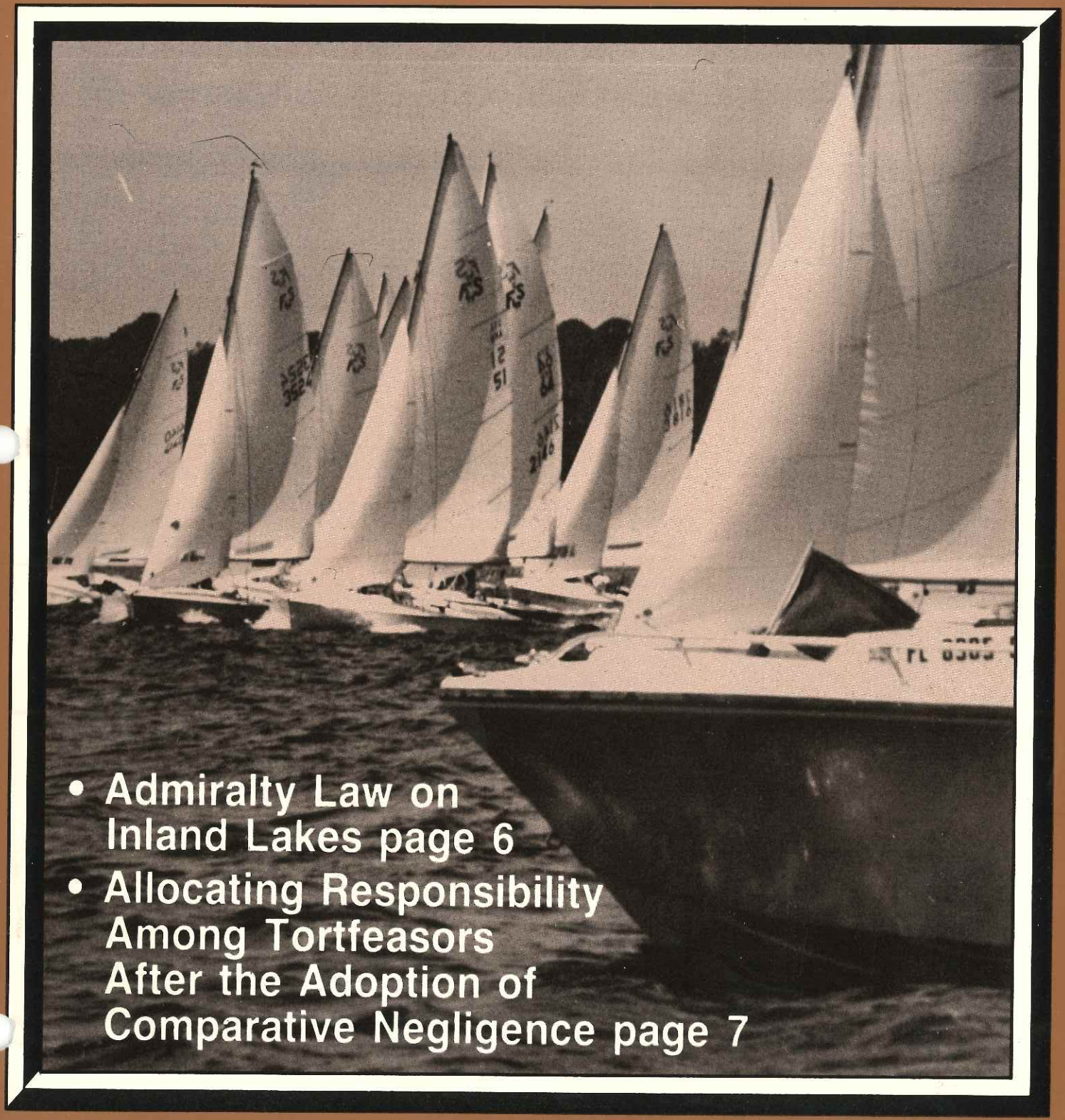
The Defense Line

S.C. Defense Trial Attorneys' Association

Summer 1991
Volume 19 Number 3



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VOLUME 19, NO. 3, SUMMER 1991

LOOKING BACK TEN YEARS AGO

President BOBBY HOOD in his report recognized CHARLIE CARPERNTER'S Amicus Committee. BOB CARPENTER, President-Elect, was working on the Joint Meeting of the Claims Management Association at Great Smokies Hilton. Professor CHARLES ALLEN WRIGHT accepted our invitation to the Annual Meeting. GENE ALLEN put together a fine CLE Seminar on "Conflicts of Interest in Insurance Practice." It was noted that GOVERNOR RILEY appointed FREDDY ZEIGLER to the Commission to replace SON TRASK. The Association was working on a logo. PETER McGEE was working on a statute to liberalize opening of defaults. ED ERVIN of Sumter, was elected president of the newly organized Indpendent Insurance Adjustors' Association of the Carolinas. SID FOSTER, Vice-President, CLAUDE RAMSEY, Secretary-Treasurer.

LOOKING BACK TWENTY YEARS AGO

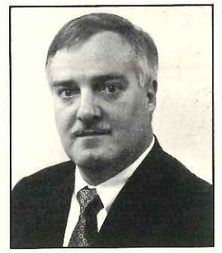
THE DEFENSE LINE was born March 1, 1971, when President HAROLD JACOBS opened the publication. The first editor was BERNARD MANNING. THE DEFENSE LINE had been planned during President GRADY KIRVEN'S term and its beginning was due much to GRADY'S guidance. HAROLD stated in Vol. 1, No. 1, on March 1, 1971, that "THE DEFENSE LINE is intended to inform Association members primarily of activities of the Association and its facilitites for helping Association members. We hope our members would use the LINE as a medium for the exchange of ideas and information." We hope that THE DEFENSE LINE has fulfilled its orginal intent and continues to meet the needs of the Association. YOU owe it to the Association to contribute.

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

South Carolina Defense Trial Attorneys Association 1990 - 1991 Officers

President	Glenn Bowers
President Elect	William M. Grant, Jr.
Secretary	W. Hugh McAngus
Treasurer	William A. Coates
Immediate Past President	Mark Wall



GLENN BOWERS
President SCDTAA

The **Twenty-Fourth** Annual Joint Meeting of the Claims Management Association of South Carolina and the South Carolina Defense Trial Attorneys' Association will be held July 18-20 at the Grove Park Inn in Asheville. The meeting promises to be an exceptional one, both educationally and socially.

The educational portion of the meeting will be highlighted by a summary jury trial on the issues of comparative negligence and contribution among joint tortfeasors. *The Honorable John Hamilton Smith* has graciously agreed to preside. *Perry Gravely, Bruce Miller* and *Tom Gottshall* will be trial counsel. The jury will be selected from a list of volunteer spouses and guests. The Workers' Compensation session will feature Commissioner Marvin F. Kittrell. The educational program will conclude on Saturday with a presentation on courtroom demonstrative evidence, including a demonstration of the use of laser disc technology and computer assisted accident reconstruction.

The social portion of the meeting will again be relaxed and include a little something for everyone. In addition to the fellowship among defense attorneys and claims managers for which this meeting has long been noted, there will be golf, tennis and white water rafting. The main event might prove to be the newest event on the agenda. On Friday evening we will attend a mountain-style party at the Taylor Ranch, a working quarter horse and cattle ranch. Ranch activities for those of you with an over abundance of heartbeats, include, among other things, basketball, volleyball and/or badminton. The more sedentary among us can try their hands at horseshoes, walking the nature trail or touring the ranch. After a country dinner buffet, we will be entertained by a country variety band and a professional clogging team.

The officers and members of both associations have worked hard to make this meeting a rewarding and enjoyable experience. Please have a safe trip to Asheville. I look forward to seeing each of you there.

THOMAS B. RHAME, JR.
President CMASC

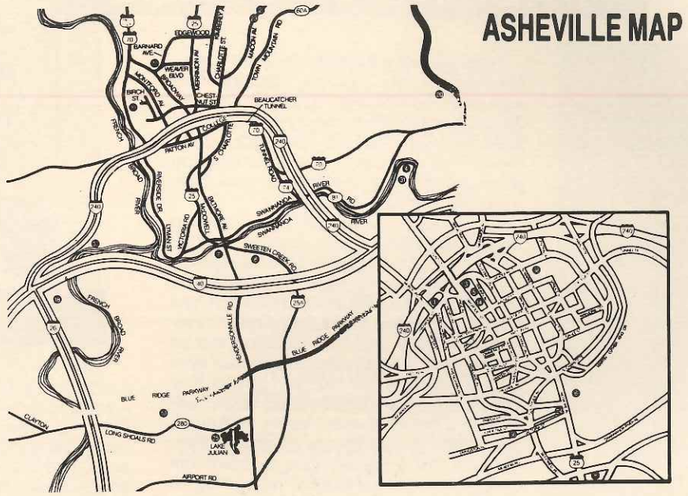
Change, continuously occurring, is one fact that seems to be constant in the legal and claims fields. Those of us in the insurance industry have had to adapt to changes and other adjustments that our companies have made during the past year. These changes can, and often do, have an impact on many of the defense firms and the individual attorneys therein. Given the challenges we all face in performing our work in a constantly changing environment, it is refreshing to turn our thoughts to our joint meeting which is always excellent.

The consensus among claims managers is that we all benefit from the educational aspects of this meeting, and we certainly enjoy the opportunity for fellowship with the defense attorneys. Plans for another informative and enjoyable meeting are in place, and we look forward to another outstanding turnout. On behalf of the Claims Management Association of South Carolina, we appreciate the opportunity to share this joint meeting with the defense attorneys. Our organization also has a spring meeting and a fall meeting, and quite often we have called on members of your organization to participate on our programs, and we have benefitted from your support. We appreciate your willingness to share your expertise with our members.

The Claims Management Association of S.C. has been fortunate throughout its years to have a membership of knowledgeable, dedicated claims professionals. These people have worked hard to fulfill their responsibilities to our insureds and others, and to our principals. Together with defense attorneys, our members have worked to meet the challenges that change brings to all of us. Our 1991 joint meeting will help prepare us to continue to meet our own challenges. We hope that many of you are able to attend as we are sure that once again our meeting will be a benefit professionally and an enjoyable time.

Claims Management Association of South Carolina 1990 - 1991 Officers

President	Thomas B. Rhame, Jr. Seibels Bruce Insurance Companies
Vice President	Glenn S. Beckham S.C. Electric and Gas Company
Secretary	Larry Haussman Crawford and Company
Treasurer	W. Ray Wessinger, Jr. Insurance Reserve Fund S.C. Budget and Control Board
Recorder	Ralph D. Chamblee, Jr. Crawford and Company



ASHEVILLE MAP

ASHEVILLE AREA ATTRACTIONS

ANTIQUE CAR MUSEUM — Asheville. On the grounds adjacent to Grove Park Inn and next door to the Biltmore Homespun Shop. Open Mon.-Sat., 9-5; Sun 1-5; Winter months, please inquired at Gift Shop for tours. Free. (704) 253-7651.

ASHEVILLE ART MUSEUM —Inside the Asheville Civic Center Changing exhibits. Open Tues.-Fri., 10-5; Sat.-Sun., 1-5. Nominal fee; free to members. (704) 253-3227.

ASHEVILLE TOURIST BASEBALL — McCormick Field off Biltmore Avenue/US 25. A farm team of the Houston Astros. Season runs April through August. (704) 258-0428.

BILTMORE ESTATE — Asheville. The largest private home in America, a 250-room French Renaissance chateau built in 1895 by George W. Vanderbilt. Self-guided tours include upstairs and downstairs of house, the Estate Winery - where Biltmore wines are available for tasting - and the gardens and grounds. Two Estate restaurants. Special events include Christmas at Biltmore, late November to late December. Located on US 25 three blocks north of exit 50 on I-40 in Asheville. Ticket office open 9-5; Biltmore House open until 6:30; Estate grounds until 8. Closed Thanksgiving day, Christmas day and News Years day. Children 11 and under are admitted free when accompanied by a parent. Admission charge. (704) 255-1700. 1-800-543-2961.

BILTMORE VILLAGE — Asheville. Adjacent to the Biltmore Estate entrance, the Village consists of restored English-style houses that now contain intriguing shops and galleries. George W. Vanderbilt intended this turn-of-the-century construction as a model village.

