

| | |
|--|---|
| NATIONWIDE MUTUAL | * |
| INSURANCE COMPANY | * |
| Serve: Registered Agent | * |
| CT Corporation System | * |
| 4701 Cox Road, Suite 301 | * |
| Glen Allen, Virginia 23060 | * |
| (Uninsured/Underinsured Motorist Carrier | * |
| For Carl E. Barnes) | * |
| AND | * |
| JAMES A. GREEN | * |
| AND | * |
| LARRY HOWARD ALLEN, JR., | * |
| Administrator of the Estate of | * |
| Sharon F. Allen, deceased | * |
| AND | * |
| CARL E. BARNES | * |
| Defendants | * |

COMPLAINT FOR DECLARATORY JUDGMENT

COMES NOW the Plaintiff, Robert A. O'Brien, Administrator of the Estate of Anna R. Smith, deceased, and for his Bill of Complaint for Declaratory Judgment pursuant to Virginia Code §8.01-184, moves this Honorable Court to declare:

A. That Anna R. Smith, deceased, is a First Class Insured under the UM/UIM endorsements of her mother-in-law's, Sharon F. Allen's four (4) motor vehicle liability insurance policies referred to below as the Farmers' I, II, III and National Fire and Marine policies.

B. Anna R. Smith, deceased, is entitled to underinsured motorist coverage as to the Defendant, James A. Green, in the minimum amount of \$1,050,000 (in the event that Defendant Green's auto liability insurance carrier, Progressive, offers its full, per

person, \$25,000.00 of its \$25,000/\$50,000 liability coverage to Anna R. Smith) subject to the UM/UIM Limits of Liability clause in the National Fire & Marine policy.

And in support, states as follows:

THE UNDERLYING COLLISION

1. On May 19, 2006, in the City of Fredericksburg, Virginia, Anna R. Smith, and her 1½ year old daughter, Betty Audrey Smith, were passengers in 2005 Mercury Sable driven by Sharon F. Allen, Anna R. Smith's mother-in-law. The Mercury Sable collided with a 1990 Ford Ranger driven by James A. Green. Immediately thereafter, as a result, the Mercury Sable collided, head-on with a 1999 Plymouth driven by Carl E. Barnes.

2. Anna R. Smith, her 1½ year old daughter, Betty Audrey Smith, and Sharon F. Allen, were killed.

3. Carl E. Barnes sustained substantial injuries, including multiple fractures.

4. James A. Green was convicted of reckless driving by a jury in the Circuit Court of the City of Fredericksburg on April 2, 2007 and sentenced to 30 days in jail.

THE UNDERLYING LAWSUITS RESULTING FROM THE COLLISION

5. Robert A. O'Brien, Administrator of the Estate of Anna R. Smith, filed a wrongful death action in the Circuit Court of the City of Fredericksburg, Law No: 08-250, against James A. Green, and Larry Howard Allen, Jr., Administrator of the Estate of Sharon F. Allen, deceased, jointly and severally, in the amount of \$2,000,000.

6. Steven T. Harris, Administrator of the Estate of Betty Audrey Smith, filed a wrongful death action in the Circuit Court of the City of Fredericksburg, Law No: CL07-000650, against Larry Howard Allen, Jr. , Administrator of the Estate of Sharon F. Allen,

deceased, and James Green, jointly and severally, in the amount of \$1,000,000.

7. Carl E. Barnes filed a Complaint for personal injuries in the Circuit Court of the City of Fredericksburg, Law No: CL-08000220-00, against James A. Green, and Larry Howard Allen, Jr. , Administrator of the Estate of Sharon F. Allen, deceased, jointly and severally, in the amount of \$1,600,000.

8. Larry Howard Allen, Jr., Administrator of the Estate of Sharon F. Allen, deceased, and James A. Green, did not file civil suits resulting from this collision.

**RESIDENT RELATIVE UM/UIM COVERAGE
FOR ANNA R. SMITH**

The Farmers' I, II and III Policies

9. At the time of this collision, Anna R. Smith was a passenger in a 2005 Mercury Sable owned and driven by Sharon F. Allen.

