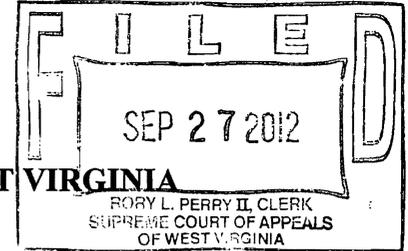


**BRIEF FILED  
WITH MOTION**

**NO. 12-0688**



**IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA**

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

**Petitioners,**

**v.**

**WILLIAM RAY McDERMITT and STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY,**

**Respondents.**

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**From the Circuit Court of Mason County, West Virginia  
Civil Action No. 11-C-81-N**

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**BRIEF OF THE WEST VIRGINIA INSURANCE FEDERATION  
AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENTS ON CERTIFIED QUESTION**

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## I. INTRODUCTION

The West Virginia Insurance Federation (the “Federation”) files this brief as *amicus curiae* in support of the brief filed by Respondent State Farm Mutual Automobile Insurance Company (“State Farm”) because the Opinion and Order Granting Plaintiff’s Motion for Partial Summary Judgment and Request to Certify Question Regarding the Effect of an Insurer’s Failure to Comply with W. Va. Code § 33-6-31d (the “Order”) entered by the Circuit Court of Mason County (the “Circuit Court”) on April 24, 2012, erroneously (1) assumed in its response to the Certified Question contained in the Order that this Court’s decision in Bias v. Nationwide Mutual Insurance Co., 179 W. Va. 125, 365 S.E.2d 789 (1987), has been completely superseded by W. Va. Code § 33-6-31d and Informational Letters #88 and #121 issued by the West Virginia Office of the Insurance Commissioner, and (2) concluded that because State Farm did not use the exact form contained in Information Letter #121 to make an offer of underinsured motorist coverage to the Plaintiffs, the “Plaintiffs are entitled to have their policy reformed and to have their underinsured motorists coverage limits ‘rolled up’ to an amount equal to their liability limits.” Order at 14 - 17(¶¶ 16-19) and 23 (¶ 32).<sup>1</sup>

Informational Letter #121 simply provides a minimum standard to determine whether an insurer is entitled to a presumption that its offer of underinsured motorist (“UIM”) coverage has been presented to an insured in a commercially reasonable manner; i.e., if an insurance company makes an offer of UIM coverage that contains the information prescribed by the Insurance Commissioner in Informational Letter #121, the insurer is entitled to the presumption that the offer

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<sup>1</sup> Pursuant to W.Va. R. App. P. 30(b), the Federation provided notice on September 21, 2012, to all parties of its intention to file an *amicus curiae* brief. In addition, the undersigned counsel authored this brief in its entirety. No party or their respective counsel contributed to or made a monetary contribution specifically intended to fund the preparation or submission of this brief. This disclosure is made pursuant to Rule 30(e)(5) of the Revised Rules of Appellate Procedure.

was made in a commercially reasonable manner. If the insurer uses an offer form that fails to provide the minimum information prescribed by Informational Letter #121, it may not be entitled to the presumption that the offer was presented in a commercially reasonable manner; however, in this instance, the insurer loses the statutory presumption *only*. It can, in the absence of the statutory presumption, utilize this Court's standards in Bias to demonstrate both a commercially reasonable offer of UIM coverage and an intelligent and knowing rejection of that offer by the applicant or insured.<sup>2</sup>

The Circuit Court found, in support of its answer to the Certified Question before this Court, that if an insurer does not use the exact form contained in Informational Letter #121, the insured is automatically entitled to reformation of the insurance policy to include (or "roll up") UIM coverage in an amount equal to the liability limits of the policy. This finding, however, as reflected in the Circuit Court's answer to the Certified Question, ignores the plain language of W. Va. Code § 33-6-31d, the plain language of Informational Letter #121, and common sense. For the reasons detailed below, the Federation respectfully urges this Court to reformulate and answer a reformulated Certified Question in such a way that permits State Farm to present evidence, using the standards detailed in Bias, on whether it made an effective offer of UIM coverage to the Plaintiffs and whether the Plaintiffs made a knowing and intelligent waiver of such coverage.<sup>3</sup>

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<sup>2</sup> The Federation does not, in this case, comment upon whether State Farm's offer form satisfied Informational Letter #121 or whether State Farm is entitled to the presumption of a commercially reasonable offer of UIM coverage. The Federation's *amicus* brief focuses only what happens in the event that an insurance company loses the presumption.

<sup>3</sup> The Federation notes that the Certified Question as formulated by the Circuit Court assumes a fact that is simply not true; i.e., that the forms promulgated by the Insurance Commissioner pursuant to § 33-6-31d represent the *only* forms that entitle an insurance company to the evidentiary presumption under the statute. Because such assumption is false, the Federation believes that the Certified Question must be reformulated, and the Federation supports the reformulated Certified Question contained in State Farm's brief before this Court.

## **II. PROCEDURAL BACKGROUND**

The Federation incorporates by reference the factual background outlined by State Farm in its brief. It emphasizes, however, that the undisputed facts in the record reveal that (1) State Farm's agent offered Angela Thomas UIM coverage on May 4, 2007, (2) State Farm's agent both presented State Farm's offer form for UIM coverage and verbally explained the purpose of the UIM coverage, the limits of UIM coverage available, and the cost of such coverage, and (3) Angela Thomas declined to purchase UIM coverage, both verbally and by signing State Farm's form. These undisputed facts clearly reveal a knowing and intelligent waiver of UIM coverage by Angela Thomas.<sup>4</sup>

The Circuit Court's answer to the Certified Question, however, as explained in the Order, renders this evidence irrelevant through the application of a faulty analysis that leads to an illogical conclusion. For the reasons detailed in State Farm's brief and below, therefore, the Federation believes and asserts that this is the exact type of evidence that a court must consider under this Court's decision in Bias.

