South Carolina Law Review

Volume 29
Issue 1 *Annual Survey of South Carolina*

Article 10

1977

Insurance

Daphne D. Spies

INSURANCE

I. Insurance Policy Construction

A. *Apparent Authority*

Two recent decisions, *American Mutual Fire Insurance Co. v. Reliance Insurance Co.*[1] and *Liberty Mutual Insurance Co. v. Gould,*[2] raise questions concerning apparent authority in second permittee situations. The litigation in *Gould* involved the first permittee Allen, who had maintained the insured car; his uncle Bufford, who was the driver of the car at the time of the accident; and Gould, who had granted the original permission (for use of the car) to Allen. Liberty Mutual Insurance Company, Gould's insurer, instituted a declaratory judgment action and alleged noncoverage on the basis that Bufford had driven the car without Gould's permission. The car had been purchased and insured by Gould, Allen's friend and past business associate.[3] However, Gould had left shortly after the transaction for an extended tour in Europe, and Allen had continued payments on the car note as per the agreement between Gould and himself.[4] Testimony during trial centered on whether Allen's uncle Bufford had assumed (he had) permission to use the car at the time in question since Allen lived with his uncle and since the car was in Allen's possession (rather than in Gould's possession). There was no indication of restricted use, other than the written statement signed by Gould and Allen, whereby Allen had agreed to be the sole user for insurance purposes.[5] The jury found South Carolina Insurance Company (hereinafter Carolina), which was the insurer of Bufford's wife, responsible for coverage.[6]

On appeal, Carolina questioned the jury's lack of specification as to whether the first permittee Allen had the authority to bind the owner of the car. The jury had determined that the

1. No. 20377 (S.C., filed Mar. 9, 1977).

2. 266 S.C. 521, 224 S.E.2d 715 (1976).

3. Record at 48-50. It was intended that the car be eventually registered in Allen's name. *Id.* at 49.

4. *Id.* at 43-47, 53.

5. The agreement provided: "The car is only to be driven by Mr. Allen, and no one else, as the insurance will not cover anyone else." Record at 32 (Plaintiff's Exhibit No. 7). *See* 266 S.C. at 529, 224 S.E.2d at 718.

6. Record at 227-28; 266 S.C. at 525-26, 224 S.E.2d at 716. Bufford was insured under his wife's family automobile policy with Carolina.

second permittee Bufford did not have the express or implied permission of the owner to drive the insured car at the time of the accident but, however, did have the consent of the first permittee.[7] The South Carolina Supreme Court, therefore, concluded that the first permittee lacked authority to bind the insured car owner and declared this decision to be "necessarily included" in the jury's conclusion.[8] It held the evidence of the written agreement between the owner and the first permittee to be dispositive.[9]

The issue of apparent authority raised by Carolina presents a basis for analyzing the court's attention to circumstantial evidence giving rise to implied consent to use another's car, particularly in the suits involving restricted use of the insured car. In the recent case of *American Mutual Fire Insurance Co. v. Reliance Insurance Co.*,[10] the supreme court reiterated the general rule in South Carolina:

> It appears well settled that the named insured's mere permission to another to use the automobile does not of itself authorize the first permittee to delegate his right of user to a third person so as to bring that third person within the coverage of the omnibus clause. It is equally well established, however, that the named insured's grant of authority to the original permittee to delegate to others need not be expressed, but may be implied from the broad scope of the initial permission or from the attending circumstances and the conduct of the parties, and a factual determination must be made in each case to determine whether the scope of the initial grant was broad enough to include an implied authority to delegate to another and thus rendered the latter an additional insured.[11]

In *Gould,* several factors tend to support an appearance of authority of the first permittee Allen to bind Liberty's insured. The fact that Allen and Bufford, the second permittee, resided in the same household and were related by marriage probably fostered the jury's belief that Allen had in fact given Bufford permission

7. Record at 224 (Order).

8. 266 S.C. at 529, 224 S.E.2d at 718. The gist of the supreme court's reasoning was that if the first permittee had had the authority to bind the insured car owner, then the jury would have found that implied consent flowed from the insured to the second permittee, particularly since the jury had decided that the first permittee had granted permission to use the car to the second permittee.

9. *See* note 5 and accompanying text *supra,* and text accompanying note 22 *infra.*

10. No. 20377 (S.C., filed Mar. 9, 1977).

11. *Id.* at 11-21.

to use the car at the time of the accident.[12] Bufford testified that he had believed Allen to be the owner of the car through a business arrangement with Gould, the named insured.[13] Such an assumption presents the question of Allen's apparent authority as an agent or a personal representative of Gould, within the meaning of section 56-9-810[14] of the South Carolina Code and the South Carolina permissive use decisions.

Although the supreme court in a line of South Carolina permissive use decisions has used language indicating that the course of conduct between the parties will determine the outcome, the court has continuously held that no omnibus clause coverage extends to the second permittee when the insured's restriction as to use is shown to have existed. For example, *State Farm v. Allstate Insurance Co.*[15] expressed the rule based on section 56-9-810 that "[c]onsent must run to the 'person who uses,' as well as to the use he makes."[16] The court in *State Farm* denied coverage where the insured had emphatically prohibited anyone other than his son and specifically the youth who had driven the car at the time of the accident from operating the insured car. The case differs from *Gould* in that the owner of the car, the father, and the first permittee, his son, lived in the same household and, therefore, the second permittee would have had more reason to know who actually owned the car and what restrictions had been placed on the car.

Decided on the same date as *State Farm, Drearbury v. New Hampshire Insurance Co.*[17] presented a similar fact situation. The

---

12. Record at 75-76.

13. A: [S]he [Gould] bought the car for him and it was his car.
Q: And it was his car?
A: Right.

Id. at 110.

14. S.C. CODE ANN. § 56-9-810 (1976) provides in part that:
(2) 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, expressed or implied, of the named insured, the motor vehicle to which the policy applies and a guest in such motor vehicle to which the policy applies or the personal representative of any of the above.

15. 255 S.C. 392, 179 S.E.2d 203 (1971).

16. *Id.* at 396, 179 S.E.2d at 205.

17. 255 S.C. 398, 179 S.E.2d 206 (1971) (both cases decided on February 3, 1971). Without a jury trial, the lower court in *Drearbury* had declared that "'It is the permission to use and not the permission to operate which is controlling.'" *Id.* at 401, 179 S.E.2d at 207 (quoting lower court order). The South Carolina Supreme Court disagreed: "This conclusion is opposed by an opinion in *State Farm* . . . ." *Id.*

daughter of the insured lived at home and had possession of the insured's car as a permittee, not as an owner. The court found that the insured had expressly prohibited use of the insured car by anyone other than his daughter;[18] therefore, unless the omnibus clause extended broader coverage than that in *State Farm*, coverage to the second permittee would be denied.[19] Finding the omnibus clauses to be essentially the same, coverage was denied. Dissenting Justice Lewis declared, "This situation is not to be likened to one where an employed minor pays for an automobile and takes title in his parent's name for reasons of convenience."[20] While purchased by the named insured, the car insured by Liberty in *Gould* nevertheless remained in the sole possession of the first permittee, who maintained a residence separate from that of the named insured. In addition, it was the first permittee, not the purchaser, who made the monthly payments on the car note. More compelling was the belief by the second permittee that his nephew, the first permittee, was the owner of the car. Since the daughter in *Drearbury* had allowed a friend to operate the insured car, it is not inconceivable that the friend realized the restrictions placed on the use of the car. The insured had directed his prohibition to include any person of an unidentifiable class who might drive the automobile; contraspectively, in *Gould* the agreement made at the time of purchase of the car was based on Gould's assumption that the insurance would not cover anyone else.[21]

In *Keeler v. Allstate Insurance Co.*,[22] the supreme court relied on the major cases of *Drearbury, State Farm,* and *Southern Farm Bureau Casualty Insurance Co. v. Hartford Accident and*

18. *Id.* at 400 & n.*, 179 S.E.2d at 206 & n.1.

