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BUSINESS AND INSURANCE LAW

I. UNIFORM SECURITIES ACT: AWARD AND DETERMINATION OF ATTORNEYS' FEES

In *Bradley v. Hullander*,¹ the South Carolina Supreme Court approved a trial court's method of determining "reasonable" attorney's fees under section 35-1-1490(2)² of the Uniform Securities Act.³ The court held that the trial judge properly considered five separate criteria in setting the award: (1) the nature, extent, and difficulty of the required services; (2) the counsel's professional standing and reputation; (3) the success of counsel's efforts; (4) whether the fee was fixed or contingent; and (5) the time devoted to the case.⁴ In this decision the supreme court

1. 277 S.C. 327, 287 S.E.2d 140 (1982). This case was before the supreme court for the third time. For earlier dispositions of the case, see *Bradley v. Hullander*, 272 S.C. 6, 249 S.E.2d 486 (1978)(trial court's ruling in favor of plaintiffs affirmed)(Bradley II); *Bradley v. Hullander*, 266 S.C. 188, 222 S.E.2d 283 (1976)(order overruling demurrer affirmed) (Bradley I). For a discussion of the impact of Bradley II, see *Business Law, Annual Survey of South Carolina Law*, 31 S.C.L. REV. 1, 7-10 (1979).

2. S.C. CODE ANN. § 35-1-1490(2) provides that:

Any person who . . .

(2) Offers or sells a security by means of any untrue statement of a material fact or any omission to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they are made, not misleading, the buyer not knowing of the untruth or omission, and who does not sustain the burden of proof that he did not know, and in the exercise of reasonable care could not have known, of the untruth or omission;

Is liable to the person buying the security from him, who may sue either at law or in equity to recover the consideration paid for the security, together with interest at six percent per year from the date of payment, costs, and reasonable attorneys' fees. . . .

3. S.C. CODE ANN. §§ 35-1-10 to -1590 (1976).

4. 277 S.C. at 332, 287 S.E.2d at 142. These standards are based on S.C. Supreme Court Rule 32, which incorporates DR 2-106 of the Code of Professional Responsibility. DR 2-106(B) provides in part:

Factors to be considered as guides in determining the reasonableness of a fee include the following:

(1) The time and labor required, the novelty and difficulty of the questions involved, and the skill requisite to perform the legal services properly.

(2) The likelihood . . . that the acceptance of the particular employment will preclude other employment by the lawyer.

(3) The fee customarily charged in the locality for similar legal services.

(4) The amount involved and the results obtained.

demonstrated that it will accept these criteria in litigation under the Uniform Securities Act. *Bradley* makes it very unlikely that plaintiff's attorney's fees will be awarded on a strict hourly or contingency basis.⁵

In *Bradley*, the plaintiffs acquired an automobile dealership in 1974 from the defendants by purchasing all of the stock in the business.⁶ After discovering that the defendants had misrepresented the worth of the dealership, the plaintiffs filed suit alleging a violation of section 35-1-1490(2) of the Uniform Securities Act.⁷ The plaintiffs prevailed at trial, and the supreme court affirmed the award of \$149,746.41 but remanded the case for a determination of costs and fees.⁸ On remand, the trial judge awarded plaintiffs \$42,500 attorneys' fees.⁹ The plaintiffs appealed claiming that the award was insufficient, while the defendants challenged it as excessive.¹⁰ The supreme court dismissed

...

(6) The nature and length of the professional relationship with the client.

(7) The experience, reputation, and ability of the lawyer or lawyers performing the services.

(8) Whether the fee is fixed or contingent.

5. The plaintiffs argued that time should be the most important single factor in determining a reasonable fee. Brief for Appellants-Respondents at 4. The defendants maintained that the fee should be limited to the originally stipulated contingency fee (25% of the final judgment). Brief for Respondent-Appellants at 25-26.

6. *Bradley* I, 266 S.C. at 190, 222 S.E.2d at 285.

7. *Id.* at 190-91, 222 S.E.2d at 285.

8. *Bradley* II, 272 S.C. at 39-41, 249 S.E.2d at 502-03.

9. 277 S.C. at 329, 287 S.E.2d at 141. The judge also awarded the plaintiffs costs of \$484.84.

