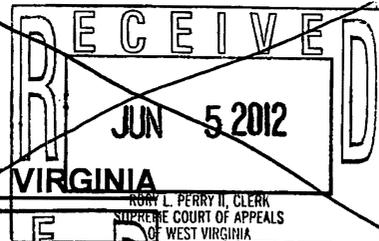


12-0688



IN THE CIRCUIT COURT OF MASON COUNTY, WEST VIRGINIA

DANIEL W. THOMAS, ANGELA Y. THOMAS, individually and ANGELA Y. THOMAS, as Mother and Next Friend of LUKE D. THOMAS, an infant

Plaintiffs,

v.

**CIVIL ACTION NO. 11-C-81-N
Honorable David W. Nibert**

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

Defendants.

**OPINION AND ORDER GRANTING
PLAINTIFFS' 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**

ON THE 13th Day of February, 2012, came the parties to the above-styled action, by their respective counsel, for a hearing on the 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 To The West Virginia State Supreme Court Of Appeals*. Whereupon the Court, having heard the arguments of counsel and having reviewed the memoranda filed by the parties, is of the opinion to and does hereby make the following findings of fact and conclusions of law:

FINDINGS OF FACT

1. This action arises out of an automobile accident which occurred on August 16, 2009 when Defendant William Ray McDermitt crossed the center line of Oshel Road in Mason County, West Virginia, and collided with a vehicle operated by

Plaintiff Daniel W. Thomas.

2. At the time of the accident, Plaintiff Angela Y. Thomas and the Plaintiffs' son, Luke D. Thomas, were riding as passengers in the Thomas vehicle. All three members of the Thomas family sustained personal injuries as a result of the accident.

3. Plaintiffs have alleged that the injuries and damages they sustained greatly exceed the available liability coverage under Defendant William Ray McDermitt's automobile liability policy, and that Defendant McDermitt was an underinsured motorist as that term is defined under West Virginia law. Specifically, the Plaintiffs assert that their medical bills alone total \$52,008.18, while Defendant McDermitt's liability limits are just \$25,000 per person, \$50,000 per accident.

4. At the time of the accident, Plaintiffs Daniel and Angela Thomas were insured under an automobile liability insurance policy issued by State Farm Mutual Automobile Insurance Company, identified as State Farm Policy No. 249 5771-E02-48H.

5. The State Farm Policy provided liability insurance coverage limits of One Hundred Thousand Dollars (\$100,000) per person, and Three Hundred Thousand Dollars (\$300,000) per occurrence for bodily injuries. However, the Policy purported to provide no underinsured motorists coverage, and State Farm has denied that any underinsured motorists coverage is available to pay for the Plaintiffs' underinsured damages in this case.

6. The Plaintiffs have alleged that the selection/rejection form utilized by State Farm in connection with their purchase of underinsured motorists coverage was defective and violated the requirements imposed by *W. Va. Code §33-6-31d* and the

West Virginia Insurance Commissioner, and did not properly provide the Plaintiffs a commercially reasonable opportunity to purchase underinsured motorists coverage equal to the liability limits of One Hundred Thousand Dollars (\$100,000).

7. The Plaintiffs initiated this action against State Farm, seeking a declaratory judgment as to the amount of coverage available.

8. The Plaintiffs allege that State Farm cannot prove that it made a commercially reasonable and effective offer of underinsured motorists coverage to the Plaintiffs because State Farm did not use the selection/rejection forms promulgated by the West Virginia Insurance Commissioner's Office through the Commissioner's Informational Letter 88 (effective July, 1983 through July, 2000), and Informational Letter 121 (effective July, 2000 through the present), to provide the mandatory forms for use by insurance companies doing business in West Virginia.

9. The Plaintiffs assert that because State Farm failed to use the selection/rejection form promulgated by the West Virginia Insurance Commissioner's Office as required under *W. Va. Code §33-6-31d*, they are entitled to partial summary judgment with respect to the availability of underinsured motorists coverage. Specifically, the Plaintiffs assert that because State Farm did not use the mandatory form to make the required offer of underinsured motorists coverage, such coverage must be added to the policy as a matter of law in the amount State Farm was required to offer.

10. Both Informational Letter # 88 and Informational Letter #121 require insurers doing business in West Virginia to use a prescribed underinsured motorists coverage selection/rejection form which states the total premium for each available

level of underinsured motorists coverage, up to the policy's liability limits, and the insured must then mark his/her selection of coverage.

11. The State Farm underinsured motorists coverage selection/rejection form at issue in this case was signed by Plaintiff Angela Thomas on May 4, 2007.

