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in *Jarka*, it would appear that the stevedore will have to look to the Supreme Court⁶³ or Congress for the solution to his problem.

DOUGLAS W. MACDOUGAL

AUTOMOBILE LIABILITY INSURANCE—THE VOLUNTARY-CERTIFIED POLICY DICHOTOMY

Virginia provides the innocent victim of an automobile accident with the right to a direct action against his tort-feasor's liability insurer.¹ But the law of Virginia also provides the defendant insurance company with a means² of avoiding liability for the negligent act of its insured motorist.³ By proving that the insurance policy which covered the negligently driven vehicle was obtained through fraud,⁴ an insurance company can avoid liability to injured third parties, except where the policy itself operates to impose absolute liability on the insurer.⁵ Whether an innocent

⁶³Some hope for the employer can now be found in *Federal Marine Terminals, Inc. v. Burnside Shipping Co.*, 394 U.S. 404 (1969). There the Court held maritime law imposes a duty upon the shipowner of due care in providing the stevedoring contractor with a reasonably safe place to work. Thus the stevedore might have a cause of action in tort against the shipowner. See Larson, *supra* note 20, for a discussion of the problems with this approach.

¹VA. CODE ANN. § 38.1-380(2) (Repl. Vol. 1970) provides in part:
that in case execution on a judgment against the insured . . . in an action brought to recover damages for injury sustained . . . occasioned during the life of the policy or contract shall be returned unsatisfied, then an action may be maintained against the insurer under the terms of the policy or contract

²VA. CODE ANN. § 38.1-336 (Repl. Vol. 1970) provides in part:
All statements . . . in any application for a policy of insurance . . . shall be deemed representations and not warranties, and no statement in such application . . . shall bar a recovery upon a policy of insurance, . . . unless it be clearly proved that such answer or statement was material to the risk when assumed and was untrue.

See, e.g., *State Farm Mut. Auto. Ins. Co. v. Butler*, 203 Va. 575, 125 S.E.2d 823 (1962); *Fidelity Bankers Life Ins. Corp. v. Wheeler*, 203 Va. 434, 125 S.E.2d 151 (1962).

³The insured motorist may be either the owner and operator of the negligently driven vehicle, the named insured, or one who is operating the named insured's vehicle with his permission, an omnibus insured. A named insured's liability coverage is extended to all who operate his vehicle with his permission by VA. CODE ANN. § 38.1-381(a) (Supp. 1971).

⁴An example of such fraud is a material misrepresentation of fact made by the named insured in applying for the policy. Note 2 *supra* & note 18 *infra*.

⁵When an insurance policy has been certified by an insurance company (Note 16 & accompanying text *infra*), the provisions of the Virginia Motor Vehicle Safety Responsibility Act come into force. VA. CODE ANN. §§ 46.1-388 to 514 (Repl. Vol. 1967). Section 46.1-511(f) holds the insurer to absolute liability for the negligence of either the named insured or an omnibus insured. Note 17 *infra*. *See* VA. CODE ANN. § 46.1-504(b) (Repl. Vol. 1967).

victim will succeed in recovering compensation for the injuries to his person and property can therefore depend on the type of insurance policy held by the owner of the negligently driven vehicle.

Virginia's motor vehicle code⁶ contemplates two distinct types of liability insurance: that which is voluntarily⁷ obtained by the insured and that which is procured as evidence of the insured's financial responsibility.⁸ Where an insured has voluntarily contracted with a liability insurer for coverage on his automobile, it is generally recognized that he did so for his own benefit:⁹ to protect himself from having to satisfy out of his personal assets the judgments of those whom he might injure. However, when an insured motorist has procured a motor vehicle liability policy¹⁰ to evidence his financial responsibility, he has complied with a statutory condition¹¹ requisite to regaining his driving privilege.

Virginia law requires the forfeiture of this privilege when a motorist has been convicted of certain driving offenses¹² or has failed to satisfy a judgment rendered in favor of someone whom he injured with his automobile.¹³ After a motorist has manifested his irresponsibility in either, or both, of these ways, the state demands, on behalf of possible future victims, absolute assurance of the motorist's future responsibility.¹⁴ In most cases¹⁵ this demand is met by obtaining a policy from an insurance

⁶VA. CODE ANN. §§ 46.1-1 to 555 (Repl. Vol. 1967).

