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S.C. SUPREME COURT

THE STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

CERTIFIED QUESTION OF LAW
FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA

The Honorable Donald C. Coggins, Jr.
United States District Judge

Case No. 2022-000887

TRAVELERS PROPERTY CASUALTY COMPANY OF AMERICA, ... PLAINTIFF,

V.

BARBARA HAWTHORNE, AS PERSONAL REPRESENTATIVE OF THE ESTATE OF NATHANIEL HAWTHORNE, JR., ... DEFENDANT.

RESPONSIVE BRIEF OF DEFENDANT

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CERTIFIED QUESTION PRESENTED

> If a law enforcement officer stops a motorist on a public highway, and during that traffic stop directs the motorist to exit his vehicle and to approach the officer's adjacent vehicle to provide his vehicle registration card, is the motorist an "insured" for purposes of Underinsured Motorist Coverage when he is struck by a passing vehicle on the public highway while standing at the officer's vehicle?

(Order, Aug. 2, 2022.)

STATEMENT OF THE CASE

Travelers Property Casualty Company of America (Travelers) issued a multi-state commercial automobile insurance policy to Terracon Consultants, Inc., (the "Policy"). (R. pp. 8–46.) By endorsement, the Policy includes underinsured motorist (UIM) coverage for covered vehicles principally garaged in South Carolina with a coverage limit of $1 million. (R. pp. 44–46.)

On December 2, 2020, Terracon employee Nathaniel Hawthorne, Jr., was driving a Terracon-owned truck insured under the Policy and principally garaged in South Carolina. (R. pp. 3, 49.) The truck was towing a trailer carrying drilling equipment. (R. pp. 189–91.) Mr. Hawthorne was operating the vehicle with Terracon's permission in the scope of his employment duties with Terracon. (*Id.*)

While driving on North Pleasantburg Drive in Greenville, South Carolina, Mr. Hawthorne was stopped by Corporal J.D. Hand of the South Carolina State Transport Police for a load securement issue. (R. pp. 1, 3.) North Pleasantburg Drive at the location of the stop is a seven-lane road with three travel lanes in each direction, a

center lane, and no shoulder or other space between the travel lanes and the concrete curbs and sidewalks bounding the roadway. (R. p. 90, Video at 00:40.)[1] The traffic stop therefore was conducted in the center lane. (*Id.*)

Once Mr. Hawthorne's vehicle was stopped in the center lane with the police vehicle stopped behind it, Cpl. Hand approached Mr. Hawthorne's driver-side door and asked for Mr. Hawthorne's driver's license and registration. (Video at 02:15; R. p. 202, lines 7–9.)[2] While Mr. Hawthorne was seated at the driver's seat of his vehicle, Cpl. Hand told him to "come here and look at this." (Video at 3:20; R. p. 202, lines 14–15.) Mr. Hawthorne exited his vehicle and Cpl. Hand escorted him to the rear of the vehicle to show him that the equipment on his trailer was improperly secured. (Video at 3:20 *et seq.*) After some discussion, Mr. Hawthorne stated he had a chain which could be used to secure his equipment. Cpl. Hand then said, "I'm going to write you a ticket right quick and then I'm going to let you go." (Video at 5:04; R. p. 204, lines 21–23.) After further inspecting the vehicle and trailer, Cpl. Hand told Mr. Hawthorne, "I'm going start doing this [writing the ticket], you start doing that [securing the equipment], then you come back here, ok?" (Video at 6:52; R. p. 206, lines 20–20.) Cpl. Hand then returned to his vehicle, moved it slightly to

[1] Page 90 of the Record is a placeholder document for the dashcam video from Cpl. Hand's vehicle. For consistency with Plaintiff's Opening Brief, further references to the video are cited as "Video at MM:SS."

[2] Pages 202 to 223 of the Record are a certified transcript of the dashcam video.

the left to provide more space next to the patrol vehicle's passenger side, and began writing the ticket. (Video at 6:52 *et seq.*)

After securing the equipment, Mr. Hawthorne walked to the passenger side of the patrol vehicle as instructed. (Video at 11:10.) Cpl. Hand asked Mr. Hawthorne to verify the Vehicle Identification Number (VIN) for the trailer, and Mr. Hawthorne walked from the patrol vehicle to the front of the trailer to check the VIN. (Video at 14:35.) Mr. Hawthorne obtained the VIN and returned to the patrol vehicle. (Video at 15:40.) He provided the VIN and handed Cpl. Hand the trailer registration. (Video at 15:40 *et seq.*) The registration card was wet, so Cpl. Hand instructed Mr. Hawthorne to place it on the hood of the patrol car to dry. (Video at 16:38; R. p. 211, lines 2–13.)

While they waited for the registration to dry and less than one minute after Cpl. Hand instructed Mr. Hawthorne to place his trailer registration on the hood of the patrol car, a speeding car driven by Allan Zack, an impaired driver, struck the patrol vehicle at high speed. (R. p. 3 ¶ 16; Video at 17:31.) The collision threw Mr. Hawthorne into oncoming traffic, killing him. (R. p. 3 ¶ 16.) Mr. Zack was charged with felony driving under the influence resulting in death as well as other crimes, *State v. Zack*, Indictment No. 2021-GS-23-06843 (Greenville Cty. Ct. Gen. Sess.), but died of a drug overdose while in jail, Motion to Substitute Party, *Hawthorne v. Zack*, Case No. 2021-CP-23-1754 (Greenville Cty. Ct. Com. Pl., Aug. 12, 2022).

Mr. Hawthorne died at age 49, survived by his wife Chasity and minor daughter Angelina. Defendant Barbara Hawthorne, Mr. Hawthorne's mother and personal representative of his estate, sued Mr. Zack for wrongful death on April 15, 2021, in the Greenville County Court of Common Pleas. Complaint, *Hawthorne*, Case No. 2021-CP-23-1754. Mr. Zack's liability carrier tendered its coverage limits of $25,000. (R. p. 52 ¶ 15, p. 53 ¶ 17.) Mr. Zack was otherwise judgment-proof. (R. p. 52 ¶ 15.) On August 16, 2021, Mrs. Hawthorne demanded Plaintiff tender the UIM coverage limit of $1 million. (R. p. 53 ¶ 21.) Two days later, Travelers responded by filing the present declaratory relief action seeking a judicial determination that it has no obligation to provide UIM benefits to Mrs. Hawthorne because Mr. Hawthorne at the moment of his death was not "occupying" his vehicle under the Policy definition of that term. (R. pp. 1–7.)

