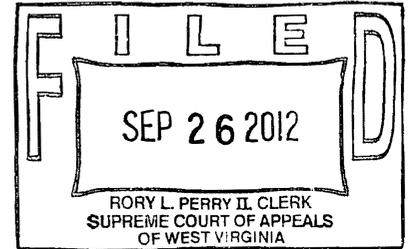

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

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,

Petitioners,

v.

WILLIAM RAY MCDERMITT and
STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY,

Respondents.

**STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY'S
RESPONSE BRIEF ON CERTIFIED QUESTION**

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CERTIFIED QUESTION AND REQUEST FOR REFORMULATION

The circuit court ordered that the following question be certified to this Court:

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 certified question should be reformulated because it assumes away a critical issue.

West Virginia Code section 33-6-31d does not define what constitutes an "effective" offer of underinsured motorist ("UIM") coverage – it merely provides insurers with a presumption of effectiveness if they offer UIM coverage on a form promulgated by the Insurance Commissioner. State Farm therefore submits that an offer is "effective" if it is "commercially reasonable" under *Bias v. Nationwide Mutual Insurance Co.*, 179 W. Va. 125, 365 S.E.2d 789 (1987). Petitioners, by contrast, contend that an offer can be effective only if made on one of the Commissioner's forms. As currently formulated, the certified question presupposes that the standard for "commercial reasonableness" under *Bias* is different – specifically, "lower" – than the standard for an effective offer under section 33-6-31d. The certified question therefore assumes away the very issue before the Court: whether the *Bias* standard is the standard for effectiveness under section 33-6-31d. Accordingly, the question should be reformulated to eliminate the premise that *Bias* provides a "lower" standard for offers of UIM coverage.

The certified question should also reflect the state of the record. In the proceedings below, State Farm provided substantial – and unrebutted – evidence that (1) it made a commercially reasonable offer of UIM coverage to Petitioner Angela Thomas, and (2) Ms. Thomas's rejection of that offer was knowing and intelligent. Petitioners' contention thus boils down to an assertion that, even if an insurer provides the information necessary to make an

intelligent purchasing decision, and even if the insured makes an informed decision not to purchase UIM coverage, a technical defect in the insurer's offer form renders the offer and rejection ineffective as a matter of law. As this is the true import of Petitioners' theory (and the circuit court's holding), the certified question should be reformulated as follows:

Where an auto insurance policyholder was provided all information necessary to make a knowing and intelligent decision regarding the selection or rejection of UIM coverage, and where the policyholder did in fact make a knowing and intelligent rejection of such coverage, must the policyholder's insurance contract be reformed to include UIM coverage simply because the insurance company's UIM selection/rejection form included information in addition to that contained in the West Virginia Insurance Commissioner's exemplar form?

STATEMENT OF THE CASE

I. Introductory Statement

On May 4, 2007, Angela Thomas visited her State Farm agent in Point Pleasant, West Virginia. Ms. Thomas's agent offered Ms. Thomas UIM coverage, which Ms. Thomas had previously declined to purchase. After explaining the Important Notice page attached to the UIM offer form, the agent explained the purpose of UIM coverage, the limits available for purchase, and the cost of each available limit. The agent then recommended that Ms. Thomas purchase UIM coverage at limits of \$100,000 per person, \$300,000 per occurrence, and \$50,000 for property damage. When Ms. Thomas declined to purchase UIM coverage at those limits, the agent recommended that Ms. Thomas purchase the coverage with lower limits for property damage. Ms. Thomas again declined the offer. Before leaving the agent's office, Ms. Thomas was presented with, and signed, a form indicating (1) she read and understood the Important Notice attached to the form, (2) she understood how UIM coverage works, and (3) she was exercising her right to reject UIM coverage.

Despite these facts – which were undisputed in the proceedings below – Ms. Thomas and several family members (collectively, “Petitioners”) seek to reform Ms. Thomas’s policy and compel State Farm to provide \$300,000 in coverage she did not want and for which she has not paid. Petitioners do not contend that State Farm failed to give Ms. Thomas sufficient information to make an intelligent purchasing decision. Nor do they contend that her decision was anything other than knowing and informed. The *sole* basis Petitioners assert for reforming Ms. Thomas’s insurance policy is their contention that the form Ms. Thomas signed when rejecting UIM coverage contained information in addition to that required by the West Virginia Insurance Commissioner.

Petitioners’ theory, which was adopted by the circuit court below, is without merit. Under the plain language of West Virginia Code section 33-6-31d, an insurer must use the Commissioner’s form in order to gain the benefit of a statutory presumption that (1) its offer of UIM coverage was effective, and (2) the insured’s rejection of such coverage was knowing and intelligent. But nothing in the statute suggests that failure to use the requisite form renders an offer of UIM coverage ineffective *per se*. Thus, as U.S. District Judge Robert Chambers held in *Martin v. State Farm Mutual Automobile Insurance Co.*, 809 F. Supp. 2d 496 (S.D.W. Va. 2011), even if an insurer’s UIM forms vary impermissibly from the Commissioner’s, the consequence of this deficiency is loss of the presumption under section 33-6-31d. The insurer is then required to prove, under the standard set forth in *Bias*, that its offer was commercially reasonable and the insured’s rejection was knowing and intelligent.

The analysis in *Martin* follows from the statute’s text, its historical context, and the relevant case law. Petitioners’ interpretation of section 33-6-31d, by contrast, finds no support in any of those sources. Petitioners’ interpretation also runs counter to West Virginia’s public

policy favoring informed consumer choice. The certified question should be therefore answered in the negative, as loss of the statutory presumption does not automatically result in UIM coverage being rolled on to a policy by operation of law.

Moreover, in the interest of judicial economy, State Farm requests that the Court direct the circuit court to apply the statutory presumption on remand. Contrary to the circuit court's holding, the UIM selection/rejection form signed by Ms. Thomas complied with West Virginia law in all respects. The form contained all of the information required by the Insurance Commissioner and section 33-6-31d, and nothing in the statute or the Commissioner's guidelines prevents an insurer from providing additional, non-mandatory information. State Farm is therefore entitled to the presumption under section 33-6-31d that its offer was effective and Ms. Thomas's rejection thereof was knowing and intelligent.

II. Statement of Facts

A. Underinsured Motorist Coverage and the Forms Used to Offer It in West Virginia

West Virginia Code section 33-6-31 requires insurance companies to offer UIM coverage to each policyholder. In *Bias v. Nationwide Mutual Insurance Co.*, the Supreme Court of Appeals held that, for an offer to be effective under section 33-6-31, the offer must be "made in a commercially reasonable manner, *so as to provide the insured with adequate information to make an intelligent decision.*" See 179 W. Va. 125, 127, 365 S.E.2d 789, 791 (1987) (emphasis added). To be "commercially reasonable," an offer must state "the nature of the coverage offered, the coverage limits, and the costs involved." *Id.* Under the holding in *Bias*, an insurer bears the burden of proving not only that its offer was commercially reasonable, but also that the insured's rejection of that offer was "knowing and intelligent." *Id.* If an insurer fails to carry its burden, the insured's policy is reformed to include UIM coverage by operation of law. *Id.*

In response to the insurance industry's concerns regarding the burden of proof under *Bias*, the West Virginia legislature enacted West Virginia Code section 33-6-31d in 1993. Section 33-6-31d requires insurers to offer UIM coverage on forms promulgated by the Insurance Commissioner. *See W. Va. Code § 33-6-31d(a)*. Section 33-6-31d also provides that:

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

Id. § 33-6-31d(b) (emphasis added). The statute does not define what constitutes an “effective” offer. Nor does the statute address how an insured can rebut the presumption that he or she received such an offer.

Shortly after section 33-6-31d was enacted, the West Virginia Insurance Commissioner issued Informational Letter No. 88, which included two sample offer forms, an “Important Notice” to be provided with each form, and instructions on how to complete the forms. (App. 346-56.) Around that time, a major insurance carrier asked the Commissioner’s office if it was acceptable to include additional information on its forms. (App. 359.) The Commissioner discussed the issue with his general counsel and, as a result of the discussion, “it was believed to be acceptable that [the insurer] add additional information; as long as the information that was on the forms was all complete.” (*Id.*)

In July 2000, the Commissioner issued Informational Letter No. 121, which superseded Informational Letter No. 88 and modified the sample forms. (App. 361-69.) Under the heading “PREPARATION OF FORMS BY INSURERS: COMPLIANCE REQUIREMENTS,” Informational Letter No. 121 states as follows:

Statutory compliance in the reproduction of the forms contained herein necessary to create a presumption of an effective offer of optional coverages and a knowing

and intelligent election or rejection is achieved *so long as the reproduced forms provide ALL the information set forth within the Insurance Commissioner promulgated forms.* It is not necessary that the reproduced forms be exact replicas of the Commissioner forms in size and shape.

