

# William & Mary Law Review

---

Volume 3 (1961-1962)  
Issue 2

Article 2

---

March 1962

## Virginia's Experience with the "Uninsured Motorist" Act

John M. Court

Follow this and additional works at: <https://scholarship.law.wm.edu/wmlr>



Part of the [Insurance Law Commons](#), and the [Transportation Law Commons](#)

---

### Repository Citation

John M. Court, *Virginia's Experience with the "Uninsured Motorist" Act*, 3 Wm. & Mary L. Rev. 237 (1962), <https://scholarship.law.wm.edu/wmlr/vol3/iss2/2>

Copyright c 1962 by the authors. This article is brought to you by the William & Mary Law School Scholarship Repository.

<https://scholarship.law.wm.edu/wmlr>

VIRGINIA'S EXPERIENCE WITH  
THE "UNINSURED MOTORIST ACT"

JOHN M. COURT

## I

## FOREWORD

This discussion is an attempt to illuminate, for the layman as well as students of the Law, the social results and practical operation of a very ingenious legal development in Virginia, namely the Uninsured Motorist Law. The procedural intricacies of this law, the inadequacy of its title and the language in which its related insurance coverage has been defined have generated considerable confusion as to the mechanics and scope of the law. A fuller appreciation of this statute might better have derived from a more felicitous selection of nomenclature, for example had the statute itself been entitled "Highway Security Act", the related coverage called a "self-protection endorsement" and the fees charged described as "penalties". As in the case of the Social Security Act, an immediate and onerous social burden of sizable proportion has been imposed upon the broadest available economic base of related activity despite the disinclination of many participants therein to contribute a fair share.

Your author makes no pretense of expertness. A practising attorney of recent vintage, he has been forced to feel out the numerous facets of this legislation, its method of administration and the legal rationale and commercial practices developed thereunder. These sufficiently aroused his curiosity to examine further into the ramifications of legislative intent and insurance theory. His research has resulted in the article here published. In no sense exhaustive,<sup>1</sup> it undertakes merely to put

<sup>1</sup> For a considerably more technical legal analysis, see Denny, *Uninsured Motorist Coverage in Virginia* 47 VA. L.R. 145 (1961). Some of the ideas there suggested have been confirmed, some rejected by recent court decisions discussed herein.

into appropriate perspective the historical, financial, administrative and judicial aspects of this scheme of legislation. Perhaps thereby its comprehension will be enhanced among our numerous citizens periodically enmeshed in its workings, as insurers or insured, drivers or owners, plaintiffs or defendants, pedestrians or passengers, repairmen or attending physicians. All have something significant at stake and in their own interest each should become aware of the system devised for his respective benefit.

As is frequently the case with recent legislation, a successful expository discussion of the matter cannot be strictly legal in the manner of the best appellate briefs. Precedents are incomplete, language is unfamiliar, and experience, rather than logic, must guide us. Your author, therefore, is more concerned here with the twilight zone of social problems and viable solutions than with the spotlighted legal stage upon which meticulously prepared summaries are presented for professional edification.

## II.

### *History of Development of Related Laws*

Fair consideration of the laws as to uninsured motorists in Virginia must also embrace examination of immediately related statutes in the general scheme of legislation developed in response to the appalling accident rates which accompanied mass migration on the highways. On one side of the problem are the State's legal tools for the regulation of the insurance business. This comprises a long-standing, well-tested, mechanism of administrative law governing the insurance contracts and centralized in the State Corporation Commission. On the other side of the problem is the steadily expanding code of traffic law, technically a form of criminal law, for the policing and licensing of motor vehicles, their operators, owners and users. The center of focus is the field of tort law where the financial responsibility of offenders is of major concern, and much of the income of the legal profession is derived. Each of these three aspects deserves equal emphasis in an effective legal system for the protection of the public on the highways.

The cornerstone of the Virginia scheme for coping with modern traffic as a social problem was laid in 1944 with the

adoption of what was rather awkwardly entitled the "Motor Vehicle Safety Responsibility Act". The said Act was the outgrowth of a study initiated in 1942 by a Commission appointed pursuant to a Joint Resolution of the General Assembly. This "Commission on Automobile Public Liability and Property Damage Insurance in Virginia" comprised two members of the Senate, two of the House, one disinterested layman, a member of the State Corporation Commission, the Director of the Division of Motor Vehicles and a representative of the insurance business. Its report,<sup>2</sup> [Senate Document #8, 1944,] stated:

An extensive and thorough investigation was made in an effort to eliminate or suggest remedies for the following evils:

1. The automobile driver who, while he cannot respond in damages, continues to drive, although he may have been involved in numerous accidents, all of which were caused by his negligence, and who because he is possessed of no property that may be made available to satisfy a judgment for damages, is not even sued.

2. The abnormal number of fatal motor vehicle accidents on the highways of this state [over 1,100 fatalities in 1943].

3. The great number of innocent victims of automobile accidents suffering personal injuries or property damages, sometimes both, who have no opportunity to collect damages for the wrongs they have suffered . . . The proposed Act is essentially a safety measure. The Commission has attempted to avoid placing any additional expense on the careful driver or on the State. Its purpose has been to eliminate the chronically reckless and irresponsible driver from the Highways of the State.

The resultant Act has been periodically amended so as to comprise at this date a comprehensive system<sup>2a</sup> including: (a) the centralized reporting and analysis of accidents, (b) the re-

<sup>2</sup> Va. Senate Document No. 8, 1944.

<sup>2a</sup> VA. CODE ANN. § 46.1-388, 541 (Repl. Vol. 1953).

vocation and suspension of the operators' permits, registration and license plates of reprehensible parties, (c) a "put-up-security or stay-off-the-highway" ultimatum for offenders, (d) a method of allocating dubious risks to specific insurers, and, finally, (e) a comprehensively spelled-out coverage requirement in all automobile liability insurance so as to leave minimum loopholes whereby insurers might escape responsibility for the derelictions of their insured.

Although considerable progress towards improved standards of highway safety was achieved by the State under this legislation, in 1957 the Virginia Advisory Legislative Council addressed to the Governor and the General Assembly another report entitled "The Problem of the Irresponsible Motorist"<sup>3</sup> wherein they advocated substantial further state action. In this report<sup>3a</sup> the Council stated:

In 1944 Virginia adopted the Motor Vehicle Safety Responsibility Act which was designed to keep off the highways of Virginia motorists who have demonstrated financial irresponsibility by failure to satisfy judgments against them resulting from accidents, thus seeking to avoid further losses to innocent persons. Experience under this statute has been excellent as far as it goes. But it does not take care of the victim of the first accident; it does not apply to out-of-state motorists except through reciprocity and it does not help those all too frequent cases in which a completely irresponsible person operates a motor vehicle after his license to do so has been suspended or revoked.

The Council proceeded to outline the two avenues of approach to this problem which had been tried elsewhere in this country, the compulsory system of insurance originating in Massachusetts<sup>4</sup> and the so-called "Unsatisfied Claim and Judgment Fund" plan developed in New Jersey.<sup>5</sup> Of these two

<sup>3</sup> Virginia Advisory Legislative Council Report of November 14, 1957, to Honorable Thomas B. Stanley, Governor of Virginia and the General Assembly of Virginia.

<sup>3a</sup> *Id.* at 5.

<sup>4</sup> MASS. ANN. LAWS Ch. 90, § 34 A-J and Ch. 175 § 113 A-G (1954). See similar provisions N.C. GEN. STAT. §§ 20-309, 319 (1953).

<sup>5</sup> N.J. STAT. ANN. § 39:6-61, 91 (1961). See similar provisions in MD. ANN. CODE Art. 66½ § 150-79 (1957).

methods the Council recommended the latter non-compulsory arrangement, but their proposed bill<sup>6</sup> to put this plan into effect appeared so forbiddingly complex and replete with administrative and judicial ramifications that it was of doubtful efficacy from the victim's standpoint of promptness of recovery and breadth of coverage. To the apparent consternation of substantial insurance interests, the Assembly in its wisdom turned its back on the drafted bill and struck out boldly with a much simpler plan. Their substitute<sup>7</sup> greatly reduced the governmental red tape to be encountered by the victim in his actual recovery of losses suffered in the form of property damage or bodily injury caused by unknown or uninsured operators.

The Members of the Assembly patterned their approach to this thorny dilemma around the existing system already in effective operation as result of the 1944 legislation. The relative importance of fiscal precision and of personal security on the highway were duly considered. The Assembly's solution reasonably emphasized the latter.

Under the Act adopted in 1958, special registration fees were established for all who undertook to license their vehicles in this state without evidence of satisfactory liability insurance or other proof of financial responsibility. In part, the funds derived from this collection were to be used to administer the program called for by the Act; the balance was to be used to defray, in part, the cost to other car registrants of the newly mandatory clause in liability insurance required in the State. The net available after the payment of administrative costs was to be disbursed annually among the insurers in proportion to their net premium income attributed to this particular risk. Rates charged by insurers would be controlled in anticipation of this subsidy in the usual manner by the Corporation Commission upon a showing of actuarial experience. Theoretically, at the outset at least, it was anticipated that the extra license fee contribution of uninsured registrants would substantially pay for the initial risk of loss generated by financially irresponsible motorists. For various reasons this anticipation has proven

<sup>6</sup> Va. Advisory Legislative Council Report Nov. 14, 1957, pp. 12 through 21.

