

EMERGENCY & DISASTER LEGAL SERVICES

Training Manual and Materials



Prepared
by:

The Virginia State Bar Young Lawyers Conference Emergency Legal Services Committee

For use by all Virginia lawyers who volunteer to assist the victims of emergencies and
disasters.



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I. INTRODUCTION – What are Emergency Legal Services?

Major disasters or emergencies, like floods, tornados, hurricanes, or riots occur, leave victims extremely vulnerable and in urgent need of legal assistance. In 1993, the Virginia State Bar recognized this and asked the Young Lawyers Conference (YLC) to develop a comprehensive Statewide Emergency Legal Service Response Plan (the Plan).

The Plan established a disaster response network consisting of one local liaison per judicial circuit. It streamlines the coordination of free legal services to Virginia citizens in the event the President or Governor declares a state of emergency.

II. OVERVIEW OF THE STATEWIDE PLAN

The State Bar, as a State agency, must ensure lawyers are prepared to respond rapidly to a natural disaster. Virginia is susceptible to severe weather, such as hurricanes, tornados, and flooding.

A. Emergencies Declared by Governor & Dept. of Emergency Services

The Virginia Department of Emergency Management (VDEM) coordinates the Commonwealth's response to all "disasters." It is responsible for the administering and coordinating the government response to the disaster. See Va. Code § 44-146.16, and 42 U.S.C. § 5122(2) for the definition of state and federally declared natural disasters. During the course of a natural or manmade disaster, the VDEM monitors conditions effecting the Commonwealth and notifies the appropriate state agencies, non-governmental organizations, and private sector partners. If the VDEM calls upon Emergency Support Function #6, governing Emergency Assistance, then VDEM will contact the Attorney General's office. The Attorney General's office will then contact the Virginia State Bar to coordinate damage assessment and provide legal services.

The full Commonwealth of Virginia Emergency Operations Plan is available at <http://www.vaemergency.gov/emergency-management-community/emergency-management-plans/>.

B. Disasters Declared by the President & FEMA

The Federal Emergency Management Agency (FEMA) administers the *Robert T. Stafford Disaster Relief and Emergency Assistance Act*, 42 U.S.C. 5121, *et. seq.*, (the "Stafford Act.") and provides federal disaster assistance after a presidential declaration of a natural disaster.

After the President declares a major disaster, he then appoints a Federal Coordinating Officer (FCO) to coordinate relief activities in affected areas. All relief for major disasters, including those authorized by separate statutes and provided by other federal, state, and local agencies, are coordinated by the FCO in conjunction with the FEMA Regional Director, and the VDEM. A Major Disaster Declaration by the President makes a broad range of federal disaster assistance programs available to the impacted area that are designed to assist disaster victims, businesses and public entities in the recovery process.

C. State and/or Federal Requests for Legal Services

Both state and federal governments have statutory and regulatory authority to make arrangements for the provision of legal services to disaster victims. See 42 U.S.C. § 5182, and Va. Code §§ 44-146.16 to 44-146.18. Regardless of whether the request for legal services is made by the state or federal government, this Plan will work in the same manner. Lawyers may, in a major disaster scenario, be providing volunteer services through a jointly coordinated federal and state effort. If the request for services is initiated by FEMA, the American Bar Association's Young Lawyer Division will coordinate with the VSB providing a clearinghouse of relief information.

Free legal services under this Plan are provided to low-income and other qualifying victims as defined by 42 U.S.C. § 5182. These legal services include legal advice, counseling, and representation in non-fee-generating cases. Lawyers may not solicit fee generating business or refer cases to their own firms.

D. Coordinating the Bar's Response

The YLC will coordinate the volunteer response under this Plan. The VSB YLC District Representatives will serve as the "Local Liaisons." These Local Liaisons must be familiar with the Emergency Plan and mobilize attorneys in the event of a disaster.

Local liaisons should compile a list of attorneys, regardless of whether these attorneys are members of the YLC, who are willing to provide *pro bono* legal services the event of a disaster. Such recruiting tactics may include:

- Request volunteers at your next local bar association meeting;
- Contact potential volunteers by telephone;
- Solicit via email or direct mail;
- Solicit via social media;
- Speak with fellow attorneys you work with.

The local liaisons will provide this list to the YLC Board of Governors and update the list annually. Local liaisons will coordinate training sessions to prepare attorneys in the event of an emergency.

Once the Governor or President declares a state of emergency, or the VDEM calls upon Emergency Support Function #6, local liaisons will coordinate the emergency legal response in their district. The extent of each liaison's role will depend on the legal services needed. The services may include:

- Providing, publicizing, and arranging for volunteer attorneys to staff a legal services hotline; and
- Coordinate volunteer attorneys to staff the local services desk a FEMA/VDEM Disaster Application Center (DAC).

E. Emergency Legal Service Plan Differs From Other Legal Services

The Emergency Plan has no formal connection to local Legal Aid Societies or similar pro bono endeavors.

Appendix A

COMMON LEGAL ISSUES FOLLOWING DISASTERS

The following information is a brief introduction to some of the legal issues that volunteer attorneys are likely to encounter after a natural disaster. This manual serves as a starting point for any legal research that volunteer attorneys may need to conduct in order to effectively assist their clients.

I. Consumer Law Issues

Emergencies and disasters frequently subject consumers to predatory practices of overreaching sellers and lenders who seek to profit from the emergency. Low income families may be particularly vulnerable to practices like scams, price gouging, and theft. The economic impact can be dramatic, as consumers pay exorbitant prices for necessary goods and services, causing them to fall behind in their regular bills and living expenses.

Lawyers can use the resources below to help educate and warn consumers to identify and avoid scams, help choose reputable businesses, advise consumers about their options when dealing with suppliers, and negotiate with creditors about moratoriums and extensions of loan and bill payments.

The following is a brief outline of consumer protection laws both in Virginia and federal statutes. The pivotal consumer protection law in Virginia is the Virginia Consumer Protection Act (“VCPA”), Virginia Code §§ 59.1-196 – 207. Many of the statutes and acts identified below are enforceable through the VCPA, which is construed as remedial legislation and provides the potential to collect attorneys’ fees, costs, and treble damages. The chief enforcement agency of the VCPA is the Office of the Attorney General’s Consumer Protection Section (“OAG”). The OAG investigates and sues suppliers who run afoul of the VCPA’s provisions. The OAG’s complaint division contact number is (804) 786-2042, and consumers may be instructed to fill out a complaint form at <https://www.oag.state.va.us/consumercomplaintform/form/start>.

A. **Post-Disaster Anti-Price Gouging Act** (Va. Code §§ 59.1-525 - 529.1)

The declaration of a state of emergency by the Governor or President triggers the Anti-Price Gouging (APG) statutes designed to protect consumers from paying exorbitant prices for necessities during an emergency. Suppliers are prohibited from charging “unconscionable prices” for “necessary goods and services” while the state of emergency is in effect and for the following 30 days, including any extension or renewal of the state of emergency.

Scope: Applicable to water, ice, food, generators, batteries, home repair materials and services, medical supplies and services, housing and lodging, emergency cleanup supplies and services, communication supplies and services, tree removal services, and other “necessaries.” Also applies to gasoline, diesel and other motor fuels.

Unconscionable price: Statutory factors to consider in determining whether a price is “unconscionable” include (1) whether the price charged by the supplier “grossly

exceeded” the price charged *by the supplier* during the 10 days immediately before the disaster (2) Whether the price charged by the supplier “grossly exceeded” the price charged for the same or similar goods or services *in the trade area* during the 10 days immediately before the disaster (3) Whether the increase in price was attributable solely to additional costs incurred by the supplier, including costs imposed by the supplier’s source, and (4) Whether the increase in price was attributable solely to a regular seasonal or holiday adjustment in price.

Remedies: There is no private right of action, and the APG statutes are enforceable by the Virginia Attorney General’s Office (“OAG”) through the VCPA. Consumers and attorneys may contact the OAG about potential APG violations at (800) 552-9963. For complaints involving gasoline or motor fuels, complaints should be made to the Office of Weights and Measures within the Virginia Department of Agriculture and Consumer Services at (804) 786-2476 and <http://www.vdacs.virginia.gov/pdf/pricegouging.pdf>

B. CONSUMER SALES AND LEASES

1. Home Solicitations Sales Act (Va. Code §§ 59.1-21.1 – 21.7:1)

Disasters tend to bring home solicitation salespersons “out of the woodwork.” Due to the high pressure sales tactics often used in connection with these contracts, the Home Solicitations Sales Act (HSSA) provides a number of consumer protections in these contracts, including a three-day right to cancel.

Scope: Applicable to sales of personal property or services at a residence other than that of seller, whether door to door or by telephone. If the consumer phones the seller to request a visit from a salesperson, the Act may still apply. Most credit sales covered, but only cash sales of \$25.00 or more covered.

Notice: Requires seller provide a receipt or written contract that includes notice of the right to cancel (on front in 10-point type or immediately above the buyer’s signature) along with a cancellation form that includes the address to which it must be sent. Also must include the date of the transaction. Until the seller has provided this notice, the buyer can cancel by notifying the seller in any manner by any means. If no notice is given, or if notice does not comply with the HSSA, buyer has infinite length of time in which to cancel, and three-day period does not begin to run until proper notice is given.

Cancellation of Sales: Permits the buyer to revoke a home solicitation sale prior to midnight of the third business day after the later of signing contract containing proper notice of the right to cancel or learning of the right to cancel if notice is not given. Seller has no claim in quantum meruit for work performed prior to a proper cancellation. In a bona fide emergency, however, the buyer may waive the right to cancel. Any statement of waiver of the rights and responsibilities of the HSSA other than an emergency is null and void.

Rights After Cancellation: Seller must tender to buyer any payments made or any note or other evidence of indebtedness. Until seller complies with these requirements, buyer has a lien on any goods delivered and may retain possession of such goods.

Remedies: Provides a private right of action through the VCPA, including the greater of actual damages or \$500, the greater of \$1,000 or treble actual damages if the violation was willful, plus costs and attorneys' fees. May also provide for revocation of the sale.

2. Virginia Consumer Protection Act (Va. Code §§ 59.1-196 –207)

The VCPA is the predominant consumer protection statute in Virginia. It was enacted to “promote fair and ethical standards of dealing” between consumers and suppliers, and it is construed as remedial legislation to deter fraudulent business practices.

Scope: Applies to "consumer transactions," including the advertisement, sale or lease of goods and services primarily for personal, family or household use. "Suppliers" of consumer goods includes manufacturers, distributors and retail sellers or lessors.

Important exclusions: Several types of companies that are regulated and supervised by the State Corporation Commission or comparable regulatory entity are exempt, including banks, savings institutions, credit unions, consumer finance companies, public service corporations, mortgage lenders, broker-dealers, gas suppliers and insurance companies.

Certain aspects of consumer transactions are also excluded, including those which are authorized under laws or regulations of Virginia, those which are regulated by the Federal Consumer Credit Protection Act 15 U.S.C. § 1601 et seq. (majority of federal consumer protection statutes), the landlord tenant acts (both Chapter 13 and 13.2 of Title 55) and real estate licensees.

Prohibited Practices: Section 59.1-200 lists over 50 specific prohibited practices related to misrepresentation, deceptive practices and false pretenses. There are a number of other statutes incorporated by reference (including over-charging for towing services (#30), unlicensed contractors (#46), and various financial products (#s 51, 45, 40, and 36)), which are enforceable as violations of the VCPA. Counsel should review each prohibited practice carefully to determine whether the client has suffered a violation of one of these prohibited practices. The “catchall” provision is # 14, which prohibits suppliers from “[u]sing any other deception, fraud, false pretense, false promise, or misrepresentation in connection with a consumer transaction.”

Remedies: Provides a private right of action through the VCPA, including the greater of actual damages or \$500, the greater of \$1,000 or treble actual damages if the violation was willful, plus costs and attorneys' fees. The statute of limitations is two years, and includes a date of discovery tolling provision.

3. Lease Purchase Act (Va. Code §§ 59.1-207.17 - 207.27)

The Lease Purchase Act requires lessors to provide certain disclosures in consumer lease-purchase agreements for the use of personal property. It applies to leases which have an initial period of four months or less; which are automatically renewable after the initial period; which do not require the consumer to continue the lease after the initial period; and which permit the consumer to become the owner of the property.

Important exclusions: This does not apply to automobiles, non-consumer leases (i.e., business or commercial), agreements with governmental agencies; safe deposit boxes, and leases of personal property incidental to the lease of real property and with no option to purchase the leased property.

Disclosures: Lessor is required to provide information about the property, the payments, the cash price of the property, itemization of fees and charges, an early purchase option, statement about the ability of the consumer to terminate the lease at the end of the initial period; and a notice about the consumer's right to reinstate the agreement in the event of a missed payment.

Prohibited Provisions: The agreement may not include a confession of judgment, a negotiable instrument, a security interest in any goods except those in the lease; a wage assignment, waiver of consumer claims or defenses; or permission for a breach of the peace in a repossession.

Remedies: Provides a private right of action through the VCPA, including the greater of actual damages or \$500, the greater of \$1,000 or treble actual damages if the violation was willful, plus costs and attorneys' fees.

4. Damaged Vehicles

Disasters like floods and winter storms frequently result in an increase of vehicles being damaged beyond repair and resold by unscrupulous dealers. Lawyers can help consumers by providing information about how to obtain vehicle histories and what to look out for when purchasing a vehicle in the wake of a disaster.

Virginia requires water damage to be reported on a vehicle's title; however, dishonest sellers can find ways to circumvent these requirements, putting buyers at risk. If a vehicle is branded as non-repairable, the vehicle cannot be titled in Virginia, but a non-repairable car could be titled in another state. If a Virginian purchases that car and tries to title it in Virginia, the vehicle's history would show it as non-repairable and the customer couldn't obtain a title. Virginia Code § 46.2-624 requires insurance companies to report to DMV when they have paid a claim of \$3,500 or more on a vehicle due to water damage. Insurers are required to notify DMV of such water damage, even if the owner intends to continue driving the vehicle.

Statutory Definitions: Virginia Code § 46.2-1600 provides definitions of multiple categories of vehicles which have been previously damaged and/or repaired, including “Nonrepairable”, “Rebuilt”, “Repairable” and “Salvage.”

Vehicle History Resources: The National Motor Vehicle Title Information System, (“NMVTIS”) <https://www.vehiclehistory.gov/> ; Virginia DMV Prospective Purchaser Inquiry <https://www.dmv.virginia.gov/general/#records/ppi.asp> ; Autocheck (operated by Experian) <https://www.autocheck.com/vehiclehistory/?siteID=0> ; Carfax <https://www.carfax.com/> .

Not all states have the same insurance and damage reporting requirements. Therefore, while these reports are useful, they are frequently incomplete, and should therefore be viewed as a **starting point** to continue the search for more information (i.e., from another state’s motor vehicle department or an insurance company.) Consumers should obtain multiple reports and review them with caution.

Remedies: Misrepresenting that a vehicle has certain characteristics or benefits, or that a vehicle is of a particular standard, quality, grade or model may be VCPA violations. See Va. Code § 59.1-200(A)(3), (4). However, ordinary “puffery” and “dealer talk” is not actionable as a VCPA violation.

5. Federal Consumer Leasing Act (15 U.S.C. §§ 1667-1667f)

The federal Consumer Leasing Act requires lessors to provide various disclosures for leases of personal property that are for more than four months and less than \$50,000. It also prohibits unreasonable default or early termination charges.

6. Federal Magnuson Moss Warranty Act (15 U.S.C. §§ 2301-2312)

The Magnuson-Moss Warranty Act (“MMWA”) imposes limitations and obligations on a seller who provide implied and/or written warranties on its goods. The MMWA as modified by the regulation applies to any consumer goods costing more than \$15. It requires minimum disclosure standards for written consumer product warranties and remedies for breach.

Implied warranties: Defined as an implied warranty arising under state law (See Va. Code § 8.2-312, -314, -315). Notably, the MMWA provides that an implied warranty cannot be disclaimed when it is accompanied by a written warranty or a service contract from the supplier (See 15 U.S.C. § 1608).

Written warranties: Includes (1) any written affirmation of fact or promise which relates to the material or workmanship and affirms or promises that the material or workmanship is defect free or will meet a specified level of performance over a specified time, or (2) any undertaking in writing in connection with the sale of a consumer product to refund, replace, or take other remedial action, when the affirmation, promise, or undertaking becomes part of the basis of the bargain. MMWA requires warranties to include contain provisions about the scope and extent of the warranty, consumer remedies, and dispute resolution procedures.

Remedies: Provides a private right of action for legal and/or equitable relief for breach of the written and implied warranties. Before filing an action, the consumer must give the warrantor a reasonable time to cure the defects. The plaintiff may be awarded damages, any other appropriate legal or equitable relief, costs and attorney's fees.

C. DEBT COLLECTION

1. Federal Fair Debt Collection Practices Act (15 U.S.C. §§ 1692-1692p)

The Fair Debt Collection Practices Act ("FDCPA") applies to persons collecting a debt for another party (i.e., not original creditors) and prohibits certain actions by the debt collector which are abusive, deceptive and unfair. It also requires debt collectors to provide affirmative disclosures to consumers when collecting a debt.

Scope: The FDCPA applies to persons or organizations that collect consumer debts on behalf of a third party. The FDCPA does not apply to organizations who attempt to collect their own debts, except if they use another name which might indicate that a third person is collecting the debt.

Consumer Protections: Debt collectors are *prohibited* from tactics which are harassing, abusive, false, misleading, or unfair. Specific practices (i.e., repeated telephone calls, threats of lawsuits or criminal action, soliciting or accepting post-dated checks and collecting an illegal or invalid debt) are spelled out in § 1692d-1692f. Debt collectors are also required to *provide* consumers with disclosures about their identity, the consumer's right to dispute the debt, and a requested validation of the debt in § 1692c and 1692g.

Remedies: Provides a private right of action for violations in federal and state court to collect actual damages (i.e., loss of employment, physical injury or other immediate harm, mental suffering, inconvenience, and harassment), plus statutory damages of up to \$1,000 for each person, punitive damages above these amounts, attorney's fees, and costs. One year statute of limitations applies.

Defenses: Collectors can defend by showing that the violation was "not intentional and resulted from a bona-fide error notwithstanding the maintenance of procedures reasonably adapted to avoid such error."

2. Federal Garnishment Protections (15 U.S.C. §§ 1671-1677)

After a creditor obtains a judgment, they may seek to garnish a consumer's wages or bank account(s). Garnishments are a particularly aggressive debt collection tactic, and should be scrutinized carefully by lawyers assisting these consumers.

