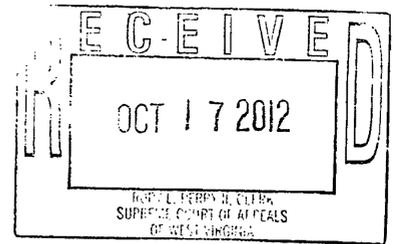


IN THE SUPREME COURT OF APPEALS
OF WEST VIRGINIA
DOCKET NO. 12-0688



PLEADING FILED
WITH MOTION

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 REPLY 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
Ernest G. Hentschel (WV Bar #6066)
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
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
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

James C. Peterson (WVSB # 2880)
jcpeterson@hpcbd.com
Douglas A. Spencer (WVSB #9369)
doug@hpcbd.com
C. Michael Bee (WVSB #290)
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
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

STATEMENT OF THE CASE 1

ARGUMENT 2

I. An Offer of UIM Coverage Which Is Not Made Using The Insurance Commissioner’s
Mandatory UIM Forms Is Ineffective As A Matter Of Law.. 2

 1. The Circuit Court’s Holding is Supported by the Text of Section 33-6-31d..3

 2. The Circuit Court’s Interpretation Of The Statute Recognizes And Implements
The Historical Purpose Of W. VA. Code Section 33-6-31d 4

 3. The Circuit Court’s Holding Is Consistent With This Court’s Prior Decisions In
Jewell I and II.. 6

 4. The South Carolina Decisions Relied Upon By State Farm Are Not Applicable
Because South Carolina Permits Insurers To Submit Their Own Forms For
Approval By Its Insurance Department..... 7

 5. The Circuit Court’s Holding Is Consistent With West Virginia Public Policy ... 9

II. The Petitioner’s Position Is Supported By *Bell* And *Ammons*. 12

III. *Bias* Has Been Superseded Insofar As It Sets Forth The Manner In Which An Effective
Offer Of UIM Coverage Is To Be Made 14

IV. State Farm’s Use Of A Complex Multi-Column Format To Make The Mandatory Offer
Of UIM Coverage Was Designed Solely To Benefit State Farm’s Agents And Could
Only Lead To Confusion On The Part Of Its Customers 16

V. The Insurance Commissioner’s Arguments Are Inconsistent With its Role Under W. Va.
Code §33-6-31d 21

CONCLUSION 24

CERTIFICATE OF SERVICE

TABLE OF AUTHORITIES

West Virginia Cases

<i>Bailey v. Geico General Ins. Co.</i> Civ. Action No. 2:05-0806, 2010 WL 2643380 (S.D. W.Va. June 2010)	17, 18, 19
<i>Bias v. Nationwide Mut. Ins. Co.</i> , 179 W.Va. 125, 365 S.E.2d 789 (1987)	2
<i>Burrows v. Nationwide Ins. Co.</i> , 215 W. Va. 668, 600 S.E.2d 565 (2004)	10, 12
<i>Ingles v. State Farm Mutual Automobile Insurance Company</i> 265 F. Supp. 2d 655 (S.D. W.Va. 2003)	17, 18
<i>Jenkins v. J.C. Penny Casualty Ins. Co.</i> , 167 W.Va. 597, 280 S.E.2d 252 (W.Va. 1981)	15
<i>Jewell v. Ford</i> , 211 W.Va. 592, 567 S.E.2d 602 (W.Va. 2002) (per curium)	6, 7
<i>Jewell v. Ford</i> , 214 W.Va. 511, 590 S.E. 2d 704 (W.Va. 2003)	6, 7
<i>Luikart v. Valley Brook Concrete & Supply, Inc.</i> , 216 W. Va. 748, 613 S.E.2d 896 (2005)	14
<i>Mandolidis v. Elkins Indus., Inc.</i> , 161 W. Va. 695, 246 S.E.2d 907 (1978)	15
<i>Martin v. State Farm Mut. Automobile Ins. Co.</i> , 809 F.Supp.2d 496 (S.D. W.Va. 2011)	4, 19, 20
<i>Mayles v. Shoney's, Inc.</i> 185 W.Va. 88, 405 S.E.2d 15 (W.Va. 1991)	15
<i>Mitchell v. Broadnax</i> , 537 S.E. 2d 882 (W.Va. 2000)	14
<i>Riffle v. State Farm Mutual Automobile Insurance Co.</i> , 186 W.Va. 54, 410 S.E.2d 413 (1991)	10
<i>State v. Harden</i> , 62 W.Va. 313, 58 S.E. 715 (W.Va. 1907)	16
<i>State Farm Mut. Auto. Ins. Co. v. Shingleton</i> , Civ. Action No. 1:07-cv-29, Doc. 22 (N.D. W.Va. Feb 17, 2009)	17, 19
<i>Webb v. Shaffer</i> , 694 F. Supp. 2d 497 (S.D. W.Va. 2010)	17, 18, 19
<i>West Virginia Employers' Mut. Ins. v. Summit Point Raceway Associates, Inc.</i> , 228 W. Va. 360, 719 S.E.2d 830 (2011)	6, 14

Westfield v. Bell, 203 W. Va. 305, 507 S.E.2d 406 (1998) 12

Other cases

Ammons v. Transportations Ins. Co.,
219 F.Supp.2d 885, 893 (S.D. Ohio 2002)12, 13

Clements v. Travelers Indem. Co., 121 Wash.2d 243, 850 P.2d 1298, 1305 (1993) 9

Erie Ins. Exchange v. Miller, 160 N.C. App. 217, 584 S.E.2d 857 (N.C. App. 2003) 8

Estate of Ball By and Through Sayre v. American Motorists Ins. Co.,
181 Ariz. 124, 127, 888 P.2d 1311, 1314 (1995) 9, 11, 12