10. The plaintiffs also challenged the amount of costs awarded, but the court held that the trial judge had properly granted only "taxable costs" as defined under South Carolina cost statutes. 277 S.C. at 332-33, 287 S.E.2d at 142-43; see S.C. CODE ANN. §§ 15-37-10, -40, 19-19-10 (1976). The defendants also contended that they had been surprised and prejudiced by plaintiffs' amended prayer for fees and that the statutory classification allowing only successful plaintiffs to recover fees violated the equal protection clause of the fourteenth amendment of the United States Constitution. The court summarily rejected the defendants' claims of surprise and prejudice, noting that parties are statutorily allowed to amend their pleadings to obtain proper recovery and that the court has taken a liberal attitude toward amendments. 277 S.C. at 331, 287 S.E.2d at 142. Rejecting the equal protection challenge, the court reasoned that because the costs and attorney's fees provisions of the Act bear a reasonable relation to legitimate state policy, the tendency of the Act to favor one class of litigants over another did not render the provision unconstitutional. *Id.* at 330, 287 S.E.2d at 141-42. *Bradley* marks the first time the supreme court has considered whether a statute allowing a specified class of litigants to recover costs and fees violates the equal protection clause of the fourteenth amendment. The court reasoned that an otherwise legitimate classification will not be over-

both parties' appeals.

The court noted that the determination of an award for attorney's fees and costs was within the discretion of the trial court.¹¹ The supreme court found that the trial judge had properly considered all five criteria in setting its award¹² and that each criterion was considered independently, as required by the court's earlier decision in *Darden v. Whitham*.¹³ The court concluded, therefore, that the trial judge had not abused his discretion.¹⁴

In *Darden v. Whitham*, the plaintiff asked the supreme court to determine his duty to continue alimony payments after his ex-wife remarried.¹⁵ Although the plaintiff sought only declaratory relief, the court determined that the defendant's ex-wife was entitled to attorney's fees as provided by section 20-3-120 of the South Carolina Code, which allows costs and attorney's fees in divorce actions.¹⁶ The court upheld the award of \$175,000 in attorney's fees because the trial judge had properly considered the nature, extent, and difficulty of the required services; counsel's professional standing; the success of the action; whether the fee was fixed or contingent; and the time devoted to the case.¹⁷ *Darden's* significance to the decision in *Bradley*, however, results from the statement that "no one of the . . . factors in itself [is] controlling but that consideration should be given to

turned simply because it provides more protection for one class of litigants. *Id.* at 330-31, 287 S.E.2d at 141. The court presumed that a statute is constitutional unless clearly proven otherwise and that statutory classifications satisfy equal protection requirements if these classifications bear a reasonable relation to legitimate state policy. *Id.*, 287 S.E.2d at 141.

11. 277 S.C. at 332, 287 S.E.2d at 142.

12. *Id.*, 287 S.E.2d at 142. See *supra* note 4.

13. 263 S.C. 183, 209 S.E.2d 42 (1974).

14. 277 S.C. at 332, 287 S.E.2d at 142.

15. *Darden* was faced with a tax problem. Because his ex-wife's remarriage would statutorily free him from his duty to pay alimony, his continued alimony payments pursuant to the divorce settlement would no longer be deductible from his taxable income. He therefore sought a court order to determine the status of these payments. 263 S.C. at 190-91, 209 S.E.2d at 44-45.

16. S.C. CODE ANN. § 20-3-120 (Supp. 1981) provides the following:

In every action for divorce from the bonds of matrimony either party may in his or her complaint or answer or by petition pray for the allowance to her of alimony and suit money and for the allowance of such alimony and suit money *pendente lite*. If such claim shall appear well-founded the court shall allow a reasonable sum therefor.

17. 263 S.C. at 193, 209 S.E.2d at 46.

all in arriving at a reasonable fee.”¹⁸ The court in *Darden* also approved the trial judge’s refusal to award the fees solely on an hourly or a contingency basis.¹⁹

Applying the *Darden* criteria, the trial judge in *Bradley* awarded plaintiffs’ attorneys an amount equal to \$28.55 per hour,²⁰ approximately 28% of the total recovery. The attorneys for the defendant in *Darden*, however, received \$233.33 per hour,²¹ an amount equal to approximately 11% of the final judgment. This comparison reveals the wide discrepancy possible when the five criteria are applied. Attacking the use of these criteria, the plaintiffs in *Bradley* argued that a flat hourly fee determined by “the market value of the time and effort justifiably expended”²² would be a more accurate measure. Had the court accepted this argument, the potential for future discrepancies in fee awards might have been minimized. The amount of an attorney’s compensation would then have no relation to the size of the award but would be based on the market value of counsel’s services.

