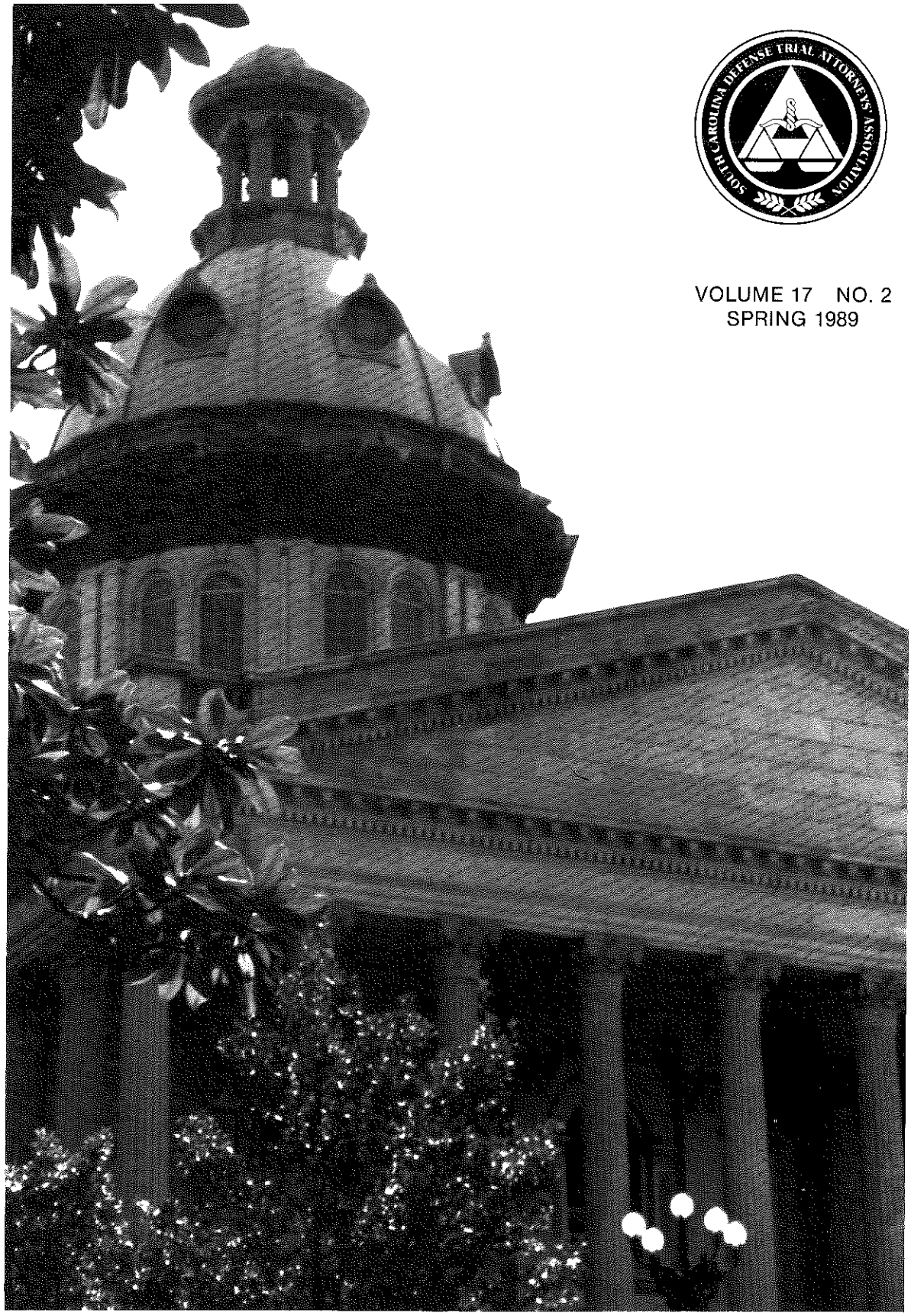

VOLUME 17 NO. 2
SPRING 1989

THE DEFENSE LINE

SOUTH CAROLINA DEFENSE TRIAL ATTORNEYS' ASSOCIATION

PRESIDENT'S LETTER

Frank H. Gibbes, III SCDTAA President

I want to take this opportunity to address three subjects.

First, I am pleased to report that the various committees of our Association have set about their work in enthusiastic and hardworking fashion. Each committee has met, has identified appropriate goals, and has begun work on the committee's substantive work for the year. I encourage each member of our Association who is a member of one of our working committees to make every effort to attend future committee meetings so that we can complete the work that we have begun in such good fashion.

On a more substantive level the Association, through the Amicus Curiae Committee chaired by David Norton, endorsed DRI's filing of an amicus curiae brief in a case in which the U.S. Supreme Court will be asked to decide whether punitive damages are constitutional. Under Hugh McAngus' leadership your Legislative Committee continues to devote substantial time, effort, and attention to monitoring pending legislation and to assuring that our voice is heard. The majority of the committee's work to this point has been in the area of legislation affecting automobile insurance and worker's compensation.

The Conventions Committee, under Tom Wills' guidance, is making plans for our joint meeting at Asheville and our annual meeting at Sea Island. Kay Crowe and Mike Wilkes, who chaired the Programs Committee for the joint meeting and the annual meeting respectively, and their committees are finalizing plans for the educational program at both meetings. Please contact Tom, Kay, or Mike in the next few days if you have suggestions concerning our upcoming meetings.

Our Public Information Committee, chaired by Charles Ridley and John Wilkerson, is working on a comprehensive long-range plan whose goal is to educate the public about defense attorneys and the defense attorney's role in our judicial system. At the last meeting of our executive committee, the Public Information Committee recommended that the committee formulate a comprehensive plan that would involve specific and well-thought out efforts extending over several years rather than pursue a short term patchwork effort. The committee's recommendation was approved by the executive committee.

Second, I want to comment on the executive committee's decision to permit limited advertising in *The Defense Line*. This subject has been hotly debated from time to time over a number of years. This year is no different, and a number of different points of view were expressed by various members of your executive committee.

In the final analysis the committee concluded that limited advertising is an acceptable way to raise the funds necessary to publish the superior type of publication that we have all come to expect. In reaching this conclusion, the committee considered and adopted a well-thought out statement of written policy recommended by *The Defense Line* Committee which contains guidelines governing the type of advertising that will be permitted in *The Defense Line.*

The executive committee will evaluate the success of the advertising program and its impact on the overall quality of *The Defense Line* during the coming months. We would obviously welcome comments and suggestions that any of our members might have. Speaking for myself, and myself alone, I feel that the committee's decision is a responsible step taken as part of our commitment to explore alternative sources of income in lieu of a more significant increase in dues.

