1980

**Business Law**

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BUSINESS LAW

I. INSURANCE

A. Bad-Faith Refusal by Insurer to Pay First-Party Benefits

In Robertsen v. State Farm Mutual Automobile Insurance Co., the United States District Court for the District of South Carolina predicted that the South Carolina Supreme Court would allow a tort cause of action against an insurer for wrongful failure to pay first-party benefits. Although this cause of action was recognized for the first time in the United States only seven years ago, the district court cited the South Carolina Supreme Court's "progressive stance . . . on matters affecting personal rights" and "attitude of substantial concern for the rights of policyholders treated unfairly by their insurers" in support of its prognostication that the state court would adopt this theory.
of recovery.\footnote{8}

1. Factual and Procedural Background.—Plaintiff, insured, sought actual and punitive damages in a diversity action in federal court against his insurer for its alleged bad-faith refusal to pay first-party personal injury protection benefits.\footnote{9} The insurer moved to dismiss the action on the jurisdictional ground that the amount in controversy did not exceed $10,000.\footnote{10} The amount allegedly due plaintiff for medical expenses under his insurance policy with defendant was $1,165.05. Plaintiff contended, however, that because of the insurer’s wrongful failure to pay these benefits, he could recover compensatory damages in excess of the face amount of the policy and, upon a showing of reckless or willful disregard of his rights, punitive damages. The district court concluded that, if such a cause of action were allowed, a punitive damages award of $9,000 (approximately eight times the amount of medical expenses claimed\footnote{11}) could stand under South Carolina precedent,\footnote{12} thus meeting the amount in controversy requirement.\footnote{13} After ruling that South Carolina would allow recovery under a tort cause of action for bad faith, the court denied defendant’s motion for dismissal.\footnote{14}

2. Historical Development.—Traditionally, a suit by an insured against his insurer for failure to pay first-party benefits was based in contract.\footnote{15} Recovery generally was limited to the

\footnote{8}{When faced with an unsettled question of state law in diversity cases, the Federal District Court of South Carolina, under Erie R.R. v. Tompkins, 304 U.S. 64 (1938), will “adopt the state’s decision-making processes.” 464 F. Supp. at 880-81 (citing Gattis v. Chavez, 413 F. Supp. 33, 37 (D.S.C. 1976)).}

\footnote{9}{Plaintiff's son received medical care valued at $2,165.05 for injuries sustained while riding his bicycle. The insurance carrier for the motorist causing the injury paid its full $1,000 personal injury protection benefit and plaintiff sought the balance under his own policy with State Farm Mutual Automobile Insurance Company. 464 F. Supp. at 878.}

\footnote{10}{See 28 U.S.C. § 1332 (1976). The amount in controversy must exceed $10,000 to give the court jurisdiction over a diversity claim. \textit{Id.}}

\footnote{11}{The court assumed that any other types of actual damages claimed by plaintiff would not be substantial. 464 F. Supp. at 879 n.2.}


\footnote{13}{464 F. Supp. at 880.}

\footnote{14}{\textit{Id.} at 886. See note 49 \textit{infra}.}

\footnote{15}{Note, \textit{Insurance—Increasing Liability for Refusal to Pay First Party Claims:}}
face amount of the policy plus interest. The rationale underlying this rule is that, under a contract to pay money, interest is the only foreseeable damage for delay in payment. This rule presents a problem; insurance companies are free to delay or omit payment arbitrarily, with any subsequent liability to the insured limited to the policy amount.

In an attempt to protect the insured against an insurer's willful delay or unreasonable failure to pay, courts have allowed recovery greater than the face amount of the policy in various ways: (1) by extending recovery under the contract to all damages reasonably within the contemplation of the parties; (2) by permitting recovery of punitive damages for breach of contract when (a) the insured establishes multiple theories of recovery such as breach of contract and fraud, (b) a fraudulent act accompanies the breach of contract, or (c) a fraudulent act induces the signing of the contract; (3) by allowing recovery in tort for mental anguish and punitive damages for intentional infliction of emotional distress; and (4) by recognizing recovery of compensatory and punitive damages in tort for bad-faith re-

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Bad Faith and Punitive Damages, 13 Wake Forest L. Rev. 685, 690 (1977) [hereinafter cited as Note, Insurance].
18. E.g., Note, Excess Damages, supra note 3, at 164, 167.
resal to pay benefits. Depending on the particular factual circumstances, the bad-faith tort cause of action may be the only theory of recovery available to the insured.26

3. The Cause of Action for Bad-Faith Refusal to Pay First-Party Benefits.—Many jurisdictions,27 including South Carolina,28 recognize the tort of bad faith, but restrict its application to actions against insurers for wrongful refusal to settle with third parties.29 If the insurer has an opportunity to settle a meritorious third-party claim against the insured for an amount within the policy limits, but refuses to do so, and the third party subsequently recovers a judgment against the insured in excess of the policy limits, the insurer’s failure to settle is a breach of an implied duty of good faith and fair dealing.30 Some courts allow the insured to recover from the insurer the amount of the excess judgment in a contract action;31 others allow recovery in a tort action, which may include recovery for mental distress.32

Historically, however, courts have been reluctant to imply a duty of good faith and fair dealing in the first-party context. The distinction rests on the belief that, in the third-party situation, the insured is in greater need of protection because he has waived, in favor of the insurer, all rights to settle with and defend against claimants. The insured, however, is no less vulnerable when seeking payment of benefits directly from his insurer;


26. When the insurer’s conduct does not rise to an outrageous or fraudulent level or when the insured’s mental distress is not severe, the tort of bad-faith refusal to pay benefits is the only mode of recovery available to the insured. See generally Note, Excess Damages, supra note 3; Note, First Party Torts, supra note 25.


29. See notes 27 & 28 supra.

30. See notes 27 & 28 supra.


the insurer controls the settlements in both situations. Thus, a refusal to impose the same duty in first-party dealings is logically unsupportable.33

In 1973, the California Supreme Court, in Gruenberg v. Aetna Insurance Co.,34 extended the implied duty of good faith to all insurance contracts and recognized the tort of bad-faith refusal in the first-party context. A year later, in Silberg v. California Life Insurance Co.,35 the same court awarded extra-contractual compensatory damages for physical and mental distress proximately caused by the insurer’s unreasonable refusal to pay benefits. Since Silberg, several other jurisdictions have adopted this theory of recovery.36

The boundaries of the tort of bad faith in first-party insurance contracts, including the elements of proof and the types of recoverable damages, have not yet been clearly delineated. The few cases decided in this area, however, suggest a framework for the future development of this cause of action. Generally, two elements must be proved before liability is imposed:

[T]he policyholder must allege and prove both of the following: (a) That the insurer did not have a reasonable basis for denying the claim (Here, it is submitted that the court will use the objective “reasonable man” standard—not whether the defendant thought it had a reasonable basis. This test will probably turn upon such considerations as [i] whether it was reasonable to conclude that there had been a proper investigation of the claim before a decision was made; [ii] whether the results of such an investigation had been subjected to a fair and reasonable review and evaluation; and [iii] based upon the foregoing, whether the decision to deny benefits was reasonable.); and (b) That the insurer denied benefits with knowledge or in reckless disregard of the fact that it had no reasonable basis upon which to deny the claim.37

34. 9 Cal. 3d 566, 510 P.2d 1032, 108 Cal. Rptr. 480 (1973).
35. 11 Cal. 3d 452, 521 P.2d 1103, 113 Cal. Rptr. 711 (1974).
Although some measure of intent must be shown, proving bad faith is not burdensome. Courts have found bad faith in a variety of situations.  

