

IN BRIEF

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

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CHANGES TO THE OMNIBUS CLAUSE

Va. Code § 38.2-2204, typically referenced as “The Omnibus Clause,” is incorporated by law into each and every motor vehicle liability policy to which it applies. When any provision of the Omnibus Clause conflicts with the policy, the language of the Omnibus Clause overrides the language of the policy. Any endorsement, provision or rider attached to or included in any such policy of insurance which purports or seeks to limit or reduce the coverage afforded by the provisions required by this section shall be void. In essence, the Omnibus Clause is the baseline from which every policy in Virginia is derived, and it cannot be modified by any policy.

Within the last year, the Virginia General Assembly enacted an amendment to § 38.2-2204 of the Code of Virginia. The changes took effect on July 1, 2005, and codified a position held by the Virginia Supreme Court that allows a plaintiff to recover from the insurer an amount up to the per person policy limit for each of the individual insureds deemed liable in that matter. The additions and modifications to Va. Code §38.2-2204 are as follows:

(1) The General Assembly inserted an identical sentence as the second sentence of subsections (A) and (D), so that these subsections now provide in part: “[W]hen one accident or occurrence involves more than one defendant who is covered by the policy, the plaintiff may recover the per person limit of the policy against each such defendant, subject to the per accident or occurrence limit of the policy.”

(2) The General Assembly inserted the phrase "or for any one person" into the first sentence of subsections (A) and (D) so that they now read:

[N]othing contained in this section shall be deemed to prohibit an insurer from limiting its liability under any one policy for bodily injury or property damage resulting from any one accident or occurrence to the liability limits for such coverage set forth in the policy for any such accident or occurrence or for any one person regardless of the number of insureds under that policy.

Previously, the question that previously plagued insurance companies was whether an individual policy can afford multiple coverages arising out of the same occurrence. Although this issue had been interpreted in several varying ways throughout the Circuit Court level in Virginia, the modification of the Omnibus Clause codifies the holding by the Virginia Supreme Court in Johnson v. Windsor Ins. Co., 268 Va. 197, 597 S.E.2d 31 (2004) and finally puts the issue to rest. It is now clear that multiple per-person coverages can be available under a single policy of insurance.

It is worth noting that recovery of multiple per person limits is not automatic in a particular case merely due to the presence of multiple insureds on a policy. The amendment does not purport to create double or treble liability on all policies that potentially cover multiple insureds. For the new provisions of this statute to apply, each of the insureds must be independently negligent or otherwise liable in some manner, and the Complaint must be pled with specificity, outlining the independent acts of each party to the suit. There would have to be independent tortious conduct on the part of each defendant claiming coverage for multiple coverages to apply. For example, a claim against an employee acting in the scope of his employment for negligent combined with a claim against his employer for negligent entrustment would create multiple per-person coverages.

This gives rise to one final question that appears to be unresolved. Is agency enough to create multiple coverages under one policy? Imagine a scenario in which an employee is operating his corporate employer's vehicle when he causes an accident resulting in catastrophic injuries to the plaintiff. Plaintiff sues seeking \$1,000,000.00 in compensatory damages. The policy provides \$500,000.00/\$1,000,000.00 in coverage. The defendant driver would be entitled to \$500,000.00 in coverage, but would the plaintiff be entitled to access another \$500,000.00 single limit for the other defendant, the defendant corporation? Interestingly, the new language of Va. Code §38.2-2204 fails to address that issue conclusively, as it says "more than one defendant who is covered by the policy" without regard to the independent tortious conduct of the defendant corporation. Virginia case law appears to be unclear on the issue of whether agency (which is a legal relationship and not a tort) is enough to create additional coverage. The Virginia Supreme Court has stated that the Omnibus Clause must be liberally construed so as to benefit the party that has suffered injury and/or damage (see Liberty Mutual v. Tiller, 189 Va. 544, 53 S.E.2d 814 (1949)). Accordingly, it is reasonable to conclude that insurers will see plaintiffs argue in favor of additional coverage based upon agency in the years to come until this potential loophole is addressed by either the Supreme Court of Virginia or the Virginia General Assembly.

**DECISIONS BY THE SUPREME COURT OF VIRGINIA
REGARDING INSURANCE INDUSTRY ISSUES
APRIL 21, 2006 SESSION**

The case summaries that follow involve insurance litigation 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.

Kondaurov v. Kerdasha - In a personal injury case arising from a vehicular accident involving plaintiff and her dog, the trial court did not err in admitting certain evidence regarding the dog or in refusing a motion to strike pending decision on appropriate jury instructions. However, it erred in giving a duplicative damages instruction tendered by the plaintiff and in refusing to grant a limiting instruction barring recovery of damages for emotional distress arising from plaintiff's concerns about her dog. The judgment is reversed and remanded for further proceedings on the issue of damages.

Baker v. Elmendorf - An appeal of a general district court conviction to a circuit court under Code § 16.1-132 is a de novo appeal. Thus, whenever a defendant appeals such a conviction, the fact of that conviction is not admissible in the appeal or in a subsequent civil proceeding because the de novo appeal negates any judgment entered by the general district court. Accordingly, the trial court erred in admitting the fact of the plaintiff's general district court conviction into evidence in a malicious prosecution action brought following the successful appeal of such conviction to the circuit court. The judgment is reversed and the case is remanded for further proceedings.

Taboada v. Daly Seven, Inc. - In a guest's suit against an innkeeper for injuries resulting from a criminal assault by a third party occurring on the hotel's property, the trial court erred in sustaining demurrers to the guest's common law negligence claims in light of the innkeeper's duty to protect guests against reasonably foreseeable injury arising from third-party criminal acts, but correctly sustained the innkeeper's demurrer to the guest's similar claim under Code § 35.1-28. The judgment is affirmed in part and reversed in part, and the case remanded for a trial on the merits.

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