Although the argument has merit, the court in *Bradley* wisely rejected it. Determining reasonable fees requires more than awarding successful counsel the hourly market rate for an attorney with comparable experience.²³ A determination of fees should consider the defendant’s ability to pay, or at least the monetary value of the defendant’s fraud as measured by the final recovery in the case. Litigation arises from a disagreement between the plaintiff and the defendant, not between the defendant and the plaintiff’s attorney.

While the Uniform Securities Act’s provision allowing successful plaintiffs to recover costs and fees has a punitive effect, the defendant’s punishment should not be determined by the opposing counsel’s hourly market rate. Imposition of punishment should be discretionary with the trial judge, and the assessment of fees should reflect both the time spent in litigation

18. *Id.*, 209 S.E.2d at 46.

19. *Id.*, 209 S.E.2d at 46.

20. Brief for Appellants-Respondents at 14.

21. 263 S.C. 183, 196, 209 S.E.2d 42, 47 (Littlejohn, J., concurring and dissenting).

22. Brief for Appellants-Respondents at 2-3 (citing Berger, *Court Awarded Attorneys’ Fees: What is “Reasonable?”*, 126 U. PA. L. Rev. 281, 283, 316 (1977)).

23. If an attorney wants a minimum hourly rate, he may stipulate this and require the client to cover any deficiency.

as well as the severity of the fraud.

The court in *Bradley* correctly held that in cases involving violations of the Uniform Securities Act, the trial judge should award attorney's fees after giving consideration to each of the five criteria, including the time spent on the case and whether the fee was fixed or contingent. A trial judge's determination of attorney's fees will be presumed valid unless the record reveals an abuse of discretion. The opinion places sound, flexible boundaries around the potential scope of punitive awards of attorney's fees and gives trial judges objective and subjective guidelines. After *Bradley*, the definition of reasonable attorney's fees in the growing field of securities litigation will be subject to the same guidelines as those applicable to litigation in other areas.²⁴

Karen E. Molony

II. INSURANCE LAW

A. *Effective Change of Beneficiary Through Substantial Compliance with Insurance Policy Provisions*

In *Horne v. Gulf Life Insurance Co.*,²⁵ the South Carolina Supreme Court held that an insured may effect a valid change of the beneficiary on his life insurance policy through substantial compliance with the policy's governing provisions,²⁶ despite the former beneficiary's voluntary payment of the premiums. While this decision is consistent with existing South Carolina law, this is the first time the court has precluded a beneficiary who paid virtually all of a policy's premiums from contesting the validity of a beneficiary change.²⁷

24. The court in *Bradley* cited three other areas in which successful plaintiffs are statutorily allowed to recover attorney's fees: S.C. CODE ANN. § 38-9-320 (1976)(allows an insured to recover attorney's fees when insurer wrongfully refused to pay claim); S.C. CODE ANN. § 29-5-20 (1976)(allows attorney's fee in actions concerning mechanic's liens); 15 U.S.C. § 1640(a) (1982)(allows attorney's fees to consumers under Federal Truth in Lending Act). 277 S.C. at 331, 287 S.E.2d at 142.

25. 277 S.C. 336, 287 S.E.2d 144 (1982).

26. The policies required that the originals be endorsed with any change of the designated beneficiary. The policies also allowed the insured to obtain duplicate copies upon certifying that the original policies had been lost, stolen, or destroyed. *Id.* at 338, 287 S.E.2d at 145.

27. In *Swygert v. Durham Life Ins. Co.*, 229 S.C. 199, 204, 92 S.E.2d 478, 480-82 (1956), the court stated that the original beneficiary cannot complain if the insurer

In the fall of 1974, the insurer, Gulf Life Insurance Company, issued three policies on the life of the insured, Marvin Horne. The insured named his ex-wife, the plaintiff, beneficiary, but reserved the right to change this designation. The plaintiff retained possession of the policies and paid all the premiums until April 1977, at which time the insured executed a request to change the beneficiary on all three policies. Because the plaintiff held the original policies, the insured requested duplicates, which were issued with the requested change of beneficiary.²⁸ The insurer's agent then informed the plaintiff that she was no longer the beneficiary. The plaintiff paid no further premiums.²⁹ Two months after the change of beneficiary, the insured died, and his sister, the new beneficiary, filed a claim with the insurer and received the policy proceeds.

