2012 SURVEY OF MOTOR VEHICLE LIABILITY CLAIMS IN THE DISTRICT OF COLUMBIA, VIRGINIA, AND MARYLAND

Steve Schwinn (D.C.)
John H. Carstens (Va./ W.Va.)
Padraic K. Keane (Md.)

I. District of Columbia

A. District of Columbia Courts –

The District of Columbia is an urban venue generally considered to be plaintiff oriented in personal injury actions.

1. Superior Court of the District of Columbia

The Superior Court was established by the Home Rule Act in 1970. Before that, the D.C. Court of General Sessions had jurisdiction over civil actions, with review in the U.S. Court of Appeals. Information on the DC Courts is available at www.dccourts.gov.

a. Civil Division – Cases are assigned to an individual trial judge for handling through trial. Typically, trial occurs within 18 months of filing. There is mandatory, court sponsored mediation. Often, claims adjusters are required to personally attend mediation, but they may be excused on motion.

b. Small Claims and Conciliation Branch – The small claims branch has exclusive jurisdiction of claims where the amount in controversy does not exceed $5,000, exclusive of interest and attorneys' fees. Typically, cases are scheduled for a non-jury trial within 90 days. A defendant may request a jury trial with a verified answer and the case will be referred to the Civil

Division for trial on an expedited basis. Rules of discovery and evidence are relaxed. An earnest effort is made to help the parties settle their differences by conciliation before trial.

2. United States District Court

The U.S. District Court has diversity jurisdiction over claims between citizens of different states where the amount in controversy exceeds $75,000, exclusive of interests and costs where the defendant is not a resident of the District of Columbia. A corporation is deemed to be a citizen of the states where it is incorporated and maintains its principal place of business. Generally, federal court jurisdiction is preferred because of the quality of the bench and the more stringent Rules of Procedure.

B. Personal Jurisdiction – The D.C. Long Arm Statute D.C. Code §13-423

D.C. Courts may exercise personal jurisdiction over any person ***as to a claim for relief arising from*** the person's (1) transaction of business in the District of Columbia, (2) contracting to supply services in the District of Columbia, (3) Causing Tortious Injury in the District of Columbia by an act or omission in the District of Columbia, (4) causing tortious injury in the District of Columbia by an act or omission outside the District of Columbia if he regularly does or solicits business, engages in any other persistent course of conduct, or derives substantial revenue from goods used or consumed, or services rendered in the District of Columbia…. A case may be transferred to another, more convenient, forum if justified by public and private policy considerations.

C. Bad Faith Exposure

First Party – There is no tort of bad faith denial of an insurance claim, but the insurer has a **contractual** duty to process and pay claims promptly, expeditiously and in good faith. A bad faith refusal to pay a loss can support a claim for attorneys' fees.

a. "Bad faith means any frivolous or unfounded refusal to pay." If probable cause is shown that payments should have been made, an inference of bad faith might be raised. Conversely, if after reasonable investigation, there is a genuine dispute over coverage or the amount of damage, the refusal to pay is not unfounded.

b. An insurer's refusal to defend a claim within the coverage of a liability policy is a breach of contract, rendering the insurer liable for the losses resulting. The damages recoverable include not only the adjudicated amount of the claim and the insured's expenses resisting the claim, but also in the additional loss legally traceable to the breach. An insurer's unjustified refusal to defend, based upon an inadequate investigation, supports a claim for attorneys' fees incurred to secure indemnification. *Seigel v. William E. Bookhultz*

& Sons, Inc., 419 F2d 720 (D.C. Cir. 1969). The better course is for the insurer to provide a defense under a reservation of rights and pursue a declaratory judgment action to resolve the coverage issue.

c. An insurer may be liable to its insured for a bad faith refusal to settle within limits if a verdict in returned in excess of policy limits. To prevail, the insured must show that the refusal to settle within the limits of liability was unfounded, motivated by self-interest and therefore a breach of the fiduciary duty to the insured.

2. Third Party – A plaintiff has no right against a defendant's insurer for failing to pay a claim. However, plaintiff may take an assignment of the insured's right to pursue a claim for bad faith refusal to settle within limits where the verdict exceeds the limits of liability.

D. Unfair Insurance Trade Practices D.C. Code § 31-2231

The law requires insurers to act in good faith to effectuate prompt, fair and equitable settlement of claims submitted in which liability has become reasonably clear.