⁷VA. CODE ANN. § 46.1-167.2(b) (Repl. Vol. 1967).

⁸VA. CODE ANN. §§ 46.1-467, 468, 471 (Repl. Vol. 1967). See *Virginia Farm Bureau Mut. Ins. Co. v. Saccio*, 204 Va. 769, 133 S.E.2d 268 (1963).

⁹*E.g.*, 8 J. APPLEMAN, INSURANCE LAW AND PRACTICE § 4811 (1962) [hereinafter cited as APPLEMAN]; *Kirk v. Home Indem. Co.*, 431 F.2d 554, 565 (7th Cir. 1970).

¹⁰The phrase "motor vehicle liability policy" is used artfully. It refers only to those policies which evidence the insured's financial responsibility. VA. CODE ANN. § 46.1-389(e) (Repl. Vol. 1967).

¹¹VA. CODE ANN. § 46.1-438(b) (Repl. Vol. 1967) provides in part:

Before granting or restoring a license or registration to any person whose . . . privilege to operate motor vehicles . . . has been revoked or suspended pursuant to the provisions of §§ 46.1-417, 46.1-418, 46.1-421, and 46.1-442, the Commissioner shall require proof of financial responsibility

. . . .

¹²See VA. CODE ANN. §§ 46.1-417 to 424 (Repl. Vol. 1967).

¹³See VA. CODE ANN. § 46.1-442 (Repl. Vol. 1967). See *Virginia Farm Bureau Mut. Ins. Co. v. Saccio*, 204 Va. 769, 133 S.E.2d 268 (1963).

¹⁴See VA. CODE ANN. §§ 46.1-438, 511 (Repl. Vol. 1967). See, *e.g.*, *Farm Bureau Mut. Auto. Ins. Co. v. Hammer*, 177 F.2d 793 (4th Cir. 1949), *cert. denied*, 339 U.S. 914 (1950). Note 17 *infra*.

¹⁵Evidence of financial responsibility can also be provided by executing a bond, depositing cash or securities, or by filing a certificate of self-insurance, VA. CODE ANN. § 46.1-468 (Repl. Vol. 1967).

company which then certifies¹⁶ to the Department of Motor Vehicles that its named insured is covered by the required amount of liability insurance. Whether his tort-feasor's insurance policy has been certified is a matter of great importance to the innocent victim of an automobile accident, for after an insurance company has certified a policy it is absolutely liable for the negligent acts of its named insured and any other person who operates the named insured's vehicle with his permission.¹⁷

The certainty of the innocent victim's recovering just compensation in the certified policy situation is in marked contrast to the uncertainty of an innocent party's recovering any compensation when injured by a negligent but voluntarily insured motorist. One of the obstacles that can be raised by a defendant insurance company to defeat recovery on a voluntarily obtained policy is that its policyholder made material misrepresentations of fact¹⁸ in applying for coverage. This defense in avoidance

¹⁶An insurance carrier certifies proof of its named insured's financial responsibility by filing a written certificate with the Department of Motor Vehicles which states there is a motor vehicle liability policy in effect for the benefit of the named insured. VA. CODE ANN. § 46.1-471(a) (Repl. Vol. 1967). This policy is then referred to as a "certified" policy as opposed to a "voluntary" policy. See *Farm Bureau Mut. Auto. Ins. Co. v. Hammer*, 177 F.2d 793 (4th Cir. 1949), *cert. denied*, 339 U.S. 914 (1950).

¹⁷In Virginia absolute liability is imposed on the insurer by provision of the Motor Vehicle Safety Responsibility Act, VA. CODE ANN. § 46.1-511(f) (Repl. Vol. 1967). This provision of the Act states:

No statement made by the insured or on his behalf and no violation of the terms of the policy shall operate to defeat or avoid the policy so as to bar recovery within the limits provided in this chapter.

In defining the purpose served by the Virginia Motor Vehicle Safety Responsibility Act, the Fourth Circuit Court of Appeals stated:

It is intended to protect the public from suffering loss through the carelessness of automobile owners who have manifested their financial irresponsibility. It differentiates between car owners who have shown themselves to be irresponsible, and those who have not. It declares that when those who carry policies through legal compulsion cause damage in automobile operation, their insurance carriers are absolutely liable for the resulting loss; but it lays down no such rule in the case of the automobile owner voluntarily carrying such a policy, whose responsibility has never been questioned.

