

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

No. 12-0688

**DANIEL W. THOMAS, ANGELA Y. THOMAS,
Individually and ANGELA Y. THOMAS, as mother and
next friend of LUKE D. THOMAS, an infant,
Petitioner,**

v.

**WILLIAM RAY MCDERMITT and STATE FARM MUTUAL
AUTOMOBILE INSURANCE COMPANY,
Respondents.**

***AMICUS CURIAE* BRIEF OF THE WEST VIRGINIA INSURANCE COMMISSIONER
IN SUPPORT OF THE RESPONDENTS, WILLIAM RAY MCDERMITT AND STATE
FARM MUTUAL AUTOMOBILE INSURANCE COMPANY'S BRIEF FOR REVERSAL
OF THE CIRCUIT COURT'S RULING ON THE CERTIFIED QUESTION**

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II. STATEMENT OF *AMICUS CURIAE*

The “Insurance Commissioner of West Virginia” is the state agency charged by the West Virginia Legislature to regulate the insurance industry and its activities in West Virginia and to otherwise enforce the provisions of the state insurance code. *See* W. Va. Code § 33-2-3(a). The Insurance Commissioner’s area of regulation includes, *inter alia*, the investigation, examination and oversight of the financial status of insurers and overall authority to review any phase of the operations of an insurer in this state (*see* W. Va. Code §§ 33-2-3a, 33-2-9); the licensing of insurers transacting insurance in West Virginia (*see* W. Va. Code § 33-3-1 *et seq.*); the approval of all forms used by an insurer in this state (*see* W. Va. Code § 33-6-9); the approval of rates charged by an insurer in this state (*see* W. Va. Code § 33-20-1 *et seq.*); the licensing of insurance producers doing business in this state (*see* W. Va. Code § 33-12-1 *et seq.*); and the investigation of insurance fraud and other crimes related to the business of insurance to assist in the detection and prosecution of such crimes (*see* W. Va. Code § 33-41-1 *et seq.*).¹ The Governor appoints the Insurance Commissioner by and with the advice and consent of the Senate. *See* W. Va. Code § 33-2-1.

The Insurance Commissioner submits this *amicus curiae* brief pursuant to West Virginia Rule of Appellate Procedure 30(a) for the purpose of emphasizing his statutorily mandated responsibilities and duties, his regulatory authority concerning the issues contained herein, and to provide insight and guidance concerning the referenced promulgated statutes and rules that fall under the Commissioner’s regulatory authority, particularly with respect to implementation of statutory and rule mandates concerning uninsured and underinsured insurance coverage

¹ The McCarran-Ferguson Act of 1945, codified at 15 U.S.C. § 1011 *et seq.*, allows states to regulate the insurance industry without interference from federal regulation unless federal law expressly provides otherwise. More specifically, 15 U.S.C. § 1012(b) states, in relevant part, “No Act of Congress shall be construed to invalidate, impair, or supersede any law enacted by any State for the purpose of regulating the business of insurance[.]”

contained in automobile insurance policies. The Insurance Commissioner wishes to respectfully inform this Honorable Court of his perspective in regards to implementation of uninsured and underinsured coverage offers and the commercially reasonableness of the same.

III. CERTIFIED QUESTION PRESENTED

Upon information and belief, the instant appeal arises out of a civil action filed in the Circuit Court of Mason County (“Circuit Court”) as a result of injuries sustained in an automobile accident. Because the injuries sustained by the Petitioners exceeded the liability coverage of the Respondent, McDermitt, an underinsured motorist situation arose. There does not appear to be underinsurance coverage contained in the Petitioner’s automobile insurance policy issued by Respondent, State Farm Mutual Automobile Insurance Company. Petitioners disputed whether a “knowing and intelligent” waiver of insurance coverage occurred by Petitioners and whether a commercially reasonable offer was made to them by Respondent, State Farm Mutual Automobile Insurance Company. (J.A. at 5-7). Consequently, the Circuit Court of Mason County certified the following question (J.A. at 517) to this Court pursuant to W.Va. Code §58-5-2:

Whether an insurance company’s failure to use the West Virginia Insurance Commissioner’s prescribed forms pursuant to W.Va. Code §33-6-31d results in underinsured motorists coverage being added to the policy as a matter of law in the amount the insurer was required to offer or merely results in the loss of the statutory presumption and a reversion to the lower standards expressed in *Bias*², which existed at common law prior to the enactment of W.Va. Code §33-6-31d.

