



IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

At Charleston

NO. 11-1142

STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY,

Petitioner

v.

JILL F. SCHATKEN and STEVEN N. SCHATKEN

Respondents.

RESPONDENTS' BRIEF

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I. STATEMENT OF THE CASE

On December 19, 2008, Respondent Jill Schatken was a front-seat passenger in a car driven by her husband, when the driver in the opposite oncoming lane smashed her car head-on into the Respondents' car. (App. 33; App. 48). The Respondent Mrs. Schatken was seriously injured as a result of the crash. Mrs. Schatken spent the next 5 nights in the hospital and was not discharged until Christmas Eve; her injuries were so traumatic that she was discharged with a portable oxygen unit and was bed-ridden for weeks thereafter. (See generally, App. 31-44).

Mrs. Schatken was forced to incur medical bills for treatment in the amount of \$29,368.47. (App. 35; App. 52-53). The tortfeasor only had liability coverage limits of \$25,000 per person and thus, was underinsured pursuant to W.Va. Code § 33-6-31(b) (App. 120).

On June 11, 2009, State Farm consented to the Respondents' settlement with the tortfeasor and waived its right of subrogation. (App. 363). At this time, State Farm did not mention, much less waive, any alleged right of reimbursement. Quite the contrary, two months later, on August 20, 2009, State Farm affirmatively asserted entitlement to reimbursement from its UIM insureds for prior medical payments made. (App. 389).

Despite the fact that Respondent Jill Schatken incurred approximately \$30,000 in medical bills, on August 20, 2010, State Farm offered her only \$30,000 to settle her underinsured motorist claim. (App. 77). State Farm's offers to Ms. Schatken reflected both the amount of liability coverage as well as a reduction in UIM for the \$5,000 in medical payments coverage previously paid. (See State Farm's Answer to Complaint, ¶ 32, App. 54).¹ However, without question, the Respondents could not have been "made whole" under W.Va. Code § 33-6-31(b)

¹ To date, State Farm has never increased its settlement offer above \$37,000, despite Mrs. Schatken having incurred almost \$30,000 in medical bills and having received only \$25,000 in liability coverage. (App. 78).

by the liability settlement, because the Respondents' medical bills *exceeded* the underlying liability limits of \$25,000.²

West Virginia Code § 33-6-31(b) 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). The language upon which State Farm relies to reduce the Respondents' UIM offers states, in pertinent part:

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:

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.

(App. 101, emphasis added).

The plain language of the policy states that UIM payments will be "reduced by" any damages paid under medical payments coverage. *Id.* Thus, the precise language that the legislature prohibited from inclusion in UIM policies was incorporated into State Farm's policy.

² Even if the medical bills had been less than the liability limits, however, the Respondents still would not have been "fully indemnified" by the tortfeasor's policy limits as required by W.Va. Code § 33-6-31(b); by definition, a UIM insured is *underinsured* because the tortfeasor's limits are insufficient to make the insured "whole."

In their briefs to the trial court on the “reduction”³ provision, State Farm placed its “reimbursement” language “in issue” by incorrectly implying that this Court has held that such language “as appropriate” and enforceable in the UIM context. (App. 122). State Farm argued that, because the “reimbursement” language had been endorsed by this Court, the lower court should also uphold the clearly and facially deficient “reduction” language. *Id.* The Court disagreed and ruled that State Farm’s “reduction” language violated W.Va. Code §33-6-31(b) and was unenforceable. (App. 1-28).

The “reimbursement” provision, which was first raised by State Farm in its Response to Respondents’ motion for summary judgment on the “reduction” language, states as follows:

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.

(App. 121-122).

In State Farm’s Response brief, it asserted that “because Mrs. Schatken received payment from the other driver and the other driver’s liability insurer, Nationwide, she [will be] *required* to reimburse State Farm the \$5,000 it paid in medical payments coverage.” (App. 122) (emphasis added). This affirmative statement, coupled with State Farm’s prior August 20, 2009 demand that Respondents preserve its right of “reimbursement,”⁴ was sufficient to place State

³During the briefing process, Respondents referred to this language as the “reduced by” provision. State Farm has referred to it as the “non-duplication of benefits” language. For the purposes of this Appeal, Respondents will refer to the contested provision as State Farm’s “reduction” language, because that is precisely what it is.

⁴State Farm’s August 20, 2009 “notice” of “reimbursement rights” states as follows: “[t]he policy *requires* injured parties to . . . hold in trust and *reimburse us* for any recovery from other parties not insured by State

Farm's "reimbursement" language "in issue" for the purposes of the Declaratory Judgments Act, W.Va. Code § 55-13-1 *et. seq.*

Because State Farm made its "reimbursement" language an issue in the litigation, Respondents moved the Court to rule that the "reimbursement" language was also contrary to West Virginia law. State Farm filed a Motion to Strike Respondents' additional request for a coverage opinion on the grounds that it was not ripe for judicial consideration. (App. 238-243). However, the trial court disagreed and denied State Farm's motion. (App. 325).

To avoid any Due Process concerns,⁵ the parties agreed to submit an Order to allow State Farm additional time to brief the "reimbursement" provision prior to the lower court's ruling. (App. 369-373). After a full briefing, the lower court found that State Farm's "reimbursement" language violated the spirit and intent of the West Virginia UM/UIM Statute and it was void as a matter of law. (App. 11-28). The Court concluded that allowing a "reduction" in UIM benefits, either directly or indirectly, would be contrary to both the meaning and purpose of the West Virginia UM/UIM statute. *Id.*

II. SUMMARY OF ARGUMENT

Through West Virginia Code § 33-6-31(b), the legislature has articulated that 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). The word "preeminent" means

Farm.")(emphasis added) (App. 389-90).

⁵ The Respondents did not address the "reimbursement" language in its first motion for summary judgment, because Respondents were unaware of State Farm's intention to enforce this language. State Farm made its "reimbursement" language an issue when it filed its Response brief in this Court, to which the Respondents replied and requested an additional coverage ruling on this provision. However, in order to prevent a full briefing by both parties, the parties submitted an Agreed Order permitting full briefing on the provision.

“having paramount weight . . . or importance.” *Webster’s Ninth New Collegiate Dictionary*, p. 927 (1988). To advance this foremost public policy, West Virginia Code § 33-6-31(b) precludes “. . . any setoff against the insured’s policy or other policy” and forbids a UIM insured’s recovery from being “reduced by payments made under the insured’s policy or any other policy.”

Notwithstanding, the above, State Farm has placed two provisions in its policy for the very purpose of reducing its first-party insureds’ recovery of UIM coverage. To justify this language, State Farm argues that its prevention of “double recoveries” is “equally important” (Petitioner’s Br. p. 13) to its affirmative duty under W.Va. Code § 33-6-31(b) to fully indemnify its first-party insureds for all losses caused by a UIM driver. State Farm could not be more self-serving or wrong. By definition, there can only be *one* “preeminent public policy,” and the legislature long ago declared it to be UIM insureds’ full indemnification. *See, e.g., Cunningham v. Hill*, 226 W.Va. 180, 186, 698 S.E.2d 944, 950 (2010)(this Court has “repeatedly recognized” that W. Va. Code § 33–6–31, as amended, “is remedial in nature and, therefore, must be construed liberally in order to effect its purpose” of full indemnification of UIM insureds.)

In seeking a reduction of its UIM insured’s benefits up front through its “reduction” language, State Farm conveniently skipped over its burden under W.Va. Code § 33-6-31(b) to first *prove* that its insured had been “fully indemnified” and thus, would receive a “double recovery.” State Farm sought to “reduce” Respondents’ UIM offers by prior medical payments without any proof that the Respondents had been “made whole.” (*see* Answer to Complaint, App. 54).⁶

State Farm’s “reimbursement” provision is equally troubling. State Farm’s claim for reimbursement, either prior to its UIM payment or after, creates an untenable conflict of interest.

⁶ Quite the contrary, because the tortfeasor was underinsured, the liability payment could not have possibly made the Respondents’ “whole.”

State Farm will always have its “thumb on the scale,” and decide that low-ball settlements have or will made its insureds “whole,” to allow it to seek reimbursement. However, a right of reimbursement can only arise “in the absence of a conflict of interest with [the] insured.” *Ferrell v. Nationwide Mut. Ins. Co.*, 217 W.Va. 243, 249, 796, 617 S.E.2d 790, 796 (2005). Thus, in the first-party UIM context such as this, a UIM insurer can never have a right of reimbursement.

