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A monthly newsletter for  
our insurance clients

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## Virginia Supreme Court Re-Affirms Favorable Rules on Material Misrepresentation in the Insurance Application

Earlier this year, the Virginia Supreme Court re-affirmed one of Virginia's favorable rules regarding material misrepresentation in the insurance application. The case is Portillo v. Nationwide Mut. Fire Ins. Co., 277 Va. 193, 671 S.E.2d 153 (2009)

The facts of the case were fairly straight forward. Mr. Portillo filed an insurance application with Nationwide, seeking insurance coverage for his newly purchased motor vehicle. The Application required the applicant to "list all household members of driving age and non-resident operators." Only Mr. Portillo and his sister were listed on the Application. The Application posed the following question: "Have all drivers who have access to the vehicles been indicated on this application?" In response, Mr. Portillo marked a "Y," indicating an affirmative answer. Just before Mr. Portillo's signature on the Application, there was the following statement: "I have disclosed all drivers who have access to the vehicles indicated on the application."

At the end of the application, the Portillo certified, "I hereby declare that the facts stated in the above application are true."<sup>1</sup> Nationwide issued a policy based on the application.

In July 2004, Jose C. Lopez, Portillo's nephew, was operating the vehicle when it was involved in a single-vehicle collision and a passenger in the vehicle was seriously injured. Following the collision, Portillo reported the loss to Nationwide. Nationwide sent a letter to Portillo stating that the policy was void because he had not disclosed in the Application that Lopez was a member of Portillo's household who was of driving age. The injured passenger filed a declaratory judgment action seeking to compel Nationwide to provide insurance coverage under the policy. At trial, the insured admitted that, at the time of the application, Lopez resided in the household and was a 21 year old licensed driver.

The insured contended that he had never given Lopez permission to drive his vehicle and that he had never seen Lopez driving his vehicle. The insured also contended that any misrepresentation would only be considered material if Nationwide would have decided not to issue the policy had it known the truth. The Court rejected both arguments.

The Virginia Supreme Court re-affirmed existing Virginia case law holding that a misrepresentation made by the insured on his insurance application is material

to the risk to be assumed by an insurance company if the representation would reasonably influence the insurer's decision on whether or not to issue the policy. Time Ins. Co. v. Bishop, 245 Va. 48, 52, 425 S.E.2d 489, 492 (1993) The insurer has the right to know the full truth in order to permit it to make inquiries and assess whether to assume the risk. Chitwood v. Prudential Ins. Co. of Am., 206 Va. 314, 318, 143 S.E.2d 915, 918 (1965); Inter-Ocean Ins. Co. v. Harkrader, 193 Va. 96, 100-01, 67 S.E.2d 894, 897 (1951). It is the insurer's "opportunity to estimate the risk under its contract" that is taken away by an applicant's misstatement of material facts. Inter-Ocean Ins. Co., (193 Va. at 101, 67 S.E.2d at 897.) As we have explained, "[a] knowledge or ignorance of such [material] facts would naturally and reasonably influence the judgment of the insurer in making the contract or in establishing the degree or character of the risk or in fixing the rate of premium." *Id.*

The Court held that the misrepresentation made by Portillo deprived Nationwide of

<sup>1</sup> Note that Virginia law requires the insurer to prove that the insured intentionally misrepresented facts on the application IF the application contains the old Accord boilerplate language before the insured's signature "the foregoing information is true to the best of my knowledge, information and belief." See Time Ins. Co. v. Bishop, 245 Va. 48 (1993). Accordingly, this language should not be used on your insurance applications.

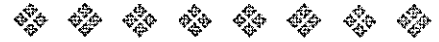


the opportunity to make inquiries and assess whether to assume the risk of issuing a policy to Portillo. The fact that Portillo had never allowed Lopez to drive the vehicle nor had he seen him use the vehicle was of no importance. What was critical was that knowledge of the existence of an additional potential driver (Lopez) would have reasonably influenced Nationwide's judgment regarding coverage. In addition, knowledge of an additional household resident of driving age would have influenced Nationwide's fixing of the rate of premium. Nationwide presented evidence that it would have charged a higher premium had it known that Lopez lived in the household and was of driving age.

It should also be noted that

in 2003 the Virginia Supreme Court again re-affirmed long established case law regarding material misrepresentation but did clarify the rule regarding reliance. In Montgomery Mutual Insur. v. Riddle, 266 Va. 539 (2003) the insurance agent issued a binder to the insured and testified that he did not review the insurance application for substance but only reviewed the applications to assure that the applications were complete and in proper form. The court held that Montgomery Mutual could not prove that it actually relied on the statements or omissions in the policy applications and therefore could not void the policy. However, in the Portillo case, Nationwide testified that it did rely on the insured's application statements in making its coverage decision.

The foregoing cases re-affirm Virginia's long standing advantageous rules regarding the insurers' ability to rely on the insured's policy application statements when making coverage determinations. While there are some procedural pitfalls as with any insurance coverage case, if the insurer can prove: 1) that an application statement was untrue when made; and 2) that the application statement actually influenced the insurer's decision regarding whether to issue the policy OR what premium to charge, then the policy can be voided.



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