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## Annual Survey of Virginia Law: Insurance Law

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## INSURANCE LAW

*E. Lewis Kincer, Jr.\**

### I. INTRODUCTION

The Supreme Court of Virginia has recently decided several significant cases in the insurance realm. The court has been most active, at least in number of cases, in the field of uninsured [UM] and underinsured motorist [UIM] coverages, followed closely by decisions affecting automobile liability insurance policies.<sup>1</sup> Although no clearly discernable trend appears to have been established by the court's insurance decisions in the past year, several observations may be made of the cases, as well as the court's general philosophy of judicial interpretation of insurance policies. "An insurance policy is a contract; therefore, we give the words used in this policy their ordinary and usual meaning when they are susceptible of such construction. If the policy language is unambiguous, we do not resort to rules of construction. We simply apply the terms of the policy as written."<sup>2</sup> The following cases should be evaluated in light of these standards.

Judicial discovery of supposed "ambiguities" in insurance contracts, or statutes governing policy content or coverages, is a potent weapon for invalidating terms and conditions that certain courts may find unpalatable or unfair in the context of a given case. A review of Virginia case law over an extended

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\* Director, Mezzullo & McCandlish, P.C., Richmond, Virginia; B.A., 1977, University of Virginia; J.D., 1982, University of Louisville. I would like to thank the staff of the *University of Richmond Law Review* for their hard work and assistance with this article.

1. The court's volume of cases in the automobile insurance field is not surprising given the ubiquitous nature of the automobile in modern life. Additionally, automobile liability insurance is, like most aspects of the insurance industry, heavily regulated by statute and administrative rule-making.

2. *State Farm Fire & Casualty Co. v. Walton*, 244 Va. 498, 501-02, 423 S.E.2d 188, 191 (1992) (citations omitted).

period shows a marked restraint by the courts in the frequency of policy language invalidation on the grounds of ambiguity.<sup>3</sup> In several recent cases where statutory or policy ambiguities were held to invalidate certain provisions of the insurance contract, strong dissents were occasioned, usually by the more senior members of the court.<sup>4</sup>

## II. UNINSURED AND UNDERINSURED MOTORIST COVERAGE

The basic statutory provision governing the requirements and duties of an insurance carrier writing policies in Virginia is found in Virginia Code section 38.2-2206.<sup>5</sup> As noted above, UM and UIM disputes were the most frequently addressed topics by the court in the past year.

### A. *UM Coverage for Criminal Acts*

The issue of UM coverage for criminal acts was addressed by the court in *Erie Insurance Co. v. Jones*.<sup>6</sup> The issue, usually involving a shooting and the presence of an automobile, is whether the claimed injury arose from the "ownership, maintenance or use" of a motor vehicle so as to trigger UM coverage for the victim.<sup>7</sup> Lower court decisions were not consistent, but tended to favor coverage.<sup>8</sup>

*Jones* involved a UM claim resulting from an allegedly acci-

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3. The ambiguities are most often found in policy language restricting, excluding or denying coverage to an insured in a given situation, are always drafted by the insurer and under virtually universal tenets of construction are construed against the insurer.

4. See *USAA Casualty Ins. Co. v. Alexander*, 248 Va. 185, 445 S.E.2d 145 (1994); *Hackett v. Arlington County*, 247 Va. 41, 439 S.E.2d 348 (1994).

5. VA. CODE ANN. § 38.2-2206 (Repl. Vol. 1995).

6. 248 Va. 437, 448 S.E.2d 655 (1994).

7. See *State Farm Mutual Ins. Co. v. Powell*, 227 Va. 492, 500-01, 318 S.E.2d 393, 397 (1984).

8. See *Hartfield v. Liberty Mutual Ins. Co.*, 31 Va. Cir. 240 (1993) (holding that a drive-by shooting by another unknown motorist on Interstate 95 afforded UM coverage to the victim). The trial court relied on a "but for" test in establishing UM coverage, i.e., that the vehicle "was the instrumentality and was the accessory for inflicting the injury because the shooting would not have occurred but for the placement of the vehicles then moving." *Id.* at 241. The Supreme Court wholly rejected such an expansive test of coverage in *Jones*. See *Jones*, 248 Va. at 441-42, 448 S.E.2d at 658.

dental shooting of an automobile passenger by the driver or occupant of another vehicle, after both vehicles were stopped on a public road.<sup>9</sup> One vehicle followed another, flashing its lights.<sup>10</sup> The vehicles came to a stop, possibly touching, and the driver or occupant of the first vehicle emerged with a rifle.<sup>11</sup> While tapping the rifle barrel against the second car's window, the gun discharged, killing a backseat passenger.<sup>12</sup> A wrongful death action was filed by the passenger's personal representative, and the insurers were served with process as alleged UM/UIM carriers.<sup>13</sup>

The car in which the decedent passenger was riding was insured by Erie, while Nationwide insured a member of the decedent's household.<sup>14</sup> The administratrix contended that the decedent's death arose from the "ownership, maintenance or use of a motor vehicle" under Virginia Code section 38.2-2206, and that the two carriers were obligated to provide UM/UIM coverage as a result of the shooting.<sup>15</sup> The vehicle from which the shooter emerged was uninsured.<sup>16</sup> Erie and Nationwide filed a declaratory judgment action, requesting a judicial determination that neither provided UM or UIM coverage as a result of the incident.<sup>17</sup> The trial court ruled that the decedent's death arose from the ownership, maintenance or use of the uninsured vehicle, and that the policies afforded UM coverage under the facts of the accident.<sup>18</sup>

The supreme court reversed, holding that the shooting did not arise from the ownership, maintenance or use of the uninsured truck previously occupied by the shooter.<sup>19</sup> Relying on

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9. The shooting was asserted to be accidental but a criminal conviction for involuntary manslaughter preceded the civil actions. *Jones*, 248 Va. at 439, 448 S.E.2d at 656.

10. *Id.* at 438-39, 448 S.E.2d at 656.

11. *Id.*

12. *Id.*

13. *Id.*

14. *Id.* at 439, 448 S.E.2d at 656.

15. *Id.* at 439-40, 448 S.E.2d at 657.

16. *Id.* at 440, 448 S.E.2d at 657. That vehicle's uninsured status arose from failure of the insured to give timely notice of the claim under the policy applicable to the vehicle. *Id.* at 439, 448 S.E.2d at 656-57.

17. *Id.* at 439, 448 S.E.2d at 657.

18. *Id.* at 438, 448 S.E.2d at 656.

19. *Id.* at 442-43, 448 S.E.2d at 658-59.

*State Farm Mutual Insurance Co. v. Powell*,<sup>20</sup> the court said "there must be a causal relationship between the accident and employment of the insured motor vehicle as a vehicle."<sup>21</sup> As a matter of first impression, the court also rejected the administratrix's argument that "but for" the use of the motor vehicles on a highway, the incident would not have occurred.<sup>22</sup> The proximate cause of the decedent's death was "a criminal assault, one related to the use of an uninsured motor vehicle only by a chronological sequence of events. Such a risk was never one within the intendment of the parties to these insurance contracts."<sup>23</sup>

### B. *Carrier's Consent to Settlement*

In *Erie Insurance Exchange v. Shapiro*,<sup>24</sup> the supreme court held that an insured's failure to comply with a UM/UIM endorsement, requiring his carrier's consent to settlement, relieved it of any duty to indemnify the insured in any post-settlement "John Doe" action. The policy in question was written in Maryland and that state's law controlled interpretation of the contract.<sup>25</sup>

Shapiro, an Erie insured, was involved in an automobile accident in Virginia.<sup>26</sup> He filed suit against a known driver and John Doe, an unidentified motorist, under a joint and several liability theory.<sup>27</sup> Shapiro settled with the known, insured motorist without his carrier's consent and attempted to proceed against Doe.<sup>28</sup> Erie filed a declaratory judgment action seeking

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20. 227 Va. 492, 318 S.E.2d 393 (1984).

