
In the
Supreme Court of Virginia

At Richmond

Record No. 072299

ACE AMERICAN INSURANCE COMPANY, ACE-INA, ACE INA, ACE GROUP OF COMPANIES, ACE USA, ACE INDEMNITY INSURANCE COMPANY, CIGNA PROPERTY AND CASUALTY COMPANY, and INSURANCE COMPANY OF NORTH AMERICA,

Appellants,

– v. –

FRANK and MELVA ALLEN, Guardians and Fiduciaries, on behalf of ANDREW ALLEN, an Incapacitated Individual, and FRANK ALLEN and MELVA ALLEN, Individually, and GRAFTON SCHOOL, INCORPORATED,

Appellees.

BRIEF *AMICUS CURIAE*
VIRGINIA TRIAL LAWYERS ASSOCIATION
SUPPORTING AFFIRMANCE

JOHN J. RASMUSSEN, VSB# 45787
INSURANCE RECOVERY LAW GROUP, PLC
P.O. Box 8049
Richmond, Virginia 23223
P: 804.308.1359
F: 804.308.1349
jjr@insurance-recovery.com

Counsel for Amicus Curiae

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ASSIGNMENTS OF ERROR

The VTLA addresses these assignments of error identified by ACE.¹

1. The trial court erred by overruling ACE's Demurrer, as the Code of Virginia prohibits Frank and Melva Allen, guardians and beneficiaries on behalf of Andrew Allen, an incapacitated individual and Frank and Melva Allen, individually,² who are not parties to the insurance policy at issue, from bringing a direct action against ACE unless and until they first obtain a judgment against the insured, the Grafton School Incorporated, which remains unsatisfied.³
2. The trial court erred by reaching the merits of the motion for summary judgment and finding a total of \$1 million in available abuse and molestation liability coverage, and, alternatively, in available professional liability coverage, as the exclusions in the insurance policy limit indemnity coverage for the underlying

¹ "ACE" includes all the ACE appellants: ACE-American Insurance Co., ACE-INA, ACE INA, ACE Group of Companies, ACE USA, ACE Indemnity Insurance Company, CIGNA Property and Casualty Company, and Insurance Company of North America

² Hereinafter, the "Allens"

³ Hereinafter, "Grafton"

acts to \$100,000, should indemnity coverage ultimately be triggered.

QUESTIONS PRESENTED

1. Whether a plaintiff in an underlying case can seek declaratory relief as to the available insurance under a defendant's policy when a coverage dispute exists, even if the plaintiff cannot yet sue the defendant's carrier for money damages.
2. Whether contradictory terms in an insurance policy's declarations page and in one of its endorsements create an ambiguity properly resolved in favor of coverage.

STATEMENT OF THE CASE

The Allens filed the underlying abuse and molestation case in Fauquier County Circuit Court against their son's school, Grafton. The Allens also filed this coverage lawsuit under Virginia's Declaratory Judgment Act⁴ against Grafton's insurer ACE. The judge in the underlying case stayed it pending resolution of this coverage action.⁵

⁴ Va. Code Ann. § 8.01-184 et seq. (hereinafter, the "Act")

⁵ Appellant's Brief (hereinafter, "Br.") at 12

The Allens' amended complaint states four causes of action under the Act.⁶ Those four seek only declaratory relief as to available coverage – not money damages.⁷

Following cross motions regarding (1) whether the Allens could sue ACE; and (2) the meaning of the policy terms, the trial court declared that \$1 million in liability limits existed for the Allens' underlying claim.⁸ A fifth cause of action alleges breach of contract against ACE and an insurance broker and asks for \$4 million in damages.⁹ Although ACE repeatedly refers to that supposed damages claim,¹⁰ the declaration appealed from does not award any damages.¹¹

⁶ JA 84-90

⁷ JA 86, 87, 88-89, 90

⁸ JA 174

⁹ JA 90-91

¹⁰ Br. at 3, 6, 15

¹¹ JA 174

STATEMENT OF FACTS

ACE insured Grafton for the relevant period.¹² The policy provides \$1 million in per-occurrence general liability limits.¹³ It also has an endorsement expressly providing coverage for abuse and molestation.¹⁴ The section in that endorsement where limits can be shown was left blank by ACE.¹⁵ The declarations page for the policy, however, states "\$300,000" in the "aggregate and "\$100,000" "per person" for "abuse and molestation" as part of "additional coverages" for the policy¹⁶

Both in opposing summary judgment below and in its brief on appeal, ACE has never argued that or presented any evidence that the endorsement's language – including its blanks – resulted from a scrivener's error or some mutual mistake. Nor did ACE seek to reform the policy.

