I. Regulatory Limits on Claims Handling

A. Timing for Responses and Determinations

In Virginia, insurance laws are found in Title 38.2 of the Code of Virginia, and insurance regulations are promulgated by the State Corporation Commission (SCC). Va. Code Ann. § 38.2-223 states that “[t]he Commission, after notice and an opportunity for all interested parties to be heard, may issue any rules or regulations necessary or appropriate to the administration and enforcement of this title.” Virginia insurance regulations are found in Title 14 of the Virginia Administrative Code.

The regulations contain the following time limits as examples: 10 working days to acknowledge receipt of notification of a claim (14 VAC 5-400-50); 15 days to respond to an inquiry from the SCC (Id.); 45 days from the date of notification of a claim to complete an investigation thereof, or to notify the claimant that more time is needed (14 VAC 5-400-60); 15 days to notify a first party claimant of the acceptance or denial of their claim (Id.); or if the insurer needs more time to determine whether a first party claim should be accepted or denied, it shall notify the first party claimant within 15 working days after receipt of the proof of loss giving the reasons more time is needed. (Id.) These time limits were derived from “Regulation 12,” the previous regulation on the topic in Virginia.

B. Standards for Determinations and Settlements

In addition to the above regulations, Title 14 of the Virginia Administrative Code, also includes claims handling standards. Chapter 400 entitled “Rules Governing Unfair Claim Settlement Practices” and Chapters 335-395 regulate Property and Casualty insurance generally.

C. Privacy Protections (In addition to the Federal Gramm-Leach-Bliley Act)

Virginia law has been changed with the intent of making it as consistent as possible with both the latest National Association of Insurance Commissioners (NAIC) model regulation and the Gramm-Leach-Bliley Act (GLBA). The format and terminology of the law may differ due to Virginia’s decision to keep the format of the old NAIC model law. Chapter 6 of Title 38.2 is titled “Insurance Information and Privacy Protection,” and deals with privacy issues under Virginia insurance law. Va. Code Ann. § 38.2-600 et seq.
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 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, that most favorable to the insured will be adopted. PBM Nutritionals at 633-634, 724 S.E.2d at 713.

C. Exclusionary Provisions

Exclusionary language limiting coverage must be clear and unambiguous. Travco 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). However, when there is doubt as to the meaning of exclusionary language, it will be construed most strongly against the insurer. PBM Nutritionals 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. Duties Imposed by State Law

A. Duty to Defend

1. Standard for Determining Duty to Defend

Insurance contracts generally contain three main duties: the insurer's duty to indemnify, the insurer's duty to defend, and the insured's duty to pay premiums. At common law, an insurer has no duty to defend. The duty to defend is purely contractual and is unquestionably broader than the duty to indemnify. See e.g., Town Crier v. Hume, 721 F. Supp. 99 (E.D. Va. 1989); Rockingham Mut. Ins. Co. v. Davis, 58 Va. Cir. 466 (Rockingham 2002). Because insurers typically author policy language, ambiguous language (including ambiguous coverage exclusions) is generally construed in favor of granting coverage rather than denying it, and the insurer bears the burden of proof in proving an exclusion applies. Town Crier, 721 F. Supp. at 101; see also Johnson v. North America, 232 Va. 340, 350 S.E.2d 616 (1986), Smith v. Allstate Ins. Co. of America, 241 Va. 477, 403 S.E.2d 646 (1991), and Boyd and Stephenson Coal Co. v. Office of Worker’s Com., 407 F.3d 663 (4th Cir. 2005).

If the claimant’s allegations state a case which may be covered by the policy, the insurer has a duty to defend, and it may be liable also to pay any judgment rendered upon those allegations. On the other hand, if it appears clearly that the insurer would not be liable under its contract for any judgment based upon the allegations, it has no duty even to defend. Town Crier, 721 F. Supp. at 102 (citing Travelers Indem. Co. v. Obenshain, 219 Va. 44, 245 S.E.2d 247, 249 (1978)), and Resource Bankshares v. St. Paul Mercury Ins. Co., 407 F.3d 631 (4th Cir. 2005). An insurance company can obtain a declaratory judgment from the state court regarding its duty to defend. Aetna Casualty & Sur. Co. v. Compass & Anchor Club, Inc., 820 F. Supp. 240 (E.D. Va., 1993) (citing Va. Code Ann. § 8.01-184), see also Green v. Goodman-Gable-Gould Co., Inc., 268 Va. 102, 597 S.E.2d 77 (2004).