III. STATEMENT REGARDING ORAL ARGUMENT AND DECISION

In light of the clearly applicable law concerning the matters herein, and the lack of novelty or difficulty, no oral argument should be required.

IV. ARGUMENT

A. The standard of review is *de novo*

In syllabus point one of *Chrystal R.M. v. Charlie, A. L.*, 194 W.Va. 138, 459 S.E.2d 415 (1995), this Court explained: “Where the issue on an appeal from the circuit court is clearly a question of law or involving the interpretation of a statute, we apply a *de novo* standard of review.” Also, “[a]lthough [this Court’s] standard of review for summary judgment remains *de novo*, a circuit court’s order granting summary judgment must set out factual findings sufficient to permit meaningful appellate review. Findings of fact, by necessity, include those facts which the circuit court finds relevant, determinative of the issues and undisputed.” Syl. Pt. 3, *Fayette County Nat’l Bank v. Lilly*, 199 W.Va. 349, 484 S.E.2d 232 (1997).

B. State Farm’s “reduction” language in its UIM policy is void as a matter of law

As this Court explained in *Taylor v. Nationwide Mutual Ins. Co.*, “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)). Courts are also not “at liberty to substitute their 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 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 this 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, this 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. 352, 354, 400 S.E.2d 596, 598 (1990). Thus, if this Court finds that the provisions of State Farm’s policy “are more restrictive than statutory requirements,” they 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)).

1. State Farm’s “reduction” language violates the plain language of W.Va. Code § 33-6-31(b)

The legislature has unmistakably forbidden any UIM payments to be reduced by “payments made under the insureds’ own policy or any other policy.” W.Va. Code § 33-6-31(b). Such “other” payments implicitly include medical payments coverage. Notwithstanding, State

Farm's policy states that an insured's UIM payment will be "reduced by . . . any damages . . . payable as expenses under Medical Payments Coverage of this policy, the medical payments coverage of any other policy, or other similar vehicle insurance." (App. 101, emphasis underlined). It is impossible to reconcile State Farm's "reduction" language with the plain language of the UIM statute.

This Court recently rejected State Farm's attempt to reduce UIM benefits under W.Va. Code § 33-6-31(b) by a similar "reduction" provision. *Cunningham v. Hill*, 226 W.Va. 180, 698 S.E.2d 944 (2010). In *Cunningham*, the UIM insured was injured and brought suit against his two UIM insurers, alleging entitlement to coverage limits from the two UIM policies. *Id.* at 182 and 946. The insurers, Erie and State Farm, placed language in their policy which limited recovery to the highest liability limits available when more than one policy provided UIM coverage. *Id.* Pursuant to this policy language, State Farm agreed to pay its insured only \$33,333.34 of the \$100,000 policy limits its insured had purchased from it.⁷ *Id.* at 183, 947. State Farm argued that the "other insurance" provision was "clear and ambiguous" and entitled its insured to only the highest limit available under all UIM policies. *Id.* at 184 and 946.

In support of State Farm's argument to reduce its insureds' UIM limits by "other insurance," State Farm argued that the policy language did not involve an offset because the Insurance Commissioner did not disapprove of its form filing under W. Va. Code § 33-6-9(a)(1957) which requires the Commissioner to reject a form if it "is in any respect in violation of or does not comply with this chapter." *Id.*

This Court found State Farm's argument that the Commissioner's failure to disapprove of the form filing was proof of State Farm's compliance with West Virginia law had "scant merit."

⁷ Erie paid the insured \$66,667.66, for a total of \$100,000 in UIM coverage.

Id. at 187, n. 4, and 951, n. 4. To emphasize this point, the Court cited several examples of when it did “not hesitate[] to strike” Commissioner-approved policy language as contrary to law and public policy. *Id.* (citing, e.g., *Jones v. Motorists Mut. Ins. Co.*, 177 W.Va. 763, 356 S.E.2d 634 (1987)(finding named driver exclusion not valid up to the mandatory liability limits of insurance); *Henry v. Benyo*, 203 W.Va. 172, 506 S.E.2d 615 (1998) (workers compensation exclusion not valid with respect to non co-worker tortfeasor); *Hamric v. Doe*, 201 W.Va. 615, 499 S.E.2d 619 (1997)(physical contact requirement not valid where there is independent third party testimony to verify the existence of phantom vehicle)).

The Supreme Court observed that the “other insurance” coverage issue could be “easily resolved by examining the plain and comprehensible public policy language enunciated in W.Va. Code § 33-6-31(b).” *Id.* at 184 and 948. This Court noted in *Cunningham* that it has “repeatedly recognized” that W. Va.Code § 33–6–31, as amended, “is remedial in nature and, therefore, must be construed liberally in order to effect its purpose.” *Id.* at 186 and 950 (citing Syl. Pt. 7, in part, *Perkins v. Doe*, 177 W.Va. 84, 350 S.E.2d 711 (1986); *Mitchell v. Broadnax*, 208 W.Va. 36, 537 S.E.2d 882 (2000)). This Court also observed in *State Auto. Mut. Ins. Co. v. Youler* that

the legislature has articulated a public policy of full indemnification or compensation underlying both uninsured or 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 persons 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.

183 W.Va. 556, 396 S.E.2d 737 (1990) (emphasis in original). This Court likewise warned that “[t]his Court will be vigilant in holding the insurers’ feet to the fire in instances where [terms, conditions and] exclusions or denials of coverage strike at the heart of the purposes of the uninsured and underinsured motorist statutes provisions.” *Cunningham*, 226 W.Va. at 186, 698

S.E.2d at 950 (*citing* Syl. Pt. 3, *Deel v. Sweeney*, 181 W.Va. 460, 463, 383 S.E.2d 92, 95 (1989); Syl. Pt. 1, *Thomas v. Nationwide Mut. Ins. Co.*, 188 W.Va. 640, 425 S.E.2d 595 (1992); *Mitchell v. Broadnax*, 208 W.Va. 36, 537 S.E.2d 882 (2000); *American States Ins. Co. v. Tanner*, 211 W.Va. 160, 563 S.E.2d 825 (2002)).

In examining the plain and clear language of W. Va.Code § 33–6–31(b) in *Cunningham*, this Court held that

policy language which provides that the limit of underinsured motorist coverage available from all policies shall not exceed the liability limits of the policy with the highest limit of underinsured motorist coverage conflicts with the spirit and intent of W. Va.Code § 33–6–31(b). The act of reducing one underinsured motorist policy by another thwarts the statutorily enunciated public policy of full indemnification. According to the plain language of W. Va.Code § 33–6–31(b), an underinsurer may not reduce the monetary extent of its coverage based upon coverage afforded by any other insurance policy. Therefore, we cannot permit Erie and State Farm to artfully craft insurance policy definitions that accomplish a goal that is contrary to the public policy behind and the plain language of W. Va.Code § 33–6–31(b).

Id. at 186-87 and 950-51.

In the instant case, State Farm did not even bother to “artfully craft” its policy language. Quite the contrary, State Farm included in its policy the *prohibited phrase* set forth in W.Va. Code § 33-6-31(b), stating that its UIM insureds’ recovery will be “reduced by” by prior medical payments paid. (App. 101). Thus, not only does State Farm’s “reduction” provision violate the “spirit and intent” of the West Virginia UIM statute as in *Cunningham, supra*, but it actually violates the express words of the law.

In 1988, the Legislature amended the UM/UIM statute to include the phrase 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). This phrase affirmatively displaced the common law with respect to double recoveries. Syl. Pt. 7, *Harless v.*

First National Bank, 169 W.Va. 673, 289 S.E.2d 692 (1982). At this time, the legislature clearly and unmistakably *elevated* the public policy of full indemnification or compensation of UIM insureds above any potential risk for double recovery.

Notwithstanding, State Farm would have this Court strike the last sentence of W.Va. Code § 33-6-31(b), rendering it a nullity. As this Court has observed, the Supreme Court is 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)). “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)). Thus, this Court is obligated to uphold the law as it is written. *Cunningham*, 226 W.Va. at 185, 698 S.E.2d at 949 (“[c]ourts must presume that a legislature says in a statute what it means and means in a statute what it says there.”).

