IN THE SUPREME COURT OF MISSOURI

ADAM DUTTON, Plaintiff-Appellant, v. AMERICAN FAMILY MUTUAL INSURANCE COMPANY, Defendant-Respondent.	)	Case No. SC94075

APPEAL FROM THE CIRCUIT COURT OF JACKSON COUNTY
STATE OF MISSOURI

THE HONORABLE MARCO A. ROLDAN, PRESIDING
NO. 116-CV08343

AMICUS CURIAE BRIEF OF FARMERS INSURANCE COMPANY, INC. IN SUPPORT OF RESPONDENT

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INTEREST OF *AMICUS CURIAE*

Farmers Insurance Company, Inc., is an insurance company licensed to do business in the State of Missouri and underwrites and issues personal automobile liability insurance policies to policyholders throughout Missouri. Amongst the insurance policies issued by Farmers, are owner's policies that are issued to automobile owners in Missouri that provide the financial responsibility required by Missouri's Motor Vehicle Financial Responsibility Law ("MVFRL"). In many cases, Farmers issues multiple owner's policies to single households owning multiple vehicles. Accordingly, the majority decision of the Western District of the Missouri Court of Appeals, which is now on transfer to this Court, is of widespread interest to Farmers and its policyholders. The matters to be decided by the Court will impact the risks assumed by Farmers and similarly situated automobile liability insurers in Missouri, the availability of automobile liability insurance in Missouri, and cost of automobile insurance borne by their Missouri policyholders.

The impact of the Western District's decision cannot be understated. The decision converts automobile liability insurance, which is tied to the designated vehicles insured under a policy, to "floating" insurance that follows the insured without limitation, at least to the minimum coverage required by the MVFRL, and, thus, renders meaningless the distinction between owner's and operator's policies under Missouri law and nullifies the "owned vehicle" exclusion, a provision entirely consistent with owner's policies under the MVFRL, as well as limitations on stacking.

The Western District's decision summarily re-writes all owner's policies sold in Missouri by expanding coverage contrary to longstanding assumptions based on past decisions by this Court and the Missouri Court of Appeals that have upheld "owned vehicle" exclusions and anti-stacking provisions in automobile liability policies. This Court, in *First Nat'l Ins. Co. of America v. Clark*, 899 S.W.2d 520, 522-23 (Mo. banc 1995), provides the leading precedent governing the stacking of owner's policies and the application of the MVFRL. In *Clark*, the Court made plain that stacking was not required, that limitations on coverage available to vehicles other than those designated under the policy are enforceable and not violative of the MVFRL, and that coverage may be properly restricted to the coverage available under the owner's policy insuring the accident vehicle operated by the at-fault driver. The Court further defined what must be done to meet Missouri public policy.

> The public policy of this state is satisfied when there is an owners policy [sic] of liability insurance sufficient to meet the requirements of Missouri's financial responsibility law. It is sufficient to say that because there was an owner's policy in effect, no operator's policy of liability insurance on the same vehicle is required by the Missouri financial responsibility law.

Id. at 522.

Insurers, in issuing owner's policies in Missouri, relied on this Court's precedent. The Western District's decision completely guts the reliance by insurers on the *Clark* decision. This expansion in coverage was not contemplated when insurers issued their

policies based on years of longstanding precedent nor taken into account by insurers in their calculation of premiums.

The impact of the Western District's decision will be great. The Western District's decision increased American Family Mutual Insurance Company's exposure under its policies twofold, in contravention of past judicial precedent, by rendering meaningless policy provisions previously endorsed by Missouri courts.

Confusion and more litigation in the trial courts are inevitable over the stacking of liability coverage under owner's policies. Already inexplicable inconsistencies exist in Missouri law. Stacking is not permitted when a single owner's policy insures multiple vehicles, but is now required when a single insurer issues multiple owner's policies to a single household. Even the Western District, in its decision, acknowledged this anomaly.

And if the Western District's decision stands, the cost of insurance will not only increase in Missouri, but increase unnecessarily so. Based on this decision, insurers will now have to calculate premiums for a single-vehicle owner's policy issued to a multi-vehicle household as if the policy insured every auto owned by that household, and not just the designated vehicle on the policy, in order to respond to the retroactive expansion of risk that insurers have now been held to have assumed and to meet the cost of future claims under the newly expanded coverage that they never contemplated.

Farmers submits this *amicus curiae* brief in support of Respondent American Family Mutual Insurance Company. It does so to address the public policy issues presented by this case under Missouri insurance law, generally, and under the Motor Vehicle Financial Responsibility Law, specifically, as well as the dramatic and far-

ranging impact this case will have on Missouri insurance law and on the availability and affordability of automobile liability insurance in Missouri.

