

## PRIMER ON VIRGINIA LAW RELATED TO A CLAIM ON A LIFE INSURANCE POLICY

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This article provides a primer of Virginia law on key issues that may arise in a claim on a life insurance policy.

### I. FORMATION OF THE LIFE INSURANCE CONTRACT

#### A. INSURABLE INTEREST REQUIREMENT

In Virginia, when someone takes out a life insurance policy on the life of another for his own benefit he must have an insurable interest in the life of the person being insured at the time the life insurance policy is issued. “It is a settled principle of our American jurisprudence that one taking out a policy of insurance on the life of another for his own benefit, must have an interest in the continuance of the life of the insured.”<sup>1</sup>

Under Virginia Code section 38.2-301(A), an insured of lawful age may procure life or accident insurance upon himself for the benefit of any person, but one cannot knowingly procure or cause to be procured any insurance policy upon another person *unless* the benefits under the policy are payable to (1) the insured or his personal representative, or (2) “a person having an insurable interest in the insured at the time when the contract was made.” In Code section 38.2-301(B), the statute goes on to define *insurable interest* to mean the following:

1. In the case of individuals related closely by blood or by law, a substantial interest engendered by love and affection;
2. In the case of other persons, a lawful and substantial economic interest in the life, health, and bodily safety of the insured. “Insurable interest” shall not include an interest which arises only or is enhanced by the death, disability or injury of the insured;

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<sup>1</sup> *Crismond’s Adm’x v. Jones*, 117 Va. 34, 37, 83 S.E. 1045 (1915).

3. In the case of employees of corporations, with respect to whom the corporate employer, a trust established by the corporate employer, or an employee benefit trust is the beneficiary under an insurance contract, the lawful and substantial economic interest required in subdivision 2 of this subsection shall be deemed to exist in (i) key employees and (ii) other employees who have been employed by the corporation for 12 consecutive months, provided that the amount of insurance coverage on such other employees shall be limited to an amount which is commensurate with employer-provided benefits to non-key employees as a group;
4. In the case of a party to a contract or option for the purchase or sale, including a redemption, of an interest in a business proprietorship, partnership or firm or of shares of stock of a corporation or of an interest in such shares, the lawful and substantial economic interest required in subdivision 2 shall be deemed to exist in each individual party to such contract or option and for the purpose of such contract or option only, in addition to any insurable interest that may otherwise exist as to the life of such individual;
5. In the case of a trustee, other than the trustee of a domestic business trust or foreign business trust, as defined in § 13.1-1201, the lawful and substantial economic interest required in subdivision 2 shall be deemed to exist, whether the life insurance policy is owned by a trustee before, on or after July 1, 2005, in (i) the individual insured who established the trust, (ii) each individual in whose life the owner of the trust for federal income tax purposes has an insurable interest, and (iii) each individual in whose life a beneficiary of the trust has an insurable interest; and
6. In the case of an organization described in § 501(c) of the Internal Revenue Code, the lawful and substantial economic interest required in subdivision 2 of this subsection shall be deemed to exist where (i) the insured or proposed insured has either assigned all or part of his ownership rights in a policy or contract to such an organization or has executed a written consent to the issuance of a policy or contract to such organization and (ii) such organization is named in the policy or contract as owner or as beneficiary.

**B. MUST THE INSURED SIGN THE APPLICATION?**

Virginia Code section 38.2-302(A) provides that no life or accident insurance policy on the life of a person can be made or effected unless at the time of making that contract the individual insured being of lawful age and competent to contract for the insurance policy (1) applies for the insurance or (2) consents

in writing to the insurance policy. Exceptions to this statute include the following:

1. a husband or wife may effect an insurance policy upon each other,
2. any person having an insurable interest in the life of a minor or any person upon whom a minor is dependent for support and maintenance, may effect an insurance policy upon the life of or pertaining to the minor, or
3. a corporate employer or an employee benefit trust having the insurable interest described in Virginia's insurable interest statute, Code section 38.2-301(B) may effect an insurance policy upon the lives of such employer provided that the employer or trust provides the employee with notice in writing that such insurance has been purchased, the amount of such coverage, and to whom benefits are payable upon the employee's death.

Virginia Code section 38.2-302(B) provides that nothing in this statute shall prohibit a minor from obtaining an insurance policy on his own life as authorized in Code section 38.2-3105 (the statute dealing with when a minor may take out a life insurance policy on his own life).

In *Hilfiger v. Transamerica Occidental Life Insurance Co.*,<sup>2</sup> the Supreme Court of Virginia held that there was no valid life insurance policy where a son completed and signed a life insurance application on his father's life. His father's alleged oral authorization to the son and the father's participation in his medical examination and signing of a medical form did not constitute the requisite written consent required by statute.