² *Bias v. Nationwide Mut. Ins. Co.*, 179 W.Va. 125, 365 S.E. 2d 789 (1987).

IV. ARGUMENT

The standard of review has been stated by this Court as the following in *Burrows v. Nationwide Mut. Ins. Co.*, 215 W. Va. 668, 672, 600 S.E.2d 565, 569 (2004). “This Court employs a plenary standard of review when we answer certified questions. In Syllabus Point 1 of *Light v. Allstate Ins. Co.*, 203 W.Va. 27, 506 S.E.2d 64 (1998), we held that ‘[a] de novo standard is applied by this Court in addressing the legal issues presented by a certified question from a federal district or appellate court.’ We have held that ‘where the issue . . . is clearly a question of law or involving an interpretation of a statute, we apply a *de novo* standard of review.’ Syllabus Point 1, *Chrystal R.M. v. Charlie A.L.*, 194 W.Va. 138, 459 S.E.2d 415(1995). 213 W.Va. at 594-95, 584 S.E.2d at 228-29.” *Id.*

Any review of the substantive issue in the case *sub judice*, ultimately begins with *Bias v. Nationwide Mut. Ins. Co.*, 179 W.Va. 125, 365 S.E.2d 789 (1987). In that case, this Court determined that making such offer for underinsured coverage was mandatory, the information needed to be provided in a commercially reasonable form in order to provide a knowing and informed decision, either accepting or rejecting coverage, to the consumer and failure to prove the same would cause coverage to be included by law. *Id.*

By way of background and as will be discussed further herein, the Insurance Commissioner’s Office has on several occasions since *Bias v. Nationwide Mut. Ins. Co.*, 179 W.Va. 125, 365 S.E.2d 789 (1987) (requiring a commercially reasonable offer of UIM coverage and a knowing and intelligent waiver or rejection thereof) and the adoption of West Virginia Code §33-6-31d (among other issues contained codification of UIM mandatory offer requirement) created and disseminated Informational Letters (“IL”) that attempt to provide guidance or other reference in regards to issues or regulatory authority that the Insurance

Commissioner deems necessary to disseminate and make public. Since the origin of the IL concerning UIM rejection forms, the Commissioner has put forth minimum criteria that needed to be in each of the required forms. The Commissioner has never stated that lack of use of the exact form was an automatic reversion to coverage at the applicable limits. The Commissioner believes the *Bias*³ standard and/or sections of W.Va. Code §33-6-31d provide a clear analysis provision taken together that must be performed for those who do not provide the minimum requirements of the IL or the referenced code section or do not use the forms in their exactitude if there is an interpretation that requires a complete and absolute copy of the form provided by the Commissioner. As posited herein, an absolute replica use of the forms, as published by the Commissioner, requirement has not been clearly established as the standard.

A. The West Virginia Offices of the Insurance Commissioner's Informational Letters and implementation posture has been intended to be a "floor" for UIM coverage offer compliance

The original Informational Letter No. 88 was made available to the public on or about July 1993. The IL No. 88 contained information concerning "All Insurers Offering Any Automobile Bodily Injury Liability or Automobile Property Damage Liability Coverage" regarding "Forms for Mandatory Offer of Optional Limits of Automobile Uninsured and Underinsured Coverage". The IL No. 88 references West Virginia House Bill 2580 that became effective on April 10, 1993 which was to become West Virginia Code §33-6-31d.⁴ Clearly the Legislature entrusted the implementation of the statute to the Commissioner and what the

³ Id.

⁴ West Virginia Code §33-6-31d(a) states in part: "(a) Optional limits of uninsured motor vehicle coverage and underinsured motor vehicle coverage required by section thirty-one [§33-6-31] of this article shall be made available to the named insured at the time of initial application for liability coverage and upon any request of the named insured on a form prepared and made available by the Insurance Commissioner. The contents of the form shall be prescribed by the commissioner..."

