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Insurance

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INSURANCE

Insurance litigation was again prolific (25 cases in the state supreme court and the federal courts) and moderately significant in South Carolina during the survey period. Though there were few cases of extreme importance, reversing precedents or striking bold new directions, a meaningful proportion of the cases did deal with situations which had never before come to a court for a construction of prevailing South Carolina law.

A. Fire Insurance

Identity of the Insured. Along the miles of beaches that compose South Carolina's justly famous "Grand Strand," innumerable motels blink their neon presence into the seaside twilight, groping for the ever-abundant tourist dollar. One of these motels, located at Horry County's Cherry Grove Beach and known commonly enough as the Ocean View Motel, spawned an interesting question in *Williams v. South Carolina Farm Bureau Mutual Insurance Co.*[1]

The motel was owned by Charlie Williams and M. D. Robinson, but they had leased it to Mack Hamilton for the beach season of 1966 and made the same arrangement for 1967. Hamilton's lease, along with an option to purchase the property, ran from April 15, 1967 through November 15 of that year, but the owners allowed Hamilton to go into possession of the property several months before the lease commenced in order to begin painting and making repairs. The owners not having fire insurance on the motel, Hamilton got in touch with the defendant's local agent[2] to buy a policy. The contract, effective as of December 12, 1966, listed the insured as "Ocean View Motel % Mack A. Hamilton, Jr." and listed Williams as a mortgagee of the property, rather than part owner. When a torrid Valentine's Day blaze destroyed the motel two months later, Williams and Robinson sued on the policy. Though the policy named the insured as "Ocean View Motel", apparently there was no such legal entity.[3]

1. 251 S.C. 464, 163 S.E.2d 212 (1968).
2. The court noted that the agent was "relatively new and inexperienced." *Id.* at 467, 163 S.E.2d at 213.
3. The caption of the case names the plaintiffs Williams and Robinson, and then says "d/b/a Ocean View Motel", but the complaint did not allege and the evidence did not show that the plaintiffs were in fact doing business as Ocean View Motel.

Thus the policy did not contain any named insured, and the question arose, whom did the insurer intend to insure?

The defendant complained that the policy was issued upon reliance on misrepresentations of fact as to the ownership and the insurable interest. But the plaintiffs alleged that the insurer through its agent had knowledge of the lease and option agreement, and thus had waived any defect as to the name stated in the policy. Hamilton, who was named as a defendant in the action, asserted in his answer that the insurer had full knowledge of the true interests of all the parties, and he cross-complained against the insurer, asserting that he was entitled to protection under the policy. The trial court found for the plaintiffs, and the insurer appealed from the trial judge's denial of its motions for judgment *non obstante veredicto* and for a new trial.

The supreme court found authority[4] for the proposition that it is not essential to the effectiveness of a policy that the name of the insured appear, if the insurance company was not misled as to the identity of the applicant. There was obvious conflict in the evidence as to whether the insurer through its agent had full knowledge of the status of the property with respect to its title and the interests of the various parties. Since a new trial was going to be necessary,[5] the court did not discuss the evidence further, save to note that it raised jury questions as to whether the insurer intended to issue the policy for plaintiffs' benefit, and as to whether Hamilton made false representations. Thus the trial judge made no error in refusing to direct a verdict for the insurer.[6]

4. 29 AM. JUR. *Insurance* § 240 (1960) (cited at 163 S.E.2d 214). 43 AM. JUR. 2d *Insurance* § 252 (1969) is to the same effect.

5. The court reversed the case on grounds other than the insurance issue. The insurer's motion for a non-suit as to Hamilton's cross complaint had been granted at the trial on the ground that Hamilton had no insurable interest. Hamilton was, from that moment on, no longer a real party in the case, but plaintiffs' attorney continued to cross-examine him as if he were still a defendant. The court ruled this reversible error.

6. During his closing argument to the jury, plaintiffs' attorney apparently made a prejudicial statement about insurance companies. The brief for plaintiffs-respondents denied that the argument went as appellent restated it, complaining that some statements were repeated out of context. Plaintiffs' attorney, obviously a well-versed layman of the cloth, noted:

> By using words and phrases out of context a different and distorted meaning from that intended can be conveyed. By way of example it can be made to appear that there is in the Bible an admonition to commit suicide. Matthew 27:5 ". . . and [Judas] went away and hanged himself." Luke 10:37: " . . . and Jesus said unto him, go, and do thou likewise."

Brief for Respondents at 12. The supreme court ruled that if plaintiffs' counsel really said what defendant's counsel said he said, the court should have reprimanded counsel and instructed the jury to disregard the argument.

Insurable interest. The issue of insurable interest was raised in *Reid v. Hardware Mutual Insurance Co.*,[7] involving the interest retained by a mortgagor who conveys the mortgaged premises but remains liable on the debt secured by the mortgage. Reid, owner-occupier of the one-family dwelling involved, had bought a fire insurance policy in 1964. The next year, Reid sold the house to Tollison, who assumed the mortgage, but Reid was still personally liable on the note which the mortgage covered. When fire destroyed the residence late in 1965, both Reid and Tollison sued on the policy. The trial court held that Tollison was not covered by the policy[8] because of failure to notify the insurer of the change in ownership. But the insurer was held liable to Reid in the amount of the balance of the mortgage debt owed by her at the time of the fire. In affirming the lower court, the supreme court held that Reid continued to have an insurable interest: "The insurable interest that a mortgagor has in real property is not defeated by a voluntary sale and conveyance of the premises as long as he is personally liable for the payment of the mortgage debt."[9]

Vacancy Provision. A not infrequent provision in fire insurance policies provides that coverage on the insured premises will be suspended "while a described building whether intended for occupancy by owner or tenant is vacant or unoccupied beyond a period of sixty consecutive days." This precise exclusionary clause came before the court for interpretation in *Rainwater v. Maryland Casualty Co.*[10] The plaintiff was involved with several service stations, some of which were owner-operated and some of which were leased. The particular store involved in this case ceased to operate as a service station-truck stop on September 20, 1965, when the tenant left. On December 12 of that year, the building was destroyed by fire. The insurers denied liability, contending that the premises had been either vacant or unoc-

7. 166 S.E.2d 317 (S.C. 1969).
8. At the time of the conveyance, the policy was not transferred by Reid to Tollison.
9. 166 S.E.2d at 319. Apparently this is the first time this precise holding has been made in South Carolina. The court found South Carolina authority for the general proposition that anyone has an insurable interest in property who derives a benefit from its existence or would suffer loss from its destruction. Crook v. Hartford Fire Ins. Co., 175 S.C. 42, 178 S.E. 254 (1935). But no case from this jurisdiction is cited for the proposition that a mortgagor who has sold the premises, being still liable for the mortgage debt, has an insurable interest in the property. The court relied primarily on Baughman v. Niagara Fire Ins. Co., 163 Minn. 300, 204 N.W. 321 (1925). Another aspect of *Reid* is discussed *infra* at 587.
10. 166 S.E.2d 546 (S.C. 1969).

cupied within the meaning of the exclusionary clause for over sixty days.

The supreme court, in affirming the trial court's decision for the plaintiff,[11] considered the following facts pertinent: though the building had ceased to operate as a service station-truck stop, various items of equipment, tools and merchandise related to the use of the premises remained there; the building remained equipped and ready for use and was in fact used by the plaintiff and his employees on numerous occasions; though the building was not open to the public, the plaintiff was "surveying the situation" to decide whether to lease the building again or open it himself, and in this connection was frequently on the premises.

The insurers, while practically conceding that the building was not vacant, grounded their defense on the argument that the premises were unoccupied. Though the argument is not precisely stated thus, the insurers seemed to be contending in effect that the station had to be open to the public to be occupied within the meaning of the policy. The court, lacking South Carolina precedent for the interpretation of the clause,[12] found ample authority from other jurisdictions that "vacancy" implies entire abandonment, as distinguished from the temporary cessation of customary use. "Unoccupied", a term distinct from "vacant", means lack of habitual human presence. Applying these definitions to the facts, the court had no trouble in finding as a matter of law that the building was neither vacant nor unoccupied.

The insurers' best argument was that the description of the premises in the policies, "the two story brick and CB building with standard roof occupied as a gas service station,"[13] was a condition suspending coverage when it was no longer so occupied. But the court held that the phrase "occupied as a gas service station" was for identification purposes only and did not prescribe a condition of coverage. Similarly, though endorsements attached to the policies included the words "occupied for Retail Automobile Filling Station purposes only," the court ruled that the oc-

11. The supreme court merely rendered a four-paragraph per curiam opinion, adopting and repeating part of Judge Baker's trial court order.
12. Apparently this is the first time "vacant" and "unoccupied" have come before the South Carolina court in such a context. Judge Baker cites no South Carolina authorities in his order. WEST'S SOUTH CAROLINA DIGEST *Words and Phrases* has no citation under "unoccupied" and the only cases listed under "vacant" or "vacancy" have to do with the absence of an officeholder from a political position.
13. 166 S.E.2d 546, 548.

cupancy referred to here was in the sense of "holding or keeping for use," and not in the absolute construction of "using or making use of." Such descriptions of the building were not sufficient for the insurers to avoid liability by alleging failure to occupy for a specific purpose.[14]

Warranties — A Promise For Now. A warranty, which in insurance law is a statement, description or undertaking on the part of the insured in the policy relating contractually to the risk insured against, is generally one of two kinds—"affirmative", which asserts the existence of a fact or condition and appears on the face of the policy, or "promissory", an absolute undertaking by the insured in the policy that certain facts or conditions pertaining to the risk shall continue.[15] In *Reid v. Hardware Mutual Insurance Co.*, [16] the court held that the policy's description of the insured dwelling as "owner occupied" was merely an affirmative warranty by the insured that the dwelling was so occupied when the policy was entered into, and not a continuing or promissory warranty that it would so remain.[17]

Waiver and Estoppel — Ignorance of Fact Is a Good Excuse. In another case involving a vacancy provision,[18] the plaintiff in *Washington Realty Co. v. American Mutual Fire Insurance Co.*[19] had lost for purposes of appeal the argument that the buildings were not vacant,[20] and so the appeal was predicated on the assertion that the insurer had waived and was estopped from asserting the vacancy provision. The insurer-defendant had in 1958 issued to the realtor-plaintiff a fire policy containing the usual 60-day vacancy provision. The policy covered two buildings owned by the plaintiff on Charleston's King Street. In 1962, one of the