Plaintiff, claiming to be the lawful beneficiary, brought an action against the insurer to recover the proceeds of the policies. At the conclusion of all testimony, both parties moved for a directed verdict. After deciding that there were no issues of material fact, the trial judge removed the case from the jury and held that the plaintiff was entitled to judgment as a matter of law. The defendant appealed and the supreme court reversed the trial judge's decision.

Relying on *Davis v. Southern Life Insurance Co.*³⁰ and *Swygert v. Durham Life Insurance Co.*,³¹ the court in *Horne* reasoned that even though the named beneficiary had paid most of the premiums, she had no vested interest in the policies because the insured had reserved the right to change the beneficiary. The named beneficiary had a "mere expectancy" that the insured defeated by the change.³²

waives the requirement that the original policy be delivered for endorsement to change the beneficiary. In that case, however, the beneficiary had not paid any of the policy premiums. *Id.* at 203, 92 S.E.2d at 480.

28. 277 S.C. at 337-38, 287 S.E.2d at 145-46.

29. Conflicting evidence regarding the date that the plaintiff stopped paying premiums on the three policies was presented at trial. The agent who collected the policy premiums testified that the plaintiff had refused to pay *before* the change of beneficiary and that, as a result of this refusal, the agent had contacted the insured to see if he would pay the premiums. Record at 83-85. The plaintiff denied the agent's allegations. *Id.* at 58.

30. 249 S.C. 194, 153 S.E.2d 399 (1967).

31. 229 S.C. 199, 92 S.E.2d 478 (1956).

32. 277 S.C. at 338, 287 S.E.2d at 146. In South Carolina, unless the insured makes a

The court then considered whether the change was in substantial compliance with the policies' provisions.³³ In this instance, the policies required that the company consent to a change of beneficiary by endorsing the original policies. However, another provision of the policies allowed the insured to obtain duplicate copies if the originals were lost. Relying again on *Swygert*, the court concluded that if the insurer consents to a change of beneficiary without requiring production of the original policy for endorsement, the original beneficiary cannot complain that the change was not in substantial compliance with the policy.³⁴ Accordingly, endorsement of the duplicate policies amounted to substantial compliance and resulted in an effective change of beneficiary.

The substantial compliance rule on which the court based its decision is followed in a majority of jurisdictions.³⁵ Courts generally regard compliance as substantial when the insured has done everything reasonably within his power to effect the change.³⁶ The original beneficiary has no standing to contest the effectiveness of an attempted change of beneficiary when the insurer has waived the specified formalities.³⁷ The rationale be-

designation irrevocable in the policy, the insured reserves the right to change the beneficiary without the consent of the original beneficiary. S.C. CODE ANN. § 38-35-440(12) (1976). A beneficiary may defeat a change in the policy designation only through enforcement of a prior contractual agreement with the insured. Courts of equity have enforced such contracts when they were based on valuable consideration by holding that the original beneficiary had a vested, equitable interest in the proceeds of the policy, superior to the rights of the subsequent beneficiary. See *Kelly v. Layton*, 309 F.2d 611 (8th Cir. 1962) (applying Missouri law).

33. 277 S.C. at 339, 287 S.E.2d at 146.

34. *Id.*, 287 S.E.2d at 146. In *Swygert*, the court noted that delivery of the original policy to the insurer for endorsement of a change in beneficiary is primarily for the insurer's protection; therefore, the insurer may waive this requirement during the insured's lifetime. 229 S.C. at 204, 92 S.E.2d at 481.

35. See, e.g., *Doering v. Buechler*, 146 F.2d 784, 788 (8th Cir. 1945) (applying Minnesota law); *Barrett v. Barrett*, 173 Ga. 375, 380, 160 S.E. 399, 401 (1931); *Teague v. Pilot Life Ins. Co.*, 200 N.C. 450, 456, 157 S.E. 421, 423-24 (1931); *Dryman v. Liberty Life Ins. Co.*, 216 S.C. 177, 180, 57 S.E.2d 163, 164 (1950). See generally R. KEETON, BASIC TEXT ON INSURANCE LAW 253 (1971).

