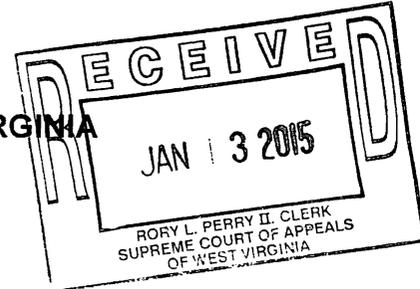


BRIEF FILED
WITH MOTION

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

No. 14-1059



Erie Insurance Property & Casualty Company, and
West Virginia Insurance Commissioner, Respondents below,

Petitioners

vs.

Vincent J. King, Petitioner Below,

Respondent.

**BRIEF OF THE WEST VIRGINIA INSURANCE FEDERATION AS *AMICUS CURIAE*
IN SUPPORT OF BRIEFS OF PETITIONERS ERIE INSURANCE PROPERTY &
CASUALTY COMPANY AND THE WEST VIRGINIA INSURANCE COMMISSIONER**

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INTRODUCTION

The West Virginia Insurance Federation ["Federation"] files this brief as *amicus curiae* in support of the briefs filed by Petitioners, Erie Insurance Property & Casualty Company ["Erie"] and the West Virginia Insurance Commissioner ["Commissioner"]. It does so because the Decision on Appeal ["Decision"] entered by the Circuit Court of Kanawha County on September 12, 2014, represents a judicial invasion into policy and rate making approval processes which this Court has firmly established are within the bailiwick of the Commissioner because of their specialized nature.¹ By impermissibly substituting its judgment for that of the Commissioner, the circuit court failed to accord appropriate deference to the Commissioner's findings and engaged in the very peril this Court recognized would occur if judicial intervention is permitted. Thus, the Federation respectfully requests that this Court reverse the Decision and reinstate the Findings of Fact, Conclusions of Law and Final Order Denying Hearing Request of Petitioner entered by the Commissioner July 10, 2013. ["Final Order"]²

STATEMENT OF THE CASE

The Federation incorporates by reference the procedural history and statement of facts set forth by Erie and the Commissioner in the Notice for Appeal.

STATEMENT OF INTEREST

The Federation is the state trade association for property and casualty insurance companies doing business in West Virginia. Its members insure approximately 80% of the automobiles and homes in West Virginia and more than 80% of the workers' compensation policies insuring employees in West Virginia. The Federation is widely regarded as the voice of

¹ Pursuant to West Virginia Rule of Appellate Procedure 30(b), the Federation provided notice on December 29, 2014, to all parties of its intention to file an *amicus curiae* brief.

² The *amicus curiae* brief has been authored in its entirety by the undersigned counsel. Neither party nor their respective counsel contributed to or made a monetary contribution specifically intended to fund the preparation or submission of this brief. This disclosure is made pursuant to Rule 30(e)(5) of the West Virginia Rules of Appellate Procedure.

West Virginia's insurance industry and has served the property and casualty industry for more than 35 years.

The Federation files this brief, pursuant to Rule 30 of the West Virginia Rules of Appellate Procedure, in support of the appeal by Erie and the Commissioner because the Federation's members must be able to rely upon the Commissioner's regulatory approvals of policy forms and rates in order to conduct business in a stable environment. Intrusion into the finality of Commissioner approvals, through judicial reexamination, creates instability in the insurance market which places both consumers and insurance companies at risk. The members of the Federation have a strong interest in ensuring that circuit courts follow this Court's established admonition not to substitute their judgment for that of the regulator with the expertise to address issues which are highly specialized in nature. Accordingly, the Federation appears as *amicus curiae* because the import of the Decision is far reaching as it reopens a door of judicial intervention which has previously been closed.

