IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

No. 23-702

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ERIE INSURANCE PROPERTY & CASUALTY COMPANY,

Petitioner,

vs.

JAMES SKYLAR COOPER,

Respondent.

CERTIFIED QUESTION FROM THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT,
No. 22-1129

PETITIONER'S REPLY BRIEF

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A. W. VA. CODE § 33-6-31 DOES NOT EXTEND TO NON-OWNED AUTOS

James Skylar Cooper's ("Cooper") argument that an insurer is required to extend offers of underinsured motorist ("UIM") coverage to non-owned autos is premised on the faulty argument that W. Va. Code § 33-6-31(a) extends to *any* auto that may qualify for liability coverage, whether or not that auto is specifically identified as a scheduled vehicle on the policy and whether or not the vehicle is owned by the named insured. Based on that broad and unsupported reading of the statute, Cooper advances the untenable argument that W. Va. Code § 33-6-31(b) necessarily then requires an offer of UIM coverage for non-scheduled and non-owned vehicles. Cooper's argument obliterates the distinction between Class I and Class II insureds, as defined by W. Va. Code § 33-6-31(c). In effect, Cooper is asserting that a Class II insured should be entitled to the same broad scope of UIM coverage that this Court has recognized is reserved for a Class I insured. More importantly, Cooper's argument is directly contradicted by the plain language of W. Va. Code § 33-6-31 and this Court's consistent interpretation of the statute.

As an initial matter, Cooper's argument necessarily ignores the fact that W. Va. Code § 33-6-31(a) expressly references the delivery of the insurance policy at issue **to the owner** of the vehicle, i.e. the named insured. In fact, the only recipient of the policy identified in subsection (a) of the statute is the owner. By expressly referencing the "owner" of the vehicle, the Legislature expressed a clear intent to limit the statute's application to vehicles that are owned by the named insured. *See Jackson v. Belcher*, 232 W. Va. 513, 518, 753 S.E.2d 11, 16 (2013) ("[a] cardinal rule of statutory construction is that significance and effect must, if possible, be given to every section, claim, word or part of the statute."). If subsection (a) was intended to apply to owned and non-owned autos, as Cooper argues, the term "owner" in the statute would become meaningless.

In fact, W. Va. Code § 33-6-31(a) expressly makes reference to the owner of the vehicle in two specific instances. The first instance is when the statute identifies the recipient of the policy:

> 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 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:[1]

W. Va. Code § 33-6-31(a) (emphasis added). The second instance is when the statute ties permissive use of the vehicle to the owner of the vehicle:

> *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.

Id. (emphasis added).

The fact that permissive use of a vehicle is tied to the owner's consent is critical to the appropriate interpretation of the statute. This Court has repeatedly recognized the nexus between the permissive use of a vehicle and its owner for the extension of liability coverage. For example,

[1] Cooper argues that the second clause of the statute, "or may be issued or delivered by any insurer licensed in this state upon any motor vehicle for which a certificate of title has been issued" expands the scope of the statute to include both owned and non-owned autos. *See W. Va. Code § 33-6-31(a).* Such a reading of that section would make the first section of the statute, addressing delivery of the policy to the owner of the vehicle superfluous. A more reasonable interpretation of that provision is that it is intended to directly impose that obligation on "any insurer licensed in this state" to ensure compliance with the statute's requirements. *Id.*

in *Burr v. Nationwide Mut. Ins. Co.*, 178 W. Va. 398, 359 S.E.2d 626 (1987), this Court held in Syllabus Pt. 3:

> The mandatory omnibus requirements imposed by W. Va. Code, 33-6-31(a), indicate that the legislature has demonstrated a clear intent to afford coverage to anyone using a vehicle with the **owner's** permission as a means of giving greater protection to those who are involved in automobile accidents. The statute should be liberally construed to effect coverage.

(emphasis added); *see Collins v. Heaster*, 217 W. Va. 652, 658, 619 S.E.2d 165, 171 (2005) ("Under West Virginia law, a person operating a motor vehicle must have the consent, express or implied, of the vehicle's **owner** or the **owner's spouse** before coverage is afforded to the operator under the motor vehicle liability insurance policy insuring the vehicle.") (emphasis added); *see also Universal Underwriters Insurance Company v. Taylor*, 185 W. Va. 606, 612, 408 S.E.2d 358, 364 (1991) ("Although vehicle owners may certainly place restrictions on the use of their vehicles, we agree with the *Jensen* court that the legislature, by its enactment of the omnibus clauses, did not intend that the **owner's liability coverage** be affected by such restrictions.") (emphasis added).

