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**The Validity of Anit-Stacking Language in Automobile Insurance Policies in West Virginia—Application Is Limited by Public Policy**

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THE VALIDITY OF ANTI-STACKING LANGUAGE IN AUTOMOBILE INSURANCE POLICIES IN WEST VIRGINIA—APPLICATION IS LIMITED BY PUBLIC POLICY

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I. INTRODUCTION

The controversial issue of "stacking" of automobile insurance coverages is the subject of an important series of decisions by the West Virginia Supreme Court of Appeals.1 Stacking has been defined as the "ability of an insured, when covered by more than one insurance policy, to obtain benefits from [a] second policy on [the] same claim when recovery from the first policy alone would be inadequate."2 In the context of automobile insurance, stacking occurs when an insured seeks to expand coverage by aggregating the policy limits of insurance coverage on multiple vehicles.3 To counter the significant increase in insurer indemnity that stacking creates, many insurance companies incorporate so-called "anti-stacking" language into automobile insurance policies.4 Despite apparent5 mutual assent of both the insurer and the insured, in certain situations these anti-stacking provisions are void.

Intertwined with the issue of stacking is section 33-6-31 of the West Virginia Code.6 This statute provides a public policy of full in-

1. See infra notes 143-46 and accompanying text.
4. Id. § 5.9(b)(1)(ii).
5. The word "apparent" is used as insurance policies are typically referred to as "contracts of adhesion." See, e.g., Marson Coal Co. v. Insurance Co. of Pa., 210 S.E.2d 747 (W. Va. 1974). This conveys the idea that the two parties are not of equal bargaining power and therefore, the insured may not be able to negotiate some or all of the terms of the contract. See, e.g., BLACK'S LAW DICTIONARY 40 (6th ed. 1991). Based on this principle, it would be a mistaken assumption to find that in all situations an insured has knowingly assented to anti-stacking language in automobile insurance policies.
demnification through language requiring that all automobile insurance policies contain mandatory uninsured and optional underinsured motorist coverages. This statute has created an exception to the general rule in West Virginia which requires that anti-stacking language be applied and not construed absent a contrary statute, regulation, or public policy.

The purpose of this Note is to explain the decisions of the West Virginia Supreme Court of Appeals regarding the validity of anti-stacking provisions in automobile insurance policies. Although this area of law has not been fully developed in West Virginia, the issue has been resolved regarding liability provisions and both underinsured and uninsured motorist coverages. One important area that the court has not dealt with is the stacking of medical payments provisions. This Note will predict how the court will resolve this area based on an analysis of the public policy exception described below.

II. FOUNDATION OF STACKING LAW IN WEST VIRGINIA—

Bell v. State Farm Mutual Automobile Insurance Co.

The first West Virginia Supreme Court of Appeals case dealing with the issue of stacking of automobile insurance was Bell v. State Farm Mutual Automobile Insurance Co. This case laid the foundation for the public policy exception allowing stacking of insurance coverage and was based, in part, on section 33-6-31 of the West Virginia Code.

7. The statute, in pertinent part, provides:

[n]or shall any such policy . . . be so issued unless it shall contain an endorsement or provisions undertaking to pay the insured all sums . . . as damages from the owner or operator of an uninsured motor vehicle . . . . Provided further, that such policy . . . shall provide an option to the insured . . . to pay the insured all sums . . . as damages from the owner or operator of an . . . underinsured motor vehicle . . . .

W. VA. CODE § 33-6-31(b) (1988).

8. See infra notes 45-64 and accompanying text.


10. What was then W. VA. CODE § 33-6-31 (1972) has been amended several times since the Bell decision, most recently in 1988. W. VA. CODE § 33-6-31 (1988).
A. The Facts of Bell

In Bell, one of the plaintiffs, Shirley Bell, was injured in a collision with an uninsured motorist while she riding a motorcycle. She sought coverage for her injuries under her State Farm policy which protected her against loss from the operation of her 1970 Fiat. The other plaintiff, Hubert Murray, the father of Shirley Bell, sought coverage for his daughter's injuries from another State Farm policy covering his 1966 Ford. The second policy listed all of Murray's household family members as insureds. In effect, the plaintiffs were attempting to stack coverages of the two policies issued by State Farm.

B. Holding and Analysis

State Farm denied coverage to both plaintiffs because of two exclusionary clauses found in the endorsements of uninsured motorist coverage in each policy.

1. The Court Voids the “Owned But Not Insured” Exclusionary Clause

The first type of exclusionary clause in each policy excluded payment “when the policyholder sustains bodily injury while occupying a vehicle which is owned by an insured but to which the insured’s liability coverage does not apply.” This exclusionary clause, if given effect, would have precluded coverage because at the time of the accident, Shirley Bell was driving a motorcycle not specified under either policy at issue.

The court found that the exclusionary clause was void because section 33-6-31(c) of the West Virginia Code requires insurers to in-
demnify policyholders for damages arising "while in a motor vehicle or otherwise." This "or otherwise" portion has been liberally construed in West Virginia to allow insureds to recover for injuries while in an owned vehicle not specified under a policy. Therefore, the court held that this type of exclusionary clause was more restrictive than the statute and therefore void.

However, the continuing validity of the Bell holding in regard to this type of exclusionary clause was called into question in the federal case Transamerica Insurance Co. v. Arbogast. In that case, the district court appeared to agree with the plaintiff's assertion that the 1979 amendment to section 33-6-31(k) of the West Virginia Code was in fact a legislative incorporation of Justice Sprouse's dissent in Bell. The amendment provided that "[n]othing contained herein shall prevent any insurer from also offering benefits and limits other than those prescribed herein, nor shall this section be construed as preventing any insurer from incorporating in such terms, conditions and exclusions as may be consistent with the premium charged." Based on this interpretation of legislative intent, the Arbogast court held that these types of exclusionary clauses, when unambiguous, are no longer more restrictive than a statute or public policy and hence are valid.