<sup>7</sup> Acts of Assembly, 1958, p. 336, Ch. 282.

ill-founded although the core of actuarial problem may be more statistical than real.

The administrative leverage for the restriction of uninsured operators, upon their becoming party to any "reportable" accident, was strengthened so as to impel all but the most rash and unknowing motorists into the ranks of the insured. It is hardly surprising that the ratio of insured drivers to uninsured grew rapidly when this legislation took effect.<sup>8</sup> An obvious side effect of this tilt to the ratio was that while the "kitty" shrank, the number of claimants and the size of claims grew. As knowledge of the existence of the new resources on tap to injured parties became general, there developed a substantial increase in the cost of underwriting such insurance. This has caused much anguish among the insurers who have returned annually to the State Corporation Commission with pleas for higher rates for the uninsured endorsement.

The initial rate for the added risk, established by the State Corporation Commission, was based on rather conservative estimates and amounted to \$6.00 per car per annum. This proved a great bonanza to the insurance companies so that after eighteen months operation the rate was reduced to \$1.00.<sup>9</sup> During this period the insurers are reported to have had an income of \$7,000,000 in premiums and distributions as against approximately \$350,000 in actual losses from this coverage.<sup>10</sup> The new \$1.00 rate remained in effect approximately two years. Several attempts by the insurers to raise it in the period were rejected by the Commission. Finally however, on January 15, 1962, the rate was raised back to \$3.00.<sup>11</sup> By this time the

---

<sup>8</sup> This statement is based on data furnished the author by the Director of the Bureau of Safety Responsibility, Division of Motor Vehicles, and has been corroborated in consultation with members of the Assembly who have participated in Committee work on this legislative area. Comparative statistics prior to 1 July, 1958 are not available except by estimate. The tables illustrate the situation since the law became effective; see Appendices "C" and "D".

<sup>9</sup> State Corporation Commission, Case No. 14585 (9 November, 1959).

<sup>10</sup> The number of policies issued insured motorists in Virginia at this period was approximately 1,300,000; the distribution made by the SCC totaled approximately \$1,000,000. The data as to losses was presented in hearings on establishment of rates. The discrepancy between actual losses and anticipated losses was due perhaps to the complexity of litigation.

<sup>11</sup> State Corporation Commission, Case No. 15521 (1 December, 1961).

relative number of uninsured registrants had decreased from 38% to 7% of the total registration.<sup>12</sup>

Many complaints have been voiced to legislators about the unfairness of forcing insured motorists to pay for the negligence or improvidence of the uninsured through their insurance premiums. This misconception was widespread. Actually the uninsured driver who paid the extra registration fee acquired nothing but the privilege of driving until he had an accident. He was entirely unprotected in the event of his own injury at the hands of another uninsured and in the event of collision he was subject to subrogation claims for any adverse judgment as well as loss of his license and operator's permit unless he was promptly vindicated.

It is interesting to note that the *only* amendment adopted to the Uninsured Motorist Law at the 1962 session of the General Assembly was a revision in the rate establishment procedure such that in the future the charge for this coverage will not be separately identified in the premium nor in the rate adjustment proceeding before the State Corporation Commission.<sup>13</sup> This is expected to softpedal the complaints of both insurers and insured. Many other revisions were offered but were rejected in favor of the *status quo*. It would appear therefore that a *modus vivendi* has been arrived at. This degree of stabilization having been achieved it appears appropriate at this stage to take note how the law is having its effect.

### III.

#### *Provisions of the Code Related to the Problem of the Uninsured Motorist*

As we noted earlier the Virginia Assembly has consistently rejected the idea of compulsory liability insurance and established instead in 1958 a voluntary system which undertakes to encourage the use of such insurance by a scheme of rewards for those who comply and a scheme of penalties for those who do not. That this approach has had a fair measure of success is

<sup>12</sup> Letter from Honorable E. E. Lane to author, 19 April, 1962.

<sup>13</sup> See Appendix "B" for full text of the Act of March 14, 1962 (Ch. 253 (S249)).



attested by the fact that whereas in 1957 only about 60% of the parties to reportable accidents were insured, by 1961 the ratio had levelled off at about 89%<sup>14</sup>. Out of each eleven uninsured autos involved in accidents reported to the Division of Motor Vehicles in 1961, seven had paid registration fees properly as "uninsured" but four had not.<sup>15</sup> These latter four were, in the expression of the Director of Safety Responsibility, "chiselers" who either had falsely certified their insurance or had allowed their policies to lapse prior to the accident. Out-of-state motorists not subject to the requirement are not included in the above classifications. The author understands these data to have so stabilized over the last two years that the vigor of enforcement cannot be expected to reduce substantially further the ratio of "chiselers".

With this background information let us examine the various provisions of the code which have been enacted to effect this scheme of rewards and penalties, and of obligations and privileges. These provisions fall into four groups as follows:

(a) Those provisions establishing certain mandatory insurance clauses included by statute in all automobile liability insurance issued on vehicles principally garaged or used in the State and prescribing special procedures for recovery of losses resulting from torts involving use of vehicles in this State.

(b) Those provisions dealing with the administration of the registration system to assure enforcement of fee requirements on uninsured motorists *prior* to their involvement in any accident.

(c) Those provisions dealing with the policing of uninsured motorists *after* their involvement in any accident.

(d) Those provisions dealing with the administration of the Uninsured Motorist Fund by the State Corporation Commission and the adjustment of related insurance rates.

<sup>14</sup> See table II in Appendix "D" on Accident data furnished by Division of Motor Vehicles. The 60% figure is an estimate since no actual figures are available prior to the effective date of UML.

<sup>15</sup> See Appendix "C" for detailed data.

Let us begin our discussion of these code provisions with those in group (a) above.

The statute generally identified as the Uninsured Motorist Law is embraced now in the Virginia Code of 1950, as amended, in Title 38.1 "Insurance", Article 4 "Liability Insurance Policies". Section 381 of this title contains, as subparagraph (a), the familiar omnibus clause adopted in 1944 requiring that any liability insurance policy delivered by licensed insurers of this state to the owner of any vehicle principally garaged or used here shall extend coverage under the policy to any operation of the insured vehicle undertaken with the owner's consent, express or implied. The other subparagraphs, (b) through (g) of this code section, are derived from the 1958 Act of Assembly<sup>16</sup> and spell out the protection which must be extended for the recovery of damages incurred by the non-cooperative 10% of the parties to accidents, "uninsured".

Subparagraph (b), the key clause, requires that such policies contain the self-protective feature whereby the insurer undertakes to pay the insured any sum, within specified limits, which said insured may become entitled to recover as result of a civil action against an unknown or uninsured motorist.

Subparagraph (c) defines the term "insured" very broadly so as to include not only the named insured and spouse but relatives of either residing in the same household and anyone using the vehicle, or guest in, the vehicle under the omnibus clause. This subparagraph further defines "uninsured" to include operators without coverage, those denied coverage and the unknown, but excludes the self-insured and the bonded. Importantly also it subjects *recovery* under the endorsement to the terms of the statute.

Subparagraphs (d) and (e)<sup>17</sup> are concerned with John Doe actions against unknown participants in an accident. Pro-

<sup>16</sup> Acts of Assembly 1958, p. 336, Ch. 282, minor amendments were added in 1959 and 1960. Of these the most significant is Acts of Assembly 1962, Ch. 457, § 1(e) (1). For full text see Appendix "A".

<sup>17</sup> Subparagraph e(1) appears to apply to both John Doe actions and actions against known uninsured.

cedures are established whereby insurers are properly put on notice to defend such suits pending identification of the proper defendant and certain privileges are permitted in the defense. This area has proven the most litigated part of the statute from the standpoint of appeals as the subsequent sections of this discussion will disclose.

Subparagraph (f) simply extends the right of subrogation to the insurer wherever he is called upon under the above clauses to pay a judgment claim to his own insured.

Subparagraph (g) prevents the "fine print" of the contract of insurance from defeating the intent of the law: (h) makes a special exception for employers covered by workmen's compensation policies.

We come now to the statutory provisions in the second group, the initial restrictions on uninsured drivers. Title 46.1 "Motor Vehicles" sections 46.1-167.1 to 167.6 set forth the mechanics for establishing the Uninsured Motorist Fund. Section 46.1-167.1 establishes the extra \$10 (total \$20) registration fee for uninsured drivers and authorizes the Commissioner at his discretion to demand a certificate of insurance from applicants who declare themselves to be eligible for the "insured" registration fee of \$10. Section 46.1-167.3 establishes special penalties for those who permit their insurance to lapse and fail to pay the uninsured motorist fee. These penalties include a six month suspension of operator's license and registration certificate. Thereafter upon presentation of the \$20 fee together with a certificate of financial responsibility the Commissioner may restore driving privileges. It should be here noted that there is a distinction between the certificate of insurance and the certificate of financial responsibility. The one assures merely that insurance complying with State requirements was effective as of a given date. The certificate of financial responsibility, however, assures that satisfactory insurance or bond has been established for the *full duration of the registration*. It should be further noted that where suspension is in effect for violation of the statute it may remain effective up to five years if proof of financial responsibility is not forthcoming.

