KADC

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LEE BUILDERS: A NEW ATTORNEY'S FEE BONANZA?

Timothy J. Finnerty[1]
Wallace Saunders Austin Brown & Enochs, Chtd.

The Kansas Supreme Court's recent decision in *Lee Builders, Inc. v. Farm Bureau Mutual Insurance Company*[2] worked a substantial revision in Kansas courts' application of K.S.A. 40-908[3] to litigation between Kansas insureds and their insurers. For enterprising counsel who appreciate the implications of the decision, *Lee Builders* will provide the foundation for litigation likely to result in attorney's fees awards in cases in which attorney's fees previously would have been unavailable.

I.Procedural Background for the Lee Builders Cases

The *Lee Builders* case came to the Supreme Court on a petition for review from the Court of Appeals.[4] The controversy involved a general contractor who sought to recover damages from its commercial general liability insurer related to the repair of construction defects claimed by a homeowner.[5] The general contractor alleged the insurer breached its duty to defend and to indemnify it in connection with property damage claimed by the homeowner resulting from window leaks.[6] Among the issues presented to the Supreme Court was whether the insured was entitled to attorney's fees under the circumstances.[7]

The trial court had determined that no material issues of fact remained so it entered judgment on the behalf of plaintiff for the amount of the settlement it had entered into between the homeowner and itself.[8] In addition, the trial court awarded $77,101.15 to the contractor in attorney's fees and costs.[9] The trial judge awarded these fees pursuant to K.S.A. 40-908, declining to award attorney's fees pursuant to K.S.A. 40-256.[10]

When the case came to the Court of Appeals, at least two coverage issues were presented by the appellant insurer. After an exhaustive analysis, the court found against the insurer on the coverage issues.[11] Because of that outcome, the Court of Appeals considered the trial court's award of attorney's fees pursuant to K.S.A. 40-908. The insurer contended that K.S.A. 40-908 ought only apply if the controversy had been with respect to the contractor's property insurance. Since the disputed claims involved the contractor's general liability insurance claim, K.S.A. 40-908, the insurer claimed, was inapplicable.[12] In contrast, the general contractor asserted that since its commercial package policy contained coverage for loss by fire, tornado, lightning, or hail, K.S.A. 40-908 applied to the assessment of attorney's fees.[13] In its analysis of this point on appeal, the Court of Appeals relied on the insurer's acknowledgment that the type of *policy*, rather than the type of *loss*, controlled whether or not K.S.A. 40-908 was applicable.[14]

After setting out the text of K.S.A. 40-908, the Court of Appeals began its analysis regarding application of the statute by turning to *Hamilton v. State Farm Fire and Casualty Company*.[15] The Court of Appeals noted that, in *Hamilton*, the district court had denied a request for attorney's fees under K.S.A. 40-908 because the loss associated with the collapse of a basement wall was not caused by fire, tornado, lightning or hail.[16] The Court of Appeals found coverage, reversed the district court, and remanded the case for a determination of a reasonable attorney's fee. Fees were allowable because the insurance policy in question covered loss from fire, tornado, lightning, or hail.[17] The Court of Appeals then quoted at length from the *Hamilton* case:

> Application of [K.S.A. 40-908] is not dependent upon the type of loss incurred. Rather, providing all conditions of the statute are met, costs, including reasonable attorney fees, are awarded where policy coverage for the loss incurred by the insured homeowner exists.
>
> The plain language of K.S.A. 40-908 supports such a conclusion. It provides application to any case in which a judgment is rendered on *any policy* given to insure any property against loss by fire, tornado, lightning, or hail. *The policy coverage controls, not the actual type of loss.* If the loss is covered by a policy which insures against fire, tornado, lightning, or hail, then the statute applies regardless of whether the actual loss occurred by one of those named

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RECOMMENDING THE LEGAL PROFESSION TO A SON

Todd Thompson
KADC Past President
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As my son winds down his senior year in college, I have been asked with some regularity: “Is Luke going to go to law school?” I don’t know the answer to that question, but the recent frequency with which the question has been asked has caused me to spend some time reflecting on my choice of profession. I also reflected because I fear that Luke will ask me if I think he should go to law school, and while I tend to want to answer “Yes,” I’m not completely sure I know the answer to that question either.

During the summer I happened upon a Wall Street Journal article on the public’s responses when asked which professions they held in high esteem. For a father wanting to advise his son to become a lawyer, and for anyone in the legal profession, the results are disturbing. Respondents to the telephone poll favored firefighters, with 63% of those polled saying that firefighters have "very great" prestige. Doctors were close behind, with 58% of the respondents attributing very great prestige to the medical profession. Other professions that scored well in the “very great prestige” category were: nurses (55%), scientists (54%), teachers (52%) and military officers (51%).

Harris has been asking about the prestige of different professions and occupations since 1977. The Journal reports that during those three decades, teaching is the only occupation that has seen an increase in prestige, rising 23 percentage points since 1977 to get to that current 52% level.

How has the legal profession fared in those 30 years? Regrettably, the answer to that question is: “Very poorly.” Lawyers have had the greatest decrease in the “very great prestige” rating, dropping 15 percentage points to 21%. Heck, even in this post-Enron era, business executives have fallen only seven percentage points. (Of course, they didn’t have as much room for movement, as they started a lot lower, dropping from 18% to 11%.)

Why has the legal profession lost so much of its gloss? Some would say the loss of gloss can be attributed to the way lawyers are portrayed in the media. I’m not buying that, although I will concede it is almost certainly one factor. Who would you say warranted the greatest prestige: Gregory Peck’s Atticus Finch, or William Shatner’s Denny Crane; Raymond Burr’s Perry Mason, or James Spader’s Alan Shore? (Is my son’s perception of attorneys based on Crane and Shore? If so, maybe he won’t even bother to ask whether he should go to law school; he’ll have ruled it out already!)

I suspect that the more damaging media portrayals are those well-publicized examples of misbehavior by actual members of the bar. That conduct seems more likely to be responsible for our profession’s drop in prestige. One example can be found in the story about two lawyers in Florida who were apparently so whiny and petty that the judge ordered them to resolve their discovery dispute using the “rock, paper, scissors” game. The behavior that leads to such an Order isn’t likely to engender “very great prestige”. For that matter, the Order itself, while perhaps an understandable expression of frustration by the judge, doesn’t exactly give the public the impression that the judicial system is a serious place in which professionals work to resolve serious disputes.

Similarly, currently making the rounds via the Internet is a video clip of a deposition in which the attorneys’ behavior is reprehensible. Their chest-thumping and threatening conduct (I especially like the anything-but-svelte attorney calling his opposing counsel “fat boy”) might be comical – if it were in a cartoon. However, it’s the real thing, and it is embarrassing. It will also contribute to the legal profession’s prestige rating taking another hit.

Even so, there is a long list of reasons why I am inclined to tell my son he would be making a wise choice if he attends law school. It is both easy and accurate to say that having an understanding of the law and the legal system will help him in whatever career path he follows. It is also true that the practice of law provides the opportunity for continued intellectual stimulation and growth (although I have to concede that this opportunity sometimes seems to be assiduously avoided by a few of our brethren). Further, an attorney has a degree of flexibility in his or her work schedule that is not available in many other occupations, and this flexibility allows one to pursue other interests as well.

If asked, I will also tell my son that on most days I enjoy going to work, and that such enjoyment is far more valuable than income or prestige. My enjoyment emanates from many aspects of my practice, but I would rank high on the list the

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Recommending Legal Profession *(Continued from page 2)*

pleasure that is to be derived from participating in an organization of fellow professionals, such as the KADC.

Over the years I have made many friends through the KADC, while at the same time improving the quality of my client service. Sometimes the contact with a fellow KADC member started with a telephone call following up on an article of interest in the Newsletter. Other times there was a discussion about a particular expert witness, or a judge, or a particular attorney for the plaintiff. (KADC members have a wealth of information to be tapped. If you aren't availing yourself of this benefit, start today.)

The KADC Annual Conference in Kansas City in early December each year has regularly provided a good opportunity for developing professional contacts into friendships. Through the Annual Conference, more than through any other means, I have made acquaintances and friends who live and practice in virtually every corner of the State.

KADC has also provided regional and national opportunities for gathering with fellow defense professionals. In May the KADC will host the DRI Mid-Region meeting in Kansas City, and most of those in attendance will be the familiar faces of the DRI State Representatives, Executive Directors and SLDO Officers from Colorado, Utah, Nebraska, Missouri, Iowa and Kansas with whom I have had the pleasure of working for the past three years as a board member and officer of KADC. (Of course, it wasn't all work; at the end of a day or two of working sessions, we found time to engage in activities such as attending a comedy show in Chicago, going on a trail ride in northern Colorado, and setting sail for a sunset cruise out of the San Francisco Bay.)

Whether my son will join the ranks of our profession remains to be determined. If he does, I will encourage him to join organizations like the KADC. Such membership can enrich one's professional experience, and the more one invests, the greater the returns. In that light, I was indeed very well-paid for the privilege of serving as the KADC President this past year. Thanks!

(By way, actors were seen by the largest percentage of people (37%) as having "hardly any prestige at all". Let's hope that Mel Gibson and Michael Richards don't get cast in any roles as lawyers!)

FUNDING JUDICIAL ELECTIONS: ONE MEMBER'S OPINION

F. James Robinson, Jr.
Hite, Fanning & Honeyman, LLP

National data show that by the time the voters had gone to the polls on November 7, 2006, judicial candidates had shattered total fundraising and spending records.

Skyrocketing judicial election fundraising from lawyers, would-be litigants and special interest groups creates the perception that judges are beholden to their contributors. The threat that this poses to the integrity and confidence in the judiciary and thus to the ability of courts to guarantee the process that litigants are due should be a call to arms for anyone who is interested in fair and impartial courts. The time has come for serious consideration of public funding of judicial elections in Kansas as one means to eliminate the perception that justice has a price tag.

Press Release, *Voter Rejection of Political Tampering with Courts Doesn't Quell Special Interest Efforts in '06 Judicial Elections* (Justice at Stake November 8, 2006), available at http://www.JusticeatStake.org [hereinafter *Voter Rejection* 2006]. On November 7 there were twenty-two contested state supreme court races. Pre-election disclosures showed that the candidates themselves raised $30 million, a number that will be much higher after the final reports are filed. *Voter Rejection* 2006. Spending on television advertising by candidates, political parties or third party interest groups exceeded $16 million. *Id.*

Big money races are no longer a phenomenon of only perennial battleground states such as Ohio and Illinios. Deborah Goldberg *et al.*, *The New Politics of Judicial Elections 2004* (Justice at Stake 2005), at http://www.JusticeatStake.org [hereinafter *New Politics 2004*]. In 2006 interests groups in Alabama, Georgia and Washington dumped millions into judicial elections. *Voter Rejection* 2006.

