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INSURANCE

I. Policy Construction Cases

In the case of *Wilson v. Southern Farm Bureau Cas. Ins. Co.*,[1] the plaintiffs were seeking to hold the insurer liable on default judgments obtained against Elton Inabinet, Jr., the driver of an automobile which was involved in a collision with the plaintiffs. The insurer had issued a liability insurance policy to Elton Inabinet, Sr., which was in force and effect at the time of the collision. Elton, Jr., at the time of the collision was driving a car owned by one Rump, and the plaintiffs sought to predicate liability on the "use of other automobiles" clause of the policy issued to Elton, Sr.

The first problem with which the court had to contend was whether Elton Inabinet, Jr. was an insured within the applicable clause which defined the word insured as "(1) such named insured and spouse and dependent children residing in the same household. . . ." If Elton, Jr., were found to be an insured, he would have to have been a dependent child residing in the same household. The court as a matter of law determined that Elton Inabinet, Jr., was married, employed, and living in an apartment with his wife at the time of the collision and in addition was furnishing money to help support his parents' household. Therefore, he was found not to come within the policy definition of "insured" and, accordingly, was not covered by his father's liability policy.

As to the issue of dependency, the court quoted from its opinion in *Day v. Day*[2] where it held that a dependent is one who looks to another for support and maintenance—one who relies on another for the reasonable necessities of life. Insofar as the requirement that the child be not only dependent but in addition must reside in the same household, this is most often a factual determination. There was evidence that in spite of the fact that Elton Jr. lived in an apartment with his wife, he did from time to time come to his parents' home on weekends. The court, conceding that there was evidence of possible residency in his parents' home, nevertheless concluded that there was no coverage because of the clear facts regarding the lack of dependency.

1. 247 S.C. 310, 147 S.E.2d 250 (1966).
2. 216 S.C. 334, 58 S.E.2d 83 (1950).

It should be noted that the definition of the term "insured" as used in the policy involved in the instant case, differs slightly from the definition of the same term as used in some other policies and in the South Carolina Code. The code's definition is:

> [T]he named insured and, while resident of the same household, the spouse of any such named insured and relatives of either, while in a motor vehicle or otherwise, and any person who uses, with the consent, expressed or implied, of the named insured, the motor vehicle to which the policy applies and a guest in such motor vehicle to which the policy applies or the personal representative of any of the above.[3]

It has recently been held that this definition applies not only to the section of the automobile insurance code dealing with uninsured motorist coverage, but throughout the rest of the automobile liability insurance policies mentioned and described in section 46-750.32.[4] In a case which came before the South Carolina Supreme Court in 1965, this section was held to refer to two classes of insureds, each having a specific period of coverage.[5] In the instant case, Elton Jr. did not come within either class. He did not fit the first because, although he was a "relative" as required by the statute, he did not reside in the same household as his parents. He did not come within the second because he was not driving the motor vehicle designated as the insured motor vehicle in his father's liability policy.

A second and more troublesome problem in the *Wilson* case was raised by the plaintiff's contention that since the defendants had certified coverage to the Highway Department after the collision, they were barred by the doctrine of waiver, estoppel or both from denying coverage at a later time. The court recognized the minority position taken by the courts of Wisconsin and Washington on this point that an insurer who certifies coverage will later be barred by waiver or estoppel

3. S.C. CODE ANN. § 46-750.31 (1962).

4. Pacific Ins. Co. v. Firemen's Fund Ins. Co., 247 S.C. 282, 147 S.E.2d 273 (1966).

5. In Davidson v. Eastern Fire & Cas. Ins. Co., 245 S.C. 472, 141 S.E.2d 135 (1965) the court said that the language now contained in Section 46-750.31, defining the term insured refers to two classes of insureds, each having a specific period of coverage; the first of which is "the named insured, his spouse and his or her relatives resident in the same household, while in a motor vehicle or otherwise." The second is a permissive user and guest while using the motor vehicle *designated in the policy.*

from denying such coverage,[6] even if such certification is made by an insurer acting under a mistake of law.[7] However, relying principally on the fact that the certification form in this case was filed not by the defendant insurer but by Elton Inabinet, Sr., the named insured, and that the form indicated only that Elton, Sr. was covered with no mention being made of Elton Jr., the person involved in the accident, the South Carolina court ruled against the plaintiff on this point also.

Worth noting here is the possibility of result had the insurer certified coverage as to Elton Inabinet, Jr. Had this been the case, the Wisconsin and Washington line of cases would clearly have indicated the application of the doctrine of estoppel. There is, however, highly persuasive authority for reaching the opposite result. The rule, best stated by *American Jurisprudence*, is:

> The rule is well established that the doctrines of implied waiver and of estoppel, based upon the conduct or action of the insurer, are not available to bring within the coverage of a policy risks not covered by its terms, or risks expressly excluded therefrom, and the application of the doctrines in this respect is therefore to be distinguished from the waiver of, or estoppel to assert, grounds of forfeiture. Thus, while an insurer may be estopped by its conduct or its knowledge from insisting upon a forfeiture of a policy, the coverage or restrictions on the coverage, cannot be extended by the doctrine of waiver or estoppel. . . . [T]he doctrine cannot be involved to create a primary liability and bring within the coverage of the policy risks not included or contemplated by its terms.[8]

One California case held that the doctrine of waiver could not be invoked to reform a contract so as to create liability for conditions which are specifically excluded.[9] The supreme

6. *E.g.*, LaPoint v. Richards, 66 Wash. 2d 550, 403 P.2d 889 (1965); Behringer v. State Farm Mut. Ins. Co., 275 Wis. 586, 82 N.W.2d 915 (1957); Laughnan v. Griffiths, 271 Wis. 247, 73 N.W.2d 587 (1955).

7. Prisuda v. General Cas. Co. of America, 272 Wis. 41, 74 N.W.2d 777 (1956).

8. 29A AM. JUR. *Insurance* § 1135 (1960). *Accord*, Campbell v. Aetna Ins. Co., 211 F.2d 732 (4th Cir. 1954); Preferred Risk Mut. Ins. Co. v. Thomas, 250 F. Supp. 204 (D.S.C. 1966).

9. Conner v. Union Auto Ins. Co., 122 Cal. App. 105, 9 P.2d 863 (1932).

courts of both North Carolina[10] and Virginia[11] have expressly ruled that the filing of a certificate of financial responsibility on a policy issued voluntarily[12] does not of itself effect an estoppel to deny coverage. Agreeing with these decisions the Fourth Circuit Court of Appeals recently said that it is a well settled rule of law that the principles of estoppel and implied waiver do not operate to extend the coverage of an insurance policy after the liability has been incurred or loss sustained.[13]

In the *Virginia Farm Bureau* case the court pointed out that had there been an intention to make liability of the insurer absolute upon filing of the statement of financial responsibility, the legislature would surely have so stated.[14] To the general rule there appears to be only one exception, that being the case where a liability insurer with knowledge of a ground for denying coverage certifies coverage and undertakes unconditionally the defense of an action brought against its insured. Such action by the insurer constitutes a waiver of the terms of the policy and gives rise to an estoppel of the insurer to assert the grounds for denial of coverage.[15] In *Laird v. Nationwide Ins. Co.*,[16] the South Carolina Supreme Court stated that in formulating our uninsured motorist act, Virginia's act was used as a model. It therefore seems reasonable to assume that if and when South Carolina is presented with the issue of whether an insurer's filing of an SR-22 form will thereafter estop or,

10. In the case of Seaford v. Nationwide Mut. Ins. Co., 235 N.C. 719, 117 S.E.2d 733, the court said that the required filing of an SR-21 does not show a legislative intent that such act creates a contract between the insurer and the insured or in any way affects their contractual rights. The better rule seems to be that by the mere filing of an SR-21 form as required by the law of this state, the insured is not later estopped to deny coverage under the policy.

