

UNITED STATES DISTRICT COURT
DISTRICT OF SOUTH CAROLINA

Application for Mediators

Please complete the entire application, using additional paper if necessary. You may also attach a resume.

Name: Ray P. McClain

Firm or Office Name: Ray P. McClain, Attorney, P.A.

Office Address: 38 Broad Street, Third Floor or P. O. Box 608
Charleston, SC 29401 Charleston, SC 29402

Office Phone: (843) 577-3170 Office Fax: (843) 577-3097

ADMISSIONS AND AFFILIATIONS

Date admitted to the Bar of the District of South Carolina: 1972 I.D. No.: 2748

Date admitted to the South Carolina Bar: September, 1971 Bar No.: 3739

Other courts or jurisdictions to which admitted (with dates of admission and bar nos.): U.S. Supreme Ct. (1974); U.S. Circuit Courts of Appeals - Fourth (1973); Fifth (1975); Federal (1993) [bar numbers not known]

Membership and positions held in bar, ADR and professional associations: Member of S.C. Bar Association; Society of Professionals in Dispute Resolution (SPIDR); S.C. Council for Conflict Resolution; National Employment Lawyers Association (NELA); S.C. Trial Lawyers Association; Association of Trial Lawyers of America

Are you a member in good standing in each jurisdiction where admitted to practice law? yes no

Are you currently the subject of any pending disciplinary proceeding in any jurisdiction? yes no

Have you, within the last 5 years, been denied admission to a bar for character or ethical reasons or disciplined for professional misconduct? yes no

EDUCATION

Year law degree received 1971 Law School University of Chicago Law School

Other professional degrees received (including year and school) None

LEGAL EXPERIENCE (A minimum of 5 years of law practice required)

Summarize legal experience (including teaching) since admission to the bar, particularly in the past five years: I have always practiced in small firms, the last 10 years as a solo practitioner. For the last 20 years I have limited my practice to civil claims (except for court appointments). The last five years about half of my practice has been employment law, and another 25% in employee benefit plan claims (ERISA and other employer plans). I have been a certified specialist in Employment and Labor Law since 1984. Although the clear majority of my work has always been for claimants, throughout the 1980's about 25% of my practice was defense, and I always have one or more business clients, primarily in employment matters. Additional experience is shown on my attached resume.

Percentage of practice in last 5 years representing plaintiff 95 % or defense 5 %

Percentage of Federal or State court practice in last 5 years: Federal 60 % State 20 %
[balance administrative, e.g., EEOC, LHWCA]

Number of years engaged in active litigation: 28

EXPERTISE

Indicate all substantive areas in which you have expertise. Place a "1" by your strongest area(s) and a "2" by all other areas in which you have expertise. (Do not rank beyond "1" and "2.") After any category you have marked, please identify any sub-areas of expertise you have (e.g. "medical malpractice" after Personal Injury).

<input type="checkbox"/> Admiralty	<input type="checkbox"/> Security or Shareholders suits
<input type="checkbox"/> Antitrust	<input checked="" type="checkbox"/> Labor
<input type="checkbox"/> Contracts	<input checked="" type="checkbox"/> ERISA
<input type="checkbox"/> Environment	<input checked="" type="checkbox"/> Wrongful Termination
<input type="checkbox"/> Fraud or Civil RICO	<input checked="" type="checkbox"/> Civil Rights in Employment
<input checked="" type="checkbox"/> Insurance (coverage issues)	<input checked="" type="checkbox"/> Other Civil Rights
<input type="checkbox"/> Miller Act	<input type="checkbox"/> Copyrights
<input checked="" type="checkbox"/> Personal Injury	<input type="checkbox"/> Patent
<input type="checkbox"/> Product Liability	<input type="checkbox"/> Trademark
<input type="checkbox"/> Other (specify)	

Publications: "Recent Developments in Motor Vehicle Use Exclusions in General Liability Policies," South Carolina Trial Lawyers Bulletin (Summer 1993), pages 7-12 (copy attached).

MEDIATION EXPERIENCE

Mediation experience (particularly in the subject matter categories above): Extensive mediation experience as advocate, both for claimants and for defendants, particularly in areas marked "1" above.

Other courts or organizations for whom you serve as a mediator: Certified Mediator, S. C. Supreme Court

Number of mediations conducted None as neutral at time of this application.

