DECARO DORAN
SICILIANO GALLAGHER & DEBLASIS LLP

VIRGINIA AUTOMOBILE INSURANCE LAW

MARYLAND OFFICE
17251 Melford Boulevard
Suite 200
Bowie, Maryland 20715
301.352.4950
Fax: 301.352.8691

VIRGINIA OFFICE
3930 Walnut Street
Suite 250
Fairfax, Virginia 22030
703.255.6667
Fax: 703.299.8548

D.C. OFFICE
1100 Connecticut Avenue, NW
Suite 950
Washington, D.C. 20036
202.582.0252
Fax: 202.582.0262

INTRODUCTION

As the breadth and depth of the knowledge of the law needed by those handling civil litigation involving tort liability is ever increasing, it became apparent that it would be of assistance to our clients to provide a manual that answers the most often asked questions regarding Virginia Automobile Insurance Law.

This manual is intended to provide the reader with a general overview of the most frequently asked questions. The manual is divided into three parts. The first provides quick answers to twenty frequently asked questions. The second discusses various insurance coverage issues. The third discusses various general issues that are important to Virginia Automobile Insurance Law.

This material is not intended to be an exhaustive study, and as the law is ever changing, one should not rely on the contents hereof for any purposes other than general information. Should any additional information be needed, please contact any of our attorneys.

Charles E. Gallagher, Jr.

TABLE OF CONTENTS

I. 20 QUICK QUESTIONS AND ANSWERS

(Alphabetical by subject)

1. Compulsory Insurance

Is Virginia a compulsory insurance state?

Answer: No.

Virginia does not require one to carry motor vehicle insurance. A vehicle owner is not required to carry motor vehicle insurance coverage of any type on any vehicle. However, if one elects not to have coverage, then one must pay a $500 fee into the Uninsured Motorist Fund. Payment of the "Uninsured Motorist fee" to the Uninsured Motorist Fund is not a substitute for insurance coverage and provides no insurance protection whatsoever. 46.2-705, 706 and 707.

2. Consortium

Does Virginia recognize a cause of action for loss of consortium?

Answer: No.

Virginia Code § 55-36 specifically abolishes all claims for loss of consortium between a husband and wife.

3. Default

Is a default automatic after the period for filing a responsive pleading has expired?

Answer: Yes.

Under Virginia Law, a Defendant has 21 days to file a responsive pleading to the Motion for Judgment (the initial pleading filed by the Plaintiff) once it has been served on the Defendant. Rule 3:8. If the Defendant fails to file a responsive pleading within 21 days, even if the Plaintiff has granted an unlimited extension of time to file a responsive pleading, the Defendant is still technically in default. Rule 3:19. It is strongly urged that in any situation where you obtain an extension for filing an Answer that such agreement be made in writing. A Plaintiff need not move for default as it is automatic.

If more than 21 days have elapsed, defense counsel should obtain and file an Agreed Order pursuant to Rule 1:9 and 3:19 to extend the time for filing an Answer or file a motion to extend time pursuant to those rules.

Default is a harsh punishment because a defendant in default is not entitled to notice of any further proceedings in the case, and may not request a trial by jury. Unlike previous rules, if the Defendant participates in a hearing to determine damages, the Defendant is allowed to object to the Plaintiff's evidence regarding damages, offer evidence regarding the quantum of damages, participate in jury selection if a jury will hear the damage inquiry, submit proposed jury instructions regarding damages, and make oral argument on the issues of damages. Rule 3:19.

4. Direct Action

May a direct action be maintained against the insurance company?

Answer: No (in most cases).

Frequently an insurance carrier is named on the suit papers in motor vehicle accident cases, but this is not a direct action against the carrier.

Under Virginia Code § 38.2-2206(F), a Plaintiff must serve any potential uninsured or underinsured carrier with suit papers. See also Virginia Code § 8.01-5(B). The carrier is not a party to the case but is permitted to participate in the case as though it were a party. Thus, though the action is not directly against the insurance company, the insurance company is named as though it were a party and has the right to file responsive pleadings if it chooses and participate in the case "as though" it was a party.

No direct actions may be filed against the insurance company except for bad faith actions under Virginia Code § 8.01-66.1. "Remedy of arbitrary refusal of motor vehicle insurance claims".

5. Duty to Defend/Reservation of Rights

Must an insurer defend its insured even if it has offered its policy limits?

Answer: Yes.

Under Virginia Code § 38.2-2206(K), for all policies issued on or after July 1, 1988, an insurer may offer its policy limits without obtaining a full release of claims but must still defend its insureds if the offer does not dispose of the case. No liability will attach to the insurance company or the attorney hired by the company for failing to obtain a Release of All Claims if the policy limits have been offered.

An insurer is required to defend its insured when an initial pleading alleges facts and circumstances, some of which would, if proved, fall within the risks covered by the policy. Lerner v. Safeco, 219 Va. 101, 104, 245 S.E.2d 249, 251 (1978).

It is very important to note that under Virginia Code § 38.2-2226, an insurer is

required to immediately notify all Claimants of the issuance of any reservation of rights letters or non-waiver agreements to the insured and of the insurer's intention to rely on any coverage defenses. The insurer is required to notify a Claimant or his/her counsel, of its intention to rely on any breach of the terms or conditions of the insurance policy by the insured, within 45 days after discovery of the breach by the insurer. Additionally, the insurer is required to notify all Claimants or his/her counsel of the issuance of any non-waiver agreements within 45 days after such letter is sent or agreement is executed. Notice shall also be given to claimant or his counsel for reservations of rights. This notice must be given not less than 30 days prior to the trial date. An insurer's failure to provide the Claimant with notice of any coverage defenses will result in a waiver of the defense based on such breach.

6. DWI AND PUNITIVE DAMAGES

Are punitive damages recoverable in DWI cases?

Answer: Yes.

The legal level of intoxication is .08 percent blood alcohol content. Virginia Code § 18.2-266.

Virginia Code Section 8.01-44.5 deals with the issue of punitive damages in alcohol related accidents. Pursuant to Virginia Code Section 8.01-44.5, punitive damages may be awarded if the defendant's conduct is found to be so willful and wanton as to evince a conscious disregard for the rights of others. This will be found when the evidence proves that (i) when the incident causing the injury or death occurred, the defendant had a blood alcohol concentration of 0.15 percent or more by weight by volume; (ii) at the time the defendant began, or during the time he was drinking alcohol, he knew, or should have known, that his ability to operate a motor vehicle was impaired; and (iii) the defendant's intoxication was a proximate cause of the injury to or death of the plaintiff.

Virginia Code Section 8.01-44.5 also encompasses circumstances where the defendant refused to submit to a blood alcohol content test.

