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Insurance

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INSURANCE

I. ACCIDENTAL INJURY

The question of determining whether or not accidental bodily injury resulted directly and independently of all other causes was interpreted by the South Carolina Supreme Court in the recent case of *Stevenson v. Connecticut General Life Ins. Co.*[1] In *Stevenson*, the insured developed peripheral neuropathy, a loss of feeling in his legs brought about by his diabetic condition. While walking on the deck of his boat heated by the summer sun, the insured received third degree burns on his feet. As a result of the burns, the insured's condition worsened and a trauma-induced infection resulted in the amputation of his left leg below the knee.[2] The insurer appealed from a jury verdict for the plaintiff.[3]

The accident insurance policy provided for payment to the insured if he " 'received an accidental bodily injury . . ., and as a result of the injury or exposure, *directly and independently of all other causes,* has suffered any of the following losses. . . .' "[4] The appellant contended that the plaintiff's loss was not caused by the injury alone, but rather was caused by his diabetic condition and arteriosclerosis which substantially contributed to the need for amputation.[5] Moreover, appellant argued, the injury itself was not accidental in that the respondent should have reasonably foreseen "injury to his extremities in view of his known lack of feeling therein."[6] Citing further support, appellant maintained that the insured's knowledge of his pre-existing disease should

1. 265 S.C. 348, 218 S.E.2d 427 (1975).

2. *Id.* at 351, 218 S.E.2d at 428.

3. This case was tried twice. In the first trial the jury returned a verdict for the insurer, whereby the judge granted a new trial to the respondent. Brief for Appellant at 5.

4. 265 S.C. at 349-50, 218 S.E.2d at 428 (emphasis added). The policy provided for compensation of the loss of a limb by amputation. *Id.*

5. Brief for Appellant at 6.

6. *Id.* at 7. Appellant cited Gulledge v. Atlantic Coast Life Ins. Co., 255 S.C. 472, 179 S.E.2d 605 (1971) as support for the proposition that injuries are not accidental if they are the probable result of an action and are reasonably foreseeable by the insured or by a reasonably prudent person in the same position. *Id.* at 476, 179 S.E.2d at 606. Appellant reasoned that since the insured knew he had no feeling in his lower extremities, potential injury was reasonably forseeable. Brief for Appellant at 7. The supreme court distinguished *Gulledge* on the grounds that it was an assault case, where there was question as to whether the insured had provoked the assault. 265 S.C. 351, 218 S.E.2d at 429.

have prevented his voluntary action since it was forseeable that it might be potentially injurious to him, even though it would not be harmful to persons in good health.[7] The court rejected appellant's contention and reaffirmed earlier decisions[8] defining "accident" as it is thought to be understood by the common man who contracts for accident insurance. The test, the court explained, was whether the injury "occurred with his intent or volition."[9] If the respondent did not willfully or intentionally burn his feet, the injury was accidental.[10]

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7. Brief for Appellant at 7. Appellant cited Young v. Continental Casualty Co., 128 S.C. 168, 171, 122 S.E. 577, 578 (1924):

> [I]f a person suffering from some weakness or disease should subject himself to conditions which would not injuriously affect persons in ordinary health, but should be dangerous to him, and injury results, it would not be due to an accidental cause.

While no mention was made of the *Young* case in the *Stevenson* opinion, it would seem to provide support to the appellant's argument. Respondent in fact subjected himself to conditions that a person with normal sensation would not have been able to endure. Had the insured felt the extreme heat which caused the burns, he would not have remained on the surface and therefore would not have sustained the injury. Brief for Appellant at 7.

There is support, however, for respondent's contention that he exercised caution in protecting himself from potential injury and that he did not reasonably foresee injury from being barefooted in the boat. Brief for Respondent at 4. The wife of the insured testified on cross-examination:

> Q. You were aware of the loss of feeling in his feet?
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> A. So much so that never in the last years has Harry gone without his shoes or gone swimming because we were afraid that he would step on a stone or something so he just didn't go swimming. We always talked about when we got our own boat, he would be able to get out on the boat and we would know that there would be no stones there or swim from the boat and, of course this is the first time he stepped on the boat.

Record at 23.

Mr. Stevenson similarly commented upon his lack of knowledge of the potential heat of the boat deck:

> Q. Had anybody warned you or given you any indication whatsoever that the deck of the boat would get so hot as to cause burns?
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> A. No, when I bought the boat it was with the idea that it would be a sport boat for fishing or swimming or waterskiing and I know with that thought in mind that people with bare feet would be aboard the boat.

Record at 13.

8. Ducker v. Central Surety and Ins. Corp., 234 S.C. 228, 107 S.E. 342 (1959), Gaethe v. New York Life Ins. Co., 183 S.C. 199, 190 S.E. 451 (1937).

9. 265 S.C. 353-54, 218 S.E.2d at 430.

10. Justices Littlejohn and Ness in a brief concurring opinion felt the court placed entirely too much emphasis upon the question of the accidental injury. *Id.* at 356, 218 S.E.2d at 431 (Littlejohn and Ness, JJ. concurring). This is justifiable commentary considering most courts' reluctance to construe familiar terms against the interests of the insured.

The insurer's primary justification for denying liability was based upon the argument that the amputation of respondent's foot was not the result of the accidental injury *directly and independently of all other causes.*[11] A common clause in most accident insurance policies, the statement seeks to exclude from liability all injuries which may have been, in part, the result of a pre-existing disease or infirmity.[12] Because courts have had considerable difficulty interpreting the clause, commentators have remarked upon the disparate coverage provided policy holders.[13]

In *Stevenson,* there was evidence to support appellant's contention that the insured's diabetic condition contributed to his failure to respond to conservative medical treatment and thus contributed to the condition which ultimately required amputation.[14] The court, however, chose to apply a proximate cause test[15] and thus affirmed the lower court verdict. In distinguishing *Gamble v. Travelers Ins. Co.*[16] as not applicable in *Stevenson* because that policy contained a specific exclusionary clause,[17] the

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11. Brief for Appellant at 11.