JURISDICTIONAL STATEMENT

Amicus Curiae Farmers Insurance Company, Inc. adopts and incorporates by reference Respondent American Family Mutual Insurance Company's Jurisdictional Statement. Farmers submits its Brief under its Motion for Leave to File *Amicus Curiae* Brief, which it has filed in accordance with MO. R. CIV. P. 84.05(f).

STATEMENT OF FACTS

For purposes of its Brief, Farmers adopts and incorporates Respondent's Statement of Facts.

POINT RELIED ON

I. The trial court did not err in entering judgment for Respondent American Family Mutual Insurance Company because neither Missouri case law nor the Motor Vehicle Financial Responsibility Law requires stacking under the facts of this case in that the American Family policy is an owner's policy that did not insure the accident vehicle, which was separately insured under another owner's policy; and disposition of this question on appeal is of widespread interest to insurers and their policyholders and will have a substantial impact on how insurance policies are interpreted, the risks assumed by automobile liability insurers in Missouri, and the affordability and availability of automobile liability insurance in Missouri.

First Nat'l Ins. Co. of America v. Clark, 899 S.W.2d 520 (Mo. banc 1995)

Hendrickson v. Cumpton, 654 S.W.2d 332 (Mo. App. W.D. 1983)

O'Rourke v. Esurance Ins. Co., 325 S.W.3d 395 (Mo. App. E.D. 2010)

MO. REV. STAT. § 303.190

ARGUMENT

I. The trial court did not err in entering judgment for Respondent American Family Mutual Insurance Company because neither Missouri case law nor the Motor Vehicle Financial Responsibility Law requires stacking under the facts of this case in that the American Family policy is an owner's policy that did not insure the accident vehicle, which was separately insured under another owner's policy; and disposition of this question on appeal is of widespread interest to insurers and their policyholders and will have a substantial impact on how insurance policies are interpreted, the risks assumed by automobile liability insurers in Missouri, and the affordability and availability of automobile liability insurance in Missouri.

A. Introduction

Farmers Insurance Company, Inc., an automobile liability insurance company insuring policyholders in Missouri, submits this *amicus curiae* brief to address the impact of the decision of the Western District of the Missouri Court of Appeals, which is now on transfer before this Court. The question whether the Motor Vehicle Financial Responsibility Law ("MVFRL") requires every owner's policy issued to a Missouri policyholder that contains an insuring clause affording coverage for "a loss," must provide the minimum liability coverage required by the Law and be subject to stacking is one of great interest and importance to Farmers and its insureds, and to all automobile liability insurers and their policyholders in Missouri, especially to those insurers, such as Farmers that issue multiple owner's policies to the same policyholders or their households.

How this question is resolved by the Court will have a significant impact on the Missouri insurance marketplace and the availability and affordability of automobile liability insurance in Missouri. The decision's effect is to convert automobile liability insurance, which is tied to the autos insured under a policy, to "floating" insurance that follows the insured without limitation, at least to the minimum coverage required by the MVFRL, and, thus, renders meaningless the distinction between owner's and operator's policies under Missouri law and nullifies the "owned vehicle" exclusion, a provision entirely consistent with owner's policies under the MVFRL, as well as limitations on stacking. This change in the law results in a significant increase of risk, without regard to the insurer's premium calculations. Here, the Western District's decision increased American Family's assumption of risk under its policy *twofold*.

American Family Mutual Insurance Company and the Missouri Organization of Defense Lawyers, in their briefs, have addressed in detail the merits of the question presented. Farmers will not repeat those arguments, but joins in them. Instead, for its *amicus curiae* brief, Farmers addresses how the Western District's decision, if not reversed on transfer, will impact insurers, their policyholders, and Missouri public policy. First, before doing so, Farmers briefly addresses the MVFRL and its statutory mandate to illustrate the great sea change that the Western District's decision represents.

B. The MVFRL

The MVFRL requires vehicle owners and operators in Missouri to maintain a minimum degree of financial responsibility. To this end, the MVFRL imposes certain

requirements upon insurers and the policies of automobile liability insurance that they issue to Missouri drivers. *See* MO. REV. STAT. § 303.190 (2000).

The MVFRL "requires every owner's and operator's policy issued in Missouri to provide minimum liability coverage." *Karscig v. McConville*, 303 S.W.3d 499, 500 (Mo. banc 2010). The minimum amount prescribed by the MVFRL for "bodily injury to . . . one person in any one accident" is $25,000 and $50,000 for two or more persons. MO. REV. STAT. § 303.190.2(2). "The plain purpose of the [MVFRL] is to make sure that people who are injured on the highways may collect damage awards, within limits, against negligent motor vehicle operators." *Halpin v. Am. Family Mut. Ins. Co.*, 823 S.W.2d 479, 482 (Mo. banc 1992).