Similarly, W. Va. Code § 33-6-31(c) requires a vehicle owner's permission for the extension of UIM coverage to a Class II insured. Specifically, that section defines insured as follows:

> the term "insured" means 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(c) (emphasis added). Section 33-6-31(c) expressly limits the availability of UIM coverage for a Class II insured to the use of "the motor vehicle to which the policy applies". *Id.* Importantly, by incorporating the same permissive use language found in subsection (a), W.

Va. Code § 33-6-31(c) further requires the Class II insured to be using "the motor vehicle to which the policy applies" with the permission of the named insured. In other words, W. Va. Code § 33-6-31(c) requires a Class II insured to be using the motor vehicle with the owner's express or implied consent. Accordingly, if the extension of UIM coverage to a Class II insured while using "the motor vehicle to which the policy applies" is subject to permission from the owner of that vehicle, the "motor vehicle to which the policy applies" must necessarily refer to owned vehicles.

Again, this Court has previously acknowledged that distinction in *Starr v. State Farm Fire and Casualty Company*:

> Uninsured or underinsured motorist provisions of an automobile insurance policy which separately define coverage for the **owner**, spouse, and any relative living in the **owner's** household as one group, and for other persons while occupying the covered vehicle with the **consent of the owner** or his or her spouse as another group, create two distinct classes of covered individuals. The first class includes the named insured, his or her spouse, and their resident relatives. The second class consists of the permissive users of **the named insured's vehicle**.

Syl. Pt. 1, *Starr v. State Farm Fire and Casualty Company*, 188 W. Va. 313, 423 S.E.2d 922 (1992) (emphasis added). The clear and concise language of W. Va. Code § 33-6-31(a) and (c), coupled with existing West Virginia case law, necessitates a finding that the scope of W. Va. Code § 33-6-31(a) governs liability policies issued in this state to the owners of those vehicles, and the extension of UIM coverage for a Class II insured is limited to the occupancy or use of an owned vehicle. That conclusion is the only way that W. Va. Code § 33-6-31(a) can be reconciled with the definition of "insured" in W. Va. Code § 33-6-31(c), which limits the scope of UIM coverage for a Class II insured to the permissive use of "the motor vehicle to which the policy applies."

Cooper's argument in this case, that Huffman's auto (an auto not owned by Pison Management) is a "motor vehicle to which the policy applies" must necessarily fail for that reason.

As a non-owned auto, Pison Management does not have the ability to provide the requisite permission for purposes of liability coverage under W. Va. Code § 33-6-31(a), nor the requisite permission for purposes of underinsured motorist coverage under W. Va. Code § 33-6-31(c). Cooper wholly misinterprets W. Va. Code § 33-6-31(a). His argument that subsection (a) applies to non-owned autos (and that a non-owned auto is a "motor vehicle to which the policy applies" in subsection (c)), would render the language requiring permissive use incongruous: the statute does not contemplate or provide a means by which permissive use can be conveyed by a non-owner of the vehicle.

Separately, W. Va. Code § 33-6-31(b), which both parties agree relates to the same policy of insurance contemplated in subsection (a), governs uninsured and underinsured motorist coverage. With respect to underinsured motorist coverage, subsection (b) states,

> *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.

W. Va. Code § 33-6-31(b) (emphasis in original). Through the use of the term "the insured", subsection (b) of the statute conveys the clear intent to extend the offer of UIM coverage to the named insured, i.e. the owner of the vehicle. *See Starr v. State Farm Fire and Cas. Co.*, 188 W. Va. 313, 315, 423 S.E.22d 922, 924, citing *Alexander v. State Automobile Mutual Insurance Co.*, 187 W. Va. 72, 415 S.E.2d 618 (1992) ("It is important to note that in *Alexander*, we use the term 'insured' in the general sense to refer to the **owner** of the vehicle **to which the policy applies**.") (emphasis in bold). W. Va. Code § 33-6-31(b) makes no reference to non-owned autos and does not tie the offer of UIM coverage to a vehicle, or class of vehicles, but rather to the insured. The

offer must be made to **the** insured for **the** insured's benefit. "The insured" is the named insured, and pursuant to subsections (a) and (c) of the statute, that is the owner of the vehicle.

