WHAT CIVIL DEFENSE ATTORNEYS SHOULD KNOW ABOUT ERISA

WOODDALE BUILDERS, INC. V. MARYLAND CASUALTY CO.

SUPREME COURT ADDRESSES CERTAIN INSURANCE COVERAGE ISSUES PERTAINING TO MOISTURE INTRUSION CLAIMS
Happy New Year to all and best wishes for 2007. Although this greeting may seem a bit dated by the time this Minnesota Defense reaches your office, the sentiment is always timely. As one year ends and another begins, it is a natural time to reflect on both the positive and negative events of 2006 and to then look forward with positive plans for the New Year. For example, I look back to 2006 and particularly the pencil drawing that accompanies this article, and it appears I actually grew hair as of August 2006, and that’s a positive. In contrast, the last edition of Minnesota Defense had several photos of me in lederhosen, and that is clearly a negative. For 2007, one resolution is no more lederhosen.

On a more serious note, one of my goals when I became president of the MDLA was to encourage participation in pro bono work. I’ve been fortunate in my career to have received wonderful support, assistance and mentoring to get involved in pro bono work. When I completed law school an old college friend, Rick Beddow, introduced me to the Legal Advice Clinics (n/k/a Volunteer Lawyers Network) and I began taking a variety of pro bono cases from landlord/tenant disputes to marital dissolutions. With help and support from Candy and Pam at LAC, along with the sage advice of my former colleagues from Mahoney Dougherty and Mahoney, and later at Rider Bennett, I did the best I could for my clients. Admittedly in the early years I was green and inexperienced, but it was still more beneficial for the clients to have representation than not. In return, I received valuable experience by learning to interview and manage clients, complete discovery and actually try cases; some before a jury, others before a judge.

I recognize you have heard the pitch about pro bono work a hundred times, and you are fully aware that the Rules of Professional Conduct state, “A lawyer should aspire to render at least 50 hours of pro bono publico legal services per year.” (Rule 6.1). Nevertheless bear with me a bit longer since this is an important topic. Now that I’m getting a bit “long in the tooth” I may be able to provide some response to the questions that frequently arise when discussing this topic. For example

1. **What qualifies as pro bono publico work?**

   By definition pro bono publico means work done without compensation for the public good, i.e. pro, for + bono, ablative of bonum, the good + publico (public). In practice pro bono publico means legal work done for persons of limited means, charitable, religious, civic and other non-profit groups, for no fee. Does free legal work for a friend or relative qualify? Probably not, but it is an issue that frequently arises in one form or another.

2. **My areas of expertise don’t seem to apply to the subject matters where pro bono representation is needed.**

   You may be surprised how wide the spectrum is for pro bono publico work, particularly for religious, charitable and other non-profit groups. Regardless of the area of law in which you practice, I am confident there is a need for your particular expertise and which qualifies as pro bono. More importantly, is that many of the skills you have developed in your area of practice are needed in pro bono work, e.g., negotiating disputes, cross examining witnesses, contract interpretation, etc., and of course problem solving. No matter how “inexperienced” you may feel in a particular area, the client is still better off with representation.
3. I just don’t have time; or my firm doesn’t credit the pro bono time against the firm goals for hours or revenue.

Perhaps this is more a question of the proper balance of pro bono work, rather than a complete exclusion. Even if you are limited to handling one pro bono matter a year, or limited to a designated number of hours to a pro bono project, your participation is valued. I strive to live by the adage of, “Don’t tell me why you can’t do something, tell me how you can.” For you, your firm or organization, the challenge may be finding the proper balance.

4. I’m interested, but where do I begin?

The Young Lawyer Section of MDLA put on a Brown Bag Seminar in early November 2006 on the topic of pro bono publico. Their materials named numerous organizations that identify appropriate clients in need of legal assistance. That information can be located on the MDLA website. A number of these organizations also provide in-house training for the particular type of cases they deal with.

In summary, my message is to consider doing pro bono publico work in 2007.

In summary, my message is to consider doing pro bono publico work in 2007. How much and what type of work is up to you, but you are needed and your participation would be appreciated.

As a closing topic, I am pleased to report on the accomplishments of the MDLA in 2006. Membership is strong and has surpassed 750 members. Revenues in 2006 exceeded projections and eliminated the shortfall we anticipated. The August 2006 TTS had record attendance, to the point we are now considering the possibility of holding the 2007 TTS at the Duluth Entertainment and Conference Center (DECC) which is near our current site. The MDLA also sponsored a number of successful seminars and events and we have witnessed new faces in several committee chair positions and on the MDLA Board. Deb Oberlander continues to provide strong leadership as the Executive Director and was instrumental in many of the successes in 2006.

2007 is also looking bright for the MDLA. Kay Teuveson presented a balanced budget for the New Year, which was approved by the Board in December. The Insurance Law Committee will have already completed the Insurance Law Institute and I want to thank the organizers and speakers for their efforts. Tom Marshall has put together a wonderful seminar for the Mid-Winter Conference at Arrowwood Resort on February 9-11, 2007 and I do hope you will join us. I am particularly pleased by the continued expansion of the Brown Bag Seminars and the development of new presenters such as Stacy Kabele, Amy Amundson, Lacee Anderson and Christine Mennen. This is a great forum for members to speak on new and relevant topics and I would encourage each of you to make it a goal in 2007. As for me, I am just hoping the hair thing continues to improve. ▲
WHAT CIVIL DEFENSE ATTORNEYS SHOULD KNOW ABOUT ERISA

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I. INTRODUCTION
If you are not an ERISA lawyer, chances are you do not pay much attention to the ERISA statute and its regulations. Why would you? ERISA is an enormous, complicated statute with seemingly endless regulations. Delving into ERISA and its regulations may seem a daunting task, and one reasonable people would not willingly undertake unless absolutely necessary. The complexities of ERISA, therefore, make it unlikely that general civil defense attorneys will find the time to become experts in this area of law. However, the scope and significance of ERISA are so great that failing to have at least a rudimentary knowledge of it may, in certain circumstances, prevent you from effectively representing your clients.

Employee benefit plans are estimated to cover over 52 million employees. See James F. Jorden, et al., Handbook on ERISA Litigation, vii-viii (2nd Ed.) (hereinafter referred to as “ERISA Handbook”). Those benefit plans are the major source of retirement income and reimbursement for medical costs for covered employees and their families. The funding and administration of such plans constitute a material and rapidly increasing part of the cost of doing business for most U.S. corporations. Id. The funds invested by these plans to support their obligations total approximately three trillion dollars and constitute a major source of investment capital in this country. Id. Managing these funds and performing tasks associated with administering employee benefit plans requires and involves the services of numerous insurance companies, banks, accountants, investment advisers, actuaries, attorneys, and other investment managers, professionals, and service providers. As numerous commentators have noted, this area of law affects so many businesses and individuals in so many ways that it is virtually impossible for any attorney to be immune from a need to have at least a basic understanding of this statutory scheme and its potential relevance to his or her practice. Id.

This article is an introductory ERISA litigation overview written for defense attorneys who are not accustomed to litigating ERISA matters. The aim of this article is to provide an introduction to ERISA law generally, and to some topics in particular within ERISA that may be relevant and important to defense attorneys.

II. BACKGROUND INFORMATION ON ERISA
Perhaps the best place to begin is by discussing some foundational aspects of ERISA—e.g., what it is and does, how it is structured, its purpose(s), how (and by whom) it is enforced, what makes an employee benefit plan an “ERISA plan,” and what are the principal claims under ERISA.

A. What is ERISA and what does it do?

ERISA regulates or is the source of a multitude of rights and obligations, including those related to plan structure and administration; reporting and disclosure to plan participants, beneficiaries, and the federal government; entitlement to and payment of plan benefits; and the investment and management of plan assets. See ERISA Handbook at vii-viii. Understandably, the volume of litigation involving the enforcement or interpretation of these rights and obligations has steadily increased since the enactment of ERISA. Id. Such litigation ranges from individual claims for benefits to claims that fundamentally affect the overall administration of a plan or the investment of its assets and involves numerous parties, plaintiffs and defendants (e.g., plan sponsors, participants and beneficiaries, plan fiduciaries, service providers). Id.

Some ERISA litigation involves violations of express statutory requirements or obvious breaches of fiduciary standards of conduct applicable to those persons or entities charged with responsibility for administering plans or managing their assets. More often, however, ERISA litigation seems to involve disputes where the rights of plan participants, the obligations of the plan, or the satisfaction by a plan fiduciary of the requisite standards of conduct are far from clear. Id. In enacting ERISA, Congress developed a comprehensive, but in some areas general, regulatory framework to be fleshed out and refined through the
courts’ development of a “federal common law of employee benefit plans” which today remains very much in its infancy. \textit{Id.} (citing \textit{Firestone Tire \\& Rubber Co. v. Bruin}, 489 U.S. 101 (1989)). Accordingly, most practitioners undoubtedly will not only be exposed to “ERISA litigation,” but in being so exposed, they will face issues and disputes whose resolution and outcome are uncertain. \textit{Id.}

B. How is ERISA Structured?

ERISA is organized into four titles. Title I provides protections for employee benefit rights and is divided into six parts: Part 1 contains ERISA’s reporting and disclosure requirements; Part 2 sets forth the minimum standards for participation and vesting; Part 3 sets forth minimum funding standards; Part 4 covers fiduciary responsibility; Part 5 pertains to administration and enforcement; and Part 6, which was added in 1986, provides requirements for continuation of group health insurance coverage in certain circumstances.

