



## Virginia Best Practices in Handling Pleas of the Statute of Limitations and/or Contractual Limitations Period in an Action on a Life Insurance Policy

By Robert B. "Chip" Delano, Jr.

This paper focuses on strategic best practices for the handling of a special plea of the statute of limitations and/or contractual limitations period in an action seeking recovery of the proceeds of a life insurance policy under Virginia law. This past year, an action on a life insurance policy was dismissed for being time-barred thanks to the Supreme Court of Virginia's 1995 holding in *Arrington v. Peoples Security Life Ins. Co.*<sup>1</sup> The other party assumed that the statute of limitations did not begin to run until the insurer denied the claim. When the *Arrington* case was cited, the other party was surprised that the statute of limitations instead had begun to run from the earlier date when the insurer acknowledged receipt of the claim. At the conclusion of the hearing on the insurer's special plea of the statute of limitations, the Judge entered a final order sustaining the special plea of the statute of limitations and dismissing the case. After that favorable ruling, I decided to write an article on the *Arrington* case and its holding regarding statutes of limitations/contractual limitations periods in a life insurance action.

*Mr. Delano is a shareholder in the Richmond office of Sands Anderson PC and is a former president of the Virginia Association of Defense Attorneys. He serves as trial and appellate counsel in insurance and tort litigation with a significant portion of his practice devoted to the defense of life, health, disability, and ERISA cases. Mr. Delano was counsel of record for the life insurance carrier in the Arrington v. Peoples Security Life Ins. Co. case.*

### I. Principles Regarding the Statute of Limitations.

A. The old and favored equity maxim behind statutes of limitations is, "vigilantibus, non dormientibus jura subveniunt," which is translated, "the laws came to the aid of the vigilant and not the sleeping ones."<sup>2</sup>

"Statutes of limitations are statutes of repose, the object of which is to compel the exercise of a right of action within a reasonable time. They are designed to suppress fraudulent and stale claims from being asserted after a great lapse of time, to the surprise of the parties, when the evidence may have been lost, the facts may have become obscure because of defective memory, or the witnesses have died or disappeared."<sup>3</sup>

B. In *Arrington v. Peoples Security Life Ins. Co.*,<sup>4</sup> the Supreme Court of Virginia analyzed a plea of the statute of limitations in a case involving recovery on two life insurance policies. In explaining its legal analysis, the Court noted these well-settled principles regarding statutes of limitations:

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Statutes of limitations are strictly enforced and exceptions thereto are narrowly construed. Consequently, a statute should be applied unless the General Assembly clearly creates an exception, and any doubt must be resolved in favor of the enforcement of the statute.<sup>5</sup>

## II. Pleading a Statute of Limitations and/or Contractual Limitations Period.

Pursuant to the Code of Virginia, the bar of a statute of limitations may only be raised as an affirmative defense in a responsive pleading such as a plea in bar<sup>6</sup> or answer, but not a demurrer,<sup>7</sup> motion to quash process,<sup>8</sup> or motion to strike.<sup>9</sup> Virginia Code § 8.01-235 provides:

The objection that an action is not commenced within the limitation period prescribed by law can only be raised as an affirmative defense specifically set forth in a responsive pleading. No statutory limitation period shall have jurisdictional effects and the defense that the statutory limitation period has expired cannot be set up by demurrer. This section shall apply to all limitation periods, without regard to whether or not the statute prescribing such limitation period shall create a new right.

Even though the limitations bar must be raised as an affirmative defense in a responsive pleading, the pleading party is not required to specify the particular statute of limitations being relied upon.<sup>10</sup> The defendant has the burden of establishing the facts necessary to prove that the statute of limitations has run.<sup>11</sup> Failure to plead the statute of limitations constitutes a waiver of that affirmative defense.<sup>12</sup> If the statute of limitations is not pleaded or relied upon in the trial court it cannot be raised on appeal.<sup>13</sup>

In cases filed in federal court, “[w]ith jurisdiction based on diversity of citizenship, the court must look to Virginia law for a determination of both the applicable statute of limitations and the time at which a claim accrues under the applicable statute.”<sup>14</sup>

## III. Which Statutory or Contractual Limitations Period Applies?

Parties to a contract may agree to a contractual

limitations period that is different from the statutory limitations period, provided the contractual period is not prohibited by statute.

