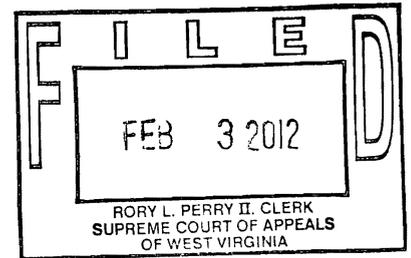


IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

NO. 11-1142



STATE FARM MUTUAL AUTOMOBILE
INSURANCE COMPANY, a foreign
corporation,

Petitioner,

vs.

JILL F. SCHATKEN and STEPHEN
N. SCHATKEN,

Respondents.

AMICUS CURIAE WEST VIRGINIA ASSOCIATION OF JUSTICE'S BRIEF

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AMICUS CURIAE WEST VIRGINIA ASSOCIATION OF JUSTICE'S BRIEF

Now comes the *amicus curiae* West Virginia Association of Justice, pursuant to Rule 30, *West Virginia Rules of Appellate Procedure*, and files its brief in support of the Orders dated February 3, 2011, and July 7, 2011, entered by the Circuit Court of Jefferson County, West Virginia, in this case and requests that said Orders and the rulings therein contained be affirmed.¹

INTRODUCTION

The West Virginia Association of Justice ("WVAJ"), as *amicus curiae*, is a private, non-profit organization founded in 1959, which consists of a diverse group of attorneys who are licensed in West Virginia. WVAJ's members represent the interests of West Virginia citizens who, among other types of clients, have been damaged, injured or killed in motor vehicle collisions. It is these citizens who are most often directly affected by the insurance practices engaged in and entangled with the issues raised by Petitioner State Farm Mutual Automobile Insurance Company ("State Farm") in this appeal.

¹ **Rule 30(e)(5) Disclosure** - WVAJ does hereby state, pursuant to Rule 30(e)(5), that no counsel for a party has authored this brief in whole or in part nor has counsel for a party or a party made a monetary contribution specifically intended to fund the preparation or submission of this Brief.

This *amicus* brief addresses the two primary issues raised in this appeal which are (1) whether State Farm's damage reduction provision contained in the "**Underinsured Motor Vehicle Coverage-Limits**" section of its West Virginia Policy Form 9848A ("damage reduction provision") violates the clear language of *West Virginia Code* § 33-6-31 and the public policy and other common law protections afforded its insureds thereunder; and, (2) whether State Farm's medical payments reimbursement provision contained in the "**General Terms-Our Right to Recover Our Payments**" section of its West Virginia Policy Form 9848A ("reimbursement provision") is subject to and limited by the public policy protections afforded its insureds under *West Virginia Code* § 33-6-31. Furthermore, this *amicus* brief addresses whether the reimbursement language is limited to third-party recoveries; violates the common law doctrine of the made-whole rule; violates the doctrine of reasonable expectations; and violates the collateral source rule.

STATEMENT OF THE CASE

The facts of the instant case, as presented in the parties' briefs, typify the current scenario faced by an injured West Virginia motorist with both underinsured and medical payments coverage who is attempting to negotiate a reasonable, good-faith settlement with Petitioner State Farm in this State

at this time. In most instances, the underinsured motorist claim is initiated and Petitioner State Farm has invoked its rights under the policy before there has been a judicial determination, either by trial or otherwise, of the total compensatory damages due an injured first-party claimant. Typically, the injured motorist is usually forced to rely solely upon the tortfeasor's liability insurance and his or her first-party underinsured motorist coverage (UIM) to provide full indemnification for the variety of recoverable general and special damages available under West Virginia law.

In some circumstances, including this case, the insured also purchases first-party medical payments coverage (MPC) under the same policy providing UIM coverage. Each first-party coverage, UIM and MPC has a specific limit of coverage for which a separate and distinct premium was charged and paid. Respondents' Declarations Page establishes this practice. Appendix, p. 83.

Once the injured underinsured motorist's claim ripens, but before trial, the claimant submits the liability and damage documentation to the insurance carrier for consideration and possible resolution. During the subsequent negotiations, both parties know: (1) the applicable liability, UIM and MPC limits and payments made and/or offered by the carriers; (2) the strength and weakness of any liability issues; (3) the measure

of physical and emotional injury, economic losses and overall damages; (4) the demand made to settle the UIM claim; and (5) that the tortfeasor's liability insurance, as well as his or her personal assets, are inadequate to fully compensate the claimant for his or her injuries.