Commissioner deemed necessary to be contained within the forms with guidance concerning mandatory content.

IL No. 88 specifies under the Section entitled “**Mandatory Contents of Form**” on Page 2, the following:

H.B. 2580 specifies that at a **minimum** [emphasis added] the form must:

- 1) Inform a named insured of the optional coverages offered;
- 2) Inform the named insured of the rate calculation for the optional coverages including amount of coverage and the number of vehicles; and
- 3) Give the named insured the option to reject the optional coverage.

IL No. 88 goes on at the end of Page 3 into Page 4 and states:

...The insurer must complete the upper portion Form A or Form B for each named insured notified in order to make an effective offer of optional UM and UIM coverages. As to each named insured notified, the insurer must provide: 1) The number of vehicles covered by the policy; 2) Whether there is a multi-car discount used in the premium calculation; 3) The agent’s name (If the insurer is a direct marketer and no agent is used, the insurer should type in “none”); 4) The policy number; 5) the name insured’s existing coverage level(s) (if there is no existing coverage the insurer should type in “none”); and 6) the policy period (e.g. 3, 6, or 12 months); 7) the premium amount for that policy period which would apply to each optional UIM and UM coverage offered by the insurer for which the named insured is eligible.

IL No. 88 in attempting to implement the statutory changes provided a “Frequently Asked Questions” section to provide guidance concerning the use of the forms promulgated. The IL

No. 88 does provide some comment concerning implementation of the forms.⁵ However, upon review there appears to be some inconsistency that can be read into the questions which were only a good faith attempt to explain implementation. Obviously, the intent was to make sure there was enough basic information that allows the consumer to make an informed decision. While some of the questions appear to anticipate issues, they are not intended to be comprehensive, nor could they be, given the various issues that could be raised concerning the same. For instance, the IL No. 88 does not clarify if the information could be provided in a way that wasn't crowded or complicated if that would continue to be an issue or if pagination issues could clearly be reconciled. As to the "at a minimum" requirement, nowhere contained therein was an express exclusion of the ability to add more pertinent information if it could be done in a commercially reasonable manner. The General Counsel at the West Virginia Offices of the Insurance Commissioner at the time IL No. 88 was drafted has confirmed the same. (J.A. at 448-449).

IL No. 88 essentially concludes with "[s]ubsequent to this letter, the attached forms will be adopted into administrative regulations." It appears, however, that the forms as stated by the then Insurance Commissioner were never formally adopted into administrative rules of the Insurance Commissioner. Consequently, there does not appear to be any legislative intent to

⁵ 1. Q. Form A provides only space for a premium that is an aggregate of the bodily injury per person, bodily injury per accident, and property damage coverages. Can the insurer break this down and give separate premium quotations as to each of these individual coverages?
A. No. The form is designed with simplicity in mind and it was felt that breaking the coverages down any further would make the form too crowded and complicated.

9. Q. Is it mandatory that insurers use an individual page format in providing the forms or may the insurer use a fold-out format or other similar arrangements?
A. No. The individual page format is not mandatory and insurers may use other formats so long as the information on the forms is not altered and the size of the forms is not reduced.

11. Q. May the insurer rearrange the form generally or arrange it so that it will fit on a single sheet or the front and back of a single sheet?
A. The insurer must use an exact duplicate of the form as to both order and size of print.

make the Informational Letter No. 88 a fully promulgated rule or regulation of the Insurance Commissioner but merely an interpretive rule.⁶

Consequently, in May of 2000, the Insurance Commissioner issued Informational Letter No. 120. IL No. 120 superseded IL No. 88. It should be noted that the body of the IL including the forms were in fact reproduced mainly in their entirety with noted exceptions. The IL No. 120 begins with “[i]t has been recently brought to the attention of the West Virginia Insurance Commissioner that some confusion exists in completing the uninsured motorist coverage of Forms A and B and the underinsured motorist coverage offer Forms A and B which are set forth in Informational Letter Number 88 (July 1993). Therefore, in order to clarify and simplify these forms, the West Virginia Insurance Commissioner has revised the forms.” Requirements concerning inclusion of “present coverage” and “vehicle description” were omitted. Further and more importantly, IL No. 120 did not contain the “Frequently Asked Questions”. The intent was to no longer provide the guidance that had been given in IL No. 88 through the question and answer provisions. The language stating that “W.Va. Code §33-6-31d specifies that at a **minimum** [emphasis added] the form must:” continues to be used in the new IL.