Farm Bureau Mut. Ins. Co. v. Jameson, 472 F.Supp.2d 1272, 1278 (D.N.M. 2006) 9

Hendrickson v. Lee, 119 N.C.App. 444, 456, 459 S.E.2d 275, 282 (N.C.App. 1995) 8

Howard v. INA County Mut. Ins. Co., 933 S.W.2d 212, 219 (Tex.App. 1996) 9

Insurance Co. of North America v. Thomas, 337 So.2d 365 (Ala.Civ.App. 1976) 9

State Farm Mut. Auto Ins. Co. v. Fortin,
350 N.C. 264 at 269, 513 S.E. 2d 782 at 784-785 (N.C. 1999) 8

State Farm Mutual Automobile Insurance Co. v. Wannamaker,
291 S.C. 518, 354 S.E.2d 555 (S.C. 1986) 8

West Virginia Statutes and Rules

W. Va. Code § 23-4-2 15

W. Va. Code § 29A-1-2 23

W. Va. Code § 33-6-31 3, 5

W. Va. Code § 33-6-31d 1, 2 3 4, 6, 7, 8, 9 10, 11, 12, 13, 14, 15, 16, 17, 18, 20, 21, 22, 23,
24

W. Va. Code § 33-11-4a 15

W. Va. Code § 33-11-4(9) 15

Other authorities

S.C. Code Ann. §38-77-350. . . .8

STATEMENT OF THE CASE

In this case, State Farm and the Amicus suggest that the failure to follow *W. Va. Code §33-6-31d* merely results in a return to the lesser common law standard which existed before the Statute was enacted. In contrast, Petitioners assert that under the plain language of the Statute, State Farm's offer could not be valid unless it was made using the form prepared and made available by the Insurance Commissioner. In order to resolve this conflict, the Trial Court certified the question in this case.¹ Petitioners submit that pursuant to *W. Va. Code §33-6-31d*, State Farm's failure to use the mandatory form renders its offer of UIM coverage ineffective as a matter of law and obligates State Farm to provide them with UIM coverage in an amount equal to their liability limits.

State Farm's "Statement Of Facts" also asserts that it is undisputed that Petitioner Angela Thomas intentionally rejected UIM coverage against her agent's advice and did not want or pay for the coverage. In support of that suggestion, State Farm refers the Court to the affidavits of its agent who sold the policy (Tyronne Somerville) and his employee (Peggy Higgs), who say that after they clearly explained the benefits of the coverage, she rejected it. In fact, while the issue was briefed before any discovery was completed or depositions taken, Petitioners specifically advised the Trial Court that they did vigorously dispute the agents' purported testimony (JA at 462). However, Petitioners also argued that the alleged factual dispute with regard to what the agent told Ms. Thomas did not create a "material" issue of fact because State Farm's use of an invalid form in

¹State Farm seeks reformation of the certified question arguing that the question as drafted improperly presupposes that the *Bias* sets forth a lesser standard than the requirements of *§33-6-31d*. See, Response at 1-2. As noted below, *§33-6-31d* mandates the use of the specified form designated by the Commissioner while the prior *Bias* test allows proof of an offer which could be conveyed any number of ways. The requirement that a specified form be used is clearly a stricter standard than the one set forth in *Bias*. Similarly, State Farm's attempt to insert what are disputed facts, into the certified question is likewise improper. The certified question is sufficient to allow the court to answer the legal question posed-what are the consequences for failing to use the mandated form.

violation of *W. Va. Code §33-6-31d* meant that Petitioners were entitled to UIM coverage as a matter of law. Inasmuch as the Trial Court accepted this position and did not consider the factual dispute over what was said by the agents, that issue has never been addressed.

Inherent in State Farm's argument regarding Ms. Thomas' communications with State Farm's agents is the presumption that Ms. Thomas knew what the coverage was, knew how much each possible level of coverage would cost and made a knowing and intelligent decision to reject the coverage anyway. While all of those issues could be of importance under the standards for making a "commercially reasonable" offer set forth in this Court's opinion in *Bias v. Nationwide Mut. Ins. Co.*, 179 *W. Va.* 125, 365 *S.E.2d* 789 (1987), State Farm's fails to recognize that the West Virginia Legislature took the decision of whether a particular agent's conversations with the insured constitute a "commercially reasonable" offer of UIM coverage away from the litigation system by mandating that all such offers be made utilizing a specific form. *W. Va. Code §33-6-31d*. For this reason, Petitioners submit that Angela Thomas' alleged understanding of the coverage and the conversations State Farm's agents had with her are simply irrelevant to the Certified Question. The only issue here is whether or not State Farm's failure to use the mandatory forms for offers of UIM coverage results in coverage being added to the policy in an amount equal to the liability limits as a matter of law.

ARGUMENT

I. An Offer of UIM Coverage Which Is Not Made Using The Insurance Commissioner's Mandatory UIM Forms Is Ineffective As A Matter Of Law.

It is State Farm's position that the failure to follow *W. Va. Code §33-6-31d* merely results in the loss of a statutory presumption and a reversion to the lesser *Bias* standard which existed before the Statute was enacted. As will be shown, that argument is without merit.

1. *The Circuit Court's Holding is Supported by the Text of Section 33-6-31d.*

State Farm first argues that the Circuit Court's holding is not supported by the statutory text because it supposedly both imposes a "penalty" not expressly provided by the statute and fails to account for the phrase "effective offer" in the statute. Both of these arguments fail because they miss the point of the statute -- the enactment of a new mandatory standard requiring the use of a promulgated form, which was the foundation for an effective offer.

State Farm argues that requiring UIM coverage to be "rolled-up" amounts to the inclusion of a "penalty" that is not explicitly set forth in the statute. The consequences of failing to make an effective offer of the cover ages explicitly required to be offered by §33-6-31 has never been explicit in the statute. Instead the remedy was judicially implied from the statutory language. *Bias at 127, 791*. The Legislature's addition of §33-6-31d following *Bias*, without creating a new remedy amounts to a sub silento acceptance of the remedy recognized in *Bias*.

Contrary to State Farm's suggestion, there is nothing in the text of §33-6-31d that is inconsistent with applying the *Bias* remedy when an insurer fails to meet §33-6-31d's dictate that insurers must use the required form. First, nothing in the Act explicitly dictates that the Legislature intended a return to *Bias*. Second, the use of the term "presumption" is not inconsistent. In requiring a specific form and then declaring that the use of the required form merely results in a presumption of an effective offer, *W.Va. Code §33-6-31d(b)*, the Legislative intent was and is obvious -- use of the form, while mandatory as the foundation of an effective offer, only creates a presumption of sufficiency. Thus, the Legislature left open the opportunity for an insured to rebut the sufficiency of the offer.

