No. 32704 – *Dairyland Insurance Company v. Stephanie Michelle Conley v. West Virginia National Auto Insurance Company*

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OF WEST VIRGINIA

Albright, C.J., concurring:

I applaud the majority opinion's scholarship in setting forth the legislative and political history of *W.Va. Code*, 33-6A-1. This law – beyond any question – requires that Ms. Conley have insurance coverage for her accident.

The dissenting opinion's claim that the majority "hing[ed] its decision on a tortured and hyper-technical reading" of the statute is flatly contradicted by the legislative and political history of the statute.

There is a style of opinion writing based on the notion that the surest way to attract attention is to frighten and alarm. "A siren turns more heads than a birdsong does, after all, and that is as it should be, provided the danger is real." Charles Kuralt, *American Moments*, ii (1998). The dissenting opinion follows this approach. The dissenting opinion says that the majority's writing is the "most outrageous court decision in the history of American jurisprudence," that the majority opinion "unnecessarily obfuscates a straightforward issue," and that the majority gives someone "something for nothing." These claims are poppycock and rubbish, all bark and no bite.

"Let us be very clear about this, dear reader" (to quote from the dissent): the dissenting opinion contains not one shred of law, history or reasoning to support its position.

In short the dissent foments public dissatisfaction with the majority view of the case without even a passing nod to legal reasoning or authorities. Great editorial; poor legal scholarship.

Our dissenting colleague neglects to point out that in 1997, he supported precisely the position that he now claims he condemns. In *Bailey v. Kentucky National Ins. Co.*, 201 W.Va. 220, 496 S.E.2d 170 (1997), Justice Davis eloquently concluded that *W.Va. Code*, 33-6A-1(e)(7) mandated that an insurance company give *prospective notice* that it is cancelling an insurance policy. Our dissenting colleague joined in Justice Davis' opinion.

In *Baily*, law plainly required that the insurance company give thirty days advance notice that it was cancelling. Because the insurance company only gave the policyholder seventeen days of advance notice that it was canceling the policy because the policyholder missed paying a premium, we concluded that the cancellation notice was defective and had no effect. The decision in *Bailey* was unanimous that the insurance company had to follow the law in order to properly cancel a policy. Our dissenting colleague does not – cannot – explain why he has changed his position, and why he thinks that the insurance company in this case can ignore that very same law.

The dissenting opinion implies that the majority's decision was based on the personal preferences of the other four members of the Court. That implication is false. Our decision is based on a clear reading of a law *passed by the Legislature*.

Since enacting *W.Va. Code*, 33-6A-1(e)(7) in 1982, the Legislature has had *five* opportunities to change this law. The Legislature has had *three* opportunities since the Court

issued its interpretation of the law in *Bailey*. The Legislature has never done so. While our dissenting colleague wishes it so, this Court cannot ignore the written law.

The dissenting opinion also fails to note that West Virginia is not alone in enacting *W.Va. Code*, 33-6A-1. While our dissenting colleague – without any support – suggests that West Virginians pay higher insurance rates than people in the five surrounding states because of laws like this, he neglects to point out that those five states have *the same kinds of laws as West Virginia* in this respect.

Forty-eight states, including Ohio, Pennsylvania, Maryland, Virginia and Kentucky, plus the District of Columbia, have statutory schemes just like that found in *W.Va. Code*, 33-6A-1, *et seq*. Almost every state requires an insurance company to give at least 10 days of advance notice to a policyholder before cancelling a policy for failure to pay a premium. Some states, like our neighbors Virginia and Pennsylvania, require 15 days of notice. Even the citizens of Guam are entitled to fifteen days' advance notice of cancellation. Kentucky is unique in requiring fourteen days' notice.[1]

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[1]*See* the laws of Alabama, *Ala. Code*, §§ 27-23-20 to -28 (1971) ("where cancellation is for nonpayment of premium, at least 10 days' notice of cancellation accompanied by the reason therefor shall be given"); Alaska, *Alaska Stat.*, § 21.36.210 to 21.36.310 (1970/1987) ("if cancellation is for nonpayment of premium, the notice shall be mailed to the named insured . . . at least 20 days before the effective date of cancellation"); Arizona, *Ariz. Rev. Stat.* §§ 20-1631 to -1634 (1972/1987) ("In motor vehicle insurance policies there shall be a provision that the policyholder is entitled to a minimum grace period of seven days for the payment of any premium"); Arkansas, *Ark. Code*, § 23-89-301 to -308 (1969) ("when cancellation is for nonpayment of premium, at least ten (10) days' notice of cancellation accompanied by the reason therefor shall be given"); California, *Cal. Ins. Code*, §§ 660 to 669 (1968/1984) ("where cancellation is for nonpayment of premium, at least 10 days' notice (continued...)

