

1 VIRGINIA ACTS OF ASSEMBLY — CHAPTER

2 *An Act to amend and reenact §§ 8.01-66.1:1 and 38.2-2206 of the Code of Virginia, relating to underinsured*
 3 *motorist benefits; actions against released defendant.*

4 [H 107]

5 Approved

6 **Be it enacted by the General Assembly of Virginia:**7 **1. That §§ 8.01-66.1:1 and 38.2-2206 of the Code of Virginia are amended and reenacted as follows:**8 **§ 8.01-66.1:1. Subrogation claims by underinsured motorist benefits insurer.**

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

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

15 2. To assist in responding to written discovery;

16 3. To meet with defense counsel for a reasonable period of time after reasonable notice, by phone or in
 17 person, ~~within 21 days of being~~ *after the underinsured motorist benefits insurer is served with any lawsuit*
 18 *and again prior to his deposition and trial; or*

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

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

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

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

33 **§ 38.2-2206. Uninsured motorist insurance coverage.**

34 A. Except as provided in subsection J, no policy or contract of bodily injury or property damage liability
 35 insurance relating to the ownership, maintenance, or use of a motor vehicle shall be issued or delivered in this
 36 Commonwealth to the owner of such vehicle or shall be issued or delivered by any insurer licensed in this
 37 Commonwealth upon any motor vehicle principally garaged or used in this Commonwealth unless it contains
 38 an endorsement or provisions undertaking to pay the insured all sums that he is legally entitled to recover as
 39 damages from the owner or operator of an uninsured motor vehicle, within limits not less than the
 40 requirements of § 46.2-472. Those limits shall equal but not exceed the limits of the liability insurance
 41 provided by the policy, unless any one named insured rejects the additional uninsured motorist insurance
 42 coverage by notifying the insurer as provided in subsection B of § 38.2-2202. This rejection of the additional
 43 uninsured motorist insurance coverage by any one named insured shall be binding upon all insureds under
 44 such policy. The endorsement or provisions shall also provide underinsured motorist insurance coverage with
 45 limits that shall be equal to the uninsured motorist insurance coverage limits and shall obligate the insurer to
 46 make payment for bodily injury or property damage caused by the operation or use of an underinsured motor
 47 vehicle to the extent the vehicle is underinsured.

48 The endorsement shall provide that underinsured motorist coverage shall be paid without any credit for
 49 the bodily injury and property damage coverage available for payment, unless any one named insured signs
 50 an election to reduce any underinsured motorist coverage payments by the bodily injury liability or property
 51 damage liability coverage available for payment by notifying the insurer as provided in subsection C of
 52 § 38.2-2202. This election by any one named insured shall be binding upon all insureds under such policy.

53 The endorsement or provisions shall also provide for at least \$20,000 coverage for damage or destruction
 54 of the property of the insured in any one accident but may provide an exclusion of the first \$200 of the loss or
 55 damage where the loss or damage is a result of any one accident involving an unidentifiable owner or
 56 operator of an uninsured motor vehicle.

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57 For the purposes of this section, "legally entitled to recover" has the same meaning as provided in
58 § 8.01-66.1.

59 B. 1. As used in this section:

60 "Bodily injury" includes death resulting from bodily injury.

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

66 "Uninsured motor vehicle" means a motor vehicle for which (i) there is no bodily injury liability insurance
67 and property damage liability insurance in the amounts specified by § 46.2-472, (ii) there is such insurance
68 but the insurer writing the insurance denies coverage for any reason whatsoever, including failure or refusal
69 of the insured to cooperate with the insurer, (iii) there is no bond or deposit of money or securities in lieu of
70 such insurance, (iv) the owner of the motor vehicle has not qualified as a self-insurer under the provisions of
71 § 46.2-368, or (v) the owner or operator of the motor vehicle is immune from liability for negligence under
72 the laws of the Commonwealth or the United States, in which case the provisions of subsection F shall apply
73 and the action shall continue against the insurer. A motor vehicle shall be deemed uninsured if its owner or
74 operator is unknown.

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

81 "Available for payment" means the amount of liability insurance coverage applicable to the claim of the
82 injured person for bodily injury or property damage reduced by the payment of any other claims arising out
83 of the same occurrence.

84 2. If an injured person is entitled to uninsured or underinsured motorist coverage under more than one
85 policy, the insurers shall be obligated to the injured person in the following order of priority of payment:

86 a. The policy covering a motor vehicle occupied by the injured person at the time of the accident;

87 b. The policy covering a motor vehicle not involved in the accident under which the injured person is a
88 named insured;

89 c. The policy covering a motor vehicle not involved in the accident under which the injured person is an
90 insured other than a named insured.

