SOUTH CAROLINA DEFENSE TRIAL ATTORNEYS' ASSOCIATION

THE DefenseLINE

http://www.scdtaa.com

Let's Roll!

by G. Mark Phillips, SCDTAA President

I am delighted to be leading the charge for the SCDTAA in '06. The enthusiasm among the members of the Executive Committee is both welcome and exhilarating. Each Board member will head up or co-chair an important task for the coming year. Assignments for the year were made and discussed with each of the Executive Committee members during our first Board meeting of December 9, 2005.

Pinehurst

The SCDTAA members and the state and federal judges from South Carolina enjoyed a most pleasant surprise at Pinehurst in early November of 2005. The accommodations at Pinehurst Resort, which was newly renovated for the U.S. Open in June of 2005, were spectacular. The SCDTAA and the South Carolina judiciary had not been to Pinehurst in roughly twenty years. The staff there was therefore most attentive to us, all in the sure hope of having the SCDTAA come back in the next few years. We had more judges than ever before at the November, 2005 meeting. The judge : lawyer ratio was the highest on record. The golf was spectacular. All of us non-golfers went on a quail hunt during the afternoon of Friday, November 4. Everyone had much fun, the fellowship was wonderful, and we managed to harvest a few birds.

The weekend was capped off with the award, to Past President Bill Davies, of SCDTAA's most coveted Hemphill Award. We all congratulate Bill on this wonderful honor-of-a-lifetime.

2006 Plans

The Executive Committee will take its annual retreat during the weekend of January 21. We will be staying at the Ritz Carlton Resort at Reynolds Plantation on Lake Oconee in Eatonton, Georgia. Donna Givens, who is slated to become the SCDTAA President in 2008, is considering whether to take the SCDTAA to this Ritz Carlton Resort for the Annual Meeting for that year. Elbert Dorn, who will lead the SCDTAA in 2007, is meanwhile considering another trip to Pinehurst for that year's Annual Meeting.

During the Board retreat, we will chart an agenda for the year and will work on the development of plans to execute that agenda.

One of the big changes that you will see, beginning with the next issue of *The Defense Line*, will be some changes to our association's main publication. Gray Culbreath and Wendy Keefer, both very talented folks, will head up this effort. We plan to feature both judges and clients, along with substantive legal articles, in each issue. I hope that you are pleased.

Stalwart Board members David Rheney, Ron Wray, and Curtis Ott will be heading up the Summer meeting at Grove Park Inn. These folks will work closely with sponsorship chairs Bill Besley and Catherine Templeton to put on a great show. Long-time Board member Glenn Elliott and former Trial Academy committeeman William Brown will meanwhile be working to put on a first rate Trial Academy for our younger, aspiring defense trial attorneys. Glenn and William are already working with the Judiciary and the respective Clerks of Court for a three-day, intense trial school in Columbia.

Our aim this year is truly to provide all SCDTAA attorneys with some real bang for their buck. We want to be as relevant for Nancy Sadler of Beaufort, Clark McCants of Aiken, and Mike Smith of Conway as we are for the folks at Sinkler Boyd, Turner Padget and the (many, many) lawyers at my own firm. We certainly realize that we compete for both your time and your CLE dollar with several excellent organizations like IADC, DRI, and FDCC. Mitch Griffith and Hugh Buyck are heading up that initiative.

We hope to make this year's meetings attractive for both judges and clients. The Amicus Curiae Committee is already considering whether to brief a novel issue and Legislative Affairs Specialist Jeff Thordahl of MG&C Consulting Services can always be contacted regarding pending legislation. Finally, we plan to host several judicial receptions, around the state, this year.

Get Plugged In

You should now have received my letter which requests your participation on an SCDTAA committee and which asks for your response to an SCDTAA survey. Please do get active in the organization by participating on a committee in 2006. We would love to have everyone's insights and help.

All Oceanfront Rooms

Begin planning now for the Annual Meeting during the weekend of November 9. We will be staying on Amelia Island Plantation, where all rooms are oceanfront. Matt Henrikson, Molly Craig, and Sterling Davies are already working up an excellent program. This should be a truly special weekend. Do plan to join us.

Letter From The Editors

by Gray T. Culbreath & Wendy J. Keefer

When we were asked by Mark Phillips to take over *The Defense Line* for the coming year, his charge to us was simple - make the magazine more relevant and worthwhile to the membership. Since then, we have been working with Aimee Hiers, our executive director, to come up with ways to make *The Defense Line* a more valuable publication in all of our day-to-day legal practices. Given the number of quality defense-oriented publications that we all receive on a monthly basis, we would appear to have a daunting challenge before us, but for the membership of this organization. Before you turn the page to the next section or look to see if your picture from Pinehurst got published, take time to read the rest of this message and think of ways that you can help us make this the quality publication that we know it can be.

This will be the last edition of *The Defense Line* in its current format. Starting with the next issue, there will be a member news section, a feature on verdicts and settlements, as well as regular profiles of state and federal judges. In addition, we will look to add articles on technology and trends in the business of the defense practice. We cannot do this alone. We need input and information from the membership to fill these new sections.

In order for the new *Defense Line* to be successful, we will rely on our members for articles and other information for publication. Although we are all busy, each one of us knows (and likely could be overheard telling other lawyers in our firms) that writing and publishing a legal article is a great way to get exposure. Thus, we encourage each of you to go back to your firm and ask for submissions, and to provide submissions yourself. If you find yourself without time to draft a full article, simply send us news about your firm; we want to know what you are doing. Nothing is too short or too long and we welcome any submissions.

In addition, we intend in the near future to convert *The Defense Line* to an electronic format, creating the ability to send *The Defense Line* to your clients, highlighting articles and features about your firm or contributed by your firm's lawyers.

