defense UPDATE

The Iowa Defense Counsel Association Newsletter October, 1995 Vol. VIII, No. 4

Insurance Coverage Issues In Pollution Claims

By Robert V. P. Waterman, Jr., Thomas D. Waterman, John D. Telleen,[1] Davenport, Iowa

Billions of dollars are at stake in litigation nationwide over general liability insurance coverage for pollution cleanup costs.[2] Declaratory judgment actions on environmental coverage issues have spawned conflicting caselaw on complex legal issues and divergent outcomes on fact sensitive cases, presenting vexing challenges to practitioners in this dynamic field. Counsel for insurers and insureds alike closely monitored *Fireman's Fund Ins. Co. v. ACC Chemical Co., et al.,* No. 80/93-1596, __ N.W.2d __ , 1995 WL 424988, (Iowa July 19, 1995) ("*Chemplex*"), rehearing denied September 15, 1995, where the Insureds' appeal and Insurers' cross-appeals from judgments on multi-million dollar jury verdicts presented our state Supreme Court with questions of first impression in Iowa that have divided courts elsewhere. In a victory for five primary and excess general liability insurers who litigated the case to conclusion,[3] the Court held that notice by the *Chemplex* insureds to their liability insurers was late and prejudicial as a matter of law, defeating coverage. In so holding, however, the Court expressly declined to reach the remaining issues. After discussing the background and significance of the *Chemplex* decision, this article will explore certain of its "unanswered questions."

BACKGROUND

Justice Larson, writing for an unanimous Court which sat *en banc* for a full hour and fifteen minutes of oral argument,[4] introduced the Court's opinion with this succinct overview:

> This case involves insurance coverage for pollution cleanup costs and the cost of defense in connection with pollution caused by a manufacturing company called Chemplex. Chemplex manufactured Polyethylene products in a plant situated on 230 acres of land leased from the City of Clinton. In the process of manufacturing these products, Chemplex dumped toxic liquid waste in leaching pits at a seven-acre landfill area at a rate of 7500 to 30,000 gallons per day. Hazardous chemical waste entered into the groundwater and soil at the site and the area surrounding it. The fact of contamination is not disputed. The insureds (Chemplex and the City of Clinton—referred to collectively as Chemplex) had spent several million dollars to correct the problems at the site as of the time of the trial, and it was estimated that the total cleanup would cost in excess of $40 million.

Slip. op. at 4.

Chemplex had sued certain of its general liability insurers in Delaware state court in late 1989 seeking defense and indemnity coverage for the underlying EPA CERCLA enforcement proceedings; the carriers commenced a declaratory judgment action in Iowa in 1990. The district court litigation culminated with a nine-week jury trial in Clinton County the summer of 1993.[5] The Honorable John A. Nahra submitted numerous claims and defenses to the jury which deliberated two weeks before returning special verdicts finding covered "occurrences" under some liability policies, total past cleanup costs (indemnity) of $19 million (out of approximately $26 million submitted by Chemplex), and $1.48 million for past defense costs. Because the jury had failed to completely answer certain special verdicts, the district court sent it back for further deliberations applying "pollution exclusions" and to determine the amount of indemnity damages during each triggered policy period. The jury returned a supplemental verdict finding that the pollution exclusions barred coverage for 70 percent of the damages, thereby reducing the $19 million damage award to approximately $8.35 million,[6] and allocated damages among the triggered policy periods. The district court then entered judgments against the insurers for total past damages of just over $5 million.[7] *Slip.*

Continued on page 6

MESSAGE FROM THE PRESIDENT

Gregory M. Lederer
President

I have been tying for too long now to think of something profound or moving or even just a little memorable to offer as my final letter as your president. Nothing comes to mind, which I'm sure says more about my failings than your high standards. In the course of combating my writers' block, it occurred to me that something should be said about the people who are responsible for this newsletter and the fact that I have a block to overcome.

The *Defense Update is* the best legal periodical published by an Iowa legal organization. It has become much more than just a reporter of what is going on the IDCA. It is a mini law review, with scholarly but practical articles on the legal issues and problems of the day. It also has come to represent IDCA, to be our trademark. We send the *Defense Update* to all of the judges across the state, and they frequently thank us, remark about the quality of the newsletter, and claim that they read it from cover to cover. Don't you wish that they said any one of those things about your briefs?

Publishing a twenty-page newsletter of articles written largely by people who are paid by the hour to do things other than write such articles is no small task. Doing it well seems to me to be insurmountable. Doing it well *and* for free calls into question the Eighth Amendment. Yet our board of editors not only keep plugging along, they make each quarterly issue better than the last. Our editors are:

Kenneth L. Allers, Jr.
Kermit B. Anderson
Mark S. Brownlee
Michael W. Ellwanger
James A. Pugh
Thomas J. Shields

These good lawyers, your friends and colleagues, deserve more than this acknowledgment and our thanks. You can help them and see your own name in these pages by taking a few hours away from your practice, just like they do, and writing an article and submitting it for their consideration. They will appreciate your contribution and you will have helped make the *Defense Update* even better than before.

I congratulate new president Chuck Miller, new president-elect Bob Engberg, new secretary Jaki Samuelson, and our enduring treasurer, De Wayne Stroud, as they embark on a new year. I know that the IDCA will prosper under their stewardship. It has been my privilege and pleasure to be a member of the Iowa Defense Counsel Association. Being a member would have been enough to make me happy. To find myself on this page and now on a list with the other past presidents is an honor I have only just begun to fathom. Thank you.

DEPOSING THE HEAD INJURY CLAIMANT

By Stephen B. Bisbing, Psy.D., J.D.

In cases involving plaintiffs claiming mild head injury in particular, it behooves deposing attorneys to consider having the claimant's mental status and performance observed and noted. This can be an especially helpful piece of information when experts or consultants are precluded from seeing the claimant or there is a suspicion of symptom exaggeration. This "mini-mental status" can be accomplished by having a colleague or staff person from the office accompany the attorney to the deposition and sit unobtrusively to the side. The colleague, if absolutely necessary, should be identified as an observer from your office. He/she should sit out of the deponent's visual field but be close enough to observe the witness' behavior and hear his/her responses. A law clerk or paralegal tend to be well suited for this task because, for example, if challenged they are usually perceived by opposing counsel and claimant as less threatening.

This individual (the observer) is then asked to quietly record observations about the claimant's behavior throughout the deposition - including breaks if possible. The following list provides some guidelines regarding what generally should be looked for and how this can be recorded.

BEHAVIORS TO OBSERVE & NOTE DURING THE DEPOSITION OF A HEAD INJURY CLAIMANT:

I. Counsel or Third Party Observer

General Appearance

Note the claimant's appearance, gait, dress, grooming, posture, gestures and facial expressions. Does the patient appear older or younger than stated age?

Motor Function

Note the claimant's level of activity (e.g., agitated, slowness) - hands, speech, gestures, gait, etc.). How consistent is his eye contact throughout the questioning? ["I notice that you rarely make eye contact, can you tell me about that?" or "... that your hands seem to tremble, can you tell me about that?"]

Attitude during Interview

Note how the claimant relates to counsel (examiner) - irritable, aggressive, guarded, cooperative, indifferent, apathetic. ["You seem irritated about something - is that accurate?"]

Mood

Note the claimant's general emotional state (gloomy, tense, hopeless, depressed, fearful, ecstatic, happy, sad, pensive, etc.) ["How do you feel"?; "You appear _______-is that accurate? why?"; What are your plans for the future?]

Affect

Note the claimant's expressed and apparent tone of his feelings (blunt, appropriate to content, flat/bland, indifferent, etc.)? Also observe nonverbal signs of emotion, body movements, faces, and rhythm of voice.

Speech

Note the rate (slow, fast, pressured, spontaneous, slurring); quality (clear/articulate, incoherent, sparse).

Perception

Note whether claimant's ideas and responses to questions are rational/logical; associated with actual events.

Thought Process

Note whether claimant's ideas and responses are goal directed; illogical, coherent, rambling, relevant, loose, flighty, etc.

Sensorium

Note the claimant's level of consciousness (e.g., alert, confused, clouded, oriented to time-place-person. ["Do you know what the purpose of today's deposition is?"; "Tell me the date?"]

Memory

Long-term memory

Note the accuracy, relevancy, clarity, and ease in which the claimant responds to questions regarding dated events in his past (e.g., location of birth, date of marriage, chronology of employment).

Recent memory

Note the accuracy, relevancy, clarity, and ease in which the claimant responds to questions regarding events occurring the past couple of days [e.g., "what did you eat this morning?"; "what did you do yesterday?"]

Immediate memory

Counsel: Deliberately ask claimant to re-give an answer he provided to a question about 5 minutes after it was asked.

Concentration/attention

Note the claimant's accuracy and ease in following questions, responding accurately, and staying on track throughout the deposition. [Does his mind appear to wander?]

Calculations

Counsel: Ask the claimant to do some simple mental calculations such as asking him to identify his hourly wage with his job, how many hours a week that he works and then "how much then did you make a week before taxes?"

Information and intellect

Note the ease, accuracy in which the claimant uses vocabulary; his breadth

Continued on page 14

CONTINGENCY FEES – THE GREAT AMERICAN ABERRATION

By David L. Hammer, Dubuque, Iowa

Guest Opinion

With the solitary exception of Louisiana, these United States are appreciative beneficiaries of the English common law. It is the basis of our law, and even more significantly, the very method of our legal thinking. America's debt to the English common law is great; it marches to the measure of its music.

