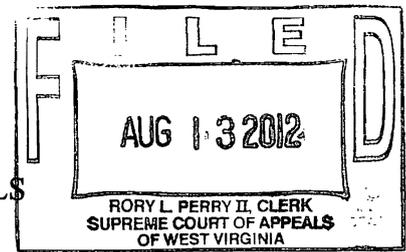


IN THE SUPREME COURT OF APPEALS  
OF WEST VIRGINIA  
DOCKET NO. 12-0688



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

v.

WILLIAM RAY MCDERMOTT and STATE FARM MUTUAL  
AUTOMOBILE INSURANCE COMPANY,  
Respondents,

**PETITIONER'S BRIEF ON CERTIFIED QUESTION**  
(from the Circuit Court of Mason County, West Virginia, Civil Action No. 11-C-81-N)

Brent K. Kesner (WV Bar #2022)  
[bkesner@kkblaw.net](mailto:bkesner@kkblaw.net)  
Ernest G. Hentschel (WV Bar #6066)  
[ehentschel@kkblaw.net](mailto:ehentschel@kkblaw.net)  
Kesner & Kesner, PLLC  
112 Capitol Street  
P. O. Box 2587  
Charleston, WV 25329  
Telephone: (304) 345-5200  
*Counsel for Petitioners*

Anthony J. Majestro (WVSB #5165)  
[amajestro@powellmajestro.com](mailto:amajestro@powellmajestro.com)  
Powell & Majestro, PLLC  
405 Capitol Street, Suite 1200  
Charleston, West Virginia 25301  
Phone: 304-346-2889

Matthew L. Clark (WVSB #7144)  
[matthew.clark@kayserlayneclark.com](mailto:matthew.clark@kayserlayneclark.com)  
Kayser Layne & Clark, PLLC  
Post Office Box 210  
701 Viand Street  
Point Pleasant, WV 25550  
Phone: 304-675-5440

Ronald F. Stein, Jr., Esq.  
Ronald F. Stein, Jr., PLLC  
P.O. Box 213  
Point Pleasant, WV 25550  
Phone: 304-675-6376  
[rfsteinlaw@gmail.com](mailto:rfsteinlaw@gmail.com)

James C. Peterson (WVSB # 2880)  
[jcpeterson@hpcbd.com](mailto:jcpeterson@hpcbd.com)  
Douglas A. Spencer (WVSB #9369)  
[doug@hpcbd.com](mailto:doug@hpcbd.com)  
C. Michael Bee (WVSB #290)  
[cmbee@hpcbd.com](mailto:cmbee@hpcbd.com)  
Hill, Peterson, Carper, Bee & Deitzler, PLLC  
NorthGate Business Park, 500 Tracy Way  
Charleston, West Virginia 25311-1555  
Phone: 304-345-5667

Kevin C. Harris (WVSB #8814)  
[Kevinharris2@suddenlinkmail.com](mailto:Kevinharris2@suddenlinkmail.com)  
Law Offices of Harris & Holmes  
111 W. Main Street  
Ripley, West Virginia 25271  
Phone: 304-372-7004  
*Co-Counsel for Petitioners*

**TABLE OF CONTENTS**

TABLE OF AUTHORITIES ..... ii

QUESTION PRESENTED ..... 1

STATEMENT OF THE CASE ..... 1

A. Procedural History ..... 1

B. Statement of Facts ..... 3

SUMMARY OF ARGUMENT ..... 14

STATEMENT REGARDING ORAL ARGUMENT AND DECISION ..... 15

ARGUMENT ..... 16

I. State Farm’s failure to follow the Insurance Commissioner’s mandatory UIM selection/rejection forms results in UIM coverage being added to the Thomas’ policy as a matter of law ..... 16

II. State Farm’s assertion that failure to follow the Insurance Commissioner’s mandatory UIM selection/rejection forms merely results in the loss of the statutory presumption and a reversion to the *Bias* standards is incorrect ..... 30

CONCLUSION ..... 33

CERTIFICATE OF SERVICE

## TABLE OF AUTHORITIES

### West Virginia Cases

<i>Bias v. Nationwide Mut. Ins. Co.</i> , 179 W.Va. 125, 365 S.E.2d 789 (1987) . . .	3, 4, 5, 6, 20, 32, 33
<i>Bell v. Vecellio &amp; Grogan, Inc.</i> , 197 W. Va. 138, 475 S.E.2d 138 (1996) . . . . .	28
<i>Burrows v. Nationwide Ins. Co.</i> , 215 W. Va. 668, 600 S.E.2d 565 (2004) . . . . .	8
<i>Cox v. Amick</i> , 195 W. Va. 608, 466 S.E.2d 459 (1995) . . . . .	31
<i>Foutty v. Porterfield</i> , 192 W. Va. 105, 450 S.E.2d 802 (1994) . . . . .	8
<i>Gallapoo v. Wal-Mart Stores, Inc.</i> , 197 W. Va. 172, 475 S.E.2d 172 (1996) . . . . .	16
<i>Luikart v. Valley Brook Concrete &amp; Supply, Inc.</i> , 216 W. Va. 748, 613 S.E.2d 896 (2005) . . . . .	28, 29
<i>Kalwar v. Liberty Mut. Ins. Co.</i> , 203 W. Va. 2, 506 S.E.2d 39, (1998) . . . . .	20
<i>Keplinger v. Virginia Electric &amp; Power Co.</i> , 208 W. Va. 11, 537 S.E.2d 632 (2000) . . . . .	17
<i>Mandolidis v. Elkins Indus., Inc.</i> , 161 W. Va. 695, 246 S.E.2d 907 (1978) . . . . .	28
<i>Martin v. State Farm Mut. Automobile Ins. Co.</i> , 809 F.Supp.2d 496 (S.D. W.Va. 2011) . . . . .	9, 12, 13, 30, 31
<i>Parham v. Horace Mann Insurance Company</i> , 200 W.Va. 609, 490 S.E. 2d 696 (W.Va. 1997) . . . . .	30, 31
<i>State v. Grant</i> , 226 W. Va. 568, 703 S.E.2d 539 (2010) . . . . .	16, 17
<i>State ex rel. Riffle v. Ranson</i> , 195 W. Va. 121, 464 S.E.2d 763 (1995) . . . . .	27, 28
<i>West Virginia Employers' Mut. Ins. v. Summit Point Raceway Associates, Inc.</i> , 228 W. Va. 360, 719 S.E.2d 830 (2011) . . . . .	29
<i>Westfield v. Bell</i> , 203 W. Va. 305, 507 S.E.2d 406 (1998) . . . . .	8, 18, 19, 28

**Other cases**

*Ammons v. Transportations Ins. Co.*,  
219 F.Supp.2d 885, 893 (S.D. Ohio 2002) ..... 8, 19, 20, 28

*Erie Ins. Exchange v. Miller*, 160 N.C. App. 217, 584 S.E.2d 857 (N.C. App. 2003) ..... 18

**West Virginia Statutes and Rules**

W. Va. Code § 33-6-31 ..... 4, 5, 10, 29

W. Va. Code § 33-6-31(b) ..... 3

W. Va. Code § 33-6-31d ..... 3, 6, 11, 12, 13, 16, 17, 28, 29, 30, 31, 32

**Other authorities**

William N. Eskridge, Jr. & Phillip P. Frickey, *Cases and Materials On Legislation: Statutes  
And The Creation Of Public Policy* (1988) ..... 28

## CERTIFIED QUESTION PRESENTED

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*.

