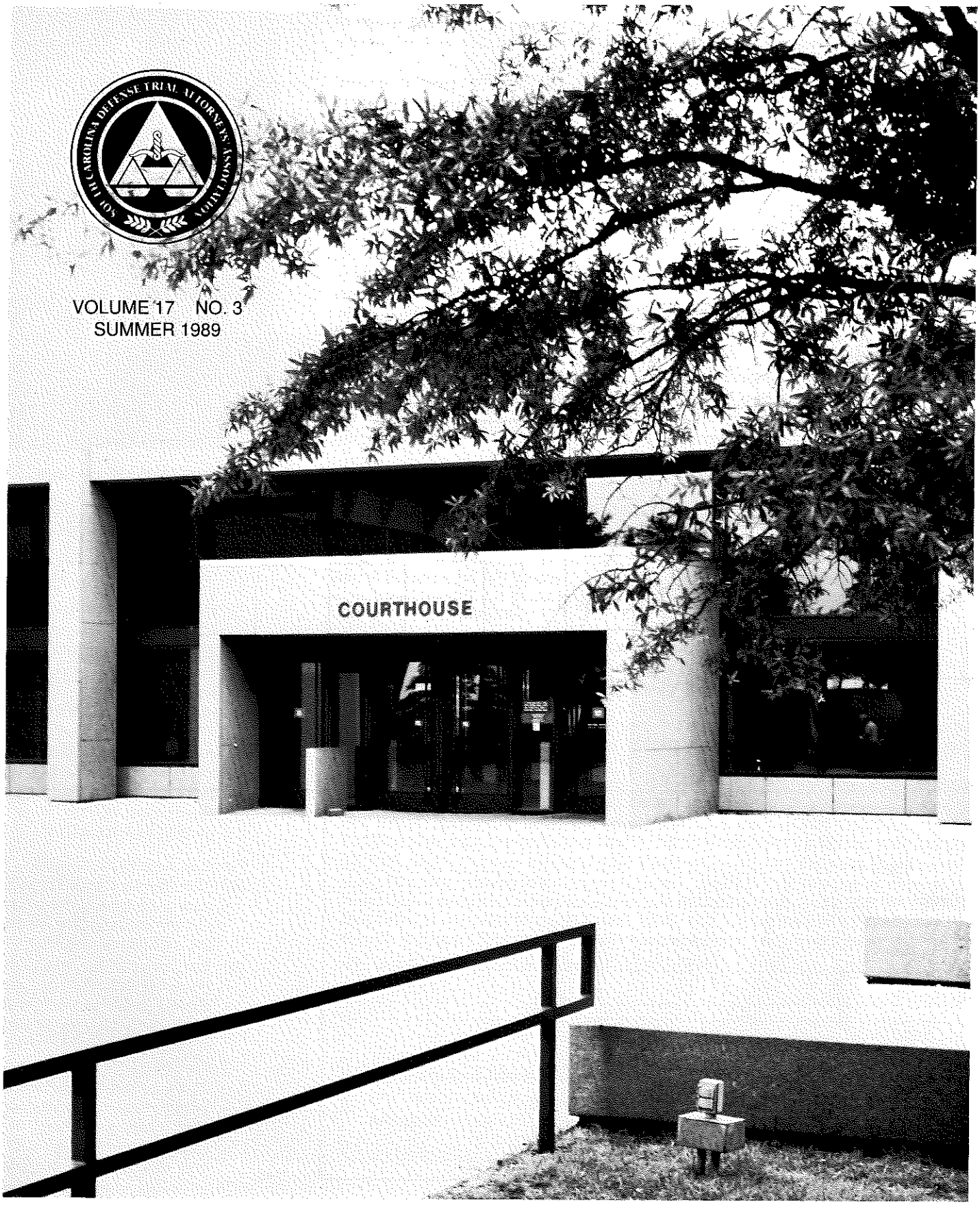
THE DEFENSE LINE

SOUTH CAROLINA DEFENSE TRIAL ATTORNEYS' ASSOCIATION

VOLUME 17 NO. 3
SUMMER 1989



(Ed Eubanks Photo)

HEMPHILL AWARD
CRITERIA

1. **Eligibility.**
   (a) The candidate must be a member of the South Carolina Bar and a member or former member of the South Carolina Defense Trial Attorneys' Association. He or she may be in active practice, retired from active practice or a member of the judiciary.
   (b) The current officers and members of the South Carolina Defense Trial Attorneys'Association Executive Committee at the time the award is made are not eligible.

2. **Criteria/Basis for Selection.**
   (a) The award should be based upon distinguished and meritorious service to the legal profession and/or the public, and to one who has been instrumental in developing, implementing and carrying through the objectives of the South Carolina Defense Trial Attorneys' Association. The candidate should also be one who is or has been an active, contributing member of the Association.
   (b) The distinguished service for which the candidate is considered may consist either of particular conduct or service over a period of time.
   (c) The candidate may be honored for recent conduct or for service in the past.

3. **Procedure.**
   (a) Nominations for the award should be made by letter, with any supporting documentation and explanations attached. A nomination should include the name and address of the individual, a description of his or her activities in the Association, the profession and the community and the reasons why the nominee is being put forward. Nominations should be directed to the President of the Association prior to the joint meeting each year.
   (b) The Hemphill Award Committee shall screen the nominees and submit its recommendation to the Executive Committee of the Association at its meeting immediately preceding the Annual Meeting of the Association. "The Hemphill Award Committee shall be comprised of the five (5) officers of the Association, and chaired by the immediate Past President."
   (c) The Hemphill Award shall be made in the sole discretion of the Executive Committee, when that Committee deems an award appropriate, but not more frequently than annually.

4. **Form of Award.**
   (a) The recipient shall receive an appropriately engraved plaque commemorating the award at the annual meeting.
   (b) The family of the late beloved Robert W. Hemphill, in the person of Harriet Hemphill Crowder of Mt. Pleasant, has consented to having the award named for the late United States District Judge, Robert W. Hemphill. When possible, the Association shall have a member of the Hemphill family present whenever this award is presented.

By July 20, 1989
Clip and Send to: SCDTAA, 3008 Millwood Avenue, Columbia, SC 29205

I NOMINATE _____

OF THE FIRM OF _____

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CITY AND STATE _____

BECAUSE _____

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(ATTACH A SHEET OF PAPER IF NECESSARY)

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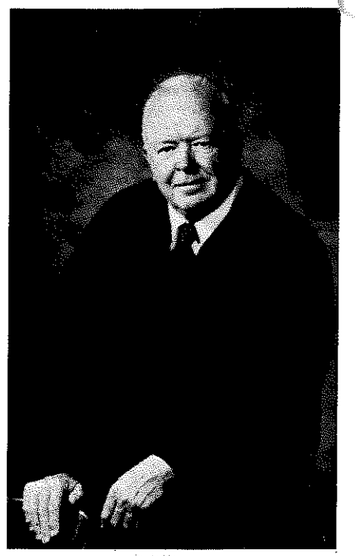
SUBMITTING ATTORNEY



Robert W. Hemphill

VOLUME 17, NO. 3 SUMMER 1989

TEN YEARS AGO

President **BRUCE SHAW** in his report in the June, 1979, *DEFENSE LINE* commented, "It looks like the Legislature is going to stay in session permanently". We were closely monitoring Legislative activity as usual.

The Joint Meeting with the claims managers was set for August 8, 9, 10, 1979, at the Grove Park. **BARRON GRIER** had planned an outstanding program, and **JACK BARWICK** acted as Convention Chairman. **JOHN LINDSEY,** South Carolina Insurance Commissioner, was to be followed on the program by **HAROLD TRASK**, South Carolina Industrial Commissioner, and **DAVE HOWSER**, one of our own. Saturday morning following the business meeting with the claims managers, there was a panel discussion scheduled with **BRUCE SHAW, SENATOR HEYWARD McDONALD** and **REPRESENTATIVE JEAN TOAL. CURTIS HIPP,** President of the Claims Managers and **JOHN DUNN,** President-Elect, lead the Claims Managers' contingency and actively participated in the program.

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.

TWENTY SECOND ANNUAL JOINT MEETING
SOUTH CAROLINA DEFENSE TRIAL ATTORNEYS' ASSOCIATION
CLAIMS MANAGEMENT ASSOCIATION OF SOUTH CAROLINA
JULY 27-30, 1989
GROVE PARK INN,
ASHEVILLE, NORTH CAROLINA
PROGRAM

Thursday, July 27, 1989:

3:00 to 5:00 p.m.	Executive Committee Meeting
4:00 to 7:15 p.m.	Registration
7:15 to 8:15 p.m.	Reception
8:15 p.m. to 12 midnight	Buffet Banquet, Open bar and Entertainment of "Willis Blume Blues Band"

Friday, July 28, 1989:

8:00 a.m. to 12 noon	Late Registration
8:15 to 8:45 a.m.	Coffee and Danish
8:45 a.m. to 12 noon	Educational Session
8:45 to 9:00 a.m.	Welcome: FRANK H. GIBBES, III, Esquire, President, SCDTAA DONALD WRIGHT, President, CMASC
9:00 to 10:00 a.m.	"Ethical Dilemmas of Defense Counsel" PROFESSOR NATHAN CRYSTAL
9:00 a.m. to 12 noon	Spouses Shopping Tour of the Biltmore Shopping Village and the Outlet Mall
10:00 to 10:15 a.m.	Coffee Break
10:15 a.m. to 12:15 p.m.	"Role of the Neuropsychologists in the Evaluation and Treatment of Head Injuries" ROBERT DEYSACH, PH.D.
12:15 to 1:15 p.m.	Bloody Mary and Screwdriver Break
12:30 p.m.	Golf Tournament - Country Club
2:15 p.m.	Tennis Tournament - Racquet Club
7:00 to 11:00 p.m.	Buses leave for Deerpark "Pig Pickin'"

Saturday, July 29, 1989:

8:15 to 9:00 a.m.	Coffee and Danish
8:30 to 9:00 a.m.	Business Meetings for Both Associations
9:00 a.m. to 12:15 p.m.	Educational Session - Heritage A & B
9:00 to 11:00 a.m.	"Objective Assessment of Lumbar Spine Injuries" DR. GLENN SCOTT
11:00 to 11:15 a.m.	Coffee Break
11:15 to 12:15 p.m.	"The Impact of Objective Assessment on Claims Decision Making" DR. GLENN SCOTT COMMISSIONER THOMAS MARCHANT, III SCDTAA AND CMASC REPRESENTATIVES
12:15 to 1:15 p.m.	Farewell Bloody Mary and Screwdriver Break

PRESIDENT'S PAGE

Frank H. Gibbes, III
SCDTAA President

The joint meeting of the Claim's Management Association of South Carolina and the South Carolina Defense Trial Attorneys' Association will be held July 27-30 at the Grove Park Inn in Asheville. As we approach the joint meeting of our two associations, I want to share a few brief but sincere thoughts.

