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Virginia

REGULATORY LIMITS ON CLAIMS HANDLING

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). Under Virginia law, insurers must acknowledge receipt of all insurance claims promptly. Va. Code Ann. § 38.2-510(A)(2). Insurers must also adopt and implement reasonable standards for the prompt investigation of claims. Va. Code Ann. § 38.2-510(A)(3).

Va. Code Ann. § 38.2-223 states that the SCC "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. 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. The regulations contain the following time limits:

- 15 calendar days to acknowledge receipt of notification of a claim. Acknowledgement of the claim is satisfied if payment or denial of the claim is made to the provider within 21 calendar days. 14 VAC 5-400-50(A);
- 15 calendar days to respond to an inquiry from the SCC. *Id.*, at (B);
- 15 calendar days to respond to an inquiry from the claimant. *Id.*, at (C);
- 15 calendar days to notify a first party claimant of the acceptance or denial of their claim. 14 VAC 5-400-60;
- 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 calendar days after receipt of the proof of loss giving the reasons more time is needed. *Id.*, at (A).
- Within 45 calendar days from the date of notification of a first party claim, if the insurer has not yet completed the investigation, the insurer must provide the claimant with a written notice setting forth the reasons additional time is needed for investigation. Such notification must be sent every 45 calendar days thereafter. *Id.*, at (B).

These time limits were derived from "Regulation 12," the previous regulation on the topic in Virginia.

Standards for Determination and Settlements

The Virginia unfair claims settlement practices statute requires insurers to acknowledge and act reasonably and promptly with respect to insurance claims. Va. Code Ann. § 38.2-510(A)(2). Insurers must adopt and implement reasonable standards for the prompt investigation of claims. Va. Code Ann. § 38.2-510(A)(3). Neither may insurers arbitrarily or unreasonably refuse a claim. Va. Code Ann. § 38.2-510(A)(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).

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. 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 shall 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).

PRINCIPLES OF CONTRACT INTERPRETATION

An insurance policy is a contract and the words used in the policy are given their ordinary and customary meaning. *Sch. Bd. of Newport News v. Commonwealth*, 279 Va. 460, 689 S.E.2d 731 (2010). Virginia courts interpret insurance policies in accordance with the intention of the parties based on the words they have used in the document. *Erie Ins. Exch. v. EPC MD 15*, LLC, Record No. 180120, 822 S.E.2d 351, 354 (January 17, 2019) (*citing 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. *Id.*, at 355. 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. *Id*. 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).

Any ambiguity must be found on the face of the policy. *Salzi v. Va. Farm Bureau Mut. Ins. Co.,* 263 Va. 52, 55, 556 S.E.2d 758, 760. 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. *Id*. Where two constructions of an insurance policy are equally possible, that most favorable to the insured will be adopted. *PBM Nutritionals*, 283 Va., at 633–634, 724 S.E.2d, at 713.

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. *Salzi*, 263 Va., at 55, 556 S.E.2d, at 760. However, when there is doubt as to the meaning of exclusionary language, it will be construed most strongly against the insurer. *PBM Nutritionals*, 283 Va. at 633-634, 724 S.E.2d at 713.

CONTRACT INTERPRETATION

Common Issues

1. **Faulty Workmanship as an "Occurrence" [What is the state of the common law in your state on this subject?]**

   The Supreme Court of Virginia has yet to issue an opinion on this topic. However, many Virginia courts concur that such conduct does not qualify as an occurrence. See, *W. World Ins. Co. v. Air*

Tech, Inc., No. 7:17-CV-518, 2019 U.S. Dist. LEXIS 53683, at *16-17 (W.D. Va. Mar. 29, 2019) (finding faulty workmanship is not an unexpected or unforeseen loss, and therefore, is not an occurrence in itself).