36. See, e.g., *Doering v. Buechler*, 146 F.2d 784, 787 (8th Cir. 1945); *Barrett v. Barrett*, 173 Ga. 375, 383, 160 S.E. 399, 402 (1931). See generally J. DOBBYN, INSURANCE LAW IN A NUTSHELL 111 (1981).

37. See, e.g., *Davis v. Modern Indus. Bank*, 279 N.Y. 405, 412, 18 N.E.2d 639, 642 (1939) (named beneficiary had no right to question the deficiency in the manner of changing the beneficiary when the insured had waived the right). See generally KEETON, *supra* note 35 at 254.

hind this rule is that the requirement of delivery to the insurer for endorsement is primarily for the protection of the insurer and not for the benefit of the beneficiary.³⁸

In *Horne*, the plaintiff, relying on *Neary v. Metropolitan Life Insurance Co.*,³⁹ argued that the insurer could not waive the requirement of endorsement on the policy. The plaintiff asserted that she had a legal interest, as opposed to a mere expectancy, of which she could not be deprived except in the manner prescribed in the policy.⁴⁰ The plaintiff, however, did not clearly state what gave rise to her legal interest.

In *Neary*, the insured and the original beneficiary, his wife, joined in the application for insurance. The policy was issued to the wife who, like the plaintiff in *Horne* paid the premiums and retained possession of the policy. The Connecticut Supreme Court held that the insurer could not waive the requirement of endorsement on the original policy because the beneficiary had a legal interest in the policy.⁴¹ *Neary* can be distinguished from *Horne* because of the relationship between the insured and the original beneficiary. In *Neary*, the beneficiary had an insurable interest in the life of the insured because of their marital relationship. The payment of premiums from the wife's separate estate entitled her as the beneficiary to reimbursement for the amount paid to keep the policy alive.⁴² In *Horne*, the plaintiff had neither financial nor marital ties with her ex-husband and, therefore, no insurable interest in his life.⁴³

38. See *supra* note 34. See also *Sears v. Austin*, 292 F.2d 690, 693 (9th Cir. 1961); *Doering v. Buechler*, 146 F.2d 784, 788 (8th Cir. 1945); *Gill v. Providential Life & Accident Ins. Co.*, 131 W. Va. 465, 470, 48 S.E.2d 165, 168 (1945).

39. 103 A. 661 (Conn. 1918).

40. Brief for Respondent at 3.

41. 103 A. at 662.

42. See, e.g., *Buford v. Southwestern Life Ins. Co.*, 77 S.W.2d 318, 321 (Tex. Civ. App. 1934); *Hatch v. Hatch*, 35 Tex. Civ. App. 378, 80 S.W. 411, 414 (1904). See generally 6 G. COUCH, CYCLOPEDIA OF INSURANCE LAW 180 (2d ed. 1961).

43. The general rule is that an insurable interest is necessary to the validity of an insurance contract; if no insurable interest exists, the contract is void. *Rogers v. Atlantic Life Ins. Co.*, 135 S.C. 89, 95, 133 S.E. 215, 217 (1926). Every person has an insurable interest in his own life and may insure it for the benefit of any beneficiary. *Warren v. Pilgrim Health & Life Ins. Co.*, 217 S.C. 453, 456, 60 S.E.2d 891, 893 (1950). As a general rule, after a divorce the insurable interest of a wife in the life of her husband ceases. *Sea v. Conrad*, 155 Ky. 51, 55, 159 S.W. 622, 623 (1913). For a general discussion of insurable interests, see DOBBYN, *supra* note 36, at 56-64.

Even if the plaintiff had had a legal interest in the policy binding the insurer to

It has been noted that in cases concerning a change in beneficiary the results often appear to be obtained through the balancing of equitable considerations.⁴⁴ The *Horne* decision is in line with this general inclination of courts, because the parties' dispute is equitably resolved. The issue before the court was whether the insurance company had acted in accordance with the contract. It apparently did. The policies provided for the change of beneficiary by endorsement on the original policy. It would be inequitable to hold an insurer liable for simply complying with the terms of its contract with the insured. Insurers should not be responsible for enforcing agreements between the insured and the beneficiary unless such agreements are endorsed on the face of the policy. Furthermore, if insurance companies were required to go before courts to establish who was legally and equitably entitled to policy proceeds, payment on claims would be delayed.