The MVFRL, by its terms, does not contemplate, much less require, the stacking of liability insurance coverage. Until recently, it had long been assumed that automobile liability insurance was not subject to stacking in Missouri. Consider Section 303.190.2 of the MVFRL, which governs owner's policies, and which states as follows:

> 2. Such owner's policy of liability insurance:
>
> (1) Shall designate by explicit description or by appropriate reference *all motor vehicles* with respect to which coverage is thereby granted;
>
> (2) Shall insure the person named therein and any other person, as insured, *using any such motor vehicle or motor vehicles* with the express or implied permission of such named insured, against loss from the liability imposed by law for

> damages *arising out of the ownership, maintenance or use of such motor vehicle or motor vehicles* . . . with respect to *each such motor vehicle,* as follows: twenty-five thousand dollars because of bodily injury to or death of one person in any one accident and, subject to said limit for one person, fifty thousand dollars because of bodily injury to or death of two or more persons in any one accident, ... (Emphasis added.)

MO. REV. STAT. § 303.190.2.

When the statute is read as a whole, and applied to an owner's policy, the phrase "each such motor vehicle" in Section 2(2) refers to the statute's mandate that "any such motor vehicle" involved in an accident receive coverage in the amount of $25,000 per person and $50,000 per accident. This language articulates the Missouri General Assembly's intent that the liability coverage afforded under an owner's policy need only be provided in instances where there is "liability imposed by law for damages arising out of the ownership, maintenance or use of such motor vehicle," namely, the vehicle involved in the accident, and not every vehicle insured under the policy. Put differently, Section 303.190.2 articulates the legislature's focus on the express designation of an insured auto under an owner's policy, and not coverage for an insured driver, and, thus, requires an owner's policy to respond to a loss only if the policy expressly designates the vehicle that caused the loss as an insured auto under the policy.

The General Assembly's intent comports with the way Missouri law has treated automobile liability insurance policies generally. Missouri courts first considered the

stacking of automobile liability insurance in *Hendrickson v. Cumpton*, 654 S.W.2d 332 (Mo. App. W.D. 1983). In that case, the insurer had issued a policy to the insured covering five separate vehicles, of which only one was involved in the accident. The injured claimant argued that stacking was permitted across all five vehicles. The Missouri Court of Appeals disagreed. In examining cases from other jurisdictions, the court noted those jurisdictions had "uniformly denied stacking" in the liability context. *Id*. at 333-34. The court then went on to address the rationale for declining to permit stacking, stating:

> [B]odily injury liability coverage is linked to the ownership, maintenance or use of an owned automobile or a non-owned automobile by the insured and others to whom the coverage is extended. . . .
>
> Obviously, any one insured can operate but one automobile at a time. Bodily injury liability coverage, with its attendant limits of liability, is therefore designed to attach to *whichever automobile an insured happens to be driving*, whether that automobile is one of several automobiles listed under the policy or whether it is a non-owned automobile.

Hendrickson, 654 S.W.2d at 335-36 (emphasis added); *see also Cameron Mut. Ins. Co. v. Madden*, 533 S.W.2d 538, 543 (Mo. banc 1976) (noting, in permitting the stacking of uninsured motorist coverage, that courts "must not confuse uninsured motorist protection as inuring to a particular motor vehicle *as in the case of automobile liability insurance*") (emphasis added) (citation omitted). Since *Hendrickson* was decided over thirty years

ago, the stacking of automobile liability insurance, except in a few exceptional cases, has not been permitted in Missouri.

In *First Nat'l Ins. Co. of America v. Clark*, 899 S.W.2d 520, 522-23 (Mo. banc 1995), this Court made plain the distinction between personal "floating" insurance, such as uninsured motorist coverage that follows the insured, and liability insurance, which attaches to a particular insured auto. In *Clark*, this Court addressed whether two owner's policies issued to the same household, and which covered different vehicles, provided coverage for an accident, when only one of the vehicles was involved in the accident. The Court, in limiting coverage only to the owner's policy insuring the accident vehicle, recognized this distinction, explaining that unlike uninsured motorist coverage, liability insurance required by the MVRFL "relates to the use and operation of a particularly described motor vehicle or class of motor vehicles. . . ." *Id*. at 522. The Court, in so ruling, held that the policy's non-owned vehicle exclusion was enforceable because it did not violate the public policy expressed in the MVFRL. *Id*. at 523. The Court also made plain what is necessary to satisfy Missouri's public policy under the MVFRL:

> The public policy of this state is satisfied when there is an owners policy [sic] of liability insurance sufficient to meet the requirements of Missouri's financial responsibility law. It is sufficient to say that because there was an owner's policy in effect, no operator's policy of liability insurance on the same vehicle is required by the Missouri financial responsibility law.

