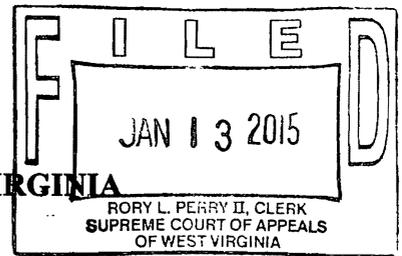


IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA



DOCKET NO. 14-1059

**ERIE INSURANCE PROPERTY & CASUALTY
COMPANY and WEST VIRGINIA INSURANCE
COMMISSIONER, Respondents Below,**

Petitioners,

v.

**Appeal from the Circuit Court
of Kanawha County (13-AA-95)**

VINCENT J. KING, Petitioner Below,

Respondent.

**BRIEF OF AMICI CURIAE AMERICAN INSURANCE ASSOCIATION
AND PROPERTY CASUALTY INSURANCE ASSOCIATION OF AMERICA
IN SUPPORT OF PETITION FOR REVERSAL**

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I. INTRODUCTION

The American Insurance Association (“AIA”) and Property Casualty Insurance Association of America (“PCI”) submit this brief as amici curiae in support of Petitioners Erie Insurance Property & Casualty Company and the West Virginia Insurance Commissioner.¹ AIA and PCI seek reversal of the final order entered by the Circuit Court of Kanawha County, West Virginia on September 12, 2014, because it violates the regulatory scheme established by the West Virginia Legislature by reexamining approved insurance rates and supplanting the circuit court’s opinion for the judgment of the Insurance Commissioner in an area that has been expressly delegated to his expertise. Specifically, the circuit court refused to apply this Court’s trilogy of decisions in *State ex rel. Citifinancial, Inc. v. Madden*, 223 W. Va. 229, 672 S.E.2d 365 (2008), *West Virginia Employers’ Mutual Insurance Company v. Bunch*, 231 W. Va. 321, 745 S.E.2d 212 (2013), and *Lightner v. Riley*, 233 W. Va. 573, 760 S.E.2d 142 (2014) (per curiam) and failed to recognize that, similar to this appeal, both *Bunch* and *Lightner* involved appeals from Insurance Commissioner administrative orders under the State Administrative Procedures Act, W. Va. Code § 29A-5-1, *et seq.* Accordingly, the circuit court breached twin precepts recognized in *Bunch* that prohibit the courts’ encroachment on the regulatory rate making process and further require separation of powers. Therefore, this Court should reverse the circuit court’s order and remand this action for purposes of entering an order reinstating the Insurance Commissioner’s administrative order.

¹ Pursuant to West Virginia Rule of Appellate Procedure 30(b), AIA and PCI notified counsel of record for all parties of their intention to file an amici curiae brief. All parties consented to this filing. *See* W. Va. R. App. P. 30(a) (providing, among other things, that amicus curiae may file a brief with the consent of all parties).

Pursuant to West Virginia Rule of Appellate Procedure 30(e), AIA and PCI represent that no counsel for a party to this action authored this brief in whole or in part. Moreover, no such counsel or party made a monetary contribution specifically intended to fund the preparation or submission of this brief. Finally, no other person who would need to be identified under Rule 30(e) made such a monetary contribution.

II. STATEMENT OF INTEREST

AIA is a leading national trade association which includes some 300 major property and casualty insurance companies that collectively underwrote more than \$100 billion in direct property and casualty premiums in 2013, including more than \$420 million in West Virginia. AIA members, ranging in size from small companies to the largest insurers with global operations, underwrite virtually all lines of property and casualty insurance, including personal and commercial auto insurance, commercial property and liability coverage for small businesses, workers' compensation, homeowners' insurance, medical malpractice coverage, and product liability insurance.

PCI is the property casualty industry's most diverse nationwide trade association. PCI promotes and protects the viability of a competitive private insurance market for the benefit of insurers and consumers. PCI has more than 1,000 members, consisting of large and small companies in all fifty states. PCI's members write more than \$210 billion in direct written premium, comprising 39 percent of the nation's property casualty insurance across numerous lines of business including auto, homeowners', commercial property and liability, and workers' compensation.

AIA and PCI advocate sound and progressive public policies in legislative and regulatory forums at the state and federal levels and file amicus curiae briefs in significant cases before state and federal courts on issues of importance to the property and casualty insurance industry and marketplace. In this action, the order of the circuit court impacts not only the litigants but also the entire industry and marketplace because it thwarts the goals of achieving stability and predictability with regard to insurance rates. Many of AIA's and PCI's members write insurance in West Virginia and could become subject to a new level of regulatory oversight by the circuit

courts as a result of the circuit court's order in this action. Therefore, AIA and PCI join Petitioners in seeking reversal of the circuit court's order.