16. Id. at 149-50.
17. Id.
18. Id. at 149.
20. Justice Sprouse dissented in Bell because he believed that the majority was taking an overexpansive view of the legislative intent behind the phrase "or otherwise." As a result of this overexpansive view, Justice Sprouse believed that the insured was wrongfully receiving the bonus of free coverage on all owned vehicles by only insuring one. He felt that the majority holding was inconsistent with the holding in Nationwide Mut. Ins. Co. v. Akers, 340 F.2d 150 (4th Cir. 1965). Bell, 207 S.E.2d at 151.
21. Following this logic, this code revision would also seem to call into question of the validity of the Bell decision in regard to stacking. However, the West Virginia Supreme Court of Appeals has still relied on Bell regarding stacking in cases after this statutory revision. The court has construed subsection (k) to mean "[i]nsurers may incorporate such terms, conditions and exclusions in an automobile insurance policy as may be consistent with the premium charged, so long as exclusions do not conflict with the spirit and intent of uninsured and underinsured motorist statutes." Deel v. Sweeney, 383 S.E.2d 92 syl. pt. 3 (W. Va. 1989) (emphasis added). This construction would seem contrary to Arbogast.
2. The Court Voids the “Excess-Escape” Exclusionary Clause

In *Bell*, the second type of exclusionary clause\(^{22}\) upon which State Farm denied coverage stated:

> [T]he insurance hereunder shall apply only as excess insurance over any other similar insurance available to such insured and applicable to such motor vehicles as primary insurance, and this insurance shall then apply only in the amount by which the Limit of Liability for this coverage exceeds the applicable limit of liability of such other insurance.\(^{23}\)

As a result of this unambiguous language, if the rights of the parties were governed exclusively by the contracts, the plaintiffs would have been foreclosed from recovering from more than one policy because the maximum coverage under both was the same, $10,000.\(^{24}\) Despite the clear language, the court held that the second exclusionary clause was also void.\(^{25}\) This decision was based primarily on the language of section 33-6-31(b) of the West Virginia Code. This statute requires that all motor vehicle insurance policies issued by any licensed insurer in West Virginia contain “provisions undertaking to pay the insured all sums which he shall be legally entitled to recover as damages from the owner or operator of an uninsured motor vehicle.”\(^{26}\) Analyzing the policy exclusions in light of the statute the court stated:

> This court holds that because the exclusionary clauses are more restrictive than the uninsured motorist statute . . . they are repugnant to the statute and therefore void. Plaintiff Shirley Bell, therefore, is entitled to recover from defendant State Farm under the statutory coverage that now stands in lieu of the void exclusionary clause.\(^{27}\)

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22. This type of exclusionary clause is typically referred to as an “excess escape” clause.
23. *Bell*, 207 S.E.2d at 149.
24. Id.
25. Id. at 150.
27. *Bell*, 207 S.E.2d at 150.
The court further explained its rationale by examining the twofold purpose of the West Virginia uninsured motorist statute. First, the statute was designed to provide a minimum level of compensation to those injured by an uninsured motorist. Second, the statute should distribute the burden of loss among all owners of insured motor vehicles in West Virginia. In contrast, an exclusionary clause in an insurance policy "which seeks to defeat the purpose of spreading the burden of loss or the benefits of coverage by limiting, through exclusions or otherwise, the insurance underwriter's liability is repugnant to the uninsured motorist statute."

3. Stacking Analysis

After determining that the exclusionary clauses were void, the court then turned to the issue of whether the plaintiffs could stack the coverages of the two policies. The court first noted that no binding West Virginia case had dealt with the issue of whether a "plaintiff may recover under more than one uninsured motorist policy." However, the court agreed with the federal district court's opinion in *Tulley v. State Farm.* In *Tulley,* the court allowed recovery under two different policies after being persuaded by the reasoning in the Virginia case *Bryant v. State Farm Mutual Insurance Co.* That case permitted stacking while construing an uninsured motorist statute similar to the one in West Virginia. From *Bryant,* the *Tulley* court extrapolated the principle that "the controlling instrument is the statute and ... provisions in the insurance policy that conflict with the requirements of the statute, either by adding to or taking away from its requirements are void and ineffective." Stated simply, not allowing stacking would have been inconsistent with the uninsured motorist statute. By

28. *Id.*
29. *Id.*
30. *Id.*
31. *Id.* at 151.
33. 140 S.E.2d 817 (Va. 1965).
34. *Bell,* 207 S.E.2d at 151 (quoting *Bryant v. State Farm Mut. Ins. Co.,* 140 S.E.2d 817, 819 (Va. 1965)).
adopting the Bryant and Tulley rationales, the court laid the foundation allowing stacking of insurance policies in West Virginia. 35

The court articulated another justification for the allowance of stacking in its brief discussion on "unjust enrichment." 36 The court, demonstrating its approval of the case Simpson v. State Farm Mutual Automobile Co., 37 stated that an insurance company must provide protection on all policies in which a premium has been paid. The court believed that "[a]ny other result would lead to unjust enrichment of insurance companies." 38 Furthermore, the court asserted that, as a general principle, since the premium has been paid for a person protected by the statute, insurers should be indifferent regarding the issue of stacking. 39

Bell was an important case for several reasons. First, it was the first binding West Virginia case on stacking. 40 More importantly, it demonstrated that the statutorily created public policy of full indemnification is applicable to the issue of stacking. In addition, the unjust enrichment justification for allowing stacking was articulated by the court. 41

The court's approach in allowing stacking despite contrary contract language was supported by more than just Virginia law. A growing number of courts were allowing stacking as a matter of public policy. 42 Today, many jurisdictions with comparable uninsured motorist

35. Id.
36. Id.
38. Bell, 207 S.E.2d at 151.
39. Id.
40. Tulley v. State Farm, 345 F. Supp. 1123 (S.D. W. Va. 1972) was truly the first West Virginia case on "stacking" since the adoption of the uninsured motorist statute in West Virginia. As discussed earlier, it was a federal case, and as such had no binding effect on the court in Bell, though the court did agree with the holdings as evidenced by its approval in the opinion. Bell, 207 S.E.2d at 151.
statutes are in accord with the holding in Bell.\textsuperscript{43} While this was not a universal principle,\textsuperscript{44} the court was certainly justified in its holding.

