No. 28481 -- Dairyland Insurance Company v. Joyce Fox, Administratrix of the Estate of Ivan Fox, Jr.; the Estate of Anthony Adkins; the Estate of Stephen Adkins; William Haga, and Steven Lowry
and
State Farm Mutual Automobile Insurance Company v. The Estate of Anthony Adkins

Starcher, J., dissenting:

FILED
July 10, 2001
RORY L. PERRY II, CLERK
SUPREME COURT OF APPEALS
OF WEST VIRGINIA

RELEASED
July 11, 2001
RORY L. PERRY II, CLERK
SUPREME COURT OF APPEALS
OF WEST VIRGINIA

The majority opinion is yet another in a line of cases that (a) gives insurance law a convoluted, counter-intuitive interpretation that only insurance companies can understand and enjoy; and (b) interferes with the Legislature's beneficent public policy of making sure that people who buy insurance have full coverage for their losses. I therefore dissent.

In the instant case, the policyholders bought two policies on two cars. They paid premiums on a "per-vehicle" basis. Yet State Farm now wants to pay benefits on a "per-person" basis, pointing to an exclusion which prohibits stacking the coverage bought on each vehicle.

An argument I hear repeatedly to support such practices is that insurance companies are struggling to comply with our State's laws, and simply can't profitably survive with this Court's interpretation of those laws. The argument is always posed that the decisions of this Court are going to bankrupt insurance companies.

I have one response: hogwash. In its *2000 Annual Report To State Farm Mutual Policyholders*, State Farm made it patently clear that it can make a hefty profit from selling insurance policies. The report, available on the Internet at *www.statefarm.com*, indicates that State Farm has

roughly $78 billion -- that's billion, with a "b" -- dollars worth of assets. By any assessment, this company is a financial monster.

On the surface, to the uninformed, it looks like selling insurance is a losing business proposition. In the year 2000, State Farm pulled in $24.234 billion in premiums, but paid out $27.540 billion on claims and costs -- an underwriting loss of $3.306 billion. (Only $18.227 billion actually went to pay claims -- the rest went into expenses and "administrative fees.")

Digging a little deeper into the annual report, however, makes it clear that selling insurance is a big-money-making proposition. State Farm was able to invest its policyholder premiums, and pull in substantial amounts of money by doing nothing. State Farm's policyholders floated the company $24.234 billion in cash which the company invested, returning the company $5.372 billion in income.

After paying all of its debts and its income taxes, State Farm was able to walk away with $1.691 billion dollars -- a 6% return. Think about that: State Farm made a 6% return using somebody else's money. Because State Farm is a mutual, technically owned by its policyholders, it gave a billion dollars back to its policyholders as a "dividend" and pocketed the remaining $684 million.

I applaud State Farm's ability to make money using someone else's money. But as I set forth below, the company should be forced to make a profit while complying with the letter of our law -- not its own, free-wheeling interpretation.

I.
Having their cake . . . and eating it, too

The majority opinion, as well as *Russell v. State Automobile Mutual Insurance Co.*, 188 W.Va. 81, 422 S.E.2d 803 (1992) and its other progeny, are fundamentally flawed because they ignore the statutory basis for un- and under-insured motorist coverage. Because this Court chooses to ignore the statutory basis for the coverage, insurance companies also continue to ignore the statutory basis, and make a ton of money in the confusion.

What I mean is this: the Legislature requires that (a) each automobile insurance policy contain (b) un- and under-insured motorist coverage for each *person* insured by the policy. However, based upon this Court's opinions, insurance companies like State Farm make (a) each automobile insurance policy contain (b) un- and under-insured motorist coverage for each *vehicle* insured by the policy, but (c) only pay benefits to each *person* insured by the policy.

In other words, insurance companies charge premiums on a per-car basis, but pay claims on a per-person basis. They ignore the law when it comes to taking money, and follow the law when it comes to paying it out, and make a tidy profit on the difference.

In the instant case, State Farm sold two separate insurance policies on two separate cars. The policyholders paid premiums on *each vehicle*. State Farm did give the policyholders a "multi-car discount" – a whopping $1.21 for every 6 months worth of coverage on each car. When the policyholders tried to collect the coverage available under both policies, State Farm only paid the maximum amount available under one policy -- $20,000 *per person*. State Farm got its money on a per-vehicle basis, but paid out policy proceeds on a per-person basis.

