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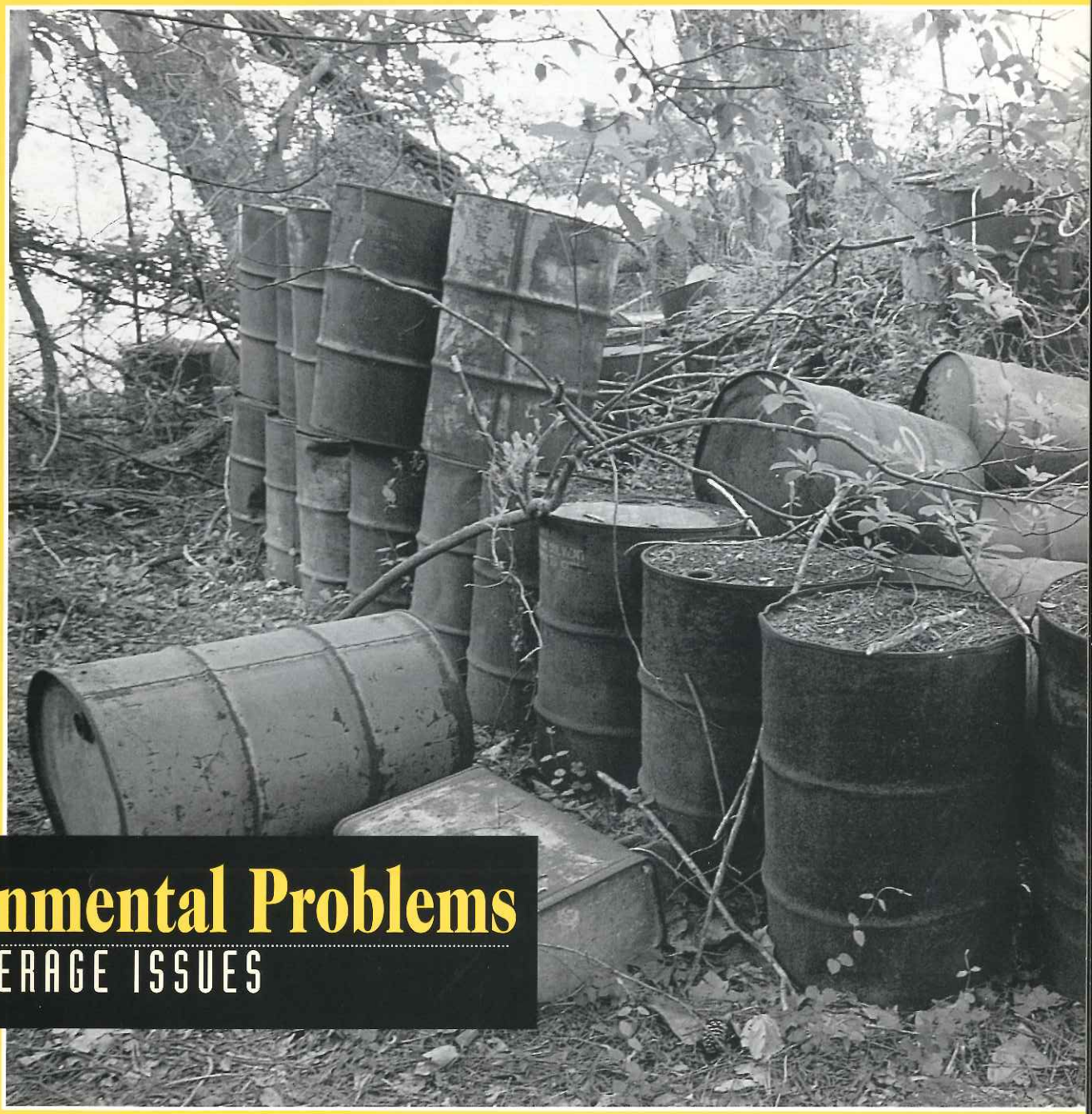
The DefenseLine



Environmental Problems
AND COVERAGE ISSUES

South Carolina Defense Trial
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The DefenseLine

Ten Years Ago

In the February 1986 *Defense Line,* CARL EPPS, Legislative Chairman, reports that tort reform was a hot item on the General Assembly's agenda for 1986. A physicians tort reform bill was introduced in both Chambers. Defense attorneys were sponsoring a broad based tort reform. ED POLIAKOFF, COSTA PLEICONES and THOM SALANE assisted in the drafting of that bill. GENE ALLEN, President, was closely involved with the South Carolina Medical Association. JOHN RODDEY HOLLAND was memorialized in the February 1986 issue of *Defense Line,* meeting his untimely death on January 8, 1986. He was with WHALEY, McCUTCHEN, BLANTON & RHODES. ED MULLINS was elected Chairman of the Board of the Defense Research Institute.

Twenty Years Ago

We headed into 1976 with our old friend C. DEXTER POWERS of Florence as President, along with President-Elect JACKSON L. BARWICK, JR., Secretary/Treasurer MARK W. BUYCK, JR., Immediate Past President JAMES W. ALFORD and Executive Committeemen PLEDGER BISHOP, SPENCER KING, and SAUNDERS BRIDGES. (DEXTER POWERS and PLEDGER BISHOP have since gone on to their reward. They were faithful members of the Association and very outstanding members of our profession.)

In March 1995 JACKSON L. BARWICK, JR., as President-Elect, represented the Association at the National Conference of Associations in San Antonio, Texas. March 25, 1976 was the BARWICKS' thirty-first wedding anniversary and was celebrated in NAN'S home state of Texas. J.W. DERRICK, Claims Manager for the South Carolina Electric & Gas Company, was President of the Management Association of South Carolina. Other officers included Vice President GARY ANTHONY, Secretary C.A. WHITAKER, Treasurer MIKE ROGERS, and Immediate Past President WILLIAM KELLAMAS. The Board of Directors included J.R. CARSON, F.M. TIMMONS, JR., JOE C. HARDIN, J.B. COATES, A.P. FONT, A.W. ROBB, JOHN P. DUNN, WILLIAM GRIGGS and CHARLES SMITH.

President's Letter

The 1996 SCDTAA Committee assignments have been made based upon the responses we have received. If you would like to be on a Committee, it is not too late. Please fill in your form with your preference or give me a call. We have many exciting plans for the new year and the help of all is needed. I would urge each of you to sign up for a Committee. It is a wonderful way to become involved in the organization.

