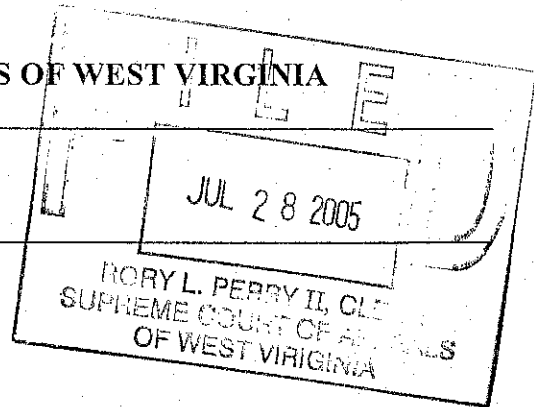


No. 32704

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

CHARLESTON



DAIRYLAND INSURANCE COMPANY,

Plaintiff,

vs.

CIVIL ACTION NO.: 03-C-0586
Honorable David M. Pancake, Judge

STEPHANIE MICHELLE CONLEY,

Defendant/Third Party Plaintiff/Appellee,

vs.

WEST VIRGINIA NATIONAL AUTO
INSURANCE COMPANY,

Third Party Defendant/Appellant.

FROM THE CIRCUIT COURT OF CABELL COUNTY, WEST VIRGINIA

**BRIEF OF THE APPELLANT, WEST VIRGINIA
NATIONAL AUTO INSURANCE COMPANY**

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No. _____

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WEST VIRGINIA NATIONAL AUTO
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Third Party Defendant.

FROM THE CIRCUIT COURT OF CABELL COUNTY, WEST VIRGINIA

**BRIEF OF THE APPELLANT, WEST VIRGINIA
NATIONAL AUTO INSURANCE COMPANY**

TO: THE HONORABLE JUSTICES OF THE SUPREME COURT OF APPEALS
OF WEST VIRGINIA

**I. STATEMENT OF THE KIND OF PROCEEDING
AND NATURE OF THE RULING BELOW**

West Virginia National Auto Insurance Company (hereinafter "West Virginia National"), by and through its counsel, James A. Varner, Sr., Debra T. Herron, and Dana N. Bonnell, appeals the November 22, 2004 order of the Circuit Court of Cabell County, West Virginia, granting

summary judgment in favor of Stephanie Michelle Conley (hereinafter "Conley") in her third-party claim for declaratory judgment concerning issues of insurance coverage. The November 22, 2004 Order found that West Virginia National issued a policy to Conley and failed to properly cancel said policy in accordance with West Virginia Code § 33-6A-1(e)(7). West Virginia National respectfully submits that the circuit court erred in so concluding, because a policy of insurance was never issued to Conley in the first place and, thus, no notice of cancellation was required. More specifically, the check tendered by Conley in an attempt to pay her initial premium was dishonored by the drawee bank prior to issuance of any policy and, therefore, no consideration existed to support the creation of a contract of insurance. Accordingly, West Virginia National seeks relief on appeal, requesting that this Court reverse the lower court's decision and remand this matter to the circuit court for proceedings consistent with this Court's opinion.

II. STATEMENT OF FACTS

On July 24, 2003, Dairyland Insurance Company (hereinafter "Dairyland") filed a complaint seeking to enforce its subrogation rights, alleging negligence on the part of Conley in connection with an automobile accident. Dairyland's complaint alleged that Dairyland's insureds, Benjamin Horton, Jr., Cheryl Horton, and Ashley Horton, had sustained bodily injuries as a result of an automobile accident which occurred on August 31, 2001. Dairyland's complaint further asserted that Dairyland had paid the sum of at least Twenty-Five Thousand Nine Hundred Six Dollars and Sixty-Six Cents (\$25,906.66) as compensation to its insured.

