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Annual Survey of Virginia Law: Insurance Law

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INSURANCE LAW

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I. INTRODUCTION

This article reviews the changes in Virginia insurance law that have occurred in the past two years. Most of the developments have been in motor vehicle liability and uninsured/underinsured motorist ("UM/UIM") coverage.¹ But the article also surveys cases on bad faith, fire insurance, insurance regulation, life insurance, motor vehicle medical expense insurance, and waiver and estoppel.

II. BAD FAITH

In *Nationwide Mutual Insurance Co. v. St. John*,² the Supreme Court of Virginia considered whether Nationwide acted in good faith under Virginia Code section 8.01-66.1(A).³ Joel St. John,

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1. Only those statutory changes likely to impact insurance practitioners will be discussed.

2. 259 Va. 71, 524 S.E.2d 649 (2000).

3. Virginia Code section 8.01-66.1(A) states:

Whenever any insurance company licensed in this Commonwealth to write insurance as defined in § 38.2-124 denies, refuses or fails to pay to its insured a claim of \$2,500 or less in excess of the deductible, if any, under the provisions of a policy of motor vehicle insurance issued by such company to the insured and it is subsequently found by the judge of a court of proper jurisdiction that such denial, refusal or failure to pay was not made in good faith, the company shall be liable to the insured in an amount double the amount otherwise due and payable under the provisions of the insured's policy of motor vehicle insurance, together with reasonable attorney's fees and expenses. The provisions of this subsection shall be construed to include an insurance

who was an insured under his father's automobile policy with Nationwide, was injured in a car accident.⁴ After the company refused to pay all of his chiropractor's bills, he sued and recovered the disallowed costs.⁵ Pursuant to Virginia Code section 8.01-66.1(A), the trial court doubled his damages and awarded him attorney's fees.⁶

The supreme court had not construed this statute, but it had interpreted Virginia Code section 38.2-209.⁷ Following the same analysis, the court held that Virginia Code section 8.01-66.1(A) is both remedial and punitive, and that an insurer's conduct is evaluated under a standard of reasonableness.⁸ An insured must prove that the insurer acted unreasonably by a preponderance of the evidence.⁹

Applying these principles, the court found that Nationwide acted unreasonably in denying St. John's claim.¹⁰ Nationwide had no medical evidence that St. John's injuries were not caused by the accident and no medical opinion that the treatment did not relate to his injuries and was not medically necessary and reasonable.¹¹ Thus, the trial court's judgment that Nationwide acted in bad faith was not clearly erroneous.¹²

Justice Compton concurred in the opinion, but would have applied a clear and convincing evidence standard of proof.¹³

This holding illustrates that an insurer has the burden of producing positive evidence to support its determination that an in-

company's refusal or failure to pay medical expenses to persons covered under the terms of any medical payments coverage extended under a policy of motor vehicle insurance, when the amount of the claim therefor is \$2,500 or less and the refusal was not made in good faith.

VA. CODE ANN. § 8.01-66.1(A) (Cum. Supp. 1999).

4. *Nationwide*, 259 Va. at 73-74, 524 S.E.2d at 650.

5. *Id.* at 74, 524 S.E.2d at 650.

6. *Id.* at 74-75, 524 S.E.2d at 650.

7. *Id.* at 75, 524 S.E.2d at 650-51 (stating that section 38.2-209 "allows an insured to recover costs and reasonable attorney's fees in a declaratory judgment action brought by the insured against the insurer, if the trial court determines that the insurer was not acting in good faith when it denied coverage or refused payment under the policy").

8. *Id.* (citing *CUNA Mut. Ins. Soc'y v. Norman*, 237 Va. 33, 38, 375 S.E.2d 724, 726-27 (1989)).

9. *Id.* at 76, 524 S.E.2d at 651.

10. *See id.* at 78, 524 S.E.2d at 652.

11. *Id.*

12. *Id.*

13. *Id.* at 80, 524 S.E.2d at 653-54 (Compton, J., concurring).

sured's medical treatment was unnecessary, unreasonable, or not causally related to his injuries.

III. FIRE INSURANCE

The Supreme Court of Virginia has decided only one fire insurance case since June 1998. In *Hitt Contracting, Inc. v. Industrial Risk Insurers*,¹⁴ the supreme court held that a suit for failure to pay a claim under a replacement coverage endorsement¹⁵ is subject to the two-year limitations period in the policy and Virginia Code section 38.2-2105.¹⁶

Hitt Contracting built a new fuel farm at Washington National Airport and later had to fix the piping system after it started leaking.¹⁷ The Metropolitan Washington Airports Authority refused to pay for the repairs, as did its insurer more than two years after they were made.¹⁸ The contractor sued the insurance company, but the Alexandria Circuit Court dismissed the case on the insurer's demurrer and special plea of the statute of limitations.¹⁹

The supreme court affirmed, holding that the limitations period in Virginia Code section 38.2-2105 barred the claim even though the policy provided broader coverage than a standard fire insurance policy.²⁰ The supreme court stated that Virginia Code sections 38.2-2100, -2101, and -2119 encompass "policies of fire insurance *in combination with other insurance coverages*" and allow replacement cost endorsements.²¹ Even so, this endorse-

14. 258 Va. 40, 516 S.E.2d 216 (1999).

15. The endorsement stated that "the coverage under this policy . . . is hereby extended to cover such property to the amount actually expended by or in behalf of the Insured to repair, rebuild or replace within two (2) years from the date of loss or damage." *Id.* at 44, 516 S.E.2d at 217.

16. *Id.* at 47, 516 S.E.2d at 219. Virginia Code section 38.2-2105 provides that a suit to recover a claim under a fire insurance policy must be "commenced within two years next after inception of the loss." VA. CODE ANN. § 38.2-2105 (Repl. Vol. 1999). Section 38.2-2105 was made part of the policy by a "Virginia Amendatory Endorsement." *Hitt Contracting*, 258 Va. at 43-44, 516 S.E.2d at 217.

17. *Hitt Contracting*, 258 Va. at 42-43, 516 S.E.2d at 216.

18. *Id.* at 43, 516 S.E.2d at 216.

19. *Id.*, 516 S.E.2d at 216-17.

20. *Id.* at 44, 516 S.E.2d at 217.

21. *Id.* at 44-45, 516 S.E.2d at 217 (emphasis added) (quoting VA. CODE ANN. §§ 38.2-2100, -2101, -2119 (Repl. Vol. 1999)).

ment did not provide separate coverage.²² It just described the manner by which the amount of recovery is measured.²³

Virginia Code section 38.2-2119(B) does not establish a different procedure for recovery under the endorsement.²⁴ Rather, it protects a claim for replacement cost value after an insured has made a timely claim for the actual cash value of the loss.²⁵

The contractor argued that since the endorsement covers costs incurred up to two years after the loss, "applying the two-year limitations period could require an insured to file suit before those costs can be presented to the insurers, or before the insured and insurer even fail to agree to the amount of the recovery."²⁶ Nonetheless, the court held that this possibility "does not change the plain language of section 38.2-2105 and of [the] policy."²⁷

IV. INSURANCE REGULATION

The United States District Court for the Eastern District of Virginia considered the authority of the State Corporation Commission ("SCC") in *Gross v. Weingarten*.²⁸ The case arose "from the financial collapse and subsequent receivership of Fidelity Bankers Life Insurance ("FBL")."²⁹ The receivership order adjudged FBL insolvent, enjoined all persons from interfering with the SCC's rehabilitation and liquidation proceedings, and appointed the Insurance Commissioner as the Deputy Receiver.³⁰

22. *Id.* at 45, 516 S.E.2d at 218.

