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## NOTES

### BINDING THE INSURER—APPARENT AUTHORITY AND ESTOPPEL IN VIRGINIA

An insurer may be bound by the conduct of his agent beyond that agent's actual grant of authority.<sup>1</sup> In applying this principle, the Supreme Court of Appeals of Virginia has relied on the concepts of apparent authority,<sup>2</sup> estoppel,<sup>3</sup> or both<sup>4</sup> as a basis for contractual liability.<sup>5</sup> A survey of the decisions reveals a uniformity of result, based, however, upon inconsistent reasoning. A Virginia litigant must rely on confusing precedent, a consequence of the court's seeming lack of recognition of the distinctions between the principles underlying apparent authority and estoppel.

The powers of insurance agents are governed by the law of agency.<sup>6</sup> The facts of each particular case determine the existence of an agency, and there need be no formal agreement for an agency relationship to arise.<sup>7</sup> The insurance company may hold a person out as an agent by furnishing him with the necessary forms, responding to his acts, approving permits of removal given by him, and paying his rent.<sup>8</sup> Insurance solicitors and collectors<sup>9</sup> and even medical examiners<sup>10</sup> are

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<sup>1</sup>*E.g.*, *Bituminous Cas. Corp. v. Baldwin*, 196 Va. 1020, 86 S.E.2d 836 (1955); *Virginia Auto. Mut. Ins. Co. v. Brillhart*, 187 Va. 336, 46 S.E.2d 377 (1948).

<sup>2</sup>Cases cited note 45 *infra*.

<sup>3</sup>*Gilley v. Union Life Ins. Co.*, 194 Va. 966, 76 S.E.2d 165 (1953); *State Farm Fire Ins. Co. v. Rakes*, 188 Va. 239, 49 S.E.2d 265 (1948); *Virginia Auto. Mut. Ins. Co. v. Brillhart*, 187 Va. 336, 46 S.E.2d 377 (1948); *Atlantic Trust & Security Co. v. Girard Fire & Marine Ins. Co.*, 156 Va. 15, 157 S.E. 570 (1931); *Royal Idem. Co. v. Hook*, 155 Va. 936, 157 S.E. 414 (1931); *Virginia Fire & Marine Ins. Co. v. Richmond Mica Co.*, 102 Va. 429, 46 S.E. 463 (1904).

<sup>4</sup>*Wytheville Ins. & Banking Co. v. Teiger*, 90 Va. 277, 18 S.E. 195 (1893).

<sup>5</sup>The scope of this note concerns the law in Virginia pertaining solely to the insurer's relationship as a bona fide contracting party because of his agent's acts, and not to the insurer's liability for the tortious conduct of its agent. For a discussion of tort recovery under the theories of apparent authority and agency by estoppel see 69 W. VA. L. REV. 186 (1967).

<sup>6</sup>*Insurance Co. v. Wolff*, 95 U.S. 326 (1877). Although this note is limited to the insurance agent, the general principles discussed herein may apply to other agencies.

<sup>7</sup>In fact, although a stipulation in the insurance policy may state that only those persons with written authority are to be deemed agents of the insurance company, this provision may be waived by the company. *Creech v. Massachusetts Bonding & Ins. Co.*, 160 Va. 567, 169 S.E. 545 (1933).

<sup>8</sup>*Hardin v. Alexandria Ins. Co.*, 90 Va. 413, 18 S.E. 911 (1894).

<sup>9</sup>*Home Beneficial Life Ins. Co. v. Unemployment Compensation Comm'n*, 181 Va. 811, 27 S.E.2d 159 (1943).

<sup>10</sup>*E.g.*, *South Atl. Ins. Co. v. Hurt*, 115 Va. 398, 79 S.E. 401 (1913); see *Metro-politan Life Ins. Co. v. Hart*, 162 Va. 88, 173 S.E. 769 (1934).

considered the agents of the insurer. An insurer's agent has been held to possess authority coextensive with the business entrusted to his care.<sup>11</sup> Such holdings exemplify the tendency of the Supreme Court of Appeals of Virginia towards a liberal construction of an insurance agent's power.<sup>12</sup>

The Restatement (Second) of Agency<sup>13</sup> describes authority as the power of an agent to conduct transactions on behalf of his principal as a result of the principal's manifestation of consent to the agent.<sup>14</sup> The Code of Virginia defines the term "insurance agent," prescribes the agent's authority,<sup>15</sup> and has been held to distinguish life insurance agents from fire and casualty insurance agents.<sup>16</sup>

In Virginia, apparent authority,<sup>17</sup> or ostensible authority,<sup>18</sup> is that

<sup>11</sup>Mutual Benefit Health & Accident Ass'n v. Ratcliffe, 163 Va. 325, 175 S.E. 870 (1934); Royal Indem. Co. v. Hook, 155 Va. 956, 157 S.E. 414 (1931), quoting from Union Mut. Ins. Co. v. Wilkerson, 80 U.S. (13 Wall.) 222 (1871).