14. *See* Stivers v. National Am. Ins. Co., 247 F.2d 921 (9th Cir. 1957).
15. 43 AM. JUR. 2d *Insurance* §§ 744, 745 (1969). Frequent recourse is had throughout this paper to Volumes 43 and 44 of AM. JUR. 2d for general statements of insurance law. These volumes are cited because they are the most recent such references — both were published in 1969 — and because their broad overview of the subject provides an excellent jumping-off point for a fuller discussion of the principles involved.
16. 166 S.E.2d 317 (S.C. 1969). For a summary of the facts of this case and the discussion of another issue raised by it, see p. 585 *supra*.
17. No South Carolina authority is cited for this proposition. For an example of a promissory warranty, see *Evans v. Century Ins. Co.*, 201 S. C. 273, 22 S.E.2d 877 (1942).
18. *See also* Rainwater v. Maryland Cas. Co., 166 S.E.2d 546 (S.C. 1969), discussed *supra* at 585.
19. 167 S.E.2d 617 (S.C. 1969).
20. The transcript of the trial court record had been prepared by plaintiff's prior counsel, who did not appeal from any of the trial judge's findings of fact — one of which was that the buildings were vacant at the time of the fire. Record at 3, 13-16, 25.

buildings became vacant. In 1963, the insurer renewed the fire policy. In 1964, the other building became vacant. A 1966 fire damaged both buildings, and the insurer denied liability, properly invoking the vacancy clause.

The plaintiff-appellant contended that the insurer had waived the vacancy provision because no inquiry was made into the status of the buildings when the policy was renewed. Though one of the buildings was actually vacant at the time of the renewal, the trial judge, sitting also as finder of fact, found that the insurer had no knowledge of such vacancy at that time. The insurer, falling back on the maxim that a waiver must be an intentional relinquishment of a known right, contended that since there was no knowledge of the vacancy, then the doctrine of waiver could not apply. But the plaintiff pushed a step farther:

> Before renewing the Policy five years later, [defendant's] agent . . . should have inquired, and if he had pursued this diligently, he clearly would have come up with the knowledge that on June 18, 1963, the clothing store had moved out of 422 King Street.[21]

The insurer's counsel replied:

> Apparently the thrust of appellant's argument is that even though an agent has no knowledge of a vacancy, he is charged with that knowledge if an actual inspection would have revealed it. There is no case that we have found in America that supports this contention . . . ."[22]

The court agreed with the insurer, stating that the insurer, without knowledge of the vacancy, was under no duty to inquire into conditions which might later exclude coverage.[23]

Plaintiff's appeal on the grounds of estoppel arose from these facts: the property involved was covered by a mortgage, and upon the issuance of the policy the insurer sent the original policy to the mortgagee, merely forwarding a "memorandum of insurance" to the plaintiff-owners. The policy itself contained the occupancy provision, but the memorandum did not. The plaintiff thus asserted that the insurer's failure to include the occupancy clause in the memorandum estopped the insurer from relying on

21. Brief for Appellant at 6.
22. Brief for Respondent at 5.
23. Though the respondent's brief claimed there was no American authority that supported plaintiff's contention, the court was able to cite no authority that supported its converse.

the defense. Though the question was actually rendered moot by stipulations in the transcript,[24] the court's dictum explained that since plaintiff's general manager did not read the memorandum carefully, did not rely on it, and was not misled by the omission of the occupancy provision, plaintiff had not carried its burden of proof in asserting the estoppel.

B. LIFE AND ACCIDENT INSURANCE

Public Policy — Life Insurance For A Dead Man. Perhaps the most controversial case to arise during the survey period was *Dixon v. Western Union Assurance Co.*,[25] which presented a rather bizarre factual situation. Sometime during the first two weeks of February, 1966, Western Union sent the Dixons, parents of a serviceman stationed in Vietnam, a letter soliciting their purchase of a life insurance policy on their son. "If your boy is, now, to the best of your knowledge in good health, he will be permanently insured in war and peace . . .", the letter said, and it further stated, "The policy will then be in force as of the date your envelope containing your premium is postmarked."[26] The Dixons decided to buy the insurance, and completed Western Union's "Ownership Certificate", which was in effect an application for insurance and was to be returned to the insurer with the first premium. The document said,

> Upon the first premium being mailed [the insurer] recognizes you as the owner and beneficiary of this policy . . . . To the best of your knowledge the insured serviceman is in good health. . . . The policy will then be in force as of the date your premium is postmarked.[27]

The Dixons thus completed the ownership certificate and mailed it with a money order for the first premium. The envelope was postmarked, "Hartsville, S.C., February 14, . . . P.M., 1966." On February 14, 1966, at 12:00 noon Vietnam time or 1:00 a.m. Eastern Standard Time, the Dixons' son was killed in action. The parents were notified the next day.

The policy itself contained the following pertinent paragraphs:

24. "This issue is precluded by the unchallenged factual findings of the trial judge that no prejudice resulted to plaintiff from anything in the memorandum." 167 S.E.2d 617, 619 (S.C. 1969); *see* Record at 22. *See also* note 20 *supra*.

25. 251 S.C. 511, 164 S.E.2d 214 (1968).

26. *Id.* at 515, 164 S.E.2d at 216. The court quotes the entire letter of solicitation.

27. *Id.* at 516-17, 164 S.E.2d at 217.

> This policy shall take effect on the date the application is mailed; provided, that unless such premium is received at the home office of the company while the insured is alive and in sound health, the liability of the company hereunder shall be limited to the return of any premiums paid hereon.
>
> . . . .
>
> 4. Contract [—] This Instrument (referred to herein as the policy) and the In Force Certificate shall constitute the entire contract of insurance between the parties hereto. All statements made by or on behalf of the insured shall, in the absence of fraud, be deemed representations not warranties . . . . The company shall not be bound by any promise or representation heretofore or hereafter made by or to any agent or person other than the persons above enumerated.[28]

One other significant document was the "In Force Certificate", mailed by the insurer to the Dixons on February 17. It showed the date of the policy's issue to be February 14, and said, "This certificate confirms the In Force Date of your policy, which is the postmarked date of the original application. This certificate is to be attached to and made part of your policy."[29]

The Dixons filed their proof of loss; Western Union disclaimed liability. The outcome of the resulting suit, of course, depended on the resolution of the conflicting documents involved. The plaintiffs attacked head-on the policy's provision as to liability being effected only if the premium was received while the insured was alive. They contended that this provision was inconsistent with the letter of solicitation, which they asserted should be a part of the policy, and with the In Force Certificate, and should therefore be stricken.

Western Union asserted as a defense that the policy was issued without the insured's knowledge or consent, and therefore it should be declared void as a matter of public policy.[30] Said

28. *Id.* at 516, 164 S.E.2d 216-17.
29. *Id.* at 517, 164 S.E.2d at 217.
30. The public policy which the insurer invoked was that the issuance of life insurance on a person without his knowledge or consent might be a source of crime. The defendant relied on Mosely v. American Nat'l Ins. Co., 167 S.C. 112, 166 S.E. 94 (1932), where a wife bought a life policy on her husband without the husband's knowledge or consent and then slipped him arsenic; and on Ramey v. Carolina Life Ins. Co., 244 S.C. 16, 135 S.E.2d 362 (1964), which recognized an exception to the rule, such as where the insurance was bought by parents on the life of their unemancipated minor children. At any rate, the court found the cases distinguishable.

Judge Spruill, whose trial court order was adopted by the supreme court in a per curiam decision:

> The writer sees no reason of public policy to avoid this contract on the life of the plaintiffs' son who was in service overseas. Moreover, the defendant is hardly in a position to assert that by its method of solicitation of business and issuance of policies it is putting many young men in danger of their lives at the hands of their parents.[31]

As to the conflicting policy provision which purported to relieve the insurer of liability if the premium was not received while the insured was alive, the court held that Western Union had waived and was estopped from asserting the clause, in view of the language of the letter of solicitation, the ownership certificate, and the in force certificate. The court relied on the well-established proposition that where there is ambiguity in the parts of an insurance contract, the beneficiaries are entitled to the benefit of the language most favorable to them. Thus the trial court, with the supreme court's blessing, held that the policy became effective as of the date of the mailing of the ownership certificate and first premium,[32] and gave judgment for the plaintiffs as to the face amount of the policy.

The defense's final plea was that a contract to insure a life must be a nullity if the life had in fact already ceased at the time when the contract was made. The court could find no authority for this proposition, and Judge Spruill made an analogy to marine insurance, where a policy may be antedated to cover a loss which may have happened before the issuance of the policy:

> [T]he writer knows of no reason in law or public policy why a policy of life insurance could not be antedated to cover a risk which may already have occurred to a life, when both parties are in ignorance of such loss and are acting in good faith to cover the risk from a time prior to actual issuance of the policy.[33]

Temporary Insurance — Eleven Days in May. When a prospective insured completes the insurer's application forms and

31. 251 S.C. at 520, 164 S.E.2d at 219.
32. "It is to be noted that it is not the time of the postmark which is controlling but the date of the postmark. This being so, it would clearly follow that the policy, by its terms, is to be considered as effective from the beginning of Febraury 14, 1966." 251 S.C. at 521, 164 S.E.2d at 219.
33. *Id.* at 521, 164 S.E.2d at 220.

submits his first premium, he is often given a receipt which affords interim coverage between the date of the application and the actual issuance of the policy. The effectiveness of such a receipt is generally conditioned upon the insurability of the applicant, and the insurance company has the reserved right to determine, in good faith, the applicant's insurability.[34]