Perhaps the plaintiff in *Horne* should have sued the subsequent beneficiary. Such an action would likely have required a greater balancing of equities, thus focusing the court's attention on the relationships between the insured and the two claimants. The plaintiff may have prevailed in this action because she had paid most of the premiums on the policy and was the deceased's ex-wife.

strict compliance with the policy provisions regarding a change of beneficiary, she could not have increased her rights through retention of the policy. When the failure of the insured to deliver the policy for endorsement is caused by the refusal of the beneficiary to surrender the policy to the insured, the change of beneficiary will generally be given effect. It need not affirmatively appear that the original beneficiary refused on demand to give up the policy if the inference can be made that the policy would not have been surrendered had a demand been made. *See, e.g.*, *Continental Assurance Co. v. Platke*, 295 F.2d 571, 573 (7th Cir. 1961)(prior beneficiary has no right to complain when her possession of the policy prevented compliance with the policy provisions)(applying Illinois law); *Doering v. Buechler*, 146 F.2d 784, 787 (8th Cir. 1945)(insured need not demand policy if demand would be futile)(applying Minnesota law).

44. In their treatise on insurance, Vance and Anderson state:

The prime reason for the confusion in the cases is no doubt due to the fact that here, as perhaps nowhere else, the courts appear to weigh heavily the equities of the adverse claimants. The courts have no difficulty in finding decisions justifying fully their actions awarding the proceeds to the ones considered by the courts to be the deserving claimants. In any study of the cases involving changes of beneficiary we cannot, therefore, overlook the equities of the situation, and particularly the relationship between the insured and the claimants.

W. VANCE & B. ANDERSON, HANDBOOK ON THE LAW OF INSURANCE § 109 (1951).

The South Carolina Supreme Court's decision in *Horne* should serve to warn practitioners that the court will be reluctant to impose double liability on insurance companies. Plaintiffs should, therefore, bring actions against subsequent beneficiaries receiving proceeds of insurance policies.

Nancy R. Hatch

B. Right of Auto Insurers to Cancel Representation by an Agent

In *G-H Insurance Agency, Inc. v. Continental Insurance Co.*,⁴⁵ the South Carolina Supreme Court held that a retroactive application of section 38-37-940(2) of the South Carolina Code⁴⁶ would violate the contract clause of both the United States Constitution⁴⁷ and the South Carolina Constitution.⁴⁸ This ruling affects all contracts between insurance companies and their agents entered into before passage of section 38-37-940(2).⁴⁹

In September of 1972, G-H Insurance Agency, Inc. (G-H) entered into a contract with Continental Insurance Company (Continental) whereby agent G-H procured automobile liability insurance business for Continental.⁵⁰ The contract provided that the agreement could be cancelled by either party.⁵¹ Two years later the South Carolina General Assembly passed Act 1177⁵² to regulate the sale of automobile insurance.⁵³ Although section 38-

45. ___ S.C. ___, 294 S.E.2d 336 (1982).

46. S.C. CODE ANN. § 38-37-940(2) (1976) provides that:

No insurer of automobile insurance shall cancel its representation by an agent primarily because of the volume of automobile insurance placed with it by the agent on account of the statutory mandate of coverage nor because of the amount of the agent's automobile insurance business which the insurer has deemed it necessary to reinsure in the Facility.

47. U.S. CONST. art. I, § 10, cl. 1.

48. S.C. CONST. art. I, § 4. ___ S.C. at ___, 294 S.E.2d at 340.

49. The S.C. General Assembly enacted § 38-37-940(2) as Act 1177. The Act also included the Automobile Repairation Reformation Act of 1974 which is codified at S.C. CODE ANN. §§ 56-11-10 to -800 (1976). Although the court addresses § 38-37-940(2) as part of the Repairation Reformation Act, this is error. See 1974 S.C. Acts 2718.

50. ___ S.C. at ___, 294 S.E.2d at 336.

51. "This agreement . . . may be terminated by either party at any time by written notice to the other." ___ S.C. at ___, 294 S.E.2d at 336.

