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**IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA**

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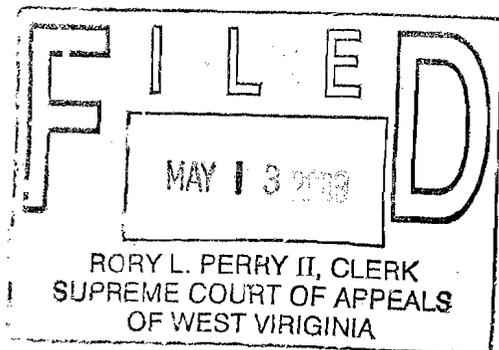
**PUTNAM BANCSHARES, INC., a West Virginia corporation, d/b/a PUTNAM COUNTY BANK, and T.C.'S USED CARS, LLC, a West Virginia limited liability company, Appellees,**

v.

**No. 34769**

**PROGRESSIVE CLASSIC INSURANCE COMPANY, a corporation, Appellant.**

**BRIEF OF THE APPELLEE, T.C.'S USED CARS, LLC**



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## **I. KIND OF PROCEEDING AND NATURE OF RULING IN THE CIRCUIT COURT**

This case concerns whether an automobile insurance policy may be effectively renewed without the payment of the initial premium, and if so, what notice of cancellation for nonpayment is required to be given by the insurance company to the insured and the loss payee under the policy.

The Circuit Court of Putnam County, O.C. Spaulding, Judge, correctly followed this Court's decision in Dairyland Insurance Company v. Conley, 218 W. Va. 252, 624 S.E.2d 599 (2005), in holding that after the Defendant, Progressive Classic Insurance Company ("Progressive"), "certified" that insurance was in effect, this "sealed" coverage, and Progressive was required to give Putnam Bancshares, Inc. d/b/a Putnam County Bank (the "Bank"), the loss payee, the required ten day notice of cancellation for nonpayment of the initial premium.

## **II. STATEMENT OF THE FACTS**

Terry R. Daniel, Jr. financed the purchase of a motor vehicle with the Bank. T.C.'s Used Cars, LLC ("T.C.'s") guaranteed the indebtedness. Mr. Daniel insured the vehicle with the Defendant, Progressive. The Bank was the loss payee under the policy.

On January 29, 2007, Progressive mailed to Mr. Daniel a package of documents renewing the insurance policy for a "Renewal Policy Period" of February 23, 2007 through August 23, 2007. The package consisted of ten pages containing a "Renewal bill", a "Renewal Declarations Page" and "Insurance I.D. Cards", and three "Certificates of Insurance" covering a 2004 Chevrolet Silverado. The Renewal Declarations Page and the Certificates of Insurance show the policy period to be February 23, 2007 until August 23, 2007. Page 2 of the Declarations page

shows the motor vehicle in question, a 2004 Chevrolet Silverado, and identifies the Bank as the "Lienholder" and as having an "Additional Interest". The Renewal bill provided that "To avoid cancellation and to renew your policy, make payment . . . by February 4, 2007."

On January 29, 2007, Progressive mailed a Renewal Reminder to Mr. Daniel indicating that although the due date for the minimum amount due of \$324.50 was February 25, 2007, the policy would expire two days earlier, on February 23, 2007.

On February 27, 2007, Mr. Daniel's vehicle was involved in an accident that resulted in the complete loss of the vehicle. The Bank requested coverage for the loss but Progressive denied the loss upon the allegation that the policy had expired because of non-renewal on February 23, 2007.

As the guarantor of the Note owing by Mr. Daniel to the Bank, T.C.'s paid the Bank \$14,390.43 on June 13, 2007. The Note was not cancelled but was assigned to T.C.'s along with the Bank's claims as loss payee against Progressive.

Progressive admits that it did not mail or otherwise deliver to the Bank the documents Progressive mailed to Terry R. Daniel, Jr. on or about January 29, 2007, which renewed the policy and notified Mr. Daniel that a payment was required before February 4, 2007. In addition, Progressive did not send the January 29, 2008 Renewal Reminder to the Bank.

According to the undisputed Affidavit of a Bank Officer, if the Bank had received the required ten day notice, the premium would have been paid to continue coverage in accordance with the Bank's customary business practices and habits.

### III. STANDARD OF REVIEW

T.C.'s Used Cars, LLC agrees with Progressive that the de novo standard is the appropriate standard of review when this Court reviews a summary judgment order.