Wage Garnishment Protections: The maximum amount that may be garnished per work week is the *lesser* of (1) 25% of the disposable earnings for that week, or (2) the amount by which the disposable earnings for that week exceed thirty times the

federal minimum hourly wage (29 U.S.C. § 206(a)(1)). Also prohibits employers from firing an employee as a result of their being garnished.

Remedies: No private right of action, as the statute is enforced by the Secretary of Labor. However, lawyers should be mindful of FDCPA in the event the wages are being garnished by a third party debt collector.

D. CONSUMER LENDING

1. VIRGINIA CONSUMER LOAN STATUTES

In the wake of a disaster or state of emergency, consumers may need more access to money and end up turning to predatory lending options as a means of obtaining emergency cash. These contracts should be reviewed with scrutiny to determine the type of loan, applicable law, and potential avenues of relief for the consumer.

Virginia provides regulations for several types of these small-dollar consumer loan products. Some of these agencies are regulated by the Virginia State Corporation Commission's Bureau of Financial Institutions ("BFI") and others are not. The statutory cap on interest rates in loans is 12%, unless the lender meets an exception. Virginia Code § 6.2-303. Below is a list of the most frequently used exceptions for non-depository financial institutions and their accompanying regulations.

a) **Consumer Finance Companies** (Va. Code §§ 6.2-1500 - 6.2-1543)

These statutes apply to closed-end installment lenders that make loans for personal, family or household purposes. The statutes require consumer finance lenders to obtain a license from the BFI, and list regulations which the lenders must comply with.

Scope: These statutes apply to licensed consumer finance companies as well as persons who making loans but are not licensed, and persons who seek to evade the regulations contained in these statutes.

Interest Rates: A *licensed* consumer finance company can charge no more than 36% annual interest on loans totaling \$2500 or less, but, for loans exceeding \$2500, there is no cap on the interest that may be charged by a licensed consumer finance company.

Prohibited Practices: Section 1524 lists various types of prohibited conduct, relating to the handling of funds, disclosures to consumers, and payment methods.

Remedies: Consumers may recover illegal or unauthorized charges. Any loans by an unlicensed lender are void, and the lender must forfeit principal, interest and all charges paid by the consumer.

b) **Open-End Credit Plans** (Va. Code § 6.2-312)

This is the least regulated type of loan product of those listed here (and possibly in Virginia). This statute applies to open-end credit plans, which are defined as plans where (1) the creditor expects the borrower to make repeated transactions on the credit plan; (2) the creditor has the right to impose a finance charge; and (3) credit is generally made available to the extent that any outstanding balance is repaid. Va. Code § 6.2-300.

Interest Rates: There is no statutory cap on the interest or fees that may be charged. However, borrowers must be given the option to pay in full during the first 25 days (grace period) before being assessed a finance charge. “Cash advance” fees should be considered finance charges, while periodic “membership” or “participation” fees generally are not. Under current Virginia law, there is no licensure requirement for open-end credit lenders.

Remedies: This statute does not provide a private right of action, but a failure to comply with the statute may render the loan usurious, or in violation of the licensure requirements of the consumer finance statutes. Lawyers should also review these contracts and billing statements for compliance with TILA.

c) **Motor Vehicle Title Loans** (Va. Code §§ 6.2-2200 – 2225)

A motor vehicle title loan is an agreement whereby a lender agrees to make a motor vehicle title loan to a borrower, and the borrower agrees to give to the lender a security interest in their motor vehicle to secure repayment of the loan. The licensure requirements and prohibitions within the statute apply to anyone making motor vehicle title loans to residents of Virginia, including over the internet.

Interest Rates: A licensed motor vehicle title lender can charge and collect interest as follows: (1) 22% per month on the first \$700 in principal; (2) 18% per month on any amount exceeding \$700, but up to \$1400; and (3) 15% per month on the remaining portion of principal exceeding \$1400.

Important Consumer Protections: Motor vehicle title loans cannot be longer than one year, and the loan amount is capped at 50% of the fair market value of the vehicle. A title lender cannot make a title loan on a vehicle that has an existing security interest, or to someone who has another existing car title loan. Title lenders cannot knowingly make payday loans to members of the armed forces, their dependents, or their spouses

Section 2215 lists over 20 prohibited and required practices for title lenders, including providing conspicuous disclosures, compliance with the FDCPA in collection tactics, prohibition against obtaining ACH withdrawal authorizations, and safekeeping of the title.

Section 2217 provides particular requirements for a title lender when it repossesses a vehicle on a delinquent title loan, including a default notice, statement of

charges and costs due, and prohibition against seeking a judgment against the consumer for remaining amounts due after the repossession sale.

Remedies: Provides a private right of action through the VCPA, including the greater of actual damages or \$500, the greater of \$1,000 or treble actual damages if the violation was willful, plus costs and attorneys' fees.

d) **Payday Loans** (Va. Code §§ 6.2-1800 – 1829)

A payday loan is a “small, short-maturity loan on the security of (i) a check, (ii) any form of assignment of an interest in the account of an individual at a depository institution, or (iii) any form of assignment of income payable to an individual, other than loans based on income tax refunds.” These statutes apply to anyone who is making payday loans to a consumer residing in Virginia, including over the internet.

Interest Rates: A *licensed* payday lender can charge an annual interest rate of no more than 36%. The lender can also charge a loan fee of no more than 20% of the loan proceeds, and the lender can charge a \$5 fee per loan, in order to defray the costs of certain statutory reporting requirements.

Prohibited Practices: The term of a payday loan must be at least two times the borrower's pay cycle, after which date interest shall not accrue on the amount advanced at a greater rate than six percent per year. Borrowers cannot exceed a total principal repayment obligation of \$500, and lenders cannot cause a borrower to be obligated on more than one payday loan. Lenders cannot refinance, renew or extend a payday loan. Nor can they make a payday loan to a borrower if the borrower would have another payday loan with another lender at the time. Lenders cannot knowingly make payday loans to members of the armed forces, their dependents, or their spouses.

Remedies: Provides a private right of action through the VCPA, including the greater of actual damages or \$500, the greater of \$1,000 or treble actual damages if the violation was willful, plus costs and attorneys' fees.

e) **Other Regulated Lenders**

- a. Refund Anticipation Loans (§§ 6.2-2500 - 2505)
- b. Debt Management Plans (§§ 6.2-2000 - 2025)
- c. Mortgage Lenders and Mortgage Brokers (§§ 6.2-1600 - 1629)
- d. Pawnbrokers (§§ 54.1-4000 - 4013)
- e. Check Cashers (§§ 6.2-2100 - 2111)

2. **Federal Truth in Lending Act** (15 U.S.C. §§ 1601-1667f)

The Truth-in-Lending Act (TILA) requires creditors in extending consumer credit to disclose in advertising and person-to-person transactions essential credit terms before credit is extended. TILA applies to consumer credit sales, as well as lending. Regulation Z is the implementing regulation and includes many of the rights and regulations applicable (12 C.F.R. §§1026.1 – 1026.60). TILA addresses the two types of credit extensions: open-end and closed end.

Scope: TILA applies to any credit sale or loan to a natural person where: (1) the credit is for personal, family, or household purposes; (2) either a finance charge is imposed or the obligation is repayable by written agreement in more than four installments; (3) the amount financed is less than \$50,000 or is secured by the consumer's home; and (4) the creditor regularly extends consumer credit.

Open-End Credit: Defined as a plan under which the creditor reasonably contemplates repeated transactions, which prescribes the terms of such transactions, and which provides for a finance charge which may be computed from time to time on the outstanding unpaid balance. The typical example is a credit card. Lenders are required to provide disclosures both at account opening (12 C.F.R. § 1026.6), and at regular periodic intervals (12 C.F.R. § 1026.7). Different disclosure requirements apply to loans secured by a residence (16 U.S.C. § 1637a).

Closed End Credit: Defined as all credit other than open-end. Typical examples are a vehicle purchase, or an installment loan. Lenders are required to provide account opening disclosures (12 C.F.R. § 1026.18). Different disclosure requirements apply to loans secured by a residence, as set forth in the regulation.

Remedies: *NOTE: There are a number of highly technical regulations that explain the required disclosures. Not all violations of TILA and Reg. Z are actionable.* Where the violation is actionable, TILA provides a private right of action for consumers to recover actual damages, attorney's fees and costs. Statutory damages depend on the type of credit extended: (1) open end credit – statutory damages of twice the finance charge, minimum \$500 and maximum \$5,000; (2) open end credit secured by residence - minimum \$200, maximum \$2,000; (3) closed end credit – statutory damages of twice the finance charge, minimum \$200, maximum \$2,000; (4) closed end credit secured by residence – twice the finance charge, minimum \$400, maximum \$4,000. The statute of limitations is one year.

Defenses: A creditor may assert that a violation was due to a bona fide error in its mathematical computations if it establishes that (1) it maintains procedures designed to provide proper disclosures; (2) it has some sort of back up to catch errors; and (3) it consistently uses these procedures.

3. Fair Credit Billing Act (15 U.S.C. § 1666-1666(j))

The Fair Credit Billing Act (FCBA) provides consumers with a procedure to resolve billing disputes in open end credit accounts, such as credit cards and cash reserve accounts.

Rights: The billing errors covered by the FCBA include charges on the consumer's statement that were not made with the consumer's permission, charges for goods that were not delivered or accepted, charges for which the consumer wants more information, mathematical errors, failure to properly credit the account and the failure to, mail it to the proper address.

The consumer must give the card issuer written notice of the error within sixty days after receiving the statement containing the error. The notice must include the consumer's name and account number, a statement of the error and an estimate of the amount of money involved. The card issuer is supposed to send a written acknowledgment of the receipt of the notice within thirty days unless the dispute is resolved before then.

The dispute must be resolved within ninety days or two complete billing cycles, whichever is less. The card issuer can correct the account as the consumer has requested, correct it in a different amount, or after a reasonable investigation, decide that no billing error was made.

During the dispute, the card issuer cannot restrict or close the account for nonpayment or report the amount to any consumer reporting agency as a debt. If the card issuer does not follow this dispute resolution procedure, it forfeits the right to collect the disputed amount, up to \$50.

Remedies – Provides a private right of action for violations in 16 U.S.C. § 1640(a), and consumer may recover actual damages, attorney's fees and statutory damages in accordance with § 1640(a).

E. CONSUMER CREDIT

1. Federal Equal Credit Opportunity Act (15 U.S.C. §§ 1691-1691f)

Overview: The Equal Credit Opportunity Act (ECOA) prohibits discrimination in many credit transactions (not just consumer transactions) on the basis of race, color, religion, national origin, sex, marital status or age, receipt of income from public assistance and a consumer's good faith exercise of rights under the Consumer Credit Protection Act.

Scope: The statute and regulations are fairly complex and contain numerous exceptions. Generally, it applies to all stages of a credit transaction, including the initial application, terms, termination, collection and reporting of the account to third parties. A guarantor can also be protected by ECOA.

Remedies: Provides a private right of action for violations, and consumer may recover actual and punitive damages, costs and attorney's fees, as well as equitable and declaratory relief. Actual damages may include the higher cost of obtaining credit, the higher cost of purchasing an alternative item, time off from work and transportation expenses. Such intangibles as injury to credit reputation, mental anguish, humiliation

and embarrassment are also recognized as elements of actual damages. The statute of limitations for bringing an action on an ECOA violation is two years from its occurrence.

2. Federal Fair Credit Reporting Act (15 U.S.C. §§ 1681-1681x)

The Fair Credit Reporting Act (FCRA) was enacted to assure the accuracy, confidentiality and proper use of information that credit reporting agencies provide about consumers. The FCRA applies when a consumer reporting agency supplies a consumer report or an investigative consumer report to a third party. The FCRA establishes the permissible content.

Scope: A "consumer reporting agency" is a person that assembles or evaluates information on consumers for the purpose of furnishing consumer reports to third parties. A "consumer report" is information supplied by a consumer reporting agency that bears on the consumer's credit worthiness, credit standing, credit capacity, character, general reputation, personal characteristics or mode of living, and is used to determine the consumer's eligibility for credit, insurance or employment. An "investigative consumer report" is information about the consumer's character, general reputation, personal characteristics or mode of living based on interviews with individuals who know the consumer personally.

Consumer Protections: The FCRA imposes certain obligations on consumer reporting agencies and users of the reports and gives consumers certain rights relating to the information that is reported, procedures in place to ensure accuracy, prohibitions against obsolete information, disclosures to consumers and third parties, and dispute procedures for consumers who have discovered an inaccurate reporting. These prohibitions are numerous and fairly complex.

Remedies: Provides a private right of action against a user and a consumer reporting agency for negligent noncompliance with the FCRA. Damages may include actual damages (mental anguish, embarrassment, humiliation, or injury to reputation, family, work or well-being), costs and attorney's fees. If the noncompliance was willful, the consumer may also recover punitive damages.

F. HOME REPAIRS

Consumers should be particularly wary of who they choose to provide repairs and maintenance on their homes. Contractors are required to be licensed by the Virginia Department of Professional and Occupational Regulation ("DPOR"), and unlicensed or under-licensed contractors seeking to take advantage of vulnerable consumers can cause more harm than good at an extremely high cost.

1. Licensure of Contractors – Va. Code § 54.1-1100

A contractor is any person that, for a fee, contracts for the construction, removal, repair or improvement of any building or structure permanently annexed to real property or any other improvements to such real property. Improvement includes (i) remediation,

cleanup, or containment of premises to remove contaminants or (ii) site work necessary to make certain real property usable for human occupancy.

Class A contractors perform work valued (in a single project) at \$120,000 or more, or (ii) the total value of all such construction, removal, repair, or improvements undertaken by such person within any 12-month period is \$750,000 or more.

Class B contractors perform work valued (in a single project) between \$10,000 and \$120,000 or more, or (ii) the total value of all such construction, removal, repair or improvements undertaken by such person within any 12-month period is between \$150,000 and \$750,000.

Class C contractors perform work valued (in a single project) between \$1,000 and \$10,000, or (ii) the total value of all such construction, removal, repair, or improvements undertaken by such person within any 12-month period is less than \$150,000. The Board shall require a master tradesmen license as a condition of licensure for electrical, plumbing and heating, ventilation and air conditioning contractors.

Section 1115 of Title 54.1 prohibits persons from performing unlicensed contracting work, and prohibits licensed contractors from performing work in excess of their licensed Class.

Resources: Consumers may look up a contractor and find their licensure information and status on the DPOR website at <http://www.dpor.virginia.gov/LicenseLookup/> . Consumers can also file a complaint with DPOR against a licensed contractor at <http://www.dpor.virginia.gov/File-Complaint/> .

Remedies: It is a violation of the VCPA for a person to perform or contract for these repairs or improvements without a DPOR license. Va. Code § 59.1-200(46); 54.1-1115(B).

2. Contractor Transaction Recovery Act (Va. Code § 54.1-1118-1127)

In the event a consumer files suit and obtains a judgment against a licensed contractor but cannot recover the money from the contractor, Virginia provides a recovery fund that is administered by the Board for Contractors.

Requirements: Judgment must be against a licensed residential contractor, the consumer's residence must be located in Virginia, consumer must exhaust bankruptcy options (if applicable), consumer must serve the Board with notice at the time the complaint is filed and provide all subsequent pleadings, claim must be made within 12m of the judgment, and consumer must attempt to conduct debtor's interrogatories and sell any assets identified therein.

Recovery: Consumer, if eligible, may recover up to \$20,000 from the Fund, including attorneys' fees and costs; punitive damages are not eligible. The maximum amount that may be paid in one year for a contractor by the Fund is \$40,000.

II. Insurance Law Issues

A. General Considerations and Principles

Most of the insurance law issues that arise in emergency or disaster situations involve coverage questions, typically, whether damage to a home or automobile is covered by a particular policy. When considering whether a particular insurance policy covers a particular loss, volunteer attorneys should keep the following basic principles in mind. Insurance policies are interpreted according to general principles of contract law.

1. Policy must be construed as a whole. See *e.g.*, *Hill v. State Farm*, 237 Va. 148, 375 S.E.2d 727 (1989).
2. A court is bound to apply the terms of an insurance policy if the language is plain, clear and not in contravention of law or public policy. See, *e.g.*, *Monticello Ins. Co. v. Baecher*, 252 Va. 347, 477 S.E.2d 490 (1996).
3. The intention of the parties, as surmised from the language employed, controls the interpretation of the policy. See, *e.g.*, *Floyd v. Northern Neck Ins. Co.*, 245 Va. 153, 427 S.E.2d 193 (1993).
4. An insurance policy will be construed strictly against the insurer and liberally in favor of coverage. See, *e.g.*, *Bituminous Casualty Com. v. Sheets*, 239 Va. 332, 389 S.E.2d 696 (1990).

B. The Rights and Duties of the Insured:

1. Right to indemnification from the insurer.
2. Duty to provide accurate and complete information.
3. Duty to provide notice of an accident, occurrence, loss, claim, or suit to the insurer within a reasonable time.
4. Duty to cooperate with the insurer.
5. Duty of proof of coverage.
6. Duty of proof of loss.

C. The Rights and Duties of the Insurer:

1. Duty to indemnify its insured.
2. Right or duty to investigate an accident, occurrence, loss, claim, or suit.
3. Duty to defend its insured.

4. Right to negotiate a settlement.
5. Right to defend its insured under a reservation of rights.
6. Duty of dealing with insured in good faith.

D. Common Issues

In addition to these basic principles, volunteer attorneys may also find the following sample issues and answers instructive in dealing with insurance issues that frequently arise in the wake of a disaster.

Question: Is the damage to my home covered under my insurance policy?

Answer: If this damage is covered, it will probably fall under a fire or homeowner's policy. Homeowner's policies generally cover losses due to accidents or specific causes such as fire or theft. This usually includes accidental damage to the residence, loss of personal property belonging to the insured, bodily injury to the insured or guests, or increased living expenses if the residence is uninhabitable.