The Allens contended in the trial court that (1) the policy plainly provided \$1 million in limits; and (2) in the alternative, those conflicting provisions create an ambiguity that must resolve against ACE under settled

¹² JA 23-58

¹³ JA 25

¹⁴ JA 53-54

¹⁵ JA 53

¹⁶ JA 26

Virginia law. That, in turn, means the policy provides at least \$1 million in coverage for the underlying action. ACE, on the other hand, argued that no ambiguity exists and the policy provides only \$100,000 in coverage.¹⁷

SUMMARY OF ARGUMENT

Virginia's courts – including this Court – have long used Virginia's Declaratory Judgment Act to resolve insurance coverage disputes, even while the underlying case goes forward. Moreover, they have done so without regard to which interested party brought the suit: the defendant insured, the insurer, or the underlying tort plaintiff. ACE now wants to stop permitting tort plaintiffs – and only tort plaintiffs – from bringing such claims, even though that Act's plain language does not distinguish among classes of parties that can sue under it.

Resolving such coverage disputes early through declaratory relief actions serves judicial economy. Feedback as to what insurance may or not apply to an underlying claim provides enormous practical benefits to the parties in a dispute. Indeed, such guidance can help settle both the coverage and the underlying dispute short of full trials.

To support ending such suits by tort plaintiffs, ACE argues that all suits by such plaintiffs against a defendant's carrier are direct actions and

¹⁷ JA 107, Br. at 18-23

thus barred by statute. But only actions against the tort defendant for money damages that also join the carrier constitute direct actions.

Declaratory relief suits resolve controversies – including controversies where consequential relief cannot yet be claimed; they do not seek damages. Thus, they are not direct actions. ACE also fails to account for this Court's past decisions regarding suits under the Act – including insurance coverage suits. Indeed, much of the authority cited by ACE is inapposite.

Moreover, not all defendant insureds have the wherewithal or the motivation to seek declaratory relief when the carrier challenges coverage – for example, a judgment-proof defendant might not pursue such a claim. Leaving the discretion to bring coverage suits with the carrier in such situations does not serve the ends of justice or judicial economy when it might be in the carrier's self-interest to delay a likely unfavorable coverage ruling. Continuing to permit tort plaintiffs to sue under the Act to resolve coverage disputes would prevent that.

On a separate issue, ACE also asks this Court to depart from the well-settled principle that all ambiguities in policy language resolve in favor of coverage. Two different portions of the policy at issue conflict. ACE asks the Court to give effect to only one of those provisions. It offers no

construction that accounts for both. That approach does not follow Virginia law. The decision below, however, acknowledges both provisions and that they create an ambiguity. And the judgment resolves that ambiguity in favor of coverage. That is the proper analytic framework.

Both positions taken by ACE ask this Court to depart from long-established standards and practices. Continuing to permit all parties interested in a coverage dispute to seek declaratory relief will serve litigants statewide, and confirming the correct analytical approach when policy provisions conflict will provide clear guidance for the future. For both reasons, the VTLA respectfully requests this Court affirm the decision below.

ARGUMENT

I. VIRGINIA'S COURTS HAVE ROUTINELY DECIDED – PROSPECTIVELY – WHAT COVERAGE EXISTS UNDER A DEFENDANT'S INSURANCE

The rules for interpreting the Act in connection with Virginia Code sections 8.01-5(B) and 38.2-2200 make clear that tort plaintiffs may sue a defendant and its carrier in order to resolve coverage disputes via a judicial declaration. Since 1922, the Act has allowed parties to resolve legal controversies even before a claim accrues. Indeed, Virginia's courts routinely resolve coverage disputes under the Act. Moreover, this Court

has allowed such actions even when the coverage case involves issues scheduled to be addressed in the underlying tort claim. This Court has also allowed plaintiffs like the Allens to bring such suits before a judgment is entered on their underlying tort claim. Such an approach can save significant judicial resources.

What is more, commentators and lower courts agree that allowing plaintiffs to sue under the Act can help to resolve both such coverage disputes and the underlying claim. Eliminating a plaintiff's statutory right to seek declaratory relief would eliminate a powerful, practical tool for resolving all sorts of litigation short of full trials.