12. W. VANCE HANDBOOK OF THE LAW OF INSURANCE 976 (3d ed. B. Anderson 1951).

13. Bronson & Fields, *The Problem of Concurrent Causation of Death Under Health and Accident Policies: A Solution Found?,* 32 INS. COUNSEL J. 241 (1965) [hereinafter cited as *Bronson & Fields*]. The authors suggest three basic approaches when considering pre-existing illness as a concurring cause of injury or death. Courts may construe the policy strictly, finding that "death would not have occurred but for the pre-existing disease" and therefore deny recovery. *Id.* Conversely it may determine that but for the accident, death would not have occurred, allowing recovery. However, the solution offered by the authors is a determination of the proximate cause of the injury, allowing recovery when "the accicent was the dominant cause . . . ." *Id.* at 243. *See generally* Annot., 84 A.L.R.2d 176 (1962).

14. The orthopedic surgeon who performed the amputation testified that it was "most probable that the pre-existing conditions [the insured's diabetes, and arteriosclerosis] contributed to the necessity for the amputation." Record at 61. While admitting that the infection resulting from the burns did not heal properly because of the insured's diabetes and arteriosclerosis, *id.* at 45-46, Respondent's medical expert denied that the pre-existing condition caused the infection itself. *Id.* at 41.

15. The court cited Lesley v. American Sec. Ins. Co. as correctly quoting the law of proximate cause:

> "[I]n determining the cause of a loss for the purpose of fixing insurance liability when concurring causes of damages appear, the proximate cause to which the loss is to be attributed is or may be the dominant or efficient cause - the one that sets the others in motion - although other and incidental causes may be nearer in time to the result and may operate more immediately in producing the loss."

261 S.C. 178, 184, 199 S.E.2d 82, 85 (1973). For a general discussion of proximate cause see Simon, *Proximate Cause in Insurance,* 10 AMER. BUS. L.J. 33 (1972).

16. 251 S.C. 98, 160 S.E.2d 523 (1968).

17. *Gamble* involved an insurance policy which contained an exclusionary clause specifically disclaiming liability for injuries caused or contributed to by disease or bodily

supreme court may have provided South Carolina litigants with a potential guideline in cases where bodily disease or infirmity is a concurring cause of the loss.

Previously the South Carolina court had held that the insured need not be in perfect health prior to the accident to recover,[18] and commentators have noted that most courts are hesitant to strictly interpret policy provisions denying coverage.[19] Many jurisdictions have allowed recovery even though bodily disease and infirmity substantially contributed to the loss,[20] al-

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infirmity. Allowing recovery to the insured because the defendant failed to sustain the burden of showing that the deceased's epilepsy caused or contributed to his death, the court commented upon factors requiring denial of recovery when disease concurs with an accident to cause loss:

> If the insured is inflicted with a disease or infirmity at the time an alleged accident occurs, which disease or infirmity causes or contributes to the death or injury resulting, such death or injury is not within the coverage of a policy which insures against death or bodily injury by accidental means, independently of all other causes or *which excepts death or bodily injury caused or contributed to by a disease or infirmity.*

251 S.C. at 103, 160 S.E.2d at 525 (emphasis added). Although the language could arguably be interpreted to deny recovery whether one *or* both clauses are present in the contract, the *Stevenson* court placed greater emphasis upon the presence of the secondary clause, finding the additional exclusion controlling. 265 S.C. at 354, 218 S.E.2d at 430.

18. Richardson v. Pilot Life Ins. Co., 237 S.C. 47, 115 S.E.2d 500 (1960). In *Richardson,* the court applied a "but for the acccident" test and determined that the insured's recovery from a leg fracture would have been uneventful but for the accident. It should be noted that no specific exclusionary clause was present in the policy. *Id.* at 51, 115 S.E.2d at 503. *See also* Kilgore v. Reserve Life Ins. Co., 231 S.C. 111, 97 S.E.2d 392 (1957), where an accidental injury activated a *latent* arthritic condition, thereby causing disability. The court noted:

> The courts have been particularly quick to permit recovery where the diseased condition was a latent one, which might never have caused loss without the occurrence of the accident.

Id. at 116, 97 S.E.2d at 394.

19. See *Bronson & Fields, supra* note 13, at 242. The authors maintain that courts doubt that the insured intended that any condition he might later have that contributed with accidental means to cause his death would bar benefits to which his beneficiaries might otherwise be entitled.

Id.

20. *See* Mutual Benefit Health and Acc. Ass'n v. Ratliff, 440 S.W.2d 119 (Tex. Civ. App. 1969), where the court allowed recovery although the insured developed ulcers as a consequence of an accident breaking both bones of a leg. The resulting hemorrage of the ulcers caused the insured's death. The court determined that sufficient evidence was present to support a finding that the death resulted directly and independently of all other causes. *See also* United States Fidelity & Guar. Co. v. Smith, 249 Miss. 873, 164 So.2d 462 (1964), where the court found that an automobile accident was the direct and independent cause of death, although an autopsy confirmed that the insured died several days later from a ruptured aortic aneurysm. The court explained:

> [I]f death or disability results from the accident, the fact that but for weakness or infirmities produced by former illness or disease it might not have been fatal

though recovery may be denied where exclusionary clauses specifically outline the boundaries of liability.[21] Liability may be relieved where, although an accident commenced the chain of events, the extenuating complications are too far removed from the initial event to justify recovery.[22] Nevertheless, on the whole the courts have been cognizant of the implications of interpreting insurance policies too literally, since in doing so, they may well exempt from liability all but the most simultaneous of accidental injuries and deaths.[23] Similarly, the courts have been hesitant to exclude from recovery accidental injuries complicated by the normal aging process unless the contract specifically outlines the limits of liability.[24]

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or as severe will not prevent recovery.

