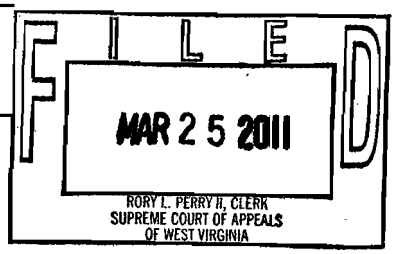
No. 101414

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

AT CHARLESTON



WEST VIRGINIA EMPLOYERS' MUTUAL INSURANCE COMPANY d/b/a BRICKSTREET MUTUAL INSURANCE COMPANY,

Petitioner and Defendant Below,

v.

SUMMIT POINT RACEWAY ASSOCIATES, INC.,

Respondent and Plaintiff Below.

WEST VIRGINIA EMPLOYERS' MUTUAL INSURANCE COMPANY d/b/a BRICKSTREET MUTUAL INSURANCE COMPANY'S SUPPLEMENTAL APPEAL BRIEF

Appeal from Orders dated May 4, 2010, and June 29, 2010,
in Civil Action No. 09-C-275 (Judge David H. Sanders)
in the Circuit Court of Jefferson County, West Virginia

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I. INTRODUCTION

In an effort not to repeat information and arguments contained in its Petition for Appeal, West Virginia Employers' Mutual Insurance Company d/b/a BrickStreet Mutual Insurance Company ("BrickStreet") refers this Court to the facts, assignment of errors, standard of review, issues, and arguments in its Petition for Appeal. In this supplemental appeal brief, BrickStreet responds to arguments raised in Summit Point Raceway Associates, Inc.'s ("Summit Point") Response in Opposition to Petition for Appeal.

II. POINTS AND DISCUSSIONS OF THE LAW

A. The word "offer" does not require a Bias-type[1] offer where the pertinent statute does not set forth a provision for such an offer.

In its Opposition to BrickStreet's Petition for Appeal, Summit Point argues that the trial court appropriately ruled that BrickStreet had an obligation to make a Bias-type offer of "deliberate intent" insurance coverage. Summit Point makes this argument based on its reading of W. Va. Code § 23-4C-6, which states:

> Upon the termination of the commission [WCC], all assets, obligations and liabilities resulting from this article are transferred to the successor of the commission. Thereafter, the company shall offer insurance to provide for the benefits required by this article until at least the thirtieth day of June, two thousand eight. . . .

W. Va. Code § 23-4C-6.

Summit Point's argument in this regard completely relies upon the following premise (a premise that BrickStreet submits is completely and utterly false): That the words "shall offer" can only mean one thing – a mandate of a Bias-type procedure when making "deliberate intent" insurance coverage available for purchase.

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[1] Bias v. Nationwide Mut. Ins. Co., 365 S.E.2d 789 (W. Va. 1987).

Interestingly, in order to bolster its argument, Summit Point refers to various parts of the West Virginia Code that use the word "offer" in the context of mandates to make other types of insurance coverage available for purchase. One has to assume that Summit Point seeks to show that the Legislature's use of the word "offer" is not a legislative aberration and that use of the word "offer" must necessarily mean an offer as contemplated under Bias.

However, Summit Point is completely wrong in its view of these other statutory requirements. If anything, the existence of these other statutory requirements (which are analyzed in detail below in Subsections 1-6) proves that, in the absence of an explicit Bias-type procedure such as that laid out in W.Va. Code §33-6-31d[2], the West Virginia Legislature only means one thing when it requires an entity to "offer" insurance: To make such insurance available for purchase.

In its Opposition, Summit Point has cited to six different parts of the West Virginia Code as requiring an entity to "offer" insurance coverage. Yet, in only one of those parts of the West Virginia Code has our Legislature outlined an "offer" as required in Bias: in the uninsured/underinsured motorists' insurance coverage context. See W.Va. Code §33-6-31d. This shows that when the Legislature wants a Bias-type procedure, it knows to explicitly mandate such. It is clear from the statutes, regulations, and case law, that a Bias-type procedure is not required in any context other than uninsured/underinsured motorists' insurance coverage.

What follows is a detailed analysis of each portion of the West Virginia Code cited by Summit Point to support its arguments in this regard.

[2] The Legislature drafted W.Va. Code §33-6-31d to instruct insurers in how to make a Bias-type offer in the context of uninsured/underinsured motorists' insurance coverage.

