I. Regulatory Limits on Claims Handling

In addition, numerous regulations affecting insurance sold in South Carolina have been promulgated by the Department of Insurance. These regulations can be found at S.C. Code Ann. Regs. §§ 69-1 through 69-70.

A. Timing for Responses and Determinations

While no South Carolina Code section mandates timing for claim response and determination, several sections provide guidance on this topic. Section 38-59-20 lists numerous indicia of improper claim practices, any or all of which, if performed with such frequency to indicate a general business practice, could lead to an administrative finding of improper claims practices. An insurer must adopt and implement reasonable standards for the prompt investigation and settlement of claims; promptly respond to an insured’s claim and communications; and attempt, in good faith, to effect a prompt, fair, and equitable settlement of claims. See S.C. Code Ann. § 38-59-20. This code section does not create a private right of action. Masterclean, Inc. v. Star Ins. Co., 347 S.C. 405, 415, 556 S.E.2d 371, 377 (2001).

In addition to administrative action, an insurer’s delay in responding to a claim in South Carolina may result in liability for attorney’s fees. Upon a finding that an insurer’s refusal to pay a claim within ninety days after a demand has been made was without reasonable cause or in bad faith, the insurer will be liable for all reasonable attorney’s fees for the prosecution of the case against it. This amount will be determined by the judge and cannot exceed one-third of the judgment amount. S.C. Code Ann. § 38-59-40.

With respect to life insurance, an insurer is statutorily required to pay interest at the legal rate on the policy proceeds if it fails to pay the proceeds of a policy within thirty days of receipt of proof of death and all necessary claim papers. S.C. Code Ann. § 38-63-80; see S.C. Code Ann. § 38-63-220(f) (requiring statement of such in each individual life insurance policy).

While handling claims does not have a specific time element, the South Carolina Health Care Financial Recovery and Protection Act specifies time limits for when “clean claims” must be paid. The South Carolina Health Care Financial Recovery and Protection Act became effective on June 11, 2009. The Act provides for specific claims handling procedures regarding health care claims. A “clean claim,” an eligible electronic or paper claim for reimbursement (which is further defined at S.C. Code Ann. § 38-59-210(8)), must be paid within the later of 40 days of the receipt of a paper claim (20 days for claims submitted electronically) or the receipt of all information needed (and in the format required) (1) to determine that such claim does not contain any material defect, error, or impropriety or (2) to make a payment determination. S.C. Code Ann. § 38-59-230. “A clearinghouse, billing service, or any other vendor that contracts with a provider to deliver health care claims to an insurer on the provider’s behalf is prohibited from converting electronic claims received from the provider into paper claims for submission to the insurer. . . .” S.C. Code Ann. § 38-59-230(D). A violation of § 38-59-230(D) “constitutes an unfair trade practice under Chapter 5, Title 39, and individual providers and insurers injured by violations of this subsection have an action for damages as set forth in Section 39-5-140.” Id.
If the insurer fails to direct the issuance of payment within the time set forth in § 38-59-230, the insurer shall pay interest on the balance due computed from the 21st or 41st business day, as appropriate, until the clean claim is paid. S.C. Code Ann. § 38-59-240.

The requirements of this Article 59 of Title 38 of the Code of Laws of South Carolina do not apply to claims that are processed under any national account delivery program in which an insurer participates but is not solely responsible for the processing and payment of the claims, or claims for services under a program offered or sponsored by any state or federal governmental entity other than in its capacity as an employer, or both. S.C. Code Ann. § 38-59-260.

B. Standards for Determinations and Settlements

As noted above, the South Carolina Legislature has enacted numerous laws pertaining to insurance company trade and claims practices. See S.C. Code Ann. §§ 38-57-10 - 38-57-320 and §§ 38-59-10 - 38-59-270. Under Section 38-59-20, any of the following actions committed by an insurer “without just cause and . . . with such frequency as to indicate a general business practice, constitutes improper claim practices:”

1. Knowingly misrepresenting to insureds or third-party claimants pertinent facts or policy provisions relating to coverages at issue or providing deceptive or misleading information with respect to coverages.

2. Failing to acknowledge with reasonable promptness pertinent communications with respect to claims arising under its policies, including third-party claims arising under liability insurance policies.