In the absence of a contractual limitations period in the life insurance policy, Virginia’s five year statute of limitations for written contracts, Code § 8.01-246.2, applies to an action on a life insurance policy such that the action for breach of contract must be filed within five years after the cause of action accrues.<sup>15</sup>

In Virginia, parties may contract in life insurance policies for a shorter contractual limitations period than that provided by the statute of limitations<sup>16</sup> provided that it is one year or more.<sup>17</sup>

## IV. When Does the Cause of Action for Breach of Contract Accrue and the Limitation Period Begin to Run?

Code § 8.01-230 states that a cause of action for breach of contract accrues and the limitations period begins to run from the date of the alleged breach of contract.<sup>18</sup>

The ticking of the limitations period clock stops when the Complaint is filed in the Clerk’s office.<sup>19</sup>

In *Arrington v. Peoples Security Life Ins. Co.*, the Supreme Court of Virginia resolved the question of when a cause of action on a life insurance policy accrues and the limitations period begins to run.<sup>20</sup> In the trial court, the administrator of the insured’s estate argued that her action on the life insurance policy accrued and began to run on the date of the insurer’s letter refusing the administrator’s demand for payment of the policy benefits.<sup>21</sup> The trial court adopted the insurer’s position that the five year limitations period accrued and began to run on the date of the insured’s death.<sup>22</sup>

While the Supreme Court of Virginia affirmed the trial court’s ruling sustaining the insurer’s plea of the statute of limitations, the appellate court disagreed with the trial court’s selection of the insured’s date of death as the accrual date, with the Court stating: “With respect to life insurance policies, we have said that, when a policy requires a demand for payment and proof of death, the statute of limitations begins to run on the date of the demand and proof.”<sup>23</sup>

In the *Arrington* case, as is the case with most life insurance policies, the express language of the life insurance policy at issue established that the cause of action accrued when People Security “received proof

of [the] Insured's death" and, thus, was required to pay the proceeds of the policy.<sup>24</sup> There, the insurer wrote a letter on March 30, 1988 to the insured's widow, who was the beneficiary on both life insurance policies, acknowledging that it had received proof of the insured's death.<sup>25</sup>

The *Arrington* Court ruled that "...at the very latest..." at that moment when Peoples Security acknowledged in writing its receipt of proof of the insured's death, Virginia's five year statute of limitations began to run.<sup>26</sup> The plaintiff administrator's lawsuits on the two life insurance policies were not filed until February 15, 1994, well beyond March 30, 1993, the five year anniversary of Peoples Security's letter to the insured's widow acknowledging receipt of proof of the insured's death.<sup>27</sup> Therefore, those actions filed over ten months beyond the statute of limitations period were time barred.<sup>28</sup>

Significantly, even though the life insurer Peoples Security stated in its letter that it would continue to gather the insured's medical records during the contestability period,<sup>29</sup> the presence of this language in the insurer's acknowledgement letter to the widow did not stop the life insurance claim from accruing and the five year statute of limitations period from the beginning to run. As long as the policy has language stating that it will pay the policy proceeds when it receives proof of the insured's death and an insurer's letter to the beneficiary acknowledges receipt of such proof, the life insurance claim accrues, at the latest, on the date of the insurer's letter and the limitations period, be it a statute of limitations or a contractual limitations period, will begin to run.<sup>30</sup>

## V. Applying a Statute of Limitations/Contractual Limitations Period to a Claim of a Life Insurance Policy.

*Arrington* provides the roadmap to raise a limitations defense to an action seeking life insurance benefits. First, one must determine which statute of limitations or contractual limitations applies. Does the life insurance policy have a contractual limitations period of one year or more? If so, then that contractual limitations period applies. If not, then as in the *Arrington* case, Virginia's five year statute of limitations applies.<sup>31</sup>

Second, one must determine when the limitations period accrues and begins to run? Did the life insurer

send a letter to the beneficiary acknowledging receipt of proof of the insured's death like Peoples Security did in the *Arrington* case?<sup>32</sup> If so, then the cause of action for breach of contract accrued and the limitations period, be it a statute of limitations or a contractual limitations period of one year or more, begins to run. If the limitations period ran before the plaintiff filed his action for recovery of life insurance benefits, then, as in *Arrington*, the action is time barred.<sup>33</sup> Conversely, if the policy does not have language stating that it will pay the policy proceeds when it receives proof of the insured's death, and the insurer has not written a letter to the beneficiary acknowledging its receipt of proof of the insured's passing, the cause of action has not yet accrued and the limitations period has not begun to run.