Informational Letter No. 120-A was issued in June of 2000 and “[t]he purpose of this informational letter is to withdraw Informational Letter 120. It is to be disregarded in its

⁶ See W.Va. Code §29A-1-2(c), "Interpretive rule" means every rule, as defined in subsection (i) of this section, adopted by an agency independently of any delegation of legislative power which is intended by the agency to provide information or guidance to the public regarding the agency's interpretations, policy or opinions upon the law enforced or administered by it and which is not intended by the agency to be determinative of any issue affecting private rights, privileges or interests. An interpretive rule may not be relied upon to impose a civil or criminal sanction nor to regulate private conduct or the exercise of private rights or privileges nor to confer any right or privilege provided by law and is not admissible in any administrative or judicial proceeding for such purpose, except where the interpretive rule established the conditions for the exercise of discretionary power as herein provided. However, an interpretive rule is admissible for the purpose of showing that the prior conduct of a person was based on good faith reliance on such rule. The admission of such rule in no way affects any legislative or judicial determination regarding the prospective effect of such rule. Where any provision of this code lawfully commits any decision or determination of fact or judgment to the sole discretion of any agency or any executive officer or employee, the conditions for the exercise of that discretion, to the extent that such conditions are not prescribed by statute or by legislative rule, may be established by an interpretive rule and such rule is admissible in any administrative or judicial proceeding to prove such conditions."

entirety.” Consequently, as of June 29th, 2000, there was no official guidance of record from the West Virginia Offices of the Insurance Commissioner concerning implementation of UIM forms.

Informational Letter No. 121 was issued in July of 2000. The IL states “[a]lthough the forms provided by the Commissioner with Informational Letter No. 88, previously executed and on file with the insurers, shall continue in full force and effect for the purpose of creating a presumption of an effective offer and a knowing and intelligent election or rejection, this Informational Letter **replaces** [emphasis added] Informational Letter No. 88 in its entirety.” Again the requirement of “present coverage” and “vehicle description” were in fact removed. It further retains the language “W.Va. Code §33-6-31d specifies that at a **minimum** [emphasis added] the form must...” Interestingly again, the “Frequently Asked Questions” are not included in the IL No. 121. More importantly, the following is included,

PREPARATION OF FORMS BY INSURERS: COMPLIANCE REQUIREMENTS

Statutory compliance in the reproduction of the forms contained herein necessary to create a presumption of an effective offer of optional coverages and a knowing and intelligent election or rejection is achieved so long as the reproduced forms provide ALL the information set forth within the Insurance Commissioner promulgated forms. **It is not necessary that the reproduced forms be exact replicas of the Commissioner forms in size and shape.** [Emphasis added.] However, a minimum 10 point font size and a commonly used font face are required. Additionally, the portions of the Insurance Commissioner promulgated forms which appear in bold font style must likewise appear in bold on the insurer reproduced forms.

Therefore, the Insurance Commissioner clearly states that (a) the presumption is created if the reproduced forms provide “ALL” the information set forth in the forms and (b) it is not necessary that the forms be exact replicas. Another former General Counsel of the Offices of the

Insurance Commissioner has stated that in drafting Informational Letter No. 121, the use of “ALL” as opposed to a more restrictive “ONLY” was intended. (J.A. at 445).

This Court has previously reviewed and decided what weight is given to the Commissioner’s Informational Letters generally.