Mr. Hawthorne's vehicle never left the roadway. Mr. Hawthorne never left the immediate vicinity of his vehicle, nor did he leave the roadway, and Mr. Hawthorne and Corporal Hand both intended that Mr. Hawthorne would continue driving his vehicle on the roadway at the conclusion of the traffic stop. (*See generally* Video.) Travelers nonetheless filed an action seeking a judicial declaration that no UIM benefits were available because Mr. Hawthorne did not qualify as an "insured" under the Policy solely because he was not "occupying" the vehicle at the moment of his death. (R. pp. 1–7.) Travelers even *admitted* that had Mr. Hawthorne

defied Corporal Hand's instructions and remained in his vehicle until Mr. Zack collided with the Cpl. Hand's police vehicle, the Policy would have provided benefits for any resulting injuries to Mr. Hawthorne. (*See* R. p. 4–5 ¶¶ 19–25 (explaining that benefits were not available under the Policy because Mr. Hawthorne was not "occupying" the vehicle as defined in the Policy), p. 197 ¶ 20 (admitting that Mr. Hawthorne would have been "occupying" the vehicle as defined in the Policy if he did not comply with Cpl. Hand's direction to exit his vehicle during the traffic stop).) Because Mrs. Hawthorne believes that position is contrary to South Carolina law, but no South Carolina appellate court has definitively so ruled, she moved to certify the question to this Court. The federal district court granted the motion on June 13, 2022, and this Court accepted the question on August 2, 2022.

STANDARD OF REVIEW

"In answering a certified question raising a novel question of law, this Court is free to decide the question based on its assessment of which answer and reasoning would best comport with the law and public policies of the state as well as the Court's sense of law, justice, and right." *Shaw v. Psychemedics Corp.*, 426 S.C. 194, 197, 826 S.E.2d 281, 282 (2019) (citation omitted).

ARGUMENT

Mrs. Hawthorne, as representative of the estate of Mr. Hawthorne, is entitled to benefits under Terracon's UIM endorsement because Mr. Hawthorne met the

statutory definition of an "insured" under South Carolina Code § 38-77-30(7). Further, she is also entitled to UIM benefits because Mr. Hawthorne never left the roadway, never left the immediate vicinity of his vehicle, and intended to (and was going to be allowed to) continue driving on the roadway at the conclusion of the traffic stop. (*See generally* Video.) Construing the UIM endorsement to deny coverage only because Mr. Hawthorne briefly exited his vehicle in compliance with the lawful directions of a police officer during a traffic stop in the middle of the road would be unreasonable, unconscionable, and contrary to public policy.

Mrs. Hawthorne agrees with Travelers that to answer the certified question, the Court need only resolve (1) whether the statute or the policy language controls the definition of an "insured," or (2) whether construing the policy's definition of an "insured" to exclude a motorist directed by a police officer "to exit his vehicle and to approach the officer's adjacent vehicle to provide his vehicle registration card," while remaining in middle of the road, would be unreasonable, unconscionable, or violate the public policy of this State. (Order, Aug. 2, 2022.) For the reasons argued below, Mrs. Hawthorne believes the answer to both issues is "yes." South Carolina law unambiguously provides that a person who uses a motor vehicle with the express consent of the named insured in a UIM endorsement is an "insured" under that endorsement. And even if that were not the law, allowing a UIM endorsement to suspend benefits during any routine traffic stop in which a driver complies with a

lawful instruction to exit his vehicle—effectively conditioning coverage on committing a criminal act—would be unreasonable, unconscionable, and violate the public policy of this State.

I. TRAVELERS CANNOT CHANGE THE STATUTORY DEFINITION OF AN INSURED UNDER SOUTH CAROLINA CODE § 38-77-30(7).

Travelers argues its policy definition trumps South Carolina's statutory definition of an insured because insurers "are generally free to contract for exclusions or limitations on coverage," those exclusions will be enforced unless they are "in contravention of public policy," as expressed in a statute, "or some statutory inhibition," and no statute prohibits requiring occupancy to qualify as an insured. (Opening Br. 6 (quoting *Nationwide Ins. Co. of Am. v. Knight*, 433 S.C. 371, 375, 858 S.E.2d 633, 635 (2021).) This is all true except for the last point. There is "some statutory inhibition" to an agreement to define "insured" more narrowly than "any person who uses with the consent, expressed or implied, of the named insured the motor vehicle to which the policy applies"—it is in fact the statute *defining* "insured" as "any person who uses with the consent, expressed or implied, of the named insured the motor vehicle to which the policy applies." S.C. Code § 38-77-30(7). Further, there is a clear public policy, expressed by statute, requiring UIM endorsements to define "insured" consistently with the definition used in the liability policy. The optional nature of UIM coverage does not allow UIM endorsements to exclude persons defined as an "insured" in the liability policy. Finally, Travelers

further argues it would somehow be unreasonable to require UIM coverage to apply to "statutorily defined 'insureds'" (Opening Br. 11–13), but this argument is simply without merit.

A. Definitions in insurance contracts cannot trump definitions in statutes regulating insurance.

South Carolina Code § 38-77-30(7) defines an insured as:

> the named insured and, while resident of the same household, the spouse of any named insured and relatives of either, while in a motor vehicle or otherwise, and any person who uses with the consent, expressed or implied, of the named insured the motor vehicle to which the policy applies and a guest in the motor vehicle to which the policy applies or the personal representative of any of the above.

In this case, the named insured was Terracon Consultants, Inc., (R. p. 2 ¶ 3), and Mr. Hawthorne was a person using the named insured's motor vehicle with express consent, (R. pp. 189–91). Mr. Hawthorne therefore meets the statutory definition of an "insured."