Title II contains tax law provisions codified as amendments to the Internal Revenue Code of 1954 relating to retirement plans. Title III sets forth provisions regarding the jurisdiction, administration, and enforcement of ERISA by both the Secretary of Labor and the Secretary of Treasury. Title IV establishes the Pension Benefit Guaranty Corporation (“PBGC”) and creates a system of pension benefit plan termination insurance and includes special provisions for multi-employer plans.

Titles I, III, and IV of ERISA are codified in Chapter 18, Title 29, United States Code, as Subchapters I, II and III respectively.

C. What is the Purpose of ERISA?

Broadly stated, the purpose of ERISA is to regulate employer sponsored employee benefit plans. Prior to the enactment of ERISA in 1974, it was often virtually impossible to fully litigate a dispute arising out of an employee benefit plan. There were too many parties in too many different places. The entities that could be deemed necessary parties to complete relief in a pension or benefit dispute could include the trustee, the employer, the plan, the administrator, the insurance company, the union, investment advisors, and the plan actuary. The likelihood of finding all these parties in the same jurisdiction was and still is very slim. Consequently, obtaining personal jurisdiction and accomplishing service on all necessary parties could be virtually impossible. Further, among all the par-

eties and all of the various agreements that are likely to be involved, choice of law becomes an enormously complicated issue. ERISA was designed with these problems in mind and solves most of them.

ERISA also was enacted in response to findings that the then existing minimum standards for employee benefit plans were inadequate and endangered their soundness and stability, that plan funds were often insufficient to pay promised benefits, and that plans often terminated before requisite funds had been accumulated thereby depriving many employees and their beneficiaries of anticipated benefits. ERISA § 2(a). Congress further found that employee benefit plans substantially affect interstate commerce, federal tax revenues, and the national public interest, as well as “the continued well-being and security of millions of employees and their beneficiaries.” \textit{Id.}

More specifically, the purpose of ERISA is to “protect interstate commerce and the interests of participants in employee benefit plans and their beneficiaries, by requiring disclosure and reporting to participants and their beneficiaries of financial and other information.” \textit{ERISA §2(b).} This policy is carried out by establishing standards of conduct, responsibility, and obligation for fiduciaries of employee benefit plans, and by providing for appropriate remedies, sanctions, and ready access to the Federal courts. \textit{Id.} In addition, Congress designed ERISA “to protect interstate commerce, the Federal taxing power, and the interests of participants in private pension plans and their beneficiaries by improving the equitable character and soundness of such plans by requiring them to vest the accrued benefits of employees with significant periods of service, to meet minimum standards of funding, and by requiring plan termination insurance.” \textit{ERISA §2(c).}

D. Who Enforces ERISA?

The agencies charged with the administration and enforcement of ERISA’s various parts are the Department of Labor, the PBGC, and the Internal Revenue Service.

The Department of Labor is statutorily mandated to investigate and enforce alleged violations of all of the non-tax aspects of ERISA. \textit{ERISA § 504.} In addition, ERISA authorizes the Department of Labor to issue regulations to implement Title I of ERISA. \textit{ERISA § 505.} These regulations and other interpretive pronouncements are contained in Title 29 of the Code of Federal Regulations. The DOL maintains a practice of answering inquiries from individuals or organizations affected by ERISA with
respect to the effect of certain transactions and their status under the statute. The DOL has an established procedure for obtaining advisory opinions, information letters, and prohibited transaction exemptions. \textit{ERISA Handbook} at xii-xiii (citing ERISA Procedure 76-1 (Advisory Opinion Procedure), 41 Fed. Reg. 36281 (Aug. 22, 1976)). A grant of a prohibited transaction exemption by the DOL protects persons subject to the exemption from excise taxes otherwise assessable. Prohibited transaction exemptions, advisory opinions, and information letters are often persuasive authority in litigation involving similar ERISA issues.

\section*{E. What is an ERISA Plan?}

ERISA recognizes two general types of employee benefit plan arrangements (1) employee welfare benefit plans and (2) employee pension benefit plans (or plans that are both). ERISA §§ 3(1), 3(2)(A) and 3(3). \textit{See also} C.F.R. §§ 2510.3-1, 2510.3-2 and 2510.3-3.

An action seeking to assert claims under ERISA that fail to adequately allege the existence of an employee benefit plan will be dismissed, in most courts, for lack of subject matter jurisdiction. \textit{See Kulinski v. Medtronic Bio-Medicus Inc.}, 21 F.3d 354, 256 (8th Cir. 1994) (vacating judgment because plan was not governed by ERISA and court therefore lacked jurisdiction, but noting that other courts have treated the issue as going to the merits rather than to jurisdiction).

Whether an ERISA covered plan is at issue is important because, if no ERISA plan is involved, then ERISA’s broad preemption of state law claims is not triggered. \textit{See gen., Fuller v. Ulland,} 76 F.3d 957 (8th Cir. 1996).

The Eleventh Circuit has set forth a test, widely followed by other courts, for determining the existence of an ERISA employee welfare benefit plan:

By definition…a welfare plan requires (1) a "plan, fund or program" (2) established or maintained (3) by an employer or by an employee organization, or by both, (4) for the purpose of providing medical, surgical, hospital care, sickness, accident, disability, death, unemployment or vacation benefits, apprenticeship or other training programs, day care centers, scholarship funds, prepaid legal services or severance benefits (5) to participants or their beneficiaries.

\textit{Donovan v. Dillingham}, 688 F.2d 1367, 1371 (11th Cir. 1982). A “plan, fund or program” is established under the Donovan test “if from the surrounding circumstances a reasonable person can ascertain the intended benefits, a class of beneficiaries, the source of financing, and procedures for receiving benefits.” \textit{Id.} at 1373.

An “employee pension benefit plan” means any plan, fund or program established or maintained by an employer or employee organization to the extent that, by its express terms or as a result of surrounding circumstances, provides retirement income to employees or defers income by employees for periods extending to the termination of covered employment or beyond, regardless of the method of calculating contributions or benefits under the plans or of distributing benefits from the plan. ERISA § 3(2)(A). The \textit{Donovan} test is also used to determine whether an employee pension “plan, fund or program” is established.

\section*{F. What are the Principal Claims Under ERISA?}

ERISA provides for enforcement of its rights and requirements through its civil enforcement provision, Section 502 of ERISA, 29 U.S.C. § 1132. Litigation under ERISA will most often involve the following types of claims:


2) Actions claiming a breach of fiduciary duty standards, ERISA § 502(a)(2), 29 U.S.C. § 1132(a)(2);

3) Actions seeking equitable relief, ERISA § 502(a)(3), 29 U.S.C. § 1132(a)(3);

4) Actions for funding, contributions or withdrawal liability;

5) Actions involving challenges to voluntary plan terminations of over-funded plans and asset reversions;

6) Actions involving termination of under funded plans; and

7) Tax litigation.

Analysis of these ERISA claims is not the aim of this article because, in most instances, actions involving such claims will be handled by attorneys who are well-versed in ERISA law. It is important, however, for the general litigation practitioner to understand the scope of potential ERISA claims to be able to recognize when and in what ways ERISA may be implicated even if not specifically pled.

\footnote{The PBGC is a corporate body established within the Department of Labor that Congress created to encourage the growth of private pension plans, provide for the timely and uninterrupted payment of pension benefits, and maintain pension insurance premiums at the lowest level necessary. The PBGC also has authority to bring enforcement actions.}
III. Why Would a Defendant Want ERISA to Govern?2

Since ERISA primarily protects the interests of participants and beneficiaries (i.e., plaintiffs), one might ask why a defendant who has been sued under a state law theory would seek to be pulled into the federal morass that is ERISA. There are several reasons for this. First, if ERISA governs the claim then federal courts will have federal question jurisdiction over it, meaning you may have the opportunity to litigate in federal court. If the case is in federal court, your client will have the benefit of having the ERISA statute interpreted and applied by a judge who is probably much more familiar with ERISA’s legislative history and purpose than a state court judge is likely to be. Second, under ERISA, plaintiffs normally do not have the right to a trial by jury. See Dasler v. E.F. Hutton & Co., 694 F.Supp. 624, 627 n.4 (D. Minn. 1988) (no right to a jury trial for breach of fiduciary claims); but see Bugher v. Feightner, 722 F.2d 1356 (7th Cir. 1983) (jury trial available for claim to collect delinquent contributions in the multimember plan context), cert. denied, 469 U.S. 822 (1984). There again, your client may benefit from the knowledge and experience of a federal judge who is likely to be quite familiar with ERISA, and your client will not have to deal with a potentially plaintiff-oriented jury or with the many unpredictable variables that so often accompany trials by jury.