Id.

This distinction and the minimum requirements necessary to satisfy the MVFRL have foreclosed the stacking of automobile liability insurance as a general rule. *See, e.g.*, *O'Rourke v. Esurance Ins. Co*., 325 S.W.3d 395 (Mo. App. E.D. 2010) (declining to permit the stacking of automobile liability coverage across vehicles insured under a single policy); *National Union Fire Ins. Co. of Pittsburgh, PA v. Maune*, 277 S.W.3d 754 (Mo. App. E.D. 2009)(same); *Mazzocchio v. Pohlman*, 861 S.W.2d 208 (Mo. App. E.D. 1993)(declining to stack coverage across two vehicles insured under the same policy); *Hendrickson v. Cumpton*, 654 S.W.2d 332 (Mo. App. W.D. 1983) (rejecting stacking across five vehicles insured under a single policy); and *DeMeo v. State Farm Mut. Auto. Ins. Co*., 686 F.3d 607 (8th Cir. 2012).

This general rule, however, is not without exceptions. In *American Standard Ins. Co. v. Hargrave*, 34 S.W.3d 88 (Mo. banc 2000), this Court held that two separate owner's policies, which both designated the vehicle involved in the accident as an insured vehicle, as required by Section 303.190.2, were required to respond to an accident, at least up to the limits required by the MVFRL. In *Karscig v. McConville*, 303 S.W.3d 499 (Mo. banc 2010), the Court permitted the stacking of liability insurance policies because there were two separate policies at issue, an operator's policy and an owner's policy, which the Court held, under the facts of that case, to each provide the minimum coverage mandated by the MVFRL.

However, the *Hargrave* and *Karscig* decisions have no application here. They are exceptional cases, limited by their facts. They do not govern this case where separate owner's policies insuring different autos are at issue. And, they should not be read to

convert every owner's policy into an operator's policy that responds to any accident involving an insured without regard to the identity of the vehicle that the insured is operating at the time.

Unlike in this case, the insured in *Karscig* was driving a non-owned auto at the time of the accident and was insured under an operator's policy subject to MO. REV. STAT. § 303.190.3. Moreover, the two policies at issue, unlike the American Family policies at issue in this case, were purchased by two distinct parties. *Karscig*, 303 S.W.3d at 505.

The *Hargrave* decision is also not controlling. While the case addressed two owner's policies, the decision did not address the critical question here, namely, whether the minimum liability coverage required by the MVFRL and provided by an owner's policy follows the insured's operation of *any* vehicle, regardless of whether the vehicle is "designated" as a covered vehicle under the owner's policy.

Moreover, it is telling that this Court in *Hargrave* did not cite or distinguish its prior decision in *Clark*. The two decisions are separated by only five years. No doubt the Court saw no need to do so because the facts in *Clark* and *Hargrave* are clearly distinguishable. Therefore, the *Hargrave* decision should not be read to have reversed the decision in *Clark sub silentio*. Under these circumstances, the Court's decision in *Clark* should govern this case. It is the longstanding precedent that has guided insurers in Missouri in defining the risks that they have assumed under their automobile liability insurance policies and their calculation of premiums for those risks.

C. The Impact on Insurers and Their Policyholders if Every Owner's Policy is Required to Provide Liability Coverage for Vehicles Other Than the Designated Vehicle Insured Under the Policy.

The impact of the Western District's decision on insurers, their policyholders, and the insurance marketplace in Missouri will be far reaching and deleterious. The Western District's decision expands, by judicial fiat, insurance coverage and the transfer of risk far beyond the limited confines contemplated by the Missouri General Assembly under the MVFRL and undermines the assumptions made by insurers issuing automobile liability policies in Missouri concerning the risks that they have assumed and their calculation of premiums for those risks.

1. The Western District's decision subjects insurers issuing owner's policies in Missouri to risks not required by the MVFRL.

The Missouri General Assembly enacted the MVFRL to respond to harm caused by financially irresponsible motorists by imposing mandates directly on vehicle owners, and, secondarily, on vehicle operators. MO. REV. STAT. §§ 303.010, *et seq*. (2000). Compliance with the MVFRL rests with those owners and operators, alone. Their failure to maintain the minimum required liability insurance or equivalent financial responsibility forecloses the licensing of their vehicles and exposes them to penalties when they are involved in an accident and are unable to demonstrate that they have satisfied the requisite financial responsibility. MO. REV. STAT. § 303.025 (2000).

