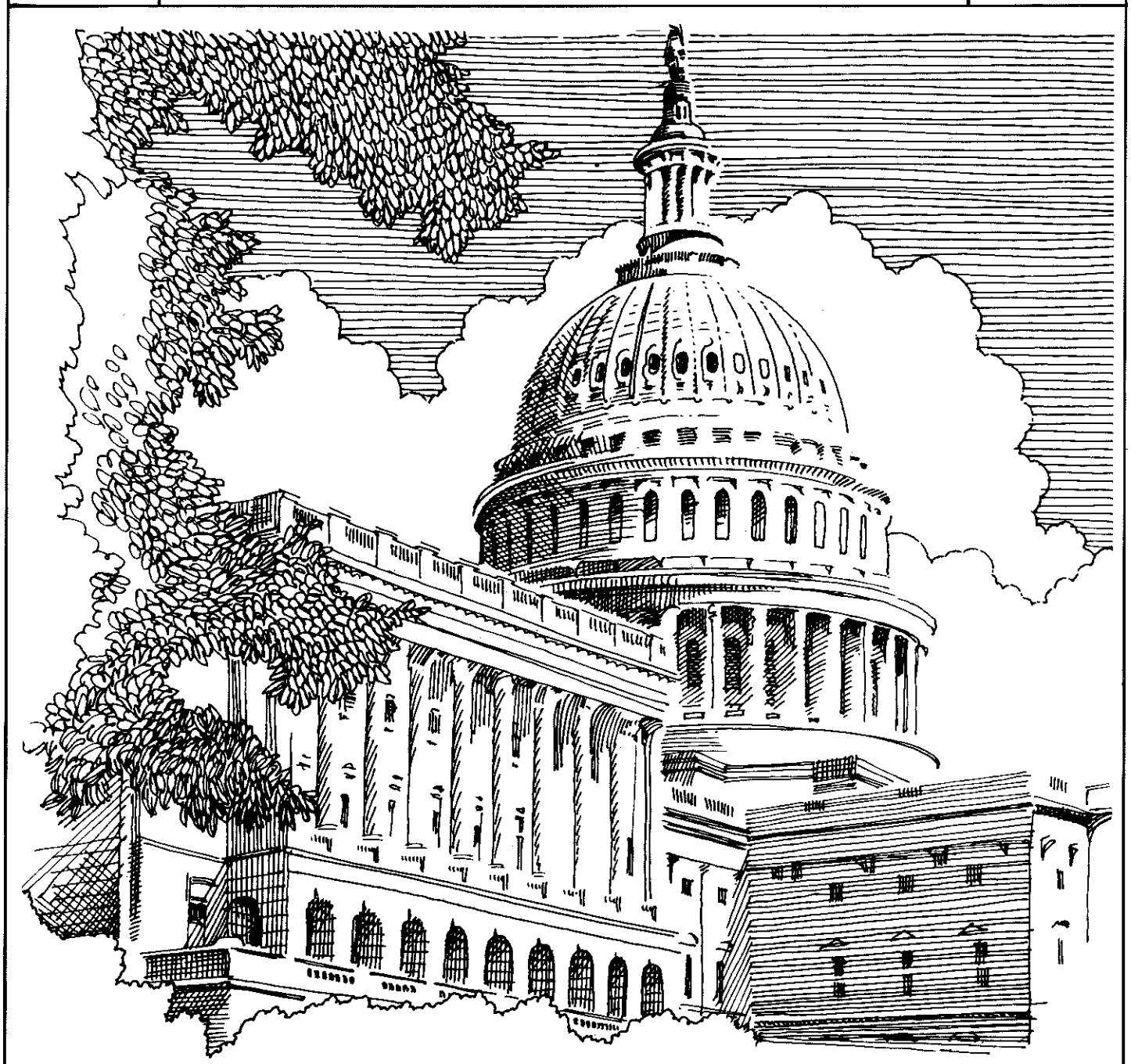
THE DEFENSE LINE

SPRING 1988

VOLUME 16 | THE SOUTH CAROLINA DEFENSE TRIAL ATTORNEYS' ASSOCIATION | NO. 2



PRESIDENT'S LETTER

CARL B. EPPS, III
Turner, Padget, Graham & Laney
Columbia, South Carolina

We are well into our year and are making good progress on all fronts. We are upgrading *The Defense Line,* as you should be able to witness with this issue. The Conventions and Programs Committees have been working on the Asheville and Kiawah Island meetings since the end of last year and will bring you programs that are interesting and educational. We are planning a joint program with CLE and have approved a tentative date of November 11, 1988. On the legislative front, a few good things have happened, and perhaps even more importantly nothing bad has happened to this point.

As you can see this issue of *The Defense Line* contains several articles authored by our members. This is a part of our program to gradually improve the quality of *The Defense Line* and is due to the efforts of **JACK BARWICK, WILL DAVIDSON, NANCY COOPER,** and the lawyers who were kind enough to submit them. We called upon a number of lawyers around the state to request that they contribute to this issue of *The Defense Line* and are proud to say that each one responded.

BILL COATES has completed the social program in Asheville, and he promises to keep both you and your spouses/dates entertained. **DAVE NORTON** and **JOHN WILKERSON** are in the final stages of planning the program. The Claims Managers are anxious to witness a summary trial and at least one day will be dedicated to that and alternative dispute resolutions. You will remember that the date for the Asheville meeting has been changed to August 11 through August 13, and you need to mark your calendars accordingly.

TIM BOUCH had essentially completed the social program for the Kiawah Island Annual Meeting to be held October 27 through October 29. Dave and John have contacted several national speakers, and we should be able to give you a full report in our next issue. We have dipped into our reserve fund over the last two or three years, and if we are going to stay in good shape financially it is going to be critical to have full attendance at our meeting this year.

As mentioned above, **GLENN BOWERS** and **MARK WALL** have arranged with the CLE to conduct a seminar on November 11, 1988 tailored to the trial bar. As you know, it has become increasingly difficult to find cases for our new lawyers to try. The Association is therefore taking steps to offer trial programs to members as a training tool, and hopefully you will see the results of some of their effort this year.

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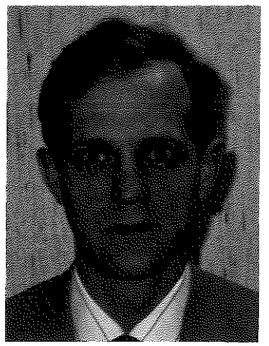
The Defense Line is a regular publication of the South Carolina Defense Trial Attorneys' Association. All inquiries, articles, and black and white photos should be directed to Nancy H. Cooper, 3008 Millwood Avenue, Columbia, SC 29205, 252-5646.

Liens For Rent

William Dixon Robertson III*
Moore & Van Allen
Columbia, South Carolina



Is a lessor of construction equipment entitled to claim a mechanic's lien for amounts he bills for rental charges? A trio of South Carolina cases decided under the public works bond statute[1] suggests rental charges do not constitute "labor or materials" within the meaning of Sections 29-5-10 and -20, Code of Laws of South Carolina, 1976, as amended.[2]

Both Code Sections 29-5-10 and -20 provide for a lien on real property and improvements for all persons who have furnished or provided labor or materials used in erection of those improvements — a mechanic's lien. Mechanics' liens are among the most powerful weapons available to any creditor for collection of amounts due him. Since the statutory lien was foreign to the common law, a person claiming a lien must bring his claim squarely within the terms of the statute.[3]

Several South Carolina decisions have defined what constitutes "labor or materials" under the lien statute. Surveying,[4] grading,[5] and security guard services[6] have all, at one time or another, been held not to support a mechanic's lien claim. With respect to these three items, the General Assembly has acted quickly to amend the statute to expressly provide for liens for these actors in the construction theater.[7] No South Carolina decision, however, has squarely decided whether a lessor of equipment can claim a lien for unpaid rental charges.

South Carolina's highway public works bond statute[8] provides a remedy for unpaid subcontractors and materialmen on state funded projects. Where a general contractor has furnished a labor and materials payment bond, unpaid suppliers can claim against the surety on the bond for payment. South Carolina's statute is similar to other "little Miller Acts" in force in nearly every United States jurisdiction; its language is virtually identical to the federal act.[9]

In *Kline v. McMeekin Construction Company,*[10] the Supreme Court held that tools, machinery and equipment used in the performance of a construction contract were not "labor or materials" within the meaning of the highway payment bond statute. *Kline* is based on a distinction between a contractor's capital costs, and his costs for materials actually incorporated into the work. Since tools and equipment ordinarily become part of a contractor's permanent assets, they are available for use on other jobs beside the project for which they were purchased. Accordingly, it would be unfair to charge the surety on a payment bond with the costs of increasing a materialman's or subcontractor's capital. With little explanation, the *Kline* court extended this rule to tools and equipment which are consumed in the course of construction.

