IN BRIEF

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FOR WHOM THE LIMITATION PERIOD TOLLS!!

Should a period of limitation written in a contract trigger the tolling provision of §8.01-229(e) of the Code of Virginia, or is it merely contractual with no statutory connection? [Section (e) shown at end of this article] This was the question addressed by the Twenty-First Judicial Circuit in the case of *Graham v. United Services Automobile Association* (USAA), 2014 Va. Cir. LEXIS 98 (Fairfax). The case involved a house fire. The parties to the action stipulated to the following facts: The date of the fire; the filing of a lawsuit at 4:49p.m. exactly two years after that fire; nonsuit of that action; and filing of the present action after the expiration of the two year period. [1] The defendant, USAA, filed a plea in bar which asserted that the second case was filed after the expiration of the period provided in the contract of insurance and, therefore, was time barred.

In reaching its decision, the Court considered two opposing views of the issue. The first stated in *Massie v. Blue Cross and Blue Shield of Virginia*, 256 Va. 161 (1998) that they found no statutory connection and, therefore, contractual periods of limitation are not subject to the tolling provision in §8.01-229(e).[2] On the other hand, several federal cases hold that if the legislature requires the time period for filing suit to be included in a contract, that provision acts like a statute of limitations, and §8.01-229(e) applies. The Court in this case finds that the federal cases are based on two erroneous assumptions.

The first assumption is "that the legislature did not know how to enact a statute of limitations on suits to enforce fire insurance policies".[3] The Court asserts that this assumption is false, and that the legislature "clearly knows how to enact statutes of limitations".[4] The Court continues to point out that the legislature has enacted many special statute of limitations provisions throughout the Code, and could have done so for fire insurance policies if that were its intention. The Supreme Court of Virginia has asserted that the provisions of Code §38.2-2105, which requires suit within a specified time, are more particularly suited to fire insurance

[1] *Id*. at 2-3.
[2] *Id*. at 3.
[3] *Id*. at 4.
[4] *Id*. at 4.

policies than the general statute of limitations provisions. Regarding this first assumption, the Court finds that "the legislature knows how to create tolling provisions for suits on insurance contracts, and the instruction from the Supreme Court of Virginia is that the court should enforce policies as written."[5]

The second assumption made in the federal cases is "that the legislature did not intend the outcome in this case that contractual limitations are not subject to any of the tolling provisions of §8.01-229".[6] The legislature has spent a great deal of time and energy creating a comprehensive regulatory scheme and the provisions in question are a part of that scheme. The Court continued, stating that "an entire title of the Code, Title 38.2, is devoted to insurance" and contracts are "very tightly prescribed".[7] "For fire insurance policies, the form to be used is regulated by the contents of Chapter 21, an entire chapter, is devoted to fire insurance."[8]

The Court finds that in all of the Chapters and provisions dealing with insurance, there is nothing which indicates that the legislature intended to convert contracts of insurance into statutes of limitations. "The single biggest difference between a statute of limitations and a contractual limitation on the time in which suit can be filed is that contractual periods are not subject to the tolling provisions of §8.01-229."[9] Several practical examples of why this is good policy are cited by the Court. If a policy holder dies and the policy passes to an infant, if tolling of the time provision is allowed, the insurance company's exposure and the reserves to cover liabilities may remain undetermined for years. Also, if a building is damaged by fire but no suit is filed for years because of tolling, it may be impossible to differentiate fire damage from the damage of allowing an unrepaired building to sit unused for years.

For all the reasons given above, the Court upholds the Massie decision and determines that no tolling can be allowed due to the nonsuit. As a result, the plea in bar is upheld. Contractual time limitations are not statutes of limitations and, therefore, are fixed and not subject to tolling.

DECISIONS BY THE SUPREME COURT OF VIRGINIA REGARDING INSURANCE INDUSTRY ISSUES April 13-17, 2015 SESSION

The following case summaries involve insurance litigation issues. We have downloaded these summaries directly from the Virginia Supreme Court website. We offer them to you without further legal analysis. However, if you would like a brief legal analysis or the full text of these cases, please make your request by return e-mail. If you would like to discuss the ramifications of these decisions, please call (804) 893-3854 for Ray; (804) 893-3855 for Kevin or (804) 893-3866 for Mark.