2. Use of the “reduction” language against UIM insureds creates a conflict of interest and allows State Farm to avoid paying its *pro rata* share of attorney’s fees

Although State Farm relies on this Court’s decision in *Ferrell v. Nationwide Mut. Ins. Co.*, 217 W.Va. 243, 617 S.E.2d 790 (2005), to support both its “reduction” and “reimbursement” language, State Farm conveniently ignores important aspects of the ruling. The first tenant that State Farm neglects is that any right of reimbursement can *only* arise when there has been proof that the insured has been “made whole” as, with subrogation, reimbursement can be available only to the extent necessary to avoid a “double recovery.” Syl. Pt. 11, *State ex rel. Allstate v. Karl*, 190 W.Va. 176, 184, 437 S.E.2d 749, 757 (1993)(holding that “subrogation . . . is not available where the policyholder has not been fully compensated for

the injuries received” because “[s]ubrogation is permitted *only* to the extent necessary to avoid a double recovery by such policyholder.”) (Emphasis added).

Quite clearly, a UIM insured can never be “made whole” by a tortfeasor’s liability limits because the limits, by definition, are insufficient to provide full compensation (i.e., the tortfeasor is *underinsured*). Because the very *existence* of insufficient liability limits is what *triggers* a UIM claim,⁸ the tortfeasor’s payment can *never* provide the basis for the insurer’s claim that the tortfeasor’s payment has fully indemnified its insured under W.Va. Code § 33-6-31(b). As a corollary observation, unless and until the UIM insurer can *prove* that its insured has been “fully indemnified” for all of his or her damages resulting from the tortfeasor’s negligence, as required by W.Va. Code § 33-6-31(b), the insurer cannot show that a “double recovery” has taken place or that a right of reimbursement has been triggered.⁹

In addition, as this Court observed in *Ferrell*, an insurer’s right of reimbursement can only arise “*in the absence of a conflict of interest with [the] insured.*” *Ferrell*, 217 W.Va. at 796, 617 S.E.2d at 249. In the UIM settlement context, where damages remain undetermined and disputed, there will *always* be a conflict of interest between the insurer and the insured concerning what the insured should receive in UIM versus the insurer’s self-serving position that the insured will be “made whole” by the insurer’s low ball settlement offers.¹⁰ Fighting with an

⁸ In Syllabus Point Pt. 5 of *Pristavec v. Westfield Insurance Company*, 184 W.Va. 331, 338, 400 S.E.2d 575, 582 (1990), this Court held that “underinsured motorist coverage is activated under W.Va.Code, 33-6-31(b), as amended, when the amount of such tortfeasor’s motor vehicle liability insurance actually available to the injured person in question is less than the total amount of damages sustained by the injured person.”

⁹ As noted before, the evidence is incontrovertible that the Respondents were not, nor could they be, “made whole” by their receipt of the underlying \$25,000 in liability limits when the Respondents’ medical bills were almost \$30,000. (App. 35; App. 52-53). Yet, contrary to the clear evidence that its insureds *had not* received “full indemnification” for their claims, State Farm nevertheless sought to enforce their “right” of reimbursement by reducing their UIM insured’s UIM offer by \$5,000 in medical payments coverage previously tendered. (App. 32).

¹⁰ Case in point: State Farm’s UIM settlement offers to date have not risen above \$37,000 despite the fact that Respondent Jill Schatken spent 5 nights in the hospital and was discharged on Christmas Eve with a portable oxygen

insured over what is owed in reimbursement versus the value of a UIM claim, while the insurer sits on the money because it has the means to wait, is a textbook example of a conflict of interest.

In addition, State Farm’s invocation of its “reduction” language before a UIM insured has been “made whole” allows State Farm to avoid paying its fair share of its insured’s attorney fees. In *Federal Kemper Ins. Co. v. Arnold*, 183 W.Va. 31, 34, 393 S.E.2d 669, 672 (1990), this Court held that “[b]ecause attorneys' fees and other reasonable expenses are a routine cost in obtaining a satisfactory judgment or settlement, we will construe the reimbursement provisions of the contract as reflecting appropriately the cost to the covered person of obtaining the recovery.” The Court continued by holding that “*reimbursement* should be reduced by the insurer's *pro rata* share of the cost to the covered person of obtaining the recovery against the third party.”

Id. at Syl.Pt. 3 (emphasis added). This Court reasoned that

[t]o establish an artificial rule which would provide an insurer with the right to sit back and permit its insured to proceed with an action, expecting to share in the avails of that proceeding without the burden of any of the expense, occurs to us to be anomalous.

Id. (citing *Klacik v. Kovacs*, 111 N.J.Super. 307, 312, 268 A.2d 305, 308 (1970)).¹¹

unit, that she was bed-ridden for weeks and incapacitated for months thereafter, that she incurred approximately \$30,000 in medical expenses, that she suffered permanent damage to her hand and knee, and that she only received \$25,000 in liability coverage. State Farm’s suggestion that the Respondent would be “fully indemnified” under W.Va. Code § 33-6-31(b) by its meager offer of \$37,000 UIM, and thus, State Farm was entitled to reduce Jill Schatken’s UIM offer by the \$5,000 in medical payments received, is self-serving in the extreme and evidence of bad faith. In light of State Farm’s low ball offers, its assertion that it must be entitled to enforce the “non-duplication of benefits” language to “prohibit[] [Jill Schatken] from *profiting from a loss*” is despicable. (Petitioner’s Brief at 19).

¹¹ Although *Arnold* dealt with the equitable right of subrogation, as opposed to the contractual right of reimbursement, this Court has treated the concepts interchangeably as they are both predicated upon the idea of preventing “double recoveries” while still ensuring that the insured has been “made whole.” Both equity and reason dictate that a UIM insured, who by law is entitled to “full indemnification” under W.Va. Code § 33-6-31(b), should not be penalized if the UIM insurer elects to recover through reimbursement, as opposed to through subrogation from the tortfeasor “*to whom [the insurer] owes no duty.*” Syl. Pt. 2, *Richards v. Allstate*, 193 W.Va. 244, 455 S.E.2d 803 (1995). If such were the case, the UIM insurer would never seek subrogation because it would receive substantially more by seeking reimbursement from its own insured (i.e., UIM insurers could recover 100% through reimbursement as opposed to only 66.6% through subrogation). A *pro rata* reduction for both reimbursement and subrogation eliminates the inevitable conflict of interest that would arise with differing results and promotes the public policy of full indemnification of UIM insureds.

However, in the instant case, State Farm has reduced its UIM offer by the entire amount of the medical payments previously paid, without any consideration for attorney's fees in obtaining the liability limits from the tortfeasor. (App. 32). Such is patently unfair to the Respondents and is contrary to the West Virginia UIM statute and State Farm's first-party obligations to its insureds.

C. State Farm created a justiciable controversy concerning its “reimbursement” language when it invoked the language and placed it “in issue” in support of its “reduction” language

State Farm has not once but *three* times placed the propriety of its “reimbursement” language “in issue” through its actions and representations to the lower court.¹² The first time was on August 20, 2009, when State Farm forwarded correspondence to Respondents to place them on notice of its intention to seek reimbursement from any recovery. (App. 389-90). State Farm has unconvincingly attempted to characterize this letter as an innocuous statement of policy terms, as opposed to a directive to Respondents' counsel to preserve its “right” of reimbursement from any recovery. (App. 386).¹³ However, either way, by notifying its insureds of its so-called right of reimbursement by correspondence dated August 20, 2009, State Farm placed the language “in issue” for the lower court's, and now this Court's, consideration.

State Farm next placed its “reimbursement” language “in issue” by citing the language in legal papers to support the enforceability of its problematic “non-duplication of benefits” language (App. 119-131). In State Farm's Response in Opposition to Plaintiff's first motion for

¹² State Farm has attempted to avoid judicial review of its reimbursement language by incorrectly asserting to the lower court that the issue was not yet “ripe,” as State Farm had not yet claimed reimbursement from the Respondents. (Motion to Strike, App. 238-243).