ARGUMENT

I. THE CIRCUIT COURT FAILED TO ACCORD APPROPRIATE DEFERENCE TO THE FINAL ORDER AND SUBSTITUTED ITS JUDGMENT FOR THAT OF THE COMMISSIONER

At the outset, the Federation acknowledges that orders of the Commissioner are and should be subject to review. That review is governed by the statutory standards set forth in the Administrative Procedures Act ["APA"], W.Va. Code §29A-1-1, *et. seq.*, under which the circuit court sits as an appellate body. It is also tempered by a trilogy of decisions from this Court which unequivocally recognize that circuit courts are not to reexamine insurance rate issues nor substitute their judgment for that of the Commissioner. See *Lightner v. Riley*, _____ W.Va. _____ 760 S.E.2d. 142 (2014); *West Virginia Employers' Mut. Ins. Co. v. Bunch Co.*, 231 W.Va. 321, 745 S.E.2d. 212 (2013); *State ex rel. Citifinancial v. Madden*, 223 W.Va. 229, 672 S.E.2d. 363 (2008). Here, however, the Decision runs afoul of both the APA standard and the trilogy of cases for it accords no deference whatsoever to the findings of the Commissioner, it

reexamines the insurance policy form and corresponding rate approval and it substitutes the circuit court's judgment for that of the Commissioner. In short, the circuit court operated independently and without regard to the carefully prescribed role it was to play in reviewing the Final Order.

Under the APA, administrative appeals are controlled by the standard set for in W.Va. Code §29A-5-4(g). The statute provides:

“The court may affirm the order or decision of the agency or remand the case for further proceedings. It shall reverse, vacate or modify the order or decision of the agency if the substantial rights of the petitioner or petitioners have been prejudiced because the administrative findings, inferences, conclusions, decisions or order are:

- (1) In violation of constitutional or statutory provisions; or
- (2) In excess of the statutory authority or jurisdiction of the agency; or
- (3) Made upon unlawful procedures; or
- (4) Affected by other error of law; or
- (5) Clearly wrong in view of the reliable, probative and substantial evidence on the whole record; or
- (6) Arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion.”

Questions of law under such review are presented *de novo* while findings of fact “are accorded deference unless the reviewing court believes the findings to be clearly wrong.” *Muscatell v. Cline*, 196 W.Va. 588, 590, 474 S.E.2d. 518, 520 (1996). That deference presumes an agency's action to be valid as long as the decision is supported by substantial evidence or a rational basis. *Stewart v. W.Va. Board of Examiners for Registered Professional Nurses*, 197 W.Va. 386, 475 S.E.2d. 478 (1996), citing *Frymier-Halloran v. Paige*, 193 W.Va. 687, 458 S.E.2d. 780 (1995). Added to this review standard in the insurance context is the statutory directive that “[w]here 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 [Chapter 33].” W.Va. Code §33-6-30(c).

Moreover, “the burden for disproving the validity of such rates is placed on the entity who seeks to set the rates aside.” *Citifinancial*, 223 W.Va. at 239, 672 S.E.2d. at 375.

Further refining the proper role of circuit courts with respect to rate challenges is the trilogy of cases in which this Court has clearly prescribed that highly specialized rate matters are to be decided by the Commissioner and are not to be disturbed by circuit courts through reexamination and substitution of judgment. Indeed, these cases also make clear that substantial deference is to be given to the Commissioner’s actions and decisions.

The seminal case is, of course, *State ex rel. Citifinancial v. Madden*, 223 W.Va. 229, 672 S.E.2d., 365 (2009). There, a consumer alleged that the finance charge provisions of the West Virginia Consumer Credit Protection Act were violated by *Citifinancial* charging unreasonable and excessive amounts for credit property and involuntary unemployment insurance despite prior approval of such rates by the Commissioner. The allegations were subsequently expanded into a class action before the Circuit Court of Marshall County. When the circuit court denied *Citifinancial*’s motion for partial summary judgment which sought dismissal of the insurance rate claims or, alternatively, a stay until the Commissioner made a determination regarding the rate issues, a writ of prohibition was sought. In granting the writ, this Court recognized that rate making matters are within the province of the Commissioner and such jurisdiction should not be invaded by circuit courts. Specifically, the opinion contained the following three syllabus points which addressed the authority and jurisdiction of the Commissioner over insurance rates:

2. In providing for a cause of action that permits the recovery of excess charges included in a consumer credit transaction pursuant to the provisions of W.Va. Code §46A-3-109 (1998) (Repl. Vol. 2006) and §46A-5-101 (1996) (Repl. Vol. 2006), the Legislature did not authorize the circuit courts to invade the jurisdiction of the Insurance Commissioner and conduct a reexamination of insurance rates previously approved by the Commissioner.

3. Any challenge to an approved insurance rate by an aggrieved person or organization should be raised pursuant to the provisions of W.Va. Code §33-20-5(d) (1967) (Repl. Vol. 2006) in a proceeding before the Insurance Commissioner.

4. The presumption of statutory compliance for approved insurance rates set forth in W.Va. Code §33-6-30(c) (2002) (Repl. Vol. 2006) may only be rebutted in a proceeding before the Insurance Commissioner.

The reason rate challenges are to be handled before the Commissioner was articulated by Justice McHugh as follows:

“Whether intended or not, the position advanced by Respondent Lightner has the end result of involving the judiciary in issues of insurance rate making. As evidenced by the data Respondent Lightner introduced to defeat CitiFinancial’s motion for summary judgment, factual 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 [citations omitted]. 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.”

223 W.Va. at 237, 672 S.E. 2d. at 373.

This Court was next required to address the circuit court’s role in rate making challenges in *West Virginia Employers’ Mut. Ins. Co. v. Bunch Company*, 231 W.Va. 321, 745 S.E.2d. 22 (2013). There, as here, the Circuit Court of Kanawha County considered an administrative appeal and reversed and vacated an order from the Commissioner which had upheld the previous filing and approval of rates and forms by Brickstreet which contained the same premium charge for direct write and agent written business. The Commissioner had concluded that the rates charged by Brickstreet were reasonable in relation to the benefits provided due to the fact that certain administrative costs and special expenses were incurred by Brickstreet in handling direct written business which would otherwise be handled by appointed agents. In so finding, the Commissioner concluded that Bunch had not provided any information which would rebut the statutory presumption that attaches to approved insurance rates. The circuit court,

however, reversed and vacated the Commissioner's order and found that the Commissioner had erred by allowing Brickstreet to charge Bunch a commission when no correlated expense had been incurred and had also erred in finding that the subject insurance rates were reasonable.³

In reversing the circuit court's decision and reinstating the order of the Commissioner, this Court determined that the circuit court had not accorded sufficient deference to the Commissioner's actions and, in fact, had encroached upon a matter which was expressly delegated to the executive branch of our state government. As stated by Justice Loughry:

"At any rate, it is not up to this Court to identify the component charges that can be included in an insurance premium. That decision has been left to the Commissioner. And the Commissioner, upon its review of the consumer complaint filed by Bunch, found no basis for disturbing the presumption that the approved rates were valid. See W.Va. Code §33-6-30(c). 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 these 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. [citation omitted]. As we recognized in *Appalachian Power Company 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.' [citation omitted]. 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 which has been expressly delegated to the executive branch of our state

³ It is noteworthy that *Bunch* originated before the same circuit judge who entered the Decision in the present appeal. An amended class action complaint had been filed in the Circuit Court of Cabell County by Bunch in which it was alleged that Brickstreet had wrongfully charged Bunch an expense for an agent commission when Bunch did not have an agent. The Honorable John L. Cummings granted summary judgment in favor of Bunch and concluded that Brickstreet had indeed wrongfully charged a commission as a part of its premium without incurring a specific agent-related expense. Judge Cummings' decision was reversed and vacated by a succeeding circuit judge after this Court issued its decision in *Citifinancial*. Later, in issuing its opinion reversing the Circuit Court of Kanawha County, this Court observed that when Judge Cummings issued his original summary judgment ruling, he had "wholly disregarded the stipulation that Brickstreet incurred increased administrative costs in connection with the servicing of its direct-written policies." *Bunch*, 231 W.Va. at 324, n. 7, 745 S.E. 2d at 215, n. 7.

government. [citation omitted]. 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 previous approved by the Commissioner.' [citation omitted]."

