defense UPDATE

The Iowa Defense Counsel Association Newsletter October, 1990 Vol. III, No. 4

IDCA Announces Formation of a Case Reporting System

Craig Warner, the Iowa Defense Counsel Association president, has announced that after years of investigating the feasibility of establishing an expert witness and brief bank retrieval system, a feasible system has been established to achieve these goals. Warner explained that since most cases are disposed of at the trial court level, they remain unreported. Valuable information about someone else's case never becomes known. The case report method of the Iowa Defense Counsel will allow communication within the membership to share information about experts, briefs, valuations, products, opposing counsel's strategy, instructions and any other matters counsel deem pertinent.

Under the new system, case reports will be solicited from the members and entered on a computer to be retrieved by word queries. The system is simple to operate, fast, thorough and unique.

As an example, if an attorney wants to know if expert "x" has ever given a report or deposition regarding a product, inquiry may be made of the Iowa Defense Counsel Association office as to whether there are any case reports on the expert or the product, or both. If an affirmative response is received, the actual case reports filed by member attorneys can either be faxed or mailed to the requesting member. In addition, the reporting member would be available to furnish further information upon request. The system will also keep a record of inquiries so that if information is obtained after the inquiry that answers that inquiry, the person making the initial inquiry can be notified of the later information. Warner emphasizes that the success of the endeavor depends totally upon the contribution of the product by the membership. If members are not willing to make case reports to the computer system, obviously the system cannot work.

Our president has requested that each of us submit information in a uniform format for inclusion in the computer data base. Case report forms will be distributed at the Annual Meeting and are available at the office of the Iowa Defense Counsel Association, 520 35th Street, Des Moines, IA 50312; Telephone (515) 274-5918. Members may either write or call to receive the case report forms for inclusion in the computer data base.

Don't Forget The Annual Meeting

Annual Meeting Scheduled For

October 18th-19th & 20th

University Park Holiday Inn

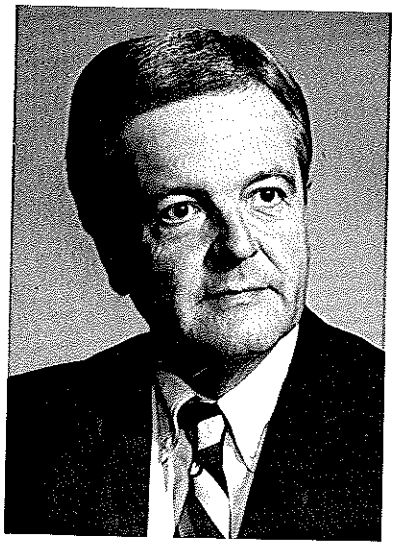
West Des Moines, Iowa

Meeting Highlights: Special Guest Speakers: The Honorable Terry E. Branstad, Governor - Thursday Luncheon; The Honorable Bruce Snell, - Friday Luncheon; The Honorable Ross A. Walters, - Friday, 4:30-5:00 p.m.; Donald Kahl, Columnist, - Friday Evening Banquet; The Honorable Charles A. Wolle, - Saturday, 10:45 - 11:30 a.m. Western-Style Barbeque Dinner - Thursday Evening.

If you have lost your registration materials, call Eugene Marlett at (515) 225-5600.

Please mail registration ASAP.

MESSAGE FROM THE PRESIDENT



Craig D. Warner

The most important news in the IDCA at present is our 26th Annual Meeting and Seminar October 18-20. The program is printed in another part of this Defense Update and you can see that Alan Fredregill has put together an interesting and informative seminar with 27 speakers. Most IDCA members look forward to and attend our annual get together. If you haven't yet attended one of these programs, I want to extend a special invitation to you to do so. Our seminar satisfies all of our CLE requirements and covers a wide range of topics which are currently interesting and informative for Iowa defense lawyers. Additionally, it is always fun to see old friends and colleagues and meet new people. Special events this year include a Western style barbecue and band on Thursday night and for the Friday night banquet we've lined up Donald Kaul, the popular columnist with the "Des Moines Register" as an after dinner speaker. If you haven't already made plans to attend, do so, you will enjoy it.

