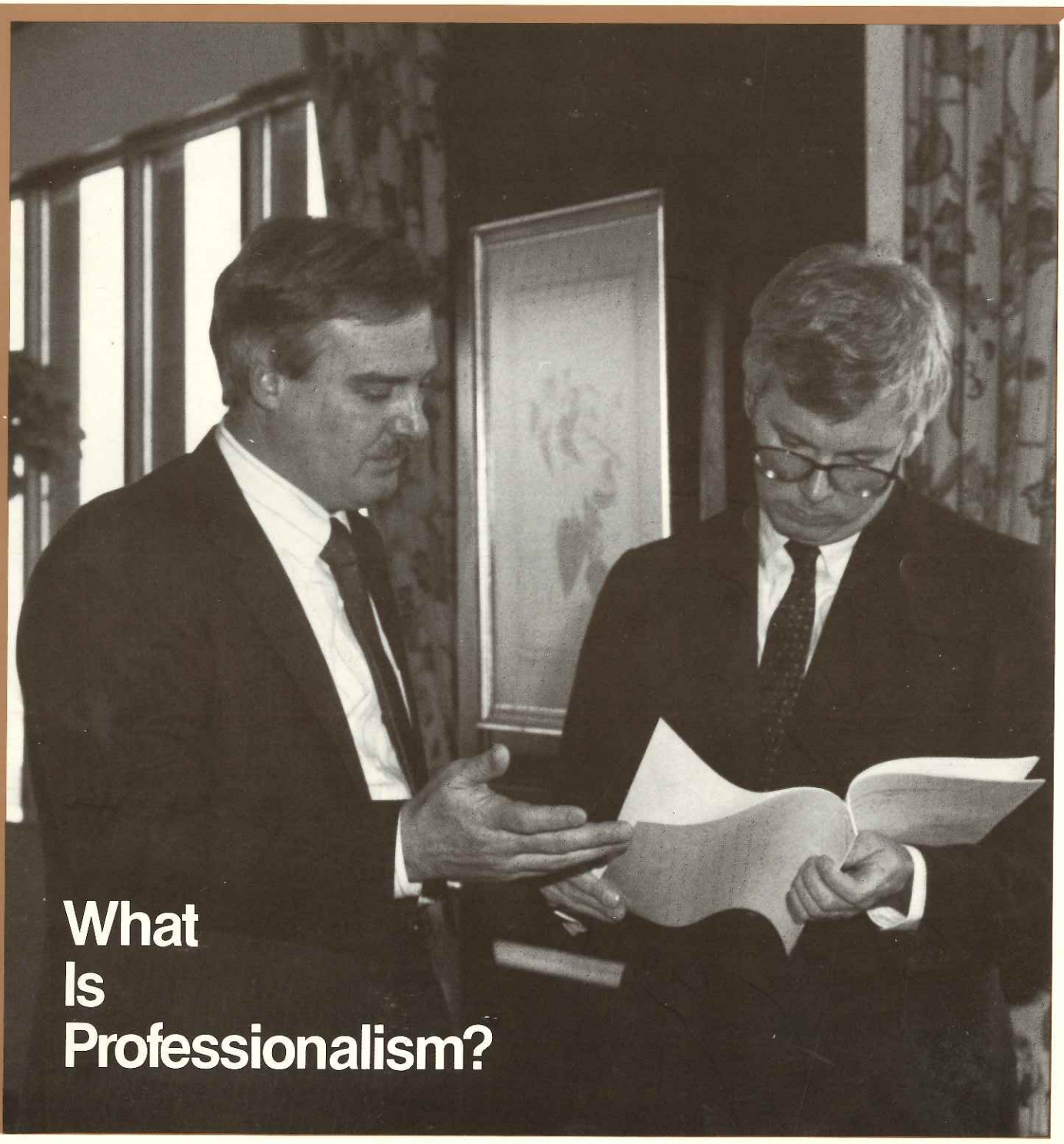
The Defense Line

S.C. Defense Trial Attorneys' Association

Spring 1991
Volume 19 Number 2



What Is Professionalism?

VOLUME 19, NO. 2 SPRING 1991

LOOKING BACK TEN YEARS AGO

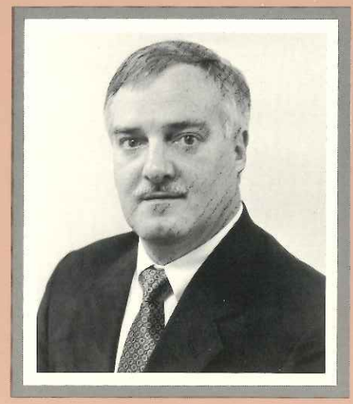
E.B. "MAC" McCONKEY was named 1980 Claims Manager of the Year by the Claims Management Association. The 1981 officers for the Claims Management Association were President RALPH SHANDLEY, Vice-President MAC McCONKEY, Secretary JERRY TARLTON, Treasurer C. L. MATTHEWS, Recorder/Historian J.W. DERRICK, Immediate Past President JOHN P. DUNN, Directors, EDWARD L. DILLARD, SAM BLACK, JOHN HAMBY, CURTIS HIPP, GREGG HODSON, HAROLD WESSINGER and JOHN WOODS. THE DEFENSE LINE noted the passing of our old friend, E.W. LANEY, III.

LOOKING BACK TWENTY YEARS AGO

THE DEFENSE LINE noted that 28 states had "No-Fault" bills pending in their Legislatures including Study Committees in the United States Senate and the United States Congress. The South Carolina Bar created an Automobile Reformations Committee to look into the impact of the various "No-Fault" plans on the public. To defray the expenses of this committee, the South Carolina Bar Association appropriated $4,000.00, the S.C. Trial Lawyers $4,000.00 and the S.C. Defense Attorneys' Association contributed $2,000.00

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



Glenn Bowers

Our annual meeting with the Claims Management Association of South Carolina will be held over the dates of July 18-20 in Asheville, North Carolina. The Program Committee, chaired by **John Wilkerson**, has planned what will prove to be one of the most timely legal educational programs conducted in South Carolina this year. The major focus of the Program, which should come as no surprise to anyone considering the monumental change in tort law about to take place in our State, will be comparative fault. The format for the Program will be a summary jury trial with a distinguished member of our judiciary presiding, a member of the plaintiffs' bar serving as plaintiff's counsel, members of our Association serving as defense counsel and certain of our spouses serving as jurors. The participants will grapple with a variety of comparative fault issues which, before too long, will be routinely faced by all of us.

The Conventions Committee, co-chaired by **Charley Ridley** and **Mike Wilkes**, has been busy developing plans for the social portion of the Joint Meeting. As I understand it, in addition to the usual golf, tennis and white-water rafting, Charley and Mike, in cooperation with the Claims Management Association, are exploring the idea of trying something new like spending an evening at an actual working horse and cattle ranch. Further details will be provided in the registration materials.

The Trial Academy Committee, chaired by **Tim Bouch**, has been meeting on a regular basis to finalize the plans for our Association's inaugural Trial Academy. The Trial Academy is scheduled for July 23-25 at the South Carolina School of Law, which has graciously agreed to make their facilities available to us.

The trial training program is being built upon training manuals and video tapes produced by the International Association of Defense Counsel and will be supplemented with the active instruction and participation of a faculty comprised of leading defense trial attorneys from our Association. Participants will learn by observing experienced defense lawyers and by practicing their own skills in small break-out sessions. Participants will be videotaped and critiqued by members of the faculty.

The goal of the Trial Academy is to provide an intensive intermediate level trial training program as a service to the members of our Association. The Committee currently plans to limit registration to 20 participants. Registration will be on a first come, first serve basis. The registration fee, excluding room and board, will be in the neighborhood of $200.00.

The Legislative Committee, under the guidance of **Susan Lipscomb** and **Bill Sweeny**, continues to monitor pending legislation.

It now appears that there will be a last minute effort to get a comparative fault statute enacted by the Legislature this session. The South Carolina Law Institute, in response to *Nelson v. Concrete Supply Company*, ____ S.C. ____, 399 S.E.2nd 783 (1991), has drafted and submitted to the Legislature a proposed comparative fault statute.

Unfortunately, the Institute's proposed statute is unacceptable. First, like a bolt from the blue, it encompasses the "pure" version of comparative fault rather than the "not greater than" version adopted in *Nelson*. Second, it utterly fails to address any of the corollary issues left unanswered by *Nelson* such as, among others, the inequities of joint and several liability, strict liability, punitive damages or the fault of non-parties.

