

# VTLA 2006 ANNUAL CONVENTION

## AUTO INSURANCE LAW UPDATE

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The Virginia Supreme Court did not decide any auto insurance cases of practical significance since the last annual convention. Based upon the numerous questions from practicing attorneys which the author receives regarding non-owned auto coverage, the following topic has been selected.

### **NON-OWNED AUTO LIABILITY COVERAGE: THE POT OF GOLD AT THE END OF THE COVERAGE RAINBOW**

#### **INTRODUCTION**

If you represent a plaintiff injured by a defendant driving a car she did not own, there is a good chance that the defendant was driving a "non-owned auto". If that is true, -- smile -- you have found the pot of gold at the end of the coverage rainbow.

What is so special about finding "non-owned auto" coverage? Answer: It gives your client the benefit of more liability coverage. In addition to the primary coverage insuring the car driven by the defendant, (owned auto coverage under the owner's policy), "non-owned auto" coverage gives your client the benefit of all auto liability coverage insuring the defendant under the defendant's personal auto policy as well as under all auto policies, insuring the defendant, issued to relatives residing with the defendant as part of the same household.

How do you initially spot "non-owned auto" coverage? Answer: Look at the police report. If the defendant was driving an auto she did not own, and resides at an address different from the car owner, you are on your way to finding "non-owned auto" coverage to maximize your client's recovery.

#### **HISTORY OF NON-OWNED AUTO LIABILITY COVERAGE**

##### **1. The owned automobile:**

Originally, auto insurance policies covered the policyholder and his family for each "owned automobile," such as the family Ford, for which a specific premium was paid. This was simple.

However, insurance underwriters realized that its policyholder was not fully covered by merely insuring the "owned automobile." For example, if the owned auto broke down, the policyholder would need a temporary substitute auto. In addition, the policyholder might use the owned auto with a trailer or might replace the insured auto with a new one or buy an additional auto.

To provide additional liability coverage to its policyholder, the underwriters expanded the definition of "owned automobile" to include a trailer; a farm automobile; replacement or newly acquired automobiles; and a temporary substitute automobile. (See page 6 below for the policy definition of "owned automobile.")

## **2. The non-owned automobile:**

The expanded "owned automobile" coverage was still not enough protection since the policyholder might drive a vehicle he did not own, which was not covered under his "owned automobile" coverage. For example, if the policyholder borrowed a friend's uninsured car, he would have no liability coverage.

Insurance companies earn premiums only on the "owned automobiles" set forth in the declarations page. Providing liability coverage on autos the policyholder does not own gives the policyholder extra coverage, "for free," and at the same time increases the insurance company's risk of loss. The more often the policyholder drives a "non-owned automobile," the greater the insurance company's risk of an accident with resulting increased claims and payouts. Therefore, the underwriters did not want to provide additional "free coverage" for non-owned vehicles which were regularly driven by its policyholders.

**Casual, infrequent use** of an auto owned by another, such as when the policyholder borrowed his neighbor's car, was what the underwriters intended when they first developed "non-owned automobile" coverage. Casual, infrequent use would not significantly increase the insurance company's risk of loss, and at the same time would give its policyholder added liability protection.

### **DEFINITION OF NON-OWNED AUTOMOBILE**

The standard family auto policy, Part I, Liability, defines "non-owned automobile".

"Non-owned automobile means an automobile or trailer not owned by or furnished for the regular use of either the named insured or any relative other than a temporary substitute vehicle."

## SCOPE OF NON-OWNED AUTO COVERAGE

The traditional policy definition of "non-owned automobile" accomplishes the underwriter's goal of providing "free" coverage only for the casual, infrequent use of a non-owned automobile. Vehicles regularly used by the policyholder, for which no additional premium is paid, are excluded. For example, if the policyholder were a traveling salesman, a company Ford "furnished for his regular use" while calling on customers would be excluded from coverage on the policyholder's personal auto policy insuring his Chevrolet. The policyholder's use of the Ford is not casual or infrequent, and is excluded from coverage under the policyholder's personal auto policy since it falls outside the definition of "non-owned automobile."

