VIRGINIA TRIAL LAWYERS ASSOCIATION

Law Letter

VOLUME 45 NUMBER 3 MAY/JUNE 2006

Making a Difference

From Your President

Gerald A. Schwartz

This is my first President's column and I would like to thank you for allowing me to serve this year as your President. It is the greatest honor a trial lawyer can receive.

I am proud to be a trial lawyer. I am proud of what we do. We represent people – people with heartbeats; not large corporations; not large insurance companies; not large corporate banks with cold steel vaults. Many times our clients have only us. Our clients place their case, their future and their trust in our hands. We have an awesome responsibility. What makes it all worthwhile is the realization that we can make a difference in our clients' lives.

VTLA has made a difference in my life. I am proud to say that I am a product of the VTLA CLE. When I first started my practice as a lawyer, I had just left a government position in patent law. I wanted to become a trial lawyer representing people - not patents. I took out my retirement funds and with the help of my wife, I went out on my own. I had no mentor, but I had VTLA. VTLA was my mentor. I learned to be a trial lawyer from VTLA's best by going to VTLA seminars and listening to VTLA lecture tapes. I learned, and I was inspired, by these speakers who gave of their time, who gave of themselves, and who shared their knowledge and skills with me. They made a difference. It is always a special honor for me to be asked to speak at a VTLA seminar. It allows me to do for other VTLA members what was done for me when I first started. Hopefully, I can make a difference for them.

I have been involved with VTLA for the past 20 years. I have seen VLTA grow and move forward like a fast flowing river. Today, VLTA is no longer just about personal injury lawyers. We are criminal lawyers, family lawyers, small business lawyers, personal injury lawyers, consumer lawyers, employment and civil rights lawyers, social security lawyers and worker's compensation lawyers - united - with a common bond and a common goal - to improve our system of justice for the citizens of Virginia, for our clients, and to make ourselves better lawyers.

VTLA has come a long way in 20 years. We have the most-respected CLE programs. We have the most timely and incisive publications - witness the issue of the VTLA *Journal* on Indigent Defense. The Supreme Court updates on our web site are up-to-the-minute. Our list serves provide a forum for members to query and learn from each other. The Virginia College of Trial Advocacy is our own Boot Camp for Trial Lawyers. And, our Amicus Curiae Committee, and our members who have heeded the call to author VTLA amicus briefs, have won major victories for our clients and for the citizens of Virginia.

VTLA gives us knowledge and skills which translate to power in the courtroom. VTLA empowers the small firm lawyer to represent a mom and pop business against a major corporation; VTLA empowers the small firm lawyer to be a victorious David over a defeated, much stronger Goliath; and, VTLA empowers the small firm lawyer to be the best he or she can be.

We are all small firm lawyers. Today, the small firm lawyer is the lone voice articulating the rights of people against big powerful interests. Over the last two decades, government regulations and oversight have been eroded. We live in an era of "deregulation". So, today in America, we stand alone, at the bridge of responsibility, holding wrongdoers accountable. Today, our clients, the civil justice system and the criminal justice system need us more than ever.

We live in an era where every American's fundamental right to trial jury is under severe attack, along with trial lawyers and the civil justice system we uphold. In 2005, our legislature introduced bills to place additional recovery caps on the rights of those most severely injured by medical malpractice – caps within a cap. Imagine the horror of a young 10-year-old-girl named Becky, blinded by medical malpractice. Sixty-five years of permanent blindness for this young girl would be capped at $250,000. Is this what our founding fathers, some of whom were patriotic Virginians, had in mind when they drafted the Bill of Rights 200 years ago? In 2006, a bill was introduced into our legislature that would have the practical effect of doing away with punitive damages against drunk drivers. Punitive damages are essential as a deterrent to set an example and to keep drunk drivers off of the road.

As our Immediate Past President, Richard Railey, Jr., said, "It is not enough to represent our clients in the courtroom. We must also represent our clients in the halls of the legislature." This year and last year, a record number of our members represented their clients at the legislature on Justice Day. Together, with VTLA's legislative team, we made a difference. The $250,000.00 medical malpractice cap on non-economic damages and the punitive damage bill did not become law.

