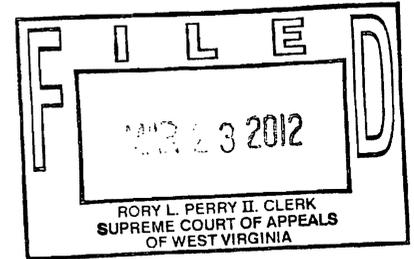


IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

No. 11-1750



**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.

**BRIEF OF PETITIONER, WEST VIRGINIA EMPLOYERS' MUTUAL INSURANCE COMPANY
d/b/a BRICKSTREET MUTUAL INSURANCE COMPANY**

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ASSIGNMENTS OF ERROR

I. The Circuit Court erred in finding that BrickStreet stipulated to the fact that it charged some insureds for the expense of an agent commission that it did not incur. The Circuit Court simply misconstrued the facts, as BrickStreet never stipulated that it charged any insured an expense for an agent commission. In addition, BrickStreet never stipulated that it did not incur an expense for insureds which did not use an agent. There was ample evidence in the record before the Insurance Commissioner that BrickStreet did incur certain administrative costs and other policy acquisition and servicing expense - other than commissions to agents or brokers - for insureds which did not use an agent.

II. The Circuit Court erred in concluding that the Insurance Commissioner was clearly wrong in finding that "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 business which would otherwise be handled by appointed agents." In addition to a number of documents in the record before the Insurance Commissioner cited to the Circuit Court, the Commissioner independently verified that BrickStreet disclosed its intentions on the use of its filed rate, and especially in incurring certain administrative costs and servicing expenses in directly handling policies written through the company, as opposed to acquisition costs incurred through the use of an agent.

III. The Circuit Court erred in concluding that an Affidavit submitted by BrickStreet could not be considered because it was not litigated in this case and was not susceptible to cross-examination by Bunch. The Circuit Court relied upon the Stipulation of Facts filed in the Cabell County action, which was submitted with the Answer to the Consumer Complaint and was a part of the record before the Insurance Commissioner, to determine that BrickStreet charged some insureds an expense for agent commissions that it did not incur. Yet it refused to consider the Affidavit filed in the Cabell County action, which was also submitted with the Answer to the Consumer Complaint and was part of the record before the Insurance

Commissioner, even though Bunch had the opportunity to contest the Affidavit in that action but declined to do so, and even though the Affidavit supported the finding that BrickStreet incurred other acquisition and servicing expenses in handling direct business that would otherwise be handled by appointed agents.

IV. The Circuit Court erred by reversing and vacating the July 9, 2010 Order of the Insurance Commissioner, which amounts to a reexamination of the rates previously approved by the Commissioner and runs afoul of *State ex rel. CitiFinancial, Inc. v. Madden*, 223 W.Va. 229, 672 S.E.2d 365 (2008). The Circuit Court cannot substitute its determination as to a permissible insurance rate for that of the Commissioner or supplant its opinion in rate matters which are expressly delegated to the jurisdiction and expertise of the Commissioner.

V. The Circuit Court erred in concluding that the Insurance Commissioner should not have allowed BrickStreet to charge for an agent commission when no such expense was incurred. This is not a correct interpretation of the applicable legislative rules, 85 C.S.R. 8-8 or 85 C.S.R. 8-11.2, which expressly permit the rate charged by BrickStreet and now other private carriers of workers' compensation insurance to include expenses related to administration costs, including not only underwriting expenses such as commissions to agents and brokers, but also other policy acquisition or servicing expenses. Also, the rules do not require that for BrickStreet to request or the Insurance Commissioner to approve a certain component of the rate, the insurer must have already incurred that expense, and it would be virtually impossible for the Insurance Commissioner to set separate LCMs based on whether the insurer will actually incur every administrative cost or underwriting expense for a particular insured.

STATEMENT OF THE CASE

This appeal concerns a case that has been litigated in multiple venues since 2007. First, the West Virginia Employers' Mutual Insurance Company d/b/a BrickStreet Mutual Insurance Company ("BrickStreet") prevailed in the Circuit Court of Cabell County when that Court reversed itself following the decision of the Supreme Court in *State ex rel. CitiFinancial v.*

Madden, 223 W.Va. 229, 672 S.E.2d 365 (2008), and granted summary judgment in favor of BrickStreet. Second, The Bunch Company (“Bunch”) filed a Petition for Appeal with the Supreme Court, which was not accepted. Third, Bunch filed a Consumer Complaint before the West Virginia Insurance Commissioner, and the Commissioner denied its request. Fourth, Bunch filed an appeal of the Insurance Commissioner decision in the Circuit Court of Kanawha County seeking not only to reverse the Commissioner, but also to declare the legality of the agent commission, to certify a class action, to reinstate the vacated order from the Circuit Court of Cabell County granting its Motion for Summary Judgment, to award damages against BrickStreet and to grant a trial by jury for all claims. The Circuit Court of Kanawha County granted the Motion by BrickStreet to dismiss all of the claims outside the appeal of the Insurance Commissioner decision.

