

NEW UIM STATUTE

RECENT CHANGES BY THE

GENERAL ASSEMBLY WILL

DRAMATICALLY SHIFT DEFENSE

OF UIM CLAIMS

The Virginia General Assembly has recently enacted several significant changes to two statutes pertaining to settlement of underinsured motorist claims and subrogation rights of underinsured motorist carriers. The revisions specifically impact Virginia Code Section 38.2-2206 and add a new statute at 8.01-66.1:1. According to the State Corporation Commission, the stated purpose of these changes is to expedite uninsured and underinsured motorist payments. These changes will go into effect for policies issued or renewed on or after January 1, 2016.

In short, these changes impact both liability and underinsured motorist carriers in claims involving UIM coverage:

- 1) The liability carrier can tender policy limits in exchange for a complete settlement and release of the defendant/tortfeasor and the liability carrier.
- 2) Acceptance of the liability carrier's limits by the injured party extinguishes the primary liability carrier's duty to defend. This duty is extinguished upon payment of the liability limits (not merely acceptance of the offer).
- 3) A settlement under these revisions extinguishes the UIM carrier's right of subrogation against the underinsured defendant.
- 4) Upon being released, the defendant/tortfeasor now has statutory duties to reasonably cooperate with the UIM carrier in its defense of the case.

Changes to Virginia Code 38.2-2206

The statute governing uninsured and underinsured motorist coverage is found in

Virginia Code Section 38.2-2206. Prior to this revision, the liability carrier was permitted

to tender its limits in cases where the injured person had UIM coverage. However, such tender did not secure the release of the liability carrier or its insured. Significantly, the liability carrier retained the duty to defend its insured and bore the cost of defense if the injured party could not settle with the UIM carrier. Under the former version of 38.2-2206(L), the liability carrier could attempt to shift the costs of defense to the UIM carrier by making an "irrevocable" offer of settlement; however, it was still the duty of the liability carrier to defend the case.

The revisions specifically impact Subsections (K) and (L) of 38.2-2206. Subsection (K) now allows the liability carrier to settle a claim with the injured party for its liability coverage limits in exchange for a release of all claims as to the defendant/tortfeasor and the liability carrier. Under the new law, upon payment of the liability carrier's coverage limits, the injured party or their personal representative "shall proceed to execute a full release in favor of the underinsured motorist's liability insurer and its insured...." Furthermore, upon payment of the liability insurer's available limits, the liability insurer "shall thereafter have no further duties to its insured, including the duty to defend its insured...." Finally, and perhaps most significantly, the UIM carrier "shall have no right of subrogation or claim against the underinsured motorist."

These provisions embody a sea change in the defense of UIM claims and will now allow liability carriers to completely extricate themselves from litigation even if there is continued litigation by the injured party as to the UIM carrier. The significance of these revisions cannot be understated. Liability carriers will no longer bear the burden of defending a case if the injured party cannot settle with the UIM carrier and defendant/tortfeasors will no longer be subject to subrogation claims by the UIM carrier. The cost of litigation has now been shifted from the liability carrier to the UIM carrier.

Because Subsection (K) relieves the liability carrier of its duty to defend its

insured, Subsection (L) no longer deals with the right of the liability carrier to shift the cost of defense to the UIM carrier subject to an "irrevocable" offer of settlement. Subsection (L) now addresses notification requirements to the insured of the settlement by the liability carrier. This section also apprises the insured of the responsibility to cooperate with the UIM carrier in defense of the case. This section sets forth specific language the liability carrier must include in their written notification to their insured of the settlement. There are several additional things to note in Subsection (L). First, the tortfeasor must sign and initial the release. Second, the tortfeasor can refuse to consent to the settlement. If the tortfeasor does not consent to settlement, the liability carrier must continue to defend the case, but the tortfeasor will not have the protections of a full release and is subject to subrogation by the UIM carrier.

In addition to the changes referenced above, the General Assembly has added two new sections to 38.2-2206. In Subsection (M), if the injured person wishes to bring an action to recover underinsured motorist benefits after payment and settlement of the liability insurer's limits pursuant to Subsection (K), the action shall be brought against the released defendant, and a copy shall be served on the UIM carrier. If such action results in a verdict in favor of the injured party against the released defendant, then judgment against that defendant will be entered in the name of "Released Defendant" and is enforceable against the UIM carrier.

In Subsection (N), proposed settlements for injury or wrongful death between liability carriers and persons under a disability or personal representatives may be but are not required to be court approved. Interestingly, the personal representative can elect not to have the settlement approved. We recommend that the liability carrier always seek court approval under such circumstances and should push plaintiff's counsel to agree to same and possibly make court approval a condition of settlement.

UIM Carrier's Right of Subrogation Against Released Defendant

In addition to the revised language of 38.2-2206(K) which states the UIM carrier "shall have no right of subrogation or claim against the underinsured motorist," an additional statute has been enacted which further addresses the right of subrogation of the UIM carrier. Virginia Code Section 8.01-66.1:1 adds a qualifier to the subrogation provisions and states that the UIM carrier shall have no right of subrogation against a defendant/tortfeasor released pursuant to 38.2-2206(K), "unless the underinsured motorist failed to reasonably cooperate in the defense of any lawsuit against him."

The statute goes on to state that an underinsured motorist shall be presumed to have failed to reasonably cooperate if he fails or refuses to: 1) attend his deposition or trial if subpoenaed at least 21 days in advance of either event; 2) assist in responding to written discovery; 3) meet with defense counsel for a reasonable period of time after reasonable notice, by phone, or in person, within 21 days of being served with any lawsuit and again prior to depositions and trial; or 4) notify UIM counsel of any change in address.

The statute allows the underinsured motorist to rebut the presumption that he failed to reasonably cooperate. If the court finds that the failure to cooperate was not unreasonable or that he made a good faith effort to comply, then the UIM carrier will not regain the right of subrogation. The UIM carrier seeking the cooperation of the underinsured motorist is required to pay the reasonable costs and expenses associated with procuring such cooperation. Additionally, if the court finds that the underinsured motorist satisfied his duty to cooperate or that his failure to do so was not unreasonable, then the court may award him his costs in defending a subrogation action, including attorneys' fees. This new subsection applies only to cases settled pursuant to 38.2-2206(K). It does not apply to a UIM carrier's right of subrogation against an uninsured motorist, as set forth in 38.2-2206(G).

Rely on KPM to help you Navigate this New Landscape

As with any significant statutory change, there are a multitude of questions which will arise and there will most certainly be issues that will result in litigation. We at KPM are at the forefront of these statutory changes

and have already begun forecasting potential issues, and strategizing how best to handle anticipated issues and questions. You can trust us to help guide you through the new world of UIM claims. We encourage you to log onto our website and view our informative videos on this very topic hosted by Attorney Gary Reinhardt.

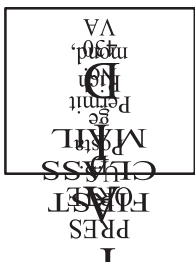


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