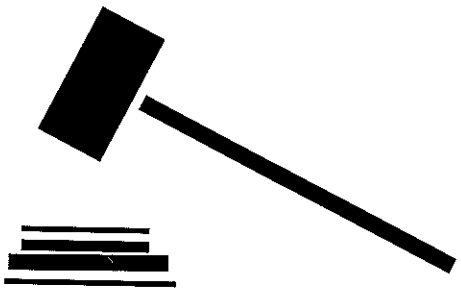
Reported elsewhere in this Defense Update is an article on our new case reporting system. This system is the result of the efforts of the officers and directors to make membership in the IDCA more meaningful by providing quality member services. The system is really unique, simple to use and opens up a wealth of information in the area where most of our efforts are spent at the trial level. The officers and directors have been busy seeding the data base with information and in the near future you will be receiving a mailing with forms and instructions and asked to send in information on cases you feel would be of interest that you're working on or have completed. The ultimate success of the system is wholly dependent on the participation of the membership. The bigger the data base, and the more we use the system, the better it gets.

Since publication of the last Defense Update and at the writing of this article the Iowa Trial Lawyers Association PAC has made a contribution of $50,000 to one political candidate in Iowa. No doubt the plaintiffs' lawyers are also making less, but substantial contributions to a number of key legislative campaigns. News of the one contribution came as a surprise to many of us and the general public as well. This is serious money.

Our legislative program is, for the most part, one of reacting to the political urgings of the plaintiff's bar. Last February our Board of Directors approved the recommendation of a study committee and approved the formulation of a PAC. At this writing our PAC is unfunded; however, IDCA-PAC will in the near future, if it hasn't already by the time you receive this issue, be asking you for a modest contribution. I'm sure we will never get into a bidding war with the plaintiffs' bar, but as you can imagine our legislative program is seriously restrained without our ability to be making at least some financial contributions. Like it or not, today they are a necessary cost of being politically effective.

This being my last Message from the President, I would like to say that whatever accomplishments the IDCA made this year have been the product of those who have gone before us and the efforts and dedication of the other officers, the Board of Directors and membership. Thanks for giving me this opportunity to serve.

Craig D. Warner
President



FROM THE BENCH

Motion Practice From The Judicial Viewpoint –
Comments By Third Judicial District Judge Dewie J. Gaul

There are a lot of controversies that come before a judge that are intriguing, fascinating, and challenging. Trials are nearly always fun, and most hearings on motions bring up interesting questions which are a joy to solve. The questions which arise in regard to discovery are fully capable of falling into such an enjoyable category. Why is it, then, that so often such motions turn out to be an uninteresting drudgery for a judge? I believe it is because such motions are sometimes sprawling, unfocused, and rely on poorly prepared discovery requests, objections, or answers.

With a little care, a practitioner can make motion practice in regard to discovery less likely to be something the court looks on as a chore.

I. When preparing interrogatories one should read not only Rule 126, but I believe Hot Spot Detector v. Rolfes Elect. Corp., 251 Iowa 647, 102 N.W.2d 354 (1960) should not be overlooked. It tells us that putting one number on an interrogatory having multiple parts does not insure that the interrogatory is only single.

II. When interrogatories or requests for production are received we all know a response is required within 30 days. Seemingly not so well known is the risk one runs in not filing any objections within 30 days. The Iowa Supreme Court has frequently looked to cases interpreting the federal rules when — as is often the case — those rules are similar to the Iowa rules. See, e.g., Sullivan v. Chicago & Northwestern Transp., 326 N.W.2d 320, 326 (Iowa 1982). There are numerous federal cases holding that failure to object within 30 days is a waiver of any objection. See-Wright & Miller, 8 Federal Practice, Sec. 2173 page 544; 4A Moore's Federal Practice, Sec. 33.27; 23 Am.Jur.2d 689, Depositions, Sec. 291, where some are cited.

III. The objections not only should be timely filed, but carefully formulated. If objections are waived by not being filed on time — as I believe they are — they are also waived by not being included with objections which are timely filed.

IV. Rule 122(e) provides "No motion or discovery shall be filed by the clerk or considered by the court unless the motion alleges that counsel...has made a good faith but unsuccessful attempt to resolve the issues raised by the motion..." Maybe your clerk doesn't refuse your filing when it doesn't contain the required allegation, but with a sprawling, many-faceted motion to compel which doesn't contain it a judge may see the language of the rule as making for a simple one-sentence ruling.

