The Defense Line

S.C. Defense Trial Attorneys' Association

Fall 1991
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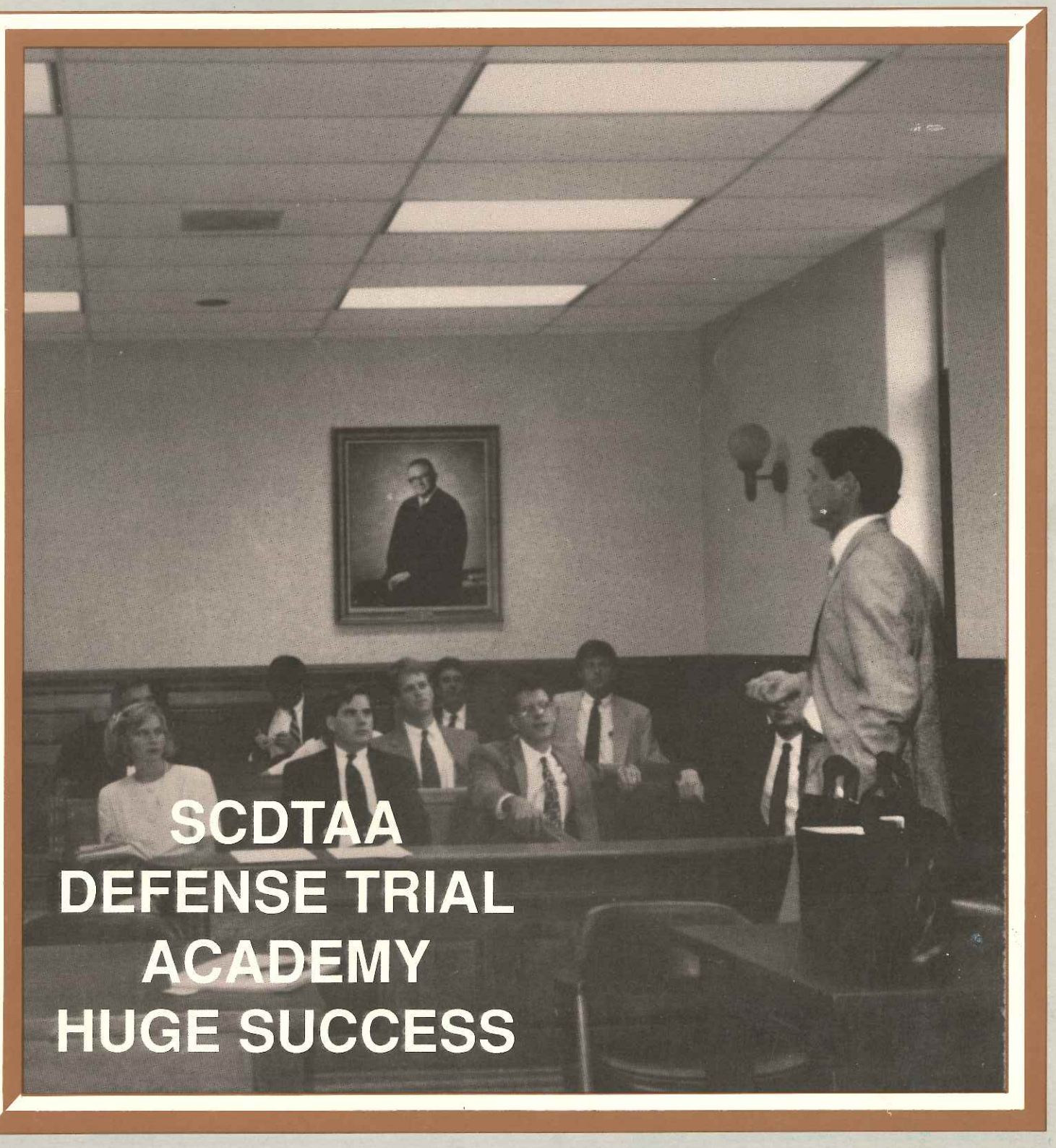


SCDTAA DEFENSE TRIAL ACADEMY HUGE SUCCESS

VOLUME 19 NO. 4, FALL 1991

TEN YEARS AGO

Looking back ten years ago, ROBERT H. HOOD, President, accepted the Defense Research Institute's Exceptional Performance Citation at the Fourteenth National Conference of State and Local Defense Associations held April 2 - 4th at Cincinnati. Our Association continues to receive this award. The South Carolina Defense Trial Attorneys' Association adopted a new logo, thanks to BOB CARPENTER. BURNIE WALKER MORRIS was awarded the Claims Adjuster of the Year by the South Carolina Claims Association in Myrtle Beach. Congratulations BURNIE and State Farm. The Joint Meeting of the Defense Attorneys and Claims Managers was held at the Great Smokies Hilton in Asheville, NC, August 6-9. The Claims Management Association reported that ZACK AILLISON was returning to South Carolina to head up the National Grange office while JOHN DUNN was being promoted and transferred to Richmond.

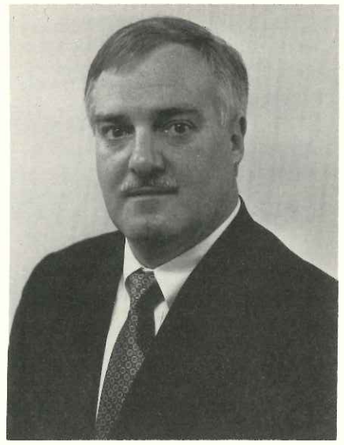
TWENTY YEARS AGO

Our Association's Annual Meeting was moving toward preparation under President HAROLD JACOBS to be held at the Town House in Columbia tied in with a football weekend. Judge ROBERT CHAPMAN and DEAN FOSTER were on the program.

The Fourth Joint Meeting of the Defense Attorneys and Claims Managers was planned for Friday, December 3rd, and Saturday, December 4th at the Mills Hyatt House. No Fault was the topic of conversation and the program at that time . Judge ROBERT CHAPMAN and DEAN FOSTER were on the program.

The Defense Line is a regular publication of the South Carolina Defense Trial Attorneys' Association. All inquiries, articles, and black and white photos should be directed to Nancy H. Cooper, 3008 Millwood Avenue, Columbia, SC 29205, 1-800-445-8629.

PRESIDENT'S PAGE



Glenn Bowers

Our Association has long been recognized as one of the most preeminent state defense lawyers' associations in the nation. Our enviable reputation is a direct result of the substantial time and effort which our members have been willing to devote to the work of the Association.

The successes we have enjoyed this year are again attributable to the hard work and dedication of many. While it is difficult to appropriately thank every person who contributed, there are certain Committees and individuals who deserve special recognition for their efforts.

Will Davidson, the Editor of The Defense Line, and his assistant, Nancy Cooper, have again done yeoman's work. It seems that with each issue, The Defense Line only gets better. Thanks to the efforts of Will and Nancy, our Association's publication is truly an exceptional one.

John Wilkerson and the members of the Joint Meeting Program Committee are to be congratulated for the exceptional program at our Joint Meeting in Asheville. The highlight was a summary jury trial involving numerous issues raised by the adoption of comparative negligence. The trial participants including Judge John Hamilton Smith, Bruce Miller, Perry Gravely and Tom Gottshall all did an excellent job. The handout materials, graciously provided by Judge William Traxler and Allen Smith, are certainly one of the most thorough and practical guides to comparative negligence issues that I have seen.

The Trial Academy Committee, chaired by Tim Bouch, conducted our Association's inaugural Trial Academy on July 23-25 at the South Carolina School of Law. There were 27 students. The Academy was a tremendous success thanks in no small part to the countless hours of preparation devoted by Tim and his Committee and to the trial expertise and leadership of the esteemed Trial Academy Faculty which included: Gene Adams, Bob Carpenter, Carl Epps, Frank Gibbes, Billy Gunn, Jim Hinchey, Ellis Johnston, Frankie Marion, Dewey Oxner and Bruce Shaw. In addition, Jim Alford, John Bell and Ed Martin kindly gave of their time to serve as judges at the Trial Academy. The law school has again agreed to make their facilities available to us next year. The 1992 Trial Academy will be held August 11-13. Please mark your calendars and make sure the younger lawyers in your office are aware of these dates.

The Legislative Committee, under the leadership of Susan Lipscomb and Bill Sweeny and with the able assistance of Carl Epps, was instrumental in garnering substantial opposition to the "pure" comparative fault bill submitted to the Legislature last spring by the South Carolina Law Institute. As a result of the efforts of Susan, Bill, Carl and others, the bill never made it out of the House Judiciary Committee.