However, the Circuit Court of Kanawha County then reversed and vacated the July 9, 2010 Findings of Fact, Conclusions of Law and Final Order Denying Hearing Request of Complainant of the Insurance Commissioner, finding that the Commissioner erred as a matter of law by allowing BrickStreet to charge as part of its premium rate to Bunch an agent commission when no such expense was incurred. (Appendix, pp. 351-359). The October 31, 2011 Order states that West Virginia law clearly permits BrickStreet to charge an appropriate premium for certain administrative expenses, however, the term “expenses” infers that BrickStreet has actually incurred the expense. (App. 356-357).

The Circuit Court also held that the factual finding by the Insurance Commissioner that “the rates charged by BrickStreet were reasonable in relation to the benefits provided due to the fact that certain administrative costs and/or expenses were incurred by BrickStreet in handling direct business which would otherwise be handled by appointed agents” is clearly wrong because there is no evidence in the record to support the finding that increased costs of administering policies for direct business offsets the agent commission. (App. 357). With respect to the Affidavit of Harry E. Mahler, Senior Vice President for Insurance Operations for

BrickStreet, submitted in the prior Cabell County Action, the Circuit Court determined that even if it could be considered by implication or judicial notice to form a factual basis, the Affidavit is fatally defective because it was never litigated in this case and was not susceptible to cross-examination by Bunch. (App. 357-358). The Circuit Court held that the Insurance Commissioner was clearly wrong when it concluded that charging an agent commission to Bunch, even though it did not have an agent, was justified due to additional expenses incurred by BrickStreet. (App. 358). It is from this October 31, 2011 Order that BrickStreet and the Insurance Commissioner now appeal.

Most recently, however, Bunch has filed a new class action in the Circuit Court of Kanawha County, asserting that the October 31, 2011 Order in the present case grants judgment as a matter of law in favor of Bunch and against BrickStreet, which is a final adjudication on the merits regarding liability, and seeking an award damages without resorting to exhaustion of administrative remedies for the unlawful excess charges. Throughout this litigation, all parties agree that BrickStreet charged a rate that the Insurance Commissioner approved, and charged the only rate the Insurance Commissioner had approved. Nevertheless, its filed rate continues to be subject to collateral attack by the Respondent.

Bunch first asserted a claim against BrickStreet on October 15, 2007, when it filed an Amended Class Action Complaint in the Circuit Court of Cabell County in Civil Action No. 07-C-0852, alleging that the premium charged to the plaintiffs and others similarly situated for workers' compensation insurance included a charge for the expense of an agent commission, even though these insureds did not retain an agent when their coverage novated to BrickStreet on January 1, 2006. BrickStreet filed an Answer to the Amended Class Action Complaint in the Cabell County action, asserting that the rates utilized by BrickStreet as part of the premium calculation are established by the West Virginia Office of the Insurance Commissioner ("OIC"), that the claims are barred by the filed rate doctrine, and that the exclusive remedy lies with the Insurance Commissioner. (App. 51-62). The parties in the Cabell County action filed a joint

Stipulation of Facts for the resolution of the threshold legal question of the filed rate doctrine.

The salient facts to which the parties stipulated are as follows:

- The applicable legislative rule is found at 85 C.S.R. 8-8 which states that in addition to a loss cost base rate, the premium rates charged by BrickStreet may also include: (1) a reasonable provision for expenses related to the administration costs of the Mutual, including underwriting expenses, such as commissions 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 Mutual's surplus; and (3) all other rate making components consistent with industry practices. 85 C.S.R. 8-8.1.c. The rule further provides that "[a]ll such provisions must be subject to approval by the insurance commissioner" (emphasis added).
- The October 31, 2007 version of the Rule, specifically §85-8-11.2, provides that the base rates charged by the private carriers may also include (1) a reasonable provision for expenses related to the administration costs of the Mutual, including underwriting expenses, such as commissions 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 Mutual's surplus; and (3) all other rate making components consistent with industry practices. The rule further provides that "[a]ll such provisions must be subject to the provisions of W.Va. Code § 33-20-4 . . . (emphasis added)."
- BrickStreet uses a Loss Cost Multiplier ("LCM") as another component of the premium rate to recoup the administrative expenses. Other components of the LCM allow BrickStreet to recover for costs associated with adjusting claims, defending its insureds in claim litigation, purchasing reinsurance, subscribing to NCCI and achieving a reasonable profit.
- On December 27, 2005, BrickStreet requested an LCM of 1.288, to be effective January 1, 2006. An agent commission was not included in the calculation. The OIC approved an LCM of 1.105.
- On April 7, 2006, BrickStreet requested an LCM of 1.254, to be effective July 1, 2006. An agent commission was included in the LCM calculation. The commission appears in the rate filing as an acquisition expense.
- In the July 1, 2006 rate filing, BrickStreet requested an acquisition expense of 3.0% of premium effective July 1, 2006 and an acquisition expense of 6.5% effective January 1, 2007.
- By letter of April 26, 2006, the OIC selected an acquisition expense of 1%. The OIC approved an LCM of 1.17.

- Not all BrickStreet insureds have an agent.
- For policies written through an agent, the portion of the premium attributable to commission is not retained by BrickStreet. For policies written direct, that portion of the premium collected is retained by BrickStreet. According to BrickStreet, for policies written direct, that portion of the premium collected is attributed to acquisition and servicing costs to offset the increased expenses in administering direct policies through the performance of a number of services.

(App. 63-67).

The parties each filed summary judgment motions in the Cabell County action. BrickStreet argued that the filed rate doctrine precluded the plaintiffs from challenging the premium rates because those rates, including the lost cost multiplier (“LCM”) portion of the rate which contains a component for agent commission, were properly filed with and approved by the Insurance Commissioner, the regulatory agency with the exclusive jurisdiction as to insurance premiums in this State. In support of its motion, BrickStreet presented the following undisputed facts via the Affidavit of Harry E. Mahler, Senior Vice President for Insurance Operations for BrickStreet:

- The LCM agreed to by BrickStreet and the OIC assumed that some policies would not be written through an agent and, therefore, would not have a commission expense.
- BrickStreet advised the OIC prior to adoption of the LCM that only about eighty percent (80%) of its premium was written through an agent and the remaining was written direct.
- For policies written through an agent, the portion of the premium attributable to commissions is not retained by BrickStreet. For policies written direct, that portion of the premium collected is attributed to acquisition and servicing costs.
- On those policies not written through an agent, the acquisition load was intended to offset the increased expenses of BrickStreet in administering direct policies through the performance of a number of services.
- These services are the same if not more than what an appointed agent does for an insured. A copy of the Affidavit was attached to the Answer to Consumer Complaint filed with the Insurance Commissioner.¹

(App. 68-71).

¹ The tier filing by BrickStreet just prior to the appeal of the July 9, 2010 Order assumed ninety percent (90%) of its premium was written through an agent.

The Circuit Court heard argument on the motions and subsequently entered an Order on November 3, 2008, granting plaintiffs' motion and denying BrickStreet's motion, concluding that the filed rate doctrine has not been adopted in West Virginia and does not apply to this matter. (App. 1-15). As a result, the Court determined that BrickStreet unlawfully charged an agent commission to insureds without an agent, thereby entitling plaintiffs to judgment as a matter of law. (App. 15). Shortly thereafter, on December 10, 2008, this Court issued a decision in *State ex rel. CitiFinancial, Inc. v. Madden*, 223 W.Va. 229, 627 S.E.2d 365 (2008), which held that circuit courts cannot invade the jurisdiction of the Insurance Commissioner and conduct a reexamination of insurance rates previously approved by the Commissioner, that any challenge to an approved insurance rate by an aggrieved person or organization should be raised pursuant to W.Va. Code § 33-20-5(d) in a proceeding before the Insurance Commissioner, and that the presumption of statutory compliance for approved insurance rates set forth in W.Va. Code § 33-6-30(c) may only be rebutted in such a proceeding before the Insurance Commissioner. *Id.*, Syl. Pts. 2, 3, and 4.

In light of the *CitiFinancial* decision, BrickStreet sought relief from the November 3, 2008 Order by way of a Motion for Relief from Judgment pursuant to Rule 60(b). The Circuit Court of Cabell County granted the Motion by Order of February 27, 2009, finding that the Supreme Court issued a clear expression of the filed rate doctrine in the *CitiFinancial* case, and although it did not explicitly address the doctrine, it implicitly embraced the principles of the doctrine, and in doing so, rejected the reasoning contained in the prior Order. (App. 17-25). The Circuit Court also ordered that the November 3, 2008 Order be set aside and summary judgment granted in favor of BrickStreet. (App. 24). Bunch filed a Petition for Appeal with the Supreme Court, to which BrickStreet filed a Response. This Court refused to accept the Petition by Order of October 29, 2009.

