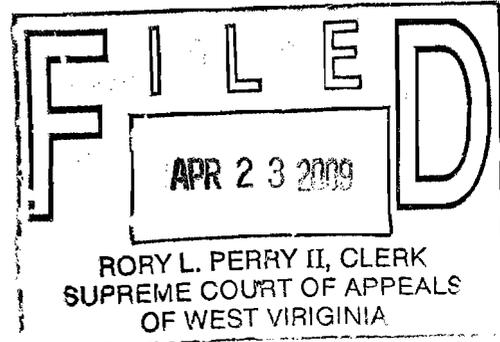


IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

PUTNAM BANCSHARES, INC.,  
a West Virginia corporation  
d/b/a PUTNAM COUNTY BANK and  
T.C.'S USED CARS, LLC, a West  
Virginia limited liability company,

Appellees,



v.

No. 34769

PROGRESSIVE CLASSIC INSURANCE COMPANY,

Appellant.

**BRIEF ON BEHALF OF**  
**PROGRESSIVE CLASSIC INSURANCE COMPANY**

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TABLE OF CONTENTS

	<u>Page</u>
TABLE OF AUTHORITIES	ii
KIND OF PROCEEDING AND NATURE OF RULING IN THE CIRCUIT COURT OF PUTNAM COUNTY	1
STATEMENT OF FACTS	3
ASSIGNMENT OF ERROR	9
STANDARD OF REVIEW	9
DISCUSSION	9
I. The Circuit Court erroneously relied upon <i>Dairyland v. Conley</i> to conclude that an offer to renew an existing policy created a new contract of insurance.	9
II. Offering to renew an existing contract of insurance does not result in the formation of a new contract of insurance.	15
A. Under basic tenets of contract law, an offer to renew an insurance policy does not create a new contract.	15
B. West Virginia law recognizes a distinction between an offer to renew an existing policy of insurance and the formation of a new insurance contract.	17
CONCLUSION	27
PRAYER FOR RELIEF	27

## TABLE OF AUTHORITIES

<u>Cases</u>	<u>Page</u>
<i>Adamson v. State Farm Mutual Automobile Insurance Company</i> , 676 So.2d 227 (La. Ct. App. 1996)	21
<i>American Modern Home Insurance Company v. Corra</i> , ___ W. Va. ___, 671 S.E.2d 802 (2008)	9
<i>Boone v. Standard Accident Insurance Company of Detroit</i> , 192 Va. 672, 66 S.E.2d 530 (1951)	16
<i>Burrows v. Nationwide Mutual Insurance Company</i> , 215 W. Va. 668, 600 S.E.2d 565 (2004)	17
<i>Dairyland Insurance Company v. Conley</i> , 218 W. Va. 252, 624 S.E.2d 599 (2005)	8, 10-14, 18-19
<i>Horace Mann Insurance Company v. Shaw</i> , 175 W. Va. 671, 337 S.E.2d 908 (1985)	18
<i>Kane v. American Insurance Company</i> , 52 Conn. App. 497, 725 A.2d 1000 (1999), <i>aff'd</i> , 252 Conn. 113, 743 A.2d 612 (2000)	21-23
<i>Knapp v. Independence Life &amp; Accident Insurance Company</i> , 146 W. Va. 163, 118 S.E.2d 631 (1961)	15
<i>Mazon v. Camden Fire Insurance Association</i> , 182 W. Va. 532, 389 S.E.2d 743 (1990)	15
<i>Monteleone v. Allstate Insurance Company</i> , 51 Cal. App.4th 509, 59 Cal. Rptr.2d 48 (1996)	23-24
<i>Painter v. Peavy</i> , 192 W. Va. 189, 451 S.E.2d 755 (1994)	9
<i>Pennington v. Allstate Insurance Company</i> , 202 W. Va. 178, 503 S.E.2d 267 (1998)	26
<i>Preferred Risk Inc. Company v. Central Surety &amp; Insurance Corporation</i> , 191 F. Supp. 797 (W.D. Ark. 1961)	16
<i>Sheppard v. Farmers' Mutual Fire Association of West Virginia</i> , 106 W. Va. 177, 145 S.E. 181 (1928)	15
<i>Smith v. Southeastern Fidelity Insurance Company</i> , 171 Ga. App. 26, 318 S.E.2d 708 (1984)	23

<u>Cases</u>	<u>Page</u>
<i>Tennant v. Smallwood</i> , 211 W. Va. 703, 568 S.E.2d 10 (2002)	9

Statutes

W. Va. Code §17D-2A-4	10
W. Va. Code §17D-2A-4(a)	20
W. Va. Code §33-6A-1	8, 12
W. Va. Code §33-6A-1(e) (7)	3, 8, 10, 13, 14, 19, 23, 27
W. Va. Code §33-6A-4	2, 14, 17, 18, 25
W. Va. Code §33-6A-4(b)	17, 18
W. Va. Code §33-6A-4(e)	6, 25, 26

Other Authority

43 Am. Jur.2d <i>Insurance</i> § 392 (2008)	16
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**KIND OF PROCEEDING AND NATURE OF RULING  
IN THE CIRCUIT COURT OF PUTNAM COUNTY**

This appeal became necessary due to the Circuit Court's confusion over the distinction between renewal of an existing automobile liability insurance policy and the issuance of a new automobile liability insurance policy. Although the Circuit Court of Putnam County correctly found that a policy issued by Progressive Classic Insurance Company ["Progressive Classic"] to Terry Daniel, Jr. expired as a result of Mr. Daniel's failure to accept Progressive Classic's offer to renew his policy, the lower court erroneously found that Progressive Classic's mere offer to renew the policy resulted in the formation of a new insurance contract.