21. *Jones*, 248 Va. at 440, 448 S.E.2d at 657 (quoting *Powell*, 227 Va. at 500-501, 318 S.E.2d at 397).

22. *Id.* at 441, 448 S.E.2d at 658. See *State Farm Mut. Auto. Ins. Co. v. Bright*, 850 F. Supp. 493 (W.D. Va. 1994) (describing for a similar factual situation involving a parking lot shooting, motor vehicles and a claim to liability and UM coverages under two separate policies). The *Bright* court rejected the insured's "but for" argument and held there was no causal connection between the ownership, maintenance or use of the vehicle in which the victim was shot and the shooting. "In fact, the harm in this case originated from an external source." *Id.* at 498.

23. *Jones*, 248 Va. at 443, 448 S.E.2d at 659.

24. 248 Va. 638, 450 S.E.2d 144 (1994).

25. *Id.* at 640, 450 S.E.2d at 145.

26. *Id.* at 639, 450 S.E.2d at 144.

27. *Id.*

28. Shapiro settled with the defendant's carrier and expressly reserved his right

a ruling that it was not obligated to pay any judgment which Shapiro obtained against Doe.<sup>29</sup> The trial court ruled that Erie's "consent to settlement" provision applied only to Shapiro's settlement with an uninsured motorist and not to the policyholder's settlement with the other driver.<sup>30</sup> The trial court held that while Erie would be entitled to a credit on the settlement, it still risked exposure for its policy limit above the settlement amount.<sup>31</sup>

The Supreme Court of Virginia reversed the trial court, relying on Maryland law.<sup>32</sup> The court correctly read the Erie UM/UIIM endorsement, which prohibited settlement "with anyone who may be liable for the damages, without our written consent" as including the insured co-defendant.<sup>33</sup> Erie was not obligated to pay any subsequent judgment against Doe.<sup>34</sup>

Although interpreting Maryland law, the *Shapiro* court referenced a similar Virginia case on "consent to settlement" clauses, upheld in *Virginia Farm Bureau v. Gibson*.<sup>35</sup> The Maryland case law relied upon by the court is not inconsistent with Virginia authority.

### C. UM Coverages Not Subject to Liability Set-Off

In *Nationwide Mutual Insurance Co. v. Hill*,<sup>36</sup> the court voided a UM-liability coverage "set-off" provision found in many automobile insurance policies issued in Virginia and blurred the distinction between class one and class two insureds in a UM setting.<sup>37</sup>

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to pursue his claim against Doe. *Id.* at 640, 450 S.E.2d at 145. See VA. CODE ANN. § 8.01-35.1 (Repl. Vol. 1992).

29. *Shapiro*, 248 Va. at 640, 450 S.E.2d at 145.

30. *Id.*

31. *Id.* The settlement with the known driver was \$15,000 and the Erie UM/UIIM coverage totaled \$20,000, leaving the carrier potentially exposed for \$5,000.00, according to the trial court. *Id.* at 642, 450 S.E.2d at 146.

32. *Id.* at 640, 450 S.E.2d at 145.

33. *Id.* at 642, 450 S.E.2d at 146.

34. *Id.*

35. 236 Va. 433, 374 S.E.2d 28 (1988).

36. 247 Va. 78, 439 S.E.2d 335 (1994).

37. See *Insurance Co. of N. Am. v. Perry*, 204 Va. 833, 134 S.E.2d 418 (1964). Insureds of the first class include the named insured and, if residing in the same household, the spouse and relatives of such insured. Insureds of the second class are

In *Hill*, the decedent was a passenger in an automobile struck by an uninsured motorist. Her representative obtained a joint and several verdict against the uninsured motorist and the driver of the automobile in which the decedent was riding.<sup>38</sup> The latter automobile was insured by Nationwide (\$50,000) and was being used with permission at the time of the accident.<sup>39</sup> The insured driver was also covered by a State Farm policy (\$100,000).<sup>40</sup> After the verdict, both carriers paid their liability limits.<sup>41</sup> The administrator then filed a declaratory judgment action against Nationwide and State Farm, alleging that the decedent was also insured under each policy's UM endorsement, effectively doubling the available coverage.<sup>42</sup> The trial court agreed with the administrator.<sup>43</sup>

On appeal, a unanimous supreme court affirmed the trial court's voiding of Nationwide's set-off provision but split sharply on the State Farm holding. State Farm's position on appeal was that its UM endorsement precluded coverage.<sup>44</sup> It noted that an identical endorsement was held to preclude coverage in *Bayer v. Travelers Indemnity Co.*,<sup>45</sup> but the majority distinguished *Bayer* factually and on dissimilarities between the policies, taken as a whole.<sup>46</sup> In the instant case, the court found that State Farm neither limited its UM coverage to automobiles owned by the named insured nor restricted the definition of "insured vehicle" to one appearing on the declaration sheet.<sup>47</sup> Another significant distinction between *Bayer* and the

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those individuals occupying the insured motor vehicle. *Id.* at 835, 134 S.E.2d at 420.

38. *Hill*, 247 Va. at 81, 439 S.E.2d at 336.

39. *Id.*

40. *Id.*

41. *Id.*

42. *Id.*

43. *Id.* at 81, 439 S.E.2d at 336-37.

44. State Farm's UM endorsement defined "an insured" as "any other person while occupying an insured motor vehicle" and defined an "insured motor vehicle" as "a motor vehicle registered in Virginia with respect to which the bodily injury and property damage liability coverage of the policy applies but shall not include a vehicle while being used without the permission of the owner." *Id.* at 81, 439 S.E.2d at 337.

45. *Id.* at 81, 439 S.E.2d at 336-37 (discussing *Bayer v. Travelers Indemnity Co.*, 221 Va. 5, 267 S.E.2d 91 (1980)).

46. *Id.* at 82, 439 S.E.2d at 337. The policy in *Bayer* restricted UM coverage to "automobiles owned by the Named Insured" and involved a non-owned vehicle. *See Id.* at 83, 439 S.E.2d at 337.

