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Insurance Law in Virginia

Editors: John M. Claytor
John D. Eure



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Insurance Law in Virginia

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VIRGINIA LAWYERS PRACTICE HANDBOOK

INSURANCE LAW IN VIRGINIA

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Editors:

John M. Claytor

Harman Claytor Corrigan & Wellman, P.C. / *Richmond*

John D. Eure

Johnson, Ayers & Matthews, P.L.C. / *Roanoke*

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CHAPTER 15

HOMEOWNERS INSURANCE

15.1 INTRODUCTION

A home is generally a person's most valuable asset. While the subject of obtaining homeowners insurance is usually covered as an afterthought to the real estate closing, this insurance is certainly the most important source of proceeds for a homeowner who suffers property damage or incurs a loss on the premises.

This chapter is intended to help practicing attorneys quickly determine potential issues of coverage in settled areas of the law. There is absolutely no substitute for reading both the statutes and the policy. Whenever representing a client in a first-party claim involving homeowners insurance, counsel *must* obtain a complete copy of the insurance policy and any other related documents, such as the insurance application, before rendering advice. Counsel should request copies of these documents from the insurer.

While an insured may rely on any policy provided by the insurance company, it is strongly recommended that counsel review in detail the declarations page to ensure that all endorsements and policy forms have been provided. Many insurance companies use standardized forms, such as the copyrighted forms prepared by the Insurance Services Office,¹ which include Virginia changes and endorsements to the policy.

Finally, many attorneys who represent insureds do not realize the extent of their clients' duties under the homeowners insurance contract. The client has very specific responsibilities in the event of a loss or claim. Counsel should read the policy carefully to understand the terms and conditions that must be met by the client before filing a lawsuit. Without this attention to the detail of these requirements, counsel could conclude that the insurance company is overreaching in its document request or "harassing" the client. Courts have the power to stay a lawsuit and order an insured to submit to an exam-

¹ Insurance Services Office, Inc. (ISO) is a supplier of services to the property and casualty insurance industry. For more information about ISO, see its website at www.verisk.com/iso.html.

ination under oath or to produce documents requested by the insurance company before allowing the litigation to proceed.

15.2 WHAT IS HOMEOWNERS INSURANCE?

15.201 “Homeowners Insurance” Defined. “Homeowners insurance” is defined by section 38.2-130 of the Virginia Code as a combination multi-peril policy containing “fire, miscellaneous property, and liability coverages” insuring primarily owner-occupied residential real property. A homeowners policy should be distinguished from special types of “renters” policies, which are commercially available and competitively priced for those who rent apartments or single-family homes. Rental policies have similar coverages providing personal property, liability, and medical payment coverages, but generally have lower limits for liability coverage and no coverage for the building since that is usually maintained by the owner-landlord.

15.202 Statutory Provisions. Nearly all aspects of the life of a policy (issuance, existence, cancellation, nonrenewal, etc.) are governed by statute. Regarding issuance, a homeowners policy, because it covers accidental direct physical loss caused by fire, is subject to section 38.2-2101 of the Virginia Code, which requires that no policy be issued or delivered in Virginia unless it meets the requirements of section 38.2-2105 of the Virginia Code. These standard provisions are mandatory. If a policy “covers property in Virginia and insures against the peril of fire, it necessarily includes the mandatory provisions enumerated in [section] 38.2-2105.”² Any deviation from the standard provisions included in a homeowners policy must in no respect be less favorable to the insured.³ The provisions of section 38.2-2105 notwithstanding, other statutes (for example, section 38.2-2114) address the procedure and grounds for cancellation and nonrenewal.⁴ But no aspect of section 38.2-2114 applies to a nonrenewal

[i]f an affiliated insurer has manifested its willingness to provide coverage at a lower premium than would have been charged for the same exposures on the expiring policy. The affiliated insurer shall manifest its willingness to provide

² *Hitt Contracting, Inc. v. Industrial Risk Insurers*, 258 Va. 40, 43, 516 S.E.2d 216, 217 (1999). In addition, “Virginia Code [section] 38.2-2107 permits insurance companies to use simplified language that deviates from the standard [Virginia] Code [section] 38.2-2105 policy language as long as the simplified terms are no less favorable to the insured.” *Coker v. State Farm Fire & Cas. Co.*, 45 Va. Cir. 510, 515 (Fairfax 1998).