The Defense Line Committee provides you with the opportunity to write an article on a topic of interest to you and to have it published. *The Defense Line* is mailed to all of our members and to all of the South Carolina Judges. If you do not have time to write an article please consider sending in a recent decision with or without commentary.

The Trial Academy has been filled each year we have held it. Please apply early if you want to participate in this program.

Many years ago the SCDTAA began an organized effort to be the voice of the defense bar in the South Carolina legislature. Each year we have a legislative chairperson who monitors legislation, reports legislation to our members, and when needed speaks or arranges for others to speak before legislative committees and at public hearings. Will Davidson is serving for a second year in this capacity. We now subscribe to the McNair Firm Legislative monitoring service. Michael Ey of the McNair Firm is listed as our lobbyist. We have a contract with McNair to provide "monitoring plus". Although he is not lobbying for us on individual bills he is providing us with valuable help. The responsibility of speaking on behalf of or against bills, will continue to fall primarily on the Executive Committee. We have solicited your involvement with this effort on a number of occasions. I anticipate that each of you will be asked to take an active role in contacting any legislators you know and those you should know on important issues as this session continues.

Based upon my recent conversations with many people, both lawyers and non lawyers, few believe we have the best process for judicial selection. The process appears to be one of deals and politics. The opinions of the lawyers who actually appear before judges seem to matter less and less. I believe that we have a good judiciary, not because of, but in spite of the current process.

The House has passed a Judicial Merit Selection bill. This bill sets more objective criteria for judicial qualification. It also establishes a committee composed of both legislators and non-legislators to conduct judicial screening. Susan Lipscomb has accepted the responsibility of being the lead person for the defense attorneys on this bill. If you would like a copy of this bill, please contact her. If you have any opinions about this bill, please let her know.

The people of South Carolina deserve a judicial selection process that is as free as possible from politics and one that looks to qualifications of experience, knowledge and temperament. In every lawsuit one side wins and the other loses. I believe that we should strive to have selected those individuals who possess knowledge, love and respect for the law, who have the experience to identify the issues, and the courage to address them, and who have the temperament to rule. The process must be one which focuses on these issues.

I frequently hear defense lawyers complain about the changes in the practice of Law and the loss of civility and professionalism in the practice. All of us have firms where there are marketing meetings and many of us deal with marketing goals. My challenge of action to those who have these complaints is for them to spend in the upcoming three months as much time building legal community, establishing relationships with fellow lawyers and treating fellow lawyers with respect as they spend on marketing. If we would all take this challenge we would realize that the world has changed and the practice of law has changed but that professionalism and civility are still possible.

Please contact me with your thoughts and suggestions. I am still working on my home page but for now I can be reached at aol@Auchila.com

– Kay G. Crowe

Whose Problem: The Insured's or the Insurer's?

Moffatt G. McDonald Haynsworth, Marion, McKay & Guéard, L.L.P.

Coverage Issues Related to Environmental Problems

Because they deal with liability insurance policies on a daily basis, defense lawyers have a good working grasp of the basic rules related to the coverage issues that typically arise. When an insured faces environmental suits or cleanup responsibilities, however, an entirely new set of issues may arise. The issues are often unusual for several reasons.

First, the acts giving rise to the liability may have occurred many years ago. An industrial landfill constructed in the 1960's may not leak into surrounding water supplies in detectable amounts until the 1990's. As a result, policies drafted in the 1960's may provide coverage. Nevertheless, when the companies drafted those policies, neither the insurer nor the insured, in all likelihood, envisioned Congress' current strict liability approach to environmental cleanups. See Comprehensive Environmental Response, Compensation and Recovery Act ("CERCLA") at 42 U.S.C. § 9601, et seq.

Second, actions under the various environmental laws do not always follow the traditional approach of a suit for damages. Agency actions and orders may initially set out the issues to be resolved and actually begin the legal process. Finally, current environmental laws encourage voluntary cleanups, and insureds have argued that policies should cover even the expense of preventive measures.

This article is not intended to be a comprehensive article on all the possible issues, and cases often turn on the language of particular policies. Nevertheless, the following is a brief discussion of several areas that have been the subject of litigation in recent years.

Are CERCLA Response Costs Damages?

Under CERCLA, the liability scheme makes almost anyone related to contaminated property responsible for cleaning it up. The government or a third party can pay to remediate the site and then sue to recover the costs. Alternatively, the government can procure an order requiring the responsible parties to clean the site. Finally, the government can also sue for damages to "natural resources." Each of these fact situations raise their own issues, but the question naturally arises as to whether these costs are covered by the typical general liability policy.

In Maryland Casualty Co. v. Armco, Inc., 822 F.2d 1348 (4th Cir. 1987), cert. denied 484 U.S. 1008 (1987), the Fourth Circuit first addressed this issue. Seeking the cost of cleanup actions taken by the United States as well as damages for injury to natural resources, the government sued both the owners of a hazardous waste site and the defendants that had generated the waste there. Armco, which was a generator of some of the waste, approached its liability carrier for coverage, and a declaratory judgment action was the result.

The Fourth Circuit held that the liability carrier was not liable, because there were no "damages" as defined in the policy. The court first

observed that other courts had repeatedly held that CERCLA claims were equitable claims so that the parties were not entitled to a jury trial. This meant that the relief was equitable in nature and did not take the form of the typical legal relief - damages. Distinguishing other decisions that found coverage, the court offered as an example the cleanup of a marsh. The expense of cleanup might far outweigh any possible value of the property so that the cost of

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cleanup would not be a proper measure of "damages." The Court carefully pointed out, however, that although the complaint asked for natural resources damages, in fact, the government's action was immediately following a spill to prevent further damage. The government's actions were "fundamentally prophylactic." Id. at 1354.

In Cincinnati Ins. Co. v. Milliken & Co., 857 F.2d 979 (4th Cir. 1988), the Fourth Circuit addressed the same issue in a case arising under South Carolina law. In that case, the government brought suit for cleanup costs which it had expended cleaning a site and sought a declaratory judgment that the defendants would be liable for future response costs. The Fourth Circuit again found no coverage. Nevertheless, the Court carefully pointed out that the government had sought no damages for injury to natural resources. Consequently, the Armco decision controlled the case. In line with the Armco decision, other Courts have also limited insurers' liability for this type of claim. See Patrons Oxford Mutual Ins. Co. v. Marois, 573 A.2d 16 (ME, 1990); Grishon v. Commercial Union Ins. Co., 951 F.2d 872 (8th Cir. 1991).

