

MINNESOTA *Defense*

WINTER 2008

COMPLIMENTARY

THE A.P.I. CASE: THE "KISS O' DEATH" OF *KISSOONDATH*?

THE GOVERNMENTAL IMMUNITY UPDATE

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THE PRESIDENT'S COLUMN

Paul A. Rajkowski

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Recently I was contacted by a member who inquired what type of services the MDLA offers its members. The inquiry was a reasonable one, but it got me thinking how the MDLA could do a better job communicating to its members what it has to offer. After all, in order for the MDLA to grow and flourish as a professional organization it needs to offer its members something of value.

In order to serve the members of the MDLA it is essential that the organization become more responsive to the ever changing practice of law. One of the goals of the organization this year is to restructure the committees in order to better assist members in their particular practice area. Committees exist for the benefit of the members and if a person wants to be a committee member that committee needs to provide a benefit or a resource. In the past many committees existed on paper only. This year the committees will have a formal leadership structure set up which will provide guidance and transition from year to year. The leadership will be responsible to see that the committees remain active. Regular committee meetings, planning and participation in seminars, preparing articles and newsletters will be requirements of the committees. Hopefully these requirements will assure that members receive something of value for their membership due.

There are many other services offered by the MDLA that have value, but I am sure there are members who have ideas for additional things the MDLA can offer its members. I encourage all members to share their ideas with committee chairs, Board members, or with the Executive Director. Times change and what was a good idea years ago may not be the best approach today. An organization is only as good as its members so get involved and let us know how we are doing. ▲

BENEFITS OF MDLA MEMBERSHIP INCLUDE THE FOLLOWING:

Minnesota Defense, a quarterly publication containing substantive articles regarding defense practice and association news.

Information Sharing, a weekly e-mail service through which members can solicit information on expert witnesses, depositions, briefs and other defense related issues from the entire MDLA membership.

Committees, members may join any of thirteen committees that represent a wide range of practice areas and interests. A full listing of the committees appears on page 24 with contact information.

Legislative Program, including our MDLA Law Improvement Committee, monitors legislation of interest to the defense bar, authors legislation, testifies at bill hearings, and contacts legislators for support.

Trial Techniques Seminar and Annual Meeting, a CLE program held each August in Duluth featuring techniques used in defense litigation. The association's annual membership meeting and elections are held in conjunction with the seminar.

Mid-Winter Conference, a CLE program held each February at various locations. Venues are chosen based on close proximity to skiing and family centered activities for free time enjoyment.

Seminars, CLEs and Social Events, including the Medical Malpractice Seminar, CLE Seminar and Golf tournament, Women Lawyers Breakfast, Insurance Law Seminar, and the New Lawyers Brown Bag CLEs and networking socials.

MDLA CLE CREDIT APPROVALS

This list is not inclusive of every MDLA program that has received approval since 2004.
For additional reporting assistance, contact director@mdla.org or 612-338-2717

Trial Techniques Seminar, Duluth

2007	32nd Annual TTS	6.25 Standard & 1.5 Ethics 6.25 Standard & 1.5 Ethics 6.25 Standard & 1.5 Ethics 9.5 Standard 7.5	MN Code # 112168 Iowa Activity ID 45424 North Dakota Wisconsin Civil Trial Specialist.
2006	31st Annual TTS	7.75 Standard 8.0 Standard 8.0 Standard 9.0 Standard 8.0	MN Code # 99996 Iowa Activity ID 37944 North Dakota Wisconsin Civil Trial Specialist.
2005	30th Annual TTS	8.25 Standard 8.25 Standard 8.25 Standard 10.0 Standard 8.25	MN Code # 92073 Iowa Activity ID 32046 North Dakota Wisconsin Civil Trial Specialist.
2004	29th Annual TTS	8.25 Standard 8.25 Standard 9.5 Standard	MN Code # 83117 Iowa Activity ID 25402 Wisconsin

Mid-Winter Conference

2007	42nd Annual Alexandria	7.75 Standard 7.75 Standard 7.75 Standard 9.50 Standard 5.5	MN Code # 105057 Iowa Activity ID 41019 North Dakota Wisconsin Civil Trial Specialist.
2006	41st Annual Biwabik	8.0 Standard 8.0 Standard 8.0 Standard 9.5 Standard 5.5	MN Code # 95751 Iowa Activity ID 35086 North Dakota Wisconsin Civil Trial Specialist.
2005	40th Annual Alexandria	6.75 Standard 7.5 Standard 7.5 Standard 9.0 Standard 5.5	MN Code # 86828 Iowa Activity ID 28323 North Dakota Wisconsin Civil Trial Specialist.
2004	39th Annual Lutsen	5.0 Standard 5.0 Standard 6.0 Standard	MN Code # 78955 Iowa Activity ID 22096 Wisconsin

Medical Malpractice Conference, Minneapolis

2007		4.0 Standard & 1.0 Ethics 5.0 Standard & 1.0 Ethics	MN Code # 107199 Wisconsin
2006		5.25 Standard 6.0 Standard	MN Code # 97402 Wisconsin
2005		5.5 Standard 5.5 Standard 5.5 Standard 6.5 Standard 5.5 Standard	MN Code # 89168 Iowa North Dakota Wisconsin Civil Trial Cert.
2004		5.0 Standard & 1.0 Ethics 6.0 Standard & 1.0 Ethics	MN Code # 81939 Wisconsin

Golf and CLE Seminar, Stillwater

2007: <i>Sanctioned! Traps and Hazards in Litigation and How to Avoid Them</i>			
		2.0 Ethics 2.0 Ethics 2.0 Ethics	MN Code# 108426 Iowa Activity Code 4350 Wisconsin
2006: <i>Elimination of Bias</i>			
		2.0 Elim. of Bias 2.0 Ethics 2.0 Ethics	MN Code # 98438 Iowa Activity Code 36963 Wisconsin

Golf and CLE Seminar, Stillwater (continued)

2005: <i>Ethics Seminar</i>	2.0 Ethics 2.0 Ethics 2.0 Ethics	MN Code # 89048 Iowa Activity Code 30454 Wisconsin
2004: <i>Elimination of Bias</i>	2.0 Elim. of Bias 2.0 Standard 2.0 Standard	MN Code#81399 Iowa Activity Code 24394 Wisconsin

Women Lawyers Breakfast, Minneapolis

2007	6th Annual	1.0 Elim. of Bias Denied	MN Code #111275 Wisconsin
2006	5th Annual	1.0 Prof. Dev. 1.0 Standard	MN Code #100263 Wisconsin
2005	4th Annual	1.0 Prof. Dev. 1.0 Standard	MN Code #91922 Wisconsin

Motor Vehicle Insurance Institute, Minneapolis

2004		5.75 Standard 7.5 Standard	MN Code # 81777 Wisconsin
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Insurance Law Institute, St. Louis Park

2007		6.0 Standard 6.0 Standard 6.0 Standard 7.0 Standard 6.0	MN Code # 103710 IA Activity ID 40008 North Dakota Wisconsin Civil Trial Specialist
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New Defense Lawyers "Brown Bags"

<i>Insurers in Dire Straits: Money for Nothing and Checks for Free</i>			
January 17, 2007		1.5 Standard 1.5 Standard	MN Code #105272 Wisconsin
<i>Now That I Have Passed the Bar Exam What Can I Do to Benefit My Community</i>			
November 1, 2006		1.5 Standard 1.5 Standard	MN Code#103299 Wisconsin
<i>Economic Loss Doctrine</i>			
May 11, 2006		1.5 Standard 1.5 Standard	MN Code #98288 Wisconsin
<i>No-Fault Arbitration – From Start to Finish</i>			
March 27, 2006		1.5 Standard 1.5 Standard	MN Code #97653 Wisconsin
<i>Residential Moisture Intrusion Cases: How to Get the Most Out of an Expert</i>			
November 29, 2005		1.5 Standard 1.5 Standard	MN Code #94882 Wisconsin
<i>All I Ever Really Needed to Know I Learned From "My Cousin Vinny"</i>			
October 19, 2005		1.5 Standard 1.5 Standard	MN Code #94213 Wisconsin
<i>No-Fault in a Nutshell</i>			
September 13, 2005		1.5 Standard 1.5 Standard	MN Code #93219 Wisconsin
<i>A View from the Bench</i>			
May 25, 2005		1.0 Standard 1.0 Standard	MN Code #90937 Wisconsin
<i>Preparing For an Administrative Hearing</i>			
April 13, 2005		1.5 Standard 1.5 Standard	MN Code#88524 Wisconsin

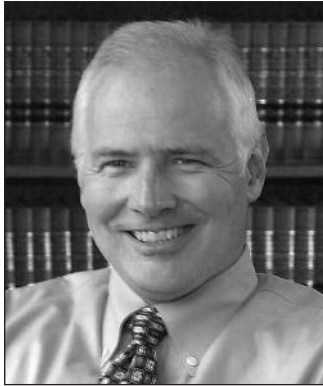
North Central Region Trial Academy, Oakbrook, IL

2008		14.25 Standard	MN Code #115084
2007		14.25 Standard	MN Code #104984
2006		15.25 Standard	MN Code #94143
2005		14.5 Standard	MN Code #85847

THE A.P.I. CASE: THE “KISS O’ DEATH” OF KISSOONDATH?

By Dale O. Thornsjo

JOHNSON & CONDON, P.A.



INTRODUCTION

It seems interest in insurance “bad faith” is cyclical in Minnesota. About ten years ago, there were various efforts at the legislative to pass an insurance “bad faith” Bill. Those efforts were revived last year, and may again be considered at the upcoming session.

As well, from time to time, an insurance “bad faith” opinion is issued by a Minnesota appellate court that causes insurance practitioners to pause and consider how the case really impacts insurance claims in the state. In the relatively recent past, this occurred in 1983 when the supreme court issued *Short v. Dairyland Ins. Co.*¹ Most recently, policyholder counsel trumpeted the Court of Appeals’ 2001 decision in *Kissoondath v. United States Fire Ins. Co.*² as a watershed for Minnesota bad faith law because the case supposedly opened the tort floodgates of recovery when carriers committed a bad faith breach of an insurance contract.

On September 11, 2007, the court of appeals issued its long-awaited *St. Paul Fire and Marine Ins. Co. v. A.P.I., Inc.*³ decision. This case as well has caused many to pause and ponder its implications in numerous areas, including its impact on insurance bad faith. *A.P.I.* involved an asbestos products manufacturer, distributor and applicator’s efforts to seek third-party liability coverage and other remedies from its insurance carriers. This article focuses on specific rulings by the Court of Appeals dealing with insurance “bad faith” and how the opinion impacts policyholder arguments that *Kissoondath* allows an insured to obtain tort remedies for a “bad faith” breach of an insurance policy. As detailed

below, *A.P.I.* confirms a “bad faith” breach of a “fiduciary duty” associated with a carrier’s defense and control of settlement discussions does not expand the insured’s remedies available to the policyholder beyond the traditional contract damages which have been available to an insured in Minnesota for generations. Extracontractual “tort” style damages continue to only be available if the insurer somehow breaches a tort-related duty which is independent of the contractual relationship with its insured. Since this would be an extraordinary situation, an insured will rarely if ever be able to recover extracontractual damages once an insured defends and controls settlement discussions.

Simply put, after six years of arguments to the contrary, *A.P.I.* confirms that *Kissoondath* does not recognize a tort of insurance bad faith in Minnesota.

ASBESTOS LITIGATION

Some of *A.P.I.*’s rulings are not fully appreciated without a few comments on asbestos litigation in general. The coverage action is an outgrowth of the continuing asbestos litigation which has troubled the judicial system for nearly forty years. Asbestos is a broad term used to describe several similar types of a mineral which have remarkable insulating and bonding characteristics. Over the last 120 years, asbestos has been used in hundreds of thousands of applications around the world.

A typical asbestos bodily injury or wrongful death lawsuit involves a person who was exposed to asbestos over many years, and whose conditions or symptoms develop many years after the significant exposure. The cases usually involve development of historic evidence detailing the Plaintiff’s exposures, the extent of each of the exposures, when the various exposures occurred, and what was known in the scientific or medical community at the time of the various exposures. The historic nature of the testimony necessitates each defendant to look back many, many years to determine not only what its business practices were as far back as sixty years ago, but to also determine if it had purchased insurance during those times which would possibly respond to the claims.

One of the first asbestos cases in the country awarding damages was tried in Minnesota.⁴ By the early 1980s, Minnesota asbestos litigation was robust, and necessitated the development of case management orders in both Dakota and Hennepin Counties. Thereafter, a statewide

⁴ See *Karjala v. Johns-Manville Corp.*, 523 F.2d 155 (8th Cir. 1975) (chronicling the case’s 1971 filing, verdict and appeal).

¹ 334 N.W.2d 384 (Minn. 1983).

² 620 N.W.2d 909 (Minn. App. 2001), *review denied* (Minn. April 17, 2001).

³ 738 N.W.2d 401 (Minn. App. 2007), *review denied* (Minn. December 11, 2007).