Bunch then filed a Consumer Complaint with the Insurance Commissioner on February 17, 2010, alleging that BrickStreet is charging it for an agent commission although Bunch does

not have an agent, which is a clear violation of law. Bunch attached to the Consumer Complaint a copy of the Amended Class Action Complaint in the Cabell County action which, as set forth above, purports to bring a lawsuit on behalf of all BrickStreet insureds overcharged an agent commission in West Virginia for workers' compensation insurance. (App. 27-38). BrickStreet filed its Answer to Consumer Complaint on March 30, 2010, asserting that it does not charge any insured an agent commission fee. (App. 39-50). Rather, the premium rate charged by BrickStreet to an insured is comprised of multiple components, one of which is the LCM, which is authorized by legislative rule at 85 C.S.R. 8-8.1c, and later 85 C.S.R. 8-11.2. (App. 39). Because Bunch submitted a copy of the Amended Class Action Complaint in the Cabell County action to the Insurance Commissioner, BrickStreet attached as exhibits to the Answer to Consumer Complaint the Answer it filed in the Cabell County action, as well as the Stipulation of Facts and the Affidavit of Mr. Mahler.

On July 9, 2010, the Insurance Commissioner issued the Findings of Fact, Conclusions of Law and Final Order Denying Hearing Request of Complainant in 10-AP-FP-02027. (App. 77-89). The Findings of Fact adopt and incorporate the Stipulation of Facts filed by the parties in the Cabell County action, as well as the six (6) rate filings made by BrickStreet relevant to the allegations in the Administrative Complaint. (App. 80-84). The Findings of Fact also include that "BrickStreet disclosed its intentions to the West Virginia Office of the Insurance Commissioner concerning the use of its filed rates and especially in incurring certain administrative costs and expenses in directly handling policies written through it as opposed to acquisition costs incurred through the use of an appointed agent." (App. 85). The Order contains the following Conclusions of Law:

- 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.
- 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.

- The filings of BrickStreet are deemed to meet the requirements of Chapters 23 and 33 of the West Virginia Code.
- 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.
- 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.
- 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.
- 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).

(App. 86-88).

Bunch then appealed the July 9, 2010 Order of the Insurance Commissioner and asked the Circuit Court of Kanawha County to declare the legality of the agent commission as applied to BrickStreet insureds which have not retained an agent, to certify a class action, to reinstate and reaffirm the November 3, 2008 Order Granting Plaintiffs' Motion for Summary Judgment and Denying BrickStreet's Motion for Summary Judgment from the Circuit Court of Cabell County, to award damages against BrickStreet, and to grant a trial by jury for all claims. (App. 91-150). This is the same relief requested by Bunch in the Cabell County action which, as set forth above, has since been dismissed.

The Insurance Commissioner filed a Designation of the Record with the Circuit Court on August 6, 2011. (App. 151-154). BrickStreet filed a Motion to Dismiss Appeal Or, In the Alternative, Response to Petition, alleging that the Petition filed by Bunch exceeds the scope of the July 9, 2010 Order and the statute under which it brought the appeal, W.Va. Code § 33-2-14, and seeks relief that could not have been afforded by the Insurance Commissioner and cannot be granted by the Circuit Court on appeal. (App. 155-216). At a status conference

requested by Bunch, the Circuit Court proceeded to hear the arguments of the parties on the fundamental question raised in the Motion, which is whether the Court may only revise, reverse or affirm the July 9, 2010 Order or remand the action to the Insurance Commissioner, or whether it may also grant the additional relief sought by the Bunch in its appeal. The parties thereafter submitted a proposed Order Granting Motion to Dismiss of West Virginia Employers' Mutual Insurance Company d/b/a BrickStreet Mutual Insurance Company. The Circuit Court subsequently entered an Order dated July 6, 2011, stating that the matters in the July 9, 2010 Order in Insurance Commissioner Case No. 10-AP-FP-02027 shall be and can be heard on appeal, but the other claims are dismissed. (App. 217-222).