Finally, the remedy of rolling up coverage is not contrary to the legislature's use of the term

“effective offer” in §33-6-31d(b). State Farm argues that this Court defined “effective offer” by equating it with the term “commercially reasonable” and that the use of the term “effective offer” should be construed to apply the *Bias* commercially reasonability standard. Response at 14. The problem with this argument is that *W. Va. Code §33-6-31d* was explicitly intended to impose the requirement of the use of a required form. Presuming that the Legislature intended to equate “effective offer” with the prior *Bias* test is inconsistent with the statute’s direction to use the promulgated form. In adding §33-6-31d, the Legislature was not adopting “effective offer” as a term of art as previously defined by *Bias*; rather, it was specifically defining an “effective offer” as one requiring the use of the mandatory form. *W.Va. Code § 33-6-31d(a)* (optional UIM limits “shall be made available . . . on a form prepared and made available by the insurance commissioner”) (emphasis added)).

2. *The Circuit Court’s Interpretation Of The Statute Recognizes And Implements The Historical Purpose Of W. Va. Code §33-6-31d.*

In this case, State Farm and the Amicus argue that the Insurance Commissioner’s promulgated form was not intended to be a mandatory part of making the required “commercially reasonable” offer of UIM coverage. Instead, they suggest that the requirements of Informational Letters 88 and 121 were intended to be a “floor for UIM coverage offer compliance,” such that insurance carriers would still be free to add whatever additional information they chose to the form. (See, for example, the Commissioner’s *Amicus Curiae* Brief at pg. 4) They further argue that the Statute was never intended to supersede or replace the *Bias* standard for whether a “commercially reasonable” offer of UIM coverage had been made. These arguments are simply inconsistent with the history of the Statute.

In *Martin v. State Farm Mut. Automobile Ins. Co.*, 809 F.Supp.2d 496 (S.D. W.Va. 2011),

the claimants deposed Donna Quesenberry and Keith Huffman about the historical purpose of the Statute and its effect on how the mandatory offer of UIM coverage was to be made by insurers. Both were former employees of the Insurance Commissioner's Office directly involved in the creation and distribution of the Informational Letters that provided the prescribed forms. In her deposition, Ms. Quesenberry testified:

- Q. Okay. But you don't disagree, as the Supreme Court said in the Luikart case, that the entire Bias standard and that process that people went through or the industry went through under Bias isn't the law anymore?
- A. Right.
- Q. There was a time that, under 33-6-31, that the industry was required to make these mandatory offers of optional coverage, Bias told them how they had to do that in terms of what they had to communicate, and then the legislature said, "No. Here is now how you have to do it"?
- A. That's correct. And the intent was for them to use the form.

(JA 491-492, the deposition at pgs. 64 - 65.) Similarly, 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.

(JA at 497) With respect to the underlying purpose of the Statute, Ms. Quesenberry further testified that it was designed to "eliminate any potential for litigation." (J.A. at 483). This testimony regarding the desire for uniformity and simplicity is in direct conflict with State Farm's argument that the Statute was not intended to prevent insurers from modifying or placing additional information on the Commissioner's mandatory form as they saw fit.

State Farm and the Amicus ignore the history of the Statute set forth by this Court in *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 noted:

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. While the theory that *W. Va. Code §33-6-31d* was always intended to allow insurers to add whatever "additional information" they saw fit to the Commissioner's form is certainly creative, it contradicts the actual history and purpose of *W. Va. Code §33-6-31d*. The Circuit Court's holding on this issue was correct.

3. *The Circuit Court's Holding Is Consistent With The Decisions In Jewell I and II.*

State Farm next suggests that its position is supported by this Court's decisions in *Jewell v. Ford*, 211 W. Va. 592, 567 S.E.2d 602 (W. Va. 2002) (per curium) (*Jewell I*) and *Jewell v. Ford*, 214 W. Va. 511, 590 S.E. 2d 704 (W. Va. 2003) (*Jewell II*). In fact, the Court in *Jewell I* 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.

Jewell at 595, 605. While the Court in *Jewell I* found that neither the insurance company or the claimant were entitled to summary judgment, it did not do so because Nationwide did not use the Commissioner's form or because the lower court would need to apply the *Bias* test. In fact, there is no indication that the Court even considered, let alone rejected, the argument that an insurer's

material deviation from the Commissioner's form is determinative of the coverage issue. Instead, this Court recognized that it was "undisputed that Nationwide made an offer of optional uninsured motorist coverage to Jewell using the insurance commissioner's form," and merely found that there was a genuine question of fact regarding whether Nationwide completed the form correctly and whether Jewell made a knowing and intelligent rejection of coverage, inasmuch as she had failed to check any of the selection boxes to indicate her choice. *Jewell I* at 596, 606. Implicit in this finding was the premise that if Jewell had signed the Commissioner's form and checked a box indicating her choice of coverage, her selection would have been binding and conclusive under *W. Va. Code § 33-6-31d* because Nationwide had used the Commissioner's form. Jewell's failure to check any of the selection boxes simply illustrates why the use of the Commissioner's form creates a "presumption" since it was still possible to rebut that presumption by showing that the form was not properly completed.

In *Jewell II*, this Court considered whether the amount of uninsured motorists coverage to which Jewell would be entitled was an amount equal to the liability limits she purchased or the maximum \$100,000/\$300,000 of coverage Nationwide was required to offer her. *Jewell II* at 515, 708. Again, there was no discussion of whether an insurer's material deviation from the Commissioner's form is determinative of the coverage issue. Therefore, State Farm's assertion that Petitioners' arguments cannot be reconciled with *Jewell I* and *II* is without merit.