(App. 363 (italics added, underline in original).)

This lawsuit challenges State Farm's use of UIM offer forms containing information in addition to that required by section 33-6-31d and the Commissioner. Beginning in 1993, State Farm offered UIM coverage on a reproduction of the Commissioner's form that contained no additional information. In late 1995, State Farm began planning to offer a multi-car discount for UIM coverage. (See App. 371-74.) In anticipation of this change, State Farm submitted copies of a revised UIM selection/rejection form to the Insurance Commissioner by letter dated August 16, 1995. (*Id.*) The revised form listed two columns of premiums – one column for premiums including a multi-car discount, and one column for premiums without a multi-car discount. (See, e.g., App. 376.) The form also contained a box that, if checked, indicated which column of rates applied to the policy at issue. State Farm used this two-column form from 1996 through 2003.

From 2003 until mid-2010, State Farm began to calculate UIM rates based on an additional factor: whether the policy at issue included collision coverage. As a result, the applicable UIM rate for a given policy depended both upon whether the policy included a multi-car discount and upon whether the insured purchased collision coverage. To help agents better explain the true cost of the various levels of UIM coverage, State Farm developed a four-column form that differentiated between what premiums would apply if the policy included or did not include collision coverage. (App. 378-80, 383-84.)¹ Like the two-column form before it, the

¹ The difference between UIM rates with and without collision coverage was minimal. On Ms. Thomas's policy, for example, the difference amounted to only \$1 per six months for most levels of coverage. (See App. 175.) For some policies, including one of the policies at

four-column form contained a check-box indicating whether the rates included a multi-car discount.

B. The Role of the Insurance Agent in Offering UIM Coverage

Dr. William Wilkie is a professor of marketing at Notre Dame and an expert in the field of consumer behavior. (App. 387.) In his expert report in the *Martin* case, he testified that a printed offer form plays only a limited role in informing consumers about UIM coverage, its purpose, and its cost. (App. 388-95.) This is because a consumer's purchasing decision is influenced by external stimuli such as economic circumstances, family members, and insurance agents. (App. 392-93.) A consumer's state of mind therefore cannot be assessed "by examining only [the UIM offer form] and ignoring the context for [his or her] actual mental processes." (App. 390.)

The insurance agent, in particular, can be a helpful resource to an applicant being presented with an offer of UIM coverage. (App. 393-95.) An in-person offer permits two-way communication between the agent and the customer, which in turn permits the agent to respond to the customer's individualized need for information. (App. 394-95.) Consequently, a conversation with an agent may permit a customer to "tailor[] a purchase to a particular situation" and "gain[] understanding of points that may not be clear initially." (*Id.*)

C. Practices Employed by State Farm Agents When Offering UIM Coverage

Each State Farm agent has his or her own practice for offering UIM coverage. Several examples are instructive:

issue in *Martin*, the quoted rates for UIM coverage were identical for the first four levels of coverage. (See App. 380.)

- Agent Dan McPherson not only explains UIM coverage to each policyholder (including its purpose and the premium cost for various levels of coverage), but also recommends that policyholders purchase UIM coverage with limits of \$100,000 per person and \$300,000 per accident. (App. 253-54, McPherson Aff. ¶ 8.)
- Former agent Chuck Romine generally discussed UIM coverage with policyholders “near the end of the automobile application process.” (App. 411-12, Romine Aff. ¶ 8.) Mr. Romine’s standard practice was to explain UIM coverage, including “available limits and premium costs,” explain the Important Notice attached to State Farm’s offer forms, and provide the Important Notice to the customer. (App. 412, ¶¶ 9-10.)
- Agent Jeff Smith’s standard practice is to “give examples to show why UIM coverage is valuable, rather than focus on State Farm’s UIM coverage selection form.” (App. 399, Smith Aff. ¶ 5.) Smith explains to his customers that UIM coverage is optional, but recommends that they purchase the coverage. (*Id.*) It is also his practice to discuss the premiums for different levels of coverage and to provide the Important Notice to the customer. (App. 400, ¶¶ 6, 8.) Smith usually reviews UIM coverage with the customer before he and the customer review the offer form together. (*Id.* ¶ 6.) On the rare occasions when Smith mails a UIM offer form, he always speaks with the policyholder on the telephone, *prior* to mailing the form and Important Notice, to “explain UIM coverage and the UIM form” to the policyholder. (*Id.* ¶ 9.)
- Agent Charles Noffsinger typically offers UIM coverage in person. (App. 405, Noffsinger Aff. ¶ 4.) Like McPherson, Noffsinger both explains UIM coverage and recommends that customers purchase the coverage with limits of \$100,000 per person and \$300,000 per accident. (*Id.* ¶ 5.) Because UIM coverage “is normally one of the

last coverages” he discusses, when the discussion occurs the customer “has already been told if he or she has a multi-car discount and/or collision coverage.” (*Id.* ¶ 6.) Noffsinger does not read the Important Notice to the customer word-for-word; rather, his practice is to review the Important Notice with the customer and to “use the UIM form to explain UIM coverage and to point out what premium the individual would pay at each level of coverage.” (App. 405-06, ¶ 7.) At the end of every discussion, Noffsinger solicits questions from the customer about UIM coverage and the UIM form and answers any questions the customer might have. (*Id.* ¶ 9.)

- Agent Tyrone Sommerville sold the State Farm policy at issue in the present case. His standard practice is to explain UIM coverage to policyholders, including the purpose of the coverage and the premium costs for various levels of coverage. (App. 419-20, Sommerville Aff. ¶ 12.) It is also his practice to recommend that policyholders purchase UIM coverage as a way to protect themselves and their families. (*Id.*)

D. Petitioner Angela Thomas’s Father, and Then Ms. Thomas Herself, Purchase UM Coverage but Reject UIM Coverage

On May 2, 1994, Kenneth Baker – Petitioner Angela Thomas’s father – purchased State Farm policy number 249 5571-E02-48 (“the Policy”). (App. 417-18, Sommerville Aff. ¶¶ 4-5.) Mr. Baker selected uninsured motorist (“UM”) coverage with limits of 100/300/10 – that is, \$100,000 per person and \$300,000 per occurrence for bodily injury and \$10,000 for property damage. (*Id.* ¶ 5.) Though Mr. Baker was offered UIM coverage as well, he rejected such coverage in its entirety. (*Id.*)

In September 1999, State Farm agent Tyrone Sommerville was informed that Mr. Baker wished to transfer the Policy to his daughter, then-named Angela Baker. (App. 418, Sommerville Aff. ¶ 7.) Sommerville’s office offered Ms. Baker UM and UIM coverage on

September 18, 1999. (*Id.* ¶ 8.) As part of the offer, Sommerville’s office explained UIM coverage to Ms. Baker and informed her of the available limits and the specific costs involved. (App. 428-29, Higgs Aff. ¶ 4.) Ms. Baker selected UM coverage with limits of 100/300/10, but declined to purchase UIM coverage because she wanted “the same coverages as her father.” (*Id.*)

Upon marrying Petitioner Daniel Thomas in 2007, Ms. Baker informed Sommerville that she had changed her last name to Thomas. (App. 418-19, Sommerville Aff. ¶ 9.) Somerville’s office once again offered her UM and UIM coverage. (*Id.* ¶¶ 9-10.) The offer was made using State Farm’s four-column selection/rejection form. (App. 175.) Peggy Higgs, a licensed agent employed by Somerville, testifies as follows:

- Ms. Higgs met with Ms. Thomas in person on May 4, 2007.
- Prior to discussing UIM coverage, Ms. Higgs explained the various coverages on Ms. Thomas’s policy, including liability coverage, medical payments coverage, and collision coverage.
- Ms. Higgs explained the Important Notice page of the UIM form, removed the Important Notice, and provided the Important Notice to Ms. Thomas.
- Ms. Higgs explained the purpose of UIM coverage and recommended that Ms. Thomas purchase such coverage with limits of 100/300/50. When Ms. Thomas declined to purchase such coverage, Ms. Higgs then recommended that Ms. Thomas purchase UIM coverage with limits at least equal to her UM coverage of 100/300/10.

(App. 429-30, Higgs Aff. ¶¶ 5-7.) Despite Ms. Higgs’ recommendation that Ms. Thomas purchase UIM coverage, Ms. Thomas once again declined to do so. (App. 175.)