## **III. STATEMENT OF INTEREST**

The West Virginia Insurance Federation is the state trade association for property and casualty insurers doing business in West Virginia. Its members insure eight of every ten automobiles, seven of every ten homes, and write more than 80% of the workers' compensation

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<sup>4</sup> The Federation finds it remarkable that the result of the Petitioners' argument – and the effect of the Circuit Court's answer to the Certified Question – is that the Plaintiffs would obtain \$300,000 in UIM coverage that Angela Thomas did not want and for which she did not pay a single penny. More than anything, this reflects a case of form over substance, and not only is the argument as to form a hollow one, but it also would result in free – FREE – coverage, to the tune of \$300,000 in this case. Only the Petitioners benefit under this scenario because all other West Virginia insurance consumers would have to make up for this loss. What is more, if the Circuit Court's answer to the Certified Question is permitted to stand, then all automobile insurance policies that used a UIM offer form that complied with § 33-6-31d would be reformed as a matter of law, and the cost of these reformed policies, conceivably amounting to millions of dollars in insurance benefits that were not bargained or paid for, would be borne by all West Virginia consumers.

policies insuring West Virginia employees in our State. The Federation is widely-regarded as the voice of West Virginia's insurance industry and has a strong interest in promoting a healthy and competitive insurance market to ensure that insurance is both available and affordable to West Virginia's insurance consumers.

The Federation files this brief pursuant to Rule 30 of the Revised Rules of Appellate Procedure in support of State Farm because the Circuit Court's answer to the Certified Question, and its analysis as reflected in the Order, are clearly erroneous. Specifically, the Circuit Court's finding that an insurer that uses a form that contains all of the requisite information – but includes additional information – negates the statutory presumption that the insurer made a commercially reasonable offer of underinsured motorist coverage to its insured and, as a consequence, the insurer is liable for the coverage up to its limits, is simply inequitable, nonsensical, unjust and extreme.

Insurers long have relied on the standards established in Bias to satisfy their burden of proving that an effective offer of optional UIM coverage was made to their customers. The Circuit Court's Order strips insurers of the ability to make this showing, finding instead that Bias is superseded by W. Va. Code § 33-6-31d and Informational Letters No. 88 and No. 121 issued by the West Virginia Insurance Commissioner. This finding, however, ignores both common sense and this Court's established case law. Indeed, in Martin v. State Farm Mutual Auto. Ins. Co., 809 F. Supp. 2d 496 (S. D. W. Va. 2011), the Hon. Robert C. Chambers of the U.S. District Court for the Southern District of West Virginia considered a similar case in which he opined that the plaintiffs' argument that W. Va. Code § 33-6-31d superseded Bias and the common law would create a "result that defies logic: compliance with the statute creates merely a presumption while noncompliance is deemed to impose coverage." Id., at 507.

The Circuit Court's Order here presumes coverage, thwarting existing law and, from the Federation's perspective, undermines the long-standing practices of offering UIM coverage that insurers legitimately have relied upon through law. Perhaps more importantly, the Order also risks the imposition of UIM coverage for each automobile insurance policy the Federation's members currently have in place – a very costly prospect for insurers and certainly, ultimately, our State's insurance consumers. Clearly, this cannot be the result; it is illogical and contrary to the long-standing application of these statutes and Informational Letters.

For these reasons, those detailed below, and considering the far-reaching, adverse impact that agreeing with the Circuit Court's decision would have on both West Virginia's insurers and its insurance consumers, the Federation respectfully urges this Court to reformulate and answer a certified question that conforms to the standards of § 33-6-31d and this Court's dictates in Bias.

#### **IV. ARGUMENT**

An insurer's offer of UIM coverage is governed by W. Va. Code § 33-6-31d, a statute enacted by the West Virginia Legislature in 1993. Specifically, § 33-6-31d(b) states that, if a form described by the statute has been signed by an applicant, it "shall create a presumption that such applicant . . . . received an effective offer of the optional coverages . . . [and] exercised a knowing and intelligent election or rejection, as the case may be, of such offer as specified in the form." If a form that includes the minimum amount of information required by the statute is not used, the insurer loses the "presumption" identified in the statute. Loss of that presumption, however, merely returns the insurer to where it would have been without using the form described in the statute – in the position of having to prove up, without the benefit of the statutory presumption, an effective offer and the customer's knowing and intelligent election of coverage or rejection of the offer. The statute, which was the result of years of uncertainty compounded by litigation, provides an

evidentiary mechanism enabling an insurer to demonstrate, by using a form which contains all of the minimum information required by the West Virginia Insurance Commissioner (“Insurance Commissioner”), an effective offer of coverage and a knowing and intelligent election or rejection of coverage as a result of that offer. Use of such a form gives the insurer the statutory presumption. Likewise, use of a defective form only results in loss of the presumption. Where an insurer loses the presumption because its form is somehow defective, that insurer can still prove, through other evidence of the sales transaction, both an effective offer of UIM coverage and a “knowing and intelligent election or waiver” of such offer under the standards detailed in Bias v. Nationwide Mutual Ins. Co., 179 W. Va. 125, 365 S.E.2d 789 (1987).

**A. W. Va. Code § 33-6-31d(b) and Informational Letter #121 provide for an evidentiary “presumption” only.**

W. Va. Code § 33-6-31d(b) states, in part, as follows:

The contents of a form described in this section which has been signed by an applicant shall create a presumption 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.

This identical language is also found in § 33-6-31d(c), though “applicant” is replaced with “named insured” to denote that forms must also have been sent to current policyholders as specified in the statute. In both instances, the clear and unambiguous language of the statute is that the use of a “form” creates an evidentiary “presumption” only.

This Court examined offers of UIM coverage under § 33-6-31 at length in Bias. There, this Court noted that “[w]here an offer of optional coverage is required by statute, the insurer has the burden of proving that an effective offer was made, . . . and that any rejection of said offer by the insured was knowing and informed.” Bias, at 127, 791 (citations omitted). In turn, the “offer”

contemplated by the statute “must be made in a commercially reasonable manner so as to provide the insured with adequate information to make an intelligent decision.” Id., at 127, at 791 (citations omitted).