No longer are races for the states' highest courts the sole beneficiaries of this largess. Two candidates for an Illinois Court of Appeals seat raised more than $3 million. *Id.* Americans for Limited Government, a Chicago-based interest group, contributed at least $175,000 to a successful effort to unseat a circuit court judge in Cole County, Missouri. *Id.*

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Funding Judicial Elections *(Continued from page 3)*

The reason for the explosion in fundraising is obvious. In 2003-04 the candidate in high court races who raised the most money won in 35 of 43 races. *New Politics 2004* at 16. In that election cycle, the winning candidates raised over $27 million while the losing candidates raised $19 million. *New Politics 2004,* at 13.

In 2003-04 the candidate in high court races who raised the most money won in 35 of 43 races. In that election cycle, the winning candidates raised over $27 million while the losing candidates raised $19 million.

In order to amass the sums of money that have become almost a prerequisite, the candidates must increasingly depend on large contributors. Some of the largest contributors are those who frequently have business before the courts. In the 2004 supreme court elections, business groups and lawyers contributed a total of $27.4 million or approximately 59% of all contributions. *New Politics 2004,* at 20, Fig. 14.

There is no reason to believe that these trends are confined to states that use partisan elections to select judges. In 2006 more than $4 million was spent in the state of Washington on three non-partisan races, nearly tripling the record that was set in 2004. *Supreme Court Races Over, But Future May Bring Campaign Changes,* Seattle Post-Intelligencer, November 11, 2006, at http://seattlepi.nwsource.com/local/6420AP_WA_Supreme_Court.html. Even in states that held retention elections in 2006, there were orchestrated "vote no" campaigns directed against judges. *Voter Rejection 2006.*

This trend extends to the election of district court judges. A March 2003 study of judicial elections in district court races in Sedgwick County by the Kansas Appleseed Center for Law and Justice found a 674% increase in contributions from 1980 to 2000. Kansas Appleseed Center for Law and Justice, *Buying the Bench? An Analysis of 2000 and 2002 Judicial Elections in Sedgwick County* (March 2003). In 2000, the average cost of a judicial election in Sedgwick County was $86,085, as compared to an average cost of $47,970 for all other countywide elections. *Id.* In 2000 and 2002 the candidates who raised the most money prevailed in the elections. *Id.*

In a 2002 survey of 2,428 state judges, 46% said that they believe campaign contributions influence their decisions.

In the midst of these trends there is a widespread public perception that justice has a price tag. According to a 2004 public opinion survey by Zogby International, 70% of Americans believe that campaign contributions have some influence on judicial decisions. Justice At Stake Campaign, March 2004 Survey Highlights: Americans Speak Out On Judicial Elections, at http://faircourts.org/files/ZogbyPollFactSheet.pdf. This data is consistent with other national survey results. Survey data reported by the American Bar Association in 2003 show that the public is alert to the interplay between politics and the law and is divided as to which is more influential, with a "slender majority believing that law trumps politics." ABA, *Justice in Jeopardy Report of the American Bar Association Commission on the 21st Century Judiciary,* pp.17-18 (2003) at http://www.abanet.org/judind/jeopardy/home.html. In a 2001 national poll, 76% of those surveyed believed that contributions influence decisions in the courtroom. Greenberg Quilan Rosner Research & American Viewpoint, Justice at Stake Frequency Questionnaire 8 (2001), at http://www.gqrr.com/articles/1617.

Perhaps more telling, in a 2002 survey of 2,428 state judges, 46% said that they believe campaign contributions influence their decisions. Greenberg Quilan Rosner Research & American Viewpoint, Justice at Stake Frequency Questionnaire 5 (2002), at http://www.gqrr.com/articles/1617/1411_JAS_judges.pdf. More than 70% of the judges expressed concern that "[i]n some states, nearly half of all supreme court cases involve someone who has given money to one or more of the judges hearing the case." *Id.* at 9. More than 55% of the judges believed that "judges should be prohibited from presiding over and ruling in cases when one of the sides has given money to their campaign." *Id.* at 11.

In the Sedgwick County study, certain judges themselves reported feeling pressure because lawyers contribute to their campaigns:

- "You try to put it out of your head, but a weekly light bulb goes off 'will this decision have any effect on the next election?' I hate it."
- "Litigants get characterized in my head as prospective voter, contributor, or opponent."
- "It is tough to rule against someone in your county who is a voter when the case is from someone out of county who is not."
- "Even your time on the bench becomes a sales pitch for yourself."
- "If you are honest, you cannot separate who contributed or worked against you. Those who say otherwise are 'selling

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Funding Judicial Elections *(Continued from page 4)*

a crock of bull.'"

- "I hated being asked for contributions when I was a lawyer and I feel like it's a shakedown when raising money as a judge."
- "Why would lawyers contribute to both sides of a campaign unless they thought it made a difference in how they were treated after the election?"

Kansas Appleseed Center for Law and Justice, *Buying the Bench? An Analysis of 2000 and 2002 Judicial Elections in Sedgwick County* (March 2003).

The story behind the contributions to a candidate to the Illinois Supreme Court and the ramifications of those contributions on a case pending before that court illustrate the reason for concern. Illinois selects Supreme Court judges in partisan elections. In *Avery v. State Farm Auto. Ins. Co.*, an Illinois jury, in a policyholder class action accusing State Farm of improperly requiring the use of generic parts rather than original manufacturer's equipment for repair of damaged vehicles, awarded $1.05 billion to 4,762,000 policyholders. On October 2, 2002 the verdict was upheld by the Illinois Court of Appeals. 321 Ill.App. 3d 269, 746 N.E.2d 1242 (5th Cir. 2001). The case was argued and submitted to the Supreme Court in May of 2003. There was a regularly scheduled election in November of 2004 for a vacant seat on the Supreme Court representing the appellate district from which the *Avery* case arose. In a race that was described by the press as one of the "most bitter" and "most expensive" races in Illinois history, the winning candidate, then circuit court judge Lloyd Karmeier, raised and spent over $4.8 million. According to the plaintiffs in *Avery*, Karmeier received over $350,000 from State Farm, State Farm's attorneys, and State Farm's *Amicus* and their attorneys. In addition, Karmeier allegedly received over $1 million in funds from groups with which State Farm was affiliated and a member. After his election, Justice Karmeier declined to recuse himself. He then cast the decisive fourth vote overturning the verdict against State Farm. 216 Ill.2d 100, 835 N.E.2d 801 (2005).

Plaintiff's filed a petition for *writ of certiorari* with the U.S. Supreme Court. The question posed by the petition was this: "May a judge who receives more than $1million in direct and indirect campaign contributions from a party and its supporters, while that party's case is pending, cast the deciding vote in that party's favor, consistent with the Due Process Clause of the Fourteenth Amendment to the United States Constitution?" Twelve non-profit, nonpartisan organizations submitted an *amicus curiae* brief in support of the petition. However, on March 6, 2006 the High Court denied *certiorari*.

The facts of cases like *Avery* have done little to improve the public's perception of the judiciary. Regardless of whether Justice Karmeier's decision was the result of unbiased consideration of facts and law, his integrity has been tarnished.

Federal courts continue to strike down state restrictions on judicial campaign activities on First Amendment grounds. This began with the U.S. Supreme Court's decision in Republican Party of Minn. v. White, 536 U.S. 765 (2002), which struck down Minnesota's prohibition against judicial candidates stating their views on legal issue that court come before the court for which they were running.

Meanwhile, federal courts continue to strike down state restrictions on judicial campaign activities on First Amendment grounds. This began with the U.S. Supreme Court's decision in *Republican Party of Minn. v. White*, 536 U.S. 765 (2002), which struck down Minnesota's prohibition against judicial candidates stating their views on legal issue that court come before the court for which they were running. There have been numerous decisions in the wake of *White*, including Judge Julie Robinson's decision in *Kansas Judicial Watch v. Stout*, 440 F. Supp. 2d 1209, 2006 U.S. Dist. LEXIS 50765 (D. Kan. July 19, 2006), striking down certain Kansas judicial canons and judicial ethics opinions.

Last winter, in a closely watched case, the High Court declined to review the Eighth Circuit's decision in *Dimick v. Republican Party of Minn.*, 416 F.3d 738 (8th Cir. 2005), *cert. den.* 126 S. Ct. 1165, 163 L. Ed. 2d 1141, 2006 U.S. LEXIS 1050 (January 23, 2006), which struck down key provisions in Minnesota's Code of Judicial Conduct that barred judicial candidates from personally soliciting contributions from donors and from accepting or using party endorsements and participating in partisan events. In an *amicus* brief urging the Court to accept *certiorari*, forty large corporations stated: "*Amici* often have reasons for concern about—and many of them have had at least one experience of—receiving what appears to be less than fair and impartial justice in jurisdictions where they . . . have not contributed to . . . judicial candidates." Brief of *Amicus*

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Funding Judicial Elections *(Continued from page 5)*

Curiae Concerned Corporations in Support of Petitioners, at 3.

With the increasing importance of money in judicial elections and the decreasing effectiveness of the judicial canons to reign in campaign activities, there will be increasing pressure on attorneys to seek recusal of judges. , but few litigants will dare to tread the recusal path. To do so is the equivalent of burning down the house while you are still in it.

With the increasing importance of money in judicial elections and the decreasing effectiveness of the judicial canons to reign in campaign activities, there will be increasing pressure on attorneys to seek recusal of judges. Recusal is one of the few remaining safeguards. As Justice Kennedy noted in his concurrence in *White*, states "may adopt recusal standards more rigorous than due process requires, and censure judges who violate these standards" [536 U.S. at 794 (Kennedy, J., concurring)], as a collective, albeit sarcastic, "Gee, thanks" was muttered in law offices across the country. Few litigants will dare to tread the recusal path. To do so is the equivalent of burning down the house while you are still in it.

If, according to Justice Kennedy, maintaining the integrity of the judiciary is a vital state interest of "the highest order" [536 U.S. at 793], recusal does not well serve the cause. Satellite litigation over recusal in case after case can only confirm the public's perception that justice has a price tag.

One means to eliminate the public's perception and avoid a possible ground for recusal would be to finance judicial elections with public funds.