11. Virginia Farm Bureau Mut. Ins. Co. v. Saccio, 204 Va. 769, 133 S.E.2d 268 (1963). The court did point out that where a financial responsibility form is filed on a policy issued to an assigned risk, liability becomes absolute, not because of filing the form, but rather because of the strict state policy regarding assigned risk policies.

12. The term "voluntarily" is used simply to distinguish between a policy issued to one who buys insurance because he wants it as opposed to one who, after having an accident, buys insurance to satisfy the provisions of our Uninsured Motorist Act requiring proof of financial responsibility.

13. Insurance Co. of No. America v. Atlantic Nat'l Ins. Co., 329 F.2d 769 (4th Cir. 1964).

14. Virginia Farm Bureau Mut. Ins. Co. v. Saccio, 204 Va. 769, 133 S.E.2d 268 (1963).

15. Insurance Co. of No. America v. Atlantic Nat'l Ins. Co., 329 F.2d 769 (4th Cir. 1964). *Accord*, Maryland Cas. Co. v. Aetna Cas. & Sur. Co., 191 Va. 225, 60 S.E.2d 876 (1950). See generally 29A AM. JUR. *Insurance* § 1465 (1960).

16. 243 S.C. 388, 134 S.E.2d 206 (1964).

through waiver, prevent him from denying coverage, the South Carolina court will adopt the view espoused by Virginia and the Fourth Circuit Court of Appeals.

In the case of *Williams v. Pennsylvania Nat'l Mut. Ins. Co.*,[17] the insured's automobile was stolen and was thereafter involved in an accident with a third party. The third party attached the vehicle under section 45-551 of the South Carolina Code and obtained an in rem judgment against it. The insured entered into a contract with the third party and obtained a release of the automobile from attachment. When demand was made on the insurer for the amount, the insured had already paid for the release. The insurer denied coverage, contending that the insured was obligated to pay under any in rem judgment agreement.

When faced with a similar situation under an identical clause in a policy which obligated the insurer to "pay on behalf of the insured all sums which the insured shall become legally obligated to pay as damages because of injury to or destruction of property" the South Carolina Supreme Court, in the case of *Sexton v. Harleysville Mut. Ins. Co.*[18] held that the provision did not cover in rem judgment agreements. The policy in this case, as well as the one involved in *Sexton*, provided that no action should lie against the company until the "insured's obligation to pay shall have been finally determined either by judgment against the insured after actual trial or by written agreement of the insured, the claimant and the company." The court in *Sexton* held that a judgment in rem did not operate in personam or create any personal liability.

The appellant in *Williams* conceded that if nothing but the policy provisions were considered by the court, the respondents would have no responsibility in his case. However, the appellant contended that the policy did not comply with section 46-750.32[19] of the South Carolina Code and that the requirements of that statute must be read into and become part of the insur-

17. 246 S.C. 396, 143 S.E.2d 797 (1965).

18. 242 S.C. 182, 130 S.E.2d 475 (1963).

19. This section provides that:

> No policy or contract of bodily injury liability insurance or of property damage insurance, covering liability arising from the ownership, maintenance or use of any motor vehicle shall be issued or delivered in this State . . . unless it contains a provision insuring the persons defined as insured against *loss* from the liability imposed by law for damages arising out of the ownership, maintenance or use of such motor vehicles. . . . (Emphasis added.)

ance contract between the parties. The court held, however, that the lien against the appellant's automobile under section 45-551 was not within the coverage afforded the appellant under section 46-750.32 as this section protected the insured against loss from liability imposed by law while section 45-551 imposed no personal liability but related only to the automobile.

Mr. Justice Bussey, in a well reasoned and most logical dissent,[20] pointed out that in *Sexton* no statutory question had been raised and that the case turned solely on the provisions of the policy. In his dissent he said that section 46-750.32, which provides that the insured is protected against "loss," should not be restricted to loss from the payment of an in personem judgment but should include all loss arising out of liability imposed by law for damages arising out of the ownership, maintenance or use of the vehicle. He also made an excellent point in saying that section 45-551 was enacted forty years prior to the Motor Safety Responsibility Act[21] but that it is in para materia with that act in that they are both designed to protect persons injured or damaged through the negligent operation or use of automobiles. In his view, the legislature when they passed the Safety Responsibility Act must have been cognizant of the fact that loss of a person's automobile under the procedure provided by section 45-551 would be a loss imposed by law for damages arising out of the ownership, maintenance or use of a motor vehicle.

The case of *Fulbright v. Fidelity & Cas. Co.*[22] involved a suit by a widow to recover the cost of her husband's funeral from an insurer. The deceased had been a truck driver and had died from injuries sustained while driving the truck furnished by his employer for his regular use. Deceased and his wife were insured by the defendant under a policy which covered their two cars. The policy in part provided:

> Coverage C-Medical Payments
>
> To pay all reasonable expenses incurred within one year from the date of accident for necessary medical, surgical, X-Ray and dental services including prosthetic devices, and necessary ambulance, hospital, professional nursing and funeral services:

20. Mr. Justice Bussey also entered an excellent dissenting opinion in the *Sexton* case.

21. This act is contained in S.C. CODE ANN. §§ 49-701 to -856 (1962).

22. 247 S.C. 226, 146 S.E.2d 618 (1966).

> Division 1. To or for the named insured and each relative who sustains bodily injury, sickness or disease, including death resulting therefrom, hereinafter called "bodily injury" caused by accident, while occupying or through being struck by an automobile. . . .
>
> Exclusions—This policy does not apply to bodily injury: . . . . (b) sustained by the named insured or a relative
>
> (1) while occupying an automobile owned by or furnished for the regular use of either the named insured or any relative, other than an automobile defined herein as an "owned automobile."

The appellant's first contention was that the exclusionary clause applied only to an automobile furnished for the regular use of the "named insured" and the named insured was two persons under the terms of the policy, but the vehicle was furnished only to one person—the deceased. Appellant relied on *Baxley v. State Farm Mut. Auto Liab. Ins. Co.*[23] for this contention. In that case Mr. Baxley owned a Buick in his name; his wife owned a Chrysler in her own name. The insurance policy provided that the word "insured" included both Baxley and his wife. It also provided that funeral expenses would be provided for his burial in the event that he was killed in a "Temporary Substitute Automobile" and defined such an automobile as one "not owned by the named insured. . . ." Mr. Baxley's Buick was being repaired and he was killed while driving his wife's car. In holding the insurer liable for Baxley's funeral expenses the court said:

> The definition of "named insured" in the policy, and under the circumstances here involved, simply had the effect of making "the named insured" two people instead of one. Since it is conceded that the Chrysler automobile was not owned by Mr. Baxley, nor by Mr. and Mrs. Baxley jointly, but only by Mrs. Baxley, it was "not owned by the named insured" and was covered as a temporary substitute automobile under the provisions of the policy.[24]

The court in *Fulbright*, however, limited *Baxley* to its facts, noting that to hold the term "named insured" wherever appearing to mean both husband and wife would lead to absurd results and held this ground of appeal to be without merit. The

23. 241 S.C. 332, 128 S.E.2d 165 (1962).
24. *Id.* at 335, 128 S.E.2d at 166.

court also dismissed the appellant's second contention regarding ambiguity in the medical payments coverage clause and the exclusionary clause discussed above.