Bunch also filed Petitioner's Motion to Supplement the Record, which the Circuit Court denied by Order of July 12, 2011. (App. 223-224). The Order stated that Bunch has not provided the Court with good cause or any irregularities that occurred before the Insurance Commissioner and that the record has sufficient evidence - from both the Insurance Commissioner and the Circuit Court of Cabell County - so that any further discovery in the case would be costly and unnecessary. The Order also stated that after the parties have briefed the issue, if the Court deems it necessary, it retains the prerogative to allow the introduction of additional evidence and allow testimony at the scheduled hearing. (App. 224).

Bunch then filed the Petitioner's Brief. (App. 225-236). BrickStreet thereafter filed the Brief of Respondent, requesting that the Circuit Court affirm the July 9, 2010 Order of the Insurance Commissioner and dismiss the appeal. (App. 237-262). The Insurance Commissioner also filed a Brief of Respondent, asserting that it has not violated any constitutional or statutory provision, that the procedures used by the Commissioner were wholly lawful and within the parameters of his authority, and that nothing the Commissioner has done was clearly wrong, affected by other error of law, arbitrary or capricious, or an abuse of discretion. (App. 263-298). The Insurance Commissioner also asserted that the filings by BrickStreet are contained in the record, that the information was filed with the Commissioner

and reviewed and approved in due course, that BrickStreet was authorized to use the rate as approved, and that Bunch has not alleged that BrickStreet deviated from the approved rates. (App. 280-281). Bunch thereafter filed Petitioner's Reply Brief, asserting for the first time that BrickStreet did not disclose to the Insurance Commissioner that the charge for an agent commission in the absence of an agent was offset by the increased expense of administering direct policies until after Bunch filed the lawsuit, that this information could not be located in the administrative record, that Bunch was never permitted the opportunity to conduct discovery regarding this issue, and that the Insurance Commissioner made the finding that BrickStreet disclosed its intentions concerning the use of its filed rates and especially in incurring certain administrative costs and expenses in directly handling policies written directly as opposed to acquisition costs incurred through the use of an agent "to cover up its approval of an unlawful charge rendering it clearly erroneous." (App. 299-301).

At the hearing on October 18, 2011, the Court heard argument from the parties on the appeal. Bunch argued that the case came down to two orders: the first dated November 3, 2008 from Judge Cummings in the Cabell County action which granted summary judgment in favor of Bunch, the second dated July 9, 2010 from the Insurance Commissioner which upheld the approved rate and the use of that filed rate by BrickStreet and denied Bunch a hearing. Bunch contended that Judge Kaufman should pick the first order. (App. 306-308). Bunch also contended that the finding of fact by the Insurance Commissioner in the second order, that the rates charged by BrickStreet were reasonable in relation to the benefits provided, due to the fact that certain administrative costs and expenses are incurred in handling direct business which would otherwise be handled by appointed agents, was clearly erroneous because that fact could not be found in the record. (App. 309-312).

By contrast, the Insurance Commissioner argued that he did go back and look at the rate filings which were approved several years ago, and on direct write business, which is when BrickStreet does not use an agent and has to handle the business itself, there are additional

expenses that would be attributed to its acquisition costs. This information was divulged in the rate filing, the Commissioner was made aware of it and approved it. There was no deviation by BrickStreet from the rate that was duly promulgated and filed. The Commissioner argued that Bunch is basically going back and trying to substitute its judgment for the Commissioner, to ask the Circuit Court to second-guess a rate decision. (App. 314-316).

Similarly, BrickStreet argued that although the decision of the Insurance Commissioner is subject to limited judicial review on appeal, Bunch cannot come back to the Circuit Court of Kanawha County and have it adopt the decision of Judge Cummings from the Cabell County action, which has been set aside. Pursuant to *CitiFinancial*, courts cannot weigh in on issues of rate making and the reasonableness of rates. In addition, there is sufficient evidence in the record to support the finding by the Commissioner that the rates approved were reasonable in relation to the benefits provided because part of what was charged was for administrative expenses in writing insurance policies directly when there was no agent, including but not limited to the Affidavit of Mr. Mahler. (App. 336-340).

Following the hearing, Bunch filed a Second Motion to Supplement the Record, which was denied by Order of October 28, 2011, stating that "the record in this case has sufficient evidence from both the Insurance Commissioner and the Circuit Court of Cabell County." (App. 349). The Circuit Court then entered its Order of October 31, 2011, reversing and vacating the July 10, 2010 Order of the Insurance Commissioner. Bunch filed a Motion to Alter or Amend Judgment and Motion to Amend the Complaint shortly thereafter, on November 9, 2011, requesting leave to file an amended complaint to revive the previously asserted class allegations prior to entry of judgment so that it need not file an independent civil action. (App. 365-368). BrickStreet filed a Motion to Alter or Amend Judgment on November 14, 2011, and on the same date, the Insurance Commissioner filed a Motion for Reconsideration, Motion to Alter or Amend Judgment and/or Motion for Relief from Final Order. (App. 369-392). All of these motions were denied by Final Order of November 22, 2011. (App. 361). BrickStreet and

the Insurance Commissioner filed a Notice of Appeal with the Supreme Court of Appeals of West Virginia on December 22, 2011.