In Section 46.1-167.4 there is provided a revocation of operator's license and an additional penalty of \$75 upon the

operators of uninsured vehicles subject to State registration who have failed to maintain insurance, failed to pay the uninsured motorist fee and subsequently became involved in a reportable collision in this State. This penalty applies regardless whether civil or criminal liability in the accident is proven. The mere fact of the accident and the occurrence of damages trigger the penalty. This fine or fee also applies where resident operators of out-of-state vehicles, not properly insured by State law, become similarly involved in collisions. Section 46.1-167.5 provides further suspension penalties where the additional proof of financial responsibility called for by the section is not forthcoming.

As will be noted the provisions of the code for the control of uninsured vehicles *prior* to any reportable accident in which their operator may be involved, designated as group (b) above, and those applying *after* such an event, designated as group (c) above, tend to overlap. The emphasis in the one case is on the collection of the fees for, and the integrity of, the Uninsured Motorist Fund; the emphasis in the latter situation is on the careful policing of accident-prone operators. The effect of the two groups of penalties is cumulative.

By code provisions 46.1-449, 442, and 443, the group (c) penalties are set forth. Under this part of the Code uninsured motorists who have paid their \$20 uninsured registration fees and who become involved in a reportable accident, regardless of the establishment of any civil or criminal liability on the part of the uninsured operator, are subjected to suspension of operator's license and registration certificate pending the posting of security for *possible* claims based upon the reported accident. Section 46.1-442 provides further suspension penalties against uninsured operators who become defendants with unsatisfied civil judgments of thirty days record. To make this provision effective such judgments are required to be reported to the Division of Motor Vehicles by the Clerk of the Court in which the judgment is rendered. By section 46.1-443 similar penalties are made applicable where out-of-state judgments against Virginia operators remain unsatisfied a similar period and are reported to the Division.

The final group of Code provisions, (d) above, comprise a portion of Title 12 "State Corporation Commission". Sections

12-65, 12-66, and 12-67 govern the administration of the Uninsured Motorist Fund by the State Corporation Commission. By the amendment adopted 14 March 1962<sup>18</sup> the Assembly coordinated the language of these sections with that of sections 38.1-21 and 38.1-252 so as to redefine the definition of liability insurance coverage and the rate-controlling function of the Corporation Commission. By this means they have eliminated the separate consideration of the "Uninsured" Endorsement premium.<sup>18a</sup> It now becomes part of the overall liability coverage for purposes of financial analysis. The policy of the Commission, until now, has been to disburse all the annual accumulation of fees each year among the insurers after payment of the administration expenses for the plan in the Division of Motor Vehicles and in the Corporation Commission itself.

It is patent from the above pattern of statutes that both the penalties of non-insurance and the close restriction of accident-prone operators effectively increase the security of the average motorist in the State. Further the exceptional breadth of coverage of the mandatory endorsements should be noted. The uninsured sector of the Virginia population, as to injuries from vehicular accidents, is probably smaller than in virtually any other state. Contractually and on a voluntary basis the Virginia system protects its residents to the \$15,000 bodily injury limit both in and out of state, and as driver, passenger or pedestrian, provided only that the injured be a member of the same household, guest or bailee of an insured, and provided further that the victim is not himself guilty of the negligence which was the proximate cause of the accident.

Precise figures are not available to illustrate the overall effectiveness of the Virginia system but it may be noted that in 1961 the accident fatality rate on her highways was a substantial 20% lower than it had been eighteen years before despite a traffic load in the order of three times greater. There can be no doubt that the order of reduction in the financial distress created by the accident rate is even more substantial. It is a

---

<sup>18</sup> *Supra* note 13.

<sup>18a</sup> It should be noted that all reference to making the Uninsured Motorist Fund defray the cost of the Uninsured Motorist Endorsement has now been stricken from 12-66.

highly commendable accomplishment attributable, in large measure, to the wisdom of the legal system devised to achieve it.

The controversies which have arisen regarding the above group of statutes have concerned primarily two irritants to the insurance interests. First of these is the rate-making policy of the Corporation Commission which we have discussed above. The other is the scope of contractual responsibility assumed under the Uninsured Endorsement. This we shall amplify below.

#### IV.

##### *The Tort Phase of Litigation*

The issues in litigation carried to the appellate level, involving interpretation of the foregoing legislation, can be fairly cleanly divided into those in the tort phase and those in contract phase. As Professor Arthur Phelps states in his "*Handbook of Virginia Rules of Procedure in Actions at Law*",<sup>19</sup> "Causes of action in tort cannot be joined with causes of action in contract according to the classic rule which has been followed in Virginia for some years. This rule leads to much injustice under modern rules of pleading." Although there are indications that adherence to this rule is wavering, the reasons for the rule are perhaps nowhere better illustrated than in the "John Doe" cases which have come to the Court of Appeals.

As of this writing<sup>20</sup> appeals have been allowed in four cases involving the fictitious John Doe. Three of these cases were ruled on by the Appeals Court on 23 April 1962, the fourth is pending. A review of these cases is helpful at this stage in order to untangle the confusion as to procedural requirements.

Fundamentally, as in the proverbial recipe for rabbit stew, the first step is to catch the rabbit. In other words the tort liability of the unknown tortfeasor must be established at law before the contractual and statutory obligations under the endorsement can be properly considered. The reasons become

---

<sup>19</sup> Michie, Charlottesville, p. 142 (1959).

<sup>20</sup> May, 1962.

amply clear from a brief study of cases discussed below.<sup>21</sup> In the first of these, the Brown Case, the multiplicity of issues tends to obscure the true holding. The other two decided cases, those of Mangus and Faulkner, hinged on very narrow points. In the one, a definition of "unknown" was put in issue; in the other, the necessity for corroboration at the tort phase. It should be kept in mind that in *none* of these cases has final judgment been rendered *against the plaintiff's insurer*. The contract liability aspect is separately analyzed in the subsequent section of this discussion.

The case of John Doe vs. T. P. Brown came on appeal from the Circuit Court of the City of Lynchburg. Plaintiff Brown, a guest in an insured vehicle there won a \$14,000 personal injury verdict against Doe in the Trial Court. The facts of the case were that the car in which Brown was riding, driven by a party named Grubbs, struck a parked car about midnight on a hilly street in the City of Lynchburg. In the collision Brown sustained a head injury which resulted in spells of dizziness, interfering with his employment. Grubbs was convicted of reckless driving in the Traffic Court. Grubbs attributed the accident to his having had to swerve to avoid collision with the glaring headlights of an unknown vehicle coming in the opposite direction and in the wrong lane. It appeared from the testimony that, after its collision with the parked car, the car in which Brown was passenger continued to drive around for an appreciable period and later returned to the scene of the accident where the police had arrived to investigate the complaint of the owner of the parked car. No report of the accident was ever filed with the Division of Motor Vehicles by either Grubbs or Brown. Suit was brought by Brown against Grubbs and John Doe. The jury found *for* Grubbs and *against* Doe and assessed \$14,000 damages. Subsequent to the trial, a new witness to the disputed events was discovered by Doe's attorneys. This witness asserted that there had been no other car involved and that Grubbs was not the driver of the car at the time of the accident. Further it had developed during the trial that plaintiff Brown

<sup>21</sup> These cases, in the order in which they are here discussed, are as follows:

- a) John Doe v. Thomas Preston Brown, Rec. No. 5405 203 Va.—(1962).
- b) Arthur J. Mangus v. John Doe, Rec. No. 5386 203 Va.—(1962).
- c) John Doe v. Robert Faulkner, Rec. No. 5388 203 Va.—(1962).
- d) Dorothy Hodgson v. John Doe, Rec. No. 5502—Va.—(1962).

had been several times convicted of forgery, had spent most of his time in the penitentiary in recent years, and was a frequent participant in brawls wherein he had sustained head injuries. Suit had not been brought until fourteen months after the accident and that Code provision requiring notice to the Department of Motor Vehicles had not been complied with. Counsel for Doe therefore moved for a retrial on the grounds of newly discovered evidence and excessive verdict. The Trial Court denied the motion for retrial, whereupon Doe filed an appeal based primarily upon these grounds, as to the Uninsured Motorist Law:

(a) The constitutionality of the John Doe statute was challenged for its failure to provide due process upon Doe under the 14th Amendment. It was argued that, absent a requirement for proceeding by Order of Publication against Doe, there could be no proper process as regards the unknown defendant. Further, under article 52 of the State Constitution, it was complained that the procedural aspects incorporated in Title 38.1 of the Code properly should have been placed in Title 8 of the Code, hence the Uninsured Motorist Law was in violation of the said article of the Virginia Constitution, which requires each act of legislation to treat but a single subject.