<sup>12</sup>Virginia Auto. Mut. Ins. Co. v. Brillhart, 187 Va. 336, 46 S.E.2d 377 (1948); Home Beneficial Ass'n v. Clark, 152 Va. 715, 148 S.E. 811 (1929); Harrison v. Provident Relief Ass'n, 141 Va. 659, 126 S.E. 696 (1925). *Contra*, National Union Fire Ins. Co. v. Dixon, 206 Va. 568, 206 Va. 568, 145 S.E.2d 187 (1965).

<sup>13</sup>The RESTATEMENT (SECOND) OF AGENCY, because of its concise statement of the generally accepted rules, will be relied on as a framework in the general discussion of the concepts of authority, apparent authority, and estoppel. For a similar summary see Comment, *Government Contracts: Apparent Authority and Estoppel*, 55 GEO. L.J. 830, 831-33 (1967).

<sup>14</sup>RESTATEMENT (SECOND) OF AGENCY § 7 (1958). Manifestation of consent means conduct from which it is reasonable for the agent to infer consent. *Id.*, comment b at 29. "The manifestation may be made by words or other conduct, including acquiescence." *Id.*, comment c at 29.

<sup>15</sup>Particular meanings are ascribed to the individual terms by the Code: "Agent" or "insurance agent," when used without qualification, means any individual, partnership or corporation authorized by any insurance company to solicit, negotiate or effect in its behalf contracts of insurance or annuity, and, if authorized so to do, to collect premiums on such contracts. "Life agent" or "life insurance agent" means an agent of a licensed insurance company authorized to solicit and procure applications for life insurance and annuity contracts, or for accident and sickness insurance, or for both.

VA. CODE ANN. § 38.1-280 (Repl. Vol. 1953).

<sup>16</sup>In *Botts v. Shenandoah Life Insurance Co.*, the court stated:

The authority of a life insurance agent is very different from that of a fire or casualty insurance agent. As is generally known, the latter may, and universally does, make binding contracts of insurance for his principal; on the contrary, a life insurance agent may only take applications for life insurance and is never authorized to actually make contracts. This distinction is recognized in the Code of Virginia, Section 38.1-280....

*Botts v. Shenandoah Life Ins. Co.*, 134 F. Supp. 893, 894 (W.D. Va. 1954).

<sup>17</sup>The Supreme Court of Appeals of Virginia has also used the term "apparent scope of authority." *Bituminous Cas. Corp. v. Baldwin*, 196 Va. 1020, 86 S.E.2d 836 (1955); *Wright v. Shortridge*, 194 Va. 346, 73 S.E.2d 360 (1952); *Peoples Life Ins. Co. v. Parker*, 179 Va. 662, 20 S.E.2d 485 (1942); *Bardach Iron & Steel Co.*

authority which the principal has held the agent out as possessing<sup>19</sup> or which he has permitted the agent to represent that he possesses.<sup>20</sup> A third person, dealing with an insurance agent, and having no notice or knowledge<sup>21</sup> of any limitation on his powers, has the right to rely

v. Charleston Port Terminals, 143 Va. 656, 129 S.E. 687 (1925); J. C. Lysle Milling Co. v. S. W. Holt & Co., 122 Va. 565, 95 S.E. 414 (1918). Apparent authority, however, has an *actual* scope, which is determined by the reasonable belief of the third person that the agent is authorized; in other words, apparent authority defines its own scope. See *Richmond Guano Co. v. E. I. duPont de Nemours & Co.*, 284 F. 803 (4th Cir. 1922); *Nolde Bros., Inc. v. Chalkey*, 184 Va. 553, 35 S.E.2d 827 (1945); RESTATEMENT (SECOND) OF AGENCY § 8, comment c at 32 (1958). Note, however, that while *Nolde Brothers, Inc. v. Chalkey* properly states the principle that apparent authority exists only as to third persons who reasonably believe that authority actually exists, it confuses the concepts of apparent authority and estoppel. *Richmond Guano Co. v. E. I. duPont de Nemours & Co.* states the principle in terms of the "apparent scope of an agent's authority." *Richmond Guano Co. v. E. I. duPont de Nemours & Co.*, 284 F. 803, 807 (4th Cir. 1922). In any event, many courts use the term "apparent scope of authority" coextensively with "apparent authority." See 3A WORDS AND PHRASES 267 (perm. ed. 1953).

