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## Annual Survey of Virginia Law: An Overview of Automobile Liability Insurance in Virginia

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# AN OVERVIEW OF AUTOMOBILE LIABILITY INSURANCE IN VIRGINIA<sup>1</sup>

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## I. INTRODUCTION

Automobile liability insurance coverage is considered one of the basic necessities of modern living, following closely on the heels of shelter and food. This priority is the outgrowth of two facts of life: one, that automobile transportation is practically unavoidable and two, that automobile accidents are practically inevitable. Thus, the shadow of liability for the damage and the suffering of automobile accidents falls across most of the American population. Because the losses which may be sustained by the negligent—and the innocent alike—are so great, the need for protection has escalated to the top of modern society's list of indispensable commodities. Shifting the burdens of such potential losses to prevent individuals, both innocent and negligent,

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1. Portions of this article were originally prepared as an update for the well-known lawyer's deskbook, *Virginia Automobile Liability Insurance* (1983) by the late Wilfred J. Ritz. Accordingly, some parts of this article were taken from the original Ritz deskbook, and the materials set out below are reproduced with permission of the copyright owner, The Harrison Company, Norcross, Georgia. Special thanks to Henry H. Blake and George Mattox for facilitating this limited revival of Ritz's important work. Thanks also to Peter Swisher, Professor of Law at the University of Richmond.

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from being financially destroyed, moreover, serves the public interest.

When we speak of the liability which automobile use imposes, we are concerned not only with the losses sustained at the accident scene, but also with losses which may be sustained long afterward in court. Following an accident, the blame usually falls upon the operator of a vehicle involved. As Professor Calvin H. Brainard wrote, "[t]he peril with which we are presently concerned is not the automobile accident itself but the claims and lawsuits that may result from it."<sup>2</sup>

The automobile liability insurance policy has evolved as a contractual solution to ease the fear of such losses. In the legal arena, the insurer agrees to stand in the shoes of the insured, so to speak, and to protect the insured from the prospect of ruinous financial losses. Though the concept seems simple enough, in practice it is quite complex. Because the automobile is movable, and because many persons may operate it, the contractual relationship between the insurer and the insured may become complicated.

#### A. *Four Critical Elements*

There are four elements that complicate the terms of the typical motor vehicle insurance agreement. First, there is the *automobile* itself. In an accident analysis for insurance purposes, we need to know facts such as whether the automobile was owned or borrowed and whether it was a private passenger vehicle or a truck.

Second, there is the *person* who bears the blame. In our analysis, we need to know whether the person to blame was the owner of the insured vehicle, a relative, employee, or some other person with permission to drive the vehicle.

Third, there is the *claimant*. We may need to know how the injured claimant is related to the person against whom the claim is being made.

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2. CALVIN H. BRAINARD, *AUTOMOBILE INSURANCE* 145 (1961) [hereinafter BRAINARD].

Fourth, there is the question of *how the vehicle was being used*. We need to know if the insured vehicle was being used for normal transportation, for business, or for other purposes.<sup>3</sup>

Because of the wide range of combinations possible from these four critical elements of the automobile liability insurance contract, the insurance industry has developed specialized policies to limit the combinations. The Family Automobile Policy (FAP), the most common form of insurance contract covering those vehicles not ordinarily used for business purposes, will be the subject of this article's discussion.

The Virginia State Corporation Commission (SCC) has created approved forms for insurance policies written in the Commonwealth. The SCC forms covering family automobile policies define the "owned automobile" as a private passenger, farm or utility automobile, including a trailer.<sup>4</sup> They define the "persons insured" to be the named insured, any resident of the same household, any person using the vehicle with permission, and any other person or organization legally responsible for use of the automobile.<sup>5</sup>

## B. Coverages

Even with limitations on what sort of vehicle may be insured under the FAP, a variety of coverages offered by the insurer to the purchaser of the policy contribute to the complexity of the contract. For example, Virginia requires that every insurance policy providing liability coverage also contain uninsured motorist coverage.<sup>6</sup>

In 1983, Virginia expanded that requirement to include underinsured motorist coverage. The insurer may offer medical expense and income loss coverage at the option of the policy's purchaser. Collision coverage insures against losses to the vehicle from collision or upset. Comprehensive coverage insures

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3. *Id.* at 145-46.

4. Standard Provisions for Automobile Combination Policies: Family Automobile Form, Part I, "Definitions" (Va. State Corp. Comm'n Bureau of Ins., 1st Rev., 1958) [hereinafter SCC Forms].

5. SCC Forms, Part I, "Persons Insured."

6. VA. CODE ANN. § 38.2-2206(A) (Repl. Vol. 1994).

against losses from fire, theft and flood. Insurers offer additional coverage against loss of life, against total disability, and against towing expenses.

As the late Wilfred J. Ritz pointed out, these "different coverages in a single policy fit together, after a fashion, but with considerable duplication . . ." <sup>7</sup> By way of illustration, Ritz gave the example of an accident caused by an uninsured motorist. The blameless owner of the insured automobile may collect under both his uninsured motorist coverage and under his collision coverage. Which coverage the insured motorist chooses to recover under may depend on his deductible, but in no case will he be able to make a double recovery, thus profiting from his insurance. <sup>8</sup>

### C. *Overlapping Coverages and Multiple Policies*

Even more interesting is the question of whether a double recovery may be possible when more than one insurance policy is available to claims. An example would be a situation where the negligent driver of an automobile is not the owner of the insured vehicle, but owns a policy on another vehicle. Ostensibly, the injured person has two policies against which to make a claim. When the claim falls within the limits of both policies, the question essentially becomes which of the two insurers must pay the claim. When the damage cannot be covered by one policy and more than one is available, which policy pays to the limit and which policy takes the overage? This controversy is related to insurance "stacking" and has been the source of much discussion and litigation in recent years.

### D. *Regulation*

Family automobile insurance policies issued by different insurance underwriters vary slightly. As stated, the SCC issues

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7. WILFRED J. RITZ, VIRGINIA AUTOMOBILE LIABILITY INSURANCE 1 (1983) [hereinafter RITZ].

8. *See id.* at 1-2.

approved forms that insurance companies writing policies in Virginia may follow to ensure SCC approval.<sup>9</sup>

The Commonwealth of Virginia regulates the insurance industry through a collection of statutes in the Code of Virginia and through the regulatory arm of the SCC. In 1989, the Code title governing insurance was modified, expanded, and recodified under the new Title 38.2. Statutes dealing with automobile insurance were renumbered under two separate titles, Title 38.2 and Title 46.2.

The 1989 revision of the insurance title produced a statutory description of motor vehicle insurance significantly improved over the previous statute which had included "aircraft or any private pleasure vessel, ship, or other watercraft."<sup>10</sup> Aircraft and marine craft have now been culled out of the motor vehicle insurance statute into separate statutes.<sup>11</sup> The complete text of section 38.2-124 reads:

A. "*Motor vehicle insurance*" means insurance against:

1. Loss of or damage to motor vehicles, including trailers, semitrailers or other attachments designed for use in connection with motor vehicles, resulting from any cause, and against legal liability of the insured for loss or damage to the property of another resulting from the ownership, maintenance or use of motor vehicles and against loss, damage or expense incident to a claim of such liability; or

2. Legal liability of the insured, and liability arising under subsection A of § 38.2-2206 and against loss, damage, or expense incident to a claim of such liability, arising out of the death or injury of any person resulting from the ownership, maintenance or use of motor vehicles. Motor vehicle insurance does not include any class of insurance specified in § 38.2-119.

B. Any policy of "motor vehicle insurance" covering legal liability of the insured under subdivision 2 of subsection A and covering liability arising under subsection A of § 38.2-2206 may include appropriate provisions obligating the

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9. See generally SCC Forms, *supra* note 4.

10. See VA. CODE ANN. § 38.1-381 (Repl. Vol. 1990).

11. VA. CODE ANN. §§ 38.2-125 (aircraft), 38.2-126 (marine) (Repl. Vol. 1990). The old statute which lumped together aircraft, pleasure watercraft, and motor vehicles still survives in Code § 38.2-2204, which governs standard insurance policy provisions and the omnibus clause.

insurer to pay medical expense and loss of income benefits arising out of the death or injury of any person, as set forth in subsection A of § 38.2-2201. Any such policy of motor vehicle insurance may include appropriate provisions obligating the insurer to pay weekly indemnity or other specific benefits to persons who are injured and specific death benefits to dependents, beneficiaries or personal representatives of persons who are killed, if the injury or death is caused by accident and sustained while in or upon, entering or alighting from, or through being struck by a motor vehicle while not occupying a motor vehicle. These provisions shall obligate the insurer to make payment regardless of any legal liability of the insured or any other person.<sup>12</sup>

### E. *Outline of this Article*

This article will begin by examining the motor vehicle insurance policy as a contract. The formation, execution, performance, rescission, cancellation, and renewal of the contract will be discussed in terms of the statutory scheme designed to govern all insurance contracts in Virginia. Next, the interlocking complexities of the four critical elements: vehicle insured, named insured, claimants, and uses will be examined. This article will then focus on the various forms of coverage offered by an automobile insurance policy. Finally, this article will examine the Virginia Uninsured and Underinsured Motorist Statute and will conclude with a brief discussion of "stacking" such coverages.

## II. FORMATION OF THE INSURANCE CONTRACT

The purpose of the automobile liability insurance contract is to provide protection against claims for damages and expenses of litigation. In return for adequate consideration in the form of a premium, the insurance carrier promises to indemnify the insured against any legal liability for damages resulting from an automobile accident. Additionally, the insurance company promises to defend any suit alleging bodily injury or property damage, even if the allegations of the suit are groundless, false,

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12. VA. CODE ANN. § 38.2-124 (Repl. Vol. 1994).

or fraudulent. Such promises to pay damages and defend suits reach deeply into the realm of unforeseeability. Public interest requires that such promises not be undertaken lightly and that performance should be certain. To ensure certainty of performance, the writing of insurance contracts is strictly regulated in all jurisdictions. In Virginia, statutory law under Title 38.2 regulates the formation of this contract between the insurance applicant and the insurance carrier.

#### A. *Requisites to the Contract*

Section 38.2-301 states that “[a]ny individual of lawful age may procure or effect an insurance contract upon himself for the benefit of any person.”<sup>13</sup> The same statute, however, forbids the knowing procurement of an insurance contract on “another individual unless the benefits under the contract” are payable either to the insured person or to a person having “an insurable interest . . . at the time when the contract was made.”<sup>14</sup> Insurable interests include those “engendered by love and affection” between persons closely related, “a lawful and substantial economic interest in the life, health and bodily safety” of persons not closely related, and in the case of employees, those who are “key employees” or employees of duration longer than a year.<sup>15</sup>

Likewise, under section 38.2-303, to make a valid contract for insurance on property there must exist an insurable interest—that is, “any lawful and substantial economic interest in the safety or preservation of the subject of insurance free from loss, destruction or pecuniary damage.”<sup>16</sup>

Section 38.2-304 allows a contract to be formed temporarily—but not longer than sixty days—by means of an oral or written binder until the insurance carrier is able to issue a complete, formal policy.<sup>17</sup> An insurance binder may be a very brief agreement and its purpose is to allow a person seeking to

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13. VA. CODE ANN. § 38.2-301(A) (Repl. Vol. 1994).

14. *Id.*

15. *See id.* § 38.2-301(B).

16. VA. CODE ANN. § 38.2-303 (Repl. Vol. 1994).

17. *Id.* § 38.2-304.



insure an interest to have the convenience of immediate coverage and to avoid the risk attendant to a delay in processing a formal insurance contract. Virginia law requires the assumption, unless otherwise indicated, that both oral and written binders include all the usual "provisions, stipulations and agreements which are commonly used in the Commonwealth in effecting the class of insurance being written."<sup>18</sup>

Virginia Code section 38.2-305 provides that any insurance policy, including an automobile policy, must include:

- (1) the names of the parties;
- (2) the subject of insurance;
- (3) the risks insured against;
- (4) the effective date and period during which insurance continues;
- (5) the amount of the premium; and
- (6) the conditions pertaining to the insurance.<sup>19</sup>

Virginia Code section 46.2-472 sets out the minimum requirements for motor vehicle owner's policies used to satisfy the Commonwealth's statutory requirement of proof of financial responsibility.<sup>20</sup> First, the vehicles to be covered must be expressly described.<sup>21</sup> Second, the policy must cover the named insured and any other person using or responsible for the use of the vehicle, with permission of the owner.<sup>22</sup> Third, the policy must:

Insure the insured or other person against loss from any liability imposed by law for damages, including damages for care and loss of services, because of bodily injury to or death of any person, and injury to or destruction of proper-

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18. *First Protection Life Ins. Co. v. Compton*, 230 Va. 166, 169, 335 S.E.2d 262, 264 (1985).

19. VA. CODE ANN. § 38.2-305 (Repl. Vol. 1994).

20. *See Farm Bureau Mut. Auto. Ins. Co. v. Hammer*, 177 F.2d 793, 797 (4th Cir. 1949), *cert. denied*, 339 U.S. 914 (1950); *Stillwell v. Iowa Nat'l Mut. Ins. Co.*, 205 Va. 588, 592, 139 S.E.2d 72, 75-76 (1964). The requirements of Code § 46.2-472 and its predecessor statute in former Title 46.1 do not apply to motor vehicle policies that are voluntarily procured. *See* VA. CODE ANN. § 46.2-472 (Repl. Vol. 1994).

21. VA. CODE ANN. § 46.2-472(1) (Repl. Vol. 1994).

22. *Id.* § 46.2-472(2).

ty caused by accident and arising out of the ownership, use or operation of such motor vehicle or motor vehicles within the Commonwealth, any other state in the United States, or Canada, subject to a limit exclusive of interest and costs, with respect to each motor vehicle, of \$25,000 because of bodily injury to or death of one person in any one accident and, subject to the limit for one person, to a limit of \$50,000 because of bodily injury to or death of two or more persons in any one accident, and to a limit of \$20,000 because of injury to or destruction of property of others in any one accident.<sup>23</sup>

## 1. Oral Contracts

In 1977, the Virginia Supreme Court, in *Dickerson v. Conklin*,<sup>24</sup> held that an oral contract of insurance may be enforceable if all the elements set out under section 38.2-305's predecessor were proven by clear and convincing evidence. In *Yates v. Whitten Valley Rental Corp.*,<sup>25</sup> the Virginia Supreme Court reenforced its requirement of a clear and convincing evidence standard for each element before an oral contract of insurance could be found enforceable.<sup>26</sup>

## 2. Consumer Protection Information

Section 38.2-305 requires that each contract or policy for insurance have a notice which states substantially that:

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23. VA. CODE ANN. § 46.2-472(3) (Repl. Vol. 1994). A similar version of the bare necessities, but without the limits necessary for proof of financial responsibility under Virginia Code § 46.2-435, is the statute designed to define the conditions of an operator's policy for the purposes of the Motor Vehicle Safety Responsibility Act. Code § 46.2-473 reads:

Every driver's policy shall insure the person named therein as insured against loss from the liability imposed upon him by law for damages, including damages for care and loss of services, because of bodily injury to or death of any person, and injury to or destruction of property arising out of the use by him of any motor vehicle not owned by him, within the territorial limits and subject to the limits of liability set forth with respect to a motor vehicle owner's policy.