MEDIATION TRAINING

<u>Course Provider</u>	<u>Course Content</u>	<u>Date</u>	<u>Place</u>	<u>No. of Hours</u>
Dispute Management, Inc. (DMI), Orlando, FL	Civil Trial Mediation	12/1-4/1994	Charleston, SC	40.0
Cotton Harness et al.	Civil Mediation (served as "Coach")	9/10-11/1999	Charleston, SC	3.5

OTHER INFORMATION

Are you familiar with the statutes, rules and practice governing mediation conferences in the District of South Carolina? X yes no

Other relevant experience or skills or other information you would like considered in connection with this application:

In Fall, 1996, I joined a group of mediators in a 10-day program studying mediation in South Africa, including a meeting with two commissioners and several staff of the Truth & Reconciliation Commission. In that meeting, we explored the Commission's efforts to promote reconciliation of offenders and victims of years of political violence there.

Cities in which you are available to conduct mediation:

X Columbia X Charleston Greenville X Florence
Other Sumter, Conway, Beaufort, others possible

Fees charged:

Hourly Rate: \$ 125.00 Minimum charge each mediation: \$500

How do you bill for travel? (explain): per hour to \$250 maximum; waived if mediation equals or exceeds 8 hours

I agree to: (1) Be subject to the Rules of Professional Conduct, Rule 407, South Carolina Appellate Court Rules; to the Rules on Disciplinary Procedure, Rule 413, South Carolina Appellate Court Rules; and the Local Rules of the District Court; (2) Provide mediation to indigents without pay if ordered by the Court; (3) Notify the Clerk of Court of any change in the above facts or otherwise in my ability to perform duties as a mediator; (4) Disclosure of information contained in this application to litigants and other members of the public.

I certify that the foregoing is true and correct.

Signature [Handwritten Signature] Date 5/19/2000
Applicant

Return completed application to:
U.S. District Court
Mediation
1845 Assembly Street
Columbia, SC 29201-2431

Approved: [Handwritten Signature] Date May 23, 2000
U.S. District Judge

RESUME

Ray P. McClain

Ray P. McClain, Attorney, P.A.

38 Broad Street, Third Floor
Post Office Box 608
Charleston, SC 29402-0608

Telephone: (843) 577-3170
Telefax: (843) 577-3097
E-mail: rpmclain@worldnet.att.net

Firm:

Ray P. McClain, Attorney, P.A., sole practitioner, September 1, 1988 to present

Admissions:

Supreme Court of South Carolina, 1971
United States Supreme Court, 1974
United States District Court for the District of South Carolina, 1972
U.S. Courts of Appeals for Fourth Circuit (1973); Fifth Circuit (1974); Federal Circuit (1993)

Memberships:

South Carolina Bar Association
National Employment Lawyers Association
Society for Professionals in Dispute Resolution
South Carolina Council for Conflict Resolution

Practice Areas:

Employment and Labor Law, representing primarily employees and labor unions

- * Certified Specialist in Employment and Labor Law, 1984 to present
- * Member, Advisory Board on Employment and Labor Law to Commission on Specialization for S.C. Supreme Court (1984-1990)
- * Legal counsel to Local 1422-A, International Longshoremen's Ass'n (1982-1999)

Complex Federal Litigation: lead counsel in *Edmonds v. United States*, 658 F.Supp. 1126 (D.S.C.) 1987) (National class action to collect military bonuses, recovery exceeding \$30 Million)

Civil Rights and Government Negligence
Personal Injury, particularly complex insurance coverage questions

Education:

Swarthmore College, B.A. with Honors; Phi Beta Kappa and Ivy Award (1968)
University of Chicago Law School, J.D.; Mcchem Fellow awarded by Justice Tom Clark (1971)

Listing:

Martindale-Hubbell *Bar Register of Preeminent Lawyers*, 83rd ed. (1999)

Selected Reported Cases:

United States Supreme Court:

Wright v. Universal Maritime Services, et al., 119 S.Ct. 391 (U.S. 11/19/98)
In re Primus, 436 U.S. 412 (1978)

United States Courts of Appeals:

