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## Annual Survey of Virginia Law: Insurance Law

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## INSURANCE LAW

*Terrence L. Graves\**

### I. INTRODUCTION

This article will summarize and discuss case decisions and statutory changes in the field of insurance law that have taken place over the last two years. As in years past, most of the cases involve automobile coverage, particularly uninsured and underinsured motorist coverage. Other areas covered by this article include the following: liability insurance, automobile medical payments coverage, insurance regulation, fire insurance, and homeowners insurance.

### II. UNINSURED ("UM") AND UNDERINSURED MOTORIST ("UIM") COVERAGE.

#### A. *UM Coverage for Actions of Carjacker*

The Court of Appeals for the Fourth Circuit, in *Huston v. State Farm Mutual Automobile Insurance Co.*, looked at the question of whether or not the actions of a carjacker fell within the definition of "use" of a vehicle for purposes of providing uninsured motorist coverage.<sup>1</sup> The case arose out of an incident in which Huston was killed during an attempted carjacking of his vehicle. He was shot twice by the carjacker and subsequently died from his wounds.<sup>2</sup> This case initially was filed in the U.S. District Court for the Eastern District of Virginia as a declaratory judgment action in which the administrator of Huston's estate sought a ruling that Huston's injuries arose out

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1. 99 F.3d 132 (4th Cir. 1996).

2. *See id.* at 133.

of the use of the vehicle by an uninsured motorist. The district court, however, granted the defendant's motion for summary judgment.<sup>3</sup>

Huston's estate appealed the case to the Court of Appeals for the Fourth Circuit. The Fourth Circuit certified to the Supreme Court of Virginia the question of "whether or not Huston's injuries arose out of the use of the automobile within the meaning of the policy of insurance."<sup>4</sup> The Supreme Court of Virginia declined to accept the certified question; however, the court stated in its denial order that there was "nothing in the present case [that] distinguishes it from *Lexie v. State Farm Mutual Automobile Insurance Co.*"<sup>5</sup> The supreme court decided in *Lexie* that uninsured motorist coverage is not applicable where the conduct of an assailant, in causing the death of a motorist, does not constitute use of a vehicle as contemplated by the uninsured motorist statute or the uninsured motorist provisions of the insurance policy in question.<sup>6</sup>

The supreme court's statement in its denial order further points out that criminal acts which take place while the actor is occupying a vehicle generally will not be considered "use" of the vehicle as contemplated by the uninsured motorist statute or the provisions of policies of insurance sold in Virginia.

#### B. *UM Coverage for Student Crossing Street to Board School Bus*

The Supreme Court of Virginia answered two other certified questions from the Court of Appeals for the Fourth Circuit in *Stern v. Cincinnati Insurance Co.*<sup>7</sup> This case involved an accident in which a ten-year-old girl, Elena Stern, was injured as she crossed the street to board a school bus. The bus was stopped with its flashing lights activated. The girl was struck by an oncoming car.<sup>8</sup>

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3. *See id.*

4. *Id.*

5. *Id.* (citing 251 Va. 390, 469 S.E.2d 61 (1996)).

6. *See Lexie*, 251 Va. at 392, 469 S.E.2d at 62.

7. 252 Va. 307, 477 S.E.2d 517 (1996).

8. *See id.* at 309, 477 S.E.2d at 518.

The car was operated by David Demoss and was insured by an insurance policy issued by Cincinnati Insurance Company. The policy had liability limits of \$25,000 per person with a total maximum payout of \$50,000.<sup>9</sup> Elena's parents were insured by State Farm Insurance Company. This policy had liability limits of \$100,000 per person, and because Elena was a resident of her parents' household, she was insured under the underinsured motorist coverage of that policy.<sup>10</sup> The school bus was owned and operated by the City of Lynchburg and was insured under a policy issued by Graphic Arts Insurance Company, which provided underinsured motorist coverage in the amount of \$1,000,000 to individuals who fit within the definition of "insured."<sup>11</sup> The Graphic Arts policy defined "insured" to include those who are injured while "occupying" a covered vehicle. The policy then defined "occupying" as "in, upon, getting in, on, out or off."<sup>12</sup>

The supreme court discussed the provisions of Virginia Code section 38.2-2206,<sup>13</sup> which is applicable to the use of a vehicle. Specifically, section 38.2-2206 provides that coverage is afforded to an individual who "uses" the motor vehicle to which the policy applies with the expressed or implied consent of the named insured.<sup>14</sup>

The Supreme Court of Virginia considered the following two certified questions from the Fourth Circuit: "(1) Was [Elena] 'occupying' the school bus, as that term is defined in the Graphic Arts policy, when she was injured?; [and] (2) Was [Elena] 'using' the school bus, as that term is defined in Virginia Code Ann. § 38.2-2206, when she was injured?"<sup>15</sup>

The supreme court answered the first certified question in the negative, stating that the child was not "occupying" the bus

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9. *See id.*

10. *See id.* at 310, 477 S.E.2d at 518.

11. *See id.*

12. *Id.*

13. VA. CODE ANN. § 38.2-2206 (Cum. Supp. 1998).

14. *See id.*

15. *Stern*, 252 Va. at 310, 477 S.E.2d at 518.

as defined in the Graphic Arts policy.<sup>16</sup> The court found that at best, Elena was “merely approaching the bus” at the time of the accident.<sup>17</sup>

The court also answered the second certified question in the negative. The court indicated that at the time of this accident, “Elena clearly was not utilizing the bus as a vehicle because she was not yet a passenger of the school bus and, therefore, was not using the bus, within the meaning of Code § 38.2-2206, when she was injured.”<sup>18</sup> The court further held that the Graphic Arts policy did not provide coverage to the Sterns.<sup>19</sup> The court distinguished the present case from *Great American Insurance v. Cassell*,<sup>20</sup> stating that in *Cassell*, the firefighter who was killed was still using the fire truck to extinguish the fire and control traffic at the time the accident occurred.<sup>21</sup>

The court followed its holding and reasoning in *Insurance Company v. Perry*<sup>22</sup> and *United States Fire Insurance Co. v. Parker*.<sup>23</sup> *Perry* and *Parker* both involved situations in which the erstwhile users or occupants of the vehicles in question were involved in accidents while outside the vehicles.<sup>24</sup> The court found that neither of the accident victims in *Perry* nor *Parker* were actually “utilizing” or “using” their vehicles when they were struck.<sup>25</sup>

### C. UM Coverage for an Employee

In *Stone v. Liberty Mutual Insurance Co.*,<sup>26</sup> the Supreme Court of Virginia answered another certified question from the Court of Appeals for the Fourth Circuit. The question was

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16. See *id.* at 311, 477 S.E.2d at 519.

17. *Id.*

18. *Id.* at 313, 477 S.E.2d at 520.

19. See *id.*

20. 239 Va. 421, 389 S.E.2d 476 (1990).

21. See *Stern*, 252 Va. at 312, 477 S.E.2d at 520 (citing *Cassell*, 239 Va. at 424, 389 S.E.2d at 477).

22. 204 Va. 833, 134 S.E.2d 418 (1964).

23. 250 Va. 374, 463 S.E.2d 464 (1995).

24. See *Stern*, 252 Va. at 313, 477 S.E.2d at 520 (citing *Parker*, 250 Va. at 378, 463 S.E.2d at 466; *Perry*, 204 Va. at 838, 134 S.E.2d at 421).

25. See *id.* at 312-13, 477 S.E.2d at 520.

26. 253 Va. 12, 478 S.E.2d 883 (1997).

whether, under the facts presented, Thomas Stone was an insured person as defined in Virginia Code section 38.2-2206(B).<sup>27</sup> In other words, does section 38.2-2206(B) mandate that Stone is insured under the uninsured motorist endorsement of his employer's automobile policy notwithstanding the policy language?<sup>28</sup>

This case arose out of an automobile accident between Thomas Stone and Carol Drye, which occurred while Stone was driving his personally owned vehicle during the course of his employment with Tidewater Pizza, Inc. Stone was a pizza delivery person and was required to provide his own transportation.<sup>29</sup>

Stone eventually recovered a judgment against Drye in the amount of \$250,000, plus interests and costs, following a trial in the Virginia Beach Circuit Court.<sup>30</sup> Drye's liability insurance had a limit of \$25,000 at the time of the accident; therefore, that amount was all that was available to satisfy the judgment.<sup>31</sup>

At the time of the accident, Tidewater Pizza, Inc. was insured by a business auto insurance policy issued by Liberty Mutual. Tidewater Pizza, Inc. was the named insured and was covered by motor vehicle liability insurance with a limit of \$350,000 and uninsured motorist coverage with a limit of \$350,000.<sup>32</sup>

Stone subsequently filed a declaratory judgment action in the Virginia Beach Circuit Court against Liberty Mutual, which was removed to the U.S. District Court for the Eastern District of Virginia.<sup>33</sup> This declaratory judgment action sought a ruling that the insurer was liable to Stone under the underinsured motorist coverage in the amount of \$225,000.<sup>34</sup> The parties agreed to stipulate to the facts and to submit the issue of coverage under the policy to the district court on cross-motions for

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27. VA. CODE ANN. § 38.2-2206(B) (Cum. Supp. 1998).

28. See *Stone*, 253 Va. at 16, 478 S.E.2d at 885.

29. See *id.* at 14, 478 S.E.2d at 883.

30. See *id.*

31. See *id.*

32. See *id.*

33. See *id.*

34. See *id.*

summary judgment.<sup>35</sup> The district court agreed with Stone's argument that the policy issued to Tidewater conflicted with Virginia Code section 38.2-2206, the uninsured motorist statute, and granted Stone's motion for summary judgment.<sup>36</sup> An appeal was filed with the Fourth Circuit, which then certified the question presented to the supreme court.<sup>37</sup>

The supreme court analyzed the language of the policy in question in light of the facts of this particular case and the requirements of Virginia Code section 38.2-2206. Specifically, the supreme court determined whether Stone qualified as an "insured" under the uninsured motorist coverage provision of the policy.<sup>38</sup> Particular emphasis was placed on the two classes of potential insureds. The uninsured motorist endorsement provided that

the term "insured" is defined as the named insured (Tidewater) "or any family member" of the named insured. Second, the term "insured" includes "[a]nyone else occupying a covered auto" . . . . [A] "covered auto" is defined to include "[o]nly those autos [Tidewater owns] which, because of the law in the state where they are licensed or principally garaged, are required to have and cannot reject uninsured motorists insurance."<sup>39</sup>

Two vehicles met this definition, and Stone's vehicle was not one of them.<sup>40</sup>

Stone argued that he was operating a vehicle that was covered under the liability provision of the Liberty Mutual policy.<sup>41</sup> Therefore, according to Stone, the insurer was required to provide him with uninsured motorist coverage<sup>42</sup> pursuant to Virginia Code section 38.2-2206(A).<sup>43</sup> Stone also argued that

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35. *See id.*

36. *See id.* at 14, 478 S.E.2d at 884.

