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SUPREME COURT OF APPEALS
OF WEST VIRGINIA

No.: 11-1186

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

AMERICAN STATES INSURANCE COMPANY,

Petitioner/Defendant Below,

v.

BARBARA SURBAUGH, Administrator of the Estate of Gerald Kirchner,

Respondent/Plaintiff Below.

PETITIONER'S REPLY BRIEF AND RESPONSE TO CROSS-ASSIGNMENTS OF ERROR

(In The Circuit Court of Greenbrier County, West Virginia,
The Honorable Joseph C. Pomponio, Jr.,
Civil Action No. 97-C-241)

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REPLY TO RESPONDENT'S COUNTERARGUMENTS

I. RESPONSE TO RESPONDENT'S PROCEDURAL HISTORY

The Respondent's "procedural history", *see,* Respondent's Brief at 3, says little, but means much. In substance, Respondent aptly observes that: "numerous summary judgment motions were filed by the parties", but were consistently denied, because the circuit court perceived that there were genuine issues of material fact in dispute. *See*, Respondent's Brief at 3. Respondent quotes the June 17, 2011 Order denying cross-motions for summary judgment, R.925, which states that the "fact" in dispute was whether the insurance policy exclusion was "provided and disclosed to the insured". R.928.[1] The Order further states that the efficacy of the subject insurance policy exclusion would "depend on whether the terms and conditions were fully and appropriately even provided, and then disclosed to Mr. Grimmett." Id. That, presumably, is the "fact" issue requiring a trial, and a jury trial no less. What is so revealing, among other things, is that there was absolutely no dispute about whether the terms and provisions of the insurance policy, including the key exclusionary clause, was contained in the policy, conspicuously placed therein, and it was also undisputed that the policy was provided to Mr. Grimmett -- twice -- long before the fatality. So, there was no dispute whatsoever as to these facts, notwithstanding the assertions of the Respondent and the circuit court to the contrary. A

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[1] The full quote from the Order set forth in Respondent's Brief states as follows:

> "Defendant's (sic) argue in their Motion that there is no requirement that the exclusion be conspicuous or brought to the attention of the insured, then further states 'there is certainly no requirement that the exclusions be explained to be enforceable' (See Motion page 5). They do, however, require that they be provided and disclosed to the insured. That fact is in contention. And therefore, that fact is made material as to whether the exclusion can be enforced.
>
> As to whether the exclusion was in effect would depend on whether the terms and conditions were fully and appropriately even provided, and then disclosed to Mr. Grimmett. That matter is still in dispute...."

R.928-929.

careful scrutiny of the circuit court proceedings reveals no other, or different statement of the "facts" that were ostensibly in dispute. Quite to the contrary, a careful examination of the record in the circuit court demonstrates that there were no material facts in dispute, the circuit court simply would not rule as a matter of law on whether the delivery to the policyholder of an insurance policy containing a clear, unambiguous, and conspicuous and clear exclusion is sufficient as a legal proposition to make that exclusion enforceable.

II. Response To Respondent's Statement Of Facts

The most outstanding feature of the Respondent's Statement of Facts, *see,* Respondent's Brief at 4-7, is the focus on uncontested irrelevancies. Once again, a thoughtful examination of the Respondent's assertions regarding important facts does little more than betray the inanity of a jury trial in this particular case. As above-stated, on the key question of whether the subject insurance policy was duly and timely delivered to the policyholder, there was no dispute -- it decidedly was. On the question of whether the insurance policy exclusion at issue was contained in the policy at the time of delivery, both times the policy was delivered, again, it certainly was. If and to the extent that conspicuity is an issue of fact, the insurance policy exclusion was plain and conspicuous. No other facts are of consequence.

Respondent goes to length in her brief to point out nothing more than that Mr. Grimmett was a very typical purchaser of insurance. He had been a manager in a department store, then decided to go into business for himself and open a sporting goods store. He was high school educated, and according to Respondent had no prior experience "buying commercial insurance". Respondent also points out that Mr. Grimmett had taken no "insurance courses", nor had he been

"taught how to read insurance policies." *See*, Respondent's Brief at 4.[2] In short, Mr. Grimmett was typical of the vast majority of people, consumers and business people alike, who purchase insurance every day, and as to whom the courts in America consistently enforce the clear and unambiguous terms contained in the insurance policies that they buy. Ironically, in light of the emphasis on Mr. Grimmett's lack of specific training on "how to read insurance policies", it should not go unnoticed that the placement of this particular exclusion, on page of 2 of 10 in the "Business Owners Liability Coverage Form", R.1184-1194, directly under the heading "EXCLUSIONS Applicable to Business Liability Coverage", R.1185, makes it easy to find, and the wording is painfully simple. The policy provides that the insurance does not apply to:

> "e. 'Bodily injury' to:
>
> (1) An employee of the insured arising out of and in the course of employment by the insured...."

R.1185.[3]

Respondent points out in her Statement of Facts that the policy was sold to Mr. Grimmett through an out of state insurance agency.[4] The Respondent also points out that Mr. Grimmett had few, very brief, relatively insubstantial discussions with the agent from whom he purchased the policy over the telephone. In specific, Respondent observes that Mr. Grimmett testified that he was never "warned" that there were any exclusions in the policy. All of this might be germane, if the policy had not been sent to Mr. Grimmett -- twice -- long before the fatality; and

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[2] Mr. Grimmett had, however, clearly learned to read, as was abundantly clear at trial. *See*, e.g. R.1017, 1038, 1041-1042, 1053-1059, 1074-1075.

[3] As pointed out in Petitioner's principal brief, at trial Mr. Grimmett was handed a copy of the insurance policy and asked to locate the Exclusions. He found them in less than two minutes, R.1057-1059, and then demonstrated a capability of understanding the language. R.1059-1060, 1065.

[4] Mr. Grimmett testified that he was referred to the agency, Emery & Webb located in New York, by an agent in Summersville, West Virginia, because "there's certain companies that won't write for sporting goods dealers" that sell guns. R.1004-1005, 1087.

the first time it was sent along with a letter, R.1009, instructing him to: "Please read your policy carefully"; and further admonishing him that: "In the event of a loss your insurance coverage will be controlled by the terms, conditions and exclusions of your policy"; and further offering: "...please call us should you find you require any further explanation regarding any part of your policy...." P. Ex. 2, R.1048-1049, 1050-1051, 1141. Given that, and with the explanatory wording contained in the policy itself which clearly does "warn" of limitations and exclusions in the policy, nothing in our law makes it at all consequential whether or not the agent discussed the policy with Mr. Grimmett at length, warned him about any exclusions, or lived in New York instead of West Virginia.