Farm Bureau Mut. Auto. Ins. Co. v. Hammer, 177 F.2d 793, 798 (4th Cir. 1949), *cert. denied*, 339 U.S. 914 (1950). See *Cohen v. Metropolitan Cas. Ins. Co.*, 233 App. Div. 340, 252 N.Y.S. 841 (1931).

In general, absolute liability is imposed on the insurer because the certified policy is issued for the benefit of the public at large as opposed to that of the policyholder. See APPLEMAN at § 4818 (1962).

¹⁸VA. CODE ANN. § 38.1-336 (Repl. Vol. 1970); note 2 *supra*. The misrepresentation of fact must be material to the insurer's risk. A fact is material to an insurer's risk if it would reasonably influence the decision whether or not to issue a policy. *United States Fidelity & Guar. Co. v. Haywood*, 211 Va. 394, 177 S.E.2d 530 (1970). See generally *Sivertsen v. Guardian Life Ins. Co. of America*, 423 F.2d 443 (4th Cir. 1970) (insurer not

of liability to an injured third party was most recently considered by the Fourth Circuit Court of Appeals in *Bernstein v. Nationwide Mutual Insurance Co.*¹⁹

Bernstein was seriously injured when the car he was driving was struck by a pick-up truck operated by Stephens. Bernstein sued both Stephens and Hurtt, the owner of the truck and the named insured in Nationwide's liability policy.²⁰ While the suit was in progress,²¹ Nationwide sought a declaratory judgment in the United States District Court for the Western District of Virginia seeking to rescind Hurtt's insurance policy *ab initio* on the basis of material misrepresentations of fact made by Hurtt on Nationwide's application form.²² The form showed that in answering the questions whether any driver²³ of the vehicle to be insured had had his

liable on policy where applicant for life insurance had materially misrepresented his medical history).

Virginia law does not require a material misrepresentation of fact to be knowingly or intentionally made before an insurance company can raise the misrepresentation as a defense in avoidance of liability. *Chitwood v. Prudential Ins. Co. of America*, 206 Va. 314, 143 S.E.2d 915 (1965).

¹⁹*Bernstein v. Nationwide Mut. Ins. Co.*, No. 14,949 (4th Cir., Nov. 24, 1971), *rev'g* *Nationwide Mut. Ins. Co. v. Stephens*, 313 F. Supp. 890 (W.D. Va.).

²⁰Who actually owned the truck, Hurtt or Stephens, was an issue of fact which was hopelessly confused and strongly contested. Nationwide contended that Stephens was the actual owner of the truck although it had been titled in Hurtt's name apparently to enable insurance coverage to be obtained under other than certified conditions. Brief for Appellee at 3. The trial court ruled that Nationwide had not proved by a preponderance of the evidence that Hurtt had misrepresented the ownership of the truck. 313 F. Supp. at 893. However, because Stephens was operating the vehicle ostensibly with Hurtt's permission, he was an additional insured, or omnibus insured, under the liability policy issued by Nationwide. *See* VA. CODE ANN. § 38.1-381(a) (Supp. 1971). *See generally* *State Farm Mut. Auto. Ins. Co. v. Arghyris*, 189 Va. 913, 55 S.E.2d 16 (1949).

²¹Bernstein was suing Nationwide, Hurtt, and Stephens in the District of Columbia, the situs of the accident.

²²Federal jurisdiction was based on diversity of citizenship. The Hurtt-Nationwide contract for insurance had been formed in Virginia; therefore Virginia law governed the action. *See Capers v. White*, 195 Va. 1123, 81 S.E.2d 597 (1954).

Nationwide had asserted at trial seven instances of material misrepresentations made by Hurtt in answering questions on the application form; however, the court ruled that Nationwide's proof established only those discussed in the text *infra*.

²³Because the questions asked of Hurtt had reference to any "driver" rather than being restricted to the applicant Hurtt, the trial court noted the following caveat:

The point is not raised either by pleadings, memoranda, or argument, and the court specifically does not pass upon the question of whether or not the application form used by Nationwide is so broad in its terms that it is in conflict with the permissive use statute, Virginia Code, Section 38.1-381.