### STATEMENT OF THE CASE

#### A. Procedural History

Daniel Thomas and Angela Thomas, individually and as next friend of Luke Thomas, an infant (collectively referred to as the "Thomas Family"), filed this action on August 3, 2011, alleging personal injuries from an August 16, 2009, accident. The Thomas Family asserted negligence claims against the at-fault driver, William Ray McDermitt ("McDermitt"). (J.A. at 2). With respect to State Farm Automobile Insurance Company ("State Farm"), the insurer for the Thomas Family, the Thomas Family sought a declaratory judgment regarding the availability of underinsured motorists coverage under their policy and asserted that State Farm failed to make a commercially reasonable offer of such coverage at the time their policy was purchased. McDermitt filed his *Answer* on September 2, 2011, (J.A. at 3) and State Farm filed its *Answer* on September 8, 2011. (J.A. at 16). State Farm denied the availability of UIM coverage and asserted that the coverage had been expressly rejected by the Thomas Family.

On February 13, 2012, a hearing was held upon *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 to the West Virginia State Supreme Court of Appeals*. (J.A. at 37).

Following argument, the Circuit Court issued an *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*, which granted Plaintiffs' *Motion* and certified the question. (J.A. at 517). The Circuit Court found that State Farm chose to use an underinsured motorist coverage selection/rejection form which was materially different from the form promulgated by the West Virginia Insurance Commissioner. (J.A. at 524). The Circuit Court further concluded that “[t]he 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[.]” and, that State Farm’s form failed to present the Thomas’ with a “commercially reasonable” offer of underinsured motorist coverage. (J.A. at 527).

The Circuit Court certified the following question in this case:

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*.

The Circuit Court certified this question for this Court’s review because of conflicting decisions on this issue and because the Thomas Family’s remaining claims “turn upon how the proposed question is resolved[.]” (J.A. at 541). In its answer to the certified question, the Circuit Court found “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[.]” (J.A. at 542). Petitioners submit that the Circuit Court correctly answered this question.

**B. Statement of Facts**

This action arises out of an automobile accident which occurred on August 16, 2009. On that date, Daniel Thomas was operating a 2004 Jeep Grand Cherokee on Oshel Road, in Mason County, West Virginia, when McDermitt negligently crossed the center line of the highway in his 2008 Honda Accord and collided with the Thomas vehicle. (J.A. at 58). Daniel Thomas' wife, Angela Thomas, and their son, Luke Thomas, were passengers with him in the 2004 Jeep Grand Cherokee at the time of the accident, and all three sustained serious injuries as a direct and proximate result of McDermitt's negligence. Because the injuries sustained by the Thomas Family exceeded the available liability coverage under McDermitt's automobile liability policy, McDermitt is an underinsured motorist as that term is defined under West Virginia law.

At the time of the accident, the Thomas Family was insured under an automobile liability insurance policy issued by State Farm, identified as State Farm Policy No. 249 5771-E02-48H ("the State Farm Policy"). 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 underinsured damages sustained by the Thomas Family. (J.A. at 73).

Pursuant to *W. Va. Code §33-6-31(b)*, insurers such as State Farm are required to offer underinsured motorists ("UIM") coverage to their customers in amounts at least equal to their liability limits. Furthermore, under *W. Va. Code § 33-6-31d*, insurers are required to make such offers on the form "prepared and made available" by the West Virginia Insurance Commissioner. In *Bias v. Nationwide Mut. Ins. Co.*, 179 *W.Va.* 125, 365 *S.E.2d* 789 (1987), this Court held that if

an insurer cannot establish that it made such an offer and that the insured made a knowing and intelligent rejection of UIM coverage, the policy must be reformed to provide such coverage in an amount equal to the level of coverage which the insurer was required to offer. *Bias, 179 W. Va. at 127*. The claims of the Thomas Family against State Farm in this case are based on the fact that the UIM selection/rejection forms used by State Farm are materially different from the Commissioner's mandatory, prescribed form. Because State Farm failed to make the required offer of UIM coverage to the Thomas Family on the form "prepared and made available" by the West Virginia Insurance Commissioner, UIM coverage in an amount equal to their liability limits must be added by State Farm to the Policy issued to the Thomas Family.

1. ***All insurer's providing automobile liability coverage in West Virginia are required to make an offer of underinsured motorists coverage in an amount equal to the insured's liability limits on the form "prepared and made available" by the West Virginia Insurance Commissioner's Office.***

The Thomas' claims arise from State Farm's failure to make a commercially reasonable offer of UIM coverage as required by *W. Va. Code § 33-6-31*, the "omnibus statute." The omnibus statute sets forth requirements which apply to all auto insurers issuing policies in West Virginia, and addresses both un- and underinsured motorists coverage, as follows:

(b) Nor shall any such policy or contract be so issued or delivered unless it shall contain an endorsement or provisions undertaking to pay the insured all sums which he shall be legally entitled to recover as damages from the owner or operator of an uninsured motor vehicle, within limits which shall be no less than the requirements of section two, article four, chapter seventeen-d of this code, as amended from time to time: Provided, That such policy or contract shall provide an option to the insured with appropriately adjusted premiums to pay the insured all sums which he shall be legally entitled to recover as damages from the owner or operator of an uninsured motor vehicle up to an amount of one hundred thousand dollars because of bodily injury to or death of one person in any one accident and, subject to said limit for one person, in the amount of three hundred thousand dollars because of bodily injury to or death of two or more persons in any one accident and in the amount of fifty thousand dollars because of injury to or destruction of property of others in any one

accident: Provided, however, That such endorsement or provisions may exclude the first three hundred dollars of property damage resulting from the negligence of an uninsured motorist: ***Provided further, That such policy or contract shall provide an option to the insured with appropriately adjusted premiums to pay the insured all sums which he shall legally be entitled to recover as damages from the owner or operator of an uninsured or underinsured motor vehicle 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 ...***

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

This Court extensively examined these statutory requirements in *Bias*, and explained:

Code §33-6-31(b) addresses both uninsured and underinsured motorist coverage. It provides, first, that every automobile insurance policy issued or delivered in West Virginia contain uninsured motorist coverage with minimal limits of coverage as set forth in West Virginia Code §17D-4-2 (1986 Replacement Vol.). Additionally, it provides that each policy shall offer an option for somewhat higher dollar limits of uninsured motorist coverage, which coverage is automatic unless waived in writing by the insured. The section's third proviso is that each policy ***shall offer an option*** for both uninsured and underinsured motorist coverage up to the dollar limits of the liability insurance purchased by the insured.