E. After Being Injured by an Allegedly Underinsured Motorist, Petitioners Seek UIM Coverage from State Farm

On August 16, 2009, Petitioners were injured in an automobile accident with William Ray McDermitt. (App. 1-2, Compl. ¶ 6.) In response to an inquiry from Ms. Thomas's counsel, State Farm advised Petitioners that UIM benefits were unavailable under the terms of the Policy. (App. 440.)

III. Procedural History

Petitioners filed this lawsuit in August 2011 against McDermitt and State Farm, alleging: (1) that Petitioners were injured as a result of McDermitt's negligence; (2) that McDermitt was an underinsured motorist; (3) that the Policy must be reformed to include UIM coverage; and (4) that State Farm's refusal to provide UIM benefits constituted a breach of Ms. Thomas's insurance contract. On April 24, 2012, the circuit court granted Petitioners' motion for partial summary judgment, concluding that State Farm's UIM selection/rejection form did not comply with the Insurance Commissioner's guidelines. (App. 517-41.) The circuit court certified the following question pursuant to West Virginia Code section 58-5-2:

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

(App. 542.) Adopting Petitioners' interpretation of section 33-6-31d, the circuit court answered the certified question as follows: "an insurance company's failure to use the West Virginia Insurance Commissioner's prescribed forms pursuant to *W. Va. Code § 33-6-31d* results in underinsured motorists coverage being added to the policy as a matter of law." (*Id.*)

SUMMARY OF ARGUMENT

The circuit court's answer to the certified question is incorrect. Regardless of whether State Farm's selection/rejection form complied with the Insurance Commissioner's guidelines (which it did), use of a noncomplying form does not render an offer of UIM coverage ineffective as a matter of law. As Judge Chambers held in *Martin*, an insurer that offers UIM coverage on a noncomplying form is deprived of the statutory presumption that its offer was effective and the insured's rejection was knowing and intelligent. The insurer is then obligated to demonstrate the reasonableness of its offer under the standard set forth in *Bias*. Unlike the circuit court's answer to the certified question, the holding in *Martin* follows from the text of section 33-6-31d, the historical context of the statute, this Court's prior decisions, analogous case law in other states, and sound public policy.

Moreover, although the sufficiency of State Farm's selection/rejection forms is not germane to the certified question, judicial economy will be served if the Court overturns the circuit court's erroneous conclusion that State Farm is not entitled to the statutory presumption. The form signed by Ms. Thomas contains all the information required by West Virginia Code section 33-6-31d, the Insurance Commissioner, and this Court in *Bias*. Nothing in the statute or the Commissioner's guidelines prohibits an insurer from providing *additional* information to its insureds, and recent lower court decisions holding otherwise represent a marked departure from prior case law. Therefore, to avoid a needless trial on remand, State Farm requests that the Court also overturn the circuit court's erroneous conclusion that the selection/rejection form signed by Ms. Thomas did not comply with the requirements of section 33-6-31d.

STATEMENT REGARDING ORAL ARGUMENT AND DECISION

State Farm agrees with Petitioners that oral argument is necessary pursuant to the criteria set forth in Rule 18(a) of the Rules of Appellate Procedure and appropriate pursuant to Rule 20(a) of the Rules of Appellate Procedure.

ARGUMENT

I. If an Insurer's UIM Form Varies Impermissibly from the Commissioner's Guidelines, the Insurer Loses the Statutory Presumption but Its Offer of UIM Coverage Is Not Ineffective *Per Se*

The certified question asks whether use of a noncomplying selection/rejection form renders an offer of UIM coverage ineffective as a matter of law, regardless of whether the insured made a knowing and informed rejection of such coverage. As the United States district court held in *Martin*, the answer to that question is “no”: even if an insurer's forms do not comply with the technical requirements of Informational Letter No. 121, the standard articulated by this Court in *Bias* governs whether the insured received a commercially reasonable offer of UIM coverage and knowingly rejected that offer. *See Martin*, 809 F. Supp. 2d at 504-07.

A. Use of a Noncomplying Form Does Not Render an Offer of UIM Coverage “Commercially Unreasonable” as a Matter of Law

Adopting Petitioners' interpretation of section 33-6-31d, the circuit court held that failure to use the Insurance Commissioner's exemplar selection/rejection form renders an offer of UIM coverage ineffective as a matter of law. The circuit court's holding is inconsistent with the language of section 33-6-31d, the historical context of the statute, this Court's prior decisions, and the Supreme Court of South Carolina's interpretation of similar legislation. The circuit court's holding also runs counter to West Virginia public policy, which favors informed consumer decisionmaking in insurance transactions.

1. *The Circuit Court's Holding Is Unsupported by the Statutory Text*

The circuit court's holding does not follow from the plain language of section 33-6-31d for at least two reasons: first, the circuit court imposed a penalty that is not included in the express terms of the statute; and second, the circuit court failed to account for the phrase "effective offer," a term of art borrowed from prior judicial decisions.

Under the circuit court's interpretation of the statute, if an insurer offers UIM coverage on a noncomplying form, UIM coverage must be included in the policy and "rolled up" to the policy's liability limits. Section 33-6-31d, however, does not provide for such a result. Instead, section 33-6-31d provides that use of a complying form entitles an insurer to a presumption. Although it is implicit that failure to use a complying form deprives an insurer of the presumption, nothing in the statutory language suggests that failure to use a complying form also renders an offer of UIM coverage ineffective *per se*. The circuit court thus imposed a penalty for noncompliance that the legislature itself did not see fit to enact. Such amendment by judicial fiat is improper under West Virginia law. *See Phillips v. Larry's Drive-In Pharm., Inc.*, 220 W. Va. 484, 491, 647 S.E.2d 920, 927 (2007) ("It is not for this Court arbitrarily to read into [a statute] that which it does not say." (quotation omitted, alteration in original)); *State ex rel. Frazier v. Meadows*, 193 W. Va. 20, 24, 454 S.E.2d 65, 69 (1994) ("Courts are not free to read into the language what is not there, but rather should apply the statute as written.").

The circuit court's interpretation of section 33-6-31d also fails to account for the legislature's use of "effective offer" as an undefined term. *See* W. Va. Code § 33-6-31d(b) (providing that signed offer form "shall create a presumption that such applicant and all named insureds received an effective offer of the optional coverages"). According to the circuit court, section 33-6-31d "superseded" the commercial reasonableness standard set forth in *Bias*. (App.

530.) That conclusion is without merit for the reasons discussed below, *see* Section I.B, *infra*, but fails in the first instance because the statute does not define what constitutes an “effective offer.” Where a statute employs a term of art without definition, it is presumed the legislature intended to incorporate pre-existing judicial interpretations of that term. *CB&T Operations Co., Inc. v. Tax Comm’r*, 211 W. Va. 198, 204, 564 S.E.2d 408, 414 (2002). At the time section 33-6-31d was enacted, this Court had defined “effective” to mean “commercially reasonable.” *See Bias*, 179 W. Va. at 127, 365 S.E.2d at 791. Thus, the legislature’s use of “effective offer” as an undefined term defeats any inference that section 33-6-31d was intended to supersede the *Bias* standard of commercial reasonableness.

2. *The Circuit Court’s Interpretation Does Not Follow from the Statute’s Historical Context*

The circuit court’s interpretation of section 33-6-31d is not only without basis in the statutory language, it also fails to account for the statute’s historical context. As Petitioners recognize, section 33-6-31d was enacted in response to this Court’s 1987 decision in *Bias*. (Petitioners’ Brief at 6.) In *Bias*, the Court held that West Virginia Code section 33-6-31 requires insurers to make a “commercially reasonable” offer of UIM coverage – that is, an offer that “provide[s] the insured with adequate information to make an intelligent decision.” 179 W. Va. at 127, 365 S.E.2d at 791. The Court further held that an insurer bears the burden of proving that its offer was reasonable and that the insured’s selection or rejection of UIM coverage was “knowing and intelligent.” *Id.*

Viewed against the backdrop of *Bias*, the legislature’s decision to create a statutory presumption makes perfect sense. *Bias*, at its core, was about providing consumers with enough information to make an informed decision, not about requiring insurers to provide coverage their policyholders do not want. *See Webb v. Shaffer*, 694 F. Supp. 2d 497, 504 (S.D.W. Va. 2010)

(“The goal of § 33-6-31, as interpreted in *Bias*, is not to provide underinsured motorist coverage to all West Virginia drivers, but rather to provide all West Virginia drivers the opportunity to purchase such insurance, if they so desire.”). The result of *Bias*, however, was that insurers faced the difficult task of proving that specific offers of UIM coverage were reasonable and that specific rejections of such coverage were knowing and intelligent. Creating a statutory presumption based on a standardized offer form solved that problem.