313 F. Supp. at 892 n.1.

Hurtt had testified that he thought Nationwide's questions referred only to him, yet he knew at the time of answering that Stephens would be using the truck. *Id.* at 893.

operator's license suspended, or been on an assigned risk plan, or had been refused insurance coverage within the past three years, Hurtt had responded, "No".²⁴ However, the trial court found that Hurtt knew at the time he answered the form's questions that Stephens would be using the truck, and the questions as they related to Stephens should have been answered, "Yes".²⁵ The trial court held that Hurtt's negative responses constituted material misrepresentations of fact and Nationwide could, therefore, avoid liability to Bernstein by rescinding the policy *ab initio*.²⁶

The defendants, Stephens, Hurtt, and Bernstein, had sought to prevent Nationwide from avoiding its liability by relying on estoppel and the absolute liability provision²⁷ of the Motor Vehicle Safety Responsibility Act²⁸ which provides that no statement made by an insured shall operate to defeat or avoid an insurance policy. The trial court rejected the estoppel argument and ruled that the absolute liability provision was not available as a defense because Hurtt's insurance policy had not been certified as proof of his financial responsibility, but had been voluntarily obtained.²⁹ The trial court drew specific attention to the fact that the provisions of the Motor Vehicle Safety Responsibility Act apply exclusively to policies which have been certified as proof of financial responsibility.³⁰ As a consequence of this decision, Bernstein, assuming he was awarded judgment on his negligence action, would be forced to look to the personal assets of Stephens and Hurtt in order to recover any compensation for his injuries.

In reversing, the Fourth Circuit noted the consistent refusal of the Virginia Supreme Court to hold an insurer liable on an insurance policy voluntarily obtained through material misrepresentations of fact.³¹ Nev-

²⁴313 F. Supp. at 893.

²⁵*Id.*

²⁶*Id.*

²⁷*Id.* VA. CODE ANN. § 46.1-511(f) (Repl. Vol. 1967). Notes 5 & 17 *supra*.

²⁸VA. CODE ANN. § 46.1-388 to 514 (Repl. Vol. 1967).

²⁹313 F. Supp. at 893.

³⁰*Id.* See VA. CODE ANN. § 46.1-509 (Repl. Vol. 1967). In 1948 the Virginia legislature amended the Motor Vehicle Safety Responsibility Act in order to remove any doubt as to its applicability:

It is provided however that the provisions of this act shall not apply to any policy of insurance except as to liability thereunder incurred after certification thereof as proof of financial responsibility.

[1948] VA. ACTS ch. 201, 14-A at 438. The quoted language is essentially the same as that of VA. CODE ANN. § 46.1-509 (Repl. Vol. 1967). See *Connell v. Indiana Ins. Co.*, 334 F.2d 993 (4th Cir. 1964); *State Farm Mut. Auto. Ins. Co. v. Arghyris*, 189 Va. 913, 55 S.E.2d 16 (1949).

³¹No. 14,949 at 12. See, e.g., *Utica Mut. Ins. Co. v. National Indem. Co.*, 210 Va. 769, 173 S.E.2d 855 (1970); *Inter-Ocean Ins. Co. v. Harkrader*, 193 Va. 96, 67 S.E.2d 894 (1951).

ertheless, the court held "that in its judgment the deception ought not be visited upon an innocent and injured third party such as Bernstein."³² Reversal was necessary, in the opinion of the court, because an insurance company could not be allowed to condition its liability policy on the veracity of an applicant's representations as to persons who might use the vehicle.³³ To allow an insurer to do so would impermissibly restrict the comprehensive protection intended for the public by the omnibus clause.³⁴

The court reasoned that the purpose of the omnibus clause is to extend a named insured's coverage to all who operate his vehicle with his permission.³⁵ An insurer could not, therefore, avoid liability to one harmed by a negligent omnibus driver by relying on the named insured's application statements if they are materially untrue only with reference to the omnibus driver. Were such a tactic allowed, the public could never be certain of the intended protection from otherwise uninsured motorists.³⁶ Moreover, the court reasoned that each time an automobile owner permitted another person to use his vehicle, he would first have to determine whether the statements he made in applying for coverage retained their truth in relation to that other person. Otherwise the policyholder himself could not be certain of insurance protection.³⁷