An unreasonable refusal to submit to a blood alcohol content test shall be deemed sufficiently willful or wanton as to show a conscious disregard for the rights of others when the evidence proves that (i) when the incident causing the injury or death occurred defendant was intoxicated, which may be established by evidence concerning the conduct or condition of defendant, (ii) at the time the defendant began, or during the time he was, drinking alcohol, he knew, or should have known, that his ability to operate a motor vehicle was impaired, and (iii) the defendant's intoxication was a proximate cause of the injury to the plaintiff or the death of the plaintiff's decedent. A certified copy of the court's determination of an unreasonable refusal pursuant to § 18.2-268.3 shall be prima facie evidence the defendant unreasonably refused to submit to the test.

§ 8.01-44.5.

Va. Code 8.01-445 did abrogate the common law claim for punitive damages if the criteria set forth in 8.01-44.5 are not met.

7. FINANCIAL RESPONSIBILITY

Is Virginia a financial responsibility state?

Answer: Yes.

Keep in mind that Virginia is not a compulsory insurance jurisdiction, but for all policies that are issued, there must be minimum limits of $25,000 per person and $50,000 per occurrence for bodily injury. Property damage limits of $20,000 must also be provided. There is no limit required for medical payments coverage. Virginia Code § 46.2-472.

A self-insurer must meet the requirements set forth in Virginia Code § 46.2-368 as to its potential liability.

8. INTRAFAMILY/INTERSPOUSAL IMMUNITY

Does Virginia recognize interspousal or intrafamily immunities arising out of a motor vehicle accident?

Answer: No.

Interspousal immunity has been abrogated by statute in Virginia and is no longer a valid defense to any cause of action arising out of a tort, including motor vehicle accidents. Virginia Code § 8.01-220.1.

Virginia has also abolished intrafamily immunities between parents and children by case law. Thus whether a child is emancipated or not, the child may bring an action against its parent for injuries sustained in a motor vehicle accident. Smith v. Kauffman, 212 Va. 181, 183 S.E.2d 190 (1971).

9. JOINT AND SEVERAL LIABILITY

Are two or more tort-feasors that are found liable by a judgment or verdict jointly and severally liable to the Plaintiff for damages?

Answer: Yes.

If a verdict or judgment is rendered against two or more tort-feasors, each tort-feasor is required to pay his/her pro rata share of the judgment. Virginia Code § 8.01-34.

It should be noted that Virginia's "Joint Tort-Feasor Statute", Virginia Code § 8.01-35.1 does allow a party to settle and preclude a non-settling party from seeking a pro rata contribution from that settling party. The non-settling party is only entitled to a pro tanto, or dollar for dollar, reduction of any judgment or verdict received against it, for the amount paid by the settling party. The decision as to a "joint tort-feasor" release is usually up to the Plaintiff, because the settling Defendant is protected by statute from any form of contribution once that Defendant settles. Thus, the Plaintiff has to decide whether he wants to run the risk of a joint tort-feasor release or not.

10. JURISDICTIONAL LIMITS OF THE COURT

Are there jurisdictional limits in the amount of recovery in the various Virginia Courts?

Answer: Yes.

If the amount in controversy is less than $4,500, then the exclusive jurisdiction resides with the General District Courts.

If the amount in controversy is between $4,500 and $25,000, the General District Court and the Circuit Courts have concurrent jurisdiction. Va. Code § 16.1-77.

Prior to 2007, Virginia allowed removal of cases by the defendant from the General District Court to the Circuit Court by requesting a jury. However, the General Assembly of Virginia removed that right in Act 2007, Chapter 869 (HB 2425). Cases filed after the act becomes effective, July 2007, cannot be removed from General District Court to the Circuit Court by requesting a jury. In essence this allows the Plaintiff to control where a case is tried when there is concurrent jurisdiction.

Usually, Federal District Courts have jurisdiction in one of two ways. First, if the action arises under the federal Constitution, federal laws or treaties of the United States, then the federal courts have jurisdiction regardless of the amount in controversy. 28 USCA §1331. Federal courts will also have jurisdiction, when the amount in controversy exceeds $75,000 and the opposing parties are from

different states. 28 USCA §1332.

A Plaintiff must only plead in good faith that the amount in controversy is the amount set forth in the suit papers. If a judgment or verdict is rendered for less than the amount of the jurisdictional limits of the Court, the Court will not dismiss the case nor deny the Plaintiff the judgment or verdict on the grounds that it was less than the jurisdictional limit of the Court.

11. MINOR/INFANT SETTLEMENTS

Does Virginia require Court approval of minor or infant settlements?

Answer: Yes.

In any action where a person is under a disability, the Court in which the action is pending must approve and confirm a compromise or a settlement of the matters in controversy. Virginia Code § 8.01-424. Virginia Code § 8.01-2 states that "a person under a disability" is an infant. An infant is defined as a person under the age of 18. Virginia Code § 1-207. A bond is required to be posted by the legal guardian or parent and next friend if the payment to be made to the infant is in excess of $15,000. It is required that all minor infant settlements be court approved.

12. NEGLIGENCE RULE

Is Virginia a contributory negligence state?

Answer: Yes.

Virginia follows a contributory negligence rule which states that any negligence whatsoever on the part of the Plaintiff operates as a complete bar to recovery. Virginia does not recognize comparative negligence in any of its forms and is a strict contributory negligence jurisdiction.

13. NO-FAULT

Does Virginia recognize any form of No-Fault?

Answer: No.

Virginia does not recognize any form of No-Fault and any liability claims are made against the alleged tort-feasor. No thresholds need be met to make any such claims.

14. NON-SUIT STATUTE

Does Virginia allow a Plaintiff to non-suit a case even if the statute of limitations has run?

Answer: Yes.

Virginia Code § 8.01-380 allows a Plaintiff to non-suit (or dismiss) a case without prejudice anytime before a Defendant's Motion to Strike the Evidence at Trial has been sustained or before the jury retires to deliberate. A Plaintiff may non-suit a matter as to any or all Defendants one time as a matter of right and the dismissal is without prejudice. The Court must grant the request even over the strenuous objection of the Defendant. Plaintiff may refile the same case against the same parties in the same court within six months of the entry of the Order of Nonsuit even if the statute of limitations has run. Va. Code 8.01-229.

In 2004, Virginia Code § 8.01-380 (C) was amended to permit the defense to recover reasonable witness fees and travel costs of expert witnesses scheduled to appear at trial which are actually incurred by the defense if the plaintiff fails to give notice of an intent to non-suit at least seven days prior to trial. The statute holds that the court shall have the authority to determine the reasonableness of expert fees and travel costs.

15. OWNER LIABILITY

Is an owner of a vehicle liable for the acts of the operator of that vehicle?

