COMMONWEALTH OF KENTUCKY
SUPREME COURT
CASE NO. 2014-SC-000354-D
CASE NO. 2014-SC-000357-D

PHILADELPHIA INDEMNITY INSURANCE COMPANY, INC.; and
ENCOMPASS INDEMNITY COMPANY — APPELLANTS

v. On Discretionary Review from the Kentucky Court of Appeals
Case No. 2013-CA-001275

RICHARD TRYON — APPELLEE

BRIEF ON BEHALF OF *AMICUS CURIAE* KENTUCKY JUSTICE ASSOCIATION

Submitted by:

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CERTIFICATE OF SERVICE

I hereby certify that on this 10th day of June, 2015 sufficient copies of this brief and the appropriate filing fee were served via Federal Express upon Susan Stokley Clary, Clerk of the Supreme Court, State Capitol, Room 209, 700 Capitol Ave., Frankfort, KY 40601, with one (1) copy of the brief served upon each of the following: Sam Givens, Clerk of the Kentucky Court of Appeals, 360 Democrat Drive, Frankfort, KY 40601; Hon. Charles Cunningham, Jr., Judge, Jefferson Circuit Court, Judicial Center, 700 West Jefferson Street, Louisville, KY 40202; A. Thomas Johnson, 304 West Liberty Street, Louisville, KY 40202; Robert Stopher and Robert Bobrow, Boehl Stopher & Graves, LLP, 400 West Market Street, Louisville, KY 40202; William Orberson, Patricia Le Meur, and James Wade, Phillips Parker Orberson & Arnett, PLC, 716 West Main Street, Suite 300, Louisville, KY 40202.

KEVIN C. BURKE

STATEMENT OF POINTS AND AUTHORITIES

PURPOSE AND INTEREST OF *AMICUS CURIAE*

At issue is whether "owned but not scheduled for coverage" exclusions should prevent stacking of underinsured motorist (UIM) benefits, even if insureds pay separate premiums for separate units of UIM coverage.[1]

On July 20, 2012, Richard Tryon was riding his motorcycle when he was struck by an automobile driven by Logan Hopkins.[2] Mr. Tryon insured his motorcycle through Nationwide Insurance Company of America (Nationwide). The Nationwide policy includes UIM coverage. Tryon also owned two other vehicles: an antique Pontiac Firebird insured through Philadelphia Indemnity Insurance Company, Inc. (Philadelphia), and a Lexus RX330 insured through Encompass Indemnity Company (Encompass). Tryon purchased UIM coverage in those policies as well, for a total of three (3) units of UIM coverage based on three (3) separate premiums.

Following the wreck, Mr. Tryon made a claim for UIM benefits under all policies. Nationwide paid UIM benefits, but Philadelphia and Encompass denied coverage purportedly based on language in their policies that excluded UIM benefits where:

> [The] covered person is operating or occupying a motor vehicle owned by, leased by, furnished to, or available for the regular use of a covered person if the motor vehicle is not specifically identified in this policy under which a claim is made.[3]

Put differently, Philadelphia and Encompass denied coverage because Mr. Tryon was operating a motor vehicle he owned but did not specifically insure through

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[1] In other states, these exclusions are variously labeled "owned but not scheduled for coverage," "owned but not insured," "other owned vehicle," "owned vehicle," "other vehicle," "other motor vehicle," or "non-occupancy" exclusions.

[2] It is undisputed that the at-fault motorist, Mr. Logan, is not related to Mr. Tryon or otherwise a resident of Mr. Tryon's household.

[3] See Court of Appeals Opinion, p. 2.

Philadelphia or Encompass—even though Tryon himself, an insured of the first class, paid separate premiums to insure all three vehicles under three separate policies.

The Circuit Court relied on a de-published opinion it incorrectly labeled "precedent."[4] The Court of Appeals reversed, relying on decades-old binding precedent. The Court of Appeals held that such provisions are unreasonable and unenforceable, because insureds like Tryon, who have paid separate premiums UIM coverage, are entitled to UIM benefits they bought, paid for, and reasonably expected.