4. *The South Carolina Decisions Relied Upon By State Farm Are Not Applicable Because South Carolina Permits Insurers To Submit Their Own Forms For Approval By Its Insurance Department.*

State Farm asserts that Petitioners' theory has been rejected in South Carolina and directs the Court to various decisions from that State. However, in states where the legislature has

mandated that a specific form be used to offer UIM coverage, strict adherence with the form is required.” (See *Erie Insurance Exchange v. Miller*, 160 N.C. App. 217, 584 S.E.2d 857 at 859 (N.C. App. 2003) citing *Couch on Insurance* .) In this case, *W. Va. Code §33-6-31d* sets forth a specific procedure to be followed when making an offer of underinsured motorists coverage and mandates that a specific form be used. In contrast, the South Carolina statute provides a process where each insurer can submit its own form to the insurance department for “approval. (See *S.C. Code Ann. §38-77-350*). Since insurers in South Carolina are permitted to use a form of their own design, there is still a need to determine whether the insurer’s offer is effective under the common law process set forth in *State Farm Mutual Automobile Insurance Co. v. Wannamaker*, 291 S.C. 518, 354 S.E.2d 555 (S.C. 1986), which is South Carolina’s equivalent of the *Bias* decision.

In contrast, *W. Va. Code §33-6-31d* requires that all insurers use the single standardized form “prepared and made available” by the West Virginia Insurance Commissioner’s Office, and does not contemplate or provide for the submission for approval of alternative forms. Accordingly, it is more appropriate to look to the law of states where the statute mandates the use of a specific form. See, e.g., *State Farm Mut. Auto Ins. Co. v. Fortin*, 350 N.C. 264 at 269, 513 S.E. 2d 782 at 784-785 (N.C. 1999) (rolling up coverage to liability limits after concluding, “The language of this provision is mandatory. An insurer is obligated to obtain the insured’s selection or rejection . . . on a form promulgated by the Rate Bureau and approved by the Commissioner.”); *Hendrickson v. Lee*, 119 N.C.App. 444, 456, 459 S.E.2d 275, 282 (N.C.App. 1995) (use of selection rejection form other than the required form resulted in implication of coverage as a matter of law in spite of evidence that named insured did not desire coverage).

Even when a specific form is not required, other Courts consistently strictly construe the

selection rejection requirements and imply coverage when the statutory requirements are not met. *Howard v. INA County Mut. Ins. Co.*, 933 S.W.2d 212, 219 (Tex.App. 1996) (strictly construing UIM statutory written waiver requirements and implying coverage as a matter of law finding that evidence of parties intent could not substitute for strict statutory compliance). Coverage is implied when the statutory offer and rejection requirements are not met even when there is undisputed evidence that the coverage was not desired by a sophisticated insured. *Estate of Ball By and Through Sayre v. American Motorists Ins. Co.*, 181 Ariz. 124, 127, 888 P.2d 1311, 1314 (1995) (failure of insurer to obtain written waiver of optional UIM coverage resulted in coverage implied as a matter of law in spite of undisputed testimony that sophisticated corporate risk manager specifically orally requested no optional UIM coverage); *Clements v. Travelers Indem. Co.*, 121 Wash.2d 243, 850 P.2d 1298, 1305 (1993) (same); *Insurance Co. of North America v. Thomas*, 337 So.2d 365 (Ala.Civ.App. 1976) (same); *cf. Farm Bureau Mut. Ins. Co. v. Jameson*, 472 F.Supp.2d 1272, 1278 (D.N.M. 2006) (interpreting New Mexico law and holding that failure of insurer to follow administrative regulation requiring that written offer and waiver of optional uninsured coverage “be endorsed, attached, stamped, or otherwise made a part of the policy” resulted in coverage being implied as a matter of law).

5. *West Virginia Public Policy Supports Implying Coverage When an Insurer Fails to Use the Required UIM Selection/Rejection Form.*

State Farm argues that West Virginia public policy is frustrated by the Circuit Court’s holding implying coverage into the policy when an insurer fails to use the selection/rejection forms mandated by §33-6-31d(a). State Farm argues that there is a public policy of consumer choice which would be frustrated by implying coverage when the insurer fails to use the selection rejection forms mandated by §33-6-31(d)(a). Contrary to State Farm’s suggestion, public policy is advanced

by the rule accepted by the Circuit Court because it encourages insurers to make mandatory offers using the form the Commissioner has prepared and made available to convey the benefits and costs for optional UIM coverage.

First, this Court has explained that, while the Legislature's objective in mandating of optional underinsurance coverage was certainly to provide a mechanism that would encourage or enable full compensation up to the limits of the ... underinsured motorist coverage, there is no law which requires that underinsurance must be purchased. *Burrows v. Nationwide Mut. Ins. Co.*, 215 W.Va. 668, 675-676, 600 S.E.2d 565, 572-573 (2004). The *Burrows* Court found that this policy objective was met even “[i]n those situations when underinsurance was not purchased *after it was properly offered.*” *Id.* (emphasis added). Neither *Burrows* nor *Riffle v. State Farm Mutual Automobile Insurance Co.* 186 W.Va. 54, 410 S.E.2d 413 (1991), decided prior to the enactment of *W.Va. Code § 33-6-31d*, addressed the policy behind the specific requirement that insurers use a specific form to make the mandatory offer. However the *Riffle* Court did note:

The purpose of W.Va.Code 33-6-31 [1988] is to provide all insurance buyers with an opportunity to purchase a minimum amount of underinsured motorist coverage. When the buyer is not given this opportunity, the statute provides him with the minimum coverage. The statute and our decision in *Bias v. Nationwide Mutual Ins. Co.*, 179 W.Va. 125, 365 S.E.2d 789 (1987)] encourage insurance companies to make a real effort to inform customers about the opportunity for underinsured motorist coverage.

186 W.Va. at 56, 410 S.E.2d at 415. Thus, it is clear from both *Burrows* and *Riffle* that the policy identified in these cases is not merely consumer choice, but *informed* consumer choice.

