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Annual Survey of Virginia Law: Insurance Law

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INSURANCE LAW

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I. INTRODUCTION

This article addresses the significant case decisions and statutory changes in the past year in the field of insurance. Most of the cases involved automobile insurance coverage. Other cases involved insurance agent liability, duty of good faith to third party beneficiaries, and interpretation of general liability policies. The statutory changes were minor amendments to statutes dealing with medical payments coverage and cancellation of motor vehicle insurance policies.

II. UNINSURED AND UNDERINSURED MOTORIST COVERAGE

In several cases in 1995-96, the Supreme Court of Virginia narrowed the definition of "use" of a vehicle as contemplated by Virginia Code section 38.2-2206, and restricted the scope of uninsured motorist (UM) coverage.¹ These cases clearly show that physical proximity to the vehicle is not the test for cover-

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1. Virginia Code § 38.2-2206 states, in relevant part:

no policy or contract of bodily injury or property damage liability insurance relating to the ownership, maintenance, or use of a motor vehicle shall be issued or delivered in this Commonwealth to the owner of such vehicle or shall be issued or delivered by any insurer licensed in this Commonwealth upon any motor vehicle principally garaged or used 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.

VA. CODE ANN. § 38.2-2206(A) (Cum. Supp. 1996) (emphasis added).

age. Instead, the issue is whether the vehicle is being used as a vehicle.

A. *UM Coverage for Criminal Acts*

In 1996, after several years of confusion, the supreme court finally ruled on the issue of UM coverage for injuries resulting from a drive-by shooting.² In *Lexie v. State Farm Mutual Automobile Insurance Co.*,³ the supreme court held that injuries resulting from drive-by shootings were not covered by UM coverage because the use of an automobile as a "mobile fortress" was not in the regular and normal use of a vehicle as a vehicle.⁴

Prior to 1994, the issue of UM coverage for criminal acts arose frequently in the lower courts.⁵ The cases usually involved a shooting and the presence of an automobile. The shooting victims argued that due to the roles which automobiles played in their shootings, they were entitled to UM coverage.⁶ The lower courts were split on the issue, but tended to favor coverage.⁷

In 1994, the supreme court considered UM coverage for criminal acts in *Erie Insurance Co. v. Jones*.⁸ In *Jones*, the supreme court held that the accidental shooting of an automobile passenger by an occupant of another car was not covered by the UM coverage of the vehicle in which the victim was a passenger.⁹ The supreme court determined that "there must be a causal relationship between the accident and the employment of the insured motor vehicle as a vehicle."¹⁰

2. *Lexie v. State Farm Mut. Auto. Ins. Co.*, 251 Va. 390, 469 S.E.2d 61 (1996).

3. 251 Va. 390, 469 S.E.2d 61.

4. *Id.* at 396, 469 S.E.2d at 64, (quoting *Travelers Ins. Co. v. LaClair*, 250 Va. 368, 373, 463 S.E.2d 461, 464 (1995)).

5. *See, e.g.*, *Hartfield v. Liberty Mut. Ins. Co.*, 31 Va. Cir. 240 (Richmond City 1993), *aff'd*, 36 Va. Cir. 106 (Richmond City 1995).

6. *Id.*

7. *Id.*

8. 248 Va. 437, 448 S.E.2d 655 (1994).

9. *Id.* at 443, 448 S.E.2d at 659. In *Jones*, both automobiles were stopped by the side of the road, and the individual who was holding the gun when it discharged was no longer occupying a vehicle.

10. *Id.* at 440, 448 S.E.2d at 657 (quoting *State Farm Mut. Ins. Co. v. Powell*,

In 1995, circuit courts continued to find that the victims of drive-by shootings were covered by UM coverage.¹¹ A distinction was drawn between incidents in which the shooting took place from a vehicle, and those cases, like *Jones*, in which the shooter had left his automobile.¹² Circuit courts continued to find that the victims of shootings which took place from inside moving vehicles were entitled to UM coverage. In those cases, the trial courts reasoned that "the proximate cause of the . . . injury was neither incidental nor tangential to the use of the vehicle; rather a sufficient nexus exists between the accident and the employment of the vehicle as a vehicle."¹³

The issue was revisited by the supreme court late in 1995 in *Travelers Insurance Co. v. LaClair*.¹⁴ In that case, LaClair, an Arlington County deputy sheriff, was shot by Marcus Arban, the operator of a parked automobile.¹⁵ LaClair, who was driving a marked police car, noticed a vehicle being driven erratically on the road in front of him.¹⁶ LaClair pulled alongside Arban's vehicle, and Arban pulled into the right-hand lane and stopped. LaClair parked behind the vehicle, exited his police car and approached the stopped vehicle. When LaClair reached the vehicle, Arban opened the driver's side door and shot LaClair.¹⁷

The trial court found that LaClair was entitled to UM coverage from Travelers Insurance Company, the liability insurance carrier for his police car.¹⁸ The trial court determined that

227 Va. 492, 500-01, 318 S.E.2d 393, 397 (1984)).

11. See, e.g., *Hartfield v. Liberty Mut. Ins. Co.*, 31 Va. Cir. 240 (Richmond City 1993), *aff'd*, 36 Va. Cir. 106 (Richmond City 1995). *Hartfield* was decided in 1993 prior to the supreme court's ruling in *Jones*. After *Jones*, Liberty moved for reconsideration and vacation of the original judgment because of the supreme court's ruling in *Jones*. However, the trial court distinguished *Hartfield* from *Jones* and held that UM coverage should be extended to a person in a *moving* vehicle shot by a person in another *moving* vehicle. *Hartfield*, 36 Va. Cir. at 106-07.

12. *Hartfield*, 36 Va. Cir. at 106-07; see also, *Travelers Ins. Co. v. LaClair*, 250 Va. 368, 463 S.E.2d 461 (1995).

13. *Hartfield*, 36 Va. Cir. at 107.

14. 250 Va. 368, 463 S.E.2d 461 (1995). The trial court's ruling in *LaClair* was made before the Supreme Court's decision in *Jones*.

15. 250 Va. at 369-70, 463 S.E.2d at 462.

16. *Id.*

17. *Id.*

18. *Id.* at 370, 463 S.E.2d at 463.

Arban used his vehicle as a "lure" to entice LaClair into stopping behind him, as a "shield" to protect him while he fired his shots, and as a "swift form of escape."¹⁹ Based on these findings, the trial court held that LaClair's injuries had arisen from the "use" of an uninsured vehicle and that pursuant to Virginia Code section 38.2-2206, Travelers should provide coverage to LaClair.²⁰

The supreme court overturned the decision of the lower court and extended its ruling in *Jones*. The supreme court held that the use of an automobile as a "mobile or stationary pillbox or fortress, or as a shield, or as an outpost from which an assailant may inflict intentional injury with a firearm" was not within the ordinary and regular meaning of "use" of a private, passenger automobile contemplated by either the statute or the parties to the insurance contract.²¹ Therefore, even though the automobile was, as the trial court found, an "accessory" to LaClair's shooting, UM coverage did not extend to his injuries.²²

Although the language of *LaClair* implicitly referred to drive-by shootings by stating that the use of an automobile as a stationary or *mobile* fortress was not within the definition of "use," litigants in the trial courts continued to attempt to distinguish cases in which the automobile from which a shot was fired was moving from those in which it was stationary.²³

The supreme court finally ruled explicitly that injuries from shots fired from moving vehicles do not arise from the use of a vehicle as a vehicle in *Lexie v. State Farm Mutual Auto Insurance Co.*²⁴ The *Lexie* decision was a consolidation of four cases each involving the issue of whether an intentional shooting by a person occupying an uninsured vehicle constituted the "use" of a vehicle for purposes of UM coverage.²⁵ One of the four

19. *Id.* at 371, 463 S.E.2d at 463.