19. *Id.* at 401, 179 S.E.2d at 207. The omnibus clause in *Drearbury* was identical to the clause in the Liberty policy issued to the insured car owner in *Gould.* Both clauses provided coverage for "(1) the named insured and (2) any other person using such automobile with the permission of the named insured, provided his actual operation or (if he is not operating) his other actual use thereof is within the scope of such permission." *Id.; Gould,* 266 S.C. at 528, 224 S.E.2d at 718. The supreme court had commented on the omnibus clause in *Drearbury* as being as broad as the South Carolina statute, but "its obvious purpose is to provide a shield against the so-called liberal view adopted by some courts in construing omnibus coverage, holding that permission to use an automobile for one purpose implies permission to use it for all purposes . . . ." 255 S.C. at 401, 179 S.E.2d at 207.

20. *Id.* at 404, 179 S.E.2d at 208 (Lewis, J., dissenting). As perceived by Justice Lewis in his dissent, the question should have been whether the use to which the auto was being put was within the scope of the original permission, not whether the driver had permission to drive. *Id.* at 405, 179 S.E.2d at 208-09.

21. *See* notes 5 & 9 and accompanying text *supra.*

22. 261 S.C. 151, 198 S.E.2d 793 (1973).

Indemnity Co.[23] in deciding not to extend coverage to a second permittee, when the user had warned against third party use of the vehicle. The fact situation contemplated by Justice Lewis in his dissent in *State Farm* had occurred; the first permittee had purchased the car, but due to his minority, had been required to title and insure the auto in his father's name.[24] The facts in *Keeler* and *Gould* diverge at this point; in *Gould,* the first permittee garaged the vehicle at his residence separate from that of the named insured. Further, the second permittee was a household member at the residence, as well as a relative, of the first permittee. Also absent in *Gould,* as contrasted to *Keeler,* was the presence of car use restrictions specifically listing certain named persons. Upon learning about a prior occasion when the son had allowed a friend to drive, the named insured in *Keeler* had specifically instructed that this particular friend was not to drive the car at any future time. It was unnecessary for the court to focus on the authority of the son to lend the car; the strict prohibition of this friend's use had compelled a prophesied rejection by the supreme court of any implied or express consent flowing from the father to the second permittee without a determination as to whether the second permittee had relied on the son's apparent authority to lend the car.

Justice Brailsford, although concurring in result, noted that the terminology in the *State Farm* and *Drearbury* omnibus clauses was different from the language in the *Keeler* Allstate policy and, thus, concluded that those decisions were not to be controlling.[25] Justice Lewis, in dissent, agreed with Justice Brails-

23. 255 S.C. 427, 179 S.E.2d 454 (1971). In *Southern Farm,* the first permittee had occupied the insured car while the second permittee had driven. The South Carolina Supreme Court emphasized that "Consent must flow from the insured or from one authorized to act in his behalf." *Id.* at 433, 179 S.E.2d at 457.

There seemed to be no necessity for determining who had the authority to lend the car, for the first permittee and the second permittee were well acquainted with the fact that the insured had purchased the car only for his son's use. Authority to bind the insured obviously did not rest with the insured's daughter. More important, the court had discovered proof of an express instruction against third party use. Language in the omnibus clause was identical to that contained in the insured's policy issued by Liberty in *Gould. See* note 19 and accompanying text *supra.*

24. *See* note 21 and accompanying text *supra.*

25. 261 S.C. at 157, 198 S.E.2d at 796. The Allstate omnibus clause provided coverage for the following persons:

> (1) the named insured with respect to the owned or a nonowned automobile; (2) any resident of the named insured's household with respect to the owned automobile; (3) any other person with respect to the owned automobile, provided the actual use thereof is with the permission of the named insured . . . .

ford on the terminology point, and discussed an additional reason; the holding in *State Farm* had been confined to its facts and, thus, decisions resting on it were similarly limited "so as to render them of no binding authority" in *Keeler*.[26]

Having rejected precedent as inapposite to the new insurance terminology in *Keeler*, Justice Lewis must have recalled the supreme court's conclusion in *State Farm*: "We intimate no view as what the outcome might be in other cases involving a second permittee where the record reveals a materially different course of conduct by the parties involved."[27] Since the course of conduct in *Keeler* was not significantly different from that in prior cases concerning teenaged drivers and their parents' specific instructions, Justice Lewis turned to the policy to fashion what he considered to be an equitable and supported interpretation. Examining the clause, he discovered it to be more liberal than required by state statute.

> The present policy extends coverage to *any person* where the *actual use* of the vehicle is with the permission of the named insured. There is no condition that the person using the vehicle must have such insured's consent. *Actual use* means the use to which the vehicle is being put at the time by the third party; and the fact that the named insured may have instructed his son not to allow a third person to drive the vehicle is irrelevant, since such prohibition refers to the operation of the vehicle and not the purpose for which the use is permitted.[28]

This use-operation dichotomy has been rejected by the South Carolina Supreme Court as an invalid construction.[29] Similarly, the court has tended to ignore the issue of authority to lend, except to equate it with the connotation of implied consent. The court has, instead, focused on the scope of the original permission. Thus, in *American Mutual Fire Insurance Co. v. Reliance Insurance Co.*[30] the concepts of authority and implied consent were expressed contemporaneously and circumstantial evidence was declared to be the key in determining the scope of implied

---

Id. at 154, 198 S.E.2d at 795.

26. *Id.* at 160, 198 S.E.2d at 798 (Lewis, J., dissenting).

27. 255 S.C. at 398, 179 S.E.2d at 205.

28. 261 S.C. at 161-62, 198 S.E.2d at 798 (Lewis, J., dissenting).

29. *See* 255 S.C. at 395-97, 179 S.E.2d at 204-05; notes 18 & 19 and accompanying text *supra*.

30. No. 20377 (S.C., filed Mar. 9, 1977).

consent.[31] The facts in *American Mutual* suggest those hypothesized by Justice Lewis in *State Farm.*[32] The insured car in *American Mutual* was titled and insured in the name of the father who had purchased the car for his son, who lived with him. The supreme court also determined that there was general and unrestricted use of the car given to the son. Justice Littlejohn quoted from the New Jersey decision *Baesler v. Globe Indemnity Co.*[33] in extending coverage to the second permittee in *American Mutual.*

Baesler recognized that the courts are split on whether authority to delegate permission will be assumed from the fact that the permittee has general custody of the car, where the car had been purchased by the insured for the exclusive use of another, as a minor.[34] In a four-three decision the New Jersey Supreme Court denied omnibus clause coverage to the second permittee, where the named insured had given his nephew, a resident of his household, exclusive use of the car, and the nephew, in violation of his uncle's instructions, permitted a friend to use the car. However, the court noted, "The public interest might be better served if comprehensive liability policies were written to cover every driver of an insured automobile, without regard to intra-familial instructions given by laymen unfamiliar with insurance law."[35] Chief Justice Weintraub, who wrote the dissent, decried the technical and unrealistic interpretations propounded by insurers. He urged that the "ultimate question should be whether under the circumstances the named insured wanted to deny policy protection."[36] Further, Chief Justice Weintraub stressed that the facts and common sense in each case should determine the result; in this case there was exclusive use of the car granted to the nephew.

