I. Regulatory Limits on Claims Handling

A. Timing for Responses and Determinations

Virginia’s Administrative Code contains rules and regulations governing the investigation, payment, and denial of claims. See 14 V.A.C. § 5-400-10, et seq. An insurer must provide notice of the acceptance or denial of a claim to the insured within 15 working days after receipt of proof of loss. 14 V.A.C. § 5-400-60(A). If additional time is needed to investigate the claim, the insurer must give notice within the above time frame and give reasons for the delay. Id. If an investigation of a claim has not been completed then within 45 days from the date of notification of the claim, and every 45 days thereafter, the insurer shall send to the claimant a letter setting forth the reasons additional time is needed for investigation, unless otherwise specified in the policy. 14 V.A.C. § 5-400-60(B).

Additionally, insurers must acknowledge their receipt of claims within 10 working days unless payment is made within such time. 14 V.A.C. § 5-400-50(A). Insurers must reply to any communications from a claimant reasonably suggesting that a response is expected within 10 working days of their receipt. Id. at § 5-400-50(C).

B. Standards for Determinations and Settlements

The Virginia unfair claims settlement practices statute requires insurers to acknowledge and act reasonably promptly with respect to insurance claims. Va. Code § 38.2-510(2). Insurers must adopt and implement reasonable standards for the prompt investigation of claims. Va. Code § 38.2-510(3). Neither may insurers arbitrarily or unreasonably refuse a claim. Va. Code § 38.2-510(4). However, where an insurer possesses an enforceable contractual right to exercise its sole discretion to approve or reject certain benefits, a rejection by the insurer can only be overturned if evidence demonstrates an abuse of discretion. Blue Cross & Blue Shield of Va. v. Keller, 248 Va. 618, 450 S.E.2d 136 (1994).

The Virginia Administrative Code, 14 V.A.C. § 5-400-10, et seq., sets forth various standards governing claims handling and settlement. Any denials of claims must be made in writing and must set forth a reasonable explanation of the basis for denial. 14 V.A.C. § 5-400-70(A), (B). If denial is based on policy provisions, then specific reference to such
provisions must be made in the letter denying payment on the policy. Id. at § 5-400-70(B).

C. State Privacy Laws, Rules, and Regulations

Virginia Code sections 38.2-600 through 38.2-620 embody Virginia’s privacy protection laws regarding insurance information. The statutes impose conditions and limitations on disclosure and provide penalties for violations by insurance institutions. Section 38.2-617 creates a private right of action against an insurance institution for certain types of disclosure violations. A claimant has two years from when the violation is discovered or should have been discovered to bring such a claim. Recovery is limited to actual damages, costs, and fees. Id. In addition, Virginia has enacted legislation to conform to the federal Gramm-Leach-Bliley Act of 1999. See Va. Code §§ 38.2-221.1-221.2.

II. Principles of Contract Interpretation

A. Insurance Policies are Contracts

An insurance policy is a contract and the words used in the policy are given their ordinary and customary meaning. Graphic Arts Mut. Ins. Co. v. C.W. Warthen Co., 240 Va. 457, 397 S.E.2d 876 (1990). Virginia courts interpret insurance policies in accordance with the intention of the parties based on the words they have used in the document. TravCo Ins. Co. v. Ward, 284 Va. 547, 736 S.E.2d 321 (2012). When the terms in a contract are clear and unambiguous, the contract is construed according to its plain meaning. Barber v. VistaRMS, Inc., 272 Va. 319, 634 S.E.2d 706 (2006). Each phrase and clause of an insurance contract should be considered and construed together and seemingly conflicting provisions harmonized when that can be reasonably done. TravCo, 284 Va. at 552, 736 S.E.2d at 325. Where there is doubt as to the meaning of insurance policy language, courts will construe the language in favor of an interpretation that grants coverage to the insured. PBM Nutritionals, LLC v. Lexington Ins. Co., 283 Va. 624, 724 S.E.2d 707 (2012).

B. Ambiguity

Any ambiguity must be found on the face of the policy. Nationwide Mutual Ins. v. Wenger, 222 Va. 263, 268, 278 S.E.2d 874, 877 (1981). Language is ambiguous when it may be understood in more than one way or when such language refers to two or more things at the same time. Lincoln National Life Ins. Co. v. Commonwealth Corrugated Container Corp., 229 Va. 132, 136-37, 327 S.E.2d 98, 101 (1985). Where two constructions of an insurance policy are equally possible, the construction most favorable to the insured will be adopted. PBM Nutritionals, 283 Va. at 633-634, 724 S.E.2d at 713.

