I. LEGISLATIVE REGULATION

A. Insurance Defined

1. Insurance defined: a contract whereby one undertakes to indemnify another or pay a specified amount upon determinable damages.
    a) Must be issued by an insurance company
    b) Payable upon certain contingencies
    c) A mechanism for spreading loss (a form of indemnification; insurers are in the business of spreading risk; insurance shifts the risk to the insurers.)
    d) Must have an insurable interest
2. SC Code: contract where one undertakes to indemnify another or pay a specified amount upon determinable contingencies; includes annuities
3. The insurance industry is huge!
4. Insurance contracts are adhesion contracts. But state statutes and courts can change the policy terms.
5. Insurance is a planning device.

B. Regulation

1. Government regulates insurance industry through state legislatures, regulatory agencies, and the judiciary. (Mostly state regulated).
2. Paul v. VA, 1869: issuing an insurance K is not a transaction in commerce, so the federal government can't regulate it.
3. US v. Southeastern Underwriters, 1944: federal antitrust acts apply to insurance transactions; federal government *can* regulate insurance.
4. Legislative regulations:
    a) control rates to make sure they are not:
        (1) inadequate [rates must be high enough to cover payment of claims, profits for insurer, and costs of operation; part of each premium dollar goes to profit, reserves (for claims), and operating],
        (2) excessive [people should be able to afford them], or
        (3) discriminatory [eg, can't charge women higher premiums, LA v. Meynhard];
        (4) Rating bureaus devise rate schedules and submit them to the administrative agency headed by commissioner of insurance for approval; powers of enforcement are granted to the commissioner
    b) prevent unfair practices by insurers;
    c) Prevents insolvency (for protection of insureds)
    d) regulate designated assets and reserves of insurance companies to prevent insurers' insolvency and to protect insureds.
        (1) Make sure the rates are high enough to pay proceeds, profits, and administrative costs, and also making sure they are not discriminatory amount individuals presenting the same risks
5. Other ways of regulating: National Regulation
    a) Regulation of Unfair Competition:
        (1) Federal Unfair Trade Practices Act doesn't apply to insurance.
        (2) Federal *McCarran-Ferguson Act*, 1945: reverse preemption; Congress will leave regulation of insurance to states, but where states don't regulate it, fed law will fill in gaps.

(a) McCarran-Ferguson Act: after 3 year grace period, the Sherman Act, Clayton Act, and FTC Act would be applicable to insurance business to extent not regulated by state law
(i) McC-Ferg 2(b): most tenuous line; question of whether or not a particular area of unfair competition is sufficiently regulated by state law to foreclose federal intervention

(3) *See statutes for McCarran Ferguson Act; starts on p. 2 of supplement
(a) supports total state regulation
(b) 15 USC §1011-1015

(4) SC has unfair trade statutes for insurance.

b) Regulation of Unauthorized Insurers:
(1) Regulated by Uniform Unauthorized Insurers Service of Process Act.
(a) Provides for acquisition of jurisdiction over an out-of-state insurer and an in-state insured through service of process on the state commissioner of insurance

(2) Service on Insurance Commissioner is good against the insurer, even if insurer is not registered in state. (SC)

(3) Regulations are placed by licensing, standard form requirements, monitoring, bankruptcy, and state statutes

c) Prevention of Insolvency:
(1) Licensing requirements
(2) Insurers are exempt from bankruptcy code, cannot declare bankruptcy
(3) Insurers must pay into guarantee fund

d) Standard Form Requirements: forms have been interpreted by the courts, so we know what they mean

e) Annual statements: insurers are not taxed on money in their reserves (that they may have to pay out in claims); annual report is to make sure they aren't overstating their reserves and understating earned surplus. [in mutual companies, policy holders are treated like shareholders]

f) Penalty statutes: eg., claim for bad faith refusal of claims

6. SC regulation:
a) Insurance Commission => Department of Insurance.
(1) Title 38
(a) Establishes Dept. of Insurance; Commission consists of 7 members appointed by the Governor; elects and employs Commissioner
(i) Issues general polices and broad objectives regarding the operation of the insurance industry in SC to the Commissioner, who implements polices and objectives to the people

(b) See p. 3 for start of SC statutes
(i) Definitions
(ii) Dept of insurance and insurance commission established
(iii) Powers and duties of commission and chief insurance commissioner
(iv) Duets of chief insurance commissioner
(v) Enforcement of article; promulgation of regulation
(vi) GET 38-3-110 (page 8)

b) SC Windstorm and Hail Underwriting Ass'n: all insurers who write property insurance must join.

(1) Further regulation by requiring insurers to join the SC Windstorm and Hail Underwriting Assoc.; all private insurers authorized to write and engage in property insurance are in the association unless those insurers' writing are limited to property wholly owned by parent, subsidiary, or allied organizations
  (a) Exclusion only for insurers that write insurance for organizations allied with the insurer through a form of ownership and control
  (b) Does NOT apply to insurers that are merely allied w/on another

7. ERISA Preemption of State law: ERISA preempts the state law claim for bad faith refusal to pay benefits when the bad faith claim arises under an employee benefit plan
   a) **Duncan v. Provident Mutual Life Insurance Co., SC 1993**: Provident moved for grounds to dismiss on 12(b)(6) on ERISA pre-empting state law; court disagreed. (ERISA – Employment Retirement Income Security Act)
      (1) **Cause of action**: participant in (or beneficiary of) a group health insurance plan can bring a civil action to recover benefits due to him under terms of the plan, or clarify rights in the future benefits under the terms of the plan
        (a) State court jurisdiction explicitly under USCA § 1132 (a)(1)(B); concurrent jurisdiction
      (2) **Saving** clause: Where a state has promulgated law governing the insurance issue in controversy, such state law is not preempted by ERISA (excepts ERISA prevention when dealing with insurance)
        (a) **Deemer** clause: provides any state law regulating insurance cannot deem an employee benefit plans to be an insurance company or like insurer (makes clear that a state law that purports to regulate insurance cannot deem an employee benefit plan to be an insurance company)
   b) HELD: that expansive scope of ERISA preempts state common law tort and bad faith actions where they are asserted against an employee benefit plan
      (1) Tort created by Nichols (recognition in an action for bad faith refusal to pay benefits under an insurance policy) is preempted when the bad faith claim is under an employee benefit plan
   c) Bottom line: ERISA does NOT preempt insurance plan actions; does seem to preempt employee benefit plans
   d) ERISA provisions:
      (1) a civil action may be brought by a participant in or beneficiary of a group health insurance plan to recover benefits due to him under the terms of the plan, or to clarify his rights to future benefits under the terms of the plan. Both state courts and federal courts have concurrent jurisdiction over these actions.
      (2) Any state law which relates to employee benefit plans is preempted by ERISA, except that where a state has promulgated law governing/regulating the insurance issue, such state law is not preempted. Any state law regulating insurance cannot deem an employee benefit plans to be an insurance company.
      (3) For a law to regulate insurance, the law must be specifically directed toward the insurance industry.
      (4) Legislative regulation in business of insurance is changing.
   e) State common-law tort and contract actions alleging improper processing of claims for benefits under an employee benefit plan are preempted by ERISA.

II. JUDICIAL REGULATION:

Insurance regulation is generally perceived as statutory control enacted by legislatures and the activities of administrative agencies exercising power delegated by legislators

Judiciary's job is to interpret the insurance statutes – this leads to a retroactive application of the rules in a particular fact pattern

If court decides that an insurance policy provides coverage, the insurer is collaterally estopped from taking the counter position in future cases

Note: other carriers are not bound by this decision, however they normally will adjust their conduct to comply with the judicial decision

I. Contract Interpretation

Process by which the courts determine the language used by parties in a K

K interpretation is the most important function of judiciary in the insurance regulation process

Primary areas where contractual language is difficult to ascertain meaning:

Vague language – imprecise in marginal application (term used "occurrence")
Ambiguity in terms – when multiple means to a terms used
Ambiguity in syntax – imprecision of grammar (including a disease in man's policy that would only apply to a woman)
Ambiguity of organization – misleads/fails to inform insured of extent of coverage
Ambiguity created by extrinsic info – including confusing brochures, certificates, oral explanations

Gambrell v. Travelers Ins. Co., SC 1983:

a) Contract Interpretation principles:
   (1) Insurance policies are subject to general rules of contract construction.
   (2) Give policy language its plain, ordinary, and popular meaning.
b) Statutory interpretation principles:
   (1) legislative intent must prevail if it can be reasonably discovered in the language used
   (2) the words used should be taken in their ordinary and popular sense, unless there is something in the statute requiring a different interpretation.
c) Holding: The purpose of SC Code § 56-9-831 (providing for underinsured motorist coverage) is to provide coverage where the injured party's damages exceed the liability limits of the at-fault motorist. The only limit is that the insured may not have a greater amount of underinsured motorist coverage than he has liability coverage. The injured party here can recover damages exceeding the at-fault motorist's liability coverage to the extent of her underinsured motorist coverage. J. for insured.
d) One buys uninsured motorist coverage to protect himself in case an at-fault driver has no liability coverage or has less liability coverage than required by statutes. One buys underinsured motorist coverage to protect himself in case an at-fault driver has liability coverage but the amount is insufficient to cover the damages sustained.
e) An insurance policy must provide the minimum coverage required by statute.

Edens v. SC Farm Bureau Mut. Ins., SC 1983:

a. Cancellation of insured's policy was ineffective because he never received notice. Insurer must provide coverage. J for insured.

a) **Where language used in an insurance contract is ambiguous, or where it is capable of two reasonable interpretations, that construction which is most favorable to the insured will be adopted.** [why? Because insurance is adhesion K; insured has no bargaining power]
b) Court found that "giving written notice" was ambiguous, and interpreted it to mean actual receipt of the cancellation notice by the insured.
c) Dissent: law only requires the insurer to prove that it properly mailed the cancellation notice; court should not interpret contract to add stricter requirement.

Trimper v. Nationwide Ins., D.SC 1982:

a) Insurance policies are construed most strongly in favor of coverage and against the insurer who drafted them.
b) Every contract imposes on each party a duty of good faith and fair dealing in its performance and enforcement.
c) SC legislature has recognized the quasi-fiduciary nature of insurance companies by creating statutory provisions which benefit consumers.
d) The courts will recognize first-party actions for bad-faith rejection of an insurance claim.
e) Here, the policy required only that there be visible evidence of forcible entry; whether the evidence was sufficient to support a recovery was properly a question for the jury.

Mandatory statutory provisions relating to insurance contracts are held to be part of the contract, and any policy provision which controverts an applicable statute is, to that extent, invalid.

The internal inconsistency created by an exclusion which purports to bar coverage for claims arising out of the very operation sought to be insured renders the policy ambiguous, and the court must resolve that ambiguity in favor of coverage.

A minor insured must affirm or disaffirm his contract in toto and is not allowed to affirm beneficial terms of the policy and disaffirm the burdensome ones.

MCG, Inc. v. Kinghorn Ins. Agency, Ct. App. 1999:

a. Where a motion for summary judgment presents a question as to the construction of a written contract, the question is one of law if the language employed by the agreement is plain and unambiguous.
b. In construing an insurance contract, all its provisions must be considered together; the contract must be read as a whole. That construction will be adopted which will give effect to the whole instrument and each of its various parts, so long as it is reasonable to do so.
c. The court must enforce, not write, insurance contracts; an insurer's obligation under a policy is defined by the terms of the policy itself, and cannot be enlarged by judicial construction.
d. Ambiguous or conflicting terms in an insurance policy must be construed liberally in favor of the insured and strictly against the insurer.
e. If the intention of the parties is clear, courts have no authority to torture the meaning of policy language to extend or defeat coverage that was never intended by the parties.
f. Here, court found the policy was unambiguous and didn't cover damages arising from the use of a car (it is the occurrence itself that is excluded, not the type of damages). J for insurer.

II. Contract Construction

S.C. Code Ann. § 38-61-10 – "all contracts of insurance on property, lives, or interests in this State are considered to be made in…this State and are subject to the laws of this state."

Sangamo Weston, Inc. v. Nat'l Surety Corp., SC 1992:

a. Historically, in insurance coverage disputes, SC Courts have followed the doctrine of *lex loci contractus*, applying the law of the state where the contract was formed. But where § 38-61-10 applies, SC law governs the dispute.
b. Rest. (2d) Conflicts of Law § 193: the law of the place of the insured risk governs unless with respect to the particular issue, some other state has a more significant relationship to the transaction and the parties. [Court declined to consider applying this rule, because the facts of this case were not sufficiently developed.]
c. Under § 38-61-10, it is irrelevant where the contract was entered into, and there is no requirement that the policyholders or insurers be SC citizens. What is solely relevant is where the property, lives, or interests insured are located.
d. The statute is not unconstitutional: for a state's substantive law to be selected consistent with the Full Faith & Credit and Due Process clauses, the state must have a significant contact or aggregation of contacts, creating state interest, such that the choice of its law is neither arbitrary nor fundamentally unfair.

Adhesion Contract: one party having superior bargaining power imposes its choice of terms on the other party. This is what insurance contracts are.

III. Doctrine of Reasonable Expectation – Not Applicable in SC

Requires that insurance K's provide the coverage that the insured reasonably believed he was purchasing

Requires that insurance K provide the coverage that a reasonable person in the place of the insured would expect after reading the policy.

Note: If insured read policy got a meaning from the language that a reasonable person in his position would get, then those expectations would be protected

Allstate v. Magnum, Ct. App. 1989:
a. The theory behind the doctrine of reasonable expectations is that the construction of the language of an insurance contract is not controlled by the same standards as control an arm's length contract.
b. SC does not accept this theory; insurance policies are subject to the general rules of contract construction.
c. If the intention of the parties is clear, the courts have no authority to change the contract in any particular.

Humana Hosp-Bayside v. Lightle, SC 1991: Court reserved ruling on whether the policy's notice requirement should be relaxed and the contract applied as only requiring notice within a reasonable time until the issue is properly before it.

IV. Existence of K of Insurance

Whether a insurance K has been entered into is a question of fact

Layperson who has paid premium can reasonably expect that they will receive immediate coverage

However, insurer may reserve determination of whether applicant has insurable risk
Procedure to reserve:
1. Insurer use "clear and unequivocal" language evidencing intent to do so
2. Call those conditions to applicant's attention

Note: A letter explaining that a policy has lapsed does not form a new insurance K

V. Waiver and Estoppel

Doctrine of *Estoppel*: detrimental reliance on a course of conduct.

Estoppel Elements:

a. Actual misrepresentation
b. Detrimental reliance
c. Arises by operation of law.
d. Bilateral
e. Depends on a prejudicial change of position by the insured.
f. Can't extend scope of risk by estoppel, except insurer can't use the contract to prove that the risk isn't covered, if the insurer mislead the insured to believe that the risk *was* covered.