12. Rather than providing the insured with a single column listing the applicable premium for each level of optional coverage, the form utilized by State Farm includes four (4) possible premiums for each coverage level. These separate premiums appear to depend upon whether a multi-car discount and collision coverage is included on the policy. These four columns are labeled, "With Collision Multiple Vehicle Discount Included," "With Collision Multiple Vehicle Discount Not Included," "Without Collision Multiple Vehicle Discount Included," and "Without Collision Multiple Vehicle Discount Not Included."

13. State Farm's selection/rejection form presents the insured with four possible premiums after the form has already indicated, in a separate check box, whether the proposed rates include or do not include a multi-car discount. There is no indication anywhere on the form whether the insured has collision coverage and it is impossible for the insured to tell by looking at the form which premium would apply for each available level of coverage.

14. In the "Frequently Asked Questions" section of Informational Letter #88, the West Virginia Insurance Commissioner's Office addressed inquiries about modifications of the Commissioner's forms promulgated pursuant to §33-6-31d stating:

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 damages 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.

* * *

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.

15. The Insurance Commissioner's Informational Letter #121 also requires insurers to provide all of the information contained in the promulgated form and permits only modification to the promulgated forms, 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. It is not necessary that the reproduced forms be exact replicas of the Commissioner Forms in size and shape. 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 insurer reproduced forms.

16. In support of their position, the Plaintiffs offered the deposition testimony of State Farm designated representative with respect to its selection/rejection forms, Larry Cipov, who was asked about the fact that State Farm's selection/rejection form does not contain all of the information necessary to determine which premium would apply for each optional level of coverage and testified as follows:

Q. Right. So you will agree with me that if you look just at the form as provided by the insurance commissioner, under Form A under Informational Letter 121, assuming the premiums were filled in, under that single column you would be able to tell what the coverage costs for 50/100/10, wouldn't you?

A. You have only one number there.

Q. Right. And you wouldn't have to look at any other form to see, would you?

A. No.

Q. But on State Farm's form, you do; correct?

A. You have to tie in knowledge from some other source, yes, to know whether or not you're getting a discount for collision; and you have to look at the boxes up above to know whether you're getting a multiple vehicle discount or not.

(Deposition of Larry Cipov at pgs. 176-177)

17. The Plaintiffs also offered the testimony of a number of other State Farm employees who also acknowledged that they could not identify the cost of a particular level of coverage without additional information not provided on State Farm's form.

(Deposition of Shannon Cazad at pgs. 89-90, Deposition of Angela Cooke at pgs. 109-110, Deposition of Eric Paugh at pg. 67, and Deposition of Patricia Paul at pgs.

72-73.)

18. State Farm's employees have also testified that State Farm's decision to use a underinsured motorists coverage selection/rejection form with multiple premiums for each optional level of coverage was motivated by a desire to make the preparation of the forms easier for the agents involved in selling State Farm's policies, even though State Farm's forms did not identify the specific premium that an insured would be expected to pay for any specific level of coverage. In that regard, Mr. Cipov testified:

Q. Now, before that time, before you were able to implement this technology, you could have still used a single format - - or a single column format, could you not?

A. We could have, but it would have been very, very burdensome on the agent and prone to lots of errors that would have been expensive to the company.

Q. Why would it have been burdensome on the agent?

A. The agent would have to either calculate the premium for each of the coverage offers that were listing themselves or create some sort of job aid so they wouldn't have to recalculate those rates every time a new customer walked in the door.

Q. So in order to save the agent from having to essentially sit down and figure out what the rate would be if you had collision coverage and what the rate would be if you have a multi-vehicle discount, State Farm elected to have a form that had a multi-column format that populated all four columns for all four possible options or permutations; correct?

A. That's correct.

* * *

Q. So would it be safe to say, then, that the reason why these various formats came about as far as the different numbers of columns on each of these forms was to account for the different pricing or rate schedules or schemes that State Farm had in place for the different coverages, such as collision and multi-vehicle discount?

MR. NOTEBOOM: Object to the form.

A. I believe that's a generally accurate statement.

(Deposition of Larry Cipov at pgs. 214-215)

19. Because State Farm's underinsured motorists coverage selection/rejection form contains multiple columns listing multiple premiums for each optional level of coverage and does not contain information necessary to determine what the actual premium would be for each level of UIM coverage the Plaintiffs could have purchased, State Farm's form is materially different from the forms promulgated by the West Virginia Insurance Commissioner's Office through Informational Letters #88 and 121. State Farm's form is more complicated, and defeats the goal of simplicity.

20. In light of the testimony of State Farm's employees, the Court concludes that State Farm chose to use an underinsured motorists coverage selection/rejection form which was materially different from the form promulgated by the West Virginia Insurance Commissioner's Office for the purpose of making life easier for State Farm's agents.