American Fire & Cas. Co. v. Surety Indem. Co.[25] presented the South Carolina Supreme Court with a new policy provision interpretation problem.

In this case the car owner, Mr. Delaney, needed some repair work done on his car. He arranged with a garage owner, Mr. Jeter, to have the latter drive him to work in Delaney's car and then drive the car back to the garage where it could be worked on. On the way back to the garage, Jeter was involved in a collision. Delaney was insured under a policy issued by the defendant which specifically excluded coverage of "an owned automobile while used in the automobile business" and defined "automobile business" as "the business or occupation of selling, repairing, servicing, storing or parking automobiles."

Jeter was insured by a garage liability policy issued by the plaintiff. A claim against Jeter arose out of the accident and was settled with the party by the plaintiff and defendant. They subsequently disagreed as to the coverage afforded Jeter under their respective policies. As a result, the plaintiff instituted a declaratory judgment action, the parties stipulating the basic facts and, in addition, stipulating that Jeter *was* covered by the garage liability policy and that there was no issue of primary or secondary coverage. The parties in essence agreed that the unsuccessful party of the suit would provide coverage up to the limits of his policy and would reimburse the other for the share paid in the settlement. The issue would be resolved by a determination of whether Delaney's automobile was being used in the automobile business within the meaning of the exclusion in Delaney's policy, for, as the parties admitted, Jeter was an insured under that policy and therefore primarily covered by it unless his use came within the ambit of the exclusion. The lower court, sitting without a jury, found for the plaintiff concluding, as a matter of fact, that Jeter was not using Delaney's automobile in the "automobile business" at the time of the collision and that the defendant's policy afforded coverage. The supreme court noting the novelty of the question in South Carolina, but finding

25. 246 S.C. 220, 143 S.E.2d 371 (1965).

ample authority in other jurisdictions,[26] affirmed. The court stated that these cases, in interpreting an exclusionary clause of this type, refer to the use being made of the car and not the occupation of the driver. It pointed out that the issue is essentially one of fact which must be resolved with regard to the nature of the particular business and the circumstances surrounding the use at the time of the collision. The court then noted that the record showed that Jeter was not in the habit of transporting cars to his garage for repairs but was making a special effort to accommodate Delaney. This was, to the court, ample proof that the car was not being used in the automobile business.

The case of *Sims v. Nationwide Mut. Ins. Co.*[27] involved a suit by an insured judgment debtor against his insurer to recover on a judgment declared against the insured in a prior tort action in which the insurer refused to defend the insured. The ground for insurer's refusal to defend and his defense in this action was that the injuries for which the insured was sued were intentionally inflicted by him. The insured's position was that in view of the fact that he had merely been found *negligent* in the prior action against him by the injured third party, the fact that the insurer had refused to defend him in that action now precluded him from asserting that insured's actions were intentional; or, in essence, that the insurer was bound by the court's decree as to the insured's degree of culpability. The trial court agreed with the insured and so held.

In reversing, the South Carolina Supreme Court recognized the general rule that where an insurance company has notice and opportunity to defend an action against its insured, the company is bound by pertinent material facts established against its insured, whether it appears in defense of the action or not. However, the court ruled that this proposition applies only where the interests of the insurer and insured in opposing the injured person's claim are identical.[28] The court quoting from *Farm Bureau Mut. Ins. Co. v. Hammer*[29] said that the

26. *E.g.*, Hamner v. Malkerson Motors Inc., 269 Minn. 563, 132 N.W.2d 174 (1964); Case v. Fidelity & Cas. Co., 105 N.H. 422, 201 A.2d 897 (1964). See generally 7 APPLEMAN, INSURANCE LAW & PRACTICE, § 4372 (Supp. 1965); 7 AM. JUR. 2d *Automobile Insurance* (1963).

27. 247 S.C. 82, 145 S.E.2d 523 (1965).

28. Stout v. Grain Dealers Mut. Ins. Co., 307 F.2d 521 (4th Cir. 1962); Farm Bureau Mut. Ins. Co. v. Hammer, 177 F.2d 793 (4th Cir. 1949).

29. Farm Bureau Mut. Ins. Co. v. Hammer, 177 F.2d 521 (4th Cir. 1949).

general rule did not extend to matters outside the scope of the insurance contract and that the insurer is neither obligated to defend the insured nor is he bound by the decision of the court if the claim against the insured is not covered by the provisions of the policy. The insurance contract in this case contained a clause saying in effect that the company would afford the insured no protection for any injury caused intentionally by him or at his direction.

The court realized here that application of the general rule would put the insurer in an impossible situation, in that it could not have possibly defended the tort action against the insured while at the same time protecting its own interest. If it tried to defend by showing an intentional injury, it might well expose the insured to greater liability than the court actually found. If it had urged an unintentional injury, it would have foregone its position taken under the exclusionary provision of the policy.[30] The court therefore concluded that it was not possible for the company in these suits to defend the insured and at the same time protect its own interests. The insurer and the insured had taken different positions on a vital point and the insurer acted properly in refusing to defend the insured in the action by the injured third party. Therefore, the insurer was not bound by the court's decree in the tort action as to the defendant's degree of culpability, but rather it was free to assert its policy defenses in this action on the insurance contract.

The case of *Pickens v. State Farm Mut. Ins. Co.*[31] involved a controversy over coverage during a "grace period." The deceased insured had an automobile liability policy with a death indemnity provision. The insured was notified that his premium was due on March 2, 1961, but no specific *time* of that day was mentioned. On or about March 2, the insured having failed to forward his premium was sent a notice of expiration which stated that the policy expired at 12:01 A. M. on the due date. On this same notice, however, was printed, "Payment within ten days of the due date will renew your policy and provide continuous protection." At approximately 1:00 A. M. on Sunday, March 12, 1961, the insured was killed in an automobile accident. On the following day, one of the deceased's relatives

30. See Harbin v. Assurance Co. of America, 308 F.2d 748 (10th Cir. 1962).
31. 246 S.C. 380, 144 S.E.2d 68 (1965).

tendered the premium, but it was refused, the agent saying that it was a day too late.

Upon suit the trial court refused the defendant insurer's motions for nonsuit, directed verdict and judgment n.o.v. from which rulings the insurer appealed. The Supreme Court of South Carolina affirmed the lower court holding that the language of the expiration notice indicated an intent on the part of the insurer to give the insured time through March 12 in which to tender his premium and that continuous coverage would be afforded him during this ten day grace period provided that payment be made by midnight March 12. As to payment not being tendered until the following day, the court held under established precedent[32] that since March 12 the extended due date fell on a Sunday, the tender of the premium was made in due time. Besides the circumstances of this particular case, there was another factor which was important in the court's decision that is best described in an earlier South Carolina case which quoted from *Corpus Juris:* "A forfeiture for nonpayment of premium is not favored in the law, and the courts are prompt to seize upon circumstances which indicate an election to waive the forfeiture."[33]

There had been evidence offered in the earlier case by the plaintiff to the effect that the insurer had, in the past, accepted late premiums from the insured and had continued his coverage. The court also noted that an insurer had a clear right to extend the payment of any premium due.[34] These factors, coupled with the language in the expiration notice, gave the court ample reason for allowing the lower court's verdict to stand.

