IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

January 2000 Term

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SUPREME COURT OF APPEALS
OF WEST VIRGINIA

No. 25539

**PAUL MITCHELL,
AS EXECUTOR OF THE ESTATE OF
MARY S. MITCHELL,
Plaintiff Below, Appellant,**

V.

**ANTHONY GEORGE BROADNAX,
Defendant Below, Appellee,**

AND

**NAOMI S. MITCHELL AND
GERALDINE O'DELL,
Plaintiffs Below,**

V.

**ANTHONY BROADNAX,
Defendant Below.**

**Appeal from the Circuit Court of Raleigh County
Honorable Harry L. Kirkpatrick, III, Judge
Civil Action Nos. 97-C-241-K and 97-C-481-K**

VACATED AND REMANDED

**Submitted Upon Rehearing: January 25, 2000
Filed: February 18, 2000**

Roslyn Clark-Payne
Wilbert A. Payne
Beckley, West Virginia
Attorneys for the Appellant

Mark A. Bramble
Brent K. Kesner
Ellen R. Archibald
Kesner, Kesner & Bramble
Charleston, West Virginia
Attorneys for the Appellee,
Anthem Casualty Insurance Company

Wesley W. Metheney
Paul T. Farrell, Jr.
Wilson, Frame, Benninger & Metheney, PLLC
Morgantown, West Virginia
Barry Hill
Law Offices of Barry Hill
Wheeling, West Virginia
Attorneys for Amicus Curiae,
West Virginia Trial Lawyers Association

JUSTICE DAVIS delivered the Opinion of the Court.

JUSTICE STARCHER concurs and reserves the right to file a concurring opinion.

JUSTICE MCGRAW concurs, in part, and dissents, in part, and reserves the right to file a concurring and dissenting opinion.

SYLLABUS BY THE COURT

1. "'A determination of the existence of public policy in West Virginia is a question of law . . . .' Syllabus point 1, [in part,] *Cordle v. General Hugh Mercer Corp.*, 174 W. Va. 321, 325 S.E.2d 111 (1984)." Syllabus point 1, in part, *Page v. Columbia Natural Resources, Inc.*, 198 W. Va. 378, 480 S.E.2d 817 (1996).

2. "The Uninsured Motorist Law, Chapter 33, Article 6, Section 31, *Code of West Virginia*, 1931, as amended, governs the relationship between an insured and insurer and provisions within a motor vehicle insurance policy which conflict with the requirements of the statute, either by adding to or taking away from its requirements are void and ineffective." Syllabus point 1, *Bell v. State Farm Mutual Automobile Insurance Co.*, 157 W. Va. 623, 207 S.E.2d 147 (1974).

3. "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 motorist statutes." Syllabus point 3, *Deel v. Sweeney*, 181 W. Va. 460, 383 S.E.2d 92 (1989).

4. "An 'owned but not insured' exclusion to *uninsured* motorist coverage is valid and enforceable above the mandatory limits of *uninsured* motorist coverage required by W. Va. Code §§ 17D-4-2 (1979) (Repl. Vol. 1996) and 33-6-31(b) (1988) (Supp. 1991). To the extent that an

'owned but not insured' exclusion attempts to preclude recovery of statutorily mandated minimum limits of *uninsured* motorist coverage, such exclusion is void and ineffective consistent with this Court's prior holding in Syllabus Point 2 of *Bell v. State Farm Mutual Automobile Insurance Company*, 157 W. Va. 623, 207 S.E.2d 147 (1974)." Syllabus point 4, *Imgrund v. Yarborough*, 199 W. Va. 187, 483 S.E.2d 533 (1997).

5. When an insurer incorporates, into a policy of motor vehicle insurance, an exclusion pursuant to W. Va. Code § 33-6-31(k) (1995) (Repl. Vol. 1996), the insurer must adjust the corresponding policy premium so that the exclusion is "consistent with the premium charged."

6. When an insurer has failed to satisfy the statutory criteria of W. Va. Code § 33-6-31(k) (1995) (Repl. Vol. 1996) requisite to incorporating an exclusion in a policy of motor vehicle insurance, the enforcement of such an exclusion is violative of this State's public policy.

7. "An insurance company seeking to avoid liability through the operation of an exclusion has the burden of proving the facts necessary to the operation of that exclusion." Syllabus point 7, *National Mutual Insurance Co. v. McMahon & Sons, Inc.*, 177 W. Va. 734, 356 S.E.2d 488 (1987).

8. "An insurer wishing to avoid liability on a policy purporting to give general or 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." Syllabus point 10, *National Mutual Insurance Co. v. McMahon & Sons, Inc.*, 177 W. Va. 734, 356 S.E.2d 488 (1987).

Davis, Justice:

The appellant herein and plaintiff below, Paul Mitchell [hereinafter "Mitchell"], as executor of the estate of Mary S. Mitchell [hereinafter "Ms. Mitchell" or "the decedent"], appeals from an April 15, 1998, order entered by the Circuit Court of Raleigh County. In that order, the circuit court awarded summary judgment and declaratory judgment to the appellee herein and defendant below, Anthem Casualty Insurance Company [hereinafter "Anthem"],[1] and ruled that Anthem was obligated to pay to Mitchell, under the "owned but not insured" exclusion contained in the decedent's policy of motor vehicle insurance, uninsured motorist [hereinafter "UM"] benefits equal to the statutorily required minimum limits of such coverage, *i.e.*, $20,000. *See* W. Va. Code § 17D-4-2 (1979) (Repl. Vol. 1996); W. Va. Code § 33-6-31(b) (1995) (Repl. Vol. 1996). Mitchell appealed the circuit court's decision to this Court and argued that the "owned but not insured" exclusion should be declared void and that he should be permitted to recover the full amount of uninsured motorist benefits provided for in the decedent's Anthem policy, *i.e.*, $300,000. We previously upheld the circuit court's order in a per curiam opinion filed on July 16, 1999. *See Mitchell v. Broadnax*, No. 25539 (W. Va. July 16, 1999) (per curiam). Following Mitchell's petition for rehearing, we concluded that justice required us to revisit the public policy attending the enforcement of "owned but not insured" exclusions to motor vehicle insurance coverage, noting in our

[1]West Virginia law permits insurers providing uninsured and/or underinsured motorist coverage(s) to participate in lawsuits regarding such insurance in either their own name or "in the name of the owner, or operator, or both, of the uninsured or underinsured motor vehicle." W. Va. Code § 33-6-31(d) (1995) (Repl. Vol. 1996). *See also* Syl. pt. 4, *State ex rel. State Farm Mut. Auto. Ins. Co. v. Canady*, 197 W. Va. 107, 475 S.E.2d 107 (1996) ("Pursuant to West Virginia Code § 33-6-31(d) (Supp. 1995), an uninsured motorist carrier is entitled to appear and defend in its own name rather than that of the uninsured tortfeasor even when policy defenses raising issues of coverage are not asserted by the carrier.").