After the policy expired, Mr. Daniel was involved in an accident which resulted in property damage to his vehicle. Putnam Bancshares, Inc. d/b/a Putnam County Bank ["the Bank"], as loss payee under the policy, made a claim for the property damage. Progressive Classic denied the claim as the policy expired prior to the loss because Mr. Daniel had not accepted Progressive Classic's offer to renew his policy.

On December 5, 2007, the Bank and T.C.'s Used Cars, LLC filed suit against Progressive Classic in the Circuit Court of Putnam County, West Virginia.<sup>1</sup> In the complaint, the Bank

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<sup>1</sup>T.C.'s Used Cars had entered into a Commercial Guaranty, in favor of the Bank, guaranteeing repayment of the amount the

claimed that Progressive Classic did not give it advance notice of non-renewal of the policy, as required under W. Va. Code §33-6A-4. Progressive Classic disputed this characterization, for it offered to renew Mr. Daniel's policy, but he failed to accept the offer and allowed the policy to expire.

The parties filed cross-motions for summary judgment. Progressive Classic argued that the Bank lacked standing, inasmuch as it had been fully compensated by T.C.'s Used Cars for the loan balance. The Circuit Court agreed and granted Progressive Classic's summary judgment motion on that issue, dismissing the Bank from the action.

The other issue presented by cross-motions for summary judgment was whether the policy issued by Progressive Classic expired due to Mr. Daniel's failure to accept Progressive Classic's offer to renew the policy. T.C.'s Used Cars argued that Progressive Classic cancelled the policy and failed to give the Bank notice of cancellation. The Circuit Court agreed with Progressive Classic that Mr Daniel's policy expired at the end of the policy period, but erroneously found that Progressive Classic's offer to renew Mr. Daniel's policy resulted in the creation of a new policy. The lower court therefore held that Progressive Classic was required to give the Bank ten days

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Bank loaned to Mr. Daniel. Pursuant to the Commercial Guaranty, T.C.'s Used Cars paid the Bank the balance due upon Mr. Daniel's loan.

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notice of cancellation of the policy, pursuant to W. Va. Code §33-6A-1(e)(7).

By Order Granting Putnam Bancshares Inc.'s Motion for Summary Judgment and Granting in Part and Denying in Part Defendant Progressive Classic Insurance Company's Motion for Summary Judgment ["Summary Judgment Order"], the lower court granted judgment in favor of T.C.'s Used Cars in the amount of \$14,390.43, plus pre-judgment and post-judgment interest, as well as costs. Progressive Classic petitioned this Court for an appeal of the lower court's Summary Judgment Order and by Order entered March 26, 2009, this Court granted Progressive Classic's Petition for Appeal.

#### STATEMENT OF FACTS

The essential facts surrounding this appeal are undisputed. On August 24, 2006, the Bank loaned Mr. Daniel funds for the purchase of a 2004 Chevrolet Silverado from T.C.'s Used Cars. (See Ex. A, Note, Disclosure and Security Agreement.)<sup>2</sup> As part of that transaction, Mr. Daniel signed an Agreement to Provide Insurance, obligating himself to provide comprehensive and collision insurance upon the vehicle, with the Bank named as the loss payee. (See Ex. B, Agreement to Provide Insurance.) In addition, T.C.'s Used Cars executed a Commercial Guaranty, in

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<sup>2</sup>Unless otherwise indicated, references to exhibits are to those exhibits attached to Progressive Classic's Motion for Summary Judgment.

favor of the Bank, guaranteeing repayment of the amount loaned to Mr. Daniel. (See Ex. C, Commercial Guaranty.)

On August 23, 2006, Mr. Daniel obtained automobile liability insurance from Progressive Classic upon the Chevrolet Silverado. Progressive Classic issued policy number 16793267-0 which provided coverage upon the 2004 Chevrolet Silverado, as well as upon a 1999 Ford Windstar van, for a policy period of August 23, 2006 to February 23, 2007. (See Ex. G, Progressive Classic policy 16793267-0.) Mr. Daniel made an initial payment of \$424.43 on August 23, 2006, and chose to pay the remainder of the premium through a payment plan. (See Ex. D, Tiffany Burton Aff.)

Mr. Daniel made a premium payment on December 4, 2006, in the amount of \$523.36. (See Ex. D, Tiffany Burton Aff.) Effective December 5, 2006, there were certain changes to the policy which resulted in a slight premium increase. (See Ex. D, Tiffany Burton Aff.) Progressive Classic sent Mr. Daniel a bill on December 7, 2006, advising that his premium had changed and that his payment of \$729.71 was due by December 23, 2006. (See Ex. D, Tiffany Burton Aff., Ex. 1 attached thereto.) A "Payment Reminder" was sent to Mr. Daniel on December 24, 2006, advising that his payment was past due. (See Ex. D, Tiffany Burton Aff., Ex. 2 attached thereto.)

