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Annual Survey of Virginia Law: Insurance Law

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INSURANCE LAW

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I. INTRODUCTION

This article discusses judicial decisions and various legislation that have affected the law of insurance in Virginia since June 1, 2000.[1] As in years past, most of the changes have taken place in the area of uninsured/underinsured motorist ("UM/UIM") insurance coverage. This article will discuss these developments as well as those in other areas of insurance law—specifically, those pertaining to agents, coverage, the insurer's duty to defend, fire insurance, life insurance, misrepresentation, and waiver and estoppel.

II. AGENTS

In *American Spirit Insurance Co. v. Owens*,[2] the Supreme Court of Virginia considered whether an insurance company could recover its attorney's fees and other expenses related to claims made on a policy issued by its agent in breach of the agency agreement.[3]

The agent accepted an insurance application on a house that he knew was in a dilapidated state, relying on the owner's represen-

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1. Health, accident, and sickness insurance are not discussed. This article discusses only those statutory changes that are likely to impact insurance practitioners.

2. 261 Va. 270, 541 S.E.2d 553 (2001).

3. *Id.* at 273, 541 S.E.2d at 553–54.

tation that it was being renovated.[4] The agent valued the structure and its contents based solely on these representations.[5] Later, the agent admitted that the market value of the property "wasn't very high" and that the structure did not comply with the insurance company's underwriting guidelines.[6] Less than one month later, the property was destroyed by fire.[7] The insurer denied the owner's claims under the policy because it determined that he set the fire and that he made material misstatements on his application.[8]

The owner and his wife sued the insurer for breach of contract.[9] The jury found that, while the owner did indeed set the fire and make false statements on his application, his wife was a resident of the house as defined by the policy, and thus was entitled to recover.[10] The case was later settled.[11] The company then sued its agent seeking indemnity for its costs.[12] The trial court awarded the company the amount that it incurred to settle the case as well as legal fees associated with the investigation of the claim, but not attorney's fees and costs incurred in the litigation on the policy.[13]

The supreme court reversed, holding that American Spirit was entitled to indemnity for all of its costs.[14] The court found nothing ambiguous in the terms of the agency agreement.[15] Paragraph four provided indemnification for "any liabilities" that the company incurred as a result of the agent's breach.[16] No express term of the agreement excluded from that indemnity "'reasonable attorney's fees and expenses of litigation spent in defense of the claim indemnified against.'"[17]

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4. *Id.* at 273, 541 S.E.2d at 554.
5. *Id.*
6. *Id.*
7. *Id.*
8. *Id.* at 273–74, 541 S.E.2d at 554.
9. *Id.* at 274, 541 S.E.2d at 554.
10. *Id.*
11. *Id.*
12. *Id.*
13. *Id.* at 274, 541 S.E.2d at 555.
14. *Id.* at 277, 541 S.E.2d at 556.
15. *Id.*
16. *Id.*
17. *Id.* (quoting S. Ry. Co. v. Arlen Realty, 220 Va. 291, 296, 257 S.E.2d 841, 844 (1979)). Regarding express indemnification agreements, the court adopted

III. COVERAGE

A. *Directors' and Officers' Liability Insurance*

The Supreme Court of Virginia decided two cases dealing with insurance coverage in June 2000. The first, *Partnership Umbrella, Inc. v. Federal Insurance Co.*,[18] was a declaratory judgment action over a director's liability policy.[19]

Partnership Umbrella, a Virginia corporation affiliated with the United Way, had an executive liability and indemnification insurance policy with Federal.[20] A director of the company, an "insured person" under the policy, told Federal that the charity and federal prosecutors might sue him.[21] Federal declined coverage, concluding that a claim did not exist.[22] During the following two years, the corporation authorized advances in excess of

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> "the rule followed in the great majority of other jurisdictions . . . that the indemnitee may recover reasonable attorney's fees and expenses of litigation spent in defense of the claim indemnified against." The indemnitee's right to recover is based upon the express terms of the contract, and where "no provision of the contract provides otherwise," that right extends to any expense reasonably incurred as a result of the breach, including the proper legal costs and expenses incurred in defending an indemnified claim made by a third party against the indemnitee.

Id. at 275, 541 S.E.2d at 555 (quoting *Arlen Realty*, 220 Va. at 296, 257 S.E.2d at 844).

18. 260 Va. 123, 530 S.E.2d 154 (2000).

19. *Id.* at 125, 530 S.E.2d at 155.

20. *Id.* at 126, 530 S.E.2d at 155. The policy provided two forms of coverage. *Id.* According to "Insuring Clause 1," Federal was required under the "Executive Liability Coverage" to

> pay on behalf of each of the Insured Persons all Loss for which the Insured Person is not indemnified by the Insured Organization and which the Insured Person becomes legally obligated to pay on account of any claim first made against him, individually or otherwise . . . for a Wrongful Act committed, attempted, or allegedly committed or attempted, by the Insured Person(s) before or during the Policy Period.

Id. "Insuring Clause 2" contained "Executive Indemnification Coverage," which obligated Federal to

> pay on behalf of the Insured Organization all Loss for which the Insured Organization grants indemnification to each Insured Person, as permitted or required by law, which the Insured Person has become legally obligated to pay on account of any claim first made against him, individually or otherwise . . . for a Wrongful Act committed, attempted, or allegedly committed or attempted, by such Insured Person(s) before or during the Policy Period.

Id.

21. *Id.* at 127, 530 S.E.2d at 156.

22. *Id.*

$300,000 to cover his legal expenses, but additional fees were still owed.[23] When the U.S. Attorney notified the director by letter that he was a target of a grand jury investigation, Federal still declined to provide coverage.[24] The director was later convicted on eight counts of fraud, conspiracy, and tax violations.[25] Partnership Umbrella approved a formal resolution of indemnification for his legal fees and expenses from the date of the target letter onward.[26]

Federal determined that the indemnification was illegal under Virginia law and filed for a declaratory judgment seeking to avoid liability under the policy.[27] Partnership Umbrella counterclaimed for breach of contract, seeking to recover the money that it had advanced for legal expenses and that it had agreed to pay as indemnity.[28]

The court held that, under "Insuring Clause 1," the director could recover both the expenses that he incurred and those for which he was not indemnified.[29] Further, Partnership Umbrella could recover the advances that it made to the director and could enforce the policy on his behalf with respect to monies still "due and owing."[30] The court's rationale was that the advances and the amounts owing did not constitute indemnification, so the director remained "legally obligated to pay" those expenses.[31] The court also ruled that if Partnership Umbrella's decision to indemnify was found to be invalid or unlawful, Partnership Umbrella could not recover the money it paid as indemnification under Insuring Clause 1.[32]

B. *Property Insurance*

In *Lower Chesapeake Associates v. Valley Forge Insurance Co.*,[33]

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23. *Id.* at 128, 530 S.E.2d at 156.
24. *Id.* at 128, 530 S.E.2d at 157.
25. *Id.*
26. *Id.* at 129, 530 S.E.2d at 157.
27. *Id.*
28. *Id.*
29. *Id.* at 134, 530 S.E.2d at 160.
30. *Id.*
31. *Id.* at 133–34, 530 S.E.2d at 160.
32. *Id.* at 135, 530 S.E.2d at 161.
33. 260 Va. 77, 532 S.E.2d 325 (2000).

