



BUREAU OF INSURANCE

June 7, 1999

**ADMINISTRATIVE LETTER 1999-5**

**TO: ALL INSURERS LICENSED TO WRITE ACCIDENT AND SICKNESS INSURANCE, LIFE INSURANCE, VARIABLE LIFE INSURANCE, ANNUITIES, VARIABLE ANNUITIES, MODIFIED GUARANTEED ANNUITIES, CREDIT LIFE INSURANCE, OR CREDIT ACCIDENT AND SICKNESS INSURANCE IN VIRGINIA**

**ALL HEALTH SERVICES PLANS, FRATERNAL BENEFIT SOCIETIES, HEALTH MAINTENANCE ORGANIZATIONS, LEGAL SERVICES PLANS, OR DENTAL OR OPTOMETRIC SERVICES PLANS**

**RE: Policy provisions Limiting Liability for Damages**

It has recently come to my staff's attention that many policy forms, evidences of coverage, and other related documents submitted to the Bureau of Insurance, ("Bureau") for approval contain provisions under which a carrier's liability would be limited in the event a lawsuit is initiated by a policyholder or his representative for recovery of direct or indirect damages. The purpose of this administrative letter is to notify carriers of the types of limitations which will or will not be accepted under such provisions, and to provide guidance concerning the Bureau's rationale in formulating approval guidelines relating to these types of provisions. The Bureau has identified and evaluated a number of specific limitations in these provisions, as follow:

**LEGAL FEES**

Section 38.2-209 of the Code of Virginia expressly permits an award of attorney fees in a suit brought by an insured to determine coverage where the court determines the insurer has not acted in good faith in failing to make payments to its insured under a policy. Thus, any provision barring the recovery of attorney fees will be disapproved as not conforming with the laws of this Commonwealth, in accordance with § 38.2-316 D 1 of the Code of Virginia.

Our review of §§ 38.2-4214, 38.2-4319, 38.2-4408 and 38.2-4509 indicates that these sections currently do not include references to § 38.2-209.

## **PUNITIVE DAMAGES**

The Bureau believes there is ample authority in relevant case law to support its position that it is against the public policy of Virginia for a carrier to exempt itself from future liability for punitive damages when such an exemption would apply to **any** suit or **any** cause of action which might be brought against a carrier, including suits with counts in tort. Therefore, provisions which exempt a carrier's liability for punitive damages will be disapproved, in accordance with § 38.2-316 D 3 of the Code of Virginia. It should be noted, however, that the Bureau does not assert that a limitation on punitive damages conflicts with contract law since, as a general rule, damages for breach of contract are limited to the pecuniary loss sustained. Therefore, while the Bureau will not approve a provision under which the carrier is exempted from all liability for punitive damages, it will approve a provision under which it is clearly stated that such losses are not recoverable under the policy.

## **INDIRECT OR CONSEQUENTIAL DAMAGES**

Unlike punitive damages, consequential damages may be recovered in certain breach of contract actions. Provisional language which exempts a carrier from liability for indirect or consequential damages, or which seek to limit the full range of remedies to which an insured may be entitled as a result of the carrier's actions in breaching the insurance contract will be considered to be impermissible as against the public policy of Virginia, and will be disapproved accordingly.

While the Bureau will disapprove those specific limitations noted above, it will accept certain limitations placed on the amount of covered benefits under a policy, provided there is no reference to a limitation applicable to extra-contractual damages. Language similar or substantially similar to the following will be acceptable:

In the event you or your representative sue [carrier] or any of [carrier's] directors, officers or employees acting in his or her capacity as a director, officer, or employee, for a determination of what coverage, if any, exists under this policy, your damages shall be limited to the amount of your claim for benefits. The damages shall not exceed the amount of any claim not properly paid as of the time the lawsuit is filed. This policy does not provide coverage for punitive damages, or damages for emotional distress or mental anguish; provided, however, this provision is not intended, and shall not be construed, to affect in any manner any recovery by you or your representative of any non-contractual damages to which you or your representative may otherwise be entitled.

The Bureau will grant carriers a period of sixty (60) days from the date of this letter to identify any inappropriate language in forms currently in use and resubmit revisions or amendments for approval.

Revised submissions, as well as any questions relating to this matter, should be referred **IN WRITING** to:

Jacqueline K. Cunningham  
Supervisor  
Forms and Rates Section - Life and Health Division  
State Corporation Commission  
Bureau of Insurance  
Post Office Box 1157  
Richmond, Virginia 23218

Sincerely,

Alfred W. Gross  
Commissioner of Insurance

AWG/jkc