Answer: There is a rebuttable presumption that the owner of a vehicle is liable for the acts of the operator of that vehicle. Breeding v. Johnson, 208 Va. 652, 159 S.E.2d 836 (1968).

In order to prevail, a Plaintiff must show more than mere permission. The Plaintiff must show that the operator of the vehicle was doing something as his/her agent, servant, or employee at the time of the accident. If this cannot be proven, then the owner is not liable.

It should be noted that under Virginia Code § 8.01-279 an Affidavit denying that the operator was operating as the agent, servant or employee of the owner, must be filed at the time the responsive pleading to the Motion for Judgment is filed. Failure to do so may result in a denial of this defense.

If the Affidavit could not be obtained, then the responsive pleading must have a specific denial that the operator was the agent, servant or employee of the owner. A general denial of all allegations is insufficient. If the Affidavit is not obtained, and the Plaintiff does not move to strike a properly plead defense in the responsive pleading denying agency, etc. within seven days after the responsive pleading is filed, then the Plaintiff is precluded from relying on the failure to file

an Affidavit as a bar to that defense. Rule 1:10 and Rule 7B:6.

16. SEAT BELT DEFENSE

Is the failure of a Plaintiff to wear a seat belt a defense to liability in Virginia?

Answer: No.

Virginia Code § 46.2-1094 states that the failure to use a seat belt is not deemed negligence. Moreover no such evidence can be presented to the jury.

17. SERVICE OF PROCESS

Does Virginia allow service of process on non-resident Defendants by serving a statutory agent?

Answer: Yes.

Virginia allows service of process on a non-resident individual involved in a motor vehicle accident in Virginia by serving the Commissioner of the Department of Motor Vehicles in Richmond. Virginia Code § 8.01-308.

Virginia allows for the service of process on a non-resident corporation by serving the Secretary of the Commonwealth of Virginia in Richmond. Virginia Code § 8.01-329. In order to have jurisdiction over the non-resident corporation, Plaintiff must allege facts that satisfy the requirements of the Virginia Long Arm Statute. Virginia Code § 8.01-328.1.

It should be noted that Virginia allows service on natural persons in any of the following manners: 1) service in person; or 2) substituted service if the party to be served is not found at his usual place of abode by: a) delivering it in person to a family member found at his usual place of abode who is sixteen years or older and regularly resides there; or b) posting service of process at the front door of his usual place of abode provided that written notice is given by certified mail at his usual place of abode not less than ten days before judgment of default may be entered; or c) obtain a general order of publication under 8.01-316 - 8.01-320. The general statute as to serving natural persons is 8.01-296.

18. STATUTE OF LIMITATIONS

Does Virginia have different statutes of limitation for tort and property damage claims?

Answer: Yes.

The key statutes of limitations in Virginia are as follows:

1. Tort - bodily injury - 2 years (Virginia Code § 8.01-243(A))

2. Property Damage - 5 years (Virginia Code § 8.01-243(B))

3. Contracts - 5 years (Virginia Code § 8.01-246)

Remember the statute of limitations is the time from the date of the incident or breach to the time the suit must be filed. Often the suit papers are not served until well after the statute of limitations has run. The service is still good provided service is effected within one year after the suit was filed. If it is not served within that time period, then the case may be subject to dismissal. Virginia Rule 3:5.

19. TRAFFIC CITATIONS AND POLICE REPORTS

Is a plea of guilty or nolo contendere or forfeiture in a criminal prosecution or traffic case admissible in a civil action?

Answer: Yes.

Under Virginia Code § 8.01-418, a plea of guilty or nolo contendere or forfeiture in a criminal prosecution or a traffic case arising out of the same occurrence as the civil action is admissible in the civil action. This includes when the person issued the citation signs a traffic ticket and pays the court fine simply to avoid appearing in traffic court. Virginia traffic tickets clearly state that by signing the ticket and paying the fine to avoid court, that it is an admission of guilt to the offenses of which the driver is charged. All drivers should consider entering a plea of not guilty and appearing in traffic court. A conviction, after a trial, is not admissible in a civil matter. It should be noted that the fact a driver was not given a ticket is also not admissible in a civil action.

May a police officer's report be used in a civil action?

Answer: No.

Virginia Code § 46.2-379 prohibits the introduction of the police report as

evidence and prohibits a police officer from using the accident investigation report to refresh his/her recollection of the accident at the time of trial.

20. WRONGFUL DEATH

Does Virginia allow a cause of action for wrongful death to the surviving beneficiaries?

Answer: Yes.

Virginia Code § 8.01-50 et seq. sets forth very specific elements of damage and very specific persons who may qualify as wrongful death beneficiaries. Those statutes must always be consulted when handling any wrongful death case. Any wrongful death settlement must be approved by the Court. Virginia Code § 8.01-55.

II. MOTOR VEHICLE INSURANCE COVERAGE

A. BODILY INJURY COVERAGE

1. Minimum limit of required coverage?:

Twenty-five thousand ($25,000.00) for one injured, fifty thousand ($50,000.00) for two or more, exclusive of interest and costs. Virginia Code §46.2-472.

2. Is Coverage Mandatory?:

No. Virginia does not require one to carry motor vehicle insurance but if a policy is issued, it must contain the minimum limits of 25/50/20. Anyone registering an uninsured vehicle, defined as a vehicle as to which there is no bodily injury liability insurance and property damage liability insurance, or no such bond has been given or case or securities delivered in lieu thereof, or the owner of which has not qualified as a self-insurer, must pay a $500 fee into the uninsured motorist fund. Virginia Code §46.2-706 and 46.2-707. Payment of the "uninsured motorist fee" to the DMV is not a substitute for insurance coverage and provides no insurance protection whatsoever.

3. Does coverage have to be rejected in writing?:

No.

4. Is it subrogable?:

No. Virginia Code §38.2-2209.

5. What is the statute of limitations for a personal injury claim?:

Two (2) years. Virginia Code §8.01-243.

B. MEDICAL PAYMENTS COVERAGE

1. Is coverage mandatory?:

No. Virginia Code §38.2-2201.

2. Is there a minimum limit of required coverage?:

No, the insurer and the insured may agree to any limit if the insured does not elect to purchase the $2000 limit specified in the statute. See Virginia Code §38.2-2201.

3. What does medical payment coverage encompass in Virginia?:

All reasonable and necessary expenses for medical, chiropractic, hospital, dental, surgical, ambulance, prosthetic and rehabilitation services, and funeral expenses. Virginia Code §38.2-2201.

Lost wages are a separate coverage and the insured may elect to purchase either or both. See §38.2-2201(A)(2) and 38.2-2201(B).