“Finally, we note that the Insurance Commissioner's Informational Letter No. 157 has also rejected the interpretation given to W. Va. Code § 23-4-10 by Policy 2.02 - 2003. Because the Insurance Commissioner is the Administrator of the Workers' Compensation system in this State, we are entitled to give deference to her interpretation, so long as it is consistent with the plain meaning of the governing statute, as it is in this instance. *Cf*, Syl. pt. 4, *State ex rel. ACF Indus. v. Vieweg*, 204 W. Va. 525, 514 S.E.2d 176 (1999) ("Interpretations as to the meaning and application of workers' compensation statutes rendered by the Workers' Compensation Commissioner, as the governmental official charged with the administration and enforcement of the workers' compensation statutory law of this State, pursuant to W. Va. Code § 23-1-1 (1997) (Repl. Vol. 1998), should be accorded deference if such interpretations are consistent with the legislation's plain meaning and ordinary construction.")” *State ex rel. Crist v. Cline*, 219 W. Va. 202, 211, 632 S.E.2d 358, 367 (2006).

Upon information and belief, the Respondent in this matter did in fact have the minimum requirements of the IL’s of the Commissioner contained in each of their forms. The concern exhibited herein this litigation has been an excess of information provided to the consumer. (J.A. at 175).

When reviewing the progeny of Informational Letters of the Insurance Commissioner through time, the intent in the first IL was that of “minimum” requirements and attempts to anticipate issues with form usage. As several additional IL’s on the matter were provided, each somewhat moved further away from any type of strict usage interpretation and in fact clearly

showed an intent to make sure there was at least a “floor” for compliance but not a “ceiling”. Eventually, there were clear statements concerning the non-requirement of using exact replicas and this made it clear that complete reproduction of the form was not necessary so long as appropriate minimum content was contained therein. Further, since *Bias, supra*, there has been an understanding that these issues may be established through evidence other than the forms in an attempt to show a commercially reasonable offer and a knowing and intelligent waiver.

It should be noted that there is no requirement under West Virginia law that the forms for the interpretative rule be filed and/or approved by the Commissioner. *See* W.Va. Code §33-6-8.

In the case *sub judice*, it does appear that Respondent, State Farm used the minimum criteria contained in the Commissioner’s IL forms and/or W.Va. Code §33-6-31d. The forms require notification of optional coverages offered, rate calculation for the optional coverages including amount of coverage and the number of vehicles and an option to reject the coverage. W.Va. Code §33-6-31d(a) likewise states “[t]he contents of the form shall be as prescribed by the commissioner and shall specifically inform the named insured of the coverage offered and the rate calculation therefor, including, but not limited to, all levels and amounts of such coverage available and the number of vehicles which will be subject to the coverage. The form shall be made available for use on or before the effective date of this section. The form shall allow any named insured to waive any or all of the coverage offered.”

Respondent, State Farm in evidence submitted to the Circuit Court upon information and belief used a form that provided (a) the coverage offered and the rate calculation; and (b) all levels and amounts of such coverage available and the number of vehicles which will be subject to coverage. State Farm’s alleged infraction would appear to be their inclusion of additional coverage options. These options appear to give the consumer more choice in selecting coverage.

Consequently, the conduct allegedly to have occurred in this matter is providing more information to the consumer than the minimum floor required.

As discussed more fully below, due to the harshness of the remedy for noncompliance, regardless of the replication of the Commissioner's form, fairness should dictate the ability to prove a commercially reasonable offer by other means available.

B. *Bias* and W.Va. Code §33-6-31d clearly show that that there should be an ability to prove a commercially reasonable offer and a knowing and informed waiver by other evidence

This Court has spoken concerning the matters contained *sub judice*. The standard that has been in place for many years has been *Bias v. Nationwide Mut. Ins. Co.*, 179 W.Va. 125, 365 S.E.2d 789 (1987). In *Bias*⁷, the Court found that

