

CAUTION: TRIAL COURT FINDS UIM CARRIER'S SUBROGATION RIGHTS ARE NOT EXTINGUISHED UNDER SECTION L OF Va. Code 38.2-2206 UNLESS DEFENDANT TORT-FEASOR SIGNS THE RELEASE

In a personal injury case pending in the Circuit Court of Fairfax County, *Michael Byorick v. Sergia Flores Reyes*, Law No. 2018-11642, the defendant's insurer tendered its policy to the plaintiff, pursuant to Section K, with the expectation that its duty to defend would end, and the UIM carrier would absorb the defense. In that case, the release was not signed by the defendant and the UIM carrier objected to the insurer's attempt to withdraw from the defense of the case asserting that there was non-compliance with Va. Code Section 38.2-2206(L). Pursuant to Section L, in order for the liability insurer to settle with the plaintiff and extinguish the UIM carrier's subrogation rights, the settlement must be in writing and signed by both the plaintiff and underinsured motorist (i.e. the defendant). Section L requires specific "Notice to Release Party" which states that the underinsured motorist must initial it. After hearing argument, the court denied defense counsel's motion to withdraw. While defense counsel argued that the notice was mailed, in accordance with the statute, the trial court held that the release needed to be signed by the defendant in order to extinguish the UIM carrier's subrogation rights. The court also commented that the statute was less than clear. As a result, the defendant's attorney, who was retained by the underlying insurer, was not allowed to withdraw from the case. This was also **AFTER** the policy limits had been paid to the plaintiff. The take away under the present statute is for the underlying carrier to make all efforts to obtain the defendant's signature on the release in compliance with the statute. If the defendant cannot be located, then prior to tendering the policy limits agreement should be obtained from the UIM carrier to the motion to withdraw from the defense.

The lack of clarity in the statute is underscored by a proposed bill in our General Assembly's present 2019 session. SB 1293 seeks to clarify the prior amendment. SB 1293 passed the Senate on 1/25/19 and is now in the House. The Senate's proposed bill includes the following new language: "by sending the notice and release to the underinsured motorist's last known address by certified mail, the

liability insurer satisfies the requirement of having the underinsured motorist sign the release and initial the notice.”

The entire content of SB 1293 is as follows:

SUMMARY AS INTRODUCED:

Uninsured motorist insurance coverage; settlement and release. Provides that any release executed as a result of a liability insurer settling a personal injury claim with an underinsured claimant for the available limits of the liability insurer's coverage shall not operate to release any parties other than the liability insurer and the underinsured motorist. The bill clarifies that neither a duty to defend nor an attorney-client relationship is created between the underinsured motorist and counsel for the underinsured motorist benefits insurer without the express intent and agreement of the underinsured motorist. The measure modifies the language in the written notice that is required to be provided to the underinsured motorist upon settlement to further clarify that no attorney-client relationship or duty to defend is created between the underinsured motorist and the underinsured motorist benefits insurer as a result of the settlement and release. The bill clarifies that by sending the notice and release to the underinsured motorist's last known address by certified mail, the liability insurer satisfies the requirement of having the underinsured motorist sign the release and initial the notice.

For more information about the specific ruling, please email mkatz@bmhlaw.com, and see article contained within this months' Defense Line regarding the status of bills VADA's lobbyist are monitoring to include SB 1293.