DALE O. THORNSJO focuses his practice on the emerging insurance coverage and defense issues involved in delayed-injury/damage cases in the toxic tort, environmental, products liability, construction and railroad arenas. He serves as a founding co-chairman of MDLA’s Insurance Law Committee and is a past chair of the MDLA’s Toxic Tort and Environmental Law Committee.

case management order was put into place to govern all asbestos cases filed in Minnesota state courts. Today, all state court asbestos cases in Minnesota are venued in Ramsey County, and are jointly assigned to the Honorable John T. Finley and the Honorable Dale B. Lindman. Federal court asbestos cases are automatically transferred to the Multi-District Litigation Docket assigned to the Eastern District of Pennsylvania under *In Re: Asbestos Products Liability Litigation*.⁵

Historically, asbestos bodily injury and wrongful death cases were initially brought against numerous insulation manufacturer defendants, as a plaintiff's exposure usually occurred either while applying asbestos-containing insulation or while working in direct proximity to asbestos product insulators. These exposures occurred at scores of sites over many years, and the asbestos-containing materials utilized at these sites were manufactured by many different manufacturers.

By the early 1980s, it became evident that asbestos product manufacturers were facing mass tort liability because of the number of persons who were exposed, and illnesses that began to appear after extended latency periods. In August 1982, the largest asbestos-containing insulation manufacturer in the world, Johns-Manville, sought reorganization protection under the Federal Bankruptcy Code to protect it against mounting asbestos liabilities.⁶ Many more asbestos-containing insulation manufacturers also filed Bankruptcy over the next 10 years.

Because fewer and fewer manufacturers were capable of being sued, plaintiffs began looking for additional defendants who would be liable for damages caused by their exposures. Here is where A.P.I., Inc. became entangled in the asbestos litigation.

A.P.I.'S ASBESTOS LITIGATION INVOLVEMENT:

A.P.I., formerly known as Asbestos Products, Inc., was a major contract installer of asbestos-containing materials at scores of large industrial and commercial sites in Minnesota and neighboring states. A.P.I. typically applied asbestos-containing materials it had purchased from various manufacturers at these jobs. Evidence admitted at the coverage trial stated that A.P.I. distributed and/or installed asbestos-containing materials from the 1940s up until 1972.⁷

Beginning in 1982, A.P.I. began to be sued under traditional "products liability" theories which would hold A.P.I. liable for the various bankrupt manufacturers' liability.⁸ These theories expanded to include claims that A.P.I. also had its own direct liability because its contract installation practices exposed nearby workers to asbestos fibers which many years later caused an alleged asbestos-related condition or disease. Over twenty-plus years, A.P.I. was sued in approximately 3,000 asbestos bodily-injury and wrongful death lawsuits.

Once sued, A.P.I. realized it would need to submit these claims, not only to its then-current insurers, but also to carriers which insured A.P.I. going back to when the plaintiffs had been first exposed to asbestos because of A.P.I.'s conduct. Therefore, A.P.I. began to search for these policies, as well as secondary information and documents which might tend to show that a carrier insured A.P.I. Information was gathered from its insurance brokers, its accountants, and from old customers. A.P.I. also retained an "insurance archeologist," in an effort to identify potentially available coverages. Policies and other evidence of coverage were located, and A.P.I. began to tender the cases to several of its liability insurers. Four of these carriers -- St. Paul Fire and Marine Insurance Company, Great American Insurance Company, Fireman's Fund Insurance Company, and The Home Insurance Company -- responded to defend A.P.I. in the cases.

A.P.I. also located certain information indicating it may have procured liability coverage from one of OneBeacon

⁷The factual and procedural discussion herein is taken largely from the Opening and Responsive Brief of A.P.I., and the Opening Brief of OneBeacon. These briefs are available from the author.

⁸Liability theories evolved to hold all entities involved in the manufacture and distribution of a product liable for its defects. Beginning in 1980, entities downstream from the manufacturer in Minnesota could avoid this liability if the distributor complied with the certification requirements found in Minn. Stat. § 544.41. However, this protection was not available if the manufacturer was not "subject to the jurisdiction of the courts of this state . . ." Minn. Stat. § 544.41, Subd. 2(c). Therefore, distributors or applicators of bankrupt manufacturers' products could be held liable for the manufacturers' fault, even if the distributor was a "pass-through" entity which merely distributed the asbestos-containing product.

⁵Civil Action No. MDL 475 (E.D. Penn.).

⁶*In re Johns-Manville Corp.*, No. 82-11656 (S.D.N.Y. Bankr. Aug. 26, 1982).

Insurance Company's predecessors, General Accident Insurance Company,⁹ in the 1958 to 1966 timeframe.¹⁰ In 1987 (five years after it was first sued in the litigation), A.P.I. began to tender the lawsuits to OneBeacon. In response, OneBeacon stated the materials A.P.I. provided in conjunction with the tenders did not give sufficient information to allow OneBeacon to confirm the existence of coverage. As well, some of the information provided was conflicting in that it tended to show another carrier may have issued coverage to A.P.I. during the relevant time periods. Therefore, further information was needed to allow OneBeacon to confirm whether or not coverage was in place with A.P.I. In the meantime, because there was not sufficient information to make a coverage determination, OneBeacon denied the tenders.

Despite these denials, A.P.I. continued to tender cases to OneBeacon as well as to the other carriers. OneBeacon's response was equally uniform – further proof of the existence of the policies was needed to determine if OneBeacon had issued policies to A.P.I. Eventually, in March 1999, A.P.I. stopped tendering cases to OneBeacon, noting it was futile to continue to do so.

Prior to, during, and even after the time it stopped tendering cases to OneBeacon, A.P.I. was generally very successful in defending its asbestos lawsuits. Typically cases were either dismissed, or relatively nominal amounts were paid to settle a plaintiff's claim. It appears A.P.I. never paid more than \$25,000 to settle any asbestos case before 2001. However, as more and more asbestos-related entities declared Bankruptcy, the pool of defendants from which settlements could be obtained became fewer and fewer. Therefore, formerly "fringe" defendants such as A.P.I. necessarily became targets.

This evolution culminated with A.P.I. in 2001 when it was the last remaining defendant in a case, *Akin v. American Standard, et al.*, where the plaintiff claimed his exposure to A.P.I.'s applications of asbestos-containing insulation at a refinery was a substantial contributing factor in his devel-

⁹In order to eliminate confusion over the timing of when OneBeacon became a successor to General Accident, this article will refer to these two entities as "OneBeacon."

¹⁰At trial, evidence was presented which estimated that roughly fifty to seventy percent of the cases asserted against A.P.I. may have involved exposure to asbestos as a result of A.P.I.'s activities before 1966.

opment of mesothelioma.¹¹ After a relatively short trial for Minnesota asbestos cases, the Jury awarded the plaintiff \$8,000,000.00.¹²

Especially considering its posture in the litigation prior to *Akin*, this verdict dramatically changed how plaintiffs looked at A.P.I. as a source of recovery.

Especially considering its posture in the litigation prior to *Akin*, this verdict dramatically changed how plaintiffs looked at A.P.I. as a source of recovery. Because of this heightened attention, some of the carriers which had been involved in A.P.I.'s defense resolved the *Akin* case and additional lawsuits against A.P.I. in a 2002 agreement which allowed one excess carrier, The Hartford Accident & Indemnity Co., to exhaust its coverage with A.P.I. by paying \$9,500,000 of its \$15,000,000 coverage limit to the settlement.¹³ As well, A.P.I. and its insurers involved in A.P.I.'s defense clarified their respective positions on coverage at issue in A.P.I.'s asbestos liabilities. For example, A.P.I. asserted that its historic asbestos liabilities were covered, not only by its products liability limits, but also by its separate "operations" coverage limits (which allegedly did not contain any aggregate limits) as liabilities and injury arose out of its application of asbestos-containing materials at sites prior to the time it completed its operations at these sites. The carriers defending A.P.I. notified the insured of positions that included discussions on the erosion of liability coverage, and that payments of additional settlements and/or judgments might exhaust certain or all of the applicable policies. If the carrier's coverage with A.P.I. was exhausted, then the carrier would no longer owe A.P.I. a defense in the litigation. A.P.I. characterized this position as being tantamount to a defense of A.P.I. on a "case-by-case" basis.

Despite these positions, it appears A.P.I. was defended by one or more carriers in every one of its asbestos lawsuits; it also appears one or more carriers paid all settlements or judgments involving A.P.I. However, since

¹¹*Akin v. Am. Standard, Inc., et al.*, Ramsey County District Court, Minnesota.

¹²The author represented one of the last co-defendants to be dismissed from the case on the morning of trial.

¹³This \$5.5 million "gap" in coverage becomes material to A.P.I.'s damages claim against OneBeacon as described below.

OneBeacon had denied coverage, and A.P.I. had quit tendering cases as of 1999, OneBeacon was not participating in any of these carrier efforts.

A.P.I.'S January 2005 Bankruptcy:

By 2005, the concept of an entity filing for Bankruptcy because of its asbestos-related liabilities was relatively common. The unique issues facing these companies had been largely resolved through prior litigation while in Bankruptcy, or in evolutions of the Bankruptcy Code. By this time, a form of a Bankruptcy called a "prepackage" Bankruptcy was available to allow a company exposed to asbestos liabilities to almost simultaneously propose a Reorganization Plan at the time it filed its Bankruptcy Petition.

By 2005, A.P.I. was also continuing to face more and more asbestos liabilities. Therefore, A.P.I. filed a voluntary "prepackaged" Bankruptcy Petition in the Bankruptcy Court for the District of Minnesota.¹⁴ The proposed Reorganization Plan ultimately required A.P.I. to contribute \$40,500,000 to a trust established to compensate asbestos claimants. A.P.I. was also required to contribute to the trust any recoveries it would receive from its insurers. As of late 2005, A.P.I. claimed it had expended over \$5.8 million in bankruptcy-related attorneys' fees and costs.

A.P.I.'S COVERAGE LAWSUIT

In 2002, St. Paul brought a declaratory judgment action against A.P.I. seeking to determine that the carrier had exhausted its coverage limits, and therefore owed no further defense obligation to the insured under any of its policies. A.P.I. in turn added Fireman's Fund, Great American and The Home to the lawsuit in an effort to also resolve coverage issues involved with these carriers. Nearly a year later, A.P.I. added OneBeacon to the action. A.P.I. asserted a variety of claims against the carriers, including causes of action for declaratory judgment, breach of contract, "bad faith/breach of fiduciary duty," intentional and/or negligent misrepresentation, consumer fraud, and equitable reapportionment of past insurance payments to the policies' "operations" coverage.¹⁵

¹⁴ No. 05-30073 (D. Minn. Bankr. 2005).

¹⁵ A.P.I.'s December 29, 2004 Amended Answer and Combined Third Amended Counterclaim and Third-Party Complaint. The consumer fraud and equitable reapportionment of past insurance payments to the policies' "operations" coverage theories were not issues in the trial, mostly because all other carriers eventually settled.

Once A.P.I. filed Bankruptcy in January 2005, it asserted that the carriers collectively forced it into reorganization, because A.P.I. was concerned it might not have sufficient insurance coverage to protect itself from future asbestos lawsuits. Ultimately, St. Paul, Fireman's Fund and Great American paid a total of roughly \$54,000,000 into the A.P.I. Bankruptcy Trust to settle the coverage claims against them.

OneBeacon chose not to settle A.P.I.'s claims against it. Instead, this carrier asserted the insured had consistently failed to show that OneBeacon had issued liability coverage to A.P.I. ...

OneBeacon chose not to settle A.P.I.'s claims against it. Instead, this carrier asserted the insured had consistently failed to show that OneBeacon had issued liability coverage to A.P.I., and, even if it did, there was no proof as to what the coverage terms were in the policies, or even what the amount of limits were on the policies. Even if there was an insuring agreement capable of being defined by terms and conditions of policies, OneBeacon also asserted that coverage only applied on a case-by-case basis premised upon whether or not the plaintiff may have been exposed prior to or during the time of any OneBeacon policy with A.P.I.; that Minnesota's trigger and allocation rules applied to limit the amounts claimed; that A.P.I.'s claims for extracontractual or tort damages had no merit, as OneBeacon had never actually defended A.P.I.; and that A.P.I. had failed to bring any claim within the requisite statute of limitation.

OneBeacon's "Bad Conduct":

As the case progressed, A.P.I. again searched for materials or information which might tend to show that it had coverage with OneBeacon during the 1958-1966 time period. On the eve of trial, A.P.I. produced to OneBeacon two Certificates of Insurance addressing time periods of 1958 to 1961, and 1961 to 1964, which it had obtained from a customer. Based on this newly discovered evidence, OneBeacon agreed it did insure A.P.I. for liability coverage between 1958 and 1964 in the abstract, but still claimed there was insufficient evidence as to the terms of the policy to then apply the terms to the facts in light of Minnesota law to determine if A.P.I. had coverage for any of the asbestos liabilities. A.P.I. asserted otherwise, and pointed to four specimen policy forms its counsel had discovered

when pursuing another asbestos coverage case in California.¹⁶ OneBeacon contested these assertions, claiming the forms were inconsistent with the information on the newly-disclosed Certificates of Insurance. Despite these objections, the trial court admitted the forms, and allowed A.P.I.'s insurance expert to also testify about whether the forms would have been part of the OneBeacon policies. As well, this expert testified that "operations" coverage in policies during this era did not generally have aggregate limits. This last point was reinforced by OneBeacon's predecessor's answers to interrogatories in the California coverage action which stated that the policies at issue in the California case did not have operations aggregate limits.

A.P.I. also asserted at trial that OneBeacon's conduct when it initially received A.P.I.'s tenders was less than forthcoming. A.P.I. pointed to an internal memorandum which seemed to imply that OneBeacon was concerned about the insured's submissions:

"What I do not want is to telegraph to the defense attorneys or insured we are eager and in short order they would all be on our back to tender their defense."¹⁷

As well, A.P.I. pointed to the fact that OneBeacon knew its policy numbers in the 1950s and 1960s utilized "ICG" and "CG" prefixes, but that this was never told to A.P.I. despite the fact the tenders referenced one policy with an "ICG" prefix. As well, A.P.I. asserted that OneBeacon had copies of the specimen forms it disclosed in the California action, but never provided them to A.P.I.