Damages recoverable by the insured under the tort of bad faith include compensation for losses proximately flowing from the breach of the duty of good faith, for example, lost earnings, legal expenses to defend suits brought by creditors, and loss of an interest in a business. Recovery of compensation for mental distress and punitive damages, however, is less certain. There are questions whether mere loss of benefits under the policy, as opposed to other substantial economic losses suffered, is sufficient to support recovery for mental distress, and whether the insured can meet the burden of proving that his mental distress flowed from the insurer’s breach rather than the occurrence causing the original loss. Recovery of punitive damages may hinge upon the character of the insurer’s conduct; intentional or reckless disregard of the insured’s rights should justify a punitive award. Statutes in some jurisdictions limit the recovery of damages when the insured has acted in bad faith, but these statutes generally are held not to apply to recovery in tort.


42. In the cases brought to date, the insureds compensated for emotional harm had suffered substantial economic losses in addition to damages claimed under the contract. Cf. Fletcher v. Western Nat’l Life Ins. Co., 10 Cal. App. 3d 376, 89 Cal. Rptr. 78 (1970) (loss of benefits under the contract sufficient to support recovery for intentional infliction of mental distress).

43. See note 40 supra.

44. See note 41 supra.

actions.\textsuperscript{46}

Extension of the tort of bad faith to allow recovery under first-party insurance contracts is justified in order to protect the insured from an insurer's dilatory tactics. During the evolutionary period of this cause of action, however, courts must carefully balance the rights of each party so that (1) the insured who actually suffers injury as a result of the insurer's bad faith is compensated, and (2) the insurer can refuse or delay payment without liability whenever reasonable cause for doing so exists.\textsuperscript{47}

4. The District Court's Rationale for Predicting Adoption of the Tort of Bad Faith in South Carolina.—After noting that the South Carolina Supreme Court imposes a duty on insurers to defend and settle in good faith and with reasonable care suits brought against their insureds,\textsuperscript{48} the district court addressed the question of whether the state court would impose a similar duty on insurers in the first-party context.\textsuperscript{49} In support of its conclusion that the South Carolina Supreme Court would extend this duty to first-party claims and allow extra-contractual recovery for compensatory damages including mental distress and punitive damages, the court cited numerous cases and statutes\textsuperscript{50} and made a general reference to the state court's "liberal attitude in the protection and promotion of the rights of individuals against insurance companies."\textsuperscript{51}

Under section 38-9-320 of the South Carolina Code,\textsuperscript{52} an insurer is liable to the insured for reasonable attorneys' fees upon


\textsuperscript{47} At the least, adoption of this cause of action will encourage insurers to improve their investigation and communication techniques so that claims may be promptly processed.


\textsuperscript{49} 464 F. Supp. at 881-86. The court limited its holding to extending the duty of good faith to the specific type of policy (an automobile liability policy providing for personal injury protection benefits) sued on in this case. Id. at 881 n.5. The court stressed that a strong argument exists for imposing a duty in personal injury protection benefits cases because the legislature intended for these benefits to be paid without litigation. Id. at 885. Courts in some other jurisdictions have imposed such a duty in the first-party context. E.g., Fletcher v. Western Nat'l Life Ins. Co., 10 Cal. App. 3d 376, 89 Cal. Rptr. 78 (1970).

\textsuperscript{50} See 464 F. Supp. at 883-85.

\textsuperscript{51} Id. at 883.

\textsuperscript{52} S.C. CODE ANN. § 38-9-320 (1976).
a finding in a suit on the contract that the insurer has refused without reasonable cause or in bad faith to pay a claim. The final subsection of this statute states that "[n]othing in this section shall be construed to alter or affect the Tyger River . . . doctrine." This doctrine allows an insured in the third-party context to waive the insurance contract and sue the insurer in tort for unreasonable refusal to settle or defend. The insured can recover the amount of the excess judgment against him. The district court, faced with the task of statutory interpretation, decided that by referring to the Tyger River doctrine, rather than "limit[ing] recovery to attorney's fees in cases not traditionally covered by Tyger River . . ., [the legislature] intend[ed] to express a 'hands-off' approach to the future development of the Tyger River doctrine." The court, therefore, felt free to expand the doctrine to the first-party context "without interference from the Legislature."

53. Id. This statute 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 of 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 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.

54. Id.
56. 464 F. Supp. at 882. The Seventh Circuit Court of Appeals interpreted a similar statute in Eckenrode v. Life of America Ins. Co., 470 F.2d 1, 5 n.5 (7th Cir. 1972) and reached the same result. 464 F. Supp. at 833 n.6. Furthermore, as the court noted in Robertsen, the language of § 38-9-320 supports this view. Id.
57. 464 F. Supp. at 882.
In further support of its position, the district court noted that the courts and the legislature of South Carolina have demonstrated substantial concern for policyholders who have been treated unfairly. The adoption of a bad-faith tort cause of action in the first-party context in South Carolina would be merely an extension of the currently recognized Tyger River doctrine and of the cause of action for breach of contract accompanied by a fraudulent act. Drawing upon South Carolina's liberal approach to protecting the rights of insureds against their insurers, the court noted several situations in which the insured is already allowed recourse against the insurer, e.g., Boggs v. Aetna Cas. & Sur. Co., 272 S.C. 460, 252 S.E.2d 565 (1979); (in third-party actions, insured can recover the amount of settlement and attorneys' fees, for both negotiating settlement and suing the insurer upon a finding that the insurer acted unreasonably in denying coverage and failing to defend); Madden v. Pilot Life Ins. Co., 272 S.C. 284, 251 S.E.2d 196 (1979); (although recovery was not allowed on the facts of this case in first-party actions, insured can recover attorneys' fees if the insurer acted unreasonably in denying a claim); Thompson v. Home Security Life Ins., 271 S.C. 54, 244 S.E.2d 533 (1978); (insured can recover punitive damages from his insurer if the breach is accompanied by a fraudulent act); Moultrie v. North River Ins. Co., 272 S.C. 53, 249 S.E.2d 158 (1978); (the insured can claim personal injury protection benefits from his own insurer without a set-off for the amount already recovered from a third party); Tyger River Pine Co. v. Maryland Cas. Co., 170 S.C. 286, 170 S.E. 346 (1933); (in third-party actions, the insured can recover the amount of any excess judgment against him in an action against the insurer for bad-faith refusal to settle or defend); S.C. CODE ANN. § 38-9-320 (1976); (in first- and third-party contract actions, the insured can recover attorneys' fees if the insurer acts unreasonably or in bad faith); id. at §§ 38-37-1110(2), -1120 (by complaining to the Insurance Commission, insured can have the license of his insurer revoked or a fine imposed for the insurer's failure to pay benefits owed the insured); id. at §§ 38-55-70, -240 (the insured can have the license of his insurer revoked or a fine imposed for the insurer's misrepresentation concerning an insurance policy during settlement negotiations). See also King v. Allstate Ins. Co., 272 S.C. 259, 251 S.E.2d 194 (1979); Middleton v. United States Fidelity & Guar. Co., 273 S.C. 8, 263 S.E.2d 505 (1979); Esler v. United Services Auto Ass'n, 273 S.C. 259, 255 S.E.2d 676 (1979).

