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Litigation Forum

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Insurance Law

INSURANCE BAD FAITH

By Jennifer Addleton Welch (RAL)

Bad faith claims against insurers in North Carolina are on the rise. Thus, insurers must familiarize themselves with the possible grounds for such claims so they will know how best to avoid them.

North Carolina provides both a common law and a statutory scheme for asserting bad faith claims against an insurer. In order to prove common law bad faith on the part of an insurer, the plaintiff must prove the following elements: (1) Refusal to pay after receiving and recognizing a valid claim; (2) bad faith on the part of the insurer; and (3) some additional aggravating or outrageous conduct. *Lovell v. Nationwide Mut. Ins. Co.*, 108 N.C. App. 416, 420, 424 S.E.2d 181, 184 (1993). Aggravating or outrageous conduct has been held to include fraud, malice, gross negligence, willful and wanton conduct, and other similar conduct which shows a reckless disregard of the policy holder's rights. *Id.* at 422, 424 S.E.2d at 185. Conduct that was based on honest disagreement or innocent mistake is not bad faith. *Id.* at 421, 424 S.E.2d at 185 (citation omitted); see also *Topsail Reef Homeowners Ass'n v. Zurich Specialties London Ltd.*, 11 Fed. Appx. 225, 238-39, (4th Cir.) 2001 ("[W]hen an insurer denies a claim because of a legitimate

honest disagreement as to the validity of the claim, the insurer is entitled to judgment as a matter of law because the plaintiff cannot establish bad faith or any tortious conduct on the part of the insurer.") (internal quotations omitted). Unless an insurer's interpretation of the policy is "strained or fanciful," there is no bad faith, even if the insurer's coverage position is ultimately determined to be incorrect. *Olive v. Great Am. Ins. Co.*, 76 N.C. App. 180, 189, 333 S.E.2d 41, 46 (1985).

Statutory bad faith claims exist pursuant to N.C. Gen. Stat. § 58-63-15(11) (Unfair Claims Settlement Practice Act) and N.C. Gen. Stat. § 75-1.1 (Unfair and Deceptive Trade Practices Act). Specifically, § 58-63-15(11) sets forth various unfair claims settlement practices that can give rise to statutory unfair and deceptive trade practices claims under § 75-1.1. To recover under § 75-1.1 the plaintiff must prove: (1) That the insurer engaged in an unfair or deceptive act or practice; (2) that the insurer's actions were in or affected commerce; and (3) that the insurer's actions proximately caused the plaintiff's claimed injury. *Gray v. North Carolina Ins. Underwriting Ass'n*, 352 N.C. 61, 68, 529 S.E.2d 676, 681 (2000). A practice is deceptive if it has the tendency to deceive. *Id.* A practice is unfair when it offends established public policy as well as when the practice is immoral, unethical, oppressive, unscrupulous, or substantially injurious to consumers." *Id.* (internal quotations omitted).

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Good faith is not a defense to an alleged unfair and deceptive trade practices claims under § 75-1.1. *Id.*

The conduct prescribed by § 58-63-15(11) amounts to an unfair trade practice under N.C.G.S. § 75-1.1 as a matter of law. *See Gray*, 352 N.C. at 71, 529 S.E.2d at 683. However, conduct not specifically listed in § 58-63-15(11) can also amount to bad faith as long as the conduct is determined to be a violation of Chapter 75. It is not necessary that the offending conduct be committed with such frequency that it constitutes a “general business practice,” as is typically required under Chapter 75. *Id.* Rather, a single violation of § 58-63-15(11) can establish the first element of an unfair and deceptive trade practices claim under § 75-1.1. *Id.*; *see also Country Club of Johnston County v. U.S. Fid. & Guar. Co.*, 150 N.C. App. 231, 246, 563S.E.2d 269, 279 (2000).

It has been held that an insurer cannot be held liable for a statutory bad faith claim if the insurer reasonably believes that a claim is not covered, even if the insurer’s coverage position is ultimately found to be incorrect. *See Cen. Carolina Bank & trust Co. v. Sec. Life of Denver Ins. Co.*, 247 F.Supp. 2d 791, 801-02 (M.D.N.C. 2003). Thus, the reasonableness of an insurer’s interpretation of the policy is a defense available to the insurer faced with a bad faith claim. Additionally, a mere breach of contract cannot give rise to a claim for unfair and deceptive trade practices. *Boyd v. Drum*, 129 N.C.App. 586, 593, 501 S.E.2d 91, 97 (1998). On the other hand, even if an insurer rightly denies an insured’s claim, and therefore does not breach its contract, the insured may nevertheless have a bad faith claim against the insurer if the insurer fails to employ good business practices which are neither unfair nor deceptive. *Nelson v. Hartford Underwriters Ins. Co.*, 177 N.C. App. 595, 609, 630 S.E.2d 221, 231 (2006).

The damages an insured may recover against the insurer are different depending on whether the claim is for common law or statutory bad faith. Consequential damages proximately caused by the insurer’s acts of bad faith are recoverable under both common law and statutory bad faith claims. Punitive damages are recoverable

for common law bad faith as long as the insured meets the statutory requirements of N.C. Gen. Stat. § 1D-1 et seq. A statutory bad faith plaintiff is not entitled to punitive damages. However, any damages proximately caused by an insurer’s violation of Chapter 75 are automatically trebled. N.C. Gen. Stat. § 75-16. Additionally, if the judge finds that the insurer willfully engaged in the offending act or practice and there was an unwarranted refusal to fully resolve the matter by the insurer, then the judge may award attorney’s fees to the insured. N.C. Gen. Stat. § 75-16.1. An insured may bring both common law and statutory bad faith claims in the same action against the insurer. However, the insured cannot recover both punitive and treble damages. Thus, the insured must elect which remedy he wishes to recover.

North Carolina does not recognize a cause of action for third-party claimants against an insurer of an adverse party. *See Wilson v. Wilson*, 121 N.C. App. 662, 665, 468 S.E.2d 495, 497 (1996). However, if the plaintiff achieves the status of an intended third-party beneficiary arising from the contractual relationship between the adverse party and the adverse party’s insurance company, the plaintiff may then bring a claim against the insurer for bad faith. *Prince v. Wright*, 141 N.C.App. 262, 270, 541 S.E.2d 191, 197 (2000). Unless the plaintiff obtains a judgment against the insured, plaintiff is not a third-party beneficiary and plaintiff has no claim for bad faith. An insured cannot assign his claim for bad faith to a third-party in North Carolina. *Craven v. Demidovich*, 172 N.C.App. 340, 615 S.E.2d 722 (N.C. App. 2005). This rule would not apply in the context of uninsured and underinsured motorist claims since the plaintiff in those cases would be the insured.

