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Pleading Under The Virginia Uninsured Motorist Statute

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PLEADING UNDER THE VIRGINIA UNINSURED MOTORIST STATUTE

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Although the Virginia uninsured motor vehicle statute has been in operation since 1958, uncertainty still exists in the procedural moves a defense lawyer may take in representing an insurance company in an action against a known uninsured motorist or an unknown John Doe. The decisions of the past two years, together with some excellent Law Review articles, have done much to clarify the inherent obscurities of the statute as it was originally written and later amended.

A good deal, however, remains to be decided in respect to the pleadings that may or may not be filed and defenses raised, together with the all important question as to the time various defenses are to be raised.

In order to determine whether or not a certain pleading or defense should be filed, and when it should be filed, it is essential to analyze the intrinsic nature of the action.

Perhaps the most significant determination the Virginia Supreme Court of Appeals has made during the last two years is to classify definitely the original action against John Doe *or* the known uninsured motorist as one *ex delicto* and not *ex contractu.* It is this very distinction that has prompted this article.

The line of cases to be later analyzed has refused to grant the insurance company relief in the tort action when the defenses relied upon by the company are of a contractual nature and relate to the uninsured motorist endorsement on the policy and not to the tort.

In *State Farm Mut. Auto Ins. Co. v. Duncan*[1] the court held that serving upon the company a copy of the process as required by section 38.1-381(e) (1) was a prerequisite to maintaining the action against the insurance company, and further that the copy of process had to be served in the manner prescribed by the statute.[2] It is significant that the action was against the insurance company on the endorsement, after the judgment had been obtained by Duncan against the unin-

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[1]203 Va. 440, 125 S.E.2d 154 (1962).

[2]203 Va. at 445, 125 S.E.2d at 158.

sured defendant. The Court held that the insurance company had not waived its right to have process served on it in the manner prescribed by law, even though it had engaged in extensive negotiations with the plaintiff. This was an action arising *ex contractu* to recover against the insurance company on its endorsement and therefore this statutory contractual defense could be interposed by the company.

In the subsequent case of *John Doe v. Brown*[3] the unknown uninsured motorist was sued as John Doe and service was made on the company in accordance with the statute.[4] The company filed a demurrer and moved the court for a summary judgment on the principal ground that no report of the accident had been made to the insurance company according to the provisions of the statute[5] and that there was no contact between the John Doe vehicle and the insured vehicle. The court held that the lower court ruled correctly in not permitting these defenses, reasoning that this was purely an *ex delicto* action against John Doe and therefore these policy defenses could not be interposed. It pointed out that the statute contains no provision requiring contact between the two vehicles. In the next sentence[6] the court said that the suit was not against the insurance company to recover on the endorsement, which endorsement required contact. If the insurance company had a provision in its endorsement requiring contact between the two vehicles, then presumably this provision would be in conflict with the uninsured motorist statute, although the case did not so hold. As regards the report required by the statute, the court found the giving of such to be necessary only in order for the insured to recover under the endorsement on the policy. Therefore, neither defense was timely raised in the tort action. Of course, the court expressed no opinion as to whether the defenses would be valid in a later action on the policy.

However, in *Mangus v. John Doe*,[7] the insurance company, having been served according to the statute, filed pleadings in its own name, and in the name of John Doe, in the form of a joint motion to dismiss the motion for judgment, on the ground that the person causing the injury was not unknown within the purview of the uninsured motorist statute. The court accepted this defense as being properly before it, but decided the case adversely to the company, reasoning that a requirement of due diligence to ascertain the identity of the

[3]203 Va. 508, 125 S.E.2d 159 (1962).
[4]Va. Code Ann. § 38.1-381(e)(1) (Supp. 1962).
[5]Va. Code Ann. § 38.1-381(d) (Supp. 1962).
[6]203 Va. at 516, 125 S.E.2d at 165.
[7]203 Va. 518, 125 S.E.2d 166 (1962).

unknown motorist could not be found in that statute. The court's reasoning must be limited to a set of facts where the injured person had no knowledge of his injury and therefore it was not necessary for him to inquire as to the identity of the unknown motorist.

Again, in *John Doe v. Faulkner*,[8] the defense as to whether or not John Doe was a person incapable of testifying, as defined in section 8-286 of the Code,[9] was considered as being properly before the court. The court, however, considered John Doe to be a person merely unavailable to testify, rather than incapable of doing so. Hence, the insurance company suffered yet another reversal.