Use of the word "apparent" has been somewhat indiscriminate. The term "apparent principal" has been utilized. 69 W. VA. L. REV. 186 (1967). Logically, however, the principal is always *real*, since the third person has the same rights with reference to the principal when apparent authority exists as where the agent is authorized. RESTATEMENT (SECOND) OF AGENCY § 8, comment a at 30 (1958). For an interesting discussion mentioning the "apparent scope of an apparent agent's apparent authority" see Rubenstein, *Apparent Authority: An Examination of a Legal Problem*, 44 A.B.A.J. 849 (1958). The usage of these terms seems to be more a problem of semantics than of legal principles.

<sup>19</sup>Ostensible authority is used by many courts as a synonym for apparent authority. See *Bituminous Cas. Corp. v. Baldwin*, 196 Va. 1020, 86 S.E.2d 836 (1955); *Peoples Life Ins. Co. v. Parker*, 179 Va. 662, 20 S.E.2d 485 (1942).

<sup>20</sup>Apparent authority results from the insurer's manifestations being made to a third person, and not, as when authority is created, to the agent. *Nolde Bros., Inc. v. Chalkey*, 184 Va. 553, 35 S.E.2d 827 (1945); RESTATEMENT (SECOND) OF AGENCY § 8, comment a at 30 (1958). The manifestation may be made directly to the third person, or may be made to the community, as by advertising or continuous employment. RESTATEMENT (SECOND) OF AGENCY § 8, comment b at 31 (1958).

<sup>21</sup>See *Wright v. Shortridge*, 194 Va. 346, 73 S.E.2d 360 (1952); *Southern Packing Corp. v. Crumpler*, 175 Va. 431, 9 S.E.2d 446 (1940); *Bardach Iron & Steel Co. v. Charleston Port Terminals*, 143 Va. 656, 129 S.E. 687 (1925); *J. C. Lysle Milling Co. v. S. W. Holt & Co.*, 122 Va. 565, 95 S.E. 414 (1918). Although these cases concern other than insurance agents, the general agency principles expressed therein apply to the insurance situation. See note 6 *supra* and accompanying text.

<sup>22</sup>See *Peoples Life Ins. Co. v. Parker*, 179 Va. 662, 20 S.E.2d 485 (1942). In *Parker*, the court stated that oral contracts to insure are binding when made by agents acting within the apparent scope of their authority, but held for the insurer since the language of the application negated any such apparent authority. Whether or not the insured read the application, "he is chargeable with notice of what it contained." *Id.* at 487, citing *Flannagan v. Northwestern Mut. Life Ins. Co.*, 152 Va. 38, 146 S.E. 353 (1929) and *Royal Ins. Co. v. Poole*, 148 Va. 363, 138 S.E. 487 (1927). *Contra*, *Virginia Fire & Marine Ins. Co. v. Richmond Mica Co.*, 102 Va. 429, 46 S.E. 463 (1904) (holding insured must have

upon the agent's ostensible powers.<sup>22</sup> Because this person is often ignorant of the legal complexities of the transaction,<sup>23</sup> apparent authority makes any undisclosed limits upon the agent's powers inapplicable to the insured. These limitations are varied and commonly include an agent's lack of power to collect advance premiums,<sup>24</sup> to waive forfeitures,<sup>25</sup> or to make oral binders for temporary insurance.<sup>26</sup> Although not explicitly decided in Virginia, the general rule elsewhere is that where apparent authority exists, the third person has the same rights with reference to the insurer as where the agent is in fact authorized.<sup>27</sup>

In other jurisdictions, courts have often stated that apparent authority is based on estoppel.<sup>28</sup> However, this may be because estoppel is frequently present when there is apparent authority, and because

actual, not constructive, notice of limitations on agent's powers). Compare *Gilley v. Union Life Ins. Co.*, 194 Va. 966, 76 S.E.2d 165 (1953), overruling *Flannagan and Poole, with Northern Neck Mut. Fire Ass'n v. Turlington*, 136 Va. 44, 116 S.E. 363 (1923).

<sup>22</sup>*Royal Indem. Co. v. Hook*, 155 Va. 956, 157 S.E. 414 (1931); *Mutual Life Ins. Co. v. Brown*, 137 Va. 278, 119 S.E. 142 (1923).

<sup>23</sup>*E.g.*, *Virginia Auto. Mut. Ins. Co. v. Brillhart*, 187 Va. 336, 46 S.E.2d 377 (1948); *Royal Indem. Co. v. Hook*, 155 Va. 956, 157 S.E. 414 (1931); *Home Beneficial Ass'n v. Clark*, 152 Va. 715, 148 S.E. 811 (1929); see *Mutual Benefit Health & Accident Ass'n v. Ratcliffe*, 163 Va. 325, 175 S.E. 870 (1934) (agent was new to business and applicant was an expert).

<sup>24</sup>*Mutual Life Ins. Co. v. Brown*, 137 Va. 278, 119 S.E. 142 (1923).