In response to the Bias decision, the West Virginia Legislature enacted § 33-6-31d in 1993, which tasked the Insurance Commissioner with developing minimum standards that insurers could follow to obtain the presumption identified in the statute. The Insurance Commissioner, in turn, issued Informational Letter #88 in 1993, which provided such minimum standards, and then subsequently issued Informational Letter #121 in 2000, which replaced Informational Letter #88 “in its entirety.” See Informational Letter #121 at 1. Importantly, Informational Letter #121 mirrors the language in § 33-6-31d by stating:

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. (Emphasis in original.)

The net result is that § 33-6-31d and Informational Letter #121 provide for the same thing -- using a form to offer UIM coverage that “reproduce[s] ALL the information set forth within” Informational Letter #121 creates a “presumption” of both an “effective offer of optional coverages” and “a knowing and intelligent election or rejection” of such coverage by the applicant or insured. Specifically, Informational Letter #121 creates the minimum standards by which to measure whether a form used by the insurer entitles the insurer to the evidentiary presumption. If an insurer’s offer form meets the minimum standards provided by Informational Letter #121, the insurer is entitled to the evidentiary presumption contained in § 33-6-31d. If an insurer’s offer form does not meet the minimum standards provided by Informational Letter #121, it may not receive the

evidentiary presumption in § 33-6-31d.<sup>5</sup> Again, however, all that can be gained or lost by an insurer under 33-6-31d and Information Letter #121 is the evidentiary presumption.

**B. If an insurer loses the evidentiary presumption under § 33-6-31d by using an offer form that does not contain the minimum information required by the Insurance Commissioner, the insurer can still, pursuant to Bias, present evidence that it made both an effective offer of UIM coverage and that a person knowingly and intelligently elected or rejected such coverage.**

Assuming that (1) an insurer (such as, in this case, State Farm) uses an UIM offer form that varies slightly from the exact form contained in Informational Letter #121, but which contains all of the information (and some additional information, hence the slight variance) required by the Insurance Commissioner, and (2) the insurer, because of its slightly varying form, is not entitled to the evidentiary presumption under 33-6-31d, the question necessarily becomes, what happens next? The simple – and correct – answer is that the insurer can, through extrinsic evidence of what occurred during the sales transaction, meet its burden under Bias of proving that an effective offer of UIM coverage was made and that a knowing and intelligent rejection of such coverage occurred. That is exactly what this Court provided for in Bias.

The Circuit Court, however, took a different – and erroneous – route. Per the Circuit Court’s answer to the Certified Questions, as explained in the Order, State Farm’s failure to use the exact form contained in Informational Letter #121, even though State Farm’s form contained all of the information minimally required by the Insurance Commissioner, meant that “the Plaintiffs did not receive ‘commercially reasonable’ offers of underinsured motorists coverage,” and hence, they were “entitled to have their underinsured motorists coverage limits ‘rolled up’ to an amount equal

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<sup>5</sup> Again, the Federation believes that an offer of UIM coverage must simply contain, at a minimum, the information detailed in Informational Letter #121, and it certainly does not believe that any variation from the example form contained in Informational Letter #121 necessarily results in a loss of the evidentiary presumption. While the Federation does not comment upon State Farm’s form at issue in this case, it believes that an insurance company can obtain the evidentiary presumption provided by 33-6-31d if its UIM offer form contains all of the information required by Informational Letter #121 and that the offer is made in a manner that is “commercially reasonable.”

to the liability coverage limits available under their policy of insurance with State Farm.” Order at 24, ¶ 35-36. In other words, State Farm not only lost the evidentiary presumption provided by § 33-6-31d, but the Circuit Court went further and reformed the insurance contract to add UIM coverage, for which its customer had not bargained or paid, in an amount equal to the policy’s liability limit because of State Farm’s failure to use the exact form in Informational Letter #121. To reach that conclusion, however, the Circuit Court, through its answer to its Certified Question, stripped both § 33-6-31d and Informational Letter #121 of their respective references to an evidentiary presumption and relegated this Court’s decision in Bias to the trash heap of “superseded” by statute. In doing so, however, the Circuit Court ignores the plain language of § 33-6-31d and Informational Letter #121 and relies upon a faulty analysis to reach an illogical conclusion. For the reasons detailed below, this Court should reject that approach.

The Circuit Court ultimately premises its answer to the Certified Question solely on Ammons v. Transportation Ins. Co., 219 F. Supp.2d 885 (S.D. Ohio 2002). Order at 13, ¶14. While the Ammons court concluded that an insurer’s failure to use the exact form prescribed by the Insurance Commissioner resulted in a policy’s underinsured motorists coverage “rolling up” to the policy’s liability limit, that decision is an anomaly that (1) defies logic and (2) relies upon limited *dicta* from West Virginia decisions that cite to Bias – as explained in a detailed, logical, and persuasive way by the Hon. Robert C. Chambers in Martin v. State Farm Mutual Auto. Ins. Co., 809 F. Supp. 2d 496 (S. D. W. Va. 2011).

In Martin, Judge Chambers faced virtually the identical issue presented in this case. There, the plaintiffs “vociferously argue[d] that § 33-6-31d superseded Bias and the common law that, prior to the statute’s enactment, governed what actions by an insurer complied with the requirements of § 33-6-31(b).” Martin, 809 F. Supp. at 504. In addition, the court noted that the

plaintiffs in Martin “point to the mandatory nature of the directives contained in § 33-6-31d” and “place[d] heavy emphasis on four cases, Westfield v. Bell, 203 W. Va. 305, 507 S.E.2d 406 (1998) (per curium), Ammons[, ] Burrows v. Nationwide Insurance Co., 215 W. Va. 668, 600 S.E.2d 565 (2004), and Luikart v. Valley Brook Concrete & Supply, Inc., 216 W. Va. 748, 613 S.E.2d 896 (2005)” – which are the same arguments, the same cases and the same emphasis reflected in the Certified Question and in the Order in the instant matter. In light of this, Judge Chambers’ opinion in Martin is both instructive and compelling.