A.P.I.'s Damages:

At trial, A.P.I. estimated that roughly fifty to seventy percent of the cases asserted against it may have involved exposure to asbestos as a result of A.P.I.'s activities before the last year of the alleged OneBeacon coverage – 1966. However, A.P.I. only cited two specific lawsuits in detail. The first, the *Akin* case, did not involve allegations that the plaintiff's exposure to asbestos because of A.P.I. occurred prior to the termination of the last alleged OneBeacon policy. A.P.I. claimed the other case, *Gartner v. American Standard, Inc., et al.*, however, did involve exposure which

¹⁶ *Western MacArthur v. General Accident, et al.*, Alameda County Superior Court, Court File No. 721595-7.

¹⁷ May 14, 1987 Claims Analyst Frank Thorn internal memorandum. The memo, as well as follow-up correspondence the following day, states that this person continued to request materials which might verify coverage.

either pre-dated or occurred during the time of the alleged OneBeacon coverage; this Complaint had not been tendered to OneBeacon. A.P.I. did not have an expert analyze the roughly 3,000 lawsuits, whether by a complete review of each case, or by considering any "representative sampling," to determine the specific dollar amount for which OneBeacon may be liable for defense and indemnity under the alleged coverage. Instead, A.P.I. presented evidence that it was generally damaged in the amount of the \$40,500,000 it was required to pay into its reorganization trust, the \$5,875,765 in attorneys' fees and costs related to the Bankruptcy as of the time of trial, and the loss of the \$5,500,000 in limits from The Hartford's policy it agreed to in order to settle the *Akin* verdict, and that all these damages were caused by OneBeacon not agreeing to coverage.

The Trial Court's Pretrial Rulings and Jury Instructions:

On the eve of trial, OneBeacon moved the court in limine to bar evidence on A.P.I.'s bad faith and breach of fiduciary duty claims, as Minnesota did not recognize these theories under a scenario where a carrier does not assume a duty to defend or settle underlying claims. The court denied the Motion.

Ultimately, the court instructed the jury on "fiduciary duty" as follows:

"A fiduciary relationship exists when one person places trust and confidence in another person who, as a result of having this trust and confidence placed in him or her, assumes a position of superiority or influence.

"An insurer and its policyholder hold a fiduciary relationship and the insurer owes its policyholder a fiduciary duty."

The court then went on to list eight "duties" an insurer owes its policyholder.¹⁸ As well, the court instructed the jury on "bad faith" by stating:

"An insurer acts in 'bad faith' when it breaches its fiduciary duty. Bad faith includes dishonest or deceitful conduct and action or a failure to act which demonstrates a significant disregard for the rights and economic interests of others. An insurer acts in bad faith towards its policyholder if it fails to perform any of its fiduciary duties."¹⁹

Despite the symbiotic nature of the bad faith and fiduciary duty instructions, as well as A.P.I.'s pleading which asserted these matters in a single count, the court inserted two separate sets of questions on the verdict form to allow the

¹⁸ A.P.I.'s November 18, 2005 Proposed Specific Instruction 4.

¹⁹ A.P.I.'s November 18, 2005 Proposed Specific Instruction 5.

jury to award separate damages for bad faith, and for breach of fiduciary duty.²⁰

The Verdict and Post-Trial Motions:

The case was tried over six days in late November and early December, 2005 before the Honorable John T. Finley in Ramsey County. In relevant part, the jury determined OneBeacon:

- 1) Issued policies to A.P.I. during the time frame of 1958 to 1966;
- 2) Breached its contracts by failing to defend and/or indemnify A.P.I.;
- 3) Committed bad faith with regard to its conduct with A.P.I.;
- 4) Breached its fiduciary duty owed to A.P.I.; and
- 5) Misrepresented facts to A.P.I., but that A.P.I. did not rely on these misrepresentations.

The jury awarded the following damages:

Breach of Contract:	\$27,573,824
Bad Faith:	\$10,000,000
Breach of Fiduciary Duty:	\$15,000,000
TOTAL:	\$52,573,824

The trial court later awarded A.P.I. its declaratory judgment action fees and costs which totaled just under \$1.1 million. As well, the court denied OneBeacon's Motions for Judgment as a Matter of Law and for New Trial on the bad faith, breach of fiduciary duty, and breach of contract claims. Judgment was thereafter entered, and the appeal was taken.

THE APPELLATE DECISION

On appeal, OneBeacon argued the trial court erred as a matter of law when it allowed A.P.I. to submit the bad faith and breach of fiduciary duty claims to the jury, as a fiduciary relationship did not exist between A.P.I. and OneBeacon which would then allow any analysis of whether that relationship was breached by any bad faith acts. The carrier also argued the court improperly awarded extracontractual damages for breach of contract when the damage evidence was based on OneBeacon's conduct, and not on what A.P.I.'s actual consequential damages were because of any failure to defend or indemnify.

²⁰ Jury Verdict Form Questions 14 - 15, Questions 16 - 17.

The court first analyzed parties' combined "bad faith" and breach of fiduciary duty matters in a single discussion, thereby underscoring that these issues are substantively intertwined.²¹ The issue distilled down to whether merely entering into an insurance contract imposed a fiduciary duty on the carrier. The court began by observing, in Minnesota, "[t]he general rule is that special circumstances must exist in a relationship between parties for creation of a fiduciary relationship."²² However, a business relationship does not *per se* impose such a duty; this is especially true in an insurance relationship where "competing interests [] often generate litigation between an insurer and insured."²³ Therefore, the court reaffirmed prior cases which have never deviated from the proposition that, "at its inception, the insurer-insured relationship is not fiduciary."²⁴ Quite to the contrary, the insured-insurer relationship at this stage is merely contractual.²⁵

The question then became whether a special relationship was created at any point *subsequent* to inception of the insurance contracts between A.P.I. and OneBeacon.²⁶ The court of appeals, focusing specifically on *Short v. Dairyland Ins. Co.*²⁷ and *Kissoondath v. U.S. Fire Ins. Co.*,²⁸ determined that no Minnesota case had ever imposed a fiduciary duty on an insurer unless two conditions had been satisfied: 1) an insurer is obligated to assume the insured's defense, and (2) the insurer, in fact, actually assumes that defense and its concomitant duty to reasonably settle a case against

²¹ The court may have felt compelled to do so, either because the trial court's jury instructions intertwined the concepts, or because the parties argued these theories interchangeably in their briefs.

²² 738 N.W.2d at 406 (emphasis added) (citing *Klein v. First Edina Nat. Bank*, 293 Minn. 418, 421-22, 196 N.W.2d 619, 622-23 (1972)).

²³ *Id.* at 407 (citing *Cherne Contracting Corp. v. Wausau Ins. Cos.*, 572 N.W.2d 339, 343 (Minn. App. 1997)).

²⁴ *Id.* (emphasis added). See also *Morris v. American. Fam. Mut. Ins. Co.*, 386 N.W.2d 233 (Minn. 1986); *Pillsbury Co. v. Nat'l Union Fire Ins. Co.*, 425 N.W.2d 244 (Minn. App. 1988); *R.L.B. Enterprises, Inc. v. Liberty Nat'l Fire Ins. Co.*, 413 N.W.2d 551 (Minn. App. 1987); *Saltou v. Dependable Ins. Co.*, 394 N.W.2d 629 (Minn. Ct. App. 1986); *Seren Innovations, Inc. v. Transcon. Ins. Co.*, No. A05-917, 2006 WL 1390262 (Minn. App. May 23, 2006) (unpublished); *Miller v. ACE USA*, 261 F. Supp. 2d 1130 (D. Minn. 2003).

²⁵ *Id.* at 407.

its insured.²⁹ Without these conditions being met, a carrier could not owe a fiduciary duty to an insured.

The outcome at this point became simplistically academic. Since OneBeacon had not actually assumed a defense obligation and therefore did not engage in any settlement endeavors, the trial court's instructions imposing a *per se* fiduciary duty on OneBeacon were in error. Therefore, the \$10,000,000 award on the bad faith claim, and the \$15,000,000 award on the breach of fiduciary duty claim, were reversed, and the matters were remanded for a new trial.

The court also considered whether the damages award should be overturned. The court noted "[t]he jury found OneBeacon liable for extracontractual damages arising out of OneBeacon's breach of fiduciary duty and bad faith." Because the bad faith and fiduciary duty instructions were erroneous, these damages were also reversed. The court then proceeded to discuss under what circumstances extracontractual damages could be awarded in the case. In order to award extracontractual damages, A.P.I. needed to prove that OneBeacon committed a tort independent of the contractual relationship which occurred prior to a point in time when the carrier actually assumed the defense of A.P.I.³⁰ Absent establishing this independent tort, extracontractual damages were not available. Therefore, on remand, A.P.I. could retry its tort case

²⁶ A.P.I. argued on appeal that a fiduciary duty is created "when confidence is reposed on one side and there is resulting superiority and influence on the other; and the relation and duties involved in it need not be legal, but may be moral, social, domestic or merely personal." *Toombs v. Daniels*, 361 N.W.2d 801, 809 (Minn. 1985). See also, *Murphy v. Country House, Inc.*, 307 Minn. 344, 350, 240 N.W.2d 507, 512 (1976) (a fiduciary relationship exists where there is "[d]isparity of business experience and invited confidence"); *Stark v. Equitable Life Assur. Soc'y.*, 205 Minn. 138, 145, 285 N.W. 466, 470 (1939) ("A fiduciary relation exists when confidence is reposed on one side and there is resulting superiority and influence on the other."). However, instead of pointing to some event which occurred after the policies were entered into to create OneBeacon's fiduciary duty, A.P.I. merely argued that the insurance relationship in and of itself was sufficient to create the fiduciary duty.

²⁷ 334 N.W.2d 384, 387 - 88 (Minn.1983).

²⁸ 620 N.W.2d 909, 916 (Minn. App. 2001).

against OneBeacon for misrepresentation.³¹

The court next considered whether the damages awarded for breach of contract were actually proven at trial. The court observed the jury's findings did not identify whether the insurer breached its defense obligation, or its indemnity obligation, or, if it did, when those breaches occurred. Without specifying the facts of when and to what extent OneBeacon breached its contractual obligations to defend and indemnify, it was impossible to link the damages to the breaches that are a necessary element to award breach of contract damages.³² Therefore, the court reversed the breach of contract award, and remanded to retry the issues of when breaches occurred, and what damages are awardable because of the breach of contract.

A.P.I.'S IMPLICATIONS FOR MINNESOTA'S THIRD-PARTY BAD FAITH LAW

Since *Kissoondath*, policyholder counsel have advocated

²⁹ *Id.* at 407 (citing, for the first proposition, *Metro. Prop. & Cas. Ins. Co. v. Miller*, 589 N.W.2d 297, 299 (Minn.1999) (duty to defend arises if any one of asserted causes of action is arguably within scope of policy coverage); *SCSC Corp. v. Allied Mut. Ins. Co.*, 536 N.W.2d 305, 316 (Minn.1995) (stating when duty to defend arises), and, citing, for the second proposition, *Short*, 334 N.W.2d at 387- 88; *Kissoondath*, 620 N.W.2d at 916 (insurer who knew that insured would likely be liable and accepted the insured's defense, but refused to settle within policy limits, had breached its fiduciary duty to its insured). See also *Miller*, 261 F.Supp.2d at 1140 at 1141 (limiting *Short's* and *Kissoondath's* imposition of fiduciary duty to context of settlement negotiations)).

³⁰ *Id.* It appears this signaled that, if A.P.I. could prove OneBeacon committed a tort at any time, and the tort was independent of the contractual relationship, then A.P.I. could seek extracontractual damages, as OneBeacon had never assumed A.P.I.'s defense.

³¹ This is a curious ruling given the jury's determination that A.P.I. failed to prove each element of its misrepresentation claims. *Id.* at 405. It may well be that the court felt that the bad faith/fiduciary duty/extracontractual damages errors at trial were so pervasive that the parties should simply have a "do over."

³² *Id.* (citing *Meadowbrook, Inc. v. Tower Ins. Co.*, 559 N.W.2d 411, 418-19 (Minn. 1997); *Milbank Ins. Co. v. B.L.G.*, 484 N.W.2d 52, 59 (Minn. App. 1992)).

that insureds now have an ability to seek tort-style extra-contractual damages when an insurer commits a “bad faith” breach of an insurance contract. In fact, this argument seems to have been the primary factor which shaped events at the *A.P.I.* trial court level. When analyzed in detail, however, the court of appeals’ opinion underscores that *Kissoondath* does not stand for such a proposition.

The Law of “Bad Faith”

A.P.I. is certainly not the first case before the appellate courts addressing claims of “bad faith” by an insurer.

Minnesota appellate courts have long addressed situations where the insured has claimed damages because of its carrier’s conduct.

Minnesota appellate courts have long addressed situations where the insured has claimed damages because of its carrier’s conduct. Given the longstanding and consistent standards enunciated in this caselaw, it is not surprising the *A.P.I.* court declined to imply that a bad faith breach of the insurance contract entitles a policyholder to extra-contractual damages.