31.

> Implied authority or permission by the named insured, if established, is as effective to extend the coverage of the omnibus clause as that which is formally conferred.
>
> . . . We [have] noted the important role of circumstantial evidence in establishing implied consent in situations, . . ., where direct evidence, for obvious reasons, is seldom available.

Id. at 12.

32. *See* notes 21 & 25 and accompanying test *supra.*

33. 33 N.J. 148, 162 A.2d 854 (1960).

34. *Accord,* G. COUCH, COUCH ON INSURANCE 2d § 45:430 (1964). However, strict attention must be given to the peculiar facts in each situation in order to ascertain whether valid authority and/or consent was present at the time the second permittee operated the insured car. *Id.* at §§ 45:409 and 45:423 (1964 & Supp. 1976).

35. 33 N.J. at 155, 162 A.2d at 858.

36. *Id.* at 157, 162 A.2d at 859 (Weintraub, C.J., dissenting).

"It could be found that he [the uncle] thereby clothed the nephew with the appearance of authority to engage in so ordinary a transaction as a loan of the car to a friend," particularly in the face of secret instructions.[37] *American Mutual* reaffirms the established rule in South Carolina that in the absence of express prohibition and of express consent, circumstantial evidence will determine the extent of original permission and the second permittee's coverage.[38] *American Mutual* involved no express restriction as to use of the insured car. Thus, the South Carolina Supreme Court's attention to *Baesler* is curious, inasmuch as that case belongs to the genre of second permittee cases concerning express prohibitions. Since *Baesler* was a four-three decision, the South Carolina court's reference to *Baesler* could be characterized as a tolerant recognition of the difficulties concerning omnibus clause coverage of the second permittee in the parent-owner and teenager-driver situation.

B. Ambiguity

Finding no ambiguity on the face of the insurance literature in *Yarborough v. Phoenix Mutual Life Insurance Co.*,[39] the South Carolina Supreme Court did not apply the doctrine of *contra proferentem*.[40] The action involved a group life and medical insurance policy under which the plaintiff-employee was insured. The plaintiff did not claim that an ambiguity appeared on the face of the master policy itself, but rather that there existed an ambiquity on the certificate sent as a substitution and condensation of the insurance contract.[41] The certificate quoted relevant portions of the policy, but clearly specified that it was not the contract. Appended to the front of the certificate was a sticker which had

37. *Id.* at 159, 162 A.2d at 860 (Weintraub, C.J., dissenting).

38. *See* note 11 and accompanying text *supra*.

39. 266 S.C. 584, 225 S.E.2d 344 (1976).

40. This well-known rule specifies that in the context of insurance policy ambiguity, where there exist two reasonable interpretations, the final reading will be construed against its maker, the insurer. *See generally* 43 AM. JUR. 2d *Insurance* § 257 (1969) and cases collected therein. South Carolina has, heretofore, followed this procedure by liberally finding an ambiguity. *See, e.g.*, Walker v. Commercial Cas. Ins. Co., 191 S.C. 187, 4 S.E.2d 248 (1939); Prosser v. Carolina Mut. Benefit Corp., 179 S.C. 138, 183 S.E. 710 (1935); Parker v. Jefferson Standard Life Ins. Co., 158 S.C. 394, 155 S.E. 617 (1930); Jennings v. Clover Leaf Life & Cas. Co., 146 S.C. 41, 143 S.E. 668 (1928).

41. As is typical with group insurance policies, the master policy had been kept by the employer, whereas a certificate, explaining the policy, had been delivered to each insured. 266 S.C. at 586, 225 S.E.2d at 345.

caused the insured's confusion.[42]

Reversing the lower court's decision favoring the insured, the supreme court held that the lower court had erred in not looking only to the four corners of the instrument. Although the supreme court, per Justice Littlejohn, recognized that " 'for the purposes of construction . . . the master policy and the certificate are to be considered together as parts of the same contract,' "[43] it maintained that the sticker and the certificate would only be considered if the policy itself were ambiguous. The court decided that the lower tribunal's error originated in its treatment of the sticker and the certificate as riders to and as parts of the policy itself. Referring to the language in the certificate and to section 37-146[44] of the South Carolina Code, the court ruled that the certificate and sticker were not in fact parts of the insurance policy.

The court further declared that there was no ambiguity on the face of the sticker, even if it were to be considered a part of the contract; the court ruled that ambiguity may not be created by examining only a part of the contract; rather, the contract must be viewed as a whole to determine if an ambiguity exists. Thus, the court adopted a reading it considered to be reasonable, consistent with the entire instrument, and based on the intent of the parties.[45] Despite the fact that the plaintiff had incurred total costs amounting to $3,177, the supreme court ruled in favor of the

42. The referee whose findings were adopted by the lower court spelled out the ambiguity created. The language on the front of the certificate quoted a deductible amount of $100. The only other reference to a deductible feature in the same vicinity was included under the provision PERCENTAGE OF COVERED EXPENSES PAYABLE, but simply stated "80% OF THE FIRST $2000 IN A CALENDAR YEAR *OVER THE DEDUCTIBLE AMOUNT* AND 100% OF THE BALANCE." (emphasis supplied). See Plaintiff's Exhibit #1, Record following page 26. Record at 27, 32 (Referee's report).

43. 266 S.C. at 591, 225 S.E.2d at 348 (quoting 44 AM. JUR. 2d *Insurance* § 1870 (1969)).

44. S.C. CODE ANN. § 37-146 (current version at S.C. CODE ANN. § 38-9-70 (1976)), although not pertaining to certificates, provides that:

> Every insurance company doing a life, health or accident insurance business in the State shall deliver with each policy of insurance . . . a copy of the application made by the insured so that the whole contract shall appear in the application and policy of insurance, in default of which no defense shall be allowed to such policy on account of anything contained in, or omitted from, such application.

Other sections in the Code relating to insurance standards evince an intent to provide regulated and conscionable contracts. *See, e.g.*, S.C. CODE ANN. §§ 38-35-480, 38-35-1210 (1976).

45. 266 S.C. at 593, 225 S.E.2d at 349. The court emphasized this rule with regard to the obvious meaning of the type of insurance involved.

insurance company, stating, "[i]t is common knowledge that a major medical expense insurance policy is designed to take care of major, as contrasted with minor, hospitalization and medical expenses."[46]

Further, the supreme court rejected the trial court's emphasis on the particular rule of construction that favors typewritten print over printed matter[47] as "not warranted."[48] Although the plaintiff had allegedly read and had expected the certificate and sticker to provide the claimed medical benefits, the court regarded such an understanding as disregarding the basic principles of insurance and of this particular contract's coverage.[49] The South Carolina Supreme Court dismissed the plaintiff-respondent's reliance on the sticker's listed deductible features as unfortunate, but unreasonable and unintelligent.[50] Such a holding evidences a clear decision to encourage insureds to read and to attempt full comprehension of the insurance that they buy.[51]

---

46. *Id.* For the rules of construction in group insurance policies, *see generally* 44 AM. JUR. 2d *Insurance* §§ 1868-1896 (1969). *See also* §§ 259-279.

47. This rule is stated at 43 AM. JUR. 2d *Insurance* § 267 (1969). The referee for the lower court had also determined that the typewritten sticker pasted on the front of the printed certificate and the interior printed portions varied in type size; "the first of which was typed in bold letters and the latter of which was printed in the ordinary printing" in the remainder of the certificate. Record at 37.