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of cancellation accompanied by the reason therefor shall be given"); Colorado, *Colo.Rev.Stat.* §10-4-601 to -609 (1969/1990) ("where cancellation is for nonpayment of premium, at least ten days' notice of cancellation accompanied by the reason therefor shall be given"); Connecticut, *Conn. Stat.*, §§ 38a-341 to -345 ("(1) where cancellation is for nonpayment of the first premium on a new policy, at least fifteen days' notice of cancellation accompanied by the reason for cancellation shall be given, and (2) where cancellation is for nonpayment of any other premium, at least ten days' notice of cancellation accompanied by the reason for cancellation shall be given."); Delaware, *Del.Code Ann.*, tit. 18 §§ 3903 to 3911 (1959) ("where cancellation is for nonpayment of premium, at least 10 days notice of cancellation accompanied by the reason therefor shall be given"); District of Columbia, *D.C. Code* § 31-2409 (1982) ("in the case of a refusal or failure of the insured to pay a premium due under the terms of the policy, the notice shall be provided to the insured not less than 15 days prior to the effective date of the cancellation"); Florida, *Fla.Stat.* §§ 627.728 to 627.7286 (1982) ("when cancellation is for nonpayment of premium, at least 10 days' notice of cancellation accompanied by the reason therefor shall be given"); Georgia, *Ga. Code Ann.* §§ 33-24-44 to -45 (1960/1987) ("When a policy is canceled for failure of the named insured to discharge when due any of his obligations in connection with the payment of premiums for a policy or any installment of premiums due, . . . the notice requirements of this Code section may be satisfied by delivering or mailing written notice to the named insured and any lienholder, where applicable, at least ten days prior to the effective date of cancellation"); Hawaii, *Hawaii Rev. Stat.* §§ 431:10C-111 to -113 (1988/2004)("in the case of cancellation for the nonpayment of premiums the insurer shall: (1) Mail a written notice of prospective cancellation to the insured not fewer than twenty days prior to the effective date of the cancellation; and (2) Continue all motor vehicle insurance and optional additional coverages in force for twenty days following the mailing."); Idaho, *Idaho Code* §§ 41-2506 to -2512 (1969)("where cancellation is for nonpayment of premium at least ten (10) days' notice of cancellation accompanied by the reason therefor shall be given"); Illinois, 215 *Ill.Comp.Stat.* 5/143.10 to 5/143.20, 5/143.24 (1979/1982) ("where cancellation is for nonpayment of premium, the notice of cancellation must be mailed at least 10 days before the effective date of the cancellation."); Indiana, *Ind. Code*, §§ 27-7-6-1 to -12 (1969/1985) ("where cancellation is for nonpayment of premium at least ten (10) days notice of cancellation accompanied by the reason therefor shall be given"); Iowa, *Iowa Code*, §§ 515D.1 to 515D.12 (1970) ("where the cancellation is for nonpayment of premium . . . at least ten days prior to the date of cancellation"); Kansas, *Kan. Stat. Ann*, §§ 40-276 to -278 (1968/1984); Kentucky, *Ky. Rev. Stat.*, § 304.20-040 (1980/1986)("where cancellation is for nonpayment of premium, at least fourteen (14) days notice of cancellation accompanied by the reason therefor shall be given"); Louisiana, *La. Rev. Stat. Ann.*, §§ 22:636 to 22:636.1 (1958/1987)
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("Any policy may be cancelled by the company at any time during the policy period for failure to pay any premium when due . . . by mailing or delivering to the insured written notice stating when, not less than ten days thereafter, such cancellation shall be effective"); Maine, *Me. Rev. Stat. Ann.* tit. 24-A §§ 2911 to 2924 (1973/1983) ("No notice of cancellation of a policy shall be effective unless received by the named insured . . . when the cancellation is for nonpayment of premium, at least 10 days prior to the effective date of cancellation"); Maryland, *Md. Ann. Code Ins.* §§ 27-605 to 27-609; *Md. Admin. Code* §§ 31.08.03.01 to 31.08.03.11 (1979/2005) ("At least 10 days before the date an insurer proposes to cancel a policy for nonpayment of premium, the insurer shall cause to be sent to the insured . . . a written notice of intention to cancel for nonpayment of premium."); Massachusetts, *Mass. Gen. Laws* ch. 175 §§ 113D, 113F (1971/1983); Michigan, *Mich. Comp. Laws*, §§ 500.2101 to 500.2104, 500.2122 to 500.2124 (1981) ("A notice of termination for nonpayment of premium shall be effective as provided in the policy"); Minnesota, *Minn. Stat.*, §§ 65B.14 to 65B.21 (1967/1984) ("when nonpayment of premium is the reason for cancellation or when the company is exercising its right to cancel insurance which has been in effect for less than 60 days at least ten days' notice of cancellation, and the reasons for the cancellation, shall be given"); Mississippi, *Miss. Code Ann.*, §§ 83-11-1 to -21 (1970) ("where cancellation is for nonpayment of premium at least ten (10) days' notice of cancellation accompanied by the reason therefor shall be given"); Missouri, *Mo. Rev. Stat.*, §§ 379.110 to 379.120 (1974); *Mo. Admin. Code* tit. 20 § 500-2.300 (1975/2005) ("When an insurance carrier has certified a motor vehicle liability policy . . . the insurance so certified shall not be canceled or terminated until at least ten (10) days after a notice of cancellation or termination of the insurance has been filed with the office of the director of revenue"); Montana, *Mont. Code Ann.*, §§ 33-23-201 to -217 (1967/2003) ("if cancellation is for nonpayment of premium, at least 10 days' notice of cancellation accompanied by the reason must be given"); Nebraska, *Neb. Rev. Stat.*, §§ 44-514 to -521 (1972) ("if cancellation is for nonpayment of premium, at least ten days' notice of cancellation accompanied by the reason therefor shall be given"); Nevada, *Nev. Rev. Stat.* §§ 687B.310 to 687B.400 (1971) ("No cancellation under subsection 1 is effective until in the case of paragraph (a) of subsection 1 ['Failure to pay a premium when due'] at least 10 days . . . after the notice is delivered or mailed to the policyholder"); New Hampshire, *N.H. Rev. Stat. Ann.* §§ 417-A:1 to 417-A:10 (1969); *N.H. Admin. Code Ins.* 1401.01 to 1401.09 (1982/1992) ("such effective date may be 10 days from the date of mailing or delivery [of the notice] . . . When the policy is being cancelled or not renewed for nonpayment of premium"); New Jersey, *N.J. Rev. Stat.*, §§ 17:29C-1 to -13 (1968/2003) ("where cancellation is for nonpayment of premium at least 15 days' notice of cancellation accompanied by the reason therefor shall be given"); New Mexico, *N.M. Stat. Ann.*, § 59A-18-29 (1984) ("The insurer or agent shall give the named insured written notice