Mr. Daniel failed to pay the premium amount due and on January 4, 2007, a Cancel Notice was mailed to him, informing him that due to his failure to pay the premium, the policy would be cancelled on February 4, 2007. (See Ex. D, Tiffany Burton Aff., Ex. 3 attached thereto.) The policy cancelled on February 4, 2007, but was reinstated on February 8, 2007, when Mr. Daniel paid \$729.71. (See Ex. D, Tiffany Burton Aff., Exs. 4 and 5 attached thereto.)<sup>3</sup>

Prior to that, on January 29, 2007, Progressive Classic provided Mr. Daniel with a renewal bill. (See attached Ex. D., Tiffany Burton Aff., Ex. 6 attached thereto.) The renewal bill reminded him that his policy period was August 23, 2006 to February 23, 2007. *Id.* He further was advised that although he needed to pay \$729.71 to avoid cancellation of his policy on February 4, 2007, if he wished to renew his policy for the next policy period, a minimum payment of \$324.50 was necessary. *Id.* The "Renewal Declarations Page" provided to Mr. Daniel on January 29, 2007, unequivocally warned him that "[t]he coverage, limits and policy period shown apply only if you pay for this policy to renew." *Id.*

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<sup>3</sup>There is no dispute over the payment history upon Mr. Daniel's policy nor the propriety of the cancellation and subsequent reinstatement of the policy during the August 23, 2006 through February 23, 2007, policy period.

Having not received a renewal premium payment from Mr. Daniel, on February 9, 2007, Progressive Classic sent him a "Renewal Reminder", which advised him that his insurance "will expire on February 23, 2007 at 12:01 a.m." (See Ex. D, Tiffany Burton Aff., Ex. 7 attached thereto.) The "Renewal Reminder" further informed Mr. Daniel that to avoid a lapse in coverage, he needed to make a payment postmarked by February 25, 2007, to renew the policy for the next six month policy period of February 23, 2007 to August 23, 2007. *Id.*

Mr. Daniel did not pay the renewal premium nor any part thereof by February 25, 2007. (See Ex. D, Tiffany Burton Aff.) As a result, the policy expired as of February 23, 2007, and was not in effect February 27, 2007. (See Ex. D, Tiffany Burton Aff.)

On February 27, 2007, Mr. Daniel was operating the 2004 Chevrolet Silverado when he was involved in an accident. Due to the expiration of the Progressive Classic policy and Mr. Daniel's failure to renew the same, there was no insurance coverage upon the vehicle, which apparently was a total loss. On February 28, 2007, after the loss, Mr. Daniel paid the minimum amount premium amount necessary to renew the policy. (See Ex. D, Tiffany Burton Aff.) In keeping with W. Va. Code §33-6A-4(e), Progressive Classic renewed the policy, but there was a

lapse in coverage from February 23, 2007, until March 1, 2007.  
*Id.*

After Mr. Daniel's accident, the Bank made a claim with Progressive Classic to recover for the loss of the vehicle. Progressive Classic denied the Bank's claim because the policy expired prior to the accident. Thereafter, T.C.'s Used Cars, pursuant to the Commercial Guaranty, paid the Bank \$14,390.43, which allegedly represented the balance due upon the loan to Mr. Daniel. (Compl., ¶ 9.)

On December 5, 2007, the Bank and T.C.'s Used Cars filed suit against Progressive Classic in the Circuit Court of Putnam County, West Virginia. The Bank acknowledged in the complaint that the note had been paid by T.C.'s Used Cars and the debt owed by Mr. Daniel had been retired. (Compl., ¶ 9.) Despite the fact the Bank had not sustained any loss, it, together with T.C.'s Used Cars, sought recovery of \$14,390.43. (Compl., ¶¶ 8, 9.)

Initially, the Bank and T.C.'s Used Cars claimed that Progressive Classic failed to give the Bank, as loss payee, forty-five days notice of its "election not to renew" the policy. (Compl., ¶ 7.) After apparently realizing that Progressive Classic properly offered to renew Mr. Daniel's policy, but he failed to accept that offer, they subsequently shifted their focus. By the time they filed their summary

judgment motion, the Bank and T.C.'s Used Cars claimed that Progressive Classic's offer to renew Mr. Daniel's policy for the next policy period constituted the issuance of a new policy of insurance, which required Progressive Classic to give the Bank ten days notice of cancellation of the so-called "new" policy under W. Va. Code §33-6A-1(e) (7).

The parties filed cross-motions for summary judgment. By Summary Judgment Order entered September 19, 2008, the Circuit Court granted Progressive Classic's Motion for Summary Judgment as it pertained to the Bank's lack of standing to pursue this action and dismissed the Bank as a party. Progressive Classic does not dispute that finding.

