IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

SCA EFiled: Mar 12 2024
02:02PM EDT
Transaction ID 72495193

No. 23-702

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

RESPONDENT'S BRIEF

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CERTIFIED QUESTION PRESENTED

This case is before the Supreme Court of Appeals of West Virginia upon the following certified question from the United States Court of Appeals for the Fourth Circuit:

> Does West Virginia Code § 33-6-31 require an insurer, who issues a commercial automobile insurance policy to a named insured providing liability coverage for particular owned vehicles and a class of non-owned vehicles, to offer underinsured motorist coverage for the class of non-owned vehicles?

Respondent, James Skylar Cooper, submits that the Supreme Court of Appeals of West Virginia should answer the certified question in the affirmative and hold, consistent with West Virginia statutory and common law (and Judge Berger's United States District Court opinion), that when insurers offer liability coverage for any auto, including non-owned autos, they must also extend an offer of underinsured motorist coverage for the protection of all insureds using that covered auto.

STATEMENT OF THE CASE

James Skylar Cooper ("Mr. Cooper" or "Respondent") was severely injured on August 9, 2019 as a result of a motor vehicle collision in West Virginia. [Joint Appendix ("J.A.") 14-15]. At the time of the collision, Mr. Cooper was a passenger in a vehicle owned by Rick Huffman ("Mr. Huffman" and "the Huffman vehicle"). [J.A. 14]. Mr. Cooper and Mr. Huffman were co-workers and were on their way to a job site on behalf of their employer, Pison Management, Inc. ("Pison"). [J.A. 14]. The Huffman vehicle was struck, head-on, by a vehicle owned and operated by Thelma Crystal White ("Ms. White"). [J.A. 30]. Based on Ms. White's clear liability for the collision and acknowledgment that Mr. Cooper's damages exceeded the liability limits provided by Ms. White's insurance, Ms. White's insurer offered Mr. Cooper the policy's liability insurance limits. [J.A. 78].

Upon receiving the policy limits offer from Ms. White's insurer, Mr. Cooper sought first-party coverage through any policies that provided him with underinsured motorist coverage. [J.A. 30]. At the time of the collision, Pison had a Commercial Auto Insurance Policy (the "Policy") through Erie Insurance Property & Casualty Company ("Erie"). [J.A. 30]. Through that Policy, Pison purchased liability coverage of $1 million for the vehicles it owned — a 2004 Chevrolet and a 2019 Dodge. [J.A. 419]. The 2004 Chevrolet is identified as "Auto 10" on the Policy's Amended Declarations and the 2019 Dodge is identified as "Auto 13." [J.A. 419].

In addition to purchasing liability coverage for the two vehicles it owned, Pison also purchased liability coverage for its employees' personal vehicles to cover liability

arising out of the vehicles being driven between Pison's facilities and its job sites.[1] [J.A. 419]. While Erie may have been trying to provide Pison with protection from vicarious liability claims resulting from Pison's employees' operation of the vehicles, what Erie did was actually make these non-owned vehicles "covered autos" on the Policy's Amended Declarations as "Auto 12." [J.A. 419].

ITEM 4. AUTOS COVERED			
AUTO	YR MAKE	VIN	ST
10	04 CHEV SILVERADO	1GCHK24U64E104071	WV
11	00 HIRED AUTO	IF ANY	WV
12	00 NON-OWNED AUTO	1 - 25 EMPLS	WV
13	19 RAM PU	1C6RR7FTXKS541983	WV

[J.A. 419].[2] Just like with the two vehicles it owned, Pison purchased $1 million in liability protection for these employees' vehicles while the vehicles were being used for Pison's business. [J.A. 419].

In addition to liability insurance, the Erie policy also provided Auto Medical Payments and Death Benefit Coverage by an endorsement to the policy which Erie identified as endorsement "ABBB01 (Ed. 8/88)" (the "medical payments endorsement"). [J.A. 451-452]. That endorsement is identified on the Amended Declarations, under Item 6, and is noted to be specifically applicable to only "Auto 10" (the 2004 Chevrolet) and "Auto 13" (the 2019 Dodge) – the vehicles Pison owned. [J.A. 419]. The endorsement is not listed as being applicable to all vehicles insured by the policy. [J.A. 419].

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[1]As part of Pison's business, employees used their own personal vehicles to drive to and from job sites. [J.A. 396-397]. Non-owned vehicles are defined by the Policy to include autos that Pison did not own, hire, rent or borrow that are used for the business. [J.A. 425].

[2]The reference to "1-25 EMPLS" apparently refers to the number of employees who potentially would be driving their own vehicles as part of Pison's business.

The Erie policy also provided uninsured motorist ("UM") coverage and underinsured motorist ("UIM") coverage through an endorsement which Erie identified as "AHWU01" (the "UIM Endorsement"). [J.A. 438-440]. Unlike the medical payments endorsement, the UIM Endorsement is specifically listed on the Amended Declarations, under Item 6, as an endorsement applicable to "ALL AUTOS." [J.A. 419]. Despite this designation, Erie claims that UIM coverage under the Policy only applies to the vehicles Pison owned and denied Mr. Cooper's claim for UIM coverage, despite acknowledging that Mr. Cooper qualifies as an insured. See *Petitioner's Brief*, p. 11, f.n. 2.

Pison had elected to add UIM coverage to the Policy through "Underinsured Motorists Coverage Offer" forms. [J.A. 454, 456]. The form that Pison first signed[3] provided the company with the option to purchase single-limit UIM coverage in the amount of $75,000 or $500,000, as well as an opportunity to reject UIM coverage altogether. [J.A. 454]. Despite the form not providing information as to the amount of the premium or cost for each level of coverage, Pison's representative selected the highest level of UIM coverage offered – $500,000. [J.A. 454]. The language on the form indicates that two (unidentified) vehicles are subject to the unlisted premium, but that no multi-car discount was provided in calculating the unlisted premiums. [J.A. 454].

In March 2016, Pison requested that Erie increase its liability, UM, and UIM coverage limits to $1 million. [J.A. 455]. As a result of that request, the Erie agent presented Pison with another opportunity to select or reject coverage on an

[3] The first form is dated February 8, 2016. [J.A. 454].

"Underinsured Motorist Coverage Offer" form.[4] [J.A. 456]. On the second form, Erie offered Pison single-limit UIM coverage of $75,000, $500,000, $1,000,000, or an option to reject UIM coverage completely.[5] [J.A.456]. Unlike the first offer, Erie actually included the premiums on the second form. [J.A. 456]. However, just like with the first form, Pison selected the maximum UIM coverage offered on the second form – $1 million. [J.A. 456].[6] Erie claims that Pison's selection of UIM coverage through these forms was limited to the two autos it owned and admits that it did not make an offer of UIM coverage for the non-owned autos.

Both Erie and Mr. Cooper sought declaratory judgment in the United States District Court for the Southern District of West Virginia. Upon submission of opposing motions for summary judgment on these issues, Judge Berger of the United States District Court determined, in her Memorandum Opinion and Order, that Erie failed to make a commercially reasonable offer of UIM coverage as to all insured vehicles and failed to obtain a knowing and intelligent waiver of UIM coverage as to the non-owned autos. [J.A. 13-26]. The District Court declared that Mr. Cooper shall be afforded UIM coverage under the Erie policy up to the $1 million policy limit, in accordance with *West*

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[4] This second form is not dated, but Erie's agent describes it as being provided in conjunction with Pison's March 2016 request for increased limits. [J.A. 456].