## VI. Conclusion.

In handling an action on a life insurance policy, the attorney should be prepared to address in the appropriate case the key issues that may be presented if the case was not timely filed within the applicable statute of limitations/contractual limitations period such as those discussed in this paper. ✱

## (Endnotes)

1. 250 Va. 52, 458 S.E. 2d 289 (1995).
2. *Tackett v. Bolling*, 172 Va. 326, 335, 1 S.E. 2d 285, 289 (1939)(Hudgins, J., dissenting). One astute law student summarized the maxim to "you snooze, you lose." W. Hamilton Bryson, Bryson on Virginia Civil Procedure § 6.03[8][k][i] at footnote 339 (5th ed. 2017).
3. *Street v. Consumers Mining Corp.*, 185 Va. 561, 575, 39 S.E. 2d 271, 277 (1946).
4. 250 Va. 52, 458 S.E. 2d 289 (1995).
5. 250 Va. at 55, 458 S.E. 2d at 290-291 (citations omitted.)
6. A plea in bar can be filed when the defendant's defense can be reduced to a single question of fact such as the lawsuit being barred by the statute of limitations. W. Hamilton Bryson, Bryson on Virginia Civil Procedure § 6.03[6] (5th ed. 2017).
7. See VA. CODE § 8.01-235.
8. *Lane Bros. & Co. v. Bauserman*, 103 Va. 146, 149, 48 S.E. 857, 858 (1904).
9. *Helm v. Lyons*, 23 Va. Cir. 307 (1991).
10. VA. SUP. CT. RULE 3:18(d). ("Pleading the statute of limitations. – An allegation that an action is barred by the statute of limitations is sufficient without specifying the particular statute relied upon.")

11. *Lo v. Burke*, 249 Va. 311, 316, 455 S.E.2d 9, 12 (1995).
12. *Herrell v. Bd. of Supervisors of Prince William Cty.*, 113 Va. 594, 597, 75 S.E. 87, 88 (1912).
13. *Gibson v. Green's Admin'r*, 89 Va. 524, 526, 16 S.E.2d 661, 662 (1893).
14. *Brown v. American Broad. Co.*, 704 F.2d 1296, 1299 (4th Cir. 1983). *Accord Coe v. Thermasol, Inc.*, 785 F.2d 511, 514 n. 5 (4th Cir. 1986) ("federal courts sitting in diversity apply the forum's statute of limitations").
15. *Arrington*, 250 Va. at 55, 458 S.E.2d at 291 (citing Va. Code § 246(2)).
16. *Koonan v. Blue Cross and Blue Shield of Virginia*, 802 F. Supp. 1424, 1425 (E.D. Va. 1992) (Plaintiff's action seeking recovery under his group health insurance contract held to be time-barred by one year contractual limitations period permitted by VA. CODE § 38.2-314.)
17. See VA. CODE § 38.2-3316(1) (individual life insurance policy); § 38.2-3338(1) (group life insurance policy); § 38.2-3354(1) (industrial life insurance policy); § 38.2-314 ("any insurance policy").
18. 250 Va. at 55, 458 S.E.2d at 291 (citing VA. CODE § 8.01-230).
19. VA. SUP. CT. RULE 3:2(a) ("A civil action shall be commenced by filing a complaint in the clerk's office.").
20. 250 Va. at 56, 458 S.E.2d at 291.
21. *Id.* at 54-55, 458 S.E.2d at 290.
22. *Id.* at 54, 458 S.E.2d at 290.
23. *Id.* at 55, 450 S.E.2d at 291 (citing *Page v. Shenandoah Life Ins. Co.*, 185 Va. 919, 925-27, 40 S.E.2d 922, 925-36 (1947)).
24. 250 Va. at 56, 458 S.E.2d at 291.
25. The body of Peoples Security's letter to the insured's widow/beneficiary dated March 30, 1988 which was found in that case's Joint Appendix at the Supreme Court of Virginia's law library in Richmond stated as follows:

Dear Ms. Arrington,

We wish to express to you our sincerest sympathy on your recent loss.

Since death occurred during the two-year period after the policy was issued, it is necessary for us to obtain additional information concerning the insured's health history prior to the date of the application for this policy.

Please be assured that we are giving your claim our prompt attention.

26. *Id.*
27. *Id.*
28. *Id.*

29. Life insurance policies are incontestable after they have been in force during the lifetime of the insured for two years from the date of issue except for nonpayment of premiums. See VA. CODE § 38.2-3305 (individual life insurance policy); § 38.2-3326 (group life insurance policy); § 38.2-3345 (industrial life insurance policy).
30. Interestingly, this rule that a life insurance claim begins to run on the date when the insurer is presented with proof of death is not only found in the *Arrington* case. Virginia's statute governing interest of life insurance proceeds similarly states: "If an action to recover the proceeds due under a life insurance policy ... results in a judgment against the insurer, interest on the judgement at the legal rate of interest shall be paid from (i) the date of presentation to the insurer of proof of death on a life insurance policy..." VA. CODE § 38.2-3115(A),
31. 250 Va. at 55, 458 S.E.2d at 291.
32. 250 Va. at 56, 458 S.E.2d at 291.
33. Commencement of Action/Proceeding which includes failure to file a contested action within the applicable statute of limitations/contractual limitations period is the second highest type of malpractice claims. ABA Standing Committee on Lawyers' Professional Liability, *Profile of Legal Malpractice Claims: 2012 – 2015* (ABA 2016). ♦