As far back as 1926, the Supreme Court has addressed allegations that carrier misconduct resulted in damages to an insured. In the first of two cases entitled *Mendota Electric Co. v. New York Indemn. Co.*,³³ the court reversed the trial court’s dismissal of a complaint which alleged the insurer, while defending a policyholder, had improperly failed to reasonably settle an underlying claim brought against the insured and others. As a result, the policyholder, which was alleged to be clearly liable, asserted it was compelled to personally pay amounts towards a settlement which the carrier had previously represented it would be willing to pay.

The court discussed the duty the insurer owed to its insured under these circumstances as follows:

“Good faith and fair dealing are correlative obligations, and the insurer owes to the insured some duties in the matter of the settlement of claims covered by the policy . . . ; and, where the insured is clearly liable and the insurer

refuses to make a settlement, thus protecting the insured from a possible judgment for damages in excess of the amount of the insurance, the refusal must be made in good faith and upon reasonable grounds for the belief that the amount required to effect a settlement is excessive.”³⁴

Because the court recognized there may be a claim under the contract for failure to settle, the court reversed the dismissal, and remanded the case for trial.

The insured prevailed at trial on its claim against the carrier. On appeal, however, the Supreme Court reversed the award by stating:

“Our examination of the record has failed to disclose any such proof of bad faith of defendant as will support a verdict against it. * * * It takes something more than error of judgment to create liability. There must be bad faith with resulting injury to the insured before there can be a cause of action.”³⁵

These opinions became the basis on which subsequent cases analyzed an insurer’s bad faith exposure to an insured.

Almost thirty years later, the Supreme Court summarized its bad faith caselaw, and succinctly articulated the standards by which carriers would be judged in these cases. In *Larson v. Anchor Cas. Co.*, the court confirmed that:

“Minnesota has adopted the rule that a liability insurer, having assumed control of the right of settlement of claims against the insured, may become liable in excess of its undertaking under the policy provisions if it fails to exercise ‘good faith’ in considering offers to compromise the claim for an amount within the policy limits.”³⁶

Two significant points are articulated here. First, the carrier’s “good faith” conduct must be associated with consideration of settlement offers within the liability policy’s limits. These efforts necessarily follow the insurer’s assumption of a defense obligation. Second, the carrier’s exposure is the amount which is “in excess” of its policy limits. The amount “in excess” of the policy limits is the amount of a resulting judgment less the applicable and the paid policy limits.³⁷ Stated another way, these are the damages which

³⁴ 169 Minn. 377, 211 N.W. at 318-19.

³⁵ *Mendota Electric Co. v. New York Indemn. Co.*, 175 Minn. 181, 221 N.W. 61, 62 (1928).

³⁶ 249 Minn. 339, 82 N.W.2d 376, 386-87 (1957).

³⁷ See, e.g., *Lange v. Fidelity & Cas. Co. of New York*, 290 Minn. 61, 185 N.W.2d 881 (1971). See also *Strand v. Travelers Ins. Co.*, 300 Minn. 311, 219 N.W.2d 622 (1974) (per curiam); *Herges v. Western Cas. & Sur. Co.*, 408 F.2d 1157 (8th Cir. 1969).

³³ 169 Minn. 377, 211 N.W. 317 (1926). The case returned to the court two years later. *Mendota Electric Co. v. New York Indemn. Co.*, 175 Minn. 181, 221 N.W. 61 (1928).

naturally and proximately flow from the carrier's breach of the contract to defend the insured's interests by settling a claim in good faith within the policy's limits.³⁸

Neither *Larson*, nor any of the cases it analyzes, discuss or even reference whether a "fiduciary duty" is at issue in a "bad faith" cause of action against an insurer, or whether extracontractual damages are available to an insured. The first time a fiduciary concept was mentioned in these types of "bad faith" cases was in *Short v. Dairyland Ins. Co.*³⁹ However, the opinion does not enunciate any new or expanded right for a policyholder.⁴⁰ Its fiduciary duty references are as follows:

"Usually, however, the insurer contractually acquires control of the negotiations and settlement, thus oftentimes creating conflicting interests on the part of the insurer. On the one hand, the insurer owes a fiduciary duty to the insured to represent his or her best interests and to defend and indemnify. On the other hand, the insurer is interested in settlement at the lowest possible figure. It is important, however, and must be remembered, that the insurer's right to control the negotiations for settlement must be subordinated to the purpose of the insurance contract to defend and indemnify the insured within the limits of the insurance contract."⁴¹

As well:

"[The claims adjuster's] reference to [a No Fault] subrogation right should the matter be placed into suit could be nothing more than an attempt to gain leverage and a discount from the policy limits all in dereliction of [the carrier's] fiduciary duty to [its insured]."⁴²

Despite these references, the actual legal analysis in *Short* focused on the "bad faith" rule of law as enunciated in

³⁸ See *Olson v. Rugloski*, 277 N.W.2d 385, 387-88 (Minn. 1979); see also *Lesmeister v. Dilly*, 330 N.W.2d 95, 103 (Minn. 1983) (citing *Hadley v. Baxendale*, 9 Ex. 341, 156 Eng.Rep. 145 (1854); *Francis v. Western Union Telegraph Co.*, 58 Minn. 252, 59 N.W. 1078 (1894)).

³⁹ 334 N.W.2d 384 (Minn. 1983)

⁴⁰ This makes sense in that the Supreme Court's opinion is only one paragraph in length. The court appended the trial court's Memorandum as its opinion. It would not make sense that a trial court would create or recognize any new cause of action or remedy, and would make even less sense for the Supreme Court to allow the trial court judge to do so.

⁴¹ 334 N.W.2d at 387.

⁴² *Id.* at 388-89.

Larson and reiterated in subsequent cases.⁴³ Therefore, it seemed *Short's* references to an insurer's "fiduciary duty" merely reinforced the fact an insured possessed a cause of action against its insurer when, in bad faith, the carrier defends and then fails to settle the underlying claim within policy limits. In other words, the language did not appear to create a new or separate cause of action for an insured against its carrier, let alone one in tort which permitted an award of extracontractual damages.⁴⁴

Three years after *Short*, the Supreme Court addressed whether the newly-enacted Fair Claims Handling Act⁴⁵ created a private cause of action for a claimant or an insured against a carrier.⁴⁶ In discussing this issue, the *Morris v. American Fam. Mut. Ins. Co.* court reiterated what the "bad faith" cause of action was:

"If an insurer fails to settle in good faith with a third party claimant, the insured can bring a bad faith action against the insurer; further, the claimant can take an assignment of the insured's bad faith claim and maintain the insured's action against the insurer."⁴⁷

In making this observation, Justice Simonett cites the court's *per curiam* decision in *Strand v. Travelers Ins. Co.*, which states that the insured's damages in a "bad faith" cause of action against its insurer are measured by the difference between the policy limit and the verdict.⁴⁸

⁴³ *Id.* at 387-88 (citing *Continental Cas. Co. v. Reserve Ins. Co.*, 307 Minn. 5, 238 N.W.2d 862 (1976); *Lange v. Fidelity & Cas. Co. of New York*, 290 Minn. 61, 185 N.W.2d 881 (1971); *Peterson v. American Fam. Mut. Ins. Co.*, 280 Minn. 482, 160 N.W.2d 541 (1968); *Boerger v. American Gen. Ins. Co. of Minn.*, 257 Minn. 72, 100 N.W.2d 133 (1959)).

⁴⁴ See *Cherne Contracting*, 572 N.W.2d at 343 (discussing the lack of tort liability or negligence discussions in *Short* and other "bad faith" cases).

⁴⁵ Minn. Stat. § 72A.20 (1984).

⁴⁶ *Morris v. American Fam. Mut. Ins. Co.*, 386 N.W.2d 233 (Minn. 1986).

⁴⁷ 386 N.W.2d 233, 237 (Minn. 1986) (citing *Strand v. Travelers Insurance Co.*, 300 Minn. 311, 219 N.W.2d 622 (1974) (*per curiam*)). *Strand* seems to be an odd citation for this proposition; it is a one page *per curiam* summary affirmation of a jury finding that the insurer acted in bad faith in refusing to settle a personal injury claim against its insured. The case contains no factual recitation, no analysis, and no citations. Most importantly for the purposes of this article, it contains no reference to an insurer's fiduciary duty to its insured.

⁴⁸ 300 Minn. 311, 219 N.W.2d 622 (1974).

It was against these well-established rules of law that the court of appeals issued *Kissoondath v. United States Fire Ins. Co.*⁴⁹ *Kissoondath* arose out of the typical “bad faith” failure-to-settle scenario discussed in *Larson, Strand* and

***Kissoondath* arose out of the typical “bad faith” failure-to-settle scenario discussed in *Larson, Strand* and *Short*.**

Short. One of the insureds collided with a parked vehicle which was occupied by the physically injured plaintiffs. The insurer assumed the insureds’ defense, determined that the insureds would most likely be found liable, but “hotly contested” the extent of the plaintiffs’ injuries. The injured plaintiffs offered to settle their claims for the \$350,000 policy limits, but the insurer refused the demand and offered just under \$50,000. Ultimately, a verdict was returned for the plaintiffs in an amount in excess of \$1.6 million. The policy’s named insured thereafter assigned his “bad faith” cause of action to the plaintiffs, who then proceeded with the claim against the carrier.

At trial, the plaintiffs submitted a proposed “good faith” jury instruction which included fiduciary duty language as well as a list of the insurer’s specific obligations to its insureds. Over objection, the trial court declined to include any reference to fiduciary duty in the instruction, and reasoned that the fiduciary duty references in *Short* were dicta. The court did instruct the jury on the list of insurer obligations, but included the following language on how the jury was to weigh each of these “obligations”:

“[n]o one factor in and of itself is determinative of a breach. All factors taken together must lead you to believe that the insurance company breached its duty of good faith in order to answer question number 1 on the jury verdict form ‘yes’.”⁵⁰

The jury found the insurer did not breach its good faith duty, and the plaintiffs appealed.

The court of appeals framed the issues before it as follows:

“Did the district court commit reversible error by failing to instruct the jury on ‘fiduciary duty’ in connection with instructing the jury on ‘good faith’ and by implying that an insurer must fail to perform more than one of its obliga-

tions to an insured before it can be found not to have acted in good faith?”⁵¹

By framing the first issue in this fashion, the court confirmed it was considering whether fiduciary duty language was appropriate to include in jury instructions which would present the law on whether the insurer had satisfied its historically recognized “good faith” contractual obligations to its insured. Stated another way, nothing in the court’s opinion implied it was considering whether an insured is entitled to assert a separate cause of action for breach of fiduciary duty in addition to its “bad faith” claim, or that the damages available were extracontractual in nature.

The court ruled on the two issues by first holding that the failure to include fiduciary duty language in the jury instructions, as well as the failure to take fiduciary duty concepts into consideration in evidentiary rulings, were reversible error. As well, an instruction which did not allow the jury to determine that even one factor was dispositive to determine whether there was a breach of the good faith obligation “destroyed the substantial correctness of the instruction,” and as well mandated a reversal.⁵²

Despite these rulings, at no time did the court state or imply that a fiduciary duty obligation was a separate cause of action under which an insured was entitled to a separate, let alone extracontractual, remedy. Instead, the court’s opinion underscores that the “fiduciary duty” at issue equated to an insurer’s good faith obligation owed to an insured if the carrier was defending the insured and was considering settlement matters.⁵³ This proposition is exemplified in at least two critical passages in the opinion. First, the court of appeals determined that *Short*’s references to fiduciary duty were not dicta. In so ruling, the court stated the issue “squarely” before the Supreme Court was what “*duty*” Dairyland owed its policyholder; therefore, the Supreme Court “clearly” expressed its opinion on the subject.⁵⁴ The use of the singular here can only mean that the *Kissoondath* court read *Short* as only dealing with one duty in the case. Since *Short* analyzed *Larson* and its progeny in determining what that duty was, there can be no doubt that the one duty at issue in *Short* was whether the insured had a bad faith cause of action against the

⁵¹ *Id.* (emphasis added).

⁵² *Id.* at 916.

⁵³ *Id.* (“The fiduciary duty owed by an insurer to its insured is measured by the standard of ‘good faith.’”).

⁵⁴ *Id.* at 915.

⁴⁹ 620 N.W.2d 909 (Minn. App. 2001), *rev. denied* (Minn. April 17, 2001).

⁵⁰ *Id.* at 913-14.

insurer to recover amounts in excess of the policy limits.

Second, *Kissoondath* did not discuss the court's concerns about the insured-insurer relationship in the abstract. Instead, the court recognized the insurer has heightened obligations, but only when the carrier has an opportunity to manipulate the relationship while engaging in settlement discussions on behalf of the insured:

"In the insurance context a special relationship arises out of the parties' unequal bargaining power and the nature of insurance contracts which would allow unscrupulous insurers to take advantage of their insureds' misfortunes in bargaining for settlement or resolution of claims."⁵⁵

By stating the insurer's fiduciary duty good faith obligations only exist after the carrier is involved in settlement discussions on behalf of its insured, *Kissoondath* underscored that the insured's claim, whether described as "bad faith" or in terms of a fiduciary relationship, can only arise when the insurer is engaged in settlement decisions after it has assumed the insured's defense.⁵⁶ In other words, *Kissoondath* merely holds that the cause of action which an insured may assert is the cause of action Minnesota courts had recognized for at least seventy-five years.

It is against this backdrop that that the court of appeals issued *A.P.I.* As noted above, *A.P.I.* intertwined the fiduciary duty and bad faith concepts as part of its analysis of whether OneBeacon owed any duty to its insured. The duty analyzed was the duty discussed in *Short* and *Kissoondath*, which in turn was the singular contractual duty which has been recognized for many, many years.

