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West Virginia's Automobile Insurance Policy Laws: A Practitioner's Guide

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WEST VIRGINIA'S AUTOMOBILE INSURANCE POLICY LAWS: A PRACTITIONER'S GUIDE

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I. INTRODUCTION

Automobile insurance in West Virginia is pervasive. Every car registered in this state must have, at a minimum, liability and uninsured motorist coverage. Nationally, and statewide, the automobile insurance industry has grown almost as quickly as the number of cars

produced each year.¹ With the growth of automobile insurance companies and the enactment of state statutes covering insurance company operations, automobile insurance policy law has grown more complex and convoluted.

This Article provides a roadmap of the automobile insurance policy laws of the State of West Virginia from a practitioner's perspective. Our purpose is to clarify the statutory laws governing automobile insurance policies in this state, and to provide some background for the common law interpretations of these statutes. This Article should provide a basic guide to the practice of automobile insurance policy law in the state of West Virginia where policy interpretation and statutory reference are at issue. This Article undertakes the first comprehensive analysis of automobile insurance policy law in this state and, as such, is written as a guide to the basic aspects of each element of the law.

Part Two of this Article details the history of the development of automobile insurance, including a brief history of insurance law in the United States and in West Virginia. Automobile liability insurance is discussed in Part Three, which assesses the mandatory liability insurance provisions required by statutory law essential to a basic understanding of the rights and responsibilities of West Virginia's automobile liability insurance companies. Part Four explores the statutory and common law requirements for medical payments (MEDPAY) insurance coverage. Uninsured motorist (UM) coverage is the subject of Part Five, which analyzes the mandatory coverage requirements and the numerous common law mandates for uninsured motorist coverage. And finally, Part Six explores the underinsured motorist (UIM) provisions of state law, and includes a definitional guide to the mandatory offer requirement of UIM insurance.

1. The gasoline powered automobile was developed in Europe by Etienne Lenoir in 1860. In 1893, J. Frank and Charles E. Duryea produced the first successful gasoline-powered automobile in the United States. They began commercial production of this model in 1896, the same year in which Henry Ford produced his first successful model in Detroit. Mass production of the automobile began in 1901 by Ransom E. Olds, whose company manufactured more than 400 "Oldsmobiles" in the first year of production. *Automobile*, COMPTON'S ENCYCLOPEDIA 134-36 (1994).

This Article presents with a survey of West Virginia's automobile insurance policy laws, and should serve as a springboard for further research and practice in this field.

II. HISTORY AND BACKGROUND OF THE LAW

In 1991, there were 168,995,000 licensed drivers in the United States.² Of these licensed drivers, in that same year, there were an estimated 31,300,000 motor vehicle accidents.³ As the number of licensed drivers increases, so does the need for automobile insurance.⁴

Where did the need for automobile insurance start? Why did an automobile insurance system develop rather than a personal responsibility system? While the complete answers to these questions are beyond the scope of this Article, what follows is a basic introduction to the development of automobile insurance policy law. This background should provide some insight into the purposes of insurance law and the reasons for its development.

A. *Why Insurance?*

In the United States, the right to redress from injuries sustained in an automobile accident has primarily been based on an allocation of fault.⁵ This right of redress is predicated on the notion that the negligent party should pay for the damages to the injured party or property caused by the tortfeasor's negligence.⁶ The majority of motorists choose to obviate the economic risk of accidents by purchasing auto-

2. ALAN I. WIDISS, UNINSURED & UNDERINSURED MOTORIST INSURANCE xxi (2d ed. 1992).

3. *Id.*

4. For example, in 1980, there were more than 100,000,000 licensed drivers in the United States. U.S. BUREAU OF THE CENSUS, *Statistical Abstract of the United States: 1993*, No. 1018, p. 616 (113th ed. 1993). In that same year, 24,000,000 were involved in at least one motor vehicle accident during that year. *Id.*, No. 1027, at 620. This is an increase of 7,300,000 accidents over an eleven year period.

5. WIDISS, *supra* note 2, at 3. See W. J. Heyting, *Automobiles and Compulsory Liability Insurance*, 16 A.B.A. J. 362 (1930), for a discussion of early financial responsibility laws.

6. WIDISS, *supra* note 2, at 3.

mobile liability insurance. Additionally, insurance can be purchased which covers the risk of an accident caused by a “financially irresponsible” motorist — an uninsured or underinsured motorist who is unable to pay the cost of his or her own negligence, and who has failed to secure enough automobile liability insurance for that purpose.

B. Development of the Law in the United States

The problem of financial irresponsibility and the need for automobile insurance dates from the beginning of the mass production of automobiles in the early 1900s.⁷ Initially, automobile insurance policies were “voluntary” policies. Under the voluntary system, insureds voluntarily contracted for an insurance policy to cover any expenses which might arise from future automobile accidents. Because insurance was not mandatory, these policies were exempt from regulation.⁸ The Fourth Circuit outlined its stance on “voluntary” versus “mandatory” insurance policies in *State Farm Mutual Automobile Insurance Co. v. Cooper*,⁹ holding that where a policy was issued to the named insured on his own request, and not issued pursuant to a state statute, the policy was not regulated by that statute. Thus, voluntary insurance policies created a contractual relationship between the insured and the insurance company which was not governed by state automobile insurance statutes.

In the mid-1920s, automobile insurance shifted from a “voluntary” system to a “certified” system, as states sought to protect the victims of highway accidents by securing their right to compensation.¹⁰ The

7. *Id.* at 4.

8. See *State Farm Mut. Auto. Ins. Co. v. Cooper*, 233 F.2d 500 (4th Cir. 1956). For other examples of “voluntary” policy decisions, see *McCann v. Continental Casualty*, 128 N.E.2d 624 (Ill. 1955) (involving a private passenger car, wherein the court held that the state’s financial responsibility law was not applicable due to the private contracting of the insurance policy); *Gray v. Rich*, 152 F. Supp. 520 (E.D. Ill. 1957) (holding that a privately contracted policy, voluntarily entered, was not subject to the state’s financial responsibility law); *Perkins v. Perkins*, 284 S.W.2d 603 (Mo. Ct. App. 1955) (holding that the Missouri Motor Vehicle Liability Act had no effect unless the insurance policy involved was required under that act).

9. *Cooper*, 233 F.2d at 500.

10. See Joseph P. Murphy & Ross D. Netherton, *Public Responsibility and the Unin-*

first legislation enacted was the Connecticut Financial Responsibility Law of 1925.¹¹ Specifically, if the accident was one causing death, personal injury, or property damages in excess of one hundred dollars, the Connecticut law authorized the Commissioner of Motor Vehicles to require an operator of a motor vehicle to prove his “financial responsibility to satisfy any claim for damages, by reason of personal injury to, or death of, any person, of at least ten thousand dollars.”¹² If a motorist was unable to produce such proof of financial responsibility, the Commissioner could suspend the motorist’s vehicle registration or could refuse to register any subsequent vehicle for that motorist.¹³

This initial attempt at state regulation of motorists provided power for the Commissioner of Motor Vehicles to regulate dangerous drivers, but only *after* the motorist had been involved in an accident. Additionally, the injured driver had to file a complaint with the Commissioner’s office in order to gain recourse under the tortfeasor’s automobile insurance policy. This meant that the dangerous motorist would go unnoticed by the Commissioner *unless* he was reported to the Commissioner’s office by the injured party.¹⁴

In 1925, proponents of “compulsory” insurance secured a victory in the State of Massachusetts with the enactment of a compulsory insurance requirement in that state.¹⁵ The Massachusetts Act required all motorists to secure automobile insurance as a prerequisite to vehicle registration. Massachusetts remained the only state to require compulsory automobile insurance prior to vehicle registration for the next thirty years.¹⁶

sured Motorist, 47 GEO. L.J. 700 (1959), for a detailed history of the evolution of coverage terms and the scope of protection given by insurance companies. Most of the early legislation induced motorists to obtain insurance coverage if they lacked the personal financial resources to satisfy a major damage claim.

11. 1925 Conn. Pub. Acts 183. This statute encouraged motorists to obtain automobile insurance to cover excess damages, and threatened motorists with a suspension of driving privileges in the event that they were unable to prove that they could pay claims which could arise from their negligence.

12. *Id.*

13. *Id.*

14. *See* WIDISS, *supra* note 2, at 5.

15. 1925 Mass. Acts 346. Although enacted in 1925, the compulsory insurance requirement did not actually take effect in Massachusetts until 1927.

16. WIDISS, *supra* note 2, at 5. From 1925 to 1965, only New York in 1956, *see*

In New Hampshire in 1937, and then later in many other states, legislatures began to require that all persons involved in accidents be able to offer proof of their financial responsibility to pay claims up to the limits required by each state's laws.¹⁷ This approach became known as a "security-type" approach, and was the forerunner of modern automobile insurance legislation in the United States.¹⁸ Because proof of ability to pay was required after an accident occurred, these "security-type" laws induced the prudent driver to obtain automobile liability insurance, at least in the minimum amount specified by each state's laws.¹⁹

The difference between compulsory and "security-type" insurance is that "security-type" insurance requires security only after an accident has occurred, or where the operator is classified as a "habitual offender."²⁰ The typical compulsory insurance statute requires that automobile liability insurance be purchased as a condition precedent to the issuance of valid license plates and the registration of the automobile.²¹ West Virginia and a majority of states follow the compulsory approach to automobile insurance.

C. *Development of the Law in West Virginia*

Effective October 1, 1981, West Virginia became a compulsory insurance state, requiring that all motorists show proof of liability insurance in order to register a motor vehicle.²² West Virginia Code §

N.Y. VEH. & TRAF. LAW § 312 (McKinney 1960), and North Carolina in 1957, *see* N.C. GEN. STAT. §§ 20-309 to -319 (Supp. 1957), enacted comparable compulsory requirements.

17. 1927 N.H. Laws § 54.1.

18. Murphy & Netherton, *supra* note 10, at 706.

19. WIDISS, *supra* note 2, at 8. The minimum amounts of coverage required under state financial responsibility laws vary in range from 5/10 to 25/50 (representing respectively, bodily injury per person/bodily injury per accident — property damage per accident in units of thousands of dollars). *Id.*

20. JOHN ALAN APPLEMAN & JEAN APPLEMAN, INSURANCE LAW AND PRACTICE § 4299, at 302 (1994).

21. *Id.* The validity of such a condition precedent rests on the notion of state police power, and has been upheld as valid by the Supreme Court. *See* Bell v. Burson, 402 U.S. 535 (1971) (holding that a statute which bars issuance of licenses to all motorists who do not carry liability insurance or who do not post security does not violate the Fourteenth Amendment).

22. W. VA. CODE § 17D-4-1 to -26 (1991 & Supp. 1994); W. VA. CODE § 17D-2A-1

17D-4-2 provides a minimum liability coverage requirement for all automobile liability policies: \$20,000 per person; \$40,000 per accident; and \$10,000 property damage.²³ West Virginia first required that all motorists carry an uninsured motorist policy (UM) in 1967, and that requirement is still mandatory for all state motorists.²⁴ Additionally, West Virginia requires that all automobile insurance companies offer an optional underinsured motorist (UIM) policy to all insureds; such coverage may be waived by the insured, but the initial offer is a mandatory requirement by statute.²⁵

III. LIABILITY INSURANCE

Liability insurance is the basic coverage in the West Virginia automobile insurance policy and covers tort damages of the automobile-injured party. The purpose of liability insurance is to provide a means of compensation for victims of automobile accidents.²⁶ West Virginia requires that all drivers carry at least a minimum amount of automobile liability insurance "as proof of financial responsibility."²⁷

As of July 1, 1994, there were 1,181,210 passenger vehicles registered in West Virginia.²⁸ All of the operators of these vehicles had to provide proof of liability insurance before the vehicles could be registered in this state. The required provisions of a standard automobile liability insurance policy, the steps to recovery on such a liability policy, and the persons covered under a such a liability policy are discussed in detail below.

(1991).

23. W. VA. CODE § 17D-4-2 (1991).

24. W. VA. CODE § 33-6-31 (1992). West Virginia first required UM coverage on June 6, 1967. The initial UM minimum required amount was 10/20/5 (in thousands). In 1979, the amount was raised to 20/40/10 (in thousands). From 1982 to 1988, UM coverage was elective if the insured waived such coverage in writing; however, in 1988, UM coverage was once again made mandatory by the legislature in its regular session.

25. W. VA. CODE § 33-6-31 (1992). UIM coverage has been optional in West Virginia since 1982.

26. W. VA. CODE § 17D-4-12 (1991 & Supp. 1994).

27. W. VA. CODE § 17D-4-12(a) (1991 & Supp. 1994).

28. Telephone Interview with Steven Dale, Department of Motor Vehicles of West Virginia (Mar. 16, 1995).

A. Mandatory Coverage Under Statutory Law

Effective on October 1, 1981, the West Virginia Motor Vehicle Safety Responsibility Act (WVMVSRA) required all motor vehicle owners in the state to obtain liability insurance coverage for all automobiles operated by West Virginia residents.²⁹ By making liability insurance mandatory, West Virginia has joined the majority of states which require a mandatory level of minimum liability insurance coverage for every driver on the road.³⁰ This compulsory insurance requirement followed the precedent established by Massachusetts in 1925.³¹

The mandatory requirement for automobile liability insurance is set forth in West Virginia Code § 17D-4-2.³² All drivers are required to

29. W. VA. CODE § 17D-2A-1 (1991). The WVMVSRA reads as follows: "The purpose of this article is to promote the public welfare by requiring every owner or registrant of a motor vehicle licensed in this State to maintain certain security during the registration period for such vehicle." *Id.* The WVMVSRA requires that *all* vehicles registered in the State of West Virginia be covered by an insurance policy which meets the state's minimum standards for coverage.

For an interpretation of the legislative intent behind the WVMVSRA, *see* *Myers v. Cline*, 437 S.E.2d 267 (W. Va. 1993) (holding that the WVMVSRA is designed to require mandatory coverage for motor vehicles owned in this state); *Jones v. Motorists Mut. Ins. Co.*, 356 S.E.2d 634 (W. Va. 1987) (holding that the legislature did not intend that the WVMVSRA protect a named insured's property from destruction by a teenage driver).

30. Twenty-six states, including West Virginia, and two United States territories make automobile liability insurance compulsory. APPLEMAN, *supra* note 20, § 4299, at 301 (1994). *See* CAL. VEH. CODE § 16020 (West 1994); COLO. REV. STAT. § 10-4-705 (Supp. 1994); CONN. GEN. STAT. § 38-327 (1993); DEL. CODE ANN. tit. 21, § 2118 (Supp. 1994); FLA. STAT. ch. 627.733 (1993); GA. CODE ANN. § 56-3403b (1994); HAW. REV. STAT. § 431:10C-308 (Supp. 1994); IDAHO CODE § 49-233 (1994); KAN. STAT. ANN. § 40-3104 (1994); KY. REV. STAT. ANN. § 304.39-080 (Baldwin 1994); MD. ANN. CODE art. 66½, § 7-101 (1994); MASS. ANN. LAWS ch. 90, § 1A (Law. Co-op. 1993); MICH. COMP. LAWS § 500.3101 (Supp. 1994); MINN. STAT. § 65B.48 (1994); MONT. CODE ANN. § 61-6-301 (1994); NEV. REV. STAT. § 698.190 (1994); N.J. STAT. ANN. § 39:6A-3 (West Supp. 1994); N.M. STAT. ANN. § 66-5-218 (Michie Supp. 1994); N.Y. VEH. & TRAF. LAW § 312 (McKinney 1994); N.C. GEN. STAT. § 20-310 (Supp. 1994); N.D. CENT. CODE § 26-41-04 (1994); OKLA. STAT. ANN. tit. 47, § 7-601 (West 1994); PA. STAT. ANN. tit. 40, § 1009.104 (1994); S.C. CODE ANN. § 46-750.119 (Law. Co-op. 1994); UTAH CODE ANN. § 31-41-4 (1994); P.R. LAWS ANN. tit. 9, § 2064 (1994); V.I. CODE ANN. tit. 20, § 701 (1994).

31. *See supra* text accompanying notes 15-16.

32. Liability insurance and "proof of financial responsibility" requirements are covered

prove an "ability to respond in damages for liability, on account of accident occurring subsequent to the effective date of said proof, arising out of the ownership, operation, maintenance or use of a motor vehicle. . . ."³³ The liability policy must cover, at minimum, \$20,000 for the death or personal injury of any one person in any one accident; \$40,000 for the bodily injury or death of two or more persons in any one accident; and \$10,000 for the injury or destruction of property of others in any one accident.³⁴

Additionally, the state has established the West Virginia Automobile Insurance Plan (WVAIP).³⁵ The WVAIP is an assigned risk pool in which all companies that write automobile insurance in West Virginia are required to participate.³⁶ In short, the WVAIP spreads the risk of bad drivers across the entire pool of insurance providers so that "bad risk" drivers can procure the minimum level of insurance coverage.³⁷ West Virginia Code § 33-20-15 outlines the purpose of the WVAIP, and allows agreements to be made among insurers "with respect to the equitable apportionment among them of insurance which may be afforded applicants who are in good faith entitled to but who are unable to procure such insurance through ordinary methods."³⁸

WVAIP limits coverage to the "operation, maintenance and use" of the insured automobile.³⁹ In *D & M Logging Co. v. Huffman*,⁴⁰ the

in W. VA. CODE §§ 17D-4-1 to -26 (1991 & Supp. 1994).

33. W. VA. CODE § 17D-4-2 (1991). See *West Virginia Compulsory Motor Vehicle Liability Insurance Regulations*, Informational Letter No. 22 (Jan. 1984) for a recital of the Department of Insurance regulations and sample insurance forms.

34. W. VA. CODE § 17D-4-2 (1991). These requirements are generally referred to as the "20/40/10 split limits requirement."

35. W. VA. CODE §§ 33-20-15, 33-20A-1 to -7 (1992) (outlining the statutory requirements for the WVAIP). See *D & M Logging Co. v. Huffman*, 427 S.E.2d 244 (W. Va. 1993), for a description of how the WVAIP operates.

36. *Huffman*, 427 S.E.2d at 246.