During its evaluation of the underinsured's claims, State Farm incorporates into its valuation and subsequent settlement offer, pursuant to the damage reduction provision contained within its policy, a reduction for previous MPC payments made under the same policy. Moreover, State Farm's reimbursement provision allows it to seek reimbursement from its insured for any amounts previously paid under the claimant's medical payments coverage. According to State Farm, if it chooses not to waive its subrogation rights under §§ 33-6-31(f) and 33-6-31e, it can seek reimbursement of any amounts paid pursuant to its medical payments coverage from any amount its insured received as underinsured benefits. Thus, in the event State Farm seeks to enforce both the damage reduction provision and reimbursement provision, it stands to recover twice for its medical payments coverage at a significant loss of benefits for the insured.

A careful review of §§ 33-6-31(f) and 33-6-31e demonstrates that the West Virginia Legislature never, either at the time of enactment or at any subsequent time, provided any

motor vehicle insurance carrier the right to seek "reimbursement" from its own first-party UIM insured for any amounts it paid under the UIM and MPC provisions of the insurance policy. Subrogation was the only manner in which the Legislature provided insurance carriers with protection from double recovery in motor vehicle cases and reimbursement was never mentioned.

The impact on the injured first-party UIM claimant attempting to be fully compensated for injuries and damages where there is limited third-party liability coverage is stark. As in the present case, Petitioner State Farm asserts its superior position ahead of its own insured's right to seek and receive full compensation and indemnification under the UIM and MPC provisions of the motor vehicle insurance policy. Petitioner State Farm's assertion of its right to significantly reduce UIM benefits and damages by MPC payments it has made, along with its asserted right to full reimbursement of MPC payments made from both UIM and all other insurance benefits available to the first-party claimant as expressed in the policy form, usually forces the claimant to accept less in settlement or forces suit to be initiated.

In Defendant's Reply Brief, Petitioner State Farm admits, "[r]eimbursement is a provision triggered when the claimant/insured receives monies from a third party and is then

contractually obligated to reimburse State Farm for medical payments advanced.” p. 2, Reply Brief. Interestingly, in the instant case, Petitioner State Farm knew that Respondent’s medical expenses were in excess of the tortfeasor’s liability insurance limits of \$25,000.00 yet still only offered \$30,000.00 in UIM benefits. See correspondence dated August 20, 2010, found at Appendix, p. 77. Obviously, with serious physical injuries and significant medical expenses in excess of liability limits, Respondents could not have been fully indemnified by the liability limits and would not be fully compensated by adding the \$30,000.00 UIM offer made by Petitioner State Farm. This is important because, at this critical time in the case, Petitioner State Farm obviously applied one or both of the provisions at issue in this case to arrive at its UIM offer made to Respondent. The written settlement offer does not tell Respondents how Petitioner State Farm calculated or determined the UIM offer it was making or that it had utilized either the UIM damage reduction provision or its reimbursement provision to conclude that \$30,000.00 was the appropriate UIM offer.

As medical payments coverage in West Virginia is unregulated and in spite of the UIM statute which clearly sets forth the public policy requiring full indemnification, Petitioner State Farm was free in this case (and has been in all other cases) to make these value determinations without

disclosing the claims process and how these two suspect policy provisions were utilized in arriving at its offer of UIM benefits made to Respondents. Appendix, p. 77.

ARGUMENT, DISCUSSION AND POINTS AND AUTHORITIES

WVAJ asserts that:

- A. State Farm's underinsured damage reduction provision which is at issue in this case violates the clear and unambiguous language of West Virginia Code § 33-6-31(b) and the public policy protections it affords West Virginia residents to seek, obtain and recover full compensation and indemnification for damages sustained in motor vehicle accidents.**

The Legislature last amended *West Virginia Code* § 33-6-31 in 1998. At the time Petitioner State Farm began applying its new West Virginia Policy Form 9848A, on March 6, 2006, the pertinent part of this statute read as follows:

That such policy or contract shall provide an option to insured with appropriately adjusted premiums to pay the insured all sums which he shall be legally entitled to recover as damages of the owner or operator of an uninsured or underinsured motor vehicle up to an amount not less than the limits of bodily injury liability and property damage liability insurance purchased by the insured without setoff against the insured's policy or other policy.... **No sums payable as a result of underinsured motorists' coverage shall be reduced** by payments made under the insured's policy or any other policy. [Emphasis added.]