The following information may assist volunteer attorneys when reviewing a specific policy:

1. The first page of the policy is referred to as the declarations page. This page will indicate whether the policy is in effect at the time of the loss.
2. The main body of the policy sets forth the insurance coverage and exclusions from coverage. Conditions control whether claims will be defended, losses paid, or the policy canceled.
3. Volunteers should especially be aware of the condition that the insured report the loss promptly to his or her insurance company.
4. The policy may include endorsements which add coverage that would otherwise be excluded by the policy. Additionally, endorsements may delete or modify coverage as provided in the body of the policy.
5. Fire insurance policies are governed by Va. Code Ann. §§ 38.2-2100 to 38.2-2128.
6. Sections 38.2-2103 to 38.2-2107 set forth minimal provisions required of all fire insurance policies issued in Virginia. A fire insurance policy may provide a broader scope of coverage than is required by the statutory minimum. Volunteer attorneys should review the actual policy to confirm coverage.

Question: My policy is either lost or was destroyed, what should I do?

Answer: In order to determine coverage under an insurance policy, it is crucial to know what the policy actually says. Therefore, a volunteer attorney might consider taking the following basic steps:

- 1) If the policy has been lost or misplaced, contact the insurer, who should have a copy of the policy on file.
- 2) If the insured cannot remember the name of the insurer for some reason, mortgage holders or other lienholders may have that information.
- 3) If the policy is lost and no duplicate can be found, the contents of the policy usually can be proven with secondary evidence.

Question: Do I need to take any affirmative steps to get insurance coverage?

Answer: When an accident or disaster occurs giving rise to a claim under an insurance policy, an insured typically has several affirmative duties. Completion of these duties not only starts the coverage process, but also is often a condition precedent to recovery.

- 1) Duty to Notify Insurer. Virtually all insurance policies require an insured to give the insurer notice (usually in writing) of any "occurrence" likely to give rise to a covered claim "as soon as possible."
- 2) An "occurrence" means an incident which was sufficiently serious to lead a person of ordinary intelligence and prudence to believe that it might give rise to a claim for damages covered by the policy.
- 3) Timely notice is a condition precedent to an insurance company's liability coverage and it requires "substantial compliance by the insured."
- 4) If a violation of the notice requirement is substantial and material, the insurance company need not show that it was prejudiced by such a violation.
- 5) Giving notice triggers the duty of the insurer to determine whether a claim is covered and allows the insurer to investigate while the evidence is still fresh.
- 6) The policyholder usually does not have to give notice personally, but it is often wise for the policyholder to do so to ensure that notice is given.
- 7) The policy itself should contain information about what to include in the notice and where to send it.
- 8) Proof of Loss. Most insurance policies require an insured to submit a proof of loss document, signed and sworn to, which contains all necessary information as to ownership and damages.
- 9) Examinations Under Oath/Duty to Cooperate. An insured usually has a general duty to cooperate with any insurance investigation, including submission to examination under oath.
- 10) Contractual Limitations Periods. When an insurer denies coverage in full or in part, the policy will often set a specified time limit for an insured to bring suit challenging that denial. An attorney must be aware of that time limit and advise victims of its consequences.

Question: Should I treat insurance proceeds as taxable income?

Answer: Under the general principles of federal income tax, the receipt of insurance proceeds from involuntarily converted property is treated as a sale or exchange of the property triggering recognized gain or loss. That general rule, however, is subject to a series of exceptions where the proceeds are reinvested in similar property. The most important exceptions for proceeds resulting from natural disasters include:

- 1) Internal Revenue Code Section 1033. If a taxpayer replaces lost property within two years with other property that is similar or related in use, no gain will be recognized up to the amount of that reinvestment. Property is similar or related in use if the end of the replacement property is substantially similar to that of the property it replaced.
- 2) Internal Revenue Code Section 1033(h)(1)(A)(1). Proceeds compensating a victim for damages to unscheduled personal property resulting from a Presidentially declared disaster will not be treated as gain. See also Rev. Rul. 95-22 (1995).
- 3) Internal Revenue Code Section 1033(h)(1)(A)(1). Proceeds compensating a victim for damages to a principal residence or contents therein resulting from a Presidentially declared disaster will not be treated as gain up to the point that an insured replaces damaged property with similar property within four years.

Question: Are there any particularly helpful resources available to insureds or their attorneys when dealing with insurance problems?

Answer: Given the wide array of issues and complications which arise under insurance law, it should be no surprise that there are many resources available for policyholders and their attorneys. Here are a few of the more helpful resources:

- 1) Bureau of Insurance for the State Corporation Commission; Telephone number - (800) 552- 7945; Bureau of Insurance Consumer Inquires (804) 371-9741. The Bureau has personnel available to answer a wide variety of insurance questions. Although they do not give legal advice, the Bureau may be helpful in sending a policyholder or attorney in the right direction.
- 2) Other Resources:
 - a. Alan Brody Rashkind & Gerald P. Rowe, Virginia Insurance Case Finder (1994)
 - b. Rowland H. Long, The Law of Liability Insurance (Matthew Bender 1998)
 - c. John H. Mathias, et al. Insurance Coverage Disputes (1998)
 - d. Allan D. Windt, Insurance Claims & Disputes (1995)
 - e. Virginia CLE Materials

III. Housing Law Issues

A. Generally (Virginia Citizens, Non-Military Personnel)

Property damage that accompanies natural disasters presents several challenges to both homeowners and renters. Obviously, financial considerations often arise that compound the emotional losses felt during severe property loss or damage. Volunteer attorneys can have a positive impact during these times of need by offering calm advice to help best protect a disaster victim's financial status and history.

Housing law issues that arise in emergency or disaster situations are typically of the kind described below:

Question: My house has been substantially damaged and is uninhabitable. Must I continue paying my mortgage?

Answer: Floods and other natural disasters frequently render homes uninhabitable. Generally speaking, however, damage to a home will not alleviate a borrower's duty to continue making mortgage payments. Nevertheless, banks are typically willing to work with borrowers facing sudden emergencies, especially where the borrower has a steady income, the prospect of insurance proceeds, or the financial wherewithal to refinance. Temporary mortgage payment moratoriums can sometimes be negotiated to allow a disaster-struck borrower to get back on his or her feet. Volunteer attorneys might want to consider all of the following issues when advising a homeowner who has suffered a catastrophic home loss:

- Review mortgage documents (deed of trust, note) for payment and other terms.
- Has written notice of the damage been provided to the mortgagee?
- Were mortgage payments current before disaster struck?
- Verify coverage under applicable insurance policies. Provide notice, whenever required
- Property damage should be photographed and otherwise documented.
- Quantify the damage through appraisals and estimates.
- Begin negotiations with mortgagee(s) and insurance companies.
- Request from mortgagee a temporary, voluntary moratorium on mortgage payments.
- Pursue alternative financial relief mechanisms through federal and local aid agencies.
- Reduce any agreements, waivers, or modifications to signed writing.
- If the borrower's financial situation warrants (i.e., liabilities substantially exceed assets or income source has been lost permanently), you may want to advise them to seek counsel from a qualified bankruptcy practitioner.

Question: My landlord has been sending collection notices for rent, and refuses to refund my security deposit, even though my apartment building has been condemned since the disaster. What should I do?

Answer: As a general rule, a tenant is not required to pay rent for destroyed premises, assuming the tenant is without fault or negligence in causing the destruction. See Va. Code Ann. § 55-226. At the same time, however, a landlord generally has no continuing duty to rebuild premises after a disaster, unless the lease provides otherwise.

Attorneys assisting tenants following natural disasters should familiarize themselves with the landlord-tenant provisions of the Virginia Code, in particular, Landlord and Tenant law (§§ 55- 217 *et seq.*), the Virginia Residential Landlord Tenant Act (VRLTA) (§§ 55-248.2 - 55-248.40) and the Manufactured Home Lot Rental Act (MHLRA) (§§ 55-248.41 - 55-248.52). Advice to affected tenants should be tailored to each particular tenant's needs and desires regarding the tenancy. Some tenants may want to stay where they are and give their landlord a reasonable period to repair any damages. Others, particularly those whose premises have been severely damaged, may want to vacate immediately.

First and foremost, review the lease terms to determine the rights and obligations of both the tenant and the landlord. Bear in mind, however, that some residential leases contain terms that are invalid because they violate the Virginia Residential Landlord and Tenant Act. The Act must be consulted where you have questions. Informal and amicable resolutions between the landlord and tenant may be appropriate and desirable, but they should be carefully considered and documented appropriately. If a satisfactory resolution cannot be reached, consider the following options:

1. Vacation and Termination. If the premises are damaged or destroyed by casualty so that enjoyment is "substantially impaired," the tenant may vacate immediately and within fourteen (14) days thereafter give written notice to the landlord of its intention to terminate the rental agreement. See Va. Code Ann. § 55-248.24. In the event of such termination, the landlord must return the security deposit and all prepaid rent, plus interest if applicable, within 45 days of the when the tenant has vacated the premises. However, a landlord can withhold all or part of the security deposit if the tenant still owes rent, late fees provided for in the lease or damages if the landlord reasonably believes that the tenant, tenant's guests, invitees or authorized occupants caused the damage or casualty and it was beyond normal wear and tear. Va. Code §§ 55-248.24 and 55-248.15:1. If the landlord withholds the security deposit he must provide both a written itemization of any damages or deductions and return the balance of the security deposit within 45 days of when the tenant vacated the property.
2. Continue Lease with Rent Abatement. Under the VRLTA's **tenant's assertion** provision discussed above, the tenant may instead request a court-ordered rent abatement of "such an amount as may be equitable to

represent the existence of the condition or conditions found by the court to exist.” See Va. Code § 55-225.12(D)(4). Similarly, under VRLTA and MHLRA, tenants may file a **tenant’s assertion** in general district court that there exists a condition constituting a material noncompliance by the landlord with the lease or that constitutes a serious threat to life, health, or safety if not corrected promptly. A tenant occupying premises that lack “heat, running water, hot water, electricity, gas or other essential service” due to the landlord’s willful or negligent failure may also recover damages for “the diminution in the fair rental value of the dwelling unit” under certain circumstances. Va. Code § 55-248.23. Under the VRLTA and VLTA, before bringing a tenant’s assertion, the tenant must serve upon the landlord a written notice specifying the breach, and the landlord must fail to correct it after a reasonable time. Id. The tenant must also pay into the court “the amount of rent called for under the rental agreement, within five days of the date due thereunder, unless or until such amount is modified by subsequent order of the court under this chapter.” Va. Code §§ 55-225.12(B)(2) and 55-248.27(B)(2).

3. Rent Escrow (Va. Code Ann. § 55-248.27). If the tenant opts to remain in habitable premises, has paid as required, and the landlord fails after written notice and a reasonable period of time to make necessary repairs, tenants may file an assertion in General District Court that there exists a condition constituting a material noncompliance by the landlord with the lease or that will constitute a serious threat to life, health, or safety if not corrected promptly. Tenant must pay all rent within five days of due date into the court.

Keep in mind that pursuing these alternatives may provoke legal action from the landlord in response. Ensure that the tenant has met statutory requirements and prerequisites for each remedy. Also make sure the tenant is not in violation of the lease terms and thereby subject to potential lease acceleration clauses or other landlord remedies.

The following is a checklist of issues to consider when providing advice to any disaster struck tenant:

- Analyze relevant sections of the Virginia Code affecting landlord/tenant duties.
- Review relevant lease provisions regarding shifting damage liability to tenant (particularly for nonresidential tenants).
- Compare lease provisions with protections afforded by the Virginia Code.
- Verify the term and nature of the lease.
- Provide notice to the landlord where required.
- Verify the existence of relevant insurance policies.
- Document damage to the premises (pictures, video, etc.).
- Calculate and compare property values of premises before and after the damage.
- Assess overall condition of property (utilities, water, sewage).

- Assess landlord's duties to repair/rebuild. See Va. Code § 55-248.13 - Landlord's Duty to Maintain Fit Premises.
- Construct defenses to landlord's action for possession or rent. See Va. Code § 55-248.25 (Tenant in possession and asserts defense of existing conditions that constitute serious threats to life, health, or safety).
- Look for evidence of waiver by landlord for acceptance of rent.
- Notify inspectors and other local officials and pursue enforcement of repairs through the Virginia Uniform Statewide Building Code.
- Apply principles of constructive eviction.
- Assess impact of federal housing regulations if applicable (HUD, etc.).
- Consider an escrow account to contain rent payments until lease disputes are resolved. See Va. Code § 55-248.27.
- Reduce any agreements, waivers, or lease modifications to a signed writing.

B. Military Personnel Housing Issues (State and Federal Laws)

1. Early termination of rental agreement by military personnel. Va. Code § 55-248.21: 1

Any member of the armed forces of the United States or a member of the Virginia National Guard serving on full-time duty or as a Civil Service technician with a National Guard unit may, through the procedure detailed in subsection B, terminate his rental agreement if the member:

- has received permanent change of station orders to depart thirty-five miles or more (radius) from the location of the dwelling unit;
- has received temporary duty orders in excess of three months' duration to depart thirty-five miles or more (radius) from the location of the dwelling unit;
- is discharged or released from active duty with the armed forces of the United States or from his full-time duty or technician status with the Virginia National Guard; or
- is ordered to report to government-supplied quarters resulting in the forfeiture of basic allowance for quarters.

Tenants who qualify to terminate a rental agreement pursuant to subsection A shall do so by **serving on the landlord a written notice of termination** to be effective on a date stated therein, said date to be not less than thirty days after receipt of the notice. The termination date shall be no more than sixty days prior to the date of departure necessary to comply with the official orders or any supplemental instructions for interim training or duty prior to the transfer. Prior to the termination date, the tenant shall furnish the landlord with a copy of the official notification of the orders or a signed letter, confirming the orders, from the tenant's commanding officer.

The final rent shall be prorated to the date of termination and shall be payable at such time as would have otherwise been required by the terms of the rental agreement, together with any liquidated damages due pursuant to subsection C.

In consideration of early termination of the rental agreement the landlord may require that the tenant pay to the landlord **liquidated damages** in an amount no greater than:

- One month's rent if the tenant has completed less than six months of the tenancy as of the effective date of termination, or
- One-half of one month's rent if the tenant has completed at least six but less than twelve months of the tenancy as of the effective date of termination.

2. FEDERAL LAW: Servicemembers Civil Relief Act - Termination of Leases by Lessees 50 USC § 3955

The Servicemembers Civil Relief Act allows servicemembers to terminate a residential rental agreement, executed by or on their behalf, for either their or their dependents occupation of said residential premises at any time following their receipt of certain military orders. See 50 USC §§ 3955(a), (b)(1)(B). See also 50 USC § 3955(i)(1)(defining “military orders”).

Said military orders include orders for a permanent change of station or deployment orders (either with a military unit or as an individual in support of a military operation) for a period of not less than 90 days. See 50 USC § 3955(b)(1)(B).

The Servicemembers Civil Relief Act also allows a tenant who was not a service member at the time the rental agreement was executed, but who thereafter enters military services to terminate said rental agreement upon entry into military service. See 50 USC §§ 3955(a), (b)(1)(A).

Under the Act, the lessor, its agents, or their grantees must receive a written notice of the termination of the rental agreement along with a copy of the servicemember’s military orders. See 50 USC § 3955(c)(1)(A). The written notice and copy of the military orders must be delivered by hand, by private business carrier, or by “by placing the written notice in an envelope with sufficient postage and with return receipt requested, and addressed as designated by the lessor (or the lessor's grantee) or to the lessor's agent (or the agent's grantee), and depositing the written notice in the United States mails.” See 50 USC § 3955(c)(2).

As to the effective date of termination, the Act contemplates that, for residential rental agreements that provide for monthly payments “termination of the lease under subsection (a) is effective 30 days after the first date on which the next rental payment is due and payable after the date on which the notice under subsection (c) is delivered.” See 50 USC § 3955(d)(1). For agreements with different provisions, “termination of the

lease under subsection (a) is effective on the last day of the month following the month in which the notice is delivered.” Id.

Any unpaid rent amounts preceding the effective termination date must be prorated. See 50 USC § 3955(e)(1). Though the landlord may not impose an early termination charge under these circumstances, tenants remain responsible for other obligations and liabilities imposed upon them by the rental agreement. Id.

The Act imposes both civil and criminal penalties on landlords, their agents, grantees, or others who may interfere with a servicemember’s rights under these provisions. Specifically,

[a]ny person who knowingly seizes, holds, or detains the personal effects, security deposit, or other property of a servicemember or a servicemember's dependent who lawfully terminates a lease covered by this section, or who knowingly interferes with the removal of such property from premises covered by such lease, for the purpose of subjecting or attempting to subject any of such property to a claim for rent accruing subsequent to the date of termination of such lease, or attempts to do so, shall be fined as provided in Title 18 or imprisoned for not more than one year, or both.

50 USC § 3955(h).

IV. Lost Documents

The following documents may be destroyed, lost, or damaged during natural disasters:

- Bank accounts (checkbook, savings).
- Birth, death, marriage certificates, divorce decrees.
- Court documents (deeds).
- Driver's license, vehicle registration and ownership (title) records.
- Food stamps.
- Immigration documents.
- Insurance documents (homeowners, vehicle, health, etc.).
- Medicare card.
- Social Security card.
- Wills or other estate planning documents.
- Leases.

Question: How do I replace a lost birth, death or marriage certificate or divorce decree?

Answer: Write to the Office of Vital Records, Virginia Department of Health, P.O. Box, 1000, Richmond Virginia, 23218-1000 (Phone: 804-662-6200). Current processing times take two to four weeks upon receipt of the request. While many documents have practical importance, only those certificates that register births, deaths, adoptions, marriages, and divorces that occurred in Virginia are maintained as vital records by the Virginia State Department of Health.

The Department of Health maintains vital records from June 14, 1912 to the present. All written requests must be signed and should include the return address and daytime telephone number of the individual making the request. The Department charges twelve dollars (\$12.00) per certified copy of **each** record and accepts checks or money orders only, payable to "Virginia Department of Health." For additional information, visit the Department's website at www.vdh.state.gov.

Individuals may request certified copies of vital records for themselves and/or immediate family members (spouse, father, mother, siblings, and immediate offspring). Records may also be obtained for individuals not directly related to the person making the record request upon a showing of custody (adoption, etc.) or a tangible interest (attorney- client relationship). In addition, any individual can request and receive vital records concerning any other person from the public record. After one hundred (100) years, certificates of births are placed in the public record. Death and marriage certificates, as well as divorce decrees, are placed in the public record after fifty (50) years.

When writing to request a certified copy of a birth or death record, please provide the following information:

- Full name of the person whose record is being requested.
- Sex.
- Parents' names, including maiden name of mother.
- Month, day, and year of birth or death.
- Place of birth or death (city or town and county; hospital, if known).
- Purpose for which the copy is needed.
- Relationship to person whose record is being requested.