III. ARGUMENT

This Court should reverse the circuit court's order because it violates the regulatory scheme established by the West Virginia Legislature by according no deference to approved insurance rates and supplanting the circuit court's opinion for the judgment of the Insurance Commissioner in an area that has been expressly delegated to his expertise. West Virginia Code § 33-20-3, which governs the ratemaking process, provides in relevant part as follows:

(a)Due consideration shall be given to past and prospective loss experience within and outside this state, to catastrophe hazards, if any, to a reasonable margin for underwriting profit and contingencies, to dividends, savings or unabsorbed premium deposits allowed or returned by insurers to their policyholders, members or subscribers, to past and prospective expenses both countrywide and those specially applicable to this state and to all other relevant factors within and outside this state.

(b)Rates may not be excessive, inadequate or unfairly discriminatory.

See also W. Va. Code § 33-20-3(c) (setting forth additional provisions for ratemaking in casualty and surety insurance).

West Virginia Code § 33-6-30(c) further provides in relevant part:

Where any insurance policy form, including any endorsement thereto, has been approved by the commissioner, and the corresponding rate has been approved by the commissioner, there is a presumption that the policy forms and rate structure are in full compliance with the requirements of this chapter. It is the intent of the Legislature that the amendments in this section . . . are . . . specifically intended to clarify the law and correct a misinterpretation and misapplication of the law that was expressed in the holding of the Supreme Court of Appeals of West Virginia in the case of *Mitchell v. Broadnax*, 537 S.E.2d 882 (W. Va. 2000).

In a trilogy of cases, this Court has held that Section 33-6-30(c)'s presumption of statutory compliance for approved insurance rates may only be rebutted in a proceeding before the Insurance Commissioner pursuant to West Virginia Code § 33-20-5(d). *State ex rel.*

Citifinancial, Inc. v. Madden, 223 W. Va. 229, 672 S.E.2d 365, Syl. Pts. 3-4 (2008). *See also Lightner v. Riley*, 233 W. Va. 573, 760 S.E.2d 142, Syl. Pts. 2-3 (2014) (per curiam); *W. Va. Emp'rs' Mut. Ins. Co. v. Bunch*, 231 W. Va. 321, 745 S.E.2d 212, Syl. Pts. 3-4 (2013).

The Court reasoned in *Citifinancial*:

[F]actual evidence on issues such as loss ratios and rates of return is required to disprove the reasonableness of an established insurance rate. These issues, due to their highly specialized nature, are typically reserved to the Commissioner's bailiwick. *See* W. Va. Code §§ 33-20-3, 33-20-4, 33-6-30(b). *It stands to reason that if a circuit court is allowed to invade this administrative arena and reexamine the issue of whether a given insurance rate is reasonable or excessive, the judiciary will necessarily be substituting its determinations as to permissible insurance rates for those previously determined by the Commissioner and supplanting its opinion in matters expressly delegated to the Commissioner's expertise and jurisdiction. A further peril that cannot be overlooked is that judicial intervention in the rate making area would open the door to conflicting decisions amongst the various circuits regarding what constitutes an unreasonable or excessive charge for credit insurance.* In this manner then, the uniformity of regulation that the Legislature has established by delegating all matters involving rate making and rate filings to the Commissioner is certain to be infringed if the circuit courts or jurors are permitted to second guess the reasonableness of rates previously approved by the Commissioner.

Citifinancial, 672 S.E.2d at 373 (emphasis added).²

Accordingly, the Court concluded:

. . . [T]he inclusion of the statutory language that creates a presumption of compliance occurred as part of the Legislature's attempt to strengthen the rate making powers of the Commissioner. *See* W. Va. Code § 33-6-30(b), (c) (2002 amends). Through its adoption of this statutory language, the Legislature established a procedural mechanism by which insurance rates are presumed to be in compliance with all regulatory requirements upon their approval by the Commissioner. While approved insurance rates are still subject to challenge, the burden for disproving the validity of such rates is placed on the entity who seeks to set the rates aside. *See* W. Va. Code § 33-20-5(d). . . . Consequently, we are of the opinion that the presumption of statutory compliance for approved insurance rates set forth in West Virginia Code § 33-6-30(c) may only be rebutted in a proceeding before the Commissioner.

² The Court noted that the significant amount of time and resources that the Commissioner and his staff would be expending while participating in litigation before the various circuit courts is of further concern. *Id.*, 672 S.E.2d at 373 n.25.

Id., 672 S.E.2d at 375-76.