the Supreme Court of Virginia considered whether a commercial marina could recover against its property insurer for damage done to its floating docks during a hurricane.[34] At trial, the dock master testified that all of the docks were damaged by the hurricane.[35] An expert witness estimated the cost of repairing all of the docks, but admitted that he could not tell whether some of the damage had been caused by an earlier storm.[36] Other evidence showed that rot and poor maintenance had caused some of the damage.[37]

The trial court found that one dock that had collapsed due to the "windstorm" and "water damage" was a covered loss.[38] It found that the damage to the other docks, however, resulted from excluded causes, and those docks did not suffer "collapses."[39] The trial court entered judgment for the marina for the damage to the one collapsed dock in the amount of $500,000.[40]

The term "collapse" was not defined in the policy, so the supreme court gave it its ordinary and accepted meaning.[41] The trial court said that it did not use "a dictionary definition" of that term but instead reviewed photographs and other evidence to conclude that the damage to one of the docks was "what the policy meant when it sa[id] collapse."[42] The supreme court held that the trial court properly applied the ordinary and accepted meaning of "collapse" in reaching its conclusion and that the decision was not plainly wrong or without evidentiary support.[43]

The court also found that the evidence supported the trial court's finding that the other docks were damaged by wind-driven water and gradual deterioration, which were excluded causes under the policy.[44] However, the policy's exclusions did not defeat its "collapse" coverage provisions because the policy was ambiguous

34. *Id.* at 79, 532 S.E.2d at 326.
35. *Id.* at 80, 532 S.E.2d at 327.
36. *Id.* at 81–82, 532 S.E.2d at 328.
37. *Id.* at 82, 532 S.E.2d at 328.
38. *Id.* at 85, 532 S.E.2d at 330.
39. *Id.*
40. *Id.*
41. *Id.* at 86, 532 S.E.2d at 330.
42. *Id.*
43. *Id.* at 86, 532 S.E.2d at 331.
44. *Id.* at 87, 532 S.E.2d at 331.

and would be construed in favor of providing coverage.[45] Finally, the supreme court set aside the trial court's award of damages, finding that the evidence did not support the amount of damages awarded.[46]

The supreme court's ruling in this case is significant because it demonstrates that a trial court does not have to determine the "ordinary and accepted" meaning of an undefined policy term in deciding whether coverage exists under that provision. It is sufficient if, when construing undefined terms, the trial court's conclusion of "what the policy meant" is supported by the evidence.

IV. DUTY TO DEFEND

In *Morrow Corp. v. Harleysville Mutual Insurance Co.*,[47] the United States District Court for the Eastern District of Virginia considered the issue of an insurer's duty to defend.[48] The case involved a coverage dispute between two insurers, Harleysville and Sentry Insurance Company, and Morrow, who operated a "plant-on-premises" dry-cleaning business in a shopping center from 1986 until 1996.[49] During this time, the plaintiffs had several different comprehensive general liability ("CGL") insurance policies that provided different coverage for pollution damage.[50]

The policies fell into three categories: (1) "those containing an 'absolute pollution exclusion,'" without an exception for sudden and accidental discharges;[51] (2) "those containing a pollution exclusion with an exception for 'sudden and accidental' discharges of pollutants . . . ;"[52] and (3) "those containing pollution liability insurance."[53]

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45. *Id.* at 88–89, 532 S.E.2d at 332.

46. *Id.* at 89, 532 S.E.2d at 332.

47. 101 F. Supp. 2d 422 (E.D. Va. 2000), *motion to amend denied*, 110 F. Supp. 2d 441 (E.D. Va. 2000).

48. *Id.* at 424.

49. *Id.*

50. *Id.*

51. *Id.* at 425. A Harleysville policy, in effect from May 1986 to May 1987, contained a coverage exclusion for "bodily injury or property damage arising from 'the actual or threatened discharge, dispersal, release, or escape of pollutants.'" *Id.* Two Sentry policies in effect from May 1989 through December 1990 also contained this exclusion. *Id.* at 424–25.

52. *Id.* at 425. Two Sentry policies in effect from May 1987 to May 1989 provided cov-

In their business, Morrow used a solvent containing the toxic chemical perchloroethylene ("PCE"), which, when released into the environment, breaks down into another hazardous chemical.[54] In 1996, as part of the sale of the shopping center, a site examination revealed PCE contamination in the soil and groundwater under Morrow's business.[55] Under the sales contract, the seller of the mall bore all costs for the inspection and remediation of the contamination.[56]

The seller then sued Morrow, seeking damages and injunctive relief requiring them to remedy, or bear the costs of remedying, the contamination.[57] Morrow sought a defense and indemnification under their policies.[58] Both insurers, however, refused to indemnify, or even to defend, based on the various pollution exclusions in the policies.[59] Morrow settled the case with the sellers, then sued the insurers for declaratory relief and breach of contract.[60]

The court held that the first category of policies, those containing an "absolute pollution exclusion," were clear and unambiguous.[61] Because they did not provide coverage for any damage resulting from pollution, the insurers did not have any duty to defend.[62] The second group, those with a "sudden and accidental"

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erage for "sudden and accidental" discharges or releases of pollutants. *Id.* at 424.

53. *Id.* at 425. The Sentry policies in effect from May 1991 through May 1995 included coverage for dry-cleaning businesses, entitled "Pollution Liability Insurance." *Id.* According to this provision, the policies covered bodily injury or property damage arising from "'the actual, alleged or threatened discharge, dispersal, release or escape of pollutants.'" *Id.* This provision, however, excluded from coverage "'any loss, cost or expense arising from any direction or request that you [the insured] test for, monitor, clean up, remove, contain, treat, detoxify or neutralize pollutants.'" *Id.*

54. *Id.*

55. *Id.*

56. *Id.*

57. *Id.*

58. *Id.*

59. *Id.* at 426.

60. *Id.*

61. *Id.* at 428.

62. *Id.* The question remained whether Sentry, since it had a duty to defend under its other policies, had to bear the entire cost of defense, or whether Morrow would have to pay for that portion attributable to this uncovered period. *Id.* at 429. The majority rule, which the court predicted that Virginia would adopt, was that "when 'there is no reasonable means of prorating the costs of defense between the covered and the not-covered' periods, the insurer must bear the entire cost of the defense." *Id.* (quoting Ins. Co. of N. Am. v. Forty-Eight Insulations, Inc., 633 F.2d 1212, 1224 (6th Cir. 1980)).

exception, might have provided coverage because the underlying complaint included allegations that were broad enough to cover both sudden and accidental releases.[63] Consequently, Sentry had a duty to defend under these policies.[64] Finally, the third group of policies providing "Dry Cleaners Additional Coverage" specifically provided coverage for injury or property damage arising from the discharge or release of pollutants.[65] Thus, Sentry had a duty to defend under these policies as well.[66]

Sentry also argued that it had no duty to defend Morrow because the underlying suit was an action for reimbursement or restitution, not for "damages" within the scope of any of its policies.[67] There was no Virginia law on this issue, but the court adopted the view that environmental remediation costs constitute damages within the meaning of a CGL policy.[68] Because the record was not sufficiently developed, the court declined to decide the amount of Morrow's award and whether any defense costs attributable to non-covered periods may have been apportioned to them.[69]

Sentry later moved to amend the opinion,[70] because the policies in effect from 1991 through 1995 required an "occurrence" of bodily injury or property damage to trigger coverage.[71] "Occurrence" was defined as "the date on which bodily injury or property damage first manifests itself."[72] Therefore, whether the policies, and Sentry's duty to defend, were triggered depended on when the occurrence "first manifested itself."[73]

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63. *Id.* at 431–32. Noting that the Supreme Court of Virginia had not previously addressed the meaning of "sudden and accidental," the fact that most courts that had done so had concluded that "sudden" "add[ed] a temporal component to the exception" weighed heavily with the court. *Id.* at 430 (citations omitted). The court adopted this construction, saying that it was the most accurate since it gave effect to both words in the phrase. *Id.* at 431.