In addition, if the policyholder owns two cars, each insured under a *separate* policy, the *liability* coverage on car 1 does not apply to car 2, and visa-versa. Neither car is an "owned automobile" nor a "non-owned automobile" on the other policy.

Similarly, if the named insured resides in the same household with his son, the son's car is excluded from the traditional definition of "non-owned automobile" since it is "owned by or furnished for the regular use of a relative," and is therefore not covered under the father's liability coverage.<sup>1</sup> As an example, assume a father, who insures his Cadillac for \$1 million with GEICO, borrows his son's car, insured with Colonial for \$25,000. The standard definition of "non-owned automobile" in the father's policy excludes *liability* coverage to the father, under his GEICO policy, while using his son's car. If the son's car were uninsured, the father would have no coverage.<sup>2</sup> The underwriters presumed that autos which are furnished for the regular use of a relative residing in the same household would be used by the policyholder (named insured) more than on a casual, infrequent basis. Hence, the term "relative" was inserted into the definition of "non-owned automobile."

Understanding one purpose for "non-owned automobile" coverage is essential to understanding the scope of the coverage. More than 25 years ago, the Supreme Court of Virginia commented on the then "new non-owned automobile coverage" in Quesenberry v. Nichols and Erie.<sup>3</sup>

"In recent years some companies have written policies to cover a "non-owned" automobile . . . Other policies obtain the same result by extending the driver's regular insurance to casual driving of cars other than his own without the payment of extra premium, by the use of the 'drive other cars' clause or 'use of other automobiles' clause . . . The general purpose . . . is to protect the insured against liability . . . from the infrequent or casual use of automobiles other than the ones described in the policy. **Usually excluded is protection**

against liability with respect to the insured's frequent use of another automobile . . . ." [Emphasis added]

### THE "GOLDEN CLAUSE"

The "Other Insurance Clause" found in the liability section of the standard Family Auto Policy provides excess liability coverage to a defendant driving an auto he does not own – a **non-owned auto**.

The "Other Insurance Clause" found in Part I, Liability of the Family Auto Policy provides:

Other Insurance. If the insured has other insurance against a loss covered by Part I (Liability) of this policy . . . . the insurance with respect to . . . non-owned automobile shall be excess insurance over any other collectible insurance.

#### Non-Owned Auto Coverage Excess - Example:

As an example, Don Denver borrowed his neighbor's car insured with Nationwide. Don is insured with GEICO with \$100,000 liability limits. Don negligently injures Alan Anderson who obtains a \$125,000 judgment against Don. The neighbor's car, insured with Nationwide for \$25,000 in liability limits, provides primary liability coverage of \$25,000. Don's own carrier, GEICO, provides excess, non-owned auto liability coverage of \$100,000, since Don was driving a non-owned auto.

If Don borrowed his son's car (resident relative), the son's car would not fit the standard definition of a "non-owned auto" (owned by a resident relative), and Don would have no excess "non-owned auto" coverage under his own GEICO policy.

### THE THREE (3) STEPS OF COVERAGE ANALYSIS

Coverage analysis involves three steps:

- **RTP** – Read the policy;
- **RTS** – Read the statute;
- **RTC** – Read the cases (especially those found in the annotations to the statute).

## **MINING FOR GOLD (COVERAGE) WITH NON-OWNED AUTO LIABILITY COVERAGE**

1. **You Represent Priscilla Anderson:** Priscilla Anderson was rear-ended by defendant Larry Long driving his girlfriend's Ford insured with Colonial for \$25,000 in liability coverage. Priscilla Anderson's claim has a value of \$100,000. Colonial has offered its \$25,000 liability policy limits. What do you do – you represent Priscilla Anderson?

### **A. To Find Coverage:**

1. Follow the Car (driven by defendant)
2. Follow the Driver (defendant's own policy-NOA)
3. Follow the Driver Home (Resident Relative Policy-NOA)

Once you have determined that the defendant was driving a non-owned auto, then and only then, can you go to steps 2 and 3 and analyze **each** policy under which the defendant is an insured for non-owned auto coverage.

