and individual retirement accounts worth

$247,784.22, a life insurance of $4,000.00, and musical instruments in the amount of $8,000.00. Id. The remaining assets he surrendered and filed for Chapter 7 bankruptcy. Id.

The bankruptcy court held that Johnson's intent to shift property into exempt forms under state law was not sufficient to constitute fraud. Id. at 80. This bankruptcy decision was prior to the Hanson and Tveten decisions. The Eighth Circuit, however, was now reviewing this case subsequent to these decisions. The Eighth Circuit Court stated, "We recognize that separating ordinary pre-bankruptcy planning from fraudulent action is difficult. The law permits debtors to intentionally transform property into exempt assets. The exemptions allow a debtor to carry over certain types of property with which to make a fresh start." Id. at 81. The Eighth Circuit Court continued, "In both cases, rather than setting forth what fraudulent intent is, as compared to the ordinary use of lawful exemptions, or what extrinsic evidence might prove the existence of fraudulent intent, we satisfied ourselves with illustrating the rule by example. (citations omitted)." Id. The Eighth Circuit Court found,

> We read Tveten and Hanson to reaffirm the rule that conduct sufficient to defeat discharge requires indicia of fraud beyond mere use of the exemptions. Under Tveten, Hanson, and the cases they discuss, extrinsic evidence can be composed of: further conduct intentionally designed to materially mislead or deceive creditors about the debtor's position; conveyances for less than fair value; or, the continued retention, benefit or use of property allegedly conveyed together with evidence that the conveyance was for inadequate consideration. In addition, Tveten establishes that where an exemption, other than a homestead exemption, is not limited in amount, the amount of property converted into exempt forms and the form taken may be considered in determining whether fraudulent intent exists.

Johnson, 880 B.R. at 82.

The Johnson Court went on to discuss the significance and importance of the homestead exemption. Id. at 82-83. The Court held:

> We hold that Tveten does not apply to homestead exemptions absent traditional extrinsic evidence of fraud unrelated to the amount of money involved. In addition, we remind the lower courts that there is nothing fraudulent per se about making even significant use of other legal exemptions. Ultimately, fixed dollar limits on the use of exemptions must be set by legislatures. Tveten and Hanson sanction an exceptional use of judicial discretion. In light of the danger that judges will inadvertently fix inconsistent or arbitrary limits on the statutory exemptions, we must err in favor of the debtor. The power sanctioned in Tveten should be reserved for exceptional cases and has no application to homestead exemptions. (Emphasis added.)

Johnson, 880 F.2d at 84. The Eighth Circuit Court in Johnson, thus, limited the power it had set forth in Tveten, particularly in relation to the homestead exemption.

In Iowa, a creditor who is faced witha debtor who has converted non-exempt assets to exempt assets should also be familiar with the Iowa Fraudulent Transfers Act, which is found in Iowa Code Chapter 684.

4) **Garnishment**.

In determining to what extent, a creditor can garnish the wages of a debtor, the matter is controlled by Iowa Code §642.21. This section provides that a creditor may garnish up to two hundred and fifty dollars in one year if the debtor's earnings are less than twelve thousand dollars for the year. Otherwise, a creditor may garnish as follows:

Up to:	When earnings are:
$400.00	$12,000.00 or more, but less than $16,000.00
$800.00	$16,000.00 or more, but less than $24,000.00

$1,500.00	$24,000.00 or more, but less than $35,000.00
$2,000.00	$35,000.00 or more, but less than $50,000.00
Not more than 10%	$50,000.00 or more

Iowa Code §642.21.

In reviewing the assets of a potential debtor to determine the likelihood of collecting a judgment or to subrogate one's claim, the following assets should be considered: (Note: this is not an exhaustive listing.)

* All bank accounts of the potential debtor;
* All IRA's, annuities, pensions, or other similar plans;
* Wages, income, or earnings;
* Pending or possible judgments or causes of actions;
* Inheritances;
* Collectibles;
* Stocks, bonds, or other investment instruments;
* All assets not identified under Iowa Code §627.6.

In addition, the timing of transfer of any assets and to whom those assets were transferred should also be considered to make sure that no preferential transfers or fraudulent transfers occurred.

CHAPTER 627

EXEMPTIONS

Avails of life and accident insurance and wrongful death
§633.333 633.336

627.1 Repealed by 81 Acts, ch 182, § 5

627.2 Who deemed resident.

Any person coming into this state with the intention of remaining shall be considered a resident.

[C51, §1902; R60, §3308; C73, §3076; C97, §4014; C24, 27, 31, 35, 39, **§11756;** C46, 50, 54, 58, 62, 66, 71, 73, 75, 77, 79, 81, §627.2]

627.3 Failure to claim exemption.

Any person entitled to any of the exemptions mentioned in this chapter does not waive the person's rights thereto by failing to designate or select such exempt property, or by failing to object to a levy thereon, unless the person fails or neglects to do so when required in writing by the officer about to levy thereon.

[C51, §1898, 1899; R60, §3304, 3305, 3308; C73, §3072; C97, §4017; C24, 27, 31, 35, 39, **§11757;** C46, 50, 54, 58, 62, 66, 71, 73, 75, 77, 79, 81, §627.3]

627.4 Absconding debtor.

When a debtor absconds and leaves the debtor's family, such property as is exempt to the debtor under this chapter shall be exempt in the hands of the debtor's spouse and children, or either of them.

[R60, §3309; C73, §3078; C97, §4016; C24, 27, 31, 35, 39, **§11758;** C46, 50, 54, 58, 62, 66, 71, 73, 75, 77, 79, 81, §627.4]

627.5 Purchase money.

None of the exemptions prescribed in this chapter shall be allowed against an execution issued for the purchase money of property claimed to be exempt, and on which such execution is levied.

[C73, §3077; C97, §4015; C24, 27, 31, 35, 39, **§11759;** C46, 50, 54, 58, 62, 66, 71, 73, 75, 77, 79, 81, §627.5]

627.6 General exemptions.

A debtor who is a resident of this state may hold exempt from execution the following property:

1. All wearing apparel of the debtor and the debtor's dependents kept for actual use and the trunks or other receptacles necessary for the wearing apparel, not to exceed in value one thousand dollars in the aggregate. In addition, the debtor's interest in any wedding or engagement ring owned and received by the debtor or the debtor's dependents on or before the date of marriage.

2. One shotgun, and either one rifle or one musket.

3. Private libraries, family bibles, portraits, pictures and paintings not to exceed in value one thousand dollars in the aggregate.

4. An interment space or an interest in a public or private burying ground, not exceeding one acre for any defendant.

5. The debtor's interest in household furnishings, household goods, and appliances held primarily for the personal, family, or household use of the debtor or a dependent of the debtor, not to exceed in value two thousand dollars in the aggregate.

6. The interest of an individual in any accrued dividend or interest, loan or cash surrender value of, or any other interest in a life insurance policy owned by the individual if the beneficiary of the policy is the individual's spouse, child, or dependent. However, the amount of the exemption shall not exceed ten thousand dollars in the aggregate of any interest or value in insurance acquired within two years of the date execution is issued or exemptions are claimed, or for additions within the same time period to a prior existing policy which additions are in excess of the amount necessary to fund the amount of face value coverage of the policies for the two-year period. For purposes of this paragraph, acquisitions shall not include such interest in new policies used to replace prior policies to the extent of any accrued dividend or interest, loan or cash surrender value of, or any other interest in the prior policies at the time of their cancellation.

In the absence of a written agreement or assign-

ment to the contrary, upon the death of the insured any benefit payable to the spouse, child, or dependent of the individual under a life insurance policy shall inure to the separate use of the beneficiary independently of the insured's creditors.

A benefit or indemnity paid under an accident, health, or disability insurance policy is exempt to the insured or in case of the insured's death to the spouse, child, or dependent of the insured, from the insured's debts.

In case of an insured's death the avails of all matured policies of life, accident, health, or disability insurance payable to the surviving spouse, child, or dependent are exempt from liability for all debts of the beneficiary contracted prior to death of the insured, but the amount thus exempted shall not exceed fifteen thousand dollars in the aggregate.

7. Professionally prescribed health aids for the debtor or a dependent of the debtor.

8. The debtor's rights in:

a. A social security benefit, unemployment compensation, or a local public assistance benefit.

b. A veteran's benefit.

c. A disability or illness benefit.

d. Alimony, support, or separate maintenance, to the extent reasonably necessary for the support of the debtor and dependents of the debtor.

e. A payment or a portion of a payment under a pension, annuity, or similar plan or contract on account of illness, disability, death, age, or length of service, unless the payment or a portion of the payment results from contributions to the plan or contract by the debtor within one year prior to the filing of a bankruptcy petition, which contributions are above the normal and customary contributions under the plan or contract, in which case the portion of the payment attributable to the contributions above the normal and customary rate is not exempt.

9. Any combination of the following, not to exceed a value of five thousand dollars in the aggregate:

a. Musical instruments, not including radios, television sets, or record or tape playing machines, held primarily for the personal, family, or household use of the debtor or a dependent of the debtor.

b. One motor vehicle.

c. In the event of a bankruptcy proceeding, the debtor's interest in accrued wages and in state and federal tax refunds as of the date of filing of the petition in bankruptcy, not to exceed one thousand dollars in the aggregate. This exemption is in addition to the limitations contained in sections 642.21 and 537.5105.

10. If the debtor is engaged in any profession or occupation other than farming, the proper implements, professional books, or tools of the trade of the debtor or a dependent of the debtor, not to exceed in value ten thousand dollars in the aggregate.

11. If the debtor is engaged in farming and does not exercise the delay of the enforceability of a deficiency judgment or general execution under section 654.6 in relation to the execution under which the exemption is claimed, any combination of the following, not to exceed a value of ten thousand dollars in the aggregate:

a. Implements and equipment reasonably related to a normal farming operation. This exemption is in addition to a motor vehicle held exempt under subsection 9.

b. Livestock and feed for the livestock reasonably related to a normal farming operation.

12. If the debtor is engaged in farming the agricultural land upon the commencement of an action for the foreclosure of a mortgage on the agricultural land or for the enforcement of an obligation secured by a mortgage on the agricultural land, if a deficiency judgment is issued against the debtor, and if the debtor does not exercise the delay of the enforceability of the deficiency judgment or general execution under section 654.6 in relation to the execution under which the exemption is claimed, the disposable earnings of the debtor are exempt from garnishment to enforce the deficiency judgment after two years from the entry of the deficiency judgment, sections 642.21 and 642.22 notwithstanding. However, earnings paid to the debtor directly or indirectly by the debtor are not exempt.

13. The debtor's interest, not to exceed one hundred dollars in the aggregate, in any cash on hand, bank deposits, credit union share drafts, or other deposits, wherever situated, or other personal property not otherwise specifically provided for in this chapter.

14. The debtor's interest, not to exceed five hundred dollars in the aggregate, in any combination of the following property:

a. Any residential rental deposit held by a landlord as a security deposit, as well as any interest earned on such deposit as a result of any statute or rule requiring that such deposit be placed in an interest-bearing account.

b. Any residential utility deposit held by any electric, gas, telephone, or water company as a condition for initiation or reinstatement of such utility service, as well as any interest earned on such deposit as a result of any statute or rule requiring that such deposit be placed in an interest-bearing account.

c. Any rent paid to the landlord in advance of the date due under any unexpired residential lease.

Notwithstanding the provisions of this subsection, a debtor shall not be permitted to claim these exemptions against a landlord or utility company, with regard to sums held under the terms of a rental agreement, or for utility services furnished to the debtor.

[C51, §1898, 1899; R60, §3304, 3305, 3308; C73, §3072; C97, §4008; C24, 27, 31, 35, 39, **§11760;** C46, 50, 54, 58, 62, 66, 71, 73, 75, 77, 79, 81, §627.6; 81 Acts, ch 182, §3]

86 Acts, ch 1216, §4–6; 88 Acts, ch 1255, §3–7; 92 Acts, ch 1061, §1, 2; 96 Acts, ch 1136, §1

Exemptions denied, §123.113
Judgment for exempt property §643.22
NEW subsection 14

627.6A Add
Ch 175 §237 - 97 Acts

MEDICAL MALPRACTICE CLAIMS AND HEALTH MAINTENANCE ORGANIZATIONS

by
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I. ERISA PREEMPTION STANDARDS.

A. Broad Scope of ERISA.

1. Congress designed ERISA to preempt a substantial portion of state laws addressing employee benefits, displacing all state laws relating to an ERISA employee benefit plan. 29 U.S.C. § 1144(a).

2. ERISA also gives federal courts exclusive jurisdiction over many ERISA claims. 29 U.S.C. § 1132(e).

3. Plaintiffs are not entitled to a trial by jury, and compensatory and punitive damages are not permitted. 29 U.S.C. § 1132(a)(1)(B), *Houghton v. SIPCO*, 38 F.3d 953 (8th Cir. 1994).

B. Conflict Preemption -- 29 U.S.C. § 1144(a).

1. ERISA preempts a state law claim if the claim "relates to" an ERISA employee benefit plan. 29 U.S.C. § 1144(a).

2. Once a court determines that Section 1144(a) applies, the state law claim is preempted and subject to dismissal.

3. Distinguish complete preemption 29 U.S.C. § 1132.

   a. Removal doctrine.

b. Complete ERISA preemption occurs when a claim is subject to conflict preemption under Section 1144(a) and is brought under one of the specific causes of action described in Section 1132(a). Section 1132(a)(1)(B) permits claims based on an administrator's refusal to provide information or services, to clarify rights under a plan, breach of fiduciary duty, and direct violations of ERISA rules.

II. ERISA PREEMPTION AND HEALTH MAINTENANCE ORGANIZATIONS.

A. General.

1. ERISA's broad preemption has generally protected HMO's from litigating many types of claims brought in state courts. Even if plaintiffs only bring state law claims, courts often find the claims are related to an ERISA plan and thus preempted.

2. In recent years, however, federal courts have been more willing to hold that ERISA does not preempt certain state law claims. This section will address various claims plaintiffs have tried to make to avoid ERISA preemption.

B. Benefit Determination and Utilization Review.

1. ERISA preempts claims by an insured regarding treatment decisions that may or may not be covered under a plan. 29 U.S.C. § 1132(a). This is clearly an issue that relates to an ERISA plan for which state law would be preempted.

2. ERISA preempts claims for improper handling of benefit claims.

   a. A claim that an insurance company negligently delayed approval for a bone marrow transplant treatment is preempted by ERISA because the state wrongful death statute directly relates to the administration and disbursement of ERISA plan benefits. *Spain v. Aetna Life Ins. Co.*, 11 F.3d 129 (9th Cir. 1993).

b. A plaintiff cannot characterize a plan administrator's role as providing medical advice to avoid ERISA preemption when the administrator only determined that a hospital stay had not been properly approved so that plaintiff was only entitled to home nursing care. *Corcoran v. United Healthcare, Inc.*, 965 F.2d 1321 (5th Cir. 1992).

C. Failure to Disclose.

1. Claims against HMO's alleging that a plan failed to provide adequate information are also preempted, but other courts have recently held that ERISA does permit this type of claim. Courts have not addressed the type of remedy available to a plaintiff in this position.

2. ERISA permits a plaintiff to pursue a cause of action for breach of fiduciary duty against HMO that failed to disclose that its physicians have an incentive to avoid specialist referrals, *Shea v. Esensten*, 107 F.3d 625 (8th Cir. 1997); ERISA will also preempt a similar claim brought under a state tort action. *Lakorko v. Pennsylvania Hospital*, 1998 WL 405055 (E.D. Pa. 1998); *but see Weiss v. CIGNA Healthcare, Inc.*, 972 F. Supp. 748 (S.D.N.Y. 1997) (ERISA imposes no duty on plan administrators to inform participants about financial arrangements with physicians).

D. Vicarious Liability.

1. Vicarious liability of HMO's for medical malpractice is an area in which there has been a great deal of recent litigation. Currently there is disagreement among the circuit regarding whether claims arising from the negligence of plan physicians in which the plan administrator is also sued is sufficiently related to ERISA to merit preemption. Some federal courts have begun denying removal attempts and permitting these claims to go forward in state courts.

2. Cases Supporting Preemption:

a. ***Jass v. Prudential Health Care Plan, Inc.***, 88 F.3d 1482 (7th Cir. 1996). In *Jass*, the court held that conflict

preemption did in fact bar a plaintiff's medical malpractice claim against a plan administrator. In *Rice v. Panchal*, 65 F.3d 637 (1995), the Seventh Circuit had previously held that a medical malpractice claim was not covered under complete preemption.

b. ***Nealy v. U.S. Healthcare HMO***, 844 F. Supp. 966 (S.D.N.Y. 1994). Plaintiff's claim that ERISA plan administrator is liable for physician's refusal to properly treat patient is preempted by ERISA's "relates to" language.

c. ***Ricci v. Gooberman***, 840 F. Supp. 316 (D.N.J. 1993). Physician's failure to properly evaluate mammogram does not permit state action against insurance company under a vicarious liability theory.

