

**IN THE UNITED STATES DISTRICT COURT  
FOR THE WESTERN DISTRICT OF VIRGINIA  
ROANOKE DIVISION**

<b>VIRGINIA FARM BUREAU</b>	)	
<b>MUTUAL INSURANCE CO.,</b>	)	<b>Civil Action No.: 7:03cv00122</b>
	)	
<b>Plaintiff,</b>	)	<b><u>MEMORANDUM OPINION</u></b>
	)	
<b>v.</b>	)	
	)	<b>By: Samuel G. Wilson</b>
<b>JOHNSON A. SUTHERLAND, et al.,</b>	)	<b>United States District Judge</b>
	)	
<b>Defendants.</b>	)	

This is an action for declaratory relief filed by Virginia Farm Bureau Mutual Insurance Company (“Virginia Farm Bureau”), seeking to establish its obligations under a family automobile insurance policy for claims arising out of an accident in which Johnson A. Sutherland struck a pedestrian, Cariangeli Leon. Leon filed a tort action against Sutherland in the Circuit Court of Montgomery County, Virginia. Virginia Farm Bureau, in turn, filed this declaratory judgment action naming both Sutherland and Leon as defendants. Virginia Farm Bureau is a Virginia corporation with its principal place of business in Virginia. Defendant Johnson A. Sutherland is a citizen of Houston, Texas, and defendant Cariangeli Leon is a citizen of Puerto Rico. The amount in controversy exceeds \$75,000 and the court, therefore, has diversity jurisdiction pursuant to 28 U.S.C. § 1332. The matter is before the court on Virginia Farm Bureau’s motion for summary judgment. The court finds that there are no genuine issues of material fact and that Sutherland failed to satisfy the notice requirements of Virginia Farm Bureau’s policy, a condition precedent to coverage. Virginia Farm Bureau therefore has no duty to defend or indemnify Sutherland and the court grants Virginia Farm Bureau’s motion for

summary judgment.

## I.

On November 11, 2000, Johnson Sutherland was operating a vehicle owned by his uncle, Kenneth Sutherland, and insured under a policy issued by Virginia Farm Bureau. As he turned left at a four-way stop, looking into the morning sun, Sutherland struck Cariangeli Leon, a pedestrian. The impact knocked Leon to the ground, and she was transported to the hospital by ambulance. Sutherland was arrested at the scene for driving under the influence and later convicted. On that same day, Sutherland informed his uncle of the accident by phone from the jail.

The applicable Virginia Farm Bureau policy contained a provision requiring that, “In the event of an accident, occurrence, or loss, written notice. . . shall be given by or for the insured to the company. . . as soon as practicable.” It was not until July 5, 2002, however, that Kenneth Sutherland informed Virginia Farm Bureau that he had received a letter dated July 3, 2002, notifying him of a liability claim raised by Leon. Virginia Farm Bureau raised the late notice problem with Kenneth Sutherland, Johnson Sutherland, and counsel for Leon in a letter. Nevertheless, Virginia Farm Bureau took a recorded statement from Johnson Sutherland under a full reservation of its rights. Virginia Farm Bureau then filed this suit, seeking a declaration that it owes no duty to defend or indemnify Sutherland against Leon’s claims.

## II.

Virginia courts construe a notice provision as a condition precedent to liability. The insured’s failure to give timely notice voids the insurer’s obligation under the policy. Because the court finds that a 601-day delay in providing notice is untimely as a matter of law and that Sutherland was not excused

from providing notice, Virginia Farm Bureau is not obligated to defend or indemnify Sutherland.

Under Virginia law, a notice provision in an automobile insurance policy is reasonable and enforceable, and “performance. . . is a condition precedent to coverage.” State Farm v. Scott, 372 S.E.2d 383, 385 (Va. 1988). Virginia courts have interpreted the requirement that notice be given “as soon as practicable” to mean that “the notice must be given within a reasonable time after the accident.” State Farm Mut. Auto. Ins. Co. v. Douglas, 148 S.E.2d 775, 777 (Va. 1966). Whether delayed notice is reasonable is generally an issue of fact, with the timeliness of notice considered in light of all the facts and circumstances of the particular case. Stonewall Ins. Co. v. Hamilton, 727 F. Supp. 271, 273 (W.D. Va. 1989). However, “when the facts are undisputed and certain the question becomes one of law for the court.” Douglas, 148 S.E.2d at 777. “The question of delayed notice may be decided as a matter of law where reasonable men could not differ as to the inferences to be drawn from the undisputed facts.” Atlas Ins. Co. v. Chapman, 888 F. Supp. 742, 745 (E.D.Va. 1995).