C. Exclusionary Provisions

Exclusionary language limiting coverage must be clear and unambiguous. TravCo, 284 Va. at 553, 736 S.E.2d at 325. Exclusions are construed according to their plain language. Id. The burden is on the insurer to prove that an exclusion of coverage applies. Id. Reasonable policy exclusions will be enforced when the exclusionary language clearly and unambiguously brings the particular act or omission within its scope. Floyd v. Northern
Neck Ins. Co., 245 Va. 153, 427 S.E.2d 193 (1993). When there is doubt as to the meaning of exclusionary language, however, it will be construed most strongly against the insurer. PBM Nutritionals, 283 Va. at 633-634, 724 S.E.2d at 713.

III. Choice of Law

A. Liability imposed as a Matter of Tort


B. Liability Imposed as a Matter of Contract


IV. Extracontractual Claims Against Insurers: Elements and Remedies

A. Bad Faith

An insurer owes a common law duty of good faith and fair dealing to its insured. Allstate Ins. Co. v. USAA, 249 Va. 9, 452 S.E.2d 859 (1995). Courts will apply a “reasonableness” standard to an insurer’s actions and will consider the following factors in determining whether an insurer acted in good faith:

1. Whether reasonable minds could differ in interpretation of the relevant policy provisions defining coverage and exclusions.
2. Whether the insurer conducted a reasonable investigation of the facts and circumstances underlying the insured’s claim.
3. Whether the evidence reasonably supports a denial of liability.
4. Whether it appears that the insurer’s refusal to pay was used as merely a tool in settlement negotiations; and
5. Whether the defense the insurer asserts at trial raises an issue of first impression or a reasonably debatable question of law or fact.

An insurer may be liable if it fails to settle a claim against its insured for an amount within the policy limits and a judgment in excess of such limit is thereafter recovered against the insured. Aetna Cas. & Sur. Co. v. Price, 206 Va. 749, 146 S.E.2d 220 (1965). Liability arises if the insurer acted in bad faith when refusing to settle. Id.; see also A & E Supply Co. v. Nationwide Mut. Fire Co., 798 F.2d 669 (1986).

Bad faith is defined as the insurer’s acting in furtherance of its own interests, with intentional disregard of the financial interests of the insured. State Farm Mut. Auto. Ins. Co. v. Floyd, 235 Va. 136, 141, 366 S.E.2d 93, 96 (1988); see also Goldstein v. Nat’l Cas. Co., No. 4:07CV00028, 2008 U.S. Dist. LEXIS 58129, at *14-15 (W.D. Va. July 28, 2008). There is a presumption that the parties have acted in good faith. Floyd, 235 Va. at 144, 366 S.E.2d at 98. To prevail on a claim of bad faith, the insured must prove the existence of bad faith by clear and convincing evidence. Id.

B. Fraud

To maintain a fraud claim the insured must show that (1) the insurer made a material false representation, (2) intending the insured to rely upon the representation, (3) which the insured in fact believed and relied on, (4) to the insured’s detriment. Nationwide Ins. Co. v. Patterson, 229 Va. 627, 629, 331 S.E.2d 490, 492 (1985). The plaintiff must prove each element by clear and convincing evidence. Id. at 629, 331 S.E.2d at 492. Even expressions of opinion about the meaning of a contract may be actionable if the parties are on unequal terms. Id., at 631, 331 S.E.2d at 493.

C. Intentional or Negligent Infliction of Emotional Distress

1. Intentional Infliction of Emotional Distress

The elements of an emotional distress claim include: (1) intentional or reckless conduct on the part of the defendant; (2) which is outrageous and intolerable; (3) a causal connection between the wrongful conduct and the emotional distress; and (4) the emotional distress must be severe. Womack v. Eldridge, 215 Va. 338, 210 S.E.2d 145 (1974).


2. Negligent Infliction of Emotional Distress
As stated above, there is no published opinion in Virginia recognizing a cause of action for negligent infliction of emotional distress for an insurance company’s bad-faith refusal to pay insurance benefits.

