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PRIMER ON VIRGINIA LAW DEALING WITH MATERIAL MISREPRESENTATIONS IN APPLICATIONS FOR LIFE, HEALTH, AND DISABILITY POLICIES

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This article[1] provides a primer of Virginia law on key issues that may arise when the insurer seeks to void coverage under life, health, or disability insurance policies ab initio by asserting that the insured made material misrepresentations in his application. An insurer can raise the issue of the insured's material misrepresentations in the insurance application either affirmatively in a declaratory judgment action seeking a rescission of coverage[2] or defensively in the insured's breach-of-contract action against the insurer.[3] While this article focuses on Virginia law applicable to cases involving material misrepresentations in applications for life, health, and disability insurance policies, it should be noted that most of the legal principles discussed are also readily transferable to material misrepresentations in applications for any type of insurance policy.[4]

1. Rationale behind the Material Misrepresentation Rule

In Virginia, it has been established that a material misrepresentation of fact by the insured in an insurance application renders the entire insurance policy void ab initio, thereby relieving the insurer from any obligation to provide cov-

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1 For a more detailed analysis by this author of Virginia law on material misrepresentations in both the application and claims process, *see* chapter 5 (Misrepresentations) in *Insurance Law of Virginia* (2d ed. 2009).

2 *See* Banner Life Ins. Co. v. Noel, 861 F. Supp. 2d 701 (E.D. Va. 2012), *aff'd*, 505 Fed. Appx. 250 (4th Cir. 2013).

3 *See* Parkerson v. Federal Home Life Ins. Co., 797 F. Supp. 1308 (E.D. Va. 1992).

4 Even though the elements of rescission for material misrepresentations in the application under the Employee Retirement Income Security Act of 1974, 29 U.S.C. § 1001, *et seq.* ("ERISA") are governed by federal common law, federal courts still look to state law for guidance. For instance, in *Anderson v. Life Insurance Co. of North America,* 2012 U.S. Dist. Lexis 44109 (W.D. Va. 2012), an ERISA action for recovery of group life insurance benefits, the court relied upon both federal common law and Virginia law on rescission for material misrepresentations in ruling that the insurer had not abused its discretion in deciding that the insured had knowingly misrepresented his health and medical history. The Court held:

> [B]ecause the federal common law and Virginia law are largely identical as to the law of rescission, reliance on one or the other is hardly determinative.

Thus, the legal principles discussed herein are equally transferable to a rescission for material misrepresentations in applications even when the insurance claim is governed by ERISA.

erage.[5] The underlying rationale behind Virginia's rule centers on providing the insurer a fair basis to make the underwriting decision.

> Representations in an application for a policy of insurance should not only be true but full. The insurer has the right to know the whole truth. If a true disclosure is made, it is put on guard to make its own inquiries, and determine whether or not the risk should be assumed. A misstatement of material facts by the applicant takes away its opportunity to estimate the risk under its contract. A knowledge or ignorance of such facts would naturally and reasonably influence the judgment of the insurer in making the contract or in establishing the degree or character of the risk or in fixing the rate of premium.[6]

In other words, the insurer is entitled to a truthful and full disclosure from the applicant so that the insurer can make its own inquiries, if any, to determine whether to assume the risk against which it is being asked to insure.[7]

In explaining why an insured's representations to his insurer must be not only true but also full, the Supreme Court of Virginia has focused on the issue of intentional concealment, stating that

> a lack of fullness, if designed, in a respect material to the risk, is tantamount to a false representation, and is attended by like consequences. This lack of fullness is termed a "concealment," which is the designed and intentional withholding of some fact material to the risk which the insured in honesty and good faith ought to communicate to the insurer. It is not mere unintentional silence or inadvertence. It is a positive omission to state what the applicant knows, or must be presumed to know, ought to be stated. It is a suppression of the truth, whereby the insurer is induced to enter into a contract which he would not have entered into had the truth been known to him. It is a deception whereby the insurer is led to infer that to be true, as to a material matter, which is not true. Hence, strictly speaking, under the general law of insurance, there can be no concealment of a fact which is not known to the applicant.[8]

In responding to questions asked in the application, the applicant should state everything that might—and probably would—influence the insurer's underwriter in deciding whether to approve or reject the insurance application.[9]

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5 *See, e.g.,* Scott v. State Farm Mut. Auto. Ins. Co., 202 Va. 579, 118 S.E.2d 519 (1961).

6 Inter-Ocean Ins. Co. v. Harkrader, 193 Va. 96, 100-101, 67 S.E.2d 894, 897 (1951) (citations omitted).

7 Parkerson v. Federal Home Life Ins. Co., 797 F. Supp. 1308, 1315 (E.D. Va. 1992).

8 Talley v. Metropolitan Life Ins. Co., 111 Va. 778, 782, 69 S.E. 936, 938 (1911) (quoting 1 MAY ON INSURANCE § 200 (4th ed. 1900)).