The final case decided at the 1962 term on the question of the uninsured motorist law is *Hodgson v. John Doe.*[10] An accident occurred inTennessee as the result of a no-contact incident with another vehicle. The policy, issued in Virginia, contained the standard endorsement required by the Virginia statute. An action was instituted against John Doe in accordance with the provisions of the Code and service made on Nationwide Mutual Insurance Company by delivering a copy of the motion on its registered agent in Lynchburg. The defendant then filed a plea in abatement challenging the venue of the action and also a demurrer on the ground that the motion for judgment did not allege that the accident was reported as required by section 38.1-381(d). As was to be expected the court had no difficulty in disposing of the demurrer in respect to reporting the accident, ruling as previously, that this was not an action on the policy, but merely an action to establish legal liability against John Doe. However, in ruling on the plea in abatement, the court, after discussing the point as to whether or not the plea provided a better writ, proceeded to reverse the trial court which had sustained the plea in abatement. The reversal was grounded on the fact that the plea in abatement did not negative every ground of venue and did not give the plaintiff a better writ. In arriving at this conclusion, the court said: [11]

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[8]203 Va. 522, 125 S.E.2d 169 (1962).

[9]Va. Code Ann. § 8-286 (Repl. Vol. 1957) provides:

> In an action or suit by or against a person who, from any cause, is incapable of testifying, or by or against the committee, trustee, executor, administrator, heir, or other representative of the person so incapable of testifying, no judgment or decree shall be rendered in favor of an adverse or interested party founded on his uncorroborated testimony; and in any such action or suit, if such adverse party testifies, all entries, memoranda, and declarations by the party so incapable of testifying made while he was capable, relevant to the matter in issue, may be received as evidence.

[10]203 Va. 938, 128 S.E.2d 444 (1962).

[11]Id. at 943, 128 S.E.2d at 447.

> Since John Doe is a fictitious person and has no place of abode apart from the insurance company, and since notice of the action must be served on the insurance company which defends the action in the name of John Doe, it may be reasonably concluded, for the purpose of venue, that the action may be treated as being against the real defendant, the insurance company, and thus permit the plaintiff to have the protection for which he has paid. We hold, therefore, that the venue for the John Doe action, which is not specifically fixed by the uninsured motorist law, is to be determined under the general venue statutes as if the action against John Doe were against the insurance company itself.

Thus, it seems that after a series of decisions firmly distinguishing between a tort action against John Doe and a contract action on the endorsement, the *Hodgson* decision has failed to pursue this distinction to its logical end. Justice Whittle, in his dissenting opinion, was quick to point this out, stating that this was an action purely in tort and against the unknown uninsured motorist, John Doe, and thus the venue should be laid accordingly. In his opinion the venue should be limited to the place where the accident occurred, namely where the cause of action arose. He reasoned that, since John Doe was unknown his residence too was unknown, and, further, that since the insurer was not technically a party defendant, the only proper venue was where the cause of action arose. He points out that there may be many witnesses willing to testify on behalf of John Doe. If the accident happens in Alaska, but the insured was covered by a policy containing the Virginia uninsured motorist endorsement, the action could be brought in Virginia, requiring the insurance company, filing on behalf of John Doe, to make investigation in Alaska and bring witnesses from that far State to testify on behalf of John Doe in the Virginia trial. If the distinction between tort and contract action is to be maintained, this dissent is well taken.

Venue in Virginia is fixed by the statutes,[12] and these statutes[13] must be followed in respect to John Doe as with any other defendant. The court stated that since the venue of an action against John Doe is not specifically fixed by the uninsured motorist law, venue is to be determined under the general venue statutes "as if the action against John Doe were against the insurance company itself."[14] The venue statutes do fix the venue when John Doe is a defendant, as they do for every other party litigant. The fact that John Doe is unknown and has

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[12]Vrginia & S.W. Ry. v. Hollingsworth, 107 Va. 359, 58 S.E. 572 (1907).
[13]Va. Code Ann. §§ 8-38, 8-39 (Repl. Vol. 1957).
[14]203 Va. at 943, 128 S.E.2d at 447.

no residence merely negates one permissible basis of venue, without changing the applicability of the venue statute to him. If, in creation of this legal fiction, John Doe, he is found to be deficient of a residence, then he must be sued where the cause of action arose. The court should not provide a residence for him by *fiat.*

The insurance company is not a defendant in the action against John Doe. It is merely served as if it were one. The uninsured motorist law imposes a considerable contractual burden upon the company, thought by some to be without adequate consideration, and it should be strictly construed in determining whether or not the company is an actual defendant, or whether it merely answers in the name of John Doe or the known uninsured motorist. If it is an actual defendant, then the prior holdings of the court excluding the policy or contractual defenses, are not well founded. If it is not an actual defendant, then venue should not be determined by reference to its residence.