1. "Offer" does not mean a Bias-type "offer" in W.Va. Code §29-12B-6.

One statute relied upon by Summit Point for its assertion that the use of the word "offer" means a Bias-type offer is W.Va. Code §29-12B-6. This statutory provision provides:

> There is hereby established through the Board of Risk and Insurance Management [BRIM] optional insurance for health care providers consisting of a preferred professional liability insurance program and a high risk professional liability insurance program.
>
> Each of the programs described in subsection (a) of this section shall offer optional prior acts coverage from and after a retroactive date established by the policy declarations. . . .
>
> Each of the programs described in subsection (a) of this section shall offer limits for each health care provider in the amount of one million dollars per claim, including repeated exposure to the same event or series of events, and all derivative claims, and three million dollars in the annual aggregate. . . .

W.Va. Code §29-12B-6(a), (c), and (e).

There is nothing in the statutory provision or related provisions requiring a Bias-type procedure. This statutory provision requires that BRIM must make such coverage available for purchase as an optional insurance coverage for those individuals who are ineligible for other professional liability insurance. See §29-12B-7(a). Supporting such a conclusion is the language contained in the legislative findings for this type of insurance contained in W.Va. Code §29-12B-2. This provision states:

> The Legislature finds and declares that there is a need for the State of West Virginia to assist in making professional liability insurance available for certain necessary health care providers in West Virginia to assure that quality medical care is available for the citizens of the State.

Id. (emphasis added). The statute was enacted to make professional liability insurance available for purchase despite the use of the word "offer."

2. "Offer" does not mean a Bias-type "offer" in W.Va. Code §33-16D-7.

As support for its argument that the use of the word "offer" means a Bias-type offer, Summit Point cites to W.Va. Code §33-16D-7 relating to health benefit plans for employees of small employers. The word "offer" is used often throughout this statute relating to whether an insurer will cancel or cease to offer health care coverage to a class of employers. For example, the statute states:

> [A] carrier may refuse to renew a health benefit plan only for one of the following reasons:
>
> * * *
>
> (4) The carrier ceases to offer health benefit plans to small employers as provided in subsection (d) of this section;
>
> (5) For coverage offered under a network plan, a carrier no longer has any enrollees of the network plan who live or work in the plan's service area, and the carrier would deny coverage under the network plan to a small employer with no eligible employees or dependents in its service area. . . .

W.Va. Code §33-16D-7(b)(4) and (5). Clearly, the word "offer" in these provisions does not mean a Bias-type procedure. Rather, here the word "offer" means insurance coverage that has been made available for purchase. Furthermore, the statute, including related statutory provisions, does not set forth any terms of any offer or notification of availability of such coverage.[3]

3. "Offer" does not mean a Bias-type "offer" in W.Va. Code §33-48-8.

As further support for its argument that the use of the word "offer" means a Bias-type offer, Summit Point refers to the use of the word "offer" in W.Va. Code §33-48-8, a provision governing the provision of health insurance to those individuals who cannot otherwise obtain health insurance. The statute states:

[3] Summit Point also relies on W.Va. Code §33-16-31. No such provision exists.

> The plan shall offer health care coverage consistent with comprehensive coverage to every eligible person who is not eligible for medicare. The coverage to be issued by the plan, its schedule of benefits, exclusions and other limitations shall be established by the board and subject to the approval of the commissioner.

W.Va. Code §33-48-8(a). Here again, the use of the word "offer" means to make available for purchase. The statute or related statutory provisions do not set forth any terms of any offer or notification of availability of such coverage.

4. "Offer" does not mean a Bias-type "offer" in W.Va. Code §23-4B-9.

As support for its argument that the use of the word "offer" means a Bias-type offer, Summit Point also cites to W.Va. Code §23-4B-9 which contains the word "offer." W.Va. Code §23-4B-9 refers to similar language as W.Va. Code §23-4C-6, but relating to the Coal-Workers' Pneumoconiosis Fund (also known as Black Lung). The OIC addressed similar language contained in Chapter 23 of the West Virginia Code regarding other coverages. In a May 31, 2006, letter from the OIC to BrickStreet, the OIC addresses another optional coverage: Coal-Workers' Pneumoconiosis coverage ("black lung" coverage). See OIC May 31, 2006, letter, attached as **Exhibit A**. The OIC stated that BrickStreet must continue to offer black lung coverage based on W.Va. Code §23-4B-9 which states:

> Upon the termination of the commission, the Coal-Workers' Pneumoconiosis Fund shall close and the company [BrickStreet Insurance] shall offer insurance to provide for the benefits required by this article [i.e., federal black lung coverage] until at least the thirty-first day of December, two thousand eight. . . .