Conley filed an answer to Dairyland's complaint on September 12, 2003. In her answer, Conley denied that she had engaged in any negligent conduct in connection with the said automobile accident. Conley also filed a third party complaint for declaratory relief against West

Virginia National in order to obtain an adjudication of certain coverage issues involving a policy of insurance which West Virginia National supposedly issued to Conley. In her third party complaint, Conley claimed that there was an improper cancellation of this alleged West Virginia National policy. Specifically, Conley asserted that she applied for a policy on August 15, 2001; that a policy was issued to her on that same date; that fifteen (15) days later she was provided with a declaration page, certificate of insurance, and billing statement; and that by letter dated September 10, 2001, she was advised that her policy had been rescinded effective as of August 15, 2001.¹ West Virginia National filed an answer to the third party complaint on November 7, 2003, generally denying all of the allegations set forth therein.²

Conley filed a motion for summary judgment, along with a supporting memorandum of law, on May 28, 2004, arguing it was proper for the trial court to grant summary judgment in her favor in her declaratory judgment action.³ Conley asserted that West Virginia Code § 33-6A-1(e)(7) requires ten (10) days notice of cancellation and, further, that the same notice of cancellation is required by the terms and provisions of the West Virginia National policy which Conley claims issued to her.⁴

On July 15, 2004, West Virginia National filed a response to Conley's motion and memorandum, in which it submitted that the trial court should deny Conley's motion for summary

¹ See Third Party Complaint of Stephanie Michelle Conley.

² See West Virginia National Auto Insurance Company's Answer to Third Party Complaint.

³ See Motion for Summary Judgment of the Third Party Plaintiff.

⁴ *Id.*

judgment.⁵ Said response explained that Conley was not entitled to any notice of cancellation because no policy had ever been formed to begin with, due to a lack of consideration.⁶ More particularly, West Virginia National relied upon the case of Nationwide Mutual Insurance Co. v. Smith, 153 W.Va. 817, 172 S.E.2d 708 (1970), for the proposition that effective payment of initial insurance premiums is the consideration prerequisite to a valid policy of insurance.⁷

On August 19, 2004, Conley filed a reply to West Virginia National's response, asserting that West Virginia National's reliance on Nationwide was misplaced, as the case had been abrogated by the enactment of West Virginia Code § 33-6A-1(e)(7), notwithstanding the fact that the case was decided subsequent to the statute's enactment.⁸ Conley further argued that a policy was in fact issued to her and that the policy was not contingent upon whether her check for the premium payment was honored.⁹ Despite the lack of consideration, Conley pointed to documents furnished to her as evidence of the existence of a policy, including a billing statement which unequivocally indicated that coverage would be provided based upon timely payments of premiums.¹⁰ Conley also pointed to a September 10, 2001 letter from West Virginia National advising her that her policy had been rescinded, arguing that this letter signifies that a policy had to exist and that, once the policy

⁵ See Response of the Third Party Defendant, West Virginia National Auto Insurance Company, to Motion for Summary Judgment of the Third Party Plaintiff.

⁶ *Id.*

⁷ *Id.*

⁸ See Third Party Plaintiff Stephanie Michelle Conley's Response to Third Party Defendant West Virginia National Auto Insurance Company's Response to Motion for Summary Judgment.

⁹ *Id.*

¹⁰ *Id.*

issued, West Virginia National was obligated to comply with West Virginia Code § 33-6A, *et seq.*¹¹ Conley asserted that, because West Virginia National failed to provide proper notice of cancellation, her coverage was effective on August 31, 2001, the date of the aforementioned vehicle accident.¹²

Paragraph 15(b) of the policy of insurance which Conley alleges was in effect on the date of her accident, in the section entitled "Cancellation," provides as follows:

Cancellation by the Company of *a policy which has been in effect* for less than sixty (60) days: This policy may be canceled by the Company by mailing to the insured named in Item 1 of the declarations at the address shown in this policy, written notice stating when, not less than ten days thereafter, such cancellation shall be effective, provided that *the policy has been in effect* less than sixty (60) days and this is not a renewal policy. The policy may be canceled by the Company upon actual notice to the insured or by mailing notice of such cancellation.¹³

West Virginia Code § 33-6A-1(e)(7) provides that the cancellation of an *existing* insurance policy by an insurer for failure of consideration to be paid upon the initial issuance of the policy requires ten (10) days notice of cancellation to the insured. Thus, while such notice of cancellation is clearly required where a policy has been formed and some consideration other than a premium payment, such as the promise to pay, has been given, no such notice is required where no consideration was provided and no policy exists.