The reasoning employed by the Fourth Circuit in ruling that Nationwide had attempted to restrict the effect of the omnibus clause appears to be sound. It seems clear that the legislative purpose underlying the omnibus clause would be violated if an insurance company could condition the coverage of a policy on the truth of an applicant's representations as to persons who "might" use the vehicle to be insured.³⁸ Similarly, if an insurer could avoid liability for the negligent act of an omnibus driver by producing an application form containing the vehicle owner's statements which are materially untrue only in relation to the omnibus driver, the force of the omnibus clause would certainly be diminished. But such was not the situation presented by the *Bernstein* case. Hurtt had not been asked to make representations of such unlimited scope. Rather, he was asked questions the answers to which were, by his own admission,³⁹

³²No. 14,949 at 3. The phrasing of the court in this diversity action is particularly unfortunate as it comes dangerously close to violating the doctrine of *Erie R.R. v. Tompkins*, 304 U.S. 64 (1938), by not following established Virginia statutory and case law.

³³No. 14,949 at 5-6.

³⁴*Id.*

³⁵*Id.*

³⁶*Id.*

³⁷*Id.*

³⁸See note 23 *supra*.

³⁹*Nationwide Mut. Ins. Co. v. Stephens*, 313 F. Supp. 890, 893 (W.D. Va. 1970).

within his knowledge at the time the questions were posed.

In maintaining that the scope of the questions on Nationwide's application form placed it in conflict with the purpose of the omnibus clause, the Fourth Circuit relied upon a Wisconsin decision as holding that an insurer cannot demand representations of an applicant which are not allowed by state statutes.⁴⁰ However, the court's interpretation of the Wisconsin Supreme Court's holding in the case of *Zepczyk v. Nelson*⁴¹ appears misconceived. In that case an innocent party sustained injuries in a collision with an automobile driven by the named insured's son. The liability insurer's motion for summary judgment was based on a representation made by the named insured in applying for coverage that he would operate the vehicle 100% of the time.⁴² The Wisconsin Supreme Court, affirming the trial court's denial of the motion, stated:

Even if the insured had knowledge of the 100% clause in the application when he signed it, and that the statement was false . . . the insurance company could not avoid liability to an innocent third person on the grounds that the car was driven by a person other than the named insured and who could not be excluded under the provisions of sec. 204.34(1).⁴³

The Supreme Court of Wisconsin affirmed, holding that the evidence was conflicting and presented substantial questions of fact as to whether the insurer was estopped from relying on the misrepresentations of the insured.⁴⁴ There was no ruling in either court that the questions asked by the insurer were improper.⁴⁵ The *Zepczyk* decision apparently is authority for only two propositions: (1) an insurer cannot avoid liability solely on the ground that the negligent driver was someone other than the named insured; and (2) a representation by an insured as to percentage of future use does not constitute a material misrepresentation of fact.⁴⁶

⁴⁰No. 14,949 at 6.

⁴¹35 Wis. 2d 140, 150 N.W.2d 413 (1967).

⁴²150 N.W.2d at 414.

⁴³*Id.* at 416.

⁴⁴*Id.* at 413.

⁴⁵Two more recent cases decided by the Wisconsin Supreme Court, not cited by the Fourth Circuit, would seem to support the type of inquiry conducted by Nationwide in *Bernstein*. See *Ryder v. State Farm Mut. Auto. Ins. Co.*, 51 Wis. 2d 318, 187 N.W.2d 176 (1971); *Felde v. Kohnke*, 50 Wis. 2d 168, 184 N.W.2d 433 (1971).

With regard to the type of questions asked by an insurer and his right to rely on the answers elicited, see, e.g., *Government Employees Ins. Co. v. Dennis*, 232 N.E.2d 750 (1967); 90 Ill. App. 2d 356, 232 N.E.2d 750 (1967); *Inter-Ocean Ins. Co. v. Harkrader*, 193 Va. 96, 67 S.E.2d 894 (1951).

⁴⁶Wisconsin law does not regard a representation as to percentage of future use as a misrepresentation of an existing fact. See *Kreklow v. Miller*, 37 Wis. 2d 12, 154 N.W.2d 243 (1967).

Consequently, it seems clear that the *Zepczyk* case was inapposite to the situation presented to the Fourth Circuit by *Bernstein*. The insurance company in *Zepczyk* had indeed attempted to negate the effect of the omnibus clause by inserting a 100% driver clause into the insurance contract.⁴⁷ Nationwide's contract with Hurtt, however, contained no such restrictive coverage clause. And Nationwide's attempt to rescind Hurtt's policy was not based on breach of contractual provision, but on grounds provided by a Virginia statute⁴⁸ and well recognized by Virginia's courts.