The statute says that an underinsurance option *shall be* offered, and this language must be afforded a mandatory connotation. Syl. Pt. 1, *Nelson v. West Virginia Public Employees Insurance Board*, W. Va. , 300 S.E.2d 86 (1982). Where an offer of optional coverage is required by statute, the insurer has the burden of proving that an effective offer was made, *Holman v. All Nation Insurance Co.*, 288 N. W.2d 244 (Minn. 1980), and that any rejection of said offer by the insured was knowing and informed, *Lane v. Waste Management, Inc.*, 420 So. 2d 1086 (Fla. 1982). The insurer's offer must be made in a commercially reasonable manner, so as to provide the insured with adequate information to make an intelligent decision. *State Farm Mutual Automobile Insurance Co. v. Wannamaker*, 291 S.C. 518, 354 S.E.2d 555 (1987). The offer must state, in definite, intelligible, and specific terms, the nature of the coverage offered, the coverage limits, and the costs involved. *Id.*; *Tucker v. Country Mutual Insurance Co.*, 125 Ill. App. 3d 329, 465 N.E.2d 956, 80 Ill. Dec. 610 (1984). When an insurer is required by statute to offer optional coverage, it is included in the policy by operation of law when the insurer fails to prove an effective offer and a knowing and intelligent rejection by the insured. *Wannamaker*, 291 S.C. 518, 354 S.E.2d 555; *Tucker*, 125

⁷ *Id.* at 127, 791.

Ill. App. 3d 329, 465 N.E.2d 956, 80 Ill. Dec. 610; *Holman*, 288 N.W.2d 244; see *Lane*, 432 So. 2d 70.

Subsequent to *Bias v. Nationwide Mut. Ins. Co.*, 179 W.Va. 125, 365 S.E.2d 789 (1987), the West Virginia Legislature enacted W.Va. Code §33-6-31d(b) (1993) which states in part:

The contents of a form described in this section which has been signed by an applicant shall create a **presumption** [emphasis added] that such applicant and all named insureds received an effective offer of the optional coverages described in this section and that such applicant exercised a knowing and intelligent election or rejection, as the case may be, of such offer as specified in the form.

The language contained in W.Va. Code §33-6-31d(b) clearly states that a presumption is created from use of the forms. Otherwise, there would be absolutely no need to create a presumption if there is an automatic reversion to coverage.

This Court has stated that its duty is not to rewrite a statute but to apply its clear language.

“Even if this Court viewed the position advocated by Ms. Burrows as wise from a public policy standpoint, our duty is not to retool the statute but merely to apply its provisions where the language at issue is unambiguous. As we recognized in syllabus point five of *State v. General Daniel Morgan Post No. 548, V.F.W.*, 144 W.Va. 137, 107 S.E.2d 353 (1959) ‘when a statute is clear and unambiguous and the legislative intent is plain, the statute should not be interpreted by the courts, and in such case it is the duty of the courts not to construe but to apply the statute.’ Another rule of statutory construction that must be considered provides that “in the interpretation of statutory provisions the familiar maxim *expressio unius est exclusio alterus*, the express mention of one thing implies the exclusion of another, applies.” Syl. Pt. 3, *Manchin v. Dunfee*, 174 W.Va. 532, 327 S.E.2d 710 (1984).” *Burrows v. Nationwide Mut. Ins. Co.*, 215 W. Va. 668, 675, 600 S.E.2d 565, 572 (2004).

While the Court has expressly stated in statutes such as W.Va. Code §33-6-30(c)⁸ that it was expressly overruling a Supreme Court of Appeals case, no such mention is made in W.Va. Code §33-6-31d. Consequently, there was no express intention of the Legislature to overrule *Bias v. Nationwide Mut. Ins. Co.*, 179 W.Va. 125, 365 S.E.2d 789 (1987) in codifying W.Va. Code §33-6-31d. As discussed in the Memorandum Opinion of the Southern District Court of West Virginia by the Honorable Robert Chambers in a case similar to the case *sub judice*, the federal court states “[f]irst, the Court notes that the West Virginia Legislature, unlike in numerous other instances, did not clearly express an intent to displace the governing common law. Defendants point to *W. Va. Code* § 33-6-30 as an example. There, the Legislature stated that the provision was ‘specifically intended to clarify the law and correct [the] . . . misapplication’ of the law in a West Virginia Supreme Court of Appeals holding. There is no similar intent expressed with respect to § 33-6-31d and its interaction with *Bias*.” *Martin v. State Farm Mut. Auto. Ins. Co.*, 809 F. Supp. 2d 496, 505 (2011). Therefore, while the Legislature codified the mandatory nature of the offer required, there was no need to overrule the wisdom of the *Bias*, *supra*, analysis.

