

11-1142

M. Stevens

IN THE CIRCUIT COURT OF JEFFERSON COUNTY, WEST VIRGINIA

JILL F. SCHATKEN and
STEVEN N. SCHATKEN,

Plaintiffs,

v.

CIVIL ACTION NO. 10-C-367

STATE FARM MUTUAL AUTOMOBILE
INSURANCE COMPANY, *a foreign
corporation*, CATHI THOMPSON, *claim
representative for State Farm*, JOHN OR
JANE DOE 1, *the unidentified supervisor
for Cathi Thompson*, and JOHN OR JANE
DOE 2, *the unidentified director and/or
supervisor for all bodily injury claims in
West Virginia for State Farm*,

Defendants.

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**AMENDED ORDER GRANTING PLAINTIFFS' SECOND MOTION FOR
SUMMARY JUDGMENT AS TO COVERAGE UNDER STATE FARM'S POLICY**

This motion comes on for consideration upon the Plaintiff's Second Motion for Summary Judgment as to Coverage under Plaintiffs' State Farm Policy. After having reviewed the motion and all documents offered in support and in opposition to Plaintiffs' Motion, the Court makes the following Findings of Fact and Conclusions of Law:

FINDINGS OF FACT

1. On December 19, 2008, Plaintiff Jill Schatken was a front-seat passenger in a car driven by her husband, Steve Schatken, when 19-year-old Ida Trayter, driving in the opposite direction on Route 230, smashed her car head-on into the Schatkens' car. (See Complaint, ¶ 9, State Farm's Answer, ¶ 9).

2. Both of the Schatkens were taken by ambulance to the hospital. After the ER stabilized Mrs. Schatken, she was transferred to the hospital's ICU for close observation and pain control.

3. Mrs. Schatken spent the next 5 nights in the hospital and was not discharged until Christmas Eve, at which time she was required to take home a portable oxygen unit.

4. Mrs. Schatken suffered serious, painful, and debilitating personal injuries as a result of the December 19th head-on crash. (See Complaint, ¶ 18, Answer, ¶ 18).

5. As a result of the head-on crash, Mrs. Schatken suffered medical bills for treatment in the amount of \$29,368.47. (See Complaint, ¶ 26, Answer, ¶ 26).

6. At the time of the crash, the tortfeasor only had liability coverage limits of \$25,000 per person, which limits were tendered to the Plaintiff Jill Schatken. (See Complaint, ¶ 28, Answer, ¶ 28).

7. The tortfeasor's vehicle was an "underinsured motor vehicle" and Ms. Schatken is entitled to underinsured motorist coverage benefits under her State Farm policy. (See Complaint, ¶ 29, Answer, ¶ 29).

8. Despite having almost \$30,000 in medical bills, on August 20, 2010, State Farm made an offer of \$30,000 to settle Mrs. Schatken's underinsured motorist claim.

9. It is undisputed that State Farm reduced its UIM offers by the amount of medical payments coverage previously tendered to the Plaintiff.

10. On September 15, 2010, State Farm increased its settlement offer to \$37,000.

11. On September 17, 2010, Plaintiffs reduced their demand to \$90,000.00. In response, State Farm reiterated its offer of \$37,000.

12. Since State Farm's \$37,000 UIM settlement offer, State Farm has since asserted that the Plaintiff is only entitled to \$30,000 in UIM.

13. The West Virginia UM/UIM statute precludes the reduction of a UIM insured's recovery by amounts available under the insured's policy: "[n]o sums payable as a result of underinsured motorists' coverage shall be reduced by payments made under the insured's policy or any other policy." W. Va. Code § 33-6-31(b). Plaintiffs assert that State Farm's

“reimbursement” language does exactly that in violation of West Virginia law.

14. On February 3, 2011, this Court found invalid under the West Virginia UM/UIM statute a similar provision in State Farm’s policy that sought to “reduce” its UIM insured’s recovery by prior Medical Payments Coverage tendered.¹

15. Also on February 3, 2011, this Court denied State Farm’s Motion to Strike the Plaintiffs’ request for declaratory judgment concerning the contested “reimbursement” language.

16. After the two adverse rulings, State Farm requested that Plaintiffs submit an Agreed Order declaring the Court’s summary judgment Order was final and appealable pursuant to W.Va. R. Civ. P. 54(b).