37. *See id.* at 15, 478 S.E.2d at 884.

38. *See id.* at 16, 478 S.E.2d at 885.

39. *Id.* at 15, 478 S.E.2d at 884.

40. *See id.*

41. *See id.* at 16, 478 S.E.2d at 884.

42. *See id.*, 478 S.E.2d at 885.

43. Virginia Code section 38.2-2206(A) provides in pertinent part:  
no policy or contract of bodily injury or property damage liability insurance relating to the ownership, maintenance, or use of a motor vehicle

the Liberty Mutual policy violated Virginia Code section 38.2-2206(A) because it specifically provided coverage for non-owned vehicles under the liability provision of the policy while failing "to provide uninsured motorist coverage to anyone occupying the same non-owned vehicle."<sup>44</sup>

The supreme court reasoned that Stone was not using either of the motor vehicles covered by the policy because he was driving his own vehicle at the time of the accident.<sup>45</sup> The court focused on subsection (B) of the uninsured motorist statute<sup>46</sup> and subsequently determined that Stone did not fit within any of the described classes of insureds under the statute.<sup>47</sup> Consequently, the supreme court answered the certified question by finding that Stone was not an "insured."<sup>48</sup>

#### D. Calculating UIM Coverage in Single Car Accidents

The Supreme Court of Virginia in *Trisvan v. Agway Insurance Co.*, addressed the issue of "whether, in a single vehicle accident, the uninsured/underinsured motorist (UM/UIM) endorsement of a tortfeasor's automobile liability insurance policy is to be considered when determining the extent to which the tortfeasor's motor vehicle is underinsured."<sup>49</sup> *Trisvan* was a

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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. 1998).

44. *Stone*, 253 Va. at 16, 478 S.E.2d at 885.

45. *See id.* at 18, 478 S.E.2d at 886.

46. Virginia Code section 38.2-2206(B) provides in pertinent part:

"Insured" as used in subsection A . . . of this section means the named insured and, while resident of the same household, the spouse of the named insured, and relatives, wards or foster children of either, while in a motor vehicle or otherwise, and any person who uses the motor vehicle to which the policy applies, with the expressed or implied consent of the named insured, and a guest in the motor vehicle to which the policy applies or the personal representative of any of the above.

VA. CODE ANN. § 38.2-2206(B) (Cum. Supp. 1998).

47. *See Stone*, 253 Va. at 18, 478 S.E.2d. at 886.

48. *See id.* at 19, 478 S.E.2d at 886.

49. 254 Va. 416, 417, 492 S.E.2d 628, 628 (1997).



passenger in a vehicle driven by Marcus Smith. The vehicle was involved in a single car accident, and Trisvan suffered injuries resulting in more than \$125,000 in damages. Smith's vehicle was insured by an insurance policy with a limit of \$25,000 per person. Trisvan, however, was insured under a family automobile policy issued by Agway with a limit of \$100,000 for uninsured/underinsured motorist coverage. Trisvan sued Smith for personal injuries suffered, and Agway was served as the underinsured motorist carrier for Trisvan. The suit was settled when Smith's liability carrier paid Trisvan the limits of that policy and when Agway tendered \$75,000.<sup>50</sup>

Agway then filed a declaratory judgment action seeking a determination that \$75,000 was the maximum extent of its underinsurance obligation. Trisvan argued that the total amount of uninsured/underinsured motorist coverage available was \$125,000, thereby making Agway's total liability \$100,000 instead of \$75,000.<sup>51</sup> The trial court determined that Smith's vehicle was underinsured in the amount of \$75,000; consequently, Trisvan was only entitled to \$75,000, not \$100,000 as he had argued.<sup>52</sup>

Trisvan asserted that Virginia Code section 38.2-2206(B)<sup>53</sup> requires that, in a single car accident, the tortfeasor's uninsured/underinsured motorist coverage always be stacked onto other available uninsured/underinsured motorist coverage.<sup>54</sup> This construction requires that the driver's uninsured/underinsured motorist coverage be provided to his passengers, even if the driver is the sole tortfeasor.<sup>55</sup> Trisvan argued that the purpose of the 1982 amendments to Virginia Code section 38.2-2206 was to "increase the total protection afforded"

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50. *See id.* at 418, 492 S.E.2d at 628.

51. *See id.*

52. *See id.*

53. The pertinent portion of Virginia Code section 38.2-2206(B) provides:

[a] motor vehicle is "underinsured" when, and to the extent that, the total amount of bodily injury and property damage coverage applicable to the operation or use of the motor vehicle and available for payment for such bodily injury or property damage . . . is less than the total amount of uninsured motorist coverage afforded any person injured as a result of the operation or use of the vehicle.

VA. CODE ANN. § 38.2-2206(B) (Cum. Supp. 1998).

54. *See Trisvan* 254 Va. at 419, 492 S.E.2d at 629.

55. *See id.*

to parties injured by the negligence of motorists.<sup>56</sup> The supreme court disagreed, explaining that the purpose of the 1982 amendments was to allow an injured person "access to the 'over-insurance' in his uninsured/underinsured motorist insurance endorsement, even if the tortfeasor was insured."<sup>57</sup> The supreme court affirmed the trial court, stating that "in applying section 38.2-2206(B), a passenger injured in a single vehicle accident is not entitled to include the UM/UIM coverage contained in the tortfeasor's automobile liability insurance policy when determining the extent to which the tortfeasor's vehicle was underinsured."<sup>58</sup>

Notably, Justices Compton and Kinser, in a concurring opinion, analyze the case in a way that most practicing attorneys would analyze it. The Justices determined that the \$25,000 in uninsured motorist coverage available from Smith's policy can not be added when computing "the total amount" of "coverage" referred to in the uninsured motorist statute in order to determine the extent to which the claimant's vehicle was underinsured.<sup>59</sup> In other words, the tortfeasor's underinsured motorist coverage is not considered, and the amount of liability insurance is subtracted from the remaining underinsured motorist coverage available, leaving one with the amount that the vehicle is underinsured.

#### E. UIM Coverage for Employment Functions of Automobiles

The Supreme Court of Virginia examined the purpose of a vehicle, the equipment that it utilized, and its relationship to the employee's job in *Randall v. Liberty Mutual Insurance Co.*<sup>60</sup> The issue in *Randall* was "whether, for purposes of qualifying as an insured under Code section 38.2-2206, a highway

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56. *Id.* (citing *Nationwide Mut. Ins. Co. v. Scott*, 234 Va. 573, 363 S.E.2d 703 (1988)).

57. *Id.* *Scott* explained that an anomaly existed that allowed a person who was injured by an uninsured motorist to recover greater monetary damages than if the person was injured by someone who was insured, and the injured party had elected to obtain uninsured motorist coverage in an amount greater than the liability limits of the insured tortfeasor. *See* 234 Va. at 575-76, 363 S.E.2d at 704.

58. *Trisvan*, 254 Va. at 420, 492 S.E.2d at 630.

59. *See id.* at 422, 492 S.E.2d at 631 (Compton, J., concurring).

60. 255 Va. 62, 496 S.E.2d 54 (1998).

worker was 'using' his employer's vehicle while placing lane closure signs along the side of a highway."<sup>61</sup> James L. Downey and another employee were putting lane closure signs along a portion of Interstate 64 ("I-64") during the course of, and in the scope of, their employment with Archer-Western Contractors, Ltd. when Downey was struck and killed by a car driven by Thomas Pasterczyk.<sup>62</sup>

Downey and his fellow employee followed a certain procedure while placing the lane closure signs along the highway. They drove company owned pickup trucks and stopped at several points along a one-mile stretch of I-64. While stopped, Downey and the other employee would leave the engines of the vehicles running and the truck's yellow flashing bubble lights turned on. Downey would remove the lane closure signs from the rear of the vehicle and place them six feet from the rear of the truck.<sup>63</sup>

The administrators of Downey's estate filed a motion for judgment against Pasterczyk for wrongful death.<sup>64</sup> Before trial the parties agreed to have a judgment entered against Pasterczyk in the amount of \$105,000, of which \$60,000 would be paid jointly by Pasterczyk's liability carrier and Downey's uninsured/underinsurance motorist carrier.<sup>65</sup>

The trial court determined Downey's estate was not entitled to recover under the uninsured/underinsured motorist endorsement of the Liberty Mutual policy that covered the Archer-Western vehicle even though the estate argued that Downey was "using" said vehicle at the time of his death.<sup>66</sup> The trial court specifically found that Downey was not using or occupying the vehicle in question at the time of the accident.<sup>67</sup>

The estate appealed the trial court's decision. The supreme court reversed the trial court, relying in part upon its previous

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61. *Id.* at 63-64, 496 S.E.2d at 54.

62. *See id.* at 64, 496 S.E.2d at 54-55.

63. *See id.*

64. *See id.*

65. *See id.* The parties presumably agreed to have judgment entered to satisfy the requirement in most policies that UM/UIM coverage only be paid when the tortfeasor legally is obligated to pay.

66. *See id.* at 65, 496 S.E.2d at 55.

67. *See id.*

holding in *Great American Insurance Co. v. Cassell*.<sup>68</sup> As in *Cassell*, the supreme court found that Downey was using his employer's vehicle at the time of his death.<sup>69</sup> The supreme court also indicated that it was important that the vehicle that Downey was using was a specialized vehicle with warning equipment.<sup>70</sup> This allowed the supreme court to distinguish the current case from its prior decision in *United States Fire Insurance Co. v. Parker*.<sup>71</sup> The supreme court's decision in this case seems to suggest that the court places great importance upon the type of vehicle that purportedly is being "used" by the person who is seeking the benefit of the uninsured/underinsured coverage. This decision, however, cannot be reconciled with the supreme court's previously discussed decision in *Stern*.<sup>72</sup> The difficulty in reconciling the finding in *Stern* with the finding in *Randall* is recognized in the dissent by Justices Hassell, Lacy, and Keenan in the *Stern* case.<sup>73</sup>

#### F. UIM Credit Priorities

The Supreme Court of Virginia looked at the issue of whether or not Virginia Code section 46.2-368(B)<sup>74</sup> modified the credit priorities of Virginia Code section 38.2-2206(B)<sup>75</sup> in *Catron v. State Farm Mutual Insurance Co.*<sup>76</sup> Catron was injured in an automobile collision with another vehicle, driven by Brian Layman. Catron was employed by Roanoke County at the time of this accident, and he was acting within the scope of his employment at the time that the accident occurred. Layman was provided liability coverage by Rockingham Casualty Company with

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68. *See id.* at 65-68, 496 S.E.2d at 55-57 (citing *Great Am. Ins. Co. v. Cassell*, 239 Va. 431, 389 S.E.2d 476 (1990)).

