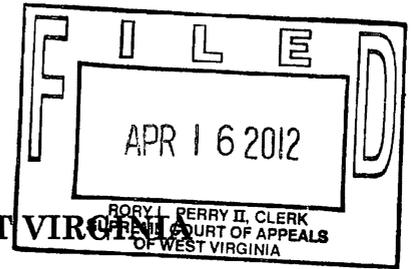


NO. 11-1750



IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

WEST VIRGINIA EMPLOYERS' MUTUAL INSURANCE COMPANY

D/B/A BRICKSTREET MUTUAL INSURANCE COMPANY,

AND

JANE CLINE, WEST VIRGINIA INSURANCE COMMISSIONER,

Petitioners,

v.

THE BUNCH COMPANY,

Respondent.

From the Circuit Court of Kanawha County, West Virginia
Civil Action No. 10-AA-113

**BRIEF OF THE WEST VIRGINIA MUTUAL INSURANCE COMPANY, INC.,
AS *AMICUS CURIAE*, IN SUPPORT OF BRIEF OF PETITIONERS**

D.C. Offutt, Jr., Esquire (WV Bar No. 2773)
Offutt Nord Burchett, PLLC
949 Third Avenue, Suite 300
P.O. Box 2868
Huntington, West Virginia 25701
(304) 529-2868 - Office
(304) 529-2999 - Facsimile
dcoffutt@ofnlaw.com

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I. INTRODUCTION

The West Virginia Mutual Insurance Company (“the Mutual”) files this brief as *amicus curiae* in support of the brief filed by Petitioners, West Virginia Employer’s Mutual Insurance Company d/b/a BrickStreet Mutual Insurance Company (“BrickStreet”) and Jane Cline, West Virginia Insurance Commissioner, (“Insurance Commissioner”), on the basis that the Final Order entered by the Circuit Court of Kanawha County (“Circuit Court”) on October 31, 2011 disturbs carefully crafted legislation that insurance companies like the Mutual rely upon to ensure the finality of the rates they charge their insureds, which is a keystone of the insurance industry.¹ The Circuit Court’s final order supplants the judgment of the Insurance Commissioner, who was entrusted by the West Virginia Legislature for its experience and expertise in the insurance rate making process, with that of its own without proper respect or knowledge of the insurance rate making process. For the reasons set forth herein, the Mutual respectfully urges this Court to accept this Appeal.²

II. STATEMENT OF FACTS

The Mutual adopts and incorporates by reference the factual background as set out by BrickStreet in its Notice of Appeal.

¹ Pursuant to Rule 30(b) of the Rules of Appellate Procedure, the Mutual provided notice on April 9, 2012, to all parties of its intent to file an *amicus* brief.

² The undersigned counsel authored this brief in its entirety. 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 Rules of Appellate Procedure.

III. STATEMENT OF INTEREST

The Mutual is a West Virginia domestic, private, non-stock, nonprofit corporation that currently insures approximately 1550 of the State of West Virginia's physicians. The Mutual insures 60-65% of the physicians in private practice within the State of West Virginia who purchase insurance in the commercial market. In matters of significant interest to itself and its insureds, the Mutual appears before state and local legislative bodies, administrative agencies and before the courts of the state on behalf of itself and entities similarly situated, including participation as *amicus curiae* in cases raising significant legal and policy issues.

This case, arising from the Kanawha Circuit Court's final order substituting its judgment regarding the appropriateness of insurance rates for that of the West Virginia Insurance Commissioner, presents such an issue. Insurance companies, such as the Mutual, rely on the finality of rate determinations by the Insurance Commissioner as the foundation of their entire business. Unstablens in the finality of these rate determinations, by way of judicial hindsight and second guessing, creates an unneeded instability in the insurance market that places both consumers and insurance companies at risk. Because of this the Mutual has a strong interest in assuring that state trial court judges do not supplant their judgment for that of the Insurance Commissioner, the Mutual files this brief pursuant to Rule 30 of the Revised Rules of Appellate Procedure in support of BrickStreet's Petition because unnecessary and unneeded judicial interference in the West Virginia statutory insurance regulatory

scheme is fundamentally disruptive to the Mutual's operations and fundamentally disruptive to the insurance market place as a whole.