To add these new sections discussing verdicts and settlements, we are relying on each of you to provide information on the resolution of cases of interest. We also need volunteers to write articles for the next few issues and would like to solicit volunteers from among the membership who clerked for judges to write articles profiling those judges. Lawyers learn from the experience of their peers as well as their own experiences; *The Defense Line* is a great forum for defense attorneys in South Carolina to share their wealth of experiences with one another.

The next step is for the membership to provide us with the information needed to make these improvements to *The Defense Line*. As previously stated, we hope to have an electronic version of *The Defense Line* available and going forward as soon as possible, further investigating the possibility of an entirely electronic version. However, we cannot do that at the present time because many of the email addresses that the Association has on file are no good. Mass emails sent by the Association meet with returns or spam filters reaching fifty percent. It is, therefore, necessary that each of you ensure the Association has your correct email address. Until we have a good set of email addresses, we cannot effectively take the next step.

Gray T. Culbreath

Wendy J. Keefer

Finally, even if you cannot find the time to submit an article, we solicit your input and ideas to make this a better publication. Our goal is to make this the flagship publication for the defense bar in South Carolina. To do that, we need you to provide news about changes in your firms, promotions, memberships and organizations, community involvement and whatever other news you want to tell everyone in the Association.

Please let us know what you think. Wendy can be contacted at wkeefer@bancroftassociates.net or 202-714-9605 and Gray can be contacted at gculbreath@collinsandlacy.com or 803-255-0421.

SCDTAA presents donation of $6,140.00 to the SC Bar Foundation Children's Fund. L to R: Bill Besley, Glenn Elliott, Jay Courie, Cal Watson, Frank Knowlton

SOUTH CAROLINA DEFENSE TRIAL ATTORNEYS' ASSOCIATION

THE DefenseLINE

2006 SCDTAA Officers

2005 Annual Meeting Revisited

by John T. Lay, Jr.

The SCDTAA Annual Meeting was held this year at Pinehurst Resort in Pinehurst, North Carolina on November 3rd-6th, 2005. Approximately 90 attorneys and 36 judges attended the meeting accompanied by their guests. Everyone that attended was overwhelmed by the wonderful atmosphere and the many amenities provided by the resort.

The CLE and social programs were once again a big success. Chief Justice Toal discussed the current state of the judiciary and particularly her continuing efforts to bring the entire judicial department of South Carolina online, as well as her ongoing efforts to ensure proper funding of the judicial department. We were honored to have David Dukes and Ken Suggs speak to us about different national legal trends affecting our profession. David of Nelson Mullins Riley and Scarborough is President of the Defense Research Institute and Ken Suggs of Suggs and Kelly, P.A. is President of the Association of Trial Lawyers of America. This is the first time that any state has had representatives in these two high profile positions at the same time. Viet Dinh spoke to us about the US Supreme Court's nominating process. Viet is well known in Washington, D.C. having been a primary author of the Patriot Act and he is a former Assistant Attorney General of the United States. He had firsthand accounts of the nomination process and knows many of the Supreme Court judges personally. It was a very entertaining discussion. Several judges participated in various panel discussions including Judge John Few, former Judge Jim Brogdon and Judge Bryan Harwell. We always appreciate the efforts of our judges participating on our panels as it always makes it more interesting and insightful. Mark Phillips' discussion entitled "Taking the Show on the Road" provided his perspective on trying cases in different states. As always, Mark was very entertaining. Sam Outten also spoke to us on avoiding legal malpractice. This was a very timely topic and as usual, Sam delivered an informative and lively talk. The immediate past president of the South Carolina Bar, Earl Ellis, also spoke to us about the Graniteville train accident. The South Carolina bar was heavily involved in the different ethical issues and the solicitation problems

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Meeting Recap

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that came out of the Graniteville accident; Earl was able to give his perspective on those problems. Finally, Ron Rash, the Parris Distinguished Professor of Appalachian Cultural Studies at Western Carolina University and an author of several very successful regional novels spoke to us and read from one of his recent novels, One Foot in Eden.

The Annual Meeting officially kicked off Thursday night with a Presidential Reception in honor of outgoing President, Jay Courie. Under Jay's leadership the association has continued to gain new membership and influence. Jay led the way in reorganizing the association and in making sure our efforts were directed to several significant tasks that our organization has historically done very well. Jay was also instrumental in making sure our group was heard at the legislature during the recent tort reform discussions. Jay will continue to serve on the Executive Committee as the immediate past President. On Friday evening the association hosted a "Taste of North Carolina" dinner of North Carolina's best cuisine which included barbeque and seafood, live bluegrass music, and some very interesting "night light putting" keeping in the tradition of Pinehurst.

Saturday evening featured the black tie dinner and dance at which Bill Davies was honored with the Hemphill award. This award goes to members of our organization who have served the organization tirelessly, and whose career has reflected well on the legal profession as a whole. Congratulations to Bill on this award. His dedication to this organization has directly led to many of its successes and Bill, we thank you for your efforts.

In addition, as expected, Pinehurst golf was a significant focus of the activities and the Pinehurst golf courses met all possible expectations. The courses were extremely challenging and the weather could not have been more perfect. Also, from what we understand, some of the most fun at the meeting occurred during the quail-hunting trip. When we attend future trips to Pinehurst, the hunting trip will likely include many, many more people after all of the tall tales that were told. The social program concluded on Sunday with Golf at the famous Pinehurst #2. All who participated in golf on Sunday came away respecting the golf course immensely and had a wonderful time despite the high scores.

During the final business meeting on Saturday, the nominating committee presented its list of candidates for 2005. Mark Phillips of Nelson Mullins Riley and Scarborough was unanimously elected President, Elbert Dorn of Turner Padgett will serve as President-Elect, Donna Givens of Woods & Givens will serve as Treasurer and John T. Lay, Jr. of Ellis, Lawhorne & Sims will serve as Secretary. Finally, the Association would like to thank several people who helped make the meeting a success particularly Glenn Elliott, Anthony Livoti, Mundi Moss, and Aimee Hiers. Thank you for your energetic efforts.