9 Home Ins. Co. v. Berry, 175 Va. 447, 451, 9 S.E.2d 290, 292 (1940) (quoting Columbian Ins. Co. v. Lawrence, 27 U.S. 25 (1829)).

2. The Starting Point: Virginia Code Section 38.2-309

A claim or defense based on the alleged material misrepresentation by the insured in an insurance application in Virginia is necessarily grounded upon Code section 38.2-309, which states:

> All statements, declarations and descriptions in any application for an insurance policy or for the reinstatement of an insurance policy shall be deemed representations and not warranties. No statement in an application or in any affidavit 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.

Section 38.2-309, which is mandatory, is read into all insurance applications and cannot be set aside by the insurer, even with the insured's consent.[10] The language of the predecessor statute (which was almost identical[11] to Code section 38.2-309) was held to be clear and unambiguous.[12] Section 38.2-309 and its predecessors have been uniformly applied to void an insurance policy when the insured has made a misrepresentation of facts material to the risk.[13]

Virginia Code section 38.2-309 states that an insurer seeking rescission on the basis of a material misrepresentation in an insurance application must clearly prove that (1) a statement on the application was untrue and (2) the insurer's reliance upon that false statement was material to the risk in that it influenced the insurer's decision to issue the policy.[14] Where the application includes wording that the representations made in the application are qualified as being "true to the best of the knowledge and belief" of the applicant, the insurer's affirmative burden increases from merely proving the statements' falsity to proving that the representations were "knowingly false" when they were made.[15] This heightened standard of proof, however, "is not as exacting as the clear-and-convincing standard required in certain fraud cases."[16] In the absence of such language requiring the insurer to prove that the insured *knowingly* made a false

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10 Union Indem. Co. v. Dodd, 21 F.2d 709, 711 (4th Cir. 1927), *cert. denied,* 280 U.S. 581 (1929).

11 In *Rush v. Hartford Mutual Insurance Co.*, 652 F. Supp. 1432, 1434 n.1 (W.D. Va. 1987), the court noted that "the language of § 38.2-309 has changed almost none since adoption of a similar statute in the early 1900[ ]s."

12 Inter-Ocean Ins. Co. v. Harkrader, 193 Va. 96, 100, 67 S.E.2d 894, 897 (1951).

13 *Id*.

14 Banner Life Ins. Co. v. Noel, 861 F. Supp. 2d, 701, 707 (E.D. Va. 2012), *aff'd*, 505 Fed. Appx. 250 (4th Cir. 2013) (citing Commercial Underwriters Ins. Co. v. Hunt & Calderone, P.C., 261 Va. 38, 42, 540 S.E.2d 491, 493 (2001)).

15 Sterling Ins. Co. v. Dansey, 195 Va. 933, 940-42, 81 S.E.2d 446, 451-52 (1954).

16 Banner Life Ins. Co. v. Noel, 861 F. Supp. 2d at 711.

representation on the application, the insurer is required only to show by clear proof that the application contained a false statement.[17]

3. Two-Year Contestablility Period

Under Virginia law, every life insurance and accident and sickness insurance policy becomes incontestable for material misrepresentations in the application, except for nonpayment of premiums, after the policy has been in force for a period of two years.[18] Pursuant to Virginia Code section 38.2-3109, any reinstated life insurance policy is contestable only for fraud, material misrepresentations in the reinstatement application, or any written statement supplemental to the reinstatement application, during the new two-year contestability period created after the policy's reinstatement.[19] The contestability period begins to run at the point when the insurance is effective and the insured is entitled to policy benefits.[20] The contestability clause precludes only untimely challenges to the validity of the policy based on the alleged untruthfulness of the insured's answers in the application and has nothing to do with the terms of the coverage.[21]

The insurer cannot contest the validity of the life insurance policy for material misrepresentation in the application when the policy's incontestability two-year clause forecloses such a challenge. However, a reinstatement application creates a new incontestability period under which—if it has not yet run at the time of the insured's death and the filing of suit—the insurer can challenge the claim for material misrepresentations in the application.[22] The contestability clause is liberally construed in favor of the insured, as well as the beneficiary, and against the insurer who prepared the insurance policy.[23]

4. Application Must Be Attached to Policy

An insurance company cannot contest a claim on the basis of the insured's alleged material misrepresentations in the application unless a copy of the application is attached to the insurance policy when issued.[24] An insurer, however,

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[17] Reid-Smith v. Globe Life & Acc. Ins. Co., 2012 U.S. Dist. Lexis 174298, at *4 (W.D. Va. 2012) ("In the absence of application language requiring a different conclusion, an insurance company need not demonstrate that the insured knowingly made a false representation in his or her application or related documents to rescind a policy, but must only demonstrate by clear proof that the application contained a false statement.")

[18] *See* Va. Code § 38.2-3107 (life policies generally); § 38.2-3305 (individual life policies); § 38.2-3326 (group life policies); § 38.2-3345 (industrial life policies); § 38.2-3503 (accident and sickness policies).

[19] Nyonteh v. Peoples Sec. Life Ins. Co., 958 F.2d 42, 45-46 (4th Cir. 1992).