VA. CODE ANN. § 46.2-473 (Repl. Vol. 1994).

24. 218 Va. 59, 65, 235 S.E.2d 450, 454 (1977).

25. 226 Va. 436, 309 S.E.2d 330 (1983).

26. *Id.* at 438, 309 S.E.2d at 331.

In the event you need to contact someone about this policy for any reason please contact your agent. If you have additional questions you may contact the insurance company issuing this policy at the following address and telephone number . . . .

If you have been unable to contact or obtain satisfaction from the company or the agent, you may contact the Virginia Bureau of Insurance . . . .<sup>27</sup>

Section 38.2-310 requires that all fees, charges, premiums and other consideration charged for insurance or its procurement must be stated in a policy.<sup>28</sup> An exception is the service charge for installment payments of insurance premiums, if these are provided to the insured in writing.<sup>29</sup>

Section 38.2-320 requires that the insurer must provide the insured with the forms required for preliminary proof of loss or damage within fifteen days of a request from the insured. A delay beyond fifteen days constitutes a "waiver of any condition, stipulation or provision in the policy requiring preliminary proof."<sup>30</sup>

To insure against the use of "fine print" to obscure critical provisions of an insurance contract, section 38.2-311 requires that restrictions, conditions, and provisions contained in any insurance policy or endorsed by any insurance policy must be printed in type at least as large as eight points, or written in ink or typewritten on the policy.<sup>31</sup>

### 3. Other Provisions

Additional provisions may be inserted into insurance policies or contracts beyond the requirements of section 38.2-305, provided those provisions are not in substantial conflict with Virginia law.<sup>32</sup> Such additional provisions may include those re-

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27. VA. CODE ANN. § 38.2-305(B) (Repl. Vol. 1994).

28. *Id.* § 38.2-310(B).

29. *Id.* § 38.2-310(A).

30. *Id.* § 38.2-320.

31. *Id.* § 38.2-311.

32. *Id.* § 38.2-306.

quired by the laws of the insurer's state or country of domicile, those of the state or country in which the policy is to be delivered or issued, or provisions "necessary to state the rights and obligations of the parties to the contract because of the manner in which the insurer is constituted or operated."<sup>33</sup>

Section 38.2-318 allows any insurance policy or form having a provision or condition which does not comply with the provisions under Title 38.2 to be valid under Virginia law, but provides that such a provision or condition will be construed "in accordance with the conditions and provisions required by this title."<sup>34</sup> If the insurance contract is made in violation of the law, section 38.2-319 provides that the contract "may be enforced against the insurer."<sup>35</sup>

#### 4. Jurisdiction and Time Limitations

To establish unequivocally the jurisdiction of Virginia courts, section 38.2-312 forbids any insurance contract delivered in Virginia covering people located or residing in Virginia from having a provision requiring the contract to be construed according to the laws of any other state, except to meet the motor vehicle financial responsibility laws of that state.<sup>36</sup> Nor may such insurance contracts contain any provision limiting the jurisdiction of Virginia courts in any actions against the insurer.<sup>37</sup> If a contract should contain such proscribed provisions, only those improper clauses will be deemed void, while the rest of the contract will be considered severable and effective.<sup>38</sup>

Section 38.2-316 gives authority over insurance contracts to the SCC. The Commission must have a copy of any contract—including endorsements—issued for insurance in the Commonwealth.<sup>39</sup> To establish a minimum statute of limitations to govern insurance policies, section 38.2-314 renders invalid any provision which limits the time within which an

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33. *Id.*

34. *Id.* § 38.2-318(A).

35. *Id.* § 38.2-319.

36. *Id.* § 38.2-312(1).

37. *Id.* § 38.2-312(2).

38. *Id.* § 38.2-312.

39. *Id.* § 38.2-316(A).

action may be brought to less than one year after the loss occurs or the cause of action accrues.<sup>40</sup> Section 38.2-315 prevents a breach of contract which occurs prior to a loss under the contract from voiding the contract or allowing the insurer to avoid liability under the contract unless the breach existed at the time of the loss.<sup>41</sup>

## B. *Construing the Terms of the Insurance Contract*

### 1. Ambiguity Construed Against Insurer

"[W]here the language of an insurance contract is susceptible of two constructions," wrote the Virginia Supreme Court in *American Fidelity Fire Insurance Co. v. Allstate Insurance Co.*, "it is to be construed strictly against the insurer and liberally in favor of the insured."<sup>42</sup>

### 2. Liberal Construction to Advance Public Policy

The Virginia Supreme Court in *Fidelity & Casualty Co. v. Harlow*, held that statutory provisions express a public policy.<sup>43</sup> Therefore, statutes should be liberally construed to effect public policy. In *Southside Distributing Co. v. Travelers Indemnity Co.*,<sup>44</sup> the court made it clear that any conflict between a provision in an insurance policy and the Virginia Code sounded the death knell for that provision.<sup>45</sup>

Where forms promulgated by the SCC under present Virginia Code section 38.2-2218 may be in conflict with statutory provisions, the form is void according to two federal decisions.<sup>46</sup>

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40. *Id.* § 38.2-314.

41. *Id.* § 38.2-315.

42. 212 Va. 302, 304, 184 S.E.2d 11, 13 (1971); see *Ohio Nat'l Life Assurance Corp. v. Crampton*, 822 F. Supp. 1230, 1232 (E.D. Va. 1983). *But see Quesenberry v. Nichols*, 208 Va. 667, 159 S.E.2d 636 (1968) (holding that an inartfully drawn sentence does not necessarily mean that it is ambiguous).

43. 191 Va. 64, 69, 59 S.E.2d 872, 874 (1950).

44. 213 Va. 38, 189 S.E.2d 681 (1972).

45. *Id.* at 41, 189 S.E.2d at 683; see *United States v. Government Employees Ins. Co.*, 409 F. Supp. 986, 990 (E.D. Va. 1976).

46. *United States v. Government Employees Ins. Co.*, 409 F. Supp. 986, 992-93 (E.D. Va. 1976); *Travelers Indem. Co. v. Wells*, 209 F. Supp. 784, 787 (W.D. Va.

### 3. Application Statements Deemed Representations

Under section 38.2-309, statements made by an applicant for insurance are deemed to be representations and not warranties.<sup>47</sup> Moreover, unless a statement made in an application for insurance can be shown to be both untrue and material to the risk when it was assumed, the insurer cannot use that statement to bar recovery.<sup>48</sup> The standard of falsity of a statement made in an insurance application, however, need not rise to the level of being made "willingly" as false or fraudulent.<sup>49</sup>

The insurer must rescind or cancel the policy as soon as it learns of a misrepresentation which qualifies for rescission, because delay may constitute waiver or estoppel. The most likely scenario for the litigation of an application misrepresentation is that the insurer will learn of a misrepresentation after there has been a loss.<sup>50</sup> In such a case, the insurer would probably bring "a declaratory judgment action against all interested parties and have its right to rescind adjudicated."<sup>51</sup>

The insurer has the burden of raising the issue of a material misrepresentation as an affirmative defense and then of proving that the misrepresentation was material to the risk.<sup>52</sup> If the insurer would have rejected the risk or charged a higher premium if it had known the truth, the misrepresentation will be found material.<sup>53</sup> In *Scott v. State Farm Mutual Automobile Insurance Co.*, the court held the insurer was not entitled to rescind because the insurer did not present evidence that it would have rejected the risk had it known that the teenage son

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1962), *rev'd on other grounds*, 316 F.2d 770 (4th Cir. 1963).

47. VA. CODE ANN. § 38.2-309 (Repl. Vol. 1994).

48. *Id.*; see *Parkerson v. Federal Home Life Ins. Co.*, 797 F. Supp. 1308, 1314 (E.D. Va. 1992) (holding that the materiality of misrepresentation is a question of law).

49. *Insurance Co. of N. Am. v. United States Gypsum Co.*, 639 F. Supp. 1246, 1250 (W.D. Va. 1986), *later proceedings*, 678 F. Supp. 138 (W.D. Va. 1988), *aff'd*, 870 F.2d 148 (4th Cir. 1989).

50. *RTZ*, *supra* note 7, at 104.

51. *Id.*; see, e.g., *Utica Mut. Ins. Co. v. National Indem. Co.*, 210 Va. 769, 173 S.E.2d 855 (1970).

52. *Scott v. State Farm Mut. Auto. Ins. Co.*, 202 Va. 579, 584, 118 S.E.2d 519, 523-24 (1961); see *Fidelity Bankers Ins. Corp. v. Wheeler*, 203 Va. 434, 438-39 (1962).

53. *Scott*, 202 Va. at 584, 118 S.E.2d at 523-24.

was the true owner of the vehicle insured under his father's name.<sup>54</sup>

In *Buckeye Union Casualty Co. v. Robertson*,<sup>55</sup> the Virginia Supreme Court held that a representation concerning ownership may be an immaterial technicality if the insurer would have charged the same premium had the policy been issued in the true owner's name.<sup>56</sup> In that case, the assigned-risk policy was issued in the name of the teenage son, although the vehicle was titled in the mother's name.<sup>57</sup> In a concurrence, two justices wrote that the misrepresentation was material to the risk, but because it was an assigned-risk policy, the insurer had not met its burden to prove willful misrepresentation to void the policy.<sup>58</sup>

In *MFA Mutual Insurance Co. v. Lusby*,<sup>59</sup> the Federal District Court for the Western District of Virginia found that a statement that the driver's license had never been suspended was not a material misrepresentation where the license had been voluntarily surrendered in a juvenile justice proceeding.<sup>60</sup>

Misrepresented matters found to be material in the formation of automobile liability insurance contracts include whether the automobile to be insured was actually new,<sup>61</sup> whether the identification number of the automobile was the one actually assigned to the insured automobile,<sup>62</sup> and whether the insured automobile was actually owned by the insured.<sup>63</sup> An untrue answer to a question about prior cancellations has been found material to the risk.<sup>64</sup>

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54. *Id.*

55. 206 Va. 863, 147 S.E.2d 94 (1966).

56. *Id.* at 866-67, 147 S.E.2d at 96-97.

57. *Id.* at 864-65, 147 S.E.2d at 95.

58. *Id.* at 870, 147 S.E.2d at 99.

59. 295 F. Supp. 660 (W.D. Va. 1969).

60. *Id.* at 667-68.

61. See *North River Ins. Co. v. Atkinson*, 137 Va. 313, 119 S.E. 46 (1923).

62. See *id.*

63. See generally *Scott v. State Farm Mut. Auto. Ins. Co.*, 202 Va. 579, 118 S.E.2d 519 (1961).

64. See *Hawkeye-Security Ins. Co. v. Government Employees Ins. Co.*, 207 Va. 944, 948, 154 S.E.2d 173, 176 (1967).

#### 4. Parol Evidence

Parol evidence provisions of the type found in most insurance contracts may not be as strictly applied in litigation as their wording may suggest. A policy may state "that this policy embodies all agreements existing between himself [the insured] and the company or any of its agents relating to this insurance."<sup>65</sup> However, in *State Farm Mutual Automobile Insurance Co. v. Butler*, the Virginia Supreme Court held admissible statements going to the issue of whether a valid and binding contract was formed at the outset.<sup>66</sup> In *Butler*, the insurer claimed that the policy had been obtained using false and material representations.<sup>67</sup> The trial court had struck the application as extrinsic evidence prohibited by the parol evidence provision of the contract. The supreme court reversed the trial court's decision because the application had not been offered for the purpose of interpreting the terms of the contract, but rather for the purpose of attacking the very formation of the contract.<sup>68</sup>

#### C. Contract Performance

Section 38.2-321 sets out the requirements for an insurer to be discharged from claims under any insurance policy in Virginia.<sup>69</sup> When the payments under the policy or contract become payable and the insurer makes the payments in accordance with the terms of the policy or contract, the insurer is released.<sup>70</sup>

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65. RITZ, *supra* note 7, at 6.

66. 203 Va. 575, 579, 125 S.E.2d 823, 825 (1962); see *Nyonteh v. Peoples Sec. Life Ins. Co.*, 958 F.2d 42, 44-45 (4th Cir. 1992); *Nationwide Mut. Ins. Co. v. Stephens*, 313 F. Supp. 890, 893 (W.D. Va. 1970).

67. 203 Va. at 576, 125 S.E.2d at 824.

68. *Id.* at 579-81, 125 S.E.2d at 825-27.

69. VA. CODE ANN. § 38.2-321 (Repl. Vol. 1994).

70. *Id.* § 38.2-321(A).



## 1. Cooperation

The insured likewise has two critical obligations under the insurance contract. The first is to assist and cooperate with the insurer during the investigation, defense or settlement of a claim.<sup>71</sup>

Section 38.2-2204(C) requires that every motor vehicle policy containing liability coverage must have a provision or endorsement which obligates the insurer even if the insured does not cooperate. But the statute contains a caveat: "If the failure or refusal to cooperate prejudices the insurer in the defense of an action for damages arising from the operation or use of such insured motor vehicle, then the endorsement or provision shall be void."<sup>72</sup>

## 2. Notice<sup>73</sup>

Likewise, as a condition precedent to the contract, the insured has an obligation to notify the insurer of any accident or claims to be made under the policy.<sup>74</sup>

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71. The approved FAP form issued by the SCC reads:

5. The insured shall cooperate with the company and, upon the company's request attend hearings and trials and assist in making settlements, securing and giving evidence, obtaining the attendance of witnesses and in the conduct of any legal proceedings in connection with the subject matter of this insurance. The insured shall not except at his own cost, voluntarily make any payment, assume any obligation or incur any expense other than for such immediate medical and surgical relief to others as shall be imperative at the time of accident.

SCC Forms, *supra* note 4, "Conditions."

72. VA. CODE ANN. § 38.2-2204(C) (Repl. Vol. 1994); *see* State Farm Mut. Auto. Ins. Co. v. Porter, 221 Va. 592, 598, 272 S.E.2d 196, 199 (1980).

73. Portions of this section were taken with permission from RITZ *supra* note 7, with minor changes to update the material.