37. *Id.* With the risk of bad or high risk drivers spread over the entire pool of West Virginia's automobile insurance agencies, insurers are more willing to write policies for these drivers because the individual insurance agency loses less money on the overall claims filed.

38. W. VA. CODE § 33-20-15 (1992). Any rates approved by the insurance groups are subject to approval by the State Insurance Commissioner. See also W. VA. CODE §§ 33-20A-1 to -7 (1992) for additional WVAIP requirements.

39. *Huffman*, 427 S.E.2d at 246. In *Huffman*, the court held that a business automobile liability policy on a truck did not insure the truck owner because that truck had a

court outlined the parameters of the WVAIP. To expand the assigned-risk coverage under WVAIP beyond "operation, maintenance and use," would unnecessarily increase the exposure of insurance companies and would impose an undue hardship on many West Virginians, who cannot obtain automobile insurance but for the WVAIP, through increased insurance premiums.⁴¹ *Huffman* held that the language of the insurance contract governs the coverage parameters under a WVAIP policy, as long as the specified coverage is not contradictory of the "operation, maintenance and use" language in the statute and meets the mandatory minimum coverage requirements.⁴²

B. Cancellation and Non-Renewal

Because automobile liability insurance is mandatory, the insurance companies' cancellation and non-renewal of insurance policies must be limited.⁴³ In *Paxton v. Allstate Insurance Co.*,⁴⁴ the southern district court held that insurers can cancel an insurance policy only for those reasons expressly outlined in the controlling statute.⁴⁵ West Virginia

crane attached to it for the purpose of loading logs onto another truck. WVAIP coverage is limited to the operation, maintenance or use of the insured automobile when that vehicle is being used as an automobile — not when being used as a crane. *Id.*

40. *Id.* at 244.

41. *Id.* at 247. WVAIP does not require insurance companies to insure activities involving specialized equipment (such as cranes) because this is the function of a general liability policy; the WVAIP covers only automobiles, as the WVAIP's function is to provide automobile liability insurance.

42. *Id.* The court held that the truck involved was covered by the policy, when used as an automobile, but the attached crane was not covered as the policy expressly excluded it. This exclusion of coverage was held valid because the use of the crane on a stationary truck did not constitute an "operation, maintenance or use" of the truck as an automobile. *Id.*

43. Cancellation and non-renewal of automobile insurance policies are controlled by W. VA. CODE §§ 33-6A-1 to -5 (1992 & Supp. 1994).

44. 663 F. Supp. 99 (S.D. W. Va. 1987).

45. In *Paxton*, the court reasoned that a policy-holder should not be expected to know that legal recourse is available when a policy is canceled; rather, an ordinary individual would most likely assume that the cancellation was valid and obtain substitute insurance. The statutory language is controlling precisely because the insurance company's knowledge of the insured's rights is greater than the average insured; the controlling statute establishes an affirmative duty on the part of insurance carriers to maintain a policy unless one of the statutory exceptions allowing cancellation is present. *Id.* at 100.

Code § 33-6A-1 establishes the allowable reasons for insurance policy cancellation.⁴⁶ Additionally, statutory law requires that the insurance company may not cancel a policy without giving the insured thirty-day notice of the company's intention to cancel.⁴⁷

A violation of W. Va. Code § 33-6A-1 by the insurer does not give the insured a right to sue the insurer.⁴⁸ Rather, the express remedy, under the statute, is an administrative hearing.⁴⁹ The *Paxton* court did hold, however, that a private cause of action may exist where the insurance company is guilty of "malicious intent to injure or defraud."⁵⁰

46. W. VA. CODE § 33-6A-1 (Supp. 1994). The statute provides, in pertinent part, that an insurance company may cancel a policy *only* where one or more of the following reasons exists:

- (a) The named insured fails to discharge when due any of his obligations in connection with the payment of premium for such policy . . . ;
- (b) The policy was obtained through material misrepresentation;
- (c) The insured violates any of the material terms and conditions of the policy;
- (d) The named insured or other operator . . . :
 - (1) Has his operator's license suspended or revoked [for DUI or drug charges while driving];
 - (2) Is or becomes subject to epilepsy or heart attacks . . . ;
- (e) The named insured or an other operator . . . is convicted or forfeits bail for any of the following:
 - (1) Any felony or assault involving the use of a motor vehicle;
 - (2) Negligent homicide arising out of the use of a motor vehicle;
 - (3) Operating a vehicle under the influence of alcohol or of any controlled substance . . . ;
 - (4) Leaving the scene of a motor vehicle accident in which the insured is involved without reporting it as required by law;
 - (5) Theft of a motor vehicle . . . ;
 - (6) Making false statements in the application for a motor vehicle license;
 - (7) A third violation, within twelve months, of any moving traffic violation which constitutes a misdemeanor. . . .

Id.

47. *Id.* Any notice of cancellation for reasons other than those elaborated in W. VA. CODE § 33-6A-1 are void. W. VA. CODE § 33-6A-2 (1992).

48. *Paxton*, 663 F. Supp. at 101.

49. *See* W. VA. CODE § 33-6A-5 (1992) (establishing an administrative remedy, but providing for no alternative remedy for violation of statutory cancellation requirements).

50. *Paxton*, 663 F. Supp. at 101. For the standard of malicious conduct needed for a tort claim, *see* *Hayseeds, Inc. v. State Farm Fire & Casualty Co.*, 352 S.E.2d 73, 80 (W. Va. 1986).

The elements of cancellation notification were expressly detailed in *Conn v. Motorists Mutual Insurance Co.*⁵¹ A notice of cancellation "must be clear, definite and certain,"⁵² and must contain such a clear expression of intent that it would be apparent to an ordinary person that the insurance company intended to cancel.⁵³ Additionally, the insurance company must provide the insured with the exact reason(s) for policy cancellation.⁵⁴ Finally, the reason(s) for cancellation must conform to a reason delineated in West Virginia Code § 33-6A-1.⁵⁵

The leading case on non-renewal of liability policies is *Horace Mann Insurance Co. v. Shaw*,⁵⁶ which holds that, where an insurance policy is in effect for more than two years, the insured is entitled to the renewal protection of West Virginia Code § 33-6A-4.⁵⁷ In addition to this statutory non-renewal protection, the insurer must provide the insured with at least forty-five days *advance* notice of non-renewal intent, as well as the specific reason(s) for the non-renewal.⁵⁸

An insured's non-renewal protection extends to *all* additional policies issued by the insurer for additional or replacement automobiles. These additional policies need not have been in existence for two or

51. 439 S.E.2d 418 (W. Va. 1993). For a more in depth analysis of cancellation requirements, see W. VA. INS. REGS. §§ 114-3-1 to -3 (1994); *Termination of Automobile Liability Insurance*, Informational Letter No. 1 (Apr. 1967); *Procedure for Filing Policy Forms Relating to Cancellation*, Informational Letter 1-A (June 1967); *Cancellation or Non-renewal of Automobile Liability or Physical Damage Insurance Policies*, Informational Letter No. 35 (Mar. 1, 1986); *Usage of Vehicle Registration Lists as a Basis for Cancellation or Non-renewal of Policies*, Informational Letter No. 47 (Dec. 28, 1987).

52. *Staley v. Municipal Mut. Ins. Co. of West Virginia*, 282 S.E.2d 56 (W. Va. 1981) (providing the standard for sufficiency of notice).

53. Any ambiguities in the notice will be resolved in favor of the insured. *Id.*

54. W. VA. CODE § 33-6A-3 (1992) (stating that the notice of cancellation must contain the reason or reasons relied upon by such insurer for such cancellation).

55. See *supra* note 46.

56. 337 S.E.2d 908 (W. Va. 1985).

57. W. VA. CODE § 33-6A-4 (1992). This statute expressly states that an insurer may not fail to renew an outstanding automobile insurance policy or physical damage insurance policy which has been in existence for more than two years except for those reasons enumerated in the statute. These reasons are similar to those detailed in W. VA. CODE § 33-6A-1 (Supp. 1994). See *supra* note 46.

58. W. VA. CODE § 33-6A-4 (1992).

more years.⁵⁹ As in the case of policy cancellations, non-renewal of automobile liability insurance policies, for reasons other than those enumerated in the statute, does not give rise to a private cause of action for the aggrieved policy-holder. The policy-holder must grieve through the administrative process.⁶⁰ A private cause of action for non-renewal will only arise where the aggrieved insured can prove a tort claim of "malicious intent to injure or defraud" on the part of the insurance company.⁶¹

C. *Inclusion and Exclusion*

Inclusions and exclusions allow the expansion or limitation of policy coverage through specific contractual provisions. An insured may always negotiate for more insurance coverage through an inclusion clause; there are no statutory prohibitions to providing coverage above the statutory minimum requirements. Thus, inclusion clauses which add a higher level of coverage are always permitted in West Virginia.

Exclusion clauses, however, present several problems. An exclusion is simply a clause limiting some aspect of insurance coverage. Because the primary objective of liability coverage is the indemnification of injured third-parties, an exclusionary clause must not abrogate the tortfeasor's duty to indemnify. To that end, exclusionary language in a policy will be strictly construed against the insurer to promote this policy of indemnification.⁶²

There are several different types of exclusions which have been held valid in this state. First, the "named driver exclusion" allows a policy-holder to specifically name a driver who is to be excluded from coverage under the insurance policy;⁶³ to be effective, the exclusion must refer to the designated individual(s) specifically by name.⁶⁴ An

59. *Mann*, 337 S.E.2d at 912.

60. *Id.*

61. *Id.*

62. *See Marshall v. Fair*, 416 S.E.2d 67 (W. Va. 1992).

63. W. VA. CODE § 33-6-31(a) (1992).

64. *See Burr v. Nationwide Mut. Ins. Co.*, 359 S.E.2d 626 (W. Va. 1987) (requiring that an excluded individual be specifically named). In *Jones v. Motorists Mut. Ins. Co.*, 356 S.E.2d 634, 635 (W. Va. 1987), the court provided an example of a "named driver" exclu-

exclusionary clause may not designate a class of excluded individuals; such a clause has been held void by the court.⁶⁵ Additionally, the named driver exclusion is of no force or effect up to the limits of financial responsibility required by West Virginia Code § 17D-4-2.⁶⁶

Currently, under the “family purpose doctrine,” where an automobile is driven by a named excluded family member on the insured’s policy, the insurer must provide the mandatory minimum coverage for damages incurred by the family member’s negligence. The “family purpose doctrine” was explained by the court in *Freeland v. Freeland* as follows:

Where one purchases and maintains an automobile for the comfort, convenience, pleasure, entertainment and recreation of his family, any member thereof operating the automobile will be regarded as an agent or servant of the owner, and such owner will be held liable in damages for injuries sustained by a third person by reason of the negligent operation of the vehicle by such agent or servant. The family member is carrying out the purpose for which the automobile was provided.⁶⁷

The family purpose doctrine protects third-party victims by insuring that the owner of the automobile incurs liability for the actions of a family member — thus, protecting the third-party from the negligence of a financially irresponsible driver.⁶⁸

sion clause:

It is agreed that such insurance as is afforded by the policy shall not apply with respect to any automobile or its use while such automobile is being operated by the following designated individual:

DALE EDWARD JONES

The named assured accepts this endorsement as witness his signature.

X/s/Evelyn R. Jones.

Id. Note that the clause highlights the name of the excluded individual and that the signature of the insured party is required following the exclusion clause.

65. *Burr*, 359 S.E.2d at 626. In *Burr*, the court held that an exclusionary clause must designate a specific individual by name, and that an exclusionary clause designed to exclude coverage for “persons operating insured vehicles with dealer plates” as a class was void. *Id.* at 632.

66. *Jones*, 356 S.E.2d at 634.

67. 162 S.E.2d 922, 925 (W. Va. 1968), *overruled on other grounds*, *Lee v. Comer*, 224 S.E.2d 721 (W. Va. 1976).

68. *Id.* For further explanation of the family purpose doctrine, *see, e.g.*, *Bartz v. Wheat*, 285 S.E.2d 894 (W. Va. 1982); *Bell v. West*, 284 S.E.2d 885 (W. Va. 1981).

Initially, the southern district court, in *McKenzie v. Federal Mutual Insurance Co.*,⁶⁹ held that an express exclusion of a policy-holder's son was valid in accordance with West Virginia Code § 33-6-31(a) where there was an express contractual agreement, notwithstanding the family purpose doctrine. The *McKenzie* court held that an insured may only exclude a family member from the insurance policy by a restrictive endorsement which conforms to the statutory requirements of West Virginia Code § 33-6-31(a).⁷⁰ However, the *McKenzie* court failed to consider the exclusion statute in conjunction with the mandatory minimum coverage requirements of § 17D-4-2.

The Supreme Court of Appeals of West Virginia considered this issue in *Jones v. Motorists Mutual Insurance Co.*⁷¹ The *Jones* court restricted *McKenzie* by reading the exclusionary code provisions in conjunction with the statutory minimum coverage requirements. In *Jones*, the insured expressly excluded her teenage son from her insurance policy, to eliminate her "high risk" teenage son from her policy and avoid the resulting increase in insurance premiums.⁷² The *Jones* court held that an insured cannot so exclude a family member, or any driver, from coverage up to the mandatory minimum limits of West Virginia Code § 17D-4-2, notwithstanding the common law family purpose doctrine.⁷³ The court interpreted the legislative intent of Chapter 17 of the West Virginia Code as providing security for third-parties "who might suffer bodily injury or property damage from negligent drivers."⁷⁴ Above the mandatory minimum coverage requirements, West Virginia Code § 33-6-31(a) allows the insurer and the insured to agree to a "named driver exclusion."⁷⁵ However, the insured is free to

69. 393 F. Supp. 295 (S.D. W. Va. 1975). Exclusionary clauses are governed by W. VA. CODE § 33-6-31(a) (1992), which exempts "any persons specifically excluded by restrictive endorsement."

70. W. VA. CODE § 33-6-31(a) (1992). This section sets forth the requirements for an exclusion from the insured's liability policy. The family purpose doctrine is a common law remedy and, as such, is trumped by an express statutory mandate. *McKenzie*, 393 F. Supp. at 29.

71. *Jones*, 356 S.E.2d at 634.

72. *Id.* at 635.

73. *Id.* at 636.

74. *Id.* at 637.

75. *Id.* The minimum financial responsibility limitations are enumerated in W. VA.

contract away coverage rights for her own property, such as coverage for any damage to the insured's personal automobile.⁷⁶ In summary, an insured is free to contract away her own personal liability coverage through a named driver exclusion, but may not contract for third-party liability coverage below the statutory minimums.⁷⁷

In *Ward v. Baker*,⁷⁸ the Supreme Court of Appeals of West Virginia outlined the state's policy specifics for the "named driver exclusion" in automobile insurance policies. The *Ward* court held that a named driver exclusion is valid only where the excluded individual is specifically designated by name.⁷⁹ Where a valid named driver exclusion is present, and where the injured third-party seeks recovery under the family purpose doctrine, the insurance company need only provide coverage up to the mandatory minimum coverage limits. The family purpose doctrine does not prevail over a clear and unambiguous named driver exclusion.⁸⁰

Where the named insured receives a notice of insurance cancellation which is due to the legal violations of a covered party, the insured may exclude that party from his insurance coverage.⁸¹ Such an exclusion is allowed in order for the named insured to maintain insurance coverage, and to avoid punishing the named insured for the wrongdoing of others. This exclusion was expressly written into West Virginia Code § 33-6-31(a), and is a provision of which attorneys should be aware.

CODE § 17D-4-2 (1991), which provides that the insurer must cover at least \$20,000 for the insured's vehicle and at least \$40,000 for the bodily injury or death of the persons injured in an accident, as well as at least \$10,000 for the destruction of property involved in the accident which is not owned by the insured.

76. *Jones*, 356 S.E.2d at 636. Further, West Virginia Code § 17D-4-12(b)(2) is entirely silent on the issue of protection for the named insured's property, providing only for the "destruction of property of others." W. VA. CODE § 17D-4-12(b)(2) (Supp. 1994).

77. W. VA. CODE § 33-6-31(a) (1992).

78. 425 S.E.2d 245 (W. Va. 1992). *Ward* is similar to *Jones* in that the named driver exclusion was held to be valid in *Ward* only above the minimum coverage requirements.

79. *Id.* at 247; W. VA. CODE § 17D-4-2 (1991).

80. *Ward*, 425 S.E.2d at 250.

81. W. VA. CODE § 33-6-31(a) (1992).

D. *Omnibus Clauses and Permittees*

Generally, an automobile insurance policy covers the “insured,” or that person who secures the insurance policy and is a licensed driver of competent legal capacity. The purpose of an omnibus clause is “to extend coverage, in proper circumstances, to any person using the insured vehicle, and to afford greater protection to the public generally.”⁸² The Supreme Court of Appeals of West Virginia has construed an omnibus clause to be “remedial in nature,”⁸³ holding that such a clause “must be construed liberally so as to provide insurance coverage where possible.”⁸⁴

Omnibus clauses are governed by two different West Virginia Code provisions. West Virginia Code § 17D-4-12(b)(2) extends liability coverage to the insured and “any other person, as insured, using any such vehicle . . . with the express or implied permission of such named insured.”⁸⁵ West Virginia Code § 33-6-31(a) extends liability coverage to any other person with “the consent, express or implied, of the named insured or his spouse against liability for death or bodily injury.”⁸⁶ The former statute focuses on the insured’s permission, while the latter statute focuses on the insured’s consent. There is no practical difference between the two governing statutes.

Issues of coverage under an omnibus clause are resolved primarily through one of three judicial rules.⁸⁷ The “strict construction” or “con-

82. *State Farm Mut. Auto. Ins. Co. v. Allstate Ins. Co.*, 175 S.E.2d 478 (W. Va. 1970).

83. *Burr v. Nationwide Mut. Ins. Co.*, 359 S.E.2d 626 (W. Va. 1987).