47. *Id.* at 83, 439 S.E.2d 337-38.

case sub judice was, according to the majority, the fact that in *Bayer*, the operator of the vehicle was not liable for damages arising from its use, while State Farm's driver was liable, as evidenced by the joint verdict.<sup>48</sup> State Farm's UM endorsement did not exclude coverage under the facts of the case and the trial court was affirmed on its finding of such coverage.<sup>49</sup>

Nationwide never disputed that the decedent was covered under the terms of its UM endorsement as an occupant of the vehicle it insured. Nationwide relied instead on a set-off provision in its insurance contract which it acknowledged was designed "to limit the coverage under the policy to a total of \$50,000 per person, regardless of whether the insured is recovering under the liability provision, the UM endorsement, or both."<sup>50</sup> The court held that the provision violated Virginia Code section 38.2-2206 and was void as against public policy.<sup>51</sup> The court found Nationwide's set-off provision similar in effect to the contractual limitations on UM payments rejected by the court in *Bryant v. State Farm Mutual Automobile Insurance Co.*<sup>52</sup> The trial court was affirmed as to its holding that Nationwide was obligated to pay an additional \$50,000 under its UM endorsement.<sup>53</sup>

Justice Compton, joined by Justices Whiting and Hassell, criticized the majority's failure to differentiate between class-one and class-two insureds under State Farm's UM endorsement. "In deciding the State Farm case, the majority has misinterpreted the applicable statute, misread the pertinent case law, and misconstrued the relevant provision of State Farm's insurance policy."<sup>54</sup>

The dissenters also found the majority's attempt to distinguish the instant case from *Bayer* unpersuasive and believed the result should have been controlled by that case.<sup>55</sup> The

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48. *Id.* at 83, 439 S.E.2d at 338.

49. *Id.* 439 S.E.2d at 337-38.

50. *Id.* at 84, 439 S.E.2d at 338.

51. *Id.* at 86, 439 S.E.2d at 339.

52. 205 Va. 897, 140 S.E.2d 817 (1965).

53. *Hill*, 247 Va. at 86, 439 S.E.2d at 339.

54. *Id.* at 86, 439 S.E.2d at 340 (Compton, Whiting & Hassell, dissenting in part).

55. *Id.* at 87, 439 S.E.2d at 340-41.



decendent's occupancy of a non-owned vehicle operated by a class one State Farm insured did not render the decedent such an insured under the UM endorsement in issue and such reasoning "involves an unwarranted leap of logic that converts State Farm's uninsured motorist coverage to accident insurance, a result never intended by the uninsured motorist statute, . . . never authorized by the case law, . . . and never contemplated by State Farm's contract with its named insured."<sup>56</sup> The dissent's reasoning and interpretation of *Bayer* appears more consistent with settled law than the majority's opinion.

#### D. *Effective and Ineffective Waivers of UM/UIM Coverages Equal to Liability Limits*

In *State Farm Mutual Automobile Insurance Co. v. Weisman*,<sup>57</sup> the court interpreted Virginia Code section 38.2-2202<sup>58</sup> as requiring the written rejection of UM/UIM limits equal to liability limits to be done by all named insureds in order to be effective.

Weisman and his spouse were both named insureds under a State Farm automobile insurance policy with liability limits of \$100,000/\$300,000.<sup>59</sup> Their daughter was an insured under the policy, permanently residing with her parents, but attending college away from home.<sup>60</sup> The daughter was injured in a serious accident involving a known defendant and a John Doe defendant.<sup>61</sup>

State Farm's initial policy with the Weismans listed both husband and wife as named insureds, although the husband's signature was the only one appearing on the application for

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56. *Id.* at 87, 439 S.E.2d 340 (citations omitted).

57. 247 Va. 199, 441 S.E.2d 16 (1994).

58. Virginia Code § 38.2-2202 requires all original premium notices for automobile liability insurance to include notice to the insured concerning optional purchase of health care, disability, and lost income protection, as well as advising the insured of the increase in UM/UIM coverage to equal liability limits if such limits were "higher than that required by law" absent a written rejection of such an increase. VA. CODE ANN. § 38.2-2202 (Repl. Vol. 1994).

59. *Weisman*, 247 Va. at 201, 441 S.E.2d at 17.

60. *Id.*

61. *Id.* at 200, 441 S.E.2d at 17.

insurance.<sup>62</sup> This policy provided for a \$100,000/\$300,000 liability limit, with UM/UIM coverage of \$25,000/\$50,000, which remained unchanged through the time of the daughter's accident.<sup>63</sup> State Farm sent the Weismans at least six notices as required under Code section 38.2-2202, advising them of their right to purchase UM/UIM protection in an amount equal to their liability limits, unless a written rejection form was executed.<sup>64</sup> The husband signed such a form in 1985, but his wife did not, although State Farm sent all renewal notices and billings to Mr. & Mrs. Weisman.<sup>65</sup> Four years after Weisman's rejection of UM/UIM coverage equal to his liability limits, his daughter was involved in the accident and filed a declaratory judgment action against State Farm seeking UM/UIM protection of \$100,000.<sup>66</sup> The trial court found coverage in that amount was available to her.<sup>67</sup>

The supreme court affirmed, and interpreted Virginia Code section 38.2-2202 as requiring each named insured to reject the higher limits.<sup>68</sup> Since Mrs. Weisman was a named insured who never signed the rejection form, the UM/UIM limits were equal to the liability coverage at the time of the accident.<sup>69</sup>

The court noted that such a "bright-line" rule would benefit both insurers and named insureds by eliminating disputes over UM/UIM limits in similar situations.<sup>70</sup>

The court noted that Virginia Code section 38.2-2206(A) requires "the insured" to reject the enhanced coverage.<sup>71</sup> Read literally, any permissive user of a motor vehicle would have to join in the rejection and the court presumed the General As-

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62. *Id.* at 201, 441 S.E.2d at 18.

63. *Id.*

64. *Id.*

65. *Id.*

66. *Id.* at 200, 441 S.E.2d at 17.

67. *Id.*

68. *Id.* at 203, 441 S.E.2d at 19.

69. *Id.*

70. *Id.* at 204, 441 S.E.2d at 19. The court rejected State Farm's arguments that Weisman was acting in an express or implied agency capacity for his wife when he signed the 1985 rejection form as lacking evidentiary support in the record. *Id.* at 203, 441 S.E.2d at 19.

71. *Id.* at 202, 441 S.E.2d at 18.

sembly did not intend such an absurd, impossible result.<sup>72</sup> Therefore, the court judicially engrafted the phrase "each named" into the statutory scheme.<sup>73</sup>

Despite the husband's clear rejection of higher UM/UIM limits, the insureds were rewarded in this instance with enhanced insurance coverage after the fact, which is the most economical type.<sup>74</sup> Given the fact that the injured party seeking increased UM protection was not the named insured whose rejection or acceptance of higher limits was relevant to the court's analysis, a strong argument could be made for an opposite result.

In *USAA Casualty Insurance Co. v. Alexander*,<sup>75</sup> the supreme court resolved issues concerning the validity of an insured's earlier rejection of UM/UIM coverage equal to his liability limit in view of the insured's non-response to a subsequently mailed waiver accompanying a renewal policy, as well as the availability of UIM "stacking" to an insured electing minimum limits of coverage.<sup>76</sup>

Pursuant to Virginia Code section 38.2-2206, *Alexander*, the named insured under a USAA policy, signed and returned a waiver form in which he rejected UM/UIM coverage equal to his \$100,000 liability limits.<sup>77</sup> This election was made seven years prior to a serious accident implicating such coverage.<sup>78</sup> Approximately one year prior to the accident, the insured was sent another waiver form which accompanied a renewal policy, but he failed to respond in any manner to the waiver form.<sup>79</sup> The trial court ruled in a declaratory judgment action that by furnishing its insured with a new waiver, USAA "triggerred a new policy limit selection decision" and that *Alexander's* failure

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72. *Id.* at 202-03, 441 S.E.2d at 18-19.