(b) It was further argued that the failure to file the five day accident report which the statute required if the "insured" (meaning plaintiff Brown as guest in an insured automobile) intended to recover under the endorsement defeated plaintiff's rights under the statute. The Trial Court had overruled these contentions, originally set forth in the defense demurrer, on the ground that whereas they might constitute a bar to an action directly against the Company in contract, they were not a bar in the action against John Doe to establish legal liability in tort. This raised a technical question of whether the John Doe theory of action was *ex contractu* or *ex delicto*. Here lay the crux of the case.

(c) The liability insurance contract endorsement, as approved by the State Corporation Commission, defined as "uninsured" only those unknown "hit and run" drivers who



had caused impact between the vehicles, for purposes of coverage under the policy. The appellant therefore argued that since the General Assembly, in full knowledge of this endorsement, approved by the Commission had not seen fit to prohibit such a requirement, it should be considered a valid restriction under the statute.

In ruling upon the appeal the Court, Judge I'Anson writing the opinion, found no merit in the appellant's objections. The Constitutional issues were summarily dealt with. The Court explained that this action was against a legal fiction, Doe, who for the purposes of the statute was represented by the insurer of the plaintiff. Since service was had on the representative of the insurer, there was no necessity for service by publication on the fictitious party.

Said the Court:

. . . a State, under its exercise of police power, may adopt a statute providing for constructive service of process on a non-resident causing injuries on the highways and there is no denial of 'due process of law' if it contains reasonable provision for notice to the defendant and affords him reasonable opportunity to be heard.

The defendant John Doe is a fictitious person created under the provisions of the statute to stand in the place of the unknown motorist. John Doe is not a person but for the purpose of this proceeding speaks through the Insurance Company. Since John Doe is afforded the opportunity to defend the action through the Insurance Company he has not been denied due process of law.

As to the confusion of title the Court pointed out that there was no deception in the name of the Act; that as is frequently the case, a general title was adopted which properly should put the parties on notice of the need to examine the legislation in greater detail, and that it patently was impossible to include every aspect of the legislation in the title without making the title as long as the act itself.

The basic rationale of the Court's position on the procedural points was that the John Doe action was fundamentally an

action *ex delicto* rather than *ex contractu*. Its function was to establish the legal liability of the unknown party and to establish the liquidated damages for future reference. The Court expressly stated that the judgment rendered was *not* a judgment against the insurer. This is a matter of separate litigation *ex contractu*. Thus, in effect the plaintiff, having been rendered a favorable verdict as to the unknown driver, is now in a position to negotiate with the insurer or to sue the insurer if the negotiation is not satisfactory.

Accordingly the issues of notice to the Director of Motor Vehicles under the statute or notice to the insurer under the contract were irrelevant to the problem of tort liability. Presumably they would not be irrelevant in the case of suit on the contract against the insurer.

As can be seen from the above line of reasoning the matter of contact between vehicles, as required under the contract endorsement, is also moot in this case. All in all, it becomes apparent, by its logical segregation of the tort action from the contract action, that the Court has adhered to the tradition of Virginia Law and has made future litigation under the Act considerably more understandable, although it would appear to become more difficult for the plaintiff to obtain the actual recovery since frequently the plaintiff will have to win two actions one in tort and one in contract to obtain an effective recovery.

The case of Arthur J. Mangus vs. John Doe,<sup>22</sup> et al, came on appeal from the Court of Law & Chancery of the City of Norfolk. The facts were as follows: On 3 August 1960 plaintiff Mangus, driving his own vehicle unaccompanied, had halted for a red light at a Norfolk intersection. The John Doe automobile bumped him slightly in the rear while Mangus waited for the light to change. Both parties got out of their automobiles and discussed and inspected the damage. Since the damage was exceedingly slight, there was no exchange of identification, of insurance data or of license tag numbers and no report was made of the accident to the Division of Motor Vehicles. Mangus made no notification of the accident to his insurer,

---

<sup>22</sup> *Supra* note 21.

United States Casualty Company, as required by his policy endorsement regarding claims.

In November, 1960, plaintiff Mangus, who had a long history of arthritis, suffered aggravated arthritic pains and was found to require surgery for ruptured disc in his spine. In December, 1960, plaintiff brought the above suit. Copy of his Motion for Judgment was served upon the registered agent of the United States Casualty Company whose counsel, acting on behalf of defendant, moved to dismiss and/or quash process. The Trial Court held that the clause in the policy requiring notice to the insurer was in conflict with Va. Code 38.1-381 (d) and therefore the clause was void, but stated that the failure of the plaintiff to file report of the accident to the Division of Motor Vehicles within five days after the accident "unless insured was reasonably unable to do so" was a condition precedent to the cause of action and must be asserted and proven by the plaintiff. The Trial Court stated further:

Certainly the purpose of the Act is to protect those using the highways of this Commonwealth from the negligence of operators carrying no liability insurance. In the instant case, while the operator was unknown, he is unknown only because the plaintiff himself failed to ascertain his identity, which according to his own testimony was readily available by the exercise of due diligence. Therefore, without the necessity of passing upon the question of whether or not the plaintiff complied with Section 38.1 381(d) requiring notice to the Division of Motor Vehicles as soon as reasonably practicable under the circumstances, the Court is of the opinion that the plaintiff cannot maintain his action under the provisions of the aforementioned statutes and that the defendant's motion to dismiss and/or quash process against the United States Casualty Company, should be sustained.

The Supreme Court reversed and remanded for consideration on the merits of the tort issue. Judge I'Anson's opinion, adhering to its line of reasoning in the Brown case above, found that the tort issue of legal liability required resolution before the contract issues were to be considered. The Court pointed out that the term "unknown" as used in the statute had no qualifications about the use of due diligence to determine the

identity of the party. Obviously it will normally behoove the participant in a collision to fully identify any other participants but the fact that he has failed or been unable to do so should have no bearing on the legal liability for damages—it merely makes more difficult the subsequent problem of recovering liquidated damages.

The case of John Doe vs. Robert Faulkner<sup>23</sup> involved the single issue of corroboration. The case came to the Supreme Court of Appeals from the Circuit Court of the City of Norfolk, where Faulkner had a judgment for two thousand dollars.

The facts were that the defendant Faulkner, driving unaccompanied, collided with a telephone pole at the traffic circle at the intersection of Tidewater Drive and Brambleton Avenue in Norfolk about 5:30 a.m., on a wet street. His automobile had a history of steering difficulty. Faulkner's own account to the investigating officer indicated he had been exceeding the speed limit although his testimony at the trial denied this. He attributed his loss of control of his automobile and the resultant collision with the pole, however, entirely to the negligent operation of a John Doe vehicle which had entered the traffic circle from a feeder lane against the traffic light. Faulkner testified that John Doe by negligent operation of his vehicle caused Faulkner to maneuver violently to avoid collision, whereupon the steering gear of his vehicle froze in an extreme position, which in turn caused his vehicle to strike the telephone pole. Upon the conclusion of Faulkner's case in the Trial Court, attorneys for Doe moved to strike Faulkner's evidence. This motion was overruled and a verdict of \$2,000 was returned for Faulkner, whereupon Doe's attorneys sued for a writ of error to the Supreme Court of Appeals on the following argument:

(a) The fictitious defendant John Doe, being incapable of testifying, was encompassed by the terms of Code Section 8-286, "The Dead Man's Statute."

(b) By the specific provision of 8-286 no judgment may be rendered solely on the uncorroborated testimony of a party at interest where the defendant is incapable of testifying in his own behalf.

---

<sup>23</sup> *Ibid.*

(c) In view of the above their motion to strike should have been sustained.

The Supreme Court affirmed the Trial Court's judgment and, Judge I'Anson again writing the opinion, pointed out the well-established function of Code Section 8-286, as set forth in *Robertson vs. Atlantic Realty*,<sup>24</sup> wherein it was said:

The purpose of the section (formerly #6209, now 8-286) was to remove disqualifications, not to create them in any case, nor to impose burdens on witnesses already competent.

The Court in the *Faulkner* case went on to say:

... The operator of the John Doe automobile is unavailable because his identity is unknown. The word *unavailable* is not synonymous with the word *incapable* used in the statute. A witness may be *unavailable* for various reasons but he is not *incapable* simply because he is *unavailable*.

Another John Doe case arising out of the UML is now pending in the Supreme Court of Appeals which involves a new issue as to its scope. In the Corporation Court for the City of Bristol the defendant's demurrer was sustained in the case of *Dorothy Hodgson vs. John Doe*<sup>25</sup> because the Virginia insured failed to report to the Division of Motor Vehicles a hit and run accident in Tennessee of which she was victim. The plaintiff has now appealed on the issue of whether her failure to promptly report the accident is a fatal defect in the tort claim against an unknown hit and run driver, where the plaintiff, a Virginia registrant, resident and insured, seeks to recover under the Virginia Uninsured Motorist Law. It would appear to the author here that since Virginia procedural traffic law is not applicable in Tennessee, the tort issue could be considered on its merits in the Virginia Courts and that thereafter the contract issue should be resolved subject to Virginia procedural requirements.