When writing for marriage records, please include the following:

- Full names of bride and groom.
- Month, day, and year of marriage.
- Place of marriage (city or town and county).
- Purpose for which the copy is needed.
- Relationship to persons whose record is being requested.

When writing for divorce records, give the following information:

- Full names of husband and wife.
- Date of divorce or annulment.
- Place of divorce or annulment.

- Type of final decree.
- Purpose for which the copy is needed.
- Relationship to persons whose record is being requested.

Question: How do I replace a lost Social Security card?

Answer: To replace a lost Social Security card, you may either:

1) Go to the nearest Social Security Administration Office and fill out an application. Be sure to provide a current ID with the name of the individual who has lost the social security card. Offices are open from 9:00 a.m. - 4:00 p.m. Monday through Friday; or

2) Order an application by phone by calling 1-800-772-1213 between 7:00 a.m. - 7:00 p.m. Monday through Friday. The completed application should be returned to the nearest Social Security Administration office by mail. Included must be a current ID (no photocopies will be accepted). A person can expect to receive back their new Social Security card in two to three weeks.

Question: How do I replace a lost Medicare card?

Answer: To replace a lost Medicare card, call 1-800-772-1213 between 7:00 a.m. - 7:00 p.m. Monday through Friday. You must have your Social Security claim number. You can expect to receive a new Medicare card in about thirty (30) days.

Question: How do I replace lost Department of Motor Vehicles (DMV) documents?

Answer: If a person has lost a driver's license, vehicle registration, or vehicle ownership record, he or she should go to the local DMV. To replace a driver's license a person must present their Social Security card and proof of name and address. This may include a utility bill, passport, W2, paycheck, or bank statement, but not a credit card. Along with the two forms of identification, the individual must pay a fee in order to receive a new license. To replace a vehicle registration a person must present a valid driver's license. To replace a vehicle title a person must present a valid driver's license and pay a fee.

V. Wills – Title 64.2, Subtitle II of the Code of Virginia

A. Will Requirements, Va. Code §§ 64.2-400 to 64.2-409

1. A will is a signed writing in which a person (“testator”) directs what is to be done with his or her property after death.
2. Anyone who is at least 18 years of age and is mentally competent may make a will. Va. Code §64.2-401
3. Execution Requirements, Va. Code §64.2-403

- a. In writing
 - b. Signed by the testator or by some other person in the testator's presences and by his direction
 - c. Signed/acknowledged by the testator in the presence of at least two competent witnesses who are present at the same time and who subscribe the will in the presence of the testator.
 - i. The witnesses are not considered incompetent based solely on having an interest in the will or the estate of the testator. Va. Code §64.2-405.
4. Execution Best Practices
- a. Although the will does not need to be notarized, it is highly recommended.
 - b. If the will includes a "Self-Proving Affidavit," the will is presumed to be properly executed and is accepted by the court without testimony from the witnesses. Va. Code §§ 64.2-452-453.
 - i. Otherwise, at least one of the two witnesses signing the will must appear and state under oath that the requirements for execution of the will were met.
5. Substantial Compliance, Va. Code §64.2-404
- a. If the Will does not comply with the requirements of §64.2-403, the document shall nonetheless be treated as if it had complied if the proponent of the Will establishes by clear and convincing evidence that the decedent intended the document to constitute:
 - i. the decedent's will,
 - ii. a partial or complete revocation of the will,
 - iii. an addition to or alteration of the will, or
 - iv. a partial or complete revival of the formerly revoked will or formerly revoked portion of the will.
6. Holographic Will, Va. Code §64.2-403(B)
- a. Must be entirely in the testator's own handwriting and signed by testator.
 - i. The handwriting of the testator must be established by two disinterested witnesses at the time of probate.
 - b. Does not have to be witnessed.
7. Tangible Personal Property Memorandum, Va. Code §64.2-400
- a. A personal representative shall distribute tangible personal property in accordance with a separate writing or list that disposes of tangible personal property not otherwise specifically bequeathed if:
 - i. the writing is referenced in the will,

- ii. it identifies the property with reasonable certainty, and
- iii. it identifies the intended recipients with reasonable certainty.

B. Intestacy, Va. Code § 64.2-200

If a person dies without having a valid will, that person is said to have died intestate. When a person dies intestate, the laws of the Commonwealth of Virginia, in effect at the time of death, determine who the heirs are and who receives the decedent's property. In such a situation, after the payment of funeral expenses, debts, and cost of administration, the residue of the estate passes as follows:

1. All to the surviving spouse, unless there are children (or their decedents) of someone other than the surviving spouse, in which case one-third goes to the surviving spouse and the remaining two-thirds is divided among all children of the decedent.
2. If no surviving spouse, then all passes to the decedent's children and their descendants.
3. If no surviving spouse and no children or their descendants, in equal parts to the decedent's parents, or all to the surviving parent.
4. If no surviving spouse, no children or their descendants, and no parents, then equally to the decedent's siblings and their descendants.
5. This continues, without end, passing to the nearest lineal ancestors and the descendants of such ancestors.
6. If there are no paternal nor maternal kindred, then the whole estate passes to the kindred of the decedent's most recent spouse, if any, provided that the decedent and the spouse were married at the time of the spouse's death.
7. If there are no heirs, then the estate is subject to escheat to the Commonwealth.

C. Rights of Surviving Spouses

In Virginia, surviving spouses and minor children have certain rights to property of the decedent, even if the spouse were disinherited by a will.

1. Elective Share, Va. Code §§64.2-308.1 – 64.2-308.17
 - a. The surviving spouse of a decedent who dies domiciled in Virginia has a right of election to take an "elective share" amount equal to 50 percent of the value of the marital-property portion of the augmented estate.
 - i. The augmented estate is calculated in accordance with Virginia Code §64.2-308.4.

- b. The surviving spouse's homestead allowance, exempt property, and family allowance, if any, are not charged against but are in addition to the elective-share amount.
2. Family Allowance, Va. Code §64.2-309
 - a. The surviving spouse and minor children whom the decedent was obligated to support are entitled to a reasonable allowance in money out of the estate for their maintenance during the period of administration, which shall not exceed one year if the estate is inadequate to discharge all allowed claims, in the amount of a lump sum of \$24,000 or \$2,000 per month.
 - b. The family allowance has priority over all claims against the estate.
3. Exempt Property, Va. Code §64.2-310
 - a. This allows the surviving spouse an entitlement of up to \$20,000 in household furniture, automobiles, furnishings, appliances, and personal effects.
4. Homestead Allowance, Va. Code §64.2-311
 - a. The homestead allowance of \$20,000 is in lieu of any share passing to a surviving spouse or minor children by the decedent's will or by intestate succession, unless that share is less than \$20,000, then the homestead allowance is in the amount necessary so that when added to the property passing to the surviving spouse or minor children by will or intestate succession equals the sum of \$20,000.

D. Other Estate Planning and Fiduciary Issues

- **Guardianship of Minor.** See Virginia Code §§ 64.0-1700-1806.
- **Guardianship and Conservatorship of an Incapacitated Person.** See Virginia Code §§ 64.2-2000 through 64.2-2029
- **Powers of Attorney.** See Virginia Code §§ 64.2-1600 through 64.2-1642.
- **Advance Medical Directives.** See Virginia Code §§ 54.1-2981 to 54.1- 2996.

VI. Probate in Virginia (Revised September 2018)

A. General Information

1. Pre-Probate Tasks and Decisions.

Following a death, arrangements will need to be made for the disposition of remains. An obituary, funeral, and burial often occur before a personal representative of an estate is qualified; however, reasonable expenses can be reimbursed by the

personal representative. Note, if an estate is insolvent (that is, the assets of the estate of the decedent are not sufficient to pay all debts and demands against the decedent), reasonable funeral expenses paid by or reimbursed by the estate are limited to \$4,000 by Code of Virginia §64.2-528.

An autopsy may be advisable when the death is incident to an emergency or natural disaster for qualification for accidental death benefits under an insurance plan. In a case of death by injury, a member of the immediate family or the spouse of the deceased may petition the circuit court to order an autopsy. Va. Code §32.1-285. If official inquiry is not required, then an autopsy to determine the cause of death may be authorized by certain individuals as authorized in Code of Virginia §54.1-2973.

It is generally necessary to have a death certificate in order to obtain access to assets or initiate probate proceedings. Typically, the funeral home obtains the death certificates and should be told how many will be needed. If death cannot be established by the existence of a body, it may be necessary to initiate a judicial proceeding in accordance with Virginia Code §§ 64.2-2303 through 64.2-2306 to establish death and obtain a death certificate. Va. Code § 64.2-2300.

Other tasks prior to probate include locating the will, securing assets, and determining if probate is even necessary. If the total value of the decedent's probate estate, valued as of the date of the decedent's death, does not exceed \$50,000, the Virginia Small Estate Act provides that these assets may be transferred without probate. See Va. Code §§64.2-600 through 64.2-605.

2. Probate/Probate Assets.

Probate is the court-supervised administration of an estate. The laws involving probate in Virginia are found in Code of Virginia Title 64.2: Wills, Trusts, and Fiduciaries. The purpose of probate is to make sure that an individual's probate assets are transferred to the correct creditors and beneficiaries.

Probate assets are those assets that are owned in the decedent's sole name or as tenants in common with another person. Probate assets do not include assets that pass by: (i) beneficiary designation (i.e. life insurance and retirement benefits), unless the benefits are payable to the estate; or (ii) operation of law (i.e. property owned with another person as joints tenants with rights of survivorship or as tenants by the entirety or bank accounts with a payable on death (POD) provision or a transfer on death (TOD) provision). More detailed information as to what assets are included in the probate estate can be found in the Instructions for Inventory – Decedent's Estate, Form CC-1670 (INST). This form, along with the other forms required to be filed in probate, can be found on the Website of Virginia's Judicial System, here:

<http://www.courts.state.va.us/forms/circuit/fiduciary.html>

The disposition of probate assets is governed by the will or, if none, by the applicable intestacy statute, and those assets are the subject of a probate proceeding. The administration of the estate is overseen by a Commissioner of Accounts, who is

appointed by the Circuit Court and whose function is to oversee the administration done by the fiduciary.

3. Jurisdiction/Ancillary Administration.

The Circuit Court has jurisdiction of the probate of wills. Va. Code § 64.25-443. The probate of the will should take place in the county/city:

- (a) where the decedent had a known place of residence; or if none,
- (b) where the decedent owned any real estate; or if none,
- (c) where the decedent died or wherein the decedent has estate.

There is a rebuttable presumption that, if the decedent was a patient in a nursing home or similar institution upon his or her death, then the place of legal residence of the decedent is the same as it was before he or she became a patient.

Sometimes, a nonresident of Virginia may pass away owning real property in Virginia, or a Virginia resident may pass away owning real property in another state. Ancillary administration is administration that is auxiliary and subordinate to the administration at the place of the decedent's domicile. The purpose of ancillary administration is the collection of assets and payment of debts in the jurisdiction outside of the decedent's domicile.

The probate of "foreign" wills is governed by Code of Virginia §64.2-450. First, the will must be probated in the state of the decedent's domicile, and then an authenticated copy of the foreign will, which must be executed in a form satisfying the requirements of a valid will in Virginia, and a certificate of probate may be offered for probate in the appropriate office of the Clerk of the Circuit Court in Virginia. This allows for the distribution of the Virginia real property from the estate.

If a will probated in Virginia is needed to be probated in another state, it will need to be determined what precisely that state requires in order to have the Virginia will properly authenticated and admitted to probate.

4. Qualification of Personal Representative.

A "personal representative" is the fiduciary in charge of the administration of a decedent's estate. A fiduciary appointed by the will is generally called an "Executor." This person will be qualified to serve if he or she is at least 18 years of age, is able to obtain surety if required, and complies with Virginia Code §64.2-1426 regarding service of process if he or she is a nonresident of Virginia. If there is no will, the court will appoint the fiduciary, and this person is generally called an "Administrator." If the will does not appoint an executor or the executor is unable to or refuses to act, then the court may grant administration with the will annexed; this person is called an "Administrator c.t.a." The court appoints the fiduciary in accordance with the provisions of Virginia Code §§64.2-500 and 64.2-502.

At the time of probate of the will and qualification of the personal representative, several forms must be provided to the Court: the original will, the Probate Information

Form, Memorandum of Facts, List of Heirs, Probate Tax Return, and proof of death (death certificate or obituary). The clerks fee and the probate taxes must be paid at this time. An order is then entered, stating the appointed personal representative and amount of the bond. A certificate of qualification will also be issued.

Within 30 days of qualification of the personal representative or the admission of the will to probate, notice of the same must be sent to the spouse, beneficiaries, and heirs, as provided by Virginia Code §64.2-508. Within four months of qualification or probate, the personal representative or proponent of the will must record an affidavit stating the names and addresses of the individual to whom notice was sent, or that no notice was required to be given to any person.

5. Inventory and Accounting.

The personal representative must file an inventory within four months of the date of his or her qualification. Va. Code §64.2-1300. The inventory lists the probate assets and their values as of the date of the decedent's death.

Within 16 months of the date of his or her qualification, the personal representative must file a statement of accounting to report all transactions that occurred from the date of the decedent's death until the final distribution of assets. This will be a "first and final accounting." If the estate administration will take longer than 16 months, then interim accountings must be filed annually through the final distribution of assets. If all of the distributees of a decedent's estate are personal representatives of the decedent's estate, then a Statement in Lieu of Accounting may be filed instead of an accounting. Va. Code §64.2-1314.

VII. Social Security Benefits

If you did not receive your regularly scheduled payment from Social Security, as a result of a disaster, you can go to any open Social Security office and request an immediate payment or call 1-800-772-1213 (TTY 1-800-325-0778). You can also visit the Social Security website at www.socialsecurity.gov.

With very few exceptions, the Social Security Administration requires that you sign up for their direct deposit service. With direct deposit, your money is deposited directly into your bank, savings and loan, or credit union account, even if mail service is interrupted. Alternatively, you could have a credit card that has your benefits added to it. This measure should have eliminated many issues related to missed benefits payments.

You may be eligible for Social Security survivors' benefits if a spouse, an ex-spouse, or parent died (if you are a minor or disabled child). You should apply for survivors' benefits promptly because, in some cases, benefits may not be retroactive. The Social Security Administration should be notified as soon as possible when a person dies. In most cases, the funeral home will report the person's death, however, if

you need to report a death or apply for benefits, call **1-800-772-1213** (TTY **1-800-325-0778**). You cannot report a death or apply for survivors benefits online.

Additionally, the surviving spouse, ex-spouse, or minor or disabled child may receive a \$225 one-time death benefit, if the surviving spouse who was living in the same household with the worker when they died; or if they were living apart, the surviving spouse can still receive the lump-sum if, during the month the worker died, they:

- were already receiving benefits on the worker's record; **or**
- became eligible for benefits upon the worker's death.

If there's no eligible surviving spouse, the lump-sum can be paid to the worker's child (or children) if, during the month the worker died, the child:

- was already receiving benefits on the worker's record; **or**
- became eligible for benefits upon the worker's death.

VIII. Food Assistance

FEMA's disaster assistance program does not cover food losses. The public assistance formerly called "food stamps" is now known nationally as Supplemental Nutrition Assistance Program (SNAP) benefits. First, people who are destitute or whose housing expenses are greater than their gross income are entitled to **expedited food assistance**. Second, households are entitled to **replacement food assistance** if they were participating in SNAP at the time of the disaster and their food was destroyed as a result of the disaster. And, third, disaster victims may be eligible for **D-SNAP** following a disaster, under criteria developed for that particular disaster. See 7 U.S.C. § 2011 *et seq.*; 7 C.F.R. § 271 *et seq.*

The availability of **replacement food assistance** and **D-SNAP** is governed by decisions made by the Food and Nutrition Service of the U.S. Department of Agriculture in conjunction with the state agency following each disaster. In order for the Department of Agriculture to authorize issuance of replacement and disaster food assistance, it must find that: (1) the disaster has disrupted commercial channels of food distribution; (2) disaster victims are in need of temporary food assistance; and, (3) commercial channels of food distribution have again become available. See 7 U.S.C. § 2014(h)(1); 7 C.F.R. § 280.1.

Administrative decisions regarding whether to make **replacement food assistance** and **D-SNAP** available are made within the first few days or weeks after the disaster. Because many operational decisions on implementing the **replacement assistance** and **D-SNAP programs** are left to the state agency's regional and district staff, local legal aid programs must take the lead role in advocating with regional and district authorities for replacement and disaster benefits in their area(s), for effective notice to potentially eligible households, and for adequate time frames for disaster victims to respond and obtain the food assistance.

A. Expedited Food Assistance

Expedited food assistance is available to needy people, whether or not a disaster has occurred. An eligible applicant must receive benefits within seven calendar days of application. To be eligible, a person must either have less than \$150 in gross monthly income and \$100 or less in liquid resources, have a combined gross household income that is less than the household's housing expenses, or be a destitute migrant or seasonal worker.

B. Replacement Food Assistance

Following a declaration of disaster, the Secretary of Agriculture must provide for issuance of replacement food assistance benefits to households receiving SNAP at the time of the disaster to replace food destroyed during the disaster.¹⁸⁷ Replacement food assistance should be at least equal to the amount of food lost but may not be greater than the applicable maximum monthly allotment for the household's size.

C. D-SNAP (Disaster Food Stamps)

The Secretary of Agriculture may authorize issuance of SNAP benefits to all disaster victims in households found to be in need of temporary food assistance. See 7 U.S.C. § 2014(h)(1); 7 C.F.R. § 280.1. To be eligible, the household's total income received or expected during the disaster period PLUS its accessible liquid assets MINUS a deduction for disaster-related expenses cannot exceed the disaster gross income limit. Other eligibility criteria for this type of D-SNAP food assistance is determined by the Secretary after the disaster and may be very broad, so that persons who would not ordinarily be eligible for SNAP are rendered eligible for D-SNAP.

1. Resources Test for Accessible Liquid Assets

Households may have \$2,250 in countable resources, such as a bank account, or \$3,500 in countable resources if at least one person is age 60 or older, or is disabled.

Defining Accessible Liquid Assets. Accessible liquid assets include cash on hand, and funds in accessible checking and saving accounts on the first day of the benefit period. It does NOT include:

- o Retirement accounts,
- o Disaster insurance payments,
- o Disaster assistance received or expected to be received during the benefit period,
- o Payments from Federal, state or county/local government agencies or disaster assistance organizations (including disaster-related Unemployment Compensation).