Just days before the Petitioners filed the Notice of Appeal, Bunch filed its new Class Action Complaint in the Circuit Court of Kanawha County, Civil Action No. 11-C-2265, on December 19, 2011. The Class Action Complaint asserts that the Circuit Court of Kanawha County entered a Final Order in Case No. 10-AA-113 on October 31, 2011, granting judgment as a matter of law in favor of Bunch and against BrickStreet, which is a final adjudication on the merits regarding liability. Bunch seeks an award damages without resorting to exhaustion of an administrative remedy, citing *State ex rel. CitiFinancial v. Madden*, 223 W.Va. 229, 672 S.E.2d 365, n. 26 (2008), for the proposition that nothing prevents an aggrieved party from seeking monetary relief for excess charges after a rate charge has been found not to comply with the requirements for assessing such charges, and stating that an administrative remedy is inadequate since the Insurance Commissioner only has the statutory authority to provide a prospective remedy pursuant to W.Va. Code § 33-20-5(d). The Complaint in Civil Action No. 11-C-2265 further states that Bunch and the class of insureds it seeks to represent are entitled to seek monetary relief for the unlawful excess charges as determined by the Final Order at issue in this appeal. Thus, the litigation against BrickStreet and the collateral attack to recover damages for charging a duly approved and filed insurance rate continues.

SUMMARY OF ARGUMENT

The October 31, 2011 and November 22, 2011 Orders of the Circuit Court of Kanawha County dated should be reversed and the July 9, 2010 Order of the Insurance Commissioner affirmed. In the alternative, the case should be remanded to the Insurance Commissioner for further proceedings to develop the record regarding the expenses BrickStreet incurred in handling direct business that would otherwise be handled by appointed agents. The errors committed by the Circuit Court are numerous and significant. First, the Circuit Court arrived at conclusions of law based on inaccurate and incomplete facts. Specifically, the Circuit Court

concluded that BrickStreet stipulated that it charged some insureds for the expense of an agent commission that it did not incur. However, BrickStreet did not stipulate that it charged insureds an expense for an agent commission. Nor did BrickStreet stipulate that it did not incur expenses for insureds which did not use an agent. The Circuit Court simply misunderstood or misconstrued the facts.

The undisputed facts are that one component of the premium charged to all BrickStreet insureds is the loss cost multiplier or LCM, which is combined with the loss cost base rate established by the National Council on Compensation Insurers ("NCCI"), designated by the Insurance Commissioner to be the rate making entity in West Virginia. The LCM is specifically authorized by regulation and allows the insurer to recover administration costs, including underwriting expenses, such as commissions to agents and brokers, and other policy acquisition or servicing expenses. The LCM also allows the insurer to recover for premium taxes, assessments and fees, reinsurance expenses, expenses associated with advisory or rating organizations such as NCCI, loss adjustment expenses not included in the loss cost base rates, such as claims defense expenses, a reasonable profit and contingency provision to contribute to the surplus, and all other rate making components consistent with industry practices.

BrickStreet stipulated that it requested an LCM of 1.288, to be effective January 1, 2006. An agent commission was not included in the calculation. The Insurance Commissioner approved an LCM of 1.105. (App. 66, ¶ 13). BrickStreet requested an LCM of 1.254, with as an acquisition expense of 3% of premium, to be effective July 1, 2006. An agent commission was included in the LCM calculation and appears in the rate filing. The Insurance Commissioner selected an acquisition expense of 1% and approved an LCM of 1.17. BrickStreet had to apply the same LCM to determine the premium for all insureds. (App. 66, ¶ 14). Although not all BrickStreet insureds have an agent, for policies written through an agent, the portion of the premium attributable to commission is not retained by BrickStreet. For policies written direct,

that portion of the premium collected is retained by BrickStreet and attributed to acquisition and servicing costs to offset the increased expenses in administering direct policies through the performance of a number of services. (App. 66, ¶¶ 15-17). The LCM approved by the Insurance Commissioner and included in the premium calculation recognizes that BrickStreet incurs an acquisition expense for all policies, for eighty to ninety percent (80 - 90%), as an agent commission, and for the balance, as an increased cost for writing and handling policies directly. These stipulated facts were supported by other evidence in record before the Insurance Commissioner.