The lower court, however, mistakenly found that Progressive Classic's offer to renew Mr. Daniel's policy resulted in the creation of a new policy. Thus, the Circuit Court erroneously applied W. Va. Code §33-6A-1 and *Dairyland Insurance Company v. Conley*, 218 W. Va. 252, 624 S.E.2d 599 (2005), to conclude that Progressive Classic was required to give the Bank ten days notice of cancellation even though Mr. Daniel had not accepted the offer to renew and there was no policy in existence to be cancelled. As a result, the lower court erred in granting judgment in favor of T.C.'s Used Cars. By Order entered March 26, 2009, this Court granted Progressive Classic's Petition for

Appeal from the portion of the Summary Judgment Order which granted judgment in favor of T.C.'s Use Cars.

**ASSIGNMENT OF ERROR**

The lower court erred by concluding that Progressive Classic's offer to renew Mr. Daniel's policy resulted in the creation of a new policy, thereby triggering an obligation to give the loss payee ten days notice of cancellation.

**STANDARD OF REVIEW**

A *de novo* standard of review is utilized when reviewing a lower court's entry of summary judgment. Syllabus Point 1, *Painter v. Peavy*, 192 W. Va. 189, 451 S.E.2d 755 (1994). When, as in the instant case, the facts are not in dispute, and the issue is purely a question of law, a *de novo* review is used. *American Modern Home Ins. Co. v. Corra*, \_\_\_ W. Va. \_\_\_, \_\_\_, 671 S.E.2d 802, 804 (2008); *Tennant v. Smallwood*, 211 W. Va. 703, 706-07, 568 S.E.2d 10, 13-14 (2002).

**DISCUSSION**

**I. The Circuit Court erroneously relied upon *Dairyland v. Conley* to conclude that an offer to renew an existing policy created a new contract of insurance.**

The Circuit Court correctly concluded that the Progressive Classic policy expired on February 23, 2007, because Mr. Daniel failed to pay the renewal premium to extend the policy for the next six month policy period of February 23, 2007, to August 23, 2007. (Summary Judgment Order, p. 11.)

Inexplicably, however, the lower court also concluded that by offering to renew Mr. Daniel's policy, Progressive Classic had issued a new policy of insurance to him and was required to provide a notice of cancellation of that phantom policy, under W. Va. Code 33-6A-1(e)(7). The lower court's ruling misconstrues this Court's holding in *Dairyland Insurance Company v. Conley*, 218 W. Va. 252, 624 S.E.2d 599 (2005).

According to the lower court, merely offering to renew Mr. Daniel's policy and providing him, pursuant to the requirements of W. Va. Code §17D-2A-4, with a certificate of insurance for a new policy period, resulted in the creation of a new contract of insurance. On the basis of this incorrect premise, the Circuit Court concluded that pursuant to *Conley*, Progressive Classic was required to give Mr. Daniel and, therefore, the Bank, ten days notice of its intent to cancel the policy. The flaw in this reasoning is that no new contract of insurance was created and, therefore, the principles enunciated in *Conley* do not apply.

A crucial distinction between the circumstances of this case and the situation in *Conley* is that in *Conley*, a contract of insurance had been issued because coverage had been bound, and, therefore, this Court concluded that notice of cancellation of that contract was required. In this case, the Progressive Classic policy had expired. There was no policy in

effect and, therefore, nothing for Progressive Classic to cancel.

In *Conley*, the insured, Stephanie Conley, completed an application for automobile liability insurance with West Virginia National Auto Insurance Company ["West Virginia National"] on August 15, 2001. Significantly, the application advised that coverage would be bound on the date and time the application was signed by the applicant/insured. *Id.* at 254, 624 S.E.2d at 601.

As a result, West Virginia National issued an automobile liability insurance policy to Ms. Conley for a policy period of August 15, 2001 to February 15, 2002. *Id.* at 254, 624 S.E.2d at 601. On August 31, 2001, Ms. Conley was involved in an accident, but West Virginia National refused to provide coverage for her. *Id.* Instead, West Virginia National advised Ms. Conley that the check she tendered for her initial premium payment had not been honored by her bank, due to insufficient funds, and it was rescinding the policy as of August 15, 2001. *Id.* at 254-55, 624 S.E.2d at 601-02.

In *Conley*, unlike the instant case, the insurer actually had bound coverage, as of August 15, 2001, and then attempted to rescind that coverage on the basis of the insufficient funds check submitted by the insured. On that basis, this Court held that a policy was in force and, in order to cancel that policy, the insurer was required to give ten days notice of

cancellation. This Court agreed with Ms. Conley's position that when an "insurance company chooses to issue a new automobile liability policy to a new customer, and there is later a failure of consideration to be paid by the customer in any fashion, *W.Va.Code*, 33-6A-1 requires the insurance company to afford the customer ten days notice before terminating the policy." [Emphasis supplied]. *Id.* at 256-57, 624 S.E.2d at 603-04.

In discussing the legislative history behind *W. Va. Code* §33-6A-1, the *Conley* Court recognized that in 1982, "the Legislature adopted language into *W.Va.Code*, 33-6A-1 which was intended to reduce from thirty days to ten days the notice required to be given to a new insurance customer" when the policy was cancelled for failure of consideration upon the initial issuance of the policy. [Emphasis supplied]. *Id.* at 263, 624 S.E.2d at 610. The *Conley* Court explained:

We believe that the legislative history behind the enactment and modification of the statute makes the Legislature's intent clear: if an insurance company chooses to issue a new policy of automobile liability insurance to an insured, and the insured fails to pay the initial premium or otherwise provide necessary consideration for the new policy, the insurance company may cancel the policy. However, the cancellation of the policy can take effect no earlier than ten days after notice of the cancellation is provided to the insured.

