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SENATE BILL NO. 27

Offered January 8, 2020

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A BILL to amend and reenact §§ 8.01-66.1 and 38.2-2206 of the Code of Virginia, relating to uninsured and underinsured motorist insurance policies; bad faith.

Patrons—Petersen; Delegate: Samirah

Referred to Committee on Commerce and Labor

Be it enacted by the General Assembly of Virginia:

1. That §§ 8.01-66.1 and 38.2-2206 of the Code of Virginia are amended and reenacted as follows:

§ 8.01-66.1. Remedy for arbitrary refusal of motor vehicle insurance claim.

A. Whenever any insurance company licensed in this Commonwealth to write insurance as defined in § 38.2-124 denies, refuses, or fails to pay to its insured a claim of \$3,500 or less in excess of the deductible, if any, under the provisions of a policy of motor vehicle insurance issued by such company to the insured and it is subsequently found by the judge of a court of proper jurisdiction that such denial, refusal, or failure to pay was not made in good faith, the company shall be liable to the insured in an amount double the amount otherwise due and payable under the provisions of the insured's policy of motor vehicle insurance, together with reasonable attorney's attorney fees and expenses.

The provisions of this subsection shall be construed to include an insurance company's refusal or failure to pay medical expenses to persons covered under the terms of any medical payments coverage extended under a policy of motor vehicle insurance, when the amount of the claim therefor is \$3,500 or less and the refusal was not made in good faith.

B. Notwithstanding the provisions of subsection A, whenever any insurance company licensed in this Commonwealth to write insurance as defined in § 38.2-124 denies, refuses, or fails to pay to a third party claimant, on behalf of an insured to whom such company has issued a policy of motor vehicle liability insurance, a claim of \$3,500 or less made by such third party claimant and if the judge of a court of proper jurisdiction finds that the insured is liable for the claim, the third party claimant shall have a cause of action against the insurance company. If the judge finds that such denial, refusal, or failure to pay was not made in good faith, the company, in addition to the liability assumed by the company under the provisions of the insured's policy of motor vehicle liability insurance, shall be liable to the third party claimant in an amount double the amount of the judgment awarded the third party claimant, together with reasonable attorney's attorney fees and expenses.

C. Notwithstanding the provisions of subsections A and B whenever any person who has paid a fee to the Department of Motor Vehicles to register an uninsured motor vehicle pursuant to § 46.2-706 or any person who has furnished proof of financial responsibility in lieu of obtaining a policy or policies of motor vehicle liability insurance pursuant to the provisions of Title 46.2 or any person who is required and has failed either to pay such fee or to furnish such proof pursuant to the provisions of Title 46.2 denies, refuses, or fails to pay to a claimant a claim of \$3,500 or less made by such claimant as a result of a motor vehicle accident; and if the trial judge of a court of proper jurisdiction finds that such denial, refusal, or failure to pay was not made in good faith, such person shall be liable to the claimant in an amount double the amount otherwise due and payable together with reasonable attorney's attorney fees and expenses.

For the purposes of this subsection C, "person" shall mean means and include includes any natural person, firm, partnership, association, or corporation.

D. 1. Whenever a court of proper jurisdiction finds that an insurance company licensed in this Commonwealth to write insurance as defined in § 38.2-124 denies, refuses, or fails to pay to its insured a claim of more than \$3,500 in excess of the deductible, if any, under the provisions of a policy of motor vehicle insurance issued by such company to the insured and it is subsequently found by the judge of a court of proper jurisdiction that such denial, refusal, or failure to pay was not made in good faith, the company shall be liable to the insured in the amount otherwise due and payable under the provisions of the insured's policy of motor vehicle insurance, plus interest on the amount due at double the rate provided in § 6.2-301 from the date that the claim was submitted to the insurer or its authorized agent, together with reasonable attorney's attorney fees and expenses.

2. The provisions of this subsection shall be construed to include an insurance company's refusal or failure to pay medical expenses to persons covered under the terms of any medical payments coverage extended under a policy of motor vehicle insurance when the refusal was not made in good faith.