1. Administrative Remedy Only: The Act states it shall be construed to permit an administrative remedy only, and nothing in the Act shall be construed to create or imply a private cause of action for a violation of the Act. The Commissioner of insurance may impose a penalty of up to $1,000 for each violation.

2. Unfair Claims Settlement Practices – No person shall commit or perform with such frequency as to indicate a **general business practice** in any of the following:

   a. Knowingly misrepresent pertinent facts or coverage.
   b. Refuse to pay a claim for a reason that is arbitrary or capricious.
   c. Fail to settle a claim promptly whenever liability is reasonably clear.
   d. Fail promptly upon request to provide a reasonable explanation of the basis for the denial of a claim.

E. Contributory Negligence – The contributory negligence of the plaintiff is an absolute defense. Even if the relative negligence of the defendant is greater, any negligence on the part of plaintiff that contributes to cause the injury bars any recovery. As a practical matter, however, juries often mitigate damages instead.

1. By statute, the failure to comply with the law mandating the use of seatbelts is not evidence of negligence.

2. *Massengale v. Pitts 778 2d 1029 (1999)* – the claim of a spouse for loss of consortium is separate and distinct. Accordingly, the contributory negligence of the plaintiff does not bar a claim by the spouse for loss of consortium damages.

F. Joint and Several Liability/ Contribution - All defendants found liable are responsible for the full measure of damages sustained, without regard to their respective degree of fault. Any defendant paying more than his pro rata share is entitled to contribution from the other.

1. *Martello v. Hawley* 300 F2d 721(D.C. Cir. 1962) – When a settlement was made with one joint tortfeasor and later a verdict was obtained against the other, and the jury found that the settling tortfeasor should contribute, then the verdict should be credited with one half its total amount and the non-settling defendant should be required to pay the balance. By virtue of the settlement, the plaintiff sold one half his claim for damages.

2. *Washington v. Washington Hospital Center* 579 A2d 177 (D.C. 1990) – In order to claim the credit, the liability of the settling defendant must be established. In the absence of a determination of the settling tortfeasor's liability, the defendant is entitled to a *pro tonto* (dollar for dollar) credit because the plaintiff should not be entitled to recover more than full satisfaction. The *pro tonto* credit is available where there is no cross-claim for contribution, or where the settling defendant is exonerated by the jury.

3. In order to preserve a claim for a contribution or indemnification, a settling defendant must discharge the liability of the non-settling tortfeasor. A claim for contribution or indemnification is premised on the fact that the claimant has paid the other's share. It is not permitted where the other's liability is not extinguished by the settlement and the plaintiff remains free to pursue a claim for the balance of damages sustained.

G. Assignment of Claim – Under the D.C. Workers' Compensation Act, the employee's right to pursue tort damages from a third party responsible for the injury is irrevocably assigned to the employer if suit is not brought within six months after the claimant accepts compensation benefits under an award in an order. This is true even if it operates to shorten the three years statute of limitations for personal injury. *Triplett v. George Hyman*, 565 A2d 83 (D.C. 1989).

H. District of Columbia No Fault Act, D.C. Code § 31-2401

The purpose of the Act is to provide adequate protection for "victims" who are injured in a motor vehicle accident in the District or who are injured while riding in motor vehicles registered or operated in the District. The Act sets mandatory

personal injury protection insurance requirements to cover medical expenses and lost wages without regard for fault of the other party or the injured victim.

1. Coverage: Extends to Non-Residents who own or operate motor vehicles in the District. A non-resident owner shall not permit a motor vehicle to be operated in the District unless the statutory minimum insurance is provided and maintained during the time the motor vehicle is in the District.

2. Required Insurance

    a. Property Damage Liability Insurance – covers the insured's liability to pay for property damage to property not owned or controlled by the insured in accordance with the law. The minimum amount of property damage liability insurance coverage is $10,000 for property damaged in any one accident.

    b. Third-Party Personal Liability Insurance – provides insurance for any liability of the insured to pay for injury arising from an accident within or outside the District of Columbia, in accordance with applicable law. The minimum amount of third-party personal liability insurance coverage is $25,000 per person and $50,000 for all persons injured in any one accident.

    c. Uninsured and optional underinsured coverage are subject to the same limits.

    d. Personal Injury Protection – optional insurance required to be offered by any company licensed in the District of Columbia to provide motor vehicle liability insurance. It provides benefits for medical and rehabilitation expenses, work loss and funeral benefits incurred by the insured or any occupant of the insured's vehicle or a vehicle operated by the insured.