The West Virginia legislature was plainly aware of the *Bias* decision and its impact on the insurance industry. See *Kessel v. Monongalia County Gen. Hosp. Co.*, 220 W. Va. 602, 648 S.E.2d 366, Syl. pt. 5 (2007) (“When the Legislature enacts laws, it is presumed to be aware of all pertinent judgments rendered by the judicial branch.” (quotation omitted)). Had the legislature intended to replace *Bias*’s emphasis on substance with rigid, technical requirements, the legislature easily could have specified that use of a different form (even one that contains all of the requisite information) renders an offer of UIM coverage unreasonable *per se*. Instead, the legislature (1) ordered the Insurance Commissioner to prepare a form containing certain mandatory information, and (2) created a presumption that use of the Commissioner’s form results in an effective offer of coverage. The legislature thus created a functional solution to the evidentiary problems created by *Bias*, not a formalistic rule that penalizes insurers for providing additional information.

3. *The Circuit Court’s Holding Cannot Be Reconciled with This Court’s Prior Decisions*

In addition to lacking support in the text and historical context of section 33-6-31d, the circuit court’s holding is inconsistent with this Court’s decisions in *Jewell v. Ford* (“*Jewell I*”), 211 W. Va. 592, 567 S.E.2d 602 (2002), and *Jewell v. Ford* (“*Jewell II*”), 214 W. Va. 511, 590 S.E.2d 704 (2003). In *Jewell I*, an insurer offered uninsured motorist (“UM”) coverage to its

policyholder on the form prescribed by Informational Letter No. 88, but did not include the policyholder's present coverage under the "optional limits" section. 211 W. Va. at 596, 567 S.E.2d at 606. The Supreme Court of Appeals rejected the policyholder's argument that the trial court should have granted her motion for summary judgment, concluding that "a genuine issue of material fact exists as to whether an effective offer of optional [UM] coverage was made." *Id.* By declining to direct judgment in the policyholder's favor, the Court implicitly (but necessarily) held that technical noncompliance with the Commissioner's form does not render an offer of UM or UIM coverage ineffective as a matter of law. *See also Webb*, 694 F. Supp. 2d at 503, 505 (holding that State Farm's offer of UIM coverage was reasonable despite fact issue regarding whether certain information was included on form).

In a subsequent appeal in the same case, the Court reaffirmed that technical noncompliance with the Commissioner's guidelines does not render an offer of UM or UIM coverage ineffective *per se*. In *Jewell II*, the Court began its analysis by stating: "The only issue presented in this appeal is whether the circuit court erred by finding that the amount of UM coverage to which Jewell is entitled, **should she prevail at trial on the *Bias* issues**, is an amount equivalent to the liability limits contained in her policy." *Jewell II*, 214 W. Va. at 514, 590 S.E.2d at 707 (emphasis added). The Court's reference to *Bias* confirms that, as a result of the insurer's failure to comply with the Commissioner's directives, the insurer was obligated to prove the reasonableness of its offer under the *Bias* framework. Under the circuit court's interpretation of section 33-6-31d, by contrast, the offer in *Jewell I* and *Jewell II* would be ineffective as a matter of law.

4. *The Circuit Court's Holding Is Inconsistent with South Carolina Decisions Interpreting a Similar Statute*

Interpreting a statute similar to section 33-6-31d, the Supreme Court of South Carolina has rejected the argument that use of a noncomplying form renders an offer of UIM coverage ineffective *per se*. Given the close parallels between South Carolina and West Virginia law in this area, decisions interpreting the South Carolina statute are instructive and further undermine the circuit court's holding in the present case.

This Court in *Bias* explicitly followed the decision in *State Farm Mutual Automobile Insurance Co. v. Wannamaker*, in which the Supreme Court of South Carolina held that UIM coverage is "implied in law" unless the insurer made a commercially reasonable offer of such coverage and the insured intelligently rejected that offer. *See* 354 S.E.2d 555, 556-57 (S.C. 1987); *Bias*, 179 W. Va. at 127, 365 S.E.2d at 791. Shortly after an appellate court interpreted *Wannamaker* as placing the burden of proof on insurers, *see Knight v. State Farm Mut. Auto. Ins. Co.*, 374 S.E.2d 520, 522 (S.C. Ct. App. 1988), the South Carolina legislature enacted a statute that created a presumption of an effective offer and an effective rejection if an insurer used a form approved by the South Carolina Department of Insurance. S.C. Code Ann. § 38-77-350.²

² Section 38-77-350 provides, in its entirety:

(A) The director or his designee shall approve a form that automobile insurers shall use in offering optional coverages required to be offered pursuant to law to applicants for automobile insurance policies. This form must be used by insurers for all new applicants. The form, at a minimum, must provide for each optional coverage required to be offered:

- (1) a brief and concise explanation of the coverage;
- (2) a list of available limits and the range of premiums for the limits;
- (3) a space to mark whether the insured chooses to accept or reject the coverage and a space to state the limits of coverage the insured desires;

The Supreme Court of South Carolina has rejected the notion that failure to comply with the statute automatically results in the inclusion of UIM coverage as a matter of law. *See Ray v. Austin*, 698 S.E.2d 208, 212 (S.C. 2010); *Floyd v. Nationwide Mut. Auto. Ins. Co.*, 626 S.E.2d 6, 12 (S.C. 2005). Instead, failure to use a compliant form merely deprives an insurer of the presumption, with the result that the insurer must satisfy its burden under *Wannamaker*. *See Ray*, 698 S.E.2d at 212.

The circuit court held that South Carolina authority is inapposite because South Carolina is an “approved form” state as opposed to a “promulgated form” state like West Virginia. (*See App. 537.*) But whether an insurer is required to obtain approval of its own form (as in South Carolina) or use a promulgated form (as in West Virginia) relates to *how* an insurer complies

(4) a space for the insured to sign the form that acknowledges that the insured has been offered the optional coverages;

(5) the mailing address and telephone number of the insurance department that the applicant may contact if the applicant has questions that the insurance agent is unable to answer.

(B) If this form is signed by the named insured, after it has been completed by an insurance producer or a representative of the insurer, it is conclusively presumed that there was an informed, knowing selection of coverage and neither the insurance company nor an insurance agent is liable to the named insured or another insured under the policy for the insured’s failure to purchase optional coverage or higher limits.

(C) An automobile insurer is not required to make a new offer of coverage on any automobile insurance policy which renews, extends, changes, supersedes, or replaces an existing policy.

(D) Compliance with this section satisfies the insurer and agent’s duty to explain and offer optional coverages and higher limits and no person, including, but not limited to, an insurer and insurance agent is liable in an action for damages on account of the selection or rejection made by the named insured.

(E) If the insured fails or refuses to return an executed offer form within thirty days to the insurer, the insurer shall add on uninsured motorist and underinsured motorist coverages with the same policy limits as the insured’s liability limits.

with the statute. The certified question in this case relates to a different issue altogether: the *consequence* of using a noncomplying form. That was precisely the issue in *Ray v. Austin*, in which the Supreme Court of South Carolina affirmed summary judgment in the insurer's favor even though the insurer's UIM offer form "failed to comply" with the South Carolina statute. *Ray*, 698 S.E.2d at 212. Because failure to use a compliant form merely deprived the insurer of the statutory presumption, the insurer was still permitted to demonstrate – and did in fact demonstrate – that an effective offer of coverage was made under *Wannamaker*. *Id.* at 212-13. Nothing about the supposed distinction between an "approved form" and a "promulgated form" suggests a different result is warranted in West Virginia.

5. *The Circuit Court's Holding Is Inconsistent with West Virginia's Public Policy Favoring Informed Consumer Decisions in Insurance Transactions*

The circuit court's answer to the certified question should also be rejected as inconsistent with public policy. This Court has repeatedly concluded that West Virginia's insurance statutes were intended to promote consumer choice, *not* to mandate the provision of unwanted coverage. The circuit court's interpretation of section 33-6-31d, by contrast, would result in the provision of UIM coverage even where the insured knowingly rejected the coverage. Such an interpretation of section 33-6-31d represents a marked departure from the public policy recognized in this Court's prior decisions.

The Court first interpreted West Virginia's insurance statutes as promoting informed consumer choice in *Bias*. The statute at issue in *Bias*, section 33-6-31, required only that insurers "provide an option to the insured" to purchase UIM coverage. W. Va. Code § 33-6-31(b). The statute was silent about how the offer must be made or what information should be provided. *See id.* Nevertheless, the Court in *Bias* interpreted section 33-6-31 as requiring insurers to make a "commercially reasonable" offer – that is, an offer providing the insured "with

adequate information to make an intelligent decision.” 179 W. Va. at 127, 365 S.E.2d at 791. The Court also required insurers to prove not only that they provided the information necessary for an informed decision, but also that the insured’s selection or rejection of UIM coverage was “knowing and intelligent.” *Id.* In reaching these holdings, the Court followed a line of authority from other jurisdictions requiring insurers to provide insureds with sufficient information to make a meaningful purchasing decision. *See id.* (citing various decisions from other states, including *Wannamaker*).

