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Virginia Takes New Approach To The Uninsured Motorist

STATUTORY COMMENT

VIRGINIA TAKES NEW APPROACH TO THE UNINSURED MOTORIST

The Virginia General Assembly at its 1958 session came up with a new plan for dealing with the uninsured motorist and his traffic victims.[1] Although the Virginia Advisory Legislative Council had recommended the adoption of the New Jersey Plan of an Unsatisfied Claim and Judgment Fund,[2] this recommendation was rejected in favor of a plan based on use of the uninsured Motorist Rider, which has given optional coverage under the ordinary liability policy.[3]

The first state to take any action whatsoever was Massachusetts, which adopted a compulsory liability plan in 1925.[4] Similar legislation became effective in New York in 1957[5] and in North Carolina in 1958.[6] This type of plan eliminates the problem of the resident uninsured motorist, but not that of the nonresident uninsured driver. Nonresidents could be reached only with costly and unpopular points of entry check stations. A second objection to compulsory liability insurance is that it gives no protection to the victim of a hit and run driver.

Another approach was developed in New Jersey which utilizes an Unsatisfied Claim and Judgment Fund.[7] This plan provides coverage

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[1]Va. Code Ann. § 38.1-381(b) (Supp. 1958). For a full understanding of the Virginia Plan, the following Code sections must be considered and analyzed: 12-65; 12-66; 12-67; 38.1-381; 46.1-167.1; 46.1-167.2; 46.1-167.3; 46.1-167.4; 46.1-167.5; 46.1-167.6.

[2]The problem of the Irresponsible Motorist—A report of the Virginia Advisory Legislative Council to the Governor and The General Assembly of Virginia 1957. The New Jersey Plan is cited and discussed in the text at n. 7 infra.

[3]For example, see The Travellers Insurance and Indemnity Company's Standard Family Protection Coverage Endorsement 4093:

"I. Damages for Bodily Injury Caused by Uninsured Automobiles

"To pay all sums which the insured or his legal representative shall be legally entitled to recover as damages from the owner or operator of an uninsured automobile because of bodily injury, sickness or disease, including death resulting therefrom, hereinafter called 'bodily injury', sustained by the insured, caused by accident and arising out of the ownership, maintenance or use of such uninsured automobile; provided, for the purposes of this endorsement, determination as to whether the insured or such representative is legally entitled to recover such damages, and if so the amount thereof, shall be made by agreement between the insured or such representative and the company or, if they fail to agree, by arbitration."

[4]Mass. Gen. Laws ch. 90, § 1A (1954).

[5]N.Y. Vehicle and Traffic Law § 93 through 93-K.

[6]N.C. Gen. Stat. §§ 20-309 through 20-319 (Supp. 1957).

[7]N.J. Stat. Ann. §§ 39:6-61 through 39:6-91 (Supp. 1957).

in the two instances that compulsory liability insurance does not reach.[8] New Jersey assesses a special registration fee that is earmarked for the fund;[9] if the automobile is uninsured, the fee is higher.[10] Any deficiency in the fund is made up from assessments against the insurers doing business in New Jersey on the basis of their premium income from such business within the state.[11] Each year's fee is determined on the past year's experience and subject to maximum limitations.[12] The fund so created is held in trust to provide a source from which collision victims can collect on judgments which otherwise would not be satisfied.[13]

The Virginia Plan requires every policy of bodily injury or property damage liability insurance issued or delivered in the Commonwealth to contain a clause wherein the coverage under the policy is extended to protect the insured to the extent of legal damages suffered from a wrongdoer who is an uninsured motorist and not financially responsible.[14] This fund is subject to the control of the State Corporation Commission.[15] The Commission will authorize annual payments from the fund to the insurers doing business in Virginia in the proportion to their premium income from the new mandatory clause.[16] In this way it is hoped that uninsured motorists will be required to pay substantially all of the premium increase imposed on insured drivers due to the increased risks covered by the mandatory clause required by the statute.[17] A further purpose, expressly stated in the act, is to encourage motorists to secure liability insurance.

A peculiar situation will be created by application of the Virginia Plan. By the very nature of the Plan the insurer would seem to have an adverse interest to that of the insured whenever the latter is

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[8]Id. §§ 39:6-78 through 39:6-81.
[9]Id. § 39:6-63(a).
[10]Id. § 39:6-63(b).
[11]Id. § 39:6-63(c).
[12]Id. § 39:6-63 (d).
[13]Id. § 39:6-88.
[14]Va. Code Ann. § 38.1-381(b) (Supp. 1958): "Nor shall any such policy or contract be so issued or delivered unless it contains an endorsement or provision undertaking to pay the insured all sums which he shall be legally entitled to recover as damages from the owner or operator of an uninsured motor vehicle, within limits which shall be no less than the requirements of § 46-455, as amended from time to time, of the Code herein. Such endorsement or provisions shall also provide for no less than five thousand dollars coverage for injury to or destruction of the property of the insured in any one accident but may provide an exclusion of the first two hundred dollars of such loss or damage." See also n. 1 supra.
[15]Id. § 12-65.
[16]Id. § 12-66.
[17]Ibid.

damaged by an uninsured motorist.[18] Although the insurer is subrogated to the rights of the insured against the uninsured motorist to the extent the insurer has paid the insured,[19] this will not eliminate the conflict of interest between the insurer and the insured since these subrogation rights will in most cases prove worthless under the Virginia Plan. This is true because the insurer seems to be liable to the insured under the new clause only when the uninsured motorist has been proved to be financially irresponsible. Thus, when an uninsured driver, who is financially irresponsible, is involved in a collision with an insured motorist, the insurer of the latter would be interested in a finding of no liability in favor of the uninsured driver, thereby relieving itself of its obligation to the insured motorist under the mandatory clause of the policy.