Crescent Co. v. Ins. Co. of North America, SC 1976:

a. The scope of risk under an insurance policy can be extended by estoppel if the insurer has misled the insured into believing the particular risk is within the coverage. (Insurer cannot use the contract to prove that the risk is not covered.)
b. Elements of equitable estoppel:
    1. Ignorance of the party invoking it of the truth as to the facts in question
    2. Representation or conduct of the party estopped which mislead
    3. Reliance upon such misrepresentations or conduct
    4. Prejudicial change of position as the result of such reliance.

Waiver Elements:

a. Arises by the act of one party (unilateral).
b. Depends on knowledge of the insured.
c. Arises by operation of fact.
d. Waiver must be pleaded in the complaint.
e. Limitations on the doctrine:
    1. Neither the insured nor the insurer can waive a right that exists for a broader public purpose.
    2. The parol evidence rule operates in some situations to constrict the effect of the waiver doctrine.
    3. Some courts have held that the doctrines of waiver and estoppel cannot be used to expand the coverage of a policy, which is to be distinguished from using the doctrine to prevent recision of a policy or a defense to a claim within coverage.

SC Farm Bureau v. Mayer, SC 1994: despite knowing that the insured had another home, the insurer paid the claim in full; the insurance company thus waived its right to claim reimbursement and was estopped from seeking repayment.

Unenforceable provisions are blue-lined from the insurance contract; K as a whole still enforced. (Eg., choice of law provision in insurance K written in another state; SC choice of law statutes will apply. [note that statutes can trump contract terms.])

Note: neither the insurer nor insured can waive statutorily created rights that exist for the broader public purpose

III. SELECTION AND CONTROL OF RISKS

A. Warranties

1. Defined:
    a) Warranty and condition refer to representations or promises by the insured, incorporated into the contract and sale, on the truthfulness or fulfillment of which it is agreed that the promise of the insurer shall depend.

b) condition = an event uncertain to occur which must occur, unless excused, before performance of a duty becomes due

c) warranty = gives an assurance on the part of policy holder that a certain situation exists or will continue which diminishes the likelihood that the event insured against will occur

d) evidentiary conditions doctrine: it imposes a rule of evid. upon the insured to establish that a loss was caused by a risk that the policy was intended to cover and failure to satisfy the literal lang. of the condition will not prevent coverage so long as the insured carries the evidentiary burden

e) Representation vs. Warranty:
   (1) Insurer has the burden of proving the materiality of a misrepresentation before it will be grounds for avoidance. If representation or warranty is material to the risk, policy can be avoided.
   (2) Materiality of a warranty or condition is conclusively presumed (burden shifts to the insured).
   (3) Insurer has burden of proof on materiality of representation.
   (4) Representation will not be grounds for avoidance as long as it is substantially true
   (5) Warranty or condition must be strictly complied with to preclude avoidance.
   (6) A representation can become a warranty. A belief or opinion is not a representation.

f) Elements of Warranty:
   (1) Representation or promise must be expressly included or incorporated by clear reference into the insurance contract
   (2) Contract must clearly show that the parties intended that the rights of the insured would depend on the truth or performance of the warranty or condition
   (3) Clear statement in the written contract that the insured warrants the truth of the statements under penalty of loss of rights under the contract.

g) Types of Warranties:
   (1) ***Affirmative***: statement concerning a fact as of the time the contract is entered into. The fact must be true only at the time the K is made; it not true later, will not be a breach. Warranties presumed to be affirmative and to act only in the present, unless clearly shown to be promissory (to act in the future).
   (2) ***Promissory***: statement or promise about the future or continuing truth of the matter represented. Fact will continue to be true.

h) If possible, courts will interpret a clause in the policy to be something other than a warranty.

i) Reid v. Hardware Mutual Insurance Co., SC 1969:
   (1) Facts: policy issued for fire insurance for house, described as "owner occupied." At time of fire, the house had been transferred to someone else.
   (2) Issue: whether the designation, at the time the policy was issued, that the insured swelling was "owner occupied" was a continuing warranty
   (3) A promissory, or continuing, warranty is an absolute undertaking by the insured that certain facts or conditions relating to the risk shall continue, or that certain things shall be done or not done.
   (4) Warranty def – a statement, description, or undertaking on the part of the insured, appearing in the policy of insurance or in another instrument properly incorporated in the policy, relating contractually to the risk insured against.
   (5) The term "owner occupied" is not a promissory warranty; it is only a description and not an agreement that insured will continue to occupy it, and is thus an

affirmative warranty (not a warranty that it shall continue to be so occupied but is only a warranty of the situation at the time the insurance is effected).

2. Temporary Breach:
   a) many courts hold that policy is merely suspended during breach and is revived when the breach is cured, where:
      (1) Warranty or condition is only temporarily breached,
      (2) Insurer does not take action to have the policy voided before the breach is cured, and
      (3) The risk is not substantially increased during the period of the breach.
   b) If the temporary breach is not material, then coverage still available.
   c) Tsalapatas v. Phoenix Insurance Co., SC 1960:
      (1) Lake Murray Case
      (2) Facts: boat was being moved from dock to be repaired, sank while being moved. Insurance contract provided that boat was to be "laid up" at the time boat sank.
      (3) Held: the boat was not "laid up" at the time damage was sustained, resulting in a temporary breach of the warranty and a suspension of the insurance on the boat during the existence of the breach. Thus, the insurance does not cover the damage to the boat.
      (4) The plaintiff's breach of the warranty resulted in a suspension of the insurance on the boat at the time the loss is to have occurred. The breach of the promissory warranty or conditions subsequent contained in the policy such as that before us operates to suspend the coverage of the policy during the existence of the breach (*Schaefer v. Home Ins. Co.*)
      (5) A warranty as to the place where the insured vessel is to be located during the period covered by the policy makes the right of the insured to recover for damages dependent on the vessel being at the stated place when the loss occurs.

3. Divisibility of contracts:
   a) Johnson v. South State Insurance Co., SC 1986:
      (1) Facts: fraud as to the contents of the house prevents recovery for the content; but insured can still recover for the house and living expenses because the fraud did not effect those items.
      (2) In the absence of fraud or any act condemned by public policy, the contract is divisible, and recovery may be had for the loss of property not affected by the particular warranty broken.
      (3) Fraud only voids the provisions tainted by the fraud.
      (4) Forfeitures of insurance contracts are not favored.
      (5) Insurer must establish a causative link between a policy exclusion and a loss before recovery may be defeated.
      (6) Majority of jurisdictions holds that any fraud or misrepresentation as to any portion of the property under an insurance policy voids the entire policy. SC does not adopt this rule.
   b) Elias v. Firemen's Insurance Co., SC 1992:
      (1) Facts: insured had joint auto and home insurance policy. Insured did not pay the premiums for the auto portion of the policy, but paid the home portion. Insurer did not comply with statute's requirements for canceling policy, so home policy was still in effect when house burned down.
      (2) Payment and acceptance of insurance premiums creates insurance contract.
      (3) Contract of insurance may be divisible where the property consists of different items which are separately valued or insured for separate amounts.

(4) **Where contract is divisible, a breach of warranty or condition as to one item will not affect the insurance on the remainder of the property; court will enforce the contract to the extent warranty wasn't breached.**

(5) Insurer must comply with SC 38-75-740 to cancel policy when insured is not in breach.

4. Curtailing Effects of Warranties

a) SC Insurance Guaranty Ass'n v. Broach, SC 1987:

(1) Facts: airplane insurance contract provided that only certified pilots will fly plane. Student pilot did not get approval to fly plane; plane crashed.

(2) Majority rule: an insurance exclusion is effective whether or not there is any causal connection between the excluded risk and the loss.

(3) SC rule: insurance exclusion does not limit coverage unless it is casually related to the loss.

(4) Rationale for SC rule: when the parties made the contract, they were not inserting a mere arbitrary provision, but it was the purpose of the insurer to relieve itself of liability from accidents caused by the excluded provision.

(5) Insurer must show the causal connection (ie, must show that student flying plane caused loss, before it can exclude coverage for the loss).

B. Misrepresentations

1. Defined:

a) A representation is any statement, oral or written, express or implied, made by the insured to the insurer which forms at least part of the basis on which the insurer decides to enter into the contract.

b) Representation does not become a term of the contract unless it is expressly incorporated into the written document, in which case it becomes a warranty or condition.

c) Majority rule: any fraud or misrepresentations as to any portion of property under an insurance policy voids the entire policy.

d) Minority rule (SC): an insurer can use misrepresentation as grounds for avoidance of the policy at any time (unless policy has become incontestable) or as a defense to payment of proceeds under the policy if:

(1) a representation of the insured is untrue or misleading,

(2) is material to the risk, and

(3) is relied on by the insurer in issuing the policy at the specified premium.

e) To vitiate a policy on grounds of fraudulent misrepresentation, insurer must show:

(1) False statement

(2) Material to risk

(3) Known to applicant to be false

(4) Made with intent to mislead or defraud insurer (prove with clear and convincing evidence)

(5) Relied on by insurer in issuing policy.

f) Negligent misrepresentation does not avoid the policy.

2. Gasque v. Voyager Life Insurance Co., SC App. 1986:

a) Facts: insured indicated on life insurance application that she did not have any history of heart/lung disease. She was being treated for something, but she did not understand that it was one of the diseases asked about on the policy application. Question of fact whether insured knowingly made false statements.

b) False representations alone will not void a policy; must consider the insured's good faith in making the representations. Insurer must show the statements were made with intent to deceive.

c) At best, this was a negligent misrepresentation.
d) Ct says false reps won't void a policy. Imp consideration is insured's good faith.
Once again, insurer must show, by CLEAR AND CONVINCING E, that:
(1) False statement
(2) Material to risk
(3) Known to applicant to be false
(4) Made with intent to mislead or defraud insurer (prove with clear and convincing evidence)
(5) Relied on by insurer in issuing policy.
e)

3. Lanham v. Blue Cross, SC 2002:
a) Facts: insured said on insurance application that he did not have liver disease; doctor had been monitoring his liver enzymes, but had not yet diagnosed him with liver disease. Later insured was diagnosed with Hep C and Blue Cross cancelled his insurance for fraudulent misrepresentations. Question of fact on insured knowledge of falsity and intent to deceive.
b) SC 38-71-40: falsity of statement in application does not bar right to recovery unless the false statement was made with actual intent to deceive or unless it materially affected either the acceptance of the risk or the hazard assumed by the insurer.
c) Restates rule in 1.e. above.

C. Notice of Claim

1. Insured is considered in breach of the terms and conditions of the policy where the insured fails to notify the insurer of the insured's claim.
2. Burden is on the insurer to show that the failure to notify substantially prejudiced the insurer.
3. Purpose of notification requirement is to allow insurer to adequately investigate the facts and to prepare a defense.
4. Notification requirement applies to mandatory automobile insurance and voluntary liability insurance.

D. Life Insurance

1. To void a life insurance policy and avoid liability because of misrepresentations in the application, insurance company must show:
a) Statements complained of were untrue
b) Their falsity was known to the applicant
c) They were material to the risk
d) The carrier relied on the statements in issuing the policy at the specified premium, and
e) They were made with intent to deceive and defraud the company.
2. SC does not require the insurer to show a causal connection between the material misrepresentation and the death to void the policy.
3. Carroll v. Jackson National Life Insurance Co., SC 1992:
a) Facts: insured made misrepresentations on life insurance application, died within 2 years. Insurer cannot show connection between misrepresentations and death.
b) SC 38-63-220(d): all life insurance policies must provide for a 2 year contestability period, after which the insurer cannot challenge the truthfulness of the application or the representations of the insured.
c) When the insured dies during the contestability period of a life insurance policy, the insurer is not required to prove a causal connection between the death and material misrepresentations by the insured; if the above test is met, the policy is void.
d) Company isn't req to prove a causal connection between the death and material misrepresentations by the insured in the application of insurance.

e) Must show the above 5 elements.
f) Carroll II changed Carroll I.

4. Incontestability Clauses:
   a) must challenge policy for fraud, misrepresentation within 2 years of issuance; should be liberal in those 2 years construing possible misrepresentations.
   b) After 2 years, can't challenge, even if it's fraudulent.
   c) Cf. Incontestability for health insurance: can challenge on grounds of negligent misrepresentation for 2 years; can challenge for fraud at any time, but within 3 years of discovery.
5. *Materiality*:
   a) ** Common law: A representation is considered material if it is such as to induce the reasonable insurer to enter into a contract of insurance that it would otherwise have refused, or to accept a lower premium than it would have otherwise required.
   b) Statutes may alter this definition; for example, many statutes require that the misrepresentation have actually increased the risk of loss.
   c) Other statutes require that the matter misrepresented actually contribute to the loss before it is grounds for a defense.
   d) SC: misrepresentation is material to the risk when the insured knows or has reason to know that it will likely affect the decision of the insurer as to whether to insure the applicant or as to the terms of the contract.
6. Obligation of Insured to Correct Representations:
   a) Insured is under obligation to correct any representation that becomes untrue at any time before the contract is formed (ie, things that change between application and issuance), but is not under an obligation to correct a representation that becomes untrue after policy issued.
   b) **Courts will uphold the contract if logically possible**; court will not void the policy or permit a defense for insubstantial errors (ie, representation is substantially correct).
7. Return of Premiums: if misrepresentation was fraudulent, no recovery of premiums is required.
8. Representations by Employer:
   a) All group life insurance policies must also have a two year contestability period, after which the validity of the group policy cannot be contested except for non-payment of premiums, and validity of an individual's coverage cannot be contested based on his own statements. (SC 38-65-210(2)). [note: group insurance with less than 25 people are governed by state law; above that, ERISA applies and preempts certain claims]
   b) Rapak v. Companion Life Insurance Co., SC 1992: employer told insurer than employee-insured was employed full time, but employee was not. Employee died more than 2 years later. Held: incontestability period applies whether the statements were made by the employer or the individual insured.
9. Representations by agents:
   a) representations by agent of insured will be binding on the insured.
   b) But insured is not bound by representations made by third parties, even if materially false and relied on by insurer.
10. Assignee of Insured: assignee can acquire no greater rights than those possessed by an assignor.
11. Renewal of a policy:
   a) when a fire policy is renewed, it is considered to be on the basis of representations made and originally applied at time of original policy, unless a new application is submitted.
   b) Insured has an affirmative duty in renewing the contract to advise the insurer of any material changes in the information supplied since the time of the original representations.

12. Right to Change Beneficiary:
    a) Generally insured has the right to change the beneficiary of a life insurance policy. But insured may enter into contract NOT to change the beneficiary, even though the right to change the beneficiary is set forth in the policy itself.
    b) Lane v. Williamson, SC App. 1992:
        (1) Facts: husband agreed in court to maintain life insurance for wife, but later attempted to change the beneficiary.
        (2) H: the agreement made in open court and approved by the judge is fully enforceable; husband contracted away his right to substitute other beneficiaries for his wife. Absent a modification of the order, wife gets the proceeds of the policy.
        (3) The status quo (the existing state of things at any given date) of an insurance policy may be changed:
            (a) by failing to pay the premiums
            (b) by naming substitute beneficiaries
        (4) While an insured person normally has the right to change the beneficiary, the insured may also enter in to a K not to change the beneficiary, even though the right to change the beneficiary is not set forth in the policy itself
13. Killer Beneficiaries:
    a) SC 62-2-803 denies proceeds under a life insurance policy (and under will) to beneficiaries who feloniously and intentionally kill the decedent.
    b) The estate of the decedent passes as if the killer had predeceased the decedent.
    c) A final conviction is conclusive for this section. In the absence of a conviction, the court may determine by a preponderance of the evidence whether or not the killing was felonious and intentional.
    d) This section does not affect persons who purchases property from the killer for value and without notice, but killer is liable to estate for value of property sold.