Philadelphia and Encompass both moved for discretionary review, and this Court granted the motions. In this Court, Philadelphia, Encompass, and now *Amicus Curiae* Kentucky Defense Counsel, seek a ruling that would, in effect, overturn decades of Kentucky law and enforce such anti-stacking provisions against all UM or UIM insureds, regardless of vehicle class or type, and regardless of the premiums paid. Therefore, this case is of substantial interest to the *Amicus Curiae* Kentucky Justice Association, its members, as well as the consumers and policyholders it represents. For the reasons that follow, *Amicus Curiae* submits that the Court of Appeals opinion should be affirmed.

ARGUMENT

I. CONTROLLING PRECEDENT RENDERS THE "OWNED BUT NOT SCHEDULED FOR COVERAGE" EXCLUSION UNENFORCEABLE.

For decades, this Court and the Court of Appeals have held nearly identical anti-stacking provisions unenforceable in both the uninsured motorist (UM) and UIM context. *See Chaffin v. Kentucky Farm Bureau Ins. Co.*, 789 S.W.2d 754 (Ky. 1990); *Allstate Ins.*

[4] See Circuit Court Opinion, p. 4.

Co. v. Dicke, 862 S.W.2d 327 (Ky. 1993); *Hamilton Mut. Ins. Co. v. U.S. Fidelity & Guar. Co.*, 926 S.W.2d 466 (Ky. App. 1996).[5]

In *Chaffin*, the insured had three policies and paid three separate premiums, but the applicable policy provision prohibited UM coverage:

> While occupying, or when struck, by any motor vehicle owned by you or any family member which is not insured for this coverage under this policy. This includes a trailer of any type used with that vehicle.

The insurer, Kentucky Farm Bureau, denied coverage. This Court held such coverage is "personal to the insured"; "an insured who pays separate premiums for multiple items of the same coverage has a reasonable expectation that such coverage will be afforded; and it is contrary to public policy to deprive an insured of purchased coverage[.]" *Id.* at 756.

In *Dicke*, this Court followed *Chaffin* to invalidate a similar "owned but not scheduled for coverage" exclusion, this time for UIM. In context, this Court noted the "the difference between the uninsured and underinsured statutes is more illusory than real." *Dicke*, 862 S.W.2d at 329. Furthermore, this Court noted that, with respect to KRS 304.39-320, the statute allows only terms and conditions "not inconsistent with this section," and "[a] prohibition of the type at issue here which results in elimination of one of the items of coverage purchased by the insured is manifestly inconsistent with [KRS 304.39-320] and beyond the permissible scope of any right to set terms and conditions." *Dicke* at 329. This Court also held that enforcement of the provision would be inconsistent with "public policy of this jurisdiction with respect to stacking." *Id.*, *citing Meridian Mutual Ins. Co. v. Siddons*, 451 S.W.2d 831 (Ky. 1970); *Ohio Casualty Ins. Co.*

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[5] The Court of Appeals has issued "not to be published" opinions that follow the holdings in *Chaffin*, *Dicke*, and *Hamilton Mutual* in the UIM context, but *Amicus Curiae* will not cite them because *Chaffin*, *Dicke*, and *Hamilton Mutual* are on point. See CR 76.28(4)(c).

v. Stanfield, 581 S.W.2d 555 (Ky. 1979); *Hamilton v. Allstate Ins. Co.*, 789 S.W.2d 751 (Ky. 1990).

In *Hamilton Mutual*, the applicable policy provision prohibited UIM coverage:

> While "occupying", or when struck by, any motor vehicle owned by you or any "family member" which is not insured for this coverage under this policy.

