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BARRY ZALMA ON BAD FAITH: TIME TO PUT A STAKE THROUGH THE HEART OF THE TORT OF BAD FAITH

Mr. Barry Zalma, Esq., recently spoke at the Investigative Engineers Association Convention 2008 concerning Insurance Policy Interpretation for the Investigative Engineer. Mr. Zalma also assisted as a co-moderator of two panels; Ethics and Investigative Engineering as well as Technical Report Writing.

This excerpt of "Barry Zalma on Bad Faith: Time to Put a Stake through the Heart of the Tort of Bad Faith," by Barry Zalma, is reprinted with permission by LexisNexis for the limited purpose of informing readers of The Forensic Engineering Report about the author's publication. Copyright 2008, all rights reserved. To access a complete version of the article, please visit <http://law.lexisnexis.com/practiceareas/Insurance/Insurance-Bad-Faith/Barry-Zalma-on-Bad-Baith-Time-to-Put-A-Stake-Through-the-Heart-of-the-Tort-of-Bad-Faith.>

You may also visit LexisNexis Insurance Law Center: <http://law.lexisnexis.com/practiceareas/Insurance>

US law was first organized based on English Common law. When a contract was breached only contract damages could be recovered. Tort damages were limited to tortious conduct and the two categories of damages were mutually exclusive.

Attorney and insurance consultant Barry Zalma discusses the need to discard the so-called tort of bad faith because it has outlived its usefulness and because it has created a greater abuse than it was designed to cure. Although the tort of bad faith was created with good intentions to cure a perceived wrong it has fallen victim to the law of unintended consequences. It is time to put a stake in the heart of the tort of bad faith. Insureds who are wronged by their insurer should limit their recovery to contract damages.

Instead of protecting the consumer imprecise language, an attempt to force insurers to deal "fairly" with the insureds, resulted in thousands of lawsuits determined to impose penalties on

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ROTARY BLADE BRUSH CUTTERS - INADEQUATE SAFETY SHIELDS

This article was written by TRNKA Engineers Company, Zdenek "Denny" Trnka, PE, I-ENG-A Member, Seattle, WA and is a follow-up article from the Volume 12, No. 4 issue of this newsletter.

The setting of this investigation is a major municipal expansion project requiring the clearing of a sizeable unused property covered by scrub trees and heavy brush. The vegetation on this property was so thick that it was impenetrable to humans on foot. Indeed, this dense growth was undisturbed for nearly 60 years following the end of WW II when the use of the property as a part of the war effort was terminated. The project was of such large magnitude that a consortium of competing earth moving contractors formed a common corporation in order to accomplish the required scope of work.

Equipment selected for the job of clearing the large amount of dense brush on the property

was a rotary blade brush cutter installed on a hydraulic boom of a track mounted excavator. It is significant that the brush cutter attachment was designed, developed and manufactured independent of the excavator manufacturer. There was no evidence of cooperation between them in unifying their products into a mobile brush cutter. Indeed, a small independent earth moving and timber industry heavy equipment service shop was retained to install the hydraulically powered brush cutter head on the excavator. The service shop was also instructed to provide a safety shield for the operator's cabin. This they accomplished by build-



Damage to the Safety Shield in Front of Cabin

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BARRY ZALMA ON BAD FAITH: TIME TO PUT A STAKE THROUGH THE HEART OF THE TORT OF BAD FAITH

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insurers for attempting to enforce ambiguous “easy to read” language of their policies. The multiple lawsuits cost insurers and their insureds millions (if not billions) of dollars to get court opinions that interpret the language and reword their “easy to read” policies to comply with the court decisions. For more than thirty years the unintended consequence of a law designed to avoid litigation has done exactly the opposite.

The author discusses why in 1958 the California Supreme Court created a tort new to U.S. jurisprudence when it decided *Comunale v. Traders & General Ins. Co.*, 50 Cal. 2d 654, 658-659, 328 P.2d 198 (1958). The author writes: “After the creation of the tort of bad faith, if an insurer and insured disagreed on the application of the policy to the factual situation, dam-

ages were no longer limited to contract damages as in other commercial relationships. If the court found that the insurer was wrong it could be required to pay the contract amount AND damages for emotional distress, pain, suffering, punishment damages, attorney’s fees and any other damages the insured and the court could conceive. It was hoped that the tort of bad faith would have a salutary effect on the insurance industry and force insurers to treat their insureds fairly. However, claims for \$40.00 wrongfully denied resulted in \$5 million verdicts. Juries, unaware of the reason for and operation of insurance decided that insurers who did not pay claims were evil and that they wrote contracts so they never had to pay. They punished insurers severely even when the insurer’s conduct was correct and proper under the terms of its contract. The massive judgments were publicized and many insurers decided fighting its insureds in court was too expensive

regardless of how correct its position was on the contract.”