As claims managers and defense attorneys, we are the people who are responsible for the defense side of the business in which we are engaged. When a claim is asserted against a person, we are the people to whom that person first turns for assistance and through whom that person first becomes acquainted with our dispute resolution process and our judicial system. When a claim is asserted against a person, we are the people who shepherd that person through the claims process and offer that person meaningful guidance toward resolving the claim short of litigation. When a person is sued, we are the people who protect that person by vigorously asserting that person's rights within the confines of the judicial process afforded by our state and federal constitutions.

Over the past 10-15 years those of us on the defense side of the street have received a great deal of bad press both inside and outside of the judicial system. The advent of bad faith claims cast us defense folks in a bad light. In virtually every claim that was made and in every lawsuit that was filed, we heard that we had acted in bad faith and in derogation of the rights of the claimant, our insured, and the public at large. Undoubtedly, there were and are exceptional cases where those in our industry and in our profession have not acted properly and should be subjected to a bad faith claim. These, however, are isolated exceptions. Nonetheless, through court decisions, news publicity, and verbal attacks from afar, we have been led to believe that bad faith is rampant in our industry and in our profession. This is not the case, and it is time that we stood up and said so.

Ninety nine percent (99%) of those of us who are claims managers and defense attorneys are no different than anyone else who has the responsibility of making a living and supporting a family. We are good hardworking people who do our best to do our job the best way we know how. In the process we strive to afford the people we represent in the claims handling and the litigation process a capable defense. Where our clients are in the right, we do our best to assure them that their rights will be asserted, that they will be defended in vigorous fashion, and that solid principle will not be sacrificed in the name of economic

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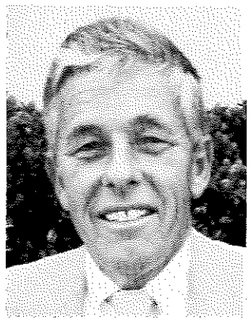
Don Wright
CMASC President



The Officers and Board of Directors of the Claims Management Association of South Carolina (CMAS.C.) wish to extend a welcome to all our members planning to attend the July 27-30 joint meeting with the South Carolina Defense Trial Attorneys Associations (S.C.D.T.A.) at Grove Park Inn.

This meeting has been going on for many years. I can easily say it has been at the top of my priority list of meetings and seminars I attend. It will be my 9th year and I look forward to it each year.

Not being a native of South Carolina I think I can lend a perspective to what the CMAS.C./S.C.D.T.A. joint meeting does to help my day to day function as a claims manager. Prior to transfer to the south I only had contact with one in-house defense firm. We thought they did a very credible job trying cases but I had no experience with other defense firms. I now handle claims throughout South Carolina; therefore, assign suits to many different firms depending upon the locale.

The joint meeting has allowed us to meet with many of the defense lawyers we would normally only speak with by phone. By meeting with them in a combination social/business environment, we gain some insight into the personality of the persons. If you will excuse the analogy I liken it to sitting down with strangers to play poker. It doesn't take long to figure out who is aggressive, conservative, or a bluffer. This is important for us in claims management. Certain cases require aggressive defense, some require conservative gathering of all evidence and some require a bit of bluff. I know some of the larger defense firms assign suits with some thought as to which attorney will use what approach to reach a desired end result.

The programs at the joint meeting have been, for the most part, outstanding. I particularly want to mention the 1988 program. The Summary Jury Trial attracted our largest attendance yet. Just about all attendees, including spouses, were either in the audience or a participant and the trial itself was a topic of conversation even at the social gatherings.

The CMAS.C. wish to thank the S.C.D.T.A. for all the work done planning the meeting. Each year the planning starts in January and February with joint meetings and open discussion between the two associations. Cooperation between us has been excellent and we look forward to many more years of it.

RECENT DECISIONS

INSURER INTERVENES TO PROTECT OWN INTERESTS

David L. Morrison

In Linda Smith v. Richland Corporation d/b/a Filling Station Saloon, Civil Action Number 88-CP-40-3583, the insurance carrier was allowed to intervene in the litigation in order to protect its own interests.

The insurer denied the coverage for certain particulars of negligence alleged in the Complaint, while at the same time, accepting coverage for the remaining particulars of negligence alleged in the Complaint. However, any general verdict in favor of the Plaintiff would force the insurer to pay the judgment since\ the judgment might have been based upon one of the particulars of negligence that is covered by the policy. A declaratory judgment action after the trial to determine whether the actions of the Defendant were in fact were covered would be useless since there would be no way to determine which particular of negligence the jury based their judgment upon. Thus, the disposition of the original litigation would, as a practical matter, determine whether the carrier has to pay any judgment. The carrier would never have the opportunity to have the coverage question litigated.

Under these circumstances, the carrier, through separate counsel, sought intervention pursuant to Rule 24 of the South Carolina Rules of Civil Procedure. The carrier had an interest adverse to that of the insured in not paying a judgment based upon the particulars of negligence for which coverage had been denied. Since the disposition of the litigation would prevent the carrier from protecting its interest, intervention in the litigation was the only means available to the insurer to protect its interests. The Court allowed intervention in this matter pursuant to South Carolina Rules of Civil Procedure, Rule 2 (a) (2) and (b) (2). Rule 24 (a) (2) allows intervention as a matter of right when the applicant claims an interest relating to the property or transaction which is the subject of the action and he is situated so that the disposition of the action may as a practical matter impair or impede his ability to protect that interest. Rule 24 (b) (2) allows the Court to exercise its discretion in determining whether to allow intervention and to consider delay or prejudice to the original parties.

In this case, the Court allowed the carrier to intervene on its own behalf solely for the purpose of submitting special Interrogatories to the Court to be answered by the jury in the event of a verdict for the Plaintiff. There is no delay or prejudice to the original parties since the carrier will not be a party to the trial of the case ,but is only allowed to represent its own interest by submitting special Interrogatories to the Court. Those Interrogatories will allow the parties to determine the basis for any verdict returned by the jury so that the parties will know whether the verdict is based upon a particular of negligence that is covered under the insurance policy or whether the verdict is based upon a particular of negligence that is not covered by the insurance policy. Thus, the trial of the case will not be delayed and the carrier can protect its interests at the same time.

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SCDTAA President

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expediency. Where our clients are in the wrong, we strive just as hard to obtain a prompt, fair, and just disposition of the claim that is the best economic interest of all concerned.

A major goal of the this year is to develop a comprehensive and long-term program for improving the public image of those of us who serve on the defense side of our judicial process. In the past we have sometimes shown less than adequate concern about the public image that we have presented. This we will address through the program we are developing.

For the moment let me make clear that it is the image and the image only that we need to address. Let me reaffirm that, in reality, the overwhelming majority of those of us who serve as claims representatives and defense attorneys are "good folks." We work hard - we act in a professional manner - and we constantly strive to carry out our duties and responsibilities in a manner that best serves the ends of justice. Far from acting in bad faith, we act in good faith. We do so with the good faith hope and expectation that we will be recognized over the next 10-15 years for the good work that our predecessors have accomplished and that we will continue to accomplish.

On the eve of our joint meeting let me express my thanks to the officers and members of both associations who have worked hard to make this meeting a rewarding and enjoyable time for each of you in attendance. I look forward to seeing you at Asheville.

See You in Asheville July 27-30

Amendments to Federal Practice and Procedure in a shorter version has appeared in the *S.C. Lawyer* and is also scheduled for release in the Trial and Advocacy Section Newsletter. We would like to express our appreciate to Professor Stravitz and Mr. Tate for allowing us to publish this article in the *Defense Line*.

RECENT FEDERAL PRACTICE AND PROCEDURE AMENDMENTS

Howard B. Stravitz* and H. Simmons Tate, Jr.**

HOWARD B. STRAVITZ

Mr. Stravitz has been a professor at the University of South Carolina School of Law since the Fall, 1983. He graduated from Brooklyn College in 1969 (B.A., cum laude), and received his Juris Doctor (magna cum laude) from Rutgers University in 1972. While at Rutgers, Mr. Stravitz was Editor-in-Chief of the Rutgers Law Journal. After graduation from law school, Mr. Stravitz served as law clerk to the Honorable David N. Edelstein, then Chief Judge of the United States District Court for the Southern District of New York. From October, 1974 until he joined the Law School faculty, Mr. Stravitz practiced law in New York City with the firm of Cleary, Gottlieb, Steen & Hamilton.

Mr. Stravitz teaches Civil Procedure, Federal Practice and Creditors' and Debtors' Rights.

H. SIMMONS TATE, JR.

Born Taylors, South Carolina, September 19, 1930; admitted to bar, 1956, South Carolina. Education: Harvard College (A.B., 1951); Harvard University (LL.B., 1956). Chairman, U.S. District Court Advisory Committee, 1984—. Member, Board of Editors Federal Litigation Guide Reporter, 1985—. Member: The Association of the Bar of the City of New York; Richland County and American Bar Associations; South Carolina Bar; American Judicature Society; American Law Institute; South Carolina Defense Trial Attorneys Association; Defense Research Institute. [With U.S. Army, active duty, 1951-1953]. (Resident, Columbia Office)

Effective May 18, 1989, the jurisdictional amount for federal diversity cases was raised to $50,000. The new jurisdictional amount and other significant changes in federal practice and procedure were made by the "Judicial Improvements and Access to Justice Act,[1] which was signed by the President and became law on November 19, 1988. Although the Act contains ten titles dealing with a broad range subjects affecting federal courts,[2] the practicing bar will be particularly interested in the sections relating to removal, venue and diversity jurisdiction. This article will principally focus on those sections and briefly discuss other selected topics of interest to the practitioner.

CHANGES IN DIVERSITY JURISDICTION

The legislative history of the Act states that Title II, labelled Federal Jurisdiction--Diversity Reform, is intended "to reduce the basis for Federal Court jurisdiction based solely on diversity of citizenship."[3] Title II may effect a short term decrease in diversity cases, but the anticipated reduction of forty percent by certain proponents of the bill[4] seems unduly optimistic. Moreover, the current amendments represent a compromise with those favoring total abolition of diversity jurisdiction.[5] Title II contains three sections.