Finally, and this is the big one, ERISA’s preemption clause broadly preempts state law causes of action and the remedies potentially derived therefrom as long as the state law claims “relate to” an employee benefit plan that is governed by ERISA. Hence, state law claims for breach of fiduciary duty, misrepresentation, tortious interference, bad faith, breach of contract, consumer fraud, common law fraud, medical malpractice, wrongful death and the like will be preempted if those claims “relate to” an employee benefit plan governed by ERISA. Likewise, if the state law claims are preempted, there can be no state law remedies such as punitive and compensatory damages. Instead, if the claim is governed by ERISA, the remedy will be limited to the benefit claim itself, as ERISA does not allow money damages even if couched as “equitable restitution.” Knieriem v. Group Health Plan, Inc., 434 F.3d 1058 (8th Cir. 2006).3

A. ERISA Preemption

Because ERISA does not require employers to create employee benefit plans, the existence of employee benefits in the United States remains largely dependent upon the willingness of employers to create employee plans. Pilot Life Ins. Co. v. Dedeaux, 481 U.S. 41, 54 (1987). Therefore, to further the “public interest in encouraging the formation of employee benefit plans,” ERISA was designed to simplify and unify the regulatory environment within which a plan administrator must operate. Id. A uniform system of regulation “is difficult to achieve, however, if a benefit plan is subject to differing regulatory requirements in differing States.” Fort Halifax Packing Co. v. Coyne, 482 U.S. 1, 9 (1987). Congress recognized that inconsistent regulation from state to state would dramatically decrease the efficiency and increase the cost of maintaining a plan. Congress therefore sought to eliminate the problem of inconsistent state and local regulation in the area of employee benefit plans by enacting express statutory preemption provisions as part of ERISA. These preemption provisions are designed to “establish pension plan regulation as exclusively a federal concern,” and their significance, particularly with respect to potential defense strategies, should not be underestimated. Alessi v. Raybestos-Manhattan, Inc., 451 U.S. 504, 523 (1981). ERISA’s preemption provisions have been the subject of substantial litigation, and practitioners should be aware of their potential impact.

Three statutory provisions are the source of ERISA’s preemptive impact. These provisions are commonly referred to by courts and commentators as 1) the “preemption clause,” 2) the “saving clause,” and 3) the “deemer clause.” ERISA §§ 514(a), 514(b)(2)(A) and 514(b)(2)(B). The preemption clause generally provides that ERISA will supersede any and all state laws to the extent that those laws “relate to” any employee benefit plan that is subject to differing state and local regulation in the area of employee benefit plans. Congress sought to eliminate the problem of inconsistent state and local regulation in the area of employee benefit plans by enacting express statutory preemption provisions as part of ERISA. These preemption provisions are designed to “establish pension plan regulation as exclusively a federal concern,” and their significance, particularly with respect to potential defense strategies, should not be underestimated. Alessi v. Raybestos-Manhattan, Inc., 451 U.S. 504, 523 (1981). ERISA’s preemption provisions have been the subject of substantial litigation, and practitioners should be aware of their potential impact.

1 One important factor for both sides to consider is the availability of attorneys’ fees under ERISA. ERISA § 502(g)(1) provides that a court, in its discretion, may award reasonable attorneys’ fees and costs to either party in an action under ERISA Title I. Hogan v. Raytheon Co., 302 F.3d 854,857 (8th Cir. 2002); see also Antolik v. Saks, Inc., 463 F.3d 796 (8th Cir. 2006) (reversing lower court award favoring plaintiffs and therefore remanding significant attorneys’ fee award, noting that it is an open issue in this circuit whether attorneys’ fees may be awarded to an ERISA plan claimant who does not prevail and leaving that decision to the lower court in the first instance); Dasler v. E.F. Hutton & Co., 698 F.Supp. 172, 173-76 (D. Minn. 1988) (employer who breached fiduciary duty was liable for attorneys’ fees where it had the ability to pay and had engaged in culpable conduct, the award would serve as a general deterrent to other fiduciaries, the action benefited other participants, and the plaintiffs were successful).

2 ERISA does, however, allow claimants to seek relief on behalf of the plan. Defendants therefore could be subject to pay a monetary award not to an individual but rather to the plan where the unlawful conduct caused a loss to the plan.
to ERISA. ERISA § 514(a). The saving clause operates to “save” or exempt from preemption certain state laws that “regulate insurance, banking, or securities.” ERISA § 514(b)(2)(A). Finally, the deemer clause ensures that ERISA plans or trusts are not “deemed” to be engaged in the insurance or banking business for purposes of determining whether the saving clause should apply to exempt a state law from preemption. ERISA § 514(b)(2)(B).

These three clauses may aptly be described as “the general rule,” “the exception to the general rule,” and “the exception to the exception to the general rule.”

1. The Preemption Clause


ERISA’s preemption clause provides as follows:

Except as provided in subsection (b) of this section, the provisions of this title and Title IV of this chapter shall supersede any and all State laws insofar as they may now or hereafter relate to any employee benefit plan described in [ERISA § 4(a)] and not exempt under [ERISA § 4(b)]. ERISA § 514(a).

The legislative history behind the preemption clause makes it clear that Congress intended to supplant all state regulation of employee benefit plans with a uniform federal system. Shaw, 463 U.S. at 99. The U.S. Supreme Court has observed that the statutory preemption language is “deliberately expansive” and “conspicuous for its breadth.” FMC Corp. v. Holliday, 498 U.S. 52, 57 (1990).

By its terms, the preemption clause applies to all state laws that “relate to” an employee benefit plan. Pilot Life, 481 U.S. at 47. The Supreme Court has given this phrase its “broad common-sense meaning.” Accordingly, a state law relates to an employee benefit plan, “in the normal sense of the phrase, if it has a connection with or reference to such a plan.” Shaw, 463 U.S. at 96-97. Although a state law that expressly refers to an ERISA plan will “relate to” an employee benefit plan for purposes of the preemption clause, any significant connection to an employee benefit plan is sufficient to meet the statutory standard, and “the preemption clause is not limited to state laws specifically designed to affect employee benefit plans.” Pilot Life, 481 U.S. at 47-48.

A state law relating to an employee benefit plan may be preempted by ERISA even if it does not specifically deal with one of the subject matters covered by ERISA, such as reporting, disclosure, fiduciary obligations, or vesting requirements. Shaw, 463 U.S. at 98. Moreover, preemption does not depend upon the existence of a real or potential conflict between ERISA and the state law. The fact that a state law may have been enacted to further ERISA’s underlying purposes is not enough to save the state law from preemption. Mackey v. Lanier Collection Agency & Serv., Inc., 486 U.S. 825, 829 (1988). The preemption clause was intended to displace all state laws that fall within its sphere, even including state laws that are consistent with ERISA’s substantive requirements. Metropolitan Life Ins. v. Massachusetts, 471 U.S. 724, 739 (1985).

Despite the breadth of the preemption clause, there are limits to its application. The Supreme Court has stated that state laws which affect ERISA plans in “too tenuous, remote or peripheral a manner” do not “relate to” plans within the meaning of the preemption clause. Shaw, 463 U.S. at 100. Based upon this language, a variety of laws have survived preemption challenges because courts have found that their connection to ERISA plans was too remote. See Workforce Development, Inc. v. Corporate Benefit Services of America, Inc., 316 F. Supp. 2d 854 (D. Minn. 2004) (where employer’s state law claims against third party administrator involved duties potentially owed to employer, but not to employees or beneficiaries, and involved an administrative services agreement, but not the plan itself, the state law claims were not preempted because they affected the plan in too tenuo...

2. The Saving Clause

The ERISA saving clause states that “[e]xcept as provided in [the deemer clause], nothing in this subchapter shall be construed to exempt or relieve any person from any law of any State which regulates insurance, banking, or securities.” ERISA § 514(b)(2)(A). Accordingly, the saving clause acts as an exception to the general rule set forth by the preemption clause in that it preserves any state law “which regulates insurance, banking, or securities.” Metropolitan Life Ins. v. Massachusetts, 471 U.S. at 739.

A two-part test set forth by the U.S. Supreme Court determines whether a state law is saved from preemption. Two requirements must be met: 1) the law must be specifically directed toward entities engaged in insurance; and 2) it must substantially affect the risk pooling arrangement between the insurer and the insured. UNUM Life Ins. v. Ward, 526 U.S. 358, 369 (1999).

3. The Deemer Clause

The deemer clause acts to further refine operation of the saving clause by ensuring that no employee benefit plan or trust covered by ERISA is “deemed” to be engaged in the insurance or banking business for purposes of applying the saving clause. The deemer clause provides as follows:

Neither an employee benefit plan described in [ERISA 4(a)] which is not exempt under [ERISA 4(b)] (other than a plan established primarily for the purpose of providing death benefits), nor any trust established under such a plan, shall be deemed to be an insurance company or other insurer, bank, trust company, or investment company or to be engaged in the business of insurance or banking for purposes of any law of any State purporting to regulate insurance companies, insurance contracts, banks, trust companies, or investment companies.

ERISA § 514(b)(2)(B).

The U.S. Supreme Court has interpreted the deemer clause relatively broadly to exempt all self-funded ERISA plans from state laws that “regulate insurance” within the meaning of the saving clause. FMC Corp. v. Holliday, 498 U.S. at 61. Although these state insurance laws are generally “saved” from preemption, they “do not reach self-funded employee benefit plans because the plans may not be deemed to be insurance companies, other insurers, or engaged in the business of insurance for purposes of such state laws.” See ERISA Handbook at 2-25 – 2-26. As a result, uninsured, self-funded ERISA plans are generally exempt from direct and indirect state regulation. Id. See infra at section B.3.