The OIC further states:

> [T]here should be no inordinate financial risks in writing any company(s) that request their CWP coverage to be written by BSI [BrickStreet].

Exhibit A (emphasis added). The language upon which the OIC relies to determine that black lung coverage should be offered mirrors the language in W.Va. Code §23-4C-6. Thus, it is clear that the intent is that "offer" means to make available for purchase by those employers who request that their coverage be written by BrickStreet, and not to make a Bias-type offer. Furthermore, the statute does not set forth any terms of any offer or notification of availability of such coverage.

5. "Offer" does not mean a Bias-type "offer" in W.Va. Code §33-20D-3.

As support for its argument that the use of the word "offer" means a Bias-type offer, Summit Point refers to W.Va. Code §33-20D-3 requiring an offer of tail insurance upon the cancellation, nonrenewal or termination of any claims-made professional malpractice insurance policy. Id. Unlike W.Va. Code §23-4C-6, this provision does contain terms related to the outcome if an offer is not made: that such an offer "shall expire forty-five days after the cancellation, termination or other expiration of the claims made professional malpractice insurance policy, unless sooner accepted, in writing, by the insured." W.Va. Code §33-20D-3(e). The statute also provides for a penalty if the insurer fails to offer tail insurance, or for other violations. W.Va. Code §33-20D-3(d). However, even here, the Legislature does not set out what constitutes an offer. The Legislature does not outline a Bias-type procedure for this coverage either.

6. The Legislature requires a Bias-type offer related to uninsured/underinsured motorists insurance coverage in W.Va. Code §33-6-31f.

Summit Point cites to W.Va. Code §33-6-31f as requiring a Bias-type offer. This statutory provision relates to uninsured/underinsured motorists' coverage which was addressed in Bias and is now superseded by statute. This statutory provision does include language that

"offers" of uninsured/underinsured motor vehicle coverage for umbrella and excess liability policies must be made on a form prepared and made available by the OIC, in the same way as offers of uninsured/underinsured motorists' coverage under an automobile insurance policy are made. Unlike the statutes cited in sections 1 through 5 above, this statute requires a specific manner and form for an offer of uninsured/underinsured motorists' coverage to be made, and requires the insured's waiver of such coverage in a specific manner. See also W.Va. Code §33-6-31d.

Clearly, the Legislature knows how to explicitly mandate a Bias-type procedure when it wants such a procedure. Yet, the Legislature did not incorporate into W.Va. Code §23-4C-6 a Bias-type procedure. The other statutory provisions cited by Summit Point actually prove BrickStreet's point. In the absence of an explicit Bias-type procedure, the word "offer" means only one thing: to make available for purchase.

When considered in context, BrickStreet's interpretation of the word "offer" makes perfect sense, while Summit Point's argument makes no sense at all. The Legislature intended to reform the workers' compensation system by privatizing workers' compensation insurance. The Legislature was not in the business of reforming "deliberate intent" (EELF) coverage. It makes no sense for the Legislature to require BrickStreet to follow a Bias-type procedure for its provision of "deliberate intent" coverage to employers during the 2 ½ year time period that BrickStreet was the sole workers' compensation insurer. Neither BrickStreet, nor the WCC before it, has ever been the sole "deliberate intent" insurer in West Virginia. Why in the world would the Legislature have required only one of many insurance companies in the "deliberate intent" insurance coverage market to follow a Bias-type procedure for selling such coverage?

The Legislature was trying to reform workers compensation insurance, not "deliberate intent" insurance.

Moreover, if the Legislature had actually intended to require BrickStreet to follow, for such a limited time only, a Bias-type procedure for the provision of "deliberate intent" insurance coverage (which, again, is illogical), the Legislature would have explicitly mandated such a procedure. It is clear from West Virginia statutes, regulations, and case law that the only Bias-type procedure that has ever been required is in the context of uninsured/underinsured motorists' insurance. When it uses the word "offer," and chooses not to explicitly outline a Bias-type procedure, the Legislature only requires insurers to make insurance coverage available for purchase. It is what the Legislature expects of BRIM in providing optional professional liability insurance for individuals who are ineligible for other professional liability insurance. It is what the Legislature expects of insurers selling group health insurance to small employers. It is what the Legislature expects of insurers providing health insurance to those individuals who cannot otherwise obtain health insurance. It is what the Legislature expects of insurers providing black lung insurance. It is what the Legislature expects of insurers relating to tail insurance coverage for professional malpractice insurance.