#### C. CONDITIONAL RECEIPT AND TEMPORARY INSURANCE APPLICATION AND AGREEMENT (TIAA)

When an applicant pays the initial premium at the time he applies for a life insurance policy, he usually is given a document such as a conditional receipt or completes a TIAA. The language of these documents determines if and when his life insurance coverage attaches.

##### 1. Conditional Receipt

In *Elliott v. Interstate Life & Accident Insurance Co.*,<sup>3</sup> the agent issued a "field receipt" when the applicant paid the initial premium for the policy. The language of the application expressly stated the agent's lack of authority to bind the insurer and, therefore, the applicant was put on notice that there was no coverage in effect until the insurer determined the applicant was insurable and ac-

<sup>2</sup> 256 Va. 265, 505 S.E.2d 190 (1998).

<sup>3</sup> 211 Va. 240, 126 S.E.2d 314 (1970).

ceptable for insurance under the insurer's rules and practices for the amount of insurance at the premium rate set forth in the application.

In contrast, in *Evers v. Standard Security Life Insurance Co. of New York*,<sup>4</sup> the Fourth Circuit, applying Virginia law, held that on facts indicating that conditional receipt issued to the applicant stated that the life insurance would be effective on the date of the receipt if, after its investigation, the insurer determined the applicant was insurable, the case had to be submitted to the jury on the issue of whether the applicant was insurable under the insurer's underwriting rules and regulations on the date of the application when the insurer had notice of the applicant's death before its rejection of the application.

## 2. TIAA

More recently, insurers have tended to avoid the use of conditional receipts and instead often use a TIAA when the applicant seeks to pay the initial premium to apply for temporary life insurance coverage. In *Banner Life Insurance Co. v. Noel*,<sup>5</sup> the Court ruled the life insurance carrier was not obligated under the TIAA to pay temporary life insurance benefits and was required only to refund the premium when the applicant died before the policy was issued. Under the TIAA, the insurer's obligation was limited to a premium refund when the applicant made multiple material misrepresentations concerning his medical history in any part of the multipage life insurance application.

### D. DOES THE INSURER'S ACCEPTANCE AND RETENTION OF A PREMIUM CREATE A LIFE INSURANCE POLICY?

In *Hayes v. Durham Life Insurance Co.*,<sup>6</sup> the Supreme Court of Virginia ruled decades ago that the insurer's retention of the initial premium—coupled with an unreasonable delay in acting upon the application—does not constitute acceptance of the application or create a binding contract.

### E. GOOD HEALTH REQUIREMENT AT TIME OF DELIVERY

Most life insurance policies contain a "good health" provision, which states that the policy does not become effective unless (1) it is delivered to the insured, and (2) the first premium is paid *before* there is any change in the proposed insured's health. "So we find in Virginia that the words 'good health' in policies of insurance do not mean 'good health' in its literal sense, but in the sense in which they are used by the man in the street speaking of his physical condition."<sup>7</sup>

<sup>4</sup> 345 F. Supp. 1162 (W.D. Va. 1972), *aff'd*, 490 F.2d 1407 (4th Cir. 1974).

<sup>5</sup> 861 F. Supp. 2d 701 (E.D. Va. 2012), *aff'd*, 505 F. App'x 250 (4th Cir. 2013).

<sup>6</sup> 198 Va. 670, 96 S.E.2d 109 (1957).

<sup>7</sup> *Combs v. Equitable Life Ins. Co. of Am.*, 120 F.2d 432, 436 (4th Cir. 1941) (applicant was not in good health at the time his life insurance policy was delivered because he failed to disclose to the agent at delivery that he had been suffering from a respiratory disease).

The phrase “good health” as used in its common and ordinary sense by a person speaking of his own condition, undoubtedly implies a state of health unimpaired by any serious malady of which the person himself is conscious. When one says he is in good health, he does not mean, and nobody understands him to mean, that he may not have a latent disease of which he is wholly unconscious.<sup>8</sup>

#### F. FREE LOOK PERIOD AFTER POLICY DELIVERY

Every life insurance policy delivered or issued for delivery in Virginia must contain a notice stating in substance that the policyholder has at least ten days from delivery to review the terms of the policy during which he can void the policy and obtain a refund of any premium paid. This statutorily required right to examine the policy applies to individual life insurance policies (Code section 38.2-3301) and industrial life insurance policies (Code section 38.2-3342). The insurer may extend this right to examine period for more than ten days if the period is specified in the policy.<sup>9</sup>

#### G. ELECTRONIC SIGNATURE REQUIREMENTS

Virginia Code section 38.2-325(A) deals with insurers conducting business by electronic means, which would include use of electronic signatures for applications for life insurance policies. The governing language provides:

§ 38.2-325. Electronic delivery.