3. No Conflict Preemption:

a. ***Pacificare of Oklahoma v. Burrage***, 59 F.3d 151 (10th Cir. 1995). In cases in which neither the administration of benefits nor the level or quality of care are at issue, ERISA does not preempt medical malpractice or vicarious liability claims. Reference to a plan by itself does not invoke ERISA preemption.

b. ***Dukes v. U.S. Healthcare, Inc.***, 57 F.3d 350 (3rd Cir. 1995). Because the HMO was involved in the supervision and selection of physicians for plan participants, plaintiff's vicarious liability claims for the negligent acts of plan doctors are not preempted by ERISA.

c. ***Moreno v. Health Partners Health Plan***, 1998 WL 229809 (D. Ariz. 1998). Following the 9th Circuit's three-part test for determining whether ERISA preempts, the court held that a vicarious liability claim for medical malpractice is not preempted. The three-part test, based on the Supreme Court's *Travelers* decision (514 U.S. 645 (1995)) looks at whether the state law is of general application, does not

depend on ERISA, and does not affect the relationship between principal ERISA participants.

d. ***McClellan v. HMO of Pennsylvania,*** 604 A.2d 1053 (Penn. 1992). ERISA preemption may also be avoided by claiming the HMO negligently selected and retained physicians who commit malpractice.

III. STRATEGIES FOR AVOIDING STATE LAW CLAIMS FOR HMO'S.

A. Argue that Plaintiff's Claim Falls within ERISA Preemption.

1. A medical malpractice claim may not be preempted by ERISA, but if the claim can instead be characterized as a denial of benefits, this will fall within the complete preemption rule.

2. Even if the claim is not completely preempted, it can still be argued that it is still sufficiently related to ERISA as to be conflict preempted.

B. Argue Limits on Direct Medical Decision-Making.

1. The better the HMO can portray its services as mere administrative duties, the more likely courts will be to preempt claims against it.

2. It is only when direct medical advice or supervision is performed that problems arise.

C. Attack State Law Claim under *Travelers* Approach.

1. Arguments can be made that state claims imposing liability on HMO's directly affect the relationship among principal ERISA parties.

D. Limitations on Removal.

CROSS EXAMINATION GOES TO THE MOVIES

JAMES W. SEMPLE
Morris, James, Hitchens & Williams
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I. INTRODUCTION

II, Irving Younger's Ten Commandments

1. Be Brief
2. Use Plain Words
3. Use Only Leading Questions
4. Be Prepared
5. Listen
6. Do Not Quarrel
7. Avoid Repetition
8. Disallow Witness Explanation
9. Limit Questioning
10. Save for Summation

III. MONTAGE

IV. MY COUSIN VINNY

A. Scenario

The cross-examining attorney here is Vincent Gambini, played by Joe Pesci. This is his first trial. He is appearing in the court only because he woefully misrepresented his credentials and name to the judge played by the late Fred Gwynn. Mr. Gambini's cousin, played by Ralph Macchio, is on trial for murder and armed robbery. Mr. Gambini passed the bar after six previous unsuccessful attempts.

In these examples, he is cross-examining three eyewitnesses who heard gun shots and then saw two men leave the convenience store, the Sack of Suds, where the robbery and murder took place. Each witness identified the defendants as the two men who were leaving the store.

B. Techniques

1. He is generally brief.
2. He generally uses plain words.
3. He uses leading questions effectively [". . . isn't it possible . . . "] but not exclusively.
4. He is evidently prepared. [His use of the photographs with the second witness; the tape measure, and the structure of cross of the first witness.]
5. Gambini listens to the witnesses. [The effectiveness of his cross-examination of the first witness is almost solely dependent upon his listening to the direct examination and the testimony that he was making breakfast when he observed the defendants.]

- Gambini is somewhat quarrelsome with the first witness ("Do the laws of Physics . . . ") and he is also somewhat repetitious ("Are you sure . . . ")
- He is effective in controlling the witnesses by eliminating or minimizing their opportunities to explain. [This is particularly so with the first witness.]
- There is little argument in Gambini's questions. [He changed his tone and paid appropriate deference to the elderly woman with the poor eyesight.]
- The examinations were generally succinct and not too lengthy.

Issues

- Is use of a tape measure governed by D.R.E. 901-902?

- Gambini's dress, tone, and use of language [See D.R.P.C. 3.5(c)]

- Gambini's approaching the jury and witnesses during his examination. [Some judges forbid movement from the podium without prior consent.]

- Gambini's references to "the entire grit eating world". Could the court take judicial notice of that fact? [See D.R.E. 201 ". . . one not subject to reasonable dispute in that it is generally known within the territorial jurisdiction . . . or . . . capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned."]

- Gambini's admonition to the judge. ["... and only Mrs Reilly". See D.C.J.R. Canon 2; D.R.P.C. 35]

WITNESS FOR THE PROSECUTION

Charles Laughton plays Sir Wilford in this classic British courtroom drama. In this case he is cross-examining the wife, played by Marlena Deitrich, who is married to the accused, Tyrone Power. Power is accused of murdering an elderly spinster who befriended him and left her entire fortune to him in her will.

- He challenged her credibility by establishing her tendency to lie about collateral issues [about marital status] and then established a pattern of lying, and focused on difference between her statements to police and her trial testimony ["Were you lying then or lying now"]

- He controlled the witness by insisting upon "just yes or no please" [Disallow witness explanation].

- He played on juror prejudices by addressing her as "Frau Helm"

- He used statements rather than questions ["you lied when . . . "]

- He used repetition to get an answer [questions about Max]

Issues

1. D.R.P.C. 3.4 requires fairness to opposing party and counsel [no assertions of personal knowledge of facts; no personal opinions re: credibility of a witness].

2. Did he violate D.R.P.C. 4.1 that demands truthfulness in statements to others [shall not make false statements of material facts].

3. Rule 8.4 Misconduct [. . . shall not engage in conduct involving dishonesty, fraud, deceit or misrepresentation]; In re Enstar Corp., Del.Ch., 593 A.2d 543 (1991) rev'd on other grounds, 604 A.2d 404 (1992). Did use of letter comply with Rules? He reads before showing to witness or her counsel; he reads it before marking as exhibit. See U.R.E. 612-613.

4. Propriety of Statement: "If you like, I can have an expert identify your handwriting."

5. Judge's admonition to witness regarding perjury [See Canons 1 and 2; Buckley v. R.H. Johnson, Del.Super., 25 A.2d 392 (1942) (trial judge must avoid language or conduct which would lead jury to suspect judge is favorable to one party)]

1998 LEGISLATIVE REPORT
BY
ROBERT M. KREAMER

I am pleased to report that the 1998 session of the Iowa Legislature was another session of positive legislative accomplishment for the Iowa Defense Counsel Association. While in 1997 the Iowa Defense Counsel Association, along with other organizations interested in tort-reform, successfully promoted the legislative approval of House File 693, the 1998 legislative issues were ones having negative implications, if passed, to the Iowa Defense Counsel Association. There were four bills introduced in 1998 that were strongly opposed by your Board of Directors and were eventually defeated through lobbying efforts. These bills were as follows:

1. House File 2457. This is the tobacco legislation sought by Attorney General Tom Miller in his litigation against tobacco companies. While the Iowa Defense Counsel Association obviously will not take sides in the Iowa tobacco litigation, this legislation was viewed by the Board of Directors as being unfair and targeting one industry, which is against our basic philosophy on any tort legislation. This legislation was approved by the House Judiciary Committee but received no further action during the legislative session. There were other attempts, however, to use this legislation as an amendment to various legislative bills during the session but all such attempts were defeated.

2. House File 2083. This legislation was initiated by Attorney General Tom Miller and would, among other things, set up a system of court-sponsored mediation in all civil cases in Iowa. This legislation never received support in the House Judiciary Committee and, consequently, died in committee.

3. House File 2086. This legislation would change the statute of limitations for wrongful death in certain Iowa cases. It would provide that the statute of limitations does not begin until the date of death irrespective of the plaintiff's knowledge of the cause of the condition that led to the death. This legislation failed to win the approval of the House Judiciary Committee.

4. House File 2245. This legislation would have placed a cap of $250,000.00 on non-economic damages awarded in Iowa cases. This legislation failed to win the approval of the House Judiciary Committee.

Finally, in addition to defeating the above legislation, the Iowa Defense Counsel Association, and other interest groups that helped to pass the 1997 tort-reform effort, were successful in resisting any attempts to modify these 1997 tort-reform accomplishments.

I want to thank the Iowa Defense Counsel Association for allowing me the opportunity to represent them during the 1998 legislative session. A special thanks to Mike Weston, IDCA Legislative Chair, for the time and support he so freely gave to me.

Robert M. Kreamer

RMK:cc

FEB 26 1998
Place On Calendar

HOUSE FILE 2457
BY COMMITTEE ON JUDICIARY

(SUCCESSOR TO HSB 564)

Passed House, Date _____ Passed Senate, Date _____
Vote: Ayes _____ Nays _____ Vote: Ayes _____ Nays _____
Approved _____

A BILL FOR

An Act establishing a civil cause of action on behalf of the state to recover, from manufacturers of tobacco products, medical assistance payments made by the state due to injury, disease, or disability caused by the use of tobacco by the recipients of medical assistance, providing for a jury trial, making related changes, and providing for severability.

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

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TLSB 3650HV 77

S.F. _____ H.F. 2457

Section 1. NEW SECTION. 249A.50 STATE RECOVERY OF TOBACCO-RELATED MEDICAL ASSISTANCE PAYMENTS.

1. For purposes of this section:

a. "Manufacturer" means any person engaged in the process of designing, fabricating, assembling, producing, constructing, or otherwise preparing a product containing tobacco, including any packaging or labeling or repackaging or relabeling of such a product, with the intention of selling the product for gain or profit. "Manufacturer" does not include persons whose activity is limited to growing natural leaf tobacco or to selling tobacco products at wholesale or retail to consumers.

b. "Tobacco" means any tobacco product, including but not limited to loose tobacco suitable for smoking, snuff, snuff flour, cavendish, plug and twist tobacco, fine cuts and other chewing tobaccos, shorts, refuse scraps, clippings, cuttings, and sweepings of tobacco, and other kinds and forms of tobacco suitable for chewing and smoking, including cigars and cigarettes.

2. Notwithstanding any limitations upon recovery of medical assistance payments contained in sections 249A.5 and 249A.6, the state and the department shall have a civil cause of action to recover the full amount of medical assistance provided under this chapter to or on behalf of recipients of medical assistance, using any or all legal theories existing in the Code or at common law, against any manufacturer for injury, disease, or disability caused by the use of tobacco, and to recover all related expenses and fees, including attorney fees. The attorney general may institute the cause of action on behalf of the state and the department.

3. Trial shall be by jury, if either party demands a jury.

Sec. 2. SEVERABILITY. In the event any provision of this Act is ruled void or unenforceable for any reason, the court shall give full effect to all other provisions.

EXPLANATION

S.F. _____ H.F. 2457

This bill establishes a civil cause of action, in favor of the state and against manufacturers of tobacco products, to recover the full amount of medical assistance payments made by the state due to injury, disease, or disability caused by the use of tobacco by medical assistance recipients. The bill defines the terms "manufacturer" and "tobacco".

The bill authorizes the attorney general to institute a suit based on the cause of action and allows recovery of related expenses and fees, including attorney fees. The attorney general may utilize all statutory and common law theories of recovery in such a suit.

A jury trial may be requested by any party.

The bill includes a severability clause.

JAN 2 3 1998
JUDICIARY

HOUSE FILE 2083
BY CHAPMAN

Passed House, Date _____ Passed Senate, Date _____
Vote: Ayes _____ Nays _____ Vote: Ayes _____ Nays _____
Approved _____

A BILL FOR

An Act providing for court-referred mediation, and related standards and procedures.

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

TLSB 3036HH 77
jls/cf/24

Section 1. NEW SECTION. 679D.1 DEFINITIONS.

As used in this chapter, unless the context requires otherwise:

1. "Mediation" means a process in which an impartial person facilitates the resolution of a dispute by promoting voluntary agreement of the parties to the dispute. In a mediation, the decision-making authority rests with the parties. A mediation commences at the time of initial contact with a mediator or mediation program and includes all contacts between the mediator or a mediation program and any party until such time as a resolution is reached by the parties or the mediation process concludes.

2. "Mediation communication" means any communication or behavior in connection with a mediation by or between any party, mediator, mediation program, or any other person present during a mediation.

3. "Mediation document" means any written material, including copies of written material, prepared for the purpose of or in the course of, or pursuant to, a mediation, including, but not limited to, memoranda, notes, files, records, and work product of a mediator, mediation program, or party, except that a "mediation document" shall not include either of the following:

a. An agreement by the parties which specifies that the mediation documents may be disclosed or enforced.

b. Summary records of a mediation program necessary to evaluate or monitor the performance of the program.

4. "Mediation program" means a plan or organization through which mediators and mediations may be provided.

5. "Mediator" means an impartial person who facilitates the resolution of a dispute between parties in the mediation process.

6. "Party" means a mediation participant other than the mediator and may be a person, public officer, corporation, association, or other organization or entity, either public or

private.

Sec. 2. NEW SECTION. 679D.2 INITIATION OF MEDIATION.

1. A district court may, on its own motion or by motion of any or all parties, refer a case pending before the court to mediation under this chapter if the court determines that the matter is appropriate for resolution by mediation. The court may refer a case to mediation at any time prior to the entering of a final order or the granting of a final decree.

2. The court shall, by written order to all parties, notify the parties of its determination to refer the matter to mediation. The order shall provide for all of the following:

a. Appointment of a mediator who meets the requirements in section 679D.3.

b. The maximum number of days that the mediation may continue, based upon the relative complexity of the issues involved in the case, or other time parameters within which the mediation is to operate.

3. Extensions of time for mediation may be granted by the court, upon application to the court by any party in advance of the expiration of the time for mediation.

4. Within ten days after the issuance of the court order under this section, any party may file a written objection to the referral that details the reasons for the objection. If the court finds that the objection establishes a reasonable basis for concluding that mediation would not be an appropriate method for resolving the case, the court shall rescind its order for mediation.

5. An initial mediation session shall be held no earlier than twenty days, but not later than fifty days, after the date of the original order for mediation, unless otherwise agreed by all parties.

Sec. 3. NEW SECTION. 679D.3 MEDIATOR QUALIFICATIONS AND DUTIES.

1. a. Prior to providing court-referred mediation services, a mediator shall complete a minimum of forty hours

of classroom training in dispute resolution techniques in a course or courses conducted by dispute resolution organizations approved by the judicial council, with the assistance of the state court administrator.

b. In addition to the requirements in paragraph "a", a mediator shall complete an additional twenty-four hours of training in the fields of family dynamics, child development, and family law prior to providing mediation services in a case relating to a parent-child relationship.

2. Notwithstanding the requirements of subsection 1, a court may, in its discretion, appoint a mediator who does not meet the qualifications in subsection 1 if the court bases its appointment on other training or experience of the mediator that would be beneficial to resolution of the case.

3. A court-appointed mediator shall encourage and assist the parties to the case in reaching a mutually acceptable resolution of their dispute through discussion and negotiation. The mediator shall not compel or coerce the parties into entering into a settlement agreement. The mediator shall have no authority to make or impose any agreement, adjudication, sanction, or penalty upon the parties.

4. The mediator shall abide by the standards for confidentiality in chapter 679C, if enacted by the general assembly, and shall be immune from civil liability according to the provisions of section 679C.4, if enacted by the general assembly.

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5. The mediator shall terminate the mediation process when the mediator determines that the parties are unable to agree, or when the time frame for mediation established by the court has expired, and no extension has been granted. The parties shall sign a statement certifying to the court that the parties have been unable to reach agreement. The termination of mediation shall be without prejudice to any party to the proceeding.

Sec. 4. NEW SECTION. 679D.4 COMPENSATION OF MEDIATOR.

1. The parties to a case shall bear the costs for a court-appointed mediator equally. However, if the court determines that a party is unable to pay that party's share of the costs, the party shall be charged based upon ability to pay, according to a sliding scale. No party shall be ordered to pay more than their share of the costs of mediation.

2. The supreme court may set a reasonable daily fee for the services of a mediator appointed under this chapter and may establish a sliding scale for payment of costs based upon a party's ability to pay.

Sec. 5. NEW SECTION. 679D.5 REPRESENTATION BY AN ATTORNEY.

A party participating in a mediation under this chapter shall have the right to be represented and advised by an attorney during the course of mediation.

Sec. 6. NEW SECTION. 679D.6 EFFECT OF MEDIATION.

1. If the parties to a case reach a settlement during court-referred mediation and execute a written settlement agreement, the agreement is enforceable and may be utilized by the court in the same manner as any other written settlement agreement.