Under the pure version, contributory negligence is not a bar to plaintiff's recovery, but damages are reduced by the percentage of the plaintiff's fault. Thus, a plaintiff who is 90% at fault for his own injuries may still recover 10% of his damages. The plaintiff is only barred if he is found to have been 100% at fault.

Under the *Nelson* "not greater than" version, a plaintiff who is 51% or more at fault recovers nothing. A plaintiff who is 50% or less at fault, recovers damages diminished by the percentage of fault attributable to him. This version retains plaintiff's contributory negligence as an absolute bar in cases in which the plaintiff is primarily responsible for his own misfortune. By adopting the modified version, our Supreme Court acceded to the longstanding condemnation of contributory negligence, but at the same time recognized the inequity of permitting a plaintiff who is primarily at fault for his own injuries to recover against a defendant who was only minimally at fault for those injuries.

Adoption of the pure version of comparative fault would not only be unwise, it also would not be in the best interest of *all* of the citizens of South Carolina. The Legislature need only look to the experiences of many other jurisdictions which have abandoned contributory negligence for some form of comparative fault to see the general disfavor with which the pure version is viewed. For example:

> The overwhelming majority of jurisdictions, 30 to be exact, have chosen to employ some form of the modified version and only 14 have chosen to employ the pure version.
>
> Arkansas, which adopted the pure version in 1955, switched to a modified version in 1957.
>
> Iowa, which adopted the pure version in 1982, switched to a modified version in 1984.
>
> Illinois, which adopted the pure version in 1981, switched to a modified version in 1986 and called the change tort reform.

(Continued on page 4)

(Continued from page 3)

No jurisdiction which either judicially or legislatively adopted a modified version has switched to the pure version.

A hard look at the underlying reasons for the action taken by so many other jurisdictions with respect to comparative fault will reveal that:

The pure version, as opposed to a modified version, will cause an increase in the number of claims filed.

The pure version, as opposed to a modified version, will cause an increase in the number of lawsuits filed.

The pure version, as opposed to a modified version, will discourage settlements.

The pure version, as opposed to a modified version, will cause an increase in the dollar amount of settlements and judgments.

The pure version, as opposed to a modified version, will cause higher insurance premiums.

It is difficult to conceive of a more drastic change in tort philosophy than from pre-*Nelson* contributory negligence where a plaintiff is barred if his own negligence contributes in any degree to his own injuries *to* the pure version of comparative fault where a plaintiff may recover even if his own negligence is 99% to blame for his own injuries.

At a time when there is certainly no public clamor for more lawsuits or for expansion of the universe of tort liability, the Legislature should also consider the effect that the adoption of the pure version of comparative fault will have on future economic development in our state.

The Legislative Committee will continue to monitor all legislative developments involving comparative fault. The Committee may be calling on many of you to write letters, contact legislators, or appear before the Legislature. I encourage each of you to participate if called upon. If you are interested in becoming involved in the efforts of the Legislative Committee with respect to comparative fault, please contact Susan or Bill to share your thoughts and your time.

Program At Joint Meeting To Focus On Comparative Negligence

Since the case of *Nelson v. Concrete Supply Co.*, one of the main topics of discussion among lawyers and claim professionals has been comparative negligence. This year's Joint Meeting program will showcase that issue, utilizing a summary jury trial format. We also hope to be able to study the interplay between comparative negligence and contribution among joint tortfeasors through this trial demonstration. We will again call upon members' spouses to volunteer for "jury duty" and look forward to their comments following the jury's deliberation. This program format will also give us the flexibility to incorporate any legislation which is passed before our meeting.

In addition to the summary jury trial, we will devote one hour to discussion of ethical issues raised by the case being tried. We have some other surprises in store which we hope will round out an exceptional and very timely program.

What Is Professionalism?

By James W. Logan, Jr., Esquire

WHAT IS PROFESSIONALISM?
An Interview of Harold G. Clarke
Chief Justice of the
Supreme Court of Georgia

I think we have all struggled with the idea of coming up with a definition of professionalism. I don't know that any two people have come up with the same words. It seems to me that the most troublesome thing is distinguishing between professionalism on one hand and ethics on the other hand. What I have felt from the very beginning is that ethics as we know them within the legal profession really are not ethics as some philosopher might know. They are really more the rules of lawyering — a code of professional responsibility. I think maybe we put the wrong tag on that but it is fixed so strongly that you are not really going to undo it.

Professionalism differs from legal ethics in the sense that ethics is a minimum standard required of lawyers while professionalism is a higher standard expected of all lawyers. Professionalism imposes no official sanctions. It offers no official reward. Yet, sanctions and rewards exist unofficially. Who faces a greater sanction than lost respect? Who faces a greater reward than the satisfaction of doing right for right's own sake?

It may defy definition, but it is the kind of thing that you may look at, like the Cheshire cat's grin — you see it now, then you don't see it, but when you finally get through it and see it you have an awfully good feeling about it.

WHY IS PROFESSIONALISM IMPORTANT?

For the legal profession to exist at all, it has to justify its own existence. And you justify your existence by doing what tradition expects of you, what the people expect of you, and what the system expects of you. The whole idea of professionalism is doing those things which are expected of a person who has a professional calling. A big part of it, of course, is public service. A big part of it is being a problem solver rather than being the problem.

If lawyers fail to meet the mandate of doing those things which the people expect of them and fail in their mandate of doing those things which the system expects of them, then there is a possibility that the exclusive franchise to practice law may be taken from them. It only exists because people perceive it to be in their best interest. On the other hand, it also means that the public interest would suffer because lawyers really are there to solve people's problems. And if lawyers don't solve them then they may just go unsolved.

HAS SOMETHING GONE WRONG THAT MAKES IT NECESSARY TO MANDATE STUDYING PROFESSIONALISM?

I think something has gone wrong in every field of human endeavor and every generation in the history of the world, and I am not sure that lawyers are any worse today than they were forty years ago when I first came to the Bar. I am not sure that lawyers were any worse then than they were at the beginnings of this century. I think we have always had our failings and just because we are trying to do better does not mean we are now doing worse than we did at an earlier time. Certainly, there are things that need to be improved but there have always been things needing improvement. The effort that we're making is one that needs to be made now, probably needed to be made earlier, and certainly will need to be made in the future.

DOES PROFESSIONALISM ADDRESS THE ISSUE OF HARDBALL LITIGATION?

Yes, it does address the question of hardball litigation, Rambo tactics, and all of that sort of thing. In my view, there are instances where you may gain some advantage by hardball tactics, but over the long haul, in looking at the big picture, you don't gain very often. Long experience as a lawyer and ten years as a judge has taught me that once you create a polarization between you and the opposing counsel and the opposing parties, the possibility of settlement and working things out just becomes more and more difficult. And so by doing this, you oftentimes are performing a disservice to your client because you are not able to get your client's problem solved. Benjamin Franklin said something to this effect, "All things you have the right to do are not best to be done." The idea of lawyers just insisting on everything they have a right to when they don't really need it is sort of silly to me. It is like saying all evidence ought to come into a trial whether it is relevant or not. Well, that is not true. All rights that you might be entitled to ought not to be insisted on if it doesn't do any good for you or your client. There are those who sometimes just insist on it because it causes trouble for the opponent rather than doing any good for them. That's bad. That's not what we ought to do.

IT SEEMS THAT COURTESY AND COMMON SENSE HAVE A LOT TO DO WITH PROFESSIONALISM.

Common sense has a lot to do with everything in life, of course. There are a lot of people who think that lawyers don't exercise common sense. There are a lot of people who don't understand, for instance, constitutional rights, and think that they don't make sense. They do. But certainly we ought to apply our efforts as lawyers and judges with common sense and there is nothing wrong with being courteous. I think people can differ and can be zealous in their advocacy without being obnoxious and without being discourteous and uncivil.

A person could be ethical to the very letter of the law and in a very Pharisaical* way and at the same time be an unpleasant, discourteous person. It seems to me that the spirit of the calling to the law practice needs to get more attention. We ought not to ignore the letter of the law and the letter of ethics, but we need also to give attention to the spirit that's behind it, and maybe that is part of what professionalism is. Maybe once you've got the slavish adherence to all the rules — the standards and the Code of Professional Responsibility — then the next thing is to not only adhere to them technically but to try to live up to the reasons behind them in a more philosophical way.