In the quarter-century since *Bias* was decided, the Court has repeatedly cited the public policy of consumer choice when interpreting sections 33-6-31 and 33-6-31d. In *Riffle v. State Farm Mutual Automobile Insurance Co.*, for example, the Court noted that the purpose of section 33-6-31 “is to provide all insurance buyers with an *opportunity* to purchase a minimum amount of underinsured motorist coverage.” 186 W. Va. 54, 56, 410 S.E.2d 413, 415 (1991) (emphasis added). The Court therefore rejected an interpretation of the statute that would have disincentivized insurers from offering additional, non-mandatory levels of UIM coverage, concluding that such an interpretation was supported by “[n]either statutory construction nor the dictate of wise public policy.” 186 W. Va. at 55, 410 S.E.2d at 414.

Later, in *Burrows v. Nationwide Mutual Insurance Co.*, 215 W. Va. 668, 600 S.E.2d 565 (2004), the Court recognized that section 33-6-31d was similarly intended to advance the public policy of consumer choice. In *Burrows*, the plaintiff claimed that the removal of her mother as a named insured from an existing policy triggered the insurer’s obligation to offer UIM coverage under section 33-6-31d(e). 215 W. Va. at 674-75, 600 S.E.2d at 571-72. In support of this claim, the plaintiff argued that the public policy of “full compensation” supported an expansive interpretation of the statute. 215 W. Va. at 674, 600 S.E.2d at 571. This Court disagreed,

concluding that removal of a named insured did not fall within the triggering events under section 33-6-31d. 215 W. Va. at 675, 600 S.E.2d at 572. In so doing, the Court noted that West Virginia’s insurance statutes mandate only “the *offering* of [UIM] coverage” – that is, “the *opportunity* to purchase such coverage” – and rejected the plaintiff’s claim that a public policy of “full compensation” warranted a different result. 215 W. Va. at 676, 600 S.E.2d at 573 (emphasis in original).

This Court has repeatedly held that sections 33-6-31 and 33-6-31d were intended to provide consumers with a meaningful opportunity to purchase UIM coverage. In the present case, Ms. Thomas was provided such an opportunity on two separate occasions, and both times she knowingly rejected UIM coverage. By awarding Petitioners such coverage, therefore, the circuit court departed from this Court’s prior authority and imposed liability regardless of whether the insured made an informed purchasing decision. The circuit court’s answer to the certified question should be rejected as inconsistent with the public policy underlying West Virginia’s insurance statutes.

B. Petitioners’ Arguments in Support of the Circuit Court’s Holding Are Without Merit

Petitioners raise two core arguments in support of the circuit court’s answer to the certified question. First, Petitioners contend the circuit court’s answer is supported by the decisions in *Westfield Insurance Co. v. Bell*, 203 W. Va. 305, 507 S.E.2d 406 (1998) (per curiam), and *Ammons v. Transportation Insurance Co.*, 219 F. Supp. 2d 885 (S.D. Ohio 2002). Second, citing *Ammons* and *dicta* in several decisions of this Court, Petitioners contend that *Bias* was “superseded” by section 33-6-31d. Both arguments are without merit.

1. *To the Extent Bell and Ammons Support Petitioners' Theory, Neither Decision Is Binding or Persuasive*

As the plaintiffs did in *Martin*, Petitioners rely heavily upon the *per curiam* opinion in *Bell*. (See Petitioners' Brief at 8, 18, 28.) The *Bell* decision, however, does not explicitly address the issue raised in the certified question: whether use of a noncomplying form renders an offer ineffective *per se*, or merely deprives an insurer of the statutory presumption. In *Bell*, the insured challenged an offer of UIM coverage made after section 33-6-31d became effective but before Informational Letter No. 88 was issued in July 1993. Answering a certified question from a federal district judge, the Court held that such an offer "is acceptable if within the mandate of *Bias*." 203 W. Va. at 309, 507 S.E.2d at 410. The Court was not presented with, and therefore did not address, whether an offer made on a noncomplying form after July 1993 was ineffective as a matter of law.

Petitioners seize upon one ambiguous statement in *Bell* as support for their contention that failure to use a compliant form renders an offer ineffective *per se*. (See Petitioners' Brief at 28.) Before addressing the standard governing offers of UIM coverage before July 1993, the Court noted 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." *Bell*, 203 W. Va. at 309, 507 S.E.2d at 410. It is unclear precisely what the Court meant by that statement, as the Court did not discuss the consequences of failing to comply with the Commissioner's guidelines. But even if that statement is interpreted as supporting Petitioners' contention, the statement was unnecessary to the issue before the Court and therefore was *dictum*. The statement was also conclusory and unsupported by analysis of the statute's text or historical context. Because the *dictum* in *Bell* is not persuasively reasoned and is inconsistent

with the Court's subsequent decisions in *Jewell I* and *Jewell II*, the *dictum* should be afforded no weight in the present case.

Petitioners also rely heavily upon the Southern District of Ohio's decision in *Ammons*. (See Petitioners' Brief at 8, 19-20, 28.) Citing the aforementioned *dictum* in *Bell*, the court in *Ammons* simply assumed – without analysis – that use of a noncomplying form results in coverage being “rolled on” by operation of law regardless of whether the offer itself was reasonable. See 219 F. Supp. 2d. at 893. Like the *dictum* in *Bell*, *Ammons* does not meaningfully address the statutory text or historical context and cannot be reconciled with the Court's decisions in *Jewell I* and *Jewell II*. *Ammons* is therefore unpersuasive and should not be followed by this Court.

If anything, the facts of *Ammons* illustrate why that case was wrongly decided and why Petitioners' interpretation of section 33-6-31d is incorrect. *Ammons* involved an offer of UM coverage to a business owning a fleet of commercial vehicles. The insured was a sophisticated entity, and the record contained evidence that the insured's management and the insurer's agent engaged in numerous discussions about appropriate insurance coverage for the fleet. See 219 F. Supp. 2d at 891-92. Based on those discussions, the insured declined to purchase optional UM coverage for its entire fleet. *Id.* There was no dispute that the insured received a reasonable offer and exercised a knowing waiver, yet the court still ruled for the plaintiff (a third party) because the insurer did not engage in the formality of listing the massive range of potential premiums for the hundreds of vehicles covered by the policy. See *id.* at 892-93. The result in *Ammons* defies common sense, ignores the reality of how commercial insurance contracts are negotiated, and surely cannot be what the legislature intended when enacting section 33-6-31d. By way of contrast, the South Carolina decision in *Ray*, which ruled for the insurer on similar

facts, is the better-reasoned opinion and should inform this Court’s analysis in the present case. *See* 698 S.E.2d at 213 (affirming summary judgment in insurer’s favor where insured “made a business decision to refuse UIM coverage,” even though offer did not identify specific limits of such coverage).

2. *Section 33-6-31d Did Not Render Bias Irrelevant to the Determination of Whether an Offer Was Commercially Reasonable*

Seizing on *dicta* in *Ammons* and several Supreme Court of Appeals decisions, Petitioners argue that *Bias* was “superseded” by section 33-6-31d. (*See* Petitioners’ Brief at 28-29.) But the decisions cited by Petitioners do not address whether the legislature, in enacting section 33-6-31d, intended to displace *Bias*’ substantive requirements of a commercially reasonable offer and a knowing and intelligent waiver. Because section 33-6-31d only has meaning when read against the backdrop of the *Bias* decision, the answer to that question is “no.”

Under the plain terms of section 33-6-31d, an insurer that uses the Commissioner’s exemplar form is entitled only to a *presumption* that the insured received an “effective offer” of UIM coverage and “exercised a knowing and intelligent election or rejection, as the case may be, of such offer.” W. Va. Code § 33-6-31d(b). The statute does not define what constitutes an “effective” offer. Nor does the statute define how an insured may rebut the presumption afforded by a compliant form. As Judge Chambers held in *Martin*, the answers to both questions lie with *Bias*:

A presumption is “[a] legal inference or assumption that a fact exists, based on the known or proven existence of some other fact or group of facts.” *Black’s Law Dictionary* (9th ed. 2009). The creation of the presumption is only given meaning when examined within the context of *Bias*. There, the West Virginia Supreme Court of Appeals concluded that the insurer bears the evidentiary burden of proving that an effective offer of the optional insurance was made. *Bias*, 365 S.E.2d 789 at Syl. Pt. 1. Without the imposition of the evidentiary burden in *Bias*, the need for the statutory presumption created by § 33-6-31d would be nonexistent.