2. The court may, with agreement of all parties, incorporate the terms of the settlement agreement into the court's final decree.

3. A settlement agreement does not affect an outstanding court order unless the terms of the agreement address the outstanding order and are incorporated into a subsequent decree.

4. Participation in mediation under this chapter shall not toll any applicable statute of limitations.

5. Participation in mediation under this chapter shall not toll the running of any other time period under the rules of civil procedure unless so ordered by the court.

Sec. 7. NEW SECTION. 679D.7 RELATION TO OTHER LAWS.

1. This chapter shall apply to court-referred mediation in domestic relations cases to the extent that this chapter is not inconsistent with section 598.7A.

2. This chapter shall not apply to any proceeding:

a. Conducted under chapter 654A, 654B, or 654C.

b. Regarding compensation issues under chapter 20 or 86.

c. Conducted in accordance with chapter 216.

Sec. 8. NEW SECTION. 679D.8 FORMS AND RULES.

The supreme court may establish rules, procedures, and forms consistent with this chapter, including establishing a procedure for identifying and listing qualified mediators, setting reasonable mediator's fees, and establishing a sliding scale for payment of mediator's fees by persons unable to pay.

EXPLANATION

This bill creates a new Code chapter 679D regulating court-referred mediation.

New Code section 679D.1 provides definitions for new Code chapter 679D.

New Code section 679D.2 provides that at any time prior to a final order or decree, a court may refer a pending case to mediation upon its own motion or upon the motion of any party, if the court determines that the case is appropriate for resolution by mediation. The court shall issue a written order to all parties appointing a mediator who meets certain requirements as provided in new Code section 679D.3, and establishing the time parameters for the mediation process. Any party may object in writing to the referral to mediation within 10 days, and if the objection establishes a reasonable basis for concluding that mediation would not be appropriate for resolving the case, the court shall not refer the case to mediation. The mediation may start according to a date agreed to by the parties, or otherwise between 20 and 50 days after the order for mediation.

New Code section 679D.3 provides the minimum qualifications for a court-appointed mediator, including additional

requirements for mediators in cases involving a parent-child relationship. A court may appoint a mediator who does not meet the specified qualifications if the court believes the person possesses special knowledge or experience that would be beneficial to the resolution of the case. The mediator shall assist the parties in reaching agreement, but shall not coerce or impose an agreement or penalty on the parties. The mediator shall abide by the confidentiality standards in Code chapter 679C, as proposed in House File 2025, if enacted. The mediator shall terminate the mediation when the mediator determines the parties cannot reach agreement, or when the time for mediation has expired. Termination shall not prejudice the position of any party to the case.

The parties shall bear the costs of mediation equally. Any party participating in a mediation may be represented by an attorney. Participation in mediation does not toll any applicable statute of limitations, and tolls any other period provided for in the rules of civil procedure only if so ordered by the court.

A written settlement agreement reached during mediation shall be utilized in the same manner as any other written settlement agreement.

New Code section 679D.7 provides that new Code chapter 679 does not apply to determining which domestic relations cases are appropriate for mediation under Code section 598.7A, and does not apply to certain mediations regulated by other chapters.

The supreme court is authorized to set a daily fee for mediators, and to establish rules, procedures, and forms consistent with the provisions of the new Code chapter, including a procedure for identifying and listing qualified mediators, and establishing a sliding scale for payment of mediation costs by persons unable to pay.

JAN 2 3 1998
JUDICIARY

HOUSE FILE 2086
BY TYRRELL

Passed House, Date _____ Passed Senate, Date _____
Vote: Ayes _____ Nays _____ Vote: Ayes _____ Nays _____
Approved _____

A BILL FOR

An Act relating to the time for accrual of an action for wrongful death based on personal injury.

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

TLSB 3275YH 77
jls/jl/8

S.F. _____ H.F. 2086

Section 1. Section 614.1, subsection 2, Code Supplement 1997, is amended to read as follows:

2. INJURIES TO PERSON OR REPUTATION -- RELATIVE RIGHTS -- STATUTE PENALTY. Those founded on injuries to the person or reputation, including injuries to relative rights, whether based on contract or tort, or for a statute penalty, within two years. Notwithstanding this limitation, actions for wrongful death based on personal injury that are not otherwise limited by this or other sections of the Code shall be deemed to accrue from the date of death, rather than the date of injury.

EXPLANATION

This bill changes the time for accrual of an action for wrongful death based on personal injury. Under this bill, the statute of limitations would expire two years from the date of death, rather than the date of injury.

This bill does not affect wrongful death actions subject to other limitations under the Code, including malpractice actions and product liability actions.

S

LSB 3275YH 77
jls/jl/8

FEB 12 1998
JUDICIARY

HOUSE FILE 2245
BY LARSON

Passed House, Date _____ Passed Senate, Date _____
Vote: Ayes _____ Nays _____ Vote: Ayes _____ Nays _____
Approved _____

A BILL FOR

An Act limiting damages for noneconomic losses, and making related changes.

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

TLSB 3801HH 77
jls/jl/8

S.F. _____ H.F. 2043

Section 1. Section 624.18, subsection 3, Code Supplement 1997, is amended to read as follows:

3. a. In a civil action in which liability is admitted or established according to special verdict, the present value of the damages awarded for noneconomic losses incurred or to be incurred in the future by the plaintiff by reason of personal injury or death shall not exceed two hundred fifty thousand dollars. As used in this section, "noneconomic losses" includes but is not limited to pain and suffering, mental anguish, emotional distress, humiliation, loss of consortium, lost opportunity, loss of expectations, and punitive or exemplary damages.

b. In an action tried to a jury where damages for noneconomic losses are sought, the court shall submit an instruction to the jury that the maximum allowable award for noneconomic losses in a case of the most egregious nature is two hundred fifty thousand dollars, and that damages for noneconomic losses shall be awarded accordingly. A separate interrogatory verdict shall be submitted for damages for noneconomic losses unless waived by all parties.

4. Under no circumstances shall there be a reduction to present value more than one time by either the trier of fact or the court.

EXPLANATION

This bill adds a subsection to Code section 624.18 pertaining to designation and calculation of damages. The new subsection would limit damages for noneconomic losses to $250,000, and defines "noneconomic losses". The new subsection would also require a special interrogatory and instructions in a jury trial where noneconomic losses are claimed.

S

LSB 3801HH 77
jls/jl/8

UNINSURED (UM)/UNDERINSURED (UIM) MOTORISTS

•••

INSURANCE ISSUES
By Sharon Greer
AND
VOIR DIRE DEMONSTRATION
By Anne Henry

I. **Introduction**

This outline addresses current issues and decisions involving uninsured motorist insurance (UM) or underinsured motorist coverage (UIM) claims.

A. **UM or UIM claim?**

The purpose of UM coverage is to insure a minimum level of compensation to victims of UM drivers whereas the goal or purpose of UIM coverage is full compensation of the victim to the extent of the injuries suffered or damages sustained. Thomas v. American Family Mut. Ins. Co., 485 N.W.2d 298 (Iowa 1992). An uninsured tort-feasor is one who has no liability insurance to pay for a loss. Id. at 299. A UIM tort-feasor is one who has liability insurance in an amount insufficient to cover the possible loss. Id.

The Iowa Supreme Court takes a broad coverage view of UIM coverage and a narrow view of UM coverage. Id. In a UM coverage question, courts will only be concerned with whether the insured receives minimum compensation as set by the statute. Id. In contrast, a claim under UIM coverage will be examined to see whether the goal of making the victim whole has been met.

B. **Iowa Code Chapter 516A**

The requirements and intent of Iowa Code Chapter 516A are a part of every UM or UIM policy written in Iowa. Benzer v. Iowa Mut. Tornado Ins. Ass'n, 216 N.W.2d 385 (Iowa 1975). If the requirements of the statute and the policy language at issue conflict, the statutory language controls. Rodman v. State Farm Mut. Auto. Ins. Co., 208 N.W.2d 903 (Iowa 1973).

Every automobile liability policy sold in Iowa must provide UM/UIM coverage unless it is rejected in writing by the named insured. However, this requirement does not apply to an umbrella or excess insurance policy. Jalas v. State Farm Fire and Cas. Co., 505 N.W.2d 811 (Iowa 1993).

Terms of the policy concerning UM benefits are read together with the statute to effectuate intent of

contracting parties. Hollingsworth v. Schminkey, 553 N.W.2d 591 (Iowa 1996).

II. **Who is covered?**

A. **Family Members.**

UM/UIM policies extend coverage to the "insured." Often the "insured" includes a "family member" under the policy's terms. A "family member" generally must be resident of the household of the named insured. In determining whether a claimant is a resident of the named insured's household, the Supreme Court has laid out seven factors to be considered:

1. Whether the claimant was living under the same roof as the named insured at the time of the loss;

2. Whether the relationship between the claimant and the named insured was close and intimate;

3. Whether the claimant's stay at the household of the named insured is likely to be substantial;

4. The age of the claimant;

5. Whether the claimant had a residence separate from that of the named insured;

6. Whether the claimant was self-sufficient at the time of the loss; and

7. The frequency and duration of the claimant's stay in the named insured's household.

These factors are not exclusive. No one factor controls. AMCO Ins. Co. v. Rossman, 518 N.W.2d 333, 335 (Iowa 1994).

B. **"Occupants" or "user".**

Another category of persons who receive coverage for damages caused by UM or UIM drivers are persons occupying or using the covered auto. As always, the definitions in the policy of an "occupant" will be very important in determining whether a claimant is covered under the policy. A comparison of two recent cases will demonstrates the importance of different policy definitions upon the recovery of UM or UIM benefits.

In Tropf v. American Family Mut. Ins. Co., 558 N.W.2d 158 (Iowa 1997), an automobile policy defined "occupying" as meaning "in, on, getting into or out of, and in physical contact with" it. To be covered under medical payments coverage, a person had to "occupying" the insured vehicle. The Iowa Supreme Court held that a person who was injured by a UM vehicle while outside his car inspecting the damage from an earlier accident was not "occupying" the vehicle because he was not physically touching the insured vehicle.

In Simpson v. U.S. Fidelity & Guar. Co., 562 N.W.2d 627 (Iowa 1997), an employee was injured by a UM driver while returning from a manhole to the insured truck to pick up a tool. The injured employee was 5-20' away from the insured vehicle at the time of the incident. The "occupying" definition covered those "in, upon, getting in, on, out or off" of the insured vehicle. The Iowa Supreme Court looked to the policy's definition of an "insured" under the liability coverage that defined an "insured" as one "using" the vehicle for guidance. Because the injured employee was "using" the insured vehicle and was in the "zone" or "area" around the vehicle where protection is afforded, he was covered by the UM insurance. Tropf was distinguished as having policy language that required "physical contact with" the insured vehicle in order to qualify as an "insured." See also, Whicker v. Goodman, 576 N.W.2d 108 (Iowa 1998) (not an insured since use of pickup had ceased before accident.)

Remember, if there is an opening to provide coverage, the court will do so. The lesson of Simpson is that courts are reluctant to exclude from UM or UIM coverage someone who is not named in the policy but who is engaged in an activity associated with the insured vehicle's use or operation. Construing the injured party's actions in Simpson as being "in, upon, getting, on, out or off" the insured vehicle seems to be stretching that definition to its outer limits. However, Tropf does demonstrate that a specifically limited policy definition of "insured" will sometimes be effective in limiting a policy's coverage. See, Grinnell Mut. Reinsurance Co. v. State Farm Mut. Auto. Ins. Co., 558 N.W.2d 176 (Iowa 1997) for a discussion on coverage under the omnibus UM clause. Passenger was allowed coverage as an insured under parent's policy but not under owner's policy since no consent. Id. at 179-80.

C. **Does an exclusion apply?**

Once you have decided that the person making a claim is an "insured," you must determine whether the facts bring into play any exclusions. One obvious exclusion is a special endorsement that deletes, by name, persons from the policy. The Iowa Supreme Court has upheld such a special endorsement in Katz v. American Family Mut. Ins. Co., 490 N.W.2d 60 (Iowa 1992). However, the courts have struggled with policy exclusions of injuries, in vehicles not listed in the policy, to persons who would otherwise qualify as "insureds" under the policy.

1. **Unowned but insured exclusion.**

Many policies exclude coverage for bodily injury sustained by an insured who is occupying a vehicle not owned by the named insured but insured under another policy. This is one of the areas in which UM and UIM differ. In the UM context, the "not owned but insured" clause is enforceable. McClure v. Employers Mut. Cas. Co., 238 N.W.2d 321, 326-27 (Iowa 1976). However, it is clear that such a clause is completely unenforceable in the UIM

insurance context. Veach v. Farmers Ins. Co., 460 N.W.2d 845 (Iowa 1990). The "not owned but insured" clause in an UIM coverage case frustrates the purpose of such coverage. The Supreme Court has held that the exclusion is invalid because the goal of full compensation cannot be met. There is no such goal in UM coverage. The goal of UM coverage--minimum compensation under the statute--will be met even if the exclusion is applied.

2. **Owned but not insured exclusion**. The "unowned but insured" exclusion should not be confused with the similar sounding but differently applied "owned but not insured" exclusion. The "owned but not insured" exclusion generally excludes any coverage for an "insured" for injuries resulting when the insured is occupying a vehicle owned by the named insured or a family member that is not insured under the applicable policy. A recent case decided by the Iowa Court of Appeals demonstrates how such an exclusion is applied.

In Dilly v. Grinnell Select Insurance Company, 563 N.W.2d 197, (Iowa App. 1997), the son of the policyholders owned a 1985 Camaro with no insurance. The son allowed a passenger to drive his vehicle. The passenger's insurer made a payment to the son under its liability policy. Because his damages exceeded this payment, the son made a claim under his parent's UIM policy.

The insurer relied upon an exclusion in its policy for any vehicle "owned by or furnished or available for the regular use of you or a relative." The Court of Appeals held that this type of "owned but not insured" exclusion was quantitatively different from the "not owned but insured" exclusion that was held to be void as against public policy in Veach. The exclusion was upheld because the son had the power to have insurance coverage for his own vehicle and chose not to exercise that power.

However, the "owned but not insured" exclusion will not be applied in the context of a UM coverage claim. In Lindahl v. Howe, 345 N.W.2d 548 (Iowa 1984), an insured was operating his UM motorcycle when he was struck by another UM driver. The Iowa Supreme Court held that mandatory coverage specified in Iowa Code §516A.1 makes this exclusion invalid because it would deny the insured any coverage. In all cases but this one, the Supreme Court has upheld this exclusion. See, Kluiter v. State Farm Mut. Auto. Ins. Co., 417 N.W.2d 74, 76 (Iowa 1987).

D. **Physical contact requirement**. UM coverage must include coverage for damages caused by a hit-and-run motor vehicle. Iowa Code §516A.1 requires coverage for injuries "arising out of physical contact of such hit-and-run motor vehicle with the person insured or with the motor vehicle which the person insured is occupying at the time of the accident." Rohret v. State Farm Mut.

Auto Ins. Co., 276 N.W.2d 418 (Iowa 1979). However, neither the doctrine of reasonable expectations nor the right of equal protection compels coverage for injuries caused by an unidentified vehicle through some means other than physical contact. Moritz v. Farm Bureau Mut. Ins. Co., 434 N.W.2d 624 (Iowa 1989).

E. **What claims are covered?**

UM and UIM coverages are "for the protection of persons insured under such policy who are legally entitled to recover damages from the owner or operator of a uninsured motor vehicle or a hit-and-run motor vehicle or an underinsured motor vehicle because of bodily injury, sickness or disease, including death" resulting from a UM or UIM driver. Iowa Code §516A.1. To make a recovery of any sort, it is clear someone must have suffered "bodily injury" as it is defined in the UM/UIM policy. However, the status of the person who suffers the "bodily injury, sickness or disease" can determine whether there is coverage, and how much coverage there is, for a claim.

In Hinners v. Pekin Ins. Co., 431 N.W.2d 345 (Iowa 1988), an insured person recovered damages caused by a UM even though the person who suffered bodily injury was not the insured. The plaintiff wife in Hinners claimed loss of consortium for the death of her husband, who was not an insured under her UM policy. The claim for loss of consortium was also approved for an unborn but viable child killed in an automobile accident. Craig v. IMT Ins. Co., 407 N.W.2d 584 (Iowa 1987).

The question of whether someone has suffered bodily injury is important. It generally deals with the applicable policy limits. Many UM or UIM policies limit the insurer's liability for covered damages to a set sum for all damages all persons suffer as a result of bodily injury to one person. In Lepic v. Iowa Mut. Ins. Co., 402 N.W.2d 758 (Iowa 1987), the Iowa Supreme Court held that such a limit meant that a parent's loss of consortium claims must be lumped together with the children's claims in determining whether the "each person" limit of liability had been exhausted. Because one suffering loss of consortium does not have a "bodily injury" as defined under Chapter 516A and the insurance policy, a stated policy limit for each person suffering bodily injury applied to lump those claims together. Id.