The author explains why the tort of bad faith, designed to help the innocent, resulted in punishing the honest and correct insurers, honoring the insurers who acted in bad faith with profit, allowed many frauds to succeed and caused contract terms and conditions to be ignored while simultaneously making rich members of the plaintiffs’ bar. He also explains how the tort is not applied equally in violation of Due Process and why its elimination from U.S. jurisprudence will help those who are insured as well as their insurers.

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ROTARY BLADE BRUSH CUTTERS—INADEQUATE SAFETY SHIELDS

(Continued from page 1)

ing a shield out of 16 gauge expanded metal screen in front of the windshield and called it good, as did everybody else involved in the project. The machine was then delivered to the contractor who accepted it without any documented safety inspection and placed it into service to be operated by someone with about 10 years of experience with brush cutters. An additional brush cutter machine of similar capacity was also placed into service and operated by a person with no prior experience after receiving only minimal instruction from the other and more experienced operator.

The work of clearing started and progressed much according to the schedule until one day at quitting time the more experienced operator did not respond to radio calls for pick up at the end of the work shift. The supervisor drove to the working location and found the brush cutter machine running at full throttle, blade spinning and the operator dead, slumped forward on the control levers with half of his head missing.

Rotary cutters are simple and very effective devices best described as rotary

grass mowers on steroids. The head of the unit in this case was more than four feet in diameter with heavy rotating blade assembly spinning with cutting tip speed approaching the speed of sound.

These cutters are frighteningly effective. There are videos available by other manufacturers showing a rotary brush cutter destroy an automotive passenger van in less than two minutes (visit http://www.slashbuster.com/auto_shred.htm)

The vehicle in the video ends up shredded into small pieces (6 inches in size or less I would guess) including the sheet metal, cast iron engine block, transmission and steel axles. The power responsible for their effectiveness is also the source of the safety problems. These are three-fold:

First, there is direct danger to innocent bystanders who wonder into the line of fire. The only possible solution is to clear an area of 1/4 mile around the operating machine and guard it continuously while the machine is operating. Safety instruction to the operators in our case was to keep everybody 300 feet away, which is, in my opinion, woefully inadequate.

Secondly, the blade can hit and throw a rock or a piece of debris with great speed for long distances. In our case the projectile is a piece of 1/2 inch Schedule 40 steel pipe 19 inches long. The operator sits as close as about 10 feet away from blade in the direct line of fire.

Third, in my opinion, there is the danger of a failure of the rotating blade assembly that could disintegrate or discharge a cutting tip at high velocity and destroy everything in its path.

The safety shield installed by the equipment service shop, penetrated in our case by the 19 inch long piece of pipe, is clearly worse than no shield at all. The presence of this shield gives the operator a false feeling of safety. Small low mass debris may be deflected but the screen mesh safety shield provides no protection at all for heavier and/or high speed flying objects. In our case the pipe penetrated the safety screen, the laminated glass of the windshield that is about 1/4 inch thick and then strik-



Inadequate Safety Shield



ROTARY BLADE BRUSH CUTTERS—INADEQUATE SAFETY SHIELDS

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ing the machine operator in the head. The pipe piece broke through another laminated glass side window and continued on for some distance. The calculated energy of this impact compares on equal basis with the energy of a bullet fired from a large caliber handgun. It should be obvious that any shield for this machine should have impact strength exceeding resistance to this energy by a comfortable margin of safety. Indeed, the situation is worth a research study aimed at determination of the greatest possible danger in terms of maximum kinetic energy from the machine and establishing high result with a suitable safety factor as a minimum requirement for shield design. The kinetic energy is proportional to the product of mass and square of velocity of the moving object and it follows that a heavier item will be thrown at a slower speed. The maximum kinetic energy will have to be found in order to set the safety requirements on scientific basis, for the pipe thrown in our case may not have been representative of the possible maximum kinetic energy.

Guarding against a rotating head failure is, in my opinion impossible or, at the very least impractical. I would recommend guarding by installing a vibration detection system that would shut the rotation down when the vibrations exceed certain allowable limit. Needless to say, the equipment in our case had nothing of the sort.

In conclusion, I contend that the rotary brush cutters as I evaluated them in the case in point are:

- 1) Inherently dangerous and not serviceable as observed.
- 2) Developed by people who are not engineers and who do not fully understand the inherent danger of the equipment.
- 3) In need of extensive safety research and development before they can be safely employed.

From a safety perspective, competency of designers of this equipment is properly questioned in this case. We had the benefit of reading the transcripts of depositions and all written material associated with this case, evaluating the design and safety features and I conclude that none of the designers is competent to do this work. There was no engineer involved in the entire process of design, development, installation and shielding the brush cutter. Indeed the shielding was intentionally passed from the manufacturer of the cutter head to the purchaser and from him to the installer who was just a well meaning repair shop specializing in hydraulic systems with no safety engineer on staff.