In Braswell v. Faircloth, 300 S.C. 338, 387 S.E.2d 707 (Ct. App. 1989), the South Carolina Court of Appeals addressed the issue and took a different approach. In Braswell, the trial court entered judgment in favor of a landlord against its tenant. The landlord had paid for a cleanup following an agency action. Having cleaned up a spill and having paid to remove drums containing chemicals, the landlord received a judgment for those amounts.

Finding coverage in a subsequent action against the tenant's liability insurer, the court awarded the cost of cleaning up the spill. With regard to removing the drums, however, because there had been no spill, there was no "property damage" within the meaning of the policy. Therefore, there was no coverage. Similarly, there was no coverage for the expense of sampling and the expense of chemical tests, because those expenses also were not "property damage."

The Braswell decision is obviously an indication that at least some types of cleanup expenses are covered under South Carolina law. In fact, while the cost of cleaning up the spill in Braswell was a minor amount, Braswell may open the door to a much larger recovery against a carrier in a future case. Most of the expense in a cleanup situation is typically incurred dealing with the chemicals that have escaped into the environment. Braswell indicates that such expenses may be covered.

The South Carolina Supreme Court has yet to address this issue, but many courts in other states have found coverage. In C.D. Spangler Construction Co. v. Industrial Crankshaft & Engineering Co., 326 N.C. 133, 388 S.E.2d 557 (N.C. 1990), for example, the North Carolina Supreme Court found coverage for agency ordered cleanup expenses, because the costs essentially represented "damages" to natural resources. See also Morton International, Inc. v. General Accident Ins. Co., 134 N.J. 1, 629 A.2d 831 (N.J. 1993); Outboard Marine Corp. v. Liberty Mutual Ins. Co., 154 Ill.2d 90, 607 N.E.2d 1204 (Ill. 1993); Bausch & Lomb, Inc. v. Utica Mutual Ins. Co., 330 Md. 758, 625 A.2d 1021 (Md. 1993); Coakley v. Marine Bonding & Casualty Co., 136 N.H. 402, 618 A.2d 777 (N.H. 1992); MacDonald Industries, Inc. v. Insurance Co. of North America, 475 N.W.2d 607 (Iowa 1991); Boeing Co. v. Aetna Casualty & Surety Co., 113 Wash.2d 869, 885, 784 P.2d 507 (Wash. 1990); Avondale Industries, Inc. v. The Travelers Indemnity Co., 697 F. Supp. 1314 (S.D.N.Y. 1988).

"Most of the expense in a cleanup situation is typically incurred dealing with the chemicals that have escaped into the environment."

Does the Beginning of Agency Action Trigger the Duty to Defend?

A closely related question is whether an insurer's duty to defend is triggered by the beginning of an agency action against the insured or whether the carrier can wait until suit before providing a defense. Under CERCLA, a company often learns that it may be responsible for a cleanup when it receives a potentially responsible party ("PRP") letter from an enforcement agency. Pursuant to CERCLA, this letter begins the enforcement process. After receipt of the letter the recipient typically engages counsel, and the process of investigating and negotiating the company's liability, if any, begins. This is expensive for the recipient, and so the question naturally arises as to whether the receipt of such a letter triggers the duty to defend.

To date, no South Carolina Appellate Court has addressed this issue, and of course, it is closely related to the question of coverage, because the duty to defend depends on coverage. The cases typically focus, however, on whether the beginning of agency action is the equivalent of a "suit" under the policy.

In Coakley v. Marine Bonding & Casualty Co., 136 N.H. 402, 618 A.2d 777 (N.H. 1992), for example, the New Hampshire Supreme Court addressed the issue of whether a PRP letter triggered the duty to defend. The Court concluded: "The PRP notice, like a civil complaint, alerted the [insured] that the EPA had begun a legal process to conclusively and legally determine...the appropriate [action the] liable parties must perform or pay for to abate pollution. ...This determination is akin to the determination of 'damage' in a tort suit." Id. at 786. Similarly, in Hazen Paper Co. v. USF&G, 407 Mass. 689, 555 N.E.2d 576, 580 (Mass. 1990), the court concluded:

> Literally, there is no suit. However, the litigation defense protection that Hazen purchased from USF&G would be substantially compromised if USF&G had no obligation to defend Hazen's interest in response to the EPA letter.

In fact, the North Carolina Supreme Court reached the same result in C.D. Spangler Const. Co. v. Industrial Crankshaft & Engineering Co., 326 N.C. 133, 388 S.E.2d 557 (N.C. 1990), and other courts have agreed. See A.Y. McDonald Industries, Inc. v. Insurance Co. of North America, 475 N.W.2d 607 (Iowa 1991); Village of Morrisville Water & Light Dept. v. USF&G, 775 F. Supp. 718 (D.Vt. 1991); Aetna Casualty & Surety Co. v. Pintlar Corp., 948 F.2d 1507 (9th Cir. 1991); Higgins Industries, Inc. v. Fireman's Fund Ins. Co., 730 F. Supp. 774 (E.D. Mich. 1989); Avondale Industries, Inc. v. The Travelers Indemnity Co., 697 F. Supp. 1314 (S.D.N.Y. 1988), aff'd, 887 F.2d 1207 (2d Cir. 1990); USF&G v. Specialty Coatings & Specialty Chemical Co., 180 Ill. App. 3d 378, 535 N.E.2d 1071 (1st Dist. 1989).

This is a hotly contested issue, however, and so it is not surprising that other courts have disagreed. See Patrons Oxford Mutual Ins. Co. v. Marois, 573 A.2d 16 (Me. 1990); Ray Industries, Inc. v. Liberty Mutual Ins. Co., 974 F.2d 754 (6th Cir. 1992); Harleysville Mutual Ins. Co. v. Sussex Co., 831 F. Supp. 1111 (Del. 1993); Becker Metals Corp. v. Transportation Ins. Co., 802 F. Supp. 235 (E.D. Mo. 1992); Harter Corp. v. Home Indemnity Co., 713 F. Supp. 231 (W.D. Mich. 1989); Ryan v. Klimek, Ryan Partnership v. Royal Ins. Co., 728 F. Supp. 862 (D.R.I. 1990), aff'd, 916 F.2d 731 (1st Cir. 1990).

