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SENATE BILL NO. 1190

AMENDMENT IN THE NATURE OF A SUBSTITUTE

(Proposed by the Joint Conference Committee
on February 25, 2015)

(Patron Prior to Substitute—Senator Norment)

A *BILL to amend and reenact § 38.2-2206 of the Code of Virginia and to amend the Code of Virginia by adding in Article 7 of Chapter 3 of Title 8.01 a section numbered 8.01-66.1:1, relating to motor vehicle accidents; settlement of underinsured motorist claims; subrogation claims by underinsured motorist benefits insurer.*

Be it enacted by the General Assembly of Virginia:

1. That § 38.2-2206 of the Code of Virginia is amended and reenacted and that the Code of Virginia is amended by adding in Article 7 of Chapter 3 of Title 8.01 a section numbered 8.01-66.1:1 as follows:

§ 8.01-66.1:1. Subrogation claims by underinsured motorist benefits insurer.

A. Any underinsured motorist benefits insurer paying such benefits to an insured, by way of settlement or payment pursuant to a judgment, shall have no right of subrogation against any individual or entity who settled with the underinsured motorist benefits insurer's insured pursuant to subsection K of § 38.2-2206 unless the underinsured motorist failed to reasonably cooperate in the defense of any lawsuit brought against him. An underinsured motorist shall be presumed to have failed to reasonably cooperate if he fails or refuses:

1. To attend his deposition or trial if subpoenaed to appear at least 21 days in advance of either event;

2. To assist in responding to written discovery;

3. To meet with defense counsel for a reasonable period of time after reasonable notice, by phone or in person, within 21 days of being served with any lawsuit and again prior to his deposition and trial; or

4. To notify counsel for the underinsured motorist benefits insurer of any change in address.

The underinsured motorist may rebut the presumption that he failed to reasonably cooperate. If the court finds that the underinsured motorist's failure to cooperate was not unreasonable or that the underinsured motorist otherwise acted in good faith in attempting to comply with his duty to reasonably cooperate with the underinsured motorist benefits insurer, then the underinsured motorist benefits insurer will not regain its right of subrogation.

B. The underinsured motorist benefits insurer seeking the cooperation of the underinsured motorist shall pay the reasonable costs and expenses related to procuring such cooperation, including any travel costs if the underinsured motorist resides more than 100 miles from the location of his deposition or trial. Travel costs may be considered by the court in determining whether the underinsured motorist's failure to cooperate was unreasonable or not.

C. If the court finds that the underinsured motorist satisfied his duty to cooperate with the underinsured motorist benefits insurer or that his failure to do so was not unreasonable, then the court may award him his costs in defending such subrogation action, including reasonable attorney fees.

§ 38.2-2206. Uninsured motorist insurance coverage.

A. Except as provided in subsection J of this section, 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 any insurer licensed in this Commonwealth upon any motor vehicle principally garaged or used in this Commonwealth unless it contains an endorsement or provisions undertaking to pay the insured all sums that he is legally entitled to recover as damages from the owner or operator of an uninsured motor vehicle, within limits not less than the requirements of § 46.2-472. Those limits shall equal but not exceed the limits of the liability insurance provided by the policy, unless any one named insured rejects the additional uninsured motorist insurance coverage by notifying the insurer as provided in subsection B of § 38.2-2202. This rejection of the additional uninsured motorist insurance coverage by any one named insured shall be binding upon all insureds under such policy as defined in subsection B of this section. The endorsement or provisions shall also obligate the insurer to make payment for bodily injury or property damage caused by the operation or use of an underinsured motor vehicle to the extent the vehicle is underinsured, as defined in subsection B of this section. The endorsement or provisions shall also provide for at least \$20,000 coverage for damage or destruction of the property of the insured in any one accident but may provide an exclusion of the first \$200 of the loss or damage where the loss or damage is a result of any one accident involving an unidentifiable owner or operator of an uninsured motor vehicle.

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

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

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

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

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

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

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

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

K. ~~A liability insurance carrier providing coverage under a policy issued or renewed on or after July 1, 1988, may pay the entire amount of its available coverage without obtaining a release of a claim if the claimant has underinsured insurance coverage in excess of the amount so paid. Any liability insurer making a payment pursuant to this section shall promptly give notice to its insured and to the insurer which provides the underinsured coverage that it has paid the full amount of its available coverage. An injured person, or in the case of death or disability his personal representative, may settle a claim with (i) a liability insurer or insurers, including any insurer providing liability coverage through an excess or umbrella insurance policy or contract and (ii) the liability insurer's or insurers' insured for the available~~

limits of the liability insurer's coverage. Upon settlement with the liability insurer or insurers, the injured party or personal representative shall proceed to execute a full release in favor of the underinsured motorist's liability insurer and its insured and finalize the proposed settlement without prejudice to any underinsured motorist benefits or claim. Upon payment of the liability insurer's available limits to the injured person or personal representative or his attorney, the liability insurer shall thereafter have no further duties to its insured, including the duty to defend its insured if an action has been or is brought against the liability insurer's insured, and the insurer providing applicable underinsured motorist coverage shall have no right of subrogation or claim against the underinsured motorist. However, if the underinsured motorist unreasonably fails to cooperate with the underinsured motorist benefits insurer in the defense of any lawsuit brought by the injured person or his personal representative, he may again be subjected to a claim for subrogation by the underinsured motorist benefits insurer pursuant to § 8.01-66.1:1. This section provides an alternative means by which the parties may resolve claims and does not eliminate or restrict any other available means.