The Annual Meeting Program Committee, chaired by Kay Crowe, has planned an excellent educational program for our Annual Meeting which is fast approaching. We currently have in the neighborhood of 370 people signed up including members, guests and spouses. The meeting promises to be one of our best ever.

The Conventions Committee, co-chaired by Charley Ridley and Mike Wilkes, has done a superb job this year. Thanks to the detailed planning and diligence of Charley and Mike, the social portion of our Joint Meeting went very smoothly, was enjoyed by all and came off within, if not under, budget. Charley and Mike have also planned a wonderful weekend for all at Sea Island.

Our remaining working committees, each of which was chaired by a member of our Executive Committee, have all been active and have all performed admirably. These include: the Amicus Curiae Committee chaired by Mills Gallivan; the By-Laws Committee chaired by Jim Logan; the Ethics Committee chaired by Mike Nunn; the Judiciary Committee chaired by Tom Wills; the Long Range Planning Committee chaired by Bill Grant; the Membership Committee chaired by George James; and the Public Information and Relations Committee chaired by Steve Baggett.

Our Association has again been awarded the Exceptional Performance Citation Award by DRI.

Speaking of DRI, our Association was invited and has agreed to co-sponsor, along with the North Carolina Association of Defense Attorneys, DRI's annual National Leadership Conference for 1992. The Conference will be held April 2-5, 1992 at Pinehurst, North Carolina.

As this is my last President's Letter, I want to thank each of you for affording me the privilege of serving as your president.

I would also like to thank Bill Grant, President Elect; Hugh McAngus, Secretary; Bill Coates, Treasurer; Mark Wall, Immediate Past President, Carol Davis, our Executive Director, and each member of the Executive Committee for the guidance and support they provided me over the course of the year.

Please have a safe trip to Sea Island. I look forward to seeing each of you there.

RECENT DECISIONS

1) Robert E. Beasley v. Sohio Oil Co., U.S. Court of Appeals, 4th Cir., No. 89-1781 (April 26, 1991); UNPUBLISHED.

Robert Beasley, while working for Beasley Mechanical Contractors, Inc., in Charleston, was working on an oil pipeline in connection with a subcontract Beasley Mechanical had negotiated with Sohio Oil. An accident ensued, causing extensive injuries to Beasley's legs, hands, and face. Beasley subsequently filed a workers' compensation claim through Beasley Mechanical's insurance carrier, and received $28,000 in benefits.

Beasley then filed this diversity claim against Sohio seeking damages for personal injury. Sohio, however, moved for summary judgment on the notion that Beasley was a "statutory employee" of Sohio as defined by § 42-1-10 et seq. of the South Carolina Code Ann., and therefore limited to benefits arising out of this state's workers' compensation laws.

Two issues were thus presented on this appeal: (I) whether Beasley was, at the time of his injury, a "statutory employee" of Sohio within the meaning of the Code, and therefore limited in his available remedies; and (2) whether the district court erred in refusing to apply the "dual capacity" doctrine in this case.

S.C. Code Ann. § 42-1-400 provides:

> When any person...undertakes to perform or execute any work which is part of his trade, business or occupation and contracts with any other person...for the execution or performance by or under such subcontractor of the whole or part of the work undertaken by such owner, the owner shall be liable to pay any workman employed in the work any compensation under this Title which he would have been liable to pay if the workman had been immediately employed by him.

S.C. Code Ann. § 42-1-540 further provides that relief under the Workers' Compensation Act precludes all other injury-related remedies to which an employee covered by the Act might otherwise be entitled.

Beasley contended that questions of material fact existed as to whether the modification and addition of pipeline at the Sohio facility was part of the trade, business or occupation of Sohio, and that the district judge therefore erred in granting summary judgment.

The court of appeals, however, affirmed by reasoning that a "...well maintained pipeline system is an important part of Sohio's business and that maintenance of existing pipelines or installation of new pipelines is essential to the trade, business or occupation of Sohio." Beasley was thus held to be a "statutory employee" of Sohio at the time of his injuries.

As for the second issue, whether the district court should have applied the "dual capacity" doctrine, which holds that, in certain instances, an employer bears additional duties to the employer which are separate and distinct from the duties arising out of the employer-employee relationship, the court also balked at its possible application. It noted that this doctrine had never been applied in South Carolina, and thus had no relevance to the present facts.

2) Clyde Hatton v. Lockwood Greene Engineers/ etc., Court of Common Pleas, No. 89-CP-40-3097 (October 28, 1990).

In this Order Granting Summary Judgment, the court considered two issues: (I) whether the Plaintiff had assumed the risk by placing himself in close proximity to the steam vents which caused his injuries; and (2) whether the Plaintiff's actions constituted contributory negligence and recklessness.

The Plaintiff, an employee at the Department of Mental Health (DMH), had worked at DMH for ten years as a steam supervisor and later as superintendent of maintenance. Just prior to his injury, certain modifications had been made to the steam system at DMH, of which Hatton was completely aware. The newly developed system occasionally caused scalding water and steam to be emitted from vents dispersed around the compound.

The evidence against the Plaintiff was overwhelming. In deposition, Hatton admitted that he had a complete knowledge of the system, and that he knew of the dangers of being burned by steam and scalding water. Furthermore, he particularly knew that the actual vent which caused his injury emitted steam daily, and at one point had even admitted to a safety inspector that the new system posed a serious safety problem due to its dispersal of steam and water.

The court cited Senn v. Sun Printing Company, 295 S.C. 169, 367 S.E.2d 456 (S.C. App. 1988), in setting forth the four elements required to establish the defense of assumption of the risk:

> (I) The plaintiff has knowledge of the facts constituting a dangerous condition.
> (2) He knows the condition is dangerous.
> (3) He appreciates the nature and extent of the danger.
> (4) He voluntarily exposes himself to the danger.

In the case at hand, the court had little trouble imposing all four conditions upon the factual scenario presented by the testimony, for when the accident occurred, the Plaintiff was voluntarily standing less than one and a half feet from the valve in question.

The court then went on to cite House v. European Health Spa, 296 S.C. 644, 239 S.E.2d 653 (1977), in setting forth the law governing the defense of contributory negligence:

> It is equally well settled that one who, with knowledge of the conditions, goes into danger, he assumes the consequences and, even though there be negligence on the part of the other, if the complainant suffers hurt to which his negligence contributed as a proximate cause, without which it would not have occurred, he is barred from recovery.

And although contributory negligence is generally a question for the jury to decide, the House court went on to state that "...it is also true that when evidence admits of but one reasonable inference, it becomes a matter of law for the determination of the court." Summary judgment was thus allowable in the case at hand, where the court found all the evidence in favor of the Defendants.

Defense Trial Academy

From July 23 through July 25, 1991 twenty-seven (27) members of the Association gathered at the University of South Carolina School of Law for the First and Annual Defense Attorneys Trial Academy. The response was outstanding. 17.75 hours CLE credit was approved for the participating in the Academy.

The academy was chaired by Tim Bouch of Young, Clement, Rivers & Tisdale of Charleston. Frankie Marion and Ellis Johnston of the Haynsworth Firm in Greenville directed the faculty. The program centered upon the use of two real case problems and the IADC training tapes and materials which were used as background material. Following presentations on the various trial phases by a distinguished faculty lead by Gene Adams, Bruce Shaw, Dewey Oxner, Bob Carpenter, Glenn Bowers, Carl Epps, Jim Hinchey, and Billy Gunn, the students were divided into three (3) working groups of nine (9) students each.

The students were on their feet for at least three (3) two hour sessions per day. Opening statements, closing arguments, direct and cross examining of both Lay and expert witnesses were the areas focused upon by the faculty. The students were video taped in their activities and the tapes were then critiqued by a mentor faculty consisting of Gene Adams, Frankie Marion, Ellis Johnston, Tim Bouch, Billy Gunn, Frank Gibbes, and Jim Hinchey. On the last afternoon, seven mock trials were held in which all participated. The simultaneous mock trials were held before the faculty judges which included Jim Alford, Ed Martin, and John Bell.

