

IN BRIEF

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

Sinnott Nuckols & Logan, PC
ATTORNEYS AT LAW

CONTENTS:

- Part 1: General Assembly Update**
- Part 2: The Latest CGL Opinion re: Occurrence**
- Part 3: Supreme Court Decisions**

PART 1 GENERAL ASSEMBLY UPDATE 2009

There were many bills that were raised that were significant for the industry during this past legislative session in Virginia. The following bills passed both the Senate and the House and should be signed into law soon:

- 1) HB 1982 makes forms for commercial automobile insurance policies that are written to large commercial risks eligible for the exemption that currently exists for other insurance of large commercial risks.
- 2) HB 2164 provides new standards and procedures for acquisition and disposal of abandoned vehicles.
- 3) HB 2430, authorizes property, casualty, life, and certain other types of insurers to electronically transmit notices to insured's.

- 4) SB 1326 allows the Department of Motor Vehicles to collect a fee of no more than \$25 from insurance companies and their agents for processing applications for motor vehicle titles when the original titles are unavailable.
- 5) HB 2035 amends the life expectancy table.
- 6) SB 958 adopts the Uniform Interstate Depositions and Discovery Act.
- 7) SB 1154 allows copies of medical bills and charges at no cost.
- 8) SB 1275 provides that communications between physicians and their patients are privileged and cannot be disclosed, except at the request or with the consent of the patient.
- 9) HB 2169 revises the composition of the Board of Towing and Recovery Operators by making the Superintendent of the State Police Chairman of the Board. In addition, the towers are the minority on the new 17 member board.
- 10) HB 1747 prohibits the establishment of any regulatory scheme for public safety towing and recovery services.
- 11) HB 1887 authorizes the cancellation of a policy insuring an owner-occupied dwelling on grounds that the property secured by the policy has been sold pursuant to foreclosure of a deed of trust encumbering the property.
- 12) HB 2364 provides that a court, upon finding an animal to be a dangerous or vicious dog, may order the owner, custodian, or harbinger thereof to pay restitution for actual damages to any person injured by the animal or whose companion animal was injured or killed by the animal.

The following bills were not successful and will not become law:

- 1) SB 1360, which would increase the minimum liability limits to 100K/300K was passed by indefinitely in Senate Courts of Justice.
- 2) HB 1984, eliminating the requirement limiting patient's health information that may be discovered or introduced at trial to information obtained or formulated during treatment and contemporaneously recorded by the treating health practitioner, was left in the House Courts of Justice.

- 3) HB 2386, which sets out the responsibilities of drivers and pedestrians at marked and unmarked crosswalks, did not pass in the House. In addition, SB 1239, which is similar to this bill, was killed in the House.
- 4) HB 1870, Delegate Janis' bill to reduce the penalty for motorcycles operating abreast in a single lane, was defeated in the Senate.
- 5) SB 1161, which makes non-use of a safety belt a primary offense, was killed in the House.
- 6) SB 1408, allowing for primary enforcement of safety belt requirements when violations are observed by law-enforcement officers at traffic safety checkpoints, was killed in the House.
- 7) HB 2431, Delegate Joannou's bill to amend the current underinsured motorist statute, was tabled in the House Committee on Courts of Justice. However, the Committee Chairman, Delegate Albo, and others stressed that this issue will be revisited next year.

PART 2
DID THE CGL OCCURRENCE OCCUR?
THE ONGOING SAGA!

Through a series of decisions, courts at all levels have been struggling to define exactly what a "triggering occurrence" is and when such occurrence initiates insurance coverage under a standard commercial general liability (CGL) policy. In the instant case, *Stanley Martin Companies, Inc. v. Ohio Casualty Group*, No. 07-2102, 2009 U.S. App. LEXIS 2758 (4th Cir. Va. Feb 12, 2009)(unpublished), the court of appeals makes another shift from what had been the fairly steady direction Virginia law was taking.

The Martin case involves Stanley Martin Companies, Inc., a general contractor whose subcontractor supplied mold-laden trusses for a duplex development. The mold from the trusses grew into the surrounding gypsum firewalls thereby contaminating the general contractor's work. Ohio Casualty Group had issued an umbrella policy to Stanley Martin and Martin requested indemnification under that policy for repair work performed on the development. Ohio Casualty refused. The dispute arises from the definition of an "occurrence" in the policy as "an accident, including continuous or repeated exposure to substantially the same general harmful conditions." (Policy Definition Section). The district court found in favor of Ohio Casualty and granted summary judgment. Martin appealed this decision.