74. *See generally* Porter, 221 Va. 592, 272 S.E.2d 196. The approved SCC form sets out the requirement:

3. In the event of an accident, occurrence or loss, written notice containing particulars sufficient to identify the insured and also reasonably obtainable information with respect to the time, place and circumstances thereof, and the names and addresses of the injured and of available witnesses, shall be given by or for the insured to the company or any of its authorized agents as soon as practicable.

SCC Forms, *supra* note 4, "Conditions."

### a. Form and Contents of Notice

"Notice must be in writing and must contain particulars sufficient to:

- (1) Identify the insured;
- (2) Contain or lead to reasonably obtainable information with respect to the time, place, and circumstances of the accident;
- (3) Names and addresses of the injured; and
- (4) Names and addresses of available witnesses.<sup>75</sup>

### b. Who Must Give Notice

Notice must be given by or for the insured. The term "insured," in this instance, must be defined in light of the coverage that is involved. In the case of liability coverage, the insured is the party who is likely to be a defendant-tortfeasor and therefore gives notice as a means of protection.

When the insured-tortfeasor does not give notice to the insurer, the injured-party plaintiff may be forced to do so. In *State Farm Mutual Automobile Insurance Co. v. Porter*, the driver of the "insured" hit-and-run vehicle did not give notice of the accident to his liability insurer.<sup>76</sup> The injured claimant knew the identity of the vehicle and its driver, but did not give notice until more than seven months after the accident. The court held that the notice condition of the insurance contract had been breached.<sup>77</sup>

### c. Who Receives Notice and When

Notice may be given directly to the insurer or to any of its authorized agents. The contract requires that notice be given "as soon as practicable," a condition which becomes an issue for the fact-finder.<sup>78</sup> The Virginia Supreme Court ruled, in *State*

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75. RITZ, *supra* note 7, at 94.

76. 221 Va. 592, 272 S.E.2d 196 (1980).

77. *Id.* at 599, 272 S.E.2d at 200.

78. *Utica Mut. Ins. Co. v. State Farm Mut. Auto. Ins. Co.*, 280 F.2d 469, 471-72

*Farm Mutual Automobile Insurance Co. v. Douglas*,<sup>79</sup> that delivery of notice after sixty-five days fits the requirement. But in *Sawyer v. Travelers Insurance Co.*,<sup>80</sup> the court ruled that notice given more than ten months after a *fatal* accident was not timely. In *National Grange Mutual Insurance Co. v. Taylor*,<sup>81</sup> the court held that notice given 155 days after the accident was within the standard because the insured was underage, had little education and had no advisor to point out that his mother's insurance policy might cover him while he was driving his own vehicle and not his mother's.<sup>82</sup>

Another underage motorist was allowed 117 days to give adequate notice because he was unaware that he had been involved in a collision where the car against which he was racing had actually collided with a third vehicle.<sup>83</sup> In *Hunter v. Hollingsworth*, however, the Virginia Supreme Court found that notice given in September of a July accident was not "immediate" within the meaning of the policy.<sup>84</sup>

#### d. Other Notice Issues

In 1980, the Virginia Supreme Court found an insurer was justified in denying coverage because the insured had willfully violated the provisions of the policy relating to notice of accident, notice of suit, and the forwarding of lawsuit papers.<sup>85</sup> The General Assembly amended the Code with what is presently section 38.2-2204(C) to state:

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(4th Cir. 1960); see *State Farm Fire & Cas. Co. v. Scott*, 236 Va. 116, 120, 372 S.E.2d 383, 385 (1988).

79. 207 Va. 265, 148 S.E.2d 775 (1966).

80. 10 F. Supp. 848 (E.D. Va. 1935); see *Hunter v. Hollingsworth*, 165 Va. 583, 594, 183 S.E.2d 508, 512 (1936).

81. 292 F. Supp. 986 (W.D. Va. 1968).

82. *Id.* at 991.

83. *American Mut. Liab. Ins. Co. v. State Farm Mut. Auto. Ins. Co.*, 411 F.2d 605 (4th Cir. 1969), *aff'd* 293 F. Supp. 256 (W.D. Va. 1968).

84. 165 Va. 583, 183 S.E. 508 (1936). *But see* *Stonewall Ins. Co. v. Hamilton*, 727 F. Supp. 271, 274 (W.D. Va. 1989) (*Hunter* principles not followed as dicta).

85. *State Farm Mut. Auto. Ins. Co. v. Porter*, 221 Va. 592, 598, 272 S.E.2d 196, 199 (1980). Condition 3 of the SCC approved FAP states: "If claim is made or suit is brought against the insured, he shall immediately forward to the company every demand, notice, summons or other process received by him or his representative." SCC Forms, *supra* note 4, "Conditions."

If an insurer has actual notice of a motion for judgment or complaint having been served on an insured, the mere failure of the insured to turn the motion or complaint over to the insurer shall not be a defense to the insurer, nor void the endorsement or provision, nor in any way relieve the insurer of its obligations to the insured, provided the insured otherwise cooperates and in no way prejudices the insurer.<sup>86</sup>

An insurer need not show it has been prejudiced in order to rely upon a breach of the notice condition. The amendment to the Code requiring the insurer to show prejudice where a breach of cooperation clause is involved does not apply to the notice requirement.<sup>87</sup>

#### D. *Contract Modification*

##### 1. Increasing Premiums

Section 38.2-1905 prohibits an insurer from arbitrarily raising the premium or changing the number of points under a safe driver insurance plan as a result of an accident unless the accident can be shown to have been caused, either wholly or partially, by one of three individuals: the named insured, a resident of the named insured's household, or another customary operator of the vehicle. If the principal operator who caused the accident was insured under a separate policy, the insurer cannot alter the premium or the points. If the insurer does increase the premium or points as a result of an accident, the named insured must be notified in writing and informed of the right of appeal to the Commissioner.<sup>88</sup>

An appeal of a premium increase or point change on a safe driver insurance plan must be filed with the Commissioner within sixty days of receipt of notice of the increase or change.

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86. VA. CODE ANN. § 38.2-2204(C) (Repl. Vol. 1994).

87. *State Farm Cas. Co. v. Scott*, 236 Va. 116, 120-21, 373 S.E.2d 383, 385-86 (1988); *Liberty Mut. Ins. Co. v. Safeco Ins. Co. of Am.*, 223 Va. 317, 323, 288 S.E.2d 469, 473 (1982); *Erie Ins. Ex. v. Meeke*, 223 Va. 287, 290, 288 S.E.2d 454, 456 (1982); *Porter*, 221 Va. at 598, 272 S.E.2d at 199.

88. VA. CODE ANN. § 38.2-1905(A) (Repl. Vol. 1994).

The increase or change remains in effect until the Commissioner rules that an adjustment is warranted. If the Commissioner rules an adjustment is warranted, the insurer is required to promptly refund any premium payment and adjust future billing to reflect the Commissioner's ruling.<sup>89</sup>

### E. *Cancellation and Refusal to Renew*

An insurer may not cancel or refuse to renew a motor vehicle insurance policy unless the provisions of section 38.2-2208 have been followed. The cancellation or refusal to renew must be mailed by certified or registered United States mail and the insurer must retain a duplicate copy of the cancellation notice.<sup>90</sup> The Virginia Supreme Court has held, however, that the insurer is not required to prove that the insured received the certified or registered notice.<sup>91</sup> If terms of the policy require notice to any lienholder, then the insurer must follow the same procedure for verifying the mailing of the notice to the lienholder, the duplicate copy to be held for at least one year by the insurer.<sup>92</sup>

#### 1. Statutory Safeguards Against Cancellation

The grounds and procedure for cancellation of or refusal to renew a motor vehicle insurance policy are set out in detail under section 38.2-2212. The intention of the statute is to provide procedural safeguards to the insured when a policy is cancelled against his or her wishes.<sup>93</sup> In 1991, the General Assembly removed the vehicle weight limit of 1500 pounds. Thus the termination of any insurance policy on a private pas-

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89. *Id.* § 38.2-1905 (B).

90. VA. CODE ANN. § 38.2-2208(A) (Repl. Vol. 1994).

91. *See Ampy v. Metropolitan Cas. Ins. Co. of N.Y.*, 200 Va. 396, 401, 105 S.E.2d 839, 844 (1958); *Locke v. Allstate Ins. Co.*, 26 Va. Cir. 304, 310 (Richmond City 1992). *But see Gregory v. Providence Wash. Ins. Co.*, 214 Va. 134, 136, 198 S.E.2d 616, 618 (1973) (holding that the insurer's burden of proving that notice had been mailed was not met by the introduction of an unsigned or blank certificate).

92. VA. CODE ANN. § 38.2-2208(B) (Cum. Supp. 1993).

93. *See American Interinsurance Exch. v. Lucy*, 222 Va. 530, 533, 281 S.E.2d 895, 896 (1981). *But see Atwater v. District of Columbia Dep't of Consumer & Regulatory Affairs*, 566 A.2d 462, 471-73 (D.C. 1989).

senger, state wagon, or motorcycle that is not used commercially (car pools excepted) or any four-wheel motor vehicle not used commercially (farm vehicles excepted) will be governed by the provisions of section 38.2-2212.<sup>94</sup>

## 2. Proscribed Grounds for Cancellation

An insurer is forbidden to refuse renewal of a motor vehicle insurance policy "solely" on the grounds of age, sex, residence, race, color, creed, national origin, ancestry, marital status, lawful occupation (including military service), lack of driving experience, or lack of supporting business or potential for acquiring supporting business.<sup>95</sup>

Section 38.2-2213 repeats the prohibition of discrimination on the bases enumerated above, but limits that protection to residents of the Commonwealth. The statute also allows an insurer to limit the writing of insurance policies to persons engaging in a particular profession or occupation and to persons who are members of a particular religious sect.<sup>96</sup>

In addition, an insurer is forbidden to refuse renewal on the grounds that the insured had one or more accidents or violations during the four years immediately preceding the policy's upcoming anniversary date.<sup>97</sup> In addition, the insurer may not refuse to renew if there were two or fewer accidents within a three-year period unless the named insured, a resident of the insured's household, or the customary operator of the vehicle can be shown to be at fault, wholly or partially.<sup>98</sup> Furthermore, the insurer may not refuse renewal based on one or more claims submitted under the uninsured motorists coverage of the policy if, attendant to those claims, the uninsured motorist was known or "there is physical evidence of contact."<sup>99</sup>

A single claim under the medical coverage due to an accident for which the named insured bore no fault may not be used as

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94. VA. CODE ANN. § 38.2-2212(A) (Repl. Vol. 1994).

95. *Id.* § 38.2-2212(C)(1)(a-1).

96. *Id.* § 38.2-2213.

97. *Id.* § 38.2-2212(C)(1)(m).

98. *Id.* § 38.2-2212(C)(1)(q).

99. *Id.* § 38.2-2212(C)(1)(n).

grounds for a refusal to renew the insurance contract.<sup>100</sup> Finally, the insurer may not refuse renewal based on one or more claims submitted under comprehensive or towing coverage.<sup>101</sup>

If the insured's occupation has changed in such a way as to "materially increase the risk," however, the insurer is not prohibited by the provisions of section 38.2-2212 from refusing to renew the insurance contract. Nor is the insurer barred from renewing an insurance contract if any claim was false or fraudulent. Furthermore, an insurer is not prohibited from setting rates based on actuarial data.<sup>102</sup> However, the motor vehicle's age (provided the vehicle is licensed) may not be used by an insurer as the sole reason to refuse to issue or renew a policy.<sup>103</sup>

## 2. Approved Grounds for Cancellation

Three reasons for cancellation of a motor vehicle policy are permitted under Virginia law. First, a policy may be cancelled if the named insured or the person who customarily operates the vehicle has had his or her driver's license suspended or revoked during the policy period, or in the case of renewal, during the ninety days immediately preceding the last anniversary date.<sup>104</sup> Second, the policy may be cancelled if the insured fails to pay the premium, or any installment of the premium.<sup>105</sup> Third, any new policy can be cancelled if it has been in effect less than sixty days and the cancellation notice has been mailed within that time period.<sup>106</sup>

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100. *Id.* § 38.2-2212(C)(1)(o).

101. *Id.* § 38.2-2212(C)(1)(p). However, nothing in this section prohibits an insurer from modifying or refusing to renew the comprehensive or towing coverages at the time of renewal of the policy on the basis of one or more claims submitted by an insured under those coverages, provided that the insurer mails or delivers to the insured, at the address shown in the policy, written notice of any such change in coverages at least forty-eight days prior to renewal. *Id.*

102. *Id.* § 38.2-2212(C)(2).

103. *Id.* § 38.2-2215 (Repl. Vol. 1994).

104. *Id.* § 38.2-2212(D)(1).

105. *Id.* § 38.2-2212(D)(2). The Virginia Supreme Court has held that the acceptance of late premium payments, in and of itself, does not estop the insurer from cancelling the policy provided that prompt refunds are made to the insured. *See Harris v. Criterion Ins. Co.*, 222 Va. 496, 502-03, 281 S.E.2d 878, 881-82 (1981); *Tyler v. Security Mut. Cas. Co.*, 7 Va. Cir. 90, 91 (Richmond City 1981).

106. VA. CODE ANN. § 38.2-2212(F)(3) (Repl. Vol. 1994). In *Virginia Mut. Ins. Co.*

Section 38.2-2210 requires a statement on the first page of an application form in boldface print warning:

**READ YOUR POLICY. THE POLICY OF INSURANCE FOR WHICH THIS APPLICATION IS BEING MADE, IF ISSUED, MAY BE CANCELLED WITHOUT CAUSE AT THE OPTION OF THE INSURER AT ANY TIME IN THE FIRST 60 DAYS DURING WHICH IT IS IN EFFECT AND AT ANY TIME THEREAFTER FOR REASONS STATED IN THE POLICY.<sup>107</sup>**

#### 4. Procedure for Cancellation or Refusal to Renew

If an insurer does cancel or refuse to renew an insurance contract, the Code sets out precise requirements for the execution of the cancellation or refusal to renew. Section 38.2-2212(A) defines the insurer to be “any insurance company, association, or exchange licensed to transact motor vehicle insurance in this Commonwealth.”<sup>108</sup> “Insurance agent” is not mentioned anywhere in the statute. The logical conclusion, then, is that only the insurance company, and not the agent, may cancel or refuse to renew a policy.