21. In conjunction with their request for partial summary judgment on the coverage issues, the Plaintiffs have also requested, pursuant to *W.Va. Code §58-5-2*, that the Court certify the following question to the West Virginia State Supreme Court of Appeals:

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 *Bias* standards which existed at common law prior to the enactment of *W. Va. Code § 33-6-31d*.

CONCLUSIONS OF LAW

1. *West Virginia Code §33-6-31(b)* requires every insurer selling automobile insurance coverage in West Virginia to offer underinsured motorists coverage "up to an amount not less than limits of bodily injury liability insurance and property damage liability insurance purchased by the insured without setoff against the insured's policy or any other policy."

2. An insurer must prove that it made an "effective offer" of underinsured motorists coverage "and that any rejection of said offer by the insured was knowing and informed. Said offer must be made in a commercially reasonable manner[.]" *Bias v. Nationwide Mut. Ins. Co.*, 179 W. Va. 125, 127, 365 S.E.2d 789, 791 (1987) (citations omitted).

3. "A commercially reasonable offer is one that provide[s] the insured with adequate information to make an intelligent decision." *Bias*, 365 S.E.2d at 791).

4. The West Virginia Supreme Court of Appeals made it clear in *Bias* that the “commercially reasonable offer” made by the insurance company must be made “so as to provide the insured with adequate information to make an intelligent decision. The offer must state, in definite, intelligible, and specific terms, the nature of the coverage offered, the coverage limits, **and the costs involved.**” *Kalwar v Liberty Mut. Ins. Co.*, 506 S.E.2d 39, 43 (W. Va. 1998) (emphasis in original).

5. If “the insurer fails to prove an effective offer [of underinsured motorists coverage] ...[,]” the amount of . . . underinsured motorists coverage available is what the insurer was required to offer, that is, the amount of the policy’s liability limits. Syl. Pts. 1, 2, *Bias*, 179 W. Va. 125, 127, 365 S.E.2d 789).

6. *W. Va. Code § 33-6-31d* requires the West Virginia Insurance Commissioner to promulgate a standardized form for making the mandatory offer of underinsured motorists coverage to be used by all insurers doing business in the State of West Virginia and expressly requires that the offer be made “on a form prepared and made available by the insurance commissioner.” It goes on to state:

(a) ... The 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.**

(b) ... Any insurer who issues a motor vehicle insurance policy in this state **shall provide the form** to each person who applies for the issuance of such policy by delivering the form to the applicant or by mailing the form to the applicant together with the applicant’s initial premium notice. . .

(c) ... The contents of a form described in this section

which has been signed by any named insured shall create a presumption that all named insureds under the policy received an effective offer of the optional coverages described in this section and that all such named insureds exercised a knowing and intelligent election or rejection, as the case may be, of such offer as specified in the form. Such election or rejection is binding on all persons insured under the policy.

W. Va. Code § 33-6-31d (emphasis added)

7. The use of the Commissioner's form is not optional and there is no provision in the statute for an insurer to alter or modify the form for their own purposes or convenience.

8. In compliance with *W. Va. Code § 33-6-31d*, the West Virginia Insurance Commissioner promulgated the mandatory UIM optional-coverage offer forms through Informational Letters #88 and 121, which provided the mandatory forms for use by insurance companies doing business in West Virginia.

9. The mandatory underinsured motorists coverage selection/rejection forms provided through Informational Letters #88 and 121 require insurers to state in a single column on the form the total premium for each available level of underinsured motorists coverage, up to the policy's liability limits, and the insured must then mark his/her selection of coverage.

10. The clear and unambiguous language of *W. Va. Code § 33-6-31d* provides that State Farm was required to use the form "prepared and made available" by the Commissioner. In that regard, the West Virginia State Supreme Court noted, in the case of *State v. Grant*, 226 W. Va. 568, 703 S.E.2d 539 (W.Va. 2010):

[i]n determining the meaning of the statutory language, this Court first

must determine whether the language is ambiguous. **“A statute is open to construction only where the language used requires interpretation because of ambiguity which renders it susceptible of two or more constructions or of such doubtful or obscure meaning that reasonable minds might be uncertain or disagree as to its meaning. . . . However, “[t]he fact that parties disagree about the meaning of a statute does not itself create ambiguity or obscure meaning.” . . . Moreover, “[c]ourts always endeavor to give effect to legislative intent, but a statute that is clear and unambiguous will be applied and not construed.” . . . Under our law, “[i]n the absence of any specific indication to the contrary, words used in a statute will be given their common, ordinary and accepted meaning.” . . . As we have previously recognized, “courts must presume that a legislature says in a statute what it means and means in a statute what it says there.”**

State v. Grant at 541-42. (Emphasis supplied.)