### IV. DISCUSSION

#### A. Statement of Position

When an insurance company delivers a "Certificate of Insurance" to an insured certifying that coverage exists, the insurance company cannot cancel the coverage without giving the statutorily required prior notice.

#### B. W. Va. Code, § 33-6A-1

W. Va. Code, § 33-6A-1 provides that an insurer may not cancel an auto liability insurance policy that has been in effect for sixty days except for certain reasons specified in the statute. One of the listed reasons is for failing to pay a premium. W. Va. Code, § 33-6A-1(a). However, the first phrase of the last paragraph of the statute requires a thirty day notice of cancellation whether the policy has been in effect for sixty days or not. "Notwithstanding any of the provisions of this section to the contrary, no insurer may cancel a policy of automobile liability insurance without first giving the insured thirty days' notice of its intention to cancel". W. Va. Code, § 33-6A-1(e)(7).

The following and last phrase of § 33-6A-1(e)(7) provides a shorter cancellation period of ten days for nonpayment "upon initial issuance of the . . . policy".

**Provided, 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 the expiration of ten days' notice of cancellation to the insured.**

W. Va. Code, § 33-6A-1(e)(7) (emphasis added).

W. Va. Code, § 33-6A-1a provides that any notice required by the Statute must also be given to the loss payee, in this case, the Bank.

In every instance in which an insurer notifies an insured of its intent to cancel or not renew an automobile liability insurance contract or policy, the insurer shall also provide notice to the loss payee of such cancellation and nonrenewal in accordance with the same notice requirements established for the insured pursuant to sections one [§ 33-6A-1] and four [§ 33-6A-4] of this article.

W. Va. Code, § 33-6A-1a(b).

### C. Dairyland Insurance Company v. Conley

W. Va. Code, § 33-6A-1(e)(7) was interpreted by this Court in Dairyland Insurance Company v. Conley, 218 W. Va. 252, 624 S.E.2d 599 (2005). In Dairyland, the insured, Ms. Conley, on August 15, 2001, filled out an application for an auto insurance policy and remitted a check for \$174.00, the " 'minimum required down payment' ". Dairyland, 218 W. Va. at 254, 624 S.E.2d 601 (2005). The application stated " 'if my premium remittance is not honored by the bank, no coverage will be bound' ". Dairyland, 218 W. Va. at 254, 624 S.E.2d at 601 (2005).

On August 30, 2001, Ms. Conley was delivered a declarations page, a certificate of insurance, two proof of insurance cards showing August 15, 2001 to February 15, 2002 as the effective dates of coverage, and a billing statement that provided to " 'avoid the termination of your coverages, make an installment payment of \$88.55 by September 9, 2001' ". Dairyland, 218 W. Va. at 254, 624 S.E.2d at 601.

On August 31, 2001, Ms. Conley was involved in an automobile accident causing injury to three individuals. Thereafter, by letter, dated September 11, 2001, the insurance company informed Ms. Conley that because her check had been returned due to insufficient funds, the

insurance policy was rescinded as of August 15, 2001, resulting in no coverage. Dairyland, 218 W. Va. at 254-55, 624 S.E.2d at 601-02.

The insurance company made payments to the individuals injured in the car accident, but then filed a complaint against Ms. Conley for subrogation. Ms. Conley alleged that the insurance company had improperly cancelled her policy without giving her ten days' prior notice of the cancellation for failure to pay the premium upon the initial issuance of a policy as required by W. Va. Code, § 33-6A-1(e)(7). Dairyland, 218 W. Va. at 255, 624 S.E.2d at 602. In response, the insurance company asserted that "it never delivered or issued an insurance policy to Ms. Conley because no insurance contract was ever formed" due to the non-payment of the premium. Dairyland, 218 W. Va. at 256, 624 S.E.2d at 603.

The Court, in Dairyland, held that: "Our legislature enacted W. Va. Code, § 33-6A-1 specifically intending to prevent the retroactive cancellation practices such as that done by the appellant [insurance company] in this case". Dairyland, 218 W. Va. at 257, 624 S.E.2d at 604 (2005) (brackets added).

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.

Dairyland, 218 W. Va. at 265, 624 S.E.2d at 612 (2005).

In Dairyland, this Court rejected the insurance company's argument that no policy of insurance was formed by referring to the declarations page, the certificate of insurance and the

insurance cards showing the coverage periods for the insurance policy. Dairyland, 218 W. Va. at 266, 624 S. E. 2d at 613. In the present case, the Circuit Court clearly followed this rationale in its Summary Judgment decision, when it found that the Dairyland decision "controls". Summary Judgment Order, p. 6.