Apart from its failure to deal with the fact of Hurtt's knowledge that Stephens would be a user of the truck, the court's reasoning as to why Nationwide was held liable to Bernstein remains troublesome. The court held that once Nationwide issued the insurance policy to Hurtt it became "bound by law to honor, for the benefit of the public, its coverage of all permissive users of the car."⁴⁹ By such a ruling the court seemed to confuse the distinctly different rules of liability which govern a certified policy with those that govern a voluntarily obtained policy. When an insurance policy has been voluntarily obtained, it is generally recognized that the innocent victim of an automobile accident is subrogated to the rights of the negligent policyholder.⁵⁰ Thus, Nationwide's liability to Bernstein would depend on the validity of the Hurtt-Nationwide insurance contract.

Nationwide was held to have established a valid contract defense⁵¹ in the trial court because Hurtt's knowledge of Stephens as a user of the truck made his representations to Nationwide fraudulent. The Fourth Circuit registered its agreement that Nationwide had indeed been deceived,⁵² but ignored that fact in reasoning that Nationwide could not be allowed to avoid liability because it had attempted to restrict the effect

⁴⁷The Wisconsin omnibus statute specifically includes as additional insureds "persons while driving or manipulating a motor vehicle, who shall be of an age authorized by law so to do . . ." WIS. STAT. ANN. § 204.34(1)(a) (1957). At the time of the accident involved in *Zepczyk*, the named insured's son was 28 years old. 150 N.W.2d at 414.

⁴⁸VA. CODE ANN. § 38.1-336 (Repl. Vol. 1970); note 2 *supra*.

⁴⁹No. 14,949 at 6.

⁵⁰APPLEMAN at § 4811.

⁵¹The injured party is said to "stand in the shoes of the insured" and, therefore, the contract defense is good to defeat the direct action. *See, e.g., State Farm Mut. Auto. Ins. Co. v. Worthington*, 405 F.2d 683 (8th Cir. 1968); *Farm Bureau Mut. Auto. Ins. Co. v. Hammer*, 177 F.2d 793 (4th Cir. 1949), *cert. denied*, 339 U.S. 914 (1950); *Mertes v. Ballard*, 103 Ill. App. 2d 171, 242 N.E.2d 905 (1968); *Hoosier Cas. Co. v. Fox*, 102 F. Supp. 214 (N.D. Iowa 1952); *Ampy v. Metropolitan Cas. Ins. Co.*, 200 Va. 396, 105 S.E.2d 839 (1958). In other words, when an insurance policy has been voluntarily contracted for, the rights of an injured third party are contractual and are derived from those of the policyholder. *See, e.g., 12 G. COUCH, CYCLOPEDIA OF INSURANCE LAW* §§ 45:806, 812, 859 (2d ed. R. Anderson 1964); VA. CODE ANN. § 38.1-380(2) (Repl. Vol. 1970); note 1 *supra*.

⁵²No. 14,949 at 4.

of the omnibus clause. Therefore, a ruling that Nationwide was bound by law to honor its coverage once the policy had been issued seems not only inconsistent with the focus of the court's reasoning but would also seem to make the court's stated ground for reversing superfluous.⁵³

While the court of appeals' principal ground for reversal seems to have been its belief that Nationwide had attempted to restrict the effect of the omnibus clause, the court offered an additional basis for holding Nationwide liable to Bernstein. Turning its attention to matters of public policy, the court observed that

[a]n insurer doubtlessly may for fraud in its procurement rescind a policy *ab initio* and withdraw its protection of the named insured alone. But it ought not to be free *indefinitely* to rescind the policy *ab initio* after the public right has become fixed.⁵⁴

Such an unfettered right to rescind would, the court believed, "cloud the protection the state intends for the public."⁵⁵

The court's interpretation of the public policy considerations raised by the *Bernstein* case is perplexing in light of the seemingly clear statutory language and case law in Virginia which uphold an insurer's right to rescind a voluntarily procured policy at any time, given the existence of material fraud.⁵⁶ The Virginia legislature has abrogated the liability insurer's right to rescind a policy after injury to an innocent party but only in the case where the insurance company has certified the policy as proof of financial responsibility.⁵⁷ It would appear, therefore, that in discussing its additional ground for reversal the court confused the differing public policy considerations which attach to the voluntary-certified policy dichotomy.