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of such cancellation not less than ten (10) days prior to the effective date of the cancellation."); New York, *N.Y. Ins. Law*, § 3425 (1984/2004) ("Payment to the insurer . . . shall be timely, if made within fifteen days after the mailing to the insured of a notice of cancellation for nonpayment of premium"); North Dakota, *N.D. Cent. Code*, §§ 26.1-40-01 to -12 (1985)("When cancellation is for nonpayment of premium, the notice must be mailed or delivered to the named insured at the address shown in the policy at least ten days prior to the effective date of cancellation"); Ohio, *Ohio Rev. Code Ann.*, §§ 3937.30 to 3937.39 (1969) ("Where cancellation is for nonpayment of premium at least ten days notice from the date of mailing of cancellation accompanied by the reason therefore shall be given."); Oregon, *Or. Rev. Stat.*, §§ 742.560 to 742.572 (1971/1975) ("where cancellation is for nonpayment of premium at least 10 days' notice of cancellation accompanied by the reason therefor shall be given"); Pennsylvania, *Pa. Cons. Stat.*, §§ 40 P.S. 991.2001 to 991.2013 (1998) ("When the policy is being cancelled [for non payment of premium] . . . the effective date may be fifteen (15) days from the date of mailing or delivery."); Rhode Island, *R.I. Stats.*, 27-29-13 (1994) ("Policyholders shall be entitled to receive no less than thirty (30) days notice before a cancellation of an automobile insurance policy for any reason except nonpayment of premium, in which instance policyholders shall be entitled to receive no less than ten (10) days notice."); South Carolina, *S.C. Code Ann.*, §§ 38-77-30 to 38-77-125 (1988) (A written cancellation notice "must state the date not less than fifteen days after the date of the mailing or delivering on which the cancellation . . . becomes effective"); South Dakota, *S.D. Codified Laws Ann.*, §§ 58-11-45 to -55 (1968/2004); Tennessee, *Tenn. Code Ann.*, §§ 56-7-1301 to -1305 (1968/1981) ("If the cancellation is due to nonpayment . . . the policy may be cancelled by the company by mailing to such insured written notice stating when not less than ten (10) days thereafter such cancellation shall be effective"); Texas, *Vernon's Tex. Code Ann.*, §§ 551.051 to 551.055 (1976/1983) ("Not later than the 10th day before the date on which the cancellation of a liability insurance policy takes effect, an insurer must deliver or mail written notice of the cancellation"); Utah, *Utah Code Ann.*, § 31A-21-303 (1986/2004) ("Cancellation for nonpayment of premium is effective no sooner than ten days after delivery or first class mailing of a written notice to the policyholder."); Vermont, *Vt. Stat. Ann.*, Tit. 8 §§ 4222 to 4227 (1972/1977)("where cancellation is for nonpayment of premium at least 15 days' notice of cancellation shall be given"); Virginia, *Va. Code*, §§ 38.2-2212 to -2213 (1986/1998) ("When the policy is being canceled" because the named insured failed to pay the premium, "the effective date may be less than 45 days but at least 15 days from the date of mailing or delivery" of the cancellation notice); Washington, *Wash. Rev. Code Ann.*, §§ 48.18.291 to 48.18.297 (1985) ("If cancellation is for nonpayment of premium . . . at least ten days notice of cancellation, accompanied by the reason therefor, shall be given."); Wisconsin, *Wis. Stat.*, § 631.36 (1975/1981); § 632.35 (continued...)