In that case, the insured, Dr. Ray Allen Gibson, owned three motor vehicles which were insured by three different carriers—just like Mr. Tryon. The vehicle involved in the collision was registered in the name of Dr. Gibson's professional service corporation and was insured by USF & G. His other vehicles were registered in his own name and were insured by USAA and Hamilton Mutual. Hamilton Mutual and USAA attempted to enforce the "owned but not scheduled for coverage" exclusion to deny UIM coverage. Following *Chaffin*, and noting the irrationality and absurdity of the exclusion as applied, the Court held the exclusion unenforceable because "[q]uite simply, had the Gibsons been injured while riding as a passenger in another's vehicle, there would be no dispute that coverage would be available from all three carriers." *Hamilton Mut. Ins. Co.* at 469.

Therefore, since at least 1996, Kentucky law has been clear: UM and UIM coverages are "personal to the insured" and follow the person not the vehicle[6]; "an insured who pays separate premiums for multiple items of the same coverage has a reasonable expectation that such coverage will be afforded"; and "owned but not scheduled for coverage" exclusions are "contrary to public policy" when used to prohibit stacking of UM or UIM coverages. *Chaffin*, 789 S.W.2d at 756; *Dicke*, 862 S.W.2d at 329; *Hamilton Mut. Ins.* Co., 926 S.W.2d at 469. Insurers who write policies in

[6] Indeed, UIM applies "***regardless*** of whether the insured is injured as a motorist, a passenger in a private or public vehicle, or a pedestrian" and is "only limited by the actual, ***valid exclusions*** of each insurance policy." *Dupin v. Adkins*, 17 S.W.3d 538, 643 (Ky. App. 2000)(emphasis added).

Kentucky, like Encompass and Philadelphia, understand "owned but not scheduled for coverage" exclusions are unenforceable—and charge premiums accordingly. [7]

Importantly, these exclusions, as applied to the facts of this case, are not based on the *type or class* of *vehicle* (like a motorcycle exclusion) or the *relationship* between the insured and the at-fault party (like a "resident relative/regular use" exclusion). Rather, the exclusions are designed to prevent stacking based on the arbitrary location of an insured when an at-fault motorist strikes.

For example, if Mr. Tryon was injured while occupying the *identical* make and model of an *unowned* vehicle—including any of the more than 101,000 motorcycles registered in Kentucky that he does not own[8]—or was injured as a pedestrian, or was injured while engaging in the most risky behavior imaginable, the exclusion would not apply. The exclusion, therefore, is not tied to any "risk" associated with the type of vehicle or conduct of the insured. This prompted a nationally-recognized authority on UM and UIM coverage to note: "[i]t is difficult to accept the propriety of such a restriction on coverage" and the "value of the imputed business purpose for this exclusion

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[7] Kentucky is not alone. Many other states invalidate "other vehicle" exclusions, even for "optional" UIM policies, because "innocent members of the public who have purchased underinsured motorist coverage are entitled to coverage as if the offending driver was insured in the amount of the underinsured policy limit…'[F]irst party coverages for which an insured pays a premium follow the person, not the vehicle.'" *Higgins v. Fireman's Fund Ins. Co.*, 160 Ariz. 20, 22, 770 P.2d 324, 326 (1989), *quoting American Motorist Ins. Co. v. Sarvela*, 327 N.W.2d 77, 79 (Minn. 1982); *see also Cont'l Ins. Co. v. Murphy*, 120 Nev. 506, 508, 96 P.3d 747, 749 (2004)(invalidating "other vehicle" exclusion in antique car UIM policy endorsement where insured was injured on motorcycle). In Delaware, where the uninsured motorist statute includes UM and UIM provisions, the Supreme Court found that "[a]n apparent ***majority*** of jurisdictions which have addressed the issue support the view that OMV [other motor vehicle] exclusions are incompatible with statutorily created uninsured motorist insurance, because the insurance is personal to the insured, and public policy prohibits the limiting of this coverage based on the manner in which the insured is injured. We agree with this view." *Frank v. Horizon Assur. Co.*, 553 A.2d 1199, 1202 (Del. 1989).