- A. If parties have agreed to conduct business by electronic means, and the agent of record, if applicable, has been so notified by the insurer, any information that is required to be delivered in writing may be delivered by (i) placing such information within the body of the electronic message; (ii) placing such information as an attachment to the electronic message that may be opened through the use of software that is readily available; (iii) displaying the information, or a clear and conspicuous link to the information, as an essential step to completing the transaction to which the information relates; or (iv) placing such information on the insurer’s secured server and an electronic message is provided advising that insurance information or, when appropriate, time-sensitive insurance information has been placed on the insurer’s secured server and is available for retrieval. This section should be construed to be consistent with the Electronic Signatures in Global and National Commerce Act (15 U.S.C. § 7001 *et seq.*).

<sup>8</sup> *Greenwood v. Royal Neighbors of Am.*, 118 Va. 329, 334, 87 S.E. 581, 583 (1916) (insured’s statement that she was in good health was true in the sense that her doctor had neglected to tell her or her husband that she had an incurable and dangerous health disease).

<sup>9</sup> *Id.*

## II. MAINTENANCE OF THE LIFE INSURANCE POLICY

### A. GRACE PERIOD

Each individual life insurance policy (Code section 38.2-3303), group life insurance policy (Code section 38.2-3325), group accident and sickness insurance policy (Code section 38.2-3527), mutual assessment life, accident, and sickness insurance policy (Code section 38.2-3913), and industrial life insurance policy (Code section 38.2-3343) shall contain a grace period of at least thirty-one days within which the payment of any premium after the first premium may be made during which the policy shall continue in full force.

### B. LAPSE FOR FAILURE TO TIMELY PAY PREMIUMS

It is well settled in Virginia that the insured must pay his life insurance premiums in a timely manner to avoid lapse for nonpayment.

Promptness of payment is essential in the business of life insurance. All the calculations of the insurance company are based on the hypothesis of prompt payments. They not only calculate on the receipt of premiums when due, but on compounding interest upon them. It is on this basis that they are enabled to offer insurance at the favorable rates they do. Forfeiture for non-payment is a necessary means of protecting themselves from embarrassment. Delinquency cannot be tolerated or redeemed except at the option of the company.<sup>10</sup>

However, in order for an insured's life insurance policy to lapse for failure to timely pay premiums, the insurer must comply with Virginia's notice-of-lapse or pending lapse statute, Virginia Code section 38.2-232, which provides in pertinent part: "Every insurer . . . that issues a policy, contract, or plan of insurance . . . shall provide the policy owner, contract owner, or plan owner with a written notice prior to the date that the policy, contract, or plan will lapse for failure to pay premiums due."

Code section 38.2-232 is silent as to whether notice is effective upon dispatch by mail or whether proof of actual receipt is required. The burden placed upon the insurer to prove compliance with Virginia's statutory notice requirement depends on whether the life insurance policy contains a provision providing that lapse notice was effective upon mailing. In *Auxo-Med, LLC v. Ohio National Life Assurance Corp.*<sup>11</sup> and *Russell v. Nationwide Life Insurance Co.*,<sup>12</sup> the Eastern District courts ruled that the insurers had complied with Virginia's statutory notice-of-lapse requirement, albeit by different methods. In *Auxo-Med*, pursuant to the policy provision stating that notice of the impending lapse would be

<sup>10</sup> *Mercer v. South Atl. Life Ins. Co.*, 111 Va. 699, 705, 69 S.E. 961, 963 (1911) (quoting *Klein v. New York Life Ins. Co.*, 104 U.S. 88, 91, 26 L. Ed. 662 (1881)). *Accord* *Pacific Mut. Life Ins. Co. v. Turlington*, 140 Va. 748, 758, 125 S.E. 658, 661 (1924); *Atlantic Life Ins. Co. v. Bender*, 146 Va. 312, 322, 131 S.E. 806 (1926).

<sup>11</sup> 2011 U.S. Dist. LEXIS 131590 (E.D. Va. Nov. 15, 2011).

<sup>12</sup> 2008 U.S. Dist. LEXIS 93186 (E.D. Va. Nov. 17, 2008), *aff'd*, 401 F. App'x 763 (4th Cir. 2010).

mailed, the lapse notice the insurer mailed to the policy owner at his address of record complied with the statutory notice requirement by informing the owner that a premium payment had been missed and providing a date certain on which coverage would lapse.<sup>13</sup>

Conversely, in *Russell*, the absence of a policy provision providing that notice of lapse was effective upon mailing, the insurer could not just rely upon its mailing of the notice to the policy owner and instead had to prove actual receipt of the lapse notice, the insurer proved actual receipt by providing evidence about Nationwide's automatic mailing system that established a presumption of proper mailing of the lapse notice to the policy owner.