IV. POLICY EXCLUSIONS

A. Topic Summary

- Policy Exclusions:
    - Limitations or restrictions on coverage of which an insured has no notice are not binding
    - Internal Inconsistencies:
    - If an exclusion is inconsistent with the rest of the policy then the policy is ambiguous and the ambiguity is construed in favor of coverage
    - An insurance policy contains an internal inconsistency when an exclusion therein purports to bar coverage for claims arising out of the very operation sought to be insured
    - This is just an example of one possible way to ambiguity obviously there are any number of ways a K could be ambiguous
- Automobile Policies:
    - SC Code Ann. 38-77-140 provides no liability insurance policy shall be issued "unless it contains a provision insuring the persons defined as insured"
    - This is pretty self explanatory
    - An insurer can exclude coverage for certain aspects of a business as long as it is still insuring some other operation
- Random Notes:
    - If a provision of a policy conflicts with a provision of an endorsement the latter controls
    - Policy and endorsement read together

- This chapter is short for a reason, because it is not important

B. Generally

1. Courts are not in favor of denying coverage to insureds and narrowly interpret exclusions in favor of coverage.
2. Insurer must specifically exclude the otherwise covered loss.
3. Restrictions or limitations on coverage of which an insured does not have notice are not binding.
4. *Condition*: an event uncertain to occur that must occur to create a duty or to terminate a duty
5. Usually conditions state limitations on coverage
6. Conditions must be strictly complied with.
7. Examples of conditions:
   a) conditions precedent–eg., to pay premiums
   b) conditions subsequent
   c) Evidentiary: what you must prove before making claim (this limits coverage)
   d) Reporting: eg., report amount of inventory in store, policy will only cover reported amount.
   e) Vacancy (objects)
   f) Occupancy (people)

C. Internal Inconsistencies Created by Exclusions

1. Internal inconsistencies created by an exclusion which purports to bar coverage for claims arising out of the very operation sought to be insured renders the policy ambiguous, and the court must resolve the ambiguity in favor of coverage.

2. Isle of Palms Pest Control Co. v. Monticello Ins. Co.: insured bought policy to protect itself against damage to property of others caused by insured's negligence. Insurer maintained that the policy excluded professional liability. Held: to give effect to this exclusion would render policy meaningless because it would exclude coverage for all claims arising from the insured's business, the very risk contemplated by the parties.
3. Forner v. Allstate Insurance Co.: in the absence of a policy term defining "relative," construction most favorable to the insured shall be adopted.

D. Automobile Policies

1. SC 38-77-30(7) defined insured to include any person who used with the consent, express or implied, of the names insured the motor vehicle to which the policy applies.
2. American Mutual Fire Insurance Co. v. Aetna Casualty, SC 1991:
   a) Facts: Aetna insured Ford dealership, American insured Joe Woodward's employer; Joe was driving within the scope of his employment in a car owned by dealership when accident happened. Aetna's policy excluded liability for an individual using a covered vehicle while working in the business of servicing automobiles.
   b) H: the exclusion is invalid.
   c) 38-77-140 provides that no liability insurance policy can be issued unless it contains a provision insuring the persons defined as insured (ie, any person who, with consent, uses the vehicle to which the policy applies)
   d) Certain statutes provide specific exemptions which may be properly included in an automobile liability policy, thus giving rise to a strong inference that no other exceptions were intended.
3. McPherson v. State Budget and Control Board, SC 1993:
   a) Facts: pedestrian sued Charleston after being hit by police car, which was chasing a suspect. BCB insures Charleston, denied coverage for pedestrian's injuries. Policy excluded liability for personal injury arising out of the ownership, operation and use of an

automobile owned or operated by the insured, or an automobile operated by a person in the course of his employment for the insured.

b) Rules of construction require clauses of exclusion to be narrowly interpreted, and clauses of inclusion to be broadly construed, to the benefit of the insured.

c) "Arising out of" is narrowly construed to mean "caused by" – here, the injuries arose out of Charleston's ownership of the car, so pedestrian's injuries are excluded from coverage.

4. BLG Enterprises v. First Financial Insurance Co., SC 1999:
   a) Facts: BLG (a bar) served alcohol to drunk person, who then injured someone in car accident. BLG's insurer claims its policy excludes dram shop liability.
   b) Duty to defend: liability insurer must defend any suit alleging bodily injury or property damage seeking damages payable under the terms of the policy. Insurer has no duty to defend an insured where the damage was caused for a reason unambiguously excluded under the policy.
   c) Insurers have the right to limit their liability and to impose conditions on their obligations provided they are not in contravention of public policy or a statutory prohibition. Policies providing products liability coverage may contain exclusions designed to limit the insurer's risk exposure from hazards peculiar to that business.
   d) An absolute liquor exclusion (no coverage for any damage arising out of or connected with selling, distributing, serving alcohol) in a policy covering a tavern is illusory. But the dram shop exclusion in BLG's policy (excluding coverage for bodily injury by reason of selling, serving, or giving an alcoholic beverage, but allowing, eg, coverage for patron who slips and falls at tavern) is unambiguous and enforceable
   e) Endorsements: policy and endorsement should be read together. Policy remains in full force and effect to the extent its terms are modified by the words of the endorsement. If provision in policy conflicts with provision of endorsement, endorsement controls.
5. SEE NOTES AND DECISIONS, p. 67.
   A) Miscellaneous Exclusions:
      i. Business Pursuits
      ii. Pollution
      iii. Employment-Related Practices

V. INTENTIONAL CONDUCT: OVERVIEW

A. Fortuity requirement

1. Insurer will not pay for a loss unless the loss is *fortuitous*. Can't insure against a certainty.
   a) The insurer bases its rates on the probabilities of fortuitous losses; if the insured is in control of the insured risk (ie, if the policy covers intentional acts), then the ability of the insurer to calculate fair rates is frustrated.
   b) Public policy forbids contracts indemnifying a person against loss resulting from his own willful wrongdoing.
2. Courts will imply this requirement if not expressly stated in contract.
3. In SC: consider whether the incident was unexpected or unintended from the viewpoint of the injured party, not the viewpoint of the insured.
4. State Farm Insurance Co. v. Moorer, SC App. 1998:
   a) Facts: insurance policy coverage extended to the use, by an insured, of a non-owned vehicle. Coverage was limited to accidents. Insured, driving a non-owned vehicle, shot and killed a third person.
   b) Limitation on coverage to accidents applies to non-owned vehicles, too.
   c) Exclusion of intentional acts is contrary to state statute.

(1) SC Farm Bureau v. Mumford, 1989: insurer may not exclude intentional acts from statutorily required policies of liability coverage. This prohibition does not apply to voluntary policies of insurance that are not required by SC law.

(2) Insurance against third party loss arising out of the use of a car is compulsory in SC. The primary purpose of compulsory insurance is to compensate victims who have been injured by at-fault motorists (cf., the purpose of voluntary insurance is to save harmless the insured himself). Thus, the victim's right to recover from the insurance carrier does not depend on whether the insured's conduct was intentional or negligent.

(3) However, coverage for non-owned vehicles is voluntary, so parties could exclude intentional acts from coverage as to those cars.

d) *Accident*: an occurrence is an accident if the event is unexpected or not intended by the person suffering the harm or hurt. This definition should apply unless altered by the parties.

e) Here, the death of the third person was an accident as to the victim, so insured's insurance must provide coverage.

B. Property Insurance

1. If the insured intentionally causes damage to his own property, the loss is not covered.
2. An innocent co-insured will be able to recover for a loss intentionally caused by the other insured, because the interests of the coinsured are severable (the unilateral acts of one coinsured cannot divest the other of her separate contract rights under the policy).
3. McCracken v. Government Employees Insurance Co., SC 1985:
   a) Independent Spouses Doctrine: the acts of one spouse are not, as a matter of law, imputed to the other spouse.
   b) In the absence of any statute or specific policy language denying coverage to a coinsured for the arson of another coinsured, the innocent coinsured is entitled to recover her share (ie, ½) of the insurance proceeds.
4. Fire Insurance:
   a) a friendly fire is one that is intentionally kindled and confined to a particular place.
   b) Hostile fire is one that has burned out of control.
   c) Fire insurance only covers hostile fires. (If a friendly fire turns hostile, those damages will be covered.)
   d) Damages resulting from good faith efforts to prevent or save property from a hostile fire will be covered. (SC)

C. Intent

1. Approaches to defining:
   a) Narrowest, Minority (the Patch test): look to the natural and probable consequences of the insured's act; foreseeability. (Pro-insurer.)
   b) Majority: the insured must have intended both the act and to cause some kind of injury or damage.
   c) Broadest: Insured must have had the specific intent to injure and to cause the specific type of injury suffered. (Pro-insured). (SC)
2. Miller v. Fidelity-Phoenix Insurance Co., SC 1977:
   a) The act causing the loss must have been intentional AND the results of the act must have been intended.
   b) Insured must have acted intentionally in setting the fire and also have intended that the fire cause the type of loss or injury which resulted.
3. Runge v. Metropolitan Life Ins. Co., 4th Cir. 1976:

a) If the death of the insured, although unforeseen and unexpected, results directly from the insured's voluntary act and aggressive misconduct, or where the insured culpably provokes the act which causes the injury and death, it is not death by accidental means, even though the result may have been an accidental injury.
b) The insured's death here was a natural and foreseeable, though unintended, consequence of his activity. No coverage.
c) Accidental means: the unforeseen event; the happening that leads to the result
d) Accidental death: the result (act was intentional, but end was accidental)

4. Death while intentionally involved in criminal conduct:
   a) Some policies prohibit coverage when the insured's death results from a criminal act.
   b) Self-Defense:
      (1) SC (maybe) has minority position: injuries inflicted in self-defense are not intentional (and are covered). (SC rule not clear)
      (2) Majority position: acts of self-defense are intentional (and therefore excluded) where the insured intended to harm his attacker.
   c) Self-Provoked Accidents: If you start the aggression, it's intentional => no coverage.
   d) Execution of convicted criminal: should family of convict get the life insurance proceeds? Under life insurance, the fortuity is *when*; execution is not a fortuity. But one case (not SC) gave the beneficiary the life insurance proceeds.
   e) Suicide: policies can exclude coverage for death due to suicide that occurs within 2 years of the policy being issued.
   f) Child Sexual Abuse: perpetrator's intent to injure the child is inferred as a matter of law.
   g) SC Killer Beneficiary Statute: beneficiary who brings about another's death forfeits his rights under will or insurance.

D. Wally's Topic Summary

Fortuity Requirement:

- General Rule: a loss must be an "accident" to be covered under an insurance policy
- "Accident" can be defined in a number of different ways principally from the viewpoint of the insured or the viewpoint of the injured party
- For Compulsory Insurance (for example, statutorily required car insurance) determining whether an accident has occurred, the courts in SC must consider whether the incident was unexpected or unintended from the viewpoint of the injured party rather than from the viewpoint of the insured.
  - Of course the insured could be the injured party, but that doesn't change the analysis BECAUSE
- For Voluntary Insurance (for example, coverage for non-owned cars) the insurer can define "accident" to mean unintended/unexpected from the viewpoint of the insured.
- Therefore, if the insured crashes his car into Eldon because he hates Eldon, then Eldon's injuries are covered under the insured's liability coverage because it is compulsory on an owned vehicle (*Wally is still bitter about being called on in Crim Pro when not prepared. "Does it matter that I haven't read?")*
- If the insured is driving Jared's car and runs over Cory intentionally then Jared's liability insurance would cover Cory's injuries as the insured was a permissive user, liability insurance is compulsory, and the incident was an accident from Cory's viewpoint. If Jared's liability doesn't completely cover Cory's injuries then the insured would be personally liable for the rest. Let us say that the insured has coverage for non-owned vehicles. This is voluntary, meant to protect the insured and not required by statute. The insurer can define "accident" as it pleases in the insurance contract and will most likely choose to do so from the viewpoint of the insured. Therefore, as the insured intentionally ran over Cory, the incident would not be an "accident" from the insured's viewpoint and would not be covered under the voluntary non-owned vehicle policy coverage. (*Jared is harboring feelings of violence, watch out for that Isuzu Cory*)
- It should come as no surprise that if you intentionally kill yourself you can't recover on your life insurance or if you burn your house down you can't collect on the insurance

- For life the insured and the injured party, ie. dead guy, is always the same so there is no problem discerning the viewpoint with which to define accidental, there is only one and death must have been accidental from that viewpoint
- For property insurance the same sort of analysis applies a lot of the time, but you also have instances of co-insureds

Co-Insured:
- If two people are co-insured on the same property and one of them intentionally damages the property then we have a problem
- Some states make distinctions based on whether the property is held jointly or severably, but in SC the innocent co-insured is entitled to recover regardless of the style of ownership
- If I burn down our house and Lindsey doesn't know anything about it then she can recover and I cannot

Intent:
- There is basically three ways to term intent:
    - 1. Foreseeability: insured deemed to intend the natural and probable consequences of his act—if I erect a huge gasoline drenched pyre in my living room and attempt to light it with a arrow shot from the bedroom a la olympic torch style it probable that I will that I will burn the house down whether that is my intention or not, but under this standard I am deemed to have intentional burned down the house
    - 2. Majority: insured deemed to have acted intentionally if he intended to cause some type of damage/injury—if I sledge hammer a wall to insert a hot tub and knock out key structural supports and the roof caves, I have intended to cave the roof essentially
    - 3. South Carolina—insured must intend the act and intend the actual harm—under this standard neither the house burning down or the roof caving would be an intentional act under a policy, I still couldn't recover for wall I knocked out or at least a huge charred spot in the middle of the living room because I intended wall to come down and the pyre to burn.
- I am assuming that the insurer could define intent any way it so chooses in the policy so as to avoid the two ridiculous results above but I have no caselaw to back that up I'm just going on the fact that property insurance is voluntary and/or there is no statute specifically prescribing the definition of intent

Fire Insurance:
- Friendly fire: fire started intentionally and confined to an area
- Hostile fire: fire not started intentionally or one that moves/spreads from the intended area
- Friendly fire isn't covered, hostile is, if you damage your house trying to stop a hostile fire that damage is covered

Self-Defense:
- Intentional acts in self defense are not excluded from coverage—if Johnny tries to sweep Ralph's leg and he dropkicks him and breaks his nose, Ralph's insurance will cover Johnny's nose if liability is found

Statutes:
- As noted above, if a statute requires coverage and doesn't distinguish between intentional or accidental acts then it supercedes the policy language attempting to exclude intentional acts

Child Sex Abuse:
- Intentional harm is inferred as a matter of law in child sex abuse cases so I assume this means that insurance doesn't cover it

Self Provoked Accidents:
- Coverage doesn't extend to accidents brought on by the insured's aggressive or voluntary conduct

• Therefore, if you asphyxiate yourself permanently during some kinky solo lovin' then your beneficiaries will not only think you are weird but they will also have to get jobs
• If executed your family recovers

VI. LIABILITY INSURANCE

A. Defined

1. Liability coverage protects an at-fault insured while driving a particular vehicle owned by the insured.
2. Obligations under a liability insurance policy:
   a) Duty to indemnify for successful claim within coverage
   b) Duty to defend claim
3. Insurance policies don't cover contractual claims.