The response critiques returned by the students were uniformly enthusiastic. The students came early, worked late, and evidenced a great deal of improvement in their trial skills. Plans are being made for the Second Annual Trial Academy to be held next Summer. This is a tremendous opportunity for personalized, hands on instruction, over a concentrated three day period, for the young trial lawyer. While some program improvements undoubtedly can be made, the enthusiasm of both faculty and students were such that the program should continue into its second year. The attendance will be limited to keep the class size small and the personal attention at a high level. Suggestions such as an expanded mock

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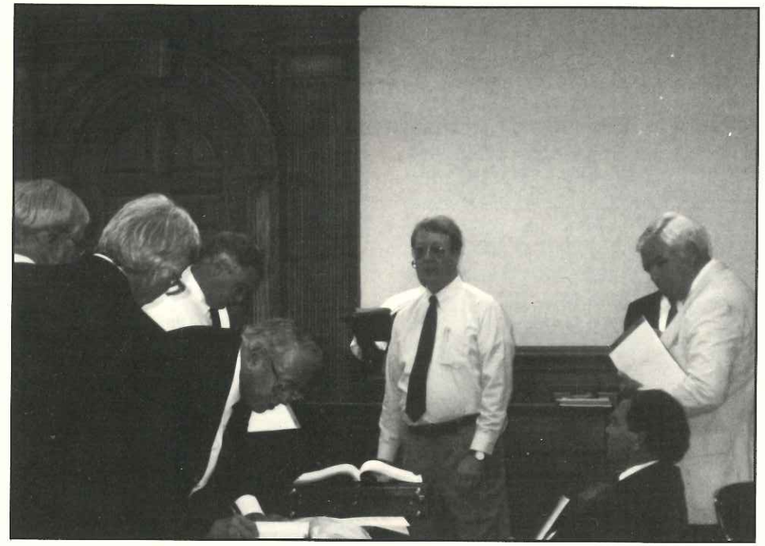
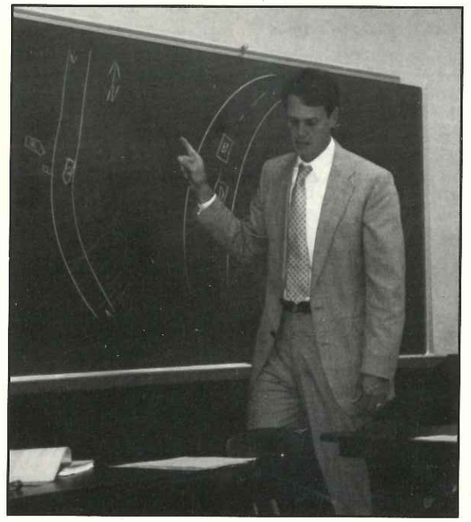


Hard at work at The Defense Trial Academy



Frances Marion testifies at The Defense Trial Academy

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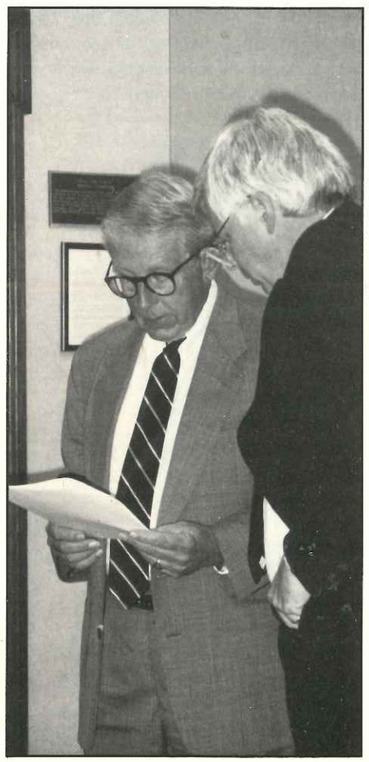
trial and a longer course using at least three full (vice 2-1/2 this year) were received and will be considered by next years Trial Academy Committee.

Grateful and heartfelt thanks to those faculty who devoted so much time and effort in making the program a success: Tim Bouch, Frankie Marion, Ellis Johnston, Jim Hinchey, Gene Adams, Billy Gunn, Frank Gibbes, Bruce Shaw, Bob Carpenter, Glenn Bowers, Carl Epps and Dewey Oxner. Thanks are also in order for the firms of Nelson, Mullins, Riley and Scarborough; Haynsworth, Marion, McKay & Guerard; Barnes, Alford, Stork & Laney; and Young, Clement, Rivers & Tisdale for the loan of video equipment and providing witness and jurors for the mock trials. The Academy could not have taken place without the gracious assistance of the University of South Carolina School of Law, its Dean, John Montgomery and his assistant, Ms. Pat Thomas.



Gambel's Impact On Excessive Punitive Damages

By D. Clay Robinson
Ronbinson, McFadden & Moore, P.C.

The last edition of The Defense Line included an article posing the question whether excessive punitive damage verdicts are unconstitutional. After the article was written, but prior to its publication, the South Carolina Supreme Court addressed a few of the deficiencies of South Carolina's punitive damage law raised by the article.

A. Gamble v. Stevenson

In Gamble v. Stevenson, et al. Op. No. 23424 (S.C. Sup. Ct. filed June 24, 1991) (Davis Adv. Sh. No. 16 at 32) the Court established certain criteria for post-verdict review of a punitive damage award by the trial court. Gamble involved allegations of negligence arising from the alleged failure of Southern Bell and a construction company to replace a stop sign which had been removed in the course of underground cable installation. Evidence showed the sign had been removed for approximately 18 days before its absence caused an automobile accident. The defendant driver crossclaimed against Southern Bell and the construction company. The jury awarded the defendant driver $5,000 actual and $87,500 punitive damages against Southern Bell. Southern Bell challenged the award on appeal contending that it violated due process and equal protection rights.

The Supreme Court utilized this opportunity to respond to Pacific Mutual Life Insurance Co. v. Haslip, 499 U.S. _____, 111 S.Ct. 1031, 113 L.Ed.2d 1 (1991). The instructions and significance of Haslip are outlined in the article published in the last edition. Although the Supreme Court in Haslip did not address the constitutionality of the punitive damage regimes in states other than Alabama, the observations by the majority in that opinion made patently clear that South Carolina's punitive damage regime was unconstitutionally deficient when tested by an excessive punitive damage award. In Gamble, the South Carolina Supreme Court implicitly recognized as much. Although the Supreme Court concluded that the punitive award in Gamble did not violate the due process guarantees of the Constitution, the Court established new post-trial procedures for scrutinizing punitive awards.

> Hereafter, to ensure that a punitive damage award is proper, the trial court shall conduct a post-trial review and may consider the following: (l) defendant's degree of culpability; (2) duration of the conduct; (3) defendant's awareness or concealment; (4) the existence of similar past conduct; (5) likelihood the award will deter the defendant or others from like conduct; (6) whether the award is reasonably related to the harm likely to result from such conduct; (7) defendant's ability to pay; and finally, (8) as noted in Haslip, other factors' deemed appropriate.
>
> Gamble at 38.

Lastly, using a double negative phrase, the Supreme Court recognized that an award should have some proportionate relationship to the severity of the offense, i.e. the actual damages. Id. p.38. This last requirement represents a departure from previous South Carolina law which held that there was no relationship between actual and punitive damages. Thompson v. Home Security Life Insurance Co., 271 S.C. 54, 244 S.E.2d 533 (1978).

With the benefit of its newly established procedure, the Supreme Court reviewed the punitive award in Gamble and concluded that it did not violate Southern Bell's due process rights. The court's analysis appeared to be limited to consideration of the nature of the wrongful conduct and the need to deter others from similar misconduct. The Court dismissed Southern Bell's contentions that the award violated equal protection rights on other grounds.

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B. Adequate Reform?

Despite the post-verdict review procedure established by Gamble, the opinion may not have gone far enough to pass constitutional muster. The Gamble post-trial procedure deviates from the Alabama procedure approved in Haslip in several ways which may or may not be material. Since Haslip involved the Court's review of only one state's procedure, a determination of which Haslip safeguards the United States Supreme Court considers essential to its approval cannot now be made.

Gamble fell short of adopting the following Alabama factors approved in Haslip. (1) profitability to the defendant from the wrongful conduct; (2) costs of litigation; (3) existence of criminal sanctions; (4) existence of other punitive awards for the same misconduct. Where applicable, defense counsel should argue that these and additional factors should still be considered under the final "catch-all" factor cited in Gamble.

An important distinction between South Carolina law after Gamble and the regime approved in Haslip continues to be that an award of punitive damages is compulsory in South Carolina where the jury finds wanton, willful or malicious misconduct. Broome v. Southeastern Highway Contracting, Inc., 291 S.C. 93, 352 S.E.2d 302 (Ct. App. 1986). To the contrary, the Haslip court seemed to stress that, under Alabama's regime, the jury's decision to award any punitive damages remained discretionary. 113 L.Ed.2d at 12, fn. 1 and at 21.

