

**IN THE CIRCUIT COURT OF ROANE COUNTY, WEST VIRGINIA**

**NATIONWIDE MUTUAL INSURANCE COMPANY,  
Plaintiff/Counterclaim Defendant,**

**v.**

**CIVIL ACTION NO. 00-C-37  
(Judge David W. Nibert)**

**GEORGE G. O'DELL, JR. and STACY McKOWN O'DELL,  
Defendants/Counterclaim Plaintiffs,**

**and**

**CHAD DAVID KENNY and BOBBIE DAWN KENNY,  
Plaintiffs,**

**v.**

**NATIONWIDE MUTUAL INSURANCE COMPANY,  
Defendant,**

**and**

**GEORGE G. O'DELL, JR. and STACY McKOWN O'DELL,  
Plaintiffs,**

**v.**

**NATIONWIDE MUTUAL FIRE INSURANCE COMPANY,  
NATIONWIDE PROPERTY AND CASUALTY INSURANCE COMPANY,  
and NATIONWIDE ASSURANCE COMPANY (formerly known as  
COLONIAL INSURANCE COMPANY OF WISCONSIN),  
Defendants.**

**GEORGE G. O'DELL, JR. AND STACY McKOWN O'DELL'S  
CONSOLIDATED FOURTH AMENDED ANSWER,  
AMENDED COUNTERCLAIMS, AND COMPLAINT**

Exhibit A

**O'DELL AND McKOWN'S CONSOLIDATED  
FOURTH AMENDED ANSWER TO AMENDED COMPLAINT**

George G. O'Dell, Jr., ("O'Dell") and Stacy McKown O'Dell ("McKown") (collectively, the "O'Dells"), individually and on behalf of all other similarly situated persons, by counsel ("Class Counsel"), for their fourth consolidated Answer to the Amended Complaint of Nationwide Mutual Insurance Company ("Nationwide Mutual"), answer as follows:

1. As to Paragraph 1 of said Amended Complaint, upon information and belief the O'Dells admit the allegations contained therein.

2. As to paragraph 2 of said Amended Complaint, the O'Dells admit that O'Dell is a resident of both Wirt County and Wood County, West Virginia.

3. As to paragraph 3 of said Amended Complaint, the O'Dells deny that McKown is a resident of Wirt County, West Virginia, and allege that she is a resident of Wood County, West Virginia.

4. As to paragraph 4 of said Amended Complaint, the O'Dells admit that O'Dell had a policy of insurance issued by Nationwide Mutual that was in effect on April 22, 2000. The O'Dells also admit that the coverages sold by Nationwide Mutual under that policy were bodily injury liability limits of \$50,000 per person/\$100,000 per accident, uninsured motorist limits of \$100,000 per person/\$300,000 per accident, and \$0 of underinsured motorist coverage. However, the O'Dells specifically deny that Nationwide Mutual provided O'Dell with an opportunity to purchase optional limits of uninsured or underinsured motorist coverage in accordance with the laws of the State of West Virginia, and, therefore, allege that Nationwide Mutual's said policy was reformed by operation of law to include underinsured motorist coverage of \$50,000 per person/\$100,000 per accident, in accordance with Bias v. Nationwide,

179 W.Va. 125, 365 S.E.2d 789 (1987).

5. As to Paragraph 5 of said Amended Complaint, the O'Dells admit the allegations contained therein.

6. As to Paragraph 6 of said Amended Complaint, the O'Dells admit the allegations contained therein.

7. As to Paragraph 7 of said Amended Complaint, the O'Dells admit the allegations contained therein.

8. As to Paragraph 8 of said Amended Complaint, the O'Dells expressly deny that Nationwide Mutual made any offers, commercially reasonable or otherwise, to O'Dell to purchase optional limits of uninsured or underinsured motorist coverage, and, in the alternative, if Nationwide Mutual made any offers to O'Dell to purchase optional limits of uninsured or underinsured motorist coverage, such offers were not commercially reasonable and were not in compliance with the requirements of West Virginia Code §§ 33-6-31 and 33-6-31d, West Virginia Insurance Commissioner Regulations and Informational Letter No. 88, and/or Bias v. Nationwide. Furthermore, the O'Dells expressly deny that O'Dell knowingly and intelligently waived his legal right to purchase optional limits of uninsured or underinsured motorist coverage.

9. As to Paragraph 9 of said Amended Complaint, the O'Dells admit that Nationwide Mutual filed a lawsuit against the O'Dells, but have no way of knowing Nationwide Mutual's true motive for filing such a lawsuit.

### **First Defense**

Except as expressly admitted above, the O'Dells deny each and every allegation in Nationwide Mutual's Amended Complaint.

**Second Defense**

The O'Dells hereby reserve the right to assert any and all affirmative defenses that may become evident during the course of these proceedings.

**Third Defense**

The O'Dells assert the affirmative defenses of estoppel and laches.

