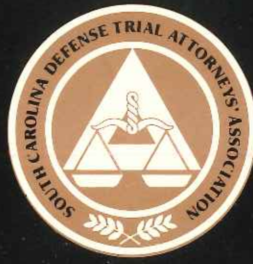
The Defense Line



S.C. Defense Trial Attorneys' Association

April 1990
Volume 18 Number 2

Overview: Automobile Insurance Reform Act 1989

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LOOKING BACK TEN YEARS AGO

President F. BARRON GRIER, III, in February, 1980 issue reported several prominent members of our Association participated in the Law School Seminar entitled "Medical Proof in Workmens' Compensation Cases". They were HOOVER BLANTON, ROBERT GALLOWAY, BARRON GRIER, ERNIE NAUFUL, WILLIAM SHAUGHNESSY and VERNON SUMWALT. He also reported that the Legislature had started up and that he would be working with BRUCE SHAW, CARL EPPS and ED MULLINS to work with Legislative matters.

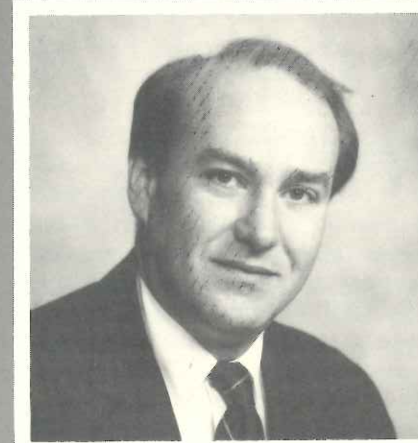
The Atlanta Claims Association reported ED KELLY had resigned his duties with the Association and the Association elected to name their Annual Educational Award as the EDWARD S. KELLY Award.

LOOKING BACK TWENTY YEARS AGO

THE DEFENSE LINE reported that GRADY KIRVEN, our President, and HUGH HARLESS, President of the Claims Managers, had presided over a joint meeting of the Defense Attorneys and Claims Managers at the Sheraton Fort Sumter, March 27th and March 28th. Program topics included excess liability, fees and billing. The group was entertained Friday evening with "gullah stories" by the renowned DICK REEVES.

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.

PRESIDENT'S PAGE



MARK H. WALL

The Association is now fully up and running for the 1989-90 fiscal year. One of the first items approved by the Executive Committee was the conversion of our accounting procedures from a cash basis to an accrual basis. The advantage being that it gives the Association a more accurate picture of the income and expenses for each fiscal year. For example, on a cash basis we incurred a cash flow loss in 1988-89, however, we received, in 1990, the income generated from the 1988 Seminar and the 1989 Contribution of the Claims Managers to the cost of the Joint Meeting. The overall result establishes that the additional income raised by the dues increase of last year is sufficient to carry the Association for this year.

The various Committees of our Association have now met and begun the substantive work of the Association for the remainder of the year. I encourage each member of the Association who is a member of one of the working Committees to make every effort to attend all future Committee Meetings so that the Committees can continue to function with direct input from our members and to provide sufficent manpower to carry out the goals of each of the Committees.

I would like to personally thank everyone who responded to our call for help concerning the punitive damage/strict liability bill. We received a very strong response which resulted in the bill being returned to Committee. Kay Crowe deserves special thanks for all of her hard work. I am sure we will be continuing to call on you from time to time for your assistance with Legislative matters. Currently, there is a proposed bill to extend the statute of limitations for bringing actions related to asbestos in buildings. The bill will provide, if passed, that causes of action that have already expired for removal, abatement or reimbursement for removal will be extended until July 1, 1991 and thereafter the statute of limitation shall be five (5) years from the completion of abatement or discovery of the identity of the manufacturer. Such a bill effects a good number of the defense firms in this State and it is our present intention to oppose this Bill.

As all of you by now know, David C. Norton, a member of the Executive Committee, has been nominated by the Honorable J. Strom Thurmond to fill the District Court seat being vacated by the Honorable Sol Blatt, Jr. who will be assuming senior status. We have had other members of our Association appointed to judgeships, however, I do not recall an appointment of a sitting member of the Executive Committee. Dave has been involved in trials on both the plaintiff and defense side of cases and therefore, I am sure that he will make a superb United States District Court Judge.

The Association wrote a letter to Senator Thurmond heartily endorsing and supporting Dave for this position. In that same regard, Dave will be required to resign from the Executive Committee upon his confirmation. Dave was appointed and accepted the Chairmanship of the Program Committee for the Joint Meeting but because of the time constraints he has asked to be relieved of that responsibility. I have now appointed Bradish J. Waring of Young, Clement, Rivers & Tisdale and Thomas W. Johnston of Buist, Moore, Smythe and McGee as Co-Chairmen of that Committee. I am sure they will produce a quality educational program. It is never too early to begin advertising, therefore, I would like to remind the membership that the Joint Meeting is scheduled for Asheville at The Grove Park Inn on July 26th-28th, 1990.

Mike Wilkes, Chairman of the Social Committee for both of our meetings this year inspected the Mariners Inn on Hilton Head Island (along with his wife) and Carol Davis. Mike's report confirms Carol Davis' belief that the Mariners Inn will provide a great setting for our Annual Meeting to be held on October 25th through 28th. Mike's Committee is hard at work on providing suitable entertainment so that a good time can be had by all.

The Seminars Committee headed by John Wilkerson and Bob Erwin have already secured a date for our Annual South Carolina Bar SCDTAA Seminar to be held November 2, 1990, in Columbia. The Seminar will be sent via satellite to locations all over the State. In addition to being educational, this Seminar generates income to the Association. The last Seminar provided over $5,000 in supplemental income. Please save some of your CLE hours and particularly those of your young associates so that we can have a large turn out for the Seminar. Pursuant to the new Supreme Court Rule, a portion of this Seminar will be devoted to ethical considerations thereby assisting in securing the additional CLE hours mandated by the Supreme Court.

This Seminar is presented in conjunction with the South Carolina Bar and the South Carolina School of Law. They have requested that we advertise for them an upcoming Seminar entitled "LITIGATING PSYCHOLOGICAL INJURIES" scheduled for Friday, April 27, 1990 at the Law School. This Seminar features William Barton, a nationally known lecturer. The Seminar fits in nicely with the presentation made and the article written for the Defense Attorneys by Robert E. Deysach, Ph.D.

As always, if any member has any questions as to the services provided by the Association, please feel free to contact Carol H. Davis, our Executive Director, myself and/or any of the officers or Committee Chairman.

Overview of the Automobile Insurance Reform Act of 1989

ANDREW F. LINDERMANN
Nauful & Ellis, P.A.

The recent enactment of the Automobile Insurance Reform Act of 1989 by the South Carolina General Assembly has resulted in numerous changes in automobile insurance law. The purpose of this article is to outline those changes which most greatly affect the defense of automobile insurance cases.

Uninsured Motorist Coverage

The Reform Act resulted in only minor changes to the laws governing uninsured motorist (UM) coverages.