The starting point for Judge Chambers’ analysis in Martin was the language of § 33-6-31d, which creates the statutory presumption that an insurer has made an effective offer of UIM coverage if a form containing the minimum information required by the Insurance Commissioner is used. As Judge Chambers correctly observed, however, “[t]he creation of the presumption is only given meaning when examined within the context of Bias, [because] without the imposition of the evidentiary burden in Bias, the need for the statutory presumption created by § 33-6-31d would be nonexistent.” Martin, at 505.

Not only, therefore, did this Court’s decision in Bias survive passage of § 33-6-31d, but this Court has confirmed that Bias has never been superseded by § 33-6-31d, but is alive and well, and that the two should be considered together. For example, this Court in Burrows stated that “the statute and our decision in Bias encourage insurance companies to make a real effort to inform customers about the opportunity for underinsured motorist coverage.” Burrows, 215 W. Va. at 674, 600 S.E.2d at 571. Of course, that statement – made by this Court in 2004 – makes no sense if Bias had been superseded by § 33-6-31d. Judge Chambers reached the same conclusion when he stated, “Bias did not become obsolete when the West Virginia legislature passed § 33-6-31d. It is still a guidepost for determining what is necessary to provide a ‘commercially reasonable’ offer pursuant

to § 33-6-31(b). And it is what guides courts in analyzing the facts of a specific offer of the optional coverage when an insurer is not entitled to the statutory presumption.” Id., at 505.

Notwithstanding this, the Circuit Court’s Order attempts to recast snippets of cases to support the notion that § 33-6-31d superseded Bias – the same cases and the same tactic used by the plaintiffs in Martin and rejected by Judge Chambers – in an effort to justify its formulation of, and answer, to the Certified Question. As Judge Chambers concluded after a careful and detailed examination of a similar effort in Martin, the references to Bias in Bell, Ammons, Luikart and Foutty v. Porterfield, 192 W. Va. 105, 450 S.E.2d 802 (W. Va. 1994), “represent narrow descriptions, in dicta, of the effect of the statute on Bias[.]” Id., at 507. For example, the Order states that this Court “recognized that the Bias standard had been superseded in Bell[.]” Order at 14, ¶ 17. In fact, this Court said no such thing. Rather, as Judge Chambers noted, this Court stated in Bell, admittedly in *dicta*, that forms which did not strictly comply with either § 33-6-31d or the Insurance Commissioner’s forms were nonetheless considered a commercially reasonable offer, and the insured’s rejection as reflected in such a form was valid. Bell, 203 W. Va. at 309, S.E.2d at 410, n.10 (cited in Martin, 809 F.Supp.2d at 505-506). See also Martin, 809 F.Supp. 2d at 506-507 (Court found that neither Ammons, Luikart nor Foutty support the proposition that § 33-6-31d superseded Bias).

Perhaps most importantly, the position advocated by the Petitioners, and adopted by the Circuit Court in its formulation of, and answer to, the Certified Question, “advocate[s] a result that defies logic: compliance with the statute creates merely a presumption while noncompliance is deemed to impose coverage.” Martin, at 507. Judge Chambers rejected this illogical position in Martin, and his reasoning comports with courts that have addressed the same issue.

The Supreme Court of South Carolina has faced the situation before this Court on a number of occasions in circumstances remarkably similar to those before this Court. In State Farm Automobile Insurance Co. v. Wannamaker, 354 S.E.2d 555 (S.C. 1987), the court examined whether a booklet provided to an insured made an effective offer of UIM coverage as required by a statute remarkably similar to W. Va. Code § 33-6-31. Much like this Court did in Bias, the court in Wannamaker found that “it is clear from the language of the statute that the burden is on the insurer to effectively transmit the offer to the insured” and held that “the statute mandates the insured to be provided with adequate information, and in such a manner, as to allow the insured to make an intelligent decision of whether to accept or reject the coverage.” Wannamaker, at 556 (citations omitted).

Thereafter, and in response to Wannamaker, the Legislature in South Carolina passed a statute “to establish the requirements for forms used in making offers of optional insurance coverage such as UIM.” Floyd v. Nationwide Mut. Insurance Co., 626 S.E.2d 6, 11 (S.C. 2005). South Carolina Code §38-77-350 details the information that must be on an offer of UIM coverage; however, unlike in West Virginia, a form must be “approved” by the Department of Insurance. See §38-77-350(A) (“The director or his designee shall approve a form which automobile insurers shall use in offering optional coverages required to be offered . . . .”). Nationwide, however, failed to comply with the South Carolina statute because the insurance agent, and not the insured, marked the space on the form to indicate acceptance or rejection of the UIM coverage. Floyd, at 11-12. Critically, however, the court stated as follows:

Our decision does not resolve the question of whether Insurer made a meaningful offer to Darla in this case. We simply conclude that Insurer, by allowing an agent or his employee to partially complete the offer form in a manner inconsistent with the plain terms of Section 38-77-350, is denied the benefit of the conclusive statutory presumption a meaningful offer was made. Such a case presents a

factual issue for resolution by the factfinder, with the insurer bearing the burdens of proof and persuasion in demonstrating whether a meaningful offer was made to the insured pursuant to the Wannamaker analysis.

Id., at 15. See also Ray v. Lumbermens Mutual Casualty Co., 698 S.E.2d 208, 212 (S.C. 2010) (Where the form used by the insurer “failed to comply with the requirements of section 38-77-350(A)(2)[,]” the insurer “was not entitled to the statutory presumption that a meaningful offer of UIM coverage was made[;]” however, “[e]ven where the insurer is not entitled to the statutory presumption that a meaningful offer of UIM coverage was made, the insurer can still demonstrate that a meaningful offer of UIM coverage was made to the insured under Wannamaker.”).

