

NO. 23-702

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

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ERIE INSURANCE PROPERTY & CASUALTY COMPANY,

Petitioner,

v.

JAMES SKYLER COOPER,

Respondent.

On Certified Question from the
United States Court of Appeals for the Fourth Circuit
No. 22-1129

WEST VIRGINIA INSURANCE FEDERATION'S
MOTION FOR LEAVE TO FILE BRIEF
AS AMICUS CURIAE IN SUPPORT OF PETITIONER
ERIE INSURANCE PROPERTY & CASUALTY COMPANY

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Pursuant to Rule 30(a) of the West Virginia Rules of Appellate Procedure, the West Virginia Insurance Federation (“Federation”) respectfully requests leave of this Court to file a brief as amicus curiae in support of Petitioner Erie Insurance Property & Casualty Company (“Erie”). The certified question presented by the United States Court of Appeals for the Fourth Circuit has an immediate and significant impact on the insurance industry in West Virginia, and the Federation thus seeks leave to submit a brief that will aid the Court in its consideration of this case.

This Court is asked to determine whether insurers are required to make an offer of underinsurance coverage for vehicles not owned by the policyholder. As explained in the Federation’s brief, the industry has consistently understood the existing statutes, regulations, and this Court’s precedents not to require such an offer. As a result, insurers in West Virginia rarely offer such coverage. If the Court determines that such an obligation exists, it would automatically lead to the imposition of underinsurance coverage for non-owned autos on thousands of policies in West Virginia for which no offer of coverage was made and no premiums have been collected. Because of this dramatic impact, the Federation respectfully requests the opportunity to brief the Court on this important issue.

For these reasons and those more fully-detailed in its brief, the Federation respectfully urges this Court to grant its Motion to file its brief as amicus curaie to assist the Court in its analysis of the certified question before the Court.

WEST VIRGINIA INSURANCE FEDERATION

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EXHIBIT A

NO. 23-702

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ERIE INSURANCE PROPERTY & CASUALTY COMPANY**

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I. Introduction

The West Virginia Insurance Federation (“Federation”) files this brief as amicus curiae in support of the brief filed by Petitioner Erie Insurance Property & Casualty Company (“Erie”) because the issue before the Court would have immediate impact on thousands of West Virginia insurance policies currently in effect.¹ The insurance industry has always understood the statutes at issue *not* to require an offer of underinsurance coverage for non-owned autos. Like the Erie policy at issue in this case, insurers across the state have issued thousands of underinsurance policies without offers to cover non-owned autos. As such, the practical effect of this Court holding that such offers were required would be to apply that coverage to thousands of policies for which no premiums have been paid or collected.

The Federation submits that such a ruling would upend the industry’s understanding of the statutory requirements regarding uninsured and underinsured motorist coverage. The Federation, like Erie, understands the statutory language and this Court’s prior law to lead only to the conclusion that underinsurance coverage is *not* required to be offered for non-owned autos. This is a sensible conclusion because of the underlying purpose of underinsurance coverage, which is to protect the policyholder, not third parties. As such, requiring an offer of underinsurance coverage for a vehicle not owned by the policyholder is of no benefit, since the vehicle’s owner would necessarily have received an offer of underinsurance coverage and had the opportunity to purchase the coverage he or she desired.

¹ Pursuant to Rule 30(e)(5) of the West Virginia Rules of Appellate Procedure, the undersigned counsel authored this brief in its entirety. Neither party nor their respective counsel contributed to or made a monetary contribution specifically intended to fund the preparation or submission of this brief. The Federation provided notice of its intent to file a brief as amicus curiae on February 5, 2024, pursuant to Rule 30(b).

Accordingly, the Federation respectfully asks this Court to answer the question certified by the United States Court of Appeals for the Fourth Circuit in the negative.

II. Statement of Interest

The West Virginia Insurance Federation is the state trade association for property and casualty insurers doing business in West Virginia. Its members insure more than 80% of the automobiles insured in West Virginia, as well as approximately 70% of West Virginia's homes, and more than 80% of the workers' compensation policies insuring West Virginia workers. The Federation is widely regarded as the voice of West Virginia's insurance industry and has a strong interest in promoting a healthy and competitive insurance market to ensure that insurance coverage is both available and affordable to West Virginia's insurance consumers.

The Federation files this brief pursuant to Rule 30 of the West Virginia Rules of Appellate Procedure in support of Petitioner because this Court's jurisprudence provides predictability and stability for the insurance market and, in turn, West Virginia policyholders.

III. Factual Background

The Federation relies on Petitioner for a thorough discussion of the facts but provides the following as it relates to the Federation's interest before this Court.