Under Dairyland, where an insurance company sends the insured a declarations page or some other documents expressing insurance coverage for a specified policy period West Virginia Code § 33-6A-1(e)(7) requires the insurance company which issued the insurance policy to provide the insured with ten (10) days notice prior to cancellation for non-payment of premium. The coverage is sealed when the insurance company provides a declarations page, certificate of insurance, and proof of insurance cards covering a policy period for which the insurance company has not yet received payment.

Summary Judgment Order, p. 8.

The Federation argues that the Circuit Court "reached the conclusion, without citing any supporting law, that the mere 'act of sending a declarations page, certificate of insurance, and proof of insurance cards creates an obligation to provide ten (10) days written notice of cancellation under the statute'". Federation's Brief, p. 13, quoting, Summary Judgment Order, p. 13. As discussed above, the Circuit Court's Order clearly cites Dairyland as its authority. Summary Judgment Order, pp. 6 and 8. While the Federation may not agree with the Circuit Court's decision, the Circuit Court hardly required a "conclusion without citing any supporting law".

**D. Progressive's Unaccepted Offer Argument And The Federation's Bounced Check Distinction Are Without Merit**

Progressive asserts that the Circuit Court misapplied Dairyland, because in the present case, Progressive only made a "mere offer" to extend the auto insurance coverage to Mr. Daniel

when it sent him the January 29, 2007 renewal bill that states "to renew your policy, please pay at least the minimum by February 23, 2007." Progressive argues that because the minimum due, \$324.50, was not paid, Mr. Daniel did not accept the offer, and therefore, the policy never took effect. Progressive's Brief, pp. 15-16.

Progressive argues that because no payment was made at all, there was no contract. In the same rationale, the Federation argues that the "narrow fact pattern" in Dairyland involving a bounced check distinguishes Dairyland from the present case where no payment attempt was made at all. Federation's Brief, p. 11.

The insurance company's argument in Dairyland and the arguments of Progressive and the Federation in the present case are wrong for the same reasons.

First, the relevant facts of the present case are nearly identical to the facts in Dairyland. In Dairyland, the insured filled out an "application" that stated " 'if my premium remittance is not honored by the bank no coverage will be bound' ". Dairyland, 218 W. Va. at 254, 624 S.E.2d at 601. The insurance company in Dairyland argued that because the insured's check bounced, there was no coverage. In the present case, Progressive argues that because Mr. Daniel did not make the first premium payment, there was no coverage.

In Dairyland, the insurer issued to Ms. Conley a "declarations page", two "proof of insurance cards" and a "certificate of insurance", all of which showed the effective dates of the policy to be August 15, 2001 until February 15, 2002. Dairyland, 218 W.Va. at 254 and 256, 624 S.E.2d at 601 and 603. In the present case, the insured, Mr. Daniel, was presented with a "Renewal Declarations Page" signed by Progressive's secretary and insurance I.D. cards entitled "Certificate of Insurance" showing the "effective dates of policy term from Feb 23, 2007 to Aug

23, 2007". Also, as in Dairyland, the required ten day notice of cancellation was not provided to the insured, Mr. Daniel, or in the present case, to the Bank.

Therefore, in the present case, on nearly identical facts, Judge Spaulding correctly followed Dairyland, and held that a policy was issued to Mr. Daniel when he received the declarations page, a certificate of insurance, and the proof of insurance cards. Summary Judgment Order, pp. 6 and 8.

Second, even though the insured's application in Dairyland stated that there would be no coverage if payment were not made (i.e., if the check bounced), this Court still found coverage. Moreover, this Court in Dairyland did not limit its ruling to nonpayment by reason of a bad check; rather, the Court specifically held that **even if no initial payment was made**, the statutory notice of cancellation was still required. In discussing the 1981 and 1982 amendments to the Code which provided a thirty day notice, rather than the current ten day notice, this Court stated as follows:

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 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.**

Dairyland, 218 W. Va. at 263, 624 S.E.2d at 610 (emphasis added).

The Court in Dairyland clearly held that the ten day notice is required even where the insured was given notice that if the initial premium check bounced that " 'no coverage will be bound' ". Dairyland, 218 W.Va. at 254, 624 S.E.2d at 601.

[I]f 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.**

Dairyland, 218 W. Va. at 265, 624 S.E.2d at 612 (emphasis added). Therefore, under Dairyland it matters not whether the failure of cancellation is a bad check or no payment attempt at all. This rationale is consistent with W.Va. Code, § 33-6A-1(e)(7), which specifically refers to a "failure of consideration to be paid", and which, therefore, does not show a legislative intent to limit the statute's effect to bad checks.