While *Citifinancial* involved a collateral attack on the Commissioner's ratemaking authority, the Supreme Court of Appeals recently applied its holdings to the review of an administrative appeal, which is controlled by West Virginia Code § 29A-5-4(g) (standard of review under Administrative Procedure Act). In *Bunch*, this Court reversed and remanded a circuit court's order that reversed and vacated the Commissioner's administrative order upholding previously approved insurance policy rates. The Court agreed with the petitioners and amici curiae in *Bunch*³ that the circuit court ignored the holdings in *Citifinancial* and improperly injected itself into a ratemaking matter expressly delegated to the Commissioner. *Bunch*, 745 S.E.2d at 222. Explaining its holding in *Citifinancial*, the Court emphasized in *Bunch*:

In the course of discussing the myriad reasons for disallowing circuit courts to invade the highly specialized administrative realm of insurance rate making, we made the following observation regarding the amendments to our insurance laws enacted in 2002: "*The new provisions, including the presumption, were expressly adopted to curb what the Legislature perceived as judicial intrusion into issues of insurance rate setting.*"

Id., 745 S.E.2d at 218 (emphasis added) (citation omitted) (footnote omitted). The Court noted that included in the reasons discussed in *Citifinancial* were the related goals of achieving uniformity, stability, and predictability with regard to insurance rates. The Court further noted that West Virginia Code § 33-6-30(b)(7) expressly provides "[t]hat it is in the best interest of the citizens of this state to ensure a stable insurance market[.]" *Id.*, 745 S.E.2d at 218 n.20.

In addition to applying the holdings in Syllabus Points 3 and 4 of *Citifinancial*, the Court adopted a new Syllabus Point 5 in *Bunch*, which states: "By design, insurance rate setting involves the prospective use of proposed rates which are calculated based on cost projections

³ The amici curiae in *Bunch* included the West Virginia Insurance Federation and the West Virginia Mutual Insurance Company, Inc. *Bunch*, 745 S.E.2d at 222 n.36.

derived from past experience combined with a reasonable expectation of future losses and expenses.”

The Court concluded in *Bunch*:

We find it noteworthy that Judge Kaufman, during the hearing on this matter, was quick to recognize two fundamental concerns presented by this case: encroachment on the regulatory rate making process and separation of powers. Notwithstanding the trial court’s appreciation of these issues, it proceeded to breach established precepts pertaining to both of those juridical areas. Specifically failing to heed this Court’s recognition in *State ex rel. Crist v. Cline*, 219 W. Va. 202, 632 S.E.2d 358 (2006), “that we . . . give deference to [the Insurance Commissioner’s] interpretation, so long as it is consistent with the plain meaning of the governing statute,” the trial court substituted its judgment for that of the Commissioner on a matter that clearly fell within the rate making area of the Commissioner’s expertise. *Id.* at 211, 632 S.E.2d at 367. As we recognized in *Appalachian Power Co. v. State Tax Dep’t*, 195 W. Va. 573, 466 S.E.2d 424 (1995), “[a]n inquiring court – even a court empowered to conduct *de novo* review – must examine a regulatory interpretation of a statute by standards that include appropriate deference to agency expertise and discretion.” *Id.* at 582, 466 S.E.2d at 433. Ignoring the deference that the Commissioner was entitled to in connection with the interpretation of its own regulation, the trial court encroached upon a matter that has been expressly delegated to the executive branch of our state government. *See Citifinancial*, 223 W. Va. at 237, 672 S.E.2d at 373. In doing so, the trial court neglected to regard this Court’s admonition in *Citifinancial* that “*the uniformity of regulation that the Legislature has established by delegating all matters involving rate making and rate filings to the Commissioner is certain to be infringed if circuit courts or jurors are permitted to second guess the reasonableness of rates previously approved by the Commissioner.*” *Id.*

Id., 745 S.E.2d at 223 (emphasis added) (footnote omitted).

Similarly, in *Lightner*, this Court applied *Bunch* and held that the Insurance Commissioner did not abuse his discretion in denying a hearing to the petitioner who raised arguments and provided thousands of pages of evidence to the Insurance Commissioner in an administrative appeal brought by the petitioner who had been the respondent in the *Citifinancial* writ petition. *Lightner*, 760 S.E.2d at 152. In *Lightner*, the Court rejected among other things the petitioner’s argument that the Commissioner ignored his rights under West Virginia Code §

33-20-9 to obtain all pertinent information from CitiFinancial regarding the rates at issue. *Id.* at 148. The Court held that the circuit court properly affirmed the Commissioner's decision finding that the rates were reasonable. *Id.* at 152.

The separation of powers doctrine referred to in *Bunch* is set forth in Section 1 of Article V of the West Virginia Constitution, which states:

The legislative, executive and judicial departments shall be separate and distinct, so that neither shall exercise the powers properly belonging to either of the others; nor shall any person exercise the powers of more than one of them at the same time, except that justices of the peace shall be eligible to the legislature.