### III. ANTI-STACKING LANGUAGE IS VALID ABSENT A CONTRARY STATUTE, REGULATION, OR PUBLIC POLICY; 
**Shamblin v. Nationwide Mutual Insurance Co.**

Shamblin v. Nationwide Mutual Insurance Co.\textsuperscript{45} more clearly defined the court’s stance on the issue of stacking. This case centered on the stacking of liability provisions\textsuperscript{46} in insurance policies. Liability provisions were not backed by a public policy comparable to that of uninsured motorist coverage.\textsuperscript{47} Shamblin developed the general rule in West Virginia for determining the validity of anti-stacking language in automobile insurance policies.

#### A. The Facts of Shamblin

In Shamblin, the defendant, Nationwide Mutual Insurance Co. (Nationwide), issued one policy to the plaintiff Clarence Shamblin, doing business as Shamblin’s Mobile Cleaning.\textsuperscript{48} The single policy covered the company’s three trucks. Shamblin paid a separately computed premium for each vehicle to obtain personal injury liability coverage limits of $100,000 per person, $300,000 per occurrence, and property damage liability coverage limits of $50,000 per occurrence.\textsuperscript{49}

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\textsuperscript{44} See, e.g., Maid v. Illinois Farmer’s Ins. Co., 428 N.E.2d 1139 (Ill. 1981) (while stacking was allowed due to ambiguous policy language, the court recognized that an insured may be denied the right to stack policies with unambiguous anti-stacking language); Allstate Ins. Co. v. Alfa Mut. Ins. Co., 565 So. 2d 179 (Ala. 1990) (stacking of uninsured motorist coverage not permitted).

\textsuperscript{45} 332 S.E.2d 639 (W. Va. 1985).

\textsuperscript{46} Liability endorsements are provisions in automobile insurance policies that indemnify one from liability to third persons. BLACK’S LAW DICTIONARY 805 (6th ed. 1991).

\textsuperscript{47} Shamblin, 332 S.E.2d at 645 n.9.

\textsuperscript{48} Id. at 640.

\textsuperscript{49} Id.
One of the trucks, driven by employee Owens, was involved in an accident. The accident occurred when Shamblin’s three insured trucks were traveling together and one communicated by CB radio to Owens that it was safe to pass a slower vehicle. When Owens attempted to pass the slower vehicle, he collided with it and another vehicle. Shamblin was sued in the Circuit Court of Kanawha County, and was found 90% liable for the plaintiffs damages of $775,000.

To compensate for this judgment, Shamblin desired to stack liability coverage of the three vehicles covered under the single policy. The plaintiff justified ignoring the policy’s explicit anti-stacking language based on an alleged ambiguity in the contract language. Shamblin contended that there was a conflict between the payment of a separate premium for each vehicle and the limitations of liability clause. The assertion was that this contradiction created an ambiguity which should have been strictly construed against the insurer to allow stacking. The insurer denied that an ambiguity existed and contended that the exclusionary clause was valid and should be upheld.

B. Holding and Analysis

The court, agreeing with Nationwide that the policy was unambiguous, held, “Certainly ‘stacking’ is to be denied when, as in the present case, there is express ‘anti-stacking’ language (‘regardless of the number of automobiles to which this policy applies’) in the limitation

50. Id. at 641.
51. Id. at 640-41.
52. Id. at 641.
53. The anti-stacking language in this case stated that the limitation of liability shown in the policy is the maximum the company would pay “regardless of the number of vehicles to which this policy applies.” Shamblin, 332 S.E.2d at 646.
54. Id. at 645.
55. This assertion in Shamblin is supported by West Virginia’s adoption of the theory that ambiguous provisions in insurance policies are to be construed strictly against the insurer and liberally in favor of the insured. Shamblin, 332 S.E.2d at 642 (citing Marson Coal Co. v. Ins. Co. of State of Pa., 209 S.E.2d 567 (W. Va. 1974) and Farmers’ & Merchant’s Bank v. Balboa Ins. Co., 299 S.E.2d 1 (W. Va. 1982)).
56. Shamblin, 332 S.E.2d at 645.
of liability clause." In reaching this conclusion, the court articulated the general rule in West Virginia for determining the validity of anti-stacking language by stating that "[w]here provisions in an insurance policy are plain and unambiguous and where such provisions are not contrary to a statute, regulation, or public policy, the provisions will be applied and not construed." Since the anti-stacking provision purportedly applicable to liability coverage was not contrary to statute, regulation, or public policy, the court held that it was valid.

The court further clarified the general rule and public policy exception by comparing Bell and Shamblin. The cases were distinguished by the fact that Bell involved more than one policy and also that the contract's exclusionary clause in Bell was in conflict with a statute. By distinguishing the two cases on the latter point, the court demonstrated that Bell was actually an example of the public policy exception to the general rule applied in Shamblin.