In enacting §33-6-31d, the Legislature made the determination that the Commissioner was in the best position to determine how to effectuate the legislative aim of requiring offers of these important optional coverages to informed insureds. Unlike some other states, the use of the

Commissioner's form was mandated. Implying coverage into the insurance policies when an insurer fails to use the required form encourages the use of the statutorily required mechanism that the Legislature has determined will best facilitate the policy of *informed* consumer choice. In addition, there are other public policies that are advanced by the Circuit Court's ruling. Litigation arising from the application of the *Bias* test led to the enactment of the requirement for the use of a mandatory form by *W. Va. Code §33-6-31d*. Compliance with the requirement that insurers make mandatory offers using the prescribed form is served by implying coverage when an insurer fails to follow the statute. This serves a number of important public policies.

A regime that allowed for *ad hoc* waivers of written offers would create havoc. An insurer could argue that a person who wrote a letter requesting specific coverage, but not UIM, made a knowing waiver of an offer of UIM. Or insurers and named insureds might have an incentive to "agree" to the underlying facts surrounding the issuance of an insurance policy when it suited them, to the detriment of others insured under the policy.

Estate of Ball, 181 Ariz. at 126, 888 P.2d at 1313. These were the sort of problems encountered under the *Bias* standard. Strict compliance with §33-6-31d eliminates this potential havoc, fulfilling the purpose of the statute.

Requiring statutory compliance to avoid implying coverage also protects the legitimate interests of all insureds and insurers and avoids uncertainty:

Ball [as an additional insured] was a person insured under the policy. Allowing the insurer and named insured to agree to facts and the legal significance of documents after the claim arises defeats the protective purpose of the statute. It lets the insurer and named insured bind a "person insured under the policy" to their post-claim statement of facts. But it is this person, the driver, that the statute was designed to protect. When the driver dies, he or she will not be able to dispute the statement of facts. Yet Kemper's theory requires some dispute to overcome a purported waiver. Had Ball lived, she might have been able to provide such a dispute. She reduced her personal UIM coverage when she began using Fleming's company car. Her reasons for doing so are not clear. She may have done so in reliance on some representation made by Fleming or Kemper. That she died and cannot tell us should not result in a

windfall to Kemper. The statute was designed to prevent controversies like this. An insurance provider protects itself by complying with the statute.

Estate of Ball, 181 Ariz. at 126, 888 P.2d at 1313.

II. The Petitioner's Position Is Supported By *Bell* And *Ammons*.

Throughout its *Response Brief*, State Farm attacks the many decisions supporting Petitioners' position as "dicta" and unpersuasive. For example, State Farm suggests that this Court's finding in *Westfield v. Bell*, 203 W.Va. 305, 507 S.E.2d 406 (1998) that "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," was unclear and simply represents dicta. *Bell*, 203 W. Va. at 309. However, State Farm ignores the fact that this Court was addressing whether an offer made after *W.Va. Code §33-6-31d* was enacted, but prior to the promulgation of the Commissioner's form, could be an effective offer. Recognition that the Commissioner had not yet promulgated the required form was a critical element of the Court's reasoning and can hardly be characterized as "dicta." Moreover, this Court also clearly stated that "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.) State Farm apparently feels that the term "required to use" is unclear and subject to interpretation.

State Farm next asserts that the Federal Court's reasoning in *Ammons v. Transportation Ins. Co.*, 219 F.Supp.2d 885 at 893-894 (S.D. Ohio 2002), was faulty and did not properly interpret West Virginia law. However, this Court cited *Ammons* with approval in *Burrows v. Nationwide Ins. Co.*, 215 W.Va. 668, at 673 n. 10. 600 S.E.2d 565 (2004), and discussed the requirement that insurers make mandatory offers on the form promulgated by the Insurance Commissioner, noting:

This form, developed by the Insurance Commissioner, is required to: “1) Inform a named insured of the optional coverages offered; 2) Inform the named insured of the rate calculation for the optional coverages including amount of coverage and the number of vehicles; and 3) Give the named insured the option to reject the optional coverage.” *Ammons v. Transp. Ins. Co.*, 219 F.supp 2d 885, 891 (S.D. Ohio 2002) (quoting from W.Va. Informational Letter No. 88, issued by W.Va. Ins. Comm’r July 1993).

Burrows at n. 10. Importantly, this Court also stated:

Under the terms of West Virginia Code § 33-6-31d, the insurer must make an offer of optional underinsurance coverage concurrent with the initial purchase of liability coverage. **In mandatory terms**, the statute provides that “[o]ptional limits of ... underinsured motor vehicle coverage required by section 31 [§ 33-6-31] of this article shall be made available to the named insured at the time of initial application for liability coverage.” W.Va.Code § 33-6-31d(a). **The manner in which the form offering the underinsurance coverage is required to be transmitted to the insurance applicant is further set forth by statute. The insurer has the option of either “delivering the form to the applicant” or “mailing the form to the applicant together with the applicant's initial premium notice.”** W.Va.Code § 33-6-31d(b).

Id at 673, 570 (Emphasis supplied.) Such language hardly suggests that the *Ammons* decision “cannot be what the legislature intended when enacting §33-6-31d.” Instead, it leaves little doubt that this Court recognized the requirement for the mandatory use of the Commissioner’s promulgated form and the compliance with the additional requirements of *W.Va. Code §33-6-31d* in the same manner as recognized by the Court in *Ammons*.

The crux of the decision in *Ammons* was that the failure to use the mandatory form the failure by an insurer to make a “commercially reasonable” offer. *Ammons*, 219 F.Supp.2d at 894. While it may seem counterintuitive that an insurance agent’s personal communications with the customer are irrelevant to whether an effective offer has been made, that is exactly what *W.Va. Code §33-6-31d* was designed to accomplish. In that regard, the Statute contains no exceptions for commercial

policies or situations where an agent provides additional information to a customer. By design, the statute simply and unequivocally requires that the offer be made on the Commissioner's form so that if the form is used, there can be no "wiggle room" or reason to litigate the issue. While insurers routinely enjoy the benefit of summary judgment on this issue when a valid form has been used, fairness requires that the Statute be a double edged sword. The *Ammons* Court's recognition that the plan language of the Statute requires insurers to use the mandatory form or face the consequences does not "defy common sense" or "ignore the reality of how commercial insurance contracts are made." Instead, it enforces the statute as written.