Ten years later, the court reaffirmed the principle announced in *Kline. South Carolina Supply & Equipment Co. v. James Stewart & Co.*[11] was a suit to recover unpaid rental charges on scaffolding the plaintiff leased to the general contractor for the Greenville Memorial Auditorium. The supply company also sought damages for conversion on account of the contractor's failure to return all the scaffolding. In a confusing decision, the court permitted recovery on both counts as against the general contractor, but refused to hold the surety liable for conversion. By affirming the judgment against the surety as to the unpaid rental charges, the court apparently relied on the language of the bond, which expressly included claims for "rental of equipment directly applicable to the contract."[12]

Most recently and most emphatically, the *Kline* rule was cited in *Rish v. Theo Brothers Construction Co.*[13] There, some $480,000 in unpaid rental charges was sought from the construction surety. Refusing to overrule *Kline* and *James Stewart,* the court focussed on the "nature of the equipment" as dispositive. Since "[t]he equipment was the sort that would not have been used on only one contract, but would have become a part of the contractor's permanent 'plant' or repertoire of machinery,"[14] it did not constitute "labor or materials" under the highway bond statute.

The appellants in *Rish* urged the court to construe the statute in accord with decisions under the Miller Act. Since the highway bond statute is substantially similar to the federal act, they reasoned, the General Assembly should be deemed to have intended its similar construction. Rejecting this argument, the court noted that, although our statute had been amended since *Kline* and *James Stewart,* the key language — "labor and materials" — had not been changed. The court then "presumed" the legislature intended the amended statute to be construed as it had been in those two decisions.[15]

From a lessor's viewpoint, there remain arguments in favor of the lienability of equipment rental charges. First, there is authority from other jurisdictions that a lien claim may be proper, at least where services are provided in addition to leased equipment.[16] There should be no doubt a contractor is entitled to a lien for the value of the use of his equipment, if he uses that equipment in constructing improvements. If, for example, one of his trucks broke down and he was forced to rent another, would he not be entitled to include in his lien claim the amount of the lease charges, at least to the extent of his originally anticipated charge for the equipment?

Second, the supreme court's disregard of Miller Act decisions in *Rish* is undermined by the enactment of the State Procurement Code.[17] Section 11-35-3030 of the Procurement Code is identical to the Miller Act. The Code itself specifically exempts the Department of Highways and Public Transportation.[18] Even if the legislature intended rental charges not to serve as a basis for a claim under the highway bond statute, as pronounced in *Rish,* the Procurement Code has enacted a separate "little Miller Act" which may not be affected by that holding. Since the Miller Act has been consistently interpreted to include claims for rental,[19] and since Code Section 57-5-1660 applies peculiarly to highway projects, the mechanic's lien statute should be inter-

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LIENS

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preted consonant with the Procurement Code and not with Title 57.

Finally, the practicalities of current industry practices suggest that rental charges be included among the items of work for which a mechanic's lien may be claimed. Increasingly contractors rent equipment rather than tying up their capital in expensive "plant." Many contractors have captive leasing companies who hold major pieces of equipment for tax purposes, leasing exclusively to their parents. Nearly every general contractor's lien will include some charge — usually not identified as such — for equipment rental. None of the three cases discussed in this article have suggested that a contractor must segregate "lienable" and "nonlienable" items in his claim against the owner.

The answer to the question posed at the top of this article ultimately must come from the supreme court. Until they decide, though, owners defending against liens should include in their interrogatories one which asks the contractor to identify all charges for rented equipment. Lessors, on the other hand, may find the General Assembly more receptive to their arguments than the courts. The legislature has acted before to include non traditional services within its definition of "labor and materials"; faced with a persistent lobbying effort, it may well act again.

FOOTNOTES

The author thanks Sherry A. Lydon, Attorney at Law, for her assistance with this article, and L. Franklin Elmore, Esquire, for his informal contributions.

* Mr. Robertson is a 1983 graduate of the University of South Carolina School of Law. Following a clerkship with Judge Randall T. Bell at the South Carolina Court of Appeals, he joined the firm of Moore & Van Allen as an associate. His practice is concentrated in the area of construction contracting and litigation. Mr. Robertson is a member of the Forum Committee on the Construction Industry of the American Bar Association.

1. Section 57-5-1660, Code of Laws of South Carolina, 1976. This statute provides a direct action against a contractor's surety for "[e]very person who has furnished labor or material in the prosecution of the work provided for in such contract. . . ."

2. Code Section 29-5-10(a) provides a lien to

> [a]ny person to whom a debt is due for labor performed or furnished or for materials furnished and actually used in the erection, alteration, or repair of any building or structure upon any real estate . . . by virtue of an agreement with, or by consent of, the owner . . . .

Code Section 29-5-20(a) provides in part that

> (e)very laborer, mechanic, subcontractor, or person furnishing material for the improvement of real estate when the improvement has been authorized by the owner has a lien thereon . . . to the value of the labor or materials so furnished . . . .

3. *E.g.,* Shelly v. Sea Garden Homes, 287 S.C. 24, 336 S.E.2d 488 (Ct. App. 1985).

4. Johnson v. Barnhill, 279 S.C. 242, 306 S.E.2d 216 (1983).

5. Clo-Car Trucking Co. v. Clifflure Estates of South Carolina, 282 S.C. 573, 320 S.E.2d 51 (Ct. App. 1984).

6. *See* Code Section 29-5-25.

7. *Id.* (security guards); Code Section 29-5-21 (surveyors); Code Section 29-5-10(a) (excavation and grading).

8. Code Section 57-5-1660, quoted at n. 1, *supra.*

9. *CF.* Code Section 57-5-1660 *with* 40 U.S.C. §270b.

10. 220 S.C. 281, 67 S.E.2d 304 (1951).

11. 238 S.C. 106, 119 S.E.2d 517 (1961).

12. *Id.* at _____, 119 S.E.2d at 520.

13. 269 S.C. 226, 237 S.E.2d 61 (1977).

14. *Id.* at _____, 237 S.E.2d at 63.

15. *Id.*

16. Ellis-Mylroie Lumber Co. v. Luke's Hospital, 119 Wash 142, 205 P. 398 (1922); *cf.* Giles & Ransome, Inc., v. First National Realty Corp., 238 Md. 203, 208 A.2D 582 (1965); *but see* Mableton Erectors v. Dunn Properties of Georgia, 135 Ga. App. 504, 218 S.E.2d 175 (1975), *contra.*

17. 1981 S.C. Acts & Jt. Res., Act No. 148, codified as Chapter 35 of Title 11, Code of Laws of South Carolina, 1976, as amended.

18. Code Section 11-35-710(a).

19. *E.g.,* United States f/u/o Eddie's Sales & Leasing v. Federal Ins. Co., 634 F.2d 1050 (th Cir. 1980) (earth moving equipment); United States f/u/o P.A. Bourquin & Co. v. Chester Constr. Co., 104 F.2d 648 (th Cir. 1939) (scaffolding).

PRESIDENT'S LETTER

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We are approximately mid-way through our legislative session at this point. A tort reform bill has been agreed upon by members of the Coalition and the South Carolina Trial Lawyers' Association which accomplishes the following:

1. Reduces the statute of limitations from six years to three years;
2. Reduces the tolling period for infants and minors to seven years for medical health care providers;
3. Provides that no new trials can be granted on the issue of damages alone, unless the only inference from the evidence was that the Plaintiff was entitled to a verdict as a matter of law;
4. Provides that punitive damages can only be obtained if there is "clear and convincing proof" that the Plaintiff is entitled to them;
5. Establishes a right of contribution among joint tort feasors; and
6. Imposes liability for costs and attorneys fees on the losing party if he brings a frivolous lawsuit or offers a frivolous defense.

There will be no cap on non-economic damages, nor will there be any modification of the collateral source rule or joint and several liability. Contributory negligence will be retained as a condition to the compromise.

I think most lawyers will agree that these changes are improvements to our system. There will be very little money savings, if any, but the Coalition's position was never directed towards money savings *per se.* I am very pleased with the bill because it strikes a good balance between the rights of the injured party and the Defendant, and again wish to express my appreciation to other members of the Association who helped the legislation, particularly **ED POLIAKOFF, THOM SALANE, BILL GRANT** and **MARK WALL,** as well as the members of the Speakers Committee.

Please mark your calendars for the Joint Meeting, Annual Meeting and our seminar.

EXPERTS PART 2: FIRE INVESTIGATORS

Dr. Richard W. Henderson
Southeastern Research Laboratories, Inc.
Quinby, SC 29501

In the parlance of today, "C and O" is used to refer to the determination of the "cause and origin" of a fire. Such a term is backwards, since the origin of a fire must be identified before its cause can possibly be determined. Unfortunately, some investigators find "a cause," and then place the origin in that area. In this paper, the steps necessary to conduct a proper fire investigation will be reviewed, and some problem areas in reconstructions will be pointed out.

A fire investigation can be compared to an attempt to assemble the pieces to a gigantic, complicated jigsaw puzzle. In some cases, there are too few pieces available for any picture to emerge. In others, many pieces are available, but not in the crucial area of origin. Even when the origin can be identified, there may not be sufficient definition to allow identification of the specific cause. The pieces of the puzzle can be generally broken down into four main areas of information (there will be some overlap): 1. Context; 2. Witnesses; 3. Fire Scene; and 4. Analyses/Tests.

Context information includes the type of construction and materials used, furnishings/contents, services present (gas or other fuels, electricity), flammability properties of materials in the structure, heating/cooling systems and equipment, flammable liquids normally present, sources of ignition, and related details.