64. *Id.* at 431–32.

65. *Id.* at 432.

66. *Id.*

67. *Id.* at 433.

68. *Id.* at 434.

69. *Id.* at 435. For the same reason, the court also denied summary judgment on the issue of Sentry's duty to indemnify Morrow. *Id.*

70. Morrow Corp. v. Harleysville Mut. Ins. Co., 110 F. Supp. 2d 441 (E.D. Va. 2000).

71. *Id.* at 444–45.

72. *Id.* at 445.

73. *Id.* at 446.

The court gave the term "manifest" its plain meaning in the context of hazardous chemical pollution.[74] Accordingly, the court found that pollution damage "manifests itself" when it reaches a detectable and legally significant level in soil or groundwater.[75] Although the PCE contamination was not actually known or discovered until after the policies expired, it may have been discoverable while they were in effect.[76] Even if the term was ambiguous—meaning both "discoverable" and "discovered"—it had to be interpreted to mean the former, to construe the policy in favor of the insured.[77]

The court said that the allegations of the complaint fell within the risk covered by the policy, leaving open the possibility that the PCE contamination "first manifested itself" during the life of the policies.[78] Thus, Sentry had a duty to defend its insureds.[79]

V. FIRE INSURANCE

Moorehead v. State Farm Fire & Casualty Co.[80] arose from a fire that occurred at the plaintiffs' residence.[81] State Farm insured the Mooreheads through a homeowner's policy.[82] After an investigation, State Farm denied the Mooreheads' claim because it believed that they had set the fire and that Mr. Moorehead had concealed and misrepresented material facts about the loss by refusing to answer certain questions during an examination under oath.[83]

The Mooreheads sued for "bad faith" breach of the insurance contract, claiming damages of $114,140.[84] They also sought per diem damages of $100 for emotional harm, characterized as a "loss of peace of mind" due to the denial of their claim.[85] Addition-

74. *Id.* at 449 (citation omitted).
75. *Id.* at 450.
76. *Id.* at 450–51.
77. *Id.* at 452.
78. *Id.* at 454.
79. *Id.*
80. 123 F. Supp. 2d 1004 (W.D. Va. 2000).
81. *Id.* at 1005.
82. *Id.*
83. *Id.*
84. *Id.*
85. *Id.* at 1005–06.

ally, they asserted claims for expert witness fees and litigation expenses.[86] State Farm moved for partial summary judgment with respect to these claimed damages.[87]

The court recognized that, while Virginia law does not allow recovery in tort for a bad faith refusal to honor a first-party insurance claim, in some circumstances it might allow a plaintiff to seek consequential damages above and beyond an insurance policy's limits.[88] The Supreme Court of Virginia had not yet decided "whether emotional harm is a proper basis for consequential damages in a contract action."[89]

The court acknowledged that the supreme court had been reluctant to allow damages for emotional harm in contract actions.[90] The Supreme Court of Virginia held, however, that Virginia follows the rule set forth in the Restatement of Contracts,[91] which says that "'damages for emotional disturbance are not ordinarily allowed'" in contract actions, except where the claim involves bodily injury or where "'the contract or the breach is of such a kind that serious emotional disturbance was a particularly likely result.'"[92]

The court agreed with this interpretation of Virginia law and applied the restatement rule to the case.[93] While the homeowner's insurance policy was not the type of contract commonly associated with such harm, State Farm's alleged breach might have been such that serious emotional disturbance was a likely result.[94] The court reserved this question for trial.[95]

The court did, however, grant partial summary judgment as to

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86. *Id.* at 1005.

87. *Id.*

88. *Id.* at 1006 (citing A & E Supply Co. v. Nationwide Mut. Fire Ins. Co., 798 F.2d 669, 676, 678 (4th Cir. 1986)).

89. *Id.*

90. *Id.* For this proposition, the court cited *Sea-Land Services, Inc. v. O'Neal*, 224 Va. 343, 297 S.E.2d 647 (1982), where the Supreme Court of Virginia stated that "'absent some tort,' damages for 'humiliation or injury to feelings' are not recoverable in an action for breach of contract." *Id.* at 354, 297 S.E.2d at 653 (citation omitted).

91. *Moorehead*, 123 F. Supp. 2d at 1006–07 (citing Wise v. Gen. Motors Corp., 588 F. Supp. 1207 (W.D. Va. 1984)).

92. *Id.* (quoting RESTATEMENT (SECOND) OF CONTRACTS § 353 (1981)).

93. *Id.* at 1007.

94. *Id.*

95. *Id.*

the Mooreheads' claim for emotional harm calculated on a per diem basis, finding that the calculations were inconsistent with Virginia law because they were arbitrary estimations lacking evidentiary support.[96]

Finally, the court denied the Mooreheads' motion for litigation expenses.[97] Virginia Code section 38.2-209(A) provides for the award of costs and reasonable attorney's fees where "the court determines that the insurer, not acting in good faith, has either denied coverage or failed or refused to make payment to the insured under the policy."[98] The court said that if the Mooreheads were to win at trial, it would consider an award of costs according to the evidence at trial.[99]

In *Moorehead*, the district court predicted that the Supreme Court of Virginia would follow the restatement rule allowing recovery of damages for emotional harm in contract cases, while acknowledging that it had been reluctant to do so.[100] As a result, consequential damages for emotional disturbance appear to be recoverable in almost all first-party insurance claims, regardless of whether the insurance contract is the type commonly associated with such harm. This is because insureds can argue that the "breach was such that serious emotional disturbance was a particularly likely result."[101]

VI. LIFE INSURANCE

Mohamud v. Monumental Life Insurance Co.[102] was the only significant life insurance case decided in Virginia last year. In that case, the United States District Court for the Eastern District of Virginia considered whether the insured's widow could recover under group mortgage life insurance and accidental death insurance policies.[103] Falhad Mohamud sued Monumental Life for