WHEREFORE, the O'Dells pray that Nationwide Mutual take nothing under its Amended Complaint, and pray that they be compensated \$50,000 each as reformed underinsured motorist coverage, as well as being compensated for their costs and reasonable attorneys' fees incurred herein, pre- and post-judgment interest, damages for annoyance, inconvenience, aggravation and distress, and all other relief that they are entitled to under West Virginia law.

**AMENDED COUNTERCLAIMS AND COMPLAINT  
OF O'DELL AND McKOWN AND ALL OTHERS  
SIMILARLY SITUATED AGAINST NATIONWIDE**

1. O'Dell and McKown are husband and wife and are residents of Wood County, West Virginia. They make these counterclaims and claims in their own right and on behalf of all those similarly situated, as set forth below.

2. Nationwide Mutual Insurance Company, Nationwide Mutual Fire Insurance Company, Nationwide Property and Casualty Insurance Company, and Nationwide Assurance Company (formerly known as Colonial Insurance Company of Wisconsin) are corporations authorized by the Insurance Commissioner's Office in the State of West Virginia to sell various kinds of insurance to the residents of the State of West Virginia. These companies shall hereafter be collectively referred to as "Nationwide".

3. At the time of the events which formed the basis of this litigation, Nationwide Mutual maintained a policy of insurance owned by O'Dell and denominated as Policy No. 92 47 H401 554. O'Dell has paid all required premiums on the policy, and all conditions of the policy have been performed. Nationwide Mutual has issued similar policies to thousands of West Virginia vehicle owners.

4. The insurance policy Nationwide Mutual sold to O'Dell provided insurance coverage for a 1985 Chevrolet, which coverage included, among other things, comprehensive, uninsured, and liability, but specifically lacked coverage for underinsured motorist protection. Nationwide has issued thousands of similar policies to West Virginia vehicle owners.

5. McKown, who was a passenger in O'Dell's vehicle at the time of the events which formed the basis of this litigation, was and is an express and intended beneficiary of the promises contained in the policy that Nationwide Mutual sold to O'Dell, and, as a passenger in O'Dell's vehicle at the time of the April 22, 2000 motor vehicle accident discussed below, McKown, as well as all other passengers similarly injured in motor vehicle accidents involving Nationwide insureds, was and is a covered person under Nationwide's policies pursuant to West Virginia Code § 33-6-31(c) and Starr v. State Farm, 188 W. Va. 313, 423 S.E.2d 922 (1992). (McKown was also a Nationwide Mutual automobile policyholder at the time of the April 22, 2000 motor vehicle accident.)

6. On or around April 22, 2000, O'Dell and McKown were involved in a two-vehicle automobile accident that gave rise to this litigation. O'Dell was driving one of the vehicles involved in the accident, and McKown was a passenger in that vehicle. The other vehicle involved in the accident was driven by Melvin Marks, and Chad and Bobbie Kenny were passengers in that vehicle.

7. O'Dell and McKown suffered substantial injuries and damages in the April 22, 2000 accident, including severe head and face trauma and multiple, severe and permanently disfiguring facial scars to McKown, who incurred medical bills in excess of \$6,000, and including a severe and permanent orthopaedic injury to O'Dell, who incurred medical bills of approximately \$25,000.

8. In full compliance with the terms of O'Dell's policy with Nationwide, O'Dell and McKown promptly reported their claims from the April 22, 2000 accident to Nationwide Mutual.

9. Shortly after the accident, it became apparent that O'Dell and Melvin Marks did not have sufficient liability insurance to fairly compensate the individuals who were injured in the accident, including O'Dell and McKown. (Melvin Marks ultimately confessed judgment in favor of O'Dell and McKown in the amount of \$300,000 each.)

10. O'Dell and McKown notified Nationwide that the value of each of their claims would easily exceed all applicable liability insurance limits, and requested verification that Nationwide had properly and validly offered O'Dell the opportunity to purchase optional levels of underinsured motorist coverage in accordance with the laws of this State. In connection therewith, O'Dell requested copies of all underinsured motorist selection/rejection forms that Nationwide had allegedly sent to O'Dell.

11. Nationwide responded by stating that O'Dell had waived his option to purchase any level of underinsurance coverage. Nationwide claimed that in 1993 and 1999 it had conducted two separate mass mailings of uninsured and underinsured motorist selection/rejection and IMPORTANT NOTICE forms to its West Virginia policyholders, including O'Dell. Nationwide claimed that in each of those mass mailings, it included a letter to all of its automobile policyholders, including O'Dell, explaining uninsured motorist coverage ("UM") and underinsured motorist coverage ("UIM") and offering optional levels of such coverages. Nationwide claimed that O'Dell had not returned a selection form within thirty (30) days of either the 1993 or 1999 mass mailing indicating that he wished to purchase underinsured motorist coverage. On information and belief, this has been Nationwide's standard response to the coverage requests of other policyholders in a similar position to that of O'Dell.

