

INSURANCE TRIAGE

I. Basic Virginia Law Governing Insurance Contract Interpretation

- A. As a preliminary matter, it is settled in Virginia that interpreting the undisputed terms of a contract presents a question of law for the court. C. F. Garcia Enterprises, Inc. v. Enterprise Ford Tractor, 480 S.E.2d 497, 498, 253 Va. 104, 107 (1997). The basic law governing analysis is also settled: courts look first to the contract itself. "Courts interpret insurance policies, like other contracts, in accordance with the intention of the parties gleaned from the words they have used in the document." Floyd v. Northern Neck Ins. Co., 427 S.E.2d 193, 196, 245 Va. 153, 158 (1993). "[A]s in the case of any other contract, the words used are given their plain and customary meaning" Hill v. State Farm Mut. Auto Ins. Co., 375 S.E.2d 727, 729, 237 Va. 138, 152 (1989).
- B. That rule regarding doubt applies ever more strongly to exclusionary language. "[T]o be effective, exclusionary language must clearly and unambiguously bring the particular act or omission within its scope." Floyd at 158. Indeed, policies are "to be construed liberally in favor of the insured and strictly against the insurer." Central Sur. & Ins. Corp. v. Elder, 129 S.E.2d 651, 655, 204 Va. 192, 197 (1963). And "the burden is on the insurer to prove that an exclusion applies." American Reliance Ins. Co. v. Mitchell, 385 S.E.2d 583, 585, 238 Va. 543, 547 (1989).
- C. If two constructions are reasonable, an ambiguity exists. Thus, [the question in a case can be] resolved by the mere fact that reasonable men . . . may reach reasonable, but opposite, conclusions" Id. Indeed, "an ambiguity exists when language admits of being understood in more than one way or refers to two or more things at the same time." Lincoln Nat. Life Ins. Co. v. Commonwealth Corrugated Container Corp., 327 S.E.2d 98, 101, 229 Va. 132, 136-137 (1985).
- D. Virginia law is also settled that all ambiguities resolve against the insurer. "An ambiguity, if one exists, must be found on the face of the policy." Id. Insurance policies are contracts whose language is ordinarily selected by insurers rather than by policyholders." St. Paul Fire & Marine Ins. Co. v. S.L. Nusbaum & Co., Inc., 316 S.E.2d 734, 736, 227 Va. 407, 411 (1984). "The courts, accordingly, have been consistent in construing the language of such policies, where there is doubt as to their meaning, in favor of that interpretation which grants coverage, rather than that which withholds it." Id. "Where two constructions are equally possible,

that most favorable to the insured will be adopted." Id. "Language in a policy purporting to exclude certain events from coverage will be construed most strongly against the insurer." Id.

II. Basic Virginia Law Governing Waiver Of Contract Defenses

- A. Virginia Code section 38.2-2226 provides that insurers cannot deny coverage based on breaches of policy conditions by their insureds if they do not notify the claimant (the person seeking money from the insured) both (1) with 45 days after discovering the alleged breach; and (2) at least 30 days before trial. It also provides that a carrier must notify the claimant within 45 days of reserving its rights or entering a non-waiver agreement based on the purported breach of any condition.
- B. Specifically, that statute provides for the 45-day deadline as follows:
Whenever any insurer on a policy of liability insurance discovers a breach of the terms or conditions of the insurance contract by the insured, the insurer shall notify the claimant or the claimant's counsel of the breach. Notification shall be given within forty-five days after discovery by the insurer of the breach or of the claim, whichever is later.
- C. The statute also provides for the pre-trial deadline as follows:
Notwithstanding the provisions of this section, in any claim in which a civil action has been filed by the claimant, the insurer shall give notice of reservation of rights in writing to the claimant, or if the claimant is represented by counsel, to claimant's counsel not less than thirty days prior to the date set for trial of the matter. The court, upon motion of the insurer and for good cause shown, may allow such notice to be given fewer than thirty days prior to the trial date. Failure to give the notice within thirty days of the trial date, or such shorter period as the court may have allowed, shall result in a waiver of the defense based on such breach to the extent of the claim by operation of law.
- D. The deadline regarding a reservation of rights or non-waiver agreement stems from the following language:
Whenever, on account of such breach, a nonwaiver of rights agreement is executed by the insurer and the insured, or a reservation of rights letter is sent by the insurer to the insured, notice of such action shall be given to the claimant or the claimant's counsel within forty-five days after that agreement is executed or the letter is sent, or after notice of the claim is received, whichever is later. Failure to give the notice within forty-five days will result in a waiver of the defense based on such breach to the extent of the claim by operation of law.