BLACK MOUNTAIN — Located a mile from the Eastern Continental Divide and a short drive from Asheville, Black Mountain is widely known for its antique shops and large denominational conference centers which attract more the 150,000 guest a year. Four major conference centers are within two miles of the town. Quaint antique and craftstores, unique restaurants, and historic Cherry Street make Black Mountain an inviting tourist destination. For more information, contact the Visitor Information Center in Black Mountain. (704) 669-2300.

BOTANICAL GARDENS — Asheville. This ten acre native wildflower area is located on the campus of University of North Carolina - Asheville. Open daylight hours. Free (704) 252-5190.

CHEROKEE INDIAN RESERVATION — Located at the eastern edge of the Great Smoky Mountains National Park is the home of 8,000 Eastern Cherokees. This is the largest organized Indian reservation east of the Mississippi and spans over 56,000 acres. Cherokee history on this continent goes back more than 10,000 years, and the excellent Cherokee Indian Museum pieces this colorful tradition together. The Oconaluftee Indian Village recreates a living Indian community hundreds of years old, with Guides to explain crafts and arts. Admission charged. Open mid-May - late October, 9-5:30. The Qualla Arts and Crafts Mutual, Inc., located on Hwy. 441 North, is the most successful Indian-owned and operated craft cooperative in America, featuring arts and crafts of the Eastern Band of Cherokee Indians. Open year round, seven days a week. Mid-June through Labor Day, 8-8. Winter months, 8-5. (704) 497-3103; Cherokee Tribal Travel & Promotions office, (704)497-9195; Cherokee Indian Museum, (704) 497-3481; Oconaluftee Indian Village, (704) 497-2315.

COLBURN MINERAL MUSEUM — Asheville. On the lower level in the Civic Center Educational display of gems and minerals of Southern Appalachia.Open Tues. - Fri., 10-5; weekends, 1-5; closed Mon. Nominal fee. (704) 254-7162.

CONNEMARA — Home of Carl Sandburg. Three miles south of Hendersonville at Flat Rock. A 267-acre farm where this famous poet and biographer spent his later life with his wife, who raised prize-winning goats. Scheduled guided tours of house. Ages 17-61 nominal charge. Daily except Christmas. (704) 693-4178.

FARMER'S MARKET — Operated by NC Dept. of Agriculture. A modern, year-round facility with retail and wholesale produce, crafts and garden plants. Easy access from I-40 and I-26. Hours vary, closes at dusk. Free. (704) 253-1691.

FLAT ROCK PLAYHOUSE — Located 3 mile south of Hendersonville on US 25. The Vagabond Players present evening performances Wednesday through Saturday at 8:15, matinees Thursday, Saturday and Sunday at 2:15 throughout the summer. The State Theatre of North Carolina. Open mid-June to early September. (704) 693-0731.

GRANDFATHER MOUNTAIN — US 221 and the Blue Ridge Parkway near Linville, North Carolina. Dated as one of the oldest mountains on earth, it is named for its bearded faced looking toward the sky. Features a mile-high swinging bridge and environmental habitats for large game animals. Visitor Center and trails. Admission charged. Open daily from April 1 though mid-November. Open daily weather permitting during winter months. (704) 733-4337.

GREAT SMOKY MOUNTAINS NATIONAL PARK — Extends about 70 miles along the North Carolina-Tennessee border and contains over half a million acres of unspoiled forest. This is the most popular Park in the country and has a resident population of 400 to 600 black bears. Open year-round (615) 436-5615.

THE HEALTH ADVENTURE — Asheville. 501 Biltmore Ave. A health education facility with displays for hands-on learning for all ages. Open year-round. In June, July and August, guided tours Mon-Fri., 10:30 a.m.; remainder of year, Wed., 3 p.m.; all other times, call for reservations. Nominal admission. Open 8:30-5, Mon.-Fri. (704) 254-6373.

LINVILLE CAVERNS — Four miles south of Blue Ridge Parkway on US 221. this brightly lit cavern offers many interesting formations and extends deep into the mountainside. Guided tours. Open daily, March-November and weekends only December-February. Admission charged. (704) 756-4171.

LINVILLE GORGE/FALLS — At Blue Ridge Parkway Milepost 316. A vast and very rugged terrain. Good hiking trails lead to excellent views of falls and gorge. Open Year round, weather permitting. (704) 765-9266.

LINVILLE VIADUCT — Near Grandfather Mountain at Blue Ridge Parkway Milepost 304. Opened in 1987, this engineering marvel represents the final link in the construction of the Blue Ridge Parkway. Open year-round, weather permitting. (704) 295-7591.

NEW ASHEVILLE SPEEDWAY — 219 Amboy Road. NASCAR sanctioned stock car racing. Friday nights mid-April to mid-September. (704) 254-4627.

PISGAH NATIONAL FOREST — Covers almost 497,000 acres of forest and land and spread over 12 western North Carolina counties. Part of this forest, originally a part of Biltmore Estate, was purchased from George W. Vanderbilt's estate in 1914. Waterfalls, rock slides, swimming holes, fishing, camping and picnics areas are all found here. Entrance near Brevard where NC 280 intersects NC 276. Open year-round. (704) 257-4200.

RIVERSIDE CEMETARY —Asheville. On Birch Street. Burial place of Thomas Wolfe and O. Henry.

SMITH-MCDOWELL HOUSE — Asheville. 283 Victoria Road, off Biltmore Avenue. Built ca. 1840 and restored as Asheville's oldest house and Museum, may also be used as a rental facility. Open year-round, From May 1 to October 31: Tuesday-Saturday, 10-4; Sunday, 1-4. From November 1 to April 31: Tuesday-Friday, 10-2. Office hours: Monday-Friday, 9-5, year round. (704) 253-9231. Small fee.

THOMAS WOLFE MEMORIAL — Asheville. Enter from Woodfin Street beside The Radisson Hotel. Famous novelist's boyhood home. This is the Dixieland boardinghouse depicted in the novel *Look Homeward, Angel.* Tours given. Open year-round, 9-5, Mon.-Sat.; 1-5 Sun. Winter hours: 10-4, Tues.-Sat.; 1-4 Sun.; closed Mon. (704) 253-8304. Nominal fee.

UNTO THESE HILLS — At Cherokee, North Carolina. An outdoor drama depicting the great story of the Cherokee Indians. Mid-June through late August, 8:45 p.m. Admission charged. (704) 497-2111.

VANCE HOMESTEAD — State Historic Site. Located on Reems Creek Road of Hwy. 25 North, near Weaverville, Restored late 18th century farmstead of North Carolina senator and Civil War governor, Zebulon B. Vance, born 1830. From November to March: open Tues.-Sat.,10-4; Sun., 1-4; closed Mon. From April to October: open Mon.-Sat., 9-5; Sun., 1-5. (704) 645-6706.

TWENTY-FOURTH ANNUAL JOINT MEETING
SOUTH CAROLINA DEFENSE TRIAL ATTORNEYS' ASSOCIATION
CLAIMS MANAGEMENT ASSOCIATION OF SOUTH CAROLINA
JULY 18-20, 1991
GROVE PARK INN, ASHEVILLE, NORTH CAROLINA

PROGRAM

Thursday, July 18:	
3:00 to 5:00 p.m.	Executive Committee Meeting
4:00 to 6:30 p.m.	Registration
	DINNER ON YOUR OWN
8:30 p.m. to midnight	Open bar and Dancing to the music of the "Willis Blume Blues Band" at the Grove Park Inn
Friday, July 19:	
8:00 a.m. to 12 noon	Late Registration
8:15 to 8:45 a.m.	Coffee Service
8:40 to 8:45 a.m.	Welcome
8:45 to 10:45 a.m.	Summary Jury Trail Jury Drawn from Volunteer Spouses and Guests Issue: Comparative Negligence
8:45 to 10:45 a.m.	Workers' Compensation Breakout Employment Law
9:00 a.m. to 12 noon	Spouses Program: Tour of Ashville including the Thomas Wolfe Home and the Smith McDowell Museum
10:45 to 11:00 a.m.	Break
11:00 a.m. to 12 noon	Panel Discussion Ethical Issues in Litigated Claims
12:15 to 1:15 p.m.	Refreshment Break
12:30 to 6:00 p.m.	White Water Rafting Trip (Chairman: Charles Ridley) (Includes box lunch)
12:30 p.m.	Golf Tournament (Lunch on Your own) (Chairmen: Sam Outten and Luke Hughes)
2:15 p.m.	Tennis Tournament (Chairmen: John Britton and Steve Darling)
6:00 to 6:30 p.m.	Buses leave for a "mountain-style party" at the Taylor Ranch - country buffet, open bar, country variety band with a professional clogging team - Before dark, there is available, horseback riding (additional cost required), hiking or a tour of the Ranch. (Call Carol Davis at SCDTAA to determine whether you need your own equipment) - Wear your favorite country clothes, country boots, hats, jeans...
10:30 p.m.	Last bus returns to the Grove Park
Saturday, July 20:	
8:15 to 9:00 a.m.	Coffee Service
8:30 to 9:00 a.m.	Business Meetings for Both Associations
9:00 to 10:45 a.m.	Jury Verdict and Discussion Issue: Comparative Negligence
10:45 to 11:00 a.m.	Break
11:00 to 11:15 a.m.	Claims Manager of the Year Award
11:15 a.m. to 12:15 p.m.	Courtroom Demonstrative Evidence Forensic Technologies International
12:15 to 1:15 p.m.	Farewell Party

NOTICE TO SPOUSES AND GUESTS

Our educational program this year will include a summary jury trial. Some of you may recall that we tried this several years ago with a great deal of success. As before, we will select jurors from a list of volunteer spouses and guests. If you are chosen as a juror, you will hear the arguments of counsel, be instructed on the applicable law by the presiding judge, and be asked to render a verdict. After the verdict, we would like for you to participate in a panel discussion to more fully explore some of the issues in the case.

If your are interested in "putting your name in the hat" as a potential juror, please sign up at the SCDTAA registration desk at the Grove Park Inn. This should prove to be a very interesting and educational experience.

Admiralty Law On Inland Lakes

By Edwin P. Martin & Linda Weeks Rogers
Turner, Padget, Graham & Laney, P.A., Columbia, SC

Our firm was recently retained to represent a defendant in a case arising out of a collision on Lake Murray. The defendant was on his way to a favorite fishing hole when his boat collided with a pontoon boat. Two passengers on the pontoon were thrown overboard and drowned. The evidence suggested that the defendant was at fault.

The accident occurred on May 15, 1988, and complaints for wrongful death and survival were filed on June 1, 1991. For the most part, the boating activities on Lake Murray are recreational in nature. There is very little commercial boating on the lake. Further, Lake Murray exists entirely within the boundaries of South Carolina, with no streams or rivers flowing from the lake into Georgia or North Carolina. Nonetheless, our research led us to the conclusion that admiralty law applicable to this action.

There are over 20 lakes in South Carolina, and, undoubtedly, numerous serious accidents arise on the lakes each year. Under certain circumstances, admiralty law may be applicable to such accidents. The purpose of this article is to address when and where admialty law is applicable and the advantages to be gained by asserting admiralty jurisdiction.

Admiralty jurisdiction extends only to actions arising on bodies of water which are navigable in interstate or foreign commerce. *See, Hartman v. U.S.*, 522 F. Supp. 114 (D.C.S.C.,198). Thus an initial determination of navigability must be made. 33 C.F.R. §329.4 (1990) sets out a general definition of navigable waters as " [t]hose waters that are subject to the ebb and flow of the tide and/or are presently used, or have been used in the past, or may be susceptible for use to transfer interstate of foreign commerce." The Corps. of Engineers, in making determinations as to navigability, takes a number of factors into consideration which are enumerated in 33 C.F.R. §329.14 (1990).

"Although conclusive determinations of navigability can be made only by the federal courts, those made by federal agencies [such as the Corps. of Engineers] are nevertheless accorded substantial weight by the courts." 33 C.F.R. §329.14 (1990). A body of water existing entirely within the boundaries of state may be considered navigable. "[I]t is [not] necessary that there be a physically navigable connection across the state boundary". 33 C.F.R. §329.7 (1990). Lake Murray, which exists entirely within the boundaries of South Carolina, has been recognized as a navigable body of water by the U.S. District Court for the 4th Circuit. *See, Onley v. SCE&G,* 488 F.2d 758 (4th Cir. 1973); *Oliver by Oliver v. Hardesty*, 745 F. 2d 317 (4th Cir. 1984); *Thompson v. SCE&G*, 122 F. Supp. 313 (D.C.S.C. 1954). Lake Wiley has also been judicially recognized as navigable. *See, Hartman v. U.S.*, 522 F. Supp. 114 (D.C.S.C. 1987). Finally, the Army Corps. of Engineers has determined that Lakes Marion, Moultrie, Wateree, Murray, Wiley and Fishing Creek Reservoir are "navigable waters of the U.S.". *See,* U.S. Army Corps. of Engineers Navigability Study of Lakes, 1977.