B. Types of Claims Preempted by ERISA

Numerous types of state laws have been held preempted by ERISA, and the case law in this area is continuously growing. Consequently, a comprehensive discussion of this topic is well beyond the scope of this article. Instead, this article briefly touches on the three types of state laws of most potential significance to general civil defense litigation practitioners: 1) State Common Law Tort Causes of Action; 2) State Law Contract Claims; and 3) State Subrogation Laws.


ERISA defines the term “state law” to include “all laws, decisions, rules, regulations, or other State action having the effect of law.” Therefore, state common law may be preempted under ERISA. Pilot Life, 481 U.S. at 47-48.

ERISA’s preemption provisions have been held to preempt a variety of state common law causes of action for the wrongful denial of benefits. The U.S. Supreme Court has held that common law tort causes of action are preempted when the claims were based on the failure to pay benefits under an employee benefit plan. Id. at 43-44. State common law claims based upon the wrongful denial of benefits are especially susceptible to preemption because they fall within an area specially reserved for ERISA’s civil enforcement remedies. Metropolitan Life Ins. V. Taylor, 481 U.S. 58, 62-63 (1987). Attorneys defending these types of claims where employee benefit plans are involved should therefore be aware of the potential ERISA preemption defense.

Consistent with the Supreme Court’s holdings, courts have consistently held that ERISA preempts state common law tort claims based on estoppel, bad faith, claims for defamation, misrepresentation, tortuous interference with contract, and fraud, as well as claims for breach of fiduciary duties, wrongful death, and the intentional or negligent infliction of emotional distress. See ERISA Handbook at 2-27 – 2-43.

2. State Contract Law

State actions based on breach of contract have also been held preempted under ERISA. Pilot Life, 486 U.S. at 57.
Courts have held that a plaintiff’s exclusive remedy for a breach of contract resulting in the denial of benefits is an action under ERISA § 502. In addition, some courts have held that state common law governing the interpretation of contracts may be preempted under ERISA. However, state contract claims are not preempted where the benefit plan at issue is not an ERISA plan.


State subrogation laws, which provide for, limit or preclude a benefit plan’s right to obtain reimbursement through a right of subrogation, fall within the broad scope of the preemption clause. Holliday, 498 U.S. at 58; Lyons v. Phillip Morris, Inc., 225 F.3d 909, 912-13 (8th Cir. 2000). State common law equitable doctrines that affect subrogation rights, such as the collateral source rule and make-whole doctrine, are also preempted. Waller v. Hormel Foods Corp., 120 F.3d 138,139-40 (8th Cir. 1997). Nevertheless, state laws affecting subrogation rights may be exempted from preemption by the saving clause because such laws may constitute laws that “regulate insurance.” Medical Mutual of Ohio v. deSoto, 245 F.3d 561,573-74 (6th Cir. 2001). In the case of a self-funded, uninsured plan, however, the Supreme Court has held that a state anti-subrogation law was preempted by operation of the deemer clause. Holliday, at 411.

In Minnesota, state laws governing subrogation are preempted and will not apply to self-funded ERISA plans. Hunt v. Hunt v. Sherman, 345 N.W.2d 750 (Minn. 1984). Conversely, if an ERISA plan merely purchases health or disability insurance as a benefit for employees, that insurance plan’s subrogation claims may be controlled by state laws regulating insurance, including Minnesota Statutes § 62A.095, which regulates subrogation clauses.5

C. Procedural Issues Involving Preemption

ERISA preemption is ordinarily raised in the answer as a defense to state causes of action asserted in a state or federal lawsuit. See ERISA Handbook at 2-61 – 2-64. Defense counsel may seek a ruling upon the defense by a pre-answer motion to dismiss or later by a motion seeking judgment as a matter of law. If raised by motion to dismiss, counsel should anticipate that the plaintiff may be afforded the opportunity to amend the complaint, including the opportunity to re-draft factual allegations and to add a claim for relief under ERISA. Id. Consequently, a greater degree of finality can sometimes be obtained if the preemption defense is successfully pursued later in the proceedings through a motion affecting the merits of the action. Id.

If the issue of preemption will affect only a court’s choice of law, it may be waived if it is not timely raised as an affirmative defense. However, as in the Eighth Circuit, the preemption defense is jurisdictional in that it affects the choice of forum—e.g., an ERISA claim filed in state court as to which federal court jurisdiction is exclusive—it is not waivable and can be raised for the first time on appeal.

1. Removal

The right to remove a case from a state court to a federal court is provided for in 28 U.S.C. § 1441. The statutory provision governing the removal of ERISA claims is § 1441(b), which states:

Any civil action of which the district courts have original jurisdiction founded on a claim or right arising under the Constitution, treaties or laws of the United States shall be removable without regard to the citizenship or residence of the parties.

Cases over which the federal district courts have federal question jurisdiction under ERISA are removable from state court. The long-settled rule is that the presence of a federal question is determined on the face of the plaintiff’s well-pleaded complaint. Gully v. First Nat’l Bank, 229 U.S. 109 (1916). Ordinarily, where the federal question does not appear on the face of a well-pleaded complaint, the mere availability of federal preemption as a defense to a plaintiff’s state law claim does not authorize removal to federal court. Id. However, the expansive nature of ERISA’s express preemption provisions, which were designed to establish employee benefit plan regulation as an area of exclusive federal concern, has prompted voluminous litigation addressing the twin issues of removal and remand in disputes relating to employee benefit plans. Airco Corp. v. Aero Lodge No. 735, Int’l Ass’n of Machinists and Aerospace Workers, 390 U.S. 557 (1968).

An exception to the well-pleaded complaint rule exists where Congress has so completely preempted a particular area that any claim, even if characterized in a plaintiff’s complaint as a state law claim, is necessarily federal in char-

acter. This principle is often referred to as the “complete preemption doctrine.” Metropolitan Life Ins. v. Taylor, supra.

When confronted with a state court lawsuit that asserts claims that may be preempted by ERISA, it is not essential to remove the action to federal court. ERISA Handbook at 2-61 – 2-64. A defense based on preemption may be raised in state court and, in fact, the existence of a preemption defense alone does not create federal question jurisdiction. Id. If federal question jurisdiction exists, however, removal may be advisable for strategic purposes where counsel believes that the federal court would be more familiar with preemption principles or more likely to appreciate the policies underlying ERISA’s preemption clause. Id.

When state law claims assert the improper processing of a claim for benefits, the Supreme Court has ruled that federal jurisdiction exists even though the state court suit purports to raise only state law claims and the complaint on its face does not reflect the existence of any federal question. Metropolitan Life Ins. v. Taylor, 481 U.S. at 58. While many courts have discussed the difference between complete preemption and conflict preemption, much confusion over the concepts remains. ERISA Handbook at 2-63. The relevant and simplified distinction is that although a defendant may have a successful preemption defense under ERISA, the case is not removable “unless it is also encompassed within ERISA’s civil enforcement scheme.” Id.; See also Workforce Development, Inc. v. Corporate Benefit Services of America, Inc., 316 F.Supp.2d 854 (D. Minn. 2004) (remanding case to state court and holding state law claims were not preempted).

IV. STATUTE OF LIMITATIONS

This article would not be complete without at least a brief discussion of the applicable limitations periods. ERISA sets forth an express statute of limitations for actions arising from breach of fiduciary duties, but not for claims arising out of benefits issues. ERISA’s fiduciary limitations provisions provide:

No action may be commenced under this subchapter with respect to a fiduciary’s breach of any responsibility, duty, or obligation under this part, or with respect to a violation of this part, after the earlier of –

(1) six years after (A) the date of the last action which constituted a part of the breach or violation, or (B) in the case of an omission the latest date on which the fiduciary could have cured the breach or violation, or

(2) three years after the earliest date on which the plaintiff had actual knowledge of the breach or violation; except that in the case of fraud or concealment, such action may be commenced not later than six years after the date of discovery of such breach or violation.


ERISA does not provide a limitations period for claims for benefits. The statute instead directs that the most analogous state law limitations period ought to apply. The Eighth Circuit Court of Appeals has held that Minnesota’s two-year statute of limitations governing contract actions to recover unpaid benefits is the most analogous limitation period. Abdel v. U.S. Bancorp, 457 F.3d 877 (8th Cir. 2006); see also Wilkins v. Hartford Life & Accident Ins. Co., 229 F.3d 945, 948 (8th Cir. 2002) (applying two-year state law contract limitations period); but see Weyrauch v. Cigna Life, Ins., 416 F.3d 717 (8th Cir. 2005) (noting that the Eighth Circuit applies the two-year Minnesota contract limitations period to claims for unpaid benefits, but distinguishing Weyrauch on the grounds that the policy at issue contained language mandating that the longer limitations period found in Minn. Stat. 62A.04, subd. 2(11) ought to apply.).

V. CONCLUSION

One need not be an “ERISA expert” to be able to recognize ERISA issues as they arise, to take advantage of available ERISA defenses, and to reap the potential benefits associated with litigating ERISA matters in federal court (as opposed to litigating ERISA matters couched as state law claims in state court). Once equipped with a basic grasp of ERISA law, general civil defense attorneys ought to be prepared to assess whether their clients’ cases involve employee benefit plans subject to ERISA, and hence whether ERISA’s preemption provisions and/or statute of limitations will apply.