4. Does coverage have to be rejected in writing?:

The statute provides that the insured must contact the agent or company that issued his policy if he wishes to purchase either the medical coverage or lost wages coverage. Virginia Code §38.2-2201. The insurer is required to give notice to insured of optional additional coverage. Virginia Code §38.2-2202.

5. Is medical payment coverage subrogable?:

No. Virginia Code §38.2-2209.

6. Can a Worker's Compensation claimant receive Medical Payments benefits?:

Maybe. Virginia Code 38.2-2201 does not prohibit an insurance policy from allowing medical payments to be paid to a workers' compensation claimant. However, two Virginia cases (Scarbrow v. State Farm Mut. Auto. Ins. Co., 1998, 504 S.E.2d 860, 256 Va. 357 and Baker v. State Farm Mut. Auto. Ins. Co., 1991, 405 S.E.2d 624, 242 Va. 74.) have upheld exclusions in policies for medical payments when the claimant is receiving workers' compensation.

7. Can Medical Payments benefits offset a Bodily Injury claim?:

No. Virginia Code §38.2-2216 prohibits "any provision reducing the amount of damages covered under the liability or uninsured motorist coverages of the policy by the amount of payments made by the insurer under the medical expense or other medical payments coverage of the policy." On a similar note, tortfeasors cannot benefit from compensation or write offs provided by the tort victim's insurer. These write offs and direct compensation are benefits that the tort victim has paid compensation for and the tortfeasor is not allowed to reap those benefits. Acuar v. Letourneau, 260 Va. 180, 531 S.E. 2d 316 (2000).

8. Can a motor vehicle liability insurer receive a credit for other medical expense insurance?:

No.

Virginia Code § 38.2-2211 states that a policy may not provide for a credit against the medical expenses coverage for any other medical expense insurance to which the injured person may be entitled. However, nothing in the statute allows the injured person to collect more than his actual expenses as a result of an accident from anyone or any combination of all policies providing motor vehicle medical payment coverage applicable to the accident.

9. What is the applicable statute of limitations?:

A medical payments claim is a contract claim and therefore the statute of limitations is five years. Virginia Code §8.01-246. However, Virginia Code provides that a claimant may only claim reasonable and necessary medical expenses incurred within three years from the date of the accident. Virginia Code §38.2-2201.

10. Can medical payments coverage be stacked?

Yes.

Every insurer providing med pay coverage arising from the ownership, maintenance, or use of not more than four motor vehicles shall be liable to pay up to the maximum policy limit available on every motor vehicle insured under such coverage. Va. Code § 38.2-2201.

For example, if an insured has a personal auto policy with med pay limits of $5,000 per vehicle on five vehicles, and incurs medical expenses of $50,000, the insurer must pay $5,000 per vehicle up to a limit of four vehicles, for a total payment of $20,000.

C. UNINSURED/UNDERINSURED MOTORIST

1. How is uninsured and underinsured motorist coverage defined in Virginia?:

Answer: Consult Virginia Code §38.2-2206.

UNINSURED

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

UNDERINSURED

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

2. What is the availability and priority of payment?

Virginia Code § 38.2-2206(B) states: "Available for payment" means the amount of liability insurance coverage applicable to the claim of the injured person for bodily injury or property damage reduced by the payment of any other claims arising out of the same occurrence.

If an injured person is entitled to uninsured motorist coverage under more than one policy, the following order of priority of policies applies and any amount available for payment shall be credited against such policies in the following order of priority:

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

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

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

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

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

It should be noted that under Virginia Code § 46.2-368, the usual order of priority of payments is changed and uninsured/underinsured coverage provided by a self insured is "secondary" to any other uninsured/underinsured coverage that may be available. Thus uninsured or underinsured coverage provided by a self insured would be last in

priority under any circumstances and would be prorated with another self insured UM/UIM coverage if applicable.

3. How is the amount of uninsured/underinsured coverage that might be available calculated?:

All possible available uninsured motorist coverage afforded any person injured as the result of the operation or use of the vehicle must be considered. Depending on the language of the policy, and whether there are one or multiple policies stacking of coverage may be allowed.

For example in USAA Cas. Ins. Co. v. Alexander, 248 Va. 185, 445, S.E. 2d 145 (1994), the Supreme Court of Virginia allowed stacking when three separate policies were issued and each policy could be applicable to the accident in question. The court found that all UM coverage available to the plaintiffs included the limits under all three of the policies. The stacked amount was used to determine if the tortfeasor was underinsured.

On the other hand, in Keene v. Travelers Indemnity Company of Illinois, 73 F. Supp. 2d 638 (W.D. Va. 1999), the District Court held that the language in a single policy prohibiting stacking of coverage under the same policy. In that case, the policy covered three different vehicles, but the policy read "the limit of liability for bodily injury stated as applicable to 'each person' is the limit of The Company's liability for all damages because of bodily injury sustained by one person as the result of any one accident . . . ".

4. What are the minimum limits of required coverage?:

Twenty-five thousand ($25,000) bodily injury per person; Fifty thousand ($50,000) bodily injury per occurrence; twenty thousand ($20,000) property damage per occurrence. Virginia Code § 46.2-472.

5. Is coverage mandatory?:

Yes, if an automobile liability insurance policy is issued.

6. Is UM/UIM coverage subrogable?:

Yes. Virginia Code §38.2-2206(G).

7. What is the applicable statute of limitations for UM bodily injury and UM property damage?:

Bodily Injury = 2 years; (Virginia Code § 8.01-243(A))
Property damage = 5 years. (Virginia Code § 8.01-243(B))

8. Can UM/UIM coverage be stacked?:

Yes, depending upon the language in the policy. Inter policy (between) stacking is always allowed. Intra policy (within) is permitted unless there is express language in the policy prohibiting stacking.

The named insured is permitted to stack coverage provided by the UM/UIM provision of a policy separately listing more than one automobile where a separate, equal premium is charged for each vehicle. If an ambiguity is created, it will be construed against the insurance company. Lipscombe v. Sec. Ins. Co., 218 Va. 81 (1972).

If the policy contains plain, unmistakable language to prevent stacking, stacking will not be allowed. Goodville Mutual v. Burror, 221 Va. 967, 275 S.E.2d 625 (1981). The typical language to be deemed appropriate to prevent stacking is "regardless of the number of . . . motor vehicles to which this insurance applies . . . the limit of liability for bodily injury stated in the schedule as applicable to each person is the limit of the company's liability . . . "

Stacking will be permitted where two or more separate policies (inter policy) provide UM/UIM coverage and will not be permitted where two or more vehicles are listed on the same policy (intra policy) if the appropriate anti-stacking language is contained in the policy.

9. Are provisions of a vehicle owner's policy which require a set off of UM coverage against liability coverage void as against public policy?:

Yes.