One means to eliminate the public's perception and avoid a possible ground for recusal would be to finance judicial elections with public funds. In February of 2002 the American Bar Association House of Delegates adopted a resolution urging states that elect judges to provide public funds for their campaigns. American Bar Association, *American Bar Association Adopts Recommendation Calling for Public Financing of Judicial Campaigns,* Press Release. February 5, 2002. A survey conducted by the Center for American Politics and Citizenship from 1996 through 2002 found that most judicial candidates were dissatisfied with the current system of financing judicial elections and 49% agreed with the ABA's position that public funding would improve campaigns. Abbe and Herrnson, *Testimony on Financing for Judicial Elections Submitted to the American Bar Association's Commission on the 21st Century Judiciary,* October 1, 2002 at http://www.capc.umd.edu/rpts/judicial_elections.pdf.

In 2004, four years after former Chief Justice Henry Frye of the North Carolina Supreme Court spent a record $907,000 in a failed re-election bid, North Carolina became the first, and as yet only, state to offer full public financing to qualified candidates for the Supreme Court and the Court of Appeals. *New Politics 2004*, at 21.

Since Kansas uses merit selection for the highest profile judicial offices, the problems that public financing of judicial elections seek to address are arguably less acute than for states that elect their appellate judges. However, retention elections in Kansas pose problems that can be exacerbated by the type of orchestrated "vote no" campaigns that were played out in other states in 2006. And certainly a strong case can be made for public funding of district court elections.

The primary obstacle is whether Kansas has the political will to commit the public funds necessary to make public financing solvent and workable. The onus will be on those who have one of the greatest stakes in changing the perception that justice has a price tag—the practicing bar—to energize the reform efforts.[1]

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1. The views expressed in this article are those of the author and not necessarily those of KADC.

2006 ANNUAL MEETING RECAP

Despite bad weather and some cancellations, a fun time was had by those who did brave the weather, which turned out to be cold but not particularly snowy or icy thanks to the Kansas City street crews.

One of the highlights, as usual, was the annual presentation of awards, which came off without a hitch despite the need to subpoena two award recipients whose busy schedules would not otherwise allow them to attend. Even with the subpoena power of the KADC, the Benedict Arnold award recipient remained missing in action, mainly because our members were loyal to their defense roots and apparently nobody stepped up to the plate this year to represent a plaintiff in a case of broad significance. Outgoing President Todd Thompson received not only a plaque for his year of service as President but also a Citation from DRI for his service, making Todd the recipient of the "most awards" award.

The highlight of the awards presentation was Gene Balloun's receipt of the William Kahrs Lifetime Achievement Award. There is surely no lawyer more deserving as Gene exemplifies all of the qualities of Bill Kahrs and then some.

The Board was pleased to recognize Tony Rupp with the Distinguished Service Award and Jim Robinson with the Silver Helment Award. Both have displayed a fierce loyalty to their profession and to this organization. The highlight of the awards presentation was Gene Balloun's receipt of the William Kahrs Lifetime Achievement Award. There is surely no lawyer more deserving as Gene exemplifies all of the qualities of Bill Kahrs and then some.

The KADC would like to thank all of its speakers, who hailed from near and far:

Trends in Bad Faith Litigation – Thomas F. Segalla, Goldberg Segalla, Buffalo, NY.

Recent U.S. Supreme Court Cases Effecting Civil Litigation – Toby Kraus, Matt Wiltanger, and Bill Hays, Shook, Hardy & Bacon

Worker's Comp I – Case Law Update – Fred Greenbaum, McAnany VanCleave & Phillips

Diversifying Trial Teams to Provide Better Service and Better Trial Outcomes – Lori Shultz, Shook, Hardy & Bacon (Moderator). Panelists: Robert Alexander, Law Offices of Robert H. Alexander, Jr., (Oklahoma City, Oklahoma); Steve Coronado, Sherman Taff Bangert Thomas & Coronado (Kansas City); Cheryl E. Diaz, Thompson & Knight, Dallas, Texas.

Defending the Enforcement of State Laws such as Funeral Picketing Acts: An Overview of Section 1983 Litigation in Constitutional Cases – Stephen R. McAllister, Professor of Law and former Dean of the University of Kansas School of Law.

Anne Kindling
Goodell, Stratton, Edmonds & Palmer, LLP

Threats to An Independent Judiciary – Scott Nehrbass, Foulston & Siefkin (Moderator). Panelists: Ret. John Bukaty, Jr.; Judge Stephen Hill of the Kansas Court of Appeals; Jim Robinson of Hite Fanning & Honeyman in Wichita; Greg Musil, Shugart Thomson & Kilroy; Anne M. Kindling, Goodell Stratton Edmonds & Palmer, LLP.

Kansas Case Law Update – Steve Kerwick, Foulston Siefkin

Ethics: Traps & Pitfalls of Joint Representation – Nick Badgerow, Spencer Fane.

Experience Under the Class Action Fairness Act – Holly Smith and Becky Schwartz, Shook, Hardy & Bacon.

Worker's Comp II – Legislative Update – Doug Hobbs, Wallace Saunders.

Defending High Profile Corporate Clients – Roscoe C. Howard, Troutman Sanders, Washington, D.C.

Litigation and Risk in a Post-Enron Environment – Tom Diamante, DOAR Consulting.

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KADC AWARDS GENE BALLOUN ORGANIZATION'S HIGHEST HONOR

"As we like to say in Kansas, 'seldom is heard a discouraging word' about Gene Balloun. He is one of Kansas' most highly revered and widely admired lawyers, and a founding pillar of the KADC" said Scott Nehrbass.

The Kansas Association of Defense Counsel (KADC) awarded Shook, Hardy & Bacon Partner Gene Balloun its highest honor, the 2006 William Kahrs Distinguished Service Award, at its annual meeting held in Kansas City December 1-2, 2006. Gene was cited for his service to the bar, as a former KADC President and former President of the Kansas Bar Association, for his numerous legal victories in major cases, for his dedication to pro bono activities, including adoptions, and his overall high standards of professionalism.

"Anyone who has had the privilege of practicing or litigating with or against Gene Balloun knows that he is the consummate lawyer and gentleman," said Scott Nehrbass, President of the KADC. "His contributions to the Kansas bar, including as a board member, officer and president of the KADC, and his community, through his love and passionate advocacy for the rights of foster children, are immeasurable. Those of us who learned to practice law at Gene's feet will tell you that we could not have had a better teacher."

The award is named after a co-founder of the KADC and longtime Wichita attorney, William A. Kahrs, of the Kahrs, Nelson, Fanning & Hite firm. Mr. Kahrs had a long and distinguished legal and public service career spanning five decades.

Gene was elected a Fellow of the American College of Trial Lawyers, and is a Master Emeritus of the Kansas Inn of Court. He has served on the Tenth Judicial District Nominating Commission, which nominates judges in the Tenth District. He has served as a mediator for the Federal District Court of Kansas and frequently mediates cases for private parties. Gene has also been a faculty member at the Kansas Institute of Trial Advocacy, and has received the Justinian Award presented by the Johnson County Bar Association and the Kansas Bar Association's Pro Bono Award. He has also received a Pro Bono Award from the American Bar Association, as well as the Shook, Hardy & Bacon Lifetime Pro Bono Award. He has been selected as one of the outstanding business litigators in Kansas in numerous editions of The Best Lawyers in America, and has been named to Missouri and Kansas Super Lawyers 2006.

"As we like to say in Kansas, 'seldom is heard a discouraging word' about Gene," said Nehrbass, who practices in the Overland Park office of Foulston Siefkin LLP. "He is one of Kansas' most highly revered and widely admired lawyers, and a founding pillar of the KADC."

KADC FILING *AMICUS* BRIEF

KADC will argue that the district court should have looked to the plain language of the statute to conclude that a retired physician who had conducted no patient care for four months prior to the relevant incident date could not qualify as an expert witness under K.S.A. 60-3412.

KADC will file a brief as *Amicus Curiae* in the case of *Williams v. Lawson*, Kansas Court of Appeals Case No. 06-97132-A.

KADC's *amicus* brief will address only one of the issues in the appeal, namely, the district court's interpretation of K.S.A. 60-3412 with respect to the qualification of the plaintiff's expert witness in this medical malpractice case. K.S.A. 60-3412 provides that in any medical malpractice case, no person shall qualify as an expert witness unless at least 50% of the person's professional time within the two-year period preceding the incident giving rise to the action is devoted to actual clinical practice in the same profession in which the defendant is licensed. The Kansas Supreme Court has indicated that the statute clearly was intended to prevent the use of "professional witnesses." The district court in this case qualified a prospective witness who had retired completely from actual clinical practice four months prior to the date of the incident giving rise to the lawsuit. Instead of finding that this period of retirement disqualified the expert, the district court utilized a complex formula of averaging the expert's professional time during the two-year period to conclude that the prospective expert's total actual clinical time exceeded the total non-clinical professional time. The district court's analysis would open the door to allow full-time professional expert witnesses to testify in medical malpractice cases in Kansas if they can simply produce evidence that, on average, more than 50% of their professional time was devoted to actual patient care, regardless of whether they had ceased patient care altogether months or even years prior to the relevant incident date. KADC believes that the district court ruling is erroneous not only because it is clearly inconsistent with the plain language of the statute, but because it is inconsistent with the clear intent of the statute as noted above. KADC will argue that the district court should have looked to the plain language of the statute to conclude that a retired physician who had conducted no patient care for four months prior to the relevant incident date could not qualify as an expert witness under the statute.

Peter S. Johnson
Clark, Mize & Linville, Chtd.

NFJE CONTRIBUTION IN JUSTICE BOB GERNON'S NAME

In 2006, KADC made a contribution in the name of Justice Bob Gernon to the National Foundation for Judicial Excellence (NFJE). NFJE was created in 2004 by the Defense Research Institute (DRI) as an independent charitable foundation whose mission is to *address important legal policy issues affecting the law and civil justice system by providing meaningful support and education to the judiciary, by publishing scholarly works and by engaging in other efforts to continually enhance and ensure judicial excellence and fairness for all engaged in the judicial process.* To serve its mission NFJE has presented top-notched, tuition–free judicial education opportunities for state appellate court judges. KADC is pleased to support the efforts of NFJE with the contribution in Justice Gernon's name.

Had the Court of Appeals, and the Supreme Court thereafter, examined carefully the historical backdrop for the Hamilton case, the courts would have discovered a more complicated historical background that might have compelled a different outcome.