17. Thereafter, Plaintiffs submitted an Order to the Court to allow further briefing on the “reimbursement” language issue so that all coverage issues could be finally determined prior to State Farm’s appeal.

18. This Court entered the Agreed Order setting the briefing schedule on February 24, 2011, but vacated and replaced by an Agreed Order entered on February 28, 2011.²

¹ The pertinent “reduced by” language that this Court previously found invalid under W.Va. Code § 33-6-31(b) is as follows:

The Underinsured Motorist Vehicle Coverage limits for *bodily injury* are shown on the Declarations Page under “Underinsured Motor Vehicle Coverage—Bodily Injury Limits—Each Accident.”

The most we will pay for all damages resulting from *bodily injury* to any one *insured* injured in any one accident, including all damages sustained by other *insureds* as a result of that *bodily injury* is the lesser of:

1. the limit shown under “Each Person”; or
2. the amount of all damages resulting from that *bodily injury*, reduced by:

...

- c. any damages that have already been paid or that are payable as expenses under Medical Payments Coverage of this policy, the medical payments coverage of any other policy, or other similar vehicle insurance.

² Although the Agreed Order described the “reimbursement” language in its policy as “medical payments reimbursement,” this is actually a misnomer. The “reimbursement” language is found in the General Terms section of the policy at ¶ 12 on page 33—not in the Medical Payments Coverage section—and makes no specific reference

19. As now all coverage issues have now been briefed, the Court issues its final, appealable Order on all coverage issues.³

APPLICABLE LAW

I. Summary Judgment Standard

Rule 56 of the West Virginia Rules of Civil Procedure sets forth that “a party seeking . . . declaratory judgment may, at any time after the expiration of 30 days from the commencement of the action . . . move with or without supporting affidavits for summary judgment in the party’s favor upon all or any part thereof.” W.Va.R.Civ.P. 56(a). The Supreme Court has observed that summary judgment is “designed to effect a prompt disposition of controversies on their merits without resort to a lengthy trial,’ if there essentially ‘is no real dispute as to salient facts’ or if it only involves a question of law.” *Williams v. Precision Coil, Inc.*, 194 W.Va. 52, 58, 459 S.E.2d 329, 335 (1995)(quoting *Painter v. Peavy*, 192 W. Va. 189, 192 n. 5, 451 S.E.2d 755, 758, n. 5 (1994)).

In considering a motion for summary judgment all facts and inferences “are viewed in the light most favorable to the nonmoving party”; however, the nonmoving party must offer some “some ‘concrete evidence from which a reasonable ... [finder of fact] could return a verdict in ... [its] favor’ or other ‘significant probative evidence[.]’” *Precision Coil, Inc.*, 194 W.Va. at 60, 459 S.E.2d at 337 (quoting *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 256, 106 S.Ct. 2505, 2514, 91 L.Ed.2d 202, 217 (1986). “[T]he mere existence of *some* alleged factual dispute between the parties will not defeat an otherwise properly supported motion for summary judgment; the requirement is that there be no *genuine* issue of *material* fact.”

to Medical Payments Coverage. In addition, the “reduced by” language, which this Court recently found void under West Virginia law in its February 3rd Order, is also referred by State Farm as “non-duplication of benefits” language.

³ The February 3rd Order Granting Partial Summary Judgment to the Plaintiffs on State Farm’s “reduced by” language stands. The Court’s February 28th Order reflects as much.

Precision Coil, Inc., 194 W.Va. at 61, 459 S.E.2d at 338 (citing *Anderson*, 477 U.S. at 247-48, 106 S.Ct. at 2510, 91 L.Ed.2d at 211)(emphasis in original). The essence of the inquiry the court must make is “whether the evidence presents a sufficient disagreement to require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law.” *Id.* (citing *Anderson*, 477 U.S. at 251-52, 106 S.Ct. at 2512, 91 L.Ed.2d at 214).