84. *Id.*

85. W. VA. CODE § 17D-4-12(b)(2) (Supp. 1994).

86. W. VA. CODE § 33-6-31(a) (1991).

87. *Universal Underwriters Ins. Co. v. Taylor*, 408 S.E.2d 358, 361 (W. Va. 1991). Omnibus clause coverage in West Virginia, developed in a four-part evolution. Initially, courts extended omnibus coverage only when the bailee obtained express permission from the insured — this was known as the “strict construction” rule. From strict construction, courts moved to a “liberal” approach, also known as the “initial permission” rule, which provided that the bailee need only have secured permission initially from the insured in order to be covered by the insured’s policy. Next, the courts held that the “minor deviation” rule applied when omnibus coverage hinged on whether the bailee was using the vehicle according to the terms of the bailment. Finally, the Supreme Court of Appeals reversed its

version” rule requires use of the automobile precisely within the scope of permission granted.⁸⁸ Under the “minor deviation” rule, omnibus protection is extended to the bailee if the use made by the bailee is not a gross violation of the terms of the bailment.⁸⁹ Under the “liberal” or “initial permission” rule, the bailee only need have secured initial permission to use the vehicle; such permission entitles the bailee to use the vehicle while he or she retains possession, leaving the bailor or the insurer liable for any actions taken during this time.⁹⁰ The court has held that West Virginia is an “initial permission” state in accordance with the purpose of “liberalizing coverage.”⁹¹ Thus, if an insured permits another driver to operate his insured vehicle, the insured’s policy covers the results of the permittee’s negligence.

In *Burr v. Nationwide Mutual Insurance Co.*,⁹² the court considered the issue of an omnibus exclusion. The *Burr* insurance contract contained a restrictive endorsement clause within the insurance contract, with which the insured and the insurance company intended to exclude omnibus coverage for a class of persons.⁹³ The insured was a garage owner who attempted to narrow his omnibus coverage by inserting this exclusion clause in order to lower his rates. The clause stated that any automobile which was being used with dealer plates would not be covered unless it was being used in a business capacity.⁹⁴ The *Burr* court held that omnibus coverage is mandatory under West Virginia Code § 33-6-31(a), wherein the legislature has “demonstrated a clear intent to afford coverage to anyone using a vehicle.”⁹⁵ Thus, an exclusion clause which designates a class of persons to be excluded is not a valid omnibus exclusion. The *Burr* court held that, in order to be an

stance and adopted the “initial permission” rule, which currently is in effect in West Virginia.

88. *Id.*

89. APPLEMAN, *supra* note 20, § 4368.

90. *Taylor*, 408 S.E.2d at 361.

91. *Id.* at 364.

92. 359 S.E.2d 626 (W. Va. 1987).

93. *Id.*

94. *Id.* at 631.

95. *Id.* at 632.

effective omnibus exclusion, the insured must designate by name those individuals to be excluded.⁹⁶

An interesting quandary can arise where the permittee gives another person permission to drive the insured's automobile. In *Adkins v. Inland Mutual Insurance Co.*,⁹⁷ the bailee, James Canterbury, who had previously obtained permission to drive the insured vehicle, became intoxicated and a friend, Thomas Coffman, volunteered to drive him home in the insured's car. The court held that, although the purpose of omnibus clauses is to protect the general public from negligent drivers who are uninsured, the insurance policy did not cover Thomas Coffman because he had not received permission to drive from the named insured.⁹⁸

E. Limits of the Policy and Guests

In *Federal Kemper Insurance Co. v. Karlet*,⁹⁹ the court addressed per person liability limitations. In *Karlet*, the victim's children had filed a claim of loss of parental consortium and the court held that a claim for loss of consortium arising from an automobile accident, where the claimant is not the person suffering bodily injury, is restricted by the per person limit of liability in the policy.¹⁰⁰ Specifically, the claim for the injured person and any related claim for loss of consortium are covered within the same per person limit of liability; the recovery for both claims cannot exceed the per person limit.¹⁰¹

By statute, all automobile liability insurance policies must provide coverage for guests and invitees.¹⁰² West Virginia Code § 33-6-29

96. *Id.* at 633.

97. 20 S.E.2d 471, 472 (W. Va. 1942).

98. *Id.* at 473.

99. 428 S.E.2d 60 (W. Va. 1993).

100. *Id.* at 62.

101. *Id.* See also *Davis v. Foley*, 1995 WL 222036 (W. Va. 1995) (holding that the per person limitation applied to a recovery for the beneficiaries of an estate in a wrongful death action).

102. W. VA. CODE § 33-6-29 (Supp. 1994). See *Johnson v. Continental Casualty Co.*, 201 S.E.2d 292 (W. Va. 1973) (holding that an insurer is precluded from issuing an insurance policy which lacks coverage for guests).

provides, in pertinent part, that “[n]o insurer shall issue any policy which excludes coverage to the owner or operator of a motor vehicle on account of bodily injury . . . to any guest . . . who is a passenger in such vehicle.”¹⁰³ Any policy which purports to exclude coverage of guests or invitees is issued contrary to the statute and is void.¹⁰⁴

F. Insolvency, Immunity, and Non-Derivative Liability

The primary purpose of automobile insurance is to provide indemnification for injured third parties. In the past, tortfeasors and insurance companies used several defenses to avoid indemnification. Insolvency of the tortfeasor, immunity of the tortfeasor, and derivative liability have all been asserted in attempts to avoid financial responsibility. These defenses are no longer applicable in West Virginia.

Insolvency of the tortfeasor presents an interesting question for the injured third party.¹⁰⁵ If the insured is insolvent, can the third party recover from the insurer? The court answered this question in *Anderson v. Robinson*,¹⁰⁶ holding that the injured plaintiff may sue the tortfeasor's insurance company to satisfy a judgment against the insolvent insured. Specifically, the court held that when the plaintiff had obtained a judgment against a tortfeasor who then filed a petition for bankruptcy in federal court, the automatic stay provisions of 11 U.S.C. § 362 did not preclude the plaintiff from proceeding against the insolvent's insurer in an attempt to collect.¹⁰⁷ The *Anderson* court

103. W. VA. CODE § 33-6-29 (Supp. 1994).

104. *Johnson*, 201 S.E.2d at 297.

105. Insolvency issues are controlled by two statutory provisions. See W. VA. CODE §§ 17D-4-6, -12(f)(2) (1991 & Supp. 1994). Both provisions hold the insurance company liable to an injured third party, regardless of the insured's solvency.

106. 411 S.E.2d 35 (W. Va. 1991).

107. *Id.* Basically, this decision prevents insurance companies from dodging payment on the policy due to the insured's bankruptcy; this rationale follows the purpose of liability insurance, which is the protection of accident victims. See also *Credit Alliance Corp. v. Williams*, 851 F.2d 119 (4th Cir. 1988) (holding that 11 U.S.C. § 362 does not protect a guarantor from a creditor's action to enforce a default judgment); *Broy v. Inland Mut. Ins. Co.*, 233 S.E.2d 131 (W. Va. 1977) (holding that if an insured with liability coverage does not pay for damages due to his negligence, the injured party may proceed against the insurance company of the tortfeasor).

held that where liability clearly has been established, and following a judgment against the tortfeasor, the injured plaintiff may sue the tortfeasor's insurer to recover his damages.¹⁰⁸

Immunity also presents a quandary for the injured third party, as it has been used, in the past, as a defense for insurance companies who wished to avoid coverage payments. Generally, immunity is broken into four categories: charitable immunity; family immunity; worker's compensation immunity; and governmental immunity. West Virginia does not recognize charitable immunity as a defense to negligence. In *Adkins v. Saint Francis Hospital*,¹⁰⁹ the court held that charitable immunity was no longer a defense to an action in tort.

Family immunity is separated into various relational categories. Husband versus wife immunity was abolished as a defense in West Virginia, in *Coffindaffer v. Coffindaffer*.¹¹⁰ In *Lee v. Comer*,¹¹¹ child versus parent immunity was abolished. Further, in *Erie Indemnity Co. v. Kerns*,¹¹² parental versus child immunity was abolished. Therefore, when a child is involved in an accident and is injured, and the parent is at fault, the child can sue his or her negligent parent and ultimately collect from the parent's insurance company. Likewise, a parent who is injured can sue his or her negligent child. Similarly, when a wife is injured in an accident where the husband is at fault, the wife may sue her husband, and ultimately collect from the responsible insured's insurance company.

Worker's compensation provides an equivalent to immunity for the insured and the insurance company. Worker's compensation provides compensation for parties injured while on the job;¹¹³ therefore, if the

108. *Anderson*, 411 S.E.2d at 40.

109. 143 S.E.2d 154 (W. Va. 1965). The plaintiff brought an action in tort against a nonprofit hospital for injuries sustained as a result of the negligence of a hospital employee. The court held that there is no charitable immunity in West Virginia. *Id.* at 158.

110. 244 S.E.2d 338 (W. Va. 1978) (holding that husband versus wife immunity was abolished).

111. 224 S.E.2d 721 (W. Va. 1976) (holding the child versus parental immunity was abolished).

112. 367 S.E.2d 774 (W. Va. 1988) (holding that parental versus child immunity was abolished).

113. *See* W. VA. CODE § 23-2-6(a), (e) (1994).

injured party is entitled to worker's compensation benefits for an accident, that party is precluded from recovery under any other accident liability policy.¹¹⁴

Under the state constitution, the State of West Virginia is granted immunity.¹¹⁵ In *Pittsburgh Elevator Co. v. West Virginia Board of Regents*,¹¹⁶ the court qualified the state's immunity, by holding that the state is liable when it has purchased liability insurance, but only up to the limits of its insurance policy. Therefore, the state is immune over the limits of the policy. This is the "under and up to" principle for state liability.¹¹⁷ Political subdivisions are covered by the Governmental Tort Claims and Insurance Reform Act of 1986, which provides immunity to political subdivisions and regulates the cost of insurance.¹¹⁸ While immunity is provided for some activities, political subdivisions are still liable for negligent vehicle operation and for general negligence.¹¹⁹

Under the principles of non-derivative liability, an insurance company does not derive its liability directly from the insured. Rather, the insurance company has a duty to pay on an insurance policy which is issued prior to an "insured event."¹²⁰ In order for the insurance company to be liable on a policy, the insured must purchase that policy before an accident occurs.¹²¹ In addition to express limitations within the policy itself, an insured may render a policy void if that policy is obtained fraudulently after the occurrence of an "insured event."¹²² Thus, a fraudulently obtained policy, obtained after an accident, pro-

114. *Id.* See *Smith v. Monsanto Co.*, 822 F. Supp. 327 (S.D. W. Va. 1992) (holding that the legislative immunity afforded employers under the Worker's Compensation Act is designed to remove accidents from the common law tort system).

115. W. VA. CONST. art. VI, § 35.

116. 310 S.E.2d 675 (W. Va. 1983).

117. *Id.*

118. W. VA. CODE §§ 29-12A-1 to -18 (1992). The Act became effective on June 1, 1986 and provides immunity for seventeen different types of governmental actions. W. VA. CODE § 29-12A-5 (1992).

119. W. VA. CODE § 29-12A-5 (1992).

120. *Brown v. Community Moving & Storage, Inc.*, 414 S.E.2d 452 (W. Va. 1992).

121. *Id.*

122. *Id.* (holding that an automobile insurance policy obtained fraudulently after the occurrence of an "insured event" was void *ab initio*).

vides no coverage to the offending insured, leaving no coverage for the loss suffered by an injured third party, but a valid policy creates a duty of payment on the part of the insurer.

G. Operation, Maintenance, and Use

Automobile liability coverage is extended to the "operation, maintenance and use" of the insured vehicle. The phrase "arising out of operation, maintenance or use" in automobile liability insurance policies has been given a broad interpretation by the courts.¹²³ West Virginia Code § 33-6-31(a) provides that insurance policies issued in this state must provide coverage for the loss or damage occasioned by the "negligence in the operation or use" of the vehicle.¹²⁴ In *Baber v. Fortner by Poe*,¹²⁵ the court, in a wrongful death action where the tortfeasor had shot the decedent from the cab of his pickup truck, concluded that the death was not a result of the "operation, maintenance or use" of the vehicle, and thus the tortfeasor's automobile insurance did not cover the injury. In *Johnson v. State Farm Automobile Insurance Co.*,¹²⁶ the court considered the definition of "operation, maintenance, and use," and recognized that "use" was a much broader term than "operation." The *Johnson* court recognized that "use" of a vehicle can include: the loading and unloading of a vehicle; actions taken by a bus driver to maintain order; explosion of a beer bottle due to the heat inside a vehicle; accidental asphyxiation of a minor child resulting from the mother's use of a vehicle to commit suicide; and an attack by a dog on a passenger.¹²⁷

123. *Baber v. Fortner by Poe*, 412 S.E.2d 814, 817 (W. Va. 1991); *Dotts v. Taressa J.A.*, 390 S.E.2d 568, 574 (W. Va. 1990) (holding that "operation, maintenance, or use" should be given a wide interpretation, making it sufficient if the coverage event falls within any one of these terms).

124. W. VA. CODE § 33-6-31(a) (1992).

125. *Baber*, 412 S.E.2d at 816.

126. 438 S.E.2d 869 (W. Va. 1993).

127. *Id.* (citing *Farmers Ins. Co. v. Till*, 825 P.2d 954 (Ariz. 1991) (holding that an attack by a dog on a passenger constituted "use"); *Gov't Employees Ins. Co. v. Batchelder*, 421 So.2d 59 (Fla. Dist. Ct. App. 1982) (holding that the explosion of a beer bottle due to the hot interior of a vehicle parked in the sun constituted "use"); *Ohio Casualty Ins. Group v. Robinson*, 338 N.W.2d 898 (Mich. 1983) (holding that "use" includes the injuries resulting from a slip and fall accident which occurred during the loading and unloading of a

H. *Intentional Exclusion Clauses*

Automobile insurance typically excludes coverage for intentional conduct.¹²⁸ In *State Automobile Mutual Insurance Co. v. Skeens*,¹²⁹ the insurance policy contained an exclusion for intentional conduct where the insured "intentionally causes bodily injury or damage," and the court has held that this exclusionary clause was valid. However, subsequent to *Skeens*, the court has held that an exclusion clause for an intentional tort is not valid up to the amount of statutorily mandated liability insurance; thus, the exclusion would only apply to amounts which exceed the statutory minimum.¹³⁰ West Virginia's insurance laws provide recourse for those injured by the negligence of other drivers; the court upheld this policy by providing for coverage up to the minimum mandatory requirements to protect the interests of third-party injured persons as required by West Virginia Code § 17D-2A-1.¹³¹

vehicle); *Classified Ins. Corp. v. Vodinelich*, 354 N.W.2d 63 (Minn. Ct. App. 1984) (holding that the accidental asphyxiation of a minor child resulting from the mother's use of a vehicle exhaust to commit suicide constituted "use"); *Suburban Serv. Bus Co. v. National Mut. Casualty Co.*, 183 S.W.2d 376 (Mo. 1944) (holding that an action taken by a bus driver to maintain order constituted "use").

128. *State Auto. Mut. Ins. Co. v. Skeens*, 661 F. Supp. 1109 (S.D. W. Va. 1987).

129. *Id.* at 1111. *Skeens* must be one of the more colorful cases in West Virginia common law. Harry Skeens, the insured, intended to drive to a friend's wedding on the day of the accident. He and his wife were estranged and in the process of getting a divorce. While traveling to the wedding, Mr. Skeens became agitated about the general failure of his own marriage and decided to return home. Upon doing so, Mr. Skeens saw his ex-wife with her new companion, and promptly began a fight. Ms. Maynard, Mr. Skeens ex-wife, escaped the fight and began walking home down the road. Mr. Skeens followed her in his truck, and ran into Ms. Maynard at about 15-20 miles per hour; eventually, Mr. Skeens hit Ms. Maynard again with his truck. During this incident, Mr. Skeens also pulled a shotgun from his gun rack and began to beat Ms. Maynard with it, as the gun was malfunctioning and would not fire. Mr. Skeens admitted that his acts were intentional. Ms. Maynard attempted to recover some of her costs under her own automobile insurance policy, claiming that Mr. Skeens was an uninsured motorist.

130. *Dotts*, 390 S.E.2d at 570.

131. *Id.*; W. VA. CODE § 17D-2A-1 (1991).

I. Other Insurance Clauses

Due to the pervasive nature of insurance coverage, insureds often need or have overlapping policies to obtain the necessary insurance coverage. Accordingly, most insurance policies contain "other insurance" clauses to deal with priority problems between the various insurance policies obtained. There are three main types of other insurance clauses: pro-rata; escape; and excess. A "pro-rata" clause provides for an apportionment of payment obligations among insurance companies and is the most common "other insurance" clause. An "escape" clause provides that an insurance company is not liable for payment where another insurance company covers the same accident. An "excess" clause provides that the insurance company is only liable for any excess amount above the policy limits of any other insurance coverage; the other policy is primary, while the subject policy is secondary. "Other insurance" clauses present problems for the courts because, in certain instances, these clauses can clash.

The Supreme Court of Appeals of West Virginia adopted a bright line rule that when a pro-rata clause and an excess clause appear in the automobile liability policies of both the driver and the owner of the automobile, the insurance policy of the car owner is the primary policy and must bear the whole loss, within the limits of the policy.¹³² In other words, the owner's policy follows the car. When several policies insure the same risk, "the policy insuring the liability of the owner of a described vehicle has the first and primary obligation."¹³³

A pro-rata clause is one within the policy which apportions a loss when there are other, valid and collectible insurance policies.¹³⁴ How-

132. *Allstate Ins. Agency v. State Auto. Mut. Ins. Co.*, 364 S.E.2d 30 (W. Va. 1987) (holding that the owner's insurance is primary and follows the car). *See also* *State Farm Mut. Auto. Ins. Co. v. Universal Underwriters Ins. Co.*, 383 S.E.2d 791 (W. Va. 1989) (holding that the owner's liability policy is primary despite pro-rata and excess clauses).

133. *American Sur. Co. v. Canal Ins. Co.*, 258 F.2d 934 (4th Cir. 1958).