An area still unaddressed by the United States Supreme Court is whether punitive damages violate due process as a double recovery where, as in South Carolina, a punitive award serves a compensatory function. Gamble reaffirmed South Carolina law that punitive damages "serve 'as a vindication of private rights when it is proved that such have been wantonly, wilfully or maliciously violated." Gamble at 37. To the contrary, the United States Supreme Court in Haslip, expressly approved the jury charge under Alabama law that "the purpose of punitive damages ... [was] 'not to compensate the plaintiff for any injury." Haslip, 113 L.Ed.2d at 20.

Perhaps Gamble's most glaring constitutional weakness is the most controversial facet of most punitive damage regimes — the admissibility of the defendant's net worth or "financial position." Under Alabama law, evidence of the defendant's financial position is not conveyed to the jury. The Haslip court pointedly stressed this feature of Alabama law on two occasions. 113 L.Ed.2d at 12 and at 22.

Although the financial position of the defendant is a relevant consideration for the post-verdict review, its presence at the jury assessment stage is likely to result in "plaintiffs ... enjoy[ing] a windfall because they have the good fortune to have a defendant with a deep pocket." Haslip, 113 L.Ed.2d at 22. Rather than follow this Alabama principle, Gamble emphasizes the propriety of submitting financial information to the jury. Gamble p.38, fn.3.

Gamble also failed to extend to appellate courts the appropriate judicial review of punitive awards. Unlike Alabama's system, South Carolina appellate courts still adhere to a very limited appellate review of a punitive damage award. "Only when the trial court's discretion [as to the excessiveness of an award] is abused, amounting to an error of law, does it become the duty of this [appellate] court to set aside the award." Gamble at 39. This system presents the most lenient appellate review possible. The trial court is only instructed that it "may consider" the Gamble factors and its findings based on these factors may only be disturbed if they represent an abuse of discretion. This appellate review provides only slight improvement over the pre-Gamble law and falls short of the appellate review conducted by the Alabama appellate courts. See Haslip, 113 L.Ed.2d 21-22.

C. Future Reform

Defense counsel must continue to strive for reform of the law of punitive damages in this state. One strategy for such reform would be to pursue offering creative types of evidence which could be considered by the trial court in its post-verdict findings. Such evidence should be relevant to the Gamble factors, the Haslip factors not expressly adopted in Gamble, and "other factors deemed appropriate."

A logical extension of Haslip, would require that the jury be instructed to consider the factors, thereby allowing the jury to assess a constitutional punitive damage award. If, as Haslip and Gamble agree, the Constitution requires these factors be used to assess the appropriateness of a punitive damage award, the factors should be charged to the jury. Accordingly, defense counsel should consider submitting requests to charge which incorporate these and other appropriate factors.

Lastly, defense counsel should insist on the protection afforded by S.C. Code Ann. § 15-33-135 (Supp. 1990). Although often overlooked, this statute mandates that the plaintiff has the burden of proving his/her entitlement to punitive damages by clear and convincing evidence. Defense counsel must insist that this statute be adhered to in all cases involving causes of action arising or accruing after April 5, 1988, in which punitive damages are sought.

Conclusion

The post-verdict review of a punitive damage award established by Gamble v. Stevenson provides only limited relief from unconstitutionally excessive awards. Further definition of constitutional boundaries is necessary and was certainly anticipated by the Haslip court. Until those further principles are established, defense counsel should actively seek the procedural protection from an excessive punitive award provided by Haslip. Although that opinion can be narrowly viewed as the interpretation and application of one state's law, it seems more logical that the United States Supreme Court intended a broader message. Thus, Haslip may also be viewed as establishing a constitutional baseline affording due process in the award of punitive damages. Accordingly, proper affirmative defenses, objections, proffers of proof, requests to charge and other measures should be utilized by defense counsel to preserve questions for appellate review by our state and federal courts.

Getting A Removed Case Remanded To State Court -- It's Not As Easy As It Sounds!

By C. Mitchell Brown[1]
Nelson, Mullins, Riley & Scarborough

Suppose the following scenario occurs:

1. In a rural South Carolina County, a person allegedly slips and falls or is allegedly falsely arrested in a branch business establishment of a large Georgia company.

2. Local South Carolina counsel is hired to represent the plaintiff against the Georgia corporate defendant.

3. The plaintiff's damages are intangible — he complains of severe pain uncorroborated objectively from the alleged slip and fall, or he claims he suffered severe humiliation and emotional distress from the alleged false arrest.

4. Plaintiff's counsel, without thinking things through regarding jurisdiction, brings suit in state court for over $50,000 against the South Carolina branch business of the Georgia defendant.

5. The Georgia defendant timely removes the case to federal court in the hope of a more advantageous jury panel, and simultaneously files an Answer consisting of a general denial and other defenses.

6. Plaintiff's counsel now realizes his pleading error, and files a motion to amend his complaint to cap his client's damages to $50,000, while also filing a motion to remand the case back to state court.

Query: Will plaintiff's counsel's motions be granted?

At first glance, it would appear that the motions should and would be granted. After all, the plaintiff has forgone any opportunity to be awarded damages over $50,000. However, the likelihood is that the motion to amend the Complaint will be granted, but the motion to remand will not — the worst of all possibilities from the plaintiff's standpoint.

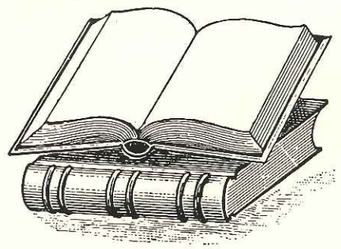
Once federal jurisdiction has attached, 28 U.S.C. §1447(c) permits a federal court to remand a case "removed improvidently and without jurisdiction." The scenario described above does not fall within the language of §1447(C). The United States Supreme Court has stated that, (even though) the plaintiff, after removal, by stipulation, by affidavit, or by amendment of his pleadings, reduces the claim below the requisite amount, this does not deprive the district court of jurisdiction. St. Paul Mercury Indemnity Co. v. Red Cab Co., 303 U.S. 283, 291-92, S8 S.Ct. 586, 591-92, 82 L.Ed. 845 (1938).

In light of the language of §1447(c) and the United States Supreme Court's pronouncement in St. Paul Mercury Indemnity Co., many federal courts have refused to remand cases to state court when plaintiffs have unilaterally attempted to alter the amount in controversy in an attempt to defeat diversity jurisdiction. See, e.g., Swafford v. Transit Casualty Co., 486 F. Supp. 175 (N.D. Ga. 1980) (plaintiff cannot, by deleting claim for punitive damages, divest federal court of jurisdiction once it has attached); Lewis v. Charles H. Bentz Associates, Inc., 601 F. Supp. 109 (E.D. Wis. 1985) (plaintiff cannot, by reducing prayer in complaint due to mitigation of damages, obtain remand of removed federal case); and Bellamy Explosives Co., Inc. v. Atlas Powder Co., 4S2 F. Supp. 6 (E.D. Tenn. 1978) (plaintiff cannot, by affidavit reducing amount in controversy, obtain remand of removed federal case).

Hence, a plaintiff in this scenario may find himself trapped in federal court with a claim limited to $50,000. If the plaintiff thinks it highly important to get his case back into state court, he may consider getting his case dismissed without prejudice, and then re-filing a complaint in state court for less than the jurisdictional amount required for removal.

This maneuver is not without risks. First, a voluntary nonsuit without prejudice has been held to "leave the situation as though no suit had been brought." Gulledge v. Young, 242 S.C. 287, 290, 130 S.E.2d 695, 696 (1963). Hence, if the statute of limitations has run before the plaintiff re-files his case in state court, his case will likely be time-barred. See, e.g., David v. Lunceford, 287 S.C. 242, 335, S.E.2d 798 (1985). Second, once a defendant has filed a motion for Summary Judgment or an Answer (and an Answer was filed in the above hypothetical), a plaintiff must obtain a court order to have his case dismissed without prejudice. See Rule 41(a)(2), Fed. R. Civ. Proc. Moreover, if the plaintiff, upon obtaining such a dismissal, then commences an action based on the same claim against the same defendant, the federal court may order the plaintiff to pay the defendant costs of the action previously dismissed. See Rule 41(d), Fed. R. Civ. Proc. In conclusion, once a case has been properly removed and defense counsel has filed an Answer, a plaintiff must overcome many hurdles to get his case back into state court, but such is, upon reflection, as it should be.