3. Failing to adopt and implement reasonable standards for the prompt investigation and settlement of claims, including third-party liability claims, arising under its policies.

4. Not attempting in good faith to effect prompt, fair, and equitable settlement of claims, including third-party liability claims, submitted to it in which liability has become reasonably clear.

5. Compelling policyholders or claimants, including third-party claimants under liability policies, to institute suits to recover amounts reasonably due or payable with respect to claims arising under its policies by offering substantially less than the amounts ultimately recovered through suits brought by the claimants or through settlements with their attorneys employed as the result of the inability of the claimants to effect reasonable settlements with the insurers.

6. Offering to settle claims, including third-party liability claims, for an amount less than the amount otherwise reasonably due or payable based upon the possibility or probability that the policyholder or claimant would be required to incur attorney’s fees to recover the amount reasonably due or payable.
7. Invoking or threatening to invoke policy defenses or to rescind the policy as of its inception, not in good faith and with a reasonable expectation of prevailing with respect to the policy defense or attempted rescission, but for the primary purpose of discouraging or reducing a claim, including a third-party liability claim.

8. Any other practice which constitutes an unreasonable delay in paying or an unreasonable failure to pay or settle in full claims, including third-party liability claims, arising under coverages provided by its policies.

S.C. Code Ann. § 38-59-20. These indicia of improper claims practices provide standards to insurers handling claims in South Carolina.

In addition, insurers are required to provide proof of loss forms following notice of a loss. If a claimant has provided written proof covering the occurrence, character, and extent of the loss within the time fixed by the policy and the insurer has failed to provide a proof of loss form within 20 days of receiving notice of the loss, the claimant is considered to have complied with the proof of loss requirements of the policy. S.C. Code Ann. § 38-59-10.

C. State Privacy Laws, Rules, and Regulations


II. Principles of Contract Interpretation

In South Carolina, general rules of contract construction apply to insurance policies. Whitlock v. Stewart Title Guar. Co., 399 S.C. 610, 614, 732 S.E.2d 626, 628 (2012). “The cardinal rule of contract interpretation is to ascertain and give legal effect to the parties’ intentions as determined by the contract language.” Id. (citing McGill v. Moore, 381 S.C. 179, 185, 672 S.E.2d 571, 574 (2009)). As such, courts will enforce insurance contracts based on the “plain, ordinary and popular meaning” of the language
used. Id. (citing USAA Prop. & Cas. Ins. Co. v. Clegg, 377 S.C. 643, 655, 661 S.E.2d 791, 797 (2008)). When contract language is “clear and unambiguous” the “language alone determines the contract’s force and effect.” Id. at 615. Courts determine as a matter of law whether or not contract language is ambiguous. McGill, 381 S.C. at 185, 672 S.E.2d at 574. “Ambiguous or conflicting terms in an insurance policy must be construed liberally in favor of the insured and strictly against the insurer.” Clegg, 377 S.C. at 655, 661 S.E.2d at 797 (quoting Diamond State Ins. Co. v. Homestead Indus., Inc., 318 S.C. 231, 236, 456 S.E.2d 912, 915 (1995)).

III. Choice of Law

Insurance contracts on property, lives and interests in South Carolina are subject to the laws of South Carolina pursuant to S.C. Code Ann. § 38-61-10 that states:

All contracts of insurance on property, lives, or interests in this State are considered to be made in the State and all contracts of insurance the applications for which are taken within the State are considered to have been made within this State and are subject to the laws of this State.

The South Carolina Supreme Court upheld this statute and held that South Carolina law applied to insurance contracts insuring property in the state even though the contracts were entered into between parties outside of the state. Sangamo Weston, Inc. v. National Surety Corp., 307 S.C. 143, 149, 414 S.E.2d 127, 130 (1992). The Sangamo court explained that under § 38-61-10 “it is immaterial where the contract was entered into” and that “there is no requirement that the policyholders or insurers be citizens of South Carolina.” Id. “What is solely relevant is where the property, lives, or interests insured are located.” Id.