Third, and finally, I want to take special note of the work which your Practice and Procedure Committee is undertaking this year. The committee, chaired by Bill Lynn, will identify and address various problems that we defense attorneys face in our day-to-day practices. Many of the problems are minor in nature; some affect only a limited segment of our membership - most, however, in one way or another are frustrating and detract from the enjoyment and satisfaction that we get out of our work as defense attorneys. Please contact Bill Lynn if you have a specific problem that you want Bill and his committee to address. I assure you that we will do our best to work for constructive change beneficial to ourselves, our clients, and our judicial system as a whole.

VOLUME 17, NO. 2 SPRING 1989

TEN YEARS AGO

In the February, 1979, issue of *THE DEFENSE LINE,* we reported **ED MULLINS** was elected DRI Director. President **R. BRUCE SHAW** reported that our primary concern in 1979 would be legislation. Comparative negligence was being discussed in the Legislature. **BARRON GRIER** was Program Chairman for the Joint Meeting at the Grove Park Inn and **CARL "BUTCH" EPPS** was Program Chairman working on the Annual Meeting. The 1979 President of the Claims Management Association was **CURTIS HIPP,** and of the South Carolina Claims Association, **JIM WATSON.**

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, 1-800-445-8629.

AMICUS CURIAE COMMITTEE

Curtis R. Trotter v. State Farm Mutual Automobile Insurance Company

The Amicus Curiae Committee petitioned and was granted leave to submit a brief in the cases of *Curtis R. Trotter v. State Farm Mutual Automobile Insurance Company,* et al., Davis' Advance Sheet No. 17 at 15 (S.C. App., August 8, 1988) and *Edgar Ancrum v. United States Fidelity and Guaranty Company,* Davis' Advance Sheet No. 4 at 53 (February 21, 1989).

In *Trotter,* the Court of Appeals reversed a jury verdict in favor of the Plaintiff who claimed that State Farm's agent had negligently failed to advise him that his automobile liability insurance policy contained an exclusion of coverage for injuries to Plaintiff's employees. The Amicus Committee's Brief was submitted to the Court of Appeals following Plaintiff's petition for rehearing.

In its order on rehearing (not yet published), the Court of Appeals affirmed its prior holding. Specifically, the court stated that an insurance agent has no duty to advise an insured as to the contents of the policy absent and express or implied undertaking to do so. Further, the court noted that when a policy exclusion is clearly and plainly written, an insured's claim that he would not have understood it if he read it will not be heard to relieve an insured of his obligation to read the policy language. Certiori has been applied for and no ruling has been made.

In *Ancrum,* the Supreme Court answered a question certified to it by Judge Blatt of the United States District Court. The question presented was whether the exclusion remedy provision of the South Carolina Workers' Compensation Act barred an action by an employee against his employer's carrier for negligence in performing safety inspections.

The court held that a carrier is immune from suit by an employee "except when the carrier stands in the position of a third party unrelated to its function as a compensation carrier." Because the carrier's policy was not part of the record, the court returned the case to the district court for a final determination.

To determine whether a carrier "stands in the position of a third party" the court offered these guidelines: A carrier can perform safety inspections to assess risks and reduce injuries to minimize benefit payments and premium increases and still retain its immunity. If, however, a carrier contracts to independently provide safety inspections it does not enjoy immunity. For instance, if there is specific policy language requiring the carrier to perform these inspections or if an additional premium is paid for the inspections, the court indicated this would be evidence that the carrier was acting as a "third party". A Rehearing Application is pending.

In Memory

G. Duffield Smith, Jr., died January 31, 1989. Duffield was the President of The Defense Research and Trial Lawyers Association (DRI) at the time of his death. He was a partner of Gardere & Wynne in Dallas, Texas. He was Past President of the Texas Association of Defense Counsel, served on the Board of Directors of the State Bar of Texas, was also a member of the American Board of Trial Advocates and the Association of Trial Lawyers of America. He is survived by his wife, Anne and three children. Duffield was one of the speakers of SCDTAA 1988 Annual Meeting in Kiawah.

Duffield's service and contribution to DRI as a state chairman, regional vice president, board member, vice president, and president-elect were unparalleled. He had completed an enormous amount of work in preparation for his year as president. This work and Duffield's visions will be carried on by the current president, Thomas Crisham, of Chicago. Duffield was a contributor to many facets of society and made his mark in every one as was indicated by the fact that attendees at his memorial service in Dallas, Texas, filled the fifteen hundred seat Highland Park Presbyterian Church.

DRI, the state defense associations and defense attorneys will sorely miss Duffield's contributions to the defense community.

ERISA IMPACT ON INSURANCE LITIGATION

R. Kent Porth
Ashley B. Abel

Most practitioners think of the Employee Retirement Income Security Act of 1974 ("ERISA"), 29 U.S.C. §1001, *et seq.,* as a set of federal statutes directed towards technical compliance with tax related requirements. While ERISA does focus heavily on tax related issues, this federal statutory scheme also sets forth certain fiduciary requirements and establishes certain procedural rules for litigation involving those fiduciary standards.

Another common misconception among many practitioners is that ERISA governs only retirement benefits. In addition to retirement benefits, ERISA controlled plans also provide welfare benefits which include health insurance, life insurance, disability insurance, severance benefits, vacation benefits, and other related types of employee benefits. Given recent trends in Congress such as proposed mandatory health benefit legislation, in the near future ERISA may have a more dramatic presence in the welfare benefit area than it currently has with respect to retirement benefits.

One area of litigation where ERISA is having a dramatic impact involves litigation over medical benefit claims under employer sponsored group insurance programs. Because an employer sponsored group medical insurance plan is governed by ERISA, any litigation by an employee over a disputed benefit claim will be governed by ERISA due to ERISA's preemption of all state laws which relate to an ERISA governed plan. The effect of this preemption is that the benefit claim must he brought pursuant to ERISA's substantive and procedural requirements, and any adjudication by the court on the merits must be made in accordance with ERISA's standard of judicial review. The following is a general discussion of ERISA's application in such a suit.

I. When is a group insurance plan covered by ERISA?

ERISA governs any employee benefit plan if it is established or maintained by any employer engaged in commerce or in any industry or activity affecting commerce. 29 U.S.C.A. § 1003. An employee benefit plan is defined as any plan, fund or program which is established or maintained by an employer or by an employee organization, or by both, to the extent that such plan, fund, or program was established or is maintained for the purpose of providing for its participants or their beneficiaries (i) retirement benefits, (ii) deferred income, (iii) medical, surgical, hospital care, or other related benefits, or benefits in the event of sickness, accident, disability, death or unemployment, or vacation benefits, apprenticeship or other training programs, or day care centers, scholarship funds or prepaid legal services. See 29 U.S.C.A. § 1002.