Birkbeck v. Marvel Lighting Corp., 30 F.3d 507 (4th Cir.), *cert. den.*, 115 S.Ct. 666 (1994)
Wyatt v. United States, 2 F.3d 398 (Fed. Cir. 1993)
Smith v. Local 7898, United Steelworkers of America, 834 F.2d 93 (4th Cir. 1987)
Bostick v. Orkin Exterminating Company, Inc., 806 F.2d 504 (4th Cir. 1986)
Simmons v. S.C. State Ports Authority, 694 F.2d 63 (4th Cir. 1982)
Newman v. Crews, 651 F.2d 222 (4th Cir. 1981)
Richardson v. McFadden, 540 F.2d 744 (4th Cir. 1976), *modified en banc*, 563 F.2d 1130 (4th Cir. 1977)
Tyler v. Vickery, 517 F.2d 1089 (5th Cir. 1975), *cert. denied*, 426 U.S. 940 (1976)

United States District Court:

Gulledge v. Smart, 691 F.Supp. 947 (D.S.C. 1987)
Raybestos-Manhattan v. ACTWU, AFL-CIO, 545 F.Supp. 387 (D.S.C. 1982)

South Carolina Supreme Court and Court of Appeals:

Green v. Lewis Truck Lines, Inc., 314 S.C. 303, 443 S.E.2d 906 (1994)
Green v. Lewis Truck Lines, Inc., 315 S.C.253, 433 S.E.2d 844 (1993)
McPherson v. Michigan Mutual Ins. Co., 310 S.C. 316, 426 S.E.2d 770 (1993)
Wilson v. Jones, 281 S.C. 230, 314 S.E.2d 341 (1984)
In re Delgado, 279 S.C. 293, 306 S.E.2d 591 (1983), *cert. denied*, 464 U.S. 1057 (1984)
State v. Brown, 267 S.C. 311, 227 S.E.2d 674 (1976)
Mock v. Dowling, 266 S.C. 274, 222 S.E.2d 773 (1975)
Smith v. S.C. Retirement, 1999 WL 486553 (S.C. Ct. App. 7/06/1999)

DMI

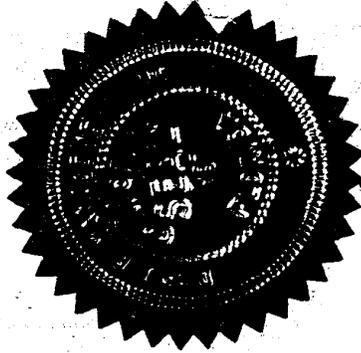
Dispute Management, Inc.
Orlando, Florida

This certifies that

Ray P. McClaine

has successfully completed the training requirements for
inclusion on the

South Carolina Council for Mediation and Alternative Dispute Resolution
Roster of Civil Mediators.



This 4th day of December, 1994,
Dispute Management, Inc.

By: _____

David U. Strawn, President

Recent Developments in Motor Vehicle Use Exclusions in General Liability Policies

By Ray P. McClain

In three decisions within the past year,¹ the South Carolina Supreme Court has addressed issues related to the definition of the "use" of a motor vehicle, as that term is used in South Carolina statutes relating to motor vehicle insurance, automobile liability insurance policies, and exclusions in general liability insurance policies. The decisions give some guidance for the application of these terms to close cases of construction, but they leave unanswered many other questions that have been addressed by other courts. This article will summarize these recent cases and survey some of the issues that other jurisdictions have addressed.

The "bottom line" of these decisions is that the plaintiff's bar needs to be alert in every case to the possibility that more than one type of coverage may be available to compensate injury victims for significant injuries when the injuries occur in extraordinary circumstances related to motor vehicles. In some instances, North Carolina and other states have held that both an automobile liability policy and a homeowner's policy (or business liability or other general liability policy) can apply to the same injuries. Not all claims will prove to be covered by multiple policies, or even by the more generous policy limits, but diligent attorneys for injury victims should thoroughly explore these possibilities whenever an unusual chain of events has resulted in injury to a client.