73. *See Hackett v. Arlington Co.*, 247 Va. 41, 439 S.E.2d 348 (1994) (documenting Justice Compton's criticism of the court for similar judicial legislation when it added "underinsured" motorist protection to a statute requiring self-insured entities to provide only uninsured motorist coverage).

74. *Weisman*, 247 Va. at 204, 441 S.E.2d at 19.

75. 248 Va. 185, 445 S.E.2d 145 (1994).

76. *See also Goodville Mut. Casualty Co. v. Borrer*, 221 Va. 967, 275 S.E.2d 625 (1981).

77. *Alexander*, 248 Va. at 189, 445 S.E.2d at 147.

78. *Id.* at 189, 445 S.E.2d at 146.

79. *Id.* at 189, 445 S.E.2d at 147.

to return the form resulted in UM/UIM limits equal to his liability limits.<sup>80</sup>

The supreme court rejected the insured's argument that the trial court's holding was supported by *White v. National Union Fire Insurance Co.*<sup>81</sup> Distinguishing the insured's incomplete, inadequate but returned waiver form in *White* from the insured's silence by inaction in the instant case, the court held that the insured's non-responsiveness to the later waiver "was not sufficient to negate [his] earlier decision to reject the higher limits of UM coverage."<sup>82</sup> The insured's UM coverage remained at the level of his previous election, \$25,000.<sup>83</sup>

Another issue the court addressed was treatment of the \$25,000 UM policy with other UM/UIM coverages available to Alexander.<sup>84</sup> Since the defendant had an automobile liability insurance policy providing \$50,000 per person in coverage, the insurer argued that Sherman Alexander's policy affording only \$25,000 limits for UM coverage could not be stacked or aggregated in the UIM calculation.<sup>85</sup> The insurer relied on Virginia Code section 38.2-2206(A) which provided in pertinent part:

[N]o policy or contract of bodily injury . . . liability insurance relating to the ownership, maintenance, or use of a motor vehicle shall be issued or delivered in this Commonwealth . . . unless it contains an endorsement or provisions undertaking to pay the insured all sums that he is legally entitled to recover as damages from the owner or operator of an uninsured motor vehicle, within limits not less than the requirements of § 46.2-100. Those limits shall equal but not exceed the limits of the liability insurance provided by the policy, unless the insured rejects the additional unin-

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80. *Id.*

81. 913 F.2d 165 (4th Cir. 1990) (describing how an employee of the insured corporation signed and returned the form but made no election whatsoever among the coverage options listed).

82. *Alexander*, 248 Va. at 190, 445 S.E.2d at 147.

83. *Id.* at 190, 445 S.E.2d at 147-148.

84. *Alexander* was a resident of the same household with two sons, each of whom had separate automobile liability policies. Scott Alexander, who was in the vehicle with his father at the time of the accident, had a USAA casualty policy providing \$100,000 UM coverage per person and the second son had \$50,000 in UM coverage on a separate issued by the same carrier. *Id.* at 187, 445 S.E.2d at 146.

85. *Id.* at 193, 445 S.E.2d at 148.

sured motorist insurance coverage by notifying the insurer as provided in subsection B of § 38.2-2202.<sup>86</sup>

Alexander had purchased \$25,000 in UM coverage, not the "higher limits" referenced in the statute and thus could not utilize that policy in the UIM calculation, according to the insurer.<sup>87</sup>

The court rejected the insurers' contention and noted a statutory ambiguity in section 38.2-2206. Although ostensibly requiring the purchase of higher limits in Section (A), "Code § 38.2-2206(B) provides that 'the extent to which the vehicle is underinsured' is determined not by whether the insured has contracted for higher limits, but by a comparison of 'the total amount of uninsured motorist coverage afforded any person' with the total amount of liability insurance available for payment."<sup>88</sup> The court resolved the perceived ambiguity by holding that the legislative purpose of the statute was promoted by allowing minimum limits UM coverage in the UIM calculation when the *total* amount of uninsured motorist coverage afforded is greater than the statutory minimum.<sup>89</sup>

Justice Compton, joined by Justice Whiting, dissented on this point. According to the dissent, the statute requires an insured to obtain higher limits as a condition precedent to UIM coverage in "clear, unambiguous language."<sup>90</sup> Since the majority correctly ascertained that Alexander did not contract for higher limits, no further discussion on the point was required, according to the dissenters.<sup>91</sup>

*Alexander* contains a good overall analysis of UM/UIM coverages and was, on the whole, correctly decided. However, a close reading of Code section 38.2-2206 indicates the majority's perceived ambiguity between the requirements of subsections

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86. Where the insured contracts for higher limits, the endorsement or provisions for those limits shall also obligate the insurer to make payment for bodily injury . . . caused by the operation or use of an underinsured motor vehicle to the extent the vehicle is underinsured, as defined in subsection B of this section. *Id.* at 193, 445 S.E.2d at 149.

87. *Id.* at 193-94, 445 S.E.2d at 149.

88. *Id.* at 194, 445 S.E.2d at 150.

89. *Id.* at 195, 445 S.E.2d at 150.

90. *Id.* (Compton, J. joined by Whiting, J., dissenting in part).

91. *Id.* at 196, 445 S.E.2d at 151.

(A) and (B) to be nothing more than a condition precedent noted in the dissent. By the express terms of the statute, an insured seeking the benefit of subsection B's UIM calculation must first "contract for [and pay for] higher limits."<sup>92</sup> *Alexander* has judicially abrogated such a requirement.

*E. Parents Claim for Loss of Minor's Services Not Covered by UIM Property Damage Endorsement*

In *Virginia Farm Bureau Mutual Insurance Co. v. Frazier*,<sup>93</sup> the Supreme Court of Virginia rejected the contention of an insured, accepted by the trial court, that an automobile liability insurance policy's UM property damage endorsement included loss of services to a minor child.

After exhausting the UM bodily injury limits available to their teenage daughter under two Farm Bureau related policies, the parents sought to recover under the policies' UM property damage (UMPD) provision for loss of the infant's services, asserting that their claim was in the nature of damage to their property, not bodily injury to their daughter.<sup>94</sup> The trial court granted the insured's summary judgment motion, relying on *Watson v. Daniel*<sup>95</sup> and agreeing that the claim was for "pecuniary losses to their estate incurred for medical care and other expenses in behalf of their infant daughter."<sup>96</sup>

The court reversed and entered final judgment for the insurer.<sup>97</sup> Neither party contended that the language in the UMPD

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92. *Id.*

93. 247 Va. 172, 440 S.E.2d 898 (1994).

94. Farm Bureau's UM coverage obligated it to pay "all sums which the insured . . . shall be legally entitled to recover as damages from the operator of an uninsured motor vehicle because of bodily injury sustained by the insured or property damage, caused by accident and arising out of ownership, maintenance or use of such uninsured motor vehicle" while excluding the first \$200 of any property damage claimed per accident. *Id.* at 175, 440 S.E.2d at 899. The policy further defined property damage as injury or destruction of a motor vehicle and its contents or "any other property (except a motor vehicle) owned by an insured and located in Virginia." *Id.*

95. 165 Va. 564, 183 S.E. 183 (1936) (holding that the five year property damage statute of limitations applied to a parent's claim for loss of services rather than the then one year personal injury statute).