As Judge Chambers concluded in Martin, the South Carolina courts have held that even if the conclusive presumption does not apply, an insurer can still prove it made a meaningful offer through other means. Floyd, at 12; McDowell v. Travelers Prop. & Cas. Co., 357 S.C. 118, 123, 590 S.E.2d 514, 517 (Ct. App. 2004); Atkins v. Horace Mann Ins. Co., 376 S.C. 625, 631-32, 658 S.E.2d 106, 110 (Ct. App. 2008). In Atkins, the Court of Appeals of South Carolina held that even when an insurer is not entitled to a conclusive presumption under § 38-77-350(B), the insurer can sustain its burden of proving it made a meaningful offer under Wannamaker by reliance on the contents of the written offer form standing alone. This is consistent with South Carolina’s requirement that insurers must use a written offer form for all new policies. S.C. Code Ann. § 38-77-350(A). The insured in Atkins relied heavily on Floyd to claim the insurer did not intelligibly advise him of the nature of UIM coverage as required by Wannamaker. Floyd, at 631, 110. The Court rejected the insured’s argument and found that Floyd was inapplicable because “the holding in Floyd was limited to the issue of whether [the insurer] was entitled to the conclusive presumption” pursuant to § 38-77-350(B). Id., at 631, 110. Because the meaningful offer

requirement does not hinge exclusively on the use and execution of a proper form, the insurer in Atkins could still prove it made a meaningful offer.

In West Virginia, as in South Carolina, even though an insurer's form is defective and, thus, the statutory presumption is not afforded, the defective form itself, along with other extrinsic evidence, if available, concerning what occurred during the sales transaction, can be used by the insurer to meet its Bias burden. Looking again to South Carolina, where that state's courts have also addressed this issue, in Woodson, the South Carolina Court of Appeals held, in this unpublished opinion, that the form "standing alone" and "[o]n its face" "clearly complies with both the statutory and common law mandates" for a meaningful offer. Woodson v. Nationwide Mut. Ins. Co., No. 2002-UP-398, 5 (S.C. Ct. App. 2002) (per curiam). The insured in Woodson testified she did not understand the meaning of the optional coverage when she signed the form. Id. at 4. She also testified that the insurance agent neither explained UIM coverage to her nor afforded her an opportunity to read the form. Id. Rejecting the insured's argument that failure to orally explain UIM coverage or give her an opportunity to read the form meant the insurer failed to make a meaningful offer, the Court agreed with the insurer that the "form, standing alone, satisfies the Wannamaker meaningful offer test and the factors set forth in § 38-77-350(A)." Id. at 5. The court highlighted language from the form that explained UIM coverage, provided contact information for the Department of Insurance for any further questions, allowed the insured to mark whether to accept UIM coverage, and acknowledged that the insured had received an explanation of the coverage and had chosen whether or not to accept it (all of which information appears on West Virginia's promulgated form as well as the form employed by State Farm and shown to Angela Thomas). Id. at 5-6. Thus, even though a form might be determined to be defective and, as a result, not afford the insurer the benefit of the presumption, it can itself, or with other evidence, be

utilized by an insurer in its effort to meet its Bias burden of proving an effective offer and a knowing and intelligent election or rejection of that offer.

Notably, the Circuit Court's Order, in cavalier fashion, dispenses with Judge Chambers' opinion in Martin by simply stating that it "rejects the Martin Court's conclusion[.]"<sup>6</sup> Likewise, the Circuit Court summarily dismisses the South Carolina cases by labeling State Farm's reference to them "misplaced" because forms in South Carolina must be "approved" by the South Carolina Department of Insurance, and in West Virginia, the Insurance Commissioner has "promulgated" an exemplar form. This, however, is a distinction without a difference, and the South Carolina decisions did not rest on or revolve around this distinction.

In short, the Federation urges this Court to reject the rationale used and the conclusion reached by the Circuit Court in the Certified Question that an insurer's failure to use the exact form contained in Informational Letter #121 results in strict liability for UIM coverage in an amount that is "rolled up" or, where there was a rejection of the coverage entirely, "rolled onto" to the liability limits under the insurance policy -- a conclusion that "defies logic[.]" Martin, at 507. Instead, this Court should adopt the thoughtful analysis, rationale and conclusion of Judge Chambers in Martin, which conforms with this Court's decision in Bias, with W. Va. Code § 33-6-31, and with this Court's references to Bias over the past 25 years. That conclusion is simple: Bias has not been superseded – it is alive and well. Rather, "the statute and the Insurance Commissioner Informational Letters were promulgated in order to clarify the standard first established in Bias. . . . [W]hen the statutory presumption does not apply, Bias and its progeny control." Id.

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<sup>6</sup> The Federation notes that the Order characterizes Judge Chambers' opinion in Martin as concluding that "the less stringent Bias standards are still applicable." Order at 18, ¶23. This characterization is nonsensical as the Bias standards are not "less stringent" than what is required under §33-6-31d. Rather, the Bias standards contain exactly what is required by the statute. Certainly, an insurance company can meet these standards by using a form that meets the minimum standards under Information Letter #121. Another way to meet the standards in Bias, however, is for the insurance company to meet its evidentiary burden under Bias. To call the Bias standards "less stringent" or "less onerous" in this context, therefore, is disingenuous, at best.

## V. CONCLUSION

Informational Letter #121 simply provides a minimum standard to determine whether an insurer is entitled to a presumption that its offer of (“UIM”) coverage has been presented to an insured in a commercially reasonable manner. If an insurer makes an offer of UIM coverage that contains the information prescribed by the Insurance Commissioner in Informational Letter #121, the insurer is entitled to the presumption that the offer was made in a commercially reasonable manner. If the insurer uses an offer form that fails to provide the minimum information prescribed by Informational Letter #121, it may not be entitled to the presumption that the offer was presented in a commercially reasonable manner. In that case, however, the insurer loses the statutory presumption only. It can, in the absence of the statutory presumption, utilize this Court’s standards in Bias to demonstrate both a commercially reasonable offer of UIM coverage and an intelligent and knowing rejection of that offer by the applicant or insured. The Federation urges this Court, therefore, to (1) reformulate the Certified Question in a way that accurately and fairly reflects West Virginia law under § 33-6-31d, Informational Letter #121, and Bias, and (2) answer a reformulated Certified Question in such a way that permits State Farm, in the event the Court finds that its UIM offer form does not comply with Informational Letter #121 or 33-6-31d, to introduce evidence that it made a commercially reasonable offer of UIM coverage to Angela Thomas and that Angela Thomas made a knowing and intelligent rejection of such coverage.