134. *Allstate Ins. Agency*, 364 S.E.2d at 32. *See also* *Nationwide Mut. Ins. Co. v. State Farm Mut. Auto. Ins. Co.*, 209 F. Supp. 83 (N.D. W. Va. 1962) (holding that excess clauses are repugnant, and that pro-rata liability applies); *State Farm Mut. Auto. Ins. Co. v. U.S.F. & G. Co.*, 490 F.2d 407 (4th Cir. 1974) (holding escape and excess clauses repug-

ever, merely inserting a pro-rata clause within an insurance policy does not relieve the primary insurer of its duty to defend the injured insured; on the contrary, the primary obligation to defend and indemnify the insured follows the automobile, rather than the driver, to facilitate an orderly determination of priorities among carriers which insure the same risk.¹³⁵ The courts do not consider a pro-rata clause within the driver's policy as other insurance, and accordingly treat the pro-rata provision as non-operative.¹³⁶

J. Stacking

"Stacking" of automobile liability coverages refers to the piling up of multiple coverages from multiple policies, or the piling up of coverages of multiple vehicles in a single policy, when there is only one loss.¹³⁷ Stacking of automobile liability policies in West Virginia is not permitted where there is express anti-stacking language in the policy's limitation of liability clause.¹³⁸ According to *Shamblin v. Nationwide Mutual Insurance Co.*,¹³⁹ where the anti-stacking provision is plain and unambiguous, it will be applied. The court held that there is no statutory provision violated where an anti-stacking provision appears in the limitation of liability clause, regardless of the number of automobiles involved in the accident.¹⁴⁰

nant, and that pro-rata liability applies).

135. *Allstate Ins. Agency*, 364 S.E.2d at 33.

136. *Id.*

137. When stacking is allowed, recovery is permitted up to the limits of each insurance policy. When more policies can be reached for coverage, a victim is more likely to receive full compensation for all of his injuries. Stacking may also be referred to as "pyramiding," "aggregating," or "pooling." "Intrapolicy stacking" involves one policy which provides coverage for multiple vehicles. "Interpolicy stacking" involves multiple policies, and may involve multiple vehicles. "Horizontal stacking" refers to the named insured seeking to stack his own policies. "Vertical stacking" refers to the named insured seeking to stack his own policy onto someone else's policy. R. JERRY, *UNDERSTANDING INSURANCE LAW* 678 (1987).

138. *Shamblin v. Nationwide Mut. Ins. Co.*, 332 S.E.2d 639 (W. Va. 1985).

139. *Id.*

140. *Id.* at 646. In *Shamblin*, one automobile liability policy covered three commercial trucks. Shamblin wanted to stack the liability coverage of those three trucks, covered under the same policy, to pay for the judgment. The court held that liability anti-stacking language was valid. *See also* *Tynes v. Supreme Life Ins. Co. of Am.*, 209 S.E.2d 567, 569 (W. Va. 1974) ("Where provisions in an insurance policy are plain and unambiguous and where such

K. Choice of Law

Generally, the law of the state in which the policy is issued governs, and its law applies to the policy. However, like most legal generalities, there are exceptions. One notable exception occurred in *Charles v. State Farm Mutual Insurance Co.*,¹⁴¹ where the court held that an insurance policy issued in Kentucky for a Kentucky resident was governed by West Virginia law with regard to the minimum policy limits. The accident occurred in West Virginia, but the insured was a Kentucky resident and the liability policy was formed in Kentucky. The *Charles* court ignored the contract interpretation rule in order to gain recovery for the injured insured; under Kentucky law, recovery would not have been permitted under the plain language of the contract, but West Virginia law allowed recovery up to the minimum statutory limits.¹⁴² Thus, *Charles* does not present a rule, but an exception made in order to sustain a favorable outcome.

Additionally, the Supreme Court of Appeals of West Virginia recently held that forum non conveniens may be applied by a circuit court to automobile insurance cases.¹⁴³ Forum non conveniens is a common law doctrine which allows a court, in its sound discretion, to decline to exercise jurisdiction to promote the convenience of witnesses and the ends of justice.¹⁴⁴ This is true even where jurisdiction and venue are authorized by statute.¹⁴⁵ The court held that, where the case involves the interpretation of an insurance contract formed in one state to be performed in another, the law of the state of formation shall govern, unless another state has a more significant relationship to

provisions are not contrary to a statute, regulation or public policy, the provisions will be applied and not construed.”).

141. 452 S.E.2d 384 (W. Va. 1994).

142. *Id.* at 390.

143. *Cannelton v. Aetna Casualty & Surety Co.*, 1994 WL 692945 (W. Va. 1994). *See also* *Norfolk & Western Railway Co. v. Tsapis*, 400 S.E.2d 239 (1990) (adopting the common law doctrine of forum non conveniens for courts of record in West Virginia).

144. *Cannelton*, 1994 WL at 692945.

145. *Id.* In *Cannelton*, the court also held that the circuit court's decision to invoke the doctrine of forum non conveniens will not be reversed unless it is found that the circuit court abused its discretion.

the transaction and the parties, or unless the law of the contract state is contrary to the public policy of the performance state.¹⁴⁶

L. Punitive Damages

In *Hensley v. Erie Insurance Co.*,¹⁴⁷ the court held that a West Virginia automobile liability insurance policy will cover punitive damages for gross, reckless, or wanton negligence. However, the standard in *Hensley* is an enigma. The West Virginia standard for an award of punitive damages according to *Wells v. Smith*¹⁴⁸ is stated as follows: "In actions of tort, where gross fraud, malice, oppression, or wanton, willful, or reckless conduct or criminal indifference to civil obligations affecting the rights of others appear, or where legislative enactment authorizes it." Thus, punitive damages in tort can be recovered only for very bad *Wells* misconduct, but an automobile liability insurance policy covers punitive damages for very mild *Hensley* misconduct. To give *Hensley* any meaning one must state that there is a very narrow *Hensley* window of misconduct where punitive damages are both recoverable and covered by an automobile insurance policy. Misconduct below the *Hensley* standard results in no recovery for punitive damages. Misconduct above the *Hensley* standard results in no liability coverage, but recovery for punitive damages is allowed.

M. Notice Requirements

An insured must provide notice to his insurance company to allow the insurance company the opportunity to investigate the claim fully and to formulate an estimate of its liabilities.¹⁴⁹ The insured must notify his insurance company of any payable occurrence within a reasonable time period after the accident; such notification is a condition

146. *Id.* See also *Liberty Mut. Ins. Co. v. Triangle Indus., Inc.*, 390 S.E.2d 562 (W. Va. 1990) (holding that a valid public interest concern for forum non conveniens is the "advantages of conducting a trial in a forum familiar with the applicable law and avoiding conflicts of law").

147. 283 S.E.2d 227 (W. Va. 1981).

148. 297 S.E.2d 872, 877 (W. Va. 1982).

149. *Petrice v. Federal Kemper Ins. Co.*, 260 S.E.2d 276 (W. Va. 1979).

precedent to recovery.¹⁵⁰ However, the courts will allow liberal interpretations of the notice requirement in order to sustain the insured's right to coverage under a policy and avoid forfeiture. The need for a proof of loss may be obviated by the actions of the insurance company — for example, where the insurance company's conduct indicates that an agent of the company obtained appraisals of damages, where the company attempted arbitration on the amount of damages, and where the company wrote out a settlement check.¹⁵¹

The insured is under a duty to cooperate with the insurance company in its investigation of the accident.¹⁵² However, the court has held that in order for a policy to be voided for lack of the insured's cooperation, the insurance company must prove that the failure to cooperate was substantial and of such a nature as to prejudice the insurer's rights.¹⁵³ Additionally, the insurer must exercise "reasonable diligence" in obtaining the cooperation of the insured prior to voiding the policy, including attendance at trial.¹⁵⁴ The burden of proof for cancellation of the policy for the insured's non-cooperation rests on the insurer; the insurer must show that the insured willfully and intentionally violated the cooperation clause of the insurance policy before denying coverage.¹⁵⁵

In *Bowyer v. Thomas*,¹⁵⁶ the court explored the scope of the insured's duty to cooperate and the responsibilities of the insurance company toward a non-cooperative insured. Applying the principle of "extend[ing] 'the maximum protection possible consonant with fairness to the insurer,'" the *Bowyer* court held that the insurance company must prove that the insured intentionally failed to cooperate.¹⁵⁷ In *Bowyer*, the insured had intermittent contact with the Aetna attorneys; while his cooperation was not exemplary, the court found that the

150. *Id.* at 278.

151. *Id.*

152. *Bowyer v. Thomas*, 423 S.E.2d 906 (W. Va. 1992).

153. *Id.* at 911.

154. *Id.* See also APPLEMAN, *supra* note 20, §§4471-4476.

155. *Bowyer*, 423 S.E.2d at 906.

156. *Id.* at 910.

157. *Id.* at 911.

insured made some effort to cooperate with Aetna.¹⁵⁸ Additionally, an insurer has the burden of proving that it exercised due diligence in maintaining contact with the insured, a burden which Aetna failed to carry.¹⁵⁹ Finally, the insurer must prove that it was substantially prejudiced by the insured's failure to cooperate. The *Bowyer* court defined this prejudice as an insured's failure to apprise his insurer of a potential lawsuit, with such failure rendering the insurance company incapable of mounting a proper defense.¹⁶⁰ In *Bowyer*, a judgment had not yet been rendered against the insured, and the insurer had been apprised of the pending case from its inception. The court found that the insurance company was not substantially prejudiced in this case.¹⁶¹

IV. MEDICAL PAYMENTS COVERAGE

Medical payments (MEDPAY) coverage is not legislatively mandated in West Virginia.¹⁶² An insurance company may write the terms of its MEDPAY coverage as it wishes.¹⁶³ Because there is no legislative control of medical payments provisions, the issues which arise in MEDPAY coverage generally center around the interpretation of specific language in the insurance policy.

A. Stacking Provisions

MEDPAY coverage in automobile insurance policies may be "stacked" so that the insured recovers under the medical payments provisions of each automobile policy.¹⁶⁴ This means that insureds who

158. *Id.*

159. *Id.*

160. *Bowyer*, 423 S.E.2d at 914.

161. *Id.*

162. *Carney v. Erie Ins. Co.*, 434 S.E.2d 374, 377 (W. Va. 1993).

163. *Id.* Some states have statutory controls over MEDPAY coverage; in such states, the statutory language is generally controlling. *See, e.g., Karabin v. State Auto. Mut. Ins. Co.*, 462 N.E.2d 403 (Ohio 1984) (holding that the statutory mandates must be followed in MEDPAY stacking). For background on non-existent statutory guidelines for MEDPAY coverage, *see generally* APPLEMAN, *supra* note 20, § 4902, at 231.

164. *Moomaw v. State Farm Mut. Auto. Ins. Co.*, 379 F. Supp. 697, 702 (S.D. W. Va. 1974).

are covered simultaneously by more than one policy can recover on each policy up to the limits of liability or up to the amount of judgment against the tort-feasor, whichever is less.¹⁶⁵ In *Moomaw v. State Farm Mutual Automobile Insurance Co.*,¹⁶⁶ the southern district court followed the reasoning of *Bell v. State Farm Mutual Insurance Co.*,¹⁶⁷ which held that a plaintiff may recover individually under the "per person" portions of his insurance policy.¹⁶⁸ Under the reasoning of *Bell v. State Farm*, the plaintiffs, Carper and Moomaw, were allowed to recover under the medical payment provisions of each of their own policies; likewise, a third party, Boggs, was allowed to stack the medical payments payable for each of his two insured cars.¹⁶⁹

Despite the liberal interpretation of MEDPAY coverage stacking in *Moomaw*, the Supreme Court of Appeals of West Virginia has held that automobile guests may *not* recover medical payments through an automobile host's separate policies;¹⁷⁰ the court held that there is no statutory or public policy against anti-stacking in this state.¹⁷¹ Indeed, the court held that an insurer may incorporate any anti-stacking language into MEDPAY provisions.¹⁷²

B. Subrogation of Medical Payments Claims

Subrogation of MEDPAY claims is allowed in West Virginia.¹⁷³ In *The Traveler's Indemnity Co. v. Rader*,¹⁷⁴ the MEDPAY insurer wanted to recover the payments made to its MEDPAY insured for medical expenses. The insured argued that MEDPAY subrogation was

165. *Id.* at 701.

166. *Id.* at 697.

167. 207 S.E.2d 147 (W. Va. 1974).

168. *Id.*

169. *Moomaw*, 379 F. Supp. at 701.

170. *Keiper v. State Farm Mut. Auto. Ins. Co.*, 429 S.E.2d 66 (W. Va. 1993).

171. *Id.* at 68.

172. *Id.* at 70. See *Deel v. Sweeney*, 383 S.E.2d 92 (W. Va. 1989), for a more substantial elaboration of the court's policy on following statutory guidelines and the leeway allowed insurers outside the boundaries of legislative intent.

173. *The Travelers Indemnity Co. v. Rader*, 166 S.E.2d 157 (W. Va. 1969).

174. *Id.*

illegal as it would constitute an assignment of a cause of action.¹⁷⁵ The court held that subrogation of MEDPAY claims is not an assignment of a cause of action and is perfectly legal in West Virginia.¹⁷⁶ The insured must pay back all of the duplicated MEDPAY coverages he has collected to his MEDPAY insurer.

In *Bell v. Federal Kemper Insurance Co.*,¹⁷⁷ the southern district court held that the subrogated MEDPAY insurer must pay its proportionate share of attorney fees and expenses. Thus, the tort plaintiff — the MEDPAY insured — may “knock off” one-third of the MEDPAY amount which was to be repaid to the MEDPAY insurer.¹⁷⁸ The Supreme Court of Appeals of West Virginia adopted *Bell v. Federal Kemper* in *Federal Kemper Insurance Co. v. Arnold*,¹⁷⁹ and made it the West Virginia rule. The subrogation amount must bear the pro-rata share of the costs of obtaining recovery, as the reimbursement “should reflect the cost to the covered person of obtaining a recovery against the person at fault.”¹⁸⁰ In *Arnold*, the insured’s cost of recovery was a one-third contingent fee; thus, the court held that the subrogation amount should be reduced pro-rata by one-third.¹⁸¹ Presumptively, then, the correct pro-rata reduction is a one-third reduction according to *Arnold*.

*Nationwide Mutual Insurance Co. v. Dairyland Insurance Co.*¹⁸² is the latest entry in the MEDPAY arena. Nationwide’s MEDPAY insured was involved in an automobile accident with Dairyland’s liability insured tortfeasor and Nationwide paid MEDPAY to its insured.¹⁸³ Nationwide put Dairyland on notice of its MEDPAY subrogation rights by letter, stating that it was seeking reimbursement of its medical pay-

175. *Id.* at 159.

176. *Id.* at 161.

177. 693 F. Supp. 446 (S.D. W. Va. 1988).

178. *Id.* at 450.

179. 393 S.E.2d 669 (W. Va. 1990). The court also reaffirmed the *Rader* decision in this case. *Id.* at 671.

180. *Id.* at 671.

181. *Id.* at 672.

182. 445 S.E.2d 184 (W. Va. 1994).

183. *Id.* at 186.

ments.¹⁸⁴ Dairyland settled with Nationwide's MEDPAY insured and did nothing to honor or protect Nationwide's subrogation rights. The Supreme Court of Appeals held that, where the plaintiff is unrepresented in settlement negotiations, the tortfeasor's liability carrier was responsible for the proper handling of the subrogation claim.¹⁸⁵ The court held that the tortfeasor's insurance carrier was primarily responsible for the payment of the subrogation claim because it was aware of Nationwide's claim before it obtained the MEDPAY insured's release.¹⁸⁶ The tortfeasor's insurer has a duty to act in good faith to protect the MEDPAY insurer's subrogation rights.¹⁸⁷

Insurance companies currently argue that *Nationwide* trumps *Arnold*. Since the liability insurance company has a duty to protect the MEDPAY insurer's rights, there is no need for *Arnold's* pro-rata sharing of the cost of collection. In other words, insurance companies now argue that subrogation reimbursement is automatic and not dependant on the plaintiff attorney's efforts. The aforementioned argument is without merit, however. First, the plaintiff's attorney may up the settlement ante to reflect the *Nationwide* loss of the *Arnold* deduction. Second, subrogation is an equitable doctrine — *Nationwide* involved an unrepresented MEDPAY insured. A represented MEDPAY insured is still entitled to an *Arnold* deduction.

Questions may also arise where both the MEDPAY insured and the liability insured are represented by the same insurance company. Such was the case in *Richards v. Allstate Insurance Co.*,¹⁸⁸ wherein Allstate was the insurer for both the injured plaintiff and the tortfeasor. Allstate sought repayment of medical payments made to the MEDPAY insured from the settlement that the plaintiffs made with the tortfeasor. The plaintiffs argued that Allstate had no right to reimbursement of MEDPAY because Allstate could not enforce a right of subrogation against its own insured tortfeasor. The *Richards* court held that "[n]o right of subrogation can arise in favor of the insurer against its own

184. *Id.*

185. *Id.* at 187-88.

186. *Id.* at 188.

187. *Nationwide*, 445 S.E.2d at 188.

188. 455 S.E.2d 803 (W. Va. 1995).

insured," since subrogation only arises with respect to rights against third parties.¹⁸⁹ The most obvious public policy reason for this is to prevent the insurer from having a conflict of interest. An insurance company may not assert a right of subrogation against its own insured, but rather, should prevent a double recovery by inserting a clear and unambiguous clause regarding reimbursement in its policies.

And finally, in *Bell v. Federal Kemper*,¹⁹⁰ the MEDPAY insured argued that she should not have to repay any of her MEDPAY because she had not been "made whole" by her settlement with the tortfeasor. The district court rejected *Bell v. Federal Kemper's* argument on the grounds that she had, in fact, been made whole. This was because the plaintiff had willingly entered into her own settlement agreement. *Bell v. Federal Kemper* suggests that the "made whole rule" should be applied to MEDPAY subrogation. The key West Virginia authority on the made-whole rule is *Kittle v. Icard*,¹⁹¹ which held that DHS could not get back any of the medical payments it made to a crippled infant because the child had not been made whole by his settlement with the tortfeasor. Because subrogation is an equitable doctrine, it may only be allowed when no injustice will be done to the insured. Any loss of under-reparations should be borne by the insurer because the insured has paid his insurance company to assume that risk.¹⁹²

C. Exclusion of Coverage Provisions

A specific exclusionary clause which restricts the MEDPAY coverage may be held valid under current court decisions.¹⁹³ In fact, a specific exclusionary clause will be held valid as drafted, absent some statute regulating coverage.¹⁹⁴ However, such exclusionary clauses are to be strictly construed against the insurer in order that the purpose of providing indemnity for the insured is not defeated.¹⁹⁵ Thus, any am-

189. *Id.* at 805.