For more in-depth information regarding ERISA litigation, please refer to an excellent treatise—a treatise cited throughout this article, on which the author regularly relies in her ERISA litigation practice—the Handbook on ERISA Litigation by James F. Jorden, Waldemar J. Pflepson, Jr., and Stephen H. Golberg, Second Edition, published by Aspen Law & Business. This comprehensive “handbook” is one of the best available resources on the substantive and procedural law pertaining to ERISA litigation.

Finally, for information, including case synopses, pertaining to ERISA case law generated by Minnesota state and federal courts, please refer to the author’s web log at www.quickminnerisa.com.
In Wooddale Builders, Inc. v. Maryland Casualty Company, 722 N.W.2d 283 (Minn. 2006), the Minnesota Supreme Court provides guidance on certain insurance coverage issues for water intrusion claims arising from faulty construction when property damage from such claims is allocated over multiple policy periods. Specifically, the opinion addresses the start and end dates for the allocation period, how to allocate when the insurance coverage is unavailable to the policyholder, how to treat partial policy years, and responsibility for defense costs when multiple policies are triggered. However, the impact of the Wooddale decision is also limited by its facts and procedural posture; in particular, it does not address the key issue of whether a water intrusion claim arising from faulty construction triggers a single policy or multiple policies. This article will address the factual background of these types of claims, the procedural posture of the instant case, the limited issues addressed therein, the Court’s holdings, and the remaining, unresolved coverage issues.

THE SYNTHETIC STUCCO ISSUE

Since the late 1990s, builders and their insurers have been inundated with claims brought by homeowners alleging faulty construction of their synthetic stucco homes. The claims typically allege that the faulty construction methods caused exterior moisture to penetrate the outer walls, soak the exterior sheathing, and affect the structural integrity of the home. The claims started out as a trickle and have reached a torrent. While most affected builders have changed their construction methods in recent years, these “wet house” claims are still being made.

These claims have spawned a number of insurance coverage issues for the general contractors and the subcontractors involved in the construction of the synthetic stucco homes. For each claim, the issues include whether the alleged faulty construction is an “occurrence”, the timing of the claimed property damage, and the applicability of various standard CGL policy exclusions, including the “your work” exclusion. There are related issues on whether a wet house claim triggers a single insurance policy or multiple insurance policies requiring allocation of the claimed loss. Since some insurers have reacted to these claims with additional exclusions, there are also issues as to the availability of insurance coverage as insurers attempt to ensure that such risks are excluded in the future.

In many cases, insurers faced with such coverage issues have attempted to reach consensus, if possible, with respect to coverage for these claims under their own policies and potential allocation issues among themselves, other insurers, and the builders. In Wooddale, the Minnesota Supreme Court addressed only a few of the insurance coverage issues that may arise in these wet house claims. In general, Wooddale provides important guidance for water intrusion claims when property damage is allocated over multiple policy periods, such as start dates and end dates for allocation periods, allocating damages where the policyholder is uninsured for certain time periods, and responsibility for defense costs in claims triggering multiple policies. Yet Wooddale is also notable for issues that were not presented by the parties, and, therefore, not addressed by the Court.

1 In Woodbury, for example, 41 percent of the synthetic stucco homes (276 of 670 homes) that were completed by 1999 have failed and required repair. See “Stucco in Residential Construction: A Position Paper by the City of Woodbury Building Inspection Division Update,” February 9, 2005.

2 Since the city of Woodbury changed the stucco guidelines in 1999, only 11 percent of the synthetic stucco homes (8 of 74 homes) have required repair. See “Stucco in Residential Construction: A Position Paper by the City of Woodbury Building Inspection Division Update,” February 9, 2005.
Procedural Posture of the Wooddale Case

The procedural posture of the case is important for understanding the reach of the holdings. From 1991-1999, Wooddale Builders constructed numerous residential homes. In late 2000, Wooddale began receiving complaints from various homeowners alleging claims of defective construction and resultant water intrusion. Although the record is unclear, it appears that Wooddale tendered the claims to some or all of the insurers on the risk from 1990-2002. Wooddale ultimately sued for declaratory relief against Maryland Casualty, who was on the risk from 1997 to 2000, and Maryland Casualty in turn brought in four other insurers who were on the risk from 1990-2002. The homeowner claims, which totaled around sixty, all alleged faulty workmanship resulting in water intrusion and mold growth problems.

At the district court level, Wooddale and its insurers agreed that the damage to the homes was not caused by a single, discrete, and identifiable event and also agreed that pro-rata by time on the risk allocation was appropriate under the factual circumstances. All parties also agreed that the insurers could recover defense costs from other involved insurers without the necessity of a loan receipt agreement.

The district court resolved the issues on summary judgment. It concluded, consistent with the agreement of the parties, that the damages the homes sustained did not result from a discrete and identifiable event. The district court concluded pro-rata by time on the risk was the appropriate method of allocating the damages over multiple policy periods. The district court held that the start date for each particular claim is the closing date on the home purchase, and the end date is the date that Wooddale was put on notice of the claim. The court also concluded that defense costs should be born equally by insurers whose policies were triggered for a particular claim.

One of the insurers appealed to the Minnesota Court of Appeals, raising two issues: (1) the end date for the allocation period should be the date of remediation, not the date of notice of claim; and (2) the proper allocation of defense costs should be pro rata by time on the risk, not equally. The court of appeals agreed and reversed the trial court on these two issues. The Minnesota Supreme Court granted review on these two limited issues.

While the issues presented were limited by the procedural posture, the Minnesota Supreme Court took a global view of the presented issues and resolved a number of related issues dealing with pro rata allocation, including allocating to uninsured periods and the effect of partial policy years on the allocation method. In addition, the supreme court set up a formula for calculating the pro rata share of each insurer through consideration of the various factors at play. The formula is $A/B \times C = D$ where “$A$” represents the individual insurer's time on the risk, “$B$” represents the total time period over which damages are allocated, “$C$” is the total damages and “$D$” represents that insurer’s allocated share of the damages.

Single Trigger or Multiple Trigger?

The Wooddale decision rests upon the assumption that the water intrusion claims triggered multiple policies. Significantly, however, the Wooddale court did not affirmatively decide whether a faulty construction claim involving continuous and progressive damage triggers a single insurance policy or multiple consecutive policies. At the district court level, the parties agreed that the subject claims triggered multiple consecutive policies and the district court agreed with this premise. No party (except an amicus) raised the trigger issue on appeal so the issue was not before the court. Nonetheless, in a footnote, the Wooddale court questioned whether the triggering of multiple consecutive policies was appropriate and noted:

Arguably, the damage to the homes is traceable to a discrete and identifiable event, such as installation of the windows, installation of the flashing, or the application of the building paper. Nevertheless, for purposes of this opinion, the application of the pro-rata-by-time-on-the-risk method is the law of the case. Accordingly, the issue whether the pro-rata-time-on-the-risk method is generally applicable to water intrusion damage cases is not before us.

Id. at 291, fn. 6.

Minnesota follows the “actual-injury” rule for purposes of determining whether an occurrence-based insurance policy is triggered. See N. States Power Co. v. Fidelity & Casualty Co. of N.Y., 523 N.W.2d 657, 662 (Minn. 1994); In re Silicone Implant Ins. Coverage Litigation, 667 N.W.2d 405, 415 (Minn. 2003). Under the actual-injury rule, “the time of the occurrence is not the time the wrongful act was committed but the time the complaining party was actually damaged.” Singsaas v. Diederich, 307 Minn. 153, 156, 238 N.W.2d 878, 880 (1976); In re Silicone, 667 N.W.2d at 415. ‘For purposes of the actual-injury trigger theory, an injury can occur even though the injury is not ‘diagnosable,’ ‘compensable,’ or manifest during the pol-
icy period as long as it can be determined, even retroactively, that some injury did occur during the policy period.” In re Silicone, 667 N.W.2d at 415 (citation omitted).

Generally, the occurrence-based policy on the risk when the damage first occurred will respond to the loss and cover all of the damages which flow from the loss. Singsaas, 307 Minn. at 155-59, 238 N.W.2d at 882; Jenoff, Inc. v. N.H. Ins. Co., 558 N.W.2d 260, 261 (Minn. 1997); In re Silicone, 667 N.W.2d at 416. However, multiple policies can be triggered where the damages are continuous and indivisible and there is no discrete identifiable event which gives rise to those damages. Domtar, Inc. v. Niagara Fire Ins. Co., 563 N.W.2d 724, 733 (Minn. 1997); NSP, 523 N.W.2d at 663. Under such circumstances, damages are presumed to be continuous and are allocated over multiple consecutive policy periods, usually pro rata by time on the risk, although the district court retains discretion to fashion a flexible allocation of damages that fits with the facts at hand. NSP, 523 N.W.2d at 663. If an insurer can demonstrate that no appreciable damage occurred during its policy period, then no damage would be allocated to that particular policy period. Id. at 664. However, under Minnesota law, the triggering of multiple consecutive policies is the exception and not the rule: it is only in those difficult cases in which property damage is both continuous and so intermingled as to be practically indivisible that allocation is appropriate. NSP, 523 N.W.2d at 663, 665; Domtar, 563 N.W.2d at 733-34; In re Silicone, 667 N.W.2d at 421.