A quick-paced sequence of events in *Hamrick v. Life and Casualty Insurance Co.*[35] caused the insurer to attempt to wriggle free from liability on such a receipt, but the court found the company's actions lacking in good faith and reversed the trial court, which had awarded the insurer a judgment *non obstante veredicto* after the jury had found for the plaintiff. A chronology of the events follows: *May 19, 1965* — the insurer's agent solicited Sutton to buy a $5,000 double indemnity life policy. Sutton paid the premium of $18.30 and was issued a receipt affording temporary insurance. *May 20* — Sutton underwent a medical examination and was found to be in good health. *May 21* — Sutton signed Part A of the application, thus putting the insurance into effect according to the terms of the receipt. *May 24* — the insurer's office stamped the application as received. *May 30* — Sutton died from accidental causes. The plaintiffs, beneficiaries under Sutton's policy, sought a $10,000 recovery, but the insurer, who had written a letter disapproving Sutton's application, defended on the ground that no contract of insurance existed. Thus the case turned on whether or not the insurer acted in good faith in rejecting Sutton's application.[36]

Apparently the major South Carolina authority on an insurer's good faith in rejecting an application comes from *Stanton v. Equitable Life Assurance Society*,[37] but the value of that decision is questionable because the court was badly divided.[38] The court quoted from the dissenting opinion the standards for judging the insurer's actions:

34. 43 AM. JUR. 2d *Insurance* § 222 (1969).
35. 165 S.E.2d 567 (S.C. 1969).
36. The plaintiffs on appeal urged the court to adopt the proposition, for which there is a developing trend of authority from other jurisdictions, that a receipt affords temporary insurance until the application is actually rejected and the applicant is notified of the rejection. The court found it unnecessary to adopt such a rule, since the case could be resolved simply on the question of the insurer's good faith.
37. 137 S.C. 396, 135 S.E. 367 (1926).
38. Justice Watts wrote the main opinion, in which Acting Associate Justice Ramage concurred, sustaining a judgment for the plaintiffs on a "binding receipt". Acting Associate Justice Purdy concurred only in the result. Justice Cothran dissented in a lengthy opinion, 137 S.C. 396, 406-433, 135 S.E. 367, 370-380, with which Acting Associate Justice Marion concurred. Justices

> [I]n ordinary business transactions, not involving matters of personal taste and convenience, neither party has the arbitrary right to decide the existence of a particular fact upon which his obligation under the contract depends .... [T]he law requires that in that decision the party who is vested with the power of decision shall act fairly, honestly, and reasonably, in view of all the circumstances, and that the other party shall not be bound by that decision when it is shown that the power of decision has been exercised arbitrarily, capriciously, and unreasonably.[39]

After the accidental death, the plaintiffs' attorney upon inquiry received the following reply from the insurer: "Mr. Sutton's application for insurance was disapproved by our Underwriting Department on the basis of all available facts and circumstances, particularly the occupational exposure that was involved and a history of domestic difficulties."[40] The court, in reviewing the facts pertinent to Sutton's application, found no more "occupational exposure" than that the applicant was a merchant operating a food store-filling station center, where he sold, *inter alia*, hot dogs and beer. His domestic difficulties included one divorce, a separation from his second wife and a return to living with the first wife before the second divorce became final. The insurer's principal witness was a member of its underwriting department, who admitted after some hedging that he was aware that Sutton was already dead when he considered the application. Though this witness testified that he regarded Sutton as a substandard risk, the court concluded that Sutton was satisfactorily insurable under the plan for this policy. The underwriter testified he had refused the application because of criticism of Sutton's drinking habits, but the precise nature of this criticism and its source were vague. Thus the court noted that Sutton's domestic difficulties and occupational exposure, the reasons listed in the insurer's letter to the beneficiaries' attorney for rejecting coverage, had nothing to do with the underwriter's decision.

This insurer was undoubtedly faced with a tempting situation, knowing that the applicant was dead and still having an oppor-

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Cothran and Marion dissented because they believed there was no proof that the insurer acted arbitrarily, capriciously or unreasonably in refusing to accept the application.

39. 165 S.E.2d at 569, *quoting from* Stanton v. Equitable Life Assurance Society, 136 S.C. 396 at 422-23, 135 S.E. 367 at 376 (dissenting opinion).

40. 165 S.E.2d at 570.

tunity to pass on the deceased's insurability, with a $10,000 liability lying in the balance. But if the insurer was attempting to camouflage its real reason for rejecting the application, it performed a highly inept job of sweeping its dirt under the rug, and the court was richly justified in concluding that there was a jury issue as to the insurer's good faith, and in restoring to judgment the jury's verdict for the plaintiffs.

Exclusions — Commas Fraught With Meaning. The federal case of *Grayson v. Aetna Insurance Co.*[41] involved the interpretation of a farm owner's liability policy. Both parties moved for summary judgment on the ground that there was no real issue as to any material fact, and so the court's inquiry was whether or not any issue was actually presented. The insurer had issued the policy under litigation to one Hudson. The plaintiff Grayson was injured in the course of his employment on Hudson's farm, sued Hudson, and got a $25,000 judgment in the state court. Grayson contended that the judgment was within the coverage of the policy and sought to collect his $25,000 from Aetna. The insurer contended that coverage to the plaintiff was precluded by the following policy exclusion:

> (d) under Coverage G, to bodily injury to any farm employee, arising out of and in the course of his employment by the Insured, and under Coverages G and H, to any person, including any residence employee or insured farm employee, [*] (1) if the Insured has in effect on the date of the occurrence a policy providing workmen's compensation or occupational disease benefits therefor, or (2) if benefits therefor are in whole or in part either payable or required to be provided under any workmen's compensation or occuptional disease law; but this subdivision (2) does not apply with respect to Coverage G unless such benefits are payable or required to be provided by the Insured;[42]

It was agreed that at the time of the injury, Hudson had no workmen's compensation insurance nor any that provided occupational disease benefits, and that neither were required by law.

Basically, Aetna contended that the first classification in the above-quoted clause excluded Grayson from coverage. Grayson

41. 291 F. Supp. 720 (D.S.C. 1968).
42. *Id.* at 721-22. Asterisk indicates the crucial comma.

contended that that exclusion only applied if Hudson had the workmen's compensation policy or occupational disease benefits in effect, or if the benefits from such policy or policies were in whole or in part payable or required to be provided for. Each party conjured up elaborate explanations as to why the clause should be interpreted in its favor.

The plaintiff asserted the rule of interpretation that where restrictive words, phrases and commas are involved, (1) no comma should be placed between restrictive clauses and those which they restrict, and (2) a restrictive clause should be set off by a comma only when it applies to several antecedent clauses which are themselves separated by a comma. In this crucial clause, the restrictive clauses as to workmen's compensation or occupational disease benefits *are* set off by commas, and thus under plaintiff's rule of construction, part two, the clauses would apply to both the first ("farm employee") and second ("any person") classes of people, and thus Grayson reasoned the exclusionary clause does not apply.

Aetna pointed out that if the first part of the clause were omitted altogether and the exclusion started off at the point, "under Coverages G and H," then plaintiff's construction would be correct — an employee would be excluded only if he were covered by workmen's compensation. But under this construction, the defense reasoned, the first clause would have no meaning at all. But summoning forth the well-ridden horse that every clause of an insurance contract is intended to have some meaning, Aetna asserted that it is improper to assume that the first clause is without meaning. Thus, the defense argument breathlessly concludes, if any meaning at all is given to the first part of the exclusion, it must be that such injuries to farm employees are excluded generally.

Judge Simons, realizing that discretion is the better part of valor, was not about to declare that these hair-splitting arguments presented "no genuine issue as to any material fact." "[T]he court concludes that the language and punctuation of the exclusionary clause gives rise to conflicting reasonable inferences that may be drawn as to the meaning thereof,"[43] Judge Simons wisely decreed, denying summary judgment to both parties and leaving the argument to the finders of fact.

43. *Id.* at 723.

Sufficiency of Evidence—The Curse of Edward Crosby. Edward Crosby must believe that he is the victim of the cruelest jinx ever visited on a man in Horry County. His belief is not without foundation. On October 2, 1966, Crosby, a farmer, was knocked against a feed trough by a bull. Four days later he was admitted to the Conway hospital with a badly bruised and swollen left leg, and because of it he was unable to work for some time. While in the hospital, Crosby's doctor observed varicose veins in his left leg, though Crosby later testified he had never had varicose veins prior to the accident. Five months later (March 5, 1967) Crosby was on some concrete steps when he was knocked down by a large dog. He was admitted to the hospital three days later complaining of chest pains, and he was subsequently operated on for a hernia of the diaphragm. He left the hospital March 23. On April 23, Crosby was at a pond at his home. When he tried to step into a boat, he fell again, reinjuring his left leg. Back in the hospital four days later, he developed phlebitis in this leg and was treated for this acute condition until May 15, when he was sent home to convalesce.

Crosby sued Prudence Mutual Casualty Co. to collect benefits under his accident policy. The jury awarded Crosby the monthly indemnity provided in the policy for the eight months from October 1966 through May 1967. The insurer appealed, contending that there was not sufficient evidence to establish that Crosby's loss of time was from accident only, and that the only reasonable inference to be drawn from the testimony was that Crosby did not suffer total disability for the period claimed.

In its brief and not very lucid opinion, the supreme court in *Crosby v. Prudence Mutual Casualty Co.*[43A] affirmed Crosby's judgment. The court ruled that the evidence was sufficient to establish that Crosby's loss of time was from the accident only, citing without comment *Kilgore v. Reserve Life Insurance Co.*[44]

43A. 166 S.E.2d 201 (S.C. 1969).

44. 231 S.C. 111, 97 S.E.2d 392 (1957). In *Kilgore* the injured insured sought to recover disability benefits under his policy, and the insurer contended that the disability was caused at least partially by the insured's arthritic condition. The court held that the question of recovery was one for the jury, and found that there was evidence in the very fact that prior to the accident the plaintiff did not suffer from arthritis, but immediately after the fall he became disabled. The doctor's testimony in the case was to the effect that plaintiff's arthritic condition was of long duration, and the accident caused the arthritis to flare up. The supreme court affirmed the plaintiff's recovery, saying "The jury could have concluded from [the physician's] testimony that the arthritic condition was dormant and only became active because of the accident. Such a conclusion would warrant recovery." *Id.* at 116, 97 S.E.2d at 394.

