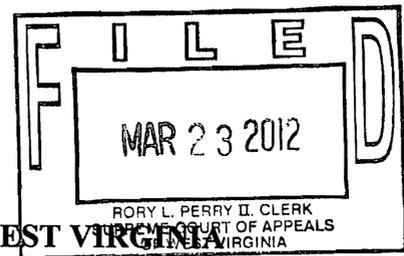


BRIEF FILED
WITH MOTION

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

WEST VIRGINIA OFFICES OF THE 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 INSURANCE FEDERATION
AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS**

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I. INTRODUCTION

The West Virginia Insurance Federation (the “Federation”) files this brief as *amicus curiae* in support of the brief filed by Petitioners West Virginia Employers’ Mutual Insurance Company d/b/a BrickStreet Mutual Insurance Company (“BrickStreet”) and the West Virginia Insurance Commissioner (“the Insurance Commissioner”) because the Final Order entered by the Circuit Court of Kanawha County (“the Circuit Court”) on October 31, 2011 (“Final Order”), fundamentally affects the entire process by which insurance companies file proposed insurance rates and seek approval of those rates before they become effective.¹ Once approved, insurance companies should be able to rely on the insurance rates approved by the Insurance Commissioner. The Circuit Court’s Final Order is aggravated by the Circuit Court’s fundamental misunderstanding of the statutory rate filing process and its failure to give any weight whatsoever to the Insurance Commissioner’s expertise in the insurance rate-making process.² For the reasons detailed below, therefore, the Federation respectfully urges this Court to accept this Appeal.

II. PROCEDURAL BACKGROUND

Although the Federation incorporates by reference the factual background outlined by BrickStreet and the Insurance Commissioner in their Notice of Appeal, the Federation provides the following inasmuch as it relates to the limited issue in which the Federation has an interest.

Respondent The Bunch Company (“Bunch Company”) filed a Consumer Complaint with the Insurance Commissioner on February 17, 2010, alleging, in pertinent part, that, “BrickStreet

¹ Pursuant to Section 30(b), the Federation provided notice on March 16, 2012, to all parties of its intention to file an *amicus curiae* 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 Revised Rules of Appellate Procedure.

is charging the Bunch Company for an agent commission. The Bunch Company does not have an agent. This is a clear violation of law.” Consumer Complaint Form, A-27.

On March 30, 2010, BrickStreet filed its Answer to the Consumer Complaint and responded that it does not charge an agent commission to any customer, but instead, the premium rate charged is comprised of multiple components, one of which is the Loss Cost Multiplier (“LCM”) that 85 C.S.R. 8-8.1c, and its subsequently adopted version, 85 C.S.R. 8-11.2, authorizes it to charge. Upon receipt of rate filings from BrickStreet, the Insurance Commissioner reviewed and approved each component of the rate filing and initially established one LCM for all BrickStreet insureds, whether or not any particular insured had an agent. Using the same methodology, the Insurance Commissioner subsequently approved five LCMs for BrickStreet, which allowed BrickStreet to tier its insureds based on certain loss history.³

Importantly, the LCM(s) that the Insurance Commissioner ultimately approved for use by BrickStreet assumed that some policies would not be written through an agent and, therefore, would not have a commission expense. In fact, BrickStreet advised the Insurance Commissioner *prior to adoption of the LCM(s)* that only about eighty percent (80%) of its premium was written through an agent of record, while the remaining twenty percent (20%) was written directly to the insured.

On July 9, 2010, the Insurance Commissioner issued her ruling in connection with the Bunch Company’s Customer Complaint in the form of Findings of Fact, Conclusions of Law and a Final Order Denying Hearing Request of Complainant in 10-AP-FP002027 (“OIC Order”). The Findings of Fact in the OIC Order included the six filings made by BrickStreet relevant to

³ While not all insurance companies use this methodology to calculate rates in this way, this is the method utilized by BrickStreet. The use of alternative approaches is one reason why rate-making is very specialized.

the allegations in this appeal and contained several conclusions of law that are critical to this appeal:

- The rate filings by BrickStreet did not violate W. Va. Code § 23-2C-18(c) (2007) or W. Va. Code § 33-20-3(b) (2006), which provide that rates may not be excessive, inadequate or unfairly discriminatory, and were approved for use accordingly. *See* OIC Order (¶ 1).
- The Insurance Commissioner complied with the requirements of W. Va. Code § 33-20-4(d) (2005) and subsequently approved the filings of BrickStreet in the normal course of business for the agency. *Id.* (¶ 2).
- The filings of BrickStreet are deemed to meet the requirements of Chapters 23 and 33 of the West Virginia Code. *Id.* (¶ 3).
- The Insurance Commissioner has been provided with no information that would in fact rebut the presumption that the policy forms and rate structure are in full compliance with the requirements of Chapter 33 of the West Virginia Code. *Id.* (¶ 4).
- There is no factual dispute concerning the filing and approval of the rates and forms of BrickStreet, and as a matter of law, the rate filings and BrickStreet's use of the same should be upheld. *Id.* (¶ 5).
- The rates charged by BrickStreet were reasonable in relation to the benefits provided due to the fact that certain administrative costs and/or expenses are incurred by BrickStreet in handling direct written business which would otherwise be handled by appointed agents. *Id.* (¶ 6).
- Based upon the lack of any factual dispute and the Commissioner's prior approval of the rates filed by BrickStreet, a hearing in this matter would serve no useful purpose, per W. Va. C.S.R. § 114-13-3.3(b). *Id.* (¶ 8).

The Bunch Company appealed the OIC Order to the Circuit Court and asked the Circuit Court to (1) determine the legality of the agent commission as applied to BrickStreet insureds that had not retained an agent; (2) certify a class action; (3) reinstate and reaffirm another Order from the Circuit Court of Cabell County dated November 3, 2008, which previously granted the

Bunch Company's Motion for Summary Judgment and denied BrickStreet's Motion for Summary Judgment -- an order that had been subsequently reconsidered and then reversed by the Circuit Court of Cabell County following this Court's decision in State of W. Va. Ex rel CitiFinancial, Inc., 672 S.E.2d 365 (W. Va. 2008); (4) award damages against BrickStreet; and (5) grant a trial by jury for all claims.

Thereafter, the Circuit Court entered an Order dated July 6, 2011, which stated that the matters in the OIC Order would be heard on appeal, but the other claims were dismissed. The Bunch Company then filed its brief with the Circuit Court, in which it alleged that (1) it purchased workers' compensation insurance from BrickStreet; (2) it was charged an agent commission, though it had no agent; (3) BrickStreet refused to refund that portion of the premium; (4) charging an insured an expense not incurred is a *per se* violation of 85 C.S.R. 8-8.1.c, and (5) BrickStreet unlawfully charged an expense not incurred. It also argued that the Insurance Commissioner erred as a matter of law by refusing to hold a hearing pursuant to W. Va. Code § 33-20-5(d) (1967), invoking the legislative rule at 114 C.S.R. 13-3.3, and concluding that BrickStreet's rate filing complied with West Virginia law. It asserted that the Insurance Commissioner was clearly wrong in concluding that the rates charged by BrickStreet were reasonable in relation to the benefits provided, and that the Insurance Commissioner acted in an arbitrary and capricious manner by refusing to consider its claims of false advertising in violation of W. Va. Code § 33-11-4 (2002).

On October 31, 2011, the Circuit Court issued the Final Order at issue in this appeal. It is this Final Order that has caused the Federation and its member insurance companies great concern. For this reason, the Federation files this brief as *amicus curiae*.

II. STATEMENT OF INTEREST

The Federation is the state trade association for property and casualty insurance companies doing business in West Virginia. Its members insure eight of every ten automobiles, seven of every ten homes, write more than 80% of the workers' compensation policies insuring West Virginia employees in our State, and insure West Virginia's businesses through commercial insurance products. The Federation is widely-regarded as the voice of West Virginia's insurance industry and has a strong interest in promoting a healthy and competitive insurance market to ensure that insurance is both available and affordable to West Virginia's insurance consumers.

The Federation files this brief pursuant to Rule 30 of the Revised Rules of Appellate Procedure in support of BrickStreet's Petition because the Federation's members must be able to rely on the Insurance Commissioner's regulatory approvals of insurance rates in order to continue their operations without disruption. The Circuit Court's order interferes with the process by which insurance companies file proposed rates and seek approval of these rates by interjecting an improper reexamination of these rates when it is the Insurance Commissioner that has the highly-specialized expertise to understand the rate-making process.

Accordingly, the Federation respectfully urges this Court to consider the far-reaching effect of the Circuit Court's decision to reverse the Final Order.