Respondent makes much of whether a "Quick Reference" guide was or was not part of the version of the insurance policy sent to Mr. Grimmett. *See,* Respondent's Brief at 5-6, and *ante*. The relevance of this particular issue is mysterious, since as Respondent repeatedly acknowledges in her brief, Mr. Grimmett made absolutely no effort whatsoever to read through the policy in any event. Consequently, whether or not it contained a guide which would have made it easier for him to find his way through it would appear to be of no consequence. Moreover, amidst all of the statutory and regulatory requirements that our Legislature, and our Insurance Commissioner have promulgated, and all of the additional embellishments that our Court has imposed on the issuance of liability insurance, there has never been a requirement that the standard, commercial general liability policy contain a "Quick Reference" guide, or anything akin thereto. Nor is there any case law in West Virginia that makes the presence or absence of such a guide a fact of consequence in determining whether the terms and provisions of the policy should be enforced as written.

Respondent points out in her Statement of Facts that Mr. Grimmett purchased the policy effective October 1, 1995, for an initial policy period of October 1, 1995 through October 1, 1996, but his copy of the policy did not arrive in the mail until October 26, 1995, some 25 days after its effective date. *See*, Respondent's Brief at 7. But, then again, that was over a year and a half before the fatality which gives rise to this matter, and a full year before Mr. Grimmett renewed the policy without change for a policy period covering the one year from October 1, 1996 through October 1, 1997. Therefore, the significance of the policy having been delivered 25 days after its inception is unclear, and would appear to be utterly irrelevant.

Respondent repeatedly reaffirms that Mr. Grimmett chose not to read the policy, either when he first bought the coverage in October of 1995, or when he renewed the policy without substantial change in October, 1996. Inexplicably, the Respondent quotes in her Statement of Facts Mr. Grimmett's attempt to explain why he elected repeatedly not to read the insurance policy, as follows: "Because American States called me up and let me talk to someone on the telephone, and he sold me something and what he sold me, we was in verbal agreement on and that's what I thought I was buying." *See*, Respondent's Brief at 7, *quoting* R.1050. For what this may be worth, while Respondent for some unknown reason emphasizes that rambling, incoherent purported explanation, the real reason why Mr. Grimmett almost certainly did not read the policy is also actually disclosed in Respondent's Statement of Facts. As the Respondent observes, Mr. Grimmett testified at trial that he bought the insurance "because his lease required him to have insurance." *See*, Respondent's Brief at 4, *citing* R.1024-1025. Therein lies the answer. Mr. Grimmett could have cared less what liability coverage he actually bought; as long as he met the lease requirement that he have insurance, he was satisfied. Consequently, he saw

no need to read through the policy to determine what coverage he had, and what coverage he did not have.[5]

III. THE DISPUTE OVER THE STANDARD OF REVIEW

As Petitioner points out at length in its principal brief, the circuit court in this case was operating under a distinct misapprehension of the legal requirements that are necessary to make a clear, unambiguous insurance policy exclusion enforceable. To the extent that this is an appeal from rulings made by the circuit court as a consequence of that misapprehension, the issues are subject to *de novo* review. "Where the issue on an appeal from the circuit court is clearly a question of law or involving an interpretation of a statute, we apply a *de novo* standard of review." Syl.pt.1, Mace v. Mylan Pharm., Inc., 227 W.Va. 666, 714 S.E.2d 223 (2011); Syl.pt.2, Roberts v. Consolidation Coal Co., 208 W.Va. 218, 539 S.E.2d 478 (2000). Likewise, in Webster County Solid Waste Authority v. Brackenrich & Associates, Inc., 217 W.Va. 304, 617 S.E.2d 851 (2005), Justice Albright restated the well-settled rule that: "Our review of declaratory judgment rulings is plenary, as we announced in Syllabus point three of *Cox v. Amick*: 'a circuit court's entry of a declaratory judgment is reviewed *de novo*.'" Cox v. Amick, 195 W.Va. 608, 466 S.E.2d 459 (1995). Further, this Court invariably reviews rulings of circuit courts regarding coverage of an insurance policy under a *de novo* standard. *See*, e.g. Witt v. Sutton, 2011 WL 1460430 (W.Va. 2011) ("We review a circuit court's order interpreting an insurance contract de novo."); Blake v. State Farm Mut. Auto. Ins. Co., 224 W.Va. 317, 685 S.E.2d 895 (2009); Syl.pt.1, Tennant v. Smallwood, 211 W.Va. 703, 568 S.E.2d 10 (2002);

[5] Mr. Grimmett conceded on cross-examination at trial that he had no idea whether his policy provided coverage for bodily injury to his employees. R.1062, 1066.

Dairyland Ins. Co. v. Fox, 209 W.Va. 598, 550 S.E.2d 388 (2001); Satterfield v. Erie Ins. Prop. & Cas., 217 W.Va. 474, 618 S.E.2d 483 (2005).

Respondent contends for a "highly differential" (sic) standard of review, *see*, Respondent's Brief at 8, that normally obtains where the issue is the sufficiency of the evidence to support a jury verdict.[6] In support of that idea, Respondent argues *ad nauseum* that this case turns on a key factual issue of whether the insurance policy exclusion was "brought to the attention of the insured". *See*, Respondent's Brief at 8-9. Respondent persistently disregards that West Virginia law commands that when an insurance policy provision is clear and unambiguous, and the relevant provision is conspicuously displayed in the policy (such as by placing an exclusion prominently under the heading "EXCLUSION"), and the policy is, in fact, delivered to the policyholder (twice in this case) prior to the loss, such that the policyholder has every opportunity to read through it, if he wants to (even though this policyholder stubbornly refused to do so), these circumstances constitute bringing the exclusion to the attention of the insured as a matter of law.[7] The failure of the circuit court to rule as a matter of law that this insurance policy exclusion was entirely enforceable is an error of law, subject to a *de novo* standard of review. Further, the declaratory judgment that was entered by the circuit court, in

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[6] Respondent cites James v. Knotts, 227 W.Va. 65, 705 S.E.2d 572 (2010). That case involved a jury trial on the mental capacity of a testator to make a valid and enforceable will. The Syllabus in that case restates the well-settled standards that normally apply when the issue is whether there is sufficient evidence to support a jury verdict. *See,* Syl.pts.1-3. The issue in James was plainly one of fact for a jury. Neither that case, nor other cases that utilize this deferential standard, have any applicability when a circuit court submits legal issues to a jury for decision. Ironically, this Court set aside the verdict of the jury as against the weight of the evidence. In this case, there was really nothing for the jury to decide. But, if there was, the jury's verdict finding that the exclusion was not brought to Mr. Grimmett's attention, too, is against the weight of the evidence.