        *All benefits are paid to each victim without regard of the fault of any person, or contributory fault of the victim

        *Medical expenses consist of all reasonable charges incurred for reasonably necessary medical products and services obtained from licensed providers for the victim's care, recovery or rehabilitation. The maximum benefits should not less be $50,000 for each victim with

an option of up to $100,000 for each victim.

*Work Loss: Net earnings (assumed 80% of gross) lost on account of injury sustained in the accident and for replacement household services that would have been performed by the victim for up to three years after the accident. Coverage shall be not less than $12,000 with an option of $24,000.

*Funeral Benefits: Up to $4,000 shall be paid to the survivors of each victim as funeral and funeral related expenses.

3. Election of Remedies: A victim who elects to receive personal injury protection benefits may maintain a civil action based on liability of another person only if:

   a. The injury directly results in substantial and medically demonstrable permanent impairment that has significantly affected the ability of the victim to perform his/her usual and customary daily activities or;

   b. Medical and rehabilitation expenses of a victim or work loss of a victim exceeds the amount of personal injury protection benefits available.

   c. The insured must notify any identifiable victim in writing of the 60 day election period, which may be extended by mutual agreement. If the victim fails to make an election within the 60 day period, the liability insurance coverage applies.

   d. Nothing in the Act prevents the survivors of a victim whose death arises from a motor vehicle accident from maintaining a civil action based on the liability of another person for the loss resulting from the death of the victim.

4. Prohibitions - A victim is prohibited from claiming personal injury protection benefits, other than to compensate for any deductible, if the victim is eligible for compensation for the loss covered by personal injury protection from another insurer or another insurance coverage, unless the victim has exhausted the benefits offered by the insurer or insurance coverage. An insured must exhaust any benefits available under a health insurance policy before seeking personal injury protection coverage. *Carter v. State Farm,* 808 A2d 466 (D.C. 2002).

5. Priorities for Payment: The insurer liable to pay benefits is 1) the insurer providing PIP insurance to the victim as a named insured; or 2) the insurer providing PIP with respect to the motor vehicle in which the victim is present.

II. Virginia

A. The Virginia Court System

1. The General District Court

a. Jurisdiction – The general district courts have jurisdiction over all civil cases in Virginia that seek damages up to $25,000. For civil cases seeking less than $4,500, the general district courts have exclusive jurisdiction.

b. Procedures

1. Trial – trial is conducted by the judge without a jury and may be had on the first return date of the summons or warrant in debt
2. Discovery -- Discovery is limited in the general district courts to subpoenas duces tecum , though the judge may order the plaintiff to file and serve a bill of particulars further outlining the allegations of his complaint.
3. All actions filed in the general district courts must be tried there.
4. Evidence of medical treatment and costs can be presented through sworn statement of treating or examining health care provider if served with written notice 10 days in advance of trial. Opposing party can summons the provider to trial or take the provider's de bene esse deposition.
5. Evidence of property damage to motor vehicle can be presented through estimator's affidavit. If more than $2,500, affidavit must be served not less than 7 days prior to trial. This statute is applicable to cases filed in the Circuit Court also.

c. Small Claims Court – Each general district court has a small claims court, for cases in which no more than $5,000 is claimed.

1. Parties, including corporations, are not permitted to be represented by counsel in small claims court

except for the limited purpose of removing the case to the general district court. Va. Code § 16.1-122.4. A corporate or partnership plaintiff or defendant may be represented by an owner, a general partner, an officer or an employee of that corporation or partnership.

2. Defendants may remove the case from small claims court to the general district court at any point before the judge hands down the decision. In small claims court, there is no jury.There is no discovery. Trials are conducted informally, with the rules of evidence suspended.

