South Dakota Defense Lawyers Association
Volume 2004--Issue 1 Spring 2004

THE BAD FAITH COMPENDIUM

New from the DRI Defense Library Series: **The Insurance Bad Faith.** ORDER YOUR COPY TODAY! To order call 312-795-1101. $95 DRI Members $115; Non-Members. This publication will be an indispensable reference tool for you and your associates! This Compendium has been compiled and presented in a format designed to offer analyses of substantive and procedural issues that insurers and defense counsel encounter in defending first party and third party bad faith claims. These issues are grouped under the following major headings for each jurisdiction: Causes of Action; Damages; Elements of Proof; Practice and Procedure; Defenses and Counterclaims; and Other Significant Cases involving Extra-Contractual Claims. Numerous subcategories of issues are addressed under each of these major headings. Jurisdictions covered include all fifty states, the District of Columbia, Puerto Rico and Canada.

The publication of more than 300 pages provides insurers and defense counsel with a framework for evaluating exposure presented by bad faith claims. It also provides a guide for developing litigation strategy in defending bad faith claims.

DRI delivers resources to build your practice.

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NOTICE OF ANNUAL MEETING

The South Dakota Defense Lawyers Association will hold its annual meeting and luncheon on June 18, 2004 at 11:30 a.m. in the Lewis & Clark Room at the Ramkota Hotel, Pierre, SD. **John Trimble, D.R.I. Director for the North Central Region, will be speaking on issues facing defense lawyers.** For reservations, please contact Julia Dvorak, 225-5420 or jmdvorak@sbslaw.net

Spring 2004 DRI State Representative's Corner

by Jeff Hurd

This is an exciting year to be a defense lawyer in South Dakota. John Trimble, the director of the North Central Region of DRI, will be attending our annual meeting next month. John is a great guy and a wonderful resource for us. Tom Welk, Past President, and Bob Riter, past DRI director, are president-elect and presidential candidate for the South Dakota Bar Association. South Dakota will also host the next DRI North Central Region meeting in Phoenix January 14-15, 2005.

Between now and then, though, make sure that you block off October 6-10 for the DRI Annual Meeting in New Orleans. The Annual Meeting is always a tremendous opportunity to learn, to network, to become more involved in the organization and, frankly, to have a wonderful time! This year, the Meeting will be at the Marriott on the French Quarter.

Some of the highlights of the Annual meeting include the Opening Reception at Generations Hall; the Women's Networking Luncheon; a debate between Todd Smith and Walter Dellinger moderated by Judge Grady Jolly; and riverboat gambling hosted by the Young Lawyers Committee. SLDO specific events include the Awards Luncheon, SLDO Leadership Breakfast, an SLDO Session by Bill Corbett, Breakout Sessions, and Regional Meetings.

It is important that we have a good showing, because DRI provides an incentive program for increased attendance among the SLDOs. DRI gives money to SDDLA if we show a sufficient increase in attendance over last year. The logistics will be different this year, so I do not yet know what will be "sufficient." Last year, DRI gave away $20,000 in prizes to SLDOs. Additionally, DRI members can register for the meeting at a reduced fee. Discounts on CLEs are just one of the many benefits of DRI membership.

DRI offers numerous benefits to the South Dakota Defense Lawyers Association, and to its individual members living in South Dakota. Did you know that every DRI publication is archived, and available in electronic format? Need information on any topic, run a search and get articles that have appeared in *For the Defense*, *The Voice*, or any other DRI publication.

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SDDLA OFFICERS AND DIRECTORS

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RECENT CASES TO NOTE

In *Burgard vs. Benedictine Living Comunitives*, 2004 SD 58, the South Dakota Supreme Court reiterated that a wrongful death claim predicated on medical malpractice is governed by the medical malpractice statute of limitations. The Court held that this ruling, announced in 2001, should be applied retroactively as well as prospectively. The result of the Court's ruling was the affirmation of summary judgment in favor of a nursing home.

In *Railsback v Mid-Century Insurance Company,* 2004 SD 64, the South Dakota Supreme Court reversed summary judgment in favor of an insurer. While acknowledging that an insurer has no duty to disclose policy limits during settlement negotiations, the Court held that an insurer could be liable to a claimant for knowingly causing or furthering a claimant's misunderstandings of the policy limits. The claimant in this case had a mistaken belief as to the policy limits. She alleged that the claim adjusters manipulated that mistaken belief for the company's benefit. As a result, she alleged that the insurer was liable to her for fraud and punitive damages. The Court cited to the Restatement (Second) of Torts § 551(2)(b) in so deciding and noted that "the fact that settlement negotiations are an adversarial process does not diminish the duties of parties to a contract to refrain from material misrepresentation."