Witness accounts are important, especially those of the occupants, and any observations they may have made, such as unusual odors (smoke, gas smell), electrical or appliance problems (flickering lights, breakers tripping, heating/air conditioning equipment problems), status of windows/doors (open, closed, locked), access to building, threats or malicious mischief, and the locations of the various contents. Neighbors may be helpful, in particular if they are eyewitnesses to the fire; descriptions of the time parameters and other factors of the fire (such as areas/colors of smoke/flames, progress of fire, explosions, and people seen in the area) can be crucial. The public officials responding to the scene are quite important, especially the fire department personnel, who are the first trained professionals who are assessing the fire itself. They can provide details on wind direction and velocity, fire suppression efforts, unusual odors, containers found, flashovers, backdrafts, flashbacks, and changes made in the fire scene.

The third area involved fire scene information. Clearly, on-site investigators have the best *opportunity* to investigate the fire; however, a review of photographs (if they are representative and detailed), diagrams, and other materials can provide an excellent alternative. The burn pattern characteristics, which are important in establishing the fire origin area, include "V" patterns (which usually look more like "U's"), flammable liquid pour trails, floor burn-throughs, above-floor vs. below-floor damage, signs of forcible entry, lines of demarcation (smoke lines), melted items, explosion indicia, electrical malfunctions, equipment damage, and other observations.

While spalling (chipping and delamination) in concrete is cited as evidence of the presence of a flammable liquid, control tests have shown that such an interpretation is not always justified. The interpretation of melted steel items, clear, crazed glass, and smoke stains on bricks and other materials is also subject to question. Much misinformation is generated by "after-the-fact-artifact-finders" (ATFAFS). These investigators go to fire scenes, find various phenomena, and then offer their interpretations as to the

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(Photo 1)

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origin of the artifacts, without conducting appropriate experiments to test their theories.

The fourth general area includes engineering and chemical tests and analyses. The presence of a flammable liquid in fire debris does not automatically mean that a fire was set, any more than negative results prove the fire was accidental. Unfortunately, in some cases, investigators have relied on positive results to conclude that a fire was set, when in fact the type of liquid detected was normally present in that area. Also, it must be shown that the analyses were interpreted correctly, requirements that are not met by some laboratories in some cases (a more detailed discussion of this area will be given in a future article). Engineering tests can be conducted to identify the specific mode of failure of a piece of equipment (malfunction prior to vs. during the fire). Other examinations may also be useful; gas lines and equipment; and flammability properties of construction materials and contents.

After the fire origin area is determined, all reasonable possible causes for the fire must be identified. If all of the possible causes are equally likely (that is, each can account for the burn pattern characteristics and other factors of the fire), then the specific cause cannot be specified. On the other hand, if a review of the evidence shows that one potential cause is more likely than any of the others, then it can be identified as the probable source of ignition.

In some fire cases, usually suspicious losses, an additional class of information ("background") is developed: for example: prior fires, marital problems, property for sale, overdue payments, bad credit, poor reputation, and informants' statements. Background information may be of value in providing motive, but should not play any role whatsoever in the determination of the origin and cause of a fire. Unfortunately, some investigators allow such details to influence their conclusions about fire causes; this is absolutely improper. It should be remembered that an accidental fire can happen to anyone, even a sleaze-ball. It is preferable that the on-scene and off-scene investigations be conducted independently, so that the determination of the cause of the fire will not be prejudiced by background information. In some cases, the criteria used by certain investigators to conclude that fires were set are very weak, and the evidence they cite is only *consistent* with a set fire. It should be remembered, however, that before a fire can be classified as arson, *every* reasonable, accidental cause must be excluded. I often wonder if these same investigators who are so easily persuaded that certain evidence proves that a stranger's house was intentionally burned, would have the same opinion if it had been a close friend's house. I would like to point out that I am no apologist for arsonists; I think they should go to jail. Of the some 25 cases that I have worked with insureds, as well as arson defendants in criminal cases, I concluded that arson was involved in 20 instances, and received a subpoena by the prosecution in two of the cases. As a result, I don't get invited to work with such individuals very often any more.

(Photo 2)

(Photo 3)

Photographs 1-3, which were taken by the first investigator, show the cleared area where the hole was, but a piece of carpet is standing up in front of the hole, blocking the view.

In most jurisdictions, a fire expert can testify that he concluded that a fire was intentionally set (but usually not who he thinks set it). In New York and a few other states, however, it has been held that such a conclusion invades the province of the jurors, who should be deciding that ultimate issue in such cases. Recently, in a New York Supreme Court, a fire investigator was allowed to testify that the fire in that case was not "chemically, mechanically, electrically, or naturally caused." Although the only other possibility was arson, the court held that such testimony did not include an opinion on the ultimate issue, namely the incendiary origin of the fire.

It is rare that my conclusions differ from those of law enforcement and fire service personnel. On the other hand, some of the opinions that private fire investigators have expressed, and the methods by which they arrived at those opinions, are nothing short of unbelievable. One arrived at the scene of a substantial commercial loss (it was burned completely to the ground), and without talking to any eyewitnesses, fire service or law enforcement personnel, strolled around the scene to get "sensations" (apparently some type of emanations) from the remains. He then walked over to an otherwise undistinguished spot, and announced that it was the origin of the fire. Truly a miraculous performance! In another case, an investigator determined that a ballast (one of the more popular targets of ATFAFS) had caused a fire in a large plant. Later, it was found that during the fire, two employees of that plant looked in the room where the ballast was located, and clearly ruled out any possibility that the fire started there, since they could see the equipment, but no fire anywhere in that room. Did that affect the investigator's conclusion? Not in the least. In a difference case, an investigator testified that he believed an overheated ballast caused the fire, in spite of the fact that a) the nearest combustible to that ballast (a 2 x 6 ceiling joist) was 14 inches away, b) he found no defect in the ballast, and c) people in the area at the time of the fire did not smell anything unusual.

Occasionally, an investigator will

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LEGAL ASSISTANTS TODAY

E. Celeste Cox
Legal Assistant
Nelson, Mullins, Riley & Scarborough
Columbia, SC

Almost twelve years ago when I moved to Columbia as a legal assistant, most defense firms in the state were not utilizing legal assistants. Their reasons varied from not knowing how to utilize one to not feeling comfortable with a non-lawyer working on their files.

Today, the attitude toward legal assistants is different. Legal assistants have become a viable and important part of most defense firms in South Carolina, both large and small. They have assumed professional status in the legal community throughout South Carolina and the United States. The attitude now is that most defense firms could not operate without their legal assistants.

What can a legal assistant do for you and your firm? The role varies depending on the size of the firm, but basically the legal assistant assumes the responsibility for many non-lawyer tasks previously done by attorneys. He or she is a team player who, more often than not, knows the file and the witnesses as well as you do. The legal assistant contacts witnesses, summarizes depositions and medical reports, prepares pleadings, organizes the file and documents and monitors deadlines and can be the most valuable asset in preparing a case for trial. Lest we forget the bottom line, a legal assistant is also a timekeeper whose valuable efforts are billable to the client. At the same time the legal assistant is able to do the everyday monitoring and work on a file at a less expensive rate than an attorney, saving the client money and freeing the attorney to spend more time on the legal and tactical issues.

If you ask any attorney today who utilizes a legal assistant about his or her role in the firm, most would confirm that the legal assistant is an invaluable part of the law practice and particularly the team approach to case preparation. What a difference twelve years make!

NEW LEGAL ASSISTANT ASSOCIATION

Nelda T. Canada
Paralegal
Glenn, Irvin, Murphy, Gray & Stepp
Columbia, SC

On January 30, 1988, legal assistants from the Columbia area attended an organizational meeting of the Columbia Legal Assistant Association (CLAA). CLAA is a professional organization for legal assistants with its purposes and objectives being to provide a forum of communication for the exchange of ideas and information; to provide sources of continuing legal assistants and members of the legal community, particularly in the form of seminars and publications; to cooperate with and to achieve enhanced participation with national, state and county bar associations; to promote the legal assistant as an educated and experienced professional; to encourage a high order of ethical and professional attainment; and, to participate in the formation of guidelines and standards for legal assistants.

Membership in the CLAA is open to residents of the State of South Carolina who meet membership requirements. Active, Associate, Student and Sustaining memberships are available. CLAA will explore affiliation with a national legal assistant association.

CLAA has adopted the following definition of a legal assistant as set forth by the American Bar Association.

> A legal assistant is a person qualified through education, training, or work experience, who is employed or retained by a lawyer, law office, governmental agency, or other entity in a capacity or function which involves the performance, under the ultimate direction and supervision of an attorney, of specifically-delegated substantive legal work, which work, for the most part, requires a sufficient knowledge of legal concepts that, absent such assistant, the attorney would perform the task.

CLAA will hold monthly membership meetings and will offer a minimum of 10 hours of continuing legal education during each year. Members of CLAA are governed by the Code of Ethics and Professional Responsibility as formulated by the National Association of Legal Assistants, which incorporate the American Bar Association Code of Professional Responsibility as one of its canons.

Inquiries regarding membership may be addressed to Valorie Songer, President, at P.O. Box 11634, Columbia, SC 29211-1634; telephone: 799-2000.