To fall within the admiralty jurisdiction of the federal courts, an action must also bear a significant relationship to traditional maritime activity. *See, Foremost Ins. Co. v. Richardson*, 457 U.S. 668 (1982). In *Foremost*, the court addressed the issue of whether a collision between two pleasure boats on navigable waters falls within admiralty jurisdiction. The court held that:

> In light of the need for uniform rules governing navigation, the potential impact on maritime commerce when two vessels collide on navigable waters, and the uncertainty and confusion that would necessarily accompany a jurisdictional test tied to the commercial use of a given boat, *we hold that a complaint alleging a collision between two vessels on navigable waters properly states a claim within the admiralty jurisdiction of the federal courts.*

457 U.S. at 678 (emphasis added).

Thus, a collision between two pleasure boats on any of the lakes mentioned above would state a claim falling within the admiralty jurisdiction of our federal courts. Other injuries occurring on those lakes may also fall within admiralty jurisdiction. For example, the court in *Oliver, by Oliver v. Hardesty*, 745 F. 2d 317 (4th Cir. 1984) found that a claim of negligence arising from a collision between a pleasure boat and a swimmer on Lake Murray fell within the admiralty jurisdiction of the federal court.

Although falling under admiralty jurisdiction, such actions may be brought in state court. 28 U.S.C. §1333 provides that "the District Court shall have original jurisdiction, exclusive of the courts of the states, of: (1) any civil case of admiralty or maritime jurisdiction, savings to suitors in all cases all other remedies to which they are otherwise entitled." Generally, the "savings to suitors" clause of §1333 gives state courts concurrent jurisdiction to hear *in personam* maritime causes of action. "In such cases, the extent to which state law may be used to remedy maritime injuries is constrained by a ... 'reverse-Erie' doctrine which requires that the substantive remedies afforded by the states conform to governing maritime standards." *Offshore Logistics, Inc. v. Tallentire,* 106 S. Ct. 2485, 2494 (1986). The savings to suitors clause only gives the plaintiff "[t]he privilege to prosecute a maritime cause in the common law courts... not the right of election to determine that the defendant's liability is to be measured by the common law. 2 Am. Jur. 2d *Admiralty* §113 (1962).

Therefore, for all actions sailing within admiralty jurisdiction, whether brought in federal or state court, if maritime law provides a remedy, substantive admiralty or maritime principles must be applied if state law does not conform with those principles. The application of such laws can have a significant impact. For example, the applicable statute of limitations for personal injury or death "arising out of a maritime tort" is 3 years. *See,* 46 U.S.C. §763(a).[1] So, for any action arising before April 5,

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Allocating Responsibility Among Tortfeasors After The Adoption Of Comparative Negligence

By William B. Traxler, Jr., and Allen D. Smith*

The adoption of the rule of comparative negligence in South Carolina will have a profound impact upon negligence cases in this state. One impact is the creation of uncertainty, and one area of uncertainty involves cases where there is more than one tortfeasor.

When the Supreme Court of South Carolina adopted comparative negligence in *Nelson v. Concrete Supply Co.*,[1] it also adopted the unit rule or the combined comparison rule. Under this rule the plaintiff's negligence is to be compared to the combined negligence of all defendants.

For example, if a plaintiff's negligence in causing an accident is 40%, and there are three defendants, each 20% negligent, the plaintiff may recover. Even though the plaintiff's negligence exceeds the negligence of each defendant and would bar his recovery in an action brought against any one defendant, his negligence does not exceed the combined negligence of all defendants. Therefore, the plaintiff's negligence would not bar his recovery in a action against all three defendants.

Assuming that more than one tortfeasor caused an injury to plaintiff, how is the responsibility for that accident to be allocated among the tortfeasors? The supreme court in *Nelson* did not discuss this question, and the answer is far from being clear.

There are at least three potential areas of concern that may arise when multiple tortfeasors are involved in an action. These areas of concern arise because of a conflict between the purposes of comparative negligence and existing rules of negligence law. The first area of concern involves tortfeasors who are immune from suit or otherwise absent from the lawsuit. The second involves application of the rule of joint and several liability, and the third involves questions of contribution among tortfeasors.

1. Absent Tortfeasors

When considering how to allocate the responsibility for an accident among tortfeasors, one potential problem under the rule of comparative negligence will arise when all tortfeasors are not parties to the action. Tortfeasors who settle with the plaintiff, who are immune from suit, or who are otherwise absent from the action will create problems in the application of the rule of comparative negligence. If a tortfeasor is immune from suit, e.g., an employer in a worker's compensation situation or a governmental entity, or is absent from the action, should the jury consider that tortfeasor's degree of negligence when apportioning the parties' fault? If so, how will the percentage of negligence of a tortfeasor not a party to the action be determined?

The answer to this question could determine whether a plaintiff may recover and how the responsibility for the accident will be allocated among the tortfeasors. For example, suppose that a plaintiff is 20% negligent, one tortfeasor is 70% negligent, and another is 10% negligent in causing the accident. Also assume that the tortfeasor who is 70% negligent is immune from suit or is not a party to the action.

May the plaintiff who is 20% negligent recover from the defendant who is 10% negligent? If the absent tortfeasor's negligence is combined with the defendant's negligence under the combined comparison approach, the answer is yes. However, if the jury does not enter the absent tortfeasor's negligence into its calculations, the plaintiff cannot recover because his negligence (20%) exceeds the defendant's (10%). If the absent defendant's negligence is included, and the plaintiff is allowed to recover, the least negligent defendant may bear the loss.

Other jurisdictions considering this issue have disagreed. Some courts have held that the negligence of every person, whether a party or not, must be considered in apportioning fault.[2] Other courts have found that the jury should consider only the negligence of parties to the action.[3] Many of these courts relied upon the language of the state's comparative negligence statute in reaching their decisions.

Because the supreme court in *Nelson* did not resolve this issue, South Carolina lawyers will have little guidance in these cases. Because of this uncertainty, defense lawyers will face difficulty in evaluating their cases and advising their clients when all tortfeasors cannot be made parties to the lawsuit.

Joint and Several Liability

Another question left unresolved by *Nelson* that will affect the allocation of responsibiltity among tortfeasors involves the rule of joint and several liability. Does joint and several liability continue to exist after the adoption of comparative negligence, or should each defendant be liable for damages only in proportion to his amount of negligence?

If a plaintiff is 45% negligent, one tortfeasor is 50% negligent, and one defendant is 5% negligent in causing an accident, the plaintiff may recover 55% of his damages, representing the amount of damages not attributable to his own fault. If joint and several liability continues to exist in its present form, and if the defendant who is 50% negligent is judgement-proof, the defendant who is 5% at fault must bear the loss. Thus, a defendant who is 5% negligent may be liable to a plaintiff who is 45% negligent for 55% of the plaintiff's damages.

Most of the courts considering this issue have retained the rule of joint and several liability.[4] However, not all courts have kept this doctrine.[5] Some of the courts retaining joint and several liability hold that the remedy of a defendant who is required to pay damages in an amount exceeding his percentage of fault is to seek contribution from the other tortfeasors. However, as will be discussed below with respect to contribution, this remedy may not be available in this state without legislative action.

The application of the rule of joint and several liability to hold a slightly negligent defendant liable for most of the plaintiff's damages appears to be inconsistent with the purposes of comparative negligence. The principles of comparative negligence were created to apportion liability according to fault and to alleviate the harsh consequences of the contributory negligence rule, which barred a slightly negligent plaintiff from recovering.

However, holding a slightly negligent defendant responsible under the rule of joint and several liability may be equally harsh. Rather than allocating responsibility according to fault, this principle results in going from one extreme, i.e., the contributory negligence rule, to another extreme. In order to further the purposes of comparative negligence, the responsibility for an accident should be allocated among the tortfeasors according to their degrees of fault. One of three possible approaches should be considered. One solution would be to abolish the rule of joint and several liability and limit the amount of damages a defendant must pay to his proportionate share of fault. Under this approach a defendant who was 20% negligent would only pay 20% of the plaintiff's recovery, and the plaintiff would bear the risk of encountering a judgement-proof defendant.

A second approach would be to retain joint and several liability but apply principles of comparative negligence in allocating responsibility among the defendants. Under this approach each negligent defendant would be jointly and severally

(Continued on page 8)

ALLOCATING RESPONSIBILITY
(Continued from page 7)
liable to the plaintiff for the entire judgment but could obtain comparative contributions from other tortfeasors for any amount paid above his proportionate share of fault. Thus, a defendant who was 30% negligent might have to pay the entire judgment, but he would be entitled to contribution from other tortfeasors according to their relative degrees of fault. Under this approach the defendant would bear the risk of involvement with a judgment-proof tortfeasor.

However, this second apporoach is unavailable to our courts without legislative action. The South Carolina Contribution Among Tortfeasors Act[6] expressly prohibits comparative contribution. This Act provides that, when determining the pro rata shares of the tortfeasors in the entire liability, their relative degrees of fault are not to be considered[7].

A third approach, a compromise between the first two approaches, would be to place the risk of encountering a judgment-proof tortfeasor on the most negligent party. For example, if a plaintiff was 20% negligent, a judgment-proof defendant was 70% negligent, and another defendant was 10% negligent, the plaintiff would be more negligent than the solvent defendant. In this case the defendant would not be required to pay more than 10% of the plaintiff's recovery. However, if the plaintiff was 20% negligent, the judgment-proof defendant was 50% negligent, and another was 30% negligent, the solvent defendant's negligence would exceed the plaintiff's. Under this approach this defendant would be jointly and severally liable for the entire judgment because he was more negligent than the plaintiff.

3. Contribution Among Tortfeasors

The third area of concern after the adoption of comparative negligence involves contribution among tortfeasors. As alluded to above, the rule of joint and several liability and the South Carolina Contribution Among Tortfeasors Act may operate in a manner contrary to the purposes of comparative negligence. The first situation, discussed above, arises when a slightly negligent defendant is held liable under the rule of joint and several liability. The second situation can arise when one defendant settles with the plaintiff while a second defendant proceeds to trial.

The first area of conflict between the principles of comparative negligence and the South Carolina Contribution Among Tortfeasors Act arises when a slightly negligent defendant is held liable for the entire judgment under the doctrine of joint and severally liability. Under the South Carolina Contribution Among Tortfeasors Act people who become jointly or severally liable have a right of contribution among themselves. However, in determining the pro rata shares of the tortfeasors in the entire liability, the court cannot consider their relative degrees of fault. Although relative degrees of fault are considered when determining the defendants' liability to the plaintiff, those same degrees of fault may not be considered when allocating responsibility among the defendants.

One purpose of the rule of comparative negligence is to apportion liability according to fault. The statute's prohibition against considering fault when determining a joint tortfeasor's right of contribution conflicts with this purpose. A similar situation existed in Florida in 1975. In 1975 Florida enacted a version of the uniform Contribution Among Tortfeasors Act similar to our statute. The Florida statute retained joint and several liability and provided for contribution on a pro rata basis. Under the Florida statute the relative degrees of fault of the joint tortfeasors was not a factor to be considered in determining the pro rata shares of the tortfeasors.

However, the Florida statute was amended in 1976 to provide that the tortfeasors' relative degrees of fault would be the basis for determining their pro rata shares in the entire liability. "The prohibition against consideration of the relative degrees of fault of joint tortfeasors did not long remain the law, however, for in 1976 the contribution statute was amended to specifically provide that in determining pro rata shares for purposes of contribution, 'the relative degrees of fault' of joint tortfeasors would be the basis for allocation of liability."[8]

By amending its contribution statute the Florida legislature brought that state's law of contribution into line with its rule of comparative negligence. Unless our legislature does likewise, or unless our appellate courts abolish joint and several liability, the law of contribution in this state will conflict with the prupose of comparative negligence.

