

# LEGAL ALERT

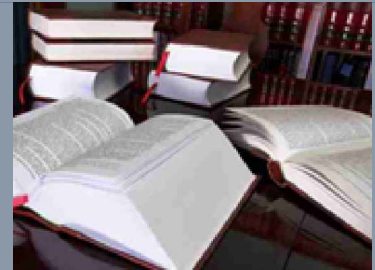
## **Virginia UIM Insurers Obligated to Assume Cost of Defense**

A statutory amendment that will take effect on July 1, 2010, will impose a new and potentially substantial burden on insurers that provide underinsured motorist (UIM) coverage especially in cases where liability is clear and the damages exceed the limit of the underlying liability coverage. Under the new subsection (l) to *Va. Code* § 38.2-2206, if a liability insurer makes an irrevocable offer in writing to pay the total available limit of liability insurance, the UIM insurer essentially has 60 days within which to settle the case. If it fails to do so, it becomes responsible for all costs of defense beginning back on the date of the liability insurer's offer. The statute does not give the UIM insurer the right to defend the alleged tortfeasor and, in fact specifies that the liability insurer retains the duty to defend its insured. Instead of assuming control over the defense, the UIM insurer is required to reimburse the liability insurer based on the costs it incurs in funding the defense. The UIM insurer is not responsible, however, for the costs of an appeal.

The amendment contains two exceptions. First, it does not apply where there is a dispositive ruling dismissing the plaintiff's complaint or where the jury returns a verdict in an amount equal to or less than the total liability coverage available for payment. The apparent purpose of these two exceptions is to relieve the UIM insurer of any liability when it is ultimately determined that its coverage was not implicated. Of course, as a practical matter, the UIM insurer will apparently have been required to reimburse the liability insurer for defense costs as they were incurred until the conclusion of any litigation. The UIM insurer will then be compelled to seek return of the amounts paid.

Prior to the amendment, a liability insurer had the duty to defend its insured regardless of whether or not liability was clear and whether or not the damages exceeded the limit of coverage. The duty to defend was seen as distinct from the duty to indemnify and a liability insurer could not escape its duty to defend by simply tendering its limit to the claimant. While UIM insurers had the right to engage counsel to contest the issues of liability and damages, they were under no obligation to do so; providing or funding the defense of an alleged tortfeasor was simply not an obligation contemplated by a UIM insurer's contractual undertaking. Although the liability insurer will continue to retain control over the defense, it is now the UIM carrier that must pay the defense costs even in cases where it is also willing to tender the limit of its coverage.

One peculiar feature of the amendment is that it is unlikely to have any net effect on the amount paid by auto insurers for defense costs. In one case, the insurer that provides UIM coverage will be required to reimburse the insurer that provides liability coverage; in another case, their positions will be reversed and the insurer that previously provided liability coverage will be forced to reimburse the insurer that previously provided UIM coverage. Thus, while the statute will have the effect of shifting responsibility for defense costs from liability insurers to UIM insurers in certain individual cases, it is not clear that it will benefit any insurer or other party in the long run.



If you would like more information regarding this publication or to discuss this opinion, please contact a member of the firm's coverage practice group:

Mark G. Carlton  
804-762-8003  
[mcarlton@hccw.com](mailto:mcarlton@hccw.com)

John M. Claytor  
804-762-8018  
[jclaytor@hccw.com](mailto:jclaytor@hccw.com)

Jeffrey L. Cole  
804-762-8007  
[jcole@hccw.com](mailto:jcole@hccw.com)

Thomas S. Garrett  
804-762-8005  
[tgarett@hccw.com](mailto:tgarett@hccw.com)

Carson W. Johnson  
804-762-8001  
[cwjohnson@hccw.com](mailto:cwjohnson@hccw.com)

Joseph Robinson  
804-762-8036  
[jrobinson@hccw.com](mailto:jrobinson@hccw.com)

Elizabeth S. Skilling  
804-762-8016  
[eskillings@hccw.com](mailto:eskillings@hccw.com)

Stanley P. Wellman  
804-762-8015  
[swellman@hccw.com](mailto:swellman@hccw.com)

Mailing Address  
P. O. Box 70280  
Richmond, VA 23255

[www.HCCW.com](http://www.HCCW.com)