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Insurance

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INSURANCE

During the survey period 21 cases of importance involving insurance contracts and the insurance statutes were decided by the South Carolina Supreme Court, the federal district courts sitting in South Carolina, and the Fourth Circuit Court of Appeals.[1] Of particular importance is *St. Paul Fire & Marine Insurance Co. v. Boykin,*[2] in which the South Carolina Supreme Court refused to follow *Clouse v. American Mutual Liability Insurance Co.*,[3] a federal case dealing with the relationship between automobile liability insurance coverage and the South Carolina Motor Vehicle Registration and Licensing Act. Since under the *Erie* doctrine this state court case had the effect of overruling *Clouse,* one of the coverage questions which frequently arose in settlement negotiations has been resolved.

Decisions which are applicable to insurance law in general have been categorized according to subject matter; other cases have been categorized according to the type of insurance involved. Names of insurance companies have been abbreviated throughout the text.

I. Application for Insurance

Avoidance of Policy for Fraud. It is basic contracts law that fraud on the part of one party in the formation of the contract renders the contract voidable at the option of the party defrauded.[4] In insurance contracts the question of fraud most often arises when false information has been given, or information has been concealed, by the insured in completing the questionnaire which is normally part of the application for insurance. A rather strict rule has developed in this

1. Gambrell v. Cox, 250 S.C. 228, 157 S.E.2d 233 (1967), although involving an insurance company, is discussed in detail in the *Contracts* and *Practice and Procedure* sections of this survey. In Bruce v. United States Fidelity & Guar. Co., 277 F. Supp. 439 (D.S.C. 1967), the federal district court held that the insured's failure to give the insurer notice of cemetery desecration suits filed against him until almost two years after the complaints had been served relieved the insurer of liability under the standard notice provision in the clause. The court stated that the insurer need not show prejudice by virtue of not having received notice.

2. 161 S.E.2d 818 (S.C. 1968). This case is discussed under the heading *Liability Insurance* in Section V of this article.

3. 344 F.2d 18 (4th Cir. 1965).

4. 1 A. Corbin, Contracts § 6 (1963).

special area of contracts law, restricting the ability of an insurance company to avoid a policy for fraud:

> [I]n order to void a policy of insurance on the ground that the fraudulant representations were made in the procuring of such policy, the burden of proof rests upon the insurer to show, by clear and convincing evidence, not only that the statements complained of were untrue, but in addition thereto that their falsity was known to the applicant, that they were material to the risk, were relied on by the insurer, and that they were made with intent to deceive and defraud the company.[5]

This rule was applied in *Southern Farm Bureau Casualty Insurance Co. v. Ausborn*,[6] in which Southern Farm brought a declaratory judgment action to determine its liability under a binder issued to Ausborn, who had been involved in an automobile accident on March 10, 1965.[7]

Ausborn obtained a liability policy on January 27, 1965, when he purchased a new automobile, but on February 7, 1965, this policy was cancelled by the insurer. After several unsuccessful attempts to obtain another policy, Ausborn, with the help of the dealer from whom he had purchased the car, contacted Southern Farm's agent and completed an application for insurance as follows:

> Q. Has any driver been arrested or convicted of any traffic violation during the past 3 years?
>
> A. No.
>
> Q. Has operator's license for any driver ever been suspended or revoked?
>
> A. No.
>
> Q. Has insurance for any driver ever been cancelled, declined or refused?

5. Smiley v. Woodmen of the World Life Ins. Co., 249 S.C. 461, 464, 154 S.E.2d 834, 835-36 (1967).

6. 249 S.C. 627, 155 S.E.2d 902 (1967).

7. Ausborn was a defendant in three separate tort actions brought by members of the Hughey family. After the wife and child had recovered actual and punitive damages in their separate suits, the husband brought an action for medical expenses, loss of consortium, and punitive damages. On appeal the supreme court held that punitive damages could not be awarded in a loss of consortium suit. Hughey v. Ausborn, 249 S.C. 470, 154 S.E.2d 839 (1967); *see* Comment, 19 S.C.L. REV. 871 (1967).

A. No.

On the strength of the answers in this questionnaire, a binder was issued, which Ausborn contended provided coverage for the March 10 accident.[8]

It was undisputed that the answers given in the questionnaire were false since there were several traffic violations by Ausborn recorded in the South Carolina Highway Department records, his driver's license had been revoked, and the previous liability policy issued to him had been cancelled.[9]

The trial judge had made the following findings: (1) that Ausborn had told Southern Farm's agent of his August 22, 1963, conviction for reckless driving, which resulted in a license suspension for four months, and that this knowledge of the agent was imputable to the company; (2) that Ausborn's other traffic violations did not technically result in "convictions," as that word was used in the policy, since he had not contested these offenses, but had merely forfeited bond; (3) that Southern Farm should be charged with notice of Ausborn's traffic violations since it knew of the reckless driving conviction and the resulting driver's license suspension for four months and since section 46-342 of the South Carolina Code provides for a revocation of driver's license

8. The party more concerned than Ausborn with the present proceedings was State Farm Mutual Automobile Liability Insurance Company, who was the tort plaintiffs' uninsured motorist carrier. It was stipulated that if the appellant was successful in this appeal, State Farm would be required to reimburse Southern Farm for the costs of defending the tort actions against Ausborn and to pay the judgments which had been obtained against him. *See* note 7 *supra*.

9. The falsity of the answers is clear from the court's summary of the defendant's driving record:

> The evidence shows, according to the South Carolina State Highway Department records, that the respondent was charged with and convicted of speeding on May 20, 1963, again on June 16, 1963, with reckless driving on August 22, 1963, for which his driver's license was suspended for four months, beginning November 22, 1963, again for speeding on September 24, 1963, again on September 7, 1964, and was charged with failing to yield right of way on September 8, 1964, at which time his driver's license was suspended for two months, beginning October 13, 1964, and again with speeding on October 21, 1964. The record also shows that the respondent's license to drive a motor vehicle was suspended on December 17, 1964, because of the cancellation of his insurance under the Safety Responsibility Act. Additionally the records from the Greenville Police Department, pertaining to the respondent, show that on June 30, 1963, and on October 21, 1964, he paid fines for driving too fast for conditions.

249 S.C. at 634, 155 S.E.2d at 906.

only for a second offense and then only for three months; (4) that Ausborn's demeanor should have put Southern Farm on inquiry notice of his driving record; and (5) that since Ausborn had bought the car on January 27 but had not applied for the policy until February 27, Southern Farm must have known that a prior policy had been cancelled.

The trial judge held that because of Southern Farm's knowledge or notice that the answers in the questionnaire were false, it was estopped to assert the defendant's fraud as a grounds for avoidance. Moreover, the lower court held that because of Southern Farm's knowledge it could not claim to have relied upon the questionnaire in issuing the binder, as required by the rule quoted above.

The supreme court held that the trial judge's finding that Ausborn had told Southern Farm's agent of his reckless driving conviction was not clearly erroneous, but that the trial judge's interpretation of the word "conviction" was clearly erroneous. The court found justification for its decision in several South Carolina statutes which provide that forfeiture of bond for the various traffic violations in Ausborn's record had the effect of a "conviction."[10] The finding that knowledge of Ausborn's conviction for reckless driving and license suspension was sufficient to charge Southern Farm with knowledge of the other traffic offenses was found to be erroneous since some of the violations took place after Ausborn's license had been suspended.

The finding that Ausborn's demeanor was sufficient to put Southern Farm on notice that the answers in the questionnaire might have been false was held to be erroneous on two grounds: Ausborn's demeanor in the court room was not evidence of his demeanor 14½ months ago when the questionnaire was completed, and it was inconsistent for the trial judge to find all of Ausborn's testimony credible if his demeanor had been such as to put Southern Farm on notice. The finding that the passage of time between Ausborn's purchase of the new car and his application for insurance was notice to Southern Farm of a previous cancellation by another insurer was summarily dismissed as clearly erroneous.

Accordingly, the supreme court concluded that Southern Farm had sustained its burden of persuasion by clear and

10. S.C. CODE ANN. §§ 46-195, -346, -702(1) (1962).

convincing evidence that the answers in the questionnaire were false and were given with the intent to defraud the company, and that the misrepresentations made by Ausborn were material to the risk and were relied upon by the company.

II. CANCELLATION

Cancellation Notice by Insurer. Most insurance policies contain provisions under which either party may bring the contract to an end at his option by complying with certain conditions precedent.[11] These conditions have been the subject of a wealth of litigation growing out of the situation in which the insurance company claims to have cancelled the policy before loss occurred, but failed to return unearned premiums. The insurance companies lost in most of the earlier litigation since the courts generally construed the older cancellation provisions as requiring a tender of unearned premiums before the contract could be successfully terminated by the insurer.[12] Apparently in response to these decisions,

11. Of course, aside from the cancellation provisions of the policy, the contract may be rescinded by mutual consent of the parties under basic contracts law. Dill v. Lumbermen's Mut. Ins. Co., 213 S.C. 593, 50 S.E.2d 923 (1948).

12. *See generally* Annot., 127 A.L.R. 1341 (1940), *supplemented*, 16 A.L.R.2d 1200 (1951). In earlier cases the South Carolina court followed the rule that the then standard cancellation clause in automobile collision policies required a tender of unearned premiums as a condition precedent to cancellation by the insurer. Crotts v. Fletcher Motor Co., 219 S.C. 204, 64 S.E.2d 540 (1951). *See also* Rice v. American Security Ins. Co., 222 S.C. 463, 73 S.E.2d 683 (1952) (applying the *Crotts* construction); Elmore v. Middlesex Mut. Fire Ins. Co., 219 S.C. 520, 65 S.E.2d 871 (1951) (applying the *Crotts* construction). The clause involved in these cases had received an extremely strained construction. A more realistic basis for the decisions holding tender a condition precedent was given by Mr. Justice Cothran in Hamilton Ridge Lumber Corp. v. Boston Ins. Co., 133 S.C. 472, 482-83, 131 S.E. 22, 26 (1925):

> These decisions construing as they do the old form, as to which there may have been some ground for doubting that the return of the unearned premium was so linked up with the notice of cancellation as to constitute it a concurrent condition precedent, are based upon the ground that a party to a contract, having performed his part of it, and acquired valuable rights under it, cannot be subject to a rescission of the contract at the pleasure of the other by his merely giving notice of his determination to cancel it, without at the same time tendering the return of what he has received by reason of the contract.

An interesting twist occurred in Herndon v. Continental Cas. Co., 144 S.C. 448, 142 S.E. 648 (1928), in which the plaintiff alleged that the insurance company "willfully, fraudulently, and unlawfully, with intent to cheat and defraud" continued to collect premiums after it had cancelled the policy. The court held that a demurrer should have been granted on the grounds that the alleged cancellation was ineffective. Unearned premiums had not been tendered, so the policy was still in force and collection of premiums could not have been fraudulent.

many insurance companies drafted clauses which allow alternative means of cancellation. Under such a clause the insurance company can either tender unearned premiums with the notice of cancellation or can simply give notice of cancellation which states that a premium settlement will be made.[13]

These new cancellation clauses were upheld by the South Carolina court,[14] but in *Allied Concord Financial Corp. v. Sterling Insurance Co.*,[15] the court made it clear that strict compliance on the part of the insurance company with the conditions described in such a clause is necessary for cancellation to be effective. In this case the fire insurance policy in question, under which loss was payable to the mortgagee of the insured premises, contained a cancellation clause which provided that "notice of cancellation shall state that said excess premium (if not tendered) will be refunded on demand."