August 31, 1999, rehearing order that our reconsideration of this case would be limited to the "public policy" issue. Upon a second review of the pertinent authorities, the record presented for appellate review, and the parties' arguments, we conclude that we cannot definitively determine whether the circuit court's ruling was in error. Our decision of this case is hindered by the absence, in the appellate record, of two vital pieces of information: (1) evidence regarding whether Anthem, in incorporating the exclusionary language into Ms. Mitchell's policy, charged her a premium consistent with such limitation of coverage and (2) any indication that the circuit court considered whether Anthem had met the statutory requirements of W. Va. Code § 33-6-31(k) (1995) (Repl. Vol. 1996) requisite to incorporating such a policy exclusion. Accordingly, we vacate the ruling of the circuit court and remand the matter for further proceedings consistent with this opinion.

I.

FACTUAL AND PROCEDURAL HISTORY

The facts of this case are largely undisputed by the parties. On November 9, 1996, Ms. Mitchell; her daughter, Naomi Mitchell [hereinafter "Naomi"]; and Geraldine O'Dell [hereinafter "Ms. O'Dell"] were involved in an automobile accident in Raleigh County, West Virginia, when the 1989 Pontiac Grand Am in which they were traveling was hit by a 1983 Cadillac driven by Anthony George Broadnax [hereinafter "Broadnax"], an uninsured motorist[2] who was driving without a valid driver's license.[3] Ms.

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[2]The parties do not dispute that Broadnax was an uninsured motorist: (1) he had no motor vehicle insurance at the time of the accident; (2) his mother, who owned the Cadillac he was driving, had specifically denied him permission and consent to drive this vehicle; and (3) Broadnax was not residing in

(continued...)

Mitchell and Naomi jointly owned the Grand Am,[4] which was insured by a policy of motor vehicle insurance issued by Kentucky National Insurance Company [hereinafter "Kentucky National"].[5] In addition, Ms. Mitchell, who was a passenger in the Grand Am at the time of the accident, held a policy of motor vehicle insurance for her separately owned vehicle, a 1981 Buick Century, which policy had been issued by Anthem.[6] As a result of the accident, Ms. Mitchell sustained numerous injuries, and it is averred that these injuries contributed to her subsequent death in late March, 1997.

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[2](...continued)
his mother's household at the time of the collision. Based upon these various facts, the circuit court ruled that Broadnax was an uninsured motorist, within the meaning ascribed to that term by *Metropolitan Property & Liability Insurance Co. v. Acord*, 195 W. Va. 444, 465 S.E.2d 901 (1995). *See* Syl. pt. 2, *id.* ("Consistent with the omnibus clause of West Virginia Code § 33-6-31(a) (1992), an insurer may properly deny liability coverage where the express terms of an automobile insurance policy provide that in order for liability coverage to exist, a driver, who is not otherwise insured under the policy, must have received the named insured's permission to use the automobile, and said driver lacked the express or implied permission of the named insured prior to using the vehicle."). *See also* W. Va. Code § 33-6-31(c) (1995) (Repl. Vol. 1996) (defining "uninsured motor vehicle" as "a motor vehicle as to which there is no: (i) Bodily injury liability insurance and property damage liability insurance both in the amounts specified by section two, article four, chapter seventeen-d of this code, as amended from time to time; or (ii) there is such insurance, but the insurance company writing the same denies coverage thereunder; or (iii) there is no certificate of self-insurance issued in accordance with the provisions of said section").

[3]It is further alleged that, at the time of the wreck, Broadnax was driving under the influence of alcohol. For statutes criminalizing substance-impaired driving, see generally W. Va. Code § 17B-4-3 (1994) (Repl. Vol. 1996) and W. Va. Code § 17C-5-2 (1996) (Repl. Vol. 1996).

[4]They also resided in the same household.

[5]The Kentucky National policy insuring the Grand Am carried UM coverage of $100,000 per person/$300,000 per occurrence. Although the parties variously refer to this insurer as Kentucky Central Insurance Company and Kentucky National Insurance Company, for ease of reference we will use the company's post-merger name of Kentucky National. *See Bailey v. Kentucky Nat'l Ins. Co.*, 201 W. Va. 220, 222 n.2, 496 S.E.2d 170, 172 n.2 (1997).

[6]The UM coverage limits of the Anthem policy were $300,000 per person/$300,000 per occurrence.

After unsuccessful attempts to recover the UM benefits provided by the Kentucky National and Anthem policies, Paul Mitchell, on behalf of Ms. Mitchell,[7] filed this action on March 24, 1997, in the Circuit Court of Raleigh County, seeking to collect the UM benefits provided by both the Kentucky National and Anthem policies.[8] Kentucky National ultimately settled with Mitchell and tendered the full policy limits of UM coverage, *i.e.*, $100,000.[9] Anthem, however, denied coverage based upon an "owned but not insured" exclusion contained in that policy, which reads:

> We do not provide Uninsured Motorists Coverage under this endorsement for property damage or bodily injury sustained by any person while occupying, or when struck by, any motor vehicle owned by you or any family member which is not insured for Uninsured Motorists Coverage under this policy. This includes a trailer of any type used with that vehicle.

Following Anthem's motion for summary judgment and declaratory judgment, the circuit court, in an order entered April 15, 1998, found the exclusion to be valid and enforceable above the minimum statutory limits of UM coverage, consistent with our recent holding in *Imgrund v. Yarborough*, 199 W. Va. 187, 483 S.E.2d 533 (1997).[10] The court also ruled that Anthem's "liability to the plaintiff is limited to the statutory

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[7]When the complaint in this action was initially filed, Mitchell served as power of attorney for Ms. Mitchell. Following Ms. Mitchell's death, the complaint was amended to reflect Mitchell's current status as executor of her estate.

[8]Naomi and Ms. O'Dell also brought suit against Broadnax for injuries they suffered and damages they sustained as a result of the automobile accident of November 9, 1996. During the proceedings below, the circuit court consolidated their action with the action filed by Mitchell. The instant appeal concerns only Mitchell's suit, as executor of Ms. Mitchell's estate.

[9]See *supra* note 5 describing coverage limits of Kentucky National policy.