When the facts of the case were applied to this recognized and well-established caselaw, it became clear OneBeacon could never have assumed a good faith fiduciary towards A.P.I. ...

When the facts of the case were applied to this recognized and well-established caselaw, it became clear OneBeacon

⁵⁵ *Id.* (citing *Arnold v. National County Mut. Fire Ins. Co.*, 725 S.W.2d 165, 167 (Tex.1987) (emphasis added)).

⁵⁶ See, e.g., *Miller v. ACE USA*, 261 F.Supp.2d 1130 (D. Minn. 2003) (Montgomery, J.) (bad faith breach of fiduciary duty cannot occur until the insurer assumes the insured's defense and control of the right of settlement of claims).

could never have assumed a good faith fiduciary towards A.P.I. as it had never taken on A.P.I.'s defense and had never engaged in settlement discussions. Given this context, it is clear bad faith and fiduciary concepts are too intertwined to be separate grounds on which to award separate damages, let alone extracontractual damages.⁵⁷

The Law of Extracontractual Damages:

A.P.I.'s fiduciary duty and good faith discussions underscore that these concepts are so meshed together that an insured can only obtain one recovery if the insurer breaches its good faith contractual obligations. The court also confirmed that the damages available for this breach are not extracontractual in nature.⁵⁸ Therefore, on remand, the parties would be able to develop what, if any, contractual damages may have resulted from any breach if proven.

A.P.I. did not completely foreclose the insured's ability to obtain extracontractual damages, however. The opinion confirmed long-standing caselaw that an insured is entitled to tort damages if it can show an exceptional circumstance exists where the insurer has breached a duty independent of the contractual relationship.⁵⁹ Something more

⁵⁷ One may ask why, if the matter is an issue of law, why didn't the court of appeals simply reverse the trial court and not remand the bad faith fiduciary duty issues? As discussed elsewhere, the appellate court reversed the trial court on numerous grounds. It also appears the appellate court may have felt that the errors were so pervasive that the entire matter needed to be remanded for, in essence, a "do over." With the appellate court's guidance, the parties on remand would be able to move the trial court for summary judgment on various issues under the law-of-the-case doctrine. See e.g., *Lange v. Nelson-Ryan Flight Serv., Inc.*, 263 Minn. 152, 155, 116 N.W.2d 266, 269 (1962). This is actually what happened in *Kissoondath* when the trial court on remand granted summary judgment against the insurer on the bad faith issue. *Kissoondath v. United States Fire Ins. Co.*, No. C5-02-472 (Minn. App. December 10, 2002) (unreported).

⁵⁸ *A.P.I.*, 738 N.W.2d at 407. See *Olson*, 277 N.W.2d at 387-88; see also *Lesmeister*, 330 N.W.2d at 103 (citing *Hadley v. Baxendale*, 9 Ex. 341, 156 Eng.Rep. 145 (1854); *Francis*, 58 Minn. 252, 59 N.W. 1078).

⁵⁹ 738 N.W.2d at 407; *Wild v. Ravig*, 302 Minn. 419, 440, 234 N.W.2d 775, 789 (1975), cert. denied, 424 U.S. 902 (1976).

than a bad faith breach of an insurance contract must be shown as such conduct is not tortious in and of itself, and therefore can not be the basis on which a policyholder may recover extracontractual,⁶⁰ or punitive,⁶¹ damages.

Key to *A.P.I.*'s discussion of these concepts is the opinion's confirmation that actions involved with a bad faith failure to settle a claim within policy limits (whether characterized as fiduciary or otherwise) can never be conduct "independent" of the contract to permit a recovery of extracontractual damages. The court confirmed that "A.P.I. must prove the elements of an independent tort before the insurer's assumption of the insured's defense" in order to seek extracontractual damages.⁶² This is the point in time when the relationship between the parties relates to the contract as opposed to some independent interaction. Stated another way:

"[W]ithout [the insurance] contract there would [be] no relationship between the parties, and no basis for liability. Therefore, there is no duty independent of the contract."⁶³

Therefore, if the conduct at issue is incident to the contract, as it would be when trying to prove a bad faith failure to settle, there is no tort which could be "independent" of the contract to be the basis on which extracontractual damages could be awarded. In other words, once a defense is assumed, and the conduct at issue is a bad faith breach of a fiduciary duty to settle with policy limits, the only remedy available is consequential, and not extracontractual, damages.

⁶⁰ *Morris*, 386 N.W.2d at 237; *Haagenson v. National Farmers Union Prop. & Cas. Co.*, 277 N.W.2d 648, 652 (Minn. 1979); *Olson*, 277 N.W.2d at 388; *Moore v. John E. Blomquist, Inc.*, 256 N.W.2d 518 (Minn. 1977); *Wild*, 302 Minn. at 440, 234 N.W.2d at 789; *Independent Grocery Co. v. Sun Ins. Co.*, 146 Minn. 214, 217, 178 N.W. 582, 583 (1920); *Beaulieu v. Great Northern Ry. Co.*, 103 Minn. 47, 50, 114 N.W. 353, 354 (1907); *Markgraf v. Douglas Corp.*, 468 N.W.2d 80 (Minn. App. 1991); *Cherne Contracting*, 572 N.W.2d at 343; *Pillsbury Co. v. National Union Fire Ins. Co.*, 425 N.W.2d 244, 248-49 (Minn. App. 1988), *pet. for review granted* (Minn. July 28, 1988), *appeal dismissed* (Minn. Mar. 13, 1989); *Saltou v. Dependable Ins. Co.*, 394 N.W.2d 629, 633 (Minn. App. 1986).

⁶¹ *Minnesota-Iowa Television v. Watonwan T.V. Improvement Ass'n.*, 294 N.W.2d 297, 309 (Minn. 1980).

⁶² 738 N.W.2d at 407.

⁶³ *Cherne Contracting*, 572 N.W.2d at 343-44. See also *Hanks v. Hubbard Broad., Inc.*, 493 N.W.2d 302, 308 (Minn. App. 1992).

Finally, *A.P.I.* provides one last confirmation that an insured is not entitled to extracontractual damages for any alleged fiduciary duty breach involved with the insurance contract. The court observed *A.P.I.* had asserted misrepresentation claims against the carrier. Those claims were also remanded for retrial to allow consideration of whether *A.P.I.* might be entitled to extracontractual damages.⁶⁴ The elements of these independent torts must be proven as a point in time which is prior to any time *OneBeacon* may have assumed a duty to defend.⁶⁵ However, key in this remand is that the court did not list any breach of any fiduciary duty as a basis on which the insured could seek extracontractual damages. Therefore, the court could not believe that any fiduciary duty at issue entitled the insured to extracontractual damages.

CONCLUSION

The *A.P.I.* decision reinforces well-established Minnesota law that a liability insurer does not have any special fiduciary relationship with its insured prior to assuming the policyholder's defense and thereafter engaging in settlement discussions. At that point, if the carrier in bad faith fails to settle the liability action against its insured within the policy's limits, it is liable for contractual damages measured by the amount of the insured's liability above the policy's limits. Extracontractual damages for a bad faith failure to settle are never available, no matter how the duty at issue is described.

Given how the court of appeals resolved these issues, it would be fascinating to see how the matter is handled on remand. However, following the Supreme Court's denial of *A.P.I.*'s Petition for Further Review, it is reported that the parties have now settled the case. Therefore, how the *A.P.I.* decision will be implemented will be left for future cases. ▲

⁶⁴ 738 N.W.2d at 408.

⁶⁵ *Id.* at 407.

GOVERNMENTAL IMMUNITY UPDATE

By Jessica E. Schwie

JARDINE, LOGAN & O'BRIEN PLLP



The State of Minnesota, counties, towns, municipalities and schools are immune from (entitled to dismissal of) various types of tort claims. Minnesota Statute Sections 3.736 and 466.03 provide an itemized list of claims from which governmental entities are immune. In addition, the Minnesota appellate courts

have created common law immunity for governmental entities and their employees, not otherwise provided for in statute. Moreover, in those cases where a governmental entity is not immune from a claim, it may still be protected by a cap or limit on the amount of tort damages awarded.

The rationale for protecting governmental entities is generally based upon the following concepts: (1) governmental entities are charged with making decisions for the public good that involve the weighing of multiple factors that often have both negative and positive outcomes, (2) the judicial branch, through the medium of lawsuits, should not second guess the political balancing decisions of governmental entities, (3) an award obtained against a governmental entity is paid out of public funds which are funded by the taxpayer, (4) public funds are better protected, and it is a better use of public funds, if a few individuals suffer as opposed to the public in general, and (5) governmental agents will perform their duties more effectively if not hampered by fear of tort liability. *Nusbaum v. Blue Earth County*, 422 N.W.2d 713, 718 (Minn. 1988); *Holmquist v. State*, 425 N.W.2d 230, 231 (Minn. 1988); *Wilson v. Ramacher*, 352 N.W.2d 389, 393 (Minn. 1984); see generally, Restatement (Second) Torts § 895B. The most often used immunity defenses are statutory discretionary immunity (referred to by the court as governmental immunity), common law official immunity, and recreational immunity.

In order to be entitled to statutory discretionary immunity, the governmental entity must demonstrate that the

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challenged act or omission arose out of a "planning-level" (also known as "policy-making") decision. *Zank v. Larson*, 552 N.W.2d 719 (Minn. 1996). Planning-level or policy-making decisions are those decisions that involve the balancing of public policy objectives, including social, economic, financial, and political factors. Statutory discretionary immunity applies not only to those losses resulting from the decisions made by elected officials, but those of staff in certain circumstances. In those cases where the challenged conduct of staff amounts to nothing more than an attack on the policy itself, it is appropriate to bar the claim under the doctrine of statutory discretionary immunity. *Watson v. Metropolitan Transit Comm'n.*, 533 N.W.2d 406, 413 (Minn. 1996); *Nusbaum*, 422 N.W.2d at 721-22; *Holmquist*, 425 N.W.2d at 232.

Common law official immunity, which is case-law generated as opposed to legislative created statutory discretionary immunity, "involves the kind of discretion which is exercised on an operational rather than a policy-making level." *S.W. v. Spring Lake Park Sch. Dist. # 16*, 580 N.W.2d 19, 23 (Minn. 1998); *accord Pletan v. Gaines*, 494 N.W.2d 38, 40 (Minn. 1992). This immunity protects a public official who is sued individually for his or her own torts. A public official charged by law with duties calling for the exercise

A public official charged by law with duties calling for the exercise of judgment or discretion is immune from a tort claim for damages unless guilty of a willful or malicious wrong.

of judgment or discretion is immune from a tort claim for damages unless guilty of a willful or malicious wrong. *Rico v. State*, 472 N.W.2d 100 (Minn. 1991). In defining acts protected by official immunity, courts have distinguished between discretionary duties (protected) and ministerial duties (not protected). A duty is ministerial "when it is absolute, certain and imperative, involving merely execution of a specific duty arising from fixed and designated facts." *Rico v. State*, 472 N.W.2d at 678. Whether discretion was involved, and official immunity applies, turns on the facts of each case. *Id.* In most circumstances, a governmental employer is entitled to share in its employees' immunity

by way of vicarious official immunity. *Olson v. Ramsey*, 509 N.W.2d 368, 372 (Minn. 1993). Vicarious official immunity can serve as a defense to a claim against a governmental employer even if a governmental employee is not named individually in the Complaint.

Recreational immunity grants governmental entities immunity from “[a]ny claim based upon the construction, operation, or maintenance of any property owned or leased by the municipality that is intended or permitted to be used as a park, as an open area for recreational purposes, or for the provision of recreational services” Minn. Stat. § 466.03 subd. 6e, *see also* Minn. Stat. § 3.736. The only exception to recreational immunity arises when the claimed injury allegedly arose from a condition existing on the property. In that case, governmental entities are still liable for conduct that would entitle a trespasser to damages against a private person. Minnesota courts have adopted the

Minnesota courts have adopted the Restatement (Second) of Torts standard as the standard of care owed to a trespasser.

Restatement (Second) of Torts standard as the standard of care owed to a trespasser. *See, e.g., Green-Glo Turf Farms v. State*, 347 N.W.2d 491, 494 (Minn. 1984). The Restatement (Second) of Torts provides for two trespasser standards of care—one for adults (§ 335) and another for children (§ 339).

Although it has been established that the adult trespasser standard of care should be used in most cases, there are conflicting judicial opinions as to whether the child trespasser standard of care should be used in cases involving injuries to children. The most authoritative case law indicates that only the adult trespasser standard of care (and not the child trespasser standard of care) should be used to analyze the applicability of the recreational immunity defense. *See Sirek v. State, DNR*, 496 N.W.2d 807 (1993). Under the adult trespasser standard of care, a governmental entity will be liable only for failing to exercise reasonable care to warn trespassers about hidden, artificial dangers knowingly created or maintained by it. *Sirek*, 496 N.W.2d at 813.

The following is a summary of case law issued in 2007

addressing statutory discretionary immunity, common law official immunity, and recreational immunity.

STATUTORY IMMUNITY

Schmitz v. City of Farmington, A06-1795, 2007 WL 2107408 (Minn. App. Jul. 24, 2007) (unpublished). The City of Farmington undertook a main street reconstruction project. Part of the project involved a process known as “de-watering” which is the removal of groundwater by pumping to lower the water table. After the dewatering process was completed, significant cracks appeared in the foundation walls, chimney, interior walls, and basement floor of Schmitz’s house. The court held that the municipal decision to use the de-watering process would be protected by statutory discretionary immunity, but that was not what was being challenged. The court held that the challenged conduct was the actual de-watering. The court further noted that the city supervised its contractors who conducted the de-watering on a daily basis and that daily monitoring is not the type of conduct protected by statutory immunity.