20. *Id.*

21. *Id.* at 373, 463 S.E.2d at 464.

22. *Id.* at 372, 463 S.E.2d at 464.

23. See *Lexie v. State Farm Mut. Auto. Ins. Co.*, 251 Va. 390, 469 S.E.2d 61 (1996). But see *Nationwide Mut. Ins. v. Sifford*, 38 Va. Cir. 341 (Pulaski County 1996) (the circuit court used the "mobile pillbox" language to deny UM coverage for a drive-by shooting). Note that *Sifford* was decided after *LaClair*, but before *Lexie*.

24. *Lexie*, 251 Va. 390, 469 S.E.2d 61 (1996).

25. *Id.* at 394, 469 S.E.2d at 62. The four appeals arose from two drive-by shoot-

cases was governed by North Carolina law. The supreme court found that North Carolina law was consistent with Virginia law on the subject and had no difficulty in finding that "North Carolina law provides that injuries and death resulting from gunshots fired from a moving automobile do not constitute an accident arising from the 'use' of such vehicle."²⁶

The appellants in the three cases determined under Virginia law attempted to distinguish their cases from *LaClair* based on the fact that the vehicles in their cases were moving at the time of the assaults.²⁷ The supreme court held that these were "distinctions without any difference" and rejected this attempt.²⁸ The supreme court further emphasized that, in determining whether or not an activity falls within the definition of "use" of a vehicle, "the principal focus is upon the manner in which the vehicle, whether moving or stationary, is being employed, not upon the activity or role of any assailant who may be in, upon, or around the uninsured vehicle."²⁹ Therefore, after several years of uncertainty, it is now clear that UM coverage does not extend to injuries sustained from the use of an automobile as an instrument of crime.

B. UM Coverage for Essential Employment Functions of Automobiles

The supreme court applied the same "causal relationship" test in determining whether or not a vehicle was being "used" by an employee at the time she was hit by an uninsured motorist.³⁰ In *United States Fire Insurance Co. v. Parker*,³¹ which was handed down on the same day as *LaClair*, an employee who was hit by an uninsured motorist at her worksite was

ings, one which occurred in the District of Columbia and the other in Prince Edward County.

26. *See Scales v. State Farm Mut. Auto. Ins. Co.*, 460 S.E.2d 201, 203 (N.C. Ct. App. 1995) ("Clearly, an automobile chase with guns blazing is not a regular and normal use of a vehicle."); *Nationwide Mutual Ins. Co. v. Knight*, 237 S.E.2d 341, 344 (N.C. Ct. App. 1977), *cert. denied*, 239 S.E.2d 263 (N.C. 1977).

27. *Lexie*, 251 Va. at 394, 489 S.E.2d at 62.

28. *Id.* at 396, 486 S.E.2d at 64.

29. *Id.* at 394, 486 S.E.2d at 62.

30. *United States Fire Ins. Co. v. Parker*, 250 Va. 374, 463 S.E.2d 464 (1995).

31. *Id.*

denied UM coverage by the supreme court because she was not "using" her company vehicle when she was hit.³² The employee, a landscape gardener, had used the company truck to carry cabbages and tools to her worksite. She left the truck's two-way radio on at all times to stay in contact with her supervisor while she planted the cabbages.³³ Although not instructed to do so by her supervisor, the employee also parked the truck in such a way that it was acting as a barrier between the worksite and a busy adjoining road.³⁴ Despite this precaution, the employee was struck by a passing car while planting the cabbages. At the time she was struck, the employee was approximately twelve to fifteen feet from the truck.³⁵

The trial court found that the employee could take advantage of the employer's UM coverage, and the insurance company appealed.³⁶ Relying on the supreme court's decision in *Great American Insurance Co. v. Cassell*,³⁷ the employee argued that the insured vehicle was performing an essential employment function at the time of the accident. She argued that she was "using" the truck as a communications link and as a barrier at the time she was hit by the passing motorist.³⁸ In rejecting this argument, the supreme court distinguished the present case from *Cassell*.³⁹

In *Cassell*, the supreme court extended UM coverage to a firefighter who was killed by a hit-and-run motorist while standing approximately twenty to twenty-five feet away from his fire truck.⁴⁰ The supreme court noted in *Parker* that the employment of the fire truck "to extinguish the fire, control traffic and protect the fire fighters, including [the deceased], was an integral part of the fire fighter's mission" and that "[the deceased] was engaged in a transaction essential to the use of the fire truck when he was killed."⁴¹ In contrast, the supreme

32. *Id.* at 378, 463 S.E.2d at 466.

33. *Id.* at 376, 463 S.E.2d at 465.

34. *Id.*

35. *Id.* at 375-76, 463 S.E.2d at 465.

36. *Id.* at 376, 463 S.E.2d at 465.

37. 239 Va. 421, 389 S.E.2d 476 (1990).

38. *Parker*, 250 Va. at 376-77, 463 S.E.2d at 465-66.

39. *Id.* at 377-78, 463 S.E.2d at 466.

40. *Cassell*, 239 Va. at 422, 389 S.E.2d at 477.

41. *Parker*, 250 Va. at 377-78, 463 S.E.2d at 466.

court found that the vehicle in *Parker* was not engaged in a transaction essential to the planting of the cabbages. The supreme court held that the use of the truck as a barrier and a communications link was not analogous to the use of a fire truck as a warning device, a source of water and a barrier at the scene.⁴² In *Parker*, the supreme court found that the truck's essential work function was that of transportation, and it was not being used for transportation at the time the employee was injured by the uninsured motorist.⁴³ The supreme court, therefore, overturned the decision of the trial court. In doing so, the supreme court quoted its contemporaneous decision in *LaClair* and stated that in determining whether or not a vehicle was being "used" for the purposes of section 38.2-2206(B), the main inquiry should be whether there is a "causal relationship between the incident and the employment of the insured vehicle as a vehicle."⁴⁴

Parker, in conjunction with *LaClair* and *Lexie*, expanded on the supreme court's previous decisions and made it clear that the breadth of the scope of UM coverage will be interpreted narrowly in Virginia.

C. Carriers Consent to Settlement

In *Osborne v. National Union Fire Insurance Co.*,⁴⁵ the supreme court held that the enforcement of a UM endorsement requiring the carrier's consent to settlement was not contingent on the settlement prejudicing the carrier.⁴⁶ Osborne, an employee operating his employer's truck, was injured when he was forced off the road by another vehicle operated by an unknown and, therefore, uninsured motorist.⁴⁷ National Union Fire In-

42. *Id.* at 378, 463 S.E.2d at 466.

43. *Id.*

44. *Id.* at 377, 463 S.E.2d at 466.

45. 251 Va. 53, 465 S.E.2d 835 (1996), *Answer to Certified Question from*, 77 F.3d 470 (4th Cir. 1996). The question certified to the Supreme Court of Virginia was: "Whether National Union may deny UM coverage to Osborne on the grounds that Osborne settled with State Farm without National Union's consent, when National Union's UM contract contained a consent-to-settlement clause but National Union was not prejudiced by the settlement." *Id.* at 55-56, 465 S.E.2d at 837.

46. *Id.* at 56, 465 S.E.2d at 837.