*Bias*, 179 W. Va. at 126 (emphasis in original).

Recognizing that the omnibus statute was intended to protect consumers who might not understand such insurance coverages, this Court discussed the required offers:

Where 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. ***The insurer's offer must be made in a commercially reasonable manner, so as to provide the insured with adequate information to make an intelligent decision.***

*Id.* at 127 (citations omitted, emphasis added).

Importantly, this Court held that if an insurer cannot establish that its insured made a knowing and intelligent rejection of the optional coverage, the amount of un- or underinsured

motorists coverage will be extended to the level of coverage which the insurer was required to offer, stating:

When an insurer is required by statute to offer optional coverage, it is included in the policy by operation of law when the insurer fails to prove an effective offer and a knowing and intelligent rejection by the insured.

*Id.* Therefore, *Bias* placed West Virginia insurers in the position of having to prove the knowing and intelligent rejection of increased levels of coverage by their customers.

In 1993, difficulties associated with proving a “knowing and intelligent waiver” prompted the West Virginia Legislature to enact *W. Va. Code § 33-6-31d*, which required the Insurance Commissioner to “prepare and make available” a form to be used by all auto insurers in West Virginia. Under *W. Va. Code § 33-6-31d*,

(a) Optional limits of uninsured motor vehicle coverage and underinsured motor vehicle coverage required by section thirty one of this article ***shall be made available to the named insured*** at the time of initial application for liability coverage and upon any request of the named insured ***on a form prepared and made available by the insurance commissioner***. The contents of the form shall be 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).

Importantly, the Legislature did not direct insurers to submit their proposed selection/rejection forms to the Commissioner for approval, or authorize insurers to create individualized forms for their own use. Instead, the Legislature expressly directed the Insurance Commissioner to “prepare and make available” a single, mandatory form to be used by all insurers. Pursuant to that mandate, the Insurance Commissioner has twice promulgated mandatory UIM optional coverage offer forms and explained their requirements in Informational Letter 88 (July, 1993). ( J.A. at 74) and Informational Letter 121 (July, 2000) (J.A. at 85). Significantly, the Commissioner emphasized that the mandatory form could not be changed by an insurer to meet its own needs. As the “Frequently Asked Questions” section of Informational Letter 88 explains,

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.***  
...
10. Q. Must insurers show actual calculated premium rates or is it permissible to use “base rates”?
  - A. The insurer must supply actual premium rates as to the automobile which is insured.  
...
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.***

(J.A. at #77-79) (emphasis added). Informational Letter 121, too, expressly indicated that insurers must show actual calculated premium rates. (J.A. at 85) [noting changes in form, stating that “the remainder of the forms’ content is identical to the prior forms[.]” required by Informational Letter 88].) Neither Informational Letter provides any authority for an insurer to create forms of its own design for use in lieu of the mandatory, promulgated form.

This Court has recognized that all insurers must use the Commissioner’s prescribed form to make a UIM coverage offer. See generally *Westfield v. Bell*, 203 W.Va. 305, 507 S.E.2d 406 (1998); *Burrows v. Nationwide Ins. Co.*, 215 W.Va. 668, 600 S.E.2d 565 (2004). 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 at 893-894 (S.D. Ohio 2002), in which an insurer used its own modified form to offer uninsured motorists (UM) coverage. Because the form did not comply with statutory requirements, the policy’s UM coverage was, as a matter of law, “rolled up” to the policy’s liability limits. As 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 v. Transportation Ins. Co.*, 219 F.Supp.2d 885 at 893-894 (S.D. Ohio 2002) (emphasis added) (citing *Foutty v. Porterfield*, 192 W.Va. 105, 450 S.E.2d 802, n. 5 (1994)). While *Ammons* was decided by an Ohio Federal District Court, applying West Virginia law, this Court cited *Ammons* with approval in *Burrows*, 215 W.Va. at 673 n. 10.

Following *Bell* and *Ammons*, a number of Circuit Courts in West Virginia have also found that deviations from the mandatory forms will result in a “roll-up” of coverage. For example, in

*Nationwide v. O'Dell*, Civil Action No. 00-C-37, the Circuit Court of Roane County found that Nationwide's substitution of the phrase "Offer Valid After Thirty (30) Days" for the phrase "Offer Void After Thirty Days" in the "Important Notice" section of its selection/rejection forms resulted in an offer of underinsured motorists coverage being invalid. (J.A. at 99). In the same fashion, in *Hardman v. Erie*, Civil Action No. 08-C-153, the Circuit Court of Jackson County found a modified selection/rejection form used by Erie Insurance Property And Casualty Company to be invalid because its' form required insureds to mathematically calculate the premium for each optional level of coverage. (J.A. at 101).

**2. *Beginning in August of 1995, State Farm used a form of its own creation to offer underinsured motorists coverage to its customers in West Virginia.***

The history and development of State Farm's UIM selection/rejection forms has been the subject of extensive discovery in the case of *Martin v. State Farm Mutual Automobile Insurance Co.*, 809 F. Supp.2d 496 (S.D. W.Va. 2011), which is presently the subject of an appeal to the United States Court of Appeals for the Fourth Circuit. In *Martin*, several claimants presented claims essentially identical to the Petitioners' claims in this case. Like the Thomas Family, the *Martin* claimants seek to recover UIM coverage based upon State Farm's failure to use the mandatory, prescribed forms required by *W.Va. Code §33-6-31d*. During discovery in *Martin*, State Farm produced exemplars of the forms it has used to offer UIM coverage to its customers from 1993 to the present. (J.A. at 122). As these forms reflect, State Farm used the Commissioner's promulgated form until August, 1995. (J.A. at 126-134). Then, beginning with Version 7, State Farm began to use forms of its own creation, which were materially different from the form "prepared and made available" by the Commissioner. (J.A. at 135-147).