12. Nationwide's alleged offers of uninsured and underinsured motorist coverages in its 1993 and 1999 mass mailings to O'Dell and other Nationwide policyholders, even if received by O'Dell or others (a fact which is not admitted), were not commercially reasonable offers to purchase optional levels of uninsured or underinsured motorist protection as required by law, specifically, as required by W. Va. Code §§ 33-6-31 and 33-6-31d, West Virginia Insurance Commissioner Informational Letter No. 88, and Bias v. Nationwide Mutual Insurance Company, 179 W.Va. 125, 365 S.E.2d 789 (1987).

13. O'Dell and McKown notified Nationwide that its denial of their claims for reformation of O'Dell's policy to include underinsured motorist coverage was in violation of West Virginia law because Nationwide's 1993 and 1999 mass mailings were not in compliance with the requirements of W. Va. Code §§ 33-6-31 and 33-6-31d, West Virginia Insurance Commissioner Informational Letter No. 88, and Bias v. Nationwide.

14. Despite knowing that its 1993 and 1999 mass mailings of forms to policyholders, including O'Dell and others similarly situated, were not in compliance with West Virginia law, Nationwide refused (and continues to refuse) to reform O'Dell's policy in accordance with Bias v. Nationwide, and has routinely refused to reform the policies of other individuals in the same situation as O'Dell.

15. Instead of reforming O'Dell's policy to provide O'Dell and McKown with underinsured motorist coverage in accordance with the laws of this State, Nationwide Mutual filed a Complaint for Declaratory Judgment against O'Dell to initiate this litigation, and later filed an Amended Complaint for Declaratory Judgment against O'Dell and McKown, all in furtherance of Nationwide's refusal to reform O'Dell's policy to provide underinsured motorist coverage.

16. On information and belief, when Nationwide insureds have made UM or UIM claims that exceed the face value of their policies, Nationwide has not informed them that they had a right to have their policies reformed to include additional UM or UIM coverage because of the non-compliance of Nationwide's 1993 and 1999 mass mailings. Further, Nationwide made affirmative misrepresentations as to the coverage some policyholders (those who had no UIM or who had stated UM or UIM limits that were below bodily injury (BI) and property damage (PD) liability limits) had, by sending those policyholders declarations pages that showed limits that were only accurate if the 1993 and 1999 mailers were valid, when Nationwide knew or should have known that those mailers were not valid. In addition, upon information and belief, Nationwide's agents, adjusters and other representatives also made affirmative misrepresentations as to the coverages those insureds had by telling them that they only had UM or UIM limits as shown on their declarations pages, which, again, would only have been true if the mailers were valid, when those representatives knew or should have known that the mailers were not valid.

17. Despite knowing that its 1993 and 1999 mass mailings of forms to policyholders, including O'Dell, were not in compliance with West Virginia law, and that it was required to reform O'Dell's policy to include UIM coverage of \$50,000 per person and \$100,000 per accident and pay that coverage to O'Dell and McKown, Nationwide has made no settlement offer to McKown, and has made an unreasonably low settlement offer of \$10,000 to O'Dell. Nationwide has routinely refused to settle with other insureds in the same position as O'Dell and McKown.

18. As a proximate result of the above-described misconduct of Nationwide, O'Dell and McKown, as well as all others similarly situated, have suffered both economic and non-economic injury including, but not limited to, the following:

- a. denial of UM or UIM coverage for uncompensated harm;
- b. increased costs of litigation, including attorneys' fees;
- c. lost interest and lost enhancement of market value on settlement funds ultimately paid;
- d. annoyance, inconvenience and emotional distress associated with Nationwide's failure to provide required insurance benefits, including annoyance and inconvenience suffered as a result of protracted litigation.

**CLASS ALLEGATIONS UNDER WEST VIRGINIA RULE OF CIVIL  
PROCEDURE 23(b)(3) FOR REFORMATION OF CONTRACT AND DAMAGES**

19. O'Dell and McKown counterclaim and assert claims against Nationwide for themselves, and on behalf of the following class of individuals (the "Denied Claims Class"):

All persons who were (i) an insured or Definitional Insured<sup>1</sup> under a Nationwide West Virginia auto insurance policy; (ii) involved in a covered auto accident or incident during the Class Period<sup>2</sup>; (iii) injured by or suffered property damage by the acts of, an uninsured motorist ("UM") or underinsured motorist

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<sup>1</sup>"Definitional Insured" means a person, except a bailee for hire and any person specifically excluded by a restrictive endorsement to the applicable insurance policy, using the subject motor vehicle with the consent of the named insured or his or her spouse or resident of the named insured's household ("resident relative"), and any person occupying a vehicle that is owned by a named insured, is a substitute or replacement vehicle (as defined by the applicable insurance policy) of the named insured, or is a non-owned vehicle being driven by the named insured, the spouse of the named insured, or a resident relative of the named insured, that is not furnished for that person's regular use.

<sup>2</sup>"Class Period" means April 11, 1993 through January 31, 2007.