[8] According to the United States Department of Transportation, Bureau of Transportation Statistics there were 101,000 motorcycles registered in Kentucky in 2012: http://www.rita.dot.gov/bts/sites/rita.dot.gov.bts/files/publications/state_transportation_statistics/state_transportation_statistics_2014/index.html/chapter5/table5-1 (last visited June 10, 2015).

seems tenuous."[9] As this Court explained more directly, such exclusions are "nearly incapable of rational construction" and "so broadly drawn as to obfuscate its purpose in prevention of fraud, if indeed such is its primary purpose." *Chaffin*, 789 S.W.2d at 756-57; *see also Hamilton Mut. Ins. Co.*, 926 S.W.2d at 468-69.

To further highlight the absurdity of such exclusions, if Mr. Tryon had been injured while occupying his Lexus RX330 (insured by Encompass), Philadelphia would argue the Lexus is "owned but not scheduled for coverage" and deny UIM benefits. Conversely, had Tryon been injured while occupying his Pontiac Firebird (insured by Philadelphia), Encompass would argue the Firebird is "owned but not scheduled for coverage" and deny UIM benefits. And if the insurer of Tryon's motorcycle, Nationwide, had the same exclusion in its UIM endorsement, and Tryon occupied either the Firebird or the Lexus at the time of the accident, Nationwide would deny UIM benefits—oddly enough—because Mr. Tryon was ***occupying a car instead of his motorcycle***. In short, despite paying three separate UIM premiums, for three separate vehicles, under three separate policies, Mr. Tryon will ***never*** be able to recover all units of UIM coverage he bought and paid for if occupying any one of his vehicles. For good reason, courts have described this as "illusory coverage." *See Sparks v. Trustguard Ins. Co.*, 389 S.W.3d 121, 128 (Ky. App. 2012)(noting that "[a] practical example" of illusory coverage "appears in *Chaffin v. Kentucky Farm Bureau Ins. Companies*, 789 S.W.2d 754 (Ky.1990).").

In light of controlling precedent, including the sound reasons in case law for invalidating "owned but not scheduled for coverage" exclusions, the Court of Appeals opinion should be affirmed.

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[9] See, Alan I. Widiss, A GUIDE TO UNINSURED MOTORIST COVERAGE, § 2.9, at 28 (1969). This Court has recognized Professor Widiss' treatise on UM and UIM coverage as the "most exhaustive treatise on the subject." *Coots v. Allstate Ins. Co.*, 853 S.W.2d 895, 900 (Ky. 1993).

II. LEGISLATIVE INTENT CONFIRMS THE "OWNED BUT NOT SCHEDULED FOR COVERAGE" EXCLUSION IS UNENFORCEABLE.

Since *Chaffin*, *Dicke,* and *Hamilton Mutual*, the General Assembly has amended both the UM and UIM statutes—the UM statute most recently in 2010 and the UIM statute most recently in 1998.

Despite the amendments, the legislature did not supersede or abrogate *Chaffin, Dicke*, and *Hamilton Mutual*. This is strong evidence the legislature agrees that "owned but not scheduled for coverage" are unenforceable in light of the UM and UIM statutes. *See Hughes v. Com.*, 87 S.W.3d 850, 855 (Ky.2002) ("[T]he failure of the legislature to change a known judicial interpretation of a statute [is] ***extremely persuasive*** evidence of the true legislative intent. There is a strong implication that the legislature agrees with a prior court interpretation when it does not amend the statute interpreted." (*quoting Rye v. Weasel*, 934 S.W.2d 257, 262 (Ky.1996)); *see also Furtula v. Univ. of Kentucky*, 438 S.W.3d 303, 320 (Ky. 2014)(applying the "reenactment" doctrine).

KRS 304.39-320 only allows ***reasonable*** terms and exclusions "not inconsistent" with the UIM statute. KRS 304.39-320(2). The plain language of the UIM statute conditions recovery on "injury due to motor vehicle accident"—not the type of vehicle the accident victim happens to occupy when an at-fault motorist unexpectedly strikes. Again, if the legislature disagreed, it could have amended KRS 304.39-320 and superseded the holdings in *Chaffin*, *Dicke*, and *Hamilton Mutual* when the legislature had the opportunity in 1998. Other state legislatures have done so.[10] But ours did not.