[5] Unlike the first form, the second form lists only one (unidentified) vehicle as being subject to the premium. [J.A. 456]. Notably, the Amended Declarations lists, under Item 5, the insurance and corresponding premiums and $103 is listed as the premium for UIM coverage for "Auto 10" - the 2004 Chevrolet. [J.A. 419]. However, inconsistent with the second form, the Declarations page indicates Pison Management was also charged a premium of $93 for "Auto 13," the 2019 Dodge. [J.A. 419].

[6] Both the Erie insurance agent and Pison's owner provided affidavits relative to the underlying litigation. [J.A.458-462]. Neither affidavit indicates that a discussion was ever had regarding an offer of UIM coverage for non-owned vehicles, but the affidavits do confirm that Pison made a knowing and informed selection of UIM coverage equal to the liability limits – $1 million. [J.A. 458-462].

Virginia Code §33-6-31, the West Virginia Insurance Commissioner's *Informational Letter 121*, and syllabus point 4 of *Thomas v. McDermitt*, 232 W.Va. 159, 751 S.E.2d 264 (2013) ("where 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 obtain a knowing and intelligent rejection by the insured"). [J.A. 26].

Erie appealed the District Court's ruling to the United States Court of Appeals for the Fourth Circuit.[7] Following oral argument, the Fourth Circuit determined that there was no West Virginia authority that definitively answered the question presented and certified the following question to the Supreme Court of Appeals of West Virginia:

> Does West Virginia Code §33-6-31 require an insurer, who issues a commercial automobile insurance policy to a named insured providing liability coverage for particular owned vehicles and a class of non-owned vehicles, to offer underinsured motorist coverage for the class of non-owned vehicles?

[J.A. 3].

Based on the arguments and law set forth below, Mr. Cooper requests that the Court answer the certified question in the affirmative.

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[7] While the case was on appeal, the Supreme Court of Appeals of West Virginia entered its decision in *Progressive Max. Ins. Co. v. Brehm*, 246 W.Va. 328, 873 S.E.2d 859 (W.Va. 2022). While Erie relied on the decision in the appeal, the United States District Court for the Fourth Circuit found that *Brehm* "is not controlling due to the distinct factual circumstances present in that case." [J.A. 10].

SUMMARY OF THE ARGUMENT

The 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. The West Virginia Legislature made no distinction between the types of liability policies that trigger this requirement and those that are exempt. Thus, no liability policies are exempt. This is consistent with longstanding West Virginia law that requires insurers to make UIM coverage available for injuries causally connected to the use (including occupancy) of a insured vehicle. *See* Syl. Pt. 6, *Keefer v. Ferrell*, 221 W.Va. 348, 655 S.E.2d 94 (2007) (*per curiam*); *see also* Syl. Pt. 3, *Adkins v. Meador*, 201 W.Va. 148, 494 S.E.2d 915 (1997). It is also consistent with the preeminent public policy of West Virginia that injured persons be fully compensated for his or her damages not compensated by an underinsured tortfeasor. *See State Auto Mut. Ins. Co. v. Youler*, 183 W.Va. 556, 564, 396 S.E.2d 737, 745 (1990).

Unlike the factual situations presented in the cases relied upon in *Petitioner's Brief*, Erie chose to make the non-owned vehicle in question a covered auto and Mr. Cooper was occupying that covered auto at the time he was injured. These important facts, combined with Erie's failure to make an offer of UIM coverage for the non-owned vehicles, are why Mr. Cooper is entitled to UIM coverage, as determined by Judge Berger. This outcome is entirely consistent with existing West Virginia case law. To accept Erie's position and answer the certified question in the negative, this Court must ignore decades of established common law and carve out an exemption that the West Virginia Legislature never made part of the West Virginia omnibus statute.

STATEMENT REGARDING ORAL ARGUMENT

Mr. Cooper submits that this case is appropriate for oral argument in accordance with Rule 20 of the *West Virginia Rules of Appellate Procedure*, as the certified question from the United States Court of Appeals for the Fourth Circuit involves an issue of fundamental importance as to how and when UIM coverage must be offered under the statutory framework of the omnibus provisions contained within *West Virginia Code* §33-6-31 and *West Virginia Code* § 33-6-31d.

STANDARD OF REVIEW

When presented with a certified question from a federal district court or federal appellate court, the Supreme Court of Appeals of West Virginia's standard of review is *de novo*. Syl. Pt. 2, *Westfield Ins. Co. v. Sistersville Tank Works, Inc.*, 2023 W.Va. LEXIS 455, 895 S.E.2d 142 (2023), (citing Syl. Pt. 1, *Light v. Allstate Ins. Co.*, 203 W. Va. 27, 506 S.E.2d 64 (1998)) ("[a] *de novo* standard is applied by this Court in addressing the legal issues presented by a certified question from a federal district of appellate court.").

ARGUMENT

I. FOR ANY AUTO ERIE CHOOSES TO INSURE AS A COVERED AUTO, ERIE MUST PROVIDE LIABILITY COVERAGE FOR BOTH THE NAMED INSURED AND THE DRIVER OF THE COVERED AUTO.

The mistake Erie made (which makes all the difference) was choosing to make Pison's employees' vehicles "covered autos' under the Policy. By doing so, Erie triggered the mandatory liability requirements under the West Virginia omnibus statute – *West Virginia Code* §33-6-31(a). Specifically, when an insurance company issues a policy "covering liability arising from ownership, maintenance or use of any motor vehicle" that policy must absolutely contain "a provision **insuring** the named insured and. . . **any other person . . . responsible for the use of or using the motor vehicle... against liability**." *See W.Va. Code* §33-6-31(a) (emphasis added).

Erie acknowledges that it was attempting to provide liability coverage to the named insured (Pison) for "potential vicarious liability arising from" an employee's use of the vehicle, but **not** provide liability coverage for the employee driver, in this instance Mr. Huffman. *See Petitioner's Brief*, p. 20.[8] This attempt was in direct violation of *West Virginia Code* §33-6-31(a) which requires all liability policies to provide coverage for the named insured **and** anyone using the covered vehicle. *See W.Va. Code* §31-6-31(a) (emphasis added).

The first step in this analysis is determining whether Erie wrote a liability policy that insured Mr. Huffman's vehicle as a covered auto. The clear answer to that question is yes. Then, if Erie wrote a policy covering the named insured (Pison) for liability arising out of the use of that vehicle, was Erie permitted to try to exclude liability

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[8] Erie claims "Mr. Huffman did not qualify as an insured for liability coverage" under the policy.

coverage for the actual driver of that vehicle? Based on the explicit requirements of *West Virginia Code* §33-6-31(a), the clear answer is no — a liability policy must provide coverage for both the named insured and also permissive users.

As it is clear that Erie wrote a liability policy covering the Huffman vehicle for liability, the question then becomes what other coverage Erie was required to offer for that covered auto. The answer to that question comes from the next section of the West Virginia omnibus statute – *West Virginia Code* §33-6-31(b). As discussed below, because Erie wrote a liability policy covering the Huffman vehicle, it was then required to offer UM and UIM coverage for that covered auto and failed to so.

Notably, there were other ways that Erie could have insured Pison's risk of vicarious liability without choosing to make the non-owned vehicles "covered autos" under the liability policy. For instance, Erie's policy already contains insuring language providing coverage to "anyone legally responsible for the conduct of anyone we protect." [J.A. 426]. This language provides coverage to Pison to the extent Pison would be legally responsible (vicariously liable) for the conduct of others. Erie could have included employees within the definition of those whose conduct may give rise to a vicarious claim. Neither one of these options would have made employee vehicles covered autos for which liability coverage for ownership, operation, or use would have been required.[9] Instead, Erie made the employee vehicles covered autos, which makes all the difference under the omnibus statute.