Young Lawyers' Division Update

by Jennifer S. Barr

The Young Lawyers' Division of the Association sponsored a Break Out Session at the Annual Meeting of the Association at Pinehurst, North Carolina. The panel discussion included five past presidents of the Association who spoke on tips to becoming a great lawyer. The Session was well attended by YLD members.

The Young Lawyers Division will host a meeting and Ethics CLE in Charleston, South Carolina at the offices of Nelson Mullins Riley & Scarborough, 151 Meeting Street, Suite 600, Charleston, South Carolina in February of 2006. Members will be offered an opportunity to gather with other young lawyers for a social, as well as participate in an Ethics CLE with experienced members of the South Carolina Bar. Additional information regarding this event will follow.

Please consider offering your time and talents to a committee of the Association. If you are interested in contributing to *The Defense Line* magazine or assisting with planning of an Association meeting or Trial Academy, please contact Jennifer Barr for more information. Serving on a committee is an excellent way to become more familiar with the Association and to get involved.

Additional updates will be sent via Electronic Mail. To sign up for Young Lawyers' Division updates or for questions, contact Jennifer S. Barr, Young Lawyers Division President, at jbarr@wcsr.com.

Hemphill Award for William Stuart Davies, Jr.

by H. Mills Gallivan

It is a privilege and a pleasure, on behalf of the South Carolina Defense Trial Attorneys' Association, to announce the recipient of the 2005 Hemphill Award.

The Hemphill Award is the highest honor that we can bestow on one of our members. It is not an annual award and this is only the eleventh recipient. The criteria is distinguished and meritorious service to the legal profession or the public, and it is given to an individual who is instrumental in developing, implementing, and carrying out the objectives of the South Carolina Defense Trial Attorneys' Association.

This year's recipient truly has a distinguished legal career, a history of outstanding service to the profession, and devotion to his community.

He was born in Greenwood in 1942 and educated in the public schools. He played high school football for the legendary "Pinky" Babb (which could explain his personality).

He is a 1964 graduate of The Citadel (which again could explain his personality). While at The Citadel, he was a member of The Citadel Honorary Society, which seems to me to be one of those contradictions in terms like "military intelligence."

In 1967, he graduated from the University of South Carolina School of Law. While in law school, he was a member of Wig & Robe and served as Managing Editor of the Law Review. During this phase of his education, he became afflicted as one of the many long suffering Gamecock fans.

Following law school, he was a Captain in the U. S. Army Judge Advocate Corps between 1967 and 1972 and tried cases across the United States and Europe. He returned to the civilian practice of law in 1972, which means he is old enough to have practiced before Judge Hemphill. He went to work as the eighth lawyer at a small law firm in Columbia by the name of Nelson, Mullins, Riley & Scarborough. Steve Morrison tells me that the number 8 is significant also because his starting salary was a whopping $8,000.00.

Throughout his legal career at Nelson, Mullins, he has been a leader and has chaired numerous firm committees. He has mentored young lawyers like Steve Morrison and David Dukes. However, his most significant firm accomplishment is that he is the self-proclaimed Managing Partner of the Nelson, Mullins Edisto Island office. His practice has included managing a nationwide asbestos practice and multi-district litigation in the L-tryptophan cases. He has also handled landmark cases, including a courageous defense of "The Sterilization Doctor" in the case of *Jane Doe, et al. v. Clovis Pierce, M.D.*

He has been listed in the Best Lawyers in America for the last ten years consecutively.

Our recipient has also given much of his time and talent to his community by serving on boards such as Harvest Hope Food Bank, the Family Service Center, United Way of the Midlands, and as President of the University of South Carolina School of Law Alumni Association.

He is a stalwart of the defense Bar and has been a member of the South Carolina Defense Trial Attorneys' Association since the 1970's. He has served on our Executive Committee and was President in 1997 and 1998. He is also a member of the Defense Research Institute and was the South Carolina state representative to the DRI from 2001 to 2004. In 2004, he received the DRI Outstanding State Representative Award.

He is a student of history and has a deep and unabiding love for our great state. He has a seemingly unlimited knowledge of "The War of Northern Aggression" and is personally known by more U. S. Park Rangers at battlefield parks than any full-time practicing attorney should be.

He is an active member of Trinity Episcopal Cathedral in Columbia and an associate member of Trinity Episcopal Church at Edisto Island. He is a devoted husband to Mahalie, an outstanding father of three wonderful children, Sterling, Rutledge, and Mahalie Stuart, and a doting grandfather of five.

I would like to read you a quote by Don Simmons, President of the Family Service Center of South Carolina, which I believe accurately characterizes the personal and professional life of this year's recipient:

> "He is a devoted and caring community advocate. He is always available to give back to his community in any way he can. His character, compassion, and commitment set a benchmark of excellence for all who know him."

Our recipient is a man who has given much to his country, his community, his profession, and to the South Carolina Defense Trial Attorneys' Association. Tonight, we honor him by giving the Hemphill Award to our good friend and colleague, Bill Davies.

So You're Going to Try Your First Case . . . .

by E. Warren Moise, Esquire

The most worrisome thing about being a new trial lawyer is unfamiliarity with courtroom procedure. The judge, clerk, and court reporter - everyone in the courtroom - has seen hundreds of trials. They know the fundamental rules. New trial lawyers don't.

What are these courtroom rules that nag the minds of young trial attorneys? They are simply the basics of "how things are done": Do the lawyers rise when jurors enter the courtroom? How do I strike a jury? What can I say and not say? How do I make a *Batson* motion? Am I supposed to give my closing argument at counsel table or in front of the jury? How should I dress? What are the magic words for directed verdict motions or for asking experts their opinions about causation (a.k.a the "most probable rule")? Are there differences between trying a case in federal and state courts? Most of these procedures are neither difficult nor complex. However, until they are learned, the rules of the courtroom can be quite unnerving to new trial attorneys. Just as important, senior lawyers are reluctant to allow associates to try cases on their own until the associates understand trial procedure.