2. Issues with Reserving Rights

Virginia insurers who intend to rely on certain coverage defenses must follow the requirements of Va. Code Ann. § 38.2-2226. The time limit (once 20 days, since amended to 45 days) for notifying claimants of the intent to rely on breach of terms and conditions is obviously intended to allow the claimant to take steps to protect his rights. Liberty Mut. Ins. Co. v. Safeco Ins. Co., 223 Va. 317, 288 S.E.2d 469 (1982). An insurer who fails to notify within the period waives its right to rely on the insured's breach. Morrel v. Nationwide Mut. Fire Ins. Co., 188 F.3d 218, 226 (4th Cir. 1999). The clock is not triggered by an insurer's determination that it will definitely rely on its insured's breach. Instead, the statute starts the period when the insurer has discovered both the claim and the breach. Thus, an insurer may not withhold the required notice until it makes a final determination to deny coverage under the policy. Id. at 228.
Notwithstanding the above statutory duties to provide notice, in cases in which a civil action has been filed by the claimant, the insurer shall inform said claimant or his counsel of its intent to defend the case under a reservation of rights in writing not less than thirty (30) days prior to trial unless a shorter period of notice is allowed by the court. Va. Code § 38.2-2226.

B. Duty to Settle

The liability carrier has the duty to defend the insured and to exercise good faith to settle meritorious claims within the policy limits. Aetna Casualty & Surety Co. v. Price, 206 Va. 749, 146 S.E.2d 220 (1966). Bad faith may arise when an insurer unjustifiably refuses to settle a claim within the insurer's coverage limits, thereby exposing its insured to liability in excess of the policy limits. Horace Mann Ins. Co. v. GEICO, 231 Va. 426, 344 S.E.2d 906 (1986). There should be no claim for an insurance company’s alleged bad faith refusal to pay a claim, however, until the insured first establishes that the insurance company breached its duty under the contract of insurance. American States Ins. Co. v. Enterpriser Lighting, 1994 U.S. Dist. LEXIS 14988 (E.D. Va., 1994) aff’d, 61 F. 3d 899 (4th Cir. 1995). This requires that the loss be covered. Reisen v. Aetna Life & Cas. Co., 225 Va. 327, 335, 302 S.E.2d 529, 533 (1983). Finally, at least one court has ruled that a judgment creditor had standing to complain of an insurer's breach of its duty to settle, in contrast to the weight of federal authority supporting a contrary rule. Munson v. Aetna Cas. & Sur. Co., 35 Va. Cir. 216 (Albemarle 1994).

V. Extracontractual Claims Against Insurers: Elements and Remedies

A. Bad Faith

1. First Party

An insured must establish that the insurance company breached its duty of good faith under the contract of insurance before any claims for an insurance company’s bad faith will be heard. American States Ins. Co. v. Enterpriser Lighting, 1994 U.S. Dist. LEXIS 14988 (E.D. Va. 1994), aff’d, 61 F. 3d 899 (4th Cir. 1995). The Fourth Circuit has held that a first-party insurer’s obligation to deal in good faith arises solely from the contract and only covers those situations connected with the insurance contract. A&E Supply Co. v. Nationwide Mut. Fire Ins. Co., 798 F.2d 669, 676 (4th Cir. 1986), see also Filak v. George, 267 Va. 612, 594 S.E.2d 610 (2004). Sections 38.2-209 and 8.01-66.1 of the Code of Virginia provide relief to insureds who have been subject to bad faith. Said relief may include the insureds’ reasonable costs and attorneys’ fees if the court determines that coverage under the policy was denied in bad faith. When evaluating insurance company conduct leading to a bad faith claim, Virginia courts apply a “reasonableness” standard. CUNA Mutual Insurance Society v. Norman, 237 Va. 33, 38, 375 S.E.2d 724, 727 (1989). Also, it appears that the insured’s burden of proof for recovery under the statutes above is a preponderance of the evidence. Nationwide Mut. Ins. Co. v. St. John, 259 Va. 71, 76, 524 S.E.2d 649, 651 (2000).