The policy was issued by Sterling on May 31, 1963, and the premium was paid for a full three years' coverage. On November 25, 1965, the insured residence was destroyed by fire. Earlier, on August 26, 1964, notice of cancellation had been sent to the plaintiff mortgagee which stated only that "premium adjustment will be made as soon as practicable after cancellation becomes effective." In an action on the policy by

13. Such a "new form" was compared with an "old form" in Hamilton Ridge Lumber Corp. v. Boston Ins. Co., 133 S.C. 472, 131 S.E. 22 (1925), and a good analysis of the alternatives under the "new form" was made by Mr. Justice Cothran. This case also illustrates one of the difficulties insurance companies have with the tender condition. The company failed to comply with the notice alternative under the "new form" but did remit its check "representing the return premiums" under the tender alternative. The amount of unearned premium due, however, was miscalculated by the company, so the attempted cancellation was held ineffective. This case seems to be a rather harsh one, but the company could have avoided this loss by complying with the notice alternative rather than attempting a simultaneous return of premiums.

14. The insurance companies avoided Crotts v. Fletcher Motor Co., 219 S.C. 204, 64 S.E.2d 540 (1951), and the cases following it (note 12 *supra*) by adding the clause "but payment or tender of unearned premium is not a condition of cancellation." McElmurray v. American Fidelity Ins. Co., 236 S.C. 195, 113 S.E.2d 528 (1960). *See also* Nance v. Blue Ridge Ins. Co., 238 S.C. 471, 120 S.E.2d 516 (1961); Moore v. Palmetto Bank & Textile Ins. Co., 238 S.C. 341, 120 S.E.2d 231 (1961). In McElmurray v. American Fidelity Ins. Co., *supra*, leave was given the appellant to ask the court to overrule the three earlier cases holding a return of unearned premiums to be a condition precedent to cancellation by the insurer (note 12 *supra*), but such steps did not have to be taken in view of the additional clause added to the cancellation provision, which caused this case to be distinguishable from the earlier decisions.

15. 159 S.E.2d 919 (1968).

the mortgagee, the court held that the notice of cancellation was ineffective since it did not state "that said excess premium (if not tendered) will be refunded on demand," as required by the policy,[16] and that the policy was thus in effect when the premises was destroyed by fire.[17]

On the basis of this case insurance companies would be well advised to be wary of form cancellation notices since the various policies issued by the company may contain different notice requirements.[18] It should also be noted that a return of unearned premium simultaneously with the cancellation notice may not provide an effective cushion in case of a defective notice since the amount of premium due may be in dispute or may have been erroneously calculated.[19]

III. FIRE INSURANCE

Public and Institutional Property Plan: Replacement Cost Endorsement. The most complex case decided during the survey period, *Columbia College v. Pennsylvania Insurance Co.*,[20] involved a construction of fire insurance policies issued pursuant to the South Carolina Public and Institutional Property

16. It should be noted that the wording used by the company in its notice was taken from the standard cancellation provision but not from that part of the cancellation provision which sets out the contents of the notice. For example, see the cancellation provision quoted in Nance v. Blue Ridge Ins. Co., 238 S.C. 471, 473, 120 S.E.2d 516, 517 (1961).

17. The court's rather technical approach and the seemingly harsh result in this case were virtually required by the holding in Hamilton Ridge Lumber Corp. v. Boston Ins. Co., 133 S.C. 472, 131 S.E.2d 22 (1925), discussed *supra* note 13. It would seem that strict compliance is a necessary requirement since it would be impractical and productive of litigation for the court to attempt to draw a line somewhere between strict compliance and non-compliance. Likewise, it should be remembered that the insurance company, not the insured, drafts the policy provisions, or in the words of Mr. Justice Cothran:

> It may safely be assumed that this modification of the cancellation clause prepared by insurance companies was intended to secure some benefit to them. It was a stage in the evolution of policy contracts, constantly tightened as experience or judicial interpretation suggested; a course of action not at all the subject of unfavorable criticism, for it was clearly within their rights, but which, in the unequal contest, has inclined the Courts, in all questions of construction, to favor the interests of the insured.

Id. at 480, 131 S.E. at 25.

18. Compare the notice requirements of the policy involved in the principal case with those of the policy involved in Nance v. Blue Ridge Ins. Co., 238 S.C. 471, 120 S.E.2d 516 (1961) (combination liability collision policy).

19. *See* Hamilton Ridge Lumber Corp. v. Boston Ins. Co., 133 S.C. 472, 131 S.E. 22 (1925). This case is discussed *supra* note 13.

20. 250 S.C. 237, 157 S.E.2d 416 (1967).

Plan, a comprehensive and sophisticated insurance plan for public institutions, overseen by the South Carolina Inspection and Rating Bureau and the Insurance Commissioner.[21] Normally such a plan comprehends several insurance companies, but under Columbia College's plan, there was only one insurance company, which issued eight separate policies. The total face amount of these policies was increased by endorsement to $3,094,200, each policy providing a pro rata share of coverage for the period from March 25, 1961, to March 25, 1964.

During February 1964 two buildings on the Columbia College campus were completely destroyed by fire. The value of these buildings was recited in the valuation clause (form 882) attached to the policies as $550,000 and $200,000 respectively. The insurance company paid the college the agreed value of $750,000.

The college then brought suit on the policies seeking to recover the difference between $1,355,736, the total cost of replacing the destroyed buildings, and $750,000, the amount paid by the insurer. After a second amended complaint was served, the defendant demurred on the grounds that under the terms of the policies, $750,000 constituted the whole of its liability. The demurrer was sustained, and the plaintiff appealed.

The following documents, among others, were attached to the standard South Carolina insuring agreement in each of the eight policies issued by the defendant: (1) Public and Institutional Property Form (P.I. Form No. 1),[22] (2) Valua-

21. The plan was submitted to the Insurance Commissioner in 1960 pursuant to S.C. CODE ANN. § 37-674 (1962).

22. This form provided in part:

> SECTION I
>
> (A) [$3,094,200 (total of all eight policies)] on all property of every description (except as otherwise limited or excluded) owned by the Insured, including architects fees, and on personal property of others for which the Insured assumed liability prior to loss, on the Insured's liability imposed by law for loss to personal property of others and on the Insured's interest in personal property belonging in whole or in part to others . . . .
>
> SECTION II
>
> (A) In the determination of any loss under this policy caused by the peril(s) insured against, occurring after the inception date of this policy and prior to [March 25, 1964], this . . . Company shall not be liable for a greater proportion of any loss than the amount of insurance under this policy bears to $3,094,200.

tion Clause — South Carolina (No. 882),[23] and (3) Public and Institutional Property Replacement Cost Endorsement (P.I. Form No. 4).[24]

Although, due to the complexity of the case, the parties' theories as to how the contract should be construed do not appear too clearly from the opinion, it would seem to have been the insurer's position that the valuation form listing the buildings as worth $750,000 was controlling in regard to the amount of insurance coverage on these buildings. The valuation clause specifically provided as follows: "The Insured and the Insurer hereby agree that the value of the buildings described herein is — and hereby fix the amount of insurance to be carried thereon (including this policy) — repectively as follows . . . ." The values are listed as $550,000 and $200,000 respectively on the two buildings destroyed. The insurer also argued that the replacement cost endorsement did not affect the valuation clause. Section five of this endorsement provided as follows:

> (5) This company's liability for loss under this policy including this endorsement shall not exceed the smallest of the following amounts (a), (b), or (c):
>
> (a) The amount of this policy applicable to the damages or destroyed property;
>
> (b) The replacement cost of the property to which this endorsement applies, or any part thereof, identical with such property on the same premises and intended for the same occupancy and use;
>
> (c) The amount actually and necessarily expended in repairing or replacing such property or any part thereof.

The insurer reasoned that section 5(a) limited its liability under the endorsement to that fixed in the valuation clause,

23. This form provided in part:
Insurance under this policy is effected subject to the following agreements and provisions:
VALUATION CLAUSE—The Insured and the Insurer hereby agree that the value of buildings described herein is—and hereby fix the amount of insurance to be carried thereon (including this policy)—respectively, as follows:
AGREED VALUE OF BUILDINGS
Building No. 1, $550,000.00
. . .
Building No. 3, $200,000.00.

24. The pertinent provisions of the replacement cost endorsement are quoted in the next paragraph of the text.

while sections 5(b) and 5(c) provided replacement cost coverage on personal property for which there was no valuation.

The court rejected this analysis by the insurer in favor of the construction offered by the plaintiff. The valuation clause could be accounted for under sections 37-154 and 37-155 of the South Carolina Code.[25] These sections read together would seem to require a valuation clause in the policy even when a replacement cost endorsement is added. Section 37-155 specifically provides that

> riders or endorsements may, in consideration of an adequate premium or premium deposit, be attached to policies insuring property, indemnifying the insured for the difference between the *actual value stated in the policy* and the amount actually expended to repair, rebuild or replace with new materials of like size, kind and quality such insured property as has been damaged or destroyed by fire or other perils insured against.[26]

Section 5(a) of the replacement cost endorsement, relied upon by the insurer, could be reasonably construed as applying to the $3,094,200 figure (as increased by endorsement) in section II(A) of the public and institutional property form number one.[27] Thus, in no event was the insurer obligated to pay any more than the face amount of the eight policies under section 5(a), no matter what replacement cost might be, but under sections 5(b) and 5(c) the insurer was obligated to pay replacement cost for any amount under the face amount given in section II(a).[28]

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25. S.C. CODE ANN. § 37-154 (1962) provides in part:
No company writing fire insurance policies, doing business in this State, shall issue a policy for more than the value stated in the policy or the value of the property to be insured, the amount of insurance to be fixed by the insurer and insured at or before the time of issuing the policy.
S.C. CODE ANN. § 37-155 (1962) is quoted in the text which follows.

26. Emphasis added.

27. Section II(A) of this form is set out in note 22 *supra*.

28. The court also found some comfort in the fact that the public and institutional property form number one provided "blanket coverage;" the term "blanket" was indicated on the endorsement—general (form no. 282), used from time to time to increase the face amount of the policies and to extend the expiration date. A schedule conversion endorsement (P.I. Form No. 2) was available to the parties to convert the blanket coverage of the basic public and institutional property form to specific coverage on items to be listed as part of this endorsement. The court found that use of the term blanket coverage in the endorsements and use

IV. LIFE, ACCIDENT, AND HEALTH INSURANCE

A. Insurable Interest

In *Foster v. United Insurance Co. of America*[29] the court held a life policy void for lack of insurable interest. The policy had been procured by the beneficiary on the life of a friend to whom the beneficiary was apparently not related. Moreover, the beneficiary was not obligated to pay the friend's funeral expenses, and the friend had no knowledge of the policy.

B. Exclusions

Death from Disease. In an action to recover death benefits under an accident policy, the burden of producing evidence of accidental death is initially upon the plaintiff, and the burden of persuasion on this issue remains upon the plaintiff throughout the trial.[30] If the insurer has answered affirmatively that the alleged accident came within an exclusionary clause of the policy, the burden of producing evidence of this fact is initially upon the insurer, and the burden of persuasion on this issue remains upon the insurer.[31]

In *Gamble v. Travelers Insurance Co.*[32] the court concluded that the plaintiff had met his persuasion burden as a matter of law on the issue of the insured's death by accident, while the insurer had failed to meet his initial burden of producing evidence that the accident came within the exclusionary clause of the policy. Thus, the supreme court affirmed the lower court's judgment for the plaintiff.