*(Ed. Note: *The Pharisees were generally characterized in the New Testament as observing the letter of the law while ignoring its spirit.)*

IS THE EMPHASIS ON PROFESSIONALISM AN EFFORT TO IMPROVE OUR PUBLIC IMAGE?

Our effort about professionalism is not a public relations effort. We are not doing this just to get the praise of our fellow man. What we are really looking for is, as I said a little earlier, the kind of satisfaction that you get for doing right for right's own sake. If you do it to get a better PR image, then I think you are doomed to failure from the beginning. So, my thinking is that professionalism ought to involve a commitment to solving problems, a commit-

(Continued on page 6)

PROFESSIONALISM

(Continued from page 5)

ment to the public interest, and a commitment to being good human beings.

HAS PUBLIC PERCEPTION OF THE LEGAL PROFESSION CHANGED?

Well, it may be that the public perception or public respect for the legal profession has diminished, I'm not sure. I've read a lot of comments by people way back who said the same things. Has law become too much of a business and too little a profession?

It seems to me that every generation needs only to look at its own failings or own shortcomings. To try to correct those shortcomings and to try to compare it with other generations is probably not possible. Time is one of nature's great anesthetics and you have a tendency to remember only the good things of an earlier era and forget the bad things. I am not sure we are that much worse than we were at another era.

My next door neighbor is a doctor and I like to tell him the old joke that when lawyers were writing the Declaration of Independence and the Constitution, doctors were putting leeches on George Washington to solve his medical problems. And, of course, the doctor doesn't like for me to tell those stories and, of course, I get a laugh out of it. But the thing that concerns me now is the thought that was 200 years ago, and what are people going to be saying 200 years from now. Are they going to be saying that when doctors were finding a cure for cancer and a cure for AIDS and other things of that sort, that lawyers spent their time propounding unnecessary interrogatories, filing frivolous motions and padding their timesheets? Where would we have been 200 years ago if Thomas Jefferson in 1776 had been back at Monticello propounding interrogatories, or if in 1787 James Madison had stayed home and prepared various motions rather than going on to be the architect of the Constitution? So what I hope for the profession is that we'll do those things necessary to be responsible members of the community, to make a good living for ourselves, and at the same time recognize that the legal profession is a service effort. Not just service in the sense that it doesn't produce a concrete product, but in the sense that it's got to serve the interests of society.

HAS LAW BECOME TOO MUCH OF A BUSINESS AND TOO LITTLE A PROFESSION?

Law may be too much business today. It may be however that the economic realities of the 1990's and coming 2000 require this to be so. What I think that lawyers who are interested in professionalism need to do is to find a way to accommodate the economic realities and economic demands of modern law practice with the good solid professionalism attitudes that involve all the things we have been talking about. There certainly must be ways that a lawyer can keep his or her head above the economic waters and still perform public service. I just don't think that making a good living and acting as a professional are incompatible factors.

ARE THERE DIFFERENT STANDARDS OR EXPECTATIONS OF PROFESSIONALISM DEPENDING ON WHERE AND WITH WHOM ONE PRACTICES?

Who can be a professional, who can't be a professional, whether it's a matter of a sole practitioner or a 1,000 member law firm, or somewhere in between, a big city or a little city — I don't think that matters. I think that really when you boil it down, it's more of an attitudinal thing than anything else. It's more of what motivates a lawyer to do what needs to be done and not do what doesn't need to be done. I think professionalism can blossom in any kind of law office. Certainly if you are talking about many, many hours of pro bono work, maybe a large law firm with a lot of backup support can afford to do more of that. But my experience of having been in a small law firm in a small town is that you do an awful lot of public service in that environment. It's a different sort of pro bono work because you do what comes in the door, and sometimes you recognize that folks can't pay very much but you do it anyway because that is what the community demands of you. I think that all of those things balance out and it's just a question of what makes the lawyer tick.

IS STRAIGHT HOURLY BILLING CONSISTENT WITH PROFESSIONALISM?

A lot of people say that one of the greatest problems with professionalism in the present day law practice is the business of billing hours. That may be so. *Maybe it would be good if we could go back to what I was taught years ago in the old "four factor billing process."* What you would do is bill based on four factors: *First the results achieved. Then the time spent. Then the complexity of the problem. And finally the ability of the client to pay.* That was a nice way to do business in a different era. I think, however, that we have come so far down the road that the idea of saying we are going to junk the billing systems of today is an unrealistic proposition. It is something we just need to deal with. As I said earlier, I don't think making a good living and acting professionally are incompatible propositions. *The whole idea of billing by the hour or by time is one that may go beyond professionalism. If there is a problem, ultimately that problem may be solved by the marketplace.* For instance, the client is really going to look at the idea of, "What am I getting for the money I am spending?" THE CLIENT DOESN'T REALLY CARE WHETHER YOU ARE SPENDING TWO HOURS OR WHETHER YOU ARE SPENDING FOUR HOURS, WHAT THE CLIENT CARES ABOUT IS RESULT ACHIEVED. [So I really think that maybe the marketplace is going to answer any of those problems down the road.] *Obviously, ignoring the client's interest in favor of padding timeslips or any other excessive billing is an unprofessional act.*

I think that we can find a way — and we are finding ways — to live with the fee propositions of modern law practice and still be good sound professionals who serve the public interest. I have confidence that there are enough lawyers with good solid attitudes to find ways to do it and I think we ought to do it.

IS THERE A GREAT LACK OF RESPECT FOR ATTORNEYS TODAY?

People are making more and more use of lawyers I think. It is true that if you go to a cocktail party, people tell mean jokes about lawyers and they say they don't hold them in very high regard. But, for the most part, it's been my observation that people do hold their *own* lawyer in a high regard. So as a group they don't like us, but when it gets down to us as individual human beings I think they do like us. I think for the most part they like the lawyer who represents them. So, it may be that things are not quite as bad as we think they are in that connection.

THE DEFENSE LINE DEADLINES

ISSUE	DEADLINE
Summer, 1991	June 15, 1991
Fall, 1991	September 15, 1991
Winter, 1992	December 15, 1991
Spring, 1992	March 15, 1992

Superfund And The Secured Creditor Defense

By Timothy W. Bouch

The Wall Street Journal on August 28, 1990 displayed the headline "Superfund Whacks the Banks." The article discussed the Eleventh Circuit ruling in *United States v. Fleet Factors Corporation*.[1] That case was one of the more recent and devastating opinions interpreting the Superfund Law (the Comprehensive Environmental Response Compensation and Liability Act, or CERCLA, 42 *USCA* §9601 et. seq.). The ruling drastically expands lender liability and is proof positive that Superfund can have terrible economic consequences to all who come within the ambit of the environmental statutes.

Federal and State environmental agencies are directed under CERCLA to clean up hazardous waste sites at the expense of private parties that contributed to the creation of those sites. Among those private parties are financial institutions, trustees, stockholders, corporate officers, parent corporations or subsidiaries, in addition to the usual and more obvious suspects; the owners, operators, or lessees of the property. The steps in achieving the status of PRP or Potentially Responsible Party are often insignificant, performed without forethought, and frequently are what otherwise would be normal and customary in the transaction ones of business. The practices may have been perfectly acceptable in a "pre-green" or a pre-environmentally sensitive age. Because of the astronomical expense involved in cleaning up hazardous waste sites, counsel are increasingly requested to voice opinions on transactions which are based on the shifty sands of an emerging body of statutory law. Because the statutory base encompasses a sociological goal, the defenses permitted under the statutes have frequently been narrowed or sometimes ignored, placing counsel in a difficult position. Counsel's effort should not be directed to establishing an absolute defense that may or may not be provided in the statute but toward making all information and risks known so the client can make an informed decision.

The CERCLA basis of liability for secured creditors is 42 *U.S.C.A.* §9607(a). This section defines the classes of responsible parties under Superfund as follows:

> Notwithstanding any other provision or rule of law, and subject to the defenses set forth in sub-section (b) of this section —
>
> 1. The owner and operator of a... facility,
>
> 2. Any person who, at the time of disposal of any hazardous substance, owned or operated any facility at which hazardous substances were disposed of,
>
> 3. Any person who, by contract... otherwise arrange for disposal or treatment...of hazardous substances...by any other party...at any facility...owned or operated by another party...containing such hazardous substances,
>
> ***
>
> shall be liable for — (a) all costs of removal or remedial action incurred...; (b) any other necessary costs or response incurred by any other person...
>
> It is not necessary that one be both an owner and an operator to be liable. The term owner and operator is further defined in CERCLA §101(20) (a) as simply "any person owning or operating such a facility."