69. *See id.* at 67, 496 S.E.2d at 57.

70. *See id.*

71. *See id.* at 67, 496 S.E.2d at 57 (citing *United States Fire Ins. Co. v. Parker*, 250 Va. 378, 463 S.E.2d 464 (1995)).

72. *Stern v. Cincinnati Inc.*, 252 Va. 307, 477 S.E.2d 517 (1996).

73. *See id.* at 313-14, 477 S.E.2d at 520-21 (Hassell, J., dissenting). Specifically, the dissent felt that under the policy in question, the infant plaintiff was "occupying" the school bus in that she was in the act of "getting on" the bus at the time of the accident. *See id.* at 313, 477 S.E.2d at 520.

74. VA. CODE ANN. § 46.2-368(B) (Cum. Supp. 1997).

75. *Id.* § 38.2-2206(B) (Cum. Supp. 1998).

76. 255 Va. 31, 496 S.E.2d 436 (1998).

a limit of \$100,000. Catron was provided underinsured motorist coverage by State Farm with a limit of \$100,000. Roanoke County was self-insured for uninsured motorist coverage purposes in the amount of \$25,000. Layman's liability carrier offered its maximum liability coverage to Catron in settlement of the case, and Roanoke County claimed that it was entitled to the proceeds of the settlement offer because it paid workers compensation benefits to Catron following the accident.<sup>77</sup>

A declaratory judgment action was filed by Catron, seeking a ruling that State Farm was obligated to pay him \$25,000 due to the applicable priority of underinsured coverage in the case.<sup>78</sup> The trial court held that the underinsured motorist coverage of State Farm was primary and that it owed no payment to Catron.<sup>79</sup> Furthermore, the court held that the county's self-insured coverage was secondary.<sup>80</sup> The trial court apparently based its holdings upon its understanding of the provisions of Virginia Code sections 38.2-2206(B) and 46.2-368(B).<sup>81</sup>

The supreme court reversed the trial court's rulings and entered final judgment for Catron, holding that the lower court erred in finding that Virginia Code section 46.2-368(B) modified

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77. *See id.* at 34, 496 S.E.2d at 437.

78. *See id.*

79. *See id.*

80. *See id.*

81. Virginia Code section 38.2-2206(B) provides in pertinent part:

[i]f an injured person is entitled to underinsured motorist coverage under more than one policy, the following order of priority of policies applies and any amount available for payment shall be credited against such policies in the following order of priority: (1) The policy covering a motor vehicle occupied by the injured person at the time of the accident; (2) The policy covering a motor vehicle not involved in the accident under which the injured person is a named insured; (3) The policy covering a motor vehicle not involved in the accident under which the injured person is an insured other than a named insured. Where there is more than one insurer providing coverage under one of the payment priorities set forth, their liability shall be proportioned as to their respective underinsured motorist coverages.

VA. CODE ANN. § 38.2-2206(B) (Cum. Supp. 1998). Virginia Code section 46.2-368 states that the Commissioner of the Department of Motor Vehicles has the power to issue certificates of self-insurance. The certificate must provide protection against an uninsured or underinsured motorist "to the extent required by § 38.2-2206." The section further provides that "protection against the uninsured or underinsured motorist" is "secondary coverage." VA. CODE ANN. § 46.2-368(B) (Cum. Supp. 1997).

the credit priorities of section 38.2-2206.<sup>82</sup> The supreme court looked at the language of both statutes in question, stating that section 38.2-2206 establishes an "order of priority of policies" which indicates that the amount available for "payment" will be "credited" against the several policies in "the following order of priority:" the county's \$25,000 which provided underinsured motorist coverage to the county vehicle operated by Catron at the time of the accident; then the \$100,000 from State Farm's policy covering a vehicle not involved in the accident under which the plaintiff was a named insured.<sup>83</sup> Section 46.2-368(B) provided that the "protection against the uninsured or underinsured motorist required under this section . . . shall be secondary coverage to any other valid and collectible insurance providing the same protection which is available to any person otherwise entitled to assert a claim to such protection by virtue of this section."<sup>84</sup> The supreme court noted that the General Assembly "recognized 'a distinction in the financial implications of recovery from self-insurers and recovery from commercial insurers,'" and in effect has placed self-insurers in a favored status.<sup>85</sup> The supreme court stated that "the General Assembly has not specified that the 'secondary language' in 368 modifies the credit priority design of 2206."<sup>86</sup> Specifically, the court notes that the words "credit" and "priority" are not used in 46.2-368.<sup>87</sup> This supreme court decision clarified an area of confusion as to whether or not Virginia Code section 46.2-368 overrides or reverses the priorities of credit and payment set out in section 38.2-2206.

### G. *Statutory Changes*

The 1997 General Assembly amended the uninsured/underinsured motorist statute to include as an "uninsured motor vehicle" any motor vehicle owned or operated by an individual immune from liability for negligence under state or federal

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82. See *Catron*, 255 Va. at 39, 496 S.E.2d at 440.

83. See *id.* at 38, 496 S.E.2d at 439.

84. VA. CODE ANN. § 46.2-368(B) (Cum. Supp. 1997).

85. *Id.* (quoting *William v. City of Newport News*, 240 Va. 425, 432, 397 S.E.2d 813, 817 (1990)).

86. *Id.*

87. See *id.*

law.<sup>88</sup> The bill further provides that such immunity does not bar an insured claimant from obtaining a judgment against his own insurer under the uninsured motorist provisions of his own insurance policy.<sup>89</sup> The insurer may not raise this immunity as a defense to its insured's uninsured motorist claim.<sup>90</sup>

### III. AUTOMOBILE LIABILITY COVERAGE

Surprisingly, the Supreme Court of Virginia has not handed down any decisions within the last two years in the area of automobile liability insurance. The circuit court judges, however, have provided some interesting opinions covering the omnibus clause, material representations, and violation of lease agreements by lessees.

#### A. Omnibus Clause

Judge Bach of the Fairfax Circuit Court addressed the question of implied permissive use relative to the omnibus clause in *USAA v. Nationwide Insurance Co.*<sup>91</sup> The court was asked to determine whether Christopher Rampe, a co-plaintiff along with USAA, was a permissive user as contemplated by Virginia Code

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88. See H.B. 2501, Va. Gen. Assembly (Reg. Sess. 1997) (codified as amended at VA. CODE ANN. § 38.2-2206(B) (Cum. Supp. 1998)).

89. See VA. CODE ANN. § 38.2-2206(B) (Cum. Supp. 1998).

90. Virginia Code section 38.2-2206(F) was amended to provide:

[n]otwithstanding the provisions of subsection A, the immunity from liability for negligence of the owner or operator of a motor vehicle shall not be a bar to the insured obtaining a judgment enforceable against the insurer for the negligence of the immune owner or operator, and shall not be a defense available to the insurer to the action brought by the insured, which shall proceed against the named defendant although any judgment obtained would be enforceable against the insurer and any other nonimmune defendant. Nothing in this subsection shall prevent the owner or operator of the uninsured motor vehicle from employing counsel of his own choice and taking any action in his own interest in connection with the proceeding.

*Id.* § 38.2-2206(F) (Cum. Supp. 1998).

91. 41 Va. Cir. 370 (Fairfax County 1997).

section 38.2-2204<sup>92</sup> and, subsequently, if Nationwide was obligated to provide liability coverage to Rampe.<sup>93</sup>

A declaratory judgment action was filed by Rampe and USAA which alleged that Rampe was given express permission by Tom Dix, III to operate a vehicle that was insured by Nationwide or in the alternative that Rampe had implied permission to operate the vehicle. Nationwide's named insured was Tom Dix. The court found that Rampe "was not given express permission to operate the vehicle at the time of the accident."<sup>94</sup> The court also found that Tom Dix, III did not have any right to give Rampe permission to drive the vehicle and that Dix, III did not have general control over the vehicle.<sup>95</sup> Judge Bach then turned to the issue of implied permission in his opinion.

Specifically, Judge Bach relied upon the language of the Supreme Court of Virginia in *State Farm Mutual Insurance Co. v. Cook*, stating that "implied permission may 'arise from either a course of conduct or relationship between the parties, in which there is mutual acquiescence or a lack of objection under circumstances signifying assent."<sup>96</sup> Recognizing that each case must be analyzed upon its own specific facts to determine the existence of permission, Judge Bach looked at the facts of the present case and determined that the Dixes did not give Rampe

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92. Virginia Code section 38.2-2204(A) provides that:

[n]o 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 be issued or delivered . . . unless the policy contains a provision insuring the named insured, and any other person using or responsible for the use of the motor vehicle . . . with the expressed or implied consent of the named insured, against liability for death or injury sustained . . . . Each such policy or contract of liability insurance . . . insuring private passenger automobiles . . . principally garaged . . . with respect to any liability insurance provided by the policy, contract or endorsement for use of a nonowned automobile : . . any provision requiring permission or consent of the owner of such automobile . . . for the insurance to apply, shall be construed to include permission or consent of the custodian in the provision requiring permission or consent of the owner.

VA. CODE ANN. § 38.2-2204(A) (Cum. Supp. 1998).