B. Duty to Defend

1. Usually a clause in the policy gives the insurer the right and the obligation to take over the defense of any action brought by a third party against the insured on any cause of action that falls within policy coverage, regardless of whether claim is fraudulent, frivolous, etc.
2. The duty to defend is triggered if any part of the complaint falls within the policy.
   a) Ambiguous claims: as long as there is potential coverage, the insurer is obligated to defend. (Sometimes insurer may have burden of investigating coverage to determine if must defend.)
   b) Alternative claims: if third party alleges both negligent and intentional conduct, some courts do not allow the insurer to defend the action because of conflict of interest arising from possible intentional tort (violates policy).
   c) Multiple causes of action: insurer must defend only against the claims within the policy; insurer no longer has exclusive right to control the litigation, as it must share control with counsel representing insured on the claims outside the policy.
   d) Untrue statements of fact in the complaint: insurer must defend if the actual facts indicate a cause of action within coverage, even if complaint states facts in such a way that cause of action is without coverage. To do otherwise would defeat the reasonable expectations of the insured under the policy.
   e) Unnecessary allegations: if any are pled within policy, duty still triggered by potential coverage.
   f) Tests for coverage:
      (1) *Factual* test: infer coverage from the actual facts known or reasonably ascertainable by the insurer; look beyond the labels in the complaint.
      (2) *Exclusive Pleadings* test: look to the four corners of the pleading to see if allegations are within coverage of policy (SC, *Isle of Palms*). **If the underlying complaint creates a possibility of coverage under policy, the insurer is obligated to defend**.
3. The duty to defend may be broader than the duty to indemnify.
4. If the covered claims are dismissed, the duty to defend ends.
5. Prior v. SC Medical Malpractice Liability Ins. Underwriters, SC App.1991:
   a) If the facts alleged in the plaintiff's complaint fail to bring a claim within policy coverage, the insurer has no duty to defend. Look to the allegations of the complaint to determine if the insurer must defend.
   b) Here, the claim was for an intentional tort, which the insurance did not cover, so insurer did not have to defend.

c) Failure to give insurer timely notice of the claim will prevent recovery, even if the insurer was not harmed by the delay. **Current Rule seems to be that the insurer must be prejudiced by failure to give notice or timely notice.**

d) Insurer can defend and yet reserve its right to later contest coverage (ie, if it finds the event was intentional).

e) You have to look beyond the labels, this was sexual assault. CT says JUA had no duty to defend, not in course of employment.

6. Isle of Palms Pest Control Co. v. Monticello Insurance Co., SC App. 1994:

a) Inclusion of some non-covered claims does not abrogate an insurer's duty to defend when a complaint raises claims covered by a policy.

b) A general liability policy is intended to provide coverage for tort liability for physical damage to the property of others; it is not intended to provide coverage for the insured's contractual liability which causes economic losses (i.e. won't cover claims of faulty workmanship, but instead covers claims of faulty workmanship that causes an accident).

c) Because the plaintiff here alleges that the insured's negligence resulted in property damage, the insurer is obligated to defend.

d) Exclusion which purports to bar coverage for claims arising out of the very operation sought to be insured renders the policy ambiguous; construe in favor of coverage (i.e. excludes coverage of claims arising from professional services, when the entire purpose of the business is to provide professional services).

e) Questions of coverage and the duty of a liability insurance company to defend a claim brought against its insured are determined by the allegations of the third party's complaint. p. 88.

7. Discharge of Duty to Defend:

a) Does payment of proceeds in the amount of the policy limits discharge duty to defend?

b) Three viewpoints:

(1) Once insurer has paid insured the full amount for which it can be held liable under the policy, it has rendered full performance

(2) Insurer can extinguish its duty to defend by payment of the full policy limit to a third party tort claimant, leaving insured on his own for the rest of the claims

(3) Obligation to provide defense is independent of obligation to indemnify the insured for liability, and therefore survives the payment of the policy limit (**S.C**).

c) Some policies say that it does.

d) SC: duty to defend is separate and distinct from the duty to pay a judgment rendered against the insured. Insurer's tender of the policy limits does not relieve the insurer of a duty to defend, if the insured doesn't want to settle (Simmons).

8. Remedies for Failure to Defend:

a) Costs and attorney's fees incurred by insured providing his own defense, as long as they are reasonable

b) Amount of the judgment or settlement (if reasonable) that insurer should have paid (equitable subrogation)

c) Consequential damages (eg., cost of selling assets; emotional distress)

d) Insurer loses right to control defense (and cannot complain that case improperly defended)

e) Insured is relieved of duty to cooperate with insurer.

f) If a secondary insurer defends because the primary insurer won't, the secondary insurer can recover its costs from the primary insurer.

9. Protections for Insurer:

a) Bring *declaratory judgment action* while main claim pending to determine if there is coverage for the claim; these cases get priority (but if insured wins, will get costs from insurer)
b) ***Nonwaiver letter***: a bilateral agreement that insurer will defend, but can challenge coverage later if insured found liable (insured shouldn't sign this!) DO NOT DO THIS. EVER.
c) *Reservation of Rights letter*: a unilateral statement that insurer will defend, but is investigating coverage and may not indemnify or will challenge coverage later. This is weak alternative to Nonwaiver letter.

10. Punitive Damages: (to punish for bad conduct and deter from future conduct)
a) Insurability of punitive damages arises as an issue only in cases involving gross negligence or wanton or reckless conduct by the insured, because punitive damages are rarely assessed for merely negligent conduct, and intentional conduct prevents coverage for all damages.
b) A policy may expressly exclude coverage of punitive damages, except where the doctrines of contra proferentum and reasonable expectations would apply.
c) Reasons not to insure punitives:
(1) They are meant to be punishment; defeat purpose if risk shifted to insurer
(2) Punitives deter tortfeasor
(3) Will result in higher premiums to public
d) Reasons to insure punitives:
(1) Line between negligence and gross negligence often indistinguishable, so coverage will not increase incidence of gross negligence
(2) Sympathetic jurors; money goes to make plaintiff whole
(3) Freedom of contract
e) Majority of courts (**including SC**) allow insurability of punitive damages. (38-77-30: damages include punitive damages)
f) Punitive damages will also be covered if an employer is held liable for punitive damages of its employee.
g) When collecting UM coverage from your insurer, can even collect punitive damages.

C. Duty to Cooperate

1. Insured has a duty to cooperate with the insurer; this cooperation is a condition to the insurer's obligation to perform its duties. If not expressly in contract, then implied duty exist.
2. First-party insurance: duty to cooperate implicit
3. A party may not suspend his own performance in response to an insignificant or immaterial breach by the other party (i.e. insurer must still defend even if insured doesn't tell them about accident, if hears about it from 3rd party).
4. A failure to cooperate is a breach, but will suspend the other party's performance only if the breach is material.
5. Before an insurer can void a policy for insured's non-cooperation, insurer must show it was prejudiced as a result of the lack of cooperation (*See Puckett)*.
6. Purpose of requiring insured to give notice of claim to insurer is to enable the insurer to investigate the accident and prepare a timely defense.
7. More statutes:
a) 38-59-20: Improper claim practices (page 101)
b) 38-71-40: effect of false statements in application (102)
c) 38-77-10: declaration of purpose (102).
d) 38-59-10: proof of loss forms required to be furnished (100)
8. Puckett v. State Farm, SC 1994:

a) Puckett purchased rental dwelling policy from insurer that insured loss by fire. Fire occurs 2 months later, thinking arson.
b) An insured's failure to cooperate may bar recovery under a policy only where the insurer can show prejudice therefrom.
c) Immaterial failures to cooperate will not forfeit the policy.

9. Conflicts of interest:
   a) Usually insurer has the right to control the defense; this right may be modified where there is a conflict of interest.
   b) Insurer may not be able to control the litigation where:
      (1) Insurer contends that insured and third party claimant are in collusion
      (2) Conduct of the insured could be found to be either negligent or intentional (insurer will want outcome to be intentional, so it doesn't have to pay)
      (3) Tactical choice of defense by the insurer conflicts with the personal interests of the insured (eg., insurer wants to settle, insured doesn't)
   c) When defense counsel learns of collusion from the insured, the attorney must cease to defend. Defense counsel cannot notify insurer of fraud unless doing so would prevent client from committing criminal act.
   d) Insurer can defend under reservation of rights to contest coverage
   e) Attorney paid by insurer is actually representing insured
10. Cowan & Blanding v. Allstate, SC App. 2002:
   a) 38-77-142(B): if insurer has **actual notice** of a complaint, the failure of the insured to turn over the complaint to the insurer will not defeat coverage, provided the insured otherwise cooperates and does not prejudice the insurer.
   b) The injured party can provide notice of the lawsuit to the insured's insurer.
   c) Insurer will not have to pay default judgment where it had no opportunity to participate in or defend case.
   d) An insurer can enforce its cooperation clause as a defense against the claim if neither the insured nor the injured party provided the insurer with notice of the lawsuit.
   e) SC is no longer a mandatory insurance state (can be uninsured if you pay a fee and register), so insurers can limit their liability and impose whatever conditions they want on the insured, if not in violation of statute or public policy. (**See page 108 middle, this seems to be the opposite of what case says**)
11. United Services Automobile Ass'n v. Markosky, SC App. 2000:
   a) Liability of the insurance carrier becomes absolute when the injury occurs.
   b) Fraud in an application for motor vehicle liability insurance is not a defense to the insurer's liability once injury has occurred, but only for the statutory minimum amount.
   c) As to any coverage in excess of the statutory minimum, the insurer is not precluded by statute or public policy from asserting the defense of fraud.
   d) Insurer can enforce cooperation clause where no notice given.
   e) **Bottom Line:** Regarding statutorily mandated automobile liability insurance coverage, coverage may not be defeated by the insured's failure to comply with insurer's notice provisions up to the mandatory minimum limits (even if insurer was prejudiced). This represents public policy of protecting innocent third parties. However, regarding any amount of coverage in excess of mandatory minimum, the insurer may enforce notice provisions.

D. Duty to Advise the Insured

1. Insurers and their agents generally do not have a duty to advise an insured.
2. Absent a promise to do so, an agent has no duty to procure insurance on the best terms or at the lowest rate.

3. If the agent nevertheless undertakes to advise the insured, he must exercise due care in giving advice.
4. Rickborn v. Liberty Life Insurance Co., SC 1996:
    a) An agent of an insurance company has the duty to properly complete applications for insurance, to properly explain the terms and limitations of coverage, and to assure that the initial premium is properly tendered and handled.
    b) Those dealing with such an agent, without notice of restrictions on his authority, have a right to presume that his authority is coextensive with its apparent scope. A limitation on the authority of a general agent having power to make contracts of insurance, will not relieve the insurer of liability on a policy issued by the agent, though in violation of the limitation, where the insured did not have actual or constructive notice of the limitation.
    c) The obligation to advise created by an agent acting within the scope of his actual or apparent authority becomes the obligation of the insurer.
    d) Insurer owed insured a duty of care in supervising its agents, because possible harm to the insured by the agent could have been reasonably anticipated by the insured.
    e) The application for insurance is an offer; a contractual relationship will not exist between insured and insurer until the insurer accepts the offer.
    f) Implied acceptance of the applicant's offer: negligent delay in acting upon an application or in notifying the applicant of the rejection of the application. Obviously accepting payment of premium would qualify.
    g) The applicant, not the agent, must pay the premium to guarantee coverage.
    h) Get p. 106 highlighted.
5. George v. Empire Fire & Marine Insurance Co., SC 2001:
    a) Excluding a class of permissive users from policy coverage violates SC law, which defined insured as including permissive users (just not named insured).
    b) When an endorsement is invalidated, policy will be legally reformed to provide coverage in the amount of the statutory minimum limits (unless both parties stipulate a certain amount that was intended).
    c) A contract may be reformed on the ground of mutual mistake when the mistake consists of an omission or insertion of some material element affecting the subject matter or the terms of the contract. A mistake is mutual where both parties intended a certain thing and by mistake in the drafting did not obtain what was intended. Contract will be reformed to what the parties intended.
6. Negligent Misrepresentations by Insurance Agent:
    a) Generally an insured cannot complain of fraud in the misrepresentation of the contents of the policy when the truth could have been ascertained by reading the instrument.
    b) Where an insured asks his own insurance agent about the terms of the policy and reasonably relies on the agent's response, the insurer may be liable for loss even if the actual written language of the policy excluded the coverage which the agent alleged the policy provided. Look at relationship with agent (ie trust factor)
7. Renewals:
    a) 38-77-120(b): offer of renewal must be sent more than 15 days prior to original effective date of termination.
    b) Where an insurer issues proper notice of an offer to renew and the insured fails to accept the offer, the policy has been nonrenewed by the insured, and the insurer does not have to send a notice of nonrenewal under 38-75-740. Axson v. A. Mortgage Co., SC App. 1994.
    c) Walton v. Canal Insurance Co., SC 1998:
        (1) Renewal is the issuance of or the offer to issue by an insurer a policy succeeding a policy previously issued.

(2) Nonrenewal is the termination of a policy at its expiration date.
(3) If the insurer fails to notify the insured within the statutorily prescribed time period of offer to renew, the policy is renewed as a matter of law for 30 days after notice is received. Insured must act within those 30 days to renew, or policy will terminate at end of 30 days.
(4) Statute provides that if insurer fails to furnish renewal terms as required by statute, insured may cancel policy for 30 days after receipt of the renewal terms. 38-75-750.