The interpretation of W. Va. Code § 33-6-31 as applying only to owned autos is entirely consistent with how Virginia has interpreted its own omnibus statute, which is virtually identical to West Virginia's omnibus statute.[2] *See Stone v. Liberty Mutual Insurance Company*, 253 Va. 12, 478 S.E.2d 883 (1996). As with the Erie Policy in this case, the policy of insurance in *Stone* extended liability coverage to non-owned autos, including autos that the insured did not own, lease, hire or borrow which were used in connection with the business. *See Stone*, at 15, 884. While the employee's vehicle in *Stone* qualified as a covered auto for purposes of liability coverage, the vehicle was not a covered auto for purposes of UIM coverage. *Id.*

Just as Cooper asserts in this case, the employee in *Stone* argued that because his vehicle was a covered auto for purposes of liability coverage, the insurer was required to extend UIM coverage because he was using a vehicle to which the policy applied. *See Stone*, at 16, 884. The Virginia Supreme Court flatly rejected the employee's argument, concluding that Virginia's omnibus statute only applied to owned autos. In reaching this conclusion, the Virginia Supreme Court recognized that permissive use was tied to the ownership of the vehicle:

> Dissecting the clauses, we look first to the term "motor vehicle." The language does not say "a," "any," "every," or "all." In two places, it provides "the" motor vehicle to which the policy applies. Stone was not using either of "the" motor vehicles to which the

[2] Virginia's omnibus statute, Va. Code Ann. § 38.2-2206, provides in relevant part:

> No policy or contract of bodily injury or property damage liability insurance, covering liability arising from the ownership, maintenance or use of any motor vehicle, aircraft, or private pleasure watercraft, shall be issued or delivered in the Commonwealth **to the owner** of such vehicle, aircraft, or watercraft, or shall be issued of delivered by any insurer licensed in the Commonwealth upon any motor vehicle, aircraft, or private pleasure watercraft that is principally garaged, docked or used in the Commonwealth, unless the policy contains a provision insuring the named insured, and any other person using or responsible for the use of the motor vehicle, aircraft, or private pleasure watercraft with the expressed or implied consent of the named insured . . . .(emphasis added).

> policy applies, the Ford or the Honda; he was using his own motor vehicle. Thus, the statute only requires, as to insureds of the second class, that uninsured motorist coverage be provided to those who are in either of *the* motor vehicles listed in the policy, as opposed to "any" vehicle to which the policy might apply.
>
> Second, and more importantly, we look to the language providing that the person who uses the motor vehicle must do so "with the expressed or implied consent of the named insured." Obviously, when the General Assembly employs this language, it is resorting to language relating to the omnibus clause found in Code § 38.1-2204(A), which deals with liability insurance covering motor vehicles (policy must contain a provision insuring any person using the motor vehicle "with the express or implied consent of the named insured").
>
> When construing such language, we repeatedly have held that a named insured generally cannot give permission to use a vehicle that the named insured does not own.

Stone at 18, 886 (emphasis in original).

On that basis, the Court in *Stone* focused on the definition of insured in the omnibus statute and the requisite consent for a Class II insured's occupancy, concluding:

> The "expressed or implied consent" language of the subsection modifies "the motor vehicle to which the policy applies" clause. If the legislature, in the uninsured motorist statute, had meant to include as insureds of the second class occupants of non-owned vehicles, then the General Assembly surely would have used language like it uses at the end of Code § 38.2-2204(A), which deals with the sort of permission needed when one is operating a non-owned vehicle. That statute refers to "permission or consent of the owner" of a non-owned vehicle, and deems permission or consent of "the custodian" to be the permission of the owner. The uninsured motorist statute contains no such expansive language.

Stone at 19, 886.

The fact that liability coverage extends to a non-owned auto when that auto was used in Pison's business does not make it a covered auto for purposes of UIM coverage. As in *Stone*, Cooper was not using either of "the" motor vehicles that were specifically listed and identified on

the Erie Policy. As a Class II insured under the Erie Policy, Cooper would only be entitled to UIM coverage when occupying a vehicle "to which the policy applies" with the express or implied consent of the owner of that vehicle. Huffman's vehicle does not meet that definition under the terms of the Erie Policy or by way of West Virginia's omnibus statute.