Section 201. Amount in Controversy in Diversity Cases. Subsections (a) and (b) of 28 U.S.C. § 1332 were amended to raise the diversity jurisdictional amount from $10,000 to $50,000. This is only the fourth time in two-hundred years that the jurisdictional amount has been increased.[6] The legislative history gives two reasons for the amendment: (1) to decrease the number of diversity cases, currently constituting one-forth to one-third of the federal docket; and (2) to take account of past, and provide a cushion against future, inflation.[7]

Since the effective date of the amendment, May 18, 1989, cases in which the amount in controversy exceeds $10,000, but fails to exceed $50,000, may neither be filed in, nor removed to, federal district court even when complete diversity exists. Although the number of cases falling within these limits are unknown, the impact of the new jurisdictional amount will be minimal in tort litigation, which constitutes the majority of diversity cases, because damages in these cases are generally unliquidated, and demands for relief are frequently imprecise when complaints are filed. Congress anticipates the Rule 11 of the Federal Rules of Civil Procedure will have an *in terrorem* effect on inflated demands for relief.[8]

As inflation eroded the prior $10,000 jurisdictional minimum, few cases in recent years discussed the legal principles determining amount in controversy. Now that the amount has been raised to $50,000, these principles are likely to be invoked by federal courts to resolve borderline cases. The seminal amount in controversy case is *St. Paul Mercury Indemnity Co. v. Red Cab Co.*, 303 U.S. 283 (1938), in which the Supreme Court stated that "the sum claimed by the plaintiff controls if the claim is apparently made in good faith. It must appear to a legal certainty that the claim is really for less that the jurisdictional amount to justify dismissal." *Id.* at 288-89 (footnotes omitted). The "good faith-legal certainty" standard is easy to apply only when damages are limited by contract or operation of law. S*ee, e.g., Pachinger v. MGM Grand Hotel-Las Vegas, Inc.*, 802 F.2nd 362 (9th Cir. 1986) (Nevada statute limited liability to $750); *Kahn v. Hotel Ramada*, 799 F.2d 199 (5th Cir. 1986) (same); *Doucet v. Travelers Ins. Co.*, 362 F.2d 263 (5th Cir. 1968) (insurance policy with liability limited less than the jurisdictional amount).

For example, if punitive or exemplary damages cannot be recovered under applicable law, and a plaintiff's claim for actual damages is less than the jurisdictional minimum, a federal court must disregard any claim for punitive or exemplary damages and dismiss the case. *See, e.g., Ringsby Truck Lines, Inc. v. Beardsley,* 331 F.2d 14 (8th Cir. 1964); *Salisbury v. St. Regis-Sheraton Hotel Corp.*, 490 F. Supp. 449 (S.D.N.Y. 1980).

Another area that will be affected by the new jurisdictional amount is removal. If a complaint seeks damages in a sum less than the new jurisdictional amount, defendants will be unable to remove even if there is complete diversity. The new jurisdictional amount thus presents counsel representing plaintiffs with another

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method of preventing removal. If damages are approximately $50,000, it is possible for a plaintiff to seek $48,000 or $49,000, or even precisely $50,000, and prevent removal. After preventing removal, however, it is arguable that a plaintiff may offer proof of damages in excess of $50,000 at trial, and then move under Rule 15(b) of the South Carolina Rules of Civil Procedure, or any similar provision in other states, to amend the pleadings to conform to the evidence, and to recover a judgment in excess of $50,000.[9] If amendment to the pleadings occurs within a year of commencement of the action, however, a defendant may be able to remove the case after the amendment. *Cf. Heniford v. American Motors Service Corp.*, 471 F. Supp. 328 (D.S.C. 1979).

Nevertheless, in South Carolina under Rule 8(a) of the Rules of Civil Procedure "a party may plead that the total amount in controversy shall not exceed a stated sum which shall limit the claim for all purposes." If a pleading is so limited, it would appear that later amendment to increase damages to conform to the evidence would not be permitted. Consequently, even if damages actually exceed $50,000, a claim may be limited to less than the jurisdictional amount in South Carolina to prevent removal. Of course, if damages are substantial, a claim is unlikely to be limited merely to prevent removal.

In addition, under S.C.R. Civ. P. 8(a) it is not necessary to plead a sum certain for actual damages, and one may not plead a stated sum for punitive or exemplary damages, Consequently, a state court complaint with no specific damage claim is permitted. If a complaint without a specific damage claim is filed, and from the nature and scope of the claims, it is reasonable to infer that the plaintiff is seeking in excess of $50,000, exclusive of interest and costs, the defendant may remove by claiming that on information and belief the plaintiff is seeking in excess of the jurisdictional amount.

Section 202. Diversity in Cases Involving Multistate Corporations or Representative Parties.

Despite its lengthy title, section 202 of the Act amends 28 U.S.C. § 1332(c) to add a subsection providing that the legal representative of a decedent's estate, infant, or incompetent, is deemed to be a citizen only of the same state as the decedent, infant or incompetent. This provision eliminates the need to consider the citizenship of the representative for diversity purposes. Instead it adopts a proposal long advocated by the American Law Institute.[10]

Originally, the citizenship of a representative party was controlling for diversity purposes. *See Chappedelaine v. Dechenaux,* 8 U.S. (4 Cranch) 306 (1808). Some courts even upheld appointment of a representative made solely to create diversity jurisdiction. *See, e.g., Corabi v. Auto Racing, Inc.,* 264 F.2d 784 (3d Cir. 1959). In the 1960's, however, the Third and Fourth Circuits held that the appointment of a representative for purposes of creating diversity jurisdiction ran afoul of 28 U.S.C. § 1359, which prohibits improper or collusive joinder for purposes of invoking federal jurisdiction. *See Lester v. McFaddon,* 415 F.2d 1101 (4th Cir. 1969); *McSparran v. Weist,* 402 F.2d 867 (3d Cir. 1968), *cert. denied,* 395 U.S. 903 (1969). In a series of cases dealing with the appointment of ancillary administrators to prosecute wrongful death claims, the Fourth Circuit had great difficulty applying § 1359 to slightly different fact situations,[12] and eventually expressed a willingness to consider adoption of the ALI proposal,[13] which section 202 now adopts.

Under the new subsection to § 1332(c), if a citizen of Georgia is killed in an accident in North Carolina, and a North Carolina ancillary administrator is appointed to prosecute a wrongful death claim against a North Carolina defendant, the North Carolina administrator will be deemed to be a citizen of Georgia for diversity purposes.

Section 203. Permanent Resident Alien Citizenship for Diversity Purposes.

Section 1332(a) was amended to add a provision that "an alien admitted to the United States for permanent residence shall be deemed a citizen of the State in which such alien is domiciled." Previously, a citizen of France who was a permanent resident alien domiciled in South Carolina could sue a citizen of South Carolina on a diversity claim in federal district court because both the Constitution and 28 U.S.C. § 1332 expressly include alienage diversity cases (between a U.S. citizen and a citizen or subject of a foreign state) within federal subject matter jurisdiction. Moreover, if a permanent resident alien were sued in a state court by a local plaintiff, the case could have been removed by the resident alien defendant. Critics argued that a permanent resident alien should not be able to bring what is essentially a local dispute into federal court. A permanent resident alien with local ties is more akin to an in-state citizen. The Act now recognizes this view, and, for purposes of diversity, removal and statutory interpleader, a permanent resident alien is considered a citizen of the state in which he is domiciled.

One serious question is raised by this new provision. Can a permanent resident alien (*i.e.,* a citizen of the United Kingdom) domiciled in a state, sue a foreign citizen (*i.e.*, a citizen of Canada) on a diversity claim? The same issue is raised by a suit between permanent resident aliens domiciled in different sates. The new amendment to § 1332(a) would appear to allow these actions. Nevertheless, Article III, § 2 of the Constitution makes no provision for jurisdiction in cases between aliens on state law claims. Arguably, if applied to suits exclusively between aliens, the amendment made by section 203 of the Act is unconstitutional.

CHANGES IN VENUE

Two changes to federal venue were made by the Act. Both changes are contained in Title X -- labelled Miscellaneous Provisions, and both were effective on February 17, 1989.

Section 1001. Divisional venue in Civil Cases. Section 1001abolished divisional venue in civil cases commenced in federal court by repealing 28 U.S.C. § 1393. Section 1393 required that when a lawsuit, not of a local nature *(i.e.,* not involving a land dispute) was brought in federal court, it had to be brought in the division where a defendant resided. Now a lawsuit may be brought in any division of the district, regardless of where the defendant resides. Note, however, that when a case is removed from state to federal court, divisional venue is still important.

Under 28 U.S.C. § 1446(a) a case must still be removed to the division where the state court from which it was removed is located.

The legislative history on the reason for this change is sparse. The report of the House Judiciary Committee says only that divisional venue in criminal cases was abolished in 1966 because of the undue delay in the disposition of criminal cases caused by divisional requirements.[14] The House report indicates that the Judicial Conference of the United States concluded that divisional venue requirements in civil cases should be abolished for the same reasons.[15]

A court continues to have power to transfer a case from one division to another within the same district, either on motion, by consent or stipulation, or probably *sua sponte*. 28 U.S.C. § 1404(b). Intradistrict divisional transfers are expressly committed to the discretion of the district court judge. *Id.*

Section 1013. Corporate venue. Section 1391(c) of title 28, relating to corporate defen-

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

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dant venue, was completely rewritten. Formerly, a corporation could be sued in any judicial district where it was incorporated, licensed to do business or doing business. Under the rewritten subsection, a corporation's residence is deemed to be any judicial district "in which it is subject to personal jurisdiction" when the action is commenced. Where a State has more than one judicial district, the corporation's residence is deemed to be in the judicial district in which it has "contracts . . . sufficient to subject it to personal jurisdiction if that district were a separate State," and if none of the districts meets that test, then the residence is deemed to be in the district with which it has the "most significant contacts."

The legislative history deals almost exclusively with the second sentence of new § 1391(c), and offers no rationale for the significant change made by the first sentence, other than the observation that there were problems in determining a corporation's residence.[16] The second sentence only has significance in states with more than one federal district--*e.g.,* North Carolina, Georgia. Congress was concerned that under former § 1391(c) a corporation that was neither incorporated nor licensed to do business[17] in a multidistrict state, and which confined its business activities to one district, could have been sued in any district in that state, including one in which it conducted no business. Now, under new § 1391(c), for example, an Ohio corporation that is not licensed to do business in North Carolina and which confines its activities to Charlotte (Western District) could not be sued in Wilmington (Eastern District).

Formerly a corporation licensed or qualified to do business in a state, but not actually doing business there, was deemed a resident for venue purposes. Mere licensing or qualification, however, may not be sufficient to subject a corporation to personal jurisdiction. Consequently, under new § 1391(c) mere licensing or qualification may be inadequate to confer venue.

The first sentence of new § 1391(c) makes a more significant change. For venue to be proper a corporate defendant must be subject to personal jurisdiction in the judicial district in which the action is filed at the time the action is commenced. If this provision is satisfied, the corporation is deemed to reside in that judicial district for venue purposes. Under former § 1391(c)corporate residence was defined as the district where the corporation was (1) incorporated; (2) licensed to do business; or (3) doing business. The first two basis for finding residence posed no substantial problems. The third basis for corporate defendant residence, however, was subject to much controversy. Two principal tests of "doing business" emerged. One equated "doing business" for venue purposes with the due process test for personal jurisdiction. *See, e.g., Du-Al Corp. v. Rudolph Beaver, Inc.,* 540 F.2d 1230 (4th Cir. 1976); *Houston Fearless Corp. v. Teter,* 318 F.2d 822, 825 (10th Cir. 1963). This line of authority has now been codified in new § 1391(c). The other test for "doing business" required a higher level of activity to establish venue. *See, e.g., Maybelline Co. v. Noxell Corp.,* 813 F.2d 901, 905 (8th Cir. 1987); *Flowers Industries, Inc. v. Bakery & Confectionary Union,* 565 F. Supp. 286, 290-91 (D. Ga. 1983). A variant of the second test found a corporation was "doing business" if the nature and character of it's activities in a state could allow the state to require the corporation to be licensed. *See Johnson Creative Arts, Inc. v. Wood Masters, Inc.,* 743 F.2d 947, 954-55 (1st Cir. 1984).