The insurer's argument in *Crosby* rested upon the doctor's testimony that the varicosity of plaintiff's veins was a factor in causing phlebitis. The court held that testimony supported the conclusion that the phlebitis arose while plaintiff was totally disabled from his injuries, and after the phlebitis subsided the disability resulting from the accidents continued. In these circumstances, the insurer would not be relieved of liability even if the temporary, acute phlebitis had been entirely independent of the accidental injuries. The court further held that Crosby's testimony gave the jury sufficient evidence to support the finding as to the duration of the disability.[45]

C. AUTOMOBILE INSURANCE

Theft Coverage — Ambiguity. Hann v. Carolina Casualty Insurance Co.,[46] concerned primarily with the construction of a rather vague policy provision, also had some significant things to say about the proper method for resolving ambiguities in insurance contracts in South Carolina. The insurer had issued a combination policy to Hann, which covered his long-distance tractor-trailer unit. The policy admittedly provided liability insurance for both the tractor and trailer and theft coverage for the tractor. The issue in the case was whether the policy covered theft of the trailer.

Certain policy provisions limited the insurer's liability for theft to $8,000 and included data on the tractor and trailer in the policy section calling for "description of the automobile and facts respecting its purchase by the named insured." The latter section listed only the tractor's date of purchase and its value ($8,000), without including such information on the trailer. The insurer contended that the only reason the trailer was described in the policy was to afford it liability coverage, and since the cost of the tractor and the limit of theft liability were each set at $8,000, it should be clear that the theft coverage was limited to the tractor.

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45. The insurer also argued that Crosby was not under the regular care of a physician for the entire period for which the indemnity was awarded, but this question was not considered because it was not raised by the pleadings:

> The policy provision relied upon [that the insured was to be under the regular care of a doctor? The court does not make clear the provisions of the clause being argued.] is a condition of coverage rather than an element of the policy definition of the term "total disability". Hence, compliance with this condition is a distinct issue from that of the duration of total disability.

166 S.E.2d at 203.

46. 167 S.E.2d 420 (S.C. 1969).

The lower court agreed with the insurer's construction. The supreme court was not so quick to go along with the insurer's theory, finding it "rather a strained construction" at best, and certainly not the only reasonable construction of the policy. Rather, the court concluded that the policy provisions and descriptions gave rise to a patent ambiguity. The court did not hesitate to penalize the insurer for not using simple language to make the policy indisputably clear:

> If it was the intention of the parties to afford no theft coverage for the trailer, it would have been quite simple for the insurer to have inserted in the policy with respect to theft coverage "tractor only", or, following the description of the trailer, to have inserted "insured against liability only".[47]

Instead the policy was enshrouded with doubt, which in South Carolina is adverse for the insurer. "We uniformly give the insured the benefit of any doubt in the construction of the terms used in an insurance policy,"[48] the court stated, holding that the policy thus must be construed as providing theft coverage for the trailer. The trial court was reversed, with the admonition that it should have directed a verdict against the insurer as to liability, and submitted to the jury the question as to the amount of loss.

On the problem of whether the policy's ambiguity presented an issue for the court's determination or one for the jury under proper instructions from the court, Justice Bussey in rendering the court's opinion attempted to clarify possible confusion in the South Carolina precedents. Noting that there is apparent authority for the broad proposition that any kind of ambiguity in an insurance policy presents an issue for the jury, the court found that in many of these instances the court failed to distinguish between patent and latent ambiguities, which difference has important ramifications as to who should resolve the doubt. But Justice Bussey set the record straight:

> [T]his court in a long line of cases dealing with ambiguities in insurance policies, which were in fact patent ambiguities, has held, either expressly or in effect, that the construction of the particular policy was a matter for de-

47. *Id.* at 422.
48. *Id.* at 423.

> termination by the court and that no jury issue was involved.[49]

Thus the court justified its holding that the construction of this policy provision as to liability was for the court, which should have directed a verdict on that issue for the plaintiff.[50]

Liability Insurance — "Arising out of the use". On Christmas Day, 1966, Lee Plaxco drove his car to the Greenville Municipal Airport, from whence he planned a trip in his airplane. Finding his airplane battery too weak to start the engine, the quick-witted Plaxco pulled his car up under the airplane's wing, connected the car battery to the airplane battery with jumper cables, and thus started the airplane engine. But alas, when Plaxco alighted from his plane to disconnect the jumper cables, the airplane's brakes gave way and the resulting unpiloted taxi came to a smashing conclusion against another airplane.

The owners of the damaged plane sued the unfortunate Plaxco for their loss, and Plaxco brought this action against his automobile liability insurer, seeking a declaration as to his insurer's liability for the damage in question. The policy contained the usual clauses obligating the insurer to pay for damages "arising out of the ownership, maintenance or use of any automobile," and to defend any suit against the insured alleging such damages. Thus the ponderous question the court had to consider in *Plaxco v. United States Fidelity & Guaranty Co.*[51] was whether Plaxco's use of his car battery to crank his airplane engine constituted a use of the automobile within the policy's meaning. Justice Lewis for the court concluded that it did not.

The court found nothing in the circumstances to show the necessary causal connection between the automobile battery's use as a source of power and the subsequent forward movement of

49. *Id.* The court cites nine South Carolina cases as authority for this rule, the latest being Columbia College v. Pennsylvania Ins. Co., 250 S.C. 237, 157 S.E.2d 416 (1967).

50. The insurer had counterclaimed in this case, in the event that its denial of coverage of the trailer for theft was defeated, to have the policy reformed on the ground of mutual mistake. Since the trial court had sustained the insurer's first defense, it did not rule on the counterclaim and the supreme court was faced with the resolution of that issue. Reviewing the testimony of the insurer's agent (there was some dispute as to whether the insurance agent who sold the policy to Hann was in fact an agent of the insurer) and of the plaintiff, the court concluded that the evidence tending to prove a mutual mistake fell short of the required clear and convincing burden. The only possible mistake, the court found, was a unilateral error on the insurer's part in affording theft coverage on the trailer. Thus the court refused to reform the policy.

51. 166 S.E.2d 799 (S.C. 1969).

the airplane—"The facts show that the accident resulted from the use of the airplane and not the insured automobile,"[52] the court said matter-of-factly. And since the complaint of the owners of the damaged airplane did not allege facts which revealed any negligent use of the auto, the loss was not within the policy coverage and the insurer was under no obligation to defend.

A more sober case involving the "use of the vehicle" clause in a liability policy was *Home Indemnity Co. v. Harleysville Mutual Insurance Co.*,[53] which considers the effect of a "loading and unloading" clause as an expansion of the "use of the vehicle" coverage. The litigation resulted from the following facts:

Marshall Enterprises was a trucking concern which regularly delivered live chickens to Marshall Farms, where the chickens were processed for market. On September 28, 1964, in accordance with established procedure, Enterprises' driver brought the truck to Farms' premises to be unloaded. Then a Farms employee began driving the truck to the weighing station on the premises, but on the way the truck struck Leroy Garrett, causing personal injury in the agreed sum of $13,500. Home Indemnity was Farms' liability insurer, and Harleysville Mutual was Enterprises' liability insurer, so this action sought a declaratory judgment to determine which insurer was liable to pay for Garrett's injuries. The trial court found against Harleysville.

Harleysville's policy on the trucking company contained the usual provisions for bodily injury liability, an omnibus clause covering any person using the vehicle with the insured's permission, and the following clause: "Use of an automobile includes the loading and unloading thereof."[54] In the court's approach to its decision, the first issue to be decided was whether the accident occurred during "loading and unloading." The court determined that the whole process constituted "loading and unloading" the truck under an application of the "complete operation" doctrine. This theory, as opposed to the "coming to rest" doctrine of "loading and unloading", covers "the entire process involved in the movement of goods from the moment when they are given into the insured's possession until they are turned over at the place of destination to the party to whom delivery is to be made . . . ."[55]

52. *Id.* at 801.
53. 166 S.E.2d 819 (S.C. 1969).
54. *Id.* at 822.
55. *Id.* The court claimed to have "inferentially approved" the "complete operation" doctrine in Wrenn & Outlaw, Inc. v. Employers' Liab. Assurance Corp., 246 S.C. 97, 142 S.E.2d 741 (1965). There a grocery shopper was

Since Harleysville's policy contained the omnibus clause, the court concluded that the loading and unloading clause combined with the omnibus clause to give Enterprise coverage under its Harleysville policy.[56]

The second issue in the case was the construction of an exclusionary endorsement attached to the Harleysville policy, precluding Harleysville from liability if the accident occurring during loading or unloading "occurs on premises . . . owned, rented or controlled either by the person . . . against whom claim is made or suit is brought . . . ."[57] But this exclusion was not to apply if the claim or suit was brought against a bailee of the vehicle. Since the accident occurred on Farms' premises and Garrett had made claim against them, Harleysville would be free of liability because of the exclusionary clause unless Farms was a bailee, in which case the clause would be of no effect. Applying bailment law, the court found that Farms was a bailee, and thus the express language of the exclusionary clause rendered it inapplicable. Thus the court concluded that Harleysville provided coverage for the accident, and reversed the lower court so that judgment was given in favor of Home.[58]

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injured when the grocery store's bag boy slammed the shopper's car door shut on her hand while putting the groceries in her car. The suit was brought by the grocery store to determine if the shopper's liability insurer was liable for the cost of the injury.

> The use to which Miss Coleman [the unfortunate shopper] was putting her car on the day of the accident, grocery shopping, is a use . . . within the contemplation of the parties when the policy was issued. In order to use the automobile for grocery shopping, it was, of course, necessary to load the groceries therein, which, as a matter of course, involved opening and closing the door, all of which was a part and parcel of the use to which the automobile was then being put; a use which we think was within the language and intent of the policy.

Id. at 103, 142 S.E.2d at 743. The plaintiff's policy here also included the loading and unloading clause. The court did not discuss the complete operation or coming to rest doctrines. *Wrenn* is discussed in Kemmerlin, *Insurance, 1964-65 Survey of South Carolina Law*, 18 S.C.L. REV. 68, 72-73 (1966).