V. It stands to reason a carefully focused motion dealing with specific issues actually in dispute will receive more careful and thoughtful attention than one which requires individual attention to numerous interrogatories and production requests. So the requirement of Rule 122(e) should be used to dispose of as many disputes as possible. A motion to compel production of one piece of paper is a lot more fun to consider than a motion of numerous parts, many parts of which are no longer of significance by the time the motion is heard.

VI. Rule 130 deals with procedure in regard to requests for production. It does require a written response to be served on opposing counsel and filed with the Clerk (see R.Civ.P. 82(d)), but it never — even before the recent amendment — required filing the requested items with the Clerk. The response is required to say that the requested item will be produced or to state reasons for objection to production. Why anyone believed the Rule means the court file should be cluttered with copies of produced documents is not easy to understand. Production is to be made to the opposing party, not to the Clerk.

The foregoing are a few matters it might be well to keep in mind when you are in the discovery process. They might make for a more interested judge considering your discovery dispute, and perhaps a happier result for your client.

Judge Gaul practiced law in Sioux City from 1955 to 1983 when he was appointed District Judge. He is a graduate of Georgetown Law School and resides in Sioux City.

COMMENT ON LAW

Les Reddick of the law firm of O'Connor & Thomas, Dubuque, Iowa comments on uninsured motorist suits and Iowa Rule of Civil Procedure 186.

The relatively recent legislative requirement that automobile liability insurance carriers offer uninsured motorist coverage in their policies has not only given rise to a new genre of litigation, but has raised the spectre of another deep-pocket defendant to further beleaguer the defense attorney. In an uninsured motorist case the tortfeasor may be either an unknown hit-and-run driver or a known driver without insurance coverage. In the former case, the plaintiff may sue his own automobile insurance carrier under the uninsured motorist provision, while in the latter case suit may be brought against both the known driver and the uninsured motorist carrier. (Some jurisdictions do not allow this joinder, requiring judgment against the driver first.) Such suits raise a panoply of legal issues arising from the pervasive juror bias against insurance companies. This potential lack of objectivity on the part of a jury can create a substantial problem when the insurance company is a named defendant. Three of the ten largest verdicts of 1988, as reported by The American Bar Journal, were against insurance companies. The following discussion addresses this apparent difficulty in achieving the ultimate judicial objective of fairness when trying uninsured motorist's cases.

In my experience, juries do not exercise the same reasoned, unbiased judgment when the defendant is an insurance company as when the defendant is an individual (albeit covered by liability insurance). In fact, in the latter case rules of evidence typically exclude evidence of insurance coverage. See Iowa Rule of Evidence 411. Those jurisdictions prohibiting the introduction of such evidence do so for the express reason that knowledge of insurance coverage leads juries to make judgments on improper grounds, namely, the wealth of the defendant's insurer, rather than on the basis of the applicable law governing the right of recovery. Since a consensus exists that knowledge of insurance coverage in those cases creates bias in juries, there is every reason to believe the same bias exists to a much greater degree when the insurance company itself is a named defendant. Where uninsured coverage is not contested, the issues before the jury are no different than when the defendant is an individual: fault of the driver and damages of plaintiff, if any. Yet, in the liability insurance situation courts routinely bar evidence of insurance coverage to protect against prejudice, while in the uninsured motorist case courts routinely admit into evidence the fact that the defendant is an insurance company providing coverage for the accident. The bias is the same in both cases, and the applicable rule of evidence should be the same.

Assume that plaintiff has been injured in an automobile accident by an uninsured motorist and files suit, jointly, against both the driver, who is impecunious (which is almost always the case) and the plaintiff's own uninsured motorist carrier. Existing rules of civil procedure may be applied to the hypothetical case to avoid prejudice without sacrificing fairness. I.R.C.P 186 states:

> "**Separate trials.** In any action the court may, for convenience or to avoid prejudice, order a separate trial of any claim, counterclaim, cross-claim, or of any separate issue of fact, or any number of any of them. Any claim against a party may be thus severed and proceeded with separately."