[1]C. Mitchell Brown is an associate with the law firm of Nelson, Mullins, Riley and Scarborough and former Law Clerk to South Carolina Supreme Court Justice Jean H. Toal. His primary practice is handling appeals.



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Three Aliens Visiting the World of Products Liability

F. Barron Grier, III

I. INTRODUCTION

Legislation has had an effect upon product liability litigation in this country for a long time. That which may come most quickly to mind is the Uniform Commercial Code. The purpose of this article is to explore three forms of consumer legislation of more recent origin which, although they may initially appear to have no direct impact upon product litigation, have been employed by members of the plaintiffs' bar in an attempt to better the lot of their clients.

In this article, three questions will be explored:

1. Does the Consumer Products Safety Act requirement that a manufacturer or seller report defects create a private cause of action for the failure to do so?
2. When a cause of action is alleged generically against a product, does the Magnuson-Moss Act have any application or create a Federal cause of action for personal injury claims?
3. Whether a state's Unfair Trade Practice Acts can be applied in a products liability setting involving personal injuries?

II. THE CONSUMER PRODUCT SAFETY ACT

In recent cases, plaintiffs have attempted to bring civil causes of action against product manufacturers by alleging violation of the Consumer Products Safety Act (CPSA),[1] and the regulations promulgated thereunder. They claimed that failure to comply with the reporting regulations created an independent, separate civil cause of action. Defense attorneys usually resist these claims by moving to dismiss on the ground that the claim fails to state a cause of action for which relief can be granted.[2] There has been an interesting development in this area of the law. A regulation issued pursuant to the Act specifically requires disclosure.[3] Although the Consumer Product Safety Act authorizes a private party injured by a *knowing* violation of a Consumer Products Safety Rule to bring an action against the manufacturer,[4] it does not contemplate a private cause of action for violation of the reporting rules. Rather, it is the defense position that the Act was intended to authorize standing only to plaintiffs injured by violation of a substantive consumer products safety rule relating to a specific product.[5] The interesting development in this area is that federal district courts continue to rule that the failure to report does in fact create an independent civil cause of action, whereas several federal circuit courts of appeal, which have addressed the issue, have ruled otherwise. For example, in *Drake v. Honeywell, Inc.*,[6] the plaintiff contended that the failure of the manufacturer to report purported defects to the Consumer Product Safety Commission (CPSC) authorized a private action under the Act. The court, however, held that the reporting requirements of the regulations promulgated in furtherance of the Act[7] were only interpretive rules which do not have the binding effect of law and, therefore, could not give rise to a legally recognizable right.[8] This same rationale was followed by the First and Seventh Circuits.[9] Both cases held there was no private cause of action for failure to report under the reporting regulations promulgated by the CPSC.

> The *Drake* court succinctly stated: We believe that neither the structure of the Act, its relationship to well settled principles of administrative law, its legislative history, nor its practical consequences, demonstrates that Congress intended a private cause of action to arise based on an injury resulting from non-compliance with the product hazard reporting rules issued by the Commission.[10]

In other words, it appears that there should not be a private cause of action as there is no statutory authorization for a private cause of action for violation of the CPSA itself. Section 2072 of the Act authorizes the private action only for a purported violation of a Consumer Products Safety Rule.[11] Of course, this is not to say that the CPSC lacks authority. As a matter of fact, the regulations specifically provide manufacturers with the items which must be reported,[12] the time within which the reports must be filed,[13] and the addresses at which to file such report.[14] In the event a manufacturer fails to comply with these requirements, the CPSC is authorized to seek civil penalties,[15] as well as criminal penalties including imprisonment.[16] Thus, the CPSC has ample resources at its disposal to enforce compliance with the reporting requirements of the Act.[17] Moreover, it appears on the face of the rule itself that it was not contemplated to serve as a basis for a private cause of action. For example, one regulation defines the purported defects which must be reported to the CPSC:

> On a case by case basis the Commission and the staff will determine whether a defect within the meaning of Section 15 of the CPSA [15 U.S.C. Section 2064] does, in fact, exist and whether that defect presents a substantial product hazard...*Defect as discussed in this section and as used by the Commission and staff, pertains only to interpreting and enforcing the Consumer Products Safety Act.* The criteria and discussion in this section are not intended to apply to any other area of the law.[18]

Permitting a private cause of action based upon purported violation of these rules would also result in a maze of confusion and speculation which was clearly not intended by Congress when enacting Section 2072. As aptly reasoned by Judge Warringer in *Morris v. Coleco Industries*:[19]

> Specific provisions dealing with a failure to report are contained in the

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act. *Sections 2069 and 2070 provides civil and criminal penalties as a means for enforcing the disclosure requirements of Section 2064.* Further, the requirement to disclose is not a requirement based upon a rule or order of the Commission. It is a requirement predicated upon the statute itself. Further, *it appears illogical to me that Congress would have supposed that a failure to disclose a mishap to the Commission might proximately cause an injury.* Finally, such an interpretation of the act for all practical purposes, constitute District Courts as special tribunals for the trial of products liability cases in the consumer field. Nothing I have read leads me to believe Congress intended such a sweeping change in the relative functions of state and federal courts. *I hold no private claim exists for a failure to disclosed under Section 2064.*[20]

As stated, plaintiffs rely on district court cases which have held the exact opposite of the circuit courts of appeal. The district courts have held that the Act authorizes a private cause of action for violation of the reporting requirements.[21] *Butcher v. Robertshaw Controls Co.*[22] sets forth a good example of the plaintiff's argument. The district court began its analysis by quoting an interpretation of provisions of the Consumer Products Safety Act by the Supreme Court:

We begin with the familiar cannon of statutory construction that the starting point for interpreting a statute is the language of the statute itself. Absent a clearly expressed legislative intention to the contrary, that language must ordinarily be regarded as conclusive.[23]

The *Butcher* court then observed that the plain language of Section 2072 belied any Congressional intent to limit the private right of action. It also noted that the remedial safety legislation should be broadly construed to effectuate its purpose and that it did not wish to create a loophole which "might work to the injury of public protection through a technical construction."[24] Additionally, a well respected treatise addressing itself to the issues states:

It has been said that a contention that a violation of the disclosure rule does not entitle a consumer-plaintiff to maintain a private action to recover damages from injuries flies in the face of the statutes unambiguous language. The fact that the CPSC rule that the manufacturer allegedly violated is only an interpretive guideline and not a substantive rule does not mean that a private civil action alleging violations of the same is foreclosed by the plain language of the statute granting a private right of action to plaintiffs. It has also been said that an argument claiming that, since the failure to disclose information is a single prohibited act within the meaning of the statute, and the commission can seek civil penalties for such a failure to act, Congress must have intended to preclude any private remedy for a manufacturers having failed to disclose, begs the question whether the act was intended to provide a private cause of action and ignores the express language of the statute.[25]

As one can tell, the issue is far from finally decided, although the weight of authority, meaning the circuit courts of appeal, have ruled that it does not create a private cause of action. At least one treatise on products liability, as well as all but one of the district courts that have decided the issue, have found that it does create a private cause of action. Before the issue can be finally decided, every defense attorney should be aware of this potential claim and be prepared to fight to have it dismissed. If this cause of action is allowed, it would then allow all of the statistics from other claims to be brought into evidence, which would have a devastating effect on the particular lawsuit that is being tried. This is particularly true if there is a product that has received a great deal of notoriety in the press. If the court should deny the motion for summary judgement or to dismiss for failure to state a cause of action, defense attorneys should immediately request the court to certify the issue to the court of appeals for clarification.

III.

THE MAGNUSON-MOSS ACT

Another tactic of a plaintiff in a products liability action is to bring a cause of action alleging violations of the Magnuson-Moss Warranty Act[26] and to seek damages, costs and *attorneys' fees.*[27] Specifically, the Act provides as follows:

Subject to subsections (a)(3) and (e) of this section, a consumer who is damaged by the failure of a supplier, warrantor, or service contractor to comply with any obligation under this chapter, or under a written warranty, implied warranty, or service contract, may bring suit for damages and other legal and equitable relief— (A) In any court of competent jurisdiction in any State or the District of Columbia; or (B) in an appropriate district court of the United States, subject to paragraph (3) of this subsection.[28]

Plaintiffs will argue, therefore, that since the typical product suit alleges breach of express and implied warranties, they are entitled to bring this action under the Act and, to recover the statutory award of attorneys' fees and costs as well. Likewise, it will be argued that the plaintiff fits the definition of a "consumer" as set forth in the Act.[29] Clearly, plaintiffs try to fit within the definitions and ambit of the statute, in order to attempt to collect attorneys fees. There is support for this position. In *Skelton v General Motors Corporation,*[30] the court held that Congress, by enacting this Act, intended to create a federal private cause of action for consumers injured by violation of any of its obligations.