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overlook important pieces of evidence. For example, the initial investigator on the scene concluded that a house fire, which had originated in the den, resulted from an electrical malfunction in one corner of the room. He stated in his notes that "there were no holes in any of the flooring of the house," and his photographs did not show any (a most unholy house). Later, a second investigator took photographs; they clearly show a hole burned through the floor in a different corner of the den from the first investigator's origin (a holy house, after all). Floor burnthroughs usually occur near the point of origin, since heat and flames move upward and outward. Thus, the hole was evidence tending to support an initial fire away from the first investigator's origin. Photographs 1-3, which were taken by the first investigator, show the cleared area where the hole was, but a piece of carpet is standing up in front of the hole, blocking the view. Photograph 4, which shows the hole, was taken by the second investigator.

The reconstruction of the scenario of a fire loss is supposed to be tailored to fit the evidence. However, in some investigations, the facts are forced to fit the theory; in that regard, these cases remind me of Procrustes, host extraordinary from medieval times. When a traveler passed near Procrustes' castle, he was invited inside and treated to a sumptuous banquet, followed by dancing girls and magicians. Then the honored guest was taken to an elegant bedroom. If he was shorter than the bed, he was stretched out to the proper length; on the other hand, if the visitor was too long, he would be chopped down to fit.

There have been some rather incredible statements by investigators; for example, one stated that he tasted fire debris as part of his investigation (I wonder if he is a member of the National Geographic Society). A different investigator testified that after he wrote reports, he threw away his field notes, interview notes, and diagrams, because his wife didn't like the mess. Another said in a deposition that "If it's suspicious, it is my job to relate it to the insured." While the first two statements are amusing, the last one is appalling; if an investigator tries hard enough to implicate an insured, he may well succeed, either rightly or wrongly. The correct approach is "innocent until proven guilty"; that is, he should try to rule out the insured, until the evidence doesn't allow any other reasonable conclusion. Then the carrier's representatives can appear in court and testify that they could not in good conscience honor the claim, rather than being put in the position that they were looking for an excuse to deny it. While we are on this subject: It is critical to have knowledgeable claims personnel involved in cases. One testified that once a fire was determined to be intentional, the insured had to have been involved because ". . . the only type of arson is arson-for-profit" (the case was settled for about twice the policy limits).

(Photo 4)
Photograph 4 shows the hole.

With respect to engineers, while most electrical (and other) engineers do not have sufficient training in fire investigation, they still feel qualified to go to fire scenes to investigate fire losses. In some cases, these consultants reach such ludicrous conclusions that it would be humorous if the cases weren't so serious. For example, one electrical fellow testified that he knew a certain malfunction (which he said leaves no sign of damage) had occurred in some wiring, causing a substantial fire. When asked how he knew it had occurred, he testified (with a straight face) that it was quite obvious to him, because there was no evidence of a malfunction in the wiring.

Then there are the cases of industrial strength BS. In a report on a house fire investigation, an investigator stated that he knew it had been set with an accelerant, because there was some melting on the metal grates in the block foundation of the house (the house was completely consumed by fire, a situation in which ATFAFS can be as free as the wind in their interpretations). His report read, "The melting is very unusual as 89% of heat will go up at 90 feet per second unimpeded, with 7% horizontal spread and only 4% build-down." This truly is a magnificent statement. But it is meaningless in the contest of this fire and probably all others as well. Finally, watch out for "advocate" consultants; if an investigator's resume or the investigator refers to how much he has saved insurance companies, beware! The investigator's function is not to save anyone anything, but rather to find out what happened and let the chips fall where they may.

I follow two rules in my casework: Be Prepared, and Tell the Truth. I do my best to avoid misinterpreting evidence, and try to be receptive to critiques of my investigations (I find playing devil's advocate with my reconstruction very helpful). Since so much depends on the conclusions we reach, especially in arson cases, it is mandatory for us to work conscientiously to reduce the likelihood of error, by conducting careful, competent investigations.

DR. RICHARD W. HENDERSON

Dr. Henderson, President of Southeastern Research Laboratories, in Florence, South Carolina, has been actively involved in fire investigations for nearly fifteen years, and has been qualified on numerous occasions as an expert in fire investigations and laboratory analyses in Federal and State Court. He was appointed by the Governor of South Carolina to the Arson Task Force, the Jail Commission Fire Safety Committee and the Advisory Board for the State Fire Marshal's Arson Control Team. He has presented lectures throughout the United States, including a program at Oxford University in England, and has published many articles dealing with fire investigation (over 200 programs and papers). He is the Fire Programs Coordinator at Francis Marion College (which sponsors an annual Fire, Arson, and Explosion Symposium), and has conducted numerous burn exercises with structures, vehicles, and kerosene heaters to determine burn pattern characteristics and flame temperature profiles.

RECENT DECISIONS

SHARPE V. S.C. DEPT. OF MENTAL HEALTH

Charles E. Carpenter, Jr.
Richardson, Plowden, Grier & Howser

This is an action for wrongful death against the Department of Mental Health. A mental patient named Sevits who had voluntarily admitted himself to the Department of Mental Health where he was treated for three weeks was released upon his own request. At the time of Sevit's release he was advised of his need for out-patient treatment and an appointment was scheduled for Sevits at the Columbia Area Mental Health Center. He was given medication to take through his first scheduled appointment.

Over two months later the deceased and a friend were working on a car beside the trailer in which Sevits lived. After asking the two men to keep the noise down because he had a headache Sevits fired a shotgun from his window killing one and wounding the other.

The complaint alleged negligence in two particulars: (1) in failing to give Sevits proper medical treatment or aftercare; and, (2) in failing to warn the public Sevits was in an unstable condition when he was released.

It should be noted that any claim for negligence in discharge is barred by §44-17-900, Code of Laws of South Carolina, 1976, which grants immunity to those legally participating in release or discharge of a patient from a mental health facility. *See, Sharpe v. S.C. Dept. of Mental Health,* 281 S.C. 241, 315 S.E.2d 112 (1984).

The present case was tried before Judge Julius H. Baggett, Jr., who found in favor of the Defendants. The Plaintiff appealed to the South Carolina Court of Appeals which affirmed the decision. The two judge majority of the panel affirmed without reaching the question of whether there is a general duty to warn of the dangerous propensities of others by therapists. In a concurring opinion Judge Bell went into a detailed analysis of when a legal duty arises. The concurring opinion of Judge Bell concluded that there is no principle of the common law which recognizes a duty to warn the public at large when a mental patient is released. The concurring opinion points out that there is no effective way to give the public a meaningful warning that a released patient is potentially unstable. If all institutions, in order to protect themselves from liability, adopted a policy of routinely issuing warnings not only would this involve considerable effort and expense but it would create other problems. The warnings themselves would not likely be heeded. The content of the warnings might create new grounds for legal liability. The warnings would intrude on patients' privacy; would often be therapeutically conterproductive; would publicly stigmatize mental patients and most probably deter them from seeking treatment. Such warnings would undermine the policy of favoring voluntary rather than involuntary treatment for mental disorders and would undermine the policy favoring release and reintegration of mental patients into the community. Rather than making the law more simple and certain it would create a maze of complex legal questions where none presently exist.

The opinion also recognizes that the creation of a duty to warn is unlikely to either alert the public or prevent such tragedy since these warnings, issued routinely to avoid legal liability, would become the cry "wolf!" and would have no meaningful effect on public awareness or safety.

Judge Bell then addressed the argument that warning the public would allow the police to take preventive measures. This too was rejected. The police have neither the competence, the duty, nor the legal authority to supervise after care for mental patients or to force a person to take medication or otherwise comply with a treatment regime.

The concurring opinion concluded that the Department owed the deceased no duty with respect to the patient's treatment and no duty to warn the public upon his release. Since no duty was owed the judgement for the Defendants should be affirmed. *Sharpe v. S.C. Dept. of Mental Health,* _____ S.C. _____, 354 S.E.2d 778 (S.C. App. 1987).

After the decision of the South Carolina Court of Appeals the Plaintiff petitioned the South Carolina Supreme Court for a Writ of Certiorari which was issued on July 2, 1987. On January 25, 1988, the Supreme Court issued an unpublished Order which dismissed the Writ of Certiorari as improvidently granted. The Order dismissing the Petition of Certiorari as improvidently granted cites the concurring opinion of Judge Bell from the Court of Appeals as the basis for the dismissal of the Writ of Certiorari. It appears that the analysis of Judge Bell that no duty exists is the correct current interpretation of South Carolina law.

SETTLING WITHIN POLICY LIMITS OVER INSURED'S OBJECTION

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Gardner v. Aetna Casualty & Surety Company, No: 87-2593 (March 4, 1988)

The plaintiff in this case, an oral surgeon, sued his malpractice carrier as a result of its settlement of a malpractice case against him, over his objection, for a sum of money that was well within the policy limits. The insurance policy specifically allowed the insurance company to make any settlement "as it deems expedient." Complaining that the settlement damaged his reputation and restricted his ability to obtain additional malpractice insurance in the future, the doctor alleged that the insurance company breached an implied covenant of good faith by its failure to seek a prelitigation malpractice review panel, failure to investigate the claim adequately, failure to keep him informed of the progress of the case, and failure to allow him the option of assuming responsibility for the litigation before settlement. An interesting sidelight of this case is the fact that the doctor has pleaded guilty to the criminal charge of hiring someone to kill his business partner.