### III. CHANGES IN THE BENEFICIARY

#### A. SUBSTANTIAL COMPLIANCE RULE

Although the Supreme Court of Virginia has not yet had an opportunity to decide the issue, courts applying Virginia law have ruled that a change of beneficiary in a life insurance policy can be effected with substantial compliance with the policy provisions rather than strict or complete compliance.<sup>14</sup>

#### B. REVOCATION OF DEATH BENEFITS BY DIVORCE OR ANNULMENT

Under Virginia Code section 20-111.1(A) and (B), except as otherwise provided under federal or Virginia law, upon entry of any decree of annulment or divorce, any revocable beneficiary designation contained in a then-existing life insurance policy owned by one party that provides for the payment of a death benefit to the other party is revoked. The death benefit that is prevented from passing to the former spouse by this statute shall be paid as if the former spouse had predeceased the decedent. The insurer will be discharged from all liability upon payment in accordance with the terms of the policy unless the insurer receives written notice of a revocation under this section before payment.

This statute states that it will not apply to the extent that the decree of annulment or divorce provides for a contrary result as to the specific death benefits or to any trust or any death benefit payable to or under any trust.<sup>15</sup>

If this statute is preempted by federal law with respect to the payment of the death benefits, a former spouse who, not for value, receives the payment of any death benefit that the former spouse is not entitled to under this statute is per-

<sup>13</sup> *Auxo-Med.*, 2011 U.S. Dist. LEXIS 131590, at \*20-21.

<sup>14</sup> See *Jackson v. Shenandoah Life Ins. Co.*, 4 Va. Cir. 499, 500 (1979); *Metropolitan Life Ins. Co. v. Gorman-Hubka*, 159 F. Supp. 2d 668, 673-77 (E.D. Va. 2016); *Dennis v. Aetna Life Ins. & Annuity Co.*, 873 F. Supp. 1000, 1006-1007 (E.D. Va. 1995). *Accord Phoenix Mut. Life Ins. Co v. Adams*, 30 F. 3d 554, 562 (4th Cir. 1994) (In an ERISA action, the Court recognized and applied the federal common-law doctrine of substantial compliance.).

<sup>15</sup> VA. CODE § 20-111.1(C); *Jones v. Jones*, 2016 U.S. Dist. LEXIS 129306, at \*29-30 (E.D. Va. 2016) (citing cases).

sonally liable for the amount of the payment to the person who would have been entitled to it were this statutory section not preempted.<sup>16</sup>

Under Code section 20-111.1(E), every decree of annulment or divorce entered into on or after July 1, 2012, must contain the following notice in conspicuous bold print:

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.

#### IV. PAYMENT OF LIFE CLAIMS

##### A. INTERPLEADER

Virginia Code section 8.01-364 provides that any person exposed to multiple liability<sup>17</sup> through the existence of claims by others for the same funds held by him may file an interpleader action and request that such competing parties<sup>18</sup> interplead their respective claims. In such interpleading action, the court may enter an order restraining all claimants from filing or prosecuting any proceeding in any Virginia court affecting the fund involved in the interpleader action until further court order. The court will hear and determine the case and may discharge the appropriate party from further liability, make the injunction permanent, and make all appropriate orders to enforce its judgment. The person interpleading may voluntarily pay the monies into court or be ordered to do so by the court, and the court may thereupon order such party discharged from all or part of any liability as between the claimants.

Reimbursement of the interpleading party's attorneys' fees and costs incurred in the filing and prosecution of the interpleader action out of the interpleaded funds is permitted by Virginia law.<sup>19</sup>

<sup>16</sup> VA. CODE § 20-111.1(D).

<sup>17</sup> See *Jones v. Caldwell*, 61 Va. Cir. 408, 418 (2003) ("To maintain an action for interpleader, the petitioner needs only assert a real and reasonable fear of exposure to double liability on the vexation of conflicting claims . . . . The petitioner is not required to prove that potential claimants are entitled to the *res*; rivals prove their rights during the interpleader action.") (Citations omitted.)

<sup>18</sup> See *Board of Supervisors of Fairfax Cnty. v. Peterson*, 19 Va. Cir. 57, 59 (1989) ("Jurisdiction over interpleader does not depend on the merits of the claims of the parties interpleaded . . . . A petitioner may maintain an interpleader action even though he believes one claim is without merit; a petitioner need only assert a real and reasonable fear of exposure to double liability or the vexation of conflicting claims.") (Citations omitted).

