IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

NO. 22-0155

GREG ALLEN BALL,

Petitioner,

v.

On Certified Question from the U.S. Court of Appeals for the Fourth Circuit (No. 20-1452)

UNITED FINANCIAL CASUALTY COMPANY, MILTON HARDWARE LLC, BUILDERS DISCOUNT LLC, and RODNEY PERRY,

Respondents.

AMICUS CURIAE BRIEF SUBMITTED BY THE DEFENSE TRIAL COUNSEL OF WEST VIRGINIA IN SUPPORT OF RESPONDENT UNITED FINANCIAL CASUALTY COMPANY

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STATEMENT OF INTEREST[1]

The Defense Trial Counsel of West Virginia Inc. ("DTCWV") is an organization of more than 400 attorneys who engage primarily in the defense of individuals and corporations in civil and administrative litigation in West Virginia. DTCWV is an affiliate of the Defense Research Institute, a nationwide organization of more than 21,000 attorneys committed to research, innovation, and professionalism in the civil defense bar. DTCWV endeavors to elevate the standards of legal practice within the State of West Virginia, eliminate congestion and delays in civil and administrative litigation in West Virginia, improve the administration of justice in West Virginia, and increase the quality of legal services provided to our citizens.

In this case, the United States Court of Appeals for the Fourth Circuit certified, and this Court accepted, the following question:

> When an exclusion in an automobile liability insurance policy violates West Virginia Code § 33-6-31 (a) because it would deny coverage to a permissive user of an insured automobile, must the insurance company provide the permissive user with the full liability coverage available under the policy or the minimum liability coverage required by the Motor Vehicle Safety Responsibility Law, W. Va. Code § 17D-1-1 *et seq.*?

United Fin. Cas. Co. v. Ball, 31 F.4th 164, 165 (4th Cir. 2022). DTCWV is interested in this issue because its members routinely represent insureds and insurers in litigation in West Virginia. Its members benefit from the consistent and predictable application of statutes to insurance-related questions to provide meaningful guidance to their clients.

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[1] Pursuant to W. Va. R. App. P. 30(e)(5), DTCWV states that no counsel for any party authored this amicus curiae brief, in whole or in part, and no party or its counsel made a monetary contribution specifically intended to fund the preparation or submission of this amicus curiae brief. DTCWV also states that, pursuant to W.Va. R. App. P. Rule 30(b), notice of its intent to file was provided to all counsel of record by email and regular mail and on all unrepresented parties on July 7, 2022.

For well over 30 years, this Court has consistently and predictably applied a basic tenet of insurance law to circumstances like those posited in the certified question. In particular, and as discussed in more detail below, when an automobile insurance policy contains an exclusion that is void due to the operation of a West Virginia statute, this Court has held that the exclusion still applies to amounts above the minimum limits required under this State's Motor Vehicle Safety Responsibility Law ("MVSRL"). DTCWV's members will benefit from this Court's continued application of this basic tenet, and DTCWV therefore asks this Court to continue that tradition and answer the certified question as follows:

> **"Permissive user exclusions in automobile liability policies are valid and enforceable above the minimum limits of coverage mandated by the MVSRL."**

DISCUSSION

This case involves the two omnibus statutes applicable to automobile insurance policies enacted by the West Virginia Legislature. The first, found in West Virginia Code § 17D-4-12, was enacted in 1959. The second, found in West Virginia Code § 33-6-31(a), was first adopted in 1967. Since the enactment of those statutes, this Court has consistently treated an exclusion violating either omnibus clause as being "void and ineffective" only up to the statutorily required minimum amount of liability insurance. It has done so based on a fundamental tenet of automobile insurance law -- when an automobile insurance policy contains an exclusion that is void due to the operation of a West Virginia statute, that exclusion will nonetheless apply above the minimum limits required under the MVSRL. *See, e.g., Jones v. Motorists Mut. Ins.*, 177 W. Va. 763, 356 S.E.2d 634 (1987); *Dotts v. Taressa J.A.*, 182 W. Va. 586, 390 S.E.2d 568 (1990);

Dairyland Ins. v. East, 188 W. Va. 581, 425 S.E.2d 257 (1992). *See also Imgrund v. Yarborough*, 199 W. Va. 187, 483 S.E.2d 533 (1997) (holding that an "owned but not insured" exclusion in uninsured motorist coverage was "void and ineffective" but only up to the statutorily mandated minimum limits of uninsured motorist coverage, making it valid above those limits).[2]