96. *Id.*
97. *Id.* at 1008.
98. VA. CODE ANN. § 38.2-209(A) (Repl. Vol. 1999 & Cum. Supp. 2001).
99. *Moorehead*, 123 F. Supp. 2d at 1008.
100. *See id.* at 1006–07.
101. *Id.* at 1007.
102. 138 F. Supp. 2d 709 (E.D. Va. 2001).
103. *Id.* at 712. The policies provided that the company would pay the outstanding balance on the insured's mortgage loan if either insured died. *Id.*

breach of contract, alleging that it failed to pay a claim that resulted when her husband, Abdullahi Mohamed, was shot in a coffee shop in Mogadishu, Somalia, which was in a state of civil unrest at that time.[104]

In accordance with Monumental Life's policies, Mohamud provided the company with a Somali death certificate as proof of death.[105] The insurer would not accept the certificate, however, because it claimed that it could not verify its authenticity.[106] Mohamud also produced many other requested items in support of her claim, including a certificate from a physician stating the cause of death, newspaper articles about her husband's death, her husband's plane ticket information, affidavits from friends attesting to how he died, and affidavits from people who attended his funeral.[107] Nonetheless, Monumental Life refused to pay on the policies on the grounds that Mohamud produced no verifiable proof of death.[108] Monumental Life reached this conclusion because its investigators refused to go to Somalia to verify the proof submitted by Mohamud.[109]

After a bench trial, the United States District Court for the Eastern District of Virginia found that Mohamud submitted sufficient preliminary proof of death and was entitled to recover under the policies because the insured died by accidental means.[110] It found that the documentation and the veracity of the uncontested affiants demonstrated proof of loss under the policies.[111]

Monumental Life argued that, because the Somali death certificate was inadmissible as evidence, Mohamud had not furnished sufficient admissible proof of death.[112] The court disagreed, stating that requiring Mohamud to submit a death certificate in a form that the company required would impose an impossible condition of recovery under the contract.[113] Neither the life nor the accidental death insurance policies required that a government

104. *Id.* at 712–13.
105. *Id.*
106. *Id.* at 712.
107. *Id.* at 712–13.
108. *Id.* at 713.
109. *Id.*
110. *Id.* at 714.
111. *Id.* at 715.
112. *Id.* at 717.
113. *Id.* at 715.

recognized by the United States certify the death certificate, and Virginia law did not require the production of an admissible death certificate.[114]

The court said that Monumental Life could not make recovery under its policies contingent on the ability of its investigators to investigate proof of death.[115] According to the court, "[e]ssentially, Monumental Life state[d] that it could not secure its own investigators to verify the proof of death in Somalia, and therefore, the Insured [was] not entitled to recover under the policies. Such a result is preposterous and unreasonable."[116]

The court went on to hold that the preponderance of the evidence showed that Mohamud was entitled to recover under the policies because she met her burden of showing that the death was accidental.[117] For example, Mr. Eng Xasan Dhiisi testified that he witnessed the insured's death, stating that he was ten steps away from the insured after the shooting stopped and could see that the insured was not breathing.[118] Furthermore, the court found that, under the circumstances in Somalia, Monumental Life did not meet its burden of showing that the insured died due to an act of war.[119] The court pointed out that "[i]f this Court were to make such a finding, then any random shooting, even in this country, could be deemed to have resulted from an act of war."[120]

The court denied Mohamud's request for attorney's fees, finding that Monumental Life did not act in bad faith because it had reason to question Mohamud's claim as she had been previously been convicted of forgery.[121]

VII. MISREPRESENTATION

Two cases on misrepresentation were decided last year. *U.S.*

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114. *Id.* at 715–18.
115. *Id.* at 716.
116. *Id.*
117. *Id.*
118. *Id.* at 720.
119. *Id.* at 720–21.
120. *Id.* at 721.
121. *Id.* at 722 n.6. A court shall not award costs and attorney's fees unless the court determines that the insurer did not act in good faith in refusing to pay a benefit to the insured. *See* VA. CODE ANN. § 38.2-209 (Repl. Vol. 1999 & Cum. Supp. 2001).

Specialty Insurance Co. v. Skymaster of Virginia[122] was a declaratory judgment action in which U.S. Specialty sought to avoid coverage of a pilot who misrepresented his medical condition to the Federal Aviation Administration ("FAA").[123]

Skymaster is a Virginia corporation that was formed to own a 1973 Cessna 3376 aircraft, which was insured by U.S. Specialty.[124] The policy covered property damage, personal injury liability, and medical payments.[125] Mr. Poulin, an officer and shareholder of Skymaster, crash-landed the plane on August 9, 1998, injuring himself and several passengers, as well as damaging the aircraft.[126] After the crash, FAA inspectors found Poulin's prescription medication, including insulin, at the crash site.[127] During an examination under oath, Poulin refused to answer several questions about his diabetic condition and his FAA medical certificate by asserting his Fifth Amendment privilege against self-incrimination.[128]

During his deposition, Poulin said that he was diagnosed with diabetes mellitus in 1987 and had suffered from the disease ever since.[129] He went to Dr. Royer, an FAA Medical Examiner, to renew his FAA Medical Certificate in May 1996 and May 1998, but he did not tell Royer about his condition.[130] He also failed to disclose this information on the renewal application forms, which specifically asked whether the applicant suffered from diabetes.[131]

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122. 123 F. Supp. 2d 995 (E.D. Va. 2000).

123. *Id.* at 995.

124. *Id.* at 996.

125. *Id.* The policy stated as follows:

> The aircraft must be operated in flight only by a person shown below, who must have a current and proper (1) medical certificate and (2) pilot certificate with necessary ratings required by the FAA for each flight. There is no coverage under the policy if the pilot does not meet these requirements.

Id. at 998. Sections of the policy entitled "General Provisions and Conditions," "Aircraft Physical Damage," and "Liability to Others" stated that no coverage existed under the policy unless this requirement was met. *Id.* at 998–99.

126. *Id.* at 996.

127. *Id.*

128. *Id.* at 996–97.

129. *Id.* at 997.

130. *Id.*

131. *Id.*

Poulin was using either insulin or some other hypoglycemic drug to control his diabetes on the day of the crash.[132]

The United States District Court for the Eastern District of Virginia found that Poulin's medical certificate was not current and proper due to his misrepresentations to Dr. Royer and on his medical certificate renewal form.[133] The general medical standards for a third-class airman medical certificate included: "'No established medical history or clinical diagnosis of diabetes mellitus that requires insulin or any other hypoglycemic drug for control.'"[134] The court held that the policy's requirement of a proper and current medical certificate was not satisfied by one "'granted upon the basis of a fraudulent misrepresentation. . . . Merely the fact that it had not been canceled by the FAA does not make the medical certificate valid.'"[135]

The exclusion in the policy was permissible under Virginia Code section 38.2-2227.[136] Skymaster argued that the statute only provided an exclusion of coverage for failure to possess a pilot's certificate, not a medical certificate.[137] The court said that FAA regulations require that "'a person may not act as pilot in command or in any other capacity as a required pilot flight crewmember of an aircraft, under a certificate issued to that person under this part, unless that person has a current and appropriate medical certificate.'"[138] Thus, the requirement that a pilot possess a proper and current medical certificate was clearly "relate[d] to" the "[c]ertification of a pilot in a stated category by the Federal

132. *Id.*

133. *Id.* at 999.