VII. PERSONS & INTERESTS PROTECTED

A. Identifying the Insured

1. See Supp. for statutes defining insured and other terms; agreement to exclude persons from coverage.
2. The insured is the person whose loss triggers the insurer's duty to pay proceeds.
3. Usually the insured is identified by specifically designating the person whose life, property, or other interests are covered.
4. Omnibus Clause: a statutorily mandated description of who insureds are (this definition will be implied if not explicitly stated in contract).
   a) Class I insureds: the named insured, and resident spouse and resident relatives.
   b) Class II insureds: persons who use the car with the consent of the class I insureds, and guests.
5. A corporation cannot have spouses or family members. Therefore, if the spouse of the sole shareholder in a corporation is injured while driving the corporation's insured vehicle, there will not be coverage.
6. "Resident" is other than a temporary or transient visitor; one who lives in the same house for a period of some duration, although he may not intend to remain there permanently.
7. "Insured" is broader than "named insured"
8. Approaches to defining "consent":
   a) Hell or High Water: once consent is granted, permittee can use the car for any purpose and will be covered.
   b) Middle of the Road, Minor Deviation Rule: minor deviations from consent are allowed, the use will still be covered; material deviations will not be covered.
   c) Conversion Rule (strictest): permitted must use vehicle within the scope of consent, or no coverage. (SC)
9. **US Fire Ins. Co. v. Macloskie,** SC App. 1995:
   a) Facts: Injured employee was only supposed to be using a company truck to drive to and from work. He wrecked the truck when he went out drinking.
   b) The injured person's use of the insured truck was not a minor deviation, but a substantial departure from the scope of permission granted by the insured.
   c) SC applies the conversion rule, and therefore provides no coverage for the injured person under insured's policy.
   d) Hell or High Water Rule; Maj- Slight Deviation will be covered, gross ones will not; last rule is conversion rule – permitted only to do what's within parameters of job (convert vehicle to your own use). SC looks at Edwards for Conversion rule (why?)
10. Liberty Mutual Ins. Co. v. Edwards, SC 1988:
   a) Facts: A woman rented a car and was injured when she let her daughter drive it. The contract between the car rental company and the injured woman said "only licensed drivers named on this agreement are insured."

b) If the named insured has expressly prohibited a permittee from allowing a third party to operate the vehicle, a third party driver is not a permissive user and therefore not an insured.

c) An insured's actual knowledge and acquiescence to third party's use constitutes implied permission. Here, the car rental company did not have actual knowledge that the woman's daughter would drive the car, so there was no implied permission.

11. Unisun Insurance Co. v. Schmidt, SC 2000: A permissive user was injured when a third person crashed the car. The owner's insurance would not cover the driver, who did not have permission to use the car and was therefore not an insured; therefore the driver was uninsured, and the owner's uninsured motorist insurance covered the injury.

a) The Court also notes that the uninsured motorist statute is remedial in nature, enacted for the benefit of injured persons, and is to be liberally construed so that the purpose intended may be accomplished.

12. Construction of S.C. Tort Claims Act : Language of the policy providing coverage to any employee acting in the course of employment is broader than the definition in the Tort Claims Act of "scope of official duty" and therefore provides broader coverage.

B. What Constitutes "Use" of an Automobile

1. Insurance will cover occurrences arising out of the ownership, maintenance, or use of the insured vehicle.

2. An injury arises out of the ownership, maintenance, or use of the car if:

a) There is a causal connection between the vehicle and the injury.

(1) i.e. The vehicle was an active accessory to the assault,

(2) Causal connection means something less than proximate cause and more than the car being the mere site of the injury, and

(3) The injury must be foreseeably identifiable with the normal use of the car.

b) No act of independent significance occurred which broke the causal link, and

c) The vehicle is being used for transportation at the time of the assault.

3. Wausau Underwriters Ins. Co. v. Howser, SC 1992:

a) The court found a sufficient causal connection between the use of the car and the injuries (where car chase victim was shot by unknown driver of unidentified car, the car was an active accessory to the injury), and there was no independent act which broke the causal link. Therefore injuries arose out of the use of the assailant's car (victim's own uninsured motorist coverage will pay).

b) Establishes 2-part test (causal connection, no act of independent significance.)

c) Vehicle was an active accessory by following her.

4. Travelers Indemnity Co. v. Auto World of Orangeburg, SC App. 1999:

a) Facts: Victims and assailant had pulled over on the side of the road. The assailant got out of his car and shot the victims while they were sitting in their car.

b) Adds another prong to test: it must be shown that the vehicle was being used for transportation at the time of the injury. ("use" limited by statute to transportation uses; 38-77-140.)

c) the injury must be foreseeably identifiable with normal use of the car.

d) When the only connection between an injury and the insured vehicle's use is the fact that the injured person was an occupant of the vehicle at the time of the injury, that is not a sufficient casual connection.

e) An insured can recover damages arising out of the use of an uninsured car.

f) Here, the victims were not allowed to recover because neither the victims' car nor the assailant's car were being used for transportation at the time of the injury. The only

connection between the victims' car and their injuries was the fact that they were sitting in the car when they were shot.

5. If policy of insurance contains a clause of inclusion which covers injuries arising from the ownership, maintenance or use of an automobile, the rule in Towe and Howser applies, and the court should broadly interpret the policy to determine if coverage exists.
6. If policy of general liability insurance excludes injuries arising out of the use of a car, "arising out of" should be construed narrowly to mean "caused by."
7. **State Farm v. Bookert**, SC 1999: drive-by shooting injuries not foreseeably identifiable with normal use of the car, so no coverage.
   a. Get more facts for Bookert
   b. Guys in Hardees. Son not hit by pellets. Soldiers in car, etc. Sup Ct gave Sum Judg to Mary/Michael, then 3 part test.
8. **Peagler v. USAA Insurance Company** – shotgun in back of car discharges, kills hunter's wife. Fact truck was running didn't matter since the gun discharged. Injury was foreseeable to use of truck, but no causal connection bt truck and accidental shooting. No coverage. P. 155.

C. What Constitutes an "Occurrence"

1. Insurance provides coverage for damage caused by an "occurrence" (an unexpected or unintended event [accident] from the standpoint of the insured).
2. Theories of when an occurrence takes place:
   a) *Continuous trigger*: look at date of exposure; all policies in place after exposure must cover the damage.
   b) *Exposure*: occurrence is when exposure to harm took place (eg., when oil started leaking). Coverage is triggered at the time of the injury-causing event, even though damages have not yet occurred, and the policy in effect at the time of this event covers all ensuing damage.
   c) *Manifestation*: occurrence is when the injury/damage manifests itself. Policy in effect when damage manifests itself must cover all damage, even if some damage occurred earlier but was undetected.
   d) *Hybrid injury-in-fact/continuous trigger*: after injury-in-fact occurs, all subsequent policies are triggered and must provide coverage.
3. Spinx Oil v. Federated Ins., SC 1993: In hazardous waste cases, occurrence is the time that the leakage/damage is discovered. (This is the **manifestation rule.**) when does the injury manifest itself/when crime occurs?
   a) Contaminants leaked into ground from gas tanks. Ct looks at language from statute, and follows Mraz. "Commence and "occur" are synonymous. Get highlighted, p. 160. He's not sure if it's good law anymore.
4. Joe Harden Builders v. AETNA, SC 1997:
   a) Court adopts the hybrid **injury-in-fact/continuous trigger** approach.
   b) Cracks in walls here. Condo association. Went to arbitration. Concrete was misaligned in floors.
   c) **Manifestation Rule – Coverage triggered when injury manifested itself**. Spinx case here, not followed by Joe Harden. Spinx conflicts with plain language of policy.
   d) occurrence is at the time leak/damage is discovered
   e) **Exposure theory** - Coverage is triggered at the time of an injury in fact (when the damage first started – not the same as exposure), even if it is before damage became apparent, and the policy in effect at the time of the injury in fact covers all the ensuing damages. (And all subsequent policies triggered as well.)
   f) **Coverage triggered continuously from time of injury causing event while damage progresses -**

g) **Coverage triggered at the time of an injury in fact - Continuous trigger** – p. 162.
h) An insured may be able to prove in retrospect that damage occurred during the policy period, to get coverage.
i) [Says it doesn't overrule Spinx, but really it does.]
j) No pro rating of limits; full policy triggered.

5. Century Indemnity Co. v. Golden Hills Builders, Inc., SC 2002: Repeated exposure to water damage began during policy period; policy provides coverage for property damage that occurred during the policy period and for any continuing damage.
   a) Carrier argued a good argument here.
6. Other Cases:
   a) L-J, Inc. v. Bituminous Fire and Marine Ins. Co. – Ct of App. Held that faulty workmanship, standing alone, cannot constitute an occurrence. However, faulty workmanship that causes an accident can be an occurrence because the damage is neither expected nor intended by the insured. Very confusing case. An occurrence was an accident causing Bod Inj/prop damage to another. They agreed no occurrence if no accident.
   b) Auto Owners v. Carl Brazell Builders, - Insureds allege that hazardous materials on their property should be covered by their property damage insurance. The court found that insureds had only alleged economic damages, particularly the diminished value of their property, which did not meet the definition of "property damage".
   c) Ambiguous terms should be interpreted in favor of the insured.

VIII. BAD FAITH & EXCESS LIABILITY

A. Bad Faith Cause of Action

1. To protect the interests of insureds in dealing with insurance companies
2. Majority of states recognize this cause of action
3. Arises in:
   a) Third party claims, in which the insured is seeking defense and indemnification from liability to a third party
   b) First party claims, in which the insured is seeking indemnification from the insurer for a loss suffered by the insured personally.
4. Elements for finding bad faith:
   a) Strength of the injured claimant's case
   b) Attempt by the insurer to induce the insured to contribute to a settlement
   c) Failure of the insurer to properly investigate
   d) Insurer's rejection of its attorney's advice
   e) Investigator's opinion that it should settle
   f) Failure of insurer to inform insured of compromise offer
   g) Amount of exposure to financial risk if case not settled
   h) Fault of insured in contributing to insurer's rejection of settlement

B. Third Party Claims

1. The insurer has the right to control the defense of the action, including the right to decide to accept or reject a settlement offer. What duty does the insurer owe to give consideration to the interests of the insured in making its settlement decision?
2. Before Tyger River, insurer absolutely controlled defense and settlement, owed no duty to the insured.
3. Tyger River Pine Co. v. Maryland Casualty Co., SC 1931:
   a) There is a universal implied duty of good faith and fair dealing in every contract.

b) The insurer will be liable in tort if it exercises its exclusive right of settlement (or fails to settle) in bad faith or for purposes of fraud, to the injury of the insured.
    (1) Insurance company won't be responsible if it makes a mistake when the ,matter of the settlement is within its control under the K; but the insurer must act in good faith or it will be responsible for the consequent injury to the insured
    (2) Well settled that these provisions in policies of insurance indemnifying employers against loss by injury that the insurer shall have the exclusive right to compromise and settle such claims **if exercised in good faith**
        (a) Insurer is also liable if it exercises the exclusive right of settlement in bad faith or for purposes of fraud, to the injury of the insured
c) The insurer owes the insured the duty of settling the claim if that is the reasonable thing to do.
    (1) If the insurer negligently makes no serious attempt to settle until matters are in such a shape that the claim can't be settled as advantageously as formerly, the assured may recover the insurer the loss so occasioned to him

4. Tyger River Pine Co. v. Maryland Casualty Co., SC 1933: 2nd appeal; D contended that the P wasn't entitled to recover for negligence unaccompanied by fraud or bad faith on the part of the D in the negotiations relating to the compromise and settlement; court expressly held that an insurer negligently failing to settle the case against the insured by an injured employee is liable for the loss even in the absence of fraud or bad faith
    a) If the insurer's interests conflict with those of the insured, the insurer must, in good faith, sacrifice its interests in favor of the insured's interests.
    b) An insurer negligently failing to settle a case against the insured will be liable for the loss to the insured even in the absence of bad faith or fraud. [only a minority of states have followed SC in reducing the standard from bad faith to negligence.]
5. "Tyger River Letters": evidence that plaintiff was willing to settle within the policy limits. [the demand for settlement must be within policy limits for insurer to be liable.]
6. Remedy under Tyger River: insured can recover more than the policy allowed for; gets back the excess liability that resulted because insurer wouldn't settle. This result doesn't benefit the third party victim; it benefits the insured. Sometimes damages for mental suffering, or even punitive, are allowed.
7. Assignment:
    a) If the insured didn't have any assets to pay the excess claim anyway, insured will have no incentive to sue insurer for the excess; so insured may assign his claim against the insurer. (May assign it to the original tort plaintiff, so that plaintiff can recover his award; this is a third party claim against the insurer.)
    b) Only the claim for the excess judgment over policy limits is assignable (claims for emotional distress, punitive damages not assignable)
    c) Assignment upheld even if policy conditions assignment on insurer's consent.
    d) If an insured has an excess liability insurance policy, the excess judgement will fall on the excess insurer; in that case, the excess insurer can bring the bad faith cause of action against the primary insurer.
8. ERISA preempts the state law claim for bad faith refusal to pay benefits when the bad faith claim arises under an employee benefit plan.
9. An injured third party **does not** have standing to assert a bad faith cause of action against an insurer, unless the claim is assigned to them.
10. South Carolina recognizes the existence of a cause of action for *breach of the implied covenant of good faith and fair dealing* by an insured for consequential damaged allegedly suffered b/c of the insurer's bad faith handling of 3rd party claims

11. Courts are split on whether cause of action is in tort or contract; important for statute of limitations purposes (shorter for tort).
12. Tadlock Painting Co. v. Maryland Casualty Co., SC 1996:
    a) ISSUE: May an insured assert a cause of action on an implied covenant of good faith and fair dealing against his insurance company for consequential damages he allegedly suffered b/c of the insurance company's bad faith in handling of third party claims?
        (1) Case arose out of damage to 30 cars while Insured was performing an industrial painting job
        (2) Insurer sent a letter to Insured stating it would exercise its right to settle and would seek reimbursement for the deductible after negotiations were completed
            (a) Dispute arose over whether the deductible applied to each claim or if it was a one-time deal
            (b) Due to the dispute, the Insurer sent Insured a letter saying it wouldn't proceed further until the Insured acknowledged the Insurer's interpretation of the deductible as correct; Insurer refused to process the claims
                (i) Insured was able to settle all of them for under the deductible amount ($500)
        (3) Insured then brought the bad faith action against Insurer
    b) There is an implied covenant of good faith and fair dealing in every insurance contract that neither party will do anything to impair the other's rights to receive benefits under the contract.
        (1) If an insured can demonstrate bad faith or unreasonable action by the insurer in processing a third party claim, he can recover consequential damages in a tort action for breach of the covenant of good faith and fair dealing.
        (2) Extending duty as an extension of good faith in all obligations undertaken by the insurer for the insured
    c) Insured is not only bargaining for security from financial loss, but also the additional security of knowing they will be dealt with fairly and in good faith
        (1) Doesn't come from the contractual terms, but from the implied covenant of good faith and fair dealing
    d) A breach of an express contract provision is not necessary to bring a cause of action for bad faith. (The bad faith claim is in tort, not contract; the benefits due an insured are not limited by those expressly set out in the contract.)
        (1) Whether the insurer is liable for bad faith must be determined by the evidence before it denied the claim (Howard v. State Farm)
13. Gaskins v. Southern Farm Bureau Casualty Co. (S.C. 2003)
    a) The Gaskins sued their insurance company for fraudulently inducing them to sign a claim's release; Randy Gaskins' complaint alleges that Randy's dad accidentally shot him while hunting, resulting in injuries totaling over $36K
        (1) Also alleged that S. Farm insured Randy's dad, and that one of their insurance agents told Randy's dad the policy limit was $9k when it was really $100k
        (2) Claimed they relied on erroneous information when they accepted $9k for Randy's injuries
    b) Issue: Can the Gaskins recover in tort for fraudulent inducement to sign a release of all claims?
    c) SC law prohibits an insurer from knowingly misrepresenting to third-party claimants pertinent facts or policy provisions relating to coverage at issue or providing deceptive or misleading info w/respect to coverage

