

NO. 11-1099

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

NEW HAMPSHIRE INSURANCE COMPANY,

Defendant Below, Appellant,

v.

RRK, INC., d/b/a SHOWBOAT MARINA,

Plaintiff Below, Appellee.

From the Circuit Court of Cabell County, West Virginia
Civil Action No. 09-C-301

**BRIEF OF THE WEST VIRGINIA INSURANCE FEDERATION AS *AMICUS CURIAE*
IN SUPPORT OF BRIEF OF APPELLANT
NEW HAMPSHIRE INSURANCE COMPANY.**

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I. INTRODUCTION

The West Virginia Insurance Federation (the “Federation”) files this brief as *amicus curiae* in support of the brief of Appellant New Hampshire Insurance Company (“New Hampshire”) because this case has significant implications for insurance law in West Virginia and the ability of all insurance companies who do business in the state to include clear and unambiguous exclusions in policies of insurance. Specifically, the Federation addresses a very narrow and specific issue in this appeal: whether mailing an insurance policy to an insured that contains conspicuous, plain and clearly-worded exclusions is sufficient to “bring such provisions to the attention of the insured” under West Virginia law.

Here, the Circuit Court found that the “wear and tear exclusion” at issue was on the second page of the policy issued by New Hampshire, in a section listing general exclusions, in bold and capitalized font. In addition, the officers of Appellee RRK, Inc. d/b/a Showboat Marina (“RRK”) admitted that they received the policy, but they simply did not read it. The Circuit Court found, however, that mailing the insurance policy to the insured did not satisfy New Hampshire’s burden to show that it brought the “wear and tear exclusion” to the “attention of” RRK. This finding, if allowed to stand, would place significant and intolerable burdens on insurers to ensure that insureds not only received a copy of an insurance policy, but also read the policy *and* completely understood all terms and conditions in the policy, including exclusions. The cost of obtaining such “assurance” would not only be significant (and would ultimately have to be borne by West Virginia policyholders), but the administrative burden on insurers would be onerous.

For the reasons detailed below, therefore, the Federation respectfully urges this Court to reverse the decision of the Circuit Court of Cabell County concerning the sufficiency of mailing an insurance policy containing clear and unambiguous exclusions to an insured.

II. BACKGROUND

Although the Federation incorporates by reference the factual background as outlined by New Hampshire in its brief, the Federation provides the following inasmuch as it relates to the Federation's interest in the issue before this Court.

RRK initially purchased insurance from New Hampshire that ran from September 28, 2007, to September 28, 2008. Order of the Circuit Court of Cabell County dated June 22, 2010 ("Order"), n. 1, p. 3. Thereafter, the policy was renewed for one year, until September 28, 2009, which policy period included the loss at issue that occurred on February 23, 2009. Order at n. 1, p. 3.

On January 20, 2009, New Hampshire mailed the renewal insurance policy to RRK, which policy contained a number of exclusions, including the "wear and tear exclusion" that is at issue in this appeal. Order at ¶19, p.7. That exclusion was contained on the second page of the policy, "in boldface, capitalized font referencing the covered property." Order at ¶21, p.8. In addition, the "wear and tear exclusion" was the very first exclusion listed on the second page of the policy. Order at ¶21, p.8. Finally, RRK admits that it "received this latest January, 2009 revised policy, but that they [sic] did not read the same." Order at ¶34, p.12.

RRK filed a motion for partial summary judgment and asked the Circuit Court to find, as a matter of law, that the "wear and tear exclusion" be inoperable because (1) the placement of the exclusion within the insurance policy did not make "obvious its relationship to other policy terms," and (2) simply mailing the insurance policy did not bring "such exclusionary

provisions to the attention of the insured, as required under Nat'l Mut. Ins. Co. v. McMahon & Sons, Inc., 356 S.E.2d 488 (W. Va. 1987) and its progeny.” Order at ¶27, p. 10. The Circuit Court granted RRK’s motion, and in doing so, found that New Hampshire’s mailing of an insurance policy to RRK, admittedly received but not read by RRK’s officers, did not “bring such [exclusionary] provisions to the attention of the insured.” See Order at ¶68, p. 23.

New Hampshire appealed the Circuit Court’s Order on a number of grounds, only one of which causes the Federation’s members significant concern and is the subject of the Federation’s *amicus* brief. If this part of the Circuit Court’s Order is allowed to stand, it would result in all insurance companies having the need to adopt new, significant and expensive administrative procedures to ensure that every single insured received, reviewed, and understood each and every exclusion in an insurance policy before such exclusion will be given effect by a court.