This Court's practice of analyzing the two omnibus clauses -- both of which mandate liability coverage for permissive users -- as interrelated is consistent with the treatment they have received from the West Virginia Legislature and the West Virginia Office of Insurance Commissioner. The Legislature has never altered or amended our automobile insurance statutes to produce a contrary result. Instead, it has on occasion passed legislation that addressed both statutes in the same bill. Similarly, when the Office of The West Virginia Insurance Commissioner concluded that a "family member exclusion" was contrary to West Virginia law, it informed insurers that the exclusion would be unenforceable only up to the minimum limits of coverage.[3]

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[2] Indeed, as the Fourth Circuit stated over thirty years ago, "When West Virginia has found that an attempt to exclude or restrict coverage violated state law, it has voided the restriction or exclusion only up to the level of minimum coverage. It has permitted it to operate above this minimum." *Nationwide Mut. Ins. v. Cont'l Ins.*, 1991 WL 181130, at *3 (4th Cir. September 17, 1991) (unpublished table decision).

[3] As the district court in the underlying case stated, the suggestion that this Court's decision in *Gibson* mandates a contrary result makes little sense because "the policy's liability limit and the statutory minimum limit were both $1,000,000." *United Fin. Cas. Co. v. Milton Hardware LLC*, 2020 WL 1545766, at *3 (S.D. W. Va. Mar. 31, 2020) (citing *Gibson v. Northfield Ins.*, 219 W. Va. 40, 631 S.E.2d 598, 601, 603 (2005)).

I. THIS COURT HAS HELD THAT EXCLUSIONS THAT VIOLATE THE OMNIBUS CLAUSES REQUIRED IN MOTOR VEHICLE LIABLITY POLICIES ARE VALID AND ENFORCEABLE ABOVE THE MINIMUM LIMITS OF REQUIRED COVERAGE.

A. West Virginia's Omnibus Clauses.

As part of the MVSRL,[4] West Virginia Code § 17D-2A-3(a) requires every owner or registrant of a motor vehicle to maintain security on vehicles registered and licensed in this state.[5] And West Virginia Code § 17D-2A-3(e)(1) provides that the security may be provided by an insurance policy providing the minimum limits required by West Virginia Code § 17D-4-2.[6] West Virginia Code § 17D-4-12 further discusses the requirements for motor vehicle liability insurance policies issued in West Virginia, and one provision applicable to an "owner's policy of liability insurance" provides that such policies:

> Shall insure the person named therein and any other person, as insured, using any such vehicle or vehicles with the express or implied permission of such named insured, against loss from the liability imposed by law for damages arising out of the ownership, operation, maintenance or use of such vehicle or vehicles within the United States of America or the Dominion of Canada, subject to limits exclusive of interest and costs, with respect to each such vehicle, in the amounts required in section two of this article.

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4 This Court has previously defined the MVSRL as West Virginia Code §§ 17D-1-1 to 17D-6-7. *Dairyland*, 188 W. Va. at 586, 425 S.E.2d at 262.

5 West Virginia has long required certain owners or operators to maintain some level of security on vehicles driven in this state. *See, e.g.*, 1951 W. Va. Acts 130.

6 Under West Virginia Code § 17D-4-2(b), policies issued on or after January 1, 2016, must provide $25,000 in liability coverage because of the bodily injury or death of one person, $50,000 in liability coverage for the bodily injury or death of two or more persons, and $25,000 in liability coverage for injury to or destruction of property of others.

West Virginia Code § 17D-4-12(b)(2). A version of this omnibus clause was first added to the statute in 1959, prior to West Virginia's adoption of compulsory insurance. *See* 1959 W. Va. Acts 112.

Subsequently, in 1967, the West Virginia Legislature added a second omnibus clause:

> No policy or contract of bodily injury liability insurance, or of property damage liability insurance, covering liability arising from the ownership, maintenance or use of any motor vehicle, shall be issued or delivered in this state to the owner of such vehicle, or shall be issued or delivered by any insurer licensed in this state upon any motor vehicle for which a certificate of title has been issued by the department of motor vehicles of this state, unless it shall contain a provision insuring the named insured and any other person, except a bailee for hire and any persons specifically excluded by any restrictive endorsement attached to the policy, responsible for the use of or using the motor vehicle with the consent, expressed or implied, of the named insured or his spouse against liability for death or bodily injury sustained, or loss or damage occasioned within the coverage of the policy or contract as a result of negligence in the operation or use of such vehicle by the named insured or by any such person: *Provided,* That in any such automobile liability insurance policy or contract, or endorsement thereto, if coverage resulting from the use of a nonowned automobile is conditioned upon the consent of the owner of such motor vehicle, the word "owner" shall be construed to include the custodian of such nonowned motor vehicles.

W. Va. Code § 33-6-31(a); *see also* 1967 W. Va. Acts 97 (adding, among other things, West Virginia Code § 33-6-31(a)). With a few minor exceptions -- and one major exception inapplicable to this case -- this statutory provision has largely remained unchanged since then.