So what can insurers do to avoid bad faith claims? Perhaps one of the most important things an insurer can do is to be familiar with the conduct proscribed in N.C. Gen. Stat. § 58-63-15(11) so that it is fully aware of what not to do. Additionally, the insurer should perform a thorough and timely investigation of all aspects of the claim; seek a coverage opinion from an attorney who has expertise in the particular coverage area, if appropriate; promptly send the insured a reservation of rights or denial letter providing the specific basis for your position, if appropriate; carefully document all communications with the insured and all other activity on the file; respond promptly to all communications concerning the claim; keep the insured informed of all significant developments in the case or claim; pay undisputed claims in a timely manner; and be polite, patient and respectful when dealing with an insured, no matter how hard it may be. Following these tips will significantly reduce an insurer’s chance of having to face a bad faith claim and could potentially save the insurer a great deal of time and money defending such claims. ♦

Trucking and Transportation Law

IN SEARCH OF A FAIR SHAKE

BIFURCATION OF CIVIL TRIALS IN TRUCKING CASES

By F. Marshall Wall (RAL) and Dexter "Chip" Campbell III (RAL)

You are defending a trucking company and a driver sued as the result of a traffic accident. Settlement negotiations have broken down. High-low agreements have been rejected. Your case is heading to trial. As is often the case when defending trucking companies, the accident was severe, and the plaintiff suffered serious injuries. While there is no significant dispute about causation or damages, liability is very questionable. Without a doubt, the plaintiff's injuries and the way that they changed the plaintiff's life will illicit tremendous sympathy from a jury, and his or her attorney will seek significant compensatory damages.

Since a traditional negligence jury trial consists of one trial in which a jury considers both negligence and damages, a judge may well allow the plaintiff's attorney to discuss the plaintiff's catastrophic injuries in great detail during voir dire and opening statements and while presenting evidence, leading to the coda—his or her closing argument. Your client is concerned that the damages evidence will evoke enough sympathy that the issue of liability will not receive a fair hearing.

In fact, the courts have recognized this concern, articulated, for instance, by the United States District Court for the District of New Jersey, which wrote that "sympathetic jurors might be inclined to award Plaintiff some money ... regardless of fault, if they were aware of the magnitude of the injuries incurred and the damages sought." *Miller v. New Jersey Transit Authority Rail Operations*, 160 F.R.D. 37, 41 (D.N.J. 1995).

So what can you do to prevent sympathy for the plaintiff from overwhelming strong arguments on negligence and to make sure that your client gets a fair trial? How can you help your client reduce its exposure and best predict the outcome of a very dangerous case? The Federal Rules of Civil Procedure and their state counterparts, as well as courts across the country, have provided a possible solution—bifurcation.

Splitting the liability and damages issues into two phases, determining liability first, and then, if necessary, determining damages separately, can give defendants a fair chance to present liability defenses without facing a jury that is not mostly focused on a badly injured plaintiff. Bifurcation may offer your best chance to reduce or even eliminate jury prejudice when a plaintiff suffers a catastrophic injury or death, which will likely improperly influence a jury if the jury considers liability and damages together.

You must determine whether to seek bifurcation on a case-by-case basis. In an appropriate case, bifurcation has many positives, but it certainly also offers risks that you must assess fully and discuss with

your client. For example, if a jury finds for a plaintiff on liability in the first phase of a trial and then moves on to damages, that jury may be less inclined to reduce an award for questionable liability because it has already decided and forgotten that issue.

This article will examine some telling case law on bifurcation, to you with an understanding of what courts consider in deciding whether to bifurcate a case and help you decide whether bifurcation is a desirable option for you and your clients. Some of the cases discussed below dealt with lawsuits against trucking companies; others did not. They are heavily weighted toward personal injury lawsuits involving catastrophic injuries or death. These cases generally, though not universally, have allowed bifurcation. Further, when courts have permitted bifurcation, these courts' opinions often have set out some of the most common objections made by the plaintiffs' bar, which will give you an idea of the objections that you will likely face.

THE BASIS FOR BIFURCATION: FED. R. CIV. P. 42(B)

Rule 42(b) of the Federal Rules of Civil Procedure gives judges discretion to order separate trials of issues or claims: (1) for reasons of convenience; (2) when conducive to expediting a case or to promote judicial economy; or (3) to avoid prejudice. Since bifurcation is discretionary, a court of appeals will overrule a decision to bifurcate only if the trial judge abused that discretion. See *Mosley v. General Motors Corp.*, 497 F.2d 1330 (8th Cir. 1974). Some courts have required that "[o]nly one of these criteria need be met to justify bifurcation." *Saxion v. Titan-C-Manufacturing, Inc.*, 86 F.3d 553, 556 (6th Cir. 1996). Others seem to require that the party seeking bifurcation demonstrate that it will suffer prejudice if a court does not grant separate trials. See *Marshall v. Overhead Door Corp.*, 131 F.R.D. 94 (E.D. Pa. 1990). Any party can move for bifurcation, or the court may order it sua sponte. See *Saxion*, 86 F.3d at 556.

Federal courts have universally recognized that a trial judge has the right within his or her discretion to apply Rule 42(b) to bifurcate personal injury actions into separate phases to determine liability and damage issues. *Moss v. Associated Transport, Inc.*, 344 F.2d 23 (6th Cir. 1965). The party "seeking bifurcation has the burden of showing that bifurcation is proper in light of the general principle that a single trial tends to lessen the delay, expense, and inconvenience to all parties." *Lowe v. Philadelphia Newspapers, Inc.*, 594 F. Supp. 123, 125 (E.D. Pa. 1984).

THE SEVERITY OF A PLAINTIFF'S INJURIES AS A FACTOR IN BIFURCATION

The case *Moss v. Associated Transport, Inc.*, involved four consolidated actions for conflicting claims of death and injury and an unusual twist on bifurcation. 344 F.2d 23 (6th Cir. 1965). Moss was permanently injured when he was riding as a passenger in a tractor-trailer truck that collided with another tractor-trailer truck owned by the defendant, Associated Transport, and operated by its employee. The driver of the Associated Transport truck and his passenger were both killed.

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The widows of the driver and passenger in the Associated Transport truck sued the driver and the owner of the truck in which Moss was riding at the time of the accident for wrongful death. Moss sued the driver and owner of the Associated Transport truck. The lawsuits were consolidated and, over the objection of Moss, the trial court directed that the jury should first determine the issue of liability and then, second, damages, if necessary. The jury found in the liability phase of the trial that Moss' driver was negligent and exonerated the driver of the Associated Transport vehicle. As such, Moss' claims were dismissed, and the widows prevailed at trial.