Second, the Circuit Court erred in concluding that the finding by the Insurance Commissioner that “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 business which would otherwise be handled by appointed agents” is clearly wrong in light of the record. There were a number of documents in the record before the Insurance Commissioner, including the Stipulation of Facts and the Affidavit of Mr. Mahler. The Insurance Commissioner also cited to the Circuit Court those rate filing documents in the record which support the claim that BrickStreet previously disclosed its intentions to the Commissioner concerning the use of its filed rates, including at pages 1205, 1212-1219, 1469, 1561-1578, 1583, 1592, 1626, 1640 and 1671 of the record. In addition, the Insurance Commissioner noted that there were meetings and telephonic communications with BrickStreet regarding these issues, as referenced throughout the record, including at page 1671. Based on these communications as well as institutional knowledge, the Insurance Commissioner independently verified the facts which support its finding.

Third, the Circuit Court erred in concluding that the Affidavit submitted by BrickStreet could not be considered because it was not litigated in this case and was not susceptible to cross-examination by Bunch. Although the Circuit Court was correct in finding that the Affidavit was filed with the Motion for Summary Judgment in the prior Cabell County action, it omitted the

fact that the Affidavit was also part of the record before the Insurance Commissioner, as it was filed with the Answer to the Consumer Complaint. Indeed, the record in the Cabell County action was incorporated into the proceedings before the Insurance Commissioner. The Circuit Court relied upon the Stipulation of Facts filed in the Cabell County action, which was a part of the record before the Insurance Commissioner, to determine that BrickStreet charged some insureds an expense for agent commissions that it did not incur. Yet it refused to consider the Affidavit also filed in the Cabell County action, even though Bunch had the opportunity to contest the Affidavit in that action but declined to do so, and even though it supported the finding that BrickStreet incurred other acquisition and servicing expenses in handling direct business that would otherwise be handled by appointed agents. Even if this Affidavit was not subject to challenge by Bunch in this case, the proper remedy was to remand the case to the Insurance Commissioner for further proceedings to develop the record regarding the expenses BrickStreet incurred in handling direct business that would otherwise be handled by appointed agents. It is contradictory for the Circuit Court to accept some of the evidence developed in the Cabell County action, but to reject other evidence submitted in that same action, when all of it was before the Insurance Commissioner and incorporated into the record of this ongoing rate challenge.

Fourth, the Circuit Court erred by reversing and vacating the July 9, 2010 Order of the Insurance Commissioner. In granting the relief requested by Bunch in its appeal, the Circuit Court effectively reexamined the rates previously approved by the Commissioner, which is directly contrary to the holding in *State ex rel. CitiFinancial, Inc. v. Madden*, 223 W.Va. 229, 672 S.E.2d 365 (2008). The Circuit Court cannot substitute its determination as to a permissible insurance rate for that determined by the Commissioner, nor can it supplant its opinion in matters expressly delegated to the jurisdiction and expertise of the Commissioner, as that infringes upon the uniformity of regulation that the Legislature has established by delegating all matters involving rate making and rate filings to the Commissioner. BrickStreet and the

Insurance Commissioner are now back to where they started, with the Circuit Court of Kanawha County doing just what the Circuit Court of Cabell County ultimately recognized it could not do in the November 3, 2008 vacated Order from Judge Cummings.

Fifth, the Circuit Court erred in concluding that West Virginia law permits BrickStreet to charge a premium only for expenses actually incurred and that the Insurance Commissioner should not have allowed BrickStreet to charge for an agent commission when no such expense was incurred. This is not a correct interpretation of the applicable legislative rules, 85 C.S.R. 8-8 or 85 C.S.R. 8-11.2, which expressly permit the premium rate charged by BrickStreet and now other private workers' compensation carriers, to include a reasonable provision for expenses related to administration costs, including not only underwriting expenses such as commissions to agents and brokers, but also other policy acquisition or servicing expenses in addition to the base rates. It is also an incorrect interpretation of the regulation that for BrickStreet to request, or the Insurance Commissioner to approve, a certain component of the LCM to be factored into the premium rate, the insurer must have already incurred that expense. At the time an insurer submits a rate filing and the Insurance Commissioner approves a prospective insurance premium, the insurer has not yet incurred any such expense, and it would not be possible for the Insurance Commissioner to approve a different LCM for each insured depending on whether the insurer will actually incur each and every administrative cost or underwriting expense in writing or renewing a particular policy. These errors, both individually and collectively, make it obvious that the Circuit Court of Kanawha County should be reversed on appeal.