The attack that can be made by the defense, in cases involving alleged defective design, is that the plaintiff is alleging that the entire product line is defective. For example, all three-wheelers, and not that any one particular product was defective. The Magnuson-Moss Act, commonly referred to as the "lemon law," was enacted for the purpose of giving consumers a practical redress when they have purchased a consumer item that does not conform with industry standards for *that particular item.* The Act requires that the seller be given the opportunity to cure any defects. This, of course, is rarely if ever done in the product liability litigation context.

The South Carolina Court of Appeals considered the application of the

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Act and stated "under Section 231 0(e) of the Magnuson-Moss Act, no private action for breach of implied warranty may be brought unless the warrantor is given an opportunity to cure the nonconformity." [31] Naturally the plaintiff is not contending, in the usual situation, a nonconformity and, therefore, there will be no demand by the purchaser or consumer that the manufacturer cure the nonconformity. On this ground alone, the Magnuson-Moss Act would not apply to the general factual situation which we are addressing.

Additionally, and of equal importance, is the fact that the Magnuson Moss Warranty Act was not intended to create a federal cause of action for personal injury claims which are otherwise covered by state breach of warranty law.[32] The leading case in this area, is *Gorman v. Saf-t-Mate, Inc.*[33] *Inc.*[33] This case holds that the Magnuson-Moss Warranty Act provisions authorizing a private cause of action generally do not include damage claims for personal injury. The court points out that the personal injury plaintiff seeking to state a claim for which relief can be granted, must allege special jurisdictional facts and that the plaintiff must first allege and prove that the defendants sold or supplied consumer products in violation of the Act's provisions concerning form and contents of the warranty. The court stated:

[I]f such personal injury claims were cognizable under the Act, numerous products liability actions, which historically have been confined largely to the state courts could be brought in federal courts regardless of the locus or citizenship of the party. This would be a major expansion of the jurisdiction of the federal district court.[34]

Since the plaintiff has pled personal injury and has brought suit under strict liability and for breach of warranties under the Uniform Commercial Code, it can be argued that the Magnuson-Moss Act would be inapposite to that approach. The Gorman court noted: "in sum, the apparent legislative purpose of Section 2310(d) is to provide a mechanism for consumer actions involving direct damages; it was not designed to reach personal injury claims."[35]

Since it will appear in the usual factual situation that the plaintiff is not contending that a particular product was a "lemon" and needed to be cured, but rather that it was one of a defectively designed product line, it should be the defendant's position that the plaintiff cannot maintain a cause of action for personal injury thus caused under the Magnuson-Moss Warranty Act.

IV.

STATE UNFAIR TRADE PRACTICE ACTS

Unfair Trade Practice Acts (U.T.P.A.), adopted virtually by every state, have evolved their own rules and regulations as to when they apply. Only Texas appears to have applied its U.T.P.A. in a products liability action involving personal injury.[36] South Carolina, on the other hand, like many states, has broadly interpreted exemptions from regulated industries taking product cases out of any possible coverage of the U.T.P.A. Typical is the recent case of *Scott v Mid Carolina Homes, Inc.*,[37] in which the court held that the sale of a mobile home would not be governed by the U.T.P.A., because mobile homes sales are governed by other agencies. Likewise, *Anderson v Citizen's Bank*[38] held that banking practices are governed by the State Board of Financial Institutions and thus not covered under U.T.P.A. In many states, it has been held that the sale of securities is not covered under the U.T.P.A.[39]

Occasionally, there may be a close question when there is some regulation by an independent agency, but not the degree of regulation that would encompass regulating unfair competition. In *Bocook Outdoor Media, Inc. v Summey OutdoorAdvertising,*[40] the court held that the outdoor advertising industry was not exempt from the U.T.P.A., even though it was to some extent regulated by the highway department. This was because highway regulations only related to the size and locations of the ad vertising signs for safety purposes and did not regulate the industry for unfair competition between the advertisers. Clearly, this case is distinguishable from the usual products liability situation.

Typically, the plaintiff will allege violations of the U.T.P.A. because of false and misleading advertising concerning the safety of the product in question. If advertising is relevant, arguably the Federal Trade Commission would have authority, as it regulates false or misleading advertising.[41] Clearly, if an independent agency has the power to deny, revoke or suspend a defendant's license or its ability to do business in a jurisdiction, this would preclude the application of the U.T.P.A. It could also be argued that if advertising played any role in the particular case at issue, that advertising would be on a national level affecting interstate commerce and would be subject to regulation under the Federal Trade Commission Act. For example, Section 39-5-40(d) of the South Carolina Code exempts from coverage by the U.T.P.A. practices that are subject to and comply with statutes administered by the Federal Trade Commission.[42] It can be argued therefore that such an exemption would generally be applicable.

It is highly unlikely that state Unfair Trade Practices Acts have any application to products liability actions for personal injury. They were never intended as a substitute for or adjunct to common law causes of action. Even if the opposite were true, however, it is inescapable that, in most cases, such an Act does not apply to industries that are otherwise regulated by governmental agencies. Therefore, for the foregoing reasons, the defense should always move to strike the application of a U.P.T.A. for any products liability action involving personal injury.

CONCLUSION

The three aliens to the world of products liability actions may, in fact, be frequent visitors in the future. It is my sincere hope that the foregoing discussion and the cases cited will be of benefit to our members who are faced with these issues in the future.

[1] 15 U.S.C. +s +s 2051, *et. seq.* (1988).
[2] The motion to dismiss is made by the defense pursuant to Fed. R. Civ. P. +s 12(b)(6).
[3] 16 C.F.R. +s 1115 (1990).
[4] 15 U.S.C. +s 2072 (1988).
[5] Kahn v. Sears Roebuck & Co., 607 F.Supp 957 (N.D. GA. 1985).
[6] 797 F.2d 603 (8th Cir. 1986).
[7] *See supra* note 3.
[8] *Drake,* 797 F.2d at 609.
[9] Benitez-Allende v. Alcan Aluminio Do Brasil, S.A., 857 F.2d 26 (Ist Cir. 1988); Zepikv. Tidewater Midwest, Inc., 856 F.2d 936 (7th Cir. 1988).
[10] *Drake,* 797 F.2d at 611.
[11] *Id* at 606.
[12] 16 C.F.R. +s 1115.12 (1990).
[13] 16 C.F.R. +s 1115.14 (1990).

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[14]16 C.F.R. +s 1115.13 (1990).
[15]15 U.S.C. +s 2069 (1988).
[16] U.S.C- +s 2070 (1988)
[17] U S.C. +s 2064 (1988)
[18]16 C.F.R. +s 1115.4 (1990) (emphasis added).
[19]587 F.Supp. 8 (E.D. Va. 1984).
[20] *Id.* at 9 (emphasis added).
[21] *Id* (Emphasis added). *See* Butcher v. Robertshaw Controls Co., 550 F.Supp. 692 (D.C. Md. 1981); Young v. Robertshaw Controls Co., 560 F.Supp. 288 (N.D. N.Y. 1983); Payne v. A.O. Smith Corporation, 578 F.Supp. 733, 627 F.Supp. 226 (S.D. Ohio 1983); Wilson v. Robertshaw Controls Co., 600 F.Supp. 671 (N.D. Ind. 1985); Swenson v. Emerson Electric Company, 374 N.W.2d 690 (Minn. 1985).
[22]550 F.Supp. 692 (D.C. Md. 1981).
[23] *Consumer Products Safety Commission GTE Sylvania, Inc.,* 447 U.S. 102, 108 (1980).
[24] *Butcher, 550* F.Supp. at 699 (citing Kordel v. United States, 335 U.S. 345 (1948) and United States v. Anaconda Company, 445 F.Supp. 486, 494 (D. D.C. 1977)).
[25]4 AMERICAN LAW OF PRODUCTS LIABILITY +s 63:3 (3rd ed 1975).
[26] *See 15* U.S.C. +s +s 2301, *et. seq* (1988).
[27]Attorney's fees may be recovered pursuant to 15 U.S.C. +s 2310(d)(1988).
[28]15 U S C. +s 2310 (d)(1988)
[29]15 U.S.C. +s 2301(3)(1988).
[30]660 F.2d 311 (7th Cir. 1981).
[31]Mockabee v. Wakefield Buick, Inc., 298 S.C. 386, 380 S.E.2d 848 (Ct. App. 1989).
[32]Bush v. American Motors Sales Corporation, 575 F.Supp. 1581 (D.C. Col. 1984); Washington v. Otasco, 603 F.Supp. 1295 (D.C. Miss. 1985); Cowan v. Enederle Laboratories, 604 F.Supp. 438 (D.C. Kansas 1985); Shomber v. Jewel Companies, Inc., 614 F.Supp. 210 (N.D. 111. 1985).
[33]513 F.Supp. 1028 (N.D. Ind. 1981).
[34] *Id.* at 1030.
[35] *1d* at 1033.
[36] *See* Keller Industries v. Reeves, 656 S.W.2d 221 (Tex. App. 1983).
[37]359 S.E.2d 291 (S.C. App. 1987).
[38]365 S.E.2d 26 (S.C. App. 1987).
[39] *See* e.g., State Ex rel McLeod v. Rhodes, 267 S.E.2d 539 (S.C. 1980).
[40]363 S.E.2d 390 (S.C. App. 1987).
[41]15 U.S.C. + s 45 (1970). *See* Giant Food, Inc. v. Federal Trade Commission, 322 F.2d 977 (D.C. Cir. 1963).
[42]S.C. CODE ANN. +s39-5-40(d) (1976).