“In a diversity case, a federal court must apply the choice of law rules of the state in which it is located.” See Hartsock v. American Auto .Ins. Co., 788 F. Supp. 2d 447, 450 (D.S.C. 2011); Heslin-Kim v. Cigna Group Ins., 377 F. Supp. 2d 527, 530 (D.S.C. 2005). The United States District Court for the District of South Carolina followed Sangamo and recognized that “South Carolina’s broad jurisdiction over an insurance contract is triggered by the location of the property, lives, and interests within the state, not by the entrance into an insurance contract.” Heslin-Kim, 377 F. Supp. 2d at 531-32. Further, the federal court held § 38-61-10 was not unconstitutional and agreed with Sangamo that insuring property and lives in South Carolina constitutes significant contacts with the state thus satisfying the Full Faith and Credit Clause or the Due Process Clause. Heslin-Kim, 377 F. Supp. 2d at 533 (holding insurer’s provision of life insurance to a seven-year resident allowed application of South Carolina law “without offending the Full Faith and Credit Clause or the Due Process Clause.”); Hartsock, 788 F. Supp. 2d at 452.

IV. Extracontractual Claims Against Insurers: Elements and Remedies

A. Bad Faith


South Carolina courts have recognized four critical elements which are necessary for the existence of a bad faith cause of action for failure to pay first-party insurance benefits:

1. the existence of a mutually binding contract of insurance between the plaintiff and the defendant;
2. refusal by the insurer to pay benefits due under the contract;
3. resulting from the insurer’s bad faith or unreasonable action in breach of an implied covenant of good faith and fair dealing arising on the contract;
4. causing damage to the insured.


Under South Carolina law “an insurer cannot be liable for bad faith refusal to pay proceeds . . . if there exists an objectively reasonable basis for denying the insured’s claim.” State Farm Fire & Cas. Co. v. Barton, 897 F.2d 729, 731 (4th Cir. 1990) (citing Varnadore v. Nationwide Mut. Ins. Co., 289 S.C. 155, 158, 345 S.E.2d 711, 713-714 (1986)). “Whether such an objectively reasonable basis for denial exists depends on the circumstances existing at the time of the denial.” Barton, 897 F.2d at 731 (4th Cir. 1990). Importantly, however, an insurer is not insulated from liability for bad faith merely because there is a lack of precedent resolving a coverage issue raised under the particular facts of the case. Mixson, Inc. v. Am. Loyalty Ins. Co., 349 S.C. 394, 400, 562 S.E.2d 659, 662 (Ct. App. 2002).

Moreover, “the benefits due an insured are not limited solely by those expressly set out in the contract.” Tadlock Painting Co., 322 S.C. at 503, 473 S.E.2d at 55. “[T]he covenant of good faith and fair dealing extends not just to the payment of a legitimate claim, but also to the manner in which it is processed.” Mixson, 349 S.C. at 400, 562 S.E.2d at 662 (citing Tadlock, 322 S.C. 498, 473 S.E.2d 52). “[I]f an insured can demonstrate bad faith or unreasonable action by the insurer in processing a claim under their mutually binding insurance contract, he can recover consequential damages in a tort action.” Tadlock, 322 S.C. at 500, 473 S.E.2d at 53.
In addition, if an insured is able to demonstrate that the insurer’s actions were willful and in reckless disregard of the insured’s rights, the insured can recover punitive damages in addition to bad faith consequential damages. See Barton, 897 F.2d 729; see also James v. Horace Mann Ins. Co., 371 S.C. 187, 638 S.E.2d 667 (2006); American Fire & Cas. Co. v. Johnson, 332 S.C. 307, 504 S.E.2d 356 (Ct. App. 1998). The Supreme Court of South Carolina addressed punitive damages in the context of a bad faith claim in Mitchell v. Fortis Insurance Company, 385 S.C. 570, 686 S.E.2d 176 (2009).

In Mitchell, the alleged bad faith arose out of Fortis’ actions in handling claims for benefits under a policy of health insurance. When he applied for the subject policy in May of 2001, the insured was 17-years-old, was preparing to attend college, and was no longer covered under his mother’s health insurance policy. As a result of his attempt to donate blood to the Red Cross, the insured learned that he was HIV-positive in May of 2002. After the insured began receiving treatment (for which claims were made against the Fortis policy), Fortis began an investigation to determine if the insured had failed to properly disclose a pre-existing condition – when the insured applied for the policy he indicated that he had never been diagnosed with any immune-deficiency disorder. Seizing upon an erroneous hand-written notation in one of the insured’s medical record’s (which mistakenly indicated that the insured knew of his condition prior to applying for the policy), a senior underwriter recommended rescission of the policy and the company’s rescission committee agreed after “what was likely no more than a three-minute review.”