It is obvious that any plan or program sponsored by an employer which provides for any of the above listed benefits, directly *or through the purchase of insurance,* will be governed by ERISA. Although there is no statutory provision which defines "plan, fund or program," courts have uniformly held that the existence of sufficient circumstances which would permit a reasonable person to ascertain the existence of intended benefits, intended beneficiaries, a source of financing, and a procedure for provision of those benefits will imply the existence of a plan, fund or program, even if there is no written plan document. *Donovan v. Dillingham,* 688 F.2d 1367 (11th Cir. 1982).

Simply put, as a general rule, *any* employer sponsored group life, health or disability insurance contract will constitute an ERISA plan.

II. How broad is federal preemption under ERISA?

ERISA's preemption provision, 29 U.S.C.A. § 1144, states that ERISA preempts any and all state laws to the extent that they relate to any employee benefit plan covered by ERISA. Federal courts, including the United States Supreme Court, have held that state common law causes of action such as breach of contract, fraud, misrepresentation, had faith failure to pay benefits and estoppel are all preempted by ERISA. *Pilot Life Insurance Company v. Dedeaux,* ___ U.S. ___, 107 S.Ct. 1549, 95 L.Ed.2d 39 (1987); *See, e.g., Light v. Blue Cross and Blue Shield of Alabama, Inc.,* 616 F. Supp. 558 (D. Miss. 1985), *aff'd,* 790 F.2d 1247 (5th Cir. 1986) (tort causes of action pre-empted); *Turner v. Retirement Plan of Marathon Oil Company,* 659 F. Supp. 534 (N.D. Ohio 1987), *aff'd,* 845 F.2d 325 (6th Cir. 1988) (state law claims for breach of oral agreement, promissory estoppel, detrimental reliance, negligence and misrepresentation pre-empted by ERISA); *Blau v. Del Monte Corporation,* 748 F.2d 1348, 1356 (9th Cir. 1985) (state common law claims of promissory estoppel, estoppel by

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ERISA

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contract, breach of contract, fraud and deceit pre-empted by ERISA); *Phillips v. Amoco Oil Co.,* 614 F.Supp. 694, 707 (D. Ala. 1985), *aff'd,* 799 F.2d 1464, 1470 (11th Cir. 1986), *cert. denied,* 107 S.Ct. 1893 (1987) (state law fraud claim pre-empted by ERISA); *Dependahl v. Falstaff Brewing Corp.,* 653 F.2d 1208, 1214 (5th Cir. 1981), *cert. denied,* 454 U.S. 968, 102 S.Ct. 512 (1981) (state common law tortious interference with contract pre-empted by ERISA); *Roberson v. Equitable Life Assur. Soc. of U.S.,* 661 F. Supp. 416 (C.D. Cal. 1987) (claim for breach of statutory duty under California Insurance Code pre-empted by ERISA); *Tinsley v. General Motors Corp.,* 622 F. Supp. 1547 (D. Ind. 1985) (breach of contract action pre-empted).

Recently, Judge Karen LeCraft Henderson followed this line of cases, ruling that common law breach of contract, breach of duty and breach of oral agreement claims were preempted by ERISA. *Debra Rogers v. Jefferson-Pilot Life Ins. Co.* (November 4, 1988). She also held that the plaintiff failed to state a claim for violation of ERISA §1140, because Jefferson-Pilot was not plaintiff's employer. The case is currently on appeal to the Fourth Circuit on the latter issue only.

A state law claim relates to an employee benefits plan when it arises out of some action taken in the execution or administration of the plan. *McNamee v. Bethlehem Steel Corporation,* 692 F. Supp. 1477, 1479 (E.D.N.Y. 1988). If the state law in question affects the structure, the administration or the type of benefits provided by an ERISA plan, or would determine whether any benefits are paid and directly affect the administration of those benefits under the plan, then the state law "relates to" the ERISA plan and is therefore preempted. *Id.; See also Pilot Life Insurance Company v. Dedeaux, supra; Shaw v. Delta Airlines,* 463 U.S. 85, 103 S.Ct. 2890 (1983); *Powell v. C&P Telephone Co. of Va.,* 780 F.2d 419 (4th Cir. 1985), *cert. denied,* 476 U.S. 1170 (1986).

Congress expressly created a "carve out" to this preemption with respect to any state laws which regulate insurance, banking or securities. While this carve out or saving clause would appear to be rather broad, courts have limited it to a very narrow reach. 29 U.S.C.A. §1444(b)(2)(A); *Pilot Life Insurance Company v. Dedeaux, supra.*

III. What is the effect of ERISA preemption of state law claims?

Because ERISA preempts all state law claims as they "relate to" an employee benefit plan, any benefit disputes must be brought pursuant to the procedural requirements of 29 U.S.C. § 1132. While these procedural requirements are not particularly unusual, section 1132 and the related fiduciary sections (29 U.S.C. §§ 1101, *et. seq.*) provide that all benefit disputes must he tried pursuant to the various requirements of ERISA. Thus, to recover on his claim, a plaintiff must show a violation of the applicable ERISA standard.

While state courts have previously awarded benefits under group insurance contracts on various theories including breach of contract, fraud, misrepresentation, had faith failure to pay and estoppel, the requirements for winning a benefit dispute under ERISA are much more stringent. Until recently, the circuit courts of appeal were fairly uniform in applying an arbitrary and capricious standard in reviewing a benefit determination by a plan fiduciary. See *Stanton v. Gulf Oil Corp.,* 792 F.2d 432, 435 (4th Cir. 1986); *Wolfe v. J.C. Penney Co.,* 710 F.2d 388, 393 (7th Cir. 1983). On February 21, 1989, however, the United States Supreme Court held that judicial review of a denial of benefits challenged under section 1132 (a)(1)(B) of ERISA will he adjudicated under the arbitrary and capricious standard only if the benefit plan gives the administrator or fiduciary discretionary authority to determine eligibility for benefits or to construe the terms of the plan. *Firestone Tire and Rubber Co. v. Bruch,* ___ U.S. ___, 1989 W.L. 12289 (1989). Otherwise, the de novo standard of review applies, regardless of whether the plan is funded or unfunded or whether the fiduciary is operating under an actual or possible conflict of interest. *Id.*

Assuming the plan expressly grants discretion to the administrator or fiduciary, the issue of what constitutes arbitrary and capricious conduct must be addressed. While the definition of arbitrary and capricious has not been absolutely defined, it is well settled that the major factors in making this determination include the consistency of application of standards used by the fiduciary in reaching its determination, whether the fiduciary's determination was supported by proper evidence, whether the fiduciary's determination was based on a clearly erroneous interpretation of the law, and whether the fiduciary's determination was made in good faith. *See Hoover v. Blue Cross and Blue Shield of Alabama,* 855 F.2d 1538, 1541 (11th Cir. 1988).