<sup>25</sup>*Virginia Auto. Mut. Ins. Co. v. Brillhart*, 187 Va. 336, 46 S.E.2d 377 (1948).

<sup>26</sup>*Bituminous Cas. Corp. v. Baldwin*, 196 Va. 1020, 86 S.E.2d 836 (1955). Apparently no insured can avoid the statutory limitation prohibiting life insurance agents from making a binding contract. See note 16 *supra*; see also *Peoples Life Ins. Co. v. Parker*, 179 Va. 662, 20 S.E.2d 485 (1942).

<sup>27</sup>*E.g.*, *Viles v. Prudential Ins. Co. of America*, 96 F.2d 3 (10th Cir. 1938), cert. denied, 308 U.S. 626 (1940); *English & American Ins. Co. v. Swain Groves, Inc.*, 218 So. 2d 453 (Dist. Ct. App. Fla. 1969); *McPherson v. McLendon*, 221 So. 2d 75 (Miss. 1969); *Baker v. St. Paul Fire & Marine Ins. Co.*, 427 S.W.2d 281 (Kansas City Ct. App. 1968); *Volker v. Connecticut Fire Ins. Co.*, 22 N.J. Super. 314, 91 A.2d 883 (1952); RESTATEMENT (SECOND) OF AGENCY § 8, comment a at 30-31 (1958). However, apparent authority exists only with regard to third persons who believe and have reason to believe that there is authority. *Richmond Guano Co. v. E. I. duPont de Nemours & Co.*, 284 F. 803 (4th Cir. 1922); *Nolde Bros., Inc. v. Chalkey*, 184 Va. 553, 35 S.E.2d 827 (1945). That is, such authority as a reasonably prudent man would suppose the agent to possess, in light of the insurer's conduct. See *Creech v. Massachusetts Bonding & Ins. Co.*, 160 Va. 567, 169 S.E. 545 (1933).

<sup>28</sup>*Hall v. Union Indem. Co.*, 61 F.2d 85 (8th Cir.), cert. denied, 287 U.S. 663 (1932); *Pearson v. Agricultural Ins. Co.*, 247 Ala. 485, 25 So. 2d 164 (1946); *Gitomer v. United States Cas. Co.*, 140 N.J.Eq. 531, 55 A.2d 291 (1947); *Great Nat'l Life Ins. Co. v. Gafford*, 108 S.W.2d 917 (Tex. Civ. App. 1937). See *Southern Life Ins. Co. v. McCain*, 96 U.S. 84 (1877); *Springfield Mut. Ass'n v. Atnip*, 169 Ark. 968, 279 S.W. 15 (1925); *Guarantee Mut. Fire Ins. Co. v. Jacobs*, 57 So. 2d 845 (Fla. 1952); *Gitz Sash Factory v. Union Ins. Soc'y*, 160 La. 381, 107 So. 232 (1926); *Smith v. New York Life Ins. Co.*, 21 Tenn. App. 312, 110 S.W.2d 342 (1937).

both are based upon outward manifestations.<sup>29</sup> Although it appears that there is no such specific rule in Virginia, the Supreme Court of Appeals has held that an insurer who permits his agent to appear to have authority is estopped to deny such authority.<sup>30</sup> Estoppel is fundamentally a tort concept<sup>31</sup> which in an agency situation makes a principal liable to third persons who have changed their positions in reliance upon conduct which caused them justifiably to believe that the agent actually possessed the authority indicated by that conduct.<sup>32</sup> Estoppel is closely related to the tort concept of misrepresentation.<sup>33</sup> In the typical three-party insurance context it prevents inequitable prejudice to the insured who has relied upon the misrepresentation by barring the insurer from showing another state of facts, even if they are true.<sup>34</sup>

No concise theories of recovery may be found in the Virginia insurance decisions which have been based on apparent authority and estoppel. While the Virginia court has used the terms "apparent authority,"<sup>35</sup> "estoppel,"<sup>36</sup> or both,<sup>37</sup> its decisions have in fact been based upon the principles of equitable estoppel.<sup>38</sup> The lack of recogni-

<sup>29</sup>W. SEAVEY, LAW OF AGENCY § 8E, at 14 (1964).

<sup>30</sup>The court in *Wytheville Insurance & Banking Co. v. Teiger* stated:

[I]t is enough to say that when an insurance company clothes a person with apparent authority to deliver policies and receive the premiums, as was done in this case, it is estopped, after a policy is delivered as a valid contract, to an innocent holder, to set up the defense that the agent acted without written authority from the company.

<sup>31</sup>90 Va. 277, 282, 18 S.E. 195, 197 (1893).

<sup>32</sup>RESTATEMENT (SECOND) OF AGENCY § 8B, comment a at 39 (1958); W. SEAVEY, LAW OF AGENCY § 8E (1964). See RESTATEMENT OF TORTS §§ 872 & 894 (1939); cf. *Hully v. Aluminum Co. of America*, 143 F. Supp. 508 (S.D. Iowa 1956), *aff'd*, 245 F.2d 1 (8th Cir. 1957).