Other problems may also present themselves. The statute expressly states that the insured, in order to bring himself within the mandatory clause and establish the liability of his insurer, may not be required to do more than to establish the legal liability of the uninsured motorist,[20] and further provides that the right of the insured party to the collision to employ his own counsel and pursue whatever legal remedies he may have cannot be restricted by the insurance contract itself;[21] therefore, a question arises as to the extent to which the application of the standard cooperation and settlement clauses in such policies is limited by the Virginia statute. Another interesting problem will arise when an insured motorist is damaged by another driver who is also seemingly protected by insurance, but whose insurance carrier has disclaimed coverage under the policy. Under the Virginia statute, Driver, whose Carrier has disclaimed, would be classified as an uninsured driver for the purposes of the statute.[22] The position of Motorist's Insurer would seem to be anomalous. This Insurer would be benefited by a finding of no liability in favor of Driver. However, if Motorist is successful in obtaining a judgment establishing the legal liability of Driver, certainly Insurer would have an interest in Driver's subsequent action against Carrier to establish the legal liability of the latter under the policy in question. This is so because if Driver is successful in this second action against Carrier,

[18]The definitions of the words "Insured," "Insured Motor Vehicle" and "Uninsured Motor Vehicle" are set out in Va. Code Ann. §§ 46.1-167.3 and 38.1-381 (g) (Supp. 1958).

[19]Id. § 38.1-381(f).

[20]Id. § 38.1-381(g).

[21]Ibid.

[22]Ibid.

then Insurer will not have to pay Motorist under the uninsured motorist clause of the policy. Thus, the action by Driver against Carrier also indirectly establishes the legal liability of Insurer to Motorist. How much participation will be allowed to Insurer in this second action by Driver against Carrier remains to be seen. Nevertheless, it is certainly clear that both insurance companies, Insurer and Carrier, would benefit by a finding of no liability in favor of Driver in the original action brought by Motorist.

Similarly, when an insured motorist is damaged by any vehicle whose owner or operator is not known, The Virginia Plan provides that the insured's action be styled against "John Doe" and process be served on the damaged motorist's insurer as if the latter were a party defendant.[23] Thereafter, the insurer may defend the action and take whatever action the law would have permitted "John Doe." Moreover, the statute expressly states that a judgment against "John Doe," which is thereafter paid by the insurer, is not a bar to a second action by the insured against "John Doe," whenever his identity becomes known.[24] As the insurer is subrogated to the extent it has paid the insured following the original action, the first dollars recovered by the insured in the second action up to the amount he has been previously paid will belong to the insurer.[25] The statute does not appear to contemplate, at least in express language, that the insurer will have a similar right to sue the now known uninsured motorist. Has the statute cut off the subrogation rights of the insurer to the extent he has paid, or may he come into the second action by the insured as a party plaintiff? The last approach will probably be taken by the courts since the statute does not provide for subrogation and because independent suits against the wrongdoer by both insured and insurer would result in the splitting of a cause of action. Any other approach would make the right of subrogation given by the statute meaningless. The course of action suggested here would create an ethics problem, nevertheless, if the same attorneys who defended the first action against "John Doe" again represented the insurer in this second suit.[26] Similarly, the correlative rights of the three

[23]Id. 38.1-381(e).
[24]Id. 38.1-381(f).
[25]Ibid.
[26]See the Canons of Professional Ethics:
"6. Adverse Influences and Conflicting Interests.
It is the duty of a lawyer at the time of retainer to disclose to the client all the circumstances of his relations to the parties, and any interest in or connection with the controversy, which might influence the client in the selection of counsel.
It is unprofessional to represent conflicting interests, except by express consent

parties involved against each other, when patently negligent cases are made by the insurer on behalf of "John Doe" or by the insured in the second action against the now known wrongdoer, may well result in future litigation in order to establish what duties each owes to the other, if any.

It seems relatively safe to predict that much future litigation can be anticipated in order to set out precisely what this statute does and does not require or achieve.