Id. at 888, 164 So. 2d at 469 (citation omitted. A Georgia court in Hall v. Gen. Acc. Assur. Corp., 16 Ga. App. 66, 85 S.E. 600 (1915) applied a "but for the injury" test and determined that if the insured would not have died at the time that he did, but for the injury, the accident was the direct cause. "[L]iability is not defeated merely because the existing disease aggravated or rendered more serious the consequences of the accident." *Id.* at 74, 85 S.E. at 603-04.

McCray v. Nat'l. Life & Acc. Ins. Co., 244 So. 2d 342 (La. App. 1971) involved a diabetic who, like the plaintiff in *Stevenson*, suffered an amputation of his leg because of burns which led to infection. While allowing recovery, the court, citing Carnelious v. Louisiana Indus. Life Ins. Co., 18 La. App. 739, 138 So. 533 (1931), observed that

> [t]he fact that the physical infirmity of the victim may be a necessary condition to the result does not deprive the injury of its distinction as the sole producing cause.
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> In such case, disease and low vitality do not rise to the dignity of concurring causes, but, *in having deprived nature of her normal power of resistance to attack, appear rather as the passive allies of the agencies set in motion by the injury.*

244 So. 2d at 345 (emphasis added); *cf.* Romanoff v. Commercial Travelers' Mut. Acc. Ass'n of Amer., 243 App. Div. 725, 277 N.YQ.S. 291 (1935). In *Romanoff*, another case factually similar to *Stevenson*, the New York court decided that the insured's pre-exiting diabetes and arteriosclerosis directly aggravated the accidental burns thereby necessitating and causing amputation. This previous condition therefore relieved the insurer's liability. It should be noted that most of the cases allowing recovery did not include an exclusionary clause specifically disclaiming liability for injuries contributed to by disease.

21. *See, e.g.*, Metropolitan Life Ins. Co. v. Abbott, 118 Ga. App. 587, 164 S.E.2d 859 (1968); Gulf Life Ins. Co. v. Braswell, 101 Ga. App. 133, 112 S.E.2d 804 (1960); Gamble v. Traveler's Ins. Co., notes 16 & 17 *supra.*

22. *See* Mutual Life Ins. Co. v. Asbell, 163 F.2d 121 (4th Cir. 1947), *cert. denied*, 332 U.S. 837 (1947); Horn v. Protective Life Ins. Co., 264 N.C. 157, 143 S.E.2d 70 (1965); Roeper v. Monarch Life Ins. Co., 138 Pa. Super. 283, 11 A.2d 184 (1940); Able v. Travelers Ins. Co., 248 S.C. 101, 149 S.E.2d 262 (1966).

23. *See* Wells v. Prudential Ins. Co. of Amer., 3 Mich. App. 220, 142 N.W.2d 57 (1966). The court maintained that unless the injury is instantaneous and final, most injuries are the result of contributing physical factors.

24. *See* Hartford Acc. and Idemnity Co. v. Grant, 113 Ga. App. 795, 797, 149 S.E.2d 712, 714 (1966). While commenting that the parties to an insurance policy may agree to

By allowing recovery where a pre-existing disease aggravated the injury and contributed to the loss insured against, the South Carolina Supreme Court in *Stevenson* seems to be suggesting to the insurer that liability will be imposed unless it specifically enumerates the risks excepted. The clause, *"directly and independently of all other causes,"* will exclude only those injuries so complicated by pre-existing infirmities that one may not reasonably conclude that the accident was the dominant cause of the diability. In the words of Mr. Justice Cardozo, "[a] policy of insurance is not accepted with the thought that its coverage is to be restricted to an Appollo or a Hercules."[25] If the insurer intends to limit its liability in these situations successfully, it would appear to be necessary to provide an additional exclusionary clause to eliminate any ambiguity in the policy.

II. INSURER'S LIABILITY FOR ATTORNEY FEES

In *Coker v. Pilot Life Ins. Co.*[26] the supreme court clarified a procedural question raised by the insurer regarding section 37-167.1 of the South Carolina Code of Laws. This section requires the insurer to assume liability for attorney fees where bad faith or unreasonable refusal to pay a claim forces prosecution by the insured to secure payment.[27] In *Coker,* the respondent presented

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exclude any risk, the court ruled that unless the insurer

> clearly points out the risks not assumed, it seems only logical that it accepts the risks of infirmity which are generally considered normal to mankind at the various stages of life, and therefore, that osteoarthritis . . . cannot be considered as a concurring cause of disability. . . .

25. Silverstein v. Metropolitan Life Ins. Co., 254 N.Y. 81, 84, 171 N.E. 914, 915 (1930).

26. 265 S.C. 260, 217 S.E.2d 784 (1975).

27. S.C. CODE ANN. § 37-167.1 (Cum. Supp. 1975) provides:

> (1) In the event of a claim, loss or damage which is covered by a policy of insurance or a contract of a nonprofit hospital service plan or a medical service corporation and the refusal of the insurer, plan or corporation to pay such claim within ninety days after a demand has been made by the holder of the policy or contract and a finding on suit of such contract made by the trial judge of a county court or court of common pleas that such refusal was without reasonable cause or in bad faith, the insurer, plan or corporation shall be liable to pay such holder, in addition to any sum or any amount otherwise recoverable, all reasonable attorneys' fees for the prosecution of the case against the insurer, plan or corporation. The amount of such reasonable attorneys' fees shall be determined by the trial judge and the amount added to the judgment. In no event shall the amount of the attorneys' fees exceed one third of the amount of the judgment or the sum of twenty-five hundred dollars, whichever is less.
>
> (2) If attorneys' fees are allowed as herein provided and, on appeal to the Supreme Court by the defendant, the judgment is affirmed, the Supreme Court

a motion requesting attorney fees under section 37-167.1 to the lower court judge several days following *sine die* adjournment of the initial trial which found the respondent entitled to payment. The appellant contended that following adjournment, the lower court judge no longer retained jurisdiction over the matter[28] and was therefore not empowered to order payment of attorney fees. Moreover, appellant maintained, the order effected a retroactive application of the statute since the failure to pay commenced before the statute was enacted.[29] Explaining that the statute contemplates a determination of liability after the initial proceeding is decided in favor of the insured,[30] the supreme court would not lend credence to the argument that the lower court judge no longer had jurisdiction.[31]