Third, in its argument that a bad check is different than no payment at all, the Federation's Brief fails to discuss any public policy that would favor an insured who bounces a check (and commits a crime) with a ten day notice of cancellation over an insured who does not pay at all because, for example, the insured forgets or the check is lost in the mail. Why should the person committing a crime by bouncing a check receive prior notice of cancellation while the person who forgets to pay on time receives no notice? Certainly, the legislature had no intent to favor the check bouncer.

Fourth, at least implied in the arguments of Progressive and the Federation is the notion that before an insurance policy can become effective, a premium must be paid. Of course, such a notion, if true, would turn the commercial world on its ear. Goods, services, and yes,

insurance, are often issued on credit and an express or implied promise to pay upon the acceptance of the goods or services is adequate consideration to support a contract. Neither Progressive nor the Federation cite any statute or law that prohibits an insurance company from providing coverage unless it first receives payment in good funds.

Fifth, the opposition's argument that prior payment is required to bind coverage is not supported by the statutory language. The statute itself, W. Va. Code, § 33-6A-1(e)(7), recognizes that an insurance contract may exist without a prior premium payment because the statute provides for a notice of cancellation when there is a failure to pay the first premium. If no contract can exist without prior payment, what would there be to cancel? If the law is that the effectiveness of a policy is conditioned upon prior payment of the first premium, then the enactment of the ten day notice provisions of § 33-6A-1(e)(7) was superfluous.

**E. When Progressive Issued the Certificate of Insurance,  
It Certified That Insurance Was In Effect**

Progressive argues that sending the declarations page and the certificates of insurance was a mere "offer", but the documents do not use the word "offer" or any similar word. More importantly, the delivery of the certificates of insurance constitutes more than a "mere offer" under the Code. Under W. Va. Code, § 17D-2A-4, the insurance company "**shall supply a certificate** to the insured . . . **certifying that there is in effect** a motor vehicle liability policy upon such motor vehicle" (emphasis added).

"Certify" means "To confirm formally as true, accurate, or genuine; testify to or vouch for in writing. . . . To guarantee as meeting a standard; attest." The American Heritage Dictionary of the English Language, p. 220 (1975). "Certify" is defined in Black's Law

Dictionary as: "To testify in writing; to make known or establish as a fact. . . . To vouch for a thing in writing." Black's Law Dictionary, p. 287 (1951).

The Certificates<sup>1</sup> issued by "Progressive Classic Insurance Co." to Mr. Daniel state as follows: "An authorized West Virginia insurer certifies that there is in effect a motor vehicle liability policy upon the described vehicle in accordance with the provisions of the West Virginia Motor Vehicle Code." The sheet upon which the Certificates are printed instructs the insured to "Keep these cards in your vehicle." Exhibit 1.

The Circuit Court correctly followed Dairyland in holding that when Progressive "chose to issue documentation evidencing that liability coverage existed" the policy could not be cancelled without the proper notice. Summary Judgment Order, pp. 8-9; Dairyland, 218 W.Va. at 263, 624 S.E.2d at 610.

The cases from other jurisdictions represented by Progressive to be "strikingly similar" to the present case are not. Progressive's Brief, p. 21. In Adamson v. State Farm Mutual Ins. Co., 676 So.2d 227 (La. 1996), there was no Louisiana statute that required a "Certificate of Insurance" as does W. Va. Code, § 17D-2A-4. Rather, the Louisiana statute requires operators of motor vehicles to have proof of insurance, and that "[o]ne type of evidence is an identification card issued by the insurer". Adamson, 676 So.2d at 233. In Adamson, the "insurance identification card . . . clearly stated that "THIS CARD IS INVALID IF THE POLICY FOR WHICH IT WAS ISSUED LAPSES OR IS TERMINATED." Adamson, 676 S.2d at 233.

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<sup>1</sup> The Certificates were attached to the Plaintiffs' Summary Judgment filings as part of Exhibit 1. The Certificates are also attached hereto as Exhibit 1.

Louisiana's statutory scheme is different from West Virginia's. The statute, La. R. S. § 32:863.1, referenced in Adamson, 676 So.2d at 233, does not require the insurance company to issue a certificate that "certifies" that insurance is in effect; rather, it references an "identification card issued by the insurer". La. R. S. § 32:863.1A(1)(a).