Although the Court of Appeals affirmed the District Court's decision dismissing the Complaint, it did not rely upon the "deems expedient" language of the policy. The Court stated that the respon-

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sibility to exercise good faith in settlement does not "evaporate" even if the settlement does not impose an immediate financial obligation on the insured because "under the proper circumstances, an involuntary settlement could still inflict harm of other types upon the policyholder." Therefore, the Fourth Circuit held that the proper issue was "not whether Aetna exercised unfettered discretion based on the 'deems expedient' provision in its policy but whether there was any material question of bad faith presented by Aetna's activity." The Court found that "under the facts of this case the decision to settle the West claim was unquestionably a product of reasoned good faith on behalf of Aetna." However, the Court did frown upon the failure of the insurance company to keep the doctor informed of the progress of the case. In particular, the Court took note of the fact that the attorney presented the settlement to the doctor "as a fait accompli." Interestingly enough, the Court concluded that there was "no basis for appellant's claim that Aetna was required to give him an opportunity to assume control of the litigation before settling it over his objection."

OFFER OF COVERAGE

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Two recent unpublished South Carolina Circuit Court Orders addressed the issue of State Farm Mutual Automobile Insurance Company's offer of underinsured motorist coverage. Both cases concerned whether State Farm's brochure which accompanied the renewal premium notice constituted a sufficient offer of underinsured coverage pursuant to S.C. Code Ann. §56-9-831 (1976, as amended).

In the case of *Mary Bramlett v. Nationwide Mutual Ins. Co., State Farm Mutual Automobile Ins. Co., and the SC Dept. of Education,* Judge Bristow held that the brochure accompanying the premium renewal notice was a sufficient order. Judge Bristow stated:

> The brochure mailed to the insured with the renewal notice states at its top: "Important Information . . . Offer of Coverage U and Coverage W." It then continued to explain what coverage U is (uninsured motor vehicle coverage) and what coverage W is (underinsured motor vehicle coverage). It then continues "you may purchase coverage U and coverage W," detailing the limits of such coverage. In the next paragraph it states: "if you are interested in . . . adding coverage W, please refer to your enclosed premium notice."

The enclosed premium notice indicated what the insured's cost would be if he chose to purchase underinsured motorist coverage.

Judge Bristow held that the mailing of the brochure which accompanied the renewal premium notice constituted a meaningful offer to purchase underinsured motorist coverage despite the fact that the insured may not have read the brochure. The Court noted that although a policyholder may not read or might even throw away the material that comes through the mail, that fact was not within the control of the insurer. The Court also noted that mail is used by many people for all sorts of business connections and is certainly a "commercially feasible" way of communication.

In the second case, *Albert J. Bennett, Ind. and as Executor of the Estate of Marcia D. Bennett, deceased v. Fred M. Hewitt and State Farm Mutual Automobile Ins. Co.,* Judge McInnis held that the brochure which accompanied the renewal premium notice did not constitute an adequate offer of underinsured motorist coverage. In his Order, Judge McInnis compared the original offer of underinsured motorist coverage which was deemed inadequate in the case of *State Farm Mutual Automobile Ins. Co. v. Wannamaker,* 291 S.C. 518, 354 S.E.2d 555 (1987), with the information contained in the second brochure which accompanied the renewal premium notice. Judge McInnis concluded that the substantive effect of the second mail out was the same as that of the mail out in the *Wannamaker* decision and, therefore, the offer of underinsured motorist coverage accompanying the renewal premium notice was inadequate. It should be noted that the *Bennett* decision has been appealed by State Farm.

This issue of whether the brochure which accompanied the renewal premium notice constitutes an adequate offer of underinsured motorist coverage is also on appeal in the case of *Rebecca Jean Smith v. State Farm Mutual Automobile Ins. Co.* Oral argument in that case was heard on Wednesday, March 16, 1988. It is anticipated that a decision will be published by the Court of Appeals within the next two months.

BAD FAITH EXTENDED TO UNINSURED MOTORIST CLAIMS

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United States District Judge G. Ross Anderson, Jr. recently denied a motion to dismiss under Rule 12(b)(6) in a case involving allegations of bad faith handling of an uninsured motorist claim. In so doing, Judge Anderson predicted that the South Carolina courts would recognize such a cause of action if presented with this issue.

In *Frederic C. Jefferson v. Allstate Insurance Company,* Civil Action Number 87-1886-3 (U.S.D.C.-Greenville Division), the plaintiff alleged that his insurer, Allstate, breached a duty of good faith in failing to reasonably compromise, settle or pay the uninsured motorist claim he had submitted. Allstate filed a motion to dismiss, arguing that South Carolina law does not recognize or allow a bad faith cause of action against an uninsured motorist carrier. The plaintiff did concede that a bad faith cause of action against an uninsured motorist carrier had not been decided by the South Carolina courts, but contended that if presented with the issue, South Carolina courts would recognize such an action.

In his order filed November 25, 1987, Judge Anderson discussed the existing law in South Carolina on bad faith, noting the doctrines established by *Tyger River Pine Company v. Maryland Casualty Company,* 170 S.C. 286, 170 S.E. 346 (1933); *Miles v. State Farm Mutual Insurance Co.,* 238 S.C. 374, 120 S.E.2d 217 (1961) and *Nichols v. State Farm,* 279 S.C. 336, 306 S.E.2d 616 (1983). Judge Anderson rejected an argument by Allstate that the *Nichols* holding is limited to the payment of first party benefits by insurer. He found that *Nichols* "places no limitation on an insurer's duty of good faith and fair dealing with its insured."

Judge Anderson went on to note that this ruling was supported by decisions in other jurisdictions. In particular, he relied upon *Craft v. Economy Fire and Casualty Co.,* 572 F.2d 565 (7th Cir. 1978) and *Richardson v. Employer's Liability Assurance Corp.,* 25 Cal. App. 3rd 232, 102 Cal. Rptr. 547 (1972). In *Craft,* the Seventh Circuit Court of Appeals noted that an uninsured motorist claim did in-

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MINOR SETTLEMENTS UNDER THE SOUTH CAROLINA PROBATE CODE

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Until the enactment of the South Carolina Probate Code, South Carolina Code Sections 15-71-10 et. seq. governed the compromise and settlement of litigation involving minors. Under the old procedure the minor's guardian ad litem would negotiate the settlement and obtain the approval of the circuit court.

Sections 15-71-10 through 15-71-30 were repealed on July 1, 1987 and replaced with the sections of the SCPC discussed in this article. Under new Section 62-5-424(c)(12) a conservator which has been appointed for a minor may approve settlements on behalf of the minor. The section does not require court approval of such settlements.

In September of 1987, the South Carolina Supreme Court issued an Order modifying the provisions of Section 62-5-424(c)(12). In this Order, the Court ruled that while a conservator may settle litigation involving a minor without approval of the *probate court,* this does not remove the necessity of *circuit court* approval. The Order further provides that even though Section 15-71-30 was repealed by the SCPC, the guardian ad litem retains his common law authority to negotiate a settlement on behalf of a minor and to seek court approval of the settlement where a conservator has not been appointed.

Under this modified procedure, if a conservator has been appointed for a minor the conservator may negotiate a settlement on behalf of the minor and petition the circuit court for approval of such settlement. If a conservator has not been appointed, however, the minor's guardian ad litem may negotiate the settlement on behalf of the minor and petition the circuit court for its approval. The conservator, or if there is no conservator the guardian ad litem, shall execute a proper receipt and release which shall be binding on the minor.

The order of the circuit court which approves the settlement should direct the method by which the settlement proceeds are disbursed. If a conservator has been appointed the settlement proceeds must be paid to the conservator regardless of the amount of the settlement. If no conservator has been appointed and the settlement proceeds exceed $10,000 per year the net proceeds shall be held in a trust account of the minor's attorney, or, if the minor is not represented by counsel, by the clerk of the circuit court until a conservator is appointed and the circuit court directs payment to the conservator.

If the amount of the settlement does not exceed $10,000 per year and the party making the payment has no actual knowledge that a conservator has been appointed or that proceedings for the appointment of a conservator are pending, Section 62-5-103 provides that the proceeds may be paid to (1) the minor if he is married; (2) any person having the care and custody of the minor with whom the minor resides; (3) a guardian of the minor; or (4) a financial institution incident to a deposit in a federally insured savings account in the sole name of the minor giving notice of such deposit to the minor.

The Judiciary Committees of both houses of the General Assembly are working with proposed legislation which would provide statutorily for essentially the procedure described in the Supreme Court's Order.

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volve unequal bargaining positions and must, of necessity, involve reasonable expectations of good faith and fair dealing. *Richardson* was cited for the proposition that in every insurance policy there is an implied covenant of good faith and fair dealing, including uninsured motorist policies. Since the South Carolina Supreme Court followed the reasoning of the California courts in *Nichols,* Judge Anderson found no reason to believe that South Carolina would not go further and extend such a cause of action to uninsured motorist claims.

Allstate argued that the statutory scheme in South Carolina regarding uninsured motorist coverage , found at Section 56-9-830, placed the insurer and the insured in an adversarial posture, as the carrier is given the right to appear and defend in the name of the uninsured motorist. Allstate argued that there can be no duty of good faith regarding the settling of a disputed claim in light of this adversarial posture.