¹³ Attached to State Farm's Response is the subject letter which stated as follows: “[t]he policy *requires* injured parties to . . . hold in trust and *reimburse us* for any recovery from other parties not insured by State Farm.” (emphasis added) (App. 389-90). This letter implies that insureds will be required to reimburse State Farm regardless of whether they have been made whole from the underlying liability settlement.

summary judgment, filed on December 21, 2010, State Farm again asserted that the Respondents' policy "contains General Terms that the insured *must* comply with. One of those terms *requires reimbursement* of medical payments coverage." (App. 121). State Farm also asserted that, by the policy's language, "Mrs. Schatken. . . *is required to reimburse* State Farm the \$5,000 it paid in medical payments coverage". (App. 122).¹⁴

Because State Farm asserted a right of "reimbursement" in its Response brief, and indicated that it would invoke this right should the lower court strike State Farm's "reduction" language, Respondents sought a ruling with respect to the enforceability of this language. (App. 326-364). After all, it would do the Respondents little good to obtain a coverage ruling precluding State Farm from reducing its UIM offers up front, pursuant to its "reduction" language, if State Farm was permitted to turn around and extract the same reduction in UIM benefits through its "reimbursement" language.

However, rather than invite the opportunity to confirm what State Farm contended was legally-enforceable policy language, State Farm fled from the issue by filing a Motion to Strike the Respondents' request for review. (App. 238-265). State Farm disingenuously asserted that the "reimbursement" provision was not *yet* in issue, although it conceded that it very well *could be*. (Motion to Strike, App 238-243; Reply Brief in Support of Motion to Strike, App. 256-265).¹⁵ Ironically, State Farm's equivocation¹⁵ continued the clouds of uncertainty concerning the

¹⁴ These statements belie State Farm's current position that it never intended to enforce the "reimbursement" provision against the Respondents. (Petitioner's Brief at 19).

¹⁵ In State Farm's Motion to Strike, it asserted that

[a]pplication of the medical payments reimbursement language to Plaintiffs' case is but a mere contingent *possibility* at this juncture and consideration of this clause is therefore unwarranted for failure to present a justiciable controversy. Until such time as it is invoked, the mere *possibility* that the issue *may arise in the future* is insufficient for this Court to exercise jurisdiction."

(App. 241)(emphasis added). This statement, of course, was plainly wrong as will be discussed *infra*.

legal relations between the parties. Thus, despite State Farm’s attempt to deprive the court of jurisdiction, it furthered the controversy.

State Farm’s asserted right of “reimbursement” from Respondents’ UIM recovery, and the Respondents’ attendant denial of such right, gave rise to a justiciable controversy under the West Virginia Declaratory Judgments Act, W.Va. Code § 55-13-1 *et seq.* As this Court has explained, “for the purposes of a declaratory judgment action, a justiciable controversy exists when a legal right is claimed by one party and denied by another.” Syl.Pt. 3, *West Virginia Utility Contractors Assoc., etc., et al. v. Laidley Field Athletic and Recreational Center Governing Board et al.*, 164 W.Va. 127, 260 S.E.2d 847 (1979).¹⁶

This Court has observed:

Some courts have erroneously assumed, contrary to overwhelming authority, that the issue between the [insurance] 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.

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)). Stated differently, “the Declaratory Judgments Act is designed to enable litigants to clarify legal rights and obligations *before acting upon them.*” *Bridgeport v. Matheny*, 223 W.Va. 445, 450, 675 S.E.2d 921, 926 (2009). Such advanced rulings are particularly beneficial to parties when the

¹⁶ West Virginia Code § 55-13-2 sets forth that

[a]ny person interested in a . . . written contract, or other writings constituting a contract, or whose rights, status or legal relations are affected by a statute . . . may have determined any question of construction or validity arising under the instrument, statute, ordinance, or contract or franchise and obtain a declaration of rights, status or legal relations thereunder.

legal controversy involves the construction and application of a statute, such as in the instant case. *Id.* Also,

[s]uch 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. . . . 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.

Christian v. Sizemore, 181 W.Va. 628, 632, 383 S.E.2d 810, 814 (1989)(citing *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).

State Farm's notice to the Respondents on August 20, 2009, of its so-called right of "reimbursement" from the UIM recovery,¹⁷ placed this policy language "in issue" and it was ripe for the trial court's review. In State Farm's response brief to Respondents' first motion for summary judgment,¹⁸ its assertion of a right to "reimbursement," and its implied promise to enforce it against the Respondents should the lower court rule against State Farm (App. 119-131), raised coverage questions, creating a justiciable controversy. Once again, State Farm's Motion to Strike, where it again asserted a right to "reimbursement" from the Respondents, thrice placed the language "in issue." (App. 241). Thus, despite State Farm's machinations to the contrary, the "reimbursement" language did present a justiciable controversy and the trial court was correct to decide the issue.

¹⁷ See, State Farm's "reservation of reimbursement rights" letter (App. 389-90).

¹⁸ Filed on December 21, 2010.

D. The “reimbursement” provision remains “in issue” because Respondents’ bad faith claim is, in part, predicated upon it.

Respondents’ bad faith and UTPA claims are predicated upon State Farm’s general business practice of unfairly using UIM insureds’ policy language against them to reduce UIM recovery in violation of W.Va. Code §33-6-31(b) and W.Va. Code § 33-11-4(9).¹⁹ Although State Farm asserts that it mooted the “reimbursement” issue, by promising not invoke this alleged right,²⁰ State Farm has yet to *prove* that such a right exists. A waiver of a non-existent

¹⁹ For example, despite State Farm’s repeated assurances that it does not use its “non-duplication of benefits” language to off-set its insured’s UIM coverage, a recent U.S. District Court case in the Northern District of West Virginia clearly contradicts this. As noted in the WVAJ’s Amicus brief, after State Farm filed its Notice of Appeal in this case on August 3, 2011, State Farm filed a Motion in Limine in *Nickerson v. State Farm Mut. Automobile Ins. Co.*, Case No. 5: 10CV105, to preclude introduction of medical bills previously paid under State Farm’s medical payments coverage. (Amicus App. 36-40). Judge Stamp noted that the basis for State Farm’s motion was its “non-duplication of benefits” language. *Id.* As in this case, State Farm asserted that the policy provision did not effect the amount of coverage available to the insureds, so the provision was not proscribed by § 33-6-31(b). Judge Stamp disagreed:

the language of § 33-6-31(b), especially when coupled with the . . . public policy consistently articulated by the West Virginia Supreme Court of Appeals, mandates that any reduction of underinsured motorist payments based upon previous payment of [medical payments coverage] is against West Virginia law. Therefore, this Court must deny the defendant’s motion in limine, which is based upon an attempt to do just that.

(Amicus App. 39) (emphasis in original).

State Farm’s motion to restrict its insureds from introducing the full amount of their medical bills was intended to not only decrease its UIM insureds’ recovery of liquidated medical damages (in violation of the collateral source rule), but to *also* suppress its insureds’ *general damages* and overall UIM recovery. A more cynical violation of State Farm’s duty to provide full indemnification under the remedial W.Va. Code § 33-6-31(b) cannot be imagined.

²⁰ State Farm suggested in its Appellate brief that it waived its so-called right of “reimbursement” when it waived subrogation against the tortfeasor on June 11, 2009 (Petitioners Brief at 3). This statement is incorrect as State Farm’s letter waiving subrogation did not mention waiver of “reimbursement.” (App. 363). On the contrary, over two years later, State Farm’s Motion to Strike, filed on January 7, 2010, asserted that it *still* had the right to seek “reimbursement” from the Respondents. (App. 241)(“[a]pplication of the medical payments reimbursement language to Plaintiffs’ case is but a mere contingent *possibility* at this juncture and consideration of this clause is therefore unwarranted for failure to present a justiciable controversy. Until such time as it is invoked, the mere *possibility* that the issue may arise in the future is insufficient for this Court to exercise jurisdiction.” State Farm’s Motion to Strike, filed on January 7, 2011, demonstrates that it had *not* waived its so-called right of reimbursement as it represented to this Court. It was not until State Farm filed its Response to Respondents’ motion for summary judgment on the “reimbursement provision” on April 18, 2011, that it allegedly waived its so-called right of reimbursement with respect to the Respondents’ UIM recovery. (App 377-378).

right is no waiver at all, but a cynical attempt to strip the courts of the ability to decide an important public policy issue.