2. Third Party
In the context of third parties, a relationship of confidence and trust between the insurance company and the insured is created, which imposes a duty on the insurer to deal fairly in handling and disposing of any claim covered by the policy. Aetna Cas. & Sur. Co. v. Price, 206 Va. 749, 146 S.E.2d 220 (1966). This duty, however, does not create a fiduciary relationship. State Farm Mut. Auto. Ins. Co. v. Floyd, 235 Va. 136, 366 S.E.2d 93 (1988). Under Virginia common law there is a presumption that both parties to a contract acted in good faith; therefore, in a third-party bad faith action, the insured must overcome said presumption by proving by clear and convincing evidence that the insurer acted in furtherance of its own interest with intentional disregard of the financial interest of the insured. Id. at 144.

3. **Damages**

Under Virginia law, liability for bad faith is grounded in contract law rather than tort law, springing from the relationship of trust and confidence between the parties resulting from the insurer’s contractual right to control the payment of claims. Price, 206 Va. at 760-761. Direct and consequential damages are permitted in a bad faith breach of contract case, but punitive damages are not. A&E Supply Co., 798 F.2d at 677-78; St. John, 259 Va. at 75-76. Virginia has specifically rejected attempts to recover punitive damages under a tort cause of action in any bad faith action, saying it would destroy the predictability necessary for stable contractual relations. A&E Supply Co., 798 F.2d at 672; see Lissmann v. Harford Fire Ins. Co., 848 F.2d 50 (4th Cir. 1988) (holding that breach of duty to act in good faith cannot give rise to punitive damages). Despite a recent reduction of the burden of proof of insureds for certain bad faith actions, Virginia is a relatively conservative state and does not impose bad faith liability unless an insurance company is clearly unreasonable in its actions.

**B. Fraud**

In the context of fire insurance, Virginia is no exception to the national tendency to contain provisions voiding a policy in the event of fraud or concealment on the part of the insured. Such provisions are valid in Virginia. Va. Code Ann. § 38.2-2105. Also, there is substantial case law in most jurisdictions to support the proposition that recovery will be prohibited where an insured has acted fraudulently, upholding the basic public policy that one should not profit by his or her own intentional wrongful act. There are strong indications that Virginia would embrace this rule, although no reported opinion has specifically adopted it. Eagle, Star & British Dominions Ins. Co. v. Heller, 149 Va. 82, 140 S.E. 314 (1927).

There are “false swearing” provisions in Virginia homeowners’ insurance policies, which are one of the most powerful tools an insurer has to deny coverage of a claim submitted under the policy. Virginia follows the “lie once, you lose” rule, where any material misrepresentation in a claim may allow a successful denial (it does not have to be under oath, relied on, or even deceptive to the insurance company). Therefore, attempted fraud that is willfully or intentionally perpetrated, whether successful or not, operates as a complete bar of an insured’s claim under a homeowner’s policy. Virginia Fire & Marine Ins. Co. v. Vaughan, 88 Va. 832, 14 S.E. 754 (1892); Globe & Rutgers Fire Ins. Co. v. Stallard, 68 F.2d 237 (4th Cir. 1934); see also Section V.B., infra.

C. **Intentional or Negligent Infliction of Emotional Distress (IIED**
Virginia generally does not recognize tort remedies for actions on an insurance contract. In one controversial case, however, a court refused to grant a motion to dismiss where the insured asserted a claim for IIED based upon allegations that the insurer acted in bad faith in failing to pay insurance benefits. Morgan v. American Family Life Assurance Co., 559 F. Supp. 477 (W.D. Va. 1983). The court indicated that, without more, the bad faith failure to pay insurance benefits may be insufficient to show extreme and outrageous conduct. This case is of little precedential value and has not been followed by the Court of Appeals for the Fourth Circuit.

