

NEW VIRGINIA LAW IMPOSES BURDEN ON UNDERINSURED MOTORIST CARRIERS

Earlier this year, Virginia Governor Bob McDonald signed House Bill 93 into law which imposes a new burden on insurers that provide underinsured motorist (“UIM”) coverage in Virginia. According to House Bill 93, once the defendant’s liability carrier makes an irrevocable offer in writing to pay the limits of the defendant’s liability policy, the UIM carrier must reimburse the defendant’s liability carrier for the cost of defense unless the UIM carrier can resolve the case within 60 days of the irrevocable offer. House Bill 93, which amends Virginia’s existing underinsured motorist insurance statute (Virginia Code § 38.2-2206), takes effect on July 1, 2010.

Under the current system, the defendant’s liability carrier must pay for the cost of defending its

insured under the provisions of the automobile liability policy. In cases where the plaintiff’s own insurance policy limits exceed the coverage of defendant’s liability policy, the plaintiff can serve his own insurance carrier pursuant to the provisions of Virginia Code § 38.2-2206, and claim UIM benefits beyond the limits of the defendant’s liability coverage. Once served, the UIM carrier has the right to enter the case, file pleadings, conduct discovery, and take any other action allowable by law. However, even if the UIM carrier enters the case, the liability carrier still has the duty to defend its insured (against a potential excess verdict and/or subrogation action) and pay for the cost of defense. The liability carrier is obligated to pay for the defense of its insured, even if the liability carrier has offered its policy limits to the plaintiff.

This system changes under House Bill 93, which adds subsection L to Virginia Code § 38.2-2206. Under the new system, if the liability carrier providing coverage to the defendant makes an irrevocable offer in writing to pay the total amount of its liability coverage to the plaintiff, then the UIM carrier has 60 days following the written notice to resolve the case or else it must reimburse the liability carrier for the cost of defense,

including attorneys’ fees, back to the date of the irrevocable offer. The new law provides that the liability carrier still has the duty to defend its insured and that the cost of defense after the irrevocable offer shall be assumed by the UIM carrier(s) in the same order of priority as is set forth in subsection B of Virginia Code § 38.2-2206.

Currently, the UIM carrier is not obligated to pay out any money until a plaintiff obtains a judgment against the defendant. House Bill 93, however, is designed to address the concern that UIM carriers sometimes allow meritorious cases to languish on court dockets because they have no real incentive to resolve the case timely. By shifting the cost of defense to the UIM carrier after the liability carrier has irrevocably offered its policy limits, UIM carriers will have a potentially substantial monetary incentive to resolve cases quickly once House Bill 93 takes effect.

The new law provides two escape clauses to the UIM carrier. First, if the case proceeds to trial and a jury verdict is returned in an amount less than or equal to the total amount of the defendant’s liability coverage, then the



UIM carrier will not have to reimburse the liability carrier for defense costs. Additionally, the UIM carrier will not have to reimburse the liability carrier for defense costs if a dispositive ruling is made dismissing the plaintiff's complaint.

One issue not addressed in House Bill 93 is the issue of subrogation. At this time, the defendant's attorney has an ethical obligation to protect the insured if there is the potential for a verdict in excess of the defendant's liability coverage. In many instances where there is the potential for excess exposure, the defendant's counsel will not recommend offering the

policy limits to the plaintiff unless the UIM carrier agrees to waive subrogation against the defendant. Once House Bill 93 takes effect, the UIM carrier will have a monetary incentive not to waive subrogation against the defendant. Because House Bill 93 does not adequately address the issue of subrogation, the actual effect of the bill may have a limited impact on the defense attorney's recommendation to offer the policy limits to the plaintiff and therefore trigger the provisions of House Bill 93.

KPM will continue to monitor the practical effect this new statute has on cases and report on cases that interpret the new law. Additionally, we will keep

an eye on whether or not the legislature's failure to take into account subrogation waivers restricts the application of the statute.



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