Since the Fourth Circuit previously followed the personal jurisdiction-due process test for doing business, *see Du-Al Corp. v. Rudolph Beaver, Inc.,* 540 F.2d 1230, 1233 (4th Cir. 1976), there should be no change in practice in the District of South Carolina or in other Fourth Circuit district courts under new § 1391(c). In those jurisdictions previously following more restrictive test of "doing business," opportunities for venue have been liberalized by the Act.

Note, however, that the United States Supreme Court's jurisdictional-due process test has become increasingly complex in the last decade. *See* Stravitz, *Sayonara to Minimum Contacts: Asahi Metal Industry Co. v. Superior Court,* 39 S.C.L. Rev. 729, 772-83 (1988).

CHANGES IN REMOVAL

The Act made substantial changes to both removal jurisdiction (28 U.S.C. § 1441) and removal procedure (28 U.S.C. §§ 1446, 1447).

Section 1016. Improvements in Removal Procedure. Of the amendments in Title X, this section is probably of the most general interest to the practicing bar. All of the amendments contained in § 1016 became effective on the date of enactment, November 19, 1988. It is unclear, however, if the removal amendments apply to actions pending on that date. Recent district court cases from the Ninth Circuit, however, hold that the Act's elimination of "Doe" defendants for removal purposes (see below) does not permit cases that were not removable because of the naming of "Doe" defendants prior to the Act to be removable now. *See, e.g., Phillips v. Allstate Insurance Co.,* 702 F. Supp. 1466 (C.D. Cal. 1989); *Ehrlich v. Oxford Insurance Co.*, 700 F. Supp. 495 (N.D. Cal. 1988).

1. *Citizenship of Ficticious-Named Defendants Disregarded.*Section 1441(a) was amended by adding the following new sentence:

> For purposes of removal under this chapter, the citizenship of defendants sued under fictitious names shall be disregarded.

Previously, a plaintiff could avoid removal by naming "John Doe" as a defendant and alleging that John Doe was a citizen of the same state as the plaintiff. Since removal on the ground of diversity requires complete diversity of citizenship between all plaintiffs on the one hand and all defendants on the other, the naming of a non-diverse fictitious defendant effectively barred removal by the remaining diverse defendants. This was common practice, particularly in the Ninth Circuit, where the federal courts refused to allow removal when a nominal or fictitious nondiverse defendant was joined as a party. *See Bryant v. Ford Motor Co.,* 844 F.2d 602 (9th Cir. 1987) (en banc), *cert. granted,* 109 S. Ct. 54, *vacated,* 109 S. Ct. 542 (1988) (presumably as a result of the amendment to § 1441(a) made by the Act). The amendment now permits a district court to disregard a fictitious defendant in determining whether the case can be removed.

2. *Substitution of a "notice of removal" for "petition for removal."* Title 28, § 1446(a) was amended to substitute a "notice of removal" signed pursuant to Rule 11 of the Federal Rules of Civil Procedure, for the verified "peti-

(Continued on page 10)

(Ed Eubanks Photo)

tion for removal" to federal court. The notice must contain a short and plain statement "of the grounds for removal." Under prior law the petition had to have a statement of the "facts which entitled him or them to removal ...." Thus, in addition to changing the name of the document, the amendment changes the contents of the short and plain statment. The House Judiciary Committee indicated that some courts had required fact pleading[18] in the petition for removal, contrary to the spirit of the federal rules which require notice pleading.18 As a practical matter, the change from a petition to a notice makes little difference, but the change makes sense because a removal petition did not require any action by the court. A case was removed upon the filing of a petition, and could be remanded only upon motion or *sua sponte* action by the court. The elimination of the verification requirement (which was sometimes difficult to obtain) is also an improvement.

Section 1446(b) was amended to strike out "petition for removal" and substitute "notice of removal" wherever it appeared. Curiously (and no undoubt inadvertently) subsection (e) [redesignated subsection (d) as explained below] continues to speak of a petition for removal.

3. **Diversity removal after one year prohibited.** Section

1016(b) (2) (B) effects a major change in removal on the basis of diversity. That section adds a phrase at the end of § 1446(b):

> [A] case may not be removed on the basis of jurisdiction conferred by section 1332 [diversity] of this Title more than 1 year after commencement of the action.

Title 28 U.S.C. § 1446(b) permits removal within thirty days after receipt by the defendant of an amended pleading, motion, order or other paper from which it may first be ascertained that the case is or has become removable. For example, where a nondiverse defendant (whose presence prevents removal) is dismissed by the plaintiff, the remaining defendants can remove the case within thirty days after receipt of an order dismissing the non-diverse defendant. The effect of the new provision is to prohibit removal based on diversity more than one year after commencement of the action. Thus, a plaintiff may settle a case with the nondiverse defendant and delay consummating the settlement until the case is more than one year old, thereby precluding removal. The rationale for this amendment is that after a case has been pending for some time in state court and discovery and other orders have been entered, it is a waste of judicial resources for the case to be removed.[19]

In South Carolina, there may be a question when an action is commenced in state court. Under the South Carolina Rules of Civil Procedure, an action is commenced "by filing and service of a summons and complaint." S.C.R. Civ. P. 3(a). Presumably, this means that the summons and complaint must have been both filed and served for the action to have been commenced. However, Rule 3(b) provides that for purposes of tolling a statute of limitations, an attempt to commence an action is equivalent to commencement when the summons and complaint are filed with the clerk of court and delivered for service to the sheriff, provided that actual service is accomplished within a reasonable time.

As stated above, the one-year cutoff is applicable only in diversity cases. If a federal claim is added to a state complaint more than one year after commencement of the action, a notice of removal may be filed within 30 days of the receipt by the defendant of the amended complaint adding the federal claim.

4. **Removal bond eliminated.** Section 1016(d) (3) repealed § 1446(d) of Title 28 which required a removal bond in civil cases. Subsections (e) and (f) were redesignated (d) and (e). Although the removal bond requirement was removed by the repeal of 1446(d), subsection (e) [now (d)] continues to speak of a removal bond, undoubtedly an inadvertent error on the part of Congress in not amending that language as well.

5. **Procedure after removal**. Section 1016(c) rewrites 28 U.S.C. § 1447(c).

Formerly under § 1447(c) the district court was required to remand the case to state court if at any time before final judgment it appeared that the case was "removed improvidently and without jurisdiction." The rewritten subsection requires that a motion to remand "on the basis of any defect in removal procedure" must be made within thirty days after the filing of the notice of removal. There is thus established a thirty-day time limit within which a plaintiff must move to remand, where the basis for the motion is some defect in removal procedure. Presumably, failure to file a remand motion within thirty days constitutes a waiver of any defects.

The rewritten subsection goes onto provide that "if at any time before final judgment, it appears that the district court lacks subject matter jurisdiction," the case shall be remanded. It seems that this latter change becomes applicable in two situations:

(a) where the basis for federal jurisdiction is eliminated from the case after removal (*e.g.*, by dismissal of a federal claim, or substitution of a nondiverse defendant for a diverse defendant); or

(b) where a basis for federal jurisdiction is obtained after removal (*e.g.*, by adding a federal claim, or eliminating a nondiverse defendant).

The first situation may be illustrated as follows: A suit is brought against defendants (including nondiverse defendants) alleging federal claims and pendant state claims. The case is properly removed on the basis of the federal claims. Subsequently, the court dismisses the federal claims, leaving only state claims. If all defendants were diverse, the court would still have jurisdiction on the basis of diversity of citizenship. But if any defendant is nondiverse, the courts lacks jurisdiction on the basis of diversity of citizenship and further lacks jurisdiction on the basis of federal claims. Since only state claims remain, the court is required to remand the case to state court.

The second example may be illustrated as follows: Suit is brought in state court against diverse and nondiverse defendants. The diverse defendant removes under 28 U.S.C. § 1441(c) on the ground that the suit against it is a separate and independent claim. After removal, the court remands the case against the nondiverse defendant, leaving in federal court only the claim against the diverse defendant. Under the former language of the statute, if the case was improvidently removed *(i.e.*, if the claim against the diverse defendant was not in fact separate and independent), the case had to be remanded. Under the amendment, the case may be remanded only if the court "lacks subject matter jurisdiction." Since after remand of the nondiverse defendant the federal court has subject matter jurisdiction (on the basis of diversity) the case cannot be remanded. *See Able v. Upjohn Company*, 829 F.2d 1330 (4th Cir. 1987). The result would be the same if, after improvident removal, the plaintiff adds a federal claim. The basis for retaining jurisdiction would be a federal question. The court would have federal subject matter jurisdiction at the time remand was sought, and thus, remand should be denied even though the original removal was improper because the court lacked a federal jurisdictional base.

A final provision of amended § 1447(c) permits the order of remand to require payment of just costs and actual expenses, including attorney's fees, incurred as a result of the removal. Formerly, a remand order could require payment of costs. The addition of "actual expenses, including attorneys' fees" may serve as a disincentive to spurious removals. This provision in effect replaces the bond requirement of former § 1446(d).

6. **Joinder after removal.** Section 1016c) (2) adds a new subsection (e):

> If after removal the plaintiff seeks to join additional defendants whose joinder would destory subject matter jurisdiction, the court may deny joinder, or permit joinder and remand the action of the State court.

Under Rule 19(a) of the Federal Rules of Civil Procedure a party may be joined if the joinder will not deprive the court of subject matter jurisdiction. If the joinder would deprive the court of subject matter jurisdiction, under the "equity and good conscience" test of Rule 19(b), the court must determine whether the action should proceed among the parties before it, or be dismissed. Under the new § 1447(e), the court has an alternative to nonjoinder and dismissal: it may permit joinder and remand. Of course, the court retains the option of denying joinder and dismissing under Rule 19(b).

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OTHER PROVISIONS

Other notable changes made by Title X-Miscellaneous Provisions are as follows:

Section 1002. Registration of Foreign Judgments. Section 1002 amends 28 U.S.C. § 1963 by permitting the registration of a judgment in another judicial district when the court which entered the judgment orders that the judgment may be registered "for good cause shown." Heretofore, a judgment obtained in one judicial district could not be registered in another judicial district until the judgment had become final by appeal or by the expiration of the time for appeal. The House Judiciary Committee pointed out that this delay permitted a judgment debtor with property in another judicial district to dispose of that property during the time that the judgment was being appealed.[20] Under the amendment, the judge of the district entering the judgment may, for good cause shown, permit the judgment to be registered in other districts, despite the fact that there may be an appeal. The amendment also broadens the scope of the provision by making it applicable to judgments of the Court of International Trade.

This amendment became effective 90 days after enactment, or on February 17, 1989.