Respondents contend that State Farm *never* had a right to seek “reimbursement” from its UIM insureds, and State Farm’s demand that Respondents “hold in trust and reimburse [State Farm] for any recovery” (App. 389-90), including any UIM recovery,²¹ was knowingly improper. State Farm’s demand for “reimbursement” through its “reduction” language, prior to any evidence that its insureds were “made whole” also elevated State Farm’s economic interests above its insureds’ in violation of the UTPA and State Farm’s implied duty of good faith and fair dealing.

Of course, if the Respondents are wrong, and State Farm can legally seek reimbursement from its own UIM insureds without providing any evidence that the insureds have been “fully indemnified” under W.Va. Code § 33-6-31(b), Respondents’ bad faith claim will be impacted. For the purposes of a declaratory judgment action, that is all that is required for a justiciable controversy to arise. Syl.Pt. 3, *West Virginia Utility Contractors Assoc., etc.*, 164 W.Va. at 127, 260 S.E.2d at 847. Thus, because Plaintiff’s bad faith claim is partly predicated upon whether State Farm properly sought reimbursement from its UIM insureds, the “reimbursement” issue was properly considered and decided by the lower court.

E. Even assuming *arguendo* that the “reimbursement” issue is now moot, State Farm cannot avoid review as the matter falls within several exceptions to the “mootness doctrine”

In State Farm’s legal papers filed on April 18, 2011, State Farm for the first time²²

²¹ Lest State Farm imply that this letter was not intended to place Respondents on notice of its intent to recover its medical payments from the UIM recovery, the notice of reimbursement rights was sent to Respondents two months *after* State Farm agreed to waive subrogation against the tortfeasor. (App. 363).

²² State Farm misrepresented in its Appellate brief that it waived right of “reimbursement” when it waived subrogation against the tortfeasor on June 11, 2009 (Petitioners Brief at 3). In truth, State Farm did not attempt to

asserted that it would not attempt to enforce its so-called right to reimbursement with respect to the Respondents' UIM recovery, and, thus, the matter was moot. (App 377-378).²³ However, State Farm, quite glaringly, failed to provide any justification for why it decided to suddenly waive an alleged legal right that it so ardently asserted to have. The most logical conclusion is that State Farm was attempting to manipulate the process by stripping the courts of jurisdiction over the "reimbursement" issue, so that it could preserve the troublesome language to use against other, unsuspecting UIM insureds.

The general rule is that "[m]oot questions or abstract propositions, the decision of which would avail nothing in the determination of controverted rights of persons or of property are not properly cognizable by a court." Syl. Pt. 1, *State ex rel. Jeanette v. Pancake*, 207 W.Va. 154, 529 S.E.2d 865 (2000). However, as with most general rules, there are exceptions. *Id.* at 159 and 870. This Court has explained that "the simple fact of apparent mootness, in and of itself, does not automatically preclude [the Court's] consideration of th[e] matter." *Hart v. Collegiate Athletic Assoc.*, 209 W.Va. 543, 550 S.E.2d 79 (2001).

West Virginia's well-recognized exception to the "mootness doctrine" is set forth in Syllabus Point 2 of *State ex rel. Davis v. Vieweg*:

[a] case is not rendered moot even though a party to the litigation has had a change in status such that he no longer has a legally cognizable interest in the litigation or the issues have lost their adversarial vitality, if such issues are capable of repetition and yet will evade review."

"waive" the reimbursement provision until years later, when it filed its Response to Respondents' motion for summary judgment on the "reimbursement" provision on April 10, 2011. (App. 377). Prior to this filing, State Farm suggested in its legal papers that it was possible that it would still seek to invoke the "reimbursement" provision against the Respondents. *See, e.g.*, 238-243; App. 256-265.

²³ This position is the polar opposite of the one State Farm advanced in its earlier Response to Plaintiff's first motion for summary judgment, which was that the legal issue was not yet *ripe* because State Farm had not yet invoked the "reimbursement" provision. (App. 238-243; App. 256-265).

207 W.Va. 83, 529 S.E.2d 103 (2000)(citing Syl. Pt 1, *State ex rel. M.C.H. v. Kinder*, 173 W.Va. 387, 317 S.E.2d 150 (1984)); *see also*, *Cathe A. v. Doddridge County Bd. of Educ.*, 200 W.Va. 521, 490 S.E.2d 340 (1997) (deciding a technically moot issue by invoking mootness doctrine exception); *West Virginia Educ. Ass'n v. Consolidated Public Retirement Bd.*, 194 W.Va. 501, 460 S.E.2d 747 (1995) (same); *McGraw v. Caperton*, 191 W.Va. 528, 446 S.E.2d 921 (1994) (same); *Hairston v. Lipscomb*, 178 W.Va. 343, 359 S.E.2d 571 (1987) (same); *Calhoun County Assessor v. Consolidated Gas Supply Corp.*, 178 W.Va. 230, 358 S.E.2d 791 (1987) (same); *State ex rel. M.L.N. v. Greiner*, 178 W.Va. 479, 360 S.E.2d 554 (1987) (same); *Christie v. W. Va. Health Care Cost Review Authority*, 176 W.Va. 420, 345 S.E.2d 22 (1986) (same); *White v. Linkinogor*, 176 W.Va. 410, 344 S.E.2d 633 (1986) (same); *State ex rel. Ayers v. Cline*, 176 W.Va. 123, 342 S.E.2d 89 (1985) (same); *State ex rel. J.D.W. v. Harris*, 173 W.Va. 690, 319 S.E.2d 815 (1984) (same); *Marshall v. Casey*, 174 W.Va. 204, 324 S.E.2d 346 (1984) (same); *State ex rel. McGraw v. Willis*, 174 W.Va. 118, 323 S.E.2d 600 (1984) (same); *Rissler v. Giardina*, 169 W.Va. 558, 289 S.E.2d 180 (1982) (same); *State ex rel. White v. Narick*, 170 W.Va. 195, 292 S.E.2d 54 (1982) (same); *State ex rel. Barker v. Manchin*, 167 W.Va. 155, 279 S.E.2d 622 (1981) (same); *State ex rel. K.W. v. Werner*, 161 W.Va. 192, 242 S.E.2d 907 (1978) (same).

This Court set forth three factors to be considered in deciding whether to address technically moot issues:

First, the court will determine whether sufficient collateral consequences will result from determination of the questions presented so as to justify relief; second, while technically moot in the immediate context, questions of great public interest may nevertheless be addressed for the future guidance of the bar and of the public; and third, issues which may be repeatedly presented to the trial court, yet escape review at the appellate level because of their fleeting and determinate nature, may appropriately be decided.

Syl.Pt. 1, *Israel by Israel v. West Virginia Secondary Schools Activities Com'n*, 182 W.Va. 454, 388 S.E.2d 480 (1989). Applying these criteria to the circumstances presently before this Court, it is clear that the “reimbursement” policy language is proper for consideration as the matter is both “capable of repetition, yet evading review” and is of great “public interest” to West Virginia insureds. Other jurisdictions who have examined the “capable of repetition, yet evading review” and “public interest” exceptions agree that these exceptions are critical for providing guidance for future actions.²⁴