IV. Does ERISA provide for jury trials?

While the law is not entirely uniform throughout the circuits, it is generally held that the plaintiff is not entitled to a jury trial under the provisions of ERISA. *Berry v. Ciba-Geigy Corp.,* 761 F.2d 1003, 1006-1007 (4th Cir. 1985). *Wardle v. Central States, Southeast and Southwest Areas Pension Fund,* 627 F.2d 820 (7th Cir. 1980), *cert. denied,* 449 U.S. 1112 (1981); *Hechenberger v. Western Electric Co., Inc.,* 570 F.Supp. 820 (E.D. Mo. 1983), *aff'd,* 742 F.2 453 (8th cir. 1984), *cert. denied,* 469 U.S. 1212 (1985); *Burud v. Acme Electric Co.,* 591 F. Supp. 238 (D. Ala. 1984); *Rubin v. Decision Concepts,Inc.,* 566 F.Supp. 1057 (S.D.N.Y. 1983); *Brown v. Retirement Comm. of the Briggs & Stratton Ret. Plan,* 575 F. Supp. 1073 (E.D. Wisc. 1983); *In re Vorpahl,* 695 F.2d 318 (8th Cir. 1982).

V. Conclusion.

Because ERISA is a relatively new statutory scheme, the body of decided case law is just now developing. A quick glance at the reported cases from the federal district courts and federal courts of appeal, however, shows a significant increase in the volume of ERISA litigation over the last three to four years. As the plaintiff's bar becomes more sophisticated in dealing with ERISA and as the total dollar value of ERISA protected benefits continues to increase at its present substantial rate, there is little doubt that the volume of ERISA litigation will grow at an even faster pace. Defense counsel encountering such cases should be familiar with ERISA's substantial impact.

STRUCTURED SETTLEMENTS - WORTH MORE THAN THEY COST

Thomas G. Allen
Structured Financial Associates, Inc.

One of the most common objections heard from plaintiff attorneys concerning structured settlements is that "A structured settlement is a bad investment." In fact, a structured settlement provides an excellent return for the proceeds of a personal injury settlement.

Assuming that the proceeds of the settlement are not immediately used up, and some funds are available for the claimant to invest, let's look at the alternatives available.

Investment	Deposit	Term	Rate of Return	After Tax Rate*	Investment Returned
S & L Certificate of Deposit	100,000	10 Yrs.	8.7%	6.53%	100,000
AAA Industrial Bonds	100,000	30 Yrs.	9.8%	7.35%	100,000
S.C. Tax Free Municipal Bonds	100,000	30 Yrs.	7.75%	7.75%	100,000

*Assumes 20% Federal and 5% State tax

South Carolina tax-free municipal bonds offer the best after-tax return to a claimant in a 25% or greater tax bracket. A structured settlement, however, offers a substantially improved return as illustrated by the following comparison:

Investment	Deposit	Term	Rate of Return	After Tax Rate	Investment Returned
S.C. Tax Free Municipal Bonds	100,000	30 Yrs.	7.75%	7.75%	100,000
Structured Settlement	100,000	30 Yrs.	9.35%	9.35%	100,000

In other words, a structured settlement with a cost of approximately $83,000 can provide the same annual income ($7,750.00) as $100,000 invested in South Carolina tax-free municipal bonds. Both investments would return $100,000 to the claimant at the end of the 30-year period.

Because a structured settlement costing only $83,000.00 provides the same annual income as $100,000.00 invested in tax-free municipal bonds, the $17,000.00 in resulting savings can be utilized to reduce the overall cost of the settlement to the defendant's insurance carrier and to increase the amount of "up-front" cash available to the Plaintiff.

Some other points worth mentioning are:

1. The structured settlement quoted is with an insurance company rated A + by A.M. Best & Company.
2. It is advisable to work with a qualified structured settlement representative to be sure the annuity is properly arranged to avoid constructive receipt and loss of the tax favored status.
3. Most annuity carriers have arranged for third-party ownership which releases the defendant from any contingent liability for payments in the unlikely event the annuity carrier should default.
4. The interest rates contained in a structured settlement annuity should always, assuming a reasonable tax bracket, out perform alternative guaranteed investments. As interest rates go up and down, structured settlement annuities will retain this advantage.

Structured settlement annuities tax-favored nature, in effect, makes the Internal Revenue Service a co-payer - and certainly "Worth More Than They Cost."

Defense Counsel Training Manual Published By IADC

A *Defense Counsel Training Manual*, authored by over 40 of the nation's top civil defense trial lawyers, has been published by the International Association of Defense Counsel.

IADC member and San Francisco, California, defense attorney Kevin J. Dunne, who directed the project, says the *Manual* has been created as a basis text for law firm in-house training programs but is a valuable source for all defense counsel, young and old alike. Several years were spent developing this comprehensive guide to the defense counsel's handling of a case, from beginning to end, written by practitioners who share their experience and expertise. Dunne says IADC, recognizing the little time available to busy attorneys for in-house training, designed this *Manual* to make knowledgeable information readily available in a handy, spiral-bound, desk-size book with wide margins for personal notations.

The 2,300 member IADC is composed of defense lawyers, corporate counsel and insurance executives from the United States, Canada, France and Great Britain. IADC exists to support and encourage the defense effort, increase the knowledge of the law among its members, provide a better understanding of mutual problems, promote high standards in trial skills and advocacy, and promote greater efficiency and responsible reform in branches of law pertaining to the defense of civil litigation.

For more information, contact IADC, 20 North Wacker Drive, Suite 3100, Chicago, Illinois, 60606, 312-368-1494.

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LEGISLATIVE REPORT

W. Hugh McAngus, Turner Padget, Graham & Laney

There are three pieces of legislation which concern us at this time: auto insurance reform, workers' compensation and medical privilege legislation.

The Governor's automobile insurance reform package has been reported out of the Labor, Commerce and Industry Committee. It is not expected to pass the House in its present form, but should be subject to floor amendments and much discussion. The primary features which concern us as defense attorneys are:

a. punitive damages;
b. collateral source;
c. offering and stacking PIP;
d. elimination of mandatory comprehensive and collision insurance;
e. seat belt legislation.

Numerous other issues arise in this reform package, too detailed to treat here.