Unlike the UM and UIM coverage forms prescribed by Informational Letters 88 and 121, which require a single listing of the total premium for each optional coverage level, State Farm's forms in use after August of 1995 show either two (2) or four (4) possible premiums for each coverage level. These separate premiums appear to depend upon whether a multi-car discount and/or collision coverage is included. For example, Version 7 of the State Farm selection/rejection form has two (2) separate columns reflecting the possible premium for each optional level of UIM coverage labeled "Multi-car Discount Included" and "Multi-car Discount Not Included," (J.A. at 135). In December of 2001, with the adoption of Version 14 of its selection/rejection forms, State Farm began using a UIM selection/rejection form which had four (4) columns 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." (J.A. at 143). On these forms, the insured is presented 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 level of coverage. Furthermore, from October 3, 2003, until September 23, 2004, Version 15 of State Farm's selection/rejection form added further confusion by identifying the listing of optional coverage limits as "Mandatory Limits," even though the purchase of underinsured motorists coverage is completely optional under *W. Va. Code* § 33-6-31. (J.A. at 143). Then, in June of 2007, State Farm again changed its form, removing the box surrounding the section which was to be completed in the insured's own handwriting, and removing entirely the language from the Commissioner's form which stated:

**COMPANY MUST COMPLETE THE BLANK SPACES BELOW TO  
CREATE AN EFFECTIVE OFFER IN ORDER FOR THE CONSUMER TO  
EXERCISE A KNOWING AND INTELLIGENT SELECTION OR  
REJECTION.**

(J.A. at 145). By March of 2008, the box surrounding the section to be completed by the insured was returned on Version 18 of State Farm's form, but the language directing the insurance company to fill in the blank spaces was still omitted. (J.A. at 146). State Farm then continued to omit portions of the Commissioner's required language and use a multi-column format on Version 19 of its UIM selection/rejection form. (J.A. at 147). As can be seen from a review of these evolving forms, State Farm has felt free to make whatever changes it desired to the Commissioner's promulgated form over the past several years, even though there is absolutely no authority in *W. Va. Code §33-6-31d* for it to do so.

State Farm's reasons for using these multi-column forms instead of the single column form prepared and made available by the Commissioner were revealed in the *Martin* case during the deposition of Larry Cipov, State Farm's designated corporate representative with respect to the selection/rejection forms. Mr. Cipov acknowledged that State Farm had returned to the use of the Commissioner's prescribed form, which does not include multi-premium columns, but instead uses a single column listing the premiums for each optional level of coverage. (J.A. at 149). When he was asked about whether State Farm could have used the single column format earlier, 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.

(J.A. at 150). Thus, State Farm chose to create its own UIM selection/rejection forms instead of using the forms prepared and made available by the Commissioner in order to make things easier for its agents as they completed the forms and to implement a multiple discount pricing structure of its own design, even though its decision to do so defeated the essential purpose of *W. Va. Code §33-6-31d*. Importantly, the Court in *Martin* examined the validity of State Farm's selection/rejection forms and noted in its *Memorandum Opinion And Order*:

Thus, rather than having one premium for each level of coverage like the Insurance Commissioner 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.***

*Martin*, 809 F.Supp.2d at 504 (emphasis supplied). (J.A. at 162). While the Court in *Martin* found that State Farm’s modified selection/rejection forms did not comply with the prescribed Insurance Commissioner’s prescribed forms under *W. Va. Code §33-6-31d*, it also concluded that the failure to use the prescribed forms merely resulted in the loss of a statutory presumption of a commercially reasonable offer. *Id.* at 504 and 507. In effect, the District Court in *Martin* determined that instead of being added to the claimants’ policies as a matter of law, the question of whether or not UIM coverage should be added to each of the claimants’ policies requires individual fact-finding under the lower standards set forth in *Bias*. *Id.* at 507.

***3. The Petitioners in this case have claims against an underinsured motorist and received an offer of UIM coverage on State Farm’s proprietary selection/rejection forms.***

As noted above, the Petitioners’ in this case have injury claims against McDermitt which exceed his available liability coverage. The Thomas Family’s medical bills alone total more than \$52,008, while McDermitt’s liability limits are only \$25,000 per person, \$50,000 per accident. (J.A. at 147). Because McDermitt is an underinsured motorist, the Thomas Family presented claims for underinsured motorist coverage to State Farm. Despite the fact that it knows its selection/rejection forms have been found to be invalid, State Farm has denied the availability of such coverage based solely upon the Thomas’ rejection of such coverage on State Farm’s defective selection/rejection form. (J.A. at 175).

Since the Thomas Family did not receive the mandatory offer of underinsured motorists coverage on the form “prepared and made available” by the Commissioner’s Office, their *Complaint* in this action seeks a declaratory judgment that they are entitled to underinsured motorists coverage

in an amount equal to their liability limits as a matter of law. (See generally Count Seven of Plaintiffs' *Complaint*.) (J.A. at 6). State Farm has responded by asserting in its *Answer* to the Thomas Family's *Complaint* that UIM coverage is not available under the Thomas' Family's Policy based upon Angel Thomas' "knowing and intelligent rejection" of such coverage on its defective form. (J.A. at 25).

### SUMMARY OF ARGUMENT

The West Virginia Legislature enacted *W. Va. Code § 33-6-31d*, requiring the Insurance Commissioner to "prepare and make available" a form to be used by all auto insurers in West Virginia, in order to address the inconsistencies encountered by insurers in present evidence of a "knowing and intelligent waiver" of uninsured and underinsured motorist coverage. Rather than allowing insurers to submit proposed selection/rejection forms for approval, or authorizing insurers to create individualized forms for their own use, *W. Va. Code § 33-6-31d* provided for the use of a single, mandatory form to be used by all insurers.

This Court has subsequently recognized that all insurers must use the Commissioner's prescribed form in order to make a UIM coverage offer. This Court has also recognized that a policy's UIM coverage will, as a matter of law, be "rolled up" to that policy's liability limits if an insurer fails to make a commercially reasonable offer of underinsured motorists coverage. At issue in this case is State Farm's decision to utilize various selection/rejection forms of its own creation, which set forth multiple premium options for each level of coverage, rather than using the prescribed form prepared by the Commissioner. Because the selection/rejection form used by State Farm to offer UIM coverage in this case was not compliant with *W. Va. Code § 33-6-31d*, State Farm failed to make a commercially reasonable offer of coverage and the Petitioners are entitled to

have their underinsured motorists coverage limits “rolled-up” to an amount equal to their liability limits as a matter of law.

State Farm has asserted that its failure to use the Commissioner’s prescribed form merely results in the loss of a statutory presumption and a return to the lower *Bias* standards for proving a commercially reasonable offer of UIM coverage to the Petitioners. This argument ignores the fact that the common law *Bias* standards were superseded by *W.Va. Code §33-6-31d*, and defeats the very purpose of requiring all insurers to use a single, mandatory form since the only consequence of failing to do so would be a reversion to the less stringent common law standards expressed in *Bias*. Therefore, the Petitioners request that the Court affirm the Circuit Court’s ruling on the certified question and find that State Farm’s failure to use the mandatory form results in UIM coverage being added to their policy as a matter of law in the amount which State Farm was required to offer.

#### **STATEMENT REGARDING ORAL ARGUMENT AND DECISION**

The Petitioners represent that oral argument is necessary pursuant to the criteria contained in Rule 18(a) of the Rules of Appellate Procedure for the Supreme Court of Appeals of West Virginia, because the parties have not agreed to waive oral argument; the petition is not frivolous; and the dispositive issues have not previously been authoritatively decided by this Court. The Petitioners further represent, pursuant to Rule 20(a) of this Court’s Rules of Appellate Procedure, that this case involves inconsistencies or conflicts among decisions of lower tribunals.