A. Virginia Statutory Interpretation Rules

When a statute is clear and unambiguous, a court may look only to its words to determine its meaning. Harrison & Bates, Inc. v. Featherstone Assocs., 235 Va. 364, 368, 484 S.E.2d 883, 885 (1997). The legislature's intent must be determined from those words, unless a literal construction would result in a manifest absurdity. Abbot v. Willey, 253 Va. 88, 91, 479 S.E.2d 528, 530 (1997). When the legislature has used words with clear and definite meanings, the courts cannot interpret them to hold the legislature did not intend what it said. Hubbard v. Henrico Ltd. P'ship, 255,

Va. 335, 340, 497 S.E.2d 335, 337 (1998). "[Courts] are not free to add to language, nor to ignore language, contained in statutes." Purce v. Patterson, 275 Va. 190, 194, 654 S.E.2d 885, 886 (2008).

"When faced with apparently conflicting statutes, this Court applies a well-established principle of statutory construction. If possible, we must harmonize apparently conflicting statutes to give effect to both." Boynton v. Kilgore, 271 Va. 220, 229, 623 S.E.2d 922, 927 (2006). "Indeed, whenever a given controversy involves a number of related statutes, they should be read and construed together in order to give full meaning, force, and effect to each." Id.

Moreover, the General Assembly has stated the Act is a remedial statute that should be liberally construed:

Its purpose is to afford relief from the uncertainty and insecurity attendant upon controversies over legal rights, without requiring one of the parties interested so to invade the rights asserted by the other as to entitle him to maintain an ordinary action therefor. It is to be liberally interpreted and administered with a view to making the courts more serviceable to the people. Va. Code Ann. § 8.01-191.

In that light, we examine the Act's text below.

B. The Act Has Provided For Prospective Declaratory Relief Since 1922

1. The Act's Text

The Act provides:

In cases of actual controversy, circuit courts . . . shall have power to make binding adjudications of right, whether or not consequential relief is, or at the time could be, claimed and no action or proceeding shall be open to objection on the ground that a judgment order or decree merely declaratory of right is prayed for. Controversies involving the interpretation of . . . instruments of writing . . . may be so determined, and this enumeration does not exclude other instances of actual antagonistic assertion and denial of right. Va. Code Ann. § 8.01-184. (Emphasis supplied.)

That operative language has remained virtually unchanged since the General Assembly first passed the Act in 1922. See Patterson v. Patterson, 144 Va. 113, 118-119, 131 S.E. 217, 218-219 (1926).

2. The Act Expressly Provides For Prospective Relief

The Act "does not require one to wait until a right has been violated to seek judicial relief. Preventive relief is the moving purpose." Portsmouth Restaurant Assoc., Inc. v. Hotel and Restaurant Employees Alliance, Local 807, 183 Va. 757, 763, 22 S.E.2d 218, 221 (1945). In other words, the statute looks to avoid "more serious conflicts and damages between parties." John L. Costello, Virginia Remedies § 16.09[1] (3rd ed. 2007).

The intent behind the Act is to permit the declaration of rights before they mature into accrued actions. Indeed, an insurance coverage suit under the Act must be brought before the underlying tort case is decided. In Liberty Mutual Insurance Co. v. Bishop, for example, this Court held the trial court improperly granted declaratory relief where "the various claims and rights asserted had all accrued and matured" 211 Va. 414, 421, 177 S.E.2d 519, 523 (1970)(noting the underlying claim had settled and the insured had been released). The insurers there sought "in essence . . . the recovery of a money judgment, a sum certain, from [another carrier]." Id. Therefore, the court dismissed the case as pled.

Contradicting the holding in Bishop (and other cases discussed below), ACE contends no court can hear coverage disputes at this stage of factual development in the underlying case, because no "actual controversy" can exist.¹⁸ But Virginia's courts do not so narrowly construe what constitutes such a controversy.

3. The Act Merely Requires A Real Legal Dispute

A commentator has noted "[t]oday, if there is opposition of legal positions, the imminence of some breach, and it appears that judicial

¹⁸ Br. at 12

selection between the opposing views will do some good, there is ripeness for declarative relief." Costello at § 16.09. In fact, the Act has "blossomed into a set of flexible tools which add the remedies of the citizens of the Commonwealth on both sides of the court." Id.

As detailed below, because suits under the Act resolve controversies rather than seek damages, they are not direct actions.