56. The court relied on Standard Oil Co. v. Transport Ins. Co., 324 S.W.2d 331 (Tex. Ct. of Civ. App. 1959) for the proposition that an omnibus clause covers third parties engaged in loading and unloading operations, and on 7 AM. JUR. 2d *Automobile Insurance* § 89 (1963) for the proposition that a stranger to the vehicle is covered as an additional insured within the meaning of an omnibus clause.

57. 166 S.E.2d at 823.

58. Justice Brailsford, joined by Justice Bussey, concurred in the result. Justice Brailsford agreed that Harleysville was liable, but he saw no need to delve into the "loading and unloading" rigamarole.

> The injury-producing accident was an ordinary collision between a moving vehicle and a pedestrian. This use of the truck was with the permission of the insured and fastens liability upon the insurer. It is beside the point whether the transportation of the chickens to the scales was also the commencement of the unloading

"With The Permission". Another frequent provision found in automobile liability policies is the coverage the omnibus clause affords to those who drive an automobile with the permission of the insured or of the owner. *Cooper v. Firemen's Fund Insurance Co.*[59] involved the application of two such clauses to the following facts:

While driving a pickup truck owned by O'Neal Tanner, Harry Anderson had a collision with William Cooper, resulting in personal injury and property damage to Cooper. Cooper got a $5,000 judgment against Anderson, then brought suit against Firemen's Fund and State Farm Mutual insurance companies to collect the judgment. Firemen's Fund was Tanner's liability insurer, and this policy included in the definition of "insured" "any person while using the automobile . . . provided the actual use of the automobile is by the named insured or such spouse or with the permission of either." State Farm was Anderson's liability insurer, and its policy extended coverage to Anderson while driving a non-owned automobile, "[p]rovided such use . . . is with the permission of the owner or person in lawful possession of such automobile." The two insurance companies defended on the ground that Anderson was not using Tanner's truck with permission, and they gained a directed verdict on this defense in the trial court. Thus the only issue in *Cooper* was whether there was enough evidence for the plaintiff to get to the jury on the question of whether Anderson was using the truck with Tanner's permission.

On the ample basis of the testimony, the supreme court affirmed the directed verdict, saying that the only inference that could be drawn was that Anderson had no permission to use the truck. The court noted that even implied consent "requires something more than mere sufferance or tolerance without taking steps to prevent the use of the automobile and permission cannot be implied from possession and use of the automobile without the knowledge of the named insured."[60]

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process. . . . In my view, this is a simple use case. Hence, Harleysville provided coverage.

166 S.E.2d at 824. The author agrees with the concurring justices. Most of the "loading and unloading" cases apparently arise when the vehicle involved is in a stable position, rather than in motion. *See* 7 AM. JUR. 2d *Automobile Insurance* § 87 (1963). But here the truck was in motion and the accident was the typical vehicle-pedestrian collision; thus, as Justice Brailsford says, there is no need to invoke the loading and unloading clause.

59. 167 S.E.2d 745 (S.C. 1969).

60. 167 S.E.2d at 747. Cooper also claimed on appeal that the exclusion in the State Farm policy was void because of conflict with S.C. CODE ANN. § 46-750.31 (Supp. 1968), but the question was not properly before the court, having not been raised below, and was not considered.

"Use Off Public Roads". On August 18, 1967, Grady W. Livingston, who was employed at G. D. Livingston's dirt race track, was seated in front of a ticket office near the track when a 1955 Chevrolet racer, driven and owned by W. R. Bonnette, roared past. At that instant a tire broke free from Bonnette's racer and crashed into Livingston, causing his death. The administrator of Livingston's estate subsequently brought action on an automobile liability policy held by the deceased's wife. The policy contained the following agreement:

> For purposes of this policy "land motor vehicle" does not include . . . a farm type tractor, farm machinery or implements, or equipment designed principally for use off public roads.[61]

Thus the issue in the federal district court case of *Livingston v. Nationwide Mutual Insurance Co.*[62] was whether or not Bonnette's car was designed principally for use off public roads. The court considered all the alterations that had been made from the original stock 1955 Chevrolet body style—when Bonnette bought the car, it was without motor or transmission; a 1963 Chevrolet engine and transmission were installed; the wheel centers were removed and replaced with quarter-inch steel plates; the car doors were welded shut; the headlights, tail lights, brake lights, horn, muffler and all glass except the windshield were removed; steel roll bars were inserted; the speedometer and fuel gauge were removed; there was no registration with the state highway department; the vehicle was used solely for racing purposes and was transported from track to track by use of a trailer—and concluded that the original design did not control, and that the car in its altered condition was designed principally for use off public highways.[63]

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61. Livingston v. Nationwide Mut. Ins. Co., 295 F. Supp. 1122, 1124 (D.S.C. 1969).

62. 295 F. Supp. 1122 (D.S.C. 1969).

63. The court relied principally on an Ohio case, Beagle v. Automobile Club Ins. Co., 176 N.E.2d 542 (Ohio Com. Pl. 1960), with an almost indistinguishable fact situation, for its decision.

> It is true that this car was originally designed and sold by the manufacturer as a stock car for use on the highways. But the Court does not feel that its original design is what controls. . . . [T]he fact that it could be driven on the highway, even though [illegally], does not change the fact that the vehicle had been designed for racing purposes.

Id. at 544. Both the Ohio court and the *Livingston* court rejected plaintiff's arguments that the rule *ejusdem generis* be applied to limit the language "or equipment designed principally for use off public roads" to farm type machinery. The district court found that the exclusion "farm type tractor, farm

Certificate of Title, Ownership, and Liability Insurance: Sad Injustice Laid To Rest. United States Fidelity and Guaranty Co. v. Fomby[64] affirms the federal courts' return to reason after the misadventure of *Clouse v. American Mutual Liability Insurance Co.*[65] The *Clouse* court, in making an *Erie*-required interpretation of South Carolina statutes, held that where an automobile dealer did not comply with the statute requiring the dealer, when transferring an auto of which he was not the registered titleholder, to deliver to the highway department documents including certification that the new applicant for title had liability insurance coverage or equivalents, then the dealer retained ownership of the car for purposes of his garage liability policy, making the transferee an omnibus insured under the dealer's policy and thus making the dealer's insurer liable for any torts resulting from the use of that vehicle.[66] In 1968 the South Carolina Supreme Court had its first real chance to deal with *Clouse*, and the state court refused to follow the federal interpretation in *St. Paul Fire & Marine Insurance Co. v. Boykin.*[67] *Boykin* held that the dealer's failure to comply with the title certificate law requirements in regard to delivery of the old certificate of title and application for a new certificate to the state highway department following the sale of a used car to a buyer did not prevent the title from passing to the buyer, and thus the dealer's garage liability policy did not extend coverage to the buyer.

Fomby also involved a garage liability policy and a title in a state of confusion at the time of an accident. In this instance, George Pollard, an employee of Summers Enterprises doing business as AAMCO Transmissions of Columbia, needed a car to commute to work. His employer advanced money to Pollard to buy a used car, the two agreeing that the car would be registered in Summers Enterprises' name until Pollard completed paying the advanced price. Pollard completed payment to Summers on August 20, 1966, and two weeks later he was involved in an accident in which his passenger, George Fomby, was injured. Fomby sued Pollard, seeking $120,000 damages for injuries. Then United

machinery or implements" covered any kind of farm machinery, and if the concluding phrase was to have any meaning at all, it must relate to equipment other than farm equipment.

64. 297 F. Supp. 1153 (D.S.C. 1969).

65. 344 F.2d 18 (4th Cir. 1965).

66. *Clouse* and the pre-*Clouse* cases are discussed in Kemmerlin, *Insurance, 1964-65 Survey of South Carolina Law*, 18 S.C.L. REV. 68, 74-82 (1966).

67. 251 S.C. 236, 161 S.E.2d 818 (1968). *Clouse* and the post-*Clouse* cases including *Boykin* are discussed in *Insurance, 1968 Survey of South Carolina Law*, 20 S.C.L. REV. 590, 610-14 (1968).

States Fidelity and Guaranty, the garage liability insurer for Summers Enterprises, brought suit to determine its responsibility to Fomby. The insurer, relying on *Boykin*, contended it had no liability to the injured.

The facts showed that Pollard clearly exercised ownership of the car, keeping it at his home, financing repairs, and paying operating expenses. However, after the final payment to Summers, Pollard and Summers never completed the process of getting the registration changed.

Judge Hemphill relied solely on *Boykin*, "where the facts are remarkedly similar, the interpretation of the law clear, and the sad injustice of *Clouse* is laid to rest."[68] The court concluded that the failure to register the car in Pollard's name did not negate the clear intention of the parties that the car should belong to Pollard. Thus the insurer was found to have no responsibility to defend Pollard or respond to Fomby.

Omnibus Exclusion. In a one-paragraph per curiam decision of *Heaton v. State Farm Mutual Automobile Insurance Co.*,[69] the Fourth Circuit affirmed Judge Russell's district court opinion,[70] which upheld the validity of an exclusionary provision in the omnibus clause that exempted from coverage an accident involving the use of a non-owned automobile in the automobile business.[71]

Uninsured Motor Vehicle Exclusion: Statutory Confusion. The supreme court decided that a truck which was not covered by liability insurance was not an uninsured motor vehicle in *Jones v. Southern Farm Bureau Casualty Co.*[72] This somewhat paradoxical opinion came out of the following facts:

The plaintiff's intestate, while operating his own automobile which was covered by liability insurance from Southern Farm, was killed in a collision with a truck owned by Florence County and driven by Marlowe, an indigent prisoner. The plaintiff settled with the county, but wished to pursue his claim against Marlowe. Since the county did not have liability coverage on the truck, plaintiff's contention was that the truck was therefore an

68. 297 F. Supp. 1153, 1154 (footnote omitted).
69. 398 F.2d 824 (4th Cir. 1968).
70. 278 F. Supp. 725 (D.S.C. 1968).
71. The district court opinion is discussed in *Contracts, 1968 Survey of South Carolina Law*, 20 S.C.L. REV. 536, 541, and in *Insurance, id.* 590 at 620-22, 625 (n. 109).
72. 251 S.C. 446, 163 S.E.2d 306 (1968).

uninsured motor vehicle, and sought a declaration that Southern Farm must then be obligated to defend the plaintiff's claim against Marlowe under the uninsured motorist provision.