Example: On the day the disaster struck, Laura had \$50 in cash, and \$250 in her checking account. Her mother, Joan, had an additional \$300 in her savings account. They are able to access the funds in their accounts. They have applied for FEMA assistance for the property damage they incurred, but do not anticipate receiving the payment before the benefit period ends. Their household's total accessible liquid resources are $\$50 + \$250 + \$300 = \600 .

Inaccessible Liquid Assets. Includes otherwise liquid resources that are inaccessible (for instance, because a bank is closed due to the disaster) for a substantial portion of the benefit period. Note that this is an infrequent occurrence, as household can usually access their resources via online banking or ATMs even if bank branches are closed in the affected area.

Example: Laura & Joan's local bank is closed, but they are able to withdraw money from the ATM. Laura is also able to access the paycheck and assistance payments that are deposited directly into her accounts. However, the doctor's office where Joan works is located in a part of town affected by the disaster, and her boss has informed her that the office will be closed for two weeks. She is an hourly employee and will not earn wages during the time the office is closed. The earnings she would normally receive during those two weeks would be considered inaccessible and not counted in determining the family's Disaster Gross Income. Since Joan anticipates returning to work and being paid during the second half of the benefit period, her anticipated earnings for that time would be counted as income.

IX. Employment Law Issues

This section provides advice for assisting persons who have temporarily or permanently lost employment or are facing other employment-related issues as a result of a natural disaster.

A. Unemployment Compensation

A person may be entitled to receive unemployment compensation benefits if he or she becomes unemployed as a result of a natural disaster.

Virginia unemployment compensation is available to provide temporary financial assistance to employees who become unemployed without fault on their part. See Va. Code § 60.2-100 et seq. The Virginia Employment Commission (VEC) administers Virginia's unemployment insurance program. An individual seeking unemployment benefits can file an application with the VEC at one of its local offices, by telephone, or online. After the claim is filed, the VEC will notify the claimant's last 30-day employer, as well as any subsequent employers for whom the claimant may have worked for less than 30 days. The former employers will then file reports containing wage information and explaining why the claimant was separated from employment.

To qualify for unemployment benefits, the claimant must have performed services for remuneration for 30 days, whether or not such days were consecutive, or worked for 240 hours. The claimant must have actually worked for 30 days and not simply been an employee for that period of time. Additionally, the claimant must be actively seeking suitable work, must be able to work, and must be available for work. Virginia Code § 60.2-612 explains additional eligibility criteria that may apply and section 60.2-618 lists various factors that may disqualify a claimant from receiving unemployment benefits.

Disaster Unemployment Assistance (DUA) is a federally administered program that provides unemployment benefits and re-employment services to people who are otherwise ineligible for regular state unemployment compensation and who have become unemployed because of major disasters. Benefits begin the date the individual was unemployed due to the disaster incident and can extend up to 26 weeks after the date the Presidential declared the disaster. DUA is funded 100% by FEMA and administered by the Department of Labor through the VEC.

B. Wage Payment Issues

Under the federal Fair Labor Standards Act (FLSA), 29 U.S.C. § 201 et seq., the Virginia Wage Pay Act, Va. Code § 40.1-29 et seq., and common law, employees must be paid for all of the work they have performed and for all of the time they have worked. There are no exceptions made in the case of disasters. See “Employment & Wages Under Federal Law During Natural Disasters & Recovery” available at <https://www.dol.gov/whd/regs/compliance/whdfs72English.pdf>.

Employees who are exempt from the FLSA’s minimum wage and overtime provisions must be paid their full salary if the business shuts down for less than a full work week or if the employer does not have work available for the employee for the full work week. This rule also applies if exempt employees work only part of a day. Thus, if an employer sends workers home early to deteriorating weather conditions, it may not dock exempt employees’ pay. When the business is open and work is available, deductions from a salaried employee’s salary may be made if the employee is absent from work for one or more full days for personal reasons. In addition, a full day’s absence may be deducted if it occurred because of sickness or disability, as long as the deductions are made pursuant to a sick or disability leave plan, policy, or practice. See 29 C.F.R. § 541.602. For further information, see “Salary Basis Requirement and the Part 541 Exemptions Under the Fair Labor Standards Act (FLSA)” available at https://www.dol.gov/whd/overtime/fs17g_salary.pdf, and “Frequently Asked Questions Regarding Furloughs and Other Reductions in Pay and Hours Worked Issues” available at <https://www.dol.gov/whd/regs/compliance/whdfs70.pdf>.

Workers non-exempt from FLSA, must be paid only for the time that they work. Therefore, employers need not compensate non-exempt employees who are not working because of a natural disaster. There may be exceptions during a weather event for waiting time, or on-call time. The FLSA considers employees to be “on call” if they are required to remain on their employer’s premises and are unable to use their

time for their own purposes. For example, if employees are required to remain on a jobsite that has lost power in case power returns, they should be paid for the time despite their inactivity.

In some circumstances, employees who lose employment as a result of a plant closing or mass layoff are entitled to 60 days notice under the federal Worker Adjustment and Retraining Notification (WARN) Act, 29 U.S.C. § 2101 et seq. The WARN Act notice requirement applies only to employers with at least 100 employees. A plant closing occurs when a facility is permanently or temporarily closed and 50 or more full-time employees suffer a job loss. A mass layoff occurs when either of the following suffer a job loss: 500 or more full-time employees at a facility or 50 or more full-time employees at a facility constituting at least 33% of the workforce. A job loss includes a layoff of six months or more.

Employees that do not receive proper notice may be due backpay and benefits for up to the 60 day notice period. The employer must give written notice to the bargaining representative of affected union employees and to unrepresented individual workers who may reasonably be expected to experience an employment loss. Notice must include whether the layoff or closing is permanent or for 6 months or less, the date (within a 14-day period) that your employment will end, and the name and contact information of a person in the company that can provide additional information. For more information, see <https://www.doleta.gov/layoff/warn.cfm>.

C. Leaves of Absence and Reasonable Accommodations

In addition to paid leave that may be available under an employer's vacation or sick leave policy, the federal Family and Medical Leave Act (FMLA) requires covered employers to provide up to 12 weeks of unpaid, job-protected leave to eligible employees for certain family and medical reasons. See 29 U.S.C. § 2601 et seq.; 29 C.F.R. pt. 825. Leave is available in part to cover an employee's own serious health condition that renders the employee unable to perform the employee's job, and to care for the employee's spouse, son or daughter, or parent who has a serious health condition. Employees are eligible if they have worked for their employer for at least one year, and for 1,250 hours over the previous 12 months, and if their employer has at least 50 employees within 75 miles. The FMLA permits employees to take leave on an intermittent basis or to work a reduced schedule under certain circumstances.

For the duration of FMLA leave, the employer must maintain the employee's health coverage under any group health plan. Pursuant to the statute, substitution of paid leave is allowed. 29 U.S.C. § 2612(d)(2). Employees may take, or employers may require employees to use, paid vacation, personal, family, or medical sick leave concurrently with FMLA, with some limitations. The U.S. Department of Labor updated the regulations under the FMLA in 2008, and these regulations now restrict the substitution of paid leave. Under the new 29 C.F.R. § 825.207, employers can require employees to meet all of the normal requirements of paid leave policies before permitting substitution. For example, if a policy requires that vacation be taken in full day increments, an employer can deny substitution for an employee's one-half day

FMLA leave. Similarly, if vacation time cannot be taken during a particular month, substitution could be denied during that time period. For more information, visit <http://www.dol.gov/whd/fmla/index.htm>.

D. Qualified Disaster Payments

The Internal Revenue Code section 139 permits an employer to make payments to its employees that constitute “a qualified disaster relief payment” without any income or payroll tax consequences. See 22 U.S.C. § 139. A qualified disaster relief payment means any amount paid to or for the benefit of an individual to reimburse or pay reasonable and necessary personal, family, living, or funeral expenses incurred as a result of a qualified disaster or to reimburse or pay reasonable and necessary expenses incurred for the repair or rehabilitation of a personal residence or repair or replacement of its contents. This exclusion is applicable to the extent the employee’s disaster-related expenses have not been covered by insurance.

X. Banking Protections

A. Federal Deposit Insurance Corporation (FDIC)

The FDIC is an independent agency created by the Congress to maintain stability and public confidence in the nation’s banks. The FDIC works cooperatively with state, territory, and federal banking agencies as well as other organizations to determine the status of the financial institutions located in areas affected by natural disasters. Customers with access to a working telephone can contact the FDIC toll-free at 1-877-ASK-FDIC or 1-877-275-3342 or TDD 800-925-4618 for information about accessing their bank accounts, lost records, ATM cards, direct deposits or how to reach their bank. This hotline operates from 8:00 am to 8:00 pm Eastern Time from Monday through Friday and 9:00 a.m. to 5:00 p.m. on Saturday and Sunday. Customers with access to the internet may visit the FDIC website at www.fdic.gov/consumers/assistance and submit a Consumer Assistance Online Form with questions or complaints electronically.

B. National Credit Union Administration (NCUA)

The NCUA is an independent federal agency that regulates, charters, and supervises federal credit unions. Customers with access to a working telephone can contact the NCUA Consumer Assistance Center toll-free at 1-800-755-1030 for information about accessing their accounts, lost records, ATM cards, direct deposits or how to reach their federal credit union. This hotline operates from 8:00 am to 8:00 pm Eastern Time from Monday through Friday. Customers with access to the internet may visit the NCUA Consumer Assistance Center website at <https://www.mycreditunion.gov/consumer-assistance-center/> and submit a complaint, question, or find answers to common inquiries.

Deposits at member FDIC banks and member NCUA credit unions are federally insured. Even if your local bank or credit union is destroyed, your deposits will be

protected up to \$250,000 with an FDIC insured bank or savings institution or an NCUA insured credit union. Be assured the Federal Reserve System has and will continue to meet the currency needs of the financial institution industry. The banking industry nationwide has more than sufficient resources to fill any shortfall. You should keep any financial records that you have in order to help reconstruct your accounts.

C. Access to Banking

Accessing local banks where I am not a customer: If you do not have an account relationship with the bank, it may be concerned about whether there are sufficient funds in your account. Ask the bank you are dealing with to call your bank to determine your account balance. The FDIC encourages you to work with your bank to provide the necessary information to the bank you are now dealing with so you can conduct banking transactions. However, the FDIC recognizes that you may have no other alternative but to open a new banking account in the area in which you have relocated.

Accessing my bank: Contacting your financial institution: If your institution is located in the heavily storm-damaged area, and is not a part of a major regional or national institution, it may not be open for some time. You can use the FDIC's bank find system at <https://research.fdic.gov/bankfind> to obtain a bank's contact information or the NCUA's credit union locator at <http://mapping.ncua.gov/> to obtain a credit union's contact information. You should contact one of the emergency service organizations, such as FEMA (www.fema.gov; 1-800-621-3362) or the Red Cross (www.redcross.org; 1-800-733-2767) and request assistance.

D. Deposits

There may be delays in the processing of transactions, including direct deposits, as banks activate back up plans. The banks will process the transactions once the plans are implemented. Talk to your bank about the problem. You can also contact the individual or company that originated the deposit to see if they have any information about the status of your deposit.

By the time emergency relief and insurance payments are received, the affected institutions should be prepared to process these payments for their customers. Should a customer's primary financial institution not be ready to receive these payments it is anticipated arrangements will be made with neighboring institutions to handle these special consumer needs.

E. ATM Transactions

If your ATM card will not work, it is probably because your bank's verification system is not working. You may consider other options, such as cashing a check in your immediate area or using a credit card. You may also contact one of the emergency service organizations, such as FEMA (www.fema.gov; 1-800-621-3362) or the Red Cross (www.redcross.org; 1-800-733-2767) and request assistance.

F. Wire Transfers

Here are some steps for wiring money to or from an institution affected by a disaster:

- Find a bank's telephone number, e-mail address, and physical address on the FDIC's bank Find system (<https://research.fdic.gov/bankfind/>).
- Contact the institution to which you want to send or retrieve money and determine if the bank can accept or send wire transfers.
- Provide the following information:
 - Either your account number or the account number of the individual who will receive the money (in the middle of the check or deposit slip) and the bank routing number (in the lower left hand corner of your check or deposit slip). If you cannot find a bank's routing number, it is usually listed on the bank's web page.
 - The address of the bank to which you are wiring money.
- Request the institution to fax or e-mail you a confirmation so you know the person receives the money, if you are transferring the funds over the internet.

G. Merchants not accepting checks

If a merchant cannot verify that you have an available balance, it is unlikely that they will accept your check. Until your bank is operational again, we can only suggest that you contact one of the emergency service organizations, such as FEMA (www.fema.gov; 1-800-621-3362) or the Red Cross (www.redcross.org; 1-800-733-2767).

H. Deposit Boxes

Please note that deposit insurance does not cover items contained in safe deposit contents. Safe deposit boxes are not immune from theft, fire, flood and other loss. Most safe deposit boxes are held in the bank's vault, which are fireproof and waterproof. If possible, contact the branch or office where your box was located to determine the condition of your box.

I. Bank Documents

Banks are required to have contingency plans for all types of disruptions to operations, including natural disasters. Banks have backup systems of records and other built-in duplications that are housed in safe locations so that financial records can be reconstructed and restored.

XI. Health Care Issues

A. Overview

After a natural disaster, lawyers may face questions running the gamut from simple requests about where to find the phone number for a particular state agency to more complex inquiries about health care insurance or malpractice liability. Lawyers must differentiate between questions that raise genuine legal issues or require you to direct someone to an appropriate agency and questions that are more properly within the province of a physician or another health care provider. For example, in the wake of Hurricane Katrina, some legal hotlines reportedly received calls for advice on how to diagnose “Katrina Cough” or the best first-aid techniques to deal with a particular illness or injury. These are not questions that a lawyer should (or should be expected to) answer.

On the other hand, we expect that there will be many questions that are well within the scope of a lawyer’s expertise, such as locating sources of information concerning public resources or benefits, as well as questions concerning payment for health care services. This guide is designed to provide basic information to help you formulate your response.

B. Summary of the Law

1. Organization and financing of health care in the United States

In the United States, the delivery of health care involves a complicated network of providers, including, among others, first responders (such as emergency medical technicians and paramedics), health care practitioners, hospitals, out-patient clinics, ambulatory care centers and emergency treatment centers. In some geographic areas, health care providers enter into contractual relationships known as “integrated delivery systems.” An integrated delivery system generally ties together a hospital or hospital system, professional practice groups of physicians and other providers, management systems, rehabilitation programs and, in most instances, an insurance provider or health maintenance organization (HMO).

The sources of health-care financing are also wide-ranging. In increasingly rare circumstances, patients may actually pay the entire cost of the medical services that they receive. More commonly, payment comes from a combination of sources, including a patient’s copayment and additional funds from private insurance (including employer sponsored health benefits), government benefits (such as Medicaid or Medicare) or even funds set aside to cover charity care.

Some health care financing arrangements still rely in part on a “fee-for-services” payment system, but most methods of insuring or financing health care involve some degree of managed care. Managed care combines the delivery and financing of health care in order to create economies of scale. HMOs, preferred provider organizations (PPOs) and integrated delivery systems are examples of the managed care strategy at

work. In a managed care system, a combination of contractual obligations and incentives is used to align the expectations of patients, providers and payors with the goal of reducing the cost of health care delivery while maintaining a level of health care access that satisfies the patients' needs.

2. Provider / Patient Relationships

While health care providers are not subject to a common-law "duty to treat," such an obligation can arise from contractual obligations, statutory requirements or a de facto relationship established by the parties' conduct. Lawyers should not assume that the "no duty to treat" principle is applicable in all cases.

Once a provider-patient relationship has been established, the provider assumes legal and ethical duties to the patient that, again, may be based on contract (such as may be required as a condition of the physician's participation in an HMO), common law theories of tort, fraud and fiduciary standards, federal or state statutes, or professional ethics. In addition, both private accreditation systems and public quality control regulations play a part in defining the public's reasonable expectations of health care providers.

It is also important to note that hospitals and health care systems owe certain duties to patients that are independent of any obligations that may derive from the physician/patient relationship. These responsibilities typically include: (a) the duty to select, supervise and retain medical staff; (b) the duty to use reasonable care in the maintenance of facilities and equipment; (c) the duty to oversee all persons who practice medicine within the facilities; and (d) the duty to formulate, adopt and enforce adequate rules and policies to ensure quality care for patients.

C. Useful Contacts

Virginia Department of Health
<http://www.vdh.virginia.gov/>

Contact and other information about Virginia's local health districts can be found here:
<http://www.vdh.virginia.gov/local-health-districts/>

Joint Commission on Health Care
<http://jchc.virginia.gov/>
Telephone: (804) 786-5445

Virginia Department of Social Services
<http://www.dss.virginia.gov/index.html/>
Telephone: (804) 726-7000

Department of Medical Assistance Services (including Medicaid)
<http://www.dmas.virginia.gov/>
Telephone: (804) 786-7933

Bureau of Insurance

<https://www.scc.virginia.gov/boi/>

Telephone: (804) 371-9741

American Red Cross – Virginia Region

<http://www.redcross.org/local/virginia>

D. COBRA Health Insurance Continuation

1. Job loss as a result of the disaster.

If you have lost your job due to a natural disaster, you may be eligible to extend your employer-based medical plan coverage for a limited period of time.

A federal law known as “COBRA” applies to employers of 20 or more employees. Employees, including former employees, covered under an existing health plan are eligible for continuation coverage pursuant to COBRA if: (a) the employer continues to offer health plan coverage and (b) coverage is lost due to a “qualifying event,” such as death of an employee or termination of employment. This would apply to employer-sponsored dental and vision plans as well. The maximum period of coverage allowed under federal law is 18 months for employment termination and 36 months if coverage is lost due to death of the employee.

Continued coverage must be the same as the group health plan coverage for similarly situated employees. If the employee’s plan option is terminated, coverage must continue to be offered to the employee and his/her covered dependents as long as the employer provides health plan coverage.

Generally, the cost of continuation coverage may not exceed 102% of the total premium. This may be much more than what the employee generally pays, as it can include the employer portion of the group health plan premium/cost. Furthermore, premiums may be changed only once during a 12-month period, and medical conditions may not be the basis of the change.