This Court should adopt the well-reasoned analysis of the Virginia Supreme Court in its interpretation of the scope of W. Va. Code § 33-6-31, apply the statute as written, and hold that W. Va. Code § 33-6-31(a) applies to owned autos specifically listed and insured under a policy of insurance. On that basis, Cooper's argument that Erie was required to extend an offer of UIM coverage for non-owned autos must fail, thereby preserving this Court's recognition that a Class I insured is entitled to broader coverage than a Class II insured.

B. THE EXTENSION OF LIABILITY COVERAGE TO A NON-OWNED AUTO DOES NOT MANDATE AN OFFER OF UIM COVERAGE

The District Court's January 28, 2021 Memorandum Opinion and Order in this case erroneously concluded that the extension of liability coverage for a non-owned vehicle triggered the obligation to extend optional UIM coverage. [JA 24 - 26]. Likewise, Cooper erroneously asserts that W. Va. Code § 33-6-31 requires an offer of UIM coverage anytime liability coverage is extended to a vehicle, whether that vehicle is owned or non-owned. [Response Brief, page 7]. Cooper fails to cite to any West Virginia decision in support of this assertion because this Court has never reached such a conclusion.

This Court has recognized the common and "highly desirable" practice of insurers extending liability coverage to the named insured, his or her spouse, and resident relatives to their operation of a non-owned auto. *See Allstate Ins. Co. v. State Auto Mut. Ins. Co.*, 178 W. Va. 704, 364 S.E.2d 30 (1987) (citing *American Surety Co. v. Canal Ins. Co.*, 258 F.2d 934 (4th Cir. 1958)). In that context, this Court resolved the issue of what liability policy provides the primary level of

coverage when a permissive user is operating a non-owned auto. *Id*. Recognizing the instances when liability coverage for a permissive user extends to a non-owned auto, this Court held:

> The simple, bright-line rule of law that the primary obligation to defend and indemnify follows the automobile, rather than the driver, facilitates an orderly determination of priorities among carriers insuring the same risk. These cases are based on the reasoning that the policy of the **owner** is other insurance within the meaning of the excess provision of the driver's policy and that, therefore, this provision is effective; they do not consider the driver's policy as other insurance within the meaning of the pro-rata provision of the **owner's policy** and accordingly treat the pro-rata provision of the **owner's policy** as not operative. We conclude that the result reached in the cases cited above is correct.

Id., at 707, 33 (emphasis added); s*ee also* Syl. Pt. 1, *Johnson v. State Farm Mutual Automobile Insurance Company*, 190 W. Va. 526, 438 S.E.2d 869 (1993) ("To invoke coverage under an insurance policy provision which extends coverage for use of a non-owned vehicle, there must first be established a causal connection between the use of the motor vehicle and the injury.").

The District Court's opinion in this case vastly expands the scope of W. Va. Code § 33-6-31(b) to require offers of UIM coverage on **any** vehicle that may qualify for liability coverage. Likewise, Cooper's assertion that, "[t]he West Virginia omnibus statute requires that anytime an insurer agrees to provide liability insurance for a vehicle, it must also offer UIM coverage for that vehicle", cannot be reconciled with the language of W. Va. Code § 33-6-31 and existing case law. While Cooper seeks to distance himself from the District Court's broad ruling by arguing that the Erie Policy made the Huffman vehicle a "covered auto", the District Court's conclusion was that "Erie's carve-out excluding UIM coverage for non-owned, insured vehicles" was impermissible. [JA 25] Cooper's argument, however, draws a distinction without a difference: the extension of liability coverage to a non-owned auto would make that non-owned auto a "covered auto" under any policy for purposes of liability coverage.

Most importantly, the broad implications of having to offer UIM coverage for any vehicle insured for liability coverage undercuts the whole distinction between Class I insureds and Class II insureds. While a Class I insured is entitled to UIM coverage in **any vehicle**, a Class II insured is only entitled to UIM coverage while using **the vehicle** to which the policy applies. The effect of the District Court's ruling would mean that any vehicle subject to liability coverage would be a "vehicle to which the policy applies" under W. Va. Code § 33-6-31(c). That is clearly not the case.