C. Claims Under The Act Are Not Direct Actions

1. Direct Actions Seek Money Damages Directly From A Carrier Rather Than Its Insured

Although ACE chants the mantra that Virginia is not a "direct action state," its brief never addresses what a direct action is. Black's, on the other hand, does: a direct action is "[a] lawsuit by a person claiming against an insured but suing the insurer directly instead of pursuing compensation indirectly through the insured." Black's Law Dictionary 491 (8th ed. 2004). (Emphasis supplied.)

One practitioners' guide has further explained the difference between direct actions and declaratory relief claims. "[D]irect action statutes are not to be confused . . . with statutes that have been deemed to permit third parties to seek declaratory relief against insurance companies regarding the scope or existence of coverage." Barry R. Ostrager & Thomas R.

Newman, Handbook On Insurance Coverage Disputes § 7.07 (13th ed. 2006). "Rather, a true direct action statute is one that permits the insurer to be joined as a defendant in the tort victim's suit against the alleged tortfeasor. . . ." Id.

2. Declaratory Relief Claims Do Not Seek Damages Directly From A Carrier Instead Of Its Insured

Claims under the Act differ from direct actions. Rather than damages, they seek a declaration as to the parties' respective rights and obligations. They do not replace tort plaintiffs' underlying lawsuits. Indeed, as noted above, they cannot be brought after the tort claim has gone to judgment or settled. For that reason, no "direct action" bar applies to them.

D. Courts Rely On The Act To Resolve Coverage Disputes

1. ACE Presents Inconsistent Positions On Who Can Sue Under The Act

On the one hand, ACE argues tort plaintiffs cannot seek declarations as to a defendants' coverage. Specifically, ACE contends without citing any supporting authority that: "[a] plaintiff lacks a legally-cognizable relationship with a defendant's liability insurer unless and until the plaintiff

possesses an unsatisfied judgment against the defendant."¹⁹ It further argues, again without citing support, that "[t]here is no controversy between a plaintiff and a liability insurer unless and until the conditions set forth in Va. Code Ann. Section 38.2-2200 are met."²⁰ ACE also claims that the "Allen's theoretical interest in insurance policy proceeds is not enough to establish standing" because no actual controversy exists.²¹

But at the same time, ACE also argues that defendants and carriers should be free to join tort plaintiffs in suits under the Act. "While a liability plaintiff may participate in a declaratory judgment regarding coverage, such a plaintiff may not initiate such a direct action. Only the insured or insurer may initiate such an action."²²

In short, it reads into the Act a provision that only certain classes of parties can sue under it. It also contends that the "no action clauses" in many insurance policies somehow only bar such suits by plaintiffs – not insureds or carriers.²³

¹⁹ Br. at 7

²⁰ Br. at 11-12

²¹ Br. at 12

²² Br. at 11 (Emphasis in original)

²³ Br. at 17-18

If, however, no actual, justiciable controversy existed between a defendant's carrier and a tort plaintiff until after a tort judgment against the defendant, the carrier and defendant could not seek prospective declaratory relief against the tort plaintiff, either. Under ACE's view of what constitutes a sufficient actual controversy, neither an insured nor its carrier could join the plaintiff to their coverage suit under the Act, either, because the plaintiff would not be a proper party with no actual controversy. The plaintiff could then litigate coverage a second time. Such an approach makes no sense.

That explains why Virginia courts have treated tort plaintiffs' right to bring claims under the Act differently than ACE suggests they should.

2. Plaintiffs' Claims Against Defendants' Carriers Fall Within The Act's Plain Text

When tort victims bring declaratory relief claims against the insurers for defendants, they seek a prospective statement of rights under a written instrument. By their nature, such lawsuits happen only when a coverage controversy exists. Thus, coverage claims fall directly within the Act's plain requirements.

Both this Court and commentators that it cites agree such disputes should be resolved by suits under the Act. "Some courts have erroneously

assumed, contrary to overwhelming authority, that the issue between the company and injured person is not ripe for adjudication because no judgment has been obtained by or against the insured or because there is only a contingent future possibility of disputes." Reisen v. Aetna Life & Cas. Co., 225 Va. 327, 334, 302 S.E.2d 529, 533 (1983) (Citations omitted). Such a view would "defeat one of the main purposes of the declaratory judgment, namely to remove clouds from legal relations before they have become completed attacks or disputes already ripened." Id. (Citations omitted.)