Employers must notify participants of their COBRA rights, usually within 44 days (30 days to notify the plan administrator, and 14 days for the plan administrator to notify the participants). Once the notice is mailed, participants have 60 days from that date to elect or reject coverage. Payment for the first period of coverage (no more than 1 month) must be made in full no later than 45 days from the date of the COBRA election, with a 30-day grace period for each premium due for coverage thereafter. Those who have been dislocated by a disaster may not promptly receive notice from their employers regarding COBRA continuation coverage. Qualified Beneficiaries only have 60 days in which to elect COBRA coverage from the later of the date of the COBRA notice or the loss of coverage. 26 U.S.C. § 4980B(f)(5).

If you believe that your right to continuation coverage has been ignored or violated, you should contact the Employee Benefits Security Administration (a part of the U.S. Department of Labor) at 866-444-3272.

If an employer has fewer than 20 employees, Virginia law requires that continuation coverage be extended for 12 months. An employee has 31 days to apply for coverage after receiving written notice from the policyholder of the availability of continuation coverage. Regardless of when the employee receives this written notice, the employee must apply for continuation coverage within 60 days of the date of termination of the employee's eligibility for employer-sponsored health insurance.

2. If an employer drops health insurance coverage entirely.

If your employer goes out of business or otherwise cancels its group health plan coverage, neither federal COBRA nor state continuation will be available to you or your family members. However, you and your family members may be able to obtain individual insurance policies. You should contact an insurance broker to purchase such a policy. If you do not know of one, you can contact the Virginia Bureau of Insurance at 877-310-6560 for assistance.

The Affordable Care Act (ACA) reformed the existing health insurance market by prohibiting insurers from denying coverage or charging higher premiums because of an individual's preexisting conditions. The ACA also created the Health Insurance Marketplace, also known as the "Marketplace" or the "Exchange," where taxpayers find information about health insurance options, purchase qualified health plans, and, if eligible, obtain help paying premiums and out-of-pocket costs. Although there have been many proposals to repeal the ACA, its provisions remain in effect.

Some low income individuals may qualify for Medicaid programs in Virginia. Medicaid in Virginia is dependent on various factors and is determined on a case by case basis. If you have lost your employer provided insurance and you are low income in Virginia, you or your children may qualify for Medicaid.

Often, the most cost-effective option for maintaining health coverage is special enrollment. If other group health coverage is available (for example, through a spouse's employer-provided plan), special enrollment in that plan should be considered. It allows the individual and his/her family an opportunity to enroll in a plan for which they are otherwise eligible, regardless of enrollment periods. However, to qualify, enrollment must be requested within 30 days of losing eligibility for other coverage.

After you request special enrollment due to your loss of eligibility for other coverage, your coverage will begin on the first day of the next month you and your family each have an independent right to choose special enrollment. A description of special enrollment rights should be included in the plan materials you received when initially offered the opportunity to sign up for the plan.

Special enrollment rights also arise in the event of a marriage, birth, adoption, or placement for adoption. You have to request enrollment within 30 days of the event. In

special enrollment as a result of birth, adoption, or placement for adoption, coverage is retroactive to the day of the event. In case of marriage, coverage begins on the first day of the next month.

This question and answer subsection utilizes information provided by the U.S. Department of Labor at <https://www.dol.gov/agencies/ebsa/about-ebsa/our-activities/resource-center/faqs/hipaa-consumer>.

E. HIPAA, Privacy and Special Enrollment Rights

1. HIPAA.

The Health Insurance Portability and Accountability Act of 1996 (“HIPAA”) established fairly stringent privacy and disclosure requirements for health care providers and health plans. There are certain exceptions to these requirements in the event of a disaster, however. The U.S. Department of Health and Human Services provides a summary of what patient information can be shared in order to assist in disaster relief efforts, available at <https://www.hhs.gov/hipaa/for-professionals/faq/960/can-health-care-information-be-shared-in-a-severe-disaster/index.html>.

Here is a brief look at the issue:

TREATMENT. Health care providers as well as your health plan can share patient information as reasonably necessary to provide treatment, coordinate care, and arrange for payment. You may request reasonable restrictions on the use of your data, even for these purposes.

NOTIFICATION. Health care providers and health plans can share patient information as necessary to identify, locate, and notify family members, guardians, or anyone else responsible for the individual’s care, of the individual’s location, general condition, or death.

IMMINENT DANGER. Health care providers and health plans can share patient information with anyone as reasonably necessary to prevent or lessen a serious and imminent threat to the health and safety of a person or the public – consistent with applicable law and standards of ethical conduct.

FACILITY DIRECTORY. Health care facilities maintaining a directory of patients can tell people who call or ask about individuals whether the individual is at the facility, their location in the facility, and general condition.

2. Information covered by HIPAA

HIPAA applies to individually identifiable health information used by health care providers and health plans in their treatment, payment, and health care operation functions. Under HIPAA, this information is known as “Protected Health Information” or “PHI.” Note, PHI does not include information used or disclosed by your employer for

employment-related reasons, nor by health care providers when they are performing employment-related functions (such as drug testing and fitness for work).

3. Maintaining privacy of personal health information

If you feel your life and/or health are in danger from the disclosure of your health information or identity, you should notify your health care provider and/or health plan immediately and request that your information be disclosed only to you. Under HIPAA, this is known as a Request for Confidential Communications. These requests must be reasonable and not adversely impact your care. In addition, you must specify how and where you wish to be contacted. If the non-disclosure presents a threat to public health or safety, your request may be denied.

A Request for Confidential Communications is distinct from a Request for Restrictions, which can be made for any reason. A Request for Restrictions is your right to ask that a simple restriction or limitation be placed on the medical information about you that will be used or disclosed. A health care provider or health plan does not have to agree to this request, but reasonable requests are usually honored.

If you believe PHI has been wrongfully used or disclosed, you have the right to request an accounting of all disclosures which have been wrongfully made by a health care provider or health plan in the prior 6 years. This accounting must be provided promptly. In addition, you have a right to review and receive a copy of all PHI in the possession of your health care providers and health plans. If the PHI cannot be provided to you for review in a mutually convenient time and place, the health care provider and health plans may not charge you for a copy of your PHI. Otherwise, they may charge a reasonable fee for copies. Complaints regarding the misuse or wrongful disclosure of PHI should be directed to the United States Department of Health and Human Services and must be in writing. More information about how to file a complaint can be found at <https://www.hhs.gov/hipaa/filing-a-complaint/complaint-process/index.html>.

F. Health Insurance Claims

1. Lost health insurance papers

If you lose your health insurance paperwork, ask your insurance company or plan administrator to provide you with a summary plan description (“SPD”). The SPD explains the terms of the plan, including the procedures for filing claims. If you don’t receive your health insurance through your workplace, then ask your insurer for a claims procedure booklet.

You will want to know how to file a claim for your benefits. The steps outlined below describe some of your plan’s obligations and briefly explain the procedures and timelines for filing a health or disability benefits claim.

Before you file, however, be aware of the Employee Income Retirement Security Act of 1974 (“ERISA”), a law that protects your health and disability benefits and sets

standards for those who administer your plan. Among other things, the law and rules issued by the Department of Labor include requirements for the processing of benefit claims, the timeline for a decision when you file a claim, and your rights when a claim is denied. You should know that ERISA does not cover some employee benefit plans (such as those sponsored by government entities and most churches).

An important first step is to make sure you meet your plan's requirements to receive benefits. Your plan might say, for example, that a waiting period must pass before you can enroll and receive benefits or that a dependent is not covered after a certain age. Also, be aware of what your plan requires to file a claim. The SPD or claims procedure booklet must include information on where to file, what to file, and whom to contact if you have questions about your plan, such as the process for providing a required pre-approval for health benefits. Plans cannot charge any filing fees or costs for filing claims and appeals.

If, for any reason, that information is not in the SPD or claims procedure booklet, write your plan administrator, your employer's human resource department (or the office that normally handles claims), or your employer to notify them that you have a claim. Keep a copy of the letter for your records. You may also want to send the letter by certified mail, return receipt requested, so you will have a record that the letter was received and by whom.

If it is not you but an authorized representative who is filing the claim, that person should refer to the SPD and follow your plan's claims procedure. Your plan may require you to complete a form to name the representative. If it is an emergency situation, the treating physician can automatically become your authorized representative without you having to complete a form.

When a claim is filed, be sure to keep a copy for your records.

If your claim is denied, the plan administrator must send you a notice, either in writing or electronically, with a detailed explanation of why your claim was denied and a description of the appeal process. In addition, the notice must include the plan rules, guidelines, protocols, or exclusions (such as medical necessity or experimental treatment) used in the decision or provide you with instructions on how you can request a copy from the plan. The notice may also include a specific request for you to provide the plan with additional information in case you wish to appeal your denial.

Claims are denied for various reasons. Perhaps the services you received are not covered by your plan. Or perhaps the plan simply needs more information about your claim. Whatever the reason, you have at least 180 days to file an appeal (check your SPD or claims procedure to see if your plan provides a longer period).

Use the information in your claim denial notice in preparing your appeal. You should also be aware that the plan must provide claimants, on request and free of charge, copies of documents, records, and other information relevant to the claim for benefits. The plan also must identify, on your request, any medical or vocational expert

whose advice was obtained by the plan. Be sure to include in your appeal all information related to your claim, particularly any additional information or evidence that you want the plan to consider, and get it to the person specified in the denial notice before the end of the 180-day period.

On appeal, your claim must be reviewed by someone new who looks at all of the information submitted and consults with qualified medical professionals if a medical judgment is involved. This reviewer cannot be a subordinate of the person who made the initial decision and must give no consideration to that decision.

Plans have specific periods of time within which to review your appeal, depending on the type of claim. Be sure to check your SPD or your claims procedure booklet to find out what these times are.

Source: This question and answer subsection utilizes information provided by the U.S. Department of Labor at: <https://www.dol.gov/agencies/ebsa/about-ebsa/our-activities/resource-center/publications/filing-a-claim-for-your-health-or-disability-benefits>.

2. Medicare Part C (Medicare Advantage) – Inability to access usual providers

In the event of a major disaster declaration by the President or a Governor, Medicare Advantage plans are expected to: (a) allow Part A/B & supplemental Plan C benefits to be furnished at specified non-contracted facilities; (b) waive in full requirements for gatekeeper referrals where applicable; and (c) temporarily reduce out-of-network co-pays to in-network co-pay amounts.

For more information, see: <http://www.cms.gov/manuals/downloads/mc86c04.pdf>.
Section 150 - Benefits During Disasters and Catastrophic Events

G. Prescriptions

1. Getting prescriptions filled

Any evacuee who needs a prescription filled generally must have one of the following:

- a) a written prescription from a licensed health care provider;
- b) a prescription phoned or faxed in from a licensed health care provider to a licensed pharmacy in Virginia;
- c) a current prescription bottle indicating a remaining refill; or
- d) other proof of an existing prescription.

The federal Emergency Prescription Assistance Program (“EPAP”) is a joint program of the U.S. Federal Emergency Management Agency and the U.S. Department

of Health and Human Services. Those eligible for EPAP can receive a one-time fill of up to a 30-day supply of medication, if the program has been activated in your area. There is no charge or co-pay to the eligible person.

During a disaster, individuals with prescription questions regarding EPAP eligibility, covered drugs and durable medical equipment, and claim submission may call 855-793-7470.

The EPAP-covered prescriptions can be filled at almost any pharmacy in Virginia.

The pharmacy is responsible for verifying eligibility for the EPAP program.

Eligibility for the Emergency Prescription Assistance Program:

a) Must be from a county declared as a disaster area. Recipients must demonstrate residence within the covered area. Zip codes of areas determined eligible for EPAP will be posted to the EPAP website (<https://www.phe.gov/Preparedness/planning/epap/Pages/affected-areas.aspx>) just prior to or during the activation. Identification can be a driver's license, state issued identification card, current lease, utility bill, or other credible attestation of residence.

b) Must have no prescription insurance coverage.

Medicaid clients who forgot their medication or lost it during the evacuation can get it replaced if their pharmacist approves.

2. Prescriptions under a Medicare Part D Prescription Drug Plan

Until the end of a declared disaster period, Part D sponsors are expected to suspend "refill too soon" restrictions to allow enrollees a necessary supply of drugs. Part D sponsors should also allow an affected enrollee to obtain the maximum extended day supply, if requested and available at the time of refill.

In addition, Part D sponsors are supposed to ensure that enrollees that do not have access to in-network pharmacies are guaranteed adequate access to out-of-network pharmacies to fulfill their prescription needs. Enrollees may have to pay a greater amount for a prescription purchased out-of-network, however, than is usually spent purchasing the prescription in-network.

Pharmacies are also permitted to waive co-pays when a pharmacy determines that individuals cannot pay (waiver is at the discretion of the pharmacy and is not confined to periods of disaster).

XII. Bankruptcy

A. Overview

The damages and dislocation caused by a disaster often make some storm victims think about filing bankruptcy. Below is a summary of certain applicable sections of the Bankruptcy Code and answers to common questions asked about bankruptcy. This outline is meant to only be a bankruptcy primer.

The current Bankruptcy Code was enacted in 1978 and has been amended a number of times since then. The most significant amendments to the Bankruptcy Code were implemented in 2005 by the [Bankruptcy Abuse Prevention and Consumer Protection Act \(the “BAPCPA”\)](#). The outline below is intended to highlight certain relevant provisions of the Bankruptcy Code and certain of the BAPCPA’s changes to it. Any storm victim considering bankruptcy to consult a qualified bankruptcy attorney.

B. Summary of the Law

Four different chapters of the Bankruptcy Code affect individuals: Chapter 7, Chapter 11, Chapter 12, and Chapter 13. Of these, Chapters 7 and 13 are generally the most relevant to individuals.

A Chapter 7 case is sometimes called “liquidation.” In any individual bankruptcy case, certain types of property are exempt from creditors and are kept by the debtor, but in a Chapter 7 case, all of the debtor’s assets that aren’t subject to exemption are surrendered and liquidated or distributed in order to pay creditors’ claims. Still, in many individual filings, due to the exemptions, the debtor will keep most or all of his or her property, and once the case is completed, most of the debtor’s debts that existed before filing the petition are discharged.

As explained below, eligibility for Chapter 7 is subject to a “means test.” A debtor may only file a Chapter 7 case if their income is below a certain level, as established by a calculation set forth in the BAPCPA. If a debtor’s income is above that income, then he or she must file a Chapter 13 case instead. This section of these materials contemplates debtors who file voluntary bankruptcy petitions.

In a Chapter 13 case, a debtor who has regular income must follow a “plan” obligating him to pay some or all of his debts over a 3-5 year period. Chapter 13 is available only to an individual with regular income whose unsecured debts are less than \$394,725 and whose secured debts (usually a mortgage) are less than \$1,184,200. 11 U.S.C. § 109(e). (The amounts under 11 U.S.C. § 104 are adjusted periodically; the figures provided throughout this section are current as of December 2017.) A Chapter 13 case must be voluntary.

Under both Chapters 7 and 13, certain debts cannot be discharged (these include alimony and support, student loans under most circumstances, or debts relating to death or injury due to the debtor’s drunk driving), but Chapter 13 contains a “super

discharge” that allows for discharge of some debts, upon completion of the plan, that would not be dischargeable in a Chapter 7 case (explained below). Chapter 13 also allows the debtor to retain possession of his or her property, even non-exempt property, while making payments under a repayment plan. However, Chapter 13 requires that creditors be paid at least as much as they would receive under Chapter 7, which means that the amount repaid under the plan must equal or exceed the value of the retained non-exempt property.

Chapter 11 is primarily used by businesses that need to reorganize to get out of debt, although individuals may file Chapter 11 also if they do not qualify under the Chapter 13 debt limits. In Chapter 11, the debtor proposes a plan for paying some or all of his debts, and his creditors get a chance to vote on whether to accept that plan. Chapter 11 may be the only recourse for a consumer debtor with an extremely large mortgage that causes the debtor’s secured debt to exceed the limit for Chapter 13. Its procedures and requirements are significantly more expensive than in Chapter 13.

Chapter 12 is for “farmers.” The Bankruptcy Code defines “farmer” as someone who earns more than 80% of his or her income from farming. 11 U.S.C. § 101(20), (21). There are special provisions for farmer debtors and this will include filing a plan as well and devoting income in the future to pay creditors.

In general, a major benefit of bankruptcy is that once the bankruptcy case is filed, an automatic stay is implemented preventing further collection actions by creditors. 11 U.S.C. § 362.

Filing bankruptcy will be reported on credit reports and may affect future credit applications. In addition, a bankruptcy filing could affect a debtor’s eligibility to benefit from the protections of certain provisions under the Bankruptcy Code in the event of a future filing. Therefore, it is important to evaluate how this may affect an individual before proceeding.

Finally, a note about the dollar figures in this section. As of April 1, 2008, and each three-year interval ending on April 1, certain dollar amounts in the Bankruptcy Code (such as figures used in the means test) are adjusted. 11 U.S.C. § 104(a). Therefore, if you are looking at the Bankruptcy Code in a printed source or even online, be careful to note that the dollar figures you see might not be up to date, even if the source otherwise contains the current law. This section reflects current dollar figures as of December 2017.

C. Relevant Courts/Agencies

Consult the website of U.S. Bankruptcy Courts for the Eastern or Western Districts of Virginia for information, notices, and forms. The Eastern District’s website is <https://www.vaeb.uscourts.gov/> and the Western District’s website is <http://www.vawb.uscourts.gov/>. The forms can be found at: <http://www.uscourts.gov/FormsAndFees/Forms/BankruptcyForms.aspx>.

A particularly useful link can be found at:

A summary of the bankruptcy process under the BAPCPA can be found at:
<http://www.uscourts.gov/FederalCourts/Bankruptcy/BankruptcyBasics.aspx>

Although debtors have this information available to them they should not file bankruptcy without an attorney. Bankruptcy is highly specialized, filled with traps and pitfalls. It may be difficult for a debtor to fix any mistakes he makes when filing for bankruptcy *pro se*, and it may be harder for an attorney to correct those mistakes if the case is dismissed. If you cannot afford to hire an attorney, you may be able to obtain assistance in certain circumstances, and if you qualify, by contacting the following:

Virginia Legal Aid Society

434-455-3080

Legal Aid Society of Eastern Virginia

757-627-5423

Central Virginia Legal Aid Society

804-648-1012

Legal Services of Northern Virginia

703-778-6800

Blue Ridge Legal Services

540-433-1830

Southwest Virginia Legal Aid Society

276-783-8300

D. FAQs

1. What is involved in the bankruptcy process?

A bankruptcy case begins with the filing of a petition, schedules (forms in which the debtor lists all property, secured claims, unsecured claims, claimed exemptions, and other information), and a statement of financial affairs (which provides personal background information). The debtor must also file a statement of intent with respect to any secured property indicating which such property he or she will surrender, reaffirm, or redeem. If the debtor fails to carry out the statement of intent within the appropriate time, the automatic stay (explained below) may be lifted with respect to this property. 11 U.S.C. §§ 362(h), 521(a)(2).