The notice must be written in type at least eight points in size and must give the effective date of the cancellation or refusal to renew. That date cannot be sooner than forty-five days after mailing, unless the reason for cancellation is failure to pay the premium, in which case the effective date cannot be sooner than fifteen days after mailing.<sup>109</sup> Moreover, the insurer must advise the insured of the right of appeal, and the Code sets out the exact wording:

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*v. Liberty Mut. Ins. Co.*, the Virginia Supreme Court held that the language of the statute's predecessor, § 38.1-381.5(f)(3), related to the date of cancellation by the insurer, not the length of time the policy was in effect. Therefore, a cancellation made by giving notice fifty-five days after the policy was issued—to be effective beyond the sixty days—was not covered by the statutory requirements. 218 Va. 807, 809-10, 241 S.E.2d 754, 756 (1978).

107. VA. CODE ANN. § 38.2-2210(A) (Repl. Vol. 1994).

108. *Id.* § 38.2-2212(A).

109. *Id.* § 38.2-2212(E)(1)(2).



### IMPORTANT NOTICE

Within fifteen days of receiving this notice, you or your attorney may request in writing that the Commissioner of Insurance review this action to determine whether the insurer has complied with Virginia laws in cancelling or non-renewing your policy. If this insurer has failed to comply with the cancellation or nonrenewal laws, the Commissioner may require that your policy be reinstated. However, the Commissioner is prohibited from making underwriting judgments. If this insurer has complied with the cancellation or nonrenewal laws, the Commissioner does not have the authority to overturn this action.<sup>110</sup>

Additionally, the insurer must inform the insured of the possible availability of other insurance through his agent, another company, or the Virginia Automobile Insurance Plan.<sup>111</sup> Finally, the notice must be sent by certified or registered mail, and the insurer must retain a copy.<sup>112</sup>

#### 5. Commissioner's Role in Review

Section 38.2-2212 contains a provision which protects the Commissioner of Insurance and any subordinates from any liability surrounding matters of motor vehicle insurance cancellation or nonrenewal.<sup>113</sup> An insured may request the Commissioner to review a cancellation or refusal to renew within fifteen days of receiving it.<sup>114</sup>

While the Commissioner has the matter under review, the policy will remain in effect unless the basis for cancellation was failure to pay the premium. But the Commissioner may not substitute his or her judgment for the underwriter of the insurer. If the Commissioner finds that the insurer did not comply with Virginia law and rules in favor of the insured, reasonable attorneys' fees may be awarded to the insured.<sup>115</sup>

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110. *Id.* § 38.2-2212(E)(4).

111. *Id.* § 38.2-2212(E)(5).

112. *Id.* § 38.2-2212(E)(6), (I).

113. *Id.* § 38.2-2212(G).

114. *Id.* § 38.2-2212(H).

115. *Id.*

## 6. Exemptions to Statutory Requirements

Exemptions from the requirements of section 38.2-2212 include cases where the insurer or its agent has given the insured a written "manifestation" of its willingness to renew.<sup>116</sup> The manifestation must include the name of the proposed insurer, the expiration date of the policy, the type of insurance coverage, and information regarding the estimated renewal premium.<sup>117</sup> Also exempt from the requirement of section 38.2-2212 are cases where the named insured or his "attorney-in-fact," has given the insurer notice in writing of his desire to cancel or to forego renewal.<sup>118</sup>

Another situation under which a cancellation may be exempt from section 38.2-2212 is where a motor vehicle insurance policy has been in effect less than sixty days when the termination notice is mailed. However, the same does not apply in the case of a renewal policy.<sup>119</sup>

Any insurer which limits the issuance of policies of motor vehicle liability insurance to one class or group of persons engaged in any one particular profession, trade, occupation, or business is also exempt from the cancellation and refusal to renew requirements under section 38.2-2212.<sup>120</sup>

## 7. Cancellation and Renewal by the Insured

The insured, on the other hand, may cancel the policy simply by notifying the insurer or its agent of the cancellation's effective date.<sup>121</sup> If by mutual consent, the insured and the insurer's agent may cancel a policy verbally and without following the procedures set out in the policy.<sup>122</sup>

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116. *Id.* § 38.2-2212(F)(1).

117. *Id.*

118. *Id.* § 38.2-2212(F)(2).

119. *Id.* § 38.2-2212(F)(3).

120. *Id.* § 38.2-2212(J).

121. *State Farm Mut. Auto. Ins. Co. v. Pederson*, 185 Va. 941, 41 S.E.2d 64 (1947).

122. *Prillaman v. Century Indem. Co. of Hartford*, 138 F.2d 821, 823-24 (4th Cir. 1943), *affg* 49 F. Supp. 197 (W.D. Va. 1943). But if payment of premiums is financed through a third party which gains authority to cancel for default, notice to the third

When an offer of renewal is made by the insurer, difficulties may arise as to the efficacy of the insured's response. If the insured simply provided information to the insurer needed to prepare a renewal policy, and the insurer accepted premiums at a later time, courts may find sufficient conduct to validate the contract.<sup>123</sup>

## F. *Other Contract Defenses*

### 1. Waiver

In *Insurance Co. of North America v. Atlantic National Insurance Co.*,<sup>124</sup> the United States Court of Appeals for the Fourth Circuit found that simply because an insurer has filed the required forms under the financial responsibility statutes, showing that a vehicle is insured does not alone constitute a waiver of the insurer's right to rely on defenses.<sup>125</sup>

### 2. Estoppel

As with waiver, courts have found that the filing of the required forms under the financial responsibility statutes does not, as a matter of law, estop the insurer from denying coverage.<sup>126</sup> Whether the policies were issued as assigned risks un-

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party is not notice to the insured. See *American Interinsurance Exch. v. Lucy*, 222 Va. 530, 281 S.E.2d 895 (1981).

123. See *Pennsylvania Threshermen & Farmers Mut. Cas. Ins. Co. v. Carter*, 197 Va. 776, 91 S.E.2d 429 (1956). In this case, the insured procrastinated in providing information for insurance renewal but in February, he did provide the information upon the insurer's second request. The insured's policy expired at midnight on March 19, and his car was involved in an accident on March 20. Three days later, the insured sent a messenger to pay the premium and pick up the renewed policy, never mentioning the accident. Three months later the insurer cancelled the policy, refunded the unearned premium and claimed the effective date of the policy was the day the premium was paid. Stating that "[insurer's] offer to make a contract was accepted by [the insured] in giving the agent the information requested and making payment of the premium," the court ruled the insurance policy was renewed on the day of the accident. *Id.* at 780, 91 S.E.2d at 432. But see *Boone v. Standard Accident Ins. Co. of Detroit*, 192 Va. 672, 66 S.E.2d 530 (1951).

124. 329 F.2d 769 (1964).

125. *Id.* at 779.

126. See *id.* at 779; accord *Nationwide Mut. Ins. Co. v. Allstate Ins. Co.*, 304 F. Supp. 343 (W.D. Va 1969); *Virginia Mut. Ins. Co. v. State Farm Mut. Auto. Ins. Co.*, 204 Va. 783, 133 S.E.2d 277 (1963); *Virginia Farm Bureau Mut. Ins. Co. v. Saccio*,

der the Virginia Automobile Insurance Plan does not alter the bar to estoppel. The Virginia Supreme Court, however, found in *Employers Commercial Union Insurance Co. of America v. Great American Insurance Co.*,<sup>127</sup> that the filing of the SR-22 form and a failure to timely withdraw it are factors to which the court should give weight in determining whether the insurer is entitled to deny coverage.<sup>128</sup>

In the same decision, the court found that the insurance company was estopped from denying coverage since it was shown that the insurer's agent had failed to give prompt notice to the insured that his policy was cancelled because the company had learned of false answers on the insurance application. In *Virginia Auto Mutual Insurance Co. v. Brillhart*,<sup>129</sup> the Virginia Supreme Court also found the insurer was estopped from denying coverage.<sup>130</sup> In that case, the agent knew that the insured thought the insurance would follow from his old car to a newly purchased one. Because the agent failed to inform the insured of the true situation, the insurer was prevented from denying that the insured's new car was, in fact, covered.<sup>131</sup>

### III. ELEMENTS OF COVERAGE

Standard form provisions of the Family Automobile Policy approved by the SCC for use in the Commonwealth of Virginia date from the late 1950's. Although the forms have been amended and various approved endorsements have been added, today's FAP is essentially the same as the original. The following chapter will analyze the basic elements of coverage under the approved forms used by motor vehicle insurers in the Commonwealth of Virginia. If a vehicle and its use does not fit under the definitions set out by the FAP, it should be insured by using the Basic Automobile Liability Policy.

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204 Va. 769, 133 S.E.2d 268 (1963).

127. 214 Va. 410, 200 S.E.2d 560 (1973).

128. *Id.* at 414-15, 200 S.E.2d at 563-64.

129. 187 Va. 336, 46 S.E.2d 377 (1948).

130. *Id.* at 349-50, 46 S.E.2d at 383-84.

131. *Id.* at 349, 46 S.E.2d at 383.

## A. *The Automobile*

Motor vehicle liability insurance rides both with the insured automobile and with the person who purchased the insurance. Under liability coverage, the insurer agrees to pay, up to the policy's limits, for physical injury or property damage resulting from the ownership, maintenance or use of an automobile, whether owned by the insured or not (under certain circumstances).<sup>132</sup> Under liability coverage, the premium charged by the insured is based on the number of automobiles owned by the named insured.<sup>133</sup>

### 1. Family Vehicles

The SCC approved form defines the "owned automobile" for a FAP to be "a private passenger, farm or utility automobile, or trailer owned by the named insured," and may include "a four wheel private passenger, station wagon or jeep type automobile."<sup>134</sup>

### 2. Farm Vehicles

If the vehicle is a farm automobile, it may be "of the truck type with a load capacity of fifteen hundred pounds or less not used for business or commercial purposes other than farming."<sup>135</sup> Likewise, if the vehicle is considered a utility type other than a farm vehicle, it must have "a load capacity of fifteen hundred pounds or less of a pick-up body, sedan delivery

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132. As Ritz remarked in 1983:

[Extension of coverage to nonowned vehicles] is not required by statute but is based solely on the policy provisions. It is possible to have an operator or a nonowned automobile insurance policy under which no motor vehicle is insured, but such policies are unusual. In discussing the insured with reference to a nonowned vehicle, it must be understood that it is an owner policy on an insured vehicle that is involved and the question is whether the policy extends coverage to an insured when driving or occupying a nonowned vehicle.

RITZ, *supra* note 7, at 47.

133. BRAINARD, *supra* note 2, at 155.

134. SCC Forms, *supra* note 4, at Part I, "Definitions."

135. *Id.*

or panel truck type not used for business or commercial purposes."<sup>136</sup>

### 3. Trailers

Trailers are covered under the typical FAP. Generally, an accident involving a trailer will also involve the family vehicle towing it.<sup>137</sup>

### 4. Vehicle Body-Type and Use

Classifying the automobile type included by the FAP is not enough to determine whether the FAP is the proper policy under which to insure the vehicle. How the vehicle is used must be factored into the equation as well. A family automobile which is used in the insured's business or occupation for calling on customers may still be covered under a FAP.<sup>138</sup> Even when a trailer is attached to the family vehicle to carry items, such as samples or displays, used for calling on customers, the trailer would still be covered under the FAP. Moreover, a small truck could be employed to tow a house trailer under the FAP. But when a house or utility trailer is "(1) *attached to other than a family car* and (2) *used for business purposes or deliveries*," the use is outside the FAP coverage, even though the vehicle type is one normally covered by a FAP.<sup>139</sup>

#### a. Ownership

##### i. Spouse

Who must own the covered automobile? The approved FAP form states the persons covered under the liability policy with

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136. *Id.* Because the FAP may cover some farm vehicles does not mean that the mandatory omnibus coverage required under Code § 38.2-2204 (and its predecessor § 38.1-381) in an automobile policy extends to a farm liability policy, as distinguished from an automobile liability policy. *See* Commercial Union Ins. Co. of New York v. St. Paul Fire & Marine Ins. Co., 211 Va. 373, 376, 177 S.E.2d 625, 627 (1970).

137. *See* Safeguard Ins. Co. v. Justice, 203 Va. 972, 977, 128 S.E.2d 286, 290 (1962) (holding that a towed "racing car" is not considered a trailer).

138. BRAINARD, *supra* note 2, at 148.

139. *Id.*

respect to the owned automobile are the named insured and any resident of the same household.<sup>140</sup> The FAP defines "named insured" as the individual named in Item 1 of the declarations and his spouse, if a resident of the same household."<sup>141</sup> The liability coverage of a standard FAP, then, effectively provides insurance "on all family-type automobiles owned by the named insured and spouse at any time during the policy period."<sup>142</sup>

ii. To Whom Registered

While the SCC-approved form details what vehicle type may be covered by the FAP, it leaves "ownership" undefined. Ritz's discussion of ownership in 1983 is still applicable today:

Generally, the person named in the policy as the named insured is deemed the owner of the automobile described in the policy, regardless of the true facts of ownership. Thus the father is deemed the owner of the vehicle registered in his name and described in the policy, although the actual facts might show that a son, perhaps under the age of 25, is the true owner.<sup>143</sup>

Of course, misrepresentation of ownership justifies nullification of the entire insurance contract if the insurer can show that the misrepresentation was material. Ultimately, "[d]etermination of the ownership question depends upon application of Virginia laws relating to registration and licensing of motor vehicles, particularly the statutes relating to certificates of title and their transfer."<sup>144</sup>

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140. SCC Forms, *supra* note 4, at Part I, "Persons Insured."

141. *Id.* at "Definitions."

142. BRAINARD, *supra* note 2, at 151.

143. RITZ, *supra* note 7, at 54.

144. *Id.* at 55; see VA. CODE ANN. §§ 46.2-628 to -633 (Cum. Supp. 1994).

### iii. Completed Sales

In *Wicker v. National Surety Corp.*,<sup>145</sup> a question of the applicability of the used car dealer's liability insurance arose after he sold a purchaser a used car. The court found that the sale had been executed, and was not executory, and so the dealer's policy did not cover the vehicle when the purchaser had an accident. The court wrote:

In Virginia, if the assignment of the title certificate has not been executed at the time of the accident, the seller has at least a legal title and the entire transaction may be held to be executory. At the same time, it is clear that if the seller delivers the title certificate to the purchaser, the assignment on the back of the certificate having been properly executed, the seller has divested himself of all interest in the vehicle whether or not the purchaser thereafter complies with his statutory duty of filing the assigned certificate with the Division of Motor Vehicles. Under the Virginia decisions execution of the assignment and delivery of the certificate are, or may be, critical and conclusive of the question of passage of title, but filing the documents with the Division of Motor Vehicles is not.<sup>146</sup>

The reverse facts yielded the same result. When a dealer had an accident shortly after purchasing an automobile from its owner, the dealer's policy, in this case uninsured motorist coverage, was operative, not the seller's.<sup>147</sup> When a West Virginia car dealer transferred title to a purchaser who had an accident two days later in Virginia, the court held that because the deal was complete, the car dealer's insurance did not apply at the time the vehicle was involved in the accident.<sup>148</sup>

If a nonowner policy expressly excludes any person to whom possession was transferred by agreement of sale, the Virginia Supreme Court held that such an exclusion was satisfactory

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145. 330 F.2d 1009 (4th Cir.), *cert. denied*, 379 U.S. 838 (1964).