The plaintiff brought this action as beneficiary under a group life-accident policy issued by the defendant. The insured was 39 years of age and worked at a filling station. On several occasions he had fallen and dislocated his jaw while at work. On April 26, 1965, the insured fell in his back yard and was taken to the hospital with a dislocated

of the basic form providing blanket coverage without the conversion endorsement were indicative of the parties' overall intent to secure a fluctuating coverage for the whole class of insured property rather than a specific coverage as outlined in the valuation clause.

29. 158 S.E.2d 201 (S.C. 1967).

30. *See* Coleman v. Palmetto State Life Ins. Co., 241 S.C. 384, 128 S.E.2d 699 (1962).

31. *See* Outlaw v. Calhoun Life Ins. Co., 238 S.C. 199, 119 S.E.2d 685 (1961).

32. 160 S.E.2d 523 (S.C. 1968).

jaw. After the jaw had been corrected, the patient fell in the hospital corridor, dislocated his jaw again, and began to have a strong Jacksonian seizure, described as a convulsion involving arms, legs, and tongue.[33] The convulsions continued into the night with death occurring the next day. An autopsy was performed, revealing the direct cause of death as intercranial pressure from a large hematoma caused by a skull fracture of recent origin.

On the issue of accidental death, the court interpreted *White v. North Carolina Mutual Life Insurance Co.*[34] as standing for the proposition that if the beneficiary proves that death of the insured was caused by violent external means, the presumption of accidental death arises, shifting the burden of producing contrary evidence to the insurer. Since the defendant did not produce any contrary evidence in this case, the presumption was not overcome, and the plaintiff sustained his persuasion burden as a matter of law.

The insurer's affirmative defense was based on an exclusionary clause of the policy which provided: "The insurance under this Part shall not cover any loss (1) caused or contributed to by bodily or mental infirmity, disease or infection . . ., even though the proximate and precipitating cause of the loss is accidental bodily injury . . . ." The defendant's theory was that the insured's having fallen and dislocated his jaw on several occasions, coupled with the fact that he fell in the hospital corridor and experienced severe convulsion, was sufficient evidence to sustain his persuasion burden as a matter of law that the insured's death was "contributed to by bodily or mental infirmity," probably epilepsy, marked by falling, convulsion, and dislocation of the jaw.

Although her testimony was not clear, there was some suggestion on the part of the insured's wife that the prior falls were accompanied by convulsion,[35] and there was also evidence that when a relaxant was given the insured in the hospital corridor immediately after his fall there, his jaw slipped back into place automatically,[36] suggesting that prior dislocations were the result of prior seizures.

33. Record at 18.
34. 208 S.C. 168, 37 S.E.2d 505 (1946).
35. Record at 22-26.
36. Record at 44.

The court concluded, however, that it was at least an equally reasonable inference that the fall in the hospital and the accompanying convulsion were due to pressure from the hematoma formed as a result of a skull fracture sustained in the prior fall on April 26, 1965. There was no direct evidence that this prior fall was caused by any disease.[37]

Cardio-Vascular Disease. An exclusionary clause of the hospitalization and surgical expense policy construed in *Reynolds v. Wabash Life Insurance Co.*[38] provided: "This policy does not cover hospitalization due to cardio-vascular disease . . . unless such cause shall occur after the policy has been maintained in continuous force for six (6) months from date of issue." In this action brought by the beneficiary against the insurer, it was undisputed that the insured died from a ruptured abdominal aortic aneurysm less than six months from the issuance of the policy.

An abdominal aortic aneurysm is a blister or weak spot in the aorta at a point where this artery passes through the abdomen. A rupture at this point causes internal bleeding and is always fatal, unless possibly it is treated promptly and vigorously.[39]

The defendant contended that an abdominal aortic aneurysm is a "cardio-vascular disease" within the exclusionary

37. It is a fundamental principle of procedure that evidence which supports an inference inconsistent with the proposition sought to be proved equally with the desired inference is an insufficient production of evidence as a matter of law. Ladson Motor Co. v. Croft, 212 Ga. 275, 92 S.E.2d 103 (1956). It would seem to be a more reasonable conclusion that the circumstantial evidence adduced by the defendant on the question of epilepsy or similar disease constituted a sufficient production of evidence to make a jury question. In any event, the trial court did allow this issue to go to the jury, so the supreme court's conclusion that a verdict should have been directed for the plaintiff was dictum in view of the fact that the jury found for the plaintiff.

38. 161 S.E.2d 168 (S.C. 1968).

39. Record at 20. In SCHMIDT'S ATTORNEYS' DICTIONARY OF MEDICINE 63 (1965) the term *aneurysm* is defined as follows:

> A sac-like dilation in an artery or a vein, usually the former, as a result of a weakness in the wall of the structure and the pressure of the blood within the artery. It may be visualized as the bulge occasionally seen in an old garden hose when the water is turned on.

The term *aortic aneurysm* is defined, *id.* at 63-64, as follows:

> An aneurysm affecting the aorta, especially the first part of the aorta. The aorta is the largest blood vessel or artery of the body. It begins at the outlet of the heart (slightly to the left of the center near the top), curves upward a short distance, makes a turn downward, and extends through the chest to the abdomen . . . .

clause of the policy. The plaintiff, on the other hand, argued that an abdominal aortic aneurysm is a vascular disease only, not a cardio-vascular disease, since it does not involve the heart.[40]

An English professor, qualified as an expert, testified that the hyphen between the words cardio and vascular functioned as the conjunctive *and,* not the disjunctive *or*,[41] requiring the excluded disease to be both cardio and vascular. On this issue the defendant produced medical testimony through cross examination and direct examination that the term "cardio-vascular," normally written "cardiovascular,"[42] is a medical term of art comprehending any disease of either the heart or the vascular system — that doctors do not think of the two separately.[43] These doctors also testified that in their opinion an abdominal aortic aneurysm is a cardio-vascular disease.[44]

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40. The term *cardio* means pertaining to the heart. B. MALOY, THE SIMPLIFIED MEDICAL DICTIONARY FOR LAWYERS 138 (3d ed. 1960). The term *vascular* means pertaining to the blood vessels or arteries. SCHMIDT'S ATTORNEYS' DICTIONARY OF MEDICINE 861 (1965).

41. Record at 16-17. Professor Welch demonstrated his skill with the English language in the following colloquy between him and his former student, the defendant's counsel.

> Q. Dr. Welch, you are an English Professor, aren't you? Is that correct?
> A. Yes, sir.
> Q. You are not a Doctor, are you?
> A. I am.
> Q. Are you an M.D., sir?
> A. Well, that depends, a Ph.D. was a Doctor before an M.D.
> Q. But I asked you were you an M.D.
> A. You didn't ask me that; you asked me if I was a Doctor first.
> Q. Well, I am not going to quarrel with you because obviously you are much more adept at the language than I am, but I am asking you, are you an M.D., sir?
> A. I am not an M.D., sir.

Record at 17.

Although the record reveals that both trial counsel were skillful in presenting evidence, the plaintiff's counsel, on one occasion, like the defendant's counsel above, had his problems with esoteric issues and perceptive witnesses, as is illustrated by his direct examination of one of the medical doctors:

> Q And you have stated have you not, that this gentleman, Mr. Arant [the insured], died as a result of the operation which you performed?
> A. Please, he died despite the operation.
> Q. I mean—Excuse me, I am sure I made an error there. He died, let's say, in spite of everything you could do for him.

Record at 23.

42. Record at 25-26.
43. Record at 24-25, 30.
44. Record at 25, 30.

The lower court, however, adopted the plaintiff's theory that cardio-vascular meant cardio and vascular so that the insured's abdominal aortic aneurysm, a vascular disease only, did not come within the exclusionary clause. The supreme court affirmed, noting that ambiguities in an insurance contract should be construed in favor of the insured.[45]

V. AUTOMOBILE INSURANCE

A. Collision Insurance

Conversion by Insurer. Although *Lumpkin v. Allstate Insurance Co.*[46] was an action for conversion under the law of property, it is discussed in this article because of its importance to collision insurers.

The defendant insurance company had issued its collision policy to the plaintiff which provided $100 deductible coverage for a 1964 Plymouth. On September 25, 1965, the plaintiff was involved in a wreck which demolished the right side of her car. The driver of a wrecker who approached the scene offered to take the plaintiff's car to a body shop in Seneca. In all the confusion no express objection was made by the plaintiff, and the car was taken to Seneca.

On October 13, 1965, the defendant's adjuster went to the body shop in Seneca and authorized repairs estimated at $1,104.80. The adjuster did not talk with the plaintiff while the car was being repaired, and the plaintiff never expressly consented or objected to the repairs being made.[47] The ad-

45. The defendant argued that while punctuation is an aid to arriving at the intent of the parties, it is subordinate to a consideration of the contract as a whole, as a means of ascertaining the parties' intent. Walker v. Commercial Cas. Ins. Co., 191 S.C. 187, 4 S.E.2d 248 (1939). Although the case was a difficult one to decide, the construction offered by the defendant, based upon the medical definition of "cardiovascular," seemed to be a sound one.

It should be noted that the supreme court did reduce substantially the lower court's award of damages, which had been based upon a rather strained construction of the policy.

46. 159 S.E.2d 852 (S.C. 1968).

47. On cross-examination the plaintiff testified as follows:

Q. As a matter of fact, you went there two or three times during the period of time that Mr. Hunnicutt was working on your automobile, did you not?
A. I sure did.
Q. Did you tell Mr. Hunnicutt not to work on it, that you didn't want the vehicle repaired?
A. No, sir, I did not tell him to start work on it, nor did I tell him to stop it.
Q. You did not tell him to stop work on it?

juster left a draft with the garageman for the cost of the repairs less the $100 deductible. The draft contained the typical provisions of an accord and satisfaction. A release form was also left with the garageman, and he was instructed not to turn over the car until this form had been signed. The plaintiff did not sign either the release or the draft, but she did pay the garageman $100.

The plaintiff brought suit alleging that the insurer had converted her automobile. Her theory was that the defendant made the signing of the accord and satisfaction and release a condition to recovery of her car and that she was not obligated to sign either. The jury returned a verdict for $1300 actual damages and $3000 punitive damages based upon the plaintiff's testimony that after repairs the car was worth $1300.[48] The supreme court affirmed the trial court's judgment for this amount.

On appeal the defendant contended that two essential elements of conversion had not been proved. On the one hand, the defendant argued that it had never been in possession of the car, that only the body shop had been in possession as the plaintiff's bailee. Secondly, the defendant argued that even if it had been in possession, there was still no conversion since its possession was authorized under the policy for purposes of repair and since the plaintiff had at least impliedly consented to its possession and had never demanded a return of the car.[49]

A. I did not tell him to stop work on it, nor did I tell him to start work on it.
Q. But you went there and you saw that the work was being performed?
A. After the work was started on it, which was about five weeks or six after the car was wrecked was the first time that I went to Sanders Body & Fender Shop.
Q. As a matter of fact, he called you and asked you to bring the key down and you took it to him, didn't you?
A. That was in December.
Q. Well, you did take it to him, didn't you?
A. In December, yes, sir.