On appeal, Moss argued, among other things, that separating the issues had prejudiced him, because he could not show the severity of his injuries and "was denied a weapon with which to combat the natural sympathy that a jury would feel for the two plaintiff widows who had, in effect, been made Moss' opponents by the consolidation." *Id.* at 26. Moss argued that the jury knew what the widows had lost during the liability phase of the bifurcated trial, but had no idea of the extent and severity of his injuries, since he could not introduce that evidence.

In affirming the trial court's decision to consolidate and bifurcate, the Sixth Circuit stated: There are not a few who question the wisdom of employing Rule 42(b) to divide personal injury damage actions into separate trials of the liability and damages issues, whether submitted seriatim to the same jury or to different juries. Some look upon the practice as but another procedural 'gimmick' designed to assist current judicial efforts to mass produce dispositions of pending cases, but which merely multiplies the burden of litigation. They feel that the occasional good it produces is greatly outweighed by the danger of unfairness being visited upon litigants who from right motives prefer to try their suits in traditional fashion. However, whatever academic disagreement there may be on that point, it seems now to be established that under Rule 42(b) a trial judge had right within his discretion to do what was done here.

Id. at 25 (internal citations omitted).

Another Sixth Circuit case, *Helminski v. Ayerst Laboratories*, held that bifurcation was appropriate when evidence pertinent to the issues of liability and damages was wholly unrelated and evidence relevant to damages could have a prejudicial impact on a jury's liability determination. 766 F.2d. 208 (6th Cir. 1985). The plaintiff in *Helminski* was a severely disabled child whose parents sued, claiming that his in utero exposure to a medication manufactured by the defendant caused those disabilities. The case is notable for another reason, however. In it, the Sixth Circuit discussed whether a trial court could exclude the litigant from attending the liability phase of a bifurcated trial if it determined that the plaintiff's presence would substantially prevent or impair a jury from performing its duties. While the Sixth Circuit found that the trial court should

not have barred the plaintiff from the liability phase of the trial, it also determined that this was a harmless error, since his condition rendered him unable to assist meaningfully with the prosecution of the case, and the circuit court affirmed the defense verdict.

In *Zofcin v. Dean*, the plaintiff was injured and his wife and two children were killed in an auto accident. 144 F.R.D. 203 (S.D.N.Y. 1992). The defendant stipulated to causation and moved to bifurcate. The trial court granted the defendant's motion to split the liability and damages phases of the trial. Over the plaintiff's objections, the court found bifurcation proper, since the plaintiff intended to "offer detailed evidence of extreme pain and suffering, including burning flesh and screams of pain." *Id.* at 205. This posed a "substantial risk of impairing the jury's objectivity on the liability issue." *Id.* The *Zofcin* facts were horrific—a father and husband who suffered injuries himself and, more importantly, who witnessed the deaths of his family in the same accident. It presents a classic example of a situation in which a jury would likely become overwhelmed by damages evidence without bifurcation.

OTHER CONSIDERATIONS IN DECIDING WHETHER TO BIFURCATE

In *McKellar v. Clark Equipment Company v. Lime Products Corporation*, the plaintiff was left quadriplegic and incurred significant economic damages as the result of an accident. 101 F.R.D. 93 (D. Me. 1984). The severity of the damages was not in question, but liability was hotly contested. The defendant sought to separately try the issue of liability from the damages issues on the bases of avoiding prejudice and judicial economy. The plaintiff opposed the motion, arguing that bifurcation was unnecessary to avoid prejudice and unlikely to result in time savings.

In granting the defendant's motion to bifurcate, the court considered several factors, including: Whether a separation of the issues for trial will serve to expedite the disposition of the action and to conserve trial time and other judicial resources, whether such separation will be likely to avoid prejudice to any party at trial that may occur in the absence of separation of the issues, and whether the issues to be separated are essentially independent of each other for evidentiary purposes so that there will be no need to duplicate the presentation of significant areas of the evidence in the separated proceedings.

Id. at 94.

The court determined that bifurcating the trial would "obviate likely prejudice to the defendant on the determination of the liability issues, will conserve judicial resources, and will occasion no prejudice to Plaintiff in the orderly and effective presentation of his case." *Id.* at 94. The court further stated that the plaintiff's physical injuries and lengthy treatment could "adversely and improperly affect a jury's fair, impartial and objective consideration of the liability issues." *Id.* at 95. Regarding judicial economy, the court noted that since the main dispute was liability, a plaintiff's victory on that

issue against one or both of the defendants was likely to “greatly facilitate” a voluntary settlement by the losing party. *Id.* at 95.

While not recognized as a circumstance permitting bifurcation under Rule 42(b), the *McKellar* court’s comment about the likelihood of settlement if the defense lost the liability phase of the case probably reflects reality. When a defendant pins its hopes on a liability defense that proves unsuccessful, it often chooses to settle a case rather than go forward with a trial on damages that will almost certainly end badly.

New York’s federal courts have consistently recognized several additional factors that a court should consider when determining whether bifurcation is proper, including “(1) whether the issues are significantly different from one another; (2) whether the issues are to be tried before a jury or to the court; (3) whether the posture of discovery on the issues favors a single trial or bifurcation; (4) whether the documentary and testimonial evidence on the issues overlap; and (5) whether the party opposing bifurcation will be prejudiced if it is granted.” *Dallas v. Goldberg*, 143 F. Supp. 2d 312, 315 (S.D.N.Y. 2001). The *Dallas* court noted that “bifurcation remains the exception rather than the rule,” however, and denied the defendants’ request. *Id.*

PROMOTING JUDICIAL ECONOMY: A STRONG ARGUMENT FOR THE DEFENSE

Betts v. General Motors Corp., is a wrongful death and personal injury case resulting from a motor vehicle accident. 689 P.2d 795 (1984). The case involved a high-speed, head-on collision between a 1974 Ford pick-up truck and a 1973 Chevrolet Monte Carlo that was towing a 1972 Chevrolet Vega with a rented U-Haul trailer hitch and tow bar. The accident was caused by the Ford pick-up driver’s negligence. He lost control of his vehicle when he apparently fell asleep. Five members of the plaintiffs’ family were passengers in the Monte Carlo. A fire broke out after the collision, and, except one five-year-old child, the plaintiffs’ family died. The driver of the Ford pick-up was also killed.

