

IN BRIEF

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An Insurance Industry Newsletter of Recent Issues and Opinions in Virginia Law By

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ATTORNEYS AT LAW

It's The LAW!!..... or maybe, or not

The General Assembly of Virginia met from January through March 2008 in Richmond. Kevin Logan, from our firm, attended those sessions in which proposed legislation affecting the insurance industry was discussed. The following is a summary of the state of insurance legislation in Virginia. The summaries were supplied by the Virginia General Assembly Legislative Information System:

Passed this session:

Towing. Allows tow trucks to use crossovers on controlled-access highways when providing a public safety towing and recovery service under the direction of a law-enforcement agency. Additionally, the bill repeals the provision that allows insurance company agents and persons subject to a vehicle security interest to have vehicles that have been towed as the result of a police-towing request to be towed to another location ("secondary tow"). The remaining provisions of the bill do not affect the industry. (SB 691/ HB1012)

Towing Board Regulations. Provides that in even-numbered years, the chairman of the Board of Towing and Recovery Operators will be a licensed Class A operator and the vice-chairman a licensed Class B operator, and in odd-numbered years, the chairman will be a licensed Class B operator and the vice-chairman a licensed Class A operator. The bill also extends the effective date for Board regulations pertaining to public safety towing and recovery services to July 1, 2010, and extends the effective date of other Board regulations to January 1, 2009. (SB 707)

Motor vehicle insurance settlement practices: Provides that setting arbitrary and unreasonable limits on what an insurer will allow as reimbursement for paint and materials is an unfair settlement practice. (SB 697/HB 1176)

Insurance liability disclosure of limits prior to filing a lawsuit: See Volume 16 of this newsletter posted on snllaw.com

Virginia Birth Related Neurological Injury Compensation Program: Increases the annual assessment for physicians who participate in the Virginia Birth-Related Neurological Injury Compensation Program from its current level of \$5,300 to \$5,600, which amount will increase thereafter to a maximum of \$6,200. The annual participating hospital assessment will increase from \$50 per live birth to \$52.50 per live birth in 2008, which amount will increase each year thereafter by \$2.50 per live birth to a maximum of \$55 per live birth. (SB 211/HB1305) The remaining provisions of the bill do not affect the industry.

Liability, fire & motor vehicle insurance policies; establishes exceptions to prohibitions: Establishes exceptions to prohibitions on the refusal to renew certain liability, fire, and motor vehicle insurance policies. Such renewal provisions will not apply to an insurer if an affiliated insurer has manifested its willingness to provide coverage at a lower premium than would have been charged for the same exposures on the expiring policy. (SB 612/HB 914)

Residential landlord and Tenant Act: duty of landlord and managing agent for visible mold: Provides that landlords and managing agents are not liable for civil damages in an action for exposure to mold arising from the condition within the interior of a dwelling unit brought by a tenant, authorized occupant, or guest or invitee if the mold condition is caused solely by the negligence of the tenant. Managing agents with no maintenance responsibilities are not liable for damages unless the agents have actual knowledge of the mold condition and fail to disclose the existence of the condition to the landlord and any prospective or actual tenants. If a written move-in inspection report reflects that there is no visible evidence of mold in a dwelling unit, and the tenant does not object in writing to such report within five days of his receipt of the report, there shall be a rebuttable presumption that no mold existed at the time of the move-in inspection. Landlords and managing agents with maintenance responsibilities are required to perform mold remediation if visible evidence of mold occurs within a dwelling unit.

Failed this session:

Underinsured motorist insurance coverage: Establishes a mechanism by which a liability insurer insuring the owner, operator, or maintainer of an underinsured motor vehicle may, following approval of the court, pay all of its applicable limits of liability. Upon paying its limits under the policy, the insurer will be released from further liability and its obligation to participate in the defense of the proceeding. The measure applies to policies issued or renewed on or after July 1, 2008. (HB 919)

Prospects for 2009:

Midterm cancellation notices with foreclosures: The Bureau has asserted that the insurers cannot be released from their obligations until the term of the policy expires and is up for renewal. Banks and mortgage lenders are probably satisfied with the current situation, though many in the insurance industry feel this is a material change of risk. This will be a topic of discussion in the 2009 session. Any bill concerning this topic would need to include language that the bank must put the insurer on notice of the foreclosure to trigger the cancellation.