The major exception, enacted in 1988, added the following additional limitation on the effect of omnibus clause in West Virginia Code § 33-6-31(a):

> Notwithstanding any other provision of this code, if the owner of a policy receives a notice of cancellation pursuant to article six-a of this chapter and the reason for the cancellation is a violation of law by a person insured under the policy, said owner may by restrictive endorsement specifically exclude the person who violated the law and the restrictive endorsement shall be effective in regard to the total liability coverage provided under the policy, including coverage provided pursuant to the mandatory liability requirements of chapter seventeen-d, article four, section two of this code, but nothing in such restrictive endorsement shall be construed to abrogate the "family purpose doctrine."

1988 W. Va. Acts 75. This provision was enacted in response to this Court's holding in *Jones* that named driver exclusions valid under West Virginia Code § 33-6-31(a) were nonetheless invalid up to the mandatory minimum limits prescribed by the omnibus clause of West Virginia Code § 17D-4-12.

B. This Court Has Analyzed The Omnibus Clauses Found In West Virginia Code § 17D-4-12 and § 33-6-31(a) Together.

The district court decision currently under review by the Fourth Circuit -- *United Fin. Cas. Co. v. Milton Hardware, LLC*, 2020 WL 1545766 (S.D. W. Va. Mar. 31, 2020) -- well and thoroughly discusses this State's long history of enforcing exclusions above the statutorily required minimum amounts of coverage, and DTCWV does not restate that history here. Rather, DTCWV will focus on how this Court has addressed exclusions that violate both omnibus clauses.

In *Dairyland*, the Court considered whether a "named insured exclusion endorsement" in a policy of automobile liability insurance was invalid and unenforceable. The specific exclusion provided:

> The liability insurance provided by this policy doesn't apply to injuries to the person named on the declarations page. It doesn't apply to the husband or wife of that person if they are living in the same household.

Dairyland, 188 W. Va. at 583, 425 S.E.2d at 259 (cleaned up). In that case, the plaintiff was a passenger in a vehicle she owned while being operated by her husband. He rear-ended an ambulance, and she was injured. She sued him for her injuries, and her insurer sought a declaration that it owed no liability coverage for her injuries because of the named insured exclusion endorsement.

Facially, both statutory omnibus clauses would require liability coverage for the wife's damages that were caused by her husband, notwithstanding the named insured exclusion endorsement. *See* W. Va. Code § 17D-4-12(b)(2) (policy shall "insure the person named therein and any other person, as insured, using any such vehicle or vehicles with the express or implied permission of such named insured, against loss from the liability imposed by law for damages"); W. Va. Code § 33-6-31(a) (policy must contain a provision "insuring the named insured and any other person . . . using the motor vehicle with the consent, expressed or implied, of the named insured or his spouse against liability for death or bodily injury sustained, or loss or damage occasioned within the coverage of the policy or contract as a result of negligence in the operation or use of such vehicle by the named insured"). And the Court so held. *See* Syl. Pt. 2, *Dairyland*, 188 W. Va. 581, 425 S.E.2d 257.

The question remained how much coverage would be available. *Dairyland* analogized the situation to *Jones* and answered that question:

> For the same reasons that we concluded in *Jones* that a named driver exclusion was valid above the limits of financial responsibility imposed by West Virginia Code § 17D-4-2, a named insured exclusion endorsement is similarly valid above the statutorily imposed minimum amounts of coverage.

Dairyland, 188 W. Va. at 585, 425 S.E.2d at 261. In other words, despite the applicability of the omnibus clause found in § 33-6-31(a) *and* in addition to the applicability of § 17D-

4-12(b)(2), the Court nonetheless held that the exclusion was valid above the statutorily required minimum.

Similarly, in *Jackson v. Donahue*, 133 W. Va. 587, 457 S.E.2d 524 (1995), this Court addressed two certified questions concerning the applicability of the state's motor vehicle omnibus clause statutes (i.e., West Virginia Code § 33-6-31(a) and West Virginia Code § 17D-4-12) to self-insured entities. The case arose out of a tragic accident:

> In 1991, while on a driving trip for BTI, Donahue met [Plaintiff] at a truck stop in Houston, Texas. Although BTI had a written policy prohibiting drivers from carrying passengers, Donahue allowed Jackson to ride with him for several weeks. On November 22, 1991, as he was driving along a mountain road near Elkins, West Virginia, Donahue lost control of the truck, causing the truck to plummet down the side of a mountain. The accident rendered [Plaintiff] a quadriplegic.