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[10] Most states that enforce anti-stacking or "owned but not scheduled for coverage" exclusions do so because their UM or UIM statutes have been amended to ***expressly*** permit such exclusions. See Alan I. Widiss, UNINSURED AND UNDERINSURED MOTORIST INSURANCE, §40.2 (2014 supp.)(collecting statutes). The majority of states ***without*** such statutes refuse to enforce anti-stacking or similar exclusions. See

Therefore, legislative intent through reenactment bolsters precedent and likewise invalidates the "owned but not scheduled for coverage" exclusions.

III. THE PHILADELPHIA AND ENCOMPASS POLICIES AS A WHOLE DO NOT WARRANT APPLICATION OF THE "OWNED BUT NOT SCHEDULED FOR COVERAGE" EXCLUSION.

Interestingly, even the policies themselves do not support application of the "owned but not scheduled for coverage" exclusions.

This is an ***under***insured motorist case—not an ***un***insured motorist case. Yet Philadelphia relies exclusively on the language of its uninsured motorist provision.[11] The UM endorsement in the Philadelphia policy includes only UM coverage consistent with KRS 304.20-020; it does not include UIM coverage consistent with KRS 304.39-320. The only ***underinsured*** motorist section in the policy attached to Philadelphia's brief is an endorsement titled "Single Underinsured Motorist Limit—Kentucky." And it contains no such exclusion.[12] In fact, Philadelphia's UIM endorsement specifically mandates payment of UIM in the amount listed on the Declarations page."[13] Unlike Philadelphia's policy, the Encompass UIM endorsement contains the applicable exclusion, but Encompass fails to mention an overriding term in its policy titled "THE LAW":

> ***If anything in this policy conflicts with state or local laws, we agree to honor any claim or suit in conformity with the law.***[14]

Another section, titled "WHAT LAW WILL APPLY" confirms that Kentucky law in effect at the time the policy issuance applies:

Shannon McDonough, NOTE: EXCLUSIONS FOR OWNED BUT NOT INSURED IN UNINSURED MOTORIST PROVISIONS-WHAT ARE STATES REALLY DRIVING AT IN THEIR DECISIONS?, 43 DRAKE L.REV. 917 (1995).

[11] See Brief for Appellant Philadelphia, Appendix 3: Collector Vehicle Policy, p. 6 of 13.

[12] See Brief for Appellant Philadelphia, Appendix 3: Collector Vehicle Policy, Endorsement PP 04 03 08 00.

[13] See Brief for Appellant Philadelphia, Appendix 3: Collector Vehicle Policy, Collector Vehicle Renewal Certificate.

[14] See Brief for Appellant Encompass, Exhibit 2: Encompass Policy Underinsured Motorists Coverage, "Your Policy: Special Value-Motor Vehicle-Kentucky," p. 16 of 18.

> This policy is issued in accordance with the laws of Kentucky and covers property or risks principally located in Kentucky. Subject to the following paragraph [pertaining to extraterritorial coverage], ***any and all claims or disputes in any way related to this policy shall be governed by the laws of Kentucky.***[15]

Encompass renewed Tryon's policy in 2012. "Owned but not scheduled for coverage" exclusions were unenforceable in 2012 just as they are today. Despite its promise to enforce Kentucky law over any inconsistent policy provision—including the "owned but not scheduled for coverage" exclusion—Encompass now seeks to change its agreement with Tryon and other insureds, persuade this Court to set aside decades of precedent, and enforce the exclusion anyway. If Encompass succeeds, it will result in a windfall: Encompass charged higher premiums based on the ***unenforceability*** of the "owned but not scheduled for coverage," yet Encompass still can deny payment to UIM insureds because of the exclusion. The same would be true if Philadelphia can deny UIM coverage without even citing the appropriate exclusionary language to this Court.