[20] *See, e.g.,* Parkerson v. Federal Home Life Ins. Co., 797 F. Supp. 1308, 1313-14 (W.D. Va. 1992).

[21] Va. Code § 38.2-3110; United Sec. Life Ins. Co. & Trust Co. v. Massey, 159 Va. 832, 851, 167 S.E. 248 (1933).

[22] Nyonteh v. Peoples Sec. Life Ins. Co., 958 F.2d 42, 45-46 (4th Cir. 1992).

[23] Harrison v. Provident Relief Ass'n, 141 Va. 659, 673, 126 S.E. 696 (1925).

[24] *See* Va. Code § 38.2-3304 (individual life insurance policy); § 38.2-3327 (group life insurance policy); § 38.2-3344 (industrial life insurance policy); § 38.2-3511 (accident and sickness insurance policy); Code § 38.2-3529 (group accident and sickness policy). *See also* Evans v. United Life & Accident Ins. Co., 871 F.2d 466, 469-72 (4th Cir. 1989); Southland Life Ins. Co. v. Donati, 201 Va. 855, 856-61, 114 S.E.2d 595, 596-99 (1960);

may assert the defense of material misrepresentation in the application even when the policy containing a copy of the application was not delivered until after the insured's death.[25]

5. Don't Ask, Don't Tell: Applicant's Duty to Disclose

While representations made during the application process must be true and complete, the insured has no duty to go beyond the questions asked or volunteer information to the insurer.[26] Instead, the insured is required to disclose only the information requested by the insurer.[27] If the insurer issues an insurance policy without requesting needed information from the insured, the insurer cannot later rescind the policy because the insured failed to volunteer that undisclosed information.[28] "[A] life insurance company cannot complain of a decedent's failure to answer questions which its examiner did not ask her."[29]

Likewise, if the insurer has in its possession information contradicting oral representations made by the applicant during the application process, the insurer cannot claim ignorance and seek to rescind based solely on the oral representations.[30] An insurer with knowledge of possible material misrepresentations is thereby put on notice to inquire and make a further investigation.[31] An insurer's right to rescind can be defeated by either its actual knowledge or constructive knowledge that it could have gained through reasonable inquiry.[32]

Conversely, an insurer can declare that a policy is void ab initio for material misrepresentations based on the insured's failure to answer application questions that would have affected the risk.[33]

Hammond v. Pacific Mut. Life Ins. Co. 159 F. Supp. 2d 249, 258-60 (E.D. Va. 2001), *aff'd*, 56 Fed. Appx. 188 (4th Cir. 2003).

25 *See* Anderson v. Primerica Life Ins., 934 F. Supp. 188, 189-91 (W.D. Va. 1996).

26 Insurance Co. of N. Am. v. U.S. Gypsum Co., 870 F.2d 148, 153 (4th Cir. 1989); St. Paul Fire & Marine Ins. Co. v. Jacobson, 826 F. Supp. 155 (E.D. Va. 1993), *aff'd,* 48 F.3d 778, 780-81 (4th Cir. 1995); Greensboro Nat'l Life Ins. Co. v. Southside Bank, 206 Va. 263, 268-69, 142 S.E.2d 551, 555 (1965).

27 *Southside Bank*, 206 Va. at 268-69, 142 S.E.2d at 555.

28 *Id*.; Standard Life & Acc. Ins. Co. v. Dewberry & Davis, LLC, 210 Fed. Appx. 330, 332 (4th Cir. 2006) (declining to adopt in the context of an application for reinsurance the doctrine of uberrimae fidae ("utmost good faith") to obligate insured to volunteer information that might bear on the scope of the risk assumed).

29 *Id*. at 268, 142 S.E.2d at 555 (quoting Williams v. Metropolitan Life Ins. Co., 139 Va. 341, 345, 123 S.E. 509, 511 (1924)).

30 Foremost Guar. Corp. v. Meritor Sav. Bank, 910 F.2d 118, 127 (4th Cir. 1990).

31 *Id*.

32 *Id*.

33 Pennsylvania Cas. Co. v. Chris Simopoulos, M.D., Ltd., 235 Va. 460, 465, 369 S.E.2d 166, 168-69 (1988).

6. Materiality of Insured's Alleged Misrepresentations

Through the years, the Supreme Court of Virginia has used[34] three different tests of materiality: the most demanding "nexus requirement" test,[35] the more flexible "reasonable influence" test,[36] and the intermediate "reject-the-risk" test,[37] It is noteworthy that the last six times the Court examined the issue of materiality with respect to a misrepresentation in an insurance application, it used the more flexible reasonable influence test. Under this test "[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."[38]

Regardless of which standard is used to determine materiality, the Court's critical focus is on what effect, if any, the withheld information would have had upon the insurer.[39] It is the insurer's prerogative to make its own independent inquiry and determination of the significance of various aspects of the insured's background.[40] But Code section 38.2-309 places no burden on the insurer to conduct any investigation beyond the information provided to it in the application.[41] What significance, if any, the insured, his family members, his treating physician—or even his expert witness—would place upon the insured's particular health condition is irrelevant to the materiality issue.[42] Similarly, it is irrelevant to the materiality question what the insured or even the soliciting agent may have thought regarding the significance of the misrepresented information.[43]

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34 *See* Guy M. Harbert III, *Misrepresentation on an Insurance Application: Just What Is "Material"?,* 5 J. Civ. Litig. 3 (1993) (including an excellent analysis of the various definitions of materiality used by the Supreme Court of Virginia).