The court, however, in Holmes v. Nationwide Life Ins. Co., ___ S.C. ___, 258 S.E.2d 924 (1979), reiterated its position with regard to recoverable damages in a first-party contract action. The insured sued the insurer for willfully and wantonly breaching the terms of a health insurance policy by failing to pay benefits. The court limited the amount of recoverable damages to those actually stipulated by the policy terms. This view demonstrates at the least that the court will not alter the standard for recovery in contract actions. This decision, however, does not preclude the court's expansion of recoverable damages if the cause of action sounds in tort. See 464 F. Supp. at 883-84 n.9 (citing Dawkins v. National Liberty Life Ins. Co., 252 F. Supp. 800 (D.S.C. 1966) and Hutson v. Continental Assur. Co., 269 S.C. 322, 237 S.E.2d 375 (1977)).

58. Id. at 883-85. The court noted several situations in which the insured is already allowed recourse against the insurer, e.g., Boggs v. Aetna Cas. & Sur. Co., 272 S.C. 460, 252 S.E.2d 565 (1979); (in third-party actions, insured can recover the amount of settlement and attorneys' fees, for both negotiating settlement and suing the insurer upon a finding that the insurer acted unreasonably in denying coverage and failing to defend); Madden v. Pilot Life Ins. Co., 272 S.C. 284, 251 S.E.2d 196 (1979); (although recovery was not allowed on the facts of this case in first-party actions, insured can recover attorneys' fees if the insurer acted unreasonably in denying a claim); Thompson v. Home Security Life Ins., 271 S.C. 54, 244 S.E.2d 533 (1978); (insured can recover punitive damages from his insurer if the breach is accompanied by a fraudulent act); Moultrie v. North River Ins. Co., 272 S.C. 53, 249 S.E.2d 158 (1978); (the insured can claim personal injury protection benefits from his own insurer without a set-off for the amount already recovered from a third party); Tyger River Pine Co. v. Maryland Cas. Co., 170 S.C. 286, 170 S.E. 346 (1933); (in third-party actions, the insured can recover the amount of any excess judgment against him in an action against the insurer for bad-faith refusal to settle or defend); S.C. CODE ANN. § 38-9-320 (1976); (in first- and third-party contract actions, the insured can recover attorneys' fees if the insurer acts unreasonably or in bad faith); id. at §§ 38-37-1110(2), -1120 (by complaining to the Insurance Commission, insured can have the license of his insurer revoked or a fine imposed for the insurer's failure to pay benefits owed the insured); id. at §§ 38-55-70, -240 (the insured can have the license of his insurer revoked or a fine imposed for the insurer's misrepresentation concerning an insurance policy during settlement negotiations). See also King v. Allstate Ins. Co., 272 S.C. 259, 251 S.E.2d 194 (1979); Middleton v. United States Fidelity & Guar. Co., 273 S.C. 8, 263 S.E.2d 505 (1979); Esler v. United Services Auto Ass'n, 273 S.C. 259, 255 S.E.2d 676 (1979).

59. See note 55 and accompanying text supra.

60. South Carolina is one of few jurisdictions that allows recovery of punitive damages for breach of a contract when the breach is accompanied by a fraudulent act. E.g., Thompson v. Home Security Life Ins., 271 S.C. 54, 244 S.E.2d 533 (1978).
If Supreme insurers, the district court concluded that the South Carolina Supreme Court would recognize, in the first-party context, a cause of action in tort for "the intentional, reckless, or unreasonable refusal of an insurance company to pay benefits which are clearly due under the policy." If the insured can demonstrate such conduct by the insurer he can recover compensatory damages including damages for mental distress and, upon a showing of recklessness, punitive damages.

5. Conclusion.—Because the district court filed a well-reasoned and well-documented opinion, the South Carolina Supreme Court is likely to embrace the district court's holding in Robertsen. The novelty and the indefinite boundaries of this cause of action, however, may preclude its immediate adoption in the state. In the interest of policyholders, it is hoped that the South Carolina Supreme Court will have an early opportunity to rule on this issue.


In Davenport v. Summer, plaintiff sued the insured seeking damages for the wrongful death of plaintiff's intestate in an automobile collision. The lower court granted plaintiff's motion for joinder of National Grange Insurance Company as a party-defendant, holding that section 15-15-20 of the South Carolina Code permits joinder when, as in this case, the liability insur-

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62. Id. at 883-85 (citing Craft v. Economy Fire & Cas. Co., 472 F.2d 565 (7th Cir. 1978) and Black v. Fidelity & Guar. Ins. Underwriters, Inc., 582 F.2d 984 (5th Cir. 1978)).
63. See 464 F. Supp. at 883-84 n.9. In South Carolina, a plaintiff cannot recover damages for mental distress absent a showing of some physical manifestation of such distress. See, e.g., Padgett v. Colonial Wholesale Distrib. Co., 232 S.C. 593, 103 S.E.2d 265 (1958). This requirement probably is imposed to ensure that the claimed mental distress is severe enough to warrant recovery.
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 ins-

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ance coverage of the defendant-insured is required by the South Carolina Automobile Reparation Reform Act of 1974. 68 On appeal, the South Carolina Supreme Court reversed, with Chief Justice Lewis filing a strong dissent.

1. **Historical Development.**—Because of supposed jury prejudice against insurance companies, plaintiffs commonly seek to join insurance companies as defendants. Insurers, naturally, seek to defeat joinder. Traditionally, courts have relied on three grounds when denying joinder of an insurance company with its insured tortfeasor: 69 (1) the procedural impropriety of joining a tort cause of action with a contract cause of action; 70 (2) the lack of privity of contract between the injured plaintiff and the insurer; 71 and (3) the prejudicial effect of jury notice of insurance coverage. 72

The liberal South Carolina joinder of causes statute 73 removed the first objection in most insurance cases. 74 The other bases for denial of joinder remained, in South Carolina, however, until the advent in 1925 of compulsory liability insurance for common carriers. 75 In allowing joinder when liability insurance was statutorily mandated, courts resolved the lack of privity objection by reasoning that "the contract between insured and insurer is transformed by the statute requiring insurance from a

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surance, may be joined in the same action and their liability shall be joint and concurrent.

*Id.*

67. ___ S.C. at ___, 259 S.E.2d at 816.


