

2004 SESSION

LEGISLATION NOT PREPARED BY DLS
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HOUSE BILL NO. 736

Offered January 14, 2004

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A BILL to amend and reenact §§ 38.2-2204 and 38.2-2206 of the Code of Virginia, relating to liability insurance on motor vehicles, aircraft and watercraft; standard provisions; "omnibus clause"; uninsured motorist insurance coverage.

Patron—Hargrove

Referred to Committee on Commerce and Labor

Be it enacted by the General Assembly of Virginia:

1. That §§ 38.2-2204 and 38.2-2206 of the Code of Virginia are amended and reenacted as follows:

§ 38.2-2204. Liability insurance on motor vehicles, aircraft and watercraft; standard provisions; "omnibus clause."

A. No policy or contract of bodily injury or property damage liability insurance, covering liability arising from the ownership, maintenance, or use of any motor vehicle, aircraft, or private pleasure watercraft, shall be issued or delivered in this Commonwealth to the owner of such vehicle, aircraft or watercraft, or shall be issued or delivered by any insurer licensed in this Commonwealth upon any motor vehicle, aircraft, or private pleasure watercraft that is principally garaged, docked, or used in this Commonwealth, unless the policy contains a provision insuring the named insured, and any other person using or responsible for the use of the motor vehicle, aircraft, or private pleasure watercraft with the expressed or implied consent of the named insured, against liability for death or injury sustained, or loss or damage incurred within the coverage of the policy or contract as a result of negligence in the operation or use of such vehicle, aircraft, or watercraft by the named insured or by any such person; however, nothing contained in this section shall be deemed to prohibit an insurer from limiting its liability under any one policy for bodily injury or property damage resulting from any one accident or occurrence to the liability limits for such coverage set forth in the policy for any such accident or occurrence regardless of the number of insureds under that policy. Each such policy or contract of liability insurance, or endorsement to the policy or contract, insuring private passenger automobiles, aircraft, or private pleasure watercraft principally garaged, docked, or used in this Commonwealth, that has as the named insured an individual or husband and wife and that includes, with respect to any liability insurance provided by the policy, contract or endorsement for use of a nonowned automobile, aircraft or private pleasure watercraft, any provision requiring permission or consent of the owner of such automobile, aircraft, or private pleasure watercraft for the insurance to apply, shall be construed to include permission or consent of the custodian in the provision requiring permission or consent of the owner.

B. Notwithstanding any requirements in this section to the contrary, an insurer may exclude any person from coverage under a personal umbrella or excess policy, if the exclusion is requested in writing by the first named insured and is acknowledged in writing by the excluded driver.

C. For aircraft liability insurance, such policy or contract may contain the exclusions listed in § 38.2-2227. Notwithstanding the provisions of this section or any other provisions of law, no policy or contract shall require pilot experience greater than that prescribed by the Federal Aviation Administration, except for pilots operating air taxis, or pilots operating aircraft applying chemicals, seed, or fertilizer.

D. No policy or contract of bodily injury or property damage liability insurance relating to the ownership, maintenance, or use of a motor vehicle shall be issued or delivered in this Commonwealth to the owner of such vehicle or shall be issued or delivered by an insurer licensed in this Commonwealth upon any motor vehicle principally garaged or used in this Commonwealth without an endorsement or provision insuring the named insured, and any other person using or responsible for the use of the motor vehicle with the expressed or implied consent of the named insured, against liability for death or injury sustained, or loss or damage incurred within the coverage of the policy or contract as a result of negligence in the operation or use of the motor vehicle by the named insured or by any other such person; however, nothing contained in this section shall be deemed to prohibit an insurer from excluding coverage for punitive damages or from limiting its liability under any one policy for bodily injury or property damage resulting from any one accident or occurrence to the liability limits for such coverage set forth in the policy for any such accident or occurrence regardless of the number of insureds under that policy. This provision shall apply notwithstanding the failure or refusal of the named insured or such other person to cooperate with the insurer under the terms of the policy. If the failure or refusal to

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HB736

59 cooperate prejudices the insurer in the defense of an action for damages arising from the operation or
60 use of such insured motor vehicle, then the endorsement or provision shall be void. If an insurer has
61 actual notice of a motion for judgment or complaint having been served on an insured, the mere failure
62 of the insured to turn the motion or complaint over to the insurer shall not be a defense to the insurer,
63 nor void the endorsement or provision, nor in any way relieve the insurer of its obligations to the
64 insured, provided the insured otherwise cooperates and in no way prejudices the insurer.