48. 266 S.C. at 593-94, 225 S.E.2d at 349.

49. "To attach meaning to 'deductible amount $100.00,' without considering the coverage provided, is somewhat like asking the question, 'What is the answer if one subtracts 10?' " *Id.* at 593, 225 S.E.2d at 349.

50. Defendant-appellant alleged the plaintiff was intelligent, literate, and "of considerable maturity and judgment" in the context of her managerial position. Brief for Appellant at 13-14. This argument swings both ways, however, making it all the more questionable as to whether the woman's interpretation was unreasonable. The referee had questioned whether the plaintiff should have been deemed to have "such expertise in the procurement of insurance that she was placed on notice to make such inquiry." Record at 32 (Referee's order). The referee went on to express doubt whether had she done so the language employed by the company in stating its deductible features was so clear she would have been convinced that same superseded the typed portion on the front of the policy. *Id.*

51. For results of a readability test suggesting that insurance policies are extremely difficult to read and to understand, see Freeman, *Marketing Mutual Funds and Individual Life Insurance,* 28 S.C.L. REV. 1, 66 at n. 209 (1976) (citing *Hearings on the Life Insurance Industry Before the Senate Subcomm. on Antitrust and Monopoly,* 93d Cong., 1st Sess., pt. 3, at 1540 (1973)). "In light of the readability scores, it should not be surprising that nearly three out of four respondents to a recent national survey of consumers' attitudes regarding life insurance reported having difficulty understanding 'the terminology used in life insurance policies.' " Freeman, *Marketing Mutual Funds and Individual Life Insurance,* 28 S.C.L. REV. at 67, n. 209 (quoting INSTITUTE OF LIFE INSURANCE & LIFE

C. *Employment Termination Clause*

Another erroneous interpretation of a group life insurance policy resulted in the suit of *Moss v. Aetna Life Insurance Co.*[52] The contract permitted discharged employees the usual option of either receiving the face cash value of their certificates or of taking the paid-up insurance. When the plaintiff-employees attempted to collect the cash value of their respective claims, the defendant-insurers refused, on the grounds that the plaintiffs had "not ceased active work with said employer, but [were] still employed"[53] by the Independent Publishing Company of Anderson. Agreeing with the plaintiffs' charge, General Sessions Judge Agnew of the Tenth Judicial Circuit Court, ruled that the four corners of the instrument allowed, "through the unequivocal and unambiguous language of its policy," the determination by the employer of termination of employment to be conclusive.[54] Speaking representatively for the plaintiffs, the production manager for the publishing company testified that the termination had been effected by official notices authorized by the president and publisher of the company.[55]

However, the South Carolina Supreme Court declared, in view of the automatic rehiring which had occurred, five minutes after termination,[56] that the termination on March 1, 1974 had merely been a temporary layoff. Ignoring the clause delegating conclusive determination of employment stoppage to the employer, the supreme court focused on the policy's definition of cessation of employment, which provided that " 'if an employee is temporarily laid off or is granted a leave of absence . . . em-

---

INSURANCE MARKETING & RESEARCH ASS'N, LIFE INSURANCE CONSUMERS: NATIONAL SURVEY OF COST COMPARISON ATTITUDES AND EXPERIENCE 12 (1975)).

52. 267 S.C. 370, 228 S.E.2d 108 (1976).

53. Record at 7.

54. *Id.* at 34-35. Specific clauses in the insurance contract had lent support to the lower court's decision that the employer enjoyed conclusive responsibility for determining work cessation. Aetna's policy prescribed that "[t]he determination and findings of Employer with respect to the fact and time of commencement, duration, and termination of employment of any employee, with respect to the fact and time of commencement, duration, and termination of any lay-off, . . . shall be conclusive and binding upon all persons for the purposes of this policy." *Id.* at 34. *See* Annot., 68 A.L.R.2d 8, 50 (1959). *Accord,* Cutledge v. Aetna Life Ins. Co., 53 Ga. App. 473, 186 S.E. 208 (1936); John Hancock Mutual Life Ins. Co. v. Paggageorgu, 107 Ind. App. 327, 24 N.E.2d 428 (1940).

55. Record at 14.

56. *Id.* at 15.

ployment shall be deemed to continue during such lay-off or absence . . . .' "[57]

Furthermore, the South Carolina Supreme Court rejected the lower court's judicial recognition of the stock transfer to Harte-Hank Newspapers by the Anderson Company. The lower court had given judicial notice to the stock transfer and determined that it was a sale of business which had effected a termination of employment. It noted that other jurisdictions had construed employment to cease when a sale of all or a part of a business to another occurred.[58] The South Carolina Supreme Court, however, stated that this particular stock transfer was "not the subject for judicial notice."[59]

D. House Confinement Clause

In *Martin v. Pilot Life Insurance Co.*,[60] the South Carolina Supreme Court faced novel terminology in a house confinement clause requiring the insured to be "necessarily and continuously confined within the house,"[61] before disability insurance payments would be allowed. The plaintiff Dr. Martin, a general practitioner of medicine, collapsed on June 19, 1971, with a severe acute pericarditis with hemorrhagic pericardial effusion. Pursuant to his insurance policy with the defendant Pilot Life, the plaintiff had received the maximum nonconfining disability payments (for two years). After this time, however, the insurer denied coverage and alleged that Dr. Martin was no longer totally disabled and was not confined to his house within the terms of the policy. In particular, the insurer sought to prove that Dr. Martin was able to operate his car, play golf weekly, and accomplish personal and business tasks.[62] In a jury trial, the lower court determined that the doctor was totally disabled and necessarily

57. 267 S.C. at 373-74, 228 S.E.2d at 110.

58. Record at 36 (quoting Annot., 68 A.L.R.2d at 61). *Accord,* Pan Am. Life Ins. Co. v. Garrett, 199 S.W.2d 819 (Tex. 1946).

59. *Id.* at 376-77, 228 S.E.2d at 111-12. The supreme court did not rule that the sale of a business does not per se constitute a termination of employment, but rather based its criticism on the lack of facts supporting evidence of a sale. As to a basis for the lower court's judicial notice of the sale, see Record at 27 (Exhibit A).

60. 267 S.C. 388, 228 S.E.2d 550 (1976).

61. Provisions of the insured's policy pertaining to the relevant clauses are set out in the Record at 7-9. House confinement clauses are discussed in Annot., 29 A.L.R.2d 1408, 1428 (1953).

62. Record at 9. *See* the list of the plaintiff's activities in Brief for Appellant at 5.

and continuously confined to his home.[63]

On appeal, the South Carolina Supreme Court agreed that the plaintiff was clearly totally disabled, but declared the interpretation of "necessarily and continuously confined within the house" to be more difficult.[64] However, the supreme court recognized that such language would not be applied literally, but rather, would be viewed in terms of "the character and extent of the insured's illness."[65] The appellant argued, and the supreme court agreed that the *Tyler v. United Insurance Co. of America*[66] interpretation of a somewhat similar clause allowed the insured to leave the house solely for therapeutic reasons or "for such other necessary purpose."[67] Futilely, the appellant attempted to draw a distinction between Dr. Martin's activities conducted for "primarily business or other personal, as contrasted with therapeutic reasons."[68] However, testimony including two of the plaintiff's attending physicians satisfactorily convinced the supreme court that Dr. Martin's confinement met the "substantial compliance" test in accordance with prior decisions involving confinement clauses.[69]

---

63. Record at 120.

64. 267 S.C. at 391, 228 S.E.2d at 552.