Under the BAPCPA a debtor must include in the filing: copies of all payments received from an employer within 60 days before filing; an itemized statement of monthly net income; a statement disclosing anticipated increases in income or expenditures within the next 12 months; evidence of attendance from a credit counseling agency (discussed below); and a “record” of any interest in an education IRA or tuition savings program. 11 U.S.C. § 521(a)–(c). The debtor must also file a certificate proving that the debtor received certain required notices. 11 U.S.C. § 521(a). The debtor must also file certain tax returns with the court and the trustee. 11 U.S.C. § 521(e), (f). Failure to comply with filing requirements will result in dismissal. 11 U.S.C. § 521(i).

In all bankruptcy cases, the debtor must attend credit counseling classes before filing and a financial management class before a discharge will be granted. 11 U.S.C. § 109(h)(1). The federal government does have the authority to waive this requirement for a district if it determines that “the approved nonprofit budget and credit counseling agencies for such district are not reasonably able to provide adequate services to the additional individuals who would otherwise seek credit counseling.” 11 U.S.C. § 109(h)(2). The Justice Department exercised this authority in Louisiana and in the Southern District of Mississippi after Hurricane Katrina, but there is no guarantee that any such waiver authority will be exercised in the future.

In a Chapter 7 (liquidation) case, the court appoints a trustee to represent the interests of the creditors. Around a month after filing, the debtor must attend the “Section 341 meeting” conducted by the trustee to answer questions under oath regarding his assets and schedules. Creditors are invited, though in routine bankruptcy cases do not usually appear and ask questions. The Section 341 meeting is usually pretty quick, although a debtor’s lack of compliance with requirements, incomplete information, or responses to questions may result in the hearing lasting longer than usual or being continued. After the Section 341 meeting, the trustee will gather and attempt to sell any non-exempt property. The debtor can sometimes purchase the non-exempt property from the trustee. The trustee may also file lawsuits to recover funds of the bankruptcy estate that are considered to be “preferences” or fraudulent transfers or to pursue other claims that a debtor may have. (“Preference” is a term referring to a debtor’s payment or transfer of assets to a creditor shortly before the bankruptcy.) The proceeds from all sales and lawsuits are eventually distributed to the creditors once all such property is administered. As a general matter, the debtor will receive a full discharge of all creditor claims a few months after the Section 341 meeting, while the administration of the bankruptcy case will continue until all assets are administered and the proceeds distributed.

A Chapter 13 (wage earner) case begins by filing the similar papers as under a Chapter 7. Unlike Chapter 7, where all assets that are not exempt are sold by a trustee, in Chapter 13 the debtor will file a repayment plan. The debtor makes payments under this plan from future income each month directly to the Chapter 13 trustee, who is administrator for the benefit of the creditors. It is extremely important to check the relevant local rules for any special procedures regarding mortgage payments. The trustee then pays creditors according to the terms of the plan. The debtor typically retains possession of all property during repayment. The plan typically has a three- or

five-year term (but the term may not exceed five years). The plan may provide for cure of home mortgage and automobile loan arrearages, and in certain instances for older vehicles might permit a write down of the debt to the value of the automobile as well as a reduction in interest rate. The plan may also strip an unsecured second lien from a debtor's homestead. When the debtor has repaid creditors according to the plan, the debtor will be discharged of all debts (with some exemptions), even if the plan did not pay them in full. The percentage paid to creditors will depend on the debtor's disposable income. The amount of personal expenses will be potentially subject to adjustment by the court if excessive, in order to permit disposable income to be allocated to creditors under the plan. The requirements for the plan can be found at 11 U.S.C. § 1321 *et seq.*

2. Should I file for bankruptcy?

Filing bankruptcy is a strictly personal decision and should be based upon the facts of each debtor's individual case. The ratio of a debtor's assets to liabilities is an important factor. The type of debt a debtor has is another factor. A debtor cannot discharge all debts. So, it is very important to determine before any filing whether certain types of your debts may be "non-dischargeable" in a bankruptcy proceeding. In deciding whether to file, you should consider effect bankruptcy might have on your credit rating, ability to borrow in the future, and reputation. Bankruptcy may also impact bankruptcy prior transfers of money or property. The need to cure mortgage debt arrearages might be important. The desire to retain nonexempt property in the future might also be a factor.

3. Are there any pre-requisites to filing for bankruptcy?

Before an individual debtor can file a bankruptcy petition, he or she (or if filing as spouses, both) must complete an approved credit counseling course within 180 days before filing. 11 U.S.C. § 109(h). The course must outline opportunities for credit counseling and provide budget analysis assistance. These courses can be taken online. The debtor must file a certificate of compliance. 11 U.S.C. § 521(b). However, the law provides for a temporary waiver (30 days) of this requirement if a debtor can show "exigent circumstances" and that he or she requested credit counseling but was unable to receive it within five days of the request. 11 U.S.C. § 109(h)(3)(A)(i), (ii). This is rarely allowed. Case law has consistently held that a pending foreclosure IS NOT an exigent circumstance. The law also provides an exemption if such services are not available in the area where the debtor resides or if the debtor is incapacitated, disabled, or on active military duty. 11 U.S.C. § 109(h)(2), (4). This would only be applicable in very rare circumstances, particularly given the access to online courses. As mentioned above, the Justice Department temporarily exercised authority to suspend the counseling requirement in Louisiana and in the Southern District of Mississippi after Hurricane Katrina, but there is no guarantee that any such waiver authority will be exercised in the future.

4. Virtually all my property and my apartment were destroyed in the disaster. Should I file bankruptcy?

If you only have property that is exempt from creditors then there would appear to be no immediate need as a general matter to file a bankruptcy case. As a general matter, exempt property cannot be taken from debtors except by creditors that have obtained a lien on the property when it was bought, or for unpaid taxes. However, the decision whether to file is something an individual debtor should evaluate, looking at all the facts and circumstances of his or her situation and future.

5. My business was affected by the disaster. Can it file bankruptcy?

Businesses can file bankruptcy cases. Many businesses can file Chapter 7 and Chapter 11 cases but only individuals can file Chapter 13 cases. If your business is unincorporated and a “dba”, then any bankruptcy by the business will place you into bankruptcy as well. To avoid being personally liable for business debts for unincorporated businesses, many business owners file both a business bankruptcy and a personal bankruptcy, because the business bankruptcy does not protect the owners from personal liability for the business debts. These matters should be reviewed with an attorney.

6. How does the “means test” work?

The BAPCPA introduced a new “means test” for Chapter 7 bankruptcies. 11 U.S.C. § 707(b)(2)(A). The purpose of the test is to prevent abuse of Chapter 7. If a debtor’s debt is primarily consumer debt (as opposed to business debt) and does not meet the “means test,” a presumption of abuse arises and a Chapter 7 case may be dismissed or converted to a Chapter 13 case. Debtors must file Official Bankruptcy Form B 122A-2, which contains the “means test” calculation. The form is available at <http://www.uscourts.gov/FormsAndFees/Forms/BankruptcyForms.aspx>.

The formula for the means test is quite complex, but in short, it works as follows:

First, the debtor’s “current monthly income” must be determined. “Current monthly income” is defined as the average of the last six months income received by the debtor, excluding benefits received under the Social Security Act, payments to victims of war crimes, and payments to victims of international or domestic terrorism. 11 U.S.C. § 101(10A). The debtor’s “current monthly income” (on an annualized basis) is then compared to the “median family income” for his or her state. The median incomes for each state can be found at <http://www.justice.gov/ust/eo/bapcpa/meanstesting.htm>. The current median incomes for Virginia based on household size are: \$58,759 (one person); \$61,704 (two people); \$72,749 (three people); \$101,389 (four people). If the debtor’s current monthly income is lower than the state median, there is no presumption of abuse. 11 U.S.C. § 707(b)(2).

If the debtor’s current monthly income exceeds the state median, the “means test” applies and the debtor must calculate certain expenses based on IRS standards to

determine if the debtor is eligible for a Chapter 7 bankruptcy. These allowed expenses are deducted from the current monthly income and then multiplied by 60 (the total amount over five years) to arrive at “disposable income.” If disposable income is greater than: (1) the greater of 25% of the debtor’s nonpriority unsecured debt or \$7,700; or (2) \$12,850, a presumption of abuse arises. 11 U.S.C. § 707(b)(2)(A). (Nonpriority unsecured claims include obligations such as credit card and medical-related debts.) Unless this presumption is rebutted, the case may be dismissed or converted to a Chapter 13 case.

For debtors whose annualized “current monthly income” is less than the applicable state median but who nevertheless file a Chapter 13 bankruptcy, the repayment plan must be no longer than three years (unless there is court approval for a period of up to five years). 11 U.S.C. § 1322(d)(2). If the debtor’s “current monthly income” is equal to or greater than the applicable state median, the plan generally must be for five years. 11 U.S.C. § 1322(d)(1).

Median incomes and expense deductions used to calculate the “means test” (as well as other dollar amounts under the Bankruptcy Code) are adjusted periodically. 11 U.S.C. § 104(a).

7. Which debts are not discharged in bankruptcy?

Certain debts are not dischargeable in bankruptcy. In a Chapter 7, 11, 12, or 13 case, you cannot as a general matter obtain a discharge for, among other things: (1) domestic support obligations, including alimony, child support, and certain property settlements; (2) student loans, absent extreme hardship; (3) damages resulting from driving under the influence; (4) court-ordered restitution or a criminal fine included in the sentence for conviction of a crime; (5) taxes that are generally less than three years old or, if older, arising under late or fraudulent tax returns; (6) damages for willful and malicious injury awarded for personal injury or death of another person; (7) debts incurred by fraud; (8) damages for willful and malicious injury to someone else’s person or property; (9) certain taxes and tax penalties, or debts incurred to pay non-dischargeable taxes; (10) debts that were or could have been listed in a prior case in which you waived or were denied a discharge; (11) property settlements in a divorce; (12) condominium or cooperative housing fees and assessments (*e.g.*, HOA dues); (13) court filing fees; or (14) damages resulting from securities fraud. 11 U.S.C. §§ 523, 1328. In Chapter 13, though, you can restructure the payments under the plan and provide some relief to immediate payment demands for these types of debts.

Consumer debts to a single creditor for luxury goods or services greater than \$675 incurred within 90 days before filing are presumed non-dischargeable. 11 U.S.C. § 523(a)(2)(C)(i)(I). Likewise, cash advances greater than \$950 obtained within 70 days before filing are also presumed non-dischargeable. 11 U.S.C. § 523(a)(2)(C)(i)(II). Limitations have also been attempted concerning seeking legal advice concerning the incurrence of additional debt.

8. What if I leave out a debt on my petition?

If the debt is not listed on your schedules, then you may not get the benefit of the discharge and will have to repay that debt. 11 U.S.C. § 523(a)(3). However, there is some case law to suggest that the debtor may still be able to get the discharge in a no-asset Chapter 7 case, absent any fraud or intent to hinder a creditor. But if you fail to list the debt with the intent to conceal and defraud, then you may lose your discharge in its entirety.

9. Does a bankruptcy filing stop a wage attachment?

Yes. This is a result of the automatic stay that occurs when you file a bankruptcy petition. However, the stay only applies to debts incurred before you filed the bankruptcy petition. Additionally, the automatic stay does not apply to payments for child support or alimony.

10. What is a discharge in bankruptcy?

A “discharge” in bankruptcy means that the debtor is legally free and clear of any obligation to repay certain debts. The creditor no longer has any right to demand or collect that debt. The debtor no longer has any obligation to repay it. 11 U.S.C. § 727.

11. How can I discharge my student loan debt?

Student loans are dischargeable only on a showing of “undue hardship.” 11 U.S.C. § 523(a)(8). The undue hardship standard is very hard to meet. Unlike practically every other legal liability, student loans never go away—there is currently no statute of limitations for student loan debt. 11 U.S.C. § 523(a)(8).

12. Can I repay a creditor if I want to, even after bankruptcy?

Voluntarily repaying a debt even if it would be discharged by your bankruptcy is not prohibited, but you should be very careful if you consider pursuing this option. Once a discharge is obtained, the discharge will operate as an injunction against efforts to collect the discharged debt, and creditors cannot force a debtor to pay any amounts that are discharged. In a Chapter 7 case, if you choose to do this, you must use exempt assets (assets you listed on your schedules as being exempt) or post-petition earnings (money you earned after you filed the petition), so it may be wise to wait until the bankruptcy case is closed before making such voluntary payments.

13. What is the automatic stay?

The “automatic stay” prevents a creditor from continuing to enforce a claim against a debtor during the pendency of the bankruptcy case. Some examples of actions by a creditor that would violate the stay are these: (1) filing a new lawsuit or continuing to press a lawsuit that had already been filed; (2) sending collection letters; (3) filing a “financing statement” to perfect a security interest; (4) refusing to issue a transcript of school records; or (5) seeking to foreclose on property.

There are a number of exceptions to the automatic stay, however. The automatic stay does not apply to certain proceedings involving certain domestic matters (*i.e.*, paternity, domestic violence, and dissolution of marriage matters), the withholding of income to pay domestic support obligations (*i.e.*, child support, alimony), the restriction or suspension of a driver's license, and certain pre-existing eviction actions. 11 U.S.C. § 362(b). In addition, the stay now automatically terminates after 30 days if the case is filed by a debtor within one year after he or she had another bankruptcy case dismissed, unless the court finds that the new filing is in good faith. 11 U.S.C. § 362(c)(3). The automatic stay also automatically terminates with regard to secured debt if a statement of intent is not filed timely (within 30 days after the filing of the petition or by the date of the Section 341 meeting, whichever is earlier). 11 U.S.C. § 521(a)(2).

14. I'm married. Can I file by myself?

Yes, but your spouse will still be liable for any joint debts, and all community property will be included in the debtor's bankruptcy estate. If you file together you will be able to double your exemptions. In some cases where only one spouse has debts, or one spouse has debts that are not dischargeable, then it might be advisable to have only one spouse file. If the spouses have joint debts, the fact that one spouse discharged the debt may show on the other spouse's credit report.

15. Where do I file if I haven't lived in the same state or district for the last six months?

Under 28 U.S.C § 1408, the case should be filed where the debtor has lived "for the one hundred and eighty days immediately preceding such commencement, or for a longer portion of such one-hundred-and-eighty-day period." See also 11 U.S.C. § 522(b)(3)(A). This means that the case should be filed in the bankruptcy district in which the debtor has lived for the greatest portion of the last six months. Typically, your case will be handled within the district in the closest division, and the bankruptcy judges regularly conduct hearings at each of the division's courts.

16. If I am going through a divorce, how will my ex-spouse filing bankruptcy affect our divorce settlement?

Alimony, maintenance, and/or support are protected from discharge. The exceptions to discharge broadly include "domestic support obligations" as well as property settlements not otherwise covered as "domestic support obligations," including attorney's fees. 11 U.S.C. § 523(a)(5), (15). In addition, domestic support obligations are now given the first priority for payment of unsecured debt. 11 U.S.C. § 507(a)(1)(A). And if the debtor is filing a Chapter 13 case, the debtor cannot receive confirmation of a repayment plan or discharge under Chapter 13 unless the debtor has paid all domestic support obligations coming due after the bankruptcy filing. 11 U.S.C. § 1325(a)(8).

17. Will my retirement plan or IRA be protected?

Generally yes, if the funds are in a qualified account. Retirement plans that are ERISA qualified are protected under current laws in all jurisdictions and are not included as property of the bankruptcy estate.

However, the exempted assets in an individual retirement account, except for a simple employee pension or a simple retirement account, may not exceed \$1,283,025 in a case filed by a debtor who is an individual, except that such amount may be increased if the interest of justice so requires. 11 U.S.C. § 522(n).

18. What effect does bankruptcy have on child support?

Filing bankruptcy does not allow your ex-spouse to discharge past due child support obligations. Any back payments owed for child support cannot be discharged in a bankruptcy proceeding. As noted above, the automatic stay no longer applies to proceedings to establish or modify domestic support obligations or to withholding of income for payment of domestic support. 11 U.S.C. § 523(a)(5), (15).

19. What effect does bankruptcy have on co-signers on loans?

If someone has co-signed a loan with you and you file for bankruptcy, the co-signer may have to pay your debt. Chapter 13 extends the automatic stay to co-debtors for consumer debt in most cases pending confirmation of a plan. 11 U.S.C. § 1301. Nevertheless, if the co-signed debt is not fully repaid by a debtor, the co-signer is still liable for the balance.

20. Will my filing bankruptcy stop a foreclosure?

Yes. Filing bankruptcy temporarily stalls your lender's right to foreclose (the automatic stay, discussed above), until it gets permission to go forward with the foreclosure proceedings.

However, a bankruptcy filing won't stop a foreclosure forever. Eventually, a debtor in bankruptcy will still have to provide "adequate protection" to a secured creditor by making payments on the debt (and/or satisfying certain other criteria), or the automatic stay can be lifted. See 11 U.S.C. §§ 361, 362. Moreover, in order to keep the secured asset, the debtor will have to become current on the mortgage in a Chapter 7 or cure the arrears in a Chapter 13. And note that a modification of the mortgage on a primary home is not permitted during a Chapter 13 case. 11 U.S.C. § 1322(b)(2).

21. What property is exempt from the trustee in a Chapter 7 case?

In a Chapter 7 filing, certain property is exempt from the debtor's estate. The trustee and the debtor's creditors cannot liquidate the property to repay debts. In Virginia, a debtor can elect either federal or state property exemptions, 11 U.S.C. § 522(b), assuming the debtor can meet the residency provisions discussed below for relying on state law. The federal exemptions are listed at 11 U.S.C. § 522(d).

In order to claim a state's exemptions, the debtor must have lived in the state for at least 730 days (two years). Otherwise, the debtor can only claim the exemptions of the state in which he or she resided for the largest portion of the 180-day period preceding the last two years. 11 U.S.C. § 522(b)(3)(A). This is intended to prevent a debtor from moving to the state to take advantage of its more generous homestead laws and then immediately filing bankruptcy.