Moreover, Reisen also made clear that a carrier could obtain a declaratory judgment of no liability against a tort plaintiff before the tort case was decided, even though the declaratory relief action hinged on an issue of fact "scheduled for adjudication in the tort action." Id., at 335, 533.

That is even so where the dispute's details might change. In fact, this Court has held that such changes in circumstances "are implicitly contemplated by the provision in [the Act] that grants the trial court jurisdiction 'to make binding adjudications of right, whether or not consequential relief is, or at the time could be claimed.'" Asplundh Tree Expert Co. v. Pacific Employers Ins. Co., 269 Va. 399, 408, 611 S.E.2d 531, 536 (2005).

In another case, Criterion Insurance Co. v. Grange Mutual Casualty Co., 210 Va. 446, 447, 171 S.E.2d 669, 670 (1970), a tort defendant's carrier sued the tort plaintiff's uninsured motorist carrier to determine their respective duties in connection with an accident. The uninsured motorist carrier argued there could be no ripe claim against it under the Act because it could have no liability until a court established the uninsured motorist's liability, given this Court's holding in General Accident v. Aetna, 208 Va. 467, 158 S.E.2d 750 (1968).

This Court rejected that position, pointing out that General Accident involved a subrogation claim for money, while the case at hand asked the court to determine which company was liable and should defend. 210 Va. at 448-449, 171 S.E.2d at 670-671. In other words, even though the uninsured motorist carrier could not be sued for money yet, another carrier could ask a court to determine their respective duties.

Perhaps most helpful here, this Court has recently addressed the merits of a coverage dispute when a plaintiff sought declaratory relief against a defendant's insured. In Craig v. Dye (a case cited in ACE's brief), the tort plaintiff sued the defendant's carrier under the Act. 259 Va. 533, 536, 526 S.E.2d 9, 11 (2000). She also filed a separate wrongful death action against the insured. Id. The trial court found no coverage due to

lack of notice, and the tort plaintiff appealed. This Court reversed the trial court, holding the lack of notice defense asserted by the carrier did not bar coverage. Id. at 539, 13.

Although that case did not expressly address whether the plaintiff could have sued under the Act, in granting her relief on the merits, the Court certainly did not find that section 8.01-5(B) barred her suit.

E. Commentators Agree The Act Provides A Useful Tool For Efficiently Resolving Coverage Disputes

Furthermore, several commentators point out that suits under the Act can help the judicial system better resolve insurance disputes.

"Declaratory judgment provides a prompt means of resolving insurance . . . coverage disputes so that the parties may know in advance of the personal injury trial whether coverage exists." 11A Michie's Jurisprudence § 218 (Paul Ernest et al. eds. 2007)(citing Christian v. Sizemore, 181 W.Va. 628, 383 S.E.2d 810 (1989)). What is more, addressing coverage disputes through a declaratory relief claim "facilitates the possibility of settlements and avoids potential future litigation. . . ." Id.²⁴

²⁴ See also Costello at § 16.09[1]; Charles E. Friend & Kent Sinclair, Friend's Virginia Pleading And Practice § 30.10[1] (2006)

"Moreover, the use of declaratory judgment protects the plaintiff from an insured who has no independent assets and is not concerned about insurance coverage." Id. That also explains why it should not matter if the insured does not bring its own claim against the carrier. (ACE hints that Grafton's decision not to bring a cross-claim reflects poorly on the merits of the Allens' position.)²⁵ The insured may not have the interest or the financial wherewithal to pursue such claims seeking early coverage resolution. The plaintiff should not suffer in such circumstances.

F. ACE Depends On Inapposite Authority

Four sources on which ACE rests do not actually relate to the question presented and facts here. ACE discusses RF&P Railroad Co. v. Hughes Keegan, Inc. at length, but that case involved a direct action seeking money damages from a carrier – not a suit under the Act. 207 Va. 765, 766, 152 S.E.2d 28, 29 (1967). Beyond that, despite the version of section 8.01-5(B) then in force, the Court allowed the tort plaintiff to proceed directly against the defendant's carrier. Id. at 773-774, 34.