Under South Carolina law, the statute defining an insured under an automobile insurance policy is controlling if the terms of an insurance policy excluding coverage are in conflict with the requirements of the statute. *Auto Owners Ins. Co. v. Rollison*, 378 S.C. 600, 613 n.5, 663 S.E.2d 484, 490 n.5 (2008) ("Auto Owners asserts that to allow Rollison to recover uninsured motorist benefits is contrary to the language of the policy at issue. We find this issue to be without merit given the statute is controlling if the terms of the policy excluding coverage are in conflict with the

requirements of the statute."). More particularly, as this Court previously noted (but did not expressly hold because the issue was not preserved for review), South Carolina law does not permit an insurer to modify the statutory definition of an insured under a UIM endorsement to require the insured to be "occupying" his vehicle:

> There is no requirement of actual physical contact with the insured vehicle at the time of injury to qualify as an insured under the statute. If "actual physical contact" is required, then the phrase "in a vehicle or otherwise" appears meaningless. The only statutory limitation is that a non-resident relative and others must have the consent of the named insured to use the vehicle. Consent to use the vehicle bestows the same level of coverage upon others as that enjoyed by the named insured. The statutory definition cannot be limited by a contractual provision. *Cf. Boyd v. State Farm Mut. Auto. Ins. Co.*, 260 S.C. 316, 319, 195 S.E.2d 706, 707 (1973) ("It is settled law that statutory provisions relating to an insurance contract are part of the contract, and that a policy provision which contravenes an applicable statute is to that extent invalid."); *Potomac Ins. Co. v. Allstate Ins. Co.*, 254 S.C. 107, 173 S.E.2d 653 (1970) (holding exclusionary policy language, whether it constituted an attempt to redefine the term "insured" in contravention of insurance statutes or to afford only conditional or contingent coverage, as opposed to the full coverage required by statutory law, was invalid as it was not in accordance with the state's financial responsibility law).

S.C. Farm Bureau Mut. Ins. Co. v. Kennedy, 398 S.C. 604, 617 n.4, 730 S.E.2d 862, 868 n.4 (2012) (emphasis in original removed).

The Court's doubt in *Kennedy* that a UIM endorsement can exclude persons meeting the statutory definition of an insured was based both on the hornbook principle that a contractual provision cannot alter a statutory definition and on rules

of statutory construction requiring that "[a] statute should be so construed that no word, clause, sentence, provision or part shall be rendered surplusage, or superfluous." *In re Decker*, 322 S.C. 215, 219, 471 S.E.2d 462, 463 (1995). Requiring occupancy of a vehicle to qualify as an insured would make the "in a vehicle or otherwise" language of § 38-77-30(7) meaningless surplusage. *Kennedy*, 730 S.E.2d at 868 n.4.

Additionally, the Court's doubts in *Kennedy* were informed by review of appellate decisions from other states questioning whether UIM policies restricting the definition of an insured contravened their states' respective laws regarding coverage. 398 S.C. at 616–17, 730 S.E.2d at 867–68. Those cases likewise cast doubt on Travelers' argument here that its decisions when drafting and executing its insurance contracts can supersede the General Assembly's decisions when drafting and enacting legislation regulating insurance.

For example, Arizona, like South Carolina, requires insurers to offer UIM coverage, Ariz. Rev. Stat. § 20-259.01(B), and defines "insured" as "the person named in the policy as the insured and any other person, as insured, using the motor vehicle or motor vehicles with the express or implied permission of the named insured," Ariz. Rev. Stat. § 28-4009. In *Chavez v. Arizona School Risk Retention Trust, Inc.*, the Court of Appeals of Arizona addressed an argument that students waiting to board a school bus were excluded from UIM coverage because they were

not "occupying" the bus as required by the policy language. 258 P.3d 145 (Ariz. Ct. App. 2011). The UIM endorsement at issue in *Chavez* limited coverage to those "occupying" an insured vehicle and defined "occupying" as "being in or being in physical contact with a covered Automobile, including while getting into or getting out of that covered Automobile." *Id.* at 148. This definition is substantively identical to the definition of "occupying" in the Travelers' policy at issue here: "'Occupying' means in, upon, getting in, on, out or off" a covered vehicle. (R. p. 46.) The Arizona Court of Appeals rejected the exclusion argument because "Courts will not interline the UM and UIM statutes to permit exclusions that have not been mentioned by the legislature," and it was "not shown that the statute contemplates excluding students who are using the bus but are not in physical contact with it." *Chavez*, 258 P.3d at 148 (internal quotation marks and explanatory brackets omitted). Here, likewise, it has not been shown § 38-77-30(7) contemplates excluding a driver who is killed while using a vehicle in the middle of a busy road but is not at the moment of death "in, upon, getting in, on, out or off" of the vehicle.

After discussing *Chavez* and other cases, this Court noted "we are likewise concerned about the ultimate validity of such definitional provisions and whether they alter, or conflict with, the statutory definition of an insured" but ultimately reserved the question because "that issue was not raised to the trial court nor on appeal to this Court." *Kennedy*, 398 S.C. at 616–17, 730 S.E.2d at 867–68. This

case however squarely presents the issue. Travelers concedes that if its policy language does not trump South Carolina's statutory language, Mr. Hawthorne qualifies as an insured. (Opening Br. 4.)

"[UIM] coverage is controlled by and subject to our [UIM] act, and any insurance policy provisions inconsistent therewith are void, and the relevant statutory provisions prevail as if embodied in the policy." *Kay v. State Farm Mut. Auto. Ins. Co.*, 349 S.C. 446, 450, 562 S.E.2d 676, 678 (Ct. App. 2002). "A policy of automobile insurance must provide at least the minimum amount of coverage outlined in the statute, and a policy issued pursuant to the law which gives less protection will be interpreted by the court as supplying the protection which the legislature intended." *Id.* (internal quotation marks omitted). Travelers' definition of an insured in its UIM endorsement provides less protection than the minimum amount of coverage because it denies coverage entirely from persons entitled to coverage under § 38-77-30(7). Thus, and for the reasons the Court discussed at length in *Kennedy*, Travelers' policy language cannot not trump the statute. Mr. Hawthorne therefore qualifies as an insured.

B. South Carolina's statutory scheme regulating automobile insurance expresses a clear public policy requiring UIM endorsements to define "insured" consistently with the definition in the liability policy, subject to a narrow exception confirming the rule.

Travelers' brief discusses two statutes, South Carolina Code § 38-77-160 and § 38-77-340 at length yet fails to comprehend the policy they express: a clear public

policy prohibiting an insurer from defining "insured" differently for purposes of liability coverage than for purposes of additional uninsured motorist (UM) or UIM coverage—that is, conforming to the statutory definition of "insured" for liability coverage while making up something more restrictive for additional UM or UIM coverage. That is exactly what Travelers seeks to do here: its automobile liability policy with Terracon conforms with § 38-77-30(7) by defining "insured" as anyone using a covered vehicle with permission (R. p. 21), but its UIM endorsement to that policy defines "insured" more narrowly to require actual occupancy of a vehicle.

Section 38-77-160 provides:

> Automobile insurance carriers shall offer, . . . at the option of the insured, [UIM] motorist coverage up to the limits of the insured liability coverage to provide coverage in the event that damages are sustained in excess of the liability limits carried by an at-fault insured or underinsured motorist or in excess of any damages cap or limitation imposed by statute. If, however, an insured or named insured is protected by . . . [UIM] coverage in excess of the basic limits, the policy shall provide that the insured or named insured is protected only to the extent of the coverage he has on the vehicle involved in the accident. If none of the insured's or named insured's vehicles is involved in the accident, coverage is available only to the extent of coverage on any one of the vehicles with the excess or [UIM] coverage.