In a hit-and-run situation, when the insured relies on the witness alternative to the physical contact requirement, Section 53 of the Reform Act requires that the witness sign an affidavit attesting to the truth of the facts contained in the affidavit. Additionally, the affidavit must contain the following language prominently displayed: "A FALSE STATEMENT CONCERNING THE FACTS CONTAINED IN THIS AFFIDAVIT MAY SUBJECT THE PERSON MAKING THE FALSE STATEMENT TO CRIMINAL PENALTIES AS PROVIDED BY LAW." S.C. Code Ann. § 38-77-170. This provision became effective July 1, 1989.

Furthermore, Section 17 of the Reform Act provides that insurers are no longer required to write coverage with limits in excess of $250,000/$500,000/$50,000 or $500,000 for combined single limit policies. This provision, effective October 1, 1989, applies to all mandatory liability coverages, UM and UIM coverages included. S.C. Code Ann. § 38-77-110(B).

Definition of Underinsured Motorist

In 1987, the General Assembly adopted a statutory definition of underinsured motor vehicle, which placed South Carolina in the category of a "reduction" or "limits to limits" UIM state. That statute nullified the Supreme Court's decision in *Gambrell v. Travelers Ins. Co.*, 280 S.C. 69, 310 S.E.2d 814 (1983), in which the court declared South Carolina to be an "excess" or "limits to damages" UIM state. However, Section 52 of the 1989 Reform Act redefined underinsured motor vehicle and reinstated the *Gambrell* decision. This provision, effective October 1, 1989, returns South Carolina to the status of an "excess" UIM state. *See,* S.C. Code Ann. § 38-77-30(14).

A "reduction" or "limits to limits" UIM statute provides that an underinsured motor vehicle is one whose liability coverage is less than the limits of the insured's underinsured motorist coverage. In contrast, an "excess" or "limits to damages" UIM statute provides that an underinsured motor vehicle is one whose liability coverage is less than the amount of the insured's damages.

An illustration of the two forms of UIM coverage may be instructive. Insured has an accident with B causing $75,000 of damage to Insured. B is at fault and has only $50,000 of liability coverage. Insured has UIM coverage of $25,000. Under a "reduction" statute, B would not be an underinsured motorist because B's liability coverage ($50,000) is greater than Insured's UIM coverage ($25,000). Thus, Insured would fail to recover under his UIM policy. However, under an "excess" statute, B would qualify as an underinsured motorist because B's liability coverage ($50,000) is less than Insured's damages ($75,000). Thus, Insured would recover all $25,000 from his UIM carrier.

In sum, under the "excess" statute enacted as part of the 1989 Reform Act, "if a motorist is damaged by an at-fault motor vehicle, and those damages exceed the at-fault motor vehicle's liability coverage limits, the injured motorist can recover the difference between his liability *limits* and his sustained *damages* under the underinsured motorist coverage of his own automobile insurance policy." *Department of Insurance Bulletin* No. 4-89, at 26. Note, however, that this "excess" UIM statute is applicable only to those automobile insurance policies and renewals issued on or after October 1, 1989. Those issued prior to that date will still be governed by the "reduction" UIM statute.

Procedure For Underinsured Motorist Claims

Section 21 of the Reform Act altered the procedure to be followed in a UIM case. First, Section 21 requires that a copy of the pleadings against an underinsured motorist (the at-fault driver) be served upon the UIM carrier in order to place the carrier on notice of a possible claim. S.C. Code Ann § 38-77-160.

Moreover, Section 21 provides that the UIM carrier has the right to appear and participate in the defense of the underinsured motorist. S.C. Code Ann § 38-77-160. Note that the UIM carrier is under no obligation to provide a defense to the underinsured motorist. This provision raises an interesting question as to who has control of the litigation — the liability carrier or the UIM carrier. The Insurance Commissioner has interpreted this section to mean that "the control of the defense of the putative underinsured motorist pass[es] to the underinsured motorist carrier only when the liability limits for the at-fault driver have been tendered and paid and the underinsured motorist carrier elects to assume control of the defense." *Department of Insurance Bulletin* No. 4-89, at 11.

Thirdly, Section 21 states that "consent to settlement" provisions in a UIM policy are prohibited. S.C. Code Ann § 38-77-160. Prior to July 1, 1989, the effective date of Section 21, UIM policies normally included a provision requiring the UIM carrier's consent to any settlement between the insured and the at-fault driver. These "consent to settlement" provisions often impeded the settlements of claims. However, the 1989 Reform Act "allows the at-fault party and his insurer to negotiate a settlement with the insured which exhausts the liability coverages available yet still allows the action to proceed to judgment to establish the amount of underinsured motorist recovery." *Department of Insurance Bulletin* No. 4-89, at 11.

Personal Injury Protection (PIP)

Effective July 1, 1989 personal injury protection (PIP) coverage in any amount is no longer mandated under South Carolina law. Further, Section 34 of the Reform Act provides that PIP, med-pay, or economic loss coverages may not be assigned or subrogated or subject to a set off.

Bad Faith

Section 38-59-40 provides that attorney's fees could be awarded to an insured if the insurer had acted in bad faith or without reasonable cause. Previously, this statute permitted an award of attorney's fees limited to one-third of the judgment with a maximum of $2500. However, Section 50 of the Reform Act repealed the $2500 cap. Thus, effective July 1, 1989, the maximum attorneys' fee recoverable in a bad faith claim is one-third of the judgment.

Additionally, it has previously been held that Section 38-59-40 was not applicable in the federal courts. Nonetheless, the Reform Act provides that Section 38-59-40 "applies to cases filed or removed to federal court." Section 38-59-40 also states that an additional attorneys' fee may be awarded when a judgment in a bad faith claim is affirmed on appeal.

Unfair Trade Practices

Section 18 of the Reform Act created a new statute, Section 38-77-341, which defined several acts involving automobile insurance that would constitute an unfair trade practice in accordance with the South Carolina Unfair Trade Practices Act. The statute was designed to assist automobile insurers by prohibiting excessive charges by automobile repair shops, health care providers, and others. Among the acts specified as unfair trade practices are (1) making false statements in the procurement of insurance proceeds; (2) submitting bills substantially in excess of that person's customary charges; (3) submitting bills for work covered by insurance which are in excess of bills submitted for similar work not covered by insurance; (4) submitting inflated bills designed to relieve the insured of the obligation to pay a deductible payment; and (5) charging more than 50¢ per page for copies of medical records or other documents. Note that insurers and health care providers may charge a $10.00 minimum for furnishing copies of such records. S.C. Code Ann. § 38-77-341.

Insurer's Duty to Offer Optional Mandated Coverages

Section 22 of the 1989 Reform Act provides that, effective December 1, 1989, insurers will be required to send to new applicants a form, approved by the Insurance Commissioner. This form sets forth an explanation and the available limits for the various optional coverages required by law to be offered to applicants. *See,* S.C. Code Ann. § 38-77-350. Contrary to the holding in *Knight v. State Farm Mut. Automobile Ins. Co.*, 297 S.C. 20, 374 S.E.2d 520 (Ct. App. 1988), Section 38-77-350 does not require that this form be completed at each renewal of the policy. Note, however, that the first renewal notices for existing policies after December 1, 1989, must include the form. S.C. Code Ann. § 38-77-350(C). "If an approved form is properly completed and executed by the named insured it is conclusively presumed that there was a knowing, informed selection of coverage and neither the...carrier nor its agent has any liablity to the named insured, or any other insured, for the insured's failure to purchase any optional coverage or higher limits." Maybank, et al., *The 1989 Supplement to The Law of Automobile Insurance in South Carolina* (1989), at V-31.