35 The nexus requirement test: "A fair test of the materiality of a fact is found in the answer to the question, whether reasonably careful and intelligent men would have regarded the fact communicated at the time of effecting the insurance as substantially increasing the chances of the loss insured against so as to bring about a rejection of the risk or charging an increased premium." Standard Accident Ins. Co. v. Walker, 127 Va. 140, 147, 102 S.E. 585, 587 (1920) (quoting 14 Ruling Case Law § 202, at 1022 (1916)).

36 The reasonable influence test: "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." Mutual of Omaha Ins. Co. v. Dingus, 219 Va. 706, 713, 250 S.E.2d 352 (1979).

37 The reject-the-risk test: "If the knowledge of the fact would cause the insurer to reject the risk, or to accept it only at a higher premium rate, that fact is material, though it may not even remotely contribute to the contingency upon which the insurer would become liable, or in any wise affect the risk." Fidelity Bankers Life Ins. Corp. v. Wheeler, 203 Va. 434, 438, 125 S.E.2d 151, 154 (1962) (quoting W. Vance, Law of Insurance § 62, at 376 (Anderson 3d ed. 1951)).

38 *See, e.g.,* Mutual of Omaha Ins. Co. v. Dingus, 219 Va. 706, 713, 250 S.E.2d 352, 355 (1979).

39 Jefferson Standard Life Ins. Co. v. Clemmer, 79 F.2d 724, 733 (4th Cir. 1935).

40 Mutual of Omaha Ins. Co. v. Echols, 207 Va. 949, 953-54 n.2, 154 S.E.2d 169, 172 n.2 (1967).

41 Nationwide Mut. Ins. Co. v. Fondufe, 73 Va. Cir. 338 (Fairfax 2007).

42 *See*, *e.g.*, *Clemmer*, 79 F.2d at 733; Time Ins. Co. v. Bishop, 245 Va. 48, 53-54, 425 S.E.2d 489, 492 (1993); Chitwood v. Prudential Ins. Co., 206 Va. 314, 317, 143 S.E.2d 915, 918 (1965).

43 In *Breault v. Berkshire Life Ins. Co.*, 821 F. Supp. 410, 415-16 (E.D. Va. 1993), the court held that the "reasonable influence" test of materiality is an objective standard under which the beliefs of the insured and the agent concerning the insured's existing disability insurance coverage are immaterial.

7. What Is Required for the Insurer to Prove a Material Misrepresentation?

In Virginia, the truth or falsity of a representation in an insurance application is ordinarily a question of fact for the jury.[44] "[I]f the record clearly shows that the insured gave statements that were not true and correct to the best of the insured's knowledge and belief, where asked to do so, then the Court may resolve the question as a matter of law."[45] The materiality of that representation, however, is a question of law to be resolved by the Court.[46] Once the insurer has clearly proven the insured's representation is false, the Court does not automatically conclude that the misrepresentation is material as a matter of law.[47] Rather, the insurer still has the burden of proving the materiality of the misrepresentation.[48] As a federal court applying Virginia law recently ruled: "A fact is . . . material to the risk if the insurer would have issued the policy on different terms . . . , postponed issuance of the policy . . . , or declined to issue the policy at all."[49]

While the insurer frequently meets its burden of proving materiality by calling one of its underwriters to testify on the materiality question, an underwriter is not always required to testify in order to establish the materiality of the misrepresentation. As long as the insurer presents a competent witness who had the authority to make the determination of whether the insurer would have issued the policy as applied for had it known the true facts, the insurer can meet its burden of proof on the materiality question.[50]

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44 *See* Inter-Ocean Ins. Co. v. Harkrader, 193 Va. 96, 102, 67 S.E.2d 894, 898 (1951).

45 Banner Life Ins. Co. v. Noel, 861 F. Supp. 2d, at 710-11.

46 *Id.*; Time Ins. Co. v. Bishop, 245 Va. 48, 52 n.1, 425 S.E.2d, 489, 492 n.1 (1993).

47 Scott v. State Farm Mut. Auto. Ins. Co, 202 Va. 579, 582, 118 S.E.2d 519, 522 (1961) (auto insurance); *see also* Commercial Underwriters Ins. Co. v. Hunt & Calderone, P.C., 261 Va. at 42-43, 540 S.E.2d at 493 (no judicial notice of materiality); Harrell v. North Carolina Mut. Life Ins. Co., 215 Va. 829, 833, 213 S.E.2d 792, 795-96 (1975) (no reliance upon policy language for materiality).