*Id.* at 265, 624 S.E.2d at 612.

In this case, however, Mr. Daniel's policy expired at the end of the policy period and Progressive Classic had not

bound coverage for the next policy period of February 23, 2007, through August 23, 2007. Instead, Progressive Classic had offered to renew his policy, but Mr. Daniel did not accept that offer because he failed to pay the renewal premium. In other words, unlike the situation in *Conley*, there was no policy in effect that Progressive Classic could have cancelled. As the lower court correctly found, the Progressive Classic policy expired at the end of the policy period due to Mr. Daniel's failure to accept the offer to renew. (Summary Judgment Order, p. 11.)

Despite correctly holding that the policy had expired, the lower court mistakenly relied upon *Conley*, to conclude there was a new policy in effect which required notice of cancellation. The *Conley* Court did discuss nor analyze an offer to renew an existing policy and the insured's failure to accept that offer.<sup>4</sup> Instead, as explained by the *Conley* Court, the ten day notice of cancellation provision of W. Va. Code §33-6A-1(e)(7) applies only in instances where the insurer "chooses to issue a new policy of automobile liability insurance" and "the

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<sup>4</sup>As a matter of fact, after concluding West Virginia National did not properly cancel the policy, the *Conley* Court reiterated that when there has been an invalid cancellation of the policy, the policy remains in effect until either there is a valid cancellation notice or "until the end of its term." *Id.* at Syllabus Point 4. Thus, this Court recognized that unless renewed, a policy expires at the end of the policy period.

insured fails to pay the initial premium" for "the new policy."  
*Id.*

W. Va. Code §33-6A-1(e)(7) provides, in part, "That cancellation of the insurance policy by the insurer for failure of consideration to be paid by the insured upon initial issuance of the insurance policy is effective upon expiration of ten days' notice of cancellation to the insured." Thus, in order to fit that portion of W. Va. Code §33-6A-1(e)(7) within the parameters of this case, the lower court necessarily found that Progressive Classic's offer to renew Mr. Daniels' policy constituted the "initial issuance of the insurance policy." That finding is erroneous as a matter of law.

Progressive Classic did not issue a new policy to Mr. Daniel, after the initial policy was issued on August 23, 2006. Instead, Progressive Classic offered to renew that existing policy, in compliance with W. Va. Code §33-6A-4, for the next six month policy period of February 23, 2007 to August 23, 2007. Progressive Classic's offer to renew Mr. Daniel's policy was not the issuance of a new policy to him -- it was an offer to renew an existing policy. The lower court's finding, in reliance upon *Conley*, that the offer to renew constituted the initial issuance of a new policy was incorrect.

**II. Offering to renew an existing contract of insurance does not result in the formation of a new contract of insurance.**

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**A. Under basic tenets of contract law, an offer to renew an insurance policy does not create a new contract.**

Fundamental principles of contract law apply to insurance contracts, including the essential element that no contract is formed absent an offer and acceptance of that offer. *Mazon v. Camden Fire Ins. Ass'n*, 182 W. Va. 532, 533-34, 389 S.E.2d 743, 744-45 (1990); *Knapp v. Independence Life & Acc. Ins. Co.*, 146 W. Va. 163, 171-72, 118 S.E.2d 631, 636 (1961). The lower court's finding that an offer to renew, which was not accepted, created a new contract of insurance contradicts this well-settled law.

This Court long ago recognized that renewal of a policy "does not make a new contract, but simply continues the policy for the extended term subject to its then condition and the right of recovery thereon as it existed at the time of the renewal supplement." Syllabus Point, *Sheppard v. Farmers' Mut. Fire Ass'n of West Virginia*, 106 W. Va. 177, 145 S.E. 181 (1928). Thus, even if Mr. Daniel had accepted the offer to renew and paid the renewal premium, a new insurance contract would not have been created. Instead, there would have been a continuation of the original contract for an additional six months.

"A mere offer to renew the policy, in order to bind the insurance company, must be accepted before a loss thereunder has occurred." 43 Am. Jur.2d Insurance § 392 (2008). An offer to renew must be accepted by the insured in order for the contract to be renewed:

Normally, in insurance cases the offer is made by application of the insurance and acceptance is manifested by delivery of the policy by the insurer. The unsolicited delivery of a renewal policy prior to the expiration of the original policy, as in this case, is not an acceptance, but an offer, and no contract of renewal is created unless acceptance by the insured is expressly made or necessarily inferred.

*Preferred Risk Ins. Co. v. Central Surety & Ins. Corp.*, 191 F. Supp. 797, 801 (W.D. Ark. 1961). See also *Boone v. Standard Acc. Ins. Co. of Detroit*, 192 Va. 672, 66 S.E.2d 530 (1951) (It is essential to the formation of a contract of insurance that there be an offer and acceptance.)