Safety Belts

Section 47 of the Reform Act requires, effective July 1, 1989, that all occupants of any motor vehicle operated on the public streets and highways of South Carolina must wear a safety belt. The only provision of this safety belt statute significant to defense attorneys is Section 56-5-6540(C), which provides that "[a] violation of this article does not constitute negligence per se or contributory negligence and is not admissible as evidence in a civil action." S.C. Code Ann. § 56-5-6540(C).

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This article only scratches the surface of what is contained in the Automobile Insurance Reform Act of 1989; it is by no means comprehensive. For a more detailed analysis of the Reform Act, the author suggests *The 1989 Supplement to The Law of Automobile Insurance in South Carolina* by Burnet Maybank et al., and the *Department of Insurance Bulletin* No. 4-89. It is inevitable that the 1989 Reform Act will spawn considerable debate and litigation. Accordingly, a good working knowledge of the provisions of the Reform Act will prove to be essential for the automobile insurance defense attorney.

Columbia Legal Assistant Association

The Columbia Legal Assistant Association is pleased to announce its slate of officers for the 1990 calendar year. These officers are as follows:

President
Pamela Dixon

First Vice-President
Sandra Sundin

Second Vice-President
Natalie Butrym

Secretary
Kathleen Masterson

Treasurer
Patti Daniels

Parliamentarian
Amy Martin

Chair, Bar Liaison Committee
Marian Nettles

Chair, Coordinations Committee
Nelda Canada

Chair, Development Committee
Celeste Cox

Chair, Publications Committee
Carol Counas

Chair, Public Relations Committee
Karen Goad

***Ex Officio* Member of the Executive Board Past President**
Barbara McQuillan

For information concerning membership, please contact Natalie Butrym at Nelson, Mullins, Riley & Scarborough, Post Office Box 11070, Columbia, South Carolina 29211. The Columbia Legal Assistant Association does not have a number of membership categories, and is exceedingly interested in continuing legal education for legal assistants, promoting fellowship among legal assistants and the legal community, and providing a network of support for legal assistants.

The Boomerang Effect of Corporate Self-Evaluation

ROBERT M. WILCOX
Assistant Professor of Law
University of South Carolina

Shortly after the airing of "The Uncounted Enemy: A Vietnam Deception" and subsequent criticism of that broadcast by General William Westmoreland and TV Guide magazine, the president of CBS News ordered an internal study of how the broadcast was prepared. Two years later, that same study was admitted into evidence over the objections of CBS in a libel suit brought against the network by General Westmoreland.

Businesses frequently review their own handling of a particular matter, incident or product in order to evaluate progress toward company objectives, as well as to identify and avoid reptition of any mistakes. The case of *Westmoreland v. CBS, Inc.* 601 F. Supp. 66 (S.D.N.Y. 1984), however, illustrates well the risk that a critical self-evaluation will later become a weapon in the hands of a legal adversary. Efforts to shield such reports from discovery or admission at trial under a self-evaluation privilege have been, at best, only sporadically successful.

In asserting, a self-evaluation privilege derivèd both from common law and from Fed. R. of Evid. 407, which excludes remedial measures from admission into evidence for certain purposes, CBS stressed the value of encouraging "honest, self-examination," comparing its internal review process to a medical post-mortem. The court concluded, however, that allowing CBS such protection would fail "to credit the social value of making available for trial what is often the best source of information."

The attempt by CBS to compare its study to a medical post-mortem was not accidental. Hospital medical staff reviews analyzing the treatment of a patient have been afforded the most consistent protection under a self-evaluation privilege. In the leading case of *Bredice v. Doctors Hospital, Inc.,* 50 F.R.D. 249 (D.D.C. 1970), a plaintiff in a malpractice action unsuccessfully sought records of staff meetings held to discuss the treatment and death of decedent. The court based a qualified privilege on the "overwhelming public interest" in ensuring the confidentiality of such meetings. "Constructive professional criticism cannot occur in an atmosphere of apprehension that one doctor's suggestion will be used as a denunciation of a colleague's conduct in a malpractice suit." *See also Gillman v. United States,* 53 F.R.D. 316 (S.D.N.Y. 1971); *Laws v. Georgetown University Hospital,* 656 F. Supp. 824 (D.D.C. 1987).

A year later, the U.S. District Court for the Northern District of Georgia extended the reasoning of *Bredice* beyond the medical review. In protecting an internal corporate study of progress toward equal employment goals under company affirmative action plans, the court required production of information made available to those preparing the report, but held the report itself to be privileged. "[I]t would be contrary to that policy [of compliance with federal equal employment opportunity laws] to discourage frank self-criticism and evaluation." *Banks v. Lockheed-Georgia Co.,* 53 F.R.D. 283 (N.D. Ga. 1971).

More recently that same court relied upon Fed. R. of Evid. 407 to exclude from evidence a report by an accounting firm which recommended changes in plaintiff's business practices after an alleged fraud had occurred against plaintiff. The defendant in the fraud action contended that the allegedly fraudulent acts were facilitated by plaintiff's own recordkeeping practices and were not the product of any intent to defraud. Defendant sought to introduce the accountant's report as evidence of plaintiff's inadequate business practices at the time of the alleged fraud.

Federal Rule of Evidence 407 provides that evidence of subsequent remedial measures is not admissible to prove negligence if the measures, taken prior to an event, would have made the event less likely to occur. South Carolina recognized a similar rule in *Green v. Atlantic Coast Line R.R.,* 136 S.C. 337, 134 S.E. 385 (1926). The Northern District of Georgia held the accountant's report to be a "subsequent remedial measure" under Rule 407, since it was prepared at the request of the company president to improve company procedures. The court further noted that the

Continued on page 7

South Carolina

Defense Trial Attorneys' Association

By-Laws

SCDTAA By-Laws

ARTICLE I
NAME:

The organization shall be named "South Carolina Defense Trial Attorneys' Association".

ARTICLE II
PURPOSE:

The purpose of this Association shall be to bring together by association, communication and organization, lawyers of South Carolina who devote a substantial amount of their professional time to the handling of litigated cases and whose representation in such cases is primarily for the defense; to provide for the exchange among the members of this association of such information, ideas, techniques or procedure and court rulings relating to the handling of litigation as are calculated to enhance the knowledge and improve the skills of defense lawyers, to elevate the standards of trial practice in this area and, in conjunction with similar associations in other areas, to develop, establish and secure court adoption or approval or a high standard code of trial conduct and courtroom manner; to support and work for the improvement of the adversary system of jurisprudence in our court; to work for the elimination of court congestion and delays in civil litigation; and in general to promote improvements in the administration of justice and to increase the quantity and quality of service and contribution which the legal profession renders to the community, State and nation.

ARTICLE III
QUALIFICATIONS FOR MEMBERSHIP:

Those persons shall be qualified for membership who (1) Are members in good standing of the South Carolina State Bar; (2) Are actively engaged in the private practice of civil law, or employed by governmental bodies; and (3) Individually devote a substantial portion of their time in litigated matters to the defense of damage suits on behalf of individuals, insurance companies and corporations, private or governmental, or (b) the representation of management in labor disputes.

