

2020 EDITION

Insurance Law in Virginia

Editors: John M. Claytor
John D. Eure



Continuing Legal Education
by the Virginia Law Foundation



Insurance Law in Virginia

Copyright © 2001, 2006, 2015, 2020
Virginia Law Foundation. All rights reserved.

This electronic book is licensed for use on a single personal computer only. It must be treated in the same way as the print edition. It may not be copied, made accessible on a computer network, or otherwise shared by electronic or optical means. No derivative works may be made, but the purchaser may electronically copy short passages to include in memoranda, briefs, and similar documents.

This publication is presented with the understanding that the authors, the reviewers, and the publisher do not render any legal, accounting, or other professional service. It is intended for use by attorneys licensed to practice law in Virginia. Because of the rapidly changing nature of the law, information contained in this publication may become outdated. As a result, an attorney using this material must always research original sources of authority and update information to ensure accuracy when dealing with a specific client's legal matters. In no event will the authors, the reviewers, or the publisher be liable for any direct, indirect, or consequential damages resulting from the use of this material. The views expressed herein do not necessarily represent those of the Virginia Law Foundation.

Citations to statutes, rules, and regulations are to the versions in effect at the time the material was written, unless otherwise noted. An effort has been made to ensure the material is current as of November 2016.

Click the left mouse button twice on the link below to view tips on using Virginia CLE Electronic Books (requires Adobe® Reader version 6 or later). 

VIRGINIA LAWYERS PRACTICE HANDBOOK

INSURANCE LAW
IN VIRGINIA

Fourth Edition

Editors:

John M. Claytor

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

John D. Eure

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

 Virginia CLE[®]
Publications

TABLE OF CONTENTS

<i>Chapters and Authors</i>	iii
<i>Acknowledgments</i>	vii
<i>About the Editors and Authors</i>	ix
<i>In Memoriam</i>	xxv
<i>Preface</i>	xxvii
<i>Electronic Forms: Instructions and Table</i>	xxix

CHAPTER 1: INSURANCE CONTRACTS

1.1 IN GENERAL.....	1
1.2 FORM AND REQUISITES.....	1
1.201 Offer and Acceptance	1
1.202 Essential Terms.....	2
1.203 Insurable Interest.....	2
1.204 Title 38.2 of the Virginia Code.....	4
1.3 CONSTRUCTION.....	5
1.301 In General.....	5
1.302 Ambiguity	9
1.303 Exclusions and Incontestability Clauses	14
1.304 Punitive Damages	16
1.4 TERMINATION BY CANCELLATION, SURRENDER, OR RESCISSON	17
1.401 In General.....	17
1.402 Definitions	17
1.403 Requirements for Effective Cancellation by the Insurer	17
1.404 Notice to a Loss Payee.....	19
1.405 Cancellation by the Insured; “Free Look” Provisions.....	19
1.406 Cancellation by Mutual Consent	20
1.407 Review by the Commissioner.....	20
1.5 REFORMATION AND RENEWAL.....	20
1.501 Reformation	20
1.502 Renewal.....	21

TABLE OF CONTENTS

CHAPTER 2: AGENTS AND BROKERS

2.1	INTRODUCTION	23
2.2	DEFINITIONS	23
2.201	In General.....	23
2.202	Traditional Distinction Between “Agent” and “Broker”	24
2.203	Statutory Definitions	25
2.204	“Broker” Versus “Consultant”	26
2.3	STATUTORY DUTIES AND OBLIGATIONS	26
2.301	In General.....	26
2.302	Licensing Requirements	27
2.303	Policy Language	28
2.304	Financial Duties and Obligations	29
2.305	General Trade Practices	30
2.306	Penalties	32
2.307	Insurance Data Security.....	32
2.4	COMMON LAW DUTIES	33
2.401	In General.....	33
2.402	Duty of Good Faith.....	33
2.403	Other Duties.....	34
2.5	LIABILITY AND DEFENSES	35
2.501	Overview.....	35
2.502	Parties.....	37
2.503	Jurisdiction.....	37
2.504	Tort Liability to an Insured.....	37
2.505	Contract Liability to an Insured	41
2.506	Defenses.....	42
2.507	Damages	43
2.508	Examples and Particular Problem Areas	43
2.509	Liability of Agents to Insurers	45
2.510	Liability of Brokers to Insurers.....	46
2.511	Attorney Fees	47
2.6	SURPLUS LINES INSURANCE BROKERS.....	47
2.601	Definitions	47
2.602	Statutory Requirements	48