Record at 22. It would seem that the plaintiff's actions recounted above amounted to at least an implied consent to having the body shop repair the car.

48. The plaintiff also testified that the pre-accident value of the car was $3000, which probably accounted for the amount of punitive damages awarded by the jury.

49. The defendant principally relied upon Williams v. Haverty Furniture Co., 182 S.C. 100, 188 S.E. 512 (1936); Roberts v. James, 160 S.C. 291, 158 S.E. 689 (1931). Brief for Appellant at 6, 8.

On the first issue the court simply concluded that the defendant took constructive possession of the car since the garageman "who was clearly acting under the directions of defendant with respect to the retention of the car, was at least defendant's agent if not its bailee."[50]

The defendant's argument on the second issue was that the plaintiff had always taken the position that she did not want the repaired car back, but wanted another car, since in her opinion the value of the car had depreciated substantially and it would be dangerous to drive. In particular, the defendant argued that no demand had been made for a return of the car as would be required for a conversion to have taken place.[51]

To this argument the court simply answered that "[i]t is unnecessary to review the evidence as to the unsuccessful efforts of the plaintiff to obtain possesssion of her car, without signing a full release, prior to the time she obtained counsel."[52] Under the policy the defendant's liability was

50. 159 S.E.2d at 854.

51. *See* Roberts v. James, 160 S.C. 291, 158 S.E. 689 (1931).

52. 159 S.E.2d at 854. With due deference to the court's analysis of the record, it would seem that this conclusion was a hasty one. The plaintiff did not testify on direct examination to having demanded a return of her car. On cross-examination she testified as follows:

> Q. And did you tell Mr. Hunnicutt on that occasion that you didn't want that car?
> A. That is exactly what I told him, that I didn't think I could accept the car under the conditions.
> Q. Did you tell him that you objected to the manner in which it had been repaired in any particulars?
> A. I said that I objected to the manner in which it was being handled, and that the value of my car was not there, and I could not afford to take it.
> Q. And you told him that you didn't want that car because it had been wrecked?
> A. I did not say "because it had been wrecked," I said: because of the value of the car was not there I could not sign for the car.
> Q. And you made it clear to Mr. Hunnicutt then that you did not want this car under the circumstances?
> A. I made it clear that I did not want this car under the terms that existed.
>
> . . .
>
> Q. You still don't want this car back, do you?
> A. No, sir, will be honest with you, I don't want the car back, because it might be something that will cause my life to be taken from me, and it might be something that will take the life of someone else, and I don't want this responsibility, sir.

Record at 23-24. The garageman likewise testified that the plaintiff had made no demand for a return of her car. Record at 33-35. Under the circumstances it would seem that there could be no cause of action for conversion. Roberts v. James, 160 S.C. 291, 158 S.E. 689 (1931). The

limited to "what it would cost to repair or replace the automobile or part with other of like kind or quality." The court noted that under the circumstances, the insurer could not require the plaintiff to sign a release in order to recover the repaired vehicle if in fact the repairs had not been sufficient to restore the pre-accident value of the car.[53]

Even though it is arguable whether or not an action for conversion was proper under the circumstances,[54] it is rather clear that this suit could have been avoided if the insurer had negotiated with the plaintiff concerning the repair or replacement of her car prior to repairs having been made. It would seem to have been unnecessary for the adjuster to instruct the garageman not to return the car unless the plaintiff signed a release, especially when it was not clear whether the insurer had fully performed its obligation to "repair or replace" the vehicle.

B. Uninsured Motorist Insurance

Effective Date of Statutory Requirement. In South Carolina an uninsured motorist endorsement is now required in every policy of automobile liability insurance issued in the state.[55] Under this endorsement the insurance company is obligated to pay any judgment within the policy limits obtained by its insured against an uninsured motorist.

The statute requiring an uninsured motorist endorsement was enacted in 1959 to apply to policies "issued or delivered after January 1, 1961."[56] In *Lee v. Michigan Millers Mutual Insurance Co.*[57] the court held that a policy issued prior to this effective date did not have to contain an uninsured motorist endorsement, notwithstanding an order of the Insurance Commissioner apparently to the contrary.[58]

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plaintiff's only possible cause of action would be on the insurance contract to recover the difference between the pre-accident value of the car and the value of the repaired vehicle, which was $1700 according to the plaintiff's estimate. *See* Campbell v. Calvert Fire Ins. Co., 234 S.C. 583, 109 S.E.2d 572 (1959).

53. The court cited Campbell v. Calvert Fire Ins. Co., 234 S.C. 583, 109 S.E.2d 572 (1959).

54. *See* note 52 *supra.*

55. S.C. CODE ANN. § 46-750.33 (Supp. 1967).

56. LI S.C. STATS. AT LARGE 574 (No. 311 § 21(d), 1959).

57. 158 S.E.2d 774 (S.C. 1968).

58. The order of the Insurance Commissioner provided as follows:

> It appearing that it will be to the best interest of the people of this State that all policies of motor vehicle liability insur-

Contact Requirement. The Motor Vehicle Safety Responsibility Act provides that "[a] motor vehicle shall be deemed to be uninsured if the owner or operator thereof be unknown . . . ."[59] Suit may be brought against the unknown motorist as John Doe, and the plaintiff's uninsured motorist carrier may defend in the name of John Doe.[60] To avoid the rather obvious problem of fraudulent suits based upon the negligence of phantom drivers, the legislature enacted a provision, typical in uninsured motorist laws, requiring, as a condition to bringing a "John Doe suit" that "[t]he injury or damage [be] caused by physical contact with the unknown vehicle . . . ."[61]

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ance, on January 1, 1961, contain the uninsured motorist provision as set forth in Section 46-750.23-1 of the South Carolina Code of Laws, Now, Therefore, it is

Ordered, that every policy or contract of motor vehicle liability insurance shall be construed to contain the endorsement or provision as to uninsured motor vehicles as set forth in Section 46-750.23-1 of the South Carolina Code of Laws, effective January 1, 1961.

59. S.C. CODE ANN. § 46-750.31(3) (Supp. 1967).

60. S.C. CODE ANN. § 46-750.35 (Supp. 1967) provides:

If the owner or opreator of any vehicle causing injury or damages by physical contact be unknown, an action may be instituted against the unknown defendant as "John Doe" and service of process may be made by delivery of a copy of the summons and complaint or other pleadings to the clerk of the court in which the action is brought. The insurance carrier shall have the right to defend in the name of John Doe; *provided,* that the bringing of an action against the unknown owner or operator as John Doe or the conclusion of such an action shall not constitute a bar to the insured, if the identity of the owner or operator who caused the injury or damages complained of becomes known, from bringing an action against the owner or operator theretofore proceeded against as John Doe. Nothing in the uninsured motorist provision nor any other provisions of law shall operate to prevent the joining, in an action against John Doe, of any other person causing such injury as a party defendant, and such joinder is hereby specifically authorized.

61. S.C. CODE ANN. § 46-750.34(2) (Supp. 1967). This section contains three requirements in all to restrict fraudulent "John Doe suits:"

If the owner or operator of any motor vehicle which causes bodily injury or property damage to the insured be unknown, there shall be no right of action or recovery under the uninsured motorist provision, unless

(1) The insured or someone in his behalf shall have reported the accident to some appropriate police authority within a reasonable time, under all the circumstances, after its occurrence and unless

(2) The injury or damage was caused by physical contact with the unknown vehicle, and

(3) The insured was not negligent in failing to determine the identity of the other vehicle and the driver of the other vehicle at the time of the accident.

The contact requirement was the basis of the insurer's defense in *Coker v. Nationwide Insurance Co.*[62] Coker brought a declaratory judgment action to determine the liability of Nationwide under the uninsured motorist provision of the liability policy issued by it to Coker. Coker had been injured and his wife killed when he was involved in a head-on collision with another automobile driven by Shealy. Shealy was racing with another driver at the time, who left the scene of the accident and could neither be identified nor located. Both drivers were concurrently liable for Coker's damages even though the unknown driver's car never came into contact with either Coker's car or Shealy's car.[63]

Coker's cause of action against Shealy was settled. In the present action he sought to hold Nationwide liable under the uninsured motorist endorsement for any judgment which might be obtained in a John Doe suit against the unknown driver. Nationwide contended that it was not liable since it had been stipulated that there had been no contact between the unknown driver's vehicle and either Shealy's vehicle or Coker's vehicle as required by section 46-750.34(2) quoted above.

The trial judge held for Coker, reasoning that since the contact requirement was enacted to prevent fraudulent claims based on the negligence of phantom drivers, it should have no applicability to this situation in which the presence of the unknown driver was admitted. The supreme court reversed, holding that the statute clearly required some physical contact. The court felt it could not go behind the plain meaning of the statute to determine whether the policy reasons for its enactment were applicable in this situation.[64]

62. 161 S.E.2d 175 (S.C. 1968).
63. Skipper v. Hartley, 242 S.C. 221, 130 S.E.2d 486 (1963).
64. The provision, which has been enacted in several states has been criticized on the grounds that it fails to accomplish its purpose without at the same time striking down many a bona fide John Doe suit. For example, the following illustration was given in Chadwick & Poché, *California's Uninsured Motorist Statute: Scope and Problems,* 13 HASTINGS L.J. 194, 198 (1961):

> *A*, an uninsured motorist driving a stolen car while intoxicated careens over the center line of a highway and *B*, travelling in the opposite direction, swerves to avoid a head-on collision. As a result *B*'s car rolls off the road and *B* and his passengers are severely injured. Thirty visiting bishops observe the entire event but none of them remembers the license number of *A*'s automobile. Because there was no contact with the hit-run vehicle neither *B* nor his passengers may invoke the protection

The question of whether the contact requirement would be met when the unknown vehicle strikes another vehicle and knocks this other vehicle into the insured's vehicle was left open by the court.[65]

C. Liability Insurance

Certificate of Title, Ownership, and Liability Insurance. During the survey period the South Carolina Supreme Court terminated the controversy concerning the relationship between the South Carolina Motor Vehicle Registration and Licensing Act and the concept of ownership for purposes of determining liability insurance coverage. The court refused to follow the federal case of *Clouse v. American Mutual Liability Insurance Co.*;[66] thus, under the *Erie* doctrine *Clouse* can no longer be regarded as a proper statement of South Carolina law.

Two sections of the South Carolina Code provide for the issuance of a new certificate of title upon voluntary transfer of a used vehicle. Section 46-150.15 deals with transfer by the certificate of title holder. When such a transfer is made, the seller may either send the old endorsed certificate of title to the buyer or to the highway department. If he sends it to the buyer, the buyer must forward it to the highway department along with an application for a new certificate.[67]

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of the uninsured motorist clause. To prevent this absurd result without opening the door to false claims, the statute should provide for alternatives to impact, *e.g.*, sworn statements by disinterested witnesses.

65. This situation has been passed on by the two leading cases in this area, Motor Vehicle Accident Indemnification Corp. v. Eisenberg, 18 N.Y.2d 1, 218 N.E.2d 524, 271 N.Y.S.2d 641 (1966); Automobile Club v. Lopez, 238 Cal. App. 2d 441, 47 Cal. Rptr. 834 (1965). Both these cases held that the contact requirement had been satisfied.

66. 344 F.2d 18 (4th Cir. 1965).