48 Scott v. State Farm, 202 Va. at 584, 118 S.E.2d at 523; Commercial Underwriters Ins. Co. v. Hunt & Calderone, P.C., 261 Va. at 42, 540 S.E. at 493 (professional liability insurance).

49 Banner Life Ins. Co. v. Noel, 851 F. Supp. 2d 701, 712 (E.D. Va. 2012), *aff'd,* 505 Fed. Appx. 250, 253 (4th Cir. 2013) (citations omitted.)

50 *Compare* Parkerson v. Federal Home Life Ins. Co., 797 F. Supp. 1308 (E.D. Va. 1992) (underwriter's affidavit used to prove materiality), Koger Mgmt. Group, Inc. v. Continental Cas. Co., 2009 WL 577597 (E. D. Va. 2009) (underwriter testified that insurer would not have issued the insurance policy if application question had been answered truthfully), Continental Cas. Co. v. Graham & Schewe, 339 F. Supp. 2d 723 (E.D. Va. 2004) (insurer furnished affidavit of underwriter to meet materiality requirement), and United States Fid. & Guar. Co. v. Haywood, 211 Va. 394, 177 S.E.2d 530 (1970) (finding that the insurer met its burden of proof on materiality by calling as a witness its agent who had authority to issue and did issue the fire insurance policy in question), *with* Commercial Underwriters Ins. Co. v. Hunt & Calderone, P.C., 261 Va. 38, 540 S.E.2d 491 (2001) (noting that the insurer presented no evidence of materiality other than the policy itself), *and* Harrell v. North Carolina Mut. Life Ins. Co., 215 Va. 829, 213 S.E.2d 792 (1975) (finding that the insurer failed to present any trial witness on the critical inquiry of whether it would have issued the life insurance policy had it known the insured's true medical history). *See also* Mutual of Omaha Ins. Co. v. Echols, 207 Va. 949, 954, 154 S.E.2d 169, 172-73 (1967) (holding that a retired insurance salesman, who was not an insurance underwriter and whose only familiarity with underwriting practices was derived from his experience in receiving favorable or unfavorable action on policy applications that he had forwarded to various insurance companies, was unquali-

8. Degree of Proof

With the insurer having the affirmative burden of proving that the insured's representations were untrue and material, the next question is the degree of proof under section 38.2-309 by which the insurer must prove that the insured committed those material misrepresentations. Under Virginia law, the insurer need not prove the insured's material misrepresentation was willfully false or fraudulently made.[51] And although the insurer has the burden of clearly proving a material misrepresentation, clear and convincing evidence is not required.[52]

The two possible degrees of proof suggested for proving material misrepresentations under section 38.2-309 are preponderance of the evidence and the statutory burden that the material misrepresentation be "clearly proved."

Some courts have ruled that the insurer must prove the affirmative defense of material misrepresentations in the application context by a preponderance of the evidence.[53] Additional support for the standard of a preponderance of evidence can be found in *Peoples Security Life Insurance Co. v. Arrington*.[54] There, the Supreme Court of Virginia ruled that the Commonwealth's slayer statute[55] did not preclude the insurer from establishing that the beneficiary was barred from recovering the proceeds of her husband's life insurance policy—provided that the insurer could prove by a preponderance of the evidence[56] that the beneficiary procured, participated in, or otherwise directed her husband's murder. Since the Court in *Arrington* unanimously held that the insurer need prove the beneficiary's complicity in her husband's murder by only a preponderance of the evidence, it would certainly seem that the Court would likewise require only that the insurer "clearly" prove a material misrepresentation by the same preponderance-of-the-evidence standard.

Thus, the insurer is clearly not required under Code section 38.2-309 to prove by clear and convincing evidence that the insured committed material misrepresentations in the application process. Instead, the insurer's degree of proof under the statute is either the traditional standard of preponderance of the evidence, which is used in most civil litigation in Virginia, or simply the statutory burden that the material misrepresentation be "clearly proved."

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fied to testify as an expert witness on underwriting practices and opine that the insurer would have issued a policy to the insured even if her application had disclosed her fainting spells).

51 *See* Va. Code § 38.2-309; Clintwood v. Prudential Ins. Co. of Am., 206 Va. 314, 319, 143 S.E.2d 915, 919 (1965).

52 Old Republic Life Ins. Co. v. Bales, 213 Va. 771, 773, 195 S.E.2d 854, 856-57 (1973).

53 Nationwide Mut. Ins. Co. v. Stephens, 313 F. Supp. 890, 893 (W.D. Va. 1970); Metropolitan Life Ins. Co. v. Johnson, 172 Va. 506, 514, 2 S.E.2d 288, 292 (1939).

54 243 Va. 89, 412 S.E.2d 705 (1992).

55 Va. Code § 55-401 *et seq.*

56 To the same effect is Va. Code § 55-401(1) of Virginia's slayer statute, in which the definition of *slayer* barred from acquiring property or receiving benefits as a result of the decedent's death includes a person not convicted of murder who is determined by a court by a preponderance of the evidence to have killed the decedent. *See generally* Osman v. Osman, 285 Va. 384, 737 S.E.2d 876 (2013).