2. The Circuit Court

a. Jurisdiction – The circuit courts are Virginia's trial courts of general jurisdiction. They have jurisdiction over all civil actions where the amount in controversy exceeds $4,500.

b. Appeals – The circuit courts hear appeals from the judgments greater than $50 of the general district courts pursuant to Va. Code § 16.1 -106. The appeal must be taken within ten days and is of right. The appeal will result in *de novo* review by the circuit court, which results in a new trial in the circuit court. See Va. Code § 16.1-113.

c. High-Risk Jurisdictions: City of Richmond, City of Portsmouth, Newport News, City of Norfolk, Hampton, City of Roanoke

3. The Court of Appeals

a. Jurisdiction -- The Court of Appeals has jurisdiction over appeals from the circuit courts in domestic relations cases, traffic infractions cases, and criminal cases. The Court also has jurisdiction over appeals from administrative agencies and the Workers' Compensation Commission. The Court of Appeals has no jurisdiction over appeals of civil cases from the circuit courts.

b. Appeal to the Court of Appeals is an appeal as of right, but only for the cases over which it has jurisdiction.

4. The Supreme Court of Virginia

a. Jurisdiction – Virginia's court of last resort. Has jurisdiction to hear appeals from the circuit courts and the Court of Appeals.

b. Civil Appeals – There is no civil appeal as of right in Virginia. To appeal a verdict in a civil case, you must petition the Supreme Court to hear the appeal. Roughly one in five civil cases is accepted for an appeal by the Court.

2. Federal Courts in Virginia

a. The United States District Court for the Eastern District of Virginia a/k/a the "Rocket Docket" (Interstate 95 corridor)

i. Procedures are governed by stringent local rules
ii. Normal discovery schedule is approximately six months, regardless of the complexity of the case.
i. Most cases are tried in less than one year of filing.

b. United States District Court for the Western District of Virginia (Interstate 81 corridor)
i. Court has adopted specific local rules

3. Removal Considerations

a. High Risk Jurisdiction
b. Automatic Appeal of any judgment to the United States Court of Appeals for the Fourth Circuit, as opposed to no automatic appeal in state court.
c. Availability of Summary Judgment through affidavits, declarations and deposition testimony.

C. First Party Bad Faith Exposure – Generally

1. Bad faith claims can arise either because of a refusal to pay amounts claimed by the insured under a policy or by the refusal of a defense to the insured in third party claims.

2. Duty to Defend - Virginia recognizes the "four? corners" rule for determining the duty to defend.
a. the obligation to defend arises whenever the complaint against the insured alleges facts and circumstances, some of which, if proved, would fall within the risk covered by the policy. *Lerner v. General Ins. Co. of America*, 245 S.E.2d 249 (Va. 1978)
b. Where it appears clearly that the insurer would not be liable under its contract for any judgment based upon the allegations in the complaint, it has no duty to defend. *Travelers Indem. Co. v. Obenshain*, 245 S.E.2d 247 (Va. 1978)

c. The duty to defend is to be determined initially from the allegations of the complaint. But if it is doubtful whether the case alleged is covered by the policy, the refusal of the insurer to defend is at its own risk. If it is subsequently shown upon development of the facts that the claim is covered by the policy, it is necessarily liable for breach of its covenant to defend. *London Guar. Co. v. White & Bros., Inc*. 49 S.E.2d 254 (Va. 1948)

3. Standard for First Party Bad Faith – Duty to Defend

a. There can be no finding of bad faith where there is no coverage for indemnity under the policy. *Brenner v. Lawyers Title Ins. Corp.*, 397 S.E2d 100 (Va. 1990). Claims for bad faith can only arise, then, when it was clear that there was coverage under the policy but a defense was refused, or it was unclear that there would be coverage at the time the defense was refused but it was later determined that coverage under the policy existed.

b. The standard to determine whether an insurer has acted in bad faith in refusing payment or defense of a claim is one of reasonableness. *CUNA Mut. Ins. Soc'y v. Norman*, 375 S.E.2d 724 (Va. 1989) The factors to consider are:

i. whether reasonable minds could differ in interpretation of policy provisions defining coverage and exclusions
ii. whether the insurer had made reasonable investigation of facts and circumstances underlying the insured's claim
iii. whether evidence discovered reasonably supports denial of liability
iv. whether it appears that the insurer's refusal to pay was used merely as a tool in settlement negotiations
v. whether the defense the insurer asserted at trial raises an issue of first impression or a reasonably debatable question of law or fact

4. Bad Faith – Failure to settle within policy limits

In order to prevail on a cause of action for bad faith to recover an excess judgment in Virginia, the insured must plead and prove by clear and convincing evidence that "the insurer acted in furtherance of its own interest, with intentional disregard of the financial interest of the insured." *State Farm Mutual Auto. Ins. Co. v. Floyd*, 235 Va. 136, 143 – 44, 366 S.E.2d 93, 97 (1988).