A person may make a liability claim and an uninsured claim under the same policy under certain circumstances. For example, if a company vehicle is involved in an accident where the company driver is liable, and a second vehicle was involved in that accident where the driver of that vehicle is also liable, but uninsured, the company may be liable for payments to a passenger in its vehicle under its liability coverage as well as its uninsured coverage. Nationwide v. Hill, 439 S.E.2d 335 (1994).

In the situation where the company driver is a joint tort-feasor with an

uninsured driver, the company would be liable for up to its liability limits for the actions of its own driver, and will receive no set off for any uninsured limits that it may have to pay to a passenger. The rationale is that the Virginia statutes contemplate there being uninsured coverage available for the actions of an uninsured driver. To allow a complete offset for the liability limits of an insured driver, would eliminate the need for any uninsured coverage for the actions of the uninsured driver. Thus, a passenger in either vehicle involved in this example would be allowed to recover to the company's liability limits and up to its UM/UIM limits.

10. Must UM/UIM coverage be rejected in writing?:

Technically, no. UM/UIM coverage does not need to be rejected in writing. However, the insurer may request that the rejection be in writing. Insurers **should always** request rejections of UM/UIM coverage to be in writing. If the insured later denies making such a rejection, a written rejection will be evidence for the insurer of the rejection of UM/UIM coverage.

The insurer and the insured must comply with the "important notice" requirements of Virginia Code §38.2-2202. That statute requires the insurer to notify the insured of certain basic rights regarding medical payments coverage and uninsured/underinsured motorist coverage. Specifically, the statute indicates that an insured's uninsured/underinsured motorist coverage will automatically increase to the limits of its liability coverage and an extra premium will be charged if the insured does not notify the agent or insurer of its desire to reduce coverage within twenty days of the mailing of the policy or the premium notice as the case may be. Since most commercial insureds are already making available workers' compensation to any employee that is injured as a result of a motor vehicle accident in the course of employment, most insureds do not want the higher limits but must be sure to comply with the requirements of § 38.2-2202.

If the policy is a renewed policy and a written rejection is already in place, the “important notice” is not required every year. If the insurer does send the insured a new notice every year, the insured should reject the higher limits. If the insured does not timely reject, then the insurer has the right to automatically increase the uninsured limits and charge an additional premium. However, this right can be waived if the insurer does not change limits or premiums. Government Employees Ins. Co. v. Hall, 260 Va. 349, 533 S.E.2d 615 (Va., 2000).

11. Can an employee injured in an accident while in the scope of his employment successfully make a UM bodily injury claim against his

employer?:

Yes. An employee, may recover under his employer's UM policy, in addition to recovering available workers compensation benefits when injured by an uninsured motorist who is a stranger to his employment, Fidelity & Casualty Co. v. Futrell, 211 Va. 751 (1971). An employee may not make an UM bodily injury claim arising out of an accident with a fellow employee because of the exclusive remedy of the Workers' Compensation Act. However, the employee may make a claim for UM bodily injury arising out of an accident with a fellow employee if the injured employee was not entitled to benefits under workers compensation. Aetna v. Dodson, 235 Va. 346 (1988). An example of this would be a situation where the accident was not in the course of employment.

In addition, if an employee of a self-insured employer receives a workers' compensation award for injuries resulting from an accident with an uninsured motor vehicle, such award shall be set off against any judgment for damages awarded pursuant to UM provision for personal injuries resulting from such accident. Virginia Code §38.2-2206(I).

12. John Doe actions:

A motor vehicle shall be deemed uninsured if its owner or operator is unknown. § 38.2-2206(B). There is no limitation in the statute on the commonly accepted meaning of the word "unknown". Mangus v. Doe, 203 Va. 518, 125 S.E.2d 166 (1962). John Doe is a fictitious person who speaks through the UM carrier which is the party ultimately liable. Trueman v. Spivey, 225 Va. 274, 302 S.E.2d 517 (1983).

In order to prove a John Doe case, the Plaintiff must prove: 1) that John Doe existed; 2) that there was a vehicle and the operator is unknown. When the Plaintiff has shown that there was a vehicle driven by an unknown person, then the Defendant must bring forth evidence that John Doe was indeed known. Haymore v. Brizendine, 210 Va. 578, 172 S.E.2d 744 (1970).

It should be noted that if the Plaintiff is proceeding under a John Doe action (or any uninsured or underinsured action), then the Plaintiff must follow the dictates the § 38.2-2206(E) including service of process upon the insured or underinsured motorist carriers. Virginia Code § 38.2-2206(F) makes it clear that a Plaintiff must serve the uninsured or underinsured carriers with the Motion for Judgment in a timely manner.

If the unknown vehicle has no contact with either the insured’s person or

the insured's vehicle, then the insured must promptly report the incident to either the insurer or a law-enforcement officer.

13. <u>UIM Carrier responsibilities after liability carrier offers policy limits</u>:

Effective July 1, 2010, Virginia Code Section 38.2-2206(L) permits a liability insurer to be relieved of the costs (including reasonable and necessary attorney's fees) of defending the owner or operator in a claim involving bodily injury (including death) or property damage, insured <u>after</u> the liability carrier has made an irrevocable written offer to pay the limits of its policy <u>and</u> notifies any underinsured carrier with respect to the offer. While the statute is silent on how that notice is to be sent, it is recommended the liability carrier send a written offer to the claimant/plaintiff (to counsel if represented) and serve the UIM carrier's registered agent with the written offer and send to the UIM claim representative, if known.

Once the written offer of liability limits is properly served on the UIM carrier(s), the UIM carrier has 60 days to resolve the case or the UIM carrier shall then be liable to reimburse the liability insurer(s) for the costs to defend the case from the date of the liability insurer's irrevocable offer of its limits.

It is important to note that the liability insurer always retains the duty to defend its insured.

If UIM coverage is provided by more than one insurer, the cost to defend, if applicable, shall be assumed in the same order of priority as applies to payment of UIM benefits.

Virginia Code Section 38.2-2206(L) shall <u>not</u> apply in the event of either a jury verdict being returned in an amount equal to or less than the total liability coverage available for payment or a dispositive ruling dismissing plaintiff's complaint. 38.2-2206(L) also does not apply to costs incurred in connection with an appeal.

Effective July 1, 2011, the legislature made clear that an offer of the liability limits is an "irrevocable offer" even though it is conditioned upon the UIM carrier(s) waiving subrogation.

As a practical matter, to date the main effect of Section 38.2-2206(L) is that once an offer of the liability limits is made, the UIM carrier agrees to waive subrogation if the liability carrier does not seek costs permitted by the statute.

D. PROPERTY DAMAGE

1. Minimum limit of required coverage?:

Twenty Thousand ($20,000.00). Virginia Code § 46.2-472.

