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South Carolina

REGULATORY LIMITS ON CLAIMS HANDLING

Insurance Companies doing business in South Carolina must adhere to an expansive list of "trade practices" and "claims practices," as established by the South Carolina Legislature. These laws can be found at S.C. CODE ANN. §§ 38-57-10 – 38-57-320, and S.C. Code Ann. §§ 38-59-10 – 38-59-270, respectively. See also S.C. Code Ann. §§ 38-55-10 – 38-55-720, "Conduct of Insurance Business"; S.C. Code Ann. §§ 38-61-10 – 38-61-80, "Insurance Contracts Generally"; S.C. Code Ann. §§ 38-63-10 – 38-63-660, "Individual Life Insurance"; and S.C. Code Ann. §§ 38-65-10 – 38-65-360, "Group Life Insurance"

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 69-80.

Timing for Responses and Determinations

The South Carolina Claims Practices Act governs responses to and determinations of insurance claims for property and casualty insurance and other types of insurance. See S.C. Code Ann. § 38-59-10 et seq. A provision in the Claims Practices Act provides a ninety-day limit in which to pay insurance claims after a demand has been made. S.C. Code Ann. § 38-59-40. If the refusal to pay is made without reasonable cause or in bad faith, the insured is liable for actual damages and attorneys' fees and costs. Id.

The Claims Practices Act also requires that insurers "acknowledge with reasonable promptness pertinent communications with respect to claims arising under its policies." S.C. Code Ann. § 38-59-20(2). Additionally, insurers are required to provide proof of loss forms to insureds within twenty days of notice of the loss or the insured will be considered to have complied with any proof of loss requirement in the policy. S.C. Code Ann. § 38-59-10. No private right of action exists for violation of the requirements of the Claims Practices Act. S.C. Code Ann. § 38-59-270.

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.

Standards for Determination and Settlements

Claims handling standards are set forth in the Claims Practices Act. Among other things, an insurer must "adopt and implement reasonable standards for the prompt investigation and settlement of claims." S.C. Code Ann. § 38-59-20(3). Insurers must also "attempt[] in good faith to effect prompt, fair, and equitable settlement of claims." *Id.* at § 38-59-20(4).

The South Carolina Insurance Trade Practices Act ("ITPA") also is applicable to some claims handling activities. *See* S.C. Code Ann. § 38-57-10 *et seq.* For example, the ITPA prohibits misrepresentations to insureds in connection with adjusting any claims or losses. S.C. Code Ann. § 38-57-70. There is no private right of action under the ITPA. *Masterclean*, 347 S.C. 405, 556 S.E. 2d 371.

The South Carolina Department of Insurance has promulgated numerous regulations which should be consulted as some may impact claims handling. *See* S.C. Code Regs. §§ 69-1 *et seq.* Note, however, that Reg. § 69-19 addressing improper claims practices has been repealed.

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:"

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

PRINCIPLES OF CONTRACT INTERPRETATION

In South Carolina, "[a]n insurance policy is a contract between the insured and the insurance company, and the policy's terms are to be construed according to the law of contracts." Canal Ins. Co. v. Nat'l House Movers, LLC, 414 S.C. 255, 260, 777 S.E.2d 418, 421 (Ct. App. 2015) (citing Auto Owners Ins. Co. v. Rollison, 378 S.C. 600, 663 S.E.2d 484 (2008)). "Courts must enforce, not write, contracts of insurance, and their language must be given its plain, ordinary and popular meaning." Id. at 594, 762 S.E.2d at 709-10 (quoting Sloan Constr. Co. v. Cent. Nat'l

Ins. Co. of Omaha, 269 S.C. 183, 185, 236 S.E.2d 818, 819 (1977)). "'The court cannot torture the meaning of policy language to extend coverage not intended by the parties.'" Precision Walls, Inc. v. Liberty Mut. Fire Ins. Co., 410 S.C. 175, 183-84, 763 S.E.2d 598, 602 (Ct. App. 2014) (quoting S.C. Farm Bureau Mut. Ins. Co. v. Dawsey, 371 S.C. 353, 356, 638 S.E.2d 103, 105 (Ct. App. 2006)).

"Where the contract's language is clear and unambiguous, the language alone determines the contract's force and effect." Canal Ins. Co., 414 S.C. at 260, 777 S.E.2d at 421. "It is a question of law for the court whether the language of a contract is ambiguous." Id. (quoting S.C. Dep't of Nat. Res. v. Town of McClellanville, 345 S.C. 617, 623, 550 S.E.2d 299, 302–03 (2001)). "The construction of a clear and unambiguous contract is a question of law for the court to determine." Id. (citing Hawkins v. Greenwood Dev. Corp., 328 S.C. 585, 592, 493 S.E.2d 875, 878 (Ct. App. 1997)).

"Ambiguous or conflicting terms in an insurance policy must be construed liberally in favor of the insured and strictly against the insurer." Id. (quoting Diamond State Ins. Co. v. Homestead Indus., Inc., 318 S.C. 231, 236, 456 S.E.2d 912, 915 (1995)). "[E]xclusionary terms in a policy are narrowly construed to the benefit of the insured." Hutchinson v. Liberty Life Ins. Co., 404 S.C. 20, 23, 743 S.E.2d 827, 829 (2013) (citing McPherson v. Michigan Mut. Ins. Co., 310 S.C. 316, 426 S.E.2d 770 (1993)).

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.