[10]The holding relied upon by the circuit court provides:

(continued...)

minimum limit of uninsured motorist benefits of $20,000.00, per person."[11] Thereafter, Anthem tendered

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[10](...continued)

> An "owned but not insured" exclusion to *uninsured* motorist coverage is valid and enforceable above the mandatory limits of *uninsured* motorist coverage required by W. Va. Code §§ 17D-4-2 (1979) (Repl. Vol. 1996) and 33-6-31(b) (1988) (Supp. 1991). To the extent that an "owned but not insured" exclusion attempts to preclude recovery of statutorily mandated minimum limits of *uninsured* motorist coverage, such exclusion is void and ineffective consistent with this Court's prior holding in Syllabus Point 2 of *Bell v. State Farm Mutual Automobile Insurance Company*, 157 W. Va. 623, 207 S.E.2d 147 (1974).

Syl. pt. 4, *Imgrund v. Yarborough*, 199 W. Va. 187, 483 S.E.2d 533 (1997).

[11]The statutory minimum limits of UM coverage applicable to the facts underlying the instant appeal are set forth in W. Va. Code § 17D-4-2 (1979) (Repl. Vol. 1996) and W. Va. Code § 33-6-31(b) (1995) (Repl. Vol. 1996). W. Va. Code § 33-6-31(b) requires motorists to carry UM coverage in an amount dictated by the financial responsibility laws of this State:

> (b) Nor shall any such policy or contract [of motor vehicle insurance] be so issued or delivered unless it 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, within limits which shall be no less than the requirements of section two, article four, chapter seventeen-d of this code, as amended from time to time . . . .

W. Va. Code § 17D-4-2, one of the statutes regulating motorists' financial responsibility, requires an owner or operator of a motor vehicle to possess insurance in a minimum amount of

> twenty thousand dollars because of bodily injury to or death of one person in any one accident, and, subject to said limit for one person, in the amount of forty thousand dollars because of bodily injury to or death of two or more persons in any one accident, and in the amount of ten thousand dollars because of injury to or destruction of property of others in any one accident.

these benefits to Mitchell,[12] and Mitchell appealed to this Court.

In our first decision of Mitchell's appeal, which was filed on July 16, 1999, and rendered per curiam, we upheld the circuit court's ruling. *See Mitchell v. Broadnax*, No. 25539 (W. Va. July 16, 1999) (per curiam). Upon Mitchell's petition for rehearing, we determined the need to further examine the public policy issues inherent in the enforcement of "owned but not insured" exclusions to motor vehicle coverage, based largely upon our conclusion that the parties had not adequately briefed this issue in their original appellate briefs.[13] Accordingly, in our August 31, 1999, order granting rehearing, we instructed

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[12]The parties disagree as to when Anthem actually tendered payment to Mitchell and as to whether such payment was voluntarily made by Anthem or occurred as a result of the circuit court's order directing such payment be made.

[13]As we previously have stated in other opinions requiring rehearing, "we express our concern over not resolving this case in the prior . . . opinion[]. However, . . . '[w]isdom too often never comes, and so one ought not to reject it merely because it comes late.'" *Hosaflook v. Consolidation Coal Co.*, 201 W. Va. 325, 329, 497 S.E.2d 174, 178 (1997) (quoting *Henslee v. Union Planters Nat'l Bank & Trust Co.*, 335 U.S. 595, 600, 69 S. Ct. 290, 293, 93 L. Ed. 259, 264 (1949) (per curiam) (Frankfurter, J., dissenting)). In accepting this matter for further consideration, though, we wish to caution the litigants that, in future cases, they must strive to adhere to the Rules of Appellate Procedure governing proceedings in this Court. *See* W. Va. R. App. P. 10(d) (requiring appellant's brief to "follow the same form as the petition for appeal"); W. Va. R. App. P. 3(c) (commanding petition for appeal to include "1. The kind of proceeding and nature of the ruling in the lower tribunal[;] 2. A statement of the facts of the case[;] 3. The assignments of error relied upon on appeal and the manner in which they were decided in the lower tribunal[; and] 4. Points and authorities relied upon, a discussion of law, and the relief prayed for."). *See also Hanlon v. Logan County Bd. of Educ.*, 201 W. Va. 305, 310 n.17, 496 S.E.2d 447, 452 n.17 (1997) ("'Failure to [heed the applicable court rules] not only wastes the precious and limited resources of this Court, but also those of the lawyers and their clients. *We do not wish to be perceived as "sticklers, precisians, nitpickers, or sadists. But in an era of swollen appellate dockets, courts are entitled to insist" on diligence and good faith efforts from the practicing bar so that the appellate decisional process can proceed as it should.*'" (emphasis in original) (quoting *Coleman v. Sopher*, 194 W. Va. 90, 96, 459 S.E.2d 367, 373 (1995) (quoting *Avitia v. Metropolitan Club of Chicago, Inc.*, 49 F.3d 1219, 1224 (7th Cir. 1995)))). Our review (continued...)

the parties that our reconsideration of this case would be limited to a consideration of "whether the 'owned but not insured' exclusion is against public policy as set forth in West Virginia statutes and/or in case law," and requested their briefs on rehearing to address the same. Our determination of that narrow issue follows.

II.

STANDARD OF REVIEW

On appeal to this Court, Mitchell challenges the propriety of the circuit court's decision to award Anthem summary judgment and declaratory judgment. Typically, "'"[a] circuit court's entry of summary judgment is reviewed de novo." Syl. Pt. 1, *Painter v. Peavy*, 192 W. Va. 189, 451 S.E.2d 755 (1994).' Syllabus point 1, *McGraw v. St. Joseph's Hospital*, 200 W. Va. 114, 488 S.E.2d 389 (1997)." Syl. pt. 2, *Wickland v. American Travellers Life Ins. Co.*, 204 W. Va. 430, 513 S.E.2d 657 (1998). Likewise, we afford plenary review to a declaratory judgment award: "'[a] circuit court's entry of a declaratory judgment is reviewed de novo.' Syllabus Point 3, *Cox v. Amick*, 195 W. Va. 608, 466 S.E.2d 459 (1995)." Syl. pt. 1, *Anderson v. Wood*, 204 W. Va. 558, 514 S.E.2d 408 (1999).