Background:

The Evolution of Separate Types of Liability Policies

According to a textbook used widely in training insurance professionals, the development of "monoline" liability coverages to insure specific, limited

classes of risks of doing business began in the late nineteenth century. One of the earliest forms was "employers' liability insurance," which insured against tort liability to workers injured in on-the-job accidents, before that field was pre-empted by statutes establishing workers' compensation schemes. Separate types of policies were also written, for example, for contractors' public liability exposure; manufacturers' public liability exposure; and owners,' landlords' and tenants' liability exposures.²

When motor vehicles came into business use, apparently insurers started offering coverage for this new category of business risks. When the insurance industry developed the Comprehensive General Liability policy in 1941, motor vehicle risks were left out. Conventional wisdom in the insurance industry is that separate policies continue to be issued because motor vehicle policies are rated by numbers and/or types of vehicles, and occasionally other factors (such as experience rating for trucking companies), whereas completely different types of factors are incorporated in rating premiums for general liability policies. In addition, motor vehicle liability insurance has been made effectively compulsory by many states, including South Carolina, for vehicles registered there,³ whereas most other types of liability insurance are optional. The survival of separate policies may simply be due to institutional inertia, an inertia that is increased by the regulation of the insurance industry by boards or commissions in every state.

In every case where "non-vehicle" negligence has occurred in relation to some "use" of an automobile, the insurance carriers will claim that only one or the other of several types of liability

policies will be applicable. The insurance industry consistently contends that separate liability coverages are exclusive, although many courts have held otherwise. The industry has generally pressed for the "instrumentality" theory of liability: if the vehicle is the "instrumentality" that causes the harm, motor vehicle liability coverages apply and motor vehicle exclusions preclude general liability policy coverage. Although many jurisdictions have been persuaded to adopt this approach, we shall see that the South Carolina Supreme Court has declined to follow it.⁴

Wausau Underwriters Insurance Company v. Howser: "Use" Defined Broadly For Purposes of Uninsured Motorist Claims

In the first of these recent cases, *Wausau Underwriters Insurance Company v. Howser*,⁵ the Supreme Court construed the term "use" in S.C. CODE ANN., 1976, as amended, §38-77-140, to apply to "use" of a motor vehicle to pursue the victim to shoot her, during a car chase on the streets of Richland County.

In the *Howser* case, the insurance carrier brought an action, in the United States District Court for the District of South Carolina, for a declaratory judgment that its uninsured motorist coverage did not apply, and Judge Henderson granted summary judgment for the insurer.⁶ The United States Court of Appeals for the Fourth Circuit certified the controlling questions of state law to the Supreme Court of South Carolina, which answered the questions in favor of coverage.

On the principal question, the Court followed a Minnesota case, *Continental Western Ins. Co. v. Klug*.⁷ The Supreme Court found the analysis in



Klug, which adopted a three-part test on coverage as to "use," to be "consistent with South Carolina law":⁸

- (1) That there be a "casual connection" to the injury that "is something less than proximate cause and something more than the vehicle being the mere site of the injury."
- (2) That there be no "act of independent significance ... breaking the casual link."
- (3) That the subject "use" "be limited to ... providing transportation."⁹

In *Howser*, the Supreme Court held that this test was satisfied:

... it is apparent that the unknown vehicle was an active accessory to this assault.... Only through use of his vehicle was the assailant able to closely pursue (sic) Howser, thereby enabling him to carry out the pistol assault. The gunshot was the culmination of

an ongoing assault, in which the vehicle played an essential and integral part.

This formulation clearly rejects the notion that coverage was limited to the "instrumentality" of the injury, since the firearm was the immediate instrument of harm in this case.

McPherson v. Michigan Mutual: Exclusion to Be Construed Narrowly

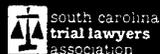
In *McPherson v. Michigan Mutual Insurance Co.*,¹⁰ the Supreme Court addressed the application of an exclusion for injuries "arising out of the ownership, use, ... or operation of a motor vehicle" contained in the General Tort Liability Policy issued to public entities by the South Carolina Budget and Control Board (reinsured at that time by *Michigan Mutual Insurance Company*).