D. State Consumer Protection Laws, Rules and Regulations


VI. Discovery Issues in Actions Against Insurers

A. Discoverability of Claims Files Generally

Virginia courts have been in general accord with federal decisions, which find that Rule 26(b)(3) (for which Virginia has an analog in Va. Supreme Court Rule 4:1(b)(3)) was not intended to protect all insurance claim files from discovery, but only to protect materials prepared in anticipation of litigation. Ring v. Mikris, Inc., 40 Va. Cir. 528, 531 (Newport News 1996). Because of the “distinct possibility of litigation” from the start of most insurance claims, an important factor in determining the availability of the contents of claims files for discovery is when the claim became “substantial and imminent.” Prior to such date, documents are generally not protected, but subsequent to it, they are protected as being prepared in anticipation of litigation or for trial. Front Royal Ins. Co. v. Gold Players, Inc., 187 F.R.D. 252 (W.D. Va. 1999). One Virginia court has held that under certain circumstances, ordinary work product (such as claims files) and opinion work product are discoverable in a claim for bad faith. Luthmand v. Government Employees Ins. Co., 40 Va. Cir. 404 (Fairfax, 1966). Virginia courts have disagreed as to whether statements made to insurance adjusters are discoverable or not. Thompson v. Winn Dixie Raleigh, Inc., 49 Va. Cir. 115 (Chesterfield 1999) (discoverable); Ring v. Mikris, Inc., 40 Va. Cir. 528 (Newport News 1996) (protected).

For a general discussion of the competing tests available for circuit courts of the Commonwealth of Virginia to determine whether items are created in anticipation of litigation, see Hawkins v. Norfolk S. Ry. Co., 71 Va. Cir. 285 (Brunswick 2006). There the court applied the “case-by-case” test rather than the “bright line test” because it allowed the court to consider, among other factors, the severity of the plaintiff’s injuries, that the insured plaintiff may have also been negligent in causing the accident, whether there
had been notification to the defendant that a claim would be filed, whether it had been suggested the defendant retain counsel, whether material had been sought of the defendant, and whether there had been a routine investigation of the plaintiff’s claim. *Id.* at 288.

Virginia does not permit a claim for an insurance company’s bad faith refusal to pay a claim to be made until the insured first establishes that the insurance company breached its duty under the contract. One could therefore argue that the insured is not entitled to discover claims files or other privileged matters while the underlying contract claim is still pending. *American States Ins. Co. v. Enterpriser Lighting*, 1994 U.S. Dist. LEXIS 14988 (E.D. Va. 1994) aff’d, 61 F. 3d 899 (4th Cir. 1995). Another strategy an insurer might employ is to bifurcate the trial so that a covered loss must be proved before the insured can obtain discovery on the bad faith issue.

B. **Discoverability of Reserves**

Virginia law in this area is quite limited. There is limited precedent for allowing the discoverability of reserve information where it may be relevant to show notice or coverage. *Front Royal Ins. Co. v. Gold Players*, Inc., 187 F.R.D. 252 (W.D. Va., 1999). The court in that case disallowed it, though, because its relevance to the case was not argued. *Id.* Other federal courts citing Virginia case law have also distinguished between “aggregate reserve information” and “individual case reserves.” The latter was deemed as work product and disallowed because it revealed the mental impressions, thoughts and conclusions of an attorney in evaluating a legal claim. *Chambers v. Allstate Ins. Co.*, 206 F.R.D. 579, 590 (S.D. W.Va. 2002).

C. **Discoverability of Existence of Reinsurance and Communications with Reinsurers**

In Virginia, a party may obtain discovery of the existence and contents of any insurance agreement under which any person (which includes any individual, corporation, partnership or other association) carrying on an insurance business may be liable to satisfy part or all of a judgment which may be entered in the action or to indemnify or reimburse for payments made to satisfy the judgment. Information concerning the insurance agreement is not by reason of disclosure admissible in evidence at trial. An application for insurance shall not be treated as part of an insurance agreement. VA. Sup. Ct. R. 4:1(b)(2). The Fourth Circuit has not considered whether communications between an insurer and a reinsurer are protected. The U.S. District Court for the Western District of Virginia held that documents and other correspondence will not be protected by the work-product doctrine where (1) they were not prepared in anticipation of litigation (but rather in the ordinary course of business) and (2) they were not prepared by or for the attorneys of the insurance company. *Front Royal Ins. Co. v. Gold Players*, Inc., 187 F.R.D. 252 (W.D. Va., 1999).

D. **Attorney/Client Communications**

Where an insurer retains counsel to represent the insured, the Supreme Court of Virginia has uniformly confirmed the relationship between them as attorney and client. An insurer’s attorney, employed to represent an insured, is bound by the same high standards which govern all attorneys, and owes the insured the same duty as if he were privately retained by the insured. *Norman v. Insurance Co. of N. Am.*, 218 Va. 718, 727, 239 S.E.2d
The Virginia Rules of Professional Conduct require that the insured client be advised about the inherent conflicts and consequences of their relationship. Specifically, Rule 1.8(f) provides that after such consultation, “there is no interference with the lawyer’s independence of professional judgment or with the client-lawyer relationship; and … information relating to representation of a client is protected as required by Rule 1.6. Va. RPC 1.8(f). Rule 1.6 governs confidential information from the attorney/client relationship; for example, counsel may not reveal confidences from the insured that could be advantageous to the insurer in subsequent coverage litigation. See Va. RPC 1.6(a).