Loss of consortium injuries, even if accompanied by physical manifestations, are not separate bodily injuries. Dahlke v. State Farm Mut. Auto Ins. Co., 451 N.W.2d 813 (Iowa 1990). However, a loss of consortium claim must be contrasted with a bystander claim. A bystander claim may be a separate bodily injury. If a UM driver kills an insured person while another insured person is in position to assert a bystander claim as set forth in Barnhill v. Davis, 300 N.W.2d 104 (Iowa 1981), then the deceased person's estate and the bystander may each make separate claims for bodily injury. If the full coverage for each bodily injury is $100,000 then there is a potential for two claims having a value of $100,000 each. This contrasts with the loss of consortium claim

that would not be a separate claim for bodily injuries. See also Pekin Insurance Co. v. Hugh, 501 N.W.2d 502, 511 (Iowa 1993)

F. "Legally Entitled to Recover."

The phrase "legally entitled to recover" in §516A.1 means the insured must have suffered damages caused by the fault of underinsured motorist and be entitled to receive those damages. Wetherbee v. Economy Fire & Cas. Co., 508 N.W.2d 657 (Iowa 1993).

The court will interpret UIM statutes and coverage liberally and such is the case with the phrase "legally entitled to recover." Waits v. United Fire & Cas. Co., 572 N.W.2d 565, 573 (Iowa 1997). (Waits' release of tort-feasor was not a defense to Waits' UIM claim.)

III. **Can there be stacking?**

Probably not. **Inter-policy** stacking occurs when the insured recovers UIM or UM benefits under more than one policy. Farm Bureau Mut. Ins. Co. of Iowa v. Ries, 551 N.W.2d 316, 318 (Iowa 1996). **Intra-policy** stacking occurs when the insured recovers UIM or UM benefits under more than one vehicle under a single policy. Id. Iowa Code §516A.2, amended in 1991, deals with stacking, and specifically overruled a 1990 case on inter-policy stacking. Specific and clear anti-stacking provisions have upheld by the courts. The enforcement of anti-stacking provisions is expressly authorized by §516A.2. The court has upheld an endorsement limiting UIM coverage for an insured injured while occupying a vehicle not owned by the named insured to an amount that does not exceed the applicable minimum limit required by Iowa law for Iowa bodily injury liability. Ries, 551 N.W.2d at 319.

In Mewes v. State Farm Auto. Ins. Co., Inc., 530 N.W.2d 718 (Iowa 1995), a clause in a UIM policy limited the insurer's liability--the insured was injured while occupying a vehicle not owned by the insured--to the highest State Farm policy limit. State Farm's policies only applied to the extent its highest limit exceeded the UIM coverage provided by the primary insurer. The court upheld these stacking provisions and stated that §516A.2 should not be interpreted to allow enforcement of anti-stacking provisions only part of the time.

Rodish v. State Farm Mut. Auto Ins. Co., 501 N.W.2d 514 (Iowa 1993), involved a UM policy, which provided that if an insured suffers bodily injury in a vehicle owned by an insured but not insured under the policy, then the policy is excess and only applies if recovery from a primary UM carrier was insufficient to meet the minimum limit required by Iowa law for bodily injury liability. The Supreme Court upheld this provision.

IV. **May the claimant's recovery be reduced by other benefits received?**

A. **Workers compensation benefits.**

In Matthess v. State Farm Mut. Auto. Ins. Co., 548 N.W.2d 562, 564 (Iowa 1996), the Iowa Supreme Court upheld the UIM policy provision that reduced the amount payable

under UIM coverage by any sums payable under "any workers compensation law, disability benefits law or similar law." The court focused on the language in Iowa Code §516A.2(1), that UIM coverage "may include terms, exclusions, limitations, conditions and offsets which are designed to avoid duplication of insurance or other benefits."

Similarly, Jackson v. Farm Bureau Mut. Ins. Co., 528 N.W.2d 516, 517 (Iowa 1995), held that UIM coverage payments could be offset by disability benefits received, or to be received, by a claimant; and Gentry v. Wise, 537 N.W.2d 732, 736-37 (Iowa 1995), upheld an offset of social security disability benefits to be received by the claimant from the amounts to be received under UIM coverage.

In each of these cases, the language and intent of Iowa Code §516A.2 as amended has been important in upholding these offset clauses. But see, Condon v. Employers Mut. Cas. Co., 529 N.W.2d 631 (Iowa App. 1995)(holding that workers compensation benefits paid to a surviving spouse of deceased worker will not reduce UIM coverage payable to the administrator of the deceased worker's estate, even though the administrator and the widow were the same person, because the workers compensation and the wrongful death benefits are payable to two distinct entities).

B. **May UM or UIM coverage benefits be offset by payments made by liability coverage or medical payments coverage?**

Under Iowa law, it is clear that UIM benefits or UM benefits may be reduced by any payments made to an insured under the policy's liability portion or the medical payments portion, as long as there is an adequate provision in the policy purporting to offset such payments. Lemrick v. Grinnell Mut. Reinsurance Co., 263 N.W.2d 714 (Iowa 1978); Poehls v. Guaranty Nat. Ins. Co., 436 N.W.2d 62 (Iowa 1989); Stecher v. Iowa Ins. Guar. Ass'n, 465 N.W.2d 887 (Iowa 1991).

The court has, however, refused to offset certain payments made under a medical payments portion of a policy when the UIM benefits will not duplicate benefits received under the medical payments policy. In Leuchtenmacher v. Farm Bureau Mut. Ins. Co., 461 N.W.2d 291 (Iowa 1990), there was no showing made that an estate would be paid twice for funeral and ambulance expenses paid under the medical payments portion of the policy. Therefore, there could be no reduction of the UIM benefits. In any case, the policy language should be closely examined in order to determine whether such an offset will be enforceable. Lemrick v. Grinnell Mut. Reinsurance Co., 263 N.W.2d 714, 718 (Iowa 1978).

V. **What procedure should be or have been followed in making a claim under UM or UIM coverage?**

A. **Have the injured parties settled with the UM or UIM tort-feasor?**

In Kapadia v. Preferred Risk Mut. Ins. Co., 418 N.W.2d 848 (Iowa 1988), the court addressed the enforceability of a standard consent-to-settle clause. The clause stated that there would be no UM or UIM coverage if the insured settled with the tort-feasor without the written consent of the insurance company. Such consent-to-settle clauses are valid and enforceable. Id. However, the insurance company must establish that it has been prejudiced by the breach of the consent-to-settle clause by establishing that its subrogation rights against the tort-feasor could have been exercised successfully but for the breach of the consent-to-settle clause. In a recent case, the Iowa Supreme Court elaborated on these principles. In Grinnell Mut. Reinsurance Co. v. Recker, 561 N.W.2d 63 (Iowa 1997), an injured party filed suit against UIM tort-feasors three days before the statute of limitations ran on his cause of action. He then settled with the tort-feasor after the statute had run, without receiving Grinnell Mutual's written consent. The Iowa Supreme Court held that this settlement breached Grinnell Mutual's consent to settlement clause and that the injured party could not then recover from Grinnell Mutual. Because Grinnell Mutual was barred from exercising its subrogation rights against the tort-feasor, the injured party was barred from seeking UM insurance benefits. The injured party should have notified Grinnell Mutual of the settlement offer in order to give Grinnell Mutual a right to pay the insured the amount of the settlement offer and pursue its subrogation claim against the tort-feasors.

B. **What effect does suit against the tort-feasor have on the insured's cause of action against the UM or UIM carrier?**

If an insured sues a tort-feasor before bringing an action against the UM or UIM carrier, there are a two possible results. One possibility is that the plaintiff will get a verdict favorable to the UM or UIM tort-feasor, and unfavorable to the insured plaintiff. In that case, the carrier will probably attempt to get a ruling that the previous action has an issue preclusion effect on an action for policy benefits.

In Mizer v. State Auto & Cas. Underwriters, 195 N.W.2d 367 (Iowa 1972), the carrier attempted to prevent the re-litigation of damage issues. The court stated the plaintiff would be bound by the result in the first suit except for the fact that the carrier was equitably estopped from relying upon the first judgment. The carrier had stated to its insured that it was not consenting to this suit against the tort-feasor and had stated that it would not be bound by any judgment pursuant to that action. Id at 371-72. Having done so, the carrier could not rely upon the earlier judgment in order to lessen its damages.

In Brown v. Kossouf, 558 N.W.2d 161 (Iowa 1997), two women injured in an accident brought suit against two tort-feasors. One of the injured women (Brown, the mother passenger) settled her claims against both tort-feasors. The other woman (Yenter, the daughter driver) went to trial against one of the UIM tort-feasors, ending

in a defense verdict. Brown's UIM carrier claimed issue preclusion based upon the defense verdict. The Iowa Supreme Court held that the injured woman was so connected in interest as to have had a full and fair opportunity to litigate, because she had been a party until just before trial, so she was bound by the jury determination that the tort-feasor was not at fault.

From these two cases, it appears injured parties can be precluded from re-litigating issues against an insurance carrier when the issues have already been litigated against the tort-feasor. Plaintiffs' full and fair opportunity to litigate those issues in the first trial precludes them from attempting to re-litigate those issues.

Consenting to a confession of judgment with the underlying carrier cannot be used by the UIM carrier as issue preclusion because the matter was not actually litigated. Hoth v. Iowa Mut. Ins. Co., 577 N.W.2d 390, 391-92 (Iowa 1998).

The other main possibility when there has been a previous suit against a tort-feasor is that the plaintiff will be happy with the results and the insurance company will not. The injured party may claim the result of the previous suit has issue preclusive effect upon the result in a later suit against the insurance carrier. Oddly enough, there is no definitive Iowa case on this issue, as yet. In Handley v. Farm Bureau Mut. Ins. Co., 467 N.W.2d 247, 250 (Iowa 1991), the Iowa Supreme Court ruled that the insurance carrier could be severed from a trial against a UIM tort-feasor in order to keep out evidence of liability insurance coverage and UIM benefits. In that case, the carrier agreed to be bound by the determination of damages in the trial against the tort-feasor. In addition, the court said that "even if Farm Bureau had not agreed to be bound by any damage determination in the trial against [the tort-feasor], it still might be precluded from re-litigating the issue." The court indicated that it would follow traditional issue preclusion principles in determining whether the insurer was so precluded from re-litigating these matters. Whether issue preclusion will apply in such a case would depend on the individual facts. The insurer can make good arguments that, since it was not a party to and had no right to defend the tort-feasor in the original suit, it should not be bound by any determinations of factual issues in that suit. However, other jurisdictions have routinely held that the insurer is bound by the determination in a suit against the tort-feasor, at least where it had notice of the proceedings and a right to intervene in the proceedings. Insurance Law and Practice, Appleman Vol. 8C §5089.75. With knowledge of the underlying suit and an opportunity to intervene, it is very risky to sit back and do nothing.

"All reasonable efforts" rule requires claimant to present evidence of all reasonable efforts used in unsuccessful attempt to ascertain the existence of any applicable liability insurance. Frunzar v. Allied Property and Cas. Ins. Co., 548 N.W.2d 880 (Iowa 1996).

It is the claimant's burden of persuasion on the uninsured status.

C. **When, in time, may the insured bring suit against the UM or UIM carrier?**

A suit against the negligent driver is not a condition precedent to a claim for UM insurance benefits. Leuchtenmacher v. Farm Bureau Mut. Ins. Co., 461 N.W.2d 291 (Iowa 1990). Nor must a suit against an UIM tort-feasor be brought before bringing suit against the UIM carrier. Handley v. Farm Bureau Mut. Ins. Co., 467 N.W.2d 247 (Iowa 1991).

The Handley court said that if suit was brought against both the underinsured tort-feasor and the UIM carrier, the UIM carrier may sever the causes because of the likelihood it would be prejudiced by evidence of liability insurance coverage and UIM benefits.

D. **What is the effect of a settlement by the insured with the UM/UIM driver?**

Most UIM policies provide that an insurer will pay UIM benefits only after the tort-feasor's liability policy limits have been exhausted. In Matter of Estate of Rucker, 442 N W.2d 113 (Iowa 1989), Mr. Rucker was killed when his bike was struck by Mr. Bunse's pickup. Rucker's estate settled with the Bunse's liability carrier, Farm Bureau, receiving cash and a structured amount, the present value of which was $85,250. This was $14,750 less than the Farm Bureau's $100,000 liability policy limits. Rucker's estate had told its own carrier, National, of its intention to settle for that amount. National claimed Rucker's estate had to exhaust the limits. The Iowa Supreme Court held that for the purpose of UIM coverage, UIM insureds will be presumed to have settled for the tort-feasor's full policy limits when making a claim under UIM coverage, even though they did not, in fact, settle for those limits. National's UIM limit was $20,000. For Rucker's estate to recover UIM benefits against National, it would need to prove damages exceeded $100,000. If the verdict were $90,000, National would not have to pay any UIM, even though the estate only received $85,250.

In the case of UM benefits, a settlement or payment by the UM tort-feasor will result in reduced benefits under the UM coverage if there is appropriate offset language. Davenport v. Aid Ins. Co. (Mutual), 334 N.W.2d 711 (Iowa 1983) (Dugan, driving a V.W., was killed by Hutzell's uninsured car; Dugan's estate got an uncollectible judgment of $100,000 against Hutzell, then settled a products liability claim against V.W. for $60,000; Dugan's own carrier, Mutual, did not have to pay the $10,000 UM policy limits, because Mutual's policy allowed offsets from any third-party tort-feasor). A UM carrier will also be able to reduce its UM coverage by the net amount an insured receives as recovery in a dram shop action. Matter of Estate of Allgood, 509 N.W.2d 486 (Iowa 1993).

An interesting case involving many of these issues is Fort Madison Bank & Trust Co. v. Farm Bureau Mut. Ins. Co., 543 N.W.2d 591 (Iowa 1996). David and Berta Boyd, husband and wife, were killed in a one-car (owned by Berta and insured by Farm Bureau) accident. David, the driver, was intoxicated after drinking at the Tin Shed tavern. Their minor child Jazzber Boyd received for loss of parental consortium a $50,000 settlement from the Tin Shed's dram shop carrier. David's estate disbursed $49,000 to Jazzber. Though David was the named insured, the policy made him a UM driver by virtue of its amendatory endorsement excluding coverage for injuries to family members residing with him, making Berta able to claim UM coverage. Farm Bureau's UM limits were $100,000. Bertha's estate's damage was $300,000, an amount fixed as a judgment against David's estate. Farm Bureau was allowed no offset in Berta's estate's claim for the $100,000 UM proceeds, because the dram shop proceeds and the $49,000 inheritance went to Jazzber, not to Berta, who thus had no "double recovery." Farm Bureau was entitled to an offset for any amount paid by David's estate to Berta's estate under the $300,000 judgment, but only about $1250 remained in David's estate at the time of trial and after the $49,000 disbursement to Jazzber.

A consent-to-settle clause in the UIM policy is enforceable to preclude payment if the UIM carrier can show prejudice to the insurer in that its subrogation rights against the tort-feasor are released. Hoth v. Iowa Mut. Ins. Co., 577 N.W.2d 390, 392-93 (Iowa 1998). Additionally, the insured must also show its subrogation rights were collectible and the dollar amount that might have been collected. Id. at 393.

E. **Limitations on suing the insurance carrier.**

Absent contractual provisions to the contrary, a suit under the UM or UIM provisions of the insurance policy is governed by the 10-year written contract statute of limitations. Lemrick v. Grinnell Mut. Reinsurance Co., 263 N.W.2d 714 (Iowa 1978).

The Supreme Court has upheld a two-year contractual limitation provision for suits against the insurance company for UM benefits. Douglas v. American Family Mut. Ins. Co., 508 N.W.2d 665 (Iowa 1993).

VI. Other issues:

A. Evidence Questions.

In a UIM case, payments made under the medical payments coverage section should not be admissible as proof of a "settlement" since the only issue before the jury should be "causation" and "damages". Johnson v. State Farm Auto. Ins. Co., 504 N.W.2d 135 (Iowa App. 1993).

Trial Court abused its discretion by admitting evidence of Waits' settlement with the tort-feasor. Waits v. United Fire & Cas. Co., 572 N.W.2d 565 (Iowa 1997). Here, the only issue was the amount of damages owed so the motion in limine to exclude evidence of Allied policy

limits and the settlement amount paid by Allied to Waits should have been sustained. Id. at 571.

VII. Other authorities:

A. Alan I. Widiss, Uninsured and Underinsured Motorist Insurance (1992), cited with approval by Simpson v. U.S. Fidelity & Guar. Co., 562 N.W.2d 627, 629 (Iowa 1997).