In *Faber v Menard, Inc.,* 2004 US App LEXIS 10054, the 8th Circuit Court of Appeals reversed the Iowa District Court in an employment/arbitration clause case. The Court noted that due to the strong federal policy favoring arbitration, arbitration agreements must be enforced unless a party can show that it will not be able to vindicate its rights in the arbitral forum. In this case, a managerial employee of Menard's was successful at the district court level in opposing Menard's attempt to compel arbitration. The employee had successfully argued that requirements that he pay his own arbitration fees and attorney fees prevented him from being able to vindicate his rights in arbitration. The 8th Circuit joined three others circuits and rejected the position of the 9th and DC Circuits, which had adopted a per se rule that employers may not force employees to accept arbitration which requires them to split or pay all of the arbitration cost. The employee had not presented enough evidence regarding the actual costs he would incur or his financial ability to pay those costs. The court reversed the decision and remanded the case for a determination as to whether those cost and fee requirements would actually prevent the employee access to the arbitral forum.

The district court had found the fee/cost requirements to be unconscionable and central to the purpose of the arbitration clause. Thus, the district court found that the provisions were not severable. The appellate court reversed the district court on this issue as well and found that the clauses were severable even if the district court were to determine on remand that the provisions would make the arbitral forum inaccessible to the employee.

WELCOME NEW MEMBERS . . .

Since the publication of the last newsletter, the South Dakota Defense Lawyers Association has added the following members and wishes to welcome them into the membership: Margo Northrup from Pierre; Neil Fulton from Pierre; Kate Benson from Watertown; Sara Frankenstein from Rapid City; Brian Donahoe from Sioux Falls; Greg Erlandson from Rapid City and Michael Hauck from Sioux Falls.

DRI State Representative's Meeting, Continued from Page 1

Recently, DRI has created "eCommunities." These are areas on the web for document sharing and include a chat function (similar to a list serve). The eCommunity is a great way to share information and receive input in your area of practice. I am one of the initial two-dozen members of the new Commercial Litigation eCommunity. As it grows, its potential to assist in the day-to-day issues of a commercial litigation practice is obvious. eCommunities are just one of benefits of joining a substantive law section of DRI. Ask a construction lawyer about the DRI Construction Law CLEs, or medical malpractice lawyer about DRI Medical Negligence CLEs, and they will tell you that they are the best substantively education programs available.

If you have not used it yet, try DRI's outstanding Expert Witness Database. There is a major initiative to expand the content of the Expert Witness Database. DRI has made enhancements so that users can search by name, topic, and keywords. Future upgrades include online bill paying and document delivery. As an SLDO member, you can get a 15% discount on transcript orders from the Expert Witness Database. This is the *only* source on the Internet where you will find expert witness information available for immediate download.

DRI is creating a new newsletter for SLDO's—The Alliance newsletter. This will be filled with content provided by the State Reps, Presidents, Executive Directors, and all Officers/Board Members.

Remember, if you have never been a DRI member, DRI will give you a ***free*** 12-month DRI membership, just for being a member of South Dakota Defense Lawyers.

In April, DRI hosed the State Rep and Executive Directors annual meeting. We were welcomed William R. Sampson, DRI President, and Patrick A. Long, DRI Second Vice President. There were helpful programs on how to make our organization stronger. Julia and I both attended, and I think that I can speak for both us when I say that it was most valuable.

Take advantage of your DRI membership. You have access to the fantastic resources! If you have any questions about your DRI members, or becoming a DRI member, please give me a call.

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NOTICE OF DECEMBER 2004 CLE

SDDLA CLE Committee is pleased to announce that there will be a full day seminar on Friday, December 3, 2004 in Sioux Falls, South Dakota. The topic of the CLE is yet to be announced. Those of you who attended last year's seminar know that we worked hard to bring the membership a quality program. For those of you who were not at the seminar, you should know that the individuals who attended the seminar thought it was one of the best seminars they had attended in years. Mark your calendars now and watch for more information on this CLE.

THE STATE OF THE LAW ON JOINT TORT-FEASORS
By Julia M. Dvorak

There have been a number of recent cases addressing when co-defendants are considered joint tort-feasors. The apparent popularity of that topic prompted me to put together the information I had on this issue to share with the SDDLA membership. In my experience, decisions have come down from the trial court level that are inconsistent with the case law of our state Supreme Court. Therefore, I would ask that anyone who is aware of circuit court decisions on this issue please get in touch with me, and I will share that information with the membership. The following information comes from a sample case. I'm sure you will be able to tell which Defendant I represented.