The majority decision in this *Hodgson* case, although not explicit on the point, seems to speak of venue in terms of contract, venue being where the contract is made or where the breach occurs.[15] Again, in deciding venue in this way the court is obscuring the distinction so carefully made in the prior *Brown* and *Mangus* cases.

The final case in point so far reported is *Rodgers v. Danko.*[16] Danko filed suit against Rodgers, a known uninsured, and John Doe, an unknown uninsured motorist. The insurance company filed a plea in abatement and a motion to quash process in respect to both defendants alleging that its policy covering the car was issued in New York, which policy provided that the uninsured motorist coverage was limited to accidents occurring in New York.[17] The court sidestepped the policy issues and again returned to the firm distinction between tort and contract, citing the *Brown* case to the effect that the issue being one of contract was not properly before it, and so it would not consider the question of coverage at this stage of the litigation. The court reasserted, however, that such *ex contractu* defenses might be later interposed in an action on the policy.

This case is highly significant in the final determination of the nature of actions under the Virginia statute. It will be noted in this case that a known uninsured was sued with John Doe, an unknown uninsured, as a joint tortfeasor. The court, however, made no distinction

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[15]Big Seam Coal Corp. v. Atlantic Coast Line R.R., 196 Va. 590, 85 S.E.2d 239 (1955) interpreting Va. Code Ann. § 8-39 (Repl. Vol. 1957).

[16]204 Va. 140, 129 S.E.2d 828 (1963).

[17]Id. at 141, 129 S.E.2d at 829.

between the two in ruling that a policy or contractual defense could not be considered in the purely *ex delicto* action.

Even though there has been some digression by the *Hodgson* case from the main line of decisions, and, as will be seen in the *Rodgers* case, it must be accepted that the Virginia Supreme Court of Appeals is going to continue to draw a hard and fast distinction between contract and tort in actions both against John Doe *and* the known uninsured motorist. Accepting that this distinction is valid, the practicing defense lawyer is faced with numerous problems concerning his pleadings. The first of these problems will be discussed and termed thusly:—

When Does a Defense Sound in Tort and When in Contract?

Certainly any provision in the endorsement or policy which does not appear in the uninsured motorist statute must be deemed a pure policy defense and precluded from being raised in an action in tort against John Doe or the known uninsured motorist.

Now let us consider provisions which may or may not be contained in the policy but are in the statute itself. May these then be interposed as defenses in a tort action? It seems clear that if the statutory provision predicates *the right* of the insured to recover *on his endorsement* upon the insured's complying with certain requirements, then this too will be deemed a policy defense. In the *Brown* case the court found that the statutory requirement of notice ran to the *ability* or right of the insured to recover upon the endorsement since the statute contains the words "in order for the insured to recover under the endorsement [the insured] shall report the accident as required by § 46.1-400."[18] Similarly, the action against a known uninsured motorist or John Doe must be initiated by complying with the statutory provisions of service[19] if the insured intends to rely on the coverage provided by paragraph (b) of the statute.[20] Again the reference to reliance on the endorsement makes this a contractual defense which may not be raised in the tort action.

The court, in the *Brown* case, in deciding whether contact between the John Doe vehicle and the insured vehicle was necessary, said that since contact was not required by the statute, it must be a policy de-

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[18]203 Va. at 515, 125 S.E.2d at 164, referring to Va. Code Ann. § 38.1-381(d) (Supp. 1962).

[19]Va. Code Ann. § 38.1-381(e)(1) (Supp. 1962).

[20]Va. Code Ann. § 38.1-381(b) (Supp. 1962). Paragraph of statute requiring uninsured mortorist endorsement.

fense. The court did not say whether this provision of contact in the policy would be contrary to the dictates of the statute. To what extent an insurance company may insert provisions in its policy not contained in the statute must be determined by litigation as the points in question arise. Where the uninsured motorist statute is silent on the requirements of contact, does this necessarily preclude the company from inserting provisions in its endorsement requiring contact? It is thought that the court would find that such a provision written in the policy by the insurance company would be in conflict with the statute and thus void.