TABLE OF CONTENTS

CHAPTER 3: THE TRIPARTITE RELATIONSHIP

3.1	OVERVIEW	53
3.2	THE INSURED-INSURER RELATIONSHIP	54
3.3	THE COUNSEL-INSURER RELATIONSHIP	55
3.4	THE COUNSEL-INSURED RELATIONSHIP	58
3.5	CONFLICTS	59
3.501	In General	59
3.502	Coverage	62
3.503	Negotiation and Settlement	64
3.6	CONFIDENTIALITY	65
3.601	In General	65
3.602	Third-Party Audits and Reviews—Legal Ethics Opinion No. 1723	68
3.7	INDEPENDENCE	69
3.8	STAFF COUNSEL	70
3.9	CONCLUSION	71

CHAPTER 4: DUTY OF GOOD FAITH

4.1	INTRODUCTION	73
4.2	FIRST-PARTY ACTIONS	73
4.201	Relationship Between the Insurance Company and the Insured	73
4.202	Good Faith Standard	75
4.203	Legal Basis of Liability for Bad Faith	76
4.204	Defenses	80
4.205	Bifurcation and Discovery	82
4.206	Question for Judge or Jury?	83
4.207	Damages	83
4.3	THIRD-PARTY ACTIONS	85
4.301	Relationship Between the Insurance Company and the Insured	85

TABLE OF CONTENTS

4.302	Good Faith Standard	85
4.303	Legal Basis of Liability for Bad Faith.....	87
4.304	Defenses.....	88
4.305	Bifurcation and Discovery	88
4.306	Question for Judge or Jury?	88
4.307	Damages	89
4.4	ACTIONS BY THIRD-PARTY BENEFICIARIES	89
4.5	UNINSURED AND UNDERINSURED MOTORIST ACTIONS	90
4.6	ACTIONS BY A SECONDARY INSURER AGAINST A PRIMARY INSURER.....	91
4.7	CONCLUSION.....	91

CHAPTER 5: MISREPRESENTATIONS

5.1	OVERVIEW.....	93
5.2	MISREPRESENTATIONS IN THE APPLICATION PROCESS	94
5.201	Rationale Behind the Rule in the Application Process	94
5.202	Section 38.2-309 of the Virginia Code.....	96
5.3	MISREPRESENTATIONS IN THE CLAIM PROCESS	127
5.301	Rationale Behind the Rule in the Claim Process	127
5.302	False Swearing Provisions	128

CHAPTER 6: FORFEITURE, WAIVER, AND ESTOPPEL

6.1	FORFEITURE.....	137
6.101	Overview	137
6.102	Bases for Forfeiture	138
6.2	SUBSTANTIAL COMPLIANCE.....	145
6.3	WAIVER AND ESTOPPEL.....	146
6.301	General Principles	146
6.302	Payment of Premiums	149
6.303	Knowledge of the Agent or Insurer	151
6.304	Misrepresentation and Mistake	154
6.305	Delay	155