B. Iowa Code Chapter 516A (attached).

CHAPTER 516

LIABILITY POLICIES — UNSATISFIED JUDGMENTS

516.1 Inurement of policy.

All policies insuring the legal liability of the insured, issued in this state by any company, association or reciprocal exchange shall, notwithstanding any other provision of the statutes, contain a provision providing that, in event an execution on a judgment against the insured be returned unsatisfied in an action by a person who is injured or whose property is damaged, the judgment creditor shall have a right of action against the insurer to the same extent that such insured could have enforced the insured's claim against such insurer had such insured paid such judgment.

[C35, §9024-g1; C39, **§9024.1;** C46, 50, 54, 58, 62, 66, 71, 73, 75, 77, 79, 81, §516.1]

516.2 Settlement.

No settlement between said insurer and insured, after loss, shall bar said action unless consented to by said judgment plaintiff.

[C35, §9024-g2; C39, **§9024.2;** C46, 50, 54, 58, 62, 66, 71, 73, 75, 77, 79, 81, §516.2]

516.3 Limitation on action.

Said action may be brought against said insurer within one hundred eighty days from the entry of judgment in case no appeal is taken, and, in case of appeal, within one hundred eighty days after the judgment is affirmed on appeal, anything in the policy or statutes to the contrary notwithstanding.

[C35, §9024-g3; C39, **§9024.3;** C46, 50, 54, 58, 62, 66, 71, 73, 75, 77, 79, 81, §516.3]

CHAPTER 516A

UNINSURED, UNDERINSURED, OR HIT-AND-RUN MOTORISTS

516A.1 Coverage included in every liability policy — rejection by insured.

No automobile liability or motor vehicle liability insurance policy insuring against liability for bodily injury or death arising out of the ownership, maintenance, or use of a motor vehicle shall be delivered or issued for delivery in this state with respect to any motor vehicle registered or principally garaged in this state, unless coverage is provided in such policy or supplemental thereto, for the protection of persons insured under such policy who are legally entitled to recover damages from the owner or operator of an uninsured motor vehicle or a hit-and-run motor vehicle or an underinsured motor vehicle because of bodily injury, sickness, or disease, including death resulting therefrom, caused by accident and arising out of the ownership, maintenance, or use of such uninsured or underinsured motor vehicle, or arising out of physical contact of such hit-and-run motor vehicle with the person insured or with a motor vehicle which the person insured is occupying at the time of the accident. Both the uninsured motor vehicle or hit-and-run motor vehicle coverage, and the underinsured motor vehicle coverage shall include limits for bodily injury or death at least equal to those stated in section 321A.1, subsection 10. The form and provisions of such coverage shall be examined and approved by the commissioner of insurance.

However, the named insured may reject all of such coverage, or reject the uninsured motor vehicle (hit-and-run motor vehicle) coverage, or reject

the underinsured motor vehicle coverage, by written rejections signed by the named insured. If rejection is made on a form or document furnished by an insurance company or insurance agent, it shall be on a separate sheet of paper which contains only the rejection and information directly related to it Such coverage need not be provided in or supplemental to a renewal policy if the named insured has rejected the coverage in connection with a policy previously issued to the named insured by the same insurer.

[C71, 73, 75, 77, 79, 81, §516A.1]
83 Acts, ch 101, §108; 90 Acts, ch 1233, §33

516A.2 Construction — minimum coverage — stacking.

1. Except with respect to a policy containing both underinsured motor vehicle coverage and uninsured or hit-and-run motor vehicle coverage, nothing contained in this chapter shall be construed as requiring forms of coverage provided pursuant hereto, whether alone or in combination with similar coverage afforded under other automobile liability or motor vehicle liability policies, to afford limits in excess of those that would be afforded had the insured thereunder been involved in an accident with a motorist who was insured under a policy of liability insurance with the minimum limits for bodily injury or death prescribed in subsection 10 of section 321A.1. Such forms of coverage may include terms, exclusions, limitations, conditions, and offsets which are designed to avoid duplication of insurance or other benefits.

To the extent that Hernandez v. Farmers Insurance Company, 460 N.W.2d 842 (Iowa 1990), provided for interpolicy stacking of uninsured or underinsured coverages in contravention of specific contract or policy language, the general assembly declares such decision abrogated and declares that the enforcement of the antistacking provisions contained in a motor vehicle insurance policy does not frustrate the protection given to an insured under section 516A.1.

2. Pursuant to chapter 17A, the commissioner of insurance shall, by January 1, 1992, adopt rules to assure the availability, within the state, of motor vehicle insurance policies, riders, endorsements, or other similar forms of coverage, the terms of which shall provide for the stacking of uninsured and underinsured coverages with any similar coverage which may be available to an insured.

3. It is the intent of the general assembly that when more than one motor vehicle insurance policy is purchased by or on behalf of an injured insured and which provides uninsured, underinsured, or hit-and-run motor vehicle coverage to an insured injured in an accident, the injured insured is entitled to recover up to an amount equal to the highest single limit for uninsured, underinsured, or hit-and-run motor vehicle coverage under any one of the above described motor vehicle insurance policies insuring the injured person which amount shall be paid by the insurers according to any priority of coverage provisions contained in the policies insuring the injured person.

[C71, 73, 75, 77, 79, 81, §516A.2]
91 Acts, ch 213, §30

516A.3 Definition.

For the purpose of this chapter, the term *"uninsured motor vehicle"* shall, subject to the terms and conditions of the coverage herein required, be deemed to include an insured motor vehicle with respect to which insolvency proceedings have been instituted against the liability insurer thereof by the insurance regulatory official of this or any other state or territory of the United States or of the District of Columbia.

An insurer's insolvency protection is applicable only to accidents occurring during a policy period in which its insured's uninsured motorist coverage is in effect and only if the liability insurer of the tort-feasor is insolvent at the time of such an accident or becomes insolvent after the accident.

[C71, 73, 75, 77, 79, 81, §516A.3]
91 Acts, ch 26, §46; 92 Acts, ch 1162, §46

516A.4 Insurer making payment — reimbursement.

In the event of payment to any person under the coverage required by this chapter and subject to the terms and conditions of such coverage, the insurer making such payment shall, to the extent thereof, be entitled to the proceeds of any settlement or judgment resulting from the exercise of any rights of recovery of such person against any person or organization legally responsible for the bodily injury for which such payment is made, including the proceeds recoverable from the assets of the insolvent insurer. The person to whom said payment is made under the insolvency protection required by this chapter shall to the extent thereof, be deemed to have waived any right to proceed to enforce such a judgment against the assets of the judgment debtor who was insured by the insolvent insurer whose insolvency resulted in said payment being made, other than assets recovered or recoverable by such judgment debtor from such insolvent insurer.

[C71, 73, 75, 77, 79, 81, §516A.4]

EVALUATING WRONGFUL DEATH CLAIMS

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EVALUATING WRONGFUL DEATH CLAIMS

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I. WRONGFUL DEATH STATUTES

A. Common Law.

In Iowa, as in most other states, the common law did not recognize any action for wrongful death. Accordingly, any action which the decedent would otherwise have had against the tortfeasor died with him or her. See Egan v. Naylor, 208 N.W.2d 915 (Iowa 1973). Accordingly, in Iowa any action for wrongful death must be based on a specific statute. See Estate of Dyer v. Krug, 533 N.W.2d 221 (Iowa 1995).

B. Types of Statutes.

1. Wrongful Death Statutes.

Wrongful death statutes contemplate a new cause of action against the potential defendant by the survivors or the decedent's estate. This new action allows claims to be brought for items of damages that encompass losses the survivors have sustained, such as loss of services, earnings, support, companionship, etc.

2. Survival Statutes.

These statutes preserve a cause of action that accrued to the decedent and allow that action to be brought by the decedent's personal representative. In its traditional form, these statutes

would only have allowed recovery for items of damages that accrued between the time of injury and the time of death. Accordingly, actions for accumulation to the estate would be precluded.

C. Iowa Statutes.

Iowa's statutes and case law create a cause of action that is a combination of wrongful death and survival statutes. The relevant statutory provisions are as follows:

1. Survival

(a) **Iowa Code § 611.20. Actions survive.** All causes of action shall survive and may be brought notwithstanding the death of the person entitled or liable to the same.

(b) **Iowa Code § 611.22. Actions by or against legal representatives substitution.** Any action contemplated in sections 611.20 and 611.22 may be brought, or the court, on motion, may allow the action to be continued, by or against the legal representatives or successors in interest of the deceased. Such action shall be deemed a continuing one, and to have accrued to such representative or successor at

the time it would have accrued to the deceased if he had survived.

2. Wrongful Death.

(a) **Iowa Code § 613.15. Injury or death of spouse measure of recovery.** In any action for damages because of the wrongful or negligent injury or death of a woman, there shall be no disability or restrictions, and recovery may be had on account thereof in the same manner as in cases of damage because of the wrongful or negligent injury or death of a man. In addition, she or her administrator for her estate, may recover for physician's services, nursing and hospital expense, and in the case of both women and men, such person, or the appropriate administrator, may recover the value of services and support as spouse or parent, or both, as the case may be, in such sum as the jury deems proper; provided, however, recovery for these elements of damage may be not had by the spouse and children as such, of any person who, or whose administrator, is entitled to recover the same.

(b) **Iowa Code § 633.336. Damages for wrongful death.** When a wrongful act produces death, damages recovered as

a result of the wrongful act shall be disposed of as personal property belonging to the estate of the deceased; however, if the damages include damages for loss of services and support of a deceased spouse and parent, the damages shall be apportioned by the court among the surviving spouse and children of the decedent in a manner as the court may deem equitable consistent with the loss of services and support sustained by the surviving spouse and children respectively. If the decent leaves a spouse, child, or parent, damages for wrongful death shall not be subject to debts and charges of the decedent's estate, except for amounts to be paid to the department of human services for payments made for medical assistance pursuant to chapter 249A, paid on behalf of the decedent from the time of the injury which gives rise to the decedent's death up until the date of the decedent's death.

3. Iowa Law.

Reading the above statutes and the cases interpreting them in combination, it is apparent that any elements of damage which would have been recoverable in a personal injury action had this decedent survived are also recoverable in a wrongful death suit. In

addition, other items of damages are also recoverable. Accordingly, the constraints which would otherwise have been in place with regard to claims under either a survival or wrongful death statute in their pure forms do not exist in Iowa

II. TYPES OF CLAIMS THAT MAY BE BROUGHT.

A. Items of Damages.

1. Accumulation of Wealth.

The claimant is entitled to the present value of the amount that the decedent would have saved or accumulated as a result of his efforts to the end of his natural life had he lived. See Iowa-Des Moines National Bank v. Schwerman, 288 N.W.2d 198 (Iowa 1980); Schmitt v. Jenkins Trucklines, Inc., 170 N.W.2d 632 (Iowa 1969).

(a) Relevant factors include:

(1) Age and life expectancy

(2) Characteristics, health and habits

(3) Education or opportunity for education

(4) General ability, competency, occupational qualifications

(5) Industriousness, manner of living

(6) Sobriety or intemperance; see Ward v. Loomis Brothers, Inc., 532 N.W.2d 807 (Iowa App. 1995) - defendant entitled to instruction on marijuana use of decedent on the day of the incident

(7) Frugality or lavishness

(b) Economic factors to be taken into account in loss of accumulation:

(1) Consumption of assets by decedent - see Iowa-Des Moines National Bank v. Schwerman, Id.

(2) Effect of income taxes - see Adams v. Deur, 173 N.W.2d 100 (Iowa 1969)

(3) Impact of inflation - see Wetz v. Thorpe, 215 N.W.2d 350 (Iowa 1975)

(c) Items not to be considered:

(1) Estate and inheritance taxes - see Iowa-Des Moines National Bank v. Schwerman, Id.

(2) Future profits of closely held corporation - see Iowa-Des Moines National Bank v. Schwerman, Id.) (Relevant amount is the amount which the decedent's efforts would have contributed to the earnings, not the earnings themselves, as such earnings are based on many factors and would be too speculative.)

2. Pain and Suffering. See Lang v. City of Des Moines, 294 N.W.2d 557 (Iowa 1980).

(a) The decedent must have been conscious after the injury to have actually suffered pain apart from the pain occurring instantaneously at the time of death.

(b) Proof of pain and suffering involves proof of physical manifestations—movement, sound.

(1) Expert testimony is available on this subject as well as lay testimony.

(2) This can be significant—burn victim.

3. Medical Expenses. See 613.15.

4. Services and Support See 613 15; Weitl v. Moes, 311 N.W.2d 259 (Iowa 1981)

(a) Spousal - present value of amount of financial support that decedent would have contributed to his or her spouse for the shorter of the spouse's or decedent's normal life expectancy.

(b) Children - present value of amount of financial support which decedent would have contributed to each of the children limited to the time when each child reaches the age of 18 or marries, unless the child has a need for support beyond those ages as found by the jury. See Iowa Civil Jury Instruction Note 200.18

5. Loss of Consortium.

In the context of wrongful death actions, spouses, parents and children may make consortium claims.

(a) Spousal consortium – traditional definition

(1) Consortium claim is not reduced by comparative fault of decedent. Fuller v. Buhrow, 292 N.W.2d 672 (Iowa 1980) – extended to death cases in Nichols v. Schweitzer, 472 N.W.2d 266 (Iowa 1991). See Iowa Civil Jury Instruction Note 200.18; Madison v. Colby, 348 N.W.2d 202 (Iowa 1984); Audubon-Exira Ready Mix, Inc. v. Illinois Central, 335 N.W.2d 148 (Iowa 1983).

(2) Re-marriage of spouse is inadmissible. Groesbeck v. Napier, 275 N.W.2d 388 (Iowa 1979) Many judges will not allow reference to changed name, dating behavior or re-marriage at any point in examination if a proper motion in limine is filed.

(b) Children's claim for loss of consortium of a parent – disruption or diminution of the parent-child relationship

must be significant. Adult children may recover for loss of consortium of a parent

6. Interest on Funeral Expenses Incurred Prematurely.

B. No Duplication of Damages.

The damages listed in II(A)(1-6) cannot be duplicative of other damages sought by a child or spouse in the same suit or a separate suit. Adams v. Deur, Id; DeWall v. Prentice, 224 N.W.2d 428.

III. SPECIFIC ACTIONS.

A. Action by Estate.

In the case of an adult, the estate brings the action and asserts the majority of the claims, including the claims of the children.

B. Action by Spouse

1. This action may be brought separately. Acuff v. Schmit, 78 N.W.2d 480 (Iowa 1956).

2. The action may include loss of consortium prior to death. (This item of damages is not an item recoverable by the estate. Madison v. Colby, 348 N.W.2d 202 (Iowa 1984).

C. Action for Death of Minor Child.

1. The parents bring the Rule of Civil Procedure 8 claim, which includes:

(a) Loss of services, companionship and society, past and future (includes economic value of child's labor)

(b) Interest on burial expenses

(c) Necessary medical expenses

2. Claims by the Estate

(a) Pain and suffering

(b) Accumulation and savings

(c) Pre-death disability

3. Children's death claims are especially difficult to value. Their value varies greatly depending upon the individual making the assessment. (If they happen to have children of about the same age, it seems to increase the value of the claim for many people. On the opposite side, some people hold the view that claims of especially young children have very little value.)

IV. EVALUATION AIDS AND SERVICES

A. Computer Software.

A variety of computer programs have been developed and are being developed which purport to value wrongful death and other personal injury cases. These programs have been developed by insurance companies, software companies and consultants.

B. Newsletters and Services

1. Verdicts and Settlements - Iowa Trial Lawyers Association

2. Medical Malpractice Verdicts and Settlements

3. Lexis/Nexis (on-line verdict and settlement information)

4. Jury research services

C. Consultants

Certain consulting companies and even accounting firms have services available whereby facts can be submitted and an evaluation opinion obtained.

D. Internet

1. Web sites

E. Expert Witnesses.

1. Economists

2. Sociologists

3. Medical doctors (re life expectancy and unrelated disease conditions)

4. Psychologists - jury consultants

F. Surveys

V CONCLUSION

Valuing wrongful death claims is one of the most difficult tasks faced by lawyers. So much depends upon the intangible factors involved in evaluating the jury's reaction to the surviving spouse and children, the defendant and the circumstances surrounding the death. In the end, there is no substitute for

thorough investigation and preparation and sound judgment which comes from experience. Evaluation of these claims involves a certain amount of objective analysis, but the subject of variables will often explain the size of the ultimate verdict or lack thereof.[1]

[1] Thank you to Glenn Norris and his great outline "Death, Damages and Iowa Revisited - 1996" from which I borrowed information and authorities.

ANALYZING INSURANCE COVERAGE ISSUES

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ANALYZING INSURANCE COVERAGE ISSUES

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I. INTRODUCTION

The insurance defense practice of the 1990's is a practice that increasingly focuses on liability insurance coverage issues. As plaintiffs attempt to expand legal theories of recovery, carriers are forced to make judgments concerning their duty to defend claims and lawsuits in general.