In the instant case, the application completed by Conley expressly indicated that if the premium remittance was not honored by the bank, then no coverage would be bound.¹⁴ Conley,

¹¹ *Id.*

¹² *Id.*

¹³ See West Virginia National Auto Insurance Company policy for which Conley submitted an application.

¹⁴ See insurance policy application submitted by Conley.

at the time of her application on August 15, 2001, attempted to pay to West Virginia National the sum of One Hundred Seventy-Four Dollars (\$174.00), as the *initial premium payment required prior to issuance of the policy of insurance*, by presenting to West Virginia National a check in that amount. However, said check was dishonored and returned due to insufficient funds. By letter dated September 11, 2001, West Virginia National notified Conley that her check had been returned for insufficient funds and advised her that she had no coverage as of August 15, 2001, as the result of non-payment of the premium.¹⁵ West Virginia National maintains that a policy was never issued due to a lack of consideration and, further, that the application clearly provides there will be no insurance coverage if the premium remittance is not honored by the bank.

The trial court found that West Virginia National issued a policy and subsequently failed to properly cancel the said policy and that, accordingly, the policy was in effect on the date of the automobile accident.¹⁶ Based upon these findings, on November 22, 2004, the trial court granted Conley's motion for summary judgment on the declaratory judgment action, concluding that West Virginia National owes a duty to defend and indemnify Conley in connection with the underlying automobile accident.¹⁷

III. ASSIGNMENT OF ERROR

The circuit court erred in concluding that a policy of insurance was in effect at the time of the accident despite the undisputed fact that the check issued by Conley in payment of the

¹⁵ See letter from Julia L. Thomas, Underwriting Department at West Virginia National, to Conley dated September 11, 2001.

¹⁶ See Findings of Fact and Conclusions of Law Granting Summary Judgment.

¹⁷ *Id.*

initial premium required prior to issuance of a new policy of insurance was dishonored by the drawee bank due to insufficient funds upon presentment.

IV. STANDARD OF REVIEW

The standard of review for summary judgment granted by the lower court is well established in West Virginia. As stated in syllabus point one of Mountain Lodge Association v. Crum & Forster Indemnity Co., 210 W. Va. 536, 558 S.E.2d 336 (2001), “‘A circuit court’s entry of summary judgment is reviewed de novo.’ Syl. Pt. 1, Painter v. Peavy, 192 W. Va. 189, 451 S.E.2d 755 (1994).” In addition, the standard by which lower courts are to dispose of motions for summary judgment is clear. In syllabus point three of Aetna Casualty & Surety Co. v. Federal Insurance Company of New York, 148 W. Va. 160, 133 S.E.2d 770 (1963), this Court explained, “[a] motion for summary judgment should be granted only when it is clear that there is no genuine issue of fact to be tried and inquiry concerning the facts is not desirable to clarify the application of the law.” Further, in syllabus point two of Williams v. Precision Coil, Inc., 194 W. Va. 52, 459 S.E.2d 329 (1995), this Court wrote, “[s]ummary judgment is appropriate if, from the totality of the evidence presented, the record could not lead a rational trier of fact to find for the nonmoving party, such as where the nonmoving party has failed to make a sufficient showing on an essential element of the case that it has the burden to prove.” Just as the lower court must, this Court is to “draw any permissible inference from the underlying facts in the light most favorable to the party opposing the motion.” Painter, 192 W. Va. at 192, 451 S.E.2d at 758.