10. At the time of this collision, Anna R. Smith was the wife of Robert A. O'Brien, the son of Sharon F. Allen, having been married on June 26, 2005.

11. At the time of this collision, Anna R. Smith, her 1 ½ year old daughter, Betty Audrey Smith, and her husband, Robert A. O'Brien, resided at 1334 Bridge Avenue, in King George, Virginia, with Sharon F. Allen and her husband, Larry Howard Allen, Jr.

12. At the time of this collision, Anna R. Smith, her 1 ½ year old daughter, Betty Audrey Smith, and her husband, Robert A. O'Brien resided at 1334 Bridge Avenue, in King George, Virginia as a resident of Sharon F. Allen's household.

13. The 2005 Mercury Sable involved in this collision was owned and driven by Sharon F. Allen, and was insured by Mid-Century Insurance Company (Farmers Insurance Group of Companies -- hereinafter referred to as the "Farmers I"), Policy No:

Virginia.

14. At the time of this collision, Sharon F. Allen also was the named insured under a second, separate, automobile liability insurance policy insuring a 1995 Jeep Cherokee Sports Wagon, also insured by Mid-Century Insurance Company (Farmers Insurance Group of Companies -- hereinafter referred to as "Farmers II"), Policy No: 68-16932-63-11, Effective Policy Period: 3/7/06 - 5/27/06; Named Insured: Sharon F. Allen, 1334 Bridge Avenue, King George, Virginia.

15. At the time of this collision, Sharon F. Allen was also the named insured under a third separate automobile liability policy issued by Mid-Century Insurance Company (Farmers Insurance Group of Companies -- hereinafter referred to as "Farmers III"), Policy No: 68 17075-24-80, Effective Policy Period: 4/21/06 - 10/21/06; Named Insured: Sharon F. Allen, 12433 Ridge Road, King George, Virginia, insuring a 2001 Chevrolet Cavalier sedan.

16. Each of the three separate Farmer's I, II and III automobile liability policies has liability policy limits of \$25,000/\$50,000 and uninsured/underinsured motorist (UM/UIM) policy limits of \$25,000/\$50,000.

17. The Farmers' I, II and III policies in the Uninsured Motorist Endorsement (p. 10 of the policies) under "PERSONS INSURED" (p. 11) includes the following as insureds:

"Each of the following is an insured under this insurance to the extent set forth below:

(a) the named insured and, while residents of the same household, the spouse of the named insured, and relatives, wards or foster children of either; (First Class Insured)

-5-

(b) any other person while occupying an insured motor vehicle; (Second Class Insured) and

(c) any person, with respect to damage he is entitled to recover because of bodily injury to which this insurance applies sustained by an insured under (a) or (b) over.

The insurance applies separately with respect to each insured, except with respect to the limits of the company's liability."

The Farmers' I, II and III policies, at page 12 of the Uninsured Motorist Endorsement, defines "relative" as follows:

"relative - means a person related to the named insured by blood, marriage or adoption, including a ward or foster child, who is a resident of the same household."

18. Sharon F. Allen is the named insured under the Farmers I, II and III policies.

19. Anna R. Smith is an insured of the "First Class" under the UM/UIM Endorsement of the Farmers' I, II and III policies since, at the time of this collision, Anna R. Smith (Sharon F. Allen's daughter-in-law), was related to Sharon F. Allen by marriage, and resided as part of the same household as Sharon F. Allen.

THE NATIONAL FIRE & MARINE POLICY

20. At the time of this collision, a commercial auto policy of insurance issued by National Fire & Marine Insurance Company, Policy No: 72TPN377676, Named Insured: Sharon F. Allen t/a S&A Trucking, 1334 Bridge Avenue, King George, Virginia, was in effect, with single limit liability policy limits of \$1,000,000 and a single limit uninsured/underinsured motorist (UM/UIM) policy limit of \$1,000,000 (hereinafter referred to as "National Fire & Marine policy).

21. The National Fire & Marine policy, in the Declarations page, under "Form of Business" for Sharon F. Allen t/a S & A Trucking, sets forth "Individual".