## ARGUMENT

“The appellate standard of review of questions of law answered and certified by a circuit court is *de novo*.” Syl. Pt. 1, *Gallapoo v. Wal-Mart Stores, Inc.*, 197 W. Va. 172, 475 S.E.2d 172 (1996).

**I. STATE FARM’S FAILURE TO FOLLOW THE INSURANCE COMMISSIONER’S MANDATORY UIM SELECTION/REJECTION FORMS RESULTS IN UIM COVERAGE BEING ADDED TO THE THOMAS’ POLICY AS A MATTER OF LAW.**

As discussed above, State Farm prepared and used its own modified UIM selection/rejection forms, despite *W. Va. Code § 33-6-31d*’s express requirement that all auto insurers doing business in West Virginia make offers of UIM coverage on the form “prepared and made available” by the Insurance Commission. The Petitioners assert that State Farm’s failure to use the Insurance Commissioner’s prescribed form results in the coverage which State Farm was required to offer being added to the Thomas Family’s policy as a matter of law.

**A. *State Farm failed to use the mandatory UIM selection/rejection form in direct violation of W. Va. Code §33-6-31d.***

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

In 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 previously have recognized, “*courts must presume that a legislature says in a statute what it means and means in a statute what it says there.*”

*Grant*, 226 W. Va. at 541-42. (emphasis supplied.)

The West Virginia Legislature expressly indicated in *W. Va. Code §33-6-31d* that offers 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). The Legislature did not indicate that such offers “may” be made on a form prepared or modified by the insurer. Instead, the Legislature specifically indicated that such offers “shall,” be made on the Commissioner’s form. 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, 22, 537 S.E.2d 632, 643 (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 mandatory form and make it available to the industry. Nothing in *§33-6-31d* supports the argument that State Farm was free to add additional, non-mandatory information to the form so long as it also contained all of the information required by *§ 33-6-31d*.

In light of the language of *§ 33-6-31d*, it is clear that West Virginia is a “promulgated form” state rather than one in which forms are created by each individual insurance company and then submitted to the Commissioner for approval. In applying a similar statute requiring use of a form promulgated by the North Carolina Insurance Rate Bureau, a North Carolina court found that a form

created by Erie Insurance Company failed to conform to the statutory requirement and was ineffective, stating:

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.***

*Erie Ins. Exchange v. Miller*, 160 N.C. App. 217, 584 S.E.2d 857, 859 (N.C. App. 2003) (emphasis added, citations omitted).

While it is difficult to understand how the phrase “***on a form prepared and made available by the insurance commissioner***” could be interpreted to suggest anything other than a requirement that all auto insurers use the Commissioner’s form instead of a form of their own creation, Courts that have interpreted the Statute since it was enacted have removed any doubt with respect to this issue. For example, in *Bell*, this Court stated:

Informational Letter No. 88 specifies the form that insurance carriers ***are required to use*** in making offers of optional uninsured and underinsured coverage.

*Bell*, 203 W. Va. at 307. (emphasis supplied). While this Court in *Bell* was addressing a form which was created and signed before Informational Letter No. 88 was issued by the Commissioner, this Court went on to note:

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*.

*Id.* at 309. (emphasis supplied).

Likewise, in *Ammons*, the Court noted:

... since §33-6-31d was adopted, the West Virginia Supreme Court has found that the offer must not only comply with *Bias*, **but must be written on a form prepared in conformity with the Insurance Commissioner's guidelines**, as set forth in Informational Letter No. 88.

*Ammons*, 219 F.Supp. 2d at 893 (emphasis supplied). In *Ammons*, the insurer had used its own form to offer West Virginia UM coverage to the claimant's employer which operated a fleet of vehicles in numerous states. The insurer had failed to list all vehicles covered by the offer or state the premiums for each optional level of coverage on its selection/rejection form. The Court noted:

Allstate acknowledges that the forms it provided to Rich did not comply with §33-6-31d, as they contained neither a listing of each vehicle covered under the policy nor the premiums associated with each optional level of coverage. Allstate contends, however, that strict compliance was not necessary under these circumstances. In particular, Allstate argues that the "oppressive paperwork" that would have been necessary made it impractical for it to list each vehicle in the Flowers fleet. Instead, it simply attached a schedule of vehicles to the policy, and wrote "see vehicle schedule" on the UIM Coverage form.

*Id.* at 892. The Court rejected Allstate's position, even though a representative of the corporate insured had expressly indicated in an affidavit that it did not want UIM coverage. The Court stated:

Allstate'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. Without such offer, there could be no knowing, intelligent waiver of the optional coverage. While the Court recognizes that it may, in fact, impose a considerable burden on insurers to present such information to sophisticated consumers who, even after due consideration, will reject the optional coverage, that finding is irrelevant to the Court's task here. Neither the statute nor the case law has carved out an exception for insurers dealing with sophisticated, corporate consumers, despite the fact that the

West Virginia legislature and judiciary no doubt recognized that such consumers would come under the purview of the statutory and insurance commissioner's guidelines.

*Id.* at 894-895. Because Allstate's selection/rejection form did not comply with the statutory requirements, its UIM coverage was "rolled up" to the policy's liability limit by the Court as a matter of law.

While State Farm's complex form may assist its agents by listing all possible premiums for each coverage level, the form only serves to confuse an insured who does not understand the differences between collision coverage, UIM coverage, and uninsured motorists coverage, or the fact that a multi-car discount can defeat the stacking of UIM coverages. As such, State Farm's forms actually defeat the statutory purpose of a standardized, easy to understand offer of coverage.

In *Bias*, supra. this Court noted that a commercially reasonable offer is one that "provide[s] the insured with adequate information to make an intelligent decision." *Bias*, 179 W. Va. at 127.

Furthermore, this Court

. . . 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.*, 203 W. Va. 2, 6, 506 S.E.2d 39, 43 (1998) (emphasis in original).

State Farm's UIM selection/rejection forms fail to provide this information.

The forms promulgated by the Insurance Commissioner's Office provide an insured with a single column listing the applicable premium for each optional level of UIM coverage. (J.A. at 90). All of the information regarding how much each level of coverage will cost is presented on the form and no additional information is needed. In contrast, State Farm's forms use a multi-column format,

requiring the insured to determine which of several different criteria apply before he or she can identify which column to even look at to determine the applicable prices. State Farm employee Larry Cipov was asked about this during his deposition in the *Martin* case, 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.

(J.A. at 151-152). In the same fashion, a number of other State Farm employees involved in the *Martin* case acknowledged that they could not identify the cost of a particular level of coverage without additional information not provided on State Farm's modified form. (J.A. at 178-179, J.A. at 185-186, and J.A. at 190). Thus, with all of the additional, non-mandatory information provided on State Farm's forms, an insured is unable to determine what each optional level of coverage costs without investigation beyond the information provided on State Farm's modified UIM selection/rejection form.