To help rectify this disconnect between neophyte "trial lawyers" (including those who have been practicing for years without much jury trial experience) and lawyers who have already been through the fire, the South Carolina Bar's CLE Division is offering a series of *Seminars Direct* online entitled *So You're Going to Try Your First Case . . . .* In the presentations, lawyers and judges are in the courtroom demonstrating and explaining the mechanics of how cases are tried. (Written materials are included too.) These seminars may be viewed directly on your office or home computer through the South Carolina Bar's web site at www.scbar.org. by clicking on Continuing Legal Education, *Seminars Direct* online. Best of all, you may earn credit for up to four CLE hours through *Seminars Direct* in a given year.

So You're Going to Try Your First Case . . . . is an innovative new development offered for the first time in South Carolina and can significantly shorten the learning curve for aspiring trial lawyers. It also can give senior lawyers peace of mind by knowing that their associate attorneys are better prepared before taking a seat at counsel table.

Accompanying the presentations are written materials about the basic procedures, truisms, and myths about the courtroom. Specifically designed for South Carolina lawyers who will practice in the federal and state courts, the seminars include speakers whose experience in the courtroom spans many years: Chief Judge Joe Anderson, Judge Henry Floyd, Judge Roger Young, Sam Clawson, Rodney Davis. The emphasis is on practical knowledge rather than legal theory.

Below are excerpts from the written materials accompanying Judge Roger Young's presentation in *So You're Going to Try Your First Case . . . .*

1. Learn the proper ways to use a deposition at trial.
2. Prepare a pre-trial brief. Pre-trial means before the trial. Look at it as an opportunity to make a good first impression on the judge about your case. Assume it will be read. If nothing else it will help you organize your case.
3. Remember to be civil. Not only is it required by your oath, it makes a much better impression on the judge and even more importantly, the jury.
4. Use demonstrative aids.
5. Go watch good lawyers try cases. Rule 403 requires you watch cases, but some lawyers are better than others, and the really great ones are special.

And much, much more!

Multiple Sales of a Defective Product: What has occurred?

by A. Johnston Cox of Ellis Lawhorne & Sims, P.A.
and Morgan S. Templeton of Elmore & Wall, P.A.

In the case of *Owners Insurance Company v. Salmonsen*, Op. No. 26059 (S.C. filed November 7, 2005)(Shearouse Adv. Sh. No. 42), the South Carolina Supreme Court was recently posed the certified question, "Is each individual sale of a defective product an occurrence or is the general act of distribution a single occurrence." While the Court declined to declare its allegiance to either the majority or minority rule for all contexts in which the meaning of "occurrence" may arise, the Court effectively adopted the majority rule under the particular facts of the *Salmonsen* case. And although the Court has been vigilant in limiting its rulings to the particular facts of the cases before it in the wake of reaction to its initial opinion in *L-J, Inc. v. Bituminous Fire and Marine Ins. Co., Salmonsen* may be important persuasive authority on similar issues in the future.

Salmonsen is a declaratory judgment action that arose out of a class action brought against Charleston Gypsum Dealers & Supply Co., Inc. ("CGD"), a distributor of synthetic stucco products manufactured by Parex. Salmonsen contended that each individual sale of the product constituted a separate occurrence triggering the aggregate limit provided by the commercial general liability policy issued to CGD.

However, the majority rule in determining whether one occurrence or multiple occurrences have taken place under the terms of a liability insurance policy is to focus on the "underlying circumstance" or "cause" which resulted in the alleged damage rather than on the number of claimants or the number of injuries. This majority rule has been applied in a number of different product liability situations.

In *Champion International Corp. v. Continental Casualty Co.*, 546 F.2d 502, 505 (2d Cir.1976), Champion sold vinyl-covered paneling to manufacturers of houseboats, house trailers, motor homes and campers. Not long after they were sold, the panels began to delaminate and split apart. Approximately 1400 vehicles manufactured by 26 different Champion customer companies were damaged by the defective panels during the policy period. The *Champion* court rejected the argument that there were 1400 separate occurrences, and held that the delivery of the defective panels was the single occurrence.

The "cause" test has also been applied in numerous asbestos cases. See, *Air Prods. and Chemicals, Inc. v. Hartford Accident & Indem. Co.*, 707 F.Supp. 762 (E.D.Pa. 1989), *Owens-Illinois, Inc. v. Aetna Cas. and Sur. Co.*, 597 F.Supp. 1515, 1525 (D.D.C.1984), and *International Surplus Ins. V. Underwriters at Lloyd*, 868 F.Supp. 917 (S.D.Ohio 1994). In each of these cases, the courts found that the causal inquiry supported the view that the many claims brought by the plaintiffs with bodily injuries caused by the asbestos product each arose from a single occurrence – the continuing manufacture and sale of the asbestos products.

Chemstar, Inc. v. Liberty Mut. Ins. Co., 41 F.3d 429 (9th Cir. 1994) arose from 28 property damage claims asserted by homeowners against Chemstar from 1985 to 1988. Chemstar manufactured and sold multiple batches of defective plaster from 1984 to 1986. The court ultimately held,

> Here, all of the plaster-pitting claims arose from "repeated exposure to one "general condition" – a failure to warn that lime with high periclase concentrations should not be used indoors. Since the policies define such "repeated exposure" as a single occurrence, the Court concludes that all 28 plaster-pitting claims arose from a single occurrence.

Id.