67. S.C. CODE ANN. § 46-150.15 (1962) provides:

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

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

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

Section 46-150.16 provides that a dealer may obtain registered vehicles for sale without applying for a new certificate of title, but when a transfer of one of these vehicles is made by the dealer, he must send the old certificate and application of the buyer for a new certificate to the highway department.[68] Thus, section 46-150.15 differs from section 46-150.16 in that the latter provision places the duty of applying for a new certificate upon the dealer, while the former provision allows the seller to place this obligation upon the buyer.

Clouse was the first of a series of cases to investigate the relationship between these transfer provisions and the determination of ownership for the purpose of deciding coverage questions. In reversing the district court, the federal court of appeals held that when a dealer did not comply with section 46-150.16 in selling a repossessed automobile, the dealer retained ownership of the car for purposes of his garage policy. Thus, the buyer who had procured no liability insurance prior to colliding with another vehicle, was held to be an omnibus insured under the dealer's policy, which provided coverage for "any automobile owned by . . . the named insured" and for any person using such an automobile, "provided the actual use of the automobile [was] by the named insured or with its permission." The court felt that the South Carolina Motor Vehicle Registration and Licensing Act "clearly spelled out a public policy that motor vehicles are not to be operated upon its highways without liability insurance coverage or its equivalents for uninsured motorists."[69] Thus, the court decided that until the dealer complied with section 46-150.16 and a certificate of title was issued, the buyer should remain an insured under the dealer's policy.[70]

68. S.C. CODE ANN. § 46-130.16 (1962) provides:
If a dealer buys a vehicle and holds it for resale and procures the certificate of title from the owner within ten days after delivery to him of the vehicle, he need not send the certificate to the Department, but, upon transferring the vehicle to another person other than by the creation of a security interest, shall promptly execute the assignment and warranty of title by a dealer, showing the names and addresses of the transferee and any lienholder holding a security interest created or reserved at the time of the resale and the date of his security agreement, in the spaces provided therefor on the certificate or as the Department prescribes, and mail or deliver the certificate to the Department with the transferee's application for a new certificate.

69. 344 F.2d at 19.

70. *Clouse* and the pre-*Clouse* cases are discussed in Kemmerlin, *Insurance, 1964-1965 Survey of S.C. Law*, 18 S.C.L. REV. 68, 74-82 (1966).

The next case in this area, *Grain Dealers Mutual Insurance Co. v. Julian*,[71] was decided by the South Carolina Supreme Court just before the federal court of appeals decision in *Clouse* appeared in the advance sheets.[72] *Grain Dealers* involved a different situation from that in *Clouse*, but virtually the same issue. Instead of the question of omnibus coverage under the seller's policy, there was the question of coverage under an operator's policy which had been issued to the buyer and which excluded owned automobiles from coverage. It was clear that the procedure of section 46-150.15 had not been followed in the sales transaction, and after the buyer caused injury to several parties in a collision involving the newly acquired vehicle, it was argued that the operator's policy provided coverage since title to the car had never passed to the buyer. The court held, however, that the buyer was the owner of the car even though section 46-150.15 had not been complied with and no certificate of title had been issued to the buyer. Thus, the court decided that the operator's policy did not provide coverage and stated clearly that "title to a motor vehicle passes to a purchaser notwithstanding the want of compliance with the Title Certificate law."[73]

Notwithstanding the rather clear language in *Grain Dealers*, the federal district court in *Security General Insurance Co. v.*

71. 247 S.C. 89, 145 S.E.2d 685 (1965).

72. As *Grain Dealers* appeared in the Smith Advance Sheets, there was the following intriguing reference to the district court opinion in *Clouse*:

> The cases of Clouse v. American Mut. Liability Ins. Co., 232 F. Supp. 1010, and Hanna v. State Farm Mut. Auto. Ins. Co., 233 F. Supp. 510, held that, as between the parties, compliance with statutory directions as to title and insurance is not necessary to transfer ownership of an automobile. In Clouse it was held that a purchaser who gave an automobile dealer a down payment for an automobile and executed a conditional sales contract for the balance, was the owner of the automobile when it subsequently became involved in a collision with a third party, even though the purchaser [*sic*] had failed to mail to the State Highway Department the papers necessary to effect a transfer of title. In Hanna it was held that a vendor's delivery of possession of an automobile to his vendee, together with the execution of a Certificate of Title in blank and the registration card, effectively divests the vendor of ownership.

The court of appeals decision in *Clouse* appeared before *Grain Dealers* was printed in the Southeastern Reporter advance sheets; when it was printed the above paragraph had been deleted. It has been said that both parties in settlement negotiations involving coverage questions which turned on whether or not *Clouse* would be followed by the South Carolina court often insited that this deletion was favorable to their position.

73. Grain Dealers Mut. Ins. Co. v. Julian, 247 S.C. 89, 99, 145 S.E.2d 685, 690 (1965).

Bill Vernon Chevrolet, Inc.[74] was able to say that "this court perceives no intimation in *Grain Dealers* that the South Carolina Supreme Court disapproves this [the *Clouse*] interpretation."[75] The factual situation in *Security General* was virtually the same as that in *Clouse*. The district court found *Clouse* and *Grain Dealers* reconciliable in that *Grain Dealers* did not involve an intermediary car dealer as did *Clouse* and in that *Grain Dealers* interpreted section 46-150.15 while *Clouse* interpreted section 46-150.16. The court felt that *Clouse* had been based primarily on the dealer's breach of duty in failing to comply with section 46-150.16, which caused the buyer to be able to operate the vehicle without a certificate of title or insurance. Indeed, the court extended this rationale of *Clouse* to a policy which apparently did not, by its terms, provide coverage for the buyer even if the dealer were still the owner of the vehicle:

> The *Clouse* interpretation of Section 46-150.16 makes this section a vital part of the State's scheme of insurance. Any part of the policy . . . inconsistent therewith is void and the pertinent provisions of the statute prevail as much as if expressly incorporated in the policy.[76]

The struggle finally came to an end with *St. Paul Fire & Marine Insurance Co. v. Boykin*,[77] decided during the survey period by the South Carolina Supreme Court. This case involved the same facts as *Clouse*, and as could be expected, the *Clouse* holding was rejected and the *Grain Dealers* holding extended to cover the *Clouse* situation. The court disagreed with the *Clouse* theory that in the transfer of title provisions the legislature had "spelled out a public policy that motor vehicles are not to be operated upon its highways without liability insurance coverage or its equivalents for uninsured motorists."[78] In particular the court noted that while liability insurance or payment of an uninsured motorist fee, as well as a certificate of title, is a prerequisite for registration and licensing of a motor vehicle to be used on the highway, liability insurance is not a requirement for obtaining the certificate

74. 263 F. Supp. 74 (D.S.C. 1967).
75. *Id.* at 78.
76. *Id.* at 79.
77. 161 S.E.2d 818 (S.C. 1968).
78. Clouse v. American Mut. Liab. Ins. Co., 344 F.2d 18, 19 (4th Cir. 1965).

of title itself under the transfer provisions.[79] Thus, noncompliance with the transfer provisions should have no effect so far as insurance coverage is concerned.

The question of ownership for insurance purposes also arose in *American Indemnity Co. v. Richland Oil Co.*[80] This was a declaratory judgment action brought by American against several defendants, including Canal Insurance Company to determine its liability under a fleet policy issued to Richland Oil.

Richland Oil, insured by American, and Finch Transportation Company, insured by Canal, were closely held corporations, both of which were managed by Henry Finch. Finch Transportation was the owner of a tractor, from a tractor trailer unit, which was transferred to Richland Oil. Richland Oil paid some $11,000 to Associates Discount Corporation, part of which represented the amount due on a note from Finch Transportation secured by the tractor. According to Henry Finch, Richland Oil was considered the owner of the tractor even though the certificate of title remained in Finch Transportation. The tractor was listed on the fleet schedule of the Canal policy, but not in the American policy, and the tractor was still used occasionally by Finch Transportation. Moreover, Henry Finch never notified Canal of the purported transfer as required by the policy.

The tractor and an attached trailer were wrecked by an employee of Richland Oil. Both insurance companies denied coverage.

The Canal policy excluded from coverage any person or organization "using the described automobile pursuant to any lease, contract of hire, bailment, rental agreement, or any similar contract or agreement either written or oral, expressed or implied . . . ." The American policy excluded liability for damages which occurred "while any trailer covered by this policy is used with any automobile owned or hired by the insured and not covered by like insurance in the company."

The court granted both insurers' motions for summary judgment and held that the exclusions in both policies ap-

79. The relevant registration provisions are found in S.C. CODE ANN. §§ 46-11, -17(3) (1962), 46-136 to -137 (Supp. 1967); *see* Kemmerlin, *Insurance, 1964-1965 Survey of S.C. Law*, 18 S.C.L. REV. 68, 81-82 (1966).

80. 273 F. Supp. 702 (D.S.C. 1967).

plied so that neither insurer was obligated to defend the tort suits. This decision was based on the court's finding that Finch Transportation was the owner of the tractor involved in the accident and had rented this tractor to Richland Oil in consideration of the payment made to Associates Discount. The documentary evidence of ownership by Finch Transportation,[81] coupled with the fact that Henry Finch did not seem to regard the corporations as separate entities, capable of purchasing from each other, was found to be persuasive. Under these circumstances, the tractor was being used pursuant to a "contract of hire" within the Canal exclusion, and the trailer was used with an automobile "hired by the insured and not covered by like insurance in the company" within the American exclusion.

Omnibus Clause. A liability policy issued in South Carolina must provide coverage not only for the named insured but, under the omnibus clause, for additional classes of persons as well.[82] Cases decided during the survey period on the omnibus clause involved two of these classes, persons driving with permission of the named insured and relative residents living in the home of the named insured.

The standard garage policy omnibus clause, applied in *Allstate Insurance Co. v. Federated Mutual Implement & Hardware Co.*,[83] extends coverage to "any person while using,

81. S.C. CODE ANN. § 46-150.11 (1962) provides: "A certificate of title issued by the Department is prima facie evidence of the facts appearing on it." The court found that this presumption had not been overcome. For cases holding the presumption to have been overcome see Grain Dealers Mut. Ins. Co. v. Julian, 247 S.C. 89, 145 S.E.2d 685 (1965); Bankers Ins. Co. v. Griffen, 244 S.C. 552, 137 S.E.2d 785 (1964); Porter v. Hardee, 241 S.C. 474, 129 S.E.2d 131 (1963).

82. S.C. CODE ANN. § 46-750.32 (Supp. 1967) provides:

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

The term "insured" is defined in S.C. CODE ANN. § 46-750.31(2) (Supp. 1967) as follows:

> The term *"insured"* means the named insured and, while resident of the same household, the spouse of any such named insured and relatives of either, while in a motor vehicle or otherwise, and any person who uses, with the consent, express or implied, of the named insured, the motor vehicle to which the policy applies and a guest in such motor vehicle to which the policy applies or the personal representative of any of the above.