It is not mandatory in Louisiana that the insurance company certify coverage, but if coverage is certified by the insurer, prior notice of cancellation is mandatory. "Proof of financial responsibility **may be** furnished by filing with the commissioner the written certificate of any insurance carrier . . . certifying that there is in effect a motor vehicle liability policy". La. R. S. § 32:898A (emphasis added). However, if the "insurance carrier has certified a motor vehicle liability policy . . . , **the insurance so certified shall not be cancelled or terminated until at least ten days after a notice of cancellation . . . shall be filed** in the office of the commissioner". La. R. S. § 39:901 (emphasis added). Thus, in Adamson, if the insurance company had "certified" that insurance was in effect, it would have been required to give ten days prior notice of cancellation, although to the insurance commissioner, not the customer.

Similarly, Kane v. American Ins. Co., 725 A.2d 1000 (Conn. 1999), did not involve a statutorily required "Certificate of Insurance". Kane only involved a policy summary sheet, a declarations page and a billing statement. Kane, 725 A.2d at 1001. Smith v. Southeastern Fid. Ins. Co., 318 S.E.2d 708 (Ga. 1984), did not involve anything but a notice stating that because of a traffic violation, a new application would have to be submitted for a future policy period. Smith, 725 A.2d at 708. Monteleone v. Allstate Ins. Co., 59 Cal. Rptr.2d 48 (1996), did not involve a statutorily required "Certificate of Insurance". Rather, it involved a declaration

reinstating a lapsed policy after it had terminated for non-renewal. Monteleone, 59 Cal. Rptr.2d at 50-51.

To the extent, Progressive relies on older common law cases on offer and acceptance or that require payment as a condition of the contract, this was squarely addressed by the Court in Dairyland when it rejected the insurance company's argument that payment is a prerequisite to coverage. "The Legislature is plainly empowered to alter the common law, and appears to have done so when it enacted W. Va. Code, § 33-6A-1". Dairyland, 218 W.Va. at 264, 624 S.E.2d at 611. Similarly, the Legislature was empowered to alter the common law regarding offer and acceptance when it enacted W. Va. Code, § 17D-2A-4, requiring that an insurance company "shall supply a certificate . . . certifying" insurance coverage.

Progressive and the Federation argue that Dairyland can be distinguished from the present case because unlike the present case, in Dairyland "the insurance company bound coverage and in fact issued a new policy." Federation's Brief, p. 12. "[I]n Conley, a contract of insurance had been issued because coverage had been bound". Progressive's Brief, p. 10. The opposition's argument is in error because in Dairyland, the insurance company argued that "it **never delivered or issued an insurance policy to Ms. Conley** because no insurance contract was ever formed . . . in the absence of a premium". Dairyland, 218 W.Va. at 256, 624 S.E.2d at 603 (emphasis added). The reason a contract was held to exist in Dairyland, and in the present case, even though the premium payment was not made, was the same - a "Renewal Declarations Page", and "Insurance I.D. Cards", each containing a "Certificate of Insurance" was issued to the insured. Dairyland, 218 W.Va. at 256 and 266, 624 S.E.2d at 603 and 613; Summary Judgment Order pp. 7-8. In other words, in Dairyland and in the present case, coverage was "sealed" when

the insurance company sent the documentation, including the Certificates, to the insured. Summary Judgment Order, p. 8.

**F. W. Va. Code, § 33-6A-1 Requires Prior Notice of Cancellation of an Effective Policy, Whether "New" or "Renewed"**

Progressive and the Federation argue that the Circuit Court failed to properly distinguish between a new policy and a renewal policy. Here, they argue that § 33-6A-1(e)(7) (and therefore Dairyland) only applies to a "new" policy for a "new" customer. Progressive's Brief, pp. 17-20; Federation's Brief, pp. 11-13. This argument is misplaced for the following reasons.

"Renew" means "[t]o make new or as if new again; restore." The American Heritage Dictionary of the English Language, p. 1101 (1975). Thus, when a policy "renews", it starts again, but it creates a contract for a separate coverage period for which an initial premium is required.

The language "initial issuance of the insurance policy" found in W. Va. Code, § 33-6A-1(e)(7) is intended to favor an insurance company by providing a "softened" or shorter ten day notice of cancellation for nonpayment at the initiation of a policy as opposed to the statutorily required thirty day notice of cancellation for non-payment after the first payment is made. Dairyland, 218 W.Va. at 263, 624 S.E.2d at 610. That is, W. Va. Code, § 33-6A-1(e)(7) is intended to favor the insurance company with a shorter notice period in the more egregious situation where the insured fails to pay the first premium. Dairyland, 218 W.Va. at 263, 624 S.E.2d at 610.