²⁴ See e.g., *Griggs v. Bennett*, 710 So.2d 411, 412 n. 4 (Ala.1998) (recognizing the “capable of repetition, yet evading review” exception to the mootness doctrine); *State Dep't of Revenue, CSED v. A.H.*, 880 P.2d 1048, 1049 (Alaska 1994) (recognizing the “public interest” exception to the mootness doctrine, which requires that an issue be (1) capable of repetition, (2) capable of evading review, and (3) of considerable public interest); *Sherrill v. Dep't of Transp.*, 165 Ariz. 495, 497, 799 P.2d 836, 838 (1990) (“We will consider cases that have become moot when significant questions of public importance are presented and are likely to recur.”); *Wilson v. Pulaski Ass'n of Classroom Teachers*, 330 Ark. 298, 301, 954 S.W.2d 221, 223 (1997) (“An exception to the mootness doctrine, however, allows review for appeals involving the public interest and the prevention of future litigation.”); *NBC Subsidiary (KNBC-TV), Inc. v. Superior Court*, 20 Cal.4th 1178, 1190 n. 6, 86 Cal.Rptr.2d 778, 980 P.2d 337, 346 n. 6 (1999) (“[A]s scores of other reviewing courts in this same posture have concluded, we determine that although the present case is technically moot, it presents an important question affecting the public interest that is ‘capable of repetition, yet evading review.’”); *Humphrey v. Southwestern Dev. Co.*, 734 P.2d 637, 639 (Colo.1987) (recognizing two exceptions to the mootness doctrine: one for matters “capable of repetition, yet evading review,” and the other if “the matter involves a question of great public importance or an allegedly recurring constitutional violation”); *Loisel v. Rowe*, 233 Conn. 370, 378–86, 660 A.2d 323, 328–32 (1995) (including a lengthy discussion of the elements and theory of the doctrine of “capable of repetition, yet evading review”); *Darby v. New Castle Gunning Bedford Ed. Ass'n*, 336 A.2d 209, 209 n. 1 (Del.1975) (“[I]n view of the substantial public interest in the statute, we consider the merits of the appeal under the well-established public-interest-exception-to-the-mootness doctrine.”); *N.W. v. State*, 767 So.2d 446, 447 n. 2 (Fla.2000) (“[B]ecause periods of supervision or community control may expire before a case may be reviewed, this case presents a controversy capable of repetition, yet evading review, which should be considered on its merits.”); *Ervin v. Capital Weekly Post*, 97 So.2d 464, 466 (Fla.1957) (“We reiterate that an appellate court does not lose jurisdiction of a cause even though the matter in controversy has become moot as to one or more of the litigants in cases involving wide public interest or where such matters involve the duties and authority of public officials in the administration of the law and are of general interest to the people. The future administration of the election law by public officials requires the hearing of the merits of the appeal.”); *Sterling v. Brevard County*, 776 So.2d 281, 285 (Fla.Dist.Ct.App.2000) (“[C]ourts are always free to address the merits of an action which has been deemed moot if the action is capable of repetition yet evading review and presents an important issue.”); *Collins v. Lombard Corp.*, 270 Ga. 120, 121–22, 508 S.E.2d 653, 655 (1998) (“[T]he term ‘moot’ must be narrowly construed to exclude from mootness those matters in which there is intrinsically insufficient time to obtain judicial relief for a claim common to an existing class of sufferers. Since there would always be, in such cases, a live controversy, albeit no longer between the named parties, jurisdiction would not be foreclosed by the prohibition against advisory opinions.” (Citation omitted.)); *Johnston v. Ing*, 50 Haw. 379, 381, 441 P.2d 138, 140 (1968) (“When the question involved affects the public interest, and it is likely in the nature of things that similar questions arising in the future would likewise become moot before a needed authoritative determination by an appellate court can be made, the exception is invoked.”); *Selkirk Seed Co. v. Forney*, 134 Idaho 98, 101, 996 P.2d 798, 801 (2000) (stating that courts have the discretion to decide cases that are in the public interest and are “susceptible to repetition yet evading review”); *In re Barbara H.*, 183 Ill.2d 482, 490, 234 Ill.Dec. 215, 702 N.E.2d 555, 559 (1998) (recognizing exception to the mootness doctrine when the

complaining party demonstrates that: “(1) the challenged action is in its duration too short to be fully litigated prior to its cessation and (2) there is a reasonable expectation that the same complaining party would be subjected to the same action again”); *In re a Minor*, 127 Ill.2d 247, 257–58, 130 Ill.Dec. 225, 537 N.E.2d 292, 296 (1989) (recognizing exception to the mootness doctrine for both questions of great public interest and issues that are “capable of repetition, yet evading review”); *In re Lawrance*, 579 N.E.2d 32, 37 (Ind.1991) (stating that the Indiana Constitution lacks a “cases and controversies” requirement, thus opening the door for courts to decide questions of “great public interest” that are likely to recur); *Polk County Sheriff v. Iowa Dist. Court*, 594 N.W.2d 421, 425 (Iowa 1999) (recognizing exception to the mootness doctrine for cases that affect public policy and that “may arise repeatedly, yet evade appellate review”); *Shirley v. Retail Store Employees Union*, 225 Kan. 470, 472, 592 P.2d 433, 434–35 (1979) (recognizing exception to mootness doctrine for cases that are “capable of repetition, yet evading review,” and that are “of public importance”); *May v. Coleman*, 945 S.W.2d 426, 427 (Ky.1997) (“However, the general rule does not apply in a situation in which litigation is likely to be repeated or where the issue is ‘capable of repetition, yet evading review.’ ” (Citations omitted.)); *State v. Taylor*, 769 So.2d 535, 537 (La.2000) (“Should we decline the issue because it is now moot, the issue could permanently escape our consideration and evade appellate review because that window of time for review is shorter than the ordinary appellate delay.”); *Fredette v. Sec’y of State*, 1997 ME 105, 4, 693 A.2d 1146, 1147 (1997) (“Because the issue raised by Fredette is capable of repetition and will evade review if we do not address the merits of his appeal, we decline to dismiss the appeal as moot.”); *State v. Parker*, 334 Md. 576, 584–85, 640 A.2d 1104, 1108 (1994) (“[E]ven if no controversy exists at the precise moment of review, a case will not be deemed moot if the controversy between the parties is ‘capable of repetition, yet evading review.’ ”); *Karchmar v. Worcester*, 364 Mass. 124, 136, 301 N.E.2d 570, 578 (1973) (recognizing the “capable of repetition, yet evading review” exception to the mootness doctrine when an issue is of public importance and when the duration of the issue makes declaratory relief very difficult); *Franciosi v. Michigan Parole Bd.*, 461 Mich. 347, 348, 604 N.W.2d 675, 675 (2000) (“[W]e issue this opinion because the issue is capable of repetition while evading our review”); *In re Schmidt*, 443 N.W.2d 824, 826 (Minn.1989) (“Notwithstanding this aversion to consideration of moot questions, appellate courts have carved out an exception provided the issue is ‘capable of repetition yet evading review.’ . . . When deemed appropriate, this court has applied the exception.”); *Hemphill Constr. Co. v. City of Laurel*, 760 So.2d 720, 724 (Miss.2000) (“While the issue before us may be academic insofar as it affects these parties at this time, the situation here presented is capable of repetition. Parties such as Hemphill might again be unable to have meaningful review of their claims. The issue, therefore, is not moot.”); *Ex parte Jones County Grand Jury*, 705 So.2d 1308, 1313–14 (Miss.1997) (“However, the doctrine which prevents adjudication of moot cases provides an exception for those cases which are capable of repetition yet evading review.” (Citation omitted.)); *In re 1983 Budget for Circuit Court*, 665 S.W.2d 943, 943 n. 1 (Mo.1984) (“[W]e decline to dismiss the case as moot since it presents an important question ‘capable of repetition, yet evading review.’ ”); *J.M. v. Montana High Sch. Ass’n*, 265 Mont. 230, 241, 875 P.2d 1026, 1033 (1994) (“[W]e also note that given the amount of time inherent in the litigation process, and given our reluctance to entertain original proceedings and special writs except under extraordinary circumstances, it would be nearly impossible for any case such as this to ever reach this Court, via the usual litigation/appeal process, within the time during which the injunction was in effect. To mechanically apply the doctrine of mootness under such circumstances would effectively deny the remedy of appeal.”); *State v. Dawn*, 246 Neb. 384, 391, 519 N.W.2d 249, 255 (1994) (“Because this situation affects the public interest and is capable of repetition, yet evading review, we now resolve that question.”); *Del Papa v. Bd. of Regents*, 114 Nev. 388, 401, 956 P.2d 770, 779 (1998) (“Although the Board chose not to issue the release, our decision on the merits of this appeal is not moot because the issue resolved is ‘capable of repetition yet evading review.’ ”); *Asmussen v. Comm’r, N.H. Dep’t of Safety*, 145 N.H. 578, 591, 766 A.2d 678, 691 (N.H.2000) (recognizing “capable of repetition, yet evading review” exception to mootness doctrine); *N.J. Div. of Youth & Family Servs. v. J.B.*, 120 N.J. 112, 119, 576 A.2d 261, 264 (1990) (stating that court would hear the case because issue was of “considerable public importance” and was “capable of repetition, yet evading review”); *Pinnell v. Bd. of County Comm’rs*, 127 N.M. 452, 456, 982 P.2d 503, 507 (1999) (recognizing exception to mootness doctrine when issue is of “substantial public interest” and is “capable of repetition, yet evading review” (citation omitted)); *People ex rel. Maxian v. Brown*, 77 N.Y.2d 422, 425, 568 N.Y.S.2d 575, 570 N.E.2d 223, 224 (1991) (recognizing exception to mootness doctrine when issue is “capable of repetition, yet evading review”); *Simeon v. Hardin*, 339 N.C. 358, 370, 451 S.E.2d 858, 867 (1994) (court has a “duty” to address an otherwise moot case when the “question involved is a matter of public interest”); *In re E.T.*, 617 N.W.2d 470, 617 N.W.2d 470, 471 (2000) (“[I]ssues characterized as moot will nonetheless be heard by this court if the controversy is capable of repetition, yet evading review, or if the controversy is one of great public interest and involves the power and authority of public officials.”); *State ex rel. Dispatch Printing Co. v. Loudon*, 91 Ohio St.3d 61, 64, 741 N.E.2d 517,