DUTIES IMPOSED BY STATE LAW

Duty to Defend

1. Standard for Determining Duty to Defend

Insurers have a duty to defend which is separate and distinct from their obligation to indemnify. City of Hartsville v. S. Carolina Mun. Ins. & Risk Fin. Fund, 382 S.C. 535, 544, 677 S.E.2d 574, 578 (2009). The insurer's duty to defend is based on the allegations found in the underlying complaint and facts known to the insurer outside of the complaint. Id. Courts examining the complaint must look past the labels identifying the acts to the acts themselves which form the basis of the claim against the insurer. Collins Holding Corp. v. Wausau Underwriters Ins. Co., 379 S.C. 573, 577, 666 S.E.2d 897, 899 (2008) (citing Prior v. S.C. Med. Malpractice Liab. Ins. Joint Underwriting Ass'n, 305 S.C. 247, 249, 407 S.E.2d 655, 657 (Ct. App. 1991)). "If the underlying complaint creates a possibility of coverage under an insurance policy, the insurer is obligated to defend." City of Hartsville at 543, 677 S.E.2d at 578. An insurer has "no obligation to defend until an action is brought and no obligation to indemnify until a judgment against the insured is obtained." Howard v. Allen, 254 S.C. 455, 461, 176 S.E.2d 127, 129 (1970). "'[A]n insurer has no duty to defend an insured where the damage was caused for a reason unambiguously excluded under the policy.'" USAA Prop. & Cas. Ins. Co. v. Clegg, 377 S.C. 643, 654, 661 S.E.2d 791, 797 (2008) (quoting B.L.G. Enters., Inc. v. First Fin. Ins. Co., 334 S.C. 529, 535, 514 S.E.2d 327, 330 (1999)). "[T]he inclusion of some non-covered claims does not abrogate an insurer's duty to defend when a complaint raises claims covered by the policy." Isle of Palms Pest Control Co. v. Monticello Ins. Co., 319 S.C. 12, 15, 459 S.E.2d 318, 319 (Ct. App. 1994).

2. Issues with Reserving Rights

An insurer may unilaterally reserve its rights to pursue coverage defenses and to seek reimbursement of defense costs spent on claims not potentially covered under the policy. *See Laidlaw Envtl. Serv. (TOC), Inc. v. Aetna Cas. & Sur. Co.*, 338 S.C. 43, 52-53, 524 S.E.2d 847, 852 (Ct. App. 1999).

An insured must be provided sufficient information in a reservation of rights letter to understand reasons the liability insurer believes the policy may not provide coverage; generic denials of coverage coupled with furnishing the insured with a verbatim recitation of all or most of the policy provisions through a cut-and-paste method is not sufficient. For a liability insurer's reservation of rights to be effective, the reservation must be unambiguous. A reservation of rights letter must also give fair notice to the insured that the liability insurer intends to assert defenses to coverage or to pursue a declaratory relief at a later date. *Harleysville Grp. Ins. v. Heritage Communities, Inc.*, 420 S.C. 321, 803 S.E.2d 288 (2017).

State Privacy Laws; Insurance Regulatory Issues; Arbitration/Mediation

The Department of Insurance has promulgated regulations concerning the treatment of nonpublic personal health information and nonpublic personal financial information by all insurance licensees. S.C. Code Ann. Regs. 69-58. These regulations, entitled "Privacy of Consumer Financial and Health Information," at a minimum, comport with the Gramm-Leach-Bliley Act. S.C. Code Ann. Regs. 69-58, § 2.

1. Criminal Sanctions

Under South Carolina law, there are criminal sanctions for insurance fraud. In a civil fraud case, evidence of non-prosecution for criminal arson has been held to be irrelevant and inadmissible. Brown v. Allstate Ins. Co., 344 S.C. 21, 25, 542 S.E.2d 723, 725 (2001).

2. The Standards for Compensatory and Punitive Damages

S.C. Code Ann. §15-32-520(D) provides that punitive damages may be awarded only if plaintiff proves by clear and convincing evidence that his harm was the result of the defendant's wilful, wanton, or reckless conduct.

S.C. Code Ann. §15-32-520(A) and (B) contain provisions addressing bifurcation of punitive damages. S.C. Code Ann. §15-32-520(E) delineates the factors the jury may consider in determining the amount of punitive damages. S.C. Code Ann. §15-32-520(G) provides that, in an action with multiple defendants, a punitive damages award must be specific to each defendant, and each defendant is liable only for the amount of the award made against that defendant.

3. Insurance Regulations to Watch

Insurance companies should be aware of several other South Carolina privacy laws. The Family Privacy Protection Act of 2002 prevents private entities from using personal information obtained from a state agency (*e.g.,* Department of Insurance) for use in commercial solicitation. S.C. Code Ann. § 30-2-50. Additional South Carolina privacy laws include the Rape Shield Law, prohibiting the media publication of the name of a victim of criminal sexual conduct, S.C. Code Ann. § 16-3-730; the Computer Crime Act, S.C. Code Ann. §§ 16-16-10 – 16-16-40; the prohibition of the sale of Social Security numbers, S.C. Code Ann. § 30-4-160; the prohibition of the sale of driver's license material, S.C. Code Ann. § 30-4-165; the privacy of genetic information, S.C. Code Ann. §§ 38-93-10 – 38-93-90; the Prescription Information Privacy Act, S.C. Code Ann. §§ 44-117-10 – 44-117-50; and the privacy of automobile accident information from acquisition pursuant to commercial solicitation, S.C. Code Ann. § 56-5-1275.