In addition to the procedural posture of this case, we also must consider the legal issue at the heart of this matter in determining the applicable standard of review. As we previously have upheld the

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[13](...continued)
of the briefs on rehearing, as well as of the original appellate briefs filed in this case, indicates that they contain little more than bald assertions regarding the public policy considerations discussed in this opinion with scant supportive authority for such contentions.

validity of exclusions to motor vehicle insurance coverage generally, *see* Syl. pt. 3, *Deel v. Sweeney*, 181 W. Va. 460, 383 S.E.2d 92 (1989),[14] and of "owned but not insured" exclusions specifically, *see* Syl. pt. 4, *Imgrund v. Yarborough*, 199 W. Va. 187, 483 S.E.2d 533 (1997),[15] we are primarily concerned in this appeal with the public policy considerations attending the incorporation of such exclusions into policies of motor vehicle insurance. Generally, "'[a] determination of the existence of public policy in West Virginia is a question of law . . . .' Syllabus point 1, [in part,] *Cordle v. General Hugh Mercer Corp.*, 174 W. Va. 321, 325 S.E.2d 111 (1984)." Syl. pt. 1, in part, *Page v. Columbia Natural Resources, Inc.*, 198 W. Va. 378, 480 S.E.2d 817 (1996). Accordingly, the appropriate standard of review for our deliberation and determination of the public policy issue also is plenary:

> "'Where the issue on an appeal from the circuit court is clearly a question of law or involving an interpretation of a statute, we apply a *de novo* standard of review.' Syllabus point 1, *Chrystal R.M. v. Charlie A.L.*, 194 W. Va. 138, 459 S.E.2d 415 (1995)." Syllabus point 2, *Webster County Commission v. Clayton*, ___ W. Va. ___, ___ S.E.2d ___ (No. 25625 July 16, 1999).

Syl. pt. 1, *State ex rel. McGraw v. Combs Services*, ___ W. Va. ___, ___ S.E.2d ___ (No. 26196 Dec. 10, 1999). Having ascertained the relevant standards of review, we proceed to consider and decide the parties' arguments.

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[14]See *infra* Section III for the text of Syllabus point 3 of *Deel v. Sweeney*, 181 W. Va. 460, 383 S.E.2d 92 (1989).

[15]See *supra* note 10 and *infra* Section III for the pertinent holding of *Imgrund v. Yarborough*, 199 W. Va. 187, 483 S.E.2d 533 (1997).

III.

DISCUSSION

With this appeal, we once again are invited to consider the ever-tumultuous realm of motor vehicle insurance law and insurer-incorporated exclusions to such coverage.[16] In determining whether enforcement of the "owned but not insured" exclusion[17] at issue herein violates the public policy of this State, it is first necessary to review the historical underpinnings which have shaped such exclusions.

The seminal case of *Bell v. State Farm Mutual Automobile Insurance Co.*, 157 W. Va. 623, 207 S.E.2d 147 (1974), was the first of our decisions to definitively consider the validity of "owned but not insured" exclusions. In that case, plaintiff Bell was involved in an accident with an uninsured motorist while riding her motorcycle, which she owned but for which she did not have insurance. Following the accident, Bell attempted to collect uninsured motorist [hereinafter "UM"] benefits under two separate policies of motor vehicle insurance. The first such policy insured a Fiat automobile which Bell also

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[16]At this juncture, we acknowledge and appreciate the appearance of Amicus Curiae herein, the West Virginia Trial Lawyers Association [hereinafter "the Association"]. We will consider the Association's arguments in connection with the party to whom they relate.

[17]Such an exclusion is typically described as follows:

> an owned but not insured exclusion in an uninsured motorist policy generally excludes uninsured motorist coverage for bodily injury sustained by a person covered under the policy while occupying a motor vehicle owned by an insured or relative living in the same household, but not insured for uninsured motorist coverage under the policy.

Shannon M. McDonough, Note, *Exclusions for Owned but not Insured in Uninsured Motorist Provisions--What are States really Driving at in their Decisions?*, 43 Drake L. Rev. 917, 918 (1995) (footnote omitted).

owned. The second policy had been purchased by her father, in whose household Bell resided, for his owned vehicle. Both of these policies, however, contained an "owned but not insured" exclusion, which the insurer claimed prevented Bell from recovering UM benefits thereunder in connection with her motorcycle accident. *Bell*, 157 W. Va. at 624-26, 207 S.E.2d at 148-49.

Issuing its opinion, the Court ultimately found the "owned but not insured" exclusions to be void and inoperative to preclude Bell's recovery of UM benefits under her and her father's policies of insurance. To reach this conclusion, the Court first examined the public policy attending this State's motor vehicle insurance laws:

> As automobile transportation has attained a pervasive status in the organization of society and commerce, the State has a legitimate interest in assuring that the burden of loss in owning, operating, and maintaining automobiles be justly and equitably distributed. For this reason the Legislature has enacted the West Virginia Uninsured Motorist Law, *Code*, 33-6-31, as amended, which contains specific requirements applicable to insurance underwriters. This statute regulates, in part, the relationship between an insured and the insurer, and, therefore, an insurance contract cannot alter the terms as provided by the statute. . . .

Bell, 157 W. Va. at 627, 207 S.E.2d at 150. Recognizing the State's preeminent interest in protecting its citizens from the financial burdens of collisions with uninsured motorists, this Court held that policies of motor vehicle insurance are required to comply with the statutory requirements of W. Va. Code § 33-6-31.

> The Uninsured Motorist Law, Chapter 33, Article 6, Section 31, *Code of West Virginia*, 1931, as amended, governs the relationship between an insured and insurer and provisions within a motor vehicle insurance policy which conflict with the requirements of the statute, either by adding to or taking away from its requirements are void and ineffective.

Syl. pt. 1, *Bell*, 157 W. Va. 623, 207 S.E.2d 147. Then, invalidating the "owned but not insured"

exclusion at issue in that appeal, the *Bell* Court ostensibly found that such a limitation of coverage conflicted with the statutory requirements requiring UM insurance:

> An exclusionary clause within a motor vehicle insurance policy issued by a West Virginia licensed insurer which excludes uninsured motorist coverage for bodily injury caused while the insured is occupying an owned-but-not-insured motor vehicle is void and ineffective under Chapter 33, Article 6, Section 31, *Code of West Virginia*, 1931, as amended.

Syl. pt. 2, *id.* Therefore, the "owned but not insured" exclusions were deemed to be void, and Bell was permitted to recover her requested UM benefits.

Following *Bell*, the legal history of motor vehicle exclusions momentarily veered off the path of judicial precedent and turned sharply towards the legislative arena. In 1979, the West Virginia Legislature substantially amended the UM law of this State by adding to W. Va. Code § 33-6-31 a new subsection (k). This amendment, which expressly authorized insurers to incorporate exclusions to coverage in their policies of motor vehicle insurance, provided:

> (k) 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*.[18]

W. Va. Code § 33-6-31(k) (1979) (Repl. Vol. 1982) (emphasis added) (footnote added).

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[18]Although W. Va. Code § 33-6-31 has been amended many times since the Legislature's addition of subsection (k) thereto, the text of subsection (k) has not changed since its original enactment. *See, e.g.*, W. Va. Code § 33-6-31(k) (1998) (Supp. 1999); W. Va. Code § 33-6-31(k) (1995) (Repl. Vol. 1996).