Together, we must continue to fight for our clients in the courtroom and in the halls of the legislature, no matter how draining it might be. We must never, ever, give up -- for our clients' rights and the civil and criminal justice system itself, are at stake.

VTLA is made up of lawyers like you; lawyers like me; and lawyers who believe in the civil justice system, the criminal justice system, and in the inalienable rights of people. Together, VTLA has made a difference and together, we will continue to make a difference.

VIRGINIA TRIAL LAWYERS ASSOCIATION

Law Letter

VOLUME 45 NUMBER 4 JULY/AUGUST 2006

Keeping the ball until the game is over

You are at the Super Bowl. You paid a premium for good seats. The home team scores a quick 3-point field goal. Imagine the rules allow the home team to keep the ball until the clock runs out and the game is over. The fans are furious because they paid a premium and didn't get what they paid for. A similar scenario is happening today with your auto insurance. Some underinsured motorist carriers are keeping the ball – withholding payment of your underinsured motorist benefits – until the game is over – until you obtain a judgment in court against the negligent defendant.

Underinsured motorist coverage is required by Virginia law to protect you and your family from negligent drivers who don't have enough liability insurance to cover serious injuries they caused you and your family. The public policy of this Commonwealth is being frustrated while certain underinsured motorist carriers earn millions of dollars in interest on its withheld coverage. With rising interest rates, this practice is becoming more and more financially rewarding to underinsured motorist carriers.

Here's how it works. Assume you are seriously injured by a negligent driver who has minimum liability limits of $25,000 and no assets. Your case has a minimum value of $200,000. You have an additional $75,000 in underinsured motorist coverage with your own insurance carrier – coverage you have paid for to protect you and your family from this very situation where a negligent driver is inadequately insured. The defendant's liability carrier steps up to the plate and offers you its $25,000 policy limits. You cannot accept this offer since signing a release will extinguish your underinsured motorist carrier's subrogation rights and your underinsured motorist claim. Your own insurance company refuses to evaluate your underinsured motorist claim, and make an offer, until the case is over - - a judgment is obtained against the negligent defendant, citing *Midwest Mutual Insurance Co. v. Aetna Casualty and Surety Co.*, 216 Va. 926, 929 (1976), which held that "judgment [against the tortfeasor] is the event which determines legal entitlement to recovery [of underinsured motorist benefits]."

In a case of clear liability, worth $100,000 more than the combined liability and underinsured motorist limits, you are forced to file a lawsuit against the negligent driver and go through an expensive trial, waiting at least a year, to obtain a "judgment" which triggers the underinsured motorist carrier's obligation to pay. Under Code §38.2-2206 (F), the underinsured motorist carrier may defend or may sit back on the sidelines and do nothing – not even enter an appearance even though it is the "real party in interest."

Your underinsured motorist carrier incurs no cost, but earns one year's worth of interest on its withheld policy limits, while the injured person – you the policyholder – and the other driver's insurance company are needlessly litigating the case with an "absent" underinsured motorist carrier. The public policy of Virginia and the expectation of you, the insured victim, who has purchased underinsured motorist coverage, are frustrated.

The injured person is forced to file a lawsuit on a clear liability case worth more than the combined policy limits, forced to spend time and money on expert witnesses and on litigation costs; the defendant's liability insurer, which has offered its policy limits early on, is forced to spend time and money on expert witnesses, on litigation costs, and on attorney's fees. And, the defendant driver is faced with having to pay any verdict above $100,000 out of his own pocket. The courts of the Commonwealth are clogged with meritorious cases that should have settled, but for the underinsured motorist carriers keeping the ball – withholding payment of its coverage – until the game is over – judgment.