96. *Frazier*, 247 Va. at 175, 440 S.E.2d at 899.

97. *Id.* at 179, 440 S.E.2d at 901-02.

endorsement was ambiguous, and the court stated it would "interpret the contracts by examining the explicit language of the agreements."<sup>98</sup> The court found that the policy exclusion for the initial \$200 in property damage and the requirement that "any other property" be situated in Virginia did not indicate any intention to include intangible personal property under the UMPD endorsement.<sup>99</sup> The court held that only tangible personal property was within the purview of the policy and discounted *Watson* as merely a limitations of action case.<sup>100</sup>

In a brief but logically compelling dissent, Chief Justice Carrico maintained that *Watson* controlled the case and accepted the insureds' argument that their claim "fit nicely within the 'any other property' clause of the 'property damage' provisions of the UMI coverage" provided by their policy.<sup>101</sup>

If the insurer intended to exclude intangible personal property from its UMPD endorsement, it could have easily done so. The court rescued the insurer from its lack of foresight in the face of a novel, innovative, but ultimately unsuccessful legal argument.

#### F. *UM Requirements for Self-Insured Municipalities and Virginia Municipal Liability Pool Members*

The court held in *Hackett v. Arlington County*<sup>102</sup> that a self-insured municipality was required under section 38.2-2206 of the Code of Virginia to provide underinsurance coverage to its employee, a police officer injured by a fleeing motorist during a high speed pursuit.

The officer filed suit against the motorist involved in the collision and recovered a judgment of \$130,000 in combined compensatory and punitive damages.<sup>103</sup> The defendant had automobile liability insurance coverage of \$100,000.<sup>104</sup> The officer

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98. *Id.* at 176, 440 S.E.2d at 900.

99. *Id.* at 178, 440 S.E.2d at 901.

100. *Id.*

101. *Id.* at 179, 440 S.E.2d at 902 (Carrico, C.J., dissenting).

102. 247 Va. 41, 439 S.E.2d 348 (1994).

103. *Id.* at 42, 439 S.E.2d at 348.

104. *Id.*

then filed an action against the county for the underinsured, unsatisfied portion of the judgment, asserting that Arlington's status as self-insurer obligated it to pay the UIM deficiency.<sup>105</sup> The trial court agreed with the county's position and the officer appealed.<sup>106</sup>

The supreme court reversed, holding that coverage against underinsured motorists is part of section 38.2-2206, that the definition of an underinsured motor vehicle is contained in that section and that the county was required as a self-insurer to pay the \$30,000 underinsured portion of the judgment.<sup>107</sup> Justice Compton concurred in the result in deference to precedent established in *William v. City of Newport News*,<sup>108</sup> but read the statute narrowly and observed that the statute did not mention UIM coverage. He asserted that *Hackett* was "another episode in judicial legislation."<sup>109</sup>

In reading the enabling legislation for self-insured entities, it is true that only protection against uninsured motorists is required. Although the majority was correct that underinsured motorist coverage is defined in section 38.2-2206, it is equally true that an underinsured motorist is not an uninsured motorist, by the very terms of the same statute. The majority's observation that in a commercial setting, UM and UIM coverages are inseparable is not relevant to the requirements of coverage for self-insurers under section 46.2-368, and Justice Compton's observation that "if language is to be added . . . it should be added by the General Assembly, not this Court"<sup>110</sup> appears more consistent with usual Virginia precepts of judicial construction than the majority's holding.

In *Virginia Municipal Liability Pool v. Kennon*,<sup>111</sup> the Sheriff of Louisa County was involved in an automobile accident while riding in a county-owned and Virginia Municipal Liability

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105. *Id.* See VA. CODE ANN. § 46.2-368(B)(ii) (Repl. Vol. 1994 & Cum. Supp. 1995) (requiring a self-insurer to furnish "protection against the uninsured or underinsured motorist to the extent required by [Code] § 38.2-2206").

106. *Hackett*, 247 Va. at 42, 439 S.E.2d at 348.

107. *Id.*

108. 240 Va. 425, 397 S.E.2d 813 (1990) (Compton, J., dissenting).

109. *Hackett*, 247 Va. at 44, 439 S.E.2d at 349.

110. *Id.*

111. 247 Va. 254, 441 S.E.2d 8 (1994).



Pool (VMLP) insured vehicle.<sup>112</sup> The sheriff recovered a judgment substantially in excess of the other driver's liability coverage and filed suit against VMLP for the balance under its asserted UM liability to him.<sup>113</sup> The trial court held that by issuing UM coverage to municipalities, it had subjected itself to the requirements of Code section 38.2-2206 and particularly that section's requirement that UM limits shall equal liability limits, absent a waiver of such by the insured.<sup>114</sup>

The supreme court reversed the trial court's ruling that the Virginia Municipal Liability Pool was subject to the requirements of Code section 38.2-2206 to provide UM coverage under the facts presented.<sup>115</sup> VMLP maintained on appeal that it was not subject to section 38.2-2206.<sup>116</sup> Under the comprehensive statutory scheme regulating VMLP, it would become subject to UM/UIM requirements only "by resolution of its governing authority to provide such coverage to its pool members" which had not been effected.<sup>117</sup> While the trial court focused on the undisputed fact the VMLP had furnished UM coverage to its members, the supreme court read the statutory provision narrowly. The General Assembly required a resolution by the pool as a prerequisite to the provision of UM coverage<sup>118</sup> and "resolution is a term of art and denotes a specific type of affirmative act by a governing body."<sup>119</sup> Neither VMLP's admission that it made a collective decision to offer UM coverage nor a letter from its administrator to pool members acknowledging

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112. The Virginia Municipal Liability Pool "is neither a commercial insurer nor a [s]elf-insurer, but a governmental self-insurance pool . . . [s]uch pools allow local governments to spread the risk of liability insurance. Code § 15.1-503.4:1." *Id.* at 256-57, 441 S.E.2d at 10.

113. *Id.* at 256, 441 S.E.2d at 9.

114. *Id.* at 257, 441 S.E.2d at 10. As a pool participant, Louisa County purchased \$1 million in liability coverage and \$25,000 in UM coverage. The published opinion is silent on the waiver issue in view of the case's ultimate disposition. *Id.* at 256, 441 S.E.2d at 9.

115. *Id.* at 258, 441 S.E.2d at 10.

116. *Id.*

117. *Id.* at 257, 441 S.E.2d at 10.

118. See Code § 15.1-503.4:4 which provides in pertinent part: "Additionally, a group self-insurance pool shall not be subject to the provisions of § 38.2-2206 relating to uninsured motorist coverage unless it elects by resolution of its governing authority to provide such coverage to its pool members." VA. CODE ANN. § 15.1-503.4:4 (Repl. Vol. 1989).

119. *Kennon*, 247 Va. at 257, 441 S.E.2d at 10.

that the offer of UM coverage would mandate compliance with the UM/UIM statute, "is an adequate substitute for the existence of such a resolution."<sup>120</sup>

*Kennon* supports the proposition that an unduly narrow reading of statutes may result in judicial application of form over substance. The supreme court was correct that the pertinent statute requires a resolution by VMLP to provide UM coverage. The trial court was correct that despite the absence of a formal resolution, VMLP had chosen to make one. Unless the actions of VMLP in furnishing the UM coverage was an ultra vires act by a rogue employee (and the record refutes such a contention), the pool should be subject to the same UM provisions that govern commercial insurers and self-insured entities.