Lee Builders *(Continued from page 1)*

> causes or some other cause covered by the same policy.[18]

Driving home the application of this language from *Hamilton*, the *Lee Builders* Court noted, "Here, Builders sued to recover on an insurance policy which, in part, insured property against loss by fire, tornado, lightning, or hail. By its very language, K.S.A. 40-908 applies in cases in which judgment is rendered on a *policy* that insures against these types of losses. . . . Accordingly, we hold that the district court did not err in finding Builders was entitled to attorney's fees under to *[sic]* K.S.A. 40-908."[19] Because the court decided that K.S.A. 40-908 applied, it found no reason to analyze Builders' claim for attorney's fees pursuant to K.S.A. 40-256.[20] As a consequence of the court's determination, the case was remanded to the district court for a further determination as to damages; however, the district court's award of attorney's fees was affirmed.[21]

The case then went to the Kansas Supreme Court on a petition for review.[22] What had been a multiplicity of insurance coverage issues in the Court of Appeals was boiled down to a single question on review, and then having affirmed the Court of Appeals on the coverage issue, the Supreme Court turned to the insurer's challenge that attorney's fees were improperly granted by the district court.[23] The insurer contended that the Court of Appeals had unreasonably extended the scope of the statute in affirming the district court's award of attorney's fees.[24] According to the Supreme Court, the only support offered by the insurer for its position was *Ramsey v. Lee Builders, Inc.*[25] On the facts of that case, the Supreme Court found that language from the *Ramsey* case on which the insurer relied was dictum and, therefore, inapplicable.[26] The court then reverted to the application of the "plain language" of K.S.A. 40-908 holding, pursuant to *Hamilton*, "Based upon the plain language of K.S.A. 40-908, it applies where judgment is rendered on *any* policy that insures against certain types of losses."[27] It affirmed the trial court's award of attorney's fees under this statute and likewise affirmed the Court of Appeals' decision on this issue.[28]

The Supreme Court's reasoning on this issue was largely an amplification of the Court of Appeals' earlier rationale which relied upon a "plain language" reading of K.S.A. 40-908 and the application of the *Hamilton* case. Had the Court of Appeals, and the Supreme Court thereafter, examined carefully the historical backdrop for the *Hamilton* case, the courts would have discovered a more complicated historical background that might have compelled a different outcome.

II. Prior Cases and Their Decisional Rationale

The *Hamilton* case involved a claim by Mr. Hamilton for damages related to the restoration of a basement wall that had collapsed.[29] Mr. Hamilton asserted that the wall collapsed due to "hidden decay" in the wall.[30] He sought reimbursement from his insurer for the cost to repair the wall and for attorney's fees resulting from his need to enforce his claim by a lawsuit.[31] After the trial court awarded the costs of repair, following a jury verdict, the trial court declined to award Mr. Hamilton fees pursuant to K.S.A. 40-908.[32] On appeal, Mr. Hamilton assigned error to the trial court on this point. He contended that, since the judgment in his favor was with respect to a homeowner's policy which provided indemnity against loss to his property by fire, tornado, lightning, or hail, he was entitled to attorney's fees.[33] The insurer, on the other hand, argued that the cause of the loss must be from one of the enumerated perils in the statute in order to support an award of attorney's fees.[34] Since the loss did not result from one of these four perils, attorney's fees were not owed.

To resolve the issue, the *Hamilton* court reviewed some earlier decisions which involved the interpretation and application of K.S.A. 40-908. Pointing to *Millers' National Insurance Company v. The Wichita Flour Mills Company*[35], the *Hamilton* court noted the Tenth Circuit's conclusion that the *cause* of loss controlled whether or not fees would be awarded under K.S.A. 40-908, not the type of policy allegedly insuring against the loss.[36] The court then pointedly observed that it had not followed the federal court's rationale in *Millers'National* three years later when it decided

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Ferrellgas Corporation v. Phoenix Insurance Company,[37] a wind loss case.[38] The *Hamilton* court went on to quote its decision in *Ferrellgas:* "[I]f the policy is one insuring property as provided in [the statute], the insurance company must pay attorney's fees as provided therein. [Citations omitted.] Accordingly, we found the statute applicable to damage caused by wind, noting '[t]here can be no question about the authority of the court to allow attorney fees if, as we have now decided, G.S. 1949, 40-908 is still in effect.' [Citation omitted.]"[39] As a consequence, even though the cause of Mr. Hamilton's loss was not among the four enumerated perils mentioned in the statute, the policy under which coverage existed did provide coverage for the enumerated perils just as the *Ferrellgas* policy had. That fact was sufficient to bring the dispute within the ambit of the statute, justifying an award of attorney's fees to Mr. Hamilton.[40]

Application of K.S.A. 40-908 was historically limited to cases in which property coverages were implicated; K.S.A. 40-908 has not historically applied to policies covering personal or commercial liability risks.

The *Hamilton* court observed that it had likewise found no error in *Thomas v. American Family Mutual Insurance Co.,*[41] in which the district court awarded attorney's fees pursuant to K.S.A. 40-908. In that case, damage to an insured's residence was caused by a windstorm.[42] Although the cause of the loss was not among the four perils enumerated in the statute, the property was presumably covered by a policy that did cover the enumerated perils. "Both *Ferrellgas* and *Thomas* support the proposition that, in determining whether K.S.A. 40-908 applies, the type of policy which provides recovery, rather than the type of loss, is the determining factor."[43] Further elucidating on its conclusion, the *Hamilton* court said:

> We conclude K.S.A. 40-908 is designed *to provide for attorney fees for the homeowner upon successful suit under the policy absent a tender by the insurance company.* Fees shall be allowed as a part of the costs under the statute *where the homeowner obtains judgment for a covered loss under the homeowner's policy*, which judgment is in excess of any amount tendered by the insurance company before commencement of the action. *Application of the statute is not dependent upon the type of loss incurred.* Rather, providing all conditions of the statute are met, costs, including reasonable attorney fees, are awarded where policy coverage for the loss incurred by the insured homeowner exists.
>
> The plain language of K.S.A. 40-908 supports such a conclusion. It provides application to any case in which a judgment is rendered on *any policy* given to insure *any property* against loss by fire, tornado, lightning, or hail. The policy coverage controls, not the actual type of loss. If the loss is covered by a policy which insures against fire, tornado, lightning, or hail, then the statute applies regardless of whether *the actual loss occurred by one of those named causes or some other cause covered by the same policy*. We conclude that the trial court erred in determining that K.S.A. 40-908 did not apply in this case and that Hamilton is entitled to his reasonable attorney fees under this statute.
>
> As a result of our determination that K.S.A. 40-908 applies, we need not consider Hamilton's contention that he is entitled to recover attorney fees under K.S.A. 40-256.[44]

While the *Hamilton* court did hold that the type of *policy*, not the type of *loss* controls, that statement must be read within the context of earlier cases on which these assertions rested. All appellate cases prior to *Hamilton* in which K.S.A. 40-908 is cited deal only with loss caused by perils specifically enumerated in the covering property policies.[45] *Hamilton* is itself a property loss case. While in some cases, including *Hamilton*, plaintiff asserted K.S.A. 40-256 as an alternative basis for an award of attorney fees, *Hamilton* and all prior cases resolved the attorney's fee issue exclusively under K.S.A. 40-908.[46] As a consequence, *Hamilton's* concern with policy coverage, not type of loss, must be read in that context. In other words, application of K.S.A. 40-908 was historically limited to cases in which *property coverages* were implicated; K.S.A. 40-908 has *not* historically applied to policies covering personal or commercial liability risks.

This historical limitation is secured by at least two rationales. First, property coverages are so-called first-party cover-

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The court's ready dismissal of the repeal-by-implication argument and its refusal to follow the federal court's Smart decision demonstrates the strength of the court's certainty that discrete purposes were to be served by each statute, a certainty that prevailed until Lee Builders.

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ages, coverage bought and paid for by the insured to protect himself against loss to his own property. K.S.A. 40-908's remedial purpose is furthered by providing a first-party insured recompense for attorney's fees when a suit to enforce coverage proves successful. *Lattner v. Federal Union Insurance Co.*,[47] cited by *Hamilton*, supports this view: "[T]he purpose of K.S.A. 40-908 is not to penalize an insurance company for making what it deems to be a bona fide defense to an action to recover on an insurance policy, but to permit the allowance of a fair and reasonable compensation to the assured's attorney in any event, after having been compelled to sue on the policy, he or she is successful in that effort."[48] The court's concern for "fair and reasonable compensation" to the insured "after having been compelled to sue on the policy" can only be a reference to a first-party claim after a coverage contest with the insurer.

Second, in *Ferrellgas*, an important underpinning of the rationale in the *Hamilton* case, the court examined the interplay between K.S.A. 40-256 and 40-908. *Ferrellgas* was a suit in which the insured alleged that a building covered by a property insurance policy had been destroyed by wind. The insurer refused to cover the damage under the policy. The insurer defended its position by asserting that the cause of the damage to the building was high water and flood, not wind.[49] When the jury returned a verdict adverse to the insurer, the resulting appeal led to a consideration of the attorney's fees awarded by the trial court. On appeal, the defendant insurer contended that K.S.A. 40-908 was effectively repealed by the relatively recent enactment of K.S.A. 40-256.[50] The *Ferrellgas* court had little difficulty rejecting this implied-repeal argument after it reviewed the purposes of the two statutes:

> It will be seen that section 40-908 applies to an action on 'any policy given to insure any property in this state against loss by fire, tornado, lightning or hail,' while section 40-256 covers a judgment 'rendered against any insurance company * * *' It is true that the latter section applies only 'if it appear from the evidence that such company or exchange has refused *without just cause or excuse to pay the full amount of such loss*.'
>
> It is to be noticed that section 40-908 has been the law of this state for many years, having been first enacted in somewhat different form in Ch. 102, Laws of 1893. We do not think that the enactment of section 40-256 can be presumed to have shown a desire upon the part of the legislature to change the established policy of the state. Especially, this is true when both statutes may easily be construed to be operative side by side. *If the policy is one insuring property as provided in the old statute, the insurance company must pay attorney fees as provided therein. If the judgment is as to any other type of policy, then the insurance company may govern its liability under the newer statute.*[51]

The court found the two statutes fulfilled different purposes so no repeal by implication, as argued by the insurer, could be legitimately claimed.[52] Indeed, the court refuted authority cited by the insurer that K.S.A. 40-908 had been repealed by the enactment of K.S.A. 40-256:

> Counsel has directed our attention to the case of *Smart v. Hardware Dealers Mutual Fire Insurance Co., D.C.*, 181 F.Supp. 575, in which the learned judge of the United States District Court for the District of Kansas held that section 40-256 repealed by implication the provisions of section 40-908. It is to be noted the judge expressed doubt about his decision. In our view, the cases cited by the court found that not only was the same field covered by the two statutes, but the provisions of the newer act were absolutely *repugnant* to the provisions of the older act. Where that is true, the older act must be held to be repealed. But as explained above, the two acts involved in this case are not actually repugnant to each other but each may be effective. In view of the fact that repeals by implication are never favored, and further because of the rule that a specific statute will be favored over a general statute, *Dreyer v. Siler*, 180 Kan. 765, 308 P.2d 127; *Ehr-*

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> *sam v. Borgen*, 185 Kan. 776, 347 P.2d 260, we are constrained to disagree with the learned judge.[53]

The court's ready dismissal of the repeal-by-implication argument and its refusal to follow the federal court's *Smart* decision demonstrates the strength of the court's certainty that discrete purposes were to be served by each statute, a certainty that prevailed until *Lee Builders*.

