No. 25539—*Paul Mitchell, as executor of the Estate of Mary Mitchell v. Anthony George Broadnax, and Naomi S. Mitchell and Geraldine O'Dell v. Anthony Broadnax*

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McGraw, J., concurring in part, and dissenting in part:

While I agree that the circuit court's award of summary judgment must be reversed in this case, I do so without joining the majority in embracing the logic of *Imgrund v. Yarborough*, 199 W. Va. 187, 483 S.E.2d 533 (1997), or its precursor, *Deel v. Sweeney*, 181 W. Va. 460, 383 S.E.2d 92 (1989). Although both of these cases work from the premise that policy exclusions must not conflict with the "spirit and intent" of the uninsured and underinsured motorist statutes, *Deel*, 181 W. Va. at 463, 383 S.E.2d at 95, neither appears to recognize that the "owned-but-not-insured" exclusion is, in fact, wholly at odds with the basic requirements of W. Va. Code § 33-6-31(b) & (c). The statute not only places a duty upon automobile insurers to provide and/or offer their customers uninsured and underinsured motorist coverages in amounts equal to or greater than the minimums set forth in W. Va. Code § 17D-4-2, but also requires that such coverages be "person-oriented," in that members of the policyholder's household must be afforded coverage irrespective of whether they travel in an insured vehicle. As this Court long ago recognized in *Bell v. State Farm Mut. Auto. Ins. Co.*, 157 W. Va. 623, 207 S.E.2d 147 (1974), the owned-but-not-insured exclusion strikes at the very heart of the latter requirement.

In *Bell*, the Court held that the owned-but-not-insured exclusion was void as against public policy because it conflicted with the requirements of § 33-6-31(b) & (c). Specifically, the *Bell* Court looked at both language from subsection (b), requiring that all automobile insurance policies must contain

"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," (emphasis added), and the corresponding definition of an "insured" contained in subsection (c), defined to 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." The Court noted that the statute makes "no distinctions with regard to an owned but not insured motor vehicle, as the coverage applies to use or occupancy of '*a motor vehicle or otherwise*,'" *Bell*, 157 W. Va. at 627, 207 S.E.2d at 149-50 (emphasis in original), and went on to hold that "because the [owned-but-not-insured] exclusionary clause[] [is] more restrictive than the uninsured motorist statute or add[s] requirements not authorized by the uninsured motorist statute, [it is] repugnant to the statute and therefore void," *id*. at 627, 207 S.E.2d at 150.

At the core of *Bell* is a comprehension that the statute's use of the phrase "while in a motor vehicle or otherwise" requires that uninsured motorist coverage attach to persons, not to particular insured vehicles.[1] Significantly, following the Court's decision in *Bell*, the Legislature amended subsection (c) to provide that an "insured" would further be defined to encompass "any person . . . who uses, with the consent, expressed or implied, of the named insured, the motor vehicle to which the policy applies." Rather than repudiating *Bell's* interpretation of subsection (c) as necessitating "person-oriented" coverage, the

[1]The dissent in *Bell* highlighted this distinction, stating that "[t]he term 'motor vehicle' refers to an insured vehicle. Therefore, the holding that a particular policyholder's non-listed vehicle is covered must be derived from the phrase 'or otherwise.'" *Bell*, 157 W. Va. at 630, 207 S.E.2d at 151 (Sprouse, J., dissenting).

Legislature in fact embraced this distinction, since the amendment tethered coverage for non-householders to use of the insured vehicle.

Notably, *Bell* is in accord with decisions from other jurisdictions, which have held that similar statutory language, focused as it is upon securing uninsured motorist coverage for the "insured" rather than a particular insured vehicle, makes such coverage "person oriented" and not "vehicle oriented."[2]