In the instant case, it is clear that the “capable of repetition, but evading review” exception applies. State Farm has indicated that it intends to waive its so-called right of reimbursement against the Respondents in the instant case only. There is no reason to believe that the “reimbursement” provision will not be invoked against other UIM insureds in West Virginia.

521 (2001) (recognizing the “capable of repetition, yet evading review” exception to the mootness doctrine when “the challenged action is too short in duration to be fully litigated before its cessation or expiration, and there is a reasonable expectation that the same complaining party will be subject to the same action again”); *Federal Land Bank v. Story*, 756 P.2d 588, 589 (Okla.1988) (“[M]ootness will not act as a bar when the challenged event is ‘capable of repetition, yet evading review.’ ”); *In re Hasay*, 546 Pa. 481, 491, 686 A.2d 809, 814 (1996) (“[T]his matter is technically moot. It is nonetheless justiciable as an exception to the mootness doctrine because it is clearly ‘capable of repetition, yet evading review.’ ”); *Blais v. Blais*, 652 A.2d 963, 964 (R.I.1995) (“Although the question before us is moot . . . , we believe it is a matter of public importance. It is a matter capable of repetition, which may evade review.”); *Charleston County Sch. Dist. v. Charleston County Election Comm’n*, 336 S.C. 174, 180, 519 S.E.2d 567, 570–71 (1999) (“A court may take jurisdiction, despite mootness, if the issue raised is ‘capable of repetition but evading review.’ ” (Citation omitted.)); *Rapid City Journal v. Circuit Ct.*, 283 N.W.2d 563, 565–66 (S.D.1979) (“A well-recognized exception to the general rule, however, is that jurisdiction will lie even though the order attacked has expired if the underlying dispute between the parties is one ‘capable of repetition, yet evading review.’ ”); *State v. Drake*, 701 S.W.2d 604, 609 (Tenn.1985) (recognizing exception to mootness doctrine in the context of a motion for closure or restrictive order because the issue is “capable of repetition yet evading review”); *Tex. Dep’t of Pub. Safety v. LaFleur*, 32 S.W.3d 911, 913–14 (Tex.App.2000) (recognizing exception to the mootness doctrine when issue is of “considerable public interest” or when “future parties could find themselves in the same position”); *State v. MLC*, 933 P.2d 380, 382 (Utah 1997) (“While we typically refrain from adjudicating moot questions, we recognize an exception to this rule where the alleged wrong is ‘capable of repetition yet evading review.’ ” (Citation omitted.)); *In re PCB File No. 92.27*, 167 Vt. 379, 380–81, 708 A.2d 568, 569–70 (1998) (recognizing “capable of repetition, yet evading review” exception when the action’s duration is too short to be fully litigated and there is a reasonable expectation that the same complaining party will again be subject to the same action); *Dep’t of Taxation v. Delta Air Lines, Inc.*, 257 Va. 419, 427–28, 513 S.E.2d 130, 134 (1999) (“Jurisdiction is not necessarily defeated . . . if the underlying dispute . . . is one ‘capable of repetition, yet evading review.’ ”); *In re Times–World Corp.*, 25 Va.App. 405, 412, 488 S.E.2d 677, 680–81 (1997) (“The Supreme Court has frequently recognized that its jurisdiction is . . . not necessarily defeated by the practical termination of a contest which is short-lived by nature. If the underlying dispute is ‘capable of repetition, yet evading review,’ it is not moot.” (Citation omitted.)); *State ex rel. Yakima Amusement Co. v. Yakima County*, 192 Wash. 179, 184, 73 P.2d 759, 762 (1937) (recognizing exception to mootness doctrine when question is one of “great public interest”), overruled in part on other grounds by *Schneidmiller & Faires, Inc. v. Farr*, 56 Wash.2d 891, 355 P.2d 824 (1960); *Federated Publ’ns, Inc. v. Kurtz*, 94 Wash.2d 51, 54, 615 P.2d 440, 442 (1980) (“We have agreed, however, to review otherwise moot cases if matters of continuing and substantial interest are involved.” (Citation omitted.)); *State ex rel. Jones v. Gerhardstein*, 141 Wis.2d 710, 723–24, 416 N.W.2d 883, 888–89 (1987) (“[T]his court has carved out certain exceptions to this general rule where: the issues are of great public importance; the constitutionality of a statute is involved; the precise situation under consideration arises so frequently that a definitive decision is essential to guide the trial courts; the issue is likely to arise again and should be resolved by the court to avoid uncertainty; or, a question is capable and likely of repetition and yet evades review because the appellate process usually cannot be completed and frequently cannot even be undertaken within a time that would result in a practical effect upon the parties.”); *Davidson v. Sherman*, 848 P.2d 1341, 1348 (Wyo.1993) (recognizing exception to the mootness doctrine when a case presents a controversy “capable of repetition yet evading review”).

The “public interest” exception also weighs heavily in favor of the Court’s retention of the “reimbursement” issue. Medical payments coverage is a largely unregulated form of insurance which, as a result, makes it particularly suited for abuse. As such, this Court should uphold the lower court’s decision to hear the issue to provide guidance to State Farm and other West Virginia insureds.

Respondents assert that an additional exception to the “mootness doctrine” should be adopted by this Court and applied in this case. The additional exception is known as the “voluntary cessation” exception, and is specially directed to prevent the type of party manipulation and gamesmanship that State Farm engaged in below to prevent judicial review. The line of decisions adopting this exception stand for the proposition that “voluntary cessation of allegedly illegal conduct does not deprive the tribunal of power to hear and determine the case, i.e., does not make the case moot.” *Gay and Lesbian Students Ass’n v. Gohn*, 656 F. Supp. 1045, 1049 (W.D. Ark. 1987) (overruled on other grounds). The rationale is that “if it did, the courts would be compelled to leave ‘[t]he defendant . . . free to return to his old ways.’” *United States v. W.T. Grant Co.*, 345 U.S. 629, 632 (1953); *see also, Walling v. Helmerich & Payne, Inc.*, 323 U.S. 37, 43 (1944) (holding case not moot where respondent continued to assert the legality of the challenged conduct but discontinued the conduct); *Goshen Mfg. Co. v. Hubert A. Myers Mfg. Co.*, 242 U.S. 202, 207-08 (1916) (same); *Helmerich & Payne, Inc.*, 323 U.S. at 42-43 (timing of defendant’s voluntary cessation after start of litigation held to support court’s refusal to dismiss as moot); *FTC v. Goodyear Tire & Rubber Co.*, 304 U.S. 257, 260 (1938) (holding FTC order to cease and desist certain conduct remained reviewable despite later amendment to statute prohibiting challenged activity and respondent’s resulting discontinuation of the conduct); *Gray v. Sanders*, 372 U.S. 368, 376 (1963)(the voluntary abandonment of a

practice does not relieve a court of adjudicating its legality, particularly where the practice is deeply rooted and long standing. For if the case were dismissed as moot appellants would be free to return to . . . their old ways); *United States Phosphate Export Ass'n*, 393 U.S. 199, 202-03 (1968)(injunctive relief is not sought just to stop a challenged practice, but to cease the *resumption* of the challenged conduct so the controversy is not removed)).