146. *Id.* at 1012 (citation and footnote omitted).

147. *See generally* Travelers Indem. Co. v. Nationwide Mut. Ins. Co., 227 F. Supp. 958 (W.D. Va. 1964).

148. *Woodson v. Celina Mut. Ins. Co.*, 211 Va. 423, 428, 177 S.E.2d 610, 614-15 (1970) (applying West Virginia law, but finding no precedent for adopting Virginia principles of insurance law).



and statutory provisions that would extend coverage did not apply.<sup>149</sup>

## b. Other Vehicles Covered

The physical body types described in the SCC-approved forms constitute a bright line between coverage under the FAP and coverage under the Basic Automobile Liability Policy.<sup>150</sup>

### i. Newly Acquired Replacement

When an insured acquires a replacement for the insured motor vehicle, the insurance policy automatically transfers to the new vehicle.<sup>151</sup> However, the owner must actually replace the previous vehicle. In *Butler v. Government Employees Insurance Co.*,<sup>152</sup> the owner put the older vehicle up for sale and transferred the license plates to the newer vehicle. The court found the arrangement was not a "replacement."<sup>153</sup>

### ii. Newly Acquired Additional Automobile

If an insurance company insures *all* the vehicles owned by a given insured, then a newly acquired additional automobile is automatically insured provided that the insured notifies the carrier during the policy period or within thirty days after ac-

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149. *Nationwide Mut. Ins. Co. v. Government Employees Ins. Co.*, 215 Va. 676, 681, 212 S.E.2d 297, 301 (1975).

150. See generally SCC Forms, *supra* note 4.

151. Condition 2 under the SCC-approved form for the FAP states:

If the named insured disposes of, acquires ownership of or replaces a private passenger, farm or utility automobile or, with respect to Part III [Physical Damage], a trailer, he shall inform the company during the policy period of such change. Any premium adjustment necessary shall be made as of the date of such change in accordance with the manuals in use by the company. The named insured shall, upon request, furnish reasonable proof of the number of such automobiles or trailers and a description thereof.

SCC Forms, *supra* note 4, "Conditions."

152. 212 Va. 174, 183 S.E.2d 147 (1971).

153. *Id.* at 176, 183 S.E.2d at 149. Note that when an owner described an older vehicle as mechanically inoperable and used a newer vehicle exclusively, a federal district court held that the newer vehicle was a replacement. See *Iowa Nat'l Mut. Ins. Co. v. McGhee*, 292 F. Supp. 176 (W.D. Va. 1968) *aff'd*, 408 F.2d 4 (4th Cir. 1969).

quisition. If, however, the insured owns other vehicles insured by other companies, the automatic coverage of a newly acquired vehicle does not apply.<sup>154</sup>

In *Celina Mutual Insurance Co. v. Cohen*, the court held the insurer must be notified of the purchase of a new automobile to effect coverage.<sup>155</sup> The insured obtained title on January 29, had an accident on February 28, and notified the insurer on March 16, five days after the policy had expired.<sup>156</sup>

### iii. Temporary Substitute Automobiles

Under the FAP, an owned automobile may also be a temporary substitute. Such an automobile or trailer, though "not owned by the named insured," is covered while "temporarily used as a substitute for the owned automobile or trailer when withdrawn from normal use because of its breakdown, repair, servicing, loss or destruction."<sup>157</sup>

A vivid example would be a family car which is disabled by a dead battery. A neighbor, who happens to be a contractor, offers a five-ton dump truck on loan to run an important errand. As this is the only vehicle available, the insured takes his neighbor's offer. While he is driving the dump-truck he is insured under his own FAP.<sup>158</sup>

If the dump truck belonged to the same person whose family car battery ceased operating, however, the FAP would not substitute for liability coverage even if the truck were being used for a family errand.<sup>159</sup> The rationale behind this would be that "[t]he named insured cannot be held responsible for the existence or non-existence of insurance on his neighbor's truck . . . [b]ut if he neglects to provide primary insurance on his own truck . . ." he has done so at his own risk.<sup>160</sup>

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154. SCC Forms, *supra* note 4.

155. 204 Va. 763, 767, 133 S.E.2d 311, 314 (1963).

156. *Id.*

157. SCC Forms, *supra* note 4, at Part I, "Definitions;" RITZ, *supra* note 7, at 59.

158. BRAINARD, *supra* note 2, at 149.

159. See *Virginia Farm Bureau Mut. Ins. Co. v. Jerrell*, 236 Va. 261, 267-68, 373 S.E.2d 913, 916-17 (1988); *State Farm Mut. Auto. Ins. Co. v. Manojlovic*, 215 Va. 382, 383, 209 S.E.2d 914, 915 (1974) (parties agree vehicle in question is neither owned nor nonowned within policy definitions).

160. BRAINARD, *supra* note 2, at 149. See *Armstrong v. Nationwide Mut. Ins. Co.*,

*iv. Nonowned Automobile*

The FAP covers another type of nonowned vehicle as well. A "nonowned automobile" is either an automobile or a trailer that is "not owned by the named insured, while temporarily used as a substitute for the owned automobile or trailer when withdrawn from normal use because of its breakdown, repair, servicing, loss or destruction."<sup>161</sup> Because the premium for liability coverage is based on the number of vehicles owned by the named insured, inclusion of nonowned vehicles amounts to free coverage if those vehicles are driven regularly and frequently.<sup>162</sup> Therefore, the definition excludes those nonowned vehicles "furnished for the regular use" of the insured.<sup>163</sup>

In *State Farm Mutual Automobile Insurance Co. v. Smith*,<sup>164</sup> the Virginia Supreme Court distinguished "permission" and "furnished" in this way: "We interpret the language 'furnished to the named insured for regular use' as referring to the furnishing for the insured's own purposes, and not the furnishing for the owner's or his family's purposes, with incidental permission for use by the insured for her purposes."<sup>165</sup>

In 1989, however, the supreme court, in *State Farm Mutual Automobile Insurance Co. v. Jones*,<sup>166</sup> overruled the *Smith* decision to the extent that it implied that a vehicle must be furnished primarily for personal use, regardless of frequency of use, to qualify as "regular use."<sup>167</sup>

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215 Va. 333, 335, 209 S.E.2d 903, 904 (1974) (finding father's truck was not a temporary substitute automobile and therefore not covered under policy purchased for son's disabled and never-repaired automobile). *But see* Lumbermens Mut. Cas. Co. v. Harleysville Mut. Cas. Co., 367 F.2d 250, 253 (4th Cir. 1966) (finding son's "uninsured" vehicle was a temporary substitute automobile under father's policy when father's vehicle was disabled and son provided transportation for fellow employees with whom his father had an arrangement to provide rides).

161. SCC Forms, *supra* note 4, at Part I, "Definitions."

162. *See* BRAINARD, *supra* note 2, at 155.

163. SCC Forms, *supra* note 4, at Part I, "Definitions." An example would be a car that an employer provides for its traveling salesperson.

164. 206 Va. 280, 142 S.E.2d 562 (1965).

165. *Id.* at 288, 142 S.E.2d at 567.

166. 238 Va. 467, 383 S.E.2d 734 (1989).

167. *Id.* at 470, 383 S.E.2d at 736. In this case, the employer furnished Jones the van he drove daily and allowed him to use the van for personal purposes if he obtained permission. Jones was injured in an on-the-job accident. His employer's insur-

In *Berry v. State Farm Mutual Automobile Insurance Co.*,<sup>168</sup> the court found the test to be not actual use, but whether the vehicle was furnished for use.<sup>169</sup> In that case, a daughter who lived with her parents was an insured under her father's insurance policy. However, her spouse had purchased an automobile and left it at home while on a military tour of duty. The court held that her spouse's vehicle had been furnished for her regular use. Since her spouse's vehicle did not qualify as a nonowned vehicle, her father's liability coverage did not include her use of her spouse's vehicle.<sup>170</sup>

In 1968, the Virginia Supreme Court made clear that an automobile furnished by an employer to transport employees between home and work, as well as to meet transportation needs while on the job, would not be considered as furnished for regular use.<sup>171</sup>

Problems arise with borderline cases on the frequency of use. If an employee uses his employer's vehicle once a month, every month, such use might be classified as "regular." Yet, the frequency is not enough to increase the insurer's exposure to loss to any significant degree.<sup>172</sup>

#### v. Exclusions

Even though the owned automobile may be covered by liability insurance, under the exclusions section of the FAP the coverage may be suspended under certain conditions. Exclusion (a) of

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ance was insufficient to cover his damages so he sought coverage under his personal automobile policy's "nonowned vehicle" provision. That provision defined a nonowned automobile as one "not owned by or furnished for the regular use of either the named insured or any relative, other than a temporary substitute." *Id.* at 468, 383 S.E.2d at 735.

The trial court found that the van was furnished for purposes of Jones' employer, not for his personal use. Thus, the van was not furnished for Jones' regular use. The court entered summary judgment in Jones' favor. Nevertheless, the court wrote: "[t]he instant case presents frequent, daily, and extensive use, dominion and control of the van by Jones. Here, the purpose of furnishing the van to Jones was precisely that it be used regularly by him." *Id.* at 470, 383 S.E.2d at 736.

168. 340 F. Supp. 228 (E.D. Va. 1972).

169. *Id.* at 229.

170. *Id.* at 230-31.

171. *Quesenberry v. Nichols*, 208 Va. 667, 674, 159 S.E.2d 636, 641 (1968); see *Jones*, 238 Va. at 470, 383 S.E.2d at 736.

172. BRAINARD, *supra* note 2, at 156.

the SCC Forms states the policy does not apply "to any automobile while used as a public or livery conveyance, but this exclusion does not apply to the named insured with respect to bodily injury or property damage which results from the named insured's occupancy of a nonowned automobile other than as the operator thereof."<sup>173</sup>

Exclusion (g) states the policy does not apply:

[T]o an owned automobile while used in the automobile business, but this exclusion does not apply to the named insured, a resident of the same household as the named insured, a partnership in which the named insured or such resident is a partner, or any partner, agent or employee of the named insured, such resident or partnership.<sup>174</sup>

Exclusion (h) states the policy does not apply:

[T]o a nonowned automobile while used (1) in the automobile business by the insured or (2) in any other business or occupation of the insured except a private passenger automobile operated or occupied by the named insured or by his private chauffeur or domestic servant, or a trailer used therewith or with an owned automobile.<sup>175</sup>

The import of these exclusions will be discussed in more detail under the section on "uses" below.

## B. Coverage of Persons

Any accident giving rise to the need for liability coverage must involve both a vehicle and some person as its owner or driver.<sup>176</sup> The following are considered "Persons Insured" under the SCC-approved form:

- (a) With respect to the owned automobile,
  - (1) the named insured and any resident of the same household,

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173. SCC Forms, *supra* note 4, at Part I, "Exclusions."

174. *Id.*

175. *Id.*

176. BRAINARD, *supra* note 2, at 158.

(2) any other person using such automobile, provided the actual use thereof is with the permission of the named insured;

- (b) With respect to a nonowned automobile,  
(1) the named insured,  
(2) any relative, but only with respect to a private passenger automobile or trailer,

provided the actual use thereof is with the permission of the owner;

(c) Any other person or organization legally responsible for the use of

- (1) an owned automobile, or  
(2) a nonowned, if such automobile is not owned or hired by such person or organization,

provided the actual use thereof is by a person who is an insured under (a) or (b) above with respect to such owned automobile or nonowned automobile.<sup>177</sup>

#### 1. Virginia Law and the Omnibus Clause<sup>178</sup>

The insurance industry has not developed a term to distinguish the person who actually takes out an automobile insurance policy from the other people insured under that same policy. Someone must apply for the insurance, determine the coverages and policy limits desired, and pay the premiums. This person will generally be the named insured, but there is no necessary connection required, either by statute or by policy terms, between the person who takes out the insurance and the named insured.

Generally it is to a person's advantage to be an "insured" under an insurance policy. But this is not an invariable rule, for being an insured under one coverage or for one purpose may have the effect of excluding the person from being an insured under a different coverage or for a different purpose.

Inasmuch as an injured party may be both a victim and a

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177. SCC Forms, *supra* note 4, at Part I, "Persons Insured."

178. This section was taken with the publisher's permission from RITZ, *supra* note 7, with only minor changes to up-date the documentation.

tortfeasor, his position as an insured has different consequences. Therefore, it is always necessary to make an inquiry as to whether a particular person is an insured with reference to a particular coverage and for a particular purpose.

The protections provided by an automobile insurance policy are not limited to the named insured, that is, to the person who takes out the policy and presumably pays the premiums. The coverage extends in two different directions.

In *Insurance Co. of North America v. Perry*,<sup>179</sup> the Virginia Supreme Court described these extensions of coverages in terms of classes of insureds:

It is our opinion that the legislature, in enacting the uninsured motorist statute, intended to create two classes of insured persons, with different benefits accruing to each class.

The first class includes the named insured and, while resident of the same household, the spouse of any such named insured, and relatives of either. A member of this class is protected, "while in a motor vehicle or otherwise," and is conceded . . . to be entitled to coverage if injured while a pedestrian. . . .

This brings us to a consideration of the second class of insured persons contemplated by the statute, that is, those "who use," with the consent, expressed or implied, of the named insured, the vehicle to which the policy applies and those who are guests in such vehicle.<sup>180</sup>

Although the court was speaking of the uninsured motorist coverage, the distinctions are equally applicable under the liability policy. The statutory requirement for the broadening of coverage to include insureds of the second class is popularly referred to as the omnibus clause which is probably the single most litigated clause in the policy.

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179. 204 Va. 833, 134 S.E.2d 418 (1966).

180. *Id.* at 836-37, 134 S.E.2d at 420.

## 2. The Named Insured

The named insured under the SCC forms is the individual named in Item 1 of the declarations. This named insured is treated as the owner of the vehicles described in the declaration.<sup>181</sup>

## 3. The Named Insured's Spouse

The same definition which set out the terms for "named insured" includes that person's spouse, if a resident of the same household. Husband and wife can be actually named in the policy, but even if one is not listed, the unlisted spouse nevertheless stands in the shoes of the named insured for the terms of the policy.<sup>182</sup>

This provision means the spouse, though unnamed, can give permission for use of the automobile, which is effective to make the permissive user an insured. This provision is also of benefit to the unnamed spouse when driving a nonowned automobile, which is not a private passenger car, inasmuch as only a named insured is covered in such a case.