809 F. Supp. 2d at 505.

The analysis in *Martin* is undoubtedly correct. Section 33-6-31d incorporates the common law phrase “effective offer,” which was defined in *Bias* to mean an offer that is “commercially reasonable.” See *Bias*, 179 W. Va. at 127, 365 S.E.2d at 791. Thus, even if an insurer complies with the statute, the insurer gains nothing more than a presumption that it made a commercially reasonable offer of UIM coverage. The burden then shifts to the insured to prove that the offer was unreasonable or that the insured did not make a knowing and intelligent rejection thereof. Petitioners have no answer for this sensible interpretation of the statute.

The holding in *Martin* is further supported by the fact that section 33-6-31d does not “clearly express an intent to displace the governing common law.” *Martin*, 809 F. Supp. 2d at 505. The West Virginia legislature does not mince words when overturning a decision by the judiciary. For example, when amending West Virginia Code section 33-6-30, the legislature stated: “the amendments in this section . . . are . . . specifically intended to clarify the law and correct a misinterpretation and misapplication of the law that was expressed in the holding of the Supreme Court of Appeals of West Virginia in the case of *Mitchell v. Broadnax*, 537 S.E.2d 882 (W. Va. 2000).” Section 33-6-31d, by contrast, does not even mention *Bias*, much less state an intention to overturn the decision.

Finally, lest there be any doubt that *Bias*’s commercial reasonableness standard remained intact following the enactment of section 33-6-31d, the Court need look no further than its prior decisions in *Jewell I* and *Jewell II*. As discussed above, *Jewell I* held that technical noncompliance with the Commissioner’s guidelines does not render an offer ineffective *per se*. See 211 W. Va. at 596, 567 S.E.2d at 606. *Jewell II* further clarified that the effectiveness of the offer was to be governed by the standards set forth in *Bias*. See 214 W. Va. at 514, 590 S.E.2d at

707. Petitioners will likely attempt to distinguish *Jewell* on the ground that *Jewell* involved an improperly completed form, whereas the present case involves a form that allegedly contained more information than permitted by Informational Letter No. 121. But that is a distinction without a difference – in *Jewell*, the insurer failed to comply with the Commissioner’s guidelines, which is precisely what Petitioners allege here. The Court should therefore follow its earlier precedent and reject Petitioners’ interpretation of the statute.

In the face of *Jewell I*, *Jewell II*, and *Martin*, Petitioners rely heavily upon the Southern District of Ohio’s decision in *Ammons*. As noted in *Martin*, however, *Ammons* does not hold that section 33-6-31d displaced *Bias* in all respects. Rather, *Ammons* “limited the superseding effect of the statute to ‘the portion of *Bias* that sets forth the information that must be contained in an offer of optional coverage for it to be effective.’” *Martin*, 809 F. Supp. 2d at 506 (quoting *Ammons*, 219 F. Supp. 2d at 894)). *Ammons* is therefore distinguishable because the insurer in *Ammons* failed to provide all of the information required by section 33-6-31d. *See id.* Moreover, regardless of whether *Ammons* can be read to support Petitioners’ theory, the opinion should be afforded little persuasive weight because it fails to address the fact that section 33-6-31d merely creates a presumption of an effective offer. For the reasons discussed above, *Martin* is the better-reasoned decision and should be followed in the present case.

Petitioners also rely heavily upon *dicta* in several decisions by the Supreme Court of Appeals. In *Luikart v. Valley Brook Concrete & Supply, Inc.*, the Court noted that insurers have “no statutory duty to offer stop gap insurance coverage.” 216 W. Va. 748, 754, 613 S.E.2d 896, 902 (2005). In a footnote, the Court then cited *Bias* for the proposition that “insurers are statutorily required to offer certain coverage benefits in the context of automobile insurance.” 216 W. Va. at 754 n.11, 613 S.E.2d at 902 n.11. The citation to *Bias* included the qualifier

“*superceded [sic] by statute as recognized in Ammons v. Transportation Ins. Co.*, 219 F.Supp.2d 885 (S.D. Ohio).” *Id.* Whatever the Court meant by the word “superseded,” the footnote was purely *dictum*. The Court in *Luikart* was not presented with, and did not address, whether use of a noncomplying form renders an offer of UIM coverage ineffective *per se* or merely deprives an insurer of the statutory presumption.

Likewise, the Court’s recent decision *West Virginia Employers’ Mutual Insurance Co. v. Summit Point Raceway Associates*, 228 W. Va. 360, 719 S.E.2d 830 (2011), does not address the issue in the present case. *Summit Point* involved a claim against Brickstreet Mutual Insurance Company, a private workers’ compensation insurer, based on West Virginia Code section 23-4C-6. The statute at issue required Brickstreet to “offer” deliberate intent coverage to its insureds. In a decision noting that section 33-6-31d was an “apparent endorsement” of *Bias*, the Court held that section 23-4C-6 did not require a *Bias*-type offer because the statute did not contain the specificity set forth in section 33-6-31d. 719 S.E.2d at 839-40. As in *Luikart*, the Court noted in *dictum* that *Bias* has been superseded in part by statute. *See id.* at 835 n.9. The Court did not, however, address the *Martin* decision or the certified question at issue here.

If the legislature intended to displace *Bias*, section 33-6-31d would look substantially different than the statute enacted in 1993. But the legislature had no such intention. Instead, the legislature reaffirmed *Bias* by providing insurers with a mechanism for proving compliance with the legal standard articulated in that decision. Petitioners’ contention that the legislature intended to overturn the *Bias* standard is therefore without merit.

II. Petitioners Inaccurately Suggest This Lawsuit Involves Consumer Confusion and a “Benefit” to State Farm

The practical import of the circuit court’s holding is simple: State Farm insureds who made knowing and intelligent decisions to reject UIM coverage will, by virtue of a supposed

technical defect in State Farm's offer form, receive coverage they did not want and for which they did not pay. Recognizing, perhaps, that such a result is neither in the interest of justice nor consistent with sound public policy, Petitioners attempt to create the impression that (1) State Farm insureds are unable to make an informed purchasing decision as a result of the additional information on its selection/rejection forms, and (2) State Farm somehow "benefits" from the holding in *Martin*. Petitioners' efforts in this respect are misleading and should not inform the Court's decision.

Petitioners first ignore the factual record by suggesting, repeatedly, that State Farm customers are not afforded a meaningful opportunity to purchase UIM coverage. In one instance, Petitioners claim that State Farm's selection/rejection form "only serves to confuse an insured who does not understand the differences between collision coverage, UIM coverage, and uninsured motorists coverage." (Petitioners' Brief at 20.) In another, Petitioners claim that State Farm's UIM form requires an 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." (*Id.* at 21.) Thus, according to Petitioners, "an insured is unable to determine what each optional level of coverage costs without investigation." (*Id.*)

The evidentiary record lends no support to these sweeping assertions. As a general matter, the record contains ample evidence of the practices State Farm agents employ when offering UIM coverage to applicants and policyholders. Those practices include in-person or telephonic explanations of UIM coverage, its purpose, and its costs. As to Ms. Thomas herself, the record contains un rebutted evidence that: (1) Ms. Thomas met with a State Farm agent and discussed UIM coverage in person; (2) the agent explained each of the coverages in Ms. Thomas's policy before explaining the purpose and cost of UIM coverage; and (3) Ms. Thomas

rejected UIM coverage against the agent's advice. Petitioners ignore this evidence, which indicates not only that Ms. Thomas made an informed purchasing decision, but that many (if not most) State Farm policyholders were similarly well-apprised of UIM coverage, its purpose, and its cost.

Petitioners also ignore the testimony of State Farm's expert witness, Dr. Wilkie. As Dr. Wilkie explained in the *Martin* case, a printed offer form plays only a limited role in informing consumers about UIM coverage. (App. 388-95.) This is because a consumer's purchasing decision is influenced by external stimuli such as economic circumstances, family members, and insurance agents. (App. 392-93.) In the present case, for example, the record demonstrates that Ms. Thomas initially rejected UIM coverage because she wanted the same coverages as her father. (See App. 428-29, Higgs Aff. ¶ 4.) In the *Martin* case, by contrast, the record demonstrated that Mr. Fleming wanted UIM coverage removed from his policy in order to reduce his premiums. See *Martin*, 809 F. Supp. 2d at 507-08. As Dr. Wilkie testified, neither Ms. Thomas's nor Mr. Fleming's state of mind can be assessed "by examining only [the UIM offer form] and ignoring the context for [his or her] actual mental processes." (App. 390.) This is particularly true given the important role played by State Farm agents, who are able to respond to each consumer's individualized need for information. (App. 394-95.)