When the statute, however, creates the right of the insured to sue an uninsured unknown motorist and bases this right on certain statutory definitions of what constitutes an uninsured or unknown motorist, then it is proper for the insurance company to question in the tort action whether the defendant falls within the statutory definitions so as to give the plaintiff the bare right to sue. Accordingly, the court in the *Mangus* case treated the question of whether the defendant was "unknown" within the meaning of the statute to be properly before it in the tort action, rather than being a policy defense, to be raised in a later contract action.

The court said that due diligence to ascertain the identity of the unknown motorist was not a requirement of the statute, but pointed out that the statute simply stated that if the owner or operator is "unknown" he shall be deemed uninsured. It further said that no qualifications are placed on the commonly accepted meaning of the word "unknown."[21] Due diligence not being specifically required by the statute, the court did not require its exercise, but the court did use the disquieting words that "under the circumstances there was no reason for him to obtain the name and address of the operator,"[22] the circumstances being that the insured did not know that he had been injured. This case may be qualified later by imposing the duty of due diligence on the insured if he *knows* he has been injured.[23]

In the *Faulkner* case, the court considered that the evidentiary character of John Doe's ability to testify was properly before it as a statutory defense in a tort action and proceeded to rule that the word "incapable," as used in the dead man statute, is not synonymous with "unavailable," which is the word used to characterize John Doe.

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[21]203Va. 518 at 520, 125 S.E.2d 166 at 168.
[22]Ibid.
[23]48 Va. L. Rev. 1177 at 1191 (1962).

By the above it is seen that these purely statutory defenses, as opposed to statutory defenses relating to the endorsement, are permissible in a tort action.

A good deal of difficulty arises, however, when one considers the juxtaposition of the two parties involved in the *Rodgers* case. The plaintiff sued a known uninsured motorist and John Doe, an unknown uninsured. The motion to quash filed by the insurance company in respect to both was dismissed by the trial court and not considered on appeal. Again, as in the *Hodgson* case, the court seems to have failed to distinguish between what is tort and what is contract, or as to what is a permissible statutory defense in a tort action, and what is a statutory defense relating to the endorsement or contract. There is a great difference between the legal character of a known uninsured and John Doe. It does not require a statute to give a plaintiff a right to sue a known uninsured. While the absence of subsequent reliance on the uninsured motorist endorsement might render this type of suit somewhat pyrhhic, such suits did occur long before the uninsured motorist statute was adopted. On the other hand, the plaintiff's right to sue John Doe is based on the right given to him by the statute.[24] The motion to quash in the *Rodgers* case stated that the policy was issued in New York by the Aetna Company. The facts do not show whether the vehicle to which the policy applied was principally garaged or used in this State, so as to make the Virginia statute applicable.[25] Certainly we may take judicial notice that Aetna is a licensed insurer in this State, and so could have issued the policy under the statute.[26] If the policy was issued in New York, and the vehicle was not principally garaged or used in Virginia, then the provisions of the subsequent parts of the statute relating to the uninsured motorist endorsement and the creation of John Doe are not applicable.[27] If the statute does not apply, the plaintiff has no statutory right to sue John Doe, an unknown uninsured motorist. It is submitted that the defense offered in respect to John Doe is an entirely permissible statutory defense in a tort action and its character has no reference or relationship to the contractual obligation of the endorsement or policy. There is

[24]Va. Code Ann. § 38.1-381(e) (Supp. 1962).

[25]Va. Code Ann. § 38.1-381(a) (Supp. 1962).

[26]Ibid.