II. Law Regarding Insurance Contract Interpretation

It is well-settled in this jurisdiction that the “[d]etermination of the proper coverage of an insurance contract when the facts are not in dispute is a question of law.” *Reed v. Orme*, 221 W.Va. 337, 655 S.E.2d 83 (2007)(citing Syl.Pt. 1, *Tennant v. Smallwood*, 211 W.Va. 703, 568 S.E.2d 10 (2002); Syl. Pt. 2, *Howe v. Howe*, 218 W.Va. 638, 625 S.E.2d 716 (2005); *Payne v. Weston*, 195 W.Va. 502, 506-07, 466 S.E.2d 161, 165-66 (1995)). The Supreme Court explained that “[i]n construing any insurance policy, it is appropriate to begin by considering whether the policy language is in accord with West Virginia law. The terms of the policy should be construed in light of the language, purpose and intent of the applicable statute.” *Adkins v. Meador*, 201 W.Va. 148, 153, 494 S.E.2d 915, 920 (1997). The applicable statute in this case is West Virginia Code § 33-6-31(b) which provides, in pertinent part:

That such policy or contract shall provide an option to the insured with appropriately adjusted premiums to pay the insured all sums which he shall be legally entitled to recover as damages from the owner or operator of an uninsured or underinsured motor vehicle up to an amount not less than limits of bodily injury liability and property damage liability insurance purchased by the insured without setoff against the insured’s policy or other policy. . . . **No sums payable as a result of underinsured motorists’ coverage shall be reduced by payments made under the insured’s policy or any other policy.**

(Emphasis added).

It is black letter law that “[a] statutory provision which is clear and unambiguous and plainly expresses the legislative intent will not be interpreted by the courts but will be given full

force and effect.” Syl. Pt. 1, *State v. Jarvis*, 199 W.Va. 635, 487 S.E.2d 293 (1997); see also *Cunningham v. Hill*, 226 W.Va. 180, ____, 698 S.E.2d 944, 949 (2010)(“courts must presume that a legislature says in a statute what it means and means in a statute what it says there.”)(citing *Martin v. Randolph County Bd. of Educ.*, 195 W.Va. 297, 312, 465 S.E.2d 399, 414 (1995)).

III. The Law Regarding Declaratory Judgment

The Supreme Court has explained that:

The purpose of a declaratory judgment proceeding ... is to anticipate the actual accrual of causes for equitable relief or rights of action by anticipatory orders which adjudicate real controversies before violation or breach results in loss to one or the other of the persons involved.

Board of Education of Wyoming County v. Board of Public Works, 144 W.Va. 593, 599 600, 109 S.E.2d 552, 556 (1959). Such advance ruling is particularly appropriate when the legal controversy involves the construction and application of a statute. *Bridgeport v. Matheny*, 223 W.Va. 445, 675 S.E.2d 921 (2009).

In *Christian v. Sizemore*, 181 W.Va. at 631, 383 S.E.2d at 813, the West Virginia Supreme Court of Appeals explained that

[s]ome courts have erroneously assumed, contrary to overwhelming authority, that the issue between the company and the injured person is not ripe for adjudication because no judgment has yet been obtained by or against the insured or because there is only a contingent future possibility of disputes. This is to defeat one of the main purposes of the declaratory judgment, namely, to remove clouds from legal relations before they have become completed attacks or disputes already ripened. If there is human probability that danger or jeopardy or prejudice impends from a certain quarter, a sufficient legal interest has been created to warrant a removal of the danger or threat. Naturally, some perspicacity is required to determine whether such danger is hypothetical or imaginary only or whether it is actual and material.

Christian v. Sizemore, 181 W.Va. 628, 631-32, 383 S.E.2d 810, 813-14 (1989)(citing *Reisen v. Aetna Life & Casualty Co.*, 225 Va. 327, 344-35, 302 S.E.2d 529, 533 (1983)). The Supreme Court continued by noting that

such a rule is consistent with the remedial purposes of the Uniform Declaratory Judgments Act. In cases such as this, there is an actual controversy between the insurance carrier and the injured plaintiff because of the very real possibility that the plaintiff will look to the insurer for payment. *See Maryland Casualty Co. v. Pacific Coal & Oil Co.*, 312 U.S. 270, 61 S.Ct. 510, 85 L.Ed. 826 (1941); *Government Employees Ins. Co. v. LeBleu*, 272 F.Supp. 421 (E.D.La.1967); *Reagor v. Travelers Ins. Co.*, *supra*; *Standard Casualty Co. v. Boyd*, 75 S.D. 617, 71 N.W.2d 450 (1955). Declaratory judgment also provides a prompt means of resolving policy coverage disputes so that the parties may know in advance of the personal injury trial whether coverage exists. This facilitates the possibility of settlements and avoids potential future litigation as to whether the insurer was acting improperly in denying coverage.

Id. at 632 and 814.