Thereafter, this Court was presented with another case involving "owned but not insured" exclusions to motor vehicle insurance, *Deel v. Sweeney*, 181 W. Va. 460, 383 S.E.2d 92 (1989). Unlike the plaintiff in *Bell*, however, Deel attempted to recover underinsured motorist [hereinafter "UIM"] benefits. Plaintiff Deel was involved in an accident with Sweeney. Sweeney was an uninsured motorist, but the vehicle he was driving at the time of the accident, which was owned by Ramsey, was insured. Additionally, Deel owned the vehicle he was driving at the time of the accident and insured the same, but he did not carry UIM coverage. After recovering insurance benefits from Ramsey's insurer, Deel attempted to recover UIM benefits from his father's policy of motor vehicle insurance.[19] This policy, like the ones at issue in *Bell*, contained an "owned but not insured" exclusion upon which the issuing insurer based its declination of UIM coverage. *Deel*, 181 W. Va. at 461-62, 383 S.E.2d at 93-94.

In deciding *Deel*, this Court considered its prior decision in the *Bell* case and reiterated those tenets by holding that "[s]tatutory provisions mandated by the Uninsured Motorist Law, *W. Va. Code* § 33-6-31 [1988] may not be altered by insurance policy exclusions." Syl. pt. 1, *Deel*, 181 W. Va. 460, 383 S.E.2d 92. Despite this admonition, the Court recognized the substantial impact of the Legislature's adoption of subsection (k) to W. Va. Code § 33-6-31, the practical effect of which was the allowance of motor vehicle insurance exclusions.

> 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

[19]Deel was residing in his father's household at the time of the accident. 181 W. Va. at 461, 383 S.E.2d at 93.

intent of the uninsured and underinsured motorist statutes.

Syl. pt. 3, *Deel v. Sweeney*, 181 W. Va. 460, 383 S.E.2d 92. Based upon this permissive provision and the fact that UIM coverage is optional, and not mandatory, as is the case with UM coverage, 181 W. Va. at 463, 383 S.E.2d at 95, the *Deel* Court held the "owned but not insured" exclusion valid and quashed Deel's attempt to recover UIM benefits under his father's insurance policy.

This brings us now to our most recent decision impacting the viability of "owned but not insured" exclusions, *Imgrund v. Yarborough*, 199 W. Va. 187, 483 S.E.2d 533 (1997).[20] The facts of *Imgrund* are akin to those presented by *Bell* and *Deel*. Imgrund was involved in an accident while he was riding a motorcycle which he owned and for which he had purchased motor vehicle insurance. Yarborough, the other driver involved in the accident, was uninsured. Imgrund successfully recovered UM benefits from his own insurance policy, and, as he was living with his parents at the time of the accident, attempted to collect additional benefits from his parents' policy of motor vehicle insurance, which insured their two vehicles. Again, however, the policy under which the plaintiff sought to recover contained an "owned but not insured" exclusion to coverage, and the issuing insurer denied coverage on this basis. 199 W. Va. at 188-89, 483 S.E.2d at 534-35.

When faced with the question of the exclusion's validity in *Imgrund*, we were forced to

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[20]Although our prior opinions in *Alexander v. State Automobile Mutual Insurance Co.*, 187 W. Va. 72, 415 S.E.2d 618 (1992), and *Ward v. Baker*, 188 W. Va. 569, 425 S.E.2d 245 (1992), touched upon "owned but not insured" exclusions, we do not discuss these cases at length herein as they did not result in a significant expansion of the law in this field.

reconcile our prior decisions in this field. On the one hand, *Bell* expressly denied the validity of "owned but not insured" exclusions, while on the other hand, *Deel* acknowledged the Legislature's allowance of motor vehicle insurance exclusions and found such a limitation to be valid and effective in denying UIM benefits. 199 W. Va. at 192, 483 S.E.2d at 538. Appreciating this inconsistency, this Court in *Imgrund* carefully balanced our conflicting precedents while adhering to the statutory provisions governing UM insurance and enabling insureds to purchase optional UM coverage above the statutory minimum limits thereof.

> An "owned but not insured" exclusion to *uninsured* motorist coverage is valid and enforceable above the mandatory limits of *uninsured* motorist coverage required by W. Va. Code §§ 17D-4-2 (1979) (Repl. Vol. 1996) and 33-6-31(b) (1988) (Supp. 1991). To the extent that an "owned but not insured" exclusion attempts to preclude recovery of statutorily mandated minimum limits of *uninsured* motorist coverage, such exclusion is void and ineffective consistent with this Court's prior holding in Syllabus Point 2 of *Bell v. State Farm Mutual Automobile Insurance Company*, 157 W. Va. 623, 207 S.E.2d 147 (1974).

Syl. pt. 4, *Imgrund v. Yarborough*, 199 W. Va. 187, 483 S.E.2d 533. We therefore found the "owned but not insured" exclusion in Imgrund's parents' policy to be valid.

Having recounted the historical treatment of "owned but not insured" exclusions to motor vehicle insurance coverage in this State, we turn our attention to the facts and circumstances of the instant appeal. In this case, like *Imgrund* and *Bell*, the plaintiff seeking to recover UM benefits was involved in an accident with an uninsured motorist. *See Imgrund*, 199 W. Va. at 188, 483 S.E.2d at 534; *Bell*, 157 W. Va. at 624, 207 S.E.2d at 148. Furthermore, Ms. Mitchell, who partly-owned the accident

vehicle, like Imgrund, who wholly-owned the accident vehicle, recovered the full policy limits of UM benefits from the insurance company providing coverage for the vehicle involved in the collision. *See Imgrund*, 199 W. Va. at 189, 483 S.E.2d at 535. Unlike *Imgrund*, however, and more akin to the insurance facts of *Bell*, Ms. Mitchell also sought to collect benefits from her own policy of insurance which insured her separately-owned vehicle, but was precluded from doing so by the "owned but not insured" exclusion contained in that policy.[21] *See Bell*, 157 W. Va. at 625-26, 207 S.E.2d at 149. As we have yet to consider this particular fact pattern in light of the Legislature's allowance of insurance policy exclusions pursuant to W. Va. Code § 33-6-31(k), we must therefore determine whether enforcement of the "owned but not insured" exclusion, under these circumstances, violates the public policy of this State.