Section 1007. Judicial Disqualification. Section 1007 added a subparagraph (f) to 28 U.S.C. § 455 relating to the disqualification of judges. Section 455 requires a judge to disquality himself, *inter alia*, if the judge (or his spouse or minor child residing in his household) has any financial interest in the subject matter or in a party. 28 U.S.C. § 455(b) (4). "Financial interest" is defined as ownership of a legal or equitable interest "however small." 28 U.S.C. § 455(d) (4). Strict compliance with that provision often resulted in problems. A judge may not discover that he has a financial interest until the case has been underway for some time. For example, in some multi-district class cases a full list of all potential class members may not be available until long after the litigation is commenced. The House Judiciary Committee cited *In Re Cement and Concrete Antitrust Litigation*, 515 F. Supp. 1076 (D. Ariz. 1981), where after six years of litigation it was discovered that the judge's wife owned seven of 210,000 class members with a financial interest estimated at between $4.23 and $29.70. Although 75 pre-trial orders had been entered, the judge felt obliged to recuse himself.[21]

The new subsection (f) provides that if, after devoting substantial time to a matter, a judge discovers that he would be disqualified because he (or his spouse or minor child residing in his household) has a financial interest ("other than an interest which could be substantially affected by the outcome") in the matter, disqualification is not required if the judge (or the relative) divests himself of the interest that provides the ground for disqualification. The Judiciary Committee found that the public interest in avoiding the cost of delay and reassignment outweighs any appearance of impropriety.[22] Note that if the interest is one which "could be substantially affected by the outcome," divestiture by the judge (or the relative) will not cure the disqualification.

The amendment took effect on the date of enactment, November 19, 1988.

Section 1019. Appeals in Arbitration Cases. Section 1019 of Title X adds to Title 9, United States Code (Arbitration) a Section 15 on appeals. The new section permits an interlocutory appeal from an order where the court has rejected a contention that the dispute is arbitrable and instead required the parties to litigate. Arguably, some such interlocutory orders might be appealable under 28 U.S.C. § 1292(a) (1), which permits interlocutory appeals from orders granting or refusing injunctions. The new section on appeals also prohibits appeals from interlocutory orders when the court has found that the dispute is arbitrable, unless the matter is certified by the district judge and accepted by the Court of Appeals for interlocutory review under the provisions of 28 U.S.C. § 1292(b).

The effect of this added section on appeals in arbitration matters is to encourage arbitration by permitting appeals from court orders denying arbitration and denying appeals [except under § 1292(b)] from orders compelling arbitration.]

Title IX of the Act adds a Chapter 43 on arbitration to Title 38, United States Code. The chapter authorizes certain district courts to establish an arbitration procedure by local rule.

The district courts which are permitted to establish this procedure are ten courts in California, Florida, Michigan, Missouri, New Jersey, New York, North Carolina, Oklahoma, Pennsylvania and Texas. In addition, ten other districts approved by the Judicial Conference of the United States may be selected for this innovative procedure. 28 U.S.C. § 658.

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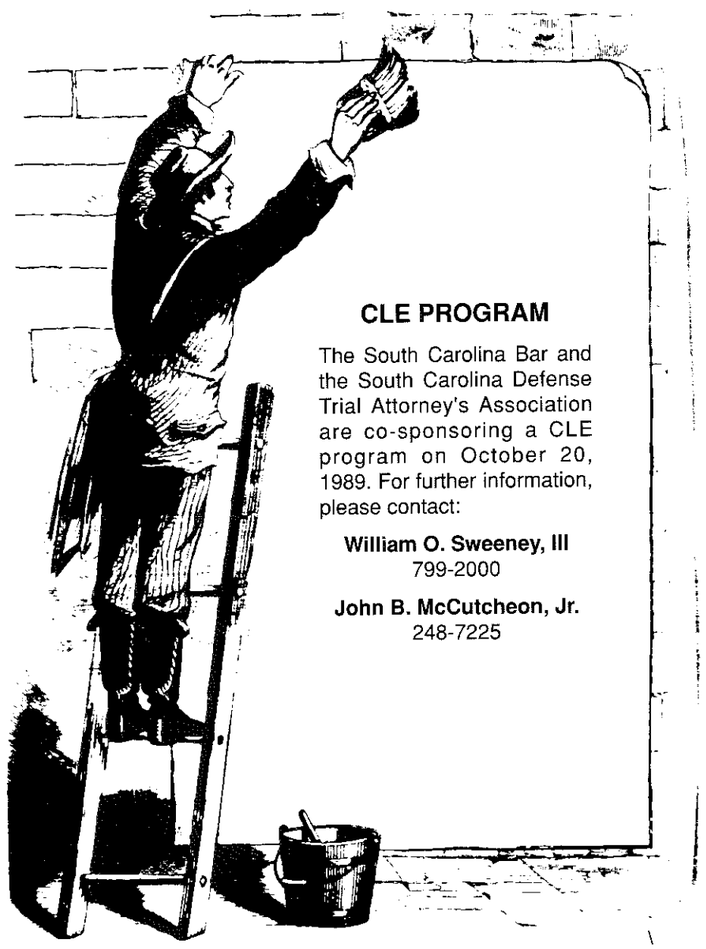


CLE PROGRAM

The South Carolina Bar and the South Carolina Defense Trial Attorney's 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

Federal Practice

(Continued from page 11)

The actions which may be referred to arbitration under this procedure are (a) any civil action if the parties consent, and (b) any action for money damages not in excess of $100,000, without the parties consent (except for constitutional and civil rights claims). Complex cases and those involving novel or predominantly legal issues may be exempted by local rule. 28 U.S.C. § 652.

The arbitratoris given the power to conduct hearings and make awards. 28 U.S.C. § 653. Within thirty days of the filing of an award, any party may demand a trial *de novo*. 28 U.S.C. § 355.

The procedure gives statutory sanction to a method of alternative dispute resolution. Many of these methods have been tried by various state and federal courts, generally with a high degree of success. The experience of the district courts where the procedure is authorized will probably determine whether the procedure will be implemented in the remaining district courts.

This new procedure takes effect 180 days after enactment, or on May 18, 1989.

*Member of the New York Bar, and professor at the University of South Carolina School of Law.

**Member of the South Carolina Bar, and shareholder in the law firm of Sinkler & Boyd, Professional Association, of Columbia and Charleston, South Carolina.

1. P.L. No. 100-702, 102 Stat. 4642 (1988) [hereinafter the "Act"].
2. For example, Title I - Federal Courts Study Committee; Title III - Federal Judicial Center; Title IV - Rules Enabling Act: Title VII - Court Interpreters Amendments; and Title VII - Jury Selection and Service.
3. *See* H.R. Rep. No. 889, 100th Cong., 2d Sess. 44-45, reprinted in 1988 U.S. Code Cong. & Admin. News 6005-6 [hereinafter the "House Report;" references hereinafter are to the U.S. Code Cong. & Admin. News only].
4. *Id.* at 6006
5. The House voted to abolish diversity jurisdiction twelve years ago, but the bill was narrowly defeated in Conference. *See* House Report, *supra* note 5 at 6005.
6. Originally set at $500 by the Judiciary Act of 1789, the jurisdictional amount was raised to $2,000 in 1887, $3,000 in 1911, and $10,000 in 1958. *See* 14A C. Wright, A. Miller & E. Cooper, *Federal Practice & Procedure* § 3701, at 1-2 (2d ed. 1985).
7. Although ABA President Robert MacCrate testified that a jurisdictional amount of $35,000 would be required to take account of inflation since 1958, *see* House Report, *supra* note 5, at 6005, 6006 n.42, the $50,000 amount was adopted because "Congress is slow to act in this area and may not revisit the issue for another three decades, [and] it is sound policy to peg the amount in controversy at this time with a reasonable inflation cushion in mind." *Id* at 6006.
8. *See* House Report, *supra* note 5, at 6006.
9. *See also* S.C.R. Civ. P. 549(c) ("[E]very final judgment shall grant the relief to which the party in whose favor it is rendered is entitled, even if the party has not demanded such relief in his pleadings.").
10. Proposed section 1301(b)(4), American Law Institute, Study of the Division of Jurisdictions Between State and Federal Courts 11 (1969).
11. 8 U.S.C. § 1359 provides as follows: "A district court shall not have jurisdiction of a civil action in which any party, by assignment or otherwise, has been improperly or collusively made or joined to invoke the jurisdiction of such court."
12. *See, e.g., Messer v. American Gems, Inc.,* 612 F.2d 1367 (4th Cir.), *cert. denied,* 446 U.S. 936 (1980); *Sadler v. New Hanover Memorial Hospital, Inc.,* 588 F.2d 914 (4th Cir. 1978); *Vaughn v. Southern Ry. Co.,* 542 F.2d 641 (4th Cir. 1976); *Bishop v. Hendricks,* 495 F.2d 289 (4th Cir.), *cert. denied,* 419 U.S. 1056 (1974); *Miller v. Perry,* 456 F.2d 63 (4th Cir. 1972).
13. *Messer v. American Gems, Inc.*, 612 F.2d 1367, 1375 n.11 (4th Cir.), *cert. denied,* 446 U.S. 956 (1980).
14. *See* House Report, *supra* note 5, at 6027.
15. *Id.*
16. House Report, *supra* note 5, at 6031.
17. *Id.*
18. House Report, *supra* note 5, at 6032.
19. *Id.* at 6032-33.
20. *Id.* at 6028.
21. *Id.* at 6029.
22. *Id.* at 6030.

TURBO-ENCABULATORS

1. Turbo-encabulators may be insured under such forms as are hereinbefore set forth in section B, subparagraph "F" of rule #1678, except when the standard non-payable loss clause is attached in accordance with section "H" of rule #1789 and then only for such amount which is otherwise insured, whichever is the greater.

2. The rate shall be 20% of three-fourths of the 80% commutation rate unless policy contains warranty as set forth in paragraph three above; in which case and an accordance with no other provisions not hereinafter excluded the rate shall be subject after deductions in accordance therewith and subject to all provisions of the extra-sensory perception clause if effective prior thereto.

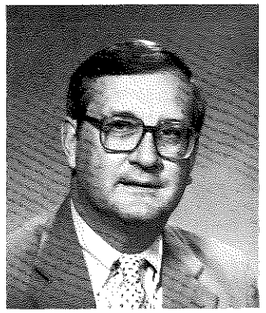
3. Insurance may be written for not in excess of and pro rata of shorter terms and the following mandated middleroad endorsement shall be used unless otherwise attached to the contrary notwithstanding.

Inherent extrusion clause -- Subject to the provisions, stipulations and enigmatic enlivenment of the policy to which this endorsement is attached, it is expressly stipulated that insurance hereunder covers only this company's pro rated share of any excess or similar property for which the insured may be liable unless there be other insurance within 30 days of cancellation prior to but not exceeding the amount in each policy year.

This policy shall not be liable, however, and then only for loss resulting from disturbances caused by trackless twisters, tremors or tweeters, whether in forward or reverse and in no event for more than such proportion as all other insurance may bear to any loss thus incurred whether such insurance is without similar provisions.

NOTE - The nimble pick-up endorsement and the low-form convertible clause may be attached without change.