In *Carter v. Standard Fire Insurance Co.*, the Court rejected exactly the argument Travelers makes here regarding this statute when it rejected a policy term limiting a Class I insured's ability to stack UIM coverage: "Under [the insurer's] formulation of [§ 38-77-160], the insurer is required *to offer* UIM coverage to an insured, but is not required to provide coverage unless the insured purchases such coverage, and

because the Policy contained a valid exclusion, that coverage was not purchased by [the policyholder]." 406 S.C. 609, 614, 753 S.E.2d 515, 517 (2013). The Court held that "[b]ecause the exclusion in question conflicts with . . . clear language" in § 38-77-160 regarding stacking, "we hold the exclusion is void." *Id.* 406 S.C. at 616, 753 S.E.2d at 518.

Travelers employs precisely the same argument rejected in *Carter*—UIM coverage is optional, so any exclusions are simply coverages the policyholder elected not to purchase—in an attempt to limit who qualifies as a Class II insured. But if insurers are free to disregard the statutory definition of an insured, the Court's decision in *Carter* is vitiated and made meaningless. An insurer could just exclude the language "while resident of the same household, the spouse of any named insured and relatives of either" from the definition of an insured in a UIM endorsement, covering those persons only as permissive users and thereby transforming them into Class II insureds unable to stack.[3]

[3] For this reason, Judge Harwell's unpublished pre-*Carter* decision that "insurers are not subject to any statutory requirements regarding who is required to be included as an insured" under a UIM endorsement because "UIM is voluntary coverage" is simply wrong and Travelers' reliance upon it is misplaced. *See McWhite v. ACE Am. Ins. Co.*, No. 4:07-CV-01551-RBH, 2010 WL 1027872, at *7 (D.S.C. Mar. 17, 2010). That reasoning cannot be reconciled with this Court's later decision in *Carter* that insurers are subject to statutory requirements regarding stacking despite the policyholder's ability to decline UIM coverage entirely. Further, Judge Harwell's opinion that UIM "insurers are not subject to any statutory requirements regarding who is required to be included as an insured" relies solely upon a citation to *Burgess v. Nationwide Mutual Insurance Co.*, 373 S.C. 37, 644 S.E.2d 40 (2007), which holds

The absurdity of that result is further illustrated by the existence of a statute that allows insurers and policyholders to agree to change the definition of an "insured" to exclude relatives only in certain narrow circumstances. Section 38-77-340 provides:

> Notwithstanding the definition of "insured" in Section 38-77-30, the insurer and any named insured must, by the terms of a written amendatory endorsement, the form of which has been approved by the director or his designee, agree that coverage under such a policy of liability insurance shall not apply while the motor vehicle is being operated by a natural person designated by name. The agreement, when signed by the named insured, is binding upon every insured to whom the policy applies and any substitution or renewal of it. However, no natural person may be excluded unless the named insured declares in the agreement that (1) the driver's license of the excluded person has been turned in to the Department of Motor Vehicles or (2) an appropriate policy of liability insurance or other security as may be authorized by law has been properly executed in the name of the person to be excluded.

In other words, an insurer and named insured may agree to depart from the statutory definition of an "insured" in § 38-77-30(7) if and only if the departure excludes a specific person and the named insured demonstrates that person does not need liability coverage either because (1) he has no driver's license, or (2) he has another source of liability coverage. As the Court observed in *Knight*, the purpose of the statute is to "alleviate the problem often faced by the owner of a family policy, who

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no such thing. *Burgess* merely held that no statute prohibits a limitation on "UIM portability when an insured is involved in an accident while in a vehicle he owns, but does not insure under the policy." 373 S.C. at 42, 644 S.E.2d at 43; *see also Carter*, 406 S.C. at 618–23, 753 S.E.2d at 519–22 (discussing *Burgess*).

. . . has a relatively safe driving record but is forced to pay higher premiums because another member of the family . . . is by definition also included in the policy coverage" while ensuring the named insured "may not exclude a costly resident relative . . . unless the excluded person has turned in his driver's license or is insured under his own policy." 433 S.C. at 379, 858 S.E.2d at 637. It is not clear what relevance this statute can have to coverage of drivers employed by a corporate policyholder except to illustrate that, contrary to Travelers' argument, insurers and policyholders do not enjoy a general freedom of contract allowing them to change the statutory definition of an "insured" at will in endorsements to automobile liability insurance policies.

Travelers presents *Knight*, which merely rejected the argument that "the General Assembly intended to allow [§ 33-77-340] to apply only to liability coverage, not to UIM coverage," 433 S.C. at 380, 858 S.E.2d at 637, for the proposition that § 38-77-160 "does not preclude an insurer and policyholder from deciding that particular persons are not insured under a policy." That is partially true—§ 38-77-340 allows the insurer and policyholder to do so if certain strict conditions are met—but irrelevant. Terracon did not decide Mr. Hawthorne was not an insured under its UIM coverage. What is relevant is that the General Assembly passed a statute allowing particular persons—"natural person designated by name"—to be excluded as insureds, "[n]otwithstanding the definition of 'insured' in

Section 38-77-30," because, in the absence of such a statute, insurers and policyholders would not be free under § 38-77-30 to exclude particular persons as insureds. But no statute permits blanket exclusion of all natural persons from UIM coverage based on a use of a motor vehicle that would qualify by statute for liability insurance coverage. Rather, there is a statute which prohibits exactly that: § 38-77-30(7).

After presenting arguments that it would be unreasonable or contradictory to use the statutory definition of "insured" when construing statutes that use the word "insured," which as explained below are without merit, Travelers returns to the argument that the liability and UIM definitions of "insured" need not be consistent because UIM coverage is optional with a paean praising freedom in choosing insurance coverage that frankly is more a political argument than a legal argument. (Opening Br. 15–18.) The General Assembly's decision not to require individuals in South Carolina to purchase UM coverage above $25,000 per person and $50,000 per accident, or to purchase UIM at all, has no apparent relevance to the legal issues in this case. Failed legislative proposals to require individuals to purchase a small minimum UIM coverage have even less possible relevance. *See CFRE, LLC v. Greenville Cty. Assessor*, 395 S.C. 67, 80-81, 716 S.E.2d 877, 884 (2011) (holding failed legislative proposals are "'a particularly dangerous ground on which to rest an interpretation of a prior statute'" that "'lacks persuasive significance because several

equally tenable inferences may be drawn from such inaction'" (quoting *Cent. Bank of Denver, N.A. v. First Interstate Bank of Denver, N.A.*, 511 U.S. 164, 187 (1994)). The General Assembly allows persons and entities to choose coverage levels and Terracon chose to protect its employees by purchasing liability coverage of $2 million, UM coverage of $1 million, and UIM coverage of $1 million. (R. pp. 9, 17, 18.) The question is whether allowing the definition of "insured" under the $1 million UIM endorsement to be narrower than in the $2 million liability policy would be consistent with South Carolina's statutory scheme regulating automobile insurance.