23. *Id.*

24. *Id.* at 45-46, 516 S.E.2d at 218. Section 38.2-2119(B) provides:

Where any policy of insurance issued or delivered in this Commonwealth pursuant to this chapter provides for the payment of the full replacement cost of property insured thereunder, the policy shall permit the insured to assert a claim for the actual cash value of the property without prejudice to his right to thereafter assert a claim for the difference between the actual cash value and the full replacement cost unless a claim for full replacement cost has been previously resolved. Any claim for such difference must be made within six months of (i) the last date on which the insured received a payment for actual cash value or (ii) date of entry of a final order of a court of competent jurisdiction declaratory of the right of the insured to full replacement cost, whichever shall last occur.

VA. CODE ANN. § 38.2-2119(B) (Repl. Vol. 1999).

25. *Hitt Contracting*, 258 Va. at 46, 516 S.E.2d at 218.

26. *Id.* at 46, 516 S.E.2d at 219.

27. *Id.* at 47, 516 S.E.2d at 219.

28. 18 F. Supp. 2d 616 (E.D. Va. 1998).

29. *Id.* at 617.

30. *Id.*

The commissioner initiated an action on behalf of FBL, its policyholders, and its creditors to recover losses from alleged violations of federal securities law, state statutory law, and common law.³¹ Despite having been adjudged insolvent, FBL was found during the litigation to have substantial assets, so the court gave the defendants leave to file counterclaims.³² The district court later granted the receiver's motion for judgment on the pleadings.³³

The district court found that the SCC's receivership order, which established an exclusive forum for the resolution of claims against FBL, was "entitled to full faith and credit and divest[ed] [the] court of subject matter jurisdiction."³⁴ The federal government has left the regulation of insurance to the states, and Virginia Code section 38.2-1508 establishes a single regulatory scheme for resolving claims against insolvent insurers.³⁵ The court found that the SCC's receivership order established "exclusive jurisdiction to the fullest extent of [its] statutory authority."³⁶

The court also rejected the argument that the Deputy Receiver had waived the SCC's exclusive jurisdiction by filing his claims in federal court.³⁷ The court noted that "to hold that a receiver, by going into a foreign court to collect sums alleged to be due the estate, thereby opens the estate to suits in those foreign jurisdictions would defeat the goal of state insurance insolvency statutes"³⁸

31. *Id.*

32. *Id.*

33. *Id.* at 620.

34. *Id.*

35. *Id.* at 618. Virginia Code section 38.2-1508 states that when the SCC "is authorized to act as a receiver to rehabilitate or liquidate an insurer . . . [a]ll further proceedings in connection with the rehabilitation or liquidation shall be conducted by the Commission" VA. CODE ANN. § 38.2-1508 (Repl. Vol. 1999).

36. *Gross*, 18 F. Supp. 2d at 618.

37. *Id.* at 619.

38. *Id.* (quoting *Bard v. Charles Myers Ins. Agency, Inc.*, 839 S.W.2d 791, 796 (Tex. 1992)).

V. LIFE INSURANCE

A. Application

Three cases involving life insurance have been decided in the past two years. In the first, *Hilfiger v. Transamerica Occidental Life Insurance Co.*,³⁹ the Supreme Court of Virginia answered three questions about the enforceability of a life insurance policy certified from the United States Court of Appeals for the Fourth Circuit.⁴⁰

James A. Hilfiger applied to Transamerica for an insurance policy on the life of his father, naming himself as the beneficiary.⁴¹ Claiming that he had his father's permission to do so, Hilfiger answered all of the questions and signed his father's name on the application, which was witnessed by a Transamerica agent.⁴² His father later underwent a medical examination, during which he signed part of the application.⁴³ Transamerica subsequently issued the policy, and Hilfiger's father died approximately two months later.⁴⁴ Hilfiger sued the company after it refused to pay the proceeds of the policy.⁴⁵

The Fourth Circuit certified three questions to the supreme court.⁴⁶ First, it asked whether the application violated Virginia Code section 38.2-302.⁴⁷ The supreme court held that it did, as the facts did not show that either statutory condition was met.⁴⁸ Neither the father's oral authorization nor his "material participation" in the application process, in other words, being examined constituted "applying" for the policy.⁴⁹ Furthermore, his signature

39. 256 Va. 265, 505 S.E.2d 190 (1998).

40. *Id.* at 267, 505 S.E.2d at 191.

41. *Id.* at 268, 505 S.E.2d at 191.

42. *Id.*

43. *Id.*

44. *Id.* at 268, 505 S.E.2d at 191-92.

45. *Id.*, 505 S.E.2d at 192.

46. *Id.*, 505 S.E.2d at 191.

47. *Id.* at 269, 505 S.E.2d at 192. Virginia Code section 38.2-302(A) states: "No contract of insurance upon a person shall be made or effectuated unless at the time of the making of the contract the individual insured, being of lawful age and competent to contract for the insurance contract (i) applies for insurance, or (ii) consents in writing to the insurance contract." VA. CODE ANN. § 38.2-302(A) (Repl. Vol. 1999).

48. *Hilfiger*, 256 Va. at 269-70, 505 S.E.2d at 192.

49. *Id.* at 270, 505 S.E.2d at 192-93.

on the medical form, which contained none of the contract terms, did not qualify as “written consent ‘to the insurance contract.’”⁵⁰

The court answered the second question—whether the policy should be enforced pursuant to section 38.2-319⁵¹—in the negative.⁵² The supreme court concluded that doing otherwise would render section 38.2-302 meaningless.⁵³ Virginia Code section 38.2-319 applies to insurance contracts that are “made” illegally, but no contract even can be “made or effectuated” if the requirements of section 38.2-302 are not met.⁵⁴ In the latter case, any policy issued is void *ab initio*.⁵⁵

The third question was “whether an insurance company can be estopped [from] rely[ing] on section 38.2-302 because its agent knew [that the signature on the application was incorrect].”⁵⁶ The supreme court answered this question in the negative.⁵⁷ The court refused to apply equitable estoppel because “[t]hat statute was not enacted for the protection of the beneficiary but to protect the insured against potentially improper motives of the beneficiary.”⁵⁸

Public policy concerns almost compel a decision such as *Hilfiger*. Otherwise, people with less than honorable intentions would be encouraged to buy life insurance policies on family members and others and to name themselves as beneficiaries in the hopes of profiting from the proceeds. The supreme court recognized this in *Hilfiger*, noting that “[a]t common law, a policy of insurance taken out on the life of an insured without the insured’s knowledge or consent . . . was usually held void as against public policy.”⁵⁹ The reason for this rule was the risk that a beneficiary might “be tempted to hasten by improper means the time when he will receive the benefits of the policy.”⁶⁰

50. *Id.* at 270, 505 S.E.2d at 193 (quoting VA. CODE ANN. § 38.2-302(A)(ii) (Repl. Vol. 1999)).