The type of commercial auto insurance at issue in this case is one commonly purchased by West Virginia businesses that own one or more vehicles. Here, it provided liability coverage for the business, Pison Management LLC ("Pison"), which allowed for payment *to a third party* injured by the company's negligence. It also provided underinsured motorist coverage for Pison's owned vehicles, which allows for payment *to Pison* in the event that Pison sustains injuries or damages that are not fully covered by the at fault driver's insurance.

Specifically, the uninsured/underinsured motorist endorsement stated:

We will pay damages for bodily injury and property damage that **you** or **your** legal representative are legally entitled to recover from the owner or operator of an uninsured motor vehicle. If Underinsured Motorist Coverage is indicated on the **Declarations**, **we** will pay damages for bodily injury and property damage that **you** or **your** legal representative are legally entitled to recover arising out of the ownership or use of the **uninsured motor vehicle** or **underinsured motor vehicle** as a motor vehicle and involve:

1. Bodily injury to **you** or others **we** protect. Bodily injury means physical harm, sickness, disease or resultant death to a person; or
2. Property damage, meaning destruction of or injury to:
 - a. An **owned auto we insure** and property owned by **anyone we protect** while contained in such **auto**;
 - b. Property owned by **you** or a **relative** while contained in any **auto we insure** under this coverage; and
 - c. Any other property (except a **motor vehicle**) owned by **anyone we protect** and located in West Virginia.

[JA 438.] “You” is defined as the named insured, Pison. [JA 419; 425.] “Others we protect” is defined, in relevant part, as “anyone else, while **occupying** any **owned auto we insure** other than an **owned auto we insure** being used without the permission of the owner” and “anyone else who is entitled to recover damages because of bodily injury to any person protected by this coverage.”² [JA 439.] The term “autos we insure” includes “Hired Autos,” which is a class of vehicles not relevant here, and “Non-Owned Autos,” which is defined as “[t]hese **autos you** do not own, hire, rent or borrow that are used in **your** business, but only for coverages for which a premium charge is shown. This includes **autos** owned by your partners, employees, or members of households, but only while used in **your** business.” [JA 425.] There is no premium charged for UIM coverage for non-owned autos, and as such, this class of vehicles is not covered by the policy. [JA 419.]

² The policy’s definition of “others we protect” includes family members and anyone else occupying a “non-owned auto we insure,” but only if the insured is an individual, which Pison is not. [JA 439.]

This policy language is common, and it is consistent with the industry’s understanding of West Virginia law regarding underinsured motorist (“UIM”) coverage. It ensures that Pison, the policyholder, is protected from liability to a third party that is injured by the negligence of one of its employees acting in the scope of his or her employment. It also protects Pison from its own losses caused by an uninsured or underinsured motorist. It does not, however, protect Pison’s employees from suffering an injury at the hands of a third party motorist while occupying a vehicle not owned by Pison.

Turning to the question before this Court, whether W. Va. Code § 33-6-31 requires an insurer to offer UIM coverage for non-owned autos that are covered by liability policies, the Federation submits that the language of the applicable statutes and case law, considered together, all make it abundantly clear that neither the Legislature, nor this Court, nor the insurance industry at large, have ever contemplated that such offers be made. Indeed, it is well-settled such coverage need not be offered.

IV. Argument

A. Mandating that offers of UIM coverage be made on non-owned autos would apply such coverage to thousands of policies in West Virginia for which no premiums have been paid or collected.

Pursuant to this Court’s prior decisions, “[w]hen an insurer is required by statute to offer optional coverage, it is included in the policy by operation of law when the insurer fails to prove an effective offer and a knowing and intelligent rejection by the insured.” Syl. Pt. 4, *Thomas v. McDermitt*, 232 W. Va. 159, 751 S.E.2d 264 (2013). Accordingly, should this Court hold that offers of this coverage are required, such coverage will automatically be applied to not only the Erie policy at issue, but also to thousands of similar policies already in effect throughout our state.

The Federation submits that its members seldom offer the type of coverage contemplated here. The Federation’s members have understood the statutory language at issue and this Court’s

prior decisions *not* to require offers of UIM coverage for non-owned autos since the applicable statutory language is capable of only this interpretation. Moreover, the applicable regulations promulgated by the Insurance Commissioner and this Court's decisions, most recently *Progressive Max Ins. Co. v. Brehm*, 246 W. Va. 328, 873 S.E.2d 859 (2022), also make clear that the purpose of UIM coverage is to protect the insured, if he chooses to, rather than any third party.

Should this Court hold that such offers are in fact required, it would upend the insurance industry's understanding and practices with dramatic effect. If UIM coverage for non-owned autos is deemed to be required, these policies would necessarily include that coverage by operation of law. Since premiums are not paid by insureds or collected by insurers when coverage is not offered, insurers in West Virginia would be liable to pay benefits on policies for which premiums were neither paid nor collected, nor even contemplated.