Shamblin severely limited the potential scope of the holding in Bell. Conceivably, the court could have extended the nullification of anti-stacking language to the area of liability endorsements which was not supported by a public policy comparable to that of uninsured motorist coverage. Instead, Shamblin defined the parameters of Bell by only invalidating anti-stacking language when the language is more restrictive than a statute, regulation, or public policy.

57. Id. at 645-46.
58. Id. at 642 (quoting Tynes v. Supreme Life Ins. Co. of America, 209 S.E.2d 567, 567 (W. Va. 1974); Farmers' & Merchants' Bank v. Balboa Ins. Co., 299 S.E.2d 1 (W. Va. 1982)). The court was merely extending this well settled principle to the area of stacking of automobile insurance policies.
59. Shamblin, 332 S.E.2d at 646.
60. Id. at 645 n.9.
61. The court in State Auto. Mut. Ins. Co. v. Youler, 396 S.E.2d 737 (W. Va. 1990), hinted that even with more than one policy stacking of liability endorsements is not permitted with anti-stacking language. This holding appears to leave only the statutory or public policy argument to distinguish Shamblin from Bell.
62. Shamblin, 332 S.E.2d at 645 n.9.
63. Furthermore, the court also limited the scope of its discussion in Bell of the concept of "unjust enrichment." The court, citing with approval Lemoi v. Nationwide Mut. Ins. Co., stated:
Lemoi, also disposes of the appellant's public policy argument to the effect that an insurer should not be permitted "unjust enrichment" by allowing it to limit liability.
Had the court decided differently, it would have gone beyond the bounds of its authority. Presumably, if this distinction had not been made, anti-stacking language would now be invalid in any insurance contract, regardless of the type of coverage. The court would have exceeded its judicial authority by engaging in construction of unambiguous insurance contracts.64

IV. UNDERINSURED MOTORIST COVERAGE ALSO BACKED BY STATUTORY PUBLIC POLICY—
STATE AUTOMOBILE MUTUAL INSURANCE CO. v. YOULER

West Virginia law requires all motor vehicle insurance policies issued in the state to "provide an option to the insured with appropriately adjusted premiums to pay the insured all sums which he shall be legally entitled to recover as damages from the owner or operator of an . . . underinsured motor vehicle."65 Section 33-6-31(b) of the West Virginia Code defines an underinsured motor vehicle as

a motor vehicle with respect to the ownership, operation, or use of which there is liability insurance applicable at the time of the accident, but the limits of that insurance are either (i) less than the limits the insured carried for underinsured motorists' coverage, or (ii) has been reduced by

coverage available to an insured to the limit for one vehicle when separate premiums have been paid for more than one vehicle: Nationwide should not be required to pay twice simply because it collected two premiums. The greater the number of vehicles, the greater the risks incurred. That the insurer charged twice for the [coverage] cannot warrant our ignoring the specific language of the limitation clause . . . . [T]here is no judicial policy that prevents an insurer from charging more when it assumes a greater risk.

Shamblin, 332 S.E.2d at 645 (citation omitted). It appears that this statement renounced the "unjust enrichment" argument from Bell. At the very least, the discussion limited the scope of the "unjust enrichment", argument to cases like Bell in which there is a supplementary statutory or public policy justification. However, even in these cases, the argument's impact is lessened by the fact that the further justification is not necessary to permit stacking.

64. Consistent with the general rule applied in Shamblin, the court in National Mut. Ins. Co. v. McMahon & Sons, 356 S.E.2d 488 (W. Va. 1987), stated the well settled West Virginia law that "unambiguous contracts do not require construction by the court." Id. at 496 n.7.

65. W. VA. CODE § 33-6-31(b) (1988).
payments to others injured in the accident to limits less than limits the insured carried for uninsured motorists' coverage.66

A. Underinsured Motorist Defined Inconsistently With the Statute—Pristavec v. Westfield Insurance Co.

Despite this clear definition of an underinsured motorist, the legislature's language was not construed literally in the case Pristavec v. Westfield Insurance Co.67 Pristavec held that underinsured motorist coverage takes effect when the negligent tortfeasor's liability coverage is less than the damages, not less than the limits the insured had for underinsured motorist coverage.68 The court reasoned that the statute is remedial in nature and should be construed not from a single part, but from general consideration of the act in its entirety.69 Thus, the court decided to disregard a clear statutory definition based on a liberal reading of the words "all sums" in the portion of the statute mandating optional underinsured motorist coverage.

However it may be defined, unlike uninsured motorists' coverage, underinsured motorists' coverage is optional.70 This distinction presented a stacking issue of first impression for the court in State Automobile Mutual Insurance Co. v. Youler.71

B. The Youler Decision

In Youler, the Circuit Court of Berkeley County certified questions to the West Virginia Supreme Court of Appeals concerning three general areas.72 One of the three certified questions raised the issue of

66. Id.
68. Id. syl. pt. 5.
69. Id. syl. pt. 3.
70. See Riffle v. State Farm Mut. Auto. Ins. Co., 410 S.E.2d 413 (W. Va. 1991) (holding that when an insurer is required by statute to provide optional coverage, that coverage is included as a matter of law when the insurer fails to prove effective offer and knowing and intelligent rejection by insured).
72. Id. at 739.
the validity of anti-stacking language applicable to underinsured motorist coverage. 73

1. Facts

The dispute arose when Anthony Youler was struck and injured by a car driven by Clifford Moore. 74 Mr. Youler sought recovery of $500,000 for his personal injuries, and his mother, Mildred Youler, sought $5,000 for damage to her business premises caused by the accident. 75 Mr. Moore’s liability insurer, Nationwide, offered the Youlers $50,000, the liability limit of Mr. Moore’s policy. 76 The Youlers refused to accept the $50,000 as a full satisfaction of their claim. 77 Even if the Youlers had accepted the payment, Mr. Moore would have been an underinsured motorist as defined by section 33-6-31(b) of the West Virginia Code. 78