71. See note 70 supra.


private agreement to one executed primarily for the benefit of third persons, namely, the injured plaintiff and the public generally and thus enforceable as a third-party beneficiary contract.\textsuperscript{76} In addition to being required by statute, an insurance contract, to be transformed into a contract protecting the injured third person, must indemnify against liability rather than against loss. A contract indemnifies against liability if the insurer's obligation inures to the benefit of the injured person and arises at the time the liability attaches to the insured. A contract indemnifies against loss, however, if the insurer's obligation inures to the benefit of the insured and does not arise until the insured has suffered a loss through payment of damages.\textsuperscript{77} In answer to the jury prejudice objection courts concluded that "[s]ince the act was a public act of which every citizen is presumed to have knowledge, the jury could not in such case be prejudiced by further knowledge that the defendant was thus insured."\textsuperscript{78}

In 1935, the South Carolina Legislature enacted what is now section 15-15-20 of the state code.\textsuperscript{79} It is suggested that this joiner statute merely codified the existing common law with regard to joinder when liability insurance was compulsory. Arguably, the statutory language, allowing joinder "when . . . insurance is required by law . . . as insurance against personal injury founded upon tort . . . ,"\textsuperscript{80} impliedly incorporates the requirements for such joinder at common law, namely that: (1) the statute mandate insurance coverage that indemnifies against liability, not loss, and that benefits the injured party and the public, and (2) the causes of action to be joined meet the requirements of the general joinder of causes statute.\textsuperscript{81} This view finds support in case law subsequent to the enactment of section 15-15-20 in which the South Carolina Supreme Court used the common-law analysis in deciding whether joinder was proper with regard

\textsuperscript{76} Note, supra note 70, at 464 (citing Piper v. American Fidelity & Cas. Co., 157 S.C. 106, 154 S.E. 106 (1930)).


\textsuperscript{78} Note, supra note 69, at 463 (footnotes omitted)(citing Benn v. Camel City Coach Co., 162 S.C. 44, 160 S.E. 135 (1931)).


\textsuperscript{81} Id. § 15-15-10.
to a particular compulsory insurance statute or ordinance and did not allow joinder merely because the insurance was statutorily mandated.\textsuperscript{82}

In every case allowing joinder under the statute, the defendant-insured has been a common carrier.\textsuperscript{83} This may be because, until recently, insurance coverage was statutorily mandated only for common carriers. Only one other statute approached what might be regarded as a mandatory requirement. In 1952, the Motor Vehicle Safety Responsibility Act,\textsuperscript{84} requiring proof of motorists' financial responsibility under certain circumstances, was passed.\textsuperscript{85} A liability insurance policy was one alternative for such proof. Although, arguably, joinder was proper under one portion of the Act,\textsuperscript{86} no cases have been found attempting to join the insurance company as a party-defendant when coverage was required pursuant to this Act.\textsuperscript{87}

In 1974, the South Carolina Legislature enacted the Automobile Reparation Reform Act.\textsuperscript{88} Section 56-11-190 of the South Carolina Code requires all owners of motor vehicles to maintain security as a condition precedent to automobile registration.\textsuperscript{89}


\textsuperscript{85} The Act required proof of financial responsibility following revocation of his driver's license and automobile registration when (1) a party was involved in a motor vehicle accident resulting in bodily injury, death, or damage to property exceeding fifty dollars, or (2) a party was convicted of certain offenses. 1952 S.C. Acts 1853, No. 732, §§ 5, 17 (the pertinent portions of these sections are presently codified at S.C. Code Ann. §§ 55-9-450, -520 (1976)).

\textsuperscript{86} See Note, supra note 68, at 473-76.

\textsuperscript{87} Cf. Cox v. Employers Liab. Assur. Corp., 191 S.C. 233, 196 S.E. 549 (1938)(unsuccessful attempt to join insurer of private automobile when insurance coverage was not required by statute).


\textsuperscript{89} S.C. Code Ann. § 56-11-190 (1976). This section states:

Every owner of a motor vehicle required to be registered in this State shall maintain the security required by § 56-11-200 with respect to each such motor vehicle owned by him throughout the period the registration is in effect. No certificate of registration shall be issued or transferred to an owner by the
The required security may be a liability insurance policy or another form acceptable to the chief highway commissioner.\textsuperscript{90} Davenport is the first attempt to join an insurance company as a party-defendant by reason of this statutorily mandated motor vehicle insurance.

2. The Court's Rationale for Disallowing Joinder.—In support of its position that the legislature did not intend to change the common-law rule disallowing joinder, the court cited the title and purpose of the Automobile Reparation Reform Act of 1974.\textsuperscript{91} Apparently, the court equated the stated purpose of the Act with legislative intent. Since the legislature did not articulate that its purpose was to permit joinder under the Act, the court could not infer such an intent if to do so would derogate common-law rights.\textsuperscript{92} In so ruling, the majority rejected the lower court's view, apparently based on the absence of any prohibitory language, that the legislature, when considering passage of the Act, was aware of the joinder statute and intended to permit joinder of the insurance carrier in all motor vehicle collision cases.\textsuperscript{93} The court also relied on prior case law under the joinder statute in concluding that the statute applies to joinder only

\textsuperscript{90} Chief Highway Commissioner unless the owner or prospective owner produces satisfactory evidence that such security is in effect.

\textsuperscript{91} Id. § 56-11-200. This section states:

The security required under this chapter shall be a policy or policies written by insurers authorized to write such policies in South Carolina providing for at least (1) the minimum coverages specified in article 7 of Chapter 9 and (2) the benefits required under §§ 56-11-110, 56-11-120 and 56-11-150; provided, however, that the Chief Highway Commissioner may approve and accept another form of security in lieu of such liability insurance policy if he finds that such other form of security is adequate to provide and does in fact provide the benefits required by this chapter.

\textsuperscript{92} Id. at \textsuperscript{91}, 259 S.E.2d at 816-17.

\textsuperscript{93} Id. at \textsuperscript{91}, 259 S.E.2d at 816 (citing Crower v. Carroll, 251 S.C. 192, 161 S.E.2d 235 (1968)).
when the insured is a common carrier.\textsuperscript{94} This latter argument is of questionable validity since, as the dissent pointed out, the "statutory requirements of mandatory insurance . . . [were] unique to common carriers."\textsuperscript{95} The majority also distinguished the type of security required as a condition precedent to motor vehicle registration\textsuperscript{96} from the type of security required of common carriers.\textsuperscript{97} In the former situation the security may be an insurance policy or any other form of security acceptable to the chief highway commissioner.\textsuperscript{98} As the dissent noted, the court in a prior case considered this distinction to be without merit because of the public knowledge of the statute.\textsuperscript{99}

Because the dissent's approach focused on a construction of the joinder statute rather than the compulsory insurance statute, it is more appealing. Chief Justice Lewis reasoned that the proper question is whether liability insurance is required by statute, not whether a common carrier is involved.\textsuperscript{100} In answering this inquiry, he concluded that joinder was proper because the motor vehicle security was statutorily mandated.\textsuperscript{101}

Although the dissent's initial approach is valid, the analysis under the joinder statute should proceed further.\textsuperscript{102} Rather than to conclude summarily that the insurance is statutorily man-

\textsuperscript{94} __ S.C. at __, 259 S.E.2d at 816. See note 83 and accompanying text supra.