CONCLUSIONS OF LAW

I. State Farm's "reimbursement" language presents a legal issue ripe for this Court's determination

There is little doubt that a controversy presently exists concerning the meaning of State Farm's "reimbursement" policy language. As State Farm previously indicated, it believes that its policy language permits it to require its UIM insureds to deduct a portion of their UIM settlement by the amount of medical payments coverage previously tendered.⁴ In its Response brief, State Farm noted that on August 20, 2009, it sent correspondence to Plaintiffs indicating that State Farm intended to exercise its "right" of "reimbursement." Taking State Farm's August 20, 2009 correspondence at face value, it appears to the Court that State Farm clearly intended to enforce its "right" of "reimbursement" until the Plaintiffs filed their instant Motion for Summary Judgment. Only after Plaintiffs were forced to file the instant motion, did State Farm advise that it wished to "waive" its "right" of "reimbursement."

However, the Court finds that State Farm cannot seek to enforce a "right" and then,

⁴ As State Farm asserted in its brief:

By [the "reimbursement" provision's] language, because Mrs. Schatken received payment from Ida Traytor and her liability insurer, Nationwide, she is required to reimburse State Farm the \$5,000 it paid in medical payments coverage.

(State Farm's Response to Motion for Summary Judgment, p. 4).

when a policyholder challenges the “right,” simply “withdraw” its request for enforcement of the “right.” If waiving a non-existent right could “moot” a coverage action, insurance companies could always avoid adverse rulings by simply “waiving” non-existent “rights” prior to an imminent ruling.

Before State Farm can “waive” a “right,” it must first prove that the right exists. As such, the legality of its “reimbursement” language clearly still presents a justiciable issue that must be decided by this Court. The Plaintiffs are thus, entitled to a ruling as to the legality of this provision under the West Virginia Declaratory Judgments Act.

II. The West Virginia UM/UIM statute is remedial in nature, unambiguous, and it must be applied as the Legislature intended

In 1932, the West Virginia Supreme Court of Appeals observed that the public policy expressed through a statute is not for the courts to determine, because it is for the Legislature to determine public policy. Syl.Pt. 1, *State Road Comm'n v. Kanawha County Court*, 112 W.Va. 98, 163 S.E. 815 (1932). More recently, the West Virginia Supreme Court of Appeals held in *Taylor v. Nationwide Mutual Ins. Co.*, that “a statute may not, under the guise of interpretation, be modified, revised, amended, distorted, remodeled, or rewritten” by a court simply to address public policy concerns. 214 W.Va. 324, 327, 589 S.E.2d 55, 58 (2003)(citing *State v. General Daniel Morgan Post*, 144 W.Va. 137, 145, 107 S.E.2d 353, 358 (1959). With respect to statements of public policy, the Supreme Court is also not “at liberty to substitute [its] policy judgments for those of the Legislature.” *Estep v. Mike Ferrell Ford Lincoln-Mercury, Inc.*, 223 W.Va. 209, 217, 672 S.E.2d 345, 354 (2008)(citing *Taylor-Hurley v. Mingo County Bd. of Ed.*, 209 W.Va. 780, 787, 551 S.E.2d 702, 709 (2001)).

“The primary object in construing a statute is to ascertain and give effect to the intent of the Legislature.” Syl. Pt. 1, *Smith v. State Workmen's Compensation Com'r*, 159 W.Va. 108, 219 S.E.2d 361 (1975). “Once the legislative intent underlying a particular statute has been

ascertained, [a court must] proceed to consider the precise language thereof.” *State ex rel. McGraw v. Combs Services*, 206 W.Va. 512, 518, 526 S.E.2d 34, 40 (1999). Moreover, when a court interprets a statutory provision, the court is bound to apply, and not construe, the enactment’s plain language. *Taylor*, 214 W.Va. at 327, 589 S.E.2d at 58. The West Virginia Supreme Court of Appeals has long held that “[a] statutory provision which is clear and unambiguous and plainly expresses the legislative intent will not be interpreted by the courts but will be given full force and effect.” *Estepp*, 223 W.Va. at 217, 672 S.E.2d at 354 (citing Syl. Pt. 2, *State v. Epperly*, 135 W.Va. 877, 65 S.E.2d 488 (1951)).