## 4. Relatives in the Same Household

Both a relative and nonrelative who is a "resident of the same household" are insureds under the FAP.<sup>183</sup> None of the key words—resident or household—are defined in the policy and the definition of "relative" uses its own root in the definition giving little guidance. A relative resident is an insured whether that person has permission to operate the motor vehicle or

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181. Item 1 also calls for a mailing address, which is considered the place of principal garaging of the vehicle insured, unless a different place of garaging is given. The place of principal garaging determines the state whose law determines the contents of the policy and also who regulates the policy. Thus, a Virginia policy is issued only on an automobile principally garaged in Virginia at the time the policy was issued. The place in Virginia where the automobile is principally garaged determines the amount of premium that will be charged.

182. SCC Forms, *supra* note 4, at Part I, "Definitions."

183. *Id.*



not.<sup>184</sup> Therefore, a relative resident is apparently insured, even if forbidden to drive the automobile.

Whether a person is a relative living in the same household may generate controversy if that person was once a resident and is no more, or if that person only recently became a resident of the household.<sup>185</sup>

A relative resident of the same household is as fully covered as the named insured when liability involves the owned automobile. But the same cannot be said for the relative resident when liability involves nonowned automobiles. The relative resident is an insured only when liability involves a nonowned *private passenger* automobile. In the case of the named insured, there is no restriction on that type of nonowned automobile.<sup>186</sup>

##### 5. Household Resident Not a Relative

The liability policy covers the household resident who is not a relative of the insured to the same extent as the relative resident or the named insured when liability involves an owned automobile. The requirement of permission does not apply to the residents of the insured's household, whether relatives or not. But the coverage does not extend to use of nonowned automobiles of any description.<sup>187</sup>

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184. *See id.*

185. *See Allstate Ins. Co. v. Patterson*, 221 Va. 358, 362, 344 S.E.2d 890, 892 (1986); *St. Paul Mercury Ins. Co. v. Nationwide Mut. Ins. Co.*, 209 Va. 18, 22, 161 S.E.2d 694, 697 (1968) (defining "household" as "a collection of persons as a single group, with one head, living together, a unit of permanent and domestic character, under one roof"); *see also State Farm Mut. Auto. Ins. Co. v. Smith*, 206 Va. 280, 285, 142 S.E.2d 562, 566 (1965), *overruled on other grounds*, *State Farm Mut. Auto. Ins. Co. v. Jones*, 238 Va. 467, 383 S.E.2d 734 (1989) (requiring the person to have "assumed a residence and become so intertwined with the . . . family as to become a member of that family"). In *Smith*, the court ruled that the negligent driver was not a member of the insured's household when she drove an uninsured vehicle owned by the insured. *Smith*, 206 Va. at 285-86, 142 S.E.2d at 566. But the court stopped short of defining whether the driver was a relative.

186. SCC Forms, *supra* note 4, at Part I, "Exclusions".

187. *Id.*

## 6. Permissive User

A permissive user is a person using an automobile, ordinarily driving it, with the permission of the named insured. After combing out all the repetitive qualifiers, Code subsections 38.2-2204(A) and (C) require all motor vehicle insurance policies to contain a provision or endorsement, commonly called the omnibus clause, insuring "any other person using or responsible for the use of the motor vehicle . . . with the expressed or implied consent of the named insured."<sup>188</sup>

In *State Farm Mutual Automobile Insurance Co. v. Government Employees Insurance Co.*,<sup>189</sup> the Virginia Supreme Court set out the statutory parameters for the permissive user under the omnibus clause of approved insurance policies:

Virginia Code § 38.2-2204, the omnibus clause, requires that an automobile liability insurance policy provide coverage for a person who is "using" a motor vehicle "with the express or implied consent of the named insured." In interpreting this provision we have rejected the broad interpretation held by some states that express permission to use the vehicle for one purpose implies permission for all other purposes. *State Farm Mut. Auto. Ins. Co. v. Cook*, 186 Va. 658, 665, 43 S.E.2d 863, 866 (1947). Nevertheless, we have repeatedly held that the omnibus clause is remedial and must be liberally interpreted to subserve the clear public policy reflected in it, which is to broaden the coverage of automobile liability policies. In defining "implied permission," and applying it to the facts of the many cases we have had, this court has been liberal in its interpretation and application, and has gone far in holding insurance carriers liable. *Fidelity & Casualty Co. v. Harlow*, 191 Va. 64, 68-69, 59 S.E.2d 872, 874 (1950).<sup>190</sup>

Permission to drive a car presupposes that the person who gave the permission has the power to give or withhold it. Ordinarily, the person giving permission must own the vehicle or have such an interest in it that he is entitled to possession and

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188. VA. CODE ANN. § 38.2-2204(A),(C) (Repl. Vol. 1994).

189. 241 Va. 326, 402 S.E.2d 21 (1991).

190. *Id.* at 330, 402 S.E.2d at 22.

control. If the named insured sold the vehicle, the buyer's use is by virtue of the buyer's ownership and not by virtue of any permission given by the seller. Thus, the seller's insurance policy would not cover the buyer when the buyer is driving the car.<sup>191</sup>

## 7. Legal Responsibility

The SCC-approved FAP covers another class of insureds—persons or organizations “legally responsible for the use of . . . an owned automobile, . . . or a nonowned automobile . . . provided the actual use . . . is by a person who is an insured under” one of the definitions of insured.<sup>192</sup> The principal effect of this definitional extension is to eliminate the necessity of duplicative causes of action where the relationship of the person using the vehicle to the person or organization “legally responsible” might give rise to liability under *respondeat superior* or agency doctrines.<sup>193</sup>

## 8. Severability of Interests

The SCC-approved form concludes the listing of insureds under Part I with the following: “The insurance afforded under Part I applies separately to each insured against whom claim is made or suit is brought, but the inclusion herein of more than one insured shall not operate to increase the limits of the company's liability.”<sup>194</sup> This clause is added to prevent an ex-

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191. See *Nationwide Mut. Ins. Co. v. Cole*, 203 Va. 337, 341, 124 S.E.2d 203, 206 (1962).

192. SCC Forms, *supra*, note 4, at Part I, “Persons Insured.”

193. BRAINARD, *supra* note 2, at 162. Brainard noted:

The injured third party would probably join both the named insured and the person or organization he represented in one action for damages, and therefore any judgment awarded the injured party would be collectible from the defendant. Since the insurer has the burden of defending its named insured in any event, there is little reason why it should not also include in the defense his principal and codefendant. Thus, the FAP insures not only the named insured and other persons actually using his car but also any person or organization *legally responsible* for its use.

*Id.* at 163 (emphasis in the original).

194. SCC Forms, *supra* note 4, at Part I, “Persons Insured.”

tension of coverage as to persons from being improperly interpreted as an extension of coverage as to dollar amount.<sup>195</sup>

### C. Use

#### 1. Permissible Uses

A discussion of the use of the vehicle insured inevitably overlaps with the description of the types of vehicles insurable under the FAP. Nevertheless, the opportunity for circumstances to fall through the cracks in a legal analysis of the FAP requires examining the uses of the vehicle separately. Under the "definitions" section of Part I of the SCC-approved FAP, "use" of the vehicle is simply explained as including "the loading and unloading" of the vehicle.<sup>196</sup>

Unlike the Basic Automobile Liability Policy, which states the purposes for which the covered vehicle is used, the FAP does not address the purpose of use. So unless a specific use is excluded in the contract, any legal use should be covered. Because the FAP is specifically designed for "family-type" vehicles which are owned by individuals, a presumption arises that the purpose of use would be limited to those activities associated with family living such as "for pleasure, family errands, driving to

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195. See RITZ, *supra* note 7, at 44 ("The fact that potentially there are two or more insureds, such as a servant and a master, that may be held liable to an injured claimant does not increase the policy limits.").

196. SCC Forms, *supra* note 4, at Part I, "Definitions;" see generally *American Mut. Liab. Ins. Co. v. State Farm Mut. Auto. Ins. Co.*, 411 F.2d 605 (4th Cir. 1969), *aff'g* 293 F. Supp. 256, 260 (W.D. Va. 1968) (holding that when a non-participating vehicle is damaged by a vehicle which was engaged in a race, the passive vehicle was also being "used" within the meaning of the coverage); *Safeguard Ins. Co. v. Justice*, 203 Va. 972, 128 S.E.2d 286 (1962) (holding that towing qualifies as a "use"). A tougher question is whether a vehicle is being used if the insured is struggling with his keys at the time he is attacked by an assailant. In *Lord v. State Farm Mut. Auto. Ins. Co.*, the court, in order to decide the case on another issue, assumed the injured insured was using the vehicle at the time. 224 Va. 283, 295 S.E.2d 796 (1982). But where a vehicle was employed as a gun-rest when the insured was injured, one federal court showed a strong desire to draw the line. See *Fidelity & Cas. Co. of New York v. Lott*, 273 F.2d 500, 502 (5th Cir. 1960); see also *Wausau Underwriters Ins. Co. v. Hoover*, 727 F. Supp. 999, 1003 (D.S.C. 1990) (holding that a shooting attack and resulting injuries did not arise from the use of an automobile, since the attack was not reasonably identified with normal use of the vehicle).

and from work, and also, when the insured travels in connection with his [or her] business."<sup>197</sup>

Not forbidden by the FAP is the circumstance where a family car is used by an individually owned business for traditionally commercial purposes such as transporting supplies or making deliveries. Theoretically, such uses would be factored into the insurer's calculation of the risk when the policy was created.<sup>198</sup>

## 2. Exclusions

Not covered at all by the FAP's liability coverage are three situations worth noting. First, no coverage exists in the FAP for injury or damage caused intentionally, or by the direction of the insured.<sup>199</sup> Second, unless the injured party is a domestic employee not covered by workers' compensation, employees injured in the course of their employment would also not be covered under the FAP's liability coverage.<sup>200</sup> Finally, injury to property in the charge of or being transported by the insured is not covered.<sup>201</sup> These three gaps are not dependent on whether the vehicle is owned or nonowned at the time of the accident.

### a. Exclusion for Intentional Conduct

In 1982, the Virginia Supreme Court essentially gave effect to the exclusion for intentional conduct in *Utica Mutual Insurance Co. v. Travelers Indemnity Co.*<sup>202</sup> The court found that an automobile liability policy provides coverage *only* for damages caused by an "occurrence" or by an "accident." The court then held that "[a]n intentional act is neither an 'occurrence' nor an 'accident' and therefore is not covered by the standard policy."<sup>203</sup>

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197. *Id.* SCC Forms, *supra* note 4, at Part I, "Definitions."

198. BRAINARD, *supra* note 2, at 174.

199. SCC Forms, *supra* note 4, at Part I, "Exclusions."

200. *Id.*; see VA. CODE ANN. § 38.2-2205(A)(1) (Repl. Vol. 1994).

201. SCC Forms, *supra* note 4, at Part I, "Exclusions."

202. 223 Va. 145, 286 S.E.2d 225 (1982).

203. *Id.* at 147, 286 S.E.2d at 226.

Virginia Code section 38.2-2204 does not address the issue of coverage based on an accident or an occurrence. However, these terms are still used in some automobile liability policies.<sup>204</sup>

#### b. Employee Bodily Injury

In 1966, the Virginia General Assembly amended the automobile liability insurance statute to make clear that any endorsement, provision, or rider limiting or reducing the coverage required by the Virginia Code would be wholly void.<sup>205</sup> In 1972, the Virginia Supreme Court held that this statute invalidated the standard employee exclusion found in many standard FAP forms.<sup>206</sup> The statute expressly provides that coverage between employees cannot be excluded even though one employee is awarded workers' compensation.<sup>207</sup> However, the statutory provisions relating to liability and uninsured motorist coverage are not applicable to policies issued to cover employers' liability under any workers' compensation law or liability under the Federal Tort Claims Act.<sup>208</sup>

#### c. Public or Livery Conveyance

When a vehicle is used for hauling cargo, the insurer faces an increased risk called a "trucking risk." Likewise, when a passenger is charged for a ride in the vehicle, the operator of the vehicle is characteristically held to a higher standard of care. In either case, higher mileage is also more likely than

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204. See *Lerner v. General Ins. Co. of Am.*, 219 Va. 101, 102, 245 S.E.2d 249, 250 (1978); *Travelers Indem. Co. v. Obenshain*, 219 Va. 44, 45, 245 S.E.2d 247, 248 (1978); *Norman v. Insurance Co. of N. Am.*, 218 Va. 718, 720, 239 S.E.2d 902, 903 (1978).

205. VA. CODE ANN. § 38.2-2204(D) (Repl. Vol. 1994).

206. See *Southwide Distrib. Co. Inc. v. Travelers Indem. Co.*, 213 Va. 38, 189 S.E.2d 681 (1972). This case specifically states that *Aetna Cas. & Ins. Co. v. Kellam*, 207 Va. 736, 152 S.E.2d 287 (1967) and *Stillwell v. Iowa Nat'l Mut. Ins. Co.*, 205 Va. 588, 139 S.E.2d 72 (1964), are no longer followed. 213 Va. at 40-41, 189 S.E.2d at 683. Presumably, *Nationwide Mut. Ins. Co. v. Minnifield*, 213 Va. 797, 196 S.E.2d 75 (1973), should also be included among the cases no longer followed. The accident involved in this case occurred in 1965, before the statutory amendment. See also *United Serv. Auto. Ass'n v. Pinkard*, 356 F.2d 35 (4th Cir. 1966), *aff'g* 258 F. Supp. 804 (W.D. Va. 1965).

207. VA. CODE ANN. § 38.2-2207 (Repl. Vol. 1994).

208. *Id.* § 38.2-2206(I).

under normal family-driving circumstances. The result of this underwriting analysis is the standard exclusion "of any automobile while used as a public or livery conveyance, but this exclusion does not apply to the named insured with respect to bodily injury or property damage which results from the named insured's occupancy of a nonowned automobile other than as the operator thereof."<sup>209</sup>

The Virginia Supreme Court defined a vehicle as being used for public or livery conveyance "if it is held out to the general public for carrying of passengers for hire and is used indiscriminately to carry the public."<sup>210</sup> In *Smith v. Stonewall Casualty Co.*, the court held that the use of the vehicle in a car pool involving payment is not a holding out to the public and so does not fall within the exclusion.<sup>211</sup> This exclusion does not apply to the named insured sustaining either bodily injury or property damage while occupying a nonowned automobile other than as the operator.<sup>212</sup>

#### d. Property Owned or Transported by the Insured

The liability coverage under the policy language does not apply to damage caused to the insured due to injury or destruction of property owned by and transported by the insured, nor to property rented to or in his charge, other than a residence or private garage.<sup>213</sup> This clause was intended to prevent conversion of the liability policy into a limited collision policy.<sup>214</sup>

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209. SCC Forms, *supra* note 4, at Part I, "Exclusions." Because the exclusion applies only while a car is "used as a public or livery conveyance," a vehicle will be covered by the FAP in an accident occurring while the vehicle was being used for typical family purposes even though on the preceding weekday the same vehicle had been used for public purposes. See BRAINARD, *supra* note 2, at 176.