11. In this case, the West Virginia Legislature expressly indicated in *W. Va. Code §33-6-31d* that the offer of underinsured motorists coverage **“shall be made available to the named insured . . . on a form prepared and made available by the insurance commissioner.”** (Emphasis supplied.) It did not indicate that such offers “may” be made on a form prepared or modified by the insurer. Instead, it specifically indicated that such offers “shall” be made on the Commissioner’s form.

12. In West Virginia, “[i]t is well established that the word “shall” in the absence of language in the statute showing a contrary intent on the part of the Legislature, should be afforded a mandatory connotation.” *Keplinger v. Virginia Electric & Power Co.*, 208 W.Va. 11 at 22, 537 S.E.2d 632 at 643 (W.Va. 2000) (Citations omitted.) Likewise, the Legislature did not give the Commissioner the authority to waive any of the requirements of §33-6-31d, or to delegate the role of preparing the forms to the insurance industry. Instead, it mandated that the Commissioner prepare the form and make it available to the industry. Thus, nothing in

§33-6-31d supports the assertion that State Farm was free to add additional, non-mandatory information to the form so long as it also provided all of the information required by § 33-6-31d.

13. Since Informational Letters #88 and 121 were issued, the West Virginia Supreme Court of Appeals has expressly recognized that all auto insurers must use the Commissioner's form to make an underinsured motorists coverage offer. See generally *Westfield v. Bell*, 507 S.E.2d 406 (W. Va. 1998); *Burrows v. Nationwide Ins. Co.*, 600 S.E.2d 565 (W. Va. 2004).

14. The consequences of an insurer's failure to use the mandatory form were explained in *Ammons v. Transportation Ins. Co.*, 219 F. Supp.2d 885 (S.D. Ohio), in which an insurer used its own modified form to offer optional West Virginia uninsured motorist coverage to its insured. Because the form did not comply with statutory requirements, the policy's uninsured motorists coverage was, as a matter of law, "rolled up" to the policy's liability limit. The *Ammons* Court stated:

the West Virginia Supreme Court has found that, since July 1993, insurers have been required to make offers for optional UM coverage in the manner prescribed by the 1993 statute and the Insurance Commissioner's guidelines. ... [the insurer's] failure to comply with §33-6-31d by failing to set forth a premium breakdown showing the cost of each optional coverage limit must be construed as a failure to make an effective and commercially reasonable offer.

Ammons, 219 F.Supp.2d at 894 [emphasis added, citing *Foutty v. Porterfield*, 450 S.E.2d 802, 804 n. 5 (W. Va. 1994)]. (emphasis supplied.) While *Ammons* was decided by an Ohio Federal District Court, applying West Virginia law, the West Virginia

State Supreme Court cited *Ammons* with approval in *Burrows*, 215 W.Va. at 673 n. 10, 600 S.E.2d at 570 n. 10.

15. In *State ex rel. Riffle v. Ranson*, 195 W.Va. 121, 464 S.E.2d 763 (W.Va. 1995), the West Virginia State Supreme Court noted:

It has been a mainstay of Anglo-American jurisprudence that the common law gives way to a specific statute that is inconsistent with it; when a statute is designed as a revision of a whole body of law applicable to a given subject, it supersedes the common law.

Riffle at 128, 770.

16. Because the Legislature clearly and unambiguously responded to *Bias* by mandating the use of the Commissioner's form to make offers of underinsured motorists coverage, the *Bias* test for proving an effective offer and knowing and intelligent rejection of such coverage has effectively been superseded by *W.Va. Code § 33-6-31d*.

17. The West Virginia State Supreme Court recognized that the *Bias* standard had been superseded in *Bell*, where the Court stated:

While an offer of optional coverage had to be made by an insurance company in compliance with W.Va. Code, 33-6-31d and the insurance commissioner's guidelines after July 1993, [the date Informational Letter No. 88 was issued] we believe that any offer prior to July 1993 is acceptable if within the mandate of *Bias*.

Bell at 309, 410. (Emphasis supplied.) Likewise, in *Ammons*, the Court found that an offer of underinsured motorists coverage was ineffective despite the fact that the insured's risk manager had testified that he understood the nature of the coverage and

made a knowing and intelligent business decision to reject it due to the costs involved and his desire to avoid duplicative coverage. *Ammons* at 891-892. While the insurer in *Ammons* could clearly prove a knowing and intelligent waiver of the coverage by the insured's risk manager under *Bias*, the Court applied the clear language of the statute and rolled up the coverage.