The statute in question is W.Va. Code § 33-6-31(b), which states in clear, unequivocal language the following:

That such policy or contract shall provide an option to the insured with appropriately adjusted premiums to pay the insured all sums which he shall be legally entitled to recover as damages from the owner or operator of an uninsured or underinsured motor vehicle up to an amount not less than limits of bodily injury liability and property damage liability insurance purchased by the insured without setoff against the insured’s policy or other policy. . . . **No sums payable as a result of underinsured motorists’ coverage shall be reduced by payments made under the insured’s policy or any other policy.**

W.Va. Code § 33-6-31(b)(emphasis added).

As the Supreme Court has observed:

It is obvious from the “all sums ... as damages” language of *W.Va. Code*, 33-6-31(b), as amended, that the legislature has articulated a public policy of full indemnification or compensation underlying both uninsured and underinsured motorist coverage in the State of West Virginia. That is, the preeminent public policy of this state in uninsured or underinsured motorist cases is that the injured person be *fully compensated* for his or her *damages* not compensated by a negligent tortfeasor, up to the limits of the uninsured or underinsured motorist coverage.

State Auto. Mut. Ins. Co. v. Youler, 183 W.Va. 556, 396 S.E.2d 737 (1990).

Terms and conditions in insurance policy that “conflict with the spirit and intent of the uninsured and underinsured motorists statutes” will be held invalid. Syl. pt. 3, *Deel v. Sweeney*, 181 W.Va. 460, 383 S.E.2d 92 (1989). What’s more, the Supreme Court warned that “[t]his

Court will continue to be vigilant in holding the insurers' feet to the fire in instances where [terms, conditions,] exclusions or denials of coverage *strike at the heart of the purposes of the uninsured and underinsured motorist statutes* [" provisions." *Id.* (emphasis in original).

The UM/UIM statute is remedial in nature and therefore, must be liberally construed in order to effectuate its purpose and in favor of the insured and coverage. Syl.Pt. 4, *Pristavec v. Westfield Ins. Co.*, 184, W.Va. 331, 400 S.E.2d 575 (1990). Stated otherwise, W.Va. Code § 33-6-31(b) must be construed to strictly avoid or preclude exceptions or exemptions from coverage, and any doubtful language must be resolved in favor of the insured. *Brown v. Crum*, 184 W.Va. at 354, 400 S.E.2d at 598. Thus, provisions in State Farm's policy that "are more restrictive than statutory requirements," must be found "void and ineffective as against public policy." *Id.* (citing Syl.Pt. 2, *Universal Underwriters Ins. Co. v. Taylor*, 185 W.Va. 606, 408 S.E.2d 358 (1991); Syl.Pt. 1, *Bell v. State Farm Mut. Auto. Ins. Co.*, 157 W.Va. 623, 207 S.E.2d 147 (1974); Syl.Pt. 2, *Johnson v. Continental Casualty Co.*, 157 W.Va. 572, 201 S.E.2d 292 (1973)).

The "reimbursement" language, upon which State Farm relies to reduce its UIM insureds' recovery sets forth:

12. Our Right to Recover Payments

...

b. Reimbursement.

If *we* make payment under this policy and the *person* to or for whom *we* make payment recovers or has recovered from another party, then that person must:

- (1) hold in trust for *us* the proceeds of any recovery; and
- (2) reimburse *us* to the extent of *our* payment.

As State Farm points out in its original Response brief, its "reimbursement language" has absolutely the same effect as State Farm's "reduced by" language, which this Court previously found void under West Virginia law. The only difference between the two concepts is the timing of State Farm's reduction of payment from its UIM insured. Under the "reduced by" language, State Farm reduces its UIM settlement offers by the amount of Medical Payments

Coverage previously paid. Under the “reimbursement language,” State Farm deducts or offsets any Medical Payments Coverage from its payment of UIM benefits. In either case, the Plaintiff receives less UIM from State Farm than he or she would absent this language. Under both policy provisions, State Farm asserts that it may 1) ignore the “made whole” rule; and 2) refuse to pay its share of its insured’s attorneys fees and costs in recovering the underlying settlement from the tortfeasor.

State Farm’s “reimbursement” language is intended to ensure State Farm’s own “full recovery,” not its UIM insured’s recovery, as required by W.Va. Code § 33-6-31(b). State Farm’s demand for “reimbursement” reduces the amount of UIM coverage that the Plaintiffs are permitted to keep. The practical effect of State Farm’s “reimbursement” language is to offset payment of UIM by prior payments made under the insured’s policy. However, as the statute makes clear: **“No sums payable as a result of underinsured motorists’ coverage shall be reduced by payments made under the insured’s policy or any other policy.”** W.Va. Code § 33-6-31(b). Allowing State Farm to “deduct” from its UIM settlement amounts paid under the insured’s policy violates both the language and spirit of the West Virginia UM/UIM statute.