That the Fourth Circuit seemed to confuse or ignore the distinctions between the voluntarily obtained insurance policy and the certified policy is again evidenced in the reasons advanced by the court for holding Nationwide liable. At the beginning of its discussion of the additional ground for reversal the court maintained that

[a]s a prerequisite to the registration and licensing of a motor

⁵³The court appears to equate "bound by law" with absolute liability. Its discussion of Nationwide's attempt to restrict the effect of the omnibus clause would therefore be dictum. *Id.* at 4.

⁵⁴No. 14,949 at 9. It seems clear that the court meant that an insurer should not retain the right to rescind for an indefinite period after the policy has been issued.

⁵⁵*Id.*

⁵⁶*E.g.*, notes 2 & 31 *supra*; *Mutual of Omaha Ins. Co. v. Echols*, 207 Va. 949, 154 S.E.2d 169 (1967); *Hawkeye-Sec. Ins. Co. v. Government Employees Ins. Co.*, 207 Va. 944, 154 S.E.2d 173 (1967).

⁵⁷*Compare* VA. CODE ANN. § 46.1-511(f) (Repl. Vol. 1967) with note 17 *supra*.

vehicle, the State statutes demand assurance of the owner's financial responsibility, accepting as proof a qualifying liability policy.⁵⁸

Because the State of Virginia allows uninsured motor vehicles to operate on its roadways,⁵⁹ the court's statement cannot find support in the law of Virginia unless made with reference to a certified policy. Furthermore, the court ruled that "the general public is a third-party beneficiary to the contract of insurance."⁶⁰ But, again, this ruling is without apparent support in the law of Virginia unless the contract referred to is one for certified insurance coverage. Since Virginia does not compel automobile owners to obtain liability insurance except in the cases where a motorist has manifested his irresponsibility,⁶¹ the public is recognized as a beneficiary only to the certified insurance policy contract.⁶² Then followed the court's conclusion that because Bernstein was a third-party beneficiary to the Hurtt-Nationwide contract, Nationwide should not be allowed to rescind the policy *ab initio* after injury to Bernstein had occurred.⁶³ In the opinion of the court, it was Nationwide's obligation to discover Hurtt's fraud prior to a member of the public being injured, or be barred from disclaiming liability.⁶⁴

The reasoning used by the court in establishing its additional ground for reversal seems to have been borrowed from that employed by the California Supreme Court in *Barrera v. State Farm Mutual Insurance Co.*⁶⁵ The California court's decision in *Barrera* rested almost entirely on its interpretation of the public policy considerations underlying that state's financial responsibility law.⁶⁶ The decision cannot be easily reconciled with the statutory or case law of Virginia as it presently exists. *Barrera* explicitly denounced the concept which is integral to the law governing all third party actions brought in Virginia on voluntarily obtained insurance policies—that the injured party succeeds only to those contract rights of the named insured.⁶⁷ Instead, the California court seems

⁵⁸No. 14,949 at 8 (footnote omitted).

⁵⁹VA. CODE ANN. §§ 46.1-167.1 to 167.3 (Repl. Vol. 1967). Although a \$50.00 fee must be paid into an uninsured motorists fund at the time a vehicle is registered, and the fund is to be paid out by the state to any party injured by a negligent, uninsured motorist, the fund is not considered as insurance. See *Drewry v. State Farm Mut. Auto. Ins. Co.*, 204 Va. 231, 129 S.E.2d 681 (1963).

⁶⁰No. 14,949 at 8.

⁶¹Notes 11 & 13 *supra*.

⁶²See, e.g., *Virginia Farm Bureau Mut. Ins. Co. v. Saccio*, 204 Va. 769, 133 S.E.2d 268 (1963); APPLEMAN, § 4818, at 205 (1962). See generally *Jones v. Mid-South Ins. Co.*, 358 F.2d 887 (5th Cir. 1966).

⁶³No. 14,949 at 9. Note 32 *supra*.

⁶⁴No. 14,949 at 11.

⁶⁵71 Cal. 2d 659, 456 P.2d 674, 79 Cal. Rptr. 106 (1969).