Bad faith arises when "an insurer unjustifiably refuses to settle a claim within the insurer's coverage limits" and exposes the insured to liability in excess of the policy limits. *Horace Mann Ins. Co. v. Government Employees Ins. Co.*, 231 Va. 426, 429, 344 S.E.2d 906, 908 (1986).

The Virginia Supreme Court has stated that the insurer has the obligation to exercise good faith when dealing with settlement offers and the insurer is tasked with making a "reasonably diligent effort . . . to ascertain the facts upon which a good faith judgment as to settlement can be formulated." *Aetna Casualty and Surety Co. v. Price*, 206 Va. 749, 762, 146 S.E.2d 220 (1966).

Simply stated, a decision not to settle must be honest and intelligent. *Id.* However, an insurer is not obligated to offer the amount of its maximum limit to protect the insured from an excess verdict. *Gaskill v. Preferred Risk Mut. Ins. Co.*, 251 F. Supp. 66, 68 (1966), *aff'd per curiam* 371 F.2d 792 (4th Cir) (quoting *Lee v. Nationwide Mutual Ins. Co.*, 184 F. Supp. 634, 638 (D. Md. 1960)).

Courts have found that insurers have not acted reasonably, in good faith without negligence when "a) there was only a superficial investigation; b) there was no serious attempt to settle; c) the company did not accept the recommendations of its counsel and agents as to the amount it should offer in settlement of the case; d) there was only scanty consideration given to the insured's predicament; and e) there was neglect in appraising the danger of the outstanding determination of liability." *Daniels v. Horace Mann Mut. Ins. Co.*, 422 F.2d 87, 90 (4th Cir. 1970).

5. Consequences of a Finding of Bad Faith

    a. If a court finds that an insurer acted in bad faith in refusing coverage or a defense to an insured, the insured is entitled to recover his attorney's fees and costs that arise as a result of the action brought to compel the insurer to pay. Va. Code § 38.2-209.

D. Third Party Bad Faith Exposure

1. In Virginia, liability for bad faith insurance practices is not a tort, but is a matter of contract law. *A & E Supply Co. v. Nationwide Mut. Fire Ins. Co.*, 798 F.2d 669 (4th Cir. 1986).
    a. For this reason, claims for bad faith can usually only be brought under the insurance contract by the insured, meaning third parties cannot sue the insurance company for bad faith. Judgment creditor can pursue claim for excess verdict upon assignment of claim from the insured, There is, however, an statutory exception in certain small value motor vehicle cases.
    b. Because it is a contractual claim, punitive damages are not recoverable for bad faith absent the insured pleading and proving a separate independent willful tort,

2. Statutory Actions for Bad Faith Refusals to Pay Motor Vehicle Claims
    a. Va. Code § 8.01-66.1 -- whenever any insurance company licensed in this Commonwealth to write insurance as defined in § 38.2-124 denies, refuses or fails to pay to a third party claimant, on behalf of

an insured to whom such company has issued a policy of motor vehicle liability insurance, a claim of $ 3,500 or less made by such third party claimant and if the judge of a court of proper jurisdiction finds that the insured is liable for the claim, the third party claimant shall have a cause of action against the insurance company. If the judge finds that such denial, refusal or failure to pay was not made in good faith, the company, in addition to the liability assumed by the company under the provisions of the insured's policy of motor vehicle liability insurance, shall be liable to the third party claimant in an amount double the amount of the judgment awarded the third party claimant, together with reasonable attorney's fees and expenses.

b. Whenever a court of proper jurisdiction finds that an insurance company licensed in this Commonwealth to write insurance as defined in § 38.2-124 denies, refuses or fails to pay to its insured a claim of more than $ 3,500 in excess of the deductible, if any, under the provisions of a policy of motor vehicle insurance issued by such company to the insured and it is subsequently found by the judge of a court of proper jurisdiction that such denial, refusal or failure to pay was not made in good faith, the company shall be liable to the insured in the amount otherwise due and payable under the provisions of the insured's policy of motor vehicle insurance, plus interest on the amount due at double the rate provided in § 6.2-301 from the date that the claim was submitted to the insurer or its authorized agent, together with reasonable attorney's fees and expenses.

c. The statute, on its face, only applies to corporations who are licensed to sell policies of motor vehicle insurance (as defined by Va. Code § 38.2-124) in the Commonwealth of Virginia. Note also that third party claims are only authorized for claims that are LESS THAN $3,500.