While Cooper attempts to minimize the import of this Court's decision in *Progressive Max Ins. Co. v. Brehm* as a "rental car case", the fact is that *Brehm* involved yet another situation where liability coverage was extended to a non-owned auto. *Progressive Max Ins. Co. v. Brehm*, 246 W. Va. 328, 873 S.E.2d 859 (2022). In *Brehm*, this Court held that the extension of liability coverage to the rental vehicle, a non-owned auto, did not alter the fact that its guest passengers were Class II insureds and not entitled to UIM coverage because the rental vehicle was not a vehicle to which the policy applied. That extension of liability coverage, whether by statute or by policy provision, does not mandate a corollary extension of UIM coverage. This stems from the fact that UIM coverage, which is designed to protect the named insured, his or her spouse and resident relatives, is already extended to those insureds when they are operating or occupying a non-owned auto. Through the extension of UIM coverage under W. Va. Code § 33-6-31(c) to non-owned autos for Class I insureds, a separate offer of UIM coverage becomes unnecessary unless this Court concludes, in contravention to *Brehm*, that Class II insureds should be entitled to the same broad protections as Class I insureds.

In interpreting a virtually identical definition of insured, the United States District Court for the Southern District of Mississippi aptly described the different classes of insureds, reaching the same conclusion as this Court in *Brehm*:

> "Persons included in Class I consist of '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.' " *Id.* (quoting Miss. Code Ann. § 83-11-103(b)). "Persons included in Class II consist of 'any person who uses, with the consent, expressed or implied, of the named insured, the motor vehicle to which the policy applies.' " *Id.* (quoting § 83-11-103(b)).
>
> The Act provides "broad coverage" for Class I insureds: "[A] Class I insured is covered in any automobile, as a pedestrian, or even in the bathtub—if an uninsured motorist came flying through the window and caused an injury." *Glennon v. State Farm Mut. Auto. Ins. Co.*, 812 So. 2d 927, 931 (Miss. 2002), *overruled on other grounds by Meyers v. Am. States Ins. Co.*, 914 So. 2d 669, 674 (Miss. 2005). In contrast, Class II insureds are covered only when in a covered automobile. *Id*.

Mills on Behalf of Dotson v. Axis Ins. Co., No. 3:21CV7TSL-RPM, 2021 WL 2660614, at *2 (S.D. Miss. Apr. 29, 2021) (citing *Meyers v. Am. States Ins. Co.*, 914 So. 2d 669, 674 (Miss. 2005)).

Recognizing the impact of the *Brehm* decision, Cooper goes to great lengths to try and distinguish its holding. Cooper revisits the terms of the Erie Policy, arguing that "Erie chose to make the non-owned vehicle in question a covered auto". [Respondent's Brief, page 7]. In so doing, Cooper goes well beyond the scope of the certified question before this Court and seeks to relitigate the terms of the Erie Policy. In any event, both the District Court and the Fourth Circuit Court of Appeals agree that the Erie Policy does not provide UIM coverage for Huffman's personal vehicle. As the Fourth Circuit Court of Appeals noted in its certification Order to this Court:

> In order to render the certified question dispositive of the appeal before us, we resolve in advance the question of coverage under *the policy*. *See W. Va. Code § 51-1A-3.* We agree with the district court that the policy did not include UIM coverage for Cooper while riding in Huffman's car. The "uninsured/underinsured (UM/UIM) endorsement in the policy stated that "[w]e will pay damages: that involve . . . bodily injury to 'you or others we protect.'" "You" was defined as the named insured, which under the policy was Pison. "Others we protect" included in relevant part: "anyone . . . while occupying any *owned auto* we insure*"* and "if you are an *individual*, anyone else while occupying a *non-owned auto we insure*." Because

> Pison was not an "individual" under the policy terms, we agree with the district court's holding that the plain language of the UM/UIM endorsement established that he policy did not provide UIM coverage to Cooper while riding in Huffman's car. Our conclusion is not altered by Cooper's argument seeking an alternative basis for affirming the district court's judgment, namely, that the policy was ambiguous regarding whether UIM coverage applied. Cooper contends that the declarations page states that the UM/UIM endorsement applied to "all autos," including non-owned vehicles. But the declarations page plainly showed that no premium was paid for UIM coverage for non-owned vehicles, which payment was required for UIM coverage to apply. We therefore conclude that the policy unambiguously did not extend UIM coverage to Cooper while riding in Huffman's car.

[JA 4]. As a non-owned auto, the Huffman vehicle was not a covered auto under the Erie Policy for UIM coverage and both the District Court and the Fourth Circuit Court of Appeals agreed with this point. The fact that liability coverage extended to the Huffman vehicle, as a non-owned auto, for the benefit of Pison Management, does not change that fact and does not make the Huffman vehicle a covered auto for purposes of UIM coverage.[3]

Cooper suggests that, by virtue of the fact that the Erie Policy identifies non-owned autos as a class of vehicles subject to certain coverages, this case is different from *Brehm*. However, the way in which a policy extends liability coverage to non-owned autos is irrelevant to the fact that those vehicles are not covered autos for purposes of UIM coverage.