2. Is coverage mandatory?:

Yes, on all policies issued. See II.A.2. above.

3. How must salvage value be handled?:

Where personal property such as a motor vehicle is damaged, the measure of damages is the difference in value immediately before and immediately after the accident, plus the necessary and reasonable expenses proven to have been incurred as a result of the damage. If, however, the cost of repairing the damaged property is less than the difference in value immediately before and immediately after the damage, then the measure of the damages is a reasonable cost of repair with a reasonable allowance for depreciation. Averett v. Shircliff, 218 Va. 202 (1977).

If the automobile is determined to be a total loss, the salvage value must be credited.

4. How must loss of use be handled?:

Virginia Code §8.01-66 provides that any person entitled to recover for damage to a motor vehicle is entitled to recover for loss of use of the vehicle. He shall be entitled to recover the reasonable costs which was actually incurred in hiring a comparable substitute vehicle for the period of time during which such person is deprived of the use of his motor vehicle. However, such rental period shall not exceed a reasonable period of time for such repairs to be made or if the vehicle is a total loss, a reasonable time to purchase a new vehicle. Nothing in the statute relieves the claimant of the duty to mitigate damages.

IV. OTHER ISSUES

A. ALCOHOL RELATED ISSUES

1. What is the legal level of intoxication?

Virginia Code § 4.1-100 defines "intoxicated" as any person who has consumed enough alcoholic beverages to so affect his manner, disposition, speech, muscular movement, general appearance or behavior.

For prosecution for driving under the influence of alcohol, the amount of the alcohol in the blood of the accused at the time of the alleged offense as indicated by a chemical analysis of a sample of suspect's blood or breath, shall give rise to the following rebuttable presumption:

(a) If there was at that time 0.08 percent or more by weight by volume of alcohol in the accused's blood, it shall be presumed that the accused was under the influence of alcoholic intoxicants.

(b) If there was at the time more than .05 percent but less than 0.08 percent by weight by volume of alcohol in the accused's blood, such fact shall not give rise to any presumption that the accused was or was not under the influence of alcoholic intoxicants, but such fact may be considered with other competent evidence in determining the guilt or innocence of the accused.

c) If there was at that time 0.05 percent or less by weight by volume of alcohol in the accused's blood, it shall be presumed that the accused was not under the influence of alcohol intoxicants at the time of the alleged offense.

Virginia Code § 18.2-269.

2. May punitive damages be awarded for driving while intoxicated?:

Yes.

Virginia trial courts may allow a jury to consider the issue of punitive damages arising out of drunk driving. The standard is whether "the defendant's conduct was so willful or wanton as to show a conscious disregard for the rights of others." The Courts will review the facts of each case in determining whether punitive damages can go to the jury. Doe v. Isaacs, 265 Va. 531, 579 S.E.2d 174 (Va. 2003).

Punitive damages may be awarded if the evidence proves that the

defendant acted with malice toward the plaintiff or the deendant's conduct is found to be so willful and wanton as to evidence a conscious disregard for the rights of others. In motor vehicle accidents, the willful and wanton conduct may be established by the following:

1. Evidence of a blood alcohol of .15% or more at the time of the accident.

2. The Defendant's intoxication was a proximate cause of the accident.

3. The Defendant knew, or should have known, before or while drinking that his ability to operate a motor vehicle would be impaired or while operating a motor vehicle defendant knew or should have known that his ability to operate a motor vehicle was impaired.

Virginia Code § 8.01-44.5

3. What is the penalty for refusal to take a breath or blood test?:

Penalties for failure or refusal to take a breath or blood test has been increased and the person's license will automatically be suspended for failure to take a blood or breath test for one year for a first offense. Virginia Code § 18.2-268.3.

As was stated on page 3, a refusal to take the blood alcohol test does not eliminate the application of Virginia Code § 8.01-44.5 on the issue of evidence of punitive damages. As was stated above, the refusal to submit to the test can now be utilized at trial on a civil case in the pursuit of punitive damages as long as the other criteria are met under 8.01-44.5.

B. BAD FAITH ISSUES

Virginia Code §38.2-510 lists seventeen unfair settlement practices, prefaced by the statement that no person or insurer shall commit the listed practices "with such frequency as to indicate a general business practice . . .". The following is a listing of the seventeen statutory unfair settlement practices:

- Misrepresenting pertinent facts or insurance policy provisions relating to coverages at issue;

- Failing to acknowledge and act reasonably promptly upon communications with respect to claims arising under insurance policies;

- Failing to adopt and implement reasonable standards for the prompt investigation of claims arising under insurance policies;

- Refusing arbitrarily and unreasonably to pay claims;

- Failing to affirm or deny coverage of claims within a reasonable time after proof of loss statements have been completed;

- Not attempting in good faith to make prompt, fair and equitable settlements of claims in which liability has become reasonably clear;

- Compelling insureds to institute litigation to recover amounts due under an insurance policy by offering substantially less than the amounts ultimately recovered in actions brought by such insureds;

- Attempting to settle claims for less than the amount to which a reasonable man would have believed he was entitled by reference to written or printed advertising material accompanying or made part of an application;

- Attempting to settle claims on the basis of an application that was altered without notice to, or knowledge or consent of, the insured;

- Making claims payments to insureds or beneficiaries not accompanied by a statement setting forth the coverage under which payments are being made;

- Making known to insureds or claimants a policy of appealing from arbitration awards in favor of insureds or claimants for the purpose of compelling them to accept settlements or compromises less than the amount awarded in arbitration;

- Delaying the investigation or payment of claims by requiring an insured, a claimant, or the physician of either to submit a preliminary claim report and then requiring the subsequent submission of formal proof of loss forms, when both contain substantially the same information;

- Failing to promptly settle claims where liability has become reasonably clear, under one portion of the insurance policy coverage in order to influence settlements under other portions of the insurance policy coverage;

- Failing to promptly provide a reasonable explanation of the basis in the

insurance policy in relation to the facts or applicable law for denial of a claim or for the offer of a compromise settlement;

- Failing to comply with § 38.2-3407.15, or to perform any provider contract provision required by that section;

- Payment to an insurer or its representative by a repair facility, or acceptance by an insurer or its representative from a repair facility, directly or indirectly, of any kickback, rebate, commission, thing of value, or other consideration in connection with such person's appraisal service; or

- Making appraisals of the cost of repairing an automobile that has been damaged as a result of a collision unless such appraisal is based upon a personal inspection by a representative of the repair facility or the insurer who is making the appraisal.

A violation of Virginia Code §38.2-510B does not create a cause of action in favor of anyone except the Commission.