9. Changes between Time of Application and Issuance of Policy

If an insurance application provides that no insurance shall take effect until the policy is delivered to the insured while he is in good health or before any change in his health, that requirement is a valid and enforceable condition precedent to the life insurance policy taking effect.[57]

10. Causal Connection between the Misrepresentation and Loss

In Virginia, a causal connection does not have to exist between the material misrepresentation and the loss.[58] "It is of no consequence that the facts suppressed had no causal connection with the death of the insured, for they affect the very origin of the insurance contract, and, except for them, the contract would not have been made."[59]

11. If a Material Misrepresentation Is Proved, the Policy Is Deemed Void Ab Initio

With the exception of misstatements of age, if the insurer clearly proves a material misrepresentation in the application, the policy is rendered void ab initio, thereby relieving the insurer from any obligation to provide coverage under the policy.[60] If the age listed is incorrect, the amount of the proceeds payable under the policy is the amount that the premium would have purchased at the correct age at the time the policy was issued.[61]

12. Retention of Premiums by the Insurer

There have been no reported cases decided under Virginia law dealing with retention of premiums by an insurer in a case involving a material misrepresentation in the application. However, when an insurer rescinds a policy for mate-

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[57] *See, e.g.,* Hayes v. Durham Life Ins. Co., 198 Va. 670, 671, 96 S.E.2d 109, 110 (1957); Oliver v. Mutual Life Ins. Co., 97 Va. 134, 136, 33 S.E. 536, 537 (1899); Combs v. Equitable Life Ins. Co., 120 F.2d 432, 434 (4th Cir. 1941) (applying Virginia law); Gustafson v. Southland Life Ins. Co., 885 F.2d 854 (4th Cir. 1995) (applying Virginia law); Hammond v. Pacific Mut. Life Ins. Co., 159 F. Supp. 2d 249, 252 (E.D. Va. 2001), *aff'd,* 56 Fed. Appx. 118 (4th Cir. 2003) (applying Virginia law).

[58] Jefferson Standard Life Ins. Co. v. Clemmer, 79 F.2d 724, 733 (4th Cir. 1935); Mutual Benefit Health & Accident Ass'n v. Alley, 167 Va. 144, 155, 187 S.E. 456, 461 (1936).

[59] *Clemmer,* 79 F.2d at 733. In *Clemmer*, the Fourth Circuit made the following observation, which applies where the insured, his family, and/or his physician attempt to downplay the significance of certain medical treatment:

> That such consultations were for what seemed to the applicant or his physician but trivial ailments is beside the question. It is the materiality of the company's investigation and decision as to the acceptance of the risk that is involved.

Id.

[60] *See, e.g.,* Utica Mut. Ins. Co. v. National Indem. Co., 210 Va. 769, 173 S.E.2d 855 (1970) (auto insurance).

[61] *See* Va. Code § 38.2-3108 (life insurance policies generally); § 38.2-3306 (individual life insurance policies); § 38.2-3329 (group life insurance policies); § 38.2-3346 (individual life insurance policies).

rial misrepresentation in the application, the insurer usually refunds the premiums paid.[62]

13. Federal Limitation on Rescission of Health Insurance Policies

Under the Patient Protection and Affordable Care Act (a/k/a "Obamacare"), individual and group health insurance carriers are prohibited from rescinding health insurance *except when* the misrepresentation constitutes either fraud or an intentional misrepresentation. 42 U.S.C. § 300gg-12 states:

> A group health plan and a health insurance issuer offering group or individual health insurance coverage shall not rescind such plan or coverage with respect to an enrollee once the enrollee is covered under such plan or coverage involved, except that this section shall not apply to a covered individual who has performed an act or practice that constitutes fraud or makes an intentional misrepresentation of material fact as prohibited by the terms of the plan or coverage. Such plan or coverage may not be cancelled except with prior notice to the enrollee, and only as permitted under section 2702(c) or 2742(b) [42 U.S.C.S. § 300gg-1(c) or 300gg-42(b)].[63]

There have been no reported decisions decided under Virginia law dealing with misrepresentation under the Act.

14. Common Defenses Raised by the Insured

A. knowledge of agent: "but i told the agent the truth"

The insurer is charged with the knowledge possessed by its agent or medical examiner.[64] Even if the insurance agent knew of the material misrepresentation on the application, however, there is a presumption that the applicant has knowledge of the application's contents, which cannot be rebutted if the insured also was aware of that material misrepresentation.[65]

B. errors in recording: "but it should not be my fault since it was the agent who failed to complete the application correctly"

"[O]ne who signs an application for life insurance without reading the application or having someone read it to him is chargeable with notice of the application's contents and is bound thereby."[66] Therefore, there is a rebuttable

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62 TIG Ins. Co. v. Robertson, Cecil, King & Pruitt, LLP, 116 Fed. Appx. 423, 426 (4th Cir. 2004).

63 *See also* 29 C.F.R. § 2590.715-2712.