V. ARGUMENT

A. Existing West Virginia Precedent Holds That Attempted Payment of an Insurance Premium By a Check Which is Subsequently Dishonored Does Not Constitute Payment Sufficient to Serve as Consideration for a Policy of Insurance

This Court has previously addressed the very question presented in this appeal, namely, whether attempted payment of an insurance premium by tender of a check which is subsequently dishonored due to insufficient funds constitutes payment sufficient to serve as consideration for a policy of insurance. Indeed, as early as 1934, this Court found a worthless check for a premium payment to be insufficient consideration for insurance coverage. Hare v. Connecticut Mutual Life Ins. Co., 114 W.Va. 679, 173 S.E. 772 (W.Va. 1934). The Hare decision was cited as authority in the more recent case of Nationwide Mutual Ins. Co. v. Smith, 153 W.Va. 817, 172 S.E.2d 708 (1970), as indicated below.

In Nationwide, the policy applicant tendered to the insurance company a check for the portion of the premium due at the time the policy was delivered. Said check was refused by the payor bank due to a lack of sufficient funds. The insurer was notified by the presenting bank that the payor bank had refused payment, and thereafter the insurer contacted the applicant to inform him that the check in payment of the premium had been returned. The check was presented for payment three times, and in each instance payment was refused for a lack of sufficient funds. Each time the payment was refused, the insurer notified the applicant of the non-payment and warned of policy cancellation. In holding that the tender of a dishonored check did *not* constitute payment of the premium, this Court wrote:

In *Hare v. Connecticut Mutual Life Insurance Company*, 114 W.Va. 679, 173 S.E. 772 [W.Va. 1934], this Court said: "The premium is the price of the insurance and payment of the premium is of the essence of the insurance contract. No payment – no insurance. A worthless check is not a payment of anything." In 14 Appleman, Insurance Law and Practice, Section 8144, the text, supported by numerous decisions, contains these statements: "***The mere giving or sending of a worthless check to the insurer does not effect the payment of a premium; the result being, if such check is given for the first premium, that coverage never goes into effect***, and if given for a subsequent premium, that the coverage is not thereby prevented from lapsing. In order for a worthless check to constitute a valid payment, it must have been unconditionally accepted as such by the insurer." In 44 C.J.S., Insurance, Section 270, the text states that "* * * the payment or agreement to pay the premium by insured is a condition precedent to, or at least concurrent with, the assuming of any liability by the insurance company."

Nationwide, 153 W.Va. at 825, 172 S.E.2d at 712 (emphasis added). After considering all of the available authority, this Court concluded, "[i]n the absence of the payment of the premium which was to have been paid when the policy was delivered the policy was invalid from its inception and because of the nonpayment of the premium, which constituted lack of consideration, the policy did not at any time afford the assureds any coverage and, of course, was not in effect at the time of the automobile collision[.]" *Id.*, 153 W.Va. at 827, 172 S.E.2d at 713.

More recently, in the case of American Hardware Mutual Ins. Co. v. BIM, Inc., 885 F.2d 132 (4th Cir. 1989), the United States Court of Appeals for the Fourth Circuit, applying West Virginia law, reached the same conclusion. In American Hardware, the court considered an appeal from summary judgment entered against an applicant for insurance in a declaratory judgment action instituted by an insurance company. The insurance company sought to establish non-coverage with respect to a fire loss under a binder issued by its agent on the ground that the applicant's tender of a worthless premium check precluded coverage. The insurer argued that "any prospective coverage

was void *ab initio*, inasmuch as the dishonor of [the applicant's] deposit check amounted to a 'failure of consideration.'" *Id.*, 885 F.2d at 135. In addressing the question of whether the tender of a worthless premium deposit check presumptively voided *ab initio* all coverage under the binder, the court discussed the implications of non-payment of premiums due to a dishonored check in the context of both insurance policies and binders. With respect to both scenarios, the court concluded that under West Virginia law, "where the insurer has required a premium as consideration, the insured's tender of a worthless check in satisfaction of the resulting 'condition precedent' would render any apparent coverage void *ab initio*." *Id.*, 885 F.2d at 137.

In the instant case, the insurer explicitly required payment of the initial premium as a mandatory prerequisite to formation of an insurance contract. The check tendered by Conley in an attempt to pay the initial premium was dishonored. As a result, under clear West Virginia judicial precedent, no policy of insurance was ever issued and, therefore, no notice of cancellation was appropriate or required. Accordingly, the decision of the circuit court to the contrary is in error and should be reversed.

