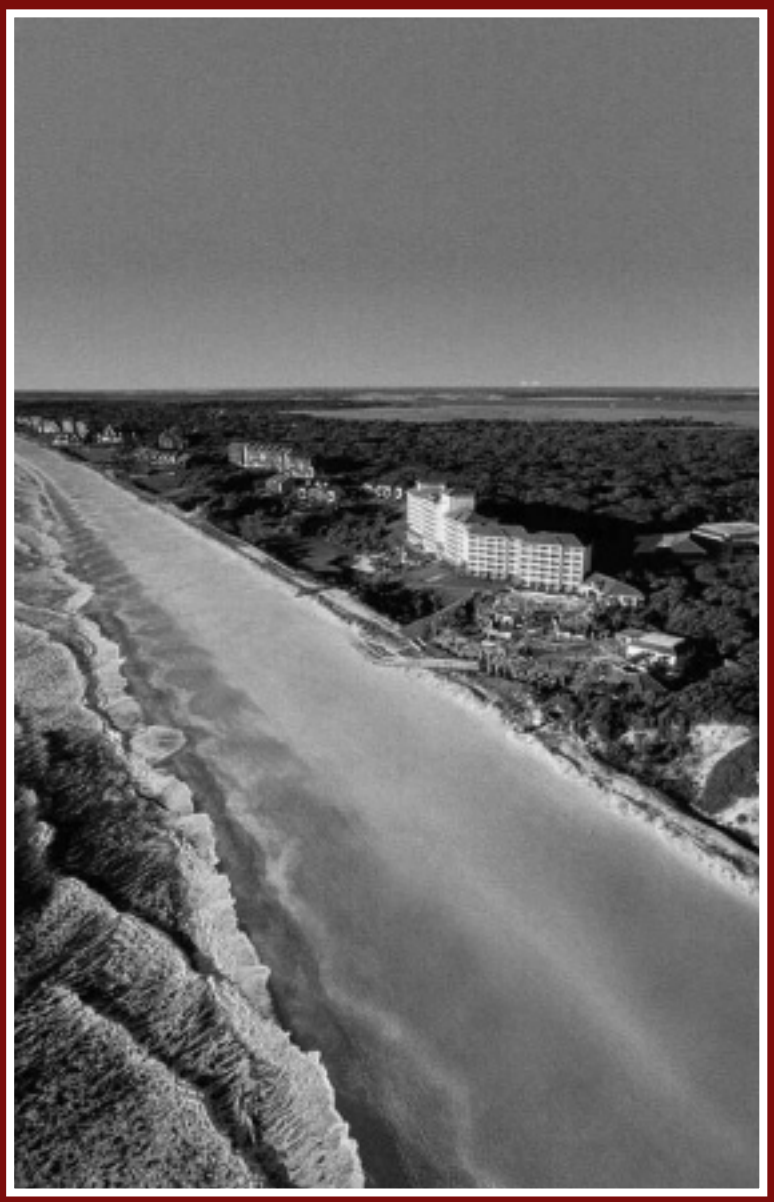
SOUTH CAROLINA DEFENSE TRIAL ATTORNEYS' ASSOCIATION

THE DefenseLINE



Amelia Island Plantation

Effective Use of Your Non-Billable Time

by G. Mark Phillips, SCDTAA President

Much has been accomplished during this SCDTAA year and I am giddy with excitement regarding the Annual Meeting, set to begin on November 9 on Amelia Island Plantation. The Board members have been enthusiastic, engaging, and willing to work hard all year. I hope that this has resulted in some real benefit to the members and has made our organization both relevant and helpful.

Where We've Been

Trial Academy - Glenn Elliott and William Brown organized and presided over a most successful Trial Academy in middle-June. We had a full enrollment and a waiting list. The folks from SCTLA approached me about sending us some students but there was no room. Our younger members received instruction from courtroom warhorses like Mike Nunn, Dave Howser, Biff Sowell, Walter Cox, and many others. Federal Magistrate Tom Rogers and Circuit Judges Tommy Russo, Thomas Cooper, Allison Lee, James Lockemy, and Mike Nettles presided over live jury trials on Friday, June 16. Glenn and William kept costs under control and finished the three-day effort well ahead of budget.

Annual Joint Meeting with Claims Management Association of S.C. - David Rheney, Ron Wray, and Curtis Ott shattered previous numbers and brought a record crowd of attorneys and claims managers to The Grove Park Inn in late July. Catherine Templeton and Bill Besley brought us more sponsorship dollars than we have received before. We heard excellent presentations from some fine, long-time trial lawyers like Heyward Clarkson, John Kuppens, Anthony Livoti, Johnston Cox, and my law school classmate, J.R. Murphy. Jennifer Barr led our effort to raise significant monies for the S.C. Bar Foundation; the SCDTAA is now at the Justice Legacy level. Meeting attendance chairmen Ed Lawson and Trey Thompson and Membership Chairs Erin Dean and Alan Lazenby helped to deliver a big crowd.

Legislative Committee - Eric Englebardt, Duncan McIntosh, and our lobbyist, Jeff Thordahl of MGC Consulting, have been remarkably busy wrestling with worker's compensation reform, the proposed reapportionment of judicial circuits, the increase in automobile liability limits, and, most recently, the licensing requirement for out of state physicians who appear as expert witnesses.

Amicus Curiae - Stephanie Burton and Wendy Keefer filed one *amicus* brief so far this year and have another in process. These briefs are filed in response to requests by SCDTAA members and clients this year.

Judicial Receptions - Mitch Griffith and Hugh Buyck spearheaded SCDTAA receptions for South Carolina's state and federal judiciary on June 15 in Columbia, July 26 in Greenville, and September 19 in Charleston. These functions have provided a perfect opportunity for SCDTAA members and our state's judges to visit with each other in a comfortable setting.

The Defense Line - Gray Culbreath and Wendy Keefer have completely reformatted *The Defense Line*, adding an editors' page, judicial profiles, member news, verdict reports, and other innovations while still providing timely substantive articles and other important information. These two are continuing to improve our quarterly magazine.

Where We're Going

To Amelia Island Plantation - We have arranged for a weekend at this luxurious resort, only a half hour further than The Cloister. As mentioned several times, all rooms in the main hotel are oceanfront. Since the SCDTAA Board retreat of January 2004, the facility has been completely renovated and upgraded. Our hospitality suite, fully equipped to broadcast the Clemson and USC games, will be poolside, facing the ocean.

Do make your reservations now. The rooms are being held for us at a special rate ($212.00 per night) until October 2. The toll-free reservations number at Amelia Island is 888-261-6165.

With Chief Justice Toal, Senator James Ritchie, and the State and Federal Judiciary - Chief Justice Toal and Senator James Ritchie will give a seminar on two timely topics. The first involves the physicians' licensing statute (sponsored by Senator Ritchie) and its effect on the judiciary, the legislature, the doctors, the defense bar, the plaintiffs' bar, and the criminal bar. The second area will regard judicial merit selection. Matt Henrikson, Molly Craig, and Sterling Davies have put together a host of excel-

Continued on bottom of page 6

Letter From The Editors

by Gray T. Culbreath & Wendy J. Keefer

"Summertime and the living is easy. Fish are jumping and the cotton is high." George Gershwin and DuBose Heyward, Porgy and Bess.

Like every season, summer has a magic all its own. The texture of these warmer months signals an age old urge to slow the pace down and take in some of life's simple pleasures. The challenge for defense lawyers comes in allowing ourselves the time to relax given the hectic pace of the practice to which we have become accustomed. When Gershwin wrote Porgy and Bess, there were no billable hours or Blackberries to interfere with the good old summertime.

The summer gives us a chance to spend time with our families and recharge our batteries. Our summers have been no different. Gray luckily got a chance to leave the country for a week with his family, where cell phones and blackberries do not work but it was still a defense lawyers meeting. However, he cannot complain too much since it was in Bermuda for the Federation of Defense and Corporate Counsel Annual Meeting. In a scene familiar to you all, he returned to Columbia to a mountain of paper and to the same deadlines that all of us have as well as the deadline of getting this issue of *The Defense Line* out.

Wendy, unfortunately, had to put off any lengthy trips in order to finalize her plans to return to South Carolina. Who needs a D.C. lawyer on our board anyway? In that effort, though, she realized even more than before how important contacts gained through organizations like the SCDTAA and other defense lawyers' groups can be. If not for the contacts and friends made through the SCDTAA, plans for a return would have been much more unwieldy.

In this issue we were lucky enough to get permission to reprint a thoughtful and well-written article from Pat Long, President-Elect of DRI about the need to join these state and local defense organizations. The fact that you are reading this article gives us hope that you are already a member of the SCDTAA and hopefully a member of DRI as well. However, for our association to continue to be successful, we need not only members, we need doers.

Traditionally, on Monday night at each FDCC meeting, all of the South Carolina members and their spouses have dinner, and this past meeting was no different. Gray noticed that if you looked around the tables at this year's meeting there were plenty of doers who have made our association what it is today. Apologizing in advance to those who may be forgotten, Bill Coates, Mills Gallivan and John Wilkerson, all former presidents of this association are all doers who have participated on both the state and national level. You do not have to look far within our association to find those doers like, among others, Sam Outten, instructor at the IADC Trial Academy this year, Jay Courie, a leader in the Law Office Economics Practice Committee of DRI and of course, David Dukes, the President of DRI. Each of them got to their positions because they were not only members but doers.

Gray T. Culbreath

Wendy J. Keefer

As serial doers, we can tell you there is a benefit to both you (great trips to good locations or boondoggles as John T. Lay might call them) and your firms to networking contacts and hopefully case referrals. For you younger lawyers, the best place to start becoming a doer is with the many committees of SCDTAA. After the Annual Meeting this year you will receive a survey that will ask for your preferences to serve on next year's committees. That is your best way to become involved in the organization and meet other defense attorneys. Become a doer, and everyone will benefit.

SOUTH CAROLINA DEFENSE TRIAL ATTORNEYS' ASSOCIATION

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THE DefenseLINE

The SCDTAA Docket

MEMBER NEWS

Brad Waring Inducted As President of SC Bar

Bradish J. (Brad) Waring, a Member in Nexsen Pruet's Charleston office, was inducted as president of the South Carolina Bar during ceremonies held at the Bar's House of Delegates meeting Friday, May 19, 2006. This position is the latest in a string of Bar positions Waring has held since 1981, including treasurer and, most recently, president-elect. He was also a member of the 11-thousand member organization's House of Delegates and, as an officer, sits on its Board of Governors. "Our firm has a long tradition of serving the profession through leadership in the Bar," said Leighton Lord, chairman of the board of Nexsen Pruet. "Brad is the ideal person to continue that tradition. He loves and respects the law, and his skills and dedication are an example to us all."

Listed in *Best Lawyers in America* for business litigation and honored last year with The Compleat Lawyer Award from the University of South Carolina, Brad Waring practices in the firm's business and consumer litigation group. He concentrates his practice primarily on civil litigation in state and federal courts, emphasizing complex commercial litigation including products liability, insurance coverage, and business litigation.

Michael Wilkes Law Firm Welcomes Daniel Atkinson

Michael Wilkes Law Firm, P.A. announces that in August 2006, C. Daniel Atkinson became an associate of the firm located at 101 West St. John Street, Suite 200, Spartanburg, SC 29306; (864) 591.1113. Dan was admitted to the South Carolina Bar in 2004, and served as law clerk to the Honorable J. Derham Cole for one year before joining the firm. Dan was admitted to the North Carolina Bar this year and will litigate civil actions for the firm in both South Carolina and North Carolina.

Stephen Bates Appointed to the South Carolina Bar's Administrative and Regulatory Law Committee

McAngus Goudelock & Courie is pleased to announce that Stephen P. Bates has been appointed to the SC Bar's Administrative and Regulatory Law Committee. The one-year term begins July 1, 2006.

Mr. Bates, a member based in the firm's Columbia office, practices in the areas of administrative law, healthcare law, government relations, election law, and environmental law. He graduated from Presbyterian College with a B.A. in Political Science. Mr. Bates received his Juris Doctorate from the University of South Carolina School of Law.

David McCormack Honored As Fellow of The College of Labor and Employment Lawyers

Buist Moore Smythe McGee P.A. is pleased to announce that Firm Principal and Employment Practice Group Head, David B. McCormack has been selected as Fellow in the College of Labor and Employment Lawyers. This appointment is the highest recognition by one's colleagues of sustained outstanding performance in the profession, exemplifying integrity, dedication and excellence.

Mr. McCormack practices in the area of employment law, representing employer interests. His practice encompasses all aspects of state and federal employment law, including wrongful termination and employment discrimination. He also provides extensive advisory and counseling services in such areas as employment contracts, employee handbooks, restrictive covenants, family and medical leave, disability law requirements and sexual harassment. Mr. McCormack has been certified by the South Carolina Supreme Court as a Certified Specialist in Employment and Labor Law and, among other honors, has been named to The Best Lawyers in America in the category of "Labor and Employment Law".

8 Nexsen Pruet Attorneys Named Top Legal Practitioners In Their Fields

Eight Nexsen Pruet attorneys have been named among the top legal practitioners in their fields in the 2006-2007 edition of Chambers USA: America's Leading Business Lawyers, and three of the firm's practice areas were rated No. 1 in South Carolina. The publication cited David Dubberly for his work in employment law; David Gossett for real estate; Mark Knight for corporate/mergers and acquisitions; Susi McWilliams for both employment and general commercial litigation; Ed Menzie for both corporate/mergers and acquisitions and real estate; Neil Robinson for real estate; and Tom Stephenson and Tom Tisdale for general commercial litigation. All were named among the state's top three attorneys in their respective practice areas, and Menzie was ranked as the top corporate/mergers and acquisition lawyer. Each earned a spot in last year's Chambers directory as well.