<sup>33</sup>"A person claiming liability by estoppel can recover only if he has so changed his position that he has suffered a loss, or would suffer a loss if he were to perform obligations undertaken with third persons." RESTATEMENT (SECOND) OF AGENCY § 8B, comment e at 41-42 (1958); accord, W. SEAVEY, LAW OF AGENCY § 8E (1964); see *American Security & Trust Co. v. John J. Juliano, Inc.*, 203 Va. 827, 127 S.E.2d 348 (1962); *Heath v. Valentine*, 177 Va. 731, 15 S.E.2d 98 (1941).

<sup>34</sup>See *United States v. Fidelity & Cas. Co.*, 402 F.2d 893 (4th Cir. 1968); *White v. Nationwide Mut. Ins. Co.*, 245 F. Supp. 1 (W.D. Va. 1965), *aff'd*, 351 F.2d 785 (4th Cir. 1966).

<sup>35</sup>*Dye v. Pennsylvania Cas. Co.*, 128 W. Va. 112, 35 S.E.2d 865 (1945).

<sup>36</sup>Cases cited note 45 *infra*.

<sup>37</sup>E.g., *Gilley v. Union Life Ins. Co.*, 194 Va. 966, 76 S.E.2d 165 (1953); *State Farm Fire Ins. Co. v. Rakes*, 188 Va. 239, 49 S.E.2d 265 (1948).

<sup>38</sup>*Wytheville Ins. & Banking Co. v. Teiger*, 90 Va. 277, 18 S.E. 195 (1893).

<sup>39</sup>The principles of equitable estoppel are expressed as follows:

[W]hen one person, by his statements, conduct, action, behavior, concealment, or even silence, has induced another, who has a right to rely upon those statements, etc., and who does rely upon them in good faith, to believe in the existence of the state of facts with which they are

tion of established principles underlying apparent authority and estoppel becomes evident in *Wytheville Insurance & Banking Co. v. Teiger*<sup>39</sup> which discusses binding the insurer in terms of both concepts. The court held that by clothing the insurer's brokers with apparent authority to deliver policies and receive premiums the insurer was estopped, after the policy was delivered as a valid contract, from setting up the defense that the brokers acted without written authority. It is not clear whether *Teiger* stands for the proposition that apparent authority is based on estoppel or whether it holds that estoppel is founded on apparent authority.

A possible distinction between those decisions based on apparent authority and those based on estoppel may be suggested by *Royal Indemnity Co. v. Hook*.<sup>40</sup> A subagent of the insurance company arranged for the transfer of title to an automobile and secured insurance for the vehicle. After an accident, the insurer denied liability, claiming that the policy was invalid due to material misrepresentations in the application. The court, considering two aspects of the case—the subagent's knowledge and the insured's lack of knowledge—held for the insured. The subagent's knowledge of the facts<sup>41</sup> was imputed to the insurer,<sup>42</sup> estopping the insurer from asserting a forfeiture.<sup>43</sup> The insured, having no knowledge of the limitations upon the subagent's power, could rely on the subagent's apparent authority to bind the in-

compatible, and act upon that belief, the former will not be allowed to assert, as against the latter, the existence of a different state of facts from that indicated by his statements or conduct, if the latter has so far changed his position that he would be injured thereby.

*Chesapeake & O. Ry. v. Walker*, 100 Va. 69, 91, 40 S.E. 633, 641 (1902).

[W]hen one of two innocent persons, each of whom is guiltless of an intentional moral wrong, must suffer a loss, it should be borne by that one of them who by his conduct has rendered the injury possible.

*Cantrell v. Booher*, 201 Va. 649, 653, 112 S.E.2d 883, 886 (1960), quoting from *Thomasson v. Walker*, 168 Va. 247, 255-56, 190 S.E. 309, 312 (1937).

<sup>39</sup>90 Va. 277, 18 S.E. 195 (1893).

<sup>40</sup>155 Va. 956, 157 S.E. 414 (1931).

<sup>41</sup>The misrepresentation would have invalidated the policy except that "... the facts were known to the insurance company when the policy was issued, and, if not known, it was charged with knowledge, for the scheme finally adopted was suggested by its agent." *Royal Indem. Co. v. Hook*, 155 Va. 956, 964-65, 157 S.E. 414, 417 (1931).

<sup>42</sup>"Knowledge to the insurance agent as to matters affecting the policy when issued is knowledge to the company . . ." *Id.* at 965, 157 S.E. at 417.