While we have modified many of its procedures to meet the exigencies of an immense republic rather than a little island kingdom, we have meticulously followed the spirit and the sense of substantive common law. Indeed, there has been only one substantial adjectival exception, but that one is both notable and significant.

That American departure is the exemption of American lawyers from the common law prohibition of personally owning a portion of a lawsuit, a prohibition followed in all other nations whose jurisprudence rests upon the common law, and where that practice is champerty.[1]

Martindale-Hubbell states the matter with its usual brevity: "Contingency fees for solicitors are banned in the UK, so that win or lose, [the] client is ultimately responsible to his solicitor for his fees..." *Martindale-Hubbell International Law Digest*, New Providence, NJ, 1995. (The law is identical for barristers.)

The Common Law system early recognized the obvious hazards of an attorney having an interest in a lawsuit which the attorney is prosecuting, for it created a devastating conflict of interest. Despite this, American law departed from centuries of black letter common law to permit just such a champertous relationship.

A discussion of many of the problems necessarily inherent in the contingent fee contract appears in the case of *Wunschel Law Firm v. Clabaugh* 291 N.W.2d 331 (Iowa, 1980), where our highest Iowa court determined that what was good for the goose was not good for the gander. In that case, the Wunschel office represented a defendant in a defamation suit on a contingent fee basis. The agreement was that the attorney would receive a contingent fee based upon the difference between the prayer and the award against the defendants. The Committee on Professional Ethics and Conduct of the Iowa State Bar Association appeared as *amicus curiae.* The trial court held for the Wunschel Law Firm. The Supreme Court reversed the trial court, holding the contingent fee contract was a nullity, relying heavily on the Iowa Code of Professional Responsibility and the stated position of the committee in the matter.

Although the Appellate Court quoted EC5-7, which acknowledged that "...a contingent fee contract gives a lawyer a financial interest in the outcome of the litigation...," (*Id.* 334) the Court inconsistently advised that it would, in principle, approve contingent fees which were reasonable. (*Id.* p. 334.) (Emphasis added.)

The Supreme Court cited *Jones v. American Home Finding Association,* 191 Iowa 211, 213 182 N.W. 191, 192 (1921) in the *Wunschel* case, quoting from it at page 335: "It is not necessary that the contract actually cause the feared evil in a given case, its tendency is sufficient." This is very significant, for it is recognition in principle that a contingent fee contract would not be enforced if there exists even a tendency to cause the feared evil. Thus the *tendency* is sufficient; the *consequence* is not required. Unfortunately, the Court's ultimate opinion did not effectuate the syllogism.

What is the feared evil? It can only be the horrendous conflict between the client and the lawyer as litigant. How can the lawyer, no matter how scrupulously ethical, be assured that the lawyer is thinking of the client, first, last and always? They are both litigants and the lawyer-litigant has a built-in edge in a built-in conflict. There is no fair resolution except to defer to the interests of the client, and if that is to be done, then no contingent fee contract should be entered into in the first place.

The American courts, to their credit, have never been wholly comfortable with the contingent fee contract, probably because the opportunity of abuse is so great, even if unintended, so the courts insist, rather plaintively, that the arrangement be *reasonable.* An example of this is the recitation in the *Wunschel* case at page 337, "We agree that the overriding principle from the ethical standards is that the fee must be reasonable."

Now the very premise of those supporting the contingent fee contract is that the lawyer needs more money than a reasonable hourly fee because otherwise the lawyer will not take the case. What this really says is that the lawyer can be bought by a higher fee. This is the ultimate admission and it is why *no* contingent fee can ever be reasonable. What happened to the lawyer's role as a guardian of society? What happened to the ethical requirement that no lawyer refuse to take a case for any reason per-

Continued on page 13

APPELLATE CASE UPDATE

By Kermit B. Anderson, Des Moines, Iowa

1. *Burton v. MTA*, 530 N.W.2d 696 (Iowa 1995)

Negligence and Causation

Child was injured by a car that struck him after he left a city bus and attempted to cross street. *En banc* decision of the Supreme Court upheld grant of summary judgment to bus company stating that bus driver's legal responsibility ends when passenger has safely alighted from the bus. The court also found no proximate cause as a matter of law between the actions alleged against the bus driver and the child's injury.

2. *Mewes v. State Farm*, 530 N.W.2d 718 (Iowa 1995)

Underinsurance benefits; Iowa Code § 516A.2

Action against insurer for underinsurance benefits. Insurer's policy limited underinsurance coverage to the amount in excess of the highest applicable policy limit. Court upholds lower court's grant of summary judgment to insurer on authority of Iowa Code §516A.2 which abrogated *Hernandez* and permitted enforcement of anti-stacking provisions in auto policies. Court rejected arguments that the statute was inapplicable because (1) policy provided UIM and UM coverage; (2) more than one insurer had issued the policies in question; and (3) the policy providing primary UIM coverage to the plaintiff was purchased by another.

3. *Padenheim v. Lovell,* 530 N.W.2d 668 (Iowa 1995)

Automobile Damage; Measure of Damages

Lower court awarded plaintiff repair, loss of use and inconvenience damages for injury caused to his vehicle. *En banc* decision of the Iowa Supreme Court remanded to the trial court for a determination of additional damages for the decrease in market value after repair since the evidence indicated that the vehicle could not by repair be restored to its pre-accident condition. The court noted that a damage award for inconvenience was unprecedented but award was nevertheless upheld because it was unchallenged by the defendant in the trial court.

4. *Squealer Feeds v. Pickering,* 530 N.W.2d 678 (Iowa 1995)

Work Comp; Discovery of Carrier's File

Work comp claimant sought to examine portion of carrier's claim file post-dating denial of work comp claim in connection with his request for penalty benefits. Deputy Industrial Commissioner ordered production of the entire file and Industrial Commissioner and district court declined to review saying review was interlocutory. Supreme Court sitting *en banc* held (1) district court erred in refusing to review because the order involved production of privileged documents; (2) documents post-dating the filing of claim for penalty benefits are irrelevant and nondiscoverable unless discoverable under Rule 125; and (3) documents in file post-dating denial of work comp claim are not discoverable except upon the showing required under Rule 122(c) or except to the extent permitted by Rule 125 dealing with expert witnesses.

5. *Tacker v. American Family Mutual Insurance Company*, 530 N.W.2d 674 (Iowa 1995)

"Other Premises" Exclusion in Homeowners Policy

Declaratory action brought by plaintiff against insurer of former owner of plaintiff's home. Plaintiff claimed that former owner's negligent wiring of family room 12 years earlier caused the electrocution death of plaintiff's husband. Insurer insured former owner's new residence and contested coverage for the claim by citing policy exclusion for injuries "arising out of" the ownership of any premises other than the insured premises. Supreme Court upheld summary judgment for plaintiff reasoning that the allegations of personal tortious negligence were not causally related to the insured's former ownership of the residence and therefore the "other premises" exclusion did not apply.

6. *Cox v. Rolling Acres Golf Course Corp.*, 532 N.W.2d 761 (Iowa 1995)

Dram Shop; Complicity

Dram shop action brought by vehicle passenger who sustained serious injuries when driver lost control of vehicle. Undisputed facts showed that prior to the accident, the claimant and driver drank over a span of at least eight hours and consumed between 20 and 30 beers together. They had alternated buying rounds of beers for each other and the claimant even admitted to buying the driver's last beer of the evening. The Supreme Court held that this uncontroverted evidence shows that the claimant contributed substantially and materially to the driver's intoxication and established the affirmative defense of complicity as a matter of law.

7. *Jamieson v. Harrison*, 532 N.W.2d 779 (Iowa 1995)

Credit for Settlement Proceeds

Injured patron commenced action against tavern making dram shop and premises liability claims. Dram shop

Continued on page 15

INSURANCE COVERAGE ISSUES IN POLLUTION CLAIMS

Continued from page 1

op. at 6. The judgment further declared certain insurers' obligations to cover future defense costs pro rata, and to cover a percentage of future indemnity (cleanup) costs matching the insurer's percentage of past damages found by the jury.[8]

Chemplex appealed seeking larger damages, and the insurers cross-appealed the district court's refusal to grant judgments for them as a matter of law.

THE LATE NOTICE DECISION

Chemplex presented the Iowa Supreme Court with its first opportunity to decide late notice issues in environmental coverage litigation, where the defense is commonly asserted by insurers belatedly contacted to defend and indemnify pollution-related claims months or years after the insureds began negotiating or litigating with government regulators (i.e., the EPA or DNR) or neighboring property owners. The Supreme Court held that Chemplex' five-year delay in notifying its liability insurers defeated coverage as a matter of law, a decision likely to encourage dispositive motions on late notice issues.

In 1984, *Chemplex* negotiated a consent degree with the EPA on pollution liability claims and that year gave written notice by letter to Evanston Insurance Company, demanding coverage under its environmental impairment liability ("EIL") "claims made" policy. Chemplex, however, did not provide direct notice to any of its comprehensive general liability ("CGL") insurers for over five years, until late 1989. The *Chemplex* Court quoted from varying notice provisions in the primary and excess CGL occurrence-based policies, and concluded that notice was a condition precedent to coverage under each policy, with the burden of proof on the insured. *Slip. op.* at 9-10. The Court observed that "[o]rdinarily, the question of whether a notice has been reasonably given is one of fact for the jury." *Id.* at 8. The *Chemplex* jury had rejected the insurers' late notice defense.[9] Nevertheless, the Supreme Court went on to resolve four commonly recurring notice issues as a matter of law in holding that the insurers had been entitled to a directed verdict relieving them of any duty to defend or indemnify.