II. UNINSURED MOTORIST CASES

The case of *Squires v. National Grange Mut. Ins. Co.*[35] involved a suit by administrators of deceased insureds against an automobile liability insurer on the uninsured motorist endorsement. The three decedents, whose administrators later brought suit, along with three others were killed when the insured automobile in which they were riding collided head-on with one of three other insured vehicles which were engaged in a race. The

32. Linfors v. Unity Life Ins. Co., 189 S.C. 527, 1 S.E.2d 781 (1939).

33. Welch v. Missouri State Life Ins. Co., 176 S.C. 494, 501, 180 S.E. 447, 450 (1935).

34. 44 C.J.S. *Insurance* § 286 (1945).

35. 247 S.C. 58, 145 S.E.2d 673 (1965).

accident occurred on May 13, 1961. The three administrators filed suit in September 1961 for wrongful death against the three who had been racing. Kennedy, one of the defendants entered into a covenant not to sue with the three plaintiffs. On April 24, 1962, the estate of Effie Johnson, one of the deceased insureds, secured judgment against the remaining two defendants. It appeared that sometime between the date of the collision and the day before the trial, the insurer of the remaining two defendants, Sessions and Hartley, denied coverage to Sessions because he had made false statements in his application. On April 23, the day before the trial of the suit brought on behalf of the estate of Effie Johnson against Sessions and Hartley, counsel for the plaintiffs wrote National Grange Mutual, who had issued the policy on the car in which deceased had been killed, notifying them that the defendant's insurer had denied coverage as to Sessions. On the next day, as noted previously, judgment was obtained on behalf of Effie Johnson's estate against both remaining defendants. On May 1, 1962, National Grange denied any uninsured motorist coverage because they contended that the plaintiffs had violated a condition of the policy whereby the plaintiffs were to forward suit papers to them immediately upon institution of the suits and further they contended that Sessions was not an uninsured motorist. However, the judgment rendered against Sessions was not appealed. The actions on behalf of the other two deceased's estates were tried in December 1962 at which time default judgments were rendered against both Sessions and Hartley in favor of the two plaintiffs. Both of these defendants had been insured by the same carrier, but as mentioned previously, coverage had been denied Sessions. Further, Hartley received no representation from the insurer because prior to December 1962, the insurer had been placed in receivership, and the attorneys representing Hartley had been allowed to withdraw. After establishing liability and the amount of damages against Sessions and Hartley, the plaintiffs sued National Grange on its uninsured motorist indorsement. The defendant denied liability on the ground that the plaintiff had not given notice of his claim under the uninsured motorist endorsement "as soon as practicable" nor had they forwarded copies of suit papers "immediately" as required by conditions in the endorsement. The defendant alleged that the plaintiffs had not forwarded suit papers until April 23,

1962, at which time Sessions was in default and the insurance carrier for Hartley was in receivership and unable to respond to judgment, all to the prejudice of the defendant. The trial court determined that the defendant was liable under its uninsured motorist endorsement for a sum not to exceed $10,000 on the judgment against Sessions to each of the two plaintiffs. The defendant appealed to the South Carolina Supreme Court on the grounds that (1) the policy provisions regarding notice and forwarding of suit papers had not been complied with and (2) that the lower court was in error in not setting a fixed amount of damages.

In deciding on the appellant's first contention, the court relied on a recent South Carolina case[36] and held that the status of a motorist as insured or uninsured is determined not as of the date of the collision but as of the date when the driver's insurer denies coverage. The court pointed out that it had held in the past that words such as "as soon as practicable" meant simply within a reasonable time.[37] Further, the appellant had received notice of the fact that the suit against Sessions was a claim against an uninsured motorist within a reasonable time after the respondents had become aware that Sessions' insurance carrier had denied coverage. It should be noted that this suit had been instituted prior to the 1963 amendments to the Uninsured Motorist Act which considerably clarified the requirements a plaintiff had to meet before proceeding against an uninsured motorist in a suit to determine liability and damages, which he must do before proceeding ex contractu against his insurance carrier on the uninsured motorist endorsement.[38] At this time there was no definite procedure by which an insurance carrier could defend the uninsured motorist in the action ex delicto brought

36. North River Ins. Co. v. Gibson, 244 S.C. 393, 137 S.E.2d 264 (1964).

37. Brown v. State Farm Mut. Ins. Co., 233 S.C. 376, 104 S.E.2d 673 (1958); Edgefield Mfg. Co. v. Maryland Cas. Co., 78 S.C. 73, 58 S.E. 969 (1907). However, where the insurance contract specifies a time within which notice must be given or suit papers forwarded, the insured must comply with the specified time. Free v. United Life & Acc. Ins. Co., 178 S.C. 317, 182 S.E. 754 (1935); Levan v. Metropolitan Life Ins. Co., 138 S.C. 253, 136 S.E. 304 (1927).

38. Recovery under the Uninsured Motorist Act is subject to the condition that the insured establish liability on the part of the uninsured motorist. Such an action is ex delicto and the only issues to be determined therein are the liability and the amount of damage. After judgment is entered against the uninsured motorist, a direct action ex contractu can be brought to recover from the insurance company on its endorsement, and policy defenses may be properly raised by the insurance company. Laird v. Nationwide Ins. Co., 243 S.C. 388, 134 S.E.2d 206 (1964).

by the insured.[39] Section 46-750.18 did provide, however, that "nor may anything be required of the insured except the establishment of legal liability." Under this statute and the policy provision requiring notice as soon as practicable, the court could easily have held that all that the insured was required to do was give notice to his insurer within a reasonable time after he found that the other party was "uninsured." The fact that such notice came after the other party was in default, or even possibly after the issues of liability and damages had already been determined, both of which would be highly prejudicial to the insurer, would be of no consequence. All that mattered was that the insured gave notice within a reasonable time after he learned that the other party was uninsured. The supreme court, in *Hatchett v. Nationwide Mut. Ins. Co.*,[40] recognizing the unjustness in this, said of 46-750.18: "[T]he legislature never intended by this language to hold an insurance company liable without notice or opportunity to investigate or contest the claim."

Any possibility of such a result was eliminated in 1963 by enactment of section 46-750.33.[41] Upon reading *Squires* it may at first seem that the court completely abandoned its position as to the legislative intent behind section 46-750.18 in that notice that Sessions was uninsured was received on April 23, 1962, and his liability to one of the plaintiffs was established on April 24, 1962; however, one must remember that this is *not* the case which was appealed. The case appealed from was heard in December 1962, over seven months after notice was received.

As to the appellants contention regarding the respondent's failure to comply with the condition requiring immediate forwarding of suit papers, it should be noted that the word

39. In Hatchett v. Nationwide Mut. Ins. Co., 244 S.C. 425, 432, 137 S.E.2d 608, 612 (1964), the court, speaking of section 46-750.18 said:

> [T]he statute was completely silent on the procedure available to an insurance company to defend a claim under the Uninsured Motorist Endorsement of the policy. It did not prohibit the insurance company from appearing in behalf of the alleged negligent uninsured motorist, neither did the statute spell out the appropriate procedure to be followed in such case.

40. 244 S.C. 425, 434, 137 S.E.2d 608, 612 (1964).