III. *Bias* Has Been Superseded Insofar As It Sets Forth The Manner In Which An Effective Offer Of UIM Coverage Is To Be Made.

State Farm next asserts that the Petitioners are incorrect in arguing that *Bias* has been superseded by *W.Va. Code §33-6-31d* insofar as the statute sets forth the manner in which an effective offer of UIM coverage is to be made. In fact, this Court has expressly recognized that *Bias* has been superseded. See, *Luikart v. Valley Brook Concrete & Supply, Inc.*, 216 *W.Va.* 748, 613 *S.E.2d* 896 (2005), at Footnote 11, and in *West Virginia Employers' Mut. Ins. Co. v. Summit Point Raceway Associates, Inc.*, 228 *W. Va.* 360, 719 *S.E.2d* 830 (2011), at Footnote 9. Nevertheless, State Farm insists that if the Legislature had intended to supersede *Bias* through the enactment of *W.Va. Code, §33-6-31d*, it would have expressly indicated as much in the Statute.

In support of its position, State Farm argues, "The West Virginia legislature does not mince words when overturning a decision by the judiciary," and directs the Court to certain amendments to *W.Va. Code §33-6-30*, which it suggests "overturned" this Court's decision in *Mitchell v. Broadnax*, 537 *S.E. 2d* 882 (*W.Va.* 2000). State Farm goes on to suggest that because the Legislature did not mention the *Bias* decision by name in *§W.Va. Code, §33-6-31d*, it must not have

intended to supersede the common law standards an effective offer of UIM coverage. However, there are many examples of statutes clearly enacted in response to situations arising from common law decisions which do not mention the cases by name.

For example, the Legislature amended *W.Va. Code §23-4-2* in response to the “deliberate intent” actions which were being filed following this Court’s decision in *Mandolidis v. Elkins Indus. Inc.*, 161 W.Va. 695, 246 S.E.2d 907 (W.Va. 1978), but the Legislature did not mention *Mandolidis* anywhere in the Statute. This Court later recognized that the amendment was made in response to *Mandolidis* in the case of *Mayles v. Shoney’s, Inc.* 185 W.Va. 88, 405 S.E.2d 15 (W.Va. 1991). *Mayles* at 92, 19. In the same fashion, the Legislature enacted *W.Va. Code §33-11-4a* to eliminate the third-party private cause of action for violations of *W.Va. Code §33-11-4(9)*, recognized in *Jenkins v. J.C. Penny Casualty Ins. Co.*, 167 W.Va. 597, 280 S.E.2d 252 (W.Va. 1981), without ever mentioning *Jenkins*. It is clear that the Legislature routinely enacts legislation in order to address issues arising from common law decisions without expressly mentioning the cases. State Farm’s argument that the Legislature had to cite *Bias* if it intended to supersede that decision is simply incorrect.

State Farm is also incorrect when it asserts that the language in *W.Va. Code §33-6-31d* regarding the “presumption” of an effective offer only has meaning if the *Bias* standards still apply. In that regard, the creation of a “presumption” must be viewed in the context of the Statute as a whole. While an insurer may have used the Commissioner’s promulgated form to make a mandatory offer of UIM coverage, the insurer’s offer could still be defective if the insurer failed to complete the form properly by including all required optional levels of coverage, or failed to have the insured sign and mark the level of coverage chosen. (See, for example, the *Jewell* decisions discussed

above.) Such deficiencies can render an offer ineffective even if the Commissioner's prescribed form was used. As such, the Statute provides that the use of the promulgated form signed by an insured creates a "presumption" of a commercially reasonable offer, since the presumption can be overcome if the form is not properly completed.

With respect to State Farm's assertion that the Statute does not define what constitutes an effective offer or suggest how an insured can rebut the presumption, this Court has held:

[t]hat which is necessarily implied in a statute, or must be included in it in order to make the terms actually used have effect, according to their nature and ordinary meaning, is as much a part of it as if it had been declared in express terms.

Syl. Pt. 14, *State v. Harden*, 62 W.Va. 313, 58 S.E. 715 (W.Va. 1907) *Disapproved of on other grounds by Wiseman v. Calvert*, 134 W.Va. 303, 59 S.E.2d 445 (W.Va. 1950). Since the Legislature mandated the use of the Commissioner's prescribed form with the word "shall," it is necessarily implied that the failure to use the form constitutes an ineffective offer. To hold otherwise would render that requirement of *W.Va. Code §33-6-31d* meaningless.

IV. State Farm's UIM Selection/Rejection Forms Did Not Comply With West Virginia Law And Were Materially Different From The Commissioner's Mandatory Forms.

State Farm continues to argue that its non-compliant forms comply with *W. Va. Code § 33-6-31d*'s requirement that all insurers doing business in West Virginia make offers of UIM coverage on the form "prepared and made available" by the Insurance Commissioner.³ State Farm makes its position clear on this issue by asserting that although its UIM offer forms provide "non-mandatory information," the forms are "otherwise nearly identical to the forms prescribed by the Insurance

³State Farm acknowledges that this issue is not part of the certified question but urges the Court to reach it anyway for purposes of judicial economy. State Farm has made no prior attempt to seek certification of this issue or otherwise properly preserve it for review in this Court. Petitioners have included a short reply below. Petitioner's full response, which includes extensive citation to the testimony presented to the Court below, appears in Petitioner's reply before the Circuit Court, is included in the appendix in this Court. (J.A. 467-476) Petitioners hereby incorporate those portions of their reply, setting forth the relevant testimony.

Commissioner.” Response at 32 (emphasis supplied). While Petitioners dispute State Farm’s claim that its forms are “nearly identical” to the forms prepared and made available by the Commissioner, State Farm’s argument ignores the express directive of *W. Va. Code §33-6-31d* that offers of UIM coverage “*shall be made available to the named insured . . . on a form prepared and made available by the insurance commissioner.*” (Emphasis supplied.) There is simply no authorization provided by the Statute for the use of forms that have been prepared or modified by insurers or forms that contain “more” information than contemplated by the Commissioner’s prescribed form.