Substantial Compliance. Chemplex asserted that its letter to its EIL insurer in 1984 constituted effective notice to the CGL insurers because a copy had been sent to "R. B. Jones Corp.," an insurance broker listed as "agent" on some of the CGL policies. The Supreme Court held that even assuming R. B. Jones was the insurers' agent for notice purposes, the letter was not effective notice to the CGL insurers as a matter of law because the letter merely claimed coverage under the specified EIL policy without mentioning any other policies or insurers. The Court's conclusion may prove fatal to future contentions that an agent's receipt of a letter expressly notifying particular carriers of claims under their policies constitutes notice to other unnamed carriers whose coverage also had been placed by that agent.

The *Chemplex* Court noted disputes over the precise identity and authority of "R. B. Jones" which it did not resolve; however, perhaps foreshadowing future rulings, the Court stated:

> There was some evidence that R. B. Jones was an insurance broker who had provided insurance for Chemplex, *but ordinarily a broker is deemed to be an agent of the insured, not the insurance company.* Appleman §4736, at 83-84.

Slip. op. at 11 (emphasis added). This dicta suggests that the Supreme Court will be receptive to insurers' arguments that an insured's written notice to the broker placing the coverage for the insured does not satisfy requirements that notice be provided to the insurer (or the *insurer's* agent).

While the *Chemplex* decision makes clear that a five-year delay fails to substantially comply with CGL policy notice requirements, the question arises whether shorter delays warrant taking the notice issue from the jury, which typically is not receptive to "technical" policy defenses. The *Chemplex* decision suggests that much shorter delays should be regarded as untimely as a matter of law; the Court cited its own auto accident cases reaching that conclusion as to 13-month[10] and 28-month[11] delays, and also pointedly observed that "[e]nvironmental cases have held that delays of substantially less than five years preclude coverage as a matter of law," citing decisions involving delays of ten months and four years.[12] The *Chemplex* Court also relied on a Michigan auto accident case holding that a seven-month delay defeated coverage as a matter of law.[13] The *Chemplex* outcome underscores the importance of swiftly identifying all potentially involved insurers and giving prompt, specific notice directly to each insurance company, as delays of months or years can defeat coverage claims.

Continued on page 7

INSURANCE COVERAGE ISSUES IN POLLUTION CLAIMS

Continued from page 6

Constructive Notice. The Supreme Court summarily rejected Chemplex's argument that the insurers had constructive notice of an occurrence under their policies because of periodic insurance inspections of the insured premises. The Court stated:

> We believe no reasonable fact finder could conclude that any of the activities observed during the periodic inspections (which were not even conducted by all of the insurers) would lead the companies to believe that there had been an "occurrence" under the policies.
>
> The inspections might well have revealed that there was pollution occurring on the site, but this could not rise to the level of notice that the EPA had in fact conducted an extensive investigation and certainly not that Chemplex had committed itself to a consent decree with the EPA to incur millions of dollars in remediation costs. We believe that the constructive notice argument must fail as a matter of law. [Citations omitted].

Slip. op. at 8-9. This plain language makes clear that such "constructive notice" arguments by insureds are good candidates for dismissal by summary judgment.

Excuse. Chemplex claimed that its late notice was excused because it was selling its business during the EPA litigation and the location of its insurance policies was uncertain. *Slip. op.* at 13. Other insureds have offered such excuses when older policies are overlooked in responding to current claims for retroactive CERCLA liability arising from pollution happening decades ago. The Supreme Court, however, summarily rejected Chemplex's excuse as a matter of law and held that it is the insured's responsibility to keep track of its liability policies. *Id.*, citing *Olin Corp. v. INA*, 966 F.2d 718, 724-25 (2d Cir. 1992).

Prejudice. The *Chemplex* Court reiterated that the issue of prejudice is usually for the jury, and stated that the *Chemplex* jury had found no prejudice. *Slip. op.* at 13. Significantly, however, the Court held that the burden of proof to show lack of prejudice is on the insured, *Id.* at 14, and that the record established prejudice as a matter of law:

> In this case, five years had passed since the occurrence. The appearance of the site had been changed. At least one key witness had died, many had left, and many relevant documents had been destroyed. The witnesses who were available could not reasonably be expected to fully recall the events of five years earlier. These insurers were deprived of any opportunity to negotiate with the EPA or provide any input, except their money, on the consent decree. Chemplex had already spent millions on remediation and had obligated itself to spend millions more before it notified these insurers that they were expected to pay these expenses.

Id. at 15. The *Chemplex* Court cited to five federal environmental coverage decisions holding prejudice was established as a matter of law .[14] The Court's treatment of the prejudice issue as one of law doubtlessly will encourage dispositive motions where similar facts as to prejudice can be established, i.e., loss of evidence or the "opportunity"[15] to participate in the underlying litigation.

THE "UNANSWERED QUESTIONS"

The Iowa Supreme Court's disposition of the *Chemplex* appeal on late notice grounds left other recurring questions unanswered. The following analysis of the district court's treatment of these issues and review of conflicting caselaw from other jurisdictions may assist practitioners awaiting further guidance from our high Court.

I. THE OCCURRENCE ISSUE

One unanswered question is the quantum of proof necessary to establish as a matter of Iowa law that a corporate insured either "expected" or "intended" some property damage from pollution, precluding coverage under "occurrence" based liability policies with or without pollution exclusions. The CGL policies typically define "occurrence" as "an accident or event, or continuous or repeated exposure to conditions resulting in property damage *'neither expected nor intended from the standpoint of the insured.'"* *Slip. op.* at 5 (emphasis added). The *Chemplex* Court noted that "Chemplex dumped toxic liquid waste into leaching pits at a seven-acre landfill area at a rate of 7500 to 30,000 gallons per day." *Id.* at 4. Judge Nahra overruled the insurers' motions for rulings that as a matter of law Chemplex either expected or intended property damage, and entered judgment on the jury findings of an occurrence under certain policies. The Supreme Court did not reach this "occurrence" issue given its disposition

Continued on page 8

INSURANCE COVERAGE ISSUES IN POLLUTION CLAIMS

Continued from page 7

of the case on late notice grounds.

The relevant inquiry under Iowa law appears to be whether the insured *objectively* knew or should have known that some property damage was likely to result from its polluting activities. *See Weber*, 462 N.W.2d at 287 ("expected denotes that the actor knew or should have known that there was a substantial probability that certain consequences will result from his actions"); *Altena v. United Fire & Cas. Co.,* 422 N.W.2d 485, 488 (Iowa 1988)(intent "to cause injury may be inferred by the nature of the act and the accompanying reasonable foreseeability of harm"); *Westbend Mut. Ins. Co. v. Iowa Ironworks,* 503 N.W.2d 596, 601 (Iowa 1993)(no occurrence if insured intended both the act "and some injury"). Thus, insureds who (objectively) should have foreseen "some" property damage should not be able to establish coverage merely by presenting evidence that the *extent* of environmental damage was unforeseen or unintended at the time of the polluting activity, or that the insured subjectively intended no harm to the environment.

A spate of recent environmental coverage decisions have held that corporate insureds "expected" property damage as a matter of law where the record showed continuing discharges of pollutants over a prolonged period, combined with the insureds' knowledge of the pollutants' toxic or harmful qualities; these courts rejected insureds' contentions that the occurrence issue involved questions of fact requiring trial.[16] These decisions should encourage dispositive motions where the record establishes that the insured's employees[17] knew or should have known that waste disposal practices were likely to cause some damage to soil or groundwater, even though the disposal activities were not illegal at the time and the insured did not reasonably foresee the ultimate extent of environmental damage.

II. THE POLLUTION EXCLUSION

Certain *Chemplex* policies contained "qualified" pollution exclusions typically providing in pertinent part:

> This insurance does not apply:
>
> * * * *
>
> ...to bodily injury or property damage arising out of the discharge, dispersal, release or escape of smoke, vapors, soot, fumes, acids, alkalis, toxic chemicals, liquids or gasses or waste materials or other irritants, contaminants or pollutants into or upon the land, the atmosphere or any water course or body of waters; but this exclusion does not apply if such discharge, dispersal, release or escape is *sudden and accidental.* (Emphasis added by the Court).

Slip. op. at 5. The Chemplex insureds contended that the pollution exclusion should not be applied to reduce their recovery at all; conversely, the insurers contended that the exclusions barred coverage entirely.

A. The "Sudden" Issue

The *Chemplex* appeal presented the Court with an issue it expressly left undecided in *Weber v. IMT Ins. Co.,* 462 N.W.2d 283 (Iowa 1990)—the meaning of the word "sudden." The *Weber* Court noted a split in authority but concluded that it need not decide the "sudden" issue because it held that repeated spillage of hog manure during transport (which contaminated sweet corn) was not "accidental," such that coverage was barred by the pollution exclusion. *Id.* at 287.[18]

Judge Nahra ruled on cross-motions for summary judgment that the pollution exclusion is **un**ambiguous and construed "sudden" as follows:

> When considered in its plain and easily understood sense, "sudden" is defined with a "temporal element." The common, everyday understanding of the term "sudden" is "happening, coming, made, or done quickly or abruptly without warning.[19]

Judge Nahra denied the insurers' motions for complete summary judgment and later for directed verdict, and entered judgments on jury verdicts finding the pollution exclusions barred coverage for 70 percent of the insureds' past cleanup costs (the jury indicated it attributed 30 percent of the damages to an "accidental" breach of a bentonite clay liner during dredging of a waste lagoon).