Jackson v. Builders Transp. Inc., 1996 WL 431992, at *1 (4th Cir. Aug. 2, 1996) (unpublished table decision). Although BTI denied that it could be vicariously liable for the negligence of its employee because Donahue had violated its written policy regarding passengers, the first question certified addressed whether BTI, as a self-insurer, would nonetheless be required to provide coverage for its employee by virtue of this state's omnibus clauses. In other words, if the omnibus clauses would have required an insurer to provide coverage for the employee, would BTI, as a self-insured entity, have the same obligations even if it was not otherwise liable for the drivers' negligence?

With respect to that question, the Court held that where a party sought and obtained permission to self-insure from Public Service Commission,[7] the self-insured entity "must afford, as a self-insurer, the same coverage under the West Virginia motor

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[7] The Public Service Commission can set minimum requirements for security determined necessary "for the reasonable protection of the traveling, shipping, and general public." W. Va. Code § 24A-5-5(g).

vehicle omnibus clause statutes . . . for the protection of the public, as would a liability insurance contract." *Jackson*, 193 W. Va. at 593–594, 457 S.E.2d at 530–531. Based on that holding, the omnibus clauses required BTI to provide some level of coverage for the driver.

The second question was whether BTI was obligated to provide $500,000 in coverage or the minimum required by West Virginia Code § 17D-4-2. Although the Court had addressed both "motor vehicle omnibus clause statutes" in answering the first question, it did not discuss them **at all** in answering the second. *See Jackson*, 193 W. Va. at 594–595, 457 S.E.2d at 531–532. Instead, while noting the minimum limits required under West Virginia law, the Court simply held:

> A foreign commercial trucking corporation operating in interstate commerce pursuant to a federal regulatory scheme, which provides federal minimum limits of liability coverage, is not subject to the limits set forth in W. Va. Code, 17D–4–2 [1979], concerning this State's financial responsibility provisions, even though the corporation was granted authority to self-insure by the West Virginia Public Service Commission.

Syl. Pt. 3, *Jackson*, 193 W. Va. 587, 457 S.E.2d 524 (cleaned up). If the omnibus clause in West Virginia Code § 33-6-31(a) had dictated a result different that the analysis under the omnibus clause found in West Virginia Code § 17D-4-12(b)(2), the Court could and would have said so. It did not.

II. THE WEST VIRGINIA LEGISLATURE AND THE WEST VIRGINIA INSURANCE COMMISSIONER HAVE TREATED THE REQUIREMENTS OF THE OMNIBUS CLAUSES TOGETHER.

For over four decades, the West Virginia Legislature has (and did so consistently with West Virginia Constitution Article 6, § 30) amended both the MVSRL and West Virginia Code § 33-6-31 in the same pieces of legislation. *See* House Bill 1351 (1979)

(amending and reenacting, among other provisions, West Virginia Code § 17D-4-2, West Virginia Code § 17D-4-12, and West Virginia Code § 33-6-31); Senate Bill 2790 (2015) (amending and reenacting, among other provisions, West Virginia Code § 17D-4-2, West Virginia Code § 17D-4-12, and West Virginia Code § 33-6-31). With the exception of the 1988 amendments to West Virginia Code § 33-6-31(a) in response to *Jones*, the Legislature has never taken any action to separate the two provisions. This is particularly significant given that this Court has struck provisions violating the omnibus clause, though only up to the statutorily required limits.

In addition, after this Court decided *Lee v. Comer*, 159 W. Va. 585, 224 S.E.2d 721 (1976), and *Coffindaffer v. Coffindaffer*, 161 W. Va. 557, 244 S.E.2d 338 (1978),[8] the Office of the West Virginia Insurance Commissioner reconsidered the validity of previously approved "family member exclusions" in automobile liability policies. Because those exclusions would be contrary to the requirements of the two omnibus clauses, which essentially require policies to insure against losses or damages for liability imposed by law, the Commissioner concluded those exclusions were "void." But like this Court in *Dairyland*, the Commissioner's Informational Letter announcing that decision specifically limited its applicability to the family member exclusion "within mandatory limits." West Virginia Informational Letter 140 (2002). This shows that the Office of the Insurance Commissioner, like this Court, has treated the omnibus clauses together.[9]