22. "The Virginia Lessor - Additional Insured and Loss Payee" Endorsement #1

to the National Fire & Marine policy, effective date of 2/2/06, prepared by the National Fire & Marine Insurance Company, sets forth "Named Insured - Sharon F. Allen".

23. "Form F - Uniform Motor Carrier Bodily Injury and Property Damage Liability Insurance Endorsement", "Attached to and forming part of Policy No: 72 TPN377676" issued by National Fire & Marine Insurance Company states that the policy was issued to "Sharon F. Allen".

24. Sharon F. Allen and Sharon F. Allen t/a S & A Trucking, are one in the same for purposes of insurance coverage. Alfonso C. Recalde t/a A & R Sweeping & Cleaning v. ITT Hartford, 254 Va. 501, 492 S.E.2d 435 (1997).

25. The National Fire & Marine policy, in the "Uninsured Motorist Endorsement" agrees to pay in accordance with the Virginia Uninsured Motorist Law, all sums the insured is legally entitled to recover as damages from the owner or operator of an uninsured motor vehicle and all sums that the insured is legally entitled to recover as damages from a person operating or using an underinsured motor vehicle.

UNINSURED/UNDERINSURED MOTORIST STATUTE

26. Virginia Code §38.2-2206(A), as amended, mandates a liability insurance policy issued on a motor vehicle contain an endorsement or provisions undertaking to pay the insured all sums that he is legally entitled to recover as damages from the owner or operator of an uninsured motor vehicle.

27. The Uninsured Motorist Endorsement or provisions shall also obligate the insurer to make payment for bodily injury caused by the operation or use of an underinsured motor vehicle to the extent that the vehicle is underinsured, as defined in subsection (B) of Virginia Code §38.2-2206.

28. Virginia Code §38.2-2206(B), as amended, defines two classes of insureds

with different benefits accruing to each class: Class 1 -- "The named insured and, while resident of the same household, the spouse of the named insured, and relatives, wards, or foster children of either, while in a motor vehicle or otherwise"; and Class 2 -- "Any person who uses the motor vehicle to which the policy applies with the expressed or implied consent of the named insured, and a guest in the motor vehicle to which the policy applies...." Stern v. Cincinnati Insurance Co., 252 Va. 307, 311-312, 477 S.E.2d 517 (1996).

29. The UM/UIM Endorsement to the National Fire & Marine policy, in Section A, entitled "Words and Phrases With Special Meaning" (p.1), defines "Family Member" as "a person related to 'you' (named insured) by blood, marriage or adoption who is a resident of 'your' (named insured) household, including a ward or foster child."

30. Under of Virginia Code §38.2-2206(B), as amended, a First Class Insured need not be occupying a motor vehicle covered under the named insured's policy, but is covered while in any motor vehicle or even as a pedestrian, in view of the statutory language "while in a motor vehicle or otherwise". In contrast, a second class insured, a permissive user, or a permissive guest, must be occupying a covered auto for UM/UIM coverage to apply. Allstate v. Meeks, 207 Va. 897, 153 S.E.2d 222 (1967); Stern v. Cincinnati Insurance Co., supra.

UM/UIM ENDORSEMENT - NATIONAL FIRE & MARINE POLICY

31. The Uninsured Motorist Endorsement of the National Fire & Marine policy, Section D, entitled "Who Is An Insured", tracks Virginia Code §38.2-2206(B) in defining two classes of insureds. A First Class Insured -- the named insured and resident family members of his/her household are covered, "while in a motor vehicle or otherwise".

There is no requirement in Section D of the National Fire & Marine policy that requires a

first class insured to be occupying a motor vehicle covered under the policy, in contrast to a Second Class Insured (anyone else). Section D of the National Fire & Marine policy Uninsured Motorist Endorsement, entitled "Who Is An Insured" states:

- "1. 'You' or any 'family member'
2. Anyone else 'occupying' a 'covered auto'....

32. The National Fire & Marine policy Declaration's page, entitled "Virginia Truckers Declarations", under "Schedule of Coverages and Covered Autos" (page 2), under "Coverages - Uninsured Motorist" sets forth symbol, "46". Symbol "46" is defined in the "Truckers Coverage Form" of the National Fire & Marine policy as "Specifically Described Autos -- only those autos described in Item 3 of the Declarations for which a premium charge is shown...." The "Schedule Of Covered Autos You Own" lists a 1993 white tractor and a 1995 East Dump trailer."