By finding that Progressive Classic's offer to renew Mr. Daniel's policy created a new contract of insurance, the lower court ignored these principles. Not only does an offer to renew an existing contract not result in the formation of a new contract, but before the renewal is effective there must be acceptance of the offer to renew. In this case, Progressive Classic's offer to renew Mr. Daniel's policy did not result in the formation of a new insurance contract and because that offer was not accepted, the original contract was not renewed. Thus, the lower court incorrectly concluded that Progressive Classic's

offer to renew the existing policy of insurance resulted in the formation of a new contract.

**B. West Virginia law recognizes a distinction between an offer to renew an existing policy of insurance and the formation of a new insurance contract.**

As recognized by both case law and statute, renewal of a policy or offering to renew a policy is not the same as issuing a new policy. This Court has recognized the benefits to the insured of renewing an existing policy versus being issued a completely new policy:

[T]here are specific monetary and contractual reasons why it is preferable for insureds in many situations to continue their insurance coverage under an existing policy rather than to apply for a new policy. These factors include premium discounts and a policy of first-time accident forgiveness that are extended to long-term insureds, as well as a prohibition against cancellation and nonrenewal. [Footnote omitted].

*Burrows v. Nationwide Mut. Ins. Co.*, 215 W. Va. 668, 676, 600 S.E.2d 565, 573 (2004).

The Legislature explicitly recognized the benefits of renewing an automobile liability insurance policy and through W. Va. Code §33-6A-4, enacted safeguards to protect a policyholder whose policy has been in existence for more than two years. Pursuant to W. Va. Code §33-6A-4(b) an insurer cannot fail to "renew an outstanding automobile liability or physical damage policy" which has been in existence for two consecutive years or more, except for certain specified reasons. The Legislature did not contemplate each renewal policy period would involve the

issuance of a totally new policy of insurance to the insured for doing so would undermine the very purpose of W. Va. Code §33-6A-4(b).

If the Circuit Court's reasoning applied, W. Va. Code §33-6A-4(b) would be meaningless. A new policy would be created for each policy period and there would be no renewal of existing policies. The Circuit Court's ruling deprives insureds of the protections and benefits afforded by W. Va. Code §33-6A-4(b). See *Horace Mann Ins. Co. v. Shaw*, 175 W. Va. 671, 674-75, 337 S.E.2d 908, 912 (1985) (W. Va. Code §33-6A-4 reflects "obvious Legislative intent to afford an insured protection, under certain circumstances, from an insurer's nonrenewal of an automobile liability or physical damage insurance policy.")

The lower court also mistakenly concluded that by providing Mr. Daniel with a "Renewal Bill", a certificate of insurance and a "Renewal Declarations Page" which indicated a policy period of February 23, 2007 through August 23, 2007, Progressive Classic issued a new contract of insurance to Mr. Daniel. Unlike the situation in *Conley, supra*, Mr. Daniel was not informed that Progressive Classic bound coverage for the policy period of February 23, 2007 to August 23, 2007. He, instead, was informed on two separate occasions of the impending expiration of his policy unless he chose to renew the same.

The Circuit Court relied upon *Conley* to support the conclusion that providing renewal documents to an insured results in the creation of an insurance contract. In actuality, the discussion upon which the lower court relied was a portion of the *Conley* Court's analysis of the historical underpinnings of W. Va. Code §33-6A-1(e) (7):

Taken one step further, and read literally, it appears that the 1981 variation of *W.Va.Code*, 33-6A-1(e) (7) had an even more far-reaching financial effect on the insurance industry than what was shown in *Bailey*. The 1981 amendments placed the insurance industry in the position of providing thirty days or more of insurance coverage to individuals who had not only missed a premium payment, but who had never made an initial premium payment in the first place. In other words, if an insured failed to even attempt to make a premium payment with his or her insurance application, but the insurance company still chose to issue documentation evidencing that liability coverage existed on the date the application was completed, then under the 1981 amendments, the insured, the commissioner of motor vehicles, and the general public were entitled to presume that the insurance customer was insured up to the limits of the policy. Even though the insured had never paid a dime in premiums, the policy could not be properly cancelled until thirty days after the insurance company gave notice that the policy was being cancelled.

The Legislature, realizing this effect of its 1981 amendment, reacted quickly to ameliorate its effect on the insurance industry.

*Conley* at 263, 624 S.E.2d at 610.

The *Conley* Court's historical overview does not support the lower court's conclusion that a mere offer to renew creates a new policy. The Circuit Court, moreover, failed to explain how the lack of acceptance of that offer to renew con-

ceivably could create a new contract. The crucial element of acceptance is lacking, which negates the lower court's conclusion that a new contract was created.

Furthermore, the certificates of insurance provided to Mr. Daniel did not operate to renew the policy absent payment of the renewal premium by Mr. Daniel, but were required under West Virginia law. W. Va. Code §17D-2A-4(a) mandates that insurers "transacting insurance in this state shall supply a certificate to the insured ... certifying that there is in effect a motor vehicle liability policy upon such motor vehicle."