[7] And, the insurance agent sends the policy to the policyholder with a cover letter warning him to: "Read the policy carefully." -- to boot.

effect, invalidating this conspicuous, plain and clear exclusion, is also subject to plenary, and *de novo* review. *See*, Webster County Solid Waste Auth. v. Brackenrich & Assocs., Inc., *supra*..

IV. THE DISPUTE AS TO THE MERITS

Respondent's attempt to justify the result below on appeal reveals that it is premised virtually entirely on the fact that the policyholder, Mr. Grimmett, claimed that he never read the policy. Respondent does not dispute that the exclusion was conspicuous, plain and clear; that it was prominently placed under the "EXCLUSIONS" heading in the policy; that the policy contained wording that warned the policyholder to "Read the entire policy carefully" because "various provisions in this policy restrict coverage"; that the policy was twice delivered to the policyholder long before the fatality; that he had every opportunity to read it but, because the insured simply chose not to read the policy, according to the Respondent, the foregoing circumstances are insufficient to make the exclusion enforceable. As the Respondent puts it: "...the insurer can still avoid liability by proving that the insured read and understood the language in question...." *See*, Respondent's Brief at 15.[8]

In its principal brief, Petitioner advanced a half dozen or more reasons why allowing the efficacy of a clear and unambiguous exclusionary provision to turn on whether the policyholder claims never to have read the policy is simply jurisprudentially unsupportable. It also reflects very bad public policy. But, in carefully examining the manner in which Respondent presents the argument on appeal, one cannot escape the conclusion that the rule for which Respondent contends is also impracticable, and utterly unworkable, as well.

[8] Respondent characterizes this as "off the hook". *See*, Respondent's Brief at 15. Since the issue here is supposed to be enforcing contracts as written, rather than "fishing" for insurance, the euphemism appears particularly inapropos.

When an insurer sends out a policy containing all of the terms, conditions, limitations and exclusions, the insurer must be able to presume that the policyholder will read it. There is literally no way an insurer can presage that the policyholder will not read the policy, or may not read some part of it that later becomes important. Consequently, there is no possibility at the time of issuance for an insurer to know whether something else must be done to bring the key provisions to the attention of the insured. That is especially true where, as here, a copy of the policy is accompanied by a letter which states: "Please read your policy carefully", and which further warns: "In the event of loss your insurance coverage will be controlled by the terms, conditions and exclusions of your policy", R.1141, but the insured just ignores the admonition. Under these circumstances, the insurer cannot know in advance that the policyholder will choose to disregard the admonition, and read nothing.

The further requirement that the Respondent would impose -- that the insured also "understood the language in question" -- is even more unrealistic. In a rhetorical sense, how can an insurer even know what a policyholder will understand? And, suppose the policy is sold to a policyholder with atypically low comprehension; or a policyholder with memory limitations; or any of the other scenarios that could lead to a claim that the policyholder did not read or did not understand the important terms of the policy. The rule for which Respondent contends essentially requires that the clear and unambiguous provisions of the insurance policy will be enforced only if the insurer, in every instance, sends out the agent, or someone else with the policy to explain its terms and provisions -- or risk having the insured later claim they never read or did not understand some key provision. And, even then, one can imagine the credibility disputes over whether the explanation session occurred, what was discussed, and what

understanding the policyholder achieved. In any event, that sort of requirement has never been part of insurance law in West Virginia, or elsewhere; and with good reason -- it makes no sense; it destroys predictability; it solves nothing.

Respondent premises her position virtually entirely on the 1987 decision of this Court in National Mutual Insurance Co. v. McMahon & Sons, Inc., 177 W.Va. 734, 356 S.E.2d 488 (1987). However, National Mutual is a completely different case. National Mutual involved an exclusion from liability insurance coverage widely known as the "property damage" exclusion.[9] This Court explicitly found that particular exclusionary language to be ambiguous, especially in the light of the specific facts and circumstances of that case. This Court stated that conclusion clearly as follows: "Unlike the circuit court, we do not find the language of this exclusion to be plain and unambiguous, especially when, as in the instant case, the exclusion is asserted in relation to real property." Id. at 740, 356 S.E.2d at 494. Given the finding of ambiguity, this Court went on to hold that the insurance policy exclusion must be construed in accordance with the "doctrine of reasonable expectations". The Court clearly limited its analysis to cases where the policy language is ambiguous, stating:

> "In West Virginia, the doctrine of reasonable expectations is limited to those instances, such as the present case, in which the policy language is ambiguous."

Id. at 742, 356 S.E.2d 496.

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[9] That exclusion has been a part of the standard commercial general liability insurance policy for many years, but the wording has changed over time. The version of the exclusion contained in the policy at issue in National Mutual provides that the insurance does not apply to:

"(j) To property damage to
(1) Property owned or occupied by or rented to the insured,
(2) Property used by the insured, or
(3) Property in the care, custody, or control of the insured or as to which the insured is for any purpose exercising physical control...."

Id. at 740, 356 S.E.2d at 494.

As such, the Court held:

> "Where ambiguous policy provisions would largely nullify the purpose of indemnifying the insured, the application of those provisions will be severely restricted."

Id.

By contrast, in the case *sub judice* it is undisputed that the exclusionary clause in issue is clear and unambiguous, as well as conspicuous, plain and clear. Consequently, the analysis in National Mutual is simply inapplicable.[10] *See*, e.g. Blake v. State Farm Mut. Auto. Ins. Co., 224 W.Va. 317, 685 S.E.2d 895 (2009); Blankenship v. City of Charleston, 223 W.Va. 822, 679 S.E.2d 654 (2009); Webster County Solid Waste Auth. v. Brackenrich & Assocs., *supra.*, 617 S.E.2d at 858-859.