65. *Id.* at 393, 228 S.E.2d at 553. The court discussed the various house confinement clauses litigated in Price v. United Ins. Co. of America, 254 S.C. 301, 175 S.E.2d 221 (1970); Tyler v. United Ins. Co. of America, 243 S.C. 114, 132 S.E.2d 269 (1963); Shealy v. United Ins. Co. of America, 239 S.C. 71, 121 S.E.2d 345 (1961); Peace v. Southern Life & Trust Co., 171 S.C. 102, 171 S.E. 475 (1933). In *Tyler*, "continuous confinement within doors" was met when the insured had been substantially confined to his house. *Peace* involved a clause requiring the insured to be "necessarily confined to bed," and the court sustained recovery since the insured had met substantial compliance, although he was not bedridden at all times. In *Shealy*, the court ruled that the insured had complied with the clause requiring "continuous confinement within doors." The court in *Shealy* cited with approval the majority view that literal compliance is not necessary. In *Price*, the insured had not been under the regular care of a physician, so the court did not view the case as controlling.

66. 243 S.C. 114, 132 S.E.2d 269 (1963).

67. 267 S.C. at 393, 228 S.E.2d at 553.

68. *Id.* at 394, 228 S.E.2d at 553; Brief for Appellant at 4. Appellant had offered substantial testimony to prove that Dr. Martin was able to participate in activities tending to depict him as able-bodied and actively independent. In particular, the defendant-appellant had sought to prove through the testimony of a golf pro at the club where Dr. Martin played that the doctor was a better than average golfer.

69. 267 S.C. at 393, 228 S.E.2d at 553. *See* cases at note 65 *supra*. It is particularly noteworthy that the supreme court accepted the theory that mental health can be an overriding factor in determining what therapeutic activities will be prescribed. Dr. J. W. Schofield testified that the plaintiff had endured depressed episodes. Although neither of the two doctors testifying had specifically directed the plaintiff to play golf, the record reveals that this sport was approved for improving the circulation in the plaintiff's leg and

E. Builder's Risk Policy

The term "in process of construction" was construed by the South Carolina Supreme Court for the first time in *Crescent Co. v. Insurance Co. of North America.*[70] The plaintiff had secured for a developmental subdivision a builder's risk policy with a vandalism and malicious mischief endorsement.[71] For two years, construction on the houses concerned in the suit had ceased due to a moratorium ordered by President Nixon on certain FHA funds. The plaintiff argued that because of an economic depression the houses were unmarketable, and that in light of this fact, they had remained four to six percent from completion.[72] During the two year period, the houses sustained approximately ten thousand dollars of damage directly caused by vandalism or malicious mischief. The defendant refused payment, relying on the defense that the buildings were not in the course of construction and that the houses had, therefore, been vacant and unoccupied for a period beyond that covered by the insurance policy. The circuit court granted summary judgment for the defendant, ruling that there was no ambiguity on the policy and that the houses were not in the process of construction as a matter of law.[73]

On appeal, the South Carolina Supreme Court agreed with the lower court's interpretation and stated that the purpose for the policy coverage was obviously not intended to include houses left vacant for more than the "normal periods of construction."[74] Consequently, the court held that the absence of a definition for "process of construction" within the policy did not create an ambiguity in this particular case and thereby applied a reasonableness standard to the construction of terms.

---

heart muscles and alleviating neurotic and manic conditions. Record at 76, 79. The plaintiff's nurse testified that the plaintiff had become severely depressed and inactive when he realized that he would no longer be able to practice medicine. Record at 60-61.

70. 266 S.C. 598, 225 S.E.2d 656 (1976).

71. For a copy of the policy issued to the plaintiff, see Record and pages preceding p. (1).

72. The supreme court found the varying margins of completed construction to be inconsequential, since the greater part of construction had previously been completed and left standing for an unusual amount of time. 266 S.C. at 601 n.1, 225 S.E.2d at 658 n.1.

73. Record at 49. The lower court found no issue of fact since construction had been halted for almost two years. *Id.*

74. 266 S.C. at 603, 225 S.E.2d at 658. The court did not specify what would be normal but stated that under the facts in the present controversy, it was clear that "in process of construction" was not "to run in perpetuity from the time of ground breaking regardless of the insured's actions postponing completion of the houses." *Id.*

However, the South Carolina Supreme Court reversed and remanded the cause for further consideration on the issue of equitable estoppel.[75] The court focused on the fact that the insurer had apparently obtained constructive knowledge of the building progress by regular receipt of inspection reports. Further, it was charged that the insurer had accepted extra premiums for vandalism during the two-year dormancy, which implied insurance for a particular risk.[76]

The decision seems to indicate that the court need not search for definitions of terminology when the intent of the parties can be ascertained through their overt acts and the policy itself. Since the insured-appellant was unaware of the possible adverse interpretation of his policy, it was not difficult for the court to seek an equitable remedy in the application of estoppel. The supreme court's action indicates a future adoption of a reasonable time allowance for vacancy or unoccupancy of buildings under construction, in the absence of clarifying provisions.

II. INSURANCE PROCEDURE

A. *Direct Action Against Insurer*

Major v. National Indemnity Co.[77] held that in South Carolina there is no implied or express right afforded a third party to sue directly a compulsory liability insurer if the claim is based on negligence. The plaintiff in *Major* sued a truck driver whose alleged negligence caused the plaintiff's injury when the truck collided with the school bus in which the plaintiff was riding. The truck driver's employer carried liability insurance as required by South Carolina law. In order to sue directly against the insurer, the plaintiff-respondent made two arguments. First, the respondent argued that sections 58-23-910[78] and 58-23-920[79] are for the benefit of the injured public and, thus, imply a right to sue solely

75. *Id.* at 605, 225 S.E.2d at 660.

76. Reply Brief for Appellant at 5 and Brief for Appellant at 3-4, 10-11 discuss the grounds for estoppel.

77. 267 S.C. 517, 229 S.E.2d 849 (1976).

78. S.C. CODE ANN. § 58-23-910 (1976) requires liability and property damage insurance or a surety bond to indemnity loss by reason of any act of negligence.

79. S.C. CODE ANN. § 58-23-920 (1976) provides in part: "The owner or owners of all motor vehicles transporting goods of any kind for hire on the roads of this State are hereby required as a condition precedent for using the highways of this State to carry with some reputable insurance company liability insurance and property damage insurance . . . ."

and directly the compulsory insurer in an action founded on negligence.[80] Second, the respondent argued that section 15-15-20,[81] allowing joinder of the liability insurer, is permissive, not mandatory, thus implying consent to bring a direct action.[82] Describing the issue to be one of "first impression,"[83] the South Carolina Supreme Court rejected the respondent's interpretation of the three statutes.

In the absence of express statutory provisions, the supreme court referred to common law where there is no right to maintain suit directly against an insurer when there is no privity of contract.[84] However, the court had previously recognized that since the purpose of compulsory liability insurance is to provide "indemnity for the liability of the tort-feasor, and not for his loss, the injured person has, under the statutes and under the contract of insurance, a beneficial interest in the policy, and is entitled to sue before or after judgment has been rendered against the insured tort-feasor."[85]

Although the supreme court in *Major* noted that the purpose of sections 58-23-910 and 58-23-920 was "to insure financial responsibility of motor vehicle carriers,"[86] there is a threshhold distinction between compulsory liability insurance statutes directed towards carriers and financial responsibility statutes. The former type, with respect to common carriers and to transporters, is

80. Brief for Respondent at 5-6.

81. S.C. CODE ANN. § 15-15-20 (1976) states:

> When an indemnity bond or insurance is required by law to be given by a principal for the performance of a contract or as insurance against personal injury founded upon tort the principal and his surety, whether on bond or insurance, may be joined in the same action and their liability shall be joint and concurrent.