The “preeminent public policy of the underinsured motorist statute” is full compensation for damages “not compensated by a negligent tortfeasor,” *see* Syl. Pt. 5, *Pristavec v. Westfield Ins. Co.*, 184, W.Va. 331, 400 S.E.2d 575 (1990), and this Court must liberally construe the statute to effect its purpose. *Perkins v. Doe*, 177 W.Va. 84, 350 S.E.2d 711 (1986). Clever policy language cannot be allowed to circumvent the Legislature’s intent. Allowing a “reduction” in UIM benefits, either directly or indirectly, is contrary to both the meaning and purpose of the West Virginia UM/UIM statute.

III. The plain language of W.Va. Code § 33-6-31(b) expressly allows for the possibility of double recovery to ensure that the UIM insured is “made whole”

The potential for double recovery is the risk that the Legislature assumed in order to ensure the preeminent public policy of full indemnification. In 1988, the Legislature amended the UM/UIM statute to include the following language:

[n]o sums payable as a result of underinsured motorists' coverage shall be reduced by payments made under the insured's policy or any other policy.

W.Va. Code § 33-6-31(b)(emphasis added). The term "sums paid" under a UIM insured's policy clearly contemplates prior payments of the insured's own Medical Payments Coverage.

State Farm asserts that although its "reimbursement" language is different than its "reduced by" language, its effect is the same. (State Farm's Response, p. 4). This Court previously held that State Farm's "reduced by" language violates the UM/UIM statute and is void as a matter of law.

State Farm cannot do by indirection that which it is forbidden by this Court and the Legislature from doing directly. *Henry v. Benyo*, 203 W.Va. 172, 506 S.E.2d 615 (1998)(noting that, in the context of a UIM case, a court cannot permit a party from doing "indirectly what he/she is specifically and statutorily precluded from doing directly.") Under the statute, a UIM insured's recovery cannot be reduced, either directly pursuant to the "reduced by" language, or indirectly, pursuant to the "reimbursement" language, by payments made under other provisions of the UIM insured's policy. Because both of State Farm's provisions lead to the reduction of a UIM insured's recovery, regardless of whether the insured has been "made whole" by the tortfeasor's settlement, such reduction is forbidden under W.Va. Code § 33-6-31(b).

Despite State Farm's assertions to the contrary, the West Virginia Supreme Court of Appeals has never affirmed policy language that either directly or indirectly permits a UIM insurer to reduce its insured's UIM recovery by amounts previously tendered under the same policy. (See Response, p. 4). In the Supreme Court's most recent case addressing

“reimbursement” language) *Ferrell v. Nationwide Mutual Ins. Co.*, 217 W.Va. 243, 617 S.E.2d 790 (2005), the Court strictly limited an insurer’s right of “reimbursement” to circumstances where **the tortfeasor’s** insurer is the same as the insured’s, and the tortfeasor’s payment “**clearly duplicates the medical expense payments**”:

When an insurance policy (a) allows an insurance company to seek “reimbursement” of medical expense payments to an insured out of any recovery obtained by the insured from a third party; (b) the insured obtains a recovery from a third party that duplicates the insurance company’s medical expense payments to the insured; and (c) *the insurance company is also the liability insurer of the third party*, then the insurance company may seek reimbursement of those medical expense payments from the insured.

(Emphasis added). *Id.* at Syl. Pt. 3. In the instant case, the tortfeasor’s insurer was Nationwide, not State Farm. State Farm’s reliance on *Ferrell* is inapposite.

In addition, because in the instant case the tortfeasor was “underinsured,” the Plaintiff’s settlement with the tortfeasor did **not** result in a full recovery that “clearly duplicates” prior Medical Payments Coverage per *Ferrell*. Quite the contrary, in the instant case, a large portion of the Plaintiff’s medical expenses will be paid under the Plaintiff’s own UIM policy as her underlying medical expenses were **greater** than the tortfeasor’s coverage limits.⁵ Thus, any “reimbursement” of Medical Payments Coverage from the UIM settlement will necessarily result in a “reduction” of the UIM benefits that the insured may retain, which is in direct contradiction of the statute’s plain language stating that “[n]o sums payable as a result of underinsured motorists’ coverage **shall be reduced by payments made under the insured’s policy or any other policy.**” W.Va. Code § 33-6-31(b)(emphasis added).