In support of its position, State Farm asserts that other Courts have already found that State Farm’s forms and the forms of another carrier using a multi-column format comply with the requirements of *W. Va. Code § 33-6-31d*. State Farm directs the Court to the cases of *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 clearly indicates that none addressed the structural defects of State Farm’s forms or the issues raised by the Petitioners in this action.

In *Ingles*, the Court addressed a claimant’s argument that an individual error on the specific form which State Farm provided to her rendered it ineffective because the form was marked “N/A” in the space next to the information on multiple vehicle discounts. While the Court did state that State Farm’s form offer was “materially identical to the Commissioner’s form,” *Ingles* at 659, the Court did not address whether State Farm’s use of a form with multiple columns and possible premiums was an improper modification of the form promulgated by the Commissioner. *Ingles* at

659. Since the defects in the basic structure of State Farm's form were not raised in support of the Plaintiff's claims in *Ingles*, the Court's dicta in that decision regarding a comparison of that form to the Insurance Commissioner's prescribed form does not support State Farm's argument with respect to the Plaintiffs' claims in this action, which are based upon such defects.

In *Bailey*, the Court noted, in dicta on pg. 7, that "[t]he Offer Form sent by GEICO to Bailey is materially identical to language in the informational letter prepared by the Insurance Commissioner," but the Court performed no analysis or direct comparison of the forms. Instead, the Court focused on whether or not the claimant qualified as a present policyholder whose coverage would remain the same if he did not return the selection/rejection offer form which had been mailed to him within thirty (30) days. *Bailey* at 7. Like the claimant in *Ingles*, the claimant in *Bailey* did not assert that GEICO's offer form failed to comply with the promulgated form, as required by *W. Va. Code §33-6-31d*. As the Court did not examine that issue, the *Bailey* decision has no bearing on the issues raised in this case.

In *Shingleton*, the Court noted, "State Farm offered them [the Shingletons] optional UIM coverage on the appropriate form, which had been approved and made available by the West Virginia Insurance Commissioner" (See the *Shingleton* Order at pg. 4), but performed no comparison of the forms and did not address whether the multi-column format was a permissible modification of the Commissioner's form. There was no need for the Court to do so because the issue was not raised by the parties.

Finally, in *Webb*, the Court was presented with a claim that State Farm's failure to include an agent's name or binder number on an offer the form rendered it ineffective, and rejected the argument. *Webb* at 505. (FN 2.) Like the Court in *Ingles*, the Court in *Webb* indicated that State

Farm's form was "consistent with Informational Letter 121," but did not address the structural defects in the form or the issues raised in the present action. As with *Ingles, Bailey and Shingleton*, there was no need for the Court to address the argument because, unlike in the present case, the issue was never raised.

Next, State Farm attempts to explain why the Court in *Martin v. State Farm Mutual Automobile Insurance Co.*, Civil Action No. 3:10-0144, which did squarely address the issue, was wrong in concluding that State Farm's UIM selection/rejection forms were invalid. Specifically, State Farm asserts that the *Martin* Court's decision was inconsistent with prior case law, such as the *Bailey* and *Webb* decisions discussed above. However, as noted, none of the claimants in those prior decisions raised the issue of whether or not State Farm's form was inconsistent with the form prescribed by the Commissioner. While State Farm asserts that the *Martin* Court was incorrect when it concluded that a State Farm insured reviewing the form would have "no idea" which premium would apply, it ignores the comparative analysis upon which that decision was based. Specifically, the *Martin* Court 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.) Unlike the Courts in *Bailey* and *Webb*, the Court in *Martin* completed an actual comparison of the columns and premium options on State Farm's forms with those on the Commissioner's forms and concluded that they did not match. Moreover, the Court in *Martin* considered whether an insured reading State Farm's forms could readily determine which premium

applied to his or her policy. Because none of the prior decisions relied upon by State Farm undertook such an analysis, they are simply irrelevant.

Donna Quesenberry testified in her deposition in *Martin* that State Farm's forms, which used multiple columns to display possible premiums for each optional level of coverage, were far less simple than the Commissioner's promulgated forms (J.A. at 487). She further testified as follows:

- Q. Is this form, then, that uses the word "mandatory" clear in terms of the offer of this coverage or these different coverage benefits?
- A. Certainly, all the different limits are not mandatory, but, no, it doesn't make it clear that - -
- Q. How would the baby-sitter look at this and know which of these different levels of coverage is mandatory and which are not?
- * * *
- A. In my opinion, she wouldn't.
- * * *
- Q. Can you see that that can create confusion for the consumer?
- A. I can see where it would, yes.

(J.A. at 490). Likewise, State Farm acknowledged, "the intent was to keep things simple," and admitted, "[a]dding additional information makes things less simple." (JA-495) Put simply, State Farm's decision to add multiple columns of possible premiums for each level of optional coverage on its UIM forms made them far more confusing than the Commissioner's prescribed form, and defeated the essential purpose of *W.Va. Code §33-6-31d*.

State Farm also directs the Court to the report of its retained expert witness in *Martin*, Dr. William Wilkie, and argues that "the printed offer form plays only a limited role in informing consumers about UIM coverage." (JA - 388-395) (State Farm Brief at 30.) The apparent purpose of this argument is to suggest that because each customer may have individual communications with their agent, and may receive some unspecified information from that agent, he/she may not be confused by the different, possible premiums on State Farm's form. In fact, State Farm's reliance

upon individual communications between its customers and its agents to “fill in the blanks” created by its defective form illustrates why the Legislature mandated the use of a prescribed standardized form in the first place. Under State Farm’s premise, only those customers with a skilled agent would get a “commercially reasonable” offer of UIM coverage, and insurers would again be left with the same individualized burden of proof under *Bias*, which *W. Va. Code §33-6-31d* was designed to eliminate. Moreover, State Farm’s position cannot be reconciled with the Statute’s provision allowing insurers to mail the forms to insurers, rather than requiring the forms be provided in a meeting with an agent.