In fact, the Erie Policy does not limit coverage to certain non-owned autos as Cooper would suggest. Because the Erie Policy charged premiums for owned autos, hired autos and non-owned autos, the Erie Policy extended liability coverage to Pison for **any** vehicle unless expressly excluded on the Declarations. The Erie Policy provides,

[3] Cooper also asserts Erie has "admitted" that he qualifies as an insured by occupying a covered auto. [Respondent's Brief, page 12]. That is simply inaccurate. What Erie has asserted is that Cooper would be considered a Class II insured under the Erie Policy because he does not qualify as a Class I insured under W. Va. Code § 33-6-31(c). As a Class II insured, Cooper is not entitled to UIM coverage while occupying a non-owned auto. *See Brehm, supra*.

> When premiums are shown on the **Declarations** for **owned autos, hired autos** and **non-owned autos**, then liability coverages apply to *any* **auto**, unless expressly excluded on the Declarations.

[JA 426]. Presumably, Cooper's position in this case would be that Erie was required to offer UIM coverage for all autos not expressly excluded on the Declarations. Such an assertion is illogical, both practically and legally.

C. W. VA. CODE § 33-6-31d MUST BE READ IN *PARI MATERIA* WITH W. VA. CODE § 33-6-31

Cooper largely ignores the concerns raised by the District Court's decision as it relates to an insurer's obligations with respect to offers of UIM coverage under WV Code § 33-6-31d. Rather than acknowledging that the statute expressly requires an insurer to identify the specific number of vehicles included within the offer of UIM coverage, Cooper equates this concern to nothing more than an insurer's underwriting of the policy for purposes of determining the appropriate premium to be charged. These are wholly different issues, and Cooper's suggestion that Erie could simply identify a range of non-owned autos (e.g. 1 – 25) ignores the requirements of the statute. By its express terms, offers of UIM coverage under W. Va. Code § 33-6-31d requires an insurer to "specifically inform" the named insured of the number of vehicles which will be subject to the coverage. *See* W. Va. Code § 33-6-31d.

The statutory framework for offers of UIM coverage pursuant to W. Va. Code § 33-631d reinforces the fact that offers of UIM coverage in West Virginia only apply to specific, scheduled vehicles on a policy of insurance. In fact, this Court has recognized that W. Va. Code §33-6-31d must be read in *pari materia* with W. Va. Code § 33-6-31. *See Cox v. Amick*, 195 W. Va. 608, 466 S.E.2d 459 (1995) ("We point out that because there is no question that both W. Va. Code, 33-6-31 [1988] and W. Va. Code, 33-6-31d [1993] relate to the provision of uninsured and underinsured

motorist coverages, it is appropriate for this Court to review those code sections in *pari materia* in order to ascertain the legislature's intent.").

The fact that the Legislature chose to include, as a component of a compliant offer of uninsured and underinsured motorist coverage, the requirement that the specific number of vehicles be included in the offer demonstrates that the Legislature contemplated offers only on owned vehicles. Giving consideration to that fact also reinforces the fact that the scope of W. Va. Code § 33-6-31 is limited to those owned autos that are subject to the offer requirements in W. Va. Code § 33-6-31d. It further reinforces the fact that offers of UIM coverage in West Virginia were never intended to include unidentified, classes of vehicles, such as non-owned autos, as Cooper suggests. Cooper's argument that Erie could "presume" or guess at the number of vehicles to be insured for purposes of UIM coverage simply does not comport with the language of the statute. [Respondent's Brief, page 21].

Cooper further asserts in his Respondent's Brief that "insurers are required to make multiple offers of UIM coverage in certain circumstances already." *Id.* However, multiple offers made at different times under the same policy because of a change of circumstance is wholly different from the requirement that there be multiple offers of UIM coverage for the same vehicle under different policies issued to different named insureds. This Court has never reached that conclusion.