At trial, the jury considered evidence that Fortis refused to perform any further investigation, despite the insured’s repeated attempts to prove that he did not misrepresent his health status and that Fortis knew or should have known that the notation upon which its decision to rescind was based was in error. Evidence also showed that Fortis regularly stopped investigating claims as soon as it discovered a single piece of evidence to support rescission. Additionally, the jury considered the consequences to the insured with respect to his compromised access to treatment as a result of Fortis’ actions. The jury awarded the insured $150,000 in actual damages on his bad faith claim and $15,000,000 in punitive damages.

On appeal, the Supreme Court remitted the punitive damages award to $10,000,000. Notably, the Supreme Court also addressed Fortis’ contention that the trial court erred in allowing into evidence testimony regarding Fortis’ retrospective investigation practices, also known as “post-claim underwriting,” conduct that the insured’s experts testified to be unlawful in “at least half a dozen states.” While not expressly taking issue with Fortis’ contention that post-claim underwriting is “perfectly lawful” in South Carolina, the Supreme Court rejected Fortis’ challenge that this testimony constituted evidence of out-of-state conduct in violation of due process because “in the context of this case, Fortis’ post-claim underwriting practices played a pivotal role in the harm inflicted upon [the insured] in South Carolina.”

Further, under South Carolina law a party, in either state or federal court, may recover reasonable attorneys’ fees of up to one-third (1/3) of the bad faith judgment. S.C. Code Ann. § 38-59-40. Attorneys’ fees may also be awarded when a case is settled prior to trial or during trial. See Brown v. Johnson, 276 S.C. 68, 71, 275 S.E.2d 876, 877 (1981). In any case, the “[d]etermination of an insurer’s liability for attorneys’ fees pursuant to S.C. Code Ann. § 38-59-40 is a matter for decision by the trial judge. In
making this determination, the trial judge must ascertain whether or not an insurer’s refusal to pay a claim was without reasonable cause or in bad faith” and, in turn, provide written reasoning for such decision in his or her order. Dorman v. Allstate Ins. Co., 332 S.C. 176, 181, 504 S.E.2d 127, 130 (Ct. App. 1998) (citing Coker v. Pilot Life Ins. Co., 265 S.C. 260, 217 S.E.2d 784 (1975)); see also S.C. Code Ann. § 38-59-40 (2012).


B. Fraud

In South Carolina a claim or defense of fraud requires the establishment of the following nine elements:

- a representation;
- the falsity of the representation;
- the materiality of the representation;
- knowledge of its falsity, or reckless disregard for its truth or falsity;
- intent that the representation will be acted upon by the party to whom the representation is made;
- the hearer’s ignorance of the falsity of the representation;
- the hearer’s reliance on the truth of the representation;
- the hearer’s right to rely on the truth of the representation; and
- the hearer’s consequent and proximate injury as a result of the representation.


Fraud, whether asserted as a cause of action or an affirmative defense, must be specifically and particularity pled. Rule 9(b), SCRCP. Nevertheless, when evidence of fraud is presented to overcome the parole

South Carolina also recognizes a cause of action for constructive fraud which requires each of the elements of fraud except intent or knowledge (i.e., scienter) by the defendant. See Woods v. State, 314 S.C. 501, 506, 431 S.E.2d 260, 263 (Ct. App. 1993) (citing O’Quinn v. Beach Assocs., 272 S.C. 95, 249 S.E.2d 734 (1978)). Constructive fraud is described as:

. . . a breach of legal or equitable duty which, irrespective of the moral guilt of the fraudfeasor, the law declares fraudulent because of its tendency to deceive others, to violate public or private confidence, or to injure public interests.

Neither actual dishonesty of purpose nor intent to deceive is an essential element of constructive fraud. An intent to deceive is an essential element of actual fraud. The presence or absence of such an intent distinguishes actual fraud from constructive fraud.

* * *

An allegation that the defendant ought to have known the falsity of the misrepresentation is sufficient to support an action for constructive fraud.