---

<sup>24</sup> 129 Va. 494, 106 S.E. 521 (1921).

<sup>25</sup> *Supra* note 21.

## V.

*The Contract Phase of Litigation*

As must now be apparent, the Court decisions as to establishment of tort liability strongly tend to liberalize consideration of issue of negligence on the part of an unknown party to an accident on Virginia highways or streets. In simple terms the purpose of the Uninsured Motorist Act has been interpreted to put the claimant against John Doe in equally as accessible a position to prove the fictitious Doe's legal liability as if Doe were a known party subject to the jurisdiction of the Court and duly served with process. As to contract liability, however, the decisions to date have been considerably less liberal. Here the action appears subject to certain conditions precedent and to certain procedural requirements as well as to the conventional rules and special statutory obligations of insurance contracts.

To date the cases which directly bear on the contract aspect of the Uninsured Motorist Law are three.<sup>26</sup> We undertake to review the salient points of these since they emphatically underscore the entirely different attitudes in which actions *ex contractu* and *ex delicto* are analyzed by the Court.

In Creteau vs. Phoenix Assurance Company,<sup>27</sup> plaintiff Creteau, a guest in a car in collision with an uninsured motorist had previously obtained a \$5,000 judgment against the said uninsured motorist which judgment had proven uncollectible. Plaintiff had acted to obtain service upon the insurer of his host's vehicle at the time suit was brought against the uninsured motorist but the Clerk of Court had, for undisclosed reasons, refused to issue the summons. Thereupon plaintiff put insurer on actual notice of the suit, as required by the contract, and insurer had had counsel present at the trial. The policy sued on, in this case against Phoenix, had been delivered prior to the enactment of Va. Code 38.1-381 (e)(1) which calls for

<sup>26</sup> These cases in the order in which they are here discussed are as follows:

a) Creteau v. Phoenix Assurance Company, 202 Va. 641, 119 S.E.2d 336 (1961).

b) State Farm Mutual Auto Insurance Company v. Charles F. Duncan, Rec. No. 5391, 203 Va.—(1962).

c) Horne v. Superior Life Insurance Co., 203 Va. 282, 124 S.E.2d 401 (1962).

<sup>27</sup> *Supra* note 26.

service of process upon the insurer if coverage required by the act is to be relied upon. The accident occurred after this amendment had become effective. The defendant insurer demurred on the ground that the law superceded the terms of the policy and that the insurer had not waived his rights under the law. The Trial Court held for Creteau on the ground that the amendment could not change the contract. Judge I'Anson, in rendering the opinion of the Supreme Court, reversed and upheld the insurer's demurrer asserting that the amendment to the law, being of a procedural nature, had not deprived the plaintiff of any substantive rights under his contract of insurance. It was simply a condition precedent to suit under the endorsement. Further, said the Court, the insurer by his conduct, nonparticipation in spite of actual notice,<sup>28</sup> had not waived service of process. The failure of plaintiff to attach copy of his previous pleadings, in his suit against Phoenix, prevented the Court from considering whether the Clerk had been in error in refusing to issue summons to the insurer. Therefore the Court could only assume that the Clerk had been justified on the face of the pleadings in making such refusal. Under these circumstances there had been no waiver of rights, since waiver is the intentional relinquishment of a known right and will not be implied "except upon clear and unmistakable proof of intention to waive such rights"<sup>29</sup>.

The sole issue involved in the case of State Farm Mutual Auto Insurance Company vs. Charles F. Duncan<sup>30</sup> was whether, under current law, a plaintiff who had obtained judgment against a known uninsured motorist may recover under the terms of his own contract with the insurer despite his failure to comply with the procedural requirements of the statute which are more favorable to the insurer and which antedated the policy in its effective date. The facts here were that Duncan had recovered a judgment of \$8,000 for personal injury in a suit against a named driver (apparently from out-of-state) who failed to make an appearance in his own defense. Duncan had sent copy of the motion and judgment against

<sup>28</sup> The insurer's counsel merely observed and did not make an appearance to plead the case for the named and known uninsured.

<sup>29</sup> Quoted in the opinion, from 19 MICHIE'S JURISPRUDENCE, *Waiver*, 2, (1950).

<sup>30</sup> *Supra* note 26.

the truck driver to his insurer in accordance with the notice requirement of the insurance contract and had further kept his insurer informed of all facts and proceedings as required by his policy. Insurer admitted, by stipulation, that he had received all of the informal notification but asserted that the failure of the defendant, Duncan, to comply with statute as to service of process defeated Duncan's claim under the policy. State Farm supported its contention with the *Creteau* case, *supra*. Duncan undertook to distinguish *Creteau* on the contention that the insurer here had offered the policy *after* the effective date of the act and in full knowledge thereof whereas in *Creteau* the act had superseded the terms of the policy. The Trial Court held for Duncan on this ground.

The Court of Appeals, Chief Justice Eggleston writing the opinion, reversed the Trial Court judgment and gave final judgment for the Insurer. In a very closely reasoned explanation for this action, it was pointed out that the notice requirement of the contract and the process requirement of the statute were not for the same purpose and were not substitutes one for the other. The notice alerted the insurer (1) to the existence of subrogation rights against the uninsured and also (2) to the possibility of a legal liability. By the statute the insurer is given the opportunity, *when served with process*, to intervene and defend under the contract in its own name, or to defend solely in the name of John Doe on the tort claim. Accordingly, adhering basically to its reasoning in the *Creteau* case, the Court held that the statutory requirements were indispensable to establishing the legal liability of the insurer. The Court said, referring to the negotiations which preceded the suit and which the claimant Duncan asserted estopped the insurer from using the statute as a defense, "We have been pointed to no principle of law, nor do we know of any which requires a party during negotiations for settlement of a controversy with his adversary, to notify his adversary that should the negotiations fail and litigation follow he will rely upon any particular defense which may be available to him."

Accordingly the Court held that the insurer had waived none of its statutory rights and gave final judgment for the insurer on the contract.



The case of *Horne vs. Superior Life Insurance Company*<sup>31</sup>, involved an interesting peripheral issue as to the Uninsured Motorist Law although the basic controversy arose from a denial of Workmen's Compensation by the Industrial Commission. The facts were that Horne, an employee of the said Insurance Company, was seriously injured in a collision while a passenger in his wife's car. At the time of the accident he was engaged in his employment. His injury, involving amputation of his leg, appeared to be the fault of an uninsured motorist. Horne's wife's vehicle was insured by Aetna, and the policy contained the required Uninsured Motorist endorsement. Horne sued the uninsured driver in whose behalf Aetna made an out-of-court settlement of \$13,000 with Horne whereby, without reference to Horne's employer, Superior, Horne gave Aetna a release of his claims under the Uninsured Motorist Law and agreed to hold for Aetna's benefit any claims he had against others as result of the accident. Horne further agreed to claim Workmen's Compensation and to divide equally with Aetna the net proceeds which he was entitled to on such a claim.

At this juncture the Industrial Commission denied Horne's claim for Workmen's Compensation because Horne by his action had destroyed his employer's right of subrogation against Aetna and because he had already enjoyed one full recovery under the Act.

In reversing and remanding the Industrial Commission's decision the distinction between tort and contract rights was emphasized by the Supreme Court of Appeals, Said the Court:

. . . Aetna's liability to its insured is contractual even though it is based upon the contingency of a third party's tort liability and Horne's employer, Superior, does not become a third party beneficiary under the insurance contract. In fact the policy specifically provided that it was not to inure directly or indirectly to the benefit of any Workmen's Compensation Carrier or self insurer under the Act (Va. Code 65-38). Mrs. Horne had chosen to provide, at her expense, additional protection under the uninsured

---

<sup>31</sup> *Ibid.*

motorist provision for herself and others protected thereby and not for Superior or its Compensation Carrier.

Further said the Court:

Since Superior was subrogated to no rights against Aetna, Horne has not prejudiced or destroyed any rights of Superior by releasing Aetna from liability on its policy.

The Court found Horne's agreement to divide the proceeds of his Workmen's Compensation claim void as a matter of law but did say with regard to the tort liability,

When we consider public policy and welfare aspects of the Workmen's Compensation Act we reach the conclusion that the General Assembly did not intend, by enacting the Uninsured Motorist Law, to abrogate the right of subrogation conferred by it in the Workmen's Compensation Act, nor did it intend to deprive the employer, or its Compensation Carrier, of its primary right of Subrogation to the proceeds of any recovery had from the negligent third party. Thus we hold that the employer's right of subrogation against the negligent third party is superior to that of the insurer under the Uninsured Motorist Law.

To summarize, the law intended that Horne have two separate sources of compensation but Aetna's bargained rights in settling the policy claim were subordinate to the statutory rights established by the Workmen's Compensation Law, both as to employer and employee. Hence Superior was subrogated to the claim against the uninsured driver but not to Horne's settlement with Aetna, and Aetna was cut out, both of its subrogation against uninsured and its bargain with Horne for half of his Workmen's Compensation proceeds.