### III. AUTOMOBILE LIABILITY COVERAGES

#### A. *Insurers Not Liable for Prejudgment Interest Which Exceeds Policy Limits*

The Supreme Court of Virginia held in *Dairyland Insurance Co. v. Douthat*<sup>121</sup> that liability and underinsured motorist carriers were not obligated to pay a prejudgment interest award which exceeded their policy limits.

Douthat was insured by State Farm for UM/UIM coverage of \$100,000.<sup>122</sup> She was involved in a 1987 accident with a Dairyland insured who had \$25,000 in liability coverage.<sup>123</sup> In 1991, Douthat recovered a jury verdict of \$95,000 plus prejudgment interest from the date of the accident.<sup>124</sup> Dairyland paid the injured party its policy limits of \$25,000 and State Farm paid its total UIM exposure of \$75,000.<sup>125</sup> Douthat thus received the entire judgment and \$5,000 in prejudgment interest. She filed suit against State Farm and Dairyland on the respective policies to recover an additional \$27,000 in unpaid

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120. *Id.* at 258, 441 S.E.2d at 10.

121. 248 Va. 627, 449 S.E.2d 799 (1994).

122. *Id.* at 629, 449 S.E.2d at 800.

123. *Id.*

124. *Id.*

125. *Id.*

prejudgment interest.<sup>126</sup> Both carriers contended that their policy limits had been exhausted and that nothing more was owed by them.<sup>127</sup> The trial court granted Douthat summary judgment for the unpaid interest.<sup>128</sup>

The supreme court reversed and entered final judgment for the insurers, holding that the pertinent policy provisions, in addition to the distinction between prejudgment and post judgment interest, relieved them of any duty for the excess, unpaid prejudgment interest.<sup>129</sup>

Both policies were silent on any specific provision to pay prejudgment interest.<sup>130</sup> Douthat asserted that Virginia Code section 8.01-382<sup>131</sup> obligated the insurers to pay prejudgment interest in excess of their stated limits of liability.<sup>132</sup> Despite Douthat's argument to the contrary, the court held that the statute did make a crucial distinction between pre-judgment and post-judgment interest, with the latter being mandatory and the former discretionary.<sup>133</sup> Relying on *Nationwide Mutual Insurance Co. v. Finley*,<sup>134</sup> the court stated that "postjudgment interest is not an element of damages, but is a statutory award for delay in the payment of money actually due."<sup>135</sup> Prejudgment interest according to the court "is part of the actual damages sought to be recovered."<sup>136</sup>

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126. *Id.*

127. *Id.*

128. *Id.* at 630, 449 S.E.2d at 800.

129. *Id.* at 632, 449 S.E.2d at 802.

130. State Farm's UM endorsement obligated it to pay "all sums" Douthat was "legally entitled to recover as damages" from the underinsured motorist. Dairyland's policy stated that its liability limits as set forth on the declaration sheet were its limits of liability "for all damages . . . arising out of bodily injury sustained by one person as the result of any one occurrence." *Id.* at 629, 449 S.E.2d at 800. Dairyland also agreed to pay "all interest on the entire amount of any prejudgment which accrues after entry of the judgment" prior to payment of the judgment not exceeding its limits of liability. *Id.*

131. Section 8.01-382 provides in pertinent part that "[t]he judgment or decree entered shall provide for such interest until such principal sum be paid." VA. CODE ANN. § 8.01-382 (Repl. Vol. 1992).

132. *Douthat*, 248 Va. at 630, 449 S.E.2d at 801.

133. *Id.* at 631, 449 S.E.2d at 801.

134. 215 Va. 700, 214 S.E.2d 129 (1974).

135. *Douthat*, 248 Va. at 632, 449 S.E.2d at 801. *Finley* treats the duty to pay *postjudgment* interest as an extra-contractual one, imposed by § 8.01-382 and not as one dependent on the insurance policy. *Finley*, 215 Va. at 702, 214 S.E.2d at 131.

136. *Douthat*, 248 Va. at 631-62, 449 S.E.2d at 801 (citing *Monessen S.W. Ry. v.*

Absent an express contractual obligation to pay prejudgment interest in excess of policy limits, the insurers were not liable for such amounts. "[T]he trial court effectively rewrote the parties' insurance contracts in the absence of any overriding statutory requirement, and it imposed on the insurers an obligation they had not contracted to assume."<sup>137</sup>

*B. Insurer Not Permitted to Challenge Reasonableness of Consent Judgment Obtained From Insured After Denial of Coverage Absent Fraud or Collusion*

In *Liberty Mutual Insurance Co. v. Eades*,<sup>138</sup> the court rejected the insurer's contention that a \$40,000 consent judgment entered into by an injured pedestrian and an allegedly negligent motorist, on underlying special damages of \$1,872, was subject to challenge for reasonableness in a subsequent lawsuit to enforce the judgment against the insurer.

The insurer denied coverage to the driver and vehicle owner and alleged a material misrepresentation on the assigned risk application concerning business versus personal use of the vehicle involved in the accident.<sup>139</sup> However, other than issue a denial of the claim, Liberty Mutual did nothing to adjudicate its material misrepresentation/no coverage position.<sup>140</sup> Subsequent to the carrier's denial, the driver entered into a consent judgment with Eades, the injured pedestrian, and the order was entered by a circuit court.<sup>141</sup> Liberty Mutual did not participate in or have any knowledge of the agreed judgment or settlement.<sup>142</sup> The driver assigned all rights against the insurer to Eades, who filed suit to enforce the \$40,000 judgment.<sup>143</sup>

The court affirmed the trial court's rulings that the consent judgment was not subject to collateral attack on the grounds of reasonableness of amount and would be subject to challenge

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Morgan, 486 U.S. 330, 335 (1988).

137. *Id.* at 632, 449 S.E.2d at 802 (citation omitted).

138. 248 Va. 285, 448 S.E.2d 631 (1994).

139. *Id.* at 286, 448 S.E.2d at 632.

140. *Id.* at 287, 448 S.E.2d at 632.

141. *Id.*

142. *Id.*

143. *Id.*

only on the basis of fraud or collusion between the parties to the agreement.<sup>144</sup> While every other jurisdiction considering the issue has concluded that such judgments are subject to challenge on the basis of reasonableness, the court was unpersuaded by those authorities.<sup>145</sup> The court also rejected the insurer's reliance on *Nationwide Mutual Insurance Co. v. Jewel Tea Co.*,<sup>146</sup> a contribution action in which the non-settling tortfeasor was permitted to challenge the underlying settlement for reasonableness, though it did so in a conclusory fashion.<sup>147</sup>

C. *Excess Liability Carrier Not Entitled to Contribution From Second Excess Insurer on Non-Consensual Settlement*

*Allstate Insurance Co. v. United States Automobile Association*<sup>148</sup> involved a claim for contribution by USAA against Allstate. The underlying tort action and settlement giving rise to USAA's claim arose from the wrongful death of an infant who was struck and killed by a dual insured of the carriers.<sup>149</sup> USAA insured the permissively loaned vehicle which the defendant driver was operating at the time of the accident and included a \$300,000 per person primary liability limit and a \$1 million excess liability or "umbrella" policy.<sup>150</sup> Allstate insured the defendant driver as a named insured under a \$1 million personal umbrella policy.<sup>151</sup>

USAA defended the wrongful death action as primary insurer; Allstate hired counsel to monitor the case but did not actively participate in the defense at any of the three trials eventually held.<sup>152</sup> USAA settled the wrongful death action during the final trial for \$590,000 and demanded Allstate contribute

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144. *Id.* at 289, 448 S.E.2d at 633.