2. Does Your State Have an Anti-Indemnity Statute? [And if so, does it have any notable peculiarities?]

The Code of Virginia sections 11-4.1 and 11-4.4 pertain to design contracts and construction contracts, respectively. Similarly, both statutes restrict indemnification. The provision "caused by or resulting solely from the negligence of such other party, his agents or employees, is against public policy and is void and unenforceable," is present in both statutes. Widespread confusion has resulted from this provision. Nevertheless, as stated by the Supreme Court of Virginia, the effect of the statutory language is to nullify "any indemnification provision that reaches damage caused by the negligence of the indemnitee, even if the damage does not result solely from the negligence of the indemnitee." *Uniwest Constr., Inc. v. Amtech Elevator Servs.*, 280 Va. 428, 442. (2010).

CHOICE OF LAW

Virginia applies its own law to determine whether the issue of liability is one of tort or of contract. *Dreher v. Budget Rent-A-Car Sys., Inc.*, 272 Va. 390, 395, 634 S.E.2d 324, 327 (2006). If liability is determined to be a matter of tort, Virginia applies the doctrine of lex loci delicti, or the law of the place where the tort occurred. *Id*. Generally, the law of the place where an insurance contract is formed and executed applies when interpreting the contract and determining its nature and validity. *Id.* (*citing Buchanan v. Doe*, 246 Va. 67, 70, 431 S.E.2d 289, 291 (1993)).

DUTIES IMPOSED BY STATE LAW

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). When considering whether an insurer has a duty to defend, Virginia courts apply an "eight-corners" rule, meaning that the court will consider whether the allegations contained within the four corners of the complaint fall within the coverage defined within the four corners of the insurance policy. *AES Corp. v. Steadfast Ins. Co.*, 283 Va. 609, 616-17, 725 S.E.2d 532, 535 (2012). 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. *PBM Nutritionals*, 283 Va. at 633-634, 724 S.E.2d at 713.

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. *AES Corp*., 283 Va., at 617, 725 S.E.2d, at 535. On the other hand, if it appears clear that the insurer would not be liable under its contract for any judgment based upon the allegations, it has no duty even to defend. *Id*. An insurance company can obtain a declaratory judgment from the state court regarding its duty to defend. *See Green v. Goodman-Gable-Gould Co., Inc.*, 268 Va. 102, 597 S.E.2d 77 (2004). *See also* Va. Code Ann. § 8.01-184).

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. Under that code section, an insurer must give notice to the claimant or the claimant's counsel of a breach of the terms or conditions of the insurance contract within 45 days after the insurer has discovered the breach. *See* Va. Code Ann. § 38.2-2226. The Supreme Court of Virginia has held that the time limit is 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. *See 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. *See Liberty Mut. Ins. Co.*, 223 Va., at 326, 288 S.E.2d, at 474. As a result, an insurer may not withhold the required notice until it makes a final determination to deny coverage under the policy, but instead it must provide notice within 45 days of discovery of a breach to preserve its defense to coverage. *See Morrel*, 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 Ann. § 38.2-2226.

State Privacy Laws; Insurance Regulatory Issues; Arbitration/Mediation

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. The statutes impose conditions and limitations on disclosure and provide penalties for violations by insurance institutions. 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). *See* Va. Code Ann. §§ 38.2-221.1–221.2. The format and terminology of the law may differ due to Virginia's decision to keep the format of the old NAIC model law.

1. Criminal Sanctions

Virginia's own insurance privacy laws do not impose criminal sanctions for violations by insurers. However, under Virginia Code § 38.2-619, any person who knowingly and willfully obtains information about an individual from an insurance institution, insurance agent, or insurance-support organization under false pretenses can be fined up to $10,000.00 or confined in jail for up to 12 months. Virginia law also permits broad access to federal regulators through the SCC. *See* Va. Code

Ann. §§ 38.2-221.1–221.2.

2. The Standards for Compensatory and Punitive Damages

Virginia's insurance privacy laws provide limited individual civil remedies for violations. If an insurer discloses information in violation of Va. Code Ann. § 38.2-613, can be liable for the actual damages sustained by the individual to whom the information relates. *See* Va. Code Ann. § 38.2-617. Punitive damages are not available; however, Virginia courts may award costs and reasonable attorney's fees to the prevailing party.