In deciding whether a public policy violation is imminent, we consider both the facts and the law relevant to our inquiry. Stated otherwise, decision of a public policy issue is a legal query, but such a determination is made on a case-by-case basis: "'"[i]t is a question of law which the court must decide in light of the particular circumstances of each case."'" *Morris v. Consolidation Coal Co.*, 191 W. Va. 426, 433 n.5, 446 S.E.2d 648, 655 n.5 (1994) (quoting *Cordle v. General Hugh Mercer Corp.*, 174 W. Va. at 325, 325 S.E.2d at 114 (quoting *Allen v. Commercial Cas. Ins. Co.*, 131 N.J.L. 475, 477-78, 37 A.2d 37, 39 (1944) (citations omitted))). Where public policy issues are concerned,

> "[t]he rule of law, most generally stated, is that 'public policy' is that

[21]See *supra* Section I for the text of the "owned but not insured" exclusion contained in Ms. Mitchell's Anthem policy.

> principle of law which holds that 'no person can lawfully do that which has a tendency to be injurious to the public or against public good . . .' even though 'no actual injury' may have resulted therefrom in a particular case 'to the public.' . . .
>
> "The sources determinative of public policy are, among others, our federal and state constitutions, our public statutes, our judicial decisions, the applicable principles of the common law, the acknowledged prevailing concepts of the federal and state governments relating to and affecting the safety, health, morals and general welfare of the people for whom government--with us--is factually established."

Id. With these precepts in mind, then, we must carefully weigh the factual and legal components of the instant appeal.

At the center of the instant controversy is the policy of motor vehicle insurance provided by Anthem to Ms. Mitchell and containing a limitation to her UM coverage in the form of an "owned but not insured" exclusion.[22] The mandatory nature of UM insurance is well-established in the law of this State. W. Va. Code § 33-6-31(b); Syl. pt. 1, in part, *Miller v. Lambert*, 195 W. Va. 63, 464 S.E.2d 582 (1995) ("Uninsured motorist insurance coverage is mandatory."); *Deel*, 181 W. Va. at 463, 383 S.E.2d at 95 (same). "'The primary, if not sole purpose of mandatory uninsured motorist coverage is to protect innocent victims from the hardships caused by negligent, financially irresponsible drivers.'" *Perkins v. Doe*, 177 W. Va. 84, 87, 350 S.E.2d 711, 714 (1986) (quoting *Lusk v. Doe*, 175 W. Va. 775, 779, 338 S.E.2d 375, 380 (1985), *overruled on other grounds by Hamric v. Doe*, 201 W. Va. 615, 499 S.E.2d 619 (1997)). In this regard, W. Va. Code § 33-6-31

[22]For the exclusionary language contained in the Anthem policy, see *supra* Section I.

> seeks to assure at least minimum relief from the consequences of a loss caused by an uninsured motorist. Because every citizen is exposed to the risk of loss, the Legislature has provided through the uninsured motorist statute that the burden of loss should be distributed among all owners of insured motor vehicles registered in West Virginia. . . .

Bell, 157 W. Va. at 627, 207 S.E.2d at 150. Given that the purpose of UM insurance is to alleviate the financial burdens of West Virginia motorists who are involved in accidents with other motorists who are uninsured,[23] we have specifically held that "[t]he uninsured motorist statute, West Virginia Code § 33-6-31 (Supp. 1986), is remedial in nature and, therefore, must be construed liberally in order to effect its purpose." Syl. pt. 7, *Perkins v. Doe*, 177 W. Va. 84, 350 S.E.2d 711.

It is precisely this same UM statute upon which our prior decisions validating "owned but not insured" exclusions have based their rulings. *See* Syl. pt. 4, *Imgrund*, 199 W. Va. 187, 483 S.E.2d 533; Syl. pt. 3, *Deel*, 181 W. Va. 460, 383 S.E.2d 92. With specific regard to the public policy issue at hand, subsection (k) of W. Va. Code § 33-6-31 permits insurers to "incorporat[e] in [policies of motor vehicle insurance] such terms, conditions and exclusions as may be consistent with the premium charged." Because a "public statute[]" may serve as a source of authority for public policy issues, *see Morris*, 191 W. Va. at 433 n.5, 446 S.E.2d at 655 n.5, a detailed analysis of this permissive provision would be instructive to our inquiry.

> "'The primary object in construing a statute is to ascertain and give effect to the intent of the Legislature.' Syllabus point 1, *Smith v. State Workmen's Compensation Commissioner*, 159 W. Va. 108, 219

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[23]See *supra* note 2 for authorities defining "uninsured motorist" and "uninsured motor vehicle."

> S.E.2d 361 (1975)." Syllabus point 6, *State ex rel. ACF Industries, Inc. v. Vieweg*, 204 W. Va. 525, 514 S.E.2d 176 (1999).

Syl. pt. 3, *Daily Gazette Co., Inc. v. West Virginia Dev. Office*, ___ W. Va. ___, ___ S.E.2d ___ (No. 25437 May 19, 1999). Moreover, when we interpret a statutory provision, this Court is bound to apply, and not construe, the enactment's plain language. Syl. pt. 4, *Daily Gazette Co., Inc. v. West Virginia Dev. Office*, ___ W. Va. ___, ___ S.E.2d ___ (No. 25437 May 19, 1999) ("'"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. 2, *State v. Epperly*, 135 W. Va. 877, 65 S.E.2d 488 (1951).' Syllabus point 1, *State v. Jarvis*, 199 W. Va. 635, 487 S.E.2d 293 (1997)."); *DeVane v. Kennedy*, ___ W. Va. ___, ___, ___ S.E.2d ___, ___, slip op. at 17 (No. 25206 Mar. 26, 1999) ("Where the language of a statutory provision is plain, its terms should be applied as written and not construed." (citations omitted)). Although a provision's language may be plain, there nevertheless may arise circumstances in which the plain language does not speak completely on the subject to which it is addressed. Therefore,

> "[t]hat which is necessarily implied in a statute, or must be included in it in order to make the terms actually used have effect, according to their nature and ordinary meaning, is as much a part of it as if it had been declared in express terms." *Syllabus* point 14., *State v. Harden*, 62 W. Va. 313, 58 S.E. 715 (1907).

Syl. pt. 4, *Smith v. State Workmen's Compensation Comm'r*, 159 W. Va. 108, 219 S.E.2d 361. Finally,

> "[i]t is the duty of a court to construe a statute according to its true intent, and give to it such construction as will uphold the law and further justice. It is well the duty of a court to disregard a construction, though apparently warranted by the literal sense of the words in a statute, when

> such construction would lead to injustice and absurdity." Syl. pt. 2, *Click v. Click*, 98 W. Va. 419, 127 S.E. 194 (1925).