Another situation where the South Carolina Contribution Among Tortfeasors Act may operate contrary to the purposes of comparative negligence may arise when less than all of the defendants settle with the plaintiff. For instance, suppose that a plaintiff is 20% negligent, one defendant is 10% negligent, and one defendant is 70% negligent in causing an accident. Also assume that the defendant who is 70% negligent settles with the plaintiff in good faith for $200,000. If the settling defendant's fault is allowed by the courts to be combined with the remaining defendant's, the plaintiff may continue to proceed against the defendant who is 10% negligent. If the jury returns a verdict of $1 million actual damages against the remaining defendant, the plaintiff may obtain a judgment for $600,000 ($1 million - $200,000 representing the plaintiff's negligence of 20% = $800,000 - $200,000 representing the settlement proceeds received from the other defendant = $600,000).

Under the theory of joint and several liability the remaining defendant may be liable for the entire judgment. In some jurisdictions the non-settling defendant's remedy would be to seek contribution from the settling defendant for the amount paid in excess of his proportionate share of fault.[9] However, this remedy would not be available to a non-settling defendant in South Carolina. First, S.C. Code Ann. Section 15-38-30 (Cum. Supp. 1990) prohibits the consideration of fault when determining the amount of contribution.

More importantly, though, the South Carolina Contribution Among Tortfeasors Act would prohibit the non-settling defendant from obtaining any contribution from the settling defendant. Under S.C. Code Ann. Section 15-38-50 (2) (Cum. Supp. 1990), when a release or covenant not to sue is given in good faith to a person who would be liable in tort, it discharges the person to whom it is given from all liability for contribution to any other tortfeasor. Therefore, the settling defendant is not obligated to make any contribution to the non-settling defendant.

In the example above, the plantiff who is 20% negligent might recover $200,000 from a defendant who is 70% negligent and $600,000 from a defendant who is 10% negligent. The greatest portion of the plaintiff's recovery will be from a defendant less negligent than the plaintiff. This possible scenario will obviously encourage settlement by a co-defendant who is largely responsible for an injury to the plaintiff. By the same token, this scenario will put a lesser-fault co-defendant at great risk in proceeding forward to trial alone. When such cases arise, the ramifications of this possible situation need to be examined thoroughly by all parties in determining how their decision concerning settlment and/or trial may affect the liability of each defendant.

Conclusion

Although the court in *Nelson* adopted the rule of comparative negligence for a plaintiff's cause of action, the questions concerning the allocation of liability among tortfeasors has not been addressed. A plaintiff whose cause of action accrues on or after July 1, 1991, will be relieved of the harsh consequences of the rule of contributory negligence. The more equitable rule of comparative negligence will allow a negligent plaintiff to recover the amount of his damages not attributable to his own fault. However, the issues presented above should be addressed by either the legislature of the courts so that guidance can be given as to the policy of this state with regard to the effects of comparative negligence in situations involving multiple defendants.

* *Judge Traxler is a Resident Judge of the Thirteenth Judicial Circuit and Mr. Smith is his law clerk.*

Notes

1. ___S.C.___, 399 S.E. 2d 783 (1991).

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2. *See, e.g., Bode v. Clark Equipment Co.*719 P. 2d 824 (Okla. 1986); *Connar v. West Shore Equipment of Milwaukee*, 68 Wis. 2d 42, 227 N.W.2d 660 (1975).
3. *See, e.g., North v. Bunday*, 226 Mont. 247, 735 p.2d 270 (1987); *Mills v. Brown*, 303 Ore. 223, 735 P.2d 603 (1987); *Blocker v. Wynn*, 425 So. 2d 166 (Fla. App. 1 Dist. 1983).
4. *See Mountain Mobile Mix, Inc. v. Gifford*, 660 p.2d 883 (Colo. 1983); *Wisconsin Natural Gas Co. v. Ford, Bacon & Davis Construction Corp.*, 96 Wis. 2d 314, 291 N.W.2d 825 (1980); *Bradley v. Appalachian Power Co.*, 163 W.Va. 332, 256 S.E.2d 879 (1979).
5. *See Kennedy v. City of Sawyer*, 228 Kan. 439, 618 P.2d 788 (1980).
6. S.C. Code Ann. § 15-38-10 through 15-38-70 (Cum. Supp. 1990).
7. S.C. Code Ann. § 15-38-30 (Cum. Supp. 1990).
8. *Blocker v. Wynn*, 425 So. 2d 166, 168 (Fla. App. 1 Dist. 1983).
9. *Reager v. Anderson*, ___W. Va. ___, 371 S.E.2d 619 (1988).

ADMIRALTY LAW

(Continued from page 6)

1988, the application of admiralty law could present a significant advantage in defending such action.

The assertion of admiralty jurisdiction may also provide some significant advantages in terms of damage control. First, it was recently determined that there could be no recovery for loss of society in a general maritime action for wrongful death. *See, Miles v. Apex Marine Corps.*, S. Ct. Op. No. 89-1158 (1990).[2] The *Miles* court also held that there could be no recovery for lost future earnings in a general maritime survival action. Futher, there can be no recovery for mental anguish or grief under a general maritime wrongful death remedy. *See, Sea-Land Services, Inc., v. Gaudet*, 414 U.S. 573 (1974). Finally, U.S. Coast Guard Regulations apply to actions arising on navigable waters. Depending on the circumstances of the case, this too could prove advantageous.

There may also be some disadvantages to an assertion of admiralty jurisdiction for injuries arising on our lakes. Contributory negligence does not apply under maritime law, nor does assumption of the risk. However, in defending a personal injury claim occurring on any of our lakes, it could certainly pay to give a hard look at the applicability of admiralty and the effect it may have on your case.

ENDNOTES

1. In *Butler v. American Troller Co., Inc.*, 887 F.2d 20 (1st Cir. 1989), the court, relying on the legislative history of 46 U.S.C. §763(a), held that "[t]he statute of limitations for maritime torts... is substantive in nature." 887 F.2d at 35.
2. The U.S. Supreme Court first recognized the existence of a general maritime remedy for wrongful death in *Moragne v. States Marine Lines, Inc.*, 398 U.S. 397 (1970). Prior to *Moragne*, the remedies provided under state wrongful death statutes were applied in cases brought pursuant to the "savings to suitors" clause.

Indemnity v. Contribution Between Joint Tortfeasers

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Nothing has created more confusion in recent years than the distinction between the rights of indemnity and the argument that it is a disguise for contribution between joint tortfeasers. Some very recent cases have dealt with this situation and in some instances shed some light, and in others, created more confusion. This note will deal with the rights of indemnification between two or more defendants in a products liability setting.

Typically, the Plaintiff sues the manufacturer of a machine and the machine manufacturer brings in a third party defendant who manufactured a component part that was the actual alleged defect in the machine. The third party defendant then moves for summary judgment on the grounds that it is not indemnification (assuming no written contract of indemnification exists) but rather is an attempt to get contribution from a joint tortfeaser.

The traditional rationale for holding a non-negligent retailer and/or distributor strictly liable for the sale of a defective product is to give the plaintiff a local defendant from whom to recover. Each seller held strictly liable would then have a right of indemnity against its "upstream" seller until ultimate liability falls on the manufacturer of the defective product. See generally *Jones v. Aero-Chem Corporation*, 680 F. Supp. 338 (D.Mont. 1987); 4 American Law of Products Liability 3d, Section 52:33 (Law Co-op. 1987). The same right of indemnity generally exists in favor of the assembling or finished product manufacturer against the manufacturer of the defective component. 4 American Law of Products Liability 3d, Section 52:55 (Law Co-op. 1987).

The above seems clear until we are confronted with the case of *Scott v. Fruehauf Corporation*, 396. S.E.2d, 354 (S.C. 1990). In that case, Scott, the injured plaintiff, sued Fruehauf, the seller of a used trailer on which was mounted a defective wheel assembly. The wheel assembly had been manufactured by a party who had previously settled with the plaintiff. Fruehauf sold the trailer to Piedmont and Southern leasing who leased (held equivalent to a sale) the trailer to plaintiff's employer. Neither defendant in the Scott case was the manufacturer of the defective product. The basis for denying indemnity to Piedmont in the Scott case was that Piedmont and Fruehauf shared a common liability to the plaintiff in that they each sold a defective product. 396 S.E.2d at 358.

Another possible distinction is the fact that the party against whom indemnity was sought, bought and resold a used trailer. In the normal situation, the manufacturer is not seeking indemnity from another party which, like it, merely sold a defective product. The manufacturer is seeking indemnity against the actual manufacturer of the defective component.

In other jurisdictions, the Courts have held that the manufacturer of a finished product who is held strictly liable for the sale of a product which caused injury because of a defective component, can seek indemnity against the manufacturer of the component provided the manufacturer of the finished product was not himself negligent in either creating or failing to discover the defect. For example, see *Kanawha Steel & Equipment Co. v. Dorsey Trailers*, 856 F.2d 780 (6th cir. 1988 applying Kentucky law), *Eastern Refectories Company, Inc. v. Forty Eight Insulations, Inc.* 658 F.Supp 197 (S.D.N.Y. 1987 applying Florida law), *Jones v. Aero-Chem Corporation*, 680 F.Supp. 338 (D.Mont. 1987); *La Fountain v. Sears, Roebuck and Co.*, 680 F.Supp. 251 (E.D. Mich. 1988); *Burke v. Safeway Stores, Inc.*, 554 So.2d 184 (La.App. 1989). The rationale of these cases is that a party who is not actually at fault, but is only technically or constructively responsible under the doctrine of strict liability, may seek indemnity from the party guilty of actual fault or who created the unreasonably dangerous condition.

Simply stated it would seem that the manufacturer who is exposed to liability by the wrongful act of another in which it did not join ought to be allowed indemnification. See *Stuck v. Pioneer Logging Machinery, Inc.* 301 S.E.2d 552 (S.C. 1983)

The Scott decision has been distinguished recently by Judge Luke Brown in an Order dated November 20, 1990 which upheld his direction of a verdict for indemnification in favor of the local sellers of a defective tire against the manufacturers of the tire. The Order is entitled *Raino v. Goodyear Tire and Rubber Company, et al.* This case is now on appeal to the South Carolina Supreme Court. Anyone wishing a copy of this Order can contact me and I will be happy to forward a copy to you.

There are many other ramifications of the indemnity argument and especially fertile grounds for argument is the applicability for indemnification agreements and their enforceability. Those issues are outside the permian of this short article but may be the subject of additional articles in future publications.

Defending a Workers' Compensation Claim Demystifying the Practice

By Kelly J. Golden, Esquire
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The recently adopted South Carolina Workers' Compensation Commission's Regulations take the mystery out of workers' compensation practice. The Regulations consolidate into one cohesive text an assortment of statutory provisions and the formerly unwritten rules of practice.

This article highlights some of the Workers' Compensation Regulations which took effect September 2, 1990. The text of the Regulations appear in Chapter 67 of the South Carolina Code of Regulations. The Commission has also adopted a revised set of forms. A sample set of forms is available by writing the Commission's mail room and including a legal size envelope with one dollar postage. Forms may be reproduced as long as the appearance, size, and color are the same. Those wishing to reproduce forms by word processing may request approval of a sample form by sending a copy of the form to the Commission's Executive Director's office.

The Regulations are divided into seventeen articles, each article containing one or more regulations concerning a specific subject. The basic rules of practice are contained in Articles 2, 5, 6, and 7. Regulations governing attorneys and fees appear in Article 12.

Representing the Client

A letter of representation is required by R.67-1202. The Commission enters the attorney's name and address into its main computer system. Thereafter, the attorney rather than the party is served with hearing notices, orders and other documents rather than the party R.67-208. A motion and order to be relieved as counsel and order are required to withdraw from a case R. 67-1203.

The insurance carrier is required to retain counsel and counsel is required to file a letter of representation within sixty days of service of the employee's request for hearing, Form 50 or 52 - Death Case, or within thirty days of service of an employer's request for hearing, Form 21. R. 67-207; R. 67-208; R. 67-603. The date of service of a Form 50 or 52 is the date stated on the transmittal letter, R. 67-211. Serve a copy of the answer on the claimant or attorney. R. 67-603: R. 67-212.