(“UIM”) in the accident or incident; and (iv) denied or not provided UM or UIM coverage for the accident or incident by Nationwide, or provided UM or UIM coverage for the accident or incident by Nationwide with limits less than the stated bodily injury (“BI”) or property damage (“PD”) liability limits of the policy, where Nationwide lacked a legally-compliant waiver of the optional coverages required to be offered under West Virginia Code § 33-6-31(b), including instances where Nationwide relied upon its 1993 or 1999 mass mailings and/or a Non-Compliant Waiver of UM/UIM Coverage.<sup>3</sup> The following claims are not included in the Denied Claims Class:

1. Claims where the right to UIM coverage or additional UM/UIM coverage equal to liability limits was waived by the signing of a compliant (complying with West Virginia law) selection/rejection form giving up the right to the UIM coverage and/or additional UM/UIM coverage;
2. Claims where the applicable policy provided stated UM/UIM BI coverage, and the claimant settled for less than the stated UM/UIM BI limits;
3. Claims where the applicable policy provided stated UM/UIM PD coverage, and the claimant settled for less than the stated UM/UIM PD limits;
4. Claims where the applicable policy provided stated UM/UIM BI coverage at the time of the accident or incident, and the claimant did not make a

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<sup>3</sup>“Non-Compliant Waiver of UM/UIM Coverage” refers to a selection/rejection form which purports to give up an insured’s right to UM/UIM coverage in amounts required to be offered under West Virginia Code § 33-6-31(b), but which does not comply with West Virginia law.

- claim for UM/UIM BI coverage within the Class Period;
5. Claims where the applicable policy provided stated UM/UIM PD coverage at the time of the accident or incident, and the claimant did not make a claim for UM/UIM PD coverage within the Class Period;
  6. Claims for UIM BI coverage where the claimant did not assert a BI liability claim against the purported underinsured motorist, or asserted such claim and failed to bring a civil action after having been denied any money by the purported underinsured motorist's liability insurer;
  7. Claims for UIM PD coverage where the claimant did not assert a PD liability claim against the purported underinsured motorist, or asserted such claim and failed to bring a civil action after having been denied any money by the purported underinsured motorist's liability insurer;
  8. Claims for UIM BI coverage where the claimant brought a BI liability action against the purported underinsured motorist and in which there was a final judgment for the purported underinsured motorist, or in which the claimant obtained a final judgment for less than the purported underinsured motorist's available liability insurance limits;
  9. Claims for UIM PD coverage where the claimant brought a PD liability action against the purported underinsured motorist and in which there was a final judgment for the purported underinsured motorist, or in which the claimant obtained a final judgment for less than the purported underinsured motorist's available liability insurance limits;
  10. UIM BI claims where the stated or prior reformed UIM BI limits of the

applicable policy were equal to or greater than the stated BI liability limits of the same policy;

11. UIM PD claims where the stated or prior reformed UIM PD limits of the applicable policy were equal to or greater than the stated PD liability limits of the same policy;
12. UM BI claims where the stated or prior reformed UM BI limits of the applicable policy were equal to or greater than the stated BI liability limits of the same policy;
13. UM PD claims where the stated or prior reformed UM PD limits of the applicable policy were equal to or greater than the stated PD liability limits of the same policy; and
14. Claims where the claimant had primary UM/UIM coverage under another policy and settled the claim without exhausting that coverage, or brought an action to obtain payment under such coverage and failed to obtain a judgment or verdict in an amount equal to or greater than the applicable limits of such primary UM/UIM coverage.

20. The Denied Claims Class is created pursuant to W. Va. R. Civ. P. 23(b)(3), and asserts the compensatory and punitive damages claims of all members of the Denied Claims Class. This Denied Claims Class is a non-mandatory class (class members can opt out of it) seeking monetary damages.

21. As to Nationwide's 1999 mass mailing, in every instance the operative language in the policies of Denied Claims Class members was substantially identical, as was the wording

of Nationwide's 1999 mass mailing.

22. Nationwide's 1999 mass mailing was not compliant with W. Va. Code §§ 33-6-31 and 33-6-31d, West Virginia Insurance Commissioner Informational Letter No. 88, and Bias v. Nationwide Mutual Insurance Company, 179 W.Va. 125, 365 S.E.2d 789 (1987) in that, among other deficiencies, the IMPORTANT NOTICE form that Nationwide included in its 1999 mass mailing contained the incorrect centered, capitalized and emboldened heading "**OFFER VALID AFTER THIRTY (30) DAYS**", instead of "**OFFER VOID AFTER THIRTY (30) DAYS**" as required by the Insurance Commissioner's IMPORTANT NOTICE form. On January 23, 2004, the Court in this case determined as a matter of law that Nationwide's 1999 mass mailing was not compliant with West Virginia law because of this error in the IMPORTANT NOTICE form.

23. As to Nationwide's 1993 mass mailing, in every instance the operative language in the policies of Denied Claims Class members was also substantially identical, as was the wording of Nationwide's 1993 mass mailing.