CONFLICTS OF INTERESTS



R. Davis Howser
Richardson, Plowden, Grier & Howser

The subject of conflicts of interests is a highly relevant issue on the eve of a meeting of claims managers and insurance defense counsel. A conflict of interest is created when a lawyer on behalf of one client must contend for that which his duty to another client requires him to oppose. The prohibition against an attorney representing interests that conflict is attributed to the maxim that "no man shall serve two masters."[1] The purpose of this article is to discuss conflicts of interests that may arise in the settlement of cases and from the disclosure of confidential communications from the insured.

I.

Insurance defense counsel represents two clients: insurer and insured. Defense counsel is selected by the insurer and the representation of the insured by counsel retained by the insurer creates what has been characterized as a tripartite relationship. An excellent description of this relationship is found in *American Mutual Liability Insurance Co. v. Superior Court,* 38 Cal.App. 3d 579, 113 Cal. Rptr. 56 (1974) where the court recognized that:

> In the insured-insurer relationship, the attorney characteristically is engaged and paid by the carrier to defend the insured. The insured and the insurer have certain obligations each to the other, *** arising from the insurance contract. Both *** have a common interest in defeating or settling the third party' claim ***.

When the matter reaches litigation the attorney has two clients whose primary, overlapping and common interest is the speedy and successful resolution of the claim and litigation. *** [E]ach member of the trio, attorney, client-insured, and client-insurer has corresponding rights and obligations founded largely on contract, and as to the attorney, by the Rules of Professional Conduct, as well. The three parties may be viewed as a loss partnership, coalition or alliance directed toward a common goal, sharing a common purpose which lasts during the pendency of

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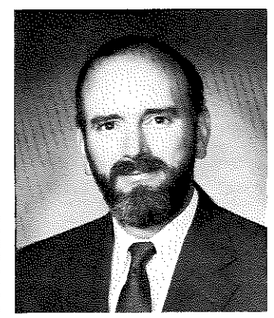

Tom Hesse
American Mutual Fire Insurance Company

The mishandled conflict situation can be like a near-miss midair collision between two aircrafts. It's no big deal if no one gets hurt. If a carrier can always guarantee a happy ending for all parties, it can very well choose not to take conflicts seriously. But, of course, no carrier can always guarantee the end result, and, in fact, should be prepared to have its method of handling a conflict closely scrutinized when all goes wrong for the insured.

Most of the time, the carrier has a clear choice of what its obligation is as far as coverage is concerned. Coverage either clearly exists or, for a number of reasons, coverage does not exist. But in the imperfect world in which the carrier must live, the choices are not always that easy. Coverage may somehow be in doubt and the number of reasons it is in doubt can be endless. One of the most common coverage questions is that of permissive use. Another revolves around the ownership of the vehicle and whether or not a particular vehicle is covered under the policy. Other questions of coverage arise from one or more perceived policy violations: lack of notice, lack of cooperation, an excluded driver or a misrepresentation made at the time the application was taken.

Let's stick with the permissive use question, or, following the exclusion language in many of today's automobile insurance contracts, a situation involving a person using an insured vehicle "without a reasonable belief that that person is entitled to do so." The problem for the carrier in these permissive use situations is that it won't be in a position to make its decision on coverage until more facts are developed. Furthermore, the carrier does not have the luxury of time in developing those facts and making its decision. Pressures are exerted as claims are being made on the insured. Suits are even being filed against the insured, and the insured is clamoring for the claims to be paid and/or suits to be defended.

Once the carrier realizes that there is a possible problem, it must immediately attempt to have its rights reserved. This can be accomplished with a non-waiver agreement signed by both parties or it can be done with a unilateral reservation of rights letter to the prospective insured sent, preferably, registered mail return receipt requested. In such a letter, the carrier would spell out the specific nature of the coverage dispute and the carrier's intention to handle the matter without waiving any of its rights to deny coverage at a later date should the facts developed dictate such an action.

All would be fine if everyone who had

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Hesse

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an interest in the matter would be patient. But no, there's always someone who has to fire off a lawsuit against the prospective insured or, just as bad, there's a prospective insured who will not sign a non-waiver agreement and who rejects the unilateral reservation of rights letter. These situations where the insured will not sign a non-waiver agreement and rejects the reservation of rights will trigger the "Full Employment Act for Defense Attorneys" for the carrier must now hire an attorney to defend the pending tort action and hire yet another firm to bring that cure-all for the carrier's ailments, the Declaratory Judgment ("DJ") Action.

We've finally arrived at the real moment of conflict for the carrier. How does it concurrently oversee the defense of the tort action and the prosecution of its own DJ Action? More often than carriers like to admit, there sits one person within the company supervising both processes. As with all claims people, this one is pure of heart, has the best of intentions, and is optimistic that the end result will be a happy one for all. This person would be insulted to know that there are people out there who believe that he or she might take information acquired during disscovery in the tort action and use it to the carrier's benefit in the DJ Action.

Should such a conflict arise, the carrier, in order to lessen the appearance of an internal conflict, needs to have separate files set up. One file would receive material only related to the defense of the tort action. The other file would contain only material involving the prosecution of the DJ Actin. The files must be supervised by separate individuals within the company who never discuss their respective files with the other. Although skeptics on the outside will some- times question whether or not the carrier truly established "Chinese Walls" within the organization, this arrangement is the only one which will suffice under the circumstances. Hiring some outside entity to oversee one of the files is cumbersome and is still subject to scrutiny since any outside entity would have to receive some direction from the carrier itself.

There are other situations where separate files with separate supervisors becomes a necessity in order to reduce the appearance of a conflict. Not all of them involve coverage questions. A carrier may insure two or more of the tortfeasors involved in an occurrence. Ideally, the carrier would have the exposures of its respective insureds supervised by different individuals overseeing separate files. This would presumably avoid the carrier's sacrificing one insured, for whatever reasons, in favor of another insured. This would particularly be necessary in situations where cross-claims and counterclaims have been filed where the temptation for one "omnipotent" supervisor would be to sabotage the claims of the insureds involved in order to obtain a favorable result for the carrier.

To bring the point home as to how ridiculous matters can get where there is a conflict involved, the discussion will turn to a true-life situation.

Under the liability section of a Special Multi-Peril Policy, the carrier provided "Advertising Injury Coverage." This coverage included protection for copyright infringement arising out of the advertising activities of the insured. A suit was filed in Pennsylvania against the Atlanta-based insured by a Pennsylvania-based plaintiff alleging copyright infringement including willful violations of penal statutes. The insured had its own attorneys answer and counterclaim. The insured's attorneys in Atlanta ("A") coordinated the defense although this firm referred the matter to a Pennsylvania firm ("P") to handle the necessary pleadings.

The questions of coverage centered around timely notice to the carrier; whether or not any of the alleged infringements arose out of the insured's advertising activities; and the fact that the policy excluded intentional acts. The carrier's attempts to have the insured sign a non-waiver agreement were rejected and the carrier's attempts at unilaterally reserving its rights by letter were also rejected. This prompted the carrier to hire its own counsel in Pennsylvania ("W") for the purpose of filing a DJ Action in Pennsylvania against the insured and the plaintiff to preserve its rights and ultimately resolve the coverage question. (There was much deliberation as to whether or not the action should be filed in Georgia where the insured's operations were headquartered and where the contract of insurance originated. For better or for worse, it was decided to bring it in Pennsylvania.) The insured hired another firm ("B") to answer the DJ Action and counterclaim against the carrier for bad faith for not accepting coverage.

Although the carrier maintained the services of the insured's attorneys, A and P, in defending the original action, this developed into an adversarial relationship. Many questions existed as to how much of A and P's services billed to the carrier were for the prosecution of the insured's own counterclaim for damages against the plaintiff. Also, the carrier felt that the fees being charged for all services were excessive. Because of this adversarial relationship, the carrier hired another Pennsylvania firm ("X") to oversee the activities of A and P. A and P would have to receive prior approval from X before conducting discovery and all bills for services from A and P were screened by X before submission to the carrier. Separate files were maintained within the carrier's claims department with separate examiners supervising the tort action and DJ Action.

The original copyright infringement action by plaintiff was voluntarily dismissed. The U. S. District Court Judge in Pennsylvania transferred the DJ Action to the Federal Court in Atlanta. This required the carrier to hire an Atlanta firm ("Y") to take over the handling of the DJ Action. Even though the original action had been dismissed, the DJ Action was maintained due to a dispute over attorneys' fees for A, P and B, and insured's insistence on pursuing its counterclaim for bad faith against the carrier. The fee disputes were ultimately resolved and all actions subsequently dismissed.

Although the carrier did not pay anything to the plaintiff in a situation where its exposure could have reached a million dollars, it paid over two hundred thousand dollars for legal fees incurred by the six law firms involved (A,P,B,W,X, and Y) on the "defense side."

What are the lessons to be learned from this true-life situation? I ain't got the foggiest idea.

Howser

(Continued from page 13)

the claim or litigation against the insured.

Counsel retained by the insurer to represent the insured may often find himself in this dilemma: By reason of being retained and paid by the insurer with whom the attorney usually has a long standing personal and financial relationship, the defense attorney feels loyalty to the insurance company. In representing the insured, the attorney's relationship is usually limited to the defense of a particular lawsuit, but counsel must have unqualified loyalty to the insured. He must try to protect fully the insured from an adverse judgment, raise no issues of coverage, keep the insured fully informed, and represent the insured just as if the insured had personally retained the lawyer.[2]

II.

Several cases illustrate well the dilemma faced by insurance defense counsel in the representation of both the insured and the insurer in connection with the settlement of litigation. In *Lieberman v. Employers Insurance of Wausau*, 84 N.J. 325, 419 A.2d 417 (1980) the question was presented of whether an attorney retained by an insurance carrier to represent the insured in defense of claim can settle that claim upon instructions of the insurer, contrary to the wishes of the insured.

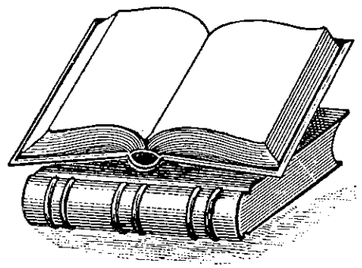
In this case Dr. Lieberman, a neurosurgeon was charged with malpractice in the performance of an arteriogram. Employers Insurance of Wausau, the malpractice carrier for Lieberman retained Attorney Robert P. McDonough to defend the $3,000,000.00 suit filed against Lieberman. The suit was reviewed by a local medical society and was deemed to be "non-defensible," thus potentially subjecting Lieberman to an assessment under a surcharge program then in effect in New Jersey.

Lieberman, as required by his policy, gave his written con- sent to settle the case. He later withdrew this consent because he felt the patient was committing a fraud and malingering based upon information he received from other physicians. Lieberman informed both Employers and Attorney McDonough that he did not want the case settled until he approved the amount.

Eventually, at a pretrial conference the settlement demand dropped to $50,000.00. At this point McDonough advised Employers, but not Lieberman, of the demand. McDonough was instructed by Employers to settle the case immediately. The settlement of this case, when combined with two other settled cases involving Lieberman subjected him to imposition of a 150% premium surcharge of approximately $27,000.