III. Types Of Insurance

A. Auto Liability Insurance

1. Provides coverage for:
 - a. "all sums"
 - b. "the insured"
 - c. "shall become legally obligated to pay as damages"
 - d. "because of bodily injury or property damage"
 - e. "arising out of the ownership, maintenance or use"
 - g. "of an owned automobile"
 - h. "or any non-owned automobile"
2. Persons insured:
 - a. For owned automobiles
 - (1) the named insured and any resident of the same household
 - (2) any other person using such automobile with the permission of the named insured if his use is within the scope of permission
 - b. For non-owned automobiles
 - (1) the named insured
 - (2) any relative, but only with respect to a private passenger automobile or trailer, provided the use or operation is "with the permission, or reasonably believed to be with the permission, of the owner" and is within the scope of such permission
3. Defined terms:
 - a. "'Bodily injury' means bodily injury, sickness or disease sustained by a person, included death resulting from any of these at any time."
 - b. "'Property damage' means . . . physical injury to or destruction of tangible property which occurs during the policy period, including the loss of use thereof at any time resulting therefrom, or . . . loss of use of tangible property which has not been physically injured or

destroyed provided such loss of use is caused by an 'occurrence' during the policy period."

- c. "Owned automobile" means:
 - (1) "an automobile which is owned by the named insured and described in the declarations or"
 - (2) an auto newly acquired by the named insured to substitute for a listed auto
 - (3) any auto for thirty days if no other insurance is purchased
 - (4) any "temporary substitute automobile"
- d. "Temporary substitute automobile" means:
 - (1) "an automobile not owned by the named insured or any resident of the same household,"
 - (2) "while temporarily used"
 - (3) "with the permission of an owner"
 - (4) "as a substitute for an owned automobile"
 - (5) "when withdrawn"
 - (6) "from normal use"
 - (7) "for servicing or repair or because of breakdown, loss, or destruction"
- e. "Non-owned automobile" means
 - (1) "an automobile or trailer"
 - (2) "not owned by"
 - (3) "or furnished for the regular use of"
 - (4) "the named insured"
 - (5) "or any relative"
 - (6) "other than a temporary substitute vehicle"
- f. "Relative" means a relative of the named insured who is a resident of the same household
- g. "Household" is typically not defined in policies. Virginia courts have conducted a fact-specific inquiry. Household indicates a

group of people, as opposed to a "home" which is tied to a specific place. Look for personal, social, family, and financial interactions.

B. Uninsured Motorist Insurance

1. Provides coverage for:
 - a. "all sums"
 - b. "which the insured or his legal representative"
 - c. "shall be legally entitled to recover"
 - d. "as damages"
 - e. "from the owner or operator"
 - f. "of an uninsured highway vehicle"
 - g. "because of bodily injury"
 - h. "sustained by the insured"
 - i. "caused by accident"
 - j. "arising out of the ownership, maintenance, or used of such insured highway vehicle"
2. Who is insured:
 - a. First Class: "the named insured and, while residents of the same household, the spouse and relatives"
 - b. Second Class: "any other person while occupying an insured highway vehicle"
3. What is an uninsured vehicle?
 - a. If no liability insurance is available
 - b. If less than \$25,000 in liability insurance is available
 - c. If the liability carrier denies coverage
 - d. If the tortfeasor cannot be identified ("John Doe")
 - e. If the tortfeasor is immune from suit (law enforcement officer)

4. How can policies be combined or "stacked"
 - a. Limits of separate policies can always be stacked
 - b. Limits for UM coverage for several cars under a single policy usually cannot be stacked unless the contract was drafted sloppily

C. Underinsured Motorist Insurance

1. Derives from uninsured motorist coverage
2. Add the limits for all available uninsured motorist coverage
3. Add the limits for all available liability coverage
4. Subtract the liability limits from the uninsured motorist limits

D. Medical Payments Insurance

1. Provides coverage for:
 - a. all reasonable medical payments
 - b. incurred
 - c. within one year for the date of the accident
 - d. to or for
 - (1) each person
 - (2) who sustains bodily injury
 - (3) caused by an accident
 - (4) while occupying
 - (5) a designated automobile
 - (6) which is being used by
 - (7) a person for whom bodily injury liability insurance is afforded under this policy
 - (8) with respect to such use AND
 - e. to or for
 - (1) each insured
 - (2) who sustains bodily injury
 - (3) caused by accident

- (4) while occupying or
 - (5) while a pedestrian
 - (6) through being struck by a highway vehicle
2. Multiply the per person limits by the number of automobiles on the policy (up to four automobiles)
 3. No subrogation of medical payments coverage – it cannot be collected from a third party!

E. CGL Coverage – Bodily Injury and Property Damage

1. Provides coverage for:
 - a. all sums
 - b. the insured
 - c. becomes legally obligated to pay as damages
 - d. because of bodily injury or property damage
 - e. caused by an occurrence
 - f. during the policy period

2. Who is insured?

"If you are designated in the Declarations as:

An individual, you and your spouse are insureds, but only with respect to the conduct of a business of which you are the sole owner.