The Wooddale decision leaves open the question of whether a water intrusion claim arising from faulty construction, with continuous and progressive damage over several years, triggers multiple policies or a single policy. A clear answer to this question depends on consideration of several factors and is beyond the scope of this article, but there are some general observations to make. In water intrusion cases, a number of courts have found the faulty construction which caused the water intrusion and ultimate damage to be the discrete originating event which triggers a single policy (i.e., the policy on the risk when the damage first occurred). See Westfield Ins. Co. v. Weis Builders, Inc., 2004 WL 1630871, *3 (D.Minn. July 1, 2004) (discrete event was faulty installation of drainage system); Kootenia Homes, Inc. v. Federated Mut. Ins. Co., 2006 WL 224162, *4 (Minn. Ct. App., Jan. 31, 2006) (discrete event was improper application of stucco); Parr v. Gonzalez, 669 N.W.2d 401, 406-07 (Minn. Ct. App. 2003) (physical damage to vent cap was a discrete and identifiable event that triggered a single policy). In addition, as highlighted by the footnote in Wooddale, a single trigger approach is arguably consistent with other Minnesota appellate decisions that apply a single trigger. See SCSC Corp. v. Allied Mut. Ins. Co., 536 N.W.2d 305 (Minn. 1995) (spill was a discrete and identifiable event which triggered a single policy); In Re Silicone, 667 N.W.2d at 422 (implantation was the discrete event triggering a single policy).

If Multiple Trigger, What is Start Date and End Date for Allocation Period?

Where multiple policies are triggered, the district court must decide the length of the allocation period, which involves identifying a beginning date and an end date. The start date for allocation, consistent with Minnesota’s actual injury rule, is the date damage first began. See NSP, 523 N.W.2d at 663-64. In Wooddale the parties agreed “that the starting point for the liability allocation period for each claim is the closing date on the purchase of the home.” Id. at 289. Practitioners are reminded that dates tied to closing or completion of construction are artificial dates that are not necessarily the appropriate start date for any allocation period. The critical inquiry is the date on which the claimed damage began. As such, the start date for any allocation period will be necessarily fact-specific.

Prior to Wooddale, the length of the allocation period had been addressed by the supreme court only in the context of environmental contamination cases. These cases did not yield any clear answer to what the appropriate end date for any allocation period might be. See NSP, 523 N.W.2d at 657; Domtar, 563 N.W.2d at 724. See also, In re Silicone Insurance Coverage Litigation, 652 N.W.2d 46, 61-62 (Minn. Ct. App. 2002) (overruled) (applying continuous trigger to breast implant injuries and holding that end date was notice of claim or death). In NSP, in discussing the allocation period for continuous trigger cases, the supreme court suggested that the actual-injury trigger implicates policies from the beginning of contamination until the damages end or are discovered. NSP, 523 N.W.2d at 663-64. In another part of the opinion, the NSP court states that damages will be presumed continuous until the time of discovery, cleanup or whenever the last triggered policy period ended. Id. at 664. Domtar was similarly unclear on the end date for allocation, suggesting “clean-up or discovery” at one point. Domtar, 563 N.W.2d at 732.
In Wooddale, the court concluded that the appropriate end date for water intrusion claims was notice of claim, even though the water damage might continue beyond the time that the damage is discovered and the builder receives notice of claim. In so holding, the Wooddale court recognized that this end date conflicts with the actual injury rule, under which multiple policies are triggered while property damage continued. However, the court reasoned that once the insured is on notice of the particular claim, any insurers renewing or issuing policies after notice of that claim would not be required to respond because it would be a known loss that is not covered under the terms of the policy provisions. Notably, in identifying the applicable allocation period, the court used full policy year periods. Thus if damage started mid-policy term the insurer was assigned a full policy year for allocation purposes. Similarly, if the damage ended or notice of claim was received mid-policy term the insurer was again assigned a full policy year for allocation purposes.

The Wooddale court emphasized that the district court retains flexibility and discretion in establishing various aspects of the allocation periods and the end dates. However, it would be difficult to argue that the holding here would not extend to other wet house cases, unless, of course, a party takes the position that a single trigger is appropriate.

**WHAT IF POLICYHOLDER DID NOT HAVE COVERAGE FOR SOME OF THE ALLOCATION PERIOD?**

It appears the door remains open for a constitutional challenge regarding potential contribution and indemnity claims. In her concurring opinion, Justice Meyer writes:

The Wooddale decision is also significant for its handling of the issue of periods where the insured had no insurance, an issue that had not been directly addressed by Minnesota appellate courts. In Wooddale, the court distinguished between periods when the insured is voluntarily and involuntarily uninsured. Once the allocation period is established, if the policyholder did not have insurance coverage for any period of time within the allocation period, the policyholder is responsible for losses on a pro rata basis unless insurance coverage was not “available” to the policyholder. In so doing, the court followed the approach of other jurisdictions that have held that the policyholder should not be responsible for a share of the indemnity expenses if it was unable to purchase insurance coverage for the loss. See Stonewall Ins. Co. v. Asbestos Claims Mgmt. Corp., 73 F.3d 1178 (2d Cir. 1995), modified on other grounds, 85 F.3d 49 (2d Cir. 1996). In Stonewall, an asbestos coverage case, the Second Circuit concluded that in uninsured years, the allocated loss should be prorated to the policyholder. Stonewall, 73 F.3d at 1202-05. But if the policyholder was unable to purchase coverage for asbestos-related claims, these time periods should not be included in the allocation period. Id.

This holding raises some interesting issues on what it means to have “available” insurance coverage, which will likely be addressed in future cases. Most CGL insurers have responded to the flood of water intrusion claims by placing additional limitations and exclusions in their CGL policies issued to builders. There seems to be a distinction between a decision to not purchase any insurance coverage and a decision to purchase available coverage that no longer covers the loss at issue. Other jurisdictions have struggled with this concept of what constitutes “available” insurance coverage with differing results. Compare Stonewall, 73 F.3d at 1202-04 (coverage not available after 1985 for asbestos claims, so no damage would be allocated to policyholder after 1985) with AAA Disposal Systems, Inc. v. Aetna Cas. & Sur. Co., 821 N.W.2d 1278, 1290-91 (Ill. App. Ct. 2005) (an allocation period for an insolvent insurer will be borne by the insured, not the prior and subsequent insurers).

**IF MULTIPLE TRIGGER: HOW ARE DEFENSE COSTS ALLOCATED?**

For duty-to-defend carriers, defense costs, unlike indemnity costs, are subject to an equal sharing rule. The Wooddale court rejected the argument that defense costs should be allocated in the same fashion as indemnity costs and held that insurers are equally liable for an insured's defense costs. In reaching this conclusion, the court noted “[i]f insurers know from the beginning that defense costs will be apportioned equally among insurers whose policies are triggered, the possibilities for delay will be minimized because no insurer will benefit from delaying or refusing to undertake a defense.” Id. at 303-04. While the court mentions the fact the insurers “waived” Minnesota's loan-receipt requirement, it does not overrule Iowa National or otherwise undercut the continuing need for a loan receipt if a defending insurer intends to seek sharing from another insurer with an obligation to defend. Further, under the court's equal sharing analysis, the fact the insured may be voluntarily uninsured has no bearing and the insured has no responsibility for any portion of the defense costs incurred. Notably, in this regard, it is telling that the court does not discuss any of the factors it...
mentions in its pro rata indemnity analysis and instead adheres to Minnesota’s long-standing equal sharing rule.

Under long-standing Minnesota law, each insurer with a duty to defend owes its insured an independent duty to defend. See Iowa National Mut. Ins. Co. v. Universal Underwriters Ins. Co., 276 Minn. 363, 150 N.W.2d 233 (1967). As the Iowa National court recognized in rejecting a claim for reimbursement by one insurer against another, “no contractual obligation existed to make one insurer accountable to the other for a breach of its independent obligation to the insured. The obligation of defending an insured and paying for the defense is a separate obligation existing exclusively between the insurer and the insured.” Id. at 367, 159 N.W.2d at 236. According to the court:

We dispose of the contention that recovery may be supported on the basis of contribution by observing that the two companies have no joint liability or common obligation. Both were obligated to defend under separate contractual undertakings which would not support a common obligation for the purpose of invoking the principle of contribution (citation omitted)

Nor do we think the right or recovery could be justified on principles of subrogation, either legal or conventional, since each of the companies had a separate and distinct obligation to defend. The equities between them are at best equal. Id. at 368, 159 N.W.2d 237. An insurer that provides a defense to its insured has no right to recover any portion of the defense costs it incurs from any other insurer. An exception to this rule exists if the insurer provides the defense under a loan receipt allowing the insured to remain the real party in interest for purposes of pursuing a claim against any other insurers with an obligation to defend. Curiously, however, this rule arguably does not apply if no insurer with a defense obligation has agreed to defend. While an insurer is entitled to select an insurer and recover 100% of the defense costs incurred from that insurer, as between the selected insurer and any other insurer, equal sharing applies. See Jostens, Inc. v. Mission Ins. Co., 387 N.W.2d 161 (Minn. 1986). The reason for allowing recovery in such a situation, according to the Jostens court, is because the issue of “[w]ho should pay the insured’s defense costs should not depend on the whim or caprice of the insured, when, at the time the defense was needed, both insurers arguably had a duty to defend.” Id. at 167. In adopting equal sharing the Jostens court was trying to prevent insurers from taking a “wait and see” approach and noted “[w]e believe this rule will encourage two insurers when tendered a defense, to resolve promptly the duty to defend issue either by some cooperative arrangement between them, or by a declaratory judgment action, or by some other means.” Id. at 167.