83. 161 S.E.2d 240 (S.C. 1968).

with the permission of the named insured, an automobile to which the insurance applies . . . provided such person's actual operation . . . is within the scope of such permission." On the issue of who is a permittee under this clause, the South Carolina court has followed what is known as the strict rule — that "[p]ermission to use a covered vehicle for a particular purpose does not imply permission to use it for all purposes."[84]

Allstate had issued its garage liability policy to Martin, who managed a service station. Federated had issued its garage policy to Bailey, who managed a used car lot. Bailey arranged with Martin to have a used car of Bailey's washed and serviced. Bailey's employee was to drive the car to the service station and pick up Martin's employee, who was to return with Bailey's employee and then drive back to Martin's service station. On the way back Martin's employee deviated from the direct route between Martin's and Bailey's, and after the deviation was completed and he was returning toward Martin's, he negligently wrecked the vehicle. All claims resulting from the wreck were settled by Allstate, who brought this declaratory judgment action against Federated to determine which insurance company, if either, provided coverage.

It was determined that Allstate's policy provided excess coverage to Federated's policy if Federated's policy provided coverage at all. The issue of Federated's coverage turned on whether or not Martin's employee was an omnibus insured under Federated's policy. Federated contended he was not since he had deviated from his assigned mission and therefore was not driving "with the permission of the named insured" or "within the scope of such permission." The lower court so found on stipulated facts and the superme court affirmed. Allstate contended that an analogy should be drawn between the scope of permission issue and the much litigated scope of employment issue in torts cases.[85] There is authority for the proposition that a servant in the process of returning to

84. *Id.* at 241. This rule has been applied in Crenshaw v. Harleysville Mut. Cas. Co., 246 S.C. 549, 144 S.E.2d 810 (1965); Eagle Fire Co. v. Mullins, 238 S.C. 272, 120 S.E.2d 1 (1961); Rakestraw v. Allstate Ins. Co., 238 S.C. 217, 119 S.E.2d 746 (1961). These cases are not altogether clear, however, on the application of this rule to second permittees. For an exhaustive discussion and categorization of the various situations involving second permittees, see Annot., 4 A.L.R.3d 10 (1965).

85. Brief for Appellant at 4-7.

his assigned mission after a deviation is within the scope of his employment.[86] The supreme court apparently rejected this analogy, holding that the degree of deviation necessary to bring a permittee outside the scope of the omnibus clause was a question of fact and that the trial judge's finding was not clearly erronous.

The strict rule that "permission to use a covered vehicle for a particular purpose does not imply permission to use it for all purposes" was also applied by the federal district court in *Great American Insurance Co. v. McDowell.*[87] Great American brought a declaratory judgment action, seeking a determination that its garage policy issued to Coastal Motor Company did not afford coverage for an accident caused by the negligence of one of Coastal's employees. The tort plaintiffs contended that the employee had implied permission to use the vehicle at the time of the wreck and was thus an omnibus insured under the standard garage policy omnibus clause.

The employee, McDowell, had worked sporadically at Coastal for over ten years and had been hired the last time on January 21, 1966. Since McDowell had no means of transportation to and from work, his employer told him he could use a company car for this purpose. The employer, however, specifically denied McDowell permission to use the car on weekends because he knew McDowell was a heavy drinker. He had preivously fired him for drinking and using a customer's car without permission.

McDowell drove the car home on Saturday, January 29, 1966, against the instructions of his employer. On the following Monday and Tuesday he did not appear for work, and on Tuesday at 7:00 p.m. the wreck occurred out of which the tort suits pending against McDowell arose. Earlier on Tuesday Elizabeth McDowell had also wrecked the company car, damaging another vehicle owned by Bellamy. McDowell told Bellamy to bring his car to Coastal's repair department and it would be fixed. Bellamy did so on Wednesday, and this was the first notice received by anyone at Coastal that McDowell still had the company car. At this time an official at Coastal obtained a warrant for McDowell's arrest.

86. Carrol v. Beard-Laney, Inc., 207 S.C. 339, 35 S.E.2d 425 (1945).
87. 276 F. Supp. 702 (D.S.C. 1967).

The district court found that under the strict rule McDowell did not have implied permission to use the car on the day of the wreck. Thus, the court held that McDowell was not an omnibus insured under Coastal's policy and that Great American did not have to defend the pending tort actions. The particular South Carolina rule applicable to this situation was quoted by the court as follows:

> Consent to the use by an employee of his employer's automobile, outside the scope of his employment, will be implied only if there has been "a course of conduct or a practice with the knowledge and acquiescence of the owner, such as would indicate to a reasonable mind that the employee had the right to assume permission under the particular circumstances."[88]

Another case involving the permission aspect of the omnibus clause, *St. Paul Fire & Marine Insurance Co. v. American Insurance Co.*,[89] held that the issue of implied permission was properly submitted to the jury. In this case St. Paul brought a declaratory judgment action to determine whether it was obligated to defend a tort action under a policy issued to Marvin F. Matthews as named insured. The tort action arose out of an accident in which the named insured's father was driving the insured vehicle. If the father was not an omnibus insured, American, who was the tort plaintiff's uninsured motorist carrier, would be liable for any judgment which might be obtained against the father.

The issue of implied permission arose out of the following facts. The father lived around the corner from his son's house. Although the insured vehicle was left at the father's house, the father had no South Carolina driver's license. The car was used primarily by the named insured's mother. The son testified that his father had been told he should not drive the car and that to his knowledge his father had no key to the car. There was testimony, however, that the father did have a key, drove the car about once a week to deliver eggs, had driven to another town to visit his sister, and had occasionally driven the car to the son's house.

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88. *Id.* at 706, *quoting from* Crenshaw v. Harleysville Mut. Cas. Co., 246 S.C. 549, 554, 144 S.E.2d 810, 813 (1965).
89. 159 S.E.2d 921 (S.C. 1968).

Although the son testified that he had no knowledge of his father's use of the car, both the lower court and the supreme court held that the defendant had produced sufficient circumstantial evidence of implied permission to create a jury question. The jury rejected the son's testimony and decided that under the circumstantial evidence the son had impliedly consented to his father's use of the car when the accident occurred. Thus, the father was an omnibus insured under St. Paul's policy, and St. Paul was obligated to defend the tort action.

In *Buddin v. Nationwide Mutual Insurance Co.*[90] the court was concerned with the relative-resident category of omnibus insureds. Aetna Insurance Company had paid the tort plaintiff $2000 pursuant to its uninsured motorist endorsement and brought this action along with the tort defendant to recover the amount paid from Nationwide. Nationwide's liability depended on whether Buddin, the tort defendant, was an omnibus insured under a liability policy issued to Buddin's uncle as named insured. The trial judge entered judgment for Nationwide on a jury verdict. The supreme court reversed, holding that as a matter of law Buddin was an omnibus insured under his uncle's liability policy.

The omnibus clause of the uncle's policy extended coverage "to any other land motor vehicle . . . while used by the [named insured] or by his spouse and the relatives of either if a resident of the same household." The accident occurred on October 10, 1965, when Buddin was driving an automobile owned by James Hill. Neither Hill nor Buddin owned liability policies themselves.

Both of Buddin's parents had died prior to the accident, and their home had been purchased by Buddin's uncle, the named insured. While attending college, Buddin spent several weekends with his uncle. After leaving college he stayed with his uncle for two months. After a trip to California he spent seven or eight days at the uncle's house and then moved into a motel, and later a trailer. In August 1965 while unemployed he moved back in with his uncle, where he remained through the date of the accident until December 28, 1965.

The facts concerning Buddin's relationship to his uncle between August and December 1965 are set out in detail by

90. 250 S.C. 332, 157 S.E.2d 633 (1967).

the court. In sum it can be said that their relationship was very close to that of father and son, even though the nephew paid some rent when he could afford it.

The defendant argued that it had sustained its burden of producing sufficient evidence to create a jury question by offering evidence of the following: (1) that the nephew made rental payments, suggesting the relationship was that of landlord and tenant, (2) that the uncle did not maintain the degree of control over his nephew normally exercised over a relative resident, and (3) that there was a lack of permanency in the living arrangements between the uncle and nephew. The court held that this was not a sufficient production of evidence to contradict the plaintiff's evidence that Buddin was a relative resident of his uncle's household so that a directed verdict should have been granted the plaintiff.

Omnibus Exclusion: Non-Owned Automobiles in Automobile Business. Although a typical omnibus clause extends coverage to the named and omnibus insureds when they are driving a non-owned automobile, many policies exclude from this coverage any accident occasioned by use of a non-owned automobile in the automobile business.[91] *Heaton v. State Farm Mutual Automobile Insurance Co.*[92] held that such an exclusion was valid according to South Carolina cases even though omnibus coverage is required by the Motor Vehicle Safety Responsibility Act.[93]

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91. This exclusion has been explained as follows:
> Coverage on non-owned automobiles has become almost standard in automobile insurance policies. Its purpose is to give an insured who has coverage on a described, owned automobile protection when the insured uses a non-owned automobile. Such insurance is afforded in recognition of the fact that an insured may from time to time use automobiles which are not protected by the type coverage which he carries on the vehicle described and covered by his policy. An insurer is willing to cover such a non-owned automobile where the use by its insured is casual and the non-owned automobile is of the type covered in the policy, in most situations a private passenger automobile. However, an insurer does not wish this coverage to extend to a non-owned automobile used regularly by an insured, since such an extension of coverage could result in the risk to the insurer being greatly increased. Therefore, after the grant of non-ownership coverage, the insurer must undertake to limit it by exclusions.

Kemmerlin, *Insurance, 1964-1965 Survey of South Carolina Law*, 18 S.C.L. REV. 68-69 (1966).

92. 278 F. Supp. 725 (D.S.C. 1968).

93. S.C. CODE ANN. §§ 46-750.31(2), -750.32 (Supp. 1967). These provisions are set out *supra* note 82.

The omnibus exclusion applied in this case provided that non-owned automobile coverage did not extend to "any accident arising out of the operation of an automobile business." Automobile business was defined as "the business of selling, repairing, servicing, storing or parking of automobiles."

A tort judgment was obtained against an employee of a public parking lot when he backed a customer's car into the tort plaintiff's car. The employee's liability policy contained the above omnibus exclusion, and the insurer refused to defend on the ground that the exclusion applied to the employee's accident. The employee and his judgment creditor brought this suit in the federal district court against State Farm to recover the amount of the judgment. State Farm moved for summary judgment on the ground that there was no factual issue for determination concerning the applicability of the exclusion.[94]

The plaintiffs contended that the applicability of the exclusion to this situation presented a question of fact, and alternatively, if the exclusion did clearly apply, it was void under the Motor Vehicle Safety Responsibility Act.

On the first issue the court held that there was no question of fact surrounding the applicability of the exclusion in the present situation because the accident clearly arose out of the operation of the business of parking automobiles. The court noted that the case cited by the plaintiffs[95] for the proposition that such an exclusion always presented a question of fact when applied to any particular factual situation, had construed the newer exclusion which applies to an "automobile while used in the automobile business." In the court's opinion the words "used in the automobile business" tended to create factual issues not created by the words "arising out of the operation of an automobile business."