Application for membership must be made upon a form provided by the Secretary and submitted to the Secretary, who shall then refer the application to the Membership Committee. A check for annual dues, in an amount fixed by the Executive Committee, shall accompany the application.

ARTICLE IV
OFFICERS:

The officers of the Association shall be a President, A President-Elect, a Secretary and a Treasurer.

ARTICLE V
EXECUTIVE COMMITTEE:

There shall be an Executive Committee which shall consist of two officers, the immediate past-president and twelve executive committeemen made up of two representatives from each congressional district and three at large executive committeemen. Eight members of the Executive Committee shall constitute a quorum. The state chairman of the Defense Research Institute shall be an ex-officio member of the Executive Committee provided he is a member of the Association in good standing.

ARTICLE VI
ELECTION OF OFFICERS AND TERMS OF OFFICE:

The first election of officers shall be held at the meeting in which these By-Laws are adopted in general session by those present at said meeting. Thereafter, the election of officers shall take place at the Annual Meeting of the Association, the date to be determined by the Executive Committee. Officers shall be elected by a majority vote of the members present. The fifteen members of the Executive Committee who are not officers or the immediate past-President shall be elected in the same manner.

The terms of each officer and member of the Executive Committee shall begin on the date of election and end on the election of his successors. No person shall be eligible to succeed himself as President except as provided in Article VII.

The term of each member of the Executive Committee who is not an officer or an immediate past-president shall be three years. Five members shall be elected at each annual meeting. Vacancies in office, other than the President and President-Elect, shall be filled by the Executive Committee. The terms of office of the at large members of the Executive Committee elected at the 1984 Annual Meeting shall be staggered so that one at large member shall serve for one year, one member for two years and one member for three years.

"This Association shall be to bring together by association, communication and organization, lawyers of South Carolina who devote a substantial amount of their professional time to the handling of litigated cases and whose representation in such cases is primarily for the defense."

ARTICLE VII
DUTIES OF THE OFFICERS:

THE PRESIDENT shall preside at all meetings of the Association and of the Executive Committee. He shall, with the assistance of the Secretary, present to each meeting of the Association and of the Executive Committee an agenda of the matters to come before such meeting. He shall perform such other duties and acts as usually pertain to his office and as may be prescribed by the Association and/or the Executive Committee.

THE PRESIDENT-ELECT shall succeed to the office of President upon the expiration of the President's term or upon the President's death, disability, or resignation. In the event of succession to the office of President by reason of death, disability or resignation of the incumbent, the President-Elect shall serve out the remainder of that term and the term for which he was elected. While serving as President-Elect, he shall assume the duties of the President upon his request or when the President is absent or otherwise unable to perform the duties of his office.

THE SECRETARY shall be custodian of all books, papers, documents and other records of the Association. He shall keep a true record of the proceedings of the Association and the Executive Committee and do and perform all acts usually pertaining to his office and as may be prescribed by the Association and/or Executive Committee - all under the supervision and direction of the Executive Committee. He shall make reports of the Association's activities at every meeting of the Association and of the Executive Committee.

THE TREASURER shall be the custodian of all books, documents, funds and other property relating to the financial aspects of the Association. He shall perform the usual duties of a treasurer in associations of this kind: collect dues, keep accounts and except for current expenses shall disburse the money of the Association only upon the direction of the Executive Committee of the Association at every meeting of the Association and of the Executive Committee. If required by the Executive Committee, he shall have a good and sufficient bond for the performance of his duties.

ARTICLE VIII
MEETINGS:

The Association shall meet annually at such time and place as the Executive Committee may determine. Special meetings may be called by the President or by a majority of the members of the Executive Committee, upon five days' written notice to the membership.

Those present at any meeting shall constitute a quorum except for the purpose of changing the By-Laws, for which purpose there shall be at least one-third of the members of the Association present to constitute a quorum.

ARTICLE IX
COMMITTEES:

The following committees shall be appointed annually by the President, by and with the advice and consent of the Executive Committee: Amicus Curiae Committee, The Defense Line Committee, Judiciary Committee, Legislative Committee, Long Range Planning Committee, Membership Committee, Programs and Conventions Committee, Seminars Committee, Defense Research Institute Association Committee, Finance Committee, Ethics Committee, By-Laws Committee and Practice and Procedures Committee. The President shall have the authority to appoint, from time to time, such other standing or special committees as he deems advisable. Each standing and special committee shall consist of a number of members to be determined by the President, one of whom, when feasible, shall be a member of the Executive Committee.

ARTICLE X
REMOVAL OF MEMBERS:

A member may be removed or expelled from membership by the Executive Committee or by a majority vote of the Association at any regularly called meeting, for conduct which is adverse to the best interest of the Association. A member shall have the right to a full hearing before the Executive Committee before expulsion.

ARTICLE XI
FISCAL YEAR:

The fiscal year of the Association shall be from January 1 through December 31.

ARTICLE XII
AMENDMENTS:

These By-Laws may be amended or rescinded at any meeting of the Association by an affirmative vote of two-thirds of the members present, provided further, that notice of the proposed change be given by the Secretary to the members by mail at least fifteen (15) days before the meeting at which such action is proposed.

ARTICLE XIII

Upon dissolution of the Association, the assets of the Association must be distributed exclusively to another eleemosynary corporation which is exempt from South Carolina income tax and will in no event inure benefit of any private individual.

PAST PRESIDENTS

B. Allston Moore, Jr.	1969	F. Barron Grier, III	1980
H. Grady Kirven	1970	Robert H. Hood	1981
Harold W. Jacobs	1971	Robert R. Carpenter	1982
G. Dana Sinkler	1972	Ernest J. Nauful, Jr.	1983
Edward W. Mullins, Jr.	1973	Saunders M. Bridges	1984
G. Dewey Oxner, Jr.	1974	Wade H. Logan, III	1985
James W. Alford	1975	T. Eugene Allen, III	1986
C. Dexter Powers	1976	Theron G. Cochran	1987
Jackson L. Barwick	1977	Carl B.Epps, III	1988
Mark W. Buyck, Jr.	1978	Frank H. Gibbes	1989
R. Bruce Shaw	1979	Mark H. Wall	1990

1990 CALENDAR OF EVENTS

Association of Defense Trial Attorneys	April 18-22	Ritz-Carlton Hotel Atlanta, Georgia
SC Bar Annual Meeting	June 7-10	Myrtle Beach, S.C.
International Association of Defense Counsel (Annual)	July 1-7	The Greenbrier White Sulphur Springs, West Virginia
Defense Research Institute (Mid-Year)	July 2-4	The Greenbrier White Sulphur Springs, West Virginia
SCDTAA Joint Meeting	July 26-28	Grove Park, Asheville, N.C.
Defense Counsel Trial Academy	July 20-28	College Inn Conference Center, Boulder, Colorado
Federation of Insurance and Corporate Counsel	August 1-5	Ritz-Carlton Hotel Laguna, California
American Bar Association (Annual)	August 2-9	Chicago, Illinois
SCDTAA Annual Meeting	October 25-28	Mariner Inn Hilton Head, S.C.

report did not address conditions at the time of the alleged fraud, but two months later. *Alimenta (U.S.A.), Inc. v. Stauffer,* 598 F. Supp. 934 (N.D. Ga. 1984).

