

VIRGINIA ACTS OF ASSEMBLY — CHAPTER

An Act to amend and reenact § 38.2-2206 of the Code of Virginia and to amend the Code of Virginia by adding a section numbered 65.2-309.1, relating to workers' compensation; uninsured or underinsured motorist coverage; subrogation.

[S 576]

Approved

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 a section numbered 65.2-309.1 as follows:

§ 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 § 46.2-100. Those limits shall equal but not exceed the limits of the liability insurance provided by the policy, unless the insured rejects the additional uninsured motorist insurance coverage by notifying the insurer as provided in subsection B of § 38.2-2202. 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 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 § 46.2-100, (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, or (iv) the owner of the motor vehicle has not qualified as a self-insurer under the provisions of § 46.2-368. 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

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58 forth, their liability shall be proportioned as to their respective underinsured motorist coverages.

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

61 C. There shall be a rebuttable presumption that a motor vehicle is uninsured if the Commissioner of
62 the Department of Motor Vehicles certifies that, from the records of the Department of Motor Vehicles,
63 it appears that: (i) there is no bodily injury liability insurance and property damage liability insurance in
64 the amounts specified by § 46.2-100 covering the owner or operator of the motor vehicle; or (ii) no
65 bond has been given or cash or securities delivered in lieu of the insurance; or (iii) the owner or
66 operator of the motor vehicle has not qualified as a self-insurer in accordance with the provisions of
67 § 46.2-368.

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

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

83 F. If any action is instituted against the owner or operator of an uninsured or underinsured motor
84 vehicle by any insured intending to rely on the uninsured or underinsured coverage provision or
85 endorsement of this policy under which the insured is making a claim, then the insured shall serve a
86 copy of the process upon this insurer in the manner prescribed by law, as though the insurer were a
87 party defendant. The provisions of § 8.01-288 shall not be applicable to the service of process required
88 in this subsection. The insurer shall then have the right to file pleadings and take other action allowable
89 by law in the name of the owner or operator of the uninsured or underinsured motor vehicle or in its
90 own name. Nothing in this subsection shall prevent the owner or operator of the uninsured motor
91 vehicle from employing counsel of his own choice and taking any action in his own interest in
92 connection with the proceeding.

93 G. Any insurer paying a claim under the endorsement or provisions required by subsection A of this
94 section shall be subrogated to the rights of the insured to whom the claim was paid against the person
95 causing the injury, death, or damage and that person's insurer, although it may deny coverage for any
96 reason, to the extent that payment was made. The bringing of an action against the unknown owner or
97 operator as John Doe or the conclusion of such an action shall not bar the insured from bringing an
98 action against the owner or operator proceeded against as John Doe, or against the owner's or operator's
99 insurer denying coverage for any reason, if the identity of the owner or operator who caused the injury
100 or damages becomes known. Any recovery against the owner or operator, or the insurer of the owner or
101 operator shall be paid to the insurer of the injured party to the extent that the insurer paid the named
102 insured in the action brought against the owner or operator as John Doe. However, the insurer shall pay
103 its proportionate part of all reasonable costs and expenses incurred in connection with the action,
104 including reasonable attorney's fees. Nothing in an endorsement or provisions made under this subsection
105 nor any other provision of law shall prevent the joining in an action against John Doe of the owner or
106 operator of the motor vehicle causing the injury as a party defendant, and the joinder is hereby
107 specifically authorized.

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

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

119 uninsured motor vehicle, such award shall be set off against any judgment for damages awarded
120 pursuant to this section for personal injuries resulting from such accident.

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

127 K. A liability insurance carrier providing coverage under a policy issued or renewed on or after July
128 1, 1988, may pay the entire amount of its available coverage without obtaining a release of a claim if
129 the claimant has underinsured insurance coverage in excess of the amount so paid. Any liability insurer
130 making a payment pursuant to this section shall promptly give notice to its insured and to the insurer
131 which provides the underinsured coverage that it has paid the full amount of its available coverage.

132 § 65.2-309.1. Subrogation of employer to employee's rights to recover uninsured or underinsured
133 motorist benefits pursuant to insurance coverage carried by and at the expense of employer.

134 A. A claim against an employer under this title for injury or death benefits shall create a right of
135 subrogation on behalf of the employer against proceeds recovered by the injured employee pursuant to
136 the uninsured or underinsured motorist provisions of a policy of motor vehicle insurance carried by and
137 at the expense of the employer. In any action by an employee against any person other than the
138 employer, the court shall, on petition or motion of the employer at any time prior to verdict, ascertain
139 the amount of compensation paid and expenses for medical, surgical and hospital attention and supplies,
140 and funeral expenses incurred by the employer under the provisions of this title and deduct therefrom a
141 proportionate share of such amounts as are paid by the plaintiff for reasonable expenses and attorney's
142 fees as provided in § 65.2-311; and, in the event of judgment against such person other than the
143 employer, the court shall, in its order, require that the judgment debtor pay such compensation and
144 expenses of the employer, less said share of expenses and attorney's fees, so ascertained by the court
145 out of the amount of the judgment, so far as sufficient, and the balance, if any, to the judgment creditor.

146 B. Notwithstanding the provisions of § 38.2-2206, in any action by an employee against any person
147 other than the employer, wherein proceeds are recovered by the injured employee pursuant to the
148 uninsured motorist provisions of a policy of motor vehicle insurance carried by and at the expense of
149 the employer, protection against the uninsured motorist pursuant to a policy of motor vehicle insurance
150 carried by and at the expense of the employer shall be secondary coverage to any other valid and
151 collectable insurance providing the same protection which is available for payment to the employee.
152 "Available for payment" means the amount of uninsured motorist insurance coverage applicable to the
153 claim of the injured employee for bodily injury reduced by the payment of any other claims arising out
154 of the same occurrence.

155 C. If an injured employee is entitled to underinsured motorist coverage under more than one policy,
156 the order of priority shall be as provided by subsection B of § 38.2-2206.