TABLE OF CONTENTS

6.306	Examples of Specific Policy Provisions	156
6.307	Waiver of Defenses by Failure to Comply with Statute	163
6.4	STATUTORY REQUIREMENTS.....	164
6.401	In General.....	164
6.402	Liability Insurance.....	164
6.403	Fire Insurance	165
6.404	Accident and Sickness Insurance Policies	166
6.405	Life Insurance.....	168
CHAPTER 7: PRACTICE AND PROCEDURE		
7.1	OVERVIEW	171
7.2	DECLARATORY JUDGMENTS	172
7.201	In General.....	172
7.202	Purpose	173
7.203	Initiation	173
7.204	Virginia State Court.....	174
7.205	Federal Court	185
7.3	RESERVATION OF RIGHTS	191
7.301	In General.....	191
7.302	Purpose	192
7.303	Statutory Language	192
7.304	Scope	194
7.305	Estoppel and Waiver	195
7.4	REIMBURSEMENT AND SUBROGATION (OTHER THAN FIRE INSURANCE).....	197
7.401	Comparison.....	197
7.402	Subrogation.....	197
7.403	Statutory Provisions Affecting Subrogation	197
7.404	Proceedings	200
7.405	Reimbursement	200
7.406	Workers' Compensation	201
7.407	Miscellaneous Case Law	204
7.5	MISCELLANEOUS	206
7.501	Disclosure of Policy Limits.....	206
7.502	Electronic Notification and Delivery.....	207
7.503	Website Access to Forms and Endorsements.....	208
APPENDIX 7-1: COMPLAINT.....		211

TABLE OF CONTENTS

**CHAPTER 8: MOTOR VEHICLES: BODILY INJURY AND
PROPERTY DAMAGE LIABILITY INSURANCE**

8.1	THE AUTOMOBILE LIABILITY INSURANCE POLICY	219
8.101	Introduction.....	219
8.102	How to Read the Policy	220
8.2	STATUTORY REQUIREMENTS	223
8.201	In General.....	223
8.202	Insurance Is Not Mandatory	223
8.203	Minimum Limits Not Required.....	224
8.204	Section 38.2-2204—The Omnibus Statute.....	224
8.205	Other Requirements of Chapter 22 of Title 38.....	227
8.206	Certified Policies	233
8.3	VEHICLES AND PERSONS INSURED	235
8.301	In General.....	235
8.302	Motor Vehicles.....	236
8.303	Persons	241
8.4	RISKS COVERED	258
8.401	Ownership, Maintenance, and Use.....	258
8.402	Policy Exclusions in General	267
8.403	Statutory Exclusions.....	269
8.404	Bureau of Insurance Exclusions.....	271
8.5	THE INSURER'S OBLIGATIONS	273
8.501	In General.....	273
8.502	Basic Policy Coverage	273
8.503	Limits of Liability	274
8.504	Duty to Defend	277
8.505	Punitive Damages.....	280
8.506	Supplementary Payments	280
8.507	Multiple Coverages and Policy Limits	281
8.508	Out-of-State Endorsements	284
8.6	THE INSURED'S OBLIGATIONS	284
8.601	In General.....	284
8.602	Notice	284
8.603	Cooperation	285
8.604	Breach of Notice and Cooperation Conditions.....	285

TABLE OF CONTENTS

8.7	CANCELLATION AND RENEWAL.....	285
8.701	Introduction	285
8.702	Applicable Statutes	286
8.703	Cancellation and Refusal to Renew.....	290
8.704	Review by the Commissioner of Insurance	296