In *Colonial Gas Co. v. Aetna Cas. and Sur. Co.,* 823 F.Supp. 975 (D. Mass. 1993), the insured sold UFFI insulation to 390 of it customers between 1977 and 1979. In 1979, the Massachusetts Commissioner of Public Health found that UFFI insulation was a health hazard, subjecting the insured to multiple claims from its customers. The court found that the single cause of the property damage was Colonial's use of UFFI insulation in its insulation program, and therefore, found that there was a single occurrence. *Colonial*, 823 F.Supp. at 983.

Similarly, in *Household Manufacturing, Inc. v. Liberty Mutual Ins., Co.*, 1987 WL 6611 (N.D.Ill), the insured manufactured and sold a plastic pressure plumbing system for residential use. More than 60 lawsuits on behalf of numerous plaintiffs were brought against the insured alleging the plumbing system was defective. Adopting the "cause" test, the court determined that the cause of the property damages claimed was the "continuous and repeated sale of a defective product on a mass basis." *Id.* The court added,

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ATTENTION SCDTAA MEMBERS

The SCDTAA is relying more and more on email to communicate with the membership. Prime examples are the email information sharing system and announcements about SCDTAA events.

A number of emails are being returned as "undeliverable" or "blocked". If you have changed your email address or if you aren't sure the SCDTAA has the correct address please notify the SCDTAA office today.

If your firm is "blocking emails" or if you do not want to receive email communications, please contact the SCDTAA office at (803) 252-5646 or (800) 445-8629.

2006

Spring

TRIAL ACADEMY

June 14 - 16

Columbia, SC

Summer

JOINT MEETING

July 27 - 29

The Grove Park Inn

Asheville, NC

Fall

ANNUAL MEETING

November 9-12

Amelia Island Plantation

Amelia Island, FL

Multiple Sales...

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> The underlying claims in this case arise from "continuous or repeated exposure" to the same conditions since plaintiff made numerous shipments of the Qest system. The "cause" or "underlying circumstance" of the claims are therefore unitary: the sale of the allegedly defective Qest system.

It is true that the *Salmonsen* Court limited its ruling to the particular facts and policy language before it. However, it is important to note that the policy issued to Charleston Gypsum is a standard CGL policy that contains the standard definition of "occurrence," which includes "continuous and repeated exposure to substantially the same general harmful conditions." The *Salmonsen* Court stated, "because the distributor has taken no distinct action giving rise to liability for each sale, we conclude under this policy definition that placing a defective product into the stream of commerce is one occurrence." The Court found it significant that "this case involves the distribution of inherently defective goods, and not the defective distribution of otherwise satisfactory goods."

At the very least, the *Salmonsen* decision is significant for merchants and distributors who have claims or lawsuits filed against them under a "pass through" strict liability theory. In those situations in which the seller of a defective product places the product into the stream of commerce without alteration, a single limit of liability coverage should apply, regardless of the number of sales of the product and the number of people injured by the product. Although *Salmonsen* is a class action, the holdings from other jurisdictions are not limited to class actions, and there is no reason to believe that the reasoning in *Salmonsen* would be constrained to class actions.

In addition, having come down on the side of the "cause" test in *Salmonsen*, the Court may be more likely to adopt the majority rule in situations involving manufacturers of defective goods similar to the cases cited above. It stands to reason that if the defective design and manufacture of a product is the cause of the injuries, that there should be one occurrence despite the number of sales of the defective product or the number of people injured by the product.

Salmonsen is a case of first impression in SC. As such, it is reasonable to expect that this issue will be one that will arise again in the future. It will be interesting to see how our appellate courts expand or retract the logic and analysis of *Salmonsen*.

Supreme Court Justices: The Power to Appoint

by Wendy J. Keefer*

At this year's Annual Meeting, Viet D. Dinh addressed our membership on the issue of the judicial nomination and confirmation process. Given the unique opportunity for the current President to fill two Supreme Court vacancies in just several months, the topic could not have been more timely. This brief article attempts to add to that discussion by providing an overview of the roles of the President and the Senate in this process, the historical understanding of those roles, and to explain how the recent debate about the proper role of the judicial branch in our system has led to growing Senate involvement in – and from some perspectives interference with – this process.

The United States Constitution provides that the President "shall nominate, and by and with the Advice and Consent of the Senate, shall appoint Ambassadors, other public Ministers and Consuls, Judges of the Supreme Court, and all other Officers of the United States, whose Appointments are not herein otherwise provided for, and which shall be established by Law." U.S. Const., art. II, § 2. From the outset it is important to note that this provision appears not in Article I, setting forth the limited and delegated powers of Congress, but rather in Article II, which proscribes the powers of the Executive. That the President was to be the primary player in the judicial nomination and appointment process is further bolstered by views of those involved in the drafting of the Constitution.

The Founders placed the power of appointment with the President based, at least in part, on a belief that a single person was better able to analyze the qualifications of nominees and make the best selection than a body of many persons. Alexander Hamilton explained it like this: " that one man of discernment is better fitted to analyze and estimate the peculiar qualities adapted to particular offices, than a body of men of equal or perhaps even of superior discernment." The Federalist No. 76 (Alexander Hamilton). Regardless of the Senate's "Advice and Consent" responsibilities, the choice ultimately rests with and at all times remains with the President for even if advice and consent is not forthcoming, such disapproval by the Senate would only "make place for another nomination by [the President]. [As t]he person ultimately appointed must be the object of his preference, though perhaps not in the first degree." *Id.* (emphasis added). Hamilton went on, however, to note that "[i]t is also not very probable that his nomination would often be overruled." *Id*.

That the President's appointment power is not unfettered is indisputable. The Senate most certainly plays a crucial role, providing the checks and balances found throughout our system, and ensuring that no single branch – the Executive – has total control over another branch – the judicial – by requiring participation of the remaining branch of government – the legislature. But, at least as Alexander Hamilton viewed the checks on presidential authority in this regard, the Senate's role was limited:

> To what purpose then require the cooperation of the Senate? I answer, that the necessity of their concurrence would have a powerful, though, in general, a silent operation. It would be an excellent check upon a spirit of favoritism in the President, and would tend greatly to prevent the appointment of unfit characters from State prejudice, from family connection, from personal attachment, or from a view to popularity. In addition to this, it would be an efficacious source of stability in the administration.