Also for the second consecutive year, the firm's corporate/mergers and acquisitions, real estate law, and general commercial litigation practices were ranked No. 1, while the labor and law practice was No. 2.

Continued on page 6

Member News

McAngus Goudelock & Courie, LLC Welcomes New Attorneys

McAngus Goudelock & Courie, LLC welcomes Kristine L. Cato, John M. "Mac" Tolar, and Margaret "Maggie" Fawcett to the firm.

Kristine L. Cato leads the firm's employment law practice group. She is certified by the South Carolina Supreme Court as a specialist in labor and employment law. Mrs. Cato handles all aspects of employment contracts, wage/hour, affirmative action, union avoidance and campaigns, non-compete contracts, employment discrimination, and unemployment compensation.

Mac Tolar joined the firm's Columbia office. Mr. Tolar graduated from the University of South Carolina where he received his Bachelor of Science degree. He later received his Juris Doctorate from the University of South Carolina School of Law. Mr. Tolar was formerly the Georgetown County Attorney and served as an Assistant Solicitor for the Fifteenth Judicial Circuit. Currently, he is a Lieutenant Colonel in the United States Marine Corps Reserve where he serves as an infantry officer. Mr. Tolar is a member of the Richland County Bar, the Georgetown County Bar, and the South Carolina Bar. His area of practice is workers' compensation.

Maggie Fawcett joined the firm's Charleston office. Ms. Fawcett practices in the area of workers' compensation. She graduated from the Leeds College of Business at the University of Colorado-Boulder with a Bachelor of Science degree in Business Administration. She received her Juris Doctorate from the University of Denver Sturm College of Law, where she was a member of the Business Law Society, DU Elder Society, Colorado Women's Bar Association, and Student Bar Association. Ms. Fawcett is a member of the South Carolina Bar Association.

Doc Morgan has moved to the firm's Greenville, SC office. Doc practices in the areas of litigation, including personal injury, bad faith/arson and insurance fraud, premises liability, products liability and insurance coverage.

Molly Hughes Selected For Leadership South Carolina

Mary L. ("Molly") Hughes, a Member in Nexsen Pruet's Charleston office, has been chosen for the 2007 class of Leadership South Carolina.

Hughes concentrates her practice in the areas of litigation and employment and labor law, and has been certified as a specialist in employment and labor law by the South Carolina Supreme Court.

Earlier this year, she was also named to the Charleston Regional Business Journal's "40 Under 40" list, an annual honor that recognizes 40 of the region's "brightest business stars" under the age of 40.

"Molly is a leader in every sense of the word," said Leighton Lord, chairman of the board of Nexsen Pruet. "She's made major contributions to the firm, the community and now she's got the chance to do the same for the state. We're proud of her service."

Shaw Named Chair of State Trial Lawyers Group

The American College of Trial Lawyers has selected Nelson Mullins Riley & Scarborough partner R. Bruce Shaw as chair of the South Carolina State Committee. Mr. Shaw will serve a one-year term as head of the 11-member South Carolina committee. The ACTL's mandate is to improve and elevate the standards of trial practice, the administration of justice and the ethics of the profession. Fellowship in the college is extended only by invitation, after careful investigation, to those experienced trial lawyers who have mastered the art of advocacy and whose professional careers have been marked by the highest standards of ethical conduct, professionalism, civility and collegiality.

A senior partner of Nelson Mullins in Columbia, Mr. Shaw practices in the areas of asbestos litigation, product liability litigation, drug and medical device law, mass torts, national and regional litigation planning and management, and in complex trial work such as class actions and consolidated trials. Chairman of one of the Firm's litigation groups, Mr. Shaw has practiced extensively in South Carolina's state and federal courts.

Pres. Message cont. from pg 2

lent speakers and panels, many of which include both judges and in-house clients. We will hear from DRI President David Dukes, Senior White House Correspondent Ken Walsh, and a panel of SCDTAA Past-Presidents, among others.

For the Annual Meeting-Do plan on joining the state and federal judiciary, a number of SCDTAA past-presidents, and some excellent speakers on Amelia Island Plantation beginning Thursday, November 9. A tentative agenda for our meeting is included in this issue.

Attorney General's Office Provides Trial Experience While Supporting A Valuable Community Program

by Drew Hamilton Butler*

New associates often face the difficulty of gaining valuable jury trial experience during their first few years of practice. Managing partners looking for training opportunities are further confronted with the recent rise of ADR and the concerns of clients who are unwilling to pass their files to less experienced attorneys with little or no trial experience. Small claims are often settled prior to trial, while larger claims remain with well-established counsel. The Attorney General's most recent pro bono program may provide a reasonable solution for young associates looking to expand their trial practice while supporting a worthwhile cause.

In 2004, Attorney General, Henry McMaster launched a pro bono program using volunteer attorneys throughout South Carolina to prosecute criminal domestic violence cases in magistrate and municipal courts. Lawyers participating in the program receive pro bono credit under Rule 608, SCACR, and typically handle one or two jury trials a month. The prosecution of these CDV trials averages two hours each, providing a meaningful experience without posing a threat to one's profitable practice.

Recent statistics have also shown that the CDV program is helping to manage and effectively address the overwhelming number of domestic violence arrests in South Carolina. Since its inception, the program has handled more than 1,600 cases and has a 73% average conviction rate. The program is currently active in Kershaw, Lee, York and Pickens counties and the cities of West Columbia, Orangeburg, Columbia, and Winnsboro. Expansion efforts plan to include the counties of Sumter, Anderson, Greenwood, Florence, Cherokee and Fairfield before the end of the 2006 calendar year. There have been more than 100 attorneys trained to participate in the program since its inception, and there are currently forty-nine (49) attorneys who actively prosecute cases for the program.

The program is extremely flexible; keeping the interests of both the court and the attorney in mind. Since the program is not currently active in every county, the Attorney General provides two options for those who wish to participate. First, one may decide to prosecute cases in an already designated pro bono jurisdiction. In this instance, volunteers receive case assignments from the Attorney General's Office, including all pertinent documents and support from the S.T.O.P. Violence Against Women staff.

Second, volunteers may prosecute cases in jurisdictions that are not currently under the program. This option is particularly attractive to attorneys who reside in areas that are not easily accessible to pro bono jurisdictions. In this instance, one would only be assigned to cases for which the local Solicitor's office or law enforcement requested assistance.

In either situation, the CDV program allows the attorney to maintain complete control over the number of cases in which he or she is assigned. Many volunteers have an opportunity to try two cases a month for the program, while others choose to take one case every-other-month or less. And, attorneys always have the option of declining a particular case appointment.

Attorneys who wish to participate in the Pro Bono program must attend a one-day training course, sponsored by the Attorney General's office. There are three (3) trainings scheduled for the remainder of the 2006 calendar year.

August 29, 2006: Cherokee County
September 21, 2006: Fairfield County
November 9, 2006: Georgetown County

Each of these trainings is accredited for 6.25 hours through the Commission on CLE. Once completed, attorneys may begin accepting case assignments.

Those interested in participating should contact the CDV Pro Bono Program Coordinator, Alexandra Chase, at (803) 734-3745 or through their website at: www.scattorneygeneral.org/public/women.php.

*Drew Hamilton Butler is an associate with Richardson, Plowden, Carpenter & Robinson, P.A. in Columbia.

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SCDTAA 2006 Annual Meeting
November 9-12 • Amelia Island, FL
Tentative Agenda

Thursday, November 9, 2006

3:00 p.m. to 5:00 p.m.
Executive Committee Meeting

4:00 p.m. to 6:00 p.m.
Registration Desk Open

5:00 p.m. to 6:00 p.m.
Nominating Committee Meeting

5:00 p.m. to 6:00 p.m.
Young Lawyer's Meeting

7:00 p.m. to 9:00 p.m.
President's Welcome Reception & Dinner

9:00 p.m.
Hospitality Suite Open

Friday, November 10, 2006

8:00 a.m. to 12:00 noon
Registration Desk Open

8:00 a.m. to 9:00 a.m.
Coffee Service

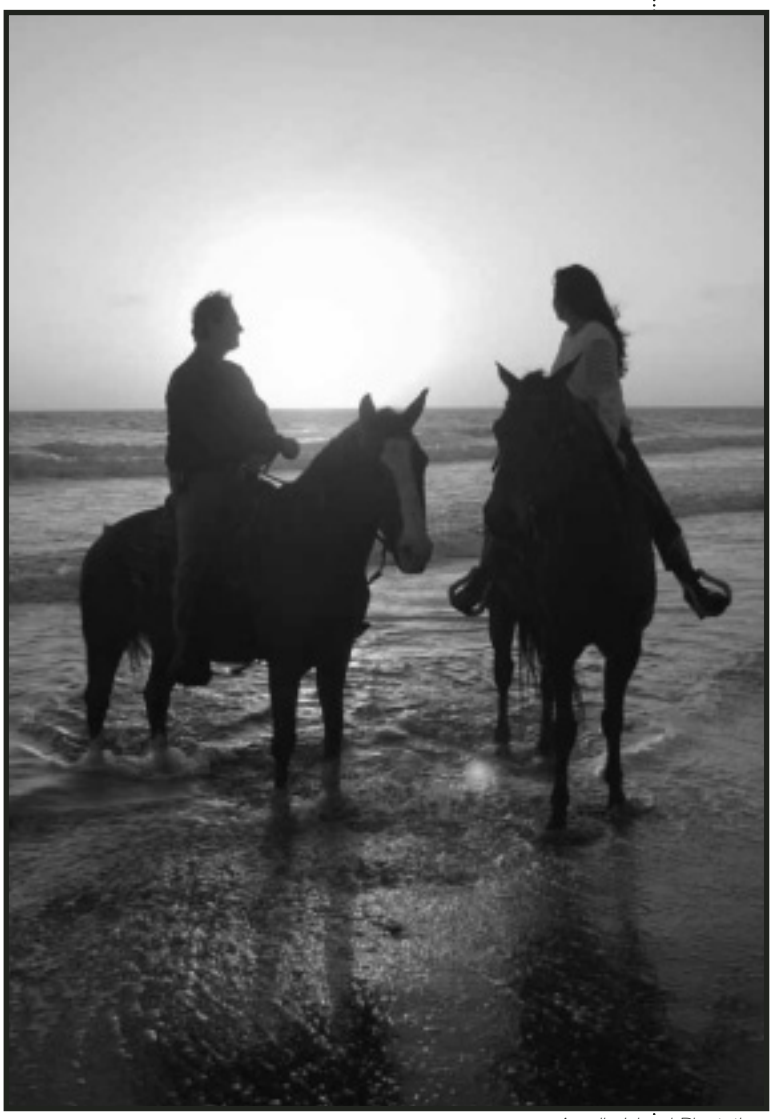
8:15 a.m. to 8:30 a.m.
Welcome and Opening Remarks
G. Mark Phillips, President SCDTAA

8:30 a.m. to 9:15 a.m.
Past Presidents Panel Discussion

How 30(b)(6) Depositions Can Make or Break Your Case – Stories from the Trial Lawyers
Harold W. Jacobs, Esquire
G. Dewey Oxner, Jr., Esquire
R. Bruce Shaw, Esquire
Mark H. Wall, Esquire
Moderator: Robert H. Hood, Esquire

9:15 a.m. to 10:00 a.m.
From Mt. Vernon to Crawford: U. S. Presidential Retreats
Kenneth T. Walsh,
Senior White House Correspondent,
US News & World Report

10:00 a.m. to 10:15 a.m.
Break



Amelia Island Plantation

SEMINAR NEWS

10:15 a.m. to 11:00 a.m.

Upcoming Changes to Electronic Discovery: Tips from the Federal Judiciary

The Honorable Michael P. Duffy
The Honorable Henry F. Floyd
The Honorable Margaret B. Seymour
The Honorable William W. Wilkins
Moderator: Gray T. Culbreath, Esquire

11:00 a.m. to 12:00 noon

Sex, Drugs and Alcohol: Creating Curiosity in Your Opening Statement

David E. Dukes, Esquire,
President, Defense Research Institute

12:30 p.m.

Golf Tournament

Played on Ocean Links Course

12:30 p.m.

Fishing Excursion

1:00 p.m.

Historic Downtown Fernandina Walking Tour/Shopping Trip

7:00 p.m. to 9:30 p.m.

Oyster Roast and Lowcountry Dinner

9:30 p.m.

Hospitality Suite Open

Saturday, November 11, 2006

8:00 a.m. to 12:00 noon

Registration Desk Open

8:00 a.m. to 9:00 a.m.

Coffee Service

8:00 a.m. to 8:30 a.m.

SCDTAA Business Meeting

Amelia Island Plantation

8:30 a.m. to 9:30 a.m.

Professionalism Hour:

Chief Justice Jean H. Toal and
S.C. Senator James H. Ritchie, Jr.

- §40-47-35, *Baggerly v. CSX Transportation, Inc.*, and the Professional Licensing Issue
- Judicial Merit Selection

9:30 a.m. to 10:15 a.m.