The Youlers themselves were covered by two automobile insurance policies issued by State Automobile Mutual Insurance Company (State Auto). 79 Each policy contained an underinsured motorist coverage limit of $100,000 for the bodily injury of one person. 80 Both policies contained anti-stacking limitation clauses that were purportedly applicable to all coverages provided. 81 The Youlers contended that the anti-

73. The court stated with regard to the certified questions: “three general areas of concern are: (1) delay in giving notice of an automobile accident to one’s own insurer providing underinsured motorist coverage; (2) antistacking language in the policies; and (3) policy language allegedly requiring a setoff of the tortfeasor’s liability insurance coverage against the underinsured motorist coverage.” Id. at 739 (emphasis added).
74. Id.
75. Id. at 740.
76. Id.
77. Id.
78. This case was decided before Pristavec. However, Moore was an underinsured motorist even under the more literal reading of the statute theoretically in place at that time as the Youlers’ underinsured motorist limits were greater than the liability limits of Moore.
79. Youler, 396 S.E.2d at 740.
80. Id.
81. The “anti-stacking” language stated: “If this policy and any other auto insurance policy issued to you by us apply to the same accident, the maximum limit of our liability under all the policies shall not exceed the highest applicable limit under any one policy.” Id.
stacking language applicable to underinsurance coverage was more restrictive than code section 33-6-31 and, therefore, contravened the public policy of full indemnification.82 However, State Auto asserted that the limit of underinsurance coverage should have been $100,000 pursuant to the unambiguous anti-stacking language.83

2. Holding and Analysis

First, the court noted the public policy of full indemnification embodied in section 33-6-31(b) of the West Virginia Code supports uninsured motorist coverage.84 The court further noted that uninsured motorist coverage was added to the statute in 1982.85 In discussing the legislative purpose for this statutory revision the court stated, "It is obvious from the 'all sums . . . as damages' language of section 33-6-31(b), as amended, that the legislature has articulated a public policy of full indemnification or compensation underlying both uninsured and underinsured motorist coverage in the State of West Virginia."86 The court indicated that this public policy requires that an injured person be fully compensated for his or her damages not paid by a negligent tortfeasor, up to the limits of coverage.87

After demonstrating the parallel between uninsured and underinsured motorist coverage, the court concluded that

so-called "antistacking" language in automobile insurance policies is void under W. VA. CODE section 33-6-31(b), as amended, to the extent that such language is applicable purportedly to uninsured or underinsured motorist coverage, and an insured covered simultaneously by two or more uninsured or underinsured motorist policy endorsements may recover under all of such endorsements up to the aggregated or stacked limits of the same . . . .88

82. Id. at 741.
83. Id.
84. Id. at 745.
85. Id.
86. Id.
87. Id.
88. Id. at 746.
Thus, with regard to stacking, the court equated underinsured and uninsured motorist coverages. This comparison seems irreconcilable with the court’s prior decision in *Deel v. Sweeney*.

C. Youler Contrasted with *Deel v. Sweeney*

In *Deel*, the plaintiff was attempting to obtain coverage for injuries sustained in an accident that occurred while he was driving a personally owned vehicle covered by a policy without underinsured motorist coverage. He sought payment from a policy taken out by his father which was required by statute to provide coverage for “the named insured . . . and relatives . . . while in a motor vehicle or otherwise.” The policy issued to the plaintiff’s father contained an exclusionary clause which, if effective, would have denied underinsured motorist coverage for any insured while driving a vehicle not covered under the policy. Since the plaintiff was driving a vehicle not covered under his father’s policy, under the terms of the contract, he had no underinsured motorist coverage.

The court upheld the exclusionary clause. In reaching this conclusion, the court noted that the 1982 amendments to section 33-6-31(b) of the West Virginia Code “indicate that the legislature does not view uninsured and underinsured motorist coverage in the same light. Uninsured motorist coverage is required, while underinsured motorist coverage is optional.” After drawing this distinction, the court concluded that the exclusionary clause purportedly applicable to underinsured motorist coverage was not contrary to the statute and, therefore was valid.

89. 383 S.E.2d 92 (W. Va. 1989).
90. Id. at 93.
91. W. VA. CODE § 33-6-31(c) (1988).
92. *Deel*, 383 S.E.2d at 93-94.
93. Id. at 95.
94. Id.
95. Id.
In Youler, on the other hand, the distinction between the optional nature of underinsured motorist coverage and the mandatory nature of uninsured motorist coverage was described by the court as "a distinction without a difference." The court surmised that once an insured exercises the option to obtain underinsured motorist coverage, they should be protected by the public policy of full indemnification. While there appear to be prevalent ideological differences in the two cases, Youler actually quotes a different segment of Deel in support of its holding.

One explanation for the apparent conflict is that in Deel the plaintiff had not exercised the option for underinsured coverage on his own policy and was instead attempting to take advantage of his father's extension of coverage. In contrast, the plaintiffs in Youler had exercised the option to be protected by underinsured motorist coverage and were merely trying to stack the limits of two policies.