The plaintiffs sued General Motors for faulty product design and manufacturing and for negligence in installing the fuel tank in a place where the plaintiffs claimed that it would likely rupture in a collision and cause a gasoline fire. General Motors moved to bifurcate the liability and damages issues so that a jury first could determine liability, if any, of General Motors, U-Haul and the Kansas Turnpike Authority. The trial court allowed a bifurcated trial, and the jury decided that General Motors was not liable.

The plaintiffs argued on appeal that the trial court had abused its discretion in ordering bifurcation. The Kansas Supreme Court found no error, noting that the trial court pointed out the advantages of a bifurcated trial—that it would help the jury comprehend the issues, economize the court’s time, and reduce the parties’ trial expenses. The Supreme Court affirmed the trial court’s bifurcation order, which found that “the additional expenses of time and resources might be unnecessary if determination of the fault issues

made the damages issues moot or enhanced the prospects of settlement.” *Id.* at 802.

In *Marshall v. Williams*, the North Carolina Court of Appeals approved an order initiated by the trial judge to bifurcate a personal injury action. 574 S.E.2d 1 (2002). The case involved a collision between a truck and a boy on his bicycle. The trial was bifurcated to consider all issues related to negligence before proceeding with a trial on the damages.

Arguing against bifurcation, the plaintiff’s attorney took the position that the jury needed to see the “entire picture of the accident” and that to prove negligence the plaintiff would have to prove that the boy’s damages were proximately caused by the negligence of defendant. In response, the defendant stipulated that the boy’s injuries were the direct result of the accident.

The court bifurcated the trial “for the purpose of judicial economy, for the ease of understandability and presentation to the jury, and . . . after lengthy consideration of the best presentation of this matter.” *Id.* at 4. At trial, the court granted a directed verdict in favor of defendant on the issue of negligence. The North Carolina Court of Appeals upheld the trial court’s decision to bifurcate, noting that a trial judge’s discretion in separating trials is extremely broad.

EVEN “SIMPLE” CASES CAN BE BIFURCATED

Sometimes plaintiffs oppose bifurcation, as in *Hunter v. McDaniel Construction Company*, by arguing that their case is the result of a “simple vehicular collision,” and, as such, does not meet bifurcation criteria. 623 S.W.2d. 196, 198 (1981). The Arkansas Supreme Court has disagreed. It held that bifurcation of liability and damages in a personal injury action was “common” in federal and state courts and did not infringe on the constitutional right to a jury trial. *Id.* The court also noted that “the primary concern is efficient judicial administration, rather than the wishes of the parties, as long as no party suffers prejudice by bifurcation.” *Id.* at 198.

Trucking cases may seem “simple” to courts, and plaintiffs’ attorneys may try to depict them that way. The truth is often different, however. For example, trucking cases often involve the Federal Motor Carrier Safety Regulations, for instance, whether a carrier violated them and, if so, whether that violation was a proximate cause of an accident. Expecting jurors to parse evidence of regulatory violations when determining liability and then asking those same jurors to ignore that evidence when deciding compensatory damages is optimistic at best. Educating a court about the complexity of your case can be crucial when trying to win a bifurcated trial.

STIPULATING TO OTHER ISSUES TO WIN BIFURCATION

Sometimes, you might need to stipulate some issues to win bifurcation. One case that illustrates this strategy is *Fisher v. Northland Insurance Company*, which involved a fatal trucking accident and in which the Court of Civil Appeals of Oklahoma upheld bifurcation

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of liability and damages. 23 P.3d 296 (2000). The plaintiff, the personal representative of her granddaughter's estate, sued a trucking company and its insurance carrier. Granting a motion by the defense, the trial court bifurcated the issues of liability and damages and further bifurcated the plaintiff's claims against the insurer until the jury decided the liability question. The jury found in favor of the trucking company. The plaintiff argued that evidence of her relationship with her granddaughter was necessary to prove that she was an appropriate personal representative. The defendants stipulated that the plaintiff had the legal ability to bring the suit, dispensing with the plaintiff's arguments. The plaintiff could not show that bifurcation was prejudicial to her, and the appeals court affirmed the trial court's decision.

Fisher is also a classic example of a trucking case bifurcation. It involved the death of a child, questionable liability, and coverage issues. The court wisely chose to try liability first, and second, have the jury decide damages and coverage, if needed. After hearing the negligence case, the jury found for the defense, and the jury did not need to sort through coverage and damages evidence to conclude the case.

BIFURCATION AS COURT PRACTICE REQUIRES INFORMED DISCRETION

Courts must generally adhere to particular principles when granting bifurcation, as illustrated in *Lis v. Robert Packer Hospital*, in which a four-month-old child was taken to the emergency room with breathing difficulties after possibly aspirating food. 579 F. 2d 819 (3d Cir. 1978). On arrival at the hospital, a doctor's examination revealed extremely high blood sugar levels, and the baby was diagnosed with diabetes. Next, the baby received 15 insulin injections. Shortly after receiving the injections, the baby experienced serious seizures, which lead to severe brain damage, and mental retardation. At the time, the emergency room examining doctor thought that the child would also experience blindness. The doctor's diagnosis and treatment was later proven erroneous, and the family sued the hospital and the physician.

The case was tried in the Middle District of Pennsylvania. The trial court, as was its "usual practice," ordered the case to go to the jury first on the issue of negligence. *Id.* at 823. Over the plaintiffs' objection, the trial court stated: "I bifurcated it because we bifurcate all negligence cases, and I think everybody is more fairly treated that way." *Id.*

During the bifurcated trial, the defense argued that the baby's seizures were not the result of the insulin injections, but of a preexisting congenital brain disorder. The jury found the treating physician negligent, but found no proximate cause. The plaintiffs appealed, and the Third Circuit held that it was improper for the lower court to adopt a general practice of bifurcating all negligence trials. The court stated that:

A general policy of a district judge bifurcating all negligence cases offends the philosophy that a decision must

be made by a trial judge only as a result of an informed exercise of discretion on the merits of each case.

Id. at 824.

The Third Circuit upheld the trial court's decision to allow bifurcation in this case, however, noting that the plaintiffs did not show that bifurcation prejudiced them. The Third Circuit noted, however, that it would not necessarily require a showing of prejudice in future cases to overrule a trial court's decision to bifurcate if the trial court failed to demonstrate that it had exercised informed discretion. *Id.* at 825. This opinion illustrates that although discretionary, a trial judge must consider the merits of each individual case when granting or denying bifurcation.