In 1984, prior to the abrogation of sovereign immunity by *McCall v. Batson*¹¹ and the enactment of the South

Carolina Tort Claims Act,¹² Jonathan McPherson had been struck by a police patrol car and permanently disabled when a police officer "attempted to block the path of a fleeing prowler¹³ with his cruiser." McPherson alleged claims, under federal civil rights statutes, that he had been injured by conduct attempting to "seize" him unreasonably, in violation of the Fourth and Fourteenth Amendments to the United States Constitution. He also alleged claims, under state law, that the City of Charleston was negligent in training and supervising its officers, by failing to train them to pursue pedestrians on foot, and instead permitting officers to "use" the moving vehicle to block pedestrians, a "use" that was not normally contemplated within the coverage of a motor vehicle policy.¹⁴

The City settled independently with the Plaintiff for a structured settlement of monthly payments, plus fees and expenses. The applicable auto liability

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policy had only \$15,000 of coverage. Liability on the claims under federal law was not limited by applicable insurance.¹⁵

In a suit against the insurers to collect the settlement, the trial judge ruled in favor of coverage. The South Carolina Court of Appeals reversed, in an opinion that gave a very expansive reading to the scope of the exclusion.¹⁶ The Supreme Court granted certiorari, but affirmed the result, on modified reasoning.

The Supreme Court restricted the reading of the language of the exclusion, that the injury "arose out of" "the ownership, use ... or operation of a motor vehicle," to those injuries "caused by" the excluded risks. Regardless of the theory of liability, the Court held that the injuries "arose out of" the excluded risks because there was "no link [without negligent operation of the vehicle] by which [the City's] negligence can be independently connected to McPherson's injuries."¹⁷ (Emphasis supplied).

Canal Insurance Co. v. Insurance Company of North America:
Mandate of Coverage Limited to "Transportation Uses"

In the most recent case, *Canal Insurance Co. v. The Insurance Company of North America*,¹⁸ the Supreme Court addressed the issue of what "use" of a truck crane was required to be covered by an automobile liability insurance policy.¹⁹ The statute, S.C. CODE ANN., 1976, as amended, §38-77-140, mandates that such a policy provide coverage "for damages arising out of the ownership, maintenance, or use of these motor vehicles...." Since the truck crane was the only vehicle referenced in the policy, the Court held that the standard printed exclusion for "mobile equipment" did not apply to exclude coverage. But the policy had a special endorsement "that no coverage is afforded for any accident resulting [from] the use of the crane." The Court construed this to apply, unambiguously, only to "accidents caused by

the use of the crane part of the truck," since the crane could not be used except "when the truck is hoisted on the outriggers." Apparently, this crane could not properly be in use when the equipment was being driven for transportation.

At the time of the damage the truck crane was stationary, and the vehicle was being used solely as a crane. The Court construed the statutory mandate as limiting "use of motor vehicle ... to transportation uses." Since the statutory mandate of coverage did not apply to use of the crane, the special endorsement excluding damage "resulting [from] the use of the crane" did not violate public policy, and the Court enforced it.

The Next Case:
Concurrent Coverage?

Since this is not a law review article, I will not try here to "distill" the principles of these cases into any formula. In future cases the rationale of these opinions will play some role, but the facts of each case, as developed and presented by creative advocates,

are likely to carry greater weight with our courts.²⁰ What are some important issues to be alert to in our next cases?

North Carolina and a number of other jurisdictions have adopted the doctrine of concurrent causation in cases that have some other causative factor. The leading case is *State Farm Mut. Auto Ins. Co. v. Partridge*,²¹ decided by the California Supreme Court in 1973. North Carolina adopted the same approach in 1986 in *State Capital Ins. Co. v. Nationwide Mutual Ins. Co.*²² This approach authorizes coverage for the same injury by both motor vehicle liability policies and general liability policies.

The *Partridge* case is a good example of the type of case where an independent non-vehicular cause was involved. The injury occurred when one occupant of a car was wounded by a gunshot fired at a jack rabbit by another occupant, who had filed down the trigger of the weapon. Both "using" the vehicle and the negligent modification of the weapon were considered independent and concurring causes of the victim's injury. Therefore, both the

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motor vehicle liability policy and the shooter's homeowner's policy liability coverage were available to compensate the victim.

In these "concurrent causation" cases, the problem that faces Plaintiff's counsel is that the language of the coverage provision in a motor vehicle liability policy is substantially the same as the language of the motor vehicle exclusion in virtually all general liability policies: A typical clause references injuries "arising out of the ownership, use, repair, maintenance, loading, unloading, or operation of any motor vehicle owned by or loaned to the insured." How can there be concurrent coverage when the coverage clause and the exclusionary clause of the relevant policies are stated in substantially the same terms?