Whatever the court's rationale was, the Youler holding permits stacking of underinsured motorist coverages because the public policy of full indemnification is applicable to both uninsured and underinsured motorist coverages. The rationale which permitted stacking of uninsured motorist coverage in Bell also applies to underinsured motorist coverage. A very important limitation on this holding, however, was

96. Youler, 396 S.E.2d at 746.
97. Id.
98. The court in Youler quoted Deel by stating "[t]his court will continue to be vigilant in holding the insurers' feet to the fire in instances where [terms, conditions,] exclusions or denials of coverage strike at the heart of the purpose of the uninsured and underinsured motorist statutes." Youler, 396 S.E.2d at 745.
99. The holding in Alexander v. State Auto. Mut. Ins. Co., 415 S.E.2d 618 (W. Va. 1992), seems to offer support for this theory which helps to reconcile the court's apparently inconsistent holdings. In Alexander, which relied heavily on the holding in Deel, the plaintiff was a guest passenger attempting to obtain underinsured motorist coverage from her sister's policy even though she was not a member of the household and had not opted for underinsured motorist coverage on her own policy. The court stated, "It seems patently unfair that a person, who by her own freewill, chooses not to buy optional underinsured motorist coverage, should still seek to benefit from someone else's choice to protect themselves, at a cost, from the potential negligence of other motorists who are underinsured." Alexander, 415 S.E.2d at 625. Following this rationale, the Deel case appears less at odds with the holding in Youler because in Youler the plaintiff had exercised the option for underinsured motorist coverage.
that Youler only dealt with the issue of stacking underinsured motorist limits under two policies. Thus, it would not necessarily govern a situation in which only one policy had been issued covering multiple vehicles. This limitation laid the foundation for the case of Russell v. State Automobile Insurance Co.

V. THE PUBLIC POLICY OF FULL INDEMNIFICATION IS LIMITED—RUSSELL V. STATE AUTOMOBILE MUTUAL INSURANCE CO.

Russell v. State Automobile Mutual Insurance Co. illustrated the limits of West Virginia's public policy exception. The court's rationale for limiting the public exception exception was based primarily on principles of contract law applicable to insurance policies. The holding in Russell appears to be limited to policies meeting two requirements. First, the insured must have several vehicles covered under a single policy. Second, the policy must include a multi-car discount.

A. The Facts of Russell

The dispute in Russell arose when a two car collision occurred in which Tina Russell was a passenger in a vehicle owned by William and Judy Halt but driven by Laura Halt. Both Tina Russell and Laura Halt died as a result of injuries sustained in the accident. Laura Halt's insurance policy was exhausted by a settlement of claims which included a payment to the respondent, the grandmother of Tina Russell, in the amount of $33,333.33.

At the time of the accident, Tina Russell and the respondent had a single policy issued by the petitioner, State Automobile Insurance

100. Youler, 396 S.E.2d at 740 n.2.
101. See infra note 102 and accompanying text.
103. See Keeton & Widess, supra note 3, § 2.1(c).
104. Russell, slip op. at 9.
105. Id. at 1-2.
106. Id. at 2.
107. Id.
Company (State Auto). This policy, which had uninsured and underinsured coverage limits of $20,000 per person and $40,000 per occurrence, covered two separate vehicles, a 1980 Mustang and a 1988 Sunbird. The annual combined premiums for underinsured and uninsured motorist coverages were $6.00 for the Sunbird and $5.00 for the Mustang which included a multi-car discount. The policy covering the two vehicles contained anti-stacking language.

Despite the anti-stacking language, the respondent desired to stack the limits based on the fact that there were two vehicles covered under the policy and because the anti-stacking clause was void as more restrictive than section 33-6-31 of the West Virginia Code. The action sought a determination of coverage under the policy issued by State Auto and prompted a certified question to the West Virginia Supreme Court of Appeals asking: "If an insured is covered under one (1) policy of automobile insurance which provides underinsured motorist coverage for two (2) separate vehicles and which contains antistacking language, is the insured entitled to stack the coverage?"

B. Holding and Analysis

The first step the court took in answering the certified question was to show that Youler was not controlling because as the court stated in that case, "The record presented to us does not disclose, and no issue is raised concerning the premium costs for the two policies, as compared with the premium cost had one policy been issued for all of the Youlers' motor vehicles." Therefore, the Youler decision

108. Id.
109. Id.
110. Id.
111. The specific wording of the anti-stacking language was as follows: "[t]he limit of liability applicable to Uninsured Motorists Coverage or Underinsured Motorists Coverage is the most we will pay regardless of the number of: 1) Insureds[;] 2) Claims made; 3) Vehicles or premiums shown in the Schedule or in the Declarations; or 4) Vehicles involved in the accident." Id. at 3 (emphasis added).
112. Id. at 5.
113. Id. at 1.
was not applicable to the situation in *Russell* where only one policy was involved.

In limiting *Youler*, the *Russell* court held that

W. Va. Code section 33-6-31 does not forbid the inclusion nor the application of an anti-stacking provision in an automobile insurance policy where a single insurance policy is issued by a single insurer and contains an underinsured motorist endorsement even though the policy covers two or more vehicles. Under the terms of such a policy, the insured is not entitled to stack the coverages of the multiple vehicles and may only recover up to the policy limits set forth in the single policy endorsement.\(^\text{115}\)

The court's rationale for this decision was that the premium for underinsured motorist coverage on the second vehicle was set at a lesser rate than the first vehicle.\(^\text{116}\) Because of the multi-car discount, the court concluded that the insured obviously bargained for only one policy, and was receiving a reduced rate on her automobile insurance in return for taking out one policy instead of two.\(^\text{117}\) In exchange, the insurer, as consideration for the second premium, was assuming an increased risk of injury which could occur while the insured was occupying the second vehicle. "The insured was therefore receiving the benefit of that which he bargained for and should not receive more."\(^\text{118}\)

Thus, the case appeared to hinge on the existence of a multi-car discount. The court stated that "[h]ad this multi-car discount not been given by the insurer and had the insured paid a full premium for both vehicles, a different result may have been reached by this court."\(^\text{119}\) The word "may" leaves some room for debate as to what result would be reached if an insurer issues a single policy covering several vehicles without a multi-car discount.