APPENDIX 8-1: ANALYSIS OF AUTHORITY—CASES FROM OTHER STATES—SUMMARY OF JURISDICTIONS	297
---	-----

**CHAPTER 9: MOTOR VEHICLES: UNINSURED AND
UNDERINSURED MOTORIST INSURANCE**

9.1	INTRODUCTION.....	299
9.2	STATUTORY ANALYSIS.....	300
9.201	When Uninsured Motorist Coverage Must Be Provided	300
9.202	“Insured” Defined	307
9.203	“Uninsured Motor Vehicle” Defined	319
9.204	Geographical Scope of Uninsured Motorist Coverage	329
9.205	What Coverage Is Provided	330
9.206	What Triggers Coverage	330
9.3	FILING AN UNINSURED MOTORIST LAWSUIT.....	334
9.301	Prompt Report of a John Doe Accident	334
9.302	Service of Process	335
9.303	Venue	339
9.304	Statute of Limitations	340
9.305	Choice of Law.....	341
9.306	Federal Cases	342
9.4	RIGHTS AND OBLIGATIONS OF UNINSURED MOTORIST CARRIERS	343
9.401	Duty to Pay	343
9.402	Right to File Pleadings and Make Defenses in General.....	345
9.403	Right to File Pleadings and Make Defenses in John Doe Actions	349
9.404	No Duty to Furnish Information to the Insured.....	349
9.405	Duty to Defend and Settle Claims.....	349
9.406	Effect of the Failure of the Uninsured Motorist to Testify	350
9.407	Disclosure of Insurance Coverage Prohibited.....	350
9.408	Consent to Settlement Clauses.....	351

TABLE OF CONTENTS

9.409 Arbitration.....	351
9.410 Medical Examinations	351
9.5 STACKING OF UNINSURED MOTORIST CLAIMS	352
9.501 Inter-Policy Stacking	352
9.502 Intra-Policy Stacking	353
9.6 PRIORITY OF UNINSURED MOTORIST COVERAGES.....	354
9.601 Multiple Uninsured Motorist Coverages	354
9.602 Virginia Property and Casualty Insurance Guaranty Association.....	356
9.7 SETTLEMENTS AND JUDGMENTS IN UNINSURED CLAIMS.....	356
9.701 Judgment.....	356
9.702 Contribution	356
9.703 Subrogation	357
9.704 Joint Tortfeasors	358
9.705 Items Recoverable.....	358
9.8 RELATIONSHIP OF UNINSURED MOTORIST COVERAGE TO WORKERS' COMPENSATION	360
9.9 UNDERINSURED MOTORIST COVERAGE.....	362
9.901 Historical Development	362
9.902 "Underinsured Motor Vehicle" Defined	362
9.903 Calculation of Underinsured Motorist Limits	363
9.904 When and to Whom Coverage Is Applicable.....	369
9.10 FILING AN UNDERINSURED MOTORIST LAWSUIT	369
9.11 RIGHTS AND OBLIGATIONS OF UNDERINSURED MOTORIST CARRIERS.....	370
9.12 STACKING OF UNDERINSURED CLAIMS	370
9.1201 Inter-Policy Stacking	370
9.1202 Intra-Policy Stacking	371
9.13 PRIORITY OF UNDERINSURED MOTORIST COVERAGES.....	382
9.14 SUBROGATION AND RELEASE OF UNDERINSURED CLAIMS.....	383

TABLE OF CONTENTS

9.15	RELATIONSHIP OF UNDERINSURED MOTORIST COVERAGE TO WORKERS' COMPENSATION	387
CHAPTER 10: MOTOR VEHICLES: MEDICAL EXPENSE INSURANCE		
10.1	INTRODUCTION.....	389
10.2	OFFER OF COVERAGE	390
10.3	WHO IS COVERED?	390
10.301	Statutory Coverage.....	390
10.302	“Motor Vehicle” Defined	391
10.303	“Resident Relative” Defined.....	391
10.304	“Occupying” a Motor Vehicle	393
10.305	“Alighting From” a Motor Vehicle	394
10.306	“Upon” a Vehicle.....	396
10.307	Being Struck by a Motor Vehicle While Not Occupying a Motor Vehicle	397
10.308	Shooting Cases	398
10.309	Policy Provisions.....	400
10.4	WHAT IS COVERED?	401
10.401	In General.....	401
10.402	“Reasonable”	401
10.403	“Necessary”	402
10.404	“Incurred”.....	402
10.5	AMOUNTS OF COVERAGE	404
10.501	Medical Expenses	404
10.502	Loss of Income Expenses.....	405
10.503	Stacking	405
10.6	EXCLUSIONS	408
10.601	In General.....	408
10.602	Workers’ Compensation	410
10.603	Vehicle Furnished for Regular Use	411
10.604	Combined Effect of Exclusions	412
10.7	PRIORITY OF COVERAGE	414
10.8	WRITE-OFFS	415