134. *Id.* (quoting 14 C.F.R. § 67.313 (2001)).

135. *Id.* (quoting Ranger Ins. Co. v. Bowie, 574 S.W.2d 540, 542 (Tex. 1978)).

136. *Id.* That statute provides as follows:

> No insurance policy issued or delivered in this Commonwealth covering loss, expense, or liability arising out of the loss, maintenance, or use of an aircraft shall act to exclude or deny coverage because the aircraft is operated in violation of federal or civil regulations or any state or local ordinance. This section does not prohibit the use of specific exclusions or conditions in any policy that relates to any of the following:
>
> . . . .
>
> 2. Certification of a pilot in a stated category by the Federal Aviation Administration.

VA. CODE ANN. § 38.2-2227 (Repl. Vol. 1999 & Cum. Supp. 2001).

137. *Skymaster*, 123 F. Supp. 2d at 1001.

138. *Id.* at 1002 (quoting 14 C.F.R. § 61.3(c) (2001)).

Aviation Administration."[139] The court further held that a causal connection between the lack of a proper medical certificate and the crash was unnecessary to void the policy.[140]

Finally, the injured passengers argued that U.S. Specialty failed to give them proper notice of its intention to rely on a breach of the terms or conditions of the policy.[141] Because Skymaster filed the only claim under the policy, which was for damage to the aircraft, and the passengers had filed a suit in state court against Poulin and Skymaster but had not served them with that action, the forty-five day notification period had not begun to run, and U.S. Specialty had not waived any defense based on Poulin's breach of the policy.[142]

The second case on misrepresentation, *Commercial Underwriters Insurance Co. v. Hunt & Calderone, P.C.*,[143] was a declaratory judgment action involving coverage under a professional liability, claims-made insurance policy.

On May 8, 1997, the insured accounting firm filed a renewal application for professional liability insurance with Commercial Underwriters Insurance Company ("CUIC").[144] The next day, a partner in the firm realized that she had missed a filing deadline for one of their clients.[145] She knew that her error could result in the client's loss of a $125,000 tax credit, but she did not think that a claim would result because an administrator of the government tax credit program told her that enough money probably would be available after the timely applications had been proc-

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139. *Id.* (quoting VA. CODE ANN. § 38.2-2227 (Repl. Vol. 1999 & Cum. Supp. 2001)).

140. *Id.* at 1002–03 (citing Holland Supply Corp. v. State Farm Mut. Auto. Ins. Co., 166 Va. 331, 335, 186 S.E. 56, 57 (1936) (stating that a causal connection is not required in a contract action, as opposed to a tort action)).

141. *Id.* at 1003. The Virginia Code states:

> 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. . . . 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. 2001). For further discussion of Virginia Code section 38.2-2226, see *infra* Part IX.

142. *Skymaster*, 123 F. Supp. 2d at 1003.

143. 261 Va. 38, 540 S.E.2d 491 (2001).

144. *Id.* at 40, 540 S.E.2d at 492.

145. *Id.*

essed.[146] The client also was satisfied with these assurances.[147] The firm did not tell CUIC of the error while its insurance application was pending.[148]

After the policy became effective, the firm learned that sufficient funds were not available for its client's tax credit.[149] In August 1997, the client told the firm that he would hold it responsible for the lost tax credit.[150] The firm filed a claim with CUIC, which denied coverage and refused to provide a defense for the firm in a subsequent action by the client.[151]

The trial court held that CUIC failed to meet its burden of proof on the question of the materiality of the firm's misrepresentation.[152] The Supreme Court of Virginia affirmed, saying that the only material evidence was the policy itself, which recited in boilerplate language that the representations in the application were material.[153] The court said, "[s]uch evidence is far from the clear proof required to show that truthful answers would have reasonably influenced CUIC's decision to issue the policy to [the firm]."[154]

The policy contained a condition precedent and an exclusion that involved a determination of whether the insured reasonably anticipated that the error, made before the inception of the policy, would result in a claim under the policy.[155] A partner of the firm

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146. *Id.*
147. *Id.*
148. *Id.*
149. *Id.*
150. *Id.*
151. *Id.*
152. *Id.* at 41, 540 S.E.2d at 492.
153. *Id.* at 43, 540 S.E.2d at 492. The Virginia Code states: "No statement in an application [for an insurance policy] . . . made before or after loss under the policy shall bar a recovery upon a policy of insurance unless it is clearly proved that such answer or statement was material to the risk when assumed and was untrue." *See* VA. CODE ANN. § 38.2-309 (Repl. Vol. 1999 & Cum. Supp. 2001).
154. *Commercial Underwriters*, 261 Va. at 43, 540 S.E.2d at 493.
155. *Id.* at 43, 540 S.E.2d at 493–94. Section I.A.2 of the policy provided:

> All of the following conditions must be satisfied before coverage will apply:
>
> . . . .
>
> 2. the Insured had no knowledge of such actual or alleged act, error, omission, circumstance or Personal Injury or otherwise had no basis to reasonable [sic] anticipate a claim that would be insured by this Coverage Part at policy inception.

Id. at 43 n.3, 540 S.E.2d at 494 n.3. Section II.A. of the policy, relating to exclusions, pro-

testified that the error was not one that could reasonably be anticipated to result in a claim because of the government administrator's assurances.[156] The client also testified that he believed that the matter "would be okay."[157] The court held that, faced with this testimony, CUIC had to provide evidence that would challenge the reasonableness of the firm's belief, but that CUIC failed to satisfy that burden.[158]

VIII. MOTOR VEHICLE UNINSURED/UNDERINSURED MOTORIST COVERAGE

A. *Definition of Insured*

The Supreme Court of Virginia decided three cases pertaining to UM/UIM insurance coverage since June 1, 2000. The most recent case, *Allstate Insurance Co. v. Jones*,[159] involved the issue of whether a passenger was entitled to UM benefits under the driver's insurance policy.[160] Marcellus D. Jones was injured while riding in a car driven and owned by Christopher D. Robinson and insured by Allstate.[161] Jones sued Robinson for negligence, but during the pendency of the action, Allstate denied coverage to Robinson due to his lack of cooperation.[162] Jones served Allstate with process and obtained a judgment against Robinson.[163]

Jones alleged that he became an uninsured motorist pursuant to Virginia Code section 38.2-2206 when Allstate denied liability coverage to Robinson and that Allstate was required to pay its $25,000 UM insurance limit as partial satisfaction of Jones's judgment.[164] The circuit court held, on summary judgment, that

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vided: "any claim arising out of any actual or alleged act, error, omission, Personal Injury or circumstance likely to give rise to a claim of which an Insured had knowledge, or otherwise had reason to anticipate might result in a claim, prior to the inception of this policy." *Id.*

156. *Id.* at 44, 540 S.E.2d at 494.
157. *Id.*
158. *Id.*
159. 261 Va. 444, 544 S.E.2d 320 (2001).
160. *Id.* at 445, 544 S.E.2d at 321.
161. *Id.*
162. *Id.* at 446, 544 S.E.2d at 321.
163. *Id.*
164. *Id.*

Allstate was obligated under Virginia Code section 38.2-2206 to pay its UM policy limit.[165]

On appeal, Allstate argued that because the UM endorsement in its policy provided coverage to persons occupying insured motor vehicles, the question was whether Robinson's vehicle was an "insured motor vehicle" when Jones served Allstate with process.[166] Jones contended that he was an insured as defined by Virginia Code section 38.2-2206(B).[167]

Applying the statutory definitions of "insured" and "uninsured motor vehicle,"[168] the court held that Allstate was required to pay the limit of its UM coverage toward Jones's judgment.[169] Once it denied coverage to Robinson, the vehicle met the statutory definition of an uninsured motor vehicle, thereby precluding payment on the liability coverage.[170] The court therefore held that Jones, a passenger in the car at the time of the accident, was an insured

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165. *Id.*

166. *Id.* at 446, 544 S.E.2d at 321–22.