[27]Id. § 38.1-381(b). This subsection in part provides that no such policy or contract shall be *so issued or delivered* unless it contains the uninsured motorist endorsement. This therefore automatically writes into any policy so issued or delivered the required uninsured motorist endorsement. For the endorsement to be written in, however, the policy must be issued in Virginia or the vehicle to which it applies principally garaged in Virginia as provided for in paragraph (a).

no distinction between this defense and the statutory defenses offered in the *Mangus* and *Faulkner* cases in respect to statutory definitions. If the plaintiff had no statutory right to sue even in tort then there is no tort action in which he may obtain a judgment. In respect to the known uninsured motorist, however, the motion to quash falls under the heading of the statutory contractual defense as set forth in the second paragraph of this section. The *Rodgers* case is short and works a summary dismissal of the company's defenses. It will, in the opinion of the writer, have far-reaching effects, for it has rendered a permissible defense in tort available only in a later contract action, thus creating for the company a danger of waiver if there has been an omission to present such a tort defense in the original action, in the event of subsequent modification of the *Rodgers* holding. The court's decision in this case as to the known uninsured motorist must be conceded to be well taken, but in respect to John Doe it again constitutes, like the *Hodgson* case, a deviation from the carefully drawn lines of the *Brown, Mangus,* and *Faulkner* cases.

In the light of these recent cases the defenses *available* therefore may be summarized as follows:— (1) defenses on the merits in tort; (2) statutory defenses permissible in tort actions; (3) statutory defenses only permissible in a contract action; and (4) pure policy defenses only permissible in a contract action.

If the available defenses may be so categorized, it should follow that since contract defenses are not available in a tort action the omission of such defenses, when answering in tort, does not constitute a waiver by the insurance company, so that it may still rely on these contract defenses in a subsequent action on the policy.

Where both a statutory defense that is permissible in the tort action, and a defense on the merits are available, a critical question of waiver arises if the defense lawyer, either through inadvertence or by hoping to rely upon it in a later action, omits to interpose the permissible statutory defense in his tort answer.

If he could have pleaded this statutory defense in tort, but omitted to do so, is the company precluded from relying on the same in a subsequent action in contract on the policy? It is submitted that had the defense attorneys in the *Mangus* and *Faulkner* cases merely filed defenses on the merits in answer to the tort action and omitted to raise the statutory defenses of whether or not the defendant was truly unknown or whether he was incapable of testifying, the company would be precluded from relying on these defenses in a subsequent action on the policy. In rendering a judgment against John Doe, the

court has surely decided that he was John Doe and that he was unknown. As is seen, however, from the previous comments in the *Rodgers* case, the court itself is not altogether in accord with the view presented in this article that there is such a clear line between statutory defenses in tort and statutory defenses in contract, making this problem of waiver more complex.

How Should the Suit Against a Known Uninsured or John Doe be Defended?

In view of the preceding, how then should a defense lawyer representing the insurance company defend the suit instituted under the Virginia statute? The statute gives the company, after having been duly served with a copy of the motion for judgment, a right to answer in its own name, in the name of the uninsured motorist, known or unknown, or in the name of both.[28] In order that the defense lawyer may freely move around within the framework of his pleadings and to insure that no waiver of defenses or rights has been inadvertently given, the pleadings which are filed and their contents must be a subject of very careful study.

Logically, the defenses upon the merits of the case must first be considered. Should these be filed in the name of the uninsured motorist, known or unknown, in the name of the company, or in the name of both? Presumably one of the reasons for permitting this type of dual answer is to obviate the danger of the jury's realizing that an insurance company, rather than an individual, is responsible. The Virginia Supreme Court of Appeals has stated categorically, however, on two recent occasions that it is error for the trial court to allow the pleadings to go to the jury, thus informing them that an insurance company is involved.[29] The reason behind this statute which authorizes dual pleadings has been mooted. If the jury cannot be so informed, it is submitted that no pleadings at all should be filed in the name of John Doe or the known uninsured motorist, but pleadings should be filed solely in the name of the insurance company.

The exercise of this procedural choice, permitted by the statute, should not present a danger of a default judgment running against John Doe or the known uninsured, for it is submitted that whether or not an answer is filed in the name of the insurance company alone or in the name of John Doe or the known uninsured motorist, it would

[28]Va. Code Ann. § 38.1-381(e)(1) (Supp. 1962).

[29]John Doe v. Brown, 203 Va. 508, 516, 125 S.E.2d 159, 165 (1962); Gilliand v. Singleton, 204 Va. 115, 129 S.E.2d 641 (1963).

successfully join issue on the motion for judgment. Certainly, where an issue of law or fact is properly raised by an answer or other pleading *of the defendant* a judgment by default cannot be entered against the defendant.[30] The statute in giving the insurance company the right to file in its own name or in the name of the owner or operator of the uninsured motor vehicle must surely create a species of privity joining the issue even though the company is not technically the named defendant.