145. *Id.* See *Miller v. Shugart*, 316 N.W.2d 729 (Minn. 1982).

146. 202 Va. 527, 118 S.E.2d 646 (1961).

147. *Eades*, 248 Va. at 289, 448 S.E.2d at 633.

148. 249 Va. 9, 452 S.E.2d 859 (1995).

149. *Id.* at 10-11, 452 S.E.2d at 860.

150. *Id.* at 11, 452 S.E.2d at 860.

151. *Id.*

152. The first trial resulted in a \$5 million verdict and was set aside by the trial court, to be retried solely on damages. The second trial ended in a mistrial and USAA reached settlement with the administrator during the third trial which gave rise to the declaratory judgment action. *Id.* at 11, 452 S.E.2d at 860.

equally to the settlement in excess of the \$300,000 primary liability limits.<sup>153</sup> Allstate refused, and a declaratory judgment action resulted in a judgment for one half of the settlement plus interest.<sup>154</sup>

On appeal, Allstate asserted that it shared no common obligation with USAA for contribution and claimed the trial settlement violated the conditions of its umbrella policy.<sup>155</sup> The court rejected as "irrelevant" USAA's argument that both carriers shared an obligation to their mutual insured to determine settlement within the confines of good faith and that absent a showing of unreasonableness or lack of good faith in settlement, it should prevail.<sup>156</sup>

The court focused solely on the issue of whether the two carriers shared a common obligation in the settlement which would justify equal contribution.<sup>157</sup> In rejecting such a joint obligation, the court found that the settlement violated Allstate's policy terms which required a final judgment against its insured or a settlement agreement it approved.<sup>158</sup> The Allstate policy did not violate public policy, despite USAA's contention that Allstate's refusal to settle was in violation of the public policy embodied in Virginia Code section 38.2-510, which prohibits unfair claim settlement practices.<sup>159</sup>

In reversing the trial court, the supreme court gave full effect to Allstate's policy conditions and interpreted those provisions as written. Unless the contested provisions were ambiguous,

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153. *Id.*

154. *Id.*

155. The Allstate policy provided that "we will not begin to make payment for any occurrence covered by this policy until its liability has been determined by: (1) agreement between the insured, the claimant and Allstate; or (2) a final judgment against an insured, resulting from an actual trial." *Id.* at 12, 452 S.E.2d at 861.

156. *Id.* at 12-13, 452 S.E.2d at 861. Allstate relied on dicta in *Erie Ins. Group v. Hughes*, 240 Va. 165, 393 S.E.2d 210 (1990), to the effect that the insured's liability carrier owed such a "good faith" duty to its insured. The court stated that this obligation differed from the issue of Allstate's duty to USAA. *Allstate*, 249 Va. at 12-13, 452 S.E.2d at 861.

157. *Allstate*, 249 Va. at 12-13, 452 S.E.2d at 861.

158. *Id.* at 14, 452 S.E.2d at 862.

159. USAA apparently relied on subsection 6 of the cited section proscribing failure "to make prompt, fair, and equitable settlement of claims in which liability has become reasonably clear" with such frequency as to constitute a general business practice. *Id.*

violated public policy, statute or valid regulation, the provisions should be given effect.

*D. Good Faith Purchaser of Stolen Automobile Not Owner Under Terms of Garage Keepers Property Damage Endorsement*

In *Hall, Inc. v. Empire Fire & Marine Insurance Co.*,<sup>160</sup> the Supreme Court of Virginia affirmed the trial court's determination that a garage keeper's insurance policy did not provide coverage for a vehicle fire loss occurring one day after the innocent purchase and attempted but invalid transfer of a stolen vehicle to the dealership. The lawful owner's insurance carrier had paid the theft loss, thus becoming the legal owner of the automobile.<sup>161</sup> The auto was brought to the dealership by the alleged owner, who presented an invalid certificate of title.<sup>162</sup> A Department of Motor Vehicles record check conducted on the day of sale erroneously showed the seller as the owner; DMV had not received notice of the vehicle's theft at the time of the transfer.<sup>163</sup>

The garage keeper's insurance policy provided fire and casualty coverage to "private passenger autos [that Hall] own[s]. This includes those private passenger autos [that Hall] acquire[s] ownership of after the policy begins."<sup>164</sup>

The insurer denied coverage to Hall on the grounds that the policy definition of covered automobiles excluded the stolen vehicle as Hall did not and could not possess legal title at the time of the fire.<sup>165</sup> The court rejected the insured's contention that its possession of the vehicle through a good faith purchase vested it with a sufficient ownership interest to bring the auto within the policy terms.<sup>166</sup> The court relied upon Code section 46.2-100's definition of vehicle ownership as one "who has legal title to it."<sup>167</sup> The policy requirement that Hall "own" the vehi-

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160. 248 Va. 307, 448 S.E.2d 633 (1994).

161. *Id.* at 308, 448 S.E.2d at 634.

162. *Id.*

163. *Id.* at 309, 448 S.E.2d at 634.

164. *Id.* at 308, 448 S.E.2d at 634.

165. *Id.* at 309, 448 S.E.2d at 634.

166. *Id.*

167. *Id.* at 309, 448 S.E.2d at 635.

cle was found to be unambiguous.<sup>168</sup> Hall's reliance on case law for the proposition that a good faith purchaser for value had an insurable interest in the stolen property was rejected as inapposite to the question of whether the specific terms of the insurance policy provided coverage for the loss.<sup>169</sup>

#### IV. AUTOMOBILE MEDICAL PAYMENTS COVERAGES

The supreme court reversed a trial court's ruling that a medical payments provision requiring an insured to submit to an independent medical examination (IME) violated Virginia Code section 38.2-2206 governing UM/UIM claims.

In *Allstate Insurance Co. v. Eaton*,<sup>170</sup> the insured submitted and was paid for approximately \$3,000 in medical bills incurred as a result of an accident with an uninsured motorist. After the insured's continued treatment for recurring back pain, Allstate requested an IME pursuant to its medical payments endorsement which provided that "the injured person shall submit to physical examination by physicians selected by the Company when and as often as the Company may reasonably require."<sup>171</sup> The insured refused, on the putative, and perhaps retrospective, basis that she intended to file a UM claim under her policy.<sup>172</sup> Eaton sued the insurer for unpaid medical bills.<sup>173</sup> The lower court held that since Eaton relied on an intention to file a UM claim, her refusal to undergo an IME was not a breach of the policy provisions requiring such an examination.<sup>174</sup> In reaching this conclusion, the lower court relied upon section 38.2-2206(H) which provides in the context of a UM claim that the establishment of legal liability of an uninsured motorist is a prerequisite to recovery and nothing else may be required of the insured.<sup>175</sup>

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168. *Id.*

169. *Id.* at 310, 448 S.E.2d at 635.

170. 248 Va. 426, 448 S.E.2d 652 (1994).