Filing Dates

The date of filing a form or document with the Commission is the date of receipt in the Commission's office unless the document is posted by certified or registered mail. R. 67-205. A document delivered to the Commission by registered or certified mail is deemed filed the date of deposit in the United States Postal Service as indicated by the date of postmark. A special exception is made for the Form 30, Application for Review, which is deemed filed the date of mailing whether by first class, certified or registered mail. The date of receipt rule applies to all documents including pre-hearing briefs, appellant's brief, and other documents. The rule does not provide for private overnight delivery service.

First Report of Injury

Each employer is required to file a First Report of Injury Form 12A with its insurance carrier within ten days of the occurrence and knowledge of an injury requiring medical attention or compensable lost time from work. S.C. Code §42-19-10; R.67-411. Pursuant to R. 67-411, the insurance carrier files the 12A with the Commission unless R. 67-412 applies. Summary reporting of injuries on a Form 12M, Report of Injury, Medical Only, is allowed in R. 67-412 for injuries resulting in less than one thousand dollars in medical treatment and which do not involve a permanent impairment. The carrier is required to retain the 12A for future filing if the criteria in R.67-412 is exceeded. In event the 12A is required, the insurance carrier files it marked "Previously Filed and Medical Only".

A 12A marked "alleged" and completed based on available information is acceptable. If a 12A has not been filed, counsel should request the client comply with S.C. Code §42-19-30 and R.67-411 and file the report as an "alleged" injury. Filing the employer's report of injury is not an admission of liability and will avoid imposition of a fine against the carrier.

After the claim is investigated and is denied, the employer's representative may close its file by filing a Form 19 along with a copy of a letter it has written to the claimant denying the claim. R67-414. The burden is on the employee to timely file a claim.

Temporary Compensation

Article 5 of the Regulations provides instructions for payment and receipt of temporary total and temporary partial compensation. If the employer's representative agrees to pay temporary compensation, a Form 15 or 16 is prepared, signed and filed with the Commission. A Form 15 records payment of temporary total compensation. A form 16 records payment of a second period of temporary total compensation or temporary partial compensation. Once the form is recorded and approved by the Commission, it is enforceable as an order of the Commission. R.67-503.

The parties may agree to amend the temporary compensation rate previously reported by a Form 15 or Form 16 by filing an amended form. R.67-508. If the parties do not agree, the rule provides that the claimant is entitled to litigate the compensation rate.

Regulation R.67-503 is a restatement of S.C. Code §42-17-10 which requires the carrier file a Form 15 or Form 16 for approval by the Commission within fifteen days after the agreement has been reached. Thereafter, each sixty days after payment begins a Form 18 must be filed reporting the status of payments. S.C. Code §42-19-20; R.67-413. Penalties may be imposed for failure to timely file Forms 15, 16 or 18.

The employer is prohibited from reducing, suspending, or terminating temporary compensation until it complies with the provisions of R.67-504 or R.67-507. Voluntary suspension of temporary compensations is governed by R.-67-504. After the claimant returns to work without restriction for fifteen calendar days and signs a Form 17, Receipt of Compensation, temporary compensation can be terminated by filing the executed Form 17 with the Commission. Return to work without restriction is defined in part as "A statement of the authorized health care provider about the capacity of the claimant to meet the demands of a job and the conditions of employment." The question comes down to whether the claimant is able to return to work doing the same type of work at similar wages as before the injury. If the claimant is able to return to work at lesser wage or reduced hours, temporary partial compensation should be paid in lieu of temporary total compensation and reported by filing a Form 16.

If the employer does not agree to pay temporary compensation, the claimant may request a hearing by filing a Form 50. Conversely, if the claimant has reached maxium medical improvement but refuses to sign a Form 17 voluntarily relinquishing his claim to continue temporary compensation, the employer's representative may request a hearing by filing a Form 21. Under R.67-504E, the employer may file a Form 21, with the completed but unsigned form 17, an updated Form 18 and one of the affidavits referred to in R.67-504E. The twenty five percent penalty can be imposed against a carrier who fails to comply with 42-9-260 and R.67-504 and R.67-507 but does not apply upon a showing that the employee has returned to work at his pre-injury wages.

Filing the Employee's Claim

The 1990 edition of Forms 50 and 52, Employee's Notice of Claim and/or Request for Hearing, include two additional lines stating: "I am filing a claim. I am not requesting a hearing at this time.", or "I am requesting a hearing." The Form 50, or Form 52 - Death Case, may be used to file a claim with the Commission R.67-206. When a Form 50 or 52 is received by the Commission, the employer's representative is notified that the

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claim has been filed but an answer, Form 51 or 53, is not required.

Employee's Request for Hearing

When the claim is ripe for adjudication, a hearing is requested by filing a new Form 50 or 52 with the Commission. Lines six, seven and eight of the form specify the type of relief requested and marking the box requesting a hearing refers the file to the Judical Department to set for hearing. R.67-207. A request for hearing may be withdrawn once as a matter of right; however a second withdrawal may result in dismissal of the underlying claim. R.67-609. Postponement and adjournment of the hearing is discussed in the contested case section of the article.

Service of the Request For Hearing

When a Form 50 or 52 is filed with the Commission without a certificate of service attached to it, the Commission serves the form on the insurer's R.67-401 designee by first class mail. Pursuant to R.67-401, each insurance carrier designates one address as it designated recipient for service.

Rule 67-211 allows the claimant to serve the insurer's R.67-401 designee directly and file a copy of the form with the Commission along with a certificate of service. The methodology has been criticized as confusing when claimant's counsel serves the form without attaching a certificate of service to it. The Commission has emphasized that the Form must have attached, to both the copy being served and the Commission's file copy, a certificate of service. The service rules continue to be studied in an effort to accommodate perceived problems. Ineffective service, service on the wrong carrier, and the like may be raised by filing an amended Form 51 or 53.

Service of Documents other than the Request for Hearing

The parties serve all forms and motions, other than the Forms 50, 52, or 54, and file the forms or motion and proof of service with the Commission. R.67-212. If a party is represented by counsel, service is made by delivering a copy of the document to the attorney by first class mail. If the party is not represented by counsel, the party may be served personally or by certified mail, return receipt requested, delivery restricted to the addressee. Although the rule states that the return receipt should be filed with the Commission's Judicial Department, the Commission has requested attorneys retain the return receipt and file it only when necessary. It is expected that this rule will be amended in 1992 to conform with the Commission's request.

Employer's Answer to the Request For Hearing

The employer's representative, i.e., and adjustor, may prepare and file an Employer's Answer to a Request For Hearing, Forms 51 or 53 - Death Case. R.67-603. The Forms 51 or 53 must be filed with the Commission within thirty days from date of service of the Form 50 or 52 and a copy served on the claimant. Failure to file a Form 51 or 53 within thirty days of service of a Form 50 or 52 is deemed a general denial of liability for benefits, but special and affirmative defenses are forfeited. Counsel for the employer and its insurance carrier must be designated no later than sixty days from the date of service of the Request for Hearing, Form 50 or Form 52.

Employer's Request For Hearing

An employer may request a hearing regarding payment of compensation by filing a Form 21 or to request a hearing for reimbursement from the Second Injury Fund by filing a Form 54. R.67--208.

The 1990 edition of Form 21 is a significant departure from the old stop payment application. The new form in conjunction with R.67-208 allows the employer to request a hearing to reduce an award of compensation pursuant to S.C. Code § 42-17-90, pay compensation if an informal conference does not result in a settlement, or stop payment of periodic payments of compensation. Because the employer is the moving party, this may give the attorney the advantage of timing and forces the claimant to rebut the employer's evidence and go forward with evidence in opposition to the employer's position.

A claimant is not required to answer a Form 21. A Form 55 is used by the Second Injury Fund in reply to Form 54.

The employer's representative, i.e., an adjustor, may prepare, file and serve the Form 21 or 54; however, counsel must be retained immediately. The attorney for the employer is required to file a letter of representation with a copy to the claimant within thirty days of service of the Form 21 or 54. R.67-208.

Stop Payment

When the claimant is receiving temporary total or temporary partial compensation under the terms of an order or Form 15 or Form 16, compensation must continue until the claimant signs a Form 17 or a Commissioner grants permission to stop payment after a Form 21 hearing. The employer's representative requests a hearing to stop payment based on one of the four reasons set out in R.67-507. The Form 21 must have attached to it a Form 18 showing compensation is current and one of the following: (1) a medical certificate is current stating the claimant has reached maximum medical improvement; (2) a medical certificate stating the claimant is able to return to the same or other suitable job, an impairment rating, if any, and an affidavit that the job has been provided to the claimant; (3) a medical certificate stating the claimant is unable to return to the same or other suitable job and an impairment rating; or (4) a medical statement that the claimant refuses medical treatment.

If the claimant has refused to sign a Form 17, the employer may attach the completed but unsigned Form 17 to a Form 21, an updated Form 18 and an affidavit stating: (1) the claimant completed fifteen calendar days of work, or (2) the claimant has returned to work for another employer at the same wage as before the injury. The twenty-five percent penalty does not apply if the employer or carrier has terminated or suspended benefits when the employee has returned to any employment at the same or similar wage. S.C. Code § 42-9-260.

A Form 21 hearing proceeds under the provisions of Article 6 governing contested case hearings before the Commission.

The Contested Case Hearing

Unless the parties stipulate to a compensation rate, evidence establishing the average weekly wage must be presented at the hearing. The employer's representative must file a Form 20, Statement of Days Worked and Earnings of Injured Employee, within sixty days from the date of filing a Form 50 or Form 52 in order to receive a wage calculation from the Commission. Failure to timely file a Form 20 results in the average weekly wage and compensation rate being determined by reference to the wage stated on the Forms 12A, 50, 52, and according to evidence admitted at the hearing.

The claimant may withdraw a Request for Hearing once as a matter of right with leave to renew; however, withdrawing a Request for Hearing a second time may operate as a voluntary dismissal of the claim. R.67-609. There is no parallel rule when the employer is the moving party but R.67-613 provides postponement if it is premature to hear the case.

A commissioner may grant a motion to postpone a hearing but can only reschedule the hearing during the term he or she is in the district in which the claim is assigned R. 67-613. Since Commissioners are currently assigned to districts for sixty days, a postponement during the second month of a Commissioner's assignment will result in the case being returned to the Commission and reset for hearing before the next Comrnissioner assigned to the district.

Limited discovery is provided by requiring pre-hearing briefs. Attorneys must file and serve the opposing party a Form 58, Prehearing Brief, at least ten days before the hearing. R. 67-611. Some Commissioners will not allow a witness to testify if the witness is not declared on the pre-hearing brief. There is nothing in the rules to prohibit filing an amended Pre-hearing brief.

The admission of an expert's written report as evidence is governed by R.67-612. The proponent of an expert's report serves a notice and a copy of the expert's written report on the opposing party at least ten days before the hearing. A copy of the notice stating the expert's name and address and date and number of pages of the report but not the report itself is filed with the Commission at least ten days before the hearing. If timely notice is given to the opposing party and the Commission, the expert's report may be admitted at the hearing without calling the expert to testify. Failure to provide at least ten days notice may be cured by obtaining the opposing party's consent to admit the report and filing the terms of the agreement with the Commissioner or obtaining the attendance of

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the expert at the hearing to testify and be cross-examined, or taking the *de bene esse* deposition of the expert before the hearing and filing the deposition in the record.

Settlements

Settlements using a Form 16 or an Agreement and Final Release (Clincher) are addressed in Article 8. Claimants represented by counsel need not appear before a Commissioner for approval of a settlement. Simply file the original and one copy of the Form 16 or Agreement and Final Release with the Commission's Claims Department. Counsel should sign the Form 16 or Agreement and Final Release to signify that an informal conference is unnecessary. Unrepresented claimants must appear before a Commissioner for approval of a Form 16 or Agreement and Final Release. R.67-801 *et. seq.*

An informal conference is requested by filing a Form 18 with the Commission. R.67-804. The Form 18 must state the proposed settlement agreement contemplates a Form 16 or clincher. Commissioners are assigned all clincher conferences while a deputy may hear a Form 16 settlement conference. An attorney for the carrier must appear at the informal conference if the settlement is by clincher. The rules make clear that the clinchers are not binding until signed, approved by the Commissioner(s) and recorded by the Commission. A clincher for an unrepresented claimant must be signed by four Commissioners.

When the clincher or Form 16 is approved and payment is made, the file is closed by filing a Form 19. R.67-414. Each person receiving compensation must sign a Form 19. The hourly rate for the defense attorney is also reported on the Form 19 pursuant to R.67-1205.