Management of Product Liability and Mass Tort Litigation

John C. Childs – Chief Litigation Counsel, Georgia-Pacific Corporation

C. Nathan Clark, Esquire, Special Toxic Tort Counsel, John Deere & Company

Tonya D. Holcombe – Chief Litigation Counsel, Toxic Tort, Honeywell International, Inc.

Moderator: Sara S. Turnipseed, Esquire

9:30 a.m. to 10:15 a.m.

Workers' Compensation Breakout

10:15 a.m. to 10:30 a.m.

Break

10:30 a.m. to 11:15 a.m.

Recent Trends in Jury Behavior

Rick R. Fuentes, Ph.D.
R and D Strategic Solutions

11:15 a.m. to 12:00 noon

Keynote Address

1:00 p.m.

Horse Back Riding Excursion

2:00 p.m.

Chef Demonstration and Wine Tasting

Afternoon on your own / Hospitality Suite Open

6:30 p.m. to 7:30 p.m.

Cocktail Reception

7:30 p.m. to 12:00 midnight

Dinner and Dancing with music by "The Maxx"

(Black Tie Optional)

JUDGE PROFILE

Inside the Judge's Chambers: The Honorable Ralph King Anderson, Jr.

by Christian Stegmaier*

I distinctly recall attending "Bridge the Gap" during the spring break of my third year of law school. I had just accepted a job in with Judge Ralph King Anderson, Jr.. Kevin Barth, a Florence lawyer, had given a presentation and mentioned he had clerked for the judge. After his talk, I introduced myself to Kevin and related to him that I would be Judge Anderson's next clerk. Kevin smiled and just said, "Bring your running shoes."

Kevin wasn't lying. As I would learn during the next two years at the Court of Appeals, there isn't any idleness in Judge Anderson's chambers. From the working lunches, to the weekends and late nights in the library, to the 4 a.m. voice mails from the judge dictating a new passage for an upcoming opinion, there was no stopping Judge Anderson. The judge is tireless in his pursuit of writing thoughtful and comprehensive decisions with the ultimate goal of edifying the parties to the dispute, as well as the Bench and Bar.

I learned a great deal under Judge Anderson's tutelage. He instilled in me a tremendous work ethic, as well as a love for legal scholarship. He was truly a mentor and friend during my clerkship with him. I owe Judge Anderson a great deal – he was integral in making me the lawyer I am today.

When I was approached with the opportunity to write an article about the judge, I thought it would be ideal to provide the members of SCDTAA a little insight into Judge Anderson's thinking. Accordingly, I posed several questions to the judge regarding a variety of pertinent matters pertaining to the law and its practice. He was kind enough to provide the following responses:

Q. What is your greatest source of pride as it relates to the practice of law in South Carolina?

A. After graduation from law school, I was blessed with the opportunity and privilege to be a trial lawyer for twenty years. Representing clients from the entire spectrum of poor individuals to large corporations is a source of immense satisfaction to a trial practitioner. In 1979, I was elected circuit judge by the South Carolina General Assembly. The best job in the judicial field is circuit judge. The trial of cases, both civil and criminal, to their ultimate conclusion is a great source of pride to a trial judge.

As an appellate judge for ten years, the judicial response is to view litigation with some degree of finality. Addressing novel issues and applying the extant precedent to litigation is challenging and fulfilling.

The practice of law has been enhanced by the performance of the Continuing Legal Education Division of the South Carolina Bar. The training and guidance given to practitioners in every facet of the law is edifying. I have written five books for publication by the Continuing Legal Education Division and, hopefully, this writing activity is beneficent.

Q. You are known as the workhorse of the Bench. As well, you and your wife had a loving marriage and raised happy, successful children. What are your thoughts on managing the demands of the law while maintaining a good home life?

A. The practice of law is demanding and rewarding. Balancing a successful law practice with a happy family life demands equanimity. The etiology of a happy home life as juxtaposed to a demanding law practice requires diligence and work. A successful practitioner must work in the practice and in his or her family life. The devotion of talents and capabilities to one facet of this equation to the exclusion of the other will be negativistic and detrimental. God has richly blessed me in the gift of a daughter and a son. My daughter is a musician of inimitable talent. My son is an Administrative Law Judge and a scholar par excellence.

Q. Where are lawyers committing the greatest number of errors in appellate practice? How can lawyers do a better job in representing their clients at the appellate level?

A. The appellate practice is trifurcated:

(1) error preservation;
(2) brief writing; and
(3) oral argument.

The Supreme Court Commission on Continuing Legal Education and Specialization decided against the idea and notion of designating appellate practice as an area of specialty. The Commission and devotees of appellate practice are convinced that errors in appellate practice occur at the trial level and within

Continued on page 12

JUDGE PROFILE CONT.

the ambit and aegis of the appellate process. The Continuing Legal Education Division of the Bar is endeavoring to produce seminars devoted to enhancing the skills of attorneys practicing in appellate venues. It is absolutely essential and critical that attorneys study and review the opinions emanating from the South Carolina Court of Appeals and the Supreme Court of South Carolina involving errors in appellate practice.

Q. What is the greatest danger facing the practice of law in South Carolina?

A. For centuries, the learned professions, consisting of medicine, law, and theology, have been recognized by the general citizenry. The profession of law may be losing its professional status as one of the three great professions because of a plethora of trends and activities within the legal profession. Acceptance of the legal profession by the general public emanates from the performance and conduct of legal practitioners. The South Carolina Bar has done an outstanding job in recent years in providing services pro bono to deserving clients and conducting programs that educate the public in regard to the legal profession. Attorneys who violate the Rules of Professional Conduct in the handling of a client's case and/or money denigrate the legal profession. An attorney should be proud of his or her status as a member of the profession.

Q. What is your advice to new lawyers joining the practice of law?

A. Regardless of the level of intellect, nothing trumps hard work. An attorney beginning the practice of law must dedicate talents, capabilities, and time to the profession. A prepared attorney is easy to recognize. A lackadaisical or lazy attorney is not only recognizable but embarrassing. Many new lawyers fail in the profession by assumptively concluding admission to the Bar guarantees success. The formula for success encapsulates the utilitarian aspect of an attorney's God-given abilities plus HARD WORK.

**Christian Stegmaier is a shareholder of Collins & Lacy, P.C., a Columbia-based defense litigation firm with a statewide practice. His practice areas include appellate advocacy and retail and hospitality liability defense. He can be reached by either calling him at (803) 256-2660 or emailing him at cstegmaier@collinsandlacy.com.*

ATTENTION SCDTAA MEMBERS

The SCDTAA is relying more and more on email to communicate with the membership. Prime examples are the email information sharing system and announcements about SCDTAA events.

A number of emails are being returned as "undeliverable" or "blocked". If you have changed your email address or if you aren't sure the SCDTAA has the correct address please notify the SCDTAA office today.

If you firm is "blocking emails" or if you do not want to receive email communications, please contact the SCDTAA office at (803) 252-5646 or (800) 445-8629.

On The Record: Other Defense Organizations

by Patrick A. Long, DRI President Elect*
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I am grateful to DRI, its membership, its past and present officers and board members, and its staff and supporters across the country, for providing the opportunity to work with so many wonderful attorneys throughout these United States and indeed around the world. As many have heard me say, it's a second full-time job, but truly a labor of love. I know well that our terms of office come and go, but the friendships we have formed will continue as long as we draw breath. During my first days on DRI's board, there were women and men in leadership positions whose terms of office have come and gone, yet still I treasure their friendship, value the time we worked together, and look forward to seeing them whenever possible. I'm thinking about folks like Bob Krause in Michigan, Oregon's John Holmes, Cynthia Bivins in Texas, Sheryl Willert in Washington, and Tom Burke in Arizona, to name just a few. These enduring relationships are among the great paybacks for the nights and weekends spent on DRI stuff.

Suffice it to say that DRI, through the efforts of a long line of directors and officers, has become a solid, strong and successful organization of defense attorneys—national in scope and comprehensive in its work for defense lawyers and the civil justice system. If you're reading this magazine most probably you are a member. If not, you should be.

Be that as it may, the purpose of these notes is to encourage you to join another legal organization. Being by nature reticent, I am loath to express deeply held personal convictions, but I absolutely need to say this. You really need to be a member of the state or local organization where you live and work.

For me, long before DRI, there was the Association of Southern California Defense Counsel. It was and is my local, the men and women I came to know almost from the day I took an attorney's oath. I was proud to be a member then, and I am today as well. I've served on its board, moved through its officers' chairs, and continue to edit its magazine, Verdict.

Someone once asked me which organization was more important to me, DRI or the Southern California group. It ain't a contest. For me, neither is more important. The work of DRI and that of the state and local organizations is complementary and mutually beneficial. Some members of local associations may not appreciate DRI and its work at the national level. While that may be, such attitudes do not diminish the value and importance to me attached to my membership in my local association. There may be some in DRI who do not appreciate the great work carried on local defense groups. I feel badly for folks in both these camps, and am grateful that their numbers appear to be small.

The state and local organizations are of course more tightly focused on local issues, and their membership sometimes more restricted. Though their membership numbers are small compared to DRI, the issues local organizations address are every bit as significant and major as any with which DRI deals. Also, one advantage that the state and local organizations have is that a smaller membership makes consensus on issues more achievable and potential conflicts of interest less likely.

As a national organization of attorneys from every state in the U.S., as well as Canada, and with a membership of more than 22,000, DRI perhaps has less flexibility than smaller state and local groups but more muscle in terms of both financial resources and the sweat equity of its members. I believe that DRI and the state organizations don't compete but rather work together in different ways to represent our memberships, and to protect our system of justice including the right to a trial by jury.

DRI has a Membership Committee, led this year by the pride of New Hampshire, Matt "Sidecar Boy" Cairns (ask him). This committee does superb work as evidenced by our membership count. I am proud of and grateful for their success, but today I would encourage those of you not already members of your state or local organization to join immediately. They need your membership. Your membership will make them stronger; your membership in your local defense organization will make us all stronger.

The state and local organizations across the country constitute the foundation of the defense community, and without their hard work, cooperation and communication DRI could not do the work it does on the national level. The locals need to know who you are, and to understand that we would like to work with them, and hope that they will join with us, in working to protect the interests of all our members, and the civil justice system. Neither DRI, nor local organizations to my knowledge, have rules requiring memberships in both groups. I sometimes wish that we did.

As busy as I am with DRI business these days, I continue to believe that it is important for me to remain active and in touch with my colleagues and friends in Southern California. Were it not for them, I sure wouldn't have this second full time job.

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FEATURE ARTICLE

The Credibility Exception to the Collateral Source Rule - Impeaching the Plaintiff's Damages

by Jennifer D. Eubanks*

The plaintiffs bar has long viewed the collateral source rule as a shield in presenting damages evidence.[1] However, there is a chink in the armor. South Carolina is one of several jurisdictions that recognizes an exception to the collateral source rule when the plaintiff testifies untruthfully about the amount or impact of damages. This "credibility exception" can be used to peel back the armor of the collateral source rule when a plaintiff testifies falsely about the amount of damages or mischaracterizes the effect of damages on his or her life. The effect of the exception is not, however, to lessen damages, but to impeach the credibility of the plaintiff or the plaintiff's witness.

The credibility exception was first recognized by the South Carolina Supreme Court in *Rhodes v. Spartanburg County*, 262 S.C. 644, 650, 207 S.E.2d 85, 88 (1974). In *Rhodes*, the plaintiff in an automobile wreck case testified that her injuries from the accident left her unable to work and that she received no income during the time of her injury and recuperation. In fact, evidence existed that the plaintiff received monthly payments from her father's business, which payments were noted to be "for labor." The evidence of the payments was admitted because it was relevant to the plaintiff's credibility.

The credibility exception was later applied by the South Carolina Court of Appeals in *Bonaparte v. Floyd*, 291 S.C. 427, 443, 354 S.E.2d 40, 50 (Ct.App. 1987). In *Bonaparte*, the plaintiff testified on direct examination that she neglected follow-up visits with her physicians because she was financially unable to afford to do so. However, the defendant knew that the plaintiff had health insurance coverage and was allowed on cross-examination to question the plaintiff about her ability to afford medical care and introduce evidence of the health insurance.

In 2001, the South Carolina Court of Appeals issued an unpublished opinion in *Holliday v. Cooley*, Op. No. 2001-UP-534, filed December 10, 2001, involving the credibility exception and the existence of Medicaid coverage. In *Holliday*, a trip-and-fall case, the plaintiff had multiple pre-existing conditions for which she received Medicaid coverage. Upon direct examination, her attorney asked her what she "wanted the jury to do for [her]" and she responded, "I would just love to have my bills paid to where I might get my nerves straightened out [without] having to worry so much about bills." It was undisputed that Medicaid had paid the medical bills associated with her injury and defense counsel moved to cross-examine the plaintiff on that fact. The trial judge, instead of allowing cross-examination, made a statement to the jury after the plaintiff was released from the stand, telling the jury that the plaintiff's testimony about the medical bills may have given them the "impression" that they were past due when, in fact, most of the bills were paid by collateral sources. The judge then told the jury that when it began deliberations, it was not to be concerned with whether any of the bills had been paid or by whom. During the charge, the trial judge gave a collateral source charge, advising the jury that it was not to consider any amounts paid by collateral sources in calculating the plaintiff's damages.

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FEATURE ARTICLE CONT.