Rule 186 provides the basis for filing a motion to bifurcate the issues of fault and damages tried against the uninsured driver from the contractual issues of coverage to be tried against the insurance company. Where coverage is not disputed or no factual issue exists regarding the uninsured motorist carrier's obligation to pay any damages arising from the accident, the potential second trial against the insurance company is, in actuality, no more than entry of judgment and would not cause any delay. Where a coverage dispute does exist, the goal of avoiding prejudice would certainly seem to outweigh any claim that bifurcation would result in undue delay. In this way, prejudice is avoided, because in the trial of fault and damage issues, the nature and existence of insurance coverage is irrelevant to the issues before the jury and would be excluded. This exclusion is premised upon the notion that a plaintiff's right to a fair verdict is not prejudiced by concealing from the jury any participation by an uninsured motorist carrier.

The procedure used to accomplish the above would work well where the uninsured driver is a named party and is either a participant in the trial or a default judgment has been taken and liability is no longer at issue. In that situation, the attorney representing the uninsured motorist carrier will, in effect, be defending the damage claim. In other words, where the uninsured motorist is a known, named party, the trial is identical to a trial in which the liability insurance carrier defends its insured. However, where the uninsured motorist is a hit-and-run driver, by definition unknown, the logistics of trying the case before the jury become more difficult. The jury could rightfully wonder who the defense attorney is representing and may even suspect uninsured motorist coverage, but suspicion is better than outright knowledge in that case; the same suspicion of liability coverage probably exists in all automobile cases, but the evidence is nonetheless excluded. The matter can fairly be handled by instructing the jury that the defendant is unknown and their only duty is to determine fault and damages.

While separate trials as outlined above would most certainly avoid any potential prejudice, there can be no reasonable argument advanced by the plaintiff that the procedure is unfair, i.e., that it somehow deprives the plaintiff of the right or ability to recover under the applicable law governing liability. The plaintiff's right to have a jury decide the fault and damage issues continues inviolate.

Any time an attorney defends a named insurance company in an uninsured motorist case, he or she should give serious consideration to using *R.C.P. 186* to remove the issue of insurance coverage from the jury's deliberation. I've used this method once in the First Judicial District and the court granted the motion and the matter was tried to the jury without their knowledge of any insurance coverage. As an aside, the court did not allow the "insurance question" on voir dire, either, because liability insurance was not involved.

CASENOTE SUMMARY

Punitive Damages, Contribution and Settlement.

Reimers v. Honeywell, Inc.

Analyzed by Robert B. Hanson of Hanson, Bjork & Russell, Des Moines, Iowa

Prior to the implementation of comparative fault in Iowa via Chapter 668 of the Code of Iowa, Iowa Supreme Court rulings followed the rule preventing intentional or reckless tortfeasors from recovering contribution from joint tortfeasors. However, the Court appears to have withdrawn, at least partially, from this position in its recent ruling in the case of Reimers et al. v. Honeywell,et al., 457 N.W.2d 336 decided June 20, 1990. In addition to its precedential significance, this ruling is of practical importance to litigators and their clients. After Reimers, settling parties contemplating actions for contribution would be well-advised to consider alternative courses of action which might help to avoid some or all of the pitfalls of the contribution action.

Plaintiffs in Reimers were victims of a gas explosion involving a furnace. They sued Honeywell (the manufacturer of the furnace valve that failed) amongst others. Honeywell cross-claimed for contribution against the co-defendants and filed a third-party petition for contribution against Poweshiek-Jasper Farm Service ("Poweshiek"), the gas supplier. Honeywell proceeded to settle plaintiffs' claims and its own contribution claims against the other defendants. Honeywell then tried its third-party contribution action against Poweshiek. A verdict was returned allocating fifteen percent of the causal fault against Poweshiek and Poweshiek appealed.

In the original lawsuit, plaintiffs had sought exemplary damages based upon allegations of wanton and reckless conduct against Honeywell. In its settlement of the claims and crossclaims, Honeywell settled all claims including (the Court presumed) those for exemplary damages but apparently no allocation was made between payments for alleged tortious conduct giving rise to claims for compensatory damages and those for conduct giving rise to the claims for exemplary damages in the release. Neither was Honeywell's contribution claim against Poweshiek tried in a fashion requiring segregation of the two types of damages. Instead, the trial court believed that, with the advent of Chapter 668, Iowa law now allowed contribution for damages arising from the alleged reckless conduct of Honeywell, based upon §668.1(1)'s definition of fault as "acts or omissions that are in any measure negligent or reckless 457 N.W. 2d at 339 (Emphasis supplied). The trial court did not have the benefit of the Supreme Court's opinion in the case of Godbersen v. Miller, 439 N.W.2d 206 (Iowa 1989), rendered in the interim, which held explicitly that comparative fault principles under Chapter 668 did not apply to claims for exemplary damages. Id. Thus the trial court's entry of judgment against Poweshiek was reversed.