## **2. Maximizing Recovery with "Non-Owned Auto" Liability Coverage**

Use the three steps of coverage analysis: RTP (Read the Policy); RTS (Read the Statute); and RTC (Read the Cases). Let's begin by reading selected standardized parts of the Family Auto Policy – Part I – Liability. (Since the State Corporation Commission pre-approves all auto liability insurance policies, most companies generally use the same standardized format).

### **A. RTP (Read the Policy)**

#### Part I – Liability

Coverage A – Bodily Insurance Liability: To pay on behalf of the insured all sums which the insured shall become legally obligated to pay as damages because of: (A) bodily injury . . . arising out of the ownership, maintenance or use of the *owned automobile* or any *non-owned automobile* . . . .

#### **Persons Insured:**

The following are insured's under Part I:

#### **(1) With Respect to the Owned Automobile.**

- (a) the named insured and any resident of the same household;

(b) "Omnibus Clause" – any other person using such automobile with the permission of the named insured, provided his actual operation or (if he is not operating) his other actual use thereof is within the scope of such permission; and

(c) [deleted – not relevant].

**(2) With Respect to a Non-Owned Automobile.**

(a) the named insured;

(b) any relative, but only with respect to a private passenger automobile or trailer, provided his actual operation or (if he is not operating) the other actual use thereof is with the permission, or reasonably believed to be with the permission, of the owner and is within the scope of such permission, and

(c) [deleted – not relevant].

**Definitions.** Under Part I [selected]:

**"Insured"** means a person or organization described under "Persons Insured";

**"Relative"** means a relative of the named insured who is a resident of the same household;

**"Owned Automobile"** means:

(a) a private passenger, farm or utility automobile described in this policy for which a specific premium charge indicates that coverage is afforded;

(b) A trailer owned by the named insured;

(c) A private passenger, farm or utility automobile ownership of which is acquired by the named insured during the policy period, provided . . .;

(d) A temporary substitute automobile.

**"Non-Owned Automobile"** means an automobile or trailer not owned by or furnished for the regular use of either the named insured or any relative, other than a temporary substitute automobile.

**B. RTS (Read the Statute)**

The key statute involving liability coverage is Code §38.2-2204; the "omnibus clause" (permissive user) statute. Code §38.2-2204(A) requires all Virginia auto

insurance policies have an “omnibus clause” extending liability coverage to all persons using the insured motor vehicle “with the expressed or implied consent of the named insured.” The term “omnibus” is derived from the Latin meaning “all persons” – hence the name “omnibus clause”. This standard clause is found on page 6 (Part I – Liability “Persons Insured” (1)(b)). Any policy provision which limits this omnibus coverage is void. Code §38.2-2204(D); Southside Distributing Company v. Travelers.<sup>4</sup>

In the case of Priscilla Anderson, the defendant, Larry Long, had permission to drive his girlfriend’s car, which was insured with Colonial. Code §38.2-2204(D) requires that Colonial extend “omnibus” (also called “permissive user”) liability coverage to Larry Long.

### C. RTC (Read the Cases)

Two landmark Virginia Supreme Court cases discuss the term “furnished for the regular use” contained in the policy definition of non-owned automobile – “not owned by or **furnished for the regular use** of either the named insured or any relative” – (emphasis added). Both cases involve State Farm: one case is *Smith* and the other case is *Jones*.

#### 1. Casual, Infrequent Use Allowed:

Elaine Mellow, four months pregnant, left her furniture and automobile insured by State Farm, in California after her husband died, to stay with her brother-in-law and sister in Norfolk, Virginia, until the birth of her baby. Elaine Mellow drove her brother-in-law’s uninsured car 10 times during a two-month period before her auto collision. On three occasions she drove the car for her own purposes and on seven occasions she drove the car to assist her sister, who could not drive. Elaine Mellow was sued by the other driver. Since the car she was driving was uninsured, she looked to her State Farm policy back in California to provide liability coverage. State Farm denied coverage on the ground that “non-owned automobile” coverage was excluded because her brother-in-law’s car, which was involved in the collision, had been furnished for Elaine Mellow’s **regular use**. The Supreme Court of Virginia in State Farm Mut. Auto. Ins. Co. v. Smith<sup>5</sup> held that the brother-in-law’s uninsured car was not furnished for Elaine Mellow’s regular use since her use of the car was sporadic and controlled (casual and infrequent). Accordingly, it was a “non-owned automobile” and State Farm was required to provide liability coverage to its insured, Elaine Mellow.