The *Holliday* Court concluded that the plaintiff's testimony on direct examination indicated that she suffered emotional distress because of unpaid bills. "Therefore, the issue of whether [the plaintiff's] medical bills had been paid was introduced by her own testimony and bears directly on her credibility. Where such evidence is relevant to a witness's credibility, it is admissible." *Id.* at 3. The issue of whether the trial judge had correctly handled the issue by making a statement rather than allowing cross-examination, however, was not preserved for review according to the Court.

In another recent unpublished decision, *Stewart v. Flynn*, Op. No. 2006-UP-240, filed May 15, 2006, the South Carolina Court of Appeals again acknowledged the credibility exception to the collateral source rule. In *Stewart*, an automobile accident case, the plaintiff claimed that he was unable to work after the accident. The plaintiff's wife testified that as a result of her husband's inability to work, they were struggling financially.[2] However, the plaintiff applied for and began receiving Social Security Disability benefits after the accident. In fact, the testimony at trial indicated that the plaintiff received more income from his disability benefits than he had in the last 5 years leading up to the accident. The trial judge allowed the cross-examination of the plaintiff's wife based on the credibility exception to the collateral source rule and gave a collateral source rule charge.

On appeal, the Court of Appeals affirmed based on the plaintiff's failure to preserve the issue for appellate review. However, it acknowledged that "our courts have created a clear exception to the collateral source rule when the admission of such testimony is relevant to the witness's credibility." *Id.* at 3 (citing *Rhodes v. Spartanburg County*, supra).

The credibility exception to the collateral source rule should be a part of defense counsel's arsenal, particularly in dealing with plaintiffs who are known to have Social Security Disability, Medicare and Medicaid, or other health insurance benefits. This exception should also be useful in dealing with plaintiffs who paint an exaggerated picture of the impact of damages on their lives and who make unfounded appeals for sympathy to a jury. There is generally no way to know in advance whether the plaintiff will open the door for such testimony to be offered. Sometimes the plaintiff's attorney will assist by asking questions related to financial ability to pay or the impact of mounting medical bills; other times, the plaintiff will simply answer a question about damages with an emotional appeal based on untruthful testimony about the impact of the damages on his or her life. The key to using the credibility exception is to develop fully all facts of collateral sources in discovery and to anticipate and have ready that information should the plaintiff open the door to the exception at trial.

Footnotes

1 The collateral source rule provides that compensation received by an injured party from a source wholly independent of the wrongdoer will not reduce the amount of damages owed by the wrongdoer. In re W.B. Easton Constr. Co., 320 S.C. 90, 92, 463 S.E.2d 317, 318 (1995).

2 The testimony at trial was that the plaintiff's home was being foreclosed and that the couple was only able to pay their "small bills."

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FEATURE ARTICLE

Amendments to Federal Rules Will Require Litigants To Discuss Electronically Stored Information, Creating Challenges and Opportunities

by Jim Irvin*

I. Introduction

Over the past ten to fifteen years, parties and courts have struggled with the challenges presented by the discovery of electronically stored information ("ESI"). Some attorneys have learned to work with information technology ("IT") departments, while others have avoided the topic altogether, remaining blissfully unaware of the challenges that ESI creates. Courts have sanctioned parties for failing to preserve or produce ESI. Because the case law is often contradictory, determining a party's discovery obligations regarding ESI has become a practice area of its own. While the parties and courts have struggled with ESI, the Federal Rules of Civil Procedure have remained largely silent, referring only to "data compilations" and "detection devices," language that now sounds archaic, but somewhat prophetic in its ability to describe much of the information technology that the drafters only could have imagined.

Against this backdrop, parties' approaches to ESI have varied as much as the decisions seeking to unravel these complicated issues. Some parties aggressively pursued ESI and litigated technical issues surrounding ESI production, while other parties pretended ESI did not exist. However, effective December 1, 2006, the new amendments to the Federal Rules of Civil Procedure will address a number of the more problematic issues associated with ESI. Parties will first encounter the effect of these amendments in the Rule 26(f) conference, where the parties will be required to discuss specific ESI issues. Requiring a front-end discussion of some of the more controversial ESI issues is intended to minimize conflict, or at least ensure that the parties have discussed the issues before they are brought before the court. These new procedures will create significant challenges, requiring parties to do more "homework" than ever. But for the parties that actually do their homework, the benefits can be greater than ever because the new Rules will provide opportunities for protection against the costs associated with litigating against an overly aggressive requesting party. This article identifies the new topics that the parties must discuss, describes the challenges in preparing for this discussion, and presents the potential opportunities that preparation can secure.

II. ESI Preservation: An Opportunity to Be Reasonable

Failing to preserve ESI sometimes has resulted in severe sanctions over the last 10 years. But, determining what preservation is appropriate depends largely on the facts of each case because the cost of preservation can vary significantly. Because continuing to use IT systems can alter or destroy potentially relevant information (by overwriting existing data files or changing metadata), IT would need to be shut down in order to ensure total and pristine preservation. Obviously, this is not a practical solution, so a litigant must strike a balance between the duty to preserve and the cost and business disruption caused by preservation efforts. IT professionals have developed alternatives to shutting down IT systems, such as "imaging" hard drives, but these steps require technical expertise and costs can vary depending on the sophistication of the technology. Inconsistent case law on the duty to preserve complicates these decisions. Some courts have held that a duty can arise pre-suit,[1] while others have concluded that there is no duty to preserve until discovery requests provide the producing party with specific guidance on what should be preserved.[2] Some parties have sought to exploit the duty to preserve by seeking ex parte preservation orders with which it is impossible to comply. Or, the litigants discuss preservation only after one party has moved for sanctions against the other for alleged breaches of the preservation duty.

While not providing guidance on the preservation efforts required, the Amendments seek to minimize ambush tactics by requiring the parties to discuss preservation at the outset:

> the parties must…confer to consider the nature and basis of their claims and defenses and the possibilities for a prompt settlement or resolution of the case, to make or arrange for the disclosures required by Rule 26(a)(1), to discuss any issues relating to preserving

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> discoverable information, and to develop a proposed discovery plan.[3]

Challenges: In order to determine what preservation efforts are reasonable in a given case, an attorney must gain an understanding of the technical challenges and costs associated with preserving ESI that is potentially responsive to a given case. As part of this process, the attorney must gain an understanding of where "discoverable" ESI is located on the party's IT systems and then determine the best technically sound and cost-effective means of preserving the ESI. In short, negotiating a preservation agreement at the 26(f) conference without first consulting IT could result in an agreement that will cost the party significantly. In addition, if a party faces similar litigation in multiple jurisdictions, then the party should develop a strategy for ensuring that its preservation efforts are consistent across jurisdictions.

Opportunities: Fortunately, the drafters of the amendments recognized the challenges created by ESI preservation and have made it clear that preservation orders, onerous or otherwise, should be the exception rather than the rule:

> The parties' discussion should pay particular attention to the balance between the competing needs to preserve relevant evidence and to continue routine operations critical to ongoing activities . . . [where] broad cessation…could paralyze the party's activities. [4]

Thus, the Comments now expressly recognize that preservation of ESI can paralyze business operations and provide the preserving party with some measure of protection against unreasonable preservation demands. In addition, if the parties can agree on preservation protocols at the beginning of the case, it makes it less likely than one party will attempt to ambush the other with a motion for sanctions for failure to preserve potentially relevant data.

Litigants should recognize that an agreement to preserve does not equate to a duty to produce. Preserving a limited number of back-up tapes, for example, may be relatively inexpensive. In contrast, restoring the information on the back-up tapes, reviewing it for responsiveness and privilege, and producing responsive, non-privileged materials may be many times more expensive than the total exposure in the case. Fortunately, the Rules now recognize this and provide for a two-tiered ESI discovery procedure, which is one of the most significant developments in the Rules, and will be discussed below.

Finally, the new Rule 37(f) will provide a "safe harbor" from sanctions for inadvertent loss of ESI. However, this harbor has been characterized as "narrow and shallow." Specifically, the new Rule 37(f) provides:

> Absent exceptional circumstances, a court may not impose sanctions *under these rules* on a party for failing to provide electronically stored information lost as a result of the *routine, good-faith* operation of an electronic information system. [5]

This safe harbor is narrowed by the Committee Note:

> [G]ood faith in the routine operation of an information system may involve a party's *intervention* to modify or suspend certain features of that routine operation to prevent the loss of information, if that information is subject to a preservation obligation.[6]

Thus, a party is likely to need a robust litigation-hold process in order to seek the safety of this harbor.

III. Form of the Production of ESI: Better to Know Now

The "form" of producing ESI also has generated conflict and case law. The controversy usually turns on whether a party can produce ESI such as e-mail in the form of paper or electronic images, or whether the party should be required to produce the ESI in its native format, which would include metadata.[7] While form of ESI production has not often resulted severe sanctions against a party, a court could require a party to re-produce the ESI in a different form, which would increase the cost of production. The new Rules will require the parties to discuss this issue at the front-end in hopes of avoiding the need to litigate the issue after a party has produced the ESI in one form, only to have the requesting party object. The new Rule provides that the:

> discovery plan that indicates the parties' views on… (3) Any issues relating to disclosure or discovery of electronically stored information, *including the form or forms* in which it should be produced.[8]

Challenges: As with preservation efforts, preparing to discuss form of production with an opponent will require an understanding of the ESI likely to be discoverable and consultation with IT professionals to understand the potential methods of producing the discoverable ESI. The party should also be given the opportunity to thoroughly consider the competing considerations in making a decision about the form of production because there are risks and potential benefits associated with each available option. In addition, production of data from proprietary applications, relational databases, or other sophisticated technology can present technical challenges. Finally, consistency is also a consideration for parties facing litigation in a number of jurisdictions. Inconsistent positions on form of production will undermine credibility should the issue be litigated.

Opportunity: Producing ESI in one form only to have your opponent object and ask for it in another creates the risk that a party may need to incur the cost of litigating the issue and re-producing the ESI if the Court disagrees with the producing party's position. The Amendment seeks to minimize these risks by requiring the parties to discuss the issue before any production has taken place. In practice, parties often have these discussions anyway, so the new Rules simply reflect this practice.

IV. Disclosure of ESI "Category and Location" & Two-Tiered Discovery

While technically not part of the Rule 26(f) conference, the Amendments to Rule 26(a)(1)(B) will require a party, in its initial disclosures, to identify by category and location, ESI related to the party's claims or defenses. The Rule will provide that a:

> party must provide to other parties…
>
> (B) a copy of, or a description by category and location of, all documents, electronically stored information, and tangible things…that the disclosing party might use to support its claims or defenses…[9]

Challenges: The same preparation required for discussions of preservation and form of production should allow a party to identify the categories and locations of ESI that the party may use to support its case. However, the use of the "and location" language arguably requires a party to disclose more than just "e-mails and excel spreadsheets." It instead may require more technical information such as "Susie's hard drive, the Outlook server, and shared drives for the business unit." In any event, after obtaining an understanding of the case issues and the witnesses involved, an attorney should be in a position to get the required information from IT professionals when consulting on the preservation and form-of-production issues mentioned above. From a practical standpoint, the initial disclosures are likely to be just that – information based on an initial investigation. The parties likely will need to supplement the disclosures as the case investigation develops.

A party facing pattern litigation across different jurisdictions will need to ensure consist responses identifying "categories and location" of ESI. To accomplish this, the party should consider developing responses before they are required. In this way, the party will have sufficient time to develop complete and accurate responses and distribute them to counsel likely to be involved in future litigation requiring the disclosures. Otherwise, the party risks inconsistent or inaccurate disclosures, which will undermine the party's credibility and provide fodder for discovery motions.

Finally, the Committee Notes acknowledge that in some cases, discovery about computer systems "may be helpful":

> It may be important for the parties to discuss…[information] systems, and accordingly important for counsel to become familiar with those systems before the conference…In appropriate cases *identification of, and early discovery from, individuals with special knowledge* of a party's computer systems may be helpful. [10]

Given this, a party should consider identifying an IT professional responsible for assisting counsel in responding to such discovery requests.

Opportunities: As mentioned above, complete and accurate responses to these initial disclosures will enhance credibility. However, the new Rules provide another important protection against the overly broad and unduly burdensome requests related to ESI. The Rules expressly allow a producing party to identify certain ESI as "not reasonably accessible" and object to its production:

> A party need not provide discovery of electronically stored information from sources that the party identifies as not reasonably accessible because of undue burden or cost. [11]

This language sets up a two-tier system for discovery of ESI. The first tier would be discovery of ESI that is "reasonably accessible," which the producing party would be expected to produce as long as it is not objectionable for some other reason. However, the producing party may object to the discovery of other ESI that is "not reasonably accessible because of undue burden or cost." Thus, the new Rules attempt to address the most significant problem associated with ESI – the cost of production. However, a party objecting to production on this ground should be prepared to defend the objection. This may include an evidentiary hearing if the requesting party moves to compel in response to the producing party's objection:

> [o]n motion to compel discovery, if that showing is made, the court may nonetheless order discovery from such sources if the requesting party shows good cause, considering the limitations of Rule 26(b)(2)(C). *The court may specify the conditions for the discovery*. [12]

Thus, the new Rules provide the court with options in resolving such a dispute. One of the most significant options is the cost-shifting tool:

> The conditions may take the form of limits on the amount, type, or sources of information required to be accessed and

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> produced. The conditions may also include *payment by the requesting party* of part or all of the reasonable costs of obtaining information from sources which are not reasonably accessible. [13]

The cost-shifting mechanism could have a significant impact on the requesting party's enthusiasm for continuing to seek the requested ESI. As a result, producing parties should be prepared to defend their objections based on undue burden and cost. As part of this preparation, the party should consider identifying IT professionals who can explain the technical challenges of production in a way that everyone can understand and appreciate. In addition, the prospect of having to litigate this issue puts a premium on accurate disclosures and objections in the first instance.