The insurers in this case seemingly forget that any limitation of insurance coverage is strictly construed against the insurer, and to be enforceable, the limitation "must be ***clearly*** stated in order to apprise the insured of such limitations." *See Bidwell v. Shelter Mut. Ins. Co.*, 367 S.W.3d 585, 588-89 (Ky. 2012)(finding step-down provision in motor vehicle policy unenforceable based on the doctrine of reasonable expectations); *see also Kentucky Farm Bureau Mut. Ins. Co. v. McKinney*, 831 S.W.2d 164, 166 (Ky. 1992)(exclusions and limitations are strictly construed, and policy is liberally construed in favor of insured). Neither limitation falls in that category. In fact, when read as a whole, the policies reveal that the "owned but not scheduled for coverage" exclusions are

[15] See Brief for Appellant Encompass, Exhibit 2: Encompass Policy Underinsured Motorists Coverage, "Your Policy: Special Value-Motor Vehicle-Kentucky," p. 18 of 18.

inapplicable. *See Sun Life Ins. Co. v. Taylor*, 108 Ky. 408, 56 S.W. 668 (1900)(requiring insurance policies to be read as a whole).

One insurer, Philadelphia, cannot even cite the applicable exclusion in its own UIM endorsement—yet somehow expects its insureds to find it. The other, Encompass, contractually agreed that Kentucky law in effect at time of policy issuance controls over any inconsistent policy provisions, and, based on judicial decisions and legislative intent, Kentucky law trumps the exclusion.

Accordingly, the policies when read as whole do not warrant application of the "owned but not scheduled for coverage" exclusion.

IV. THE INSURERS' ARGUMENTS ARE FUNDAMENTALLY FLAWED.

Faced with controlling precedent, legislative approval, and policy language the insurers either misapplied or ignored, Encompass and Philadelphia seek to reverse the Court of Appeals Opinion, overturn decades of precedent, and fundamentally alter settled consumer expectations with respect to UM and UIM coverage. They do so based on three flawed arguments: (1) the exclusion at issue is really a "motorcycle exclusion"; (2) this case involves a "resident relative/regular use" scenario like *State Farm Mut. Auto. Ins. Co. v. Hodgkiss-Warrick*, 413 S.W.3d 875 (Ky. 2013); and (3) a de-published opinion from a panel of the Court of Appeals is somehow "controlling." None of these arguments have merit, and all three arguments ask this Court to re-write the Philadelphia and Encompass policies or ignore the facts.

A. There is no applicable "motorcycle exclusion."

Philadelphia and Encompass hope to convince this Court to reverse the Court of Appeals because Mr. Tryon was on a motorcycle at the time of the wreck. However,

neither policy excludes UIM coverage based on the risks inherent in the use of a motorcycle—the so-called "motorcycle exclusion." Kentucky has enforced "motorcycle exclusions" since 1977. *See Preferred Risk Mut. Ins. Co. v. Oliver*, 551 S.W.2d 574 (Ky. 1977); *State Farm Mut. Ins. Co. v. Christian*, 555 S.W2d 571 (Ky. 1977); *Baxter v. Safeco Ins. Company of America*, 46 S. W .3d 577 (Ky. App. 2001). Philadelphia and Encompass could have included the exclusion in their UIM endorsements—and, in retrospect, they probably wish they did. But they did not. The purported exclusions in the policies do not mention motorcycles at all. Indeed, Philadelphia and Encompass conveniently fail to mention that the purported exclusionary language would not even apply if Mr. Tryon was injured on a motorcycle ***other than*** the one he owned.

B. This case does not involve a "resident relative/regular use" scenario like *State Farm Mut. Auto. Ins. Co. v. Hodgkiss-Warrick.*

Likewise, Mr. Tryon was ***not*** injured by a resident relative operating a vehicle Tryon owned and made available for that relative's regular use. He was injured by a complete stranger, Logan Hopkins. Therefore, the facts and reasoning in *State Farm Mut. Auto. Ins. Co. v. Hodgkiss-Warrick*, 413 S.W.3d 875 (Ky. 2013) do not in any way alter *Chaffin*, *Dicke*, and *Hamilton Mutual*.