Finally, South Carolina recognizes a cause of action for negligent misrepresentation which focuses on whether the defendant owed the plaintiff any duty of due care within the particular context of the case. Brown, 348 S.C. at 42, 557 S.E.2d at 680-681. Negligent misrepresentation is distinguishable from fraud since, in order to prove the elements of fraud, the plaintiff is required to show that the defendant conveyed a known falsity. Gordon-Gallup Realtors v. Cincinnati Ins. Co., 274 S.C. 468, 471, 265 S.E.2d 38, 40 (1980).

Our courts have stated a claimant:

. . . must allege (1) the defendant made a false representation to the plaintiff, (2) the defendant had a pecuniary interest in making the statement, (3) the defendant owed a duty of care to see that he communicated truthful information to the plaintiff, (4) the defendant breached that duty by failing to exercise due care, (5) the plaintiff justifiably relied on the representation, and (6) the plaintiff suffered a pecuniary loss as the proximate result of his reliance on the representation.


C. Intentional or Negligent Infliction of Emotional Distress

1. Intentional Infliction of Emotional Distress

South Carolina has adopted the tort of intentional infliction of emotional distress (“IIED”) or, as it is more commonly referred to, the tort of outrage. Ford v. Hudson, 276 S.C. 157, 276 S.E.2d 776 (1981). To demonstrate outrage a plaintiff must prove that someone, by extreme and outrageous conduct, intentionally and recklessly caused severe emotional distress to another. The elements have been established as follows:

1. The defendant intentionally or recklessly inflicted severe emotional distress or was certain or substantially certain that such distress would result from his conduct;

2. The conduct was so extreme and outrageous as to exceed all possible bounds of decency and must be regarded as atrocious and utterly intolerable in a civilized community;

3. The actions of the defendant caused the plaintiff’s emotional distress; and

4. The emotional distress suffered by the plaintiff was so severe that no reasonable man could be expected to endure it.


South Carolina adopted the tort of outrage (or IIED) as a remedy for tortious conduct where no remedy previously existed, not as a replacement for other tort causes of action. Todd v. S.C. Farm Bureau Mut. Ins. Co., 283 S.C. 155, 173, 321 S.E.2d 602, 613 (Ct. App. 1984), rev’d on other grounds, 287 S.C. 190, 336 S.E.2d 472 (1985) (citations omitted). If other tort causes of action may be asserted in response to tortious conduct, outrage or IIED may, arguably, not be a valid claim. Id.

To constitute outrage the conduct must be directed at the plaintiff, or occur in a plaintiff’s presence of whom the defendant is aware; also, immediate family members cannot recover unless they were present at the time the injury was inflicted on the victim. Upchurch v. N.Y. Times Co., 314 S.C. 531, 536, 431 S.E.2d 558, 561 (1993) (citing Christensen v. Sup. Ct., 820 P.2d 181, 202...
The court, as a matter of law, initially determines if the defendant’s conduct is so extreme and outrageous so as to allow recovery for this cause of action. Gattison v. S.C. State College, 318 S.C. 148, 151, 456 S.E.2d 414, 416 (Ct. App. 1995). “Initially, it is for the Court’s determination whether the defendant’s conduct may reasonably be regarded as so extreme and outrageous as to permit recovery, and only where reasonable persons might differ is the question one for the jury.’” Hansson, 374 S.C. at 357, 650 S.E.2d at 71 (citing Holtzscheiter v. Thomson Newspapers, 306 S.C. 297, 302, 411 S.E.2d 664, 666 (1991) (quoting Todd, 283 S.C. at 167, 321 S.E.2d at 609)).

2. Negligent Infliction of Emotional Distress

Negligent infliction of emotional distress, on the other hand, is limited to bystander recovery. Kinard v. Augusta Sash & Door Co., 286 S.C. 579, 583, 336 S.E.2d 465, 467 (1985).

The elements of negligent infliction of emotional distress are:

1. the negligence of the defendant must cause death or serious physical injury to another;
2. the plaintiff bystander must be in close proximity to the accident;
3. the plaintiff and the victim must be closely related;
4. the plaintiff must contemporaneously perceive the accident; and
5. the emotional distress must both manifest itself by physical symptoms capable of objective diagnosis and be established by expert testimony.

Kinard, 286 S.C. at 582-83, 336 S.E.2d at 467 (citing Dillon v. Legg, 441 P.2d 912 (Cal. 1968)).