\textsuperscript{95} See notes 83-87 and accompanying text supra.

\textsuperscript{96} __ S.C. at __, 259 S.E.2d at 817 (quoting S.C. CODE ANN. § 56-11-200 (1976)). For full statutory text, see note 89 supra.

\textsuperscript{97} __ S.C. __, 259 S.E.2d at 817 (citing S.C. CODE ANN. § 58-23-910 (1976)). This statute provides:

The Commission shall, in the granting of a certificate, require the applicant to procure and file with the Commission liability and property damage insurance or a surety bond with some casualty or surety company authorized to do business in this State on all motor vehicles to be used in the service in such amount as the Commission may determine, insuring or indemnifying passengers or cargo and the public receiving personal injury by reason of any act of negligence and for damage to property of any person other than the assured. Such policy or bond shall contain such conditions, provisions and limitations as the Commission may prescribe and shall be kept in full force and effect and failure to do so shall be cause for revocation of such certificate.


\textsuperscript{98} S.C. CODE ANN. § 56-11-200 (1976). For full statutory text, see note 90 supra.


\textsuperscript{100} __ S.C. at __, 259 S.E.2d at 818 (Lewis, C.J., dissenting).

\textsuperscript{101} Id. (Lewis, C.J., dissenting).

\textsuperscript{102} See notes 80-82 and accompanying text supra.
dated, the court should examine the compulsory insurance statute to determine whether it satisfies the common-law requirements for joinder. If, in addition to being statutorily mandated, the compulsory insurance indemnifies against liability, rather than loss, and is for the benefit of the public, joinder is proper. The result of such an analysis of section 56-11-200 is unclear. The liability insurance provision states that the insurance must cover the insured against “loss from the liability imposed by law for damages.” The uninsured motorist provision, however, undertakes to pay the insured “all sums which he shall be legally entitled to recover as damages.” Whether these provisions and the provision covering optional medical, hospital, and disability benefits may be construed as indemnification against liability and in favor of the public as a third-party beneficiary is open to question. It is submitted, however, that any analysis under the joinder statute must utilize common-law principles and determine the type of insurance coverage required.

3. Joinder of Insurer in Automobile Tort Actions in Other Jurisdictions.—In Shingleton v. Bussey, the Florida Supreme Court allowed joinder of an insurance company as a party-defendant regardless of whether the liability insurance coverage for the operation of a motor vehicle was secured to meet statutory requirements. Using public policy considera-

103. See notes 80-82 and accompanying text supra.
105. Id. § 56-9-830.
110. 223 So. 2d 713 (Fla. 1969). See also Ross v. Bowling, 233 So. 2d 415 (Fla. 1970).
111. 223 So. 2d 713 (Fla. 1969). The court allowed joinder despite a “no-action” clause in the insurance contract. See also Williams, Shingleton v. Bussey Doctrine: To
tions as support, the court concluded that a motor vehicle liability insurance contract is a "‘quasi-third party beneficiary contract’ . . . giving the injured third party an unquestionable right to bring direct action against the insurance company as a party defendant." 112 The court weighed heavily the social desirability of affording the injured person a remedy as quickly and inexpensively as possible. 113

Other jurisdictions allow joinder of automobile liability insurers pursuant to direct action statutes. 114 In considering joinder under a statute similar to the South Carolina compulsory automobile liability insurance statute, 115 however, at least one state has used a statutory analysis like that suggested above. 116 The court in that case construed the statute to require indemnification against loss, rather than liability, and refused to allow joinder. 117

4. Conclusion.—In refusing to allow joinder of an insurance company as a codefendant in automobile tort litigation, the South Carolina Supreme Court is in accord with the majority of jurisdictions. Some recognition is being given, however, to the possibility of such joinder either at common law, pursuant to direct action statutes, or through application of common-law principles to statutory construction of compulsory liability insurance laws. Courts are beginning to reexamine the policy arguments advanced against joinder. As Chief Justice Lewis pointed out in his dissent in Davenport, attempts to avoid jury prejudice caused by knowledge "would be futile . . . [because insurance coverage] 'is a public act, and every citizen is presumed to have public knowledge of it.' " 118 The desire to avoid a multiplicity of

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Join or Not To Join—This Is the Question, 37 INS. COUNSEL J. 418 (1970); Comment, Joinder of Insurer as Co-Defendant in Automobile Tort Litigation—Shingleton v. Bussey, 1970 UTAH L. REV. 468.

112. 223 So. 2d at 715 (citing Bussey v. Shingleton, 211 So. 2d 593, 596 (Fla. Dist. Ct. App. 1968)).

113. 223 So. 2d at 717-19.


117. Id.

suits in the interests of judicial economy and plaintiff resources is increasing. Although Davenport indicates that the South Carolina Supreme Court is not yet ready to extend joinder to the automobile tort litigation context, there remains the possibility that it may do so in the future.

C. Rescission of a Personal Injury Release on the Ground of Mutual Mistake Using an “Intent of the Parties” Approach

In Gecy v. Prudential Insurance Co. of America,\textsuperscript{119} the South Carolina Supreme Court adopted an “intent of the parties” approach\textsuperscript{120} to disallow the rescission of a personal injury release on the basis of mutual mistake of a material fact. Gecy is only the third case concerning rescission of a personal injury release to be brought before the South Carolina Supreme Court.\textsuperscript{121} Although the court had recognized the validity of the mutual mistake basis for rescission when ruling on a demurrer in Herndon v. Wright,\textsuperscript{122} it did not outline the appropriate test for determining the existence of mutual mistake. In Gecy, the court accepted the following statement of the law:

“If there is to be avoidance of a release on the ground of mistake, it must be based upon a finding of unknown injuries that were in existence and were not within the contemplation of the parties when the settlement was agreed upon. But if the parties did in fact intentionally agree upon a settlement for unknown injuries, the release will be binding.”\textsuperscript{123}


\textsuperscript{121} In Lawton v. Charleston & Western Carolina Ry., 91 S.C. 332, 74 S.E. 750 (1912), the court ruled that a release can be set aside only on the grounds of fraud or bad faith in the transaction, not for mere mistake. The court, however, in Herndon v. Wright, 257 S.C. 98, 184 S.E.2d 444 (1971), accepted mutual mistake as a basis for rescission and characterized Lawton as having disallowed rescission on the ground of unilateral mistake, not as having dismissed the validity of the mutual mistake ground altogether. The fact situation in Gecy is similar to that in Lawton; Gecy thus suggests issues of unilateral mistake on the part of the plaintiff rather than mutual mistake.