47. *Id.* at 54, 465 S.E.2d at 837.

insurance, the primary insurer, had issued the employer an insurance policy with UM coverage of \$25,000. Osborne had also purchased a personal insurance policy with UM coverage of \$100,000. In an action in which both insurers had responded as "John Doe," Osborne obtained a \$300,000 judgment against the unknown motorist. Osborne sought payment from both insurers and settled with his own insurance company for \$65,000. He then sought payment from National Union Fire Insurance, which denied payment relying on an exclusion in its policy which specified that insurance did not apply to any claim settled without its consent.⁴⁸

Osborne brought an action seeking recovery against National Union Fire Insurance.⁴⁹ He contended that the consent-to-settlement clause should not bar recovery in the absence of prejudice to the insurer.⁵⁰

The supreme court held that Osborne was bound by the language of the policy endorsement, and declined to impose a subjective test of prejudice on the clear and unambiguous language of the insurance contract.⁵¹ The supreme court noted that this decision was consistent with interpretations it had made of other similar policy provisions such as that requiring timely notice of an accident.⁵²

There are certain circumstances in which prejudice must be shown in order for an insurer to enforce a policy provision; for example, for the enforcement of cooperation provisions and certain policy provisions requiring prompt delivery of suit papers to the insured. The supreme court noted, however, that in those cases the General Assembly has required prejudice to be shown, and in the present case, there had been no such legisla-

48. *Id.* at 55, 465 S.E.2d at 836-37.

49. *Id.* National Union Fire Insurance removed Osborne's suit to federal court. The district court judge denied recovery based on the exclusion, and Osborne appealed to the Court of Appeals for the Fourth Circuit which certified the question to the Supreme Court of Virginia.

50. *Id.* at 56, 465 S.E.2d at 837.

51. *Id.*

52. *Id.* ("[W]hen an insured fails to comply with a policy provision requiring timely notice of an accident, we have said that 'the insurance company need not show that it was prejudiced by such a violation.'" *State Farm Fire and Cas. Co. v. Walton*, 244 Va. 498, 504, 423 S.E.2d 188, 192 (1992); *accord State Farm Fire and Cas. Co. v. Scott*, 236 Va. 116, 120, 372 S.E.2d 383, 385 (1988)).

tive action.⁵³ The supreme court, therefore, declined to judicially legislate the necessity of a prior finding of prejudice in UM consent to settlement cases.

D. Subrogation—Equitable Indemnification

In *Carr v. Home Insurance Company*,⁵⁴ the supreme court held that an insurer could not bring an action for equitable indemnification in a case in which the statute of limitations for a subrogation action had run.⁵⁵ Because the statute of limitations for the subrogation suit had expired, the insurance company filed an action for contribution and/or implied or equitable indemnification.⁵⁶ The trial court granted summary judgment to the insurance company on its claim of equitable indemnification.⁵⁷

In *Carr*, the driver and passenger of a vehicle were injured and the vehicle damaged as a result of a two vehicle accident. The liability insurer of the other driver, Carr, denied coverage, and the injured parties recovered under the UM provision of their own policy, carried by Home Insurance Company. Home Insurance then filed a motion for judgment against Carr alleging that her negligence caused the accident and seeking to recover from her the money it had paid to its insured.⁵⁸ This

53. *Id.*; see VA. CODE ANN. § 38.2-2204(C) (Cum. Supp. 1996) (requiring prejudice to be established for an insurer to rely on an insured's breach of a cooperation clause, and under certain circumstances, for violation of policy provision requiring prompt delivery of suit papers to insurer).

54. 250 Va. 427, 463 S.E.2d 457 (1995).

55. *Id.* at 429-30, 463 S.E.2d at 458-59.

56. *Id.* Equitable indemnification is a cause of action available to a party, without personal fault, who is legally liable for damages caused by the negligence of another.

57. *Id.* at 429, 463 S.E.2d at 458.

58. The right of an insured to bring a subrogation action against the person causing the injury or damage for which the insured had extended coverage is set forth in Virginia Code § 38.2-2206(G), which states, in relevant part:

Any insurer paying a claim under the endorsement or provisions required by subsection A of this section shall be subrogated to the rights of the insured to whom the claim was paid against the person causing the injury, death, or damage and that person's insurer, although it may deny coverage for any reason, to the extent payment was made. The bringing of an action against the unknown owner or operator as John Doe or the conclusion of such an action shall not bar the insured from bringing an action against the owner or operator, . . . if the identity of the owner or operator who caused the injury or damages becomes known.

motion for judgment was filed two years and six days after the date of the accident, and Carr filed a plea of the statute of limitations.⁵⁹ The trial court continued Carr's plea, and granted Home Insurance time to amend its motion for judgment. Home Insurance amended its motion for judgment and changed its demand from legal damages to equitable relief. Home Insurance then moved for summary judgment on its equitable claim. The trial court denied Carr's plea of the statute of limitations and granted Home Insurance's motion for summary judgment because the statute of limitations for the equitable claims in the amended motion for judgment did not begin to run until Home Insurance paid its insured.⁶⁰

In overruling the trial court's grant of summary judgment, the supreme court held that a determination that the negligence of another party caused the damage is a prerequisite to a recovery based on equitable indemnification.⁶¹ Without such a determination neither party can be held liable for the damages. In this instance the case had settled and there had been no prior determination of negligence on Carr's part; therefore, Home Insurance was not permitted to assert a claim of equitable indemnification against her.⁶²

Because equitable indemnification was not available to Home Insurance, its only cognizable cause of action was that of subrogation, a cause of action which should have been brought within two years of the accident and was, therefore, barred by the statute of limitations.⁶³

VA. CODE ANN. § 38.2-2206(G) (Cum. Supp. 1996).

59. In Virginia, the statute of limitations for personal injury actions is two years. VA. CODE ANN. § 8.01-243(A) (Repl. Vol. 1992 & Cum. Supp. 1996).

60. *Parker*, 250 Va. at 429, 463 S.E.2d at 458 (holding that the claim for equitable relief was covered by Virginia Code § 8.01-249(5) which states the cause of action for contribution or indemnification accrue at the time "the contributee or indemnitee has paid or discharged the obligation").

61. *Id.*

62. *Id.*

63. *Id.* at 429-30, 463 S.E.2d at 458.

E. *UM Statutory Choice of Law Provision*

In *Gulf Insurance Co. v. Davis*,⁶⁴ the United States Court of Appeals for the Fourth Circuit determined that Virginia's uninsured motorist statute contains a choice of law provision which supersedes Virginia's common law rule.⁶⁵ In *Davis*, an unpublished opinion, the Fourth Circuit ruled that an insurance policy issued in Missouri for a motor vehicle principally garaged and used in Virginia was bound by Virginia's rules on UM or underinsured motorist (UIM) coverage.⁶⁶ In Virginia, the UM or UIM coverage of an insurance policy must equal the liability coverage of the policy, unless the insured has rejected this level of UM or UIM coverage in writing.⁶⁷

Davis was driving a friend's car when he was hit by an underinsured motorist, Rutherford. Rutherford negligently caused the accident resulting in serious injury to several individuals. After settling the claims of other passengers, there was only \$187,414 of coverage left under Rutherford's policy for any claims asserted by Davis. Because Davis' medical expenses and claims for pain and suffering far exceeded this amount, Davis

64. No. 94-2123, 1995 U.S. App. LEXIS 22273 (4th Cir. Aug. 15, 1995) (per curiam).

65. *Id.* at *7-8. Virginia Code § 38.2-2206(A) provides in relevant part:

Except as provided in subsection J of this section, no policy or contract of bodily injury or property damage liability insurance relating to the ownership, maintenance, or use of a motor vehicle shall be issued or delivered in this Commonwealth to the owner of such a vehicle or shall be issued or delivered by an insurer licensed in this Commonwealth upon any motor vehicle principally garaged or used 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 to exceed the limits of § 46.2-472. Those limits shall equal but not exceed the limits of the liability insurance provided by the policy, unless any one named insured rejects the additional uninsured motorist insurance coverage by notifying the insurer as provided in subsection B of § 38.2-2202. . . . The endorsement or provision shall also obligate the insurer to make payment for bodily injury or property damage caused by the operation or use of an underinsured motor vehicle to the extent the vehicle is underinsured

VA. CODE ANN. § 38.2-2206(A) (Repl. 1994 & Cum. Supp. 1996).