167. *Id.* at 446, 544 S.E.2d at 322.

168. The court cited the following:

> A. . . . [N]o policy or contract of bodily injury or property damage liability insurance relating to the ownership, maintenance, or use of a motor vehicle shall be issued or delivered in this Commonwealth to the owner of such vehicle or shall be issued or delivered by any insurer licensed in this Commonwealth upon any motor vehicle principally garaged or used in this Commonwealth unless it contains an endorsement or provisions undertaking to pay the insured all sums that he is legally entitled to recover as damages from the owner or operator of an uninsured motor vehicle. . . .
>
> B. . . . *"Insured"* as used in subsections A, D, G, and H 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.
>
> *"Uninsured motor vehicle"* means a motor vehicle for which (i) there is no bodily injury liability insurance and property damage liability insurance in the amounts specified by § 46.2-472, (ii) there is such insurance but the insurer writing the insurance denies coverage for any reason whatsoever, including failure or refusal of the insured to cooperate with the insurer.

Id. at 447, 544 S.E.2d at 322 (quoting VA. CODE ANN. § 38.2-2206(A)–(B) (Cum. Supp. 2001)).

169. *Id.*

170. *Id.* at 448, 544 S.E.2d at 322 (citing VA. CODE ANN. § 38.2-2206(B) (Cum. Supp. 2001) (providing that an uninsured motor vehicle means a motor vehicle for which there is insurance, "but the insurer writing the insurance denies coverage for any reason whatsoever, including failure or refusal of the insured to cooperate with the insurer")).

within the meaning of Virginia Code section 38.2-2206(B) because he was a guest in the motor vehicle.[171]

Allstate argued that, as a condition precedent to UM coverage, there must be both an insured motor vehicle and an uninsured motor vehicle.[172] It relied upon *Superior Insurance Co. v. Hunter*[173] for the proposition that an automobile cannot be deemed both "an insured motor vehicle and an uninsured motor vehicle."[174] In rejecting Allstate's argument, the court distinguished *Superior* from *Jones*.[175] In *Superior*, the court held that the UIM provisions of a tortfeasor's policy could not be used to satisfy claims of passengers who were insureds under the same policy and whose claims exceeded the limits of the liability coverage.[176] There was no possibility, however, that Allstate could be required to pay its contracted limits of liability coverage and also pay UIM coverage from the same policy because Jones only sought recovery under the UM provisions.[177]

B. *Judgment Against Insurer*

In *Nationwide Mutual Insurance Co. v. Hylton*,[178] the Supreme Court of Virginia considered whether, in a tort action, a judgment could be entered against an insurance company that was not a party to the suit.[179] Clarence E. Hylton sued Mark Daniel DeHart, a Virginia State Trooper, alleging that he was injured by DeHart's negligent operation of a motor vehicle.[180] Robert C. Wetzel, registered agent for Nationwide and Hylton's insurer, received a copy of the motion for judgment.[181] DeHart filed both a grounds of defense and a plea of sovereign immunity, asserting

171. *Id.* at 448, 544 S.E.2d at 322–23.
172. *Id.* at 446, 544 S.E.2d at 322.
173. 258 Va. 338, 520 S.E.2d 646 (1999).
174. *Jones*, 261 Va. at 446, 544 S.E.2d at 322.
175. *Id.* at 450, 544 S.E.2d at 324.
176. *Superior Ins. Co.*, 258 Va. at 344–45, 520 S.E.2d at 649.
177. *Jones*, 261 Va. at 450, 544 S.E.2d at 324.
178. 260 Va. 56, 530 S.E.2d 421 (2000).
179. *Id.* at 59, 530 S.E.2d at 422.
180. *Id.*
181. *Id.*

that he decided to apprehend a traffic violator and was determining how to proceed when the accident occurred.[182]

The circuit court sustained the plea of sovereign immunity on the morning of trial and allowed Hylton to proceed with his lawsuit against Nationwide.[183] Nationwide, however, was not a party to the action and had not filed any pleadings.[184] Further, DeHart's lawyer told the court that "he did not represent Nationwide."[185]

The jury found in favor of Hylton, and the circuit court confirmed the $100,000 verdict.[186] After learning of the judgment, Nationwide asked the court to set it aside because it was not a named party to the suit.[187] When the circuit court took no action on the motion, Nationwide appealed the judgment.[188]

The supreme court held that the circuit court erred by entering a judgment against Nationwide.[189] In prior cases the supreme court had held that "a plaintiff who files a tort action for injuries caused by an owner or operator of an uninsured motor vehicle cannot recover a judgment in that action against" the UM carrier.[190] The court also stated that although Virginia Code section 38.2-2206(F)[191] gave Nationwide the right to participate in the

182. *Id.*
183. *Id.*
184. *Id.*
185. *Id.*
186. *Id.* at 59–60, 530 S.E.2d at 422.
187. *Id.* at 60, 530 S.E.2d at 422.
188. *Id.*
189. *Id.* at 61, 530 S.E.2d at 423.
190. *Id.* The court relied on the following language:

> "This is not an action arising ex contractu to recover against the insurance company on its endorsement. The insurance company is not a named party defendant and judgment cannot be entered against it in this action. This is an action ex delicto, since the cause of action arises out of a tort, and the only issues presented are the establishment of legal liability on the unknown uninsured motorist, John Doe, and the fixing of damages, if any."

Id. (quoting Doe v. Brown, 203 Va. 508, 515, 125 S.E.2d 159, 164 (1962)).

The court went on to hold that, to the contrary, "the question whether an automobile insurance company has a legal obligation to a plaintiff "may be decided in an action ex contractu brought on the policy by the interested judgment plaintiff, or in a declaratory judgment proceeding to determine the rights of the parties." *Id.* (citing Rodgers v. Danko, 204 Va. 140, 143, 129 S.E.2d 828, 830 (1963)).