In addition, to the listed unfair settlement practices, an insurer must disclose to the claimant in writing that an estimate has been based on the use of an after market part. An after market part means an automobile part which is not made by the original equipment manufacturer and which is a sheet metal or plastic part generally constituting the exterior of a motor vehicle, including inner and outer panels.

Bad faith actions most often arise in the context of an insurance carrier's failure to settle a claim within the limits of the insured's policy. The Supreme Court of Virginia quoted a New Jersey case to use as guidelines in evaluating the conduct of an insurer:

> "The obligation assumed by the insurer with respect to settlement is to exercise good faith in dealing with the offers of compromise, having both its own and the insured's interests in mind. And it may be said also that a reasonably diligent effort must be made to ascertain the facts upon which a good faith judgment as to settlement can be formulated . . ."
>
> ". . . A decision not to settle must be an honest one. It must result from a weighing of probabilities in a fair manner. To be a good faith decision, it must be an honest and intelligent one in the light of the company's expertise in the field. Where reasonable and probable cause appears for rejecting a settlement offer for defending the damage action, the good faith of the insurer will be

vindicated . . ."

Aetna v. Price, 206 Va. 749, 146 S.E.2d 220 (1966).

With respect to bad faith, Virginia enacted § 8.01-66.1 entitled "Remedy of Arbitrary Refusal of Motor Vehicle Insurance Claim". That section only applies to claims of $3,500 or less, but does allow recovery of double the amount otherwise due and payable under the policy, together with reasonable costs and attorney fees. There must be a finding that the insurer did not act in good faith in refusing to pay. This statute provides a remedy in both the first party and third party claims of $3,500 or less under the medical payments, medical expenses, and property damage type claims.

Under Virginia law, but for that allowed under § 8.01-66.1, there is no first party bad faith. It should also be noted that there is no tort of bad faith in Virginia. Bad faith in Virginia is a contract action. Therefore, punitive damages are not allowable under a bad faith action unless an independent willful and wanton tort action is shown. The punishment for bad faith is not punitive damages. Rather, it is to make the insurer pay the amount of the verdict which is in excess of the policy limits that should have been offered.

If a liability insurer has an opportunity to settle a claim against its insured and refuses in bad faith to settle the claim, it is liable for the whole amount of the judgment against the insured, even if the judgment exceeds the policy limits. If the insurer's decision not to settle is made in good faith, the insurer is not liable for the amount of the judgment which exceeds the policy limits. A good faith decision is one that is made honestly and intelligently in light of the insurer's expertise in the field. Aetna v. Price, 206 Va. 749, 146 S.E.2d 220 (1966).

C. NEGLIGENCE

1. Can the negligence of a claimant driver be imputable to claimant passengers?:

Negligence ordinarily cannot be imputed to one unless he has done something which he knew or had reason to believe might cause injury to another. A passenger may be prevented from recovering under certain circumstances. If the passenger took action or failed to take action that caused the accident then the passenger may be barred from recovery. If the passenger sees a dangerous condition of which the driver is unaware, then the passenger is under a duty to advise the driver if practicable to do so. Major v. Hoppe, 209 Va. 193, 163 S.E.2d 164 (1968).

The passenger may also be barred from recovery if the passenger carelessly remained in the car of a reckless driver after he had the

opportunity to get out. Arndt v. Russill, 231 Va. 328, 343 S.E.2d 84 (1986). A Plaintiff is deemed to have assumed the risk of injury as a matter of law if the passenger was aware that the driver was under the influence of alcohol or drugs and remained in the vehicle when there was an opportunity to get out. Leslie v. Nitz, 212 Va. 480, 484 S.E.2d 755.

2. Can a joint venture be established?:

Each person engaged in a joint venture is liable for the negligence of his joint venturers, if the negligent act is committed within the scope of such joint venture. "In order to constitute a joint enterprise so that the negligence of the driver of an automobile may be imputed to an occupant of the car, it is generally held that there must be a common purpose and a community of interest in the object of the enterprise and an equal right to direct and control the conduct of each other with respect thereto. In other words, the passenger, as well as the driver, must be entitled to a voice in the control and direction of the vehicle. There must be a community in the object and purpose of the undertaking and an equal right to direct and govern the movements and conduct of each other in respect thereof." MacGregor v. Bradshaw, 193 Va. 787, 71 S.E.2d 361 (Va. 1952)

D. PUNITIVE DAMAGES

1. Are punitive damages covered by insurance?:

Yes, unless explicitly exempted. If not covered, they can be pled and recovered against the defendant. In 1988, the Virginia Supreme Court ruled that the phrase "all sums which the insured shall become legally obligated to pay as damages because of bodily injury . . ." includes the obligation to pay an award of punitive damages. United Services Auto Association v. Webb, 235 Va. 655, 369 S.E.2d 196 (1988). The Court noted that inserting the word "compensatory" before "damages" would have excluded punitive damages.

Va. Code § 38.2-227 states, "it is not against public policy of the Commonwealth for any person to purchase insurance providing coverage for punitive damages arising out of the death or injury of any person as the result of negligence, including willful and wanton negligence, but excluding intentional acts." (Emphasis added)

Punitive damages may be awarded in property damage cases under Virginia law. However, Va. Code § 38.2-227 does not allow insurance coverage for punitive damages arising out of property damage.

2. What limitations are there on the recovery of punitive damages?:

The cap on recovering punitive damages is $350,000. Virginia Code § 8.01-38.1.

Punitive damages may not be recovered unless the unlawful act is done with bad motive, with gross negligence, or is so wanton or reckless as to manifest a conscious disregard for the rights of others.

3. Are punitive damages available against an employer for the acts of an employee?:

Generally, no.

Punitive damages normally may be awarded only against one who has actually participated in the offense. Freeman v. Sproles, 204 Va. 353, 131 S.E.2d 410 (1963). Thus, in a typical motor vehicle case, they may

be awarded against the driver but usually not against the employer/owner. However, if the employer or owner authorized or ratified the tort, such employer may be liable for punitive damages. Id.

An employer may still be liable for punitive damages arising out of the operation of a motor vehicle if the employer is separately liable for a willful and wanton act. Examples of this would be defective brakes or other mechanical conditions that rendered the vehicle unsafe and unfit for operation on the highway.

4. May insurance for punitive damages be obtained?

Yes.

Virginia Code § 38.2-227 states that it is not against the public policy of the Commonwealth for any person to purchase insurance providing coverage for punitive damages arising out of the death or injury of any person as a result of negligence, including willful and wanton negligence, but excluding intentional acts.

E. SEAT BELT DEFENSE

1. Is there a seatbelt defense in Virginia?:

No. Virginia Code § 46.2-1094 requires persons occupying the front seat to wear a safety belt.