B. West Virginia Should Continue to Follow the National Trend and Reaffirm That the Tender of a Worthless Check Does Not Constitute Payment of an Insurance Premium and Is Not Consideration for Insurance Coverage

Courts from other jurisdictions have also addressed the question of the effect of attempted payment of an initial insurance premium with a subsequently dishonored check, and have uniformly reached the same conclusion as West Virginia's courts. For example, in Johnson v. Dairyland Ins. Co., 398 So. 2d 317 (Ala. Civ. App. 1981), the applicant paid a premium for an automobile insurance policy with a check which was returned for insufficient funds. The insurance company informed the applicant that no insurance coverage had been extended as a result of the

dishonored check, and the applicant brought suit to obtain coverage. The Alabama Court of Civil Appeals held that payment of the insurance premium was a condition precedent to an enforceable contract of insurance. *Id.*, 398 So. 2d at 319. Since the applicant's check was returned, the applicant failed to satisfy the condition precedent and, therefore, no coverage existed. *Id.* The court rejected the applicant's argument that handing over the check itself constituted absolute payment of the premium, finding that, while parties may agree to consider a check as accepted as absolute payment and satisfaction of the premium, the party claiming such an agreement has the burden of proving an agreement to that effect. *Id.*

Similarly, in Statewide Ins. Corp. v. Dewar, 143 Ariz. 576, 694 P.2d 1190 (Ariz. App. 1983), the applicant applied for an automobile liability insurance policy and paid the entire policy premium with a check which was dishonored. The applicant was subsequently involved in an accident and the insurance company sought a declaratory judgment that, because no coverage existed, it was liable to neither the applicant nor the injured party. The Arizona appellate court held that the insurer was not required to provide liability coverage because the applicant's check, which was consideration for the coverage, was dishonored, therefore releasing the insurer from any liability.¹⁸ Interestingly, in reaching this conclusion, the Arizona court cited to the West Virginia case of Hare, *supra*, as persuasive authority.

¹⁸ Dewar was reversed by the Arizona Supreme Court in Statewide Insurance Corporation v. Dewar, 143 Ariz. 553, 694 P.2d 1167 (1984). The court held that coverage under a binder of insurance became effective in accordance with the terms contained therein, which did not condition the existence of coverage under the binder upon payment of the initial premium. However, the court noted that, while the insurer could not contend that no coverage had ever existed under the binder, the insurer could have, upon dishonor of the check given for the policy premium, refused the application for insurance and cancelled coverage under the binder, retaining the right to collect for any temporary coverage already extended under the binder.

Colorado courts have also found worthless premium checks to be insufficient consideration for insurance coverage. In Bolz v. Security Mutual Life Ins. Co., 721 P. 2d 1216 (Colo. App. 1986), a widow made a claim for life insurance benefits following her husband's suicide. The insurer denied the claim, explaining that the policy had lapsed due to dishonor of the premium check tendered by the husband prior to his death. The court affirmed the trial court's grant of summary judgment in favor of the insurer, ruling that the insurer had neither expressly nor impliedly accepted the check itself as absolute payment of the premium, *Id.*, 721 P. 2d at 1218, and that the insurer did not waive its right to forfeit the policy because the insurer was unaware of the dishonor of the check until after the husband's suicide. *Id.*, 721 P.2d at 1219.

Likewise, the Supreme Court of South Carolina held that a life insurance policy lapsed prior to the death of the insured, who had given the insurer a check for payment of an insurance premium, which check was twice dishonored. Burns v. Prudence Life Ins. Co., 243 S.C. 515, 134 S.E.2d 769 (S.C. 1964). The court explained the general rule that, absent an express or implied agreement to the contrary, a check does not constitute payment unless it produces payment in cash, the presumption being that the check is accepted on the condition that it be paid. The court concluded that in the insurance context, the taking of a check for an insurance premium is conditional upon payment of the check upon presentation. *Id.* Numerous other cases have held that a worthless check does not constitute payment of an insurance premium sufficient to serve as consideration for coverage.¹⁹