#### 2. Frequent Use Not Allowed:

Paul Jones was a route salesman for The Southern Vending Company in Richmond. The company furnished Jones a 1978 Ford van which he used every day in his job. Jones drove the van 30 miles a week, six days a week, over a two- to three-year period. The trial court found coverage on Jones’ personal auto policy holding the van as a “non-owned automobile” since the van was not furnished for his regular use but for the regular use of his employer. The Supreme Court of Virginia in State Farm

Mut. Auto. Ins. Co. v. Jones<sup>6</sup> reversed, holding that the van was furnished to Jones for his regular use and therefore did not qualify as a "non-owned automobile" under the terms of Jones' own State Farm policy. The Virginia Supreme Court quoted from State Farm Mut. Auto. Ins. Co. v. Smith,<sup>7</sup> stating the purpose for "non-owned automobile" coverage: "The general purpose and effect of such a policy is to protect the insured against liability arising from the use of his automobile, and in addition, from the infrequent or casual use of automobiles other than the one described in the policy. Usually excluded is protection against liability with respect to the insured's frequent use of another automobile."

### **3. Mining for Gold – The Three Steps:**

#### **A. Primary Coverage – Follow the Car Occupied by the Defendant:**

Generally, the vehicle the defendant was driving provides primary liability coverage. (Exception – garage policies covering the auto business, such as dealers, repair shops, and parking lots – Code §38.2-2205 provides that such insurance is excess).

Larry Long was driving his girlfriend's car insured with Colonial. Colonial has offered its minimum policy limits of \$25,000, which is inadequate in view of the magnitude of Priscilla's injuries. Let's search together for excess, non-owned auto liability coverage to find the pot of gold at the end of the coverage rainbow.

#### **B. The Search for Excess Liability Coverage:**

##### **1. Follow the Driver:**

Larry Long's 2002 yellow Toyota, which was not involved in this collision, is insured with Stonewall Dixie. Larry is covered under his Stonewall Dixie policy if he was driving an "owned automobile" or a "non-owned automobile" at the time of the collision (see page 6). His girlfriend's Ford is not an "owned automobile" under the terms of Larry's policy since it is not described in Larry's policy, nor is it a "newly acquired automobile" nor a "temporary substitute automobile." However, his girlfriend's car is a "non-owned automobile" **under the terms of Larry's policy** if it was not furnished for Larry's "regular use". State Farm Mut. Auto. Ins. Co. v. Smith<sup>8</sup> held that casual, infrequent use is *not* considered "regular use" within the definition of "non-owned automobile". Since his girlfriend's car was only furnished for Larry's use once a month, this most likely will be considered infrequent, casual use, and coverage should be allowed. Accordingly, an additional \$25,000 in "non-owned auto" liability coverage is available under Larry's policy with Stonewall Dixie.

##### **2. Follow the Driver Home:**

Following Larry home brings us to his mother's \$25,000 liability policy with Maryland Casualty and his brother's \$25,000 liability policy with Bankers and Shippers.



Since Larry was driving a "non-owned automobile" at the time of this collision, he is an insured under both **his mother's and brother's policies**. (See page 6). Each policy covers "any relative (residing in the same household)" with respect to a "non-owned automobile" if such automobile is a private passenger automobile or trailer, provided permission from the owner was granted, and "the relative" (Larry) was driving within the scope of permission, which is the case here. Accordingly, Larry is covered for "non-owned auto" liability insurance under both his mother's liability policy with Maryland Casualty and his brother's liability policy with Bankers and Shippers for an additional \$25,000 each per policy.