Citing this Court's decision in Riffe v. Home Finders Associates, Inc., 205 W.Va. 216, 517 S.E.2d 313 (1999), Respondent points out that prior to the issuance of the original

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[10] The Respondent does not rely on Luikart v. Valley Brook Concrete & Supply, Inc., 216 W.Va. 748, 613 S.E.2d 896 (2005), probably because that case actually counsels that summary judgment should have been entered for American States without the necessity of a trial. *See*, Petitioner's Brief at 23-24. Instead, Respondent cites the interpretation of Luikart provided by the Pennsylvania federal district court in Canal Insurance Co. v. Sherman, 430 F.Supp.2d 478 (E.D.Pa. 2006). Respectfully, the Pennsylvania district court in that case misunderstood, and misinterpreted, and, therefore, misapplied this Court's decision in Luikart. In Canal, the federal court mistakenly held that an insurance policy exclusion which is clear and unambiguous, prominently and conspicuously displayed in the policy, and applicable to the loss is, nonetheless, unenforceable because it was not *also* explained to the insured. That interpretation is not consistent with the decision in Luikart, nor with any other West Virginia case. It is revealing to say the least that the Respondent readily acknowledges that the Canal decision is the "only case the Respondent could find...since Luikart, *supra.*, that has considered the issue of failure to disclose exclusions to an insured...." *See*, Respondent's Brief at 11. The solitariness of the Canal interpretation certainly buttresses the conclusion that the Canal Court was on the wrong track in its attempt to divine West Virginia insurance law. Quite to the contrary, in all of its decisions since Luikart, this Court has repeatedly reaffirmed that in order to be valid and enforceable, an exclusion from general liability coverage must be "conspicuous, plain, clear,...". *See*, e.g. West Virginia Employers' Mut. Ins. Co. v. Summit Point Raceway Assocs., Inc., 719 S.E2d 830 (W.Va. 2011) , *citing and quoting from* Webster County Solid Waste Auth. v. Brackenrich & Assoc., *supra.* ("...an insurer wishing to avoid liability on a policy purporting to give general or comprehensive coverage must make exclusionary clauses conspicuous, plain, and clear....").

commercial general liability policy, the agent sent the policyholder, Mr. Grimmett, a one page letter listing the basic types of property and liability coverages that were being offered, with applicable limits, and a quotation for the annual premium. *See*, R.1140; Respondent's Brief at 15. Respondent observes that the one page document "did not reference exclusions". *See*, Respondent's Brief at 16.[11] Respondent then argues that the subject exclusion, and, presumably all of the other exclusions as well, should not be enforceable because they are inconsistent with the one page offer letter. *See*, Respondent's Brief at 15-16. That argument is unavailing, if not preposterous, and utterly misapplies the reasoning of the Riffe case. At the outset, Riffe addresses an entirely different problem. That case did not involve conventional insurance. Rather, it involved the purchase by a homeowner of a plan or program that would presumably reimburse the homeowner for the cost of repairing conditions in the home that were required to be remediated upon sale of the property. Although the Court ultimately interpreted the plan to constitute "insurance" subject to West Virginia principles of insurance law, the product involved in Riffe bears absolutely no remote resemblance to typical commercial general liability insurance; especially a commercial policy provided on the standard Insurance Services Offices, Inc. ("ISO") commercial general liability insurance form -- the most widely used commercial form in the United States. Further, it is not apparent from the Riffe opinion whether there was actually a policy contract that contained terms and provisions governing the "insurance". Thus, Riffe provides no guidance on whether a clear, unambiguous, conspicuous exclusionary provision contained in a policy provided to the policyholder well in advance of the loss is or

[11] Of course, the one page letter also contained no other coverage provisions, either. Thus, if the coverage were to be interpreted according to what was contained in the one page offer letter, there would be no way to tell what the liability coverage covered or did not cover. That, of course, would be a senseless method of insurance coverage interpretation.

should be enforceable. Indeed, in Riffe this Court observed that it was "...not entirely clear from the record what policy language the [policyholder] saw before the plan was purchased." Id. at 222, 517 S.E.2d at 319. Conversely, there was clearly evidence in the record before the Court in Riffe that the homeowner had been provided with a brochure which purported to extend reimbursement coverage for "...THE COSTS OF REPAIRING OR REPLACING MECHANICAL AND STRUCTURAL SYSTEMS IN YOUR HOME WHICH [SIC] BECOME DEFECTIVE DUE TO NORMAL WEAR AND TEAR." Id. at 219, 517 S.E.2d at 316. The Court ultimately concluded on this basis that "considerations of ambiguity, reasonable expectations, exclusionary language, and conflicts with promotional materials may determine the rights of the parties under the contract...." Id. at 223, 517 S.E.2d at 320. Consequently, the Court determined that summary judgment was inappropriately rendered against the homeowner. It should be obvious that Riffe has no bearing on a proper determination of the issues in this case. Here, it is undisputed that this was a typical purchase of commercial liability insurance, in which the policyholder received a complete copy of the policy, containing all forms and provisions contained therein, well in advance of the loss. Given these circumstances, it is absurd to suggest that the insured was confused or could have been misled because the complete copy of the policy obviously differed greatly from a one page offer letter listing types of coverages, limits and a premium quotation. And, in case there could have been any basis for confusion, in this instance the agents sent out the policy with a cover letter clearly admonishing the policyholder that: "In the event of a loss your insurance coverage will be controlled by the terms, conditions and exclusions of your policy." P. Ex. 2, R.1141.

Respondent readily concedes in her brief, "...Mr. Grimmett was warned about reading his policy" in several other places as well, including on the first page of the liability form which states: "[the] [v]arious provisions of this policy restrict coverage. Read the entire policy carefully to determine rights, duties and what is and is not covered." R.1167.[12] Respondent makes the interesting, but totally banal argument that these admonitions are of no moment, because, according to Respondent: "...the most logical place to warn Mr. Grimmett about reading his policy...was on the first three pages of the policies, the declarations pages." *See*, Respondent's Brief at 19. Evidently, Respondent has overlooked that there is also an admonition in that place, too. In the center of the very first page of the Declarations, that accompanied the original (1995-1996) policy, R.1144, and in the same place on the first place of the Amended Declarations that accompanied the renewal (1996-1997) policy, R.1220, the following wording appears:

> "IN RETURN FOR THE PAYMENT OF THE PREMIUM AND SUBJECT TO ALL TERMS OF THIS POLICY, WE AGREE WITH YOU TO PROVIDE THE INSURANCE AS STATED IN THIS POLICY." (Emphasis supplied.)

Thus, Respondent's complaint about the placement of the repeated admonitions to "read the policy" is misplaced.

Finally, given the Respondent's trenchant attack on the efficacy of a clear and unambiguous insurance policy exclusion, conspicuously displayed in the policy provided to the insured, the counter-argument cannot close without reference to the legislative reaffirmation of the viability of properly included insurance policy exclusions set forth in W.Va. Code §33-6-

[12] Actually, Mr. Grimmett was cross-examined at trial regarding the number of times he had been warned to "read the policy carefully", whereupon he testified: "I was probably told a lot more than three times, if you read through the policy, time after time, that little print." (Emphasis supplied.) R.1075. Indeed, Mr. Grimmett conceded, "...it will tell you [to read the policy carefully] thousands of times...."