Unlike the exclusion here, the "resident relative/regular use" exclusion in *Hodgkiss-Warrick* is ***not*** designed to thwart stacking—it is designed to prevent insureds from buying less expensive UIM coverage in lieu of more expensive liability coverage applicable when the at-fault motorist is a family member. *Id.* at 881-82. Moreover, unlike the exclusion here, the exclusion in *Hodgkiss-Warrick* actually ***advances*** the policy objectives of the Kentucky Motor Vehicle Reparations Act (KMVRA) to encourage a policyholder to purchase a larger amount of ***liability*** coverage.

In any event, *Hodgkiss-Warrick* involved a Pennsylvania policy, issued to Pennsylvania residents, considered in the context of Kentucky choice-of-law principles. It did not involve a Kentucky insurance policy. And it did not break new legal ground with respect to "resident relative/regular use" provision anyway. The "resident relative/regular use" exclusion has been enforceable in Kentucky for decades. *See, e.g.*, *Windham v. Cunningham*, 902 S.W.2d 838 (Ky. App. 1995); *Pridham v. State Farm Mutual Insurance Co.*, 903 S.W.2d 909 (Ky. App. 1995); *Motorists Mut. Ins. Co. v. Glass*, 996 S.W.2d 437 (Ky. 1997); *Murphy v. Kentucky Farm Bureau*, 116 S.W.3d 500 (Ky. App. 2002); *Edwards v. Carlisle*, 179 S.W.3d 257 (Ky. App. 2004); *Burton v. Kentucky Farm Bureau Mut. Ins. Co.*, 326 S.W.3d 474 (Ky. App. 2010).

As this Court noted in *Hodgkiss-Warrick*, the "resident relative/regular use" exclusion is effective because judicial interpretations of the exclusion survived legislative amendments to the UM and UIM statutes over the years—just like the reasoning in *Chaffin*, *Dicke*, and *Hamilton Mutual* survived. *See Hodgkiss-Warrick,* 413 S.W.3d at 882 (collecting cases and noting that the provisions are reasonable because "the General Assembly has not amended the pertinent provisions of KRS 304.39–320").

Thus, the reenactment doctrine cuts both ways: while the ***validity*** of the exclusion in *Hodgkiss-Warrick* survived legislative amendments to the UM and UIM statutes, so too did the ***invalidity*** of "owned but not scheduled for coverage" exclusions. The legislature intended both, and the reasoning in *Hodgkiss-Warrick* confirms as much.

C. The Insurers' reliance on a de-published opinion is misguided.

Philadelphia and Encompass rely heavily on an opinion ordered de-published by this Court. *Motorists Mutual Ins. Co. v. Hartley*, 2010-CA-000202-MR (Ky. App. Feb.

11, 2011), discretionary review denied and opinion ordered de-published, Case No. 2011-SC-000146 (Ky. Feb. 15, 2012). De-published opinions are not authoritative, binding, or controlling, and are certainly not "law" any reasonable insurer would rely on when calculating premiums.[16] Such opinions carry no weight whatsoever. See CR 76.28 (4)(a) and (c). The Rule states in pertinent part:

> (a) ... ***Unless otherwise ordered by the Supreme Court***, upon entry of an order denying the motion for discretionary review or granting withdrawal of the motion, the opinion of the Court of Appeals shall be published if the opinion was designated "To Be Published" by the Court of Appeals. Upon entry of an order of the Supreme Court granting a motion for discretionary review the opinion of the Court of Appeals shall not be published, unless otherwise ordered by the Supreme Court. ***All other opinions of the appellate courts will be published as directed by the court issuing the opinion. Every opinion shall show on its face whether it is "To Be Published" or "Not To Be Published."***
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> . . . .
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> (c) ***Opinions that are not to be published shall not be cited or used as binding precedent*** in any other case in any court of this state; however, unpublished Kentucky appellate decisions, rendered after January 1, 2003, ***may be cited for consideration*** by the court ***if there is no published opinion that would adequately address the issue before the court.*** Opinions cited for consideration by the court shall be set out as an unpublished decision in the filed document and a copy of the entire decision shall be tendered along with the document to the court and all parties to the action.