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[9] Erie could have also written vicarious liability coverage into a commercial general liability policy that did not specifically provide auto coverage for Pison's employees' vehicles, but insured the risk that a vicarious liability claim would be asserted arising out of an employee's use of a vehicle while working for Pison.

II. *WEST VIRGINIA CODE* §33-6-31 REQUIRES ERIE TO OFFER UIM COVERAGE FOR ANY AUTOS INSURED FOR LIABILITY, INCLUDING NON-OWNED AUTOS THAT ARE IDENTIFIED AS COVERED AUTOS ON THE POLICY.

Subsection (b) of the West Virginia omnibus statute requires insurers, like Erie, to offer UIM coverage each and every time a liability policy is issued. *W.Va. Code* §33-6-31(b). There is neither a distinction in the West Virginia omnibus statute nor in West Virginia common law that exempts non-owned vehicle liability policies from the requirement to offer UIM coverage. Contrary to Erie's claim that the omnibus provisions do not apply to liability policies for non-owned vehicles, the plain language of the statute requires UM and UIM coverage to be offered anytime a liability policy is written for a "covered" vehicle, whether the policy covers owned vehicles, non-owned vehicles, or both, like the Erie Policy at issue in this case. *See W.Va. Code* §33-6-31. The fact of the matter is the Huffman vehicle was a covered auto under the Erie policy – a fact Erie admits – and Mr. Cooper qualifies as an insured by occupying the covered auto – a fact Erie also admits. What Erie wants is for this Court to provide a carve out that the Legislature never made part of the West Virginia omnibus statute.

A. Section (a) of the West Virginia Omnibus Statute Identifies the Types of Liability Policies That Trigger a Mandatory Offer of UM and UIM Coverages.

Section (a) of the West Virginia omnibus statute specifically provides that no policy covering liability for the use of **any motor vehicle** may be issued in West Virginia unless it contains a provision insuring not only the named insured, but any other permissive user of the vehicle:

> (a) **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 a 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[. . .]

W.Va. Code §33-6-31(a), in part (emphasis added).

Despite the fact that the statute twice references "**any** motor vehicle," Erie focuses on the phrase "may be issued or delivered in this state to the owner of such vehicle" to try to argue that the statute only applies to liability policies covering owned autos. However, immediately following the phrase Erie references is the conjunction "**or**" linking it to the next phrase: "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...[.]" *W.Va. Code* §33-6-31(a), in part (emphasis added). Upon a full reading of the statute, the requirements apply to not only policies issued to owners, but also policies issued for **any** vehicle titled in the State of West Virginia – whether the owner is the person insuring the vehicle, or if it is a non-owner insuring the vehicle. *W.Va. Code* §33-6-31(b).

Erie's claim is perhaps most contradicted by the fact that section (a) continues on to specifically reference situations where the named insured purchases liability insurance for vehicles he or she does not own:

> 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), in part (emphasis added). Erie argues that reference to non-owned vehicles in this part is "to ensure that a person who is the custodian of the auto, even though not the owner, can provide permission." *Petitioner's Brief*, p. 22. However, if section (a) only applies to liability policies covering owned vehicles, reference to non-owned vehicles would not have been necessary. When permission was addressed, the Legislature would have simply referred to consent of the named insured, his or her spouse, and any custodian of the vehicle. If the omnibus statute does not apply to non-owned vehicles, the language cited above would not have been necessary or included. The fact that the statute specifically references non-owned vehicles demonstrates that the requirements of *West Virginia Code* §33-6-31 do apply to liability policies insuring both owned and non-owned vehicles, like the Erie Policy at issue here.

In West Virginia, "[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." *Jackson v. Belcher*, 232 W.Va. 513, 518, 753 S.E.2d 11, 16 (2013) (*citing* Syl. Pt. 3, *Meadows v. Wal-Mart Stores, Inc.*, 207 W.Va. 203, 530 S.E.2d 676 (1999)). When a statute is "clear and unambiguous" it will not be interpreted "but will be given full force and effect." Syl. Pt. 2, *State v. Epperly*, 135 W.Va. 877, 65 S.E.2d 488 (1951). Courts should look first to the statute's language and, if the plain meaning of the statute answers the question, the language must prevail and further inquiry is foreclosed. *See State ex rel. Gallagher Bassett Services, Inc. v. Webster*, 242 W.Va.

88, 94, 829 S.E.2d 290, 296 (2019) (*citing Appalachian Power Co. v. State Tax Dept. of W.Va.*, 195 W.Va. 573, 587, 466 S.E.2d 424, 438 (1995)). Applying the plain language of the omnibus statute results in but one conclusion – the requirements apply to liability policies that cover owned vehicles, as well as the more unusual circumstance, such as here, where the liability policy includes non-owned vehicles as a covered auto.

B. Section (b) of the West Virginia Omnibus Statute Requires UM and UIM Coverage Offers for the Same Types of Liability Policies Identified in Section (a).

Section (b) of the omnibus statute then addresses UM and UIM coverage. Leaving no doubt that the Legislature, in section (b), was referencing the same types of policies referenced in section (a), section (b) begins by referring back to the types of policies or contracts referenced in section (a): "Nor may **any such policy or contract**...[.] *W.Va. Code* §33-6-31(b), in part (emphasis added). The language "any such policy or contract" obviously refers to the same types of policies listed in section (a) – both those providing liability coverage for owned vehicles, as well as liability policies providing coverage for non-owned autos. Even Erie admits that the policies of insurance at issue in section (b) are the same as those referenced in section (a). [J.A. 247].

Section (b) continues on by requiring that all such liability policies or contracts provide an option for UM and UIM coverage:

> Provided further, **That such policy or contract shall** provide an option...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), in part (emphasis added). Again, the plain language of the statute results in but one conclusion – UM and UIM coverage must be offered with any policy or contract providing liability coverage, whether it be for owned or non-owned vehicles. *W.Va. Code* §33-6-31(b). There is absolutely nothing in the statute that indicates that the types of policies referenced in section (a) are different than the types of policies referenced in section (b). If there were, section (b) would not begin with the phrase "[n]or may any such policy or contract" but would rather identify the different policies for which section (b) applies.

C. Section (c) of the West Virginia Omnibus Statute Expands the UM and UIM Benefits to Occupants of the Covered Autos.

Erie argues that the omnibus statute is not intended to benefit third parties who are not the named insured. *Petitioner's Brief,* p. 31. Once again, the language of the omnibus statute demonstrates that Erie is wrong. Section (b) refers to the purpose of UM and UIM coverage being to "pay the **insured** all sums he or she is legally entitled to recover from the owner or operator of an uninsured or underinsured motor vehicle[...]" *W.Va. Code* §33-6-31(b) (emphasis added). The term "**insured**" is later defined in section (c) to include not only the named insured and his or her resident spouse, but also "**any person . . . who uses . . . the motor vehicle to which the policy applies**[...]." *W.Va. Code* §33-6-31(c), in part (emphasis added).[10] The benefit

[10] The definitions in *West Virginia Code* §33-6-31(c) state that they apply to the entirety of section 31 and, therefore, necessarily to *West Virginia Code* §33-6-31(b) where it requires the **insured** (the named insured, resident relatives, and anyone using the vehicle) to receive all sums he or she is legally entitled to recover as damages from an underinsured motor vehicle.

protections afforded by the UM and UIM provisions are intended to benefit not just the named insured and his resident spouse, but **ANY** permissive user of a motor vehicle insured under the policy. *See Starr v. State Farm Fire & Casualty Co.*, 188 W.Va. 313, 315-318, 423 S.E.2d 922, 924-927 (1992) (a permissive user's occupancy in a covered auto entitles that user to recover UM or UIM coverage); *see also W.Va. Code* §33-3-31(c) (definitions are applicable to entire section).[11]

Even Erie acknowledges that Mr. Cooper qualifies as an insured under the West Virginia omnibus statute. *See Petitioner's Brief*, p. 11, f.n. 2 ("There is no dispute in this case that Cooper would be considered a Class II insured"). All the while, Erie continues to reference the language in *West Virginia Code* §33-6-31 regarding "the motor vehicle to which the policy applies" and acts as if that language is only limited to owned vehicles. Unlike many policies where liability coverage is extended in certain circumstances for non-owned vehicles without the vehicles being made covered autos, Erie chose to make the non-owned vehicles covered autos in this case. Thus, under *West Virginia Code* §§ 33-6-31(c) the Huffman vehicle is certainly a vehicle to which the policy applies. Erie's efforts to imply otherwise are feigned.