Similar reasoning has been applied by Massachusetts courts to prevent admission into evidence of a portion of a report on the cause of a bus accident. The report had been prepared for the bus company to determine whether the driver needed more training and included the conclusion of the investigator that the driver could have prevented the accident. Considering the policy of protecting against the admission of post-accident improvements, the court noted "that good public policy also requires the exclusion of the results of the defendant's investigation into the causes of an accident involving its bus." The court characterized the report as "the prerequisite to any remedial safety measure." *Martel v. Massachusetts Bay Transportation Authority,* 403 Mass. 1, 525 N.E. 2d 662 (1988).

Recognition of a broad separate privilege protecting corporate self-evaluation reports has been criticized, however. *See* Flanagan, *Rejecting a General Privilege for Self-Critical Analyses,* 51 George Washington L. Rev. 551 (1983). A number of courts have indicated unwillingness either to recognize a self-evaluation privilege or to define Rule 407 broadly to exclude from evidence self-examinations reports outside of the medical review context. The court in *Westmoreland* distinguished *Bredice* and similar hospital post-mortem cases as a limited policy exception to a general rule of admissibility. "The fact that subsequent remedial measures are excluded as admissions of fault does not mean that competent evidence resulting from an internal investigation of a mishap must also be excluded." 601 F. Supp. at 67.

In *Fasanero v. Mooney Aircraft Corp.,* 687 F. Supp. 482 (N.D. Cal. 1988), the U.S. District Court for the Northern District of California declined to follow what it perceived to be an overly broad interpretation of Fed. R. of Evid. 407 by the Northern District of Georgia in *Alimenta.* The court admitted evidence of manufacturer tests conducted after a plane crash, distinguishing expressly between remedial measures protected under Rule 407 and "the initial steps toward ascertaining whether any remedial measures are called for."

The U.S. Court of Appeals for the Tenth Circuit also has allowed admission of evidence of post-accident testing as relevant evidence of the cause of a helicopter crash, rejecting a claim that the tests should be excluded as remedial measures under Fed. R. of Evid. 407. As in *Fasanero,* the court drew a clear distinction between post-accident tests or reports and protected remedial measures. "[I]t is usually sounder to recognize that such tests are conducted for the purpose of investigating the occurence to discover what might have gone wrong or right. Remedial measures are those actions taken to remedy any flaws." *Rocky Mountain Helicopters, Inc. v. Bell Helicopters Textron, a division of Textron, Inc.,* 805 F.2d 907 (10th Cir. 1986).

Given these recent decisions and the reluctance of the United States Supreme Court in its last term to recognize a similar privilege for academic peer reviews, *see University of Pennsylvania v. Equal Employment Opportunity Commission,* 58 U.S.L.W. 4093 (Jan. 9, 1990), future recognition of even a limited qualified privilege for self-evaluation reports is questionable. However, a fundamental split of opinion remains regarding the value of the self-examination process and the need to protect that process by excluding the results from later litigation.

The differing approaches to this issue are no better illustrated than by comparing the decisions in *Martel* and *Rocky Mountain Helicopters.* Focusing upon the value of self-examination, the Supreme Judicial Court of Massachusetts in *Martel* concluded that admission of the internal investigatory report on the accident "would discourage potential defendants from conducting such investigations, and so preclude safety improvements, and frustrate the salutary public policy" of excluding evidence of remedial measures.

The Tenth Circuit, in contrast, focused on the value to the litigation of information contained in a report and concluded in *Rocky Mountain Helicopters* that the policy of excluding remedial measures is "not as vigorously implicated where investigative tests and reports are concerned. To the extent that such policy concerns are implicated, they are outweighed" by the danger of excluding one of the best sources of accurate evidence.

Despite the consequent uncertainty in this area, these and other cases do offer some practical guidance for evaluating the chance that at least portions of a self-examination report may be shielded either from discovery or admission into evidence at trial.

First, any claim of common-law privilege for self-evaluation is weakened if the report is widely disseminated beyond those persons responsible for corrective measures. The need for confidentiality was fundamental to the decision in *Bredice* which first formulated a privilege to protect hospital clinical reviews. In recognizing a limited self-evaluation privilege, the U.S. District Court for the District of New Jersey has also noted recently that "confidentiality is the 'sina qua non' of self-evaluation." *Wei v. Bodner,* 127 F.R.D. 91, 100 (D.N.J. 1989).

By contrast, in *Westmoreland,* CBS had publicly summarized its internal investigation and publicly asserted that the investigation supported the accuracy of its initial broadcast. Thus, CBS subsequently could not treat the report as a confidential internal matter prepared solely for purposes of self-evaluation. The court focused on this absence of confidentiality in allowing discovery of the report over claims of privilege by CBS. *Westmoreland v. CBS, Inc.,* 97 F.R.D. 703 (S.D.N.Y. 1983).

Second, the report should focus upon appropriate corrective measures and include recommendations based upon the findings in the report. Failure to do so may cause a reviewing court to dismiss more readily a claim of privilege based on the policy of excluding remedial measures. For example, in *Wilson v. Beebe,* 770 F.2d 578 (6th Cir. 1985) a civil rights plaintiff sought to admit a report regarding a police shooting prepared by the defendant's superior officer for supervisor review. The U.S. Court of Appeals for the Sixth Circuit allowed admission of the report, finding that it "did not recommend a change in procedures following the shooting; it was a report of that incident and nothing more." *See also Benitez-Allende v. Alcan Aluminio do Brasil, S.A.,* 857 F.2d 26 (1st Cir. 1988) (The court found that a report prepared prior to a product accident and used later to plan a voluntary recall was "more an 'internal investigatory report' of the sort not protected by Rule 407.").

Third, even when recognized in private civil litigation, the privilege may not be available when the report is sought by a federal agency. The U.S. Court of Appeals for the District of Columbia Circuit, while citing *Bredice,* has expressed reluctance to recognize a self-evaluation privilege, especially when the documents are sought by a federal agency. *Federal Trade Commission v. TRW, Inc.,* 628 F.2d 207 (D.C. Cir. 1980). A similar reluctance may be inferred from the Supreme Court's ruling in *University of Pennsylvania* where records were sought by the EEOC.

Fourth, any privilege is likely to be limited

in scope to protect only certain portions of a self-evaluation. As in *Banks,* information provided to the investigator, such as statistical information, may not be protected simply by virtue of its inclusion in the report. Evaluative portions of the report, including opinions of the investigator, are more likely to be protected.

The best course for the company may be to attempt to structure the investigation from the outset to avoid reliance upon a self-evaluation privilege. The need to rely upon a separate self-evaluation privilege is greatest when the report is prepared other than in anticipation of litigation and without lawyer supervision. With lawyer supervision, the investigation might be shielded adequately from discovery in a number of cases by the more universally recognized attorney-client privilege or by discovery protections afforded to a lawyer's work-product. However, establishment of either of these claims requires that the lawyer involved in the matter anticipate the likelihood of a later discovery request and conduct the investigation appropriately to avoid potential pitfalls.

The attorney-client privilege is a privilege of the client to protect from disclosure any confidential communications from the client to a lawyer, who is acting in that professional capacity, so long as the communications are made for the purpose of obtaining legal advice. Unless waived, the privilege typically is absolute.