24. Nationwide's 1993 mass mailing was not compliant with W. Va. Code §§ 33-6-31 and 33-6-31d, West Virginia Insurance Commissioner Informational Letter No. 88, and Bias v. Nationwide Mutual Insurance Company, 179 W. Va. 125, 365 S.E.2d 789 (1987) in that, among other deficiencies:

a. Nationwide did not keep a list of the policyholders to whom it allegedly sent its 1993 mass mailing and, as a result, Nationwide has no proof that it "mailed or otherwise delivered" its 1993 mass mailing to any particular policyholder as required by W. Va. Code § 33-633-6-31d.

b. Upon information and belief, some of the selection/rejection forms that Nationwide sent with its 1993 mass mailing omitted prices for uninsured and underinsured

motorist coverage, while other forms had incorrect prices.

c. Upon information and belief, Nationwide failed to send uninsured or underinsured motorist selection/rejection forms to commercial or fleet policyholders in its 1993 mass mailing.

d. Upon information and belief, Nationwide did not send its 1993 mass mailing to policyholders within the time prescribed by the West Virginia Insurance Commissioner.

e. Upon information and belief, the selection/rejections forms that Nationwide sent with its 1993 mass mailing contained lines for the signatures of Nationwide's insurance agents, contrary to the mandate of West Virginia Insurance Commissioner Informational Letter No. 88.

25. All of the prerequisites for maintenance of a class action under W. Va. R. Civ. P. 23(a) have been satisfied for this Rule 23(b)(3) Denied Claims Class:

a. The class of persons who meet the above definition is so numerous that joinder of all members is impracticable. The exact number of Nationwide insureds or their passengers who have been refused or not informed of their rights to uninsured or underinsured motorist coverage since 1993 based upon Nationwide's 1993 and 1999 mass mailings is not known, because only Nationwide has this knowledge, but the number can reasonably be expected to exceed hundreds of persons since Nationwide annually provides more than 150,000 West Virginia residents with automobile liability insurance.

b. There are numerous questions of law and fact common to the class, including:

(1) whether Nationwide's 1993 and 1999 mass mailings were

commercially reasonable (and therefore legally valid) offers to purchase optional levels of uninsured and underinsured motorist coverage as required by W. Va. Code §§ 33-6-31 and 33-6-31d, West Virginia Insurance Commissioner Letter No. 88 and Bias v. Nationwide;

(2) whether Nationwide breached its insurance contracts with class members by denying claims based on its 1993 and 1999 mailers;

(3) whether Nationwide wrongfully concealed from class members the invalidity of the 1993 and 1999 mailers, and/or wrongfully concealed from class members all of the coverages and damages they were entitled to recover under West Virginia law as a result of the invalidity of those mailers;

(4) whether Nationwide violated its duty of good faith and fair dealing to class members, and thereby committed common law bad faith, by denying claims based on its 1993 and 1999 mailers;

(5) whether Nationwide violated West Virginia's Unfair Trade Practices Act and/or the West Virginia Insurance Commissioner's Regulations promulgated pursuant to that Act, and thereby committed statutory bad faith, by denying claims based on its 1993 and 1999 mailers;

(6) whether Nationwide acted with actual malice in denying claims based on its 1993 and 1999 mailers, thereby justifying

punitive damages.

c. The claims and defenses of the representative parties, O'Dell and McKown, are typical of all Denied Claims Class members. Like all Denied Claims Class members, O'Dell and McKown claim that Nationwide's 1993 and 1999 mailers were invalid, that Nationwide therefore uniformly breached its contracts with all Denied Claims Class members by denying their claims based on those mailers, and that all Denied Claims Class members are entitled to increased UIM or UM coverage as a matter of law. In addition, also like all Denied Claims Class members, O'Dell and McKown claim that Nationwide has committed common law and statutory bad faith as to all Denied Claims Class members by uniformly denying their claims based on the 1993 and 1999 mailers, and, therefore, all Denied Claims Class members, including O'Dell and McKown, are entitled to compensatory, punitive and other extra-contractual damages.

d. The representative parties, O'Dell and McKown, will fairly and adequately protect the interests of the Denied Claims Class. O'Dell and McKown have persevered in this litigation for over eight years. They are represented by able counsel, familiar with both insurance coverage issues in West Virginia and class action practice. Their claims are not in conflict with the claims of other members of the Denied Claims Class.

26. The prerequisites for maintenance of a class action under W. Va. R. Civ. P. 23(b)(3) have also been satisfied. Questions of law and fact common to all class members predominate over any questions affecting only individual members so that a class action is superior to other methods available for the fair and efficient adjudication of the controversy.

**COUNT I**

**O'DELL IN HIS OWN RIGHT AND ON BEHALF OF SIMILARLY  
SITUATED POLICYHOLDER MEMBERS OF THE DENIED CLAIMS  
CLASS AGAINST NATIONWIDE**

**BREACH OF CONTRACT CLAIM**

27. O'Dell realleges each and every allegation previously set forth in this Consolidated Fourth Amended Answer, Amended Counterclaims, and Complaint.

28. As explained previously, because Nationwide failed to make commercially reasonable offers of optional limits of UM/UIM coverage as required by W. Va. Code §§ 33-6-31 and 33-6-31d, West Virginia Insurance Commissioner Informational Letter No. 88 and Bias v. Nationwide, Bias imposed by operation of law increased UM/UIM coverage on the policies applicable to Denied Claims Class members' UM/UIM claims.