Judge Anderson rejected this argument, relying again on the *Craft* decision of the Seventh Circuit. Judge Anderson agreed that the insured pays a premium for the coverage and has a "reasonable expectation" that he will be dealt with fairly and in good faith. In *Craft, the Seventh Circuit found that the adversarial posture "does not materially distinguish uninsured motorist insurance from first party insurance with respect to the existence of a duty on the part of the insurer to handle the insured's claim fairly and in good faith." Craft, supra,* at 569.

Allstate then argued that the South Carolina cases interpreting Section 56-9-830 stand for the proposition that the carrier's duty is limited to paying judgments rendered against the uninsured motorist. Judge Anderson noted that the cases did not address the issue of good faith and therefore do not support the conclusion that there is a complete absence of such a duty on the part of the carrier.

Finally, Allstate argued that under prior South Carolina law, the insured must establish legal liability through a tort action against the uninsured motorist prior to bringing an action *ex contractu* against the carrier. Judge Anderson rejected this argument on the grounds that these cases did not expressly address the "bad faith" issue.

While Judge Anderson's order is unpublished and is not binding on the South Carolina courts, it may encourage further cases of this nature and automobile insurance carriers and attorneys who represent them should be put on notice of their potential liability in the handling of such claims.

FEDERAL RULE 11 — STANDARDS AND APPLICATION

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Federal Rule of Civil Procedure 11 was amended in 1983 to authorize sanctions for frivolous filings. As set out below, the procedure, standards, and the Federal Appellate and District Court decisions concerning the Rule which have been handed down are illustrative of the continuing problem facing the Practitioner.[1] The origin of a rule requiring the counsel to sign pleadings extends back to the English equity practice at the time of Sir Thomas More. The original purposes behind the Rule seem to have been to assure that the pleadings complied with the correct form and to grant counsel and monopoly over cases brought before the Chancery Courts. Justice Joseph Story, however, believed that counsel's signature served to guarantee that "there is good ground for the suit in the manner in which it is framed." [2] This principle continues in the present Rule.

In 1983, the Rule was substantially changed. Under the former Rule 11, an attorney's signature on a pleading constituted a certificate that there was good cause for the pleading and that it was not brought for the purpose of delay. This rule was severely criticized on the grounds that "good cause" was poorly defined. Other abuses, such as litigation intended to harass or force the opposition party to incur unnecessary expense, were not prohibited. The new Rule 11 provides that an attorney's or party's signature on a pleading, motion, or other paper constitutes a certificate that (1) a reasonable inquiry of the relevant facts and law was conducted, (2) that the pleading, motion, or paper is well grounded in fact, (3) that it is warranted by existing law, or a good faith argument for the extension, modification, or reversal of existing law exists, and (4) it is not interposed for any improper purpose such as harassment, delay, or unnecessary cost.

A subjective bad faith standard prevailed under the former Rule 11. A pleading gave rise to a violation then only if the attorney signing it was aware that there was no good ground to support the pleading or that it was brought for the purpose of delay.[3] The new Rule 11 encompasses both an objective and subjective standard.

Rule 11 currently provides that a pleading or motion must be supported by a "reasonable inquiry." According to the advisory committee notes, the requirement of a reasonable inquiry "is more stringent than the original good faith formula, and thus, it is expected that a greater range of circumstances will trigger its violation."[4] The amendment to the Rule also deleted the restriction that a violation must be willful in order to sanction an attorney personally. As a result of this amendment, every Court of Appeals that has considered the question has held that Rule 11 incorporated this objective standard of reasonableness.[5] A noted writer on the subject, Judge William Schwarzer (N.O. Cal.), has observed "there is no room for a pure heart, empty head defense under Rule 11." [6]

Although Rule 11 does not use the work "frivolous," Courts have consistently employed a frivolous standard.[7] An objective standard more effectively deters frivolous filings because it avoids the difficulties of determining subjective bad faith. By eliminating the need to ascertain subjective "intent," the standard reduces the cost of satellite litigation.[8] Because of the addition of an objective test, decisions denying sanctions under the former Rule no longer possess precedential force.[9]

In addition to requiring a reasonable inquiry, Rule 11 provides that an attorney's or party's signature constitutes a certification, that to the best of the signer's knowledge, the pleading is well grounded and brought for proper purpose. A subjective good faith belief is required.[10] Rule 11 is violated if an attorney or party signs a paper in subjective bad faith, even if another lawyer reasonably could have believed that the filing was well grounded and brought for proper purpose.[11]

Rule 11 formerly required an attorney merely to read a pleading before signing it. The attorney was required to believe that there was good ground to support it. An investigation of the relevant facts and law was not expressly required. The moral obligation was minimal; an attorney merely had to satisfy him or herself that there was a good ground for the suit. The current Rule, however, expressly imposes an affirmative duty to investigate the facts and law that support the pleading. As one Court has noted, "the day is passed when our notice pleading procedure . . . and liberal discovery rules invited the federal practitioner to file a suit first and find out later whether he had a case or not."[12] The Seventh Circuit in *Stewart v. RCA, Corp.*[13] noted that Rule 11 requires lawyers to think first and file later on pain of personal liability.[14]

The prerequisite of reasonable inquiry differs from the requirement that a pleading or motion be well grounded in fact and warranted by law. Failure to conduct a reasonable investigation violates Rule 11 regardless of the merit of the pleading.[15] The investigation's reasonableness, however, must be assessed in light of the circumstances in each case. Investigation need not be to the point of certainty to be reasonable.[16]

Short of certainty, the degree of inquiry is less clear. The Courts rely on various factors to determine whether an investigation is reasonable. The thoroughness of an inquiry required by Rule 11 depends upon the time available for investigation. Routine pleadings or motions demand more extensive investigation than pleadings for a preliminary injunction or a Complaint filed shortly before the limitation expires.[17] Absent time pressures, a reasonable inquiry requires the counsel to interview the available witnesses.[18] Counsel also should review the relevant documents that are in his client's possession.[19]

Rule 11 allows counsel to rely on a client's statement but only when it is

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USE OF ERISA TO DEFEAT BAD FAITH CLAIMS

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Recent Supreme Court decisions with respect to the Employee Retirement Income Security Act of 1974 ("ERISA") provide a new avenue of approach to attorneys representing health insurers and companies which provide group employee benefit plans. If properly utilized, the law in this area can be used to defeat bad faith claims for punitive and extra-contractual damages.

ERISA is a federal statute which has a very broad pre-emptive effect. Attorneys can use ERISA to eliminate bad faith claims since ERISA pre-empts any state law which has a connection with or refers to any employee benefit plan described in § 1003(a) of ERISA. *Pilot Life Insurance Company v. Dedeaux,* 95 L.Ed.2d 39, 48 (1987); *Shaw v. Delta Airlines,* 463 U.S. 85, 98 (1983). State laws which can be pre-empted by ERISA include laws, rules, regulations, decisions, or any other state actions having the effect of law. 29 U.S.C. § 1144(c)(1).

One who seeks to invoke ERISA coverage and to obtain the benefit of pre-emption must first determine if the plaintiff's state law claim relates to or has a connection with an employee benefit plan which falls under the coverage of ERISA. ERISA generally covers group plans which provide health and accident benefits to employees.

Once it is determined that ERISA applies to the plaintiff's claim, the claim will be pre-empted unless the "saving clause" of ERISA saves the plaintiff's state law claim from pre-emption. This clause basically provides that ERISA does not pre-empt state laws which "regulate insurance."

In *Pilot Life Insurance Company v. Dedeaux,* 95 L.Ed.2d 39 (1987) the Supreme Court's main analysis concerned whether the plaintiff's common law bad faith claim escaped pre-emption because it fell within the coverage of ERISA's saving clause. The plaintiff's employer had a long-term disability employee benefit plan which was established by the purchase of a group insurance policy from Pilot Life Insurance Company. The plaintiff injured his back in a work-related accident and sought permanent disability benefits. Pilot Life, which was responsible for determining who received benefits under the plan, initially paid plaintiff disability benefits, but then terminated the benefits.

The plaintiff brought state common law claims against Pilot Life in which he sought damages for emotional stress and punitive damages as well as damages for failure to provide benefits. Plaintiff's claims were based upon Mississippi's common law of bad faith. There was no dispute that plaintiff's claims had an obvious connection with or reference to an ERISA plan.

The Supreme Court was guided by several considerations in determining whether Mississippi's common law of bad faith was saved from ERISA pre-emption. The saving clause saves those laws which "regulate insurance." The Court reasoned that, in order for a law to regulate insurance, it must not just have an impact on the insurance industry, but must be "specifically directed toward that industry." *Dedeaux,* 95 L.Ed.2d at 49. The Court found that Mississippi's common law of bad faith, though identified with the insurance industry, was not specifically directed at that industry since it was grounded upon general principles of Mississippi tort and contract law, not insurance law. *Dedeaux,* 95 L.Ed.2d at 50.

The McCarran-Ferguson Act, 15 U.S.C. § 1011, *et seq.* provides that the business of insurance shall be regulated by the states. The Court considered three criteria to determine whether the Mississippi law of bad faith fell within the "business of insurance" as the term has been interpreted for purposes of the McCarran-Ferguson Act. The three criteria identified by the Court were: (1) whether the law has the effect of transferring or spreading a policyholder's risk; (2) whether the law is an integral part of the policy relationship between the insurer and the insured; and (3) whether the law is limited to entities within the insurance industry. *Dedeaux,* 95 L.Ed.2d at 48.