The policy in question contained an exclusionary clause that an uninsured automobile did not include one owned by a state or one of its subdivisions, an exclusion inserted in reliance on Section 46-704 of the South Carolina Code which provides that the Motor Safety Responsibility Act does not apply to state-owned vehicles.[73] The plaintiff conceded that this exclusion applied to the provisions of the act as enacted in 1952, but pointed out that the provisions of the act which provide protection against operators of uninsured automobiles[74] were not enacted until 1959. Thus the plaintiff urged that the state-owned vehicle exclusion did not apply to the more recent legislation.

The court, in a five-paragraph decision which affirmed and reprinted the trial court holding of Judge McGowan, concluded that Section 46-704 applied to all the provisions of the act and dismissed the plaintiff's complaint with this brief explanation:

> It is my conclusion that the provisions of Section 46-704 apply to all the provisions contained in the entire Motor Vehicle Safety Responsibility Act, which provisions constitute Chapter 8 of Title 46 of the 1962 Code, as amended. This is clear from the wording of the Section itself. The title of the Section states: "Chapter Inapplicable to Certain Motor Vehicles." The text of the Section begins with the following: "This Chapter shall not apply with respect to any motor vehicle owned by" the designated political entities.[75]

Justice Bussey filed an impressive dissent, not agreeing that the resolution of the statutes was so simple. Bussey noted that

73. S. C. CODE ANN. § 46-704 (1962) provides: "This chapter shall not apply . . . to any motor vehicle owned by the United States, this State or any political subdivision of this State or any municipality therein. . . ."

74. S.C. CODE ANN. § 46-750.31 (Supp. 1968) provides:

> (3) The term *'uninsured motor vehicle'* means a motor vehicle as to which (a) there is no bodily injury liability insurance and property damage liability insurance. . . .

S.C. CODE ANN. § 46-750.33 (Supp. 1968) 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. . . .

75. 251 S.C. 446, 450, 163 S.E.2d 306, 307 (1968).

from "the plain, clear and unequivocal language" of Section 46-750.31,[76] Florence County's truck was an uninsured motor vehicle. Southern Farm's contention that the truck was not an uninsured vehicle rested solely on Section 46-704,[77] the political exclusion clause. Thus there was a prima facie conflict between the two sections, Justice Bussey declared, necessitating an inquiry into the history of the statutes for proper construction.

Searching the history, Justice Bussey found that Section 46-704 was originally a section of the Motor Safety Responsibility Act of 1952.[78] It originally read, "This act shall not apply . . ." rather than "This chapter shall not apply . . .", *act* becoming *chapter* upon the codification of the 1962 Code. Sections 46-750.31 and -750.33 came from a 1959 enactment,[79] at which time Section 46-704 had not been codified and thus still said *act*, not *chapter*. The 1959 act was the first to contain uninsured motorist provisions; the 1952 act sought to achieve a degree of financial responsibility on the part of tort-feasors. Said Justice Bussey:

> At the time of the adoption of the 1959 Act, I think there was no conflict between Sec. 11 of said Act, providing for uninsured motorist coverage, and Sec. 33 of the 1952 Act which then contained the word "act" rather than the word "chapter" . . . .[80]

Even if there was a conflict, Justice Bussey concluded that the 1959 act's standard repealer eliminated the inconsistency in favor of the more recent legislation; thus the conclusion must be that Section 46-704 did not apply to Section 46-750.31. Further, Justice Bussey found the term "uninsured motor vehicle" defined separately and differently in several places, for obviously different purposes:

> Under the clear and unambiguous language of that definition [Section 46-750.31], enacted expressly for the purpose of determining what constitutes an "uninsured motor vehicle" within the coverage of the required uninsured motorist endorsement, the truck owned by Florence County was an "uninsured motor vehicle".[81]

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76. Set out *supra*, note 74.
77. Set out *supra*, note 73.
78. XLVII S. C. STATS. AT LARGE 1853, 1872 (No. 723, § 33, 1952).
79. LI S.C. STATS. AT LARGE 567 (No. 311, 1959).
80. 251 S.C. 446, 453, 163 S.E.2d 306, 309 (1968).
81. *Id.* at 455, 163 S.E.2d at 310.

Another case concerned with the definition of an "uninsured motor vehicle" was *Gary v. Nationwide Mutual Insurance Co.*[82] Here the plaintiff, who had uninsured motorist coverage from Travelers Insurance Co., was involved in a collision with a tort-feasor insured by Nationwide. The Nationwide policy excluded the operation of a stolen car from its coverage, and the car which collided with the plaintiff had, in fact, been stolen. Thus the exclusionary clause applied so that the stolen vehicle was an "uninsured motor vehicle" under Section 46-750.11(3), since it was then a motor vehicle on which there was no liability insurance. Nationwide had appeared in the trial court for the tort-feasor, but with a full reservation of its rights, and it withdrew when it became clear that its exclusionary clause would have the intended effect. Travelers appealed from the adverse lower court decision, contending that the tort-feasor did not become uninsured until Nationwide withdrew from the case. But the supreme court distinguished Travelers' cited authorities and affirmed the lower court, holding that Travelers would be liable to Gary under the uninsured motorist coverage.

Automatic Insurance Clause: Two for the Price of One. The standard automatic insurance clause found in some liability policies, which provides immediate coverage for new automobiles as they are acquired by the insured, was again before the court[83] in *Washington v. National Service Fire Insurance Co.*[84] On August 30, 1965, National Service had issued liability insurance on a 1957 Ford, listing Marion Boyles and Edna Mae Brown as the named insureds. On December 20, 1965, Boyles and Brown bought a 1961 Chevrolet, but not as a replacement for the Ford. That same day Boyles approached the insurer's agent to secure insurance on the Chevrolet. The agent explained to Boyles that the insurer had ceased to write new business in South Carolina and that no additional vehicles would be covered, so that the newly-acquired Chevrolet could not be added to the existing policy. The agent offered to request a policy endorsement substituting the Chevrolet for the Ford and to seek an additional policy covering the Ford. Boyles agreed to these proposals and paid the agent a premium. On December 23 the agent forwarded the request for the endorsement to the insurer's general agent in Atlanta. On

82. 251 S.C. 530, 164 S.E.2d 213 (1968).
83. For a discussion of two other recent cases involving the automatic insurance provision, see *Insurance, 1968 Survey of South Carolina Law*, 20 S.C.L. REV. 590, 622-25 (1968).
84. 168 S.E.2d 90 (S.C. 1969).

December 24, Brown was driving the Ford and had a collision, resulting in injuries to her passenger Betty Washington. On December 27, the endorsement was issued eliminating the Ford from the policy and adding the Chevrolet.

From these facts the ensuing litigation can easily be foreseen: Washington obtained a default judgment against Brown, then sued the insurer as Brown's liability carrier. Washington obtained a verdict of $10,000 against the insurer, who appealed contending that the endorsement relieved National from liability for the December 24 collision.

The supreme court, in upholding the judgment for Washington, found that only the insurer's general agent could effect an amendment of the policy.[85] Thus neither Boyles' assent to the local agent's suggestions, nor that agent's request for an endorsement, worked to change the policy. Thus, on the day of the accident the Ford was the owned automobile listed in the policy and was covered by its provisions. The court's dictum adds, "The 1961 Chevrolet was also a covered vehicle (not because of a substitution of vehicles) per force the automatic insurance provision of the policy . . . ."[86]

Excess Insurance: A Time To Defend. Insurance policies sometimes provide that as to a particular coverage the policy will give "excess" insurance only. This provision means that the insurance company which issued the policy is not liable for any part of the loss covered by other insurance, but is liable only when the amount of loss is in excess of the coverage provided by the other insurance policy.[87] The issue of when an excess insurer

85. *Id.* at 91-92.
86. *Id.* at 92. Apparently there is some confusion as to the effect of the automatic insurance provision. The court reports that National, apparently at the direction of the South Carolina Insurance Commission, had ceased to write new business in South Carolina, and it notified its local agents that no additional vehicles would be covered. Undoubtedly the agent whom Boyles contacted was acting under this premise when he suggested substituting the Chevrolet for the Ford as the insured automobile and trying to get an assigned risk policy on the Ford. But the court construes the policy as covering both the Ford and the Chevrolet from the time of the acquisition of the Chevrolet, thus making unnecessary the agent's attempts to secure the endorsement for the Chevrolet and find new insurance for the Ford. The court noted that the endorsement sought would be appropriate in a replacement situation, but that it was inappropriate as to the acquisition of an additional car, for which the policy provided automatic coverage without impairment of the insurance on the car already listed in the policy.
87. 44 AM. JUR. 2d *Insurance* § 1815 (1969).

should step into a claim was raised by *Hartford Accident and Indemnity Co. v. South Carolina Insurance Co.*[88]

Hartford had issued automobile liability insurance to Mrs. Tomberlin, with a $20,000 coverage limit for bodily injury for each person injured, and Hartford made the usual promise to defend. The insured and relatives of her household, including son Bedford, were also insured with respect to a non-owned automobile, but the policy provided that as to such a car, the coverage was excess insurance only. Carolina had issued automobile liability insurance to William Cameron, with $10,000 coverage limit for bodily injury for each person injured arising out of the use of the insured car. This policy, which also contained the promise of the insurer to defend, covered as an additional insured any person driving the insured car with the named insured's permission. Thus it came to be that when son Bedford had an accident while driving Cameron's Ford with his permission, Tomberlin was covered by both Carolina (as an additional insured driving Cameron's car) and by Hartford (as Mrs. Tomberlin's relative of the household driving a non-owned auto). By the provisions of the policies, Carolina had primary coverage; Hartford provided excess coverage.