More than 20 years after *Ferrellgas*, the court reinforced its adherence to the reasoning in *Ferrellgas* and its rejection of *Smart* in *State Farm Fire and Casualty Company v. Liggett*.[54] This was a declaratory judgment action for a determination of no coverage for a fire loss suffered by the insured; the case also contained a counterclaim by the insured for the amount of the fire loss.[55] After a six-week trial, the jury determined that the insurer's arson defense was not supported by the evidence and that the insured was entitled to the amount of their fire loss.[56] As a consequence, the trial court awarded attorney's fees pursuant to K.S.A. 40-908.[57] On appeal, the Supreme Court affirmed the award under that statute saying, "As we noted earlier in this opinion, the trial judge found that K.S.A. 40-908 was applicable and controlling on the fee issue, and that K.S.A. 40-256 was not. We agree."[58] The court went on to refute an argument by the insurer that the court had seen once before. "State Farm argues that there is clearly an implicit conflict between those statutes [K.S.A. 40-256 and K.S.A. 40-908] and that the earlier statute, K.S.A. 40-908, was repealed by implication by the enactment of K.S.A. 40-256 in 1931. Cited in support of this argument is *Smart v. Hardware Dealers Mutual Fire Insurance Co.*, 181 F.Supp. 575 (D.Kan. 1960), Judge Arthur J. Stanley, Jr. so held. The following year, however, this court unanimously disagreed."[59] The court went on to distinguish between the two attorney's fees statutes as it had in *Ferrellgas*: "If the policy is one insuring *property* as provided in the old statute, the insurance company must pay attorney's fees as provided therein. If the judgment is *as to any other type of policy*, then the insurance company may govern its liability under the newer statute."[60] To be certain that its point was not missed, the court adverted to the earlier–rejected, repeal-by-implication argument found in *Smart* and rejected it once again concluding, "We adhere to our opinion in *Ferrellgas*."[61]

Decisions since Liggett suggest that the Kansas appellate courts have remained, perhaps unwittingly, faithful to the distinction between K.S.A. 40-256 and 40-908 elucidated in Ferrellgas and reiterated in Liggett.

Decisions since *Liggett* suggest that the Kansas appellate courts have remained, perhaps unwittingly, faithful to the distinction between K.S.A. 40-256 and 40-908 elucidated in *Ferrellgas* and reiterated in *Liggett*. In *Narron v. Cincinnati Insurance Company*,[62] Ms. Narron brought suit against her automobile insurance carrier claiming that the carrier wrongfully denied her claim for underinsured motorist benefits. On appeal and following the trial court's grant of summary judgment and an award of both damages and attorney's fees, the Kansas Court of Appeals reversed the summary judgment and then addressed the attorney's fees awarded by the trial court. The court noted, "In her original petition, Narron asked the trial court to award her attorney fees pursuant to K.S.A. 40-256 and/or K.S.A. 40-908."[63] The trial court awarded fees but failed to specify the authority for the award.[64] The Court of Appeals reversed the trial court's award:

> It has been held that whether attorney fees are to be allowed depends upon the facts and circumstances of each particular case. Where the only issue between the parties is a factual dispute with respect to coverage under an insurance policy, and the insurer has refused to pay the full amount of the insured's loss for such reason, the phrase "without just cause or excuse" means a frivolous and unfounded denial of liability. However, if there is a bona fide and reasonable factual ground for contesting the insured's claim, there is no failure to pay without just cause. *Koch, Administratrix v. Prudential Ins. Co.,* 205 Kan. 561, 564-65, 470 P.2d 756 (1970).
>
> Generally, an award of attorney fees is not warranted if the issues in the cause are raised in good faith. See *Garrison v. State Farm Mut. Auto. Ins. Co., 20 Kan. App. 2d 918, 931, 894 P.2d 226 (1995).*
>
> After reviewing the record on appeal, we do not believe that Cincinnati acted in bad faith. Instead, we believe that Cincinnati made a good faith denial based on applicable statutes and case law as well as the language of Narron's

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> policy. Since Cincinnati did not act in bad faith, K.S.A. 40-256 does not apply, and Narron is not entitled to attorney fees.[65]

Notably absent from the court's analysis is any mention of K.S.A. 40-908 as a separate or alternative basis for an award of attorney's fees. It seems unlikely the omission to mention K.S.A. 40-908 was an oversight in the face of the court's explicit note that the trial court itself had failed to state a basis for the award. Nevertheless, the court failed to explain why K.S.A. 40-256 applied but K.S.A. 40-908 did not.[66]

In another case that would have permitted the Kansas Court of Appeals to opine on the proper application of K.S.A. 40-256 or 40-908, the court found K.S.A. 40-256 applicable under the circumstances and dismissed the potential application of K.S.A. 40-908 without elaboration. In *Loucks v. Farm Bureau Mutual Insurance Company, Inc.*,[67] the court found the insurer had failed to pay underinsured motorist benefits without just cause or excuse.[68] Turning to the attorney's fee issue, the court noted the insurer's argument that the court erred by awarding attorney fees pursuant to K.S.A. 40-256 and 40-908.[69] After a discussion limited entirely to the application of K.S.A. 40-256 to the attorney's fees issue, the court found, "The district court did not err in awarding attorney fees in favor of Loucks pursuant to K.S.A. 40-256. Since K.S.A. 40-256 provided an appropriate basis for the district court to assess attorney fees, we will not address whether attorney fees were also authorized under K.S.A. 40-908."[70] There is no elucidation about why an award pursuant to K.S.A. 40-256 was "appropriate."

Even though both *Narron* and *Loucks* offered the Court of Appeals an opportunity to consider the potential application of K.S.A. 40-908, the court found K.S.A. 40-256 applicable in instances in which the recovery of underinsured motorist benefits was at issue.[71] As already noted, the court provided no guidance for its decision to apply K.S.A. 40-256 instead of K.S.A. 40-908. With the arrival of *Lee Builders*, however, there is no reason that one of the statutes should be preferred over the other so long as the policy in question provides coverage for the four perils named in K.S.A. 40-908. In the *Narron* and *Loucks* cases, the court's focus was on the application of K.S.A. 40-256. Such a focus, even if unconscious, is consistent with the historical application of K.S.A. 40-908 to first-party property losses only which the *Ferrellgas* and *Liggett* courts long ago recognized. It is also consistent with the evolution of property and liability coverages.

III. An Historical Perspective on the Packaging of Property and Liability Coverages

While the court in *Ferrellgas* did not look outside the law when it drew the distinction between the purposes served by K.S.A. 40-256 and 40-908, there were very practical reasons why the distinction was legitimately drawn. Before the 1950s, individuals and businesses had to purchase separate policies for the risks they wished to insure against. A homeowner or business was required to purchase a fire policy to insure against that risk and, if the insured wished to insure against the other risks of loss to property, an "all-perils" endorsement to cover windstorms, hail, or water losses could also be purchased.[72] To cover the risks presented by potential liability to third parties, the insured purchased a separate personal or commercial liability policy.[73] However, during the 1950s, the predecessors to the present-day Insurance Services Office were formed by groups of stock insurers.[74] They began programs to consolidate a variety of personal and commercial property coverages in a single package.[75] During this time, the first "homeowners" policy was issued which consolidated both property and personal liability coverages in a single policy.[76] Likewise, commercial property risks were first insured by "manufacturer's output policies" that combined multiple, previously separate types of property policies.[77] Still later, in 1958, the first "commercial package policy" appeared combining previously discrete property and liability coverages.[78] This novel concept quickly swept through the commercial insurance industry.[79] Today virtually all personal and commercial policies routinely include property and liability coverages in a single package.

This evolution in the way in which property and liability insurance is sold informs the distinct purposes of the two attorney's fees statutes and how they ought to be applied today. The predecessor to presently denominated K.S.A. 40-908 was brought into its modern form in 1927.[80] Since property and liability insurance coverages were not packaged together until the late 1950s,

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Even though both Narron and Loucks offered the Court of Appeals an opportunity to consider the potential application of K.S.A. 40-908, the court found K.S.A. 40-256 applicable in instances in which the recovery of underinsured motorist benefits was at issue.[71] As already noted, the court provided no guidance for its decision to apply K.S.A. 40-256 instead of K.S.A. 40-908.

With the arrival of Lee Builders, however, there is no reason that one of the statutes should be preferred over the other so long as the policy in question provides coverage for the four perils named in K.S.A. 40-908.

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K.S.A. 40-908 provides recompense to an insured who sues the insurer for first-party property loss coverage and succeeds in the effort. K.S.A. 40-256, on the other hand, is directed to cases meriting an award of attorney's fees in third-party cases "if it appear from the evidence that such company, society or exchange has refused without just cause or excuse to pay the full amount of such loss . . . ." Unlike K.S.A. 40-908, this statute does not provide for automatic insurer liability for attorney's fees should the insurer lose the contest.

The court reads K.S.A. 40-908's application to "any policy given to insure . . . against loss by fire, tornado, lightning or hail" without regard to the evolution in the way these insurance coverages have been offered since the statute was enacted in 1927. No single policy could have been found in 1927 that would have insured against those four perils and personal or commercial liability.