30(a) (2002) . In that statute, enacted not 10 years ago, our Legislature mandated that: "Every insurance contract shall be construed according to the entirety of its terms and conditions as set forth in the policy and as amplified, extended or modified by any rider, endorsement or application attached to and made a part of the policy." To the extent that the circuit court in this case invalidated a policy exclusion, not to mention a very standard, typical exclusion which has long been a part of the standard commercial liability insurance policy, the circuit court's ruling violates the clear mandate of W.Va. Code §33-6-30(a).[13]

[13] Leaving no argument unasserted, no matter how inapposite, Respondent suggests in her brief that none of the exclusions in the policy should be enforced because the premium for the insurance "...does not show any reduction for exclusions per Luikart." *See*, Respondent's Brief at 16. Aside from the fact that Luikart says absolutely nothing about premium reductions, this point also conflicts with the provisions of W.Va. Code §33-6-30(c) in which our Legislature ordained, in relevant part, as follows: "Nothing in this chapter may be construed as requiring specific line item premium discounts or rate adjustments corresponding to any exclusion, condition, definition, term or limitation in any policy of insurance, including policies incorporating statutorily mandated benefits or optional benefits which as a matter of law must be offered."

RESPONSE TO CROSS-ASSIGNMENTS OF ERROR

INTRODUCTION

Respondent's brief contains cross-assignments of error on three points. First, observing that the American States policy issued to Grimmett was not countersigned by a resident West Virginia agent as required by the version of W.Va. Code §33-12-11 as it existed in 1995-1996, Respondent, characterizes the policy as "illegal".[14] However, rather than contending that the policy is, therefore, void and unenforceable, Respondent argues instead that the policy should be enforced, but that the insurer must be estopped to assert "policy defenses". *See*, Respondent's

---

[14] In her brief, Respondent acknowledges that the requirement for countersignature by a resident agent existed "...up until December 31, 2004". (Emphasis added.) *See*, Respondent's Brief at 18. The elimination of the countersignature requirement which formerly appeared in W.Va. Code §33-12-11 is more interesting than that. Prior to 2004, W.Va. Code §33-12-11 provided:

> "No contract of insurance covering a subject of insurance, resident, located or to be performed in this state, shall be executed, issued or delivered by any insurer unless the contract or, in the case of an interstate risk, a countersignature endorsement carrying full information as to the West Virginia risk, is signed or countersigned in writing by a licensed resident agent of the insurer, except that excess line insurance shall be countersigned by a duly licensed excess line broker."

In 2004, the Legislature amended W.Va. Code §33-12-11 to eliminate the countersignature requirement. The amendment was accomplished by adding a proviso to the statute, which explicitly states:

> "*Provided*, That the countersignature requirements of this section shall no longer be required for any contract of insurance executed, issued or delivered on or after the thirty-first day of December, two thousand four."

W.Va. Code §33-12-11 (2004). The available legislative history interestingly shows that the amendment phasing out the resident agent countersignature requirement was recommended by the Insurance Commissioner and adopted "...in light of recent rulings in other jurisdictions which have declared similar requirements unconstitutional." *See*, *West Virginia House Summary*, 2004 Reg.Sess., H.B. 4303, H.R.Jud.Comm. February 24, 2004 (A copy of the Abstract of Committee Substitute is attached hereto for convenience). In all likelihood, such provisions failed to pass scrutiny under the "Privileges and Immunities Clause" contained in Article IV, which, of course, provides that: "The Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States." That provision has been construed to mean that all states must "treat all citizens, resident and nonresident, equally." Baldwin v. Fish & Game Comm'n of Montana, 436 U.S. 371 at 383, 98 S.Ct. 1852 (1978). As applied to the insurance industry. *See also*, Silver v. Garcia, 760 F.2d 33 (1st Cir. 1985) ("...the ability of a citizen in one state to act as an insurance [agent or broker] in another state must be considered a fundamental right or privilege protected by the privileges and immunities clause." 760 F.2d at 36). Thus, among other shortcomings in the Respondent's argument on this point, the statutory requirement that was departed from by the agent is probably unconstitutional anyway.

Brief at 28-35. The circuit court rejected this argument, concluding, in substance, that the policy is valid. *See*, Order of June 17, 2011, R.925-930.

Second, observing that the instant commercial general liability policy provides both an "occurrence" limit ($1 million), and an annual "aggregate" limit ($2 million), like essentially every other such standard commercial general liability policy, Respondent argues that this is ambiguous and confusing, and the limit applicable to this single "occurrence" should be construed to be $2 million, the annual "aggregate" limit. Of course, the circuit court recognized that the applicable limit per "occurrence" is stated to be $1 million, found nothing ambiguous about the $2 million "aggregate" limit, and rejected the Respondent's argument to the contrary. Id.

Third, Respondent contends that the circuit court erred in refusing to instruct the jury on the so-called "doctrine of reasonable expectations". *See*, Nat'l Mut. Ins. Co. v. McMahon & Sons, *supra*. Since the circuit court found the exclusionary language in the policy to be clear and unambiguous, and the doctrine of reasonable expectations only applies when the policy language is ambiguous, the circuit court refused to so instruct the jury.

These issues are addressed hereinafter, *seriatim*.

I. The Commercial General Liability Policy Must Be Enforced According To Its Terms And Provisions, Regardless Of Whether Or Not It Was Countersigned By A Resident West Virginia Agent

Relying in part on evidence that is in the circuit court record and some material that is totally *dehors* the record, Respondent argues that the policy issued to Grimmett Enterprises is "illegal", because it is not countersigned by a resident West Virginia agent in violation of W.Va.

Code §33-12-11.[15] Notably, Respondent concedes that American States is properly licensed as an insurer in the State of West Virginia. *See*, Respondent's Brief at 34. Further, Respondent does not contend that the standard commercial general liability policy issued to Grimmett, which is written on the ISO form, is not approved for use by the West Virginia Insurance Commissioner. Rather, Respondent points to the solitary technical departure from the now repealed version of W.Va. Code §33-12-11 that required countersignature by a West Virginia resident agent. On that hyper-technical basis, the Respondent first characterizes the insurance policy as an "illegal contract", then, makes the quantum leap that the policy should be enforced, but the insurer must be "estopped from being able (sic) to raise any policy defenses...." *See*, Respondent's Brief at 35.