D. COOPER'S CLAIM FOR UIM COVERAGE AS A CLASS II INSURED CONTRAVENES WEST VIRGINIA PUBLIC POLICY

This Court has repeatedly recognized the public policy differences between mandatory uninsured motorist coverage and optional underinsured motorist coverage. As this Court explained in *Deel v. Sweeney*, 181 W. Va. 460, 463, 383 S.E.2d 92, 95 (1989):

> The above statutory changes indicate that the Legislature does not view uninsured and underinsured coverage in the same light. Uninsured motorist coverage is required, while underinsured motorist coverage is optional. There are significant public policy reasons for the mandatory requirement of uninsured coverage. As *Bell* pointed out, the State has a legitimate interest in assuring every citizen is protected from the risk of loss caused by the uninsured motorist. *Bell*, 157 W.Va. at 627, 207 S.E.2d at 150. The purpose of optional underinsured motorist coverage is 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.

This Court's distinction, as noted in *Deel*, is the focus and intent of the two types of coverage. Uninsured motorist coverage has an underlying public policy of ensuring that all citizens are protected at some level from "the risk of loss caused by the uninsured motorist" *Id.* Conversely, underinsured motorist coverage provides an added layer of coverage that enables the insured to protect himself from losses that are underinsured.[4] *Id.* In other words, underinsured motorist coverage is not intended for the benefit of third parties. That benefit is only conferred when that third party is occupying a vehicle owned by the insured that is covered for underinsured motorist coverage.

In *Alexander v. State Auto Mut. Ins. Co.*, 187 W. Va. 72, 415 S.E.2d 618 (1992), this Court concluded that an attempt by a third party to the policy of insurance to obtain the benefits of underinsured motorist coverage was "far afield from what the Legislature intended in codifying the underinsured motorist coverage in Chapter 33 of the West Virginia Code," finding it unfair for a person, who chooses not to purchase underinsured motorist coverage to "still seek to benefit from someone else's choice" to do so. *Id.*, at 79, 625. Perhaps more importantly, this Court

[4] As with minimum limits of liability coverage required under West Virginia law, uninsured motorist coverage provides that same level of base coverage to protect West Virginia citizens. Underinsured motorist coverage, on the other hand, is coverage that extends over and above what West Virginia has recognized as the minimum amount of financial responsibility required for the operation of a motor vehicle in this state.

recognized in *Alexander* that a party must first qualify as an insured before West Virginia's public policy of broad indemnification could be considered. *Id.* at 75, 621.

Yet, what Cooper seeks in this case is to have this Court interpret the requirements for underinsured motorist coverage in such a way that the coverage is extended for the benefit of a third party, i.e. a Class II insured. Because underinsured motorist coverage extends to the named insured, his or her spouse and resident relatives whether they are in the owned vehicle, a non-owned vehicle, or even a bathtub, as recognized by the Mississippi District Court, underinsured motorist coverage is available to a Class I insured without having to make a separate offer of underinsured motorist coverage for vehicles that the insured does not own.

The only reason that an offer of underinsured motorist coverage would be required for non-owned autos would be to extend those same protections to a Class II insured. Because the Hoffman vehicle was insured for liability coverage by Hoffman, as the owner of that vehicle, Cooper's ability to recover the benefits of underinsured motorist coverage as a Class II insured was dependent on whether Huffman chose to purchase underinsured motorist coverage. Cooper's efforts to change stated public policy relating to underinsured motorist coverage should be flatly rejected.

E. CONCLUSION

The Court has never held that West Virginia law or public policy demand that insurers offer UIM coverage for the benefit of third parties using or occupying vehicles the named insured does not own and which are not specifically listed on the policy of insurance. A plain reading of W. Va. Code §33-6-31, in *pari materia* with W. Va. Code § 33-6-31d, establishes that the scope of those statutory provisions is limited to owned autos. The District Court's conclusion to the contrary conflicts with the statutory text and this Court's public policy decisions recognizing that

the purpose of UIM coverage is for the named insured to protect himself, if he chooses to do so, through the optional purchase of UIM coverage. For these reasons, Erie submits that the West Virginia Supreme Court of Appeals should answer the certified question in the negative and hold that insurers are not required to extend offers of underinsured motorist coverage to a class of non-owned autos that are insured for liability coverage.

Respectfully submitted,

ERIE INSURANCE PROPERTY & CASUALTY COMPANY,

By Counsel

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CERTIFICATE OF SERVICE

The undersigned, counsel for the Petitioner, Erie Insurance Property & Casualty Company, does hereby certify that on the 27th day of March, 2024, the foregoing Petitioner's Reply Brief was filed electronically with the Court via West Virginia's File & ServeXpress which will provide an electronic copy upon counsel of record.

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