A corporation may assert the privilege for confidential communications between counsel and corporate employees in connection with the rendering of legal advice. The privilege attaches at least so long as the matters discussed are within the scope of an employee's corporate duties and the employee is aware of the purpose of the communication. *Upjohn Co. v. United States,* 449 U.S. 383 (1981).

Thus, communications between a lawyer and client as part of an investigation conducted by the lawyer for the purpose of acquiring sufficient information to render legal advice may be privileged. If the communications would otherwise qualify for the privilege, it may not matter that the lawyer conducting the investigation is in-house counsel. *In re Sealed Case,* 737 F.2d 94 (D.C. Cir. 1984); *Duplan Corp. v. Deering Milliken, Inc.,* 397 F. Supp. 1146 (D.S.C. 1975).

Inclusion of a lawyer in the investigation, however, does not automatically cloak the investigation with attorney-client privilege. The privilege attaches only to confidential communications between the client and lawyer, not to the underlying facts. There also is authority that the attorney-client privilege does not attach to communications with former employees. *In re Grand Jury Subpoena Dated July 13, 1979,* 478 F. Supp. 368, 374 (E.D. Wis. 1979). More importantly, given the multiple capacities in which many lawyers serve, an investigation can be protected under a claim of attorney-client privilege only if it is conducted for the purpose of rendering legal advice.

In-house counsel, as well as outside counsel who may function also as business or financial advisors, must be particularly aware of the purpose for their involvement in the investigation. "Business advice, such as financial advice or discussions concerning negotiations, is not privileged." *North Carolina Electric Membership Corp. v. Carolina Power & Light Co.,* 110 F.R.D. 511 (M.D.N.C. 1986). In-house counsel who has other business responsibilities within a company "can shelter...advice only upon a clear showing" that the advice was given in a "professional legal capacity." *In re Sealed Case,* 737 F.2d 94 (D.C. Cir. 1984).

A 1962 New Jersey case illustrates the limitations on the availability of the attorney-client privilege as a means to protect lawyer investigations. The chairman of a company directed general counsel, who was also a shareholder and later a director, to investigate the business practices of the former president of the company who remained an employee. As a result of the lawyer's findings and report to the Board, the former president was discharged as an employee. In subsequent litigation between the company and its former officer, the lawyer's investigation and report were held to be unprivileged. General counsel "undertook to serve as an investigator and not as a lawyer. The service rendered could have been rendered by any corporate agent who was not a lawyer." *Metalsalts Corp. v. Weiss,* 76 N.J. Super. 291, 184 A.2d 435 (1962).

Reports prepared by third parties at a lawyer's request for the limited purpose of translating data into a form useful to the lawyer in rendering legal advice may be privileged. For example, an audit of the client prepared at the lawyer's request to aid the lawyer in rendering tax advice may be privileged. However, these cases typically push the outer reaches of the privilege, and a claim of privilege may fail if the client is unable to satisfy the burden of showing that the privilege attaches in admittedly close cases. *See Federal Trade Commission v. TRW, Inc.,* 628 F.2d 207 (D.C. Cir. 1980).

Where no attorney-client privilege attaches, a qualified protection from discovery still may be available under S.C.R. of Civ. Proc. 26(b)(3). Work product prepared by or for a party in anticipation of litigation or for trial may be discovered only upon a showing of substantial need and an inability without undue hardship to obtain equivalent materials by other means.

Thus, notes of unprivileged interviews and materials prepared as part of an investigation conducted in anticipation of litigation, even if unprivileged, may be qualifiedly protected from discovery. The United States Supreme Court first recognized work-product protections in a case involving a lawyer's investigation of a ferry boat accident. The lawyer had interviewed witnesses and others with information relevant to the incident. In *Hickman v. Taylor,* 329 U.S. 495 (1947), the Court gave qualified immunity from discovery to the lawyer's work undertaken in anticipation of litigation.

These protections do not attach, of course, to routine internal reviews where no reasonable basis exists to anticipate specific litigation. While it is not necessary that a lawsuit have been commenced, "the work product immunity requires a more immediate showing than the remote possibility of litigation." *Garfinkle v. Arcata National Corp.,* 64 F.R.D. 688 (S.D.N.Y. 1969). The work-product doctrine will protect only those investigations conducted after the prospect of litigation becomes "identifiable because of specific claims that have already arisen." *Stix Products, Inc. v. United Merchants & Manufacturers, Inc.,* 47 F.R.D. 334 (S.D.N.Y. 1969).

Clients must be made aware that self-evaluations may well be discoverable and admissible in any subsequent litigation regarding the matter investigated. While some courts have found sufficient policy reasons to recognize a self-evaluation privilege, general reliance upon such a privilege may be illadvised. To the extent that a review can be conducted by a lawyer for the purpose of rendering legal advice, a greater possibility of protection is offered by the attorney-client privilege. The investigation still must be conducted carefully to fall within the limited scope of that privilege, however, and only those investigations conducted in anticipation of foreseeable litigation may qualify for the protections afforded unprivileged work-product under the rules of discovery.

COURT GRANTS SUMMARY JUDGMENT FOR CITY OF YORK IN WIFE'S ACTION FOR DAMAGES FOR THE SUICIDE DEATH OF HUSBAND WHILE HE WAS INCARCERATED

By Terry B. Millar
McKinney, Givens and Millar, P.A.

Judge Karen LeCraft Henderson (U.S. District Court) in two separate orders granted Defendant, City of York, Summary Judgment on Plaintiff's 1983 Cause of Action as well as her Cause of Action for negligence under the South Carolina Tort Claims Act, Sections 15-78-20 *et seq. Beulah C. Howard, Personal Representative of the Estate of John E. Howard, deceased, v. the City of York,* C.A. #: 0:89-806-16 (D.S.C. filed February 2, 1990 and March 8, 1990).

Decedent, John E. Howard, committed suicide while incarcerated in the York City jail. Mr. Howard had been arrested for driving under the influence. A breathalyzer examination showed his blood alcohol level to be .19. Plaintiff, Mrs. Howard, telephoned the York Police Department and was informed by the officer on duty that her husband was being held. Mrs. Howard told the officer that her husband suffered from various health problems, including an enlarged heart, sugar diabetes and high blood pressure, and that he was under several medications. She later received a call from a lieutenant and told lieutenant about her husband's health problems and identified the medications he was taking.

The lieutenant telephoned a Judge and made arrangements for Mr. Howard's release. He then called Mrs. Howard and told her that she could pick her husband up at 2:30 a.m. In light of his health problems and his age, Mr. Howard was placed in a normal cell, rather than the "drunk tank" by the lieutenant. The lieutenant then completed his shift and went home about fifteen (15) or twenty (20) minutes later.

Around midnight, another officer checked Mr. Howard's cell and found that he had hanged himself with a blanket that had been provided by the lieutenant. The coroner's report listed the cause of death as "asphyxiation due to hanging".