The "Sudden and Accidental" Exclusion

Of course, no discussion of liability policies as they relate to environmental problems would be complete without a discussion of the "sudden and accidental" exclusion. Added in the early 1970's to the typical liability policy, the exclusion generally provides that the policy does not cover:

> 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 gases, waste materials or other irritants, contaminants or pollutants into or upon the land, the atmosphere or any water course or body of water, but this exclusion does not apply if such discharge, disbursal, release or escape is sudden and accidental.

Under this exclusion, the argument generally centers around whether a particular release of contaminant can be considered "sudden" or whether the phrase "sudden" is ambiguous. If the exclusion is ambiguous, then the court must construe it in favor of the insured.

A South Carolina appellate court first addressed this issue in Harleysville Mutual Ins. Co. v. Harp & Sons, Inc., 305 S.C. 492, 409 S.E.2d 418 (Ct. App. 1991). The Harp & Sons case arose under North Carolina law and was a declaratory judgment action related to a leaking gas tank located at a convenience store. Relying on a North Carolina decision, the court held that the word "sudden" did not mean "unexpected" or it would be redundant when used with the word "accidental." Consequently, the court concluded that "sudden" meant something that happened "instantaneously" or "precipitantly." Id. at 420. Because the leak developed over time, there could be no coverage.

In Greenville Co. v. Insurance Reserve Fund, 311 S.C. 169, 427 S.E.2d 913 (Ct. App. 1993), the Court of Appeals addressed the same issue under South Carolina law with regard to a landfill that had leaked and contaminated neighboring property. It once again reached the same result. Upon review, however, the Supreme Court reversed the Court of Appeals' decision. See Greenville Co. v. Insurance Reserve Fund, __S.C.__, 443 S.E.2d 552 (1994). Applying the rule that courts must construe policies in favor of insureds, the court turned to two dictionary

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definitions of the word "sudden." It then concluded that the word "sudden" could properly be interpreted as "unexpected." Consequently, it held that there could be coverage.

The Supreme Court's decision in the Greenville Co. case is obviously controlling on this issue in South Carolina. The decision is favorable to insureds because so many environmental contaminations occur slowly over time. Of course, the Supreme Court's ruling on the "sudden and accidental" exclusion does not preclude the possibility that other exclusions might be raised to prevent coverage.

What about Preventive Measures?

An interesting question that only a few courts have addressed is whether liability policies must pay for preventive measures. In the typical case on this issue a company learns that its landfill is leaking into the surrounding groundwater but no contamination has left the company's property. The company might do nothing, and when the neighboring landowners sue, the liability carrier may have to pay for a defense. Alternatively, the company may spend much less now to clean up the contamination before it leaves its property.

Interestingly, a few courts have allowed recoveries against liability carriers for the expenses of this type of cleanup. The courts have reasoned that the law should encourage this approach and that in the long run, the liability carrier saves money. See United States Aviex Co. v. Travelers, 125 Mich. App. 579, 336 N.W.2d 838 (1983); Broadwell Realty Serv., Inc. v. Fidelity & Casualty Co., 528 A.2d 76 (1987); and Aronson Assoc. v. Nat. Mut. Cas. Ins. Co., 272 Pa. Super. 606, 422 A.2d 689 (1977). In these cases, however, a government agency was already ordering a cleanup, and so the question is closely related to the CERCLA cleanup cost issue discussed earlier. Many courts, moreover, do not agree that these costs are covered. The Fourth Circuit, with its ruling in the Armco case discussed earlier, is a perfect example of a court that does not believe that "prophylactic" measures are covered. See Maryland Casualty Co. v. Armco, Inc., 822 F.2d 1348 (4th Cir. 1987), cert. denied 484 U.S. 1008 (1987); cf. Braswell v. Faircloth, 300 S.C. 338, 387 S.E.2d 707, 710 (Ct. App. 1989)(Expense of removing stored wastes that had not leaked was "preventative" in nature and was not covered).

Conclusion

We can expect our courts to address these issues in the future. Until we have definitive answers, however, a wise practitioner will keep in mind that these issues can present problems as well as opportunities for both carriers and insureds.

SCDTAA To Hold Sixth Annual Trial Academy August 14-16, 1996

Plans are now being made for the South Carolina Defense Trial Attorneys' Association's Sixth Annual Trial Academy to be held during the Summer at the University of South Carolina Law School. The Academy has helped train many younger defense attorneys in this state. Co-chairing the committee this year will be Steve Darling of Sinkler & Boyd and Sam Outten of Leatherwood, Walker, Todd & Mann, with John Bell of Nelson, Mullins, Riley & Scarborough serving as Vice Chair.

The Academy is an intensive three day session in which members of the Association make presentations to the students on various aspects of trial practice and lead interactive breakout groups. In addition, one of the South Carolina appellate court judges may well participate. In the past and this year, we anticipate having federal and state judges volunteer their time to preside over mock trials held on Friday and concluding the Academy.

The Academy is designed for 24 young lawyers. In the past, response to the Academy has been overwhelming. Thus, when the final details are announced, law firms should promptly reserve space to assure their young lawyers' registration.

Anyone interested in assisting with the Academy can contact Steve at (803) 722-3366, Sam at (864) 242-6440 or John at (803) 799-2000.

Offers Of UIM Coverage After Osborne v. Allstate

William P. Davis
BAKER, BARWICK, RAVENEL & BENDER, L.L.P.

On July 17, 1995, the South Carolina Court of Appeals decided the case of Osborne v. Allstate Insurance Co., ___S.C.___, 462 S.E.2d 291 (Ct. App. 1995). The Court held that Allstate's offer of underinsured motorist (UIM) coverage to its policyholder was ineffective, even though it was made on a form that had been approved by the Chief Insurance Commissioner, because it did not indicate that UIM coverage was available in amounts less than the minimum liability limits of the policy. Allstate's petition for rehearing was denied on September 21, 1995. Allstate filed a petition for writ of certiorari with the South Carolina Supreme Court on October 19, 1995. Unisun, the National Association of Independent Insurers, Nationwide and State Farm have filed Amicus Curiae briefs. To date, the Supreme Court has not ruled on Allstate's petition.

A review of some of the case law leading up to Osborne will put this decision in perspective.