65 Where the insurer has elected to provide a defense to its insured under such circumstances and files
66 responsive pleadings in the name of its insured, the insured shall not be subject to sanctions for failure
67 to comply with discovery pursuant to Part Four of the Rules of the Supreme Court of Virginia unless it
68 can be shown that the suit papers actually reached the insured, and that the insurer has failed after
69 exercising due diligence to locate its insured, and as long as the insurer provides such information in
70 response to discovery as it can without the assistance of the insured.

71 E. Any endorsement, provision or rider attached to or included in any such policy of insurance which
72 purports or seeks to limit or reduce the coverage afforded by the provisions required by this section
73 shall be void, except an insurer may exclude such coverage as is afforded by this section, where such
74 coverage would inure to the benefit of the United States Government or any agency or subdivision
75 thereof under the provisions of the Federal Tort Claims Act, the Federal Drivers Act and Public Law
76 86-654 District of Columbia Employee Non-Liability Act, or to the benefit of the Commonwealth under
77 the provisions of the Virginia Tort Claims Act (§ 8.01-195.1 et seq.) and the self-insurance plan
78 established by the Department of General Services pursuant to § 2.2-1837 for any state employee who,
79 in the regular course of his employment, transports patients in his own personal vehicle.

80 § 38.2-2206. Uninsured motorist insurance coverage.

81 A. Except as provided in subsection J of this section, no policy or contract of bodily injury or
82 property damage liability insurance relating to the ownership, maintenance, or use of a motor vehicle
83 shall be issued or delivered in this Commonwealth to the owner of such vehicle or shall be issued or
84 delivered by any insurer licensed in this Commonwealth upon any motor vehicle principally garaged or
85 used in this Commonwealth unless it contains an endorsement or provisions undertaking to pay the
86 insured all sums that he is legally entitled to recover as damages, *excluding punitive damages*, from the
87 owner or operator of an uninsured motor vehicle, within limits not less than the requirements of
88 § 46.2-472. Those limits shall equal but not exceed the limits of the liability insurance provided by the
89 policy, unless any one named insured rejects the additional uninsured motorist insurance coverage by
90 notifying the insurer as provided in subsection B of § 38.2-2202. This rejection of the additional
91 uninsured motorist insurance coverage by any one named insured shall be binding upon all insureds
92 under such policy as defined in subsection B of this section. The endorsement or provisions shall also
93 obligate the insurer to make payment for bodily injury or property damage caused by the operation or
94 use of an underinsured motor vehicle to the extent the vehicle is underinsured, as defined in subsection
95 B of this section. The endorsement or provisions shall also provide for at least \$20,000 coverage for
96 damage or destruction of the property of the insured in any one accident but may provide an exclusion
97 of the first \$200 of the loss or damage where the loss or damage is a result of any one accident
98 involving an unidentifiable owner or operator of an uninsured motor vehicle.

99 B. As used in this section, the term "bodily injury" includes death resulting from bodily injury.

100 "Insured" as used in subsections A, D, G, and H of this section means the named insured and, while
101 resident of the same household, the spouse of the named insured, and relatives, wards or foster children
102 of either, while in a motor vehicle or otherwise, and any person who uses the motor vehicle to which
103 the policy applies, with the expressed or implied consent of the named insured, and a guest in the motor
104 vehicle to which the policy applies or the personal representative of any of the above.