VII. Defenses in Actions Against Insurers

A. Misrepresentations/Omissions: During Underwriting or During Claim

Material misrepresentations of fact by the insured in a Virginia insurance application renders the entire insurance policy void ab initio. The insurer is relieved of any obligation to provide coverage and from any duty to defend. Scott v. State Farm Mut. Auto Ins. Co., 202 Va. 579, 118 S.E.2d 519 (1961). The starting point in any case involving a material misrepresentation is Section 38.2-309 of the Code of Virginia, which applies to virtually all classes of insurance and is read into all insurance applications. Union Indem. Co. v. Dodd, 21 F.2d 709 (4th Cir. 1927). Since misrepresentation is an affirmative defense, the insurer has an affirmative burden to prove by a preponderance of the evidence the representations of the insured were both untrue and material to the risk that would be assumed by the insurer. Time Ins. Co. v. Bishop, 245 Va. 48, 425 S.E.2d 489 (1993); Old Republic Life Insurance Co. v. Bales, 213 Va. 771, 195 S.E.2d 854 (1973); Peoples Security Life Ins. Co. v. Arrington, 243 Va. 89, 412 S.E.2d 705 (1992).

For misrepresentations during the claims process, Virginia insurance policies contain “false swearing provisions.” See, e.g., Moore v. Virginia Fire & Marine Ins. Co., 69 Va. (28 Gratt.) 508 (1877). These provisions provide that the entire policy will become void and the insurer will not be liable if any false statement concerning some fact material to the policy or a claim under the policy. Globe v. Rutgers Fire Ins. Co. v. Stallard, 68 F.2d 237 (4th Cir. 1934). “Material” is defined as, “of a nature that knowledge of the item would affect a person’s decision making process.” Montgomery Mutual Insurance v. Riddle, 266 Va. 539, 587 S.E.2d 513 (2003). These provisions are particularly likely to be found in fire insurance policies. At least one court in Virginia has ruled that insurers need only prove false statements by a preponderance of the evidence, despite the typical requirement to prove fraud in any context by clear and convincing evidence. Winston v. State Farm Fire & Cas. Co., 97 F.3d 1450 (4th Cir. 1996) (unpublished).

B. Failure to Comply with Conditions

The Code of Virginia clearly states that no suit or action for the recovery of any claim will be sustained unless all the policy conditions, provisions, stipulations and agreements have been complied with. Va. Code Ann. § 38.2-2105. However, in the absence of bad faith, only reasonable and substantial compliance with the requirements of a policy is necessary, not literal compliance. Home Ins. v. Cohen, 61 Va. (20 Gratt.) 312, 319 (1871). The burden of proving such compliance is on the insured, who must establish it by a preponderance of the evidence. Allstate Ins. Co. v. Charity, 255 Va.

C. Challenging Stipulated Judgments: Consent and/or No-Action Clause

An insurer was not allowed to attack collaterally a stipulated judgment entered into in another court proceeding in which the insurance company was not named, or participated in any fashion. Liberty Mut. Ins. Co. v. Eades, 248 Va. 285, 288-289, 448 S.E.2d 631, 633 (1994). Whenever a judgment has been recovered against a party who clearly qualifies within the provisions of such a policy as an insured, then the liability of the insurer is definitely fixed, unless fraud or collusion is shown in the procurement of the judgment. Id. (citing Union Indem. Co. v. Small, 154 Va. 458, 463, 153 S.E. 685, 687 (1930)).

D. Statutes of Limitation

In general, Virginia law authorizes a one-year statute of limitations for insurance policies, and insurers may not limit the time within which an action may be brought to less than one year after the loss occurs or the cause of action accrues. (See Va. Code Ann. § 38.2-314 (2003)). If the policy of insurance is silent as to the statute of limitations, however, the insured will have five years from which to file. This five year period applies to any suits involving written contracts. (See Va. Code Ann. § 8.01-246). Furthermore, if an insurance policy requires a proof of loss, damage or liability to be filed within a specified time, the time consumed in an effort to adjust the claim will not be considered part of that time. (Id.) The statute applies to any policy which does not specifically mention such limitations. Ramsey v. Home Ins. Co., 203 Va. 502, 125 S.E.2d 201 (1962), see also S. Wallace Edwards & Sons, Inc. v. Cincinnati Inc., 353 F.3d 367 (4th Cir. 2003).