TABLE OF CONTENTS

10.9	CREDITS.....	415
10.10	OFFSETS	415
10.11	SUBROGATION	416
10.12	CONDITIONS.....	416
10.1201	Payment to the Injured Person or Pursuant to an Assignment of Benefits.....	416
10.1202	Independent Medical Examination.....	418
10.1203	Notice.....	418
10.13	ASSIGNED RISK POLICIES	419
	APPENDIX 10-1: MEDPAY LETTER 1.....	421
	APPENDIX 10-2: MEDPAY LETTER 2.....	423
	APPENDIX 10-3: SCC MEDICAL EXPENSE ENDORSEMENT	425
	APPENDIX 10-4: PAP FORM AND AMENDMENT OF POLICY PROVISIONS—VIRGINIA (2015).....	431

**CHAPTER 11: MOTOR VEHICLES: PHYSICAL DAMAGE
INSURANCE**

11.1	OVERVIEW.....	453
11.2	POLICY LANGUAGE IN GENERAL.....	453
11.201	Scope of Coverage.....	453
11.202	Definitions	454
11.203	Exclusions.....	459
11.3	DAMAGES	460
11.301	In General.....	460
11.302	Measure of Damages.....	460
11.303	Types of Losses.....	461
11.304	Newly Acquired Vehicles	462
11.4	DUTIES OF THE INSURED	462
11.401	The Duty of Notification	462
11.402	The Duty of Cooperation.....	463
11.403	Proof of Loss	463

TABLE OF CONTENTS

11.404	Examination Under Oath	463
11.405	Protection of Salvage.....	463
11.406	Consent to Settlement.....	464

**CHAPTER 12: MOTOR VEHICLES: RENTAL VEHICLE
INSURANCE AND SELF-INSUREDS**

12.1	LEGISLATIVE STRUCTURE FOR LIABILITY AND UNINSURED MOTORIST POLICY COVERAGE.....	465
12.2	SELF-INSUREDS	468
12.3	RENTAL AGREEMENTS AND INSURANCE POLICIES	472
12.301	Rental Agreements.....	472
12.302	Personal Automobile Policies.....	473
12.303	Garagekeepers' Policies.....	473
12.304	Miscellaneous Issues	474
12.305	Practical Considerations	475

CHAPTER 13: FIRE INSURANCE

13.1	THE POLICY	477
13.101	In General.....	477
13.102	Coverages.....	479
13.103	Exclusions	479
13.104	Insurable Interest.....	482
13.2	THE INSURED'S DUTIES IN THE EVENT OF A LOSS.....	483
13.201	Notice of Loss.....	483
13.202	Protection of the Insured Property.....	486
13.203	Separation of the Insured Property.....	486
13.204	Inventory.....	486
13.205	Proof of Loss.....	486
13.206	Exhibition of Property	489
13.207	Examination Under Oath and Production of Records.....	490
13.208	Effect of Failure to Cooperate	495
13.3	CONCEALMENT AND FRAUD	497
13.301	In General.....	497
13.302	Basis of the Defense	497
13.303	Affirmative Defense.....	499
13.304	Burden of Proof.....	500