COURTS CAN INITIATE BIFURCATION

A court can initiate bifurcation. Further, even if both parties oppose bifurcation, a court can find that it is appropriate given the circumstances of a particular case. For example, in *Hosie v. Chicago & N.W. Ry. Co.*, the trial court initiated and ordered bifurcation on the issues of liability and damages one day before the trial, over the objection of *both* the plaintiff and the defendant. 282 F.2d 639 (7th Cir. 1960). The defendant prevailed on the issue of liability at trial, and the plaintiff appealed, arguing that bifurcation deprived him of his constitutional right to a trial by jury.

In affirming the trial court's decision to bifurcate and rejecting the plaintiff's constitutional argument, the Seventh Circuit held that the procedural rules in place when the Bill of Rights was adopted were not set in stone and, just as with rules on the form of pleadings, they could be changed. In support of bifurcation, the court stated:

Many of the federal district courts of this country are laboring under the heavy burden of crowded trial dockets. The Northern District of Illinois is no exception. The judges of that court should be commended for their search for methods and means to expedite the disposition of cases upon their calendars. There is no doubt that in numerous cases, the severing of the issue of liability from the issue of damages will result in the shortening of the time of trial. The instant case is a good example. Without such severance, hours or even a day or two might have been consumed on the issue of damages.

Id. at 643.

Bifurcation initiated by a court, however, is the exception, rather than the rule, and the best practice is to request bifurcation rather than hope that a court will decide to split a trial.

DAMAGES AS AN ESSENTIAL LIABILITY ELEMENT

With all this said, achieving bifurcation creates challenges when damages are an essential element of a liability claim, as exemplified by *Miller v. Fairchild Industries, Inc.*, in which two employees sued their employer, alleging that they were discharged from their jobs in

retaliation for filing discrimination charges with the Equal Employment Opportunity Commission. 885 F.2d. 498 (9th Cir. 1989). Among other claims, the plaintiffs sought redress for intentional infliction of emotional distress. The Ninth Circuit held that the facts supporting the intentional infliction of emotional distress claim were “so intertwined with liability” that bifurcation was improper. *Id.* at 511. Specifically, the Ninth Circuit noted that a finding of liability for intentional infliction of emotional distress required that the fact finder determine that a plaintiff in fact had suffered emotional distress. As such, the court determined that separating the issues would create confusion and uncertainty for the jury, rendering separation inappropriate.

BEWARE THE DEMAND FOR A JURY TRIAL

At least one court has relied, in part, on a defendant’s demand for a jury trial in denying a motion to bifurcate in a trucking accident case. *Fetz v. E&L Truck Rental*, 670 F. Supp. 261 (S.D. Ind. 1987). In this case, as a result of the accident the plaintiff sustained brain damage that left her in a permanent vegetative state. Noting that bifurcation typically only shortened trials if the defense won on liability, the trial court found that the trucking company had “not demonstrated that its probability of prevailing in a separate trial of liability is sufficiently substantial to warrant ordering a bifurcated trial in this case based on ‘judicial economy’” *Id.* at 266.

The court next discussed the defendant’s concern about prejudice, should a jury hear the full case. After writing that “the defendant’s sudden lack of faith in the jury system must be viewed with skepticism given that the defendants themselves demanded a jury trial in this case,” the court denied the request to bifurcate.

While an uncommon basis for denying a motion to bifurcate, the *Fetz* court’s logic would require the defense to decide whether prejudice is likely when you file an initial pleading and when you decide whether to request a jury trial.

CONCLUSION

Lest you believe after reading the cases discussed above that courts frequently grant bifurcation, remember that there is essentially a presumption against it. While not dealing specifically with bifurcation under Rule 42(b), the United States Supreme Court in *Miller v. Am. Bonding Co.*, wrote that “the general practice is to try all the issues in a case at one time; and it is only in exceptional instances where there are special and persuasive reasons for departing from this practice that distinct causes of action asserted in the same case may be made the subject of separate trials.” 257 U.S. 304, 308 (1921).

In defending your client, a motion to bifurcate a trial can offer an important tool. Separating consideration of issues at trials may give your client some predictability and save time and money in certain circumstances. While you should decide to move to bifurcate on a case-by-case basis, generally serious personal injury lawsuits resulting from trucking accidents lend themselves to bifurcation as much as any other. When you and your client believe that bifurcation

would prove useful, consider a bifurcation motion from the start of a case and use discovery to develop arguments to support it. Bifurcation may be an uncommon remedy, but it could help alleviate your clients’ concerns about facing a jury in a catastrophic trucking accident case.

F. Marshall Wall is a partner and Dexter “Chip” Campbell III an associate in the Raleigh, North Carolina, office of Cranfill Sumner & Hartzog LLP. Members of DRI’s Trucking Law Committee, both are also members of the firm’s trucking and transportation section who defend commercial motor vehicle accidents and other disputes involving trucking companies. ♦

Professional Negligence

APPLICABILITY OF PROFESSIONAL SERVICES EXEMPTIONS UNDER STATE CONSUMER PROTECTION STATUTES

By Richard T. Boyette (RAL) and Melody J. Canady (CHAR)

I. HISTORY OF PROFESSIONAL SERVICES EXEMPTIONS

A number of state legislatures and courts exclude professional services as beyond the reach of consumer protection statutes. The rationales vary from state to state, but the crux of it is that true professional services are not commercial in nature, and they therefore fall outside the purview of “trade and commerce”. Further, professionals employ specialized knowledge and skill in rendering their services, which is often not considered to be the proper subject of oversight for the court, but is better addressed by specific regulatory bodies with an intimate understanding of the profession. “Consumers” of professional services are protected by enforcement of regulations by these agencies or government bodies, and application of state consumer protection statutes to professionals therefore opens the possibility of inconsistent results and inconsistent application of rules and regulations.

Medical practitioners, clergy and attorneys are typically regarded as professionals without much debate. However there is growing support for exempting other “professional services” under the same rationale. Professional services exemptions are created either through legislative action or through rulings by state courts construing and applying consumer protection statutes. The statutes and decisions run the gamut from exempting no professionals to specifically exempting the professional services of certified public accountants, architects, clergymen, professional engineers, lawyers, veterinarians, insurance companies, insurance producers, Christian Science practitioners, land surveyors, property line surveyors, chiropractors, optometrists, physical therapists, podiatrists, real estate brokers and salespeople and medical or dental practitioners. Court opinions express varying rationales as to why certain exemptions are outside the

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reach of consumer protection laws. Due to the unsettled nature of professional services exemption case law, practitioners should seize this opportunity to hone in on favorable case law that will support extending professional services exemptions to professions that are not as clearly regarded as “professionals.”