<sup>19</sup> See *Transamerica Life Ins. Co. v. Sallome*, 2015 U.S. Dist. LEXIS 4579, at \*9 (E.D. Va. 2015); *Schlegal v. Bank of Am., N.A.*, 271 Va. 542, 555-57, 628 S.E.2d 362, 369-70 (2006); *Pettus v. Hendricks*, 113 Va. 326, 332,



## CLAIM ON A LIFE INSURANCE POLICY

575

## B. SLAYER STATUTE AND RELATED COMMON-LAW RULE

Virginia's slayer statute, Virginia Code sections 64.2-2500 through 2511, provides:

1. The slayer statute is not to be considered penal in nature and is to be construed broadly in order to effect the policy of the Commonwealth that no person shall be allowed to profit from his own wrong, wherever committed. In furtherance of this policy, the provisions of chapter 24 of title 64.2 are not intended to be exclusive, and all common law rights and remedies that prevent one who has participated in the willful and unlawful killing of another for profiting by his wrong shall continue to exist in the Commonwealth.<sup>20</sup>
2. The statute broadly provides that neither the "slayer" nor anyone claiming through him shall in any way acquire any property or receive any benefits as a result of the decedent's death and such property will instead pass under the statutory provisions.<sup>21</sup>
3. The term "Slayer" is now defined in Code section 64.2-2500 to encompass two specific factual scenarios:
  - a. A person who is convicted of the murder or voluntary manslaughter of the decedent, or
  - b. In the absence of such conviction, a person who is determined whether before or after his death, by a court of appropriate jurisdiction by a preponderance of the evidence to have committed murder or voluntary manslaughter resulting in the death of the decedent, with the party seeking to establish that the decedent was slain by such person having the burden of proof.
4. Code section 64.2-2508 sets forth the following procedure for payment of life insurance proceeds on the life of the decedent to persons other than the "slayer":
  - a. Insurance benefits payable to the slayer as a beneficiary or assignee of a life insurance policy on the life of the decedent or as the survivor of a joint life policy shall be paid to the decedent's estate, unless the policy designates some other person not claiming through the slayer as an alternative beneficiary to the slayer.<sup>22</sup>
  - b. Insurance benefits payable to the decedent as beneficiary or assignee of a life insurance policy on the life of the slayer shall be paid to the decedent's estate, unless the policy names someone other than the slayer or

74 S.E. 191, 194 (1912); Prudential Ins. Co. v. Clark, 48 Va. Cir. 557, 560 (1999); Golden Rule Ins. Co. v. Jarvis, 53 Va. Cir. 393, 394-98 (2000).

<sup>20</sup> VA. CODE § 64.2-2511(A).

<sup>21</sup> VA. CODE § 64.2-2501.

<sup>22</sup> VA. CODE § 64.2-2508(A).

his estate as an alternative beneficiary or unless the slayer, by naming a new beneficiary or assigning the policy, performs an act that would have deprived the decedent of his interest in the policy if he had been living.<sup>23</sup>

- c. No insurer shall be subject to liability on a policy insuring the life of the decedent if as part of the slayer's plan to murder the decedent, such policy was procured and maintained by the slayer or as a result of actions taken or participated in by the slayer whether directly or indirectly and the decedent's death resulted from the slayer's act committed within two years from the date such policy was issued by the insurance company.<sup>24</sup>
  - d. If an insurer makes payment to the slayer according to the policy terms or performs an obligation for the slayer as one of several joint obligations without notice of the circumstances bringing it within the scope of the slayer statute, the insurer shall not be subjected to additional liability by the terms of the statute.<sup>25</sup>
5. The record of the criminal trial where the slayer is convicted of the murder of the decedent is admissible into evidence either for or against a claimant of property in any civil action arising under the slayer statutes. In a statutory exception to usual Virginia principles of res judicata and collateral estoppel, the conviction is deemed to be conclusive evidence of the guilt of the alleged slayer.<sup>26</sup>
  6. In *Peoples Security Life Insurance Co. v. Arrington*,<sup>27</sup> the Court reaffirmed Virginia's adherence to the common law doctrine that no person shall be allowed to profit from his wrongful acts by ruling that, even if a person's actions do not fit within the term "slayer" as defined in the slayer statute, the insurer is permitted to establish that the beneficiary is barred from recovering the proceeds of the insurance policy by proving, by a preponderance of the evidence, that the beneficiary "procured, participated in or otherwise directed" the insured's untimely death.