51. Virginia Code section 38.2-319 provides that “[a]ny insurance contract made in violation of the laws of this Commonwealth may be enforced against the insurer.” VA. CODE ANN. § 38.2-319 (Repl. Vol. 1999).

52. *See Hilfiger*, 256 Va. at 271, 505 S.E.2d at 193.

53. *Id.*

54. *Id.* (quoting VA. CODE ANN. § 38.2-319 (Repl. Vol. 1999)).

55. *Id.*

56. *Id.*

57. *Id.* at 273, 505 S.E.2d at 194.

58. *Id.*

59. *Id.* at 269, 505 S.E.2d at 192.

60. *Id.* (quoting *Wood v. N.Y. Life Ins. Co.*, 336 S.E.2d 806, 809 (1985)).

B. Cancellation

The United States District Court for the Western District of Virginia also decided a case involving the payment of life insurance policy proceeds. In *Herndon v. Massachusetts General Life Insurance Co.*,⁶¹ the executrix of the insured's estate, along with a lender that was an assignee of the policy proceeds, sued to recover the proceeds despite the alleged lapse of the policy for non-payment of premiums.⁶² Both parties filed summary judgment motions.⁶³

While no Virginia court had addressed the issue, many jurisdictions had held that "nonpayment of premiums is an affirmative defense for which the insurer bears the burden of proof," and the district court adopted this rule.⁶⁴ It was undisputed that the insured failed to pay the premiums, but a question of fact existed as to whether the insurer sent notice to the lender that the policy was about to lapse, which precluded summary judgment.⁶⁵ The district court also held that the insurer bears the burden of proving that proper notice was sent to the insured before termination of coverage, where the policy so requires.⁶⁶

C. Change of Beneficiary

*Lincoln National Life Insurance Co. v. Johnson*⁶⁷ was another case in which a federal court anticipated the likely holding of the Supreme Court of Virginia. Lincoln National filed interpleader and declaratory relief actions in the United States District Court

61. 28 F. Supp. 2d 379 (W.D. Va. 1998).

62. *Id.* at 381.

63. *Id.*

64. *Id.* at 381 n.3. For treatment of the issue by other jurisdictions, see, for example, *Huff v. Standard Life Insurance Co.*, 638 F.2d 1363, 1367 (11th Cir. 1982); *Wiles v. Nationwide Insurance Co.*, 334 F.2d 296, 302 (4th Cir. 1964); *Sethman Electric & Manufacturing Co. v. Mountain States Life Insurance Co.*, 23 P.2d 952, 953-54 (Col. 1933); *N.Y. Life Insurance Co. v. Holroyd*, 68 P.2d 529, 520-30 (Okla. 1937); *Shock v. Pennsylvania Mutual Fire Insurance Co.*, 24 A.2d 738, 740 (Pa. Super. 1942).

65. *Herndon*, 28 F. Supp. 2d at 382-85.

66. See *id.* at 381 n.3 (citing *Villwock v. Ins. Co. of N. Am./CIGNA*, 22 Va. App. 127, 134, 468 S.E.2d 130, 134 (Ct. App. 1996) (stating that the insurer bears the burden of proof on the issue of notice); *Wright v. Grain Dealers Nat'l Mut. Fire Ins. Co.*, 186 F.2d 956, 958 (4th Cir. 1950) (holding that the insurer must comply with policy terms governing cancellation)).

67. 38 F. Supp. 2d 440 (E.D. Va. 1999).

for the Eastern District of Virginia to resolve conflicting claims to the proceeds of a life insurance policy.⁶⁸ The claims were made by the children from the insured's first marriage, his second wife, and the daughter of his second wife, whom he had adopted.⁶⁹ The children from the first marriage moved to dismiss the interpleader claims of the others.⁷⁰

A stipulation and agreement between the insured and his first wife provided:

[H]usband shall maintain in full force and effect all insurance on his life, and the beneficiary of such insurances shall be the Wife until such time as a final divorce decree shall be entered by a court of competent jurisdiction. Thereafter the beneficiaries of such insurance shall be the children of the parties.⁷¹

This stipulation and agreement was incorporated into their final divorce decree.⁷²

The district court noted that the Supreme Court of Virginia had not ruled on the effect of a stipulation and agreement incorporated into a divorce decree on an insured's property right to change the beneficiary designation of his life insurance policy.⁷³ Several other jurisdictions, however, had held that a separation agreement restricting the right to change a beneficiary, or requiring that a certain beneficiary be named, "takes precedence over future attempts by the insured to change the beneficiary."⁷⁴ Based on these cases, the district court anticipated that the Supreme Court of Virginia would hold that a contractual obligation, such as the stipulation and agreement, takes precedence over the existing beneficiary designation and any expectancy interest of the second wife and adopted daughter.⁷⁵ Therefore, the district

68. *Id.* at 442.

69. *Id.* at 442-43.

70. *Id.* at 444.

71. *Id.* at 447.

72. *Id.*

73. *Id.* at 449-50.

74. *Id.* at 450-51 (citing *Equitable Life Assurance Soc'y v. Jones*, 629 F.2d 356, 359 (4th Cir. 1982); *Glover v. Metro. Life Ins. Co.*, 664 F.2d 1101, 1103 (8th Cir. 1981); *Murphy v. Travelers Ins. Co.*, 534 F.2d 1155 (5th Cir. 1976); *Principal Mut. Life Ins. Co. v. Karney*, 5 F. Supp. 2d 720, 731 (E.D. Mo. 1998); *Perkins v. Prudential Ins. Co.*, 455 F. Supp. 499, 501 (D. W. Va. 1978); *Western Life Ins. Co. v. Bower*, 153 F. Supp. 25, 28-29 (D. Mo. 1957); *Dubois v. Smith*, 599 A.2d 493, 497 (N.H. 1991); *Herrington v. Boatright*, 633 S.W.2d 781, 783 (Tenn. Ct. App. 1982)).