V. Additional Opportunity: Clawback of Privileged Materials

In addition to the technical challenges associated with producing ESI, its volume and the attendant expense of reviewing this volume for potentially privileged materials, contributes greatly to the cost associated with discovery of ESI. The sometimes draconian outcome of cases addressing privilege waiver[14] encourage parties to undertake full-blown privilege review despite the volume of ESI. In an effort to provide litigants with options to address this challenge, the new Rules will expressly recognize a "clawback" procedure for inadvertently produced privileged documents:

> If information is produced in discovery that is *subject to a claim of privilege or of protection* as trial-preparation material, the party making the claim may notify any party that received the information of the claim and the basis for it. After notification, a party must promptly return, sequester, or destroy the specified information and any copies it has and *may not use or disclose* the information until the claim is resolved. A receiving party may promptly present the information to the court under seal for a determination of the claim. [15]

However, it is important to recognize that this is merely a procedural rule and a particular jurisdiction's law will control substantive waiver issues.

CONCLUSION

The new Amendments to the Federal Rules will provide litigants with much needed tools to address the burden and expense of ESI discovery. However, to reap the full benefits of these new tools, a party will need to invest in the preparation needed to overcome the challenges that the new Amendments also create.

Footnotes

1 *See, e.g., Broccoli v. Echostar Communs. Corp.*, 229 F.R.D. 506 (D. Md. 2005) (finding that employee's harassment claims provided notice before initiation of lawsuit and defendants acted in bad faith by failing to suspend their email and data destruction policy).

2 *See, e.g., Applied Telematics v. Sprint Communs. Co.*, L.P., 1996 U.S. Dist. LEXIS 14053, (E.D. Penn. Sept. 18, 1996) (despite defendant's claims that it could not have known prior to spring of 1995 that the electronically stored information was relevant and might be subject to discovery, the language of plaintiff's first request for production of documents dated August 2, 1994, caused the court to conclude that defendant knew or should have known that this information was relevant prior to spring of 1995 and, therefore, defendant had an affirmative duty to preserve this information).

3 FED.R.CIV.P. 26(f) (Proposed Text Rules App. C-31) (emphasis added)

4 FED.R.CIV.P. 26(f) Committee Note (Proposed Text Rules C-34).

5 FED.R.CIV.P 37(f) (Proposed Text Rules App. C-86) (emphasis added)

6 *Id.*, Committee Note (Proposed Text Rules App. C-87) (emphasis added)

7 The Rules Committee pointed out that certain electronic processes that may destroy otherwise discoverable information has "no direct counterpart in hard-copy documents." Committee Note (Rules App. C-83).

8 FED.R.CIV.P. 26(f)(3) (Proposed Text Rules App. C-32) (emphasis added).

9 FED.R.CIV.P. 26(a)(1)(B) (Proposed Text Rules App. C-30) (emphasis added).

10 FED.R.CIV.P. 26(f) Committee Note (Proposed Text Rules App. C-33) (emphasis added)

11 FED.R.CIV.P. 26(b)(2) (Proposed Text Rules App. C-45).

12 FED.R.CIV.P. 26(b)(2)(B) (Proposed Text Rules App. C-46) (emphasis added).

13 *Id.,* Committee Note (Proposed Text Rules App. C-50) (emphasis added).

14 *See, e.g., Crossroads Sys. (Tex.), Inc. v. DOT Hill Sys. Corp.*, 2006 U.S. Dist. LEXIS 36181 (W.D. Tex. May 31, 2006) (finding that the privilege had been waived for inadvertently produced e-mail because defendant had repeatedly failed to secure the return of the e-mail after learning of its inadvertent disclosure) (quoting *GFI, Inc. v. Franklin Corp.*, 265 F.3d 1268, 1273 (Fed. Cir. 2001) "Once a party waives the attorney-client privilege with respect to one communication, the privilege is waived with respect to all communications relating to the subject matter of the disclosed communication.").

15 FED.R.CIV.P. 26(b)(5)(B) (Proposed Text Rules App. C-57) (emphasis added).

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Order and Opinion

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA
CHARLESTON DIVISION**

C/A No. 2:01-4267-DCN

**Bituminous Casualty Corporation,
Plaintiff,
vs.
R.C. Altman Builders, Inc.; Robert N. Grove;
Waverly Building Company, LLC;
Auto-Owners Insurance Co.;
Carl Nelson, d/b/a Nelson Masonry; and
Bobby Vincent, d/b/a Vincent's Plumbing,
Defendants.**

Abandon hope, all ye who enter here.[1]

I. BACKGROUND

Plaintiff Bituminous Casualty Corporation ("Bituminous") seeks a declaratory judgment to clarify its obligations under a commercial general liability ("CGL") insurance policy issued to defendant R.C. Altman Builders, Inc. ("Altman"). The action also names Robert Grove ("Grove"), Waverly Building Company LLC ("Waverly"), Auto-Owners Insurance Company ("Auto-Owners"), and others.[2] In an underlying state claim, Robert Grove sued "Robert C. Altman, individually and d/b/a R.C. Altman Builders, now d/b/a Waverly Building Co., LLC," and others[3] for damages arising from construction of the Grove residence on Debordieu Island, South Carolina. A certificate of occupancy was issued August 13, 1997. Grove's complaint alleges Robert Altman controlled Altman.[4] Robert and Faye Altman formed Waverly on March 2, 1998. Bituminous insured Altman during construction of the Grove residence. Auto-Owners insured Waverly.

Grove settled with Altman for a confession of judgment of $300,000.00 and an assignment of Altman's rights under its policy with Bituminous. In February 2003 this court stayed this action pending the resolution of *L-J, Inc. v. Bituminous Fire and Marine Insurance Co.*, 366 S.C. 117, 621 S.E.2d 33 (2005). Subsequently, Bituminous and Auto-Owners each filed motions for summary judgment. On November 30, 2005 this court referred both motions to Magistrate Judge Kosko. One week later, Altman and Grove filed their own motion for summary judgment. The magistrate judge's Report and Recommendation ("Report") addressed all three motions, although this court only referred the insurers' filings.

In the underlying state action, Grove alleges breach of contract, breach of implied warranties, negligence and violations of the unfair trade practices act. Grove contends Altman's work was defective and deficient because improperly laid foundations, masonry and wood framing have permitted water intrusion and other damage.

Bituminous seeks summary judgment on three grounds: (1) there was no occurrence giving rise to coverage; (2) the underlying claim does not constitute property damage, and (3) one or more of the policy's exclusions apply to Grove's claim. Bituminous provided coverage to Altman from August 2, 1996 to August 2, 1997, and from November 10, 1997 to November 10, 1998.

Auto-Owners seeks summary judgment on similar rationales: (1) there is no "successor liability" coverage; (2) there was no occurrence to trigger coverage, and (3) one or more exclusions applied. Waverly's policy with Auto-Owners provided coverage from November 14, 1998 to July 11, 2000, and from November 29, 2000 to November 29, 2001. The magistrate judge concluded that "successor liability" invoked Waverly's policy with Auto-Owners, and that the allegations constituted an "occurrence" giving rise to coverage under both policies. The magistrate judge denied both insurers' motions and granted Grove/Altman's motion for summary judgment.

The insurers object on several grounds. Bituminous contends (1) the Report misapplies L-J in determining whether the claim arises from an "occurrence;" (2) the Report does not address whether the claim meets the policy definition of "property damage," (3) the Report does not address the policy's exclusions, and (4) the Report does not address Bituminous's contention that some damage occurred after the applicable policy period. Auto-Owners objects to the Report's conclusion regarding "successor liability" and contends the magistrate judge erred in construing L-J and in not addressing the policy's exclusions.

II. DISCUSSION

a. Occurrence

First among the insurers' objections is that the magistrate judge misinterpreted *L-J*. Few cases have such a complicated history.[5] Needless to say, this

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latest rendition has occasioned "much throwing about of brains."[6]

L-J considered "whether property damage to the work product alone, caused by faulty workmanship, constitutes an occurrence." *L-J*, 366 S.C. at 121, 621 S.E.2d at 35. As in *L-J*, both the Bituminous and Auto-Owners policies apply only if "the 'bodily injury' or 'property damage' is caused by an 'occurrence' that takes place in the 'coverage territory.'" Bituminous Policy §1.b.1; Auto-Owners Policy §1.b.1. Also as in *L-J*, both policies define occurrence as "an accident, including continuous or repeated exposure to substantially the same general harmful conditions." In *L-J*, the insured general contractor was responsible for constructing a road which later deteriorated. After settling various negligence and warranty claims, the general contractor sought indemnification from its insurers. One insurer refused to contribute, and a declaratory judgment action ensued. The state supreme court's latest opinion noted

> [T]hese negligent acts [of the contractor and subcontractors during road design, preparation, and construction] constitute faulty workmanship, which damaged the roadway system only. And because faulty workmanship is not something that is typically caused by an accident or by exposure to the same general harmful conditions, we hold that the damage in this case did not constitute an occurrence.[4]
>
> [4] The CGL policy may, however, provide coverage in cases where faulty workmanship causes a third party bodily injury or damage to other property, not in cases where faulty workmanship damages the work product alone.

We find the analysis used by the New Hampshire Supreme Court helpful in distinguishing between a claim for faulty workmanship versus a claim for damage to the work product caused by the negligence of a third party. *High Country Assocs. v. New Hampshire Ins. Co.*, 139 N.H. 39, 648 A.2d 474 (1994). In *High Country Assocs.*, the court held that a CGL [policy] provided coverage for property damage caused by continuous exposure to moisture when the complaint alleged negligent construction that resulted in property damage and not merely negligent construction damaging only the work product itself. Id. at 477. The complaint in *High Country Assocs.* alleged:

> [a]ctual damage to the buildings caused by exposure to water seeping into the walls that resulted from the negligent construction methods of High Country Associates. The damages claimed are for the water-damaged walls, not the diminution in value or cost of repairing work of inferior quality. Therefore, the property damage described in the amended writ, caused by continuous exposure to moisture through leaky walls, is not simply a claim for the contractor's defective work.
>
> *Id.* As a result, the court held that the plaintiffs' alleged negligent construction was the result of an occurrence, rather than an allegation of faulty or defective work. *Id.* at 478.
>
> In the present case, the complaint did not allege property damage beyond the improper performance of the task itself. The complaint alleged breach of contract, breach of warranty, and negligence. However, each of the claims repeated verbatim the same allegation--faulty workmanship in completing the project. As a result, the insurance policy will not stand to cover liability for the Contractor's contract liability for a claim that was for money damages to compensate for the defective work.

L-J, 366 S.C. at 123-24, 621 S.E.2d at 36. Bituminous and Auto-Owners emphasize two sentences: the court's distinction between claims for faulty workmanship and "for damage to the work product caused by the negligence of a third party," and footnote four.

The insurers urge the court to read the "third party" phrase as permitting coverage only where "the insured's relationship to the damaged property is . . . the relationship of a third party." (Bituminous obj., doc. 115, at 3.) Under this reading, an insured subcontractor whose faulty workmanship permits water intrusion that damages the work product of another subcontractor could get coverage for the damage to the other's work product. The insurers argue that since Altman is the general contractor it is responsible for the entire project and the acts of its subcontractors, and therefore the negligence at issue is not that of a "third party." Similarly, they argue that footnote four excludes coverage where the faulty workmanship damages the work product alone. In sum, the insurers assert that since Altman was the general contractor responsible for the entire project, the damage is neither caused by a third party nor beyond the work product alone. As such, Bituminous and Auto-Owners contend *L-J* prohibits coverage.

In contrast, Altman implicitly suggests the "work product" is not the entire general contractor's project, but each specific subcontractor's task. This reasoning is the only way to square Altman's conclusion with the two qualifications discussed above.

Altman does not specifically address the third party language of *L-J*.

Several factors point towards the insurers' interpretation. First, it is a stretch to claim the "work product" of a general contractor is anything other than the entire project. Here, Altman contracted to build a residence for Grove; therefore, Altman's "work product" is Grove's house. As noted below, a contrary reading is inconsistent with *L-J's* policy discussion.

Altman's reliance on the outcome in *High Country Associates v. New Hampshire Ins. Co.,* 648 A.2d 474 (1994) is misplaced.[7] *L-J* cites *High Country* to distinguish between faulty workmanship claims and claims for damage to work product caused by third parties. The South Carolina Supreme Court's discussion of *High Country* demonstrates the difference between claims for defective work and claims for damage stemming from that defective work. The limited excerpts and discussion of *High Country* do not reveal that the insured in that case was the general contractor.[8] The South Carolina Supreme Court cited *High Country* for its analysis, not its conclusion.[9] However, Altman relies on factual similarities with the substance of *High Country* and its favorable outcome. This court does not believe the *High Country* outcome is controlling.

The policy considerations discussed in *L-J* also support the insurers' interpretation. The supreme court noted its

> holding . . . ensures that ultimate liability falls to the one who performed the negligent work - the subcontractor - instead of the insurance carrier. It will also encourage contractors to choose their subcontractors more carefully instead of having to seek indemnification from the subcontractors after their work fails to meet the requirements of the contract.