Pison permitted its employees to use personal vehicles as part of its business. Mr. Cooper was using one of those vehicles with both Pison's and Mr. Huffman's permission. Even though Pison did not own the Huffman vehicle, Pison nevertheless chose to purchase liability insurance for that vehicle and Erie chose to make that vehicle a covered auto. By choosing to cover the auto, Erie's mandatory obligation to

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[11] This is an important distinction from the situation where a named insured purchases UIM coverage to protect him or herself, no matter what vehicle he or she is operating or occupying.

offer UM and UIM coverage for the vehicle and any permissive users was triggered. *See W.Va. Code* §33-6-31.[12]

While Erie alleges section (k) of the omnibus statute permits insurers to exclude coverage so long as the premium is appropriately adjusted, section (k) cannot relieve Erie and other insurers of their initial obligation to offer UM and UIM coverage – which is really the threshold question. *See W.Va. Code* §33-6-31(k); *see also Petitioner's Brief*, p. 15. While insurers may, under subsection (k), limit UIM coverage by properly adjusting the premium, that does not mean that UIM coverage need not be offered. Here, Erie never offered UIM coverage for these non-owned vehicles. Therefore, subsection (k) cannot save Erie from failing to make a commercially reasonable offer for vehicles it chose to insure for liability purposes. *See W.Va. Code* §33-6-31(k).[13]

D. Applying the West Virginia Omnibus Statute To Non-Owned Vehicles Does Not Present Erie With an Impossible Task.

Erie argues that the District Court's ruling presents it and other insurers with an impossible task of offering UIM coverage on an unspecified number of vehicles, or a class of vehicles, which are not specifically listed on the Policy. *Petitioner's Brief*, pp. 9,

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[12] While Erie is technically correct that the named insured would already have UIM coverage for its operation of non-owned vehicles because a Class I insured's coverage is broader, the fact of the matter is that the named insured here is Pison Management, a legal entity that will never itself operate a motor vehicle. Further, as discussed above, the liability coverage must cover the named insured, but also for permissive users. Thus, in terms of offering UIM coverage, that coverage must be offered for the named insured, but also permissive users.

[13] Mr. Cooper acknowledges that if the premium was adjusted appropriately, subsection (k) would arguably permit an insurer to exclude UIM coverage for the factual situation presented here – guest passengers in a non-owned vehicle. However, before any inquiry should be made into exclusions, the initial inquiry into whether coverage was offered must first be determined.

28.[14] However, this task is identical to the task all insurers face when determining an appropriate premium to charge for insuring a risk involving a non-owned vehicle. In fact, Erie faced the same task when it decided to offer liability insurance for the non-owned vehicles on the Policy at issue. Erie's underwriting department apparently determined an appropriate premium for the liability coverage based on the number of vehicles that may implicate the coverage. Specifically, on the Amended Declarations, Erie described the non-owned vehicles as "1-25 EMPLS," which means that Erie wrote the Policy with an understanding that Pison had up to twenty-five employees who could be operating personal vehicles on behalf of the company. [J.A. 167]. Based on that possibility, Erie determined an appropriate premium for the coverage despite not knowing exactly which vehicles the employees may be operating.[15]

Just like for liability coverage, Erie and other insurers can determine an appropriate premium for UM and UIM coverage based on the anticipated risk of loss. In fact, there are fewer unknowns in calculating the risk for UM and UIM coverage than are involved in calculating the risk of loss for liability coverage. For liability, the risk of loss relates to potential bodily injury and property damage to some unknown vehicle or property that may be damaged by the insured vehicle, as well as an unknown number of persons who may be harmed in a collision. Despite these unknowns, insurers

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[14] Erie complains that an insurer would have no way of identifying a specific number of vehicles within that class and would have no ability to comply with the requirements of *West Virginia Code* §33-6-31d for offers of UIM coverage." [J.A. 230]. The fact of the matter is Erie did identify the number of vehicles by specifying that employees "1-25" may have vehicles qualifying as non-owned vehicles under the Policy. [J.A. 419].

[15] As the insurer, if Erie needed more information to determine an appropriate premium, it could have requested that Pison identify the vehicles that its employees owned and used for work.

calculate the risk and affix premiums regularly. In determining the premium Erie charged Pison for insuring non-owned vehicles for liability, Erie likely considered these risks.

For UIM coverage, the risk is even less speculative. Erie is insuring the employee's own vehicle and the number of persons that typically ride in that vehicle when it is being used for Pison's business. Erie certainly had the opportunity to request information from Pison if it needed more information than the twenty-five employees it apparently used to determine the liability premium.[16] Additionally, Pison's UIM coverage for non-owned vehicles would only be implicated where there is underlying liability coverage for an insured's injuries and damages. Thus, Erie could presume that the at-fault party's liability insurance will at least provide the statutory minimum coverage, which lessens the risk of loss submitted under the UIM coverage. So, there is nothing unique about insuring non-owned vehicles for UIM coverage that causes Erie and other insurers to be unable to comply with the requirement of listing the number of vehicles subject to the coverage and calculating premiums.

Erie implies that not knowing the specific vehicles Pison employees may be operating makes it impossible to comply with *West Virginia Code* §33-3-31d and the West Virginia Insurance Commissioner's *Informational Letter No. 121. Petitioner's Brief*, pp. 9, 28. This is not the case. The statute and the Informational Letter simply require Erie to specify the number of vehicles which will be subject to the coverage.

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[16] The Policy only provides coverage for employee autos while such vehicles are being used for Pison's business. Thus, the Erie Policy does not provide coverage for a countless number of vehicles to which Pison's employees may have access. Rather, it only applies to the vehicles Pison's employees own and use for Pison's work – an accounting Erie is capable of determining, if it wanted to do so. It is certainly not an impossible task.

See W.Va. Code §33-6-31d(a); *see also* West Virginia Office of Insurance Commissioner, *Informational Letter No. 121*. Erie has not cited to anything that requires each insured vehicle to be described on the UIM offer form. So, just like for liability coverage, Erie could presume that twenty-five employees may have been operating their own vehicles in furtherance of Pison's business when determining an appropriate premium to charge for the coverage.

Erie argues that if the omnibus provisions apply to non-owned vehicles, multiple offers of UIM coverage would be required for a vehicle that is insured through multiple policies. In fact, insurers are already required to make multiple offers of UIM coverage in certain circumstances. For instance, just like with Pison, when an insured requests an increase in his or her liability limits, the insurer is required to make multiple offers of UIM coverage. Erie is apparently concerned that multiple insurers may be forced to offer UIM coverage on the same vehicle, but that is exactly what *West Virginia Code* §33-6-31 requires if an insurer writes a liability policy covering a vehicle the insured does not own. The insurer of the vehicle owner would write one liability policy and offer UIM coverage and the insurer of the non-owner must do the same when electing to provide liability insurance for the same vehicle. *W.Va. Code* §33-6-31. Multiple offers do not pose a problem. Insurer A's offer would apply to the coverage applicable through insurer A's policy, while insurer B's offer would apply only to the coverage available through insurer B's policy.