Insurance companies, such as American Family and Farmers, play an important,

but subsidiary, role under the MVFRL. They provide the insurance products that enable the owners and operators of motor vehicles in Missouri to meet their statutory financial responsibility obligations. The MVFRL defines the two types of insurance policies that satisfy the law and prescribes the minimum requirements for those policies. However, the MVFRL does not regulate, dictate, or prescribe any terms or conditions above the Law's minimum requirements. *See* MO. REV. STAT. § 303.190.2.

Consider the "first principles" that govern automobile liability insurance under the MVFRL. It is these principles that govern the participation of insurers in the Missouri automobile insurance marketplace, the risks that they assume, and the premiums they charge for the transfer of those risks.

To meet the MVFRL's requirements, an automobile insurance policy must be an owner's policy or an operator's policy, as defined by the Law. MO. REV. STAT. § 303.190. The overwhelming majority of such policies issued in Missouri are owner's policies that designate one or more vehicles as the owned vehicles that are covered by the policies. These policies, such as American Family's policy, typically contain an "owned vehicle" exclusion that bars coverage for vehicles owned and operated by the insured other than the insured car under the policy.

Under the MVFRL, the Missouri General Assembly has determined that $25,000 for the bodily injury or death of a single person in an accident and $50,000 for two or more persons is the only financial responsibility required by owners and operators of motor vehicles in Missouri. MO. REV. STAT. § 303.190.2(2). Nothing more is required. The Law does not require owner's policies to be converted into operator's policies and to

be applied collectively to any vehicle owned and operated by the insured. By statute, the coverage under an owner's policy is limited to explicitly designated vehicles only. MO. REV. STAT. § 303.190.2. Nothing in Section 303.190.2 requires an insurer under an owner's policy to afford coverage for non-owned autos or autos not expressly designated as insured autos under the policy. And, nothing in the Law requires the stacking of coverage under multiple owner's policies available to a single insured. The MVFRL is altogether silent on the question of stacking.

One may question whether the minimum limits required by the MVFRL provide adequate financial responsibility in the early Twenty-First Century. But, that is a legislative determination. It is not a judicial function to expand statutorily required financial responsibility required of policyholders by extending coverage under an owner's policy to a vehicle not designated under the policy, but which the insured was operating at the time of the accident, by nullifying the "owned vehicle" exclusion and mandating stacking under the MVFRL where none is required, and the requisite financial responsibility is satisfied in full by the owner's policy insuring the tortfeasor's car involved in the accident.

2. There is no public policy basis under the MVFRL, or elsewhere under Missouri law, for nullifying the "owned vehicle" exclusion or the limitations on stacking in an owner's policy.

The public policy governing insurance under Missouri law is the General Assembly's exclusive province. "[C]omplete freedom" exists as to the "sanctity of contract" for insurance coverage beyond the reach or breadth of a specific statute. *Baker*

v. DePew, 860 S.W.2d 318, 325 (Mo. banc 1993). Unless the public policy is found in a legislative enactment, courts are bound to interpret insurance policies as written. Absent a clear mandate in the MVFRL, no basis in public policy exists to void plain and unambiguous policy language. *Halpin v. Am. Family Mut. Ins. Co.*, 823 S.W.2d 479, 483 (Mo. banc 1992). Thus, restrictions on the freedom to contract "should not go further than is strictly necessary to serve the statutory policy." *Geneser v. State Farm Mut. Auto. Ins. Co.*, 787 S.W.2d 288, 290 (Mo. App. W.D. 1989). The Western District's decision violates these first principles.

There is no compelling statutory basis for the Western District's decision. The limited financial responsibility mandated by the Missouri General Assembly for any one insured in any one accident is $25,000 for one person and $50,000 for two or more persons injured in the accident. MO. REV. STAT. §§ 303.030.5 and 303.190.2(2) (2000). Missouri public policy, as defined by the General Assembly, requires nothing more. In the face of the legislature's determination, it is not the role of the courts to engraft on insurance contracts greater financial responsibility than the law requires, or for which the insured has not paid a premium.

Yet, this is precisely what the Western District has done. There can be no compelling public policy reason for the Western District's decision to expand the minimum coverage under the MVFRL in the absence of a clear mandate in the Law.