In fact, given that UIM coverage is required to be offered for *owned* autos, requiring that it is also offered on *non-owned* autos could lead to scenarios wherein a vehicle owner declined UIM coverage for his or her own vehicle, but coverage is nonetheless imposed by operation of law on some other policy because UIM coverage for non-owned autos was not offered to that policyholder. Thus, coverage for a given vehicle could be found despite neither the owner of the vehicle nor the policyholder paying premiums for that coverage. This is plainly not the scenario contemplated by the Legislature, the Insurance Commissioner, the industry at large, nor this Court's prior opinions. The Federation respectfully asks this Court to decline to impose such a strikingly outlandish result and reversal of what has previously been a commonly understood regulation.

B. The applicable statutes and regulations clearly contemplate that UIM coverage need not be offered to non-owned autos.

West Virginia Code section 33-6-31d provides that the Insurance Commissioner shall provide a form for offers of UIM coverage, and that form “shall specifically inform the named insured of the coverage offered and the rate calculation for the coverage, including, but not limited to, levels and amounts of the coverage available and *the number of vehicles which will be subject to the coverage.*” W. Va. Code § 33-6-31d(a) (emphasis added). Simply, there is no known number of non-owned autos that can be identified.³ Non-owned autos include an entire class of vehicles used for business purposes that are owned by other people or entities, which is necessarily an undefinable number. The mere fact that the statute and form mandate that a specific number of vehicles be identified clearly means that neither the Legislature nor Insurance Commissioner ever contemplated that an offer of insurance to an undefinable class of vehicles be required. Indeed, an insurer who offered UIM coverage on non-owned autos would have no way of completing the form by identifying a specific number of vehicles.⁴

It is this requirement that overshadows any interpretation of W. Va. Code § 33-6-31. Broadly, W. Va. Code section 33-6-31(a) mandates:

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, may be issued or delivered in this state to the owner of such vehicle, or may be issued or delivered by any insurer licensed in this state upon any

³ Non-owned autos in this context include autos used by a business’s employees or agents in the scope of business. A business cannot define *what* vehicles its employees or agents may use in the scope of business, and as such cannot identify *how many* vehicles such a policy would cover. A business can obviously identify the number of vehicles it owns, and thus the Federation submits that the only sensible interpretation of this requirement is that it contemplates coverage that is applicable to a business’ own identifiable vehicles and not the unidentifiable number of vehicles that could someday be used in the scope of business.

⁴ In briefing before the Fourth Circuit, Mr. Cooper suggested that an insurer may simply provide a range of vehicles to which the policy applies (i.e. “1-25”) to comply with the statute. [JA 307.] Respectfully, this would neither comply with the statute nor be necessary in the first place. First, there is no way to determine if a given non-owned auto is one of the 25 vehicles included in that undefined range; and second, if the Legislature and Insurance Commissioner intended for coverage to apply to an undefined number of vehicles, there would be no reason to even have a form to identify the vehicles.

motor vehicle for which a certificate of title has been issued by the Division of Motor Vehicles of this state, unless it contains 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 or her 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 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.

This section of W. Va. Code § 33-6-31(a) provides that a liability policy must also include coverage for permissive users of an owned vehicle aside from bailees for hire and others excluded by restriction, and it provides that custodians of a given auto may provide permission for others to use the vehicle such that they constitute permissive users covered by the policy.

The following paragraph, in relevant part, provides:

Nor may any such policy or contract be so issued or delivered unless it contains an endorsement or provisions undertaking to pay the insured all sums which he or she is 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: . . . Provided further, That such policy or contract shall provide an *option to the insured with appropriately adjusted premiums to pay the insured* all sums which he or she is legally 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 set off against the insured's policy or any other policy. Regardless of whether motor vehicle coverage is offered and provided to an insured through a multiple vehicle insurance policy or contract, or in separate single vehicle insurance policies or contracts, no insurer or insurance company providing a bargained for discount for multiple motor vehicles with respect to underinsured motor vehicle coverage may be treated differently from any other insurer or insurance

company utilizing a single insurance policy or contract for multiple covered vehicles for purposes of determining the total amount of coverage available to an insured. . . .

W. Va. Code § 33-6-31(b) (emphasis added). This language mandates that insurers may not offer liability policies unless they provide an “option to the insured with appropriately adjusted premiums *to pay the insured*” in the event of injury by an underinsured motorist.⁵ *Id.* Notably, it does not mandate that UIM coverage be offered for vehicles not owned by the policyholder—which the Legislature could no doubt expressly do—and it does not contemplate that payments would be made to anyone other than the insured.