Plaintiffs purchased a residential home from Defendants Homeowners. Pursuant to law, Homeowners provided a Disclosure Statement to Plaintiffs prior to the purchase. Also before purchasing the home, Plaintiffs hired Defendant Home Inspector to perform a home inspection.

Plaintiffs alleged in their Complaint that Defendants Homeowners breached their contract with Plaintiffs, negligently misrepresented information to Plaintiffs about the condition of the home in the Disclosure Statement, and fraudulently misrepresented information about the condition of the home in the Disclosure Statement. Plaintiffs further alleged that Defendant Home Inspector negligently performed the home inspection, and breached his contract by failing to perform his inspection in a good and workmanlike manner.

As a result of Defendants Homeowners and Defendant Home Inspector's actions, Plaintiffs allege in their Complaint that they suffered the injury of the costs of repair and renovation to their home. Plaintiffs requested compensatory damages against all the Defendants jointly and severally.

Defendant Home Inspector filed a cross claim for contribution against Defendants Homeowners. After Defendants Homeowners settled with Plaintiffs, they filed a Motion for Summary Judgment on the Crossclaim.

Defendant Home Inspector argued he was entitled to contribution as a joint tort-feasor under SDCL 15-8-12 and 15-8-17.

Defendants Homeowners contended that they were not joint tort-feasors with Defendant Home Inspector. Defendant Homeowners correctly noted that the determination as to whether two parties are joint tort-feasors is based upon the Plaintiffs' pleadings. *Degen v. Bayman*, 241 N.W.2d 703 (S.D. 1976). However, Defendant Homeowners argued that Plaintiffs did not allege common tort liability because of the differences in the allegations in the Complaint. Defendants Homeowners ignored the fact that a plaintiff's Complaint does not have to allege the same tort liability against the defendants. Rather, to be considered joint tort-feasors, the Plaintiffs must only allege that the Defendants caused the same injury. SDCL 15-8-11.

In *Degen, supra*, the case that Defendants Homeowners relied upon, the plaintiff was injured when defendant Bayman backed a boat over the plaintiff and struck his legs with the boat's propeller. *Degen, supra,* at 705. Plaintiff charged defendant Bayman with negligent operation of the boat and also filed suit against defendant Outboard Marine Corp. for negligent design of the boat and failure to give an adequate warning of the danger. *Id.* at 705. Defendants Homeowners asserted that a plaintiff must "allege common tort liability based upon the same factual basis for the injuries allegedly suffered by the plaintiff" in order to be considered joint tort-feasors. Defendant Home Inspector, however, argued that this contention was obviously incorrect as demonstrated by *Degen.* The *Degen* Court found that because plaintiff's Complaint alleged that the defendants were joint tort-feasors, the right of contribution existed and the lower court was correct to deduct the settling defendants' settlement from the jury verdict. *Id.* at 707-708.

Defendant Home Inspector argued that Defendants Homeowners' focus was misplaced. Defendants Homeowners relied on SDCL 15-8-11, the definition for joint tort-feasors. That statute provides that "the term 'joint tort-feasors' means two or more persons jointly or severally liable in tort for the same injury to person or property...." Defendant Home Inspector noted that the statute does not provide that two or more persons must be liable for the same *tort*, but rather that they be liable for the same *injury*. In this case, Plaintiffs alleged that Defendants Homeowners and Defendant Home Inspector were liable for the same injury, i.e., the costs of repair and renovation to their home.

Defendants Homeowners could cite no authority for their proposition that the Plaintiffs must allege tort liability based upon the same factual basis in order for Defendants to be joint tort-feasors. On the contrary, South Dakota case law is full of examples where defendants are held to be joint tort-feasors where the basis for tort liability differs as to each defendant. *See Degen, supra,* at 703 (holding defendants to be joint tort-feasors where one defendant was alleged to have negligently operated a boat and the other was charged with negligent design of a boat); *Freeman v. Berg*, 482 N.W.2d 32 (S.D. 1992) (holding defendants to be joint tort-feasors where one defendant was alleged to have negligently failed to protect the scene of an accident and the other was charged with negligent operation of a motor vehicle); *Schick v. Rodenburg*, 397 N.W.2d 464 (S.D. 1986) (holding defendants to be joint tort-feasors where one defendant was alleged to have negligently operated a vehicle and the other was charged with negligent and defective construction of a vehicle.)