\textsuperscript{122} 257 S.C. 98, 184 S.E.2d 444 (1971).
\textsuperscript{123} 273 S.C. at 441, 257 S.E.2d at 711 (quoting Schmidt v. Smith, 299 Minn. 103, 109, 216 N.W.2d 669, 672 (1974)).
A determination of the intent of the parties under this test requires an examination not merely of the wording in the release, but of all the circumstances surrounding the settlement.124 The intent of the parties is usually a question of fact for the jury.125 In some situations, however, courts that apply this test may grant a summary judgment.126 The court in Gecy reversed a summary judgment for plaintiff and remanded for entry of a summary judgment for defendant.127

1. Background.—Most personal injury releases contain broad language expressing an intent to cover both future consequences of known injuries and injuries unknown to the parties at the time the release is signed that later are found to arise from the original occurrence. Strict application of the parol evidence rule and general contract principles regarding the doctrine of mutual mistake would preclude rescission of a release containing such a clause.128 Courts have developed various approaches,

125. E.g., id. at 109, 216 N.W. 2d at 672.
126. E.g., Schmidt v. Smith, 299 Minn. 103, 216 N.W. 2d 669 (1974). Those courts granting summary judgment look to a variety of factors to find intent as a matter of law. Id. at 109-10, 216 N.W. 2d at 673; Sloan v. Standard Oil Co., 177 Ohio St. 149, 153, 203 N.E. 2d 237, 240 (1964). See text accompanying note 132 infra for a list of these factors.
127. 273 S.C. at 442, 257 S.E. 2d at 712.
128. If the parol evidence rule is applied to this unambiguous, albeit broad, language, the wording of the contract would control. Havighurst, supra note 120, at 11. Even in the absence of such a clause,

[under general principles of contract law, the fact that the existence or nature of an injury was not known when the release was executed, would not ordinarily mean that it could be avoided. It is recognized that parties to a bargain are free to allocate the risk of the discovery of unknown facts as well as the risk of future developments, so that they fall upon one or the other, and the question of which party takes the risk is simply one of construction of the contract.

One party is seldom given the right to avoid a bargain on the ground of mutual mistake with respect to extrinsic facts, even though they are important in inducing the bargain and in the fixing of its terms. The question in each instance is whether the fact concerning which the parties were mistaken was "assumed by them as the basis on which they entered into the transaction." Otherwise the mistake is regarded as "collateral" and does not affect the obligations of the contract.

Although the broad formulas serving to mark the boundary between basic and collateral mistake leave considerable room for the exercise of judgment, it has usually been thought that, when the parties are necessarily aware that there is doubt with reference to certain matters and make no provision in their agreement concerning them, each one takes the risk that the true facts when
however, to avoid application of these rules to releases for personal injuries. Underlying this effort is the judicial realization that in some situations correction of an injured person's mistake regarding the extent or existence of his injuries outweighs compliance with both general contract principles and the strong public policy to encourage the finality of settlements. Even when courts do rescind on the ground of mutual mistake, however, the rescission is usually allowed only for injuries not known to be in existence at the time of the release, rather than for future consequences of known injuries.

2. The “Intent of the Parties” Test.—One approach that courts use to grant rescission when the release contains a clause covering all unknown injuries is to focus on the intent of the parties at the time the release was signed. The question of intent is for the jury, in light of all the circumstances surrounding the release. The language of the release is not controlling, but is merely one factor to be weighed with all other evidence. Courts have recognized, however, that “the evidence as to finality [of the release] can be conclusive when the release is executed under circumstances evincing basic fairness and both releasor and releasee clearly indicate in the instrument an intent to release

revealed will make his bargain less advantageous than he had thought it to be.

If these principles were applied to the release of a personal injury claim, it would seem that, in the absence of a reservation in the instrument, it should be binding even though the injuries later proved to be either more or less serious than the parties supposed them to be when it was executed.

Id. at 3-4 (footnotes omitted).

129. See generally Havighurst, supra note 120, at 3-15; Stephens, Medico-Legal Aspects of Compromise Settlements, 30 Minn. L. Rev. 505, 520-26 (1946); Annot., 71 A.L.R.2d 82 (1960). The following cases illustrate some of the approaches used by the courts: Ranta v. Rake, 91 Idaho 376, 421 P.2d 747 (1967)(personal injury release can be set aside when it is inequitable to sustain because the injuries were more serious than could reasonably have been foreseen by the parties); Clancy v. Pacenti, 15 Ill. App. 2d 171, 176, 145 N.E.2d 802, 805 (1957)(personal injury releases are sui generis and because of their personal subject matter courts should allow liberal rescission); Aronovitch v. Levy, 238 Minn. 237, 246, 56 N.W.2d 570, 576 (1953)(parol evidence is admissible to vary the terms of a written contract in order to show fraud or mistake). Other courts have allowed rescission for innocent or intentional misrepresentations. See generally Havighurst, supra note 120, at 7-9.

130. E.g., DeWitt v. Miami Transit Co., 95 So. 2d 898 ( Fla. 1957); Schmidt v. Smith, 299 Minn. 103, 108, 216 N.W.2d 669, 672 (1974). Each party assumes the risk that known injuries may later be more or less serious.
all claims for both known and unknown injury. 131 Factors courts frequently consider in determining whether to grant a motion for summary judgment include: (1) the time period between injury and settlement; (2) the time period between settlement and the attempt to avoid the settlement; (3) the existence of independent medical advice to the plaintiff; (4) the presence of plaintiff's attorney during negotiation and signing of the release; (5) the language of the release; (6) the adequacy of the consideration; (7) the competence of the plaintiff; (8) the existence of an injury unknown at the time of the release, rather than a consequence of a known injury; (9) the extent of negotiation prior to the settlement; and (10) the conclusiveness of the insurer's liability on the claim. 132

3. The Court's Application of the Test.—In Gecy, defendant appealed the trial court's decision to grant plaintiff's motion for summary judgment in an action to rescind a personal injury release on the ground of mutual mistake. 133 The South

132. E.g., id. at 109-10, 216 N.W.2d at 673; Sloan v. Standard Oil Co., 177 Ohio St. 149, 153, 203 N.E.2d 237, 240 (1964). Rather than focusing on the specific intent of the parties, some courts consider whether an inequitable result can be shown. E.g., Ranta v. Rake, 91 Idaho 376, 421 P.2d 747 (1967). These courts examine such factors as: (1) the dignity afforded the person, (2) the inequality of bargaining positions between the injured person and the insurance company, (3) the likelihood of mistakes regarding the future course of personal injuries, and (4) the amount of consideration received. E.g., id. at 380, 421 P.2d at 751.
133. 273 S.C. at 439, 257 S.E.2d at 711. The court's summary of the facts states:

On July 26, 1975, the automobile in which Mrs. Gecy was riding was struck in the rear by an automobile owned by Mr. Harper and driven by his daughter Carolyn. As a result of the collision Mrs. Gecy sustained personal injuries to her neck and back.