West Virginia law requires every insurance company, in every automobile insurance policy, to include uninsured motorist coverage. The law also requires every insurance company to offer the

consumer the right to purchase underinsured motorist coverage. Un- and under-insured motorist coverage is not designed to protect the automobile -- it is specifically designed to protect responsible insurance consumers, their families, and their passengers.

W.Va. Code, 33-6-31(b) requires every insurance policy to contain coverage "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.) The statute also requires every insurance policy to contain an option for the policyholder to purchase coverage "to pay *the insured* all sums which he shall be legally entitled to recover as damages from the owner or operator of an . . . underinsured motor vehicle[.]" (Emphasis added.)

The term "insured" is defined by *W.Va. Code*, 33-6-31(c) in the following manner (with emphasis added):

> As used in this section, . . . 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[.]

W.Va. Code, 33-6-31(b) and (c), read together, requires the insurance company to provide un- and under-insured motorist coverage, not for each motor vehicle owned by the named insured, but instead for the "named insured," his or her resident spouse, and the relatives of either who reside in their household, while "in a motor vehicle or otherwise."

The statute is not intended to bolster the profits of an insurance company by requiring coverage -- and therefore, premiums be paid -- for each vehicle. The Legislature could have tied un- and

under-insured motorist coverage in all instances to the vehicle insured under the automobile policy; it did not, and instead chose to tie coverage to the named insured, his or her spouse, and their relatives residing in their household, whether in a motor vehicle -- any motor vehicle -- or otherwise.

Somehow, this Court has overlooked *W.Va. Code*, 33-6-31(c), and repeatedly allowed insurance companies to require policyholders to pay for coverage on a "per vehicle" basis (with, of course, a "multi-car discount"). Then, when the policyholder needs to use the coverage, the insurance company points to language in the policy prohibiting stacking -- in essence, contractually limiting the coverage to a once-per-person form of coverage. The policyholder pays premiums for multiple cars, but only gets one coverage per person insured.

When the Legislature added un- and underinsured motorist coverage to *W.Va. Code*, 33-6-31(b), it created a simple-to-understand public policy of full indemnification: "the preeminent public policy of this state in uninsured or underinsured motorist cases is that the injured person be *fully compensated* for his or her *damages* not compensated by a negligent tortfeasor, up to the limits of the uninsured or underinsured motorist coverage." *State Auto Mut. Ins. Co. v. Youler*, 183 W.Va. 556, 564, 396 S.E.2d 737, 745 (1990).

This Court bluntly stated in *Youler* that "[a]ntistacking language in an automobile insurance policy which is applicable purportedly to uninsured or underinsured motorist coverage strikes at the heart of the purpose of the uninsured and underinsured motorist statute and conflicts with the spirit and intent of such statute, in that antistacking language thwarts the statutorily stated public policy of full indemnification." 183 W.Va. at 564-565, 396 S.E.2d at 745-746.

Somehow, in *Russell v. State Auto* and its progeny (including the majority opinion), this fundamental principle has been overlooked. The result is that policyholders buy un- and under-insured motorist coverage on each car they own -- but are then limited to only one coverage per injured person.

In the instant case, I would have ruled that the anti-stacking language in the State Farm policy was void. I would also have adopted a syllabus point[1] which would roughly state that:

> *W.Va. Code*, 33-6-31(b) and (c), when read *in pari materia*, require insurance companies to provide, in each automobile insurance policy, uninsured and underinsured motorist coverage that will pay benefits to "insureds." If an insurance company requires a policyholder to buy uninsured or underinsured motorist coverage and pay premiums on a "per-vehicle" basis rather than a "per-insureds" basis, an anti-stacking provision in the policy is void and unenforceable, and each "insured" should be permitted to recover the maximum coverage available for each vehicle.

Insurance companies should be compelled to abide by the terms of *W.Va. Code*, 33-6-31 -- either provide coverage to "insureds" as defined by *W.Va. Code*, 33-6-31(c) and charge premiums accordingly; or provide coverage (through multiple policies) for each vehicle and charge premiums accordingly. This Court should not allow insurance companies to mix the coverages and premiums.