Background

In 1978, the General Assembly enacted S.C. Code Ann. § 56-9-831 (1976) [now § 38-77-160], which provided, in part, that:

> [a]utomobile insurance carriers... shall also offer, at the option of the insured, underinsured motorist coverage up to the limits of the insured liability coverage to provide coverage in the event that damages are sustained in excess of the liability limits carried by an at fault insured or underinsured motorist....

In Garris v. Cincinnati Insurance Co., 280 S.C. 149, 311 S.E.2d 723 (1984), the South Carolina Supreme Court held that this section requires that UIM coverage "in any amount up to the insured's liability coverage must be offered to a policyholder." The Court indicated that an offer of 15/30/5 UIM coverage was required where the insured had liability limits of 15/30/5. The Court did not indicate how the offer should be made. That was addressed three years later in State Farm v. Wannamaker, 291 S.C. 518 354 S.E.2d 555 (1987). In that case the Court held that the statute placed the burden on the insurer to effectively transmit the offer, and it adopted the following standard for determining whether such offers are effective:

(1) The insurer's notification process must be commercially reasonable, whether oral or in writing;
(2) The insurer must specify the limits of optional coverage and not merely offer additional coverage in general terms;
(3) The insurer must intelligibly advise the insured of the nature of the optional coverage; and
(4) The insured must be told that optional coverages are available for an additional premium.

The Court noted that, if the agent had discussed UIM coverage and made a verbal offer the statutory burden of providing the insured the option of rejecting or accepting the coverage would clearly have been met.

In Dewart v. State Farm 296 S.C. 150, 370 S.E.2d 915 (Ct. App. 1988), State Farm had mailed its South Carolina policyholders a nine-page booklet with their renewal notices, along with a separate three-page insert. The booklet and insert purported to explain and offer UIM coverage. The Court held that State Farm's offer was deficient because the renewal notice itself did not contain an explanation of UIM coverage, but merely referred to "Coverage W", and the renewal notice did not direct the insured to read the insert. The Court approved State Farm's notification process (by mail) and its premium renewal notice informing the policyholder that she could purchase coverage limits of 15/30/5 or 25/50/25 for specified additional premiums. This point is significant because the notice apparently did not offer UIM coverage in any other amounts.

In 1988, the Court of Appeals held that the offer of UIM coverage must be made each time

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the policy is renewed, unless the renewal is consummated pursuant to a provision in the expiring policy. Knight v. State Farm, 297, S.C. 20 374 S.E.2d 520 (Ct. App. 1988).

In response to Wannamaker, the General Assembly enacted S.C. Code Ann. § 38-77-350 as part of "The Insurance Reform Act of 1989." Subsection (A) requires the Chief Insurance Commissioner to approve a form "which automobile insurers shall use in offering optional coverages required to be offered pursuant to law to applicants for automobile insurance policies." It also provides that "[t]his form must be used by insurers for all new applicants after December 1, 1989" and specifies that the form should contain, among other things, "a list of available limits and the range of premiums for the limits." S.C. Code Ann. § 38-77-350(A)(2). Subsection (B) provides:

> If this form is properly completed and executed by the named insured it is conclusively presumed that there was an informed, knowing selection of coverage and neither the insurance company nor any insurance agent has any liability to the named insured or any other insured under the policy for the insured's failure to purchase any optional coverage or higher limits.

Under Interpretive Bulletin 4-89 (1989) Section 22, insurers may comply by using their own forms provided they meet the requirements of § 38-77-350 and are approved by the Commissioner.

Subsection (D) contains additional protection contingent on compliance with the entire statute.

In Osborne the Court of Appeals held that Allstate was not entitled to the protection of § 38-77-350(B) because its form was not identical to that promulgated by the Commissioner and it did not comply with § 38-77-350(A) or § 38-77-160. (See discussion below.)

In Hanover v. Horace Mann, 301 S.C. 55 389 S.E.2d 657 (1990), the Supreme Court addressed the issue of whether an offer of UIM only in an amount equal to the insured's liability limits complied with § 38-77-160. The Court held it did not:

> ...had the legislature intended coverage only in an amount equal to the insured's liability limits, it would have specified coverage be offered "at" rather than "up to" that limit. Id. at 658.

In Jackson v. State Farm, 301 S.C. 440, 392 S.E.2d 472 (Ct. App. 1990), the Court of Appeals held that State Farm's offer was insufficient because, although it stated in general terms that the optional coverage was available up to the limits of the insured's liability coverage, it did not specify the limits of the coverage in dollar amounts, and it failed to state the amount of additional premium required for UIM at the specified limits.

In Anders v. S. C. Farm Bureau Mutual Insurance Co., ___S.C.___, 415 S.E.2d 406 (Ct. App. 1992) the Court said that the sophistication of the applicant may be considered in determining whether sufficient advice was given with regard to an offer of UIM coverage.

Finally, in White v. Allstate, ___S.C.___, 442 S.E.2d 195 (Ct. App. 1994), Allstate offered Mr. White UIM coverage in the same amount as his liability coverage (15/30/5). The Court of Appeals said that § 38-77-160 requires insurers to offer UIM coverage "up to the limits of the insured liability coverage," and interpreted this language to mean that insurers must offer UIM coverage below the minimum liability limits. The Court rejected Allstate's argument that it is unreasonable to require it to provide UIM coverage in any amount up to the minimum limits, stating that, "...had the legislature intended there to be a minimum offer requirement for UIM coverage it would have done so." Id. The protection afforded by § 38-77-350(B) was not an issue because it had not been enacted at the time of the offer in question.

Osborne v. Allstate

In Osborne, Allstate had offered its insureds UIM coverage on a form which had been approved by the South Carolina Department of Insurance. It was enclosed with the renewal notice, which referred the insureds to the form. One of the named insureds, Mr. Osborne, signed the form indicating that the offer of UIM coverage was rejected.

The Court noted that Allstate's form was not identical to that promulgated by the Commissioner because it omitted the following paragraph:

> Some of the more commonly sold limits of underinsured motorist coverage, together with the additional premiums you will be charged, are shown upon this Form. If there are other limits in which you are interested, but which are not shown upon this Form, then fill in those limits. If your insurance company is allowed to market those limits within this State, your insurance agent will fill-in the amount of increased premium. (emphasis that of the Court).