4. State Arbitration and Mediation Procedures

The South Carolina ADR Rules set out guidelines for mediation and arbitration in circuit court. Alternative Dispute Resolution is now mandatory in all 46 counties in South Carolina for circuit court (subject to certain exceptions, listed in Rule 3(b), SCADR). The South Carolina ADR Rules provide for the procedures for alternative dispute resolution.

5. State Administrative Entity Rule-Making Authority

South Carolina Administrative Entity Rule-Making Authority is governed by S.C. Code Ann. §1-23-10 et. seq.

EXTRACONTRACTUAL CLAIMS AGAINST INSURERS: ELEMENTS AND REMEDIES

Bad Faith Claim Handling/Bad Faith Failure to Settle Within Limits

1. First Party

To recover for bad faith refusal to pay, an insured must show: (1) the existence of a mutually binding contract of insurance between the plaintiff and the defendant; (2) the insurer's refusal to pay benefits or meet any obligation owed by the insured under the contract; (3) the insurer's refusal is a result of bad faith or unreasonable action in breach of an implied covenant of good faith or fair dealing arising on the contract; and (4) damages resulting from the refusal to pay. Mixson, Inc. v. American Loyalty Ins. Co., 349 S.C. 394, 398, 562 S.E.2d 659, 661 (Ct. App. 2002); see also Carolina Bank & Trust Co. v. St. Paul Fire & Marine Co., 279 S.C. 576, 580, 310 S.E.2d 163, 165 (Ct. App. 1983) (recognizing that bad faith claim may result from unreasonable refusal to pay or process claim as well as any other obligation undertaken by insurer for the insured such as an insurer's contractual obligations to pay third parties). An insurer acts in bad faith where there is no reasonable basis to support the insurer's decision. See American Fire & Cas. Co. v. Johnson, 332 S.C. 307, 311, 504 S.E.2d 356, 358 (Ct. App. 1998) ("Bad faith is a knowing failure on the part of the insurer to exercise an honest and informed judgment in processing a claim."). "Bad faith" is a separate tort cause of action under South Carolina law and is not merely a contract remedy. Charleston County Sch. Dist. v. State Budget & Control Bd., 313 S.C. 1, 7-8, 437 S.E.2d 6, 9-10 (1993).

"[A]n 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); see also Helena Chem. Co. v. Allianz Underwriters Ins. Co., 357 S.C. 631, 645, 594 S.E.2d 455, 462 (2004). "Whether such an objectively reasonable basis for denial exists depends on the circumstances existing at the time of the denial." Id. An insurer is not insulated from liability for bad faith merely because there is a lack of clear precedent resolving a coverage issue raised under the particular facts of the case. Mixson, Inc. v. American Loyalty Ins. Co., 349 S.C. 394, 400, 562 S.E.2d 659, 662 (Ct. App. 2002).

2. Third-Party

Generally, South Carolina law does not recognize a third-party tort action for bad faith refusal to pay benefits. See Charleston Dry Cleaners & Laundry, Inc. v. Zurich Am. Ins. Co., 355 S.C. 614, 617-18, 586 S.E.2d 586, 588 (2003) ("In South Carolina, although the insurer owes the insured a duty of good faith and fair dealing, this duty of good faith arising under the contract does not extend to a person who is not a party to the insurance contract. Thus, no bad faith claim can be brought against an independent adjuster or independent adjusting company." (internal citations omitted)). A very narrow exception has been created for a spouse who sues based on the insurer's bad faith refusal to pay the benefits of the insured spouse. Ateyeh v. Volkswagen of Florence, Inc., 288 S.C. 101, 103, 341 S.E.2d 378, 380 (1986) (finding wife had standing based on her derivative relationship to the policyholder husband created by unique doctrine in South Carolina, the necessaries doctrine, which makes wife personally liable for the bills of the insured). In addition, while not specifically addressing the question, case law suggests that an insured may assign its bad faith rights to a third-party claimant. See Peterson v. West Am. Ins. Co., 336 S.C. 89, 93, 518 S.E.2d 608, 610 (Ct. App. 1999) (noting that insurer assigned rights to third party who brought bad faith action against insurer). South Carolina federal courts have recognized that a third party may acquire standing

through the assignment of the first party bad faith cause of action. Davis v. Liberty Mut. Ins. Co., No. 9:15-CV-2818, 2015 WL 6163243, at *4 (D.S.C. Oct. 19, 2015); see also Whittington v. Nationwide Mut. Ins. Co., 263 S.C. 141, 144, 208 S.E.2d 529, 529-30 (1974); Hodges v. State Farm Mut. Auto. Ins. Co., 488 F. Supp. 1057, 1059 (D.S.C. 1980).

If the insured proves bad faith against the insurer, the insured can recover actual and consequential damages. Nichols v. State Farm Mut. Auto. Ins. Co., 279 S.C. 336, 340, 306 S.E.2d 616, 619 (1983). Consequential damages also include recovery for attorneys' fees caused by the insurer's tortious conduct. Brown v. South Carolina Ins. Co., 284 S.C. 47, 55-56, 324 S.E.2d 641, 646-47 (Ct. App. 1984) (recognizing the insured had reasonably foreseeable attorneys' fees caused by insurer's bad faith refusal to perform the insurance contract), overruled on other grounds, Charleston Cnty. Sch. Dist. v. State Budget & Control Bd., 313 S.C. 1, 8, 437 S.E.2d 6, 9 (1993) (explicitly overruling Brown only to the extent that Brown suggested a bad faith action is based in contract rather than tort).