52. See *supra* note 49.

53. The Act made sweeping changes in the sale of automobile insurance. ___ S.C. at ___, 294 S.E.2d at 337.

37-940(2) of the Act forbids an insurer from cancelling its contract with an agent due to the quantity of substandard risk placed with the insurer by the agent,⁵⁴ Continental cancelled its agreement with G-H.⁵⁵

Subsequently, G-H brought an action to enjoin termination of the contract and to recover damages from Continental, alleging that the termination violated the Act.⁵⁶ Continental asserted as its defense that the Act violated the contract clauses of the South Carolina and United States Constitutions.⁵⁷ The trial court granted summary judgment for G-H and Continental appealed.⁵⁸ The supreme court held that section 38-38-940(2) was unconstitutional when applied to contracts entered into before passage of the Act⁵⁹ and overruled *Rowell v. Harleysville Mutual Insurance Co.*⁶⁰

In reaching its decision, the court utilized an analysis applicable to the contract clause of the United States Constitution, which provides that "no state shall . . . pass any . . . law impairing the obligation of contracts."⁶¹ The court balanced the

54. See *supra* note 46. At the time Continental entered into the contract with G-H, South Carolina had no applicable laws regarding cancellation of agency contracts. — S.C. at —, 294 S.E.2d at 338.

55. — S.C. at —, 294 S.E.2d at 337.

56. After a hearing on a Rule to Show Cause, the trial court issued a temporary relief order requiring Continental to rescind the cancellation. Continental demurred to the complaint, and the trial court sustained the demurrer. The South Carolina Supreme Court reversed the order, relying on *G-H Ins. Co., Inc. v. The Travelers Ins. Co.*, 270 S.C. 147, 241 S.E.2d 534 (1978) (construing the Act as creating a private cause of action for agents whose contracts had been cancelled in violation of the Act). Continental then served its answer. — S.C. at —, 294 S.E.2d at 337.

57. In addition, Continental denied that its cancellation violated the Act because of alleged violations of the due process clause of the fifth and fourteenth amendments to the United States Constitution. — S.C. at —, 294 S.E.2d at 337.

58. The trial judge apparently ignored the defenses raised by Continental. *Id.* at —, 294 S.E.2d at 338. See *supra* note 57 and accompanying text.

59. — S.C. at —, 294 S.E.2d at 340. The dissenting justices felt that the appeal should be remanded for a de novo determination of the issues. — S.C. at —, 294 S.E.2d at 341 (Lewis, C.J., dissenting).

60. 272 S.C. 108, 250 S.E.2d 111 (1978). In *Rowell*, the supreme court sustained the constitutionality of the Act after finding that § 38-37-940(2) did not affect any vested right of the insurer. In the case at bar, Continental asserted that the court would not have reached the same conclusion had it engaged in the constitutionally required balancing test of reasonableness and necessity as outlined by the United States Supreme Court. — S.C. at —, 294 S.E.2d at 339. See *infra* note 62 (cases dealing with the constitutionally required balancing test).

61. U.S. CONST. art. I, § 10, cl. 2.

strictures of the contract clause against the reserved powers of the state to regulate in the public interest.⁶² Although the states possess broad powers to adopt general regulatory measures in furtherance of the public interest, the court acknowledged that this power is subject to the contract clause of the United States Constitution.⁶³ To survive a constitutional challenge under the contract clause the challenged legislation must be "both reasonable and necessary" to effectuate a particular public purpose.⁶⁴

Continental claimed that retroactive application of section 38-37-940(2) was not reasonable and necessary to accomplish the overall purpose of Act 1177.⁶⁵ Continental based its argument on *Garris v. Hanover Insurance Co.*⁶⁶ in which the Fourth Circuit Court of Appeals found that the predominant purpose of the challenged provision, as distinguished from the rest of the Act, was the protection of affected insurance agents rather than any broader societal interest.⁶⁷ The *Garris* court then held that private enforcement of section 38-37-940(2) was unconstitutional when retroactively applied.⁶⁸ The South Carolina Supreme Court agreed, holding that section 38-37-940(2) was "largely for the benefit of the insurance agents,"⁶⁹ rather than for a general

62. ___ S.C. at ___, 294 S.E.2d at 339. See *Allied Structural Steel Co., Inc. v. Spannaus*, 438 U.S. 234 (1978); *United States Trust Co. of New York, Trustee v. New Jersey*, 431 U.S. 1 (1978). See also Brief for Appellant at 22.