## VI.

### *Summary and Conclusion*

We have traced, in a perhaps disjointed manner, the available record of the Uninsured Motorist Law in Virginia, its origin, its associated laws, its effect, and its interpretation. Those concerned with the operation of only one aspect of the

system, of which this statute forms an essential part, tend to criticize without a full appreciation of the scope of the problem it attempts to resolve or of the relative importance of the various measures which may be made of the program's success. We have attempted to place the rationale of the law and its practical results in a fair overall perspective without undue emphasis on the problems confronting any one group of parties affected by its operations.

The Virginia tradition of emphasis on the voluntary rather than the compulsory should be noted; also her preference for the pay-as-you-go plan rather than a redistribution of wealth and for private enterprise rather than the governmental bureaus. There is also discernible in the cases reviewed the strong flavor of common-law pleading and practice underlying her special statutory provisions.

It remains to be seen how the Supreme Court of Appeals will treat the contact requirement in the Corporation Commission's approved endorsement<sup>31a</sup> and the contract obligations for notice to the insurer independent of service of process and advice via the Department of Motor Vehicles. The ambit of Va. Code 38.1-381(g) remains to be clarified in the contract phase of litigation. The terminology of Chief Justice Eggleston's opinion in the *Duncan* case would incline this writer to the position that the insured will be held to the approved contract endorsement, and the phrase, "nor may anything be required of the insured except the establishment of legal liability," will be applied only to the matters of reports and claims, not to the circumstances antecedent thereto.

The *Hodgson* case should resolve the question of procedure requisite to maintaining a Virginia action to recover for damages incurred in an out-of-state accident in which a Virginia insured becomes party plaintiff.

The other murky areas, pointed out primarily in early commentary on the law,<sup>32</sup> such as the conflict of interest between

---

<sup>31a</sup> See Appendix "E" for standard endorsement used to effect the coverage required by the UML.

<sup>32</sup> See 16 W. & L. L. R. 134, 135, 136, and 47 Va. L. R. 145, 166.

insured and insurer appear to have been largely dissipated by the recent decisions, particularly by the emphatic distinction between contract and tort proceedings.

It is common practice for insurers, notified by the Division of Motor Vehicles of potential accident claims by their insureds against uninsured operators, to send these uninsured to good legal counsel. This cannot be considered a conflict of interest. The insurer is under no obligation to assist his insured in winning a recovery. It would seem that the cause of justice is advanced rather than hindered by firmly contesting claims against financially irresponsible motorists. The strenuous curtailment of the privileges such parties have on the highways, if they do not remain judgment free, makes it important to litigate fairly the initial tort claim rather than to enfeeble the restrictions on offending drivers. We may be sure that, if the restrictions against the financially pressed drivers become too rigid, the whole program will be watered down politically, one way or another. The present system has proven itself surprisingly effective and should not be modified significantly without very careful consideration of all the ramifications of upsetting the calculated balance of public and private interests, of inducements and penalties, of administrative burden and of personal privilege.

It would appear to the author that the courts should now be receptive to the concept of a concurrent trial of tort and contract issues, at the option of the defendant insurer, should the latter choose to intervene in his own name. Despite the prevailing fiction that the issue of insurance must not raise its ugly head in tort litigation it is commonly recognized as a considerable factor by judges and jurors. It would certainly streamline litigation to consider simultaneously the contract liability where the defendant insurer so desires. To the knowledge of the author, however, no intervenor insurer under the statute has specifically identified itself as such; the insurers have merely attempted to argue their own case disguised as John Doe. Now that the Brown case has disposed of this ruse, perhaps the insurers should come out of camouflage and engage their adversary as such initially.

## APPENDIX "A"

## CHAPTER 457

*An Act to amend and reenact § 38.1-381, as amended, of the Code of Virginia, relating to policies or contracts of bodily injury liability insurance or of property damage liability insurance.*

[H 311]

---

APPROVED MARCH 31, 1962

Be it enacted by the General Assembly of Virginia:

1. That § 38.1-381, as amended, of the Code of Virginia be amended and reenacted as follows:

§ 38.1-381. (a) No policy or contract of bodily injury liability insurance, or of property damage liability insurance, covering liability arising from the ownership, maintenance or use of any motor vehicle, shall be issued or delivered in this State to the owner of such vehicle, or shall be issued or delivered by any insurer licensed in this State upon any motor vehicle then principally garaged or principally used in this State, unless it contains a provision insuring the named insured and any other person responsible for the use of or using the motor vehicle with the consent, expressed or implied, of the named insured, against liability for death or injury sustained, or loss or damage occasioned within the coverage of the policy or contract as a result of negligence in the operation or use of such vehicle by the named insured or by any such person; *provided, that every automobile liability insurance policy or contract, or endorsement thereto, insuring private passenger automobiles principally garaged and/or used in Virginia, when the named insured is an individual or husband and wife, which includes, with respect to any liability insurance provided by the policy, contract or endorsement for use of a non-owned automobile, any provision requiring permission or consent of the owner of such automobile in order that such insurance apply, shall be construed to include permission or consent of the custodian in such provision requiring permission or consent of the owner.*

(b) Nor shall any such policy or contract be so issued or delivered unless it contains an endorsement or provisions

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 § 46.1-1(8), 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.

(c) As used in this section, the term "bodily injury" shall include death resulting therefrom; the term "insured" as used in subsections (b), (d), (f), and (g) hereof, means the named insured and, while resident of the same household, the spouse of any such named insured, and relatives of either, while in a motor vehicle or otherwise, and any person who uses, with the consent, expressed or implied, of the name insured, the motor vehicle to which the policy applies and a guest in such motor vehicle to which the policy applies or the personal representative of any of the above; and the term "uninsured motor vehicle" means a motor vehicle as to which there is no (i) bodily injury liability insurance and property damage liability insurance both in the amounts specified by § 46.1-1(8), as amended from time to time, or (ii) there is such insurance but the insurance company writing the same denies coverage thereunder, (iii) there is no bond or deposit of money or securities in lieu of such bodily injury and property damage liability insurance and (iv) the owner of such motor vehicle has not qualified as a self-insurer under the provisions of § 46.1-395. A motor vehicle shall be deemed to be uninsured if the owner or operator thereof be unknown; provided that recovery under the endorsement or provisions shall be subject to the conditions hereinafter set forth.

(d) If the owner or operator of any motor vehicle which causes bodily injury or property damage to the insured be unknown, the insured or someone on his behalf, in order for the insured to recover under the endorsement, shall report the accident as required by § 46.1-400, unless such insured is reasonably unable to do so, in which event the insured shall make such report as soon as reasonably practicable under the circumstances.

(e) If the owner or operator of any vehicle causing injury or damages be unknown, an action may be instituted against the unknown defendant as "John Doe" and service of process may be made by delivery of a copy of the motion for judgment or other pleadings to the clerk of the court in which the action is brought and service upon the insurance company issuing the policy shall be made as prescribed by law as though such insurance company were a party defendant. The insurance company shall have the right to file pleadings and take other action allowable by law in the name of John Doe.

(e) (1) Any insured intending to rely on the coverage required by paragraph (b) of this section shall, if any action is instituted against the owner or operator of an uninsured motor vehicle, serve a copy of the process upon the insurance company issuing the policy in the manner prescribed by law, as though such insurance company were a party defendant; such company shall thereafter have the right to file pleadings and take other action allowable by law in the name of the owner or operator of the uninsured motor vehicle or in its own name; provided, however, that nothing in this paragraph shall prevent such owner or operator from employing counsel of his own choice and taking any action in his own interest in connection with such proceeding.

This subsection shall not apply to any cause of action arising prior to the effective date of this amendment.

(f) Any insurer paying a claim under the endorsement or provisions required by paragraph (b) of this section shall be subrogated to the rights of the insured to whom such claim was paid against the person causing such injury, death or damage to the extent that payment was made; provided that the bringing of an action against the unknown owner or operator as John Doe or the conclusion of such an action shall not constitute a bar to the insured, if the identity of the owner or operator who caused the injury or damages complained of becomes known, from bringing an action against the owner or operator theretofore proceeded against as John Doe, provided that any recovery against such owner or operator shall be paid to the insurance company to the extent that such insurance company paid the named insured in the action brought against such owner or operator as John Doe, except that such insurance

company shall pay its proportionate part of any reasonable costs and expense incurred in connection therewith including reasonable attorney's fees. Nothing in an endorsement or provisions made under this paragraph nor any other provision of law shall operate to prevent the joining in an action against John Doe of the owner or operator of the motor vehicle causing such injury as a party defendant and such joinder is hereby specifically authorized.

(g) No such endorsement or provisions shall contain any provision requiring arbitration of any claim arising under such endorsement or provisions, nor may anything be required of the insured except the establishment of legal liability, nor shall the insurer be restricted or prevented in any manner from employing legal counsel or instituting legal proceedings.