The Court also noted that the Commissioner's form provides a space for the applicant to write in the coverage desired. According to the Court, an insurer is fully protected by § 38-77-350(B) only if it uses the Commissioner's form. Allstate was therefore not entitled to such protection because (1) its form was not identical to the Commissioner's, and (2) Allstate did not comply with § 38-77-160 and § 38-77-350(A). Allstate's offer was deemed ineffective "because it did not indicate to the Osbornes that UIM coverage could be obtained in amounts less than the minimum liability limits of their policy." Id.

Before the Osborne decision, The Honorable David Norton had ruled in Holt v. State Farm, 870 F.Supp 658 (D.S.C. 1994) that it would not be commercially reasonable for insurers to be required to offer UIM coverage in increments of one cent in order to comply with the mandate of § 38-77-160 that UIM coverage be offered up to the limits of the insured's liability coverage.

The Osborne Court expressed concern over "this seemingly impractical requirement," and concluded that while the Commissioner may approve insurers' offers of UIM coverage, he does not have the discretion to approve offers that do not make it clear to applicants that they may obtain UIM coverage for amounts less than the minimum liability coverages provided by § 38-77-160.

Another question raised in Osborne, but which was not necessary for the Court to decide, was whether Mr. Osborne had the apparent authority to reject UIM coverage for Mrs. Osborne, who was also a named insured on the policy.

Allstate argues in its petition for writ of certiorari that the Court erroneously interpreted § 38-77-160, and that Allstate's use of an approved form entitles it to the protection of § 38-77-350(B) and (D). Allstate also argues that the phrase "up to" includes the minimum limits, and Allstate's offer to provide UIM coverage "up to" and including the amount of the insured's liability limits was in compliance with even the Court's view of the statutory requirements. Allstate adds that Garris supports this interpretation of the phrase "up to."

Allstate also points out that § 38-77-350(A) requires insurers to list "available limits" on their forms and since the statutory scheme for approval of insurers' rates does not contemplate offers of UIM in amounts less than 15/30/5, such UIM limits are not "available."

Finally, Allstate argues that § 38-77-350 "is a valid delegation of power to the Commissioner" and that "[i]t is not within the authority of the appellate court to re-write the relevant statute or to fail to give effect to the Commissioner's discretionary authority."

The respondent argues in her return that the Osborne decision is in harmony with § 38-77-160 and prior case law. She also contends that Allstate's arguments concerning the interpretation of the phrase "up to" are irrelevant because the Courts have already specifically defined the term in the context of offers of UIM coverage.

The respondent also takes issue with Allstate's contention that Osborne requires that more than one limit of UIM coverage below 15/30/5 must be offered, arguing that the court specifically stated that a single increment would be sufficient.

Finally, the respondent argues that § 38-77-350(A) contains minimum requirements, which the Court of Appeals correctly held were not satisfied.

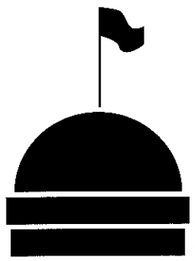
"As a result of Osborne, insurers have been receiving demands for UIM coverage under policies where it has been rejected."

Conclusion

As a result of Osborne, insurers have been receiving demands for UIM coverage under policies where it has been rejected. Numerous declaratory judgment actions are pending, many of which are on hold awaiting guidance from the Supreme Court.

The case of Butler v. Unisun involves very similar issues, and is currently on appeal from the Order of The Honorable A. Victor Rawl granting summary judgment to Unisun on the ground that Unisun's form offering UIM coverage complied with §38-77-350. Ms. Butler had brought a declaratory judgment action, and summary judgment was granted about a month before the Osborne decision. Butler was scheduled to be heard by the Supreme Court on February 21, 1996 at 11:00 a.m. As in Osborne, Nationwide and State Farm filed a joint Amicus Curiae. Insurers who have relied on the protection afforded by § 38-77-350 and Interpretive Bulletin 4-89 should carefully monitor both Osborne and Butler for future guidance.

Legislative Report



Bills in the General Assembly currently being watched by the Legislative Committee.

This year's South Carolina legislative session is the second year of a two year term. Therefore, any bills from last year are still active and are being watched.

To help the Legislative Committee monitor and lobby the General Assembly for the South Carolina Defense Trial Attorneys' Association, we have retained the services of Michael Ey of the McNair Law Firm.

The bills now in the General Assembly which we are monitoring closely are listed below:

If you have any questions or comments about any of these bills, please feel free to contact the Legislative Committee.

– William H. Davidson, II
Legislative Committee Chairman

Summary of Selected Legislation

1. **Judicial Merit Selection.** H. 3961, by Representative Wilkins and others, establishes a Judicial Merit Selection Commission. The legislation, as passed by the House of Representatives at the end of the 1995 session, requires the Commission to submit to the General Assembly the names of the three candidates best qualified for the position. The Commission's nominations are binding on the General Assembly. In addition, H. 3961 requires members of the General Assembly to resign prior to submitting an application for consideration as a judicial candidate. H. 3961 was referred to the Senate Judiciary Committee where it is being considered by a Subcommittee chaired by Senator Ed Saleeby.

2. **Venue.** S. 503, sponsored by Senator Sam Stilwell, passed the Senate during the 1995 session and was referred to the House Judiciary Committee where it was placed in the Constitutional Laws Subcommittee. The bill allows tort actions against a defendant to be tried in the county where the cause of action arose. At this time, the Subcommittee has not scheduled S. 503 for consideration.

3. **Noneconomic Damages.** Representative Herb Kirsh introduced H. 4466 in January 1996. The bill limits the award for noneconomic damages in a personal injury action to the greater of either $250,000 or the amount awarded as economic damages. The bill includes definitions for economic and noneconomic damages and requires the trier of fact to make separate findings on components of the damage award. H. 4466 was referred to the House Judiciary Committee and no action has been scheduled on the bill. Senator Greg Gregory introduced S. 1046, which is the Senate version of H. 4466. S. 1046 was referred to the Senate Judiciary Committee and no action is scheduled on it.

4. **Double Recoveries**. H. 4468, introduced by Representative Herb Kirsh, allows the admission into evidence of proof of collateral source payments to a person as compensation for the same damages sought in the suit. In addition, the bill requires the trier of the fact to be informed of the tax implications of all damage awards. H. 4468 was introduced in January 1996 and referred to the House Judiciary Committee where no action has been scheduled on the bill. Senator Greg Gregory introduced S. 1048 which is the Senate version of H. 4468. S. 1048 was referred to the Senate Judiciary Committee and no action has been scheduled on it.