Indeed, the MVFRL contemplates that some coverage available under an automobile liability policy is not subject in any way to Missouri's public policy under the MVFRL. MO. REV. STAT. § 303.190.7 expressly states that the "additional coverage"

under an automobile liability policy "shall not be subject to the provisions of this chapter."[1] This provision refers, amongst other examples, to the coverage available to an insured under an owner's policy when the insured is operating a vehicle other than a designated auto. Thus, when an insured under an owner's policy operates a vehicle that is not explicitly described by designation as insured auto, as required by Section 303.190.2, the coverage available to the insured for the insured's use of that vehicle is purely a matter of contract and not a matter of Missouri public policy under the MVRFL. *DeMeo v. State Farm Mut. Auto. Ins. Co.*, 686 F.3d 607, 611 (8th Cir. 2012)("In other words, though consistent with the purpose of the MVFRL, McGinness's purchase of coverage when operating a non-owned vehicle like his daughter's was a matter of contract, not a mandate of Missouri public policy.").

Finally, there are also no compelling societal reasons to do so. As a concomitant of the insurance marketplace and under risk-sharing principles, individuals desiring more protection against the risks of injury presented by Missouri's highways than the limited financial responsibility prescribed by the General Assembly can purchase underinsured

[1] MO. REV. STAT. § 303.190.7 states: "Any policy which grants the coverage required for a motor vehicle liability policy may also grant any lawful coverage in excess of or in addition to the coverage specified for a motor vehicle liability policy and such excess or additional coverage shall not be subject to the provisions of this chapter. With respect to a policy which grants such excess or additional coverage the term 'motor vehicle liability policy' shall apply only to that part of the coverage which is required by this section."

motorist coverage ("UIM") to protect themselves against negligent drivers who maintain only the minimum liability limits required by the MVFRL or whose liability limits are less than the accident victims' UIM coverage. In this area, the Missouri General Assembly has acted to ensure -- even when policyholders have purchased only minimal UIM coverage -- that their coverage provides compensation in the event of serious injury. MO. REV. STAT. § 379.204 (2000).

3. The Western District's decision undermines insurance underwriting assumptions and premium calculations.

The Western District's decision runs afoul of first principles and turns the insurance marketplace on its end. These first principles guide insurers in issuing their policies. The limitations imposed by the General Assembly on financial responsibility provided by owner's policies underlie the critical assumptions upon which such policies are issued and premiums are charged. These principles define the risks assumed by insurers under the MVFRL and the costs to the insureds for the transfer of those risks.

So do the prior decisions of this Court and the Missouri Court of Appeals. While exceptional cases arise from time to time, such as *Hargrave* and *Karscig* based on unique factual predicates, insurers, in developing their insurance contracts rely on judicial decisions to identify the risks that they have assumed in order to ensure that their policies are written to satisfy their policyholders' obligations under the MVFRL, to accurately describe the risks to be covered and those to be excluded, and to establish a premium that accurately reflects the insurers' assumption of risk.

American Family no doubt relied, as did Farmers and other insurers issuing automobile liability insurance in Missouri, on the first principles derived from the MVFRL and prior case law, including this Court's directive in *Clark*, namely, so long an owner's policy satisfies the required financial responsibility, Missouri public policy does not require exclusions or other limitations on coverage in another policy covering the insured's operation of the same vehicle to be overridden. *First Nat'l Ins. Co. of America v. Clark*, 899 S.W.2d 520, 522-23 (Mo. banc 1995). Indeed, Missouri courts have previously rejected arguments that the MVFRL requires an insurer to cover other vehicles owned by an insured, *Lawson v. Traders Ins. Co*., 946 S.W.2d 298, 301 (Mo. App. S.D. 1997), and have enforced "owned vehicle" exclusions as limitations on coverage, *Sisk v. American Family Mut. Ins. Co*., 860 S.W.2d 34, 36 (Mo. App. E.D. 1993), and *Shelter Mut. Ins. Co. v. Harter*, 940 S.W.2d 555, 556-57 (Mo. App. S.D. 1997). *See also Farmers Ins. Co., Inc. v. Wilson*, 424 S.W.3d 487, 495 (Mo. App. S.D. 2014) ("regular use" exclusion enforceable; therefore, "[b]ecause the [vehicle involved in the accident] is excluded from coverage …, there is no coverage to stack"); *Gibbs v. National General Ins. Co.*, 938 S.W.2d 600, 605 (Mo. App. S.D. 1997) ("Missouri courts have repeatedly held that the regular use exclusion is valid when used in a liability policy.").

Sound underwriting and pricing of insurance policies require predictability concerning the actual risk assumed under a policy. The Western District's decision, which represents an abrupt and retroactive change in Missouri law, exposes insurers to risks that they never intended to assume, namely, the stacking of liability insurance

because their "owned vehicle" exclusions are not enforceable. This is an anomalous result, without regard to the premiums charged for the coverage.