3. Insurance Regulations to Watch

In Virginia, insurance regulations do not create a private cause of action, and therefore policy-holders cannot sue for violations of those insurance regulations. *See* A & E *Supply Co. v. Nationwide Mut. Fire Ins*. Co., 798 F.2d 669 (4th Cir. 1986); *Riverside Hosp., Inc. v. Optima Health Plan*, 82 Va. Cir. 250 (Richmond 2011); *Harris v. USAA Cas. Ins. Co.*, 37 Va. Cir. 553, 572-573 (Norfolk 1994). Enforcement of regulations is carried out by the SCC.

In the context of auto torts, Virginia law was recently amended to require the disclosure of insurance policy limits to an injured person regardless of the amount of losses where the alleged tortfeasor was convicted of driving under the influence and the injured person's injuries arose from the same incident that resulted in the DUI conviction. *See* Va. Code Ann. § 8.01-417.

In the context of healthcare, Virginia law was recently amended to require health insurance carriers to establish a comparable healthcare service incentive program under which savings are shared with a covered person who elects to receive a covered healthcare service from a lower-cost provider. *See* Va. Code Ann. § 38.2-3461-3464. Additionally, health insurance plans are required to cover certain telemedicine programs. *See* Va. Code Ann. §§ 32.1-325 and 38.2-3418.16.

4. State Arbitration and Mediation Procedures

Generally, arbitration provisions are considered a valid form of alternative dispute resolution and Virginia law favors the arbitration forum. *See* Va. Code Ann. § 8.01-581.01. This general rule does not hold true in the insurance context. Insurance contracts issued for delivery within Virginia cannot contain binding arbitration agreements under Virginia law. *See* Va. Code Ann. § 38.2-312. *See also Minnieland Private Day Sch., Inc. v. Applied Underwriters Captive Risk Assur. Co.,* 867 F.3d 449 (4th Cir. 2017). Additionally, Virginia's uninsured or underinsured motorist coverage statute explicitly bars arbitration in the UIM context. *See* Va. Code Ann. § 38.2-2206; *Matthews v. Allstate Ins. Co.*, 194 F. Supp. 459 (E.D. Va. 1961). Notwithstanding the general bar on arbitration agreements within insurance contracts, home protection company contracts may include binding arbitration provisions.

Although insurance contracts may not require arbitration, it is not prohibited entirely. Va. Code Ann. § 38.2-312 only states that insurance contract conditions, stipulations, and agreements cannot deprive the Virginia courts of jurisdiction. Insurance companies can propose arbitration as an alternative dispute forum, but cannot require insureds to submit to arbitration. Managed care health insurance plans in Virginia must adhere to additional rules related to arbitration as an alternative dispute resolution forum. First, the insured must be provided with a description of any arbitration procedure along with its disclosures to new enrollees. Va. Code Ann. § 38.2-5803. Additionally, where complaints of an insured are subject to an arbitration agreement, the insured must be advised in

writing of his or her rights under the arbitration agreement at the time the complaint is registered. Va. Code Ann. § 38.2-5806(C). If a complaint is filed by an insured, the insured must provide written acceptance of the arbitration agreement, and the arbitration agreement must be provided to the insured along with a statement explaining the terms and conditions of the arbitration procedure. *Id*.

With regard to property damage claims between insurance companies, any party to the Nationwide Intercompany Arbitration Agreement must submit claims for property damage to arbitration unless the parties mutually agree to a different forum. Va. Code Ann. § 38.2-2231(A). However, insurers should note that the constitutionality of the statute requiring property damage arbitration has been called into question. *See Virginia Mut. Ins. Co. v. Burgess*, 51 Va. Cir. 269 (Roanoke 2000); *Virginia Mut. Ins. Co. v. Dean*, 49 Va. Cir. 132 (Rockingham 1999); *Bass v. Young*, 49 Va. Cir. 525 (Danville 1996).

5. State Administrative Entity Rule-Making Authority

Va. Code Ann. § 38.2-223 states that the SCC "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. Pursuant to Va. Code Ann. § 38.2-613.01, the SCC may also promulgate regulations related to medical test results in the context of life or accident and sickness insurance coverage.