93. See *USAA*, 41 Va. Cir. at 370.

94. *Id.*

95. See *id.*

96. *Id.* (quoting *State Farm Mut. Ins. Co. v. Cook*, 186 Va. 658, 667, 43 S.E.2d 863, 867 (1947)).



express or implied permission to use the vehicle, that Rampe was, therefore, not an insured under Nationwide's policy, and that Nationwide had no obligation under its policy to insure Rampe for damages arising out of the underlying automobile accident.<sup>97</sup> The court determined that no relationship or course of conduct existed between the Dixes and Rampe that could establish permissive use.<sup>98</sup> In fact, the evidence indicated that Rampe had obtained express permission each time he borrowed the vehicle in the past.<sup>99</sup>

The Virginia Beach Circuit Court also addressed coverage under the omnibus clause in 1997. In *Jaynes v. Haigh*, the Virginia Beach Circuit Court determined that liability coverage founded upon the omnibus clause is extended to lessees of an insured vehicle and that any contract providing the contrary is void.<sup>100</sup> The court, however, noted that coverage can be limited by the garage keepers exception.<sup>101</sup>

This case arose out of an automobile accident between the defendant Haigh, who was driving a leased Ford pickup truck, and four West Virginia University students occupying another vehicle. The case was filed as a declaratory judgment action seeking a determination that liability insurance coverage was available for this particular accident under an insurance policy issued by defendant, Michigan Mutual Insurance Company.<sup>102</sup> The pickup truck driven by Haigh was leased from a local Ford dealership and the terms of the lease required Haigh to carry liability insurance on the vehicle. Haigh's liability insurance, however, had been canceled for non-payment of premiums approximately two months prior to the accident.<sup>103</sup>

The lease and all of the interest held in the vehicle by the local dealership was assigned to Ford Motor Credit Company ("Ford Credit"), a wholly owned subsidiary of Ford Motor Company. A commercial automobile policy with a limit of \$12,000,000 issued to Ford Motor Company as the primary

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97. *See id.* at 371.

98. *See id.*

99. *See id.*

100. *See* 42 Va. Cir. 125 (Va. Beach City 1997).

101. *Id.* at 129-30.

102. *See id.* at 125.

103. *See id.* at 126.

named insured was in effect at the time of the accident. The term "named insured" was further defined in an endorsement as "Ford Motor Company, its subsidiary, associated and affiliated companies, and its owned or controlled companies as are now or may thereafter be constituted."<sup>104</sup>

Judge Shockley analyzed Virginia Code sections 38.2-2204(A) and (D) and determined that because Haigh was, for all intents and purposes, a permissive user of the vehicle covered by the Michigan Mutual policy, Michigan Mutual had to provide him with coverage under the policy in question.<sup>105</sup> The policy also had a clause which stated: "No coverage is afforded to the lessees of autos unless otherwise provided by endorsement or required by statute or law."<sup>106</sup> Judge Shockley specifically found that this clause was void pursuant to Virginia Code section 38.2-2204(D).<sup>107</sup>

The other issue considered by the court was whether the "garage keepers" exception, as codified in Virginia Code section 38.2-2205,<sup>108</sup> limited the amount of liability coverage, which

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104. *Id.*

105. *See id.* at 127-28.

106. *Id.* at 127.

107. *See id.*

108. Virginia Code section 38.2-2205 provides in pertinent part:

Each policy or contract or bodily injury or property damage liability insurance which provides insurance to a named insured in connection with the business of selling, leasing, repairing, servicing, storing or parking motor vehicles, against liability arising from the ownership, maintenance, or use of any motor vehicle incident thereto shall contain a provision that the insurance coverage applicable to those motor vehicles shall not be applicable to at person other than a named insured and his employees in the course of their employment if there is any other valid and collectible insurance applicable to the same loss covering the other person under a policy with limits at least equal to the financial responsibility requirements specified in section 46.2-472. Such provision shall apply to motor vehicles which are either for the purpose of demonstrating to the other person as a prospective purchaser, or which are loaned or leased to the other person as a convenience during the repairing or servicing of a motor vehicle for the other person, or leased to the other person for a period of six months or more . . . .

. . . .  
If there is no other valid and collectible insurance available, the coverage under such policy afforded a person, other than the named insured and his employees in the course of their employment, shall be applicable, but the amount recoverable in such case shall not exceed the financial responsibility requirements specified in section 46.2-472.

was available to the plaintiffs in this case, to the statutory minimum limits provided for in Virginia Code section 46.2-472 (\$25,000 per person/\$50,000 per accident).<sup>109</sup> The court closely analyzed whether Ford Credit was a "garage keeper" or whether it was in the business of financing vehicles.<sup>110</sup> The court concluded that Ford Credit actually became the "lessor of the vehicles, not just a financial backer" and was, therefore, covered by the "garage keeper" exception.<sup>111</sup> Therefore, the liability limits applicable to this accident were the minimum statutory limits provided for in Virginia Code section 46.2-472.<sup>112</sup>

The omnibus clause and its construction continues to be a source of litigation in Virginia. As shown above, in most cases, the outcome will be fact specific; consequently, the findings of the circuit courts do not represent any recognizable trend.

#### B. *Material Misrepresentations by Insured*

In *Heinzelman v. State Farm Mutual Automobile Insurance Co.*,<sup>113</sup> the Fairfax County Circuit Court determined whether plaintiff Heinzelman made material misrepresentations in his application for insurance which made the binder of insurance void ab initio.<sup>114</sup> Heinzelman filed a declaratory judgment action seeking coverage from State Farm pursuant to a binder of insurance that State Farm had issued but claimed was void due to material misrepresentations that Heinzelman made on the application for the policy.<sup>115</sup>

Heinzelman went into the office of an independent State Farm agent on March 2, 1994, and provided information to one of the employees who recorded it on the application. Heinzelman was asked the following question: "During the past five years have you, the applicant, any household member, or

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VA. CODE ANN. § 38.2-2205 (Repl. Vol. 1994).

109. See *Jaynes*, 42 Va. Cir. at 128.

110. See *id.* at 128-30.

111. *Id.* at 129.

112. VA. CODE ANN. § 46.2-472 (Repl. Vol. 1996).

113. 41 Va. Cir. 505 (Fairfax County 1997).

114. See *id.*

115. See *id.*

any regular driver . . . had an accident or sustained a loss?"<sup>116</sup> Heinzelman answered this question in the negative. Although half the premium was due, Heinzelman was unable to pay until he received his paycheck on March 4, 1994. He was informed that he would have no insurance coverage until the money was paid and that the application would be held in a "pending file."<sup>117</sup> Neither Heinzelman, nor the employee of the agency, signed the binder.<sup>118</sup>

On March 4, 1994, at 2:30 a.m., Heinzelman was involved in an automobile accident in which two people were injured. Heinzelman went back to the agency office approximately eleven hours after the accident and, without telling anyone about the accident, paid the premium and received a binder for insurance which had an effective date of March 2, 1994. Heinzelman represented to State Farm, when he signed the application, that all of "[his] statements on [the] application [were] correct."<sup>119</sup> He reported the accident to State Farm on March 7, 1994. State Farm investigated the circumstances surrounding the accident and the issuance of the binder and unilaterally changed the binder's effective date from March 2, 1994, to March 4, 1994, at 1:00 p.m. State Farm issued a policy to Heinzelman on March 24, 1994, covering the period from March 4, 1994, at 1:00 p.m. until October 10, 1994.<sup>120</sup>

Heinzelman argued that the binder was clear and unambiguous and that State Farm could not use parole evidence to vary its terms. He also argued that State Farm was barred from alleging fraud because State Farm failed to plead fraud in its Grounds of Defense, and because it issued an insurance policy based upon an application that purportedly contained misrepresentations. Heinzelman relied upon *Virginia Mutual Insur-*

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116. *Id.* at 506-07.

117. *See id.* at 507.

118. *See id.*

119. *Id.*

120. *See id.*

*ance Co. v. State Farm Mutual Insurance Co.*<sup>121</sup> to support his argument that State Farm waived any right to claim fraud.<sup>122</sup>

On the other hand, State Farm argued that there was no coverage for the accident of March 4, 1994, and relied primarily on Virginia Code section 38.2-309<sup>123</sup> to support its contention.<sup>124</sup>

The court found that there was no coverage from State Farm applicable to the March 4, 1994, accident.<sup>125</sup> Furthermore, the court held that the binder of insurance issued on March 4, 1994, was void ab initio because Heinzelman made a material misrepresentation at the time he signed the application—he knew he had been involved in an accident “less than twelve hours earlier.”<sup>126</sup>

### C. Violation of Lease Agreement by Lessee

In *Martin v. National Car Rental System, Inc.*,<sup>127</sup> Judge Johnson of the Richmond City Circuit Court decided the following two issues:

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121. 204 Va. 783, 785, 790, 133 S.E.2d 277, 279, 283 (1963). The applicant for insurance answered “no” in response to a question regarding whether any member of his or her household had been denied a driver’s license within the last five years even though the applicant was aware that his wife had been denied a driver’s license twice in that time frame. The wife was involved in an accident, and during its investigation, State Farm discovered that the wife did not have a license to drive. Subsequently, State Farm issued a new policy covering a new vehicle purchased by the applicant and his wife. State Farm then tried to rescind all policies issued to the couple based upon material misrepresentations on the application for insurance. The Supreme Court of Virginia held that State Farm could not show that the misstatements were material to its decision to provide insurance because it had provided a new policy to the couple even with the knowledge that the wife did not have a license prior to the rescission. *See id.*

122. *See Heinzelman*, 41 Va. Cir. at 507.

123. Virginia Code section 38.2-309 provides in pertinent part:

[a]ll statements, declarations, and descriptions in any application for an insurance policy . . . shall be deemed representations and not warranties. No statement in an application . . . made before or after loss under the policy shall bar recovery unless it is clearly proved that such an answer or statement was material to the risk when assumed and was untrue.

VA. CODE ANN. § 38.2-309 (Repl. Vol. 1994).

124. *See Heinzelman*, 41 Va. Cir. at 507-08.

125. *See id.* at 508.

126. *Id.*

127. 42 Va. Cir. 179 (Richmond City 1997).

(1) whether a rental car agreement and/or Virginia Code sections 38.2-2204 and 38.2-2206 require the rental company to provide insurance coverage for a traffic accident which occurred while the rental car was being operated by a person other than the rental car customer, with the rental car customer's consent, but in violation of the rental car agreement; and (2) whether the rental car customer's own insurance carrier must provide coverage under the circumstances just stated.<sup>128</sup>

This case involved one car accident that injured three passengers. At the time of the accident, the car was being driven by Antonio Crews with the consent of Dawn Taylor. Taylor rented the car from National Car Rental Systems ("National") subject to the terms of its standard rental agreement. National was a self-insured entity at the time of the accident, and Taylor was the named insured under an insurance policy issued to her by Colonial Insurance Company of California ("Colonial"). The injured parties filed a declaratory judgment action seeking a ruling that coverage existed from either National or Colonial, or both.<sup>129</sup>

Judge Johnson examined the Colonial policy, the National rental agreement, and the provisions of Virginia Code sections 38.2-2204 and 38.2-2206. Judge Johnson found that neither liability nor uninsured motorist coverages were applicable to the accident from either National or Colonial.<sup>130</sup> The National agreement clearly stated that any use of the vehicle by an unauthorized user would make any liability insurance upon the vehicle void.<sup>131</sup> Moreover, Judge Johnson found that Crews

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128. *Id.* at 180.