5. **Punitive Damages**. This bill, H. 4320, caps punitive damages at the greater of either $250,000 or three times the amount of compensatory damages. The bill provides that punitive damages may be awarded only if the defendant is liable for compensatory damages and an aggravating circumstance, such as fraud, malice, or wilful, wanton, or reckless conduct, is found. H. 4320 was introduced by Representative Herb Kirsh and the bill was referred to the House Judiciary Committee. No action is scheduled on the bill.

6. **Non-unanimous Juries.** Representative J.L. Cromer introduced H. 3267 during the 1995 session. This joint resolution proposes an amendment to the Constitution and, if approved, allows only ten or more members of the petit jury of the Circuit Court to agree to a verdict. H. 3267 was referred to the House Judiciary Committee and no action is scheduled on the bill.

7.**Workers' Compensation.** During the 1995 session, the House of Representatives passed four

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DRI to Present First Annual Membership Meeting

DRI First Annual Leadership Meeting set for October 1996

DRI will present its First Annual Membership Meeting in Chicago in October, 1996. While DRI has a long history of presenting quality educational seminars and an annual National Conference for Defense Bar Leaders, this will be the first meeting open to all DRI members.

DRI President-Elect, Patrick Maloney, recently announced "We are thrilled to be presenting this groundbreaking meeting in Chicago, home of DRI headquarters. This meeting will offer the full range of educational opportunities and social activities to our members and their guests."

Continuing legal education seminars will be presented on products liability issues, drug and medical device law, trial techniques, and employment law, with the potential to obtain up to 14 hours of CLE credit. There will also be a meeting for women lawyers, all of DRI's substantive law committees will hold breakfast meetings, a DRI Board of Directors meeting will be open to all attendees, and the Nominating Committee will also convene.

Another part of the Meeting will focus on state and local defense bar leaders. They will present the "practical" issues of financial planning, legislative political action, CLE seminars, publications, publicity, and administrative leadership of the state and local associations.

DRI will welcome a variety of prominent guest speakers and dignitaries and will sponsor great entertainment for its "late night" caberet. Tours, excursions and other activities are also planned for spouses and children, giving them the chance to explore all that Chicago has to offer.

This First Annual Membership Meeting will be held October 9-12, 1996 at the Fairmont Hotel in Chicago. Registration materials for the conference will be available in the Spring. Please mark your calendars now for this exciting opportunity to participate on a national level in defense bar activities. In order to attend, you must be a DRI member. If you're not currently a member of DRI, now is the perfect time to join because DRI is offering one-half price memberships to any member of the SCDTAA who is not a member of DRI. This offer expires April 1.

For further information, contact David E. Dukes, South Carolina State DRI Chair at (803) 733-9451.

Legislative Report

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bills, sponsored by the House Labor, Commerce and Industry Committee, relating to workers' compensation and which were subsequently referred in the Senate to the Senate Judiciary Committee:

H. 3835 - "Administrative Package." This legislation, among other things, redefines "average weekly wage," prohibits health care providers from pursuing collection against a workers' compensation claimant prior to the final adjudication of the claimant's claim; requires timely payment to health care providers; and revises the recording and reporting requirements for employers.

H. 3836 - Mental Illness-Stress. This legislation codifies the definition of "stress" and provides the conditions under which stress is compensable under the S.C. Workers' Compensation Law. Stress would be compensable if it is established that the stressful employment conditions causing the mental injury were extraordinary and unusual in comparison to the normal conditions of the employment.

H. 3837 - Start-Stop Pay. This bill, among other things, allows an employer to stop temporary disability payments without a Workers' Compensation Commission hearing within 120 days of the date that payments are commenced if a good faith investigation reveals grounds for denial of the claim. In addition, the legislation allows an employee to attempt a trial return to work for a period not to exceed three months.

H. 3838 - Back Injuries. H. 3838 provides that a fifty percent or more loss of use of the back creates a presumption of total and permanent disability which may be rebutted by a preponderance of the evidence.

J. Edgar Eubanks & Associates

Association Management Services, Inc.

MaryAnn S. Eubanks, President

Carol H. Davis, Executive Vice President

Nancy H. Cooper, Communications Vice President

For twenty-five years, J. Edgar Eubanks & Associates has brought professional management techniques to the association field. For the past ten years, we have had the pleasure of working with the SCDTAA and have been proud to be a part of all that has taken place over these years. We believe it is important for the membership to understand what Eubanks & Associates does for SCDTAA. We are a specialized business enterprise engaged in providing, on a contract basis, the time and talent required to manage the affairs of non-competing trade and professional associations.

Our office in Columbia, South Carolina is the office of record for client associations, and provides office furniture and equipment at a cost much less than would be incurred in a larger city.

We offer access to complete services which provide not only all the needed physical requirements, i.e. fully equipped and furnished offices, conference rooms, local and toll free telephone service, FAX machine, mailing address, etc., but also our highly competent and experienced staff. We are responsible for payroll, employee benefits, taxes, insurance, replacement of personnel, and all other office operations. The management fee pays for: Administrative Directors, bookkeepers, secretaries, writers, meeting planners, communicators, editors, printers...a full and complete association staff for much less than the cost of hiring one Executive Director.

We are excellent financial managers and all employees are bonded. Our fiscal management and strict attention to detail has helped other associations have the financial flexibility to fund new programs with accumulated reserves and without the necessity for assessments.

In essence, we provide a complete full-time staff serving you. All meetings and trade shows are arranged from start to finish smoothly with a minimum of effort on your part. We work with your committees to carry out their ideas and programs.

The Basic Services provided by J. Edgar Eubanks & Associates include:

- Furnishing a fully staffed and equipped office
- Collecting dues
- Financial Planning
- Bookkeeping and financial record keeping
- Soliciting new members and associate members
- Preparing meeting notices
- Publishing and editing publications
- Mailing timely legislative bulletins
- Planning and executing meetings, conventions and trade shows
- Taking, printing, proofing and distributing minutes
- Preparing, printing and proofing membership rosters
- Working with committees
- Assisting in development of PR program, if desired
- Developing group insurance programs, if desired
- Developing continuing education programs
- Developing Board liability insurance

Our company is a strong, dedicated and effective group of professionals who are motivated by the many opportunities presented by our client associations. We take pride in performing our tasks for these groups in a manner which is beneficial in every way to our clients and professionally satisfying to us.