**WEST VIRGINIA INSURANCE FEDERATION**

**BY DINSMORE & SHOHL, LLP**



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**THE STATE OF SOUTH CAROLINA  
IN THE COURT OF APPEALS**

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KIMBERLY S. WOODSON AND CHRISTOPHER  
WOODSON,

RESPONDENTS,

V.

NATIONWIDE MUTUAL INSURANCE COMPANY,

APPELLANT.

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APPEAL FROM ANDERSON COUNTY  
L. CASEY MANNING, CIRCUIT COURT JUDGE

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UNPUBLISHED OPINION NO. 2002-UP-398  
SUBMITTED MARCH 5, 2002 - FILED JUNE 4, 2002

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**REVERSED**

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J. R. MURPHY, OF MURPHY & GRANTLAND, OF  
COLUMBIA, FOR APPELLANT.

DONALD CHUCK ALLEN AND WILLIAM E. PHILLIPS,  
OF ALLEN LAW FIRM, OF ANDERSON, FOR  
RESPONDENTS.

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**PER CURIAM:** IN THIS DECLARATORY JUDGMENT ACTION,  
NATIONWIDE MUTUAL INSURANCE COMPANY APPEALS THE TRIAL

COURT=S RULING REFORMING TWO INSURANCE POLICIES ISSUED TO KIMBERLY AND CHRISTOPHER WOODSON FOR LACK OF A MEANINGFUL OFFER OF UNDERINSURED MOTORISTS COVERAGE. WE REVERSE.

### **FACTS/PROCEDURAL HISTORY**

KIMBERLY AND CHRISTOPHER WOODSON BOUGHT SEPARATE POLICIES OF AUTOMOBILE INSURANCE FROM NATIONWIDE MUTUAL INSURANCE COMPANY. ALTHOUGH THE WOODSONS ALSO PURCHASED ADDITIONAL UNINSURED MOTORIST COVERAGE, THEY SPECIFICALLY REJECTED UNDERINSURED MOTORIST (UIM) COVERAGE ON AN ADDITIONAL COVERAGE OFFER FORM.<sup>1</sup>

ON DECEMBER 15, 1997, KIMBERLY WAS INJURED IN AN AUTOMOBILE ACCIDENT AND SUFFERED DAMAGES IN EXCESS OF THE AT-FAULT DRIVER=S LIABILITY LIMITS; SHE THEN SOUGHT UIM COVERAGE UNDER HER OWN POLICY AND NATIONWIDE REFUSED. THEREAFTER, THE WOODSONS FILED THIS DECLARATORY JUDGMENT ACTION SEEKING REFORMATION OF THEIR NATIONWIDE POLICIES TO INCLUDE UIM COVERAGE.

SITTING WITHOUT A JURY, THE TRIAL COURT FOUND NATIONWIDE FAILED TO MAKE MEANINGFUL OFFERS OF UIM COVERAGE TO THE WOODSONS PURSUANT TO STATE FARM MUT. AUTO. INS. CO. V. WANNAMAKER, 291 S.C. 518, 354 S.E.2D 555 (1987). IN PARTICULAR, THE COURT DETERMINED NATIONWIDE=S OFFERS WERE NOT MEANINGFUL BECAUSE NATIONWIDE NEVER PROVIDED THE WOODSONS WITH AN ORAL EXPLANATION OF UIM COVERAGE OR AN OPPORTUNITY TO READ THE OFFER FORMS. AS A RESULT, THE TRIAL COURT REFORMED BOTH POLICIES TO INCLUDE UIM COVERAGE. THIS APPEAL FOLLOWED.

### **LAW/ANALYSIS**

#### **STANDARD OF REVIEW**

AN ACTION TO REFORM AN INSURANCE CONTRACT SOUNDS IN EQUITY. ELIAS V. FIREMAN=S INS. CO. OF NEWARK, N.J., 309 S.C. 129, 420 S.E.2D 504 (1992). IN AN APPEAL FROM AN ACTION IN EQUITY TRIED BY THE

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<sup>1</sup> ON MARCH 30, 1998, KIMBERLY RENEWED HER POLICY WITH THE SAME UNINSURED LIMITS AND AGAIN SPECIFICALLY REJECTED ADDITIONAL UIM COVERAGE.

JUDGE ALONE, THIS COURT HAS JURISDICTION TO FIND FACTS IN ACCORDANCE WITH ITS OWN VIEW OF THE PREPONDERANCE OF THE EVIDENCE. TOWNES ASSOCS. LTD. V. CITY OF GREENVILLE, 266 S.C. 81, 221 S.E.2D 773 (1976).

S.C. CODE ANN. ' 38-77-160 (2002) PROVIDES THAT AUTOMOBILE INSURANCE CARRIERS SHALL . . . OFFER, AT THE OPTION OF THE INSURED, UNDERINSURED MOTORIST COVERAGE UP TO THE LIMITS OF THE INSURED LIABILITY COVERAGE. SEE RABB V. CATAWBA INS. CO., 339 S.C. 228, 528 S.E.2D 693 (CT. APP. 2000). IN WANNAMAKER, OUR SUPREME COURT ADOPTED A FOUR-PART TEST FOR DETERMINING WHETHER AN INSURER HAS COMPLIED WITH ITS DUTY TO OFFER OPTIONAL COVERAGES: (1) THE INSURER'S NOTIFICATION PROCESS MUST BE COMMERCIALY REASONABLE, WHETHER ORAL OR IN WRITING; (2) THE INSURER MUST SPECIFY THE LIMITS OF OPTIONAL COVERAGE AND NOT MERELY OFFER ADDITIONAL COVERAGE IN GENERAL TERMS; (3) THE INSURER MUST INTELLIGIBLY ADVISE THE INSURED OF THE NATURE OF THE OPTIONAL COVERAGE; AND (4) THE INSURED MUST BE TOLD THAT OPTIONAL COVERAGES ARE AVAILABLE FOR AN ADDITIONAL PREMIUM. WANNAMAKER, 291 S.C. AT 521, 354 S.E.2D AT 556.