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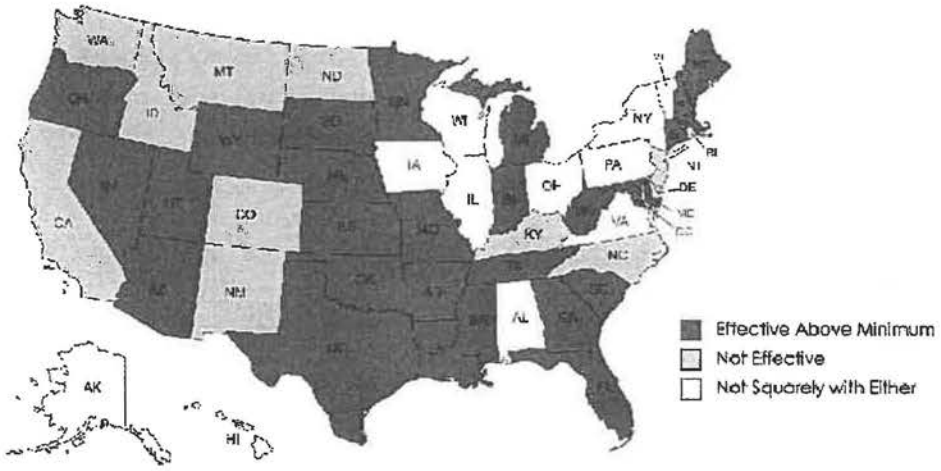
[8] *Comer* abolished immunity in an automobile liability case between child and parent, and *Coffindaffer* abolished immunity between spouses in all contexts.

[9] In 2003, the Insurance Commissioner promulgated West Virginia Code of State Rules § 114-53-3.5, which among other things prohibited motor vehicle liability policies from containing family member exclusions. In *Howard v. Property & Casualty Ins. Co. of Hartford*, 2011 WL 4596715 at *2–3 (S.D. W. Va. Sept. 30, 2011), the court considered both the language of Informational Letter 140 and the subsequent regulation

III. WEST VIRGINIA IS NOT ALONE IN ALLOWING EXCLUSIONS TO OPERATE ABOVE STATE MANDATORY MINIMUMS.

Most states allow another otherwise ineffective policy exclusions to remain effective above mandatory minimum coverage. Per *Jones*, this Court is part of the majority that covers most of the country:[10]



Courts in both camps have given reasons for the rule chosen, but the minority view is harder to justify. The one state that switched sides lacked compelling reasons for that choice. This Court shouldn't switch sides to the minority. Instead, it should stick with the well-reasoned majority.

Twenty-seven states, along with the District of Columbia, have concluded that even if an exclusion is ineffective because of a statute setting minimum coverage, that exclusion remains effective "above those mandatory limits." *Jones*, 356 S.E.2d at 637. In Arkansas,

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and concluded that family member exclusions were valid above the statutory minimum limits.

[10] Counsel created the following graphic using MapChart and based on the cases discussed below. *See* MapChart, https://www.mapchart.net (last visited July 13, 2022).

this is accomplished by statute. *See Shelter Gen. Ins. v. Williams*, 867 S.W.2d 457, 458 (Ark. 1993) (noting that "an insurer may contract with its insured upon whatever terms the parties may agree upon which are not contrary to statute or public policy"). As this Court did in *Jones*, this principle has been applied by many courts across the country:

- **Arizona**—*Arceneaux v. State Farm Mut. Auto. Ins.*, 550 P.2d 87, 89 (Ariz. 1976) (observing "it seems logical" that statutory minimum applies "and thereafter the exclusionary clause is viable" (cleaned up)).

- **Connecticut**—*Garcia v. City of Bridgeport*, 51 A.3d 1089, 1104 (Conn. 2012) (emphasizing "essential concern of our motor vehicle liability insurance scheme is guaranteeing minimum coverage").

- **District of Columbia**—*Smalls v. State Farm Mut. Auto. Ins.*, 678 A.2d 32, 37 (D.C. Ct. App. 1996) (deciding "there is not bar to enforcement of the clause with respect to amounts greater than the minimum statutory requirements").

- **Florida**—*Maryland Cas. Co. v. Reliance Ins.*, 478 So.2d 1068, 1070 (Fla. 1985) (limiting coverage to minimum amount required by financial responsibility law).

- **Georgia**—*Stepho v. Allstate Ins.*, 383 S.E.2d 887, 889 (Ga. 1989) (holding "liability is limited to the mandatory $15,000 coverage").

- **Indiana**—*Fed. Kemper Ins. v. Brown*, 674 N.E.2d 1030, 1037 (Ind. Ct. App. 1997) (explaining state law's purpose "is to put the injured party in the position he would have been had the other person complied with the [state law], not in a better position").

- **Kansas**—*DeWitt v. Young*, 625 P.2d 478, 480 (Kan. 1981) (adhering to "general rule" and finding "exclusions void only as to the minimum coverage required by statute").

- **Louisiana**—*Marcus v. Hanover Ins.*, 740 So.2d 603, 609 (La. 1999) (believing "applicable limits of coverage should be the minimum required by statute").

- **Maine**—*Concord Gen. Mut. Ins. v. McLain*, 270 A.2d 362, 366 (Me. 1970) (affording "coverage co-extensive with that required by the statute").