(1) Can't maintain an action against an insurer for fraudulently obtaining a release until he proves the materiality of the false representation

C. First Party Claims

1. First Party insurance involves policies covering losses suffered directly by the insured.
2. Majority view: failure to exercise good faith in deciding whether or not to pay a claim is a breach of the implied duty of good faith and fair dealing, and therefore actionable in tort. If he can prove insurer's actions were willful or reckless in disregard of insurer's rights, he can recover punitive damages (Adopted in SC, below)
   a) Provision applied only to breach of K and not to tort
   b) If an award sounds in tort, the award of attorney's fees is improper
3. Nichols v. State Farm, SC 1983:
   a) 2 causes of action:
      (1) breach of contract
      (2) bad faith refusal to pay benefits
   b) ISSUE: should this state recognize an action for bad faith in insurer's handling of claim for first party benefits?
   c) If an insured can demonstrate bad faith or unreasonable action by the insurer in processing a first party claim under their mutually binding insurance contract, the insured can recover consequential damages in a tort action.
   d) Policy reasons: insured doesn't normally possess bargaining power and has no means of protecting himself form the kind of treatment respondent complained of
      (1) Absent the threat of a tort action, the insurance company can deny any claim, regardless of whether or not it is valid
   e) Actual damages are not limited by the contract
      (1) If P wins in contract and tort, may have to reform the verdict so P only gets actual damages once
   f) If insured can demonstrate that the insurer's actions were willful or in reckless disregard of the insured's rights, he can recover punitive damages. (Tort action only.)
   g) [this was the first case that allowed a direct action against your own insurer for failure to pay first-party claim]
4. Elements of cause of action for bad faith refusal to pay first-party benefits:
   a) Existence of a mutually binding insurance contract;
   b) Refusal by insurer to pay benefits due under the contract,
   c) Resulting from insurer's bad faith or unreasonable action in breach of implied covenant of good faith and fair dealing,
   d) Causing damage to the insured.
5. Cock-n-Bull Steakhouse v. Generali Ins., SC 1996:
   a) Bad faith denial standard: was there a reasonable basis for denying the claim? If no reasonable basis, denial is in bad faith.
   b) Emphasizes tortious elements of bad faith claim.
   c) Sets forth test, above.
   d) Generali here tried to get out of paying by limiting the policy to the short-hand descriptions and ignored their own detailed language of the contract that set for the scope of coverage (stupid bastards)
      (1) Two of their own witnesses testified to the unreasonableness of their policy
6. Remedies for bad faith refusal to pay:
   a) Policy proceeds
   b) Emotional distress (consequential)
   c) Economic harm

d) Punitive damages
e) Attorneys' fees
f) Statutory remedies:
(1) 38-59-40: insurer liable for amount of the claim, and attorney's fees.
(2) 38-71-190: insurance policy can provide for subrogation (substitution) of insurer for insured in right of recovery against third party, but not for more than insurer has paid to insured for the injury caused by the third party.

7. Chucktown Dry Cleaners v. Zurich: independent insurance adjusters have no duty of care to an insured for their negligent or bad faith adjustment of claims (majority rule)
8. Crossley v. State Farm: no unreasonable for insurer to investigate medical history of an applicant who was diagnosed as having coronary artery disease the day after applying for a health insurance policy
9. Note that contract claims can get consequential damages, attorney's fees, but tort claims can get punitive damages.

IX. CHAPTER IX: AUTOMOBILE INSURANCE AND STACKING

I. Statutory Requirements for Liability Coverage
a. 38-77-30 Definitions
i. automobile insurance—covers automobile bodily injury, property damage, including medical payments, uninsured motorist coverage, automobile physical damage, economic loss benefits, and any nonowner policy which covers an individual who rides in a car not owned by the insured or family member of the insured
ii. insured—named insured, and spouse or relative of insured if resident of the same household; also, any person who used the insured motor vehicle with consent of the insured and a guest in the insured motor vehicle
iii. uninsured motor vehicle—a car to which: (1) no insurance in the amounts acquired by law, (2) insurer denies coverage, (3) insurer is declared insolvent, etc.
iv. underinsured motor vehicle—car that has insurance applicable at time of accident in amounts required by law, but the amount of the insurance is less that the amount of the insured's damages.
b. 38-77-340: agreement to exclude person from coverage
i. person can't be excluded unless (1) driver's license has been turned in to the Dept. of Public Safety, or (2) the insured already has an appropriate policy of liability insurance
c. 38-77-140: minimum required coverage: 15/30/10
i. $15,000 for bodily injury to one person in any one accident,
ii. $30,000 for bodily injury to 2 or more person in any one accident,
iii. $10,000 for damage to property of others in any one accident
d. 38-77-280: collision, comprehensive coverage
e. 38-77-220: Not required to cover any liability under Worker's Comp
f. 38-77-160: additional uninsured, underinsured coverage
i. additional uninsured and underinsured coverage has to be offered in amounts up to the limits of the insured's liability
g. 38-77-350 Forms used in offering insurance policies must have:
i. explanation of coverage
ii. list of available limits and range of premiums for the limits
iii. space for insured to mark whether he accepts or rejects the coverage and a space for insured to select the limits of coverage he desires

iv. space for insured to sign
v. mailing address and telephone number of Insurance Dept. in case insured has questions the agent can't answer

h. 38-77-120: requirements for notice of cancellation or refusal to renew
   i. insurer has to mail or deliver to insured's address shown in the policy a notification of cancellation or refusal to renew
   ii. notification must say that policy will be terminated in no less than 15 days after mailing or delivering
   iii. notification must state specific reason for cancellation or refusal to renew
   iv. notification must inform insured of his right to request within 15 days of receipt of notice that that the director review the action of the insurer
   v. must inform insured of possible availability of other insurance
   vi. doesn't apply if insurer has already issued a renewal policy, certificate etc. that indicates to the insured that he still has insurance or if insured demonstrates to insurer that he intends for policy to be canceled.

i. 38-77-341: unfair trade practices
j. 38-77-330: no claim for property damage can be denied or delayed because of pending claim for personal injury
k. 56-10-40: notification to department when insurance lapses
l. 38-77-230: payments made for a claim against insured are not admissions of liability.
m. 38-77-260: release, assignment of claims
   i. insurer cannot contract with the insured to get a general release, covenant not to sue, assignment, or article of subrogation that would assign the insured's claim against another party
   ii. some exceptions
n. 56-10-220: Every registered vehicles must be insured.
o. 38-3-110: duties of chief insurance officer
p. 38-77-112: insurers are not required to write automobile insurance for every applicant
q. 56-10-10: security required on registered vehicles
r. 56-10-20 Type of security required
s. 56-10-30 Automatic suspension of registration upon lapse or termination of security
t. 56-10-50 Suspension of registration not to affect title to vehicle
u. 56-10-210: definitions, insured motor vehicle
v. When 2 policies extend coverage to the operation of a vehicle, the policy insuring the liability of the owner of a described vehicle has the first and primary obligation, and the other policy is the excess carrier. Unisun Insurance Co. v. First Southern Insurance Co., SC App. 1994.38-77-340

II. Statutory requirements for Uninsured Motorist Coverage (UM)

a. 38-77-30 Definitions
   1.38-77-30: defining uninsured motor vehicle:
      a) There is no liability insurance, or
      b) Insurer denies coverage, or
      c) Insurer is insolvent, and
      d) There is no security in lieu of the insurance, and
      e) The owner of the vehicle is not a self-insurer. OR
      f) Owner is unknown. OR
      g) State vehicle is driven by unauthorized person.

b. 38-77-150 minimum uninsured motorist coverage required is 15/30/10
   i. UM automatically rolls on to every automobile liability policy in minimum limits:
      1. 15,000 for single injury
      2. 30,000 for single occurrence

3. 10,000 for personal property damage (of others)

2. Single-Limits Policy: eg., 35/35/35. UM rolled on at 15.

c. 38-77-160 Additional uninsured motorist coverage; underinsured motorist coverage
   i. additional uninsured and underinsured coverage has to be offered in amounts up to the limits of the insured's liability
   ii. Can purchase UM above minimum limits, up to your policy's liability limit coverage.

d. 38-77-161 Uninsured or underinsured coverage not required in excess or umbrella policy

e. 38-77-170 If owner of car is unknown, can't recover under uninsured motorist provision unless:
   i. insured or witness reported accident within reasonable time
   ii. injury/damage caused by physical contact with unknown vehicle or accident witness by someone other than owner or operator of insured vehicle
   iii. insured was not negligent in failing to determine the identity of the other vehicle and its driver

f. 38-77-180 "John Doe" actions against unknown defendant; service of process and defense by insurer; action against or joinder of identified owner or operator.

g. 38-77-190 Subrogation of insurer who pays claim under uninsured motorist provision to rights of insured
   i. insurer who pays UM claim is subrogated to insured against responsible third parties

h. 38-77-200 Arbitration clause prohibited in uninsured motorist provision

i. 38-77-210 Uninsured motorist provision not required to cover property damages paid to insured.
   i. UI motorist provision doesn't have to cover property damages for a loss the policyholder has already been compensated for by insurance or otherwise.

j. Uninsured motorist insurance is carried on your own policy, acts as liability coverage when you are injured by an uninsured tortfeasor.

3. Self-insurers as well as insurance carriers must provide uninsured motorist coverage.

III. Underinsured Motorist Coverage (UIM)

a. 38-77-30(15) Definitions
   i. underinsured motor vehicle—the car is insured at minimum limits, but the damages are more than the coverage; tortfeasor's insurance doesn't cover your injuries

b. The tortfeasor must have been insured at minimum limits; below that, driver is considered uninsured.

c. Insured must receive meaningful offer up to policy limits.

d. Assignment of Underinsurance Coverage
   i. 38-77-160 Additional uninsured motorist coverage; underinsured motorist coverage
      1. additional underinsured motorist coverage is not required, but is considered excess insurance
      2. benefits paid to this section are not subject to subrogation and assignment
   ii. McMillan v. John Hughes Seafood Co., Inc. (SC 1997)—Π agreed to pursue al excess insurance recoveries available and assign the recoveries to the Δs. This is an impermissible assignment of a claim for underinsured motorist coverage under 38-7-160.

e. 38-77-161 Uninsured or underinsured coverage not required in excess or umbrella policy—a policy that supplements the underlying primary policy.

f. Tucker v. Allstate Ins. Co. (SC Ct. App. 1999)
   i. 38-77-160 requires that auto insurers offer UIM to their insureds up to the limits of the insured liability coverage. To comply with this requirement, the offer of UIM must be meaningful.
   ii. If the insurer fails to comply with this duty to make a meaningful offer, the policy will be reformed by operation of law to include UIM coverage up to the limits of the liability insurance carried by the insured.
   iii. Here, the offer sufficiently conveyed the required information and was meaningful, even though it did not include an offer of UIM in the precise amount of the liability coverage.

g. State Farm v. James (SC Ct. App. 1999)

i. The policies at issue excluded recovery for injuries to an insured's employees arising out of employment.
ii. Insurers have the right to limit their liability and to impose whatever conditions they desire on an insured, provided they are not in contravention of some statutory inhibition or public policy.
iii. This exclusion does not conflict with any statutory mandate, 38-77-220, and is enforceable.
iv. A suit to determine coverage under an automobile liability policy is an action at law.
v. The terms underinsured and uninsured are mutually exclusive; you can only get one of them.

h. 38-77-170 If owner of car is unknown, can't recover under uninsured motorist provision unless the 3 conditions are met. A witness must be required to sign an affidavit. A false statement in the affidavit may subject the person to criminal penalties.
i. Courts have required strict compliance with this statue. Collins v. Doe (SC 2002) held that a Π's strict compliance with the affidavit requirement is mandatory. Even if a witness testifies, there still must be an affidavit; there is no provision for the functional equivalent of an affidavit.

i. As a general rule, when 2 policies extend coverage to the operation of a vehicle, the policy insuring the liability of the owner of a described vehicle has the first and primary obligation, and the other policy is the excess carrier. Unisun Ins. Co. v. First So. Ins. Co. (SC Ct. App. 1994).

IV. Meaningful Offer of UIM

a. Norwood v. Allstate Ins. Co. (SC Ct. App. 1997)
i. Four elements required for an insurer to make a meaningful offer of coverage:
1. Notification process must be commercially reasonable, whether oral or in writing
2. Insurer must specify the limits of optional coverage and not merely offer additional coverage in general terms
3. Insurer must intelligibly advise the insured of the nature of the optional coverage
4. The insured must be told that optional coverages are available for an additional premium

b. State Farm Mut. Auto Ins. Co. v. Wannamaker (SC 1987)
i. Court found that 9 page booklet was not an effective offer of UIM.
ii. Statutes provide that the insured will have the option of accepting or rejecting the offer of UIM. The insured must be provided with adequate information, and in such a manner as to allow the insured to make an intelligent decision of whether to accept or reject the coverage.
iii. Court adopts the test above for meaningful offer.
iv. Issue is whether he rec'd adequate notice of UIM coverage, and came up with the WANNAMAKER TEST.
v. If mutual mistake, no meeting of minds. Cts will reform K to reflect what MoM should have been. The other is fraud??? Maybe.
vi. GET ALL OF 38-77-160. UM and UIM are considered personal and portable.

c. Jackson v. State Farm Mutual Auto. Ins. Co. (1991)
i. An insurer makes a meaningful offer of UIM if it provides the insured with a premium renewal notice that refers to underinsured and uninsured motor vehicle coverage and includes and insert explaining the terms.
ii. The initial burden of proof is on the insurer to show that it made a meaningful offer.
iii. The offer here was meaningful because it:
1. referred to uninsured and underinsured coverage
2. included an insert explaining the coverage
3. contained a statement instructing the insured to read the insert for further information.
4. In another case, found that offer wasn't meaningful where is placed critical information in 2 documents and didn't include anything in the renewal notice alerting the insured to read the insert (this did not draw the insured's attention to the nature of the offer.)
5. Form has changed now, has to list all covered, and be signed by insured.

d. American Security Ins. Co. v. Howard (SC Ct. App. 1993)

i. Offer found to be improper because it:
1. automatically rolled on UIM with mandatory liability coverage, and then gave the insured the right to reject the coverage and receive a partial refund of the premium. This is an illegal negative sale.
2. offered UIM only for an amount equal to the liability coverage. The statute requires optional coverage to be offered in any amount up to the limits of liability coverage.
3. did not specifically state the limits of the coverage. The offer must specify the limits of the additional coverage in dollar amounts.
4. did not provide the insured with a separately stated premium amount for coverage at the specified limits.
5. did not explain the nature of UIM coverage and how it differs from other coverages.

ii. Even if the insured expressly refuses the coverage, a noncomplying offer has the legal effect of no offer at all.
iii. Underinsured motorist coverage is not limited to the use of the insured vehicle.
iv. Concrete Services, Inc. v. U.S. Fidelity and Guaranty Co. (SC 1998), Supreme Court held that ownership of the vehicle is not required in order to stack coverage. Therefore, American Security is overruled to the extent that is implies that ownership is required.

e. McDonald v. SC Farm Bureau Ins. Co. (SC Ct. App. 1999)
i. If the form provided in 38-77-350 for new applicants is properly completed by the named insured, there is a presumption that the insured made an informed coverage decision.
ii. Substituting a new person as the named insured on a policy creates a new policy, and an offer of UIM is required to the new insured.

f. Only the named insured, and not just any insured, can waive UIM by rejecting the offer. The named insured must make a knowing, informed selection of coverage.