Numerous courts have held that "sudden" in the pollution exclusion is unambiguous and has a temporal meaning (i.e., "abrupt or quick"), which bars coverage for pollution resulting from even accidental but gradual discharges and routine operations.[20] Courts have reiterated that "the phrase 'sudden and accidental' within the pollution exclusion clause is 'clear and plain, something only a lawyer's ingenuity could make ambiguous.' The Minnesota Supreme Court recently illustrated the effect of this conclusion, stating:

> [T]he pollution exclusion clause [is] unambiguous and bar[s] cov-

Continued on page 9

INSURANCE COVERAGE ISSUES IN POLLUTION CLAIMS

Continued from page 8

erage for any discharge that was nót both sudden, meaning abrupt, and accidental, meaning unexpected or unintended [citation omitted]. Therefore, a CGL policy with a pollution exclusion clause affords no coverage for a waste disposal site which gradually over time pollutes an area. On the other hand, if an explosion sends chemical fumes over a residential area, or an oil truck overturns and spills oil into a marsh, these would be sudden and accidental happenings, so that the exclusion would not apply and there would be insurance coverage.[22]

By contrast, other courts have held that "sudden" is ambiguous and therefore should be construed in the insured's favor (without a temporal element) to mean "unexpected, unintended" (one of various dictionary definitions) — thereby allowing coverage for gradual pollution.[23] In *Chemplex*, Judge Nahra squarely rejected the insureds' position that the existence of conflicting judicial interpretations of "sudden" mandated a finding of ambiguity, because that position would compel that result once any two courts disagreed, wrongly abdicating the reviewing court's responsibility to independently construe policy language.[24] The better reasoned decisions,[25] hold (as did Judge Nahra[26]) that "sudden" unambiguously includes a temporal element when combined with the term "accidental" (i.e., "sudden and accidental"); otherwise, the term "accidental" becomes surplusage if "sudden" is redundantly defined to mean "unexpected, unintended," the definition given "accidental."[27] The authors predict that the Iowa Supreme Court ultimately will construe "sudden" as having a temporal meaning in the pollution exclusion that bars coverage for gradual pollution.

B. Insurance Commission Findings

The *Chemplex* insureds unsuccessfully contended in district court that evidence regarding insurance industry representations to the Iowa Insurance Commissioner during the approval process for the pollution exclusion form in 1970 - allegedly that the exclusion did not modify existing coverage - either "estopped" insurers from relying on the pollution exclusion or supported the insureds' position that the pollution exclusion language is ambiguous and permits coverage of gradual pollution. Judge Nahra considered the insureds' evidence on this issue but found it unpersuasive, and held that the exclusion was unambiguous.[28] While the Supreme Court's decision did not reach this issue, the two Justices who spoke out on the issue at oral argument expressed considerable skepticism about the propriety of the Court even considering evidence concerning the regulatory approval process when judicially construing the pollution exclusion.[29]

The New Jersey Supreme Court accepted a "regulatory estoppel" argument in *Morton Internat'l, Inc. v. General Acc. Ins. Co.*, 629 A.2d 831 (N.J. 1993), holding that insurers were "estopped" from barring coverage under the pollution exclusion for non-intentional discharges, based on perceived misrepresentations to the New Jersey Insurance Commissioner during the approval process for that exclusion in 1970. In the two years since *Morton* was decided, however, other courts have overwhelmingly rejected the regulatory estoppel theory on a number of grounds, including insurers' rebuttal evidence putting representations to regulators in proper context; general contract principles rejecting the use of extrinsic evidence to alter unambiguous policy language; and the lack of reasonable reliance, i.e., that the plaintiff-insureds were mislead by (or even aware of) alleged representations in Commission filings, as required for an estopped remedy.[30] The authors believe that when faced with the issue, Iowa appellate courts will follow the overwhelming majority of courts elsewhere in rejecting challenges to the pollution exclusion based on alleged representations made decades ago to Insurance Commissioners.

C. The "Microanalysis" Issue

The *Chemplex* Court also failed to reach the "microanalysis" issue of whether the pollution exclusion entirely bars coverage for pollution resulting from a pattern of discharges during routine business operations, even though some of the discharges, viewed in isolation, were "sudden and accidental." Judge Nahra rejected the *Chemplex* insurers' contention that they were entitled to a judgment of no coverage because most of the damages resulted from Chemplex's routine dumping of chemical wastes into unlined leaching pits; the Insurers appealed his denial of a JNOV on the thirty percent of the damages the jury found resulted from the sudden and accidental breach of the waste lagoon liner. Courts in other jurisdictions are divided; some permit insureds to seek coverage for isolated "sudden and accidental" discharges that contribute to

Continued on page 10

INSURANCE COVERAGE ISSUES IN POLLUTION CLAIMS

Continued from page 9

pollution damage,[31] while others in better reasoned opinions refuse to engage in such "microanalysis" and bar coverage where the damage primarily results from a pattern of discharges during routine business operations.[32]

III. THE "ALL SUMS" ISSUE: "JOINT AND SEVERAL"LIABILITY VERSUS "ALLOCATION"

Perhaps the most significant question left unanswered by the *Chemplex* Court is whether and how to "allocate" liability among successive insurers when pollution damage occurs over multiple policy periods. Chemplex contended that each insurer was "jointly and severally" liable for all damages up to its policy limits. Judge Nahra rejected Chemplex' position and instead instructed the jury to allocate its total damage award among the triggered policy periods based on when damages actually occurred; this considerably reduced each insurer's liability.[33] The "allocation" versus "joint and several liability" debate has divided courts elsewhere and has an enormous impact on insurers' potential exposure, since many environmental coverage cases involve allegations of pollution spanning many different insurers' policy periods.

The Insureds support their joint and several theory by pointing to the Insurers' contractual promise to pay "*all sums* which the insured shall become legally obligated to pay...." (emphasis added), ignoring other contract language arguably limiting coverage to property damage occurring *during* the policy period.[34] The seminal case for the Insureds' theory is *Keene Corp. v. INA*, 667 F.2d 1034 (D.C. Cir. 1981), *cert. denied,* 455 U.S. 1007 (1982), *reh'g denied,* 456 U.S. 951 (1982). The seminal case rejecting joint and several liability in favor of prorating coverage among multiple policies is *INA v. Forty-Eight Insulations, Inc.*, 633 F.2d 1212 (6th Cir. 1980), *aff'd on reh'q,* 657 F.2d 814, *cert. denied,* 454 U.S. 1109 (1981).

Judge Nahra's allocation ruling preceded two well-reasoned, recent decisions by the supreme courts of Minnesota and New Jersey, which thoroughly analyze voluminous authorities on the issue, and squarely reject joint and several liability in favor of allocating coverage obligations among successive, triggered policies. *Northern States Power Co. v. Fidelity & Cas. Co. of New York,* 523 N.W.2d 657, 663-65 (Minn. 1994)("NSP") (allocation should be pro rata by time on risk when damages are continuous, or proportionate to the damages actually occurring during each policy period when that factual determination is feasible); *Owens-Illinois, Inc. v. United Ins. Co.,* 650 A.2d 974 (N.J. 1994)(allocation by time on the risk, including uninsured periods for which a pro rata share is allocated to the "self-insured" party). The New Jersey Supreme Court noted the unfairness of the joint and several liability theory in rejecting that approach, stating:

> Finally, principles of simple justice cannot be entirely discounted. To rebut effectively the question posed in Forty-Eight Insulations is difficult:
>
> "Were we to adopt [the policyholder's] position on defense costs a manufacturer which had insurance coverage for only one year out of 20 would be entitled to a complete defense of all asbestos actions the same as a manufacturer which had coverage for 20 years out of 20. Neither logic nor precedent support such a result. 633 F.2d at 1225.
>
> O-I emphasizes that its policies were in effect for eight years, but the principle that it advocates would apply if the policies had been in force for one day.

650 A.2d at 992-93. During the *Chemplex* oral argument, Justice Larson (author of the unanimous, *en banc Chemplex* opinion) illustrated this point as follows:

> Wouldn't it be unfair for that carrier that...wrote a policy effective for only a month before the pollution ended until some time in the future...Now, should they be stuck with the whole—the whole $19 million? Because most of the pollution took place before their policy was in effect...It's almost like making it into a claims-made policy, isn't it—instead of CGL?

Transcript of oral argument at 65-66. The authors predict that the Court will reject the "joint and several" liability theory in favor of some form of allocation.

An interrelated question is what "trigger" theory is to be adopted to determine when contamination "occurs" requiring insurers to respond. Hotly contested litigation has produced four general trigger theories recently described as follows by the Minnesota Supreme Court:

> [C]ourts tend to follow one of four "trigger" theories to determine which policies were "on the risk": the "exposure" rule, whereby only

Continued on page 11

INSURANCE COVERAGE ISSUES IN POLLUTION CLAIMS

Continued from page 10

> those policies in effect when the claimant or property was exposed to hazardous materials are triggered; the "manifestation" rule, whereby only those policies in effect when the injury or damage was discovered are triggered; the "continuous trigger" where the policies in effect at the time of exposure, the time of manifestation, and all the time in between are triggered; and the "actual injury" or "injury-in-fact" trigger, whereby only those policies in effect when damage occurred are triggered.

NSP, 523 N.W.2d at 662.