129. *See id.* at 179.

130. *See id.* at 181-86.

131. The National agreement provided in pertinent part:

I understand that if the vehicle is obtained or used for any prohibited use or in violation of this agreement, then any limitation of my responsibility under this agreement shall be void and I shall be fully responsible for all loss and resulting damages, including loss of use, claims processing fees, administrative charges, costs and attorneys' fees. Also, where permitted by law, the . . . liability . . . insurance shall be void.

Additionally, it was provided in another part of the agreement that: "I understand that protection does not apply to . . . any liability of a driver who is not an Authorized Driver and any liability for an accident which occurs while the vehicle is obtained or used in violation of this Agreement.

was clearly an unauthorized user due to the following factors: (i) he was seventeen; (ii) he was unlicensed; (iii) he was not a member of Taylor's family; (iv) he did not live with Taylor; (v) he was not a business partner, employer, or regular fellow employee; and (vi) he had not signed the rental agreement.<sup>132</sup> The court further held that there was no uninsured motorist coverage available from National because the statutes spoke of the "named insured," and the three injured individuals did not qualify as "named insureds" or others to whom protection would apply.<sup>133</sup>

Similarly, the court found that neither liability nor uninsured motorist coverage existed under the Colonial policy for the accident.<sup>134</sup> Judge Johnson stated that because of the following reasons, the language of the policy<sup>135</sup> did not provide liability coverage to Crews: (i) Crews was not a relative of Taylor, who is the named insured; (ii) he did not have the permission of the vehicle owner to operate the vehicle; and (iii) the mandatory liability coverage provision of Virginia Code section 38.2-2204(C)

Authorized or Additional Authorized Drivers were defined in another part of the agreement as "capable and validly licensed drivers, 25 years of age or older . . ."

Authorized Drivers must be:

(1) a member of my immediate family who permanently lives with me; or

(2) a business partner, employer or regular fellow employee who drives the vehicle for business purposes.

Additional Authorized Drivers must be:

(1) a person who has signed the Rental document of this Agreement as an Additional Authorized Driver after qualification by the Company.

*Id.* at 181.

132. *See id.* at 180.

133. *See id.* at 184.

134. *See id.* at 186.

135. The policy language provided as follows:

Persons Insured: the following are insureds under Part I . . . (b) with respect to a non-owned automobile, (1) the named insured, (2) any relative, but only with respect to a private passenger automobile or trailer, provided his actual operation or (if he is not operating) the other actual use thereof is with the permission or reasonably believed to be with the permission, of the owner and is within the scope of such permission, and (3) any other person or organization not owning or hiring the automobile, but only with respect to his or its liability because of acts or omissions of an insured under (B)(1) or (2) above.

*Id.*

is applicable only to the vehicle on which the policy was written, which was Taylor's personal vehicle.<sup>136</sup> The mandatory liability coverage was not applicable to the rental vehicle.<sup>137</sup> The uninsured motorist coverage of the Colonial policy also was found to be inapplicable because section 38.2-2206 only provided coverage to individuals other than the named insured for "injuries incurred while occupying or using the motor vehicle, to which the policy applies."<sup>138</sup>

#### IV. LIABILITY INSURANCE

##### A. *Duty to Defend*

In *VEPCO v. Northbrook Property and Casualty Insurance Co.*,<sup>139</sup> the Supreme Court of Virginia analyzed the meaning of the term "employee" in the context of a liability insurance policy. In addition, the supreme court evaluated whether a liability insurer properly refused to provide defense to a named insured by relying on a provision clause in the policy that excluded coverage for personal injury suits filed by an "employee."<sup>140</sup>

VEPCO entered into a contract with Commercial Courier Express ("Commercial") to provide courier services. The contract required Commercial to obtain an addendum to its general liability policy with Northbrook, adding VEPCO as an additional insured for suits arising out of courier services provided by Commercial to VEPCO. The policy contained a clause that excluded coverage for suits "arising out of and in the course of employment by the insured."<sup>141</sup>

While a Commercial employee was making a delivery on VEPCO's premises, she slipped and fell. The Commercial employee filed suit against VEPCO. VEPCO asked that Northbrook defend the suit under the duty to defend clause in the liability policy that Commercial had in effect at that time. Northbrook declined to defend the suit and also denied cover-

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136. *See id.* at 186.

137. *See id.*

138. *Id.*

139. 252 Va. 265, 475 S.E.2d 264 (1996).

140. *See id.*

141. *Id.* at 267, 475 S.E.2d at 265.



age. Ultimately, VEPCO defended the suit on its own, arguing that the Commercial employee who was injured was its statutory employee under Virginia Code section 65.2-302 and that as a statutory employee, the injured person's sole remedy was under the Workers' Compensation Act.<sup>142</sup>

VEPCO then filed a declaratory judgment action seeking a ruling that Northbrook improperly declined to defend the personal injury lawsuit.<sup>143</sup> The trial court held that Northbrook was correct in refusing to defend VEPCO in the suit.<sup>144</sup> VEPCO appealed that decision, and the supreme court reversed the decision of the trial court and entered final judgment for VEPCO.<sup>145</sup>

The supreme court held that the trial court erred in finding that the employee exclusion language in the Northbrook policy issued to Commercial allowed Northbrook to refuse to defend in the personal injury suit.<sup>146</sup> The supreme court, therefore, determined that the plain and generally accepted definition of "employee" should be utilized when construing the Northbrook policy.<sup>147</sup> The injured employee, though a "statutory employee" for purposes of workers compensation, was not an "employee" of VEPCO within the plain meaning of the policy.<sup>148</sup> Relying upon its prior decision in *American Reliance Insurance Co. v. Mitchell*,<sup>149</sup> the supreme court held that the definition of "employee" found in the Workers' Compensation Act would not be applied to the terms found in an insurance policy unless the policy specifically provided that the statutory definition was to apply.<sup>150</sup> This ruling is consistent with the court's policy in refusing to read anything into a legal writing that is not actually there.

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142. *See id.* at 268, 475 S.E.2d at 265.

143. *See id.*

144. *See id.*

145. *See id.* at 272, 475 S.E.2d at 267.

146. *See id.* at 271-72, 475 S.E.2d at 267.

147. *See id.*

148. *See id.*

149. 238 Va. 543, 385 S.E.2d 583 (1989).

150. *See VEPCO*, 252 Va. at 271, 475 S.E.2d at 267.

### B. *Enforceability of a Health Hazards Exclusion*

The Supreme Court of Virginia in *Monticello Insurance Co. v. Baecher* considered the issue of whether or not an insurance company may enforce an exclusion clause described as a "health hazard exclusion."<sup>151</sup> The estate of John Baecher was the owner of an "Owners', Landlords', and Tenants' Liability Insurance" policy which covered property owned by the estate in Norfolk, Virginia, and occupied by Louise Conyer and her granddaughter, Shanay Hunter. Hunter ingested lead based paint and Conyer filed a personal injury lawsuit against the estate alleging negligence in allowing the lead based paint to be on the premises.<sup>152</sup>

The estate asked Monticello Insurance Company ("Monticello") to provide it with a defense in the suit. Monticello filed a declaratory judgment action seeking a determination that it owed no duty to defend or indemnify the estate in the personal injury action because of the health hazard exclusion provisions.<sup>153</sup> The trial court held that the health hazard exclusion was unenforceable, accepting the arguments of the estate and Conyer that the lead based paint was not "utilized" within the plain meaning of the exclusion.<sup>154</sup>

On appeal, the supreme court looked at familiar principles of contract and policy interpretation.<sup>155</sup> Specifically, the supreme court stated that "in the absence of an ambiguity, we must

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151. 252 Va. 347, 477 S.E.2d 490 (1996).

152. *See id.* at 349, 477 S.E.2d at 490.

153. *See id.* at 349, 477 S.E.2d at 491. The health hazard exclusion provided in pertinent part:

[n]o coverage is granted by this policy for any claim or expense (including but not limited to defense costs) for personal injury (as defined) made by or on behalf of any person or persons directly or indirectly on account of continuous, intermittent or repeated . . . ingestion . . . of, any substance . . . where the Insured is or may be liable as a result of the manufacture, production, extraction, sale, handling, utilization, distribution, disposal or creation by or on behalf of the Insured of such substance . . . .

*Id.*

154. *See id.*

155. *See id.* at 350, 477 S.E.2d at 491. *See also* *Floyd v. Northern Neck Ins. Co.*, 245 Va. 153, 427 S.E.2d 193 (1993); *Graphic Arts Mut. Ins. v. C.W. Warthen Co.*, 240 Va. 457, 397 S.E.2d 876 (1990).

interpret the insurance contract by examining the language contained therein."<sup>156</sup>

Furthermore, the supreme court held that the exclusion was enforceable; therefore, the insurance company had no obligation to defend or indemnify the estate for any claims arising out of the allegations made by Conyer and her granddaughter.<sup>157</sup> The plain language found in the exclusion is not subject to more than one meaning; therefore, the exclusion was not ambiguous according to the court.<sup>158</sup>

### C. *Failure to Cooperate by Insured*

In *Angstadt v. Atlantic Mutual Insurance Co.*,<sup>159</sup> the Supreme Court of Virginia decided two issues. The first issue was whether the defendants in a declaratory judgment action were denied their right to a jury trial by the trial court's finding that the jury was impaneled under Virginia Code section 8.01-336(E) to decide an issue out of chancery.<sup>160</sup> The second issue was whether the trial court erred in entering judgment contrary to the jury verdict.<sup>161</sup> This matter arose out of a declaratory judgment action filed by Atlantic Mutual Insurance Co. ("Atlantic") against Keith Angstadt, Raymond Rask, and Multicomm Telecommunications, Inc. ("Multicomm"), which sought a ruling that it had no obligation to indemnify Rask and Multicomm against a \$2,000,000 judgment obtained by Angstadt.<sup>162</sup>

The matter was filed in chancery, and the defendants asked for a jury to be impaneled to determine issues of fact pursuant to Virginia Code section 8.01-188.<sup>163</sup> This request was granted

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156. *Id.*

157. *See id.*

158. *See id.*

159. 254 Va. 286, 492 S.E.2d 118 (1997).

160. *See id.*

161. *See id.*

162. *See id.* at 288, 492 S.E.2d at 119.