The BAPCPA imposes a \$160,375 cap on filers for any equity interest in a homestead purchased during the approximately 40 months (1,215 days) before the bankruptcy filing. 11 U.S.C. § 522(p)(1). There is no cap on the homestead exemption for property owned for more than 1,215 days. The cap also does not apply to equity rolled over from a prior residence located in the same state if the prior residence was acquired before the 1,215-day period. 11 U.S.C. § 522(p)(2).

The following exemptions are allowed under Virginia law (these are available to individuals who meets the residency requirements):

- 1) \$1,000 of the value of clothing. As a practical matter, trustees in Virginia never ask for the turnover of any of the debtor's clothing.
- 2) \$6,000 of the value of an automobile. This is applicable to the equity (profit) in the car.
- 3) \$5,000 worth of home furniture. Like clothing, unless you have valuable antiques that can easily be sold and converted to cash, the trustee in Virginia will not be interested in taking this from you.
- 4) Homestead: \$5,000, plus \$500 per defendant; may also claim rents and profits; sale proceeds exempt to \$5,000 (if married, may double); unused portion of homestead may be applied to any personal property.
- 5) Insurance: Accident or sickness benefits; burial society benefits; cooperative life insurance benefits; fraternal benefit society benefits; group life or accident insurance for government employees.
- 6) Pensions: City, town, and county employees; ERISA-qualified benefits to \$17,500 per year; judges; state employees.
- 7) Miscellaneous personal property: Bible; burial plot; family portraits and heirlooms to \$5,000 total; health aids; pets; wedding and engagement rings.
- 8) Public Benefits: Crime victim's compensation unless seeking to discharge debt for treatment of an injury incurred during crime; unemployment compensation.
- 9) Tools of trade: Tools, books and instruments of trade, including motor vehicles, up to \$10,000, needed in your occupation or education.
- 10) Wages: Minimum 75% of earned but unpaid wages, pension payments, bankruptcy judge may authorize more for low-income debtors.
- 11) \$2,000 of any property for disabled veteran.

22. What about obtaining payment from my company or someone I did business with before the disaster who are now out of business?

If you have a claim for payment you might contact a lawyer for assistance in collecting the debt or seek relief in state court.

XIII. The National Flood Insurance Program

A. What is the National Flood Insurance Program:

The Federal Emergency Management Agency (FEMA) administers the National Flood Insurance Program (NFIP).¹ While FEMA also administers disaster assistance, the NFIP provides an alternative in the form of insurance to mitigate against future flood losses. Under this voluntary federal program, a community adopts and enforces a local floodplain management ordinance designed to reduce future flood risks and, in exchange, FEMA authorizes the sale of flood insurance within that community.²

B. How to Buy Flood Insurance:

If you are a renter or a homeowner in a NFIP-participating community, you are eligible to purchase a flood insurance policy under the NFIP. The Community Status Book³ provides a list of participating communities. Other options for finding out whether your community participates would be to contact an insurance agent or your local government official.

Congress mandates that federally regulated or insured lenders require flood insurance on mortgaged properties located in high-risk areas, called Special Flood Hazard Areas (SFHA).⁴ Even if your property is not in a high-risk area, your lender may still require flood insurance. And, a low-cost Preferred Risk Policy exists for people with homes and businesses in moderate- to low-risk areas that would like to purchase flood insurance.⁵

Flood insurance cannot be purchased directly from the federal government; rather it must be purchased through an insurance agent. Under a cooperative arrangement

¹ The NFIP was established by Congress through the passage of the National Flood Insurance Act of 1968, broadened and modified by the Flood Disaster Protection Act of 1973 and other legislative measures, and further modified by the National Flood Insurance Reform Act of 1994 and the Flood Insurance Reform Act of 2004.

² <https://www.fema.gov/national-flood-insurance-program>

³ <https://www.fema.gov/national-flood-insurance-program-community-status-book>

⁴ The Flood Disaster Protection Act of 1973 and the National Flood Insurance Reform Act of 1994. A SFHA is a land area covered by the floodwaters of the base flood on NFIP maps. The SFHA is where floodplain management regulations must be enforced and where mandatory purchase of flood insurance applies. <https://www.fema.gov/special-flood-hazard-area>

⁵ https://www.fema.gov/media-library-data/1510930476779-bba620eace0d147d445ecd1f273cc15a/FEMA_ResidentialPRP_BRO_SinglePage_508_10-25-17_v2.pdf (for homes), https://www.fema.gov/media-library-data/1504550112310-920e02c2d29c38e996c8b8b8e8a54e05/FEMA_Commercial_English_SinglePage_508_8-22-17.pdf (for businesses)

between FEMA and the private insurance industry, the Write Your Own (WYO) Program enables participating insurance companies to write and service Federal flood insurance in their own names.⁶ An insurance agent has three options for placing his/her flood insurance business:

1. With 1 (or more) WYO Companies,
2. With both the NFIP directly and with 1 (or more) WYO Companies, or
3. All with NFIP directly.

NFIP offers three Standard Flood Insurance Policy forms that provide a description of coverage and other important information. The three forms are Dwelling Policy, General Property Policy, and Residential Condominium Building Association Policy.⁷ The Dwelling Policy form is available for homeowners, residential renters and condominium unit-owners, owners of residential buildings containing two to four units. This coverage is available for a one-year term and premiums are determined based on a variety of factors including the amount of coverage purchased, the selected deductible amount, the property's flood zone, age of the building, and foundation type. You can insure your home up to \$250,000 for the building and \$100,000 for the contents. Typically, there is a 30-day waiting period before coverage goes into effect.⁸

C. What is Covered:

The Standard Flood Insurance Policy, including your Policy Declarations page, serve as your official contract for insurance. However, the following summary of coverage provided by FEMA can be found at: https://www.fema.gov/media-library-data/20130726-1620-20490-4648/f_679_summaryofcoverage_11_2012.pdf.

Guidelines regarding what is insured under your flood insurance policy for your building:

- The insured building and its foundation.
- The electrical and plumbing systems.
- Central air-conditioning equipment, furnaces, and water heaters.
- Refrigerators, cooking stoves, and built-in appliances such as dishwashers.
- Permanently installed carpeting over an unfinished floor.
- Permanently installed paneling, wallboard, bookcases, and cabinets.
- Window blinds.
- A detached garage (up to 10 percent of Building Property coverage).
- Note that detached buildings (other than detached garages) require a separate policy. Debris removal.

Guidelines regarding what is insured under your flood insurance policy for your contents, or personal property:

- Personal belongings such as clothing, furniture, and electronic equipment.

⁶ https://www.fema.gov/media-library-data/1503238681911-30b35cc754f462fe2c15d857519a71ec/02_reference_508_oct2017.pdf

⁷ <https://www.fema.gov/national-flood-insurance-program/standard-flood-insurance-policy-forms>

⁸ <https://www.fema.gov/national-flood-insurance-program>

- Curtains.
- Portable and window air conditioners.
- Portable microwave ovens and portable dishwashers.
- Carpets not included in building coverage (see above).
- Clothes washers and dryers.
- Food freezers and the food in them.
- Certain valuable items such as original artwork and furs (up to \$2,500).

Guidelines regarding what is not insured under your flood insurance policy:

- Damage caused by moisture, mildew, or mold that could have been avoided by the property owner.
- Currency, precious metals, and valuable papers such as stock certificates.
- Property and belongings outside of a building such as trees, plants, wells, septic systems, walks, decks, patios, fences, seawalls, hot tubs, and swimming pools.
- Living expenses such as temporary housing.
- Financial losses caused by business interruption or loss of use of insured property.
- Most self-propelled vehicles such as cars, including their parts.

D. How to File a Claim:

FEMA's website includes resources to walk you through the claims process. The following ten-step process can be found at: https://www.fema.gov/media-library-data/1454965506940-fabb104bfd871fd94e3c6ce5e3d59e19/NFIP_Flood_Claim_Process.pdf.

STEP 1: Report the loss to your insurance agent or the insurance carrier, who will in turn assign an adjusting firm who provides an adjuster to assist you with presenting the support for your loss.

STEP 2: The adjuster inspects the property (scoping visit) and may ask if you wish to request an advance payment from your insurer; the adjuster will send you a detailed room-by-room unit-cost estimate of damage and a proof of loss form. If you agree, the proof of loss form should be signed to and sworn to, and upon your insurer's review and agreement, the loss is settled.

STEP 3: If you do not agree, you should work with your adjuster to find a dollar amount for the covered loss that can be agreed on. Also, working with your general contractor is helpful.

STEP 4: If you are unable to reach an agreement with the adjuster, you should contact your adjuster's supervisor by calling the adjusting firm.

STEP 5: The supervisor should work with you to find a dollar amount for the covered loss that can be agreed on.

STEP 6: If you are unable to reach an agreement with the adjuster's supervisor, you should contact your insurance carrier's claims department to discuss the amount difference or coverage issue with a claim examiner.

STEP 7: If you are unable to reach an agreement with the claim examiner, you should complete a proof of loss form for the total amount you are requesting (the undisputed amount plus any additional amount), and then send the signed and sworn-to proof of loss form with documentation to support the additional amount you are requesting, directly to the insurance carrier claim examiner.

STEP 8: If the insurer agrees with your documentation, they will pay the amount you are requesting; or they may provide the adjusting firm with their recommendation which may lead to an additional payable amount and a new Proof of Loss. If the insurer disagrees, they will issue payment for any undisputed amount, and a written denial letter will be sent to you fully explaining the reasons for the disallowance (denial) of your claim or any portion of your claim.

STEP 9: If you agree with the denial or no longer dispute the decision, the loss is settled.

STEP 10: For any denial of payment, in whole or in part, which you are disputing, three options remain:

- You may send an amended Proof of Loss with supporting documentation back to the claim examiner; see STEP 8.
- You may submit a formal Appeal to FEMA:
 - A written Appeal letter must be sent to FEMA within 60 days of your insurer's denial letter, along with a copy of the denial letter and the documentation you have to support your Appeal.
- You may file a lawsuit against your insurer:
 - A lawsuit must be filed within one year of your insurer's first written denial letter and only in U.S. District Court in the district where the property is located at the time of the loss.
 - However, once you file a lawsuit, you may no longer appeal your claim to FEMA or file an amended Proof of Loss with your insurers sign an adjusting firm who provides an adjuster to assist you with presenting the support for your loss.

E. Additional Considerations

Mold Clean Up: You are required to minimize the growth and spread of mold, to the extent possible. FEMA provides Guidelines regarding cleanup.⁹

⁹ https://www.fema.gov/media-library-data/1505845149598-2160c1c999ee817722d405868fe43398/NFIP_Policyholders_Must_Follow_Policy_Guidelines_For_Clean_up_FINAL_508_Sept_2017.pdf

Documenting your Damage: Proper documentation of the damage is very important for your flood insurance claim. It is best to discuss specific policy requirements with your agent, but or videos should be taken of appliances and receipts should be provided when possible. Additionally, physical samples of building materials such as carpeting and wallpaper should be saved.¹⁰

Flood Insurance vs. Disaster Assistance: Most federal disaster assistance is provided by way of low-interest disaster loans that must be paid back. A claim through your flood insurance policy could provide more funds than those you may qualify for under disaster assistance, and do not have to be paid back. Additionally, you can file a flood insurance claim even if there has not been a Presidential Disaster Declaration while such a declaration is needed for disaster assistance.¹¹ That being said, please note that when a Presidential Disaster Declaration has been granted, it is advisable to apply for disaster assistance to help pay for items that are not covered by your policy – such as temporary housing assistance.

XIV. Federal Tax Relief in Disasters

There are various forms of federal tax relief available to survivors of federally declared disasters. The first requirement for tax relief to be available is for a disaster or emergency to be designated as a federally declared disaster. 26 U.S.C. § 165 defines “federally declared disasters” as any disaster that the President of the United States subsequently determines warrants assistance by the Federal Government under the Robert T. Stafford Disaster Relief and Emergency Assistance Act. 26 U.S.C. § 165(h)(5)(A) (The Robert T. Stafford Disaster Relief and Emergency Assistance Act is codified at 42 U.S.C. 5121 et seq.). A “disaster area” is the area the President determined needs federal assistance. 26 U.S.C. § 165(h)(5)(B).

Once the federal government has issued a disaster declaration and FEMA identifies areas for its Individual Assistance Program, the designated disaster areas becomes an IRS Designated Disaster Area. If a disaster survivor lives in or maintains a principal place of business in the disaster area, the IRS will automatically grant that individual any relief offered if the address on record for that individual is in this area. IRS Disaster Assistance, <https://www.irsvideos.gov/Individual/DisasterInformation/IRSDisasterAssistance>. For this reason, it is important that individuals and practitioners ensure that the taxpayer’s address is current before a disaster strikes.

IRS computer systems automatically identify taxpayers located in covered disaster areas and apply automatic filing and payment relief. Affected taxpayers who reside or have a business outside the covered area, or who moved to the covered area after their last contact with IRS, must call the IRS Disaster Assistance Hotline at 1-866-562-5227

¹⁰ Id.

¹¹ https://www.fema.gov/media-library-data/20130726-1643-20490-9801/f_217_benefits_30nov2012_web.pdf

to self-identify as an affected taxpayer and request tax relief. Calls are only answered on weekdays from 7:00 a.m. to 7:00 p.m., local time.

Once there has been a federally declared disaster, the IRS issues Notices and News Releases on its website describing filing and payment deadline extensions and other tax relief for affected taxpayers, <https://www.irs.gov/newsroom/news-releases-for-current-month>. All applicable IRS notices and news releases should be read carefully to determine which deadlines are extended, for how long, and for which taxpayers. In some major disasters, the IRS has suspended certain types of collection actions, including liens, levies, and seizures. For all federally declared disasters, however, installment agreement payments are automatically suspended. Internal Revenue Serv., IRS Disaster Relief and Emergency Assistance Program at 5 (2017), <https://www.irs.gov/pub/irs-utl/irs-disaster-assistance-faqs-2017.pdf>.

In addition to checking the IRS Notices and News Releases website, advocates and survivors should use three other IRS webpages as starting points for their research. First, the IRS website has a section on disaster tax issues where it posts all of the latest information related to tax relief available to disaster survivors, <https://www.irs.gov/newsroom/tax-relief-in-disaster-situations>. This page provides a comprehensive set of FAQs for disaster survivors at <https://www.irs.gov/businesses/small-businesses-self-employed/faqs-for-disaster-victims>.

Second, the IRS also maintains a “Disaster Relief Resource Center for Tax Professionals” on its web page providing resources for advocates assisting disaster survivors with tax issues, <https://www.irs.gov/tax-professionals/disaster-relief-resource-center-for-tax-professionals>. Resources include guidance on procedures for practitioners in areas affected by a disaster who want to submit bulk requests on behalf of their clients for disaster relief, <https://www.irs.gov/tax-professionals/bulk-requests-from-practitioners-for-disaster-relief>.

Third, the IRS has published a general Resource Guide about its Disaster Assistance and Emergency Relief Program that includes FAQs and links to relevant IRS.gov resources, https://www.irs.gov/pub/irs-utl/irs_disaster_assistance_faqs_2017.pdf. This guide is a great tool and provides details on the process of a Disaster Declaration, various FEMA relief services, and the kinds of tax issues that can be expected to arise during or after a disaster. Tax issues that individuals and businesses may experience include filing tax returns that are due; making tax payments; and determining whether a casualty loss incurred from the disaster or emergency can be claimed on a tax return as a deduction. Id. at 2.

Generally, a disaster survivor must deduct a loss incurred as a result of a disaster in the year it occurred. However, in the case of losses incurred from a federally declared disaster area, disaster survivors have a choice of when to deduct the loss. Under 26 U.S.C. § 165(i), disaster survivors may elect to take any loss occurring in a disaster area and attributable to a federally declared disaster into account for the taxable year

immediately preceding the taxable year in which the disaster occurred. 26 U.S.C. § 165(i)(1). To do so, disaster survivors must file an amendment tax return for the preceding taxable year.

Disaster survivors may need quick access to prior year tax returns to file amendments to claim disaster losses in a prior year as allowed under 26 U.S.C. § 165(i), to prove business income for business interruption insurance claims, or for any number of other disaster-related exigencies. The IRS will waive the usual fees and expedite requests for copies of previously filed tax returns and tax return transcripts for affected taxpayers. Taxpayers should write the federally assigned disaster designation, such as “Texas, Hurricane Harvey” in red ink at the top of Form 4506, Request for Copy of Tax Return, or Form 4506-T, Request for Transcript of Tax Return, as appropriate, and submit it to the IRS. Other transcripts, such as account and wage and income transcripts, can be requested free of charge by calling 1-800-908-9946 or online at <http://www.irs.gov/Individuals/Order-a-Transcript>.

Taxpayers claiming disaster losses on amended tax returns to access immediate cash refunds should write the disaster designation in red across the top of Form 1040X to ensure the IRS applies expedited processing procedures. The average expedited processing time is sixty days. Taxpayers experiencing economic hardship should apply for a manual refund through the IRS taxpayer advocate service. A manual refund can generally be processed within one to two weeks. Apply by faxing a completed IRS Form 911 to your local taxpayer advocate office. In such a case, do not file the amended tax return by mail. Instead, attach it to the Form 911 so it can be manually input by the taxpayer advocate assigned to assist with the manual refund request. Visit www.irs.gov/taxpayer-advocate for more information.

Federally funded disaster relief may be taxable income. Under 26 U.S.C. § 139, qualified disaster relief payments are taxable income to disaster survivors if the reimbursed expense is (1) also paid by insurance or other reimbursement, and (2) has been deducted on a prior year tax return. 26 U.S.C. § 139(b). Qualified disaster relief payments include payments to reimburse reasonable and necessary personal, family, living, or funeral expenses incurred as a result of the disaster, reasonable and necessary expenses incurred for the repair or rehabilitation of a personal residence (even if rented), and expenses incurred to repair or replace contents of a personal residence.

Appendix B

Emergency Relief Agency Contact Information

A. FEMA & TOLL FREE TELEPHONE

Virginia is a part of the Federal Emergency Management Agency's Region 3, along with the District of Columbia, Delaware, Maryland, Pennsylvania, and West Virginia. The Region 3 Headquarters is located at:

Federal Emergency Management Agency

**615 Chestnut Street
One Independence Mall, 6th Floor
Philadelphia, Pennsylvania 19106-4404**

For immediate disaster assistance, dial 1-800-621-FEMA (3362).

B. Immediate Need for Supplies

If the people you are counseling have an immediate need for food, water, or shelter, please contact the American Red Cross at 1-800-RED-CROSS (1-800-733-2767). Or, please contact the United Way by dialing 2-1-1 from a landline phone.