So when the occupants of the other car, the Byrum family, instituted a flurry of tort actions against Tomberlin, whose liability for the accident was clear, Carolina fulfilled its obligation to defend and retained counsel. Hartford took no action. Carolina settled within its policy limits all the Byrum claims except one for injuries, a $40,000 suit. Carolina, wishing to settle this action also, tried to get Hartford to participate in the negotiations. When Hartford refused to take over the defense of the case, Carolina agreed to pay $10,000 on the claim, the limit of its liability under the Cameron policy. Then Carolina, with leave of the court, withdrew from the case. Hartford then took over the defense, but could not negotiate a settlement. The trial resulted in a verdict of $33,000. Hartford paid its $20,000 policy limit, then brought this action against Carolina to recover its cost of the defense of the action following Carolina's withdrawal, contending that its defense had been prejudiced by such withdrawal. Carolina's demurrer to this complaint was sustained, but this action was reversed by the supreme court and the case remanded for

88. 166 S.E.2d 762 (S.C. 1969). The parties are hereinafter referred to simply as "Hartford" and "Carolina".

trial.[89] The case was then referred to a master, who recommended judgment for Carolina. The master's report was affirmed by the lower court and in turn by the supreme court.

The court noted that it is settled law that whether an insurance company is required to defend an action against its insured is determined by the allegations of the complaint in such an action. The insurer must defend the suit if the injured party states a claim for an injury covered by the policy. Since the complaint by the Byrums alleged damages of $40,000, the claim was brought within the liability coverage afforded Tomberlin by both the Carolina and Hartford policies. The court held that Hartford's obligation to defend was absolute—"It became absolute at the time the action was instituted because the allegations of the complaint brought the claim within the coverage of the Hartford policy."[90]

Thus the court observed that when Hartford assumed the defense upon Carolina's withdrawal it was merely beginning to discharge a duty it owed the insured from the beginning. So Hartford had no valid claim to be reimbursed by Carolina for defending the suit—after Carolina paid its policy limit, Hartford alone was liable to pay the remaining obligation for the suit's defense.

Duties Of The Insured (Cooperation Clause): With All Deliberate Non-Cooperation. Cooperation clauses, common provisions in liability policies, require that the insured will cooperate with the insurer by carrying out such insurer's requests as attending hearings and trials, effecting settlements, securing and giv-

89. Hartford Accident and Indem. Co. v. South Carolina Ins. Co., 249 S.C. 120, 153 S.E.2d 124 (1967). In sustaining the demurrer, the trial judge had considered the policies themselves, which had not been made a part of the complaint. In passing on a demurrer, the court is restricted to the facts as they appear in the pleadings. See *Pleadings, 1967 Survey of South Carolina Law,* 19 S.C.L. REV. 611, 615 (1967).

90. 166 S.E.2d 762, 765. The court cites no South Carolina law for this holding, but relies on two recent North Carolina cases, Strickland v. Hughes, 273 N.C. 481, 160 S.E.2d 313 (1968) and Firemen's Fund Ins. Co. v. North Carolina Farm Bureau Mut. Ins. Co., 269 N.C. 358, 152 S.E.2d 513 (1967). The South Carolina federal district court has considered similar excess insurance clauses in two recent declaratory judgment cases, Macloskie v. Royal Indem. Co., 254 F. Supp. 782 (D.S.C. 1966), *aff'd per curiam* 374 F.2d 892 (4th Cir. 1967), and Travelers Indem. Co. v. Dees, 235 F. Supp. 515 (D.S.C. 1964). In *Macloskie,* Georgia law was applied; the court held, *inter alia,* that where the coverage of insured's liability insurer was secondary and excess coverage only, the insurer had no responsibility to defend the insured and its liability was brought into play "only by judgments being obtained against plaintiff in excess of [the primary insurer's] coverage to plaintiff under its policy." 254 F. Supp. at 792. Thus the district court seemed to apply a judgment standard; the *Hartford* court applied a pleadings standard.

ing evidence, and the like. A material breach of this provision by the insured constitutes a defense to liability on the policy.[91] Although there appears to be some minor split of authority on the matter in American jurisdictions,[92] in South Carolina the insurer has the burden of proving the breach of a cooperation clause.[93]

The insurer failed to meet this burden, according to the supreme court, in *Evans v. American Home Assurance Co.*[94] Evans was involved in an auto collision with Walton in Greenville on February 18, 1967. At the time Walton was a seaman stationed at Charleston and was driving an Econo-Car. He was arrested and charged with reckless driving and leaving the scene of a collision. Evans commenced suit against Walton and Econo-Car the following April. At that time Walton was AWOL from the Navy and was served through the Chief Highway Commissioner.[95] An attorney was retained to represent Econo-Car and Walton, and he found out in July that Walton was AWOL. The attorney made no further attempt to locate him until shortly before trial, which was to come up in the Greenville County Court term beginning on August 28.

August 24 (a.m.) — the attorney moved unsuccessfully for a continuance on the ground that Walton could not be found. *August 24 (p.m.)* — as a result of a private detective's investigation, Walton got in touch with the attorney. *August 25* — the attorney wrote Walton at several possible addresses, emphasizing the importance of his being in court on the 28th. *August 26* — the attorney interviewed Walton at his sister's home, and a constable served a subpoena on Walton. Walton was "friendly and cooperative" and told the attorney that he would be in court on the 28th. *August 28* — Walton did not show up for court. His trial was to come up the next day, and the attorney again made unavailing attempts to contact him. *August 29* — Walton did not show up for court. At the trial, the attorney did not inform the court that Walton had been located after the motion for continuance had been refused. The motion to continue was not renewed and no request was made for an opportunity to investigate Wal-

91. 44 AM. JUR. 2d *Insurance* § 1560 (1969).
92. *Id.* at § 1563.
93. See the authorities reviewed in Crook v. State Farm Mut. Auto. Ins. Co., 235 S.C. 452, 112 S.E.2d 241 (1960).
94. 166 S.E.2d 811 (S.C. 1969).
95. Pursuant to S.C. CODE ANN. § 10-431 (1962).

ton's failure to attend trial. The record is silent as to any reason for Walton's failure to show up.

Thus Evans gained a judgment against Walton and sued American Home, liability carrier for Econo-Car. The insurer disclaimed liability on the ground that Walton had violated the cooperation clause. The trial court ruled that the insurer failed to prove a violation of the cooperation clause, and the supreme court affirmed.

The court found "settled law" that a liability insurer has a defense on the ground that the insured has violated the cooperation clause only when the breach has been material and has resulted in substantial prejudice to the insurer. The insurer must be "reasonable in its demands and diligent in its efforts" to get the insured to cooperate. Thus the court held that Walton's "mere failure to appear", in spite of the attorney's frenzied efforts to secure his appearance at the trial, did not establish that he was deliberately non-cooperative. The insurer had the burden to establish that the tort-feasor's failure to attend trial was his deliberate act, and the court chose not to find as a matter of law that the insurer had met the burden. The court preferred to conjecture that "Walton may have become ill, met with foul play or been arrested by military police and returned to the Naval Base in Charleston."[96]

D. CONTRIBUTION BETWEEN INSURERS OF JOINT TORT-FEASORS

An insurance company found a pregnant phrase in a 1918 South Carolina decision, to the effect that one of two joint tort-feasors is liable for only half the judgment, and nursed it all the way to the supreme court in *American Fidelity Fire Insurance Co. v. Hartford Accident & Indemnity Co.*[97] The injured party in an automobile collision had recovered a $4,000 judgment against two joint tort-feasors, one insured and one uninsured. American, the insurer of the insured tort-feasor, paid $2,000 to the judgment creditor and brought this declaratory judgment action seeking a verdict that Hartford, the injured party's liability carrier, was liable for the balance. American based its contention that it was liable for only half the judgment on the following language from *Brown v. Southern Railway*:[98] "In such cases the rule of law is that one of the two joint wrongdoers

96. 166 S.E.2d at 814.
97. 251 S.C. 507, 163 S.E.2d 926 (1968).
98. 111 S.C. 140, 96 S.E. 701 (1918).

can have no contribution from the other. Both the defendants are liable to pay the recovery in equal parts."[99]

But the court was unimpressed by American's find and ruled the appeal a miscarriage. "The language quoted from the opinion was not addressed to any issue involved on the appeal and was not intended to convey the meaning attributed to it by American. Thus construed, it is athwart the settled law of this jurisdiction . . . ."[100] Rather, the court preferred to deliver a more recent case, *Travelers Insurance Co. v. Allstate Insurance Co.*,[101] for the proposition that one injured by the negligence of joint tort-feasors may elect the one against whom he will proceed and can pursue the collection of a judgment against one or more of the judgment debtors.

E. FRAUD

"Don't sign it until you read it," is a popular statement of a valid caveat. But what if you read it, don't understand it, rely on somebody's explanation of it, and then sign it? The court got the chance to consider such a rather unique situation in *Guy v. National Old Line Insurance Co.*[102]

Guy brought an action for fraud and deceit, alleging false representations by the insurer upon Guy's purchase of a "Foundation Investment Policy" in 1951. Guy's complaint contended that the insurer had falsely represented that if the policy were kept in effect for ten years, then Guy would receive $2,076. The complaint alleged that this representation was false and that it had induced Guy to take out the policy, and it further asserted that the truth or falsity of the representation could not be determined from reading the policy. The policy was not attached to or made part of the complaint. The insurer demurred to the complaint, contending that there were no facts sufficient to constitute a cause of action because it appeared on the complaint's face that the policy contained no mention of the amount allegedly represented as a benefit of the policy, and that Guy had failed to take advantage of his opportunity and means to protect his own interest. The trail court overruled the demurrer, and the insurer

99. *Id.* at 152, 96 S.E. at 704. The court had found the railroad company and the city of Spartanburg to be "joint wrongdoers" for imperfectly planning and constructing a railroad trestle.
100. 251 S.C. 507, 510, 163 S.E.2d 926, 927.
101. 249 S.C. 592, 155 S.E.2d 591 (1967).
102. 164 S.E.2d 905 (S.C. 1968).

appealed from the order.[103] Thus the issue on appeal was merely whether the complaint, without considering the policy, sufficiently stated a cause of action good against a demurrer.

The court began by citing the general rule from *Gordon v. Fidelity & Casualty Co.*:[104]

> We have consistently followed the rule that ordinarily one cannot complain of fraud in the misrepresentation of the content of a written instrument when the truth could have been ascertained by reading the instrument, and one entering into a written contract should read it and avail himself of every reasonable opportunity to understand its content and meaning.[105]

But the court distinguished *Guy* from the general rule, for here it did not appear that the plaintiff failed to read the policy.

