

WEDNESDAY, APRIL 29, 2009  
11:00 A.M.

NO. 2

#22931

UNION PACIFIC RAILROAD  
COMPANY, AS SUCCESSOR-IN-  
INTEREST TO THE CHICAGO  
AND NORTH WESTERN  
RAILWAY COMPANY,  
Plaintiff and Appellant,

vs.

CERTAIN UNDERWRITERS AT LLOYD'S,  
LONDON, ET AL., INCLUDING  
CONTINENTAL CASUALTY CO.,  
Defendants and Appellees.

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Mr. Timothy W. Burns  
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(FOR APPELLANTS)

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(FOR APPELLEE CONTINENTAL CASUALTY)

The Honorable Jon R. Erickson  
Third Judicial Circuit  
Beadle County Clerk of Courts

(CIV 99-164)

## LEGAL ISSUES INVOLVED

A. Whether Continental is entitled to summary judgment, based on its coverage defense of late notice, where, as here, the insurance contract does not contain an express requirement concerning the timing of notice of loss, and even if notice of loss was untimely, Continental has suffered no prejudice based on the timing of notice of loss.

The Circuit Court entered summary judgment in favor of Continental, holding that Continental is relieved of its obligation to provide coverage because Union Pacific did not give notice of loss and subsequent proof of loss "as soon as practicable," even though this time limitation is inapplicable to notice of loss. Relevant cases include *Auto-Owners Ins. Co. v. Hansen Housing, Inc.*, 2000 S.D. 13, 604 N.W.2d 504 (S.D. 2000); *Crum & Forester Ins. Co. v. Pacific Employers Ins. Co.*, 907 F. Supp. 312 (D. S.D. 1995); and *Kremer v. American Family Mutual Ins. Co.*, 501 N.W.2d 765 (S.D. 1993).

B. Whether a choice of law analysis is required where there is no conflict between the controlling laws of both states and, if such analysis is necessary, whether South Dakota or Illinois law governs a breach of insurance contract case when the insured is seeking to recover for damage to South Dakota property.

In its May 2, 2003 Order, the Circuit Court performed a choice of law analysis and held that Illinois law applied to this action. Relevant cases include *Anderson v. Taurus Fin. Corp.*, 268 N.W.2d 486 (S.D. 1978) and *Phillips v. Marist Society*, 80 F.3d 274 (8th Cir. 1996). Relevant statutes include S.D.C.L. § 53-1-4.