The above section goes on to provide what has become known as the secured creditor exception:

> Such term does not include a person who, without participating in the management of a...facility, holds indicia of ownership primarily to protect his security interest in the...facility.

At first glance, this provision would clearly exempt lenders from CERCLA liability. The criteria in the statute, however, are very general and subject to wide interpretation. The leading cases which have addressed the issue have avoided any uniform conclusions or guidelines. The Court decisions since 1985 have relied heavily on the unique factual situations presented in those cases. As the Courts address the environmental issues in pending cases, however, certain specific activity has been identified as establishing liability on behalf of the lender.

The first case of consequence is that of *U.S. v. Mirabile*.[2] That case involved three lenders, Girard Bank, American Bank and Trust, and the Small Business Administration. All of the lenders had varying degrees of involvement in the affairs of the borrower/property owner. The property owner was the owner and operator of a manufacturing facility whose operations resulted in contamination of property. Girard Bank's loan to the owner was secured by a mortgage on inventory and assets. The owner formed an advisory board to assist in the management of the company, and the Girard loan officer was appointed to this board. Initially, his participation was limited to the giving of financial advice. The owner later went into Chapter 11 bankruptcy proceedings and thereafter, the loan officer became more heavily involved in the day-to-day activities of the owner. Girard's representative was frequently present at the facility offices; he monitored cash collateral accounts; insured that receivables went to the proper accounts; established a reporting system between the company and bank; demanded that additional sales efforts be made; and insisted that certain management and manufacturing changes be made.

American Bank and Trust received a mortgage on the real estate on which it foreclosed following discharge of the bankruptcy proceedings. American Bank and Trust was the highest bidder on the property at foreclosure sale and negotiated with third parties for the purchase of the property, but the bank made no effort to continue the operation of the business. It secured the building against vandalism, inquired as to the cost and disposal of drums of waste on the property, and showed the property to prospective purchasers. American Bank and Trust did not actually take title from the sheriff but it assigned its rights to Mirabile who received the deed.

The Small Business Administration loaned operating funds to the owner and received a second mortgage on all of its assets. SBA regulations required that it provide management assistance but no evidence was presented that such assistance was provided. The loan agreement contained requirements for SBA approval, for hiring management consultants, officer compensation increases, purchase of life insurance, payment of dividends and advances to officers. Little evidence existed that any applications by the owner for such approvals were made.

After Mirabile acquired title to the property, EPA cleaned up the site by use of Superfund monies and then the EPA filed suit against Mirabile, the present owner of the site. Mirabile brought third party actions against the three financial institutions claim-

(Continued on page 8)

(Continued from page 7)

ing that they were "owners and operators" of the facility.

The Court in reviewing the statute, focused on the definition of "facility" at 42 *U.S.C.A.* §9601(9). That section provides that the critical concern is the participation in the operational, production, or waste disposal activities and this was the general standard the court used in determining the liability of the lenders in the case. Addressing first the issue of whether American Bank and Trust had become an owner by virtue of being the successful bidder at a foreclosure sale, the court held that that action was plainly undertaken in an effort to protect the security interest of the property. "Before secured creditors such as AB&T may be held liable, it must, at a minimum, participate in the day-to-day operational aspects of the site." In this case AB&T foreclosed after operations had ceased and all actions thereafter were only those prudent and routine and needed to secure the property against further depreciation.

Likewise, the SBA was dismissed on summary judgment based on the Court's decision that SBA took neither legal nor equitable title. Although their loan agreements may have authorized some degree of day to day involvement in the owners' management, that authority was never exercised. The court viewed the SBA participation was purely financial, concerning only the aspects of the operation, and was not sufficient to bring the lender within the scope of CERCLA liability.

The claim against Girard Bank was more successful. The evidence of actions taken by Girard's representatives indicated that the bank achieved a greater day-to-day hands-on involvement than others. The case stands for several important propositions:

(1) The critical issue in determining whether a secured creditor may be characterized as a "owner or operator" for liability purposes is not whether it participated in the operational aspects of the business.

(2) The acquisition of legal title through foreclosure accompanied by only acts consistent with the protection of the property against further depreciation and for resale should not impose liability on the creditors.

(3) Involvement by a creditor into the debtor's day-to-day management of the operations may go beyond the protection of the secured creditor exemption.

In *U.S. v. Maryland Bank and Trust*,[3] a lender again was involved in a CERCLA action. For a number of years, the bank had loaned money to the owners of a farm in Maryland, part of which was used for the disposal of hazardous wastes for a period of time. In 1981, Maryland Bank filed a foreclosure action and later the Bank purchased the property at the foreclosure sale in 1982. From that date throughout 1986, the bank continued to own the property.

In 1983 EPA discovered the presence of hazardous wastes on the property and notified the bank it would be required to clean up the property, failing which, EPA would perform the cleanup. The bank declined and EPA performed the cleanup activity. In 1984 EPA filed suit against the bank to recover cleanup costs of $551,000.

The Court held that the "secured creditor" exemption must exist at the time of the cleanup. The mortgage held by the bank terminated at the foreclosure sale. The Court found the bank purchased the property at foreclosure sale not to protect the security interest but to protect its investment. "The exclusion does not apply to former mortgagees currently holding title after purchasing the property at a foreclosure sale, at least when, as here, the former mortgagees has held title for nearly four years, and a full year before the EPA cleanup."

The Court distinguished *Mirabile* by noting in that situation, the bank promptly assigned the property. The distinguishing fact in the Maryland Bank and Trust case appeared to be the length of time the bank held the property after it foreclosed, as distinguished from the prompt transfer by American Bank and Trust in *Mirabile*.

The Court also held there were certain public policy reasons as a basis for its decision. The Court felt that if a bank could foreclose on contaminated property with the cleanup to be performed by the government, the bank would receive a windfall. The Court noted that mortgagees must conduct due diligence investigations before making prudent loans. The case stands for the holding that the security interest protected by the secured creditor exemption must remain a security interest at the time the cleanup is performed. The exemption does not apply when the creditor acquires ownership title.

In *Tanglewood East Homeowners v. Charles-Palmers, Inc.*,[4] the Court extended the liability of lenders. This case raises a significant issue of whether a lending institution, by financing a development project on contaminated property, may be viewed as one who "arranges for the treatment or disposal" of hazardous substances.

The development company commenced construction in 1973 on a housing subdivision. The subdivision was located on a site that had been a former wood treatment facility and was contaminated with creosote and other hazardous substances. The development was financed by a savings and loan. Following the construction and sale of some homes, the residents began to complain of problems. EPA and state authorities investigated and, in 1983, placed the site on the National Priorities List. Cleanup required the demolition of six homes and extensive site work with the estimated cost being in the millions of dollars. The purchasers of the homes filed suit against the developer, contractors, real estate agents and the savings and loan claiming they were owners and operators of the site.

The Fifth Circuit Court of Appeals discussed the potential liability of current owners and relied significantly on the *Maryland Bank and Trust* case as an example in which a lending institution was found to be an owner or operator. The Court ruled, however, that the development of the site in which contaminated soils were excavated, moved, disbursed or released during construction could constitute "disposal" of hazardous substances. Notwithstanding that the substances may have been originally disposed years ago, the Court noted that the definition of disposal does not limit it to a one-time occurrence. The Court held that relevant evidence may establish that the savings and loan was an arranger for, or transporter of, the toxic materials. There is nothing in the Court's opinion to indicate what acts, other than loaning money to make the development possible, the savings and loan had performed to arrange for the treatment or disposal of hazardous substances. Likewise the Court failed to address the secured creditor exemption. The case does not stand for the proposition that the mere loaning of money by a financial institution for the development of property which is contaminated will make the lender liable. It does however open the door for that argument to be made particularly where the lender may be aware the property is contaminated at the time the loan is made. It should be noted that the case was decided on a Motion to Dismiss without the development of a full factual record.