Even State Farm's own experts in the *Martin* litigation acknowledged that simplicity was one of the primary goals of the Insurance Commissioner's mandatory form and that State Farm's

form was less simple than the forms attached to Informational Letters 88 and 121. In that regard, State Farm provided the Circuit Court below with the affidavits of two former employees of the West Virginia Insurance Commissioner's Office, Keith Huffman and Donna Quesenberry. (J.A. at 444-446 and 448-449). Both were disclosed as witnesses in *Martin* and both of their Affidavits were actually produced in connection with that case. Those affidavits indicated 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 suggested that there was no prohibition against an insurer including "additional information" on the subject forms. (J.A. at 445 and 449). In fact, the deposition testimony of both witnesses is contrary to that position, supports the Petitioners' claims.

In her deposition in *Martin*, Ms. Quesenberry was asked about the reasons why a single mandatory UIM selection/rejection form was developed, and testified as follows:

- Q. Bias indicated the Supreme Court's analysis of what an insurance company was required to do when they had a mandatory obligation to offer optional coverage; right?
- A. That's correct.
- Q. They had to do so in a commercially reasonable way?
- A. Right.
- Q. And you know through the history of this that that means that different insurance companies were doing it different ways?
- A. Right.
- Q. And that was creating litigation problems?
- A. That's correct.

Q. And you know that 33-6-31d developed as result of the industry's desire and request for assistance in having a uniform way to address the problem so that we knew exactly -- the industry knew exactly what they were expected to do, how to do it, so that if they followed those instructions they had made a commercially reasonable offer?

A. That's correct. And to eliminate any potential litigation.

Q. And using a form was a clean, simple way to do that, wasn't it?

A. Yes.

Q. So that every carrier used the same form, provided the same information, and informed the consumer of what was available, what it was for, and what it cost?

A. Correct.

(J.A. at 483). Ms. Quesenberry clearly agreed that *W.Va. Code §33-6-31d* was designed to mandate the use of a single standardized form for making offers of UIM coverage. She also acknowledged that Informational Letter 88 expressly required all insurance carriers to use the Commissioner's promulgated form rather than some modified version of it. She was asked:

Q. If we'll go to page 2, again, it references, "HB 2580," and it says, "dictates that the forms prescribed by the Insurance Commissioner must be provided by the insurer to a named insured," and it indicates the circumstances when that has to be done; is that right?

A. That's correct.

Q. Now, again, "dictates" and "must," those are mandatory words, are they not?

A. They are.

Q. Anything there that suggests that there's some permissive element for the industry to use a different form or an altered or modified form?

A. It does not.

Q. Specifically, it indicates that the insurance companies are to use a form and must use a form prescribed by the Insurance Commissioner; is that right?

A. That's what it says.

(J.A. at 484-485). Ms. Quesenberry also acknowledged that the Commissioner's form was designed with simplicity in mind and that insurers were not permitted to modify the form to provide additional pricing information. She testified:

Q. Do you understand the benefit to simplicity when you're making an offer of something to an individual maybe that's not a lawyer and doesn't have insurance information as a background in their employment or history?

A. I do.

Q. That's an important component, isn't it?

A. It is.

Q. And apparently, from what Hanley Clark communicated to you, that was one of the overriding goals that he sought to complete through the Insurance Commissioner's Office in promulgating these forms?

A. To make it as simple as possible, yes.

Q. While at the same time providing the required information?

A. Yes.

Q. From that answer, is it your understanding, then, that the various insurers that do business in West Virginia were not permitted leave or authority to modify the form in any way that broke it down on pricing, provided separate premiums based on coverages?

A. That's correct..

(J.A. at 485-486).

Having acknowledged that the Commissioner had mandated the use of a simple, easy to understand form in Informational Letter 88, Ms. Quesenberry expressly agreed that State Farm's modified, multi-column form was not as simple and easy to understand as the Commissioner's mandatory form. She testified:

Q. Let's go back to Exhibit 8 and make some comparisons. The State Farm form has four prices as opposed to one; is that right?

A. That's correct.

Q. Other information is necessary for a consumer to figure out which price would apply to him or her; is that right?

A. Could you repeat that?

Q. Other information is required for the consumer to know which of these four prices applies?

A. Yes.

Q. And whether or not there is collision, or whether that's collision coverage or not, is not indicated on this form; is that right?

A. Right.

Q. Is this form as simple and easy to understand as Form A with Informational Letter 88?

A. I don't think it's as simple, no.

(J.A. at 487). In the same fashion, Ms. Quesenberry also testified that she understood how State Farm's identification of the optional levels of coverage as "mandatory" on one of the selection/rejection forms signed by Plaintiff Martin could "create confusion for the consumer." (J.A. at 490). In short, Ms. Quesenberry agreed that State Farm's UIM selection/rejection form is far more complex and confusing than the Commissioner's mandatory, promulgated form.

When questioned about the intent of the Commissioner's Informational Letter 121, which she assisted in creating, Ms. Quesenberry testified as follows:

Q. Now, this goes on to say, "However, the remainder of the form's content is identical to the prior forms."

A. That's correct.

Q. And was that your understanding of the intent of the Insurance Commissioner in promulgating the new forms under Informational Letter 121?

A. Right.

Q. Other than eliminating those two areas of concern, the forms stayed the same?

A. That's correct.

Q. Anything in that communication that suggests to you that the industry was given some *carte blanche* to alter, modify, or amend the forms that had been promulgated by the Insurance Department or to disregard them and use forms of their own choosing or preparation?

A. No.

(J.A. at 488). Ms. Quesenberry then again acknowledged that there was no authority in the Informational Letter authorizing an insurer to use its own modified form. (J.A. at 489).

Remarkably, despite having been offered as an important witness by State Farm, Ms. Quesenberry indicated that she agreed with the Plaintiffs' retained experts in *Martin* as to their conclusion that State Farm's UIM selection/rejection form did not follow the Commissioner's form (J.A. at 491), testifying:

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.

(J.A. at 491-492).

State Farm's other expert in *Martin*, Keith Huffman, also acknowledged that State Farm's UIM selection/rejection forms were "less simple" than the Commissioner's mandatory form. He was asked:

Q. Now, if there is a price there listed for the coverage option of 20/40/10 and a price listed for each of the other levels there, this is a fairly simple and easy to understand form, isn't it, for someone to look at it and say, "Okay. 20/40/10 of coverage is going to cost me X. 100/300/10 is going to cost me Y"; is that right?

A. I think the intent was to keep the form simple.

Q. If I put two prices or four prices there, this becomes less simple, doesn't it?

A. Adding additional information makes things less simple.

Q. This answer to Question 1 actually talks about something being -- or adding the different breakdowns of prices making the form too crowded and complicated. That was a concern, wasn't it?

A. Well, it said that they couldn't break out those specific coverages.

(J.A. at 495). Thus, State Farm's UIM selection/rejection form was both materially different from and less simple than the Commissioner's mandatory form and State Farm clearly failed to follow the requirements of *W.Va. Code §33-6-31d* when it offered UIM coverage to the Petitioners.