From Your President

Gerald A. Schwartz

Other states have solved this problem by shifting the cost of defense to the underinsured motorist carrier, who is the real party in interest, after the liability insurance company has offered its policy limits. Several states, like North Carolina and Maryland, have enacted statutes which require the underinsured motorist carrier, after a policy limits offer is made by the defendant's insurance company, to tender a check to the injured person in the amount of the liability policy limits offer or waive its subrogation rights and give the injured person (its policyholder) its consent to settle with the defendant's liability carrier without prejudice to the injured person's right to bring an underinsured motorist claim.

The Commonwealth of Virginia has been a pioneer in the development of underinsured motorist coverage. Through its General Assembly and Supreme Court, Virginia has moved forward to protect its citizens against the hardships resulting from the negligence of inadequately insured drivers. Unfortunately, the legislative purpose of the underinsured motorist statute and the strong public policy of this Commonwealth have become frustrated when an underinsured motorist carrier "keeps the ball until the game is over."

VIRGINIA TRIAL LAWYERS ASSOCIATION

Law Letter

VOLUME 45 NUMBER 5 SEPTEMBER/OCTOBER 2006

VTLA CLE: Learn, grow, be the best you can be

As VTLA members we share a common identity. We are all small firm lawyers. Today, it is us, the small firm lawyer, who stands up for the rights of people against powerful interests; it is us, the small firm lawyer, who stands up to represent consumers, families, small business owners and indigent defendants; and it is us, the small firm lawyer, who stands up at the bridge of responsibility, holding wrongdoers accountable.

As your President, I am proud of VTLA CLE. Our CLE has made us better lawyers – better lawyers to serve our clients; better lawyers to serve the citizens of Virginia; and better lawyers to help preserve our system of justice, both civil and criminal.

As small firm lawyers, we know "knowledge is power". VTLA CLE has given us that knowledge and the skills that translate to power in the courtroom.

VTLA CLE has given us the knowledge and skills to represent a mom and pop business against a major corporation; the knowledge and skills to represent a citizen charged by the state with a major crime; and the knowledge and skills to represent a consumer injured by a defective product manufactured by a large multi-national corporation.

VTLA CLE empowers us to learn; to grow; and to be the very best we can be.

I know firsthand. I am a small firm lawyer - - the proud product of VTLA CLE. When I first started my career as a lawyer, it was just me. I even did my own typing. My first office was my apartment. I had no mentor. I yearned for knowledge and to be taught the skills needed to be a trial lawyer. I attended VTLA CLE seminars and eagerly listened to VTLA CLE lecture tapes. I was the one who requested, in advance, the seminar outline book to study beforehand to get the most out of the VTLA CLE seminar.

I learned and I was inspired by VTLA CLE's best speakers. They gave of their time, they gave of themselves, and they shared their knowledge and skill with me.

This is what VTLA is all about, and why VTLA CLE is special. VTLA and VTLA CLE is about sharing, mentoring and making our members better lawyers.

From Your President

Gerald A. Schwartz

VTLA and VTLA CLE make a difference. It has made a difference for me, and continues to make a difference today.

VTLA CLE is indebted to the efforts of many of our members, including our Executive Director, Jack Harris; our Director of Education, Alison Love; our Director of Communications, Valerie O'Brien; our CLE Committee Chairs; members of our hardworking CLE committee; Seminar Chairs; and all those who have taught us, mentored us, and shared their knowledge and skills with us.

At VTLA the tradition continues. Join us. Experience CLE at its best - - learn, grow, be the very best you can be with VTLA CLE.

VIRGINIA TRIAL LAWYERS ASSOCIATION

Law Letter

VOLUME 45 NUMBER 6 NOVEMBER/DECEMBER 2006

A conservative remedy for a shameful UIM insurance practice: HB 3035

It happens all too frequently in auto collision cases. Your client is badly hurt. Liability is clear. The defendant's liability carrier offers its policy limits -which are inadequate. Your client's underinsured motorist carrier refuses to make an offer - forcing needless litigation of a highly meritorious case that should have settled. The defendant's liability carrier, who has offered its policy limits, is forced to expend money on litigation costs, expert witnesses, and defense attorney fees; the plaintiff is forced to spend money on litigation costs and expert witnesses.