L-J, 366 S.C. at 124, 621 S.E.2d at 37. Permitting Altman to recover in this context runs counter to these considerations. Finding coverage would penalize the general contractor's carrier rather than the negligent party, the subcontractor. Further, affording coverage to a general contractor for damage to a residence stemming from its subcontractor's defective work would not encourage general contractors to more carefully select their subcontractors.*10*

Bituminous and Auto-Owner's argument that the entire house is the general contractor's "work product" is analogous to interpretations of the "faulty workmanship provision." That provision excludes from coverage "'property damage' to . . . . [t]hat particular part of any property that must be restored, repaired or replaced because 'your work' was incorrectly performed on it." See Bituminous Policy § I.2.j.6. "Your work" includes "work or operations . . . performed . . . on your behalf." Id. § V.19.a.

In *Century Indemnity Co. v. Golden Hills Builders, Inc.*, 348 S.C. 559, 561 S.E.2d 355 (2002), the insured was the general contractor responsible for the entire home. A subcontractor's negligent work in applying the stucco allowed water to enter the interior, which damaged the properly constructed framing and substrate. Upon certification by the Fourth Circuit, the supreme court considered whether the faulty workmanship provision precluded the insured general contractor's claim for damage stemming from a subcontractor's improper work. The supreme court apparently interpreted "it" in the faulty workmanship provision to refer to the entire property upon which the insured performed work; in other words, the entire house. "It" was seen to encompass all parts of the general contractor's project, as opposed to only the work of the subcontractor. This interpretation reflects the fact that the insured general contractor was responsible for the entire structure.

While the supreme court did not discuss the "it" interpretation issue, the Fourth Circuit noted the different interpretations in its certification order. *See Century Indemnity Co. v. Stoltz*, 248 F.3d 253, 258 (4th Cir. 2001) ("Century urges us to read the pronoun 'it' and its antecedent ('[t]hat particular part of any property that must be restored, repaired or replaced') as referring to the entirety of the Stoltzes' home, inasmuch as Golden Hills Builders was the general contractor engaged to construct the entirety of the Stoltzes' home.").

This court recognizes that analysis of the "faulty workmanship provision" is distinct from *L-J's* "occurrence" discussion.[11] Nonetheless, similar principles apply. In support of its conclusion, *Century Indemnity* invoked the "purpose of CGL policies" and noted CGL insurers are "not obligated to defend insured where action against insured did not involve accidental injury to property other than that on which insured was performing its work." *Century Indem.*, 348 S.C. at 567, 561 S.E.2d at 360 (citing *C.D. Walters Constr. Co. v. Fireman's Ins. Co.*, 281 S.C. 593, 316 S.E.2d 709 (Ct. App. 1984) (emphasis in original)); *see also Carolina Prod. Maint., Inc. v. U.S. Fidelity and Guar. Co.*, 310 S.C. 32, 37, 425 S.E.2d 39, 42 (Ct. App. 1992) (reversing summary judgment in insurer's favor because evidence suggested insured "was responsible for only certain parts of the [work product], and not for the entire thing."). *L-J's* footnote four reflects this concern.

These considerations support Bituminous's summary of *L-J's* "third party" language:

> The words "of a third party" show that the [s]upreme [c]ourt meant to highlight that coverage under the policy would only be afforded to that part of the total project which is other than the work product of the insured contractor. Only

Continued on page 24

> where the damaged work was performed by some other contractor would the contractor whose policy is under review be a "third party" and entitled to coverage for this negligence in damaging that property.

(Bituminous mem. in opp'n, doc. 112, at 2.) As *L-J* states, CGL policies do not cover faulty workmanship. Therefore, a general contractor's CGL policy does not provide coverage to repair or replace its subcontractor's defective work. Further, *L-J* apparently demonstrates that damage stemming from defective work that is limited to the general contractor's work product is not an occurrence.

c. Application of L-J

"In an action for declaratory judgment, the obligation of a liability insurance company to defend and indemnify is determined by the allegations in the complaint." *Mfr. & Merch. Mut. Ins. Co. v. Harvey*, 330 S.C. 152, 162, 498 S.E.2d 222, 228 (Ct. App. 1998). The majority of Grove's complaint alleges pure faulty workmanship; i.e., defective and deficient work. These allegations are clearly not covered. However, "Exhibit A," incorporated into paragraph seventeen, alleges poor workmanship on various aspects of the house allowed water intrusion that damaged the interior of the structure. These allegations would be covered if they involve items other than Altman's "work product;" i.e, the Grove's residence. Therefore, coverage exists for damage to items which were not the work product of the general contractor or its subcontractors. There is no coverage for damage to aspects of the residence for which Altman or its subcontractors were responsible, as those aspects constitute Altman's "work product." Exhibit A does not specify what parts of the interior were damaged by the water intrusion.

d. Exclusions

Given the above findings, the court need not address the exclusions.

III. CONCLUSION

For the reasons stated above, the court finds that the claims against Altman or Waverly for defective work do not constitute an occurrence, and therefore are not covered under either insurers' policy. The damage resulting from defective workmanship is covered by Altman's policy to the extent that this damage is to property not the work product of Altman or its subcontractors.

There remains the possibility that claims against Waverly could be covered if the damage as to property which was not Altman/Waverly's "work product." As noted, Grove/Altman seeks to invoke Waverly's policy with Auto-Owners via "successor liability." The court reserves judgment on whether successor liability can invoke a putative successor's CGL policy. This difficult question might be rendered moot upon the parties' review of this order. Specifically, this order requires Grove to clarify what damage, if any, occurred to property not within Altman/Waverly's "work product." If there is no covered damage, then Waverly's policy with Auto-Owners is not invoked. To allow the parties to review this order, the court will schedule a status conference to discuss these issues on August 9, 2006 at 10:00 am.

It is therefore ORDERED that defendant Auto-Owner's motion for summary judgment is GRANTED in part and DENIED in part. It is further ORDERED that plaintiff Bituminous's motion for summary judgment as to coverage is GRANTED in part and DENIED in part. In the interim, the court will take under advisement Bituminous's motion for summary judgment as to Grove and Altman's counterclaims.

Consistent with this ruling, it is further ORDERED that Grove and Altman's motion for summary judgment is DENIED in part and GRANTED in part.

AND IT IS SO ORDERED.

DAVID C. NORTON

UNITED STATES DISTRICT JUDGE

July 28, 2006 • Charleston, South Carolina

Footnotes

1 Dante, *The Divine Comedy (Inferno)*, Canto III. The welcome sign of the afterlife aptly describes this court's hesitation in construing *L-J, Inc. v. Bituminous Fire and Marine Insurance Co.,* 366 S.C. 117, 621 S.E.2d 33 (2005). Five months ago, Judge Harwell concluded *L-J's* ambiguities justified abstention under the district court's limited discretion to abstain from declaratory judgment actions. *See Penn. Nat'l Mut. Ins. Co. v. Ely Wall & Ceilings, Inc.*, No. 4:04-1576, 2006 WL 569589 (D.S.C. March 6, 2006). More recently, Judge Duffy followed the same approach in another construction case turning on *L-J's* interpretation. *Harleysville Mut. Ins. Co. v. Cambridge Bldg. Corp.*, No. 9:04-23412, 2006 WL 2038302 (D.S.C. July 19, 2006). Notably, *Penn. National* and *Harleysville* involved eleven and thirteen underlying complaints as a significant factor in their abstention analysis. In contrast, the instant case involves one underlying state complaint which is included in the record and discussed by the parties. Unlike in *Penn. National* and *Harleysville*, a motion to dismiss based on abstention grounds is not before this court. In fact, the parties explicitly request the court not to abstain. Further, this court benefits from the well-reasoned opinions of Judges Duffy, Wooten, Harwell, and Magistrate Judge Kosko (all of which analyzed *L-J*), and the thorough briefs of the parties. Because of the insights garnered by reviewing these opinions, the court declines to abstain, and marches through the gates.

2 Carl Nelson d/b/a Nelson Masonry and Bobby Vincent d/b/a Vincent's Plumbing. Altman has filed counterclaims against Bituminous for insurance bad faith, improper claims practices, and breach of covenant of good faith and fair dealing. (Altman countercl. ¶¶ 25 - 38, doc. 31.) Grove has filed counterclaims against Bituminous for insurance bad faith and improper claims practices. (Grove countercl. ¶¶ 25 - 33, doc. 34.)

3 Nelson Masonry, Jeff Blackburn, Summers Roofing, Tri County Insulation, and John Summers.

4 According to paragraph fourteen of the second amended state court complaint, Grove contracted with Altman to construct a residence for Grove for the sum of $359,202.00. Paragraph twenty-one of the second amended complaint alleges that Altman was the general contractor for the construction of the Grove residence and was "ultimately responsible for the construction."

5 The South Carolina Court of Appeals issued a decision in 2002. *L-J, Inc. v. Bituminous Fire & Marine Ins. Co.*, 350 S.C. 549, 567 S.E.2d 489 (Ct. App. 2002). The state supreme court reversed in a 2004 opinion. *L-J, Inc. v. Bituminous Fire and Marine Ins. Co.*, No. 28554, 2004 WL 1775571 (S.C. Aug. 9, 2004). The supreme court reheard the case and later withdrew the 2004 decision and issued the present opinion on September 26, 2005. The court denied a rehearing on November 10, 2005.

6 William Shakespeare, *Hamlet, Prince of Denmark*, act II, sc. II.

7 Altman's briefs are replete with comparisons to the specific facts in, and conclusion of, High Country. As discussed above, the South Carolina Supreme Court apparently cites that opinion for limited purposes.

8 A review of the entire High Country opinion demonstrates that the insured in that case constructed the condominium units. High Country, 648 A.2d at 40 - 42. The absence of that factor in L-J's review of High Country contrasts sharply with Altman's reliance on it, and suggests the South Carolina Supreme Court used High Country not for its outcome, but merely to distinguish between damage to defective work and damage stemming from defective work.

9 *High Country* is included in *L-J* because the quoted paragraph distinguishes between damage to the work product itself and damage to other property. Judge Duffy's order in *Okatie Hotel Group, LLC v. Amerisure Ins.*, No. 2:04-2212, 2006 WL 91577 (D.S.C. Jan. 13, 2006) recognizes the distinction between improper performance of the task itself (not covered) and "alleged property damage beyond damage to the work product" (possibly covered). However, this court would not reach the same conclusion in *Okatie*. This court would hold the damage was limited to insured's work product, i.e., the entire house. The parties in *Okatie* subsequently settled before the court could rule on a motion for reconsideration. On similar facts, Judge Wooten arrived at the same conclusion in *Pennsylvania Manufacturers' Ass'n Ins. Co. v. Dargan Construction Co.*, No. 4:05-113, 2006 WL 2038270 (D.S.C. July 13, 2006). Judge Wooten relied heavily on Okatie, Magistrate Judge Kosko's Report in this case, and *High Country*.

10 This court's opinion would encourage general contractors to hire subcontractors with the financial wherewithal to stand behind their own work or to make sure the subcontractors have insurance to cover the results of their defective work. Damages to the subcontractor's own work product resulting from its own defective work would not be covered; however, the insurance would cover damage to the work product of other subcontractors.

11 Coverage excluded by the faulty workmanship provision can be restored by the "products-completed operations hazard." The latter is an exception to the general exclusion. For purposes of the "work product" question discussed above, the "faulty workmanship" analogy is useful because it demonstrates that a subcontractor's faulty work can be imputed to the insured general contractor, as in *Century Indemnity*.

Order and Opinion

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA
CHARLESTON DIVISION

C/A No. 2:01-4267-DCN
ORDER and OPINION

Bituminous Casualty Corporation, Plaintiff,
vs.
R.C. Altman Builders, Inc.; Robert N. Grove;
Waverly Building Company, LLC;
Auto-Owners Insurance Co.;
Carl Nelson d/b/a Nelson Masonry; and
Bobby Vincent, d/b/a Vincent's Plumbing,
Defendants.
_____)

Defendant R.C. Altman Builders, Inc. ("Altman") and Robert N. Grove ("Grove") request the court to alter or amend its July 28, 2006 order addressing coverage under Altman's CGL insurance policy. Plaintiff Bituminous Casualty Corporation ("Bituminous") and defendant Auto-Owners Insurance Company ("Auto-Owners") have filed briefs in opposition. This order addresses Altman/Grove's objections to the original order, and will not recite the factual or procedural history of this action.

I. ANALYSIS

The CGL policies in *Altman* and *L J, Inc. v. Bituminous Fire and Marine Insurance Co.*, 366 S.C. 117, 621 S.E.2d 33 (2005) ("*L-J*") apply only if "the 'bodily injury' or 'property damage' is caused by an 'occurrence' that takes place in the 'coverage territory.'" Both policies define "occurrence" as "an accident, including continuous or repeated exposure to substantially the same general harmful conditions." In both cases the insured is the general contractor.

Insureds assert the "occurrence" in *Altman* is different than the one identified in L-J. Altman identifies the water intrusion allowed by the faulty workmanship of its subcontractors as the "accident." In *L-J*, the alleged "'occurrences' were various negligent

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acts" of the insured's subcontractors. *L-J,* 366 S.C. at 123, 621 S.E.2d at 36. However, like *Altman*, these negligent acts eventually led to the property damage (alligator cracking). As in *Altman*, the subcontractor's faulty work permitted conditions which ultimately resulted in the damage to the road itself.