The Court found that the common law of bad faith did not have the effect of spreading or tranferring a policyholder's risk. The Court also found that Mississippi's law of bad faith developed from general principles of tort and contract law available in any Mississippi breach of contract case. Therefore, the law of bad faith was not limited to entities within the insurance industry.

The Court also reasoned that, even though Mississippi's bad faith law arguably concerned the policy relationship between the insurer and the insured, such a connection was no more integral to the insurer-insured relationship than any state's general contrct law was integral to an insurance contract made in that state. The Court pointed out that the law of bad faith only declares that, when terms have been agreed upon in an insurance contract, a breach of the contract may allow the policyholder to obtain punitive damages. The Court implicitly required that a law define the substantive terms of the contract relationship between an insurer and an insured in order to constitute an integral part of the insurer-insured relationship. *Dedeaux,* 95 L.Ed.2d at 50.

The Court also gave consideration to the effect of application of ERISA's saving clause to Mississippi's law of bad faith in the context of ERISA's civil enforcement scheme. A study of ERISA's legislative history, especially Congress' specific reference to the Labor Manage-

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ment Relations Act to describe the civil enforcement scheme of ERISA, led the Court to conclude that ERISA's civil enforcement remedies were intended to be exclusive in suits brought asserting improper processing of claims under ERISA-regulated plans. The Court reasoned that, if participants and beneficiaries covered by ERISA plans could obtain remedies under state law that Congress rejected in ERISA, Congressional intent would be undermined. The Court concluded that Congress intended that suits for improper processing of claims under ERISA plans be treated as federal questions and be governed by the federal ERISA statutes.

The Court determined that plaintiff's bad faith claim was pre-empted by ERISA and not saved by the saving clause. *Dedeaux,* 95 L.Ed.2d at 54. The Court did not indicate which of its considerations held the most weight. However, if a plaintiff's cause of action is based upon the alleged improper processing of a claim under an ERISA plan, one can make a strong argument that ERISA remedies are meant to be exclusive and that the saving clause shuld not save the state law from pre-emption.

Several causes of action under South Carolina law may be subject to ERISA pre-emption. A common law bad faith refusal to pay first party benefits action was established in *Nichols v. State Farm,* 279 S.C. 336, 306 S.E.2d 616 (1983). This cause of action allows a plaintiff to recover consequential or punitive damages. A *Nichols* cause of action is similar to the bad faith claim asserted by the plaintiff in *Pilot Life v. Dedeaux.* An analysis of the considerations set forth in *Dedeaux* leads to the conclusion that ERISA pre-empts a *Nichols* cause of action.

State statutory laws may also be pre-empted by ERISA. These laws include the bad faith attorneys' fees statute, the Unfair Trade Practices Act, and the Insurance Trade Practices Statutes. Each of these statutory provisions should be thoroughly analyzed under the considerations stated in *Dedeaux.* The Court's argument that ERISA remedies are meant to be exclusive when claims are brought for improper processing of a claim under an ERISA-regulated plan indicates that these laws should not be saved from pre-emption.

Once it has been determined that ERISA pre-empts the plaintiff's cause of action and that the cause of action is not saved by ERISA's saving clause, the practical implications of ERISA pre-emption should be addressed. Once pre-empted, a state law cause of action is subject to dismissal. *See Pilot Life v. Dedeaux,* 95 L.Ed.2d 39 (1987); *Salomon v. Transamerica Occidental Life Insurance Co.,* 801 F.2d 659 (4th Cir. 1986). This means that the accompanying state law remedies, such as extra-contractual or punitive damages or attorney's fees, are no longer available to the plaintiff. ERISA pre-emption also allows the defendant to remove the action from state to federal court. *Metropolitan Life Insurance Co. v. Taylor,* 95 L.Ed.2d 55 (1987).

ERISA pre-emption does not necessarily mean that the plaintiff's case is no longer viable. The plaintiff will still be entitled to remedies under ERISA. *Powell v. Chesapeake and Potomac Telephone Company of Virginia,* 780 F.2d 419 (4th Cir. 1985), *cert. denied,* 106 S.C. 2892; *Salomon v. Transamerica Occidental Life Insurance Co.,* 801 F.2d 659 (4th Cir. 1986). The plaintiff may seek to recover benefits due him under the terms of his plan. He may also seek injunctive relief, attorneys' fees, and costs. 29 U.S.C. §1132(g). However, the courts have generally held that a plaintiff may not recover extra-contractual or punitive damages under ERISA. *See Powell v. Chesapeake and Potomac Telephone Company of Virginia,* 780 F.2d 419 (4th Cir. 1985).

ERISA pre-emption provides a very useful tool to attorneys who represent insurers or companies which provide group health plans to employees. If the plaintiff's cause of action relates to an ERISA-regulated plan, and the cause of action is based on the improper processing of a claim, the cause of action will probably be pre-empted by ERISA. The attorney representing the insurer or the company will then have eliminated the possibility of extra-contractual or punitive damages being recovered against his client.

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reasonable to do so. Whether such reliance is reasonable depends on several factors. Can a client's statements be corroborated? If corroboration is possible, at what cost? It is generally unreasonable to rely on unverified statements that can be readily corroborated.[20] Are the statements based upon a client's personal knowledge? It can be unreasonable to file a pleading or motion founded on unreliable second-hand assertions.[21] Are the statements plausible? How well does the counsel know the client? The degree of research required by Rule 11 depends upon the experience of the attorney or the party signing the pleading or motion.[22] Lawyers with expertise in a particular field are held to a higher standard than that expected of general practitioners.[23]

Under the former Rule 11, an attorney's signature on a pleading constitutes a certificate that there was "good ground" for the pleading. The former Rule required some factual foundation for suit. The former Rule required some factural foundation for suit. Nonetheless, other than disciplinary action against the attorney, the only sanction authorized by the former Rule was striking the pleading. The Courts were reluctant to dismiss pleadings for want of a factual foundation at the early stage of the proceedings, and they employed a very lenient standard. Pleadings were stricken only when they were "entirely without color." [24]

The new Rule 11 has replaced the concept of "good ground" with the requirement that a pleading be well grounded in fact. The new Rule articulates a reasonableness standard: a filing is well grounded in fact if it has reasonable basis in fact.[25] A filing is not well grounded in fact when there is no evidence to support an essential element of the argument.[26] A filing is not well grounded in fact if it is contradicted by uncontroverted evidence that was or should have been known to the party signing the pleading.[27] The former Rule 11 required a pleading be supported by "good ground" but did not specify what a "good ground" meant; only that factual allegations were well founded or the legal claims were tenable.

The new Rule makes clear that what the old Rule left to be inferred: a filing must be warranted by existing law or a good faith argument for the extension, modification, or reversal of the existing law. It incorporates the language from Disciplinary Rule 7-102(a)(2) of the Code of Professional Responsibility. A pleading is warranted by existing law if it addresses a question of first impression.[28] A filing is warranted by existing law if it concerns an issue on which the law is unsettled.[29] A filing need not ultimately prevail to be warranted by existing law.[30] A pleading or motion is unwarranted by existing law, however, if it is contrary to settled precedent.[31] It is no defense that counsel was unaware of authority that should have been known to a competent attorney.[32]

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(Continued from page 14)

The Courts also employ an objective standard to determine whether a filing is warranted by a good faith argument for change in the law.[33] An argument for the reversal of existing law which is made to preserve the issue for higher review is not subject to sanction merely because a lower court is bound by existing law to reject the argument.[34] An argument that has been rejected does not necessarily mean it is unreasonable.[35]

"Old" Rule 11 precluded pleadings filed for delay but did not reach pleadings or motions motivated by other improper purposes. The amended Rule 11 expressly bars any pleading brought for any improper purpose such as harassment, delay, or unnecessary increase in cost. Improper purpose is the subject of a two-part test of objective reasonableness and subjective good faith. Under the objective standard, the Courts infer the purpose of a filing from the consequences of the pleading or motion. The Courts also often find an improper purpose on the basis of direct evidence of an attorney's or party's subjective bad faith.[36] The Courts have found that a pleading is interposed to harass an opposing party when it merely repeats previously unsuccessful claims against the same defendant.[37] Improper purpose is found in cases in which the movant stands to benefit financially from delay.[38] The initiation of a suit against a judge for the purpose of compelling the judge to recuse herself from presiding over another case is subject to sanctions.[39]

Practice in South Carolina has traditionally been a collegial one, a practice which has avoided the acrimony associated with a routine practice of sanctions. To this extent, the State Bar has avoided the onslaught of Rule 11 decisions which have appeared in other jurisdictions. Increasing court dockets, along with the growth of the Bar, may portend an increasing use of Rule 11. Careful examination of the prerequisite elements prior to any filing is required.

[1] *Cf. Zaldivar v. City of Los Angeles,* 780 F.2d 823, 829 (9th Cir. 1986) "The large number of reported opinions . . . can only be a fraction of the large number of incidents in which sanctions have been imposed under . . . Rule 11.

[2] J. Story, *Equity Pleadings* § 47 (1838).