(h) The provisions of paragraph (a) and (b) of this section shall not apply to any policy of insurance to the extent that it covers the liability of an employer under any workmen's compensation law, but no provision or application of this section shall be construed to limit the liability of the insurance company, insuring motor vehicles, to an employee or other insured under this section who is injured by an uninsured motor vehicle.

2. An emergency exists and this act is in force from its passage.



## APPENDIX "B"

## CHAPTER 253

*An Act to amend and reenact §§ 12-65, 12-66, 38.1-21 as amended, and 38.1-252 of the Code of Virginia, the sections respectively relating to supervision, control and payments from the Uninsured Motorists Fund; distribution to insurance companies; reduction in rates applicable to the uninsured motorist endorsement and the disposition of balance after payments to companies; definitions of motor vehicle and aircraft insurance; and provisions governing the making of rates, so as to provide that the rates charged for the uninsured motorist endorsement shall be fixed as are the rates charged for other motor vehicle insurance.*

[S 249]

---

APPROVED MARCH 14, 1962

Be it enacted by the General Assembly of Virginia:

1. That §§ 12-65, 12-66, 38.1-21, as amended, and 38.1-252 of the Code of Virginia be amended and reenacted as follows:

§ 12-65. The Uninsured Motorists Fund now or hereafter provided for by law shall be under the supervision and control of the State Corporation Commission and shall be paid out, on warrants of the Comptroller issued on vouchers signed by such person as the Commission shall designate, for the purpose of reducing the costs of \* *motor vehicle liability insurance as defined by § 38.1-21, as amended.*

§ 12-66. The Commission shall annually, at such time in each year as it may deem best for the purposes, make distribution from the Fund among the several insurance companies writing motor vehicle bodily injury and property damage liability insurance on motor vehicles registered in the State of Virginia in the proportion that the premium income for the basic limits coverage of each insurance company (that is, gross premiums less cancellation and return premiums) for the coverage required by paragraph (b) of § 38.1-381 of the Code of Virginia bears to the total of such premium income for such coverage written in the State during the preceding year. \*The

amount payable to any such insurance company hereunder shall apply only to those companies maintaining records satisfactory to the Commission as will disclose loss experience under such endorsement.

§ 38.1-21. Motor vehicle and aircraft insurance means and includes insurance against:

(1) Loss of or damage resulting from any cause to motor vehicles which shall include trailers, or semitrailers or other attachments designed for use in connection therewith, or aircraft and their equipment, and against legal liability of the insured for loss or damage to the property of another resulting from the ownership, maintenance or use of motor vehicles or aircraft and against loss, damage or expense incident to a claim of such liability, and

(2) Legal liability of the insured, and *liability arising under paragraph (b) of § 38.1-381* and against loss, damage, or expense incident to a claim of such liability, arising out of the death or injury of any person resulting from the ownership, maintenance or use of motor vehicles or aircraft, but not including any kind of insurance specified in § 38.1-17.

Any policy of motor vehicle and aircraft insurance covering legal liability of the insured under paragraph (2) of this section and *liability arising under paragraph (b) of § 38.1-381* may include appropriate provisions whereby the insuring company assumes the obligation of payment of medical, hospital, surgical and funeral expenses arising out of the death or injury of any person, and any such policy of motor vehicle insurance may include appropriate provisions whereby the insuring company assumes the obligation of payment of weekly indemnity or other specific benefits to persons who are injured and specific death benefits to dependents, beneficiaries or personal representatives of persons who are killed, if such injury or death is caused by accident and sustained while in or upon, entering or alighting from, or through being struck by a motor vehicle, provided that such obligations are irrespective of any legal liability of the insured or any other person.

§ 38.1-252. Rates for the kinds of insurance to which this chapter applies shall be made in accordance with the following provisions:

(1) Rates shall not be excessive, inadequate or unfairly discriminatory;

(2) As to the kinds of insurance to which Article 2 of this chapter applies, and the kinds of insurance to which paragraphs (15), (16) and (17) of § 38.1-240 apply, including insurance against contingent, consequential and indirect losses as defined in § 38.1-23, manual, minimum, class rates, rating schedules or rating plans, shall be made and adopted, except in the case of specific inland marine rates on risks specially rated;

(3) Due consideration shall be given to past and prospective loss experience within and outside this State, to conflagration or catastrophe hazards, to a reasonable margin for underwriting profit and contingencies, to dividends, savings or unabsorbed premium deposits allowed or returned by insurers to their policyholders or members or subscribers, to past and prospective expenses both countrywide and those specially applicable to this State, and to all relevant factors within and outside this State; and in the case of fire insurance rates consideration shall be given to the experience of the fire insurance business during a period of not less than the most recent five-year period for which such experience is available *and, in the case of motor vehicle insurance as defined in § 38.1-21, consideration shall be given to all sums distributed by the State Corporation Commission from the Uninsured Motorist Fund in accordance with the provisions of §§ 12-65 and 12-66 to the companies writing motor vehicle bodily injury liability and property damage liability insurance on motor vehicles registered in the State:*

(4) As to the kinds of insurance to which paragraphs (1) to (13), inclusive, of § 38.1-240 apply, including insurance against contingent, consequential and indirect losses as defined in § 38.1-23, (a) the systems of expense provisions included in the rates for use by any insurer or group of insurers may differ from those of other insurers or groups of insurers to reflect the requirements of the operating methods of any such insurer or group with respect to any kind of insurance, or with respect to any subdivision or combination thereof for which subdivision or combination separate expense provisions are applicable; and (b) risks may be grouped by classifications for the establishment of rates and minimum premiums. Classification rates may

be modified to produce rates for individual risks in accordance with rating plans which establish standards for measuring variations in hazards or expense provisions, or both. Such standards may measure any difference among risks that can be demonstrated to have a probable effect upon losses or expenses; and

(5) All such rates, rating schedules or rating plans and every manual of classifications, rules and rates and every modification thereof, heretofore approved by the Commission, shall be used until changed with the approval of the Commission.

## APPENDIX "C"

TABLE I.

## VIRGINIA MOTOR VEHICLE REGISTRATION—1958—1962

TIME PERIOD	TOTAL NO. OF POWERED VEHICLES REGISTERED	TOTAL NO. OF VEHICLES REGISTERED, POWERED AND TOWED	UNINSURED FEES PAID BY REGISTRANTS	% UNINSURED POWERED VEHICLES
1 October 1957 to 14 March 1958	97,256	.....	17,735	18.24%
15 March 1958 to 14 March 1959	N.A.	1,505,063	N.A.	N.A.
15 March 1959 to 14 March 1960	1,471,245	1,505,096	107,941	7.34%
15 March 1960 to 14 March 1961	1,464,526	1,556,116	89,202	6.09%
15 March 1961 to 14 March 1962	1,540,236	1,638,269	89,245	5.79%

Based upon data furnished by  
Commissioner of Motor Vehicles

## APPENDIX "D"

TABLE II.

## VIRGINIA ACCIDENT ANALYSIS—AUGUST 1959, 1960, 1961

DATE	TOTAL NO. OF MOTOR VEHICLES IN REPORTED ACCIDENTS IN STATE	a. VA. LICENSED MOTOR VEHICLES INVOLVED b. FOREIGN VEHICLES	% INSURED a. AMONG VA. LICENSED b. AMONG FOREIGN LICENSED	% PAID UN- INSURED FEE AMONG VIRGINIA LICENSED	% NEITHER PAID FEE NOR INSURED
August 1959	12,339	a. 9,964 b. 1,707	a. 90.2% b. 37.8%	7.4%	2.4%
August 1960	12,402	a. 10,773 b. 1,604	a. 89.6% b. 47.1%	6.9%	3.5%
August 1961	14,602	a. 11,369 b. 2,073	a. 88.9% b. 51.3%	6.9%	4.2%

Based upon official data furnished by  
Director of Safety Responsibility

## APPENDIX "E"

FAMILY PROTECTION AGAINST  
UNINSURED MOTORISTSBODILY INJURY LIABILITY AND PROPERTY  
DAMAGE LIABILITY—VIRGINIA

This endorsement forms a part of

Policy Number \_\_\_\_\_ issued to \_\_\_\_\_

effective from \_\_\_\_\_

to \_\_\_\_\_

Schedule \_\_\_\_\_

Limits of Liability:

Bodily Injury—\$15,000 each person; \$30,000 each accident  
Property Damage—\$5,000 each accident

In consideration of the payment of the premium for this endorsement, the company agrees with the named insured, subject to the limits of liability, exclusions, conditions and other terms of this endorsement and to the applicable terms of the policy:

*Insuring Agreements*

*I. Damages for Bodily Injury and Property Damage 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:

- (a) bodily injury, sickness or disease, including death resulting therefrom, hereinafter called "bodily injury", sustained by the insured;
- (b) injury to or destruction of (1) an automobile which is registered in Virginia and which is owned by the named insured or by his spouse if a resident of the same household and (2) the contents of an insured automobile, hereinafter called "property damage";

caused by accident and arising out of the ownership, maintenance or use of such uninsured automobile.