So the dissenting opinion is completely off the mark in suggesting that West Virginians pay higher insurance premiums than their neighbors because of the ten-day notice requirement in *W.Va. Code*, 33-6A-1(e)(7). The dissenting opinion is also wrong in claiming that the majority opinion is unique in the history of American jurisprudence – unless what the dissenting opinion also meant to say was that the people of West Virginia aren't entitled to the same protection from scurrilous insurance companies as the people of Guam.

Remarkably, the dissenting opinion fails to note that *these laws were written and pushed by the insurance companies themselves*. As the majority opinion makes clear, the insurance industry proposed the passage of these laws to deal with renegade insurers that cancelled insurance policies willy-nilly throughout the 1950s and 1960s. These "bad" insurers took premiums from low-risk customers, but cancelled the policies of customers who were a "risk" because they had an "antagonistic attitude" and questioned an insurance company decision, or because they spoke poor English, were actors or in similar occupations,

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(1975/1979) ("No cancellation . . . is effective until at least 10 days after the 1st class mailing or delivery of a written notice to the policyholder."); Wyoming, *Wy. Stat.*, § 26-35-101 to -204 (If cancellation is for failure to pay a premium when due, notice must be given "Not less than ten (10) days prior to the proposed effective date of cancellation"). *See also* Guam, *Guam Code Ann.*, Title 16, §§ 21101 to 21110 (1968) (when a policy is cancelled for nonpayment of premium, a cancellation notice must state a cancellation date at least "fifteen (15) days from the date of mailing or delivery").

It appears that only North Carolina and Oklahoma do not require advance notice of the cancellation of automobile insurance policies (however, an Oklahoma statute, 36 Okl.St.Ann. § 3639, states that for "commercial property insurance policies, commercial casualty insurance policies, and commercial fire insurance policies" at least ten days' notice of cancellation must be given to the insured for nonpayment of premium).

were nationals of other countries, or lived in neighborhoods that the insurance company decided were "going downhill."

Let me say it again: *these laws were written at the request of good insurance companies to regulate bad insurance companies.* This is not, as our dissenting colleague might suggest, a wacky scheme that only exists in West Virginia. Nationwide, honest insurance companies wanted to regain the public's trust, and therefore encouraged the passage of laws like *W.Va. Code*, 33-6A-1 to rein in all insurance companies, and to make them all compete on an even, fair playing field.