II. EXPRESS STATUTORY EXEMPTIONS

A minority of the state consumer protection acts contain express statutory exemptions for professional services either through identification of specific, enumerated professions or by exempting “learned professions,” with no defining or explanatory language.

Statutes exempting specific, enumerated professions

Several state legislatures and the District of Columbia have drafted their consumer protection acts with professional services exemptions for specific, enumerated professions. Maryland and Ohio have the broadest statutes, exempting nearly every profession that could be considered “learned.” Florida, Virginia and Wisconsin only exempt licensed real estate professionals. In these states, it will be difficult to extend application of the professional services exemption to non-enumerated professions, because legislatures expressly declined to include them.

Statutory exemptions with no defining or explanatory language

In North Carolina and Texas, the legislatures opted to exempt professional services rendered “by a member of a learned profession” and providing advice or professional skill, respectively. Thus, it is left to the courts to construe the meaning of the statute and to apply the exemptions accordingly.

In addition to the practice of medicine, law, and theology – professions the courts have traditionally considered “learned” – courts have expanded the learned profession exemption under this Act to include such professionals as architects, chemical dependency treatment facility operators, residential home inspectors and a professional arborist. In other contexts, the North Carolina Court of Appeals defined “professional services” as “an act or service arising out of a vocation, calling, occupation, or employment involving specialized knowledge, labor, or skill, and the labor [or] skill involved is predominantly mental or intellectual, rather than physical or manual.”

By analogy, these “learned profession” exemptions should extend to other professionals such as engineers, appraisers, real estate agents, accountants and engineers, all professions the practice of which involves specialized knowledge and intellectual skills. Further, these professions are subject to the scrutiny of regulatory bodies and regulatory schemes including licensing, certifications, examination, continuing education, ethical

codes, promulgation of standards and discipline, similar to that of attorneys, physicians and others to whom courts have extended the exemption.

III. EXEMPTIONS CREATED BY CASE LAW

Exempting “professional services” regulated by other governmental bodies

A growing number of state courts have fashioned exemptions where professions are otherwise regulated by governmental bodies, based on the rationale that the regulation of professional services by a separate and developed specialized body of law on malpractice and other professional regulations obviates the need for consumer fraud acts to impose additional regulations, and attempted regulation by the courts via consumer protection acts may encroach on the authority of the regulatory body and lead to inconsistent enforcement and results. In states such as New Hampshire, there is good occasion to push for extension of the exemption to professionals other than lawyers. The New Hampshire Supreme Court in *Rousseau v. Eshleman*, exempted legal services from the reach of the act, stating that “disciplinary measures exercised [by the New Hampshire Supreme Court against attorneys] protect the public as effectively from deceptive or unfair actions in the marketplace as would double or treble damages under [the act].” The Court went on to say in dicta that based upon the same rationale, “[p]resumably, physicians would be considered exempt from the act . . .” By analogy, other regulated professionals should have the benefit of the same exemption, thereby reducing the chance of inconsistent results and overstepping between courts and regulatory agencies, and in the interest of judicial economy.

A few state consumer protection statutes expressly exempt conduct that is subject to regulation by regulatory boards. Some of those exemptions apply “only where the business is both regulated elsewhere



and the unfair acts and practices are therein prohibited.” The rationale is that consumers are already protected by the authority and discipline imposed by regulatory boards. In these states, the exemption will simply apply where conduct of the profession is regulated elsewhere.

Professional services are not “trade or commerce”, except when professionals are engaging in “entrepreneurial” enterprise

A growing majority of jurisdictions have taken the position that some professional services may be governed by their consumer fraud acts. More often than not the courts draw a distinction between the commercial or entrepreneurial aspects of the profession and the “pure” practice of the profession, which relates to the actual competence of the professional and is therefore beyond the realm of “trade or commerce.” While recognizing that claims which allege negligence or professional malpractice are exempt from their consumer protection laws, these states carve out an exception for the “entrepreneurial aspects” of the practice of the profession.

For example, in Washington, courts have held that claims of professional negligence do not fall under the state’s consumer protection laws because the provision of professional services do not fit the definition of “trade or commerce.” Citing the reasoning of the Washington Supreme Court, the Washington Court of Appeals in *Quimby v. Fine*, extended the exemption to medical profession-

als, saying: “[w]e see no basis to distinguish the legal practice from the medical practice. Therefore the [plaintiff’s medical] negligence claim paralleling legal negligence . . . is not under the Consumer Protection Act because it relates to the actual competence of the medical practitioner.” Washington Courts have gone on to extend this exemption to the professional services of a home appraiser, reasoning that like the “term ‘trade’ as used by [the act] only includes the entrepreneurial or commercial aspects of professional services, not the substantive quality of services provided.” Accordingly, practitioners should utilize this case law and similar reasoning of other courts as a basis for extending application of the exemption to other professional services, such as engineering, architecture, veterinary practice and the like. Outside the context of the business aspects of these professions, there is no basis for distinguishing the provision of veterinary services, for example, from the provision of legal services. A challenge to the competence of a learned professional in the provision of his or her services is simply outside of the realm of consumer protection, and therefore, all learned professionals should be excluded from application of these acts. ♦

Footnotes have been omitted in the interest of space. To view a footnoted version of this article, go to www.cshlaw.com, click on News and Publications, Articles of Interest.

Land Condemnation

Our Land Condemnation Group, consisting of Raleigh lawyers George Autry, Stephanie Autry, and Brady Wells, has had several favorable recoveries for its landowner clients recently.

NC Dept. of Transp. Turnpike Authority v. Kane; 09 CVS 022898; Wake County

In January, we reached a settlement of \$5.38 million due to the N.C. Turnpike Authority’s taking of approximately 22 acres of a 62-acre tract for the construction of the Western Wake Expressway toll road. Before the taking, the property was on both sides of Roberts Road, and there was no disagreement about the value of the land at that time (\$115,000 an acre). However, with the new expressway passing underneath Roberts Road, the remaining acreage will be split into four remainders. The Turnpike Authority’s appraisers essentially concluded that the per-acre value of the severed remainders had not been diminished. As a result, the Turnpike Authority’s first offer was \$2.7 million. Our appraiser determined that the remainders had been severely damaged by the change of elevation of Roberts Road, the restrictions on access to Roberts Road, the proximity of the new expressway, and the limitations imposed by the 100-foot buffer requirements along the new expressway. As a result, our appraiser reached a just compensation opinion of \$6.06 million. The parties entered into a voluntary mediation shortly after the suit was filed and settled for \$5.38 million.