29. Nationwide has breached its contracts with policyholders in a material and substantial way by failing to provide such increased UM/UIM coverage, and by denying the UM/UIM claims of Denied Claims Class members for such increased UM/UIM coverage.

30. Denied Claims Class members are entitled to retraction of the claim denials and increased UM/UIM coverage as authorized by Bias.

**COUNT II**

**O'DELL AND McKOWN IN THEIR OWN RIGHT AND ON BEHALF OF  
THE DENIED CLAIMS CLASS AGAINST NATIONWIDE**

**Hayseeds v. State Farm “SUBSTANTIALLY PREVAILED” CLAIM**

31. O'Dell and McKown reallege each and every allegation previously set forth in this Consolidated Fourth Amended Answer, Amended Counterclaims, and Complaint.

32. Should O'Dell and McKown and the Denied Claims Class they represent “substantially prevail”, as that term is defined by Hayseeds v. State Farm Fire & Cas. Co., 177 W. Va. 323, 352 S.E.2d 73 (1986) and its progeny, in their Breach of Contract claim against Nationwide, O'Dell and McKown, individually and as representatives of the Denied Claims Class, are entitled to the consequential damages allowed by Hayseeds and its progeny, including, but not limited to, (1) reasonable attorneys' fees; (2) damages for net economic loss caused by the delay in settlement; (3) damages for aggravation and inconvenience; and (4) punitive damages, based on Nationwide's malicious intention to injure or defraud Denied Claims Class members, as alleged herein.

### **COUNT III**

#### **O'DELL AND McKOWN IN THEIR OWN RIGHT AND ON BEHALF OF THE DENIED CLAIMS CLASS AGAINST NATIONWIDE**

##### **COMMON LAW BAD FAITH**

33. O'Dell and McKown reallege each and every allegation previously set forth in this Consolidated Fourth Amended Answer, Amended Counterclaims, and Complaint.

34. Nationwide's misconduct described herein violates Nationwide's common law duty of good faith and fair dealing to O'Dell, McKown and members of the Denied Claims Class, all of whom are first-party insureds within the meaning of West Virginia law.

35. Specifically, Nationwide violated its duty of good faith and fair dealing to Denied Claims Class members by, among other things:

- a. refusing, based on Nationwide's unreasonable position that its 1993 and 1999 mailers were valid offers of optional limits of UM/UIM coverage under West Virginia law, to settle Denied Claims Class members' UM and UIM claims within UM and UIM policy limits increased because of the invalidity of the mailers, when Nationwide had the opportunity to settle within said limits;
- b. failing to disclose to insureds the invalidity of the 1993 and 1999 mailers and the consequences of that invalidity (higher UM/UIM limits);
- c. providing increased UM and/or UIM motorist coverage to some insureds after initially denying those insureds' claims based on the 1993 mailer, because Nationwide recognized the invalidity of the 1993 mailer, without disclosing to those insureds the full extent of the damages those insureds

were entitled to because of Nationwide's initial claim denials;

- d. making affirmative misrepresentations as to the coverage Denied Claims Class members had, by sending policyholders declarations pages that showed limits that were only accurate if the 1993 and 1999 mailers were valid, when Nationwide knew or should have known that those mailers were not valid; and
- e. Nationwide's agents, adjusters and other representatives making affirmative misrepresentations as to the coverages Denied Claims Class members had, by telling insureds that they only had UM or UIM limits as shown on their declarations pages, which, again, would only have been true if the mailers were valid, when those representatives knew or should have known that the mailers were not valid.

**COUNT IV**

**O'DELL AND McKOWN IN THEIR OWN RIGHT AND ON  
BEHALF OF THE DENIED CLAIMS CLASS AGAINST NATIONWIDE**

**VIOLATIONS OF WEST VIRGINIA'S UNFAIR TRADE PRACTICES ACT**

36. O'Dell and McKown reallege each and every allegation previously set forth in this Consolidated Fourth Amended Answer, Amended Counterclaims, and Complaint.

37. Nationwide has a duty to comply with the provisions of West Virginia's Unfair Trade Practices Act, W. Va. Code § 33-11-1, et seq., and with the West Virginia Insurance Commissioner's Rules and Regulations promulgated pursuant to West Virginia's Unfair Trade Practices Act, including, but not limited to, Series 14, Title 114 of the West Virginia Code of State Rules.

38. Nationwide's previously alleged misconduct violates West Virginia's Unfair Trade Practices Act and the West Virginia Insurance Commissioner's Rules and Regulations promulgated pursuant to West Virginia's Unfair Trade Practices Act.

39. Even though Nationwide had knowledge sufficient to justify the reformation of O'Dell's policy to include underinsured motorist coverage covering both O'Dell and McKown, Nationwide wrongfully refused to do so, in violation of W. Va. Code § 33-11-4(9)(f). Likewise, Nationwide has wrongfully refused for the identical reasons to reform the policies of other members of the Denied Claims Class.