The Court in *Martin*⁹ went on to distinguish several cases cited for the proposition that *Bias*, *supra*, had been overruled and immediate coverage was created by failure of use of the form in its exact creation. The cases included *Westfield v. Bell*, 507 S.E.2d 406 (W.Va. 1998)(per curiam), *Ammons v. Transportation Insurance Co.*, 219 F.Supp.2d 885 (S.D. Ohio

⁸ ... (2) specifically intended to clarify the law and correct a misinterpretation and misapplication of the law that was expressed in the holding of *Mitchell v. Broadnax*, (537 S.E.2d 882 (W.Va. 2000))...

⁹ *Id.*

2002), *Burrows v. Nationwide Insurance Co.*, 600 S.E.2d 565 (W.Va. 2004), and *Luikart v. Valley Brook Concrete & Supply Inc.*, 613 S.E.2d 896 (W.Va. 2005).¹⁰

Further, this Court after the adoption by the Legislature of W.Va. Code §33-6-31d apparently reaffirmed *Bias, supra*, by inclusion of it in its decisions. “We note though that should Nationwide fail to prove that an effective offer of optional coverage was made and/or that there was a knowing and intelligent rejection by the insured, the coverage is included in the policy by operation of law. Syllabus Point 1, *Bias, supra*.” *Jewell v. Ford*, 211 W. Va. 592, 597-98, 567 S.E.2d 602, 607-8 (2002). The same appears to have been reconfirmed by this Court again by subsequent usage of the *Bias v. Nationwide Mut. Ins. Co.*, 179 W.Va. 125, 365 S.E.2d 789 (1987) standard in *Jewell v. Ford*, 214 W. Va. 511, 514, 590 S.E.2d 704, 707 (2003) the progeny of *Jewell I. Id.*

Therefore, it appears from the context of the referenced issues that there has been no intent exhibited that *Bias* be overruled or in any way not be the current standard in reviewing UIM offers and/or rejections where form usage is determined to be deficient creating a loss of presumption.

- C. **The Certified Question should be answered as follows:
“An insurance company’s failure to use the West Virginia Insurance Commissioner’s prescribed forms pursuant to W.Va. Code §33-6-31d may result in a loss of statutory presumption and if so, in any event, an analysis of evidence under *Bias* should be undertaken by the Circuit Court to determine if a commercially reasonable offer was made and knowing and intelligent waiver occurred.”**

¹⁰ The undersigned cannot provide a better analysis of the cases cited than the Court in coming to its conclusion that *Bias* was not overruled despite failure to use the exact form and in distinguishing the cited cases among others. *See Martin v. State Farm Mut. Auto Ins. Co.*, 809 F.Supp.2d 496, 505-507.

For the reasons discussed herein, the Circuit Court of Mason County should be overturned and there should be a finding that the forms of the Commissioner are a “floor” for usage by insurance companies doing business in this State and not a mandatory ceiling that must be complied with. Regardless of the form usage, any insurance company doing business in this State should be able to place in evidence its effort to make a commercially reasonable offer to a consumer and certainly to potentially refute the automatic imposition of coverage into the policy as a matter of law.

To include the coverage as a matter of law, the conduct of the insurance company should be so deficient as to warrant such a punitive measure. As stated earlier, failure to follow an interpretive rule should not be used in a punitive manner. Additionally, effecting coverage in this manner causes the insured to be covered without paying appropriate premium for the coverage. “Rates may not be excessive, inadequate or unfairly discriminatory.” W.Va. Code §33-20-3(b). While it is extremely important to protect consumers from those who would not provide a “spirit and intent of the law” type of offer, such punitive measure should not be taken without at least the company being able to provide evidence in addition to form usage as to why their offer was or was not commercially reasonable and in any event should be reserved for egregious conduct. It appears the conduct *sub judice* was providing information in excess of that required by law. Should coverage be imposed before alleged confusion has even been shown to occur? Additionally, this is not the type of conduct that should require an extreme penalty such as automatic coverage by operation of law at least and until the conduct is allowed to be discerned through appropriate evidence.