Accordingly, under W. Va. Code §17D-2A-4(a), Progressive Classic was required to provide Mr. Daniel with a certificate of insurance. Because the initial policy period did not end until February 23, 2007, and Progressive Classic had no way of knowing whether Mr. Daniel would renew his policy, it was necessary for Progressive Classic to send the certificates of insurance to him with the "Renewal Bill." That way, if Mr. Daniel renewed his policy for the February 23, 2007 to August 23, 2007, policy period, he would have the mandatory certificate of insurance for the new policy period.<sup>5</sup>

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<sup>5</sup>The lower court's focus on the issuance of the certificate of coverage as evidencing an effective policy, does not take into consideration that a certificate can exist even though the policy has properly been cancelled, either by the insurer or the insured. In such circumstances, the insured does not return the certificate to the insurer and the certificate still states that coverage is in effect, even though the policy is not in force.

In a strikingly similar situation, the Court in *Adamson v. State Farm Mutual Automobile Insurance Co.*, 676 So.2d 227 (La. Ct. App. 1996), rejected the argument that the issuance of a certificate of coverage indicated there had been a renewal of the policy. The *Adamson* Court noted that a Louisiana statute, similar to W. Va. Code 17D-2A-4, required insurers to provide insurance identification cards and required motorists to keep such cards within their vehicles. *Id.* at 233. The Court agreed with State Farm that "identification cards are provided to the insured to fulfill his obligation under LSA-R.S. 32:863.1, not to acknowledge actual renewal of the policy." *Id.* As a practical matter and as a general practice within the insurance industry, "identification cards are issued in anticipation of renewal and are sent to the insured with the renewal notice or sometime shortly after the notice is sent." *Id.*

In *Kane v. American Insurance Company*, 52 Conn. App. 497, 725 A.2d 1000 (1999), *aff'd*, 252 Conn. 113, 743 A.2d 612 (2000), the Court held that statutory notice of cancellation is not required when, as in the instant case, an offer to renew, including the issuance of policy documentation, has been made, but not accepted by the insured. The insurer in *Kane* issued an automobile liability insurance policy with an expiration date of July 8, 1995. *Id.* at 499, 725 A.2d at 1001. Prior to the expiration of the policy, American Insurance Company sent the

insured a letter "along with personal automobile policy summary and declarations sheets and a policy premium billing statement." *Id.* The insured failed to pay the premium amount and the insurer provided her with a final lapse notice, but did not send her a statutory cancellation notice. *Id.*

After she was involved in an accident, the insured contested American Insurance Company's claim that the policy had lapsed prior to the accident, arguing that the mailing of the renewal policy by American Insurance constituted the issuance of a six month renewal policy and, therefore, American Insurance was required to provide a statutory cancellation notice. *Id.* at 499-500, 725 A.2d at 1001. The Kane Court held otherwise. The Court noted that the underlying policy, like the policy in this case, expired, but before expiration, the insurer sent a letter, a policy summary, declaration page and a premium billing statement to the insured. *Id.* at 501, 725 A.2d at 1002. The Court explained that this constituted an offer to renew the policy, which would automatically expire unless the renewal premium was paid. *Id.* The insured failed to accept the offer to renew the contract of insurance, inasmuch as she did not pay the renewal premium by the due date. *Id.* at 502, 725 A.2d at 1002.

The Court rejected the argument that mailing of the renewal documents constituted the issuance of a new policy, thereby triggering the statutory obligation to provide notice of

cancellation. *Id.* at 502, 725 A.2d at 1002-03. Noting the purpose of the statutorily required notice of cancellation, similar to W. Va. Code §33-6A-1(e)(7), was to ensure that prior to cancellation, the insured had clear and unambiguous notice of cancellation, the *Kane* Court explained that because the insured had not renewed the policy, there was no policy to cancel:

Kane never sent the defendant a payment, partial or otherwise. Therefore, since Kane's contract of insurance terminated on July 8, 1995, and since she did not accept the defendant's offer of renewal by paying the premium, the defendant was not required to cancel the policy. In other words, because no renewal was in effect, no written notice of cancellation was required.

*Id.* at 503, 725 A.2d at 1003. See also *Smith v. Southeastern Fid. Ins. Co.*, 171 Ga. App. 26, 318 S.E.2d 708 (1984) (When the insurer manifested willingness to renew policy, but insured failed to pay renewal premium, policy lapsed and no statutory notice of cancellation required).

Likewise, the Court in *Monteleone v. Allstate Insurance Company*, 51 Cal. App.4th 509, 59 Cal. Rptr.2d 48 (1996), rejected the former insureds' argument that a policy declarations page which indicated that the policy was in force at the time of the accident controlled, notwithstanding that the insureds had not paid the renewal premium. The Court noted that the renewal offer, like the renewal offer provided by Progressive Classic, clearly indicated that "the insurance described in the document would not go into effect unless the premium was

paid by the date shown, ..." *Id.* at 516, 59 Cal. Rptr.2d at 52.

As with every contract, "[i]n order to renew an insurance policy, there must be both an offer and an acceptance."

*Id.* The Court concluded that the former insureds' failure to remit the renewal premium by the due date was a failure to accept the offer of renewal and resulted in a lapse of the policy. *Id.*

The same analysis applies in the instant case. On January 29, 2007, Progressive Classic mailed Mr. Daniel an offer to renew his policy, which would expire on February 23, 2007. That offer to renew, like the offer in *Kane*, also included a copy of the Renewal Declarations Page and the certificate of coverage. In addition, Progressive Classic sent Mr. Daniel a "Renewal Reminder" on February 9, 2007, again advising him that his policy would expire on February 23, 2007, unless he paid the renewal premium.