NC Dept. of Transp. v. Parks; 08 CVS 469; Montgomery County

In February, a jury in Montgomery County returned a verdict for our client, a family who owned a machine shop in the town of Troy. NCDOT took most of their land and their entire shop, and deposited \$86,700 into court as its estimate of just compensation. We presented evidence that the land and building were worth \$313,000, and the jury agreed by returning a verdict of \$313,000, which will be increased to \$341,668.80 when statutory interest is added. This amount will enable the family to continue its business at a new location.

NC Dept. of Transp. v. B3 Partners, LLC; 08 CVS 10353; Cumberland County

In March, we settled a claim involving property in Fayetteville being affected by the Fayetteville Outer Loop. The property is improved with a tire and auto business. NCDOT acquired only slope, drainage, and construction easements, and deposited \$27,050 into court, acknowledging only some interference with the business during DOT’s construction period. We argued that the grade of the slope and its proximity to the car service bays will likely destroy the current use of the property, and that the property likely would have to be redeveloped in the future. At mediation, we convinced NCDOT to pay \$175,000 to settle the claim.

"LUNCH WITH A LAWYER"

Partner Nicholas P. Valaoras and associate Mica L. Nguyen have volunteered to participate in the "Lunch with a Lawyer" program organized by the Mecklenburg County Bar as part of the MCB's Diversity Initiative. Through a partnership with Charlotte-Mecklenburg Schools (CMS), lawyers serve as mentors to eighth graders throughout the academic school year, meeting with a student at school at least once a month for lunch and providing the student with a positive role model as well as unique insight into the legal profession.

Students expressing an interest in the legal profession are selected by their schools to be partnered with a lawyer-mentor. The students are given the opportunity to ask important questions about the reality of a career in law as well as the journey taken to become a lawyer. Each year, over 150 students, parents, mentors, and school administrators dedicate time to participate in this program with the common endeavor of providing much needed guidance and support to students of diverse backgrounds in an effort to foster interest in the legal profession at a young age.

"VIS MOOT INTERNATIONAL COMMERCIAL ARBITRATION MOOT"

Mica L. Nguyen, an associate in the Charlotte office, was invited to participate in the judging and scoring of legal memoranda in this year's Wilem C. Vis Moot Competition. The goal of the "Vis Moot" is to foster the study of international commercial law and arbitration for the resolution of international business disputes through the application of international case law and scholarly works to a concrete situation. The legal issues for the Vis Moot are always based on an international sales transaction subject to the United Nations Convention on Contracts for the International Sale of Goods ("CISG").

The annual competition takes place in Vienna, Austria where teams make their best oral arguments and advocate for their moot client's position before an arbitration panel of lawyers. However, prior to the Vienna competition, each law school must submit a memorandum of law advocating for the Claimant's position that will be distributed to another school's team for response in a second legal memorandum arguing for the Respondent's position. Last year, Ms. Nguyen was invited to serve as a guest Arbitrator in Vienna, Austria; as Ms. Nguyen is unable to attend the Vis Moot this year, she has been invited to participate in the scoring of the law schools' memoranda.

Ms. Nguyen is proud to be able to serve on behalf of Cranfill Sumner & Hartzog in the capacity as a volunteer judge for the Vis Moot, as the program trains law students from all over the world in methods of alternative dispute resolution, legal writing and persuasive oral argument.

Pro Bono:

On March 5th, **NICK VALAORAS (CHAR)** participated in the statewide 4All pro bono campaign sponsored by the North Carolina Bar Association where volunteer lawyers served in a call center and provided legal information over the phone to members of the general public.

MARSHALL WALL (RAL) recently handled a pro bono case representing a woman who was being pursued by the Employment Security Commission for alleged overpayment of unemployment benefits. After being provided with additional information, the ESC dropped the claim against our client, and she was not required to repay any of the benefits in question.

Civic/Professional Notes

CRANFILL SUMNER & HARTZOG LLP RECENTLY ANNOUNCED THREE NEW PARTNERS:

JESSE J. BLYTH – Jesse has been practicing law since 1997 and has been with the **Wilmington office** of Cranfill Sumner & Hartzog LLP since 2005. He concentrates his practice in the defense of architects and engineers in construction litigation, as well as defending businesses in premises and product liability claims. Jesse's practice includes all facets of construction law arising out of public and private projects. He has also defended and served as counsel for clients including product manufacturers, equipment manufacturers and premises owners. Jesse attended the University of California, Santa Barbara for his undergraduate studies and received his J.D. from the University of San Diego School of Law. State bar admissions include

California in 1997 and North Carolina in 2005. Other bar admissions include the U.S. District Court, Southern District of California and Eastern District of North Carolina.

KATHERINE HILKEY-BOYATT – Since joining the **Raleigh office** of Cranfill Sumner & Hartzog LLP in 2001, Katherine has focused her practice on cases involving medical malpractice and professional negligence as well as long-term care/nursing home defense. Representative clients include various individual health care providers, long term care providers and numerous other individuals and entities. She routinely handles cases in the State and Federal Courts of North Carolina. Katherine attended the University of North Carolina at Chapel Hill for her undergraduate studies. She received her J.D. from the University of North Carolina School of Law in Chapel Hill.

DAWN CONGER LANE – Dawn has been defending employers and insurance companies with Cranfill Sumner & Hartzog's **Raleigh office** since 2002. Prior to joining Cranfill Sumner & Hartzog, she represented plaintiffs from 1998-2002 in workers' compensation cases, personal injury matters, other civil suits and estate and financial planning. Dawn has experience with all levels of workers' compensation litigation including motions, mediations, hearings with a Deputy Commissioner, Full Commission oral arguments and appeals to the state appellate courts. She has handled numerous claims involving a variety of issues ranging from injury by accident, occupational disease, medical causation, medical treatment, vocational rehabilitation and return to work issues. Dawn received her undergraduate degree from Campbell University and her J.D. from the North Carolina Central University School of Law.

RICHARD T. BOYETTE (RAL) was recently re-elected to the Board of Directors of the YMCA of the Triangle after a year off of the board, and has been elected to the office of Assistant Secretary and serves as a member of the Executive Committee.

WILLIAM POLLOCK (RAL) recently began serving a third year of term on the board of directors of the North Carolina Association of Defense Attorneys.

WILLIAM POLLOCK (RAL) was recently appointed to the board of directors of the North Carolina Law Education Assistance Foundation (NCLEAF).

KIRK D. KUHN (RAL) is a volunteer coach for the upcoming Spring Season in the "Miracle League of the Triangle" -- baseball for kids with disabilities.

KIRK D. KUHN (RAL) was recently certified as a Superior Court Mediator by the North Carolina Dispute Resolution Commission.