Representing The Underinsurance Carrier: An Overview

By E. Glenn Elliott
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Because of inflation, the ever increasing cost of medical care, the gradual rise in average jury verdicts and fact that "minimum limits" in South Carolina still means $15,000/$30,000; placing an underinsurance carrier on notice of a claim or case has become the rule instead of the exception. This article is offered as a basic outline of the role of underinsurance counsel in a typical automobile accident case.

Section 38-77-160 Code of Laws of South Carolina (1976, as amended) states, in pertinent part

> In the event the automobile insurance insurer (sic) for the putative at-fault insured chooses to settle in part the claims against its insured, the underinsured motorist insurer may assume control of the defense of (the) action for its own benefit.

This sentence was part of the second paragraph added to the underinsurance statute by the 1989 amendment. At first blush, the sentence would seem to be self-explanatory. In practice, however, the sentence can be difficult to properly implement and can raise a number of ethical considerations.

The usual scenario which brings the above-quoted sentence of Section 38-77-160 into play is all too familiar. An underinsurance carrier is served with copies of a Summons and a Complaint, placing it on notice of the potential/probable underinsurance claim. The insured has filed suit and you have been asked to monitor the case and provide the underinsurance carrier with reports on the developments in the case and with your evaluation and recommendations.

The first step? File a Notice of Appearance with the Clerk of Court and serve it upon all counsel of record. The Notice of Appearance should clearly state: 1) you and your law firm are making an appearance on behalf of the underinsurance carrier pursuant to Section 38-77-160; 2) you and your law firm do not represent the defendant(s) and you will not undertake that representation; and, 3) you are specifically reserving the option to assume control of the defense of the case in the name of the defendant(s) pursuant to the underinsurance statute should the carrier choose to exercise that option.

The Notice of Appearance should be filed for several reasons. First, it advises the court and counsel of your appearance in the case. Second, it clearly defines your role in the case as counsel for the underinsurance carrier. Third, it serves as the carrier's good faith efforts in monitoring and evaluating the potential underinsurance claim.

Unless it assumes control of the defense of the case, the underinsurance carrier is dependent upon the good nature of the Plaintiff's lawyer and the skill of the lawyer representing the liability carrier for information concerning the case. All counsel of record should be asked, in writing, to provide you with copies of all discovery requests, all discovery responses and to provide you with notice of all depositions. Because it will further his goals, the plaintiff's lawyer will probably make certain that you have all the basic information on liability and damages. Because you have no right or authority to initiate discovery, however, you may have to take at face value whatever information the plaintiff chooses to make available. On the other hand, the lawyer for the liability carrier will probably be accommodating in this regard and may even be willing to work with you in framing and implementing discovery. This courtesy should not be abused, however, as no lawyer likes another lawyer constantly peering over his shoulder or criticizing his work.

As early in the case as possible, you should attempt to provide the

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underinsurance carrier with a complete evaluation and analysis of the case and, if the liability carrier has tendered or paid its limits, make a recommendation as to whether or not the under-insurance carrier should assume control of the defense of the case. While some carriers are hesitant to voluntarily take on the expense of defending a case, there is much to be said for having control of one's own destiny. This is especially true if you are faced with a lawyer who is telling you that the liability carrier has instructed him not to incur more expense by initiating discovery because its limits have been tendered or paid (which presents ethical questions beyond the scope of this article).

When given the option, you should usually recommend that the underinsurance carrier assume control of the defense of the case. If the underinsurance carrier chooses not to defend the case, unless you are dealing with an especially accommodating lawyer for the liability carrier the underinsurance carrier will have no control or input into any discovery to be done, jury selection, trial of the case, etc. In that situation, underinsurance counsel virtually sits on the sidelines and can do little but observe the trial and call the underinsurance carrier to advise of unfortunate developments or the jury's verdict. That decision should also be made as soon as possible. A circuit judge is much less likely to give an underinsurance carrier a continuance to complete discovery if the decision to defend the case was made late in the game.

Because the second paragraph of Section 3877-160 is relatively new, neither the South Carolina Supreme Court or the Court of Appeals has had the opportunity or the need to examine the mechanics of how an underinsured carrier should assume control of the defense of the case. The prudent lawyer, however, will insure that his role as counsel for the underinsurance carrier is defined and understood by everyone involved.

Although you represent the underinsurance carrier, when you take control of the defense of the case you do so in the name of the defendant(s). You will therefore want to make it clear that no contractual or ethical duties flowing from you to the defendant(s) arise or are implied in the process. (By the same token, the lawyer for the liability carrier should not appear to be abandoning his contractual and ethical duties to the defendant(s). This situation is best handled by way of a Consent Order. The Order should be signed by you as underinsurance counsel, for the liability carrier and by the defendant(s) whose liability coverage has been tendered or paid. After the usual introductory remarks and factual background, the Consent Order should include language similar to the following:

> Court and counsel are mindful that although the liability carrier has offered to pay to the plaintiff its available liability policy limits that the liability carrier still owes its insured a full and complete defense of this action. Pursuant to Section 38-77-160, however, "the underinsured motorist insurer may assume control of the defense of (the) action for its own benefit." Unfortunately, this quoted portion of the statute and its potential effects upon the insureds, insurers or defense counsel has yet to be interpreted by an appellate court of this State. For that reason, the liability carrier, the underinsured motorist carrier and their respective attorneys are desirous of defining their various roles in their attempt to exercise their rights and duties under the statute while also keeping in mind their respective rights and duties, both contractual and ethical, to the insureds. For the protection of all interested parties, counsel requests that this function be accomplished by use of a Court Order. In the interest of justice to all parties, the court deems this to be reasonable request.

Moreover, the court acknowledges that the defendant, the Defendant's personal attorney, counsel for the Defendant and the liability carrier all agree to this proposition as is evidenced by the consenting signatures set forth below.

DUE TO THE FOREGOING, IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that:

1. (Underinsurance counsel) and the law firm of_____ shall be listed as co-counsel of record for the defendant in this matter for the purposes of protecting the interests of the underinsured motorist carrier;
2. (Liability counsel) and the law firm of_____ shall remain as counsel of record for the defendant in this matter;
3. (Underinsurance counsel) and the law firm of_____ shall have the right to fully initiate, respond to or participate in any and all phases of this case, including discovery, trial, etc.;
4. No action taken pursuant to the terms of this Order by (Underinsurance counsel), the law firm of _____or the underinsured motorist carrier shall in any way be construed as creating any type of contractual or ethical duty flowing from (Underinsurance counsel), the law firm of and/or the underinsured motorist carrier to (Defendant(s)) or to the liability carrier;
5. The parties to the above-captioned case, counsel for the parties to the above-captioned case and all witnesses of the parties in this matter shall in no way refer to, interrogate regarding, comment on or in any way suggest to the jury the existence of this Order or the terms contained therein and this document shall not be admissible as evidence in the trial of this case.

Section 39-77-160 states that the underinsurance carrier may assume control of the defense of the case "for its own benefit".