In September, 1989 the Federal District Court in Pennsylvania refused to dismiss a lender in *Guidice v. BFG Electroplating*.[5] That case involved a toxic tort claim of twenty-eight (28) persons living in the vicinity of three electroplating facilities. Among the Defendants was the bank which held the mortgage

(Continued on page 9)

(Continued from page 8)

on the property. The bank foreclosed and held title for eight (8) months. The Court held that the bank's actions as the debtor prior to foreclosure were actions solely taken to protect its security interest. The Court distinguished the *Mirabile* decision however and held the second creditor exemption was not applicable during the time the bank was record owner of the property. This holding was reached despite the bank transferring title two (2) years before the EPA's initial investigation and cleanup.

In *U.S. Fleet Factors Corporation*, *supra*, the U.S. Court of Appeals for the Eleventh Circuit ruled that the secured creditor may incur CERCLA liability *without* being an operator of a facility. That Court held, that by participating in the financial management of a facility to a degree, that creates a "capacity to influence " the hazardous waste activities of the debtor.[6] The standard of liability then is not whether the secured creditor involved itself in the actual day to day operations as some district courts have concluded, but a secured creditor may be liable if it merely participated in the financial management of the debtor and its contractual rights and involvement were broad enough for a court to infer an ability to affect the hazardous waste disposal decisions of the debtor.

Fleet Factors Corporation ("Fleet") had a factoring agreement with Swainsboro Printworks, a cloth printing facility ("Swainsboro"). Fleet agreed to advance funds against the assignment of Swainsboro's accounts receivable. Fleet also obtained a security interest in the textile facility and all of the equipment inventory and fixtures. When Swainsboro declared bankruptcy, the factory agreement continued with court approval with the debtor in possession for two years. During this period Fleet stopped advancing funds because the debt exceeded Fleet's estimate of the value of the accounts receivable. Subsequently, Swainsboro was adjudged bankrupt under Chapter 7 and a trustee assumed title to and control of the facility.

The government alleged that Fleet's involvement in the financial management of the site was extensive prior to the bankruptcy. Fleet's approval was required before the debtor could ship its goods to customers; Fleet established the price for excess inventory; Fleet decided when and to whom the finished goods would be shipped; Fleet determined when employees should be laid off and supervised the activity of an office administrator on the site. Fleet also received and processed Swainsboro's employment and tax forms and asserted its control over the disposal of hazardous waste by prohibiting Swainsboro from selling several barrels of chemicals.

Six months after the bankruptcy adjudication, Fleet foreclosed on its security interest in the equivalent inventory and fixtures. Fleet contracted with an auction house to sell the collateral and hired a contractor to remove the unsold equipment and leave the premises "broom clean." The contractor dislodged some asbestos insulation during the cleaning process and the auctioneer moved the leaking dumps of chemicals left unattended and caused spillage.

On appeal, the Government argued for a strict and narrow interpretation of the security creditor exemption to exclude any security creditor that participates in any manner in the management of the facility. The Eleventh Circuit did not extend the rule to that extent, holding that lenders often have some involvement in the financial affairs of their debtors in order to protect the collateral. The Eleventh Circuit took the position that "participating in the management" of a facility as that phrase was used in the statute was distinguished from the statutory language of an operator. Applying that interpretation the Court noted that a secured creditor may incur liability without being an operator by participating in the financial management of a facility to a degree indicating "a capacity to influence" the corporation's treatment of hazardous waste.[7] The Court added that "a secured creditor will be liable if its involvement with the management of the facility is sufficiently broad to support the influence that it could affect hazardous waste disposal decisions if it so chose.[8]"

In another recent case, the Ninth Circuit refused, in *Bergsoe Metal Corp. v. East Asiatic Co.*,[9] to adopt the Eleventh Circuit rule. In *Bergsoe* a third party complaint was filed against the Port of St. Helens which issued industrial development bonds and pollution control revenue bonds. The bonds were to provide funds for the acquisition of land and construction of a recycling plant. The construction was to be accomplished by Bergsoe Metal Corp. The Port had taken a security interest in the form of a promissory note and a mortgage on the property. The complaint alleged that the Port of St. Helens was liable for the cost for cleaning up the recycling plant following its abandonment by Bergsoe. The Ninth Circuit affirmed the summary judgment in favor of the Port, finding it was entitled to claim a secured creditor exemption. Although the complaint alleged that the port had some contractual rights to participate in the management of the debtor, such as the right to inspect and direct that hazardous waste be stored properly, the court found the Port never exercised those rights and never actively participated in the management or operation of Bergsoe. The court stated:

> A creditor must, as a threshold matter, exercise actual management authority before it can be held liable for action or inaction which results in the discharge of hazardous waste. Merely having the power to get involved in management but failing to exercise it is not enough.[10]

Certain principles have evolved from these emerging series of cases as a means to evaluate one's potential liability. It should be recognized that a secured creditor exemption of CERCLA is somewhat general, site and fact specific. The diversity of opinion in the reported cases and the application of the exemption is subject to several interpretations as evidenced in the above cases. Despite sporadic congressional attempts to clarify that exemption, it is not anticipated that clearly defined legislative standards will be forthcoming. At a minimum, a client should be advised to do the following:

(1) Perform an environmental audit of any security which is industrial, farm or agricultural property;

(2) A creditor should resist the temptation to become involved in a borrower's day to day operations;

(3) Under no circumstances should the creditor attempt to operate the property as a going business if a loan should go into default unless it is going to assume the liability for a cleanup;

(4) If foreclosure action is considered on industrial, commercial or farm real estate, creditor should obtain an environmental audit or update a previously obtained audit;

(5) If it is possible to recover loan proceeds or substantial portion thereof through means other than foreclosure on the real estate, those alternative means should be seriously considered to avoid exposure to CERCLA liability;

(6) A creditor may wish to pursue foreclosure to determine whether a third party will purchase the property but should not exercise its right to bid in the property at the sale, no liability should be incurred by conducting a sale proceeding;

(7) The purchase of the property at a foreclosure sale is deemed advisable, it should be recognized that

(Continued on page 10)

(Continued from page 9)

all actions following this point increase substantially the risk of CERCLA liability. One's actions must be taken solely to protect the security interest.

(8) Acts designed solely to protect the security interest should be limited to include (a) securing the property against trespass and vandalism; (b) showing the property to prospective purchasers.

(9) Creditors should consider the establishment of a subsidiary corporation for the taking of title to foreclosed properties.\ However, piercing the corporate veil theories have enabled many courts to disregard this subsidiary corporate structure and hold parent corporations liable. The subsidiary created must have a clearly separate identity, officers, records and adequate capitalization in order to proceed.

(10) The secured creditor should attempt to sell the property to a third party as expeditiously as possible, preferably before the foreclosure proceedings are completed.

(11) Care should be taken if inventory and equipment are sold separately by the lender in order to avoid the release of any substances by moving, demolition or relocating.

(12) If the sale of the property also covers inventory that includes usable off-specification or waste chemicals, these should be transferred in bulk. Do not specify, include or exclude specific chemicals from the sale. A bulk sale may not be considered by the court to be an arrangement for the treatment or disposal of hazardous substances whereas specific provisions relating to certain chemicals may be so interpreted.

[1] 901 F. 2d 1550 (11th Cir. 1990).
[2] (E.D. Pa. 84-2280, 1985).
[3] 632 F.SUpp. 573 (D.Md. 1986).
[4] 849 F.2d 785 (5th Cir. 1988).
[5] Cf. *NCNB v. Tiller*, 814 F.2d 931 (4th 1987). *Cossoff v. Rodmon*, 699 F.2d 599 (2d 1983), 30 ERC 1665.
[6] *Id.* at 1557.
[7] *Id.* at 1558.
[8] *Id.* at 1558.
[9] 89-35 397 (9th Cir. Aug. 9, 1990) (5 TLR 408).
[10] *Id.* at 12.