### **NON-OWNED AUTO COVERAGE AND LACK OF PERMISSION TO DRIVE - THE STATUTE CONTROLS**

The family auto policy requires a driver to have permission of the named insured (owned auto) or permission of the owner (non-owned auto) for coverage to apply. Generally, the named insured and the owner are the same person.

As an example, assume Allen Anderson rents a rental car from Avis. Avis is the owner of the rental car and the named insured under an Allstate policy insuring Avis and the rental car. The rental agreement between Allen Anderson, the renter, and Avis, prohibits anyone but Allen Anderson from driving the rental car. Assume, contrary to the rental agreement, Allen allows his friend, Barry Brown, to drive the rental car. Barry Brown negligently injures Charles Clark, who recovers a \$100,000.00 judgment against Barry Brown, the driver. You represent Charles Clark, the plaintiff. Smile -- if the defendant, Brown, was driving a "non-owned auto" -- for you have found the pot of gold at the end of the coverage rainbow.

#### **Coverage Analysis: Follow the Car, Follow the Driver and Follow the Driver Home:**

##### **1. Follow the Car:**

The Rental car is an "owned auto" under Avis' auto policy with Allstate. The "omnibus clause" of the Allstate policy (page 6 above) does not provide coverage because the driver, Barry Brown, was not using the rental car with permission of the named insured (Avis).

##### **2. Follow the Driver:**

The defendant, Barry Brown, was driving a non-owned auto. The rental car fits the definition of a non-owned auto (page 6 above). Does Barry Brown have non-owned auto coverage under his own policy with Bankers & Shippers even though he did not have permission to drive the rental car from the named insured -- Avis? Answer: Yes.

A. **Read the Policy (RTP)** -- pages 5-6 above. The standard auto policy provides:

"Persons Insured: With respect to a non-owned auto:

(a) the named insured."

Barry Brown is the named insured under his **own policy** with Bankers & Shippers and needs no permission from anyone while driving an owned auto or a non-owned auto since he is the named insured. Accordingly, \$50,000.00, the policy limits, is available from Barry Brown's own auto carrier, Bankers & Shippers.

### **3. Follow the Driver Home:**

Barry Brown lives with his father as part of the same household. Barry's father has a separate auto policy with Frontier Insurance Company with liability limits of \$50,000.00. Barry was driving a non-owned auto, the rental car. Does Barry have non-owned auto coverage under this father's policy with Frontier?

#### **A. Read the Policy (RTP) -- (the father's policy)**

"Persons Insured:

#### **With Respect to a Non-Owned Automobile:**

(a) the named insured;

(b) **any relative**, but only with respect to a private passenger automobile...provided his actual operation... is with the permission, or reasonably believed to be with the **permission, of the owner** and is within the scope of such permission."

Barry's father's insurance company, Frontier, sends you, as the plaintiff's lawyer, a letter denying coverage on the ground that Barry Brown, the rental car driver, did not have permission from the owner (Avis) to drive the rental car. The rental agreement provided that only the renter, Allen Anderson, had permission to drive. What do you do, you represent the plaintiff, Charles Clark?

### **The Three Steps of Coverage Analysis**

- RTP
- RTS
- RTC

#### **RTP - Read the Policy**

You have just read the policy. The policy denies coverage since the driver did not have permission from Avis, the owner of the rental car.

### RTS - Read the Statute

The next step is **RTS**. Virginia Code §38.2-2204 provides:

"Every policy... of liability insurance... insuring private passenger automobiles... that has as the named insured, an individual... that includes... use of a **non-owned auto**... any provision requiring permission of the owner of such automobile... for insurance to apply, shall be construed to include **permission of the custodian** in the provision requiring permission of the owner."

### RTC - Read the Cases

In Gordon v. Liberty Mutual Ins. Co., 675 F.Supp. 321 (E.D. Va. 1987) the renter of a rental car gave permission to his friend, Rossie, to drive the car even though the rental agreement prohibited anyone but the renter from driving the car. Rossie resided with his parents as part of their household. The court held that under 38.2-2204, permission of the **custodian** (the renter) was sufficient for non-owned auto coverage under Rossie's parents' auto policy. The statute "trumped" the policy language. Accord, Kandrac v. Va. Farm Bureau Mut. Ins. Co., 13 Cir. L.E. 1165 46 Va. Car. 171 (1998); Libscomb v. GEICO, 13 Cir. HH 3743, 43 Va. Cir. 326 (1997).