III. ARGUMENT

- A. A Circuit Court should not substitute its judgment for that of the Insurance Commissioner and reopen, reexamine, and reverse an insurance rate approved by the Insurance Commissioner pursuant to the ratemaking process mandated by the Legislature.**

The Federation understands and accepts that an order or decision of the Insurance Commissioner is subject to the West Virginia Administrative Procedures Act, W. Va. Code §29A-5-1, *et seq.* As such, the Federation does not seek to immunize a ratemaking decision of the Insurance Commissioner, or a decision of the Insurance Commissioner in a proceeding filed pursuant to W. Va. Code §33-20-5(d) related to an insurance rate, from judicial review. In the ratemaking context, however, this Court has specifically and recently found that ratemaking issues are “highly specialized in nature” and, therefore, particularly within the expertise of the Insurance Commissioner.

In State of W. Va. ex rel. CitiFinancial, Inc., 223 W. Va. 229, 672 S.E.2d 365 (2008), this Court examined an attempt by an individual to bring a claim under the West Virginia Consumer Credit and Protection Act (“CCPA”) against CitiFinancial for alleged unreasonable and excessive charges related to credit insurance. In doing so, the individual sought to have the trial court examine whether the credit insurance premium charged by CitiFinancial -- which had been reviewed and approved by the Insurance Commissioner -- was proper. In effect, the individual sought to challenge in circuit court, and not via the Administrative Procedures Act mechanism, the insurance rate approved by the Insurance Commissioner -- which is exactly what Bunch Company did in this case.

This Court carefully and meticulously examined West Virginia’s statutory and regulatory insurance framework, the West Virginia Legislature’s reservation of ratemaking within that framework to the Insurance Commissioner, and the role of courts in reexamining insurance rates

previously approved by the Insurance Commissioner. This examination resulted in this Court's conclusion that "the Legislature did not authorize the circuit courts to invade the jurisdiction of the Commissioner and conduct a reexamination of insurance rates previously approved by the Commissioner." CitiFinancial, 223 W. Va. at 238, 672 S.E.2d at 374. In doing so, the Court made the following observations:

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. 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.*

CitiFinancial, 223 W. Va. at 237, 672 S.E.2d at 373 (emphasis added). In recognizing the "highly specialized nature" of ratemaking, therefore, this Court specifically warned circuit courts *against* "reexamin[ing] the issue of whether a given insurance rate is reasonable or excessive[.]"

In addition, this Court also noted that permitting a circuit court to reexamine insurance rates may contravene what the Legislature hoped to accomplish – uniformity, stability, and predictability of insurance rates:

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 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).

Here, the Circuit Court simply ignored this Court's admonition in CitiFinancial and did exactly what this Court instructed it never to do -- "substitut[e] 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." CitiFinancial, 223 W. Va. at 237, 672 S.E.2d at 373. Not only did the Circuit Court substitute its own judgment for that of the Insurance Commissioner on BrickStreet's insurance rate, but, as detailed below, it completely misunderstood how the ratemaking process works, how rates are set, and what components are included in an insurance rate as governed by applicable insurance statutes and regulations. In addition, and more egregiously, the Circuit Court completely disregarded how the Insurance Commissioner interprets and applies those same insurance statutes and regulations and substituted its own determinations in this regard -- despite this Court's stern warning in CitiFinancial that a court should *not* "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." CitiFinancial, 223 W. Va. at 237, 672 S.E.2d at 373.

It must be noted that the deference this Court gave to the Insurance Commissioner in CitiFinancial is entirely consistent with the deference it gives to administrative agencies when an agency's interpretations of statutes and regulations that govern its activities are at issue. In State ex rel. Crist v. Cline, 219 W. Va. 202, 632 S.E.2d 358 (2006), this Court deferred to the

Insurance Commissioner's interpretation of a workers' compensation insurance policy to determine whether it complied with the statutory requirements. Id., 219 W. Va. at 211-12; 632 S.E.2d at 366 ("Because the Insurance Commissioner is the Administrator of the Workers' Compensation system in this State, we are entitled to give deference to her interpretation, so long as it is consistent with the plain meaning of the governing statute, as it is in this instance.") (citing State ex rel. ACF Indus. v. Vieweg, Syl. Pt. 4, 204 W. Va. 525, 514 S.E.2d 176 (1999) ("Interpretations as to the meaning and application of workers' compensation statutes rendered by the Workers' Compensation Commissioner, as the governmental official charged with the administration and enforcement of the workers' compensation statutory law of this State, . . . should be accorded deference if such interpretations are consistent with the legislation's plain meaning and ordinary construction.")). As it did in those cases and in CitiFinancial, therefore, this Court should defer to the Insurance Commissioner in its rate-making determinations as well.