When considering that question, instead of speculating about failed legislative proposals, the Court should consider the persuasive reasoning of a sister-state appellate decision the Court cited with approval in *Kennedy*: *DeSaga v. West Bend Mutual Insurance Co.*, 910 N.E.2d 159 (Ill. App. Ct. 2009). *See* 398 S.C. at 615–16, 730 S.E.2d at 867 (discussing *DeSaga*). In *DeSaga*, the Illinois Appellate Court was presented with precisely the issue presented here: whether an insurer is prohibited "from defining the term 'insured' more narrowly for UIM coverage than it does for liability coverage." 910 N.E.2d at 166. The Illinois court held insurers are so prohibited, reasoning the prohibition follows from the state's statutory scheme of automobile insurance:

> Under Illinois's statutory scheme of automobile insurance, liability coverage, UM coverage, and UIM coverage are all connected. UM and

> UIM coverage were intended by the legislature to compliment the liability coverage that the insured had obtained. Illinois law requires that the insurer provide UM and UIM coverage at the same amount as liability coverage. Once it has been determined who will be insured under the liability section of the policy, the insurer may not, either directly or indirectly, deny UM or UIM coverage to an insured. An insurer's attempt to define the term "insured" differently for UM or UIM coverage than it did for liability coverage is exactly what our supreme court condemned in [a previous case]—an indirect attempt by the insurer to deny UM or UIM coverage to an "insured." Thus, we find in the present case that defendant's attempt to define the term "insured" more narrowly for UIM coverage under the policy than it did for liability coverage violates Illinois law.

Id. at 166–67 (citations and footnote omitted).

South Carolina, like Illinois, has a statutory scheme in which automobile insurance, liability coverage, UM coverage, and UIM coverage are all connected. *See generally* S.C. Code tit. 38 ch. 77. South Carolina, like Illinois, intends UM and UIM to complement liability coverage by providing injured persons coverage in situations where automobile liability insurance applies but the liability coverage is absent or insufficient. *Floyd v. Nationwide Mut. Ins. Co.*, 367 S.C. 253, 260, 626 S.E.2d 6, 10 (2005) ("The UIM and UM statutes are remedial in nature and enacted for the benefit of injured persons. . . ."). South Carolina, like Illinois, requires insurers to offer UM and UIM coverage at the same amount as the liability coverage. S.C. Code § 38-77-160. And South Carolina, like Illinois, should prohibit indirect attempts to deny UIM coverage to an "insured" by defining "insured" more narrowly for liability coverage than for UIM coverage.

C. Travelers' arguments that it would be unreasonable to require UIM coverage to apply to "statutorily defined 'insureds'" are without merit.

Travelers argues it would be unreasonable to read § 38-77-160 to require an insurer to offer UIM coverage to anyone who happens to use a policyholder's vehicle permissively. (Opening Br. 11–13.) Mrs. Hawthorne does not dispute that. Mrs. Hawthorne rather argues that another statute, § 38-7-30(7), restricts the ability of the policyholder and the insurer to change the definition of an insured. Travelers' point seems to be when § 38-77-160 says "insured" in "carriers shall also offer, at the option of the insured, underinsured motorist coverage," it means "named insured" and so the definition in § 38-77-30(7) cannot apply to the UIM coverage § 38-77-160 requires insurers to offer because it is broader than "named insured." This argument is foreclosed by *Carter*, which held someone who was not a named insured was an "insured" under § 38-77-160. 406 S.C. at 612, 753 S.E.2d at 516. Further, this argument, like Travelers' argument that a later reference in the statute to "an insured or named insured" reveals that "insured" cannot mean what § 38-77-30(7) says it means because named insureds are included in the definition of insureds,[4] rests on minor drafting inconsistencies too tendentious to deny coverage given "[t]he central purpose of the UIM statute is to provide coverage when the injured party's

[4] Any possible definition of "insured" would include "named insured" as a subset, so it is unclear how this argument could exclude the statutory definition or any other definition of "insured."

damages exceed the liability limits of the at-fault motorist," the statute is "remedial in nature and enacted for the benefit of injured persons," and therefore "should be construed liberally to effect the purpose intended by the Legislature." *Floyd*, 367 S.C. at 260, 626 S.E.2d at 10.

Finally, the argument that the statutory provisions making liability and UM coverage mandatory require persons defined in § 38-77-30(7) as insureds to be insured but the statutory provisions requiring the offer of optional additional UM and UIM do not require those persons to be insured because those coverages are optional is nonsensical. (*See* Opening Br. 13–15.) Those statutes merely provide that persons meeting the statutory definition of "insured" are required to be insured for statutory minimum coverage amounts. S.C. Code §§ 38-77-140, -150. They do not suggest the statutory definition of "insured" is inapplicable to other coverages or coverage amounts beyond the statutory minimum because those excess coverages are voluntarily purchased. To the contrary, the Court has held step-down provisions reducing voluntarily purchased excess coverage to the required statutory minimum are void when they conflict with statutory provisions that do not distinguish between minimum and excess coverage. *E.g.*, *Nationwide Mut. Fire Ins. Co. v. Walls*, 433 S.C. 206, 208, 858 S.E.2d 150, 151 (2021) (invalidating flight-from-law enforcement and felony step-down provisions); *Williams v. Gov't Emps. Ins. Co. (GEICO)*, 409 S.C. 586, 591, 762 S.E.2d 705, 708 (2014) (invalidating family step-

down provision reducing coverage for family members in the same household). South Carolina Code § 38-77-30(7) likewise is a statutory provision that does not distinguish between minimum and excess coverage.

II. CONSTRUING THE SOUTH CAROLINA UIM ENDORSEMENT TO SUSPEND UIM COVERAGE DURING ROUTINE TRAFFIC STOPS WOULD BE UNCONSCIONABLE AND CONTRARY TO THE PUBLIC POLICY OF THIS STATE.