66. *Davis*, 1995 U.S. App. LEXIS 22273, at *12.

67. *Id.* at *13 (citing *State Farm Mut. Auto. Ins. Co. v. Weisman*, 247 Va. 199, 202, 441 S.E.2d 16, 18 (1994)).

sought recovery from his own insurer, Gulf.⁶⁸

Davis had a policy with Gulf that covered his tractor-trailer. The policy had stated limits of \$50,000 for UM and UIM coverage, and \$1,000,000 for liability coverage. The Gulf policy was issued in Missouri to the National Association of Independent Truckers which provides benefits to independent tractor/trailer operators such as Davis.⁶⁹

Gulf denied recovery and sought a declaration that the total amount of UM/UIM coverage available to Davis was limited to \$50,000, the amount stated in the policy.⁷⁰ Davis sought a declaration that Virginia Code section 38.2-2206(A) required Gulf to provide him with \$1,000,000 in UM/UIM coverage because he had not rejected UM/UIM coverage that equaled his liability coverage.⁷¹

The district court granted Gulf's motion for summary judgment which was based on a claim that the insurance contract between Davis and Gulf should be governed by Missouri law. Gulf asserted that the common-law rule in Virginia was that "the law of the place where a contract is written and delivered controls issues as to its coverage."⁷² The Fourth Circuit overturned the decision of the district court and held that Virginia Code section 38.2-2206(A) contained a choice of law provision which superseded the common law rule.⁷³

In making this determination, the Fourth Circuit noted that the courts of Virginia had not explicitly stated that section 38.2-2206(A) was a choice of law statute.⁷⁴ However, the Fourth Circuit relied on *Rose v. Travelers Indemnity Co.*⁷⁵ in which the Supreme Court of Virginia had implicitly concluded

68. *Davis*, 1995 U.S. App. LEXIS 22273, at *3.

69. *Id.*

70. *Id.* at *4-5.

71. *Id.* at *5.

72. *Id.* at *7 (quoting *Buchanan v. Doe*, 246 Va. 67, 70 431 S.E.2d 289, 291 (1993)).

73. The Fourth Circuit relied on § 6(1) of the Restatement (Second) of Conflicts which provides that "a court, subject to constitutional restrictions, will follow a statutory directive of its own state on choice of law." *Id.* at *11. Therefore, "if a state statute provides for choice of law, it is dispositive, rather than the state common law rule." *Id.*

74. *Id.* at *9.

75. 209 Va. 755, 167 S.E.2d 339 (1969).

that the precursor of section 38.2-2206(A) contained a choice of law provision.⁷⁶ In *Rose*, the supreme court found that an individual who had purchased insurance in the District of Columbia was entitled to recover UM coverage under the precursor of section 38.2-2206(A) if (1) the policy had been issued or delivered in Virginia or (2) the insurer was licensed to transact business in Virginia and the insured vehicle was principally used or garaged in Virginia.⁷⁷

Relying on this finding, the Fourth Circuit held that Davis was entitled to UM/UIM coverage equal to his liability insurance coverage because he had not specifically rejected such coverage as required by section 38.2-2206(A).⁷⁸

This Fourth Circuit decision confirms that Virginia Code section 38.2-2206(A) contains a choice of law provision, and that the requirements of the statute apply to all insurance policies issued in Virginia *and* all insurance policies which cover motor vehicles which are principally used or garaged in Virginia.

III. AUTOMOBILE LIABILITY COVERAGE

A. *Omnibus Clause*

In *USAA Casualty Insurance Co. v. Hensley*,⁷⁹ the supreme court refined the definition of a relative living in the household of the insured for cases involving liability coverage where a relative is driving a car not owned by the insured.⁸⁰ In *Hensley*, the two oldest sons of the Hoang family came to live in Virginia with their maternal grandmother. Their parents and younger siblings resided in Saudi Arabia. Except for a year of boarding school, one son, George, lived and worked in Virginia and used his grandmother's address for employment and tax purposes.⁸¹ Mrs. Hoang, the boys' mother, purchased a car in

76. *Id.*

77. *Id.* at 758, 167 S.E.2d at 342. The supreme court decided that the insured was not entitled to the protection of the precursor to Virginia Code § 38.2-2206(A) because he did not fit within either of these categories. *Id.*

78. *Davis*, 1995 U.S. App. LEXIS 22273 at *15.

79. 251 Va. 177, 465 S.E.2d 791 (1996).

80. *Id.*

81. *Id.* at 178-79, 465 S.E.2d at 792.

Virginia for the use of her two sons and insured it with USAA. Mrs. Hoang was listed on the policy as the named insured and she, her husband and two oldest sons were listed as operators.

During the time that George was staying with his grandmother, he took his aunt's automobile to the filling station for gas. While driving his aunt's car, George collided with another automobile. Hensley, the driver of the other automobile sued George for the injuries he suffered in the collision. Hensley also brought an action against USAA seeking a declaration that the insurance policy on Mrs. Hoang's car provided additional liability coverage beyond the policy on the aunt's car.⁸²

The Hoang family's USAA policy covered the operation of a non-owned automobile by the named insured or "any relative" of the named insured.⁸³ "Relative" is defined in the policy as "a relative of the named insured who is a resident of the same household."⁸⁴ The trial court found that George was a member of his mother's household. USAA appealed, and the supreme court found that George was not a member of his mother's household in Saudi Arabia, but was instead a member of his grandmother's household in Virginia.⁸⁵

Relying on its decision in *Allstate Insurance Co. v. Patterson*,⁸⁶ the supreme court defined household as

a collection of persons as a single group, with one head, living together, a unit of permanent and domestic character, under one roof; a "collective body of persons living together within one curtilage, subsisting in common and directing their attention to a common object, the promotion of their mutual interests and social happiness."⁸⁷

The supreme court also noted that a person's intent is important in determining whether he qualifies as a member of a

82. *Id.* at 180, 465 S.E.2d at 793.

83. *Id.*

84. *Id.*

85. *Id.* at 182, 465 S.E.2d at 794.

86. 231 Va. 358, 344 S.E.2d 890 (1986).

87. *Hensley*, 251 Va. at 181, 465 S.E.2d at 793-94 (quoting *Patterson*, 231 Va. at 361, 344 S.E.2d at 892 (1986) (quoting *State Farm Mut. Ins. Co. v. Smith*, 206 Va. 280, 285 n.6, 142 S.E.2d 562, 565 n.6 (1965))).

household.⁸⁸ Because George was a minor at the time of the incident, the supreme court extended the consideration of intent to that of his parents.⁸⁹

The supreme court found that there was no evidence of any intent on the part of George or his parents that he remain a part of their household in Saudi Arabia.⁹⁰ George did not maintain a room at his former residence, did not return to visit, and had not left any of his belongings there. He was in fact fully integrated into his grandmother's household. He spent his vacations in Virginia, worked there in the summer, applied for admission to college as a Virginia resident and contributed to the common burdens associated with the operation of his grandmother's household.⁹¹

Despite George's testimony that his grandmother's house was not his "home," the supreme court held that reasonable persons could not differ in concluding that George was no longer a member of his mother's household in Saudi Arabia, but had become a part of his grandmother's household in Virginia.⁹² Relying on its finding that George was not a member of his mother's household, the supreme court overturned the trial court's finding that his mother's insurance policy should provide additional coverage against George's liability to Hensley.⁹³

B. *Statutory Changes—Policy Cancellation*

Automobile liability insurance was also affected by the 1996 General Assembly which amended two statutory provisions dealing with liability insurance. A new provision, added to Virginia Code section 38.2-231, waives the cancellation/non-renewal notice requirements for insurers if the named insured

88. *Id.* (citing *Patterson*, 231 Va. at 363, 344 S.E.2d at 893).