105 "Uninsured motor vehicle" means a motor vehicle for which (i) there is no bodily injury liability
106 insurance and property damage liability insurance in the amounts specified by § 46.2-472, (ii) there is
107 such insurance but the insurer writing the insurance denies coverage for any reason whatsoever,
108 including failure or refusal of the insured to cooperate with the insurer, (iii) there is no bond or deposit
109 of money or securities in lieu of such insurance, (iv) the owner of the motor vehicle has not qualified as
110 a self-insurer under the provisions of § 46.2-368, or (v) the owner or operator of the motor vehicle is
111 immune from liability for negligence under the laws of the Commonwealth or the United States, in
112 which case the provisions of subsection F shall apply and the action shall continue against the insurer. A
113 motor vehicle shall be deemed uninsured if its owner or operator is unknown.

114 A motor vehicle is "underinsured" when, and to the extent that, the total amount of bodily injury and
115 property damage coverage applicable to the operation or use of the motor vehicle and available for
116 payment for such bodily injury or property damage, including all bonds or deposits of money or
117 securities made pursuant to Article 15 (§ 46.2-435 et seq.) of Chapter 3 of Title 46.2, is less than the
118 total amount of uninsured motorist coverage afforded any person injured as a result of the operation or
119 use of the vehicle.

120 "Available for payment" means the amount of liability insurance coverage applicable to the claim of

the injured person for bodily injury or property damage reduced by the payment of any other claims arising out of the same occurrence.

If an injured person is entitled to underinsured motorist coverage under more than one policy, the following order of priority of policies applies and any amount available for payment shall be credited against such policies in the following order of priority:

1. The policy covering a motor vehicle occupied by the injured person at the time of the accident;
2. The policy covering a motor vehicle not involved in the accident under which the injured person is a named insured;
3. The policy covering a motor vehicle not involved in the accident under which the injured person is an insured other than a named insured.

Where there is more than one insurer providing coverage under one of the payment priorities set forth, their liability shall be proportioned as to their respective underinsured motorist coverages.

Recovery under the endorsement or provisions shall be subject to the conditions set forth in this section.

C. There shall be a rebuttable presumption that a motor vehicle is uninsured if the Commissioner of the Department of Motor Vehicles certifies that, from the records of the Department of Motor Vehicles, it appears that: (i) there is no bodily injury liability insurance and property damage liability insurance in the amounts specified by § 46.2-472 covering the owner or operator of the motor vehicle; or (ii) no bond has been given or cash or securities delivered in lieu of the insurance; or (iii) the owner or operator of the motor vehicle has not qualified as a self-insurer in accordance with the provisions of § 46.2-368.

D. If the owner or operator of any motor vehicle that causes bodily injury or property damage to the insured is unknown, and if the damage or injury results from an accident where there has been no contact between that motor vehicle and the motor vehicle occupied by the insured, or where there has been no contact with the person of the insured if the insured was not occupying a motor vehicle, then for the insured to recover under the endorsement required by subsection A of this section, the accident shall be reported promptly to either (i) the insurer or (ii) a law-enforcement officer having jurisdiction in the county or city in which the accident occurred. If it is not reasonably practicable to make the report promptly, the report shall be made as soon as reasonably practicable under the circumstances.

E. If the owner or operator of any vehicle causing injury or damages is unknown, an action may be instituted against the unknown defendant as "John Doe" and service of process may be made by delivering a copy of the motion for judgment or other pleadings to the clerk of the court in which the action is brought. Service upon the insurer issuing the policy shall be made as prescribed by law as though the insurer were a party defendant. The provisions of § 8.01-288 shall not be applicable to the service of process required in this subsection. The insurer shall have the right to file pleadings and take other action allowable by law in the name of John Doe.

F. If any action is instituted against the owner or operator of an uninsured or underinsured motor vehicle by any insured intending to rely on the uninsured or underinsured coverage provision or endorsement of this policy under which the insured is making a claim, then the insured shall serve a copy of the process upon this insurer in the manner prescribed by law, as though the insurer were a party defendant. The provisions of § 8.01-288 shall not be applicable to the service of process required in this subsection. The insurer shall then have the right to file pleadings and take other action allowable by law in the name of the owner or operator of the uninsured or underinsured motor vehicle or in its own name. Notwithstanding the provisions of subsection A, the immunity from liability for negligence of the owner or operator of a motor vehicle shall not be a bar to the insured obtaining a judgment enforceable against the insurer for the negligence of the immune owner or operator, and shall not be a defense available to the insurer to the action brought by the insured, which shall proceed against the named defendant although any judgment obtained against an immune defendant shall be entered in the name of "Immune Defendant" and shall be enforceable against the insurer and any other nonimmune defendant as though it were entered in the actual name of the named immune defendant. Nothing in this subsection shall prevent the owner or operator of the uninsured motor vehicle from employing counsel of his own choice and taking any action in his own interest in connection with the proceeding.