II.
Insurance companies improperly avoid their statutory obligations through exclusions

This Court has repeatedly held that insurance companies are statutorily required, in every single automobile insurance policy that they sell, to offer the insurance consumer the ability to purchase

---

[1]As a sidenote, attorneys should always raise and fully brief issues such as these before circuit courts, to preserve the issues for appeal. Furthermore, on appeal, a powerful tool of advocacy is to suggest, with appropriate legal support, how this Court should phrase syllabus points.

uninsured and underinsured motorist coverage with limits up to or equal to the limits of liability coverage bought by the consumer. It makes no sense to say that the insurance company is required by law to offer particular levels of coverage -- but then say the insurance company can riddle that coverage with so many exclusions that the coverage is illusory. The anti-stacking exclusion at issue in this case attempts to limit coverage to less than the amount which an insurance company is required to offer under West Virginia law, and should have been declared void and unenforceable.

W.Va. Code, 33-6-31(b) states, in pertinent part, that within an automobile insurance policy an insurance company:

> . . . shall provide an option to the insured with appropriately adjusted premiums to pay the insured all sums which he shall legally be entitled to recover as damages from the owner or operator of an uninsured or underinsured motor vehicle up to an amount not less than limits of bodily injury liability insurance and property damage liability insurance purchased by the insured without setoff against the insured's policy or any other policy.

We have repeatedly construed this language to mean that an insurance company is required to offer an insurance consumer the right to purchase an amount of uninsured motorist coverage, in every automobile insurance policy, equal to the level of liability coverage. This is a mandatory requirement -- it is not an option on the part of the insurance company.

In *Bias v. Nationwide Mut. Ins. Co.*, 179 W.Va. 125, 365 S.E.2d 789 (1987), we interpreted this clause in *W.Va. Code*, 33-6-31(b) to mean that an ability to purchase a higher limit of uninsured motorist coverage "*shall* be offered [to the consumer], and this [statutory] language must be afforded a mandatory connotation." 179 W.Va. at 127, 365 S.E.2d at 791. The insurance company must

offer the coverage; the insurance consumer then has the option to purchase that coverage. We went on to hold, at Syllabus Point 1, that

> Where an offer of optional coverage is required by statute, the insurer has the burden of proving that an effective offer was made, and that any rejection of said offer by the insured was knowing and informed.

In *Riffle v. State Farm Mut. Auto Ins. Co.*, 186 W.Va. 54, 410 S.E.2d 413 (1991), we made clear that if an insurance company fails to make an effective offer of the level of un- or underinsured motorist coverage required by *W.Va. Code*, 33-6-31(b), then under *Bias* that level of insurance will be read into the policy. As we stated in Syllabus Point 2, "when an insurer fails to prove an effective offer and a knowing and intelligent waiver by the insured, the insurer must provide the minimum coverage required to be offered under the statute." We held in *Riffle* that, in the absence of a proper offer, the minimum amount of uninsured and underinsured motorist coverage that an insurance company will be required to provide under the statute is "'an amount not less than the limits of bodily injury liability insurance and property damage liability insurance.'" 186 W.Va. at 55, 410 S.E.2d at 414.

The Legislature has even given insurance companies a way to make the offer of coverage, and requires that a written form -- approved by the insurance commissioner -- be sent to policyholders telling them the various amounts of un- and under underinsured motorist coverage they can buy, and the premiums for those various coverages. *W.Va. Code*, 33-6-31d [1993].[2] *See also*, *Westfield Ins. Co. v. Bell*, 203 W.Va. 305, 507 S.E.2d 406 (1998) (*per curiam*).

---

[2]A reading of this statute raises the obvious question: if an insurance company must offer un- and under-insured motorist coverage and the price for that coverage on a simple-to-read form, in writing, then why can't an insurance company also describe policy exclusions and their effect on the price of coverage on a simple-to-read form, in writing?

I am bothered by the majority opinion in the instant case because *Bias* holds that an insurance company must offer a certain amount of un- and under-insured motorist coverage. If the insurance company fails to make a commercially reasonable offer of coverage, then un- and under-insured motorist coverage in an amount equal to the amount of liability coverage is automatically read into the policy. Contrary to this rule, *Russell v. State Auto* tells insurance companies they can meet their statutory obligation by offering un- and under-insured motorist coverage in every automobile insurance policy with limits equal to the level of liability coverage -- but can condition and limit that coverage by including numerous exceptions, so long as the insurance consumer is only asked to pay "appropriately adjusted premiums."