41. This section provides:

> No action shall be brought under the uninsured motorist provision unless copies of the pleadings in the action establishing such liability are served in the manner provided by law upon the insurance carrier writing such uninsured motorist provision. The insurance carrier shall have the right to appear and defend in the name of the uninsured motorist in any action which may affect its liability, and shall have twenty days after service of process on it in which to make such appearance.

"immediate" used in this sense has been interpreted to mean with reasonable promptness.[42] As with the notice requirement, the court held that the reasonable time issue was to be computed as of the date the motorist became uninsured, not as of the date of the collision or the date suit was instituted. Again the court pointed out that there was no reason to believe that the papers had not been forwarded within a reasonable time after the respondent found that Sessions was uninsured. The court went on to say that not only must the appellant show that the papers were not promptly forwarded but they must also show that such a failure on the plaintiff's part substantially prejudiced the insurance carrier. The two cases cited by the court for the proposition that prejudice must be shown,[43] involve the "cooperation clause" of the liability policy which is totally distinct from the "forwarding of suit papers" clause. The clear weight of authority in South Carolina is in favor of the proposition that failing properly to forward suit papers requires no showing of prejudice, but rather in and of itself affords the insurer a complete defense.[44] The court obviously either intended to change the law or confused the two clauses.

As to the damages issue on appeal, the court held that the trial should have set the amount of damages specifically and not just a maximum amount.

The case of *Morrow v. American Mut. Fire Ins. Co.*[45] involved a most unusual question of uninsured motorist coverage. In this case, the minor son of the plaintiff was killed when the "Go-Kart", which he was riding on a track designed for this purpose, left the track and hit an ice cream truck parked nearby. The truck was not registered or licensed as a mobile vehicle and was being used at the track for selling ice cream. The plaintiff sued the track owner charging him with various negligent and reckless acts, among them furnishing unsafe equipment to minors and allowing the truck to be placed so close to a track with no guard rail. None of the allegations, however, charged the track owner as the owner or operator of the truck. The

42. Edgefield Mfg. Co. v. Maryland Cas. Co., 78 S.C. 73, 58 S.E. 969 (1907).

43. Crook v. State Farm Mut. Ins. Co., 235 S.C. 452, 112 S.E.2d 241 (1960); Pharr v. Canal Ins. Co., 233 S.C. 266, 104 S.E.2d 394 (1958).

44. Free v. United Life & Acc. Ins. Co., 178 S.C. 317, 182 S.E. 754 (1935). See Hatchett v. Nationwide Mut. Ins. Co., 244 S.C. 425, 137 S.E.2d 608 (1964); Boyle Road & Bridge Co. v. American Employers Ins. Co., 195 S.C. 397, 115 S.E.2d 438 (1940).

45. 246 S.C. 495, 144 S.E.2d 489 (1965).

owner of the ice cream truck was also sued. The track owner defaulted but the truck owner who contested the action received a verdict in his favor. Both defendants were uninsured and American Mutual, the plaintiff's insurer, was apprised of the fact but declined to appear on behalf of either defendant. After receiving judgment against the race track owner, the plaintiff sued his insurer under the uninsured motorist endorsement of his policy. The lower court held that there had been no allegation nor had there been any evidence offered to show that the track owner was guilty of any negligence with respect to the ownership or operation of the ice cream truck, and since this was the only vehicle mentioned in the complaint against the insurance company, there was no ground for recovery under the uninsured motorist endorsement.[46] The plaintiff then moved to amend his complaint so that he could proceed on the basis that the "Go-Kart," which was owned by the track owner, was an uninsured motor vehicle within the meaning of the statute. The court denied the motion, expressing the view that the "Go-Kart," being operated as an amusement device on a private track, although uninsured, was nevertheless not an uninsured motor vehicle under the statute.

On appeal the supreme court affirmed the holding of the trial court as to the ice cream truck and noted that the result would have been the same even had the plaintiff been permitted to amend his complaint and allege negligent ownership or operation of the "Go-Kart." The effect of the court's ruling in this case was in keeping with the legislative intent and purpose of the Uninsured Motorist Act which is to provide benefits and protection against the peril of injury by an uninsured motorist, *i.e.*, owner or operator of an uninsured motor vehicle, to an insured motorist, his family and permissive users of his vehicle.[47] The track owner here simply did not come within the class protected against, and the court refused to extend the Uninsured Motorist Act to cover this type of accident.

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46. Section 46-750.33 which is applicable here provides: No such policy or contract shall be so issued or delivered unless it contains a provision by endorsement or otherwise, herein referred to as the uninsured motorist provision, undertaking to pay the insured all sums which he shall be legally entitled to recover as damages from the owner or operator of an uninsured motor vehicle. . . .

47. Laird v. Nationwide Ins. Co., 243 S.C. 388, 134 S.E.2d 206 (1964).

III. STATUTORY INTERPRETATION CASES

In *Toole v. Nationwide Mut. Ins. Co.*,[48] the Fourth Circuit Court of Appeals was presented with a question of South Carolina Law which had never been passed upon by our supreme court. In this case the insurer had issued a liability policy in November 1960. In December 1960 the policy was cancelled for failure to pay the premiums. In February 1961 the driver to whom the policy had been issued was involved in an accident with the plaintiff. In this action the plaintiff contended that the cancellation, although effective between the insurer and the insured, was not effective as to him because the insurer had not complied with section 46-138 of the South Carolina Code.[49] The trial court held that the policy was effectively cancelled as to everyone saying: "The language of section 46-138 providing for notice to be given to the Department *after* a cancellation for a voluntary policy makes it clear that the cancellation of such policy is not conditional upon the statutory notice to the Highway Department."[50]

On appeal, the circuit court affirmed the court below, pointing out that the district court was correct in saying that the plaintiff could not rely on section 46-750.26[51] which sets out the more stringent rules regarding cancellation of a certified policy.

The court, considering the legislative history of section 46-138 said: "We cannot find in the statute which applies to this case any intention of the legislature that the policy should remain in effect as to the general public until the 5 days notice was given."[52]

The basic difference, of course, is in the purpose of the two statutes. In South Carolina, a driver is not compelled to have liability insurance. Under the Uninsured Motorist Act, he has the option of paying fifty dollars into a fund and operating his

48. 353 F.2d 508 (4th Cir. 1965).

49. This section provides that upon termination of insurance by cancellation or failure to renew, notice shall be filed with the Highway Department within five days following the effective date of the cancellation or other termination.

50. Toole v. Nationwide Mut. Ins. Co., 238 F. Supp. 125, 128 (D.S.C. 1965) (Emphasis added.)

51. This section requires that a certified policy cannot be cancelled or terminated unless the insurer gives at least 10 days notice to the Highway Department *before* cancellation or termination. South Carolina Highway Department form 402 prohibits cancellation of a certified policy for failure to pay premiums for a period of at least ninety days following the filing of an SR-22 certification of financial responsibility.

52. Toole v. Nationwide Mut. Ins. Co., 353 F.2d 508, 510 (4th Cir. 1965).

car as an uninsured motorist. Of course, he may buy liability insurance on his own volition if he so desires. If he does his insurance is classed as voluntary or non-certified and its cancellation comes within the ambit of section 46-138, the purpose of which is to give the Highway Department notice that this motorist is no longer insured. The Department will then compel the motorist to pay the required fee or else surrender his registration and tags.