#### C. INTEREST ON LIFE INSURANCE PROCEEDS

1. If an action filed on a life insurance policy or annuity contract results in a judgment against the insurer, interest on the judgment at the legal rate of interest (currently annual rate of 6%) shall be paid from either the date of presentation to the insurer of proof of death on a life insurance policy or

<sup>23</sup> VA. CODE § 64.2-2508(B).

<sup>24</sup> VA. CODE § 64.2-2508(C).

<sup>25</sup> VA. CODE § 64.2-2508(D).

<sup>26</sup> VA. CODE § 64.2-2510.

<sup>27</sup> 243 Va. 89, 412 S.E.2d 705 (1992).

annuity contract or the date of maturity of an endowment policy to the date of entry of the judgment.<sup>28</sup>

2. If no suit is filed, interest upon the principal sum paid to the beneficiary or policyholder is to be computed daily at an annual rate of 2½ % or at the annual rate currently paid by the insurer on proceeds left under the interest settlement option, whichever is greater, commencing from the date of death on a life insurance policy or annuity contract, from the date of receipt of a completed claim form on a variable annuity contract claim, or from the date of maturity on an endowment contract to the date of payment. The interest is to be added to and becomes part of the total sum payable.<sup>29</sup>
3. No insurer will be required to pay interest computed under this statute if the total interest is less than five dollars.<sup>30</sup>
4. This statute does not apply to certain credit life insurance policies or contracts issued before July 1, 1977, but will apply to any renewals or reissues of group life insurance policies or contracts occurring after that date.<sup>31</sup>

## V. CONTESTED LIFE INSURANCE CLAIMS

### A. CONTESTABILITY PERIOD

Under Virginia law, every life insurance and accident and sickness insurance policy becomes incontestable, except for nonpayment of premiums, after the policy has been in force for a period of two years.<sup>32</sup> Any reinstated life insurance policy is contestable for fraud, material misrepresentations in the reinstatement application, or any written statement supplemental to the reinstatement application, only during the new two-year contestability period created after the policy's reinstatement.<sup>33</sup> 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.<sup>34</sup>

The contestability period begins to run at the point when the insurance is effective and the insured is entitled to policy benefits.<sup>35</sup> The contestability clause precludes untimely challenges to the validity of the policy based on the alleged

<sup>28</sup> VA. CODE § 38.2-3115(A).

<sup>29</sup> VA. CODE § 38.2-3115(B).

<sup>30</sup> VA. CODE § 38.2-3115(C).

<sup>31</sup> VA. CODE § 38.2-3115(D).

<sup>32</sup> 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).

<sup>33</sup> VA. CODE § 38.2-3109; *Nyonteh v. Peoples Sec. Life Ins. Co.*, 958 F.2d 42, 45-46 (4th Cir. 1992).

<sup>34</sup> *Harrison v. Provident Relief Ass'n*, 141 Va. 659, 673, 126 S.E. 696 (1925).

<sup>35</sup> See, e.g., *Parkerson v. Federal Home Life Ins. Co.*, 797 F. Supp. 1308, 1313-14 (E.D. Va. 1992).

untruthfulness of the insured's answers in the application. It has nothing to do whatsoever with coverage under the policy.<sup>36</sup>

B. CAN A CLAIM STILL BE CONTESTED AFTER EXPIRATION OF THE CONTESTABILITY PERIOD?

In Virginia, the contestability clause precludes an insurer from challenging the policy based on material misrepresentations in the application beyond the contestability period.<sup>37</sup>

C. SUICIDE

Under Virginia Code section 38.2-3106(B), a life insurance policy may contain a provision limiting liability to a refund of all premiums paid on the policy for the life of an insured who, whether sane or insane, commits suicide within two years from the policy date. With the exception of an insured's suicide within the first two years of the policy, the insured's death by suicide cannot be asserted as a defense for any life insurance policy issued to a person residing in Virginia or otherwise subject to Virginia law.<sup>38</sup>

VI. MATERIAL MISREPRESENTATIONS IN THE APPLICATION<sup>39</sup>

A. APPLICABLE STATE STATUTE

A claim or defense based on an alleged material misrepresentation by the insured in an insurance application begins with Virginia 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.<sup>40</sup>

<sup>36</sup> VA. CODE § 38.2-3110; *United Sec. Life Ins. Co. & Trust Co. v. Massey*, 159 Va. 832, 851, 167 S.E. 248 (1933).

<sup>37</sup> *Nyonteh v. Peoples Sec. Life Ins. Co.*, 958 F.2d 42, 44 (4th Cir. 1992).

<sup>38</sup> VA. CODE § 38.2-3106(A).