IV. ARGUMENT

A. The Kanawha Circuit Court Was Required to Give Deference to the Insurance Commissioner's Interpretation of Its Own Regulation

The West Virginia Administrative Procedures Act (WVAPA), W. Va. Code § 29A-1-1, *et seq*, provides for judicial review of a final order of decision of contested cases. See W. Va. Code § 29A-5-4(a). Section 29A-1-2(b) of the West Virginia Code defines contested case to mean:

Contested case' means 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 shall not include rule making[.]

Section §29A-5-4 (g) of the West Virginia Code further provides that:

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, decision 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.

The Circuit Court's Final order found that the Insurance Commissioner erred as a matter of law, pursuant to W. Va. Code §29A-5-4 (g)(4), in allowing BrickStreet to charge for an agent commission when no such expense was incurred. In making its conclusion of law, the Circuit Court interpreted the term "expense" as codified in 85 C.S.R. 8-11.2 (2007 to present) and 85 C.S.R. 8-8.1.c [2005] (collectively, "the rate making regulations") to infer that an insurer must actually incur the expense in order to include it in its rate. Title 85, Section 8-11.2 of the West Virginia Code of State Rules provides in that the base rates charged by private carriers may also include:

- (1) a reasonable provision for expenses related to the administration costs of a private carrier, including underwriting expenses, such as commission to agents and brokers, other policy acquisition or servicing expenses, premium taxes, assessments and fees, catastrophe reinsurance expenses, expenses associated with advisory organizations and/or rating organizations, loss adjustment expenses not included in the loss cost base rates, such as claims defense expenses, claim administration expenses and other related expenses; (2) a reasonable profit and contingency provision to contribute to the private carrier's surplus; and (3) all other rate making components consistent with industry practices.

Title 85, Section 8-8 of the West Virginia Code of State Rules provides that in addition to a loss cost base rate, the premium rates charged by an insurance company may also include:

(1) a reasonable provision for expenses related to administration costs of the company, including underwriting expenses, such as commission to agents and brokers, other policy acquisition or servicing expenses, premium taxes, assessments and fees, reinsurance expenses, expenses associated with advisory organizations and/or rating organizations, loss adjustment expenses not included in the loss cost base rates, such as claims defense expenses, claim administration expenses, and other related expenses; (2) a reasonable profit and contingency provision to contribute to the company's surplus; and (3) all other rate making components consistent with industry practices.

While it is not disputed that the Circuit Court was within its power to interpret the rate making regulations, the Circuit Court must do so affording appropriate deference to an agency's expertise and discretion. *Appalachian Power Co. v. State Tax Dept. of West Virginia*, 195 W. Va. 573, 466 S.E.2d 424 (W. Va., 1995) (Policy favoring deference to administrative interpretation is particularly important where technically complex statutory scheme is backed by even more complex and comprehensive set of regulations.)

The West Virginia Insurance Commissioner clearly has the authority to promulgate 85 C.S.R. 8-11 and 85 C.S.R. 8-8.1.c, as was recognized by the Circuit Court's final order. Final order, Kanawha County Circuit Court Case Number 10-AA-113, (Page 6, ¶1 states, "West Virginia law authorizes the WVIC to 'issue an exempt legislative rule and premium collection by [BrickStreet].' W. Va. Code § 23-2C-18(g)(2005); W. Va. Code § 23-1-1a(j)(3); W. Va. Code § 32-2-10(b); W. Va Code § 33-2-21). The Circuit Court correctly recognized that it should defer to the Insurance Commissioner regarding the Commissioner's authority to promulgate the regulations that has given rise to this appeal. *Appalachian Power Co. v. State Tax Dept. of West*