However, under the Safety Responsibility Act of 1952, a motorist who has an accident or whose license has been revoked is required by law[53] to furnish proof of financial responsibility, if he wishes to continue to drive. One of the methods of furnishing such proof is to produce a certificate of liability insurance.[54] This is termed a certified policy and its cancellation is governed by section 46-750.26. The court made it clear that in its eyes, the legislative intent and purpose of section 46-750.26 was altogether different from that of section 46-138, and that the law regarding the termination or cancellation of a policy covered by one section could not be applied to a termination or cancellation of a policy covered by the other.

The court noted that there were no South Carolina cases construing section 46-138 but pointed out that both North Carolina and New York, which have similar statutes, have held that neither defective notice[55] nor failure to give any notice[56] affects the validity of the cancellation.

In *Grain Dealers Mut. Ins. Co. v. Julian*[57] the South Carolina Supreme Court was first faced with the problem of determining who was the legal owner of an automobile before making a subsequent determination as to which of two insurance companies would have to bear certain expenses which arose out of a collision. The action came before the court in a declaratory judgment suit.

The following is a brief summary of the facts: Prior to Christmas 1961, Davis, upon giving his father-in-law, Brissey, a late model car, took Brissey's older model Plymouth in return. Brissey subsequently gave Davis a bill of sale for the Plymouth and thereafter exercised no incident of own-

53. S.C. CODE ANN. § 4-46 (1962).
54. S.C. CODE ANN. § 46-747 (1962).
55. Levinson v. Travelers Indem. Co., 258 N.C. 672, 129 S.E.2d 297 (1963).
56. Kyer v. General Cas. Co. of America, 14 App. Div. 2d 649, 218 N.Y.S.2d 185 (1961).
57. 247 S.C. 89, 145 S.E.2d 685 (1965).

ership over the car. Davis sold the Plymouth to Julian in January 1962 for an agreed sum of 300 dollars, and Julian executed a chattel mortgage creating a lien in favor of Davis and agreed to pay the sale price in twenty-five weekly installments of twelve dollars each. Davis gave Julian the 1961 registration card, the 1962 card having been lost by Brissey. Davis also prepared a bill of sale which Julian picked up later. Julian paid off the note and the chattel mortgage was given back to him. In June 1962 Julian was involved in an accident out of which several suits against him arose. The injured parties at the time of the collision were covered by a policy issued by Lumbermen's Mutual Casualty Co. The policy, of course, had an uninsured motorist provision. Julian carried a "non-owners policy" with Grain Dealers Mutual which contained a provision that coverage would not be afforded to any automobile owned by the named insured. Apparently, at the time of the accident, Julian had not yet procured a certificate of title as required by law.[58] This, of course, meant that the title to the car was still in Brissey's name even though Julian had bought, paid for and driven the car for some six months. Lumberman's Mutual, the insurance carrier for the injured parties, contended that Julian's failure to comply with the Certificate of Title Law, under section 46-150.15[59] of the South Carolina Code, forced the conclusion that Julian was not legally the owner of the car and, therefore, was covered by the policy issued to him by Grain Dealers Mutual. Grain Dealers contended that regardless of whether Julian had complied with the Certificate of Title law, he nevertheless was the true and legal owner of the car, and that therefore they had acted prop-

58. S.C. CODE ANN. § 46-150 (1962). This section provides in § 46-150.15:

How voluntary transfer carried out; when transfer effective.—If an owner, manufacturer or dealer transfers his interest in a vehicle other than by the creation of a security interest, he shall, at the time of the delivery of the vehicle, execute an assignment and warranty of title to the transferee in the space provided therefor on the certificate or as the Department prescribes and cause the certificate and assignment to be mailed or delivered to the transferee or the Department.

Except as provided in § 46-150.16, the transferee shall, promptly after delivery to him of the vehicle, execute the application for a new certificate of title in the space provided therefor on the certificate or as the Department prescribes and cause the certificate to be mailed or delivered to the Department.

Except as provided in § 46-150.16, and as between the parties, a transfer by an owner is not effective until the provisions of this section have been complied with.

59. *Ibid.*

erly in denying coverage for the injury inflicted by his alleged negligent driving.

What the court had to decide was whether section 46-150.15 had to be strictly complied with as the exclusive procedure by which title to a vehicle could be passed, or whether it was merely a regulatory measure not establishing an exclusive method for the transfer of legal title. The court recognized that there is a split of authority in jurisdictions having similar statutes but cited a fourth circuit case[60] which held that the words "except... as between the parties" modified the other provisions of section 46-150.15, and strict compliance was not necessary to transfer ownership. The court also relied on a recent South Carolina case[61] which held that the presumption of ownership which arose from possession of title could be overcome by evidence showing the true owner to be one other than the person whose name appears on the title.

In *Grain Dealers* the court held that even though Julian did not have the title certificate to the Plymouth, he nevertheless was the legal owner. Thus the court followed what can be termed the majority rule, holding that the statute was merely a policy measure that is regulatory in nature.

It would appear that in view of the decision rendered in *Clouse v. American Mut. Liab. Ins. Co.*[62] by the Fourth Circuit Court of Appeals, there is a conflict between that court and the South Carolina Supreme Court on the point decided in the *Grain Dealers* case. In *Clouse*, which was heard prior to the *Grain Dealers* decision, the Fourth Circuit Court noted with regret that the Supreme Court of South Carolina had not had an opportunity to pass on the question before them. *Clouse* involved a situation where a dealer sold a car to an uninsured motorist, but the dealer failed to forward the buyer's application for a certificate of title as required of a dealer by section 46-150.16.[63] The buyer was involved in an accident with the

60. Lynch v. General Acc. Fire & Life Assur. Corp., 327 F.2d 328 (4th Cir. 1964).

61. Bankers Ins. Co. v. Griffin, 244 S.C. 552, 137 S.E.2d 785 (1964).

62. 344 F.2d 18 (4th Cir. 1965). See generally 18 S.C.L. REV. 78 (1966).

63. This section, as mentioned, applies to dealers as opposed to private parties and provides:

> *Same; when dealer purchases vehicle for re-sale.*—If a dealer buys a vehicle and holds it for resale and procures the certificate of title from the owner within ten days after delivery to him of the vehicle, he need not send the Certificate to the Department, but, upon transferring the vehicle to another person other than by creation of a security interest,

plaintiff, who, being unable to recover adequately from the buyer, sued the seller's insurer under a garage liability policy. The buyer contended that the seller's failure to comply with the above mentioned statute continued him as the owner of the car and subjected his insurer to liability under the omnibus clause of its liability policy which covered any automobile owned by the insured. The district court held for the defendant insurer stating that since there was authority for the proposition that a certificate of title was not conclusive of ownership, the court was not bound to reason that lack of title was conclusive that legal ownership was in another.[64] On appeal, the district court was overruled, the circuit court saying:

> We think section 46-150.16 when considered in conjunction with the other sections of the South Carolina Motor Vehicle Registration and Licensing Act and particularly section 46-150.15 indicates a legislative intent to hold the transfer [of ownership] ineffectual, certainly to the extent necessary to hold the insurance carrier [of the seller] liable . . . unless there is compliance with its terms by the dealer transfer.[65]

Though the court was dealing with a factual situation different from that in the *Grain Dealers* case, the statutes involved were very similar, and the legislative purpose and intent ascribed to one would of necessity be ascribed to the other. The court in *Clouse* did make the statement that:

> We have no doubt but that [the buyer] was the principal owner and was certainly primarily liable, but we simply hold that [the seller's] failure to comply with the affirmative obligation placed upon him by the South Carolina statute also makes his insurance carrier financially responsible for the plaintiff's judgment.[66]

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shall promptly execute the assignment and warranty of title by a dealer, showing the names and addresses of the transferee and of any lienholder holding a security interest created or reserved at the time of resale and the date of his security agreement, in the spaces provided therefor on the certificate or as the Department prescribes, and mail or deliver the certificate to the Department with the transferee's application for a new certificate.