Upholding the lower court order granting attorney fees to the insured,[32] the South Carolina Supreme Court, through Justice Bussey, disclosed its interpretation of the procedural requirements of the statute. The "preferable, *though not exclusive,* method for raising the issue"[33] of the insurer's liability for attorney fees "would be for the insured to draw the issue to the attention of the trial judge . . . prior to the commencement of the trial."[34] The court recognized, however, that the question of bad

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shall allow to the respondent such additional sum as the court shall adjudge reasonable as attorneys' fees of the respondent on such appeal.

(3) Nothing in this section shall be construed to alter or affect the *Tyger River Pine Co. v. Maryland Casualty Co.,* 161 S.E. 491, 163 S.C. 229, doctrine.

28. Brief for Appellant at 6-10.

29. *Id.* at 17-19. The supreme court rejected this argument on the basis that appellant's refusal to pay continued after the statute's enactment. 264 S.C. at 267, 217 S.E.2d at 788.

30. 265 S.C. at 266, 217 S.E.2d at 787. The supreme court noted that section 37-167.1 provided for attorney fees to be *added* to the judgment and therefore implied a post-trial determination of liability.

31. The supreme court not only affirmed the lower court order but also made use of section 37-167.1(2) and allowed reasonable attorney fees to the insured because of the insurer's appeal. 264 S.C. at 269, 217 S.E.2d at 789. The supreme court similarly applied this part of the statute to the insured in Blackburn v. Government Employees Ins. Co., 264 S.C. 535, 216 S.E.2d 192 (1975).

32. 265 S.C. at 269, 217 S.E.2d at 789. The court was of the view that the trial judge was in fact the only judge who could entertain respondent's motion since he alone was present during the initial proceding. Similarly, the court noted that liability for attorney fees was not an issue in the first trial and therefore was not "finally determined prior to the sine die adjournment. . . ." *Id.* at 266, 217 S.E.2d at 787.

33. *Id.* at 267, 217 S.E.2d at 788 (emphasis added).

34. *Id.* The court observed that this would allow the judge to consider relevant evidence during the trial and, following a judgment for the insured, the judge could hear further evidence to determine the insurer's liability. Appellant maintained that the issue

faith or unreasonable refusal to pay a claim may not become evident until the end of the trial and thus refrained from making the suggested procedure mandatory.[35]

III. South Carolina Retaliatory Statute

In *State v. Southern Farm Bureau Life Insurance Co.*[36] the supreme court again considered the South Carolina retaliatory statute[37] which had previously remained unquestioned prior to litigation beginning in 1972.[38] Similar statutes have been enacted by many states for the purpose of protecting domestic insurance companies doing business in a foreign state, the purpose being to

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should be raised in the complaint and that only evidence presented at the trial should be considered in determining the insurer's liability. Brief for Appellant at 12-17. The supreme court suggested, however, that this procedure could in fact be highly prejudicial to the insured. 264 S.C. at 266-67, 217 S.E.2d at 787-88.

35. Whether abuse of the relatively flexible procedure outlined in *Coker* could lead to an imposition of a stricter standard for allowing delayed motions on a request for attorney fees under section 37-167.1 will have to be determined by future cases.

36. 265 S.C. 402, 219 S.E.2d 80 (1975). Appellants-respondents, Southern Farm Bureau Life Insurance Co. (hereinafter referred to as "Life") and Southern Farm Bureau Cas. Insurance Co. (hereinafter referred to as "Casualty"), consented to be tried together and similarly appealed together.

37. S.C. Code Ann. § 37-132 (Cum. Supp. 1975). provides:

> Whenever the laws of any other state of the United States shall require of insurance companies chartered by this State and having agencies in such other state, or of the agents thereof, any deposit of securities in such state for the protection of policyholders or otherwise or any payment of penalties, certificates of authority, license fees or otherwise, greater than the amount required for such purposes from similar companies of other states by the then existing laws of this State, all such similar companies of such states establishing or having theretofore established an agency or agencies in this State shall make the same deposit for a like purpose with the Commissioner and pay to the Commissioner, for penalties, certificates of authority, license fees, filing fees or any other fees, an amount equal to the amount of such charges imposed by the laws of such state upon companies of this state and the agencies thereof.
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> Whenever the laws of any other state of the United States or the regulation or action of any public official of such other state shall subject insurance companies chartered by this State to any restrictions, obligations, conditions or penalties for the privilege of doing business in such other state which are greater than those required of similar insurers organized or domiciled in such other state by or in this State for the privilege of doing business herein, then all similar insurers organized or domiciled in such other state shall be subjected to such greater requirements imposed by or in such other state upon similar insurers of this State. *Provided, however,* that all license fees and charges made pursuant to this section shall be reduced to the extent of investment credits granted by §§ 37-123 and 37-125.

(Emphasis in original).