What difference should it make to stacking if an insured has a single owner's policy covering three autos or three owner's policies each insuring a single auto? Under *Dutton*, in the latter case, stacking is permissible while in the former case involving single multi-vehicle policies, it is not. *See, e.g.*, *Allstate Prop. & Cas. Ins. Co. v. Davis*, 403 S.W.3d 714, 718, n. 4 (Mo. App. W.D. 2013); *National Union Fire Ins. Co. of Pittsburgh, PA v. Maune*, 277 S.W.3d 754, 760 (Mo. App. E.D. 2009); *O'Rourke v. Esurance Ins. Co.*, 325 S.W.3d 395, 398 (Mo. App. E.D. 2010); and *Dutton v. American Family Mut. Ins. Co.*, 2014 WL 211453, *9 (Mo. App. W.D. 2014) ("If both vehicles in the case at bar had been insured under a single policy…, the outcome [permitting stacking] would be different.").

There is no reason under the MVFRL for stacking to be impermissible in one case, but not in the other. Even the Western District in *Dutton* recognized the anomaly. 2014 WL 211453, *9. So has the Eighth Circuit in considering Missouri law. *DeMeo v. State Farm Mut. Auto. Ins. Co.*, 686 F.3d 607, 612 (8th Cir. 2012) ("If the insured and insurer may contractually preclude multi-vehicle stacking within a single policy, we see no basis in Missouri public policy to conclude that the MVFRL demands stacking when there are multiple policies.").

The Western District's decision extends coverage beyond realms never contemplated under the MVFRL. Under the law, coverage under an owner's policy is limited to the vehicle involved in the accident. MO. REV. STAT. § 303.190.2. But, in this

case, the Western District finds coverage under every owner's policy issued to the insured, although the policies insure vehicles with no connection to the accident, and despite the fact that the total required financial responsibility mandated by the General Assembly is met in full by the policy insuring the vehicle involved in the accident and the requirements previously set by this Court in *Clark*.

4. The Western District decision will impact the availability and affordability of automobile liability insurance.

What is the result of the Western District's violation of the "first principles" governing financial responsibility in Missouri? Automobile insurers in Missouri are now subject to risks that they did not identify and never intended to assume when they issued their policies, for which they charged no premium, and for which they were not required by the MVFRL or prior case law to assume in the first place.

The change in risk is not an insignificant one. In *Dutton*, American Family's risk was *doubled* by the Western District's decision. The risk in future cases will be as great or greater, unless the decision is held for naught. Given the number of autos possessed by contemporary Missouri's households, the risks now faced by insurers that have issued owner's policies could be increased threefold, fourfold, or more without commensurate premium charges.

When an insurer sets its premiums, it does so based on the specific losses being insured. If an insurer pays losses not specified or covered in its policy, the insurer's calculation of the premiums to be charged to its policyholders will be insufficient to cover its losses. Also, its ability to pay future losses is impaired.

In the face of new exposures, insurers will be required to recalculate the premiums to be charged to their policyholders to recover funds sufficient to pay past claims and to cover the increased risks to be presented by future claims. Alternatively, insurers may seek to rewrite their policies to eliminate the additional risks in the future and increase their premiums to recover funds paid on past claims. In some instances, the insurers' policies will become cost prohibitive to their insureds.

This is especially true when, as in this case, a change in the law results in substantial uncertainty. When insurers cannot accurately identify their exposures, or are fearful that their past assumptions based on "first principles" are wrong, they are compelled to establish higher premiums than they otherwise would have charged before the change in the law nullified heretofore enforceable limitations on coverage and stacking and expanded Missouri public policy under the MVFRL far beyond the Law's minimum requirements as prescribed by the General Assembly.

In some cases, the uncertainty over the new risks faced by insurers may drive insurers away from the Missouri marketplace. In worst-case situations, when an insurer's ability to pay claims is impaired, the insurer must be placed in receivership leaving tort victims and policyholders often with very little recourse.

Both insurers and their policyholders are well served when insurers can avoid fluctuations in premium pricing. Uncertainty comes with a cost. If insurers cannot write their policies with confidence that their limitations on coverage will be enforced, consistent with prior case law and well-settled assumptions concerning the MVFRL, the risks created by the uncertainty will be priced into their policies. The uncertainty will

also result in increased litigation over the stacking of liability insurance. In the end, however, one result is certain. The Western District's decision, if left to stand, will force higher insurance costs on all Missourians.

5. The Western District's decision undermines the MVFRL's goals by permitting policyholders to cover all cars that they own by purchasing insurance for only one of their cars.