190. 693 F. Supp. at 446.

191. 405 S.E.2d 456 (W. Va. 1991).

192. *Id.* at 461.

193. *Carney*, 434 S.E.2d at 379.

194. *Id.*

195. *Id.* See also *National Mut. Ins. Co. v. McMahon & Sons, Inc.*, 356 S.E.2d 488

biguities in the exclusionary clause should be construed in favor of the insured.

V. UNINSURED MOTORIST COVERAGE (UM)

Uninsured motorist (UM) coverage is mandatory in West Virginia.¹⁹⁶ The purpose of UM coverage is to ensure that the burden of loss for accidents caused by financially irresponsible motorists is distributed among the owners of all motor vehicles in this state.¹⁹⁷ The West Virginia legislature enacted this state's UM policy requirements on June 6, 1967, requiring that every automobile liability insurance policy contain UM provisions.¹⁹⁸ Effective April 1, 1982, the West Virginia Legislature made UM coverage elective; such coverage had to be offered but could be waived by the insured in writing.¹⁹⁹ Then, in 1986, UM coverage again became mandatory. At present, UM coverage is mandatory for all automobile liability policies.²⁰⁰ Of course, UM provisions are to be liberally construed to promote indemnification.²⁰¹

UM coverage is based on the "*Tulley/Bell* premise," which involves three areas: statutory conformity, voidness, and unjust enrichment. In *Bell v. State Farm Mutual Automobile Insurance Co.*,²⁰² the court held that any insurance provisions which conflict with West Virginia Code § 33-6-31 are void and ineffective. Further, in *Tulley v.*

(W. Va. 1987) (holding that ambiguous exclusionary clauses must be construed in favor of the insured and against the insurer).

196. W. VA. CODE § 33-6-31(b) (1992).

197. *Bell v. State Farm Mut. Auto. Ins. Co.*, 207 S.E.2d 147 (W. Va. 1974). The court has held that an uninsured motorist policy should be given liberal construction for the purpose of protecting innocent victims from the hardships caused by negligent, financially irresponsible drivers. *Plymale v. Adkins*, 429 S.E.2d 246 (W. Va. 1993).

198. 1967 W. Va. Acts 97 (codified as amended at W. VA. CODE § 33-6-31 (1992)). Initially, UM coverage minimums were 10/20/5. Those minimums have grown to the present level of 20/40/10; mandatory UM coverage has remained at this level since 1979.

199. 1982 W. Va. Acts 106.

200. 1988 W. Va. Acts 75.

201. *Plymale v. Adkins*, 429 S.E.2d 246 (W. Va. 1993) (holding that where the plaintiff failed to name the unknown "hit-and-run" driver in the complaint, the plaintiff was allowed to amend the complaint because UM coverage is to be liberally construed and is remedial in nature).

202. 207 S.E.2d 147 (W. Va. 1974).

State Farm Mutual Automobile Insurance Co.,²⁰³ the southern district court held that any administrative rules promulgated must not conflict with the statute from which they are derived. Such regulations may also not supply remedies for omissions within the enabling statute. This emphasis on statutory conformity forms the first aspect of the *Tulley/Bell* premise that an insurance policy must comply with statutory requirements. Thus, policy provisions which conflict with the statute, either by adding requirements or by circumventing the statutory mandates, are void and ineffective. Second, the *Bell v. State Farm* court set forth the following voidness principle: if an exclusionary clause is not expressly permitted by statute, then such exclusions are impliedly void.²⁰⁴ The voidness principle is based on the court's characterization of insurance contracts as bordering on contracts of adhesion. A non-conforming UM provision is void. Finally, the *Tulley/Bell* premise is concerned with the theory of unjust enrichment — an insurance company would be “unjustly enriched” if it was not required to pay up to the coverage limits of a policy where the policy premiums have already been collected. Therefore, in order to be fully valid, an insurance policy should follow the statutory mandates; these requirements are discussed in detail below.

A. *Mandatory Offer of Minimum and Optional UM Coverage*

Insurers in the State of West Virginia are required to offer UM coverage. UM coverage is a mandatory part of every automobile insurance policy issued.²⁰⁵ This UM coverage must at least meet the minimum coverage requirements set forth by the WVMVSRA — \$20,000 per person; \$40,000 per accident; and \$10,000 per property damage.²⁰⁶ In addition to the mandatory minimum coverage, an insurer must also offer an option for a higher dollar amount of UM coverage than the minimal level — up to \$100,000 per person; \$300,000 per accident; and \$50,000 per property damage.²⁰⁷ Also, the insurer must

203. 345 F. Supp. 1123 (S.D. W. Va. 1972).

204. *Bell v. State Farm*, 207 S.E.2d at 149.

205. W. VA. CODE § 33-6-31(b) (1992).

206. W. VA. CODE § 17D-4-2 (1991). See *supra* notes 29-34 and accompanying text.

207. *Bias v. Nationwide Mut. Ins. Co.*, 365 S.E.2d 789, 790 (W. Va. 1987). This offer

offer a third option for both UM and UIM coverage up to the dollar limits of the liability insurance purchased by the insured.²⁰⁸

In West Virginia, a motorist is an uninsured motorist if he meets any one of the following six defining criteria. First, the uninsured motorist may be a driver with no insurance.²⁰⁹ Second, the uninsured motorist may have some insurance, but not up to the mandatory minimum of 20/40/10.²¹⁰ Third, the uninsured motorist may, in fact, have insurance, but his insurance company may deny coverage for the accident; that motorist is considered to be an uninsured motorist.²¹¹ Fourth, the motorist is also considered to be uninsured where he can produce no "self-insurance" certificate, as required by statute for common carriers.²¹² Fifth, a motorist may be classified as uninsured where the owner or operator of the vehicle is unknown,²¹³ and where there was a "hit and run" accident.²¹⁴ Sixth, a motorist may be classified as uninsured where the insurance proceeds are uncollectible, in part or on the whole, because the insurance company is insolvent or in receivership.²¹⁵

Since the insurer is required to offer optional coverage above the minimum UM coverage requirements, the insurer must prove an effective offer, and a knowing and intelligent waiver by the insured of the optional coverage, or by operation of law the optional coverage limits become a part of the policy.²¹⁶ To prove an "effective offer," the in-

of optional coverage should also include a \$300 deductible for property damage. W. VA. CODE § 33-6-31(b) (1992).

208. Again, this offer of optional coverage should include a \$300 deductible for property damage. W. VA. CODE § 33-6-31(b) (1992).

209. W. VA. CODE § 33-6-31(c)(i) (1992).

210. *Id.*

211. W. VA. CODE § 33-6-31(c)(ii) (1992).

212. W. VA. CODE § 17D-6-2 (1991).

213. W. VA. CODE § 33-6-31(c) (1992).

214. W. VA. CODE § 33-6-31(e)(iii) (1992). In *State Farm Mut. Auto. Ins. Co. v. Norman*, 446 S.E.2d 720 (W. Va. 1994), the court held that the physical contact in a hit-and-run accident must be a "close and substantial physical nexus" between the unidentified hit-and-run automobile and the insured's car. There is no hit-and-run where the insured's car strikes a tire, or any other immobile object or debris lying in the roadway.

215. W. VA. CODE § 33-6-31(j) (1992).

216. *Bias*, 365 S.E.2d at 791.

insurance company should "place the purchaser in the position to make an informed rejection of an offer to purchase [UM] insurance."²¹⁷ The insurer's offer must be made in a commercially reasonable manner, so that the insured is provided with adequate information with which to make a decision.²¹⁸ The offer must state, in definite, intelligible, and specific terms, the nature of the coverage offered, the coverage limits, and the costs involved.²¹⁹

B. Omnibus Clauses

An omnibus clause extends UM coverage from the named insured to other persons, "while resident of the same household, the spouse of any named insured, and relatives of either while in a motor vehicle or otherwise."²²⁰ By statute, any attempt to limit omnibus coverage is void.²²¹ In *Bell v. State Farm*, the offending insurance policy contained a limitation clause which excluded UM coverage for anyone occupying an owned-but-not-insured motor vehicle.²²² Plaintiffs Hubert Murray and Shirley Bell carried separate automobile liability insurance policies with State Farm.²²³ The accident which gave rise to *Bell v. State Farm* occurred while Shirley Bell was operating a motorcycle which she owned, but which was not insured.²²⁴ After the accident, plaintiffs brought an action against the UM and recovered a \$40,000 judgment.²²⁵ Upon demand of payment, State Farm refused to pay under either policy.²²⁶ The court held that the owned-but-not-

217. WIDISS, *supra* note 2, § 32.6, at 33.

218. *Id.* See also *State Farm Auto. Ins. Co. v. Wannamaker*, 354 S.E.2d 555 (S.C. 1987).

219. *Bias*, 365 S.E.2d at 791.

220. *State Farm Mut. Auto. Ins. Co. v. Allstate Ins. Co.*, 175 S.E.2d 478 (W. Va. 1970) (holding that omnibus clauses should be given liberal construction because their purpose is to provide coverage for persons driving vehicles whose owners have obtained insurance); W. VA. CODE § 33-6-31(c) (1992).

221. W. VA. CODE § 33-6-31(a) (1992). See *Bell v. State Farm Mut. Auto. Ins. Co.*, 207 S.E.2d 147 (W. Va. 1974).

222. *Bell v. State Farm*, 207 S.E.2d at 149.

223. *Id.* at 148.

224. *Id.*

225. *Id.*

226. *Id.*

insured limitation on omnibus coverage was void. The statute did not allow such an exclusion, hence the exclusion was void. *Bell v. State Farm* held that an omnibus clause must conform to statutory mandates.²²⁷

C. *Guests*

Any exclusion of guests in a UM policy are void under West Virginia Code § 33-6-31(c).²²⁸ By statute, guests are included in any UM coverage. A guest is defined as any person within the insured automobile who is using the vehicle under the consent provisions of the “*Tulley/Bell*” premise.²²⁹ Guests must be covered by the UM policy, or that policy is void.

D. *Other Insurance Clauses*

An “other insurance” clause allows the insurance company to limit its payment of policy benefits when the insured has other UM coverage.²³⁰ The *Tulley/Bell* premise voids “other insurance” clauses in West Virginia. Any attempt to restrict coverage payment through an “other insurance” clause is void.²³¹ The southern district court considered the issue of “other insurance” clauses in *Tulley*.²³² Mr. Tulley was negligently injured by a UM while driving his brother’s automobile.²³³ He thus had UM coverage from his own policy and his brother’s policy. Each policy had an excess UM “other insurance” clause. The court held that West Virginia Code § 33-6-31(c) does not allow other insurance clauses in UM policies, therefore, the clause was void due to a lack of statutory conformity.²³⁴

227. *Bell v. State Farm*, 207 S.E.2d at 149.

228. W. VA. CODE § 33-6-31(c) (1992).

229. See *supra* notes 202-204 and accompanying text.

230. For background on “other insurance” clause development in West Virginia, see *supra* notes 132-136 and accompanying text.

231. *Tulley v. State Farm Mut. Auto. Ins. Co.*, 345 F. Supp. 1123 (S.D. W. Va. 1972).

232. *Id.*

233. *Id.* at 1124.

234. *Id.* at 1126.

An injured insured may recover simultaneously under two policies up to the limits of liability on each policy or up to the amount of judgment against the uninsured tortfeasor, whichever is lowest.²³⁵ Under *Bell v. State Farm*, any limitation clauses or "excess clauses" within the insurance contract are void under West Virginia Code § 33-6-31.²³⁶ In *Bell v. State Farm*, the insurance company maintained that an exclusionary clause was a fair and reasonable bargained-for agreement within the insurance contract. The court reasoned that insurance contracts are "notoriously complex, . . . and border on the status of contracts of adhesion,"²³⁷ and thus are suspect to the interpreting court. Because the insured and insurer do not stand *in pari causa*, the insured's agreement to such limitations lacks completeness in relation to the insurer's position.²³⁸ The court held that it was only fair to the insured that he be able to recover up to the policy limits on each policy he obtains, when the premiums of each policy are kept up to date as "any other result would lead to an unjust enrichment of insurance companies."²³⁹

In a later case, *Moomaw v. State Farm Automobile Insurance Co.*,²⁴⁰ the court held that not only was an insured allowed to recover from two policies simultaneously, but that the insured was also entitled to medical payments. In fact, the *Moomaw* court held that contractual provisions which purport to reduce UM coverage by the amount of medical payments already advanced to the insured are void.²⁴¹ *Moomaw* also follows the *Tulley/Bell* premise, holding that any attempt to circumvent statutory mandates is void; thus, any "other insurance" clause in a UM policy is void.²⁴²

235. *Bell v. State Farm Mut. Auto. Ins. Co.*, 207 S.E.2d 147 (W. Va. 1974).

236. *Id.* at 150.

237. *Id.*

238. *Id.* at 151.

239. *Id.*

240. *Moomaw*, 379 F. Supp. at 702.

241. *Id.* at 703. The court relied on its earlier reasoning in *Tulley* where such a clause was held to be void and inoperative.

242. *Id.*

E. Stacking

Stacking of automobile insurance coverage refers to the piling up of multiple coverages from multiple policies, or the piling up of coverage of multiple vehicles in a single policy, when there is only one loss. If stacking is allowed, the insured can recover up to the amount of policy limits of each insurance policy. Under indemnity principles, an insured should only be able to recover up to the amount of his injury. However, some insurance policies do not cover the full amount of substantial damages; thus, if the insured can reach several policies, or the coverage of several vehicles, the likelihood of full compensation is much greater than where stacking is prohibited.

The stacking issue may arise in various ways under UM coverage. First, the insured may have been a passenger in a vehicle he did not own. In that case, the insured may try to recover from both his own policy (as the named insured) and the policy of the driver (as an omnibus insured). Second, the insured may have two separate policies for two different vehicles. If the insured is injured in one of these vehicles, she may attempt to recover under both policies through "interpolicy horizontal stacking."²⁴³ Third, the insured may have paid multiple premiums under one policy for multiple vehicles. If injured, the insured may attempt multiple recoveries under multiple UM coverages.²⁴⁴ Fourth, an insured may seek to recover under multiple policies owned by someone else. In each of these cases, the insured would seek to stack coverages. All of these scenarios may occur where multiple policies or coverages are at issue.

There are only five cases dealing with the stacking of UM coverage in West Virginia. *Tulley v. State Farm Mutual Automobile Insurance Co.*²⁴⁵ was the first case to address the issue of stacking in West Virginia. In *Tulley*, the southern district court held that anti-stacking provisions are void under West Virginia Code § 33-6-31.²⁴⁶

243. See *supra* note 137.

244. This is known as "intrapolicy horizontal stacking." See *supra* note 137.

245. 345 F. Supp. 1123 (S.D. W. Va. 1972).

246. *Id.* at 1127.

Building on the decision in *Tulley*, the Supreme Court of Appeals of West Virginia held, in *Bell v. State Farm Mutual Insurance Co.*,²⁴⁷ that an insurance policy which attempts to defeat stacking is repugnant to the UM statute. In *Bell v. State Farm*, the court also held that an insured may collect on as many policies as provide coverage. The court justified this holding by stating that “[a]ny other result would lead to the unjust enrichment of insurance companies.”²⁴⁸ In *Moomaw v. State Farm Automobile Insurance Co.*,²⁴⁹ where the insureds were covered by more than one policy, the court held that the insureds could recover on each policy up to the limits of each policy or up to the amount of judgment obtained against the insurer.

Anti-stacking of UM coverages reached its zenith in *State Automobile Mutual Insurance Co. v. Youler*.²⁵⁰ Anti-stacking language was held void by the court under West Virginia Code § 33-6-31(b).²⁵¹ The court followed its previous reasoning in the *Tulley/Bell* premise, holding that insurance policy language must conform to the statutory mandates.²⁵² Because anti-stacking language in the policy conflicts with the intent of West Virginia Code § 33-6-31(b), that language is void.²⁵³

However, in the most recent case, anti-stacking proponents won a round. *Russell v. State Automobile Mutual Insurance Co.*²⁵⁴ held that neither statute nor public policy required the stacking of UM coverage when the insured received a million dollar discount on his insurance policies.²⁵⁵ In *Russell*, the insured got the benefit of the bargain through the discount.²⁵⁶ The court concentrated on the fact that premiums had been paid on only one policy, thus the insurer was not

247. 207 S.E.2d 147 (W. Va. 1974).

248. *Id.* at 151.

249. 379 F. Supp. 697 (S.D. W. Va. 1974).

250. 396 S.E.2d 737 (W. Va. 1990).

251. *Id.* at 745.

252. *Id.* at 746.

253. *Id.*

254. 422 S.E.2d 803 (W. Va. 1992).

255. *Id.*

256. *Id.*

likely to be unjustly enriched by this payment.²⁵⁷ In *Youler*, there were two insurance policies for which premiums had been paid and the court allowed stacking; while in *Russell*, because there was only one policy for two cars with a multi-vehicle discount, the court did not allow stacking.²⁵⁸

F. Set Off

West Virginia Code § 33-6-31(b) provides, in pertinent part, that an automobile liability policy shall provide an option for UM or UIM coverage up to the amount of bodily injury liability coverage and property damage liability coverage “without set off against the insured’s policy or any other policy.”²⁵⁹ Section 33-6-31(b) also provides that “[n]o sums payable as a result of UM coverage shall be reduced by payments made under the insured’s policy or any other policy.”²⁶⁰ This provision was added to § 33-6-31(b) in 1982 to codify principles of the common law.²⁶¹

In *Tulley*, the southern district court considered an action to determine a plaintiff’s right to recover UM coverage without medical payments set off.²⁶² The court held that policy language which provided for the “reduction of insurance amounts by sums paid under the policies due to the insured’s ‘medical expenses’ . . . ” was void and inoperative.²⁶³ That is, the court held that damages awarded to the plaintiff cannot be reduced by the sums paid to him from his own medical payments coverage.²⁶⁴ West Virginia Code § 33-6-31(b) does not allow the set off of medical payments coverage.²⁶⁵ Thus, under the

257. *Id.* at 806.