40. In addition, Nationwide has consistently and wrongfully failed to provide a reasonable explanation for its denial of the claims of O'Dell, McKown and the members of the Denied Claims Class, in violation of W. Va. Code § 33-11-4(9)(n).

41. Nationwide also has consistently and wrongfully failed to provide a reasonable explanation or basis to O'Dell, McKown and the members of the Denied Claims Class for either its failure to make any settlement offer (as in the case of McKown), or its unreasonably low settlement offer (as in the case of O'Dell), all in violation of W. Va. Code § 33-11-4(9)(n).

42. Nationwide also has wrongfully denied the claims of O'Dell, McKown and the members of the Denied Claims Class for underinsured or uninsured motorist coverage based upon Nationwide's 1993 and 1999 mass mailings, which mailings contained misrepresentations of the conditions and terms of Nationwide's insurance policies, in violation of W. Va. Code § 33-11-4(1)(a).

43. Nationwide also has made affirmative misrepresentations to O'Dell, McKown and the members of the Denied Claims Class as to the conditions and terms of Nationwide's insurance policies, by sending class members declarations pages which misrepresented the coverages class members had, and by Nationwide representatives' misrepresentations of coverage based on those declarations pages, in violation of W. Va. Code § 33-11-4(1)(a).

44. Nationwide also wrongfully denied the claims of O'Dell, McKown and the members of the Denied Claims Class for underinsured and uninsured motorist coverage based upon Nationwide's 1993 and 1999 mass mailings, which mailings contained untrue, deceptive and misleading statements with respect to the business of insurance and with respect to the conduct of the business of insurance, in violation of W. Va. Code § 33-11-4(2).

45. Nationwide also has made untrue, deceptive and misleading statements to O'Dell, McKown and the members of the Denied Claims Class with respect to the business of insurance and with respect to the conduct of the business of insurance, by sending class members declarations pages which misrepresented the coverages class members had, and by Nationwide representatives' misrepresentations of coverage based on those declarations pages, in violation of W. Va. Code § 33-11-4(2).

46. Nationwide also wrongfully denied the claims of O'Dell, McKown and the members of the Denied Claims Class for underinsured and uninsured motorist coverage based upon Nationwide's 1993 and 1999 mass mailings, which mailings misrepresented pertinent facts or insurance policy provisions relating to coverages at issue, in violation of W. Va. Code § 33-11-4(9)(a).

47. Nationwide also misrepresented to O'Dell, McKown and the members of the Denied Claims Class pertinent facts or insurance policy provisions relating to coverages at issue, by sending class members declarations pages which misrepresented the coverages class members had, and by Nationwide representatives' misrepresentations of coverage based on those declarations pages, in violation of W. Va. Code § 33-11-4(9)(a).

48. Nationwide also did not attempt in good faith to effectuate a prompt, fair and equitable settlement of O'Dell's and McKown's underinsured motorist claims, and has likewise not attempted in good faith to effectuate a prompt, fair and equitable settlement of the claims of other members of the Denied Claims Class, after Nationwide's liability for those claims had become reasonably clear, in violation of W. Va. Code § 33-11-4(9)(f).

49. Nationwide also compelled O'Dell, McKown and other members of the Denied Claims Class either to initiate litigation or defend litigation and institute counterclaims against Nationwide to recover amounts due under their insurance policies, by offering substantially less than the amounts ultimately recovered in litigation, even though O'Dell, McKown, and other members of the Denied Claims Class made claims for amounts reasonably similar to the amounts ultimately recovered, in violation of W. Va. Code § 33-11-4(9)(g).

50. Nationwide also failed to disclose to insureds the invalidity of the 1993 and 1999 mailers and the consequences of that invalidity (higher UM/UIM limits), in violation of W. Va. Code § 33-11-4(9)(f).

51. Nationwide also provided increased UM and/or UIM motorist coverage to some insureds after initially denying those insureds' claims based on the 1993 mailer, because Nationwide recognized the invalidity of the 1993 mailer, without disclosing to those insureds the full extent of the damages those insureds were entitled to because of Nationwide's initial claim denials, in violation of W. Va. Code § 33-11-4(9)(f).

52. Upon information and belief, Nationwide has knowingly, wrongfully, wantonly, willfully, intentionally and maliciously engaged in a pattern of unconscionable, outrageous, deceptive and wrongful conduct with regard to its coverage positions, including specifically Nationwide's denial of the claims of O'Dell, McKown and other members of the Denied Claims Class, contrary to West Virginia's Public Policy, the laws of the State of West Virginia and the rulings of the West Virginia Supreme Court of Appeals.

53. Upon information and belief, Nationwide committed the acts, omissions and/or failures described herein as part of a general business practice of violating various provisions of W. Va. Code § 33-11-4(9), et seq.

54. The wanton, wrongful, willful, intentional and malicious acts, omissions and misconduct of Nationwide described herein compelled O'Dell, McKown and other members of the Denied Claims Class to defend and/or prosecute litigation and suffer hardship in many ways, including, but not limited to delay, financial hardship, embarrassment, annoyance and inconvenience.