The fact is that Pison consistently selected the highest level of UIM coverage each time it was offered coverage. If Pison wanted to select UIM coverage for owned autos only and reject UIM coverage for non-owned autos, it and Erie could have done

that in accordance with section (k), assuming the premium was adjusted appropriately. *W.Va. Code* §33-6-31(k). However, what Erie misunderstands is that before an insurer is permitted to exclude coverage for a coverage it is required to offer, it is required to make a commercially reasonable offer of that coverage. *See Thomas*, 232 W.Va. 159, 751 S.E.2d 264; *see also Westfield Ins. Co. v. Bell,* 203 W.Va. 305, 507 S.E.2d 406 (1998) (*per curiam*). Erie simply failed to do so and, as a result, the law operates to provide Mr. Cooper with the same coverage that Pison had for liability limits, and the same that Pison selected for UIM coverage – $1 million. *Riffle v. State Farm Mut. Auto. Ins. Co.*, 186 W.Va. 54, 55, 410 S.E.2d 413, 414 (1991) (*citing* Syl. Pt. 2, *Bias* v. *Nationwide Mut. Ins.*, 179 W.Va. 125, 365 S.E.2d 789 (1987).[17]

E. The West Virginia Cases Cited By Erie are Distinguishable.

Erie cites to various West Virginia cases to support its argument; however, each of those cases are factually distinguishable and not determinative of the issue presented in this appeal. The first case cited is *Deel v. Sweeney*, 181 W.Va. 460, 383 S.E.2d 92 (1989). *Petitioner's Brief*, p. 15. There is a monumental difference between the facts of *Deel* and the facts here, which is determinative.

In *Deel*, a man named Johnny Deel was involved in an accident while driving a car that he owned and insured through Kemper Insurance. *Deel*, 181 W.Va. at 461, 383 S.E.2d at 93. The at-fault driver who struck Mr. Deel did not have enough liability coverage to cover Johnny's damages and Johnny did not have UIM insurance on his auto policy through Kemper Insurance. *Id.* However, Johnny lived with his father,

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[17] A portion of *Bias* relating to the information that must be contained in an offer of optional coverage was superseded by statute but is of no consequence to the issue raised in this matter.

Junior Deel, who had his own vehicle and separate insurance through Aetna. *Id.* Unlike the situation here, Johnny's vehicle was not an insured vehicle under Junior Deel's Aetna Policy. *Id.* 181 W.Va. at 463, 383 S.E.2d at 94. Accordingly, this Court found that Aetna was not required to provide UIM coverage at all and, thus, it could reasonably limit such coverage by excluding vehicles owned by family members which were not insured under the policy. *Id.* 181 W.Va. at 461-463, 383 S.E.2d at 93-95. Unlike Johnny Deel's car, the Huffman vehicle was insured by the Erie Policy because Erie chose to insure Pison's non-owned vehicles, which is what triggered its obligation to offer UIM coverage for non-owned vehicles. *See W.Va. Code* §33-6-31. This factual distinction makes all the difference in terms of what coverages are owed.

Erie also cites to *Alexander v. State Auto Mut. Ins. Co.*, 187 W.Va. 72, 415 S.E.2d 618 (1992). *Petitioner's Brief*, pp. 12, 17, 18. *Alexander* is also distinguishable. In *Alexander*, a passenger was injured when that passenger's driver (her sister) turned in front of another vehicle. *Alexander*, 187 W.Va. at 73, 415 S.E.2d at 619. The passenger attempted to obtain UIM coverage through the vehicle in which she was riding, which was also the at-fault vehicle providing her with liability coverage. *Id.* 187 W.Va. at 74, 415 S.E.2d at 620. The reason the Court ruled that the passenger was not entitled to UIM coverage was because the vehicle in which she was riding did not qualify as an underinsured motorist vehicle – the policy excluded vehicles "[o]wned by or furnished or available for the regular use of you or any 'family member'" from the definition of an underinsured vehicle.[18] *Id.*, 187 W.Va. at 74, 417 S.E.2d at 625-626.

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[18] The Court in *Alexander* commented that the claimant chose not to obtain UIM on her own policy and, therefore, should not benefit from another's prudence. *See Alexander*, 187 W.Va. 72, 79,

Unlike the situation in *Alexander*, the undersinsured motor vehicle here is Ms. White's vehicle, not the Huffman vehicle in which Mr. Cooper was riding. Additionally, unlike the passenger in *Alexander*, Mr. Cooper is not attempting to recover from both the liability and UIM coverage under the same policy. Even further unlike the situation in *Alexander*, the at-fault vehicle here, Ms. White's vehicle, meets the definition of an underinsured motor vehicle. Solidifying that the *Alexander* decision is not applicable here, this Court has expressly stated that *Alexander* is not controlling in situations where the plaintiff's injuries were not caused by the use of the motor vehicle in which the plaintiff was riding. *See Starr*, 188 W.Va. at 315-216, 423 S.E.2d at 924-925. This Court has also recognized, distinctive from *Alexander*, that a permissive user's occupancy in a covered vehicle entitles that user to recover UM or UIM coverage under the named insured's coverage. Syl Pt. 2, *Starr*, 188 W.Va. 313, 423 S.E.2d 922.

Erie also cites to the *Brehm* rental car decision by this Court in 2022. In its order certifying the question to this Court, the Fourth Circuit specifically determined that *Brehm* was not controlling due to the distinct factual circumstances present in that case. [J.A. 10]. *See also Progressive Max Ins. Co. v. Brehm*, 246 W. Va. 328, 873 S.E.2d 859 (2022). As noted by the Fourth Circuit, *Brehm* involved the question of whether a guest passenger in a rental car qualified for UIM coverage under the personal liability policy issued to the driver of the rental vehicle. [J.A. 10]. While this case neither involves a rental vehicle or implicates the rental car statute – *West*

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415 S.E.2d 618, 625. However, the fact of the matter is that Mr. Cooper had UIM coverage on the two insurance policies that provided coverage to his household and, thus, unlike the situation in *Alexander*, he did have UIM on the policies that covered his household.

Virginia Code 33-6-29(b)[19] – the most important distinction between *Brehm* and this case is the rental vehicle in *Brehm* was not listed as a covered auto and, therefore, not insured by the driver's policy. *Brehm*, 246 W. Va. at 332, 873 S.E.2d at 863.

Here, the Huffman vehicle was a covered auto. Therefore, because Mr. Cooper was occupying a covered auto, he is entitled to the coverages applicable to that covered auto. This is exactly why Justice Wooten, in his concurring opinion in *Brehm*, noted that the guest passengers in that case would have been permitted to recover (despite being a Class II insured) if the rental car qualified as a covered auto. *See Id.*, 246 W. Va. at 335, 873 S.E.2d at 866 (J. Wooten, concurring).