"An insurer is liable to the policy holder for all reasonable attorneys' fees for the prosecution of the case against the insurer if the trial judge finds the refusal to pay the policyholder's claim was without reasonable cause or in bad faith." Mixson, Inc. v. American Loyalty Ins. Co., 349 S.C. 394, 400-01, 562 S.E.2d 659, 663 (Ct. App. 2002) (citing S.C. Code Ann. § 38-59-40, but recognizing the statutory claim for attorneys' fees as an alternative to the bad faith tort action); cf. Nichols at 342, 306 S.E.2d at 620 (holding that attorneys' fees under former Code section 38-9-320 (now 38-59-40(1)) are recoverable only under breach of contract). The Claims Practices Act allows for the recovery of attorneys' fees when an insurer refuses to pay proceeds without reasonable cause or if the refusal was in bad faith. S.C. Code Ann. § 38-59-40.

In addition, if the insured demonstrates by clear and convincing evidence that the insurer's actions were willful or in reckless disregard of the insured's rights, then the insured may recover punitive damages. Nichols, 279 S.C. at 340, 306 S.E.2d at 619; see also James v. Horace Mann Ins. Co., 371 S.C. 187, 638 S.E.2d 667 (2006).

Fraud

In South Carolina, an insured may bring a variety of fraud-type actions against an insurer, including actual or constructive fraud, fraudulent concealment, or negligent misrepresentation or omission. To recover for actual fraud, a plaintiff must prove nine essential elements: (1) a representation; (2) its falsity; (3) its materiality; (4) either knowledge of its falsity or a reckless disregard of its truth or falsity; (5) intent that the representation be acted upon; (6) the hearer's ignorance of its falsity; (7) the hearer's reliance on its truth; (8) the hearer's right to rely thereon; and (9) the hearer's consequent and proximate injury. Pitts v. Jackson Nat'l Life Ins. Co., 352 S.C. 319, 334, 574 S.E.2d 502, 509 (Ct. App. 2002). To establish constructive fraud, a plaintiff must prove all the elements of actual fraud except the element of intent. Id. at 333, 574 S.E.2d at 509. South Carolina courts have held as to constructive fraud claims, however, that there is no right to rely on a false representation, where the parties are mature and educated, have conducted an arm's length transaction, and do not share a confidential or fiduciary relationship. Id. at 334, 574 S.E.2d at 509.

To establish a claim of fraudulent concealment, a plaintiff must prove all nine elements of actual fraud with the following variations. As to the first two elements, the plaintiff must show that the defendant had a duty to disclose and failed to do so. Id. at 335, 574 S.E.2d at 510. The duty to disclose arises in three distinct circumstances: (1) where a preexisting, definite fiduciary relationship exists between the parties; (2) where one party expressly creates a trust and confidence in the other with reference to the particular transaction, or else such a trust and confidence is implied from the circumstances of the case, or the nature of the parties' dealings or

position towards each other; and (3) where the contract in question is of such a nature the parties are necessarily fiduciaries. Id. at 335, 574 S.E.2d at 510. South Carolina courts have held that a fiduciary relationship does not arise by the mere relationship of the insurer and insured. Id. at 336, 574 S.E.2d at 510-11.

To state a claim for negligent misrepresentation or omission, the plaintiff must allege: (1) the defendant made a false representation to or failed to advise the plaintiff; (2) the defendant had a pecuniary interest in making or omitting 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 or omission; and (6) the plaintiff suffered a pecuniary loss as the proximate result of his reliance upon the representation. Kelly v. South Carolina Farm Bureau Mut. Ins. Co., 316 S.C. 319, 323-24, 450 S.E.2d 59, 62 (Ct. App. 1994); Trotter v. State Farm Mut. Auto. Ins. Co., 297 S.C. 465, 471, 377 S.E.2d 343, 347 (Ct. App. 1988) (addressing an omission).

Intentional or Negligent Infliction of Emotional Distress

No South Carolina cases address an insured's claim against an insurer for intentional or negligent infliction of emotional distress in the context of settlement practices. Generally, to establish a claim for the intentional infliction of emotional distress, a plaintiff must show: "(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 person could be expected to endure it." *Argoe v. Three Rivers Behavioral Center and Psychiatric Solutions*, 388 S.C. 394, 401-02, 697 S.E.2d 551, 555 (2010); *see also Bergstrom v. Palmetto Health Alliance*, 358 S.C. 388, 401, 596 S.E.2d 42, 48 (2004) (*citing Ford v. Hutson*, 276 S.C. 157, 162, 276 S.E.2d 776, 779 (1981)).

South Carolina law recognizes that bystanders may recover for negligent infliction of emotional distress ("NIED"). The elements of an NIED claim 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 v. Augusta Sash & Door Co.*, 286 S.C. 579, 582-83, 336 S.E.2d 465, 467 (1985).

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). Accordingly, "all unfair trade practices regarding the insurance business are regulated by the [ITPA], and are exempt from the coverage of SCUTPA." *Trustees of Grace Reformed Episcopal Church v. Charleston Ins. Co.*, 868 F. Supp. 128, 130–31 (D.S.C. 1994). There is no private right of action for a violation of the ITPA or the Claims Practices Act. *Masterclean, Inc. v. Star Ins. Co.*, 347 S.C. 405, 556 S.E.2d 371 (2001).