On the second issue the plaintiffs relied on the definition of "insured" in section 46-750.31(2) of the South Carolina Code. This definition, taken together with section 46-750.32 requires the insurer to provide coverage for the named insured and relative residents "while in a motor vehicle."[96] The

94. FED. R. CIV. P. 56(c) provides for summary judgment if there is no "genuine issue of fact."

95. American Fire & Cas. Co. v. Surety Indem. Co., 246 S.C. 220, 143 S.E.2d 371 (1965).

96. These provisions are set out *supra* note 82.

court, however, interpreted South Carolina cases to mean that the general coverage requirements of sections 46-750.31(1) and 46-750.32 did not prevent the insurer from placing reasonable limitations on its liability. The exclusion for non-owned automobiles used in the automobile business was found to be reasonable.[97]

Automatic Insurance Clause. The purpose of the standard automatic insurance clause contained in many liability policies is to provide immediate coverage for new automobiles which may be acquired by the named insured.[98] The standard clause contains two alternative provisions. On the one hand, coverage is provided under the replacement provision for a newly acquired automobile which replaces the presently insured automobile. Notice to the insurer may or may not be required by the policy as a condition subsequent to this coverage. On the other hand, coverage is provided under the blanket or fleet provision for newly acquired automobiles which do not replace the presently insured vehicle if two conditions are met. The conditions are that the company must insure all automobiles owned by the named insured and that the insured must give notice to the company within a specified time from the date of acquisition of his election to make the policy applicable.[99] The requirement of notice is a condition subsequent, and coverage is provided automatically from the date the new automobile is acquired to the date when notice to the company is due.[100]

The distinctive feature of the replacement alternative is that when replacement occurs, coverage on the replaced vehicle ends, and coverage on the newly acquired vehicle begins; thus, under this alternative the insurer's risk is limited to one vehicle.[101] Fear of increasing this risk led the court in *Fleming v. Nationwide Mutual Insurance Co.*[102] to hold that the insured's newly acquired vehicle did not "replace" the presently insured vehicle.

In 1963 Fleming, who was in the television repair business, owned a 1954 Pontiac and a 1962 Ford van. The 1954 Pontiac

97. *See* note 91 *supra.*
98. *See* 12 G. COUCH, CYCLOPEDIA OF INSURANCE LAW § 45:184 (2d ed. 1964).
99. *See generally id.* §§ 45:181-83.
100. *Id.* § 45:205.
101. See the text of the standard automatic clause in *id.* § 45:182.
102. 383 F.2d 145 (4th Cir. 1967).

was not insured at this time since it was not in running condition and had not been licensed with the highway department.

On March 16, 1964, Fleming traded the 1954 Pontiac as a down payment on a 1960 Pontiac. At the same time he began looking for a buyer for his television repair business. Throughout the period from March 16 to April 25, he continued to drive both the new Pontiac and the Ford van. On April 25 the television repair business, including the Ford van, was sold. The buyer actually took title to the Ford in May 1964 when the final payment was made to a finance company.

On August 30, 1964, Fleming wrecked the 1960 Pontiac. Tort suits arising out of this wreck were pending when the present declaratory judgment action was brought by Nationwide. Fleming contended that Nationwide was obligated to defend the tort actions because the 1960 Pontiac was a replacement vehicle for the Ford van under the automatic clause in the policy.[103]

The federal court of appeals affirmed the district court's holding[104] that the vehicle being "replaced must be disposed of or be incapable of further service at the time the "replacement" vehicle is purchased.[105] Since Fleming had continued to drive the Ford van for over a month after the 1960 Pontiac had been purchased, the Pontiac was not a

103. Nationwide's automatic clause provided:
[T]he word 'automobile' means:

. . .

Newly Acquired Automobile — an automobile, ownership of which is acquired by the Named Insured or his spouse if a resident of the same household, if (i) it replaces an automobile owned by either and covered by this policy, or the Company insures all automobiles owned by the Named Insured and such spouse on the date of its delivery, and (ii) the Named Insured or such spouse notifies the Company within thirty days following such delivery date; but such notice is not required under [personal injury, property damage, and medical payments coverage] if the newly acquired automobile replaces an owned automobile covered by this policy.

104. Nationwide Mut. Ins. Co. v. Fleming, 257 F. Supp. 267 (D.S.C. 1966). The district court opinion is discussed in *Insurance, 1967 Survey of S.C. Law*, 19 S.C.L. REV. 575, 605-07 (1967).

105. The court relied principally on Mitcham v. Travelers Indem. Co., 127 F.2d 27 (4th Cir. 1942). The court found that the only South Carolina case to construe a replacement clause, Miller v. Stuyvesant Ins. Co., 242 S.C. 322, 130 S.E.2d 913 (1963), involved the situation in which the insured transferred the "replaced" vehicle to his wife. The South Carolina court held that there was no replacement under these circumstances.

replacement vehicle under the above rule, and Nationwide's policy did not provide coverage under the automatic clause.[106]

Undoubtedly, the court's opinion was based at least partially on the realization that to hold otherwise would allow an insured who operated both vehicles for a time to take alternative positions on the replacement issue, depending on which vehicle was being driven when the wreck occurred. A dissenting opinion was filed in which it was argued that the risk of double coverage was not present in this case since the collision occurred after the Ford had been sold, not while both vehicles were in the insured's possession.[107]

The other alternative under the automatic clause, known as the blanket or fleet provision, was construed by the federal court of appeals in *St. Paul Mercury Insurance Co. v. Pennsylvania Lumbermen's Mutual Insurance Co.*[108] Varndell Gallardo and his father Eusebio Gallardo purchased a car for Varndell's use. Eusebio signed both the conditional sales contract and registration application, and Varndell paid the uninsured motorist fee. Varndell's mother then talked with Lumbermen's agent concerning liability insurance for the car, but no policy was procured since she considered the premiums too high. A collision then occurred while Varndell was driving the car, and two tort suits arising out of this collision were brought against him.

St. Paul, joined by State Farm, brought a declaratory judgment action as uninsured motorist carriers for the tort plaintiffs against Lumbermen's to determine its liability under a family combination policy issued to Eusebio before the new car had been purchased. Lumbermen's policy contained the standard automatic provision which extended coverage to newly acquired automobiles of the named insured provided the insured gave the company notice during the policy period

106. The court also noted that the policy contained a declaration that the Ford van was a commercial vehicle. The fact that the 1960 Pontiac was a pleasure vehicle helped substantiate, in the court's opinion, a finding that there had been no replacement. Most policies apparently require that the newly acquired vehicle be used for the same purpose as the replaced vehicle. *See* 12 G. COUCH, *supra* note 98, §§ 45:182, 45:213, 45:214.

107. The dissenting judge noted that in Mitcham v. Travelers Indem. Co., 127 F.2d 27 (4th Cir. 1942), upon which the majority relied, the collision had occurred before the replaced vehicle was sold, distinguishing that case from the present situation.

108. 378 F.2d 313 (4th Cir. 1967).

"of his election to make this and no other policy issued by the company applicable to such automobile . . . ."

St. Paul and State Farm argued that Eusebio was the owner of the newly acquired automobile which was therefore covered under Lumbermen's automatic clause since the wreck had occurred before notice was due under the notice provision.[109] Lumbermen's argued that Varndell was the owner of the new car, and alternatively, that Eusebio through his wife had elected to obtain other insurance on the automobile when she talked with Lumbermen's agent, thus waiving automatic coverage under the notice provision.

The district court found that Eusebio was the owner of the car but that Eusebio had elected against automatic coverage so that the blanket provision did not apply.[110] St. Paul and State Farm appealed from the finding that Eusebio had made an election against automatic coverage, and Lumbermen's cross appealed from the finding that Eusebio was the owner of the car.

In a per curiam opinion the court of appeals affirmed the district court's finding that Eusebio was the owner of the car, but reversed on the second finding that Eusebio had elected against coverage. Apparently neither Eusebio's wife nor Lumbermen's agent was aware of the automatic provision whereby a true election could have been made. Moreover, the court concluded that the notice provision allowed the insured to "shop and to compare."[111]

Duties of the Insurer: Tortious Failure to Settle. In 1931 the South Carolina Supreme Court decided in *Tyger River Pine Co. v. Maryland Casualty Co.*[112] that an insured had a

109. Varndell, even though relative resident of Eusebio's household, was apparently not an omnibus insured under Eusebio's policy as to the non-named automobile owned by Eusebio. It has been suggested that S.C. CODE ANN. §§ 46-750.31, .32 (Supp. 1967) might require coverage for Varndell as omnibus insured no matter who owned the car. *Insurance, 1967 Survey of S.C. Law*, 19 S.C.L. REV. 575, 605 n.100 (1967). *But see* Heaton v. State Farm Mut. Auto. Ins. Co., 278 F. Supp. 725 (D.S.C. 1968); American Fire & Cas. Co. v. Surety Indem. Co., 246 S.C. 220, 143 S.E.2d 371 (1965); Stanley v. Reserve Ins. Co., 238 S.C. 533, 121 S.E.2d 10 (1961). These cases suggest that reasonable exclusions are allowable notwithstanding the mandatory insurance provisions of the code.

110. The district court opinion is discussed in *Insurance, 1967 Survey of S.C. Law*, 19 S.C.L. REV. 575, 604-05 (1967).

111. 378 F.2d at 315.

112. 163 S.C. 229, 161 S.E. 491 (1931) (insurer's demurrer overruled); 170 S.C. 286, 170 S.E. 346 (1933) (judgment for insured affirmed).

cause of action against its liability insurer for negligent failure to settle a tort action within the limits of the policy. The insured was allowed to recover the amount which the tort judgment exceeded the policy limits, and the court seemed to say that there was no requirement that the insured prove bad faith or fraud on the part of the insurer.[113]

There is a distinction, however, between a suit brought under the *Tyger River* theory and a suit brought for failure of the insurer to defend the insured in the tort suit when the policy provides coverage. This distinction was illustrated by *State Farm Mutual Automobile Insurance Co. v. Arnold*,[114] in which the federal district court disposed of pre-trial motions. State Farm brought a declaratory judgment action to determine whether it provided coverage for a tort judgment rendered against Arnold, its insured. State Farm had denied coverage ever since receiving notice of the accident and had refused to defend. The judgment against Arnold was for an amount greater than the limits of the liability policy. Arnold counterclaimed, setting up two causes of action, one to recover the amount of the tort judgment and one to recover actual and punitive damages allegedly caused by the insurer's willful failure to settle or defend.

The court held that the first cause of action was based on breach of contractual obligation to defend, the second on tortious failure to settle. The insurer's motion to strike the second cause of action was sustained. *Miles v. State Farm Mutual Automobile Insurance Co.*[115] was interpreted as standing for the proposition that when the insurer denies coverage in good faith, it is not liable for failure to settle even if it later turns out that the policy does provide coverage. In other words the court determined that *Tyger River* was based entirely on negligent mishandling of a suit and did not comprehend the present situation in which the insurer refused to handle the suit at all.

The federal district court's decision would seem to have been a correct interpretation of South Carolina law. Under the standard liability policy the insurer is obligated to defend any action brought against the insured for which the

113. 170 S.C. at 291, 170 S.E. at 348.
114. 276 F. Supp. 765 (D.S.C. 1967).
115. 238 S.C. 374, 120 S.E.2d 217 (1961)

policy provides coverage,[116] but there is no corresponding provision obligating the insurer to settle; the policy merely provides that the insurer has the right to control settlement negotiations.[117] Thus, any suit brought against the insurer for negligent failure to settle within the policy limits must be based in tort, while a suit against the insurer for failure to defend is based on breach of contract.[118] According to *Miles v. State Farm Mutual Automobile Insurance Co.*,[119] in the action for breach of contract the insured can recover only the amount of the judgment which is within the policy limits absent a showing of bad faith on the part of the insurer; as has been noted, the *Tyger River* doctrine allows recovery for the full tort judgment even if it exceeds the policy limits, and the insured need only prove negligence.