- **Maryland**—*State Farm Mut. Auto. Ins. v. Nationwide Mut. Ins.*, 516 A.2d 586, 592 (Md. Ct. App. 1986) (aligning with majority rule that void provision is invalid "only to the extent of the conflict between the state public policy and the contractual provision").

- **Massachusetts**—*Johnson v. Hanover Ins.*, 508 N.E.2d 845, 948 (Mass. 1987) (reversing judgment to extent it allowed recovery exceeding statutory minimum).

- **Michigan**—*Citizens Ins. Co. of Am. v. Federated Mut. Ins.*, 531 N.W.2d 138, 142 (Mich. 1995) (explaining "coverage is limited to the amount required by the applicable automobile insurance law" when unambiguous policy is void).

- **Minnesota**—*Carlson v. Allstate Ins.*, 734 N.W.2d 695, 701 (Minn. Ct. App. 2007) (noting "policy that does not provide the mandatory minimum coverage required by the statute is extended by operation of law to afford that level of coverage").

- **Mississippi**—*Jones-Smith v. Safeway Ins.*, 174 So.3d 240, 248 (Miss. 2015) (Kitchens, J., dissenting) (clarifying insurers remain "entitled to deny coverage in excess of the statutory minimum" when policy void).

- **Missouri**—*Halpin v. Am. Family Mut. Ins.*, 823 S.W.2d 479, 483 (Mo. 1992) (en banc) (stating insureds "have not basis for expecting coverage in excess of the requirements").

- **Nebraska**—*State Farm Mut. Auto. Ins. v. Selders*, 190 N.W.2d 789, 792 (Neb. 1971) (advising "statutory requirements must be complied with by insurers and if the policy issued fails in this respect, the statute will be read into the policy" (cleaned up)).

- **Nevada**—*Continental Ins. v. Murphy*, 96 P.3d 747, 751 (Nev. 2004) (concluding "exclusionary clause is void only to the extent that it would defeat the minimum security required by statute but valid to prevent recovery in excess of the minimum" (cleaned up)).

- **New Hampshire**—*Universal Underwriters Ins. v. Allstate Ins.*, 592 A.2d 515, 517 (N.H. 1991) (explaining provision

conflicting with statute "cannot be a valid part of the contract of insurance" and is ineffective "at least up to the minimum limits of liability").

- **Oklahoma**—*Ball v. Wilshire Ins.*, 221 P.3d 717, 723 (Okla. 2009) (providing any exclusion "will not be enforced as to minimal statutory liability coverage").

- **Oregon**—*Collins v. Framers Ins. Co. of Or.*, 822 P.2d 1146, 1151 (Or. 1991) (en banc) (holding void "exclusion is enforceable as to coverage other than that required" by statutory minimum).

- **South Carolina**—*Jordan v. Aetna Cas. & Sur. Co.*, 214 S.E.2d 818, 820 (S.C. 1975) (reiterating "it is settled law that statutory provisions relating to an insurance contract are part of the contract, and that a policy provision which contravenes an applicable statute is to that extent invalid" (cleaned up)).

- **South Dakota**—*Cimarron Ins. v. Croyle*, 479 N.W.2d 881, 884 (S.D. 1992), *superseded by statute on other grounds as stated in De Smet Ins. Co. of S.D. v. Pourier*, 802 N.W.2d 447 (S.D. 2011) (agreeing with trial court's determination that household exclusion was invalid as to statutory minimum "but valid and enforceable with respect to the excess coverage under the policy").

- **Tennessee**—*State Auto. Mut. Ins. v. Cummings*, 519 S.W.2d 773, 775 (Tenn., 1975) (noting provisions concerning "uninsured motorist coverage are held to be valid and enforceable, to the extent that they do not reduce coverage below the statutory minimum").

- **Texas**—*Liberty Mut. Fire Ins. v. Sanford*, 879 S.W.2d 9, 10 (Tex. 1994) (per curiam) (clarifying family member exclusion was "in invalid only to the extent it conflicts with" statutory minimum (cleaned up)).

- **Utah**—*State Farm Mut. Auto Ins. v. Mastbaum*, 748 P.2d 1042, 1044 (Utah 1987) (determining otherwise invalid household or family exclusion is valid "in excess of the statutorily mandated amounts and benefits").

- **Wyoming**—*Allstate Ins. v. Wyoming Ins. Dep't*, 672 P.2d 810, 823 (Wyo. 1983) (deciding household exclusion was only "void to the extent of the minimum coverage contemplated by law").