Lieberman sued Employers for breach of contract and McDonough for breach of duties and obligations arising out of the attorney-client relationship. The Supreme Court of New Jersey held that:

> While the insurer here did assign McDonough to the case and did pay his fee, it is nevertheless clear that there existed an attorney-client relationship between McDonough and the insured Lieberman. By ignoring the wishes of Lieberman--McDonough's client--to litigate rather than settle, McDonough breached the duty owed to his client * * * [which constituted actionable malpractice.]



The Court emphasized that an attorney provided by an insurer to an insured owes that person the same unswerving allegiance as if he were retained and paid by the defendant himself. The attorney owes to both the insurer and the insured the duty of good faith and due diligence in discharge of his duties, and the rights of one party cannot be subordinated to those of the other. Whenever counsel has reason to believe that the discharge of his duty to the insured would conflict with the discharge of his duty to the insurance carrier, he cannot continue to represent both.

In this case McDonough, by continuing to represent Lieberman without informing him of the existence of his ethical dilemma, violated his duty "to advise the client fully, frankly, and truthfully of all material and significant information."

The Court found that McDonough's dereliction of duty was two-fold: (1) failure to inform Lieberman of the clear conflict of interests and his subsequent failure to withdraw from the case or to terminate his representation of either the insured or the insurer; and (2) the active participation thereafter in the settlement of the claim against the wishes of his client.

In *Rogers v. Robson, Masters, Ryan, Brument and Belom*, 81 Ill.2d 201, 40 Ill. Dec. 816, 407 N.E.2d 47 (1980), a case that should be considered together with its lower court decision, 329 N.E.2d 1365 (1979, Dr. Rogers was sued in a malpractice case for injuries resulting from a system-wide infection following gall bladder surgery. Dr. Rogers' professional liability policy did not require consent to settle.

Initially Dr. Rogers instructed the carrier and his counsel, assigned by the carrier, not to settle the case. According to one report, Dr. Rogers wrote a letter saying "I refuse to participate any further with [the plaintiff's] absurd accusations ... I trust you can dispose of this problem quickly and with little difficulty." The case was thereafter settled for $1,250.00, which was less than the cost of defense. Dr. Rogers, however, contended that he had repeatedly informed one of the partners in the defendant law firm that he would not consent to a settlement, that he was assured that the action would be defended, and that at no time was he advised that defendants intended to settle the malpractice case.

The Illinois Supreme Court in affirming the reversal of Summary Judgment for the defendant lawyers stated:

> [The doctor] was entitled to a full disclosure of the intent to settle the litigation without his consent and contrary to his express instructions. Defendant's duty to make such disclosure stemmed from their attorney-client relationship with [the doctor] and was not affected by the extent of the insurers' authority to settle without plaintiff's consent.

Dr. Rogers attorney never gave him the opportunity to participate in the settlement decision and to take the position that he felt so strongly against settlement that if the insurer insisted on asserting its right to settle, that he would abandon his policy and handle the case himself.

The actual holding of the *Rogers* case is that there were material issues of fact to be decided by a jury and therefore summary judgment was not appropriate. There are some who fear that this case

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(Continued from page 15)

stands for the proposition that if an insured requests that no settlement be made, then regardless of the insurance contract, the defense attorney must accept this request and take proper steps to honor it. The attorney's failure to do so, even though not negligent and absolutely in accord with the contract which was agreed to by the insured, may subject the defense counsel to a claim for damages.

In each of these cases defense counsel was selected and paid for by the insurer pursuant to the provisions of the insured's policy. The typical liability insurance policy requires the insurer to:

> Pay on behalf of the insured all sums which the insured shall become legally obligated to pay as damages because of
> (a) bodily injury or
> (b) property damage
> to which this insurance applies ***.

The policy also provides that the insurance company:

> shall have the right and duty to defend any suit against the insured seeking damages on account of such bodily injury or property damages ***.

With the exception of some insurance policies such as professional liability policies, the usual liability policy also contains an "expediency clause" using this language:

> [The company] may make such investigation and settlement of any claim or suit as it deems expedient ***.

The Fourth Circuit Court of Appeals in *Gardner v. Aetna Casualty and Surety Co.,* 841 F.2d (4th Cir. 1988) appears to have reached a result different from that in *Lieberman* and *Rogers*. This case, however, did not involve a suit for legal malpractice for participating in a settlement. Gardner, an oral surgeon, was sued for malpractice. During the pendency of this suit Gardner had received adverse publicity from his being arrested and charged with conspiracy to murder his business partner. He pled guilty to solicitation of a felony.

Gardner's policy with Aetna did not require his consent to settle. The court held that the insurer therefore could not be held liable for bad faith in settling the case. The court also stated in what must be considered dicta, that even though Gardner had directed that defense counsel retained by the insurer not settle the case, counsel could properly settle the case since he owed responsibilities to the insurer as well as the insured.

Since the obligations of the insurer to defend and to pay are "primary and paramount ***, its right to control the litigation is first and paramount." *Traders and General Insurance Company v. Rudco Oil and Gas Company,* 129 F.2d 621 at 626 (10th Cir. 1942). The insurers right to control the litigation gives it the right to control the selection of defense counsel. When the insured elects to tender to the insurer the defense of a claim, the insured has been held to have consented in advance to the employment of an attorney selected by the insurer. *Moritz v. Medical Protection Company,* 428 F.Supp. 865 (W.D.Wis. 1977); *Lysick v. Walcom,* 258 Cal.App.2d 136, 65 Cal.Rptr. 406 (1968); *Fidelity and Casualty Company v. McConnaughy,* 228 Md 1, 179 A.2d (1962).

The fact that the insurance contract allows the insurer to select defense counsel does not alter the fact that an attorney- client relationship still exists between defense counsel and the insured. As previously stated, defense counsel owes the same unqualified loyalty to the insured as if he had been personally retained by the insured. The attorney has the same ethical obligations and standard of care. The existence of the attorney-client relationship does not depend upon the payment of a fee, the identity of the person paying the fee or even the ability to pay. Even if the insurer refuses to pay or can not pay the fee, that alone will not terminate the attorney's obligation to the insured.

In *Heller v. Alter,* 2557 N.Y.S. 391 (Supreme Court 1932) a default judgment was obtained at the trial of a case where the insurance company had been placed in liquidation by court order. The order enjoined all agents and employees of the insurance company from proceeding with the business of the company or doing anything which might subject the company to greater liability. The court held that the insolvency of the company did not affect the relationship of attorney-client between the insured and the previously selected defense counsel, and it was the duty of defense counsel to continue to represent the insured until relieved by order of the court.

Where the attorney hired by the insurer to represent the insured finds himself in an actual or potential conflict of interest because the insured does not want a case settled, the better course of action appears to be for the attorney not proceed to settle that case against the wishes of his client, the insured, so as to avoid subjecting himself to potential liability. This does not preclude the insurer from settling the case. The insurer can settle the case itself, or it can retain separate counsel fro the express purpose of settling the case. By proceeding in this manner the insurer is exercising its right under the policy, and it has avoided placing the attorney who was retained to defend the insured, in a conflict with his client; the insured.

III.

Insurance defense counsel is under a duty to meet the same standards of care and ethical considerations which bind every attorney. By accepting employment to render legal services, the attorney, agrees to use such skill, prudence and diligence as lawyers of ordinary skill commonly possess.

Insurance defense counsel is under at duty to maintain the confidentiality of communications which he receives. As between the attorney's two clients, the insured and insurer, there is no confidentiality as to communications intended to affect the common goal of defending a claim. Since there is a dual attorney-client relationship, there is protection of disclosures of communications made by one client which are intended to be confidential.[3]

An attorney's breach of the confidentiality, of the attorney-client privilege may result in discipline, malpractice liability and the insurer's loss of its coverage defense.[4] Parsons v. Continental National American Group, 113 Ariz. 223, 550 P.2d 94 (1976) is an excellent example of consequences of this breach. The insured was fourteen year old boy who brutally assaulted his neighbors. Once suit was instituted, CNA's retained counsel undertook the defense of the insured. Counsel wrote CNA the following letter:

> I have secured a rather complete and confidential file on the minor insured who [in now in a School for Boys which is] a maximum security institute with facilities for psychiatric treatment, and he will be kept there indefinitely ***.

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(Continued from page 16)

> The above referred to confidential file shows that the boy is fully aware of his acts and that he knew what he was doing was wrong. It follows, therefore, that the assault he committed on claimants can only be deliberate act on his part.

Quite naturally, upon receipt of this information CNA sent out a reservations of rights letter. Later the attorney interviewed the minor in preparation for trial and then wrote CNA:

> "His own story makes it obvious that his acts were willful and criminal."

At trial a verdict was directed against the insured minor and judgment entered. In an appeal in a subsequent suit on the policy, the Supreme Court of Arizona note that an attorney representing the insured in a personal injury action must be sure at all times that his compensation by the insurance company does not adversely affect his judgment or dilute his loyalty to this client, the insured. Where the attorney was simultaneously representing the insured and advising the insurer on the question of liability under the policy, it was difficult, the court noted, to see how that attorney could give undivided and undeviating loyalty and fidelity to the insured client.

The court held that when an attorney who is an insurance company's agent uses the confidential relationship between an attorney and a client to gather information so as to deny the insured coverage under the policy, such conduct constitutes a waiver of any policy defense, and is so contrary to public policy that the insurance company is estopped as a matter of law from disclaiming liability under any exclusionary clause in the policy.

In the tripartite relationship some communications are intended for one client but not for the other. Defense counsel can certainly express his opinion of the insured's credibility and appearance. However, defense counsel should not disclose communications from the insured which may affect the insured's coverage.

Suppose the insured comes to the defense attorney discloses to the lawyer something that takes him right out of the coverage -- for example that he did not accidentally injure the plaintiff, but that he intended to do that. What does the attorney do about disclosing this to the insurer?

The attorney's response is dictated by the Code of Professional Responsibility.[5] His decision is also aided by the so called "Guiding Principles" formulated by the National Conference of Lawyers and Liability Insurers which were at one time approved by the American Bar Association.

Guiding Principles VI is entitled "Duty of Attorney Not to Disclose Certain Facts and Information" and provides that:

> Where the attorney selected by the company to defend a claim ore suit becomes aware of facts or information, imparted to him by the insured's belief that such disclosure would not be revealed to the insurance company but would be treated as a confidential communication to the attorney, which indicate to the attorney a lack of coverage, then as to such matters, disclosures made directly to the attorney, should not be revealed to the company by the attorney nor should the attorney discuss with the insured the legal significance of the disclosure or the nature of the coverage question.

A delicate situation could arise where the insured tells you that he and his passenger, who has brought suit, had been smoking marijuana just before the wreck in which their car ran off the road. This fact gives an excellent defense to the third party action by the passenger. However, to disclose this could lead to criminal action against the insured. Yet the insurer needs to know that some contention might be made that the insured was smoking marijuana or that both insured and his passenger were smoking. How should this be handled? The insured should be advised that this information needs to be brought to the attention of the insurance company with the request that it be kept in confidence. However, without the permission of the insured this information should not be disclosed.