DISCOVERY ISSUES IN ACTIONS AGAINST INSURERS

Discoverability of Claims Files Generally

There are no reported South Carolina cases addressing the discovery of the claim files of insurers. In a bad faith action relating to an insurer's failure to settle a prior suit against its insured, the insurer's files in the former action, including all correspondence between the insurer and counsel employed by the insurer, have been held to be relevant and discoverable. *Chitty v. State Farm Mut. Auto. Ins. Co.*, 36 F.R.D. 37 (E.D.S.C. 1964).

Discoverability of Reserves

There are no reported cases from the South Carolina appellate courts addressing the discoverability of reserves set by insurers. However, at least one federal district court case has held that reserve information is irrelevant and undiscoverable in bad faith claims based on a denial of coverage. *Imperial Textiles Supplies, Inc. v. Hartford Fire Ins. Co.*, No. 6:09-CV-03103, 2011 WL 1743751, at *4 (D.S.C. May 5, 2011). The same court also suggested that reserve information may be relevant and discoverable in bad faith claims based on an insurer's refusal to settle. *Id.* at *9-10 ("The fact that the insurance company established a reserve may be probative on the issue of whether there is a potential for liability in considering a third-party bad faith claim, and thus reserve information may be relevant to the issue of bad faith."). A decision relying on *Imperial Textiles* found that reserve information was relevant on the issues of the insurer's participation in settlement negotiations in the underlying action, as well as the insurer's determination of the insured's potential for liability. *E. Bridge Lofts Prop. Owners Ass'n, Inc. v. Crum & Forster Specialty Ins. Co.*, No. 2:14-CV-2567, 2015 WL 12831727, at *2 (D.S.C. June 18, 2015); *see also ContraVest Inc. v. Mt. Hawley Ins. Co.*, No. 9:15-CV-00304, 2017 WL 1190880, at *11 (D.S.C. Mar. 31, 2017) (finding reserve information relevant); *McCray v. Allstate Ins. Co.*, No. 3:14-CV-02623, 2015 WL 6408048, at *6 (D.S.C. Oct. 22, 2015) (denying motion to compel production of reserve information because insured had not demonstrated that reserve information was relevant to bad faith denial of coverage).

Discoverability of Existence of Reinsurance and Communications with Reinsurers

There are no reported cases from the South Carolina appellate courts addressing the discoverability of reinsurance information and communications. One recent federal district court decision found that reinsurance information and communications were relevant and discoverable on the issue of why the insurer changed its coverage position over time. *ContraVest*, 2017 WL 1190880, at *10.

Attorney/Client Communications

A non-absolute privilege may exist, depending on the circumstances of the specific situation, between an insured and an attorney employed by an insurance company to represent both the company and the insured. *Duplan Corp. v. Deering Milliken, Inc.*, 397 F. Supp. 1146 (D.S.C. 1975). Several decisions by federal district courts in South Carolina have allowed discovery of communications between an insurer and outside counsel regarding the decision to deny coverage where the insurer later raises the affirmative defenses of reasonableness and good faith to an insured's bad faith claim. *See, e.g.*, *ContraVest Inc. v. Mt. Hawley Ins. Co.*, No. 9:15-CV-00304, 2017 WL 1190880, at *1 (D.S.C. Mar. 31, 2017); *Graham v. Nat'l Union Fire Ins. Co. of Pittsburgh, PA*, No. 0:16-CV-01153, 2017 WL 116798, at *4 (D.S.C. Jan. 12, 2017); *State Farm Fire & Cas. Co. v. Admiral Ins. Co.*, No. 4:15-CV-2745, 2016 WL 4051271, at *4 (D.S.C. July 25, 2016). A recent decision by the Supreme Court of South Carolina provided a framework for determining when communications between an insurer and outside counsel are discoverable in a bad faith claim. *In re Mt. Hawley Ins. Co.*, 427 S.C. 159, 829 S.E.2d 707 (2019). The Court provided that an insurer has waived attorney-client privilege when: (1) the insurer asserts a defense to the

insured's bad faith claim that necessarily includes information learned from counsel, the truth of which cannot be discovered without exploring communication with counsel; and (2) the insured must make a prima facie showing of bad faith. *Id.* at 174, 829 S.E.2d at 716. Applying the Supreme Court of South Carolina's analysis, federal district courts in South Carolina have subsequently found that the insurer had not waived the attorney-client privilege and that communications with outside counsel were not discoverable. *See ContraVest Inc. v. Mt. Hawley Ins. Co.*, No. 9:15-CV-00304, 2020 WL 1877911, at *7 (D.S.C. Jan. 21, 2020); *Harriman v. Associated Industries Ins. Co., Inc.*, No. 2:18-CV-02750, 2020 WL 2793610, at *6 (D.S.C. May 29, 2020).

An attorney-client relationship does not exist between an underinsured motorist coverage (UIM) carrier's attorney and the named defendant in an action, and, therefore, it was held that a UIM carrier's attorney could not assert the attorney-client privilege to protect communications with the named insured. *Crawford v. Henderson,* 356 S.C. 389, 589 S.E.2d 204 (Ct. App. 2003).