Given the complete absence of any statutory framework requiring a specific manner and/or form of an offer, it is clear that the Legislature did not intend that a Bias-type for "deliberate intent" coverage be made when it passed W. Va. Code § 23-4C-6.

B. Bias has been superseded.

In its argument that the trial court did not err in requiring BrickStreet to comply with Bias for "deliberate intent" insurance coverage, Summit Point further argues that BrickStreet must follow Bias just as every other private insurer must. This argument fails because no other private

insurer is required to follow Bias. This Court has recognized that the Legislature superseded Bias by creating a statutory mandate. See Luikart v. Valley Brook Concrete & Supply, Inc., 613 S.E.2d 896 (W. Va. 2005). This is similar to the actions taken by the Legislature in relation to Mandolidis v. Elkins Indus., 246 S.E.2d 907(W.Va. 1978) when the Legislature amended W.Va. Code §23-4-2(d)(2)(ii), otherwise known as "deliberate intent," to mirror the standards set forth in Mandolidis. In BrickStreet's view, Bias was adopted and superseded in one context only: uninsured/underinsured motorists' insurance coverage. See W.Va. Code §33-6-31d. In the twenty-four years since Bias was decided, no other decision by this Court or law passed by the Legislature has followed Bias.

Summit Point would have this Court believe that BrickStreet must still follow a Bias-type procedure despite the Luikart decision because W.Va. Code §23-4C-6 contains the phrase "shall offer" in the second sentence, thereby creating a statutory mandate to make a Bias-type offer. Yet, in Luikart, in its discussion of Bias, this Court also held that:

> [E]ven in the face of such a mandate, "[n]o insurer is required to ... notify any person of the availability of such optional coverages authorized by this section *except as required by this section.*" *See Burrows v Nationwide Mut. Ins. Co., 215 W.Va. 668, 674, 600 S.E.2d 565, 571 (2004)* (discussing W.Va. Code §33-6-31d(e) and reiterating that the duty to offer optional coverage is limited to those specific circumstances contained within the statutory language [§33-6-31d(e)].
>
> Id.

Thus, even if Bias were still the law, an insurer would only be required to notify a person of the availability of such optional coverages as provided by the statutory language. In Luikart, this Court expressly rejected the notion that an insurer has an obligation to extend an offer to purchase "deliberate intent" coverage.

BrickStreet's obligations are outlined in the statute as a whole. Taking W.Va. Code §23-4C-6 as a whole, the second sentence refers to the time period that BrickStreet was to undertake the obligations of the WCC. Additionally, the statutory language, as a whole, does not set forth any terms of an offer or notification of availability of the optional, "deliberate intent" insurance coverage. Bias does not apply to W.Va. Code §23-4C-6.

C. BrickStreet is a private insurer with a statutory mandate to assume the identical obligations of the Workers' Compensation Commission.

Summit Point correctly asserts that BrickStreet is a private insurer and not the WCC. In its efforts to convince this Court that the trial court did not err in holding that BrickStreet was required to make an offer of "deliberate intent" coverage contemplated in Bias, supra., Summit Point incorrectly assigns statutory obligations to BrickStreet that do not exist. While BrickStreet is not the WCC, BrickStreet's obligations related to "deliberate intent" (EELF) coverage were identical to the WCC's obligations during the 2 ½ year transition period. See W.Va. Code §23-4C-6. Contrary to Summit Point's arguments, BrickStreet was not required to make an offer as contemplated under Bias.[4]

BrickStreet was created in an effort to rectify a failing State-run workers' compensation system. Consequently, at the very moment of BrickStreet's creation, the WCC's assets, obligations and liabilities were transferred to BrickStreet. The pertinent statutory language states:

> Upon the termination of the commission [WCC], all assets, obligations and liabilities resulting from this article are transferred to the successor of the commission. Thereafter, the company shall offer insurance to provide for the benefits required by this article until at least the thirtieth day of June, two thousand eight. . . .

[4] For the reasons discussed in BrickStreet's Petition for Appeal, and for other reasons discussed herein, Bias does not apply because it has been superseded.