Only a dozen states—California, Colorado, Delaware, Idaho, Kentucky, Montana, New Jersey, New Mexico, North Carolina, North Dakota, Rhode Island, Washington—make up the minority.[11] When an exclusion is void in those states, an insurer is liable for the policy limit, not the statutory minimum. The few remaining states have not squarely sided with the majority or the minority.[12]

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[11] *Matz v. Univ. Underwriters Ins.*, 513 P.2d 922, 928 (Cal. 1973) (finding exclusion "ineffective to limit coverage"); *McConnell v. St. Paul Fire & Marine Ins.*, 906 P.2d 109, 112 (Colo. 1995) (en banc) (explaining exclusion is "void and unenforceable"); *State Farm Mut. Auto. Ins. v. Wagamon*, 541 A.2d 557, 562 (Del. 1988) (noting "invalid exclusion should not be partially revived"); *Farmers Ins. Grp. v. Reed*, 712 P.2d 550, 555 (Idaho 1985) (limiting recovery "to the extent of the automobile liability insurance policy"); *Lewis v. W. Am. Ins.*, 927 S.W.2d 829, 836 (Ky. 1996) (overruling decision that upheld household exclusion to amount in excess of statutory minimum); *Swank v. Chrysler Ins.*, 938 P.2d 631, 635–36 (Mont. 1997) (permitting recovery of "full amount of general liability coverage" if provision is void); *Kish v. Motor Club of Am. Ins.*, 261 A.2d 662, 666 (N.J. Super. Ct. App. Div. 1970) (rejecting contention that "liability under the policy should be limited" to statutory minimums if exclusion invalidated); *State Farm Mut. Auto. Ins. v. Ballard*, 54 P.3d 537, 540 (N.M. 2002) (reaffirming "limiting coverage for household members violates" law and public policy and affording coverage based on policy limits); *Bray v. N.C. Farm Bureau Mut. Ins.*, 462 S.E.2d 650, 686 (N.C. 1995) (finding individual entitled to coverage "equal to the liability limits of the policy"); *Hughes v. State Farm Mut. Auto Ins.*, 236 N.W.2d 870, 886 (N.D. 1975) (holding insurer liable for policy limit partly due to lack of "provision which limits the insurance company's potential liability to a statutorily defined maximum"); *Glaude v. Continental Ins.*, 719 A.2d 856, 857 (R.I. 1998) (declining to "reform" exclusion to apply only to amounts in excess of statutory minimum); *Safeco Ins. Co. of Ill. v. Auto. Club Ins.*, 31 P.3d 52, 56 (Wash. Ct. App. 2001) (rejecting argument that "public policy stemming from the mandatory liability insurance act and the financial responsibility act applies only to the minimum levels of coverage mandated by statute").

[12] These include Alabama, Alaska, Hawaii, Illinois, Iowa, New York, Ohio, Pennsylvania, Vermont, Virginia, and Wisconsin. Some -- like Pennsylvania -- are inconsistent. *Compare Donegal Mut. Ins. v. Long*, 564 A.2d 937, 593 (Pa. Super. Ct. 1989) (explaining "if a person not contemplated by the parties is provided coverage by operation of law, then coverage will be restricted to the minimum requirements under law, rather than the higher limits agreed upon by the parties"), *with Brader v. Nationwide Mut. Ins.*, 411 A.2d 516, 519 (Pa. Super. Ct. 1979) (allowing recovery "up to the policy's limits" after invalidating exclusion). Others—like Alabama—have declined to address the issue. *See Continental Cas. Co. v. Pinkston*, 941 So.2d 926, 930 (Ala. 2006). And Alaska, for example, has recognized the majority approach but then found no need to adopt either. *Burton v. State Farm Fire & Cas. Co.*, 796 P.2d 1361, 1364 (Alaska 1990) (noting majority

The outlier states don't give convincing reasons for the minority position. *See State Farm*, 516 A.2d at 639–641 (reviewing and rejecting reasoning of Colorado, Idaho, Montana, New Jersey, New Mexico, and North Dakota courts). Take *Reed* from Idaho, for example. In that decision, the court saw two choices -- don't limit recovery to policy limits *or* limit recovery to policy limits. 712 P.2d at 554–55. The first option, it observed, "could occasionally be substantially beyond" policy limits. *Id.* at 555. So the court decided that "the better approach" was to limit recovery to policy limits. *Id.* Of course, there was a third option (i.e., the majority approach), which the dissent said should apply. *Id.* at 557 (Shepard, J., dissenting) (arguing "additional coverage ought to be subject to the policy exclusions, as many cases so hold"). Problematically, the court neither mentioned nor considered that option, even though it was brought to the court's attention; hence, its decision is hardly well reasoned.

Then there is Kentucky. In the 1980s, Kentucky followed the majority approach. *See Lewis*, 927 S.W.2d at 834–35 (discussing *Bishop v. Allstate Ins.*, 623 S.W.2d 86 (Ky. 1981), and *Straser v. Fulton*, 684 S.W.2d 306 (Ky. Ct. App. 1984)). In 1996, however, it changed course with *Lewis*. That is what Appellants seek here. They want West Virginia to leave the majority and join the minority. But West Virginia should not follow Kentucky considering *Lewis*'s flimsy reasoning.