18. The *Ammons* decision's recognition that *Bias* has been superceded by statute was expressly approved by the West Virginia State Supreme Court of Appeals in *Luikart v. Valley Brook Concrete & Supply, Inc.*, 216 W.Va. 748, 613 S.E.2d 896 (W.Va. 2005), wherein the Court stated, at Footnote 11:

We have recognized that insurers are statutorily required to offer certain coverage benefits in the context of automobile insurance. See *Bias v. Nationwide Mut. Ins. Co.*, 179 W.Va. 125, 365 S.E.2d 789 (1987) (holding that if insurer fails to comply with statutory duty to offer optional underinsured and uninsured motorists coverage in commercially reasonable manner, such coverage is included in policy by operation of law), *superceded by statute as recognized in Ammons v. Transportation Ins. Co.*, 219 F. Supp. 2d 885 (S.D. Ohio) (recognizing promulgation of W. Va. Code §33-6-31d (1993) outlining manner in which insurer must offer optional uninsured motorist coverage).

19. The West Virginia Supreme Court revisited this issue in the case of *West Virginia Employers' Mut. Ins. Co. v. Summit Point Raceway Associates, Inc.*, 719 S.E.2d 830 (W. Va. 2011), wherein the Court again noted the impact of W. Va. Code §33-6-31d upon the *Bias* decision, stating:

What we find most enlightening, however, is the fact that, following this Court's holding in *Bias*, the Legislature adopted W. Va. Code §33-6-31d (1993) (Repl. Vol. 2011) and, in an apparent endorsement of the *Bias* opinion, provided even more detailed instructions with respect to how

optional uninsured and underinsured coverages are to be offered and further provided that "a form prepared and made available by the Insurance Commissioner" be used for this purpose. *W. Va. Code §33-6-31d(a)*.

Id., at 839.

20. The Legislature, as noted by the Supreme Court in *Summit Point, id.*, went beyond the requirements imposed by *Bias*, by setting forth in *W. Va. Code §33-6-31d* additional requirements for insurers in making mandatory offers of underinsured motorists coverage. In that regard, the Legislature mandated that insurers were to make the required offer on the specific form promulgated by the Insurance Commissioner which specifically advised the insured of the number of vehicles subject to the coverage and were to make the forms available by delivering them to the insured at the time of application or by mailing them with the initial premium notice. In addition, the legislature also imposed specific time limits for how long an insured had to return the mailed forms and the requirement that the offer be made again whenever any named insured requested different coverage limits. (See *W. Va. Code §33-6-31d(a), (b)* and *(e)*)

21. State Farm's argument with respect to conversations between the Plaintiff and its agents is premised upon the presumption that if the Plaintiff knew what the coverage was, knew how much each possible level of coverage would cost and made a decision to reject the coverage anyway, those facts taken together could constitute a commercially reasonable offer. While all of those factors could be of importance under the standards for making a commercially reasonable offer set forth in *Bias*, the Court finds that under *W. Va. Code § 33-6-31d*, the agent's conversations with the insured

are irrelevant since a commercially reasonable offer of underinsured motorists coverage can only be made using the specific selection/rejection form promulgated by the Insurance Commissioner's Office in the specific manner dictated by the Statute.

22. State Farm also directs the Court to a number of cases in which other Courts have purportedly found its selection/rejection forms to be valid, including *Ingles v. State Farm Mutual Automobile Insurance Company*, 265 F. Supp. 2d 655 (S.D. W.Va. 2003), *Bailey v. GEICO General Ins. Co.* Civ. Action No. 2:05-0806, 2010 WL 2643380 (S.D. W.Va. June 2010), *State Farm Mut. Auto. Ins. Co. V. Shingleton*, Civ. Action No. 1:07-cv-29, Doc. 22 (N.D. W.Va. Feb 17, 2009) and *Webb v. Shaffer*, 694 F. Supp. 2d 497 (S.D. W.Va. 2010). However, a review of these cases indicates that none of the claimants in those cases raised the structural defects of State Farm's forms or the issues raised by the Plaintiffs in this action. Since those defects were not raised in *Ingles*, *Webb*, *Bailey* or *Shingleton*, those decisions are not relevant or helpful here.

23. Next, State Farm directs the Court to *Martin v. State Farm Mutual Automobile Insurance Co.*, Civil Action No. 3:10-0144, which did squarely address the issue. While State Farm asserts that the Court in *Martin* was wrong to conclude that its selection/rejection forms were invalid, it asserts that the *Martin* Court correctly concluded that the failure to use the mandatory form merely results in the loss of the statutory presumption and a reversion to the *Bias* standards which would permit State Farm to prove that a commercially reasonable offer of underinsured motorists coverage was made through other means. In that regard, the *Martin* Court found that State Farm's selection/ rejection forms were invalid and indicated, at pg. 5 of its August 22,

2011 Memorandum Opinion And Order.

Thus, rather than having one premium for each level of coverage like the Insurance Commissioner's forms, State Farm's forms instead list either two or four different premiums that are dependent on whether the insured qualifies for a multi-vehicle discount, and/or whether the insured has collision insurance. **Thus, any insured marking "select" next to a coverage level has no idea, based on the face of the UIM form, which premium he or she will be paying.**