Id. No additional statutory obligations regarding making an offer as contemplated in Bias were outlined in the statute.

Contrary to West Virginia law relating to statutory interpretation, Summit Point takes three words out of context from the statute, and imposes an inordinately significant value on those words: "thereafter" and "shall offer." According to Summit Point, these three words mean that BrickStreet had a duty to make an offer as contemplated in Bias. Summit Point's reasoning is flawed. Applying the statutory language as a whole, it is clear that BrickStreet's obligations related to "deliberate intent" coverage during the 2 ½ year transition period were to be the same as had been borne by the WCC; BrickStreet was not obligated to make a Bias-type offer.

Under West Virginia law, a court is to apply the statute where it is clear and unambiguous. See Michael v. Appalachian Heating, LLC., 701 S.E.2d 116 (W.Va. 2010) (internal citations omitted). Where the statute is not clear, one should ascertain and give effect to the intent of the Legislature. Id. Clearly, the first sentence of W.Va. Code §23-4C-6 sets forth BrickStreet's duties at the termination of the WCC: BrickStreet assumed the obligations of the WCC in the same manner as those obligations existed for the WCC at the time of novation. Under the WCC, EELF was a voluntary coverage that an employer could choose to purchase. See W.Va. Code §§ 23-4C-2; 23-4C-4. BrickStreet assumed the coverage for "deliberate intent" actions that the former EELF provided in the same manner in which the WCC underwrote the coverage: as a voluntary coverage that an employer could choose to purchase.

The second sentence of W.Va. Code §23-4C-6, and of which Summit Point takes three words out of context, sets forth the time period, after the novation, for which BrickStreet must undertake these duties: from January 1, 2006, through June 30, 2008. Looking at the statutory provision as a whole, contrary to Summit Point's assertions, BrickStreet's obligations for the

time period of January 1, 2006, through June 30, 2008, were those that had previously been borne by the WCC and nothing more.

This makes sense in light of the reason for the creation of BrickStreet. In order to fix the State-run workers' compensation system, the West Virginia Legislature could not have intended a greater burden to be placed on BrickStreet regarding "deliberate intent" coverage than was being placed on other private insurers offering said coverage. From January 1, 2006, through June 30, 2008, BrickStreet was not the sole insurer offering coverage for "deliberate intent" actions. BrickStreet was only the sole workers compensation insurer during that time period. BrickStreet's obligations regarding "deliberate intent" coverage were only those that had previously been borne by the WCC.

D. The policy language unambiguously excludes coverage for any action brought under W. Va. Code §23-4-2, including "deliberate intent" actions

The plain meaning of the policy language clearly states that "deliberate intent" actions are not covered under the policy. BrickStreet already addressed Summit Point's alleged reasonable expectations based on the title of Part Two – Employers Liability Insurance coverage in BrickStreet's Petition for Appeal. Summit Point also argues that the policy language is ambiguous because the exclusionary endorsement does not specifically refer to the five-part "deliberate intent" test (W. Va. Code §23-4-2(d)(ii)) and refers to intentional acts where intent is not necessary in "deliberate intent" actions. Summit Point's arguments fail because the plain meaning of the policy language excludes any actions brought under W. Va. Code §23-4-2, regardless of whether the action is brought under subsection (d)(i) or (d)(ii)[5] or the level of intent.

[5] Subsection (d)(ii) relates to the five-part "deliberate intent" test.

The policy plainly states that no actions brought under §23-4-2, including "deliberate intent" actions, are covered under the policy. The policy language provides under Endorsement No. WC 99 03 06:

> WEST VIRGINIA INTENTIONAL INJURY EXCLUSION ENDORSEMENT
>
> This endorsement applies only to the insurance provided by the policy because West Virginia is shown in Item 3.A. of the Information Page.
>
> Item 1. of Section F. Payments You Must Make of Part One (Workers Compensation Insurance) of the policy is replaced by:
>
> F. Payments You Must Make
>
> You are responsible for any payments in excess of the benefits regularly provided by the workers compensation law including those required because:
>
> 1. of your serious and willful misconduct, or arising out of West Virginia Annotated Code §23-4-2.
>
> Exclusion 5. of Section C. Exclusions of Part Two (Employers Liability Insurance) of the policy is replaced by:
>
> C. Exclusions
>
> This insurance does not cover:
>
> 5. Bodily injury caused by your intentional, malicious or deliberate act, whether or not the act was intended to cause injury to the employee injured, or whether or not you had actual knowledge that an injury was certain to occur, or any bodily injury for which you are liable arising out of West Virginia Annotated Code §23-4-2.