89. *Id.* at 181-82, 465 S.E.2d at 794 ("[S]ince George was an unemancipated minor at the time of the accident, we must also consider his parents' intent in this determination); see VA. CODE ANN. § 16.1-334(5) (Repl. Vol. 1996) (stating that an emancipated minor may establish his own residence).

90. *Hensley*, 251 Va. at 182, 465 S.E.2d at 794.

91. *Id.*

92. *Id.*

93. *Id.* at 183, 465 S.E.2d at 794.

or a duly constituted attorney-in-fact requests the termination of his commercial liability or commercial automobile policy.⁹⁴

Virginia Code section 38.2-2212 was amended to allow an insurer to cancel a motor vehicle insurance policy mid-term if "the named insurer or his duly constituted attorney-in-fact has notified the insured of a change in [his] legal residence to a state other than Virginia and the insured vehicle will be principally garaged in the new state of legal residence."⁹⁵ This amendment expands the circumstances under which an insurer may cancel a policy.⁹⁶

IV. AUTOMOBILE MEDICAL PAYMENTS COVERAGE

The Supreme Court of Virginia affirmed a trial court's ruling that an insurance policy exclusion which disallows medical expense coverage for injuries that occur while occupying a non-covered motor vehicle owned by or available for the regular use of the named insured or a relative is not prohibited by Virginia Code section 38.2-2201 governing medical expense coverage.⁹⁷

94. VA. CODE ANN. § 38.2-231(A)(2) (Cum. Supp. 1996). The same bill also amended Virginia Code § 38.2-2114. That amendment eliminates the cancellation/non-renewal requirements if a homeowner's policy is cancelled at the request of the named insured's duly constituted attorney-in-fact. VA. CODE ANN. § 38.2-2114 (Cum. Supp. 1995). The section had previously exempted insurers from the requirements only if the named insured requested the cancellation. *See* VA. CODE ANN. § 38.2-2114 (Repl. Vol. 1994 & Cum. Supp. 1995).

95. VA. CODE ANN. § 38.2-2212(D)(3) (Cum. Supp. 1996).

96. Previously an insurer was permitted to cancel a policy only if:

1. The named insured or any other operator who either resides in the same household or customarily operates a motor vehicle insured under the policy has had his driver's license suspended or revoked during the policy period or, if the policy is a renewal, during its policy period or the ninety days immediately preceding the last anniversary of the effective date.
2. The named insured fails to pay the premium for the policy or any installment of the premium, whether payable to the insurer or its agent either directly or indirectly under any premium finance plan or extension of credit.

VA. CODE ANN. § 38.2-2212(D) (Cum. Supp. 1995).

97. *Cotchan v. State Farm Fire & Cas. Co.*, 250 Va. 232, 236, 462 S.E.2d 78, 80-81 (1995). *See* Virginia Code § 38.2-2201 which provides, in relevant part:

Upon request of an insured, each insurer licensed in this Commonwealth issuing or delivering any policy or contract of bodily injury or property damage liability insurance covering liability arising from the ownership, maintenance or use of any motor vehicle shall provide [medical expense

In *Cotchan v. State Farm Fire & Casualty Co.*,⁹⁸ the insurer filed a declaratory judgment seeking a declaration that Christopher Cotchan was not entitled to medical expense benefits under a family policy. State Farm was the carrier of an automobile liability insurance policy issued to Barbara and Wesley Cotchan as the named insureds.⁹⁹ The policy contained medical expense benefits for bodily injury caused by an accident arising from the ownership, maintenance or use of any motor vehicle.¹⁰⁰ The medical expense coverage extended not only to Barbara and Wesley Cotchan, but also to their son Christopher, a relative living in their household. The liability insurance policy also contained an exclusion providing that the medical expense benefits did not apply to "bodily injury sustained by the named insured or any relative while occupying any motor vehicle owned by or furnished or available for the regular use of such named insured or relative and which is not an insured motor vehicle."¹⁰¹

While the State Farm policy was in effect, Christopher suffered bodily injury and incurred medical expenses while operating a motorcycle which he owned. The motorcycle was insured for liability by Progressive Insurance Company, and Christopher rejected medical expense coverage on his policy from Progressive.¹⁰² Christopher filed a claim with State Farm requesting payment of the medical bills he incurred as a result of his motorcycle accident. Relying on the above exclusion, State Farm denied benefits because Christopher was operating a vehicle

benefits] on payment of the premium.

VA. CODE ANN. § 38.2-2201(A) (Cum. Supp. 1996).

Upon such a request the medical expense benefits shall be provided:

(i) to persons occupying the insured motor vehicle; and (ii) to the named insured and, while resident of the named insured's household, the spouse and relatives of the named insured while in or upon, entering or alighting from or through being struck by a motor vehicle while not occupying a motor vehicle. . . .

Id.

98. 250 Va. 232, 462 S.E.2d 78 (1995).

99. *Id.* at 233, 462 S.E.2d at 79.

100. *Id.* at 235-36, 462 S.E.2d at 79; see *supra* 97 and accompanying text.

101. *Cotchan*, 250 Va. at 234, 462 S.E.2d at 79.

102. *Id.*

which he owned and which was not covered by the State Farm policy.¹⁰³

The trial court ruled in favor of State Farm. On appeal, the Cotchans asserted that the exclusion in the automobile policy directly conflicted with the language of Virginia Code section 38.2-2201 and was, therefore, invalid.¹⁰⁴ Section 38.2-2201 mandates medical expense coverage for the resident relatives of the named insured while in or upon a motor vehicle.¹⁰⁵

Relying on its recent decisions in *State Farm Mutual Automobile Insurance Co. v. Gandy*¹⁰⁶ and *Baker v. State Farm Mutual Auto Insurance Co.*,¹⁰⁷ the supreme court held that in the absence of specific statutory language prohibiting reasonable exclusions of medical expense coverage, the clear and unambiguous language of the State Farm exclusion is valid.¹⁰⁸

In a logically compelling dissent, Chief Justice Carrico, with whom Justices Lacy and Keenan joined, argued that the policy exclusion was in direct conflict with the statute and should, therefore, have been stricken as invalid.¹⁰⁹ Justices Carrico, Lacy and Russell had also dissented in *Baker*, interpreting Virginia Code section 38.2-2201 as the minimum level of insurance

103. *Id.*

104. *Id.*, 462 S.E.2d at 80.

105. *See supra* note 97. There is no language in the statute which restricts coverage to accidents involving the insured vehicle.

106. 238 Va. 257, 383 S.E.2d 717 (1989).

107. 242 Va. 74, 405 S.E.2d 624 (1991).

108. *Cotchan*, 250 Va. at 236, 462 S.E.2d at 80-81. In *Gandy* and *Baker* the supreme court upheld exclusions to medical expense coverage. In *Gandy*, the supreme court unanimously upheld the validity of an insurance policy exclusion which restricted medical expense benefits for injuries caused by "equipment designed for use principally off public roads while not upon public roads." *Gandy* 235 Va. at 259, 383 S.E.2d at 718. The medical expense coverage in that case was undertaken voluntarily by the insurance company pursuant to Virginia Code § 30.2-124. The supreme court distinguished § 30.2-124 from § 30.2-2201 and determined that because the coverage regulated by § 30.2-124 was voluntary, any reasonable exclusions were not in conflict with the statute. *Id.* at 259-260, 383 S.E.2d at 718-19.