DEFENSES IN ACTIONS AGAINST INSURERS

Misrepresentations/Omissions: During Underwriting or During Claim

"In order to rescind an insurance policy on the ground of fraudulent misrepresentation, the insurer must show by clear and convincing evidence: (1) the statement was false; (2) the falsity was known to the applicant; (3) the statement was material to the risk; (4) the statement was made with the intent to defraud the insurer; and (5) the insurer relied on the statement when issuing the policy." *Primerica Life Ins. Co. v. Ingram*, 365 S.C. 264, 616 S.E.2d 737 (Ct. App. 2005) (*citing Strickland v. Prudential Ins. Co.*, 278 S.C. 82, 86, 292 S.E.2d 301, 304 (1982)). "Answers to oral questions asked of the insured by insurer's agent when applying for insurance are only representations and such answers even if false are not sufficient to avoid the policy unless they are material to the risk, known to the applicant to be false, made with intent to mislead and defraud the insurer and are relied upon by the insurer as a basis for the issuance of the policy." *Graham v. Aetna Ins. Co.*, 243 S.C. 108, 111, 132 S.E.2d 273, 274 (1963).

Failure to Comply with Conditions

"In South Carolina the failure of the insured to comply with the obligations of the contract will release the insurer from liability. But avoidance of coverage will only be allowed where the insurer has shown that the failure to cooperate prejudiced the insurer's defense of the case." *Hodges v. State Farm Mut. Auto. Ins. Co.*, 488 F. Supp. 1057, 1061 (D.S.C. 1980). "Furthermore, the insurer must be reasonable in its demands and diligent in its efforts to secure the cooperation of the insured." *Evans v. American Home Assur. Co.*, 252 S.C. 417, 420, 166 S.E.2d 811, 813 (1969). A misstatement of fact by the insured, if made recklessly or in bad faith, may under some circumstances constitute a failure to cooperate within the meaning of the policy. *Crook v. State Farm Mut. Auto. Ins. Co.*, 235 S.C. 452, 112 S.E.2d 241 (1960).

Challenging Stipulated Judgments: Consent and/or No-Action Clause

A liability policy may impose a condition precedent to the commencement of an action by the insured by barring suit against the insurer until there has been a judgment against the insured or a settlement approved by the insurer. *See Sexton v. Harleysville Mut. Cas. Co.*, 242 S.C. 182, 130 S.E.2d 475 (1963). Pursuant to a "no action" clause, the insured has no right of action against the insurer in the absence of a judgment against him or an agreement entered into by all parties fixing the amount of damages. *Id.* at 188, 130 S.E.2d at 478.

Preexisting Illness or Disease Clauses

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.

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)).

Statutes of Limitations and Repose

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 Healthcare Corp.*, 357 S.C. 570, 575-76, 593 S.E.2d 624, 627-28 (Ct. App. 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 Corp.*, 321 S.C. 360, 363-64, 468 S.E.2d 645, 647 (1996).

Actions on a policy of fire insurance and actions on contract or tort are subject to a three-year limitations period. *See* S.C. Code Ann. § 15-3-530(1), (8). The action must be commenced within three years after the insured knew or by the exercise of reasonable diligence should have known that he had a cause of action. *See* S.C. Code Ann. § 15-3-535. It has been held that the limitations period begins to run once the insurer has denied the insured's claim. *Bennett v. New York Life Ins. Co.*, 197 S.C. 498, 15 S.E.2d 743 (1941). However, the insurer may be estopped from asserting the statute of limitations as a defense if the insured's delay in bringing suit was induced by the insurer's conduct. *Kleckley v. Nw. Nat. Cas. Co.*, 338 S.C. 131, 136, 526 S.E.2d 218, 220 (2000). "Such inducement may consist of an express representation that the claim will be settled without litigation or conduct that suggests a lawsuit is not necessary. The [insurer's] conduct may also involve inducing the [insured] either to believe that an amicable adjustment of the claim will be made without suit or to forbear exercising the right to sue." *Id.* at 136-37, 526 S.E.2d at 220.

TRIGGER AND ALLOCATION ISSUES FOR LONG-TAIL CLAIMS

Trigger of Coverage

The South Carolina Supreme Court has held that for commercial general liability policies, "coverage is triggered at the time of an injury-in-fact and continuously thereafter to allow coverage under all policies in effect from the time of injury-in-fact during the progressive damage." *Crossman Cmtys. of N.C. v. Harleysville Mut. Ins. Co.*, 395

S.C. 40, 56, 717 S.E.2d 589, 597 (2011).

Allocation Among Insurers

South Carolina has adopted the "time on risk" approach. *Id.* at 50, 717 S.E.2d at 594. Under this approach, "each triggered insurer must indemnify only for the portion of the loss attributable to property damage that occurred during its policy period." *Id.* at 52, 717 S.E.2d at 595. "[T]he 'time on risk' approach requires a policyholder to bear a pro rata portion of the loss corresponding to any portion of the progressive damage period during which the policyholder was not insured or purchased insufficient insurance." *Id.* at 50, 717 S.E.2d at 594.

If "it is impossible to know the exact measure of damages attributable to the injury that triggered each policy," South Carolina has adopted the following "default rule" for applying the time on risk approach:

> The basic formula consists of a numerator representing the number of years an insurer provided coverage and a denominator representing the total number of years during which the damage progressed. This fraction is multiplied by the total amount the policyholder has become liable to pay as damages for the entire progressive injury.

Id. at 65, 717 S.E.2d at 602. This default rule "assumes the damage occurred in equal portions during each year that it progressed." *Id.* However, "[i]f proof is available showing that the damage progressed in some different way, then the allocation of losses would need to conform to that proof." *Id.*

Allocation based on time on risk does not apply to punitive damages. *Harleysville Grp. Ins. v. Heritage Communities, Inc.*, 420 S.C. 321, 803 S.E. 2d 288 (2017).