Syl. pt. 2, *Pristavec v. Westfield Ins. Co.*, 184 W. Va. 331, 400 S.E.2d 575 (1990).

Reviewing the pertinent language of subsection (k), we are convinced that the language states, in plain and comprehensible terms, that an insurer may include in a policy of motor vehicle insurance an exclusion. *See* W. Va. Code § 33-6-31(k); Syl. pt. 3, *Deel*, 181 W. Va. 460, 383 S.E.2d 92. This language further provides, in less certain terms, that such an exclusion must be "consistent with the premium charged" for such coverage. Inherent in this requirement, then, is the heretofore silent prerequisite that an insurance policy may contain an exclusion only if the issuing insurer has "appropriately adjusted" the corresponding premiums, thereby ensuring that the exclusion will be "consistent with the premium charged." In other words, just as "[a] contract for greater benefits generally justifies a greater premium," *Deel*, 181 W. Va. at 463, 383 S.E.2d at 95, so does a contract for benefits which have been reduced through the inclusion of an exclusion to coverage warrant a reduced premium. This interpretation also is consistent with the correlative statutory provision mandating that premiums be "appropriately adjusted" with respect to variable UM and UIM coverage limits. *See* W. Va. Code § 33-6-31(b). *See also* Syl. pt. 4, in part, *State ex rel. Hechler v. Christian Action Network*, 201 W. Va. 71, 491 S.E.2d 618 (1997) ("In ascertaining legislative intent, effect must be given to each part of the statute and to the statute as a whole so as to accomplish the general purpose of the legislation." (internal quotations and citations omitted)); Syl. pt. 2, in part, *Mills v. Van Kirk*, 192 W. Va. 695, 453 S.E.2d 678 (1994) ("To determine the true intent of the legislature, courts are to examine the statute in its entirety and not select 'any single part, provision,

section, sentence, phrase or word.' Syllabus Point 3, in part, *Pristavec v. Westfield Ins. Co.*, 184 W. Va. 331, 400 S.E.2d 575 (1990)."); Syl. pt. 1, *Parkins v. Londeree*, 146 W. Va. 1051, 124 S.E.2d 471 (1962) (same). To construe the language of subsection (k) otherwise would produce a result contrary to the express legislative intention that UM provisions are remedial in nature and should be liberally construed in favor of the insured. *See* Syl. pt. 2, *Pristavec*, 184 W. Va. 331, 400 S.E.2d 575; Syl. pt. 7, *Perkins v. Doe*, 177 W. Va. 84, 350 S.E.2d 711. Accordingly, we hold that when an insurer incorporates, into a policy of motor vehicle insurance, an exclusion pursuant to W. Va. Code § 33-6-31(k) (1995) (Repl. Vol. 1996), the insurer must adjust the corresponding policy premium so that the exclusion is "consistent with the premium charged." As a corollary to this holding, we reiterate our admonition in *Deel* that such exclusions must "not conflict with the spirit and intent of the uninsured and underinsured motorist statutes." Syl. pt. 3, *Deel*, 181 W. Va. 460, 383 S.E.2d 92.

At this juncture, we wish also to clarify our prior holdings, particularly in *Deel* and in *Imgrund*, wherein we found exclusions to policies of motor vehicle insurance to be statutorily permissible. *See* Syl. pt. 4, *Imgrund*, 199 W. Va. 187, 483 S.E.2d 533; Syl. pt. 3, *Deel*, 181 W. Va. 460, 383 S.E.2d 92. As is customary with the interpretation of legislative enactments, a finding that a particular provision is legally sound presupposes that the actor, whose conduct the statute was designed to govern, has satisfied the requirements thereof. Therefore, we hold further that when an insurer has failed to satisfy the statutory criteria of W. Va. Code § 33-6-31(k) (1995) (Repl. Vol. 1996) requisite to incorporating an exclusion in a policy of motor vehicle insurance, the enforcement of such an exclusion is violative of this State's public policy. To facilitate the enforcement of this statutory requirement and to ensure that an

appropriate premium adjustment does, in fact, accompany an insurer's incorporation of coverage exclusions, we restate our holding in Syllabus point 7 of *National Mutual Insurance Co. v. McMahon & Sons, Inc.*, which cautioned that "[a]n insurance company seeking to avoid liability through the operation of an exclusion has the burden of proving the facts necessary to the operation of that exclusion." 177 W. Va. 734, 356 S.E.2d 488 (1987). Applying this holding to our pronouncement herein requiring insurers to adjust policy premiums commensurate with their policy exclusions, the burden borne by insurers in instances similar to the case *sub judice* would include proof that such a premium adjustment has, in fact, taken place.

Looking now to the facts with which we are confronted in the instant appeal, we are unable to locate in the appellate record any evidence that Anthem satisfied its statutory duty by adjusting Ms. Mitchell's policy premium to account for the inclusion of her "owned but not insured" exclusion. If such proof of a premium adjustment was, in fact, proffered to the lower court, the parties had a burden of preserving such evidence for appellate consideration. "The responsibility and burden of designating the record is on the parties, and appellate review must be limited to those issues which appear in the record presented to this Court." Syl. pt. 6, *In re Michael Ray T.*, ___ W. Va. ___, ___ S.E.2d ___ (No. 26639 Dec. 3, 1999). Absent proof of these facts, we cannot determine whether Anthem properly included the "owned but not insured" exclusion in Ms. Mitchell's policy of insurance.

Neither can we find in the appellate record any indication that the circuit court weighed the limitation of coverage with the corresponding policy premium in awarding Anthem summary judgment and

declaratory judgment. As with facts not appearing in the record below, this Court is also limited in its ability to consider, for the first time on appeal, issues which a lower tribunal has not yet deliberated and decided.

> "'"In the exercise of its appellate jurisdiction, this Court will not decide nonjurisdictional questions which were not considered and decided by the court from which the appeal has been taken." Syllabus Point 1, *Mowery v. Hitt*, 155 W. Va. 103[, 181 S.E.2d 334] (1971).' Syl. pt. 1, *Shackleford v. Catlett*, 161 W. Va. 568, 244 S.E.2d 327 (1978)." Syllabus point 3, *Voelker v. Frederick Business Properties Co.*, 195 W. Va. 246, 465 S.E.2d 246 (1995).