South Dakota, like a number of other states, has adopted the Uniform Contribution Among Tort-feasors law. SDCL 15-8-11 through 15-8-22. In interpreting this Uniform Act, the South Dakota Supreme Court has, in the past, looked at New Jersey law because it defines joint tort-feasors in language identical to SDCL 15-8-11. *Duncan v. Pennington County Housing Authority*, 283 N.W.2d 546, 552 (S.D. 1979). In addressing the same issue, the Supreme Court of New Jersey has ruled that the right of contribution exists between parties liable for the same injury even if the foundations of liability are entirely different. *Dunn v.*

Praiss, 656 A.2d 413, 420 (N.J. 1995) (citing *Cartel Capitol Corporation v. Fire Co. of New Jersey*, 410 A.2d 674, 684-685 (N.J. 1980)). *Dunn* ruled that "the nature of the wrongdoer's conduct is not particularly relevant." *Dunn, supra,* at 420. Thus, an HMO could be found liable for contribution to a physician, even though the basis for their liabilities to plaintiff rested on entirely different foundations. *Id.*

Defendants Homeowners also argued that Defendant Home Inspector should not be given credit for any settlement payment made by Defendants Homeowners. Defendant Home Inspector argued that this denial of Defendant Home Inspector's statutory right to contribution would be in direct violation of South Dakota authority. SDCL 15-8-12; 15-8-17. It has been held that "once the allegation is made that one or more parties are or may be joint tort-feasors, and settlement is made with one of them, then any ultimate verdict against the non-settling parties must be reduced by the amount of the settlement, regardless of whether the settlor was liable to the plaintiff or not." *Schick, supra,* at 468.

In *Freeman, supra*, the nonsettling defendant cross-claimed against the settling defendant seeking an apportionment of fault among the defendants. *Id.* at 33. The settling defendant remained a named defendant at trial for the purposes of apportionment of fault. *Id.* After the jury returned a verdict in favor of the plaintiff, the judgment was reduced by the amount of the settlement. The South Dakota Supreme Court held this reduction of the jury verdict was in accordance with SDCL 15-8-17. *Id.* at 34.

In another case, it was held to be error for a trial court not to allow a defendant to litigate its claims for contribution against the other alleged joint tort-feasors. *Dehn v. Prouty*, 321 N.W.2d 534, 538 (S.D. 1982). In that case, the South Dakota Supreme Court remanded for the limited purpose of permitting the parties to litigate the issue of contribution between them.

Defendant Home Inspector noted that even if a verdict was to be rendered against Defendant Home Inspector and Defendants Homeowners were found to be not liable to Plaintiffs at all, the amount of the Judgment must still be reduced by the amount of the settlement with Defendants Homeowners. *Duncan, supra,* at 550-552. In determining the apportionment of fault amongst the joint tort-feasors, the *Duncan* jury found that one settling defendant was not liable to the plaintiff at all. The trial court did not reduce the judgment by the amount of the settlement. The trial court reasoned that because the jury did not find the settling defendant liable, it was not a joint tort-feasor. *Id.* at 550. The South Dakota Supreme Court found this to be error and ruled that "the prevailing view...is that the settlement amount must be so credited against the judgment, even where the person released was not in fact a joint tort-feasor or was not liable to the plaintiff at all." *Id.* at 551.

Defendant Home Inspector argued that in this case Defendants Homeowners and Home Inspector were joint tort-feasors under the law. Thus, Defendant Home Inspector had a statutory right of contribution and must be allowed to litigate the issue so that the jury can determine the extent of each Defendant's liability. "The spirit of our joint tort-feasor provisions is to allow a fact finder to place the blame in proportion upon all those who contributed to the injury." *City of Lemmon v. United States Fidelity and Guaranty Company*, 293 N.W.2d 433, 438 (S.D. 1980).

Defendant Home Inspector's attempts to resist Defendants Homeowners attempts for summary judgment on the issue of contribution was unsuccessful. In a ruling from the bench, the court noted that because some of the allegations against Defendant Homeowners were based on contract, they could not be considered joint tort-feasors.

The good news for Defendant Home Inspector is that he obtained a defense verdict at trial. On the issue of joint tort-feasors, however, there seems to be some unanswered questions. Again, if you are aware of any circuit court decisions or have a different view of this issue, please let me know and I will share that with the membership. One of the benefits of this organization is that we can all become better educated on the issues we face in our daily practice.