We are the size and capacity to handle the needs of your association but are not so large that the association is *"just another client."*

Our firm has an eye on the future. We want to help you identify opportunities and help motivate the members of the association to develop these opportunities into realities.

We feel our clientele must be accepted carefully, with an eye to avoiding conflicts of interest.

Our company is reliable, ethical and staffed by people with high standards. We are people you can be proud to know and to work with.

Above all, our company wants to work with your association. We earnestly want to serve you well and we are committed to learning about the industry, its problems and its opportunities.

The management fee for our services includes salaries, payroll taxes, health insurance, retirement, rent taxes, insurance, utilities and equipment and maintenance. All out-of-pocket expenses such as travel, printing, postage, phone, etc. are billed monthly, with complete back-up justification.

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Annual Meeting

28th Annual Meeting held November 9, 10 and 11, 1995 in Sea Island, Georgia

The South Carolina Defense Trial Attorneys' Association held its 28th Annual Meeting on November 9, 10 and 11 of 1995 in Sea Island, Georgia. Associate Justice of the United States Supreme Court Anthony M. Kennedy was the keynote speaker. Justice Kennedy addressed the group on the "Idea of the Profession" and discussed with the group how the American legal system was tied to the history of the United States, that every generation needs to re-learn the Constitution and values of their time. Justice Kennedy stressed that as attorneys we need to dedicate ourselves to guard the legal profession to make sure there is civility in the profession. This requires respect for fellow citizens and attorneys and Justice Kennedy indicated that as attorneys we all need to rededicate ourselves to provide a better image of the profession. Justice Kennedy's remarks were well received by over 150 attorneys and judges in attendance.

Justice Kennedy's remarks concluded a program on Saturday morning which included the Honorable Griffin Bell, former United States Attorney General, and currently partner in the King & Spaulding law firm in Atlanta. He discussed legislative limits on punitive damages and his experiences as an attorney in dealing with these issues in the appellate courts. Steven P. Morrison, a partner in Nelson, Mullins, Riley & Scarborough, and current Defense Research Institute President also addressed the group on national tort reform issues.

The Saturday program also was addressed by United States Federal District Court Judges Currie, Norton, Traxler, Hawkins, Simons and Perry, and dealt with conducting Daubert hearings. The group was also addressed by Gray Geddie of Ogletree, Dawkins, Nash, Smoak and Stewart on the practical aspects of requesting a Daubert hearing.

The Friday program was highlighted by an address of Chief Justice Ernest A. Finney who addressed the group on the state of the judiciary in South Carolina. The state judge panel of Judges Floyd, Pleicones and Howard addressed post-verdict juror interviews, how to handle difficult jurors and juror questions during trial.

Also, Dr. Rick Fuentes, Managing Director of DecisionQuest in Atlanta, Georgia, a trial consulting group, made a presentation on juror research and jury selection from the psychologist's point of view. In addition, Professor Alan Medlin addressed the group on ethical considerations in alternate fee arrangements and Judge William Howard addressed the group on how to handle the high profile civil trial with the media.

A reception was held on Friday evening in honor of Justice Kennedy and was attended by several area Georgia judges and attorneys in addition to the South Carolina attendees.

- Mike Bowers
1995 Chairman Annual Meeting

Eubanks

Continued from page 14.

Our staff has recently undergone a thorough evaluation and has realigned duties and upgraded equipment. We are continuing to upgrade office equipment and add staff to improve efficiency and operations. We have retained an office management and computer consultant to help us study our needs and advise us as to how we can best use state-of-the-art technology.

Recent Order of Interest

In the District Court of the United States for the District of South Carolina Columbia Division
Paula Polston, Plaintiff vs.
United Parcel Service, Inc., Defendant

Order

This action is brought under the Americans With Disabilities Act. Plaintiff identified "Gene W. Causey, M.D."[1] as an expert witness. Defendant sought to depose the witness and was informed that the fee would be $1,000 per hour.[2] Attempts to have the witness lower his fee to a reasonable amount were unsuccessful. Defendant then filed this motion for the Court to determine a reasonable fee and for plaintiff to be responsible for the portion of the fee for the deposition should plaintiff question the witness. Plaintiff has filed a response indicating that she had no objection to the court's setting of a fee, but objecting to her being responsible for a portion of the fee.

Rule 26(b) (4), Fed. R. Civ. P. states in part:

(A) A party may depose any person who has been identified as an expert whose opinions may be presented at trial...

(C) Unless manifest injustice would result (i) the court shall require that the party seeking discovery pay the expert a reasonable fee for time spent in responding to discovery...

Plaintiff has named Causey as a potential expert witness giving defendant the right to depose under the above rule. Causey has the right to expect reasonable reimbursement for his time in being deposed. Causey does not have the right to demand unreasonable fees in an effort to thwart discovery. The undersigned finds that the fee quoted by the witness is not only unreasonable, but outrageous.

The record is incomplete since the witness has submitted nothing to the court. However, after considering the factors enumerated in Anthony v. Abbott Laboratories, 106 F.R.D. 461 (D.R.I. 1985), the court sets a fee of $175 per hour with respect to the actual time the witness will spend in the proposed deposition. Should the witness object to this amount, he may present further information to the court at which time the court may alter the hourly rate.

Further should plaintiff desire to question the witness, she will be responsible for paying the witness for that portion of the deposition. In most cases, the plaintiff has access to the records maintained by the party's health care providers. Frequently, an expert witness such as a health care provider will supply plaintiff with a report. Therefore, plaintiff would have no need to engage in discovery from her own witness. It is not clear from this record why plaintiff would seek to question the witness, unless the witness has attempted to subject plaintiff to the same unreasonable fees that he has attempted to impose on defendant. In any event, plaintiff will be a party seeking discovery if she attempts to question the witness. She should be required to pay her witness in this situation.

Defendant's motion is granted.

IT IS SO ORDERED.

Joseph R. McCrorey
United States Magistrate Judge

January 9, 1996
Columbia, South Carolina

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[1]Apparently, Causey is a podiatrist and not a medical doctor.
[2]This was $500 for the first one-half hour and $250 per quarter hour thereafter.

-Submitted by Susan B. Lipscomb
Nexsen, Pruett, Jacobs & Pollard, L.L.P.