Given the context of W. Va. Code § 33-6-31d, and Informational Letter No. 121, the only reasonable interpretation of this language is that it mandates that an insured be offered UIM coverage on *its own* vehicles, which can be specifically identified, and not non-owned autos, which a policyholder cannot identify. The Federation submits that it is this interpretation and regulation on which the industry has relied in *not* making offers for UIM coverage on non-owned autos. This conclusion is further supported by this Court’s case law.

C. This Court’s opinions on UIM coverage have consistently maintained that the purpose of UIM coverage is for the benefit of the policyholder and have routinely denied coverage for non-policyholders.

Most recently, in *Progressive Max Ins. Co. v. Brehm*, 246 W. Va. 328, 873 S.E.2d 859 (2022), this Court discussed the purpose of UIM coverage. As this Court explained,

Optional UIM coverage is intended to “enable the insured to protect himself, if he chooses to do so, against losses occasioned by the negligence of other drivers who are underinsured.” The corollary of that purpose? “Underinsured motorist coverage is not available to a guest passenger unless the statute or policy language specifically provides for such coverage.”

⁵ The Federation also notes that the policy at issue contained no premiums for UIM coverage for non-owned autos. [JA 419.]

Id. at 334, 873 S.E.2d at 865 (quoting *Deel v. Sweeney*, 181 W. Va. 460, 383 S.E.2d 92 (1989); Syl. Pt. 3, *Alexander v. State Auto. Mut. Ins. Co.*, 187 W. Va. 72, 415 S.E.2d 618 (1992)). *Alexander* further emphasizes “the principle that underinsured motorist coverage contemplates recovery ‘from one’s own insurer . . . ,’ not from a third-party.” *Alexander*, 187 W. Va. at 75, 415 S.E.2d at 621 (quoting *State Auto. Mut. Ins. Co. v. Youler*, 183 W. Va. 556, 396 S.E.2d 737 (1990)).

Simply, *Brehm* and *Alexander* both make clear that UIM coverage is designed for the benefit of the insured, not his or her guest passengers. Though those cases focused on individual policyholders rather than a business, the same logic applies. A UIM policy given to a business is designed to cover the business’s losses occasioned by an underinsured third party. It is not issued for the benefit of a vehicle it does not own any more than the policies in *Brehm* and *Alexander* were designed to benefit those guest passengers. In all of these cases, the policyholders paid premiums for their own benefit, and the guest passengers who did not pay the premiums and were not included in the policy’s coverage did not receive the benefit of that coverage.

This is the only sensible conclusion. The requirement in W. Va. Code § 33-6-31 that UIM coverage be offered ensures that the owner of every vehicle has the opportunity to purchase UIM coverage for his or her own vehicles. Thus, the owner of every vehicle necessarily receives an offer of UIM coverage that would cover his or her vehicle and its occupants.

Alternatively, requiring that UIM coverage be offered for vehicles that are owned by someone else means that these vehicles will receive multiple offers of coverage, and very possibly, multiple coverages. The Federation submits that the offer to the policyholder that does not own the vehicle is unnecessary both because the vehicle’s owner already has the opportunity to purchase coverage and because the policyholder would not be the beneficiary of that coverage. Indeed, the policyholder would effectively be asked to purchase a policy for the benefit of the

occupants of a vehicle the policyholder does not own and likely cannot identify, when the vehicle's owner already received an offer for the same coverage and either obtained it or expressly determined that he or she did not wish to have such coverage. The cases cited above cannot be read to lead to this absurd conclusion.

The Federation's members have relied on these statutes, regulations, and court opinions, in combination, in making offers of UIM coverage. Nothing in any area of state law suggests that offers of UIM coverage for non-owned autos are either necessary or even warranted. The Federation submits that the statutory scheme and applicable regulations, read along with this Court's articulation of the policies framing UIM coverage confirm that W. Va. Code § 33-6-31 does not require offers of UIM coverage to apply to non-owned autos.

V. Conclusion

For the foregoing reasons, the West Virginia Insurance Federation respectfully asks this Court to answer the certified question submitted by the United States Court of Appeals for the Fourth Circuit in the negative.

WEST VIRGINIA INSURANCE FEDERATION

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CERTIFICATE OF FILING AND SERVICE

I hereby certify that on this 9th day of February, 2024, the *West Virginia Insurance Federation's Motion for Leave to File Brief as Amicus Curiae in Support of Petitioner Erie Insurance Property & Casualty Company* has been electronically with the Clerk of the Court using the File and Serve Express, which will send notice of such filing to the following registered File and Serve Express users:

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