<sup>43</sup>Provisions as to forfeiture for breach of conditions may be waived by the insurer, "... and the company is estopped to set up forfeitures when, with such knowledge, it issues a policy and accepts a premium." *Id.* at 965, 157 S.E. at 417; accord, *Virginia Auto. Mut. Ins. Co. v. Brillhart*, 187 Va. 336, 46 S.E.2d 377 (1948).

suror.<sup>44</sup> The distinction between the agent's (or insurer's) knowledge on the one hand and the third person's lack of knowledge on the other emphasizes the different theoretical bases of apparent authority and estoppel.

The Virginia cases based on apparent authority alone<sup>45</sup> stress the *insured's* lack of notice or knowledge of limitations upon the agent's powers. Without notice of any limitations upon the agent's powers, the insured may reasonably rely on the agent's ostensible powers.<sup>46</sup> Likewise, "oral binders" or contracts for temporary insurance, entered into by agents within the apparent or ostensible scope of their authority but not within their actual grants of authority, are binding on the insurance company which they represent.<sup>47</sup>

Conversely, the cases based solely on estoppel emphasize the *agent's* knowledge in situations of forfeiture.<sup>48</sup> For example, an agent's knowl-

<sup>44</sup>"One who deals with an agent and has no knowledge of any limitations upon his power may deal upon the faith of his ostensible powers, whether this agency be general or special." 155 Va. at 968, 157 S.E. at 418; *accord*, Home Beneficial Ass'n v. Clark, 152 Va. 715, 148 S.E. 811 (1929); Mutual Life Ins. Co. v. Brown, 137 Va. 278, 119 S.E. 142 (1923).

<sup>45</sup>Bituminous Cas. Co. v. Baldwin, 196 Va. 1020, 86 S.E.2d 836 (1955); Mutual Benefit Health & Accident Ass'n v. Ratcliffe, 163 Va. 325, 175 S.E. 870 (1934); Home Beneficial Ass'n v. Clark, 152 Va. 715, 148 S.E. 811 (1929); Mutual Life Ins. Co. v. Brown, 137 Va. 278, 119 S.E. 142 (1923).

<sup>46</sup>In *Mutual Life Ins. Co. v. Brown*, an insurance agent collected \$700 from the insured to be applied to seven years' advance premiums for life insurance. The insurer cancelled the policy after one year, asserting that the agent had no power to collect advance payments. "[The insured] had no notice of any limitation upon the powers of [the agent], and had the right to deal with him upon the faith of his ostensible powers, whether his agency was general or special." Mutual Life Ins. Co. v. Brown, 137 Va. 278, 284, 119 S.E. 142, 144 (1923); *accord*, Home Beneficial Ass'n v. Clark, 152 Va. 715, 148 S.E. 811 (1929). In *Mutual Benefit Health & Accident Ass'n v. Ratcliffe*, the insured applied for a health and accident policy with the soliciting agent of the insurer. The insurer refused to pay the policy benefits upon the insured's illness. Such an agent, the court said, has all ostensible powers, and when an applicant has no knowledge of limitations upon the agent's powers, he may assume that they are coextensive with the business entrusted to the agent's care. Judgment for the insured was reversed, however, since the insured was responsible for material misrepresentations in the application. Mutual Benefit Health & Accident Ass'n v. Ratcliffe, 163 Va. 325, 175 S.E. 870 (1934).

<sup>47</sup>Bituminous Cas. Co. v. Baldwin, 196 Va. 1020, 86 S.E.2d 836 (1955); Peoples Life Ins. Co. v. Parker, 179 Va. 662, 20 S.E.2d 485 (1942).

<sup>48</sup>Gilley v. Union Life Ins. Co., 194 Va. 966, 76 S.E.2d 165 (1953); State Farm Fire Ins. Co. v. Rakes, 188 Va. 239, 49 S.E.2d 265 (1948); Virginia Auto. Mut. Ins. Co. v. Brillhart, 187 Va. 336, 46 S.E.2d 377 (1948); Atlantic Trust & Security Co. v. Girard Fire & Marine Ins. Co., 156 Va. 15, 157 S.E. 570 (1931); Royal Indem. Co. v. Hook, 155 Va. 956, 157 S.E. 414 (1931); Virginia Fire & Marine Ins. Co. v. Richmond Mica Co., 102 Va. 429, 46 S.E. 463 (1904). These cases, based solely on estoppel, are not to be confused with those cases in other jurisdictions holding that apparent authority is based on estoppel. See text accompanying notes 28 and



edge of a sale of the insured property may estop the insurer from asserting a forfeiture<sup>49</sup> even though there is an express policy provision barring agents from waiving forfeitures.<sup>50</sup> The agent's knowledge is imputed to the insurer, estopping the latter from asserting policy provisions as to forfeiture, when the insurer issues a policy and accepts the premium.<sup>51</sup> Similarly, the insurer may be estopped from relying on false answers in a life insurance application in order to avoid liability where its agent fills in the false answers to questions truthfully answered by the insured.<sup>52</sup>

Usually distinctions between the two concepts will be of little consequence since in most of the situations where apparent authority exists, estoppel is also present, although unnecessary as a basis for the principal's liability.<sup>53</sup> Because the two concepts so frequently coincide and because both are based upon outward manifestation,<sup>54</sup> the Su-

30 *supra*. *Contra*, *Creech v. Massachusetts Bonding & Ins. Co.*, 160 Va. 567, 169 S.E. 545 (1933) (suggesting estoppel as a basis for the insurer's liability outside the forfeiture situations). However, no Virginia cases are cited by the court as authority for this position.