231 W.Va. at 331-32, 745 S.E.2d. at 222-23.

More recently, this Court reiterated the holding of *Citifinancial* in *Lightner v. Riley*, _____ W.Va. _____, 760 S.E.2d. 142 (2014). In *Lightner*, which was another iteration of *Citifinancial*, the petitioner appealed from a decision of the Circuit Court of Kanawha County which had upheld the Commissioner's order rejecting a consumer complaint challenging the reasonableness of the rates previously approved for credit property insurance and involuntary unemployment insurance. The Commissioner's order concluded, in part, that the insurer had complied with West Virginia law in its filings and that the rates did not violate W.Va. Code §33-20-3. The Commissioner had also concluded that the rates were reasonable in relation to the benefits provided. In reaching that conclusion, the Commissioner had determined that there was no duty upon insurers to re-file rates once approved when there was no change in the circumstances of the original filing, that rates filed by insurance companies in other states were neither necessarily relevant nor dispositive of what a rate should be in West Virginia and that historically low loss ratios in relation as to what is filed as anticipated loss ratios do not, by themselves, constitute an excessive rate violation in that claim ratios have been known to fluctuate widely depending upon the company, the state and the year.

In affirming the decision of the Circuit Court of Kanawha County, this Court again cited to the syllabus points of *Citifinancial* recognizing that circuit courts are not authorized to invade the jurisdiction of the Insurance Commissioner and conduct an reexamination of insurance rates previously approved and that the presumption of statutory compliance for approved insurance rates may only be rebutted in a proceeding before the Insurance Commissioner.

Emerging from the administrative standard of review and the trilogy are clearly established principles which govern a circuit court's review of insurance policy and rate matters. They are: (1) there is a presumption that approved forms and rates are in compliance with West Virginia law; (2) deference is to be accorded to the Commissioner's findings of fact and interpretation of statutes and regulations; (3) circuit courts are not to conduct a reexamination of forms and rates previously approved; and (4) circuit courts are not to substitute their judgment of that for the Commissioner.⁴ Against this backdrop it becomes clear that the Decision of the Circuit Court of Kanawha County cannot be sustained. What is particularly problematic from the Federation's perspective is that the Decision is essentially devoid of any real acknowledgment or application of the proper standard and authority governing a circuit court's review of the order. While the provisions of W.Va. Code §29A-5-4(g) and case law concerning the standard of review are cited, there is no mention of the presumption of statutory compliance embedded in W.Va. Code §33-6-30(c). (App. 1319-1331). This omission is glaring as the presumption serves as the starting point upon which any form or rate challenge is to be analyzed.

Equally troubling is the relegation to footnote treatment of the trilogy of decisions comprising *Citifinancial* and its progeny. The dismissive manner in which those cases are treated is compounded by the fact their purported inapplicability is based upon an inaccurate description of the cases. For example, *Bunch* is described as a case where "the insured failed to exhaust administrative remedies." (App. 1330, n. 38). That is incorrect. The case was actually an appeal from an order of the Circuit Court of Kanawha County which reversed an administrative order from the Commissioner. Similarly, *Lightner* is described as representing a

⁴ This is not to suggest that circuit courts are powerless to address insurance related questions. Courts can, for example, act when a rate or form is used by an insurance company which is different than that approved by the Commissioner. Other areas, such as first party violations of claim settlement statutes and regulations, are also subject to judicial action. It is only within the highly specialized arena of forms and rates that courts are particularly limited in their role. Even there, questions of law are subject to judicial *de novo* review and a circuit court could find irregularity in the manner in which an administrative hearing was conducted. In this regard, it should be noted that Respondent did not raise any issue as to the manner in which the Commissioner had handled the proceedings leading to the Final Order.