64. Bankers Ins. Co. v. Griffin, 244 S.C. 552, 137 S.E.2d 785 (1964).

65. Clouse v. American Mut. Liab. Ins. Co., 344 F.2d 18, 20-21 (4th Cir. 1965).

66. *Id.* at 22.

This might make it appear that possibly the two decisions are not so much in conflict were it not for the court's statement in *Grain Dealers* that:

> We have *no statute* which makes void transfers or sales of motor vehicles which are not made in compliance with the terms of the Title Certificate law. Therefore, title to a motor vehicle passes to a purchaser notwithstanding the want of compliance with the Title Certificate law.[67]

In view of this language, it seems logical to assume that if the South Carolina Supreme Court had been presented with the question which arose in *Clouse* under section 46-150.16, it would have held for the defendant finding legal ownership in the buyer and therefore no ground on which to charge the seller's insurance carrier with liability.

IV. Omnibus Clause Cases

During the period surveyed, suits arising out of claims made under the omnibus clause of liability policies came before both the South Carolina Supreme Court[68] and our Federal District Court.[69] The South Carolina rule in this area was well established by two earlier cases.[70] This rule is in essence that to bring a person within the coverage of the omnibus provision as an additional insured, it must first be determined that at the time and place of the accident, the persons had express or implied permission to use the automobile, and that the permission originated in the language or conduct of the named insured or someone with authority to bind him in this respect. The rule must be applied to varied factual situations, but in the recent cases surveyed it was not changed to any notable extent.

Worthy of note is the fact that there are other jurisdictions which apply the "hell or high water rule" that permission for one use is permission for all or any use. Therefore, regardless of what the user was doing at the time of a collision or other

67. Grain Dealers Mut. Ins. Co. v. Julian, 247 S.C. 89, 145 S.E.2d 685 (1965) (Emphasis added.)

68. Crenshaw v. Harleysville Mut. Cas. Co., 246 S.C. 549, 144 S.E.2d 810 (1965); Montgomery v. Employers Mut. Liab. Ins. Co., 247 S.C. 46, 145 (1965) (Emphasis added.)

69. St. Paul Fire & Marine Ins. Co. v. Wiley, 251 F. Supp. 577 (D.S.C. 1966).

70. Eagle Fire Co. v. Mullins, 238 S.C. 272, 120 S.E.2d 1 (1961); Rakestraw v. Allstate Ins. Co., 238 S.C. 217, 119 S.E.2d 746 (1961).

occurrance, if he was driving with initial permission from the named insured, he would come within the ambit of coverage provided by the omnibus clause.[71]

One case involving the omnibus clause that is worthy of particular note is *American Ins. Co. v. Durden*[72] which is actually more important because it deals with the problem of excess insurance. The First National Bank of South Carolina repossessed a car, then through an agent bought the car at public auction. Durden, a bank employee, had trouble with his own car and was allowed to take the repossessed car for the weekend for his personal use. During this weekend, Durden was involved in a collision with an uninsured motorist who was charged with reckless driving. The problems in this case arose out of the fact that Durden had an insurance policy which provided him with uninsured motorist protection *and* contained an "other automobiles" clause. In addition, the bank, Durden's employer, had insurance on its automobiles containing both uninsured motorist protection and an omnibus clause insuring those who drive the insured automobile with permission from the bank. Thus there were two insurers, both of whom forsaw this possibility; therefore, each had clauses in the policy which applied to "excess" or "other" insurance. Durden's policy provided: "However, the insurance shall be excess insurance over any other valid and collectible insurance with respect to (1) temporary substitute automobile or a non-owned automobile. . . ."[73]

Thus this policy purported to be only excess insurance. The bank's policy provided:

> If the insured [driver covered under omnibus clause] has other insurance against a loss covered by this policy the company shall not be liable under this policy for a greater proportion of such loss than the applicable limit of liability stated in the declaration bears to the total applicable limit of liability of all valid and collectible insurance against such loss. . . .[74]

71. See, *e.g.*, Dickinson v. Maryland Cas. Co., 101 Conn. 369, 125 Atl. 866 (1924); Stovall v. New York Indem. Co., 157 Tenn. 301, 8 S.W.2d 473 (1928).

72. 249 F. Supp. 750 (D.S.C. 1965).

73. *Id.* at 753.

74. *Ibid.*

Under this provision the insurer would pro-rate his coverage on the basis of the total of all valid and collectible insurance against the loss.

In the declaratory judgment action brought before the court, the bank's insurer's contention was that the policy in *no way* provided coverage because there was an exclusion in its policy which applied to repossessed automobiles which were put to personal use. The court quickly disposed of this contention holding that the automobile ceased to be repossessed and became "owned" when the bank's agent purchased it for the bank at public auction.

The next problem was the more difficult one of which insurer was primarily and which was secondarily "on the risk." The court pointed out that there were no South Carolina decisions on this problem but cited an excellent opinion by the Fourth Circuit Court of Appeals.[75] That case was similar to the one at bar in that the owner's (in that case lessor's) insurer had a pro rata "other insurance" clause in case there was other valid and collectible insurance, while the driver's (lessee's) insurer purported to insure for only the *excess* in case there was such other insurance. The court held that the owner-lessor's insurer afforded primary coverage and that the driver-lessee's insurance would have to afford coverage only if the other insurance protection, when fully exhausted, left a deficiency.

The court in *Durden* also declared that the owner's insurer was primarily liable and, quoting from Appleman's work on Insurance Law to point out that the "excess" and "pro rata" clauses were not in conflict, said:

> It has been held that where the owner of an automobile or truck has a policy with an omnibus clause, and the additional insured also has a non-ownership policy which provides that it shall only constitute excess coverage over and above any *other valid, collectible insurance*, the owner's insurer has primary liability. In such case, the liability of the excess insurer does not arise until the limits of the collectible insurance under the primary policy have been exceeded. It should be noted that under this rule the courts give no application to the other insurance clauses in the primary policy, which provides that if the additional in-

75. American Sur. Co. v. Canal Ins. Co., 258 F.2d 934 (4th Cir. 1958).

> sured has other valid and collectible insurance, he shall not be covered by the primary policy. That is because the *Insurance under the excess coverage policy is not regarded as other collectible insurance*, as it is not available to the insured until the primary policy has been exhausted. Or, to put it another way, a non-ownership clause, with an excess coverage provision, does not constitute other valid and collectible insurance within the meaning of a primary policy with an omnibus clause.[76]

Thus the court found no real conflict between the pro rata and excess clauses, because under the law applicable to this situation the pro rata clause in the primary (or owner's) policy is disregarded, and the excess clause in the secondary policy controls the situation.[77]

V. HEALTH AND ACCIDENT AND LIFE INSURANCE

In *Schneider v. Travelers Ins. Co.*[78] an insured plaintiff was totally disabled on October 12, 1957, and received full benefits at the rate of 250 dollars per month from December 12, 1957, through May 27, 1958. On the latter date, the plaintiff, with the advice and consent of his doctors, took a clerical job on a trial basis. The insurer was notified of this fact and on May 27 paid the plaintiff 125 dollars for the fifteen day period May 12-27. The parties both understood that the payments would cease while the plaintiff was able to work. After this date the plaintiff paid no more premiums on the policy. The plaintiff kept the job for ten months and then was discharged because he could not satisfactorily perform the work required of him due to the injuries and their after effects. He notified the defendant and demanded resumption of the benefits. The insurer refused on the grounds that: (1) the plaintiff was no longer permanently disabled, (2) the final payment made to the plaintiff had been in full satisfaction of any debt owed him and (3) the plaintiff had forfeited his rights in the policy by not keeping up the premiums during the time he was working and the policy had

76. 8 APPLEMAN, INSURANCE LAW AND PRACTICE § 4914 (1962). (Emphasis added.) The court in *American Surety* also cited this as authority and cited a number of cases from other jurisdictions as well.