This presentation is calculated to give coverage counsel a primer on "how to" analyze the issue of whether there is a duty to defend an insured and ultimately indemnify a claim or suit. An attempt has been made to catalog or chronicle cases so that the outline can be used as a resource by defense counsel.

II PRELIMINARIES

It is important for counsel to have certain facts and materials at hand before providing a coverage opinion to an insurance carrier.

A Factual background

The carrier must submit either an assumed factual recitation or transmit documents that should be reviewed for factual background. These facts should be recited by counsel back to the carrier in the opinion letter. In this way, both the lawyer and the carrier will be ensured that the correct factual scenario has been utilized in giving the coverage opinion.

V

B The pleadings

The petition or complaint set forth must be reviewed to establish what claims have been pleaded in the litigation. While the pleadings do not constitute the beginning and end of the coverage inquiry, if a claim is covered by definition in a specific type of policy (e g , umbrella policy) a review of the pleadings will reveal the claims being asserted to be measured against the policy. See generally Kibbee v. State Farm Fire & Casualty Company, 525 N W 2d 866 (Iowa 1994)

C A specific coverage issue

The specific coverage issue or question should be stated by the carrier. The carrier should be asked to identify the specific area or issue for coverage opinion. Normally, this is not a problem. However, if counsel is asked to opine on the entire policy, the coverage opinion letter may form the basis of a complaint or claim against the insurance carrier that they did not consider all bases of potential coverage when a decision on insurance coverage was made. Additionally, discovery in subsequent coverage litigation may reveal avenues of inquiry against the carrier that were not considered by the carrier.

D A certified copy of the insurance policy

Oftentimes an insurance carrier does not provide a certified copy of the policy. As such, coverage counsel may be asked to give an opinion about policy language which is changed by an endorsement. A certified copy of the policy should have the following information:

1. An affidavit from the insurance company personnel stating that a certified copy of the policy is attached, stating the effective date of the policy which embodies or covers the date of loss or claim, and setting forth the specific policy number applicable to the insured.

2. A declarations page listing all endorsements along with the basic policy form.

3. The correct policy form and endorsements. When coverage counsel receives the certified copy of the policy, the policy should be scanned to make certain that the policy forms and endorsement forms embodying the contract match those set forth on the declarations sheet. Policy forms are often amended after the policy period in question.

Additionally, certain endorsements may radically alter, and/or eviscerate coverage as set forth in the body of the policy. Without reviewing the complete policy, counsel may give an opinion based upon an inaccurate, incomplete or misleading portion of the policy

III. WHEN DOES A DUTY TO DEFEND EXIST?

A. In determining the duty to defend, the insurer must look to facts giving rise to the lawsuit, not the theories of recovery pleaded. If the facts support any possible claim that fit within the insurance coverage, the insurer owes to its insured a duty to defend. In case of doubt as to whether the petition alleges a claim that is covered by the policy, the doubt is resolved in favor of the insured.

B. Case law:

a. Employers Mut. Cas. Co. v. Cedar Rapids Television Co., 552 N.W.2d 639 (Iowa 1996)
Facts: Insurance carrier brought suit seeking determination that it had no duty to continue to pay defense costs incurred by insured in underlying litigation when the malicious prosecution count, which was clearly within the policy's coverage, was dismissed. The remaining claim was for intentional interference with a contract.
Analysis: When determining whether there is a duty to defend an insurance company is to look at the allegations of fact in the third-party plaintiff's petition against the insured and not the legal theories on which the third-party claims the insured is liable.
Holding: The facts alleged in the petition, if proven, would support a claim for malicious prosecution. Therefore, the carrier still had a duty to defend the lawsuit.

b. A.Y. McDonald Industries, Inc. v. Insurance Co. of North America, 475 N.W.2d 607 (Iowa 1991)
Facts: Environmental contamination claims were asserted by a federal agency against A.Y. McDonald. As a result of these claims, A.Y. McDonald incurred certain costs and wanted to recover the costs from the defendants, various insurance companies that had insured the plaintiff. The defendants refused to defend and indemnify A.Y. McDonald.
Analysis: An insurer's duty to defend is separate from the duty to indemnify. The duty to defend is broader. The duty to defend rests solely on whether the petition contains any allegations that arguably or potentially bring the action within the policy coverage. If any

V

claim alleged against the insured rationally falls within the coverage, the insurer must defend the entire action Any doubt about whether a claim alleged in the petition is included in the coverage is resolved in favor of the insured

Holding: The proceedings before the Environmental Protection Agency constituted a "suit" within the meaning of the insurance policy Therefore, the Insurance Company of North America did have a duty to defend A Y McDonald

c First Newton Nat'l Bank v. General Cas. Co., 426 N W 2d 618 (Iowa 1988)

Facts: First Newton was sued, along with other parties, by the original owners of a foreclosed farm property for alleged misconduct in the financing of the distressed farms The bank sought declaratory judgment to determine whether the insurance companies had potential liability in the lawsuit and therefore a duty to defend the bank on all claims in the suit

Analysis: An insurer has a duty to defend whenever there is potential or possible liability to indemnify the insured based on the facts appearing at the outset of the case The court looks first and foremost to the petition for the facts at the outset of the case

Holding: The insurance company has potential liability under the bank's policy and therefore they have a duty to defend First Newton

IV OCCURRENCE

1 Generally an accident, happening, event, or exposure to conditions in which the insured does not expect or intend the accident, happening, event, or exposure to conditions or any resulting injury An occurrence takes place when the claimant sustains actual damage, not when the act or omission that caused such damage was committed

2 Case law:

a West Bend Mut. Ins. Co. v. Iowa Iron Works, Inc., 503 N W 2d 596 (Iowa 1993)

Facts: West Bend, comprehensive general liability insurer, brought a declaratory judgment action to determine whether it had a duty to defend Iowa Iron against the DNR for depositing solid waste in an unlicensed place

Analysis: There can be no coverage under the policy unless there is an occurrence An accident, happening, event, or exposure to conditions is an

unexpected and unintended occurrence so long as the insured does not expect or intend both it and some injury
Holding: The depositing of sand, although intentional, is an occurrence under the policy because no injury was intended An occurrence was therefore alleged which triggered West Bend's duty to defend

b First Newton Nat'l Bank v. General Cas. Co., 426 N W 2d 618 (Iowa 1988)
Facts: First Newton was sued, along with other parties, by the original owners of a foreclosed farm property for alleged misconduct in the financing of the distressed farms The bank sought declaratory judgment to determine whether the insurance companies had potential liability in the lawsuit and therefore a duty to defend the bank on all claims in the suit General Casualty also argued that there was no coverage under the policy because the occurrence did not arise during the policy period and that the negligent misrepresentation claim was not an occurrence
Analysis: An occurrence policy provides coverage if the event insured against (the occurrence) takes place within the policy period, regardless of when a claim is made The occurrence is when the claimant sustains actual damage and not when the act or omission that caused such damage was committed An accident, happening, event, or exposure to conditions is an unexpected and unintended occurrence so long as the insured does not expect or intend both it and some injury
Holding: The occurrences for which the bank was being sued took place while the insurance policies were in effect The allegation of negligent misrepresentation was a covered occurrence

c Farm & City Ins. Co. v. Potter, 330 N W 2d 263 (Iowa 1983)
Facts: Mrs Potter intentionally cut the brake lines of her husband's car which was insured by Farm & City She had planned on injuring herself and the car to gain sympathy from her husband Instead, she was involved in two collisions, one with a parked car and the other with a house The liability insurer refused to pay property claims and brought a declaratory judgment action to determine coverage for collisions under the policy
Analysis: An accident, happening, event, or exposure to conditions is an unexpected and unintended occurrence so long as the insured does not expect or intend both it and some injury Even though Mrs Potter voluntarily set the sequence of events in motion, she did not intend either event which occurred
Holding: Neither collision was intended by Mrs Potter Therefore, the collisions were accidents resulting in occurrences under the policy

V

V COVERED DAMAGE AND CLAIMS

A **Bodily injury** - generally physical injury, sickness, disease or death to a person Includes emotional distress sustained by bystanders Does not include emotional distress to non-bystanders Does not include loss of consortium

Case law:

1. Pekin Ins. Co. v. Hugh, 501 N W 2d 508 (Iowa 1993)
Facts: Underinsured motorist insurer brought declaratory judgment action against the insured bystanders to a fatal automobile accident in order to determine whether the emotional distress of a bystander is a bodily injury
Analysis: An injury the bystander suffers is an injury directly to the bystander as a result of the bystander seeing the accident and believing that the direct victim is seriously injured or killed This is different from a consortium claim that arises from an injury to another person Emotional distress should generally be accompanied with physical symptoms of distress
Holding: Emotional distress sustained by insureds, bystanders to an accident which resulted in the death of two family members, was bodily injury within the meaning of the underinsured coverage

2. Dahlke v. State Farm Mut. Auto. Ins. Co , 451 N W 2d 813 (Iowa 1990)
Facts: Insureds brought action against their automobile insurer to recover uninsured motorist benefits for psychological and physical effects arising out of the loss of their son killed in a collision with an uninsured motorist
Analysis: The policy's definition of bodily injury included bodily injury to a person and sickness, disease or death which results from such injury The court did not find this definition helpful so it looked to Black's Law Dictionary It stated that bodily injury is any physical or corporeal injury; not necessarily restricted to injury to the trunk or main part of the body as distinguished from the head or limbs A physical injury only The definition of bodily injury does not include the physical manifestations of the parents' loss
Holding: Psychological and physical effects from loss are not bodily injury within the meaning of the uninsured motorist provision of the insureds' automobile policy

3. Lepic v. Iowa Mut. Ins. Co., 402 N W 2d 758 (Iowa 1987)

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Facts: In this consolidated case, two minors were injured in separate and unrelated one car accidents The parents sought to recover loss of consortium under the underinsured motorist coverage.
Analysis: Loss of consortium is not a separate bodily injury to the parents deprived of their child's consortium Instead the courts have recognized that loss of consortium is a personal injury
Holding: Parents' loss of consortium as a result of the injuries to their children was not a bodily injury within the meaning of the automobile policies' provisions for underinsured motorist coverage.

B **Property damage** - Generally includes physical injury to or destruction of tangible property. May include loss of use of tangible property. Does not include economic losses or diminution in value of property.

Case law:

1 Ide v. Farm Bureau Mut. Ins. Co., 545 N W 2d 853 (Iowa 1996)
Facts: Sheep owner entered into a contract with custom sheep feeders The owner sued the feeders when he sustained damages from the loss of a large number of sheep, during an ice storm, while in the feeders' care The owner obtained a judgment but was unsuccessful in collecting it He then brought suit against the feeders' insurer for the judgment.
Analysis: Loss did not involve injury to or destruction of tangible property where damages were awarded for economic loss. No damages were awarded for physical injury to tangible property but rather for breach of contract.
Holding: There was no coverage under the policies because there was no property damage The insurer did not have to satisfy the judgment.

2 Yegge v. Integrity Mut. Ins. Co., 534 N.W 2d 100 (Iowa 1995).
Facts: Homeowners brought an action against builder's liability insurer to recover an unsatisfied judgment against the builder The insurer had denied coverage in the suit against the builder
Analysis: Homeowners' intangible economic losses from insured builder's performance in constructing their residence were not property damage.
Holding: There was no coverage under the business liability insurance policy because the losses were not property damage. As

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a result, the homeowners could not recover their judgment from the insurer

3 Ellsworth-William Cooperative Co. v. United Fire &Cas. Co., 478 N W 2d 77 (Iowa 1991)
Facts: The owner of grain storage bins brought action against the general liability insurer seeking to recover compensation for losses caused by defective construction of the grain bins by the insured
Analysis: The cost of removal of grain from defective grain storage bins constructed by insured was property damage covered by general liability policy Property damage within meaning of policy covered loss of use of tangible property and the preexisting grain bins qualified as other tangible property
Holding: The general liability policy covered the losses for the removal of grain from the defective bins and for the loss of use of preexisting bins Coverage was excluded for loss of defective grain storage bins constructed by insured

4 Kartridg Pak Co. v. Travelers Indemnity Co., 425 N W 2d 687 (Iowa Ct App 1988)
Facts: Iowa Meat brought an action against Kartridg Pak when a deboner it leased from the company did not perform as promised Kartridg Pak asked its insurer, Travelers, to defend the lawsuit Travelers declined to defend asserting that the diminution in value of the meat was not property damage under the policy
Analysis: Under the definition of property damage, intangible damages, such as diminution in value, do not constitute physical injury to or destruction of tangible property for purposes of general liability policy
Holding: The alleged diminution in value of the pork loin meat did not constitute property damage as defined in the policy As a result, the insurance coverage was not triggered

C **Personal injury** - Generally includes listed offenses of libel, slander, disparagement, malicious prosecution, and invasion of privacy and concerns injuries to a person's rights or reputation Does not include sexual harassment

Case law:

1 Kibbee v. State Farm Fire & Cas. Co., 525 N W 2d 866 (Iowa 1994)

Facts: Kibbee, a judgment creditor, brought this action against the judgment debtor's personal injury insurer to collect the judgment for intentional infliction of emotional distress.
Analysis: Personal injury definition in policy included malicious prosecution and humiliation. However, definition could not be interpreted so that malicious modified humiliation. If the insurer had intended to cover intentional infliction of emotional distress, it would have used that well-recognized phrase as it did for the other torts listed in the definition.
Holding: Intentional infliction of emotional distress was not a personal injury within the meaning of the personal liability umbrella policies which resulted in no coverage.

2. Ottumwa Housing Authority v. State Farm Fire & Casualty Co., 495 N.W.2d 723 (Iowa 1993)
Facts: Insured sought declaratory judgment that general liability policy imposed a duty to defend on the insurer against insured's employees' claims of sex discrimination.
Analysis: Part of the general liability policy definition of personal injury listed the offenses of libel, slander, and the utterance of other defamatory or disparaging material. Claims were made that a director made verbally abusive and suggestive remarks to employees. The remarks did not come under the personal injury definition because the employees did not seek damages for injury to their reputations. There was no coverage under the personal injury clause for sexually harassing disparagement.
Holding: The insured is not covered under the personal injury clause of the general liability policy.

3. First Newton Nat'l Bank v. General Cas. Co., 426 N.W.2d 618 (Iowa 1988).
Facts: First Newton was sued, along with other parties, by the original owners of a foreclosed farm property for alleged misconduct in the financing of the distressed farms. The bank sought declaratory judgment to determine whether the insurance companies had potential liability in the lawsuit and therefore a duty to defend the bank on all claims in the suit. General Casualty also argued that there was no coverage under the policy because the

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occurrence did not arise during the policy period and that the negligent misrepresentation claim was not an occurrence
Analysis: Under the multiperil policy, personal injury included injury arising out of wrongful entry or eviction or other invasion of the right of occupancy. The court stated that an injury is any wrong or damage done to another, either in his person, rights, reputation or property. By combining the definitions of injury and personal injury, coverage was broad enough to include the homeowners being "put out of their home" because of the foreclosure
Holding: The personal injury definition in the multiperil and umbrella policies were broad enough to include the allegations of being put out of a home and suffering emotional distress as a result of the foreclosures.

VI DOES THE POLICY EXCLUDE THE LOSS?

A **Exclusions - Generally**

1. The insurer has a duty to define any exclusions in clear and explicit terms. Exclusions are narrowly construed and are strictly construed against the insurer. An exclusion that is fairly susceptible to two reasonable interpretations is ambiguous and will be construed in the light most favorable to the insured. The burden of establishing that an exclusion applies rests upon the insurer.

2. Case law:

   a. Iowa Comprehensive Petroleum Underground Storage Tank Fund Board v. Farmland, 568 N.W.2d 815 (Iowa 1997).
   Facts: The Board made a demand on the comprehensive general liability insurer for its costs of remedial action at a site contaminated by insured's leaking underground gasoline storage tank. The interpretation of the word "sudden" in the pollution-exclusion provision of the policy was at issue.
   Analysis: If an insurance policy is ambiguous, requires interpretation, or is susceptible of two equally plausible constructions, then the construction most favorable to the insured is adopted. Insurer has the duty to define any limitations or exclusionary clauses in clear and explicit terms. The burden of establishing an exclusion rests upon the insurer.