163. *See id.* Virginia Code section 8.01-188 provides:

[w]hen a declaration of right or the granting of further relief based thereon shall involve the determination of issues of fact triable by a jury, such issues may be submitted to a jury in the form of interrogatories, with proper instructions by the court, whether a general verdict be required or not.

by the trial court.<sup>164</sup> The trial court then granted Atlantic's motion for summary judgment against Angstadt, Rask, and Multicomm. The summary judgment award was reversed by the supreme court in *Angstadt v. Atlantic Mutual Insurance Co.*,<sup>165</sup> and the case was remanded to the trial court for further proceedings.<sup>166</sup>

On remand, the trial court asked the parties to frame "the issue out of chancery [that] the jury is going to decide" and also indicated that the jury's verdict would be advisory in nature.<sup>167</sup> The defendants did not object to this.<sup>168</sup> The sole question presented to the jury was "whether Rask willfully failed to cooperate with Atlantic by not appearing at a scheduled deposition on April 26, 1993."<sup>169</sup>

During a three-day trial, the jury heard that John McGavin, a lawyer who had been hired to defend Multicomm and Rask, had been unsuccessful in repeated attempts to contact Rask. The jury also heard that Atlantic sent Rask a reservation of rights letter and that Rask was warned about possible sanctions including entry of default judgment against him. The court ordered Rask to appear for a deposition on April 26, 1993. About four days before the deposition Rask sent McGavin a facsimile indicating that he would not be available for the deposition if a close family member who had suffered a stroke died. McGavin repeatedly tried to contact Rask by telephone; however, Rask did not return any of McGavin's phone calls. Three days before the depositions, Rask sent McGavin another fax stating that the family member had died and that the deposition would have to be rescheduled for April 28, 1993. Rask did not communicate with McGavin after the last facsimile.<sup>170</sup> Angstadt's lawyer was informed that Rask would be available for depositions on April 28, 1993, and not on April 26, 1993, to which Angstadt's counsel responded that he was planning to at-

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VA. CODE ANN. § 8.01-188 (Repl. Vol. 1994).

164. See *Angstadt*, 254 Va. at 288, 492 S.E.2d at 119.

165. 249 Va. 444, 457 S.E.2d 86 (1995).

166. See *Angstadt*, 254 Va. at 289, 492 S.E.2d at 119.

167. *Id.*

168. See *id.*

169. *Id.*

170. See *id.* at 289, 492 S.E.2d at 119-20.

tend depositions on April 26, 1993, as previously scheduled at Multicomm's offices. Angstadt's counsel also proclaimed that if the funeral took place at the scheduled deposition time, the depositions could be moved to another time on April 26, 1998.<sup>171</sup>

Rask testified that the funeral was set for 9:30 a.m. and that he would have been available to attend the depositions at another time that day, but he believed that the depositions had been canceled. Rask also admitted that he never tried to contact McGavin to see if and when the depositions had been rescheduled. The jury found that Rask "did not willfully fail to cooperate" with counsel and Atlantic.<sup>172</sup> Atlantic ultimately asked the chancellor to grant it judgment on the basis that the jury's decision was advisory in nature or, in the alternative, that it was contrary to the evidence.<sup>173</sup> The chancellor agreed with Atlantic and held that Rask "willfully failed to cooperate," and that he "made a deliberate, knowing, calculated and well-advised choice to not attend [the] deposition."<sup>174</sup>

The Supreme Court of Virginia considered whether the defendants were entitled to a binding jury verdict under Virginia Code section 8.01-188 and determined that they were not.<sup>175</sup> The defendants also argued on appeal that the chancellor erred in entering judgment contrary to the jury verdict.<sup>176</sup> The supreme court stated that the discretionary authority of a chancellor under Virginia Code section 8.01-336(E) allows him or her to impanel a jury to decide an issue out of chancery.<sup>177</sup> Under the supreme court's previous ruling in *Bowers v. Westvaco Corp.*,<sup>178</sup> the court determined that such a jury verdict is "advisory or pervasive" and is meant to "inform the con-

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171. *See id.* at 290, 492 S.E.2d at 120.

172. *Id.*

173. *See id.*

174. *Id.* at 291, 492 S.E.2d at 120.

175. *See id.* at 292, 492 S.E.2d at 121.

176. *See id.*

177. *See id.*

178. 244 Va. 139, 419 S.E.2d 661 (1992).

science of the chancellor."<sup>179</sup> The court also cited its decision in *Dejarnette v. Brooks Lumber Co.*,<sup>180</sup> stating

[w]hen the chancellor has decided the case himself, despite the verdict of the jury and contrary to their findings, on appeal the duty devolves upon the appellate court to examine the evidence and if in its opinion the preponderance thereof is with the verdict the decree will be reversed and final judgment entered in accordance with the verdict. But where the evidence preponderates in support of the judgment of the chancellor his judgment will be upheld.<sup>181</sup>

The supreme court then analyzed the meaning of the term "willful" in the context of a "cooperation clause" and decided to apply definitions of the term from the context of a violation of the Virginia Freedom of Information Act<sup>182</sup> and from the criminal law context.<sup>183</sup> The supreme court concluded that "a preponderance of the evidence" supported the chancellor's decision that Rask "willfully failed to cooperate" by failing to attend the April 26, 1993, deposition and affirmed the chancellor's decision.<sup>184</sup>

#### D. *Nature of Sole Proprietorship for Insurance Purposes*

In the case of *Recalde v. ITT Hartford*,<sup>185</sup> the Virginia Supreme Court answered a certified question from the Court of Appeals for the District of Columbia.<sup>186</sup> The case arose out of an automobile accident that occurred in Virginia when an employee of a cleaning service, while in the scope of his employ-

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179. *Angstadt*, 254 Va. at 292, 492 S.E.2d at 121 (citing *Bowers*, 244 Va. at 147, 419 S.E.2d at 666).

180. 199 Va. 18, 97 S.E.2d 750 (1957).

181. *Angstadt*, 254 Va. at 292, 492 S.E.2d at 121 (quoting *DeJarnette* 199 Va. at 21, 97 S.E.2d at 752).

182. See VA. CODE ANN. § 2.1-340 to -346.1 (Repl. Vol. 1995).

183. See *Angstadt*, 254 Va. at 293, 492 S.E.2d at 122. See also *RF&P Corp. v. Little*, 247 Va. 309, 320, 440 S.E.2d 908, 915 (1994) (stating that conduct is "willful" where it is intentional). The court also looked at the definition of "willful" in a non-criminal law context in the case of *United States v. Murdock* as "denoting an act which is intentional, knowing, or voluntary." 290 U.S. 389, 394 (1933).

184. See *Angstadt*, 254 Va. at 293, 492 S.E.2d at 122.

185. 254 Va. 501, 492 S.E.2d 435 (1997).

186. See *id.* at 502, 492 S.E.2d at 436.

ment, left the keys in a pickup truck. The truck was stolen and latter involved in the above-mentioned accident. Subsequently, a personal injury suit was filed against the cleaning service and the owner of the pickup truck by the driver of the other automobile involved in the collision. Hartford provided commercial insurance policy to the cleaning company, and the named insured was "A&R Industrial Sweeping & Cleaning."<sup>187</sup>

At some point during the pendency of the personal injury suit, a dispute arose over the insurance coverage and a declaratory judgment action was filed by Recalde, trading as A&R Sweeping and Cleaning ("A&R"), against Hartford. Specifically, Recalde wanted a declaration that Hartford had a duty to defend A&R and indemnify A&R in the personal injury action. Recalde argued that there should be coverage for him because the named insured was "A&R Industrial Sweeping & Cleaning." The superior court granted summary judgment to Hartford based upon the premise that the Hartford policy covered only non-owned vehicles and because Recalde and A&R were one and the same, coverage did not exist.<sup>188</sup>

Recalde appealed to the Court of Appeals for the District of Columbia, which certified the following question to the supreme court:

whether under Virginia law, for the purpose of deciding the scope of coverage of a commercial insurance policy for injury or property damage arising from the use of a motor vehicle, a sole proprietorship named as the insured is a legal entity separate and distinct from the individual owner doing business in that name.<sup>189</sup>

In analyzing the matter, the supreme court evaluated who was designated as the named insured and the two classes of motor vehicles designated as "covered autos" in the "Business Auto Coverage Part" of the policy.<sup>190</sup>

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187. *See id.* at 503, 492 S.E.2d at 437.

188. *See id.* at 504, 492 S.E.2d at 437.

189. *Id.* at 502, 492 S.E.2d at 436.

190. *See id.* at 503-04, 492 S.E.2d at 436-37.

As stated above, the named insured was listed as A&R Industrial Sweeping & Cleaning. The "covered autos" in the policy were designated as follows:

**HIRED AUTOS ONLY.** Only those autos you lease, hire, rent or borrow. This does not include any auto you lease, hire, rent or borrow from any of your employees or members of their households.

**NONOWNED AUTOS ONLY.** Only those autos you do not own, lease, hire or borrow which are used in connection with your business. This includes autos owned by your employees or members of their households but only while used in your business or your personal affairs.<sup>191</sup>

The supreme court answered the certified question in the negative "because of the definition and nature of a sole proprietorship."<sup>192</sup> The court held that "[a] sole proprietorship is [a] form of business in which one person owns all the assets of the business in contrast to a partnership, trust or corporation. The sole proprietor is solely liable for all the debts of the business."<sup>193</sup> The court found that a sole proprietorship is not a legal entity separate and distinct from the individual owner doing business in the name of the business.<sup>194</sup>

#### *E. Statutory Changes-Notice of Intention to Rely on Defenses*

The 1997 General Assembly rewrote Virginia Code section 38.2-2226 to provide a uniform deadline for an insurer's notification of its intention to defend itself by questioning the validity of an insurance contract or by executing a "nonwaiver of rights" agreement.<sup>195</sup>

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191. *Id.* at 504, 492 S.E.2d at 437.

192. *Id.*

193. *Id.* at 504-05, 492 S.E.2d at 437.

194. *See id.* at 506, 492 S.E.2d at 438.

195. Virginia Code section 38.2-2226 now provides:

Whenever any insurer on a policy of liability insurance discovers a breach of the terms or conditions of the insurance contract by the insured, the insurer shall notify the claimant or the claimant's counsel of the breach. Notification shall be given within forty-five days after discovery by the insurer of the breach or of the claim, whichever is later. Whenever, on account of such breach, a nonwaiver of rights agreement is



## V. AUTOMOBILE MEDICAL PAY COVERAGE

In the next case to be discussed, the Supreme Court of Virginia provided guidance in an area that is starting to become a hot issue among litigators across the state. With the prevalence of HMOs and other health insurance vehicles that have negotiated discounts with health care providers, the issue of incurred expenses has been a major concern in many cases in the Commonwealth.