## II. Definitions

(a) *Insured*. The unqualified word "insured" means

- (1) the named insured and, while residents of the same household, his spouse and the relatives of either;
- (2) any other person while occupying an insured automobile; and
- (3) any person, with respect to damages he is entitled to recover for care or loss of services because of bodily injury to which this endorsement applies.

The insurance applies separately with respect to each insured under this endorsement, but neither this provision nor application of the insurance to more than one insured shall operate to increase the limits of the company's liability.

(b) *Insured Automobile*. The term "insured automobile" means:

- (1) an automobile which is registered in Virginia and which is owned by the named insured or by his spouse if a resident of the same household;
- (2) an automobile while temporarily used as a substitute for an insured automobile as described in subparagraph (1) above, when withdrawn from normal use because of its breakdown, repair, servicing, loss or destruction; or
- (3) any other automobile while being operated by the named insured, or by his spouse if a resident of the same household; but the term "insured automobile" shall not include:
  - (i) under subparagraphs (1) and (2) above, an automobile unless being used by or with the permission of the named insured or his spouse if a resident of the same household; or



- (ii) under subparagraphs (2) and (3) above, an automobile owned by the named insured or by any resident of the same household.
- (c) *Uninsured Automobile*. The term "uninsured automobile" means:
  - (1) an automobile with respect to the ownership, maintenance or use of which there is, in the amounts specified in the Virginia Motor Vehicle Safety Responsibility Act, neither (i) cash or securities on file with the Virginia Commissioner of Motor Vehicles nor (ii) a bodily injury and property damage liability bond or insurance policy, applicable to the accident with respect to any person or organization legally responsible for the use of such automobile; or
  - (2) a hit-and-run automobile as defined; but the term "uninsured automobile" shall not include:
    - (i) an automobile defined herein as an "insured automobile";
    - (ii) an automobile owned by the named insured or by any resident of the same household;
    - (iii) an automobile which is owned or operated by a self-insurer within the meaning of any motor vehicle financial responsibility law, motor carrier law or any similar law;
    - (iv) an automobile which is owned by the United States of America, Canada, a state, a political subdivision of any such government or an agency of any of the foregoing;
    - (v) a land motor vehicle or trailer, if operated on rails or crawler-treads or while located for use as a residence or premises and not as a vehicle; or
    - (vi) a farm type tractor or equipment designed for use principally off public roads, except while actually upon public roads.

- (d) *Hit-and-Run Automobile*. The term "hit and-run automobile" means an automobile which causes bodily injury to an insured or property damage arising out of physical contact of such automobile (1) with the insured or (2) with an insured automobile, provided: (i) there cannot be ascertained the identity of either the operator or the owner of such "hit-and-run automobile"; (ii) the insured or someone on his behalf shall have reported the accident within 5 days or as soon as practicable to the Commissioner of Motor Vehicles, and shall have filed with the company within 30 days thereafter a statement under oath that the insured or his legal representative has a cause or causes of action arising out of such accident for damages against a person or persons whose identity is unascertainable, and setting forth the facts in support thereof; and (iii) at the company's request, the insured or his legal representative makes available for inspection the automobile which the insured was occupying at the time of the accident.
- (e) *Occupying*. The word "occupying" means in or upon or entering into or alighting from.
- (f) *State*. The word "state" includes the District of Columbia, a territory or possession of the United States, and a province of Canada.

### III. *Policy Period, Territory*

This endorsement applies only to accidents which occur on and after the effective date hereof, during the policy period and within the United States of America, its territories or possessions, or Canada.

#### *Exclusions*

This endorsement does not apply:

- (a) to the first two hundred dollars of the total amount of all property damage as the result of any one accident;
- (b) to bodily injury to an insured, care or loss of services recoverable by an insured or injury to or destruction of property of an insured, with respect to which such in-

sured or his legal representative shall, without written consent of the company, make any settlement with any person or organization who may be legally liable therefor;

- (c) so as to inure directly or indirectly to the benefit of any workmen's compensation or disability benefits carrier or any person or organization qualifying as a self-insurer under any workmen's compensation or disability benefits law or any similar law.

### *Conditions*

1. *Policy Provisions.* None of the Insuring Agreements, Exclusions, Conditions or Other Provisions of the policy shall apply to the insurance afforded by this endorsement except the Conditions "Notice" or "Notice of Accident," "Subrogation," "Changes," "Assignment," "Cancellation" and "Declarations".

2. *Premiums.* If during the policy period the number of automobiles owned by the named insured or spouse and registered in Virginia or the number of Virginia dealer's license plates issued to the named insured changes, the named insured shall notify the company during the policy period of any change and the premium shall be adjusted in accordance with the manuals in use by the company. If the earned premium thus computed exceeds the advance premium paid, the named insured shall pay the excess to the company; if less, the company shall return to the named insured the unearned portion paid by such insured.

3. *Proof of Claim.* As soon as practicable, the insured or other person making claim shall give to the company written proof of claim, under oath if required, including full particulars of the nature and extent of the injuries, treatment, and other details entering into the determination of the amount payable hereunder. Proof of claim shall be made upon forms furnished by the company unless the company shall have failed to furnish such forms within 15 days after receiving notice of claim.

The injured person shall submit to physical examinations by physicians selected by the company when and as the company may reasonably require and he, or in the event of his incapacity his legal representative, or in the event of his death his legal representative or the person or persons entitled to sue

therefor, shall upon each request from the company execute authorization to enable the company to obtain medical reports and copies of records.

The insured or other person making claim for damage to property shall file proof of loss with the company within sixty days after the occurrence of loss, unless such time is extended in writing by the company, in the form of a sworn statement setting forth the interest of the insured and of all others in the property affected, any encumbrances thereon, the actual cash value thereof at time of loss, the amount, place, time and cause of such loss, and the description and amounts of all other insurance covering such property. Upon the company's request, the insured shall exhibit the damaged property to the company.

4. *Notice of Legal Action.* If, before the company makes payment of loss hereunder, the insured or his legal representative shall institute any legal action for bodily injury or property damage against any person or organization legally responsible for the use of an automobile involved in the accident, a copy of the summons and complaint or other process served in connection with such legal action shall be forwarded immediately to the company by the insured or his legal representative.

5. *Limits of Liability.* (a) The limit of bodily injury liability stated in the schedule as applicable to "each person" is the limit of the company's liability for all damages, including damages for care or loss of services, because of bodily injury sustained by one person as the result of any one accident and, subject to the above provision respecting each person, the limit of such liability stated in the schedule as applicable to "each accident" is the total limit of the company's liability for all damages, including damages for care or loss of services, because of bodily injury sustained by two or more persons as the result of any one accident.

(b) The limit of property damage liability stated in the schedule as applicable to "each accident" is the total limit of the company's liability for all damages arising out of injury to or destruction of all property of one or more insureds as the result of any one accident.

(c) If claim is made under this endorsement and claim is also made against any person who is an insured under the Bodily Injury Liability or Property Damage Liability coverages of the policy because of bodily injury or property damage sustained in an accident by a person who is an insured under this endorsement:

- (1) any payment made under this endorsement to or for any such person shall be applied in reduction of any amount which he may be entitled to recover from any person who is an insured under the Bodily Injury Liability or Property Damage Liability coverages; and
- (2) any payment made under the Bodily Injury Liability or Property Damage Liability coverages to or for any such person shall be applied in reduction of any amount which he may be entitled to recover under this endorsement.

(d) Any amount payable to an insured under the terms of this endorsement shall be reduced by (1) all sums paid to such insured for bodily injury or property damage by or on behalf of the person legally liable therefor and (2) the amount paid and the present value of all amounts payable to such an insured under any workmen's compensation law, exclusive of non-occupational disability benefits.

6. *Other Insurance.* With respect to bodily injury to an insured while occupying an automobile not owned by the named insured under this endorsement, the insurance hereunder shall apply only as excess insurance over any other similar insurance available to such occupant, and this insurance shall then apply only in the amount by which the applicable limit of liability of this endorsement exceeds the sum of the applicable limits of liability of all such other insurance.

With respect to bodily injury to an insured while occupying or through being struck by an uninsured automobile, if such insured is a named insured under other similar insurance available to him, then the damages shall be deemed not to exceed the higher of the applicable limits of liability of this insurance and such other insurance, and the company shall not be liable under this endorsement for a greater proportion of the applicable limit of liability of this endorsement than such limit

bears to the sum of the applicable limits of liability of this insurance and such other insurance.

With respect to bodily injury to an insured and subject to the foregoing paragraphs, if the insured has other similar insurance available to him against a loss covered by this endorsement, the company shall not be liable under this endorsement for a greater proportion of such loss than the applicable limit of liability hereunder bears to the total applicable limits of liability of all valid and collectible insurance against such loss.

With respect to property damage, the insurance afforded under this endorsement shall be excess insurance over any other valid and collectible insurance against such property damage.

7. *Payment of Loss by the Company.* Any amount due hereunder is payable to the insured or his legal representative.

8. *Action Against Company.* No action shall lie against the company unless, as a condition precedent thereto, the insured or his legal representative has fully complied with all the terms of this endorsement.