171. *Id.* at 428, 448 S.E.2d at 653.

172. Allstate's evidence was that the IME request was made and refused in August 1990, and that Eaton expressed no intention of filing a UM claim until April 1991. *Id.* at 428, 448 S.E.2d at 653-54.

173. *Id.*

174. *Id.* at 429, 448 S.E.2d at 652.

175. *Id.* Section 38.2-2206(H) provides:



The supreme court reversed and entered final judgment for the insurer.<sup>176</sup> The court found no conflict between the UM statute relied upon by Eaton and the insurer's IME requirement contained in the medical payments endorsement.<sup>177</sup> It also noted there was no prohibition against IME requests in Code sections 38.2-2201 to -2202, statutes specifically governing automobile medical payments coverage.<sup>178</sup> The court concluded that the trial court

effectively rewrote the parties' contract and added a condition to the medical payments provision to which the parties had not agreed. Further, the trial court failed to apply the plain language of the medical payments coverage terms, which does not exempt the insured from compliance with the independent medical examination requirement when a UM claim either is contemplated or is made.<sup>179</sup>

In *Moore v. State Farm Mutual Automobile Insurance Co.*,<sup>180</sup> an automobile medical payments coverage dispute, the supreme court held inapplicable State Farm's exclusionary language barring coverage for injuries sustained "through being struck by . . . a farm type tractor or other equipment designed for use principally off public roads, while not upon public roads" to a plaintiff struck by a stock car at a race track.<sup>181</sup>

The subject automobile was originally a standard factory model, with some deletions of equipment, used exclusively for off-road racing.<sup>182</sup> State Farm's medical payment endorsement obligated it to pay reasonable medical expenses to an insured

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No endorsement or provisions providing the coverage required by subsection A of this section shall require arbitration of any claim arising under the endorsement or provisions, nor may anything be required of the insured except the establishment of legal liability, nor shall the insured be restricted or prevented in any manner from employing legal counsel or instituting legal proceedings.

VA. CODE ANN. § 38.2-2206(H) (Repl. Vol. 1994 & Cum. Supp. 1995).

176. *Eaton*, 248 Va. at 429, 448 S.E.2d at 652.

177. *Id.*

178. *Id.* at 430, 448 S.E.2d at 652.

179. *Id.* at 431, 448 S.E.2d at 655.

180. 248 Va. 432, 448 S.E.2d 611 (1994).

181. *Id.* at 433, 448 S.E.2d at 612.

182. The vehicle had no lights, turn signals, muffler, mirrors or operable emergency brake. However, its engine and body frame were unmodified in accordance with family-class stock car racing requirements. *Id.* at 434, 448 S.E.2d at 612.

injured "through being struck by an automobile . . . of any type."<sup>183</sup> State Farm relied on its exclusion and contended that its medical payments coverage did not extend to the stock car.<sup>184</sup> The trial court agreed, relying on *State Farm Mutual Automobile Insurance Co. v. Gandy*.<sup>185</sup>

The supreme court reversed, having little difficulty concluding that the stock car which struck plaintiff was "anything other than an 'automobile' as that word is commonly understood."<sup>186</sup> The automobile was not modified to such an extent as to bring it within the policy exclusion for "equipment designed for use principally off public roads."<sup>187</sup> That exclusionary language failed to "clearly bring the particular event, thing, or circumstances in question within its scope."<sup>188</sup>

## V. INSURANCE REGULATION

In *National Home Insurance Co. v. Commonwealth*,<sup>189</sup> a risk retention group successfully challenged the authority of the State Corporation Commission (SCC) to enjoin the group's issuance of policies in Virginia. The SCC acted upon petition of the Commissioner of the Virginia Bureau of Insurance, who instituted the action when the company's financial situation worsened, falling below minimum surplus requirements of its state of incorporation.<sup>190</sup> After a full evidentiary hearing, the SCC granted the injunction.<sup>191</sup>

The Supreme Court of Virginia reversed the SCC, holding that under the Federal Liability Risk Retention Act of 1986,<sup>192</sup>

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183. *Id.*

184. *Id.* at 434, 448 S.E.2d at 611.

185. 238 Va. 257, 383 S.E.2d 717 (1989) (upholding the same medical payments exclusion involving a forklift accident on private property).

186. *Moore*, 248 Va. at 435, 448 S.E.2d at 613.

187. *Id.*

188. *Id.* (citing *Floyd v. Northern Neck Ins. Co.*, 245 Va. 153, 158, 427 S.E.2d 193, 196 (1993)).

189. 248 Va. 161, 444 S.E.2d 711 (1994), *cert. denied*, 115 S. Ct. 735 (1995).

190. *Id.* at 163-64, 444 S.E.2d at 712.

191. *Id.* at 164, 444 S.E.2d at 713.

192. 15 U.S.C. §§ 3901-3906 (1994) exempts risk retention groups from many state laws and regulations. Such groups are subject to injunctions "issued by a court of competent jurisdiction, upon a petition by the State insurance commissioner alleging that the group is in hazardous financial condition or is financially impaired." *Id.* §

the administrative body was not a "court of competent jurisdiction" empowered to issue injunctions and its actions were preempted by federal law.<sup>193</sup> The court found that the term "court of competent jurisdiction" was not defined by the Act and was ambiguous.<sup>194</sup> Relying on legislative history, the court concluded that the phrase was equivalent to an "independent judicial officer" and for purposes of the Act, the SCC was "neither an independent judicial officer" nor a court of competent jurisdiction as contemplated by Congress."<sup>195</sup>

In dissent, Justice Lacy, joined by Justices Carrico and Whiting, asserted that the SCC injunction did not violate the federal prohibition.<sup>196</sup> The dissenters noted that National Home had unsuccessfully challenged the SCC injunction in federal district court, where the court found that Congress' omission in defining "court of competent jurisdiction" indicated a definitional reliance on state law.<sup>197</sup> In the minority's view, the SCC had the power to act as it did and interpreted section 3902 as merely prohibiting the "independent authority of state insurance commissioners to issue . . . injunction orders,"<sup>198</sup> which was not the case.

## VI. CONCLUSION

In the past year, the Supreme Court of Virginia addressed a wide variety of cases involving insurance contracts and the statutory provisions governing them. Most of the cases involved automobile liability insurance and particularly UM/UIM coverages. These cases will always provide a fertile field for litigation. The vast majority of the cases were decided consistently with prior case law and the court's conservative precepts of contract interpretation. A few were not. However, the court's

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3902(a)(1)(H).

193. *National Home*, 248 Va. at 170, 444 S.E.2d at 714.

194. *Id.* at 168, 444 S.E.2d at 714.

195. *Id.* at 170, 444 S.E.2d at 715-16.

196. *Id.* at 171, 444 S.E.2d at 715.

197. *National Home Ins. Co. v. State Corp. Comm'n*, 838 F. Supp. 1104 (E.D. Va. 1993). The district court refused to grant a preliminary injunction against the SCC's order and equated "court of competent jurisdiction" with "courts having subject matter jurisdiction," which the SCC did. *Id.* at 1114.

198. *National Home*, 248 Va. at 173, 444 S.E.2d at 718 (Lacy, J., dissenting).

treatment of insurance issues affords claimants and insurers a greater degree of certainty and consistency in its decision making than that sometimes encountered in other jurisdictions.