TABLE OF CONTENTS

13.305	Arson.....	502
13.306	Misrepresentation and Concealment	516
13.307	Effect of the Insured's Fraud, Concealment, or Misrepresentation.....	521
13.308	"Insanity" as a Defense to the Insured's Misconduct.....	522
13.4	THE RIGHTS OF THE "INNOCENT" COINSURED	528
13.401	In General.....	528
13.402	The Language of the Policy Is Controlling	528
13.403	Policy Language Excluding Coverage to the Innocent Coinsured.....	531
13.5	MORTGAGEES AND ADDITIONAL INSUREDS	535
13.501	Additional Insureds and Loss Payees	535
13.502	Rights and Duties of a Mortgagee.....	535
13.6	PAYMENT OF LOSS.....	547
13.601	Timing of Payment.....	547
13.602	Rules	547
13.603	Actual Cash Value	547
13.604	Replacement Cost.....	550
13.605	Appraisal	553
13.606	Option to Replace	562
13.7	SUIT AGAINST THE COMPANY	563
13.701	Statutory Requirement.....	563
13.702	Relationship to the Loss Payable Provision	564
13.703	Relationship to Replacement Coverage	565
13.704	Applicability to Bad Faith Claim	565
13.705	Intervention and Relation Back	566
13.706	Tolling of the Limitation Period	566
13.8	SUBROGATION	567
13.801	The Existence of the Right	567
13.802	Limitations upon the Right	568
APPENDIX 13-1: <i>MARTIN VERSUS STATE FARM GENERAL INSURANCE CO.</i> (UNPUBLISHED)		569
APPENDIX 13-2: GUIDELINES FOR APPRAISERS AND UMPIRE.....		577
APPENDIX 13-3: OUTLINE OF EXAMINATION UNDER OATH FOR BUILDING LOSS CAUSED BY ARSON		581

TABLE OF CONTENTS

APPENDIX 13-4: SAMPLE LETTER—REQUEST FOR EXAMINATION AND DOCUMENTATION	585
--	-----

APPENDIX 13-5: AUTHORIZATION	587
------------------------------------	-----

CHAPTER 14: PROFESSIONAL LIABILITY INSURANCE

14.1 INTRODUCTION.....	589
14.2 ATTORNEYS.....	590
14.201 In General.....	590
14.202 Contents of the Policy.....	590
14.203 Policy Limits	595
14.204 The Insurable Event.....	596
14.205 Who Is Covered.....	597
14.206 What Is Covered	598
14.207 Policy Exclusions	600
14.208 Conditions of the Policy.....	604
14.209 The Duty to Defend	608
14.210 Duty to Act in Good Faith.....	610
14.211 Other Insurance	612
14.3 HEALTH CARE PROVIDERS	613
14.301 Contents of the Policy.....	613
14.302 Who Is Covered.....	614
14.303 What Is Covered	616
14.304 Medical Malpractice Cap	619
14.305 Private Liability Insurance.....	622
14.306 Self-Insured Programs	624
14.307 Medical Malpractice Joint Underwriting Association	624
14.308 Birth-Related Neurological Injury Compensation Program	626
14.309 State Funded Medical Malpractice Insurance.....	629
14.4 OTHER PROFESSIONALS	629
14.401 In General.....	629
14.402 The Insurable Event.....	630
14.403 Who Is Covered.....	631
14.404 What Is Covered	632
14.405 Policy Exclusions	634
14.406 Conditions of the Policy.....	636
14.407 Other Terms of the Policy	637

TABLE OF CONTENTS

14.5 CONCLUSION.....	637
----------------------	-----

APPENDIX 14-1: COMPLAINT FOR DECLARATORY RELIEF.....	639
--	-----

CHAPTER 15: HOMEOWNERS INSURANCE

15.1 INTRODUCTION	645
15.2 WHAT IS HOMEOWNERS INSURANCE?	646
15.201 “Homeowners Insurance” Defined	646
15.202 Statutory Provisions	646
15.203 Contractual Limitation Period	647
15.204 Replacement Cost Endorsement	648
15.205 “Actual Cash Value”.....	649
15.3 PROPERTY COVERAGE.....	650
15.301 Personal Property Coverage.....	650
15.302 Structure Coverage	651
15.303 Ensuing Loss Doctrine.....	652
15.304 Location of Personal Property	652
15.305 Additional Living Expenses.....	653
15.306 Coverage After the Homeowner’s Death.....	654
15.307 Rights of the Mortgagee and Loss Payee	654
15.308 Independent Agents	655
15.309 The Homeowner’s Duties After Loss.....	655
15.310 Examination Under Oath	657
15.311 Defenses to a Homeowner’s Claim	658
15.4 LIABILITY COVERAGE	661
15.401 Personal Liability	661
15.402 Exclusions.....	662
15.403 Motor Vehicle Exclusion	663
15.404 Business Pursuits Exclusion	663
15.405 Reservation of Rights.....	666
15.5 MEDICAL PAYMENTS COVERAGE	666
15.6 TOXIC MOLD COVERAGE	667
15.7 CHINESE DRYWALL COVERAGE.....	668