Attorney Fees

Provisions concerning approval of reasonable fees are contained in Article 12. The Supreme Court's Disciplinary Rule on determining reasonable fees is adopted and, with the exception of seven conditions, contingent fees of up to, but not more than, 33.3% of compensation may be charged. Hourly fees are reported on the Form 19 filed when the case is closed. Contingent fees are reported for approval on a Form 61. R.67-1204.

Appeals

Article 7 provides instructions for filing a Request for Commission Review, Form 30. An appellant's brief is required to be filed within ten days of receipt of Form 31, Notice of Review. If the parties agree to extend the time in which to file the appellant's brief, a letter confirming the agreement must be filed within ten days from the date of receipt of the Form 31.

In addition to instructions for filing the appeal and briefs, generally, the Regulations require counsel to request oral argument by marking the appropriate box on the Form 30. Specific provisions governing the composition of the Commission's review panel, voting procedures, and introduction of additional evidence on a case on review are adopted.

Other articles concerning procedures for claims involving a fatality (Article 9), occupational disease (Article 10), scheduled losses (Article 11), medical reports, physician fees, and hospital charges (Article 13), the Commission's enforcement proceedings (Article 14), self-insurance (Article 15), and average weekly wage, the compensation rate and payment (Article 16) are included in the Regulations.

This article is not a substitute for review of the Regulations. The practitioner should refer to specific provisions for additional requirements and instructions and feel free to call the Commission for additional information.

The South Carolina Frivolous Civil Proceedings Sanctions Act: A Remedy Without Teeth?

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In recent years there has been a general outcry against the excessive use of civil proceedings by aggressive litigants in what some have called the litigation explosion. Apparently in response to this flood of litigation, the South Carolina legislature enacted the "South Carolina Frivolous Civil Proceedings Sanctions Act" as part of the Tort Reforms Act of 1988. A review of the provisions of the act lead one to question whether it even remotely accomplishes the purpose of discouraging frivolous litigation. Prior to the act, there were at least three remedies available to discourage frivolous civil litigation: malicious prosecution; abuse of process; and sanctions under Rule II. The South Carolina Act appears to be a hodge-podge of the various elements and requirements of these three remedies. However, the requirements of the South Carolina Act are, if anything, more stringent than any of the three already available remedies.

The essential elements of the South Carolina Frivolous Civil Proceedings Sanctions Act are contained in Section 15-36-10:

> Any person who takes part in the procurement, initiation, continuation or defense of any civil proceedings is subject to being assessed for payment of all or a portion of the attorney's fees and costs of the other party if: (1) he does so primarily for a purpose other than that of securing the proper discovery, joinder, or adjudication of the claim upon which the proceedings are based; and (2) the proceedings have terminated in favor of the person seeking an assessment of the fees and costs.

In order to recover under a cause of action for malicious prosecution, the plaintiff must show: (1) the institution or continuation of original judical proceedings either civil or criminal; (2) by or at the incidence of the defendant;(3) termination of such proceedings in plaintiff's favor; (4) malice in instituting such proceedings; (5) want of probable cause; and (6) resulting injury or damage. *Garr v. North Myrtle Beach Realty Company, Inc.*, 287 S.C. 525, 339 S.E.2d 887, 889 (S.C. App. 1986) [citing *Ruff v. Eckerds Drugs, Inc.*, 263 S.C. 563, 200 S.E.2d 649 (S.C. 1975)]. The Frivolous Civil Proceedings Sanctions Act is somewhat broader in its scope than the malicious prosecution action, in that, it encompasses the discovery process and joinder of parties. It is much more restrictive in requiring that the primary purpose of the civil process be other than that of securing the proper discovery, joinder of parties or adjudication of the claim. On the other hand, malicious prosecution requires the showing of malice in the institution of the proceedings whereas the Frivolous Civil Proceeding Sanctions Act does not. However, as a practical matter, it would appear that the Frivolous Civil Proceedings Sanctions Act is the more difficult remedy to pursue because of its duel requirement of proving an improper purpose and a favorable termination of claim.

A second remedy available to a victim of the improper use of civil proceedings is abuse of process. The cause of action for abuse of process has been distinguished from malicious prosecution as follows:

> ... the tort of abuse of process, as distinguished from that of malicious

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CIVIL PROCEEDINGS

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> prosecution, involves a malicious misuse or perversion of the process, after its issuance, for an end not lawfully warranted by it. The essential elements of abuse of process are: (1) an ulterior purpose; and (2) a willful act of the use of the process not proper in the regular conduct of the proceeding.

Johnson v. Painter, 279 S.C. 390, 307 S.E.2d 860 (S.C. 1983). Again, the Frivolous Civil Proceedings Sanctions Act incorporates some, but not all of the elements of abuse of process. Like abuse of process, the Act requires that the party taking part in the civil process has done so "primarily for a purpose other than that of securing the proper discovery, joinder of parties and ajudication of the claim." (§15-36-10) The Act, however, goes further and incorporates the requirement of malicious prosecution that the proceedings have been terminated in favor of the person seeking the assessment of the fees and costs. As a practical matter, the requirement of a favorable termination of the proceeding is a substantial additional requirement rendering the Act much more difficult to successfully use in discouraging frivolous civil claims. With regard to this requirement, the Act is unclear as to what constitutes a proceeding. Section 15-36-30 seems to require that the case be tried to conclusion before recovery under the Act can be made. Presumably, the "proceedings" means the entire claim. If so, then why should a party who has clearly engaged in pointless, harrassing discovery avoid sanction under the Act because the party happens to prevail on his claim?

Rule II requires that an attorney or party signing a civil pleading, motion or paper certifies by his signature that "to the best of his knowledge, information and belief, there is good ground to support it; and that it is not interposed for delay." The Rule goes on to state that if the documents are signed in violation of the Rule, the court on motion of a party or upon its own motion may impose appropriate sanctions upon the person who signed it and that these sanctions may include reasonable expenses incurred as a result of the filing of the pleading, motion or other paper, including reasonable attorney's fees. The application of Rule II is more restrictive than the Frivolous Civil Proceedings Act in the sense that it requires that the party against whom the sanctions are sought has signed the document, whereas the Act simply requires that the person has *taken part* in the "procurement, initiation, continuation or defense of the civil proceeding." (§15-36-10) On the other hand, there is no requirement under Rule II that the primary purpose of filing the document be other than that for which the proceeding was designed, nor is there a requirement that the proceedings be terminated in favor of the person seeking relief under the Rule.

Not only are the essential reqirements of the Act more restrictive than the other existing remedies available, other sections or the Act provide violators with effective defenses and place a substantial burden of proof upon those seeking relief under the Act. Section 15-36-20 basically provides that if the party against whom relief is sought establishes that he reasonably believed in the existence of the facts upon which his claim was based, sought the advice of counsel in good faith, or if the party is an attorney, that his "procurement, initiation, continuation or defense of a civil case" is not intended to merely harrass or injure the other party, then his participation in an otherwise frivolous civil proceeding is defensible. The language of this section seems to indicate that a litigant can be motivated by a desire to harrass or injure the other party as long as he establishes that this is not *only* purpose in pursuing the civil process. [§15-36-20(3)].

Section 15-36-30 provides an additional and very confusing requirement that the entitlement to recovery under the Act must be determined by "the trial judge at the conclusion of a trial upon motion of the aggrieved party." Apparently, if the action is not tried to conclusion, there can be no recovery under the Act. This requirement would seem to preclude recovery under the Act if the defendant were successful in having the cause of action dismissed pursuant to a Motion to Dismiss or for Summary Judgment. It would seem that most claims that are not "valid under the existing or developing law" [15-36-20(1)] would or should be dismissed by a Motion to Dismiss or Motion for Summary Judgment.

In addition to the stringent requirements and other obstacles placed before a party seeking relief under the Act, Section 15-36-40 places the burden of proof upon the party seeking relief to establish all of the essential elements including that "the primary purpose for which the proceedings were procured, initiated, continued or defended was not that of securing the proper discovery, joinder of parties, or adjudication of the civil proceedings. It would seem as a practical matter that the proof of this element would range from difficult to impossible for anyone attempting to recover under the Act for such matters as abuse of discovery.

The legislature is clearly faced with a difficult dilemma when enacting legislation that will discourage civil proceedings of any kind. However, it must balance the interest of ensuring that the courts are freely accessible for providing peaceful means of settling disputes with the interest of protecting parties from civil proceedings that are no more than pointless harassment. It would seem that there would have been more effective ways of approaching the problem than that taken by the legislature in this instance.

Some states have addressed the issue of the existence of multiple remedies for frivolous civil proceedings. The Minnesota statute, for example, states as follows:

> Upon motion of a party, or upon the court's own motion, the court in its discretion may award to that party costs, disbursements, reasonable attorneys fees and witness fees if the party or attorney against whom costs, disbursements, reasonable attorney and witness fees are charged acted in bad faith; asserted a claim or defense that is frivolous and that is costly to the other party; asserted an unfounded position solely to delay the ordinary course of the proceedings or to harass; or committed a fraud upon the court. An award under this section shall be without prejudice and as an alternative to any claim for sanctions that may be asserted under the rules of civil procedure. Nothing herein shall authorize the award of costs, disbursements or fees against a party or attorney advancing a claim or defense unwarranted under existing law, if it is supported by a good faith argument for an extension, modification, or reversal of the existing law.

Minn. State Ann. §549-21 (West 1986).

The Georgia frivolous litigation statute states as follows:

> The Court may assess reasonable and necessary attorney's fees and expenses of litigation in any civil action in any court of record if, upon the motion of any party, or the court itself it finds that an attorney or party brought or defended an action or any part thereof that lack substantial justification or that the action or any part thereof was interposed for delay or harassment...Ga. Code Ann. §9-15-14 (b) (Harrison 1989).

In a completely different approach, the Iowa legislature passed the following Act:

> If a party commencing an action has in the preceding five year period unsuccessfully prosecuted three or more actions, the court may if it deems the actions to have been frivolous, stay the proceedings until the party furnishes an undertaking secured by cash or approved securities to pay all costs resulting to opposing parties to the action including a reasonable attorney fee. Iowa Code Ann. §617.16 (West 1986).

All legislative acts are the product of negotiations and compromises. Unfortunately, the South Carolina Frivolous Civil Proceedings Act appears to have been negotiated and compromised into a rather ineffective remedy.

OOPS. In *Ten Years Ago*, in the last issue of Defense Line Ralph Chamblee appeared as Ralph Shandley. Our apologizes to Mr. Chamblee.

Crisis In The Marketplace

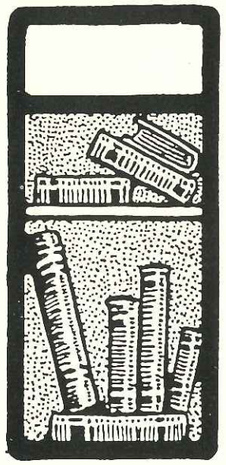
By Gene Jarrett
Director of Claims for Companion Property & Casulty Insurance Company

There is a crisis in the insurance market in South Carolina at the present time but few outside of the insurance industry are aware of the magnitude of the problem or, for that matter, even the existence of it. No, I'm not referring to the automobile situation that we have been living with for the past several years. Instead, this crisis involves the workers' compensation line of business.

Insurance carriers are presently leaving this line of insurance or severely curtailing their writings due to the ever growing size of the assigned risk pool. Briefly, when a line of insurance is mandated such as automobile and workers' compensation, the insurance industry must provide a mechanism to absorb the risks that would not be voluntarily written by the industry. On the automobile side of the house, this mechanism is referred to as the South Carolina Reinsurance Facility. On the workers' compensations side, it is referred to as the assigned risk pool. For the system to work properly, the assigned risk pool or involuntary market must be kept relatively small compared to the size of the voluntary market. As an example, Companion Property & Casualty was started in 1984 and at that time the assigned risk pool accounted for 5.7% of the total workers' compensation premium written in South Carolina. The latest available figures through 1989 show that the size of the pool or residual market has increased dramatically to 23.6%.