III. STATEMENT OF INTEREST

The Federation is the state trade association for property and casualty insurance companies doing business in West Virginia. Its members insure approximately eight of every ten automobiles and homes in West Virginia. The Federation is widely-regarded as the voice of West Virginia's insurance industry and has served the property and casualty insurance industry for more than thirty years. The Federation has a strong interest in promoting a healthy and competitive insurance market in this State to ensure that insurance is both available and affordable to West Virginia's insurance consumers.

The Federation files this brief in support of New Hampshire’s brief to underscore the importance of the issue concerning obligations associated with bringing the terms of insurance policies to the attention of policyholders. Specifically, the issue of whether mailing an insurance policy that contains clear and unambiguous exclusions is sufficient to bring such

provisions to the attention of an insured involves a basic, fundamental way in which all insurance companies do business. Requiring an insurance company to do something *beyond* mailing an insurance policy to a policyholder to satisfy the requirement that the terms of an exclusion is “brought to the attention of” the policyholder is simply untenable and unworkable. In fact, the logical result of the Circuit Court’s ruling would be to force insurance companies to send representatives to literally every home and business of every holder of an insurance policy, sit such policyholder down, go over, line by line, the policy, and then record, by video, stenograph, or other formal means, the policyholder’s pledge that the insurance company has brought the policy to his or her attention and such policy is understood by the policyholder. The administrative burden and cost of such a requirement is obvious.

Importantly, the Federation’s members seek a competitive insurance climate in West Virginia that offers access to affordable insurance to West Virginia consumers. If this Court adopts the position advocated by RRK, the Federation fears that it will require insurance companies to adopt large and unwieldy administrative processes, including hiring a new category of employees, all because the Circuit Court’s decision encourages purchasers of insurance to not review the terms of an insurance policy that is purchases.

Importantly, every insurance company doing business in West Virginia – and their policyholders – will be affected by the Court’s ruling in this case. If an insurance company cannot rely upon (1) mailing a copy of an insurance policy to an insured, and (2) the insured actually reading the terms of the insurance policy, then all insurance companies must fundamentally alter the way in which insurance policies are delivered to policyholders. As such, the Federation respectfully urges that this Court reverse the finding of the Circuit Court of Cabell

County that mailing a policy is insufficient to bring the terms of the policy to the attention of the policyholder.

IV. ARGUMENT

Under West Virginia law, an insurance company “wishing to avoid liability on a policy purporting to give general comprehensive coverage must make exclusionary clauses conspicuous, plain, and clear . . . placing them in such a fashion as to make obvious their relationship to other policy terms, . . . and must bring such provisions to the attention of the insured.” McMahon, 356 S.E.2d at 496 (citations omitted). The issue addressed by the Federation is whether mailing an insurance policy that contains “conspicuous, plain and clear” exclusions that are placed “in such a fashion as to make obvious their relationship to other policy terms” is sufficient to “bring such provisions to the attention of the insured” as required by McMahon. The answer must necessarily be yes.

First, contrary to the suggestion in the Order, West Virginia law does *not* require that an insurance company ensure that a policyholder has “read and understood” policy exclusions before such policy exclusions are deemed valid. Order at ¶56, p. 18-19. Rather, an insurance company must simply bring the exclusions “to the attention of the insured.” McMahon, 356 S.E.2d at 496. Here, RRK *admits* that New Hampshire mailed the policy, *admits* that it received the policy, *admits* that the “wear and tear exclusion” was contained on the second page of the policy “in boldface, capitalized font referencing the covered property[,]” *admits* that the exclusion was the very first exclusion listed, and *admits* that it “received this latest January, 2009 revised policy, but that [its officers] did not read the same.” Order at ¶¶ 21, 34, pp. 8, 12.