<sup>49</sup>"[T]his court has so often decided that the conduct of the agent estops the insurance company from asserting the forfeiture relied on that it may be stated as established law in this jurisdiction." *Virginia Fire & Marine Ins. Co. v. Richmond Mica Co.*, 102 Va. 429, 432, 46 S.E. 463, 464 (1904); *accord*, *State Farm Ins. Co. v. Rakes*, 188 Va. 239, 49 S.E.2d 265 (1948) (insurer estopped to rely on forfeiture for removal of personalty covered by fire insurance by agent's agreement with the insured to make a transfer); *Atlantic Trust & Security Co. v. Girard Fire & Marine Ins. Co.*, 156 Va. 15, 157 S.E. 570 (1931) (insurer estopped from asserting forfeiture of policy under clause relating to conditional ownership by agent's agreement with insured that a policy rider was not needed).

<sup>50</sup>"In other words, a nonwaiver clause may itself be waived." *Virginia Auto. Mut. Ins. Co. v. Brillhart*, 187 Va. 336, 344, 46 S.E.2d 377, 381 (1948); *accord*, *Woodmen of the World Life Ins. Soc'y v. Grant*, 185 Va. 288, 38 S.E.2d 450 (1946); *Atlantic Trust & Security Co. v. Girard Fire & Marine Ins. Co.*, 156 Va. 15, 157 S.E. 570 (1931); *Virginia Fire & Marine Ins. Co. v. Richmond Mica Co.*, 102 Va. 429, 46 S.E. 463 (1904). The legal theories distinguishing waiver and estoppel have not been recognized in Virginia and the terms are used interchangeably in insurance decisions. For a critical examination of this problem see Note, *Waiver, Election and Estoppel in Virginia Insurance Litigation*, 48 VA. L. REV. 416 (1962).

<sup>51</sup>*Virginia Auto. Mut. Ins. Co. v. Brillhart*, 187 Va. 336, 46 S.E.2d 377 (1948) (knowledge to the insurance agent as to matters affecting the policy when issued is knowledge to the company, and insurer in issuing policy and accepting premiums with knowledge of breach of conditions is estopped to set up forfeiture) (dictum); *Royal Indem. Co. v. Hook*, 155 Va. 956, 157 S.E. 414 (1931) (automobile indemnity policy held not invalid for misstatement in application respecting ownership where insurer knew facts by implication when policy was issued).

<sup>52</sup>*E.g.*, *Gilley v. Union Life Ins. Co.*, 194 Va. 966, 76 S.E.2d 165 (1953); *Modern Woodmen of America v. Lawson*, 110 Va. 81, 65 S.E. 509 (1909).

<sup>53</sup>W. SEAVEY, LAW OF AGENCY § 8, at 14 (1964).

<sup>54</sup>Apparent authority and estoppel are both based upon the underlying principle of the objective theory of contracts, that one should be bound by what he manifests and not by what he intends. W. SEAVEY, LAW OF AGENCY § 8, at 14 (1964).

preme Court of Appeals of Virginia has seemingly overlooked their basic differences. The principal in an apparent authority situation immediately becomes a party to a valid contract, with both rights and liabilities.<sup>55</sup> On the other hand, estoppel only prevents a loss to the third party and creates no rights in the principal.<sup>56</sup> Moreover, any third party seeking recovery based upon estoppel must not only show reliance, as in apparent authority, but must also demonstrate a detrimental change of position.<sup>57</sup>

In jurisdictions where apparent authority is held to be based on estoppel,<sup>58</sup> the insured's quantum of proof is the same under both concepts: lack of knowledge of the actual authority of the agent, reliance, and a detrimental change of position. Notwithstanding the *Teiger* case, which may suggest that apparent authority is based on estoppel, it is clear that in Virginia estoppel requires more elements to be proved than does apparent authority.<sup>59</sup>