82. See Brief for Respondent at 3-4.

83. 267 S.C. at 519, 229 S.E.2d at 849.

84. *Id.* at 520, 229 S.E.2d at 850 (citing G. COUCH, 12 COUCH ON INSURANCE 2d § 45:764 (1964) [hereinafter COUCH ON INSURANCE]). Professor Couch attributed the rationale of the common law proscription to "the mere fact that the insured was to be indemnified for damages awarded against him for accidental injuries to a third person." COUCH ON INSURANCE at § 45:764 (footnote omitted). Additionally, the treatise notes, "[h]owever, it is now common by statute or by policy provision to give injured persons rights of direct action against the insurer." *Id.* at § 45:763. *Accord,* Shingleton v. Bussey, 223 So. 2d 713 (Fla. 1969), *aff'g* 211 So. 2d 593 (1968) (holding that public policy recognizes that a direct cause of action inures to benefit of injured in auto liability cases).

85. Bryant v. Blue Bird Cab Co., 202 S.C. 456, 463, 25 S.E.2d 489, 492 (1943) (citing Benn v. Camel City Coach Co., 162 S.C. 44, 160 S.E. 135 (1931); Piper v. American Fidelity & Cas. Co., 157 S.C. 106, 154 S.E. 106 (1930)).

86. 267 S.C. at 520, 229 S.E.2d at 850.

usually characterized as a condition precedent to the privilege of operating on state highways, in the event that the innocent public should be injured,[87] whereas the latter is to ensure the availability of proceeds to one injured by a careless or financially irresponsible driver.[88]

Early South Carolina decisions dealing with joinder of insurance companies appear to have been based on the rationale that the right to join compulsory insurers was implicit in the purpose of this type of statutorily required insurance.[89] *Thompson v. Bass*[90] had permitted joinder of the compulsory insurer, despite the policy's prohibition of an action against the carrier's insurer until after judgment had been resolved against the insured. The supreme court had liberally construed the purpose of the compulsory insurance statute to be remedial and implied a right to join the insurer, for "[t]he contract of insurance carries with it, the Statute of the State, makes it a part of it; the Statute says that it shall be given for the protection of the traveling public . . . ."[91] The court in *Bryant v. Blue Bird Cab Co.*[92] ruled that section 8511, the predecessor to section 58-23-910, required common carriers to maintain security for tort liability and stated that there is "no doubt that it was intended to insure the collection by passengers and public of tort liabilities of the carriers."[93] The court added that the statute did not "dissipate the former clearly expressed original liability of the insurer for payment of the damages."[94] Referring to *Small v. National Surety Corp.*,[95] the South Carolina Supreme Court in *Bryant* analogized the carriers' type of insurance to suits brought upon bonds filed by State Highway Patrolmen; aggrieved members of the public, as plaintiffs, were

87. *Id. See* S.C. CODE ANN. § 58-23-920 (1976), *quoted in part at* note 79 *supra.*

88. COUCH ON INSURANCE at § 45:658.

89. *See, e.g.*, Ferguson v. Employers Mut. Cas. Co., 254 S.C. 235, 174 S.E.2d 768 (1970) (construing a North Carolina compulsory liability statute); Piedmont Fire Ins. Co., Inc. v. Burlington Truckers, Inc., 205 S.C. 489, 32 S.E.2d 755 (1945) (decided subsequent to passage of what is now § 15-15-20); Bryant v. Blue Bird Cab Co., 202 S.C. 456, 25 S.E.2d 489 (1943) (decided subsequent to passage of what is now § 15-15-20); Thompson v. Bass, 167 S.C. 345, 166 S.E. 346 (1932); Benn v. Camel City Coach Co., 162 S.C. 44, 160 S.E. 135 (1931); Ott v. American Fidelity & Cas. Co., 161 S.C. 314, 159 S.E. 635 (1931); Piper v. American Fidelity & Cas. Co., 157 S.C. 106, 154 S.E. 106 (1930).

90. 167 S.C. 345, 166 S.E. 346 (1932).

91. *Id.* at 349, 166 S.E. at 348.

92. 202 S.C. 456, 25 S.E.2d 489 (1943).

93. *Id.* at 460-61, 25 S.E.2d at 491.

94. *Id.* at 461, 25 S.E.2d at 491.

95. 199 S.C. 392, 19 S.E.2d 658 (1942).

entitled to sue the surety company alone for the alleged torts of any officers.[96] Describing the basic principles underlying compulsory liability insurance, as opposed to private insurance, the *Bryant* court said "it is not an indemnity of the carrier from loss but constitutes an original and direct liability from the insurer to the damaged passenger or other member of the public."[97] The distinction between compulsory and private insurance had been recognized in *Piper v. American Fidelity & Casualty Co.*[98] "Private so-called liability insurance may be insurance against loss so that one with a cause of action against the insured has no original right to proceed against the insurer, the latter's liability being only to absolve the insured from loss."[99]

To justify permitting joinder of the insurer in *McIntosh v. Whieldon,*[100] the supreme court, dealing with a cargo insurance policy, declared "it is clear that under its terms a direct obligation by the insurer to the shipper is created and such endorsement constitutes an unconditional and absolute promise by the insurer to pay to the shipper any loss or damage to the cargo for which the carrier could be held liable . . . ."[101] The court in *McIntosh* gathered support from the interpretation of a similar cargo insurance policy in *Carolina Transportation & Distributing Co. v. American Alliance Insurance Co.*[102] which had held "that such insurance was for the benefit of the owner of the goods, who may

96. 202 S.C. at 461, 25 S.E.2d at 491.

97. *Id.* at 462, 25 S.E.2d at 492.

98. 157 S.C. 106, 154 S.E. 106 (1930). *Piper* also analyzed the obligations arising out of the different types of insurance:

> "A distinction is made between contracts for indemnity against *liability,* and those of indemnity against *loss.* In the former case the insurer's obligation becomes fixed *when liability attaches* to the insured. In the latter case the insurer's liability does not attach until loss has been suffered, that is, when the insured has paid the damages."

Id. at 112, 154 S.E. at 108 (quoting 1 JOYCE INSURANCE 2d ed. § 27b). *See* Brief for Respondent at 6., *Major v. National Indem. Co.*

99. 202 S.C. at 462, 25 S.E.2d at 492. *Accord, Piper,* 157 S.C. 106, 154 S.E. 106. *Piper* also suggests that an action based on negligence, not on willful conduct, against the insurer should not be a claim for more than the required policy provides. *See* Brief for Respondent at 1, 3-4. For other limitations as to joinder, *see* Dobson v. American Indem. Co., 227 S.C. 307, 87 S.E.2d 869 (1955); Piedmont Fire Ins. Co. v. Burlington Truckers, Inc., 205 S.C. 489, 32 S.E.2d 755 (1945); Holder v. Haynes, 193 S.C. 176, 7 S.E.2d 833 (1940).

100. 205 S.C. 119, 30 S.E.2d 851 (1944).

101. *Id.* at 126, 30 S.E.2d at 854.