³ *Powell v. United States Fid. & Guar. Co.*, 88 F.3d 271 (4th Cir. 1996).

⁴ See also Chapter 1 of this book.

coverage by issuing a policy with the types and limits of coverage at least equal to those contained in the expiring policy unless the named insured has requested a change in coverage or limits. When such offer is made by an affiliated insurer, an offer of renewal shall not be required of the insurer of the expiring policy, and the policy issued by the affiliated insurer shall be deemed to be a renewal policy.⁵

15.203 Contractual Limitation Period.⁶ Many lawyers assume that any action for breach of a homeowners insurance contract must be commenced within five years, relying on section 8.01-246(2) of the Virginia Code. This is wrong. Section 38.2-2105 contains the special limitation period that states “[n]o suit or action on this policy for the recovery of any claim shall be sustainable in any court of law or equity unless all the requirements of this policy shall have been complied with, and unless commenced within two years next after inception of the loss.”

This provision, called the “two-year contractual limitation,” is absolutely enforceable.⁷ In *Hitt Contracting, Inc. v. Industrial Risk Insurers*,⁸ the insured submitted a claim pursuant to the replacement coverage endorsement more than two years after the loss. Industrial Risk Insurers filed a demurrer based on the two-year contractual limitation, which was sustained. The Virginia Supreme Court affirmed. Interestingly, the insured argued that applying the two-year limitations period would require an insured to file suit “before those costs can be presented to the insurers, or before the insured and insurer even fail to agree to the amount of the recovery.”⁹

As a result of this inequitable circumstance, the insured contended that logic and common sense dictate that the two-year limitation period required by section 38.2-2105 should not apply to claims made under the replacement coverage endorsement. The Virginia Supreme Court recognized that an insured may lose the ability to recover certain replacement costs incurred near the end of the two-year period. However, the court stated that it would enforce the plain language of the statute as drafted by the General Assembly.

⁵ Va. Code § 38.2-2114(E)(5).

⁶ See ¶ 13.706 of Chapter 13 of this book.

⁷ *Hitt Contracting, Inc. v. Industrial Risk Insurers*, 258 Va. 40, 516 S.E.2d 216 (1999); *Ramsey v. Home Ins. Co.*, 203 Va. 502, 125 S.E.2d 201 (1962).

⁸ 258 Va. 40, 516 S.E.2d 216 (1999).

⁹ *Id.* at 46, 516 S.E.2d at 219.

The interesting twist in this case is that Industrial Risk Insurers denied the claim based on a faulty workmanship exclusion in the policy, and the two-year limitation period was not raised until the suit was actually filed.

In *Allstate Property & Casualty Co. v. Ploutis*,¹⁰ the Virginia Supreme Court made clear that the provision in a homeowners insurance policy requiring that suits to recover under the policy be brought within two years of the date of loss was not a “statute of limitations” within the meaning of the statute that tolled the statute of limitations for a voluntary nonsuit. Thus, the contractual limitations period in a homeowners policy is not tolled by the filing of a nonsuit. At least one Virginia federal court has followed this same logic in the context of a voluntary dismissal under Federal Rule of Civil Procedure 41(a).¹¹

15.204 Replacement Cost Endorsement.¹² Many homeowners policies include a replacement cost endorsement. An insured is entitled to payment based on an actual cash value for damage to either personalty or the dwelling before undertaking repairs or replacement.¹³ Section 38.2-2119(B) of the Virginia Code provides that

[w]here any policy of insurance issued or delivered in this Commonwealth pursuant to this chapter provides for the payment of the full replacement cost of property insured thereunder, the policy shall permit the insured to assert a claim for the actual cash value of the property without prejudice to his right to thereafter assert a claim for the difference between the actual cash value and the full replacement cost unless a claim for full replacement cost has been previously resolved. Any claim for such difference must be made within six months of (i) the last date on which the insured received a payment for actual cash value or (ii) date of entry of a final order of a court of competent jurisdiction declaratory of the right of the insured to full replacement cost, whichever shall last occur.