The pleadings filed in the name of the company in this tort action should contain defenses as to the merits, including a possible plea of contributory negligence, and the statutory defenses allowable in the tort action as referred to above.

Answering solely in the company's name in this manner gives the defense lawyer a good deal more freedom in any possible settlement of the case prior to litigation. It may well be, and indeed is usually the case, that the plaintiff is willing to settle his claim against the company under the uninsured motorist endorsement of his policy, but, in settling this claim, he would not be willing to relinguish his claim against John Doe or the known uninsured motorist in the hopes that at some future date a judgment against either of them might become collectible. If the company has filed pleadings in the name of John Doe or the known uninsured motorist, it is faced with the procedural and possibly ethical problems of withdrawing from the defense of John Doe or the known uninsured motorist in whose name it has filed pleadings and for whom it has nominally appeared by counsel.

It will also be remembered that the company is subrogated to the rights of its insured against John Doe or the known uninsured motorist to the extent of any payments made under the endorsement on its policy.[31]

If pleadings are filed by the company's counsel in the name of John Doe or the known uninsured motorist and counsel is later called upon to assert the company's subrogation rights, he finds himself in the exteremely awkward position of proceeding against the uninsured motorist for whom he has previously appeared as counsel in the same matter.

While the courts have given short shrift to John Doe and known uninsured motorists, denying to them, it seems, most forms of con-

[30]Dillard v. Thornton, 29 Gratt. (70 Va.) 392 (1877).
[31]Va. Code Ann § 38.1-381(f) (Supp. 1962).

stitutional due process,[32] they should not be thrown to the wolves. It is entirely possible that John Doe or the known uninsured motorist purposely omitted to file pleadings in reliance on the fact that the company had already filed a defense. If the company files pleadings solely in its own name, this problem is obviated to some extent.

Certainly, any order reciting pre-trial settlement, entered by the court *during term* and not in vacation, would be notice to John Doe or the known uninsured, who are properly before the court under the statute.[33] It is submitted, however, in the interest of caution that, even when pleadings are filed solely in the name of the company, any order entered settling the company's liability under the uninsured motorist endorsement of its policy and permitting its counsel to withdraw from the case, should still recite a granting of leave to John Doe or the known uninsured motorist of a further twenty-one days to file such pleadings as he may be advised, for it is not known to what extent John Doe or the known uninsured motorist has relied on the company's pleadings so as to refrain from answering.

With the defense on the merits so filed and the permissible statutory defenses raised, there can be no danger of the company's waiving any of its rights, since all contractual defenses may be relied upon in a later suit on the policy. Thus, the four possible forms of defenses have been accounted for.

From a defense point of view, it is, of course, most desirable to have matters of coverage decided prior to any matters of liability, so that it may withdraw from the action if it is adjudicated that there is no contractual responsibility on the policy the company has issued. It is seen by the decisions handed down by the Virginia court during the past year that no manner of pleadings, whether by demurrer, special plea, motion to dismiss, or summary judgment, can raise a contractual defense in a tort action.

The court in the *Rodgers* case in refusing to consider what it called a contract defense said that this may be adjudicated by an action on the policy or by a motion for a declaratory judgment.[34] Presumably, it was referring to a declaratory judgment after the tort action had decided the question of liability.

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[32]See comments in John Doe v. Brown, 203 Va. 508, 512, 125 S.E.2d 159, 162 (1962).

[33]Va. Code Ann. § 8-371 (Repl. Vol. 1957). This section provides that in any action or proceeding at law the court may by consent of the parties enter judgments or orders in vacation as he might in term. Should the order be entered in term, however, no such consent of both parties is necessary. If the judgment is correctly entered it would constitute, therefore, notice to the litigants.

[34]204 Va. at 143, 129 S.E.2d at 830.

No decision has yet been handed down in Virginia concerning the permissibility of filing for declaratory judgment and asking for the same to be adjudicated *before* the tort action has been decided. It is possible that such an action could be instituted by the company either before a suit, immediately upon the company's receiving a demand, or after a suit has been brought against John Doe or the known uninsured motorist. Whether the court would draw any distinction between the nature of the declaratory action in respect to John Doe and the known uninsured motorist remains to be seen. These possibilities raise problems outside the scope of this article. It should be remembered, however, that the Virginia court has gone to great lengths to prevent the tort action from being defeated and will probably pursue this doctrine into the field of declaratory actions.

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