102. 214 N.C. 596, 200 S.E. 411 (1939).

maintain an action directly against the insurer for any loss suffered."[103]

Dealing with the decision of whether to permit joinder of insurers in actions based on negligence, the early South Carolina cases encountered the problem of possible prejudice in allowing jurors knowledge about the party insurer. Several courts easily disposed of this difficulty by emphasizing that the acts requiring a common carrier to secure a bond or insurance were deemed to be public laws and common knowledge to every citizen.[104] "In a case of this nature it would be practically impossible to keep knowledge of it from the jury."[105]

Despite the possible inferences in the early joinder suits that compulsory liability insurance inures to the benefit of the injured party, the South Carolina Supreme Court ruled such decisions to be "inapposite" in *Major*.[106] It held that there exists no right at common law and refused to imply from statutory law a right of direct action solely against the insurer. The supreme court's unequivocal reluctance to imply a right of direct action could be attributed to other reasons, in addition to those listed in the opinion. One possibility is that no insurance or surety company would be willing to assume responsibility to others than the named insured. Another argument is one of concern in any decision impacting the insurance institution; multiple litigation could increase the premiums for coverage which could in turn force the public carriers out of business.[107] Nevertheless, *Major* seems to hinder the public policy supporting the compulsory liability insurance statutes by placing time consuming procedural obstacles in the path of the injured party who is merely trying to realize the fruit of an insurance policy of which the General Assembly has declared him the principal beneficiary.

---

103. 205 S.C. at 126, 30 S.E.2d at 854. Compare surety cases permitting a direct cause of action against the surety. Small v. National Sur. Corp., 199 S.C. 392, 19 S.E.2d 658 (1942) (and cases cited therein); Great Am. Indem. Co. v. Vickers, 138 Ga. 233, 188 S.E. 24 (1936). *See also* Brief for Respondent at 4.

104. Dobson v. American Indem. Co., 227 S.C. 307, 87 S.E.2d 869 (1955); Benn v. Camel City Coach Co., 162 S.C. 44, 160 S.E. 135 (1931) (citing Piper v. American Fidelity & Cas. Co., 157 S.C. 106, 154 S.E. 106 (1930)).

105. 162 S.C. at 52, 160 S.E. at 138.

106. 267 S.C. at 519, 229 S.E.2d at 850 & n.1.

107. Brief for Appellant at 13. *Accord,* Holder v. Haynes, 193 S.C. 176, 7 S.E.2d 883 (1940).

B. "Walkaway Draft"

A "walkaway draft," a procedural device used in insurance negotiations, presented a novel problem for the South Carolina Supreme Court this past year in *Russell v. Ashe Brick Co.*[108] The plaintiff had been injured when a pallet of bricks collapsed on him during the course of his employment. Settlement negotiations between the plaintiff and his employer's insurance company, Insurance Company of North America, (hereinafter INA) proved unfruitful, and the insurer had sent a letter with a draft for $5,500.00 to the injured claimant.[109] During post-trial motions the defendant claimed an offset against a $2000 actual and $5000 punitive damages award entered for the plaintiff. The lower court denied the offset of the amount of this check, and the insurer appealed.

Advance payments differ from the walkaway draft in that a release or a receipt, stating that the insurer is entitled to an offset of the amount in a future verdict, accompanies the advance payment.[110] The advance payment is further distinguishable from the walkaway draft in that the advance payment contemplates a future adverse verdict or settlement whereas the walkaway draft is the top dollar offer figure that the insurance company is "ever willing to pay on" the claim.[111] This procedure has been acclaimed by the insurance industry as "the humane thing to do for someone in distress, but [is admittedly] principally for the purpose of controlling the case thus hoping to avoid litigation and ultimately disposing of the case by settlement at which time it

---

108. 267 S.C. 640, 230 S.E.2d 814 (1976).

109. The letter read in part:

> We regret we have been unable to mutually agree upon a settlement figure of your claim. We have again reviewed the settlement value of your claim and we want you to have now what we believe to be the full value of your claim. We enclose our draft in the amount of $5,500.00 in settlement of your claim. It is understood that you have not signed a release and that our payment is not an admission of liability. The law of this State provides that if you are to institute a suit for personal injuries it must be within six years of the date of accident. It is our hope that this payment will bring this matter to an amicable conclusion.

Copy of letter inserted in Record between 44 and 45 (Defendant's Exhibit 1).

110. *See* Carpenter & Snow, *The Legal Aspects of Partial Payments Made on Liability Claims in Advance of Final Settlement,* ABA SECTION OF INSURANCE, NEGLIGENCE AND COMPENSATION LAW 499 (1967); Gallagher, *Advance Payments: A Defense Attorney's Viewpoint,* ABA SECTION OF INSURANCE, NEGLIGENCE AND COMPENSATION LAW 513, 519 (1967); Robinson & Due, *Advance Payments—Problems in Practice and Procedure,* INS. COUNSEL J. 444 (1968); Annot., 25 A.L.R.3d 1091 (1969).

111. Record at 21.

would be expected that credit be taken for the funds advanced."[112]

The absence of a receipt of credit or offset has been held not to be dispositive of whether the insurance company may claim such credit or offset for an advance payment. Looking to the facts and circumstances and relative knowledge of the insured has been determinative of whether the insurer may claim an offset. "[P]robative evidence of a clear understanding should satisfy the need for" proving a credit condition.[113] Ignoring the lack of receipt or notice of offset, the South Carolina Supreme Court analogized the walkaway draft to a settlement procedure,[114] noting the *Harrington v. Edwards*[115] decision where a liability insurer had waived the claimant's signature after paying the medical liability proceeds required by the policy provision. Although limited to its facts and the policy provisions,[116] the *Harrington* court had determined that it would be the intent of the parties, as well as an avoidance of unjust enrichment, to allow an offset against the verdict. The supreme court reversed the lower court in *Russell* and designated the philosophy underlying its action to be in line with similar cases avoiding unjust enrichment to the claimant.[117]

Further, the fact that punitive damages may not have been contemplated by the parties when the walkaway draft was issued did not prevent the court from allowing offset against both punitive and actual damages. The respondent contended that in issuing the walkaway draft, punitive damages had not been part of the negotiations in this case nor were they a customary procedure used by INA.[118] Although the respondent acknowledged that he

112. Brief for Respondent at 10 (quoting *The Legal Aspects of Partial Payments Made on Liability Claims in Advance of Final Settlement, supra* note 110). *Accord,* Deschamps, 7 FOR THE DEFENSE No. 8 (October 1966); Franklin, Chanin & Mark, *Accidents, Money and the Law: A Study of the Economics of Personal Injury Litigation,* 61 COLUM. L. REV. 1 (1961); Graham, *Advance Payment and Personal Injury Claims,* III THE FORUM (April 1968); KEETON & O'CONNELL, BASIC PROTECTION FOR THE TRAFFIC VICTIM (1965); Morris & Paul, *The Financial Impact of Automobile Accidents,* 110 U. PA. L. REV. 913 (1962); Univ. of Mich. Law School, AUTOMOBILE ACCIDENTS COSTS AND PAYMENTS (1964).

113. Gallagher, *supra* note 110, at 519.

114. 267 S.C. at 643, 230 S.E.2d at 815.

115. 262 S.C. 263, 203 S.E.2d 691 (1974).

116. *See* 267 S.C. at 644 n.2, 230 S.E.2d at 815 n.2.

117. 267 S.C. at 643-44, 230 S.E.2d at 815. *Accord,* Boles v. Steel, 288 Ala. 732, 264 So. 2d 191 (1972); Edwards v. Passarelli Bros. Automotive Serv., Inc., 8 Ohio St. 2d 6, 221 N.E.2d 708 (1966); Byrd v. Stuart, 224 Tenn. 46, 450 S.W.2d 11 (1969); 22 AM. JUR. 2d *Damages* § 206 (1965); Annot., 11 A.L.R.3d 1115 (1967).