NICK VALAORAS (CHAR) was recently elected by the Workers' Compensation Section of the North Carolina Bar Association to serve as Section Council for the period 2010-2013.

NICK VALAORAS (CHAR) served as a lawyer-mentor for an 8th grader in the Mecklenburg County Bar Association "Lunch with a Lawyer" program and as a math tutor for two 3rd graders at Sharon Elementary School.

JENNIFER ADDLETON WELCH (RAL) and **STEPHANIE GASTON (RAL)** are serving as co-chairs of the YLD-WCBA Food Drive Committee.

JENNIFER ADDLETON WELCH (RAL) is now a member of the DRI Insurance Law Committee.

Cranfill Sumner & Hartzog Attorneys Selected for 2010 North Carolina Super Lawyers® List

The Super Lawyers multi-step process is designed to identify North Carolina lawyers who have attained a high degree of peer recognition and professional achievement. The process includes surveying more than 17,000 active lawyers in North Carolina, researching all nominee credentials, a blue ribbon panel review and a good standing review of each nominee's discipline record as provided by the North Carolina State Bar.

- **DAVID H. BATTEN** - Personal Injury Defense - Medical Malpractice
- **RICHARD T. BOYETTE** - Alternative Dispute Resolution
- **SUSAN K. BURKHART** - Insurance Coverage
- **DAN M. HARTZOG** - Civil Litigation Defense
- **JOHN D. MARTIN** - Personal Injury Defense - Medical Malpractice
- **C. D. TAYLOR PACE** - Workers' Compensation
- **SAMUEL H. POOLE, JR.** - Personal Injury Defense - Medical Malpractice
- **ROBERT W. SUMNER** - Personal Injury Defense - General
- **DAVID D. WARD** - Personal Injury Defense - Medical Malpractice

SELECTED FOR SUPER LAWYERS NORTH CAROLINA RISING STARS LIST:

Lawyers are asked to nominate the best attorneys they have observed who are 40 or under, or who have been practicing for 10 years or less. The attorney-led research team reviews the credentials of potential candidates and assigns points based on a set of defined evaluation criteria. The point totals from the general survey and research process are then added to arrive at a final tally. No more than 2.5 percent of the lawyers in the state are named to the list.

- **MELODY CANADY** - Employment & Labor
- **STEPHANIE A. GASTON** - Civil Litigation Defense
- **DAN M. HARTZOG, JR.** - Civil Litigation Defense
- **DANIEL G. KATZENBACH** - Construction Litigation
- **KATHLEEN M. MILES** - Personal Injury Defense - General
- **GEORGE L. SIMPSON, IV** - Civil Litigation Defense
- **REGAN SUMMERLIN TOUPS** - Personal Injury Defense
- Medical Malpractice

SELECTED FOR SUPER LAWYERS STAR SEARCH CREDENTIALS LIST:

The attorney-led research staff searches for lawyers who have attained certain honors, results or credentials, which indicate a high degree of peer recognition or professional competence—termed as "Star Search Credentials." The staff identifies these Star Search Credentials by reviewing a proprietary listing of more than 150 database and online sources, as well as national and local legal trade publications.

- **JONATHAN C. ANDERS**
- **P. COLLINS BARWICK, III**
- **W. SCOTT FULLER**
- **AMY L. PFEIFFER**

Recent Case Results

DAN HARTZOG (RAL) and **KARI JOHNSON (RAL)** obtained Summary Judgment in a case pending in federal court where the plaintiff claimed that the defendant municipality violated his constitutional rights by failing to provide adequate protection to him and the other residents of the municipality. The plaintiff claimed that as a result of the municipality's failure to address one crime-ridden area in particular, the plaintiff sustained significant injuries after being assaulted by a group of men in the area. The case was pending in the Eastern District of North Carolina.

DAN HARTZOG (RAL) and **KARI JOHNSON (RAL)** successfully defended a municipality and several of its police officers in a case pending in federal court where the plaintiff's son was shot and killed by the defendant police officers after he threatened the officers with a sword/knife that he had concealed in a cane. The plaintiff asserted multiple claims against the defendants including federal constitutional claims for excessive force. Plaintiff dismissed the case after the federal Magistrate Judge recommended Summary Judgment in the defendants' favor. The Magistrate found that the officers' use of deadly force was justified and reasonable as a matter of law. This case was pending in the Middle District of North Carolina.

LEE POOLE (CHAR) and **MELODY CANADY (CHAR)** briefed, and **MS. CANADY** argued, before the United States Court of Appeals for the Fourth Circuit on behalf of a law firm in a purported class action lawsuit seeking over \$11 million in damages. The action was appealed by the putative class representatives after **MR. POOLE** and **MS. CANADY** successfully obtained dismissal as a matter of law at the United States District Court for the Western District of North Carolina.

JOHN BOWEN "BO" WALKER (RAL) obtained Summary Judgment in *Norfolk Southern v. TIMEC*, which denied Plaintiff the right to recover over \$50,000 in attorney's fees under an indemnification agreement.

MATT COVINGTON (CHAR) and **NICK VALAORAS (CHAR)** won a case before Deputy Commissioner Brad Houser – *Julie Silverthorne v. Allstate*. Plaintiff alleged a back injury and psychological problems caused by her job as a service representative. We presented evidence Plaintiff had a long history of pre-existing back and psychological problems. Claim was denied on the grounds of Plaintiff's pre-existing conditions and her failure to prove a specific traumatic incident or occupational disease.

DANIEL KATZENBACH (RAL) obtained a defense verdict for his roofing contractor client at the conclusion of a three-day arbitration proceeding. The roofing contractor was a third-party defendant in a lawsuit relating to hundreds of thousands of dollars of alleged damages at a townhouse development project.

DANIEL KATZENBACH (RAL) successfully represented his engineer and land surveyor client before the NC Board of Examiners for Engineers and Land Surveyors. The client had been issued a notice of violation of the Board's rules of practice based on a complaint filed with the Board by a client of the engineer and land surveyor. After a lengthy formal conference with the Board, the Board agreed to drop all charges of violation against the client.

KATIE WEAVER HARTZOG (RAL) obtained Summary Judgment on behalf of a Homeowner's Association in a case in which a member of the Association sought to dissolve the Association and sought a declaratory judgment that the Association did not have the right to maintain a gate at the entrance to the Association. The Association filed a counterclaim seeking a declaratory judgment that the restrictive covenants governing the Association were broad enough to allow the Association to install and maintain a gate at the entrance to the community. After considering the arguments of counsel and the evidence, the judge ruled in favor of the Association as to all claims, including its counterclaim, and entered costs against Plaintiff.