¹⁹*See, e.g., Tallent v. Tennessee Farmers Mut. Ins. Co.*, 785 S.W. 2d 339 (Tenn. 1990) (insured's check was not good when issued or anytime thereafter and, thus, insurer was not liable, regardless of unconditional receipt issued to the insured and a notice that coverage was reinstated when the check was received); Progressive Preferred Ins. Co. v. Brown, 261 Ga. 837, 413 S.E. 2d 430 (Ga. 1992) (holding an insurer did not accept a dishonored check as a premium payment when it presented the check a second time for collection and, therefore, insurer had a valid ground for cancellation of the policy because of the worthless check); National Union Fire Ins. Co. v. Want, 181 Ark. 824, 827-28,

Moreover, those cases from other jurisdictions which at first blush appear to support Conley's position are easily distinguishable on their facts from the instant case because they involve situations in which the insurance carrier conducted itself so as to effectuate a waiver of its right to timely premium payments as a prerequisite to coverage. Thus, these cases actually accord with West Virginia's existing case law, which recognizes waiver situations as an exception to the general rule that a dishonored check cannot support formation of a contract of insurance. For instance, in John Hancock Mut. Life Ins. Co., 86 F.2d 783 (7th Cir. 1936), the court held that insurance coverage existed despite the fact that a premium check was dishonored, but it based this conclusion on its finding that the insurance agent had extended credit to the insured on behalf of the insurer when he knowingly accepted a post-dated check in payment of the premium. Similarly, in Kansas City Life Ins. Co. v. Davis, 95 F.2d 952 (9th Cir. 1938), the court found a policy of insurance was in effect even though the premium check was worthless, but reached this result based upon the fact that the insurer permitted the insured to make back payments for unpaid premiums and subsequently accepted a check from a third party in payment of a dishonored premium check given by the insured, thereby waiving the conditions precedent to its policy obligations.²⁰

28 S.W.2d 63, 64 (Ark. 1930) (holding that a policy of fire insurance suspending liability thereunder while the premium remains unpaid is valid, and a dishonored check offered as payment of the premium is not sufficient consideration, absent actual acceptance of the check itself as consideration, to give rise to coverage); Abdel-Rahman v. Ludas, 266 N.J. Super. 46, A. 2d 778 (N.J. Super. 1993) (holding that an insurance policy was void because the applicant's check for payment of the initial automobile insurance premium was dishonored due to insufficient funds); Cauley v. General American Life Ins. Co., 219 N.C. 398, 400, 14 S.E. 2d 39, 40 (N.C. 1941) (holding that "[n]onpayment of a premium when due, or within the period of grace thereafter, in the absence of some extension or waiver, automatically avoids a policy of insurance," and that applicant's "giving of a worthless check is not payment."); Stager v. Federal Life Ins. Co., 125 Pa. Super. 68, 189 A. 776 (Pa. Super. 1937) (insurance policy lapsed where the evidence showed that the beneficiary had sent a personal check for the premiums that was returned for insufficient funds).

²⁰See also Wiles v. Nationwide Life Ins. Co., 334 F.2d 296 (4th Cir. 1964) (holding that evidence of insurer's practices as to late premiums, prior-to-lapse notice, and easy reinstatement amounted to waiver of right to timely premium payment as condition precedent to coverage); Soso Trucking, Inc. v. Central Ins. Agency, Inc., 236 So. 2d 398 (Miss. 1970) (local agent's acceptance of check and advance from local agent through general agent to defendant waived

While a small minority of courts have found that an insurer was required to provide statutory notice of cancellation following the dishonor of a premium check, those cases differ in important respects from the instant case. Specifically, in those cases, the premiums for which the worthless checks were given were not the initial payments required as consideration for issuance of a new policy of insurance but, instead, were premiums for *existing* policies, thus subjecting the insurer to statutory notice of cancellation requirements. For example, in Yacko v. Curtis, 339 Ill. App. 3d 299, 789 N.E.2d 1274 (Ill. App. 2003), the Illinois appellate court held that under an Illinois statute, the insurer could cancel an *existing* policy for nonpayment of a premium, *but not the initial premium*, by providing appropriate notice of cancellation. Similarly, in Automobile Club Ins. Co. v. Jackson, 124 Idaho 874, 865 P.2d 965 (Ida. 1993), it was held that the insureds' attempted payment of the *second installment* of a budget payment of the premium for a *renewal policy* using a check which was dishonored did not preclude coverage, where insurer failed to provide the appropriate notice of cancellation required by statute.