D. State Consumer Protection Laws, Rules and Regulations

The South Carolina Unfair Trade Practices Act (“UTPA”) prohibits “unfair or deceptive acts or practices.” S.C. Code Ann. § 39-5-20(a). The UTPA contains a provision specifically exempting from the coverage of the Act any conduct or actions covered by the South Carolina Insurance Trade Practices Act (“ITPA”). S.C. Code Ann. § 39-5-40(c); see also S.C. Code Ann. §§ 38-57-10 – 38-57-320. There are no reported South Carolina appellate court cases addressing the viability of a UTPA claim against an insurer for conduct or actions that do not fall within this exemption. There is no private right of action for a violation of the ITPA or the Claims Practices Act. Masterclean, 347 S.C. at 415, 556 S.E.2d at 377; see also Lewis v. Omni, 970 F. Supp.2d 437, 451 (D.S.C. 2013). Although, it should be noted that the Claims Practices Act provides relief for a third-party victim of an improper claims practice by virtue of an administrative review before the Chief Insurance Commissioner. Id.

E. State Class Actions

The prerequisites to a class action under South Carolina’s subsection (a) of Rule 23 are substantially identical to its federal counterpart, with South Carolina adding the additional prerequisite that when monetary, rather than injunctive or declaratory, relief is sought in a South Carolina class action, the amount in controversy must exceed one hundred dollars ($100.00) for each member of the class. Rule 23(a), SCRCP.

The Supreme Court of South Carolina addressed the “commonality” prerequisite in Gardner v. S.C. Dep’t of Revenue, 353 S.C. 1, 577 S.E.2d 190 (2003), noting that it is “met only where the class shares a determinative issue”, and refusing to certify a class where “factual differences … are the crux of a predominate legal issue.” Gardner, 353 S.C. at 21-22, 577 S.E.2d at 200-01 (requiring individualized examination of each plaintiff’s prejudice claim negates the benefit of the class action suit); see also Rule 23(a), SCRCP. Nonetheless, it should be noted, as stated in a recent decision from the South Carolina Supreme Court, “class actions are favored in this state . . . because of their ability to ‘save[] the resources of both the courts and the parties by permitting an issue potentially affecting every [class member] to be litigated in an economical fashion . . . .’” Grazia v. S.C. State Plastering, LLC, 390 S.C. 562, 576, 703 S.E.2d 197, 204 (2010) (citing Califano v. Yamasaki, 442 U.S. 682, 701, 99 S.Ct. 2545, 2557, 61 L. Ed. 2d 176, 192 (1979)).

The Supreme Court of South Carolina has also addressed and rejected the propriety of “opt-in” notification in class actions - a procedure that is generally believed to have a limiting effect on class size because it would require a putative class member to affirmatively elect to participate in the class, as opposed to an “opt-out” procedure, whereby putative class members will remain in the class unless they affirmatively elect to be excluded from it. In Salmonsen v. CGD, Inc., 377 S.C. 442, 661 S.E.2d 81 (2008), the Court recognized that South Carolina appellate courts had not previously provided guidance for trial courts regarding the appropriate methods for notification in class actions. Id. at 456, 661 S.E.2d at 89. The Court concluded “that an ‘opt-out’ notification procedure is the proper method to be offered to putative class members in the instant case and future class action cases.” Id. at 459, 661 S.E.2d at 91. The Court specifically rejected the use of an “opt-in” notice procedure. Id.

V. Defenses in Actions Against Insurers

A. Misrepresentation/Rescission of Insurance Contract for Misrepresentation

Under South Carolina law, an insurance policy may be cancelled if the insured is guilty of fraud in his application for insurance. In order to prevail on this defense to a claim, the insurer must show, by clear and convincing evidence, not only (a) the falsity of the statement challenged, but also that (b) the falsity was known to the applicant, (c) was material to

Where a fact is specifically inquired about in an application for insurance or a question is so framed as to elicit a desired fact, a full disclosure must be made by the applicant, and the insurer has a right to rely upon the answer unless the truth is otherwise known to the insurer. Government Employees Ins. Co. v. Chavis, 254 S.C. 507, 176 S.E.2d 131 (1970).

In addition, an insurer must establish a causative link between the alleged misrepresentation and a loss before recovery may be defeated. Johnson, 288 S.C. at 241, 341 S.E.2d at 794. Where a misrepresentation applies to one distinct part of a policy having multiple forms of coverage that are properly divisible, an insurer may only deny coverage as to that part affected by the misrepresentation. Id. Recovery applies to other policy coverages unaffected by the misrepresentation. Id.