V. The Insurance Commissioner’s Arguments Are Inconsistent With its Role Under W. Va. Code §33-6-31d

Finally, Petitioners would point out that the position taken in the *Amicus Curiae Brief* by the West Virginia Insurance Commissioner’s Office is inconsistent with its role as the agency charged with enforcing *W. Va. Code §33-6-31d*. In its effort to assist State Farm, the Commissioner’s Office suggests that its only role was to set forth minimum requirements for mandatory offers of UIM coverage, which insurers were free to modify. That argument is totally inconsistent with the Statute, which requires that the form be “as prescribed by the commissioner,” and Informational Letter 88, which expressly indicated that “[t]he insurer must use an exact duplicate of the form as to both order and size of print” (J.A. at #77-79). Similarly, the Commissioner’s proposed answer to the Certified Question would eviscerate the very Statute the Commissioner is supposed to be implementing by suggesting that failure to use the prescribed form “may” result in the loss of a presumption and that a *Bias* analysis be undertaken “in any event.” The Commissioner’s Office is apparently willing to return the insurance industry to the “havoc” which existed before *W. Va. Code §33-6-31d* was enacted.

In order to properly respond to the Commissioner's arguments regarding the history of the Informational Letters, Petitioners would direct the Court to information provided by the *Martin* claimants' expert Jenny Bonham, a former employee of the Commissioner's Office involved in drafting Informational Letter 121. In an Affidavit produced in the *Martin* case, Ms Bonham noted:

If it had been the Insurance Commissioner's intent to create "minimum" requirements, the Informational Letter would have stated that to be the case. Moreover, if insurers were allowed to modify the form beyond that which is required in Informational Letter No. 88, approval of each insurer's version of the selection/rejection form by the Rates and Forms Division of the West Virginia insurance Commission would have been required. Such a review would be required to make sure that the insurer's separate forms met the "minimum" requirements.

(See the Petitioners' Supplemental Appendix at 2).⁴ Since the Informational Letters contain no mechanism for the approval of modified forms and *W.Va. Code §33-6-31d* provides no authority for the Commissioner to engage in such a process, it is obvious that it was not intended for insurers to be able to modify the commissioner's form as they saw fit. Moreover, State Farm's position is also inconsistent with the history of Informational Letter No. 121. Ms. Bonham explained that history as follows:

9. Had the Commissioner's requirements been merely "minimum" requirements, then the issues arising and resulting in litigation between the release of Informational Letter No. 88 and Informational Letter No. 121 would have centered on the insurer's additional content and whether it altered the content to such extent as to render it ineffective. Instead, however, litigation arose over whether the type face and size of print on an insurer's form matched that of the form prepared and made available by the Insurance Commissioner, and because of the 'present coverage' and 'vehicle description' requirements on the Commissioner's form.
10. In order to further reduce litigation on those issues, the Commissioner removed the requirements for "present coverage" and "vehicle description" from the prescribed form through Informational Letter No. 121, and

⁴The Petitioners have filed a separate Motion for Leave to File Supplemental Appendix in order to make Ms. Bonham's materials available for the Court's review.

explained that so long as the fonts on the form were not too small (at least 10 pt. font) and easily readable (font face, like Times New Roman or Arial), and contained ALL the information required by the Commissioner, the forms would create a presumption of a commercially reasonable offer.

(See the Petitioner's Supplemental Appendix at 3). Ms. Bonham also attached two letters from State Farm to her Report in *Martin* which illustrate the true history of the Statute and the Informational Letters. They are a letter from State Farm to the Chairman of the House Banking and Insurance Committee, dated January 27, 1992, and a letter from State Farm to the Insurance Commissioner, dated June 14, 1993, which reflect that State Farm submitted proposed changes to the Commissioner's form prior to its enactment and the issuance of Informational Letter 88, and knew full well that it would be a standardized form which all insurance carriers were required to use. (See Petitioners' Supplemental Appendix at 18-22). If insurance carriers were actually free to add additional information to the mandatory form whenever they wished, there would have been no need for State Farm to request such changes to the standardized form.

Petitioners would also point out that the Commissioner's Office has mistakenly identified Informational Letters 88 and 121 as "Interpretive Rules." In fact, *W.Va. Code §29A-1-2* defines an "interpretive" rule as one adopted "independently of any delegation of legislative power . . . which is not intended by the agency to be determinative of any issue affecting private rights, privileges or interests." However, *W. Va. Code §33-6-31d* expressly delegated the role of preparing the UIM selection/rejection form to the Commissioner's Office and indicates that if the Commissioner's form is used by an insurer and signed by the customer, it will be "binding on all persons insured under the policy." For that reason, Informational Letters 88 and 121 are mandates, and are not suggestions. Moreover, the Commissioner's argument implies that the many other forms that his Office has disseminated to the insurance industry by informational letter such as policy forms,

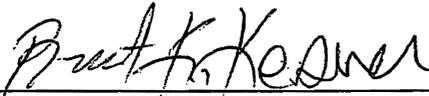
arbitration provisions and licensing applications are also just “minimum floors” which carriers are free to modify or add to as they see fit. If that was true, the Commissioner’s role would be reduced to that of a model form bank rather than a regulatory authority.

CONCLUSION

For all of the foregoing reasons, Petitioners ask that the Court affirm the Circuit Court’s holding and find that State Farm’s failure to use the Commissioner’s prescribed form means that it failed to make a commercially reasonable offer of UIM coverage under *W. Va. Code § 33-6-31d*.

**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
Ernest G. Hentschel (WV Bar #6066)
ehentschel@kkblaw.net
Kesner & Kesner, PLLC
112 Capitol Street
P. O. Box 2587
Charleston, WV 25329
Telephone: (304) 345-5200

Anthony J. Majestro (WVSB #5165)
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
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

James C. Peterson (WVSB # 2880)
jcpeterson@hpcbd.com
Douglas A. Spencer (WVSB #9369)
doug@hpcbd.com
C. Michael Bee (WVSB #290)
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
Law Offices of Harris & Holmes
111 W. Main Street
Ripley, West Virginia 25271
Phone: 304-372-7004

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 17th day of October, 2012, the foregoing **PETITIONER'S REPLY 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)