Thus, these cases finding a duty to provide notice of cancellation following the return of a premium check involve existing policies of insurance rather than mere applications, and such cases do not support Conley's novel position. Furthermore, while a few cases have held that a notice of cancellation must be provided following return of premium checks for existing policies, the more reasonable position with respect to renewal policies appears to be that found in Butt v. State Farm Mutual Auto. Ins. Co., 107 Ill. App. 3d 68, 72, 437 N.E.2d 346, 349 (1982), namely, that a plaintiff

defendant's right to forfeit coverage for the time period for which the check had been tendered); Katinsky v. Auto Club Ins. Assoc., 201 Mich. App. 167, 505 N.W. 2d 895 (Mich. App. 1993) (insurer had no right to void policy because of cancelled premium check when insurer had issued a billing notice which stated the policy would be cancelled unless payment was received by a specified date, which date was subsequent to the accident giving rise to the claim for coverage).

should not be permitted to foist upon his or her insurer a retroactive “change in the terms of their written insurance policy merely by tendering a check for an amount that represents what would have been due had plaintiffs not breached their duty to pay renewal premiums on a timely basis.”

Because those cases finding that a policy was in effect and that the insurer was subject to duties under those policies involve peculiar factual scenarios implicating the doctrines of waiver and estoppel, they are of little value in assessing the case at hand. Therefore, as a whole, the body of foreign cases addressing the issue involved in this appeal strongly supports the conclusion that a worthless premium check does *not* constitute payment of an insurance premium sufficient to serve as consideration for the creation of a contract of insurance.

C. Because No Policy of Insurance Was Ever Formed, West Virginia National Had No Statutory Duty to Provide Notice of Cancellation

The decision not to issue a policy of insurance following an application and subsequent dishonor of the check tendered in payment of the initial payment does not amount to a policy cancellation, but merely a decision not to issue a policy in the first place. Because no cancellation occurs in such a situation, the provisions relating to cancellation, W. Va. Code §§ 33-6A-1, *et seq.*, are not implicated, Conley’s assertions to the contrary notwithstanding. The language of W. Va. Code § 33-6A-1 supports this conclusion: “No insurance *once having issued or delivered a policy . . . may, after the policy has been in effect* for sixty days, or in case of renewal effective immediately, issue or cause to issue a notice of cancellation *during the term of the policy* except for one or more of the reasons specified in this section.” W. Va. Code § 33-6A-1 (emphasis added). Clearly, then, in order for a notice of cancellation to be required under section 33-6A-1 *et seq.*, there must first exist a policy of insurance. Along the same lines, the particular code provision upon

which Conley relies, W.Va. Code § 33-6A-1(e)(7), regarding notice of cancellation when an initial premium is not paid but a policy has nonetheless already been issued, requires ten days' notice of cancellation, provides as follows:

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.

Id. However, this statutory provision applies only when the insured makes a promise to pay the premium on the initial issuance of a policy but later fails to make the promised payment. In such instances, the consideration for issuance of the policy is the applicant's *promise* to pay the premium rather than the actual payment of the premium. This section coincides with the waiver exception to the case law in that it permits an insurer to waive its right to demand actual premium payment as consideration for issuance of a policy, and prevents an insurer that has waived this right and accepted a promise to pay as consideration from later contending the policy which it issued is invalid due to a worthless premium check.