With respect to life insurance, however, an insurer does not need to show a causative link between the alleged misrepresentation and the insured’s death to void the policy. All that must be shown are the five elements above listed. Carroll, 307 S.C. at 2690-71, 414 S.E.2d at 778. Importantly, however, there is a statutory time limit for an insurer to contest a life insurance policy. Such policies are incontestable as to the truth of the application and the representations of the insured individual after the policy has been in force during the lifetime of the insured for a period of two years from the date of issue. S.C. Code Ann. § 38-63-220(d). All individual life insurance policies must include a provision to this effect. Id.

B. Pre-existing Illness or Disease Clauses

1. Statutes

Specific statutory sections govern the use of pre-existing conditions in long term care insurance policies and set forth a statutory definition of the term. S.C. Code Ann. § 38-72-60. With respect to group health insurance coverage, policies may limit coverage for pre-existing conditions. S.C. Code Ann. § 38-71-730. Special conditions and exceptions apply to any such limitation. See S.C. Code Ann. § 38-71-730(4). Federal law addressing pre-existing conditions and/or issues concerning pre-existing problems would, of course, supersede any inconsistent South Carolina state statute.

2. Case Law

In South Carolina “[a]n insured has the right to contract against liability resulting from pre-existing diseases. Before non-liability can follow as a matter of law, however, the only reasonable inference must be
that the claim of the insured resulted from a disease already contracted and
active at the time of the date and delivery of the policy.” Crossley, 307
S.C. at 358-59, 415 S.E.2d at 396 (citing Johnson v. Wabash Life Ins. Co.,
244 S.C. 95, 135 S.E.2d, 620 (1964)).

3. Statutes of Limitation

The statute of limitations in South Carolina for causes of action based
in contract or tort is three years. S.C. Code Ann. § 15-3-530(1). The same
time limitation applies for an action on any life insurance policy. S.C. Code
Ann. § 15-3-530(8). Timing requirements found in South Carolina insurance
laws may impact the three-year period. See e.g., S.C. Code Ann. § 38-63-220.
The Supreme Court of South Carolina has held that a cause of action accrues,
and the statute of limitations begins to run, when an insurer denies a claim.
Bennett v. N.Y. Life Ins. Co., 197 S.C. 498, 15 S.E.2d 743, 745 (1941). In
addition, South Carolina courts have held that the three-year period does not
begin to run until the injury is discoverable. E.g., Martin v. Companion
2005); Republic Contracting Corp. v. S.C. Dep’t of Highways & Pub. Transp.,
332 S.C. 197, 205-10, 503 S.E.2d 761, 765-68 (Ct. App. 1998); Dean v. Ruscon

VI. Beneficiary Issues

South Carolina statutes require insurance policies to include sections
specific to beneficiaries. With regard to individual life insurance, S.C.
Code Ann. § 38-63-220(g) requires policies to include “a provision stating
how the beneficiary is designated and how the beneficiary may be changed.”
With regard to accident and health insurance, S.C. Code Ann. § 38-71-340(12)
requires a provision specifying “the insured can change the beneficiary at
any time by giving the company written notice. The beneficiary’s consent is
not required for this or any other change in the policy, unless the
designation of the beneficiary is irrevocable.”

Specifying whether or not an insured reserves the right to change the
beneficiary is important with regards to the rights of the beneficiary.
“When an insured reserves the right to change the beneficiary, the named
beneficiary does not have a vested right during the insured’s lifetime.”
144, 146 (1982)). The beneficiary has a “mere expectancy” and “complete
control of the policy remains in the insured.” Horne, 277 S.C. at 338, 287
S.E.2d at 146. Whereas, when an insured does not reserve the right to change
the beneficiary, “the beneficiary, upon the issuance of the policy, acquires
a vested interest in the proceeds of the insurance when available according
to the terms of the policy, which cannot be divested by any act of the
insured.” Prince, 390 S.C. at 170, 700 S.E.2d at 282 (quoting Waters v. S.
2005)). Further, courts will enforce contracts entered into by an insured
agreeing not to change the beneficiary, even though the insured reserved the
right to change the beneficiary under the terms of an insurance policy. Lane