V. Personal Injury Protection (PIP)
a. 38-77-144 Personal injury protection coverage not mandated.
i. PIP pays, regardless of fault, anyone injured for medical costs and lost wages.
ii. Used to be required by SC law. Not required now.

b. State Farm Mutual Automobile Ins. Co. v. Richardson (SC 1993)
i. If an insurer sells no-fault insurance coverage which provides personal injury protection, medical payment coverage, or economic loss coverage, the coverage cannot be assigned or subrogated and is not subject to set off. However, contract can provide for setoff of PIP.
ii. Before reforms, a tortfeasor could reduce his liability by amount of PIP benefits received by claimant under 38-77-290(f). After the reforms, the Legislature expressly provided the PIP coverage was not subject to set off under 38-77-144. The court reasoned that the set off prohibited by 38-77-144 is the tortfeasor's reduction in liability formerly allowed by 38-77-290(f).

c. Burns v. State Farm Mutual Auto. Ins. Co. (SC 1989)
i. Basic PIP is $1,000. Additional PIP (APIP) is anything about $1,000.
ii. Exclusions can be made to both PIP and APIP policies.
iii. Motorcycles may be validly excluded from both PIP and APIP coverage.

VI. Stacking
a. Stacking is an insured's recovery of damages under more than one policy in succession until all damages are satisfied or until the total limits of all policies have been exhausted. Jackson v. State Farm Mutual Auto. Ins. (SC 1986).
b. Ownership of the vehicle is not required to stack. It must be a motor vehicle—ie. not a tractor.
c. For purposes of stacking:
i. Class I insured—an insured or named insured that has a vehicle involved in the accident
ii. Class II insured—an insured whose vehicle was not involved in the accident.

d. Rules are the same for interpolicy stacking (where cars are covered by different insurers or policies) and intrapolicy stacking (where cars are covered under the same policy.
e. Rules
    i. Class I insureds (named insured, resident spouse and relatives) may stack basic 15/30/10
    ii. Class II insureds (permissive users and guests) may not stack even basic limits policies.
        1. Richardson v. SC Farm Bureau Mutual Ins. Co. (SC Ct. App. 1999)
    iii. Single limit $35,000 policies are considered excess and can be stacked in appropriate cases only in the amount of $15,000.
    iv. An insured can recover both liability and UIM benefits from the same policy in certain cases
    v. The insured cannot recover both UM and UIM benefits for the same accident.
    vi. A Class I insured that has UIM coverage on the car involved in the accident in excess of the basic statutory limits may stack UIM coverage from other policies in an amount equal to the coverage on the car involved in the accident.
        1. SC Farm Bureau Mutual Ins. Co. v. Mooneyham (1991)
            a. If an insured or named insured is protected by uninsured or underinsured motorist coverage in excess of the basic limits, the insured will be protected only to the extent of the coverage he has on the vehicle involved in the accident. (38-77-160)
            b. The statute limits the amount of coverage which may be stacked from policies on vehicles not involved in an accident to an amount no greater than the coverage on the vehicle involved in the accident.
            c. When a class I insured has UIM coverage on the car involved in the accident in excess of the basic statutory limits, the insured is entitled to stack UIM from other policies in an amount equal to the coverage on the car involved in the accident.
    vii. Reduction UIM Coverage v. Excess UIM Coverage—Reduction UIM coverage provides benefits to an insured under his own policy only when the claimant's UIM coverage is greater that the at fault driver's liability coverage b/c the amount of recovery from the claimant's UIM coverage is reduced by the amount of recovery from the at-fault motorist. Excess UIM coverage provides benefits to an insured under his own policy at any time the at fault driver's liability is less than the amount of the claimant's actual damages. SC is an excess coverage state.
    viii. Stacking Uninsured Motorist Coverage—The insured is a Class I insured and may stack uninsured motorist coverage even though the insured does not have an owned vehicle in the accident.
        1. Concrete Services, Inc. v. US Fidelity and Guaranty Company (SC 1998)
            a. So long as the individual otherwise qualifies as a class I insured, he need not own the vehicle to stack
    ix. An insured may be barred by the insurance contract from the stacking of multiple vehicle liability coverage from the same policy even though the policy can be treated as theoretically separate policies.
        1. Ruppe v. Auto-Owners Insurance (SC 1998)
            a. Policy can limit or prohibit stacking of liability coverage.
            b. Stacking of UM or UIM in an amount no greater than the coverage on the vehicle involved in the accident (*Mooneyham*) cannot be prohibited. But where none of the insured's vehicles is involved in the accident, stacking of UM or UIM can be prohibited.
            c. Stacking of non-owned liability coverage (which protects an at-fault insured while driving someone else's vehicle) may be prohibited by contract because it is

not statutorily mandated coverage (JACKSON Case). 33-77-140 reqs liability by statute, and is limited by vehicle for which it is purchased.

d. Stacking can be prohibited if it is consistent with statutory insurance requirements.

e. Argued, since liability is mandatory, you should be able to stack them.

x. Stacking Excess Underinsured Motorist Coverage

1. American Sec. Ins. Co. v. Howard

a. can stack coverages for wife's 3 other cars b/c husband is a Class I insured.

b. If the sum of all the applicable coverage available through stacking exceeds the actual damages, the coverage will be apportioned pro rata between the policies.

2. Underinsured coverage in amounts not exceeding the basic limits of 15/30/10 on each vehicle under an insurance policy can generally be stacked.

3. Concrete Services, Inc. v. US Fidelity and Guaranty Company (SC 1998)

a. So long as the individual otherwise qualifies as a class I insured, he need not own the vehicle to stack

xi. 56-9-381 No Stacking—

1. If none of the insured's or named insured's vehicles is involved in the accident, coverage is available only to the extent of coverage on any one of the vehicles with the excess or underinsured coverage.

xii. Stacking PIP Coverage

1. B/c PIP is non-mandatory, the insurer may place an anti-stacking clause in the policy as to PIP coverage.

X. INSURABLE INTEREST

a. Insurable Interest Defined

i. You can insure something, and be indemnified for loss, only if you have an insurable interest in it. [originated in England; can't use property in which you don't have an interest as a wagering device]

(1) Insurable interest in prop means you derive a benefit from its existence or would suffer a loss from its destruction

ii. Requirement of insurable interest before one can obtain benefits under an insurance policy serves 2 main purposes:

(1) Elimination of insurance as a vehicle for gambling

(2) Removal of temptation provided by a prospect of a net profit through insurance proceeds to deliberately bring about the event insured against.

iii. Benton & Rhodes, Inc. v. Boden, SC App. 1993:

(1) Anyone has an insurable interest in property who derives a benefit from its existence or would suffer loss from its destruction. An insurable interest in property is any right, benefit, or advantage arising out of or dependent thereon, or any liability in respect thereof, or any relation to or concern therein of such a nature that it might be so affected by the contemplated peril as to directly damnify the insured.

(2) An insurable interest doesnt necessarily imply a prop interest in, or lien upon, or possession or, the subject matter of the insurance, and neither the title nor a beneficial interest is requisite to the existence of such an interest

(3) It is not necessary to constitute an insurable interest that the event insured against would *necessarily* subject the insured to loss; it is sufficient that it *might* do so.

(4) A mortgagee of real or personal property has an insurable interest to the extent of the mortgage debt, even after he has assigned the mortgage, if he has guaranteed its payment. The mortgagor retains his insurable interest after selling the property if the mortgagor remains personally liable on the debt.

(5) Here, respondent sold a fellerbuncher to a third party, but retained an insurable interest in the fellerbuncher b/c use of the fellerbuncher enabled the third party to make payments to respondent

b. Life Insurance

i. Resembles an investment more than true insurance based on a contingency; the only contingency is when, not if.
ii. Everyone has an insurable interest in his own life. One can procure life insurance on his own life and name whatever beneficiary he wants, if done in good faith and not to cover a wager. (Ellison v. Independent Life & Accident Insurance Co., SC 1950) (it's assumed you won't name a beneficiary who will kill you). .
(1) Can assign a policy to a 3rd party, who then takes over premium payments and can change the beneficiary (even though the 3rd party did not have an insurable interest when policy was first created)
(a) Reason for free transferability is that life insurance is viewed as an investment more than straight insurance
iii. One cannot obtain life insurance on the life of a person in whom you have no insurable interest.
iv. The insurable interest must exist at the time the policy is made, but does not have to exist at the time of death. Eg., divorce does not defeat the ex-spouse's claim for life insurance proceeds (assuming the ex-spouse is still the named beneficiary).
(1) Can make a K not to change beneficiary. If husband insures his life w/ wife as beneficiary. As part of divorce, can agree that husband will not change the beneficiary and it will be enforceable even if husband later tries to change benes
(2) But cannot renew a policy after insurable interest has ended
v. Who else has an insurable interest in your life (and can therefore buy policy insuring your life)?
(1) Spouse (in SC, insurer or person buying policy must notify spouse that you are insuring him)
(2) Children
(3) Parents
(4) siblings, maybe grandparents
(5) Beyond these, insurers will hesitate to insure. Relationships in affinity (family relationship without blood) are usually not insurable, unless it arises in business context (see Key Man Insurance), while relationships in consanguinity (genetic relationship, Related by descent from a common ancestor) usually are
vi. Insurer (and sometimes third parties) can raise defense of no insurable interest to issuing policy.
vii. W/ regard to spousal life insurance, in SC, must get spouse's permission before you can insure their life
viii. Other interests in life:
(1) Key Man insurance: business partnership insures its partners' lives. Proceeds go to company.
(2) Creditors
(3) Salary Continuation Agreements: employer starts paying out after 65; policy belongs to the business, more of an investment because you pay in premiums.
(4) Buy-out agreements: corporation takes life insurance on partners; corp gets paid on death, then transfers proceeds to decedent's estate, which agrees to return all shares of the corporation to the company.
ix. Statutes:
(1) 38-63-220: required policy provisions for life insurance
(2) 38-69-120: requirements for annuities
(3) 38-63-210: whole contract must appear in policy
x. Conditional Receipts and Temporary Insurance: Hamrick v. Life & Casualty Insurance Co., SC 1989:
(1) In life insurance, there are binding receipts which at least conditionally afford an applicant interim coverage between the date of the application and the actual issuance and delivery of the policy.
(2) One type of provision makes the effectiveness of the temporary insurance dependent on the approval of the application by the insurance company.
(3) Another provision makes the effectiveness of temporary insurance conditioned on the insurability of the applicant at the time of the application.
(4) Where a binding receipt is issued to the applicant stating that the insurance will be binding from the date of the application if the insurance company is satisfied that the applicant is an insurable risk at that time, a contract of preliminary insurance is created with the reserved right in the insurer to determine in good faith the applicant's insurability.

c. Property Insurance

i. An insurable interest must exist in the property to be insured at the time the policy is issued and at the time of loss.
ii. Insurable Interest: interest that holder derives benefit from its existence or who suffers a loss from its destruction. Imp time for an insurable interest in prop is the time of the loss.
(1)

iii. Types of insurable interests in property:
(1) Legal title
(2) Equitable title (eg., beneficiary of a trust)
(a) K beneficiary's expectation interest (buyer of home after K is signed but before closing has an insurable interest in the home)
(3) Possessory interest
(a) Person who has temporary use of vehicle may have it insured
(b) Bailments can be insured
(i) you ask friend to take care of your car while away, friend has a possessory interest
(ii) friend asks to borrow your car, friend has possessory interest
(iii) rent a car, you can turn down their insurance, and your insurance can cover it
(4) Creditor's interest
(a) Bank has insurable interest in prop that it mortgages
(5) Future interests in property (eg., a remainder)
(6) Representative's interest
(a) PR of someone's estate has a representative interest
(7) Stockholder's interest in corporate property (closely held corp.)
(8) Liability interest (eg., guarantor)
(a) If purchaser assumes your mortgage in home sale, and your name is still on the bank note, it can be enforced against you if buyer defaults so you still have an insurable interest in the house
iv. Powell v. Insurance Co. of North America, SC App. 1985:
(1) One cannot insure for his own benefit the property of another in which he has no interest. (An insured must possess an interest of some kind in the subj matter of the policy–if not the insured sustains no loss by the prop's desturction)
(2) An expectancy (ie, to receive property in the future) is not an insurable interest. Must have a present interest in the property.
(a) If the gift is not to go into effect until the death of the donor, it is testamentary and void unless executed in a valid will
(3) Here, P's mother told him she wanted him to have her silver when she died, but she never delivered the silver to him and her will made no gift of the silver, so P has no insurable interest

d. Subrogation

i. If insured recovers from a third party for his damages, insured must repay insurer for amounts insurer paid for the same damages.
ii. Purpose is to prevent an insured from profiting from his loss, to place the ultimate economic burden on the party causing the loss in the first place, and to hopefully reduce insurance rates.
iii. SC: an insurer is subrogated to the insured's claim against a tortfeasor to the extent of the amount paid on the claim. This is usually in the contract, but can be implied.
iv. Legal (equitable) subrogation: stand in the shoes of the injured person to collect the debt you already paid for (100%). This is a form of indemnity that fully compensates the insurer
v. Contractual Subrogation:
vi. In SC, don't recognize equitable subrogation in life ins, but it is recognized in prop ins or liability ins
vii. Hall & Co., Inc. v. Bailey Lincoln-Mercury, Inc., SC 1989:
(1) Legal subrogation is an equitable doctrine, not dependent on contract, whose purpose is to require the ultimate discharge of a debt by a person who in equity and good conscience ought to pay it.
(2) When an insurer pays its insured for a loss resulting from the tortious conduct of a third party, the insurer is subrogated to the rights of its insured against the third party.
viii. Shumpert v. Time Insurance Co., SC App. 1998:
(1) Subrogation is the substitution of one person in the place of another with reference to a lawful claim or right.
(2) Subrogation enables the insurer to recover the amount paid to the insured out of any judgment or settlement proceeds received by the insured from the third party.
(3) Subrogation can arise by contract, statute, or equity. Equitable (legal) subrogation is implied subrogation that arises under

common law.

(4) Elements of equitable subrogation:

(a) Party claiming subrogation has paid the debt

(b) Party had a direct interest in the discharge of the debt and was not just a volunteer

(c) Party was secondarily liable for the debt, and

(d) No injustice will be done to the other party by allowing the equity.

(5) Statute allows subrogation in accident and health insurance policies. 38-71-190.

