

**STATE OF WEST VIRGINIA
SUPREME COURT OF APPEALS**

STATE of WEST VIRGINIA, ex rel.
DARRELL V. McGRAW, JR.,
ATTORNEY GENERAL, Petitioner

FILED

February 17, 2011
RORY L. PERRY II, CLERK
SUPREME COURT OF APPEALS
OF WEST VIRGINIA

vs.) 35716 (Kanawha County 10-MISC-372)

THE HONORABLE LOUIS H. BLOOM, JUDGE
OF THE CIRCUIT COURT OF KANAWHA COUNTY,
Respondent

MEMORANDUM DECISION

This case arises from a petition for writ of prohibition filed by Darrell V. McGraw, Jr., Attorney General of the State of West Virginia (“Attorney General”), against the Honorable Louis H. Bloom, Judge of the Circuit Court of Kanawha County (“Respondent”). The Attorney General seeks to prohibit enforcement of an order entered by Respondent in which the Attorney General’s claims against eight internet payday lenders were ordered severed pursuant to Rule 21 of the West Virginia Rules of Civil Procedure upon the institution of subpoena enforcement proceedings against the payday lenders. Following the filing of the petition and accompanying appendix, this Court issued a rule to show cause. Respondent timely filed a response. This Court has carefully reviewed the record provided and the written arguments of the parties, and the matter is now mature for consideration.

Upon consideration of the foregoing and the relevant decision of the Respondent, the Court is of the opinion that the decisional process would not be significantly aided by oral argument and that a memorandum decision is appropriate under Rule 21 of the Revised Rules of Appellate Procedure.¹

I.

Pursuant to its authority set forth in the West Virginia Consumer Credit and Protection Act, W.Va. Code §§46A-7-101, *et seq.*, the Attorney General began an investigation into the alleged usurious lending practices of eight unlicensed internet payday lenders after it received

¹This Court is further of the opinion that, pursuant to Rule 1(d) of the Revised Rules of Appellate Procedure, this matter is appropriate for consideration under the Revised Rules.

complaints from West Virginia consumers. *See* W.Va. Code §46A-7-103 (1996) (Repl. Vol. 2006) and W. Va. Code §46A-7-104(1) (1974). The Attorney General issued investigative subpoenas to each of the named lenders, seeking the production of documents and information specifically described in the subpoenas and related to the lenders' lending practices in West Virginia. When the lenders either failed or refused to respond to the subpoenas, the Attorney General filed a *Petition to Enforce Investigative Subpoenas and for Related Relief* on August 18, 2010, in the Circuit Court of Kanawha County, pursuant to W. Va. Code §46A-7-104(3). On August 19, 2010, Respondent, *sua sponte*, entered an order in which it found that the Attorney General failed to "assert any right to relief in respect of or arising out of the same transaction, occurrence, or series of transactions or occurrences by the [payday lenders], i.e., there are no factual allegations of any connection between any one of the [payday lenders], only that they all make or collect usurious payday loans or provide related services in West Virginia." *See* Rule 20(a) of the West Virginia Rules of Civil Procedure (governing permissive joinder of parties). Respondent concluded the payday lenders were not properly joined as parties pursuant to Rule 20(a) and thus, ordered that the claims against each of them be severed under Rule 21 of the West Virginia Rules of Civil Procedure.² The Attorney General now seeks to prohibit enforcement of that order.

II.

At issue is whether Respondent properly applied Rule 21 of the West Virginia Rules of Civil Procedure (hereinafter "the Rules") to sever the Attorney General's claims against the named payday lenders in the subpoena enforcement proceedings below.

