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## **EFFECTS OF SB NO. 640 (2016) ON ANTI-CREDITOR PROVISIONS TO INSURANCE POLICIES AND ANNUITIES IN VIRGINIA**

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For our July issue of Two Things Certain, our summer associate PATRICK MACALUSO, has prepared a brief explaining how a recent law change in Virginia protects beneficiaries of Life Insurance from the creditors of a decedent's estate.

### **BACKGROUND**

On March 7, 2016, Senate Bill No. 640 was signed by Gov. McAuliffe, amending § 38.2-3122 of the Code of Virginia. The general effect of this amendment creates greater difficulties for creditors to state a claim against insurance policies and annuities.

### **THE OLD STATUTE**

Prior to its amendment, § 38.2-3122 of the Code of Virginia stated as follows:

The assignee or lawful beneficiary of an insurance policy shall be entitled to its proceeds against any claims of the creditors or representatives of the insured or the person effecting the policy, except in cases of transfer with intent to defraud creditors, subject to the following conditions:

1. The policy shall have been effected by a person on his own life or on another life, in favor of a person other than himself;
2. The assignee of the policy, or the payee, if the policy is otherwise made payable to another, shall not be the insured, nor the person effecting the policy, nor the executors or administrators;
3. The right to change the beneficiary may or may not have been reserved or permitted;
4. The policy may be payable to the person whose life is insured if the beneficiary or assignee predeceases the insured[.]

The old statute essentially protects only the beneficiaries of a life insurance policy as long as that beneficiary is not the person whose life is insured, unless the intended beneficiary predeceases the insured person. Compared to the old statute, the recent amendments to § 38.2-3122 provide much broader protection against creditors. To this effect, Senate Bill No. 640 eliminates the language of the old statute in its entirety.

## ENHANCED PROTECTIONS OF THE NEW STATUTE

### **1. The new statute defines more specifically what constitutes a “protected insurance item.”**

The old statute only protected the “proceeds” of an insurance policy. The new statute protects the following: (1) cash surrender values; (2) direct proceeds; (3) withdrawal values of any optional settlement, annuity contract, or deposit; and (4) *all other benefits*. § 38.2-3122(A) (emphasis added). In essence, the language of the new statutes captures virtually any foreseeable scenario where a beneficiary may be entitled to receive a cash sum into its anti-creditor provisions.

### **2. The new statute specifically prevents certain creditors from attaching their interest to protected insurance items.**

The old statute protects only the beneficiaries listed on an insurance policy from being subject to creditors’ attachments. In contrast, the new statute states that a protected insurance item cannot be subject to garnishment, attachment, or any legal process in favor of creditors of: (1) the person whose life is insured; (2) the spouse or dependent child of whose life is insured; (3) any other person specifically protected by the insurance policy; (4) any of the beneficiaries of the policy; (5) the intended spouse of the person whose life is insured; (5) the person who owns the annuity; (6) the person who effected the annuity. § 38.2-3122(B).

In enacting this new language, the Virginia Legislature has provided more robust protections for insurance policies and annuities, making it much more difficult for creditors to pursue the interests of most beneficiaries.

### **3. Exceptions**

The new statute provides for three general exceptions to the anti-creditor provisions, and if any of the exceptions are met, creditors may, generally, attach an interest against an insurance policy or annuity.

#### *a. Exception #1 – Voluntary Assignment*

The provisions in Section B of the new statute do not apply to those creditors who were assigned interest in a protected insurance item voluntarily, nor does it apply to creditors for whom the policy was initially made. § 38.2-3122(C). This allows the person who took out the policy to assign the benefit of the policy voluntarily, but there are circumstances where the creditor can attach interest against the protected insurance item against the will of the person holding the interest.

#### *b. Exception #2 – Fraud*

The new statute protects creditors that are the victims of fraud. If the insurance policy was taken out with the intention of defrauding creditors, or if any protected insurance item was created with the intention of defrauding creditors, then the anti-creditor provisions of the statute do not apply. § 38.2-3122(D). More than likely in this scenario, a criminal investigation would be conducted against the person committing the fraud.

*c. Exception #3 – Bankruptcy*

Bankruptcy, generally, protects creditors from the terms of this statute. If the person claiming an exemption through this statute also filed a petition for bankruptcy or was declared insolvent by a bankruptcy court within six months preceding the exemption claim, then the anti-creditor provisions statute will not apply. § 38.2-3122(E).

**CONCLUSION**

In essence, the Virginia Legislature has made it much more difficult for creditors to attach their interests against anything that falls under the more focused definition of “protected insurance item,” making insurance policies and annuity contracts much more consumer-friendly in Virginia. Creditors can still involuntarily attach interest under very narrow circumstances, but, in general, the new legislation provides greater protection for consumers.



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Partick is a law student at the Duquesne School of Law. He will enter his 3 year of law school this fall.