A partnership or joint venture, you are an insured. Your members, your partners, and their spouses are also insureds, but only with respect to the conduct of your business.

A limited liability company, you are an insured. Your members are also insureds, but only with respect to the conduct of your business. Your managers are insureds, but only with respect to their duties as your managers.

An organization other than a partnership, joint venture or limited liability company, you are an insured. Your 'executive officers' and directors are insureds, but only with respect to their duties as your officers or directors. Your stockholders are insureds, but only with respect to their liability as stockholders. . . ."

3. "Occurrence" means an accident, including continuous or repeated exposure to substantially the same general harmful conditions."
4. Typically excludes
 - a. damage expected or intended by the insured
 - b. "This insurance does not apply to . . . 'bodily injury' or 'property damage' expected or intended from the standpoint of the insured. This exclusion does not apply to 'bodily injury' resulting from the use of reasonable force to protect persons or property."

F. CGL Coverage – Personal Injury

1. "Personal Injury" means something completely different
2. Also provides coverage for "'Personal and advertising injury' means injury, including consequential 'bodily injury', arising out of one or more of the following offenses . . . false arrest, detention or imprisonment; . . . [and] Oral or written publication, in any manner, of material that violates a person's right to privacy."

G. Homeowners Or Renters Insurance

1. The liability portion is similar to CGL bodily injury and property damage, and personal injury coverage
2. Typically excludes claims connected to the insured's business

H. Directors And Officers Liability Insurance

1. Provides coverage for
 - a. wrongful act
 - b. by an officer or director
2. "'Wrongful Act' means . . . with respect to Individual Directors or Officers, any breach of duty, neglect, error, misstatement, misleading statement, omission or act by the Directors or Officers of the Company in their respective capacities as such, or any matter claim against them solely by reason of their status as Directors or Officers of the Company"
3. Typically excludes bodily injury and property damage "The Insurer shall not be liable to make any payment for Loss in connection with a Claim made against an insured . . . for bodily injury, sickness, disease, death or emotional distress of any person, or damage to or destruction of any tangible property, including loss of use thereof, or for injury from libel or slander or defamation or disparagement, or for injury from a violation of a person's right to privacy."

IV. Insurance Triage Topics

- A. What Harm Happened?
 - 1. Bodily Injury
 - a. Covered Under Auto Liability, UM, UIM, CGL, and Homeowners' Policies
 - b. Excluded Under A D&O Policy
 - 2. Property Damage
 - a. Covered Under Auto Liability, UM, UIM, CGL, and Homeowners' Policies
 - b. Excluded Under A D&O Policy
 - 3. Personal Injury
 - a. Covered Under CGL and Homeowners
- B. Who Was Hurt?
 - 1. Did they have UM insurance?
 - 2. Were they guests in a car with UM insurance?
 - 3. Who did the driver of their car live with?
 - 4. Who did they live with?
- C. What Caused The Harm?
 - 1. Was there an "occurrence"?
 - 2. Was there an accident involving an auto?
 - 3. Was there a wrongful act?
 - 4. Was the harm "expected or intended"?

D. Who Caused The Harm?

1. What people caused the harm?
2. To whom were they connected?
 - a. Auto Liability
 - (1) household residents
 - (2) permissive users
 - b. UM/UIM
 - (1) Did they have liability insurance?
 - (2) How much?
 - c. CGL Insurance
 - (1) were they working at the time?
 - (2) what kind of insurance did their employer have?
 - d. Directors and Officers Insurance
 - (1) A corporation?
 - (2) A volunteer organization?

E. When Did The Harm Happen?

1. Occurrence-based policies
 - a. Consider both when the cause happened and when the damage happened
 - b. The four main timing approaches
 - (1) Manifestation -- When did the injury become known?
 - (2) Exposure -- When was the party exposed to the condition that caused the harm?
 - (3) Continuous Trigger -- Coverage from all policies through any period of progressive injury
 - (4) Injury-In-Fact -- When did the damage occur, setting aside when it was discovered?
 - c. Virginia has not chosen an approach yet. Some speculate that the Virginia Supreme Court would pick the injury-in-fact approach.

2. Claims made and reported policies
 - a. "This policy shall pay the Loss of each and every Director or Officer of the Company arising from a claim first made against the Directors or Officers during the Policy Period . . . and reported to the Insurer pursuant to the terms of this policy for any actual or alleged Wrongful Act in their respective capacities as Directors or Officers of the Company"
 - b. Pure "claims made" policies now rare

John J. Rasmussen founded the Insurance Recovery Law Group, PLC. You can read more about his practice at www.insurance-recovery.com. You can contact him at jjr@insurance-recovery.com.