<sup>39</sup> For a more comprehensive analysis by this author of Virginia law on material misrepresentations in applications for life, health, and disability policies, see *Primer on Virginia Law Dealing with Material Misrepresentations in Applications for Life, Health, and Disability Policies*, 26 J. CIV. LITIG. 19 (2014). For a detailed analysis by this author on Virginia law on material misrepresentations in both the application and claim process, see (MISREPRESENTATIONS) IN INSURANCE LAW OF VIRGINIA, ch. 5 (3d ed. 2015).

<sup>40</sup> *Union Indem. Co. v. Dodd*, 21 F.2d 709, 711 (4th Cir. 1927), *cert. denied*, 280 U.S. 581 (1929).

## CLAIM ON A LIFE INSURANCE POLICY

579

## B. PRIMA FACIE CASE OF MISREPRESENTATION

Virginia Code section 38.2-309 requires 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.<sup>41</sup>

## C. IMPACT OF "TO THE BEST OF MY KNOWLEDGE AND BELIEF" LANGUAGE IN APPLICATION

Where the application includes wording that the representations made in the application are "true to the best of the knowledge and belief" of the applicant, the insurer's affirmative burden increases to proving that the representations were "knowingly false" when they were made.<sup>42</sup> This heightened standard of proof "is not as exacting as the clear and convincing standard required in certain fraud cases."<sup>43</sup> Likewise, even under this higher "knowingly false" standard, the insurer still does not need to prove that the applicant's representations were either willfully false or fraudulently made.<sup>44</sup>

In the absence of such application language requiring the insurer to prove that the insured *knowingly* made a false representation, the insurer need show by clear proof only that the application contained a false statement.<sup>45</sup>

## D. MATERIALITY

The materiality of a misrepresentation is a question of law for the court.<sup>46</sup> "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."<sup>47</sup>

In making its determination on materiality, the court's critical focus is what effect, if any, the information that was withheld would have had upon the insurer.<sup>48</sup> The insurer may meet its affirmative defense of proving the materiality of the misrepresentations by merely stating that, *if it had known the truth*, it would have postponed issuance of the policy pending further work-up on the

<sup>41</sup> *Banner Life Ins. Co. v. Noel*, 861 F. Supp. 2d 701, 707 (E.D. Va. 2012), *aff'd*, 505 F. App'x 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)).

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

<sup>43</sup> *Banner*, 861 F. Supp. 2d at 711.

<sup>44</sup> *See Chitwood v. Prudential Ins. Co. of Am.*, 206 Va. 314, 319, 143 S.E.2d 915, 919 (1965).

<sup>45</sup> *Reid-Smith v. Globe Life & Acc. Ins. Co.*, 2012 U.S. Dist. LEXIS 174298, at \*4 (W.D. Va. Dec. 7, 2012).

<sup>46</sup> *See, e.g., Inter-Ocean Ins. Co. v. Harkrader*, 193 Va. 96, 102, 67 S.E.2d 894, 898 (1951). *Accord Time Ins. Co. v. Bishop*, 245 Va. 48, 52 n.1, 425 S.E. 2d 789, 492 n.1 (1993).

<sup>47</sup> *Mutual of Omaha Ins. Co. v. Echols*, 207 Va. 949, 953-54, 154 S.E.2d 169, 172 (1967).

<sup>48</sup> *Jefferson Standard Life Ins. Co. v. Clemmer*, 79 F.2d 724, 733 (4th Cir. 1935).

applicant's medical history,<sup>49</sup> it would have issued the policy only on different terms or at an increased premium,<sup>50</sup> or it would never have issued the policy.<sup>51</sup>

#### E. CAUSAL CONNECTION

“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.”<sup>52</sup>

#### F. IMPACT OF AGENT'S KNOWLEDGE AND FALSE RESPONSES

The insurer is charged with the knowledge possessed by its agent or medical examiner.<sup>53</sup> There is a rebuttable presumption that an applicant has read the application he signed, and the applicant is prima facie charged with knowledge of its contents.<sup>54</sup> 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 did not have actual or constructive knowledge that the application contained false responses.<sup>55</sup> 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.<sup>56</sup> Similarly, the presumption cannot be rebutted if the insured knew the application contained the misrepresentation.<sup>57</sup> Notably, the insured may acquire actual knowledge of a material misrepresentation by reading the completed application.<sup>58</sup>

<sup>49</sup> See *Banner*, 861 F. Supp. 2d at 714; *Parkerson v. Federal Home Life Ins. Co.*, 797 F. Supp. 1308, 1312 (E.D. Va. 1992).