However, instead of barring Honeywell's contribution claims altogether, the Supreme Court remanded the case for purposes of allowing Honeywell to prove what portion, if any, of the payments were for claims for punitive damages and disallowing contribution on that portion. The Court discretionarily remanded the case in fairness to Honeywell. Id. at 340. The Court expressly observed that Honeywell had carried its burden at trial on the "major" issues of the contribution claim, namely, Poweshiek's fault and the reasonableness of the settlement. Id. The Court also emphasized that the trial court had tried the case based upon a "tenable", "arguable" (albeit erroneous) interpretation of existing law, without the aid of the contemporaneous and dispositive Godbersen opinion. Id. at 339-340..

While the Court made no express comments in this regard, Reimers seems to represent a departure from the Court's previous rulings with respect to the availability of contribution to intentional or reckless tortfeasors. In Beeck v. Aquaslide 'N' Dive Corp., 350 N.W.2d 149 (Iowa 1984), the Court affirmed the denial of contribution to the defendant on the grounds that contribution was not available to reckless tortfeasors. The Court relied upon and cited extensively the Restatement (Second) of Torts §886A, Comments j and k (1979) in support of its ruling. In the Restatement's view "[t]here is no right of contribution in favor of any tortfeasor who has intentionally caused the harm" Id. This rule is extended by the Restatement to reckless conduct. Id., Comment k. Presumably, following Reimers, the intentional or reckless tortfeasor will only be denied contribution with respect to the conduct actually giving rise to claims for exemplary damages.

The reason for the Court's departure from long-standing precedent is uncertain. In response to arguments raised by Poweshiek that Honeywell's contribution action should be completely barred for its failure to segregate payments for punitive damage claims, the Court conceded that, ordinarily, a litigant would not be given a second chance merely on the basis that the substantive law was not clear at time of trial. Reimers, 457 N.W. 2d at 340. As previously stated, the Court's only response seemed to be that under the particular circumstances of this case, such a result would be too harsh or unfair to Honeywell. Id. More important, the Court's comment that "[t]he prohibition is aimed at outrageous conduct, not tortfeasors personally," (Reimers, supra at 339) is inconsistent with the previously articulated basis for the longstanding rule, namely, "that the courts will not aid one who has [recklessly] done harm, so that no man can be permitted to found a cause of action on his own [reckless] tort." Restatement, supra, Comment j. Clearly, the longstanding rule was aimed at intentional or reckless tortfeasors personally. Just as punitive damages punish the tortfeasor personally, the rule barring recovery of contribution by a reckless or intentional tortfeasor denies him personally the assistance of the courts in seeking to avoid liability.

It is also hard to imagine what can be accomplished by requiring a party to segregate claims for compensatory damages from those for punitive damages. Punitive damages arise from the same tortious acts giving rise to compensatory damages if the claimant proves that the alleged conduct amounts to something beyond ordinary negligence, namely, recklessness or

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CASENOTE SUMMARY (continued)

(continued from page 5)

intentional conduct. Arguably, it would be impossible to make the distinction the Court proposes. Conduct is either sufficiently reckless or intentional to merit an award for punitive damages or it is not. In all likelihood, the only effect of Reimers on contribution actions will be that a claimant will attempt to establish that no portion of the payment was intended to satisfy punitive damage claims thereby permitting contribution as to the entire amount. If plaintiff is called to testify he will certainly cooperate in order to establish that the payments were entirely compensatory for tax reasons. See Note, Exclusion of Personal Injury Damages From Gross Income Under I.R.C. Section 104(a)(2), 37 Drake L. Rev. 643, 653-655 (1987); e.g. Hall v. Archer-Daniels-Midland Co., 524 N.E.2d 586, 591 (Ill. 1988). Instead of demeaning the court by involving it in a mission which is arguably collusive by its very nature, it seems wiser to require the person seeking contribution to segregate settlement amounts from the start or be barred therefrom altogether.