140242 **Yelp, Inc. v. Hadeed Carpet Cleaning** 04/16/2015 Ancillary to a Virginia defamation action, a circuit court was not empowered to enforce a subpoena duces tecum requiring a California Internet-based social networking and consumer rating company to produce documents in the Commonwealth identifying three individuals who filed adverse reviews of a Virginia carpet cleaning company with the ratings company using pseudonyms. Although the General Assembly has expressly authorized Virginia courts to exercise personal jurisdiction over nonresident parties, it has not expressly authorized Virginia courts to compel nonresident non-parties to produce documents located outside of Virginia. Subpoena power was not conferred upon the circuit court by the Internet company's registering to conduct business in Virginia or designating a registered agent for service of process. The judgment of the Court of Appeals and the contempt order of the circuit court are vacated and the case is remanded for further proceedings consistent with this opinion.

[5] *Id*. at 6.
[6] *Id*. at 9.
[7] *Id*. at 6.
[8] *Id*. at 7.
[9] *Id*. at 9.

140275 **Bartolomucci v. Federal Ins. Co.** 04/16/2015 In a declaratory judgment suit concerning the scope and application of an insurance policy providing coverage for a partner's vehicle only when that vehicle is "used in" a law firm's business or personal affairs, the partner's use of his vehicle to drive from home to work did not fall within the coverage as stated in the policy. While the trial court should overrule a motion to strike the evidence where there is any doubt on the question, based on this record, no evidence supported the claim that the law firm's policy covered the partner's vehicle at the time of the collision in this case, and it was conclusively apparent that he had proven no cause of action against the law firm's insurer. The circuit court should have granted the motion to strike made at the conclusion of the partner's case-in-chief. As the jury finding was contrary to the evidence, the court properly set it aside and entered final judgment in favor of the insurer pursuant to Code § 8.01-680. The judgment is affirmed.

140297 **Vo v. Federal Ins. Co.** 04/16/2015 In a declaratory judgment suit concerning the scope and application of an insurance policy providing coverage for a partner's vehicle only when that vehicle is "used in" a law firm's business or personal affairs, the partner's use of his vehicle to drive from home to work did not fall within the coverage as stated in the policy. While the trial court should overrule a motion to strike the evidence where there is any doubt on the question, based on this record, no evidence supported the claim that the law firm's policy covered the partner's vehicle at the time of the collision in this case, and it was conclusively apparent that he had proven no cause of action against the law firm's insurer. The circuit court should have granted the motion to strike made at the conclusion of the partner's case-in-chief. As the jury finding was contrary to the evidence, the court properly set it aside and entered final judgment in favor of the insurer pursuant to Code § 8.01-680. The judgment is affirmed.

140748 **Anheuser-Busch Co. v. Cantrell (ORDER)** 04/16/2015 In mesothelioma litigation brought against numerous defendants who owned premises where plaintiff had previously worked and allegedly suffered exposure to asbestos, the circuit court erred in granting plaintiff's motion for nonsuit after the parties had completed their briefing and argument on demurrers. An action is submitted for decision within the meaning of Code § 8.01-380(A) when the case is in the hands of the trial judge for final disposition, either on a dispositive motion or upon the merits, and a demurrer is a dispositive motion for the purpose of precluding a nonsuit under this statute. In this case, neither the parties nor the court anticipated any further proceedings on the demurrers which, therefore, were committed to the court for its ruling. Thus, the case was in the hands of the trial judge for final disposition at the time of plaintiff's nonsuit motion. The judgment of the circuit court is reversed and the case is remanded for further proceedings consistent with this order. Combined case with Record No. 140749

140749 **Newport News Shipbuilding v. Cantrell (ORDER)** 04/16/2015 In mesothelioma litigation brought against numerous defendants who owned premises where plaintiff had previously worked and allegedly suffered exposure to asbestos, the circuit court erred in granting plaintiff's motion for nonsuit after the parties had completed their briefing and argument on demurrers. An action is submitted for decision within the meaning of Code § 8.01-380(A) when the case is in the hands of the trial judge for final disposition, either on a dispositive motion or upon the merits, and a demurrer is a dispositive motion for the purpose of precluding a nonsuit under this statute. In this case, neither the parties nor the court anticipated any further proceedings on the demurrers which, therefore, were committed to the court for its ruling. Thus, the case was in the hands of the trial judge for final disposition at the time of plaintiff's nonsuit motion. The judgment of the circuit court is reversed and the case is remanded for further proceedings consistent with this order. Combined case with Record No. 140748