In *Baker*, the supreme court again considered the validity of an exclusion to medical benefits coverage. However, unlike *Gandy*, the coverage was provided pursuant to the request of the insured, and was governed by § 30.2-2201. The majority determined that there was no conflict between the exclusion, which disallowed coverage for injuries covered by workers compensation, and the language of § 30.2-2201 which does not prohibit exclusions. *Baker*, 242 Va. at 76-77, 405 S.E.2d at 625.

109. *Cotchan*, 250 Va. at 236-37, 462 S.E.2d at 81.

required to be provided if the insured requests medical expense benefits.¹¹⁰ In both cases the dissenters found that the policy exclusions which reduced the level of medical benefits coverage violated the statutory requirements for the benefits and were therefore void.¹¹¹

The majority appears to have based its decision primarily on the fact that the policy exclusion was reasonable, rather than on the language of the statute. The language of section 38.2-2201 states the requirements for medical expense benefits coverage in very clear and inclusive terms.¹¹² To construe the absence of language barring exclusions as allowing exclusions "completely vitiates the coverage required by [Section] 38.2-2201."¹¹³ The result in *Cotchan* seems reasonable, but the decision of whether or not exclusions are allowed may be better left to the legislature than to the courts.

The method of payment of medical expense benefits was also affected by the 1996 General Assembly which modified Virginia Code sections 38.2-124 and 38.2-2201. These modifications require insurers to pay medical expense and loss of income benefits to the insured.¹¹⁴ Previously, these payments could be made either to the insured or to the medical provider.¹¹⁵ Now, claimants appear to have more discretion in reimbursing medical providers from third party settlements rather than being forced to reimburse them from medical payment benefits.

V. DUTY OF GOOD FAITH OWED TO THIRD PARTY BENEFICIARIES

In *Levine v. Selective Insurance Co. of America*,¹¹⁶ the supreme court finally held that the duty of good faith in an insurance contract runs to third-party beneficiaries as well as the

110. *Baker*, 242 Va. at 77-78, 405 S.E.2d at 625-26.

111. *Cotchan*, 250 Va. at 237, 462 S.E.2d at 81; *Baker*, 242 Va. at 78, 405 S.E.2d at 625-26.

112. *See supra* note 97.

113. *Baker*, 242 Va. at 78, 405 S.E.2d at 626.

114. VA. CODE ANN. §§ 38.2-124, -2201 (Cum. Supp. 1996).

115. VA. CODE ANN. §§ 38.2-124, -2201 (Repl. Vol. 1994 & Cum. Supp. 1995).

116. 250 Va. 282, 462 S.E.2d 81 (1995).

named insured.¹¹⁷ In *Levine*, the plaintiffs executed a contract with a builder to construct a house on their property. The construction contract contained a provision requiring the builder to obtain construction hazard insurance (to provide coverage for personal injuries and loss of materials on the job site) with the Levines as loss payees.¹¹⁸ The builder obtained the coverage which named him, not the Levines, as the insured. The evidence before the trial court showed that all parties understood that the Levines were the beneficiaries of the policy.¹¹⁹

While the house was under construction, it was badly damaged by wind. The Levines filed a claim with the insurance company, and an adjuster was sent to evaluate the loss. The adjuster was advised that prompt action was necessary to prevent further damage to the building.¹²⁰ The insurance company "dallied in reviewing and paying the claim," "asked the Levines and [the builder] to provide certain information regarding the loss that [the insurance company] already possessed," and "otherwise delayed paying the claim."¹²¹ Despite warnings that further damage to the home was imminent, the insurance company refused to pay the claim. Eventually, the delay resulted in further damage to the home. The Levines then filed a second claim for the additional damage. After negotiations, the insurance company paid the first claim, in a check written to the builder and Mr. Levine jointly, but refused to pay the second claim.¹²²

The Levines then filed a motion for judgment against the insurance company alleging that it had violated its duty of good faith and fair dealing. The trial court granted summary judgment in favor of the defendants. The supreme court reversed the lower court's decision and remanded the case for a trial on the merits.¹²³

In determining that Selective Insurance owed the Levines the contractual duties of good faith and fair dealing, the supreme

117. *Id.*

118. *Id.* at 284, 462 S.E.2d at 82.

119. *Id.*

120. *Id.*, 462 S.E.2d at 82-83.

121. *Id.*, 462 S.E.2d at 83.

122. *Id.*

123. *Id.* at 283, 462 S.E.2d at 81.

court relied on the well-established rule that "a party may sue to enforce the terms of a contract even though he is not a party to the contract,"¹²⁴ and Virginia Code section 55-22, which gives a contract beneficiary, whether named or not, the right to sue on the contract.¹²⁵ The supreme court noted, "we have enforced third-party beneficiary contracts when '[t]he third party . . . show[s] that the parties to the contract clearly and definitely intended it to confer a benefit upon him."¹²⁶ In *Levine*, the supreme court determined that Levine pled sufficient facts in the motion for judgment to support the Levines' claim that they were third-party beneficiaries to the contract and that the insurance company had breached its covenant of good faith and fair dealing.¹²⁷ Therefore, *Levine* was remanded to the trial court for a determination of the merits of the claim.¹²⁸

This extension of the general rule of contract construction to insurance contracts may become an important tool for plaintiffs against insurance companies. Car-crash plaintiffs, in particular, could use this decision to argue that they are third-party beneficiaries of defendants' insurance policies. Prior to *Levine*, at least one circuit court judge had allowed an injured plaintiff to go forward with a suit against an insurance carrier for failure to settle within policy limits.¹²⁹ This is an area in which much more litigation may be anticipated.

124. *Id.* at 285, 462 S.E.2d at 83 (quoting *Thacker v. Hubard*, 122 Va. 379, 387, 94 S.E. 929, 931 (1918)) ("in contracts not under seal, it has been held, for two centuries or more, that any one for whose benefit the contract was made may sue upon it").

125. *Id.* Virginia Code § 55-22 states, in relevant part:

[I]f a covenant or promise be made for the benefit, in whole or in part, of a person with whom it is not made, or with whom it is made jointly with others, such person, *whether named in the instrument or not*, may maintain in his own name any action thereon which he might maintain in case it had been made with him only and the consideration had moved from him to the party making such covenant or promise.

VA. CODE ANN. § 55-22 (Repl. Vol. 1995 & Cum. Supp. 1996) (emphasis added).

126. *Levine*, 250 Va. at 286, 462 S.E.2d at 83 (quoting *Ward v. Ernst & Young*, 246 Va. 317, 330, 435 S.E.2d 628, 634 (1993) (alterations in original)).

127. *Id.*, 462 S.E.2d at 83-84.

128. *Id.* at 289, 462 S.E.2d at 85.

129. *Munson v. Aetna Cas. and Sur. Co.*, 35 Va. Cir. 216 (Albemarle County 1994). In *Munson*, Judge Peatross interpreted Virginia Code § 38.2-2200 as providing for equal treatment of judgment creditors and insureds, and found that equal treatment "connote[s] equal rights as beneficiaries to bring suit." 35 Va. Cir. at 218.