Workers' Compensation has received considerable attention over the last year. Numerous bills are under consideration in the Workers' Compensation Study Committee chaired by Senator John Land. These bills are all in committee now, and the Study Committee meets regularly, with a final meeting to be held in May. Major pieces of proposed legislation include:

a. life time benefits for total disability;
b. claimant's choice of physician;
c. changes in the statute regarding back injuries (500 weeks vs. 300 weeks);
d. start/stop pay legislation;
e. disfigurement.

A number of other bills are pending and the Legislation Committee welcomes inquiry.

The House Judiciary Committee has reported out a bill which would create a privilege of communication by a patient to psychiatrist, psychologist, social workers and marriage counselors. The bill is House Bill 3599. It is expected to pass the House shortly. In its present form this bill would limit access to information by defendants when the plaintiff has been treated by one of the above. This Bill also creates a cause of action against these "providers" for improper release of information. This Bill is very dangerous, and we are concentrating our efforts on it. Contact your representative and/or senator and express your concern about this Bill.

We understand there is a proposed bill that will change the law regarding venue to the place of accident instead of the residence of defendant. This Bill is now in the Senate Judiciary Committee. We have asked to be heard on the Bill.

LEGISLATIVE UPDATE

H.3599, which deals with the nondisclosure of mental or emotional conditions by health care providers and others, has passed the House of Representatives and is pending before the Senate Medical Affairs Committee. A subcommittee hearing was held on April 5, 1989 and another hearing is set for Wednesday, April 19, 1989 at 10:00 a.m. in the Gressette Building.

This Bill, if passed, will have extremely serious impact on the discovery process in South Carolina when medical information is sought. While the Bill ostensibly is intended to relate only to psychotherapists, it actually will affect every health care provider in the State and its personnel.

Hugh McAngus has been actively working for the Association to minimize the effect of the Bill if passage seems imminent. It is interesting to note that the Trial Lawyers and the S.C. Medical Association are supporting the Bill so passage in some form seems likely.

If you would like a full text of the Bill or more details on its contents, please contact Hugh McAngus at 254-2200 or Ernie Nauful at 254-4190.

Plan to Attend

SCDTAA Joint Meeting
July 27-30, 1989
Grove Park Inn
Asheville, NC

SCDTAA Annual Meeting
November 2-5, 1989
The Cloister
Sea Island, GA

RECENT DECISIONS

STATE AGENCY IMMUNED FROM SUIT FOR LOSS OF CONSORTIUM

In *Sandra M. Head v. State of South Carolina, Department of Highways and Public Transportation, and Donald Edward,* Civil Action Number: 88-CP-21-1523, Special Circuit Judge Wiley H. Caldwell, Jr. granted the Defendant South Carolina Department of Highways and Public Transportation's Motion for Summary Judgment on the grounds that a State Agency is immune from suit for loss of consortium.

Sandra M. Head brought suit alleging that her husband was injured while riding a bicycle along a public highway that was improperly maintained by the Highway Department. The Highway Department sought summary judgment contending that the South Carolina Tort Claims Act does not allow for suit against the State of South Carolina for loss of consortium.

The Court recognized that the South Carolina Tort Claims Act is the exclusive civil remedy available for any tort committed by a governmental entity. The Court pointed out that the term "loss" as defined in the Tort Claims Act and does not include loss of consortium. The Court held that a compensable loss under the Tort Claims Act is limited to "a loss to the person who suffered the injury" and is limited to bodily injury, disease, death, or damage to tangible property. Thus, loss of consortium does not fall within this definition because it is not a loss "to the person who suffered the injury" and because loss of consortium is a personal injury as opposed to a bodily injury.

The Court was mindful of the fact that this issue had been litigated previously in a different setting. A similar limitation was present in the definition of injuries for which there can be a recovery against the State under the South Carolina Governmental Motor Vehicle Tort Claims Act. (Formerly, Section 15-77-210, et. seq., S.C. Code Ann., 1976). Under that Act, the definition of injury was limited to injury a person may suffer "to his person or property." The South Carolina Supreme Court in *Watford v. South Carolina Highway Department,* 273 S.C. 463, 275 S.E.2d 229, 230 (1979) held that the limited definition of injury restricted recovery to direct injuries to person and property and disallowed any recovery against the State for loss of consortium of one's spouse.

Last, the Court explained that the South Carolina Legislature in adopting the Tort Claims Act made it abundantly clear that recovery against the State is limited to those specific torts allowed under the Act itself. It then adopted a very limited definition of a "loss" for which recovery would be allowed. That limited definition of "loss," which excludes loss of consortium claims, was adopted by the Legislature with full knowledge of the existing statutory scheme which excluded recovery for the loss of consortium. Thus, the Legislature had the opportunity to specifically include loss of consortium s as compensable claim and chose not to do so.

COUNTY BUILDING CODE OFFICIALS FOUND NOT LIABLE FOR ALLEGED NEGLIGENT INSPECTION OF RESIDENTIAL HOMES.

On March 4, 1989, The Honorable Walter Bristow, Presiding Judge of the Richland County Court of Common Pleas, found that no duty existed between the Building and Inspection Department of Richland County and a Residential Home Owner for alleged negligence in inspection of the subject property prior to and during its construction in Richland County.

In this suit, the Plaintiffs brought a cause of action against Richland County as well as the builder of the home alleging negligent construction and inspection of the house occupied by Plaintiffs.

In October, 1982, the builder obtained a building permit to construct the house in question and during this period of construction the house was inspected by the Richland County Building Inspection for compliance with the Southern Building Code which was in force in Richland County.

Upon completion of this house, it was sold to a family who later sold the house to the Plaintiffs in this action.

Prior to purchasing the house in question, the Plaintiffs never spoke to anyone with Richland County nor were they even aware that Richland County had adopted any building codes.

In ruling in favor of the County of Richland, Judge Bristow in his Order recognized that South Carolina still recognized the doctrine of public duty verses a private duty as espoused in *Parker vs. Brown,* 195 SC 35, 10 S.E.2nd 625 (1985) see also *Rayfield vs. South Carolina Department of Corrections, et. al.,* Opinion No. 1233 (S.C. Ct App, filed October 31, 1988). Further, Judge Bristow noted that numerous decisions from other jurisdictions have held that a governmental entity is not liable for negligent inspection by a building official because the building codes are promulgated for the purpose of protecting the health and safety of the general public and do not give rise to an enforceable legal duty owed to individuals who might happen to be injured while making use of the building.

After reviewing the building code in force in Richland County, the Court recognized that any duty owed by the County as set forth in the Building Code itself were for the purposes of providing for the general safety and welfare of the public at large and did not create any type of special relationship or special duty which would arise between the County and the Plaintiffs in this action. For this reason, the Court granted summary judgment on behalf of the Defendants in that no private right of action had been set forth uponi which Plaintiffs could recover against the County.