CONTRIBUTION ACTIONS

Claim in Equity vs. Statutory

Under South Carolina law, an insurer's right of contribution from a co-insurer arises in equity. *Canal Ins. Co. v. Ranger Ins. Co.*, 489 F. Supp. 492, 496 (D.S.C. 1980) (*citing Cooper v. Georgia Cas. & Sur. Co.*, 244 S.C. 286, 292, 136 S.E.2d 774, 777 (1964) ("The rule of contribution is an equitable rule and is based on the fact that those who insure or become sureties for the same duty ought the share the results of the default." (citation omitted))).

Elements

In order for a right of contribution to arise, the co-insurers must insure (1) the same interest against (2) the same casualty. *Laurens Fed. Sav. & Loan Ass'n v. Home Ins. Co. of New York*, 242 S.C. 226, 234, 130 S.E.2d 558, 561 (1963). The insurer seeking contribution must also have paid pursuant to the policy and must have had either an obligation to pay or uncertain obligations. *Travelers Ins. Co. v. Allstate Ins. Co.*, 249 S.C. 592, 597, 155 S.E.2d 591, 593 (1967); *see also Nat'l Grange Mut. Ins. Co. v. Firemen's Ins. Co. of Newark, New Jersey*, 310 S.C. 116, 119, 425 S.E.2d 754, 757 (Ct. App. 1992) (stating that insurer who paid full amount of loss was not a volunteer where its obligations were uncertain and it could have been exposed to a bad faith claim.

DUTY TO SETTLE

Insurers must "attempt[] in good faith to effect prompt, fair, and equitable settlement of claims." S.C. Code Ann. § 38-59-20(4). "In South Carolina, a liability insurer owes its insured a duty to settle a personal injury claim covered by the policy, if settlement is the reasonable thing to do." *Trotter v. State Farm Mut. Auto. Ins. Co.*, 297 S.C. 465, 475, 377 S.E.2d 343, 349 (Ct. App. 1988) (citing *Tyger River Pine Co. v. Maryland Cas. Co.*, 163 S.C. 229, 161 S.E. 491 (1931)); *see also Trimper v. Nationwide Ins. Co.*, 540 F. Supp. 1188, 1192-93 (D.S.C. 1982) ("It has long been the law in South Carolina that a liability insurer owes its insured a duty to defend and settle actions brought against its insured in good faith and with reasonable care for the rights of the insured."). "Unreasonable refusal on the insurer's part to accept an offer of compromise settlement has been held to render it liable in tort to the insured for the amount of the judgment against the insured in excess of policy limits." *Trimper*, 540 F. Supp. at 1193. An insurer's unreasonable refusal to settle a matter within policy limits will subject the insurer to liability. *Tyger River*, 170 S.C. 286, 170 S.E. 346.

LH&D BENEFICIARY ISSUES

Change of Beneficiary

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." *Prince v. Liberty Life Ins. Co.*, 390 S.C. 166, 170, 700 S.E.2d 280, 282 (Ct. App. 2010) (citing *Horne v. Gulf Life Ins. Co.*, 277 S.C. 336, 338, 287 S.E.2d 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. Farm Bureau Life Ins. Co.*, 365 S.C. 519, 523, 617 S.E.2d 385, 387 (Ct. App. 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 v. Williamson*, 307 S.C. 230, 234, 414 S.E.2d 177, 179 (Ct. App. 1992).

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, 410, 509 S.E.2d 488, 491 (Ct. App. 1998) (citing *Horne*, 277 S.C. at 339, 287 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).

Effect of Divorce on Beneficiary Designation

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).

INTERPLEADER ACTIONS

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.* In at least on instance, however, the Court of Appeals upheld an award of attorney's fees that had been awarded under the doctrine of equitable indemnification. *See Rakowsky v. Law Offices of Adrian L. Falgione, LLC*, 2018 WL 3578500 *3 (Ct. App 2018).

Differences in State vs. Federal

In contrast to South Carolina state court (as discussed in Section XII, 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).

RECENT OPINIONS OF NOTE

Enforceability of Certain Policy Provisions

The Supreme Court of South Carolina has ruled on the enforceability of several different insurance policy provisions as they relate to public policy. In *Williams v. Gov't Emps. Ins. Co. (GEICO)*, 409 S.C. 586, 762 S.E.2d 705, (2014), a husband and wife were both the named insureds on a policy with $100,000 per person in liability coverage. The husband and wife were both killed when their vehicle was struck by a train. The automobile insurance policy contained a "family step-down provision" which reduced coverage for injured family members from the policy limits of $100,000 to the statutory mandatory minimum limits of $15,000. *Id.* at 592, 762 S.E.2d at 708. The insureds' estates filed a declaratory judgment action claiming the "family step-down provision" violated public policy. The Supreme Court interpreted S.C. Code Ann. § 38-77-142(C) to hold that that once the face amount of coverage is agreed upon, it may not be arbitrarily reduced or limited by conflicting policy provisions that effectively retract this stated coverage. *Id.* at 604, 762 S.E.2d at 715. The Court found the policy provision to be void as a violation of public policy. *Id.* at 608, 762 S.E.2d at 717.