ACE also relies on Ohio Casualty Insurance Co. v. State Farm Fire & Casualty Co., 262 Va. 238, 546 S.E.2d 421 (2001). For example, ACE's

²⁵ Br. at 7

opening brief states that case "recently acknowledged that Virginia is not a direct action state even in actions for declaratory judgment."²⁶ ACE further asserts "[a]s this Court's decision in Ohio Casualty confirms, a third party cannot maintain a direct action, even one for declaratory judgment, against another person's insurer."²⁷

Those assertions misstate the case and its holding. Ohio Casualty involved efforts by a tort victim's carrier to bring subrogation and contribution claims against the tortfeasor's carrier.²⁸ Id. at 240, 421. It did not involve a declaratory relief claim by a tort plaintiff regarding coverage. And while it did indeed hold that the tort plaintiff's carrier had no subrogation rights against the other carrier because the tort plaintiff could not "maintain a direct action against" the other carrier (Id. at 241, 422), that does not matter here.

That is because what Ohio Casualty really holds is that the tort plaintiff had no ripe claim for money damages, so the plaintiff's carrier could not step into its insured's shoes and bring such a claim as a subrogee,

²⁶ Br. at 14

²⁷ Br. at 15

²⁸ There also may be a question as to whether the plaintiff carrier properly framed those two equitable claims as declaratory relief.

either. That holding has nothing to do with whether plaintiffs can sue defendants' carriers under the Act.

Furthermore, the case does not discuss what "direct actions" are, nor does it talk about who can or cannot bring declaratory relief claims. In fact, this Court addressed Ohio Casualty's merits, finding that the tort plaintiff's carrier had no subrogation or contribution rights. Id. at 241 and 243, 422 and 423. For all these reasons, allowing suits like this to proceed would not "circumvent[] this Court's express ruling in Ohio Casualty" as ACE contends.²⁹

ACE also cites Appleman to argue that "[g]enerally, an insured person may not maintain an action against the liability insurer of the person who caused the injury unless permitted by a statute or a provision of the policy."³⁰ Here, of course, the Act – a statute – permits declaratory relief claims by tort plaintiffs against defendants' insurers, and the Allens do not seek to join ACE in the underlying action.

Perhaps most surprisingly, ACE also cites In re Dameron, 213 B.R. 482 (1997), even though its facts gut ACE's position. In that case, the underlying plaintiffs sued a defendant's carrier seeking (1) a declaration

²⁹ Br. at 15

³⁰ Br. at 16-17 (Emphasis in ACE's brief)

that coverage existed; and (2) bad faith damages. Id. at 483. The court dismissed the bad faith damages claim based on the "direct action" bar. Id. at n. 3. It allowed the underlying declaratory relief claim to proceed, however. Id. at 484. That result recognizes the distinction between direct actions and declaratory relief claims.

G. Allowing Trial Courts To Hear Coverage Disputes Under The Act Promotes Judicial Economy

This Court can harmonize the Act with the rest of the Code to allow all interested parties – including defendants, insureds, and plaintiffs alike – to seek declaratory relief as to the existence and extent of coverage when disputed. ACE's position, on the other hand, does not harmonize the relevant statutes.

ACE argues "[t]he trial court's decision runs afoul of three Virginia statutes: sections 8.01-5(B), 38.2-2200(2) and 8.01-184 of the Code of Virginia."³¹ In fact, that decision honors both the Act's plain language and its intent. Indeed, the Act anticipates some claims – such as insurance disputes between a plaintiff and a defendant's carrier – can involve present controversies without an accrued claim. ACE concedes this in asserting insurers and insureds can sue under the Act.

³¹ Br. at 9

Moreover, section 38.2-2200 does not prohibit such suits. It merely provides that a plaintiff can sue a carrier for money damages after securing an unsatisfied money judgment against the carrier's insured.

Instead of following ACE's approach, this Court can give each statute effect as follows: trial courts should be permitted to hear declaratory relief claims by any interested party, including tort plaintiffs, regarding the existence and extent of liability coverage available to a defendant. And they should be able to include the carrier in such an action, no matter who sues.

Such a holding would not conflict with sections 38.2-2200 and 8.01-5(B). As explained above, claims under the Act are not direct actions, and the rule would not allow tort plaintiffs to join a defendant's carrier to the underlying tort litigation.

The suggested rule would also further the Act and its goals. Suits under the Act deciding potentially-available coverage:

- Involve an actual controversy;
- Address rights under a written instrument;
- Provide prospective relief; and
- Do not involve mature, accrued claims.

Moreover, the Act's plain text does not distinguish between classes of parties that can or cannot seek relief under it. Nothing in the statute's text suggests only some parties can bring such claims. ACE would have this Court add such a term.