191. The Virginia Code provides that in any UM or UIM action, the insured must serve a copy of the process on his insurer, as though it were a party defendant. The insurer then has the right to file pleadings and take other action in the name of the owner or operator of the uninsured or underinsured motor vehicle or in its own name. *See* VA. CODE ANN. §

case, it does not allow Hylton to obtain a judgment against Nationwide.[192] The court held that "the fact that Nationwide's registered agent received a copy of the motion for judgment d[id] not permit the circuit court to enter a judgment against Nationwide."[193]

C. *Rejection of Additional Coverage*

Finally, in *Government Employees Insurance Co. v. Hall*,[194] the Supreme Court of Virginia addressed the issue of whether an insured effectively waived the maximum UM coverage for her policy mandated by Virginia Code section 38.2-2206(A).[195]

The insured bought the policy in 1974, and on or around July 1 of each subsequent year, Government Employees Insurance Company ("GEICO") mailed her a "Renewal Solicitation Package," including a waiver form allowing her to reduce the amount of her UM coverage.[196] The waiver form clearly stated that the insured "was required to return [it] within 20 days in order to select the lower uninsured motorist insurance coverage."[197] The insured executed the waiver included in the 1991 renewal package and reduced her coverage from $300,000 to $30,000 per person/$60,000 per occurrence.[198] Even though the insured's husband was also a "named insured" under the policy and did not endorse the waiver form, GEICO nevertheless honored the waiver and reduced the UM coverage and the policy premium.[199]

The insured received the 1992 renewal package at the beginning of July of that year, but she failed to execute the waiver form

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38.2-2206(F) (Cum. Supp. 2001).

192. *Hylton*, 260 Va. at 61, 530 S.E.2d at 423.

193. *Id.*

194. 260 Va. 349, 533 S.E.2d 615 (2000).

195. *Id.* at 351, 533 S.E.2d at 615.

196. *Id.* at 352, 533 S.E.2d at 615–16. The amount of the UM coverage was "otherwise statutorily mandated to equal the amount of bodily injury liability coverage provided by the policy." *Id.* at 352, 533 S.E.2d at 616. Under VA. CODE ANN. § 38.2-2206(A) (Cum. Supp. 2001), the limits of UM coverage "shall equal but not exceed the limits of the liability insurance provided by the policy, unless any one named insured rejects the additional uninsured motorist insurance coverage by notifying the insurer as provided in subsection B of § 38.2-2202." *Id.*

197. *Hall*, 260 Va. at 352, 533 S.E.2d at 616.

198. *Id.*

199. *Id.*

until August 12, 1992.[200] Even though the insured failed to execute waiver forms after 1992, "GEICO continued to provide uninsured motorist insurance coverage at the reduced rate."[201]

Five years later, the insured's daughter died as a result of a motor vehicle accident.[202] At the time the daughter resided with her mother and was therefore a "person insured" under the GEICO policy.[203] The administrators of the daughter's estate sued the driver of the car in which she was riding, as well as "John Doe," the driver of the vehicle who allegedly caused the accident.[204] The administrators also filed a declaratory judgment action against GEICO, seeking a determination of whether the estate was entitled to the maximum uninsured motorist insurance coverage of "$300,000, rather than the $30,000 stated in the policy."[205]

Upon finding that the 1991 and 1992 waivers were ineffective,[206] the trial court required GEICO to provide the maximum UM coverage of $300,000.[207]

The supreme court reversed, holding that "the trial court erred in ruling that the time limit contained in [Virginia Code section 38.2-2202(B)] applied to *renewal* notices sent to [the insured]."[208] It noted that Virginia Code section 38.1-380.2(B), the predecessor to section 38.2-2202(B), "explicitly provided a notice applicable to each 'new *or renewal policy*... and ... original *or renewal premium notice*.'"[209] The court said that the terms "renewal policy"

200. *Id.* Because the insured's husband had died, her signature was the only one required on the waiver form. *Id.*

201. *Id.* at 352–53, 533 S.E.2d at 616.

202. *Id.* at 352, 533 S.E.2d at 615.

203. *Id.*

204. *Id.* at 353, 533 S.E.2d at 616.

205. *Id.*

206. The 1991 waiver was invalid because the insured's husband, also a named insured, did not sign the waiver as required by statute. *Id.* The 1992 waiver was invalid because the insured did not return it to GEICO within twenty days. *Id.* at 354, 533 S.E.2d at 617.

207. *Id.* GEICO conceded on appeal that the 1991 waiver was invalid, since the then-applicable provisions of Virginia Code section 38.2-2206(A) required that each named insured had to reject the statutorily mandated amount of UM coverage for a waiver to be valid, and the insured's husband did not sign the waiver. *Id.* at 353 n.4, 533 S.E.2d at 616 n.4; *see* State Farm Mut. Auto. Ins. Co. v. Weisman, 247 Va. 199, 203, 441 S.E.2d 16, 19 (1994).

208. *Hall*, 260 Va. at 355, 533 S.E.2d at 617–18 (emphasis added).

209. *Id.* at 355, 533 S.E.2d at 617 (alteration in original).

and "renewal premium notice" were "conspicuously absent" from Virginia Code section 38.2-2202(B).[210] Thus, it applied the maxim *expressio unius est exclusio alterius*—the expression of one thing is the exclusion of the other.[211] Also, the final paragraph of Virginia Code section 38.2-2202(B) "expressly permits an insurance company to exclude the notice from a 'renewal policy.'"[212]

The court went on to find that the twenty-day limit stated in the waiver form, although not required by Virginia Code section 38.2-2202(B), did not bind GEICO.[213] Looking at the course of dealing between the parties, the court found that this time limit "was not an essential term of the contract, and thus, could be waived by GEICO."[214] Furthermore, the actions of the insured as well as GEICO "were consistent with an agreement for the lower amount of uninsured motorist insurance coverage."[215] The court stated that "[b]oth parties received what they bargained for: a reduced premium in exchange for reduced insurance coverage."[216] Accordingly, it held that the 1992 waiver was effective to reduce the amount of the insured's UM coverage and that the waiver was effective at the time of the accident.[217]

This holding is particularly important to insurance coverage counsel because it relaxes the requirements for insureds to reduce their UM/UIM coverage. The case makes clear that Virginia Code section 38.2-2202(B) only affects notices applicable to new policies, not renewal policies.[218] This means that once an insured reduces his UM/UIM coverage, it is effectively reduced for the life of the policy without the need for any further notice by the carrier. Moreover, the case shows that even if the carrier sends its insured a waiver form, any time limit contained therein will not bind the insurer if the course of dealing between the parties and their subsequent actions show that it was not an essential term of the contract.[219]

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210. *Id.*
211. *Id.*
212. *See* VA. CODE ANN. § 38.2-2202(B) (Cum. Supp. 2001).
213. Hall, 260 Va. at 355, 533 S.E.2d at 618.
214. *Id.*
215. *Id.*
216. *Id.* at 356, 533 S.E.2d at 618.
217. *Id.*
218. *See id.* at 355, 533 S.E.2d at 617.
219. *Id.*

D. *Statutory Changes*

The 2001 General Assembly made several changes to Virginia's insurance statutes—Title 38.2 of the Virginia Code.[220] The first amendment affected Virginia Code section 38.2-2202, which requires new motor vehicle liability policies to notify insureds that the amount of their UM/UIM coverage will automatically increase to the limits of their liability coverage if they have purchased more liability insurance than is required by law.[221] The notice also must advise insureds that they may notify their agent or insurer that they want to reduce coverage within twenty days of the mailing of the policy or premium notice.[222] House Bill 2801 added

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220. Despite the many changes, only the three statutory amendments that will likely affect insurance law practitioners will be discussed.