SUBSEQUENT TO THE WANNAMAKER DECISION, THE LEGISLATURE ENACTED S.C. CODE ANN. ' 38-77-350 (2002). THIS SECTION REQUIRES INSURERS TO USE A FORM WHEN OFFERING OPTIONAL INSURANCE COVERAGES THAT AT A MINIMUM PROVIDES:

- (1) A BRIEF AND CONCISE EXPLANATION OF THE COVERAGE,
- (2) A LIST OF AVAILABLE LIMITS AND THE RANGE OF PREMIUMS FOR THE LIMITS,
- (3) A SPACE FOR THE INSURED TO MARK WHETHER THE INSURED CHOOSES TO ACCEPT OR REJECT THE COVERAGE AND A SPACE FOR THE INSURED TO SELECT THE LIMITS OF COVERAGE HE DESIRES,
- (4) A SPACE FOR THE INSURED TO SIGN THE FORM WHICH ACKNOWLEDGES THAT HE HAS BEEN OFFERED THE OPTIONAL COVERAGES, [AND]
- (5) THE MAILING ADDRESS AND TELEPHONE NUMBER OF THE

CONTACT INSURANCE DEPARTMENT WHICH THE APPLICANT MAY  
INSURANCE IF THE APPLICANT HAS ANY QUESTIONS THAT THE  
AGENT IS UNABLE TO ANSWER.

§ 38-77-350(A). SIGNIFICANTLY, THE LEGISLATURE DECLARED THAT IF THE FORM IS PROPERLY COMPLETED AND EXECUTED BY THE NAMED INSURED IT IS CONCLUSIVELY PRESUMED THAT THERE WAS AN INFORMED, KNOWING SELECTION OF COVERAGE, AND FURTHERMORE THAT COMPLIANCE WITH [§ 38-77-350] SATISFIES THE INSURER AND AGENT'S DUTY TO EXPLAIN AND OFFER OPTIONAL COVERAGES. § 38-77-350(B), (D).

THE INSURER BEARS THE BURDEN OF ESTABLISHING THAT IT MADE A MEANINGFUL OFFER OF UIM COVERAGE. TUCKER V. ALLSTATE INS. CO., 337 S.C. 128, 131, 522 S.E.2D 819, 821 (CT. APP. 1999). IF AN INSURER FAILS TO MAKE A MEANINGFUL OFFER OF UIM, THE POLICY WILL BE REFORMED BY OPERATION OF LAW TO INCLUDE SUCH COVERAGE UP TO THE LIMITS OF LIABILITY INSURANCE CARRIED BY THE INSURED. BUTLER V. UNISUN INS. CO., 323 S.C. 402, 475 S.E.2D 758 (1996); TUCKER, 337 S.C. AT 131, 522 S.E.2D AT 821.

AT TRIAL, KIMBERLY TESTIFIED THAT ALTHOUGH SHE UNDERSTANDS UIM COVERAGE NOW, SHE DID NOT UNDERSTAND THE MEANING OF UIM COVERAGE WHEN SHE SIGNED NATIONWIDE'S OFFER FORM IN FEBRUARY 1997. SHE FURTHER STATED THE NATIONWIDE INSURANCE AGENT NEITHER EXPLAINED UIM COVERAGE TO HER NOR AFFORDED HER AN OPPORTUNITY TO READ THE FORM. LIKEWISE, CHRISTOPHER TESTIFIED HE DID NOT UNDERSTAND UIM COVERAGE WHEN HE SIGNED AN IDENTICAL NATIONWIDE FORM. HE CLAIMED HE WAS TOLD THE FORM OFFERED ADDITIONAL INSURANCE HE WAS NOT REQUIRED TO HAVE, AND FURTHERMORE, THAT HE NEVER ACTUALLY READ THE STACKS OF PAPERS PRESENTED FOR HIS SIGNATURE. CHRISTOPHER EXPLAINED THAT HE NOW UNDERSTANDS UIM COVERAGE AND, HAD HE READ THE FORM ORIGINALLY, HE WOULD PROBABLY [HAVE UNDERSTOOD] PARTS OF IT . . . [BUT] WOULD [HAVE] UNDERSTOOD IT BETTER IF IT WAS EXPLAINED TO [HIM].  
THUS, THE WOODSONS AVER THAT BECAUSE NATIONWIDE NEVER GAVE THEM AN INDEPENDENT ORAL EXPLANATION OF UIM COVERAGE OR AFFORDED THEM AN OPPORTUNITY TO REVIEW THE EXPLANATORY

LANGUAGE, IT FAILED TO MAKE A MEANINGFUL OFFER OF UIM.

ON THE OTHER HAND, NATIONWIDE ARGUES ITS FORM, STANDING ALONE, SATISFIES THE WANNAMAKER MEANINGFUL OFFER TEST AND THE FACTORS SET FORTH IN ' 38-77-350(A). WE AGREE.

ON ITS FACE, THE FORM CLEARLY COMPLIES WITH BOTH THE STATUTORY AND COMMON LAW MANDATES. THE FORM'S FIRST TWO PAGES PROVIDE AN EXPLANATION OF COVERAGES THAT SPELL OUT WHAT AUTOMOBILE LIABILITY INSURANCE COVERS AND DEFINES, IN PLAIN TERMS, UM AND UIM COVERAGES.<sup>2</sup> THE FORM SPECIFICALLY STATES THAT UIM AND OPTIONAL UM MAY BE PURCHASED FOR AN ADDITIONAL

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<sup>2</sup> UIM COVERAGE IS DESCRIBED AS FOLLOWS:

**UNDERINSURED MOTORIST COVERAGE** COMPENSATES YOU, OR OTHER PERSONS INSURED UNDER YOUR AUTOMOBILE INSURANCE POLICY, INCLUDING PASSENGERS WITHIN YOUR MOTOR VEHICLE, FOR AMOUNTS THAT YOU, OR YOUR PASSENGERS, MAY BE LEGALLY ENTITLED TO COLLECT AS DAMAGES FROM AN OWNER OR OPERATOR OF AN AT-FAULT UNDERINSURED MOTOR VEHICLE. AN UNDERINSURED MOTOR VEHICLE IS A MOTOR VEHICLE THAT IS COVERED BY SOME FORM OF LIABILITY INSURANCE, BUT THAT LIABILITY INSURANCE COVERAGE IS NOT SUFFICIENT TO COMPENSATE YOU FOR YOUR DAMAGE.