In *Chemplex*, Judge Nahra ruled that the Insurers were only obligated to indemnify (if coverage were otherwise established) for damages incurred because of property damage that took place during the policy period, and were not liable to the extent claims were based on property damage outside of the policy period,[35] citing *First Newton Nat. Bank v. General Cas. Co.,* 426 N.W.2d 618, 623 (Iowa 1988). In *First Newton*, the insured bank sought general liability coverage for tort claims arising from its debtors' loss of use of property in foreclosure proceedings taking place during the policy period. The Court, in concluding that there were sufficient allegations of an occurrence to trigger the duty to defend, reviewed general principles of Iowa insurance law as follows:

> The occurrence policy provides coverage if the event insured against (the "occurrence") takes place within the policy period, regardless of when a claim is made.
>
> * * * *
>
> Most jurisdictions that have considered "occurrence" policies have concluded that the time of the "occurrence" is when the claimant sustains actual damage and not when the act or omission that caused such damage was committed. [Numerous citations omitted].

Id. at 623. It is unclear what "trigger" theory the Iowa Supreme Court ultimately will adopt in environmental coverage cases to determine "when the claimant sustains actual damage."

IV. ADDITIONAL QUESTIONS

The *Chemplex* appeal presented a number of other recurring issues left undecided by the Court, which are beyond the scope of this article, but include: 1) whether an excess insurer's obligation to reimburse defense costs commences immediately upon exhaustion of the underlying primary policy or rather only upon exhaustion of all triggered primary policies in subsequent or preceding policy periods (the "vertical" versus "horizonal" exhaustion issue); 2) what credit or set-off, if any, nonsettling insurers should receive based on settlements of other CGL or EIL ("environmental impairment liability") insurers, which can involve related issues of allocation, contribution rights, and whether EIL insurance is primary or excess over CGL coverage; 3) whether per-occurrence limits may be "stacked" or "annualized" in multi-year policies; 4) whether insurers must reimburse an insured for "pre-tender" defense costs incurred by the insured before it gave notice to the insurer and sought a defense; and 5) whether statutory prejudgment interest runs from the date of filing or rather from the date post-filing response costs actually are incurred.□

---

1. The authors are partners in the law firm of Lane & Waterman, 220 North Main Street, Suite 600, Davenport, Iowa 52801-1987, and together with Robert Waterman, Jr. and John Telleen represented Employers' Liability Assurance Corporation, Ltd., in the *Chemplex* litigation.
2. *Nothern States Power Co. v. Fidelity & Cas. Co. of New York,* 523 N.W. 2d 657, 660-61 (Minn. 1994).
3. Four general liability insurers and one environmental impairment liability ("EIL") insurer settled before trial.
4. Justices Neuman and Ternus took no part.
5. The Clinton County Courthouse is the beneficiary of new air conditioning equipment at a cost of approximately $25,000 paid for by the litigants and installed on the eve of trial.
6. One insurer's policy lacked a pollution exclusion and therefore did not get the benefit of that 70 percent reduction.
7. The further reduction from $8.35 million to approximately $5 million resulted from the Court's application of primary policy limits and attachment points for higher-level excess policies.
8. For example, the jury allocated 18 percent of the past intemnity damage award to a three-year period covered by a policy which contained no pollution exclusion; Judge Nahra's declaration of coverage for future indemnity would have obligated that policy to pay 18 percent of future indemnity costs as they were incurred, up to the policy limits.
9. The jury answered "no" to the questions whether notice to the insurers was "late and prejudicial."
10. *Slip. op.* at 12, citing *Henderson v. Hawkeye - Security Ins. Co.,* 252 Iowa 97, 106 N.W. 2d 86, 91 - 92 (1960).
11. *Slip. op.* at 12, citing *Bruns v. Hartford Acc. & Indem. Co.,* 407 N.W. 2d 576, 579 - 80 (Iowa 1987).
12. *Slip. op.* at 12, citing *State of New York v. Blank,* 27 F. 3d 783 (2d Cir. 1994) (summary judgment granted; notice ten months late after event); *American Insurance Co. v. Fairchild Industries, Inc.,* 852 F. Supp.1173, 1177-79 (E.D.N.Y. 1994) (four-year delay in notice).
13. *Slip. op.* at 12, citing *Wehner v. Foster,* 49 N.W. 2d 87, 91 (1951) (seven-month delay; insurer deprived of adequate opportunity to investigate).
14. *Slip. op.* at 14-15, citing *In re Tex. E. Transmission Ins. Coverage Litigation,* 15 F. 3d 1249, 1254 - 56 (3d Cir. 1994) (inability to investigate toxic cleanup site, among other reasons, prejudiced the insurance company, which received notice eight months after the occurrence), *cert. denied,* 115 S. Ct. 291 (1994); *West Bay Exploration Co. v. AIG Specialty Agencies,* 915 F. 2d 1030. 1037 (6th Cir. 1990) (found prejudice in insured's destruction, prior to notice, of barrels during remediation process); *Port Servs.. Co. v. General Ins. Co.,* 838 F. Supp. 1402, 1404 (D. Or. 1993) (removal of underground storage tanks held to be prejudicial as a matter of law); *Hoppy's Oil Serv., Inc. v. Insurance Co. of N.A.,* 783 F. Supp. 1505, 1509 - 11 (D. Mass.) (insurer prejudiced as a matter of law when underground storage tank site was remediated before insurer could conduct its own tests, although others had conducted tests before the remediation): *Olin Corp. v. Insurance Co. of N.A.,* 771 F.

Continued on page 12

INSURANCE COVERAGE ISSUES IN POLLUTION CLAIMS

Continued from page 11

Supp. 76, 79 (S.D.N.Y. 1991), *aff'd*, 972 F. 2d 1328 (2d Cir. 1992) (found prejudice as a matter of law by insured's expenditure of over $2 million in remediation costs, entry into a consent decree obligating it to spend millions of dollars more and in changing physical appearance prior to giving notice); *Fireman's Fund Ins. Co. v. Valley Manufactured Prods. Co.*, 765 F. Supp. 1121, 1129 (D. Mass. 1991), *aff'd*, 960 F. 2d 143 (1st Cir. 1992) (insurer prejudiced when underground storage tank was removed prior to notice).

15. *See Met-Coil Systems Corp. v. Columbia Cas. Co.*, 524 N.W. 2d 650, 658 - 59 (Iowa 1994) (insurer's lost "opportunity" to participate in underlying patent infringement litigation established prejudice as a matter of law). Judge Nahra did not have the benefit of *Met-Coil*, which was decided after he denied the insurers' dispositive motions.

16. *Bituminous Cas. Corp. v. Tonka Corp.*, 9 F. 3d 51, 54 (8th Cir. 1993), *cert. den.* 114 S. Ct. 1834, 128 L. Ed. 46 (1994) (applying Minnesota law); *New Hampshire Ball Bearings v. Aetna Cas. & Sur. Co.*, 43 F. 3d 749, 752 - 54 (1st Cir. 1995) (applying New Hampshire law); *Mottolo v. Fireman's Fund Ins. Co.*, 43 F. 3d 723, 729 - 30 (1st Cir. 1995) (applying New Hampshire law); *Meridian Oil Production, Inc. v. Hartford*, 27 F. 3d 150, 152 (5th Cir. 1994) (applying Texas law); *Morton Intern., v. General Acc. Ins. Co.*, 134 N.J. 1, 629 A.2d 831, 884 (1993); *Bell Lumber and Pole Co. v. U.S. Fire Ins. Co.*, 847 F. Supp. 738, 745 (D. Minn. 1994); *Alcolac Inc. v. St. Paul Fire and Marine Ins.*, 716 F. Supp. 1541, 1544 (D. Md. 1989); *American Motor. Ins. Co. v. General Host Corp.*, 667 F. Supp. 1423 (D. Kan. 1987), *aff'd* 946 F. 2d 1482 (10th Cir. 1991), *rev'd on other grounds* 946 F. 2d 1489 (10th Cir. 1991); *Fireman's Fund Ins. Cos. v. Meenan Oil Co.*, 755 F. Supp. 547 (E.D.N.J. 1991); *American Mut. Liab. Ins. v. Neville Chemical*, 650 F. Supp. 929 (W.D.Pa. 1987). *But cf. Arco Indus. v. American Motorists Ins. Co.*, 531 N.W. 2d 168 (Mich. 1995) (affirming trial court finding of coverage by adopting "subjective" standard; overruling court of appeals' decision holding that corporate insured had expected damage as a matter of law under objective standard).

17. For a discussion of imputing employee knowledge of pollution to the corporate - employer - insured, *see Upjohn Co. v. New Hampshire Ins. Co.*, 476 N.W. 2d 392, 400-01 (Mich. 1991); *see also Huff v. United Van Lines*, 238 Iowa 529, 28 N.W. 2d 793, 799 (1947) (general rule is that "knowledge of an agent gained in the performance of his authorized work or duty and within its scope and reasonable connection is the knowledge for the one for whom he is acting"); *Regal Ins. Co. v. Summit Guar. Corp.*, 324 N.W. 2d 697, 703-04 (Iowa 1982) (knowledge of authorized employee is imputed to corporate employer even if never actually disclosed to the corporation).

18. In *A. Y. McDonald Indus. v. INA*, 842 F. Supp. 1166, 1172-74 (N.D. Iowa 1993) (applying Iowa law), Chief Judge Meloy likewise avoided interpreting "sudden" in granting insurers' partial summary judgment on the pollution exclusion where the insureds' dumping of foundry waste sand was held not "accidental."

19. *See* March 17, 1993 Ruling on the Insureds' Motion for Partial Summary Judgment Construing the Pollution Exclusion in Clinton County No. CL14219 (hereinafter "March 17, 1993 pollution exclusion ruling"), at 8.