Wooddale does not overrule Iowa National. Wooddale held that duty-to-defend insurers share defense cost equally. An insurer with one policy on the risk is responsible for the same share of defense costs as an insurer with multiple policies on the risk. The insured has no responsibility for any portion of the defense costs incurred regardless of whether the insured is voluntarily uninsured for any period of time.

CONCLUSION

For faulty construction claims with progressive water damage, Wooddale is significant in several respects: (1) it establishes notice of claim as an end date for allocation purposes; (2) it holds defense costs are not subject to pro rata allocation; (3) it uses a full policy year allocation period; and (4) it recognizes that an insured might not be responsible for damages allocated to certain uninsured periods. These rulings all appear to have broad application beyond water intrusion claims. Wooddale is also significant for the issues it leaves unresolved such as: (1) whether a water intrusion claim involves a single or multiple trigger; and (2) when is an insured voluntarily uninsured. More importantly, as pointed out by the Wooddale court: “[w]e note that our resolution of this case leaves questions unanswered, just as our rulings in NSP and Domtar did. Like our rulings in NSP and Domtar, our holdings here must be viewed through a lens of the facts presented to us. Therefore, we do not expect this case to be the ‘last word’ in this area, just as neither NSP or Domtar has proven to be the last word and we continue to emphasize that the district courts must be flexible, as we have been here, in responding to different fact situations.” Id. at 301.

These rulings all appear to have broad application beyond water intrusion claims.
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ASSOCIATION NEWS

Debra Oberlander
EXECUTIVE DIRECTOR, MDLA

2007—wow! I don’t know where the time goes. MDLA dues statements/member profiles were sent out in early January. If you haven’t received your statement yet, please contact me. If you are debating whether or not to renew your membership, I encourage you to do so most definitely. MDLA offers many tangible benefits to defense lawyers practicing in a number of different areas. Our e-mail query system is a valuable resource when you’re searching for information on an expert or are looking for an expert in a particular field/area.

Our committees are strong and viable and provide a valuable resource for members. We have list serves for many of our committees which allow members of those committees to communicate on a more informal level with each other. Many committees offer presentations at meetings which, at times, have qualified for CLE credit. I want to thank all of our committee chairs/co-chairs for their work on behalf of MDLA in organizing meetings, making presentations at MDLA seminars and/or writing articles for this magazine. MDLA would clearly not be the association it is today without all of you, and the Board and I are very grateful for your support and participation.

In our efforts to provide MDLA members with benefits/services you find helpful, we will be offering future issues of Minnesota Defense electronically to those individuals who requested this method of delivery of the magazine. We will still provide printed copies of the magazines to all judges in the State of Minnesota, as well as to those individuals requesting continued delivery of the printed magazine through the mail. Copies of articles from each issue of Minnesota Defense are available to MDLA members online. I would appreciate your feedback on the magazine and ways we could improve it for our members.

The New Lawyers continue to work on their e-newsletter which is provided electronically twice a year – around the Mid-Winter Conference in February and the Trial Techniques Seminar in August. If anyone would like to provide an article for this e-newsletter, please contact Jennifer Daugherty at Larson • King (jdaugherty@larsonking.com) or Tony Smith at Murnane Brandt (asmith@murnane.com).

If you are interested in being on the faculty for an MDLA-sponsored seminar, please contact me or Sue Zwaschka (952-993-1175/susan.zwaschka@parknicollet.com). Sue is Chair of MDLA’s CLE Committee and assists in coordinating MDLA seminars. We have the following upcoming seminars scheduled:

- January 25 – Insurance Law Institute
- February 9-11 – 42nd Annual Mid-Winter Conference
- April 19 – 2007 Medical Malpractice Conference
- June 8 – Annual CLE and Golf Tournament
- July 19 – Women Lawyers’ Breakfast
- August 16-18 – 32nd Annual Trial Techniques Seminar

I hope your year is off to a great start and continues that way throughout the coming months. As you may recall, MDLA rents office space from the Minnesota State Bar Association so if you’re in the area, please stop by.
NEW AND RETURNING MEMBERS
The following attorneys have joined the MDLA. We welcome them into our membership.

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Aafedt, Forde, Gray, Monson & Hager, P.A., has announced that Janet Stellpflug was elected to membership in the American Board of Trial Advocates (ABOTA) and the Minnesota Chapter of ABOTA. Ms. Stellpflug focuses her practice in the areas of defense of personal injury and death cases arising out of automobile, defective products, and construction site accidents.

Arthur, Chapman, Kettering, Smetak & Pikala, P.A., has announced the retirement of firm co-founder John (Jack) T. Chapman. Mr. Chapman focused his practice on personal injury, catastrophe fire, property, and insurance matters for over 40 years. Congratulations to Mr. Chapman on his retirement.

Arthur Chapman also announces that Shayne M. Hamann has joined the firm as an associate. Ms. Hamann practices primarily in the areas of automobile litigation (third party liability, uninsured/underinsured and no-fault), general liability including premise liability, and insurance coverage disputes for claims both before and after litigation. Ms. Hamann has extensive courtroom experience, as well as having arbitrated and mediated hundreds of cases with excellent results.

Terhaar, Archibald, Pfefferle & Griebel, LLP, is pleased to announce that Megan D. Hafner and Michael S. Rowley have been named partners with the firm. Ms. Hafner is an experienced civil defense attorney with longstanding experience in the areas of construction law, nursing home defense and insurance-related issues. Mr. Rowley’s practice focuses on construction defect/water infiltration/mold litigation and products liability subrogation and defense. He has also worked on fire litigation issues, including arson and fraud and represented clients in personal injury defense, insurance coverage and vehicle accident and cargo litigation.

Congratulations to all these MDLA members on their respective achievements.
MDLA COMMITTEE UPDATE

MDLA’s committees remain active and provide great opportunities to learn and discuss issues/topics of concern with others in similar practices. Meeting notices can be found on MDLA’s web site at www.mdla.org, on the list of upcoming MDLA events at the end of e-mails sent to members and via the list serve for the respective committee. If you are interested in being on a list serve for a particular committee, please let me know, and I’ll add your e-mail address to the appropriate list serve.

Steven M. Sitek, Rider Bennett, has taken over as chair of MDLA’s Construction Law Committee. Amy M. Gelhar, Foley & Mansfield, has assumed the Vice Chair position of the committee. This committee met for the first time in March of 2004. Shamus P. O’Meara, Johnson & Condon and MDLA Board member, was Chair and Anton J. van der Merwe, Arthur, Chapman, Kettering, Smetak & Pikala, was Vice Chair. We want to thank them for their hard work in getting this committee up and running and providing a valuable resource for MDLA members involved in this type of litigation/defense work.

Douglas J. Brown, Brown & Carlson, has assumed the co-chair position for MDLA’s Workers’ Compensation Committee from Mark A. Kleinschmidt, Cousineau McGuire, Chtd. Nicole B. Surges, Erstad & Riemer, is the other co-chair of this committee. We would like to thank Mr. Kleinschmidt for getting our Workers’ Compensation Committee active again after several dormant years. This committee has participated in a number of MDLA seminars and has provided a forum for MDLA members involved in this area of practice.

Watch for more information on MDLA committees – meetings, activities, etc. – on MDLA’s web site at www.mdla.org. We also have list serves established for each of our substantive committees which allow members of those particular committees to communicate with each other on a more informal basis. These list serves also allow our members in out-state Minnesota more opportunities to participate in the association even though they are often unable to attend meetings in person.
APPLICATION FOR MEMBERSHIP

Please print:

Date __________________

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

I am a partner in or associated with the law firm of ________________________________________________

____________________________________________________________________________________________

Year I was admitted to practice ________________ I am currently a member of DRI: Yes _____ No _____

Office address ____________________________________________ Office telephone _____________________________ Office fax number* _______________________________

____________________________________________________________________________________________

Office address ________________________________________________________________________________

Office telephone _____________________________ Office fax number* _______________________________

Home address_________________________________________________ Home phone __________________

E-mail address* ______________________________________________________________________________

*By providing a fax number and e-mail address, you are agreeing to receive fax and e-mails from the association that may contain a message of a commercial nature. Please sign here to express your understanding and acceptance of these communications. Signature ________________________________________________

Legislative district where I live __________________ Attorney ID ____________________________________

(Call House Information, Minnesota Legislature, 651-296-2146 to learn which legislative district you live in.)

I attach my check 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 2 years $95
Member of the Bar 2 to 5 years $140
Member of the Bar 5 years or more $210
Retired Membership $40

(Fees established January 1, 2003)

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.
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.