A. *Definition of Incurred*

The Supreme Court of Virginia ruled in *State Farm Mutual Automobile Insurance Co. v. Bowers*<sup>196</sup> that the term "incurred" includes only the amounts that a person is "legally obligated to pay."<sup>197</sup> This case arose in the context of medical payments coverage under an automobile insurance policy issued by State Farm to Bowers as the named insured.<sup>198</sup>

Bowers was involved in an automobile accident and sustained injuries for which he sought medical treatment. He was provided health insurance by Blue Cross/Blue Shield of Virginia ("Blue Cross"). The health care providers that rendered treatment to Bowers all had signed contracts requiring them to accept amounts considered "reasonable" by Blue Cross. The providers were allowed only to collect the amount offered by Blue Cross plus any additional co-payment made by Bowers.<sup>199</sup>

Bowers submitted claims to State Farm under his medical payments coverage. One of these claims was for \$1,586, but due to a clerical mistake, a check was sent to Bowers in the

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executed by the insurer and the insured, or a reservation of rights letter is sent by the insurer to the insured, notice of such action shall be given to the claimant or the claimant's counsel within forty-five days after that agreement is executed or the letter is sent, or after notice of the claim is received, whichever is later. Failure to give the notice within forty-five days will result in a waiver of the defense based on such breach to the extent of the claim by operation of law.

VA. CODE ANN. § 38.2-2226 (Cum. Supp. 1998).

196. 255 Va. 581, 500 S.E.2d 212 (1998).

197. *Id.* at 583, 500 S.E.2d at 212.

198. *See id.*

199. *See id.* at 583, 500 S.E.2d at 213.

amount of \$31,586, resulting in an overpayment of \$30,000. State Farm asked that Bowers return the \$30,000, but Bowers stated that he had already spent the entire amount of the overpayment and refused to repay State Farm.<sup>200</sup>

Bowers indicated that one basis for his refusal to pay was that, following the overpayment, he had incurred additional medical expenses that he wanted to offset against the total amount he owed to State Farm. The trial court awarded State Farm \$19,894.90, reasoning that State Farm was not allowed to benefit from the agreement between Blue Cross and the health care providers and allowed Bowers to offset the entire amount of the medical bills rather than the amount that was actually incurred.<sup>201</sup>

The supreme court examined the meaning of the term "incurred" as that term is used in the definition of medical expense.<sup>202</sup> State Farm argued that "incurred" expenses are the amounts that the health care providers accepted as full payment while Bowers argued that the full amount of the bills are "incurred" amounts.<sup>203</sup> The supreme court noted that it previously had decided that "an expense can only be 'incurred' . . . when one has paid it or become legally obligated to pay it."<sup>204</sup> The evidence at the trial level indicated that Bowers would not be liable for any amount in excess of what Blue Cross would pay.<sup>205</sup> Furthermore, the supreme court held that the trial court erred because it granted an offset in an amount different from what the health care providers actually accepted and that State Farm was entitled to recover judgment in the amount of \$27,564.50.<sup>206</sup>

Therefore, unless an expense is "incurred," or paid, or there is a legal obligation to pay, the expense cannot be claimed. Although this decision was made in the context of medical payments provisions, it is possible that the supreme court

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200. *See id.*

201. *See id.* at 584, 500 S.E.2d at 213.

202. *See id.* at 585, 500 S.E.2d at 214.

203. *See id.*

204. *Id.* (citing *Virginia Farm Bureau Mut. Ins. Co. v. Hodges*, 238 Va. 692, 696, 385 S.E.2d 612, 614 (1989)).

205. *See id.*

206. *See id.* at 587, 500 S.E. 2d at 215.

would apply the same reasoning in a personal injury suit in which the amounts claimed for injuries and damages were at the crux of the dispute.

### B. *Statutory Changes*

Automobile medical payments coverage was affected by the 1997 General Assembly, which amended a statute dealing with automobile liability insurance. Specifically, the amendment provides that in those situations where medical services are performed but no bill for services is issued due to an existing health care agreement, a medical expense shall be deemed to be incurred in the amount of the usual and customary fee charged by the provider.<sup>207</sup> More importantly, perhaps, a procedure was implemented whereby usual and customary fees could be established by a rebuttable affidavit, subject to authentication, but only if the affidavit is submitted to opposing counsel at least twenty-one days in advance of trial.<sup>208</sup>

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207. Virginia Code section 38.2-2201(A)(3) was amended to provide:

An expense described in subdivision 1 shall be deemed to have been incurred:

- a. If the insured is directly responsible for payment of the expense;
- b. If the expense is paid by (i) a health care insurer pursuant to a negotiated contract with the health care provider or (ii) Medicaid or Medicare, where the actual payment with reference to the medical bill rendered by the provider is less than or equal to the provider's usual and customary fee, in the amount of the actual payment; however, if the insured is required to make a payment in addition to the actual payment by the health care insurer or Medicaid or Medicare, the amount shall be increased by the payment made by the insured;
- c. If no medical bill is rendered or specific charge made by a health care provider to the insured, an insurer, or any other person, in the amount of the usual and customary fee charged in that community for the service rendered.

VA. CODE ANN. § 38.2-2201(A)(3) (Cum. Supp. 1998).

208. Virginia Code section 8.01-413.01(B) provides in pertinent part:

Where no medical bill is rendered or specific charge made by a health care provider to the insured, an insurer, or any other person, the usual and customary fee charged for the service rendered may be established by the testimony or the affidavit of an expert having knowledge of the usual and customary fees charged for the services rendered. If the fee is to be established by affidavit, the affidavit shall be submitted to the opposing party or his attorney at least twenty-one days prior to trial. The testimony or the affidavit is subject to rebuttal and may be admitted in the same manner as an original bill or authenticated copy described in subsection A of this section.

## VI. INSURANCE REGULATION

A. *Priority of Claims Among Creditors of Insolvent Insurer*

In an appeal from the State Corporation Commission ("SCC"), the Supreme Court of Virginia considered whether or not Virginia Code section 38.2-1509 allowed a reinsurer for an insurance company in receivership to obtain administrative priority over other creditors for purposes of recovering amounts owed to it pursuant to a contract of reinsurance with the insolvent company. The supreme court decided in *Swiss Re Life Co. America v. Gross*<sup>209</sup> that the reinsurer was not entitled to any priority over other creditors of the insolvent insurer.<sup>210</sup>

In *Gross*, Fidelity Bankers Life Insurance Company ("Fidelity") sold a portion of its life insurance business to Protective Life Insurance Company ("Protective"). Protective asked Fidelity to provide it with an independent guarantee against potential losses "from excess mortality claims among insureds under the policies" purchased by Protective.<sup>211</sup> Therefore, Fidelity, Protective, and a company that is now known as Swiss Re Life Company America ("Swiss Re"), agreed to enter into reciprocal treaties of reinsurance, also known as "stop-loss" agreements.<sup>212</sup> The "stop-loss" agreements required Swiss Re to indemnify Protective for any payments above the levels specified in mortality schedules for the policies Protective obtained from Fidelity, while Fidelity agreed to indemnify Swiss Re for any payments made by Swiss Re to Protective.<sup>213</sup>

Fidelity went into receivership and the SCC was appointed receiver pursuant to Virginia Code section 38.2-1505.<sup>214</sup> Subsequently, the Commissioner of Insurance was appointed as deputy receiver pursuant to section 38.2-1510.<sup>215</sup> Protective then demanded payments in the amount of \$1,134,923 for excess

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VA. CODE ANN. § 8.01-413.01(B) (Cum. Supp. 1997).

209. 253 Va. 139, 479 S.E.2d 857 (1997).

210. *See id.* at 145, 479 S.E.2d at 860.

211. *Id.* at 141, 479 S.E.2d at 857.

212. *See id.*

213. *See id.*

214. VA. CODE ANN. § 38.2-1505 (Repl. Vol. 1994).

215. *Id.* § 38.2-1510.

mortality losses in 1991 pursuant to its agreement with Swiss Re. Swiss Re paid this amount and then made a claim with the deputy receiver.<sup>216</sup>

Swiss Re sought priority over other creditors of Fidelity, claiming that the amount owed to it under its agreement with Fidelity was an administrative expense under Virginia Code section 38.2-1509.<sup>217</sup> The deputy receiver denied Swiss Re's claim of administrative priority.<sup>218</sup> Subsequent to this decision by the deputy receiver, Swiss Re obtained from another life insurer various reinsurance treaties under which Fidelity was the indemnified party, making Swiss Re both a creditor and a debtor of Fidelity. Swiss Re sought to set off payments it owed to Fidelity by the amounts owed to it under the treaties between Protective, Fidelity and itself. The deputy receiver would not allow this, indicating there was a lack of mutuality.<sup>219</sup>

Swiss Re filed a petition for review and the deputy receiver reconsidered his finding regarding the disavowal of the Fidelity treaty, stating that the treaty "would be treated as [if] it was never disavowed."<sup>220</sup> However, he did not change his determinations as to the set-offs of amounts owed to Swiss Re by Fidelity.<sup>221</sup>

Swiss Re then appealed to the SCC, contending that it was entitled to priority in the distribution of Fidelity's receivership estate because the obligations of an assumed contract were expenses of administration pursuant to Virginia Code section 38.2-1509.<sup>222</sup> Swiss Re also claimed to be entitled to interest under the Fidelity treaty as an expense of administration.<sup>223</sup>

The SCC denied Swiss Re's claim for priority, its claim for set-off of debts it owed to Fidelity, and its claim for inter-

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216. See *Gross*, 253 Va. at 141, 479 S.E.2d at 857.