While Section 33-6A-1(e)(7) relates to "the cancellation of the insurance policy . . . for failure of consideration to be paid by the insured upon the initial issuance of the policy", it does

not state that it only relates to an insured's initial or first policy with a particular insurance company. The last paragraph of W. Va. Code, §33-6A-1(e)(7) is devoid of any derivation of the word "renewal". If the legislature had wanted to give different notice periods for "new" and "renewal" policies in the event of non-payment of the initial premium, it would surely have employed the appropriate language in § 33-6A-1(e)(7).

Moreover, if the last phrase of W. Va. Code, § 33-6A-1(e)(7) only applies to "new" policies for "new" customers, then an existing customer with a "renewal" policy would be entitled to a thirty day notice of cancellation by reason of the preceding phrase of W. Va. Code, § 33-6A-1(e)(7) which provides: "Notwithstanding any of the provisions of this section to the contrary, no insurer may cancel a policy . . . without first giving the insured thirty days' notice . . .". W. Va. Code, § 33-6A-1(e)(7). Of course, in the present case, the difference between the ten and thirty day notice periods is immaterial because Progressive failed to give any notice. However, the point to be stressed is that the Code requires some prior notice of cancellation of an existing policy for nonpayment whether the policy is a "new" policy or a "renewal" policy.

The statute's focus is on the nonpayment of the initial premium for which a shorter ten day notice of cancellation is provided. In this regard, as noted by the Circuit Court, there is no public policy reason to distinguish between a "new" and "renewal" policy. In either case, if the policy is in force, some notice of cancellation is required.

In Dairyland, the Court dealt with the initial issuance of an insurance policy and in this case, the renewal of an insurance policy is at issue. Despite the fact that this case involves the renewal of a policy, as opposed to the initial issuance of a policy, the public policy issues that exist at the initial issuance of an insurance policy also exists in a policy renewal situation. As the West Virginia Supreme Court of Appeals stated in Dairyland:

[c]ertainly, "[t]he purpose of statutory and policy provisions requiring notice to the insured prior to cancellation is to enable the insured to obtain insurance elsewhere before he or she is subjected to risk without protection." 2 Couch on Insurance, § 32:1 at 32-6 (3rd Ed. 2005). But our holding today also recognizes that motorists carry insurance not only for their own protection, but also for the benefit of third parties who may suffer through the negligence of the motorist.

Dairyland, 218 W.Va. at 265, 624 S.E.2d at 612.

The Court also addressed the practical application of the policy issues examined in Dairyland, noting that if an insurance company:

. . . still chose to issue documentation evidencing that liability coverage existed on the date the application was completed . . . [the Department 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 [now ten days] after the insurance company gave notice that the policy was being cancelled.

Dairyland, 218 W.Va. at 263, 624 S.E.2d at 610.

Summary Judgment Order, pp. 8-9.

The logical flaw with the opposition's argument is that under Dairyland and W. Va. Code, § 17D-2A-4, a policy, whether "new" or "renewed," went into effect when Progressive sent a "Certificate of Insurance" to the insured "certifying" that the insurance was in effect. Thereafter, prior notice of cancellation to the insured and the Bank was required. The "new" versus "renewal" argument is irrelevant because under Dairyland and W. Va. Code, § 33-6A-1(e)(7), prior notification is required for cancellation of an effective policy, whether "new" or "renewed".

**G. Providing Certificates of Insurance Prior to a Premium Payment is Neither Efficient Nor Consistent with the Statutory Scheme of Preventing the Operation of Motor Vehicles Without Insurance**

The Federation argues that if the Circuit Court's opinion is not reversed, great harm will befall all West Virginians who will not be able to evaluate their coverages before paying a premium because they will not have first received their certificates of insurance showing coverages. Federation's Brief, pp. 2, 14-17. Certainly, the insurance company can provide a description of offered coverage by means other than a certificate of insurance, and as suggested by the Circuit Court, the insurance company can withhold the certificate of insurance until it receives payment.