See CR 76.28(4)(a) and (c)(emphasis added). When originally rendered, *Hartley* was designated "To Be Published." This Court then denied the subsequent motion for discretionary review, which would ordinarily result in publication of the original opinion. Pursuant to CR 76.28(4)(a), however, this Court de-published the opinion by order, which brings it outside of the parameters of CR 76.28(4)(c).

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[16] See Brief for Appellant Encompass, Exhibit 2: Encompass Policy Underinsured Motorists Coverage, "Your Policy: Special Value-Motor Vehicle-Kentucky," pp. 16 of 18; 18 of 18. It should also be noted that at the time the Encompass policy was issued *Hodgkiss-Warrick* was not yet decided.

Even under CR 76.28(4)(c), *Hartley* should not have been cited because *Chaffin, Dicke*, and *Hamilton Mutual* "adequately address the issue before the court." CR 76.28(4)(c). However, if *Hartley* can be cited, the opinion is only available for "***consideration***" in the absence of precedent. But an opinion originally designated "not to be published" or one later "de-published" is ***never binding precedent.*** *See Com. v. Wright*, 415 S.W.3d 606, 613 (Ky. 2013)(noting unpublished opinions are not "binding precedent" and "we are not greatly influenced by unpublished opinions.").

Assuming *Hartley* can be "considered" at all under CR 76.28(4)(c), its reasoning is suspect. Throughout the opinion, the panel focused on the fact that Mr. Hartley initially discussed insuring his motorcycles through Motorists Mutual. However, after Hartley was informed that the premiums would be higher than the existing coverage through Progressive, he continued his UIM coverage through Progressive. ***No such facts exist in this case.***

The panel in *Hartley* found Hartley's conduct troubling, and noted: "[i]f we were to apply *Chaffin* to the present facts, Hartley would reap the benefit of the coverage he specifically rejected and for which he paid no premiums." *Hartley* at 10-11. This in turn prompted the Court to interpret the "owned but not scheduled for coverage" exclusion in Motorists Mutual policy ***as if*** the policy included a "motorcycle exclusion." In so doing, the panel in *Hartley* violated a fundamental tenet of contract law: courts will not rewrite contracts for the benefit of one party or the other. *See Frear v. P.T.A. Ind., Inc.*, 103 S.W.3d 99, 106 (Ky.2003). Given the disparity in bargaining power between insureds and commercial insurance carriers, certain terms are unenforceable for the benefit insureds and victims of injury like Mr. Tryon, *see Wehr Constructors, Inc. v. Assurance Co. of*

Am., 384 S.W.3d 680, 687 (Ky.2012) *citing City of Hazard Municipal Housing Commission v. Hinch*, 411 S.W.2d 686 (Ky.1967), but nothing in Kentucky law allows alteration or creation of policy terms to ***benefit the insurer***. The panel in *Hartley* simply ignored this point, grafted a "motorcycle exclusion" on the Motorist Mutual UIM endorsement, and did so because the panel felt Mr. Hartley gamed the system.

Based on the facts, the improper "re-write" of the Motorists Mutual policy, and the confusion caused by the opinion if published, this Court correctly de-published *Hartley* on February 15, 2012. For the same reasons, and based on the language in CR 76.28(4)(a) and (c), *Hartley* should play no role here.

CONCLUSION

Appellants, in effect, seek to overturn decades of Kentucky law and enforce anti-stacking provisions against all UM or UIM insureds, regardless of vehicle class or type, and regardless of the premiums paid by policyholders. But the question remains: should this Court depart from decades of binding precedent and settled legislative intent, and instead rely on inapplicable policy language and a de-published opinion with no precedential value? For all the above reasons, *Amicus Curiae* submits the answer is no. This Court should therefore affirm the opinion of the Court of Appeals.

Respectfully submitted,

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