Another case decided in Lexington County by the Honorable Hubert E. Long on March 2, 1989, the Court ruled in a case where the Plaintiff's were claiming that their house was

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...Suing A Corporation Impact of a New Business Corporation Act...

William H. Davidson, II

The recent adoption of the Model Business Corporations Act by the South Carolina General Assembly has resulted in changes in the procedures governing the service of process upon both domestic and foreign corporations. These changes, effective January 1, 1989, are of particular importance to members of the defense bar in their efforts to determine whether a corporate client was properly served with any process, notice or demand.

Although the Model Business Corporations Act, as adopted in South Carolina, is codified in Title 33 of the South Carolina Code of Laws, it should be noted that the procedures governing the service of process have remained in Title 15 together with all other service of process provisions. As recognized in the South Carolina Reporter's Comments, this separation of the service provisions from the remainder of the Business Corporations Act will cause some confusion for out-of-state attorneys. However, this unique structuring of the provisions within the Code was expressly done for the benefit of South Carolina attorneys, who, it was presumed, would be primarily involved in corporate litigation in this state. *See,* Reporter's Comments to Section 33-5-104.

Service of Process on a Domestic Corporation

Section 15-9-210 continues to govern the service of process on a South Carolina corporation. Pursuant to Section 15-9-210(a), service of process on a domestic corporation may be accomplished by serving the corporation's registered agent. Since Section 15-9-210 does not provide the procedure for serving a registered agent, the procedures set forth in Rule 4 of the South Carolina Rules of Civil Procedure should be followed. The use of Rule 4 is in accord with Section 15-9-210(c), which states: "This section does not prescribe the only means, or necessarily the required means, of serving a domestic corporation."

The most significant change in revised Section 15-9-210 is the removal of the Secretary of State from the procedures governing the service of a South Carolina corporation. If the corporation does not have a registered agent, or if the agent cannot be served with "reasonable diligence," then service is not made on the Secretary of State as in the past but rather on the corporation itself. Pursuant to Section 15-9-210(b), a "corporation may be served by registered or certified mail, return receipt requested, addressed to the secretary of the corporation at its principal office." In accordance with this procedure, the service of process is perfected at the earliest of three dates: (1) the date the corporation received the mail, (2) the date shown on the return receipt, if signed on behalf of the corporation, or (3) five days after its deposit in the mail, as evidenced by the postmark, if mailed postpaid and correctly addressed to the corporation's principal office. Note that the address should correspond to the "address of the company's principal office which is listed on the last filed annual report of the company or, if none has been filed, the address of the principal office specified in the initial annual report of the corporation filed with the South Carolina Tax Commission." Section 15-9-210(b)(3). Hence, a properly mailed letter to a corporation even if not accepted will constitute an effective service.

Note that the prior version of Section 15-9-210 required that service of process be made on the corporation's registered agent, if any, unless that agent *could not be found* with reasonable diligence. Yet, the revised version of Section 15-9-210 provides that the alternate method of service — service on the corporation itself — can be used only if there is no registered agent or if the agent *cannot be served* with reasonable diligence. As pointed out in the South Carolina Reporter's Comments: "This new test of *cannot be served* is somewhat more liberal than the prior test of *cannot be found."* These Comments include a clarifying example: "For example, one might know that the agent was at the location but had skillfully avoided receiving mail or refused to answer the door. If such occurs, the attorney might use the alternative procedure." Reporter's Comments to Section 33-5-104.

As previously mentioned, Section 15-9-210(c) states that a domestic corporation may be served by any other proper means, including pursuant to Rule 4(d)(3) of the South Carolina Rules of Civil Procedure. Rule 4(d)(3) provides that service of process may be effectuated "by delivering a copy of the summons and complaint to an officer, a managing or general agent, or to any other agent authorized by appointment or by law to receive service of process and if the agent is one authorized by statute to receive service and the statute so requires, by also mailing a copy to the defendant."

(Continued on page 12)

Business Corporation Act

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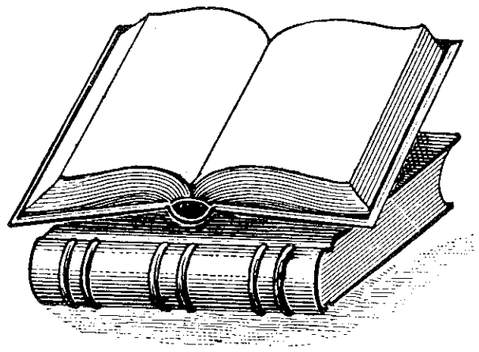
In 1981, the South Carolina Surpreme Court held in *Renney v. Dobbs Houses, Inc.* 275 S.C. 562, 274 S.E.2d 290 (1981), that service upon a general agent of a domestic corporation was proper despite the fact that the corporation had a specific registered agent. Note, however, that the *Renney* decision was not based on Rule 4(d)(3), which had not yet been adopted.

Service of Process on a Foreign Corporation

The statutory method of serving foreign corporations is similar to that of serving South Carolina corporations, except for some minor differences. Pursuant to Section 15-9-240(a), service of process on a foreign corporation may be accomplished by serving the corporation's registered agent. As was the case with Section 15-9-210, Section 15-9-240 also does not set forth the procedure for serving a registered agent; thus, the procedures provided in Rule 4 of the South Carolina Rules of Civil Procedure should be followed.

However, if the foreign corporations' registered agent cannot be served, or if the foreign corporation does not have a registered agent, then service of process should be made on the secretary of the corporation at its principal office as "shown in its application for a certificate of authority or in its most recent annual report." Section 15-9-240(b). Service under the revised Section 15-9-240 should *not* be made upon the South Carolina Secretary of State, as was the practice under the prior version of Section 15-9-240. As pointed out in the South Carolina Reporter's Comments, "[s]erving the company secretary (rather than Secretary of State) may alleviate the practical problem that in the past by the time the Secretary of State received and forwarded the summons and complaint, often the time to answer had already expired." Reporter's Comments to Section 33-15-110.

In accordance with the procedures set forth in Section 15-9-240(c), the service of process on a foreign corporation is perfected at the earliest of three dates: (1) the date the foreign corporation received the mail, (2) the



date shown on the return receipt, if signed on behalf of the foreign corporation, or (3) five days after its deposit in the mail, as evidenced by the postmark, if mailed postpaid and correctly addressed to the corporation's principal office as that address is listed on the last filed annual report of the company or, if none has ever been filed, the address of the principal office specified in its application for a certificate of authority. Section 15-9-240(c)(3). Therefore, if a plaintiff serves process upon a foreign corporation in accordance with the mailing procedures of Section 15-9-240(c)(3), then service will be effectuated regardless of whether the corporation actually accepts the letter containing the process. Note, however, that proof of the mailing must be "evidenced by the postmark"; hence, if the mailed process becomes lost in the mail as opposed to being refused by the defendant corporation, then proper service cannot be proven and will not be effectuated.