91 Where there is more than one insurer providing coverage under one of the payment priorities set forth,
92 their liability shall be proportioned as to their respective available uninsured or underinsured motorist
93 coverages.

94 3. If an injured person is entitled to underinsured motorist coverage under one or more policies wherein a
95 named insured has elected to reduce the underinsured motorist limits by the available bodily injury liability
96 insurance or property damage liability insurance coverage available for payment, any amount available for
97 payment shall be credited against such policies in payment priority pursuant to subdivision 2 a only, and
98 where there is more than one such policy entitled to such credit, the credit shall be apportioned pro-rata
99 pursuant to the policies' respective available underinsured motorist coverages.

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

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

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

115 E. If the owner or operator of any vehicle causing injury or damages is unknown, an action may be
116 instituted against the unknown defendant as "John Doe" and service of process may be made by delivering a
117 copy of the motion for judgment or other pleadings to the clerk of the court in which the action is brought.
118 Service upon the insurer issuing the policy shall be made as prescribed by law as though the insurer were a

119 party defendant. The provisions of § 8.01-288 shall not be applicable to the service of process required in this
 120 subsection. The insurer shall have the right to file pleadings and take other action allowable by law in the
 121 name of John Doe.

122 F. If any action is instituted against the owner or operator of an uninsured or underinsured motor vehicle
 123 by any insured intending to rely on the uninsured or underinsured coverage provision or endorsement of this
 124 policy under which the insured is making a claim, then the insured shall serve a copy of the process upon this
 125 insurer in the manner prescribed by law, as though the insurer were a party defendant. The provisions of
 126 § 8.01-288 shall not be applicable to the service of process required in this subsection. The insurer shall then
 127 have the right to file pleadings and take other action allowable by law in the name of the owner or operator of
 128 the uninsured or underinsured motor vehicle or in its own name. Notwithstanding the provisions of
 129 subsection A, the immunity from liability for negligence of the owner or operator of a motor vehicle shall not
 130 be a bar to the insured obtaining a judgment enforceable against the insurer for the negligence of the immune
 131 owner or operator, and shall not be a defense available to the insurer to the action brought by the insured,
 132 which shall proceed against the named defendant although any judgment obtained against an immune
 133 defendant shall be entered in the name of "Immune Defendant" and shall be enforceable against the insurer
 134 and any other nonimmune defendant as though it were entered in the actual name of the named immune
 135 defendant. Nothing in this subsection shall prevent the owner or operator of the uninsured motor vehicle from
 136 employing counsel of his own choice and taking any action in his own interest in connection with the
 137 proceeding.

138 G. Any insurer paying a claim under the endorsement or provisions required by subsection A shall be
 139 subrogated to the rights of the insured to whom the claim was paid against the person causing the injury,
 140 death, or damage and that person's insurer, although it may deny coverage for any reason, to the extent that
 141 payment was made. The bringing of an action against the unknown owner or operator as John Doe or the
 142 conclusion of such an action shall not bar the insured from bringing an action against the owner or operator
 143 proceeded against as John Doe, or against the owner's or operator's insurer denying coverage for any reason,
 144 if the identity of the owner or operator who caused the injury or damages becomes known. The bringing of an
 145 action against an unknown owner or operator as John Doe shall toll the statute of limitations for purposes of
 146 bringing an action against the owner or operator who caused the injury or damages until his identity becomes
 147 known. In no event shall an action be brought against an owner or operator who caused the injury or
 148 damages, previously filed against as John Doe, more than three years from the commencement of the action
 149 against the unknown owner or operator as John Doe in a court of competent jurisdiction. Any recovery
 150 against the owner or operator, or the insurer of the owner or operator shall be paid to the insurer of the injured
 151 party to the extent that the insurer paid the named insured in the action brought against the owner or operator
 152 as John Doe. However, the insurer shall pay its proportionate part of all reasonable costs and expenses
 153 incurred in connection with the action, including reasonable attorney fees. Nothing in an endorsement or
 154 provisions made under this subsection nor any other provision of law shall prevent the joining in an action
 155 against John Doe of the owner or operator of the motor vehicle causing the injury as a party defendant, and
 156 the joinder is hereby specifically authorized. No action, verdict or release arising out of a suit brought under
 157 this subsection shall give rise to any defenses in any other action brought in the subrogated party's name,
 158 including res judicata and collateral estoppel.