The U.S. Court of Appeals cited two cases and distinguished between them in determining what constitutes a triggering occurrence under the policy. In *Travelers Indemnity Co. of America v. Miller Building Corp.*, 142 F. App'x 147 (4th Cir. 2005) (unpublished) a subcontractor used defective fill material in site development thus causing damage to the building constructed by the general contractor. The court held that under Virginia law, "damages resulting from the insured's defective performance of a contract and limited to the insured's work or product [are] not covered" by a CGL policy because such damages are "'expected' from the standpoint of the insured." 142 F. App'x at 149 (quoting *Hotel Roanoke Conference Ctr. Comm'n v. Cincinnati Ins. Co.*, 303 F. Supp. 2d 784, 786 (W.D. Va. 2004)). The damage to the building in this case was not considered to be 'unexpected' or caused by an 'occurrence' and therefore did not trigger the insurer's duty to indemnify.

In contrast to the Miller case, the court also cited *French v. Assurance Co. of America*, 448 F. 3d 693 (4th Cir 2006), a Maryland case, in which a general contractor hired a subcontractor to clad the exterior of a home with stucco which proved to be defective and cause moisture damage to the home's structure. The French court distinguished between the original defective work and the effect of that defective work on surrounding areas. The court held that though the original defective work may have been expected, its effect on the surrounding areas was 'unexpected' and as such a 'triggering occurrence' under the policy.

The court in the Martin case has based its decision on the French precedent, stating that "Martin's obligation to repair or replace the defective trusses was not unexpected or unforeseen under the terms of its building contracts ... and does not trigger a duty to indemnify. However, any mold damage that spread beyond the defective trusses and the gypsum fire walls to non-defective components of the townhouses was an unintended accident" and a triggering occurrence under the Ohio policy.

This unpublished opinion is not binding in the 4th Circuit or in Virginia, but it does provide an additional precedent toward insurance coverage. The issue of what constitutes a triggering occurrence has not yet been addressed by the Virginia Supreme Court, but it is only a matter of time before the Court will address this subject. Stay tuned.

PART 3
DECISIONS BY THE SUPREME COURT OF VIRGINIA
REGARDING INSURANCE INDUSTRY ISSUES
February 23-27, 2009 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.

080217 Seguin v. Northrup Grumman Systems Corp. 02/27/2009

In a defamation action against the plaintiff's employer relating to a work performance evaluation, the circuit court's order compelling arbitration pursuant to the provisions of the Virginia Uniform Arbitration Act was not appealable under Code § 8.01-581.016. Additionally, the order was not a final judgment order contemplated by Code § 8.01-670(A)(3) since the circuit court retains jurisdiction under Code § 8.01-581.010 to vacate an arbitration award and under Code § 8.01-581.011 to modify or correct an arbitration award. Thus the order was not appealable and there is no jurisdiction to review the merits of plaintiff's contentions regarding the existence or enforceability of the arbitration agreement in question. The appeal is dismissed without prejudice.

081038 Johnston Memorial Hospital v. Bazemore 02/27/2009

In this wrongful death action, the sole issue is whether a plaintiff claiming to be the administratrix of a decedent's estate, but who filed the action prior to qualifying as such, is entitled to a nonsuit as a matter of right under Code § 8.01-380. Because the plaintiff was not a legal entity at the time she filed the action and therefore lacked standing to do so, the action is a nullity. Accordingly, no valid action was pending that could be nonsuited. The circuit court's judgment granting a nonsuit and denying defendants' motions to abate is reversed.

081240 Helton v. Phillip A. Glick Plumbing 02/27/2009

In a suit to collect amounts due to a plumbing company under invoices for work performed for a homeowner, the circuit court erred in failing to find an accord and satisfaction by use of an instrument within the intendment of Code § 8.3A-311, where the customer delivered a check marked "Payment in Full" which was deposited by the company after that notation was crossed out and a remaining amount due was written on the face of the check. The judgment of the circuit court is reversed and final judgment is entered in favor of the homeowner.

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