Mrs. Gecy was treated by Dr. H.L. Laffitte of Allendale who told her she had suffered neck and back strain that would clear up with time. Dr. Laffitte referred Mrs. Gecy to Dr. H. Sherman Blalock, an orthopedist, of Augusta, Georgia. Dr. Blalock confirmed Dr. Laffitte's diagnosis and told Mrs. Gecy that she had no permanent injuries and that the pain in her neck and back would eventually go away.

Mrs. Gecy, acting through her attorney Doyet A. Early, III, negotiated a settlement with Prudential, the Harpers' insurer. The settlement was negotiated by letter and by telephone. Prudential did not require an independent medical examination but was furnished with copies of Mrs. Gecy's medical reports. Prudential mailed Mrs. Gecy a release which she and her husband Robert Gecy executed on January 24, 1976. Prudential paid Mr. and Mrs. Gecy twenty-five hundred ($2500.00) dollars in settlement of their claims against the Harpers.
Carolina Supreme Court reversed and remanded, holding that "in view of the parties' agreement that the release would cover unknown injuries,"\textsuperscript{134}the trial court erred in entering summary judgment for plaintiff. The court based its decision solely on the wording of the release, stating that "[w]hile . . . equity may look beyond the wording of the release [to determine intent,] . . . [plaintiff] did not ask the lower court to exercise its equity power in this fashion. . . . [and plaintiff] neither alleged in her complaint nor offered evidence to establish that the release was not intended to cover unknown injuries."\textsuperscript{135} Notwithstanding this statement, the court, by its description of the situation surrounding the release, appeared to use the totality of the circumstances approach.\textsuperscript{136} The court stressed that (1) the parties had agreed after deliberate negotiation, (2) plaintiff had her own counsel during negotiation, (3) plaintiff executed the release without influence by defendant, and (4) the release plainly stated that the settlement included coverage of later-discovered injuries.\textsuperscript{137}

Mrs. Gecy's problems with her neck and back continued after she executed the release and in March 1977 she consulted Dr. Kenneth W. Carrington, a neurosurgeon, of Augusta, Georgia. Dr. Carrington performed a myelogram examination of her spine and diagnosed a ruptured lumbar disc. Dr. Carrington testified that this was a permanent injury that would possibly require surgical treatment.

Mrs. Gecy initiated this action in June 1977 to set the release aside on the ground of mutual mistake of a material fact.

\textit{Id.} at 439-40, 257 S.E.2d at 710-11.

134. \textit{Id.} at 442, 257 S.E.2d at 712. The release reads in part as follows:

\textbf{RELEASE OF ALL CLAIMS}

Know all men by these presents, that the Undersigned does hereby acknowledge receipt of \textit{two thousand five hundred} dollars $2,500.00 which sum is accepted in full compromise settlement of, and as sole consideration for the final release and discharge of all actions, claims and demands whatsoever, that now exist or may hereafter accrue [sic], against \textit{Lamar Harper}.

The Undersigned Agrees, as a further consideration and inducement for this compromise settlement, that it shall apply to unknown and unanticipated injuries and damages resulting from said accident, casualty or event, as well as to those now disclosed.

\textit{Id.} at 440, 257 S.E.2d at 710-11.

135. \textit{Id.} at 442, 257 S.E.2d at 712.

136. See text accompanying note 132 \textit{supra}.

137. 273 S.C. at 442, 257 S.E.2d at 711-12. Other factors in support of the court's decision can be enumerated as follows: (1) plaintiff signed the release six months after the injury; (2) plaintiff's attempt to avoid the release occurred two years after the injury and one and a half years after the execution of the release; (3) physicians chosen by
Although plaintiff did not specifically request the court to look beyond the wording of the release, the court's refusal to do so is disturbing. In the view of the dissent, plaintiff's allegation of mutual mistake should be construed broadly enough to include a request to go beyond the literal language of the release. This reasoning seems sound. The adoption of a totality of the circumstances approach should be sufficient to allow the court to go outside the terms of the release sua sponte. Under the "intent of the parties" approach, the language of the release is only one factor to be considered, not, as in the majority's opinion, the controlling factor. The court's summary refusal to go beyond the terms of the release gives little guidance to future plaintiffs regarding pleading requirements for the mutual mistake cause of action in this situation.

4. Conclusion.—The court, finding the language of the final settlement controlling, disallowed rescission of a personal injury release. A proper application of the "intent of the parties" test to the particular facts in Gecy would produce the same result. In other factual contexts, however, if all of the circumstances surrounding the settlement show the parties' intent to be inconsistent with finality, the release should be rescinded notwithstanding its language. The totality of the circumstances approach strikes a suitable balance between encouraging finality of settlements and allowing rescission in those few situations in which upholding a release is inequitable. Plaintiff's burden to present evidence of the enumerated factors sufficient to overcome the language of the release is a heavy one. Plaintiff will succeed in meeting this burden only when enforcement of the settlement is manifestly unjust.

II. Partnership Law—Capacity of Partnership To Sue or Be Sued in Its Own Name

In Marvil Properties v. Fripp Island Development Corp.,
the South Carolina Supreme Court ruled that a general partnership does not have the capacity to sue or be sued in its own name.\textsuperscript{142} Plaintiff, a general partnership, brought suit in the partnership name, without naming the partners, for specific performance of a sales agreement entered into in the name of the partnership. Defendant demurred to the complaint on the ground that plaintiff lacked capacity to sue. The South Carolina Supreme Court, on appeal, reversed the lower court’s overruling of the demurrer. Justice Littlejohn filed a dissenting opinion.\textsuperscript{143}

Defendant advanced two arguments in support of its position that a suit can be maintained in the partnership name. The majority did not expressly respond to the argument that the individual partners are necessary parties. The dissent, however, concluded that the partners were not necessary parties because defendant had entered into the contract with the partnership, not with the individual members, and the rights alleged to have been violated were partnership rights.\textsuperscript{144} The dissent’s position, at least in the particular factual context of this case, is persuasive and consistent with statute and past decisions. Concededly, the court previously has expressed the view in dicta that both the liability on partnership obligations and debts and the right to enforce obligations and debts running to the partnership are joint and require joinder of the individual partners as parties.\textsuperscript{145}

Omitting the names of the individual partners in the complaint, however, does not preclude an entry of judgment in the partnership’s favor unless the other party interposes a timely objection to the omission.\textsuperscript{146} To the same effect is section 15-5-510(1) of the South Carolina Code,\textsuperscript{147} which allows a judgment to be en-

\textsuperscript{142} \textit{Id.} at 621, 258 S.E.2d at 107.

\textsuperscript{143} Justice Littlejohn had prepared an opinion to affirm the lower court’s ruling. A majority of the court, however, disagreed with his proposed result and Justice Littlejohn filed his opinion as a dissent. \textit{Id.} at 621-23, 258 S.E.2d at 107 (Littlejohn, J., dissenting).

\textsuperscript{144} \textit{Id.} at 622, 258 S.E.2d at 107-08 (Littlejohn, J., dissenting).