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**Summer 2005**

*A Guide to the Electronic Case Filing Procedures in the District of Minnesota*

*Kenneth A. Kimber and Amy K. Amundson*

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*Outside Corporate Counsel Electronic Discovery Obligations*

*David A. Schooler and Jennifer G. Daugherty*

*Suits Against Nonresidents: The Arguments For and Against Personal Jurisdiction and Methods for Proper Service*

*William M. Drinane and Karen R.Z. Beulow*

2005 Legislative Update

*Sandy Neren*

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**Fall 2005**

*Police Dogs, the Dog Bite Statute and Governmental Immunity*

*Paul D. Reuvers*

*Bassford Remele: A Longstanding Affiliation with the MDLA*

*Marcus Sanborn*

*Proximate Cause: The Forgotten Tool in the Defense Lawyers Bag*

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**Winter 2006**

*The Medicare Super Lien: more powerful than an ordinary health care lien, faster than a typical governmental bureaucracy and able to impose penalties and increased exposure in a single bound*

*Sean J. Mickelson*

*No-Fault or Our Fault? Ideas on How We Can Solve Many of Our Own No-Fault Problems*

*Kelly Sofio*

*Statutes of Limitations, Statutes of Repose and Notice Requirements at a Glance*

*Michael D. Carr*

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**Spring 2006**


*Patricia Beety*

*The Evolution and Extinction of The Business Risk Doctrine and Other Issues Affecting Insurance Coverage in Construction Defect Litigation*

*Carrie Hund*

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**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*

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**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*

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CONTINUING LEGAL EDUCATION

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**MDLA Duluth**

*Trial Techniques Seminars*

2005 . . . . . 8.25
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**MDLA CLE**

*Medical Malpractice*

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2001 . . . . . 7.00
2000 . . . . . 6.50

**Mini-Seminars**

*Now That I Have Passed the Bar Exam, What Can I Do to Benefit My Community?*

2006 . . . . . 1.5

*Economic Loss Doctrine in Minnesota*

2006 . . . . . 1.5

*No-Fault Arbitrations – From Start to Finish*

2006 . . . . . 1.50

*Residential Moisture Intrusion Cases; How to Get the Most Out of an Expert*

2005 . . . . . 1.50

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Continuing legal education credits for all MDLA seminars are now being routinely applied for in North Dakota, Wisconsin and Iowa as well as in Minnesota.

For information regarding CLE credits, call the MDLA office at (612) 338-2717.
MDLA’s Commercial Litigation Committee will conduct its next meeting on Thursday, February 1, 2007. My good friend and colleague, Cynthia Arends, who also serves as Vice-Chair for our Committee, will host this next auspicious event at the law firm of Halleland Lewis Nilan & Johnson, P.A. I suspect our Publications Chair, Patrick Robben of Rider Bennett, will also be in attendance to offer a quick wit and steady hand. One of the things that Cynthia, Patrick and I intend to do with this great new MDLA Committee is to not only encourage increased participation from existing MDLA members, but to also recruit membership from current non-MDLA members.

I encourage you to attend our February 1st meeting. Tell your non-member MDLA friends to join us as well – all are welcome. Deb Oberlander, Executive Director for the MDLA, will have sign-up membership forms available for those non-MDLA members in attendance.

During the frenzied drafting of this article, at the very close of 2006, I learned that a giant ice shelf the size of 11,000 football fields had snapped free from Canada’s Arctic, according to prominent scientists. Actually, the mass of ice broke clear roughly 16 months ago from the coast of Ellesmere Island, about 800 kilometers (497 miles) south of the North Pole, but no one was present to see it in Canada’s remote north. This event was recently confirmed via satellite.

If this is yet another sign of imminent global warming, which I fully understand is the subject of some controversy, I am certain those laypersons among us and the experts alike will vigorously debate whether these recent events are harbingers of further calamities ahead, or naturally recurring cycles of nature.

Speaking of experts . . . on Saturday, February 10, 2007, at MDLA’s 42nd Mid-Winter Conference, yours truly will present the topic “Qualifying and Attacking Expert Witnesses.” I am very pleased and excited to present this topic on behalf of the MDLA’s Commercial Litigation Committee at the 2007 Mid-Winter Conference. Hopefully, the discussion will benefit practitioners of all experience levels. “Something for everybody,” as they say.

Mold is certainly a hot topic these days. There are estimates that the predicted effects of global warming will generate increased toxic residential and commercial mold claims in the future, which will create the further need for qualified experts (see – it all ties together, doesn’t it?). The recent case of Mondelli v. Kendel Homes, Corp., 262 Neb. 263, 631 N.W.2d 846 (Neb. 2001) is instructive.

Mondelli involved claims brought by homeowners for alleged personal injuries caused by mold exposure from water intrusion caused by alleged construction defects. 631 N.W.2d at 851-52. Plaintiffs’ expert offered the expert opinions that (a) areas of mold can cause asthma and allergic rhinitis; (b) the scientific literature supported her view that prolonged contact with or repeated exposure to mold may result in permanent lung damage; and (c) the scientific literature supported her findings that the mold levels in plaintiffs’ home were far above “normal” mold levels found in clinical studies conducted around the country. The trial court excluded plaintiffs’ expert witness on the issue of causation. Id. at 853.
In reversing the trial court, the Nebraska Supreme Court considered four factors to determine whether plaintiffs’ expert testimony was admissible. 631 N.W.2d at 856. First, the trial court conceded that plaintiffs’ expert was qualified (Bachelors degree in biology, Master’s degree in pharmacodynamics and toxicology, Ph.D. in toxicology). Id. Second, the expert’s proffered testimony was relevant to the issue of damages after the trial court established liability. Id. Third, the expert’s opinions involving the causal connection between mold and health concerns would have assisted the jury in understanding the evidence. Id. Fourth, the probative value of the expert testimony outweighed the danger of unfair prejudice. Id. Therefore, the court concluded that plaintiffs’ expert testimony satisfied the court’s four factors of consideration for the admissibility of expert testimony. Id.

Another recent Eighth Circuit case is worthy of note. In Hickerson v. Pride Mobility Prods. Corp., --- F.3d ---, No. 06-1647, 2006 WL 3614324 (8th Cir. 2006), a fire causation expert offered an expert opinion regarding the probable location of the fire’s origin, and identified a motorized scooter as a potential cause of that fire. 2006 WL 3614324, *1. The Eighth Circuit held that although the expert was not qualified to offer an opinion as to a specific defect in the scooter, his extensive background as a firefighter and fire investigator qualified him to offer an opinion as to the fire’s point of origin and the identification of devices containing or connected to power sources in the area. Id. at **4-5.

The topic of experts, their qualifications and the admissibility of their opinions will likely continue to be a rapidly developing area of complexity and change for commercial litigators. I invite you to attend MDLA’s Mid-Winter Conference at Arrowhead (just outside of Alexandria, MN) on February 9-11, 2007, and look forward to seeing you there!
DRI CORNER

By Steven R. Schwegman
QUINLIVAN & HUGHES, P.A.

MDLA DRI State Representative

This is my inaugural article as DRI State Representative. This column affords me the opportunity to once again thank Mike Ryan for serving as DRI State Representative for the past four years. Mike has been very instrumental in advocating a stronger defense bar at both the state and national level. Thanks, Mike, for your dedication to MDLA and DRI.

I would also like everyone to know that Mike received the Outstanding State Representative Award at DRI’s 2006 Annual Meeting which was held in San Francisco from October 11-15. The award is given each year to acknowledge exceptional effort in promoting DRI and its membership in a particular state. Mike was chosen because of his work with the MDLA and is one of the most committed members of the DRI Judicial Task Force.

Although I was not able to attend, the DRI Annual Meeting was another success. The DRI event is not only known for its top-flight CLE and networking opportunities but also the many family-friendly outings. The headliners included political insider and journalist Pat Buchanan, author and political strategist Donna Brazile and former solicitor general Kenneth Star. If you have never attended an annual meeting, I would strongly encourage you to make plans to attend the 2007 meeting in Washington, D.C. this October.

Since this is my inaugural column, I thought I would also take this opportunity to explain my role as a DRI State Representative.

First, the DRI is a national organization of more than 22,000 defense and trial lawyers and corporate counsel. The DRI:

- Provides numerous educational and informational resources to members
- Offers many opportunities for liaison among defense trial lawyers, Corporate America and state and local defense organizations
- Plays a major public role in legislative and judicial development
- As “The Voice of the Defense Bar,” it espouses the defense viewpoint on cutting-edge issues in state and federal legislatures and courts

The State Representative plays a significant role in the leadership of the DRI in promoting membership development and retention, in providing a link between the national organization and its members and in serving as a conduit to reinforce partnerships with State and Local Defense Organizations. I will also be required to make contact with potential new DRI members each month and identify defense lawyers who are not members of DRI or the MDLA for recruitment.

As a State Representative I will facilitate the flow of communication between DRI and MDLA. I will also be attending MDLA Board meetings when my schedule allows and then submitting quarterly reports to DRI. Regional meetings are another excellent way of opening dialogue between the national and local organizations. In fact, by the time this column finds you, I will have attended the 2007 meeting of the DRI North Central Region in Charleston, S.C. I will provide you with a summary of that meeting in my next column.

I believe I am in a unique position for bringing the needs and concerns of local defense attorneys to the national level. Accordingly, if you have any questions, needs or suggestions, please feel free to give me a call or contact me by email. My email address is sschwegman@quinlivan.com. I look forward to serving as your DRI State Representative the next three years and look at it as an honor and privilege.
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.
WHAT CIVIL DEFENSE ATTORNEYS SHOULD KNOW ABOUT ERISA

WOODDALE INC. VS MARYLAND CASUALTY COMPANY

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Internet: http://www.mdla.org