

**FILED**

**December 6, 2007**

Starcher, J., concurring:

released at 3:00 p.m.  
RORY L. PERRY II, CLERK  
SUPREME COURT OF APPEALS  
OF WEST VIRGINIA

The majority’s opinion is well-reasoned and beautifully states an arcane but obvious point of insurance law: an uninsured motorist insurance policy protects anyone<sup>1</sup> who is *using* the vehicle insured by the policy.

I write separately to point out my belief that Section III.A of the majority opinion is – while intellectually sound – wholly irrelevant.

West Virginia’s insurance statutes establish a list of things that must be included in every automobile insurance policy. These insurance statutes also say how

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<sup>1</sup>*W.Va. Code*, 33-6-31(c) [1998] says that “any person . . . who uses . . . the [insured] motor vehicle” is entitled to protection against uninsured drivers.

The named insured on the policy, however, as well as the named insured’s spouse and household family members, are entitled to additional protection. They are covered anywhere they might be injured by an uninsured driver, regardless of their relationship to the motor vehicle listed on the policy. As one court said, “They are insured when injured in an owned vehicle named in the policy, in an owned vehicle not named in the policy, in an unowned vehicle, on a motorcycle, on a bicycle, whether afoot or on horseback or even on a pogo stick.” *Bradley v. Mid-Century Ins. Co.*, 409 Mich. 1, 24-38, 294 N.W.2d 141, 145-152 (1980). See also 1 Alan I. Widiss, *Uninsured and Underinsured Motorist Insurance* § 4.2, at 60-61 (2d ed. 1992) (“Persons who are either named insureds or family members residing with a named insured . . . are afforded relatively comprehensive protection by the provisions used in most uninsured motorist insurance coverages.” As insureds they “are protected when they are operating or are passengers in a motor vehicle, as well as when they are engaged in any other activity such as walking, riding a bicycle, driving a hay wagon, or even sitting on a front porch.”).

insurance companies must define certain terms in their policies.

West Virginia law requires every motor vehicle insurance policy to contain coverage for injuries caused by uninsured motorists. *See W.Va. Code, 33-6-31(b)* [1998] (Every policy “shall contain an endorsement or provisions undertaking to pay the insured all sums which he shall be legally entitled to recover as damages from the owner or operator of an uninsured motor vehicle[.]”). Uninsured motorist coverage is required to protect the “insured,” and state law defines an insured as including “any person . . . who *uses* . . . the motor vehicle to which the policy applies.” *W.Va. Code, 33-6-31(c)* (emphasis added).<sup>2</sup>

West Virginia’s insurance laws also say that if an insurance policy has coverage or terms that are contrary to state law, then courts are to ignore the policy language and infer the coverage that should have been provided, had the insurance company followed the law. *W.Va. Code, 33-6-17* [1957] mandates that:

Any insurance policy, rider, or endorsement hereafter issued and otherwise valid which contains any condition or provision not in compliance with the requirements of this chapter, shall

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<sup>2</sup>To be fair, uninsured motorist coverage is supposed to cover the “named insured” and any other “insured,” and *W.Va. Code, 33-6-31(c)* defines those terms this way:

. . . the term “named insured” shall mean the person named as such in the declarations of the policy or contract and shall also include such person’s spouse if a resident of the same household and the term “insured” shall mean the named insured and, while resident of the same household, the spouse of any such named insured and relatives of either, while in a motor vehicle or otherwise, and any person, except a bailee for hire, who uses, with the consent, expressed or implied, of the named insured, the motor vehicle to which the policy applies or the personal representative of any of the above[.]

not be thereby rendered invalid but shall be construed and applied in accordance with such conditions and provisions as would have applied had such policy, rider, or endorsement been in full compliance with this chapter.

*See also* Syllabus Point 3, *Deel v. Sweeney*, 181 W.Va. 460, 383 S.E.2d 92 (1989) (“Insurers may incorporate such terms, conditions and exclusions in an automobile insurance policy as may be consistent with the premium charged, so long as any such exclusions do not conflict with the spirit and intent of the uninsured and underinsured motorists statutes.”).

Put another way, provisions in an insurance policy that are more restrictive than statutory requirements are void and ineffective as against public policy. *See* Syllabus Point 2, *Universal Underwriters Ins. Co. v. Taylor*, 185 W.Va. 606, 408 S.E.2d 358 (1991); Syllabus Point 1, *Bell v. State Farm Mut. Auto. Ins. Co.*, 157 W.Va. 623, 207 S.E.2d 147 (1974); Syllabus Point 2, *Johnson v. Continental Casualty Co.*, 157 W.Va. 572, 201 S.E.2d 292 (1973).

In this case, Farm Family Casualty Insurance Company adopted an insurance policy that contained language contrary to state law. As the majority opinion discusses in Section III.A, the Farm Family policy provided coverage for “occupying” the vehicle. This section of the opinion fairly interprets the Farm Family policy as covering Mr. Keefer, concluding that Mr. Keefer was “occupying” the covered vehicle because he was “getting on” the truck at the time of the collision.

But this Court made clear in *Adkins v. Meador*, 201 W.Va. 148, 494 S.E.2d 915 (1997) that an insurance company’s limitation of coverage to those people “occupying” a

vehicle is void and ineffective as against public policy. State law requires coverage for “using” a vehicle, and “[t]he term ‘uses’ in W.Va.Code, 33-6-31(c) [1995] is less restrictive than the term ‘occupying.’ ‘Use’ of an insured vehicle implies employing the vehicle for some purpose or object of the user.” Syllabus Point 3, in part, *Adkins v. Meador*.

I therefore believe that Section III.A of the majority opinion is irrelevant and, in some respects, does an injustice to West Virginia citizens who purchase car insurance. The requirement that automobile insurance policies provide coverage for “using” a vehicle was adopted by the Legislature in 1967. *See 1967 Acts of the Legislature*, Chap. 97. In the 1997 case of *Adkins v. Meador*, *supra*, this Court said that state law requires insurance companies to provide coverage for “using” and not “occupying” the vehicle. We plainly said that limiting coverage to people “occupying” the vehicle was contrary to state law, void, and unenforceable.

Yet, here we are, some ten years after *Adkins v. Meador* and forty years after the uninsured motorist statute was adopted, and in Section III.A, the majority opinion deigns to actually give some semblance of respectability and authority to an insurance policy that uses the term “occupying.”

Farm Family’s continued use of an insurance policy term that is plainly contrary to state law is, in my mind, *prima facie* bad faith. The continued use of policy language that violates state law, and the continued attempt to apply that language to deny coverage, is an affront to the citizens of this State. But when the insurance company comes into a courtroom and, through its lawyers, argues that the policy language is all hunky-dory

and should be used to deny coverage – well, in my mind, that is the definition of frivolous litigation that warrants sanctions by the court. So the next time a circuit judge hears an insurance company say “there’s no coverage because he wasn’t occupying the vehicle,” that judge should feel free to direct the insurance company’s attention to the term “use” in *W.Va. Code*, 33-6-31(c). The judge should also consider using the insurance company’s checkbook to get a firm hold on the insurance company’s attention.

In sum, I respectfully and whole-heartedly concur with the majority’s reasoning. But I believe that Section III.A of the opinion was unnecessary to the Court’s ultimate conclusion.