Thus, the Supreme Court of Appeals of West Virginia has recognized that “[w]here there is a direct and fundamental encroachment by one branch of government into the traditional powers of another branch of government, this violates the separation of powers doctrine” *Appalachian Power Co. v. Public Serv. Comm’n of W. Va.*, 170 W. Va. 757, 296 S.E.2d 887 (1982).

In this action as well, the circuit court breached twin precepts recognized in *Bunch* that prohibit the courts' encroachment on the regulatory rate making process and further require separation of powers. Contrary to the circuit court's order at note 38, the insured in *Bunch* did not fail to exhaust administrative remedies. *See Bunch*, 745 S.E.2d at 216-17 (detailing administrative proceedings and framing question as whether circuit court committed error in reversing and vacating Insurance Commissioner's decision). *Bunch* involved the same type of appeal under the Administrative Procedures Act as this action, and the Insurance Commissioner's order in this action is entitled to the same deference as its order in *Bunch*. The circuit court's order, which begins on page 1 with an admission that it has “conducted its own research and analysis,” clearly gives no such deference to the Commissioner's order.

The circuit court's reliance on *State ex rel. State Farm Mutual Automobile Insurance Company v. Marks*, 230 W. Va. 517, 741 S.E.2d 75 (2012), is misplaced. In *Marks*, this Court held that insofar as the authority to manage discovery rests with the judicial branch, the authority to limit an insurer's dissemination of confidential medical information obtained through discovery is governed by the presiding court and not by an administrative regulation applicable to insurance companies. *Id.*, 741 S.E.2d at 89. The Court noted: "We merely wish to clarify that, as between the Insurance Commissioner and the circuit court, the circuit court is the tribunal authorized to regulate matters pertaining to the discovery and dissemination of confidential medical records in proceedings over which the court presides." *Id.*, 741 S.E.2d at 89 n.20.⁴

By contrast, in *Bunch* this Court made it clear in this context:

The Legislature, in no uncertain terms, has reposed the authority for rate making matters in the Commission. See W. Va. Code § 33-6-30(c). . . ., [T]he amendments to the insurance statutes enacted in the aftermath of *Broadnax* left no question that rate making was not a matter intended for the Courts.

Bunch, 745 S.E.2d at 222.

Finally, the Court noted in *Bunch* as follows:

While it is incumbent upon this Court to refrain from the politics of insurance rate making, this Court encourages persons aggrieved by the regulatory policies and decisions of the Commissioner to rely upon the political process for accountability purposes. See *Appalachian Power [Co. v. State Tax Dep't.]*, 195 W. Va. 573, 588, 466 S.E.2d 424, 439 (1995)] ("We are not at liberty to affirm or overturn the [Tax] Commissioner's regulation or decision merely on the basis of our agreement or disagreement with his policy implications"); see also *State ex rel. Carenbauer v. Hechler*, 208 W. Va. 584, 589, 542 S.E.2d 405, 410 (2000) ("While the reasons for separating the judiciary from politics are many and varied, there can be no question that the goal of removing politics and its

⁴ Contrary to footnote 35 in the circuit court's order, *Marks* did not hold that the Insurance Commissioner is not a quasi-judicial officer. The term "quasi-judicial" is defined as "[o]f, relating to, or involving an executive or administrative official's adjudicative acts." See Bryan A. Garner, *Black's Law Dictionary* (9th ed. 2009). Accordingly, contrary to the circuit court's finding of fact number 9 on page 7 of its order the Commissioner did not exceed his authority by attempting to determine the spirit and intent of the Legislature or by reading statutory provisions in pari materia.

attendant imbróglíos from the judicial process is necessary to the proper functioning of our judicial system.”).

Id. at 223 n.38.

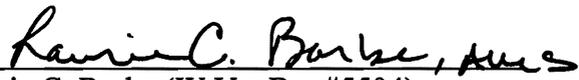
IV. CONCLUSION

For all of the foregoing reasons, AIA and PCI join Petitioners in seeking reversal of the circuit court’s order and remand of this action for the purpose of entering an order reinstating the Insurance Commissioner’s administrative order.

Respectfully submitted this 12th day of January 2015.



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CERTIFICATE OF SERVICE

I hereby certify that on this 12th day of January 2015, I caused true and accurate copies of the foregoing “**Brief of Amici Curiae American Insurance Association and Property Casualty Insurance Association of America in Support of Petition for Reversal**” to be deposited in the U.S. Mail contained in postage-paid envelopes addressed to all other parties to this appeal as follows:

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