[3] *Badillo v. Central Steel & Wire Co.,* 717 F.2d 1160, 1166 (7th Cir. 1983); *Nemeroff v. Abelson,* 620 F.2d 339, 348 (2nd Cir. 1980).

[4] Notes of Advisory Committee on Rules, FRCP 11 (1983 Amendment)

[5] *Eastway Construction Corp. v. City of New York,* 762 F.2d 243, 253-54 (2nd Cir. 1985), "simply put, subjective good faith no longer provides the safe harbor it once did"; *Avenson, Auchmuty & Greenwall v. Holtzman,* 775 F.2d 535, 540 (3rd Cir. 1985); *Stevens v. Lawyers Mutual Liability Insurance Co. of N.C.,* 789 F.2d 1056, 1060 (4th Cir. 1986); *Davis v. Veslan Enterprises,* 765 F.2d 494, 497 (5th Cir. 1985); *Albright v. Upjohn Co.,* 788 F.2d 1217, 1221-22 (6th Cir. 1986); *Rogers v. Lincoln Towing Service,* 771 F.2d 194, 205 (7th Cir. 1985); *O'Connell v. Champion International Corp.,* 812 F.2d 393, 395 (8th Cir. 1987); *Zaldivar v. City of Los Angeles,* 780 F.2d 823, 829 (10th Cir. 1986); *Donaldson v. Clark,* 786 F.2d 1570, 1576 (11th Cir. 1986); *Westmoreland v. CBS, Inc.,* 770 F.2d 1168, 1177 (D.C. Cir. 1985).

[6] Schwarzer, *Sanctions Under the New Federal Rule 11 — A Closer Look,* 104 FRD 181, 187 (1985).

[7] *Gaiardo v. Ethyl Corp.,* 835 F.2d 479 (3rd Cir. 1987). *Eastway Construction Co. v. City of New York,* 637 f.Supp. 558, 565 (E.D.N.Y.1986), *Kappenberger v. Dates,* 663 F.Supp. 991 (S.D.N.Y. 1987). *In Re Yagman,* 796 F.2d 1165, 1183 (9th Cir. 1986). *But, cf. Hoover Universal, Inc. v. Brockway, Inco, Inc.,* 809 F.2d 1039, 1044 (4th Cir. 1987).

[8] *Oliveri v. Thompson,* 803 F.2d 1265, 1275 (2nd Cir. 1986).

[9] *Frazier v. Cass,* 771 F.2d 259, 265 (7th Cir. 1985).

[10] *Stites v. Internal Revenue Service,* 793 F.2d 618, 620 (5th Cir. 1986).

[11] *In re Yagman, supra.*

[12] *Hale v. Harney,* 786 F.2d 688, 692 (5th Cir. 1986).

[13] 790 F.2d 624, 633 (7th Cir. 1986),

[14] *See also Lieb v. Topstone Ind., Inc.,* 788 F.2d 151, 157 (3rd Cir. 1986).

[15] *Blanchette v. Cataldo,* 734 F.2d 869, 871, 879 (1st Cir. 1984).

[16] *Nemmers v. United States,* 795 F.2d 628, 632 (7th Cir. 1986).

[17] *Unioil, Inc. v. E.F. Hutton & Co.,* 802 F.2d 1080, 1090 (9th Cir. 1986).

[18] *In re Ginther,* 791 F.2d 1151, 1155 (5th Cir. 1986); *O'Rourke v. City of Norman,* 640 F.Supp. 1451, 1469 (W. Dis. Okla. 1986).

[19] *Van Berkel v. Fox Farm and Road Machinery,* 281 F.Supp. 1248, 1249-51 (D. Mn. 1984).

[20] *Southern Leasing Partners Ltd. v. McMullan,* 801 F.2d 783, 788 (5th Cir. 1986). *Coburn Optical Industries, Inc. v. Silco, Inc.,* 610 F.Supp. 656, 659 (M.D. N.C. 1985).

[21] *Bockman v. Lucky Stores, Inc.* 108 FRD 296, 298 (E.D. Ca. 1985).

[22] *Oliveri V. Thompson, supra.*

[23] *Unioil Oil Co. v. E.F. Hutton & Co., supra.*

[24] *Nemeroff v. Abelson, supra.*

[25] *Tarkowski v. County of Lake,* 775 F.2d 173 (7th Cir. 1985).

[26] *MGIC Indemnity Corp. v. Weisman,* 803 F.2d 500 (9th Cir. 1986).

[27] *Frazier v. Cass, supra.*

[28] *Nelson v. Piedmont Aviation Inc.,* 750 F.2d 1234, 1238 (4th Cir. 1984).

[29] *Cammon v. American Telephone & Telegraph Co.,* 791 F.2d 1006 (2nd Cir. 1986).

[30] *Zaldivar v. City of Los Angeles, supra.*

[31] *Norris v. Grosvenor Marketing Ltd.,* 803 F.2d 1281, 1288 (2nd Cir. 1986).

[32] *Hewitt v. Stanton,* 798 F.2d 1230, 1233 (9th Cir. 1986).

[33] *Zaldivar v. City of Los Angeles, supra.*

[34] *Gilmore v. Sherison/American Express, Inc.,* 811 F.2d 108 (2nd Cir. 1987).

[35] *Eastway Construction Corp. v. City of New York,* 762 F.2d 243, 254 (2nd Cir. 1985).

[36] *Fox v. Boucher,* 794 F.2d 34 (2nd Cir. 1986).

[37] *McLaughlin v. Bradley,* 803 F.2d 1197 (D.C. Cir. 1986).

[38] *Davis v. Veslin Enterprises,* 765 F.2d 494, 500 (5th Cir. 1985).

[39] *Chu v. Griffith,* 771 F.2d 79, 81 (4th Cir. 1985); *Steinle v. Warren,* 765 F.2d 95 (7th Cir. 1985).

POLITICS

JAMES B. COPELAND, Valdosta.

A defeated newcomer to politics, after the votes had been counted, confided to a friend: "When a man gets in politics, everything comes out. I have been trying for 25 years to find out who my daddy is. Now, everybody knows."

OPINIONS AND STORIES OF AND FROM THE GEORGIA COURTS AND BAR Collected and arranged by BERTO Rogers, Member of the Georgia and New York Bars

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ADDRESS CORRECTION REQUESTED

TEN YEARS AGO

President, **MARK W. BUYCK, JR.,** in his report in the February, 1978 issue, recorded that **JIM PRESSLY** and **NEIL ROBINSON** were working on membership. Then Executive Director, **GEORGE HARMON,** helped us for a couple of years was not renewed due to our then financial status. **BARRON GRIER** and **JIM ALFORD** were co-chairman of the legislative committee and **BRUCE SHAW,** President-elect, was appointed to attend the 11th National Conference of Local Defense Associations in Des Moines, Iowa in April. This issue of the *Defense Line* contained an alert from **WADE LOGAN** for the possibility of repeal of diversity jurisdiction. Fortunately, that has not come about. **DEWEY EASLER** was announced as new President of the South Carolina Claims Association and **F.M. TIMMONS, JR.** was new President of the Claims Management Association.

CALENDAR OF EVENTS

1988		
Bodily Injury Fraud Seminar	March 30	Sheraton Hotel Charleston, SC
Association of Insurance Attorneys	April 6-10	Sunburst Hotel Scottsdale, Arizona
S.C. Bar (Annual)	June 17-19	Omni Charleston, SC
International Association of Defense Counsel (Annual)	July 3-9	The Greenbrier White Sulphur Springs, West Virginia
Defense Research Institute (Mid-Year)	July 4-6	The Greenbrier White Sulphur Springs, West Virginia
Defense Counsel Trial Academy	July 23-30	College Inn Conference Center, Boulder, Colorado
Federation of Insurance and Corporate Counsel	August 2-6	Southampton Princess Southampton, Bermuda
American Bar Association (Annual)	August 4-11	Toronto, Canada
SCDTAA Joint Meeting	August 11-14	Grove Park Inn Asheville, NC
SCDTAA Annual Meeting	October 27-30	Kiawah Island Resort
SCDTAA CLE Seminar	November 11	Columbia, SC
1989		
International Association of Defense Counsel Surety Trial Practice Program	January 27-28	The Plaza New York, New York
American Bar Association (Mid-Year)	February 1-8	Denver, Colorado
International Association of Defense Counsel (Mid-Year)	February	Location to be announced
Defense Research Institute (Annual)	February	Location to be announced
Federation of Insurance and Corporate Counsel	February 22-26	Camelback Scottsdale, Arizona
Association of Insurance Attorneys	April 18-22	Olympic Hotel Seattle, Washington
International Association of Defense Counsel (Annual)	July 2-8	Copley Place Boston, Massachusetts
Defense Research Institute (Mid-Year)	July 3-5	Copley Place Boston, Massachusetts
Defense Counsel Trial Academy	July 21-29	College Inn Conference Center, Boulder, Colorado
Federation of Insurance and Corporate Counsel	July 26-30	The Homestead Hot Springs, Virginia
SCDTAA Joint Meeting	July 27-30	Grove Park Inn Asheville, NC
American Bar Association (Annual)	August 3-10	Honolulu, Hawaii
SCDTAA Annual Meeting	November 2-5	The Cloister Sea Island, GA.