Exactly what does the growing size of the assigned risk pool have to do with insurance carriers leaving this marketplace? Very simply, a residual market has to be financially supported by the industry and this is accomplished through monetarily assessing the carriers based on their percentage of market share. When the assigned risk pool is small, these assessments are small by comparison. However, these assessments are now so high that carriers find them difficult or even impossible to pay. We refer to assessments as a burden on the voluntary market and the current burden is 25.5%. In other words, for carriers to cover the losses of the assigned risk pool, for every one dollar ($1.00) of premium charged in the voluntary market the carrier must charge one dollar, twenty-five and one half cents ($1.25.5) in order to cover the losses in the assigned risk pool. This burden in South Carolina is one of the highest in the country and it continues to grow. When you combine this large involuntary market with low rates, then you have the situation we currently find ourselves faced with trying to solve in South Carolina. One other item needs to be mentioned and that is the enormity of the financial losses in the pool. In policy year 1984, the pool had $4.3 million worth of losses. Latest available figures which are from policy year 1989 indicate that the pool's losses have now grown to $42.2 million. This is the burden the voluntary market must absorb. Put succinctly, as assigned risk pool deficits continue to erode companies' surplus, market capacity decreases. As carriers write less business, the size of the assigned risk pool and consequently assessments, increase. Knowing that decreasing market capacity builds the assigned risk pool, carriers may and already have started to leave the South Carolina market in order to avoid being the ones left to pay the growing deficits bill.

Now that we have discussed the problem, let's discuss some possible solutions. First of all, there is no questions that the size of the assigned risk pool must be reduced. The question is, how is this accomplished? To start, we must have a financial incentive for insureds to belong to the voluntary market. Simply asking for a large enough rate increase to cover the losses of the assigned risk pool is not sufficient at this time because the pool was never intended to be as large as it is now. The solution for this financial incentive lies with imposing a separate and adequate rate level in both the voluntary and involuntary markets. Over the last decade South Carolina has charged one rate—the same rate for both the voluntary market as well as the assigned risk pool. The states of North Carolina and Georgia recognize the need for an incentive as they have passed legislation imposing a rate deferential or, put another way, a higher rate for risks in the assigned risk pool. This gives the necessary incentive for companies to try to stay in the voluntary market where they would enjoy lower rates. To indicate just how far our current system is out of step, in some cases it is now possible to have a lower rate in the assigned risk pool than in the voluntary market. An anomaly such as this should never occur. Good claims handling and loss engineering of risks certainly have their place in the overall picture as well as rate adequacy. Since January 1, 1988 our sister states of Georgia and North Carolina have each had cumulative rate increases of almost 50% while at the same time South Carolina has had only 10%. File and use rate filings would help prevent this rate deterioration. In order to return to a viable market, the workers' compensation line of business must be both available and affordable.



The State of Texas is in a similar crisis to South Carolina except they are further along than we. Texas' assigned risk pool is currently 28% of the market and is producing a $1.5 billion deficit in the assigned risk pool. Just two weeks ago the chief insurance commissioner of Texas warned the Texas legislature that unless something is done about the size of their assigned risk pool, that the entire private insurance market could collapse in the very near future.

The hearing which will be very instrumental in addressing the workers' compensation crisis in South Carolina was originally scheduled for May 28 at the S.C. Insurance Department. However, due to a request from the S.C. Consumer Advocate's office, the Chief Insurance Commissioner changed the hearing date to June 25,. This delay further compounds our situation which is in need of immediate attention. The National Council on Compensation Insurance, the national workers' compensation ratemaking organization, for the first time in South Carolina has requested differing rates. They have filed for an approximate 16% increase in the voluntary market and 48% in the assigned risk pool. The magnitude of this differential is an indication of the current negative influence the assigned risk pool has on the overall workers' compensation program in South Carolina. By the time you read this article, we hope the findings of this hearing have been published. We also hope the crisis currently in the workers' compensation marketplace has been recognized and that the recommended solutions have been adopted.

Excessive Verdicts Unconstitutional??

By D. Clay Robinson
Robinson, McFadden & Moore, P.C., Columbia, SC

For decades, courts in general and the federal judiciary in particular, along with the community of legal scholars, have wrestled with the problem of containing or controlling excessive punitive awards within reason. *Pacific Mutual Life Insurance Co. v. Haslip*, Op. No. 89-1279, 499 U.S. _____, 59 L.W. 4161, *Browning-Ferris Industries v. Kelco Disposal*, 492 U.S. _____, 106 L.Ed.2d 219, 241-242, (1989) (Brennan, J., joined by Marshall, J. concurring); Id. at p.242-245, (O'Conner, J. joined by Stevens, J., dissenting); *Bankers Life & Casualty Company v. Crenshaw*, 486 U.S. 71, 87-88, (1988) (O'Connor, J., joined by Scalia, J., concurring); *Aettna Life Insurance Company v. Lavoie*, 475 U.S. 813, 828-29 (1986); Wheeler, *The Constitutional Case for Reforming Punitive Damage Procedures*, 69 Va.L.Rev. 269 (1983); Ellis, *Punitive Damage, Due Process, and the Jury*, 40 Ala.L.Rev. 975 (1989).

In spite of frequent analogies of such grossly excessive standardless awards to civil penalties arbitrarily established by a legislative body,[1] the Supreme Court, until now, has refused to address the problem. *Browning-Ferris Industries v. Kelco Disposal*, 492 U.S. _____, 106 L.Ed.2d 219 (1989); *Bankers Life and Casualty Co. v. Crenshaw*, 486 U.S. 71,100 L.Ed.2d 62 (1988); *Aetna Life Insurance Co. v. Lavoie,* 475 U.S. 813 (1986).

A. The Supreme Court Solution.

On March 4, 1991, the Supreme Court began the process of addressing the punitive damage problem. In *Pacific Mutual Life Insurance Company v. Haslip*, 499 U.S. _____, 59 L.W. 4157 (1991) the Supreme Court recognized that the Fourteenth Amendment does not prohibit the traditional common law method of awarding punitive damages:

> In view of this consistent history, we cannot say that the common-law method for assessing punitive damages is so inherently unfair as to deny due process and be *per se* unconstitutional. *Id.* at 4161.

Having said that, the Court then condemned precisely the type of punitive damage system utilized in South Carolina.

> One must concede that unlimited jury discretion -- or unlimited judicial discretion for that matter-- in the fixing of punitive damages may invite extreme results that jar one's constitutional sensibilities. *Id.* at 4161.

While refusing to establish a "Mathematical bright line" as to the constitutional limits of punitive award, the Court articulated the fundamental requirement demanded by the due process clause of the Fourteenth Amendment:

> We can say, however, that general concerns of reasonableness and adequate guidance from the court when the case is tried to a jury properly enter into the constitutional calculus. *Id* at 4161.

The Court then commenced the process of defining these "general concerns" by approving an exemplary damage award of $840.000 as the product of a punitive damage system it deemed constitutional. It noted that the Alabama punitive damage regime, requiring the application of definitive standards in passing upon the amount of the punitive verdict at all levels of the judicial process, "...imposes a *sufficiently definite and meaningful constraint on the discretion* of the Alabama fact finders in awarding punitive damages." *Id.* at 4162 (Emphasis added)'

The Court reviewed the standards that regime imposed at each level of the Alabama punitive awards process. At trial, the jury was told that the purpose of such damages was not to compensate the plaintiff but to punish the defendant and protect the public by deterring the defendant from future wrongful conduct. The Court stressed that evidence of the defendant's wealth was excluded from the jury and that "...the fact finder must be guided by more than the defendant's net worth." *Id.* at 4158, 4162. While these instructions gave the jury "significant" discretion, the Court concluded that they reasonably balanced the need for rational decision making and the state's interest in determining "the appropriate deterrence and retribution" for each individual case. *Id.* at 4162. The Court also deemed the trial judge's explanation that punitive damages were *not* compulsory to be noteworthy. *Id.* at 4162.

The Supreme court found significant due process comfort in the post-verdict requirements of the Alabama procedure. The trial judge was required to record his reasons for approving or interfering with the jury verdict. By earlier decisions, the Alabama Supreme Court had laid down guidelines required to be considered independently by the trial judge in post-verdict rulings -- including the relationship between the awards of actual and punitive damages and the culpability of the defendant's conduct. *Id.* at 4162 (the *"Hammond* standards").

The standards Alabama imposed at the appellate level were appropriate "in determining whether a particular award is greater than reasonably necessary to punish and deter." *Id.* at p. 4162. A threshold analysis was required of the relationship between the size of the actual and punitive damages and also the amounts of punitive damages previously approved in comparable situations. The appellate court specifically ensured that the amount "does' not exceed an amount that will accomplish society's goals of punishment and deterrence.'" *Id.* at 4162.

To determine that these goals were not exceeded, Alabama demanded specific consideration of enumerated standards: (a) whether there is a reasonable relationship between punitive damages and the harm actually done or likely to occur; (b) the reprehensibility of defendant's conduct, its duration, its concealment by the defendant, if any, and its past existence and frequency; (c) The profitability of the conduct and the desirability of removing any profit or creating a loss; (d) the "financial position" of the defendant; (e) litigation costs; (f) criminal sanctions; and (g) other civil awards against the defendant for such conduct. *See Hammond v. City of Gadsden*, 493 So.2d 1374 (Ala. 1986). Finally, the court found these standards "have real effect" and have resulted in appellate reduction of punitive awards. *Id.* 4162.

The Supreme Court concluded that Alabama review under these standards:

> ...ensures that punitive damage awards are not grossly out of proportion to the severity of the offense and have some understandable relationship to compensatory damages. *Id.* at 4162.

Even so, the Court found the *Haslip* verdict, more than four times the compensatory damages, "...*close to the line." Id.* at 4163. (Emphasis added). This "line" separates "proper" punitive damage awards from excessive awards which constitute, in the Court's words, "extreme results that jar one's constitutional sensibilities." *Id.* at 4161.

While identifying some minimum due process safeguards against excessive punitive damages, the Court carefully adhered to its previously stated position that the appropriate standards must be derived from state, rather than federal, law. In *Browning-Ferris Industries of Vermont, Inc. v. Kelco Disposal, Inc.* 492 U.S. _____, 106 L. Ed 2d 219 (1989) the Court refused to extend to excessive punitive damages, the protection against excessive fines afforded by the Eighth Amendment. Additionally, the Court declined to formulate a federal common law standard by which the reasonableness of punitive damages could be measured, concluding instead that such a standard must be rooted in state law. *Id.* at 240--241. By necessity, therefore, future definition of constitutional parameters of punitive damages must be developed by protracted review of punitive damage regimes in each state.[2]

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That the process of addressing the punitive damage problem did not end with *Haslip* became clear fifteen days later when, on March 19, 1991, the Supreme Court vacated seven pending case and remanded them "for further consideration in light of *Haslip*." 59 L.W. 3635. At the same time it declined to review two others. 59 L.W. 3635. A review of each sheds light on the process of constitutional definition now underway.

In *Wollersheim v. Church of Scientology*, 2600 Cal Rep. 331 (Cal. App. 2nd Dist. 1989). Docket No. 89-1361, vacated by the Court, the state appellate court reduced a jury verdict of $5,000,000 actual damages and $25,000,000 punitive to $500,000 actual damages and $2,000,000 punitive. The state standard of review was "whether the award was the result of passion or prejudice" (p. 353) and the factors considered on review were the degree of reprehensibility of the defendant's conduct, the relationship between punitive and actuals and the relationship between punitive damages and the defendant's net worth. Also vacated was *International Society for Krishna Consciousness v. George,* 213 Cal. App. 3d 729 (Cal. Ct. App. 4th Dist.) (opinion subsequently withdrawn). Docket No. 89-1339, where the state court held a $2.5 million verdict for the intentional infliction of emotional distress not to be excessive.

Hospital Authority of Gwinnett County, Georgia v. Jones, 25 Ga. 759, 386 S.E.2d 120 (1989), Docket No. 89-1315, affirming verdicts of $5,001 actual and $1.3 million punitive damages was vacated even though the Georgia Supreme Court purported to apply nine court promulgated standards not unlike Alabama's. However, the state court stated that the only limitation on punitive damages was the collective conscience of the jury and that the punitive award need not be related to actual damages. A jury award of $558,000 in actual damages and $2,000,000 in punitive was vacated in *Pacific Lighting Corp. v. MGW, Inc.*, Docket No. 90-626 (ruling below - *MGW, Inc. v. Fredericks Development Corp.*, Cal. Ct. App. 4th Dist. 4/3/90 unpublished).