258. *Id.*; *Youler*, 396 S.E.2d at 746.

259. W. VA. CODE § 33-6-31(b) (1992). *See* *Johnson v. General Motors Corp.*, 438 S.E.2d 28, 35 (W. Va. 1993) (holding that set off of UM benefits is improper as a means to reduce a tortfeasor’s damages under the collateral source rule).

260. W. VA. CODE § 33-6-31(b) (1992).

261. *Id.*

262. *Tulley*, 345 F. Supp. at 1123.

263. *Id.* at 1129. *See* W. VA. CODE §§ 17D-4-2, 29A-1-1, 31-1-71, 33-2-71, 33-4-12, 33-6-31(b), (d) (1994).

264. *Tulley*, 345 F. Supp. at 1130.

265. W. VA. CODE § 33-6-31(b) (1992).

Tulley/Bell premise, the policy language must conform to the statute or it is void.

The Supreme Court of Appeals of West Virginia did not consider the set-off question until 1990 in *Youler*.²⁶⁶ The court held that any "set-off language in the insured's policy which purportedly reduces the UM coverage limits by the tortfeasor's liability coverage payments" is void.²⁶⁷ West Virginia Code § 33-6-31(b) — the UM section — sets the West Virginia public policy promoting full indemnification by statute.²⁶⁸ *Youler* clarifies the West Virginia standard for set off in UM and UIM policies. Essentially, there are two possible approaches to set off:²⁶⁹ (1) the tortfeasor's liability coverage is set off against the UM coverage limits;²⁷⁰ or (2) the tortfeasor's liability insurance is set off against the amount of damages sustained by the injured person, but not the plaintiff's UM coverage.²⁷¹ West Virginia follows the second approach.²⁷²

The holding in *Youler* is further supported by the court's treatment of the collateral source rule in *Johnson v. General Motors Corporation*.²⁷³ The collateral source rule operates to preclude the offsetting of UM or UIM benefits.²⁷⁴ This provides protection for the injured insured by preventing his insurer from taking advantage of payments received by the insured as a result of his own contractual ar-

266. *Youler*, 396 S.E.2d at 737.

267. *Id.*

268. *Id.* at 750.

269. *Id.* at 747.

270. This type of approach is known as "reduction-type" or "decreasing-layer" UM coverage. This approach is premised on the idea that the purpose of UM coverage is to put the insured in the same position he or she would have occupied had the tortfeasor's liability insurance limits been the same as the UM coverage limits purchased by the insured. *Id.*

271. *Youler*, 396 S.E.2d at 748. Under this approach, the insurer providing UM coverage is liable to its injured insured for any excess, up to the limits of the UM coverage. This type of UM legislation is sometimes called "excess-type" or "floating-layer" UM coverage. It is premised on the idea that the injured party is entitled to recover under his or her own UM coverage to the extent that the tortfeasor's liability insurance is insufficient to compensate the injured party fully for the loss; this compensation is subject only to the limits of the UM coverage. *Id.*

272. *Id.* at 749. See also W. VA. CODE § 33-6-31(b) (1992).

273. 438 S.E.2d 28 (W. Va. 1993).

274. *Id.* at 36.

rangements entirely independent of the insurance contract at issue.²⁷⁵ The rationale behind this rule is that the tortfeasor should not be allowed to minimize damages by offsetting the payments received by an injured independent party through his own independent contractual arrangements.²⁷⁶ Thus, under *Johnson*, the offsetting of UM benefits is precluded when the UM benefits come from an entirely independent source.²⁷⁷

G. Subrogation and Consent to Settle

West Virginia Code § 33-6-31(f) provides, in pertinent part, that “an insurer paying a claim under the endorsement or provisions required under subsection (b) of this section shall be subrogated to the rights of the insured to whom such claim was paid against the person causing such injury, death or damage to the extent that payment was made.”²⁷⁸ This means that the insured’s UM insurer may recover its payments, made to the insured, from the uninsured motorist(s). This of course depends on whether the uninsured-motorist-tortfeasor has any assets; if not, there is no subrogation. Ordinarily, the UM company will waive its subrogation rights so that its plaintiff may settle with the UM tortfeasor for whatever assets the UM tortfeasor may have.²⁷⁹ In *Postlethwait v. Boston Old Colony Insurance Co.*,²⁸⁰ the court considered the issue of an insured suing his insurance company without first obtaining a formal judgment against the tortfeasor. The court held that a plaintiff can directly sue his or her insurance company only after he or she obtains the UM company’s waiver of subrogation rights and

275. *Id.*; see also *Ratlief v. Yokum*, 280 S.E.2d 584 (W. Va. 1981) (defining the collateral source rule).

276. *Id.* at 590.

277. An example of this would be an individual contract for UM insurance with a second insurer. The primary liability insurance carrier would not be able to offset the UM benefits from the second policy under the collateral source rule.

278. W. VA. CODE § 33-6-31(f) (1992). Subsection (b) refers to the code section dealing with UM and UIM coverages. W. VA. CODE § 33-6-31(b) (1992).

279. In West Virginia, the court has recognized subrogation as an equitable doctrine. *Kittle v. Icard*, 405 S.E.2d 456 (W. Va. 1991).

280. 432 S.E.2d 802 (W. Va. 1993).

after the insured settles with the tortfeasor's liability company for the full policy limits.²⁸¹

The court, in *Arndt v. Burdette*,²⁸² has held that a "consent to settle" provision pertaining to the insured's UM coverage is a *valid and enforceable means* by which an insurer may protect its statutorily mandated right to subrogate claims. Thus, an insured must first obtain written consent from the insurer *prior* to settling a claim with the tortfeasor;²⁸³ this protects the insurance company's subrogation rights against the tortfeasor.²⁸⁴ Where an insured settles and releases the tortfeasor's liability insurer without the consent of his UM insurer, the insured prejudices the UM insurer's statutory right to subrogation.²⁸⁵

The court's latest statement on subrogation and "consent-to-settle" provisions is the powerful *State ex rel. Allstate Insurance Co. v. Karl*.²⁸⁶ "Consent-to-settle" provisions are common, and protect the insurer's statutory right of subrogation. Such provisions are designed to foreclose a collusive settlement between the plaintiff and the tortfeasor's liability insurer.²⁸⁷ *Karl* prohibits such a collusive settlement between these parties.

H. Statute of Limitations

The plaintiff's UM coverage is not an alternative to the tortfeasor's liability coverage. An action for "willful breach of contractual duties to settle a claim for UM coverage" is governed by the statute of limitations for tort actions.²⁸⁸ In *Harman v. State Farm*

281. *Id.* While the UM company may waive its right to subrogation, such a waiver may not be obtained by the threat of the tortfeasor's liability carrier to withhold settlement of the claim. The primary liability carrier has a duty to deal in good faith both with its insured and with the UM carrier, and may subject itself to a bad faith suit by making such a demand and refusing to settle if such a demand is not met. *Shamblin v. Nationwide Mut. Ins. Co.*, 396 S.E.2d 766 (W. Va. 1990).

282. 434 S.E.2d 394 (W. Va. 1993).

283. *Id.* at 399.

284. *Id.* at 400.

285. *Id.*

286. 437 S.E.2d 749 (W. Va. 1993).

287. *Id.* See also WIDISS, *supra* note 2, § 17.2.

288. *Harman v. State Farm Mut. Auto. Ins. Co.*, 434 S.E.2d 391 (W. Va. 1993). The

Mutual Automobile Insurance Co.,²⁸⁹ the plaintiff maintained that his action for UM benefits should be governed by the ten year statute of limitations for contract actions, rather than by the two year statute of limitations for tort. The court held that the tort statute of limitations applied. Essentially, the plaintiff had missed the statute of limitations deadline for his suit against the tortfeasor, and thus attempted recovery from his own UM policy. Although he had the opportunity to settle, the plaintiff did not settle his claim for any amount and let the statute of limitations run. The court found that the only reason Mr. Harman filed a claim against his own UM insurer was because he failed to file a timely suit against the tortfeasor.²⁹⁰ The plaintiff tried to sue his own UM carrier to recover from his own UM coverage; unfortunately, the plaintiff was not successful.

However, a direct action against a UM insurer is a contract action governed by the contract statute of limitations.²⁹¹ In *Plumley v. May*, the court addressed the issue of a direct action against a UM insurer, and held that a plaintiff is *not* precluded from suing his UM insurer within the ten year statute of limitations for contract actions if the plaintiff had settled with the tortfeasor's liability company for the full amount of the policy and had obtained from his UM insurer a waiver of the insurer's right of subrogation against the tortfeasor.²⁹²

I. Process, Suit, and Joinder

Process, suit, and joinder are confusing under the statutes and the common law decisions in West Virginia. West Virginia Code § 33-6-31(d) provides several guidelines for these tricky issues.²⁹³ Where the plaintiff sues the tortfeasor and the plaintiff asserts that the tortfeasor is a UM, the plaintiff must serve — not sue, not join — his own UM

tort statute of limitations is two years.

289. *Id.* at 393. Mr. Harman filed his suit approximately three and one-half years after the accident occurred.

290. *Id.* at 394.

291. *Plumley v. May*, 434 S.E.2d 406 (W. Va. 1993). The contract statute of limitations is ten years.

292. *Id.* at 409.

293. W. VA. CODE § 33-6-31(d) (1992).

insurance company. That UM insurer may appear in the name of the defendant (generally always), or in its own name (rarely). If the UM is an unknown, hit-and-run "John Doe," then the plaintiff must sue John Doe and serve — not sue, not join — his own UM company. There are two points which must be emphasized: (1) the plaintiff must serve — not sue, not join — his own UM company; and (2) the plaintiff's own UM insurer is involved in the case completely adverse to the interests of its own insured, the plaintiff. Thus, in *Davis v. Robertson*,²⁹⁴ the court held that the insured cannot — during a direct action — sue his own insurer until the plaintiff has obtained a judgment against the UM tort defendant.

In *Postlethwait v. Boston Old Colony Insurance Co.*,²⁹⁵ the court slightly modified its holding in *Davis* and held that a judgment against the tortfeasor is not necessary before the plaintiff may sue his own UM insurer. If the plaintiff has settled with the tortfeasor for the full amount of the tortfeasor's policy with a waiver of subrogation rights from the UM insurer, then the plaintiff may sue his own UM insurer.²⁹⁶ Finally, in *Plymale v. Adkins*,²⁹⁷ the court held that the plaintiff could amend his complaint to add a John Doe defendant, even after the statute of limitations had run.

J. Choice of Law

West Virginia follows simple conflicts of law rules. Generally, for torts, the substantive law of the place in which the tort occurred — *lex loci delicti* — will be applied. For contracts, the law of the place where the contract was formed — *lex loci contractus* — will be applied.

Where the UM coverage process is a tort process, the law of the state in which the accident occurs applies to establish legal liability.

294. 332 S.E.2d 819 (W. Va. 1985).

295. *Postlethwait*, 432 S.E.2d at 802.

296. *Id.* at 804.

297. 429 S.E.2d 246, 249 (W. Va. 1993). The court held that the insurer was not prejudiced by this amendment because the insurer had notice of the suit before the statute of limitations had run.

ty.²⁹⁸ In *Perkins v. Doe*,²⁹⁹ the court considered a “John Doe” suit wherein the accident occurred when the plaintiff swerved out of the way of an unknown motorist; the accident occurred with no physical contact between the plaintiffs’ vehicle and that of the unknown motorist. The accident occurred in Virginia, but the insurance contract was formed in West Virginia. Because Virginia law allowed for recovery without a showing of “physical contact,” unlike West Virginia law, the court held that the suit initiated by the plaintiffs was an action in tort, and thus was subject to the traditional choice of law principles.³⁰⁰ The court applied the conflicts doctrine of *lex loci delicti*, holding that the law of the place of wrong was to be applied in tort cases.³⁰¹ Thus, the court permitted the plaintiff to recover for his injuries under Virginia law by applying the law of tort.³⁰²

Where the benefits under the insurance policy are at issue, contract law is applied.³⁰³ In *Lee v. Saliga*, the court held that issues relating to policy *coverage*, rather than *liability*, are to be resolved under the conflicts of laws principles which apply to contracts; thus, UM coverage in a policy written in Pennsylvania is interpreted according to Pennsylvania law.³⁰⁴ This is so even when the accident takes place in West Virginia.³⁰⁵ Further, the court has held that where UM benefits are at issue, questions are to be resolved under the laws of the state of formation of the contract, unless another state has a more significant

298. *Perkins v. Doe*, 350 S.E.2d 711 (W. Va. 1986).

299. *Id.* at 713. In *Perkins*, the accident in question occurred in Virginia. The plaintiffs were residents of West Virginia and their policy was written in West Virginia. Virginia’s “John Doe” law does not require actual physical contact between the hit-and-run vehicle and the claimant’s vehicle. *Doe v. Brown*, 125 S.E.2d 159 (Va. 1962). West Virginia’s “John Doe” law requires a “substantial physical nexus,” or actual physical contact, in order for a plaintiff to recover. W. VA. CODE § 33-6-31 (1992).

300. *Perkins*, 350 S.E.2d at 713.

301. *Id.* *Perkins* deviates from the general norm of applying contracts law doctrine to insurance cases. Perhaps this is due to Mr. Perkins unfortunate circumstances after the accident, as he was left a quadriplegic due to the negligence of an unknown driver.

302. The plaintiffs would not have been able to recover under West Virginia law. If the court had applied contract law to this conflicts of law quandary, the plaintiffs would not have been able to recover any of his loss.

303. *Lee v. Saliga*, 373 S.E.2d 345 (W. Va. 1988).

304. *Id.* at 349.

305. *Id.*

relationship with the parties or the transaction, or unless the law of the state of formation is contrary to West Virginia's public policy.³⁰⁶

K. Notice Requirements

The notice requirements of West Virginia Code § 33-6-31(e) affect only the contractual relationship between the UM insured and the insurer.³⁰⁷ "Hit-and-run" accidents require special measures; there are two statutory notice provisions for "hit-and-run" accidents. First, the insured must provide notice to the police or the Department of Motor Vehicles of the hit-and-run.³⁰⁸ Second, the insured must provide notice to the insurance company of the existence of a cause of action for damages against the owner or operator of the absconding vehicle.³⁰⁹ To recover under UM hit-and-run coverage, the insured must notify his insurer within sixty days after the accident.³¹⁰

For all UM accidents, notice must be given to the insurer within a reasonable time period.³¹¹ In the typical case for inadequate notice, the insured must present evidence showing the reason for the delay in giving notice.³¹² Once this prerequisite is satisfied, the insurer must demonstrate some prejudice from the insured's failure to give timely notice; if the insurer fails to present evidence of prejudice, the

306. *Liberty Mut. Ins. Co. v. Triangle Indus., Inc.*, 390 S.E.2d 562 (W. Va. 1990). *See also Johnson v. Neal*, 418 S.E.2d 349 (W. Va. 1992) (holding that Virginia law controlled where a Virginia motorist was killed in a collision with an uninsured West Virginia motorist because the policy was issued in Virginia by a Virginia company to a Virginia resident); *Adkins v. Sperry*, 437 S.E.2d 284 (W. Va. 1993) (holding that Ohio law applied because it was the state wherein the policy was issued and where the insured was principally located, thus West Virginia did not have a more significant relationship to the transaction or to the parties).

307. *Lusk v. Doe*, 338 S.E.2d 375 (W. Va. 1985). These notice provisions are *not* to inure to the benefit of a presently unknown tortfeasor in any way. *Id.*

308. W. VA. CODE § 33-6-31(e)(i) (1992).

309. W. VA. CODE § 33-6-31(e)(ii) (1992).

310. *Id.*

311. *Dairyland Ins. Co. v. Voshel*, 428 S.E.2d 542 (W. Va. 1993) (holding that, in a UM case, prejudice to the investigative interests of the insurer is a factor to be considered, along with the reasons for the delay and the length of delay in notification, in determining the overall reasonableness in giving notice of an accident).

312. *Id.*

insured's failure to give timely notice will not bar recovery.³¹³ However, if the insurer does present evidence of prejudice, then the reasonableness of insured's failure to give notice becomes an issue for the trier of fact.³¹⁴ If prejudice is shown, the insured will be barred from making a claim.³¹⁵

VI. UNDERINSURED MOTORIST COVERAGE (UIM)

Most states have some form of UIM coverage. Nationally, the growth of UIM coverage has been linked to the growing amount of accidents leaving insured motorists without some form of an economic safety net because the negligent tortfeasor was underinsured. The purpose of UIM coverage is a policy of full compensation for the innocent victim of an automobile accident.

UIM coverage was added in West Virginia in 1982.³¹⁶ While UM coverage is mandatory, UIM coverage is not.³¹⁷ It is, however, mandatory that an insurer offer UIM coverage to its insured. The insured may reject UIM coverage, and the insurance company must prove a knowing waiver on the part of the insured to satisfy this mandatory offer requirement. UIM coverage allows the insured, if he chooses, to protect himself from other drivers who are underinsured.

The key decision regarding UIM coverage in West Virginia is *Deel v. Sweeney*.³¹⁸ In *Deel*, the court stated that the purpose of UIM insurance is to allow the insured to protect himself, if he chooses to do so, against losses incurred as a result of the negligence of an underinsured driver.³¹⁹ Because UIM coverage is optional, the insurance company and the insured motorist must negotiate the terms of the UIM coverage. The terms, conditions, and premiums charged are those terms for which the parties contract — placing the insurance company in the

313. *Id.*

314. *Id.* See also *Youler*, 396 S.E.2d at 745.

315. *Dairyland*, 428 S.E.2d at 546.

316. W. VA. CODE § 33-6-31(b) (1992).

317. UIM coverage has been optional since it was adopted in 1982. *Id.*

318. 383 S.E.2d 92 (W. Va. 1989).

319. *Id.* at 95.

driver's seat of policy provisions offered.³²⁰ An insurance company may limit its UIM liability, as long as such limitations do not conflict with the statutory law.³²¹ Thus, UIM policies vary widely among the various insurance companies and the clients with which they contract.