Virginia, 195 W. Va. 573, 579, 466 S.E.2d 424, 430 (W. Va.,1995) (Syllabus Point 3) (Recognizing the United States Supreme Court’s analysis of whether an administrative agency’s position should be sustained in *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 104 S.Ct. 2778, 81 L.Ed.2d 694 (1984).). While the Circuit Court is entitled to review the conclusions of law of the Insurance Commissioner *de novo*, the Circuit Court failed to afford the Insurance Commissioner the proper level of deference in its interpretation of the term “expense” as codified in the rate making regulations. *Lowe v. Cicchirillo*, 223 W.Va. 175, 672 S.E.2d 311(W. Va.,2008) (In reviewing an administrative agency determination, the appellate court gives deference to the agency's purely factual determinations and applies *de novo* review to legal determinations.). “An 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.” *Appalachian Power Co. v. State Tax Dept. of West Virginia*, 195 W. Va. 573, 582, 466 S.E.2d 424, 433 (W. Va.,1995). It is clear from its final order that the Circuit Court substituted its judgment for that of the Insurance Commissioner in interpreting the term “expense” in these regulations and failed to afford the Insurance Commissioner with the appropriate deference giving consideration to the Insurance Commissioner’s expertise in a technically complex area of regulation.

Insurance rates are prospectively filed and approved by the Insurance Commissioner. See W. Va. Code § 33-20-4. As part of the rate approved by the

Insurance Commissioner, insurers may charge a reasonable administrative expense, including underwriting costs, such as commissions paid to agents and brokers. *See* 85 C.S.R. 8-11.2. The loss cost multiplier (LCM) structure employed by the Insurance Commissioner was specifically mandated by W. Va. Code § 23-2C-18 (b) and requires insurers to file a multiplier or multipliers to be applied to prospective loss costs. W. Va. Code, § 23-2C-18 (b) (“An insurer shall file its rates by filing a multiplier or multipliers to be applied to **prospective loss costs** that have been filed by the designated advisory organization on behalf of the insurer in accordance with section eighteen-a of this article and may also file carrier specific rating plans.”) (Emphasis Added). The term “prospective loss cost” requires insurers to anticipate losses in advance. While W. Va. Code § 23-2C-18 (b) doesn’t specifically address the issue of administrative costs as contemplated by the rate making regulations, the rate making regulations specifically authorize the inclusion of such costs in the base rates charged by private carriers. Because all rates must be filed and approved prospectively, insurers must anticipate administrative costs in advance, including commissions paid to agents. Thus, the Insurance Commissioner’s interpretation of the term expense in the rate making regulations, i.e., that an insurer only need to reasonably anticipate loss costs, is entirely appropriate in light of the statutory and regulatory background concerning how rates are determined and approved. Furthermore, in reviewing the appropriateness of a rate, the Insurance Commissioner must not only make a determination as to whether a given rate is excessive, it must also make a determination of whether a given rate is inadequate. *See* W. Va. Code § 33-20-3(b).

In addition, BrickStreet and other insurers that engage in direct sales are not legally able to charge a different premium. *See* W. Va. Code, § 33-20-4(k) (“No insurer shall make or issue a contract or policy except in accordance with the filings which are in effect for that insurer as provided in this article. This subsection does not apply to contracts or policies for inland marine risks as to which filings are not required.”) Taken together, interpreting the term “expense” as used in the rate making regulations to mean reasonably anticipated loss costs, is the only plausible interpretation that will comport with the regulatory scheme, as the Insurance Commissioner has to make a prospective determination of a rate that will not be excessive or inadequate.

This is bolstered by the fact that it is impossible for insurers such as BrickStreet to anticipate whether an insured will purchase insurance through an agent or purchase insurance directly. The Insurance Commissioner was aware of the fact that not all BrickStreet insureds purchase insurance by retaining an agent when it approve the rate. *See* Page 6 of Brief of the Respondent, West Virginia Employers’ Mutual Insurance Company d/b/a BrickStreet Mutual Insurance Company File in Case Number 10-AA-113 in the Circuit Court of Kanawha County, WV (Referencing Affidavit of Harry E. Mahler, Senior Vice President for Insurance Operations for BrickStreet). Furthermore, each loss cost multiplier (“LCM”) submitted by BrickStreet to the Insurance Commissioner was adjusted to a value less than that which BrickStreet requested. *See* Page 4 of the Circuit Court’s final order, Item 7 of Stipulations in the Circuit Court’s Findings of Fact. This provides circumstantial evidence of the fact that the Insurance Commissioner considered the fact that

perspective losses and actual losses might not be equal in BrickStreet's experience and adjusted the rates accordingly.