L. If the liability insurer or insurers providing coverage to an underinsured motor vehicle owner or operator make an irrevocable offer in writing, which may be contingent upon waiver of subrogation, to pay the total amount of liability coverage available for payment with reference to a claim for property damage or bodily injury, 60 days following written notice of the offer to any insurer or insurers providing underinsured coverage that have been served pursuant to this section, the insurer or insurers providing liability coverage shall be relieved of the cost of defending the owner or operator incurred thereafter, including expenses as well as reasonable and necessary attorney fees, and the insurer or insurers providing the underinsured motorist coverage shall reimburse the liability insurer or insurers for the costs to defend the underinsured motor vehicle owner or operator to the date of the underinsured motorist insurer's offer of its limit of coverage. The liability insurer or insurers shall nonetheless retain the duty to defend their insured. If underinsured motorist coverage is provided by more than one insurer, the cost to defend shall be assumed in the same order of priority as set forth in subsection B with regard to the payment of underinsured benefits upon the offer of each underinsured motorist insurer's limit of coverage. This subsection, including the liability insurer's irrevocable offer and the underinsured insurer's liability for defense costs, shall not apply in the event of either a jury verdict being returned in an amount equal to or less than the total liability coverage available for payment or a dispositive ruling dismissing the plaintiff's complaint, including but not limited to the plaintiff taking a voluntary nonsuit. This subsection shall not apply to costs incurred in connection with an appeal. Any settlement between the injured person or his personal representative, any insurer providing liability coverage applicable to the claim, and the underinsured motorist described in subsection K shall be in writing, signed by both the injured person or his personal representative and the underinsured motorist, and shall include the following notice to the underinsured motorist, which must be initiated by the underinsured motorist:

"NOTICE TO RELEASED PARTY: Your insurance company has agreed to pay the available limits of its insurance to settle certain claims on your behalf. This settlement secures a full release of you for all claims the claimant/plaintiff has against you arising out of the subject accident, as well as ensures that no judgment can ever be entered against you by the claimant/plaintiff. In order to protect yourself from subrogation by any underinsured motorist insurer, you are agreeing to cooperate with the underinsured motorist benefits insurer(s).

Under this manner of settlement, the underinsured motorist benefits insurer(s) that is/are involved in this case has/have no right of subrogation against you unless you fail to reasonably cooperate in its/their defense of the claim by not (i) attending your deposition and trial, if subpoenaed, (ii) assisting in responding to discovery, (iii) meeting with defense counsel at reasonable times after commencement of this suit and before your testimony at a deposition and/or trial, and (iv) notifying defense counsel of any change in your address.

Upon payment of the agreed settlement amount by your insurance company(ies), such company shall no longer owe you any duties, including the duty to hire and pay for an attorney for you. You are not required to consent to settlement in this manner. If you do not consent to settlement in this manner, your insurance company will still defend you in any lawsuit brought against you by the claimant/plaintiff, but you will not have the protections of a full release from the claimant/plaintiff, judgment could be entered against you and may exceed your available insurance coverage, and any underinsured motorist benefits insurer would have a right of subrogation against you to recover any moneys it pays to the claimant/plaintiff.

You are encouraged to discuss your rights and obligations related to settlement in this manner with your insurance company and/or an attorney. By signing this document, you agree to consent to this settlement and to reasonably cooperate with the underinsured motorist benefits insurer in the defense of any lawsuit brought by the claimant/plaintiff.

_____(initial)"

In the alternative, the liability insurer may send the notice to the released party by certified mail return receipt requested to the underinsured motorist at his last known address.

M. Any action brought by the injured person or his personal representative to recover underinsured motorist benefits after payment of the liability insurer's available limits pursuant to subsection K shall be brought against the released defendant or defendants, and a copy of the complaint shall be served on any insurer providing underinsured motorist benefits. If an action is pending at the time the liability insurer's available limits are paid to the injured person or personal representative or his attorney, then the action shall remain pending against the named defendant or defendants who have been released. If such action results in a verdict in favor of the injured person or his personal representative against a released defendant, then judgment as to that defendant shall be entered in the name of "Released Defendant" and shall be enforceable against the underinsured motorist benefits insurer or insurers, not to exceed the underinsured motorist benefits limits, and against any unreleased defendant, as though it were entered in the actual name of the released defendant.

N. Any proposed settlement between a liability insurer and a person under a disability or a personal representative as permitted in subsection K that compromises in part a claim for personal injuries by the person under a disability or for death by wrongful act pursuant to § 8.01-50 may be, but is not required to be, approved pursuant to § 8.01-424 or 8.01-55, as applicable. If the personal representative elects not to have the settlement with the liability insurer approved pursuant to § 8.01-55, then any payment made to the personal representative by the liability insurer shall be made payable to the personal representative's attorney, to be held in trust, or paid into the court pursuant to § 8.01-600 if the personal representative is not represented by an attorney, with no disbursements made therefrom until the compromise is approved by the court pursuant to § 8.01-55. Approval by the court of a settlement between the liability insurer and a person under a disability or the personal representative pursuant to this subsection shall not prejudice the person's or personal representative's claim for underinsured motorist benefits.

2. That the provisions of this act shall apply to policies issued or renewed on or after January 1, 2016.