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116. *Id.* at 9.
117. *Id.*
118. *Id.*
119. *Id.*
Russell defined the parameters of the public policy exception to the general rule favoring the application of anti-stacking language. The holding was an insufficiently justified break from the trend of expanding the rights of insureds under the public policy of full indemnification. The decision's multi-car discount justification loses much of its force when it is understood that insurers also commonly extend multi-car discounts when issuing multiple policies. As a result, the only true basis for distinguishing Russell from the prior cases permitting stacking is the fact that Russell involved a single policy covering multiple vehicles instead of multiple policies covering multiple vehicles. This is a difference in form only which completely fails to justify the eclipsing of a strong public policy. This holding will certainly provide an incentive for insurers to provide single policies covering multiple vehicles owned by their insureds.

VI. STACKING OF MEDICAL PAYMENT POLICY PROVISIONS—A PREDICTION

Another type of provision typically found in automobile insurance policies is the medical payment provision.120 These provisions offer coverage to an insured for medical expenses incurred as a result of an accident covered under a policy.121 The issue of stacking of medical payment provisions has not been dealt with by the West Virginia Supreme Court of Appeals. However, it is fairly clear how the court should respond based on existing case law. This area is examined in this Note because it clarifies the application of the public policy exception in West Virginia. Additionally, this area provides insight into how the court should deal with other unresolved areas and illuminates some of the difficulties experienced by the federal courts in West Virginia in predicting and applying state law on stacking of insurance policy coverages.

120. See Keeton & Wides, supra note 3, § 4.9(d).
121. Id.
A. An Overexpansive View of Bell is Adopted—
Moomaw v. State Farm

One of the first federal decisions on stacking in West Virginia
was Moomaw v. State Farm Mutual Automobile Insurance Co.122 The
issues in Moomaw centered on stacking of both uninsured motorist and
medical payment provisions. Based strictly on the logic in Bell, the
district court made what was in all probability a poor prediction of
how the West Virginia Supreme Court of Appeals would decide the
issue of stacking of medical payments provisions today.

In Moomaw, the three plaintiffs were injured in an automobile
accident with an uninsured driver.123 Two of the plaintiffs, Moomaw
and Carper, each had multiple policies covering separate vehicles.124
The other plaintiff, Boggs, had a single policy covering two vehi-
cles.125 All of the policies were issued by State Farm and each con-
tained uninsured motorist protection as well as medical payments cov-
erage.126 Each plaintiff had damages in excess of the coverage pro-
vided if the anti-stacking language127 in each policy was to be given
effect. The court first decided correctly that plaintiffs Moomaw and
Carper were entitled to stack the uninsured motorist coverages of their
separate policies in accord with the decision in Bell.128 A more diffi-
cult question was whether the other plaintiff, Boggs, could stack unin-
sured motorist coverage of his three vehicles covered simultaneously
under a single policy. The court answered this question in the affirma-
tive taking into account "the expansive view taken in Bell."129

123. Id. at 698.
124. Id.
125. Id.
126. Id. at 698-99.
127. According to the court, the anti-stacking language was the same for each policy
and stated as follows: "if the insured has other similar insurance available to him and appli-
cable to the accident, the damages shall be deemed not to exceed the higher of the applica-
ble limits of liability of this insurance and such other insurance" Id. at 699 n.4.
128. Id. at 701.
129. Id. at 702. Of course this holding would appear to be invalidated by the recent
decision in Russell, supra note 102, due to the fact that this plaintiff had received a multi-
car discount. Even though Russell actually dealt with underinsured motorist coverage, it
Another difficult question presented to the court was whether the plaintiffs could stack medical payments provisions in their policies in light of the stipulated damages each had in excess of their contract coverage. The court permitted stacking of the medical payment provisions and stated,

[...] the same logic that underlies the decision to allow recovery under the ‘per person’ portions of the respective uninsured motorist policies constrains this Court to allow plaintiffs Carper and Moomaw to recover under the medical payments provisions of each of their State Farm policies. Likewise, Boggs will be allowed to recover the sum of the amounts of medical payments payable as to each of his two cars insured by the [single] policy.

*Bell* was clearly based on the public policy embodied by section 33-6-31 of the West Virginia Code, which explicitly requires automobile insurance policies to contain uninsured motorist provisions. The portion of *Moomaw* dealing with medical payments provisions was an overly expansive reading of *Bell*. The *Moomaw* court underestimated the importance of the public policy argument in *Bell*. Unlike uninsured motorist coverage, medical payments provisions were not mandatory or otherwise specifically provided for by statute. Consequently, the anti-stacking language was not more restrictive than public policy or a statute and therefore should have been applied to the medical payments provisions. In defense of the court, it was without the guidance of the later *Shamblin* decision which clarified this critical distinction.

**B. The Retraction of Moomaw—Moore v. State Farm**

The district court later repudiated its holding in *Moomaw* in *Moore v. State Farm Mutual Automobile Insurance Co.* In *Moore*, the plaintiffs, husband and wife Burt and Iona Moore, were injured in an accident and incurred medical expenses in excess of $10,000.

seems that the logic would also apply to uninsured motorist coverage as the court has applied the identical public policy argument to each type of coverage with respect to stacking.

130. *Id.* at 702.

131. *Id.* (citations omitted).


133. *Id.* at 2.
The plaintiffs were covered under two separate policies issued by State Farm each containing medical payment liability limits of $5,000. Pursuant to the policy terms, which precluded stacking of medical payments of the two policies, State Farm paid $5,000 to the plaintiffs.