38. The first case, Lindsay v. Southern Farm Bureau Cas. Co., 258 S.C. 272, 188 S.E.2d 374 (1972) also involved Defendant Casualty.

create a "substantial equality of burdens upon foreign and domestic corporations."[39]

In *Southern Farm Bureau* the State claimed defendants Life and Casualty owed additional retalitory fees because they improperly deducted investment credits under sections 37-123,[40] and 37-125.[41] Although two Attorney General opinions[42] had inter-

39. 19 J. APPLEMAN, INSURANCE LAW AND PRACTICE § 10352, at 59 (1946) [hereinafter cited as APPLEMAN]. *See also* Employers Cas. Co. v. Hobbs, 152 Kan. 815, 107 P.2d 715 (1941); Life and Cas. Co. v. Coleman, 233 Ky. 350, 25 S.W.2d 748 (1930); Occidental Life Ins. Co. v. Commonwealth, 295 A.2d 853 (Pa. Commn. 1972); Lindsay v. Southern Farm Bureau Cas. Ins. Co., 258 S.C. 272, 188 S.E.2d 374 (1972). The statute calls for a comparison of the laws of the domicile state of the foreign insurer to determine whether the burden upon a South Carolina insurer doing business in the foreign state is greater than the burden on a foreign insurer in South Carolina. If the burden is greater, the retaliatory statute allows an increase in the amount owed by the foreign insurer to equal that owed by the South Carolina insurer.

40. S.C. CODE ANN. § 37-123 (1962) provides:

> If the executive officer making a return for a company required to pay the additional fee provided by § 37-122 shall file with the Commissioner a sworn statement showing that at least one fourth of the reserve on all policies issued in this State is invested in any or all of the following securities or property to wit, (a) notes or bonds of this State or of securities and municipalities of this State or subdivisions thereof, (b) first mortgage bonds of real estate in this State or first mortgage bonds of solvent domestic or domesticated corporations whose improved property is situate entirely within this State and which are owned and controlled independently of foreign corporations and operated entirely within the State; (c) average daily balance on deposits in banks of this State maintained continuously for twelve months next preceding the date of the return or (d) any property situate within the State and returned for taxes therein, at the value at which it is returned, then the additional license fees on premiums collected during the time such investments have been actually made and maintained shall be one and three fourths per cent under like conditions if such investment be one half of such reserve, the additional license fee shall be one and one half per cent. Under like conditions if such investment be three fourths of such reserve, the additional license fee shall be one and one fourth per cent. And if the entire reserve be so invested, under like conditions, the additional license fee on such premium receipts shall be one per cent.

41. S.C. CODE ANN. § 37-125 (1962) provides:

> If the executive officer making a return for a company required to pay the additional fee provided by § 37-124 shall file with the Commissioner a sworn statement showing that at least one fourth of the premium receipts on all risks in this State is invested in the securities named in § 32-123, then the additional license fee on premiums collected during the time such investments have been actually made and maintained shall be one and three fourths per cent. Under like conditions if such investments be one half of such premium receipts, the additional license fee shall be one and one half per cent. Under like conditions if the investments shall be three fourths of such premium receipts, the additional license fee shall be one and one fourth per cent. And if the entire premium receipts be so invested, under like conditions, the additional license fee on such premium receipts shall be one per cent.

42. 1964-65 OP. ATTY. GEN. 163; 1965-66 OP. ATTY. GEN. 116.

preted the interrelation between sections 37-123 and 37-125 with section 37-132 as allowing credit for local investments despite the fact that a foreign state would not provide a similar deduction for South Carolina companies, a 1969 opinion reconsidered the issue and determined that the retaliatory statute compelled disallowance of the credit.[43] In 1971, the South Carolina Insurance Department sought a declaratory judgment against defendant Casualty to determine whether investment credits were properly deductible.[44] In *Lindsay v. Southern Farm Bureau Cas. Co.*[45] the South Carolina Supreme Court, agreeing with the 1969 Attorney General opinion, determined that the retaliatory statute applied and therefore that no deduction should be allowed.[46] On June 1, 1972 the plaintiff in the present action made demand upon defendant Casualty for retaliatory fees and taxes for the years 1963 through 1971 and upon defendant Life Company for the years 1965 through 1971.[47] On July 14, 1972 an amendment to section 37-132 was signed into law, which the legislature intended to be retroactively applied.[48] On February 5, 1973 plaintiff made formal demand upon defendants Life and Casualty and the present action commenced 15 days later.[49] Prior to the *Southern Farm Bureau* decision, but after the commencement of the action, the South Carolina Supreme Court held in *Lindsay v. National Old Line Ins. Co.*[50] that the 1972 Amendment was not retroactive.[51] The State also made claims against defendants Life and Casualty for retaliation against income taxes imposed upon foreign insurers doing business in Mississippi.[52] In Judge[53] Ness's order, the

43. 1968-69 OP. ATTY. GEN. 269.

44. Record at 123. Mississippi, the domicile of the defendant, did not allow investment credits. *Id.* at 124.

45. 258 S.C. 272, 188 S.E.2d 374 (1972).

46. *Id.* at 281, 188 S.E.2d at 378.

47. Record at 124.

48. The amendment added what is now the last sentence to the section (*see* note 37 *supra*), and stated: "This enactment is declared to be declaratory of the existing provisions of Section 7-132." No. 1555, [1972] S.C. Acts & Jt. Res. 3025.

49. Record at 124.

50. 262 S.C. 621, 207 S.E.2d 75 (1974). To avoid confusion, Lindsay v. National Old Line Ins. Co. is referred to as *National Old Line;* Lindsay v. Southern Farm Bureau Cas. Co., 258 S.C. 272, 188 S.E.2d 374 (1972) is referred to as *Lindsay*; and State Southern Farm Bureau Life Insurance Co., 265 S.C. 402, 219 S.E.2d 80 (1975) is referred to as *Southern Farm Bureau.*

51. The court stated that, in effect, the legislature was trying to overrule the *Lindsay* case.

52. Record at 124.

53. Now supreme court Justice Ness.

lower court declared that retaliatory fees disallowing the investment credit and additional charges based on Mississippi income taxes were owed by both defendants.[54]

Defendants raised several issues in defense. They first asserted that the 1972 amendment was retroactive in effect and, as such, relieved them of liability for prior investment credits taken. On appeal, however, defendants acknowledged *National Old Line* to be dispositive of this issue.[55] Defendants next argued that the decision in *Lindsay* should not be given retroactive effect.[56] The supreme court found this argument "untenable"[57] and explained that the *Lindsay* decision was "the construction of a statute which had been the law since its enactment in 1934 and was the law until the July 14, 1972 amendment."[58]