Fundamentally, as noted by the commentators above, allowing declaratory relief claims brought by any party interested in the outcome of an insurance dispute would promote judicial economy by helping resolve those disputes early and facilitate settlement. Coverage suits under the Act provide practical guidance to parties before they decide what to do with underlying lawsuits.

As shown above, such a rule aligns with this Court's past decisions involving the Act generally and coverage disputes specifically. For all those reasons, the VTLA respectfully requests this Court affirm the decision below allowing this case to proceed on the merits.³²

³² The only two Virginia Circuit Court cases that we have found addressing the issue both adopt similar rules in favor of hearing coverage claims by tort plaintiffs. Martirosav v. Shenandoah Flight Services, Inc., 64 Va. Cir. 163 (Rockingham County March 2, 2004); Nottingham v. Caviggiola, 67 Va. Cir. 86 (Norfolk City February 18, 2005).

**II. THE TRIAL COURT CORRECTLY FOUND A CONFLICT
IN THE POLICY LANGUAGE AND RESOLVED
THAT AMBIGUITY AGAINST THE CARRIER**

A. Virginia Law Governing Insurance Policy Interpretation

1. Plain Language Controls

"Written contracts are construed as written, without adding terms that were not included by the parties. When the terms in a contract are plain and unambiguous, the contract is construed according to its plain meaning. The words that the parties used are normally given their usual, ordinary and popular meaning. No word or clause in a contract will be treated as meaningless if a reasonable meaning can be given to it, and there is a presumption that the parties have not used words needlessly." Heron v. Transp. Cas. Ins. Co., 274 Va. 534, 539, 650 S.E.2d 699, 702 (2007).

2. All Ambiguities Resolve Against The Carrier

Virginia law also makes clear that all ambiguities in the policy resolve against the insurer. "Insurance policies are contracts whose language is ordinarily selected by insurers rather than by policyholders." St. Paul Fire & Marine Ins. Co. v. S.L. Nusbaum & Co., Inc., 227 Va. 407, 411, 316 S.E.2d 734, 736 (1984). "The courts, accordingly, have been consistent in construing the language of such policies, where there is doubt as to their

meaning, in favor of that interpretation which grants coverage, rather than that which withholds it." Id. "Where two constructions are equally possible, that most favorable to the insured will be adopted." Id.

If two such constructions are reasonable, an ambiguity exists. Thus, [coverage questions can be] resolved by the mere fact that reasonable men . . . may reach reasonable, but opposite, conclusions . . ." Id. Indeed, "an ambiguity exists when language admits of being understood in more than one way or refers to two or more things at the same time." Lincoln Nat. Life Ins. Co. v. Commonwealth Corrugated Container Corp., 229 Va. 132, 136-137, 327 S.E.2d 98, 101 (1985).

3. Exclusionary Language Is Strictly Construed

That rule resolving doubt against insurers applies even more strongly to exclusionary language. "[T]o be effective, exclusionary language must clearly and unambiguously bring the particular act or omission within its scope." Floyd v. Northern Neck Ins. Co., 245 Va. 153, 158, 427 S.E.2d 193, 196 (1993). Furthermore, policies are "to be construed liberally in favor of the insured and strictly against the insurer." Central Sur. & Ins. Corp. v. Elder, 204 Va. 192, 197, 129 S.E.2d 651, 655 (1963). Moreover, "the burden is on the insurer to prove that an exclusion applies." American

Reliance Ins. Co. v. Mitchell, 238 Va. 543, 547, 385 S.E.2d 583, 585 (1989).

ACE aims to avoid the above rule regarding exclusionary language by inaccurately presenting what the Allens' lawyer said at oral argument. ACE writes "[t]he Allens have admitted that the abuse and molestation coverage is not insurance [sic] policy exclusion."³³ But at that hearing, counsel actually said "[n]ow this abuse endorsement is not an exclusion, but it's the same thing, in fact, they're trying to limit or restrict the scope of coverage and it should be viewed in the same way."³⁴ That statement is the law, as the endorsement does contain "exclusionary language."

B. ACE Ignores The Endorsement

ACE's position on the available limits also does not account for the endorsement's plain language. ACE, the policy's drafter, could have entered a different agreed-to limit into the blanks underneath the endorsement's statement that "[t]he insurance provided by this endorsement is subject to the following limits."³⁵ It did not.