Virginia Wind Underwriting Association: An Association consisting of all insurers licensed to write property insurance in the Commonwealth created to provide insurance against loss to property in Accomack and Northampton Counties and the Cities of Chesapeake, Hampton, Norfolk, and Virginia Beach from the risk of windstorm, in accordance with a plan of operation to be approved by the Commission. (SB 318) This issue will be re-visited in the 2009 Session.

House Bill 919 (see Failed Legislation) will likely be re-introduced in some form.

DECISIONS BY THE SUPREME COURT OF VIRGINIA REGARDING INSURANCE INDUSTRY ISSUES June 2-6, 2008 SESSION

The case summaries that follow involve insurance litigation or related issues. We have downloaded these summaries directly from the Virginia Supreme Court website. We offer them to you without further legal analysis. However, if you would like a brief legal analysis or the full text of any of these cases, please make your request by return e-mail. If you would like to discuss the ramifications of any of the decisions, please call (804) 378-7600: ext. 3304 for Ray; 3305 for Kevin or 3316 for Mark.

071197 Whitaker v. Heinrich Schepers GMBH & Co. KG 06/06/2008

In a personal injury case that was removed to federal court and then remanded back to the Virginia circuit court, the trial court abused its discretion in denying the plaintiff's subsequent motion to amend his ad damnum clause. The decision is reversed in part and the case is remanded for further proceedings with respect to damages.

071409 Williams v. Le 06/06/2008

In a wrongful death action arising from alleged medical malpractice, the trial court erred in instructing the jury on superseding intervening causation. This doctrine does not operate to exempt a defendant from liability if the purportedly intervening cause is put into operation by the defendant's wrongful act or omission. In this case it could not be said that defendant's alleged negligence did not contribute "in the slightest degree" to the death of plaintiff's decedent. The trial court therefore erred in granting the superseding intervening causation instruction. The judgment is reversed and the case remanded for a new trial

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[071451](#) **Ayala v. Aggressive Towing and Transport, Inc.** 06/06/2008

In a wrongful death action against a tow truck driver and his employer arising from a vehicular crash, the trial court erred by receiving into evidence the guilty pleas and an order of conviction for involuntary manslaughter of the driver of the car in which the victim was riding at the time of the crash. The judgment is reversed and the case is remanded for a new trial.

[071553](#) **Nichols Construction Corp. v. Virginia Machine Tool Co.** 06/06/2008

In a suit by the owner of an industrial building alleging that a roofing company breached a construction contract for installation of a new roof, the defendant contractor failed to produce sufficient evidence to overcome the plaintiff's prima facie case on damages and the circuit court did not err in awarding damages for breach of the contract based upon the cost of removing the defective roof and replacing it with a new rafter system roof, which was the object of the original contract. However, since there is no assertion that breach of the contract was willful or the result of deliberate bad faith, the circuit court erred in failing to award defendant an offset for the amount remaining due under the contract. The judgment is affirmed in part and reversed in part, and the case is remanded for calculation of the amount of the offset against the judgment and recalculation of the pre-judgment interest due on the adjusted award of damages.

[071008](#) **Webb v. Smith** 06/06/2008

On the particular facts and circumstances of this medical malpractice action, where the defendant doctor failed to perform one of two scheduled procedures, leading plaintiff to undergo a second surgical procedure, the plaintiff was not required to present expert testimony on the issue of causation. The trial court therefore erred in setting aside a jury verdict in her favor based on the absence of such proof. The judgment is reversed and final judgment is entered for plaintiff.

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Nothing on or in this material creates an express or implied contract. If you have questions or comments regarding this newsletter, please contact: Mark C. Nanavati, (804) 378-7600 ext. 3316, mnanavati@snllaw.com.