In contrast, with respect to the subject policy application, it is clear that actual payment of the initial premium was expressly required at the time of the execution of the application. West Virginia National did not waive its right to such consideration, and did not accept a mere promise to pay the premium as consideration for a policy of insurance. As the required premium check provided by Conley was refused by the bank for insufficient funds, there was a failure of consideration and, thus, no policy was issued. Because no policy was issued, the statutory provisions pertaining to policy cancellation are inapplicable in this case, and no notice of cancellation was necessary.

D. Public Policy Considerations Support a Rule Requiring Valid Consideration to Support the Issuance of Policies of Insurance

Public policy considerations support the majority rule requiring that applicants make effective payments of initial insurance premiums as consideration for the issuance of policies of insurance. This rule comports with common sense and basic principles of contract law and insurance law. The most basic concepts of insurance presuppose the payment of a premium in exchange for purchasing insurance against certain risks. While an insurer can affirmatively waive its right to actual payment of a premium in exchange for the policy of insurance by accepting as an alternative form of consideration the *promise* to pay a premium, such a waiver occurs only in unusual circumstances when the insurer has made a decision to depart from the usual practice of requiring payment. Fundamental principles of insurance, as well as the general practices of insurers, require actual payment of the initial premium as a prerequisite to issuance of a valid policy of insurance.

The rule proposed by Conley, which would require insurers to provide coverage to applicants under alleged policies of insurance in circumstances in which payment of a premium was expressly required as consideration for coverage but was never made, would undermine the very foundation of insurance risk distribution. If insurers are required to defend and indemnify applicants in such circumstances, they will be paying claims for which no premium has been received, a pattern that would significantly impair the insurer's ability to assess and distribute risks across the pool of policyholders. As a result, responsible insureds who make premium payments will bear the burden of paying increased premiums in order to take up the slack created by those who have written bad checks and failed to pay their premiums.

Conley's proposed rule would confer upon those applicants who fail to pay premiums a significant windfall which would exceed any objectively reasonable expectation of coverage. Certainly the average citizen would assume, after tendering to an insurer a worthless check in payment of a premium when the insured has expressly indicated that payment is a required prerequisite to issuance of a policy of insurance, that no policy has been formed and no coverage provided. Any belief on the part of Conley or a similarly situated individual that coverage would be provided despite the non-payment of the mandatory initial premium is objectively unreasonable and should not serve as the basis for requiring coverage. The rule proposed by Conley would serve only to encourage individuals to attempt to procure insurance at no cost by tendering worthless premium checks to insurers. West Virginia National respectfully submits that such a rule is clearly contrary to sound public policy considerations and should not be adopted by this Court.

VI. CONCLUSION

In the present case, Conley tendered to West Virginia National a check for payment of her initial insurance premium. Acceptance of said check as payment of the initial premium was obviously presumptively conditioned upon the drawee bank honoring the check. Because the check was dishonored due to insufficient funds upon presentment, the initial premium was never in fact paid and, accordingly, no policy was ever formed. Because no policy of insurance was ever formed, there was no policy to be cancelled, and West Virginia National had no duty to provide notice of cancellation under West Virginia Code § 33-6A-1(e)(7). Accordingly, the circuit court erred in granting summary judgment in favor of Conley.

VII. STATEMENT OF RELIEF SOUGHT

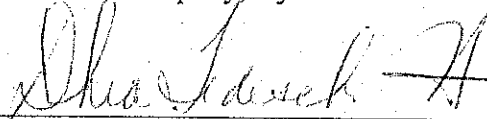
WHEREFORE, for those reasons set forth above, West Virginia National Auto Insurance Company hereby requests that this Honorable Court reverse the order of the circuit court granting summary judgment in favor of Stephanie Michelle Conley. Moreover, West Virginia National requests that this Honorable Court find that no policy of insurance exists and no duty to provide notice of cancellation arises where the check tendered in payment of the initial premium expressly required prior to issuance of the policy is dishonored, thus West Virginia National to summary judgment.

VIII. REQUEST FOR ORAL ARGUMENT

The Third Party Defendant, West Virginia National Auto Insurance Company, hereby requests that this matter be scheduled for oral argument before this Honorable Court.

Respectfully submitted this the 28th day of July, 2005.

Third Party Defendant, West Virginia National Auto
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