Lighter Side

Murphy's Laws — And Other Truths

No Good Deed Goes Unpunished • Leakproof Seals — Will • Self Starters — Will Not • Interchangeable Parts — Won't • There Is Always One More Bug • Nature Is A Mother • Don't Mess With Murphy! • 90% Of Everything Is Crud • If You're Feeling Good, Don't Worry, You'll Get Over It • All Warranties Expire Upon Payment of Invoice • Where You Stand On An Issue Depends On Where You Sit • Never Eat Prunes When You Are Famished • Friends Come And Go, But Enemies Accumulate • If You Try To Please Everybody, Nobody Will Like It • A Short Cut Is The Longest Distance Between Two Points • You Will Always Find Something In The Last Place You Look • Anything That Can Go Wrong, Will Go Wrong • Every Solution Breeds New Problems • It Is Impossible To Make Anything Foolproof Because Fools Are So Ingenious • An Ounce Of Image Is Worth A Pound Of Performance • Never Argue With An Artist • You Will Remember That You Forgot To Take Out The Trash When The Garbage Truck Is Two Doors Away • The Race Is Not Always To The Swift Nor The Battle To The Strong. But That's The Way To Bet • There's Never Time To Do It Right, But There's Always Time To Do It Over • When In Doubt, Mumble. When In Trouble, Delegate • Anything Good In Life Is Either Illegal, Immoral Or Fattening • It Is Morally Wrong To Allow Suckers To Keep Their Money • Everything East Of The San Andreas Fault Will Eventually Plunge Into The Atlantic Ocean • Nature Always Sides With The Hidden Flaw • A Bird In Hand Is Safer Than One Overhead • The Light At The End Of The Tunnel Is The Headlamp Of An Oncoming Train • Celibacy Is Not Hereditary • Murphy's Golden Rule: Whoever Has The Gold Makes The Rules • Never Sleep With Anyone Crazier Than Yourself • Beauty Is Only Skin Deep, Ugly Goes To The Bone • To Know Yourself Is The Ultimate Form Of Aggression • The Chance Of A Piece Of Bread Falling With The Buttered Side Down Is Directly Proportional To The Cost Of The Carpet • No Matter How Long You Shop For An Item, After You've Bought It, It Will Be On Sale Cheaper • No One's Life, Liberty, Or Property Is Safe While The Legislature Is In Session • The Other Line Always Moves Faster • Anything You Try To Fix Will Take Longer And Cost More Than You Thought • If You Fool Around With A Thing For Very Long You Will Screw It Up • A $300 Picture Tube Will Protect A 10¢ Fuse By Blowing First • If It Jams — Force It. If It Breaks, It Needed Replacing Anyway • Nothing Is Impossible For The Man Who Doesn't Have To Do It • You Can't Be Too Rich, Or Too Thin • Any Tool Dropped While Repairing A Car Will Roll Underneath To The Exact Center • The Repairman Will Never Have Seen A Model Quite Like Yours Before • When A Broken Appliance Is Demonstrated For The Repairman, It Will Work Perfectly • A Pipe Gives A Wise Man Time To Think And A Fool Something To Stick In His Mouth • Everybody Should Believe In Something — I Believe I'll Have Another Drink • Build A System That Even A Fool Can Use, And Only A Fool Will Use It • Everyone Has A Scheme For Getting Rich That Will Not Work • In Any Hierarchy, Each Individual Rises To His Own Level Of Incompetence, And Then Remains There • Never Play Leapfrog With A Unicorn • If Everything Seems To Be Going Well, You Obviously Don't Know What The Hell Is Going On • If More Than One Person Is Responsible For Miscalculation, No One Will Be At Fault • In Case Of Doubt, Make It Sound Convincing • Never Argue With A Fool, People Might Not Know The Difference • Nothing Is As Easy As It Looks • A Penny Saved Is Not Worth Very Much • Living Well Is The Best Revenge • Every Job Will Take Twice As Long As You Expect And Will Be Half As Lucrative • The Chances Of Seeing Someone Who Knows You Are Drastically Increased By Not Wanting To Be Seen • There Is No Such Thing As A Free Lunch.

Recent Developments At The Workers' Compensation Commission

By R. Walter Hundley, Esquire
Chairman, South Carolina
Workers' Compensation Commission

The South Carolina Industrial Commission has regulated and administered the state's system of benefits to workers injured on the job since 1935. During its fifty-five year history, through statutory changes and case law, the Workers' Compensation Act has been amended in response to and as a reflection of the working-world environment.

In 1976, Professor Arthur B. Custy wrote that "workers' compensation law is a dynamic and changing field," and he predicted that "important and far-reaching changes are ahead." Not even Professor Custy could have envisioned the scope of those "far-reaching changes" that he wrote about. At the time of Professor Custy's observations, total medical and compensation benefits paid during the year was $31 million. Fifteen years later, the total was $267 million — an increase of 850 percent. In Custy's time, maximum weekly benefits were $147.44, and the maximum compensation was $40,000. Today, maximum weekly benefits have increased by almost 250 percent to $364.37, and maximum compensation for 500 weeks has increased 455 percent to $182,185. In 1976, 83,000 accidents were reported compared with 147,500 accidents reported in 1990.

While change has been constant and progressive throughout the history of workers' compensation in South Carolina, as far as recent developments at the Commission, 1986 must be recognized as the beginning of a new era in our field of practice. In 1986, the name of the Industrial Commission was changed to the Workers' Compensation Commission recognizing not only the changing nature of employment from industry to one of greater diversity, but also the changing face of the work force in which women were taking a more prominent role. That same year also marked a period of an awakened public interest in the system. It was also a time which saw the Legislative Audit Council in the middle of its exhaustive review of the workers' compensation system.

Since 1986, the Commission has endeavored to streamline and make more efficient its administrative and judicial operations. By handling claims more quickly and accurately, the Commission believes that everyone in the system benefits. The recommendations of both the Administrative Liaison Committee and the Attorneys' Practice and Procedure Committee were very instrumental in helping to develop changes in policy during those days.

Three years ago, the Legislative Audit Council published its review of the workers' compensation system. In it were eighty-seven recommendations aimed at improving workers' compensation in South Carolina. Using this document as a blueprint for change, the Commission was able to comply with almost ninety percent of the administrative recommendations within the first year.

The report also was used by the Joint Legislative Workers' Compensation Study and Review Committee and the Governor's Advisory Committee for the Improvement of the Workmen's Compensation Law to form a basis for legislative change. During the 1989 and 1990 sessions of the General Assembly, sixty-five bills related to workers' compensation were introduced and nineteen of these bills became law.

From the Commission's standpoint, two of the most significant recommendations of the LAC centered on the need for the Commission to develop comprehensive and consistent rules of practice and have them adopted according to the Administrative Procedures Act and the need to obtain funding for the development of a new, expanded information system.

After almost two years of constant drafts and revisions, conferences with representatives of various constituent groups, publications in the *State Register*, and a period of comment and a public hearing, the workers' compensation regulations were submitted to the General Assembly in April, 1990. Governor Carroll A. Campbell, Jr. signed the regulations into law on June 4, with an effective date of September 2, 1990.

Much has been written about the regulations and their impact on the system, and generally, there appears to be a high degree of acceptance given the extent of the changes fostered by their ratification. Implementation has not been without its problems as both the Commission and the practitioners have struggled with some isolated and unclear concepts. But with time, study, patience, and understanding, barriers and obstacles to smooth operations are

being removed one at a time.

The second major development growing out of the LAC report was the Commission's ability to obtain appropriations to allow for the replacement of its information hardware and software systems. Installation has begun and completion is expected by December 31, 1991. A new system will put the Commission on the leading edge of data processing in workers' compensation, and hopefully, allow the Commission, employers, insurance companies, and claims administrators to reduce paperwork and save money through direct reporting. During the transition from one data system to another, seemingly random and unexplained "glitches" have occurred and will probably reoccur in the future, despite our best efforts. We realize that the resulting problems caused by these errors are frustrating and very time-consuming for both the practitioners and the Commission. We ask again for your patience, and I request that you bring these errors to our attention as soon as they are discovered in order that we may give our mutual problems direct and specific attention.

For all the progress towards efficient and effective administration, for all the emphasis on service and an expedited judicial process, for each step forward, the Commission is pushed two steps back because of an increase in claims volume and a decrease in resources. Because of South Carolina's strong program of economic development, and until very recently, a generally strong economy, the number of employers in the state covered by workers' compensation has increased twenty-four percent in the four

(Continued on page 12)

(Continued from page 11)

fiscal years since 1986. The number of accidents reported increased forty-six percent from 101,000 in 1986 to 147,500 in 1990. Although the number of cases docketed for a hearing increased by fifty-five percent, the commissioners were able to increase the number of hearings conducted by only twenty percent (1,774 versus 2,121) because we have finally hit the saturation point for a commissioner's availability to hold a hearing. Despite the increased demand on each commissioner's time, we were able to increase the number of appeals heard by forty-three percent, from 283 to 406, and approve forty-nine percent more settlements, from 4791 to 7134, than in 1986.