Erie continues to grasp onto this Court's holding in *Alexander*, referenced in Brehm, which noted that UIM coverage is intended to enable the insured to protect himself and not necessarily the guest passenger. *See Petitioner's Brief*, pp. 17-19; *see also* Syl. Pt. 3, *Id.* (citing *Alexander*, 187 W.Va. 72, 415 S.E.2d 618). However, Erie has failed to cite any case similar to the present case where a guest passenger who was occupying a covered auto was not entitled to UIM coverage applicable to that auto. Again, the critical distinction is that Mr. Cooper is entitled to UIM coverage because **he was occupying a covered auto under the policy**. In *Deel, Imgrund,* and *Brehm*, the person seeking coverage was seeking coverage from a vehicle that was not a covered auto. *See Deel*, 181 W.Va. 460, 383 S.E.2d 92; *see also Brehm*, 246 W. Va. 328, 873 S.E.2d 859; *see also Imgrund v. Yarborough*, 199 W.Va. 187, 483 S.E.2d

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[19] In *Brehm,* this Court noted that the statute relating to rental cars (*W.Va. Code* 33-6-29(b)) is narrow and only requires collision, comprehensive, property, and bodily injury coverage – not underinsured coverage. *Brehm*, 246 W.Va. 328, 334.

533 (1997) (motorcyclist sought excess UM coverage from parents' policy which did not insure motorcycle). Unlike those cases, Mr. Cooper is seeking coverage from a policy that insured the vehicle he was using. In *Alexander*, the guest passenger didn't qualify for the coverage because the policy had an owned by exclusion – not because Ms. Alexander was simply a guest passenger. *See Alexander*, 187 W.Va. 72, 415 S.E.2d 618. There is no owned by exclusion at issue here.

The distinction Mr. Cooper makes is not novel but, rather, is consistent with thirty-plus years of West Virginia case law. For instance, in 1992, this Court issued the *Starr* decision. *Starr*, 188 W.Va. 313, 423 S.E.2d 922. In that case, the guest passenger who occupied an insured vehicle obtained UIM coverage for that vehicle[20] based on her occupancy of the covered vehicle. *Id.* The Court simply held that she could not stack the policyholder's underinsured coverage for another vehicle that was not involved in the accident. *Id.* This is entirely consistent with Respondent's argument here – Cooper is entitled to UIM coverage from Erie because he was occupying a covered auto, just like Ms. Starr was entitled to UIM coverage from State Farm – the company that insured the vehicle Ms. Starr was occupying. Further, Ms. Starr was not occupying the other vehicles insured by the vehicle owner and was therefore not entitled to stack and obtain UIM coverage under those policies. Likewise, Mr. Cooper would not be entitled to stack and obtain UIM coverage for the other vehicles listed in the Erie policy because he was not occupying them.

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[20]Notably, the guest passenger obtained UIM coverage from two of her own policies, but also from State Farm, which insured the vehicle she was occupying at the time of the crash. *Starr,* 188 W.Va. at 314-315, 423 S.E.2d at 923-924.

What Erie misunderstands is that while prior case law may not provide Class II insureds (guest passengers) UIM coverage if the vehicle they are occupying is not a covered auto, longstanding West Virginia law does provide guest passengers the right to UIM coverage for covered vehicles they are using.[21] This law is supported by the preeminent West Virginia public policy that injured insureds be fully compensated for damages not compensated by a negligent and underinsured tortfeasor, as recognized by Judge Berger in her District Court decision in this matter. [J.A. 22].

Erie claims the omnibus statute cannot be applied as written as there would be no need for an insurer to separately offer UIM coverage for non-owned autos if UIM coverage for Class 1 insureds already extends to the occupancy of non-owned autos. *See Petitioner's Brief*, p. 13. Again, Erie either misunderstands the law or is trying to obscure the factual difference presented here. Erie chose to provide liability coverage for non-owned vehicles, not just when Class I insureds were using them, but also when Class II insureds were using them. Otherwise, the policy would not have covered an employee's use of his or her own vehicle. However, because Pison and Erie chose to make the employees' vehicles covered autos, they received the benefit of excess liability protection for those Class II insureds while they were operating their own vehicles. But that decision is what triggers the UIM offer requirements because those vehicles and their users are being provided liability coverage.

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[21] Erie seems to argue that Mr. Cooper's entitlement to UIM coverage as a Class II insured is limited to the owned autos, although the statute is clear that Mr. Cooper's use of any motor vehicle "to which the policy applies" is what entitles him to UIM coverage. *See W.Va. Code* §33-6-31(c); *see also* 24-148 *Appleman on Insurance Law & Practice* Archive § 148.1 ("[t]he Class II insured's injuries must arise out of the use or occupancy of **a covered motor vehicle**) (emphasis added).

Erie's decision to make the non-owned vehicles covered autos under the policy is what triggered the requirement that Erie offer UIM coverage. If Erie had not made the employees' vehicles covered autos, Erie would be right – Class I insureds would, in theory, still have enjoyed excess liability and UIM protection through the Erie policy (without the need for an offer) when those Class I insureds were operating a non-owned vehicle.[22] However, Pison and Erie chose to go further and listed employee vehicles as covered autos under the policy. By doing this, Erie was then required to provide liability coverage for Class II insureds operating the covered auto. That liability coverage is what then triggers Erie's duty to offer UIM coverage for the covered auto.

None of the cases cited by Erie provide an exception to the plain language of *West Virginia Code* §33-6-31 requiring UIM offers to be made anytime a covered vehicle is insured for liability. Additionally, none of the cases cited contradict the Respondent's application of the statute to the facts of this case. Thus, as the Legislature has also not provided an exception, the Court should apply the statute as written, which is completely consistent with longstanding West Virginia case law and public policy. Otherwise, the Court is carving out an exception the Legislature chose not to include in the law.

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[22] As noted above, the named insured here is Pison, a legal entity that itself would never be operating a vehicle and who has no spouse or resident relative that would enjoy the otherwise broad Class I insured protections of UIM coverage for any other vehicle operated.

F. Offering UM and UIM Coverage for Non-Owned Vehicles is Required in Other States with Similar Statutes and Without Specific Statutory or Common Law Exceptions.

Courts in multiple other states with similar omnibus statutes require insurers to offer UM and UIM coverage when insuring non-owned vehicles. In 2020, the United States Court of Appeals for the Third Circuit decided a case involving similar issues. *See Slupski v. Nationwide Mut. Ins. Co.*, 801 Fed. Appx. 850, 2020 U.S. App. LEXIS 6677, 2020 WL 1026515 (3d Cir. 2020). In *Slupski,* a person was injured after being rear-ended while driving a vehicle owned by his employer's customer. *Slupski*, 801 Fed. Appx. at 851. Nationwide insured the employer through a commercial auto policy which provided liability coverage for non-owned vehicles (like the customer's vehicle), but UIM coverage for only the owned autos. *Id.* The Third Circuit noted that Pennsylvania law[23] (like West Virginia law) requires that UM and UIM coverage be offered anytime a liability policy is issued in the State. *Id.* at 853. In that case, Nationwide failed to make a UIM offer to the insured and obtain a rejection of the coverage. *Id.* at 854. The Court found that Nationwide's attempts to exclude UIM coverage for non-owned vehicles through the policy language was an impermissible attempt to obtain a *de facto* waiver without complying with the statutory offer and waiver requirements. *Id.* at 856. The Court also found that the policy produced an asymmetry in the scope of UIM coverage as compared to liability coverage and

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[23] The statute in Pennsylvania provided, in pertinent part: **(a) Mandatory offering.** — No motor vehicle liability insurance policy shall be delivered or issued for delivery in this Commonwealth, with respect to any motor vehicle registered or principally garaged in this Commonwealth, unless uninsured motorist and underinsured motorist coverages are offered therein or supplemental thereto in amounts as provided in...[.] *75 Pa. Cons. Stat. Ann.* §1731(a) (1995) (emphasis in original).

therefore encroached on an area explicitly governed by the statutory offer and rejection requirements. *Id.* at 860. As such, UIM coverage was afforded to the employee despite the policy language. *Id.* at 860-861.[24]