A. *Mandatory Offer of Optional UIM Coverage*

UIM coverage is optional in West Virginia. It must be offered by the insurer, although it may be rejected by the insured. The insurer has the burden of proof of a commercially reasonable offer, and a knowing and informed rejection of that offer.

In *Bias v. Nationwide Mutual Insurance Co.*,³²² the Supreme Court of Appeals of West Virginia considered UIM insurance, and established several ground rules for the offer of optional UIM coverage to the insured.³²³ By statute, an insurance company must offer an option for both UM and UIM coverage up to the dollar amounts of liability insurance purchased by the insured.³²⁴ The insurance company has the burden of proving that an effective offer was made,³²⁵ and that any rejection of this offer by the insured was knowing and informed.³²⁶ The offer must state "in definite, intelligible, and specific terms," the nature of the coverage offered, the coverage limits and the costs involved.³²⁷ If the insurer cannot prove an effective and knowing waiver by the insured, the UIM coverage is included in the policy by operation of law.³²⁸

320. *Id.*

321. *Id.*

322. 365 S.E.2d 789 (W. Va. 1987).

323. *Id.* at 790.

324. W. VA. CODE §§ 33-6-31(b), 17D-4-2 (1994). The statutory language says that UIM coverage *shall* be offered, thus the court has interpreted this language to mean that such an offer is mandatory. *Nelson v. West Virginia Pub. Employees Ins. Bd.*, 300 S.E.2d 86 (W. Va. 1982).

325. *Bias*, 365 S.E.2d at 791.

326. *Id.* The insurer's offer must be made in a commercially reasonable manner, so as to provide the insured with adequate information to make an intelligent decision.

327. *Id.*

328. *Id.* See also *Federal Kemper Ins. Co. v. Wheeler*, 786 F. Supp. 565 (S.D. W. Va. 1992) (holding that the insured had not made a sufficient showing that higher benefit options were not presented to him as required to avoid summary judgment).

The court has considered the various elements of the commercially reasonable offer and the knowing and intelligent waiver. First, in *Miller v. Hatton*,³²⁹ the court held that the insurance company proved a knowing and intelligent waiver where the insured explicitly had rejected UIM coverage. However, in *Riffle v. State Farm Mutual Automobile Insurance Co.*,³³⁰ the court held that the insurance company failed to prove a knowing waiver on the part of the plaintiffs; because the purpose of West Virginia Code § 33-6-31 is to provide insurance purchasers with the opportunity to purchase UIM insurance, any lack of a knowing waiver causes UIM insurance to be added to the policy by statute.³³¹

In July, 1993, the Insurance Commissioner for the State of West Virginia issued an informational letter detailing the requirements for the mandatory offer of optional UIM coverage.³³² This letter summarizes the requirements of a 1993 bill (HB 2580) which details UIM coverage requirements.³³³ HB 2580 requires that all insurers “make available” to the named insured the optional limits of UM and UIM coverage. The offer must be made using the forms provided by the Insurance Commissioner’s office.³³⁴ UIM minimum coverage amounts are \$20,000 for bodily injury per person; \$40,000 for bodily injury per accident; and \$10,000 for property damage per accident, with a maximum amount of UIM coverage equal to the insured’s liability policy limits.³³⁵ This informational letter, and West Virginia Code § 33-6-31(d), should end all *Bias* disputes regarding UIM coverage — insurance companies should follow the requirements of the informational

The United States District Court for the Northern District held in a recent case that the insured’s spouse could effectively waive coverage under West Virginia law. *Hall v. Weisner*, 844 F. Supp. 1120 (N.D. W. Va. 1994) (holding that rejection of UIM coverage by spouse constitutes effective waiver if the intelligent and knowing requirement is satisfied).

329. 403 S.E.2d 782 (W. Va. 1991).

330. 410 S.E.2d 413 (W. Va. 1991).

331. *Id.*

332. *Forms for Mandatory Offer of Optional Limits of Automobile Uninsured and Underinsured Coverage*, Informational Letter No. 88 (July 1993).

333. The Informational Letter summarizes West Virginia House Bill 2580, which became effective on April 10, 1993.

334. The forms are provided in Informational Letter No. 88, *supra* note 332.

335. W. VA. CODE § 17D-4-2 (1991).

letter and *Bias* in order to sustain a summary judgment motion where UIM coverage was waived.

B. Definition of UIM

West Virginia Code §§ 33-6-31(b)(i) and (ii) define UIM coverage: an UIM is a motorist with liability insurance coverage but the motorist's liability limits are (a) less than the limits of the injured plaintiff's UIM insurance or (b) the motorist's liability limits have been reduced below the injured plaintiff's UIM limits by payments to others injured in the same accident.³³⁶

The first case on interpreting the UIM definition in West Virginia was *Stone v. Motorists Mutual Insurance Co.*,³³⁷ which held that West Virginia Code § 33-6-31(b)(i) and (ii) mean plainly what they say. In *Stone*, the southern district court held that an insured could not recover under his UIM policy where the tortfeasor's liability coverage limits equalled the insured's UIM coverage limits.³³⁸ In *Hines v. State Farm Mutual Automobile Insurance Co.*,³³⁹ the northern district court held that in order to recover UIM benefits, the tortfeasor must be underinsured, by definition, as a matter of law.³⁴⁰ In *Hines*, the tortfeasor had liability insurance in excess of the plaintiff's UIM limits. Because the tortfeasor had liability coverage which was not exhausted by the injured claimants, the plaintiff could not recover from his UIM insurer.³⁴¹

In 1990, the Supreme Court of Appeals of West Virginia decided the key case for the definition of UIM coverage, *State Automobile Mutual Insurance Co. v. Youler*.³⁴² In a revolutionary decision, the court held that the statutory revision of West Virginia Code § 33-6-31, which occurred in 1988, provided a clarification of the legislative in-

336. W. VA. CODE §§ 33-6-31(b)(i), (ii) (1992).

337. 654 F. Supp. 205 (S.D. W. Va. 1986).

338. *Id.* at 207.

339. 742 F. Supp. 344 (N.D. W. Va. 1990).

340. *Id.* at 346.

341. *Id.*

342. 396 S.E.2d 737 (W. Va. 1990).

tent for UIM coverage — to provide full indemnification to individuals injured by the negligent operation of motor vehicles by motorists who are not sufficiently insured.³⁴³ The court held that the amount of UIM policy payment due to the insured was equal to the total damages due the plaintiff less the tortfeasor's liability limits.³⁴⁴

In *Pristavec v. Westfield Insurance Co.*,³⁴⁵ the court held that UIM insurance coverage is activated when the amount of damages sustained by the injured plaintiff exceeds the amount of the tortfeasor's liability insurance which is actually available to the injured party. *Pristavec* extends the *Youler* definition of UIM by holding that a tortfeasor may achieve "underinsured motor vehicle status" where the tortfeasor's liability insurance which is actually available is less than the amount of damages sustained by the injured person.³⁴⁶ After *Pristavec* and *Youler*, UIM status is not determined by the comparison of the tortfeasor's available liability limits and the plaintiff's UIM limits, as required by the statutory definition. Rather, "UIM status" is determined by the comparison of the tortfeasor's liability limits and the plaintiff's damages.

C. Omnibus Clauses

There is only one case regarding omnibus clauses as they relate to UIM coverage — *Transamerica Insurance Co. v. Arbogast*.³⁴⁷ In *Transamerica*, the northern district court held that an "owned but not insured" exclusion would be held valid where the exclusionary language was unambiguous in the insured's UIM policy.³⁴⁸ The *Transamerica* decision is contrary to that made in *Bell v. State Farm*,

343. *Id.* at 751.

344. *Id.* Therefore, under *Youler*, the injured insured may recover under a UIM policy where that insured's UIM limits exceed the tortfeasor's liability limits.

345. 400 S.E.2d 575 (W. Va. 1990).

346. *Id.* at 578. However, the court has limited the application of the UIM statute. In *Cook v. McDowell County Emergency Ambulance Serv. Auth., Inc.*, 445 S.E.2d 197 (W. Va. 1994), the court held that W. VA. CODE § 33-6-31(b) does not control a state-purchased automobile insurance policy.

347. 662 F. Supp. 164 (N.D. W. Va. 1987).

348. *Id.* at 170.

which requires that any insurance policy provisions conform to statutory requirements.³⁴⁹ The *Transamerica* court reasoned that, because UIM coverage is not mandatory, *Bell v. State Farm* does not apply to UIM coverage.³⁵⁰ *Transamerica* also appears to be contrary to the policy of *Youler*, which established a policy of full compensation for injured parties. Is *Transamerica* wrongly decided? No, due to the court's decision in *Deel v. Sweeney*,³⁵¹ which held that the insurance company may incorporate any provisions it likes into the UIM coverage which do not conflict with statutory mandates.³⁵² Because UIM coverage is optional, there are no statutory mandates with which to conflict.

D. Inclusion and Exclusion

UM coverage is required in West Virginia, but UIM coverage is not mandatory — it is optional. Thus, the statutory requirements which are important in *Bell v. State Farm* only apply to UM coverage. As the court held in *Deel*, UIM coverage is not mandatory, and thus insurance companies may choose those provisions which are incorporated into UIM coverage.³⁵³ This different standard for UIM coverage is the reason for the decisions in *Transamerica Insurance Co. v. Arbogast*,³⁵⁴ *Aetna Casualty & Surety Co. v. Shambaugh*,³⁵⁵ and *Thomas v. Nationwide Mutual Insurance Co.*,³⁵⁶ discussed below.

There are several aspects of inclusion and exclusion in UIM cases. The first of these is an "owned but not insured" exclusionary clause. This type of exclusionary clause was held to be valid in *Transamerica*.³⁵⁷ "Owned but not insured" clauses do not violate the UIM statute where the insured demonstrates an understanding of the

349. *Bell v. State Farm*, 207 S.E.2d at 149.

350. *Transamerica*, 662 F. Supp. at 171.

351. 383 S.E.2d 92 (W. Va. 1989).

352. *Id.* at 94.

353. *Deel*, 383 S.E.2d at 92.

354. 662 F. Supp. 164 (N.D. W. Va. 1987).

355. 747 F. Supp. 1203 (N.D. W. Va. 1990).

356. 425 S.E.2d 595 (W. Va. 1992).

357. *Transamerica*, 662 F. Supp. at 164.

policy implications.³⁵⁸ In *Transamerica*, the insured was injured on a motorcycle which was not an insured vehicle under his standard automobile liability policy.³⁵⁹ The insured demonstrated his understanding of this exclusionary clause by purchasing motorcycle liability insurance through a different insurer than his UIM provider.³⁶⁰

In *Shambaugh*, the northern district court heard an action for a declaration that the insured's son was not a resident of the insured's household within the meaning of the UIM policy coverage.³⁶¹ The action was brought by Aetna, which was attempting to exclude the son from his father's UIM coverage.³⁶² The father's automobile insurance policy contained a "covered persons" provision, which included "family members." "Family members" were defined by the policy to include "any person related by blood or marriage who is a resident of your household including a ward or a foster child."³⁶³ The question of coverage for the son arose because his parents were divorced and his mother, who no longer resided with the insured father, had been granted physical custody.³⁶⁴ Aetna argued that the injured son could have only one residence — with his mother — and, thus, the son could not be considered a resident of the insured father's household.³⁶⁵ The northern district court held that "resident" is a more lenient standard than the "domicile" standard proposed by Aetna, and that the injured son should be considered to be a resident of his father's household under the insurance policy.³⁶⁶

358. *Id.*

359. *Id.*

360. *Id.* See also *Deel v. Sweeney*, 383 S.E.2d 92 (W. Va. 1989) (holding that an "owned but not insured" exclusion provision is valid under the UIM statute due to the optional nature of UIM coverage).

361. *Shambaugh*, 747 F. Supp. at 1203.

362. *Id.* at 1204.

363. *Id.*

364. *Id.* While the mother technically had physical custody of the injured son, the insured father spent a great deal of time with his son, the son stayed for extended periods of time with his father, and the father spent some time in his ex-wife's home caring for his son.

365. *Id.*

366. *Shambaugh*, 747 F. Supp. at 1204. The court stated that a person may have dual-residency under the plain meaning of the policy language, and thus the son could be considered a resident of both his mother's and his father's households.

In *Thomas*,³⁶⁷ the Supreme Court of Appeals of West Virginia held that a "family use" exclusion is valid under the UIM statutes, and that insurers may incorporate such terms, conditions, and exclusions in automobile insurance policies as are consistent with the UIM statutory provisions.³⁶⁸ Additionally, there is no UIM coverage for guest passengers where a policy excludes such payments,³⁶⁹ under the same logic as *Thomas*.

E. Guest Clauses

An insurance company may exclude coverage for guests in a UIM policy.³⁷⁰ In *Alexander v. State Automobile Mutual Insurance Co.*, the court held that UIM coverage is not available to guest passengers "unless the statute or the policy language specifically provides for such coverage."³⁷¹ As in *Deel*, the *Alexander* court considered the nature of UIM coverage as an optional, contracted-for-coverage provision, and held that the insurer may incorporate such terms, conditions, and exclusions as may be consistent with the premium charged, so long as these exclusions do not conflict with the "spirit and intent" of the UM and UIM statutes.³⁷² This decision is based on the notion that UIM coverage is "bargained for" by the insured, because of its optional nature; thus, the insured has the choice to include guest coverage in his UIM policy.³⁷³

A UIM policy which separately defines coverage for the owner, spouse, or member of the insured's household, and for other persons while occupying the insured vehicle with the consent of the insured, creates two distinct classes of individuals.³⁷⁴ Any guest passengers are

367. *Thomas*, 425 S.E.2d at 600.

368. *Id.*

369. *Alexander v. State Auto. Mut. Ins. Co.*, 415 S.E.2d 618 (W. Va. 1992). *But see* *Starr v. State Farm Fire & Casualty Co.*, 423 S.E.2d 922 (W. Va. 1992) (holding that a guest passenger could receive UIM benefits under the insured's policy, but could not stack these benefits).

370. *Alexander*, 415 S.E.2d at 618.

371. *Id.* at 625.

372. *Id.* *See also* *Deel v. Sweeney*, 383 S.E.2d 92, Syl. Pt. 3 (W. Va. 1989).

373. *Alexander*, 415 S.E.2d at 624.

374. *Starr v. State Farm Fire & Casualty Co.*, 423 S.E.2d 922 (W. Va. 1992). The

included in the second class, consisting of the permissive users of the named insured's vehicle.³⁷⁵ In *Starr*, the court held that a passenger who was entitled to UIM benefits solely by virtue of riding in the named insured's automobile could not stack the insured's UM/UIM coverage on another vehicle which was not involved in the accident.³⁷⁶ Because West Virginia Code § 33-6-31(c) does not expressly provide for the stacking of UIM provisions by a guest passenger, the court reasoned that there was no legislative intent for UIM stacking by a Class Two insured.³⁷⁷ Therefore, the insurer can successfully insert an anti-stacking provision as to guests.

F. Stacking

Again, stacking of automobile insurance coverages refers to the piling up of multiple coverages from multiple policies, or the piling up of coverages of multiple vehicles in a single policy, when there is only one loss. West Virginia Code § 33-6-31(b) articulates the legislature's public policy of full indemnification or compensation for accident victims which underlies both UM and UIM coverage.³⁷⁸ Thus, the "pre-eminent public policy of this state" in UM or UIM cases provides that "the injured person be fully compensated for his or her damages not compensated by a negligent tortfeasor," up to the limits of UIM coverage.³⁷⁹ Because of the policy of full indemnification, anti-stacking clauses were found repugnant to the UIM statute in *Youler*,³⁸⁰ making anti-stacking language in automobile policies void under West Virginia Code § 33-6-31(b). The insured may recover up to the amount of UIM

court held that W. VA. CODE § 33-6-31(c) (1994) creates two classes of insureds for the purposes of UM/UIM coverage. The first is the named insured, his or her spouse, and their resident relatives (Class One). The second class consists of the permissive users of the named insured's vehicle (Class Two). *Starr*, 423 S.E.2d at 926-28.

375. *Starr*, 423 S.E.2d at 925.

376. *Id.* at 928.

377. *Id.* In fact, the second UIM policy (for the automobile not involved in the accident) did not expressly provide for coverage for guests.

378. W. VA. CODE § 33-6-31(b) (1992); *Youler*, 396 S.E.2d at 745.

379. *Youler*, 396 S.E.2d at 745.

380. *Id.* See also W. VA. CODE § 33-6-17 (1992) (any insurance policy provision or condition not complying with insurance statutes must yield to the statutory mandates).

coverage, or up to the amount of the judgment obtained against the financially irresponsible tortfeasor, whichever is less, as a result of one accident and injury.³⁸¹

The question of an insurance bargain was addressed by the court in *Russell v. State Automobile Mutual Insurance Co.*³⁸² The court held that, where the insured bargains for a reduced premium price through a multi-car discount, the insured receives the "benefit of the bargain"³⁸³ and, in this instance, anti-stacking language is permitted. To ensure that an anti-stacking clause will be upheld in a "bargain" policy when there is a multi-car discount, the insurer should state "clearly and unambiguously" the limits on the declarations page; the limitation clause should make clear the maximum amount the insurer will pay for UIM coverage for any one accident, regardless of the number of insured vehicles or the number of premiums paid.³⁸⁴

In 1992, the Supreme Court of Appeals reversed its stance on stacking. In *Thomas v. Nationwide Mutual Insurance Co.*,³⁸⁵ the court held that anti-stacking language is not forbidden in a UIM policy under West Virginia Code § 33-6-31(b). However, such anti-stacking language is subject to several conditions: there must be only a single insurance policy; the policy can only be issued by a single insurer; the exclusionary language must be a "family use exclusion;" and the insured must have bargained for an underinsured policy endorsement even though the policy covers more than one vehicle.³⁸⁶ If the policy does not meet the aforementioned requirements, then the *Youler* prohibition for anti-stacking clauses still applies.

381. *Youler*, 396 S.E.2d at 746.

382. 422 S.E.2d 803 (W. Va. 1992). *See also* *Arbogast v. Nationwide Mut. Ins. Co.*, 427 S.E.2d 461 (W. Va. 1993) (holding that UIM stacking can be limited where there is a multi-car discount).