Notwithstanding the extent of the Court's departure from the traditional rules with regard to the unavailability of contribution to intentional or reckless tortfeasors, the Court has also maintained the incongruous rule allowing the intentional or reckless tortfeasor to set off amounts received by the claimant in settlement against claimant's judgment. Such was the case in Tratchel v. Essex Group, Inc., 452 N.W.2d 171 (Iowa 1990). In Tratchel, plaintiffs sued multiple defendants and, during the course of litigation but prior to trial, settled their claims with all defendants except Essex. Plaintiffs sought recovery against Essex for inter alia punitive damages based on allegations of "fraud due to the withholding of facts about known product defects which misled defendant's customers and ultimately the consumers." Id. at 174. Plaintiffs' fraud claim and punitive damage claim were asserted against Essex alone.

At the conclusion of trial, the jury returned verdicts in favor of plaintiffs on all theories of liability including fraud.

Having determined that fraudulent conduct fell outside the definition of fault under Chapter 668, the trial court entered judgment against Essex for the jury's full assessment of both compensatory and exemplary damages. However, the trial court subsequently reduced plaintiff's judgment by the amount received from the other settling defendants. In response to plaintiffs' protests, the Supreme Court stated that "a tortfeasor, liable for fraudulent misrepresentation, is entitled to a setoff even though he does not have a right of contribution. Tratchel, supra at 181 (citing Beeck). Consequently, some or all of the benefits of the remedy of contribution made unavailable to the intentional or reckless tortfeasor are restored to the tortfeasor and the deterrent value of the bar of contribution is undermined.

Perhaps the lesson to be learned from Reimers with regard to settlements is to avoid the contribution action altogether and simply settle one's own liability. Settlement of claims against a single defendant are often possible through employment of the so-called Pierringer release and thereby the defendant could avoid any difficulties inherent in the proof of a contribution claim. If a party wishes to undertake the settlement of all claims, heed should be paid to the Reimers decision where claims for punitive damages are involved. That claims for exemplary damages are frequently made is an understatement. Further, one need only look at standard release language employed by attorneys to realize that the problem encountered by Honeywell in Reimers is widespread but, at the same time, latent. For example, Iowa State Bar Association, Official Form No. 150, "Release", expressly serves to release "any and all liability whatsoever, including all claims, demands and causes of action of every nature. . . ." (Emphasis supplied.) Because causes of action for contribution do not accrue and need not be asserted at the same time as those claims from which they arise (see §668.6(3), Code of Iowa), a release might well be executed before a contribution action is even contemplated. For these reasons, in instances involving allegations of intentional or reckless conduct, thought should be given to incorporating language in a release which would 1) allocate an express sum in settlement of claims for exemplary damages or, (perhaps preferably) 2) expressly indicate that no portion of any payment is for any claim for exemplary damages, if there is any chance that contribution might later be sought. Finally, under those circumstances where claims against other parties have already been settled and trial is unavoidable, a party should keep in mind that a pro tanto setoff may be available, even in those circumstances involving intentional or reckless conduct.

IN THE PIPELINE

Pollution Exclusion Tested in the Supreme Court —

By Marsha K. Ternus,
A Partner with Bradshaw, Fowler, Proctor & Fairgrave, Des Moines, Iowa

Weber v. IMT Insurance Co.

On September 10, 1990, a case was argued before the Iowa Supreme Court which may give guidance to insurers in the future when applying liability policies to pollution claims. In Weber v. IMT Insurance Co., S. Ct. Case No. 88-1389, the Webers filed a petition for declaratory judgment against IMT, alleging that IMT had coverage under a farm liability policy and umbrella policy issued to the Webers for claims made against them by Ralph Newman. IMT denied coverage on the basis that the Newman petition did not state a claim for damages "caused by an occurrence" as required by the umbrella policy and further, that the Newman claim fell within the pollution exclusion contained in the farm liability policy.

After a trial to the court, the district court ruled that the pollution exclusion applied and furthermore, that the Newman suit did not allege an "occurrence". The court held that the pollution exclusion as applied was neither unreasonable nor bizarre and therefore, the doctrine of reasonable expectations did not apply. The Webers appealed the trial court's ruling, and the Court of Appeals affirmed the decision of the district court in all respects. The Supreme Court granted the Webers' application for further review.