The rationale for concurrent coverages has been clearly stated by the Supreme Court of North Carolina in

State Capital Insurance Company v. Nationwide Mutual Insurance Company.²³ That case involved accidental discharge of a firearm while attempting to remove ("unload") it from a pickup truck. The North Carolina court found concurrent coverages to be only one example of the general proposition that, to find coverage, coverage clauses are construed liberally and exclusionary clauses are construed narrowly. As the court stated:²⁴

... even when language in two insurance policies is similar, the rules of construction applied to an **exclusionary clause** are substantially different from the rules of construction applied to a **coverage clause**. Exclusionary clauses are interpreted narrowly while coverage clauses are interpreted broadly to provide the greatest possible protection to the insured. Since the terms of the policy must

be construed against the insurance company, the same language in two different policies can have different meanings. (Emphasis in original.)

These general principles are certainly consistent with South Carolina cases.²⁵

The South Carolina Supreme Court appears to have left this question open. In the *McPherson* case, after the Court of Appeals rejected the "concurrent cause" doctrine, the Supreme Court did not discuss it. The Supreme Court construed "arising out of" as "caused by," but it did not address whether "caused by" in an exclusion would mean **any** contributing cause, or whether the exclusion would be effective only when the **sole** cause (or causes) of the injury were excluded vehicular risks, as held by those courts that follow *State Farm v. Partridge*. This issue could be avoided in *McPherson*, since the Court held that there was no **independent** "no-vehicular" chain of causation contributing to the injury. The broad scope of "use" adopted in the *Howser* case for mandated automobile liability policy coverage may make the Supreme Court reluctant to hold that coverages are always exclusively under one type of policy or the other.

An example of a case where the Supreme Court might adopt the concurrent causation doctrine was presented in *Poston v. Michigan Mutual Insurance Company*.²⁶ In the *Poston* case, Judge Ralph King Anderson applied concurrent causation where the non-vehicular cause was negligent supervision of students by violating a school policy that required parental permission for off-campus trips. Plaintiff's teenage son had sustained serious injury in a collision between a van (from which seat belts had been removed by the school district) and another motor vehicle. At trial of the personal injury action, counsel for Plaintiff argued that the school district had been negligent both in removing safety equipment (seat belts) from the van and in failing to obtain parental permission for the

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off-campus travel. Parental permission forms would have specified the purpose of the trip and the manner of transportation. The jury returned a verdict for \$375,000.²⁷

The motor vehicle liability policy maintained by the school district had only \$100,000 of coverage. The school district also had a general tort liability policy with limits of \$1,000,000. In a suit to collect the balance of the judgment, Plaintiff successfully argued that the negligent supervision reflected by violation of the travel permission policy was an independent non-vehicular cause that contributed to the injuries.

Concurrent Coverage for Negligent Entrustment?

Another question is whether "negligent entrustment" of a motor vehicle is covered under a home owner's policy, or other general liability policy, rather than the entruster's motor vehicle policy. The South Carolina appellate courts have never faced this issue, which was first decided by the Supreme Court of Kansas in 1974, in *Upland Mutual Insurance Company v. Noel*.²⁸ In addition to Kansas, the highest courts of New York and West Virginia have held that general liability policies can apply to liability for negligent entrustment of a motor vehicle on grounds that "entrustment" does not require "ownership, use or operation" of the vehicle, and therefore is a distinct, non-excluded act of negligence.²⁹ There has been a strong trend, however, particularly in decisions of intermediate courts of appeal, to treat negligent entrustment as covered only by motor vehicle liability policies. Many of these cases rely on the "instrumentality" theory to apply the exclusion to negligent entrustment claims.³⁰

As noted above, the South Carolina Supreme Court in the *McPherson* case did not adopt the "instrumentality" theory, but the Court emphasized there that no cause logically linked the negligence in question to the injury, independently of the operation of the vehicle. Since negligent entrustment

usually involves negligent operation of the entrusted vehicle, prospects may not appear bright for persuading our Supreme Court that negligent entrustment should be covered under a home owner's liability policy or a business liability policy. However, there is a reasonable argument that the motor vehicle exclusion is ambiguous as to negligent entrustment claims, since three courts of last resort have so found.

What is the Scope of "Transportation Uses"?