In her Order, dated February 2, 1990, Judge Henderson granted Defendant's Motion for Summary Judgment on the Section 1983 Cause of Action on the ground that the record contained no facts establishing that the Defendant's police officer violated Mr. Howard's constitutional rights. Citing *DeShaney v. Winnebago Department of Social Services,* 103 L.E.2d 249, 261 (1989), Judge Henderson found that when the state takes a person into its custody, and holds him there against his will, the constitution imposes on it a corresponding duty to assume some responsibility for his safety and well being. This affirmative duty arises from the limitation which the state has imposed on the individual's right to act on his own behalf. *DeShaney at 262.* The duty to protect, however, extends only to those in confinement "whom the state knows to be under specific risk of harm from themselves or others in the state custody or subject to its effective control." *Fox v. Curtis,* 712 F2d 84, 89 (4th Cir. 1983). Although the Defendant's employees were aware of Mr. Howard's medical conditions, The Court concluded that no constitutional duty to Mr. Howard was breached, because the employees were unaware of any specific risk that he would commit suicide.

Judge Henderson determined that the alleged misconduct of the Defendant, particularly the failure to take extra precautions to prevent suicide, did not approach the sort of abusive government conduct that the due process was designed to prevent when no such suicide risk was apparent. *Davidson v. Cannon,* 474 U.S. 344, 347-48 (1986). Any remedy Mrs. Howard may have had lies in tort under state law, as alleged in her second cause of action and not under Section 1983.

The Court's subject matter jurisdiction over Mrs. Howard's state law cause of action existed solely by virtue of pendant jurisdiction based on the Federal Section 1983 Claim. The court, in its first Order, was inclined to exercise its discretion and dismiss the Plaintiff's state law cause of action for lack of subject matter jurisdiction. However, the Plaintiff may have been foreclosed from refiling in a State Court due to the applicable statute of limitations, S.C. Code Section 15-78-110 (1976, as amended). The Court, therefore, directed each party to submit a memorandum addressing the limitations issue before dismissing the pendant state claim.

In her second Order, dated March 8, 1990, Judge Henderson concluded that Defendant's employees failure to take extra precautions to prevent Mr. Howard's suicide, cannot constitute gross negligence under South Carolina Law. Both parties had agreed that the Defendant is immune from liability unless their failure to prevent Mr. Howard's suicide constitute a gross negligence. *See Jackson v. South Carolina Department of Corrections,* 1430 (S.C. Ct. App. 12/11/89) (perculium); Section 15-78-60 (25), Code of Laws of South Carolina, 1976 as amended. Although it appeared to the Court that the statute of limitations on the state law action had run, and that diversity jurisdiction may have existed over the claim, the Court concluded that in the absence of any evidence of gross negligence on the part of its employees, the Defendant, City was immune from liability for Mr. Howard's death, and was entitled to judgment as a matter of law.

COURT SUBSTITUTES MEDICAL UNIVERSITY OF SOUTH CAROLINA AS PARTY DEFENDANT AND SENDS MEDICAL NEGLIGENCE CLAIM TO CHARLESTON COMMON PLEAS

Nauful & Ellis P.A.

The Honorable C. Anthony Harris (Fourth Judicial Circuit) in a recent medical malpractice action substituted the Medical University of South Carolina as a party Defendant in place of the named Margaret Mohrmann, M.D., who was dismissed from the suit. Edward McCullough, *A Minor Under the Age of Eighteen (18), Years of Age, Through Essie McCullough, his duly-appointed Guardian Ad Litem, v. Margaret Mohrmann, M.D., J. Thomas Cox, M.D. and James O.Morphis, M.D.,* case – 89-CP-16-053 (Dated January 31, 1990.)

Plaintiff had brought suit against Dr. Mohrmann as one of the Defendants. Dr. Mohrmann was a salaried employee of the Medical University of South Carolina during the time that she cared for and rendered treatment to the Plaintiff. She did not receive payment from any source outside of her university salary, nor did she bill the Plaintiff or his parents for any services rendered during Plaintiff's stay in the Medical University Hospital in November and December of 1983.

According to the South Carolina Tort Claims Act, as amended by the General Assembly and applicable to medical malpractice cases brought after January 1, 1989, a Plaintiff may name as a party Defendant, "only the agency or political

subdivision for which the employee was acting." S.C. Code Section 15-78-70 (1976, as amended). If the employee is individually named, the statuted provides that "the agency or political subdivision for which the employee was acting must be substituted as a party Defendant." The statute continues by stating "the provisions of this section in no way shall limit or modify the liability of a licensed physician or dentist, acting within the scope of his profession, with respect to any action or claim brought hereunder which involves services for which the physician or dentist was paid, should have been paid, or expected to be paid at the time of the rendering of the services, from any source other than the salary appropriated by the governmental entity."

The parties agreed that the Medical University of South Carolina is a political subdivision of the state, and as such, comes within the provisions of the South Carolina Tort Claims Act. They also agreed that Dr. Mohrmann was on staff at the Medical University and the Plaintiff was a patient in the Medical University Hospital in November and December of 1983. Affidavits were submitted by Defendant to show that Dr. Mohrmann was paid a salary for her duty as a member of the Medical University staff, and did not bill for or receive any payment from Plaintiff or his parents for any services rendered.

After substituting the Medical University of South Carolina as a party Defendant in the place of Dr. Mohrmann, who was dismissed from the suit, Judge Harris further ordered that the cause of action as it related to the Medical University of South Carolina be transferred to the Ninth Judicial Circuit, Court of Common Pleas for Charleston County pursuant to S.C. Code Section 15-78-100 of the South Carolina Tort Claims Act, subsection B. This code section provides that for any action brought under that chapter, jurisdiction and lies in the Circuit Court in the county in which the act or admission occurred. The acts, as set forth in Plaintiff's Complaint, occurred in Charleston County. The remaining portion of the case remained in Darlington County.

DEFENSE VERDICT ON NEGLIGENT INFLICTION ACTION

An Horry County Jury returned a verdict for the defendant in a bystander liability case (See *Kinard v. Augusta Sash and Door*) on October 3. Susan Pardue and Joel Smith of Nelson, Mullins, Riley & Scarborough represented the defendant.

The case involved allegations that a father had suffered sever emotional distress as a result of perceiving the death of his son. His son was struck by the defendant's automobile as the child crossed the road after getting of a school bus in rural Horry County. The father testified that he was in his back yard when he heard the collision. He looked toward the road and saw his eight (8) year old son flying through the air. He ran to where the child lay (approximately 160 feet from where he had been standing). He found his child there bleeding and unconscious. The child died at the hospital two hours later.

The defendant argued that (1) the plaintiff was not in "close proximity" to the accident; (2) that the plaintiff had not contemporaneously perceived the accident, and (3) that the plaintiff's damages had already been recovered in a prior wrongful death action in which the plaintiff and his wife received a verdict of $90,000.00.

Judge Dan Laney allowed the jury to hear the testimony of the plaintiff from the prior trial and the verdict from that case. The court charged the jury on the elements of the negligent infliction. He instructed the jury that Mr. Inman could not recover any damages stemming from the wrongful death of the child and that only those damages resulting from the emotional distress of witnessing the accident could be recovered. The jury returned a defense verdict after forty minutes of deliberations.