This Court is also mindful that, in the context of a compromise settlement of a UIM claim, an insured often receives less than the claim is worth, but settles for finality and repose. There is no admission of liability on behalf of the UIM insurer and there is no judgment. Thus,

⁵ Nationwide settled its insured’s liability claim for the policy limits of \$25,000 but the Plaintiff’s medical bills are almost \$30,000.

the insured's damages remain undetermined.⁶ To ensure full indemnification as required by W.Va. Code § 33-6-31(b), this Court cannot presume that the UIM insured has been fully compensated by a settlement. Quite the opposite, W.Va. Code § 33-6-31(b) requires UIM to be strictly construed to avoid exceptions from coverage, and any doubtful language must be resolved in favor of the insured. *See Brown v. Crum*, 184 W.Va. 352, 354, 400 S.E.2d 596, 598 (1990). The UM/UIM statute is remedial in nature and must be liberally construed to effectuate its purpose of full indemnification of a UIM insured. *See Pristavec*, 184 W.Va. at 338, 400 S.E.2d at 582.

Since the 1988 amendment to the UM/UIM statute, inserting language that "no sums . . . shall be reduced" by other payments under the same policy, the Legislature has kept the UM/UIM statute intact, including the last sentence which expressly recognizes the potential for a so-called "double recovery." State Farm's interpretation of the UM/UIM statute would strike this language, rendering the last sentence of W.Va. Code § 33-6-31(b) a nullity. This, the Court cannot do.

It is for the Legislature to set public policy and to amend the UM/UIM statute if the Legislature is concerned about "double recovery." As the law currently stands, any direct or indirect reduction of UIM benefits by prior payments made under the insured's policy, or any other policy, is forbidden. W.Va. Code § 33-6-31(b). Accordingly, State Farm's arguments are unavailing and must be rejected by this Court.

IV. State Farm's "reimbursement" language violates insureds' reasonable expectations of coverage

The doctrine of reasonable expectations provides that the objectively reasonable expectations of applicants and intended beneficiaries regarding the terms of insurance contracts will be honored even though painstaking study of policy provisions would have

⁶ A compromise settlement is no more evidence of the actual UIM insured's damages than is the settlement a determination of a UIM's insurer's liability for the loss.

negated those expectations. See *National Mutual Insurance Company v. McMahon & Sons, Inc.*, 177 W.Va. 734, 356 S.E.2d 488 (1987), disapproved of on other grounds by *Potesta v. U.S. Fidelity & Guar. Co.*, 202 W.Va. 308, 504 S.E.2d 135 (1998). In Syllabus Points 4 and 5 of *McMahon & Sons*, the Supreme Court specifically held that

4. It is well settled law in West Virginia that ambiguous terms in insurance contracts are to be strictly construed against the insurance company and in favor of the insured.

5. Where the policy language involved is exclusionary, it will be strictly construed against the insurer in order that the purpose of providing indemnity not be defeated.”

Id.

In the instant case, State Farm asserts that its policy language allows it to reduce a UIM insured's settlement recovery by amounts paid under Medical Payments Coverage pursuant to its “reimbursement” provision. For the reasons set forth below, the Court finds that such language creates an ambiguity in the policy, violates the Plaintiffs' reasonable expectation of coverage, and otherwise deprives them of their right of full indemnification under W.Va. Code § 33-6-31(b).

A. The insureds' declarations page evidences premium payments for Medical Payments Coverage and UIM coverage, which is inherently misleading

The Schatkens purchased both Medical Payments Coverage in the amount of \$5,000 and Underinsured Motorist Coverage in the amount of \$250,000 per person. The Plaintiff, Steven N. Schatken, asserted in his affidavit that his payment of separate premiums for each coverage suggested to he and his wife that they would be entitled to receive the full benefits of both coverages. The Declarations Page does not reference “reimbursement” language or in any way apprise the insureds that they will be required to reduce any UIM recovery by amounts paid under the separately purchased Medical Payments Coverage. To the extent that the “reimbursement” provision contradicts this expectation, such creates an inherent ambiguity in the policy. As such, the “reimbursement” provision, which is a limiting provision seeking to

reduce the amount of a UIM insured's recovery, must be strictly construed against the insurer and in favor of the insureds. Based thereon, this Court must find that the Plaintiffs' policy declarations and "reimbursement" terms when read together are ambiguous, misleading, and find that the "reimbursement" provision is void as a matter of law.