The Federalist No. 76 (Alexander Hamilton). Despite whether one agreed with the assessment, some opposition to Harriet Miers claimed to rely on this Hamiltonian vision of the Senate's role – to prevent the appointment of those who were otherwise deemed unqualified but for a personal attachment to the President.[1]

That history supports a limited role for the Senate does not require the Senate to rubber-stamp any nomination. Indeed, in the first hundred or so years of our nation a number of nominees, particularly Supreme Court nominees were not approved by the Senate. "Between 1789 and 1894, 22 of 81 Supreme Court nominees failed to reach the bench as a result of being either rejected, withdrawn, or left unacted upon by the Senate." David Greenberg, "The Judge Wars: Borking Didn't Start With Bork," July 6, 2005, available at http://www.slate.com/id/2122081/. Defeated nominees included John Rutledge of South Carolina, Alexander Wolcott, Robert Trimble, and Roger Taney the first time he was nominated.[2] President John Tyler actually had five of his six nomi-

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Supreme Court Justices

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nees fail in the Senate. *Id*. The rejection of nominees slowed in the following period from 1894 to 1968, during which time only one Supreme Court nominee was rejected.

Thus, that the Senate may reject the President's pick is not novel, nor is that body's authority to so reject a nominee disputed. What has developed in recent years, however, is a process completely foreign to the Founders' vision and much different than during most of the country's history – complex, detailed investigation of nominees by the Senate Judiciary Committee and threats to refuse full Senate votes on nominees.

The current process in the Senate Judiciary Committee alters the Senate's role merely from that of ensuring no unfit nominees are confirmed to a process of investigation to ensure Senators that the nominee is an "acceptable" pick. The days of testimony witnessed during now Chief Justice John Roberts' recent confirmation hearings and even more recently the hearings of nominee Samuel Alito represent a relatively new development in the judicial nomination and confirmation process.

Indeed, the first nominee ever to appear before the Senate was Harlan Fiske Stone in 1925. But his appearance occurred after he was confirmed. *See* Greenberg *supra*. Justice Felix Franfurter appeared before the Senate Judiciary Committee, but for just a single day, during which he made it clear that the expression of personal views by a nominee to the Court would be inappropriate: "I should think it improper for a nominee, no less than for a member of the Court, to express his personal views on controversial political issues affecting the Court." Prepared Statement of Felix Frankfurter, Hearing on his Nomination before the Senate Committee on the Judiciary (1939); *see also* Joseph P. Harris, The Advice and Consent of the Senate at 310-11 (1953). Even as recently as the confirmation hearings of Justice Antonin Scalia it was understood that a nominee's refusal to discuss his or her views on the law, as opposed to one's judicial philosophy as to the proper manner of interpretation and role of judges, would not prevent confirmation.

The following exchange occurred during the hearings on Justice Scalia's nomination:

> **The CHAIRMAN**. Judge Scalia, the Supreme Court's decision in *Marbury v. Madison* is viewed as the basis of the Supreme Court's authority to interpret the Constitution and issue decisions which are binding on both the executive and legislative branches. Do you agree that *Marbury* requires the President and the Congress to always adhere to the Court's interpretation of the Constitution?
>
> **Judge SCALIA.** Well, *Marbury* is of course one of the great pillars of American law. It is the beginning of the Supreme Court as the interpreter of the Constitution. I hesitate to answer, and indeed think I should not answer the precise question you ask – do I agree that *Marbury v. Madison* means that in no instance can either of the other branches call into question the action of the Supreme Court.
>
> As I say, *Marbury v. Madison* is one of the pillars of the Constitution. To the extent that you think a nominee would be so foolish, or so extreme as to kick over one of the pillars of the Constitution, I suppose you should not confirm him. **But I do not think I should answer questions regarding any specific Supreme Court opinion, even one as fundamental as *Marbury v. Madison.***

Hearings before the Committee on the Judiciary, Aug. 5, 1986, S. Hrg. 99-1064, at 33-34 (emphasis added).

Now judicial nominees at virtually every level are subjected to complicated questionnaires and often day long hearings before a vote is even possible on

the Senate floor. Though associated with the nomination of Robert Bork by President Reagan in 1987, it is somewhat difficult to ascertain what has changed since the relatively civil hearings of Justice Scalia. A new vitriol has arrived in Washington.

Perhaps Justice Scalia best explained the foundation for the new, more investigative and hostile process. It stems from a more central debate – what is the proper role of judges and the courts? Whether one believes in the philosophies of a Living Constitution or falls more in line with the counter philosophies of original intent or strict construction dictates how one views the role of the Senate and the information to which the members of that body are entitled prior to reaching any decision on confirmation.

> What has happened? The American people have figured out what is going on. If we are selecting lawyers, if we are selecting people to read a text and give it the fair meaning it had when it was adopted, yes, the most important thing to do is to get a good lawyer. If on the other hand, we're picking people to draw out of their own conscience and experience, a new constitution, with all sorts of new values to govern our society, then we should not look principally for good lawyers. We should look principally for people who agree with us, the majority, as to whether there ought to be this right, that right, and the other right. We want to pick people that would write the new constitution that we would want.

Speech, Justice Antonin Scalia, Woodrow Wilson International Center for Scholars, Mar. 14, 2005, transcribed from C-SPAN, available at http://www.threebadfingers.com/?p=20.