77. For an excellent discussion of the "other insurance" problem, see Watson, *The Other Insurance Dilemma*, 518 INS. L.J. 151 (1966).

78. 246 S.C. 240, 143 S.E.2d 449 (1965).

lapsed as of January 1, 1958. The lower court had granted the defendant-insurer a nonsuit. On appeal the defendant's contentions were as set out above, but the supreme court reversed. As to the respondent's first contention, the court cited a strikingly similar case[79] and held that the issue of permanent disability should have been submitted to the jury. As to the second contention, the court held that at the time the 125 dollars was paid to the plaintiff, this was all that was legally owed him and there was no disputed claim. Since there was no disputed claim there could have been no compromise or settlement of such, and consequently, there was no consideration for the alleged release of defendant from further liability. The court stated: "It has been soundly held that where an insurance company pays only what is then due under its policy as an indemnity for disability, a release from liability for any future claim under its policy is invalid for want of consideration."[80]

As to the respondent's second contention, the court, relying on settled authority,[81] held that if the plaintiff had been disabled before January 1, 1958, as he undoubtedly was, and the disability continued after that date, as it undoubtedly did, the alleged lapse of the policy would have no effect on the insured's obligation to make the prescribed payments.

In the case of *Hood v. Security Ins. Co.*[82] the plaintiff, a radiologist, had applied for a policy of disability insurance on October 1, 1962; the policy had been issued on November 1 without a medical examination. On December 1, 1963, the policy lapsed but was reinstated on December 10. When applying for reinstatement the plaintiff was asked if he was in good health as of that date; he answered yes. He was subsequently disabled by a brain hemorrhage for which he claimed compensation. The defendant denied liability on the ground that the plaintiff had made fraudulent misrepresentations and had concealed material facts when he applied for the insurance and in the application for reinstatement of the policy. It appeared that during October 1962 the plaintiff had become aware of a suspicious mole on his back which he found in November to be malignant.

79. Mann v. Travelers Ins. Co., 176 S.C. 198, 179 S.E. 796 (1935).

80. Schneider v. Travelers Ins. Co., 246 S.C. 240, 250, 143 S.E.2d 449, 454 (1965). *Accord,* Moore v. Maryland Cas. Co., 150 N.C. 153, 63 S.E. 675 (1909); Sutton v. Continental Cas. Co., 168 S.C. 372, 167 S.E. 647 (1933).

81. Prudential Ins. Co. of America v. Calloway, 54 Ga. App. 863, 189 S.E. 545 (1936); 1A APPLEMAN, INSURANCE LAW AND PRACTICE § 644 (1962).

82. 247 S.C. 71, 145 S.E.2d 526 (1966).

The plaintiff was treated for this cancer and according to attending physicians was cured. The defendant contended that plaintiff's answer to the question in the application for reinstatement regarding the state of his health was false and made with intent to deceive. From a judgment in the lower court for the insured, the defendant appealed. It contended that even though the reinstatement application covered only the ten day period from the lapse date, that it was the duty of the respondent to disclose the fact that he had been treated for cancer in order that it could determine whether the respondent was in fact in good health, and that his failure to do so was fraudulent concealment.

The supreme court, in affirming the judgment below, defined the term "good health"[83] as applicable here, and stated that the respondent was asked only for his opinion as to the state of his health. It further pointed out that the reinstatement application only inquired as to the existence of any sickness that the respondent might have suffered since the lapse of the policy, and under previous cases[84] noted that "insurers failure to inquire into facts it considers material to the risk prior to issuance of the policy estops insurer to object to applicant's concealment unless the concealment is tainted with fraudulent intent."[85]

The court, relying on a recent South Carolina case,[86] further held that, under the facts, mere silence on the part of the insured is not considered a concealment that voids the policy.

The case of *Coker v. United Ins. Co. of America*[87] involved a suit for death benefits under a life insurance policy issued to plaintiff's deceased husband. The insurer had refused payment on the ground that within two years prior to the issuance of the policy, the deceased had been treated for cirrhosis of the liver, but that he had not disclosed this material fact. The clause relied on by the defendant insurer provided:

> If the insured . . . within two years before the date hereof has received institutional, hospital, medical or surgical

83. The court defined good health as used in a life insurance policy as meaning "that the applicant has no grave, important or serious disease, and is free from ailment that seriously affects the general soundness and healthfulness of the system." *Id.* at 79, 145 S.E.2d at 530.

84. Graham v. Aetna Ins. Co., 243 S.C. 108, 132 S.E.2d 273 (1963). See Dixon v. Standard Mut. Life Ins. Co., 206 S.C. 241, 33 S.E.2d 516 (1945).

85. Hood v. Security Ins. Co., 247 S.C. 71, 79, 145 S.E.2d 526, 531 (1966).

86. Graham v. Aetna Ins. Co., 243 S.C. 108, 132 S.E.2d 273 (1963).

87. 247 S.C. 271, 146 S.E.2d 868 (1966).

> treatment or attention and the insured or any claimant under this policy *fails to show* that the condition occasioning such treatment or attention was not of a serious nature or was not material to the risk, then in any case heretofore mentioned within two years from the date of this policy . . . the Company may declare this policy void either before or after death of the insured unless such case is waived by the Company in an endorsement on the policy, and the liability of the Company in case of such declaration shall be limited to the return of the premiums paid on the policy. . . .[88]

It appears from the evidence that the deceased had been treated in a hospital for cirrhosis of the liver within two years prior to the issuance of the policy and that he had died within two years after the date of issuance from the same malady. The lower court had overruled plaintiff's demurrer to the defendant's answer and from that judgment she appealed. The South Carolina Supreme Court affirmed noting that in previous cases[89] they had approved policy provisions similar to the "voidable clause" here in question and that the insurer was entitled to void the policy under the facts presented.

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88. *Id.* at 274, 146 S.E.2d at 867 (Emphasis added.)

89. The court upheld similar clauses as valid and enforceable in the absence of a conflict with statutes in the cases of Jones v. Metropolitan Life Ins. Co., 206 S.C. 139, 33 S.E.2d 384 (1945); Weston v. Metropolitan Life Ins. Co., 206 S.C. 128, 33 S.E.2d 386 (1945); Grant v. Metropolitan Life Ins. Co., 194 S.C. 25, 9 S.E.2d 41 (1940).