75. *Id.* at 451.

court upheld the insured's previous contractual obligation, granted the motion to dismiss, and ordered that the policy proceeds be disbursed to the children from the insured's first marriage.⁷⁶

VI. MOTOR VEHICLE LIABILITY INSURANCE

A. *Loading and Unloading*

In *Wagoner v. Benson*,⁷⁷ the Supreme Court of Virginia considered the issue of sovereign immunity in an action against a school board and a school bus driver.⁷⁸ In that case, Amanda Wagoner was hit by a car while crossing a street to board her school bus.⁷⁹ The Henry County Circuit Court found that the school board's motor vehicle liability policy "did not provide valid, collectible insurance for Wagoner's injuries."⁸⁰ Therefore, the circuit court dismissed her motion for judgment, holding that the defendants were entitled to sovereign immunity under Virginia Code section 22.1-194.⁸¹

The supreme court reversed, concluding that the accident arose out of the "loading" of the bus and was covered by the school board's policy.⁸² The policy did not define "loading," but from the driver's perspective, it involved a number of steps, including turning on flashing lights, extending the mechanical stop sign and the metal safety gate, and keeping these devices on until the students were on the bus.⁸³ Since all of these things were happening when Wagoner was hit, the supreme court held that the accident arose during the "loading" of the bus.⁸⁴

76. *Id.* at 452.

77. 256 Va. 260, 505 S.E.2d 188 (1998).

78. *Id.* at 262, 505 S.E.2d at 188.

79. *Id.*

80. *Id.*, 505 S.E.2d at 189.

81. *Id.* Virginia Code section 22.1-194 says that if a school board is an insured under a policy covering a vehicle involved in an accident, it is "subject to action up to, but not beyond, the limits of valid and collectible insurance in force to cover the injury complained of . . . and the defense of governmental immunity shall not be a bar to action or recovery." VA. CODE ANN. § 22.1-194 (Repl. Vol. 1997).

82. *Wagoner*, 256 Va. at 262, 505 S.E.2d at 188.

83. *Id.* at 263, 505 S.E.2d at 189.

84. *Id.*

In *Wagoner*, the supreme court also stated that *Stern v. Cincinnati Insurance Co.*,⁸⁵ a case in which students were injured while approaching their school bus, was distinguishable.⁸⁶ The issue in *Stern* was whether an injured student was an insured under a school board's UM coverage or was entitled to coverage under the UM statute.⁸⁷ Thus according to the court in *Wagoner*, *Stern* focused on the student's—not the driver's—use of the insured vehicle.⁸⁸ Furthermore, the supreme court stated that *Stern* interpreted the words "using" and "occupying" in the context of UM coverage, not the meaning of the word "loading" in the context of an automobile liability policy.⁸⁹

B. *Misrepresentation*

Smith v. Colonial Insurance Co.,⁹⁰ the only other automobile liability insurance case decided by the Supreme Court of Virginia, involved misrepresentations by the insured during the application process.⁹¹ In this case, Smith told an agent of Colonial that she owned a 1979 Chevrolet pickup truck and that no other licensed drivers lived with her.⁹² Colonial issued a policy based on her oral and written statements, but it would have cancelled the policy or charged a higher premium had it known the statements were false.⁹³ While the policy was in effect, Smith's daughter was injured in a car accident and made a claim for UM coverage under her mother's policy.⁹⁴

Colonial sought a judgment declaring that the policy was void ab initio and that coverage was not owed to Smith's daughter.⁹⁵ After an evidentiary hearing, the Augusta County Circuit Court ruled that Colonial had proven by clear and convincing evidence that Smith made material misrepresentations when applying for

85. 252 Va. 307, 477 S.E.2d 517 (1996).

86. *Wagoner*, 256 Va. at 263-64, 505 S.E.2d at 189.

87. *Stern*, 252 Va. at 310, 477 S.E.2d at 519.

88. *Wagoner*, 256 Va. at 264, 505 S.E.2d at 189.

89. *Id.* at 264, 505 S.E.2d at 189-90.

90. 258 Va. 30, 515 S.E.2d 775 (1999).

91. *Id.* at 31, 515 S.E.2d at 776.

92. *Id.* at 32, 515 S.E.2d at 776.

93. *Id.*

94. *Id.* at 31, 515 S.E.2d at 776.

95. *Id.* at 32, 515 S.E.2d at 776.

the policy, and granted the declaratory judgment.⁹⁶

The issue on appeal was whether the circuit court correctly decided that the parol evidence rule did not apply to testimony about questions by Colonial's agent and Smith's verbal answers during the application process.⁹⁷ The Smiths argued that all misleading statements that Smith made before signing the application were "merged" into the contract of insurance, the terms of which could not be varied by parol evidence.⁹⁸

The supreme court said that this argument "demonstrates a misconception of insurance law and practice generally and the application process for motor vehicle liability insurance in particular."⁹⁹ An insurance application, which can be oral or written, is merely an offer to enter into a contract—the policy is the contract between the parties.¹⁰⁰ Since the parol evidence rule only applies to written contracts, it is irrelevant to the insurance application.¹⁰¹ Thus, the circuit court properly considered the written application form, as well as the oral testimony explaining its completion, as evidence that material misrepresentations had been made.¹⁰²

C. *Omnibus Clause*

The 1999 General Assembly amended Virginia Code section 38.2-2204, the "omnibus clause" statute, allowing insurers to limit their liability under such a clause.¹⁰³ That section requires that every motor vehicle liability policy contain an omnibus clause insuring the named insured "and any other person using or responsible for the use of the motor vehicle with the expressed

96. *Id.* The circuit court found that Colonial met the requirements of Virginia Code section 38.2-309. *Id.* Virginia Code section 38.2-309 mandates that statements in an application for an insurance policy shall bar recovery under the policy if it is "clearly proved" that they were "material to the risk when assumed" and were "untrue." VA. CODE ANN. § 38.2-309 (Repl. Vol. 1999).

97. *Colonial Ins.*, 258 Va. at 31, 515 S.E.2d at 776.

98. *Id.* at 33, 515 S.E.2d at 777.

99. *Id.*

100. *Id.*

101. *Id.* at 33-34, 515 S.E.2d at 777.

102. *Id.* at 34, 515 S.E.2d at 777.

103. S.B. 448, Va. Gen. Assembly (Reg. Sess. 1999) (enacted as Act of Feb. 9, 1999, ch. 4, 1999 Va. Acts 4) (codified as amended at VA. CODE ANN. § 38.2-2204(A), (C) (Repl. Vol. 1999)).

or implied consent of the named insured."¹⁰⁴

Senate Bill 448 added a provision that states that the statute does not prohibit insurers from limiting their responsibility for any one accident to the liability limits set forth in the policy, regardless of the number of insureds covered by the policy.¹⁰⁵

VII. MOTOR VEHICLE MEDICAL EXPENSE INSURANCE

In the past two years, the Supreme Court of Virginia has decided two cases involving exclusions to motor vehicle medical expense coverage. The first, *Scarbrov v. State Farm Mutual Automobile Insurance Co.*,¹⁰⁶ involved an exclusion for medical expenses that were payable under the workers' compensation statute.¹⁰⁷ The plaintiff argued that the exclusion was inconsistent with Virginia Code section 38.2-2201 and, therefore, was "void as against public policy."¹⁰⁸

In *Scarbrov*, the Supreme Court of Virginia adhered to its de-

104. VA. CODE ANN. § 38.2-2204(C) (Repl. Vol. 1999).

105. Va. S.B. 448. The bill amended subsections (A) and (C) adding the following language to each:

[H]owever, nothing contained in this section shall be deemed to prohibit an insurer from limiting its liability under any one policy for bodily injury or property damage resulting from any one accident or occurrence to the liability limits for such coverage set forth in the policy for any such accident or occurrence regardless of the number of insureds under that policy.