In the *Canal Insurance* opinion, our Supreme Court held that the statute did not mandate coverage for non-transportation uses of equipment insured under a motor vehicle liability policy. Therefore, it did not violate the public policy of the State, as expressed in the relevant statute, to exclude coverage for a use of the equipment that could only be performed when the vehicle was immobilized. What will be the result in a case that does not have specific exclusions for the non-transportation use? Or the result in a case where the use is "incidental" to transportation, such as removing a gun after using the vehicle to transport the gun, as well as the occupants?³¹ Or in a case of "mixed" transportation and other uses, as was arguably presented in *McPherson*?

South Carolina decisions have held that the "use" of a motor vehicle extends to getting in and out of the vehicle.³² In the absence of a specific exclusion, such as the endorsement in the *Canal Insurance* case, "uses" that are "incidental" to the transportation use of the vehicle will probably be covered.

It is also important to remember that, in *Canal Insurance*, the Supreme Court was construing the scope of the mandate of coverage imposed by the statute, S.C. CODE ANN., 1976, as amended, §38-77-140. The policy there at issue had a specific endorsement excluding coverage of certain uses of the insured equipment. Arguably, the **standard policy language** providing coverage for "use" of insured equip-

ment is **not** limited to "transportation uses" — at least not within a narrow scope — since the statutory mandate establishes minimum coverages, but authorizes an insurer to provide broader coverages.

Conclusion: Practical Considerations

Each of the decisions discussed here turned ultimately on the specific facts of the case. The Supreme Court has set forth some new principles for guidance of the bar and the insurance industry, but any variation in the facts of a particular case may persuade the courts that coverage should be afforded. The state trial court judges in both *McPherson* and *Canal Insurance* had ruled in favor of coverage, and the majority of reported South Carolina cases on insurance coverage disputes are appeals from orders that find coverage.

Most cases are settled, either before or after a trial court decision. In my own experience, the percentage of settled cases may be slightly lower in insurance coverage disputes, but not much lower. Therefore, if you find a potential source of coverage and pursue it vigorously, settlement can be obtained in 75% to 90% of your disputed cases. It is the job of vigorous advocates to find the facts to persuade the courts — and the insurance companies — that claimants are reasonably entitled to the benefit of the most generous limits potentially available.

Ray P. McClain is a Charleston attorney and a member of the SCTLA.

Footnotes

¹*Wausau Underwriters Insurance Company v. Howser*, 422 S.E. 2d 106 (S.C. 1992); *McPherson v. Michigan Mutual Insurance Company*, 426 S.E. 2d 770 (S.C. 1993); and *Canal Insurance Company v. INA*, ___ S.E. 2d ___, Davis Advance Sheets No. 15, page 5 (S.C. June 1, 1993).



²Malecki, D.S., et al., *Commercial Liability Risk Management and Insurance* (Malvern, PA; American Institute for Property and Liability Underwriters, 1986). Vol. I, pp. 237-38.

³See, for example, S.C. CODE OF LAS, 1976, as amended, §§56-10-10 *et seq.*

⁴The "instrumentality" theory was adopted both by Judge Henderson in *Wausau Underwriters Insurance Company v. Howser*, 727 F. Supp. 999, 1004 (D.S.C. 1990), and by Judge Bell in the Court of Appeals decision in *McPherson v. Michigan Mutual Insurance Co.*, 306 S.C. 456, 463-64, 412 S.E. 2d 445 (Ct. App. 1991). The Supreme Court, however adopted in *Howser* a standard for coverage that is clearly much broader.

⁵422 S.E. 2d 106 (S.C. 1992).

⁶*Wausau Underwriters Insurance Company v. Howser*, 727 F. Supp. 999 (D.S.C. 1990).

⁷415 N.W. 2d 876 (Minn. 1987). It is depressing that there are ten reported cases involving attacks with firearms committed by passing motorists. 727 F. Supp. at 1003 n. 6.

⁸422 S.E. 2d at 108.

⁹This third point was actually reserved in *Howser*, 422 S.E.2d at 109, note 2, but it has been subsequently adopted in the *Canal Insurance Co.* case, discussed below.

¹⁰426 S.E.2d 770 (S.C. 1993).

¹¹285 S.C. 243, 329 S.E.2d 741 (1985).

¹²S.C. CODE ANN., 1976, as amended, §§15-78-10 *et seq.*

¹³The parties disputed whether McPherson, who was never charged with any crime, was the prowler, or just an innocent bystander who was struck when the officer lost control of his car when attempting to execute the blocking maneuver.

