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## SENATE BILL NO. 1195

Offered January 13, 2021

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*A BILL to amend and reenact § 38.2-2206 of the Code of Virginia, relating to motor vehicle insurance; underinsured motor vehicle.*

Patrons—Obenshain and Surovell

Referred to Committee on Commerce and Labor

**Be it enacted by the General Assembly of Virginia:**

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

**§ 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.

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~~ *insufficient to fully compensate* 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;

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

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

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

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

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

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

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

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

104 G. Any insurer paying a claim under the endorsement or provisions required by subsection A shall  
105 be subrogated to the rights of the insured to whom the claim was paid against the person causing the  
106 injury, death, or damage and that person's insurer, although it may deny coverage for any reason, to the  
107 extent that payment was made. The bringing of an action against the unknown owner or operator as  
108 John Doe or the conclusion of such an action shall not bar the insured from bringing an action against  
109 the owner or operator proceeded against as John Doe, or against the owner's or operator's insurer  
110 denying coverage for any reason, if the identity of the owner or operator who caused the injury or  
111 damages becomes known. The bringing of an action against an unknown owner or operator as John Doe  
112 shall toll the statute of limitations for purposes of bringing an action against the owner or operator who  
113 caused the injury or damages until his identity becomes known. In no event shall an action be brought  
114 against an owner or operator who caused the injury or damages, previously filed against as John Doe,  
115 more than three years from the commencement of the action against the unknown owner or operator as  
116 John Doe in a court of competent jurisdiction. Any recovery against the owner or operator, or the  
117 insurer of the owner or operator shall be paid to the insurer of the injured party to the extent that the  
118 insurer paid the named insured in the action brought against the owner or operator as John Doe.  
119 However, the insurer shall pay its proportionate part of all reasonable costs and expenses incurred in  
120 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

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

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

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

201 \_\_\_\_\_ (initial)"

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

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

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