Finally, beyond the significant and negative impact that the Western District's decision has on insurers and their policyholders, the irony presented by the decision, which purports to advance the goals of the MVFRL, is the great potential for harm and mischief that the decision may cause to Missouri's public policy requiring financial responsibility for every car owned and operated in Missouri. Contrary to prior law, the Western District's decision suggests to members of households owning multiple cars that they need only purchase a single owner's policy on just one of their cars to satisfy their financial responsibility for all the vehicles that they own. *See, e.g.*, *Allstate Ins. Co. v. Ibrahim*, 243 S.W.3d 452, 457 (Mo. App. E.D. 2007); *Schuster v. Shelter Mut. Ins. Co*., 857 S.W.2d 381, 385 (Mo. App. S.D. 1993).

In contrast to the holdings in *Ibrahim* and *Schuster*, the Western District's decision results in yet another anomaly. The decision can be read to permit insureds to obtain multi-car coverage for the payment of a single-car premium by procuring a single owner's policy, for that it is the ultimate lesson to be drawn from the Court's decision that nullifies the "owned vehicle" exclusion and permits stacking.

Such an outcome renders asunder the insurer's calculation of risks and premiums, increases the risks assumed by insurers in inverse proportion to the premiums previously charged for single-vehicle owner's policies, and permits insureds to argue that they have maintained the requisite financial responsibility on essentially uninsured vehicles.

Such an outcome can only drive up the cost of automobile liability insurance in Missouri. Insurers issuing single-vehicle owner's policies in households owning multiple vehicles will be required to price their policies as if they insured every vehicle in the household. Otherwise, their premium calculations will not represent the new risks that the Western District's decision requires them to assume. In such an event, reasonably priced automobile liability insurance under a single-vehicle owner's policy will no longer be available in Missouri.

There are sound, practical economic reasons why insurers sell single-vehicle owner's policies and why vehicle owners purchase them. Single-vehicle owner's policies are less expensive than multi-car policies. Households with family members owning more than one car in many cases are unable, collectively, to afford a multi-car policy. This is particularly true of families with young adult drivers. While parents may be able to afford coverage for their vehicles, they may not be able to afford the cost of insuring every vehicle in their household, including the vehicles owned by their children. The premium cost may be too much. Therefore, single-vehicle owner's policies serve a salutary purpose in the insurance marketplace. They permit family members to assume individual financial responsibility for the vehicles they own without burdening other family members with the cost of their insurance.

The Western District's decision undermines this cost-effective, familial risk-allocation scheme. While in the past multi-vehicle policies may have been cost prohibitive for some households to purchase, individual owner's policies insuring only a single auto will now have to be priced as if they insured every auto owned by a household. Thus, single-vehicle policies too may become cost prohibitive for some policyholders and their families.

This is the end result of the Western District's decision, which holds that each and every owner's policy in a household must now respond to a loss because the "owned vehicle" exclusion is no longer enforceable up to the limits required by the MVFRL and which requires stacking across all owner's policies procured by that household. In the future, there should be no surprise if the availability of affordable, single-vehicle automobile liability insurance for Missouri policyholders becomes a thing of the past.

CONCLUSION

Farmers Insurance Company, Inc., as *amicus curiae* in support of Respondent American Family Mutual Insurance Company respectfully requests the Court to affirm the trial court's judgment.

The majority decision of the Western District of the Missouri Court of Appeals should be vacated and held for naught. The decision is contrary to Missouri law, violates the "first principles" governing financial responsibility under the MVFRL, and greatly enhances the risks assumed by automobile liability insurers in Missouri without regard to their premium calculations.

In this case, the Western District's decision increased the risks assumed by American Family twofold. In other cases, the increased risk will be in direct proportion to the number of owner's policies issued to a single household and the number of cars owned by that household. If left to stand, the Western District's decision will lead to commensurate premium increases for all Missourians owning automobiles.

Therefore, Farmers requests the Court, consistent with first principles under the MVFRL and Missouri law governing automobile liability insurance in general, to affirm the trial court's decision for American Family and interpret the statutory requirements governing owner's policies under the MVFRL in accordance with the statute's plain language, and consistent with prior case law addressing coverage under owner's policies in Missouri.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I hereby certify under Rule 84.06 of the Missouri Rules of Civil Procedure that:

1. This brief includes the information required by Rule 55.03;

2. This brief complies with the limitations contained in Rule 84.06(b)(1);

3. This brief, excluding the cover page, signature block, certificate of compliance, and certificate of service, contains 7,287 words, as determined by the word-count tool contained in Microsoft Word 2010 with which this brief was prepared; and

4. This brief has been scanned for viruses and is virus free.

/s/ T. Michael Ward

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing was filed through the Missouri Court's electronic filing system on July 7, 2014, to be served on all counsel of record.

/s/ T. Michael Ward

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