G. Any insurer paying a claim under the endorsement or provisions required by subsection A of this section shall be subrogated to the rights of the insured to whom the claim was paid against the person causing the injury, death, or damage and that person's insurer, although it may deny coverage for any reason, to the extent that payment was made. The bringing of an action against the unknown owner or operator as John Doe or the conclusion of such an action shall not bar the insured from bringing an action against the owner or operator proceeded against as John Doe, or against the owner's or operator's insurer denying coverage for any reason, if the identity of the owner or operator who caused the injury or damages becomes known. The bringing of an action against an unknown owner or operator as John Doe shall toll the statute of limitations for purposes of bringing an action against the owner or operator

182 who caused the injury or damages until his identity becomes known. In no event shall an action be
183 brought against an owner or operator who caused the injury or damages, previously filed against as John
184 Doe, more than three years from the commencement of the action against the unknown owner or
185 operator as John Doe in a court of competent jurisdiction. Any recovery against the owner or operator,
186 or the insurer of the owner or operator shall be paid to the insurer of the injured party to the extent that
187 the insurer paid the named insured in the action brought against the owner or operator as John Doe.
188 However, the insurer shall pay its proportionate part of all reasonable costs and expenses incurred in
189 connection with the action, including reasonable attorney's fees. Nothing in an endorsement or provisions
190 made under this subsection nor any other provision of law shall prevent the joining in an action against
191 John Doe of the owner or operator of the motor vehicle causing the injury as a party defendant, and the
192 joinder is hereby specifically authorized. No action, verdict or release arising out of a suit brought under
193 this subsection shall give rise to any defenses in any other action brought in the subrogated party's
194 name, including res judicata and collateral estoppel.

195 H. No endorsement or provisions providing the coverage required by subsection A of this section
196 shall require arbitration of any claim arising under the endorsement or provisions, nor may anything be
197 required of the insured except the establishment of legal liability, nor shall the insured be restricted or
198 prevented in any manner from employing legal counsel or instituting legal proceedings.

199 I. Except as provided in § 65.2-309.1, the provisions of subsections A and B of § 38.2-2204 and the
200 provisions of subsection A of this section shall not apply to any policy of insurance to the extent that it
201 covers the liability of an employer under any workers' compensation law, or to the extent that it covers
202 liability to which the Federal Tort Claims Act applies. No provision or application of this section shall
203 limit the liability of an insurer of motor vehicles to an employee or other insured under this section who
204 is injured by an uninsured motor vehicle; provided that in the event an employee of a self-insured
205 employer receives a workers' compensation award for injuries resulting from an accident with an
206 uninsured motor vehicle, such award shall be set off against any judgment for damages awarded
207 pursuant to this section for personal injuries resulting from such accident.

208 J. Policies of insurance whose primary purpose is to provide coverage in excess of other valid and
209 collectible insurance or qualified self-insurance may include uninsured motorist coverage as provided in
210 subsection A of this section. Insurers issuing or providing liability policies that are of an excess or
211 umbrella type or which provide liability coverage incidental to a policy and not related to a specifically
212 insured motor vehicle, shall not be required to offer, provide or make available to those policies
213 uninsured or underinsured motor vehicle coverage as defined in subsection A of this section.

214 K. A liability insurance carrier providing coverage under a policy issued or renewed on or after July
215 1, 1988, may pay the entire amount of its available coverage without obtaining a release of a claim if
216 the claimant has underinsured insurance coverage in excess of the amount so paid. Any liability insurer
217 making a payment pursuant to this section shall promptly give notice to its insured and to the insurer
218 which provides the underinsured coverage that it has paid the full amount of its available coverage.