The defendants lastly claimed that the state was estopped from collecting the retaliatory fees and taxes,[59] asserting that they had relied in good faith upon the 1965 and 1966 Attorney General opinions declaring that investment credits were properly taken. Similar reliance was placed upon the acceptance of the defendants' annual returns by the South Carolina Insurance Department, which made no claim that the defendants owed any additional taxes or fees.[60] While acknowledging the accepted rule that

54. Record at 143. The amount due was limited by a 3-year statute of limitations deemed applicable by the lower court. The State appealed this ruling, arguing that a 3-year statute of limitations set forth in § 65-2707 was the applicable statute. Brief of Plaintiff-Appellant-Respondent at 6. The State also argued that the defendants failed to invoke the 3-year statute in their pleadings. Brief of Plaintiff-Appellant-Respondent at 8. The supreme court reversed the lower court's ruling as to the statute of limitations, stating that the issue of "applicability . . . was never presented to the court for a determination. . . ." 265 S.C. at 412, 219 S.E.2d at 85.

55. Brief of Defendants-Appellants-Respondents at 3-4.

56. *Id.* at 4. Defendants asserted as justification for this argument the speed with which the General Assembly enacted the amendment to § 37-132, 3 months following the *Lindsay* decision. While again acknowledging that the amendment was not retroactive in fact, the defendants claimed that the attempt to make it retroactive was evidence of legislative intent as to the statute's application. *Id.* at 5-6.

Defendants also argued that since the *Lindsay* case was a declaratory judgment, it should be given prospective application only. Citing Power v. McNair, 255 S.C. 150, 177 S.E.2d 551 (1970) and Williams Furn. Corp. v. Southern Coating & Chem. Co., 216 S.C. 1, 56 S.E.2d 576 (1949) as support, defendants distinguished declaratory judgment actions from "judgments in other actions, the former being to *declare* legal rights and relationships prospectively and the latter to *enforce* legal rights and relationships." Brief for Defendants-Appellants-Respondents at 11.

57. 265 S.C. at 409, 219 S.E.2d at 83.

58. *Id.*

59. Brief for Defendants-Appellants-Respondents at 13.

60. Record at 96-97. The defendants also offered as an exhibit a letter from the South

Attorney General opinions are not binding on the court,[61] the defendants questioned the "value . . . such opinions may have if they may not be relied upon at least to estop the state from applying retroactively a *subsequent judicial decision* contrary to the Attorney General's opinions."[62] Submitting that "manifest injustice" would lie if estoppel were not allowed, the defendants requested that at least interest and penalties be eliminated from the total amount due.[63]

While originally the defense of estoppel was not available against the State,[64] the rule has been modified to allow estoppel in certain areas including contractual relations.[65] However, it is generally accepted that "estoppel will not be applied to deprive the government of the due exercise of its police power, or to affect public revenues or property rights, or to frustrate the purpose of its laws or thwart its public policy."[66] Thus, misinterpretation of the law of a State by its public officials will not justify the finding of estoppel, particularly in tax cases.[67] However, it would appear difficult to justify the denial of estoppel in the present case by citing the revenue aspect of the retaliatory statute, for it is generally accepted that these statutes are not primarily a revenue raising measure, such feature being purely incidental.[68] The lower

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Carolina Department of Insurance dated March 12, 1968 informing Defendant Life of an error in its 1967 Fee and Tax Return. While impliedly acknowledging the propriety of taking investment credits, the letter asserted that the defendant had taken a credit for certain investments which did not qualify for deduction and requested remittance of an additional amount. *Id.* at 345-46.

61. Kabler v. Redfearn, 215 S.C. 224, 54 S.E.2d 791 (1949).

62. Brief for Defendants-Appellants-Respondents at 17.

63. *Id.* at 18.

64. Baker v. State Highway Dept., 166 S.C. 481, 165 S.E. 197 (1932).

65. Heyward v. South Carolina Tax Comm'n, 240 S.C. 347, 126 S.E.2d 15 (1962).

66. *Id.* at 351, 126 S.E.2d at 17 (citations omitted); Powell v. Board of Comm'rs of Police Ins. & Annuity Fund, 210 S.C. 136, 41 S.E.2d 780 (1947).

67. State v. Maddox Tractor & Equip. Co., 260 Ala. 136, 69 So. 2d 426 (1953); Berry v. American Liberty Ins. Co., 150 Colo. 543, 375 P.2d 93 (1962); Superior Coal Co. v. Department of Revenue, 4 Ill. 2d 459, 123 N.E.2d 713 (1954); Farrow v. City Council of Charleston, 169 S.C. 373, 168 S.E.2d 852 (1933).

68. 19 APPLEMAN § 10352 at 59; Note, *Retaliatory Taxation of Insurance Companies*, 27 VA. L. REV. 686, 689 (1941); *see* Life & Cas. Ins. Co. of Tenn. v. Coleman, 233 Ky. 350, 353, 25 S.W.2d 748, 749 (1930); Republic Ins. Co. v. Comm'r, 272 Minn. 325, 330, 138 N.W.2d 776, 779 (1965); Occidental Life Ins. Co. v. Commonwealth, 295 A.2d 853, 855 (Pa. Commw. 1972); Pacific Mut. Life Ins. Co. v. State, 161 Wash. 135, 138, 296 P. 813, 815 (1931). Because the retaliatory statute is aimed at equalizing the burdens of foreign and domestic insurers, it has been said that the success of the statute "depend[s] on how little is collected under its terms rather than how much." Occidental Life Ins. Co. v. Commonwealth, *supra* at 855.

court nevertheless refused to find the defense of estoppel available to the defendants,[69] and a majority[70] of the supreme court affirmed.[71]

The arguments then turned to the application of section 37-132 against Mississippi income taxes imposed upon foreign insurers doing business in that state.[72] The defendants maintained

69. Record at 133. It should be noted with interest that the lower court strongly emphasized the revenue aspect in reaching its decision, although there was minor reference to the police power jusitification. *Id.* at 129-33.