The farm liability policy issued by IMT to the Webers contained the standard pollution exclusion which contained the exception for sudden and accidental discharges. The umbrella policy did not have a pollution exclusion, but did contain the standard requirement of an "occurrence" defined as "an accident, including continuous or repeated exposure to conditions, which results in personal injury or property damage neither expected nor intended from the standpoint of the insured".

The Newman petition claimed that for a number of years the Webers, while hauling hog manure from their hog feeding operation, repeatedly allowed manure to fall on the county road in front of the Newman residence. The Newmans sought to abate this nuisance and also sought damages for the contamination of their sweet corn crop. The evidence at trial showed that Newman lived approximately one mile south of the Webers' hog operation on a county gravel road and that the Webers used this road to haul manure from their hog operation to spread on their farmland. The manure problems and the complaints of Mr. Newman about the problems were longstanding. Newman complained for several years about the Weber hog operation to other neighbors and also complained to the Iowa Department of Environmental Quality (D.E.Q.) in the late 1970s and again in 1985 and 1986. The Webers were aware of Newman's complaints concerning the hog operation throughout the years, including his complaints to the D.E.Q. After the filing of Newman's lawsuit in 1986, the pollution on the road stopped in early 1987.

The Webers claimed on appeal that the pollution exclusion did not apply because the manure they hauled did not constitute "waste materials" as that term is used in the pollution exclusion. The Webers contended that, because they intended to spread the manure on other farmland as a fertilizer, it was not waste material. The insurer claimed that the mere fact that manure serves as a fertilizer when deposited on farmland did not change its basic character as waste material. The insurer also argued that when manure is deposited on a public road, as in this case, it is not serving the beneficial purpose of fertilizer and therefore, retains its status as a waste material.

The Webers also contended on appeal that the sudden and accidental exception to the pollution exclusion applied. The amici who filed briefs on behalf of the Webers argued that the phrase "sudden and accidental" is ambiguous and that the insurance industry, when adding the pollution exclusion to the standard farm liability contract, indicated that the pollution exclusion was merely a restatement of the "occurrence" requirement. IMT argued that the Webers' deposit of the waste materials over a 10-15 year period was neither sudden nor accidental as those terms are commonly defined.

The Webers also argued that their purchase of a farm liability policy gave rise to a reasonable expectation that it would cover common farming activities such as hauling manure. IMT contended that the pollution exclusion was not ambiguous nor was it bizarre or oppressive.

The final issue before the Supreme Court concerns whether the damages claimed by Newman in his case against the Webers were caused by an occurrence as required by the umbrella policy. The Webers argued that the occurrence definition requires merely that their actions and resulting damages not be intentional. IMT argued that the Webers expected damage because they knew, based on their past actions and Mr. Newman's complaints, that there was a substantial probability that manure would be deposited on the road.

NOTE FROM THE EDITORS

The editors have been informed that the Iowa Defense Counsel Board of Directors have established a political action committee. The PAC is known as the Iowa Defense Counsel Association Political Action Committee. The chairman of the committee is Allan E. Fredregill of Sioux City and the treasurer is Kevin Kelly of Des Moines. Other members of the Political Action Committee are the members of the Iowa Defense Counsel Association Legislative Committee. The group is soliciting contributions with the goal that support will be given to Iowa legislative candidates supporting the legislative goals of the Association. It is our understanding that the committee will be sending a letter to the membership shortly. If you are interested in contributing to the PAC, make your checks payable to IDCA Political Action Committee and mail them to the Association's office at 520 35th Street, Des Moines, IA 50312. The committee has informed your editors that effective contributions are made to candidates both before and after the election.

This is the final edition of Volume III. We will be starting Volume IV with our issue in January of 1991. We have become somewhat more structured in our organization and anticipate that we will continue to publish quarterly publications on January 1, April 1, July 1, and October 1 of each year. If you should have any comments, criticisms, or compliments, we would be happy to hear from you. You may write to us at our individual addresses or by mailing your letter addressed to us at the Association's office.

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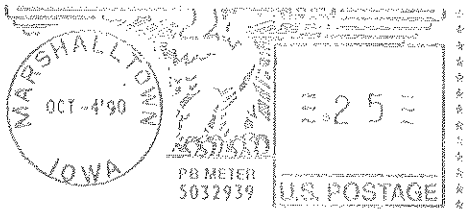

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