Despite this support for the Insurance Commissioner's interpretation of the term "expense" as codified in the rate making statutes, the Circuit Court substituted its interpretation of the statute providing no deference, whatsoever, to the Insurance Commissioner's expertise and experience in the area of insurance rate making. The Circuit Court's interpreted the term "expense" to mean an expense actually incurred. This interpretation is illogical in light of how rates are filed and approved in West Virginia.

It is difficult to conceptualize how the Circuit Court's interpretation of the term "expense" would function in the prospective rate approval process. Expense being defined as an "expense actually incurred" infers that an insurer will need to incur the expense prior to being able to include it in its rate. This simply does not comport with the requirement of W. Va. Code § 23-2C-18 (b) that insurers file multipliers to be applied to prospective loss costs.

B. The Kanawha Circuit Court Improperly Substituted Its Judgment for That of the Insurance Commissioner, Which Violates Traditional Principles of the Separation of Powers

The West Virginia Legislature specifically found that, "[t]hat consumers and insurers both benefit from the legislative mandate that the Insurance Commissioner approve the forms used and the rates charged by insurance companies in this state[.]" See W. Va. Code, § 33-6-30 (b)(1). As such, the legislature made a policy choice that the appropriate entity to review and approve the rates charged by insurance companies in

the State of West Virginia, is the Insurance Commissioner. This Court reaffirmed this position by its holding in *State ex re. Citifinancial, Inc. v. Madden*, 223 W. Va. 229, 672 S.E.2d 365 (W. Va. 2008), that “[a]ny challenge to an approved insurance rate by an aggrieved person or organization should be raised pursuant to the provisions of West Virginia Code § 33–20–5(d) (1967) (Repl. Vol. 2006) in a proceeding before the Insurance Commissioner.” *State ex re. Citifinancial, Inc. V. Madden*, 223 W. Va. 229, 672 S.E.2d 365 (W. Va. 2008) (Syllabus Point 3). While the Mutual recognizes that the Circuit Court had jurisdiction to review the Insurance Commissioner’s final order in the case brought by The Bunch Company, the Circuit Court ignored the legislature’s grant of exclusive jurisdiction to the Insurance Commissioner over matters related to the determination of the appropriateness of an insurance rate. Whether intentional or not, the Circuit Court’s Final order reopens a final determination by the Insurance Commissioner as to what rate insurers like BrickStreet can charge its insureds. This unnecessary judicial re-examination of insurance rates contradicts the regulatory scheme established by the West Virginia Legislature.

Section 33-6-30(c) of the West Virginia Code creates a statutory presumption of validity when the Insurance Commissioner approves a rate. This presumption may only be rebutted before a proceeding before the Insurance Commissioner. *State ex re. Citifinancial, Inc. V. Madden*, 223 W. Va. 229, 239-240 672 S.E.2d 365, 375-376 (W. Va. 2008). However, the Circuit Court failed to afford the Insurance Commissioner the presumption of the validity of its rate determination. The Circuit Court made no finding of fact or law that the Bunch Company produced sufficient evidence into the

record to rebut the presumption of validity in this case, but instead performed a *de novo* review of the Insurance Commissioner's final order as if the presumption did not exist. In doing so, the Circuit Court improperly substituted its own judgment for that of the Insurance Commissioner. The final order of the Circuit Court represents a direct invasion by the Circuit Court into matters that have previously been delegated by the West Virginia Legislature to the Insurance Commissioner. This improper invasion of power is in direct violation of traditional principles of the separation of powers.

The gravamen of the Bunch Company's Complaint before the Insurance Commissioner wasn't directed at whether BrickStreet unlawfully charged an agency commission, but was instead directed at the validity of the Insurance Commissioner's rate making approval process which approved the prospective assessment of agent commissions for direct insurance sales. The West Virginia Legislature clearly made a policy choice as to how decisions are to be made concerning the rates that can be charged by insurance companies doing business in this state. It elected to have this determination made by the Insurance Commissioner, not the court system. Issues related to the prospective rate approval process are better resolved through the political process than in a court of law. "It is the province of the legislature to make such political accommodations between the interests of competing groups, and it is not the function of this court to second-guess the judgments made by other actors in the political process." *ACF Industries, Inc. v. Credithrift of America, Inc.* 173 W. Va. 83, 87, 312 S.E.2d 746, 751 (W.Va.,1983) (Dissenting Opinion). The rate making process employed by the Insurance Commissioner is one such instance where courts should not