To gloss over its own failure to even read the policy, RRK advocated that the insurance company be required to prove that an insured “read and understood the language in question”

before the exclusion became valid, and the Circuit Court agreed. In doing so, the Circuit Court erroneously elevated dicta in Justice Starcher's concurrence in Mitchell v. Broadnax, 537 S.E.2d 882 (W. Va. 2000) (superseded by statute), into law. Specifically, Justice Starcher stated in his concurrence: "Methods by which insurers may effectively communicate an exclusion to an insured to secure his/her awareness thereof may include, *but are not necessarily limited to*, reference to the exclusion and corresponding premium adjustment on the policy declarations page or procurements of the insured's signature on a separate waiver signifying that he/she has read and understood the coverage limitation." Mitchell, 537 S.E.2d at 895, nt. 24 (emphasis added). While the West Virginia Legislature specifically rejected the suggestion in Mitchell that a reference to exclusions and a corresponding premium adjustment appear on a policy's declarations page, see W. Va. Code §33-6-30 (2011), it has implicitly rejected the notion that the effectiveness of insurance policies necessarily depends upon a communication method other than mail. For example, W. Va. Code §33-17A-4(b) (2011) permits an insurer to cancel a property insurance policy by mailing a notice of cancellation. In addition, the West Virginia Legislature also determined that mailing an offer of uninsured and underinsured motor coverage to insureds constitutes an effective offer of coverage, and an insured's failure to return an election form by mail constitutes a knowing and effective waiver of coverage. See W. Va. Code §33-6-31d (2011). If the mailing of a notice of cancellation of a property insurance policy represents a valid notice of cancellation, then the mailing of an insurance policy with conspicuous, plain, and clearly-worded exclusions necessarily is sufficient to bring such exclusions "to the attention of the insured."

Second, if an insurance company must ensure that an insured has actually "read and understood" the language of exclusions before such exclusions become valid, there is really only one way in which insurers can do so through the affirmative attestation of its insureds.

Specifically, insurers must employ individuals who are tasked with tracking down insureds, sitting them down to go over, line by line, the terms and exclusions of a policy of insurance, both initially, at each renewal, and anytime a policy is amended, in order to capture on video the insured's agreement that he has "read and understood" the language of the policy and the exclusions. The expense of requiring this for the hundreds of thousands of insurance policies in West Virginia, where many insureds reside in rural areas, and the time and expense of even coordinating hundreds of thousands of meetings every year, is staggering. That such an approach would significantly add to the expense of insurance in the State is obvious.

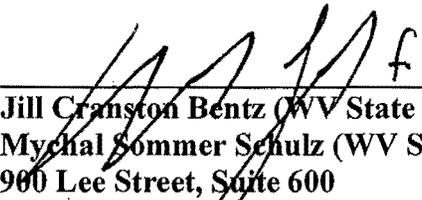
Barring undertaking this effort, the Circuit Court's decision encourages insureds in West Virginia to simply avoid reading insurance policies because, under the Circuit Court's rationale, if an insured does not read the policy -- even if, as in this case, the insured received and could read and understand the policy -- then exclusions necessarily do not take effect. In addition, requiring an insurer to ensure that an individual "read and understood" exclusions renders the "conspicuous, plain and clear" language requirement superfluous. Under the Circuit Court's rationale, an insurance policy may use "conspicuous, plain and clear" language to describe exclusions, but if the insured simply chooses not to read that language, the exclusions are not valid. In fact, that is exactly what happened in this case, as the "wear and tear exclusion" was the very first exclusion listed, was on the second page of the policy, and was written "in boldface, capitalized font referencing the covered property." Under the Circuit Court's rationale, the actual language used in insurance policies becomes largely irrelevant if an insurance company must, to give effect to that language, go over it, in person, with the insured.

CONCLUSION

For the reasons detailed above, therefore, the Federation asks that this Court accept New Hampshire's Petition for Appeal and reverse the Order entered by the Circuit Court of Cabell County that mailing an insurance policy that contains exclusionary provisions does not "bring such provisions to the attention of the insured." Any other conclusion creates an unworkable, illogical, and severely burdensome requirement on insurance companies to ensure that their policyholders read and understand every element of the policy.

WEST VIRGINIA INSURANCE FEDERATION

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CERTIFICATE OF SERVICE

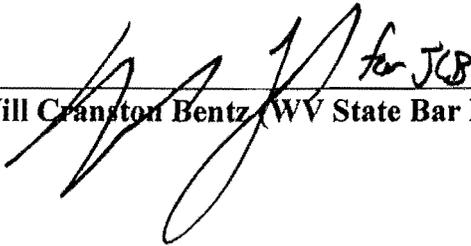
I hereby certify that I have this day served a copy of the Brief of the West Virginia Insurance Federation as *Amicus Curiae in Support of Brief of Appellant New Hampshire Insurance Company* upon all parties to this matter by depositing a true copy of the same in the U.S. Mail, postage prepaid, properly addressed to the following:

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