(Emphasis supplied.) For the reasons set forth above, the Court finds that *W.Va. Code §33-6-31d* has superseded *Bias* with respect to how an offer of underinsured motorists coverage is to be made and rejects the *Martin* Court's conclusion that the less stringent *Bias* standards are still applicable. Said finding is consistent with decisions in *Nationwide v. O'Dell*, Civil Action No. 00-C-37, from the Circuit Court of Roane County, and *Hardman v. Erie Ins. Property & Casualty Co.* Civil Action No. 08-C- 153, from the Circuit Court of Jackson County, where the Court found that failure to follow the promulgated form resulted in coverage being added in the amount equal to the liability the insurers were required by law to offer as a matter of law. Moreover, the Court finds that a reversion to the less onerous *Bias* standards would frustrate the specific purpose of *W.Va. Code §33-6-31d*.

24. State Farm's reliance upon the affidavits of two former employees of the West Virginia Insurance Commissioner's Office, Keith Huffman and Donna Quesenberry is also misplaced. Both were disclosed as witnesses in *Martin* and both of their Affidavits were actually produced in connection with that case. These affidavits indicate that Huffman and Quesenberry were involved in the creation and dissemination

of" Informational Letters 88 and 121 by the West Virginia Insurance Commissioner's Office and suggest that there was no prohibition against an insurer including "additional information" on the subject forms. However, the Plaintiffs have produced deposition testimony in which both witnesses support the Plaintiffs claims.

25. In her deposition taken in *Martin*, Ms. Quesenberry testified:

Q. Now, as you have indicated, you don't disagree, then, and you don't have an opinion that disagrees that the form that I showed you there from State Farm, Exhibit 8, is not the promulgated form, is it?

A. It is not.

Q. And as it's not the promulgated form, State Farm doesn't get any presumption that applies under the statute. Would you agree?

A. That I would agree with.

Q. The only issue, then -- and it's a question of law for the Court -- is what happens then in light of that?

A. Right.

(Deposition of Donna Quesenberry at pgs. 64 - 65.)

26. In his deposition in *Martin*, Mr. Huffman was specifically asked whether *W.Va. Code §33-6-31d* provided any authority for an insurance carrier to modify or alter the selection/rejection forms prepared and made available by the Insurance Commissioner and testified:

Q. Okay. So getting back to my original question, where in this statute is there any authority whatsoever for any insurance company, State Farm or otherwise, to alter or change the forms prepared and made available by the Insurance

Department to their own liking or for their own use?

A. As far as I know, the statute is silent on that.

Q. It's just not here, is it?

A. It's silent on it.

(Deposition of Keith Huffman at pg. 32. Furthermore, at pg. 75 of his deposition, Mr.

Huffman testified:

Q. Was it your understanding, in fact, that 33-6-31d, which was passed by the legislature in 1993, superceded the Bias decision and was intended to do so to address the entire industry concern with Bias?

A. It was my understanding at that point in time, yes.

Q. The industry was having ongoing litigation problems regarding questions about the manner in which they had made these mandatory offers of optional coverage; is that right?

A. That's my understanding.

Q. And there was seen to be a benefit to have a uniform system in place for all companies to make offers in the same manner, using the same form. Is that a fair statement?

A. That's a legal conclusion, but that seems to be a fair statement.

27. State Farm also directs the Court to the case of *Jewell v. Ford*, 211 W.Va. 592, 567 S.E.2d 602 (W.Va. 2002) (per curium), for the proposition that technical

noncompliance with the Commissioner's form does not render an offer of UIM coverage ineffective as a matter of law. However, the Court in *Jewel* stated in clear and unambiguous terms:

Pursuant to W.Va. Code §33-6-31d(a) (1993), optional limits of uninsured motorist coverage must be offered to the insured on a form which is prepared by the insurance commissioner.

Jewel at 595, 605. There is no indication in *Jewel* that the Court even considered Plaintiffs' argument in this case that an insurer's material deviation from the Commissioner's form is determinative of the coverage issue.

28. State Farm's reliance upon various cases decided under a South Carolina statute which requires the South Carolina insurance department to "approve a form which automobile insurers shall use in offering optional coverages," S.C. Code Ann. §38-77-350, is also misplaced because, unlike W. Va. Code §33-6-31d, the South Carolina statute contemplates a process where an insurer can submit its own form to the insurance department for "approval." In contrast, W. Va. Code §33-6-31d requires that each insurer use the single form "prepared and made available by" by the West Virginia Insurance Commissioner's Office and does not contemplate an approval process or authorize insurers to modify or alter the promulgated form.