3. Standard for Third Party Bad Faith - If the motor vehicle statute is triggered, the standard for bad faith is the same as for first party bad faith claims – reasonableness.

E. Statutory Unfair Claim Settlement Practice

1. Virginia has an Unfair Insurance Practices Act. Va. Code § 38.2-500 *et seq*. The Act prohibits a variety of unfair trade practices, including prohibitions related to advertising and the settlement of claims. Va. Code § 38.2 -510.

2. The Virginia Unfair Insurance Practices Act does not, however, create a private cause of action. This means that no insured can sue an insurer under the act. Instead, claims must be referred to the Virginia State

Corporation Commission, Bureau of Insurance. *See A & E Supply Co. v. Nationwide Mut. Fire Ins. Co.*, 789 F.2d 669 (4th Cir. 1986).

3. Additionally, liability under the Unfair Insurance Practices Act is not triggered by isolated violations of the Act in terms of claim settlement. The Act is only violated when failure to make good faith attempts to settle claims occurs with such frequency as to indicate a general business practice on the part of the insurer. A*llstate Ins. Co. v. United Servs. Auto Ass'n*, 452 S.E.2d 859 (Va. 1995).

F. Virginia Practice

1. Statute of limitations in Motor Vehicle Actions
   a. Bodily Injury – 2 years from the date of accident.
   b. Property Damage – 5 years from the date of accident.
   c. Minor/Infant claims – statute of limitations is tolled until minor turns 18 years old. Minor claims regardless of amount must be court approval in order to be binding.

2. Contributory Negligence - Parties' negligence is not compared; any negligence on the part of the plaintiff bars recovery.

3. Joint and Several Liability – Each defendant is liable for the full amount of any judgment with a right to contribution.

4. No Strict Liability - Virginia does not recognize the theory of strict liability in product defect actions. Consequently, if the insured is sued for a product defect (faulty brakes, etc.) the plaintiff must still prove negligence or breach of implied or express warranty on the part of the manufacturer or installer of the product.

5. The One Year Service Rule

   a. Virginia allows a plaintiff up to one year to serve the complaint on the insured. Functionally, this means that the plaintiff can file the lawsuit (to avoid the statute of limitations, for example) and then hold onto it without service for up to a year. Sometimes plaintiff's attorneys will do this in an attempt to negotiate with the insurance company without actually beginning the discovery process by serving the complaint.

6. The Non-Suit - Virginia permits a plaintiff to dismiss, once as of right, his claims against the insured and then refile them. Va. Code § 8.01-380.
   i. The effect of a non-suit is effectively to hit the reset button and begin the case again.

ii. A non-suit may be taken at any time until the case is submitted to the court, the jury retires for deliberations, or the court sustains a motion to strike.
iii. In cases where there are cross-claims or counter-claims, a plaintiff cannot non-suit without the defendant's consent, unless the cross claim or counterclaim is subject to independent adjudication.
iv. Plaintiff has 6 months, or time remaining on original statute of limitations if longer, to refile suit.

b. Costs
i. At the court's discretion, it may order the party taking the non-suit to pay reasonable attorney's fees and costs. Additional costs are authorized if the non-suit is taken within 7 days of trial.

7. Summary Judgment – cannot use affidavits, declarations or deposition testimony to support a motion for summary judgment.

8. P.I.P. Coverage
a. Virginia does not mandate personal injury protection coverage. Consequently, P.I.P. claims do not exist in Virginia.
b. Virginia requires a Virginia insurance company to offer option med-pay coverage.