case where administrative relief was sought, but there had been a failure to provide evidence as requested by the Commissioner. (App. *id*). That is incorrect, too. This Court clearly decided that the record had been fully developed before the Commissioner and, in fact, that *Lightner* had been provided adequate due process in response to his request for a hearing. As stated by the Court:

“Lightner has had ample opportunity to present his issues in multiple forums over the years and discovery has been exchanged by all parties. Lightner provided thousands of pages to the Commissioner’s investigation. He has clearly raised his arguments and put forth his evidence. For all these reasons, we find that the Commissioner’s decision that a hearing was unnecessary in this particular matter was not an abuse in discretion.”⁵

760 S.E.2d. at 152.⁶

Without consideration of the important principles governing the circuit court’s role in reviewing insurance form and rate matters, it is little wonder that the Final Order was reversed. The circuit court weighed and considered evidence as if it were a finder of fact and without regard to the presumption of statutory compliance. (App. 1322-1323). It drew conclusions about whether Erie’s Rate Protection Endorsement (“RPE”) rate should be withdrawn, despite the statutory authority being exclusively reposed to the Commissioner. See W.Va. Code §33-6-9. (App. 1326-1331). The circuit court provided no deference to the Commissioner when it determined that the RPE was misleading even though the Commissioner had conducted an extensive investigation into the original filing made by Erie. (App. 002-349). Succinctly, a *de novo* review was conducted by the circuit court and there can be no doubt that the forms and

⁵ The opinion does discuss the submission of two affidavits by Lightner to the circuit court as a part of the administrative appeal. In that discussion, this Court noted that those affidavits had not been submitted to the Commissioner and, therefore, were not available for the Commissioner to review. *Lightner*, 760 S.E.2d. at 151-52. Nothing within the opinion states that the Commissioner had requested information which Lightner failed to provide.

⁶ The circuit court’s treatment of the trilogy of cases is perhaps explained by the Decision being essentially the proposed order submitted by the Respondent. This Court has previously explained that a circuit court should make its own findings of fact and should not delegate that function to the adoption of findings proposed by counsel. *S. Side Lumber Co. v. Stone Const. Co.*, 151 W.Va. 439, 152 S.E.2d. 721 (1967). While the Federation does not challenge the circuit court’s adoption of the Respondent’s order, it does point out that the mere adoption of the Respondent’s order is compelling evidence that the circuit court disregarded the deferential role it was required to play in reviewing the Decision on Appeal.

rates were reexamined and the judgment of the court was substituted for that of the Commissioner. Because the process clearly violated the role the circuit court was supposed to play, the Decision should be reversed and the Final Order reinstated.

II. THE CIRCUIT COURT'S FINDINGS ARE NOT SUPPORTED BY THE RECORD AND ARE CONTRARY TO ESTABLISHED AUTHORITY.

Not only does the Decision fail to follow the circuit court's circumscribed role, its findings are also largely unsupported by the record and in many instances contrary to prior decisions of this Court considering similar evidence and issues.

For example, Finding of Fact No. 5 concludes that the greater weight of the evidence is contrary to Erie's representation that the RPE would be rate neutral. To support this determination, the circuit court stated that "the only evidence ... is that RPE had been a profit center in each of the states in which it had previously been implemented and the same has been true, thus far, in the State of West Virginia." (App. 1322-1323). The circuit court, however, ignored evidence in the record that Respondent's overall premium went down as a result of the addition of the RPE. (App. 608). More importantly, Erie's actual experience in other states or West Virginia is insufficient to support a finding that Erie's representations were misleading.