210. *Smith v. Stonewall Cas. Co.*, 212 Va. 765, 766, 188 S.E.2d 82, 83 (1972).

211. *Id.*

212. RITZ, *supra* note 7, at 74.

213. *Id.*

214. See generally *Nationwide Mut. Ins. Co. v. Tuttle*, 208 Va. 28, 155 S.E.2d 358 (1967) (holding that a contractor working on another's land is not "in charge of" the property, so that damage to it will fall within the property exclusion clause).

e. Farm Machinery

Exclusion (d) of the SCC-approved form for the FAP provides that coverage will not apply "to bodily injury or property damage arising out of the operation of farm machinery."<sup>215</sup> Because a collision with a farm implement is like an automobile accident, that event would be covered under the FAP. But an injury due to operation of that machinery fits into a different category of accident and requires a different analysis for underwriting. Such coverage would be best obtained under a Farmers Comprehensive Personal Liability contract.<sup>216</sup>

f. Automobile Business Uses

Under the definitions to Part I of the SCC-approved FAP form, "automobile business" is defined as "the business or occupation of selling, repairing, servicing, storing or parking automobiles."<sup>217</sup> As stated earlier, the insurer takes on a different risk when insuring business use rather than family-type use. For the specific type of business characterized as an automobile business, the purchase of coverage under a specialized policy, such as a Garage Liability Policy, might seem obvious. Because the FAP provides such broad coverage for both owned and nonowned vehicles, this exclusion becomes necessary to make the point that the procurement of alternative coverage is necessary.

In any case, the exclusion would apply only to individuals associated with the automobile business, since the FAP may only be written for individuals and not for partnerships or corporations. Thus, if an individual who works for an automobile business uses his private family vehicle in that business, the FAP covering the use of that personal vehicle would not cover the business use of the same vehicle, with certain exceptions.

Those exceptions include: (1) the insured named in the policy; (2) a resident of the same household as the named insured; (3)

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215. SCC Forms, *supra* note 4, at Part I, "Exclusions."

216. BRAINARD, *supra* note 2, at 177.

217. SCC Forms, *supra* note 4, at Part I, "Definitions."



a partnership in which the named insured or such resident is a partner; or, (4) any partner, agent or employee of the named insured, such resident or partnership.<sup>218</sup> The irony of this exclusion is that by the time one accounts for all the possible situations giving rise to a claim covered by the exceptions, the exclusion itself seems empty.

As already demonstrated, the coverage of the insured's use of a nonowned automobile seems the most comprehensive as far as use is concerned, largely due to the low level of risk to the insurer. But the use of nonowned vehicles is frequent in an automobile business. Pick-up and delivery of customer vehicles, road-testing and other uses raise the level of liability for the insurer. For this reason, the use of nonowned vehicles in an automobile business is specifically excluded under the FAP.<sup>219</sup>

This exclusion is not intended to eliminate from an individual's FAP coverage the use of a vehicle borrowed from a car-dealer or repair garage while the insured's own vehicle is under repair. The difference is that the individual who is using the vehicle, which admittedly is part of an automobile business, is not the owner of the automobile business. Therefore, in the event of an accident, the individual or customer would be covered under his own FAP as if he were using a borrowed car.<sup>220</sup>

Nothing in the exclusion prevents an insured individual from using a nonowned vehicle in any other sort of business, as long as the vehicle is not furnished for regular use.

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218. *Id.*

219. SCC Forms, *supra* note 4, at Part I, "Exclusions."

220. BRAINARD, *supra* note 2, at 180. See generally *Universal Underwriters Ins. Co. v. Strohkorb*, 205 Va. 472, 137 S.E.2d 913 (1964) (automobile driven by a garage employee between the dealer's repair garage and sales lot was being used in the automobile business at the time it was involved in a collision and thus a garage liability policy covered the automobile); *Nationwide Mut. Ins. Co. v. Federal Mut. Ins. Co.*, 204 Va. 879, 134 S.E.2d 253 (1964) (holding that an automobile salesman test-driving the customer's trade-in vehicle was using it in the automobile business, and the garage liability policy covered the vehicle when it was involved in an accident).

g. Nuclear Materials

Exclusion (c) under Part I of the SCC-approved FAP states that coverage does not apply:

[T]o bodily injury or property damage with respect to which an insured under this policy is also an insured under a contract of nuclear energy liability insurance issued by the Nuclear Energy Liability Association or the Mutual Atomic Energy Liability Underwriters and in effect at the time of the occurrence resulting in such bodily injury or property damage; provided, such contract of nuclear energy liability insurance shall be deemed to be in effect at the time of such occurrence notwithstanding such contract has terminated upon the exhaustion of its limit of liability.<sup>221</sup>

h. Medical Payments/Expenses and Income Loss Coverages

Under the medical payments coverage (Part II of the SCC forms) there are full coverage exclusions when the injury is sustained under the following conditions:

1. While occupying an owned vehicle while used as a public or livery conveyance; or
2. While occupying any vehicle while located for use as a residence or premises; or
3. When a person (whether occupying the vehicle or not) is struck by a farm-type tractor or other equipment not on a public road; or
4. While person occupying the vehicle was employed in the automobile business, and the person was covered by workers' compensation law; or,
5. In the event of war.<sup>222</sup>

In addition, any person other than the named insured or a relative will be excluded under the following conditions:

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221. SCC Forms, *supra* note 4, at Part I, "Exclusions."

222. *Id.* at Part II, "Expense for Medical Services."

1. While occupying a nonowned automobile used as a public or livery conveyance; or

2. While the person is maintaining or using a nonowned automobile while engaged in the automobile business; or

3. While the person is maintaining or using a nonowned automobile and is engaged in any other business or occupation.<sup>223</sup>

Since the statutory requirements for medical expense and income loss coverage are few, rather extensive exclusions from medical coverage can be written into the policy.

#### IV. OTHER COVERAGES<sup>224</sup>

When an owner who is driving his own insured automobile runs into a ditch—that is, he has a one-car accident—he has no rights under his liability coverage. If he has medical and disability coverage, he can recover such benefits from his insurer, whether he was at fault or not.<sup>225</sup> This coverage is similar to that provided by most health-and-accident policies.<sup>226</sup> Similarly, if the insured has collision coverage, he can recover for damages to his automobile, less any deductible, whether or not he was at fault.

When this same owner-driver is involved in a collision with another insured vehicle, his rights under his policy are the same as when he went into the ditch in a one-car accident. But now there is also the question of fault. If the other driver was at fault, then the owner-driver has rights against the other driver and his or her liability insurer. The owner-driver will not be able to recover and retain payment for damages to his automobile from both his own insurer under the collision coverage and from the other driver's liability insurer, however.

Medical expense and income loss coverage is similar to, but

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223. *Id.*

224. RITZ, *supra* note 7, at 14-15, provides the language for the introduction to this section.

225. VA. CODE ANN. § 38.2-2201 (Repl. Vol. 1994).

226. *See generally id.* §§ 38.2-3500 to -3515 (describing individual accident and sickness insurance policies) (Repl. Vol. 1994).

not the same as, the medical payments coverage.<sup>227</sup> In addition to the minimum insurance required by Virginia law, insureds can specifically request additional no-fault insurance coverage for medical and disability.<sup>228</sup> Such coverage applies to the named insured and his relatives who are members of his household while (1) in or upon, entering or alighting from a motor vehicle,<sup>229</sup> or (2) when struck by a motor vehicle when not occupying a motor vehicle.<sup>230</sup> Additionally, occupants of the insured vehicle itself are covered.<sup>231</sup>

At a minimum, the insurer must offer \$2000 coverage, per person, for all reasonable and necessary health care<sup>232</sup> and funeral expenses resulting from, and within three years<sup>233</sup> of, the accident.<sup>234</sup> Additionally, where the injured person is normally employed, up to \$100 per week loss of income benefits are provided for up to one year following the accident.<sup>235</sup> The insured has the option of purchasing either the medical or loss of income coverage, or both.<sup>236</sup> Where an insured has purchased such coverage for multiple vehicles, aggregation of the coverages is generally possible where covered expenses exceed the limits for a single insured vehicle.<sup>237</sup>

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227. RITZ, *supra* note 7, at 14-15.

228. VA. CODE ANN. § 38.2-2201 (Repl. Vol. 1994). VA. CODE ANN. § 38.2-2202 sets out the required language to notify an insured of the availability of this coverage; however, a specific request for the optional coverage is required. *State Farm Mut. Auto. Ins. Co. v. Seay*, 236 Va. 275, 278, 373 S.E.2d 910, 912 (1988).

229. The 1991 amendment substituted "while in or upon, entering or alighting from" for "while occupying a motor vehicle." VA. CODE ANN. § 38.2-2201 cmt. (Repl. Vol. 1994).

230. *Id.* § 38.2-2201(A)(ii). "Struck by a motor vehicle" includes motorcycles. *See* USAA Cas. Ins. Co. v. Yaconiello, 226 Va. 423, 426, 309 S.E.2d 324, 325 (1983).

231. VA. CODE ANN. § 38.2-2201(A)(i) (Repl. Vol. 1994).

232. Health care includes medical, chiropractic, hospital, dental, surgical, ambulance, prosthetic and rehabilitation services. *Id.* § 38.2-2201(A)(1).

233. Before the 1991 amendment, the limit was two years. VA. CODE ANN. § 38.2-2201 cmt. (Cum. Supp. 1994).

234. *Id.*

235. *Id.* § 38.2-2201(A)(2).

236. *Id.* § 38.2-2201(B).

237. *Id.* § 38.2-2201(C) (providing specific limitations).

## V. INCIDENTS OF TRIAL AND SETTLEMENT

A. *Insurer's Duty to Defend*

Under the liability coverage, the insurer not only is under a duty to pay damages, but "the company shall defend any suit" in which an injured claimant or plaintiff is seeking damages which are payable under the terms of the policy.<sup>238</sup> Such defense is provided at the insurer's expense and the insurer ordinarily has the right to retain counsel of its own choosing.<sup>239</sup>

The duty to defend may be broader than the duty to pay a judgment against the insured. In 1981, the Virginia Supreme Court restated the law on the insurer's duty to defend:

When an initial pleading "alleges facts and circumstances, some of which would, if proved, fall within the risk covered by the policy," the insurance company is obligated to defend its insured. . . . Moreover, where the allegations "leave it in doubt whether the case alleged is covered by the policy," the insurer's failure to defend is at its own risk. . . . Only when "it appears clearly [that the insurer] would not be liable under its contract for *any* judgment based upon the allegations," does the company no duty to defend.<sup>240</sup>

Thus, the suit is within the coverage of the policy, and the insurer is obligated to defend, even though the suit may be groundless, false, or fraudulent.<sup>241</sup> Only where the allegations in the pleadings make clear that the insurer would not be liable to pay any judgment under the policy based on those allegations, does the insurer have no duty to defend.<sup>242</sup>

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238. Authorities are split on whether the duty to defend encompasses a duty to appeal. See generally C.C. Marvel, Annotation, *Duty of Liability Insurer to Appeal*, 69 A.L.R.2d 690 (1960).

239. Generally, the insurer has exclusive control over the defense. *Aetna v. Price*, 206 Va. 749, 146 S.E.2d 220, 227 (1966); see generally 44 AM. JUR. 2D *Insurance* § 1393 (1982).

240. *Parker v. Hartford Fire Ins. Co.*, 222 Va. 33, 35, 278 S.E.2d 803, 804 (1981) (citing *Lerner v. Safeco*, 219 Va. 101, 104, 245 S.E.2d 249, 251 (1978); *London Guar. Co. v. White & Bros.*, 188 Va. 195, 199-200, 49 S.E.2d 254, 256 (1948)); see also *Brenner v. Lawyers Title Ins. Corp.*, 240 Va. 185, 397 S.E.2d 100 (1990); *Reisen v. Aetna Life & Cas. Co.*, 225 Va. 327, 302 S.E.2d 529 (1983); *Travelers Indem. Co. v. Obenshain*, 219 Va. 44, 245 S.E.2d 247 (1978).

241. *London Guar. Co.*, 188 Va. at 198, 49 S.E.2d at 255.

242. *Norman v. INA*, 218 Va. 718, 725, 239 S.E.2d 902, 906 (1978); *London Guar.*

When disagreement arises between the insurer and the insured as to whether the policy provides coverage, the insurer has several choices. It may do nothing, effectively refusing to defend the suit; however, when the insurer refuses to defend, it does so at its own risk. If it is correct in denying coverage, it is of course free of any liability to the insured or the injured claimant. But if the insurer is wrong, and it turns out that the policy did cover the suit, then the insurer will not only be liable for the insured's defense and adjudged liability, but also for breach of its covenant to defend.<sup>243</sup>

On the other hand, the insurer may enter into a reservation of rights agreement with the insured, under which it defends the suit, but reserves the right to contest the coverage of its policy when (1) the injured plaintiff seeks to enforce the judgment against the insurer, or (2) in an independent action by the insured for breach of the insurance contract. If the insurer defends without a reservation of rights, the insurer has waived any claim it may have that its policy does not provide coverage for the judgment.

Another option of the insurer, as exercised in *Utica Mutual Insurance Co. v. Travelers Indemnity Co.*,<sup>244</sup> is to seek a declaratory judgment to determine whether it has a duty to defend.<sup>245</sup>

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Co., 188 Va. at 198, 49 S.E.2d 254. Even where the pleadings make it clear that some claims are covered and some are not, the insurer's duty to defend arises and extends to all allegations. See, e.g., *Western Cas. & Sur. Co. v. International Spas of Ariz., Inc.*, 634 P.2d 3, 6 (Ariz. Ct. App. 1981); R.D. Hursh, Annotation, *Refusal of Liability Insurer to Defend Action Against Insured Involving Both Claims Within Coverage of Policy and Claims Not Covered*, 41 A.L.R.2d 434 (1955).