The Defendant argues that it is required by law to provide proof of insurance to its insureds and, as a practical matter, if the insured did not pay the policy premium until the final due date the insurance company would not have time to prepare and deliver the required proof of insurance documents to the insured. However, the Defendant failed to cite any West Virginia law to support the proposition that insurers are required to provide insureds with proof of insurance before renewal payment is made. Rather, it appears that providing proof of insurance before the renewal payment is due is a choice made by the insurance company. In order to avoid this situation, the insurance company could require that the renewal payment be due ten days before the end of the policy period and provide documents covering the next policy period when payment is made. Alternatively, it could provide the documents in advance and issue a cancellation notice when the premium is not received ten days before the effective date of the renewal period. Requiring payment for a renewal ten days before the end of the previous policy period would give the insurance company sufficient time to comply with W. Va. Code, § 33-6A-1(e)(7) and send the proper notice of cancellation. This practice would put the onus on the insured to make premium payments on time or risk losing insurance coverage.

For example, in this case, on January 29, 2007, Progressive provided Mr. Daniel with documents showing insurance coverage

for the policy period of February 23, 2007, through August 23, 2007. It then sent a reminder of payment stating that the payment was due on February 25, 2007, two days after the renewal policy commenced. Progressive could have avoided this problem by requiring the payment to be due at least ten days before the renewal policy went into effect, to wit: February 13, 2007. If payment was not received by February 13, 2007, then Progressive could have timely sent the ten day notice of cancellation. Instead, Progressive chose to issue the renewal policy, but not require the premium payment until after the policy became effective.

Summary Judgment Order, pp. 9-10 (footnote omitted).

The Federation argues that great confusion and harm will occur in circumstances where (1) a customer pays an initial monthly premium and promises to make five additional monthly premiums, (2) the customer is issued a certificate of insurance showing six months' worth of coverage, and (3) the insurance is cancelled, after, for example, the third monthly premium is not paid. Here, the Federation argues that following the Circuit Court's rationale (and, by logical extension, this Court's decision in Dairyland), will result in general chaos because someone will argue that the cancelled insurance policy is still in effect because of the mere existence of the certificate showing coverage for the entire six months. Federation's Brief, p. 17. The question then becomes who is going to make this argument and to what effect.

The insured and the loss payee would be in no position to make this argument. If notice of cancellation is properly given to the insured and the loss payee, neither the insured nor the loss payee will be in any position to argue that the coverage is in effect "simply because the customer still retains physical possession of a printed card". The obvious solution to the Federation's quandary is to do what the statute requires and what Progressive failed to do in the present case - give the proper notice of cancellation to the insured and the loss payee.

The Federation and Progressive also suggest that if Dairyland is upheld, that a driver injured in, for example, a two vehicle collision, could argue that coverage exists because of the other driver possessed a certificate of insurance covering his vehicle on the day of the accident, even though the policy was properly cancelled for nonpayment before the accident. See, Federation's Brief, p. 17; Progressive's Brief, p. 20, n.5. Dairyland can not be so interpreted.

Dairyland merely says that if the insurance company sends a certificate of insurance, it must give prior notice of cancellation to the insured and the loss payee. The relevant Code sections provide prior notice to the insured and the loss payee; it would be impossible to provide notice of cancellation to all those who might be involved in future accidents with the insured.

The class of persons who can be protected, and who are protected, under the prior notice provisions of the statute include the insured and the loss payee. Because it is not possible to protect accident victims of future car accidents with prior notice, this does not mean that the insureds and loss payees should lose the right to receive prior notice of cancellation.

Additionally, the Code does address the issue raised by the Federation and Progressive by providing that the insurance company must give the Division of Motor Vehicles notice of cancellation and that the Division shall suspend the registration of the motor vehicle and its owner's license until proof of insurance is presented. W. Va. Code, § 17D-2A-5(a). The issue is also addressed by W. Va. Code, § 17D-2A-9, which provides that it is a crime to operate a motor vehicle without the required insurance.

The Federation's argument that upholding the Circuit Court's ruling will cause insurance companies to change the "efficient" practice of "routinely" including "proof of insurance cards to policy holders" prior to payment is terribly misplaced in the face of the statutory mandate.

Federation's Brief, p. 14. W. Va. Code, § 17D-2A-4, provides that the insurance company "shall supply a **certificate** to the **insured certifying**" that insurance is in effect (emphasis added). Sending such a certificate to a customer "[w]ithout knowing in advance whether or not any customer will pay the premium to renew a policy" is not "efficient". Federation's Brief, p. 15. Considering the statute's requirement that the company "**certify**" to the "**insured**" that insurance is in place when it delivers the certificate, it is inefficient (and foolhardy) to send the certificate before receiving payment.