9. Uninsured / Underinsured Motorist Coverage
a. Virginia does have Uninsured and Underinsured coverage. Va. Code § 38.2 – 2206. Coverage amount, priority of coverage and set off are defined by statute.
i. The mandated minimums for this coverage are $25,000 for bodily injury or death to any one person in an accident, $50,000 for bodily injury or death to two or more persons in an accident, and $20,000 for injury to or destruction of property. Va. Code § 46.2-472
b. But, UIM coverage only exists in Virginia if:
i. The insurance policy is issued or delivered in Virginia to insure a motor vehicle; or
ii. an insurer, licensed in Virginia, issues or delivers a liability policy insuring a motor vehicle then principally garaged or docked or principally used in Virginia. *Wood v. State Farm Mut. Auto. Ins. Co.*, 432 F. Supp. 41 (W.D. Va. 1977).
c. Under Virginia conflict of laws principals, the UM or UIM claim is governed by the law of the state of contracting; Hanna v. Gravett, 262 F.Supp. 2d 643 (E.D.Va. 2003)(holding that Maryland law governs UM coverage where policy was issued and delivered in

Maryland to Maryland resident covering a vehicle used and garaged in Maryland.

d. Under Virginia, the UM or UIM carrier is served with process in the tort case to trigger coverage and has the right to file pleadings and actively defend the tort case.

e. "John Doe" actions – Virginia recognizes John Doe actions for accidents involving an unknown driver. Statute defines notification and procedural requirements.

i. John Doe is considered to be an uninsured driver under the state omnibus statute.

ii. John Doe is not a joint tortfeasor for contribution purposes.

10. Punitive Damages

a. $350,000 cap on punitive damages

b. Punitive Damages in Intoxication Cases: A defendant's conduct 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, the defendant had a blood alcohol concentration of 0.15 percent or more by weight by volume or 0.15 grams or more per 210 liters of breath; (ii) at the time the defendant began drinking alcohol, or during the time he was drinking alcohol, he knew or should have known that his ability to operate a motor vehicle, engine or train would be impaired, or when he was operating a motor vehicle 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.

c. It is not against public policy to have insurance for punitive damages as the result of negligence, including willful and wanton negligence, but excluding intentional acts.

11. Notice Requirements to claimant of intention to rely on certain defenses and of execution of nonwaiver of rights agreement.

Under Va. Code § 38.2-2226. Insurer to must give notice to the claimant or the claimant's counsel of the breach of the terms or conditions of the insurance contract by the insured. Notification shall be given within forty-five days after discovery by the insurer of the breach or of the claim, whichever is later. Whenever, on account of such breach, a nonwaiver of rights agreement is executed by the insurer and the insured, or a reservation of rights letter is sent by the insurer to the insured, notice of such action shall be given to the claimant or the claimant's counsel within forty-five days after that agreement is executed or the letter is sent, or after notice of the claim is received, whichever is later. Failure to give the notice within forty-five days will result in a waiver of the defense based on such breach to the extent of the claim by operation of law.

> In any claim in which a civil action has been filed by the claimant, the insurer shall give notice of reservation of rights in writing to the claimant, or if the claimant is represented by counsel, to claimant's counsel not less than thirty days prior to the date set for trial of the matter. The court, upon motion of the insurer and for good cause shown, may allow such notice to be given fewer than thirty days prior to the trial date. Failure to give the notice within thirty days of the trial date, or such shorter period as the court may have allowed, shall result in a waiver of the defense based on such breach to the extent of the claim by operation of law.

III. Maryland

A. Court Organization

1. District Court
    a. Exclusive jurisdiction for claims of $5,000.00 or less (small claims)
    b. Also has jurisdiction for claims up to $30,000.00
    c. No discovery allowed in small claims matters; limited discovery (interrogatories and limited document requests only) in District Court cases above $5,000.00.

2. Circuit Court
    a. Maryland's general jurisdiction court
    b. Also provides appellate review for Workers' Compensation Commission decisions and for District Court matters.

3. Court of Special Appeals (Md. Ct. Spec. App.)
    a. First step of appellate process for cases originating in Circuit Court.

4. Court of Appeals (Md.)
    a. Reviews cases based on writ of certiorari from Court of Special Appeals. State court of last resort.

5. Federal Court
    a. Only one district in Maryland—but two courthouses (Greenbelt and Baltimore)

B. Substantive Law

1. Joint and several liability for all damages.
2. Contributory negligence a complete bar to recovery—even 1%. As a practical matter, juries are anecdotally considered reluctant to impose contributory

negligence barring extreme circumstances. Further, contributory negligence bars derivative claims (such as loss of consortium) in Maryland.

C. Timeline of Cases

1. District Court
    a. Notice of Intention to Defend due within 15 days after service of complaint—60 days if defendant is served outside of Maryland, or if required by statute to have resident agent and is served via Maryland's State Department of Assessments and Taxation ("SDAT").
    b. No mandatory defenses in Notice of Intention to Defend.
    c. If small claims, no discovery; if amount in controversy is over $5,000.00, limited discovery.