20. *See, e.g., Quaker State Minit-Lube, Inc. v. Fireman's Fund Ins. Co.*, 52 F.3d 1522 (10 Cir. 1995) (Utah law); *Cincinnati Ins. Co. v. Flanders Elec. Motor Serv.*, 40 F. 3d 146, 153 - 54 (7th Cir. 1994) (Indiana law); *Aeroquip Corp. v. Aetna Cas. and Sur. Co.*, 26 F. 3d 893, 894 (9th Cir. 1994) (California law); *United States Fidelity & Guar. Co. v.Morrison Grain Co.*, 999 F. 2d 489, 493 (10th Cir. 1993) (Kansas law); *Aetna Cas. & Sur. Co. v. General Dynamics Corp.*, 968 F. 2d 707, 710 (8th Cir. 1992) (Missouri law); *Nothern Ins. Co. v. Aardvark Assocs., Inc.*, 942 F. 2d 189, 193 - 94 (3rd Cir. 1991) (Pennsylvania law); *A. Johnson & Co. v. Aetna Cas. & Sur. Co.*, 933 F. 2d 66, 72 (1st Cir. 1991) (Maine law); *New York v. AMRO Realty Corp.*, 936 F. 2d 1420, 1428 (2d Cir. 1991) (New York law); *United States Fidelity & Guar. Co. v. Star Fire Coals, Inc.*, 856 (F. 2d 31, 34 - 35 (6th Cir. 1988) (Kentucky law); *Great Lakes Container Corp. v. National Union Fire Ins. Co.*, 727 F. 2d 30, 33 - 34 (1st Cir. 1984) (New Hampshire law); *New Castle County v. Hartford Accident & Indem. Co.*, 933 F. 2d 1162, 1198 - 99 (3d Cir. 1991) (Delaware law); *Dimmitt Chevrolet, Inc. v. Southeastern Fidelity Ins. Corp.*, 636 So. 2d 700 (Fla. 1993); *Lumbermens Mut. Casualty Co. v. Belleville Indus., Inc.*, 555 N.E. 2d 568 (Mass. 1990); *American Motorists Ins. Co. v. Artra Group, Inc.*, 659 A. 2d 1295 (Md. 1995); *Upjohn Co. v. New Hampshire Ins. Co.*, 476 N.W. 2d 392 (Mich. 1991); *Board of Regents of the Umiversity of Minn. v. Royal Ins. Co.*, 517 N.W. 2d 888 (Minn. 1994); *Waste Management of the Carolinas, Inc. v. Peerless Ins. Co.*, 340 S.E. 2d 374 (N.C. 1986); *Hybud Equip. Corp. v. Sphere Drake Ins. Co.*, 597 N.E. 2d 1096 (Ohio 1992), *cert. denied*, 113 S. Ct. 1585 (1993); *Kerr-McGee v. Admiral Ins. Co.*, 1995 W. L. 58 2406 (Okl. Oct. 3. 1995).

21. *Flanders*, 40 F. 3d at 153, quoting *Star Fire Coals*, 856 F.2d at 34, in turn quoting *American Motorists Ins. Co. v. General Host Corp.*, 667 F. Supp. 1423, 1429 (D. Kan. 1987).

22. *Anderson v. Minnesota I&S Guar. Ass'n.*, 534 N.W. 2d 706, 709 (Minn. 1995).

23. *See e.g., Hecla Mining Co. v. New Hampshire Ins. Co.*, 811 P. 2d 1083 (Colo. 1991); *Claussen v. Aetna Cas. Sur. Co.*, 380 S.E. 2d 686 (Ga. 1989); *Outboard Marine Co. v. Liberty Mut. Ins. Co.*, 607 N.E. 2d 1204 (Ill. 1992); *Queen City Farms, Inc. v. Aetna Cas. & Sur. Co.*, 882 P. 2d 703 (Wash. 1994); *Joy Technologies, Inc. v. Liberty Mut. Ins. Co.*, 421 S.E. 2d 493 (W.Va. 1992); *Just v. Land Reclamation, Ltd.*, 456 N.W. 2d 570 (Wis. 1990).

24. *See* March 17, 1993 pollution exclusion ruling at 5-6, citing *Upjohn*, 476 N.W. 2d at 398.

25. *See* cases cited in n. 20 above.

26. March 17, 1993 pollution exclusion ruling at 7-8

27. *Weber*, 462 N.W. 2d at 287 (defining "accidental"); *see also, Iowa Fuel & Minerals, Inc. v. Iowa State Bd. of Regents*, 471 N.W. 2d 859, 863 (Iowa 1991) (contract to be interpreted "as a whole"; Court to favor interpretation giving effect to all terms over one which leaves part superfluous).

28. March 17, 1993 pollution exclusion ruling at 5-6.

29. When the insured's counsel mentioned Insurance Commissioner deposition testimony, Justice Lavorato interruped, stating: "Can we really consider that?" Transcript of March 21, 1995 oral argument at 55. When counsel replied by referring to two cases relying on such evidence, Justice Lavorato responded "There's 30 the other way, too, isn't there?" *Id.* at 56. Justice Larson quickly followed up by asking, "What's the difference between that kind of testimony and the testimony of our legislator that 'we all-- my associates, my colleagues and myself certainly didn't intend the law to read that way...'?" *Id.* at 57.

30. *See, e.g., Anderson*, 534 N.W. 2d at 709 (alleged reliance unreasonable as a matter of law given the unambiguous language of exclusion); *Goodyear Tire & Rubber Co. v. Aetna Cas. and Sur. Co.*, 1995 WL 422733 (Ohio App. 9 Dist. July 12, 1995) (affirming dismissal of regulatory estoppel theory for failure to state a claim); *see generally* cases compiled in monograph by Edward Zampino and Victor C. Harwood, III, "The Pollution Exclusion: Debunking the Policyholders' Regulatory Estoppel Myth," July, 1995 *For the Defense.*

31. Northern Pacific Ins. Co. v. United Chrome Prod., Inc., 122 Or. App. 77, 857 P. 2d 158, *rev. denied*, 318 Or. 171, 867 P. 2d 1385 (1993).

32. *See, e.g., Quaker State Minit-Lube v. Fireman's Fund Ins. Co.*, 52 F. 3d 1522, 1529 (10th Cir. 1995) (Utah law) ("Simply put, courts should not engage in a microanalysis of discreet discharges which are claimed to be 'sudden and accidental' when the discharges otherwise arise as commonplace events which occur in the course of daily business."); *Lumbermen's Mut. Cas. v. Belleville Indus., Inc.*, 938 F. 2d 1423 (1st Cir. 1991), *cert. denied*, 112 S. Ct. 1969 (1992) (standard is whether, taken as a whole, the claims against the insured are based upon a pattern or practice of polluting activities that occurred over an extended period of time, not whether individual instances of pollution may have occurred abruptly and unintentionally); *Smith v. Hughes Aircraft Co.*, 10 F. 3d 1448, 1453 (9th Cir. 1993) ("The district court properly rejected Hughes' effort to 'breakdown its long-term waste practices into temporal components in order to find coverage where the evidence unequivocally demonstrates that the pollution was gradual.").

33. *See* n. 7 and accompanying text.

34. Insuring agreements typically limit the insurer's obligation to pay "all sums" to those the insured would become legally obligated to pay "because of *property damage* to which this insurance applies, caused by an *occurrence...*" *Slip. op.* at 5 (emphasis added). Although policy language varies, the definitions of "property damage" or "occurrence" typically restrict coverage to damages for property damage or events taking place during the policy period. *See, e.g., First Newton Nat. Bank v. General Cas. Co.*, 426 N.W. 2d 618 (Iowa 1988).

CONTINGENCY FEES – THE GREAT AMERICAN ABERRATION

Continued from page 4

sonal to himself or herself. Surely a swollen fee is personal to the attorney. It is, to be truthful, greed, and law should not be a business, but a profession.

The reasonable fee standard requires an *ad hoc* approach to each case, with all the attendant problems. One of the consequences is that the contingent fee contract is properly subject to suspicion if there is an existing attorney-client relationship. *Lawrence v. Tschirgi,* 57 N.W. 2d 46 (Iowa 1953). How many times have you seen in a court-approved contingent fee contract even the slightest reference that there was no antecedent legal relationship? Nor are contingent fee contracts permitted in dissolution actions. In *re Sylvester's Estate,* 192 N.W. 442 (Iowa 1923). It is there stated at page 443, "A contract between an attorney and client, providing for the payment of a fee to the attorney contingent upon the procurement of a divorce for the client, is against public policy and illegal and void. Such a situation involves the personal interest of the attorney in preventing a reconciliation between the parties, a thing which the law favors and public policy encourages."

Does not the same recognized "personal interest" of the contingent fee attorney in dissolution actions also obtain in *every* case in which there is such a contract, whether it is in tort or otherwise? Settlement is urged by courts in every civil case, and what is reconciliation in a marital dispute, is settlement in a tort action, and do the courts not press for settlements, even creating mechanisms for settlement? Moreover, any lawyer involved in spousal tortious suits knows that the spousal relation is adversely affected. It would be fatuous to claim that the marital relationship is not as seriously hazarded in such suits as in separation or dissolution actions. So the same concerns militating against contingent fees in domestic relations matters demonstrably obtain in permitting contingent fees in interspousal tort suits.

What is clear is that the law, which exists for the benefit of the public and not plaintiffs nor their lawyers, has historically turned the blind eyes of justice on an opportunity for financial aggrandizement by certain members of the bar. The public has not missed this source of lawyer wealth and is no longer prepared to overlook it. If the public needed further proof of the inequity it has only to consider the massive financial contributions to politicians from the organizations of the plaintiffs bar, including the misnamed American Trial Lawyers Association.