No longer are some Senators, their supporters and special interest groups focusing on objective qualifications of judges. More and more those who believe judges are the arbiters of what is right rather than what is law seek to base the appointment process on whether they personally agree with a particular nominee. Thus, the nominee's personal views and opinions, rightly or wrongly, become the focus and decision point for confirmation. But let us not forget that the judicial branch was not envisioned as a policy branch. Indeed, its separation and independence from democratic, majority policy decisions was just the reason it was described by its creators as the least dangerous branch.

Though identification of this issue is necessary to understanding why confirmation hearings are growing more focused on nominees' individual beliefs, resolution of that issue is a discussion for another time. Whether you prefer the Living Constitution brand of jurisprudence or the more restrained original intent or strict construction philosophy is for a later day and perhaps a later discussion in this publication, what should not be debatable is that this is the issue that fuels the fight over the proper roles of the Executive and the Legislative branches in the nomination and confirmation process. There will be no likely consensus on the limits of the Senate's power as long as this debate continues.

What should be more easily decided is whether some procedural rules in the Senate, if used in the confirmation process, are consistent with the Senate's Advice and Consent role. In recent years, the idea of or threat of filibusters – requiring the vote of 60 Senators before a full vote of the Senate will be permitted – has been all too real in the case of judicial nominees. Though falling within at least one interpretation of the Senate rules, the filibuster of nominations is, on its face, at odds with the constitutional text concerning the Senate's role in this process. Had our Founders intended to require a supermajority for confirmation they could have done so, just as they did in other areas, such as the approval of treaties. That no super-majority is specified and thus only a mere majority is required means that at least in fairness to the balances in our system, any nominee with a majority of votes should be confirmed. Denying a vote on such a nominee is not advising and consenting, it is refusing to advise and consent; thereby refusing to fulfill the Senate's constitutional advice and consent obligation.

No Supreme Court Justice has ever been the victim of a filibuster.[3] No judicial nominee should ever become such a victim.

Footnotes

1 Given her withdrawal from consideration as a nominee to the Supreme Court, and the special interests involved on both sides in opposing her nomination, the full extent of her qualifications is not fully known..

2 Taney was later renominated and confirmed, though his ultimate confirmation took six weeks, which at that time was a record in terms of the lack of speed of confirmation as many confirmations occurred within hours or days of the nomination. *See* Greenberg *supra*.

3 Contrary to some who argue that Senator Strom Thurmond led a filibuster against Abe Fortas' nomination by President Johnson to be Chief Justice, Fortas never had the support of a majority of Senators, thus his nomination was ultimately withdrawn.

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DRI Supports Civil Justice System

by John S. Wilkerson, III, DRI State Representative

DRI – The Voice of the Defense Bar is making a difference in its efforts to preserve and promote our civil justice system. Many activities and initiatives are under way to advance this mission.

The 2005 DRI Annual Meeting in Chicago was a roaring success. The meeting attracted a record number of attendees who enjoyed the many educational and networking opportunities. The theme for this year's Annual Meeting was "The Voice of Civil Justice" and much of the program was devoted to the preservation of the civil jury trial and civil justice system. Highlights of the meeting included: an address by former US Senator and accomplished actor, Fred Thompson, who gave an insider's view of the confirmation process of Chief Justice John Roberts; a debate on the preservation of the jury system, moderated by South Carolinian and past DRI President, Steve Morrison; and blockbuster presentations by David Maister, one of the world's leading authorities on the management of professional service firms, and Professor James McElhaney, renowned lecturer on evidence and trial tactics.

The social agenda was highlighted by a wonderful evening in Chicago's House of Blues. Of course, the meeting culminated with the installation of David Dukes as President of DRI. Congratulations to David on all his many accomplishments and thanks for serving as such a wonderful ambassador for all the excellent defense lawyers in South Carolina. We will be hearing much more about David's agenda as he leads DRI through the coming months.

As further evidence of its continuing support of the civil justice system, DRI recently funded a grant to launch the National Foundation for Judicial Excellence. The NFJE joins bar associations, law schools, think tanks and other non-profit organizations in support of the continuous improvement of the civil justice system by offering educational programming and discourse on topics important to America's judiciary. Its mission is to:

> Address important legal policy issues affecting the law and civil justice system by providing meaningful support and education to the judiciary, by publishing scholarly works and by engaging in other efforts to continually enhance and ensure judicial excellence and fairness for all engaged in the judicial process

The NFJE held its inaugural Annual Judicial Symposium on July 15-16 in Chicago. More than 135 appellate judges from 39 states, including members of the South Carolina appellate bench, attended the program which focused on science in the courtroom. "Judges attending the Symposium gave us high marks for providing a balanced program, as well as for our planning and execution," said Lloyd Milliken, NFJE President. "In addition, state budget cuts, and increased demand on judge's time are limiting access to essential educational opportunities. By offering programs like the Annual Judicial Symposium, we aim to help fill this void." NFJE's second Annual Judicial Symposium entitled **Essential Elements of Justice: Judicial Independence and Client Privileges in the Modern Courtroom**, will be held July 7 - 8, 2006 in Chicago.

Responding to significant shortfalls in funding for the judiciary and declining public attitudes toward the judicial branch of government, DRI has recently formed a "Judicial Task Force" to study roles that defense organizations can play in protecting our judicial system. The DRI board has approved the following mission statement for the task force:

> The Judicial Task Force will research and identify issues that threaten to disrupt the independence of the judiciary. This research will be used to create a plan that may be utilized by DRI and/or the SLDOs to address particular threats to judicial independence.

The work of the task force is just beginning and will include a national survey of DRI members to learn about specific state and local judicial issues and to solicit ideas as to how to make an impact both nationally and locally.