E. Whenever any insurance company licensed in the Commonwealth to write insurance as defined in

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§ 38.2-124 (i) denies, refuses, or fails to pay to its insured or (ii) refuses a reasonable settlement demand within the policy's coverage limits for a claim for uninsured or underinsured motorist benefits within a reasonable time after being presented with a demand for such benefits under the provisions of a policy of motor vehicle insurance issued by such company to the insured, and it is subsequently found by the judge of a court of proper jurisdiction that such denial, refusal, or failure to timely pay or failure to make a timely and reasonable settlement offer was not made in good faith, the insurance company shall be liable to the insured for the full amount of the judgment, together with reasonable attorney fees, expenses, and interest from the date the initial settlement demand was presented to the insurance company. The insured or person included within the policy's coverage may seek adjudication respecting the company's conduct as a post-trial motion in litigation against the uninsured or underinsured motorist or as a separate action against the company.

§ 38.2-2206. Uninsured motorist insurance coverage.

A. Except as provided in subsection J, 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. 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. 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.

For the purpose of making a determination under subsection E of § 8.01-66.1 as to whether an insurer did not act in good faith, the term "legally entitled to recover" means the point at which the insurer knows or should have known that the uninsured or underinsured motorist is potentially liable to the insured.

B. As used in this section:

"Bodily injury" includes death resulting from bodily injury.

"Insured" as used in subsections A, D, G, and H, 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;

121 2. The policy covering a motor vehicle not involved in the accident under which the injured person
122 is a named insured;

123 3. The policy covering a motor vehicle not involved in the accident under which the injured person
124 is an insured other than a named insured.

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

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

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

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

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

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

166 G. Any insurer paying a claim under the endorsement or provisions required by subsection A shall
167 be subrogated to the rights of the insured to whom the claim was paid against the person causing the
168 injury, death, or damage and that person's insurer, although it may deny coverage for any reason, to the
169 extent that payment was made. The bringing of an action against the unknown owner or operator as
170 John Doe or the conclusion of such an action shall not bar the insured from bringing an action against
171 the owner or operator proceeded against as John Doe, or against the owner's or operator's insurer
172 denying coverage for any reason, if the identity of the owner or operator who caused the injury or
173 damages becomes known. The bringing of an action against an unknown owner or operator as John Doe
174 shall toll the statute of limitations for purposes of bringing an action against the owner or operator who
175 caused the injury or damages until his identity becomes known. In no event shall an action be brought
176 against an owner or operator who caused the injury or damages, previously filed against as John Doe,
177 more than three years from the commencement of the action against the unknown owner or operator as
178 John Doe in a court of competent jurisdiction. Any recovery against the owner or operator, or the
179 insurer of the owner or operator shall be paid to the insurer of the injured party to the extent that the
180 insurer paid the named insured in the action brought against the owner or operator as John Doe.
181 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 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 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. 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.

K. An injured person, or in the case of death or disability his personal representative, may settle a claim with (i) a liability insurer, including any insurer providing liability coverage through an excess or umbrella insurance policy or contract and (ii) the liability insurer's insured for the available limits of the liability insurer's coverage. Upon settlement with the liability insurer, 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. Any such release that states that it is being executed pursuant to or consistent with this subsection shall not operate to release any parties other than the liability insurer and underinsured motorist, regardless of the identities of the released parties set forth in the release, and any terms contained in the release that are inconsistent with, or in violation of, this section are null and void. 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. Nothing in this section or § 8.01-66.1:1 shall create any duty on the part of any underinsured motorist benefits insurer to defend any underinsured motorist. No attorney-client relationship is created between the underinsured motorist and counsel for the underinsured motorist benefits insurer without the express intent and agreement of the underinsured motorist, the underinsured motorist benefits insurer, and counsel for the underinsured motorist benefits insurer. This section provides an alternative means by which the parties may resolve claims and does not eliminate or restrict any other available means.

L. 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 initialed 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). The underinsured motorist benefits insurer is not your insurer and has no duty to defend you.

Under this manner of settlement, the underinsured motorist benefits insurer(s) that is/are involved in

244 this case has/have no right of subrogation against you unless you fail to reasonably cooperate in its/their
245 defense of the claim by not (i) attending your deposition and trial, if subpoenaed, (ii) assisting in
246 responding to discovery, (iii) meeting with defense counsel at reasonable times after commencement of
247 this suit and before your testimony at a deposition and/or trial, and (iv) notifying the underinsured
248 motorist benefits insurer or its defense counsel of any change in your address, provided that the
249 underinsured motorist benefits insurer or its defense counsel has notified you of its existence and
250 provided you with their contact information.

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

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

263 _____ (initial)"

264 In the alternative to having the underinsured motorist sign the release and initial the notice, the
265 liability insurer may send the notice and release to the underinsured motorist by certified mail return
266 receipt requested to his last known address, which will be deemed to have satisfied the requirements of
267 this subsection.

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

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