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[2]*See, e.g., Martin v. Midwestern Group Ins. Co.*, 70 Ohio St. 3d 478, 639 N.E.2d 438 (1994) ("other owned vehicle" exclusion was unenforceable; uninsured motorist statute mandates coverage to protect persons, not vehicles); *Monteith v. Jefferson Ins. Co. of New York*, 159 Vt. 378, 618 A.2d 488 (1992) ("the essence of UM/UIM coverage under § 941 is its portability. The statute does not allow insurers to condition coverage on the location of the insured nor the insured's status as a motorist, a passenger in a private or public vehicle, or as a pedestrian."); *Farmers Ins. Co., Inc. v. Gilbert*, 14 Kan. App. 2d 395, 791 P.2d 742, *aff'd* 247 Kan. 589, 802 P.2d 556 (1990) (uninsured motorist coverage protects a named insured "no matter where the named insured may be at the time of injury"); *Chaffin v. Kentucky Farm Bureau Ins. Co.*, 789 S.W.2d 754 (Ky. 1990) (uninsured motorist coverage is mandated by statute and has a "personal nature;" coverage cannot be made illusory by exclusions, so exclusion is contrary to public policy and void)*;Calvert v. Farmers Ins. Co. of Arizona*, 144 Ariz. 291, 697 P.2d 684 (1985) (relying on a "majority" of 26 jurisdictions that rejected "other vehicle" exclusions, court concluded that uninsured motorist statute established public policy "that every insured is entitled to recover damages he or she would have been able to recover if the uninsured had maintained a policy of liability insurance in a solvent company."); *Jacobson v. Implement Dealer Mut. Ins. Co.*, 196 Mont. 542, 640 P.2d 908 (1982) (statute requires all automobile insurance policies contain uninsured motorist coverage; citing to cases making coverage "person oriented," court held exclusion void because it reduces the scope of coverage required by statute, and is contrary to public policy); *Harvey v. Travelers Indem. Co.*,188 Conn. 245, 449 A.2d 157 (1982), *partially superseded by statute as stated in Travelers Ins. Co. v. Kulla*, 216 Conn. 390, 579 A.2d 525 (1990) (exclusion was void as against public policy because the coverage required by the uninsured motorist statute is "person oriented" rather than "vehicle oriented"); *Bradley v. Mid-Century Ins. Co.*, 409 Mich. 1, 294 N.W.2d 141 (1980) (uninsured motorist "coverage is portable;" "owned vehicle exclusion" declared invalid); *Squire v. Economy Fire & Cas. Co.*, 69 Ill. 2d 167, 370 N.E.2d 1044 (1977) (exclusion is void to the extent it makes coverage dependent upon insured being in a vehicle listed in the policy, since the uninsured motorist statute requires coverage regardless of the vehicle being driven); *State Farm Auto. Ins. Co. v. Reaves*, 292 Ala. 218, 292 So.2d 95 (1974) (owned-but-not-insured exclusion was invalid

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As the Michigan Supreme Court stated in *Bradley v. Mid-Century Ins. Co.*, 409 Mich. 1, 24, 294 N.W.2d 141, 145 (1980), "[t]he coverage is portable: The insured and family members are covered not only when occupying the covered vehicle, but also when in another automobile, and when on foot, on a bicycle or even sitting on a porch."

> The status of the named insured and his relatives as persons insured against negligent uninsured motorists is not altered by there being other family vehicles having no uninsured motorist coverage. They acquire their insured status when coverage is purchased for any household vehicle. Thereafter, they are insured no matter where they are injured. 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.

Id. at 38, 294 N.W.2d at 152.

What is so striking about *Imgrund* and *Deel* is the fact that neither so much as even acknowledges this most basic aspect of the Court's prior holding in *Bell*. Importantly, the term "insured,"

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[2](...continued)
because statute "mandates uninsured motorist coverage for 'persons insured thereunder' in the policy"); *Bass v. State Farm Mut. Auto. Ins. Co.*, 128 Ga. App. 285, 196 S.E.2d 485, *aff'd in part, rev'd in part on other grounds*, 231 Ga. 269, 201 S.E.2d 444 (1973) (in underinsured motorist coverage, "the named insured is covered wherever he is, whether in that car, another car or no car;" exclusion of coverage for "occupying . . . a vehicle owned by the named insured . . . if such vehicle is not an insured automobile" was void as contrary to the uninsured motorist statute). *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.")

defined in § 33-6-31(c) and interpreted by *Bell*, was employed in the 1982 amendments to subsection (b) of the statute, which require insurers to offer the prescribed uninsured and underinsured coverages. By using consistent terminology, the Legislature obviously intended that the scope of these "optional" coverages would be no less broad than what had previously been determined in *Bell* to apply to mandatory uninsured coverage.

Both *Imgrund* and *Deel* contain statements to the effect that there is some distinction to be drawn between mandatory coverages that must be provided without exception (*i.e.*, mandated minimum uninsured coverage), and other coverages that need only be offered to the insured ("optional" uninsured and underinsured coverages). *Imgrund*, 199 W. Va. at 192-93, 483 S.E.2d at 538-39; *Deel*, 181 W. Va. at 463, 383 S.E.2d at 95. This is, however, a wholly irrelevant distinction from the standpoint of the policyholder: while the insured may have the option of accepting or declining the non-mandatory coverages set forth in § 33-6-31(b), the fact remains that automobile insurers are bound by law to offer them. I simply fail to see how the Legislature was any less determined to provide the public with meaningful "optional" coverages, than it was to mandate a minimal level of uninsured coverage.

Finally, this case, as did *Imgrund* and *Deel* before it, misapprehends the effect of subsection (k) of § 33-6-31. That subsection provides as follows:

> Nothing contained herein shall prevent any insurer from also offering benefits and limits other than those prescribed herein, nor shall this section be construed as preventing any insurer from incorporating in such terms, conditions and exclusions as may be consistent with the premium charged.