Further, in accordance with Section 15-9-240(d), foreign corporations may also be served by any other proper means, including pursuant to Rule 4(d)(3) of the South Carolina Rules of Civil Procedure. Thus, service of process upon an officer or a general agent of a foreign corporation does constitute a proper service. In this regard, Section 15-9-240 clearly overrules the case of *Kreke v. Ohio Gear-Wallace Murray Corp.,* 287 S.C. 388, 339 S.E.2d 115 (1986), wherein the Surpreme Court ruled that serving both a plant manager of a registered foreign corporation and the Secretary of State constituted an improper service of process since the plaintiff did not attempt to serve the corporation's registered agent. Since the service of process in *Kreke* was attempted in 1984, prior to the adoption of the South Carolina Rules of Civil Procedure, the Supreme Court decided *Kreke* without considering Rule 4(d)(3). This conclusion is made evident by a footnote in the *Kreke* opinion, which reads, "We express no opinion whether Rule 4(d)(3), SCRCP, would change the result in a similar case." However, as the South Carolina Reporter's Comments indicate, "the service method in *Kreke* (or under Rule 4(d)(3)) is now valid." Reporter's Comments to Section 33-15-110. Therefore, it is safe to conclude that if faced with a case with identical facts as those in *Kreke,* the Supreme Court would find that the service of process upon an officer or agent of a foreign corporation is valid under Rule 4(d)(3) regardless of the existence of a registered agent.

If the foreign corporation has withdrawn from transacting business in South Carolina or has had its certificate of authority revoked under Section 33-15-31, then the corporation may be served any one of three ways: (1) by serving the secretary of the corporation (Section 15-9-240(b)(2) and (3)); or (2) by serving the Secretary of State (Section 33-15-20(b)(3) and Section 33-15-31(d)); or (3) by following Rule 4(d)(3) of the South Carolina Rules of Civil Procedure.

However, if the foreign corporation was never qualified to conduct business in South Carolina, the proper

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LIGHTER SIDE

VERSATILE SPELLING

ARTHUR G. POWELL, in I Can Go Home Again, page 28.

My father was the most versatile speller I ever knew. A saying of his was, "It is a mighty poor speller who cannot find more than one good way to spell a word." He once filed a suit for a horse. Opposing counsel said that he had spelled the word "horse" six different ways in his pleadings. My father challenged the statement, and a bet was made. He lost. He had spelled it "hoss," "hause," "hors," "hous," "horce," and "horse," — but he won the case.

. . . You Have the Right to Counsel You Have the Right to 2 Burps . . .

By Joseph Pereira
Staff Reporter of The Wall Street Journal

What's the burping limit in New Hampshire? And can a driver's license be taken away for burping over the limit?

The answers to those questions, now being weighed by the New Hampshire Supreme Court, will determine the fate of James Jordan of Nashua, who lost his license after belching once too often.

Mr. Jordan, a 35-year-old who works at an electronics company, was pulled over by police in Derry last April and asked to take a Breathalyzer test. Because burps throw off the meter, drunk-driving suspects are asked to refrain from belching.

Oops

But Mr. Jordan did. Twenty minutes later—the time it takes the mouth to rid itself of excess alcohol transported from the stomach by a burp — Mr. Jordan stepped back up to the machine. Again he belched.

"He did say, 'Excuse me,' " concedes Lt. Roger LaPlante of the Derry Police Department. But the officer trying to give the test, Anthony Ruggirio, felt Mr. Jordan was stalling and took away his license.

James Sayer, Mr. Jordan's attorney, says his client suppressed two burps while waiting to take the test, and when he did burp it wasn't intentional: "He had just had a couple of hot dogs and a couple of beers, and he couldn't help himself."

On this question, Mr. Jordan may have a point. Mark Peppercorn, a Boston gastroenterologist who isn't involved in the case, says most burps are involuntary. Only a chosen few have "esophageal speech" — the ability to burp at will.

But assistant attorney general Stephen Judge, who argued the case for the state, says he isn't convinced, since Mr. Jordan "had two strategically placed burps just prior to the tests."

Simpler Method

The case centers on the fact that New Hampshire has no established burp limit. Some police stations allow a suspect four burps before revoking his license, Mr. Sayer noted in oral arguments before the Supreme Court last week. That prompted one justice to ask, "Mr. Sayer, are you advocating a two-burp test or a four-burp test?"

Mr. Judge, ackowledging "the dilemmas that advanced technology has [created]," cited to the court a simpler test in an 18th-century poem by Thomas Love Peacock: "Not drunk is he who from the floor can rise alone and still drink more, but drunk is he who prostrate lies without the power to drink or rise."

Business Corporation Act

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method of service is set forth in Section 15-9-245, which provides that a non-qualified foreign corporation appoints as a matter of law the Secretary of State as its statutory agent upon whom process may be served. Nonetheless, pursuant to Section 15-9-245(d), service may also be effectuated by "delivery of a copy of the process to any foreign corporation outside the State." Moreover, the 1988 amendments to Section 15-9-245, most of which are merely technical in nature, include the addition of Section 15-9-245(f) which provides that non-qualified foreign corporations may also be served by any other proper means, including pursuant to Rule 4(d)(3) of the South Carolina Rules of Civil Procedure.

Recent Decisions

(Continued from page 10)

not merchantable nor fit for its intended use as a result of not only false construction but the County of Lexington's failure to properly inspect the residence for building code violations.

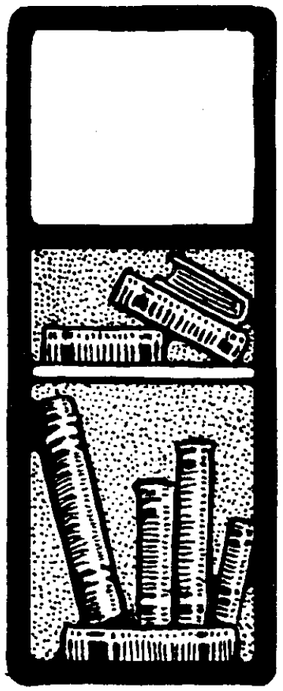
The Court in this case recognized that the purchase of the home took place in October of 1986 and that the action itself was governed by the South Carolina Governmental Tort Claims Act Section 15-78-10 et. seq. in the Code of Laws of the State of South Carolina, 1976 as amended.