EXTRACONTRACTUAL CLAIMS AGAINST INSURERS: ELEMENTS AND REMEDIES

Bad Faith Claim Handling/Bad Faith Failure to Settle Within Limits

3. First Party

A covenant of good faith is implied in all insurance contracts. *Manu v. GEICO Cas. Co.*, 293 Va. 371, 386, 798 S.E.2d 598, 606 (2017). This obligation to deal in good faith arises solely from the contract and only covers those situations connected with the insurance contract. *Filak v. George*, 267 Va. 612, 594 S.E.2d 610 (2004). 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 Virginia code also requires an insurer to attempt in good faith to make prompt settlements of claims in which liability has become reasonably clear. *See* Va. Code Ann. § 38.2-510.

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:

- Whether reasonable minds could differ in interpretation of the relevant policy provisions defining coverage and exclusions.
- Whether the insurer conducted a reasonable investigation of the facts and circumstances underlying the insured's claim.
- Whether the evidence reasonably supports a denial of liability.

- Whether it appears that the insurer's refusal to pay was used as merely a tool in settlement negotiations; and
- Whether the defense the insurer asserts at trial raises an issue of first impression or a reasonably debatable question of law or fact.

CUNA Mut. Ins. Soc'y v. Norman, 237 Va. 33, 38, 375 S.E.2d 724, 726-27 (1989). The insured's burden of proof for recovery under the statutes above is preponderance of the evidence. *Nationwide Mut. Ins. Co. v. St. John*, 259 Va. 71, 76, 524 S.E.2d 649, 651 (2000).

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. Specifically Va. Code § 8.01-66.1 provides an insurance company "shall be liable to the insured in an amount double the amount otherwise due and payable under the provisions of the insured's policy of motor vehicle insurance, together with reasonable attorney's fees and expenses" if a court finds a refusal or failure to pay was not made in good faith.

4. 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). Therefore, when an insurance company is presented with a settlement offer within its policy limits, it must take into account both the insured's interests and its own. *Erie Ins. Group v. Hughes*, 240 Va. 165, 393 S.E.2d 210 (1990). 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.

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.

Intentional or Negligent Infliction of Emotional Distress

Virginia generally does not recognize tort remedies for actions on an insurance contract. *Filak v. George*, 267 Va. 612, 594 S.E.2d 610 (2004). 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. In one controversial case, however, a federal court refused to grant a motion to dismiss where the insured asserted a claim for intentional infliction of emotional distress 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.

The elements of a generalized emotional distress claim in Virginia 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).

State Consumer Protection Laws, Rules and Regulations

The Virginia Unfair Trade Practices Act authorizes the Commissioner of Insurance to regulate the business of insurance. Va. Code Ann. § 38.2-500 et seq. Regulations enacted thereunder define and prohibit practices that constitute unfair methods of competition or unfair or deceptive acts. 14 VAC 5-400-10 et seq. A private cause of action is not created when an insurer violates the Act. *Salomon v. Transamerica Occidental Life Ins. Co.*, 801 F.2d 659, 661 (4th Cir. 1986). Insurers are also liable for penalties under the Virginia Unfair Claims Settlement Practices statute. Va. Code Ann. § 38.2-510. 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). The Virginia State Corporation Commission is empowered to investigate, penalize and otherwise enforce these provisions against insurers subject to the Acts. Va. Code Ann. § 38.2-515.

DISCOVERY ISSUES IN ACTIONS AGAINST INSURERS

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). Virginia courts have disagreed as to whether witness 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.

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). While the *Luthmand* case is of little precedential value, its holding is important enough to consider here. 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, and so an insurer may be able to 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). The insurer could also attempt to bifurcate the trial so that a covered loss must be proved before the insured can obtain discovery on the bad faith issue.

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). 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).

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. An application for insurance shall not be treated as part of an insurance agreement. VA. Sup. Ct. R. 4:1(b)(2). 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). Information concerning an insurance agreement is not by reason of disclosure admissible in evidence at trial.

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 902, 907 (1978). 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).