At the outset, Respondent's standing to complain about technical non-compliance in the issuance of the policy is doubtful -- she did not purchase the policy. But, assuming she can even raise the issue, the argument is otherwise entirely baseless. At the threshold, Respondent thoroughly misapprehends the concept of an "illegal contract". Even if there was technical noncompliance with W.Va. Code §33-12-11, Respondent mischaracterizes the insurance policy as an "illegal contract." It is well recognized that an "illegal contract" is one which is "prohibited because the performance, formation, or object of the agreement is against the law." *Black's Law Dictionary (8th Ed.)*. The issuance of a standard commercial general liability policy,

[15] For example, Respondent asserts that the agent who issued the policy "...was provided no training by [American States] regarding the laws and regulations relating to West Virginia insurance practices." *See*, Respondent's Brief at 34. For that assertion, Respondent cites a portion of a deposition that was never made part of the record below, and is simply stuck on the back of Respondent's appellate brief. That practice, of course, is utterly inappropriate and in disregard of the Appellate Rules. *See*, W.Va.R.A.P., Rule 6(a), (b) and (c). Rule 6(b) states: "Anything not filed with the lower tribunal shall not be included in the record on appeal unless the Court grants a motion for leave to supplement the record on appeal for good cause shown."

including one which does not cover bodily injury to employees of the policyholder, is plainly not in derogation of any aspect of the law. In fact, this Court recently held that there is no legal requirement that even the private, corporate successor to the West Virginia Workmen's Compensation Fund must provide employer liability coverage in the commercial general liability insurance policies that it issues. *See*, West Virginia Employers' Mut. Ins. Co. v. Summit Point Raceway Assocs., Inc., 719 S.E.2d 830 (W.Va. 2011) There is certainly no argument for any requirement that standard insurers like American States, issuing standard commercial liability insurance, must offer or provide employer liability coverage. *See*, Luikart v. Valley Brook Concrete & Supply, Inc., 216 W.Va. at 754, 613 S.E.2d at 902 ("an insurer has no statutory duty to offer stop gap [employer liability] insurance coverage.") (*citing* Erie Ins. Prop. & Cas. Co. v. Stage Show Pizza, JTS, Inc., 210 W.Va. 63, 553 S.E.2d 257 (2001) (recognizing that the standard commercial general liability policy typically does not provide employer liability coverage.)).

In any event, if as the Respondent contends the insurance policy were an "illegal contract", the appropriate remedy would be to declare the insurance policy void and unenforceable. Here, quite to the contrary, Respondent attempts to enforce the policy, but without "policy defenses". That result is literally unprecedented.

Not surprisingly, none of the cases cited by Respondent in her brief provide any remote authority for the proposition that because of noncompliance with a statutory or regulatory requirement in the issuance of the policy, a court may properly enforce the coverage, but foreclose all policy defenses. The case of West v. West Virginia Department of Transportation, Division of Highways, 224 W.Va. 563, 687 S.E.2d 346, (2009), affirmed by Memorandum

Decision, February 25, 2011, is entirely distinguishable. In that case, a signed liability insurance policy issued to the Department of Highways contained an unsigned exclusionary endorsement. The circuit court held that the signed policy was valid and enforceable, but that the unsigned endorsement was not properly enforceable to foreclose coverage. This Court affirmed. Obviously, that situation is completely different than the situation in this case, in which a signed policy is not *countersigned* by a resident agent. Further, here there is no unsigned endorsement. Rather, the key exclusion is one of a series of standard exclusions contained in the basic policy form. Nothing in the West decision suggests that the policy can properly be enforced, but without "policy defenses". Similarly, none of the other authorities or case law from other jurisdictions provides any remote support for Respondent's contention that the policy in this instance may be enforced, but all defenses foreclosed.

Respondent's effort to derive an estoppel from a technical noncompliance with the countersignature requirement is fundamentally at odds with West Virginia law. The principles of estoppel in insurance matters were fully explicated by this Court in the case of Potesta v. U.S. Fidelity & Guaranty Co., 202 W.Va. 308, 504 S.E.2d 135 (1998). In that case, Justice Davis explained that:

> "Estoppel applies when a party is induced to act on to refrain from acting to [his] her detriment because of [his] her reasonable reliance on another party's misrepresentation or concealment of a material fact...Estoppel is properly invoked to prevent a litigant from asserting a claim or a defense against a party who has detrimentally changed his [her] position in reliance upon the litigant's misrepresentation or material fact." (Emphasis the Court's.)

Id. at 316, 504 S.E.2d at 143 (*quoting from* Ara v. Erie Ins. Co., 182 W.Va. 266, 270, 387 S.E.2d 320, 324 (1989)). Further, in the law of insurance:

> "...the elements of an estoppel against an insurer are conduct or acts on the part of the insurer which are sufficient to justify a reasonable belief on the part of the insured that the insurer will not insist on a compliance with the provisions of the policy and that the insured in reliance upon such conduct or acts has changed his position to his detriment."

Id. Nothing remotely akin to these elements is asserted here. Respondent, who did not even purchase the policy in the first place, merely complains of a technical non-compliance, which does not approach a proper legal to invoke estoppel. And, even if the doctrine of estoppel could properly be invoked, it would still not assist Respondent. The Court made quite clear in Potesta that with a few exceptions not here involved:

> "...the principles of...estoppel are inoperable to extend insurance coverage beyond the terms of an insurance contract."

Syl.pt.5.

It cannot be gainsaid that Respondent's estoppel argument fails in this case.

II. The Applicable Limit Of Liability Insurance Is The $1 Million Per "Occurrence" Limit

The issue of whether the $1 million per "occurrence" limit, or the $2 million annual "aggregate" limit is applicable to the single claim underlying this matter is irrelevant, because there is not coverage for the claim. Yet, there is at least some value in the Respondent having advanced the argument -- it underscores this Court's persistent admonition that the benefits and protections of the insurance policy must be construed according to its clear terms and provisions, rather than on some hypothecated construction of what "a reasonable prudent policyholder" might conclude. *See,* Witt v. Sutton, *supra.*[16] As the circuit court recognized, the limits of coverage are not the least bit ambiguous or confusing.

[16] Respondent premises much of her argument on what Mr. Grimmett had to say at trial about the limits of his coverage. *See,* Respondent's Brief at 36-37. As Respondent has repeatedly inculcated, Mr. Grimmett never read his insurance policy. Consequently, what he thinks is *a fortiori* of no moment.

The limits of the liability insurance are stated in the Declarations. R.160. Therein, the Declarations make clear that there is a $1 million limit for "LIABILITY AND MEDICAL EXPENSES"; and a "aggregate" limit which is $1 million for "PRODUCTS – COMPLETED OPERATIONS AGGREGATE LIMIT", and $2 million for "ALL OTHER INJURY OR DAMAGE (ALL OCCURRENCES)".