The Iowa Supreme Court in the *Wunschel* case approved and adopted the Ethic Committee's *amicus* brief, (*Id.* at 337) which brief was quoted on the same page:

> "However, such a contingent fee arrangement in the defense of an unliquidated tort claim has missing the critical factor that the amount against which the percentage is taken is determined, at a later date, by an independent party or by agreement of the client. Also, the lawyer does not have to establish liability (or lack thereof) to be entitled to a fee.
>
> The Committee therefore believes that since these critical factors are missing from a defense-contingent fee arrangement in an unliquidated tort action, that such fee is based upon *pure* speculation. A fee based *purely* upon speculation cannot be reasonable as required by the *Code*. The Committee is unanimous in its decision that in a tort action claiming unliquidated damages, a defense contingent fee based upon a percentage of the difference between the prayer in the plaintiff's petition and the jury's verdict is improper. Its decision is the same even if the actual amount of prayer is written into the contingent fee contract (as in the case at bar) so that the fee would not increase if the prayer is increased."

The complaint against a contingent fee contract for a defendant is that "the amount against which the percentage is taken is determined, at a later date, by an independent party or by agreement of the client," so it is therefore "a fee based purely on speculation." (*Wunschel,* p. 337) Yet, how does this differ from the same situation where a plaintiff has a contingent fee contract? The same independent party (i.e., the jury) is present and will determine the award, or the parties themselves may set the fee.

The additional circumstance mentioned in *Wunschel* as an "also," is that the difference also lies in that the defendant's attorney doesn't have to establish liability or the lack thereof to obtain a fee. The point is that often neither is the plaintiff actually required to prove a case—in many cases the facts speak for themselves and the judge is responsible for the law. Moreover, the tendency of legal changes is to make it easier to sue and to recover. Rest assured that the plaintiff's case with liability and heavy damages will not be tried. The integer

Continued on page 14

CONTINGENCY FEES – THE GREAT AMERICAN ABERRATION

Continued from page 13

on both sides of litigation may not be the attorneys.

These considerations are precisely why all contingent fee contracts are unreasonable and unfair, whether for plaintiff or defendant, and if not fair for one, then surely not fair for the other.

Some questions must be put:

1. How can the same contracts be unethical in England and ethical here?

2. How can a lawyer who has a financial interest in the litigation be assured of being fair to the client?

3. How can such fee arrangement be unacceptable in dissolution actions and not in tort actions?2

4. How can such fee arrangements be against public policy for Defendants but not for Plaintiffs?

5. How does an arbitrary percentage of an award relate to time spent, legal ability, and the intricacies of the case?

6. What data has ever been presented statistically supporting the conventional justification that without such contracts no lawyer would represent plaintiffs?

7. Why isn't it fairer that plaintiff's attorneys receive an hourly fee calculated on time and effort?[3]

8. Why have lawyers descended to a credibility rating below used car salesmen?[4]

To put the questions is to answer them.

The American public has not been overjoyed that torts have been turned into an industry, nor has it been reassured by the receipt of seven figure lawyer fees in single tort cases. In America, lawyers have become viewed as pariahs, being more concerned about money than service, and the big money in the law comes from contingent fees. What is even more distressing to the public is that lawyers seek to disguise that big money source as a public service, thus compounding venality with dissembling.

In America the advocate continues to sink from being the most respected of all the professions to a position somewhere below a used car salesman, while contingent fees continue to be ethical.

In England advocates continue to be the most respected of all the professions and contingent fees continue to be unethical.❑

1. Champerty occurs "when he who maintains another is to have by agreement part of the land or debt in the suit." Thus an agreement to remunerate a solicitor, a share of, or commission of, a sum proportioned to the amount of the property to be recovered is bad, and the Solicitors Act, 1870, has not altered the law," p. 170, *The Law Relating to Solicitors,* A. Cordery, Stevens and Sons, London, 1878.
2. One specious justification for the contingent fee in tort actions is that there is a *res,* but there is also a *res* in dissolution actions.
3. ". . . (A) contingent fee is permitted to attorneys *only* as a reward for *skill* and *diligence* exercised in the prosecution of *doubtful* and litigated claims..." 7A CJS, Attorney and Client #313, p. 598. (Emphasis supplied). The English system has recently embarked on a program whereby attorneys may charge double their usual hourly rates if their plaintiffs prevail in a personal injury case.
4. "As most readers will be aware, lawyers in the United States are regarded with an esteem which is the rough equivalent to that of swamp leeches. The President of the Bar Association of California recently proposed that jokes about lawyers — What do you have when a lawyer is buried up to his neck in the sand? Insufficient sand. — be made a hate crime. His proposal, of course engendered even *more* hoots of disdain for the profession." *Contingent Justice,* (Don de Keiffer, Esq.), *The New Law Journal,* London, August 20, 1993.

DEPOSING THE HEAD INJURY CLAIMANT

Continued from page 3

of knowledge (is it consistent with his level of education?)

Judgment

Note the claimant's ability to understand the relationship between facts and to draw conclusions (e.g., the identification of complaints and the need for treatment for them). Also note his responses in social situations (e.g., how he acted in any social or recreational activity that he identifies engaging in recently).

Insight level

Note the accuracy and relevancy of his complaints and their purported relationship to the cause of action or whatever cause he identifies. Does he tend to blame all of his problems on outside factors, even when he admits to failing to pursue needed treatment?

II. Suggested Recording Procedure (third-party)

1. Make a well spaced list of all of these behaviors and factors (2-3 lines @) and each record observation regarding each one throughout the deposition.

2. Note the starting and ending of the deposition; times (start and stop) of each break, number of breaks, duration of each break, **and** the claimant's behavior during the break as well as deposition.

3. Make notations reagarding his behavior (*see above*) **prior** to the deposition.❑

APPELLATE CASE UPDATE

Continued from page 5

claim settled for $9,000.00. Trial of the premises claim resulted in a finding that parties were each 50% at fault and plaintiff had sustained damages of $20,000.00. Judgment entered against defendant for $10,000.00. Trial court refused to credit the previous settlement against the judgment and defendant appealed.

Supreme Court sitting *en banc* held the pro tanto rule applicable, but stated that it applied against the plaintiff's total damages as determined by the jury, not the amount of the judgment entered by the court. With damages of $20,000.00 there was no double recovery by allowing plaintiff to keep the $9,000.00 settlement and recover the $10,000.00 judgment. Therefore, no credit was due.

8. *Millington v. Kuba*, 532 N.W.2d 787 (Iowa 1995)

Emotional Distress Damages

Adult children brought action against funeral home directors to recover for emotional distress resulting from alleged wrongful cremation of their father. After setting aside defendant's default, trial court granted defendant's motion for summary judgment. Supreme Court affirmed. The court held that a claim based on negligence could not be actionable because plaintiffs suffered no physical injury. Also, under the Iowa cases making exception to this general rule, plaintiffs were too removed from the allegedly negligent conduct to create a duty on the part of the defendants to avoid causing emotional harm. The court also found the evidence of plaintiffs' emotional distress insufficient as a matter of law to meet the level of proof of severity required in intentional tort cases.

9. *Brant v. Bockholt*, 532 N.W.2d 801 (Iowa 1995)

Future Noneconomic Damages

Plaintiff appeals from judgment awarding him damages in a personal injury tort action. Plaintiff had objected unsuccessfully to jury instruction requiring jury to reduce any recovery for future pain and suffering to present value. Supreme Court observed that overwhelming weight of authorities supported plaintiff's position and held that awards for future noneconomic damages such as pain and suffering and emotional distress need not be reduced to present worth.

10. *Johnson v. Farm Bureau Mutual Insurance Company*, 533 N.W.2d 203 (Iowa 1995)

Reverse Bad Faith

Insured sued liability insurer for refusal to defend and cover liability claim. Insurer counterclaimed for "reverse bad faith" and abuse of process. Lower court granted insurer's motion for summary judgment and directed a verdict at trial for insured on insurer's counterclaim. The Supreme Court upheld summary judgment for the insurer on the insured's claim. The court, however, declined to adopt a tort of reverse bad faith saying that sanctions under Rule 80(a) were a sufficient remedy when an insured files a frivolous claim.

11. *Langner v. Simpson*, 533 N.W.2d 511 (Iowa 1995)

Medical Malpractice; Statute of Limitations

Medical malpractice action brought against psychiatrist, hospital and counselor making claims arising out of care provided during the 1980's. Lower court granted summary judgment to all defendants on statute of limitations grounds pursuant to Iowa Code §614.1(9). Supreme Court affirmed finding no factual issue concerning plaintiff's awareness of her "injury" more than two years before filing suit. Court declined to apply the "continuous treatment" or "continuum of negligent treatment" doctrines to toll the running of the statute.

12. *Morgan v. American Family Mutual Insurance Company*, 534 N.W.2d 92 (Iowa 1995)

Bad Faith; Contractual Limitations

Action against insurer for recovery of uninsured motorist benefits and for bad faith denial of claim. Jury found the insurer failed to pay benefits in bad faith and awarded compensatory and punitive damages. Supreme Court reversed. The court again stated that whether a claim is fairly debatable is appropriately decided by the court as a matter of law. (But see *Chadima v. National Fidelity Life Insurance Company*, 55 F.3d 345, 348-349 (8th Cir. 1995) where the 8th Circuit said that this issue is one for the jury.) The court found sufficient evidence in the record which made the claim "fairly debatable" as a matter of law. The court also held that an imperfect investigation is not by itself sufficient for recovery. Because the insurer had an objectively reasonable basis at the time it rejected the claim, it had no duty to investigate further.