243. *United States Fire Ins. v. Aspen Bldg. Corp.*, 235 Va. 263, 267, 367 S.E.2d 478, 480 (1988); *Parker v. Harford Fire Ins. Co.*, 222 Va. 33, 35, 278 S.E.2d 803, 804 (1981); *London Guar. Co.*, 188 Va. at 198, 49 S.E.2d at 254. The insurer who wrongfully refuses to defend may also be liable for the attorney's fees incurred by the insured to defend himself. See *Glen Falls Indem. Co. v. Atlantic Bldg. Corp.*, 199 F.2d 60, 63 (4th Cir. 1952); *State Farm Mut. Ins. Co. v. Long*, 212 Va. 234, 236, 183 S.E.2d 138, 139 (1971); see also VA. CODE ANN. §§ 38.2-209, 8.01-661 (Repl. Vol. 1994 & Repl. Vol. 1992) (dealing with coverage denials not in good faith).

244. 223 Va. 145, 286 S.E.2d 225 (1982).

245. *Id.* at 146, 286 S.E.2d at 226; see also *Criterion Ins. Co. v. Grange Mut. Cas. Co.*, 210 Va. 446, 449, 171 S.E.2d 669, 671 (1970).

## B. *Settlement*

The insurer ordinarily has the right to negotiate settlement.<sup>246</sup> If the insurer controls the defense and may make settlements as it deems expedient, a "relationship of confidence and trust is created between the insurer and the insured which imposes upon the insurer the duty to deal fairly with the insured in handling any disposition of any claim covered by the policy."<sup>247</sup> Note however, that the insurer and the insured are not in a fiduciary relationship; the insurer has a right to protect its own economic interests.<sup>248</sup> Nonetheless, the insurer cannot act in bad faith in considering settlement of a claim.<sup>249</sup> The test of bad faith involves a determination of whether the insurer acted in furtherance of its own interests in failing to take advantage of an opportunity to settle within policy limits with intentional disregard of the financial interest of the insured.<sup>250</sup>

When the claim is for an amount exceeding the policy limits, any settlement must take the insured's overall interest into account. Should the insurer refuse to settle a claim within the policy limits, the insurer may be liable for a judgment in excess of policy limits where that failure to settle resulted from the insurer's bad faith, rather than negligence.<sup>251</sup> In distinguishing the "bad faith rule" from the "negligence rule," to determine the insurer's liability in these cases, the Virginia Supreme Court has provided the following guidelines:

[T]he obligation assumed by the insurer with respect to settlement is to exercise good faith in dealing with offers of compromise, having both its own and the insured's interests in mind. And it may be said also that a reasonably diligent effort must be made to ascertain the facts upon which a good faith judgment as to the settlement can be formulat-

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246. See *State Farm Mut. Auto. Ins. Co. v. Floyd*, 235 Va. 136, 142, 366 S.E.2d 93, 97 (1988).

247. *Aetna Cas. & Surety Co. v. Price*, 206 Va. 749, 760-61, 146 S.E.2d 220, 227-28 (1966).

248. *Floyd*, 235 Va. at 143, 366 S.E.2d at 97.

249. *Id.*; *Price*, 206 Va. at 761-62, 146 S.E.2d at 228.

250. *Floyd*, 235 Va. at 143-44, 366 S.E.2d at 97.

251. *Price*, 206 Va. at 764-65, 146 S.E.2d at 230.

ed . . . . A decision not to settle must be an honest one. It must result from a weighing of probabilities in a fair manner. To be a good faith decision, it must be an honest and intelligent one in the light of the company's expertise in the field. Where reasonable and probable cause appears for rejecting a settlement offer and for defending the damage action, the good faith of the insurer will be vindicated.<sup>252</sup>

## VI. UNINSURED AND UNDERINSURED MOTORIST STATUTES

The purpose of the uninsured and underinsured motorist clauses required by statute in Virginia is to provide coverage to those innocent people injured by negligent drivers with no insurance coverage or with inadequate insurance coverage.<sup>253</sup> The uninsured or underinsured motorists themselves are not the designated beneficiaries of the coverage; in fact, negligent drivers themselves cannot make claims against uninsured or underinsured motorist coverage of the injured third parties.<sup>254</sup>

### A. *Uninsured Motorist Coverage*

The Virginia Uninsured Motorist Insurance Coverage Statute<sup>255</sup> requires automobile insurance policies to 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."<sup>256</sup> The required minimum coverages are the same as those required for general liability under a motor vehicle policy.<sup>257</sup>

Two classes of insureds can recover from uninsured motorist coverage. The first class includes the "named insured and, while resident of the same household, the spouse of the named in-

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252. *Id.* at 761-62, 146 S.E.2d at 228 (quoting *Radio Taxi Serv., Inc. v. Lincoln Mut. Ins. Co.*, 157 A.2d 319, 322 (N.J. 1960)).

253. VA. CODE ANN. § 38.2-2206 (Repl. Vol. 1994).

254. *Bayer v. Travelers Indem. Co.*, 221 Va. 5, 267 S.E.2d 91 (1980).

255. VA. CODE ANN. § 38.2-2206 (Cum. Supp. 1993).

256. *Id.* § 38.2-2206(A).

257. *Id.* Such limits are currently \$25,000 for bodily injury/death per person, \$50,000 for bodily injury/death per accident, and \$20,000 for property damage. VA. CODE ANN. § 46.2-472.3 (Repl. Vol. 1994).



sured, and relatives of either . . . ."<sup>258</sup> The second class of insured includes "any person who uses the motor vehicle to which the policy applies."<sup>259</sup>

Members of the first class receive a broader scope of coverage—they are covered "while in a motor vehicle or otherwise."<sup>260</sup> Thus, coverage exists where a first class insured is injured by an uninsured motorist and the insured is: (1) in the insured vehicle; (2) in any other vehicle; or, (3) a pedestrian. The second class of insured do not receive the same extent of coverage under the statute. Permissive users of the insured vehicle are protected only when actually "using"<sup>261</sup> the automobile. Guests of either first class members or permissive users, while "in" the insured vehicle, are afforded uninsured motorist coverage as well.<sup>262</sup>

### B. *Underinsured Motorist Coverage*

The Virginia Underinsured Motorist Coverage statute, amended in 1993, provides that:

The endorsement or provisions shall 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 subsection B of this section.

. . . .

[subsection B] A 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 and available for payment for such bodily injury or property damage . . . is less than the total amount of uninsured motorist coverage afforded any person

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258. VA. CODE ANN. § 38.2-2206(B) (Repl. Vol. 1994).

259. *Id.*

260. *Id.*

261. "Using" the vehicle does not require actual driving of the vehicle at the time of the accident. *See* Great Am. Ins. Co. v. Cassell, 239 Va. 421, 389 S.E.2d 476 (1990).

262. VA. CODE ANN. § 38.2-2206(B) (Repl. Vol. 1994).

injured as a result of the operation or use of the vehicle.<sup>263</sup>

The same group of insureds protected under uninsured motorist coverage insurance provisions are protected under underinsured motorist provisions.<sup>264</sup> Likewise, the same analysis is used to determine the extent of coverage.<sup>265</sup>

### C. *Application of the Uninsured and Underinsured Motorist Insurance Provisions*

Virginia's uninsured and underinsured motorist insurance provisions are liberally construed in favor of the insured.<sup>266</sup> Where not actually included in a policy, the provisions of the statute are implicitly incorporated into the automobile insurance contract.<sup>267</sup> Where the statute and a policy conflict, the statute controls if the policy restricts coverage,<sup>268</sup> and the policy controls when the policy expands coverage.<sup>269</sup>

### D. *Stacking Uninsured and Underinsured Motorist Coverages*

"The term 'stacking' is used to describe a situation where all available policies are added together to create a larger pool from which the injured party may draw in order to compensate him for his actual loss where a single policy is not sufficient to make him whole."<sup>270</sup> Stacking has also been referred to as "the doctrine of multiple recovery" or "pyramiding coverage."<sup>271</sup>

263. *Id.* §§ 38.2-2206(A)-(B).

264. *See supra* note 252 and accompanying text.

265. *See supra* note 256 and accompanying text.

266. *Tudor v. Allstate Ins. Co.*, 216 Va. 918, 224 S.E.2d 156 (1976); *State Farm Mut. Auto. Ins. Co. v. Brower*, 204 Va. 887, 134 S.E.2d 277 (1964).

267. *State Farm Mut. Auto. Ins. Co. v. Duncan*, 203 Va. 440, 125 S.E.2d 154 (1962).

268. *Bryant v. State Farm Mut. Ins. Co.*, 205 Va. 897, 140 S.E.2d 817 (1965).

269. *Roberts v. GEICO and State Farm Mut. Auto. Ins. Co.*, 686 F. Supp. 135 (W.D. Va. 1988); *Colonial Ins. Co. of Cal. v. Rainey*, 237 Va. 270, 377 S.E.2d 393 (1989); *Hill v. State Farm Mut. Ins. Co.*, 237 Va. 148, 375 S.E.2d 727 (1989); *Pennsylvania Nat. Mut. Cas. Ins. Co. v. Bristow*, 207 Va. 381, 150 S.E.2d 125 (1966).

270. COUCH ON INSURANCE § 45:628 (2d ed. 1981).

271. *Cunningham v. Insurance Co. of N. Am.*, 213 Va. 72, 77, 189 S.E.2d 832, 836 (1972).

Although no Virginia statute clearly mandates stacking, Virginia courts have repeatedly embraced the practice in various situations. The courts' underlying rationale has often been based upon the purpose of the uninsured and underinsured motorist insurance law in Virginia—to fully compensate insured victims of uninsured and underinsured motorists.<sup>272</sup> Although the insured cannot recover more than his actual loss or judgment,<sup>273</sup> such compensation may be held to include punitive damages.<sup>274</sup>

Virginia's application of stacking in cases of multiple uninsured or underinsured motorist coverages varies, depending upon language in the insurance policy, the number of policies involved, and the class of the insured. The following section contains a summary of the general rules concerning stacking of such insurance policies in Virginia.

#### E. *Summary of Virginia General Rules of Stacking and Priority of Payments*<sup>275</sup>

##### 1. Intra-Policy Stacking of Uninsured Motorist Coverages

Intra-policy stacking of uninsured motorist coverages (multiple coverages within one policy) is generally not allowed due to standard clear and unambiguous language precluding such stacking in most policies. Where such language is not contained in the policy, the insured has paid separate premiums on each vehicle, and the victim attempting to stack coverages is a first class insured, stacking will generally be allowed.<sup>276</sup>

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272. See *Nationwide Mut. Ins. Co. v. Scott*, 234 Va. 573, 363 S.E.2d 703 (1988); *Nationwide Ins. Co. v. Harleysville Mut. Cas. Co.*, 203 Va. 600, 125 S.E.2d 840 (1962).

273. *White v. Nationwide Mut. Ins. Co.*, 245 F. Supp. 1 (W.D. Va. 1965), *aff'd*, 361 F.2d 785 (4th Cir. 1966); *Bryant v. State Farm Mut. Auto. Ins. Co.*, 205 Va. 897, 140 S.E.2d 817 (1965); COUCH, *supra* note 259, at 73 (footnote omitted).

274. *Lipscombe v. Security Ins. Co. of Hartford*, 213 Va. 81, 84-85, 189 S.E.2d 320, 323-24 (1972).

275. For a detailed discussion of these rules, see John G. Douglass & Francis E. Telegadas, *Stacking of Uninsured and Underinsured Motor Vehicle Coverages*, 24 U. RICH. L. REV. 87 (1989).

276. See *Goodville Mut. Casualty Co. v. Borrer*, 221 Va. 967, 275 S.E.2d 625 (1981); *cf. Lipscombe v. Security Ins. Co. of Hartford*, 213 Va. 81, 189 S.E.2d 320 (1972); *Cunningham v. Insurance Co. of N. Am.*, 213 Va. 72, 189 S.E.2d 832 (1972)

## 2. Intra-Policy Stacking of Underinsured Motorist Coverages

Intra-policy stacking of underinsured motorist coverages is generally not allowed due to standard clear and unambiguous language precluding such stacking in most policies. Where such language is not contained in the policy, the insured has paid separate premiums on each vehicle, and the victim attempting to stack coverages is a first class insured, stacking will generally be allowed.<sup>277</sup>

## 3. Inter-Policy Stacking of Uninsured Motorist Coverages

Inter-policy stacking of uninsured motorist coverages is generally allowed, despite clear and unambiguous policy language attempting to preclude such stacking.<sup>278</sup>

## 4. Inter-Policy Stacking of Underinsured Motorist Coverages

Inter-policy stacking of underinsured motorist coverages is generally allowed, despite clear and unambiguous policy language attempting to preclude such stacking.<sup>279</sup>

## 5. Priority of Uninsured Motorist Coverage Payments

The primary coverage is provided by the host vehicle's insurance, and excess coverage is pro-rated among remaining insurers.<sup>280</sup>

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(both permitting intra-policy stacking in the absence of clear and unambiguous policy language preventing such stacking).

277. See *Goodville Mut. Casualty Co. v. Borrer*, 221 Va. 967, 275 S.E.2d 625 (1981).

278. *Bryant v. State Farm Mut. Ins. Co.*, 205 Va. 897, 140 S.E.2d 817 (1965).

279. VA. CODE ANN. § 38.2-2206(B) (Repl. Vol. 1994) (provisions for priority of payment among underinsured carriers clearly contemplates that inter-policy stacking is permissible); see also *Virginia Farm Bureau Ins. Co. v. Travelers Indem. Co.*, 242 Va. 203, 408 S.E.2d 898 (1991); *Dairyland Ins. Co. v. Sylva*, 242 Va. 191, 409 S.E.2d 127 (1991).

280. *State Farm Mut. Ins. Co. v. United Servs. Auto. Assoc.*, 211 Va. 133, 176 S.E.2d 327 (1970).

## 6. Priority of Underinsured Motorist Coverage Payments

The priority of payments among underinsured insurers is specifically provided for by Virginia Code section 38.2-2206(B). This section basically provides for the following priority: (1) host vehicle insurance; (2) coverage where victim's name insured; and (3) coverage where victim is a first class insured.<sup>281</sup>

## VII. CONCLUSION

The Continuing Legal Education curriculum planners for 1994 recognized the importance of automobile insurance in the legal practices of large numbers of Virginia attorneys by authorizing credit for no less than three separate seminars last spring alone. Wilfred J. Ritz served an important need in 1983 when he summarized both law and practice in the Commonwealth into a convenient deskbook. Today, the statutes governing this area have been modernized and reorganized. Yet, new and different legal issues emerge through the Commonwealth's court system on an almost daily basis forcing the practitioner to always be a few steps behind developments.

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281. VA. CODE ANN. § 38.2-2206(B) (Repl. Vol. 1994); *see also* Dairyland Ins. Co. v. Sylva, 242 Va. 191, 409 S.E.2d 127 (1991).