Virginia also allows separate suits for property damages and personal injuries arising out of the same accident and does not condemn this to be the splitting of a cause of action.[27] But the majority of jurisdictions are contrary and this consideration would have to be recognized by other legislatures which might adopt a plan in accord with the one promulgated by the Virginia General Assembly.[28]

A more far-reaching plan than any of these actually adopted by the states has been advanced by Leon Green in his book, *Traffic Victims—Tort Law and Insurance*.[29] Professor Green in this book undertakes "to demonstrate the obsolescence and futility of common

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of all concerned given after a full disclosure of the facts. Within the meaning of this canon, a lawyer represents conflicting interests when, in behalf of one client, it is his duty to contend for that which duty to another client requires him to oppose.

The obligation to represent the client with undivided fidelity and not to divulge his secrects or confidences forbids also the subsequent acceptance of retainers or employment from others in matters adversely affecting any interest of the client with respect to which confidence has been reposed."

"37. Confidences of a Client.

It is the duty of a lawyer to preserve his client's confidences. This duty outlasts the lawyer's employment, and extends as well to his employees; and neither of them should accept employment which involves or may involve the disclosure or use of these confidences, either for the private advantage of the lawyer or his employees or to the disadvantage of the client, without his knowledge and consent, and even though there are other available sources of such information. A lawyer should not continue employment when he discovers that this obligation prevents the performance of his full duty to his former or to his new client.

If a lawyer is accused by his client, he is not precluded from disclosing the truth in respect to the accusation. The announced intention of a client to commit a crime is not included within the confidences which he is bound to respect. He may properly make such disclosures as may be necessary to prevent the act or protect those against whom it is threatened." See also, 36 A.B.A.J. 733 (1950); Note, 13 U. Chi. L. Rev. 105 (1945); Note, 62 Harv. L. Rev. 104 (1948).

[27]Carter v. Hinkle, 189 Va. 1, 52 S.E.2d 1935 (1949).

[28]See Note, 14 Wash. & Lee L. Rev. 114 at n. 8 (1957). See also, Note 15 Wash. & Lee L. Rev. 316 (1958).

[29]Concerned with the ever increasing traffic accident problem, this short monograph had its origin in two earlier lectures given by the author at the Cincinnati College of Law under the Robert S. Marx Foundation in 1956 and again in their final form at the Northwestern University School of Law under the Julius Rosenthal Foundation in 1958.

law jury trial and liability insurance as a remedy for traffic casualties, and advocates compulsory comprehensive loss insurance as a substitute."[30]

Although finding merit in jury trial and negligence law in what he terms the "simpler activities," Green feels that negligence law in the traffic aspect has become outdated due to the complexity of the factual situation involved in the cases.[31] He turns to Workmen's Compensation legislation to show an analogous need and result, and to establish his present proposal by a parity of reasoning.[32]

Basically, his solution, which admittedly did not originate with him, is compulsory loss insurance as distinguished from compulsory liability insurance.[33] He would provide such loss insurance as an incident of registering an automobile and would continue it for the vehicle's duration.[34] The state Insurance Commission would act in a supervisory capacity over administration, classification of the vehicles for rates, and all other relevant matters.[35] The commission would also have the dual responsibility of providing maximum protection to the public and offering the insurers a fair return.[36] The coverage under this plan would be complete—extending to the vehicle, its owner, operator, occupants and any other vehicles, persons or property injured or suffering damages from collision, fire, theft or any other risk incidental to the operation of a motor vehicle.[37] The ordinary rules of damages would be applicable with the exception that there would be no recovery allowable for pain and suffering.[38] All claims would be paid in full unless the amount of coverage proved insufficient, in which case the claims would be paid proportionately.[39] The truly significant part of the concept is that *the only issues involved would be whether the claimant suffered any injury due to the operation of a motor vehicle, the extent and amount of his damages, and possibly the identity of the vehicle itself.*[40]

Masters would be utilized in order to expedite the cases and to

[31]Green, Traffiic Victims: Tort Law and Insurance 5.
[32]Id. at 64, 80.
[33]Id. at 19, 60, 65, 80.
[34]Id. at 87-95.
[35]Id. at 87.
[36]Id. at 88.
[37]Id. at 88, 95.
[38]Id. at 88.
[39]Ibid.
[40]Ibid.
[40]Id. at 89.

give them more thorough consideration.[41] These masters would not be bound by the ordinary rules of evidence and could call their own witnesses.[42] Moreover, they would have to approve all settlements made between the parties, and if necessary, modify any such agreement prior to submitting it to the court for approval.[43]

This much is certain—the several states are faced with finding some solution to the problems pointed out by Leon Green. His point is a valid one. With 70 million motor vehicles estimated to be operating in 1960, these problems can be expected to become even more acute.[44] While it is doubtful that few legislatures, if any, would take as extreme an approach as suggested by Green—insurance of the vehicle rather than the individual—it is less doubtful that each must take some approach if a remedy is to be found. The Virginia Plan has a practical advantage in that it uses the insurance companies to facilitate carrying it out, rather than assessing them so that the State itself operates the plan as in New Jersey. The Virginia approach is less likely to meet resistance and its adoption may thus be more feasible than other more far-reaching schemes. If it proves to be workable, when clarified by judicial decision, it may become more widespread in the future.

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[41]Id. at 97.
[42]Id. at 90.
[43]Id. at 91.
[44]Id. at 85.