\textsuperscript{147} S.C. Code Ann. § 15-5-510(1) (1976). This section provides in part:

\begin{quote}
When the action is against two or more defendants and the summons is served on one or more of them, but not on all of them, the plaintiff may proceed as follows:

(1) If the action be against defendants jointly indebted upon contract, he
forced against the jointly held property and the separately held property of defendant or defendants served, even though all who are jointly obligated are not served.\textsuperscript{148} Therefore, at least in an action to enforce a judgment against the partnership property, the individual partners are not truly necessary parties.

In \textit{Marvil Properties}, defendants did make a timely objection by demurrer to plaintiff’s failure to name the individual partners in the complaint. For this reason, the court for the first time since the Uniform Partnership Act\textsuperscript{149} was enacted in South Carolina in 1950, was faced with resolving the specific issue of a partnership’s capacity to sue. In other jurisdictions that have decided this issue subsequent to the enactment of the Uniform Partnership Act (UPA), courts have reached conflicting results.\textsuperscript{150} Some courts conclude that under the UPA a partnership is an entity to the extent that it can sue or be sued in the partnership name.\textsuperscript{151} Others embrace the view, as the South Carolina Supreme Court did in \textit{Marvil Properties}, that the common-law rule governs because the UPA is silent on the subject.\textsuperscript{152}

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may proceed against the defendant served, unless the court otherwise direct; in such case if he recover judgment, it may be entered against all the defendants thus jointly indebted so far only as it may be enforced against the joint property of all and the separate property of the defendant served . . . .

. . . .

If the name of one or more partners shall, for any cause, have been omitted in any action in which judgment shall have passed against the defendants named in the summons and such omission shall not have been pleaded in such action, the plaintiff, in case the judgment therein shall remain unsatisfied, may by action recover of such partner separately, upon proving his joint liability, notwithstanding the fact that such partner may not have been named in the original action. But the plaintiff shall have satisfaction of only one judgment rendered for the same cause of action.

\textit{Id.}

148. \textit{Id.} Separate recovery, however, is allowed against only those partners who have been served.


152. \textit{E.g.}, Dolph v. Cortez, 8 Ariz. App. 429, 430 n.1, 446 P.2d 939, 940 n.1 (1968). In \textit{Marvil Properties}, the South Carolina court noted that the UPA provides: "[I]n any case not provided for in this chapter the rules of law and equity, including the law merchant, shall govern." 273 S.C. at 621, 258 S.E.2d at 107 (citing S.C. Code Ann. § 33-41-50 (1976)).
The majority concluded that neither prior South Carolina case law nor legislative enactments support the proposition that a partnership has legal capacity to sue.\textsuperscript{153} Although the court has stated in some cases that "a partnership . . . is an entity, separate and distinct from the persons who compose it,"\textsuperscript{154} the court in \textit{Marvil Properties} limited the application of the entity principle to "determining legal relationships and liabilities of the partners,"\textsuperscript{155} and expressly declined to permit "a suit only in the partnership name."\textsuperscript{156}

The dissent acknowledged that at common law a partnership could not sue or be sued because it was not a legal entity, but argued that recent legislative enactments and judicial decisions had changed this rule.\textsuperscript{157} Although the UPA does not expressly state that a partnership is an entity, several of its provisions suggest that, at least for some purposes, a partnership may be so viewed. A partnership can own and convey real property in the partnership name.\textsuperscript{158} A partnership is liable for the wrongful acts of its partners.\textsuperscript{159} The existence of a partnership continues despite assignment of a partner's interest.\textsuperscript{160} Other South Carolina statutes also support the entity partnership theory. A partnership can register a trademark\textsuperscript{161} and a negotiable instrument can be made payable to a partnership in the firm's name.\textsuperscript{162} The South Carolina Supreme Court has conceded that a partnership is an entity for certain purposes and that the UPA recognizes this principle.\textsuperscript{163} In \textit{Marvil Properties}, however, the court was

\textsuperscript{153} 273 S.C. at 620-21, 258 S.E.2d at 106-07.
\textsuperscript{155} 155. 273 S.C. at 620, 258 S.E.2d at 107.
\textsuperscript{156} 166. \textit{Id.} The court expressly stated in Smith & Melton v. Walker, 6 S.C. 169, 173 (1874), that a partnership does not have capacity to sue or be sued. \textit{But cf.} note 146 and accompanying text infra.
\textsuperscript{159} 159. \textit{Id.} § 33-41-350.
\textsuperscript{160} 160. \textit{Id.} § 33-41-740.
\textsuperscript{162} 162. \textit{Id.} § 36-3-110.
unwilling to extend this line of reasoning by allowing a partnership to sue in the partnership name.

The dissent relied, by analogy, on the reasoning advanced in Bouchette v. ILGWU Local 371164 to support a partnership's legal capacity to sue. In that case, a unanimous South Carolina Supreme Court, per Justice Lewis, ruled that an unincorporated association, under section 15-5-160 of the South Carolina Code,165 could be sued in its own name and, under other legislative enactments recognizing the capacity of the association to act in its own name,166 could sue in its own name. The court concluded that an unincorporated association could "sue in its own name in relation to matters affecting the group as a unit."167 Although no statute exists conferring on a partnership the right to be sued in its own name as was the case for an unincorporated association in Bouchette, an implication of the right to sue and be sued arises from other legislative enactments.168 The court in Marvil Properties could have reached the same result as reached in Bouchette without ruling that a partnership is an entity for all purposes. The court has stated previously that "[a]n unincorporated association is in no sense a legal entity and is not made so by the statute [conferring on the association the right to be sued in its own name]."169 The only difficulty in justifying the same conclusion in Marvil Properties is the difference in the nature of the liabilities of a partnership compared to the liabilities of an unincorporated association. The obligations of an association are joint and several,170 while the obligations of a partnership are joint.171

The resolution of this issue may hinge ultimately upon practical considerations. It is not always practical in the case of large

167. 245 S.C. at 591, 141 S.E.2d at 835.
168. See notes 158-62 and accompanying text supra.
170. Id. When liability is joint and several, any one of the obligors may be sued separately and individually for the full amount of the obligation.
171. S.C. Code Ann. § 33-41-370(2) (1976). When liability is joint, all obligors must be sued together in one action and each is liable only for his proportionate share of the full amount of the obligation.
accounting, brokerage, or law firms to name all partners, even if
all are known. Pleading captions could run many pages and the
parties to the action could change frequently during the course
of litigation. A partnership should certainly be allowed to sue in
its own name when the rights asserted are partnership rights,
particularly when, as in Marvil Properties, the action is on a
contract entered into in the partnership name and concerns a
sale of property held in the partnership name. Likewise, a part-
nership should be allowed to be sued in its own name to bind
the partnership property. The safeguard against binding prop-
erty of individual partners when only the partnership is sued al-
ready exists by statute.172 If the partnership being sued has few
assets and plaintiff seeks to bind the property of the individual
partners, the plaintiff can utilize the discovery process to deter-
mine the names of the individual partners. Because the court is
reluctant to change the common-law rule, perhaps the legisla-
ture should take action to further the ends of commercial
practicability.

Linda L. Hightower

172. Id. § 15-5-510 (1976).