In the 3-2-2 *Lewis* decision,[13] the court cited the lack of evidence of collusive claims as one reason for its ruling concerning household exclusions. Then it conjured its own

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rule limits liability to statutory minimum but finding "this case is somewhat different" because minimum matched policy).

[13] Justice King, joined by Justices Stumbo and Wintersheimer, issued the opinion. Justices Lambert and Graves concurred in the result only. Chief Justice Stephens and Justice Baker dissented.

policy considerations to justify its change in course, concluding that "almost every member of the public is potentially a member of this excluded class." *Lewis*, 927 S.W.2d at 836. Neither reason really justifies the decision.

As for collusion, which is unique to the household exception context, the court found meaning in having "not seen, nor been directed to, any evidence that there has been an increase in collusive claims." *Lewis*, 927 S.W.2d at 835; *see also id.* at 830 ("The rationale behind family exclusions is to protect insurance companies from the possibility of family members colluding to obtain greater compensation for an injured family member than that person rightfully deserves."). This was also the only reason Justices Lambert and Graves joined the result. But that was based entirely on the lack of evidence of an increase in collusion. There was no discussion about whether it had seen evidence of less collusion or a decision that the present amount of collusion was acceptable. Put plainly, the court mistook the absence of evidence for evidence of absence. And "absence of evidence is not evidence of absence." *Mathison v. Boston Sci. Corp.*, 2015 WL 2124991 at *27 (S.D. W. Va. May 6, 2015) (cleaned up).

Both the concurrence and dissents took aim at the court's policy conjurations. According to the concurrence, the court "has broadly undertaken to adjust economic fairness with what seems to be too little regard for the role of the legislative branch" and precedent. *Lewis*, 927 S.W.2d at 837 (Lambert, J., concurring). The dissents were blunter, emphasizing that policy making is a legislative prerogative. *See id.* (Stephens, C.J. dissenting) ("I do not believe it is the prerogative of this Court to set public policy for the Commonwealth."); *id.* at 838 (Baker, J. dissenting) ("As a matter of public policy the majority states a compelling case. This, however, is a decision for the General Assembly, whom the people choose to determine public policy.").

In West Virginia, much like the concurring and dissenting Kentucky judges explained, the legislature "has the primary responsibility for translating public policy into the law," making it the "primary origin of public policy in the state." *Blanda v. Martin & Seibert LC*, 242 W. Va. 552, 836 S.E.2d 519, 529 (2019) (cleaned up). States adopting the majority approach have done so based on legislative intent. For example, in Maryland, "since public policy, as statutorily promulgated, requires no more than [the minimum coverage], an insurance exclusion should be given effect as to larger sums." *State Farm Mut. Auto. Ins. v. Nationwide Mut. Ins.*, 516 A.2d 586, 635 (Md. Ct. App. 1986). In the same case, the court explained that minority states have "explicitly stated legislative purposes to maximize insurance coverage" or failed "to explain why such a broad ruling is required by a public policy that requires only a specific minimum." *Id.* (discussing *Meyer v. State Farm Mut. Auto. Ins.*, 689 P.2d 585 (Colo. 1984) (en banc), and *Kish v. Motor Club of Am. Ins.*, 261 A.2d 662 (N.J. 1970)).

This Court, like the Maryland court, can find public policy in statutory language. West Virginia Code § 17D–4–2 provides only for minimum coverage, so the legislature intended that its "compulsory insurance law extends only to liability coverage up to and including the statutory minimum" and no more. *State Farm*, 516 A.2d at 643. Additionally, while resolving an intrastate split, the Supreme Court of Louisiana explained that the majority approach is preferable because it respects the intentions of the parties to the agreement:

> To hold that the full policy limits apply to provide coverage in this case would thwart the intentions of the parties to this contract even more because the intent of the parties, as evidenced by the business use exclusion included in the contract, was that there be no coverage at all when the insured vehicle was used in any business.

Marcus v. Hanover Ins., 740 So.2d 603, 609 (La. 1999) (cleaned up).

In the end, the minority rule urged by the Appellants is hardly justifiable. This Court should not follow Kentucky's ill-reasoned lead. Instead, this Court should remain with the majority, which it has long done in this context, thereby signaling West Virginia's legal stability and certainty. There is no reason to abandon *Jones*, so don't.

CONCLUSION

In order to ensure predictability and consistency, DTCWV respectfully submits this amicus brief and asks the Court to answer the certified question as follows:

> **"Permissive user exclusions in automobile liability policies are valid and enforceable above the minimum limits of coverage mandated by the MVSRL."**

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