³³ Br. at 18

³⁴ JA at 139

³⁵ JA at 53

In fact, nowhere in its brief does ACE provide a policy interpretation giving that language and the blanks afterwards any effect whatsoever. That failure does not fit with the settled principle that all terms should be given effect – a principle on which ACE says it relies.³⁶

Perhaps more importantly, ACE has not contended below or in its brief that the blanks in the endorsement should not be given effect because they result from a scrivener's error or some mutual mistake.³⁷ Indeed, it has never sought reformation or raised mistake as a defense in a pleading or on summary judgment. Thus, it concedes the language was intended as written and should be given effect.

C. The Decision Below Accounts For The Declarations Page

The decision below, on the other hand, accounts for all the language in the policy, and it applies the rule for when policy terms contradict each other.

³⁶ Br. at 22-23

³⁷ JA 103-108

In applying that rule, the trial court did not ignore the declarations page, or read the endorsement in isolation as ACE suggests.³⁸ Rather, the trial court accounted for the ambiguity resulting from the two apparently conflicting provisions, and it resolved that ambiguity as Virginia law required.

D. It Is Not Too Soon To Decide Available Policy Limits

ACE also asserts that it is too early to decide what limits the policy might provide (although this Court did not grant certiorari on that assignment of error in ACE's petition). "Absent litigation and the development of facts in the underlying action . . . it is impossible to determine whether, and to what extent, coverage is triggered."³⁹ Thus, ACE argues, the "the Court should not have reached the merits of the motion for summary judgment."⁴⁰

Even if that question were before the Court, ACE's position does not follow Reisen, which upheld a coverage ruling under the Act that decided an issue also scheduled for resolution in the underlying tort action.

³⁸ Br. at 23

³⁹ Br. at 25

⁴⁰ Id.

Moreover, ACE does not even hint at what facts could develop in the tort action that would further help resolve the conflict between the endorsement and the declarations page. Particularly in a case like the limits dispute here – which hinges on the undisputed contract terms – no need for factual development in the tort action exists. Thus, the trial court's ruling should stand.

CONCLUSION

As set forth above, the VTLA respectfully urges this Court to adopt a rule that trial courts should have the discretion to hear declaratory relief claims by any interested party, including tort plaintiffs, regarding the existence and extent of liability coverage available to a defendant. And all such parties should be able to include the defendant's carrier in such an action, no matter who sues first.

Moreover, the VTLA also respectfully asks the Court to affirm the trial court's decision on the merits regarding available insurance limits as properly resolving the conflicting language in the policy.

Respectfully submitted,

**THE VIRGINIA TRIAL
LAWYERS ASSOCIATION**

By: /s/ John J. Rasmussen
John J. Rasmussen – Of Counsel

The Virginia Trial Lawyers Association
700 East Main Street, Suite 1400
Richmond, Virginia 23219
Telephone: (804) 343-1143
Facsimile: (804) 343-7124

By: John J. Rasmussen
Virginia State Bar No.: 45787

INSURANCE RECOVERY LAW GROUP, PLC
P.O. Box 8049
Richmond, Virginia 23223-0049
Telephone: (804) 308-1359
Facsimile: (804) 308-1349
Email: jjr@insurance-recovery.com
Counsel *Amicus Curiae*

CERTIFICATE OF SERVICE

The undersigned certifies that this the 5th day of May, 2008, twelve copies of the foregoing Brief *Amicus Curiae* were hand-delivered to the Clerk of the Supreme Court of Virginia and an electronic copy was filed via email at scvbriefs@courts.state.va.us. This same date, three copies of the same were mailed or delivered to counsel for all parties, specifically:

Douglas M. Palais
Mellissa Ann Conner
LECLAIRRYAN, A PROFESSIONAL CORPORATION
Post Office Box 2499
Richmond, Virginia 23218
Telephone: (804) 916-7142
Facsimile: (804) 916-7242
Counsel for Appellants

Peter S. Everett
BLANKINGSHIP & KEITH, P.C.
4020 University Drive, Suite 300
Fairfax, Virginia, 22030
Telephone: (703) 691-1235
Facsimile: (703) 691-3913
Counsel for the Allens

G. Rodney Young, II
TIMBERLAKE, SMITH, THOMAS & MOSES, P.C.
Post Office Box 108, Staunton, Virginia 22402
Telephone: (540) 885-1517
Facsimile: (540) 995-4537
Counsel for Grafton

/s/ John J. Rasmussen
John J. Rasmussen