L-J holds that the subcontractors' faulty workmanship was not an accident, and therefore not an occurrence. The court regarded the subcontractors' work as that of the insured general contractor. *L-J* identified the putative "occurrences" as the "various negligent acts by [insured general] Contractor," although subcontractors performed most of the work. *Id.* Similarly, in Altman the insured general contractor's subcontractors performed the negligent work. Consistent with *L-J*, the faulty workmanship of Altman's subcontractors, which caused the conditions which led to the damage to the insured's work product, cannot be regarded as an "accident."

Altman contends the "occurrence" was the water intrusion allowed by the faulty work of the subcontractors, not the faulty workmanship itself, and therefore *L-J* is distinguishable. Altman alleges the faulty workmanship in *L-J* directly caused the damage to the property itself. Even if Altman's contention were true, this alleged distinction is not dispositive of the coverage determination. *L-J's* analysis goes beyond the conclusion that faulty workmanship is not an occurrence. As noted in the previous order, Altman relies heavily on *High Country Associates v. New Hampshire Insurance Co.*, 648 A.2d 474 (N.H. 1994) ("*High Country*") and the insured's favorable outcome in that decision. The citation of *High Country* for the delphic distinction between a "claim for faulty workmanship versus a claim for damage to the work product caused by the negligence of a third party" complicates *L-J's* application. The former is not an occurrence, while the latter presumably is an occurrence. *L-J* cites *High Country* as an example of a complaint "alleg[ing] negligent construction that resulted in property damage and not merely negligent construction damaging only the work product itself." *L-J*, 366 S.C. at 123, 621 S.E.2d at 36. In High Country, faulty workmanship permitted water intrusion, which damaged other aspects of the project. *L-J's* excerpt from *High Country* notes that the claimed damage resulted from insured High Country Associates' ("HCA") negligent construction methods. As in *Altman*, the claim was for subsequent damage to the project stemming from faulty workmanship, "not simply a claim for the contractor's defective work." *Id.* (quoting *High Country*, 648 A.2d at 477). *L-J's* limited excerpt of High Country does not definitively address whether the insured constructed only the negligent work or both the negligent work and the work product which was damaged by the water intrusion.[1] As noted in the July 28, 2006 order, *L-J* apparently cites *High Country* for its analysis, not its conclusion.

In light of the "third party" distinction, the *High Country* excerpt only makes sense if HCA were responsible for the negligent construction only. Altman contends that HCA (like Altman) is the general contractor. If HCA were responsible for the entire project, then its own negligence damaged its own work product. *High Country* would then represent a claim for damage to the work product caused by the negligence of the insured - contrary to *L-J's* "third party" distinction.

In contrast, if HCA constructed only part of the project, then another subcontractor's work was damaged by the water intrusion permitted by HCA's negligent construction. Under this interpretation, the claimed damage would be to the work product of another subcontractor, caused by the negligence of a third party (HCA). If the entire project was HCA's work product, then the work product was not damaged by the negligence of a third party. If the damaged portion of the project was constructed by a party other than HCA, then HCA would be the "third party" whose negligent work allowed that damage. *High Country* is consistent with *L-J's* "third party" requirement only if the water-damaged work were performed by a contractor other than HCA. This interpretation is consistent with *L-J's* statement that CGL policies may provide coverage where faulty workmanship causes a third party bodily injury or damage to other property, "but not in cases where faulty workmanship damages the work product alone." *L-J,* 366 S.C. at 123 n.4, 621 S.E.2d at 36 n.4. Further, this result is consistent with *L-J's* recognition that "any liability that is incurred because of faulty workmanship is part of the insured's contractual liability, not an insurable event under a CGL policy." *Id.* at 122, 621 S.E.2d at 36. Altman's definition of "occurrence" would permit coverage for liability incurred by an insured for a breach of insured's contract because of its subcontractor's faulty workmanship.

In sum, *L-J's* "third party" language suggests an additional requirement: that the damaged work must have been performed by a contractor other than the one whose policy is under review. A review of the full *High Country* decision suggests HCA is the general contractor, although this fact is not explicitly discussed in *L-J's* citation of *High Country*. However, this court reads *High Country's* limited excerpt in a manner consistent with the heart of *L-J's* analysis and as an illustration of the third party requirement. Apparently, *L-J* uses *High Country's* analysis, not its conclusion. As such, *High Country's* result is not controlling in the instant factual scenario, and Altman's reliance on it is misplaced.

In the case at bar, the underlying complaint does not comply with *L-J's* interpretation of "occurrence." Since Altman as a general contractor was responsible for the entire house, the damage was not caused by the negligence of a third party. The entity whose negligent work allowed the damage to the work prod-

uct was not a "third party." Rather, the entity that constructed the water-damaged work is seen as the same contractor who performed the negligent work.

Case law from other jurisdictions cited in *L-J* supports this conclusion. *L-J* addressed whether "property damage to the work product alone, caused by faulty workmanship, constitutes an occurrence." *L-J*, 366 S.C. at 122, 621 S.E.2d at 35. The court notes that a "majority of other jurisdictions deciding this issue have held that faulty workmanship standing alone, resulting in damage only to the work product itself, does not constitute an occurrence under a CGL policy." *Id.* Three of the four cases cited for this proposition are consistent with insurers' interpretation of *L-J's* analysis.

In *Monticello Insurance Co. v. Wil Freds Conststruction, Inc.*, 661 N.E.2d 451 (Ill. App. Ct. 1996) an insured general contractor sought coverage for an underlying complaint which alleged faulty work permitted water intrusion which damaged the interior of the structure, among other defects. The general contractor asserted that the construction defects were attributable to its subcontractors. The court found no occurrence because the complaint did not allege a claim for damage to property other than the building itself. Importantly, *L-J* summarized *Monticello* as "finding that improper construction by a contractor and its subcontractors does not constitute an occurrence when the improper construction leads to defects." *Id.* at 121, 621 S.E.2d at 36. *Monticello* held that the "construction defects set forth in the . . . complaint are for the natural and ordinary consequence of the improper construction techniques of [insured] and its subcontractors, and thus, do not constitute an occurrence." *Monticello*, 661 N.E.2d at 456. Since the damage was to the insured's project, without damage to other property or bodily injury, the complaint did not state an occurrence. Like *L-J*, the court distinguished between damage to the project itself and damage to property other than the insured's work product, such as cars. *Id.* Finally, *Monticello* supported its result by warning against turning CGL policies into "something akin to a performance bond." *Id.* at 460.

L-J cites *Heile v. Herrmann*, 736 N.E.2d 566, 568 (Ohio 1999) for the proposition that "faulty workmanship does not constitute an occurrence when the damage is to the work product only." *L-J*, 366 S.C. at 121, 621 S.E.2d at 35. *Heile* involved the familiar situation of an insured home builder seeking coverage on a underlying suit for defective construction. The court viewed CGL policies as intending "to insure the risks of an insured causing damage to other persons and their property, . . . [but not] the risks of an insured causing damage to the insured's own work product." *Heile*, 736 N.E.2d at 568. *Heile* concluded that the damage alleged in the underlying complaint all related to the work of insured or its subcontractors, "not to any consequential damages stemming from that work." *Id.*

Similarly, *L-J* cites *Pursell Construction Inc. v. Hawkeye-Security Insurance Co.*, 596 N.W.2d 67 (Iowa 1999), which addressed an insurer's obligations for faulty work performed by the insured general contractor on sidewalks. The claim was for the faulty work, not the damage resulting from that work. However, the court found no occurrence because the "damages . . . are limited to the very property upon which [insured] performed work." *Pursell*, 596 N.E.2d at 72. If that rationale is applied to Altman, no occurrence exists.

These cases contradict Altman's conception of "occurrence" in this specific circumstance. *L-J's* use of *Monticello*, *Heile* and *Pursell* strengthens insurers' interpretation of *L-J* and the reason that case cites *High Country*.

Altman contends that this court's interpretation of the "third party" language renders the "your work" exclusion meaningless. However, in another context the South Carolina Court of Appeals interpreted "occurrence" in a manner which encroached into the "intentional act" exclusion. In *Manufacturers and Merchants Mutual Insurance Co. v. Harvey*, 330 S.C. 152, 498 S.E.2d 222 (Ct. App. 1998), the court held that sexual abuse of a child was not an "occurrence" because in such acts the intent to harm is "inferred as a matter of law." Due to this interpretation of "occurrence," the court did not have to reach the policy's "intentional act" exclusion.

II. CONCLUSION

When sitting in diversity this court's task is "to rule upon state law as it exists and not to surmise or suggest its expansion." *Harbor Court Associates v. Leo A. Daly Co.,* 179 F.3d 147, 153 (4th Cir. 1999). This admonition is especially relevant in significant state insurance law matters. For the reasons stated in this order and the July 28, 2006 order, the court believes the most reasonable interpretation of *L-J* leads to the above discussed conclusion. Therefore, it is hereby ORDERED that defendants Altman and Grove's motion for reconsideration is DENIED. Defendants' request to certify questions to the South Carolina Supreme Court is also DENIED.

AND IT IS SO ORDERED.

DAVID C. NORTON

UNITED STATES DISTRICT JUDGE

August 21, 2006 • Charleston, South Carolina

Footnotes

1 L-J's full excerpt of High Country notes the complaint alleged:[a]ctual damage to the buildings caused by exposure to water seeping into the walls that resulted from the negligent construction methods of High Country Associates. The damages claimed are for the water damaged walls, not the diminution in value or cost of repairing work of inferior quality. Therefore, the property damage described in the amended writ, caused by continuous exposure to moisture through leaky walls, is not simply a claim for the contractor's defective work.

L-J, 366 S.C. at 124, 621 S.E.2d at 36.

Case Notes

State

***Kirkman v. First Union National Bank of S.C., et al.*, Op. No. 26180 (S.C. July 3, 2006).**

The Kirkmans originally entered into a contract with Miller Housing Corporation for the purchase of a house being constructed by Miller Housing. Miller Housing began having financial difficulties and ultimately was foreclosed upon by its financier and principal lien holder, First Union. At the time of foreclosure, construction of the house was not complete. First Union undertook to complete construction. Upon completion, First Union deeded the house to the Kirklands. The deed included a disclaimer of the implied warranty of habitability. The Kirklands claimed not to be aware of the disclaimer.

Several years after the initial purchase, the Kirklands sought to sell the home. Damages caused by the artificial stucco exterior, which exterior was installed by Miller Housing, were identified and the Kirklands ended up paying for repairs in order to sell the house. They then sued First Union. The trial court granted summary judgment to First Union, concluding that, as a matter of law, it was merely a lender and not the seller such that implied warranty liability attached. The court of appeals agreed.

The South Carolina Supreme Court, however, disagreed remanding the case for further consideration by the fact finders as to the role of First Union in completing construction of the house. The decision was based on the fact that evidence did exist about construction activities undertaken directly by First Union, calling into question the general rule that mere lenders do not incur implied warranty liability. Moreover, the Supreme Court considered the disclaimer in the deed, an issue of first impression. Thus, also remanded for further consideration was whether the disclaimer was effective. The court agreed with other state courts that the parties should be free to contract, including disclaimers of the implied warranty of habitability, but that disclaimers would only be effective if strict conditions are met: (1) the disclaimer must be conspicuous, (2) the disclaimer must be known to the buyer, and (3) the disclaimer must be specifically bargained for by the parties to the contract.

***Jeter v. S.C. Dep't of Transportation*, Op. No. 26168 (S.C. June 19, 2006).**

Plaintiff Jeter and another motorist, Brown, were involved in an accident in Union County. Jeter and Brown agreed the accident was caused by loose gravel on an area of the roadway recently resurfaced by the SCDOT and that the SCDOT failed to maintain the road in a safe condition. Jeter and his wife sued SCDOT in Union County; SCDOT filed a third party complaint against Brown. After Brown reached a settlement with the Jeters, Brown filed an amended answer and counterclaim against the SCDOT alleging improper venue. Brown then filed a motion to change venue from Union County to her county of residence. The trial court granted the motion to change venue and the court of appeals affirmed.

The South Carolina Supreme Court reversed the change of venue. That court concluded that when an action is properly instituted in a county other than the defendant's county of residence, no right to change venue to his or her county of residence exists based on the ground that the case was not brought in a proper county, even if the case could have been brought in the defendant's county of residence. Since S.C. Code § 15-78-100(b) operated both to provide for subject matter jurisdiction in the circuit courts for claims brought pursuant to the South Carolina Tort Claims Act and to establish venue in the county in which the relevant act or omission occurred, venue was proper in Union County, the location of the accident and the allegedly unsafe roadway. Because venue was proper, Brown had no right to request a change of venue to her county of residence pursuant to S.C. Code § 15-7-30.

***Home Port Rentals, Inc. v. Moore*, Op. No. 26182 (S.C. July 10, 2006).**

Petitioner obtained a judgment against the Respondent in the United States District Court for the District of South Carolina. That judgment was enrolled and entered on March 20, 1989. Petitioner then attempted to locate Respondent to execute on the judgment, but Respondent was not located until January 1999. Petitioner alleged that Respondent had been absent from South Carolina until that time. On July 14, 2006, Petitioner filed a declaratory action in South Carolina circuit court seeking a declaration that the 1989 judgment remained effective. The circuit court, however, found the judgment invalid, more than ten years having passed since it was entered. Petitioner argued that the ten year existence of judgments was tolled while the Respondent judgment debtor was located outside the state. The circuit court and court of appeals disagreed. The Supreme Court affirmed those decisions, refusing to apply S.C. Code § 15-3-30's tolling provision for the accrual of causes of action to the relevant statutes governing the ten year term for judgments.

