

VIRGINIA

WHAT HAPPENS TO A PERSONAL INJURY CASE IN VIRGINIA WHEN THE INSURER GOES BANKRUPT?



Dennis Crane is driving his large pickup truck after having a few shots of whiskey and hits Alex Shore's compact car, causing reasonable and related medical damages totaling \$300,000.00. Dennis Crane has a liability insurance policy with BCD Insurance Co. for up to \$1,000,000.00 and Alex Shore has \$500,000.00 in underinsured coverage with DEF Insurance Co. Alex Shore's attorney sues Dennis Crane in Circuit Court for \$1,500,000.00 for negligence and sends a copy of the Complaint to Dennis' insurer, BCD Insurance. Before the matter is settled, BCD Insurance Co. is declared insolvent and placed into liquidation and receivership.

How does this impact Alex Shore's claim against Dennis, and what happens next? If a judgment is found against Dennis Crane, does Dennis have any coverage? If so, how much? How does having an experienced defense counsel help?

Virginia Code §38.2-1600 established the Virginia Property and Casualty Insurance Guaranty Association to reduce financial loss to claimants or policyholders resulting from the insolvency of an insurer (the language in the Act was changed from "avoid financial loss" to "reduce" in 1986, as the General Assembly recognized that the purpose of the Association was to reduce losses, not eliminate them). The Guaranty Association is obligated to pay "covered claims" in an amount "not exceeding \$300,000 per claimant" for each policy issued by an insolvent insurer. VA Code §38.2-1606(A)(1)(a)(ii). The Act also includes an exhaustion of remedies provision in Section 38.2-1610 that requires any person with a claim against an insolvent insurer to exhaust recovery against any policy which is not insolvent, including the uninsured/underinsured (UM/UIM) motorist coverage of the injured. Any amount paid by any other policy reduced the Fund's obligation by the same amount. See Virginia Property & Casualty Ins. Gaur. Ass'n v. International Ins. Co., 238 Va. 702, 385 S.E.2d 614 (1989).

The first thing that an experienced defense attorney will do is determine whether it is advisable to take advantage of the statutory stay under Va. Code §38.2-1616. This code section permits a defense attorney to move for a statutory 6-month stay on all proceedings

under Va. Code §38.2-1616, to give the Association time to assume the defense of the matter. This can be extended with "additional time thereafter as may be determined by the court from the date of the insolvency." In the 60+ cases our firm has had representing clients of insolvent insurers, no judge has ever denied a Motion for Stay under this section (or a Motion for further extension), and we have found that many cases have been resolved quickly once plaintiff learns their case can be placed on the proverbial "shelf" for undetermined an extended duration of time.

The second thing an experienced defense attorney will do is to get the matter on the radar of the Guaranty Fund. Once the Fund reviews the matter and determines if they will assume the defense of the matter (not all claims are covered, i.e., breach of contract claims are not covered), the next step will be to determine what new coverage is available to the insured. Under Va. Code §38.2-1610, the Fund is only obligated up to \$300,000.00, but not more than the prior policy would have covered. Regardless of the reduction of coverage, it is in the defendant's best interest to have the Guaranty Association assume the defense of the matter, as it takes their coverage from \$0 from a bankrupt insurance company to potentially up to \$300,000.00.

The third thing that an experienced defense counsel will do is to investigate any other available coverage (including homeowner's insurance, UM/UIM, other liability insurance, any umbrella policy, etc..) and alert plaintiff of their existence so that any other available coverage can be brought into the case. As VA Code Section 38.2-1610 dictates that any other coverage must be first exhausted before the Guaranty Fund is obligated, finding every available source of coverage is advantageous to the defendant and can decrease defense costs, increase the overall amount of coverage available to the defendant, and serve as an extra layer of protection from personal exposure.

Once any other additional coverage is brought into the case, defense counsel must then determine what offsets are permitted to the Fund. Defense counsel will need to determine any liens and any amounts paid by health insurance benefits, as the Fund gets an offset for

any amounts paid by health insurance. Often, the reductions will be significant. Plaintiff's counsel will likely object based upon the Virginia Collateral Sources Rule, but will need to be directed toward Va. Code §38.2-1610, as well as decisions such as Virginia Property & Casualty Ins. Gaur. Ass'n v. International Ins. Co., 238 Va. 702, 385 S.E.2d 614 (1989) and MacDougall v. Hartford Ins. Grp., 61 Va. Cir. 181, 214 (Cir. Ct. 2003). Once the offset is determined, it is often a matter of simple math to determine whether the remaining coverage (after offsets) should be tendered based on whether liability is adverse and the damages claimed by the injured party.

Finally, even if Va. Code Section 38.2-1610 pushes a defendant's coverage with the Guaranty Fund to be last in line for coverage, defense counsel still has the duty to vigorously defend their client and protect them from personal exposure and liability.

In our example above, Dennis Crane's prior coverage of \$1,000,000.00 will be reduced to \$300,000.00 of coverage through the Fund, subject to any amount paid by any health insurance, and further reduced by any amount available through the underinsured motorist (UIM) coverage. It will be important for defense counsel to coordinate with plaintiff's attorney and DEF Insurance Company's counsel on the revised order of priority of coverage, and inform them that the Fund will be last in line for coverage. Our firm has found that the sudden reduction and re-shuffling of coverage has often expedited the resolution of cases involving liquidated insurers. There are several unique points of law that defense counsel needs to be familiar with. Claims professionals evaluating exposure for clients must also understand the impact of having a co-defendant that had prior coverage with a liquidated insurer. Having a defense counsel who is experienced with the nuances of Va. Code 38.2 is critical for proper assessment of coverage and for taking the most effective path towards case resolution.

If you have questions, please do not hesitate to call us. We will be happy to discuss the details of your case with you.



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