64 *See* Employers Comm. Union Ins. Co. v. Great Am. Ins. Co., 214 Va. 410, 413-14, 200 S.E.2d 560, 563-64 (1973) (knowledge of agent); South Atl. Life Ins. Co. v. Hunt, 115 Va. 398, 407-408, 79 S.E. 401 (1913) (knowledge of medical examiner); *see also* Va. Code § 38.2-1801.

65 *Eicher*, 198 Va. at 262, 93 S.E.2d at 274.

66 General Ins. of Roanoke, Inc. v. Page, 250 Va. 409, 412, 464 S.E.2d 343, 344-45 (1995).

presumption that an applicant has read the application he signed, and the applicant is prima facie charged with knowledge of its contents.[67] An applicant can rebut this presumption and defend against an insurer's claim of material misrepresentation by proving that (1) the false responses were inserted by the insurer's agent, (2) the applicant truthfully provided the responses without any fraud or collusion, and (3) the applicant had no actual or constructive knowledge that the application contained false responses.[68] The applicant may provide evidence to rebut this presumption even in those cases where a copy of the application is attached to and made a part of the policy,[69] and where the insurer included stipulations limiting the agent's authority in the application and policy.[70] Attempts to rebut the presumption will fail if an applicant cannot prove the responses were truthfully given to the agent, who then incorrectly recorded them.[71] Similarly, the presumption cannot be rebutted if the insured knew the application contained the misrepresentation.[72] It should be noted that the insured may acquire actual knowledge of a material misrepresentation by reading the completed application.[73]

C. INNOCENT MISREPRESENTATION BY THE APPLICANT: "BUT MY DOCTOR NEVER TOLD ME"

When insurance applications include language that representations in the application are "true to the best of the knowledge and belief" of the applicant, innocent misrepresentations cannot be used to rescind the policy unless the insurer proves that the representations were "knowingly false" when made.[74] In the absence of such language, the insurer can challenge the validity of the policy due to material misrepresentations even if they were innocently made.[75]

D. FAILURE OR INABILITY TO READ: "BUT I CANNOT READ"

An insured cannot excuse material misrepresentations in the application by claiming that he failed to read the completed application or to have someone

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67 Mutual of Omaha Ins. Co. v. Dingus, 219 Va. 706, 714-15, 250 S.E.2d 352, 356 (1979); New York Life Ins. Co. v. Eicher, 198 Va. 255, 260-61, 93 S.E.2d 269, 273-74 (1956); Gilley v. Union Life Ins. Co., 194 Va. 966, 974, 76 S.E.2d 165, 170 (1953).

68 *Dingus*, 219 Va. at 714-15, 250 S.E.2d at 356; *Eicher*, 198 Va. at 260-61, 93 S.E.2d at 273-74; *Gilley*, 194 Va. at 974, 76 S.E.2d at 170.

69 *See Eicher,* 198 Va. at 260, 93 S.E.2d at 273.

70 *Id.; Gilley*, 194 Va. at 973, 76 S.E.2d at 169.

71 *Dingus*, 219 Va. at 715, 250 S.E.2d at 356.

72 *Eicher*, 198 Va. at 262, 93 S.E.2d at 274; Breault v. Berkshire Life Ins. Co., 821 F. Supp. 410, 416-17 (E.D. Va. 1993).

73 Quillin v. Prudential Ins. Co., 280 F.2d 771, 775 (4th Cir. 1960).

74 *See* Sterling Ins. Co. v. Dansey, 195 Va. 933, 941-42, 81 S.E.2d 446, 451-52 (1954).

75 Reid-Smith v. Globe Life & Acc. Ins. Co., 2012 U.S. Dist. LEXIS 174 298, at *4 (W.D. Va. 2012).

read it to him because an applicant is "charg[ed] with notice of the application's contents and is bound thereby."[76]

E. DUTY TO INQUIRE: "BUT THE INSURER SHOULD HAVE DONE ITS DUE DILIGENCE *BEFORE* ISSUING THE POLICY"

A policy can be rescinded for material misrepresentations in the application even if the insured leaves some, but not all, of the application questions unanswered.[77] If, through actual or constructive knowledge, the insurer obtains information that contradicts the insured's oral representations, it is put on notice of its duty to inquire and cannot claim ignorance and seek to rescind based on those oral representations.[78]

F. POST-CLAIM UNDERWRITING BY THE INSURER

Post-claim underwriting is defined as "an insurer's waiting until after the insured makes a claim to determine whether the claimant is eligible for insurance according to the risks he presents."[79] There have been no reported cases decided under Virginia law dealing with claims by insureds of post-claim underwriting by the insurer.