Petitioners do not merely ignore the evidentiary record; they also distort the practical impact of the decision in *Martin* by characterizing *Bias* as a "far more lenient" standard, an "escape route," and a "second bite at the apple." (Petitioners' Brief at 29, 32, 33.) Indeed, Petitioners even go so far as to suggest that State Farm "benefits" from the holding in *Martin* (*id.* at 34), as if State Farm would rather bear the burden of proof under *Bias* than enjoy a statutory presumption in its favor. Nothing could be further from the truth.

Contrary to Petitioners' assertions, the *Bias* standard imposes a substantial burden on insurance companies in West Virginia. Essentially, *Bias* requires an insurance company to provide unfunded coverage (often in excess of \$100,000 per claim) unless the insurer can prove that the insured's earlier rejection of UIM coverage was "knowing and intelligent." In other words, the insurer must provide evidence of the insured's subjective mental state during a transaction that, in some instances, occurred over a decade before.

Section 33-6-31d, by contrast, imposes no burden on the insurer beyond producing a signed UIM offer form containing the requisite information. The notion that *Bias* imposes a "lower," "less stringent" standard (Petitioners' brief at 34) is therefore without basis in law or fact. Similarly, there is no basis for Petitioners' assertion that State Farm "benefits" from the holding in *Martin*. (*Id.*) To the contrary, *Martin's* erroneous determination that State Farm is not entitled to the statutory presumption has resulted in numerous lawsuits seeking to reform State Farm policies under *Bias*.

In sum, Petitioners' brief is misleading in two significant ways. First, Petitioners incorrectly suggest that this is a case about consumer confusion. It is not. For purposes of this proceeding, it must be assumed (based on State Farm's un rebutted evidence) that Ms. Thomas received a commercially reasonable offer of UIM coverage and made a knowing and intelligent rejection thereof. Second, Petitioners incorrectly suggest that State Farm is seeking to benefit from its use of an allegedly improper selection/rejection form. To the contrary, State Farm seeks nothing more than the opportunity to prove it made a commercially reasonable offer of UIM coverage to Ms. Thomas, consistent with its obligations under West Virginia law. If State Farm fails to carry this burden, Petitioners will be entitled to UIM coverage equal to the liability limits in Ms. Thomas's policy. If, on the other hand, State Farm demonstrates that Ms. Thomas made

an informed purchasing decision using the information provided by State Farm, then Ms. Thomas should be held to that decision, and Petitioners should not be awarded insurance coverage they did not want and for which they have not paid.

III. State Farm Is Entitled to the Presumption Under Section 33-6-31d Because Its UIM Offer Forms Comply with the Requirements of West Virginia Law

Prior to reaching the certified question, the circuit court first concluded that the UIM selection/rejection form signed by Ms. Thomas did not comply with the guidelines issued by the Insurance Commissioner in Informational Letter No. 121. Although the circuit court's decision in that regard falls outside the scope of the certified question, judicial economy will be served if the Court overturns the circuit court's erroneous decision on that issue. State Farm's UIM selection/rejection form complies with West Virginia law in all respects and, accordingly gives rise to a presumption that State Farm's offer was commercially reasonable and Ms. Thomas's rejection was knowing and intelligent.

State Farm's UIM offer forms provide some non-mandatory information, but are otherwise nearly identical to the forms prescribed by the Insurance Commissioner in Informational Letter Nos. 88 and 121. (*Compare* App. 376 and App. 435, with App. 353 and App. 366.) More importantly, it is undisputed that State Farm's offer forms contain all of the information required by section 33-6-31d, Informational Letter Nos. 88 and 121, and the decision in *Bias*. In compliance with section 33-6-31d and *Bias*, the forms identify the coverage limits being offered, the applicable rates for each level of coverage, and the number of vehicles to which the coverage applies. *See* W. Va. Code § 33-6-31d(a); *Bias*, 179 W. Va. at 127, 365 S.E.2d at 791. In compliance with Informational Letter Nos. 88 and 121, the forms also identify: whether a multi-car discount is included in the premium calculation; the agent's name; the policy number; the policy period; and, as to Ms. Thomas's 1999 form, the insured's existing coverage.

(See App. 349, 364, 432-33, 434-35.) State Farm’s UIM offer forms thus satisfy the content requirements of West Virginia law.

Until recently, every court to evaluate State Farm’s UIM offer forms has deemed the forms to be compliant with section 33-6-31d. In *Ingles v. State Farm Mutual Automobile Insurance Co.*, for example, the court evaluated State Farm’s two-column UIM form, concluding that it was “materially identical to the Commissioner’s form” and thus in compliance with the statute. 265 F. Supp. 2d 655, 659 (S.D.W. Va. 2003). A similar result was reached in *State Farm Mutual Automobile Insurance Co. v. Shingleton*. See Civ. No. 1:07-cv-29, Doc. 22 at 5 (N.D.W. Va. Feb. 17, 2009) (holding that State Farm’s two-column form resulted in statutory presumption).³ Likewise, in *Webb v. Shaffer*, the court evaluated State Farm’s four-column form and concluded that the form “conformed with Informational Letter No. 121’s Form A” and therefore “complied with the content requirements of § 33-6-31.” 694 F. Supp. 2d 497, 501 (S.D.W. Va. 2010). The forms at issue in *Ingles*, *Shingleton*, and *Webb* were substantially identical to those provided to Ms. Thomas in 1999 and 2007.

Notwithstanding this line of authority, the court in *Martin* and the circuit court below held that State Farm’s two- and four-column forms do not entitle State Farm to the presumption of reasonableness under section 33-6-31d. See *Martin*, 809 F. Supp. 2d at 504. According to the opinion in *Martin*, insurance companies are permitted “a limited flexibility” in reproducing the Commissioner’s forms, but are constrained by the Commissioner’s goal of “simplicity.” *Id.* at 503-04. *Martin* concluded that State Farm’s UIM forms do not achieve that goal because a State Farm insured reviewing the form would supposedly have “no idea” which premium would apply to which level of coverage. *Id.* at 504. The circuit court in the present case reached a similar

³ The opinion in *Shingleton* is set forth at pages 283-90 of the Joint Appendix.

conclusion, holding that State Farm failed to comply with Informational Letter No. 121 because its form “defeats the goal of simplicity.” (App. 524.)

There are three problems with the circuit court’s analysis of State Farm’s UIM forms. First and foremost, the decision cannot be squared with the body of case law applying section 33-6-31d prior to *Martin*. Before *Martin*, the only cases where insurers were deemed to be noncompliant with section 33-6-31d involved forms that failed to provide the information required by the statute. In *Ammons*, for example, the court held an offer to be ineffective because the insurer “completely excluded categories of information that were required to be provided with the offer of optional coverage.” 219 F. Supp. 2d at 893-94. By contrast, in cases involving offer forms containing additional information (even additional columns), courts uniformly held that such forms comply with section 33-6-31d. See, e.g., *Bailey v. GEICO Gen. Ins. Co.*, Civ. No. 2:05-0806, 2010 WL 2643380, at *7 (S.D.W. Va. June 29, 2010) (holding that GEICO’s uninsured motorist coverage offer form, which contains additional information, was “materially identical to language in the informational letter” and therefore resulted in statutory presumption)⁴; *Webb*, 694 F. Supp. 2d at 501 (holding that State Farm’s four-column form “complied with the content requirements of § 33-6-31”); *Shingleton*, Civ. No. 1:07-cv-29, Doc. 22 at 5 (N.D.W. Va. Feb. 17, 2009) (holding that State Farm’s two-column form resulted in statutory presumption); *Ingles*, 265 F. Supp. 2d at 659 (same). The pre-*Martin* decisions were therefore consistent with the statutory language and the decision in *Bias*, both of which speak to the minimum information that must be provided to make an effective offer. See § 33-6-31d(a) (requiring form to “inform the named insured of the coverage offered and the rate calculation

⁴ The uninsured motorist coverage offer form at issue in *Bailey* is reproduced at page 442 of the Joint Appendix.

therefore”); *Bias*, 179 W. Va. at 127, 365 S.E.2d at 791 (“The offer must state . . . the nature of the coverage offered, the coverage limits, and the costs involved.”). *Martin* and the circuit court’s decision below stand alone in limiting the information an insurer can provide to its insureds.