29. The Court also notes that in other states where the statute requires the use of a specific form, insurers are required to strictly follow the "promulgated" form. For example, in the case of *Erie Insurance Exchange v. Miller*, 160 N.C. App. 217, 584 S.E.2d 857 (N.C. App. 2003), a North Carolina Court applied a statute which required the use of a form "promulgated" by the North Carolina Insurance Rate Bureau and

found that the form used instead by Erie failed to conform to the requirement. The Court stated:

Erie first contends that its rejection complies with *N.C. Gen. Stat. §20-279.21* because it uses the same words as the promulgated form and because the statute does not require that the rejection be in a separate document. **This argument disregards the plain language of the statute. The statute requires that the rejection be “on a form promulgated by the Bureau.”** The Bureau created and the Commissioner of Insurance approved form NC 01 85 (Ed. 7-91). The Millers rejection is not on the form promulgated by the Bureau, but rather is included in box 17 on an unrelated application form created by Erie. Nothing in the statute or in any administrative ruling authorizes an insurer to merge an unrelated form with the approved Rate Bureau selection/rejection form. . . .**The authors of Couch on Insurance point out that “[w]here the use of the statutory form is expressly required, and no provision is made for alteration, addition or modification, strict adherence with the form is required.” . . . Because North Carolina by statute requires the use of a particular form and neither the statute nor any administrative ruling by the Commissioner of Insurance has provided for modification of the format of that form, Erie was required to strictly adhere to the required format.**

Miller at 220-221, 859. (Emphasis supplied.) (Citations omitted.)

30. Because State Farm’s underinsured motorists coverage selection/rejection forms are structurally and materially inconsistent with the Commissioner’s promulgated forms, they do not comply with the requirements of *W. Va. Code § 33-6-31d* and Informational Letters #88 and 121.

31. The clear spirit and intent of *§33-6-31d* and Informational Letters #88 and 121 was that all insurers use the forms promulgated by the Insurance Commissioner rather than modifying them to satisfy an insurer’s own goals or purposes. State Farm has ignored this clear intent by modifying the promulgated form and by making it far

more complicated than the form promulgated by the Insurance Commissioner in requiring an insured to perform multiple calculations in order to see the actual cost of each available level of coverage.

32. The material changes State Farm made to the Commissioner's promulgated forms made the form difficult to understand and do not present an insured with the opportunity to make a knowing and intelligent choice among the various levels of coverage. Accordingly, 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 coverage limits.

33. Rule 56 of the West Virginia Rules of Civil Procedure governs motions for partial summary judgment and provides, "The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law."

34. In this case, the evidence clearly shows that the Plaintiffs did not receive a commercially reasonable offer of underinsured motorists coverage on a selection/rejection form of the type promulgated by the West Virginia Insurance Commissioner's Office, as is expressly required by *W.Va. Code §33-6-31(d)*. Instead, the Plaintiffs were offered underinsured motorists coverage on a selection/rejection form which contained multiple columns, listing four different possible premiums for each optional level of coverage while failing to provide the information necessary to determine which possible premium would apply. Plaintiffs had no ability, in looking at State Farm's form, to determine what price they were expected to pay for any optional

level of coverage. For this reason, State Farm's forms failed to provide the necessary information about the total cost for each available level of coverage and failed to provide the Plaintiffs with a commercially reasonable offer of underinsured motorist coverage.

35. Under these circumstances, the Plaintiffs are entitled to partial summary judgment that, as a matter of law, State Farm's underinsured motorists coverage selection/rejection form failed to present them with a "commercially reasonable" offer of underinsured motorists coverage.

36. Inasmuch as the Court has found that the Plaintiffs did not receive "commercially reasonable" offers of underinsured motorists coverage, they are entitled to have their underinsured motorists coverage limits "rolled-up" to an amount equal to the liability coverage limits available under their policy of insurance with State Farm.

37. With respect to the Parties' request that the Court certify the coverage issue to the West Virginia State Supreme Court of Appeals, *W.Va. Code 58-5-2* provides that the decision to certify a question of law is discretionary and states in relevant part:

Any question of law, including, but not limited to, questions arising upon the sufficiency of a summons or return of service, upon a challenge of the sufficiency of a pleading or the venue of the circuit court, upon the sufficiency of a motion for summary judgment where such motion is denied, or a motion for judgment on the pleadings, upon the jurisdiction of the circuit court of a person or subject matter, or upon failure to join an indispensable party, may, in the discretion of the circuit court in which it arises, be certified by it to the supreme court of appeals for its decision, and further proceedings in the case stayed until such question shall have been decided and the decision thereof certified back.