The prohibition on reducing UIM benefits is clear on its face and the section defines its breadth—"by payments made under the insured's policy or other policy."

The UIM damage reduction provision at issue here reads, in part:

Limits

The Underinsured Motor Vehicle Coverage limits for **bodily injury** are shown on the Declarations Page under "Underinsured Motor Vehicle Coverage - Bodily Injury Limits - Each Person, Each Accident".

The most **we** will pay for all damages resulting from **bodily injury** to any one **insured** injured in any one accident, including all damages sustained by other **insureds** as a result of that **bodily injury** is the lesser of:

1. the limit shown under "Each Person"; or
2. the amount of all damages resulting from that **bodily injury**, reduced by:
 - a. the sum of the full policy limits of all applicable liability policies insuring any **persons** or organizations who are or may be held legally liable for that **bodily injury**;
 - b. any damages that:
 - (1) have already been paid;
 - (2) could have been paid; or
 - (3) could be paid to or for the **insured** under any workers' compensation law, disability benefits law, or similar law; and
 - c. any damages that have already been paid or that are payable as expenses under Medical Payments Coverage of this policy, the medical payments coverage of any other policy, or other similar vehicle insurance.

The limit shown under "Bodily Injury Limits - Each Accident" is the most **we** will pay, subject to the limit for "Each Person", for all damages resulting from **bodily injury** to two or more **insureds** injured in the same accident.
[Emphasis added by underlining.]

Appendix, p. 101.

WVAJ specifically requests that this Court apply its legal analysis utilized in *Cunningham v. Hill*, 226 W.Va. 180, 698 S.E.2d 944 (2010), to the insurance provision at issue in the instant case. In *Cunningham*, this Court again identified and articulated the Legislature's express intent as initially stated in *State Auto. Mut. Ins. Co. v. Youler*, 183 W.Va. 556, 396 S.E.2d 737 (1990):

the legislature has articulated a public policy of full indemnification or compensation underlying both uninsured or underinsured motorist coverage in the State of West Virginia. That is, the **preeminent public policy of this state in uninsured or underinsured motorist cases** is that the injured persons be *fully compensated* for his or her *damages* not compensated by a negligent tortfeasor, up to the limits of the uninsured or underinsured motorist coverage. [Emphasis added.]

183 W.Va. at 564, 396 S.E.2d 745. Being mindful of the significance of the Legislature's command in § 33-6-31 that it is the "preeminent public policy" of this State in cases like the instant one, this Court warned that it would be "vigilant in holding insurers' feet to the fire in instances where [terms,

conditions and] exclusions or denials of coverage strike at the heart of the purposes of the uninsured and underinsured motorist statutes provisions." *Mitchell v. Broadnax*, 208 W.Va. 36, 537 S.E.2d 882 (2000).

Accordingly, WVAJ urges this Court to stay true to the Legislature's command that full compensation of an underinsured motorist is the preeminent public policy in this State. Where, as here, an insurer attempts to apply insurance provisions which strike at the heart of this preeminent public policy, this Court should hold that such provisions are unenforceable. Thus, WVAJ requests that this Court affirm Judge Sanders' rulings in favor of Respondents below.

B. State Farm's damage reduction provision set out in its West Virginia Policy Form 9848A violates West Virginia's collateral source rule which precludes the application of collateral sources to offset claimant's underinsured claim. *Ratlief v. Yokum*.

"The collateral source rule normally operates to preclude the offsetting of payments made by health and accident insurance companies or other collateral sources as against the damages claimed by the injured party." Syl. Pt. 7 *Keese v. Saville*, 216 W.Va. 199, 604 S.E.2d 449 (2004) (citing *Ratlief v. Yokum*, 167 W.Va. 779, 280 S.E.2d 584 (1981)). "The collateral source rule operates to preclude the offsetting of uninsured and underinsured benefits since the benefits are the result of a contractual arrangement which is independent of the tortfeasor..."

Syl. Pt. 4 *Johnson v. General Motors Corp.*, 190 W.Va. 236, 438 S.E.2d 28 (1993).