D. State Consumer Protection Laws, Rules and Regulations

Virginia Code sections 38.2-500 through 38.2-518 govern unfair trade practices. Virginia Code section 38.2-510 provides a list of activities prohibited as unfair claims settlement practices. This provision applies, however, only when the insurer’s failure to make equitable settlements occurs with such frequency as to indicate a general business practice by the insurer. Allstate Ins. Co. v. USAA, 249 Va. 9, 452 S.E.2d 859 (1995).

E. State Class Actions

There is no rule or statute in Virginia generally authorizing class actions at law for damages. Virginia’s Multiple Claimant Litigation Act, however, provides a flexible remedy for consolidating trials. See Va. Code §§ 8.01-267.1 through 8.01-267.9.

Under the Act, circuit courts may enter orders joining, coordinating, consolidating, or transferring civil actions to ensure efficient litigation. Va. Code § 8.01-267.1. Such orders may include “orders which organize the parties into groups with like interest.” Id.

On motion of any party, the court may consolidate cases upon finding that:

1. Separate civil actions brought by six or more plaintiffs involve common questions of law or fact and arise out of the same transaction, occurrence or series of transactions or occurrences;
2. The common questions of law or fact predominate and are significant to the actions; and
3. The order will promote the ends of justice and is consistent with each party’s due process rights, and
4. The order will not prejudice each party’s right to a fair and impartial resolution of each action.

Id. Additionally, the court must consider the following factors before ordering consolidation:

1. The nature of the common questions of law or fact.
2. The convenience of the parties, witnesses and counsel.
3. The relative stages of the actions and the work of counsel.
4. The efficient utilization of judicial facilities and personnel.
5. The calendar of the courts.
6. The likelihood and disadvantages of duplicative and inconsistent rulings, orders or judgments.

7. The likelihood of prompt settlement of the actions without the entry of the order; and

8. As to joint trials by jury, the likelihood of prejudice or confusion.

Id.

V. Defenses in Actions Against Insurers

A. Misrepresentations/Recission of Insurance Contract for Misrepresentation

Virginia Code Section 38.2-309 provides:

No statement in an application [for an insurance policy] . . . made before or after loss under the policy shall bar a recovery upon a policy of insurance unless it is clearly proved that such answer or statement was material to the risk when assumed and was untrue.

Under this statute, the Supreme Court of Virginia has uniformly held that misrepresentations of facts, in an application for insurance, material to the risk when assumed, render the contract void. Utica Mut. Ins. Co. v. Nat’l Indem. Co., 210 Va. 769, 772, 173 S.E.2d 855, 858 (1970). A fact is material to the risk to be assumed by an insurance company if the fact would reasonably influence the company’s decision whether or not to issue a policy. Mut. of Omaha Ins. Co. v. Echols, 207 Va. 949, 953-54, 154 S.E.2d 169, 172 (1967).

The court has construed section 38.2-309 and its predecessors as requiring an insurance company contesting a claim on the basis of an insured’s alleged misrepresentation to show, by clear proof, two facts: (1) that the statement on the application was untrue; and (2) that the insurance company’s reliance on the false statement was material to the company’s decision to undertake the risk and issue the policy. Commercial Underwriters Ins. Co. v. Hunt & Calderone, P.C., 261 Va. 38, 42, 540 S.E.2d 491, 493 (2001). To prove the falsity is not sufficient; the company must prove clearly that truthful answers would have reasonably influenced the company’s decision to issue the policy. Id.

Whether a statement is untrue, or false, is a question of fact for the jury, but when falsity is proved, the question of materiality is for the court. Old Republic Life Ins. Co. v. Bales, 213 Va. 771, 195 S.E.2d 854 (1973). The fact that a statement was not willfully false or fraudulently made, however, does not affect its materiality. Chitwood v. Prudential, 206 Va. 314, 318-19, 143 S.E.2d 915, 918-19 (1965).

When an insurance contract contains a clause in the application that the answers are correct to the best of the applicant’s knowledge, the burden on the insurance company increases from clear proof that the statement was untrue, to clear proof that the answer was knowingly false. Old Republic Life Ins. Co. v. Bales, 213 Va. 771, 195 S.E.2d 854 (1973); Sterling Ins. Co. v. Dempsey, 195 Va. 933, 942, 81 S.E.2d 446, 452 (1954).
In actions upon life insurance policies, the failure of an insured to volunteer information not requested by the insurer does not constitute misrepresentation. Greensboro Nat’l Life v. Southside Bank, 206 Va. 263, 142 S.E.2d 551 (1965). Incomplete answers to questions asked by the insurer, however, may be the basis of a misrepresentation defense. Fidelity Bankers Life Ins. Corp. v. Wheeler, 203 Va. 434, 125 S.E.2d 151 (1962).