It is manifestly unconscionable and contrary to public policy to allow UIM endorsements to define "insured" in a way that suspends coverage during routine traffic stops whenever an officer needs a motorist to step out of the vehicle. Disobeying a law enforcement officer's instruction to exit a vehicle on a public road is a crime. *See* S.C. Code § 56-5-740. Travelers admits that under its interpretation of the UIM endorsement, Mr. Hawthorne would not have lost UIM coverage but for his compliance with Cpl. Hand's instruction to step out of his vehicle to secure his load and provide his registration. (*See* R. p. 4–5 ¶¶ 19–25 (explaining that benefits were not available under the Policy because Mr. Hawthorne was not "occupying" the vehicle as defined in the Policy), p. 197 ¶ 20 (admitting that Mr. Hawthorne would have been "occupying" the vehicle as defined in the Policy if he did not comply with Cpl. Hand's direction to exit his vehicle during the traffic stop).)

Travelers' interpretation should be rejected for three reasons. First, there is no principled reason why it would be unconscionable for a UIM endorsement to deny coverage to a motorist forced to relinquish physical contact to avoid physical

injury, as the Court held in *Kennedy*, but not one forced to do so to avoid committing a crime. 398 S.C. at 617, 730 S.E.2d at 868. Second, any contract that encourages criminal activity is against public policy. *Smith v. Todd*, 155 S.C. 323, 152 S.E. 506, 508–09 (1930) ("It is against the policy of our law to reward one for the commission of crime . . . ."). Third, under the standard of review for answering a certified question, the "Court is free to decide the question based on its assessment of which answer and reasoning would best comport with the law and public policies of the state as well as the Court's sense of law, justice, and right," *Shaw*, 426 S.C. at 197, 826 S.E.2d at 282, and so the Court is free to construe "occupying" to include a motorist in the factual situation described in the certified question, one directed "to exit his vehicle and to approach the officer's adjacent vehicle to provide his vehicle registration card," as other appellate courts have done in similar cases.

A. The Court held in *Kennedy* that it is unconscionable for a UIM endorsement to exclude to a motorist because he was forced to relinquish physical contact to avoid injury, and that reasoning should apply to a motorist forced to relinquish physical contact to avoid committing a crime.

Mrs. Hawthorne is entitled to UIM coverage because it would be unconscionable or otherwise contrary to public policy to deny Mr. Hawthorne coverage while operating a covered vehicle in the middle of a public roadway merely because he complied with a law enforcement order to walk to an adjacent police vehicle also in the middle of the roadway to deliver his vehicle registration.

In *Kennedy*, the Court held Mr. Kennedy, a person who was in standing next to his vehicle with his hand in physical contact with it, but relinquished that contact in an unsuccessful attempt to avoid being hit by another vehicle, was in physical contact for UIM purposes because "[t]o interpret the physical contact requirement in a manner that would require Kennedy to succumb to the approaching danger rather than relinquish physical contact would be unreasonable and unconscionable." *Kennedy*, 398 S.C. at 614, 730 S.E.2d at 866–67. The Court used the term "temporal continuum" to observe that occupancy can be established "by events immediately surrounding the initial impact and the point in time that the last injury was inflicted" even if the insured was not occupying the vehicle at the exact moment of impact. *Id.* at 612, 730 S.E.2d at 865. Mr. Kennedy was in contact with his vehicle shortly before being struck, and "Kennedy's conduct was reasonably to be expected from one acting under similar circumstances when faced with a hazard encountered in the ordinary use of a vehicle." *Id.* at 613–14, 730 S.E.2d at 866–67. Thus, "Kennedy met the physical contact requirement here because it would be unreasonable and unconscionable to interpret the provision to require a party who had physical contact with a vehicle to maintain that contact under circumstances that might result in catastrophic injury." *Id.* at 614, 730 S.E.2d at 868.

Here likewise it would be "unreasonable and unconscionable"—or at the very least contrary to public policy—to interpret the physical contract requirement in a

manner that would require a driver to commit a crime rather than relinquish physical contact. *Cf.* S.C. Code §§ 56-5-740 ("No person shall willfully fail or refuse to comply with any lawful order or direction of any police officer, fireman or uniformed adult school crossing guard invested by law with authority to direct, control or regulate traffic.") & 56-5-730 (violation of § 56-5-740 is a misdemeanor). Mr. Hawthorne's conduct likewise was reasonably to be expected from one acting under similar circumstances when faced with a situation encountered in the ordinary use of a vehicle. Mr. Hawthorne met the physical contact requirement because it is no less unreasonable and unconscionable to interpret the provision to require a party who had physical contact with a vehicle to maintain that contact under circumstances constituting a crime than to require the same under circumstances threatening physical injury.

Travelers counters *Kennedy* is factually distinct from this case because "Decedent here was not in physical contact with the insured vehicle at any [] time during temporal continuum of the accident." (Opening Br. 21.) As Travelers phrased this same argument in the district court, *Kennedy* should be narrowly construed to apply only "when (1) the claimant was in physical contact with the insured vehicle *immediately prior* to a collision and (2) forced to relinquish that physical contact to avoid an oncoming vehicle." (R. p. 101.) Travelers argues Mr.

Hawthorne's contact with his vehicle less than two minutes before the collision is too removed in time to be immediately prior to the collision. (Opening Br. 21.)

To that Mrs. Hawthorne counters that Mr. Hawthorne had been in contact with his vehicle within the "temporal continuum" of the accident because he had physical contact with his vehicle less than two minutes before the collision. (Video at 15:40 *et seq.*) Travelers gives no reason why less than two minutes is too removed in time to be within the "temporal continuum" except to say that Mr. Zack's vehicle did not come into view before Mr. Hawthorne ceased physical contact with his truck. When Mr. Zack's vehicle came into view is determined by the geography of the road and its surroundings, the amount of traffic on the road, the weather and time of day, the type of vehicle Mr. Zack was driving and its color and lights, and the direction in which Mr. Hawthorne had turned his head. There is no obvious reason why any of that should be relevant to UIM coverage. For Mr. Hawthorne, of course, Mr. Zack never came into view because he was looking into the driver's side window of Cpl. Hand's vehicle, not down the road at approaching traffic. (Video at 16:38 *et seq.*)

Moreover, Mr. Hawthorne never exited the roadway or immediate vicinity of his vehicle. (*See* Video at 0:00 *et seq.*) When the Court considers the "temporal continuum," it should also consider the "spatial continuum": Mr. Hawthorne was standing in the middle of the road immediately adjacent to his vehicle, almost within

arm's reach of the trailer attached to his truck, when the collision occurred. (Video at 17:31.)