One case wherein the U.S Supreme Court applied the “voluntary cessation” exception to the “mootness doctrine” is *Friends of the Earth, Inc. v. Laidlaw Environmental Services*, 528 U.S. 167, 120 S.Ct. 693 (2000). In that case, the Supreme Court opined that citizen suits brought under the Clean Water Act were not moot and thus rejected the defendant’s claim that subsequent and substantial compliance with the National Pollutant Discharge Elimination System permit made the issues on appeal moot. *Id.* at 189. The Supreme Court held that before a court can dismiss a claim on mootness grounds based on defendant's voluntary cessation of the challenged conduct, the court must be “absolutely clear” that the challenged conduct “could not reasonably be expected to recur.” *Id.*

In the instant case, State Farm cynically agreed to waive its alleged right of reimbursement in the Respondents’ claim for the sole purpose of avoiding judicial review. (App. 377). State Farm did this to preserve its “reimbursement” language to be used against other, unsuspecting UIM insureds. There can be little doubt that the same challenged conduct will reoccur in innumerable other UIM insureds’ cases in West Virginia. As a result, the Respondents respectfully request that this Court find that, in addition to the “capable of repetition, yet evading review” and “public interest” exceptions, State Farm’s actions fall within the “voluntary cessation” exception to the “mootness doctrine.” Insurers must learn that in West Virginia, they

will not be permitted to manipulate the judicial process to protect illegal policy terms and practices.

F. “Reimbursement” from a UIM settlement conflicts with the language and spirit of W.Va. Code § 33-6-31(b) and is invalid as a matter of law

State Farm cannot do by indirectly 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 “reduction” 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. In the Supreme Court’s most recent case addressing the issue of “reimbursement,” *Ferrell v. Nationwide Mutual Ins. Co.*, 217 W.Va. 243, 617 S.E.2d 790 (2005), this 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.

Id. at Syl. Pt. 3. In the instant case, the liability insurer was *not* State Farm. More importantly, because in the instant case the tortfeasor was “underinsured,” the Respondents’ liability settlement *could not* result in a full recovery that “clearly duplicate[d]” prior medical payments coverage per *Ferrell*. Quite the opposite, a large portion of the Respondent’s medical expenses will have to be paid under the Respondent’s *own UIM policy* as her underlying medical expenses were *greater* than the tortfeasor’s coverage limits. Thus, any “reimbursement” of medical payments coverage from the UIM settlement will necessarily result in a “reduction” of the UIM benefits that the insured will 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).

The “preeminent public policy of the underinsured motorist statute” is full compensation for damages “not compensated by a negligent tortfeasor,” Syl. Pt. 5, *Pristavec v. Westfield Ins. Co.*, 184, W.Va. 331, 400 S.E.2d 575 (1990), and the lower court was bound to liberally construe the statute to effect its purpose. *Perkins v. Doe*, 177 W.Va. 84, 350 S.E.2d 711 (1986). Clever drafting cannot be allowed to circumvent the legislature’s intent to prevent UIM insurers from reducing their insureds’ UIM benefits by other available coverages. Under the UIM statute, it makes little difference whether State Farm’s attempted reduction is before or after because, in both instances, it is forbidden.

1. **“Reimbursement” from a UIM settlement creates an inherent conflict of interest and is unenforceable**

State Farm’s “reimbursement” language presents the same conflict of interest issues as its

invalid “reduction” language. *Ferrell*, 217 W.Va. at 796, 617 S.E.2d at 249 (a right of reimbursement can only arise “in the absence of a conflict of interest with [the] insured.”).

When a UIM insurer attempts to simultaneously settle a UIM claim for as little as possible, while trying to collect the maximum reimbursement from its insured on the basis of its self-serving assessment that its UIM settlement has made its UIM insured “whole,” it presents a conflict of interest.

In a UIM settlement context, a UIM insurer can never meet its burden to show that its UIM insureds have been “fully indemnified” by the settlement, as required by W.Va. Code § 33-6-31(b).²⁵ The reason being is that, in the UIM settlement context, the insured’s damages remain disputed and undetermined. Just as State Farm contends that a settlement check is never proof of its driver’s liability,²⁶ a UIM settlement is never proof of an insured’s “full compensation.”²⁷

This is a significant point because in State Farm’s frenetic assault against “double recovery,” State Farm conveniently glides over the fact that it is the *UIM insurer’s* burden to prove that its insureds have been fully indemnified before it can seek reimbursement. However, in the UIM settlement context, an insurer can never present competent proof of full indemnification and so no right of reimbursement can ever arise.²⁸

²⁵ Stating that “such policy or contract shall . . . 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 . . . *without setoff against the insured’s policy or other policy.*”(emphasis added).

²⁶ Such claims are routinely resolved pursuant to a release where the UIM insurer disclaims *all* liability for the UIM insured’s losses.

²⁷ As this Court is aware, such claims are routinely resolved for less than full value for the purpose of providing the insured finality and repose.

²⁸ It also seems reasonable to presume that when the legislature enacted the remedial, liberal UIM statute, it did not intend for UIM insurers to take their UIM insureds to court. Quite the contrary, the UIM statute seems to expressly sanction an insured’s right to keep both the full UIM benefits, and any other that may be available to the insured for its losses, without any reduction.

2. **“Reimbursement” from a UIM settlement violates Respondents’ reasonable expectations of coverage and is unenforceable**

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 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, the Respondents purchased both medical payments coverage in the amount of \$5,000 and Underinsured Motorist Coverage in the amount of \$250,000 per person. (App. 79-83).²⁹ The insureds’ payment of separate premiums for each coverage suggested to them that they would be entitled to receive the full benefits of both coverages. (*See* Affidavit of Steven N. Schatken, App. 357-58). 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. (App. 79-83). To the extent that the “reimbursement” provision contradicts this expectation, such

²⁹ Incredibly, despite the fact that Respondents’ Dec Page clearly shows that State Farm charged separate premiums for *each* coverage, State Farm nevertheless represented to this Court that only “[o]ne premium was paid....” (Petitioner’s Br. p. 18).

contradiction 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.

In addition, Respondents assert that State Farm sold them medical payments coverage under the premise that, in exchange for a premium, the coverage would provide them with an additional layer of protection to cover medical expenses incurred as a result of an auto accident. (Affidavit, App. 357-58).³⁰ However, much too late, Respondents discovered that State Farm does not attempt to reduce the amount of a medical providers’ bills as their health insurer does. *Id.* Respondents also learned that State Farm’s “reimbursement” language does not account for State Farm’s share of attorney’s fees as their health insurer does. *Id.*

Full payments of the medical providers’ bills would be fine if State Farm did not then demand full “reimbursement”³¹ of the increased medical payments that State Farm caused. As Respondent Steven Schatken noted, medical payments coverage thus *increased* his medical debt obligation and so he would have been better off not purchasing the coverage and having his health insurance cover the bills. *Id.* State Farm’s “reimbursement” provision violated Respondents’ reasonable expectations of coverage and, as such, the provision must be construed against State Farm and found invalid as a matter of law.

³⁰ Respondents also paid for health insurance benefits from Mountain State Blue Cross Blue Shield. (Affidavit, App. 357-58). Pursuant to the negotiated agreement between the Respondents’ health insurer and participating medical providers in the insurance plan, such medical providers agreed to charge a fraction of the amount that the providers would charge someone without insurance. Thus, just by virtue of having health insurance, the Respondents’ medical lien was reduced to a fraction of what it would have been. In addition, Respondents’ health insurer also agreed to reduce its lien further, by paying its *pro rata* share of attorney’s fees and costs. *Id.*

³¹ See demand letter of August 20, 2009. (App. 389-90).

V. CONCLUSION

WHEREFORE, based upon all of the foregoing, Respondents respectfully request that this Court AFFIRM the lower court's grant of summary judgment and find that both State Farm's "reduction" and "reimbursement" provisions violate W.Va. Code § 33-6-31(b) and are invalid as a matter of law.

Respectfully Submitted,

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IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

NO. 11-1142

ON APPEAL FROM TWO ORDERS FROM 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.

CERTIFICATE OF SERVICE

I hereby certify that on the 16th day of December, 2011, I served the foregoing
RESPONDENTS' BRIEF by depositing a true copy thereof in the United States mail, postage
prepaid, addressed as follows:

E. Kay Fuller, Esq.
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