The decision below also cannot be squared with Informational Letter No. 121, the Insurance Commissioner’s most recent directive related to section 33-6-31d. Under the heading “PREPARATION OF FORMS BY INSURERS: COMPLIANCE REQUIREMENTS,” Informational Letter No. 121 states as follows:

Statutory compliance in the reproduction of the forms contained herein necessary to create a presumption of an effective offer of optional coverages and a knowing and intelligent election or rejection is achieved *so long as the reproduced forms provide ALL the information set forth within the Insurance Commissioner promulgated forms.* It is not necessary that the reproduced forms be exact replicas of the Commissioner forms in size and shape.

(App. 363 (italics added, underline in original).) This statement is unequivocal: if an insurer’s reproduction of the Insurance Commissioner’s forms includes *all* of the information in the Commissioner’s forms, the insurer is entitled to the statutory presumption. If the Commissioner meant “only” instead of “all,” he would have said so.⁵

The decision below, like *Martin* before it, improperly relied on Informational Letter No. 88 to alter the otherwise plain language of Informational Letter No. 121. (See App 520-21.) As the court in *Martin* acknowledged, the above-quoted passage from Informational Letter No. 121 “suggests that the [exemplar] forms are a compliance ‘floor,’ and that an insurer’s inclusion of additional information on the forms may yet comply with the requirements of § 33-6-31d.” 809

⁵ As explained by Donna Quesenberry, who participated in the policy discussions that led to Informational Letter No. 121, the choice of “all” instead of “only” was deliberate. (App. 445, Quesenberry Aff. ¶ 5.)

F. Supp. 2d at 503. But the court then concluded that statements set forth in the FAQ section of Informational Letter No. 88 limit an insurer's ability to provide additional information. Specifically, the court relied upon the answer to FAQ No. 1:

Q. Form A provides only space for a premium that is an aggregate of the bodily injury per person, bodily injury per accident, and property damage coverages. Can the insurer break this down and give separate premium quotations as to each of these individual coverages?

A. No. The form is designed with simplicity in mind and it was felt that breaking the coverages down any further would make the form too crowded and complicated.

(App. 349.) The circuit court below similarly relied upon FAQ No. 1 in concluding that State Farm's UIM offer form did not comply with Informational Letter No. 121. (*See App. 520-21.*)

The circuit court's reliance on FAQ No. 1 is misplaced. By its terms, Informational Letter No. 121 superseded and replaced Informational Letter No. 88 in its entirety. (App. 361.) The older, superseded directive therefore cannot be construed as limiting or altering the terms of the newer directive. Moreover, FAQ No. 1 sheds no light on the issue in this case. The FAQ asks whether an insurer can break down premium quotations by coverage – *i.e.*, by bodily injury per person, bodily injury per accident, and property damage. The State Farm selection/rejection form at issue does not break down quotations by coverage. Rather, the form lists an aggregate premium for each level of coverage as required by the Informational Letter. (*See App. 175.*) The alteration actually at issue in this case – the differentiation of premiums based on the existence of a multi-car discount and collision coverage – was not addressed in Informational Letter No. 88.⁶

⁶ Keith Huffman was the General Counsel for the Offices of the Insurance Commissioner in 1993 and drafted Informational Letter No. 88. (App. 448, Huffman Aff. ¶¶ 2-3.) His

Finally, the circuit court improperly determined that State Farm insureds cannot determine the applicable premium for each level of coverage by looking at the selection/rejection form. (See App. 520.) State Farm's two-column form – used between 1996 and 2003 – contained a box that, if checked, would indicate whether a multi-car discount applied. (See, e.g., App. 451-52, 454-56, 459-60.) An insured could therefore determine the exact premium for each level of coverage by looking at the form. The subsequent four-column form also contained a box indicating whether a multi-car discount applied. (See App. 435.) Provided insureds were aware of whether they were also purchasing collision coverage – a reasonable assumption, particularly in light of the agent testimony set forth above – insureds could still determine the exact premium for each level of coverage by looking at the form. The circuit court's decision, like the decision in *Martin*, is based on the assumption that each insured, after choosing whether or not to purchase collision coverage, immediately forgets the choice he or she just made. That assumption is implausible and unsupported by the evidentiary record.⁷

testimony in *Martin* confirms that State Farm's UIM forms were fully compliant with the earlier informational letter:

When I drafted Informational Letter No. 88, I intended to set forth certain information regarding underinsured motorist ("UIM") coverage that, *at a minimum*, an insurer was required to include in its UIM form, pursuant to West Virginia Code Section 33-6-31d. . . . The language I used in Informational Letter No. 88 was not intended to require (and does not in fact require) an insurer to use an exact duplicate of the Commissioner's UIM form attached to it. *An insurer was free to include additional information*, so long as all the information set forth within the Insurance Commissioner promulgated form was included in the insurer's UIM form.

(App. 448-49, ¶¶ 4-5 (emphasis added).)

⁷ The district court and the court in *Martin* also ignored the fact that the premiums listed on the four-column forms were occasionally the same regardless of whether the policy included collision coverage. The form signed by one of the named plaintiffs in *Martin* is just one example. On that form, the premiums for the first four levels of coverage were the same regardless of whether the policy included collision coverage. (See App. 380.) The fifth level of

In the present case, the selection/rejection form provided to Ms. Thomas in 1999 contained a check-mark indicating that her rates did not include a multi-car discount. (App. 433.) Accordingly, Ms. Thomas could have identified the exact premium applicable to each level of coverage offered in 1999 by looking at the form. In 2007, the form provided to Ms. Thomas contained a check-mark indicating that her rates included a multi-car discount. (App. 435.) It is undisputed that, at the time Ms. Thomas reviewed the form, she had just finished purchasing collision coverage for her policy. (App. 429, Higgs Aff. ¶ 5.) Moreover, *her agent had specifically called her attention to the fact that her policy included collision coverage.* (*Id.*) Ms. Thomas therefore was able, by looking at the form, to determine which premium applied to which level of UIM coverage.

Petitioners suggest that State Farm simply invented its own UIM selection/rejection form, with no regard for section 33-6-31d, the Insurance Commissioner's directives, or the requirements set forth in *Bias*. (*See* Petitioners' Brief at 11 ("State Farm has felt free to make whatever changes it desired to the Commissioner's promulgated form"); *id.* at 14 ("At issue in this case is State Farm's decision to utilize various selection/rejection forms of its own creation . . . rather than using the prescribed form prepared by the Commissioner.")) That is hardly the case. At all times since Informational Letter Nos. 88 and 121 were issued, State Farm's UIM forms have included *all* of the information required by the statute, the informational letters, and *Bias*. The circuit court's holding that State Farm's UIM offer forms do not comply with West Virginia law is therefore without merit.

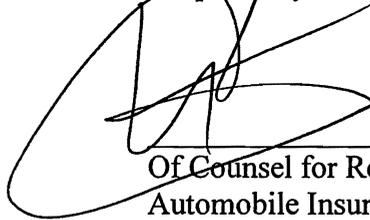
coverage was not required by section 33-6-31 and therefore did not fall within the scope of section 33-6-31d.

CONCLUSION

The circuit court's answer to the certified question is incorrect. If an insurer's UIM selection/rejection form varies impermissibly from the Insurance Commissioner's guidelines, the insurer loses the statutory presumption afforded by West Virginia Code section 33-6-31d. The insurer is then obligated, under the standard articulated in *Bias v. Nationwide Mutual Insurance Co.*, 179 W. Va. 125, 365 S.E.2d 789 (1987), to prove that (1) it made a commercially reasonable offer of UIM coverage to the insured, and (2) the insured's rejection of such coverage was knowing and intelligent. The certified question must therefore be answered in the negative.

In the alternative, the Court need not reach the certified question because State Farm is entitled to the presumption under section 33-6-31d. The selection/rejection form signed by Ms. Thomas contains all of the information required by section 33-6-31d, the Insurance Commissioner, and *Bias*, and nothing in Informational Letter No. 121 prohibits insurers from including additional, non-mandatory information on their forms.

Respectfully submitted,



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CERTIFICATE OF SERVICE

The undersigned, of counsel for respondent, State Farm Mutual Automobile Insurance Company, does hereby certify that the foregoing State Farm Mutual Automobile Insurance Company's Response Brief on Certified Question was this day served upon the following by mailing a true copy of the same this date, postage prepaid, to:

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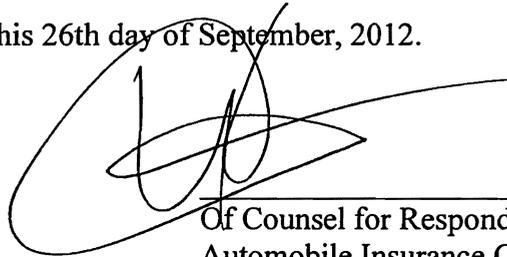
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