The plaintiffs argued that they should have been permitted to stack the medical payments provisions of the two State Farm policies based on the Moomaw decision. However, the court, contrary to Moomaw, found that the plaintiffs were not entitled to stack these provisions in light of the unambiguous anti-stacking language in each policy. This decision was based primarily on the court’s acknowledgment of the holding in Shamblin. The court noted that Shamblin was distinguished from Bell by the fact that there was no public policy supporting liability coverage comparable to that of uninsured motorist coverage. Similarly, the court acknowledged that “West Virginia . . . does not statutorily require insurers to provide medical expense coverage to their insureds.” As a result, in accord with the logic in Shamblin, stacking of medical payment provisions was not permitted since the anti-stacking language was not more restrictive than a statute or public policy. The court stated, “The West Virginia Supreme Court of Appeals, if faced with the issue presently before the court, would enforce the express ant-stacking language contained in the policy . . . precluding plaintiffs from recovering medical expenses under that policy.”

This holding aptly overruled part of the prior decision in Moomaw which was based on an overexpansive view of Bell. Even though this issue has not yet been decided by the West Virginia Supreme Court of Appeals, Moore should be consistent with any future holdings in this area. Like Shamblin, this case shows how the court should respond to the validity of anti-stacking language purportedly applicable to any

134. Id.
135. Id.
136. Id. at 14.
137. Id. at 17.
138. See supra note 44.
139. Moore, mem. order at 16.
140. Id. at 12.
141. Id.
142. Id. at 17.
type of coverage without a supporting statute, regulation, or public policy.

VII. CONCLUSION

In West Virginia, there is a well defined general rule to determine the validity of anti-stacking language in automobile insurance policies. The rule holds that anti-stacking language is to be applied and not construed absent a contrary statute, regulation, or public policy. Therefore, an insurer is generally permitted to contract with an insured to limit its liability to a maximum of that provided by a single policy or single vehicle in a multi-car policy. Anti-stacking language in unambiguous insurance contracts is generally enforceable.

Two well defined examples of the public policy exception are uninsured and underinsured motorist coverages. These types of coverage are backed by the statutorily created public policy of full indemnification. Generally, stacking of these provisions is permitted despite contrary language in an insurance contract.

However, case law has limited the public policy exception with regard to underinsured provisions in a single insurance policy covering more than one vehicle and containing a multi-car discount. In policies of this type, unambiguous anti-stacking provisions are valid. Presumably, this logic would also apply to stacking uninsured motorist provisions in policies with multi-car discounts. The result should be the same because the court does not distinguish between these two types of coverages when dealing with stacking.

The court’s approach renders unresolved areas such as the stacking of medical payments provisions somewhat predictable. By distinguishing Shamblin and Bell, the court created a fairly clear precedent with which to assess these unanswered questions. However, with the recent departure in Russell from expanding the rights of insureds under section 33-6-31 of the West Virginia Code, attention must be paid to

other circumstances the court might similarly allow to overshadow public policy.

Each change of section 33-6-31 of the West Virginia Code must also be watched with diligence. Some anti-stacking legislation favoring insurers was considered in the last session of the West Virginia Legislature but was defeated in the committee stage. This proposed legislation could eventually become law and effectively challenge the current framework of insurance stacking in West Virginia. 147

James C. Stebbins

147. At press time, the West Virginia Supreme Court of Appeals issued another decision that breaks away from the trend of expanding the rights of insureds under the public policy of full indemnification embodied in W. VA. CODE § 33-6-31. Starr v. State Farm Fire & Casualty Co., No. 21170, 1992 WL 332623 (W. Va. Nov. 13, 1992). In Starr, the plaintiff Judith Starr was a guest passenger in a 1990 Toyota owned and insured by William Cline and driven by Sherry Cline. The Toyota was struck by a vehicle driven by Virgil Cantrell, Jr., and the plaintiff was injured. Mr. Cantrell was at fault in causing the accident. The plaintiff recovered $20,000 under Mr. Cantrell's liability insurance, $40,000 in underinsured motorist benefits under two insurance policies of her own, and $20,000 in underinsured motorist benefits covering the Cline Toyota in which she was riding when the accident occurred. The plaintiff brought this action to recover $50,000 in underinsured motorists benefits under a separate insurance policy covering Mr. Cline's Ford Ranger which was not involved in the accident. Id. at *1-2.

The parties agreed that the terms of the insurance policy created two classes of insureds: "class one" insureds consisting of the named insured, his or her spouse, and resident relatives; and "class two" insureds consisting of all other permissive users of the insured's vehicle. Id. at *4. The court held that W. VA. CODE § 33-6-31 likewise creates the same two classes of insureds with regard to uninsured/underinsured motorist coverage. Id. at *5. After surveying relevant law in other jurisdictions, the court held that class one insureds are afforded broad protection that is independent of occupancy in the insured vehicle. Conversely, protection of class two insureds is dependent upon occupancy in the insured vehicle when the injuries are sustained. Id. at *4. Accordingly, the court held that the plaintiff, as a class two insured, could not stack the policyholder's underinsured motorist coverage on a separate vehicle not involved in the accident in which her injuries were sustained. Id. at *6. In support of this result the court quoted the Florida District Court of Appeal:

Stacking is derived from the presumption that when the named insured purchases uninsured motorist coverage on more than one automobile, he intends to buy extra protection for himself and his family, regardless of whether his injury occurs in any one of his insured vehicles or elsewhere. But there is no reason to apply this to a guest or employee injured in an insured vehicle. That person has no relationship with any other insured vehicle and the coverage on the others should not inure to his benefit.


Therefore guest passengers are not permitted to stack the policyholder's uninsured or underinsured coverages. This holding creates no conflict with the public policy of full indemnification of insureds because the class distinction itself is contained in statute supporting the public policy, W. VA. CODE § 33-6-31. As of press time, this opinion had not been released for publication in the permanent law reports and therefore is subject to revision or withdrawal.