Counsel must remember that disclosure of confidential communications and matters may lead to the loss of policy defenses and subject the attorney to disciplinary action and civil liability.

CONCLUSION

In the tripartite relationship created when the insurer employs defense counsel to represent the insured, counsel owes the insured the same duties as if the insured had hired the lawyer personally. The defense lawyer owes that client the duty of representation free from a conflict of interest which can arise in a number of areas including the participation in the settlement of the case without full disclosure and/or against the wishes of the insured and from the breach of duty not to disclose confidential communications. The breach of duty can lead to civil liability on the part of the attorney and to disciplinary action.

Footnotes

1. Mallen and Smith, Legal Malpractice (3d Ed.) Sec. 12.1 at p.700; Jeffry v. Pounds, 67 Cal.App.3d 6, 136 Cal.Rptr.373 (1977); Cinema 5, Ltd. v. Cinerama, Inc., 528 F.2d 1384(2dCir.1976).
2. See e.g., Parsons v. Continental National American Group, 113 Ariz. 223, 550 P.2d 94 (1976); Brohawn v. Transamerica Ins. Co., 276 Md. 396, 347 A.2d 842 (1975); Lieberman v. Employers Ins. of Wausau, 84 N.J. 325, 419 A.2d 417 (1980); Norman v. Ins. Co. of North America, 218 Va. 718, 239 S.E.2d 902 (1978).
3. Mallen and Smith, Sec. 23.5 at p. 369.
4. Id.
5. See Code of Professional Responsibility, EC 4-1.

FINDING THE TRUTH

Justice LOGAN E. BLECKLEY, in Lee v. Porter, 63 Ga. 345.

Opinion: It not infrequently happens that a judgment is affirmed upon a theory of the case which did not occur to the court that rendered it, or which did occur and was expressly repudiated. The human mind is so constituted that in many instances it finds the truth when wholly unable to find the way that leads to it.

"The pupil of impulse, it forc'd
him along,
His conduct still right, with his
argument wrong;
Still aiming at honor, yet fear
ing to roam,
The coachman was tipsy, the
chariot drove home."

(Continued from page 6)

DUTY TO PROTECT BY LAW ENFORCEMENT OFFICIALS

Will Davidson
Robert Carpenter
Terry Millar

In the fall 1988 issue of *The Defense Line* it was reported that the Honorable Karen L. Henderson granted Summary Judgment in the case of Faye Gulledge vs. Joe A. Smart, et al. on the grounds that the Plaintiff's constitutional rights had not been deprived and that the Complaint failed to state a cause of action under the South Carolina Wrongful Death and Survival Statutes.

On June 19, 1989, the Fourth Circuit Court of Appeals in an unpublished Opinion affirmed Judge Henderson's granting of Summary Judgment.

In this case the Court found that during 1985, the Deputy Sheriff was experiencing marital problems with his wife, who unknown to the Deputy Sheriff, was having an affair with the deceased son. The Deputy discussed his marital problems with his Captain, Defendant Joe Smart, on several occasions, but as the Court found there was no indication that these problems were affecting the Deputy Sheriff's job performance.

On September 4, 1985, after learning of his Wife's affair with the Plaintiff's son, the Deputy Sheriff shot and killed him. Earlier that same morning, the Deputy Sheriff's wife had told the Deputy Sheriff about her affairs and had asked for a divorce.

The Plaintiff, as a result of these events, brought suit alleging that the Defendants had failed to take adequate steps to disarm the Deputy Sheriff after the Deputy Sheriff told Defendant Smart of his marital problems. More generally, the Plaintiff claimed that the Sheriff's Department had failed to train supervisors to detect and disarm potentially unstable Officers. The Plaintiff also alleged that the Sheriff inadequately supervised his Deputies by failing to inspect the Officer's patrol car frequently enough to know whether it contained the assault rifle which was used in the killing and by allowing Deputies to use their patrol cars for personal errands. Alternately, the Plaintiff alleged a breach of a general duty to protect the public from the violence by the Deputy Sheriff.

In this Opinion, the Fourth Circuit citing *DeShaney vs. Winnebago County Dept. of Social Services,* 489 U.S. _____, _____, 103 L.Ed.2d 249, 258-260 (1989), found that the Defendants had no affirmative duty to protect the Plaintiff's son from an unknown risk of harm from the Deputy Sheriff who was acting in his personal capacity. The Court went on to state that the motives of the Deputy Sheriff in killing the Plaintiff's son was personal, the weapon he used was personal, and he was not on duty at that time of his killing.

The Court also found that the Plaintiff had failed to raise a genuine issue of material facts concerning the Defendants' training or supervision of the Deputy Sheriff since there was no indication that the marital problems experienced by the Deputy Sheriff affected his job performance.

The Fourth Circuit also found that the District Court was correct in finding both absolute and qualified immunity for the Defendants.

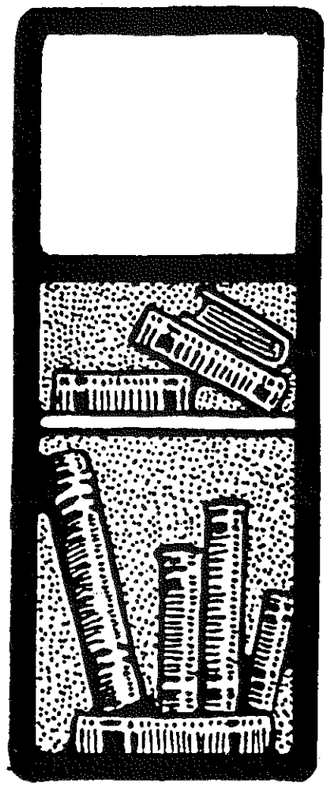
The Court Circuit in its Opinion found that in South Carolina a Sheriff, and his Deputies are state actors. *See Heath v. County of Aiken.* 295 S.C. 416, 418-19 & nn.1, 3, 368 S.E.2d 904, 905 & nn.1, 3 (1988). The Court citing *McConnell v. Adams,* 829 F.2d 1319, 1328-29 (4th Cir. 1987),*cert. denied,* 100 L.Ed.2d 195 (1988), stated that a suit against these individuals in Federal Court in their official capacity was barred by the Eleventh Amendment.

Finally, the Court based on *Harlow v. Fitzgerald,* 457 U.S. 800, 818 (1982) indicated that since the Defendants had no constitutional duty to prevent the Deputy Sheriff from killing the Plaintiff's son, they could not have violated any clearly established constitutional right which would have stripped them of their qualified immunity.

IS THERE A CONSTITUTIONAL LIMITATION ON PUNITIVE DAMAGES?

Carl Epps

The United States Supreme Court recently granted certiorari and heard oral arguments in the case of *Browning-Ferris, Inc. v. Felco Disposal, Inc.* At issue is whether the Excessive Fines Clause of the 8th Amendment or the Due Process Clause of the 14th Amendment places any limitation on the award of punitive damages. At the trial of the case, the plaintiff was awarded $51,146 in compensatory damages and $6,000,000 in punitive damages on a claim of interference with contractual relations. While no one can predict what the Supreme Court will decide, it is interesting to note that seven of the nine sitting justices in past cases have suggested that there may be some constitutional limitation on punitive damages. Most recently, in *Bankers Life and Casualty Co. v. Crenshaw,* Justices Antonin Scalia and Sandra Day O'Connor stated that "there is no objective standard that limits the amount of punitive damages" and that "this grant of wholly standard less discretion to determine the severity of punishment appears inconsistent with due process." *Browning-Ferris* was argued April 18, 1989, and a decision is expected in the near future.



LIGHTER SIDE

WHO SAID THAT?

"Push" is the force exerted upon the door marked Pull • The trouble with people is their trouble with people • Success is a matter of pluck• The best way to have a good idea is to have a lot of ideas • The chief cause of problems is solutions • Good judgement comes from experience, experience comes from bad judgement • The only thing wrong with doing nothing is that you never know when you're finished • Experience is what you get when you didn't get what you wanted • Verbal agreements lead to verbal disagreements • A thing not looked for is seldom found • Life is largely a matter of expectation • You can't win them all, if you didn't win the first one • Assume nothing • Exceptions rule • Every clarification breeds new questions • If the first person who answers the phone cannot answer your question, its a bureaucracy • There is a difference between an open mind and a hole in the head • Nothing ever gets done on schedule or within budget • If its worth doing, its worth hiring someone who knows how to do it • There is always free cheese in a mousetrap • Never, ever, play leapfrog with a unicorn • Second rate people hire third rate people • He who never sticks out his neck, never wins by a nose • The first myth of management is that it exists • The wheels of progress are not turned by cranks • The other man's word is an opinion, yours is the truth and the boss's is law • Incompetence plus incompetence equals incompetence • No job is too small to botch • Information is where you find it • The world gets better every day, then worse with the evening news • People can be divided into three groups: those who make things happen, those who watch things happen, and those who wonder what happened • Those who think they know it all are very annoying to those who do • There's never time to do it right, but always time to do it over • People ask stupid questions for a reason • Secret negotiations are usually neither • Of all possible reactions to any given agenda item, the action that will occur is the one which will liberate the greatest amount of hot air • You can never really get away you only take yourself somewhere else • Not all heads are perfect, some have hair on them • Three may keep a secret, if two of them are dead • An elephant is a mouse built to government specifications • Laws are often like cobwebs, which may catch small flies, but let wasps and hornets break through • Men and nations will act rationally when all other possibilities have been exhausted • Progress is made on alternate Fridays • Infinity is one lawyer waiting for another • Sic pilum iactum est. (Literal translation: That's the way the spear is thrown. Free translation: How come I always get the shaft?) •He who laughs last has no sense of humor.

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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
American Bar Association (Annual)	August 3-10	Honolulu, Hawaii
Hospital Law	September 14-15	Drake Hotel Chicago
SCDTAA Joint Meeting	July 27-30	Grove Park Inn Asheville, NC
Insurance Claims Supervision	September 20-21	Sheraton Hartford Hotel Hartford
Damages	September 28-29	Desert Inn Hotel Las Vegas
Bad Faith First Party Insurance Claims	October 5-6	New York Marriott Marquis New York City
13th Annual Employment Law	October 19-21	Ritz-Carlton Hotel Laguna Niguel, CA
Asbestos Medicine	October 25-27	Hotel del Coronado San Diego
SCDTAA Annual Meeting	November 2-5	The Cloister Sea Island, GA
Insurance Coverage for Environmental Claims	November 16-17	Westin Copley Place Boston
Insurance Coverage and Practice	December 7-8	New York Marriott Marquis New York City

1990

Mid-Year Meeting SC Bar	January 18-21	Omni at Charlston Place
American Bar Association Mid Year Meeting	February 7-14	Los Angeles
FICC Winter Meeting	February 21-25	Ritz-Carlton Hotel Naples, Florida
Annual Meeting SC Bar	May 31-June 3	Myrtle Beach Hilton
FICC Summer Meeting	August 1-5	Ritz-Carlton Hotel Laguna Nigel, CA
American Bar Association Annual Meeting	August 2-9	Chicago