Instead the court cited *Crosby v. Metropolitan Life Insurance Co.*[106] There the plaintiff had bought and paid premiums on a policy on a cousin's life, allegedly believing from the insurance agent's representations that the plaintiff was the named beneficiary. She was not in fact the named beneficiary, but plaintiff's evidence showed that she had been induced by the agent to believe that a "trick clause" in the policy made her the beneficiary when, of course, it did not. Plaintiff won a verdict for actual and punitive damages. Said the court in *Guy*, in affirming the overruling of the insurer's demurrer:

> This case is not directly in point, but it is the only South Carolina case coming to our attention, where it was alleged, as here, that the language of the policy itself was confusing, and that such was a factor in causing the false representation to be accepted as true. To that extent, the decision is persuasive in the instant case.[107]

Thus the court concluded that the complaint's allegations of plaintiff's conduct did not estop Guy from asserting fraud on the

103. The trial judge had considered the policy itself in ruling on the motion, and since the policy had not been made part of the complaint or the demurrer, it was error to consider it. The portions of the lower court order dealing with the contents of the policy were not affirmed.
104. 238 S.C. 438, 120 S.E.2d 509 (1961).
105. 164 S.E.2d at 906-07.
106. 161 S.C. 519, 159 S.E. 926 (1931) (overruling of demurrer aff'd), 167 S.C. 255, 166 S.E. 266 (1932).
107. 164 S.E.2d at 908. The court also cites as "of persuasive influence" Outlaw v. Calhoun Life Ins. Co., 236 S.C. 272, 113 S.E.2d 817 (1960) and found help in Southern Gas Co. v. Hughes, 33 Ariz. 206, 263 P. 584 (1928).

insurer's part at the inception of the policy. Whether or not estoppel would operate would depend upon the circumstances of the case as developed on trial.

F. SURETYSHIP AND SUBROGATION

The latest in a series of the complex cases arising out of a job foreman's diversion into check forging came before the court in *South Carolina National Bank v. Lake City State Bank*.[108]

An employee of W. Wesley Singletary & Son, Inc. had drawn his employer's payroll checks to fictitious payees, forged the endorsements, and cashed the forgeries to a total of $14,879.44. In the first step of the litigation, Singletary sued Lake City State Bank for this amount of the bogus checks which the bank had debited from Singletary's account. Hartford Accident and Indemnity Co. was Lake City's surety. South Carolina National Bank was a prior endorser of the checks.

The relevant question on this appeal was whether Lake City's right of recovery against South Carolina National was to be diminished by the partial indemnity received by Lake City under its insurance contract with Hartford. The court decided to award Lake City full recovery.

> In the exercise of its business judgment, with full knowledge of the recurring risks involved and the premiums to be saved, SCN contracted for forgery insurance with a $25,000.00 deductible clause. It thereby elected, in order to save the premium differential, to be a self-insurer against losses up to this figure. No good reason appears for giving this self-insurer the benefit of insurance procured by Lake City solely for its own protection and paid for by it.[109]

But perhaps the most important part of the court's opinion was a bit of dicta which sounded a stern caveat as to the strength of the paid surety defense in South Carolina:

> [W]e are not convinced that SCN would have a defense against Hartford if the latter had paid full indemnity to Lake City and sued as subrogee . . . .
>
> . . . [I]nsurers against forgery losses have been allowed subrogation to the rights of their insureds against for-

108. 251 S.C. 500, 164 S.E.2d 103 (1968).
109. *Id.* at 504, 164 S.E.2d at 105.

warding banks or other prior endorsers . . . . [The court relied principally for this proposition on *Metropolitan Cas. Ins. Co. v. First Nat'l Bank*, 261 Mich. 450, 246 N.W. 178 (1933); *Standard Acc. Ins. Co. v. Pellecchia*, 15 N.J. 162, 104 A. 2d 288 (1954); O'Malley, "Subrogation Against Banks on Forged Checks," 51 CORNELL L.Q. 441 (1966).]

We have called attention to these authorities principally because it was assumed by counsel and the court in *Singletary*[109A] . . . that the paid surety doctrine, as settled law, would have defeated a subrogation action by Singletary's insurer against Lake City, and because we have paid lip service to the defense in other cases . . . . However, an examination of our decisions discloses that we have never denied subrogation by applying the paid surety versus innocent bank criterion and are not committed to the doctrine. Recognizing that serious challenges have been leveled against the usefulness and practicality of the compensated surety defense under modern banking practices, we observe that the law thereabout is unsettled in this jurisdiction.[110]

G. EVIDENCE

Mention of Insurance — A Delicate Balance. In *Jones v. Massingale*,[111] the court found an opportunity to take a substantial swipe at the long-debated "rule" that the mention of insurance in a torts claims case should result in a mistrial because of possible prejudice to the defendant and his liability insurer. In this case, a typical auto collision tort action where the husband and wife brought suit for the wife's personal injuries, the principal issue was the validity of a release that the plaintiffs had executed. The defendant contended that the issue of the validity of the release should be tried first and separately from the causes of action in the plaintiffs' complaints. Appealing from the trial court's denial of this motion, the defendant pleaded that a joint trial of the issues would result in prejudice to him and his insurer because the jury would thus be made aware of the exist-

109A. W. Wesley Singletary & Son, Inc., v. Lake City State Bank, 243 S.C. 180, 133 S.E.2d 118 (1963).

110. *Id.* at 505-06, 164 S.E.2d at 105-06. The court cited as paid surety "lip-service" cases Rivers v. Liberty Nat'l Bank, 135 S.C. 107, 133 S.E. 210 (1926), and United States Fidelity & Guar. Co. v. First Nat'l Bank, 244 S.C. 436, 137 S.E.2d 582 (1964).

111. 251 S.C. 456, 163 S.E.2d 217 (1968).

ence of liability insurance. The appellant's brief cited several South Carolina rulings to the effect that the mention of insurance to a trial jury is prejudicial error in tort claim litigation.[112]

The court stated that any possible prejudice resulting from the jury's knowledge of the defendant's insurance must be weighed against the burden resulting from the multiplicity of suits that would result.[113] The court also considered that today's jury in an auto collision case can hardly be expected to doubt the existence of liability insurance coverage:

> Today owners of motor vehicles are almost required by law to procure liability insurance, and there is a popular belief (though an erroneous one) that liability insurance in this state is actually required. Before a person (including, of course, jurors) may procure an annual license plate for his motor vehicle he must prove his liability coverage or contribute to the uninsured motorists fund. Accordingly, every juror who owns an automobile is of necessity well aware of the likelihood of liability insurance coverage.[114]

Thus the supreme court affirmed the trial court's denial of the defendant's motion for separate jury trials.[115]

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112. This issue is discussed in Brief for Appellant at 11-19. The most recent South Carolina case cited in the brief is Crocker v. Weathers, from which is quoted, "The long-established rule of our decisions is that the fact that a defendant is protected from liability in an action for damages by insurance shall not be made known to the jury." 240 S.C. 412, 424, 126 S.E.2d 335, 340-41 (1962). However, in that case the court allowed the verdict to stand even after the plaintiff's counsel had not only told the jury that there was insurance in the case, but what the policy limits were. See J. DREHER, A GUIDE TO EVIDENCE LAW IN SOUTH CAROLINA 41 (1967). The most similar case the appellant could locate was Bowie v. Sorrel, 209 F.2d 49 (4th Cir. 1953), where the federal circuit court upheld the trial court in granting a separate trial on the issue of the validity of a release because if all the issues were tried at one time with a jury, the fact of the appellant's insurance coverage would inevitably be made known to the jury.

The plaintiff-respondent found a neat way to skirt the issue. Noting that the defendant's liability carrier was not a party to the instant proceeding, the brief asserted that whether or not the insurer would be prejudiced was immaterial. Brief for Respondent at 10-11.

113. If the defendant's motion were granted, four jury trials would result — separate jury trials on two issues in each of the two cases.

114. 251 S.C. at 463, 163 S.E.2d at 220. *Accord*, J. DREHER, A GUIDE TO EVIDENCE LAW IN SOUTH CAROLINA 40-41 (1967).

115. A federal district court case decided during the survey period, Preferred Risk Mut. Ins. Co. v. Greer, 289 F. Supp. 261 (D.S.C. 1968), seemed to lean the other way. There the court held that the issue of the liability of an insured under a policy of limited liability should not be tried in an interpleader action because, *inter alia*, under South Carolina law the defendant is entitled to a strict non-disclosure of insurance, which was present in the interpleader action.

H. LEGISLATION

The 1969 General Assembly will be remembered more for the insurance legislation which it saw introduced rather than that which it passed. Eight acts and one joint resolution dealing with insurance were ratified during the session, and all were of practically no significance.

However, a far-ranging proposal was introduced by Senator Waddell which would substantially revise South Carolina insurance law.[116] The bill was introduced this year to afford the legislature an opportunity to study its provisions for several months before it is again presented in 1970. It is certain to be one of the most controversial bills debated in the 1970 session.

Very briefly, the proposed law would limit an insurer's right to cancel automobile liability insurance policies to only two conditions, nonpayment of premium or suspension or revocation of the insured's driver's license.[117] The bill provides that an insured may request the state insurance commissioner to review the insurer's action in cancelling the policy, and the insurer's failure to comply with any resulting order from the commissioner could result in the revocation of the insurer's license. Further, the assigned risk statute is revised.

One of the most controversial sections of the bill would provide for mandatory arbitration proceedings, structured below the circuit courts, to arbitrate issues in non-real estate disputes where the amount in controversy is less than $3,000. Another very significant provision would enact comparative neligence as the standard for rendering judgment in auto vehicle accidents and eliminate contributory negligence as a bar to recovery. Finally, the bill would add another chapter to the South Carolina code to provide for rating organizations to promote competition in automobile insurance.

CHARLES E. HILL

116. Calendar No. S. 413, read for the first time June 24, 1969.
117. Legislative concern over insurers' unjustified cancellation of automobile liability policies was also manifested in a joint resolution, R444, June 18, 1969, which created a nine-member committee to investigate, *inter alia,* the complaints of state residents concerning the unjust, unreasonable or unexplained cancellations or rate increases in such policies.