Similarly, in *Nationwide Mt. Fire Ins. Co. v. Walls*, 433 S.C. 206, 858 S.E.2d 150 (2021), the Supreme Court examined the enforceability of a "criminal conduct step-down provision." In *Walls*, police attempted to pull over a permissive driver of the insured vehicle when the permissive driver suddenly began fleeing from the police before ultimately losing control of the vehicle. *Id*. at *1. The automobile insurance policy contained a provision which reduced the stated policy limits of $100,000 to the minimum required limits should injury or damage be caused "while fleeing a law enforcement officer." *Id.* The Court heard the declaratory judgment action, analyzed S.C. Code Ann. § 38-77-142(C), and again found the policy provision to be void as a violation of public policy. *Id*. at *4.

In contrast to *Williams* and *Walls*, the notice clause in an automobile insurance policy was found to be valid. In *Neumayer v. Philadelphia Indemnity Ins. Co.*, 427 S.C. 261, 831 S.E.2d 406 (2019), suit was filed and served upon insured driver who had struck a pedestrian. Insured driver did not answer or respond to the lawsuit, insured driver was found in default, and a default judgment was entered. *Id*. at 264, 831 S.E.2d at 407. The insurer was not made aware of the lawsuit or the default judgment until 18 months later. *Id*. Insurer argued that it was only liable for the minimum required limits as it was prejudiced by the insured's failure to provide notice of the lawsuit. *Id*. The Court analyzed S.C. Code Ann. § 38-77-142(C), weighed public policy considerations, and held that an insurer may continue to invoke notice clauses to deny coverage above the statutory limits, providing the insurer can prove that it was substantially prejudiced by its insured's failure to comply with the provision. *Id*. at 273, 831 S.E.2d at 412.

Additionally, the Court evaluated the enforceability of a "named driver exclusion" in *Nationwide Ins. Co. of America v. Knight*, 433 S.C. 371, 858 S.E.2d 633 (2021). Insured signed a named driver exclusion which excluded her husband from all coverages under her automobile policy. Husband was killed while riding his motorcycle and insured wife sought the UIM coverage from her policy, which the insurer denied. The Court provided that as was the case in *Williams*, *Walls*, and *Neumayer*, all that they may do is "apply the relevant statutes to the policy provision." In this instance, the relevant statute was S.C. Code Ann. § 38-77-340. The Court found that "[n]o statute prohibits the exclusion" and that upheld the named driver exclusion as valid.

Recently, the Court in *USAA v. Pickens*, 434 S.C. 60, 862 S.E.2d 442 (2021) held that the named driver exclusion applied to preclude UM coverage when the insured was injured as a passenger in her vehicle being driven by her

son, who was the named driver excluded in the policy.

Intervention in Construction Defect Litigation

In a construction defect lawsuit, *Ex Parte Builders Mutual Ins. Co.*, 431 S.C. 93, 847 S.E.2d 87 (2020), commercial general liability (CGL) insurers moved to intervene in order to request special jury interrogatories and verdict forms on damages. The Court held that CGL insurers for contractors and subcontractors lacked direct interest in construction defect litigation, were not real parties in interest, and, therefore, could not intervene as matter of right. *Id*. at 100, 847 S.E.2d at 91. Further, the Court held that while the insurers are bound by the total jury verdict in the construction defect action, they are not precluded from filing a declaratory judgment action to determine which damages are covered (or not covered) by the different CGL polices. *Id*. at 108, 847 S.E.2d at 95.

Relationship of Attorney And Insurer

In *Sentry Select Ins. Co. v. Maybank Law Firm*, 426 S.C. 154, 826 S.E.2d 270 (2019), the Supreme Court answered a certified question as to whether an insurer may maintain a direct malpractice action against counsel hired to represent its insured. The retained attorney did not timely answer Requests for Admission. The attorney filed a motion seeking additional time to answer the requests, which the circuit court held under advisement until the parties completed mediation. *Id*. at 156, 826 S.E.2d 271. The insurer settled the case at mediation for $900,000, and claimed that the attorney had previously represented to the insurer that the case could settle in a range of $75,000 to $125,000. *Id*. at 157, 826 S.E.2d 271. Insurer then filed suit against the attorney for malpractice. The Supreme Court held that "an insurer may bring a direct malpractice action against counsel hired to represent its insured" for breach of duty to the client when "the insurer proves the breach is the proximate cause of damages to the insurer." *Id*. at 158, 826 S.E.2d 272. If the interests of the client are the slightest bit inconsistent with the insurer's interests, there can be no liability of the attorney to the insurer. *Id*. In a case in which an insurer brings "an action against the lawyer it hires to represent its insured, the insurer must prove its case by clear and convincing evidence." *Id*. at 161, 826 S.E.2d 273.

Dram-Shop Action against an Insurer

In *Denson v. National Casualty Co.*, 2023 WL 2672096 (2023), the Supreme Court answered "no" to a certified question as to whether a person is entitled to bring a dram-shop action against a business' insurer after failure to notify the S.C. Dept. of Revenue of a lapse or termination of coverage. In the underlying case, Mr. Denson was killed in an automobile accident caused by a drunk driver who was allegedly overserved at a bar. National Casualty had insured the bar under a general liability policy with a liquor liability endorsement, but at the time of the accident, the bar had failed to renew the liquor liability coverage. The liquor liability coverage is statutorily mandated for establishments that sell alcohol under S.C. Code Ann. §61-2-145. Under that same Code provision, insurers are required to notify the S.C. Dept. of Revenue if there is lapse or termination of an establishment's liquor liability coverage. Mr. Denson's estate brought a negligence action against National Casualty alleging they were directly liable for failing to comply with the notice statute. The Court held that S.C. Code Ann. §61-2-145(C) does not create a private right of action in favor of an injured party against a business' insurer.