B. Insureds purchase Medical Payments Coverage as an additional layer of protection, not to increase their medical debt obligation after a loss.

State Farm sold the Plaintiffs their medical payments coverage to insureds as an additional layer of protection, over and above their health insurance, to cover medical expenses incurred as a result of an auto accident. State Farm sells its insureds this coverage, regardless of whether the insureds have in place their own health insurance policy that can more efficiently and cost-effectively pay the same bills.

In the instant case, the Plaintiffs paid for health insurance benefits from Mountain State Blue Cross Blue Shield. Pursuant to the negotiated agreement between the Plaintiffs' health insurer and participating medical providers in the insurance plan, such medical providers agree to charge a fraction of the amount that it would normally charge someone without insurance. Accordingly, just by using the Plaintiffs' own health insurance, the Plaintiffs' medical lien is reduced to a fraction of what it would have been if the Plaintiffs paid the medical provider's full fee. In addition, in many such policies, such as in the Plaintiffs' case, health insurers also agree to reduce their already-reduced lien further, by paying their *pro rata* share of attorney's fees and costs.

In comparison, State Farm does not negotiate or attempt to reduce the amount of a medical providers' bills. State Farm's "reimbursement" language also does not set forth that State Farm will pay any of the insured's litigation costs in obtaining payments from the responsible party. Instead, under State Farm's Medical Payments Coverage, it pays the entire

medical bill without any attempted reduction. Such full payments would be fine if State Farm did not then demand full “reimbursement” of its increased medical payments. State Farm’s demand for its UIM insured to repay to it the full amount of the medical provider’s bill in their entirety violates the Plaintiffs’ reasonable expectations. Despite representations by State Farm that purchasing Medical Payments Coverage would be beneficial and justified the Plaintiffs’ increased premiums, the Plaintiffs would have clearly been better off not purchasing Medical Payments Coverage at all. It is now clear that State Farm’s Medical Payments coverage costs the Plaintiffs twice: the first time, by charging increased premiums for the “coverage” and, a second time, by increasing the Plaintiffs’ medical debt obligation above that which it would have been had the Plaintiffs’ used their private health insurance. This is not an outcome that is consistent with the insureds’ reasonable expectations of coverage. *Id.* As such, State Farm’s “reimbursement” language must be construed against State Farm and found to be void as a matter of law.

CONCLUSION

The language and intent of the underinsured motorist statute could not be more clear. West Virginia Code § 33-6-31(b) plainly states that “[n]o sums payable as a result of underinsured motorists’ coverage shall be reduced by payments made **under the insured’s policy or any other policy.**” W.Va. Code § 33-6-31(b)(emphasis added). Pursuant to the clear and unambiguous language and intent of the statute, underinsured motorist coverage may not be reduced, either directly or indirectly, by an insured’s own medical payments coverage.

Therefore, based upon the forgoing, it is **ORDERED** and **ADJUDGED** that Plaintiff’s Second Motion for Summary Judgment as to Coverage under Plaintiffs’ State Farm Policy be, and hereby is, **GRANTED**. In addition, the Court hereby incorporates by reference the entirety of its prior February 3, 2011, Order in which the Court **GRANTED** Plaintiffs’ Motion for Partial Summary Judgment as to Declaratory Judgment Action. This consolidated Order on all

coverage issues is now final and appealable as to both the "reduced by" or "non-duplication of benefits" language and the "reimbursement" language in the Plaintiffs' State Farm policy, pursuant to W. Va. R. Civ. P. 54(b).

The Court notes any objections of the parties for the record.

The Clerk is directed to enter this Order and transmit copies of this Order to all *pro se* parties and counsel of record.

3 cc's

M. Stevens
L. Davis 7.8.11
C. Thompson

Entered: 7/7/11



David H. Sanders, Judge of the 23rd Judicial Circuit

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ATTEST:

LAURA E. RATTENNI
CLERK, CIRCUIT COURT
JEFFERSON COUNTY, W.VA.

BY B. Clark
DEPUTY CLERK