If you have included that language in your Notice of Appearance (as suggested above) and have used a Consent Order signed by the defendant(s) containing the suggested provisions, you, your firm and the underinsurance carrier should be insulated from any later complaints by a defendant who is less that pleased with a settlement or with the result of a trial. If the exposure to the defendant(s) is sufficiently severe to

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justify the liability carrier's payment of its limits and for you to take over the defense of the case, odds are that if the case is tried a large jury verdict will result. When the defendant(s) comes to the realization the judgement will be of public record and may hang over his head for ten years, the defendant(s) may begin looking for someone to blame. When the defendant(s) comes to the further understanding that even though you have assumed the defense of his case the insurance coverage you are trying to protect will not serve to lessen the amount of the judgement (See Estate of Rattenni v. Grainger, 298 S.C. 276, 379 S.E.2d 890(1989)), the defendant(s) may feel betrayed. The next thing you know, you have received a notice from the Grievance Committee. For those reasons, these seemingly esoteric precautions will certainly be worth the effort if that situation ever arises.

Once underinsurance counsel has assumed control of the defense, the case should proceed through discovery and trial as usual. The only exception would be if the plaintiff has given a putative at-fault party a Covenant Not to Execute in exchange for the tender or payment of the liability insurance proceeds and if the case proceeds to trial against that party and at lease one additional defendant. If that scenario occurs, odds are that the lawyer for the nonpaying defendant will move to introduce the Covenant Not to Execute into evidence at the trial of the case. Absent some unforeseen circumstance, such a motion should be successful. See Poston by Poston v. Barnes, 294 S.C. 261, 363 S.E. 2d 888(1987). Underinsurance counsel should insist, however, that any reference or inference to insurance proceeds or to an insurance company contained in the Covenant Not to Execute be deleted. Although Poston allows for the admission of such a document into evidence the case in no way challenges the well-settled rule that the mention of a defendant's insurance coverage is grounds for a mistrial. If no objection is made, the door may have been opened for further insurance inquiry. Additionally, once the insurance seed has been planted, the astute juror will realize that additional insurance coverage must be available or the trial would not be taking place.

At the conclusion of the case, underinsurance counsel should advise liability counsel in writing that it is liability counsel's responsibility to procure an Order or Stipulation of Dismissal (if the case is settled) or a Satisfaction of Judgment (if the case goes to judgment). Those documents would be unnecessary to the underinsurance carrier as it will be protected by either a policy release or a receipt for monies paid responding to a judgment. And while your signature will probably be necessary on any Order or Stipulation, having liability counsel perform this task would satisfy his contractual and ethical obligations to the defendant(s).

It is easy to understand how relations between the lawyers for the liability and underinsurance carriers can sometimes become strained. The liability lawyer usually has instructions to do only what is absolutely necessary to defend the case while the underinsurance carrier continues to request more and more information or activity, but is unwilling to take on the expense of actually defending the case. As with all aspects of our profession, the relationship between liability and underinsurance counsel should be governed by courtesy and professionalism. If for no other reason, lawyers in that situation should remember that principle because one day, inevitably, their rolls will be reversed.

SOUTH CAROLINA DEFENSE TRIAL ATTORNEYS' ASSOCIATION ANNUAL MEETING, NOVEMBER 7-10, 1991 THE CLOISTER, SEA ISLAND, GEORGIA AGENDA

THURSDAY, NOVEMBER 7

3:00 to 5:00 p.m.	Executive Committee Meeting
4:00 to 6:30 p.m.	Registration
5:00 to 6:00 p.m.	Nominating Committee Meeting
6:30 to 7:00 p.m.	Reception for First Time Attendees
7:00 to 8:00 p.m.	Welcome Reception and Recognition of Trial Academy Faculty and Participants Dinner on Your Own

FRIDAY, NOVEMBER 8

8:00 a.m. to 12 noon	Late Registration
8:00 to 9:00 a.m.	Coffee Service
8:30 to 8:45 a.m.	Welcome and Announcements
8:45 to 9:45 a.m.	Psychological Diagnosis: Separating Fact from Fiction Robert Sabalis, Ph.D.
9:45 to 10:00 a.m.	Coffee Break
10:00 to 11:15 a.m.	Mock Cross Examination of a Psychologist in the "Case of the Redneck Nightmare" Robert Deysach, Ph.D. and selected defense attorneys
11:15 to 12 noon	State Court Judges Panel—Effective Cross Examination Techniques
10:00 to 11:30 a.m.	Spouses' Program: Flaming Dessert Demonstration
12:10 p.m.	Golf Tournament
1:00 p.m.	Fishing Trip
2:00 p.m.	Tennis Tournament Dinner on Your Own
9:00 p.m. to 1:00 a.m.	Entertainment by the One Man Band, Rudy Blue Shoes (Open Bar)

SATURDAY, NOVEMBER 9

8:00 to 9:00 a.m.	Coffee Service
8:30 to 9:00 a.m.	SCDTAA Annual Business Meeting
9:00 to 10:15 a.m.	Ethics in Litigation Practice The Honorable Jean H. Toal, SC Supreme Court
10:15 to 10:30 a.m.	Coffee Break
10:30 to 11:30 a.m.	Practical Considerations in Representing Your Clients The Honorable Karen L. Henderson, US Court of Appeals, District of Columbia
11:30 a.m. to 12:15 p.m.	The Biden Bill: Making Federal Litigation More Efficient Panel of Federal Judges led by the Honorable David Norton and The Honorable Joe Anderson
10:15 a.m. to 12:15 p.m.	Workers Compensation Breakout The Impact of the Americans with Disabilities Act The Honorable Virginia L. Crocker Afternoon Free for Recreation Dinner on Your Own
9:00 p.m. to 1:00 a.m.	Dance to the Music of the Embers (Black Tie Requested) (Open Bar)

SUNDAY, NOVEMBER 10

10:30 a.m. to 12 noon	Farewell Reception

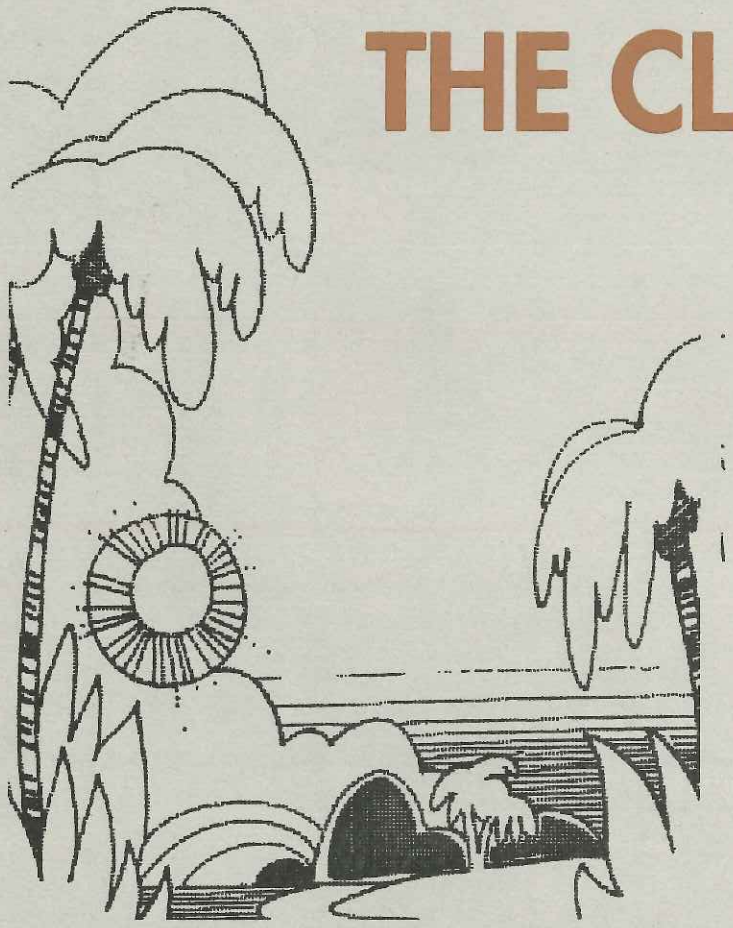
SOUTH CAROLINA
DEFENSE TRIAL ATTORNEYS' ASSOCIATION
3008 MILLWOOD AVENUE, COLUMBIA, SC 29205

ADDRESS CORRECTION REQUESTED

SOUTH CAROLINA DEFENSE TRIAL ATTORNEYS' ASSOCIATION

ANNUAL MEETING

THE CLOISTER



SEA ISLAND, GEORGIA

NOVEMBER 7-10, 1991

DON'T MISS IT!