¹⁴In the *Howser* case, Judge Henderson had rejected auto policy coverage in part because the "use" of the vehicle to pursue and shoot

another motorist "is not foreseeably identifiable with the normal use of a vehicle." 727 F. Supp. at 1006. See also *Commercial Union Ins. Co. v. Hall*, 746 F. Supp. 64 (D.S.C. 1965).

¹⁵*Martinez v. California*, 444 U.S. 277, 284 text at note 8 (1990). The history of the *McPherson* case was not described very fully by the Supreme Court, but is more fully discussed in the Court of Appeals opinion. 306 S.C. 456, 412 S.E. 2d 445 (Ct. App. 1991).

¹⁶306 S.C. 456, 412 S.E.2d 445 (Ct. App. 1991).

¹⁷426 S.E.2d at 772.

¹⁸*Davis' Adv. Sh. No. 15* (S.C. Sup. Ct. June 1, 1993), Page 5.

¹⁹The truck crane is "special mobile equipment." S.C. CODE ANN., 1976, as amended, §56-3-20(11), that is required to be registered with the Highway Department, S.C. CODE ANN., 1976, as amended, §56-3-110. It is not absolutely clear that a truck crane is an "automobile" or "motor vehicle" within the meaning of S.C. CODE ANN., 1976, as amended, §36-77-30(70). If not, the statutory mandate may not even have been relevant. This issue was not raised by Canal in the litigation.

²⁰In *Klug*, the Minnesota case followed in *Howser*, the Court observed that "each case presenting such a question must, to a great degree, turn on the particular facts presented," 415 N.W. 2d at 877-78. I recommend vigorous discovery, by review of files on similar claims, and depositions. This approach has contributed to a number of settlements, and has been effective in trial courts. Such material is relevant under *Poston v. Mutual Fidelity Life Ins. Co.*, 303 S.C. 182, 399 S.E.2d 770 (1990).

²¹10 Cal. 3d 94, 514 P.2d 123 (1973).

²²318 N.C. 354, 350 S.E.2d 66 (1986).

²³*Ibid.*

²⁴350 S.E. 2d at 71.

²⁵See, e.g., *South Carolina Budget and Control Board v. Prince*, 304 S.C. 241, 403 S.E. 2d 643 (1991).

²⁶*Poston v. Mutual Fidelity Life Ins. Co., et al.*, Case No. 89-CP-21 1291-R (Ct. Common Pleas, Florence County, Jan. 4, 1991) (judgment satisfied at slight discount after Notice of Appeal filed).

²⁷The Supreme Court affirmed, with a discussion of negligent removal of the seat belts, in *Poston v. Barnes*, 294 S.C. 261, 363 S.E.2d 888 (1987).

²⁸214 Kan. 145, 519 P. 2d 737 (1974).

²⁹*Cone v. Nationwide Ins. Co.*, 75 N.Y.2d 747, 551, N.E.2d 92 (1989); *Huggins v. Tri-County Bonding Co.*, 337 S.E.2d 12 (W. Va. 1985).

³⁰See, for example, the discussion by the United States Court of Appeals for the District of Columbia Circuit in *Rubins Construction v. Lumberman's Mutual*, 821 F. 2d 671 (D.C. Cir. 1987).

³¹See the discussion in *State Capital Ins. Co., v. Nationwide Mutual Ins.*, 318 N.C. 354, 350 S.E.2d 66, 69-70 (1986). Compare *Federated Mutual Implement & Hardware Ins. Co. v. Gupton*, 241 F. Supp. 509 (E.D.S.C. 1965), *aff'd*, 357, F.2d 155 (4th Cir. 1966) (pickup truck used to deliver gasoline to stranded uninsured motorist was still "in use" when stranded motorist put car in gear and backed up, pinning victim between delivery vehicle and uninsured vehicle).

³²*Coletrain v. Coletrain*, 238 S.C. 555, 121 S.E.2d 89 (1961); *Wrenn & Outlaw, Inc. v. Employers' Liability Assurance Corp.*, 246 S.C. 97, 142 S.E.2d 741 (1965). Both policies contained language defining "use" to include "loading and unloading" the vehicle; in each case the courts found that a non-driver was "loading and unloading" was an "insured" under the omnibus clause.

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