Armstrong v. Department of Corrections, A06-1488, 2007 WL 1893304 (Minn. App. Jul. 3, 2007) (unpublished). Armstrong was diagnosed with degenerative arthritis. While incarcerated, he requested a cell with a handrail near the toilet which was denied until one became available (he was offered a walker in the meantime). Later, at a halfway house, he was provided a room that was not handicapped accessible until he specifically requested one. Finally, his parole was revoked and he was denied release on his projected release date. Armstrong brought a negligence claim challenging unspecified conduct. The Court dismissed the claim based upon statutory immunity holding “[i]n our view, the decisions made by the DOC in this case are quintessential discretionary policy decisions in which the DOC must balance social, political, and economic considerations such as public safety, cost, offender’s needs, and rehabilitation.”

COMMON LAW OFFICIAL IMMUNITY

Larrison v. John Marshall High School, A06-631, 2007 WL 152174 (Minn. App. Jan. 23, 2007) (unpublished). Larrison was badly injured after another student assaulted him. The classroom teacher was in his office, entering attendance into his computer. The court noted that the teacher was entering attendance in accordance with a school policy. The court further noted that the school’s policy was a discretionary operational policy that resulted from the need to confirm that stu-

dents are at school and their location for safety and academic purposes. The court, thus, held that because the teacher's acts were pursuant to a discretionary policy, the conduct was protected by official immunity. Thus, claim of negligent supervision was barred.

Wilson v. City of Burnsville, A06-495, 2007 WL 1263490 (Minn. App. May 1, 2007) (unpublished). Wilson was suffering a heart attack when his wife called 911. The dispatcher gave the first responders the wrong address. Then, after the correct address was given, the first responders got lost. Wilson passed away. The court held that "the conduct of the emergency responders in first driving to an incorrect location, which occurred while making decisions about how to arrive at the address from which the request for emergency aide arose, is protected by official immunity." The court held, however, that the actions of the dispatcher in taking the call and in accurately recording the address were ministerial; and, thus, not protected by official immunity. Note, however, that the claim arising out of the dispatcher's mistake was later barred by the public duty doctrine.

Kelly v. Jerde, A06-89, 2007 WL 1531878 (Minn. May 29, 2007) (unpublished). A motorist was injured when her vehicle collided with a snow plow. The snow plow operator was clearing 2 ½ inches of snow and sanding in a traditional plow truck that weighed about 28,000 pounds fully loaded. As the operator was approaching an intersection, he made the decision to travel through the intersection without coming to the posted stop. He did not see the plaintiff's vehicle. The court held that official immunity barred the plaintiff's claims because the city did not have a policy requiring snow plows to stop at controlled intersections and the driver was considering factors such as the weight of the snow in front of the plow, the need to spread sand evenly across the intersection, and the ability to bring his vehicle to a stop.

Fisher v. Department of Corrections, A06-76, 77, 2007 WL 1673642 (Minn. App. June 12, 2007) (unpublished). Fisher had been targeted by prison gangs who subjected him to extortion and assaults. He was forced to live either in solitude (where he was still not safe) or to live in the general population. The court held that the Department of Corrections had violated Fisher's constitutional rights by failing to alleviate the known risk of harm to Fisher. The court held that because Fisher had established a constitu-

tional violation of his rights, he had demonstrated sufficient evidence to meet the malice exception to official immunity.

Armstrong v. Department of Corrections, A06-1488, 2007 WL 1893304 (Minn. App. Jul. 3, 2007) (unpublished). In this case, the facts of which are discussed under statutory immunity above, the district court held that the DOC employees were entitled to official immunity, barring Armstrong's MHRA disability discrimination claim because they did not intentionally commit any wrongful acts, but denied vicarious official immunity to the DOC. The Court of Appeals reversed the denial of vicarious official immunity holding that because the involved employees are essentially the DOC; if the individual employees did not intentionally commit any wrongful acts, then the DOC could not be held to have committed a wrongful act stripping it of vicarious official immunity protection.

Rebischke v. Metropolitan Sports Facilities Comm'n, No. A06-1605, 2007 WL 2034427 (Minn. App. Jul. 17, 2007) (unpublished). A 77 year old female attended a Twins game, which she often did. Her grandson led her out a set of "balance doors" after the game. The "wind effect" caused by air flowing through the door caused her to fall face-first into a turnstile, injuring her. The metrodome had a policy in place that left it to the discretion of the supervising MSFC Operating Technician, within a specified range, as to whether the conditions permitted the use of the balance doors, as opposed to revolving doors only, at the time of game end. The Court of Appeals held that official immunity could bar Plaintiff's claim because although the policy specified a range of conditions within which the doors could be used, it was ultimately the discretion of the operating technician as to whether the balance doors could be used. However, the Court of Appeals held that there was a question of fact as to whether the conditions (the static pressure) were in excess of that permitted by written policy; and, thus there was a question as to whether the operator violated the policy.

Koivisto v. Dale, 2007 WL 260810 (Minn. App. Sept. 11, 2007) (unpublished). A drunk driver collided with the rear-end of a snow plow. His passenger brought a claim against MNDOT, asserting that the MNDOT snow plow operator was negligent, in moving his vehicle to the right shoulder of a highway where he intended to stop his plow and assist a motorist in the ditch that appeared to be in medical distress.

The Court of Appeals affirmed dismissal of the action on the basis of official immunity. Koivisto argued that the decisions of the snowplow driver in making the lane change and moving toward the shoulder were ministerial. The court rejected that argument, stating that it would not parse out the acts of the driver. The acts of the driver were all part of a single discretionary decision—the decision of whether to cease plowing and provide assistance to a motorist.

Jasperson v. ISD #11, A06-1904, 2007 WL 313456 (Minn. App. Oct. 30, 2007) (unpublished). A student committed suicide. The estate claimed that the following caused the student to commit suicide (1) a teacher told the student that he was going nowhere in life, (2) a counselor refused to meet with the student when he asked for help, and (3) the school failed to investigate bullying of the student. The court dismissed the suit on the basis of official immunity. It found that the teacher's statements to the student arose out of his discretion as to how to motivate students; the counselor had to exercise discretion in determining how to schedule appointments and respond to requests for assistance when she was responsible for counseling 1500 or more students; and the individuals who investigated the allegations of bullying exercised their discretion in conducting the investigation and reaching the conclusions that they did.

RECREATIONAL IMMUNITY

Neither the Supreme Court, nor the Court of Appeals issued any decisions regarding recreational immunity this past year. However, summary judgment dismissal was granted in the following district court cases.

In *Adams v. ISD #625*, Ramsey County District Court dismissed a claim where a student football player injured himself while conducting a vertical jump test. During the test, Adams collided with the equipment used to measure how high he jumped. The injury causing condition (an exposed wing-nut) was open and obvious and was not likely to cause substantial bodily injury or death. Furthermore, the school district did not have any knowledge that condition was dangerous; it was a necessary piece of the equipment and no one had been injured previously.

In *Prokop v. ISD #625*, Ramsey County District Court dismissed a claim by a baseball coach who was injured while conducting batting practice in a batting cage, while using a pitching screen. The coach was struck by a ball hit by his son. The coach alleged that the injury was a result of the poor condition of the pitching screen. The condition (holes in the netting of the pitching screen) were open and obvious and were not likely to cause substantial bodily injury or death. The screen had been in use for numerous years and continued to be used without any other incidences of injury. The equipment, while not ideal, was functional. This case is on appeal.

In *Belfrey v. ISD #11*, Hennepin County District Court dismissed a negligent supervision claim where a student was injured in a fight with another student during open basketball. Open basketball had been cancelled for an in-staff meeting, but certain students remained in the gymnasium after staff, who would otherwise supervise the open basketball, left to attend the meeting. Two of the students then engaged in a fist-fight, resulting in injury. The court agreed that the claim of negligent supervision arose out of a recreational event and that it was automatically barred by recreational immunity (the trespasser exception does not apply).

Finally, a case to watch for in the coming year is *Gillespie v. Ramsey County*, which was argued before the Court of Appeals on January 24, 2008. Gillespie, an inmate at the county correctional facility, was exercising by walking around a rectangular fenced area (called the recreational area) while other inmates were playing "kitten ball." Gillespie walked near another inmate who was taking a practice swing and was struck. The county asserted recreational immunity, statutory discretionary immunity, and official immunity, but lost on summary judgment.

If you have any more questions about the above cases or immunity defenses in general, please feel free to contact Jessica Schwie at Jardine, Logan & O'Brien PLLP. Ms. Schwie regularly practices in the area of government liability, defending governmental entities against various types of claims, including personal injury, employment, excessive force, and land use. ▲

THE COMMERCIAL LITIGATION CORNER

By Patrick D. Robben

MORRISON FENSKE & SUND, P.A.



No economic trend has been getting more attention as of late than the so-called “credit crunch.” During the housing refinance boom of the last few years, enticed by ever-increasing home values and low interest rate mortgages, millions of Americans obtained mortgages that they are now struggling to afford. For many, the increase in their interest rate rates on variable rate mortgages has taken a toll. In early August, financial talking

head James Cramer had an on-air meltdown on CNBC that turned into a “YouTube” moment as he passionately warned that the Federal Reserve Bank had “no idea” how severe the credit crisis was becoming in the so-called “subprime” mortgage market and the hedge funds that invest in bundles of such mortgages on the secondary market. Cramer warned ominously this was causing an “Armageddon” in the fixed income markets.

Since then, news of credit woes suffered by some mortgage lenders have filled the media. The Federal Reserve Board has in fact moved to lower interest rates as Cramer had pleaded, bringing some momentary reassurance to the topsy-turvy financial markets.

Worries of a credit crunch are not isolated to the United States, as litigators on both sides of the Atlantic are preparing to deal with the fall-out from the credit crisis. A recent story in the *Times* of London reported that banks, hedge funds and private equity firms are “lining up” to talk to their counsel as they face the prospect of being “embroiled in years of costly litigation.”¹ The article went out note that the “sheer complexity” of the financial instruments that invested in subprime mortgages “could make it almost impossible to determine liability” and that, in a situation no doubt similar to the potential litigation in the United States, “it could take years for the courts to sort out.”²

Why am I mentioning this in a column about commercial litigation? Because business litigation is, obviously, directly affected by the economic trends of the day. So how will the current “credit crunch” affect business litigation?

One area of litigation that are bound to stay very busy as a result of the current mortgage market woes are foreclosure proceedings. The Star Tribune recently reported that 26% of all homes purchased in Hennepin County were financed by subprime mortgages, and that the number of homes financed through such mortgages had significantly increased throughout the 11-county extended metropolitan area.³ A recent report by Minnesota Public Radio discussed a survey by the

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Greater Minnesota Housing Fund that estimated that more than 11,000 foreclosures were conducted in the state last year. That same report stated the trend in the increase in foreclosures was expected to continue in 2007, as the number foreclosures was against substantially up from the previous year.⁴

Another related area sure to remain busy is title litigation. Alleged defects to marketable title may surface during foreclosure proceedings, thereby causing lenders to tender the title defect claims to the title insurer.

How will the changing economic tides affect law firms? Some big-firm watchers have commented that the credit crunch will contribute to a downturn in corporate transaction work such as structured finance, and mergers and acquisitions. In contrast, opportunities will exist for litigation lawyers in such areas as bankruptcy and securities litigation.⁵ Should the economy slow, employment litigation may heat up as well as terminated employees are less able to find replacement employment positions.

Will the hype over credit problems translate into a distinct impact on the type and volume of commercial litigation cases seen in Minnesota or elsewhere? Only time will tell. Those who watched the much-ballyhooed buildup to the “Y2K” litigation will recall the aftermath of that event was not pronounced as many had speculated before the new millennium. What is worth noting is that the recent news about the credit markets and how it will affect law practice demonstrates the dynamic nature of commercial litigation. As business conditions change, the litigation needs of businesses change as well. The ever-changing nature of commercial litigation, as with many other areas of law, gives us the opportunity to continually learn, grow, and perhaps even reinvent ourselves as our clients’ needs change. That is one of the great privileges of the profession we have chosen.

Finally, I would like to re-extend on behalf of myself and the MDLA Commercial litigation Committee’s Chair and Vice Chair, Steve Laitinen of Larson • King, LLP and Cynthia Ahrends of Halleland Lewis Nilan & Johnson, P.A., an invitation to our readers to get involved with the Committee. Also, if you have any ideas for future columns, or would like to take a turn as authoring a “Commercial Litigation Corner” of your very own, please let us know. We’d love to hear from you!

¹ Alex Spence and Michael Herman, *The Times Online*, Aug. 10, 2007, available at <http://business.timesonline.co.uk/tol/business/law/article2235829.ece>.

² *Id.*

³ Jim Buchta, *Minneapolis-St. Paul Star Tribune*, (Sept. 22, 2007), available at <http://www.startribune.com/535/story/1439915.html>.

⁴ Tom Robertson, Minnesota Public Radio, (Aug. 15, 2007), available at <http://minnesota.publicradio.org/display/web/2007/08/14/rural foreclosure/>.

⁵ Gina Passarella, *The Legal Intelligencer*, (August 28, 2007), available at <http://www.law.com/jsp/article.jsp?id=1188205348282&rss=newswire#>.