70. Justice Littlejohn wrote the opinion of the court, Justice Bussey offered the sole dissent. In the previous retaliatory statute cases, *Lindsay* and *National Old Line,* Justice Bussey was joined in dissent by former Justice Brailsford.

71. 265 S.C. at 409-10, 219 S.E.2d at 83. The court agreed with the State that the defendants had not met the essential requirements for estoppel as outlined in Frady v. Smith, 247 S.C. 353, 147 S.E.2d 412 (1966). *Frady* required the party asserting the defense to prove three elements:

> (1) Lack of knowledge and of the means of knowledge of the truth as to the facts in question; (2) reliance upon the conduct of the party estopped; and (3) action based thereon of such a character as to change his position prejudicially.

Id. at 359, 147 S.E.2d at 415. In explanation of its assertion, the State argued that the defendants did not change their positions in reliance upon the Attorney General opinions. Instead, they argued, defendants continued to take investment credits as they had before the opinions were published, and following the 1969 opinion, the defendants continued to deduct credits as they had in the past. Respondent Brief of Plaintiff-Appellant-Respondent at 10. The defendants maintained that "[t]o argue . . . one must change position in order to show reliance, when the Opinions relied upon confirm one's present position, is patently absurd." Reply Brief of Defendants-Appellants-Respondents at 3. In response to the State's allegation that the defendants ignored the 1969 Attorney General opinion, defendants argued that the opinion was being "contested in the courts" and to change positions before final judicial determination would have been unreasonable. *Id.* at 4. The majority also agreed with the lower court judge that the doctrine of estoppel is not available against the government in depriving application of its police or taxing power. 265 S.C. at 410, 219 S.E.2d at 83.

The dissent determined that the essential elements of estoppel had been met by the defendants. *Id.* at 414, 219 N.E.2d at 85 (Bussey, J., dissenting). Justice Bussey additionally declared that despite the general rule that estoppel is not applicable against the enforcement of a government's police powers,

> the instant case presents an excellent example of manifest injustice which should at least call for this Court to seriously consider the application of the doctrine of estoppel under the existing circumstances.

Id. at 414, 219 S.E.2d at 85 (Bussey, J., dissenting). Justice Bussey suggested that the State should at a minimum be estopped from collecting the interest and penalties for late payment.

72. MISS. CODE ANN. § 27-7-5 (1972) which provides in part:

> (1) There is hereby assessed and levied, to be collected and paid as hereinafter provided, for the calendar year 1968 and fiscal years ending during the calendar year 1968 and all taxable years thereafter, upon the entire net income of every resident individual, corporation, association, trust or estate, in excess of the credits provided, a tax at the following rates:
>
> On the first five thousand dollars of taxable income, or any part thereof, at the rate of three percent;

that Mississippi income taxes were not a proper item to be considered when applying South Carolina's retaliatory statute,[73] since section 37-132 makes no reference to tax or taxes while enumerating those charges which will trigger retaliation.[74] Arguing that the retalitory statute was specifically enacted to retaliate against penalties imposed upon domestic *insurers* for the *privilege of doing business in a foreign state,* the defendants maintained that the imposition of an income tax in Mississippi was not directed at insurance companies alone and, as such, was not a "charge" contemplated by the retaliatory statute.[75]

There is virtually unanimous support for the often stated rule that retaliatory statutes are penal in nature and, as such, must be strictly construed and may not be extended beyond the letter of the law.[76] One court has maintained that even though strict construction might leave the statute ineffective in certain aspects, a liberal construction cannot be justified.[77] Nevertheless, the state argued here that phrases such as "charges," "or otherwise," and "or any other fees" in section 37-132 necessarily included the income taxes imposed by Mississippi,[78] explaining that the legislature was aware it could not foresee at the time of

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On all taxable income in excess of five thousand dollars, at the rate of four percent.

(2) A like tax is hereby imposed to be assessed, collected and paid annually, except as hereinafter provided, at the rate specified in this section and as hereinafter provided, upon and with respect to the entire net income, from all property owned or sold, and from every business, trade or occupation carried on in this state by individuals, corporations, partnerships, trusts or estates, not residents of the State of Mississippi.

73. Brief for Defendants-Appellants-Respondents at 21.

74. *See* note 37 *supra.*

75. Brief for Defendants-Appellants-Respondents at 25. The Mississippi statute imposes the tax upon "every business, trade or occupation carried on in this state by individuals, corporations, partnerships, trusts or estates, not residents of the State of Mississippi." *See* note 72 *supra.* It is difficult to construe this statute as imposing a special burden upon insurers alone.

76. 19 APPLEMAN § 10352, at 59; W. VANCE, HANDBOOK ON THE LAW OF INSURANCE (3d ed. B. Anderson 1951) 137; Note, *Retaliatory Taxation of Insurance Companies,* 27 VA. L. REV. at 689, Banker's Life Co. v. Richardson, 192 Cal. 113, 218 P. 586 (1923); Pacific Mut. Life Ins. Co. v. Lowe, 354 Ill. 398, 188 N.E. 436 (1933); State v. American Ins. Co., 79 Ind. App. 398, 137 N.E. 338 (1922); Pacific Mut. Life Ins. Co. v. State, 161 Wash. 135, 296 P. 813 (1931).

77. State v. American Ins. Co., 79 Ind. App. 398, 137 N.E. 338, 341 (1922). *But see* Lindsay v. Southern Farm Bureau Cas. Ins. Co., 258 S.C. 272, 188 S.E.2d 374 (1972) which, after announcing the general rule, declared "the law should not be construed so as to defeat its purpose." *Id.* at 277, 188 S.E.2d at 376.