15. STATUTES OF LIMITATIONS

In Virginia, an action for breach of written contract must be filed within five years after the cause of action accrues.[80] However, the Supreme Court has expressly held that contracting parties to an insurance policy can agree to a shorter contractual period of limitations.[81] In the life insurance context, the contractual limitations period cannot be "less than one year after the cause of action accrues."[82] A cause of action for breach of an insurance policy accrues and the limitations period begins to run from the date of the alleged breach.[83] When a life insurance policy requires a demand for payment and proof of death of the insured, the limitations period begins to run on the date of the demand and proof.[84] The statute of limitations may be tolled if the plaintiff is a minor or

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76 General Ins. Co. of Roanoke, Inc. v. Page, 250 Va. 409, 413, 464 S.E.2d 343, 344-45 (1995); Banner Life Ins. Co. v. Noel, 861 F. Supp. 2d 701, 708, 710 (E.D. Va. 2012), *aff'd,* 2013 U.S. App. LEXIS 1539 (4th Cir. 2013); Anderson v. Life Ins. Co. of N. Am., 2012 U.S. Dist. LEXIS 44109, at *26 (W.D. Va. 2012).

77 *See* Pennsylvania Cas. Co. v. Chris Simopoulous, M.D., Ltd., 235 Va. 460, 465, 369 S.E.2d 166, 168-69 (1988) (medical malpractice insurance).

78 Foremost Guar. Corp. v. Meritor Sav. Bank, 910 F.2d 118, 127 (4th Cir. 1990) (mortgage insurance).

79 Wesley v. Union Nat'l Life, 919 F. Supp. 232, 235 (S.D. Miss. 1995).

80 VA. CODE § 8.01-246(2).

81 Massie v. Blue Cross & Blue Shield of Va., 256 Va. 161, 164, 500 S.E.2d 509, 511 (1998).

82 VA. CODE § 38.2-3316(1) (individual life insurance policies); § 38.2-3338(1) (group life insurance policies); § 38.2-3354(1) (industrial life insurance policies).

83 VA. CODE § 8.01-230.

84 *See* Arrington v. Peoples Sec. Life Ins. Co., 250 Va. 52, 55-56, 458 S.E.2d 289, 291 (1995).

incapacitated until the disability is removed.[85] If the person entitled to bring an action on an insurance policy dies with no such action pending before the expiration of the limitation period, the decedent's personal representative can file an action before expiration of the limitations periods or within one year after his qualification as personal representative, whichever occurs later.[86]

16. Estoppel, Waiver

Waiver means a voluntary, intentional relinquishment of a known right.[87] The elements of estoppel are as follows: (1) an untrue representation or the concealment of a material fact; (2) the misrepresentation was made with knowledge of the facts; (3) the party to whom the misrepresentation was directed was unaware of the true facts; (4) the party making the misrepresentation did so with the intent that the other party would act upon it; (5) the other party was induced to act upon the misrepresentation; and (6) the party asserting estoppel was misled to his detriment or injury.[88]

The party relying on waiver or estoppel has the burden of proving the pertinent elements by clear, precise, and unequivocal evidence, which must be certain and cannot be based on mere inference or conjecture.[89] Estoppel applies only when the insured can prove he justifiably relied on the insurer's conduct and was, therefore, misled into believing the policy was in force.[90] Retention of the premium combined with the insurer's delay in notification of rejection of the application does not estop the insurer if the policy required delivery during his lifetime and while in good health.[91]

Since estoppel is an equitable doctrine, an insured or beneficiary cannot rely on estoppel where he has unclean hands, such as when the alleged misconduct of the insurer or agent was induced by the party's own fraud or false representations.[92]

17. Conclusion

In sum, a life, health, or disability insurer making a claim or defense of an alleged material misrepresentation in the application can succeed in rescinding a policy if it clearly proves that the statement in the application was (1) false (or

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85 *See* Va. Code § 8.01-229(A).

86 Va. Code § 8.01-229(B)(1).

87 Employers Commercial Union Ins. Co. of Am. v. Great Am. Ins. Co., 214 Va. 410, 412, 200 S.E.2d 560, 562 (1973) (auto insurance).

88 Coleman v. Nationwide Life Ins. Co., 211 Va. 579, 582-83, 179 S.E.2d 466, 469 (1971).

89 Utica Mut. Ins. Co. v. National Indem. Co., 210 Va. 769, 773, 173 S.E.2d 855, 858 (1970) (auto insurance).

90 Harris v. Criterion Ins. Co., 222 Va. 496, 502, 281 S.E.2d 878, 881 (1981).

91 Haynes v. Durham Life Ins. Co., 198 Va. 670, 673, 96 S.E.2d 109, 111 (1957); Justice v. Prudential Ins. Co. of Am., 351 F.2d 462, 463 (4th Cir. 1965).

92 Banner Life Ins. Co. v. Noel, 861 F. Supp. 2d 701, 716-16 (E.D. Va. 2012), *aff'd*, 505 Fed. Appx. 250 (4th Cir. 2013); Pennsylvania Cas. Co. v. Simopoulous, 235 Va. 460, 465, 369 S.E.2d 166, 169 (1988) (medical malpractice insurance).

knowingly false if the application responses were qualified as being "true to the best of the knowledge and belief" of the applicant) and (2) material to the risk in that it reasonably influenced the insurer's decision on whether to issue the policy and on what terms.