Everyone loses except the UIM carrier, which earns additional interest on its money. The courts of our Commonwealth have many such meritorious cases, cases which should have settled but for the underinsured motorist carrier's withholding its coverage – failing to make an offer until the trial is over and the verdict is announced by the jury. The expectations of your client, who has paid a premium for UIM coverage, are frustrated and the public policy of this Commonwealth is thwarted.

Philip MacTaggart, a federal public defender rear-ended in an auto collision in Norfolk, experienced this unfair practice firsthand. Philip suffered a mild traumatic brain injury and a neck injury requiring surgery, which resulted in a permanent impairment. His medical bills and lost wages up until trial totaled more than $187,000, with future lost wages in excess of $1 million. The value of Philip's case exceeded the defendant's $100,000 liability limits and Philip's UIM limits of an additional $300,000. The defendant's liability carrier offered its liability limits but Philip's UIM carrier refused to make an offer. Philip was forced to trial in a case of clear liability with a value far exceeding all liability and UIM coverage. Philip's UIM carrier refused to participate in litigation, even though it was the real party in interest. The jury returned a verdict for Philip MacTaggart for $1,352,428. [*MacTaggart v. Ochsendorf*, Cir. Ct. for the City of Norfolk, Law No. CL04-401, 10/12/05 (Charles E. Poston, Judge).]

Before the jury returned its verdict, the trial judge, Charles E. Poston, felt compelled to describe, in the record, the UIM carrier's conduct as "shameful" stating: "THE COURT: One thing I wanted to say before we close the record . . . Yesterday morning, or this morning when we began, I asked the attorneys to step into chambers and I asked, How far apart are you. Mr. Nelson said with his company . . . we have laid all of our coverage on the table. I asked, why are we trying this case, and the response of the attorney was, because the uninsured carrier has refused to come to the table. I don't know who that carrier is because it is not in the file. It doesn't take a rocket scientist to know that this case would not have gone to the jury on liability, a most basic element. A freshman adjustor would have known that. I can't help but comment or observe that in forcing this trial that did not have to happen, the defendant was inconvenienced and lost money. The plaintiff was inconvenienced. And whatever amount the uninsured motorist [carrier] was going to pay would have been paid anyway, but his recovery has been reduced substantially because of **this attitude of his own carrier. It is absolutely shameful** [emphasis added]. Thank you."

Although our efforts to pass a legislative remedy for this problem have not been successful in the past, this is too important a matter to ignore, therefore we are proposing another approach this Session, use of the Unfair Claim Settlement Practices Act, existing law since 1952 with amendments over the years.

The Unfair Claim Settlement Practices Act, Code Section 38.2-510(A) prohibits 17 unfair insurance practices performed "with such frequency as to indicate a general business practice." **Subsection (A)(6) of the Act prohibits an insurance company, "Not attempting in good faith to make prompt, fair and equitable settlements of claims in which liability has become reasonably clear."**

From Your President

Gerald A. Schwartz

The Act is enforced by the State Corporation Commission, Bureau of Insurance, which has issued a set of regulations prohibiting these unfair practices. 14 Va. Admin. Code 5-400-70(D) (2003) provides, "In any case where there is no dispute as to coverage or liability, every insurer **must offer to a first party claimant** . . . an amount which is fair and reasonable as shown by the investigation of the claim . . . ."

HB 3035 in the 2007 General Assembly seeks to add a section to the Unfair Claim Settlement Practices Act clarifying that the Act **"Shall apply to uninsured and underinsured motorist claims before or after judgment against the uninsured motorist or underinsured motorist tortfeasor."** If passed, HB 3035 will give the State Corporation Commission a clear mandate to stop the frequent "shameful" insurance practice suffered by Phil MacTaggart and far too many of our clients.

If HB 3035 is passed, plaintiff's lawyers can play a vital role in helping the Bureau of Insurance. Simply notify VTLA office of the case details every time you see this practice. VTLA will keep a record, per insurance carrier, to assist the Bureau of Insurance. Together, we can make a difference for our clients and put an end to this frequent "shameful" UIM insurance practice.