(Designation of Record No. 5, Exhibit A, Endorsement No. WC 99 03 06). The policy endorsement language plainly and unambiguously states that any actions arising out of W.Va. Code § 23-4-2, including "deliberate intent" actions, are not covered.

E. Mary Jane Pickens' affidavit demonstrates the intent of those involved in the creation of the private workers' compensation system and does not contradict clear statutory language.

Summit Point would have this Court ignore the affidavit of Mary Jane Pickens (Designation of Record No. 9, Exhibit A), asserting that her affidavit cannot be the opinion of the West Virginia Office of Insurance Commissioner ("OIC") because the appropriate administrative procedure was not followed. However, the rulemaking and interpretation by the OIC of workers' compensation issues is exempt from the Administrative Procedures Act. See W.Va. Code §§ 33-2-21(a); 23-2C-22; 33-2-10(b) and (c).

This Court should not ignore the affidavit of Ms. Pickens. Ms. Pickens is general counsel for the OIC and, in that role, was involved in the privatization of the workers' compensation system. She was involved in the legislative and privatization process. Ms. Pickens is, at least, a fact witness regarding the intent of the Legislature and the OIC in the privatization process. It is well-established doctrine in West Virginia that interpretations made by administrative bodies charged with enforcement responsibilities are given great weight unless clearly erroneous. See Jefferson Utilities, Inc. v. Jefferson County Board of Zoning Appeals, 624 S.E.2d 873 (W.Va. 2005); Hawkins v. West Virginia Department of Public Safety, 672 S.E.2d 389 (W.Va. 2008).

Ms. Pickens asserts that, based on her involvement in the privatization process, BrickStreet was to assume or continue the obligations of the WCC relating to "deliberate intent" insurance coverage: to make "deliberate intent" coverage available to any West Virginia employer that voluntarily and affirmatively elected to purchase such coverage. See Id.

The information contained in Ms. Pickens affidavit relating to BrickStreet's obligations is further supported by deposition testimony of Thomas J. Obrokta, Jr., Senior Vice President and General Counsel for BrickStreet. Mr. Obrokta was involved in the drafting of the statutory

language and the privatization process. Mr. Obrokta testified that BrickStreet was to assume the obligations of the WCC relating to "deliberate intent" coverage; nothing more. See Designation of Record No. 9, Exhibit B, at 28-30, 82. Mr. Obrokta further testified that the first sentence of W.Va. Code §23-4C-6 outlined BrickStreet's obligations, and the second sentence outlined the time period for which BrickStreet undertook those obligations.

Ms. Pickens' testimony comports with the plain language of W.Va. Code §23-4C-6. This Court should not ignore Ms. Pickens' testimony because Ms. Pickens, in her role as General Counsel for the OIC, is a witness regarding what occurred with the privatization of workers' compensation insurance in West Virginia.

III. PRAYER FOR RELIEF

BrickStreet requests that this Honorable Court reverse the May 4, 2010, and June 29, 2010, Orders of the trial court, which together constitute the final Judgment Order of the Circuit Court of Jefferson County.

WEST VIRGINIA EMPLOYERS' MUTUAL INSURANCE COMPANY d/b/a BRICKSTREET MUTUAL INSURANCE COMPANY

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IV. APPENDIX A – EXHIBITS

Exhibit A May 31, 2006, letter from Mary Jane Pickens of the West Virginia Offices of the Insurance Commissioner to T.J. Obrokta.

STATE OF WEST VIRGINIA

RECEIVED JUN 0 2 2006

Offices of the Insurance Commissioner

JOE MANCHIN III
Governor

JANE L. CLINE
Insurance Commissioner

May 31, 2006

T.J. Obrokta, Vice President and Secretary
Brickstreet
4700 MacCorkle Avenue, SE
Charleston, WV 25304

Dear Mr. Obrokta:

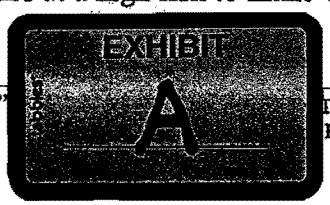
This letter relates to the question of whether BrickStreet Insurance ("BSI") is required to offer federal black lung coverage to all West Virginia Employers until December 31, 2008. While there has been some amount of discussion between the Offices of the Insurance Commission ("OIC") and BSI on this topic over the past several months, the OIC thought it would be appropriate to state its interpretation of the relevant code sections, and give BSI an opportunity to provide a written response.