Permitting the Circuit Court to overturn the insurance rate set by the Insurance Commissioner for BrickStreet in this case will necessarily lead to the exact "peril" that this Court warned about in CitiFinancial. If the Circuit Court's decision is permitted to stand, it will likely result in thousands of lawsuits by BrickStreet's insureds, each filed to challenge the insurance rate approved by the Insurance Commissioner pursuant to its legislatively mandated, approved, and detailed ratemaking process for a particular period. Such court challenges would focus on rates charged to a *particular* insured, during a *particular* period of time, based upon expenses or, possibly, other data that is unique to that particular insured. In fact, every rate for BrickStreet -- and potentially those of other insurers and in other lines of insurance -- would be subject to litigation as insureds could challenge whether or not insurance rates approved in the past through

the Insurance Commissioner's ratemaking process were approved using expenses that were "actually incurred" for a particular customer during a particular period of time.

In addition, the entire ratemaking process will be thrown into chaos as BrickStreet -- and potentially many other insurers -- will be forced to repeatedly refile rate applications to capture *past* expenses "actually incurred" for all past periods for each policy for each customer. In fact, the Final Order completely disregards actuarial principles and standards used in the ratemaking process, which will lead to additional chaos in that process, including uncertainty of what actuarial support would be necessary to obtain approval of a rate. In fact, the entire basis by which insurance is underwritten and rates are approved, i.e., on the basis of a pool of similarly situated risks, would be thrown out the window as each insurance rate would instead have to be submitted and approved on a customer by customer basis to reflect the expenses "actually incurred" by that customer. As a result, BrickStreet would need, for each individual customer, to refile for a rate that is uniquely applicable to that customer based on BrickStreet's "actually incurred" expenses attributable to that customer's insurance policy. The underwriting and administrative burden on insurance companies, and the effect this burden would have on insurance premiums, is obvious.

All of this will lead to exactly what this Court warned against in Citifinancial: judicial interference in the insurance ratemaking arena that will lead to uncertainty and unpredictability. It is for this reason that the Court in CitiFinancial emphatically warned 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." CitiFinancial, 672 S.E.2d at 373.

B. The Circuit Court's Decision Represents a Misunderstanding of West Virginia's Rate-making Process.

The peril of allowing a circuit court to reopen and reexamine an insurance rate approved by the Insurance Commissioner pursuant to the ratemaking process is amply demonstrated by the Circuit Court's Final Order in this case, which reflects a fundamental and dangerous misunderstanding of how insurance rates are calculated, filed and approved in West Virginia.

Specifically, the Final Order states that "it is contrary to West Virginia law to charge a *premium* for an expense never incurred. The [Insurance Commissioner] erred as a matter of law by allowing BrickStreet to charge for an agent commission *when no such expense was incurred.*" Final Order at 6 (emphasis added). Curiously, however, the Order *also* states that "West Virginia Law [sic] clearly permits BrickStreet to charge an appropriate premium for certain administrative expenses. The term 'expenses', however, infers BrickStreet *has actually incurred the expense.*" Order at 6-7 (emphasis added). Noting that "BrickStreet charged and received for an agent commission from insureds that did not use an agent[.]" the Order concludes that, "[b]y charging an insured an expense that was never incurred, BrickStreet has violated 85 C.S.R. 8-8.1.a-c." Final Order at 7.

Notably, the Final Order concedes that 85 C.S.R. 8-8-11.2 (2007) *explicitly permits* "base rates charged by the private insurance carriers" to "include . . . a reasonable provision for expenses related to the administration costs of the private carrier, including underwriting expenses, such as commission to agents and brokers" Final Order at 6. In fact, however, 85 C.S.R. 8-8-11.2 permits "base rates" charged by insurance companies to include far more than those listed in the Final Order:

The base rates charged by the private carriers may also include: (1) a reasonable provision for expenses related to the administration costs of the private carrier, including underwriting expenses, such

as commissions to agents and brokers, other policy acquisition or servicing expenses, premium taxes, assessments, surcharges and fees, catastrophe reinsurance expenses, expenses associated with rating organizations, loss adjustment expenses not included in the loss costs, 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.

As this regulation makes clear, therefore, and as conceded by the Circuit Court, an insurance company, including BrickStreet, may “charge an appropriate premium for certain administrative expenses[,]” including, as noted in the explicit wording of the regulation, “commissions to agents and brokers[.]”