The lower court correctly found that the policy expired on February 23, 2007, because Mr. Daniel did not accept the offer to renew and did not pay the renewal premium. However, the lower court was incorrect in its conclusion that providing Mr. Daniel with an offer to renew the policy constituted the creation of a new contract. As in *Kane*, Progressive Classic simply offered to renew Mr. Daniel's policy. It did not issue a new policy to him.

The Circuit Court's conclusion to the contrary ignores the statutory framework relating to renewal and non-renewal of automobile liability insurance policies. In addition to setting forth certain criteria regulating when and how an insurer may non-renew an automobile liability policy, W. Va. Code §33-6A-4 also addresses situations where the insured fails to renew the policy and the policy expires:

Notwithstanding the provisions of subsection (a) of this section, the insurer shall reinstate any automobile liability or physical damage insurance policy that has not been renewed due to the insured's failure to pay the renewal premium when due if:

- (1) None of the other grounds for nonrenewal as set forth in this section exist; and
- (2) The insured makes an application for reinstatement within forty-five days of the original expiration date of the policy. If a policy is reinstated as provided for in this paragraph, then the coverage afforded shall not be retroactive to the original expiration date of the policy: *Provided*, That such policy shall be effective on the reinstatement date at the current premium levels offered by the company and shall be not afforded the protections of this section relating to renewal of an outstanding automobile liability or physical damage insurance policy that has been in existence for at least two consecutive years.

W. Va. Code §33-6A-4(e).

W. Va. Code §33-6A-4(e) explicitly recognizes that an insured's failure to pay the renewal premium is a failure to accept the offer to renew, which results in expiration of the policy. In such situations, the former insured may apply for reinstatement of the policy, which is exactly what happened in this case. On February 28, 2007, after the policy expired and

after the accident which damaged his vehicle, Mr. Daniel paid the premium. Pursuant to W. Va. Code §33-6A-4(e), the policy was reinstated, with a lapse in coverage from February 23, 2007 to March 1, 2007.

This Court has recognized that a policy may lapse due to the insured's failure to pay the renewal premium and that W. Va. Code §33-6A-4(e) "makes mandatory that once an initial policy has lapsed, any renewal policy begins coverage on the renewal date." *Pennington v. Allstate Ins. Co.*, 202 W. Va. 178, 180, 503 S.E.2d 267, 269 (1998). The Circuit Court's decision renders W. Va. Code §33-6A-4(e) superfluous. If, as the lower court held, a mere offer to renew the policy constitutes the formation of a new insurance contract, then there would be no need for the provisions and protections of W. Va. Code §33-6A-4(e). W. Va. Code §33-6A-4(e) would serve no purpose because no policy would ever lapse due to the insured's failure to accept the renewal offer. Instead, every policy would be automatically renewed based solely on an offer to renew. That cannot be what the Legislature envisioned when it enacted W. Va. Code §33-6A-4.

Progressive Classic offered to renew Mr. Daniel's policy. He did not accept that offer and, therefore, the policy expired. The offer to renew did not result in the formation of a new contract. The policy expired by its own terms and there was no policy in effect which could be subject to the notice of

cancellation requirements of W. Va. §33-6A-1(e)(7). There was no policy and, therefore, nothing to cancel.

**CONCLUSION**

The Circuit Court of Putnam County, West Virginia, erred when it concluded that Progressive Classic's mere offer to renew Mr. Daniel's policy for the policy period of February 23, 2007, to August 23, 2007, resulted in the issuance of a new insurance policy. As a result of erroneously concluding that a new contract was formed, the Circuit Court also incorrectly held that Progressive Classic was required to give the Bank ten days notice of cancellation of the policy when the policy had, in fact, expired and there was no policy in existence which could be cancelled.

**PRAYER FOR RELIEF**

Your appellant, Progressive Classic Insurance Company, respectfully requests that this Court reverse the lower court's ruling granting summary judgment in favor of T.C.'s Used Cars, LLC and direct the lower court to enter judgment in favor of Progressive Classic Insurance Company and against T.C.'s Used Cars, LLC.

Respectfully submitted,

A handwritten signature in black ink, appearing to be 'JH', enclosed within a large, loopy circular flourish.

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IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

PUTNAM BANCSHARES, INC.,  
a West Virginia corporation  
d/b/a PUTNAM COUNTY BANK and  
T.C.'S USED CARS, LLC, a  
West Virginia limited liability  
company,

Appellees,

v.

NO.: 34769

PROGRESSIVE CLASSIC INSURANCE COMPANY,

Appellant.

CERTIFICATE OF SERVICE

The undersigned, of counsel for appellant, Progressive Classic Insurance Company, does hereby certify that the foregoing Brief on Behalf of Progressive Classic Insurance Company was this day served upon the following by mailing a true copy of the same this date, postage prepaid, to:

Christopher S. Smith, Esquire  
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Done this 22nd day of April, 2009.



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