Similarly, in a case involving Erie itself, the Supreme Court of Ohio found that where motor vehicle liability coverage is provided (even in limited form), UM and UIM coverage must be provided. *See Selander v. Erie Ins. Group.*, 85 Ohio St. 3d 541, 709 N.E.2d 1161 (1999) (superseded by statute). In *Selander*, two brothers were partners in an electrical company which had a commercial auto policy through Erie. *Selander*, 86 Ohio St. 3d at 546, 709 N.E.2d at 1165. While they were riding in a truck not owned by the partnership, they collided with another vehicle, killing one brother and injuring the other.[25] *Id.* 86 Ohio St. 3d at 546, 709 N.E.2d. at 1161. In reviewing Ohio's statute,[26] the Court concluded that nothing in the statute differentiated between liability policies for owned autos versus those insuring non-owned autos. *Id.* 86 Ohio St. 3d at

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[24] The rationale in *Slupski* is consistent with the opinion in *Harrington,* an Illinois case in which the Court held that where a commercial general liability policy provided liability coverage for non-owned autos used by employees, it was transformed into a motor vehicle policy, which then triggered the requirement to offer uninsured motorist coverage. *Harrington v. Am. Family Mut. Ins. Co.*, 332 Ill. App. 3d 385, 773 N.E.2d 98 (2002).

[25] Just like Erie's argument in this case, Erie argued in *Selander* that the policy only provided liability coverage for claims of vicarious liability arising out of the use of non-owned vehicles. *Selander*, 85 Ohio St. 3d at 543, 709 N.E.2d at 1163.

[26]At that time, Ohio's UM and UIM statute provided, in pertinent part: "No automobile liability or motor vehicle liability policy of insurance insuring against loss resulting from liability imposed by law for bodily injury or death suffered by any person arising out of the ownership, maintenance, or use of a motor vehicle shall be delivered or issued for delivery in this state with respect to any motor vehicle registered or principally garaged in this state unless both of the following are provided: (1) Uninsured motorist coverage...; (2) Underinsured motorist coverage... ." *See Ohio Rev. Code* §3937.18(A), in part (1988). *See also Selander*, 709 N.E.2d at 1162 (citing *Ohio Rev. Code* §3937.18(A)(1988)). The statute was then significantly altered in 1997. *See* footnote 29, below.

543, 709 N.E.2d. at 1163. Further, contrary to Erie's argument in this case that the statute only applies to policies issued to the owner of the vehicle, the Court held:

> The fact that a policy provides liability coverage for non-owned and hired motor vehicles is sufficient to satisfy the requirement of ...[*Ohio Rev Code* §3937.18] that a motor vehicle liability policy be delivered in this state with respect to any motor vehicle registered or principally garaged in this state.

Id. 86 Ohio St. 3d at 545, 709 N.E.2d. at 1164.[27] The Court's ruling directly contradicts Erie's claim in this case that the West Virginia omnibus statute (which is very similar to what Ohio's statute stated at the time *Selander* was decided) only applies to policies issued to the vehicle owner. In *Selander*, the Court determined that the coverage was incorporated by operation of law into the Erie policy. *Id.* 86 Ohio St. 3d at 546, 709 N.E.2d. at at 1165. This is the same ruling the District Court made in this case.

There are other states that do not require offers of UM and UIM coverage for liability policies covering non-owned vehicles. In fact, following the Ohio Supreme Court's decision in *Selander* (which involved a 1992 accident and policy), the Ohio legislature amended its statute in 1997 to permit insurers to exclude coverage in liability policies for vehicles, like non-owned vehicles, which are not specifically identified on the policy. *See Ohio Rev. Code Ann.* § 3937.18(L)(1997).[28] West Virginia does not have any such statute and, thus, just like the Ohio law as it existed at the time

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[27] Similar to Ohio's statute *West Virginia Code* §33-6-31(a) provides, in pertinent part "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" *See W.Va. Code* §33-6-31(a), in part.

[28] The relevant amendments to section (L) of the *Ohio Rev. Code* §3937.18 were added as a result of legislation which became effective in 1997 and after the relevant time period in *Selander.*

applicable to *Selander*, Erie was required to offer UM and UIM coverage when it decided to insure Pison's non-owned vehicles for liability purposes.

If Erie does not like the fact that the West Virginia omnibus statute requires it to offer UM and UIM coverage for non-owned vehicles, it should lobby the West Virginia legislature to change the law, like in Ohio and certain other states where state law has basically exempted non-owned vehicles from the requirement to offer UM and UIM coverage. For instance, in North Carolina, the Legislature has specifically exempted commercial motor vehicle liability policies and fleet policies from the requirement to offer UIM Coverage. *See N.C. Gen. Stat.* §20-279.21(b)(4) (2018), in part ("no policy of motor vehicle liability insurance applicable solely to commercial motor vehicles . . . or applicable solely to fleet vehicles shall be required to provide underinsured motorist coverage").

Additionally, Arizona's omnibus statute specifically includes a provision that an insurer is not required to offer, provide or make available UM and UIM coverage in connection with any liability policy that does not provide primary motor vehicle insurance, such as general commercial liability policies, excess policies, and umbrella policies. *See Ariz. Rev. Stat.* §20-259.01(I). Due to this provision, coverage was denied to an employee seeking to obtain UIM coverage under their employer's policy. *See Petrusek v. Farmers Ins. Co.*, 193 Ariz. 552, 975 P.2d 142 (Ariz. Ct. App. 1998).

Unlike the statutory exemptions in North Carolina and Arizona, West Virginia's statute contains no such exclusion. In fact, with regard to umbrella policies, the United States District Court for the Southern District of West Virginia previously held that the UM and UIM provisions of the omnibus statute apply to all policies, including umbrella

policies. *See Walker-Harrah v. Liberty Mut. Ins. Co.*, No. 2:97-1265, 2000 U.S. Dist. LEXIS 22770, at *26-27 (S.D. W.Va. Sept. 29, 2000). How the District Court in *Walker-Harrah* analyzed the omnibus statute and reached its decision is important to the issues presented in this case.

In reaching its decision, the District Court in *Walker-Harrah* recognized that other states differ on whether UIM coverage for umbrella policies must be offered.[29] *Id.*, at **26-28. However, the District Court found that the West Virginia statute "affords no distinction" and "[h]ad the Legislature intended to exclude umbrella policies from the statutory application, it could have done so." *Id.* at 28. Because it did not, the District Court found "no room for statutory construction" and held that the statute "must be afforded a mandatory connotation." *Id.* at 29 (citing *Bias*, 179 W.Va. at 127, 365 S.E.2d at 791). In doing so, the District Court concluded the following with regard to the omnibus provisions:

> [T]he court is of the view that **"any such policy or contract"** of bodily injury liability insurance covering liability arising from the ownership, maintenance, or use of any motor vehicle **means any kind of policy**, including an umbrella policy, **that covers liability** for bodily injuries arising out of the ownership, maintenance, **or use of a motor vehicle**.

Walker-Harrah, at *28 (emphasis added).