221. VA. CODE ANN. § 38.2-2202(B) (Cum. Supp. 2001). Subsection B provides as follows:

> B. No new policy or original premium notice of insurance covering liability arising out of the ownership, maintenance, or use of any motor vehicle shall be issued or delivered unless it contains the following statement printed in boldface type, or unless the statement is attached to the front of or is enclosed with the policy or premium notice:
>
> IMPORTANT NOTICE
>
> IN ADDITION TO THE INSURANCE COVERAGE REQUIRED BY LAW TO PROTECT YOU AGAINST A LOSS CAUSED BY AN UNINSURED MOTORIST, IF YOU HAVE PURCHASED LIABILITY INSURANCE COVERAGE THAT IS HIGHER THAN THAT REQUIRED BY LAW TO PROTECT YOU AGAINST LIABILITY ARISING OUT OF THE OWNERSHIP, MAINTENANCE, OR USE OF THE MOTOR VEHICLES COVERED BY THIS POLICY, AND YOU HAVE NOT ALREADY PURCHASED UNINSURED MOTORIST INSURANCE COVERAGE EQUAL TO YOUR LIABILITY INSURANCE COVERAGE:
>
> 1. YOUR UNINSURED AND UNDERINSURED MOTORIST INSURANCE COVERAGE HAS INCREASED TO THE LIMITS OF YOUR LIABILITY COVERAGE AND THIS INCREASE WILL COST YOU AN EXTRA PREMIUM CHARGE; AND
>
> 2. YOUR TOTAL PREMIUM CHARGE FOR YOUR MOTOR VEHICLE INSURANCE COVERAGE WILL INCREASE IF YOU DO NOT NOTIFY YOUR AGENT OR INSURER OF YOUR DESIRE TO REDUCE COVERAGE WITHIN 20 DAYS OF THE MAILING OF THE POLICY OR THE PREMIUM NOTICE, AS THE CASE MAY BE.
>
> 3. IF THIS IS A NEW POLICY AND YOU HAVE ALREADY SIGNED A WRITTEN REJECTION OF SUCH HIGHER LIMITS IN CONNECTION WITH IT, PARAGRAPHS 1 AND 2 OF THIS NOTICE DO NOT APPLY.

Id.

222. *Id.*

a provision allowing an insurer to require any request to reduce this increased UM/UIM coverage to be in writing.[223]

The UM insurance coverage section, Virginia Code section 38.2-2206, was also revised.[224] Subsection G provides, among other things, that an insurer that pays a claim to its insured under its UM endorsement is subrogated to the insured's rights against the owner or operator of the uninsured vehicle.[225] It also states that, to the extent that the insurer paid the named insured in an action against the owner or operator as a "John Doe," any recovery in an action against the owner or operator, or his insurer (after their identity has become known), must be paid to the injured party's insurer.[226] House Bill 1939 also amended Virginia Code section 38.2-2206 to provide that "[n]o action, verdict or release arising out of a suit brought under this subsection shall give rise to any defenses in any other action brought in the subrogated party's name, including res judicata and collateral estoppel."[227]

IX. WAIVER AND ESTOPPEL

The 2001 General Assembly also amended Virginia Code section 38.2-2226.[228] This statute requires insurers to give notice to claimants of their intention to rely on any defenses arising from the insured's breach of the terms or conditions of the insurance policy.[229] The only time limitation that the statute previously imposed was that the "[n]otification shall be given within forty-five days after discovery by the insurer of the breach or of the claim,

223. H.B. 2801, Va. Gen. Assembly (Reg. Sess. 2001) (enacted as Act of Mar. 23, 2001, ch. 564, 2001 Va. Acts 662) (codified as amended at VA. CODE ANN. § 38.2-2202 (Cum. Supp. 2001)). At the end of paragraph number two of the notice, the policy must state, "THE INSURER MAY REQUIRE THAT SUCH A REQUEST TO REDUCE COVERAGE BE IN WRITING." *Id.*

224. *See* H.B. 1939, Va. Gen. Assembly (Reg. Sess. 2001) (enacted as Act of Mar. 14, 2001, ch. 218, 2001 Va. Acts 181) (codified as amended at VA. CODE ANN. § 38.2-2206 (Cum. Supp. 2001)).

225. VA. CODE ANN. § 38.2-2206(G) (Cum. Supp. 2001).

226. *Id.*

227. *Id.*

228. H.B. 2424, Va. Gen. Assembly (Reg. Sess. 2001) (enacted as Act of Mar. 26, 2001, ch. 728, 2001 Va. Acts 990) (codified as amended at VA. CODE ANN. § 38.2-2226 (Cum. Supp. 2001)).

229. VA. CODE ANN. § 38.2-2226 (Cum. Supp. 2001).

whichever is later."[230] The previous version of Virginia Code section 38.2-2226 also stated that notice of the execution of a non-waiver of rights agreement by the insurer and the insured, or the issuance of a reservation of rights letter, must be given to the claimant or his counsel within the same time frame.[231]

House Bill 2424, however, places a new time constraint upon insurers intending to rely on their insured's breach of the policy as a defense to coverage.[232] The bill amended the section to read:

> Notwithstanding the provisions of this section, in any claim in which a civil action has been filed by the claimant, the insurer shall give notice of reservation of rights in writing to the claimant, or if the claimant is represented by counsel, to claimant's counsel not less than thirty days prior to the date set for trial of the matter. The court, upon motion of the insurer and for good cause shown, may allow such notice to be given fewer than thirty days prior to the trial date. Failure to give the notice within thirty days of the trial date, or such shorter period as the court may have allowed, shall result in a waiver of the defense based on such breach to the extent of the claim by operation of law.[233]

As a result, insurers now have an outside time limit within which to notify claimants of any defense arising from the insured's breach of the policy.[234] Even if the breach is discovered within thirty days before trial, the insurer will have waived any defense arising therefrom unless the court allows the required notice to be given closer to trial.[235]

X. CONCLUSION

For the most part, the cases decided since June 1, 2000 have changed Virginia insurance law only modestly. As discussed, however, two cases have made substantial changes and are expected to have a significant impact on this area of the law. Under *Moorehead v. State Farm Fire & Casualty Co.*,[236] plaintiffs appar-

230. *Id.* § 38.2-2226 (Repl. Vol. 1999).
231. *Id.*
232. Va. H.B. 2424.
233. *Id.*
234. *See* VA. CODE ANN. § 38.2-2226 (Cum. Supp. 2001).
235. *See id.*
236. 123 F. Supp. 2d 1004 (W.D. Va. 2000).

ently can seek consequential damages for emotional disturbance in all first-party insurance claims.[237] Also, *GEICO v. Hall*[238] eased the requirements for insureds to reduce their UM/UIM coverage.[239] This holding certainly will benefit insurance companies seeking to limit their exposure under the UM/UIM provisions of their policies.

237. *See supra* notes 80–101 and accompanying text.
238. 260 Va. 349, 533 S.E.2d 615 (2000).
239. *See supra* notes 194–219 and accompanying text.