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disputes between insured and insurer involving policies insuring property against destruction were the only possible target of K.S.A. 40-908. The statute's internal reference to the four perils could only be found in property insurance policies during the 30-year period between the statute's enactment and the debut of package policies. Indeed, the cases decided in connection with K.S.A. 40-908, the first of which dates from early 1933,[81] deal exclusively with property loss claims.[82]

The present-day predecessor to K.S.A. 40-256, enacted in 1931,[83] permitted an insured to recover from an insurer attorney's fees when the insurer failed to pay "without just cause or excuse." As already seen, the *Ferrellgas* and *Liggett* courts concluded that this statute serves a different purpose than K.S.A. 40-908. K.S.A. 40-908 provides recompense to an insured who sues the insurer for first-party property loss coverage and succeeds in the effort. K.S.A. 40-256, on the other hand, is directed to cases meriting an award of attorney's fees in third-party cases "if it appear from the evidence that such company, society or exchange has refused without just cause or excuse to pay the full amount of such loss . . . ." Unlike K.S.A. 40-908, this statute does not provide for automatic insurer liability for attorney's fees should the insurer lose the contest. When good-faith fact or legal controversy attends the dispute between an insurer and a third party, the insurer will not be penalized for its refusal to pay. The recognition of the distinction between the two statutes' purposes was the basis for Kansas courts' rejection of the repeal-by-implication arguments in *Ferrellgas* and *Liggett* discussed earlier. Despite the transformation in the manner in which coverages were assembled by insurers and purchased by insureds, Kansas appellate courts continued to observe, consciously or not, the distinct functions served by the two statutes until the arrival of the *Lee Builders* decisions.[84] These distinctions parallel the distinctly different packages in which property and liability policies were issued until the advent of the personal and commercial package policy.

IV. The Analytical Framework of the Lee Builders Cases

In the *Lee Builders* cases, the appellate courts were confronted with a third-party liability insurance controversy. An homeowner, unhappy with the quality of the construction of his home, threatened to sue the contractor for faulty work.[85] When the claim was presented to the insurer, the insurer disclaimed coverage, citing several policy provisions.[86] Rather than litigate the suit with the homeowner, the contractor and other potential defendants settled the homeowner's case then sued the insurer for the settlement under his commercial liability policy.[87] The appellate courts found against the insurer on the coverage issues.[88] The Court of Appeals and Supreme Court affirmed the district court's grant of attorney's fees under K.S.A. 40-908, finding that the statute applied on its face.[89] In addition, the Supreme Court cited *Liggett* for the proposition that K.S.A. 40-908 applies to commercial, as well as homeowners, policies, a distinction urged by the unsuccessful insurer in that case and apparently echoed by the insurer in *Lee Builders*.[90]

Yet, while adverting to the *Liggett* case, the court failed to appreciate that it was a fire-loss case, not a liability case. This distinction should have been a critical ingredient to the analysis given the way in which both the *Liggett* and *Ferrellgas* courts applied K.S.A. 40-908. However, the court did not revisit the instructive holdings of the two prior cases with regard to the respective provinces of these two attorney's fees statutes. Instead, the Supreme Court affirmed the Court of Appeals' reasoning that, simply because coverage for fire, tornado, lightning or hail could be found in the commercial *property* part of the *Lee Builders* policy, attorney's fees were properly awarded by the district court in a *liability* insurance dispute founded on a different part of the policy. The holding fails to recognize the historical genesis of the two statutes or their traditional application. It also wipes out the right of insurers, heretofore uniformly recognized, to contest coverage with their insureds, or their assigns, subject to the "just cause or excuse" standard of K.S.A. 40-256 in third-party, non-property disputes. The holding also overrules, at least by implication, the court's earlier holdings to the contrary in both *Ferrellgas* and *Liggett*.

The court reads K.S.A. 40-908's application to "any policy given to insure . . . against loss by fire, tornado, lightning or hail" without regard to the evolution in the way these insurance coverages have been offered since the statute was enacted in 1927. No single policy could have been found in 1927 that would have in-

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sured against those four perils *and* personal or commercial liability. In contrast, package policies exist today that contain both property and liability coverages. Despite the package-policy format in which property and liability coverages are sold, logic suggests that K.S.A. 40-908 nevertheless be construed as if the two types of coverages were not packaged together. If the provisions of K.S.A. 40-256 and 40-908 were read in this context they would be consistently applied in the way that *Ferrellgas* and *Liggett* explained. K.S.A. 40-908 applies to controversies involving only property coverages in whatever guise offered and K.S.A. 40-256 applies to generally third-party, non-property coverages. The appellate courts' narrow focus on K.S.A. 40-908's reference to "any policy" has led to an overly broad construction that includes property *and* liability coverages when they are found in a package policy.

The application of K.S.A. 40-908 as approved by the Kansas appellate courts in Lee Builders fails to account for the historical distinctions long recognized in Kansas case law.

The application of K.S.A. 40-908 as approved by the Kansas appellate courts in *Lee Builders* fails to account for the historical distinctions long recognized in Kansas case law. Contrary to those distinctions, the decision permits the intrusion of K.S.A. 40-908 into controversies to which previously only K.S.A. 40-256 was applicable. Under the *Lee Builders* analysis, merely because property coverage happens to be contained within the same package policy that also contains a disputed liability insurance provision, the controversy comes within the ambit of K.S.A. 40-908. The analytical flaw in this reasoning arises from the failure to recognize the mutually exclusive purposes of K.S.A. 40-256 and 40-908 in the historical context in which these statutes were enacted. The distinct purposes, articulated in both *Ferrellgas* and *Liggett*, were the cornerstone of the rejection of the attempts in *Millers' National* and then *Smart* to find that K.S.A. 40-256 repealed K.S.A. 40-908 by implication. The courts' present interpretation dismisses those distinctions and permits the very overlap cited by the *Millers' National* and *Smart* courts as foundation for their holdings that K.S.A. 40-256 impliedly repealed K.S.A. 40-908.

V. The Implications of the Lee Builders Decision

The *Lee Builders* case greatly complicates what had heretofore been the universal understanding regarding the application of these two statutes dating from at least the *Ferrellgas* case in 1961. The results of the attorney's fee holding will be seen on a number of fronts. It seems probable that K.S.A. 40-908 will supplant K.S.A. 40-256 whenever an insurance policy containing property coverage also contains the coverage provision which is the basis of any insurance coverage dispute. Indeed, in the appropriate case, the insurer's failure to offer a *presuit tender* in a *liability* case greater than the insured's recovery upon resolution the controversy will require an automatic award of attorney's fees, regardless of the merits of the insurer's basis for declining coverage. Efforts "to mousetrap" the unwary insurer by filing suit before K.S.A. 40-908's presuit-offer requirement can be met, or would even be appropriate, also appear likely in order for resourceful counsel to maximize the opportunity to recover attorney's fees.

The Lee Builders holding could make auto liability cases, including those involving uninsured and underinsured and medical payments coverages of the ISO-standard personal automobile policy, new and rich targets of highly focused efforts by enterprising counsel.

The *Lee Builders* holding could make auto liability cases, including those involving uninsured and underinsured and medical payments coverages of the ISO-standard personal automobile policy, new and rich targets of highly focused efforts by enterprising counsel. While specific attorney's fee statutes apply to certain automobile property and personal injury protection coverages,[91] controversies involving auto liability, un- or underinsured motorist, and medical payment coverages are entirely controlled by case law application of either K.S.A. 40-256 or 40-908. The court's past decisions suggested that K.S.A. 40-256 applies at least to the auto liability, un- and underinsured coverages.[92] However, past may not be prologue as attorney's fees arguments in cases involving these coverages begin to be constructed from the *Lee Builders'* attorney's fee holding. Practitioners defending these claims must be alert for new arguments for the application of K.S.A. 40-908 to these insurance coverage controversies.

The *Lee Builders* court has already shown how the existence of coverage for the four perils in one coverage part of the policy can be used as justification for applying K.S.A. 40-908 to coverage disputes involving the liability provisions in another part. If a CGL policy contains all-perils property coverage, as almost all of today's policies do, insurers and coverage counsel must anticipate that a K.S.A. 40-908 attorney's fee demand will be part of the relief sought by the liability claimant who has received a policy assignment from the insured in an excess or extra-contractual liability case.

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Lee Builders *(Continued from page 15)*

Similarly, when either personal homeowners or commercial liability package policies are involved, the insurer will be required to consider carefully its options should it decide to contest coverage. If the *Lee Builders* decision is read strictly, the "standard" reservation-of-rights letter will be insufficient to save the insurer from an award of attorney's fees, even if it presents a good-faith controversy but loses.[93] In those scenarios, it seems unlikely the insurer will have made the presuit offer required by K.S.A. 40-908 to avoid subsequent liability for attorney's fees. Insurers and coverage counsel may wish to include new content in reservation-of-rights letters in an effort to mitigate the effect of the potential application of K.S.A. 40-908.

The *Lee Builders* court had no difficulty in applying K.S.A. 40-908 to a construction defect liability case. Given the ease with which the court vaulted the fence which has historically separated the application of the two statutes, there should be no logical impediment to applying the same rationale to a controversy involving products liability coverage typically found in commercial package policies. In a similar vein, third-party environmental liability claims may now offer the successful claimant an attorney's fee recovery that does not depend on a determination of whether or not the insurer acted with "just cause or excuse." To the extent other specialty coverages, like professional liability or directors and officers coverages, are arguably included in a package policy containing coverage for the four perils, disputes involving these coverages too may become subject to a K.S.A. 40-908 attorney's fee claim.

On January 24, 2007, the Committee on Judiciary introduced House Bill 2189, which would amend K.S.A. 40-908. The new language would allow a recovery of attorney fees under K.S.A. 40-908 only "if the actual loss in such action occurred by fire, tornado, lightning, or hail."

Going forward, the prudent insurer and careful coverage counsel will continue to exercise great caution before attempting coverage litigation involving a liability policy that forms a part of an insurance package that also insures against the four perils. While an attorney's fee bonanza may not literally be in the offing, there is no doubt this new decision will place one more mine in the minefield that is insurance coverage litigation in Kansas.

VI. Relief May Be In Sight

The potential bonanza may be short-lived. On January 24, 2007, the Committee on Judiciary introduced House Bill 2189, which would amend K.S.A. 40-908. The new language would allow a recovery of attorney fees under K.S.A. 40-908 only "if the actual loss in such action occurred by fire, tornado, lightning, or hail." While this appears to be an easy fix, it remains to be seen whether the legislature will enact HB 2189.