Three federal decisions similarly vacated of are particular interest. In *Eichenseer v. Reserve Life Insurance Co.,* 881 F.2d 1355 (5th Cir. 1989) Docket No. 89-13031, the Court of Appeals affirmed a diversity district court's nonjury award of $1,000 actual damages and $500,000 punitive damages where the defendant had been previously sued for similar conduct and was aware that Mississippi's punitive damages were like private fines for the purpose of punishing and deterring. Mississippi standards for assessing punitive damages were applied and included an amount necessary to punish and deter the defendant and others, the financial worth of the defendant, the degree of reprehension, malice, and ill

motive, the public sense of justice and propriety, and the appropriate payment to the plaintiff for public service in bringing the suit. Likewise the opinion of a divided diversity appeals court, affirming a $7,923.50 actual damage and $400,000 punitive damage verdict in Jordan v. Clayton Brokerage Company, 861 F.2d 172 (8th Cir. 1988), Docket No. 88-1483, was vacated. Lastly, the Court of Appeals in *The Post Office v. Portec, Inc.,* 913 F.2d 802 (10th Cir. 1990), Docket No. 90-827, affirmed the ruling of the diversity trial court, applying Colorado factors as a matter of federal law on the question of excessiveness, ordering remittitur of $1,000,000 of a verdict for $79,519.40 actual damages and $1.5 million punitive damages. The trial court also awarded $619,000 in attorney's fees. This case was also vacated by the Court.

Equally revealing are the two cases the Supreme Court, at the same time, declined to review. *Massachusetts Mutual Life Insurance Co. v. Collins,* 1990 Westlaw 121831 (Ala. 1990) affirmed a verdict of $750,000 combined actual and punitive damages, applying *Hammond* standards. Similarly, in *General American Life Insurance Co. v. Simmons,* 562 So.2d 140 (Ala. 1989), the jury returned a verdict of $2.5 million for breach of contract, bad faith, and fraud. The Alabama Supreme Court, applying *Hammond* standards, affirmed the trial court order requiring remittitur of all but $600,000 noting that a verdict can be excessive even though not the product of wrongful jury conduct such as passion and prejudice.

This process of refining the due process requirement with respect to punitive awards apparently continues. On April 15, 1991, the Supreme Court vacated an award in *Intercontinental Life Insurance Co. v, Lindblom,* 571 So 2d 1092 (Ala. 1990), where, under *Hammond* standards, the Alabama Supreme Court required remittitur of $2,012,000 or a new trial of a jury verdict of $3,012,000 in combined damages. Similarly, on April 22, 1991, the Court vacated an award of $8.5 million in punitive damages, which exceeded compensatory damages by approximately 11 times, in *AMCA International Finance Co. v. Hilgedick,* Docket No. 90-1369 (ruling below: *Hilgedick v. Koehring Finance Corp.*, Calif. Ct. App. 1st Dist. 8/3/90, unpublished). On April 29, 1991, the Court vacated an award in *Southern Life and Health Insurance Co. v. Turner,* Docket No. 90-1399, 571 So.2d 1015 (Ala. 1990) of $500,000 in combined actual and punitive damages, of which actual damages comprised only $1,500.

The picture of the Fourteenth Amendment due process requirements for reasonable limitations on punitive damage awards has begun to emerge from the punitive damages regime approved in *Haslip* and those verdicts and standards (or lack thereof) rejected in thee *Haslip* descendants.

B. The South Carolina Law of Punitive Damages.

The South Carolina law of punitive damages contains none of the standards or due process protections approved in *Haslip* or its progeny. In South Carolina, unlike Alabama, upon proof of the requisite wrongful conduct, the jury is *required* to award punitive damages:

> In South Carolina, unlike most jurisdictions ...the award of punitive damages does not rest in the discretion of the jury but in recoverable *as a matter of right.*

Broom v. Southeastern Highway Contracting Inc. , 291 S.C. 93, 98, 352 S.E.2d 302, 305 (Ct. App. 1986). [emphasis added] Citing *Sample v. Gulf Refining Co.,* 183 S.C 399,410,191 S.E. 209, 214 (1937).

South Carolina punitive damages are not awarded solely for the public purpose of punishment and deterrence. They also are intended as additional compensation for the plaintiff, thus ensuring some form of double recovery for the harm inflicted.

> Exemplary or punitive damages go to the plaintiff, not as a fine or penalty for a public wrong, but in vindication of a private right which has been willfully invaded; and indeed it may be said that such damages in a measure compensate or satisfy for the willfulness with which the private right was invaded, but in addition thereto, operating as a deterring punishment to the wrongdoer, and as a warning to others.

Rogers v. Florence Printing Co., 233 S.C. 567,573, 106 S.E.2d 258,261 (1959). There is no requirement that a jury be informed of these purposes of the punitive award.

In determining the amount of punitive damages, the South Carolina fact finder is instructed to consider the following three factors:

> [I]n assessing punitive damages, the main things to be considered are the character of the tort committed, the punishment which should be meted out therefor and the ability of the wrongdoer to pay.

Hicks v. Herring, 246 S.C. 429,437,144

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S.E. 2d 151,155 (1965). These are also the only factors to be reviewed on appeal. *Fennell v. Littlejohn*, 240 S.C. 189, 125 S.E.2d 408 (1962); *Rogers v. Florence Printing Co., supra.* The net worth of the defendant, or comparable evidence, is available to the jury throughout their deliberations of both the merits and the assessment of punitive damages. *Charles v. Texas Company*, 199 S.C. 156, 18 S.E.2d 719 (1942); *Rogers v. Florence Printing Co., supra; Hicks v. Herring, supra* at pp. 436, 154. Mr. Justice Brennan described instructions similar to South Carolina's: Guidance like this is scarcely better than no guidance at all. "*Browning-Ferris, supra,* 106 L.ed.2d at 242 (concurring opinion).

In South Carolina there is no requirement that the amount of a punitive award bear any relationship to actual damages.*Thompson v. Home Security Life Insurance Co.,*271 S.C. 54, 244 S.E. 2d 533 (1978); *Mylin v. Allen-White Pontiac, Inc.,* 281 S.C. 174, 314 S.E.2d 354 (Ct. App. 1984). Any requested instruction to limit the punitive damages to a reasonable ratio of the compensation award can constitute grounds for reversal. *Rogers v. Florence Printing Co., supra; Eaddy v. Greensboro-Fayetteville Bus Lines,* 191 S.C. 538, 5 S.E.2d 281 (1939). Similarly, South Carolina has no provision at any level of the punitive assessment process, for consideration of litigation expenses, criminal fines, prior verdicts against the party whom punitive damages are assessed for the same or similar conduct or the profit involved in the transaction litigated.

No independent requirement exists in South Carolina that the court, at the trial or appellate level, record with any specificity its reasons for affirming or interfering with a punitive damages award. At the trial level of post-verdict review, the court has discretion to set aside a verdict either which it finds excessive or based on jury misconduct, such as caprice, passion, or prejudice. *Hicks v. Herring, supra* at p.436, 154. However, A South Carolina appellate court cannot disturb a jury punitive award for excessiveness alone but can do so only if it finds some evidence of jury misconduct in the form of caprice, passion, or prejudice. *Hicks v. Herring supra* at p. 437,154; *Rogers v. Florence Printing Co., supra at* p. 576, 263. The *Haslip* court distinguished the meaninglessness of such undefined appellate review in the similar systems of Vermont and Mississippi from that of Alabama's which it approved. *Haslip* fn. 10, p.4162.

Furthermore, South Carolina appellate review of a trial court's exercise of its discretion with respect to a punitive award is almost totally deferential; the judge's determination will not be disturbed unless an abuse of that discretion is shown. *Vandegrift v. Dent*, 258 S.C. 240, 188 S.E. 2d 185 (1972). In addition,

> ... the Court of Appeals will consider the evidence in the light most favorable to the prevailing party and will give the prevailing party the benefit of every inference that can reasonably be drawn on his or her behalf ... The Court of Appeals will also assume the truth of the evidence that supports the recovery of punitive damages and will disregard entirely evidence to the contrary.

Cash v. Kim, 288 S.C. 292, 297, 342, S.E.2d 61, 64 (Ct. App. 1986) citing *Watson v. Wilkinson Trucking Co.*, 244 S.C. 217, 224, 136 S.E. 2d 286, 289 (1964) and Duncan v. The Record Publishing Co., 145 S.C. 196, 284, 143 S.E. 31, 59 (1927)

This South Carolina punitive damage regime bears no relationship to Alabama's approved in *Haslip*. To the contrary, the South Carolina punitive damages standards and procedures seem almost deliberately designed to ensure that the amount of punitive damages will be arbitrarily determined by a jury and approved on post-verdict review without regard to any factual constraints of reasonableness or amounts necessary to accomplish the legitimate public purposes served by the award. Such a regime is patently unconstitutional in violation of the due process requirements of the Fourteenth Amendment when it yields an excessive punitive damage award.

Any excessive punitive damage verdict generated by the deficient South Carolina punitive damages system will necessarily be vulnerable to constitutional challenge. Counsel representing defendants in South Carolina should raise the unconstitutionality of an excessive punitive damage award. Post verdict motions are the appropriate stage for raising the unconstitutionality of a particular verdict. *In re Related Asbestos Cases* 543 F. Supp. 1152,1157 (N.D. Cal. 1982); *Ashwander v. Tennessee Valley Auth.* 297 U.S. 288 (1936). *See* Grass, *Penal Dimensions of Punitive Damages* 12 Hastings L. Quarterly 241,243 (1985). The prevailing plaintiff will likely argue that this basis for a post verdict motion is waived if

(Continued on page 18)

EXCESSIVE VERDICTS

(Continued from page 17)

not pleaded in the Answer. However, such an argument misstates the basis of the motion. Properly characterized, the defense motion should contend that the punitive award violated the due process clause as a consequence of its *excessiveness* rather than due to the existence of a punitive award. South Carolina common law should not require that a defendant anticipate at the pleading stage an excessive punitive damage award any more than the defendant is required while answering to anticipate an objectionable excessive actual damages award.

Conclusion

Contrary to the superficial conclusions set forth in other published articles, *Haslip* provides a reassuring message to civil defendants and their counsel. Although punitive damages are not unconstitutional *per se*, there is a boundary line, which when exceeded, signals a violation of the due process clause. *Haslip* and its progeny make clear that state prescribed fact-oriented standards must be utilized by a jury and/or trial judge to help define the location of "the line" separating proper from excessive punitive damage awards. Since *Haslip*, the Supreme Court has demonstrated no reluctance to exercise jurisdiction over and vacate excessive punitive damage verdicts and will undoubtedly continue to administer this relief until its message is clearly understood. For now, however, defense counsel and their clients may take comfort in the realization that "help is on the way."

D. Clay Robinson

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Endnotes

1. See *e.g. Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 350 (1974); *IBEW v. Foust*, 442 U.S. 42, 48 (1979); *Shamblin's Ready Mix, Inc. v.Easton Corp.* 873 F.2d 736 (4th Cir. 1989); *Boyd v. Bulala*, 877 F.2d 1191, fn. 5, 1196 (4th Cir. 1989).
2. Legislative attempts to resolve the problems associated with excessive punitive damage awards had already commenced in some states before *Haslip*. See Colo. Rev. Stat. Anno. § 73-21-102, 13-25-127 (2), (Supp. 1989); Ohio Rev. Code Anno. § 2307.80 (Supp. 1989); Mont. Code Anno. § 21-1-221 (1989).

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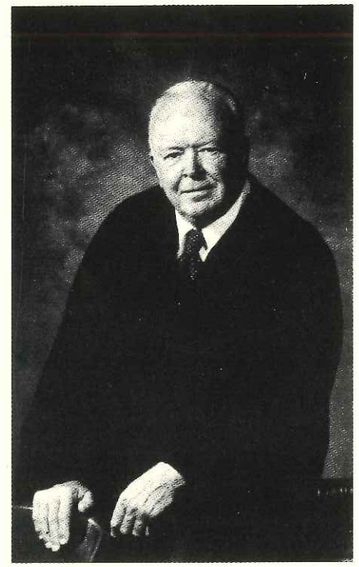
1. **Eligibility.**
   (a) The candidate must be a member of the South Carolina Bar and a member or former member of the South Carolina Defense Trial Attorneys' Association. He or she may be in active practice, retired from active practice or a member of the judiciary.
   (b) The current officers and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

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

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

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



Robert W. Hemphill

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