VI. INSURANCE AGENT LIABILITY

In *General Insurance of Roanoke, Inc. v. Page*,¹³⁰ the supreme court made it clear that Virginia law imposes an affirmative duty upon policyholders to read their policies, and if they do not they are barred from later asserting that the procuring agent negligently, or in breach of a contract, failed to procure the coverage that they requested.¹³¹

In *Page*, an independent insurance agent was asked to procure and update commercial insurance for a mechanical and tire business. The policyholder told the agent in 1981 that his inventory was worth \$10,000, his shop tools were worth \$10,000 and his hand tools were worth \$10,000 to \$20,000. The policyholder also told the agent that he could not read and understand the policy and that he wanted the agent to handle all of his insurance requirements.¹³²

In 1983, the policyholder substantially upgraded his business and met with the agent. He told the agent that he had a \$50,000 bank loan for his building, showed him a parts inventory indicating a value of \$15,000, told him that the inventory's value would increase to \$20,000, and explained that his shop tools and his hand tools were *each* worth \$20,000. The agent said that he would obtain the insurance.¹³³

The policy obtained by the agent, however, had building limits of only \$20,000 and total personal property limits of \$15,000. The policyholder did not read the policy. After sustaining a loss in excess of the limits, the policyholder sued the agent.¹³⁴

The supreme court held that the policyholder's failure to read the policy barred his claim against the agent.¹³⁵ The court made it clear that its decision was based on both contract and tort principles, stating:

130. 250 Va. 409, 464 S.E.2d 343 (1995).

131. *Id.*

132. *Id.* at 410, 464 S.E.2d at 343-44.

133. *Id.* at 410-11, 464 S.E.2d at 344.

134. *Id.* at 411, 464 S.E.2d at 344.

135. *Id.* at 412, 464 S.E.2d at 345.

The agent contends on appeal, as it did at trial, that [the policyholder's] failure to read the insurance policy constituted negligence, as a matter of law, and that such negligence proximately caused his losses and precluded recovery against it. While we previously have not decided the precise issue presented in the present case, we have held that one who signs an application for life insurance without reading the application or having someone read it to him is chargeable with notice of the application's contents and is bound thereby.¹³⁶ We also have held that the failure of a grantor to read a deed will not relieve him of obligations contained therein.¹³⁷ *While the decisions cited are contract cases, we think the same rule should apply in negligence actions.*¹³⁸

The supreme court's decision is clear and forceful.

[The policyholder] testified that he has reading difficulties. [The policyholder] had a duty, nonetheless, to have his wife, who occasionally helped with business matters, or someone else read the policy to him if he could not read it. We conclude, therefore, that [the policyholder's] failure to read the policy or to have someone read it to him constitutes negligence as a matter of law that bars a recovery against the agent.¹³⁹

Although no mention is made in the opinion, *Page* implicitly overrules a part of the supreme court's decision in *New York Life Insurance Co. v. Eicher*.¹⁴⁰ In *Eicher*, the supreme court held that "there is a presumption that the applicant has read

136. *People's Life Ins. Co. v. Parker*, 179 Va. 662, 667, 20 S.E.2d 485, 487 (1942); *Royal Ins. Co. v. Poole*, 148 Va. 363, 376-77, 138 S.E. 487, 491 (1927).

137. *Carter v. Carter*, 223 Va. 505, 509, 291 S.E.2d 218, 221 (1982); see *Metro Realty of Tidewater, Inc. v. Woolard*, 223 Va. 92, 99, 286 S.E.2d 197, 200 (1982) (absent fraud, one who has capacity to understand written document and signs it without reading it or having it read to him is bound thereby).

138. *Page*, 250 Va. at 411-12, 464 S.E.2d at 344-45 (emphasis added).

139. *Id.* at 412, 464 S.E.2d at 345.

140. 198 Va. 255, 93 S.E.2d 269 (1956). *Eicher* was an action by a beneficiary against the insurer on a life insurance policy. The insurer denied liability on the ground of material misrepresentations on the application for insurance allegedly made by the insured regarding his physical condition and medical history. The Supreme Court of Appeals of Virginia held that the beneficiary could recover if he could produce sufficient evidence to rebut the presumption that he knew that answers recorded in the application were those given by the insured and that he knew that the application contained false answers. *Id.* at 260, 93 S.E.2d at 273-74.

the application which he signed and he is prima facie charged with knowledge of its contents, but this presumption may be rebutted."¹⁴¹ *Eicher* expressly overruled the supreme court's previous decision in *Royal Insurance v. Poole*¹⁴² which states that it is the duty of an insured to read an insurance application and that an insured "was bound to know what she had signed."¹⁴³ In fact, in *Page*, the supreme court relies on the previously overruled *Poole* to support its contention that an insured "is chargeable with notice of [an] application's contents and is bound thereby."¹⁴⁴

The supreme court's decision in *Page* is likely to have wide-sweeping ramifications for insurance policy holders. The facts of *Page* involved policy limits; however, the language of the decision implies that policy holders will be responsible for reading and understanding their entire policies, including any and all exclusions.

VII. LIABILITY INSURANCE

In *S.F. (Jane Doe) v. West American Insurance Co.*,¹⁴⁵ the supreme court again confirmed that any ambiguity of definitions in insurance policies will be resolved in favor of coverage.¹⁴⁶ In overruling the decision of the lower court, the supreme court found that West American's definition of "occurrence" in an insurance policy was ambiguous.¹⁴⁷

West American brought a declaratory action against the claimants, a group of infants and their parents, and against

141. *Id.* at 260, 93 S.E.2d at 273.

142. 148 Va. 363, 138 S.E. 487 (1927). Like *Eicher*, *Poole* concerned an application for insurance signed by the insured which contained false information in response to answers material to risk. The Supreme Court of Appeals of Virginia held that the insured was bound by the writing which he had signed, regardless of whether or not he had read it. *Id.* at 376, 138 S.E.2d at 491. The court noted that "it would introduce great uncertainty in all business transactions, if a party making written proposals . . . should be allowed to show . . . that he did not know the contents of his proposals." *Id.* at 371, 138 S.E. at 489.

143. *Id.* at 373, 138 S.E. at 490.

144. *Page*, 250 Va. at 412, 464 S.E.2d at 344.

145. 250 Va. 461, 463 S.E.2d 450 (1995).

146. *Id.* at 464, 463 S.E.2d at 452.

147. *Id.* at 465, 463 S.E.2d at 452.

their insureds, the owners and managers of an apartment complex.¹⁴⁸ Claimants filed seven separate lawsuits against the insureds alleging that the infants were sexually molested by the resident manager of the apartment complex.¹⁴⁹ The suits claimed that the owners and managers of the apartment complex were negligent in hiring the resident manager, who had been convicted of child molestation and was on parole at the time of the hiring. The trial court awarded West American a declaration that the claims of sexual molestation all arose from a single negligent occurrence; the hiring of the resident manager.¹⁵⁰ This declaration limited West American's total exposure to the policy limit of one million dollars for all claimants.¹⁵¹

The insurance policy contained the following provision:

The Company will pay on behalf of the *insured* all sums which the *insured* shall become legally obligated to pay as damages because of *bodily injury* . . . or personal injury caused by an *occurrence* to which this insurance applies.

The total liability of the Company for all damages, including . . . damages for care and loss of services, as a result of any one *occurrence* shall not exceed the limit of liability stated in the Declarations as applicable to each *occurrence*.

The above limits shall apply regardless of . . . the number of persons or organizations who have sustained injury or damage.

For the purpose of determining the limit of the Company's liability, all *bodily injury* and *property damage* arising out of a continuous or repeated exposure to . . . the same general conditions shall be considered as arising out of one *occurrence*.¹⁵²

The policy defined occurrence as "an accident, including continuous or related exposure to conditions which result in *bodily injury* or *property* damage neither expected or intended from the standpoint of the *insured* and with respect to *personal injury*, the commission of an offense, or a series of similar or relat-

148. *Id.* at 462, 463 S.E.2d at 451.

149. *Id.* at 463, 463 S.E.2d at 451.