More importantly, this "routine" practice disturbs the statutory scheme of preventing the operation motor vehicles without insurance. The purpose of the Certificate is to show coverage so treating it as a "mere offer" is contrary to the statute's purpose. Further, what is the Federation's mechanism for giving notice that the non-paying customer who received the Certificate does not have coverage? That is, is the insurance company then obligated to send the Division of Motor Vehicles notice that the insurance described in the Certificate has lapsed in accordance with W. Va. Code, § 17D-2A-5(a), and if so, when? The Federation has not addressed this issue, but certainly after certifying that insurance was in effect, Progressive was obligated to give notice that the vehicle and driver described in the Certificate were not insured.

## V. CONCLUSION

The Circuit Court correctly applied Dairyland and the applicable provisions of the West Virginia Code in holding that after Progressive delivered the Certificates of Insurance "certifying" that insurance was in effect, Progressive was required to give prior notice of cancellation to the insured and the Bank.

The opposition's arguments that the Circuit Court misapplied the Dairyland case to the facts of this case are unpersuasive. The facts of the two cases are just too close. Taken in this light, what the opposition really seeks is that Dairyland be overturned. However, the statutory language considered with the logically connected public policy issues and legislative intent as discussed by the Court in the Dairyland decision, make overturning the case logically impossible.

**VI. PRAYER FOR RELIEF**

**WHEREFORE**, for the foregoing reasons, the Appellee and Plaintiff below, T.C. Used Cars, LLC, respectfully requests that this Court affirm the Summary Judgment Order of the Circuit Court of Putnam County, and respectfully requests such other and further relief as this Court deems just and proper.

**T.C.'S USED CARS, LLC**

**By Counsel**

  
\_\_\_\_\_  
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(304) 344-9821; (304) 344-9519 Fax  
Chris@HHSMLaw.com

drive®

INSURANCE FROM PROGRESSIVE

Policy number: 16793267-1

January 29, 2007

Policy period: Feb 23, 2007 - Aug 23, 2007

# Insurance ID Cards

Keep these cards in your vehicle

## If you need service or have a question

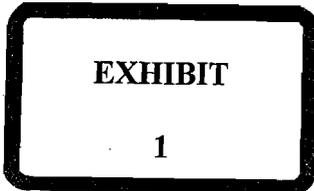
Your Drive Insurance agent is ready to help with personalized service and counsel. Refer to the front of your Insurance Identification Card for information on how to reach your agent.

## Access your policy at [driveinsurance.com](http://driveinsurance.com)

- Pay your bill
- View and print your policy documents
- Check the status of a claim
- Get important information about your vehicle
- Find out how much it would cost to insure another vehicle, add a driver and more!

## If you are in an accident

As a Drive Insurance customer, you will receive Progressive Claims Service. Representatives are ready to assist 24 hours a day, 7 days a week, including weekends and holidays. Refer to the back of your Insurance Identification Card for instructions on how to report a claim.



## Certificate of Insurance West Virginia

Progressive Classic Insurance Co

Your Drive Agent:  
ALICE THORNTON INS  
304-429-6120

NAIC number: 42994

An authorized West Virginia insurer certifies that there is in effect a motor vehicle liability policy upon the described vehicle in accordance with the provisions of the West Virginia Motor Vehicle Code.

Year Make  
2004 Chevrolet

Model  
K1500 Silverado

Vehicle owner enter plate number  
Vehicle Identification No.  
2GCBT19PX41259737

Policy number: 16793267-1  
Date certificate issued: January 29, 2007

Effective dates of policy term  
from Feb 23, 2007 to Aug 23, 2007

Name of insured

TERRY DANIEL  
RT 1 BOX 317  
PRICHARD, WV 25555

Name of owner

THIS CERTIFICATE MUST BE CARRIED IN THE VEHICLE DESCRIBED ABOVE FOR USE AS PROOF OF INSURANCE. A COPY OF THIS CERTIFICATE MAY BE REQUESTED BY THE COMMISSIONER OF MOTOR VEHICLES.

Signature of owner \_\_\_\_\_

Date \_\_\_\_\_

WV-1B 4/84

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Signature of owner \_\_\_\_\_

Date \_\_\_\_\_

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**IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA**

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**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, a corporation, Appellant.**

**CERTIFICATE OF SERVICE**

I, Christopher S. Smith, hereby certify that on the 12<sup>2</sup> day of May, 2009, the foregoing  
**BRIEF OF THE APPELLEE, T.C.'S USED CARS, LLC**, was served by United States first  
class mail, postage prepaid, on the following:

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\_\_\_\_\_  
Christopher S. Smith