<sup>50</sup> See *Banner*, 861 F. Supp. 2d at 714; *Minnesota Lawyers Mut. Ins. Co. v. Hancock*, 600 F. Supp. 2d 702, 709 (E.D. Va. 2009); *Portillo v. Nationwide Mut. Fire Ins. Co.*, 277 Va. 193, 197, 671 S.E.2d 153, 155 (2009).

<sup>51</sup> See *Minnesota Lawyers Mut. Ins. Co.*, 600 F. Supp. 2d at 709.

<sup>52</sup> *Jefferson Standard Life Ins. Co. v. Clemmer*, 79 F. 2d 724, 733 (4th Cir. 1935); see also *Mutual Benefit Health & Accident Ass'n v. Alley*, 167 Va. 144, 155, 187 S.E. 456, 461 (1936) (rejecting plaintiff's contention that there must be a causal connection between the false representations and the loss).

<sup>53</sup> See *Employers Commercial 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.

<sup>54</sup> *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).

<sup>55</sup> *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.

<sup>56</sup> *Dingus*, 219 Va. at 715, 250 S.E.2d at 356.

<sup>57</sup> *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).

<sup>58</sup> *Quillin v. Prudential Ins. Co.*, 280 F.2d 771, 775 (4th Cir. 1960).

## VII. DEFENSES

### A. STATUTES OF LIMITATION AND CONTRACTUAL LIMITATIONS PERIODS

In Virginia, no individual life insurance policy (Virginia Code section 38.2-3316(1)), group life insurance policy (Virginia Code section 38.2-3338(1)), or industrial life insurance policy (Virginia Code section 38.2-3354(1)) can contain a contractual limitations period of less than one year after the cause of action accrues.

If the life insurance policy contains no contractual limitations periods, then Virginia's five-year statute of limitations for written contracts applies. In the well-known decision in *Arrington*,<sup>59</sup> the Supreme Court of Virginia held:

Code § 8.01-246(2) provides that an action for breach of a written contract must be filed within five years after the cause of action accrues. Code § 8.01-230 provides that a cause of action for breach of contract accrues and the limitation period commences to run from the date of the alleged breach. 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>60</sup>

In *Arrington*, the Court ruled that the life insurance policies in that case provided when the cause of action accrued because the policies required the insurer to pay the proceeds after it had received proof of the insured's death. The Court held, therefore, that the five-year limitations period began to run, at the very latest, when the insurer wrote its letter to the beneficiary confirming receipt of proof of the insured's death.

### B. DUTY TO READ POLICY

"In Virginia, it is well-settled that one 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 bound thereby."<sup>61</sup>

### C. WAIVER OR ESTOPPEL

In Virginia, waiver means a voluntary, intentional relinquishment of a known right.<sup>62</sup> 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 di-

<sup>59</sup> *Arrington v. Peoples Sec. Life Ins. Co.*, 250 Va. 52, 458 S.E.2d 289 (1995).

<sup>60</sup> *Page v. Shenandoah Life Ins. Co.*, 185 Va. 919, 925-27, 40 S.E.2d 922, 925-26 (1947).

<sup>61</sup> *Banner Life Ins. Co. v. Noel*, 861 F. Supp. 2d 701, 708 (E.D. Va. 2012) (quoting *General Ins. of Roanoke, Inc. v. Page*, 250 Va. 409, 412, 464 S.E.2d 343, 344 (1995)).

<sup>62</sup> *Employers Commercial Union Ins. Co. of Am. v. Great Am. Ins. Co.*, 214 Va. 410, 412, 200 S.E.2d 560, 562 (1973).

rected 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.<sup>63</sup> 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.<sup>64</sup>

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.<sup>65</sup> Since estoppel is an equitable doctrine, an insured or beneficiary cannot rely upon 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.<sup>66</sup> 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.<sup>67</sup>

#### VIII. CONCLUSION

While the vast majority of claims on life insurance policies are promptly processed and paid out by the insurer, in the appropriate case an attorney may nevertheless need to be prepared to address the key issues that may be presented in the life insurance claim such as those discussed in this article.

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<sup>63</sup> *Coleman v. Nationwide Life Ins. Co.*, 211 Va. 579, 582-83, 179 S.E.2d 466, 469 (1971).

<sup>64</sup> *Utica Mut. Ins. Co. v. National Indem. Co.*, 210 Va. 769, 773, 173 S.E.2d 855, 858 (1970).

<sup>65</sup> *Harris v. Criterion Ins. Co.*, 222 Va. 496, 502, 281 S.E.2d 878, 881 (1981).

<sup>66</sup> *Pennsylvania Cas. Co. v. Simopoulous*, 235 Va. 460, 465, 369 S.E.2d 166, 169 (1988) *Banner*, 861 F. Supp. 2d at 715-16.

<sup>67</sup> *Hayes 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).