There is nothing new under the sun, and what the insurance company did in this case was common when *W.Va. Code*, 33-6A-1 was first enacted in 1967. For over one hundred years it has been the routine for insurance companies to issue insurance to a customer on-the-spot, the day an application was completed. That way the customer would not walk down the street to the next insurance broker.

But the routine used to be that if an insured event occurred – a fire, a death, a car accident – the insurance company would cancel the policy and tell the customer "sorry, we rejected your application." The passage of *W.Va. Code*, 33-6A-1 was supposed to eliminate these kinds of cancellations. This case is nothing more than a twist on that centuries-old "hide the peanut" scheme.

In this case, Ms. Conley applied for insurance on August 15th, and the insurance company told her, that day, that she had coverage. Fifteen days later, on August 30th, it sent her a certificate of insurance, two proof of insurance cards, and a declarations

page showing she had coverage. The next day she had an accident. A week-and-a-half later, the insurance company announced it was cancelling the policy, because the insurance company had decided that there never was a policy to begin with.

The insurance company argued this was a "something for nothing" case because Ms. Conley's check was returned by the bank for insufficient funds. The dissenting opinion suggests (without any proof) that Ms. Conley deliberately bounced a check. The problem with this argument is obvious: the insurance company has never, in the four years since the accident, asked Ms. Conley to make good on her check. If the company had sold her a television set, it wouldn't be here in court demanding the television set back. The company would be demanding that Ms. Conley pay for the goods.

But insurance isn't a consumer good you can wrap your fingers around. The insurance company would have us believe that even though Ms. Conley had scraps of paper in her hands telling her she had coverage, she didn't really have anything. Twenty-seven days after telling Ms. Conley she was walking out of her insurance agent's office with coverage, the appellant insurance company was faced with a choice: either demand that Ms. Conley make good on her $174.00 check and pay out up to $40,000.00 in bodily injury insurance coverage and $10,000.00 for property damage, or claim that there never was an insurance policy to begin with. For the insurance company, the answer was easy. It "cancelled" the policy, and attempted to make the cancellation retroactive to a date that preceded the insured event.

The dissenting opinion fails to note that the National Association of Insurance Commissioners has taken a stand against this kind of insurance company conduct. The NAIC has proposed a model law that mandates that insurance companies give customers ten days of prospective notice that their policies are being cancelled for nonpayment of premiums. The model law states:

> No insurer shall cancel an automobile insurance policy unless. . . when cancellation is for nonpayment of premium, notice shall be mailed or delivered to the named insured at the last known mailing address as shown in the records of the insurer at least ten (10) days prior to the effective date of cancellation.

National Association of Insurance Commissioners, "NAIC Automobile Insurance Declination, Termination and Disclosure Model Act," IV *Model Laws, Regulations and Guidelines* 725-1 to -16 (1997). The West Virginia Legislature, in *W.Va. Code*, 33-6A-1, has mirrored this model law.

Finally, the dissenting opinion ignores the public policy considerations behind the Legislature's decision to enact these notice of cancellation laws. These laws give the policyholder advance notice the policy is being cancelled *so the policyholder can correct any mistakes or pay a missed premium.* This is important because a policyholder will often be denied coverage from another insurer, or at least have to pay higher premiums, when a policy is cancelled – regardless of whether the reason for cancellation was valid. It also gives the policyholder a chance to buy insurance from another company before the policy is canceled. These laws protect not only the policyholder, but also innocent citizens who might be injured

by the policyholder – like the three people who claim they were injured by Ms. Conley's negligence.[2]

The scholarly majority opinion firmly established that the law required Ms. Conley get ten days of advance notice that her policy was being cancelled. The insurance company completely ignored this law, gave her retroactive notice, and gambled that it wouldn't have to pay anything under the policy. The circuit court and the majority opinion properly found that the insurance company was wrong.

I therefore respectfully concur, and I deeply regret the dissent in this case – an opinion without supporting law, history or any legal reasoning.

[2]Actually, Ms. Conley is not being sued by the three people she supposedly injured. She is being sued by their insurer, Dairyland Insurance Company. So the innocent party receiving protection under the majority's opinion is another insurance company.