This contradiction undermines the Legislature's goal of fully protecting responsible citizens and their families and guests from irresponsible, un- and under-insured motorists. The Legislature could not have intended to require an insurance company to offer un- and under-insured motorist coverage, and then allowed the insurance company to void that coverage through the use of exclusions.

I agree that when a consumer purchases an automobile insurance policy, under *W.Va. Code*, 33-6-31(b), the insurance company is required to offer the consumer the ability to purchase un- and under-insured motorist coverage in an amount up to the level of bodily injury liability insurance and property damage liability insurance purchased by the consumer. But any attempt to limit the amount of uninsured or underinsured motorist coverage purchased by the consumer pursuant to *W.Va. Code*, 33-6-31(b) should be void as against public policy.

III.

The majority opinion misunderstands W.Va. Code, 33-6-31(k)

The majority opinion, as did the Court in Syllabus Point 3 of *Deel v. Sweeney*, 181 W.Va. 460, 383 S.E.2d 92 (1989), misunderstands *W.Va. Code*, 33-6-31(k). This subsection states:

> 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.

The first clause of subsection (k) permits insurance companies to "offer[] benefits and limits other than those prescribed [in *W.Va. Code*, 33-6-31]." This language obviously permits an automobile insurer to "offer" any type of coverage (together with particular limits to that coverage) that it chooses. Under this statute, an insurance company can offer -- in *addition* to the un- and under-insured coverage required by subsection (b) of the statute -- other forms of coverage (*e.g.*, towing coverage, comprehensive and collision coverage, travel insurance, *etc*.).

As Justice W. McGraw once deftly noted, the "more crucial question in interpreting subsection (k)" is how the second clause of subsection (k) should be construed. *Mitchell v. Broadnax*, 208 W.Va. 36, ___, 537 S.E.2d 882, 907 (2000) (McGraw, J., concurring in part and dissenting in part). Subsection (k) has been relied upon by insurance companies -- including State Farm in the instant case -- for the proposition in the second clause that an insurance company can "incorporat[e] *in* such terms, conditions and exclusions as may be consistent with the premium charged." (Emphasis added.)

Justice McGraw examined the language chosen by the Legislature, and concluded that the *Deel* Court had misquoted the second clause -- and by dropping one word from the statute, the word "in," had given the statute a flawed interpretation.[3] He argued for the following interpretation:

> 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 allows 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

---

[3]*See Deel*, 181 W.Va. at 463, 383 S.E.2d at 95, where the Court misquoted the statute in the following manner:

> (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 such terms, conditions and *exclusions* as may be consistent with the premium charged.

By dropping the phrase "incorporating in," the result was a syllabus point which did not connect the second clause of subsection (k) with the first, leaving it to stand alone as a principle of law:

> 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.

Syllabus Point 3, *Deel v. Sweeney*.

> statute must be construed in favor of securing for automobile insurance consumers the opportunity to obtain the optional coverages specified in subsection (b) without the inclusion of "terms, conditions and exclusions" that otherwise conflict with the statute.

208 W.Va. at ___, 537 S.E.2d at 907. I agree with Justice McGraw's interpretation of *W.Va. Code*, 33-6-31(k).

I therefore believe that *W.Va. Code*, 33-6-31(k) should be interpreted to mean that an insurance company may offer coverages other than those prescribed by *W.Va. Code*, 33-6-31, and may "incorporate therein" -- meaning incorporate into coverages other than those prescribed -- such terms, conditions and exclusions as may be consistent with the premium charged. Accordingly, Syllabus Point 3 of *Deel v. Sweeney* and its progeny should be overruled.

IV
Conclusion

I firmly believe that, in the instant case, the Adkins' family bought two separate underinsured motorist insurance policies on two vehicles. The simple fact is, they thought they were buying two policies with a total of $40,000.00 in coverage.

I believe that, under our laws, State Farm chose to sell the Adkins two policies, and chose to make them pay premiums on a "per vehicle" basis. I therefore believe that State Farm should have paid out its benefits on a "per vehicle" basis as well. State Farm chose to avoid the law by not providing coverage on a "per insured" person basis; State Farm should face the consequences of its decision.

I therefore respectfully dissent.

I am authorized to state that Chief Justice McGraw joins in this dissent.