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1. The author wishes to acknowledge gratefully the valuable assistance of Kim Holston, librarian for the American Institute of Certified Property and Casualty Underwriters, Malvern, Pennsylvania, for reference to the authoritative material referenced in notes 72-79 below.
2. 281 Kan. 844, 137 P.3d 486 (2006).
3. The statute provides, "That in all actions now pending, or hereafter commenced in which judgment is rendered against any insurance company on any policy given to insure any property in this state against loss by fire, tornado, lightning or hail, the court in rendering such judgment shall allow the plaintiff a reasonable sum as an attorney's fee for services in such action including proceeding upon appeal to be recovered and collected as a part of the costs: Provided, however, that when a tender is made by such insurance company before the commencement of the action in which judgment is rendered and the amount recovered is not in excess of such tender no such costs shall be allowed."
4. 33 Kan. App. 3d 504, 104 P.3d 997 (2005).
5. 281 Kan. at 846-47, 137 P.3d at 488-489.
6. *Id.*
7. 281 Kan. at 846, 137 P.3d at 488.
8. 281 Kan. at 845-48, 137 P.3d at 489.
9. 281 Kan. at 848, 137 P.3d at 489.
10. *Id.*
11. 33 Kan. App. 2d at 512, 515, 104 P.3d at 1003, 1005.
12. 33 Kan. App. 2d at 517, 104 P.3d at 1006.
13. *Id.*
14. *Id.*
15. 263 Kan. at 875, 953 P.2d 1027 (1998).
16. 33 Kan. App. 2d at 517, 104 P.3d at 1006.

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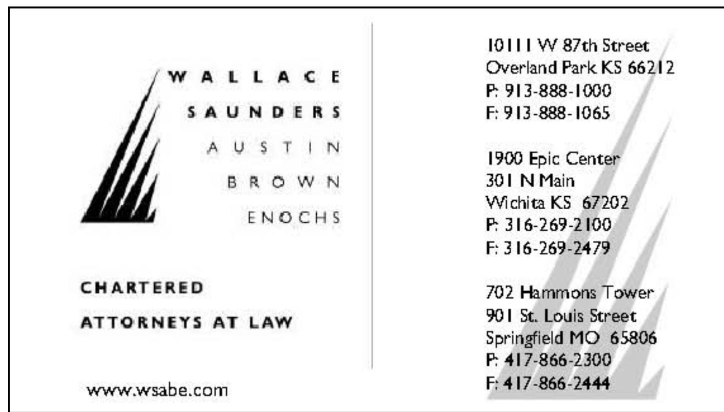

Lee Builders *(Continued from page 16)*

17. *Id.*
18. 33 Kan. App. 2d at 517-518, 104 P.3d at 1006 (first italics in original; second italics added).
19. 33 Kan. App. 2d at 518, 104 P.3d at 1006-1007.
20. 33 Kan. App. 2d at 518, 104 P.3d at 1007.
21. *Id.*
22. 281 Kan. at 844, 137 P.3d at 486.
23. 281 Kan. at 859, 137 P.3d at 495.
24. 281 Kan. at 861, 137 P.3d at 497.
25. 32 Kan. App. 2d 1147, 95 P.3d 1033, *rev. denied* 278 Kan. 847 (2004).
26. 281 Kan. at 859, 137 P.3d at 497.
27. 281 Kan. at 860, 137 P.3d at 497.
28. *Id.*
29. 263 Kan. at 875, 953 P.2d at 1029.
30. 263 Kan. at 876, 953 P.2d at 1029.
31. *Id.*
32. 263 Kan. at 876-878, 953 P.3d at 1029-1030.
33. 263 Kan at 878-879, 953 P.3d at 1030.
34. *Id.*
35. 257 F.2d 93 (10th Cir. 1958).
36. 263 Kan. at 879-880, 953 P.2d at 1031.
37. 187 Kan. at 530, 358 P.2d 786 (1961).
38. 263 Kan. at 880, 953 P.2d at 1031.
39. *Id.* citing *Ferrellgas*, 187 Kan. at 534, 358 P.2d at 1031.
40. 263 Kan. at 882, 953 P.2d at 1032.
41. 233 Kan. 775, 666 P.2d 676 (1983).
42. 233 Kan. at 780, 666 P.2d. at 680.
43. 263 Kan. at 880, 953 P.2d at 1031.
44. 263 Kan. at 882, 953 P.2d at 1032 (all emphases supplied except fourth).
45. *Phoenix Mutual Life Insurance Company v. Central States Fire Insurance Co.*, 137 Kan. 69, 19 P.2d 696 (1933) (hail loss); *Holyfield v. Farmers Alliance Mutual Insurance Co.*, 132 Kan. 539, 296 P. 710 (1931) (fire loss); *Geselle v. American Home Fine Insurance Company*, 1146 Kan. 138, 68 P.2d 1097 (1937) (fire loss); *Osborn v. Wheatgrowers' Mutual Hail Insurance Company*, 175 Kan. 235, 263 P.2d 214 (1953) (hail loss); *Lambert v. St. Paul Fire and Marine Insurance Company*, 178 Kan. 533, 289 P.2d 1057 (fire loss to crop) (1955).
46. *Id.*
47. 160 Kan. 472, 163 P.2d 389 (1945).
48. 160 Kan. at 480-481, 163 P.2d at 395.
49. 187 Kan. at 530-531, 358 P.2d at 787.
50. The statute provides, "That in all actions hereafter commenced, in which judgment is rendered against any insurance company as defined in K.S.A. 40-201, and including in addition thereto any fraternal benefit society and any reciprocal or interinsurance exchange on any policy or certificate of any type or kind of insurance, if it appear from the evidence that such company, society or exchange has refused without just cause or excuse to pay the full amount of such loss, the court in rendering such judgment shall allow the plaintiff a reasonable sum as an attorney's fee for services in such action, including proceeding upon appeal, to be recovered and collected as a part of the costs: Provided, however, That when a tender is made by such insurance company, society or exchange before the commencement of the action in which judgment is rendered and the amount recovered is not in excess of such tender no such costs shall be allowed."
51. 197 Kan. at 534-535, 358 P.2d at 790 (emphasis supplied).
52. *Id.*
53. 197 Kan. at 535, 358 P.2d at 790.
54. 236 Kan. at 120, 689 P.2d 1187 (1984).
55. 236 Kan. at 121-122, 689 P.2d at 1189-1190.
56. 236 Kan. at 122-123, 689 P.2d at 1190.
57. *Id.*
58. 236 Kan. at 127, 689 P.2d at 1193.
59. *Id.*
60. 236 Kan. at 128, 689 P.2d at 1193 (emphasis supplied).
61. 236 Kan. at 128, 689 P.2d at 1194.
62. 32 Kan. App. 2d 28, 78 P.3d 1188 (2003).
63. 32 Kan. App. 2d at 37, 78 P.3d at 1195.
64. *Id.*
65. 32 Kan. App. 2d at 37-38, 78 P.3d 1195-1196.
66. There is no reason the court should not have distinguished between the application of the two statutes since Ms. Narron pleaded them in the alternative. Narron's personal auto policy undoubtedly included comprehensive property coverage which would have included

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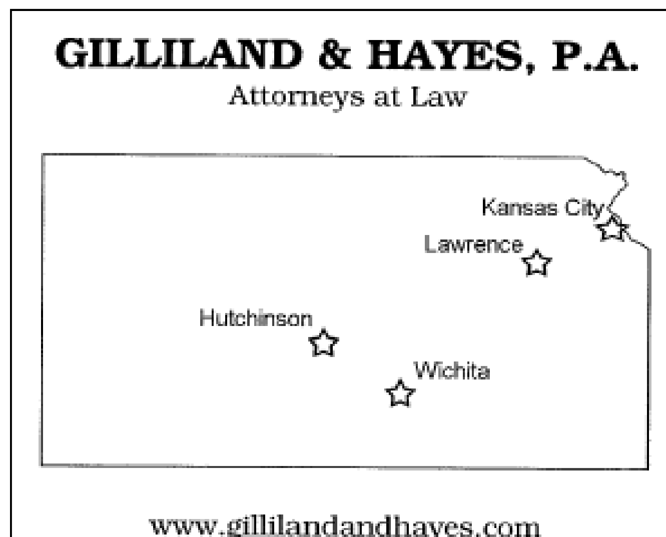
Lee Builders *(Continued from page 17)*

coverage for loss by fire, tornado, lightning or hail. If the present rationale of the *Lee Builders* case applied, then K.S.A. 40-908 was at least as legitimate a basis for the claimed attorney's fees as K.S.A. 40-256.

67. 33 Kan. App. 2d 288, 101 P.3d 1271 (2005).
68. 33 Kan. App.2d at 305, 101 P.3d at 1281-1282.
69. 33 Kan. App. 2d at 304, 101 P.3d at 1281.
70. 33 Kan. App. 2d at 306, 101 P.3d at 1283.
71. Both *Narron* and *Loucks* would have almost certainly involved an underinsured motorist coverage form that was part of a personal auto policy. If the policy were an ISO-standard policy form, it would likely have contained coverage for "direct and accidental loss" to a "covered auto" for fire, windstorm, hail, water, and flood, as well as several other perils. The stage would be set for a K.S.A. 40-908 attorney's fee claim employing the rationale of *Lee Builders*, discussed *infra.* Assuming that a plaintiff's personal auto policy contained these coverages, the insurer's failure to submit a *presuit* tender such a claim could expose it to the mandatory award of attorney's fees if a verdict or settlement is obtained later in the proceedings.
72. E. Weining *et al.*, Personal Insurance 5.3-5.4 (1st ed. 2002); Property and Liability Insurance Handbook 758-759 (Long & Gregg ed. 1965).
73. *Id.*
74. Property and Liability Insurance Handbook 760-761 (Long & Gregg ed. 1965).
75. *Id.* at 766*; see also*, E. Weining *et al.*, *supra*, at 5.3.
76. E. Weining *et al.*, *supra*, at 5.3-5.4
77. Property and Liability Insurance Handbook 760-761 (Long & Gregg ed. 1965).
78. *Id.*
79. *Id.* at 766-769.
80. 1927 Kan. Sess. Laws, ch. 231.
81. *Light v. St. Paul Fire & Marine Ins. Co.*, 132 Kan. 486, 296 P. 701 (1931) (fire loss).
82. *See*, note 46, *supra*, and the cases cited therein.
83. 1931 Kan. Sess. Laws, ch. 212.
84. Post-1950s decisions by the Kansas appellate courts continued to observe the distinction between the two statutes by awarding, or denying the award, of attorney's fees in property insurance disputes under K.S.A. 40-908, even when K.S.A. 40-256 was pled alternatively. *See, e.g., Grohusky v. Atlas Assurance Company*, 195 Kan. 626, 408 P.2d 697 (1965) (declaratory judgment action involving underlying fire loss claim); *Pattison v. State Farm Mutual Fire Insurance Company*, 209 Kan. 167, 495 P.2d 975 (1972) (fire loss); *Venable v. Import Volkswagen*, 214 Kan. 43, 519 P.2d 667 (1974) (auto collision loss); *Wing Mah v. United State Fire Ins. Co.*, 218 Kan. 583, 545 P.2d 366 (1976) (in-transit collision loss to mobile home); H*ochman v. American Family Mut. Ins. Co.*, 9 Kan. App.2d 151, 673 P.2d 1200 (1984) (fire loss to combine); *Cann v. Farmers Ins. Co.*, 17 Kan.App.2d 869, 845 P.2d 710 (1993) (auto collision loss); *Union State Bank v. St. Paul Fire and Marine Ins. Co.*, 18 Kan.App.2d 466, 856 P.2d 174 (1993) (fire loss).
85. 281 Kan. at 846, 137 P.3d at 488.
86. 281 Kan. at 847, 137 P.3d at 488-489.
87. 281 Kan. at 847, 137 P.3d at 489.
88. 33 Kan. App. 2d at 514-515, 104 P.3d at 1005; 281 Kan. at 859, 137 P.3d at 495.
89. 33 Kan. App. 2d at 518, 104 P.3d at 1006-1007; 281 Kan. at 862, 137 P.3d at 496-497.
90. 281 Kan. at 861, 137 P.3d at 496.
91. *See* K.S.A. 60-2006(b) and K.S.A. 40-3111(b) , respectively.
92. The *Narron* and *Loucks* cases cited earlier are recent examples of the application of K.S.A. 40-256 to the un- or underinsured motorist coverage.
93. The *Lee Builders* court never reached the question of whether the insurer in that case had made a good-faith argument that its coverage positions were justified since the attorney's fee demand grew exclusively out of K.S.A. 40-908.