(6) A health insurer which does not include a provision for subrogation in the insurance contract is not entitled to obtain equitable subrogation (health insurers are primarily liable for the expenses; courts generally don't recognize implied subrogation for personal insurance).

ix. When 2 policies of primary coverage extend coverage to the same property, the policy insuring the liability of the owner of the property has the primary obligation.

e. **Conditional Receipts and Temporary Insurance**

i. Hamrick v. Life and Casualty Ins. Co. of Tenn., SC 1969

(1) Where a binding receipt is issued to the applicant w/ a provision that the ins be binding from the date of the application or the medical exam if the ins co is satisfied that the applicant was an insurable risk at that time, the general rule is that a K of preliminary ins is created w/ the reserved right in the insurer to determine in *good faith* the applicant's insurability

(2) Insurer, cannot arbitrarily and capriciously determine that the applicant does not have an insurable interest.

XI. Miscellaneous Insurance

a.Disability

ii.Disability insurance pays when you can't work

iii.Total disability doesn't mean absolute helplessness; the insured may recover where he is unable to do substantially all material acts necessary to perform:

(1)his former occupation in the customary manner, *(Shealy v. United Ins. Co. of America)* or

(2)an occupation or employment for which he is reasonably fitted and that rationally approaches the same livelihood and standard of living which he enjoyed prior to his disability *(Dunlap v. Maryland Casualty Co.)*.

iv.Types of Policies:

(1)Own Occupation: can get benefits when you can't engage in your specific occupation; the fact that you can do other work doesn't prevent recovery.

(2)Any Occupation: can recover if you cannot do any occupation, and are therefore completely disabled

(3)Hybrid: own occupation for 2 years, then becomes any occupation.

v.Rowe v. Home Security Life Insurance Co., SC App. 1986: Example of hybrid policy. Will get coverage if there is a complete inability to engage in his regular occupation; or , If indemnities are paid for 2 years in any continuous disability, then for the remaining duration of such period of continued disability. Co. paid benefits for 2 years and refused to pay anymore after that.

(1)Issue: whether he was considered totally disabled after this period.

(2)Dispute = jury charge

(3)Ct. Held Disability was defined according to Dunlap and Shealy:

Total disability doesn't mean absolute helplessness; the insured may recover where he is unable to do substantially all material acts necessary to perform:

(a)his former occupation in the customary manner, *(Shealy v. United Ins. Co. of America)* or

(b)an occupation or employment for which he is reasonably fitted and that rationally approaches the same livelihood and standard of living

(c)Reversed – the jury could have found the work would not "rationally approaches the same livelihood and standard of living"

vi.Poston v. World Insurance Co., SC App 1985:

(1)Policy defined disability as that requiring continuous confinement

(2)Literal compliance with such requirements is not necessary for recovery.
(3)Insurer claimed the insured was not "continuously confined" because he was able to walk a half a mile some days, load feed once, driven to a farm to watch tobacco be loaded three times, visited children (3 who live on his land, 1 lives by Dr.), and fished 3 times on a pond on his land.
(4)Ct held: "Continuous confinement" is meant to describe the character and extent of the illness, not to prescribe a limitation on his conduct *(Shealy)*.
(5)Issue 2: the ct held the lower court did not error in defining total disability in terms of economic loss. The lower court used the definition of disability from *Shealy* and *Dunlap* and the ct held that this was the proper definition
ii.Workers Compensation: if voluntary coverage has been provided by the employer, not the individual, then a policy can require setoff of the amounts received under Workers Comp against the amount the policy pays. Otherwise setoff not allowed.

b.Accident

i.*"Accident"* is to be construed according to the meaning of the term generally understood and accepted by most people. It doesn't matter that the insured caused the injury so long as the result was not intended or expected. i.e. if the insured was negligent, he still can get accident coverage *(Goethe v. NY Life Ins. Co.)*
ii.Stevenson v. Connecticut General Life Insurance Co., SC 1975:
(1)Policy covered accidental bodily injury and resultant losses. (Hot boat deck, insured could not feel because of loss of feeling due to diabetes, 3rd degree burns => foot amputated)
(2)**Accident:** sudden event or change occurring without intent or volition through carelessness and producing an unfortunate result.
(3)An event will be an accident, even if the injured person or some third person voluntarily set in motion the series of events which caused the injury, if the resulting injury: *(Lickleider v. Iowa State Traveling Men's Assoc.)*
(a) Took place unexpectedly
(b)Was an unexpected result from a known cause
(c)Was produced without design or intention
(d)Was an unusual and unexpected result attending the performance of a usual or necessary act
(e)Was an event happening without the concurrence of the will of the person who caused it
(f)Was caused or produced without design
(4)Insurer claimed that it was not required to pay because a reasonably prudent person in the same position would have foreseen the accident, i.e. because he was negligent
(5)Unless the policy *expressly excludes* acts caused by the negligence of the insured, recovery under an accident policy will not be defeated just because the insured's negligence contributed to the injury.
(6)Whether the injury was accidental is to be determined in terms of whether it occurred with the insured's intent and whether it was an event which he actually expected or anticipated as a result of his conduct, not whether the injury was reasonably foreseeable.
(7)The accident must have been the proximate cause of the loss; the fact that some other cause may have contributed to a minor degree will not defeat recovery.
(8)A provision requiring loss to be caused by accident "independent of all other causes" will be construed as requiring that the accident be the proximate cause of the loss.
(9)THIS CASE: the injury was the nearest efficient cause and was therefore the proximate cause of the loss.
(10)The insured does not have to be in perfect health at the time the accident occurs in order to recover for an accidental injury under policy language *(Kilgore v. Reserve Life Ins. Co.)*

f.Contributive Insurance

i.If 2 or more policies are written on the same property, they are considered to be contributive insurance. Each insurer is liable for its pro rata share of the loss. 38-75-20. (Doesn't apply to chattels or personal property.)
ii.SC Insurance Co. v. Fidelity & Guaranty Insurance, SC 1997:
(1)A blanket insurance policy and a specific insurance policy, each held by a different insurer, covered the same property and interest. Both policies provided that their coverage would be "excess" to any "other insurance" on the property.
(2)Issue: When a blanket insurance policy and a specific policy provide coverage for the same peril to the same property and interest, does SC require that the specific insurance policy coverage limits be exhausted 1st before application of the

blanket policy, or will the policies be pro rated according to the respective policy limits of each policy?
(3)"Other insurance" clauses are intended to apportion an insured loss between or among insurers where 2 or more policies offer coverage of the same risk and same interest for the benefit of the same insured for the same period. Used to prevent fraud in the over-insuring of property
(4)Forms of "other insurance" clauses:
(a)*Pro rata*: insurer will pay its share of the loss in the proportion its policy limits relates to the total liability coverage available
(b)*Excess*: an insurer will pay a loss only after other available primary insurance is exhausted; covers amounts exceeding the policy limits of the other insurers.
(c)*Escape*: the insurer is absolved of all liability if other coverage is available
(d)*Excess escape*: insurer is liable for the amount of a loss exceeding other available coverage, but that insurer is not liable when other available insurance has limits equal to or greater than its own.
(2)THIS CASE: The 2 policies (1) cover the same risk (2) cover the same interest (3) are for the benefit of the same insured and (4) apply to the same time period
(3)Here, the court is resolving competing "excess" "other insurance" clauses
(4)SC: When policies insure the same entity and interest against the same casualty, their coverage is concurrent and the loss must be prorated, absent policy language in "other insurance clause" to the contrary.
(5)Generally, when 2 policies both have excess clauses, ct finds repugnant and the clauses cancel each other out and both policies are treated as primary (and loss is prorated). *(Indiana Ins. Co. v. Mission Nat'l Ins. Co.)*
(a)This rule should not apply when its use would distort the meaning of the terms of the policies involved.
(6)In determining whether a loss covered by multiple insurers should be prorated or whether one policy should be treated as an excess policy (whether they are intended to provide primary or secondary coverage), courts should consider the "total policy insuring intent" based on all the language of the insurance policies at issue.
(7)Factors to consider in determining the intent of the parties include:
(a)The "other insurance" clause
(b)The state coverage provided in the policy
(c)The premium paid for such coverage
(d)Any requirements in the policy that the insured have underlying insurance policies
S CASE:
(a)Both policies (absent the excess clauses) appear to provide primary coverage
(b)Neither policy required the insured to possess "underlying insurance" as to commercial property coverage (most strictly excess policies require)
(c)Only main diff – one covers more buildings at more locations – this does not control!
D: Under SC law, the policies' "excess" clauses are mutually repugnant, both policies provide primary coverage, and the loss with regard to the 3 building recovered should be prorated between the 2 ins. co. according to their respective policy limits

b.Co-Insurance

iii.An insured must insure up to a specified percentage of the value of the property at the time of loss, or the owner will bear a pro rata percentage of the loss himself. (Ie, if underinsured, will get less than the policy limits.)
iv.Permissible in SC, but they are frowned upon!
v.For these clauses to be permissible, a co-insurance flag must be prominently displayed on the face of the policy. SC § 38-75-40.
(1)Without the flag, the co-insurance clause is void.
vi.Generally, if insured insures 80% of the value of the property, insured can recover full value of the policy.

g.Mortgagee Insurance

i.Usually mortgagee must have proof of property insurance.
ii.Ways the mortgagee protects itself against loss:
(1)*Loss payee policy*: mortgagee becomes a named insured on the policy, up to the extent of the debt. [but if fire intentional, mortgagee won't get paid either.]
(2)*Independent policy*: mortgagee is the only named insured.

(a)*Forced place insurance*: the mortgagee buys the policy, insures itself.
(2)*Standard* or *Union Mortgage Clause*: a clause put in the loss payee policy, stating that no act of the insured other than nonpayment of premiums will void the insurance policy.
ii.Mortgagee cannot receive insurance proceeds in excess of its interest in the property.
iii.Nationwide Mutual Insurance Co. v. Hunt, SC 1997:
(3)Ins Co. claims because fire ins. was obtained through fraud, intentional concealment, and misrep by the insured, the policy was void and there was this no coverage for the mortgagee .
(4)Whether a mortgagee can recover on an insurance policy where there has been misconduct by the insured depends on the type of mortgagee clause in the insurance contract.
(5)*Loss payable clauses* (open mortgage): the loss, if any, is payable to a mortgagee as its interest appears.
(a)insured's misconduct bars recovery by mortgagee
(b)Diff. with Standard: this clause merely identifies the person who may collect the proceeds. The mortgagee stands in the insured's shoes and is usually subject to the same defenses.
(2)*Standard clauses* (Union or NY mortgage): as to the interest of the mortgagee, the insurance will not be invalidated by certain acts of the insured; the acts will still be grounds of forfeiture against the insured.

(1) insured's misconduct does not bar recovery.
(2) Diff with Loss Payable: the mortgagee will become liable to pay the premium to the insurance company if the mortgagor fails to do so, and will be freed from policy defenses which the company may have against the insured.
(3) as long as mortgagee has not breached any policy conditions, mortgagee can recover even though the risk is excluded from the policy coverage, the mortgagor caused the loss, and there is no coverage for the insured.
(4) Majority rule (substantively the same as SC): Even though the policy may be deemed void ab initio as to the insured because of nonpayment of the premium, it will remain viable as to the mortgagee until canceled in accordance with the mortgagee cancellation clause.

Mortgagee's status is separate and independent from the mortgagor. Mortgagee's status is so independent that no act or neglect by the mortgagor can derogate his status provided that if mortgagor fails to pay the premium, the mortgagee must do so.

(5) SC rule: Does not fully accept the majority rule that a standard mortgagee clause creates a distinct and independent contract. A mortgagee is vested with a status which includes all of the rights incident to an independent and separate contract, and the insured can do nothing which will divest the mortgagee of these rights except pay off the mortgage debt.
(6) This ct holds no substantive diff between majority rule and SC rule
(7) THIS CASE: The court finds a standard clause in the contract because the mortgagee is required to pay the premiums on the insurance if the insured fails to do so.

II. Reading an Insurance Contract

a.Parts of the Contract
i.Jacket:
(1)Contains policy definitions, terms of art
(2)Conditions of coverage (eg., payment of premiums)
(3)Supplemental repayments common to all
iii.Insert:
(1)Coverage part form
(2)The core of the policy

(3)Each insurance form has to be approved by state insurance department (can use forms from Insurance Services Office–a national group)

iv.Declarations Page: the most important

1. Who is covered (names insureds)
2. Policy period
3. What the premiums are
4. How much the coverage is
5. What property is covered
6. What triggers liability
7. Insurer agreement: "we will insure..." (What the coverage is; conditions; exclusions)
8. How claims are paid, and to whom

h.Consumer Policies
i.Those bought by individuals
ii.State regulatory scheme governs
iii.Must be readable (eg., # of syllables/100 words)
iv.Problems: information load, readability, conceptual ability of reader
v.Forms are used because they should be predictable; but courts interpret them differently.

Steps to Reading Contract
Declarations page (name of parties, policy period, amount of insurance for each coverage, what persons/property is insured)
Definition of insured (is claimant an identified insured? Does insured have insurable interest?)
Insuring clause (is event covered?)
Exclusions?
Conditions of compliance (last few pages of jacket)
SC Code, what it says about this type of policy (statute may change terms of policy)
Checklists in policy
Implied exceptions
Measure of recovery clause (co-insurance, share cost with insurer; apportionment of partial interests.)
Subrogation clause
Problems with definitions within policy?
Rights of beneficiaries (eg., killer beneficiaries)
Assignments of beneficiaries (probably in separate document)
Incontestability period?

XII. READING AN INSURANCE CONTRACT

A. Parts of the Contract

1. Jacket:
   a) Contains policy definitions, terms of art
   b) Conditions of coverage (eg., payment of premiums)
   c) Supplemental repayments common to all
2. Insert:
   a) Coverage part form
   b) The core of the policy
   c) Each insurance form has to be approved by state insurance department (can use forms from Insurance Services Office–a national group)
3. Declarations Page: the most important
   a) Who is covered (names insureds)
   b) Policy period
   c) What the premiums are
   d) How much the coverage is
   e) What property is covered
   f) What triggers liability
   g) Insurer agreement: "we will insure..." (What the coverage is; conditions; exclusions)
   h) How claims are paid, and to whom

B. Consumer Policies

1. Those bought by individuals
2. State regulatory scheme governs
3. Must be readable (eg., # of syllables/100 words)
4. Problems: information load, readability, conceptual ability of reader
5. Forms are used because they should be predictable; but courts interpret them differently.

C. Steps to Reading Contract

1. Declarations page (name of parties, policy period, amount of insurance for each coverage, what persons/property is insured)
2. Definition of insured (is claimant an identified insured? Does insured have insurable interest?)
3. Insuring clause (is event covered?)
4. Exclusions?
5. Conditions of compliance (last few pages of jacket)
6. SC Code, what it says about this type of policy (statute may change terms of policy)
7. Checklists in policy
8. Implied exceptions
9. Measure of recovery clause (co-insurance, share cost with insurer; apportionment of partial interests.)
10. Subrogation clause
11. Problems with definitions within policy?
12. Rights of beneficiaries (eg., killer beneficiaries)
13. Assignments of beneficiaries (probably in separate document)

Incontestability period?