63. ___ S.C. at ___, 294 S.E.2d at 339. The court referred to *United States Trust*, 431 U.S. at 22, for the proposition that "[l]egislation adjusting the rights and responsibilities of the contracting parties must be upon reasonable conditions and of a character appropriate to the public purpose justifying its adoption."

64. See Reply Brief for Appellant at 26. See also *supra* note 63.

65. Reply Brief for Appellant at 29.

66. 630 F.2d 1001 (4th Cir. 1980).

67. *Id.* at 1009-10.

68. *Id.* at 1011. After the Fourth Circuit decided *Garris*, the insurance community faced conflicting opinions on the constitutionality of § 38-37-940(2). The outcome of an action depended on whether the parties brought the action in state or federal court. The South Carolina Supreme Court had construed the Act as creating a private cause of action. See *supra* note 56. In *Rowell*, the court had upheld the constitutionality of the retroactive application of § 38-37-940(2) in a private cause of action. See *supra* note 60. The Fourth Circuit stated that the *Rowell* analysis did not "comport with that mandated by *United States Trust* and *Allied Structural Steel*," 630 F.2d at 1011 n. 10, and held that private enforcement of § 38-37-940(2) was unconstitutional when retroactively applied, 630 F.2d at 1011. The South Carolina Supreme Court granted Continental the right to argue against and seek reversal of *Rowell* because of this conflict. ___ S.C. at ___, 294 S.E.2d at 338.

69. ___ S.C. at ___, 294 S.E.2d at 339 (quoting from *G-H Ins. Co., Inc. v. The Travelers Ins. Co.*, 270 S.C. 147, 241 S.E.2d 534 (1978)).

public purpose.⁷⁰ After balancing the state's police power against the impairment of the contractual relationship,⁷¹ the court held that section 38-37-940(2) was unconstitutional.⁷²

Although the South Carolina Supreme Court apparently adopted the Fourth Circuit's analysis,⁷³ the *Garris* court emphasized that its holding was limited to private enforcement of section 38-37-940(2),⁷⁴ while the state supreme court's opinion might be read to hold section 38-37-940(2) unconstitutional in all respects.⁷⁵ The constitutional question presented to the state court was clearly limited to private enforcement of the challenged provision when applied to contracts entered into before the Act,⁷⁶ but the supreme court did not expressly limit its holding to that issue.⁷⁷

The court did not address the applicability of section 38-37-940(2) to contracts initially entered into before the passage of the Act, but subsequently amended. If these amended contracts are treated as novations, section 38-37-940(2) may apply and limit the insurers' rights to cancel contracts with their agencies. Because this question has not been addressed by the court, one can not be sure of the outcome if it were litigated. Insurance companies, agencies, and their attorneys should, therefore, real-

70. "It should have been patent at the time of the Act, and experience now reveals beyond question, that the provision in contest here was not necessary to the accomplishment of the overall purpose of the Act." — S.C. at —, 294 S.E.2d at 340.

71. The supreme court felt that Continental's reliance on the right of cancellation was an important aspect of the relationship. *Id.* at —, 294 S.E.2d at 338.

72. "[W]e have now held the contested section, 38-37-940(2), unconstitutional as an impairment of contractual rights under both the Constitution of South Carolina and the Constitution of the United States." *Id.* at —, 294 S.E.2d at 340.

73. "Having reviewed our own decision . . . we now conclude that the interpretation set forth in *Garris* is appropriate and correct as relates to not only the Constitution of South Carolina but the Constitution of the United States, both of which we are sworn to uphold." *Id.* at —, 294 S.E.2d at 340.

74. 630 F.2d at 1011 n. 11. "Our consideration and decision is expressly limited to the unconstitutionality of the private enforcement provision of § 38-37-940(2). *Id.* The Fourth Circuit noted that a different analysis would be necessary to determine whether administrative enforcement of § 38-37-940(2) would also violate the contract clause. *Id.* See also *supra* note 68 and accompanying text.

75. See *supra* note 72.

76. G-H, a private entity, brought suit to enjoin cancellation of a contract entered into prior to the date of enactment of § 38-37-940(2). See *supra* text accompanying notes 50-56.

77. See *supra* note 72.

ize the potential consequences of a novation before amending existing contracts.

Arthur E. Justice, Jr.