Then, the subject of limits of liability coverage is further addressed in Section D, entitled "LIABILITY AND MEDICAL EXPENSES LIMITS OF INSURANCE" which appears on page 7 of 11 of the basic policy form. R.189. Therein, the clear and unambiguous language of the policy explains:

> "1. The Limits of Insurance shown in the Declarations and the rules below fix the most we will pay regardless of the number of:
>
> A. Insureds;
> B. Claims made or 'suits' brought; or
> C. Persons or organizations making claims or brining 'suits'.
>
> The most we will pay for the sum of all damages because of:
>
> a. 'Bodily injury', 'property damage' and medical expenses arising out of any one 'occurrence'; and
> b. 'Personal injury' and 'advertising injury' sustained by any one person or organization;
>
> Is the Liability and Medical Expenses limit shown in the Declarations."

Thus, the language of the policy makes absolutely clear that the $1 million shown as the "Liability and Medical Expenses limit" is applicable to all bodily injury "arising out of any one 'occurrence'...."[17]

---

[17] The term "occurrence" is defined in the Definitions section of the policy, R.192, as follows:

> "'Occurrence' means an accident, including continuous or repeated exposure to substantially the same general harmful conditions."

Further, contrary to Respondent's assertion that the term "aggregate" is undefined, *see*, Respondent's Brief at 39, the policy goes on to explain the "Aggregate Limits" in great detail. Section D.4. explains as follows:

> "The most we will pay for:
>
> a. Injury or damage under the 'products completed operations hazard' arising from all 'occurrences' during the policy period is the Liability and Medical Expenses limit; and
> b. All other injury or damage, including medical expenses, arising from all 'occurrences' during the policy period is twice the Liability and Medical Expenses limit. This limitation does not apply to 'property damage' to premises rented to you arising out of fire or explosion."

Thus, the policy makes it absolutely clear under the appropriate heading "Aggregate Limits" the maximum "aggregate" coverage for "products completed operations hazard" is the basic $1 million policy limit, no matter how many "occurrences" take place during the policy period; and, for any other injury or damage, other than "products completed operations hazard", the policy provides an annual aggregate of $2 million applicable to "...all 'occurrence' during the policy period...."[18], [19] Nothing could be clearer. The effort to torture an ambiguity based on the aggregate limit of $2 million is unavailing.

III. The So-Called "Doctrine Of Reasonable Expectations" Is Inapplicable In This Case Because The Relevant Exclusionary Language Is Clear And Unambiguous

Despite having conceded repeatedly that the pertinent exclusionary language of the insurance policy is plain and unambiguous, as well as conspicuous, plain and clear, Respondent argues, nonetheless, that the jury should have been instructed on West Virginia's so-called

[18] Again, this is the standard wording contained in the then current ISO commercial general liability form. Respondent, of course, cites no case that holds that this typical, standard wording is ambiguous.

[19] Almost comically, Respondent emphasizes that the "*only* place in the entire policy 'aggregate' is discussed...is...under Section D, Liability and Medical Expense Limits of Insurance...." *See,* Respondent's Brief at 38. Where else would the limits of insurance be addressed, other than in the section of the policy that addresses "Limits of Insurance"?

"doctrine of reasonable expectations". It is difficult to perceive at the outset how Respondent could have been aggrieved by any error or omission in the jury instructions, since Respondent is the "verdict winner" in any event.[20] Thus, any such purported error is harmless. *See*, Kessel v. Leavitt, 204 W.Va. 95, 511 S.E.2d 720 (1998); Skaggs v. Elk Run Coal Co., Inc., 198 W.Va. 51, 479 S.E.2d 561 (1996).

Moreover, Respondent's argument regarding the "doctrine of reasonable expectations" disregards well-settled West Virginia insurance law. This Court has repeatedly held that if the relevant exclusionary language of the insurance policy is clear and unambiguous, the doctrine of reasonable expectations has no part in the coverage analysis. *See*, e.g. Blake v. State Farm Mut. Auto. Ins. Co., 224 W.Va. 317, 685 S.E.2d 895 (2009); Blankenship v. City of Charleston, 223 W.Va. 822, 679 S.E.2d 654 (2009). This Court just reaffirmed that well-settled principle this very term of court. *See*, West Virginia Employers' Mut. Ins. Co. v. Summit Point Raceway Assocs., Inc., *supra*. As stated, it is uncontested in this case that the language of the pertinent exclusion was clear and unambiguous, as well as conspicuous, plain and clear. Thus, Respondent's argument regarding the doctrine of reasonable expectations is not well taken, and must be rejected.

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[20] Rule 61 of the W.Va.R.C.P. states as follows:

> "No error in either the admission or the exclusion of evidence and no error or defect in any ruling or order or in anything done or omitted by the court or by any of the parties is ground for granting a new trial or for setting aside a verdict or for vacating, modifying or otherwise disturbing a judgment or order, unless refusal to take such action appears to the court inconsistent with substantial justice. The court at every stage of the proceeding must disregard any error or defect in the proceeding which does not affect the substantial rights of the parties."

CONCLUSION

Respondent's cross-assignments of error are without merit.

Respectfully submitted,

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West Virginia House Bill Summary, 2004 Reg. Sess. H.B. 4303

West Virginia House Bill Summary, 2004 Regular Session, House Bill 4303

February 24, 2004
West Virginia Legislature
2004

HOUSE COMMITTEE ON THE JUDICIARY

ABSTRACT

COUNSEL: WILLIAMS

BILL NUMBER: H. B. 4303

SPONSORS: Delegates H. White, G. White, Azinger, Frich and Hrutkay

SHORT TITLE: Relating to Gramm-Leach-Bliley and reciprocity.

DATE INTRODUCED: February 24, 2004

CODE SECTIONS AFFECTED: §33-12-26 (repeal); §33-3-33 (amend); §33-12-3 (amend); §33-12-8 (amend); §33-12-10 (amend); §33-12-18 (amend); §33-12-23 (amend); §33-12-27(amend); §33-12-28 (amend); §33-12-30(amend); §33-12-31 (amend); §33-12-32 (amend); § 33-37-1 through 7(amend); adds § 33-37-8 (new)

ABSTRACT OF INTRODUCED BILL: The bill makes various changes to Chapter 33 to bring it into compliance with Gramm-Leach-Bliley Act of 1999 (GLBA). The bill also contains some other provisions which make the following changes:
(1) The bill would amend article 37 to allow for the licensure of "insurance agencies" as managing general agents (MGA). At present, while individuals are licensed, agencies are not.
(2) The proposed amendments throughout the bill also reflect certain changes in terminology, to be consistent with these modifications. By example, an insurance agent, is now referred to as an "individual insurance producer".
(3) The bill would repeal the provisions of Code § 33-12-26, which provides for insurance vending machines for trip insurance.
(4) The bill would clarify that a non-resident insurance producer requires a WV license whenever they are issuing or selling an insurance contract that covers an insured risk which is located in West Virginia or will be performed in West Virginia.
(5) The bill amends and enhances the continuing education requirements for agents.
(6) The bill provides that after June 2002, that no new service representative permits will be issued (the Banking and Insurance Committee previously recommended an amendment to change the date).
(7) The bill would include additional language to bring limited licensees for rental car companies into compliance with GLBA.