¹⁰ 290 Va. 226, 776 S.E.2d 793 (2015).

¹¹ *Sethi v. Citizens Ins. Co. of Am.*, 157 F. Supp. 3d 501 (W.D. Va. 2016).

¹² See ¶ 13.604 of Chapter 13 of this book.

¹³ This assumes replacement cost coverage was purchased for an additional premium at the time the policy was issued.

Accordingly, an insured can make a claim for the full replacement cost within *six months* of the last day on which the insured received the payment for the actual cash value or the date of entry of a final order declaring that the insured is entitled to full replacement cost, whichever occurs last. This enables an insured to recover its actual cash value even if suit has to be filed to toll the two-year contractual limitation.

There are also many different replacement cost insurance products. Some endorsements limit replacement cost to the policy limits. Other endorsements permit “verified” replacement cost, which is guaranteed regardless of the limits and regardless of whether the insured actually replaces the item.

In most cases, however, the insured must replace the item before being entitled to replacement cost. For example, in *Weinstein v. Commerce Insurance Co.*,¹⁴ an insurance company’s liability for a fire loss was limited to the cost of repair, and the insured was not entitled to recover the full value of his building even though, because of zoning regulations, the building could not be repaired for use as an apartment house, and according to the insured’s contention, it had no value for other purposes.

In *Whitmer v. Graphic Arts Mutual Insurance Co.*,¹⁵ the court upheld a provision that replacement cost coverage would not be available to an insured on residential and personal property in the home unless and until the insured actually repaired or replaced the property. The court found this was enforceable, rejecting the argument that the provision conflicts with the mandatory requirements of sections 38.2-2105 (standard fire insurance policy form) and 38.2-2107 (prohibiting policy forms less favorable to the insured than the standard policy form) of the Virginia Code.

15.205 “Actual Cash Value.”¹⁶ “Actual cash value” generally means replacement cost less depreciation. However, there is authority that the broad evidence rule has been implicitly adopted in Virginia. In *Harper v. Penn Mutual Fire Insurance Co.*,¹⁷ the court interpreted a policy that did not define the term “actual cash value.” The court recognized that other courts have used the “market value” or “reproduction cost less depreciation” tests but held that it would apply the broad evidence rule that permits the intro-

¹⁴ 196 Va. 106, 82 S.E.2d 477 (1954).

¹⁵ 242 Va. 349, 410 S.E.2d 642 (1991).

¹⁶ See ¶ 13.603 of Chapter 13 of this book.

¹⁷ 199 F. Supp. 663 (E.D. Va. 1961).

duction and consideration of any evidence “logically tending to the formation of a correct estimate of the value of the destroyed or damaged property for the purposes of ascertaining the ‘actual cash value’ at the time of the loss.”¹⁸ Accordingly, any expert retained should evaluate actual cash value under all three tests, certainly taking into consideration depreciation. Where an insured’s personal property has been damaged, insurance companies may (depending on the age of the item) depreciate used items a very substantial percent of their current fair market replacement value.

15.3 PROPERTY COVERAGE

15.301 Personal Property Coverage. A typical homeowners policy will list those “perils” to which the insurance applies for *personal property*. The following is a list of perils caused by accidental direct physical loss to *personalty* that are generally covered:

1. Fire or lightning;
2. Windstorm or hail;
3. Explosion;
4. Riot or civil commotion;
5. Aircraft, including “spacecraft” (alien damage presumably covered);
6. Vehicles;
7. Smoke;
8. Vandalism or malicious mischief;
9. Theft;
10. Falling objects;
11. Weight of ice, snow, or sleet;
12. Sudden and accidental discharge or overflow of water or steam from plumbing or appliances;

¹⁸ *Id.* at 664.