383. *Russell*, 422 S.E.2d at 806-07.

384. *Id.* at 807.

385. 425 S.E.2d 595 (W. Va. 1992).

386. *Id.* at 597-601. *See also* *Allstate Ins. Co. v. Ashley*, 833 F. Supp. 583 (S.D. W. Va. 1993) (holding that a policy provision which denied duplication of payments was valid and that an insurer may preclude the stacking of UIM coverage when only one policy is involved).

G. Set Off

West Virginia Code § 33-6-31(b) requires that the tortfeasor's liability coverage must be set off against the amount of damages sustained by the injured insured, and not against the insured's UIM coverage limits.³⁸⁷ This is so because the statutory language, "all sums . . . as damages" evinces a public policy of full indemnification or compensation for those damages uncompensated by the financially irresponsible tortfeasor.³⁸⁸ Thus, the UIM insurer is liable for the uncompensated damages up to the insured's UIM coverage limits.³⁸⁹ Any set-off language which purports to diminish these UIM benefits is void.³⁹⁰

In *Johnson v. General Motors Corp.*,³⁹¹ the court considered the effect of the collateral source rule on the offsetting of UIM benefits payments. The "collateral source rule" was established to prevent the defendant from taking advantage of payments received by the [injured party] as a result of the [injured party's] own contractual arrangements [which are] entirely independent of the defendant."³⁹² The rationale for the rule is that a negligent tortfeasor should not be allowed to minimize his damages by offsetting payments received by the injured party through that party's own independent arrangements.³⁹³ Normal-

387. *Youler*, 396 S.E.2d at 748.

388. *Id.* at 748-49.

389. *Id.* at 749. In 1991, the southern district court considered a motion for relief of judgment following the *Youler* decision. *Dowell v. State Farm Fire & Casualty Auto. Ins. Co.*, 774 F. Supp. 996 (S.D. W. Va. 1991). The original decision was taken on March 6, 1990, prior to the ruling in *Youler*. Approximately five months after the initial judgment, the plaintiffs filed a motion for reconsideration of the March 6 opinion in light of the decision in *Youler* which allowed for UIM recovery up to full indemnification. The southern district court held that the decisional change which prevented UIM offsets did not represent a change of law because there was no change in legislative intent; the court held that, under Rule 60(b)(6) of the Federal Rules of Civil Procedure, a change in decisional law is not grounds for relief of judgment. *Id.* at 1000-01.

390. *Youler*, 396 S.E.2d at 750. See *Brown v. Crum*, 400 S.E.2d 596 (W. Va. 1990) (holding that the UIM statute precludes the offsetting of amounts paid by the tortfeasor's insurance carrier against the UIM policy limits of the injured insured).

391. 438 S.E.2d 28 (W. Va. 1993).

392. *Id.* at 36 (citing *Ratlief v. Yokum*, 280 S.E.2d 584 (W. Va. 1981) (defining the collateral source rule as a preclusion to offsetting independently contracted for benefits)).

393. *Johnson*, 438 S.E.2d at 36.

ly, the collateral source rule operates to preclude the offsetting of payments made by health and accident insurance companies, or other collateral sources, as against the damages claimed by the injured party.³⁹⁴ In the *Johnson* case, General Motors attempted to minimize its damages by offsetting the UIM settlement the Johnsons received as a result of their own contractual insurance arrangements. The court held that UIM benefits are a collateral source and, as such, may not be offset against any damages sought against a negligent tortfeasor.³⁹⁵

H. Subrogation and Consent to Settle

West Virginia Code § 33-6-31(f) authorizes subrogation by the UIM insurance company for the amount paid to an injured person by a tortfeasor.³⁹⁶ An insurance company may either waive or use its subrogation rights mandated by this statute, depending on whether or not the insurance company has given its insured the consent to settle.³⁹⁷ The court has held that a "consent to settle" provision pertaining to the insured's UIM coverage is a *valid and enforceable means* by which an insurer may protect its statutorily mandated right to subrogate claims.³⁹⁸ Thus, an insured must first obtain written consent from his insurer *prior* to settling a claim with the tortfeasor;³⁹⁹ this protects the insurance company's subrogation rights against the tortfeasor.⁴⁰⁰

I. Statute of Limitations

A direct action against a UM insurer is a contract action governed by the contract statute of limitations, which is ten years.⁴⁰¹ However, the statute of limitations involving a UIM suit or a "John Doe" action is two years. The UIM process is identical to the UM process.⁴⁰² In

394. *Id.*

395. *Id.*

396. *Postlethwait v. Boston Old Colony Ins. Co.*, 432 S.E.2d 802 (W. Va. 1993).

397. *Arndt v. Burdette*, 434 S.E.2d 394, 399 (W. Va. 1993).

398. *Id.*

399. *Id.*

400. *Id.* at 400.

401. *Plumley v. May*, 434 S.E.2d 406 (W. Va. 1993).

402. *See supra* notes 288-292 and accompanying text.

Plumley v. May,⁴⁰³ the court addressed the issue of a direct action against a UM or UIM insurer, and held that a plaintiff is *not* precluded from suing his UIM insurer if the plaintiff has settled with the tortfeasor's liability insurer for the *full amount* of the policy and where the plaintiff has obtained from his UIM insurer a waiver of said insurer's right of subrogation against the tortfeasor.

J. Process, Suit, and Joinder

The West Virginia UIM statute does not authorize a direct action against the UIM insurance company by its insured.⁴⁰⁴ In order for the UIM insured to bring suit against his insurer, a judgment against the negligent tortfeasor must first be obtained,⁴⁰⁵ or the UIM insured must settle with the tortfeasor's liability insurer with the approval of the UIM insurer.⁴⁰⁶

In *State ex rel. Allstate Insurance Co. v. Karl*,⁴⁰⁷ the Supreme Court of Appeals of West Virginia outlined the relationship between the UIM insurance company and the tortfeasor's liability insurance company during the accident litigation. The UIM insurer was held to be an excess insurer, with the tortfeasor's liability insurer holding the place of primary insurer.⁴⁰⁸ In *State ex rel. State Auto Mutual Insurance Co. v. Steptoe*,⁴⁰⁹ the court considered the issue of the UIM insurer's right to participate in litigation and held that there is no absolute right of the UIM insurer to participate in the tortfeasor's litigation defense. In fact, the court held that the UIM insurer had no absolute right to file pleadings on behalf of a tortfeasor who had liability coverage and was being defended by a liability insurance company.⁴¹⁰

403. *Plumley*, 434 S.E.2d at 409-10.

404. W. VA. CODE § 33-6-31(d) (1992).

405. *Plumley v. Allstate Ins. Co.*, 772 F. Supp. 922, 924 (S.D. W. Va. 1991).

406. *Id.* See also *Davis v. Robertson*, 332 S.E.2d 819 (W. Va. 1985); *Lee v. Saliga*, 373 S.E.2d 345 (W. Va. 1988).

407. 437 S.E.2d 749 (W. Va. 1993).

408. *Id.* at 751.

409. 438 S.E.2d 54, 58 (W. Va. 1993).

410. *Id.* The court based its holding on W. VA. CODE § 33-6-31(d) (1992).

K. Choice of Law

In general, the law of the state in which the insurance contract is formed governs the suit.⁴¹¹ However, where West Virginia has "significant contacts" to the injury and the accident at issue, the laws of West Virginia may be applied, even where the insurance contract was formed in another state.⁴¹²

The southern district court considered substantive law application involving conflicts of law and forum non conveniens in *Newsco Well Service, Ltd. v. Home Insurance Co.*⁴¹³ In *Newsco*, a Canadian insured alleged breach of insurance contract for a policy entered into in Canada.⁴¹⁴ The court reasoned that it is fundamental for a federal district court to apply the law of the state in which it sits;⁴¹⁵ however, this traditional rule was modified by the historical application, in West Virginia, of the law of the state in which the insurance contract was formed (in this case, Canada).⁴¹⁶ The court looked to a more recent decision, *Liberty Mutual Insurance Co. v. Triangle Industries, Inc.*,⁴¹⁷ in order to determine the source of substantive law interpretations. The court in *Liberty Mutual* held that the state in which the contract was formed had the controlling law *unless* (1) West Virginia had a more significant relationship to the transaction or to the parties or (2) the law is contrary to the public policy of this state.⁴¹⁸ The *Newsco* court held that the plaintiff's case did not fall under either of the exceptions, thus the law of the state of contract formation ap-

411. *Joy Technologies, Inc. v. Liberty Mut. Ins. Co.*, 421 S.E.2d 493 (W. Va. 1992).

412. *Id.* at 497. *See also* *Nadler v. Liberty Mut. Fire Ins. Co.*, 424 S.E.2d 256 (W. Va. 1992) (holding that the laws of the state in which the contract was formed apply unless another state has a more significant relationship to the transaction and the parties); *Nadler v. Liberty Mut. Fire Ins. Co.*, 770 F. Supp. 294 (S.D. W. Va. 1990) (holding that the law of the state in which the contract was formed generally, but not always, governs).

413. 799 F. Supp. 602 (S.D. W. Va. 1991).

414. *Id.* at 604.

415. *Id.* at 605 (relying on *Erie Railroad Co. v. Tompkins*, 304 U.S. 64 (1938)).

416. *Id.* at 606 (relying on the "Mattingly Rule" of *Michigan Nat'l Bank v. Mattingly*, 212 S.E.2d 754 (W. Va. 1975)).

417. 390 S.E.2d 562 (W. Va. 1990).

418. *Newsco*, 799 F. Supp. at 606 (citing *Liberty Mutual*, 390 S.E.2d at 567).

plied.⁴¹⁹ Additionally, the court considered the question of forum non conveniens,⁴²⁰ which refers to the discretionary power of the courts to decline jurisdiction where the interests of justice would be better served if the action were brought in another forum.⁴²¹ The court considered the alternative forum options, and the burden of switching forums for the plaintiff, and concluded that the case should be dismissed on the ground of forum non conveniens.⁴²²

Finally, in considering the “full faith and credit” issue, the court has held that West Virginia’s courts may not refuse to enforce another state court’s judgment merely because that judgment involves some contravention of the forum state’s public policy.⁴²³

L. Notice Requirements

As with UM insurance, the UIM insured has a duty to provide reasonable notice to his UIM insurance company when he is involved in an accident.⁴²⁴ The notice must be provided within a reasonable time period.⁴²⁵ In the typical case of inadequate notice, the insured must present evidence showing the reason for the delay in giving notice.⁴²⁶ Once this prerequisite is satisfied, the insurer must demon-

419. *Id.* at 611.

420. *Id.*

421. BLACK’S LAW DICTIONARY 452 (6th ed. 1991).

422. *Nowaco*, 799 F. Supp. at 615. The court required that the dismissal be conditioned upon the plaintiff’s ability to achieve jurisdiction and service of process over the defendant in the Canadian judicial system. *Id.*

423. *Clark v. Rockwell*, 435 S.E.2d 664 (W. Va. 1993). The full faith and credit clause, U.S. CONST. art. 4, § 1, requires each state to give effect to the official acts of sister states, including judgments entered in sister states if that state had jurisdiction over the parties and the subject matter.

424. *Youler*, 396 S.E.2d at 742-43. “Reasonableness” of the notice is an issue for the finder of fact. *Id.* at 742.

425. *Dairyland Ins. Co. v. Voshel*, 428 S.E.2d 542 (W. Va. 1993). In a UIM case, prejudice to the investigative interests of the insurer is a factor to be considered, along with the reasons for the delay and the length of delay in notification, in determining the overall reasonableness in giving notice of an accident. While the court provided no specific definition of the term “reasonableness,” the *Dairyland* court did expressly state that an “almost two-year” delay did not appear to be reasonable. *Id.* at 546.

426. *Id.*

strate that prejudice resulted from the insured's failure to give timely notice; if the insurer fails to present evidence of prejudice, the insured's failure to give timely notice will not bar recovery.⁴²⁷ However, if the insurer does present evidence of prejudice, then the reasonableness of the insured's failure to notify becomes an issue for the trier of fact.⁴²⁸ If prejudice is shown, the insured will be barred from making a claim.⁴²⁹

VII. CONCLUSION

Automobile insurance policy questions present a series of quandaries for the practicing attorney — the importance of an organized approach in researching and reviewing your client's case cannot be stressed enough. First, the insurance policy provisions should be considered, paying particular attention to the express wording of the provisions and the context in which they are written. Next, closely read the controlling statutes as they apply to the policy provisions. Then, review the insurance regulations promulgated by the Insurance Commissioner's office.⁴³⁰ Only after these initial steps have been performed should the attorney then turn to the case law. Additionally, the public policy should be gleaned from the statutes, regulations, and cases in order for the attorney to comprehend the whole picture. Finally, the national norms of automobile insurance policy laws should be considered.⁴³¹ Be prepared for several surprises along the way — insurance adjusters, statutes, and case law do not always follow a common sense direction.⁴³²

427. *Id.*

428. *Id.* See also Youler, 396 S.E.2d at 745.

429. *Dairyland*, 332 S.E.2d at 546.

430. See W. VA. INS. REGS. §§ 114-3-1 to -3 (1990).

431. Consider the following excellent treatises: WIDISS, *supra* note 2; IRVIN E. SCHERMER, *AUTOMOBILE LIABILITY INSURANCE* (2nd ed. 1981); ROBERT R. KEETON & ALAN I. WIDISS, *INSURANCE LAW* (1988); COUCH ON INSURANCE 2D (Rev. ed. 1982); APPLEMAN, *supra* note 20.

432. See, e.g., *Johnson v. Continental Casualty Co.*, 201 S.E.2d 292 (W. Va. 1973) (where the policy provision expressly excluded guests, in flat contradiction to West Virginia Code § 33-6-29 (1992)); *Perkins v. Doe*, 350 S.E.2d 711 (W. Va. 1986) (holding that Virginia law applied, in a case where the insurance contract was formed in West Virginia and the injured insureds resided in West Virginia, in order to grant recovery to the insureds).

Insurance law is governed by three important interests — the eternal triangle of insurance law — insurance company provisions; legislative and administrative law; and judicial regulation of the insurance industry. Insurance companies operate in their own self-interest with the objective of making a profit. The legislative and administrative branches of insurance law operate as the neutral go-between, creating laws which form a consensus between the insurance industry and the consumer.⁴³³ The judiciary most often operates in an oversight capacity, regulating insurance industry conduct as it affects consumers.⁴³⁴ Attorneys should consider not only the express language of the policy provisions, statutes, regulations, and case law, but also its source.

West Virginia's automobile liability insurance is fairly straightforward and consistent with the national norms. Most areas of liability insurance are either covered by, or related to, an express statutory provision. West Virginia's case law contains some liberal decisions expanding the recovery for the injured victim;⁴³⁵ however, the court has also issued some fairly conservative decisions which have reduced the amount of allowable recovery.⁴³⁶ The biggest disappointment in the liability area is the lack of a *Tulley/Bell* equivalent. Liability insurance is mandatory, but is not subject to the same statutory strictures as UM insurance. This should be remedied.

Currently, MEDPAY is under the control of the insurance industry. MEDPAY insurance needs legislative control and a *Tulley/Bell* equivalent as the present system of insurance company control does not

433. See W. VA. CODE § 33-20-1 (1992) (stating that the purpose of regulating insurance rates is to be certain that the rates are not excessive (pro-consumer); inadequate (pro-insurance industry); or unfairly discriminatory (neutral) in their application).

434. See, e.g., Justice Neeley's dissent in *Jarrett v. E. L. Harper & Sons, Inc.*, 235 S.E.2d 362, 366 (W. Va. 1977), wherein Justice Neely opined that, "[s]ome of the bandits in the insurance business, a minority I am happy to point out, predicate their company policy on the proposition that a person cannot sue them, realistically, for property damage. They offer settlements accordingly."

435. See, e.g., *supra* notes 87-91 and accompanying text (discussing *Taylor's* "initial permission rule"); *supra* note 147 and accompanying text (discussing *Hensley's* punitive damages allowance).

436. See *supra* notes 139-140 and accompanying text (discussing *Shamblin's* "no stacking" decision); *supra* notes 99-101 and accompanying text (discussing *Karlet's* restriction of loss of consortium recovery to the "per person" limits).

provide adequate protection for the public interest. Because many West Virginia residents lack medical coverage, protection of MEDPAY coverage in automobile accident cases is sorely needed. However, insurance industry control of MEDPAY is mitigated by MEDPAY policy language which tends to be "boiler-plate" — consumers are offered a choice of substantially similar provisions which are differentiated only by pennies. Subrogation presents the most problems for practitioners, especially in the areas of "fair share" reductions,⁴³⁷ spill-over from UM coverage due to the "made-whole rule," and the denial of self-subrogation for insurance companies who represent both the plaintiff and the tortfeasor.⁴³⁸

UM is controlled by the *Tulley/Bell* premise, which enforces statutory conformity and voids any provisions which either conflict with or are not expressly permitted by statute. Because UM coverage is controlled by fairly well-written code provisions, it presents few conceptual problems for the practitioner. The last truly difficult loophole was closed by *Norman*,⁴³⁹ which defined a "hit-and-run" accident as one which involved a close and substantial physical nexus.

UIM coverage is required to be offered by an insurer, but is not mandatory and may be rejected by the insured — the named insured decides the extent of his or her coverage. Therefore, UIM is less necessary to have than UM, but both are covered by the same statutory treatment. Hence, there is tension between the *Deel* decision, allowing the insured to choose the extent of UIM coverage, and the *Tulley/Bell* premise, requiring conformity with statutory requirements. This tension should be resolved.

This Article comprises a survey of four major portions of West Virginia's automobile insurance policy law: liability; MEDPAY; UM;

437. See *Arnold*, *supra* notes 179-181 and accompanying text.

438. See *Richards*, *supra* notes 188-190 and accompanying text.

439. *State Farm Mut. Auto. Ins. Co. v. Norman*, 446 S.E.2d 720 (W. Va. 1994).

and UIM insurance. We have not covered the issues of collision insurance, comprehensive coverage, and insurance company claim misconduct, but have left these for another day. This Article is intended as a primer on automobile insurance policy law in this state. While it covers a great deal of ground, attorneys should be aware that the true work only starts here.