150. *Id.*

151. *Id.*

152. *Id.* at 463-64, 463 S.E.2d at 451-52.

ed offenses.”¹⁵³ Relying on the principles of ambiguity stated in *Granite State Insurance Co. v. Bottoms*,¹⁵⁴ the supreme court found that West American’s definition of occurrence was ambiguous because it was susceptible to numerous interpretations.¹⁵⁵ The supreme court noted that under the facts stated in the claimants’ motions for judgment, occurrence could be defined as: (1) “the insureds’ negligent hiring of [the resident manager],” or (2) “the insureds’ negligent supervision of [the resident manager],” or (3) “the insureds’ negligent retention of [the resident manager].”¹⁵⁶ Noting that it is incumbent upon the insurance company to ensure that the language of the policy is sufficiently clear to avoid ambiguity in order to limit coverage, the supreme court held that the trial court erred in limiting West American’s potential liability to \$1,000,000.¹⁵⁷

The supreme court further found that, for the purposes of determining the potential exposure of West American, the sexual molestation of each child should be treated as a separate occurrence.¹⁵⁸ Therefore, because seven children were molested by the resident manager, the maximum exposure for West American was \$7,000,000.¹⁵⁹

West American reinforces the importance of clear and unambiguous language in insurance policies. The supreme court has been reluctant in recent years to find ambiguities in insurance policies; when ambiguities are found, however, the penalty for the insurance company is severe. Had West American been more precise in drafting its policy, its potential exposure to liability for the injuries to the infants would have been reduced by \$6,000,000.

153. *Id.* at 464, 463 S.E.2d at 452.

154. 243 Va. 228, 415 S.E.2d 131 (1992).

155. *West American*, 250 Va. at 464-65, 463 S.E.2d at 452. In *Granite*, the supreme court stated the following principles regarding ambiguity:

An ambiguity, if one exists, must be found on the face of the policy. And, language is ambiguous when it may be understood in more than one way or when it refers to two or more things at the same time. Finally, doubtful, ambiguous language in an insurance policy will be given an interpretation which grants coverage, rather than one which withholds it.

Granite, 243 Va. at 233-34, 415 S.E.2d at 134 (citations omitted).

156. *West American*, 250 Va. at 465, 463 S.E.2d at 452.

157. *Id.*

158. *Id.*

159. *Id.* at 465-66, 463 S.E.2d at 452-53.

VIII. INSURANCE REGULATION

The supreme court affirmed the decision of the State Corporation Commission that the Virginia Life, Accident and Sickness Insurance Guaranty Association (the Association) is not obligated to guarantee the policies of an insolvent insurer which are held by the trustees of an IRS Code section 401(k) plan.¹⁶⁰

In *Bennet v. Virginia Life, Accident and Sickness Insurance Guar. Ass'n.*,¹⁶¹ a section 401(k) retirement plan sought protection pursuant to Chapter 17 of the Virginia Code for Guaranteed Interest Contracts (GICs) which the plan had purchased from an insurance company. The insurance company subsequently became insolvent and defaulted on the contracts.¹⁶² Because the insurance company was licensed to transact business in Virginia and was a member of the Association, the plan trustees asked the Association to extend coverage to the GICs. The Association declined to extend coverage to the GICs, and the Commissioner of Insurance for Virginia ruled that the GICs were not covered by Chapter 17 of the Virginia Code because the GICs were neither issued to or owned by an individual nor annuity contracts.¹⁶³ The plan trustees next sought a declara-

160. *Bennet v. Virginia Life, Accident and Sickness Ins. Guar. Ass'n*, 251 Va. 382, 468 S.E.2d 910 (1996); see VA. CODE ANN. § 38.2-1700 to -1721 (Repl. Vol. 1994). Chapter 17 of the Code of Virginia was established to provide protection to "policyowners, insureds, beneficiaries, annuitants, payees, and assignees of life insurance policies, accident and sickness insurance policies, annuity contracts, and supplemental contracts against failure to fulfill contractual obligations due to the impairment or insolvency of the insurers issuing those policies or contracts." VA. CODE ANN. §38.2-1700(A) (Repl. Vol. 1994).

In order to provide this protection, the General Assembly created the Association, composed of all insurers licensed to transact the business of insurance in Virginia. The members of the Association are assessed from time to time to provide funds to carry out the purpose of Chapter 17. In the case of the insolvency of an insurance company, the fund is used to "[g]uarantee, assume, or reinsure or cause to be guaranteed, assumed, or reinsured the covered policies of the insolvent insurer." VA. CODE ANN. § 38.2-1704(B)(1) (Repl. Vol. 1994).

This protection is subject to certain limitations, including that it does not apply to "[a]ny contract or certificate which is not issued to and owned by an individual, except to the extent of . . . any annuity benefits guaranteed to an individual by an insurer under such contract or certificate." VA. CODE ANN. § 38.2-1700(C)(5) (Repl. Vol. 1994).

161. 251 Va. 382, 468 S.E.2d 910 (1996).

162. *Id.* at 385, 468 S.E.2d at 912.

163. *Id.* at 385-86, 468 S.E.2d at 912.

tion from the State Corporation Commission (SCC) that the GICs were "annuity contracts" entitled to coverage under Virginia Code section 38.2-1700(A).¹⁶⁴ The SCC affirmed the decision of the Association, and the trustees appealed to the supreme court.¹⁶⁵

In affirming the decision of the SCC, the supreme court first analyzed the plan trustees' contention that the GICs were entitled to coverage because the plan participants were the ultimate owners of the GICs. The trustees argued that the GICs were not excluded from coverage by the language of Chapter 17 because the ultimate beneficiaries of the GICs were the individual participants of the section 401(k) plan.¹⁶⁶ In dismissing this argument, the supreme court looked to the plan documents. The documents stated that "the Trust was to exist as a single Fund . . .," and that "[t]he Contractholder (and not the Participant . . .) is the sole owner of all payments, rights, options, and privileges granted or made to any participant, beneficiary or contingent annuitant . . . and is entitled . . . to receive all payments at the time payable under the Plan to the Participant, beneficiary or contingent annuitant."¹⁶⁷ Therefore, the supreme court found that the clear language of the section 401(k) plan documents defeated the trustees' claims that the individual plan participants were the true owners of the GICs.¹⁶⁸

The supreme court next analyzed the trustees' claim that the GICs were contracts which provided annuity benefits to individuals. In dismissing this claim, the supreme court looked to the actual form of the GICs and to the language of those statutes in Chapter 17 of the Virginia Code which govern payments by the Association. The trustees argued that the GICs were "annuity contracts because they [were] agreements to make periodic or lump-sum payments and fixed-dollar amounts to the Plan participants through the Plan."¹⁶⁹ However, the supreme court noted that Virginia Code section 38.2-106 defines an annuity as an agreement "to make periodic payments in fixed dollar

164. *Id.* at 385, 468 S.E.2d at 912.

165. *Id.* at 385-86, 468 S.E.2d at 912.

166. *Id.* at 386, 468 S.E.2d at 913.

167. *Id.* at 387, 468 S.E.2d at 913.

168. *Id.*

169. *Id.*, 468 S.E.2d at 913 (quoting Brief of Appellant).

amounts pursuant to the terms of a contract for a stated period of time or for the life of the person or persons specified in the contract."¹⁷⁰

The supreme court again reasoned that by the trustees' own definition, the GICs failed to meet the statutory requirements of annuities in that they neither provided for periodic payments nor fixed a dollar amount to be paid.¹⁷¹ Therefore, the supreme court affirmed the decision of the State Corporation Commission to deny coverage to the plan trustees.¹⁷² Again the supreme court found that clear and unambiguous language of the policy was not subject to interpretation and should be construed according to its plain meaning.

170. *Id.* at 387-88, 468 S.E.2d at 913 (quoting VA. CODE ANN. § 38.2-106 (Cum. Supp. 1996)).

171. *Id.* at 388, 468 S.E.2d at 913.

172. *Id.*, 468 S.E.2d at 914.