33. Symbol "46" on the Declarations page of the National Fire and Marine policy which restricts UM/UIM coverage for a first class insured to "specifically described autos", violates Virginia Code §38.2-2206 which mandates UM/UIM coverage to a First Class Insured "while in a motor vehicle or otherwise". Virginia Code §38.2-2206 does not restrict a First Class Insured to be occupying "specifically described autos". Allstate v. Meeks, 207 Va. 897, 153 S.E.2d 222 (1967).

34. Policy language which conflicts with Virginia Code §38.2-2206 is void and replaced by the statutory language. Bryant v. State Farm, 205 Va. 897, 140 S.E.2d 817 (1965). In this case, for a Class 1 Insured (named insured and "any family member") "specifically described auto" is replaced with the statutory language "a motor vehicle or otherwise". Allstate v. Meeks, 207 Va. 897, 153 S.E.2d 222 (1967).

35. Symbol "46" on the Declarations page conflicts with the National Fire &

Marine policy Uninsured Motorist Endorsement, Section D, defining "Who Is An Insured" by requiring a First Class Insured ("you or a family member") to be occupying a "specifically described auto". Section D entitled "Who Is An Insured" provides UM/UIM coverage to: "1. 'You' (named insured) or any 'family member' (First Class Insured). 2. Anyone else occupying a covered auto...." (Second Class Insured).

36. Symbol "46" on the Declarations page, and Section D of the Uninsured Motorist Endorsement of the National Fire & Marine policy conflict as noted in paragraph 35, resulting in an ambiguity which should be construed against the insurer. Granite State Ins. Co., v. Bottoms, 243 Va. 228, 415 S.E.2d. 131 (1992); USAA v. Webb, 235 Va. 655, 369 S.E.2d 196 (1988).

UNDERINSURED MOTORIST COVERAGE

The Statute

37. Virginia Code §38.2-2206, as amended, requires motor vehicle policies to provide underinsured motorist coverage. Virginia Code §38.2-2206(A) mandates:

"The endorsement or provisions [UM] shall also obligate the insurer to make payment for bodily injury or property damage caused by the operation or use of an underinsured motor vehicle to the extent the vehicle is underinsured, as defined in Section (B) of this section.

38. Virginia Code §38.2-2206(B), as amended, defines "underinsured motor vehicle", and sets forth the method of calculating underinsured motorist coverage as follows:

"A motor vehicle [a defendant's motor vehicle] is 'underinsured' when, and to the extent that, the total amount of bodily injury and property damage coverage applicable to the operation or use of

the motor vehicle [a defendant's motor vehicle] and available for

payment for such bodily injury or property damage [to a plaintiff]... **is less** than the total amount of uninsured motorist coverage afforded any person injured as a result of the operation or use of the [a defendant's] vehicle.

'Available for payment' means the amount of liability insurance coverage applicable to the claim of the injured person for bodily injury or property damage reduced by the payment of any other claims arising out of the same occurrence."

JOINT TORTFEASORS CONSIDERED SEPARATELY

39. In cases involving joint tortfeasors, each joint tortfeasor's vehicle must be considered separately in determining the amount of underinsured motorist coverage available to an injured plaintiff. Nationwide Mut. Ins. Co. v. Scott, 234 Va. 573, 363 S.E.2d 703 (1988).

DEFENDANT, JAMES A. GREEN'S UNDERINSURED MOTOR VEHICLE

Liability Coverage

40. The defendant, James A. Green's motor vehicle is insured with Progressive, with minimum liability policy limits of \$25,000/\$50,000. Progressive has not offered a specific amount for each Plaintiff, but instead, has offered a total of \$50,000 in liability coverage to all Plaintiffs, Robert A. O'Brien, Administrator of the Estate of Anna R. Smith, Steven T. Harris, Administrator of the Estate of Betty Audrey Smith, and Carl E. Barnes. Anna R. Smith and her daughter, Betty Audrey Smith were killed in this collision and Carl E. Barnes suffered major injuries from this collision.