Id.; VA. CODE ANN. § 38.2-2204(A), (C) (Repl. Vol. 1999).

106. 256 Va. 357, 504 S.E.2d 860 (1998).

107. The exclusion read: "This insurance does not apply . . . to bodily injury sustained by any person to the extent that benefits therefore are in whole or in part payable under any workmen's compensation law, employer's disability benefits law or any other similar law." *Id.* at 359, 504 S.E.2d at 860-61.

108. *Id.* at 360, 504 S.E.2d at 861. Virginia Code section 38.2-2201 provides, in pertinent part, that:

A. Upon request of an insured, each insurer licensed in this Commonwealth issuing or delivering any policy or contract of bodily injury or property damage liability insurance covering liability arising from the ownership, maintenance or use of any motor vehicle shall provide on payment of the premium, as a minimum coverage . . . to the named insured . . . the following health care and disability benefits for each accident:

1. All reasonable and necessary expenses for medical, chiropractic, hospital, dental, surgical, ambulance, prosthetic and rehabilitation services, and funeral expenses, resulting from the accident and incurred within three years after the date of the accident, up to \$2,000 per person

VA. CODE ANN. § 38.2-2201(A) (Repl. Vol. 1999).

cision in *Baker v. State Farm Mutual Automobile Insurance Co.*,¹⁰⁹ which involved the same issue and coverage exclusion. Repeating the language used in *Baker*, the supreme court held that the exclusion was a "clear and unambiguous provision [that] reasonably excludes medical payments coverage where those benefits are payable under a workers' compensation statute, and that no conflict or inconsistency existed between [Virginia Code section] 38.2-2201 and the policy exclusion."¹¹⁰ The supreme court refused to reverse its prior decision and find the exclusion void.¹¹¹

The second case involving an exclusion to medical expense coverage is *Pauley v. State Farm Mutual Automobile Insurance Co.*¹¹² In that case, the insured sued State Farm to recover medical payments under his and his wife's policies, both issued by State Farm.¹¹³ The Supreme Court of Virginia held that he was not entitled to benefits under his wife's policy, since his car was not an insured vehicle under her policy.¹¹⁴

The court followed its holding in *Cotchan v. State Farm Fire and Casualty Co.*¹¹⁵ and stated that Virginia Code section 38.2-2201 "does not prohibit reasonable exclusions of medical expense coverage that are clear and unambiguous."¹¹⁶ In *Cotchan*, the Supreme Court of Virginia held that an exclusion did not violate the statute's provisions requiring that coverage be extended to relatives of a named insured and permitting the "stacking" of coverage for up to four insured vehicles.¹¹⁷ In *Pauley*, the wife's policy

109. 242 Va. 74, 405 S.E.2d 624 (1991).

110. *Scarbro*, 250 Va. at 360, 504 S.E.2d at 861 (quoting *Baker*, 242 Va. at 76, 405 S.E.2d at 625).

111. *Id.* at 361, 504 S.E.2d at 862.

112. 260 Va. 1, 530 S.E.2d 414 (2000).

113. Opening Brief for Appellant at 1, *Pauley v. State Farm Mut. Auto. Ins. Co.*, 260 Va. 1, 530 S.E.2d 414 (2000) (No. 992366).

114. *Pauley*, 260 Va. at 2, 530 S.E.2d at 415.

115. 250 Va. 232, 462 S.E.2d 78 (1995).

116. *Pauley*, 260 Va. at 2, 530 S.E.2d at 415 (quoting *Cotchan*, 250 Va. at 234-35, 462 S.E.2d at 80).

117. *Cotchan*, 250 Va. at 234-35, 462 S.E.2d at 80. Virginia Code section 38.2-2201 provides in pertinent part:

A. Upon request of an insured, each insurer licensed in this Commonwealth issuing or delivering any policy or contract of bodily injury or property damage liability insurance covering liability arising from the ownership, maintenance or use of any motor vehicle shall provide on payment of the premium, as a minimum coverage . . . to the named insured and, while resident of the named insured's household, the spouse and relatives of the named insured while in or upon, entering or alighting from or through being struck by a mo-

defined an "insured vehicle" as one insured under the same policy as the vehicle for which medical expense coverage is being sought, not just one insured under a State Farm policy.¹¹⁸ Thus, the court found that the exclusion was clear and unambiguous and did not violate the statute.¹¹⁹

VIII. MOTOR VEHICLE UNINSURED/UNDERINSURED MOTORIST COVERAGE

A. *Definition of Insured*

In *Virginia Farm Bureau Mutual Insurance Co. v. Gile*,¹²⁰ the Supreme Court of Virginia considered whether an insured's cohabitant's child is his "foster child," making her an "insured" under his automobile policy.¹²¹ In this case, Charmayne Gile was injured in a car accident with Norman Russell Carter, Jr.¹²² At the time, she lived with her mother and her mother's companion, Danny J. Beavers, Jr., the named insured under a Farm Bureau policy.¹²³

Gile, by her next friend, sued Carter for personal injuries, serving a copy of the motion for judgment on Farm Bureau pursuant to Virginia Code section 38.2-2206.¹²⁴ Farm Bureau filed an

tor vehicle while not occupying a motor vehicle, [certain health care and disability benefits].

....

C. In any policy of personal automobile insurance in which the insured has purchased coverage under subsection A of this section, every insurer providing such coverage arising from the ownership, maintenance or use of no more than four motor vehicles shall be liable to pay up to the maximum policy limit available on every motor vehicle insured under that coverage if the health care or disability expenses and costs mentioned in subsection A of this section exceed the limits of coverage for any one motor vehicle so insured.

VA. CODE ANN. § 38.2-2201(A), (C) (Repl. Vol. 1999).

118. *Pauley*, 260 Va. at 2, 530 S.E.2d at 415.

119. *Id.*

120. 259 Va. 164, 524 S.E.2d 642 (2000).

121. *Id.* at 166, 524 S.E.2d at 642-43.

122. *Id.*, 524 S.E.2d at 643.