As an example of the differences between apparent authority and estoppel, an insurer's agent may contract with a third person for insurance, and represent, beyond the scope of his actual authority, that the policy will be immediately effective. To bind the insurer to the contract, the insured need only show his lack of knowledge of the actual limits of the agent's authority and reliance upon that agent's apparent authority.<sup>60</sup> The insurer, likewise under the theory of apparent authority, would then have rights under that contract; for example, he could demand payment of premiums and cancel the policy for non-payment of premiums or misrepresentations in the application.<sup>61</sup> Before

<sup>55</sup>THE RESTATEMENT (SECOND) OF AGENCY provides:

[W]hen one tells a third person that another is authorized to make a contract of a certain sort, and the other, on behalf of the principal, enters into such a contract with the third person, the principal becomes immediately a contracting party, *with both rights and liabilities* to the third person, irrespective of the fact that he did not intend to contract or that he had directed the "agent" not to contract, and *without reference to any change of position by the third party.*

RESTATEMENT (SECOND) OF AGENCY § 8, comment d at 32 (1958) (emphasis added).

<sup>56</sup>RESTATEMENT (SECOND) OF AGENCY § 8, comment d at 33, § 8B, comment b at 40 (1958). Thus, it is reasonable to hold the third party in the estoppel situation to a greater degree of proof; not only reliance, as in apparent authority, but also a change of position to his detriment. "A party cannot claim an estoppel unless he has been misled to his injury by relying upon the conduct of the other party." *American Security & Trust Co. v. John J. Juliano, Inc.*, 203 Va. 827, 834, 127 S.E.2d 348, 352 (1962), *quoting from* *Heath v. Valentine*, 177 Va. 731, 15 S.E.2d 98 (1941).

<sup>57</sup>Note 32 *supra* and accompanying text.

<sup>58</sup>Text accompanying note 28 *supra*.

<sup>59</sup>Note 32 *supra*.

<sup>60</sup>Text accompanying note 46 *supra*.

<sup>61</sup>See text accompanying note 55 *supra*.

any loss<sup>62</sup> occurred, the insured would have difficulty showing a detrimental change of position which would estop the insurer from asserting a forfeiture. While it may be rationally argued that the insured's mere entry into the contract was a detrimental change of position, it would seem extraordinary to bind the insurer in this situation if the insured had not otherwise changed his position, especially if the insurer was simply remiss in denying his agent's apparent authority as opposed to having affirmatively held the agent out as possessing such authority. Once the loss has occurred, the insured may well succeed under the theory of estoppel, by showing, additionally, a change of position, since the insured, by entering into the contract, has most likely given up the opportunity to enter into a contract with another insurer which would have provided the desired coverage.

In any event, since the Supreme Court of Appeals of Virginia allows recovery under the lesser standard of apparent authority,<sup>63</sup> it is certainly to the insured's disadvantage to attempt to bind the insurer, either before or after loss, under the theory of estoppel. Estoppel is still useful, however, where the insurer asserts a forfeiture of the policy on the grounds of an alleged "wrong" on the part of the insured. The insured is justifiably held to an additional factor of proof, *i.e.*, detrimental change of position, to overcome the evidence of his "wrong" and estop the forfeiture.

The Supreme Court of Appeals of Virginia has been given to mere recitations of the terms "apparent authority," "estoppel," or both, in reaching equitable decisions. This practice may have merit in that it allows judicial flexibility in reaching an equitable result in each particular fact situation. Nevertheless, this flexibility may be outweighed by the corresponding burden placed upon the litigants to prepare their respective cases without the benefit of clearly established principles. The distinction which the *Hook* case may suggest is simply a means to this end. Following *Hook*, the insured need prove only reliance and a lack of knowledge of the limitations upon the agent's power in order to bind the insurer to his agent's apparent authority.<sup>64</sup> Whereas to estop the insurer from asserting a forfeiture of the policy, the insured must offer evidence of the agent's knowledge of the actual

<sup>62</sup>The word "loss" in connection with insurance means the "[d]eath, injury, destruction or damage in such a manner as to charge the insurer with a liability under the terms of the policy . . ." *Atlantic Life Ins. Co. v. Greenfield*, 199 Va. 506, 509, 100 S.E.2d 717, 719 (1957).

<sup>63</sup>*See* cases cited note 45 *supra*.

<sup>64</sup>Text accompanying note 44 *supra*.

facts, and his own reliance and detrimental change of position.<sup>65</sup> Proof of contrary propositions would sustain the insurer's defense under each concept.

The merits of each litigant's case should be determined upon the underlying principles of the law and not upon mere invocation of terminology. Clarification of the concepts of apparent authority and estoppel in Virginia would provide a more reliable precedent, founded upon concise and well-reasoned principles.

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<sup>65</sup>See *State Farm Ins. Co. v. Rakes*, 188 Va. 239, 49 S.E.2d 265 (1948); *Atlantic Trust & Security Co. v. Girard Fire & Marine Ins. Co.*, 156 Va. 15, 157 S.E. 570 (1931).