Evidence of producers or agents that may have been involved in the transaction can be relevant and extremely helpful in understanding the transaction between the parties. The agent in

most instances has authority to bind the company and as such should be entitled to proffer evidence in regards to what the understanding was between the parties. W.Va. Code §33-12-22. The agent is also subject to regulatory penalties licensure actions including fines, suspensions and revocation for improper conduct or misrepresentation. *See* W.Va. Code §33-12-24. The weight and credibility of that testimony should be reviewed by the Court.

Consequently, the finding of the Court should be that a commercially reasonable offer can possibly be found even if the forms are not used exactly and the presumption could possibly be maintained especially where there is determined to be *de minimus* noncompliance. In those instances where it is determined that the minimum requirements have not been included in the form or there are other circumstances that cause confusion, an analysis should always be determined and allowed for discernment of commercially reasonable offer and a knowing and intelligent waiver. *Bias v. Nationwide Mut. Ins. Co.*, 179 W.Va. 125, 365 S.E.2d 789 (1987).

Further, the Certified Question is phrased incorrectly as it states that *Bias, supra* is a lower standard. Nothing could be more further from the actuality of implementation. The requirement of documentation for any action industry takes in regards to policyholder matters has been firmly stated by Legislative Rule.¹¹ Therefore, proof of actions taken by the insurance company is required by statute, rule and case law. There is absolutely no lowering of any standard that requires an entity to justify the actions that it has taken. Arguably, it could be stated that the standard is raised by performing the *Bias v. Nationwide Mut. Ins. Co.*, 179 W.Va. 125, 365 S.E.2d 789 (1987) analysis. It is essentially what our system of justice is based upon. Such document retention is clearly a burden and substantial cost to industry but is required in the regulatory scheme. Any company who would fail to retain such information is subject to regulatory scrutiny as well as having coverage added that was essentially not factored into

¹¹ *See* W.Va. Code St. R. §114-15-1, *et. seq.*

premium calculations for the company and insured nor obtained to be added to reserves for anticipated losses. Substantial imposition of coverage that has not had sufficient premium collected can in some instance cause financial conditions to a company that may require regulatory intervention. *See W.Va. Code §33-34-1, et. seq.*

The subsequent codification of W.Va. Code §33-6-31d doesn't in fact cover all issues itself. Obviously, the *Bias v. Nationwide Mut. Ins. Co.*, 179 W.Va. 125, 365 S.E.2d 789 (1987) standard had already discussed what a commercially reasonable offer would include where the statute itself was devoid of such explanation. It would not make rational sense if there was an intention to overrule the very case that interprets what is necessary to accomplish the required intent of the statute in its first place, i.e. consumer protection where there is a lack of commercial reasonableness and how to ascertain the same. An inference can be drawn that the *Bias*¹² standard was to be continuing in nature.

V. CONCLUSION

For the reasons detailed above, the Insurance Commissioner joins the Respondents in respectfully requesting that this Honorable Court reverse the Circuit Court of Mason County's answer of the certified question which was in the affirmative. The Insurance Commissioner would support the answer of the Certified Question to be in the negative or as phrased through argument contained herein.

Respectfully submitted,

**MICHAEL D. RILEY,
INSURANCE COMMISSIONER**

By Counsel

¹² Id.



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CERTIFICATE OF SERVICE

I, Andrew R. Pauley, counsel for Michael D. Riley, West Virginia Insurance Commissioner, do hereby certify that I have served a copy of the foregoing “*AMICUS CURIAE* BRIEF OF WEST VIRGINIA INSURANCE COMMISSIONER IN SUPPORT OF THE RESPONDENTS, WILLIAM RAY MCDERMOTT AND STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY’S BRIEF FOR REVERSAL OF THE CIRCUIT COURT’S RULING ON THE CERTIFIED QUESTION” upon the following by mailing a true and accurate copy of the same, by United States mail, postage prepaid, on this 27th day of September, 2012, as follows:

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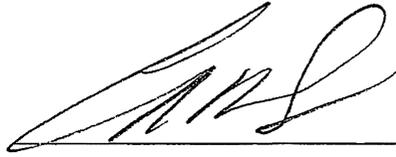
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