YOUR AUTOMOBILE INSURANCE POLICY DOES NOT AUTOMATICALLY PROVIDE ANY UNDERINSURED MOTORIST COVERAGE. YOU HAVE, HOWEVER, A RIGHT TO BUY UNDERINSURED MOTORIST COVERAGE IN LIMITS UP TO THE LIMITS OF LIABILITY COVERAGE YOU WILL CARRY UNDER YOUR AUTOMOBILE INSURANCE POLICY. SOME OF THE MORE COMMONLY SOLD LIMITS OF UNDERINSURED MOTORIST COVERAGE, TOGETHER WITH THE ADDITIONAL PREMIUMS YOU WILL BE CHARGED, ARE SHOWN UPON THIS FORM. IF THERE ARE OTHER LIMITS IN WHICH YOU ARE INTERESTED, BUT WHICH ARE NOT SHOWN UPON THIS FORM, THEN FILL-IN THOSE LIMITS. IF YOUR INSURANCE COMPANY IS ALLOWED TO MARKET THOSE LIMITS WITHIN THIS STATE, OUR INSURANCE AGENT WILL FILL-IN THE AMOUNT OF INCREASED PREMIUMS.

PREMIUM. IT FURTHER RECOMMENDS THAT THE INSURED READ THIS FORM CAREFULLY AND DIRECTS ANY QUESTIONS TO THE SOUTH CAROLINA DEPARTMENT OF INSURANCE AT THE APPROPRIATE ADDRESS AND PHONE NUMBER. PAGE TWO CONCLUDES WITH THIS SENTENCE: YOUR INSURANCE AGENT MUST ALSO ANSWER ANY QUESTIONS WHICH YOU MAY HAVE.

THE THIRD PAGE OF THE FORM GIVES A CHOICE OF STATED LIMITS OF UM COVERAGE AND ALLOWS THE INSURED TO WRITE IN ANY LEVEL OF COVERAGE DESIRED UP TO THE POLICY LIMITS. PAGE FOUR PRESENTS SIMILAR CHOICES FOR UIM COVERAGE. THE WOODSONS ADMIT THEY REJECTED UIM COVERAGE BY CHECKING "NO" AFTER THE LINE ON PAGE FOUR STATING: "DO YOU WISH TO PURCHASE **UNDERINSURED** MOTORIST COVERAGE?" THEY FURTHER ACKNOWLEDGE THEIR RESPECTIVE SIGNATURES BY THE LINES WHICH READ: "IF YOUR ANSWER IS >NO,= YOU MAY THEN SIGN HERE." FINALLY, THE WOODSONS AGREE THEY SIGNED PART FOUR OF THE FORM FOLLOWING THIS PARAGRAPH:

I HEREBY ACKNOWLEDGE THAT I HAVE READ, OR HAVE HAD READ TO ME, THE ABOVE EXPLANATION AND OFFERS OF **ADDITIONAL UNINSURED** MOTORIST COVERAGE AND **UNDERINSURED** MOTORIST COVERAGE. I HAVE INDICATED WHETHER OR NOT I WISH TO PURCHASE EACH COVERAGE IN THE SPACE PROVIDED. I FURTHER UNDERSTAND THAT THE ABOVE EXPLANATIONS OF THESE COVERAGES ARE INTENDED ONLY TO BE BRIEF DESCRIPTIONS OF UNINSURED MOTORIST COVERAGE AND UNDERINSURED MOTORIST COVERAGE, AND THAT PAYMENT OF BENEFITS UNDER ANY OF THESE COVERAGES IS SUBJECT BOTH TO THE TERMS AND CONDITIONS OF MY AUTOMOBILE INSURANCE POLICY AND TO THE STATE OF SOUTH CAROLINA'S LAWS.

IN OUR VIEW, THERE IS NO QUESTION NATIONWIDE'S OFFER FORM COMPLIED WITH BOTH WANNAMAKER AND ' 38-77-350. ACCORDINGLY, THE PRESUMPTION THAT THE WOODSONS MADE "AN INFORMED, KNOWING SELECTION OF COVERAGE" IS CONCLUSIVE, AND

NATIONWIDE HAD NO DUTY TO EXPLAIN IT=S OPTIONAL COVERAGES FURTHER. ' 38-77-350(B); SEE ' 38-77-350(D); WANNAMAKER, 291 S.C. AT 521, 354 S.E.2D AT 556; RABB, 339 S.C. AT 234, 528 S.E.2D AT 695. BECAUSE NATIONWIDE MADE A MEANINGFUL OFFER AS REQUIRED BY LAW, THE TRIAL COURT ERRED IN REFORMING THE WOODSONS= POLICIES TO PROVIDE UIM COVERAGE.

**REVERSED.**

**CURETON, STILWELL, AND SHULER, JJ., CONCUR.**

NO. 12-0688

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

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

Petitioners,

v.

WILLIAM RAY McDERMITT and STATE FARM MUTUAL AUTOMOBILE  
INSURANCE COMPANY,

Respondents.

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From the Circuit Court of Mason County, West Virginia  
Civil Action No. 11-C-81-N

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BRIEF OF THE WEST VIRGINIA INSURANCE FEDERATION  
AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENTS ON CERTIFIED QUESTION

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CERTIFICATE OF SERVICE

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I hereby certify that I have this day served a copy of *Brief of the West Virginia Insurance Federation as Amicus Curiae in Support of Respondents on Certified Question* upon all parties to this matter by depositing a true copy of the same in the U.S. Mail, postage prepaid, properly addressed to the following:

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This 27<sup>th</sup> day of September, 2012.



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Jill Cranson Rice (WV State Bar No. 7421)