TABLE OF CONTENTS

APPENDIX 15-1: SAMPLE ANSWER, WITH AFFIRMATIVE DEFENSES, FOR AN INSURANCE CLAIM LAWSUIT WHERE ARSON AND FRAUD ARE SUSPECTED	669
---	-----

CHAPTER 16: COMMERCIAL GENERAL LIABILITY INSURANCE

16.1 INTRODUCTION.....	689
16.2 “FORTUITOUS LOSS”	689
16.3 TYPES AND STRUCTURE OF POLICIES.....	690
16.301 In General.....	690
16.302 The Declarations Page	691
16.303 The Insuring Agreement.....	691
16.304 Who Is Insured	697
16.305 Limits of Liability.....	698
16.306 Definitions	701
16.307 Conditions.....	705
16.308 Endorsements	706
16.309 Exclusions	706
16.4 THE INSURER’S DUTIES.....	716
16.401 The Duty to Defend	716
16.402 The Duty to Indemnify.....	719
16.5 THE INSURED’S DUTIES.....	720
16.501 In General.....	720
16.502 Notice	720
16.503 The Duty to Cooperate with the Insurer.....	722
16.504 Payment of Premiums.....	725
16.6 TRIGGERS OF COVERAGE.....	725
16.601 In General.....	725
16.602 Manifestation Theory.....	726
16.603 Exposure Theory.....	726
16.604 Continuous Trigger Theory.....	726
16.605 Injury-in-Fact Theory.....	727
16.7 RULES OF POLICY INTERPRETATION	727
16.701 In General.....	727
16.702 Clear Language Is Enforced as Written.....	727
16.703 Intent of the Parties	728

TABLE OF CONTENTS

16.704	Ambiguities, Parol Evidence, and Construction Against the Drafter.....	728
16.705	Burden of Proof	729

CHAPTER 17: COMMERCIAL PROPERTY INSURANCE

17.1	INTRODUCTION	731
17.2	THE BASIC POLICY.....	732
17.201	Definition of Covered Property.....	732
17.202	Covered Causes of Losses	735
17.203	Excluded Causes of Loss.....	736
17.204	Fortuity and Other Related Doctrines.....	741
17.205	Policy Limits.....	742
17.206	Coinsurance.....	744
17.3	ADJUSTING THE LOSS AND BAD FAITH	745
17.4	BOILER AND MACHINERY POLICIES	745
17.5	BUSINESS INTERRUPTION COVERAGE	749
17.501	In General.....	749
17.502	Coverages	749
17.503	Causes of Loss	751
17.504	Measure of Loss.....	751
17.6	NOTICE AND SUIT	753

CHAPTER 18: DIRECTORS' AND OFFICERS' INSURANCE

18.1	INTRODUCTION	755
18.101	Purpose.....	755
18.102	“Claims Made” Coverage	755
18.2	PHYSICAL STRUCTURE OF THE POLICY	756
18.201	Overview.....	756
18.202	Declarations	756
18.203	Endorsements.....	757
18.204	Policy Form.....	757

TABLE OF CONTENTS

18.3	INSURER'S DUTIES.....	767
18.4	INSURED'S DUTIES.....	767
18.401	Duty to Give Notice	767
18.402	Duty to Cooperate.....	768
18.5	SPECIAL ISSUES.....	768
18.501	Misrepresentation in the Insurance Application.....	768
18.502	Securities Claims.....	769
18.503	Bankruptcy of the Organization	770
18.504	Self-Insured Retentions and the Duty to Defend	771
18.505	Side A Policies	772
18.506	Coverage for Service to an Unrelated Entity	772
18.507	Alternative Dispute Resolution	773
	TABLE OF AUTHORITIES	775
	INDEX	I-1

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 personality 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.