123. *Id.*

124. *Id.* at 167, 524 S.E.2d at 643. Virginia Code section 38.2-2206(F) states:

If any action is instituted against the owner or operator of an uninsured or underinsured motor vehicle by any insured intending to rely on the uninsured or underinsured coverage provision or endorsement of this policy under which the insured is making a claim, then the insured shall serve a copy of

action seeking a declaration that Gile was not an insured under the UM/UIIM and medical expense benefits provisions of Beavers's policy.¹²⁵ The trial court found that Gile was Beavers's "foster child" and, as such, was an insured under the policy.¹²⁶

The supreme court reversed, holding that Gile was not Beavers's "foster child" under the terms of the policy.¹²⁷ The court noted that because the policy language was taken directly from Virginia Code section 38.2-2206(B),¹²⁸ the parties were bound by the plain meaning of the words in the statute.¹²⁹ The term "foster child" is not defined in Title 38.2, so the court looked to other statutes.¹³⁰ By implication, the court found that a "foster child" is a child who receives "foster care services."¹³¹ Since Gile was not a recipient of such services, she was not covered under Beavers's policy as his "foster child."¹³²

B. Purpose

In *Superior Insurance Co. v. Hunter*,¹³³ the Supreme Court of Virginia decided that a vehicle cannot be "underinsured" with re-

the process upon this insurer in the manner prescribed by law, as though the insurer were a party defendant . . . The insurer shall then have the right to file pleadings and take other action allowable by law in the name of the owner or operator of the uninsured or underinsured motor vehicle or in its own name.

VA. CODE ANN. § 38.2-2206(F) (Repl. Vol. 1999).

125. *Gile*, 259 Va. at 167, 524 S.E.2d at 643. The UM/UIIM provisions defined "PERSONS INSURED" as "the named insured and while residents of the same household . . . foster children." *Id.* at 166-67, 524 S.E.2d at 643. The medical expense benefits provisions covered the named insured and any "relative," which included foster children. *Id.* at 167, 524 S.E.2d at 643. The policy did not define the term "foster children." *Id.* at 166-67, 524 S.E.2d at 643.

126. *Id.* at 167, 524 S.E.2d at 643.

127. *Id.* at 170, 524 S.E.2d at 645.

128. Virginia Code section 38.2-2206(B) states, "[i]nsured' . . . means the named insured and, while resident of the same household . . . foster children." VA. CODE ANN. § 38.2-2206(B) (Repl. Vol. 1999).

129. *Gile*, 259 Va. at 168, 524 S.E.2d at 644.

130. *Id.* Virginia Code section 16.1-228 defines "[f]oster care services' as the provision of a full range of casework, treatment and community services for a planned period of time to a child who is abused or neglected as defined in § 63.1-248.2 or in need of services." VA. CODE ANN. § 16.1-228 (Repl. Vol. 1999).

131. *Gile*, 259 Va. at 169, 524 S.E.2d at 644.

132. *Id.*

133. 258 Va. 338, 520 S.E.2d 646 (1999).

spect to itself.¹³⁴ In that case, the passengers of a car driven by the tortfeasor—all of whom were named insureds under an automobile insurance policy issued by Superior—were injured in a car accident.¹³⁵ Superior paid the claims of victims in the other car, which totaled \$38,500, so only \$11,500 of the \$50,000 in total liability coverage for the accident was left to satisfy the insureds' claims.¹³⁶ Consequently, the insureds brought declaratory judgment actions to recover UIM benefits under the policy.¹³⁷

The Hampton Circuit Court entered judgment in favor of the passengers.¹³⁸ It held that the vehicle was underinsured to the extent that the \$11,500 in remaining liability coverage was less than \$25,000, the amount of UM coverage for each person injured in the accident.¹³⁹

The supreme court, however, held that Virginia Code section 38.2-2206(B) "contemplates a situation in which . . . at least two applicable insurance policies at issue—the liability coverage provided by a tortfeasor's insurance policy and the [UM/UIM] coverage of the injured party's insurance policy."¹⁴⁰ While Virginia Code section 38.2-2206(A) does not allow the amount of liability coverage to be less than the UM/UIM coverage provided by the policy,¹⁴¹ "the definition of 'uninsured' in subsection (B) contemplates just such a scenario . . ."¹⁴² The supreme court stated that this construction was the only way that the two sections can be reconciled.¹⁴³

134. *Id.* at 344, 520 S.E.2d at 649.

135. *Id.* at 340, 520 S.E.2d at 647.

136. *Id.* at 340-41, 520 S.E.2d at 647.

137. *Id.* at 341, 520 S.E.2d at 647.

138. *Id.*

139. *Id.*

140. *Id.* at 344, 520 S.E.2d at 649. Virginia Code section 38.2-2206(B) states:

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 injured as a result of the operation or use of the vehicle.

VA. CODE ANN. § 38.2-2206(B) (Repl. Vol. 1999).

141. Virginia Code section 38.2-2206(A) requires that the limits of the UM/UIM coverage of any policy issued in Virginia to "equal but not exceed the limits of the liability insurance provided by the policy." VA. CODE ANN. § 38.2-2206(A) (Repl. Vol. 1999).

142. *Superior Ins.*, 258 Va. at 344, 520 S.E.2d at 649.

143. *Id.*

Thus, the supreme court held that the statute does not allow a claimant "to recover under both the liability and [UM/UIM] coverages of a single policy."¹⁴⁴ Since the UM/UIM coverage is not "afforded" to the insureds, no coverage exists with which "to compare the amount of liability coverage 'available for payment'" to determine whether the vehicle is underinsured.¹⁴⁵

The supreme court noted that the construction of Virginia Code section 38.2-2206 urged by the insureds would be an "arbitrary expansion of [their] recovery options."¹⁴⁶ The insureds could have contracted for more liability coverage, but "they cannot . . . augment their liability coverage by accessing the underinsured motorist coverage of their own policy."¹⁴⁷

C. *Stacking*

The United States District Court for the Western District of Virginia considered the issue of "stacking" of UM coverage in *Keene v. Travelers Indemnity Co.*¹⁴⁸ There, the parents of a child who was killed in a car accident involving an uninsured motorist filed a declaratory judgment action against their UM carrier seeking a determination of the amount of coverage available.¹⁴⁹

The policy had a bodily injury liability limit of UM coverage of "\$100,000 Each Person/\$300,000 Each Accident."¹⁵⁰ The parents argued "that the coverage limits were tripled because . . . three separate vehicles were insured under the policy, for which separate premiums were paid."¹⁵¹

144. *Id.* at 345, 520 S.E.2d at 649.

145. *Id.*

146. *Id.* at 345, 520 S.E.2d at 650 (quoting *Trisvan v. Agway Ins. Co.*, 254 Va. 416, 419, 492 S.E.2d 628, 629 (1997)).

147. *Id.*

148. 73 F. Supp. 2d 638 (W.D. Va. 1999).

149. *Id.* at 639.