118. Brief for Respondent at 7-13. *See* note 110 *supra* and Record at 15, 19, 20, 25,

understood the check was "to apply" to his claim, he also stated that he did not know what punitive damages were, and that no reference to them had been made during negotiations.[119]

South Carolina has recognized that punitive damages are inclusive in the obligation undertaken by a liability insurer that has contracted to pay all sums because of bodily injuries.[120] However, a tenable agreement presupposes that while the obligation to pay punitive damages attaches at the time of the contract, the contemplation of the actual amount arises only after a liability has been determined, and actual damages have been awarded.[121] The supreme court ruled that "[i]t is uncontested that appellant was legally obligated to pay both actual and punitive damages,"[122] and thus allowed the walkaway draft to offset both. The policy reason supporting this decision is evident. The procedure of issuing money to the plaintiff before final settlement or adjudication is beneficial to the plaintiff, regardless of any ultimate reasons by the insurance companies.

C. Conditional Receipt

Vernon v. Provident Life & Accident Insurance Co.[123] involved an action brought by beneficiaries to recover the proceeds on a life and accident insurance contract procured by the deceased applicant. The jury in the lower court trial had returned a verdict in favor of the beneficiaries, finding that the insurer Provident Life & Accident Insurance Company (hereinafter Provident) had acted in bad faith in rejecting the decedent's application. The facts centered around the conditional receipt delivered to the decedent after he had filed an application with payment for the first month's premium.[124] The receipt stipulated two con-

29, 30, 32, 37, 38, & 40 for respondent's testimony and Record at 25, 29, 30, 32, 37, & 38 for INA's procedures.

119. Record at 19, 20, & 40.

120. State Farm Mut. Auto. Ins. Co. v. Hamilton, 326 F. Supp. 931 (D.S.C. 1971); Carroway v. Johnson, 245 S.C. 200, 139 S.E.2d 908 (1965); 8 J. APPPLEMAN, INSURANCE LAW AND PRACTICE § 4900 (1948).

121. "In order to sustain a verdict for punitive damages there must be an award for actual damages." Carroway v. Johnson, 245 S.C. at 204, 139 S.E.2d at 910; State Farm Mut. Auto. Ins. Co. v. Hamilton, 326 F. Supp. at 935-36 (quoting Cook v. Atlantic Coast Line R.R., 183 S.C. 279, 190 S.E. 923 (1937)).

122. 267 S.C. at 644, 230 S.E.2d at 815.

123. 266 S.C. 208, 222 S.E.2d 501 (1976).

124. The supreme court noted the advantages and disadvantages of the effective times of such receipts. If the application is accepted only after a medical examination and

ditions precedent to the acceptance of the decedent as an insured from the date of the application: a medical examination, and the insurer's acceptance of the applicant as insurable based on "the Company's rules and standards."[125]

South Carolina has followed the rule allowing the insurer to state that such receipts are "a qualified acceptance; the risk taking effect only in the event that the application is accepted, and that the company elects, after examining it, to issue such a policy as is applied for."[126] However, the caveat to this rule is that the decision not to insure and to refuse to issue a policy must be made in good faith and not "exercised arbitrarily, capriciously and unreasonably."[127] In determining whether coverage was afforded by the interim receipt in *Vernon,* the South Carolina Supreme Court stated that the "[l]iability of the insurer, if any, is dependent upon the language of the receipt, the facts of the particular case and the intention of the parties."[128]

---

the company's approval, "[i]t eliminates misunderstandings and law suits." If immediate credit is given from the moment of the application's delivery, it gives the applicant security "of immediate insurance coverage"; the advantage to the insurance company in this case is obligatory loyalty by the insured and a lessened risk that the applicant will "shop around for other coverage and renege on his contract." *Id.* at 214, 222 S.E.2d at 504. *See also* 43 AM. JUR. 2d *Insurance* §§ 220-225 (1969); Annot., 2 A.L.R.2d 943 (1948).

125. 266 S.C. at 212, 222 S.E.2d at 503.

126. Hyder v. Metropolitan Life Ins. Co., 183 S.C. 98, 117, 190 S.E. 239, 247 (1937) (citing Life Ins. Co. v. Young's Adm'r., 90 U.S. (23 Wall.) 85, 106 (1874)). "To be binding as a contract of insurance, a preliminary contract must be one for present insurance and not merely an agreement to insure at some future time, as on acceptance of an application or on the issuance or delivery of a policy." 32 C.J. § 183 (1923) (footnotes omitted), *quoted in Hyder,* 183 S.C. at 119, 190 S.E. at 247.

> "When properly executed it [the binding receipt] protects the applicant for insurance against the contingency of sickness intervening its date and the delivery of the policy, if the application is accepted. If the latter is not accepted or refused, in the valid exercise by the company of its rights, the binding slip ceases eo instanti to have any effect."

Stanton v. Equitable Life Assur. Soc'y of the United States, 137 S.C. 396, 417, 135 S.E. 367, 374 (1926) (quoting Joyce, INSURANCE 2d § 64).

127. Hamrick v. Life and Cas. Ins. Co. of Tenn., 252 S.C. 108, 117, 165 S.E.2d 567, 571 (1969); 29 AM. JUR. *Insurance* § 210 (1960). *See* Stanton v. Equitable Life Assur. Soc'y of the United States, 137 S.C. at 422-23, 135 S.E. at 375.

128. 266 S.C. at 214, 222 S.E.2d at 503. In *Hyder,* the supreme court found there was a binding receipt, since the application had been approved by the district office, pending a medical examination, before the home office had accepted or rejected the application. In *Stanton,* the divided court had discovered that there was no binding receipt, since the receipt stated it would be effective from the date of application only upon approval by the home office. The supreme court found that the application had been, under the established rules of the insurer, rejected in good faith before the applicant's death. In *Hamrick,* the supreme court found there had been a good faith rejection when the conditions were plainly stated in the receipt, and the applicant had been determined as uninsurable.

The applicant in *Vernon* was killed in an automobile accident after his medical examination had been conducted but before his application and premium had reached the insurer's home office. Provident had rejected the applicant under its second condition precedent after its investigation determined the applicant to be unacceptable according to the company's allegedly existing rules. The South Carolina Supreme Court ruled that Provident could not deny the existence of a contract, as the testimony revealed that the insurance company had no identifiable rules or standards of its own by which to refuse the coverage;[129] therefore, good faith became a jury question. The supreme court approved the lower court's admission of testimony by an experienced underwriter for another company for determining the acceptability of the decedent as an insurable risk. Evidence revealed that Provident had acted in bad faith in refusing to insure the decedent from the date of his application.[130] The court focused on the inadequacy of Provident's investigation and found that extrinsic evidence proved there was no "evidence detrimental to the decedent, healthwise."[131]

Daphne D. Sipes

129. "This gave to Provident a flexibility of decision in each case." 266 S.C. at 217, 222 S.E.2d at 505. The assistant vice president of Provident's Life Department had testified that manuals from other companies were used not to govern, but to serve as guidelines to underwriting. *Id.* at 216-17, 222 S.E.2d at 505.

130. The company claimed to have rejected the decedent's application on the basis of some medical reports reflecting complaints of chest pains. The supreme court, however, chided Provident's investigator for not having diligently sought information from three doctors "who should have been able to give him more information relative to the decedent's health than any other persons." *Id.* at 219, 222 S.E.2d at 506. The decedent's use of nitroglycerine was deemed insignificant by the court, since the medication had been prescribed not for him, but for his mother.

131. 266 S.C. at 219, 222 S.E.2d at 506.