38. In *Abrams v. West Virginia Racing Commission*, 164 W.Va. 315, 263 S.E. 2d 103 (W.Va. 1980), the West Virginia State Supreme Court of Appeals recognized that the decision to answer a certified question is also discretionary and noted that “the basic usefulness of the certification statute ‘was to resolve ambiguities or unanswered questions’ about our State law.” *Abrams* at 317-318, 105-106. The Court finds that in this case, the issue of whether an insurer’s failure to use the mandatory form to offer UIM coverage results in coverage being added as a matter of law in the amount the insurer was required to offer presents such an ambiguity in light of the *Martin* Court’s finding that State Farm’s violation of the mandatory requirements of *W. Va. Code §33-6-31d* merely results in the loss of a statutory presumption and a return to the lower standards for determining whether an offer of UIM coverage was commercially reasonable set forth in *Bias*.

39. Inasmuch as there are conflicting decisions on this issue and the Plaintiffs’ remaining claims in this case turn upon how the proposed question is resolved, the Court finds that judicial economy favors the certification of the Plaintiffs’ proposed question in this case so that the issue can be decided before the case proceeds.

Whereupon the Court, having made the Findings of Fact and Conclusions of Law set forth above, is of the opinion to and does hereby **ORDER** that the 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 To The West Virginia State Supreme Court Of Appeals* should be and the same is hereby **GRANTED**.

Accordingly, pursuant to *W.Va. Code §58-5-2*, the Court certifies the following question to the West Virginia State Supreme Court of Appeals:

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*, which existed at common law prior to the enactment of *W. Va. Code § 33-6-31d*.

For its Answer to said Certified Question, the Court finds that 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, all as is more fully set forth above.

Pending the resolution of the Certified Question, this action is to be stayed.

Pursuant to *Rule 17* of the *West Virginia Rules of Appellate Procedure*, the parties are directed to prepare a joint appendix of the record sufficient to permit review of the Certified Question by the West Virginia State Supreme Court of Appeals.

To all of which the Court does note the objections and exceptions of the Defendants.

The Circuit Clerk is hereby **ORDERED** to forward certified copies of this Order to counsel of record as follows:

Matthew L. Clark, Esq.
Kayser Layne & Clark, PLLC
P.O. Box 210
701 Viand Street
Point Pleasant, WV 25550

Brent K. Kesner, Esq.
Kesner & Kesner, PLLC
112 Capitol Street
P.O. Box 2587
Charleston, WV 25329

Kevin C. Harris, Esq.
Law Offices of Harris & Holmes
111 W. Main Street
Ripley, WV 25271

James C. Peterson, Esq.
Douglas A. Spencer, Esq.
C. Michael Bee, Esq.
Hill, Peterson, Carper, Bee & Deitzler, PLLC
NorthGate Business Park, 500 Tracy Way
Charleston, West Virginia 25311-1555

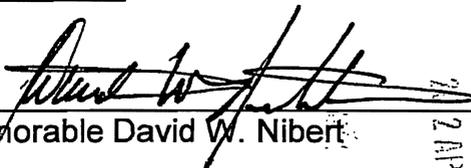
Anthony J. Majestro, Esq.
Powell & Majestro, PLLC
405 Capitol Street, Suite 1200
Charleston, West Virginia 25301

Ronald F. Stein, Jr., Esq.
Ronald F. Stein, Jr., PLLC
P.O. Box 213
Point Pleasant, WV 25550

R. Carter Elkins, Esq.
Laura L. Gray, Esq.
Campbell Woods, PLLC
P.O. Box 1835
Huntington, WV 25719-1835
**Counsel for State Farm Mutual
Automobile Insurance Company**

David A. Mohler, Esq.
Bowles, Rice, McDavid, Graff & Love, LLP
P.O. Box 1386
Charleston, WV 25325-1386
Counsel for William Ray McDermitt

ENTERED this 24th day of April, 2012.


Honorable David W. Nibert

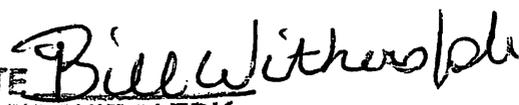
PREPARED BY:


Brent K. Kesner (WVSB #2022)
Kesner, Kesner & Bramble, PLLC
P. O. Box 2587
Charleston, WV 25329
Counsel for Plaintiff

Copies Provided to:

R. Carter Elkins, Esq.
Laura L. Gray, Esq.
Campbell Woods, PLLC
P.O. Box 1835
Huntington, WV 25719-1835
**Counsel for State Farm Mutual
Automobile Insurance Company**

David A. Mohler, Esq.
Bowles, Rice, McDavid, Graff & Love, LLP
P.O. Box 1386
Charleston, WV 25325-1386
Counsel for William Ray McDermitt

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MASON COUNTY CIRCUIT CLERK