Statutes of limitations may vary by area of insurance in Virginia. For example, Va. Code § 38.2-2105 provides a more generous statute for fire insurance; in this area any suit against the insured must be instituted within two years of the date of loss. Homeowners’ insurance policies, because they cover accidental direct physical loss caused by fire, must meet the requirements of Va. Code § 38.2-2105. Also, since the 1988 enactment of the Virginia Birth-Related Neurological Injury Compensation Act, insureds have had 10 years from the date of birth to file a claim. Va. Code Ann. § 38.2-5000 et seq. (2003).

VIII. Trigger and Allocation Issues for Long-Tail Claims

A. Trigger of Coverage

Courts around the country remain sharply divided on this issue, and the Supreme Court of Virginia has never addressed the issue. Most courts have adopted one of four general “trigger theories” based on different constructions of a covered occurrence: (1) Manifestation Theory, (2) Exposure Theory, (3) Continuous Trigger Theory, or (4) Injury-in-Fact Theory. Some have suggested that the Injury-in-Fact trigger most closely tracks Virginia
policy for commercial general liability policies by imposing risk on an insurer only when actual injury occurs while that insurer is covering the risks.

B. Allocation Among Insurers

There are a number of versions of clauses in insurance contracts which may indicate who may sue the insurer, when they may sue, and how liability will be allocated among multiple policies. These clauses are known as “other insurance,” “excess insurance,” or “allocation” clauses, and they tend to be quite complicated. This complexity and variation leads to a variety of methods by which insurers or courts will use to decide which insurers will pay which portions of a loss. St. Paul Fire and Marine Ins. Co. v. Gentio Glen, 365 F.3d 263 (4th Cir. 2004); Aetna Cas. & Sur. Co. v. National Union Fire Ins. Co., 233 Va. 49, 353 S.E.2d 894 (1987); State Capital Ins. Co. v. Mutual Assurance Soc’y Against Fire on Bldgs., 218 Va. 815, 241 S.E.2d 759 (1978).

IX. Contribution Actions

A. Claim in Equity vs. Statutory

In Virginia, courts recognize two distinct forms of the remedy of contribution: equitable contribution and the remedy at law of contribution. Cooper v. Greenberg, 191 Va. 495, 502, 61 S.E.2d 875, 879 (1950). The former remedy is based upon general equitable principles and the latter is based upon a theory of implied contract. Id., 191 Va. at 502-03, 61 S.E.2d 878-79. The distinction is important because it affects the measure of recovery.

At law, recovery for contribution is only available in the amount of each co-obligor’s fractional share. Id., 191 Va. at 501, 61 S.E.2d 878. Insolvency of other co-obligors does not affect each co-obligor’s share. Id. In equity, though, the insolvent co-obligor’s portion will be apportioned among the solvent co-obligors. Id.

Va. Code § 8.01-35 provides that contribution among wrongdoers can be enforced so long as the wrong results from negligence and does not involve moral turpitude.

Va. Code § 8.01-35.1 addresses the issue of releases and covenants not to sue among co-obligors. It provides that a release or covenant not to sue will not discharge another from liability unless the release or covenant not to sue provides for such a discharge. Va. Code § 8.01-35.1(A)(1). It further provides that such a release or covenant not to sue will discharge the released person from liability for contribution from the same injury. Va. Code § 8.01(A)(2). Such a release or covenant to sue, however, would prevent the released party from seeking contribution against another for the same injury if that other person is not also released. Va. Code. § 8.01-35.1(B).

B. Elements

To obtain the remedy of contribution at law, a party must show that he paid more than his fair share of an obligation for which two or more persons are liable. Houston v. Bain, 170 Va. 378, 389, 196 S.E. 657, 662 (1938). The law then implies a contract that each party contribute his share of the debt. Id.
Equitable indemnity is available to an innocent party who is liable for the negligence of another. *Carr v. Home Ins. Co.*, 250 Va. 427, 429, 463 S.E.2d 457, 458 (1995). The innocent party may recover that which the innocent party paid to discharge the liability. *Id.*