Syl. pt. 7, *In re Michael Ray T.*, ___ W. Va. ___, ___ S.E.2d ___ (No. 26639 Dec. 3, 1999). Given the lack of record evidence suggesting that the circuit court contemplated whether Anthem's exclusion correlated to the policy premiums it charged Ms. Mitchell, we cannot rule definitively on the propriety of the circuit court's decision to uphold the exclusion above the statutorily required minimum limits for UM coverage. Accordingly, we vacate the circuit court's order finding the "owned but not insured" exclusion to be valid above the statutory limits of UM coverage, in accordance with our prior holding in Syllabus point 4 of *Imgrund v. Yarborough*, 199 W. Va. 187, 483 S.E.2d 533, and remand this matter for further proceedings consistent with this opinion and pursuant to our instructions delineated below. Upon reconsideration of this matter, we direct the circuit court to base its determination of whether Anthem appropriately adjusted Ms. Mitchell's premium to reflect the "owned but not insured" exclusion contained in her policy, as well as its final decision regarding the exclusion's validity, upon the evidence already contained in the record of this case. In other words, we do not believe that special deference should be accorded to Anthem to permit it to make a new or more detailed record of its alleged premium adjustments when, pursuant to our holding in Syllabus point 7 of *McMahon & Sons* rendered over a decade ago, insurers have long been charged with the burden of proving facts necessary to permit the enforcement of

their policy exclusions. *See* Syl. pt. 7, 177 W. Va. 734, 356 S.E.2d 488 ("An insurance company seeking to avoid liability through the operation of an exclusion has the burden of proving the facts necessary to the operation of that exclusion.").

Before concluding our discussion herein, we would like to take this opportunity to speak on a matter that has troubled us during our decision of this case. Policies of insurance, including those providing coverage for motor vehicles, are regulated and approved by this State's Insurance Commissioner [hereinafter "the Commissioner"]. W. Va. Code § 33-6-8 (1994) (Repl. Vol. 1996). Inherent in the Commissioner's statutory duty to oversee policy provisions is his/her corresponding obligation to reject those policies that do not comply with West Virginia insurance law. Specifically, W. Va. Code § 33-6-9 (1957) (Repl. Vol. 1996) directs that

> [t]he commissioner shall disapprove any such form of policy, application, rider, or endorsement or withdraw any previous approval thereof:
>
> (a) *If it is in any respect in violation of or does not comply with this chapter.*
>
> (b) *If it contains or incorporates by reference any inconsistent, ambiguous, or misleading clauses, or exceptions and conditions which deceptively affect the risk purported to be assumed in the general coverage of the contract.*
>
> (c) *If it has any* title, heading, or *other indication of its provisions which is misleading.*
>
> (d) If the purchase of such policy is being solicited by deceptive advertising.
>
> (e) *If the benefits provided therein are unreasonable in relation to the premium charged.*
>
> (f) If the coverages provided therein are not sufficiently broad to be in the public interest.

(Emphasis added). Thus, it is apparent that the Legislature has vested the Commissioner with sufficient

authority to reject policy provisions which do not clearly and accurately inform the insured as to the coverage provided by such policy.

Despite the Commissioner's regulatory powers, we are mindful, from the policy language at issue in this case, that two marginally viable practices continue to accompany the incorporation of insurance policy exclusions. First, we observe that the "owned but not insured" exclusion in this case, though it was clearly designated as a limitation of the available UM coverage, most likely would not have been apparent to the majority of insurance consumers given its less-than-prominent placement in the appropriate policy endorsement. We previously have counseled insurance companies that

> [a]n insurer wishing to avoid liability on a policy purporting to give general or 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.

Syl. pt. 10, *National Mut. Ins. Co. v. McMahon & Sons, Inc.*, 177 W. Va. 734, 356 S.E.2d 488. Therefore, we urge the Commissioner to review proffered policies of insurance to ensure that coverage exclusions are not so incognito as to be deceptive or misleading as to the true scope of coverage available to the insured. *See* W. Va. Code § 33-6-9.[24]

[24]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's declarations page or procurement of the insured's signature on a separate waiver signifying that he/she has read and understood the coverage limitation. *See, e.g.*, Syl. pt. 1, *Bias v. Nationwide Mut. Ins. Co.*, 179 W. Va. 125, 365 S.E.2d 789 (1987) (directing insurer to obtain insured's knowing and informed rejection of optional coverage when the offer thereof is statutorily required).

Second, the Commissioner is obligated to uphold the law of this State and to reject any policy, endorsement, and the like "[i]f it is in any respect in violation of or does not comply with this chapter." W. Va. Code § 33-6-9(a). In this regard, we note that the language of Anthem's "owned but not insured" exclusion does not suggest, in any manner, that an insured is entitled to recover a statutory minimum amount of UM insurance benefits. Our prior decision in *Imgrund* clarified this entitlement vis-a-vis "owned but not insured" exclusions, and we recognize that strict application of the *Imgrund* requirements to this case would result in an improper retroactive application of the law.[25] *See* Syl. pt. 4, *King v. Kayak Mfg. Corp.*, 182 W. Va. 276, 387 S.E.2d 511 (1989) (discussing factors to consider regarding retroactivity); Syl. pt. 5, *Bradley v. Appalachian Power Co.*, 163 W. Va. 332, 256 S.E.2d 879 (1979) (same). Nevertheless, our statutory law mandating such coverage was in effect long before the events at issue herein, thereby placing insurers on notice as to required coverage provisions. *See, e.g.*, W. Va. Code § 33-6-31(b) (1972) (Repl. Vol. 1972). Thus, it appears to this Court that, regardless of any curative measures incorporated in the terms of the policy, *e.g.*, a severability clause,[26] or by statute, *e.g.*, W. Va. Code § 33-6-17 (1957) (Repl. Vol. 1996),[27] an insured could very likely understand an

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[25]The automobile accident underlying the instant appeal, which occurred in 1996, predates our decision in *Imgrund*, which was issued in 1997.

[26]Such a clause operates in a contract to "render[] enforceable a valid part, it availing pro tanto, although another part may be invalid." Ballentine's Law Dictionary 1168 (3d ed. 1969) (citation omitted).

[27]W. Va. Code § 33-6-17 (1957) (Repl. Vol. 1996) states that

> [a]ny 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 not be thereby

(continued...)

exclusion, which does not reference his/her statutory entitlement to minimum UM benefits, as completely precluding any recovery of UM benefits thereunder. Accordingly, we caution the Commissioner to be ever watchful for exclusionary language that could prevent an insured from appreciating the true measure of coverage afforded by his/her policy of insurance.

In conclusion, we charge the West Virginia Insurance Commissioner to be ever vigilant in safeguarding the rights of insurance consumers in this State while upholding the law permitting insurers to incorporate exclusions to coverage.

IV.

CONCLUSION

For the foregoing reasons, the April 15, 1998, order of the Circuit Court of Raleigh County is hereby vacated, and this matter is hereby remanded to that court for further proceedings consistent with this opinion.

Vacated and Remanded.

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[27](...continued)
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.