150. *Id.*

151. *Id.* The policy read:

Regardless of the number of . . . motor vehicles to which this insurance applies, the limit for Part III—Protection Against Uninsured Motorists is as follows:

- (a) If the schedule or declarations indicates split limits of liability, the limit of liability for bodily injury stated as applicable to "each person" is the limit of The Company's liability for all damages because of bodily injury sustained by one person as the result of any one accident and,

On the parties' cross-motions for summary judgment, the district court found that the policy limits may not be stacked on the basis that multiple vehicles were insured under the policy.¹⁵² The district court relied on *Goodville Mutual Casualty Co. v. Borrer*,¹⁵³ in which the Supreme Court of Virginia held that almost identical language was "clear and unambiguous and requires the construction that stacking is not permissible."¹⁵⁴

The district court also predicted that, under Virginia law, the parents' claim for their child's medical expenses would fall within the bodily injury limit of \$100,000 per person, rather than the limit of \$300,000 per occurrence.¹⁵⁵ Most other state courts had held that bodily injury limits include derivative claims.¹⁵⁶ In this case, however, the district court held that "the usual and ordinary construction of the language in the policy is that the limit applies to all claims for damages resulting from bodily injury sustained by one person, regardless of who asserts the claims."¹⁵⁷

D. Statutory Changes

In 1999, the General Assembly amended the UM/UIM statute to include a tolling provision for "John Doe" actions.¹⁵⁸ The statute already provided that an injured driver who brings such an action is not barred from later suing the actual driver if his identity becomes known.¹⁵⁹ House Bill 1901 amended the statute to provide that the act of bringing a "John Doe" action tolls the statute of limitations for up to three years, for the purpose of bringing

subject to the above provision respecting "each person" the limit of liability for bodily injury stated as applicable to "each accident", is the total limit of The Company's liability for all damages because of bodily injury sustained by two or more persons as the result of any one accident

Id. at 640.

152. *Id.* at 638.

153. 221 Va. 967, 275 S.E.2d 625 (1981).

154. *Id.* at 971, 275 S.E.2d at 628.

155. *Keene*, 73 F. Supp. 2d at 638.

156. *Id.* at 641 (citations omitted).

157. *Id.*

158. H.B. 1901, Va. Gen. Assembly (Reg. Sess. 1999) (enacted as Act of Apr. 7, 1999, ch. 992, 1999 Va. Acts 2627) (codified as amended at VA. CODE ANN. § 38.2-2206(G) (Repl. Vol. 1999)).

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

an action against the actual driver when he is identified.¹⁶⁰

E. *Use of Vehicle*

In *Newman v. Erie Insurance Exchange*,¹⁶¹ another school bus case,¹⁶² the Supreme Court of Virginia considered whether a child was “using” the bus at the time of the accident within the meaning of Virginia Code section 38.2-2206 and, therefore, was entitled to UM/UIM benefits under the school board’s insurance policy.¹⁶³

Seven-year-old Johnny Newman was hit by a car while crossing the street to board the bus, which was stopped with its warning lights and “stop arm” activated.¹⁶⁴ Erie, which insured the bus under a commercial automobile liability policy issued to the school board, sought a declaratory judgment that Newman was not occupying or using the school bus and was not entitled to UM/UIM benefits.¹⁶⁵ The Henrico County Circuit Court entered summary judgment for Erie, concluding that Newman was not an insured under the policy provisions because he was not “using, occupying, getting on or getting off of the school bus at the time of the accident,” as per *Stern v. Cincinnati Insurance Co.*¹⁶⁶

The supreme court reversed the portion of the judgment that held that Newman was not “using” the bus within the meaning of section 38.2-2206.¹⁶⁷ In so doing, it overruled its holding in *Stern* that “a bus driver used a bus and its equipment to create a safety

160. The new provision reads:

The bringing of an action against an unknown owner or operator as John Doe shall toll the statute of limitations for purposes of bringing an action against the owner or operator who caused the injury or damages until his identity becomes known. In no event shall an action be brought against an owner or operator who caused the injury or damages, previously filed against as John Doe, more than three years from the commencement of the action against the unknown owner or operator as John Doe in a court of competent jurisdiction.

Id.

161. 256 Va. 501, 507 S.E.2d 348 (1998).

162. *See supra* Part VI.A.

163. *Newman*, 256 Va. at 505, 507 S.E.2d at 350. Virginia Code section 38.2-2206 defines “insured” as, among others, “any person who uses the motor vehicle to which the policy applies, with the expressed or implied consent of the named insured.” VA. CODE ANN. § 38.2-2206(B) (Repl. Vol. 1999 & Cum. Supp. 2000).

164. *Newman*, 256 Va. at 503, 507 S.E.2d at 349.

165. *Id.* at 504, 507 S.E.2d at 349.

166. *Id.* (citing *Stern v. Cincinnati Ins. Co.*, 252 Va. 307, 477 S.E.2d 517 (1996)).

167. *Id.* at 510, 507 S.E.2d at 353.

zone, for the child but that 'the safety measures did not constitute a use of the bus by [the child].'¹⁶⁸ There, the child was not "using" the bus "because she was not yet a passenger of the school bus" when the accident happened.¹⁶⁹

In *Newman*, the supreme court held that "the relevant inquiry is whether 'there was a causal relationship between the accident and the use of the insured vehicle as a vehicle.'¹⁷⁰ This relationship has been found where the insured "was utilizing the [vehicle's] specialized equipment to perform his mission"¹⁷¹ and where the vehicle "was an integral part of his mission."¹⁷² Applying these cases, the supreme court stated that if an "individual, who has not occupied an insured vehicle, utilizes [its] specialized safety equipment as an integral part of performing his mission, with the immediate intent to occupy the vehicle," then he "uses" the vehicle within the meaning of the UM statute.¹⁷³

Though *Stern* recognized that only the bus driver uses the specialized safety equipment, children also use the equipment as an integral part of their mission of walking across the street to board the bus.¹⁷⁴ Therefore, the supreme court overruled its holding in *Stern* and concluded that *Newman* was "using" the bus when he was injured.¹⁷⁵ The supreme court noted that its holding eliminates the paradox created by *Stern* that only children who are injured while crossing the street after exiting a school bus are entitled to UM/UIIM coverage, while those injured in the same location while boarding the bus are denied coverage.¹⁷⁶

168. *Id.* at 506, 507 S.E.2d at 350 (alteration in original) (quoting *Stern*, 252 Va. at 312, 477 S.E.2d at 520).

169. *Id.* (quoting *Stern*, 252 Va. at 313, 477 S.E.2d at 520).

170. *Id.* at 506, 507 S.E.2d at 351 (quoting *Edwards v. GEICO*, 256 Va. 128, 132, 500 S.E.2d 819, 821 (1998)).

171. *Id.* at 507, 507 S.E.2d at 351 (citing *Randall v. Liberty Mut. Ins. Co.*, 255 Va. 62, 67, 496 S.E.2d 54, 56-57 (1998)).

172. *Id.* (citing *Great Am. Ins. Co. v. Cassell*, 239 Va. 421, 424, 389 S.E.2d 476, 477 (1990)).

173. *Id.* at 508, 507 S.E.2d at 352.

174. *Id.*

175. *Id.* at 509, 507 S.E.2d at 352.

176. *Id.* at 510-11, 507 S.E.2d at 353.

