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HOUSE BILL NO. 2339

House Amendments in [] — February 5, 1995

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

Patron—Armstrong

Referred to Committee on Corporations, Insurance and Banking

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 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 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 § 46.2-472, (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, 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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60 forth, their liability shall be proportioned as to their respective underinsured motorist coverages.

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

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

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

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

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

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

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

119 I. The provisions of subsections A and B of § 38.2-2204 and the provisions of subsection A of this
120 section shall not apply to any policy of insurance to the extent that it covers the liability of an employer
121 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.

L. Whenever, pursuant to the endorsement or provisions required by subsection A of this section, an insured institutes suit against the operator of an underinsured motor vehicle and also complies with the service requirements of subsection F, and the liability insurer of the operator of the underinsured motor vehicle offers, in writing to the insured, or to the insured's counsel, its policy limits and simultaneously makes demand of the insured's liability insurer (the "underinsurer") to become financially responsible for its proportionate share of the further defense costs, then in the event that (i) within sixty days following such written offer the underinsurer fails to assume its proportionate share of the financial obligation for defense costs and (ii) the suit is thereafter resolved by way of a judgment or settlement in an amount greater than the aforementioned remaining limits of the operator's policy of liability insurance, there shall accrue to the operator's liability insurer a right of action against the underinsurer for its proportionate share of the defense costs incurred after the date of the written offer of payment of remaining limits, provided, however, that in every such instance (i) the operator shall have the right to retain the counsel provided him by his liability insurer and (ii) the operator's lack of cooperation, if the same affects adversely either the issue of liability or the amount of the damages awarded or paid in settlement, shall be a defense to such right of action for defense costs.

An underinsurer's "proportionate share" of defense costs shall be the percentage that an underinsurer's contribution to the settlement or payment pursuant to judgment against the underinsured motorist bears to the total settlement or payment pursuant to such judgment, less any underinsurer's defense costs.

"Defense costs" means reasonable and customary expenses incurred by the liability insurance carrier in defending the insured from the allegations of the claim, including, but not limited to, costs of legal representation, investigation, and experts, including expenses incidental thereto. "Underinsurer's defense costs" means the same costs when incurred by the underinsurer in defending the claim brought against the underinsured motorist, in its own name or the name of the underinsured motorist.