***B. State Farm's failure to use the mandatory UIM selection rejection forms results in the coverage being added as a matter of law.***

In *State ex rel. Riffle v. Ranson*, 195 W.Va. 121, 464 S.E.2d 763 (1995), this 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*, 195 W. Va. at 128 (citing William N. Eskridge, Jr. & Phillip P. Frickey, *Cases and Materials On Legislation: Statutes And The Creation Of Public Policy* 690 (1988)); see also *Bell v. Vecellio & Grogan, Inc.*, 197 W.Va. 138, 143, 475 S.E.2d 138, 143 (1996) (Legislature's enactment of W.Va. Code 23-4-2(c) supersedes tort concept of deliberate intent action under *Mandolidis v. Elkins Indus., Inc.*, 161 W.Va. 695, 246 S.E.2d 907 (1978). Because the Legislature clearly and unambiguously responded to *Bias* by mandating the use of the Commissioner's form to make offers of UIM coverage, the *Bias* test for proving an effective offer and knowing and intelligent rejection of UIM coverage has effectively been superseded by *W.Va. Code § 33-6-31d*. This Court recognized this fact in *Bell*, where this 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. (emphasis supplied). Likewise, in *Ammons*, the Court found that an offer of UIM 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.

The *Ammons* decision's recognition that *Bias* has been superceded by statute was expressly approved by this Court in *Luikart v. Valley Brook Concrete & Supply, Inc.*, 216 W.Va. 748, 613 S.E.2d 896 (2005), wherein this 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).

*Luikart*, 216 W. Va. at 755, n.11. Moreover, this Court revisited the issue again in the case of *West Virginia Employers' Mut. Ins. Co. v. Summit Point Raceway Associates, Inc.*, 228 W. Va. 360, 719 S.E.2d 830 (2011), wherein this 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. In addressing the Legislature's clear intent to legislate the going forward requirements for insurers, this Court also stated, "...we note that *Bias* has been superceded by statute only as it pertains to uninsured and underinsured motorist coverage." *Id.* at 835, n. 9.

In short, while *Bias* represented this Court's common law pronouncement on the duties of insurers with respect to mandatory offers of uninsured and underinsured motorists coverage under *W. Va. Code §33-6-31*, the requirements of *Bias* were clarified and expanded by the Legislature through *W. Va. Code §33-6-31d*. Now, an insurer must conform to the statute's requirements, and *Bias* provides no alternative escape route for an insurer that elects to disregard its obligations under the law. The *Bias* standards for proving a commercially reasonable offer no longer apply, and the

Petitioners are entitled to have UIM coverage added to their policy as a matter of law in the amount which State Farm was required to offer.

**II. STATE FARM'S ASSERTION THAT FAILURE TO FOLLOW THE INSURANCE COMMISSIONER'S MANDATORY UIM SELECTION/REJECTION FORMS MERELY RESULTS IN THE LOSS OF THE STATUTORY PRESUMPTION AND A REVERSION TO THE *BIAS* STANDARDS IS INCORRECT.**

As discussed above, the Court in *Martin* found that State Farm's forms were materially different from the Insurance Commissioner's prescribed form (J.A. at 162-163), but the Court went on to find that this merely resulted in the loss of a statutory presumption. *Martin*, 809 F.Supp.2d at 504 and 507. State Farm relied upon this finding to urge the Circuit Court in the present case to reject the Petitioners' request for summary judgment, and allow State Farm to attempt to prove that a commercially reasonable offer was made to the Petitioners by other means, under the standards set forth in *Bias*. State Farm's suggestion and the *Martin* Court's decision were wrong because they are based upon the premise that an insurance carrier can prove that individuals who did not receive the offer of optional UIM coverage on the form "prepared and made available" by the Insurance Commissioner still somehow received a commercially reasonable offer and exercised a knowing and intelligent rejection of such coverage. To do so would require the Court to ignore *W.Va. Code §33-6-31d*'s express requirement that after 1993, such offers "*shall be made available to the named insured . . . on a form prepared and made available by the insurance commissioner*" (emphasis supplied), and the plain language of prior decisions, such as *Parham v. Horace Mann Insurance Company*, 200 W.Va. 609, 490 S.E. 2d 696 (W.Va. 1997), wherein this Court expressly noted:

**West Virginia Code §33-6-31d was adopted by the legislature in 1993 to specify the manner in which an insurer shall make an offer of optional uninsured and underinsured motorists coverage.**

*Parham* at 619, 706, citing *Cox v. Amick*, 195 W.Va. 608, 615, 466 S.E. 2d 459, 466 (W.Va. 1995) (Emphasis supplied.). State Farm’s argument is also in direct conflict with the decisions in *Nationwide v. O’Dell*, Civil Action No. 00-C-37 and *Hardman v. Erie*, Civil Action No. 08-C-153, where the Courts found that failing to use the Insurance Commissioner’s prescribed form results in coverage being added to the policy as a matter of law in the amount the insurers were required to offer. Since the Commissioner’s form is the mandatory method by which insurers in West Virginia “shall” make the required offer, other methods not mentioned in the Statute cannot be effective even if they could somehow meet the lower *Bias* standards.

By finding that an insurance company that fails to use the form can still attempt to prove an effective offer under the lower *Bias* standards, the *Martin* Court effectively negated the language of the Statute, suggesting that there are actually two ways in which an insurer can make the offer required by *W.Va. Code §33-6-31*. In doing so, the Court focused upon the following language from *W.Va. Code §33-6-31d*:

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.

Specifically, the *Martin* Court found that since using the form only created a “presumption” of a commercially reasonable offer, the failure to use the form could only result in the loss of a presumption. *Martin* at 505. However, this language must be viewed in the context of the Statute as a whole. While an insurer may have used the Commissioner’s form to make the offer and may have had it signed by the insured, such a form could still be defective if the insurer failed to complete the form properly by including all of the required optional levels of coverage or failed to

have the insured sign and mark the level of coverage being chosen. Such deficiencies would render ineffective the use of even the Commissioner's prescribed form. Therefore, the Statute provides that the use of the promulgated form creates a presumption of a commercially reasonable offer, and a knowing rejection, rather than final proof. Here, the issue is not whether State Farm is subject to a rebuttal of the presumption because it made the required offer on the prescribed form, but failed to have it properly completed. Instead, the evidence establishes that State Farm violated the Statute by failing to use the required form in the first place. While State Farm is certainly not entitled to the presumption that would exist if it had used the proper form and had it signed by the Petitioners, the mere fact that such a presumption exists under the Statute does not mean that insurers who fail to follow the Statute get a "second bite at the apple" under the lower standards of *Bias*. Under the plain language of *West Virginia Code §33-6-31d*, insurers who use the Commissioner's form and have it signed by the insured get the presumption, and if the form is correctly completed, the insurers can establish that a commercially reasonable offer was made and knowingly rejected. Insurers who do not use the Commissioner's form at all are simply in violation of *West Virginia Code §33-6-31d*, and have failed to make the statutorily required offer. Any other interpretation requires the Court to substitute the word "may" for the word "shall" in *West Virginia Code §33-6-31d*, and ignores the very purpose for which the Statute was enacted.