In the present case Petitioner State Farm is attempting to offset payments made under the MPC coverage against the damages claimed in the Plaintiffs' underinsured motorist claim. Recently, in a case before the United States District Court for the Northern District of West Virginia, State Farm sought to exclude from evidence those medical bills previously paid by its insured's medical payments coverage. *Nickerson v. State Farm*, 2011 U.S. Dist. Lexis 125976; 2011 WL5192317 (N.D. W.Va. 2011). *Nickerson* involved an underinsured motorist claim filed by the Plaintiffs seeking underinsured motorist benefits.² Mr. and Mrs. Nickerson were insured under a policy of insurance issued by State Farm that contained underinsured motorist coverage with limits of \$100,000 and medical payments coverage with limits of \$5,000. Relying on the policy language at issue in this case, State Farm filed a motion *in limine* seeking to exclude from evidence in the trial of the underinsured claim those bills previously paid by Mr. and Mrs. Nickerson's medical payments coverage. The District Court denied the motion *in limine* finding that the policy language in question violated *West Virginia Code* § 33-6-31(b).

² State Farm has now filed a motion with the District Court attempting to redefine Plaintiffs' claims in an effort to have the District Court reverse its ruling finding that the policy language in question violates § 33-6-31(b).

The particular facts of the *Nickerson* case demonstrate State Farm's use of the damage reduction policy language in violation of the collateral source rule. Prior to the Plaintiffs in *Nickerson* obtaining a judgment and a final determination of their damages, State Farm relied upon the damage reduction language in an attempt to limit the Nickersons' claims. Clearly, in *Nickerson*, State Farm was attempting to utilize the policy language to offset payments made under the medical payments coverage against the damages claimed by the Nickersons. In employing this tactic before a final verdict, State Farm was attempting to offset its payments under the medical payments coverage against Plaintiffs' total damages prior to a determination of the Plaintiffs' underinsured motorist claim.

State Farm's contention that the policy language prevents a double recovery is belied by its action in *Nickerson*. In *Nickerson*, the policy provision was used in an effort to exclude from evidence a portion of the Plaintiffs' damages prior to a final determination of the Plaintiffs' damages. State Farm cannot seek to prevent a double recovery before a determination of the Plaintiffs' damages.

C. Under the insurance provisions at issue in the present appeal, the underinsured and medical payment coverages selected and purchased from State Farm by the Respondents, and others, are illusory where, as here, the contested policy language allows State Farm to seek a reduction in underinsured damages and benefits and demand reimbursement, both of which, either separately or in conjunction, would reduce the insured's stated limits of coverage thereby thwarting the public policy of full indemnification and compensation under § 33-6-31(b).

Respondents' Declaration Page for their State Farm policy clearly states they purchased UIM Coverage-W in the amount of \$250,000.00 per person and MPC Coverage-C up to the per person limit of \$5,000.00. Appendix, p. 83. Both first-party coverages sold to Respondents and all others like them in West Virginia are illusory due to Petitioner State Farm's application of its UIM damage reduction provision and its MPC reimbursement provision. As written, Petitioner State Farm is free to utilize either repayment provision, separately or in tandem, against its first-party insureds. It should be noted that the "**General Terms**" section of Respondents' policy also provides for subrogation, another repayment provision—wholly equitable in nature.

Consequently, no UIM claimant will ever be able to recover up to the full amount of his or her stated underinsured motorist limits when there are MPC payments made under the same policy. It is just a matter of "how much" will be saved by Petitioner State Farm depending on whether it uses one or both

of the repayment provisions. If both the UIM damage reduction provision and MPC reimbursement provision are utilized as contemplated by the express wording of the current policy form, Respondents and insureds like them in West Virginia will never be able to receive the full limit of their UIM coverage or MPC limit as set forth in their Declaration Pages of their policies.

The Court will note that the introductory language of the **"General Terms-Our Right to Receive Our Payments"** section of Petitioner State Farm's West Virginia Policy Form 9848A makes both the subrogation and reimbursement provisions applicable to both MPC and all other coverages provided under the policy including first-party UIM payments. Appendix, p. 116.

Therefore, the preeminent public policy of full compensation to underinsured motorists injured in automobile accidents in the State of West Virginia will never be satisfied because Petitioner State Farm has included in its Policy Form the provisions which protect it and not its first-party insureds, as required by West Virginia law. On this basis and under the longstanding insurance law of this State, both the UIM damage reduction and MPC reimbursement provisions should be held unlawful and unenforceable as applied to first-party UIM claimants in this State. Subrogation should be left as the legislatively authorized mechanism for obtaining repayment.