Lightner is instructive on this point. There, the consumer complaint asserted that the rates for credit property insurance and involuntary unemployment insurance were excessive. It further maintained that historically low loss ratios incurred by the insurer as opposed to the projections and filings submitted to the Commissioner were indicative of unreasonable rates. The complaint also alleged that the insurer was not forthcoming with relevant information about loss ratios when the filings were made. The Commissioner's order denying the complaint, however, concluded, in part, that rates filed by insurance companies in other states are neither necessarily relevant nor dispositive as to what a rate should be in West Virginia. It also concluded that historically low loss ratios in relation to what is filed as anticipated loss ratios do not, by themselves, constitute an excessive rate because rates can fluctuate widely depending upon the company, the state or year. *Lightner*, 760 S.E.2d. at 146.

The Commissioner's order was affirmed by the circuit court and this Court, in turn, upheld the circuit court's determination. In doing so, this Court stated:

"We find that the Commissioner performed due diligence and questioned the rate filings, but he received adequate documentation and explanation from Triton prior to approving the rates from 1994 through 2003. While *Lightner* cites to Insurance Commissioner decisions in other jurisdictions in an attempt to show that Triton's rates were unreasonable, he fails to note that in those other states, there was a benchmark in place. Accordingly, we affirm the circuit court's finding that the rates charged by Triton were reasonable."

760 S.E.2d at 151.

Similarly, the mere fact that Erie has experienced net revenue gains subsequent to its filing with the Commissioner does not and cannot support a conclusion that the filing was misleading, particularly since the insurance product has only been in the marketplace a little over three years. In this regard, it should be noted that the approved rate filings in *Lightner* had been in effect fourteen (14) years when the consumer complaint was filed.

Findings of Fact Nos. 6 and 7 are likewise unsupportable for the same reason as Finding of Fact No. 5. *Lightner* teaches that post-filing rate experience, alone, is insufficient to draw the conclusion that the rate is unreasonable or, more significantly, that the filing made with the Commissioner was misleading. This is true even when the rates have been in effect for many years, let alone only a little more than three years which is the case with the RPE. For the circuit court to conclude it was "clearly wrong" for the Commissioner to determine that Erie's intentions were properly disclosed and that it would be unfair and premature to extrapolate information to indicate rate trends is squarely at odds with *Lightner*.

Finding of Fact No. 8 is also infirm when the record as a whole is considered. The circuit court concluded that it was clearly wrong for the Commissioner to find that no deceptive marketing was shown because neither the Agent Marketing Aid nor the Consumer Brochure disclosed that RPE prevents rate increases or that Erie's traditional preferred rates have been trending down or that the RPE precludes application of statutorily required discounts. Yet, there was testimony in the record that Erie customers have the option to lock in their premiums in lieu

of the traditional rating method, which factors in other decreases or increases that may impact policyholder premiums. As for the age 55 discount required by statute, there was additional testimony that insureds may choose, at age 55, to go back to the traditional rating. Thus, the RPE did not “trump” statutory discounts. (App. 392-590). Instead, those discounts are still available if the insured so chooses. With such evidence in the record, the circuit court was actually compelled to defer to the finding of the Commissioner because the standard of review requires the court to presume an agency’s actions are valid so long as the decision is supported by substantial evidence or by a rational basis. *Stewart v. West Virginia Board of Examiners for Registered Professional Nurses*, 197 W.Va. 386, 475 S.E.2d. 478 (1996), citing *Frymier-Halloran v. Paige*, 193 W.Va. 687, 458 S.E.2d. 780 (1995).

Finding of Fact No. 9 and Conclusions of Law Nos. 14 and 15 are also inconsistent with precedent from this Court. In *West Virginia Employer’s Mut. Ins. Co. v. Bunch Company*, 231 W.Va. 321, 745 S.E.2d. 212 (2013), this Court spoke to the right of the Commissioner to engage in statutory interpretation. Specifically, Justice Loughry stated:

“Notwithstanding the trial court’s appreciation of these issues, it proceeded to breach established precepts pertaining to both of these juridical areas. Specifically failing to heed this Court’s recognition in *State ex. rel. Crist v. Kline*, 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. [citation omitted]. As we recognized in *Appalachian Power Company v. State Tax Department*, 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.’ [citation omitted]. 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.”