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§33-12-26 (repeals) - This code section governs insurance vending machines. It is being repealed as obsolete. There are no insurance vending machines remaining in West Virginia.

§33-3-33 (amends) - The bill proposes technical changes only, by changing the word "excess" to "surplus" and changing an existing reference to "resident excess lines broker" to "surplus lines licensee". As amended, it would provide that a nonresident surplus lines licensee may collect a policy surcharge.

§33-12-3 (amends) - The purpose of these recommended changes is to clarify that a person or entity needs a license if he, she or it is selling soliciting, negotiating, issuing or receiving any direct or indirect commission or consideration from insurance policies related to subjects that are resident to, located in this state or to be performed in this state.

§33-12-8 (amends) - The bill would amends the section to provide that an agent (individual insurance producer) must complete 24 hours of continuing insurance education every 2 years. Current law would require that 24 hours of continuing education as opposed to twenty-four hours every 3 years.

§33-12-10 (amends) - The modifications recommended by the bill reflect a technical change which deletes reference to excess line broker. This class of brokers would be governed prospectively by the proposed provisions of article 12c. It also changes the associated reference to individual agents to individual producers.

§33-12-18 (amends) - Incorporates a technical change to the title of section and other technical changes.

§33-12-23 (amends) - Reflects technical clean-up to substitute the term "individual insurance producer" for "resident agent."

§33-12-27 (amends) - Technical changes only.

§33-12-28 (amends)- Provides that after June 2, 2002, that no service representative license will be issued unless it is a renewal of an existing license. This change is made as the law is outdated.

§33-12-30 - Mostly technical.

§33-12-31 - Technical changes only.

§33-12-32 - Technical changes, and clarifies that a nonresident may sell automobile rental coverage if licensed.

MANAGING GENERAL AGENTS

The purpose of this provision of the bill is to amend various provisions in article 37, of chapter 33. This article governs agencies. The bill allows insurance agencies to operate as managing general agents. The bill gives the article the title - Managing General Agents Act.

The current statute does not allow agencies to operate as managing general agents, nor does it provide a means for the Insurance Commissioner to determine who may be designated to operate as managing general agents in West Virginia. With the adoption of the Producer Licensing Model Act, agencies may be licensed effective July 1, 2004 (§ 33-12-6b), and will then be eligible to act as managing general agents. The amendment will require managing general agents to become licensed and will further provide a means for the Insurance Commissioner to determine who is acting as managing general agents in West Virginia.

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33-37-1: The bill's modifications would add definitions for the terms "home state," "insurer," and "person;" and revises the definition for "managing general agent."

33-37-2: This amendment provides that a domestic insurer may not permit any person to act in the capacity as a managing general agent unless the person is licensed in this state to act as a managing general agent; and a person may not act as a managing general agent in this state with respect to risks located in this state unless the person is state-licensed as an insurance producer.

The following requirements are also added to **§33-37-2:**
- The Insurance Commissioner shall promulgate an application fee for the license. The amount shall be from $500 to $1,000 and a renewal fee from $200 to $1000, for placement into a special fund, the Insurance Tax Fund;
- An applicant for a managing general agent license is deemed to have designated the W. Va. Secretary of State as agent for service of process;
- The commissioner may require a bond;
- The commissioner may require an errors and omission policy; and
- The Secretary of State is the agent of service.

33-37-3: The amendment provides that a managing general agent must hold all funds maintained in a fiduciary capacity with "an FDIC insured institution" (instead of "a bank which is a member of the federal reserve system"). Also, provides that the managing general agent may only use advertising on behalf of an insurer that has been approved in writing by the insurer.

33-37-4: The amendment requires the insurer to maintain on file audited financial reports from the two most recent fiscal years that demonstrate that the managing general agent has a positive net worth. Consolidated annual reports must show a worksheet that breaks down the relevant amounts for each entity and provides appropriate explanations.

33-37-6: The amendments to this section raise the penalty amount for a violation of the article, or a rule promulgated pursuant to it, from $1000 to up to $10,000; and allows the commissioner to order a managing general agent to reimburse an insurer's policyholders or creditors for losses caused by the MGA. The MGA would also be subject to a civil suit for damages caused the insurer or its policy holders, creditors and/or a receiver of the insurer.

33-37-7: The amendments reflected in bill are technical changes only.

33-37-8: This is a new section which directs that the amendments to the article are to apply to the services of MGAs on and after July 1, 2004.

ABSTRACT OF SUGGESTED BANKING & INSURANCE COMMITTEE AMENDMENTS: The Banking and Insurance Committee recommended several technical changes, and amended the last date for the issuance of service representative licenses from 06-01-02 to 07-01-04. Banking and Insurance also noted that a title amendment was needed, and proposed such an amendment.

ABSTRACT OF COMMITTEE SUBSTITUTE: The proposed Committee Substitute incorporates the recommended technical changes recommended by the Banking and Insurance Committee, and makes certain other technical changes in the bill. Further, the Committee Substitute makes certain other modifications to 33-12-11,

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33-12-23, and 33-12c-24 to reflect certain Insurance Commission recommended amendments to phase out countersignature requirements currently reflected in those sections, in light of recent rulings in other jurisdictions which have declared similar requirements unconstitutional.

TITLE: Amended Title reflected in Committee Substitute, including additional appropriate references to the additional modifications to §33-12-11 and §33-12c-24, which were not included in the original bill.

FISCAL NOTE: None.

INTERNAL OPERATIVE DATE: None.

EFFECTIVE DATE: Regular.
WV H.D. B. Summ., 2004 Reg. Sess. H.B. 4303

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IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

No. 11-1186

AMERICAN STATES INSURANCE COMPANY, Defendant Below, Petitioner

v.

BARBARA SURBAUGH, Administrator of the Estate of Gerald Kirchner, Plaintiff Below, Respondent

---

Appeal from the Circuit Court of Greenbrier County
The Honorable Joseph C. Pomponio, Jr.
Civil Action No. 97-C-241

CERTIFICATE OF SERVICE

I hereby certify that I have served a true and correct copy of the foregoing pleading, **Petitioner's Reply Brief and Response to Cross-Assignments of Error** to the following counsel via first class, U.S. Mail on February 29, 2012:

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