78. Respondent Brief for Plaintiff-Appellant-Respondent at 15.

enactment all potential fees, taxes, and charges which would trigger section 37-132. Therefore, the State maintained, the statute was drafted to accommodate future charges imposed by foreign states.[79]

The defendants referred the supreme court to the established rule requiring ambiguous tax statutes to be construed in favor of the taxpayer[80] and additionally offered the common law rule of *ejusdem generis* as support for a favorable construction.[81] While impressed with the *ejusdem generis* argument, the court determined that the legislature intended to equalize the burdens of insurance companies and therefore affirmed the lower court's inclusion of the Mississippi income taxes.[82] The dissent took issue with the majority's disposition of the income tax aspect of the case. Convinced that the rule of *ejusdem generis* required limitation of the statute to charges enumerated, Justice Bussey maintained that the intent of the legislature was "to retaliate only as to those obligations placed upon South Carolina insurers for the privilege of conducting the business of insurance in a given state."[83] Thus, the dissent determined, since legislative intent did not require inclusion, the rule of strict construction controlled.

In deciding that the Mississippi income taxes are proper items for retaliation, the lower court and the supreme court, adopted an aggregate approach to the retaliatory statute.[84] Examining the *total burdens* imposed upon a domestic insurer includ-

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79. *Id.*

80. Brief for Defendants-Appellants-Respondents at 26-27.

81. *Id.* at 27. The South Carolina court specifically defined *ejusdem generis* in Vassey v. Spake, 83 S.C. 566, 65 S.E. 825 (1909):

> "Where a statute, or other document, enumerates several classes of persons, or things, and immediately following, and classed with such enumeration, the clause embraces "other" persons, or things, the word "other" will generally be read as "other such like," so that persons, or things, therein comprised may be read as *ejusdem generis* with, and not of a quality superior to or different from those specifically enumerated."

Id. at 567, 65 S.E. at 826 (citation omitted). However, the court concluded with the following qualification:

> Whenever the intention is clear, and there is no room for construction, the rule does not apply.

Id. See also State Ins. Comm'r v. Nationwide Mut. Ins. Co., 241 Md. 108, 215 A.2d 749 (1966).

82. 265 S.C. at 411, 219 S.E.2d at 84. Thus the court determined that the clear intent of the legislature precluded application of the rules of statutory construction. *See also* South Carolina Mental Health Comm'r v. May, 226 S.C. 108, 83 S.E.2d 713 (1954).

83. 265 S.C. at 415, 219 S.E.2d at 86 (Bussey, J., dissenting).

84. Record at 137-39.

ing income taxes, and the legislative intent to equalize the burdens of insurers, the lower court maintained that the exclusion of the income taxes "would be blatently incompatible with the unanimous declared purpose of retaliation by all five members of our Supreme Court; that is, *equalization of burdens.*"[85] On appeal, the defendants argued that had the legislature intended an aggregate approach, an express provision could have been included within the statute.[86] Indeed, many statutes specifically provide for the aggregate approach to retaliatory statutes,[87] although it may be adopted as readily by judicial decision.[88]

Commentators have discussed the problems involved with the item-by-item approach when attempting to compare different types of exactions and generally observe the aggregate approach to be more satisfactory.[89] One court explained that the retaliatory statute should be employed when the total exactions imposed by one state exceed the total exactions imposed by another state, regardless of how any particular exaction is characterized.[90] Certainly the intent of the legislature was to equalize the burdens placed on insurers. Allowing the aggregate approach in determining the proper amount of retaliation would effectively accomplish this purpose.

The South Carolina Retaliatory Statute has produced a variety of legal questions in recent years and perhaps now is settled as to its application. However, even though the *Southern Farm Bureau* decision has clearly announced to insurers the approach the South Carolina Supreme Court will take regarding the statute, the recent decisions have placed insurers in the unfortunate position of being held retroactively liable for amounts previously declared not due. For this reason it appears manifestly unjust to exact penalties and interest from the defendants during the period when the application of the law was in question.

The manner in which the supreme court interpreted the statute in *Southern Farm Bureau* can be justified as a logical application of the law. Although emphasis was placed upon the revenue

85. *Id.* at 139.

86. Brief for Defendants-Appellants-Respondents at 29.

87. *E.g.*, GA. CODE ANN. § 56-321 (1970); ORE. REV. STAT. § 731-854 (1973); TEX. REV. CIV. STAT. ANN. art. 21.46 (1963); VA. CODE ANN. § 38.1-87 (1970).

88. PELLETIER, *Insurance Retaliatory Laws*, 39 NOTRE DAME LAW. 243, 257 (1964).

89. Pelletier, *supra* note 88 at 254-57. Problems traditionally arise when an exaction in one state has no comparable exaction in another state.

90. Employers' Cas. Co. v. Hobbs, 149 Kan. 774, 89 P.2d 923 (1939).

aspect of the statute, section 37-132 can be properly characterized as an exercise of the state's police power, and as such, it is not subject to the doctrine of estoppel. Similarly, a reasonable interpretation of section 37-132, coupled with the certainty of legislative intent to equalize the burdens, justifies the inclusion of foreign income taxes as a proper item to be considered when assessing retaliatory fees. The construction of the statute offered by the supreme court is nevertheless somewhat strained, particularly when considering the general rule requiring strict construction of a penal statute. However, the South Carolina Supreme Court in *Lindsay* declared that construction must not defeat the intent of the statute, and the *Southern Farm Bureau* decision preserves the legislative intent. There is considerable substance in the argument that Mississippi income taxes are not imposed upon foreign insurers for the privilege of doing the business of insurance in that state and thus should not be considered appropriate for retaliation. The supreme court, however, has taken the position that the aggregate burdens will be compared without an examination of the character of a particular assessment and in doing so has apparently joined a growing trend among jurisdictions with retaliatory statutes.

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