



**SUPREME COURT OF VIRGINIA ENFORCES
INDEMNIFICATION CLAUSE IN AUTOMOBILE RENTAL
AGREEMENT AGAINST ITS CUSTOMER**

The Supreme Court of Virginia has enforced an indemnification clause in an automobile rental agreement that was triggered as a result of the customer's failure to purchase supplemental insurance as part of the rental agreement. *Farmers Ins. Exchange v. Enterprise Leasing Co.*, Record No. 100082 (Va. Apr. 21, 2011). Many believed the use of such indemnification provisions by self-insured rental companies constituted an improper end-run around the court's decision in *USAA Cas. Ins. Co. v. Hertz*, 253 Va. 450, 578 S.E.2d 775 (2003). *Enterprise* clarifies uncertainty regarding the enforceability of such indemnification provisions.

Under Virginia law, an automobile rental company is required by statute to insure vehicles rented to the public for the minimum limits of required liability coverage. See Virginia Code § 46.2-108(D). In *Hertz*, the Virginia high court rejected a self-insured rental company's attempt to shift its primary coverage obligation to the customer's insurer based on an "other insurance" provision that was triggered by the customer's declination of supplemental liability coverage as part of the rental agreement. The *Hertz* court reasoned, in part, that the self-insured rental company could not increase the risk assumed by the customer's insurer under the insurance contract issued to the customer where the customer's insurer was not a party to the rental agreement.

In *Enterprise*, the self-insured rental company promptly paid a property damage liability claim asserted against the customer arising from the customer's use of the rental car. The rental company thereafter sought indemnification from the customer based on the customer's failure to purchase supplemental insurance protection. The customer refused.

The *Enterprise* court first concluded that the rental company complied with its obligation under *Hertz* to provide primary liability coverage because it paid the liability claim against the customer. The court then concluded that the indemnification provision in the rental agreement was valid and enforceable against the customer. The court explained that indemnification provisions are nothing more than a contract to pre-determine the allocation of a potential risk of loss between the parties and are generally enforceable under Virginia law. See, e.g., *Estes Express Lines, Inc. v Chopper Express, Inc.*, 273 Va. 358, 366, 641 S.E.2d 476, 479 (2007).

In so ruling, the court rejected the insurer's contention that the agreement was unenforceable because it violated the anti-subrogation rule. The anti-subrogation rule prohibits an insurer from seeking indemnification from its own insured. See, e.g., *Walker v. Vanderpool*, 225 Va. 266, 271, 302 S.E.2d 669, 672 (1983). The court noted that the insurer's reliance on the anti-subrogation rule was misplaced because the rental company was self-insured and not an insurer itself. The court further explained that "self-insurance does not involve a transfer of a risk of loss, but rather a retention of that risk, making it the 'antithesis of insurance.'" Applying this same reasoning, the court also rejected the insurer's argument that the "other insurance" provision set forth in the liability policy issued to the customer required the rental company to provide primary coverage. Self-insurance is not "collectible insurance" within the meaning of the insurer's "other insurance" provision. The court therefore affirmed the lower court decision and enforced the indemnification clause against the rental customer and its insurer.