B. Pre-existing Illness or Disease Clauses

1. Statutes

Virginia Code Section 38.2-3514 provides:

No insurer that has delivered or issued . . . an accident and sickness insurance policy pursuant to the provisions of this article shall deny liability on any claim otherwise covered under such policy because of the existence of a disease or physical impairment or defect, congenital or otherwise, at the time of the making of the application for such policy, unless it is shown that the applicant knew or might reasonably have been expected to know of such disease, impairment or defect.

2. Case Law


Virginia Code Section 38.2-3514 codifies the rule in Sharp v. Richmond Life Insurance Co., 212 Va. 229, 183 S.E.2d 132 (1971), by granting an insured coverage for a pre-existing condition where the insured did not, or could not reasonably have been expected, to know of the condition. The court will look to the insured’s knowledge as of the effective date of the policy. Id. at 232-33, 183 S.E.2d at 134-35.

C. Statutes of Limitation

In Virginia, claims for breach of a written contract must be brought within 5 years after the cause of action accrues. Va. Code § 8.01-246(2). A cause of action for breach of contract accrues on the date of the alleged breach.

Where a life insurance policy requires proof of death and a demand for payment, the limitations period begins to run on the date of the demand and proof. Arrington v. Peoples Sec. Life Ins. Co., 250 Va. 52, 458 S.E.2d 289 (1995). However, where a policy fails to specify a time period for making a demand and proof of death, the beneficiary is entitled to a reasonable amount of time to file following the insured’s death, and the limitations period begins to run on the date of filing. Page v. Shenandoah Life Ins. Co., 185 Va. 919, 40 S.E.2d 922 (1947).
VI. **Beneficiary Issues**

A. **Divorce or Annulment**

Revocable beneficiary designations providing for payment of death benefits to a spouse are revoked upon the entry of a decree of divorce or annulment. Va. Code § 20-111.1. An insurer is discharged from any liability for making payment in accordance with the terms of the insurance contract providing for the death benefit unless the insurer receives written notice of the revocation prior to payment. Va. Code § 20-111.1(A).

Every decree of annulment or divorce entered on or after July 1, 2012, must contain the following notice:

Beneficiary designations for any death benefit, as defined in subsection B of § 20-111.1 of the Code of Virginia, made payable to a former spouse may or may not be automatically revoked by operation of law upon the entry of a final decree of annulment or divorce. If a party intends to revoke any beneficiary designation made payable to a former spouse following the annulment or divorce, the party is responsible for following any and all instructions to change such beneficiary designation given by the provider of the death benefit. Otherwise, existing beneficiary designations may remain in full force and effect after the entry of a final decree of annulment or divorce.


B. **Slayers**

A beneficiary who procures, participates in, or otherwise directs an insured’s death is not entitled to the proceeds of the insured’s life insurance policy. Va. Code § 64.2-2508 and Peoples Sec. Life Ins. Co. v. Arrington, 243 Va. 89, 412 S.E.2d 705 (1992). The burden of proof is on the insurer to prove by a preponderance of the evidence that the beneficiary procured, participated in, or otherwise directed the insured’s death. Id.

Insurers are not be liable on a policy insuring the life of the decedent if the policy was procured as a part of the beneficiary/slayer’s plan to murder the decedent and the insured’s death was caused by the slayer within two years from the date the policy was issued. Va. Code § 64.2-2508(C). If an insurer pays a beneficiary/slayer pursuant to the terms of its policy, the insurer is not subject to additional liability if the payment was made without notice that the beneficiary caused the death of the insured. Va. Code § 64.2-2508(D).

VII. **Interpleader Actions**

A. **Availability of Fee Recovery**

It is within the discretion of the trial court to award attorney’s fees and costs involved in bringing an interpleader action when there is bona fide controversy between claimants (or there is reasonable possibility of a bona dispute). Manufacturers Life Ins. Co. v. Johnson, 385 F. Supp. 852, 853 (E.D. Va. 1974); see also Pettus v. Hendricks, 113 Va. 326, 332, 74 S.E. 191, 191 (1912). Attorney’s fees must be reasonable in light of the amount of money at issue. Manufacturers Life Ins. Co., 385 F. Supp. at 854.
B. Differences in State vs. Federal Court