Legal protection offered in this case to major players is also quite exasperating. The municipality, which is legally protected from civil law suits paid no more attention to the safety issues than requiring that all work be done in accordance with codes and laws. The contractor, who probably evaluated the situation as potentially dangerous, did nothing more than establish a 300 foot safety zone around the brush cutting work area. The cutting head manufacturer's defense consisted

of pointing to the fact that they only made the head and told the purchaser that shielding is required, but did not define it. The purchaser of the equipment passed the buck to the equipment service shop installer who said that they did exactly what they contracted to do. The definition of the shield in this case was taken from a specification defining similar shields for forestry, but nobody bothered to determine applicability of this code to this piece of equipment.

Final comment: Following this case, we got several other cases involving wood processing machinery, wood chipper, stump grinder and others. While we are not yet at liberty to give any specifics on these cases, I would like to point out that some machines have gone through a design evolution that makes them safe to use in the current state-of-the-art version. Wood chippers for instance, when used in accordance with the manufacturer's safety instructions, are now quite safe and not threatening as shown in the movie "Fargo". I have, however, still serious reservations about the level of safety features associated with certain type of stump grinders. I have seen some in operation that are, in my opinion, just accidents waiting to happen.



Piece of Debris from the Field

CONVENTION 2008...

The I-ENG-A Convention was held this year in Dallas, Texas November 12-14, 2008.

The technical sessions included:

- Vehicular Black Box and Air Bag Investigations
- Human Factors Aspects of Investigations
- Mold Origin and Cause/Testing
- Infrared Technology
- Insurance Policy Interpretation for the Investigative Engineer
- The Importance of Ethical Behavior Panel
- Fire Alarm/Fire Protection Systems Investigations
- Report Writing Discussion Panel
- Mechanical Equipment Investigations
- Engineering Catastrophe Response Team Update

COMEDY RELIEF CORNER

MILITARY LIFE INSURANCE

Airman Jones was assigned to the induction center, where he advised new recruits about their government benefits, especially their GI insurance. It wasn't long before Captain Smith noticed that Airman Jones was having a staggeringly high success-rate, selling insurance to nearly 100% of the recruits he advised. Rather than ask about this, the Captain stood in the back of the room and listened to Jones' sales pitch.

Jones explained the basics of the GI Insurance to the new recruits, and then said: "If you have GI Insurance and go into battle and are killed, the government has to pay \$200,000 to your beneficiaries. If you don't have GI insurance, and you go into battle and get killed, the government only has to pay a maximum of \$6000.

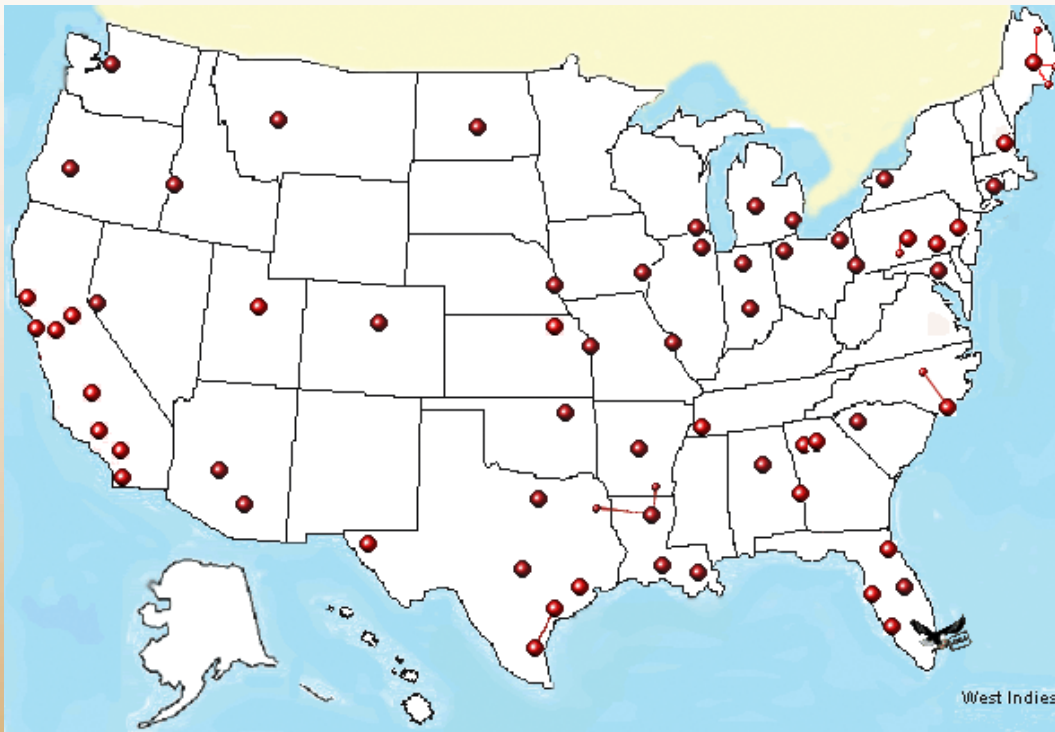
Now," he concluded, "which group do you think they are going to send into battle first?"



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