second guess the judgment of other actors in the political system. The system is one in which the legislature weighed a multitude of interests and specifically found that consumers and insurers alike benefit from rate approval by Insurance Commissioner. See W. Va. Code, § 33-6-30 (b)(1). To engage in the sort of judicial second guessing as the Circuit Court did in its Final order, opens the Circuit Court to the scrutiny of the political system and threatens its public perception as an independent and impartial decision maker. “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 attendant imbroglios from the judicial process is necessary to the proper functioning of our judicial system.” *State ex rel. Carenbauer v. Hechler*, 208 W.Va. 584, 589, 542 S.E.2d 405, 410 (W.Va.,2000).

Furthermore, the Circuit Court’s final order disrupts a fundamental and well established scheme of political accountability among the different branches of government. Citizens of this state are free to hold those responsible for the enactment of laws and regulations accountable for these policy choices. Furthermore, the West Virginia Insurance Commissioner is appointed by the Governor with the approval of the Senate. Those aggrieved by the regulatory policies and decisions of the Insurance Commissioner are free to hold those responsible accountable through the political process.³ Conversely, Circuit Judges elected to the Kanawha Circuit Court are elected

³ Elected officials in the Executive Branch of the State of West Virginia are determined by statewide election. Furthermore, the Legislature represents a collective body elected by the citizens of the State of West Virginia.

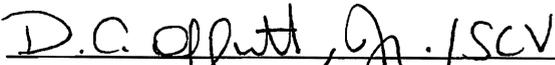
solely by the Citizens of Kanawha County. As such, individuals aggrieved by court orders, such as the Circuit Court's Final order, who live outside the Kanawha County do not have any political recourse available to hold the Judge politically accountable for his decision. Thus, when courts, as the Circuit Court did in this matter, alter policy choices that are clearly within the providence of another branch of government, our system of holding those politically accountable for the policy choices becomes skewed. For this reason, the Circuit Court should have abstained from its intrusion into policy matters and either affirmed the decision of the Insurance Commissioner or remanded the case back to the Insurance Commissioner for further deliberation.

V. CONCLUSION

For the foregoing reasons the Mutual respectfully requests that the Court consider the case for review and reverse the Circuit Court's final order.

WEST VIRGINIA MUTUAL INSURANCE COMPANY

BY COUNSEL


D.C. Offutt, Jr., Esquire (WV Bar No. 2773)
Offutt Nord Burchett, PLLC
949 Third Avenue, Suite 300
P.O. Box 2868
Huntington, West Virginia 25701
(304) 529-2868 - Office
(304) 529-2999 - Facsimile
dcoffutt@ofnlaw.com

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CERTIFICATE OF SERVICE

I hereby certify that I have this day served a copy of "**BRIEF OF THE WEST VIRGINIA MUTUAL INSURANCE COMPANY, INC., AS *AMICUS CURIAE*, IN SUPPORT OF BRIEF OF PETITIONERS**" upon all parties to this matter by depositing a true copy of the same in the U.S. Mail, postage prepaid, this 16th day of April, 2012, to the following:

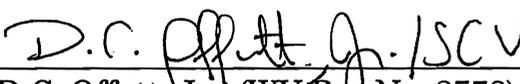
Paul T. Farrell, Jr., Esquire
Greene, Ketchum, Bailey, Walker, Farrell & Tweel
P.O. Box 2389
Huntington, WV 25724-2389

Alex J. Shook, Esquire
Hamstead, Williams & Shook, PLLC
315 High Street
Morgantown, WV 26505

Andrew E. Pauley, Esquire
West Virginia Office of the Insurance Commissioner
Legal Division, Room 409
1124 Smith Street
Charleston, WV 25301

Jeffrey M. Wakefield, Esquire
Erica M. Baumgras, Esquire
Flaherty Sensabaugh Bonasso PLLC
200 Capitol Street (25301)
P.O. Box 3843
Charleston, WV 25338-3842

Jill Cranston Bentz, Esquire
Mychal Sommer Schlz, Esquire
Jacob A. Manning, Esquire
Dinsmore & Shohl, LLP
900 Lee Street, Suite 600
Charleston, WV 25301



D.C. Offutt, Jr., (WV Bar No. 2773)