217. See *id.* at 142, 479 S.E.2d at 858.

218. See *id.*

219. See *id.*, 479 S.E.2d at 859.

220. *Id.*

221. See *id.* at 142-43, 479 S.E.2d at 859.

222. See *id.* at 143, 479 S.E.2d at 859.

223. See *id.*

est.<sup>224</sup> Swiss Re filed a petition for appeal of right to the Supreme Court of Virginia.<sup>225</sup>

The supreme court found no merit in Swiss Re's claim for administrative priority under Virginia Code section 38.2-1509.<sup>226</sup> The court determined that Swiss Re was an unsecured creditor and that its claim would be satisfied according to the dictates of section 38.2-1509.<sup>227</sup> In addition, the supreme court held that Swiss Re's claim for interest was without merit pursuant to its decision in *Metompkin Bank & Trust Co. v. Bronson*,<sup>228</sup> which held that Virginia law prohibits creditors of an insolvent estate from earning interest on claims.<sup>229</sup>

### B. State Corporation Commission's Authority to Regulate

In *Lawyers Title Insurance Corp. v. Norwest Corp.*,<sup>230</sup> the Supreme Court of Virginia affirmed the SCC's determination that it had no authority to regulate a product offered by Norwest.<sup>231</sup> The case arose out of an appeal of right from the SCC by Lawyers Title.<sup>232</sup>

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224. *See id.*

225. *See id.*

226. *See id.* at 146, 479 S.E.2d at 861. Virginia Code section 38.2-1509(B)(1) provides:

The Commission shall disburse the assets of an insolvent insurer as they become available in the following manner:

1. Pay, after reserving for the payment of the costs and expenses of administration, according to the following priorities: (i) claims of secured creditors with a perfected security interest not voidable under § 38.2-1513 to the extent of the value of their security, (ii) claims of the associations for "covered claims" and "contractual obligations" as defined in §§ 38.2-1603 and 38.2-1701 and claims of other policyholders arising out of insurance contracts apportioned without preference, (iii) taxes owed to the United States and other debts owed to any person, including the United States, which by the laws of the United States are entitled to priority, (iv) wages entitled to priority as provided in section 38.2-1514, and (v) other creditors.

VA. CODE ANN. § 38.2-1509(B)(1) (Cum. Supp. 1998).

227. *See Gross*, 253 Va. at 146, 479 S.E.2d at 861.

228. 172 Va. 494, 2 S.E.2d 323 (1939).

229. *See Gross*, 253 Va. at 147, 479 S.E.2d at 861 (citing *Metompkin Bank*, 172 Va. at 500, 2 S.E.2d at 325 (1939)).

230. 254 Va. 388, 493 S.E.2d 114 (1997).

231. *See id.* at 394, 493 S.E.2d at 117.

232. *See id.* at 390, 493 S.E.2d at 114.

Lawyers Title filed a complaint against Norwest for the sale of a product called Title Option Plus ("TOP"). Lawyers Title claimed that TOP shifted the risk of title defects and, therefore, constituted insurance subject to regulation by the SCC.<sup>233</sup>

The SCC determined that TOP was not insurance and therefore was not subject to being regulated by the SCC.<sup>234</sup> Lawyers Title appealed the decision. The supreme court determined that the SCC was correct in its characterization of the product. The court specially agreed with the SCC in rejecting the idea "that if a product looks like insurance, and is sold like insurance, it must be insurance."<sup>235</sup>

The supreme court reviews the final orders of the SCC de novo and presumes that the findings of the SCC are "just, reasonable, and correct."<sup>236</sup> This presumption, in the absence of clear and convincing proof from the appellant, will tend to result in the court upholding the SCC's findings. This trend was demonstrated in the cases discussed above.

## VII. FIRE INSURANCE

In *K&W Builders v. Merchants and Business Men's Mutual Insurance Co.*,<sup>237</sup> the Supreme Court of Virginia looked at the question of whether an "innocent co-insured" was precluded from coverage by the fraudulent or dishonest acts of other insureds.<sup>238</sup> In this case, Merchants and Business Men's Mutual Insurance Co. ("Merchants") issued a fire insurance policy which provided coverage to a building owned by K&W and occupied by Ahmad Thiab ("Thiab") and A&N Food, Inc. ("A&N"). The policy listed Thiab and A&N as named insureds and K&W as an additional insured.<sup>239</sup>

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233. *See id.*

234. *See id.*, 493 S.E.2d at 115.

235. *Id.* at 394, 493 S.E.2d at 117.

236. *See Bralley-Willett v. Holtzman Oil*, 216 Va. 888, 890, 223 S.E.2d 892, 895 (1976).

237. 255 Va. 5, 495 S.E.2d 473 (1998).

238. *See id.* at 12, 495 S.E.2d at 477.

239. *See id.* at 7, 495 S.E.2d at 474.

The building was used to operate a restaurant that was subsequently destroyed by fire. K&W filed a motion for judgment against Merchants, seeking recovery of the face amount of the policy, but Merchants denied the claim after it discovered evidence that the fire had been set by Thiab or A&N. Merchants claimed that Thiab and/or A&N had violated the policy terms, rendering the policy null and void as to all insureds.<sup>240</sup>

The jury in the trial found that the fire had been set by Thiab and A&N and that they made material misrepresentations to Merchants. The trial court entered judgment on behalf of Merchants, and K&W appealed.<sup>241</sup>

Relying on its previous decision in *Rockingham Mutual Insurance Co. v. Hummel*,<sup>242</sup> the Supreme Court of Virginia determined that K&W, Thiab, and A&N all had the joint duty not to defraud the insurer and to refrain from committing dishonest or criminal acts.<sup>243</sup> If any one of the joint insureds violated those duties, the breach was chargeable to the other insureds, thus preventing their recovery under the policy.<sup>244</sup>

K&W argued that its interests and the interests of the other co-insureds were severable and, therefore, that K&W should not be held accountable for the actions of Thiab and A&N.<sup>245</sup> The supreme court indicated that even absent a joint interest between the insureds, and notwithstanding K&W's innocence, the policy language disallowed coverage for all insureds based upon the acts of any co-insured.<sup>246</sup> The judgment of the trial court was affirmed.<sup>247</sup>

## VIII. HOMEOWNER'S INSURANCE

In cases decided by both the United States Court of Appeals for the Fourth Circuit and the Supreme Court of Virginia re-

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240. *See id.* at 1, 495 S.E.2d at 474-75.

241. *See id.* at 8, 495 S.E.2d at 475.

242. 219 Va. 803, 250 S.E.2d 774 (1979).

243. *See K&W Builders*, 255 Va. at 12, 495 S.E.2d at 477.

244. *See id.*

245. *See id.* at 9, 495 S.E.2d at 475.

246. *See id.* at 10, 495 S.E.2d at 476.

247. *See id.* at 13, 495 S.E.2d at 478.



garding homeowner's policies, the courts determined that an examination under oath clause allows an insurer to investigate the origins of a fire during an examination under oath and that collateral estoppel does not apply to an insurer litigating a declaratory judgment action.

#### A. *Scope of Examination Under Oath Clause*

In *Powell v. U.S. Fidelity and Guaranty Co.*,<sup>248</sup> the United States Court of Appeals for the Fourth Circuit determined that an examination under oath clause<sup>249</sup> in the insurance policy allowed an investigation into possible motives for suspected arson and was not limited to an investigation of the losses claimed by the insureds.<sup>250</sup> The case was originally filed in the U.S. District Court for the Eastern District of Virginia as a declaratory judgment action seeking a determination that the examination under oath clause of U.S. Fidelity and Guaranty's ("USF&G") policy was limited to an investigation of the extent of the claimed loss and did not include investigation or the causes or origins of the loss. The plaintiffs also sought compensatory and punitive damages for alleged bad faith on the part of USF&G.<sup>251</sup>

The district court dismissed the portion of the action that sought damages for bad faith because such damages were unavailable under Virginia law.<sup>252</sup> The district court subsequently awarded USF&G summary judgment on the issue of the scope of the examination under oath clause. The Powells appealed the decision. The Fourth Circuit affirmed the district court's holdings in all respects<sup>253</sup> determining that the examination under oath clause includes permitted investigation into possible motives for suspected fraud.<sup>254</sup>

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248. 88 F.3d 271 (4th Cir. 1996).

249. The homeowner's policy provided that the insured will "submit to questions under oath and sign and swear to them." *Id.*

250. *See id.* at 274.

251. *See id.* at 272.

252. *See id.*

253. *See id.* at 272, 274.

254. *See id.* at 273; *see also* *Pisa v. Underwriters at Lloyd's, London*, 787 F. Supp. 282 (D.R.I. 1992), *aff'd*, 966 F.2d 1440 (1st Cir. 1992).

### B. *Collateral Estoppel*

In *State Farm Fire & Casualty Co. v. Mabry*,<sup>255</sup> the Supreme Court of Virginia determined whether a homeowner's "insurer was estopped from litigating whether the insured's acts were negligent or intentional based upon a judgment in a prior tort action in which the insurer provided the insured a defense under a reservation of rights."<sup>256</sup> In this case, Hermond Mabry ("Mabry") shot Helena Martin ("Martin") at Mabry's residence. Martin notified State Farm of the event and State Farm issued a reservation of rights letter to both Martin and Mabry indicating that coverage may not be available due to the intentional act exclusion in the homeowner's policy.<sup>257</sup>

Martin filed a motion for judgment against Mabry seeking \$125,000 in damages for Mabry's alleged negligence in shooting her.<sup>258</sup> Although State Farm sent another reservation of rights letter to Mabry and Martin's counsel, State Farm hired counsel to represent Mabry in the tort action.<sup>259</sup>

State Farm filed a declaratory judgment motion seeking a determination that the policy provisions excluded coverage for Mabry's acts.<sup>260</sup> Before the declaratory judgment action could be decided, Mabry and Martin agreed to the entry of a consent judgment against Mabry. The trial court held that State Farm was estopped from litigating the question of whether Mabry's acts were intentional or negligent.<sup>261</sup> The trial court entered a final order declaring that State Farm had to provide coverage to Mabry and that State Farm had an obligation to pay the judgment in the underlying tort action.<sup>262</sup> State Farm appealed, arguing that the trial court's decision was based upon an improper application of the doctrine of collateral estoppel.

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255. 255 Va. 286, 497 S.E.2d 844 (1998).

256. *Id.* at 288, 497 S.E.2d at 845.

257. *See id.*

258. *See id.*

259. *See id.*

260. *See id.* at 288-89, 497 S.E.2d at 845.

261. *See id.* at 289, 497 S.E.2d at 845.

262. *See id.*

The supreme court agreed with State Farm that collateral estoppel was not available in this case.<sup>263</sup> For collateral estoppel to apply, "the parties, or their privies, must be the same in both the prior and subsequent actions."<sup>264</sup> The supreme court determined that State Farm was not a party to the tort litigation and that the requisite privity did not exist between State Farm and Mabry; therefore, collateral estoppel did not apply.<sup>265</sup>

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263. *See id.* at 289, 497 S.E.2d at 846.

264. *See id.* (citing *Angstadt v. Atlantic Mut. Ins. Co.*, 249 Va. 444, 446, 457 S.E.2d 86, 87 (1995)).

265. *Id.* at 290, 497 S.E.2d at 846.