Holding: "Sudden" is not an ambiguous term The pollution from the leaking underground storage tank did not fall within the sudden and accidental exception to the pollution exclusion clause

b Farm & City Ins. Co. v. Gilmore, 539 N W 2d 154 (Iowa 1995)
Facts: Insurance company sought judgment that there was no coverage under its auto policy for claims resulting from an accident occurring when owner's permittee gave permission to another, whose license had been revoked, to drive the vehicle The policy provision excluded liability coverage for any person "using a vehicle without a reasonable belief that that person is entitled to do so "
Analysis: Insurance policy exclusions are strictly construed against the insurer Exclusionary clauses are given narrow or restrictive construction The insurer must define exclusion in clear and explicit terms and also bears the burden of proving the applicability of an exclusion If the exclusionary language is not defined in the policy the court will give the words their ordinary meaning An exclusion that is clear and unambiguous must be given effect If the exclusion is fairly susceptible to two reasonable interpretations the exclusion is ambiguous and the interpretation most favorable to the insured will be adopted
Holding: The term "entitled" within the policy exclusion of "using a vehicle without a reasonable belief that that person is entitled to do so" was ambiguous so the court adopted the interpretation most favorable to the insured Therefore, coverage is excluded when a person is using a vehicle without a reasonable belief that he or she had permission of the owner or apparent owner to do so If the insurer wanted to exclude coverage for unlicensed drivers it could have done so in clear and explicit terms

c Essex Ins. Co. v. Fieldhouse, Inc., 506 N W 2d 772 (Iowa 1993)
Facts: The insured restaurant and lounge contacted its liability insurer to defend it against a negligence claim brought by a patron injured during an altercation The insurer sought a declaratory judgment that it had no obligation to defend its insured because the personal injury action fell within a policy exclusion for assault and battery
Analysis: If the terms of an exclusion are ambiguous, the policy should be construed in favor of the insured Ambiguity exists if, after application of pertinent rules of interpretation to the policy a genuine uncertainty results as to which one of two or more meanings is the proper one When an exclusion acts to withdraw a promised coverage, it must be clearly and explicitly defined

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However, clear and unambiguous exclusion must be given effect; liability should not be imposed that was neither intended nor purchased
Holding: The terms of the assault and battery exclusion were clear and unambiguous. The insured was not covered for the claims brought by the patron

B. **"Intended or Expected" Exclusion**

1. Generally applies either when the insured intended both to do the act which caused the injury and intended to cause some type of injury or when the insured knew or should have known there was a substantial probability certain consequences would result from his actions. Intent to cause injury may be inferred from the nature of the act and the accompanying reasonable foreseeability of harm.

2. Case law:

   b. American Fam. Mut. Ins. Co. v. De Groot, 543 N.W.2d 870 (Iowa 1996).
   Facts: The farm liability insurer brought this declaratory judgment action to determine whether it was obligated to defend 13-year-old babysitter who was sued by baby's parents. The babysitter had become angry when the baby would not stop crying and she hit the baby's head on the floor three times causing the baby's death.
   Analysis: In intentional act exclusions an intent to cause injury may be inferred by the nature of the act and the accompanying reasonable foreseeability of harm. Once intent to cause injury is established, it is immaterial that the actual injury caused is of a different character or magnitude than that intended. A repetitious action supports an inference of an intent to injure.
   Holding: Intentional acts exclusion in farm liability policy precluded coverage for the wrongful death action against the babysitter.

   b. Amco Ins. Co. v. Haht, 490 N.W.2d 846 (Iowa 1992).
   Facts: Homeowners' insurer filed an action for declaratory judgment to determine whether there was coverage for liability in a wrongful death claim. The insured was an 11-year-old boy. He deliberately struck another child by throwing a baseball at the boy during a neighborhood game.

Analysis: The exclusion in the policy prevented coverage for an insured's personal liability for bodily injury where the insured expected or intended bodily injury When used in exclusionary clauses, the term expected means that the actor knew or should have known that there was a substantial probability that certain consequences will result from his actions An intentional injury exclusion is triggered when the insured intended both to do the act which caused the injury and to cause some kind of bodily injury The intent to cause the injury may be either actual or inferred Intent may be inferred from the nature of the act and the accompanying reasonable foreseeability of harm
Holding: There was no evidence that the 11-year-old boy knew or should have known that his friend would die as a result of throwing a baseball at him The boy's intent did not rise to the level of intent to bodily injure the friend Therefore, exclusionary clause was not triggered and there was coverage under the policy

c Weber v. IMT Ins. Co., 462 N W 2d 293 (Iowa 1990)
Facts: Hog farm operators filed a declaratory judgment action seeking determination of whether their farm liability and umbrella insurer had a duty to defend them in an underlying action for nuisance and damages resulting from manure spilled on the road
Analysis: For the purpose of an exclusionary clause in an insurance policy, expected denotes that the actor knew or should have known that there was a substantial probability that certain consequences would result from his actions Substantial probability means that the indications must be strong enough to alert a reasonably prudent man not only to the possibility of the results occurring but the indications also must be sufficient to forewarn him that the results are highly likely to occur
Holding: The Webers knew or should have known that manure was going to spill on the road Therefore the spills were expected and the pollution exclusion was triggered This resulted in no coverage under the liability policy

d Altena v. United Fire & Cas. Co., 422 N W 2d 485 (Iowa 1988)
Facts: The victim of sexual acts committed by the insured brought a declaratory action seeking coverage under the insured's homeowner's and umbrella liability policies
Analysis: Under an intentional injury exclusion, the insured must have intended the act and to cause some kind of bodily injury Even though the insured denied any intent to injure, the intent may be inferred as a matter of law The nature of the acts, their

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repetition, and the force used to carry out the acts which amounted to sexual abuse allowed intent to be inferred as a matter of law. **Holding**: Victim's injuries were within intentional injury exclusions in both policies Therefore, no coverage existed for the insured's acts.

VII. INSURANCE CARRIERS' OPTIONS

If the insurance carrier determines that there is a defense to coverage either with respect to the duty to defend or indemnify, the carrier has specific options available to it.

1. Defend/indemnify
2. Defend under reservation of rights.
3. Defend under reservation and file a declaratory judgment action.
4. Disclaim coverage.

The carrier can assume the defense under reservation of rights after sending a letter to its insured specifying the potential coverage problems it perceives with the factual scenario, claims, and policy in question The carrier can decide whether to file a declaratory judgment action to contest coverage during the pendency of the action.

There are some inherent difficulties in pursuing declaratory judgment actions while underlying liability claims are being litigated. Unnecessary costs may be incurred The ultimate decision by the fact finder in the underlying liability case may resolve coverage questions with a finding of no liability at all, or no liability for covered claims. As such, a declaratory judgment action may only serve to enlighten the injured or damaged plaintiff as to how best to direct his or her case into coverage The claimant and insured may assist each other to affect coverage. Additionally, the declaratory judgment action will cause a natural tension or strain between the insured, the carrier, and the counsel defending under a reservation during the pendency of the case.

In many cases, especially where a disclaimer of coverage is based on the fact that there was no grant of coverage in the first instance, the insurance company would be best served by disclaiming coverage and affording no defense under reservation While there is a downside to such course, there are potential benefits to the insurance carrier for taking such a position. First, the insured will have the burden of proof in any subsequent action of demonstrating coverage in a declaratory judgment action Eventually the litigation may not lend itself to prosecution Second, the resolution of the underlying case without coverage may soften the damage verdict or resolution by settlement such that the ultimate exposure to the insurance carrier is lessened in the event that a court in a subsequent action finds that there should have been a defense and indemnity in the initial action.

However, in the event that an insured has refused to defend a third party's action against its insured on the ground that the policy affords no coverage an insured is liable for reasonable attorney fees and expenses incurred by the insured in defense of the action brought against him by the third party. New Hampshire Insurance Company v. Christy, 200 N.W.2d 834 (Iowa 1972).

Ultimately, an insurance carrier may not be bound by a factual determination in the liability case in which it was not a party. In the recent case of Dolan v. State Farm Fire & Casualty Company, 573 N.W.2d 254 (Iowa 1998), an insured was sued for allegedly striking the plaintiff at a golf outing. In spite of the apparent intentional conduct on the part of the insured, the victim pled the case alternatively as a negligence claim. The trial jury found that the insured/defendant was negligent. A suit then ensued by the plaintiff against the defendant's insurance carrier for indemnity under the policy. The plaintiff argued that the insurance carrier was precluded from re-litigating the issue of whether or not the actions of the insured/defendant were intentional or negligence based because of the trial court finding. The Iowa Supreme Court held that because the insurance carrier was not a party to the initial litigation, it was not bound by the decision. Therefore, the court re-examined the conduct of the plaintiff and the conduct of the defendant/insured and determined that it was intentional and that the intentional act exclusion would exclude coverage.

Thank you to my colleague, Brenda Werner, for her assistance in preparing this outline.

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Iowa Defense Counsel Association

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ANALYZING INSURANCE COVERAGE ISSUES

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ANALYZING INSURANCE COVERAGE ISSUES

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I. INTRODUCTION

The insurance defense practice of the 1990's is a practice that increasingly focuses on liability insurance coverage issues. As plaintiffs attempt to expand legal theories of recovery, carriers are forced to make judgments concerning their duty to defend claims and lawsuits in general.

This presentation is calculated to give coverage counsel a primer on "how to" analyze the issue of whether there is a duty to defend an insured and ultimately indemnify a claim or suit. An attempt has been made to catalog or chronicle cases so that the outline can be used as a resource by defense counsel.

II PRELIMINARIES

It is important for counsel to have certain facts and materials at hand before providing a coverage opinion to an insurance carrier.

A Factual background

The carrier must submit either an assumed factual recitation or transmit documents that should be reviewed for factual background. These facts should be recited by counsel back to the carrier in the opinion letter. In this way, both the lawyer and the carrier will be ensured that the correct factual scenario has been utilized in giving the coverage opinion.

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B The pleadings

The petition or complaint set forth must be reviewed to establish what claims have been pleaded in the litigation. While the pleadings do not constitute the beginning and end of the coverage inquiry, if a claim is covered by definition in a specific type of policy (e g , umbrella policy) a review of the pleadings will reveal the claims being asserted to be measured against the policy. See generally Kibbee v. State Farm Fire & Casualty Company, 525 N W 2d 866 (Iowa 1994)

C A specific coverage issue

The specific coverage issue or question should be stated by the carrier. The carrier should be asked to identify the specific area or issue for coverage opinion. Normally, this is not a problem. However, if counsel is asked to opine on the entire policy, the coverage opinion letter may form the basis of a complaint or claim against the insurance carrier that they did not consider all bases of potential coverage when a decision on insurance coverage was made. Additionally, discovery in subsequent coverage litigation may reveal avenues of inquiry against the carrier that were not considered by the carrier.

D A certified copy of the insurance policy

Oftentimes an insurance carrier does not provide a certified copy of the policy. As such, coverage counsel may be asked to give an opinion about policy language which is changed by an endorsement. A certified copy of the policy should have the following information:

1. An affidavit from the insurance company personnel stating that a certified copy of the policy is attached, stating the effective date of the policy which embodies or covers the date of loss or claim, and setting forth the specific policy number applicable to the insured.

2. A declarations page listing all endorsements along with the basic policy form.

3. The correct policy form and endorsements. When coverage counsel receives the certified copy of the policy, the policy should be scanned to make certain that the policy forms and endorsement forms embodying the contract match those set forth on the declarations sheet. Policy forms are often amended after the policy period in question.

Additionally, certain endorsements may radically alter, and/or eviscerate coverage as set forth in the body of the policy. Without reviewing the complete policy, counsel may give an opinion based upon an inaccurate, incomplete or misleading portion of the policy

III. WHEN DOES A DUTY TO DEFEND EXIST?

A. In determining the duty to defend, the insurer must look to facts giving rise to the lawsuit, not the theories of recovery pleaded. If the facts support any possible claim that fit within the insurance coverage, the insurer owes to its insured a duty to defend. In case of doubt as to whether the petition alleges a claim that is covered by the policy, the doubt is resolved in favor of the insured.

B. Case law:

a. Employers Mut. Cas. Co. v. Cedar Rapids Television Co., 552 N.W.2d 639 (Iowa 1996)
Facts: Insurance carrier brought suit seeking determination that it had no duty to continue to pay defense costs incurred by insured in underlying litigation when the malicious prosecution count, which was clearly within the policy's coverage, was dismissed. The remaining claim was for intentional interference with a contract.
Analysis: When determining whether there is a duty to defend an insurance company is to look at the allegations of fact in the third-party plaintiff's petition against the insured and not the legal theories on which the third-party claims the insured is liable.
Holding: The facts alleged in the petition, if proven, would support a claim for malicious prosecution. Therefore, the carrier still had a duty to defend the lawsuit.

b. A.Y. McDonald Industries, Inc. v. Insurance Co. of North America, 475 N.W.2d 607 (Iowa 1991)
Facts: Environmental contamination claims were asserted by a federal agency against A.Y. McDonald. As a result of these claims, A.Y. McDonald incurred certain costs and wanted to recover the costs from the defendants, various insurance companies that had insured the plaintiff. The defendants refused to defend and indemnify A.Y. McDonald.
Analysis: An insurer's duty to defend is separate from the duty to indemnify. The duty to defend is broader. The duty to defend rests solely on whether the petition contains any allegations that arguably or potentially bring the action within the policy coverage. If any

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claim alleged against the insured rationally falls within the coverage, the insurer must defend the entire action Any doubt about whether a claim alleged in the petition is included in the coverage is resolved in favor of the insured

Holding: The proceedings before the Environmental Protection Agency constituted a "suit" within the meaning of the insurance policy Therefore, the Insurance Company of North America did have a duty to defend A Y McDonald

c First Newton Nat'l Bank v. General Cas. Co., 426 N W 2d 618 (Iowa 1988)

Facts: First Newton was sued, along with other parties, by the original owners of a foreclosed farm property for alleged misconduct in the financing of the distressed farms The bank sought declaratory judgment to determine whether the insurance companies had potential liability in the lawsuit and therefore a duty to defend the bank on all claims in the suit

Analysis: An insurer has a duty to defend whenever there is potential or possible liability to indemnify the insured based on the facts appearing at the outset of the case The court looks first and foremost to the petition for the facts at the outset of the case

Holding: The insurance company has potential liability under the bank's policy and therefore they have a duty to defend First Newton

IV OCCURRENCE

1 Generally an accident, happening, event, or exposure to conditions in which the insured does not expect or intend the accident, happening, event, or exposure to conditions or any resulting injury An occurrence takes place when the claimant sustains actual damage, not when the act or omission that caused such damage was committed

2 Case law:

a West Bend Mut. Ins. Co. v. Iowa Iron Works, Inc., 503 N W 2d 596 (Iowa 1993)

Facts: West Bend, comprehensive general liability insurer, brought a declaratory judgment action to determine whether it had a duty to defend Iowa Iron against the DNR for depositing solid waste in an unlicensed place

Analysis: There can be no coverage under the policy unless there is an occurrence An accident, happening, event, or exposure to conditions is an

unexpected and unintended occurrence so long as the insured does not expect or intend both it and some injury
Holding: The depositing of sand, although intentional, is an occurrence under the policy because no injury was intended An occurrence was therefore alleged which triggered West Bend's duty to defend

b First Newton Nat'l Bank v. General Cas. Co., 426 N W 2d 618 (Iowa 1988)
Facts: First Newton was sued, along with other parties, by the original owners of a foreclosed farm property for alleged misconduct in the financing of the distressed farms The bank sought declaratory judgment to determine whether the insurance companies had potential liability in the lawsuit and therefore a duty to defend the bank on all claims in the suit General Casualty also argued that there was no coverage under the policy because the occurrence did not arise during the policy period and that the negligent misrepresentation claim was not an occurrence
Analysis: An occurrence policy provides coverage if the event insured against (the occurrence) takes place within the policy period, regardless of when a claim is made The occurrence is when the claimant sustains actual damage and not when the act or omission that caused such damage was committed An accident, happening, event, or exposure to conditions is an unexpected and unintended occurrence so long as the insured does not expect or intend both it and some injury
Holding: The occurrences for which the bank was being sued took place while the insurance policies were in effect The allegation of negligent misrepresentation was a covered occurrence

c Farm & City Ins. Co. v. Potter, 330 N W 2d 263 (Iowa 1983)
Facts: Mrs Potter intentionally cut the brake lines of her husband's car which was insured by Farm & City She had planned on injuring herself and the car to gain sympathy from her husband Instead, she was involved in two collisions, one with a parked car and the other with a house The liability insurer refused to pay property claims and brought a declaratory judgment action to determine coverage for collisions under the policy
Analysis: An accident, happening, event, or exposure to conditions is an unexpected and unintended occurrence so long as the insured does not expect or intend both it and some injury Even though Mrs Potter voluntarily set the sequence of events in motion, she did not intend either event which occurred
Holding: Neither collision was intended by Mrs Potter Therefore, the collisions were accidents resulting in occurrences under the policy

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V COVERED DAMAGE AND CLAIMS

A **Bodily injury** - generally physical injury, sickness, disease or death to a person Includes emotional distress sustained by bystanders Does not include emotional distress to non-bystanders Does not include loss of consortium

Case law:

1. Pekin Ins. Co. v. Hugh, 501 N W 2d 508 (Iowa 1993)
Facts: Underinsured motorist insurer brought declaratory judgment action against the insured bystanders to a fatal automobile accident in order to determine whether the emotional distress of a bystander is a bodily injury
Analysis: An injury the bystander suffers is an injury directly to the bystander as a result of the bystander seeing the accident and believing that the direct victim is seriously injured or killed This is different from a consortium claim that arises from an injury to another person Emotional distress should generally be accompanied with physical symptoms of distress
Holding: Emotional distress sustained by insureds, bystanders to an accident which resulted in the death of two family members, was bodily injury within the meaning of the underinsured coverage

2. Dahlke v. State Farm Mut. Auto. Ins. Co , 451 N W 2d 813 (Iowa 1990)
Facts: Insureds brought action against their automobile insurer to recover uninsured motorist benefits for psychological and physical effects arising out of the loss of their son killed in a collision with an uninsured motorist
Analysis: The policy's definition of bodily injury included bodily injury to a person and sickness, disease or death which results from such injury The court did not find this definition helpful so it looked to Black's Law Dictionary It stated that bodily injury is any physical or corporeal injury; not necessarily restricted to injury to the trunk or main part of the body as distinguished from the head or limbs A physical injury only The definition of bodily injury does not include the physical manifestations of the parents' loss
Holding: Psychological and physical effects from loss are not bodily injury within the meaning of the uninsured motorist provision of the insureds' automobile policy

3. Lepic v. Iowa Mut. Ins. Co., 402 N W 2d 758 (Iowa 1987)

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Facts: In this consolidated case, two minors were injured in separate and unrelated one car accidents The parents sought to recover loss of consortium under the underinsured motorist coverage.
Analysis: Loss of consortium is not a separate bodily injury to the parents deprived of their child's consortium Instead the courts have recognized that loss of consortium is a personal injury
Holding: Parents' loss of consortium as a result of the injuries to their children was not a bodily injury within the meaning of the automobile policies' provisions for underinsured motorist coverage.