The Attorney General is presently investigating the lending practices of the various

²According to the Attorney General's brief, it previously issued identical investigative subpoenas to approximately thirty-four other unlicensed internet payday lenders, the majority of which, as in the instant matter, were unaffiliated with each other. When all of the lenders either failed or refused to respond to the investigative subpoenas, the Attorney General instituted three enforcement proceedings against them, dividing them into three groups for purposes of the proceedings. Coincidentally, two of the proceedings were randomly assigned to Respondent. (The instant proceeding is a third enforcement proceeding assigned to Respondent.) None of the named (and unaffiliated) lenders in those previous proceedings moved to sever, nor did Respondent, *sua sponte*, order that the claims against them be severed. The Attorney General represents that full settlement agreements were reached with four of the lenders who appeared at the previous enforcement proceedings and that the remaining thirty lenders either failed to appear (resulting in the court granting the Attorney General's petition to enforce) or were dismissed because they could not be located for service of process.

named payday lenders pursuant to its authority under the West Virginia Consumer Credit and Protection Act (hereinafter “the Act”). W.Va. Code 46A-7-105 (1974) of the Act provides that, “[e]xcept as otherwise provided, the provisions of [the State Administrative Procedures Act, W.Va. Code §§29A-1-1 *et seq.*] apply to and govern all administrative action taken by the attorney general pursuant to this chapter.” Furthermore, Rule 81(a)(1) of the Rules provides, *inter alia*, that the Rules, “where applicable, apply in a trial court of record when any testimony is taken before the court in the judicial review of an order or decision rendered by an administrative agency.” As noted above, the underlying matter is in the investigatory stage and no civil action has been filed.³ Likewise, at this stage, none of the parties to the underlying matter has sought judicial review of a final order or decision in a contested case.⁴ *See* W.Va. Code §29A-5-4 (1998) (Repl. Vol. 2007). Thus, because the rules of civil procedure are not applicable to subpoena enforcement proceedings at the investigative stage, this Court is of the opinion that Rule 21 should not have been applied to sever the claims against the payday lenders.

Finally, this Court has also acknowledged that “[s]ubpoena enforcement proceedings are designed to be summary in nature, and an agency’s investigations should not be bogged down by premature challenges to its regulatory jurisdiction. As long as the agency’s assertion of authority is not obviously apocryphal. . . a procedurally sound subpoena must be

³The Act not only authorizes the Attorney General to investigate whether the provisions of the Act have (or have not) been violated, it also authorizes the filing of a civil action when an investigation reveals that a violation has been committed. *See* W.Va. Code §46A-7-106 (1974); §46A-7-108 (1974); §46A-7-109 (1996); and §46A-7-111 (1999).

⁴We have previously recognized that the “investigatory stage ends when the ‘contested case’ is brought against the individual under investigation.” *State ex rel. Hoover v. Smith*, 198 W.Va. 507, 515 n.12, 482 S.E.2d 124, 132 n.12 (1997). A “contested case” is

a proceeding before an agency in which the legal rights, duties, interests or privileges of specific parties are required by law or constitutional right to be determined after an agency hearing, but does not include cases in which an agency issues a license, permit or certificate after an examination to test the knowledge or ability of the applicant where the controversy concerns whether the examination was fair or whether the applicant passed the examination and does not include rule making[.]

W.Va. Code §29A-1-2(b) (1982). *See Smith*, 198 W.Va. at 515 n.12, 482 S.E.2d at 132 n.12 (“The ‘contested case’ is the case that has moved from the investigatory stage to the adjudicatory stage.”)

enforced. . . . Therefore, so long as the [agency] follows its own settled principles and provides a reasonable explanation for its discovery and investigation policies, judicial review is very restricted.” *State ex rel. Hoover v. Berger*, 199 W.Va. 12, 19-20, 483 S.E.2d 12, 19-20 (1996).

III.

Having found that Respondent has exceeded his legitimate powers and that, in particular, the order severing the claims against the named payday lenders was clearly erroneous as a matter of law, the writ of prohibition, as requested, is hereby granted. *See* Syl. Pts. 3 and 4, *Berger, supra*.

Writ granted.

ISSUED: February 17, 2011

CONCURRED IN BY:

Chief Justice Margaret L. Workman
Justice Robin Jean Davis
Justice Brent D. Benjamin
Justice Menis E. Ketchum
Justice Thomas E. McHugh