D. The Legislature, in enacting § 33-6-31(f), did not intend to provide an insurer with the right of subrogation or reimbursement against its own insured to recover from any underinsured benefits those sums paid to the insured pursuant to the medical payments coverage. Moreover, State Farm's reimbursement provision exceeds the lawful scope of § 33-6-31(f) which is solely limited to an insurer's right of subrogation, thereby, consistent with the *maxim expressio unius est exclusio alterius*, excluding any claim of reimbursement.

This Court plainly stated in *Cunningham v. Hill*, 226 W.Va. 180, 185, 698 S.E.2d 944, 949 (2010), that "[c]ourts must presume that a legislature says in a statute what it means and means in a statute what it says there." The statute at issue in the instant case, *West Virginia Code* § 33-6-31(f), provides, in relevant part, that "[a]n insurer paying a claim under the endorsement or provisions required by subsection (b) of this section **shall be subrogated** to the rights of the insured to whom such claim was paid against the person causing such injury, death or damage to the extent that payment was made." [Emphasis added.] Clearly, as drafted, *West Virginia Code* § 33-6-31 provides insurers only the right of subrogation. The Legislature did not mention reimbursement in § 33-6-31 or in § 33-6-31e. Thus, this Court must presume that the Legislature meant what it said in the plain language of § 33-6-31, and intended to provide an insurer only the right of subrogation – not reimbursement.

Accordingly, WVAJ urges this Court to do the same as it did in *Phillips v. Larry's Drive-In Pharmacy, Inc.*, 220 W.Va. 484, 492, 647 S.E.2d 920, 928 (2007), and apply the familiar maxim *expressio unius est exclusio alterius*, the express mention of one thing implies the exclusion of another, and hold that the express mention of subrogation in *West Virginia Code* § 33-6-31(f) implies the exclusion of reimbursement in this case. The conclusion necessarily reached would be that reimbursement, as a method of repayment of first-party UIM or MPC benefits, as written into State Farm's West Virginia Policy Form 9848A, is unenforceable since it exceeds the authority provided by the Legislature in the statute for UIM policies in the State. Therefore, the entire MPC reimbursement provision should be held invalid, unenforceable, and unlawful as it is applied to Respondent and similarly situated individuals in this State.

E. State Farm's medical payments reimbursement provision, as applied to Respondents' first-party claim for underinsured motorist benefits, is the functional equivalent of the subrogation provision, and violates West Virginia's made-whole doctrine and its socially desirable policy of fostering adequate indemnification of innocent automobile accident victims.

This Court endorsed the made-whole doctrine in *Kittle v. Icard*, 185 W.Va. 126, 405 S.E.2d 456 (1991), wherein it quoted with approval the ruling of the Wisconsin Supreme Court in *Rimes v. State Farm Mut. Ins. Co.*, 106 Wis.2d 263, 316 N.W.2d 348, 353 (1982), that "[o]ne who claims subrogation rights,

whether under the aegis of either legal or conventional subrogation, is barred from recovery unless the insured is made whole." This Court found that the settlement did not fully compensate the infant plaintiff for his injuries and that "further set-offs" would reduce money needed for the future. *Id.* This Court later clarified that "the made whole doctrine embodies a policy deemed socially desirable in this State, in so far as it fosters the adequate indemnification of innocent automobile victims." *Provident Life and Acc. Ins. Co. v. Bennett*, 199 W.Va. 236, 483 S.E.2d 819 (1997). The *Bennett* Court went on to provide a list of six factors, not all inclusive, to consider in applying the made-whole doctrine. *Id.*

In the instant case, State Farm's medical payments reimbursement provision, as the functional equivalent to its subrogation provision, clearly violates the made-whole doctrine as it completely prevents Respondent and similarly situated citizens from obtaining full compensation for their injuries. Simply, insureds in West Virginia cannot be made whole when confronted with this provision. Said provision flies in the face of this Court's socially desirable policy to provide adequate indemnification of innocent accident victims. Thus, State Farm's medical payments reimbursement provision should be held invalid, unlawful and unenforceable by this Court, or at least subject to the made-whole doctrine.