The insurer had also argued unsuccessfully in the trial court that the action was barred by the two-year limitations provision contained in the policy. On appeal, the Supreme Court determined the issue as a matter of law in the insurer's favor and held the action untimely.

Continued on page 16

APPELLATE CASE UPDATE

Continued from page 15

13. *Lawrence v. Grinde*, 534 N.W.2d 414 (Iowa 1995)

Legal Malpractice; Emotional Distress Damages

Client brought action against former attorney claiming negligence in connection with preparation of bankruptcy petition. Client alleged that due to attorney's negligence he was indicted and tried (but acquitted) for bankruptcy fraud. The jury awarded damages of $700,000.00 for emotional distress and $52,000.00 for economic loss. On post-trial motions, the trial court reduced the distress damages to $5,000.00 and the economic loss to the stipulated amount of $14,233.49.

On appeal, the plaintiff argued that the trial court erred in failing to let his claim for reputation damage go to the jury, and defendant argued that submission of emotional distress damages to the jury was improper since such damages are unrecoverable in a legal malpractice action.

The Supreme Court *en banc* held on the basis of well-reasoned authority that reputation damage is not a legal remedy available in a negligence action. Similarly, the court applied the general rule that emotional distress damages are not recoverable in negligence actions absent physical injury. Allowance of such damages as a result of an attorney's negligence in completing bankruptcy forms would represent a "clear departure" from the narrow circumstances in which exceptions to the general rule have previously been recognized.

14. *Baumler v. Hemesath*, 534 N.W.2d 650 (Iowa 1995)

Premises Liability; Open and Obvious Hazard

Negligence action commenced by employee farmhand against his employer alleging failure to maintain safe working area and failure to warn. The jury awarded plaintiff damages for injuries he sustained when he slipped in a large tire rut on the farm. Defendant argued that the rut was open and obvious and therefore no liability could result as a matter of law. Defendant appealed.

The record at trial showed that the tractor rut was an open and obvious risk of which the plaintiff was aware. Furthermore, plaintiff was an experienced farmhand knowledgeable of dangers present in working around a slippery tractor rut. Nevertheless, the Supreme Court said these undisputed facts were not enough to relieve defendant of liability. The defendant must still either warn plaintiff of the dangerous condition or make it reasonably safe. Since the record showed defendant did neither, a jury could find that the employer acted negligently. The court approved the submission of failure to warn as a separate specification of negligence despite plaintiff's demonstrated knowledge of the hazard.

The court also held that the action was one under Rule 97 and not Chapter 668. Thus, Chapter 668's provisions regarding the allowance of proof of insurance coverage for medical expenses and the interest rate on judgments had no application.❑

Welcome New Members

The following are the names and addresses of the 19 persons elected to membership in the Iowa Defense Counsel Association at our meeting held Wednesday, September 20:

Jeffrey W. Lanz
3708-75th St.
Des Moines, IA 50322

Ann C. Calhoun
801 Grand Ave., #3700
Des Moines, IA 50309

Rebecca L. Smith
2720 First Ave. NE
Cedar Rapids, IA 52406

D. Samuel Waters
11201 Douglas Ave.
Des Moines, IA 50310

Gordon R. Fischer
801 Grand Ave., #3700
Des Moines, IA 50309

Charles E. Cutler
729 Insurance Exch. Bldg.
Des Moines, IA 50309

Nathan R. McConkey
3708-75th St.
Des Moines, IA 50322

Elizabeth A. Night
801 Grand Ave., #3700
Des Moines, IA 50309

Robert S. Hatala
200 First St. SE, #1910
Cedar Rapids, IA 52401

Steven J. Holwerda
101 First Ave. W
Newton, IA 50208

David L. Rose
101 First Ave. W
Newton, IA 50208

Jean Dickson Feeney
600 Union Arcade Bldg.
111 E. Third St.
Davenport, IA 52801

Richard D. Brown
3737 Westown Parkway, #2A
West Des Moines, IA 50266

Daniel P. Schneider
5400 University Ave.
West Des Moines, IA 50266

A. John Arenz
700 Locust St., # 200
Dubuque, IA 52001

Brian C. Ivers
P.O. Box 619
Muscatine, IA 52761

Joseph A. Thornton
35 Main Place, # 300
Council Bluffs, IA 51502

J. Barton Goplerod
5400 University Ave.
West Des Moines, IA 50266

John C. Hendricks
200 E. 2nd St., # 900
Davenport, IA 52801

2000

If technology continues to move as swiftly as it has been, these innovations should be available by the year 2000:

•Virtual-reality weddings. The bride and groom will be able to wear headsets and walk down their own custom-designed virtual-aisle.

•Mailing kiosks called Postage and Mailing Centers (PMC). These freestanding kiosks will be set up in malls and in supermarkets so that people can get postal services day or night.

•Custom car keys for kids. These keys are programmed to control the speed of the family car so that it won't go over 55 m.p.h.

***Note:** The date January 1, 2000, may prove troublesome for some older computers. The internal calenders on many older computer models don't go up to the year 2000.

--Family Circle

"Frankly, Harley, you haven't been with the firm long enough to hold your hand behind your back."

1995 ANNUAL MEETING HIGHLIGHTS

IDCA 1995-1996 OFFICERS

(L to R) Charles E. Miller, President; Robert A. Engberg, President-Elect; Jaki K. Samuelson, Secretary; DeWayne Stroud, Treasurer.

Wayne Taff, DRI Representative, presents IDCA with DRI's Exceptional Performance Award.

Greg Lederer passes gavel to Chuck Miller.

Bob Houghton receives this years "Eddie" Award from Greg Lederer and Pam (Seitzinger) Holub.

1995 ANNUAL MEETING HIGHLIGHTS

Justice Newman addresses the Thursday luncheon.

Bob Kreamer gives the legislative update.

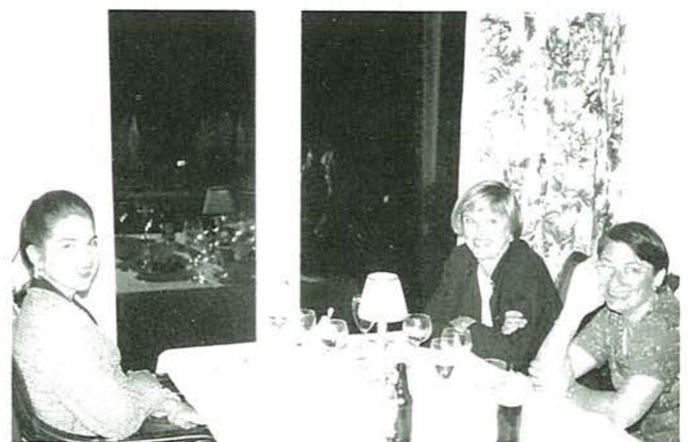
Wendy Munyon and Sharon Greer discuss client relations.

Jerry Lothrop of Minneapolis explains structured settlements.

Editors Kermit Anderson and Tom Shields discuss upcomming an upcomming issue of UpDate.

Brad Brady tries to keep everyone awake at 4:30 p.m.

Board members take the "casual" decree to heart.



The "Bradshaw wives" enjoy the banquet at Glen Oaks.

FROM THE EDITORS

At the annual meeting in September, the 1996 legislative agenda was approved. Mark Trip of Des Moines is the chairman of the Legislation Committee. Robert Kreamer of Des Moines is our lobbyist. There will be a Board meeting in December, so if anyone has any comments regarding our agenda, or additional matters that you think should be addressed, please feel free to contact Mark or Bob, or our new President, Charles Miller of Davenport.

1. Statutory repeal of the holding in *Schwennen v. Abel.* This is the case which holds that family members can recover 100% of their damages (primarily consortium) even though the injured party was more than 50% at fault. The holding of the Iowa Supreme Court in this case is in the distinct minority, and it is felt that it is simply unfair that damages could be recovered even though the injured plaintiff is 99% at fault.

2. Elimination of joint and several liability—each defendant should only pay its percentage of fault.

3. Amend the 10% interest on judgments and decrees provided for in Chapter 535.3. All judgments should bear the same rate of interest. Chapter 668.13 provides a floating rate of interest on judgments, and all judgments should be governed by this provision.

4. Allow defendants in all actions immediate access to the plaintiff's medical records, and the right to talk with plaintiff's medical care providers. There is already a similar provision in workers' compensation cases.

5. Reduce *all* future damages to present value. In *Brandt v. Bockholt,* 532 N.W.2d 81 (Iowa 1995), the Iowa Supreme Court held that non-economic damages such as pain and suffering would not be reduced to present value.

6. There are some other "pro-defense" proposals that are being promoted by other organizations. For example, the Iowa Medical Society is proposing various reforms in the area of medical malpractice, including a provision to reduce the statute of limitations for injured minors to age 18 (rather than one year after majority). The Association of Business and Industry is also making various proposals in the area of product liability, e.g., a 10 year statute of repose and immunity if the defendant's product has been altered or modified. The Association may take a role in some of these other proposals.

The Editors: Kenneth L. Allers, Jr., Cedar Rapids, Iowa; Kermit B. Anderson, Des Moines, Iowa; Michael W. Ellwanger, Sioux City, Iowa; James A. Pugh, West Des Moines, Iowa; Thomas J. Shields, Davenport, Iowa.

Michael W. Ellwanger
Toy Building, Suite 300
Sioux City, Iowa 51101

BULK RATE
U.S. POSTAGE
PAID
Permit No. 3885
Des Moines
Iowa

Michael P. Byrne
Lane & Waterman
220 North Main Street--Suite 600
Davenport, IA 52801-1987