DRI Seminars 2007 Schedule

February 7-9, 2007
Product Liability
New Orleans Marriott - New Orleans, LA

February 21-24, 2007
Pre Trial Tactics: It's All Downhill From Here
Embassy Suites - Lake Tahoe, CA

March 7-9, 2007
Medical Liability and Health Care Law
Westin Peachtree - Atlanta, GA

March 8-9, 2007
Toxic Torts and Environmental Law
JW Marriott - New Orleans, LA

March 15-16, 2007
Damages
Venetian - Las Vegas, NV

March 28-30, 2007
Life, Health, Disability and ERISA Claims
Renaissance Chicago - Chicago, IL

April 11-13, 2007
Insurance Coverage and Claims Institute
The Westin Chicago River North - Chicago, IL

April 19-20, 2007
E-Discovery
Renaissance Washington DC Hotel - Washington, DC

May 2-4, 2007
Employment Law
Westin Kierland - Phoenix, AZ

May 10-11, 2007
Drug and Medical Device
San Francisco Marriott - San Francisco, CA

May 17-18, 2007
Joint International Conference
JW Marriott Grosvenor Square - London, England

June 6-8, 2007
Young Lawyers
San Diego Marriott - San Diego, CA

DRI Update

The Voice of the Defense Bar

Timothy Finnerty
DRI Liaison
Wallace Saunders Austin Brown & Enochs, Chtd.

KADC's officers and your DRI state representative joined their compatriots from other states in San Francisco on Friday and Saturday, October 13th and 14th, 2006 for the National Conclave of State and Local Defense Organizations. This meeting is one of the "tracks" that is included in the DRI annual meeting. The conclave provides the opportunity for DRI state representatives and officers of state and local defense organizations to learn about the activities and initiatives of DRI nationally. At this year's meeting, those attending learned that the National Foundation for Judicial Excellence, a nonprofit organization founded by DRI, continued its record of success. For the second year, it garnered full attendance for its educational programming directed to state appellate court judges. This programming is topical in nature and addresses subjects of immediate relevance to the judiciary. The programming is presented by nationally recognized lawyers or scholars in a one-day program in Chicago, this year on June 29-30. In recognition of tight judicial CLE, there is no cost to the participants. (This past fall, KADC made a $500 contribution to the Foundation in memory of Justice Gernon.) The National Conclave also provided participants programs aimed at strengthening state defense organizations. Topics included "Show Me The Money! Alternative Revenue Sources"; "Membership-What Can Your Association Do To Remain Relevant?"; "How To Motivate Your Board, Committee Chairs And Volunteers"; and "How To Create A Long-Range Plan For Your Association"; among others. Former DRI state representative and KADC president, Tony Rupp, moderated the "How To" session. One of the most provocative sessions, moderated by Mike Weston (former Iowa Defense Counsel Association president), addressed the membership challenges facing state defense organizations in a changing legal and law firm environment. Kansas attendees also found time to enjoy the pleasure of each other's company during a Thursday evening supper and a Friday evening sail in San Francisco harbor organized by Dan McCune, DRI Mid Region director.

As we cross the midyear mark on the CLE calendar, keep in mind the many and varied CLE programs DRI offers. Upcoming national CLE programs include the products liability seminar on February 7, the medical liability and health care seminar on March 7, the damages seminar on March 15, and the insurance coverage and claims institute on April 11. DRI also offers CLE teleconferences. See the DRI website, www.DRI.org, for a schedule of seminars and teleconferences.

DRI offers other practical aids to your practice. The DRI expert database contains 65,000 searchable names with materials, including depositions, posted online for immediate access. DRI's Brief Bank will make its online debut in late 2007 with more than 11,000 briefs available for review. Watch DRI's web site for further announcements. DRI membership offers, of course, a subscription to its monthly publication For the Defense, a trove of timely articles relevant to a range of practices.

DRI's 2007 annual meeting is slated for Washington, DC on October 10 to 14, 2007. CLE, unrivaled in quality and quantity, will be presented by some of the best speakers in our profession. The last time DRI was in Washington, DC, meeting attendees were treated to a private, after-hours visit to the Smithsonian Institution's Air And Space Museum. An event of similar caliber is in the planning stages, so mark your calendar now and watch for details.

Executive Director's Message

Scott Heidner
Executive Director

Happy New Year from KADC headquarters! I thought I'd use my column in this newsletter to give you a general overview of some of the exciting things taking place with KADC, and a sneak preview of the 2007 legislative session. There is much to report on both topics.

KADC membership numbers over the last few years have been very consistent. Another word for "consistent" might be "stagnant." That is truly a shame, because KADC has made improvements on an already great package of membership benefits.

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KADC continues to make improvements to the website. You can find virtually anything you need at www.kadc.org. Among these are unpublished court opinions at the click of a mouse. Members can also see copies of all testimony given by KADC representatives during the most recent legislative session. The KADC list serve is a tremendous way to use your network of peers to get timely information to help with your work.

Perhaps the biggest improvements to KADC services have come at the Annual Conference. Starting with the 2005 Annual Conference, KADC made a concerted effort to increase sponsorships and exhibitors. This has had a very positive impact on the conference in two ways. First, the products and expertise our vendors bring to the conference have added a critical educational element for attendees. Second, this increased funding level has allowed KADC to bring in top notch speakers. In 2005 KADC brought Larry Pozner to the conference, generating some of the best reviews we've ever had. The 2007 Annual Conference will include a joint reception with KTLA, which we intend to be an ongoing event at future conferences. The bottom line is that the value of these conferences continues to increase dramatically. If you haven't been to one in the last two years, you need to attend!

On the legislative front, we have new leadership and committee chairs in the House of Representatives. Melvin Neufeld was elected Speaker of the House, leading a slate of conservatives who now control the agenda of the House and the appointment of committee chairs, vice chairs, and members. Representative (and KADC member) Mike O'Neal, a very steady hand on the wheel, remains Chair of the House Judiciary committee. We have not yet heard what initiatives Speaker Neufeld may have in mind that would impact KADC, but we'll have those discussions with him in the next few weeks.

Thanks as always for your continued membership and support. With your help and the leadership of the Board of Directors, KADC is getting stronger and offering more to its members all the time. I look forward to working with you in 2007!

CLARK, MIZE & LINVILLE
CHARTERED

ATTORNEYS AT LAW

129 S. 8th Street, P.O. Box 380 Tel. 785.823.6325
Salina, Kansas 67402-0380 Fax 785.823.1868

www.cml-law.com

Kansas Association of Defense Counsel

Application for Membership

The undersigned hereby makes application for membership in the Kansas Association of Defense Counsel and submits the following information in connection therewith (membership restricted to an individual)

1. Name ____________________
   (Last Name) (First Name) (Middle Initial)
2. Firm Name ____________________ Years Associated ________
3. Address: Office ____________________
   (Street or Building)
   ____
   (City/State/Zip) (Phone)
   ____
   (FAX) (Email)

   Residence ____________________
   (Street)
   ____
   (City/State/Zip) (Phone)
4. Send correspondence to: ☐ Office ☐ Residence
5. Date admitted to the Bar in the State of Kansas ____________________
6. Are you a member of the Defense Research Institute (DRI)? ☐ Yes ☐ No
7. List names of and year of admission of all courts of last resort in which you are admitted to practice: ____________________
8. List all bar associations and all other professional organizations and law societies to which you belong:____________________
9. State all legal and public offices held: ____________________
   ____
10. List any articles and books you have written:____________________
    ____
11. Are you in private practice? If so, state number of years: ____________________
12. Is your interest in litigation principally defense oriented? ____________________
13. I have enclosed annual dues for the following membership category:
    ☐ Admitted to the Bar 5 years or more $175.00
    ☐ Admitted to the Bar less than 5 years $85.00
    ☐ Governmental attorney $85.00

Dated this____________ day of____________________, 20________

____
(Signature of Applicant)

Proposed by:

____
(Name)

____
(City and State)

Membership Benefits

Being a member of KADC allows you to take advantage of benefits such as:

- **Continuing legal education**
- **Legislative liaison**
- **A quarterly newsletter to keep you abreast of legal changes and events in Kansas**
- **Amicus Briefs**
- **Weekly emails with hotlinks to Supreme Court and Court of Appeals published opinions**
- **Weekly posting on the KADC website of unpublished Supreme Court and Court of Appeals opinions**
- **Representation to the Defense Research Institute (DRI)**
- **One year free membership in DRI for new KADC members who have not previously been a member of DRI**
- **With both KADC and DRI membership you have the opportunity for exchange of ideas with some of the best attorneys in the state, region and nation**

When completed, this application, together with admission and initiation fee, should be mailed to the Kansas Association of Defense Counsel,
825 S. Kansas Ave., Suite 500
Topeka, KS 66612
Phone (785) 232-9091