MDLA 43RD ANNUAL MID-WINTER CONFERENCE
FEBRUARY 8-10, 2008
EDGEWATER RESORT AND WATERPARK, DULUTH

Despite bone chilling outdoor temperatures, this year's conference was the place to be to learn about hot topics and enjoy indoor tropics. The 43rd Annual Mid-Winter Conference, held at the Edgewater Resort and Waterpark in Duluth, was a rousing success. Seminar Coordinator **Patricia Y. Beety**, League of Minnesota Cities, chose an ADR and settlements theme for the seminar and presenters did a fantastic job of sharing their knowledge on related topics.

The traditional new lawyers CLE session took place on Friday afternoon. This segment, open to all members and presented by new lawyers, was coordinated by **Amy K. Amundson**, Lind, Jensen, Sullivan & Peterson P.A.. **Christine Mennen**, Halleland Lewis Nilan & Johnson, P.A., kicked off the program with the presentation *Discovery Strategies for Generation X and Y Plaintiffs*. She was followed by **Jennifer G. Lurken**, Larson • King, LLP, with *The New E-Discovery Rules: How It Affects New Lawyers*; **Matthew S. Frantzen**, **Matthew D. Sloneker**, and **Eric J. Steinhoff** of Lind, Jensen, Sullivan & Peterson, P.A., presented

Deposition: It Is More Than Asking Questions and **Kathryn R. Burke**, Bassford Remele, P.A., offered *Make a Statement Essential for the Non-Actor/Attorney*.

Early Saturday morning, the CLE session began with a great crowd for *ADR Settlement Strategy & Preparation: Best Practices* by presenters **Stephen P. Laitinen** and **Margaret Jennings**, Larson • King, LLP. The seminar continued with *New Opportunities for Structured Settlements and Specialized Trusts*, from **David C. Brackett**, Capital Planning, Inc.; *So, You Want to Settle with the Government?* from **Jessica E. Schwie**, Jardine, Logan & O'Brien, PLLP; and *Federal Settlement Conferences—Purpose, Process and Practice Pointers*, from **Magistrate Raymond L. Erickson**, United States District Court.

By evening, attendees were surprised to find the conference room transformed into a festive Hawaiian luau with lighted palm trees, live goldfish centerpieces, and beach music played by DJs. Kids enjoyed making photo frames, coloring, getting hibiscus tattoos and meeting Tiki Tom, the



Edgewater mascot. The luau buffet dinner was delicious and gave contestants – both kids and adults – the energy to compete in the hula hoop and limbo contests. The pictures tell it all – it was a sensational event!

Sunday's interesting programming once again got attendees up early and back to the conference room to hear *The Tangled Web: Third Party and Employment Issues in Workers' Compensation Settlements* with presenters **Douglas J. Brown**, Brown & Carlson, P.A.; **Nicole B. Surges**, Erstad & Riemer, P.A.; and **Joseph M. Nemo, III**, Arthur Chapman Kettering & Pikala, P.A. Additional programs were *The Art of Drafting Valid Employment Releases*, **Amy C. Taber**, Faegre & Benson, LLP; *Rule 68 Offers of Judgment – The Latest (and Not So Greatest) News*, **Thomas E. Marshall**, Jackson Lewis; *Tendering Defense – Passing the Torch without Putting out the Fire or Getting Burned*, **Jack E. Hennen**, League of Minnesota Cities, and **Keith Kerfeld**, Tewksbury & Kerfeld, P.A.; and *Deal or No Deal? The Reality of Insurance Settlements* with

Brian H. Sande, Bassford Remele, P.A. and **Dale O. Thornsjo**, Johnson & Condon, P.A.

Thanks to our exhibitors, EvaluMed, Integrity, MEI, Minnesota Lawyers Mutual Insurance, and Woodlake Medical Management for their support and participation in our conference and for venturing to Duluth in the winter time.

CLE credit has been applied for in Minnesota, Iowa, North Dakota, and Wisconsin. As credit approval is received, information will be updated in the weekly Requests and Events e-mail and on the MDLA website.

Next year's Annual Mid-winter Conference, our 44th, is scheduled for February 6-8, 2009. With increased conference attendance and more families at this year's Duluth location, the tentative plan is to return to the Edgewater next year. The facility and rooms have been reserved; however, a final location decision will be based on results from a conference evaluation. Mark the date and watch for future announcements.



Thank You, Exhibitors

MDLA 43rd ANNUAL MID-WINTER CONFERENCE

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We appreciate your support!

ASSOCIATION NEWS

Renee Anderson

EXECUTIVE DIRECTOR, MDLA



If you did not make it to the Mid-winter Conference – you missed a very worthwhile weekend adventure in Duluth. From the informative CLE presentations to the luau party and waterpark, there was plenty to keep members and their families engaged. We were pleased to see attendance at the conference on the upswing and hope it will continue in that direction for years to come.

So much to do - so little time.

That saying seems to fit what I face each day when I look at my desk. One reason is the dues statements that were mailed in January. If you have not yet paid your 2008 dues, please take a few minutes to do so. It will not only keep your name out of the dreaded second notice pile, but save time and MDLA mailing costs. Also, if a form was sent to an attorney who is no longer employed at your firm or company, please send it back, noting the cancellation, so the member can be deactivated and subsequent notices avoided.

You may have noticed some slight changes on the dues form. At its December meeting, the Board approved an increase to \$150 for 2nd year lawyers and made a jump from \$140 to \$150 in the 2-5 years category. There were no changes in the \$210 category for lawyers who have practiced 5 years or more. The Membership Committee is actively reviewing the dues structure for 2009 to determine potential changes or promotions that could be made in efforts to increase our membership.

Looking ahead, I'd like to remind you of upcoming events to mark on your calendars.

MDLA is co-sponsoring the annual Medical Malpractice Conference with HCBA and Minnesota Association for Justice on April 17 at the Doubletree Park Plaza Hotel in St. Louis Park. Conference details are being finalized and you should be receiving registration information soon.

The annual golf tournament and CLE will again take place at StoneRidge Golf Course near Stillwater on June 13. As in the past, the CLE will take place in the clubhouse in the morning, followed by a lunch and shotgun start on the course in the afternoon. Think Green. The snow will soon disappear.

In mid-July, Quinlivan & Hughes will be hosting the annual Women Lawyers Breakfast at Windows on Minnesota.

The Trial Techniques Seminar in Duluth is August 11-14. Seminar Coordinator Kay Tuveson has already developed a tentative outline of topics. She is also bringing back the popular Vista Fleet dinner cruise Saturday evening for members and families.

We hope to see huge turnouts at each of these events. If you have not been an active member, this is the year to get involved. These are all great opportunities not only to earn your CLE credits but to meet, share ideas, and develop friendships with your defense colleagues. MDLA can only thrive and become even more valuable as an organization when members say "count me in." We look forward to seeing you soon. ▲



NEW MEMBERS

The following attorneys have joined the MDLA.
We welcome them into our membership.

Jessie Becker

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MDLA COMMITTEE UPDATES

MDLA committees provide great opportunities to learn and discuss issues and topics of current interest or concern with other members in similar practices. They serve as the heartbeat of the organization where important and valuable practice-related information is shared or association-wide positions are initiated and developed.

Committee members are notified of upcoming meetings via a list serve. Meeting notices are also posted on MDLA's web site and in *Requests and Events*, a weekly e-mail publication. All members are strongly encouraged to become active participants. If you would like to be appointed to a committee, simply submit a statement of interest to director@mdla.org. Non-members are welcome to attend a committee meeting to learn more about the committee's activities and member benefits.

AMICUS COMMITTEE: Corresponds via list serve to consider requests for appearances by MDLA as an amicus curiae. Chair is William Hart, Meagher & Geer, PLLP.

COMMERCIAL LITIGATION COMMITTEE: Meets quarterly. The committee typically offers a presentation and discussion on a specific topic of interest to commercial litigation practitioners. Chair is Steve Laitinen of Larson • King, LLP; Vice Chair is Cynthia Arends of Halleland Lewis Nilan & Johnson; Publications Chair is Patrick Robben of Morrison Fenske & Sund, P.A.

CONSTRUCTION LAW COMMITTEE: Typically meets at 4:00 p.m. on the third Monday of every other month (January, March, May, July, September, November) at The Local, 931 Nicollet Mall, Minneapolis. Chair is Steven Sitek, Bassford Remele, P.A.

EDITORIAL COMMITTEE: Meets to proof *Minnesota Defense*, MDLA's quarterly magazine. The magazine is published on or about February 1, May 1, August 1, and November 1. Proofing meetings are scheduled about two weeks before the publication dates. Chair is Victor Lund, Mahoney, Dougherty & Mahoney, P.A.

EMPLOYMENT LAW COMMITTEE: Meets at noon on the first Wednesday of every other month (December, February, April, June, August, October). Co-chairs are Jim Andreen, Erstad & Riemer, P.A. and Amy Taber, Faegre & Benson, LLP.

GOVERNMENTAL LIABILITY COMMITTEE: Meets quarterly with a CLE-type format. In February, the committee presents an annual update at the League of Minnesota Cities in St. Paul. Other meetings rotate among firms. The December holiday party is always enjoyable.

INSURANCE LAW COMMITTEE: Meets at noon on the second Tuesday of each odd-numbered month at the law firm of Bassford Remele, P.A. (33 South Sixth Street, Suite 3800, Minneapolis). The committee typically offers a presentation and discussion on a specific topic of interest to insurance practitioners. Upcoming meetings are scheduled for March 11 and May 13. Co-chairs are Brian Sande, Bassford Remele, P.A., and Dale O. Thornsjo, Johnson & Condon, P.A.

LAW IMPROVEMENT COMMITTEE: Monitors legislation during Minnesota's legislative sessions. A meeting is typically scheduled prior to or early in the legislative session and then periodically during the session as bills are introduced and decisions are needed on proposed legislation. Co-chairs are Tom Marshall, Jackson & Lewis and Rich Thomas, Burke & Thomas, PLLP.

LONG TERM CARE COMMITTEE: Meets every other month (December, February, April, June, August, October) at various times and locations. Co-chairs are Megan Hafner and Tony Kane, Terhaar, Archibald Pfefferle & Griebel, LLP.

NO-FAULT COMMITTEE: Meets at noon on the second Friday of every other month beginning in January. The 2008 meetings are scheduled to take place at Oskie, Hamilton & Sofio (970 Raymond Avenue, Suite 202, St. Paul, MN 55114) on January 11, March 14, May 9, July 11, September 12 and November 14. Co-chairs are Kelly Sofio, Oskie, Hamilton & Sofio, P.A. and Jessica Wymore, Stich Angell Kreidler & Dodge, P.A.

PRODUCTS LIABILITY COMMITTEE: Meets on an informal basis. Chair is Cortney Sylvester, Halleland Lewis Nilan & Johnson.

WORKERS' COMPENSATION COMMITTEE: Meets at 4:00 p.m. every other month (December, February, April, June, August, October) rotating between the law firms of Erstad & Riemer (8009 34th Avenue South, Suite 200, Minneapolis) and Brown & Carlson (5411 Circle Down Avenue, Suite 100, Minneapolis). Co-chairs are Douglas Brown, Brown & Carlson, P.A. and Charlene Feenstra, Heacox, Hartman, Koshmrl, Cosgroff & Johnson, P.A.

Get Involved! Join an MDLA committee.

- **Amicus Curiae Committee**
William M. Hart, *Chair*
- **Commercial Litigation Committee**
Stephen P. Laitinen, *Chair*
- **Construction Law Committee**
Steven M. Sitek, *Chair*
- **Editorial Committee**
Victor E. Lund, *Chair*
- **Employment Law Committee**
Jim Andreen and Amy Taber, *Co-Chairs*
- **Governmental Liability Committee**
Joe Flynn, *Chair*
- **Insurance Law Committee**
Brian Sande and Dale Thornsjo, *Co-Chairs*
- **Law Improvement Committee**
Rich Thomas and Tom Marshall, *Co-Chairs*
- **Long Term Care Committee**
Megan Hafner and Tony Kane, *Co-Chairs*
- **New Defense Attorneys Section**
Amy K. Amundson and Lacey B. Anderson, *Co-Chairs*
- **No-Fault Committee**
Jessica R. Wymore and Kelly Sofio, *Co-Chairs*
- **Products Liability Group**
Cortney G. Sylvester, *Chair*
- **Workers' Compensation Committee**
Douglas Brown and Charlene Feenstra, *Co-Chairs*

NAME _____

FIRM _____

ADDRESS _____

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COPY, COMPLETE AND MAIL TO:

Renee C. Anderson, Executive Director
Minnesota Defense Lawyers Association
 600 Nicollet Mall
 Suite 380A
 Minneapolis, MN 55402
 OR email request to director@mdla.org

MDLA MEMBER ANNOUNCEMENTS

Diane B. Bratvold, a shareholder in the firm of Briggs and Morgan, Professional Association, has been elected treasurer of the Eighth Circuit Bar Association. Bratvold served previously as the bar association's director for Minnesota.



Bratvold is a fellow of the American Academy of Appellate Lawyers and was recently listed in the "Top 100 Women Super Lawyers" in Minnesota. She has served in a number of other leadership positions that further the practice of appellate law—she is currently chair of the Minnesota State Bar Association's Appellate Section, chair of the Program Committee and member of the Steering Committee of the Defense Research Institute's (DRI) Appellate Advocacy Committee, and 8th Circuit editor of *Certworthy*. She is also an appellate advocacy instructor at the University of St. Thomas Law School and a contributing author to several respected appellate publications.