Just like in *Walker-Harrah*, and as determined by Judge Berger at the District Court level in this action, this Court should find that the omnibus statute provides no distinction for liability policies covering non-owned vehicles and afford the statute a

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[29] The District Court noted that because "the West Virginia omnibus statute differs from those of other jurisdictions in important particulars," it "cannot be governed by other state statutes which are distinguishable." *Id.* at *29.

mandatory connotation requiring an offer of UIM coverage for any policy covering liability for the use of a motor vehicle, like the non-owned Huffman vehicle.[30]

Other states which have not legislated an exemption of non-owned vehicles from the mandatory offer of UIM coverage have achieved the exemption through common law. For example, in South Carolina, the State Supreme Court ruled that when an insurer voluntarily provides liability coverage for non-owned vehicles, the insurer is not required to offer UIM coverage. *See Howell v. United States Fid. & Guar. Ins. Co.*, 370 S.C. 505, 510, 636 S.E.2d 626, 629 (2006). Similarly, the Supreme Court of Virginia ruled that mandatory offers of UM and UIM coverage were not required for non-owned vehicles. *Stone v. Liberty Mut. Ins. Co.*, 253 Va. 12, 16, 478 S.E.2d 883, 885 (1996). In *Stone*, the policy definition of an "insured" did not include the employee driver who was seeking coverage and, in fact, the driver stipulated that he was not covered under the liability provisions of the policy. *Stone*, 253 Va. at 14, 478 S.E.2d at 884. Here, Mr. Cooper does qualify as an insured.

Erie cited both *Stone* and the Fourth Circuit's decision in *Levine v. Employers Ins. Co.*, 887 F.3d 623 (4th Cir. 2018). *See also Petitioner's Brief*, pp. 25-26. However, the Fourth's Circuit's decision in *Levine* was based on the fact that the Supreme Court of Virginia had already ruled in *Stone* that insurers are permitted to limit UIM coverage to owned vehicles via the declarations. *See Levine*, 887 F.3d 623, 632. As the Fourth Circuit noted in *Levine*, a court siting in diversity is "bound to apply state law, not

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[30] Consistent with *Starr*, the Plaintiff in *Walker-Harrah* qualified for excess UIM coverage under the umbrella policy because she was a named insured under that policy - she was not simply a guest passenger attempting to stack coverage. *Walker-Harrah v. Liberty Mut. Ins. Co.*, 2000 U.S. Dist. LEXIS 22770, *3.

create it[.]" *Id.* Unlike the law in Virginia when the Fourth Circuit decided *Levine*, no state law exists in West Virginia which exempts liability policies covering non-owned vehicles from the requirement to offer UM and UIM coverage.[31] Thus, this Court should apply the West Virginia omnibus statute as written, just as the District Court did in the *Walker-Harrah* decision.

While Erie does not think that the West Virginia omnibus statute should require UM and UIM offers for liability policies insuring non-owned vehicles, the fact of the matter is the plain language of the statute does require as much. Erie has pointed to no law (like the laws enacted in other states) that would exempt insurers from offering such coverages for West Virginia policies. Accordingly, the plain language of *West Virginia Code* §33-6-31, alongside West Virginia's preeminent public policy that injured people should be fully compensated for damages not compensated by a negligent tortfeasor, together favor a finding that Erie was required to offer UM and UIM coverage to Pison for the non-owned vehicles it insured. *See Youler*, 183 W.Va. 556, 396 S.E.2d 737. This Court should apply the law as written instead of carving out an exception the Legislature failed to provide. In doing so, the Court should answer the certified question in the affirmative.

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[31]Additionally, unlike the situation here, at the time the Virginia cases were decided, the Virginia omnibus provisions already included a carve out for UIM coverage on an excess basis. See *Va. Code* §38.2-2206(J)(UIM offer not required where coverage is excess). No such carve out exists in West Virginia law.

III. ERIE MUST PROVIDE UIM COVERAGE BY OPERATION OF LAW.

When an insurer is required by statute to offer optional coverage and fails to prove an effective offer and a knowing and intelligent rejection by the insured, the coverage is included in the policy by operation of law. *Riffle*, 186 W.Va. at 55, 410 S.E.2d at 414 (citing Syl Pt. 2, *Bias*, 179 W.Va. 125, 365 S.E.2d 789). *See also W.Va. Code* §33-6-31d. Erie admits that it did not offer UIM coverage for non-owned vehicles to Pison.[32] Therefore, just as determined by Judge Berger at the District Court level, UIM coverage must be read into the Policy, up to the amount of Pison's liability insurance, by operation of law.[33] Syl. Pt. 2, *Riffle*, 186 W.Va. 54, 410 S.E.2d 413 ("when an insurer fails to prove an effective offer and a knowing and intelligent waiver by the insured, the insurer must provide the minimum coverage it was required to offer under the statute").

Notably, this is the exact result that occurred in the *Walker-Harrah* decision wherein Judge Copehaver determined that the West Virginia omnibus statute provided no distinction between the types of policies that trigger an duty to offer UIM coverage. *Walker-Harrah*, at *28. If the Legislature had intended to exclude certain types of liability policies from the requirement, it could have done so, just as other states'

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[32] For an offer to be deemed commercially reasonable, "an offer must state the nature of the coverage offered, the coverage limits, and the costs involved." *Thomas*, 232 W.Va. 159, 751 S.E.2d 264 *(*citing *Bias,* 179 W.Va. at 127, 365 S.E.2d at 791). Erie did not provide any form to Pison to offer UIM coverage for non-owned vehicles. Failure to provide an insured with adequate information to make an intelligent decision renders a selection/rejection form defective. *Id.*

[33] The fact that Erie did not charge a premium or attempt to limit coverage with an exclusion in the Policy has nothing to do with the threshold question as to whether or not Erie made a commercially reasonable and effective offer of UIM coverage, which is Erie's burden to prove. Syl. Pt. 2, *Bias*, 179 W.Va. 125, 365 S.E.2d 789.

legislatures have done. However, finding no room for statutory construction in the omnibus statute, Judge Copenhaver ruled that the insured was entitled to $1 million in underinsured coverage despite no premium being paid for such coverage. *Id.* at *35.

In all cases the insurance company is required to offer an amount "not less than" the liability limits. *W.Va. Code* §33-3-31(b), in part (insurer must provide option to purchase UIM coverage up to an amount not less than the liability limits). Just like in *Walker-Harrah*, Erie was required to offer was $1 million. Thus, pursuant to West Virginia law, Mr. Cooper is entitled to $1 million of UIM coverage by operation of law, as determined by United States District Court for the Southern District of West Virginia.

Accordingly, the Court should answer the certified question in the affirmative, which is consistent with West Virginia statutory and common law, and hold that insurers who offer liability coverage for vehicles, including non-owned vehicles, are required to offer UM and UIM coverage for those vehicles. Further, when UIM coverage is provided (by policy or by operation of law) for those non-owned vehicles, guest passengers like Mr. Cooper, who are occupying a covered vehicle at the time of a crash, are entitled to the UIM coverage for that vehicle.

CONCLUSION

The certified question posed by the United States Court of Appeals for the Fourth Circuit must be answered in the affirmative. The West Virginia omnibus statute requires, without distinction, that when an insurer chooses to offer liability coverage for a vehicle, the insurer must also offer UM and UIM coverage for that vehicle. Unlike the laws in other states, the West Virginia Legislature has made no distinction for non-owned vehicles. Unlike the situation with rental cars, where the vehicle does not qualify as a covered auto under the policy, if a non-owned vehicle qualifies as a covered vehicle for liability purposes, the insurer must also offer UM and UIM coverage for that vehicle.

Further, when a guest passenger is occupying that vehicle, he or she is entitled to the coverage the policy provides, or which is provided by operation of law. In this matter, Erie and Pison chose to make the employees' vehicles (non-owned vehicles) covered autos. The decision to insure those vehicles for liability coverage is what triggers the omnibus requirement that UIM coverage be offered. Here, where Erie failed to offer the coverage, it is included by operation of law. Accordingly, the certified question must be answered in the affirmative such that the United States District Court's decision that Mr. Cooper is entitled to UIM coverage in the amount of $1 million is upheld.

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CERTIFICATE OF SERVICE

The undersigned, counsel for the Respondent, James Skylar Cooper, does hereby certify that on the 12th day of March, 2024, the foregoing Respondent's 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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