2. Circuit Court

    a. Answer to Complaint due within 30 days after being served—60 days is served outside of Maryland, or if service is made upon SDAT.
    b. Must raise defenses of lack of personal jurisdiction, improper venue, insufficiency of process, and insufficiency of service of process via motion to dismiss before answering complaint, or defenses are waived.
    c. Generally, Circuit Court wants trial to occur within 18 months of lawsuit being filed.

D. High-Risk Maryland Venues & Removal Considerations

    a. Baltimore City and Prince George's County are considered to be the most plaintiff-friendly jurisdictions in Maryland.
    b. Jurisdictions northwest of District of Columbia (Montgomery County, Howard County) tend to be more conservative, as well as venues further East and South.
    c. Removal is advised for cases in P.G. County or Baltimore City; federal jury pool is comprised of registered voters, while state court jury pools are comprised of licensed drivers.

E. First & Third-Party Bad Faith Exposure

    a. First Party Bad Faith
        i. New law effective 10/1/07 allows for first-party bad faith tort claims—but only applicable to policies delivered or issued in Maryland, or which cover individuals who work/live in Maryland.
        ii. Prior to 10/1/07, no tort claims for first party bad faith—only contract remedies, and only breach of contract damages.

iii. "Good Faith" – an informed decision based on honesty and diligence supported by evidence the insurer knows or should know at the time a decision is made related to the claim. *State Farm Mutual Automobile Ins. Co. v. White*, 236 A.2d 269 (Md. 1966).

iv. *Brohawn v. TransAmerica Insurance Company*, 347 A2d 842 (M.D. 1975). (In the absence of a pertinent statute or contractual provision, the insured is entitled to recover attorneys' fees incurred in a declaratory judgment action to determine the existence of coverage under a liability policy).

b. Third Party Bad Faith

i. Generally, there are no third-party bad faith claims in Maryland. *Bean v. Allstate Ins. Co.*, 407 A.2d 793 (Md. 1979). However, a bad faith refusal to settle claim may be assigned. *Medical Mutual Liability Ins. Society of Md. v. Evans*, 622 A.2d 103 (Md. 1993).

F. Unfair Claim Settlement Practices Act

a. Only applicable to policies delivered/issued in Maryland, or which cover individuals who live or work in Maryland. MD. CODE ANN. INSURANCE § 27-302.

b. Generally, considered unfair to:

i. Misrepresent policy provisions or pertinent facts relating to coverage;

ii. Refuse to pay a claim for arbitrary or capricious reasons;

iii. Fail to settle a claim promptly when liability is reasonably clear under one part of a policy in order to influence settlement under other parts of the policy, *etc.* MD. CODE ANN. INSURANCE § 27-303.

c. Violations are punishable fines of up to $2,500.00 per violation, and restitution for actual economic damages to claimant.

G. License Requirements

1. A "public adjuster" (including independent claims adjuster) must be licensed, and must be Maryland resident for one year prior to application. MD. CODE ANN. INSURANCE § 10-404.

H. Maryland's Non-Economic Damages Cap

a. Non-economic damages (such as pain and suffering, loss of consortium, *etc.*) are capped by MD. CODE ANN. COURTS & JUD. PROC. §11-108.

b. Amount increases every October 1st by $15,000.00—for an accident occurring after October 1st, 2011, cap for a single claimant is $755,000.00.
c. If more than one claimant (e.g., multiple wrongful death claimants), cap is 150% of the cap for one claimant—so for an accident occurring after October 1st, 2011, cap for multiple claimants would be $1,132.500.00.

I. Punitive Damages in Maryland

a. Punitive damages are only available upon a showing of actual malice in the context of a negligence action. A showing of actual malice requires "evil motive, intent to injure, ill will, fraud, *etc.*" *Owens-Illinois v. Zenobia*, 601 A.2d 633 (Md. 1992).

J. Coverage Requirements

a. Minimum automobile coverage is $30,000.00/$60,000.00/$15,000.00. PIP minimum of $2,500.00, unless waived.

For further information, please call one of the following Jordan Coyne & Savits, LLP partners to discuss motor vehicle liability claims:

John H. Carstens, (Virginia) 703-247-0909

D. Stephenson Schwinn (District of Columbia and Maryland) 202-496-2806