Bowman and Brooke LLP, a national trial firm defending corporate clients in high stakes product liability and commercial litigation, is pleased to announce the following promotions and elections in our Minneapolis office:



David W. Graves, Jr.

David W. Graves, Jr., Managing Partner, has been elected Chair of the firm's newly formed Executive Committee, with continued management responsibilities to the firm nationally.



George W. Soule

Richard G. Morgan, Managing Partner, has also been elected to the firm's newly formed Executive Committee, with added management responsibilities to the firm nationally.

George W. Soule, was reelected Managing Partner of the Minneapolis office.



David N. Lutz

David N. Lutz, was elected Co-Managing Partner of the Minneapolis office.

Ryan L. Nilsen, was promoted from Associate to Partner.



Roshan N. Rajkumar

Roshan N. Rajkumar, was promoted from Associate to Partner.

ARTICLES FROM PAST ISSUES

Members wishing to receive a copy of an article from a past issue of *Minnesota Defense* should forward a check made payable to the Minnesota Defense Lawyers Association in the amount of \$5.00 for postage and handling. In addition to the articles listed below, articles dating back to Fall '82 are available. Direct orders and inquiries to the MDLA office, Suite 380A, 600 Nicollet Mall, Minneapolis, MN 55402.

Spring 2006

Government Data and The Defense Attorney: A Practical Guide to Understanding and Working with Minnesota's Government Data Practices Act (MGDPA) **Patricia Beety**
The Evolution and Extinction of The Business Risk Doctrine and Other Issues Affecting Insurance Coverage in Construction Defect Litigation **Carrie Hund**

Summer 2006

Barbarians at the Gate: Is Public Entity Lead-Based Paint Litigation Coming to Minnesota? **Matthew S. Frantzen**
Who's on the Risk? Allocating Damages Among Insurers in Construction Defect Claims **Brian H. Sande and Mark R. Bradford**
2006 Legislative Report **Sandy Neren**

Fall 2006

The Corporate Death Defense: Alive And Well in Minnesota **Richard J. Leighton**
Hot Off The Press: Minnesota Supreme Court Clarifies Pro-rata Insurance Coverage Allocation for Wet Home Contractor **Michael D. Carr and James F. Mewborn**
Claims for Contribution and Indemnity After *Weston v. McWilliams*: Where Do the Claims Start and Where Do the Claims Stop? **Amy K. Amundson and Steven M. Sitek**
Understanding Minnesota's Contractual Indemnity Quagmire at a Glance **Michael D. Carr**

Winter 2007

What Civil Defense Attorneys Should Know About ERISA **Tiffany M. Quick**
Wooddale Builders, Inc. v. Maryland Casualty Co.: Supreme Court Addresses Certain Insurance Coverage Issues Pertaining to Moisture Intrusion Claims **John M. Bjorkman and Paula Duggan Vraa**

Spring 2007

Advice for Goldilocks When Hiring Good Help: Don't Ask Too Much; Don't Ask Too Little **Jessica J. Theisen and Tamara Novotny**
Recent Developments in Employment Law for the Defense Attorney **Janet C. Ampe, Mary L. Senkbeil and Amy C. Taber**

Summer 2007

Offers of Judgement and Fee Shifting Statutes: the "Un-American" Rule **Thomas E. Marshall**
2007 Legislative Report **Sandy Neren**

Fall 2007

Minnesota Supreme Court Considers Revisions to Rule 68 That Would Make Defendants Pay Double Costs and Disbursements Limiting Liability for Sexual Harassment: New Guidance from the Eighth Circuit **Megan Backer and Joeseph Schmitt**
Compliance With New Standard for Safety Information Can Assist Production Manufacturer in Defending Failure to Warn Claims **Christine M. Mennen and Sheila T. Kerwin**
Navigating the Workers' Compensation Subrogation Labyrinth... *How to Resolve the "Unresolvable" Subrogation Case Through Alternative, Cutting-Edge Settlement Negotiation Models* **Joseph M. Nemo III**

MDLA UPCOMING DATES

2008

Medical Malpractice Conference
Doubletree Hotel Minneapolis Park Place, Minneapolis.
April 17, 2008

2008 Golf and CLE Seminar
Stoneridge Golf Course, Stillwater
June 13, 2008

MDLA 33rd Annual Trial Techniques Seminar
Duluth Entertainment & Convention Center, Duluth
August 14-16, 2008

Watch for more information
on these and other events in
Minnesota Defense, by mail,
and at www.mdla.org



APPLICATION FOR MEMBERSHIP

Please print:

Date _____ Attorney ID _____

I, _____, do hereby apply for membership in the Minnesota Defense Lawyers Association and do hereby certify that I am an attorney primarily involved in the defense of civil actions in the State of Minnesota.

Law firm/Employer _____

Admitted to practice ____/____ (MM/YYYY) I am currently a member of DRI: Yes ____ No ____

Areas of practice and specialization:

<input type="checkbox"/> ADR	<input type="checkbox"/> Employment	<input type="checkbox"/> Products Liability
<input type="checkbox"/> Appellate	<input type="checkbox"/> Environmental	<input type="checkbox"/> Professional Liability
<input type="checkbox"/> Auto: No-Fault	<input type="checkbox"/> General Litigation	<input type="checkbox"/> Subrogation
<input type="checkbox"/> Commercial	<input type="checkbox"/> Governmental Liability	<input type="checkbox"/> Workers' Compensation
<input type="checkbox"/> Construction Law	<input type="checkbox"/> Insurance Coverage	<input type="checkbox"/> Other _____
<input type="checkbox"/> Dram Shop	<input type="checkbox"/> Medical Malpractice	

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*By providing a fax number and e-mail address, you are agreeing to receive fax or e-mail communications from the association that may contain a message of a commercial nature.

Legislative district (home) _____

(If unknown, go to www.house.leg.state.mn.us or call House Information, Minnesota Legislature at 651-296-2146.)

I attach my check payable to MDLA for \$ _____ * (to be returned to me if this application is not accepted).

I agree to abide by the bylaws of the Minnesota Defense Lawyers Association.

Signed _____

*Annual MDLA Membership Fees:

Member of the Bar less than 1 year	\$95
Member of the Bar 1 to 5 years	\$150
Member of the Bar 5 years or more	\$210
Retired Status	\$40

(Fees established January 1, 2008)

Copy, complete and mail to:
Minnesota Defense Lawyers Association
600 Nicollet Mall, Suite 380A
Minneapolis, MN 55402

*MDLA is exempt from Federal taxation under IRC 501 (c)(6).
As a result, membership dues are not tax deductible as a charitable contribution; they may be deductible as a business expense.*

DRI CORNER

By **Steven R. Schwegman**

QUINLIVAN & HUGHES, P.A.

MDLA DRI State Representative



This column affords me the opportunity to talk about DRI—*The Voice of the Defense Bar*. DRI is an international organization of lawyers involved in the defense of civil justice. Although we are comprised of more than 22,000 members, we are an organization of individual relationships. The camaraderie, friendships and professional interaction among our membership are the

elements that keep us relevant, vital, and strong.

I attended the DRI North Central Regional meeting January 17-19, 2008 in Savannah, Georgia. Joining me from Minnesota were President Paul Rajkowski, Vice-President Kay Tuveson, Treasurer Pat Beety and our Executive Director Renee Anderson. The North Central Region includes Illinois, Indiana, Minnesota, North Dakota, South Dakota and Wisconsin. We also had the privilege to have representatives from Georgia and Canada in attendance. The meeting was an excellent opportunity to meet good lawyers around the country who provided insight to their local defense organizations. Chuck Cole, our North Central Regional Director provided introductory remarks and comments. Many of you had an opportunity to meet Chuck when he was here for our 2007 Annual Meeting in Duluth. Chuck will be returning in August as one of our speakers during the 2008 Annual Meeting.

Our first speaker was Marc Williams, DRI President-Elect who provided us with a DRI update and Officers' Report. He spoke about the Board's creation of the Diversity Committee, which was approved by the Board of Directors in October 2007. Regardless of the number of DRI Committees to which you currently belong, you are encouraged to join this new and vibrant committee. Although there is a restriction that you can join a maximum of four substantive committees (The DRI Board is looking at potentially changing this restriction), the restriction does not apply with respect to the Diversity Committee. The Chair of the Diversity Steering Committee is Raymond Williams and the Vice-Chair is Toyja Kelley. Marc will be the Officer Liaison. A Diversity seminar will be held June 12-13, 2008 in Chicago at the Fairmont Hotel, which will provide a great networking opportunity for diverse lawyers and also an opportunity for law firm management to develop recruitment programs.

Marc Williams also addressed the issue of why a State or Local Defense Organization should implement a diversity program. The answer is simple and straightforward: To raise awareness of diversity, clients want their representation to exhibit diversity and it will provide leadership opportunities.

Tom Schultz and Tina Bell of the Defense Trial Counsel of Indiana spoke on the topic of motivating young associates in your firm. Here are some statistics they provided: 46 percent leave by the end of their 3rd year; 75 percent leave by the end of 5th year. In studies, attorneys in the 25 to 30 year old group ranked the following factors as motivators at their jobs: Time for personal life, opportunities for advancement, professional growth, achievement, intrinsic nature of work, security, and leadership opportunities.

Tom and Tina also addressed training programs for young lawyers. They suggested the following: a) prepare a schedule well in advance and make it a priority; b) obtain from the associate what they would like offered as part of the program and c) include nuts and bolts lectures (45 to 60 minutes once per month). Various topics might include: organization skills, drafting pleadings, discovery issues, deposition and mediation tactics, briefing strategies, marketing strategies, ethics and practice building.

The implementation of trial skills demonstrations and/or round tables was also suggested. These types of programs might include a partner demonstrating a trial skill the associate will be performing the following month and generating a check list for associates to keep track of their own accomplishments. A mentoring program must offer candid regular feedback on 1) written and oral skills and 2) client contact and business development. Critique when necessary but do not forget to give praise. The critique style is important as well – doing it without bragging about your own skills or war stories (not every associate is trying to be a “mini me” of the partner). Finally, a 5-year plan should be developed, with quarterly sit-down meetings to go over what the associate has accomplished. Start identifying their specialty areas, their professional goals and business development strategies. This will allow law firm management to make up for shortcomings that may exist in your firm.

Each of the state organizations provided updates as to the status of their organization, activities and programs. Paul Rajkowski spoke about the status of our substantive law committees and educational seminars and opportunities.

Our next topic was an interactive discussion addressing the training of new board members for the State and Local Defense Organizations, which was moderated by

Kay Tuveson and Steve Puiszis, an attorney from Illinois. If you would like more information about their discussion, please feel free to contact Kay or me. The training of new board members is critical to the long-term health of any organization.

I would strongly encourage you to make plans to attend the 2008 DRI annual meeting in New Orleans October 21-25, 2008. I also encourage you to consider joining the National Foundation For Judicial Excellence, founded in October 2004 by leading defense attorneys and supported by DRI. The NFJE provides members of the U.S. judiciary with educational programs and other tools to support a strong, independent and responsive judiciary. Since 2005, the NFJE has hosted an Annual Judicial Symposium, which draws approximately 10 percent of the state appellate court judges. The 2007 symposium, *E-Discovery and Spoliation: The Convergence of Law and Technology*, addressed theories and practices involving electronic discovery.

As a State Representative I will facilitate the flow of communication between DRI and MDLA. I will also be attending MDLA Board meetings and submitting quarterly reports to DRI. If you have any questions, needs or concerns, please feel free to give me a call or contact me by email, sschwegman@quinlivan.com. ▲

DRI SEMINAR SCHEDULE

2008

Mar. 6-7	Sharing Success: A Seminar for Women Lawyers Phoenix, AZ
Mar. 12-14	Medical Liability and Health Care Law San Francisco, CA
Mar. 26-28	Damages Las Vegas, NV
Apr. 9-11	Insurance Coverage and Claims Institute Chicago IL
Apr. 17-18	Electronic Discovery New York NY
Apr. 17-18	Trucking Law Phoenix, AZ
Apr. 23-25	Life, Health, Disability and ERISA Claims San Francisco CA

DRI MEMBERSHIP APPLICATION

DRI – The Voice of the Defense Bar
150 North Michigan Avenue, Suite 300
Chicago, Illinois 60601
(312) 795-1101

Date _____

Name Telephone

Firm

Street

City State Zip

Year Admitted to the Bar: ____ State _____

I belong to a Local or State Defense Association:
Yes () No ()

To the extent that I engage in personal injury litigation, I *do not*, for the most part, represent plaintiffs.

I have read the provision above and hereby make application for Individual Membership.

- () My check for the annual dues (\$195 U.S.) is enclosed. Please forward information on DRI publications, seminars and services.
- () I have been admitted to the bar for fewer than five years. My check for the annual dues for this category (\$125 U.S.) is enclosed. Please forward the appropriate publications.
- () I wish to serve on a committee. Please send Committee Preference List.
- () Please bill me.

Signature _____

DRI is exempt from Federal taxation under IRC 501(c)(6). As a result, membership dues are not tax deductible as a charitable contribution; they are deductible as a business expense.



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Make Plans to Attend!

2008 Medical Malpractice Conference

April 17, 2008

9:00 am to 3:30 pm

Co-sponsored by:

Hennepin County Bar Association

Minnesota Defense Lawyers Association

Minnesota Association for Justice

Doubletree Hotel Minneapolis Park Place

1500 Park Place Boulevard

Minneapolis, MN 55416

Rebecca Egge Moos and

Peter A. Schmit, Course Chairs

5.0 CLE Credits Requested