***Ardis v. Sessions*, Op. No. 4136 (S.C. Ct. App. July 10, 2006).**

Ardis sued Sessions, a chiropractor, for medical malpractice. Ardis alleged that Sessions spinal manipulations caused a herniated disk. The jury found in favor of Defendant Sessions. At trial, the judge, over Ardis's objections, gave the following instructions regarding the standard of care:

> The law does not require of him absolute accuracy either in his practice or his judgment . . . It does not even require of him the utmost degree of care and skill of which the human mind is capable.
>
> I instruct you that a physician is not an insurer of a cure or even of a beneficial result; thus, the mere fact that a treatment is not beneficial or that it is even harmful will not of itself raise a presumption of negligence . . . I instruct you that a bad result of the failure to cure is not by itself insufficient to raise an inference or a presumption of negligence on the part of a physician.
>
> I charge you that a physician is not ordinarily liable for making an incorrect diagnosis where it is made in good faith and there is reasonable doubt as to the nature of the physical conditions involved or as to what should be done in accordance with recognized authority in good current practice or where it is made in good faith on observation of the patient.

After denying Ardis's motion for jnov or for new trial, an appeal ensued. The court of appeals reversed concluding that, much like the similar instruction in *McCourt by and through McCourt v. Abernathy*, 318 S.C. 301, 457 S.E.2d 603 (1995), the charge erroneously implied that the defendant's error in judgment is only actionable if made in bad faith.

Judge Beatty dissented. Judge Beatty reiterated that a jury charge must be considered in its entirety and that unlike the charge considered in *McCourt*, the charge given to the jury in this case included many other instructions which as a whole were reasonably free from error and provided substantially correct statements of the law.

***Shealy v. John Doe*, Op. No. 4128 (S.C. Ct. App. June 26, 2006).**

Plaintiff Shealy and another passenger were riding in the bed of a pickup truck. The driver suddenly swerved, throwing the passengers from the truck and causing serious injury to Shealy. The driver later explained that he swerved to avoid another vehicle. Shealy then filed suit against the unknown driver to recover from the pickup truck owner's UM carrier. In support of that complaint, Shealy submitted two affidavits. One from Shealy and one from the other passenger, both simply restating what they were told by the pickup truck driver about the unknown vehicle. The trial court granted Defendant John Doe's motion to dismiss, concluding that the two passenger affidavits failed to comply with the witness affidavit requirement of S.C. Code § 38-77-170(2).

Section 38-77-170(2) requires, where no physical contact was made with the unknown vehicle, an independent witness – other than the owner or operator of the insured vehicle – to the accident. In other words, an independent witness must corroborate the involvement of the unknown vehicle. This requirement is intended to prevent fraudulent John Doe claims. Shealy argued that the required witness affidavit need not be based on personal knowledge. Both the trial court and the court of appeals disagreed. Without evidence of the personal knowledge of someone other than the owner or operator of the insured vehicle, the existence of a phantom vehicle is not corroborated. Shealy cannot satisfy this requirement merely by restating what he was told by the insured vehicle's operator.

The court of appeals distinguished this case from the case of Gilliland v. Doe, 357 S.C. 197, 592 S.E.2d 626 (2004), in which the South Carolina Supreme Court concluded a witness affidavit was sufficient even where the personal knowledge of the affiant provided only circumstantial evidence of another vehicle. In that case, the independent witness saw headlights following the insured vehicle and after the accident saw the headlights indicate a U-turn by the vehicle to leave the accident scene.

During the proceedings in this case, the insurer sent a letter to Shealy stating that it remained convinced there was no negligence on the part of the pickup truck driver and that that conclusion was based on the existence of a phantom vehicle that pulled out in front of the insured vehicle, causing the accident. Shealy argued on appeal that this letter should have been considered by the trial court as an admission against interest. The court of appeals refused to consider this issue, concluding Shealy failed to preserve it on appeal. The trial court never ruled on the issue and Shealy failed to raise it in a Rule 59 motion.

Federal

Jensen v. International Business Machines Corp., No. 05-1611 (decided July 24, 2006).

Plaintiff, a software sales representative for IBM, sought compensation in the form of commissions pursuant to IBM's Software Sales Incentive Plan. In 2001, IBM announced the plan and provided information to employees via a brochure. The brochure disclaimed the accuracy of any sample calculations used to explain potential incentive compensation and referred employees to additional documents available on IBM's intranet describing the incentive plan. The incentive plan permitted separate divisions to personalize a particular salesman's sales targets and incentive payments. A letter was

Continued on page 30

provided to Plaintiff from his manager tailoring the incentive plan to Plaintiff. In the letter, IBM expressly reserved the right to modify or cancel the incentive plan at any time prior to payment. Moreover, several documents on the IBM intranet set forth a 200% Rule, reserving IBM's ability to adjust any incentive payments on unusually large transactions. The 200% Rule reduced the percentage commission IBM would typically pay for single transactions that resulted in sales more than twice the representatives established yearly sales quota.

Following announcement of the sales incentive plan, Plaintiff was involved in a large $24million transaction with the IRS. By Plaintiff's calculations, that transaction entitled him to more than $2million in commissions. IBM determined his commission to be closer to $500,000, based in part on the 200% Rule. Plaintiff claimed no knowledge or notice of the 200% Rule.

The trial court, applying Virginia contract law, granted IBM summary judgment. That court concluded that no contract existed in connection with the incentive plan. The Fourth Circuit affirmed. The Fourth Circuit determined that the terms of the incentive plan made it clear that those terms were not to be construed as a contractual offer and that Plaintiff's position would require ignoring the 200% Rule that was included in materials incorporated by reference in the incentive plan brochure and available to Plaintiff via the intranet. Plaintiff's position would also require the court to overlook IBM's reservation of the right to modify or cancel the incentive plan at any time. As the Fourth Circuit explained, "[a]t most, IBM announced a policy of payment in which it reserved discretion to itself to make the payment and to determine its amount, much like it might handle year-end bonuses."

***Perdue Farms, Inc. v. Travelers Casualty and Surety Company of America*, No. 04-2208 (decided May 16, 2006).**

Plaintiff settled a class action case in which employees alleged various ERISA and wage and hour claims. Plaintiff then filed suit seeking indemnification for the $10 million settlement amount.The relevant insurance policy clearly provided coverage for the ERISA claims, but not for any wage and hour claims. Plaintiffs' insurer provided a defense in the class action, incurring $4.4 million in defense costs. In response to the request that the insurer indemnify Plaintiff Perdue for the entire $10 million settlement, the insurer sought partial reimbursement for defense costs incurred to defend the non-covered wage and hour claims. The insurer also denied it was responsible for full indemnification for the settlement, which settlement included non-covered claims.

The district court ordered indemnification for the entire $10 million settlement and refused to award the insurer any reimbursement for defense costs. The Fourth Circuit agreed on the issue of defense cost reimbursement, but concluded that the insurer was not responsible for the entire settlement amount. The duty to indemnify (in contrast to the duty to defend), the court explained, is triggered only by actual liability, not allegations or potential outcomes. The case was remanded to the district court to determine the portion of the settlement actually related to the covered ERISA claims.

***American Bankers Insurance Group, Inc. v. Long*, No. 05-1747 (decided July 14, 2006).**

Plaintiff American Bankers Insurance Group (ABIG) filed a petition to compel Richard and Lillie Long to arbitrate claims made against ABIG. The Long's filed a class action against ABIG (and others) alleging causes of action arising from an alleged scheme to defraud investors through the sale of worthless securities. Automobile insurance policies offered by Thaxton Life Partners (TLP) were underwritten by ABIG. ABIG, however, allegedly suggested that TLP offer worthless promissory notes to the public to fund the insurance. The Longs purchased a $75,000 promissory note from TLP. The Note incorporated by reference a document entitled "Form of Senior Subordinated Term Note Subscription Agreement," which contained an arbitration clause. The Longs and TLP were signatories to the Subscription Agreement; ABIG was not.

The district court refused to compel arbitration. ABIG asserted that the Longs should be equitably estopped from arguing ABIG was a non-signatory because the Longs' claims against ABIG rely upon the terms of the very agreements that contained the arbitration agreement -- the Note, which incorporated by reference the Subscription Agreement and its arbitration clause. The Fourth Circuit reversed, agreeing with ABIG. A party may be estopped from relying upon the non-signatory status of another party to a written contract, including an arbitration agreement, where that party consistently relies upon other provisions of the same agreement.

***French v. Assurance Company of America*, No. 05-1356 (decided April 27, 2006)**

Plaintiffs contracted with Jeffco, the general contractor, for construction of a single-family home. A subcontractor applied a synthetic stucco system, Exterior Insulating Finishing System (EIFS), to the outside of the home. Several years later, water damage was discovered, which damage resulted from the defective application of the EIFS. The water intrusion caused damage to, among other things, the non-defective work of Jeffco. Though prior to the 1986 revisions to the insurance industry's standard CGL policy, the your work exclusions were interpreted to exclude coverage for damage to the contractors work resulting from defects in the subcontractors work, the 1986 standard policy, the court concluded, provided coverage for unexpected damages caused by subcontractors to the work of Jeffco. Coverage did not extend to the damage to the subcontractors own defective work.

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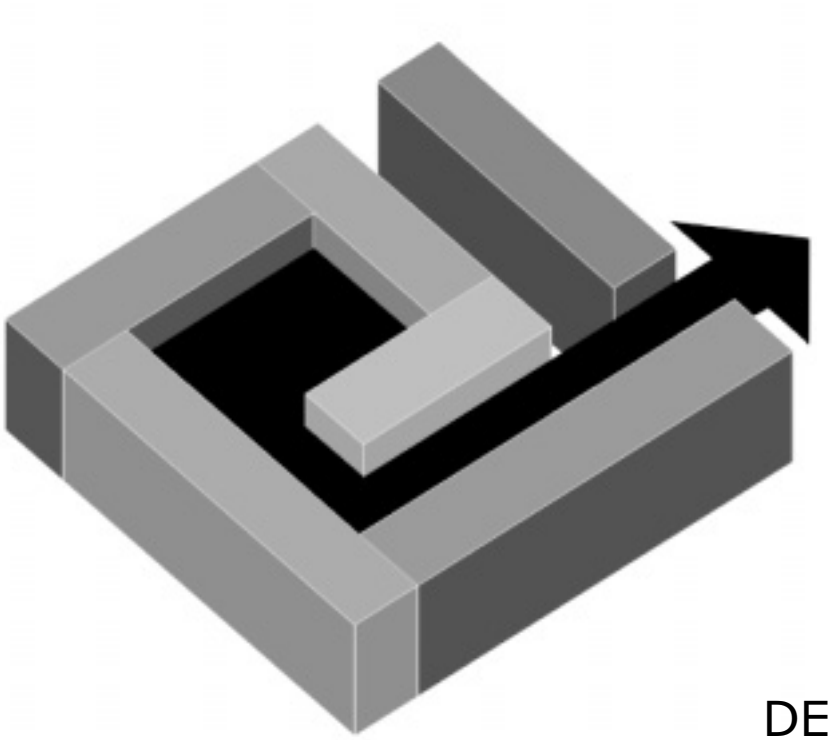

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39th Annual Joint Meeting in Review

by T. David Rheney

The 39th Annual Meeting of the South Carolina Defense Trial Attorneys' Association/South Carolina Claims Managers Association was held at The Grove Park Inn July 27-29, 2006. Nearly 300 attorneys, claims managers and guests, including four workers' compensation commissioners, were in attendance.

Once again this year there was a great group of speakers on a number of topics that were both interesting and relevant to the Association. We were particularly pleased to have as speakers Dr. Ted Davis of Albuquerque, New Mexico, Gary Parsons of Raleigh, North Carolina, Barbara Seymour at the Office of Disciplinary Counsel and Judge John Few. In addition, SCDTAA members Heyward Clarkson, J.R. Murphy, Anthony Livoti, John Cuppins, Johnston Cox and Immediate Past President Jay Courie served as speakers during the meeting.

We are most appreciative of the five vendors who attended the meeting, including A.W. Roberts Court Reporting, DecisionQuest, IKON Office Solutions, South Carolina Bar Foundation and South Carolina Lawyer's Weekly. We encourage our members to use the services these vendors offer, not just because they support us but because they are leaders in their industries. Their services can be of great benefit to each of us in our practices and we thank them for their support of the Association.

Finally, congratulations to the Young Lawyers Division of the SCDTAA for the hugely successful silent auction held on Friday evening. This year's silent auction raised nearly $12,000.00, the proceeds of which have been donated to the South Carolina Bar Foundation Children's Fund. This donation permanently places the SCDTAA in the highest level category for this worthy charity.

Given the success of the Joint Meeting now is the time to plan to attend the Association's Annual Meeting. The SCDTAA Annual Meeting will be held at Amelia Island Plantation in Florida November 9-12, 2006. Matt Henrikson, Molly Craig and Sterling Davies are finalizing yet another great program. This is a great opportunity for our members to spend time with each other and with numerous federal and state court judges who will be in attendance. We look forward to seeing you there.

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