B **Property damage** - Generally includes physical injury to or destruction of tangible property. May include loss of use of tangible property. Does not include economic losses or diminution in value of property.

Case law:

1 Ide v. Farm Bureau Mut. Ins. Co., 545 N W 2d 853 (Iowa 1996)
Facts: Sheep owner entered into a contract with custom sheep feeders The owner sued the feeders when he sustained damages from the loss of a large number of sheep, during an ice storm, while in the feeders' care The owner obtained a judgment but was unsuccessful in collecting it He then brought suit against the feeders' insurer for the judgment.
Analysis: Loss did not involve injury to or destruction of tangible property where damages were awarded for economic loss. No damages were awarded for physical injury to tangible property but rather for breach of contract.
Holding: There was no coverage under the policies because there was no property damage The insurer did not have to satisfy the judgment.

2 Yegge v. Integrity Mut. Ins. Co., 534 N.W 2d 100 (Iowa 1995).
Facts: Homeowners brought an action against builder's liability insurer to recover an unsatisfied judgment against the builder The insurer had denied coverage in the suit against the builder
Analysis: Homeowners' intangible economic losses from insured builder's performance in constructing their residence were not property damage.
Holding: There was no coverage under the business liability insurance policy because the losses were not property damage. As

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a result, the homeowners could not recover their judgment from the insurer

3 Ellsworth-William Cooperative Co. v. United Fire &Cas. Co., 478 N W 2d 77 (Iowa 1991)
Facts: The owner of grain storage bins brought action against the general liability insurer seeking to recover compensation for losses caused by defective construction of the grain bins by the insured
Analysis: The cost of removal of grain from defective grain storage bins constructed by insured was property damage covered by general liability policy Property damage within meaning of policy covered loss of use of tangible property and the preexisting grain bins qualified as other tangible property
Holding: The general liability policy covered the losses for the removal of grain from the defective bins and for the loss of use of preexisting bins Coverage was excluded for loss of defective grain storage bins constructed by insured

4 Kartridg Pak Co. v. Travelers Indemnity Co., 425 N W 2d 687 (Iowa Ct App 1988)
Facts: Iowa Meat brought an action against Kartridg Pak when a deboner it leased from the company did not perform as promised Kartridg Pak asked its insurer, Travelers, to defend the lawsuit Travelers declined to defend asserting that the diminution in value of the meat was not property damage under the policy
Analysis: Under the definition of property damage, intangible damages, such as diminution in value, do not constitute physical injury to or destruction of tangible property for purposes of general liability policy
Holding: The alleged diminution in value of the pork loin meat did not constitute property damage as defined in the policy As a result, the insurance coverage was not triggered

C **Personal injury** - Generally includes listed offenses of libel, slander, disparagement, malicious prosecution, and invasion of privacy and concerns injuries to a person's rights or reputation Does not include sexual harassment

Case law:

1 Kibbee v. State Farm Fire & Cas. Co., 525 N W 2d 866 (Iowa 1994)

Facts: Kibbee, a judgment creditor, brought this action against the judgment debtor's personal injury insurer to collect the judgment for intentional infliction of emotional distress.
Analysis: Personal injury definition in policy included malicious prosecution and humiliation. However, definition could not be interpreted so that malicious modified humiliation. If the insurer had intended to cover intentional infliction of emotional distress, it would have used that well-recognized phrase as it did for the other torts listed in the definition.
Holding: Intentional infliction of emotional distress was not a personal injury within the meaning of the personal liability umbrella policies which resulted in no coverage.

2. Ottumwa Housing Authority v. State Farm Fire & Casualty Co., 495 N.W.2d 723 (Iowa 1993)
Facts: Insured sought declaratory judgment that general liability policy imposed a duty to defend on the insurer against insured's employees' claims of sex discrimination.
Analysis: Part of the general liability policy definition of personal injury listed the offenses of libel, slander, and the utterance of other defamatory or disparaging material. Claims were made that a director made verbally abusive and suggestive remarks to employees. The remarks did not come under the personal injury definition because the employees did not seek damages for injury to their reputations. There was no coverage under the personal injury clause for sexually harassing disparagement.
Holding: The insured is not covered under the personal injury clause of the general liability policy.

3. First Newton Nat'l Bank v. General Cas. Co., 426 N.W.2d 618 (Iowa 1988).
Facts: First Newton was sued, along with other parties, by the original owners of a foreclosed farm property for alleged misconduct in the financing of the distressed farms. The bank sought declaratory judgment to determine whether the insurance companies had potential liability in the lawsuit and therefore a duty to defend the bank on all claims in the suit. General Casualty also argued that there was no coverage under the policy because the

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occurrence did not arise during the policy period and that the negligent misrepresentation claim was not an occurrence
Analysis: Under the multiperil policy, personal injury included injury arising out of wrongful entry or eviction or other invasion of the right of occupancy. The court stated that an injury is any wrong or damage done to another, either in his person, rights, reputation or property. By combining the definitions of injury and personal injury, coverage was broad enough to include the homeowners being "put out of their home" because of the foreclosure
Holding: The personal injury definition in the multiperil and umbrella policies were broad enough to include the allegations of being put out of a home and suffering emotional distress as a result of the foreclosures.

VI DOES THE POLICY EXCLUDE THE LOSS?

A **Exclusions - Generally**

1. The insurer has a duty to define any exclusions in clear and explicit terms. Exclusions are narrowly construed and are strictly construed against the insurer. An exclusion that is fairly susceptible to two reasonable interpretations is ambiguous and will be construed in the light most favorable to the insured. The burden of establishing that an exclusion applies rests upon the insurer.

2. Case law:

   a. Iowa Comprehensive Petroleum Underground Storage Tank Fund Board v. Farmland, 568 N.W.2d 815 (Iowa 1997).
   Facts: The Board made a demand on the comprehensive general liability insurer for its costs of remedial action at a site contaminated by insured's leaking underground gasoline storage tank. The interpretation of the word "sudden" in the pollution-exclusion provision of the policy was at issue.
   Analysis: If an insurance policy is ambiguous, requires interpretation, or is susceptible of two equally plausible constructions, then the construction most favorable to the insured is adopted. Insurer has the duty to define any limitations or exclusionary clauses in clear and explicit terms. The burden of establishing an exclusion rests upon the insurer.

Holding: "Sudden" is not an ambiguous term The pollution from the leaking underground storage tank did not fall within the sudden and accidental exception to the pollution exclusion clause

b Farm & City Ins. Co. v. Gilmore, 539 N W 2d 154 (Iowa 1995)
Facts: Insurance company sought judgment that there was no coverage under its auto policy for claims resulting from an accident occurring when owner's permittee gave permission to another, whose license had been revoked, to drive the vehicle The policy provision excluded liability coverage for any person "using a vehicle without a reasonable belief that that person is entitled to do so "
Analysis: Insurance policy exclusions are strictly construed against the insurer Exclusionary clauses are given narrow or restrictive construction The insurer must define exclusion in clear and explicit terms and also bears the burden of proving the applicability of an exclusion If the exclusionary language is not defined in the policy the court will give the words their ordinary meaning An exclusion that is clear and unambiguous must be given effect If the exclusion is fairly susceptible to two reasonable interpretations the exclusion is ambiguous and the interpretation most favorable to the insured will be adopted
Holding: The term "entitled" within the policy exclusion of "using a vehicle without a reasonable belief that that person is entitled to do so" was ambiguous so the court adopted the interpretation most favorable to the insured Therefore, coverage is excluded when a person is using a vehicle without a reasonable belief that he or she had permission of the owner or apparent owner to do so If the insurer wanted to exclude coverage for unlicensed drivers it could have done so in clear and explicit terms

c Essex Ins. Co. v. Fieldhouse, Inc., 506 N W 2d 772 (Iowa 1993)
Facts: The insured restaurant and lounge contacted its liability insurer to defend it against a negligence claim brought by a patron injured during an altercation The insurer sought a declaratory judgment that it had no obligation to defend its insured because the personal injury action fell within a policy exclusion for assault and battery
Analysis: If the terms of an exclusion are ambiguous, the policy should be construed in favor of the insured Ambiguity exists if, after application of pertinent rules of interpretation to the policy a genuine uncertainty results as to which one of two or more meanings is the proper one When an exclusion acts to withdraw a promised coverage, it must be clearly and explicitly defined

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However, clear and unambiguous exclusion must be given effect; liability should not be imposed that was neither intended nor purchased
Holding: The terms of the assault and battery exclusion were clear and unambiguous. The insured was not covered for the claims brought by the patron

B. **"Intended or Expected" Exclusion**

1. Generally applies either when the insured intended both to do the act which caused the injury and intended to cause some type of injury or when the insured knew or should have known there was a substantial probability certain consequences would result from his actions. Intent to cause injury may be inferred from the nature of the act and the accompanying reasonable foreseeability of harm.

2. Case law:

   b. American Fam. Mut. Ins. Co. v. De Groot, 543 N.W.2d 870 (Iowa 1996).
   Facts: The farm liability insurer brought this declaratory judgment action to determine whether it was obligated to defend 13-year-old babysitter who was sued by baby's parents. The babysitter had become angry when the baby would not stop crying and she hit the baby's head on the floor three times causing the baby's death.
   Analysis: In intentional act exclusions an intent to cause injury may be inferred by the nature of the act and the accompanying reasonable foreseeability of harm. Once intent to cause injury is established, it is immaterial that the actual injury caused is of a different character or magnitude than that intended. A repetitious action supports an inference of an intent to injure.
   Holding: Intentional acts exclusion in farm liability policy precluded coverage for the wrongful death action against the babysitter.

   b. Amco Ins. Co. v. Haht, 490 N.W.2d 846 (Iowa 1992).
   Facts: Homeowners' insurer filed an action for declaratory judgment to determine whether there was coverage for liability in a wrongful death claim. The insured was an 11-year-old boy. He deliberately struck another child by throwing a baseball at the boy during a neighborhood game.

Analysis: The exclusion in the policy prevented coverage for an insured's personal liability for bodily injury where the insured expected or intended bodily injury When used in exclusionary clauses, the term expected means that the actor knew or should have known that there was a substantial probability that certain consequences will result from his actions An intentional injury exclusion is triggered when the insured intended both to do the act which caused the injury and to cause some kind of bodily injury The intent to cause the injury may be either actual or inferred Intent may be inferred from the nature of the act and the accompanying reasonable foreseeability of harm
Holding: There was no evidence that the 11-year-old boy knew or should have known that his friend would die as a result of throwing a baseball at him The boy's intent did not rise to the level of intent to bodily injure the friend Therefore, exclusionary clause was not triggered and there was coverage under the policy

c Weber v. IMT Ins. Co., 462 N W 2d 293 (Iowa 1990)
Facts: Hog farm operators filed a declaratory judgment action seeking determination of whether their farm liability and umbrella insurer had a duty to defend them in an underlying action for nuisance and damages resulting from manure spilled on the road
Analysis: For the purpose of an exclusionary clause in an insurance policy, expected denotes that the actor knew or should have known that there was a substantial probability that certain consequences would result from his actions Substantial probability means that the indications must be strong enough to alert a reasonably prudent man not only to the possibility of the results occurring but the indications also must be sufficient to forewarn him that the results are highly likely to occur
Holding: The Webers knew or should have known that manure was going to spill on the road Therefore the spills were expected and the pollution exclusion was triggered This resulted in no coverage under the liability policy

d Altena v. United Fire & Cas. Co., 422 N W 2d 485 (Iowa 1988)
Facts: The victim of sexual acts committed by the insured brought a declaratory action seeking coverage under the insured's homeowner's and umbrella liability policies
Analysis: Under an intentional injury exclusion, the insured must have intended the act and to cause some kind of bodily injury Even though the insured denied any intent to injure, the intent may be inferred as a matter of law The nature of the acts, their

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repetition, and the force used to carry out the acts which amounted to sexual abuse allowed intent to be inferred as a matter of law. **Holding**: Victim's injuries were within intentional injury exclusions in both policies Therefore, no coverage existed for the insured's acts.

VII. INSURANCE CARRIERS' OPTIONS

If the insurance carrier determines that there is a defense to coverage either with respect to the duty to defend or indemnify, the carrier has specific options available to it.

1. Defend/indemnify
2. Defend under reservation of rights.
3. Defend under reservation and file a declaratory judgment action.
4. Disclaim coverage.

The carrier can assume the defense under reservation of rights after sending a letter to its insured specifying the potential coverage problems it perceives with the factual scenario, claims, and policy in question The carrier can decide whether to file a declaratory judgment action to contest coverage during the pendency of the action.

There are some inherent difficulties in pursuing declaratory judgment actions while underlying liability claims are being litigated. Unnecessary costs may be incurred The ultimate decision by the fact finder in the underlying liability case may resolve coverage questions with a finding of no liability at all, or no liability for covered claims. As such, a declaratory judgment action may only serve to enlighten the injured or damaged plaintiff as to how best to direct his or her case into coverage The claimant and insured may assist each other to affect coverage. Additionally, the declaratory judgment action will cause a natural tension or strain between the insured, the carrier, and the counsel defending under a reservation during the pendency of the case.

In many cases, especially where a disclaimer of coverage is based on the fact that there was no grant of coverage in the first instance, the insurance company would be best served by disclaiming coverage and affording no defense under reservation While there is a downside to such course, there are potential benefits to the insurance carrier for taking such a position. First, the insured will have the burden of proof in any subsequent action of demonstrating coverage in a declaratory judgment action Eventually the litigation may not lend itself to prosecution Second, the resolution of the underlying case without coverage may soften the damage verdict or resolution by settlement such that the ultimate exposure to the insurance carrier is lessened in the event that a court in a subsequent action finds that there should have been a defense and indemnity in the initial action.

However, in the event that an insured has refused to defend a third party's action against its insured on the ground that the policy affords no coverage an insured is liable for reasonable attorney fees and expenses incurred by the insured in defense of the action brought against him by the third party. New Hampshire Insurance Company v. Christy, 200 N.W.2d 834 (Iowa 1972).

Ultimately, an insurance carrier may not be bound by a factual determination in the liability case in which it was not a party. In the recent case of Dolan v. State Farm Fire & Casualty Company, 573 N.W.2d 254 (Iowa 1998), an insured was sued for allegedly striking the plaintiff at a golf outing. In spite of the apparent intentional conduct on the part of the insured, the victim pled the case alternatively as a negligence claim. The trial jury found that the insured/defendant was negligent. A suit then ensued by the plaintiff against the defendant's insurance carrier for indemnity under the policy. The plaintiff argued that the insurance carrier was precluded from re-litigating the issue of whether or not the actions of the insured/defendant were intentional or negligence based because of the trial court finding. The Iowa Supreme Court held that because the insurance carrier was not a party to the initial litigation, it was not bound by the decision. Therefore, the court re-examined the conduct of the plaintiff and the conduct of the defendant/insured and determined that it was intentional and that the intentional act exclusion would exclude coverage.

Thank you to my colleague, Brenda Werner, for her assistance in preparing this outline.

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Iowa Defense Counsel Association

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Copies of specific presentations may be obtained by contacting:

Iowa Defense Counsel Association
c/o Mr. James Pugh
5400 University Avenue
West Des Moines, IA 50265
515/225-5608

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