Subsection (k) was added to the statute in 1979, after the Court's decision in *Bell*. The first clause of the subsection straightforwardly permits insurers to "offer[] benefits and limits other than those prescribed [in § 33-6-31]." This language obviously permits an automobile insurer to "*offer*" any type of coverage (together with particular policy limits) that it chooses.[3] It is therefore easily conceivable that an insurer could offer, *in addition* to the required offerings set forth in subsection (b) of the statute, other forms of coverage, including alternative uninsured or underinsured protection. What this language clearly does not sanction, however, is an automobile insurer failing in the first instance to present consumers with the prescribed optional coverages.

The more crucial question in interpreting subsection (k) is whether the second clause merely applies to the subject of the first clause—to the "benefits and limits other than those prescribed herein"—or whether it instead has freestanding significance such that insurers have broad authority to impose exclusions upon all motor vehicle coverages, even the "optional" uninsured and underinsured coverages required under subsection (b). The *Deel* Court apparently chose the latter construction.

Deel misconstrued the second clause of subsection (k), an error that has been repeated in subsequent cases.[4] This result is perhaps explained in no small part by the fact that the *Deel* Court

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[3]Of course, automobile insurers are not free to offer any lesser form of uninsured coverage than that mandated in the first clause of § 33-6-31(b).

[4]For example, the majority in this case reads the second clause of subsection (k) such that it "permits insurers to 'incorporat[e] in [policies of motor vehicle insurance] such terms, conditions and exclusions as may be consistent with the premium charged." Majority slip op. at 21 (quoting W. Va. Code

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misapprehended the relevant statutory language. The opinion, in fact, misquotes the second clause of subsection (k), by omitting the crucial word "in." *Deel*, 181 W. Va. at 463, 383 S.E.2d at 95. Although not a model of textual clarity, the word "in" was plainly intended to be synonymous with "therein," which in effect limits the second clause to the subject of the first. Subsection (k) therefore merely permits an insurer to impose "terms, conditions and exclusions" upon "benefits and limits other than those prescribed herein." In other words, the statute merely permits an insurer to impose limitations or exclusions on offerings that are otherwise not specified in the statute. There is simply nothing in this language that could, by any stretch of the imagination, be construed to permit an insurance company to corrupt or curtail the coverages specifically prescribed in subsection (b), regardless of whether those coverages are mandatory or optional to the policyholder.

The construction of subsection (k) that I put forward here is certainly no less plausible than that placed upon it by *Deel* and its progeny. As the Court stated in syllabus point 7 of *Perkins v. Doe*, 177 W. Va. 84, 350 S.E.2d 711 (1986), "[t]he uninsured motorist statute, West Virginia Code Sec. 33-6-31 (Supp. 1986), is remedial in nature and, therefore, must be construed liberally in order to effect its purpose." Consequently, to the extent there is any ambiguity in subsection (k), the statute must be construed in favor of securing for automobile insurance consumers the opportunity to obtain the optional

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§ 33-6-31(k)) (alterations in original). There is no textual support for this construction, and one may only surmise that it was chosen to be consistent with *Deel*.

coverages specified in subsection (b) *without* the inclusion of "terms, conditions and exclusions" that otherwise conflict with the statute.

Any other construction would, in effect, render the provisions of subsection (b) nugatory, since an automobile insurer would otherwise be free to disregard, through the inclusion of onerous policy exclusions, even those coverages specifically required by the statute. *See Brooks v. City of Weirton*, 202 W. Va. 246, 256, 503 S.E.2d 814, 824 (1998) ("'It is always presumed that the legislature will not enact a meaningless or useless statute.'") (quoting syl. pt. 4, *State ex rel. Hardesty v. Aracoma-Chief Logan No. 4523, Veterans of Foreign Wars of the United States*, 147 W. Va. 645, 129 S.E.2d 921 (1963)). Indeed, if the Court is to continue construing subsection (k) as giving insurers the ultimate trump card, there is no logical reason for not overruling *Bell* to the extent that even mandatory uninsured coverage may be subject to nullifying exclusions.

I would instead overrule *Imgrund* and *Deel*, and hold that an owned-but-not-insured exclusion is invalid as against public policy except where an automobile insurer can demonstrate that (1) the policyholder was first offered the prescribed optional coverages without the exclusion; (2) the potential consequences of accepting a policy containing such an exclusion was explained to the policyholder in clear and understandable terms; (3) the policyholder's acceptance of the exclusion resulted in an actuarially appropriate reduction in the premium charged by the insurer; and (4) the amount of the savings obtained by the policyholder through incorporation of the exclusion was made known at the time of acceptance.

I would therefore reverse the circuit court's award of summary judgment on the basis that there is nothing in the record showing that Anthem made such offers of proof. Because the analytical approach taken by the majority only compounds fundamental errors already evident in this Court's past treatment of this subject, I concur only in the basic result reached in this case.