F. If this Court determines that an ambiguity exists as a result of the comparison of the limits of UIM and MPC coverages as stated on Respondents' declaration page with Petitioner State Farm's UIM damage reduction provision and its MPC reimbursement provision contained in its West Virginia Policy Form 9848A, which provisions, in essence, nullify the purpose of fully indemnifying Respondents for their accident-related injuries and damages, then such provisions should be severely restricted and the doctrine of reasonable expectation should be applied by this Court to hold such provisions as unenforceable.

Should this Court conclude, after comparing the limits of UIM and MPC coverages on Respondents' Declarations Page, with application of Petitioner State Farm's UIM damage reduction provision in Policy Form 9848A, that an ambiguity exists, then the doctrine of reasonable expectations should be applied to severely restrict the effect of this provision to limit Petitioner State Farm's ability to seek repayment of MPC benefits to third-party recoveries. See, *National Mut. Ins. Co. v. McMahon & Sons, Inc.*, 177 W.Va. 734,742, 356 S.E.2d 488,496 (1987); see also, *Blake v. State Farm Auto Ins. Co.*, 224 W.Va. 317, 685 S.E.2d 895 (2009).

G. The MPC reimbursement provision contained in Petitioner State Farm's West Virginia Policy Form 9848A is the legal and factual equivalent of the subrogation provision contained in the same section of the same policy form and should be subject to all equitable defenses to payment under the holdings of *Federal Kemper v. Arnold* and *Richards v. Allstate*.

The subrogation and reimbursement provisions contained in "**General Terms - Our Right to Recover Our Payments**" section are functional equivalents. Each provision reads, in part:

a. Subrogation

If we are obligated under this policy to make payment to or for a *person* who has a legal right to collect from another party, then we will be subrogated to that right to the extent of *our* payment.

The *person* to or for whom we make payment must...

b. Reimbursement

If we make payment under this policy and the *person* to or for whom we make payment recovers or has recovered from another party, then that *person* must...

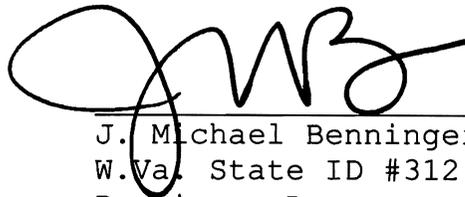
Appendix, p. 116. Each provision is designed solely to provide Petitioner State Farm with repayment of MPC benefits paid to an insured under the policy form. Logically, each provision contemplates payment to an insured under the policy, the receipt or collection of compensation from another party and the repayment full to Petitioner State Farm. These provisions include the right to subrogate and for reimbursement of first-party UIM benefits paid by Petitioner State Farm to its own insured. Therefore, this Court should hold that Petitioner State Farm's right to MPC reimbursement under its current Policy Form against its own insured from UIM benefits is unenforceable and that such right to reimbursement as against third-party recoveries should be limited by the equitable doctrine of the made-whole rule and be subject to attorney fees and expenses, as set forth in *Federal Kemper v. Arnold*, 183 W.Va. 31, 293 S.E.2d

669 (1990); *Richards v. Allstate Insurance Company*, 193 W.Va. 244, 455 S.E.2d 803 (1995).

CONCLUSION AND RELIEF REQUESTED

The *Amicus Curiae* WVAJ respectfully requests that this Court hold unenforceable the two insurance provisions included by Petitioner State Farm Mutual Automobile Insurance Company in its West Virginia Policy Form 9848A and affirm the rulings made by Judge Sanders in this case below.

Respectfully submitted,



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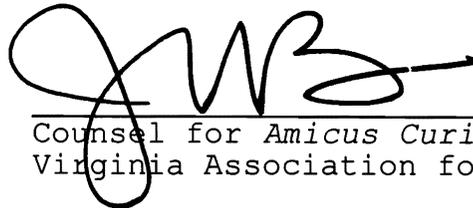
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CERTIFICATE OF SERVICE

I, J. Michael Benninger, counsel for *Amicus Curiae* West Virginia Association for Justice, do hereby certify that on February 3, 2012, the foregoing ***Amicus Curiae West Virginia Association for Justice's Brief*** was duly served upon counsel of record by depositing true and exact copies thereof in the regular course of the United States Mail, First Class, postage prepaid, addressed as follows:

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