South Carolina follows the general rule that “absent waiver, an insured
must substantially comply with the method the policy prescribes for changing
the beneficiary.” Life of Georgia Life Ins. Co. v. Bolton, 333 S.C. 406,
S.E.2d at 146). Courts defer to the specific language of an insurance policy when deciding if an insured substantially complied with the requirements for changing the beneficiary. See e.g. 
Horne, 277 S.C. 336, 287 S.E.2d 144; Lane, 307 S.C. 230, 414 S.E.2d 177; Waters, 365 S.C. 519, 617 S.E.2d 385. Substantial compliance is determined on a case by case basis and courts have found substantial compliance even in instances where the insurer did not have record of a change in beneficiary request. Bolton, 333 S.C. at 411, 509 S.E.2d at 491 (holding that change of beneficiary form executed in front of insurer’s agent constituted substantial compliance even though form was never received by insurer).

Divorce does not automatically affect the beneficiary of insurance policies. With regard to accident and health insurance, S.C. Code Ann. § 38-71-170 specifically prohibits policy provisions that terminate coverage solely as a result of divorce. Section 38-71-170 states:

No policy or certificate of accident, health, or accident and health insurance issued or delivered in this State which in addition to covering the insured also provides coverage to the spouse of the insured may contain a provision for termination of coverage for a spouse covered under the policy solely as a result of a break in the marital relationship except by reason of an entry of a valid decree of divorce between the parties.

Policies that contain a provision terminating coverage pursuant to entry of a valid decree of divorce must contain a provision that provides the divorced spouse the option to obtain, upon application and payment of premiums, coverage similar to the terminated coverage. S.C. Code Ann. § 38-71-170.

While divorce itself does not automatically change the beneficiary, an insured who reserved the right to change the beneficiary may do so at any time provided there are no binding contracts or court orders to the contrary. An agreement made in open court and approved by a judge is fully enforceable to prevent an insured from changing the beneficiary. Lane v. Williamson, 307 S.C. 230, 233-34, 414 S.E.2d 177, 179 (Ct. App. 1992) (holding that insured contracted away his right to change the beneficiary as part of divorce settlement agreement).

VII. Interpleader Actions

A. Availability of Fee Recovery

In First Union Nat. Bank of South Carolina v. FCVS Commc’ns, 328 S.C. 290, 292 (1997), a bank brought an interpleader action to resolve conflicting claims to a bank account held in a partnership’s name. The circuit court granted interpleader, dismissed the bank from suit with prejudice, and summarily denied the bank’s motion for attorneys’ fees. Id. On cross-appeals, the court of appeals affirmed in part, reversed in part, and remanded. Id. On certiorari, the Supreme Court held, in pertinent part, that the bank was not entitled to attorney’s fees on the theory that it was a mere innocent stakeholder in the case. Id. at 293. The Court noted, “[a]ttorney’s fees are not recoverable unless authorized by contract or statute.” Id.

B. Differences in State vs. Federal Circuit
In contrast to South Carolina state court (as discussed in Section VII, subsection A, above), in South Carolina district court, it is discretionary with the court as to whether to award fees to a plaintiff in an interpleader action. See, e.g., Guardian Life Ins. Co. v. Engel, 2010 WL 1027614, *2 (D.S.C. 2010) (noting courts have the authority to award within their discretion costs and attorneys’ fees to a stakeholder in interpleader actions); Ohio Nat’l Life Assur. Corp. v. Morris, 2006 WL 3479030, *5 (D.S.C. 2006) (noting it is “settled that a disinterested stakeholder may be entitled to attorneys fees and costs” and that “the matter is discretionary with the court” and “governed by equitable principles as well”); Bucksport Water System, Inc. v. Weaver Engineering, Inc., 2013 WL 5914410, *6 n.5 (D.S.C. 2013) (collecting cases). This is in line with Fourth Circuit decisions on this point. See, e.g., Trustees of Plumbers and Pipefitters Nat. Pension Fund v. Sprague, 251 Fed. Appx. 155, 156 (4th Cir. 2007) (noting despite the lack of an express reference in the federal interpleader statute to costs or attorney’s fees, federal courts have held that it is proper for an interpleader plaintiff to be reimbursed for costs associated with bringing the action forward).