But the Commission — both staff and commissioners — have hit the point of finite limitations. It is difficult to envision how we can improve productivity, especially in light of the unprecedented budget reductions of the past twelve months. The only figures that now seem to be growing with any consistency are the number of accidents reported and the number of requests for hearings, stop-pays, and appeals.

The Commission is receiving Forms 50 at the rate of more than 600 per month, and it may be ten to twelve working days after a Form 50 is received before the Commission sends it to the opposing party. Similar delays are being experienced in areas such as requests for copies of files, attorney fee petitions, settlements, Forms 20 determinations, and general correspondence.

Requests for appellate review are averaging sixty-five each month. Because of this increase in volume, the backlog of appeals has grown from sixty days to about one hundred thirty-five days. An extra appellate day was added each month starting in January to close the gap, but the consequence is that the commissioners have one less day to hold single commissioner hearings.

The workers' compensation system in South Carolina has grown and improved dramatically during the recent past years because of the vital partnerships that the Commission has renewed with the practicing bar, insurance companies, health care professionals, employers, working men and women, the Governor's Office, and the General Assembly, but there are still many challenges which must be overcome if our present system is to remain responsive to injured workers and their employers. By using that same spirit of concern, understanding, and cooperation that has so ably served the system in the past, the Commission and its many allies will be able to meet the challenges and realize the full potential of this very important and necessary function of state government.

The Continuing Importance of Winning Early And Winning Often

The South Carolina Supreme Court in a recent unpublished opinion emphasized once again the importance in Worker's Compensation cases of winning early and winning often.

On June 25, 1987 the claimant filed a Form 50 alleging an accidental injury occurring on April 3, 1986. This claim was denied by the employer. A hearing was held before Commissioner Victor Rawl. At the hearing it was the claimant's contention that he had on April 3, 1986, stepped over a platform and had a sudden onset of foot and ankle pain. Thereafter his pain worked its way up his right leg finally coming to rest in his lumbar spine. The records of the plan nurse demonstrated the claimant was seen in medical on April 3, 1986 complaining of a popping sensation in his heel of several weeks duration. He never returned to medical and he continued to work as a sewing machine mechanic until February 27, 1987 missing only two days. The claimant first sought medical attention for his complaints on February 24, 1987 when he saw a chiropractor, Dr. Pierce. The claimant had been involved in a prior automobile accident and had been treated for his back in 1985.

Commissioner Rawl issued his decision denying the claim. In his order, the Commissioner found as a fact that the claimant did not sustain an injury by accident in the course and scope of his employment on April 3, 1986 and also found that there was no causal connection between any April 3, 1986 event and the medical condition the claimant complained about at the hearing. On appeal the Full Commission affirmed Commissioner Rawl's findings and adopted his order as its own.

This was appealed to the Circuit Court where Judge Timmerman reversed the Commission's factual findings as "clearly erroneous."

The Supreme Court pursuant to Rule 23, reversed Judge Timmerman in Memorandum Opinion No. 91-MO-32 citing as authoritative the cases of *Merck v. South Carolina Employment Security Commission*, 290 S.C. 459, 351 S.E. 2d 338 1986), *Lark v. BiLo*, 276 S.C. 130, 276 S.E. 2d 304 (1981), *Koon v. Spartan Mills*, 286 S.C. 190, 332 S.E. 2d 544 (Ct. App. 1985) and *Bilton v. Best Western Royal Motor Lodge*, 282 S.C. 634, 321 S.E. 2d 63 (Ct. App. 1984).

How To Be A Winner In A World Of Change

The world we all prepared for is not the world we will find ahead. For many of us, the future has arrived too soon. A tidal wave of change has swept over our lives. The rules of the game are changing rapidly. We are finding what has gotten us where we are today, is no longer sufficient to keep us there.

There are over 5 million Americans who lost their jobs due to changes in the economy in the past 10 years.

Changes are taking place in all areas of life: Economic, Social, Cultural, Technological, and Political. It is occurring at an increasing rate. As a result, each of us faces a choice — whether to stand idly by and become the next victim of change or rise to the challenge of the new Information Age.

In rising to the challenge, we must become masters of change. We must welcome change. We must explore the exciting opportunities it brings, and be optimistic about the future.

4 Tips on Winning at Change

- Welcome changes rather than trying to resist them.
- Learn how to make change work for you, not against you.
- Continue to develop new skills which will enable you to create opportunities.
- Become a student of change.

There's nothing mysterious about those of us who benefit from change, because we are creating some of the changes ourselves. We figure out how, why and where things are changing, so that we can exploit the possibilities.

Rather than trying to resist change, we seek to harmonize with it.

Remember this: We live in a fast changing world. Traditionally, the two major inevitabilities are death and taxes. But let us add another to the list — *Change.*

Travis A. Badeaux, Sales Training & Development, P.O. Box 9554 Metairie, LA 70055.

The Ivory-Billed Woodpecker Is Dead: What To Expect From Its Successor — Comparative Negligence

By Roy R. Hemphill and Stephen D. Baggett
Burns, McDonald, Bradford, Patrick & Dean
Greenwood, South Carolina

With the S.C. Supreme Court decision in *Nelson v. Concrete Supply Co.*, Opinion No. 23303, dated Jan. 7, 1991, South Carolina finally joined the fold by abolishing the contributory negligence doctrine and adopting a rule of comparative negligence for all causes of action arising on or after July 1, 1991. Ever since old Mr. Butterfield ran his horse into the defendant's gate and found he could not recover, contributory negligence had been the majority rule in most states. *Butterfield v. Forrester*, 11 East. 60, 103 Eng. Rep. 926 (1809). However, the 1970's found a mass exodus of jurisdictions making the switch to comparative fault systems, leaving South Carolina and six other states to "man the ship."

Termed the "Ivory-Billed Woodpecker of the common law" by Chief Justice Alex Sanders in *Langley v. Boyter*, 284 S.C. 162, 325 S.E.2d 550 at 562 (Ct.App., 1984), contributory negligence officially has become extinct in South Carolina! Before the defense bar becomes overwhelmed with grief (at least those members who did not believe juries used their own makeshift comparative fault system), let's take a moment to see what the future holds by examining what effects the transition to comparative negligence had on another jurisdiction — Arkansas.

Out of 44 other jurisdictions from which to choose, why Arkansas? Well, Arkansas is considered a "pioneer" state for the comparative fault system since it enacted a "pure" form of comparative negligence by statute in 1955. Under this form, the plaintiff's contributory negligence, however great, was no bar to recovery but only served to diminish the plaintiff's damages. In 1957, the Arkansas legislature replaced this "pure" form with a "modified" form. Under the modified form, contributory negligence is not a bar to recovery if the plaintiff's negligence is less than the defendant's negligence, but the amount of the plaintiff's recovery is diminished accordingly.

But, still, why Arkansas? Well, in addition to having lived with comparative negligence for a long time, the Arkansas bench and bar have done a good job in measuring and surveying the effect of comparative negligence. Assuming that all other things are relatively the same here and there, the charting of the course in Arkansas shows us what we may expect in South Carolina.

In 1958, the first Arkansas survey was conducted to determine the effects of the transition from contributory negligence to "pure" comparative negligence. The results of this survey are compiled at 13 Ark. L.Rev. 89 (1959). A second survey was conducted ten years later, after a "modified" form had been in place for as many years and the system had been allowed to settle down long enough for the bench and bar to become comfortable with its operation.

The results of the second survey, set forth at 22 Ark. L.Rev. 692 (1969), have been chosen for review by the authors. The second survey compares the effects of a modified form of comparative negligence, which South Carolina has adopted, with the pure form and with the old contributory negligence rule. Results relating to comparisons between the modified form of comparative and contributory negligence will be highlighted since South Carolina has had no intervening pure form, like Arkansas.

The old "floodgates" argument, that a shift toward comparative negligence would open the Court to a mad rush of careless plaintiffs whose claims would have otherwise been barred, has long been advanced by opponents of such a system. Conversely, advocates of comparative fault contend that its adoption would ease overcongested dockets by promoting settlements and shorter trials.[2] The purpose of the 1968 Arkansas survey was to settle the dispute.

The survey opened with a questionnaire to the bench and bar which solicited their overall impression of the transition between the doctrines. When asked what effect it had on court-processing and lawyer-handling, a clear majority of the respondents — defense lawyers (70%), plaintiff lawyers (67%) and judges (69%) — agreed that the switch to comparative negligence had a "significant effect" on both functions.