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

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

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

178 K. An injured person, or in the case of death or disability his personal representative, may settle a claim
 179 with (i) a liability insurer, including any insurer providing liability coverage through an excess or umbrella
 180 insurance policy or contract and (ii) the liability insurer's insured for the available limits of the liability

181 insurer's coverage. Upon settlement with the liability insurer, the injured party or personal representative shall
182 proceed to execute a full release in favor of the underinsured motorist's liability insurer and its insured and
183 finalize the proposed settlement without prejudice to any underinsured motorist benefits or claim. Any such
184 release that states that it is being executed pursuant to or consistent with this subsection shall not operate to
185 release any parties other than the liability insurer and underinsured motorist, regardless of the identities of the
186 released parties set forth in the release, and any terms contained in the release that are inconsistent with, or in
187 violation of, this section are null and void. Upon payment of the liability insurer's available limits to the
188 injured person or personal representative or his attorney, the liability insurer shall thereafter have no further
189 duties to its insured, including the duty to defend its insured if an action has been or is brought against the
190 liability insurer's insured, and the insurer providing applicable underinsured motorist coverage shall have no
191 right of subrogation or claim against the underinsured motorist. However, if the underinsured motorist
192 unreasonably fails to cooperate with the underinsured motorist benefits insurer in the defense of any lawsuit
193 brought by the injured person or his personal representative, he may again be subjected to a claim for
194 subrogation by the underinsured motorist benefits insurer pursuant to § 8.01-66.1:1. Nothing in this section or
195 § 8.01-66.1:1 shall create any duty on the part of any underinsured motorist benefits insurer to defend any
196 underinsured motorist. No attorney-client relationship is created between the underinsured motorist and
197 counsel for the underinsured motorist benefits insurer without the express intent and agreement of the
198 underinsured motorist, the underinsured motorist benefits insurer, and counsel for the underinsured motorist
199 benefits insurer. This section provides an alternative means by which the parties may resolve claims and does
200 not eliminate or restrict any other available means.

201 L. Any settlement between the injured person or his personal representative, any insurer providing
202 liability coverage applicable to the claim, and the underinsured motorist described in subsection K shall be in
203 writing, signed by both the injured person or his personal representative and the underinsured motorist, and
204 shall include the following notice to the underinsured motorist, which must be initialed by the underinsured
205 motorist:

206 "NOTICE TO RELEASED PARTY: Your insurance company has agreed to pay the available limits of its
207 insurance to settle certain claims on your behalf. This settlement secures a full release of you for all claims
208 the claimant/plaintiff has against you arising out of the subject accident, as well as ensures that no judgment
209 can ever be entered against you by the claimant/plaintiff. In order to protect yourself from subrogation by any
210 underinsured motorist insurer, you are agreeing to cooperate with the underinsured motorist benefits
211 insurer(s). The underinsured motorist benefits insurer is not your insurer and has no duty to defend you.

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

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

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

230 _____ (initial)"

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

234 M. Any action brought by the injured person or his personal representative to recover underinsured
235 motorist benefits after payment of the liability insurer's available limits pursuant to subsection K shall be
236 brought against the released defendant *by name*, and a ~~copy~~ of the complaint shall be served on any insurer
237 providing underinsured motorist benefits *but is not required to be served on the released defendant*. If an
238 action is pending at the time the liability insurer's available limits are paid to the injured person or personal
239 representative or his attorney, then the action shall remain pending against the named defendant or defendants
240 who have been released. If such action results in a verdict in favor of the injured person or his personal
241 representative against a released defendant, then judgment as to that defendant shall be entered in the name of
242 "Released Defendant" *without identifying the released defendant's name* and shall be enforceable against the

243 underinsured motorist benefits insurer, not to exceed the underinsured motorist benefits limits, and against
244 any unreleased defendant, as though it were entered in the actual name of the released defendant.
245 N. Any proposed settlement between a liability insurer and a person under a disability or a personal
246 representative as permitted in subsection K that compromises in part a claim for personal injuries by the
247 person under a disability or for death by wrongful act pursuant to § 8.01-50 may be, but is not required to be,
248 approved pursuant to § 8.01-424 or 8.01-55, as applicable. If the personal representative elects not to have the
249 settlement with the liability insurer approved pursuant to § 8.01-55, then any payment made to the personal
250 representative by the liability insurer shall be made payable to the personal representative's attorney, to be
251 held in trust, or paid into the court pursuant to § 8.01-600 if the personal representative is not represented by
252 an attorney, with no disbursements made therefrom until the compromise is approved by the court pursuant to
253 § 8.01-55. Approval by the court of a settlement between the liability insurer and a person under a disability
254 or the personal representative pursuant to this subsection shall not prejudice the person's or personal
255 representative's claim for underinsured motorist benefits.

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