### NON-OWNED AUTO COVERAGE - THE POT OF GOLD AT THE END OF THE COVERAGE RAINBOW

If you represent the plaintiff, and the defendant was driving a non-owned auto -- smile. You have found the pot of gold at the end of the coverage rainbow.

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<sup>1</sup> Approximately seventeen (17) years ago, **State Farm** amended the definition of “non-owned automobile” in Part I – Liability of its Family Auto Policy – Policy Form 9846F.8 (preferred risks); Policy Form 9946F.9 (higher risks); but *not* Policy Form 9346F.8 (non-voluntary, assigned risks). The “6989AS and 6989AG Amendatory Endorsements” provide “The definition of ‘non-owned automobile’ means an automobile or trailer not owned by, or furnished for the regular use of: (1) the named insured; or (b) any relative **unless** at the time of the accident or loss: (a) the automobile is or has been described on the declarations page of a liability policy within the preceding 30 days; and (2) the named insured or a relative who does not own such automobile is the driver. A temporary substitute automobile is not considered a non-owned automobile.”

This State Farm amendment provides excess “non-owned automobile” liability coverage to the policyholder, his spouse, and to relatives residing in the same household who drive each other’s owned autos, provided the auto involved in the collision is insured or was insured 30 days before the collision by *any* insurance company. In the example, if the father were insured with State Farm, excess “non-owned automobile” coverage could be provided the father while driving his son’s car if the son’s car “is or has been described on the declarations page of a liability policy within the preceding 30 days.”

**This is a significant expansion by State Farm of “non-owned automobile” liability coverage.** For example, assume son Gary, insured with GEICO and his son Sam, insured with State Farm, residing in the same household with their father, on separate occasions borrow their father’s car, the same Ford, insured with Frontier Insurance Company. Son, Gary, negligently injures plaintiff-1 and son, Sam, negligently injures plaintiff-2 while driving their father’s car. All autos carry minimum limits liability coverage of \$25,000. Both plaintiff-1 and plaintiff-2 win \$50,000 judgments against son Gary and against son Sam for their separate accidents.

Plaintiff-1 recovers only \$25,000 from Frontier, the primary carrier insuring the father’s car since Gary’s GEICO policy contains the *standard* definition of “non-owned automobile” (page 7). The GEICO policy excludes excess “non-owned automobile” coverage since Gary was driving a car “owned by or furnished for the regular use of . . . any relative,” i.e., his father.

Plaintiff-2 recovers \$50,000. \$25,000 from Frontier and \$25,000 in excess “non-owned automobile” liability coverage from Sam’s State Farm policy which contains the *amended* definition of “non-owned automobile” quoted above.

<sup>2</sup> See note 1. In the first example, if the father insured his Cadillac with State Farm, instead of with GEICO, the father would be entitled to \$25,000 liability coverage on his son’s Colonial policy and \$1,000,000 in “non-owned automobile” liability coverage under his own State Farm policy. However, in the second example, the father would *not* be entitled to any “non-owned automobile” liability coverage under his own State Farm policy if his son’s auto was uninsured for more than 30 days.

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<sup>3</sup> Quesenberry v. Nichols and Erie, 208 Va. 667 at 670, 672 (1968).

<sup>4</sup> Southside Distributing Company v. Travelers, 213 Va. 38, 189 S.E.2d 681 (1972).

<sup>5</sup> State Farm Mut. Auto. Ins. Co. v. Smith, 206 Va. 280, 142 S.E.2d 562 (1965).

<sup>6</sup> State Farm Mut. Auto. Ins. Co. v. Jones, 238 Va. 467, 383 S.E.2d 734 (1989).

<sup>7</sup> State Farm Mut. Auto. Ins. Co. v. Smith, *supra*, note 5.

<sup>8</sup> State Farm Mut. Auto. Ins. Co. v. Smith, *supra*, note 5.