What can we as defense lawyers do to help DRI in its efforts to improve and protect our civil justice system? Many opportunities are available, but the most important and effective way is to get involved and make your views known. Join DRI and lend your time and talents to some of its important initiatives. Learn more about the work of the NFJE, and how you can support its work by visiting its website, www.nfje.net. Respond to the Judicial Task Force survey when it arrives on your desk, and help to spread the word about the importance of a well-funded and impartial judiciary. Also plan to attend the 2006 DRI Annual Meeting and learn more about what you can do to make a difference in these continuing debates. Mark your calendars for the 2006 Annual Meeting which will be held in San Francisco on October 11-15, 2006.

Legislative Update

by Jeffrey N. Thordahl, MG&C Consulting

Workers' Compensation Reform

Workers' Compensation Reform has begun its journey through the General Assembly. On January 11, Senator Scott Richardson introduced the business coalition bill, S. 1035, along with 15 other Senators. The sponsors include Senate Majority Leader Harvey Peeler, Senate Finance Chairman Hugh Leatherman, Senate Transportation Chairman Greg Ryberg, Senate Labor, Commerce and Industry Chairman Verne Smith, Senate Corrections Committee Chairman Mike Fair, and Senate General Committee Chairman Bill Mescher. The bill was referred to the Senate Judiciary Committee.

On January 12, Rep. Harry Cato, Chairman of the House Labor, Commerce and Industry Committee, introduced the business coalition bill, H. 4427, along with 49 co-sponsors. The bill was referred to the House Labor, Commerce and Industry Committee. The sponsors include Speaker Bobby Harrell, Speaker Pro Tem Doug Smith, Ways and Means Chairman Dan Cooper, Education and Public Transportation Chairman Ronnie Townsend, and Business and Commerce subcommittee Chairman Converse Chellis. Ten of the eighteen members of the House LCI committee are sponsors.

The House LCI committee heard a presentation from Workers' Compensation Commission Chairman David Huffstetler on January 11. On Wednesday, January 18th the House LCI Business and Commerce subcommittee, chaired by Converse Chellis, will have a hearing on the House bill. The purpose of the meeting is to hear testimony from NCCI. The House has quickly taken up the issue and it is expected that the bill will be ready to be debated by the full House in late February or early March.

The 15 page bill covers a range of topics: elimination of the second injury fund, addresses the Bi-Lo case, addresses the Tiller case, addresses repetitive trauma cases, adds an additional four commissioners (of which three commissioners will act solely as an appellate panel), authorizes the Attorney General to hire a forensic accountant in the Insurance Fraud Division, changes the intoxication presumption, and addresses a few additional issues.

A link to the bills can be found on the Defense Trial Attorneys' website.

Property Tax Reform

Perhaps no other issue will get as much attention by the General Assembly this year than the debate over how to reduce or eliminate property taxes. There are competing proposals between the House and Senate and even within each body. Whether the differences can be resolved before the session ends in June remains to be seen. In any event, it is likely that there will need to be a public referendum to approve a constitutional amendment before the legislative proposals can take effect. The one common thread among almost all of the proposals is the addition of 2 cents to the sales tax to reduce or eliminate a portion or all of property taxes. In addition, any reduction or elimination tends to apply to owner-occupied residences and not business property.

Eminent Domain

The U.S. Supreme Court case *Kelo v. New London* has led many states, including SC, to review their constitution and applicable eminent domain laws. By the time this article is printed, it is expected that there will be another Eminent Domain bill filed that will be the basis of discussion going forward.

Equity Funding Lawsuit

The landmark decision by Judge Thomas Cooper has led to much discussion over what is the appropriate response by the General Assembly. It is expected that the plaintiffs will appeal the case to make sure, at a minimum, that the General Assembly provides additional resources especially for at-risk children through the third grade.

Judicial Screening Process

Coming next – a review of the Judicial Screening process and an update on current elections.

SOUTH CAROLINA DEFENSE TRIAL ATTORNEYS' ASSOCIATION

Case Notes

Shuler v. Gregory Electric, Op. No. 4039 (S.C. Ct. App. Nov. 7, 2005)

Mrs. Shuler, who had been an electrician's helper employed by Gregory Electric, injured her right hand while on the job. She received worker's compensation benefits and as part of those benefits required treatment at an approved doctor. After going to a treatment appointment, she was in an automobile accident. The injuries she received as a result of that accident were fatal. Her family sought benefits under the Worker's Compensation Act for her death. Gregory Electric challenged those benefits arguing that the "coming and going" rule – which generally deems one's travel to and from work not in the course of employment – dictated that the fatal injuries Mrs. Shuler received in the accident did not arise out of or in the course of her employment.

The single commissioner and the full commission (which adopted the single commissioner's order verbatim) disagreed, concluding that having been required to receive treatment or risk losing her benefits the trip to and from the doctor did arise out of and in the course of her employment, pointing out that the employer, Gregory Electric, was paying Mrs. Shuler mileage for that trip.

It was further determined that any issues raised as to other stops Mrs. Shuler may have made after leaving the doctor's office, as indicated by the grocery and other bags found in her car and testimony that she indeed intended to go shopping after her appointment, did not change the result as any such activities amounted to no more than insubstantial personal comfort deviations from the trip to the doctor. Gregory Electric appealed the decision of the full commission to the Court of Appeals.

The Court of Appeals affirmed the determination that Mrs. Shuler's accident and resulting death arose out of and in the course of her employment. Judge Kittredge dissented from that decision.

Other cases of interest:

***Edge, et al. v. State Farm Mut. Aut. Ins. Co.*, Op No. 26078 (S.C. Dec. 5, 2005)**

- Establishment of insurance premium rates and at-fault determinations
- Justice Toal dissented from majority opinion

***Bass v. Kenco Group*, Op. No. 4046 (S.C. Ct. App. Nov. 21, 2005)**

- Psychological treatment under Workers Compensation Act

***Aiken v. World Fin. Corp. of S.C.*, Op No. 4055; *Simpson v. World Fin. Corp.*, No. 4059 (S.C. Ct. App. Dec. 12, 2005)**

- Enforceability and scope of arbitration agreement

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