DEFENSES IN ACTIONS AGAINST INSURERS

Misrepresentations/Omissions: During Underwriting or During Claim

Fraud or 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); *Peoples Security Life Ins. Co. v. Arrington*, 243 Va. 89, 412 S.E.2d 705 (1992); *Old Republic Life Insurance Co. v. Bales*, 213 Va. 771, 195 S.E.2d 854 (1973).

Virginia insurance policies contain "false swearing provisions" for misrepresentations during the claims process *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).

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. 55, 58, 496 S.E.2d 430, 431 (1998); *Aetna Cas. & Sur. Co. v. Harris*, 218 Va. 571, 578, 239 S.E.2d 84, 88 (1977). The insurer need not show that it was prejudiced by the violation of a policy requirement. *Martin v. State Farm Gen. Ins. Co.*, No. 97-0008-D, slip op. at 5 (W.D. Va. Sept. 24, 1997). Conditions precedent which are impossible to perform are ineffectual and void. *Boyd and Stephenson Coal Co. v. Office of Worker's Com.*, 407 F.3d 663 (4th Cir. 2005).

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)).

Preexisting Illness or Disease Clauses

Insurers may limit coverage for pre-existing illness or disease claims at their election. *See Crowder v. Gen. Accident, Fire & Life Assurance Corp.*, 180 Va. 117, 120-21, 21 S.E.2d 772, 773-74 (1942) (*citing Mut. Benefits Health & Accident Ass'n v. Ryder*, 166 Va. 446, 185 S.E. 894 (1936)). Mere knowledge by the insurer of a pre-existing condition does not make the insurer liable for coverage where the policy plainly stipulates to the contrary. *Id*.; *see also Macaulay v. Home Beneficial Life Ins. Co.*, 235 Va. 649, 651-52; 369 S.E.2d 420, 421-22 (1988).

Virginia Code Section 38.2-3514 further 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.

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.

Statutes of Limitations and Repose

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. 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. Va. Code Ann. § 38.2-314. 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).

Statutes of limitations may vary by area of insurance in Virginia. For example, Va. Code Ann. § 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 Ann. § 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.

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).

TRIGGER AND ALLOCATION ISSUES FOR LONG-TAIL CLAIMS

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.

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).

CONTRIBUTION ACTIONS

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 the insolvent co-obligor's portion will be apportioned among the solvent co-obligors. *Id*.

Va. Code Ann. § 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 Ann. § 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 Ann. § 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 Ann. § 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).

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*.

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 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).

LH&D BENEFICIARY ISSUES

Change of Beneficiary

An insured has the right to name any beneficiary or change the beneficiary in accordance with the terms of the policy. *See* Smith v. Coleman, 184 Va. 259, 35 S.E.2d 107 (1945). This principle holds true even where the insurance policy in question serves as security to a debt. *See Vellines v. Ely*, 185 Va. 889, 41 S.E.2d 21 (1947). Similarly, the Virginia Supreme Court has also held that a beneficiary change made solely to defraud the insured's creditors was valid. *See Coalter v. Willard*, 156 Va. 79, 158 S.E. 724 (1931). That said, an insured cannot change the beneficiary on his or her insurance policy unless he or she has sufficient mental capacity to understand the nature of the beneficiary change. *See Kaplan v. Copeland*, 183 Va. 589, 32 S.E.2d 678 (1945).

Effect of Divorce on Beneficiary Designation

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 Ann. § 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 Ann. § 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.

Va. Code Ann. § 20-111.1(E).

INTERPLEADER ACTIONS

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.

Differences in State vs. Federal

Virginia's interpleader statute is modeled after Federal Rule of Civil Procedure 22 and 28 U.S.C. § 1355 and therefore courts have looked to federal precedent in discussing Virginia interpleader. *See e.g., Sovran Bank v. Bedford Park Assoc. Ltd. Partnership*, 23 Va. Cir. 110 (Fairfax Cir. Ct. Feb. 7, 1991). However, the major difference between federal interpleader and state interpleader is that federal courts may exercise a broader jurisdictional reach than state courts. As a result, it is often easier to establish personal jurisdiction over an interpleader defendant in federal court because Virginia state court jurisdiction is limited to the state of Virginia.