COURT DETERMINES COMMERCIAL UMBRELLA INSURANCE POLICY NOT SUBJECT TO THE UNINSURED MOTORIST STATUTE

By Michael M. Nunn
Coleman, Aiken and Chase

In a recent Order in a declaratory judgment action, Judge James M. Morris of the Third Judicial Circuit found that the "excess policy" or commercial umbrella policy issued by Federated Mutual Insurance Company (Federated) was not subject to the statutory provisions of the uninsured motorists statute due to its inherent nature as merely supplemental coverage and due to the fact that the underlying "primary policy" complied with the requirements of the act. *Ronnie Todd v. Federated Mutual Insurance Company and South Carolina Farm Bureau Insurance Companies,* No. 89-CP-45-38 (February 13, 1990).

The action arose out of a head-on collision between a motorhome and a truck. The owner of the motorhome was insured with Federated. There were eleven (11) persons occupying the motorhome at the time of the accident, including its owner and Ronnie Todd, the Plaintiff in this action. Eight (8) of the eleven (11) occupants of the motorhome died in or as a result of the collision.

The operator of the truck was responsible for the accident, but under South Carolina Law, the truck was an "uninsured motor vehicle". The aggregate damages sustained by the Plaintiff and other occupants of the motorhome exceeded the total of all available coverages.

At the time of the accident, the owners of the motorhome were covered by an insurance package from Federated. The package included a business automobile insurance policy, as well as a commercial umbrella liability policy, and some other unrelated coverages. The Plaintiff had several policies with South Carolina Farm Bureau which covered his personal vehicles, none of which were involved in the accident. All of the policies were in full force and effect at the time of the accident.

The first issue before the Court with regard to Defendant, Federated was whether it had made an effective offer of uninsured motorist coverage up to the limit of the insureds liability coverage, under its "primary policy". S.C. Code Section 38-77-160 (1976, as amended) provides that "automobile insurance carriers shall offer at the option of the insured, uninsured motorist coverage up to the limits of the insureds liability coverage." Not only must the insurer offer excess uninsured motorist coverage up to the liability limits, but the offer must be an effective one that is meaningful to the insured. In *State Farm Mutual Auto Insurance Company v. Wannamaker,* 291 S.C. 518, 354 S.E.2d 555 (1987), the Supreme Court adopted a four-part standard by which to determine whether an insurer has complied with this duty to offer optional coverages. 291 S.C. at 521. The standard is set out as follows:

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

The Court found that Federated to meet its burden of offering excess uninsured motorist coverage to the owners of the motorhome on their liability policy. When an insurer fails to make a meaningful offer of optional insurance coverage, such as to fulfill the mandatory provisions of South Carolina Law, Wannamaker entitles the insured to such optional coverage by operation of law, in an amount equal to the liability limits. *Wannamaker,* 291 S.C. at 522. The Court, therefore, reformed the Federated primary policy by operation of law to provide uninsured motorist coverage in an amount equal to the liability coverage limit.

Plaintiff, however, also argued that as to Defendant, Federated, the South Carolina uninsured motorist statute applies to a commercial umbrella policy and that the "excess policy" should be delcared by operation of law to contain uninsured motorist coverage in an amount equal to the liability limits of that policy as well. The Court found no South Carolina cases considering this issue. Of the several other jurisdictions that have considered the issue, there exists a split of authority as to whether a respective uninsured motorist statute applies to excess or umbrella policies. The Court determined that the general rule was that those jurisdictions representing the "minimum limits" of uninsured motorist protection find that uninsured motorist coverage is not required in excess or umbrella policies while those jurisdictions representing "maximum limits" of uninsured motorist protection find that excess or umbrella policies must provide uninsured coverage. The South Carolina statutory scheme embodies the "minimum limits" legislative scheme.

The Court found the case of *Trinity Universal Insurance Co. v. Metzger,* 360 So.2d 960 (Ala. 1978) persuasive. In that case, the Court looked at the differences in the basic nature of umbrella policies as opposed to automobile and motor vehicle liability policies and at the fact that the existing underlying automobile policy was itself sufficient to meet the requirements of the law. The Court reasoned, "automobile liability policies and motor vehicle liability policies insure against the risk of loss through the operation of specific automobiles" while "an umbrella policy . . . is fundamentally excess insurance designed to

Continued on back page

Community Service Award

The York County Young Lawyers Association has awarded its Annual C.W.F. "Charlie" Spencer, Jr. Community Service Award for outstanding service to the community and Bar to Beverly A. Carroll of Rock Hill.

Ms. Carroll is a shareholder in the law firm of Roddey, Carpenter & White, P.A. and was admitted to practice in 1981. She is a 1974 graduate of Winthrop College and earned her law degree from the University of South Carolina. She is a member of Oakland Avenue Presbyterian Church in Rock Hill where she is a deacon, the coordinator for the youth basketball program and serves on the activity center and property committees. She is a member of the Board of Directors of the York County Hospice and is currently serving as treasurer. She is a commissioner on the Rock Hill Parks and Recreation Commission, a volunteer for the Special Olympics program, and for the York County Habitat for Humanity. She also serves as a member of the Board of Directors of the Rock Hill YMCA and has served as president of the Rock Hill Branch of the American Association of University Women, in addition to editing the Branch's newsletter. She is a volunteer for the Northwestern Trojans Booster Club, serves on the Annual Fund Committee of Winthrop College, and is active in the College's Alumni Chapter. She is a member of the York County Bar, the South Carolina Bar, the South Carolina Association of Defense Trial Attorneys', the American Bar Association, and the South Carolina Association of Hospital Attorneys.

OOPS

Due to an error Lilli K. Lindbeck's name was not included as co-author of the article "Will the Real 'Wages' Governed By State Wage Payment Law Please Stand Up." (*Page 5, February issue of Defense Line.)

Charles T. Speth II and Lilli K. Lindbeck are attorneys with the firm of Haynsworth, Baldwin, Johnson & Greaves.

LEGISLATIVE UPDATE

PUNITIVE DAMAGES AND STRICT LIABILITY

By: Kay Crowe, Esquire

A Bill has been introduced by Senator Ernest Passailaigue which reads as follows:

Section 1: Section 15-73-30 of the 1976 Code is amended to read:

Section 15-73-30. Comments to Section 402A of the Restatement of Torts, Second, are incorporated in this chapter by reference as its legislative intent. This chapter does not preclude the award of appropriate punitive or exemplary damages or interest before judgment.

Section 2: This act takes effect upon approval by the Governor.

This Bill, which has been introduced in the Senate, has now been referred to by Tort Subcommittee of the Senate Judiciary for review. The Legislative Committee of the South Carolina Defense Trial Attorneys' Association has appeared before the Senate and expressed its concerns about this Bill. Larry Marchant, of the South Carolina Chamber of Commerce, appeared and opposed the Bill.

As you can see, one of the obvious problems with this Bill is that not only does it allow punitive damages to be awarded in strict liability cases but also allows interest to be applied before the judgment. The Bill has been phrased to declare what the legislative intent was when Section 15-73-30 was first enacted. If passed as drafted, there would be a very good argument that this Bill would have retroactive effect.

The Legislative Committee is watching this Bill very closely. If you have any comments, suggestions, or help you can provide the Committee in presenting the Association's position on this matter, please feel free to contact me at Barnes, Alford, Stork & Johnson, 1613 Main Street, Post Office Box 8448, Columbia South Carolina 29202, (803) 799-1111.