While failing to wear a seatbelt can lead to civil penalties, Va. Code 46.2-1094 limits the importance that a party failed to wear a seatbelt. For example, failing to wear a seat belt does not constitute negligence nor can it be considered in mitigation of damages of whatever nature. In addition, failing to wear a seatbelt is not admissible in evidence nor can it be the subject of comment by counsel in any action for the recovery of damages arising out of the operation, ownership, or maintenance of a motor vehicle.

F. WORKER'S COMPENSATION

1. Is worker's compensation subrogable?:

Yes, but only to the extent of amount paid by the employer.

Virginia Code Sections 65.2-309, 65.2-310, 65.2-311 and 65.2-812 grant subrogation to an employer/insurer of an employee's right at common law against "another party." The right of subrogation allows the employer to seek the amount it has paid to its employee in workers benefits from the person who injured the employee. A suit may be maintained in the name of the employee or the employee's personal representative, the employer, or the insurer.

The employer/insurer may not subrogate against proceeds recovered by the injured employee pursuant to uninsured or underinsured motorist provisions of a policy carried by the employee. However, Va. Code 65.2-309.1 allows an employer to subrogation against proceeds recovered by the injured employee pursuant to uninsured or underinsured motorist provisions of a policy carried by the employer. The employer/insurer's right of subrogation against a negligent third party is superior to that of the uninsured motorist carrier. Horne v. Superior Life Insurance Company, 203 Va. 282, 123 S.E.2d 401 (1962).

Although the employer/insurer having made payments to an employee may institute an action against a third party, it is usually the employee who does so. In that situation, the employer/insurer may protect his interest in the third party action by filing the procedure outlined in §65.2-310 of the Code of Virginia. This Code section allows the Court in which the third party action is pending, after reasonable notice to the parties and

the employer, to ascertain the amount of compensation paid and expenses and deduct the same out of the judgment. This is the only procedure that guarantees that the employer/insurer's lien will be protected.

Failure to notify the employer/insurer of the third party action can jeopardize the employee's right to further compensation. The employee who settles without the knowledge and consent of the employer/insurer impairs the subrogation rights of the employer/insurer, and further compensation benefits will be forfeited. This is so even if the carrier knows of the pending third party claim but does not know of or approve the settlement. Safety-Kleen Corp. v. VanHoy, 225 Va. 64, 300 S.E.2d 750 (1983).

G. WRONGFUL DEATH

See Virginia Code § 8.01-50 et seq. whenever handling a wrongful death claim.

1. What is a wrongful death claim?

A wrongful death is a death that occurs because of someone else's malice, negligence, or recklessness. A wrongful death claim is a claim that a representative of the deceased person may bring to recover the damages that the deceased person could have claimed against the tortfeasor had the deceased person lived

2. Amount of Damages

The jury or the court can award damages as it may seem fair and just. These damages shall include, but is not limited to, the following:

a. Sorrow, mental anguish and solace which may include society, companionship, comfort, guidance, kindly offices and advice of the decedent;

b. Compensation for reasonably expected loss of (i) income of the decedent and (ii) services, protection, care and assistance provided by the decedent;

c. Expenses for the care, treatment and hospitalization of the decedent incident to the injury resulting in death;

d. Reasonable funeral expenses; and

e. Punitive damages may be recovered for willful or wanton conduct, or such recklessness as evinces a conscious disregard for the safety

of others.

Virginia Code § 8.01-52.

3. Who are the Statutory Beneficiaries?

Virginia Code 8.01-53 sets out the five classes of beneficiaries. The classes are as follows:

a. the surviving spouse, children of the deceased and children of any deceased child of the deceased or

b. if there be none such, then to the parents, brothers and sisters of the deceased, and to any other relative who is primarily dependent on the decedent for support or services and is also a member of the same household as the decedent or

c. if the decedent has left both surviving spouse and parent or parents, but no child or grandchild, the award shall be distributed to the surviving spouse and such parent or parents or

d. if there are survivors under clause (i) or clause (iii), the award shall be distributed to those beneficiaries and to any other relative who is primarily dependent on the decedent for support or services and is also a member of the same household as the decedent or

e. if no survivors exist under clause (i), (ii), (iii), or (iv), the award shall be distributed in the course of descents.

No parent whose parental rights and responsibilities have been terminated by a court of competent jurisdiction or pursuant to a permanent entrustment agreement with a child welfare agency shall be eligible as a beneficiary. A relative is any person related to the decedent by blood, marriage, or adoption and also includes a stepchild of the decedent.

At the time the verdict is entered by the jury or the judgment is rendered by the court, the class and beneficiaries eligible to receive a distribution shall be fixed.

H. INADEQUACY OF VERDICTS

In Bowers v. Sprouse, 254 Va. 428, 492 S.E.2d 637 (1997), the Supreme Court held that if a jury returns a verdict in the exact amount of the claimed numeric specials without any additional compensation, then as a matter of law the verdict is inadequate. In Bowers, the Virginia Supreme Court in their opinion stated:

> A jury award in a personal injury action which compensates the plaintiff for the exact amount of the plaintiff's medical expenses and other special damages is inadequate as a matter of law, irrespective of whether those damages were controverted.

Bowers, at 431.

The majority opinion was unclear as to whether the court was of the opinion that any verdict for an amount less than the numeric damages was inadequate as a matter of law. Justice Lacey, in a very strongly worded dissent, interpreted that her belief was that the decision only applied to cases where the verdict was the exact amount of uncontroverted numeric damages.

In several cases decided after Bowers, the Virginia Supreme Court clarified that fact and did rule that the holding in Bowers only applied to cases where the verdict was for the exact amount, or very close to it, of the uncontroverted numeric damages. In one of those cases, Walker v. Mason, 257 Va. 65, 510 S.E.2d 734 (Va. 1999), the jury returned a verdict which exceeded the numeric damages by approximately $86.00. The Virginia Supreme Court concluded that there was nothing in the record from the trial to support a conclusion that the jury's verdict was a result of improper influence or mistaken view of the merits of the case. The court further indicated the facts of Walker were similar to that of Dinwiddie v. Hamilton, 201 Va. 348, 111 S.E.2d 275 (1959). In that particular case, the jury verdict exceeded the claimed special damages by $761.00. The Supreme Court affirmed that jury verdict stating that "the compensation for the pain and suffering is within the discretion of the jury and no mere difference of opinion of the trial judge, however decided, will justify an interference with their verdict, unless it appears in the record that the jury has been influenced by partiality or prejudice, or have been mislead by some mistaken view of the merits of the case." Id. at 352, 111 S.E.2d at 278.

Therefore, if a jury returns a verdict on a case for an amount identical to the numeric damages, the court will set aside the verdict and order a new trial. If the verdict is for an amount less than, or slightly more than, the numeric damages, the verdict will stand.