And when considering the "temporal continuum," the Court should consider that Mr. Hawthorne's use of his vehicle had not ended. He was not being arrested. He was told that he would be free to go once the ticket was written. (Video at 5:04; R. p. 204, lines 21–23.) He was not abandoning his vehicle in the middle of the road. He was driving the truck because Terracon paid him to drive it and he was going to continue driving the truck on the road that it never left as soon as the officer gave him the ticket. These facts are even more compelling than the facts of *Kennedy*, where the driver was standing in a parking lot next to his vehicle when the collision occurred. 398 S.C. at 613, 730 S.E.2d at 866.

B. The Court can invalidate or reform contracts that are unconscionable or contrary to public policy.

Travelers argues courts generally cannot decline to enforce contractual terms based on their own view of unconscionability or public policy. (Opening Br. 21–22.) Travelers largely relies on language in *Knight* to support that proposition: "this Court has no authority to invalidate an automobile insurance policy provision simply because we believe it is inconsistent with our own notion of 'public policy.'" 433 S.C. at 376, 858 S.E.2d at 635. Public policy for regulating the business of insurance is expressed by the General Assembly in statutes. *Id.* ("[T]he General Assembly establishes the public policy relating to automobile insurance and enacts statutes to

let the public and the courts know what that policy is. When an insured challenges a policy provision on the ground the provision violates public policy, the Court's authority is limited to determining whether the policy provision violates a statute.").

But this language clearly refers to the judiciary's own subjective opinions on regulatory policies regarding insurance. The Court of course cannot invalidate insurance contracts based on its own view of the best public policy for regulating the business of insurance. Courts can and do however reform or invalidate contracts that are contrary to established public policy, which in a broader context than insurance regulation may be expressed not only by statute but also by constitutional provisions or judicial decisions. *See, e.g.*, *White v. J.M. Brown Amusement Co.*, 360 S.C. 366, 371, 601 S.E.2d 342, 345 (2004) ("The general rule, well established in South Carolina, is that courts will not enforce a contract when the subject matter of the contract or an act required for performance violates public policy as expressed in constitutional provisions, statutory law, or judicial decisions."); *Branham v. Miller Elec. Co.*, 237 S.C. 540, 545, 118 S.E.2d 167, 170 (1961) ("Freedom of contract is subordinate to public policy; agreements that are contrary to public policy are illegal."). Of course, any contract that rewards, encourages, or conditions benefits on commission of a criminal act is both unconscionable and against the public policy of this State. *See, e.g.*, *Weeks v. N.Y. Life Ins. Co.*, 128 S.C. 223, 122 S.E. 586, 588 (1924) ("Public policy forbids the insertion in a contract of a condition which would

tend to induce crime . . . ."). An interpretation of a UIM endorsement that conditions UIM coverage on a criminal act, as Travelers admits it does here, is against public policy and must be reformed or voided.

Courts also reform or invalidate contractual terms that are unconscionable. South Carolina Code § 36-2-302(a) provides:

> If the court as a matter of law finds the contract or any clause of the contract to have been unconscionable at the time it was made the court may refuse to enforce the contract, or it may enforce the remainder of the contract without the unconscionable clause, or it may so limit the application of any unconscionable clause as to avoid any unconscionable result.

Recognizing this, Travelers tries to cabin the concept of unconscionability into a nonexistent dispute over Terracon and Travelers' relative bargaining power. (Opening Br. 22–23.) Terracon is a substantial business but obviously lacks the bargaining power of Travelers, a multibillion-dollar company listed on the Dow Jones Industrial Average. But lack of bargaining power is not the only basis for finding an interpretation of a contractual term unconscionable. The interpretation can be so substantively unreasonable that "no reasonable person would" make it and "no fair and honest person would accept" it. *See Damico v. Lennar Carolinas, LLC*, 437 S.C. 596, 611, 879 S.E.2d 746, 754 (2022), *reh'g denied* (Nov. 17, 2022) (discussing unconscionability as a contract defense). Whether a term is so substantially unreasonable "depends upon all the facts and circumstances of the

case." *Id.* at 611, 879 S.E.2d at 755 (citing *Kennedy*, 398 S.C. at 614, 730 S.E.2d at 867).

This was the case in *Kennedy*, where the Court held that a UIM endorsement defining "insured" in a manner requiring the insured to maintain physical contact with a vehicle even in circumstances in which physical injury would result was so substantively unreasonable as to be unconscionable. 398 S.C. at 614, 730 S.E.2d at 866–67. Likewise, here, Travelers' UIM endorsement defining "insured" in a manner requiring the insured to commit a crime to maintain coverage is so substantively unreasonable as to be unconscionable.

Finally, even if it were not a crime for Mr. Hawthorne to refuse to exit his vehicle, as a question of first impression the Court should hold it would likewise be unconscionable and against the public policy of this State for an automobile insurance contract to restrict the definition of "insured" in a UIM endorsement to reward or encourage confrontational behavior at a traffic stop. Traffic stops can be dangerous for both motorists and law enforcement, and for that reason the United States Supreme Court has held that once a motor vehicle has been lawfully detained for a traffic violation, police officers may order the driver and passengers to get out of the vehicle without violating the Fourth Amendment. *Maryland v. Wilson*, 519 U.S. 408, 412–15 (1997). The danger of possible criminal conduct is not the only or even most likely danger. Persons may be ordered from their vehicles "as a

'precautionary measure' to protect the officer's safety" because "the danger to the officer of standing by the driver's door and in the path of oncoming traffic might also be "appreciable." *Id.* at 412. The Court should hold it contrary to public policy to allow an insurer to restrict the definition of "insured" in a UIM endorsement in a way that places police officers' legitimate safety concerns as recognized by the U.S. Supreme Court in direct conflict with motorists' interest in maintaining UIM coverage while still using (if not in immediate contact with) their vehicles on or next to the roadway.

C. The Court can reasonably find Mr. Hawthorne was occupying his truck for the same reasons other appellate courts have held motorists were occupying their vehicles in similar factual circumstances.