41. James A. Green's \$25,000 per person and \$50,000 per occurrence liability coverage is insufficient to cover the magnitude of the damages suffered by the three Plaintiffs set forth in paragraph 40. Should Progressive offer less than \$25,000 to the Administrator of the Estate of Anna R. Smith, the amount available for payment for the

claim will be less, thus increasing the amount of underinsured motorist coverage

afforded Anna R. Smith.

**TOTAL AMOUNT OF UNINSURED MOTORIST COVERAGE
AFFORDED TO ANNA R. SMITH**

42. Anna R. Smith (Sharon F. Allen's daughter-in-law), a resident of Sharon F. Allen' household at the time of this collision, is a First Class Insured under the UM/UIM endorsement to Sharon F. Allen's Farmer's I, II and III automobile policies, each providing UM/UIM limits of \$25,000/\$50,000.

43. Anna R. Smith is entitled to stack the per person \$25,000 UM/UIM coverage limits under Sharon F. Allen's Farmer's I, II and III policies for a total UM/UIM coverage of \$75,000.

44. Anna R. Smith (Sharon F. Allen's daughter-in-law), a resident of Sharon F. Allen's household at the time of this collision, is a First Class Insured under the UM/UIM endorsement to Sharon F. Allen's National Fire & Marine policy providing an UM/UIM coverage single limit of \$1,000,000.

45. The National Fire & Marine policy, in Section E of the UM/UIM Endorsement (page 2) entitled "Our Limit of Liability" limits the most the company will pay from any one accident "regardless of the number of... insureds" to \$1,000,000.

46. Anna R. Smith is entitled to stack the \$75,000 in UM/UIM coverage under Sharon F. Allen's Farmer's I, II and III policies (three policies, each with \$25,000/\$50,000 UM/UIM coverage) and the \$1,000,000 UM/UIM single limit coverage under Sharon F. Allen's National Fire & Marine policy, for a total of \$1,075,000 in UM/UIM coverage afforded to her, subject to the Limit of Liability clause in the National

(1965); USAA Casualty Ins. v. Alexander, 248 Va. 185, 194-195, 455 S.E.2d 145 (1994).

47. James A. Green's 1990 Ford Ranger involved in this collision is underinsured, as to Anna R. Smith, in the amount of One Million Fifty Thousand Dollars (\$1,050,000.00) calculated as follows: The total UM/UIM coverage afforded Anna R. Smith - \$1,075,000 minus \$25,000.00 (total per person amount of James A. Green's liability policy limits applicable to his 1990 Ford Ranger) equals \$1,050,000 (subject to the National Fire & Marine policy Limit of Liability clause in paragraph 45. Virginia Code §38.2-2206(B), as amended "Underinsured Motor Vehicle". Nationwide Mut. Ins. Co. v. Scott, 234 Va. 573, 363 S.E.2d 703 (1988); Dyer v. Dairyland Insurance Co., 267 Va. 726, 594 S.E.2d 592 (2004).

WHEREFORE, for the foregoing reasons, Robert A. O'Brien, Administrator of the Estate of Anna R. Smith, deceased, requests this Honorable Court to declare that: (1) Anna R. Smith, deceased, is a First Class Insured under the UM/UIM endorsements of Sharon F. Allen's four (4) motor vehicle liability insurance policies referred to as Farmers' I, II, III and the National Fire and Marine policies; (2) Anna R. Smith, deceased, is entitled to underinsured motorist coverage as to the Defendant, James A. Green, in the minimum amount of \$1,050,000 (in the event that Defendant Green's auto liability insurance carrier, Progressive, offers its full, per person, \$25,000.00 of its \$25,000/\$50,000 liability coverage to Anna R. Smith) subject to the UM/UIM Limits of Liability clause in the National Fire & Marine policy; (3) and any other relief as the Court may deem appropriate.

By Counsel

Gerald A. Schwartz VSB No: 14618
Law Offices of Gerald A. Schwartz
2827 Duke Street
Alexandria, Virginia 22314
(703) 823-0055
(703) 370-7732 - FAX