In this case, Virginia Farm Bureau did not receive notice until July 5, 2002, 601 days after the November 11, 2000, accident. The court finds that a delay of 601 days is beyond the outer limits of reasonableness. Virginia courts have generally held that notice given beyond 75 days, without a reasonable excuse, is untimely. See, e.g., Lord v. State Farm Fire & Cas. Co., 295 S.E.2d 796, 799-800 (Va. 1982) (holding that a 173-day delay constituted untimely notice); State Farm Mut. Auto Ins. Co. v. Porter, 272 S.E.2d 196, 200 (Va. 1980) (holding that a delay of seven months constituted untimely notice); See also, Chapman, 888 F. Supp. at 746 (applying Virginia law to find that a 126-day delay was a substantial and material breach of the notice provision). The court concludes that Sutherland’s failure to give notice to Virginia Farm Bureau for 601 days after the accident was

therefore a substantial and material breach of a condition precedent of the policy.

The court further finds that the defendants have not presented a reasonable excuse for the delayed notice. A delay may be excusable “when the accident is trivial, results in no apparent harm and furnishes no reasonable ground for the insured to believe that a claim might arise.” Hamilton, 727 F. Supp at 273. Here, the undisputed facts establish that the accident was not “trivial.” See id. In his statement to Virginia Farm Bureau, Sutherland admitted that he was aware that Leon was injured and that she was taken by ambulance to the hospital, and he admitted that he was concerned at the time that Leon might file a personal injury claim against him. This accident, therefore, is distinguishable from an accident which “results in no apparent harm.” See id. The undisputed circumstances of the accident and Leon’s injury and treatment provided reasonable grounds for Sutherland to believe that a claim might arise, and the delay in notifying Virginia Farm Bureau is not excusable.

Leon claims that Sutherland’s failure to give timely notice was not a “substantial and material” breach sufficient to void application of the policy and that Virginia Farm Bureau was not prejudiced by the delay. The Virginia Supreme Court has held that “if violation of the notice requirement is substantial and material, the insurance company need not show that it was prejudiced by such a violation.” Scott, 372 S.E.2d at 385. An absence of prejudice is still a “circumstance to be considered,” however, in evaluating the materiality of the violation. Id. The court need not reach this issue because Sutherland failed to provide any notice to Virginia Farm Bureau for 601 days. Absence of prejudice is relevant to materiality only where the insured gives incomplete information to the insurer, not where, as here, the insured provides no information at all. See State Farm Fire & Cas. Co. v. Walton, 423 S.E.2d 188, 192 (Va. 1992) (“Although absence of prejudice may have a bearing on the issue of materiality of the

information that an insured should have given, when no notice is given, lack of prejudice is not an issue.”) Because the court finds that the failure to give notice for 601 days is a “substantial and material” violation of a condition precedent of the policy, Virginia Farm Bureau is not required to show that it was prejudiced by the delay.

### **III.**

For the reasons stated, the court finds that Sutherland failed to give timely notice of the November 11, 2000, accident, a condition precedent to Virginia Farm Bureau’s obligations under the policy. Virginia Farm Bureau, therefore, owes no duty to defend or indemnify Sutherland against Leon’s claim, and the court grants its motion for summary judgment.

**ENTER:** This October 19, 2004.

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UNITED STATES DISTRICT JUDGE

**IN THE UNITED STATES DISTRICT COURT  
FOR THE WESTERN DISTRICT OF VIRGINIA  
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<b>VIRGINIA FARM BUREAU</b>	)	
<b>MUTUAL INSURANCE CO.,</b>	)	<b>Civil Action No.: 7:03cv00122</b>
	)	
<b>Plaintiff,</b>	)	<b><u>FINAL ORDER</u></b>
	)	
<b>v.</b>	)	
	)	<b>By: Samuel G. Wilson</b>
<b>JOHNSON A. SUTHERLAND, et al.,</b>	)	<b>United States District Judge</b>
	)	
<b>Defendants.</b>	)	

In accordance with the accompanying memorandum opinion entered on this day, it is **ORDERED** and **ADJUDGED** that plaintiff Virginia Farm Bureau's motion for summary judgment is **GRANTED**. This action shall be stricken from the docket of this court.

**ENTER:** This October 19, 2004.

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UNITED STATES DISTRICT JUDGE