In recognizing that the Governmental Tort Claims Act was the exclusive basis for any tort liability against the governmental entity, the Court found that pursuant to Section 15-78-60 (13), that governmental entities are not liable for negligent inspection of any property to determine whether the property complies with or violates any laws, regulations, code or ordinance, or contains a hazard to health and safety; . . . In making this recognition, the Court found that the statute itself barred any type of recover against Lexington County as a result of an alleged negligent inspection of the Plaintiff's house.

Based on this rationale, the Court dismissed the action as against Lexington County.

DEFENSE BAR CONFERENCE

Mark H. Wall
SCDTAA President-Elect



The Twenty-Second National Conference of Defense Bar Leaders was held in New Orleans, Louisiana on March 2nd through 4th, 1989 (Frank Gibbes is still upset that the meeting he attended last year was in Minneapolis). The Conference was sponsored by the Defense Research Institute and is attended by the Presidents and/or Presidents Elect of the State and Local Defense Attorneys' Associations. I attended the Conference in my capacity as President Elect of our Association.

I am pleased to report that we have again won an award for excellence. The award will be presented to Carl Epps at our annual meeting in November, at the Cloisters.

The major thrust of the general sessions of the Conference again concerned tort reform and the need for the Defense Attorneys' to inform the public that our Associations are involved in representing parties in all the lawsuits brought in this Country. As such, we are also spokesmen for the Civil Trial Bar.

To further assist in this goal the DRI has retained the services of Ruder-Fin Inc., a public relations firm from Chicago. They stressed that they were a Public Relations Firm and not an advertising agency. The difference being that their job is to provide information to the media for its distribution to the public, not the direct sale of a product. Ruder-Fin emphasized that we, as defense lawyers, have a duty to the public to keep them informed of changes in civil litigation and its effect on the community at large.

Another interesting topic broached at the Conference was the election of Judges. Present to speak on the issue was the Chief Justice of the Texas Supreme Court who was recently elected to the position by popular election. Millions of dollars are spent on such elections in Texas as they are statewide, at large elections. Most of the funding comes from special interest groups. Constitutional challenges are now being presented as the effect of at-large elections on the "one man one vote" rule.

Needless to say, a lively discussion was held concerning the different modes of appointing or electing Judges.

The Conference also included three (3) "break out" sections to allow interplay between the State and Local Associations. At all of the meetings it became obvious that our Association is well ahead of most of the State Associations in providing services to its members, the only Associations that compare with us favorably are those from much larger states such as Texas, California and Ohio.

Our Association should be justifiably proud of the past leadership of the Association for bringing us to the point where we are and for our effective use of an Executive Director whose services provide for effective organization and coordination of the services provided by the Association.

CALENDAR OF EVENTS

1989		
Association of Insurance Attorneys	April 18-22	Olympic Hotel Seattle, Washington
Annual Meeting SC Bar	June 29-July 2	Hyatt Regency Savannah
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
1990		
Mid-Year Meeting SC Bar	January 18-21	Omni at Charleston Place
Annual Meeting SC Bar	May 31-June 3	Myrtle Beach Hilton

CLE PROGRAM

The South Carolina Bar and the South Carolina Defense Trial Attorneys' Association are co-sponsoring a CLE program on October 20, 1989. For further information, please contact:

William O. Sweeney, III
799-2000

John B. McCutcheon, Jr.
248-7225

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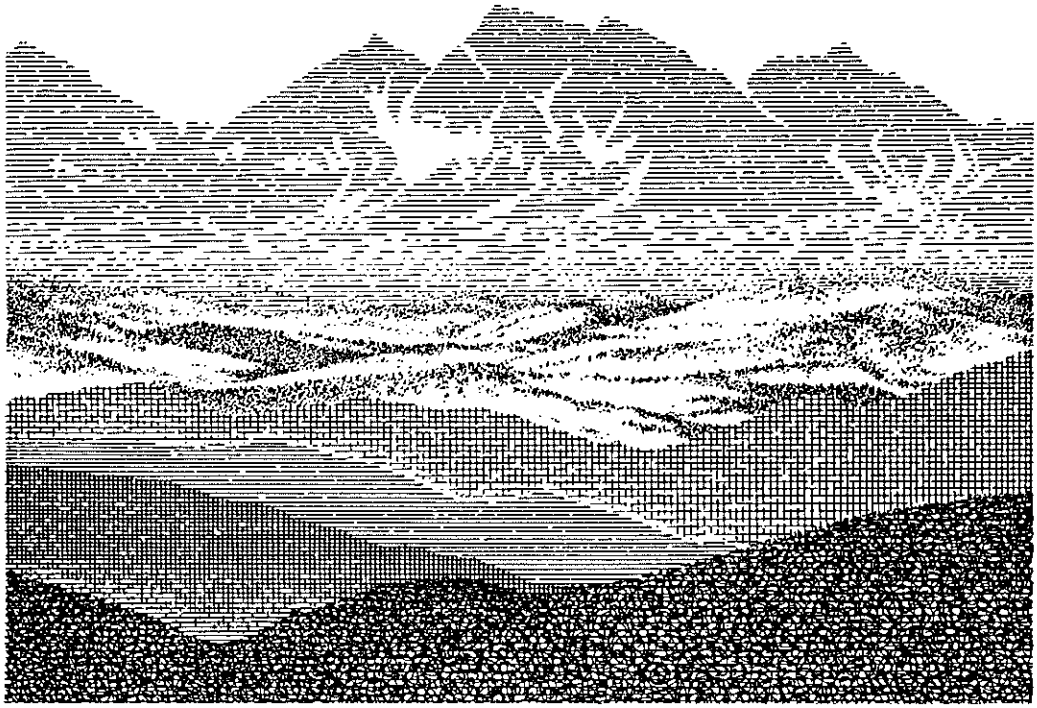
1989 JOINT MEETING GROVE PARK INN ASHEVILLE, NC JULY 27-30, 1989



We are looking forward to another outstanding joint meeting at the Grove Park in Asheville. One hundred and eighty (180) rooms have been reserved and with the recent additions to the Inn, there should be no problem for those wanting to stay at the Grove Park. On Thursday evening we will have a steak fry and reception. The entertainment will be provided by Willis Blume's Blues Band. On Friday evening, we will travel by bus to the Deer Park Inn for a pigpickin'.

As always, we will have golf and tennis tournaments, and as an option, for the more daring among us, we will have a sign-up for a river raft excursion. The availability of the river raft excursion will be contingent upon the number of people who sign up. An outstanding spouses' program is also planned in which buses will be provided for an afternoon shopping spree.