231 W.Va. at 332, 745 S.E.2d. 223.

Clearly, the Commissioner can and is required to interpret statutes which relate to insurance issues. At times, the interpretation and application of those statutes requires the

Commissioner to read them *in pari materia*. See *Lightner* (analyzing the Commissioner's decision and authority not to grant a hearing within the context of varying insurance statutes and regulations). Thus, for the circuit court to use the Commissioner's interpretation of insurance statutes as a basis for not deferring to his expertise and decision is inappropriate.

III. AS A MATTER OF PUBLIC POLICY, DEFERENCE TO THE COMMISSIONER'S PRIOR APPROVAL RESULTS IN A STABLE AND HEALTHY INSURANCE MARKET FOR BOTH INSURERS AND CONSUMERS.

The insurance industry relies on a stable and predictable insurance market in order to make affordable insurance products available to consumers. At the heart of that stability is an insurance company's ability to rely on the Commissioner's approval of forms, products, and rates to trust whether its own policies and premiums are valid. During the Commissioner's administrative review, questions or concerns can be raised and resolved in a shared process prior to releasing a product onto the market. Once the Commissioner approves that product for sale in West Virginia, insurers should not have to second guess whether the product offered complies with West Virginia insurance law. Operating with the blessing of the Commissioner is vital to a sound insurance environment for both insurers and consumers.

On the other hand, allowing a circuit court to readily substitute its opinion in place of the Commissioner's legislatively established expert review would seriously undermine the requisite stability essential for insurers. Predictability would be replaced with confusion when an insurer is faced with competing decisions from the circuit court and the Commissioner. The resulting patchwork regulatory environment would prohibit insurers from relying the Commissioner's approval of products and rates, and, in turn, consumers could not rely on the validity of their own policies and premiums. As a matter of public policy, this Court should protect the legislatively mandated expertise of the Insurance Commissioner in facilitating a stable and predictable insurance market in West Virginia, and discourage the resulting turbulence when a settled decision is upset by a circuit court simply because the court's opinion is different than the Commissioner's findings and conclusions.

CONCLUSION

The Decision of the Circuit Court of Kanawha County should be reversed and the Findings of Fact, Conclusions of Law and Final Order Denying Hearing Request of Petitioner entered by the Commissioner on July 10, 2013, should be reinstated. The Decision is fundamentally at odds with established standards of review and this Court's prior decisions specifically admonishing circuit courts not to invade the jurisdiction of the Commissioner. Here, the circuit court conducted its own independent review and clearly substituted its judgment for that of the Commissioner. Such a result cannot be sanctioned for it will resurrect the peril which this Court thought was eliminated when it rendered its decision in *Citifinancial* and create an unstable insurance market which will only harm both consumers and insurance companies.

**West Virginia Insurance Federation
By Counsel**



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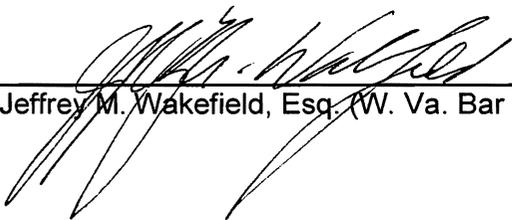
CERTIFICATE OF SERVICE

I, Jeffrey M. Wakefield, do hereby certify that the **BRIEF OF THE WEST VIRGINIA INSURANCE FEDERATION AS *AMICUS CURIAE* IN SUPPORT OF BRIEFS OF PETITIONERS ERIE INSURANCE PROPERTY & CASUALTY COMPANY AND WEST VIRGINIA INSURANCE COMMISSIONER** was served upon the following counsel of record by depositing a true copy thereof in the United States Mail, first class, postage prepaid, this 13th day of January 2015:

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