What was the significant effect? An increased caseload was clearly generated by the transition since the claims of contributorily negligent plaintiffs suddenly became attractive to plaintiff lawyers. Sixty-five (65%) percent of plaintiff lawyers and sixty-nine (69%) percent of lawyers for both plaintiffs and defendants became willing to accept cases which were formerly submarginal under a contributory negligence rule.

Since plaintiff lawyers accepted more cases under a comparative negligence rule, courts had to obviously spend more time dealing with personal injury cases. If this fact were coupled with the theory, posited by opponents of the comparative fault system, that settlements are discouraged since plaintiffs can more easily get to the jury on liability, one could easily imagine overflowing trial dockets. However, the survey casts doubt on this argument and provides evidence that a comparative fault system fosters settlements before trial. Sixty-seven (67%) percent of plaintiff lawyers and forty-four (44%) percent of defense lawyers responded that they settled more cases under a comparative fault rule than under a contributory negligence rule. Even though a majority of defense lawyers reported no change, the forty-four (44%) percent who did notice a change were unanimous in their reply that more settlements occur under a comparative rather than a contributory negligence rule.[3] Therefore, the increased settlements before trial have possibly offset the potential overload in the Arkansas courts, and decreased the amount of courtroom time spent on the individual case.

Opponents of comparative negligence have argued that proportioning liability among the parties and adjusting damages injects too much complexity into the jury's deliberations. Advocates, like Chief Justice Sanders, argue that such a function is no more difficult than assigning a dollar value to

(Continued on page 14)

WOODPECKER
(Continued from page 13)

pain and suffering and humiliation.[4] Unfortunately, these arguments remain largely unsettled after the Arkansas survey. No definitive majority responses arose from the questions based on the difficulty of deciding issues of liability or damages, as the lawyers more or less split evenly in their answers. From the surveys, the respondents obviously experienced more lengthy trials in developing these issues in light of the 1958 survey, but appeared to have grown accustomed to them by 1968.[5] As to verdicts, sixty (60%) percent of defense lawyers felt the proportion and amount of plaintiff verdicts had remained unchanged since the advent of comparative negligence.[6]

Perhaps the most surprising results evolved from the questionnaires which solicited general attitudes toward comparative negligence. Prior to its adoption in 1955, seventy-two (72%) percent of defense lawyers were clearly opposed to the change. By the time Arkansas adopted the modified form in 1957, the defense bar reversed itself and voted seventy-two (72%) percent in favor of a comparative fault system. Furthermore, when asked whether they favored any change from the modified comparative negligence rule, all judges as well as eighty-two (82%) percent of defense lawyers rejected the idea.[7] Naturally, the plaintiff bar was a strong supporter throughout.

Now that the arguments for and against adoption of comparative negligence have become moot in South Carolina, the defense bar must gird itself for the transition into a comparative fault system. Future handling of personal injury cases will be difficult to foretell, but, hopefully, the experience of the Arkansas bench and bar will offer some guidance. If South Carolina's transition proves to be anything like that of Arkansas from 1955 through 1969, then we might be able to predict certain results. Plaintiff lawyers will accept more cases which were formerly submarginal due to the plaintiffs' contributory negligence, thereby further filling the trial dockets. However, settlements should be on the rise, thereby disposing of many cases before trial. Those cases which reach trial should take longer to try due to the added dimensions of the case.

There is obviously something in the comparative fault system which appealed to the Arkansas defense bar, because it adamantly refused to return to the days of contributory negligence. Hopefully, such overwhelming appeal will be shown in South Carolina. If the surveys there hold true here, we'll get more cases to defend, we'll settle more before trial, and we'll probably have more fun trying those we try, because of the additional issue of the degree of the plaintiff's comparative fault. When you think about it, there's nothing bad in any of that.

[1] Interestingly, the demise of contributory negligence was foreshadowed in *Langley*, which tentatively adopted comparative negligence, subject to an inevitable writ of certiorari to the State Supreme Court. The decision was overturned a short time later. However, that plethoric opinion, which is incorporated by reference in *Nelson*, is a good source for the rise and fall of contributory negligence, and the birth of comparative negligence.

[2] 22 Ark. L.Rev. at 696.

[3] *Id.*, at 702.

[4] *Langley*, at 563.

[5] 22 Ark. L.Rev. at 707 - 708.

[6] *Id.*, at 708 - 709.

[7] *Id.*, at 711.

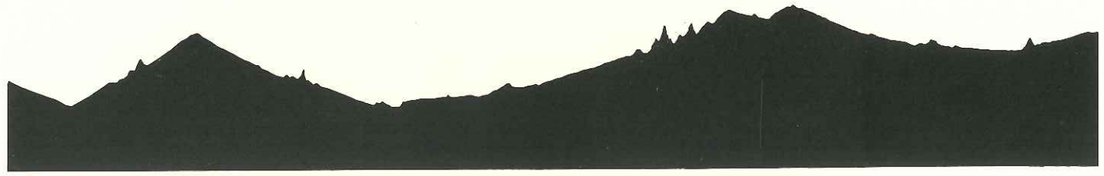
Harmless Errors

Justice LOGAN E. BLECKLEY, in Cherry v. Davis, 59 Ga. 454.

Opinion: The court erred in some of the legal propositions announced to the jury, but all the errors were harmless. Wrong directions which do not put the traveler out of his way, furnish no reason for repeating the journey.

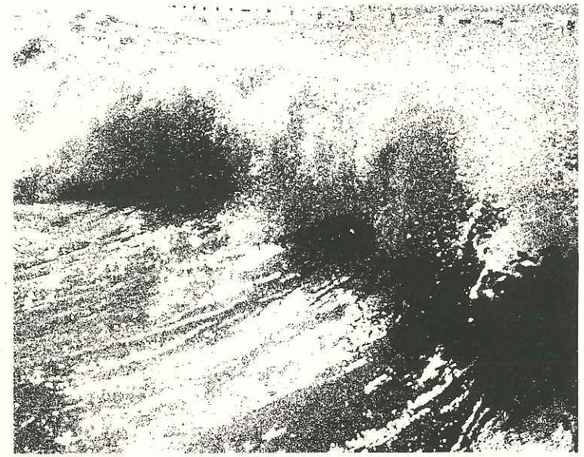
—Opinions and Stories of and from The Georgia Courts and Bar collected and arranged by Berto Rogers.

Follow SCDTAA from the Mountains



July 18 - 20, 1991
Joint Meeting
Grove Park Inn
Asheville, NC

To the Sea



November 7-10, 1991
Annual Meeting
The Cloister
Sea Island, GA

SOUTH CAROLINA
DEFENSE TRIAL ATTORNEYS' ASSOCIATION
3008 MILLWOOD AVENUE, COLUMBIA, SC 29205

ADDRESS CORRECTION REQUESTED

Bulk Rate
U.S. Postage
PAID
Columbia, S.C.
29201
Permit No. 535

South Carolina Defense Trial Attorneys' Association First Annual Trial Academy

University of South Carolina Law School July 23 - 25, 1991

About The Trial Academy

The first annual South Carolina Defense Trial Attorneys' Association Trial Academy will be offered on Tuesday, Wednesday and Thursday, July 23-25, 1991 at USC School of Law in Columbia, South Carolina.

This three-day trial advocacy course is designed for practitioners admitted to the bar no later than December, 1989 and who have conducted or substantially conducted three or more jury trials. The course will focus on the successful handling of all major aspects of a trial from opening statement to closing argument. Though there will be demonstration and lecture by the instructors, the majority of time will be spent on reviewing and critiqueing the performance of the participants through their conduct of a mock trial. Each participant's performance will be video-taped in order to facilitate review and discussion. Eighteen (18) hours of CLE credit have been requested.

Please register me for the First Annual SCDTAA Trial Academy:

NAME:_____

FIRM:_____

ADDRESS:_____

CITY, STATE, ZIP CODE:_____

TELEPHONE:_____

I understand that the registration fee for this seminar is $200.00 (including a $25.00 non-refundable processing fee.)

CANCELLATIONS

ADVANCE REGISTRATION IS ENCOURAGED AS ENROLLMENT WILL BE ON A FIRST-COME, FIRST-SERVE BASIS. FOR MORE INFORMATION CALL TIMOTHY W. BOUCH AT (803) 577-4000.