



Risk Manager

Preserving a UM/UIM Carrier's Right to Defend

By: Justin Ward. Friday, January 4th, 2013

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By: Ian Lambeets, Esq.

In its recent decision in *Transportation Ins. Co. v. Womack*, the Virginia Supreme Court held that uninsured/under-insured motorist (UM/UIM) carriers who cede control over litigation to a defendant or his liability carrier retain their right to defend should their interests diverge from the interests of their codefendants. 2012 Va. Lexis 187. **Chip Delano**, a shareholder in Sands Anderson's **Coverage & Casualty Litigation Group**, represented Transportation Insurance Company in its successful appeal.

The plaintiff, Sheila Womack, filed suit in the City of Richmond against the defendant, Jerrene V. Yeoman, for injuries sustained in an automobile accident allegedly caused by Yeoman's negligence. The plaintiff served Transportation Insurance Company, the UIM carrier, pursuant to **Va. Code § 38.2-2206(F)**. Both Transportation and **GEICO**, defendant's liability carrier, filed separate answers denying the plaintiff's allegations and asserting affirmative defenses. Importantly, Transportation reserved "the right to defend [its] case in its own name or in the name of the Defendant as permitted by [§ 38.2-2206(F)]." However, Transportation remained silent beyond this point and allowed the defendant and GEICO to control the litigation.

In the midst of the tort suit, the defendant filed for **Chapter 7 bankruptcy** in the Eastern District of Virginia. In her bankruptcy petition, the defendant listed claims of five million dollars each to the plaintiff, GEICO and Transportation. However, the defendant failed to designate whether these claims were disputed or contingent. The bankruptcy court subsequently granted the defendant's petition and discharged the claims.

In accordance with Yeoman's designation of the tort claims as "uncontested" in the bankruptcy proceedings, and their subsequent discharge by the court, Womack filed a motion for summary judgment. Womack argued that under the principles of approbate and reprobate and judicial estoppel, Yeoman is prohibited from admitting liability in the bankruptcy action while simultaneously denying liability in the tort action. Yeoman argued that her failure to designate the claims appropriately was an inadvertent error that caused no prejudice to Womack. In its response to Womack summary judgment motion, Transportation noted its support of Yeoman's defense and

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also argued that it should not be bound by the Chapter 7 bankruptcy proceedings because it was not made a party and had no knowledge of the details.

The trial court granted the plaintiff's summary judgment motion on the grounds that the defendant's denial of liability in the tort action constituted inappropriate approbating and reprobating. However, the court failed to mention whether Transportation was also bound by the ruling. In response to Transportation's motion for reconsideration, the trial court ruled that Transportation had waived its right to defend by relying on the defendant to assert its affirmative defenses. Transportation subsequently appealed the judgment.

Citing its previous decisions in *State Farm Mutual Ins. Co. v. Cuffee*, 248 Va. 11 (1994) and *State Farm Mutual Auto Ins. Co. v. Beng*, 249 Va. 165, 169, 455 S.E.2d 2, 4 (1995), the Supreme Court agreed with Transportation, holding that Transportation retained its right to defend should the other defendants abandon their defense of the case. The court relied on the fact that Transportation filed an answer in its own name, demanded that GEICO assert certain affirmative defenses, and reserved its right to defend under Code § 38.2-2206(F). Once the "interests of the parties diverged" Transportation retained its right under the statute to proceed with its defense.

This holding is significant because it fortifies the UM/UIM carrier's right under Code § 38.2-2206(F) to defend its interests even after ceding control over the litigation to the defendant and primary liability insurer. Attorneys who represent UM/UIM carriers should think carefully about how this ruling may alter the manner in which they litigate cases. More specifically, litigators representing UM/UIM client should file independent answers and be sure to include language that preserve their right to defend their own interests should the litigation so require.

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