IX. WAIVER AND ESTOPPEL

A. *Notice of Accident*

Since 1998, the Supreme Court of Virginia and the United States Court of Appeals for the Fourth Circuit have decided cases involving the surrender of rights under insurance policies due to breaches of the policy provisions by insureds as well as insurers.¹⁷⁷

In *Craig v. Dye*,¹⁷⁸ the Supreme Court of Virginia construed a policy provision excluding coverage if an insured “refuses” to perform certain duties.¹⁷⁹ Robert Dye was insured under a State Farm personal liability umbrella insurance policy issued to his parents.¹⁸⁰ He was in a car accident with Jose Salvadore Antonio, who died as a result.¹⁸¹ More than two years later, State Farm first received notice of the accident from Dye’s father, who said that he “never had the slightest idea” that the policy would cover his son.¹⁸² State Farm denied coverage because the insureds failed to timely notify it of the accident.¹⁸³

The personal representative of Antonio’s estate filed a declaratory judgment action to determine whether Dye was covered under the policy for the accident.¹⁸⁴ The circuit court awarded State Farm summary judgment, concluding that Dye “is not covered under State Farm’s Umbrella Policy and there is no coverage applicable to [Dye] under the policy in question for failure to provide timely notice”¹⁸⁵

The supreme court reversed.¹⁸⁶ Although it had held in a previous case that substantial compliance with a policy’s notice provision is a condition precedent to coverage,¹⁸⁷ the supreme court distinguished between the language in other policies and that in

177. See *infra* notes 178-91 and accompanying text.

178. 259 Va. 533, 526 S.E.2d 9 (2000).

179. *Id.* at 534, 526 S.E.2d at 10.

180. *Id.* at 535, 526 S.E.2d at 10.

181. *Id.*

182. *Id.* at 536, 526 S.E.2d at 11.

183. *Id.* at 535, 526 S.E.2d at 10-11.

184. *Id.*, 526 S.E.2d at 10.

185. *Id.* at 536, 526 S.E.2d at 11.

186. *Id.* at 539, 526 S.E.2d at 13.

187. *State Farm Fire & Cas. Co. v. Scott*, 236 Va. 116, 119, 372 S.E.2d 383, 384 (1988).

State Farm's policy.¹⁸⁸ The latter policy said that the company may not provide coverage if the insureds "refuse"—not "fail"—to provide notice.¹⁸⁹ Looking at the ordinary and accepted meanings of "refuse" and "fail," the supreme court found that the words were not synonymous.¹⁹⁰ The insureds' failure to give timely notice "was not a refusal to do so" and did not allow State Farm to deny coverage.¹⁹¹

B. *Notice of Breach of Policy Terms or Conditions*

In *Morrel v. Nationwide Mutual Fire Insurance Co.*,¹⁹² the United States Court of Appeals for the Fourth Circuit addressed the issue of waiver of policy defenses by the insurer.¹⁹³ The Morrels obtained a default judgment against a contractor who damaged their home during its renovation.¹⁹⁴ Nationwide, the contractor's liability insurer, refused to satisfy the judgment, claiming that the contractor breached the policy provisions requiring it to assist Nationwide in the investigation and lawsuit.¹⁹⁵

In an action against Nationwide to enforce the judgment,¹⁹⁶ the U.S. District Court for the Eastern District of Virginia awarded the Morrels summary judgment, finding "that Nationwide had delayed too long in notifying [them] that it would invoke the contractor's failure to perform under the policy as a defense to liability."¹⁹⁷

The Fourth Circuit affirmed, holding that Nationwide waived its right to rely on the insured's breach of the policy as a de-

188. *Craig*, 259 Va. at 537, 526 S.E.2d at 12.

189. *Id.* at 537-38, 526 S.E.2d at 12.

190. *Id.* at 538-39, 526 S.E.2d at 12.

191. *Id.* at 539, 526 S.E.2d at 12.

192. 188 F.3d 218 (4th Cir. 1999).

193. *Id.* at 227.

194. *Id.* at 220-21.

195. *Id.*

196. Virginia Code section 38.2-2200 provides in part:

That if execution on a judgment against the insured or his personal representative is returned unsatisfied in an action brought to recover damages for injury sustained or for loss or damage incurred during the life of the policy or contract, then an action may be maintained against the insurer under the terms of the policy or contract for the amount of the judgment not exceeding the amount of the applicable limit of coverage under the policy or contract.

VA. CODE ANN. § 38.2-2200(2) (Repl. Vol. 1999 & Cum. Supp. 2000).

197. *Morrel*, 188 F.3d at 221.

fense.¹⁹⁸ To protect claimants such as the Morrels, Virginia Code section 38.2-2226 requires an insurer to notify a claimant promptly of its intention to defend based on an insured's breach of the policy.¹⁹⁹ Federal and state courts interpreting this statute have held that an insurer waives its right to rely on the insured's breach if it fails to notify a claimant within the twenty-day statutory period.²⁰⁰

“[D]iscovery of a breach entails, first, awareness by the insurer of facts tending to show there has been a violation of the policy provisions and, second, evaluation of those known facts culminating in a decision that a breach apparently has occurred.”²⁰¹ Since Nationwide had discovered the contractor's breach more than three months before notifying the Morrels, it did not satisfy the statutory notification requirement and waived its right to raise the defense.²⁰²

The circuit court also noted that the twenty-day period in Virginia Code section 38.2-2226 is not triggered by an insurer's determination that, “for strategic or tactical reasons, it will definitely rely on its insured's breach,” but rather, by discovery of the claim and breach of the policy.²⁰³

198. *Id.* at 222.

199. *Id.* at 226. The version of Virginia Code section 38.2-2226 then in effect provided that:

Whenever any insurer on a policy of liability insurance discovers a breach of the terms or conditions of the insurance contract by the insured and the insurer intends to rely on the breach in defense of liability for any claim within the terms of the policy, the insurer shall notify the claimant . . . of its intention to rely on the breach as a defense. Notification shall be given within twenty days after discovery by the insurer or any of its agents of the breach or of the claim, whichever is later.

VA. CODE ANN. § 38.2-2226 (Repl. Vol. 1994). The statute was amended in 1997 and now reads:

Whenever any insurer on a policy of liability insurance discovers a breach of the terms or conditions of the insurance contract by the insured, the insurer shall notify the claimant or the claimant's counsel of the breach. Notification shall be given within forty-five days after discovery by the insurer of the breach or of the claim, whichever is later. . . . Failure to give the notice within forty-five days will result in a waiver of the defense based on such breach to the extent of the claim by operation of law.

VA. CODE ANN. § 38.2-2226 (Repl. Vol. 1999 & Cum. Supp. 2000).

200. *Morrel*, 188 F.3d at 226 (citations omitted).

201. *Id.* at 227 (quoting *Liberty Mut. Ins. Co. v. Safeco Ins. Co.*, 223 Va. 317, 326, 288 S.E.2d 469, 474 (1982)).

202. *Id.* at 228.

203. *Id.*