In another case brought under the *Tyger River* doctrine, *Andrews v. Central Surety Insurance Co.*,[120] the insured recovered $134,000, the total amount of two tort judgments rendered against him less $10,000 paid by the insurer under the policy.

The tort suits were occasioned by the following facts. Andrews was riding as a passenger in his own automobile being driven by a sailor when it collided with another car driven by Green. Green was burned to death when his vehicle caught fire. Both the insured and the sailor were drunk; the wreck occurred when the sailor pulled out to pass, meeting Green's vehicle head-on.

Green's estate retained an attorney and began negotiations with Central's adjuster. A settlement offer of $9,950 was made and rejected by the adjuster, who counteroffered to pay $9,850. The attorney extended the time for acceptance of his offer on two different occasions, and Andrew's personal attorney advised the adjuster to accept since it appeared that a jury would render a verdict for an amount well in

116. 7A J. APPLEMAN, INSURANCE LAW AND PRACTICE § 4682 (1962).
117. *Id.* §§ 4681, 4711.
118. *See* Miles v. State Farm Mut. Auto. Ins. Co., 238 S.C. 374, 120 S.E.2d 217 (1961). *Compare* Fuller v. Eastern Fire & Cas. Ins. Co., 240 S.C. 75, 124 S.E.2d 602 (1962), *with* Andrews v. Central Sur. Ins. Co., 271 F. Supp. 814 (D.S.C. 1967), *aff'd mem. sub nom.* Andrews v. Commercial Union Ins. Co., 391 F.2d 935 (4th Cir. 1968).
119. 238 S.C. 374, 120 S.E.2d 217 (1961).
120. 271 F. Supp. 814 (D.S.C. 1967), *aff'd mem. sub nom.* Andrews v. Commercial Union Ins. Co., 391 F.2d 935 (4th Cir. 1968).

excess of the $10,000 policy limit. The adjuster so advised the company, but no action was taken.

Wrongful death and survival actions were then commenced on behalf of Green's estate against Andrews.[121] After investigating the case, Central's local attorneys offered to settle for the full policy limit of $10,000, which offer was now rejected by the estate. The two cases were tried and resulted in verdicts for $133,000, and $11,000 respectively. Central paid the policy limit of $10,000, and Andrews brought the present action to recover the remaining $134,000 plus attorney's fees for the tort action, alleging that Central negligently and in bad faith failed to settle within the policy limits.

The case was tried before the federal district court without a jury. The court found that the circumstances surrounding the death and survival actions presented a clear case of liability and that it was unreasonable for Central to have rejected the offer of settlement within the policy limits.[122] Under the *Tyger River* doctrine Central was held liable in tort to Andrews for the amount of the verdicts less the $10,000 paid.[123] The district court's holding was affirmed in a memorandum opinion by the Fourth Circuit Court of Appeals.[124]

Duties of the Insured. The standard automobile liability policy requires the insurer to defend any suit against the insured even though it is groundless, false, or fraudulant. There is a corresponding right of the insurer to exclusive control over this litigation. The standard policy also contains a provision under which the insured promises to cooperate

121. Apparently the tort suits were brought under the theory of joint enterprise-imputed negligence since the sailor, not the insured was driving.

122. Investigation revealed that the sailor had been driving too fast for conditions, had failed to yield the right of way, had passed unlawfully, and had been driving under the influence of intoxicants. 271 F. Supp. at 819. After offering to settle for the full $10,000, Central's counsel answered only by way of general denial, suggesting that the issue of liability had been virtually conceded. On the question of wrongful death damages, it should be noted that Green was 26 years old, made $60.00 a week, and had a life expectancy of 44.90 years. The survival action was based on the fact that Green was not killed immediately, but burned to death.

123. The court did not allow the cost to the insured of retaining an attorney for the personal injury action, citing American Fidelity & Cas. Co. v. Greyhound Corp., 258 F.2d 709 (5th Cir. 1958); Christian v. Preferred Accident Ins. Co., 89 F. Supp. 88 (N.D. Cal. 1950). The court also noted that the damages in this suit would be handled by the attorney who prosecuted the personal injury suit against Andrews.

124. Andrews v. Commercial Union Ins. Co., 391 F.2d 935 (4th Cir. 1968).

with the insurer in the defense of any suit for which the policy provides coverage. In South Carolina a breach of this latter provision, known as the cooperation clause, will relieve the insurer of liability under the policy only if the insurer can show that it was substantially prejudiced thereby.[125]

In *Vaught v. Nationwide Mutual Insurance Co.*,[126] an action on a liability policy by the tort plaintiff as judgment creditor, Nationwide contended it was relieved of liability because the insured had failed to assist in securing witnesses for the defense of the tort suit as required by the cooperation clause in the policy. The lower court entered judgment for the plaintiff, and the supreme court affirmed.

The cooperation clause, which formed the basis of the insurer's defense, provided as follows:

> The insured shall cooperate with the company and, upon the company's request, shall attend hearings and trials and shall assist in effectuating settlements, securing and giving evidence, obtaining the attendance of witnesses and in the conduct of suits.

The tort action arose out of an accident involving the named insured's truck driver and the plaintiff. The wreck occurred in South Carolina while the insured's driver was making one of his regular trips between Florida and North Carolina. Suit was brought against the insured in Horry County, the place of the accident. Before trial Nationwide's counsel requested the insured to have his driver available as a witness. The insured instructed the driver to stop over on his way from North Carolina to Florida. Although the driver was present for trial, the trial judge declared a mistrial before time for him to testify.

A second trial was held on January 6, 1964. Again the insured's driver was instructed to be present. This time, however, he did not appear by the time trial was to begin. Nationwide's counsel informed the court that one of his witnesses had not arrived yet but was expected to be there in time to testify. No motion for continuance was made at this time. During the trial, however, the insured notified his

125. Crook v. State Farm Mut. Auto. Ins. Co., 235 S.C. 452, 112 S.E.2d 241 (1960); Pharr v. Canal Ins. Co., 233 S.C. 266, 104 S.E.2d 394 (1958).
126. 250 S.C. 65, 156 S.E.2d 627 (1967).

attorney by telephone that the driver would not arrive until the following day, and a motion for continuance was then made and denied.

Nationwide contended that the driver's absence was substantially prejudicial to its defense. The trial judge had instructed the jury that it could draw the inference from the driver's absence that his testimony would have been adverse to the insured had he been present.[127] Furthermore, the driver was not a resident of South Carolina and could not be subpoenaed, so Nationwide was totally dependent upon its insured to have the driver present for trial.

There is authority for the proposition that if the named insured himself does not appear for trial, there is a prejudicial lack of cooperation in many circumstances as a matter of law, and the insurer will be relieved of liability.[128] Although the truck driver was neither a named insured nor a party defendant in the tort action, Nationwide argued that the same rule should apply.[129] The court held, however, that the issue of cooperation had been properly submitted to the jury: The jury could find from the evidence that the insured had instructed the driver to return to the second trial and that there had been ample time for him to do so after leaving Florida for North Carolina. Under these circumstances the insured had done all he could be reasonably expected to do by way of having his driver present at trial, especially since he had arrived in time for the first trial. Moreover, there were other eye witnesses to the wreck who did testify for the insured, suggesting that the insurer had not necessarily been substantially prejudiced by the driver's absence.

A second case involving the insured's duties, *Gunnels v. American Liberty Insurance Co.*,[130] was concerned with the

127. The trial judge's instruction would seem to be doubtful. Although the driver was within the control of the insured and his absence was to a certain extent unexplained, under the circumstances there could have been no justified suspicion that the defense was wilfully withholding the driver's testimony. *See* Davis v. Sparks, 235 S.C. 326, 111 S.E.2d 545 (1959). Indeed, the court's holding in the principal case, 250 S.C. at 73, 156 S.E.2d at 631, that the jury could find the insured had "acted reasonably and in good faith in attempting to have the driver present to testify" would seem to be inconsistent with such an instruction under the rationale of *Davis supra.*

128. *See generally* Annot., 60 A.L.R.2d 1146 (1958).

129. Brief for Appellant at 17-22.

130. 161 S.E.2d 822 (S.C. 1968).

requirement of the uninsured motorist statute that the tort plaintiff serve his liability carrier with the suit papers so that the carrier might defend the uninsured motorist and protect itself from liability under the required uninsured motorist endorsement.[131] In *Gunnels* the court held that under the circumstances compliance with the statute was not a condition precedent to the insured's liability under its uninsured motorist endorsement.

Gunnels brought suit against Hewitt, who was insured by Republic Casualty Company. Although American, who was Gunnels' insurer, had received no suit papers, it had been notified of the accident which gave rise to the tort suit, and when Hewitt counterclaimed, it participated in the successful defense against the counterclaim. Gunnels recovered in the suit, but before the judgment could be collected, Republic became insolvent and went into receivership. At this time Hewitt became an uninsured motorist under section 46-750.31 of the South Carolina Code.[132]

Gunnels then sought to recover the tort judgment from American under its uninsured motorist endorsement; American denied liability, and the present suit followed. American demurred to the complaint on the grounds that it had never been sent the suit papers during the tort action as specifically required by section 46-750.33. The lower court overruled the demurrer and American appealed. The supreme court affirmed.

On appeal American contended that the statute requiring suit papers to be served was unambiguous so that it was not open to construction. The court held, however, that since the Motor Vehicle Safety Responsibility Act was remedial in nature, the various provisions should be applied liberally with a view toward effectuating the overall purpose

131. S.C. CODE ANN. § 46-750.33 (Supp. 1967) provides:
No action shall be brought under the uninsured motorist provision unless copies of the pleadings in the action establishing such liability are served in the manner provided by law upon the insurance carrier writing such uninsured motorist provision. The insurance carrier shall have the right to appear and defend in the name of the uninsured motorist in any action which may affect its liability, and shall have twenty days after service of process on it in which to make such appearance.

132. A defendant becomes an uninsured motorist if his liability carrier becomes insolvent before it is able to respond to a judgment. S.C. CODE ANN. § 46-750.31 (Supp. 1967).

of the legislation. The court felt that relieving American of liability under the present circumstances would tend to defeat the purpose of the required uninsured motorist endorsement of protecting against damages caused by the negligence of an uninsured motorist.[133]

Under the particular facts of the case, the insurer did have notice of the tort suit and was actually present through its attorney. The insured was in no better a position to know that the tort defendant might become an uninsured motorist than was the insurer. In such a situation the requirement of forwarding suit papers would be a meaningless technicality. The case might have been decided differently, however, had the tort plaintiff's insurer not been present at trial. If this were the situation the insurer would certainly have been prejudiced by not having received the suit papers even though the tort defendant did not become an uninsured motorist until after trial. Unlike the present case the insurer would be in no position to determine whether or not it wished to participate on behalf of the tort defendant. It would thus seem advisable for plaintiffs' attorneys to make a practice of sending pleadings to their client's liability insurer when feasible, especially if the defendant's liability insurer is in any financial difficulty.

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133. For cases decided prior to the enactment of 46-750.33 involving a policy provision which required that suit papers be forwarded to the uninsured motorist carrier, see Squires v. National Grange Mut. Ins. Co., 247 S.C. 58, 145 S.E.2d 673 (1965); Hatchett v. Nationwide Mut. Ins. Co., 244 S.C. 425, 137 S.E.2d 608 (1964). The rationale in *Squires, supra*, is very similar to that in the principal case.