The Circuit Court, however, fundamentally erred when it decided that, in its opinion (and without citation to any legal or industry ratemaking authority), “the term ‘expenses’ infers BrickStreet has actually incurred the expense.” Order at 7. In other words, the Circuit Court unilaterally decided that all of the “administrative costs”⁴ in 85 C.S.R. 8-8-11.2 can be included in the “base rate” submitted by an insurance company, *but only if the insurance company has actually incurred those “administrative costs”* in its transaction with the particular customer being charged the approved rate. The necessary implication of the Circuit Court’s Final Order, therefore, is that every insurance rate filed for approval with the Insurance Commission may *only* properly include “administrative expenses” that have been “actually incurred” by an insurance company in each transaction that it engages in with a customer.⁵ That, however, is simply not how rates are calculated, filed or approved in today’s insurance industry.

⁴ While the Final Order uses the phrase “administrative expenses” as being clearly permitted as part of a premium charge under West Virginia law (see Final Order at 6), the regulation instead speaks of “expenses” that include “administrative costs.”

⁵ For example, an “expense” for customer in one year may include claims handling expenses or attorney fees from defending against a claim filed against that customer, while another customer may not have any claims

Generally speaking, insurance rates are filed *prospectively* based on past experience. This means that insurance rates are formulated upon what an insurer *expects* its loss and expense experience will be *in the future*, based, in significant part, on its past experience. While past administrative expenses will necessarily have some actuarial relevance in calculating prospective insurance rates, requiring, as the Circuit Court would here, that *prospective* insurance rates only include expense calculations “actually incurred” would turn ratemaking on its head and unravel the explicit and carefully crafted insurance ratemaking framework constructed by the Legislature and approved by this Court.

Fortunately, the Insurance Commissioner, who the Legislature has charged with administering W. Va. Code § 33-20-4, which contains the rate filing and approval mechanism for insurance rates in West Virginia, understood how insurance rates are calculated. Indeed, the Insurance Commissioner clearly understood that proposed insurance rates that include “expenses” pursuant to 85 C.S.R. 8-8-11.2 necessarily include calculated estimates of future administrative expenses -- not just “expenses” that have been “actually incurred.” She recognized the absurdity of requiring that proposed insurance rates only include expenses “actually incurred.” Unfortunately, however, the Circuit Court ignored the Insurance Commissioner’s judgment, as reflected in the OIC Order, and, as detailed above, substituted its own judgment (based upon a flawed view of ratemaking) in opening, and ultimately redoing, the insurance ratemaking for BrickStreet in this case.

The Circuit Court, therefore, substituted its own judgment for that of the Insurance Commissioner concerning BrickStreet’s insurance rate, which judgment was based on a flawed understanding of how the insurance ratemaking process works and how insurance rates are

in a given year, and hence may not “incur” that expense in that year. Each of those customers would, under the Circuit Court’s order, necessarily have to have a different insurance rate to reflect “expenses” that were “actually incurred.”

calculated. . In doing so, the Circuit Court did exactly what this Court told it not to do in CitiFinancial, and in the process, threatens to inflict the very “perils” that this Court warned against in CitiFinancial.

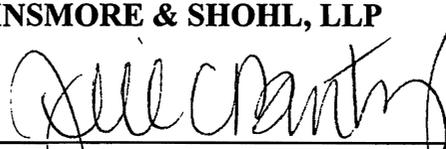
V. CONCLUSION

Companies need to be able to rely on the Insurance Commissioner’s actions, especially in ratemaking. As this Court has acknowledged, ratemaking represents a “highly specialized” process that the Legislature has “expressly delegated to the [Insurance] Commissioner’s expertise and jurisdiction.” Citifinancial, , 223 W. Va. at 237, 672 S.E.2d at 373. The Circuit Court in this case, however, ignored this Court’s directive in CitiFinancial and substituted its own judgment concerning BrickStreet’s insurance rate for that of the Insurance Commissioner. Worse, the Circuit Court’s judgment is based on a fundamental misunderstanding of West Virginia’s ratemaking process and the West Virginia statutes and regulations that govern that process.

Based on the foregoing, therefore, the Federation respectfully requests that the Court consider the case for review and, ultimately, reverse the Circuit Court’s Final Order.

WEST VIRGINIA INSURANCE FEDERATION

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v.

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From the Circuit Court of Kanawha County, West Virginia
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CERTIFICATE OF SERVICE

I hereby certify that I have this day served a copy of *The West Virginia Insurance Federation's as Amicus Curiae in Support of Petitioners* upon all parties to this matter by depositing a true copy of the same in the U.S. Mail, postage prepaid, properly addressed to the following:

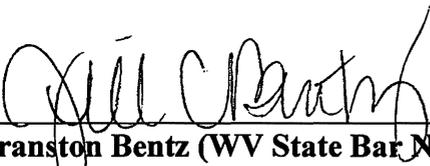
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