55. Upon information and belief, Nationwide acted with actual malice toward O'Dell, McKown, and other similarly situated members of the Denied Claims Class.

56. Upon information and belief, Nationwide has a long-standing business practice of resolving claims similar to the claims of O'Dell, McKown and other class members with confidentiality provisions to hide Nationwide's conduct from the public, and to buy silence from the people harmed by Nationwide's conduct.

57. Upon information and belief, Nationwide has, by judicial determination in civil cases, been found guilty of violating the insurance laws and regulations of this State to the detriment of each and every member of the Denied Claims Class.

#### **COUNT V**

#### **O'DELL AND McKOWN IN THEIR OWN RIGHT AND ON BEHALF OF THE DENIED CLAIMS CLASS AGAINST NATIONWIDE**

#### **PUNITIVE DAMAGES**

58. O'Dell and McKown reallege every allegation previously set forth in their Consolidated Fourth Amended Answer, Amended Counterclaims, and Complaint.

59. Nationwide's previously alleged misconduct was committed with actual malice, in that, among other things:

- a. Nationwide knew the UM/UIM claims of O'Dell, McKown and members of the Denied Claims Class were valid claims, yet Nationwide nevertheless denied and/or delayed paying those claims;
- b. Nationwide knew its mass mailers were invalid, yet intentionally and deceptively:
  - (1) failed to notify its insureds that the mailers were invalid;
  - (2) failed to advise its insureds of the consequences of such invalidity (additional coverage); and,

- (3) represented to its insureds that its mailers were valid; and
- c. Nationwide knew that its and its representatives' representations of coverage as indicated by declarations pages were false, yet Nationwide intentionally and deceptively failed to notify its insureds that the declarations pages contained false representations of coverage, and, to the contrary, represented to its insureds that the representations of coverage in said declarations pages were true.

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60. Nationwide also demonstrated its actual malice in that it committed a series of almost identical wrongful acts over the course of fourteen years (and counting), and compounded those wrongful acts by stubbornly and intentionally defending and/or concealing them. Nationwide's first wrongful act was to send a 1993 mass mailing that was not compliant with the requirements of W. Va. Code §§ 33-6-31 and 33-6-31d, West Virginia Insurance Commissioner Informational Letter No. 88 and Bias v. Nationwide. Nationwide compounded that wrongful act by using its invalid 1993 mass mailing as a basis to deny and/or delay paying legitimate uninsured and underinsured motorist claims of its insureds, after Nationwide realized that its 1993 mass mailing was invalid, concealing from its insureds the invalidity of the 1993 mass mailing. Upon information and belief, Nationwide then compounded those two wrongful acts by attempting to settle some of the claims that it had previously denied or delayed paying based on the invalid 1993 mass mailing without fully and adequately disclosing to its insureds the invalidity of the 1993 mass mailing and all of the damages that those insureds were entitled to under West Virginia law. Nationwide then compounded those three wrongful acts by sending **another** invalid mass mailing to its insureds in 1999 in an attempt to cure the invalidity of the 1993 mass mailing. Nationwide compounded the aforementioned four wrongful acts by again using an invalid mass mailing, this time the invalid 1999 mailing, as a basis to deny and/or delay paying legitimate uninsured and underinsured motorist claims of its insureds, after Nationwide realized that its 1999 mass mailing was invalid. After Nationwide discovered that its 1999 mass mailing was invalid, Nationwide compounded the aforementioned five wrongful acts by not only again denying and/or delaying the payment of legitimate claims based on an invalid mailer (the 1999 mailer), but by re-invoking its 1993 mailing to deny and/or delay paying legitimate claims, knowing full well that the 1993 mailing was invalid.

61. Nationwide's series of wrongful acts committed over the course of fourteen years evidences the type of stubborn, egregious, deceptive, intentional and malicious conduct that punitive damages are meant to punish and deter, and Nationwide's knowing and malicious behavior should be punished by an award of punitive damages to the Denied Claims Class.

**PRAYER FOR RELIEF**

WHEREFORE, O'Dell and McKown in their own right, and on behalf of the members of the Denied Claims Class, pray for judgment against Nationwide in accordance with Counts I, II, III, IV and V for:

1. Compensatory damages, including:
  - a. \$50,000 each to O'Dell and McKown, and an appropriate amount per person of uninsured or underinsured motorist coverage for other Denied Claims Class members;
  - b. the amounts of any uncollected judgments against tortfeasors or the amount of a class member's damages in excess of uninsured or underinsured motorist coverage;
  - c. damages for annoyance, inconvenience, aggravation and emotional distress; and,
  - e. such other compensatory damages as they are entitled to under West Virginia law.
2. Pre- and post-judgment interest and costs.
3. Reasonable attorneys' fees.
4. Punitive damages.
5. Such further relief as they are entitled to under West Virginia law.

O'Dell and McKown request a jury trial as to the above Counterclaims and Claims.

GEORGE AND STACY O'DELL,  
By Counsel

**Counsel for George and Stacy O'Dell and Co-Lead Class Counsel**



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