A comparison of the standards for making a commercially reasonable offer of UIM coverage before and after *W. Va. Code § 33-6-31d* was passed reveals why the *Martin* Court's analysis was incorrect. In *Bias*, the Court found that the offer must "provide the insured with adequate information to make and intelligent decision" and set forth the following very general standards for the making of such an offer:

The offer must state, in definite, intelligible, and specific terms, the nature of the coverage offered, the coverage limits, and the costs involved.

*Bias* at 127, 791. In stark contrast, *W. Va. Code § 33-6-31d* specifies exactly when the offer must be made and to whom. It provides that the offer must be made “to the named insured at the time of initial application for liability coverage and upon any request of the named insured.” It goes on to require that the offer “shall specifically inform the named insured of the coverage offered, the rate calculation therefor, including, but not limited to, all levels and amounts of such coverage available, and the number of vehicles which will be subject to the coverage.” The *Martin* Court failed to consider these additional requirements and found where State Farm failed to comply with the strict standards of *W. Va. Code § 33-6-31d*, it can instead seek to satisfy the far more lenient standards for making the mandatory offer that existed under *Bias* before *W. Va. Code § 33-6-31d* was enacted. Accordingly, State Farm’s argument that the *Bias* standards for making the offer still apply is the equivalent of a driver caught speeding asking the traffic court to instead apply the general standard of reasonable conduct which existed before speed limits were adopted.

### CONCLUSION

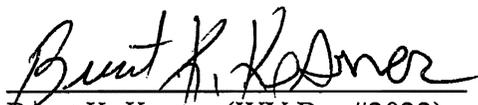
The Circuit Court below and the District Court in *Martin* concluded that the use of the Insurance Commissioner’s form is not optional and *W. Va. Code §33-6-31d* includes no provision allowing an insurer to alter or modify the form for its own purposes or convenience. (J.A. at 524 and 161). Both the Circuit Court below and the *Martin* Court also found that State Farm’s underinsured motorists coverage forms are materially different that the Insurance Commissioner’s prescribed form and failed to present State Farm customers, such as the Petitioners, with a “commercially reasonable” offer of underinsured motorists coverage. (J.A. at 539-540 and 162-163). The only question remaining was whether or not State Farm’s failure to comply with *W. Va. Code § 33-6-31d* resulted in underinsured motorists coverage being added to the insureds’ policy as a matter of law in the amount State Farm was required to offer, or merely resulted in the loss of a

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*.

The Petitioners submit that the Circuit Court correctly resolved the certified question by finding that UIM coverage is added to the Thomas Family's policy as a matter of law in the amount State Farm was required to offer, inasmuch as State Farm failed to meet the requirements of *W. Va. Code § 33-6-31d*. The Legislature enacted *W. Va. Code § 33-6-31d* in order to address the requirement that insurers make commercially reasonable offers of uninsured and underinsured motorists coverage. The Statute directed that all insurers use the same mandatory form, providing West Virginia consumers with the mandatory offer in a specific way, using a specific format which was expressly designed to be easy to understand. State Farm's failure to use the prescribed form means that State Farm failed to make a commercially reasonable offer in the only way possible under *W. Va. Code § 33-6-31d*. State Farm is not be permitted to benefit from ignoring the law by attempting to take advantage of the lower and less stringent *Bias* standards, which existed before *W. Va. Code § 33-6-31d* was enacted. Accordingly, the Petitioners request that this Court uphold the judgment of the circuit court and find that State Farm's failure to use the Insurance Commissioner's prescribed form, as required by *W. Va. Code § 33-6-31d*, results in underinsured motorists coverage being added to the Petitioner's policy in the amount which State Farm was required to offer.

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

By Counsel



Brent K. Kesner (WV Bar #2022)  
[bkesner@kkblaw.net](mailto:bkesner@kkblaw.net)  
Ernest G. Hentschel (WV Bar #6066)  
[ehentschel@kkblaw.net](mailto:ehentschel@kkblaw.net)  
Kesner & Kesner, PLLC  
112 Capitol Street  
P. O. Box 2587  
Charleston, WV 25329  
Telephone: (304) 345-5200  
*Counsel for Petitioners*

Anthony J. Majestro (WVSB #5165)  
[amajestro@powellmajestro.com](mailto:amajestro@powellmajestro.com)  
Powell & Majestro, PLLC  
405 Capitol Street, Suite 1200  
Charleston, West Virginia 25301  
Phone: 304-346-2889

Matthew L. Clark (WVSB #7144)  
[matthew.clark@kayserlayneclark.com](mailto:matthew.clark@kayserlayneclark.com)  
Kayser Layne & Clark, PLLC  
Post Office Box 210  
701 Viand Street  
Point Pleasant, WV 25550  
Phone: 304-675-5440

Ronald F. Stein, Jr., Esq.  
Ronald F. Stein, Jr., PLLC  
P.O. Box 213  
Point Pleasant, WV 25550  
Phone: 304-675-6376  
[rfsteinlaw@gmail.com](mailto:rfsteinlaw@gmail.com)

James C. Peterson (WVSB # 2880)  
[jcpeterson@hpcbd.com](mailto:jcpeterson@hpcbd.com)  
Douglas A. Spencer (WVSB #9369)  
[doug@hpcbd.com](mailto:doug@hpcbd.com)  
C. Michael Bee (WVSB #290)  
[cmbee@hpcbd.com](mailto:cmbee@hpcbd.com)  
Hill, Peterson, Carper, Bee & Deitzler, PLLC  
NorthGate Business Park, 500 Tracy Way  
Charleston, West Virginia 25311-1555  
Phone: 304-345-5667

Kevin C. Harris (WVSB #8814)  
[Kevinharris2@suddenlinkmail.com](mailto:Kevinharris2@suddenlinkmail.com)  
Law Offices of Harris & Holmes  
111 W. Main Street  
Ripley, West Virginia 25271  
Phone: 304-372-7004  
*Co-Counsel for Petitioners*

IN THE SUPREME COURT OF APPEALS  
OF WEST VIRGINIA  
DOCKET NO. 12-0688

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

v.

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

**CERTIFICATE OF SERVICE**

I, Brent K. Kesner, as counsel for the Petitioners, hereby certify that on the 13<sup>th</sup> day of August, 2012, the foregoing **PETITIONER'S BRIEF ON CERTIFIED QUESTION** has been served upon the following by depositing a true copy thereof in the regular United States mail, postage prepaid, addressed as follows:

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*

  
\_\_\_\_\_  
Brent K. Kesner (WVSB #2022)