⁶⁶456 P.2d at 682-83.

⁶⁷*Id.* at 688-89.

to have adopted the theory that the general public is a third-party beneficiary to *all* automobile insurance contracts.⁶⁸ Under such a theory an injured party's rights against a liability insurer are independent of those of the named insured.⁶⁹ The philosophy of the *Barrera* case parallels the law of Virginia only with respect to the certified policy of insurance.

Because the California court interpreted that state's financial responsibility law as making the general public a beneficiary of all insurance contracts, the duty of an insurance company to investigate the insurability of all applicants for coverage naturally follows. The insurance companies of California know that if they do not detect an applicant's fraud before he negligently injures an innocent party, they are estopped from denying liability. A similar situation exists in Virginia when an insurance company is faced with the prospect of issuing a certified insurance policy. However, neither the Virginia legislature nor the courts of the state have deemed it to be in the public interest to impose a duty to investigate the insurability of one who voluntarily seeks liability insurance.⁷⁰

The *Bernstein* decision does not appear to be in harmony with the statutory or case law of Virginia. Because the Fourth Circuit ignored the trial court's finding that Hurtt knew Stephens would be a user of the truck, the reasoning used by the court in reversing, on the ground that Nationwide had attempted to restrict the effect of the omnibus clause, is of uncertain validity. But the soundness of the court's additional basis for reversal, that Bernstein had the status of a third-party beneficiary to the Hurtt-Nationwide insurance contract and therefore Nationwide's liability became fixed at the moment of his injury, is most uncertain. By confusing the distinctly different rules of liability which govern the voluntary-certified policy dichotomy, the court seems to have endeavored to arrive at an outcome which it held to be most consistent with the demands of public policy and the function of liability insurance: Bernstein, an inno-

⁶⁸Throughout its quite lengthy opinion the California court maintained that the public policy underlying that state's financial responsibility law requires the recognition of a duty on the part of a liability insurer to the members of the general public, as a class of potential victims, to assure the validity of the insurance contract which protects them from risk of death or injury. The court insisted that due to the quasi-public nature of the insurance business, the rights and obligations of a liability insurer cannot be determined solely on contract principles. *Id.* at 681-82. *Cf.* *State Farm Mut. Auto. Ins. Co. v. Wood*, 25 Utah 2d 427, 483 P.2d 892 (1971); *Bailey v. Universal Underwriters Ins. Co.*, 474 P.2d 746 (Ore. 1970).

⁶⁹*See* 12 G. COUCH, *supra* note 52 at §§ 45:806, 816 (2d ed. R. Anderson 1964).

⁷⁰The question of an insurance company's duty to investigate the truthfulness of an applicant's answers has not come before the Virginia Supreme Court. However, in the case of *Carrico v. Pennsylvania Nat'l. Mut. Cas. Ins. Co.*, No. 756 (1964), the Circuit Court of Amherst County ruled in favor of the insurance company's right to rely on the applicant's representations. A petition of error was filed; the Supreme Court of Virginia denied the writ saying the judgment was plainly correct.

cent, injured third party should recover compensation for his injury from his tort-feasor's liability insurer.⁷¹

While a statute could be drawn which would adequately protect the public by suspending an insurer's right to rescind a voluntarily obtained policy *ab initio* when injury to an innocent party has occurred, and allowing the right to remain as between the insurer and the named insured, there are no such provisions in the present Virginia statutes. The legislature has acted in this regard only to protect the public from those motorists who have displayed their irresponsibility by requiring an insurer to certify its coverage of such policyholders and imposing absolute liability. Until such time as the legislature acts to extend the protection provided by the certified policy, the law of Virginia would seem to sanction the possibility of innocent, injured victims of negligent motorists going without any compensation.

See addendum for disposition on rehearing.

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⁷¹*But see* *Bryant v. Liberty Mut. Ins. Co.*, 407 F.2d 576 (4th Cir. 1969), where the court said in applying the law of Virginia:

The State of Virginia, whose law we apply, has in no way intimated that all automobile accidents are to be compensable and that technical defenses are to be stricken with a view toward advancing the universality of insurance coverage. Even if this is a desirable goal, Virginia's explicit and consistent recognition of the defense of noncooperation . . . makes it plain that we should not achieve it by judicial fiat.

Id. at 581.