As you know, W. Va. Code § 23-4B-9 states:

> Upon termination of the commission, the Coal-Workers' Pneumoconiosis Fund shall close and the company [BrickStreet Insurance] shall offer insurance to provide for the benefits required by this article [i.e., federal black lung coverage] until at lest the thirty-first day of December, two thousand eight.

Based on this language, and the fact that BSI's predecessor, the WCC was required to offer federal black coverage to any employer in the State of West Virginia (including both WCF subscribers and self-insured employers), the OIC believes that it was the intent of the legislature to require BSI to continue to offer this coverage to all employers in the State of West Virginia until December 31, 2008. The OIC believes this interpretation is consistent with the policy behind S.B. 1004 to have a "transition period" from 2006 to 2008 where BSI would be the sole WC insurer in West Virginia, and then have the market open in 2008 to all licensed WC carriers. In other words, we believe that it was the intent of the legislature that during this transition period, BSI, the successor to the WCC, would provide the same coverages that the WCC did prior to the WCC's termination. The fact that the language in Chapter 23 pertaining to the Excess Liability Fund ("ELF Fund") contains similar language to the CWP Fund language gives further credence to this interpretation.

It is my understanding that BSI is concerned that this interpretation could cause a severe financial strain, particularly in regard to writing CWP coverage for certain self-insured employers. Specifically, BSI is concerned about certain self-insured employers in the coal industry that employ numerous employees who are at a high risk to make OP



claims sometime in the near future, and that they could essentially shift this liability to BSI by purchasing their CWP coverage from BSI.

In response, the OIC would note that although the code requires BSI to write CWP coverage until 1/1/09 this does not mean that BSI has to write it at an *inadequate rate* which may cause financial strain to BSI. In fact, it is required under West Virginia's insurance laws that insurance rates, including casualty insurance rates,[1] *not be* inadequate. (See W. Va. Code § 33-20-3(b)). Consequently, as long as BrickStreet applies proper actuarial and underwriting methodologies in calculating any CWP risk it must offer until 2009, there should be no inordinate financial risks in writing any company(s) that request their CWP coverage to be written by BSI.

The OIC invites BSI to respond to the opinions set forth in this letter with any legal arguments in support of an alternative interpretation of W. Va. Code § 23-4B-9, and the OIC will certainly consider any response given by BSI before making a final decision on this topic. Further, the OIC would encourage additional meeting(s) between OIC and BSI representatives to resolve this issue. If you have any questions, please feel free to contact me at your earliest convenience.

Sincerely,

Mary Jane Pickens
General Counsel

CC: Jane Cline, Commissioner
Bill Kenny, Deputy Commissioner
Ryan M. Sims, Esq.
Melinda Kiss, Assistant Commissioner of Finance
Tonya Gillespie, Director, Rating Services
Richard Cundy, Actuary
Randy Suter, Brickstreet, Esq.

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[1] Pursuant to Senate Bill 1004, workers' compensation insurance is now a form of casualty insurance (see W. Va. Code § 33-1-10(e)).

No. 101414

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

AT CHARLESTON

WEST VIRGINIA EMPLOYERS' MUTUAL INSURANCE COMPANY d/b/a BRICKSTREET MUTUAL INSURANCE COMPANY,

Petitioner and Defendant Below,

v.

SUMMIT POINT RACEWAY ASSOCIATES, INC.,

Respondent and Plaintiff Below.

CERTIFICATE OF SERVICE

I, Angela D. Herdman, hereby certify that service of the foregoing **West Virginia Employers' Mutual Insurance Company d/b/a BrickStreet Mutual Insurance Company's Supplemental Appeal Brief**, has been made upon the following counsel of record by depositing a true and exact copy through the regular course of the United States mail, postage prepaid, on this 25th day of March, 2011, addressed as follows:

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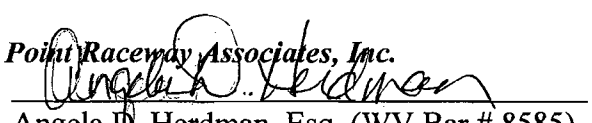

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