Travelers argues Mr. Hawthorne should be excluded from benefits under his employer's UIM policy endorsement because the Policy limits coverage to persons "occupying" a covered vehicle and defines "occupying" as "in, upon, getting in, on, out or off," and Travelers represents Mrs. Hawthorne conceded he was not "in, upon, getting in, on, out or off" his truck. (Opening Br. 23.) Mrs. Hawthorne's counsel did concede in discussions with opposing counsel, and does concede here, that Mr. Hawthorne was not "in, upon, getting in, on out or off" of the vehicle in the sense that Mr. Hawthorne was not in physical contact with his truck, and he was not at the moment of the collision engaged in the physical process of entering or exiting his truck. This concession merely states the obvious: the police dashcam video shows

Mr. Hawthorne was standing in the middle of the road next to the police vehicle immediately behind his truck when the fatal collision occurred. (Video at 17:31.)

But Mrs. Hawthorne does not concede Mr. Hawthorne was not "occupying" the vehicle if this Court is inclined to follow the lead of some other appellate courts and learned treatises that have construed "occupying" as broadly synonymous with "using" to avoid an interpretation of a UIM endorsement that would, for the reasons explained above, be unreasonable, unconscionable, or violate public policy. *E.g.*, *Argonaut Great Cent. Ins. Co. v. Mitchell*, 482 F. App'x 477, 479 (11th Cir. 2012) (sanitation worker was occupying a garbage truck when struck by a vehicle even if standing while standing behind the garbage truck to collect garbage cans); *DeSaga*, 910 N.E.2d at 167–68 (Ill. App. 2009) (finding occupancy where the driver exited his vehicle to remove from the roadway debris that had fallen from his vehicle); *Olsen v. Farm Bureau Ins. Co. of Nebraska*, 609 N.W.2d 664, 670 (Neb. 2000) (collecting cases and holding the act of "getting out" of a vehicle extends until time and distance remove the insured from the zone of danger or risk to which an insured is exposed by the act of exiting a vehicle under the circumstances); *De Almeida v. Gen. Acc. Ins. Co. of Am.*, 714 A.2d 967, 968 (N.J. App. Div. 1998) (finding occupancy where an employee was retrieving road construction signs about 10 feet away from his truck when struck and killed by a passing vehicle); *Nelson v. Iowa Mutual Ins. Co.*, 515 P.2d 362, 364 (Mont. 1973) (holding a decedent who

abandoned a vehicle that slipped off the road during a blizzard and became stuck in a ditch, and was found frozen to death 143 feet away from the vehicle, was still "alighting from" her vehicle within the meaning of her insurance policy when she froze to death).

In *Kennedy*, the Court noted, citing American Jurisprudence, that "whether a person is deemed to have been 'occupying' a vehicle depends on the facts of each case, although the general trend appears to be in favor of a liberal construction of the term 'occupying.'" 398 S.C. at 612–13, 730 S.E.2d at 866. More recently, American Jurisprudence has provided:

> A person who is engaged in a lawful use of an insured vehicle and is injured will be considered to be "occupying" the vehicle within the meaning of automobile insurance policy, even if not actually inside the vehicle, provided:
>
> (1) there is a causal relation or connection between the injury and the use of the insured vehicle;
>
> (2) the person asserting coverage is in reasonably close geographic proximity to the insured vehicle, although the person need not be actually touching it;
>
> (3) the person is vehicle-oriented rather than highway-oriented or sidewalk-oriented; and
>
> (4) the person is engaged in a transaction essential to the use of the vehicle.
>
> Under the "reasonable connection test," the court looks to whether the claimant's activities at the time of the accident were so reasonably connected to the insured auto that, under the law, the claimant could be said to be an occupant within the policy's meaning.

> A person remains an "occupant" of a car until the person is able to go to a neutral zone or is removed to a neutral zone. However, where the person is a substantial distance from the vehicle and is engaged in an activity which is not directly related to the vehicle's operation, the person is not "occupying," or "in or upon" the vehicle, as those terms are used in automobile insurance policies.

7 Am. Jur. 2d Automobile Insurance § 97 (Nov. 2022 update) (footnotes omitted). This four-part standard appears to have originated in Washington, *see Rau v. Liberty Mut. Ins. Co.*, 585 P.2d 157, 162 (Wash. 1978), *abrogated by Butzberger v. Foster*, 89 P.3d 689 (Wash. 2004), and has been adopted by Pennsylvania, *Utica Mut. Ins. Co. v. Contrisciane*, 473 A.2d 1005, 1009 (Pa. 1984); Rhode Island, *Gen. Acc. Ins. Co. of Am. v. Olivier*, 574 A.2d 1240, 1242 (R.I. 1990); Kentucky, *Ky. Farm Bureau Mut. Ins. Co. v. McKinney*, 831 S.W.2d 164, 168 (Ky. 1992); Tennessee, *Tata v. Nichols*, 848 S.W.2d 649, 652 (Tenn. 1993); New Mexico, *Cuevas v. State Farm Mut. Auto. Ins. Co.*, 28 P.3d 527, 529–30 (N.M. 2001); Wisconsin, *Roden v. Gen. Cas. Co. Of Wis.*, 671 N.W.2d 622, 628 (Wis. 2003); and Maryland, *Md. Auto. Ins. Fund v. Baxter*, 973 A.2d 243, 248 (Md. App. 2009).

If this four-part test were applied here, Mr. Hawthorne would qualify as an occupant. First, there is an obvious causal relation between his injury and his use of his vehicle—he was standing next to it in the middle of the road handing his registration to the police officer when he was struck by a passing car, immediately after getting out and securing a load on his vehicle's trailer at the direction of the police officer. Second, he was in reasonably close geographic proximity to his

vehicle—standing in the road immediately behind it. Third, he was vehicle-oriented rather than highway-oriented: his purpose in being outside his vehicle was to operate it (secure a load) and his actions outside the vehicle were oriented toward the vehicle. In other words, the functional purpose of his occupancy had not ended. Fourth, he was engaged in a transaction essential to the use of the vehicle, i.e., cooperating with a traffic stop while driving the vehicle. Further fitting this test within the Travelers' UIM endorsement definition of "occupying," Mr. Hawthorne was "getting off" the truck because he ceased physical contact with the truck but continued to occupy it while never leaving the zone of danger. *See, e.g.*, *Olsen*, 609 N.W.2d at 670–71 (collecting cases).

CONCLUSION

South Carolina law does not permit Travelers to change the definition of an "insured" in a UIM endorsement to deny coverage to persons defined as "insured" by statute and by the liability policy language. Further, any reading of a UIM endorsement that suspends coverage during a routine traffic stop or conditions coverage on refusing an officer's direction "to exit his vehicle and to approach the officer's adjacent vehicle to provide his vehicle registration card" is unreasonable, unconscionable, and contrary to public policy. The Court therefore should answer the certified question "Yes."

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