STATEMENT REGARDING ORAL ARGUMENT AND DECISION

The Petitioner respectfully requests oral argument pursuant to Rule 20 of the West Virginia Rules of Appellate Procedure. This appeal presents, in part, a matter of first impression as to the scope of judicial review of an Insurance Commissioner decision regarding a filed rate in light the decision of this Court in *State ex rel. CitiFinancial, Inc. v. Madden*, 223 W.Va. 229, 672 S.E.2d 365 (2008), as well as the interpretation of the applicable legislative rules, 85 C.S.R.

8-8 and 85 C.S.R. 8-11.2, as to whether the premium rates charged by the Petitioner, as well as other private workers' compensation insurers, may include a provision for expenses related to administration costs, including policy acquisition or servicing expenses other than commissioners to agents and brokers, expected to be incurred.

ARGUMENT

In considering an appeal from a circuit court review of an administrative decision, both the Supreme Court and the circuit court below are subject to the same standards, as set forth in the West Virginia Administrative Procedures Act. *Myers v. West Virginia Consolidated Public Retirement Board*, 226 W.Va. 738, 744, 704 S.E.2d 738, 744 (2010). A court shall reverse, vacate or modify the order or decision of the agency only if the substantial rights of the petitioner have been prejudiced because the administrative findings, inferences, conclusions, decision or order are: (1) in violation of constitutional or statutory provisions; (2) in excess of the statutory authority or jurisdiction of the agency; (3) made upon unlawful procedures; (4) affected by other error of law; (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. W.Va. Code § 29A-5-4(g) (2007). On appeal of an administrative order from a circuit court, the Supreme Court reviews questions of law presented *de novo*, and findings of fact by the administrative officer are accorded deference, unless the reviewing court believes the findings to be clearly wrong. *Myers*, 226 W.Va. at 745, *citing* Syl. Pt. 1, *Muscatell v. Cline*, 196 W.Va. 588, 474 S.E.2d 518 (1996). The "clearly wrong" and "arbitrary and capricious" standards of review are deferential ones which presume that an agency's actions are valid as long as the decision is supported by substantial evidence or a rational basis. *Stewart v. W.Va. Bd. of Exmrs. For Registered Prof. Nurses*, 197 W.Va. 386, 475 S.E.2d 478 (1996). In the present case, the Circuit Court erred in reversing the administrative decision of the Insurance Commissioner by failing to defer to the findings of fact made by the Commissioner, misconstruing the stipulated facts, disregarding other facts properly

in the record, intruding into issues of insurance rate setting, and erroneously applying the applicable legislative rules.

I. THE CIRCUIT COURT ERRED IN FINDING THAT BRICKSTREET STIPULATED THAT IT CHARGED SOME INSURED FOR AN EXPENSE THAT IT DID NOT INCUR.

The Circuit Court of Kanawha County in its October 31, 2011 Order concluded as a matter of law that “BrickStreet charged and received payment for an agent commission from insureds that did not use an agent. BrickStreet stipulated to this fact that it charged some insureds for an expense (the agent commission) that it did not incur. By charging an expense that was never incurred, BrickStreet has violated 85 C.S.R. 8-8.1a-c (2007).” This conclusion is in error because BrickStreet did not stipulate that it charged any insured for an agent commission, and BrickStreet did not stipulate that it charged any insureds for an expense that it did not incur.

One component of the premium charged to all BrickStreet insureds is the loss cost multiplier or LCM, which is combined with the loss cost base rate established by NCCI. The LCM is specifically authorized by regulation, 85 C.S.R. 8-8 and later 85 C.S.R. 8-11, and allows BrickStreet and now other private workers' compensation carriers to recover administration costs, including underwriting expenses, such as commissions to agents and brokers, and other policy acquisition or servicing expenses. The LCM also allows the insurer to recover for premium taxes, assessments and fees, reinsurance expenses, expenses associated with advisory or rating organizations such as NCCI, loss adjustment expenses not included in the loss cost base rates, such as claims defense expenses, a reasonable profit and contingency provision to contribute to the surplus, and all other rate making components consistent with industry practices. The earlier version of the rule provides that all such provisions must be subject to approval by the Insurance Commissioner, while the later version provides that all such provisions must be subject to the provisions of W.Va. Code § 33-20-4 regarding rate filings.

The salient facts to which BrickStreet stipulated are consistent with these regulations. Specifically, once BrickStreet became licensed in West Virginia, it began a collaborative effort with the Insurance Commissioner to create a rate making system. (App. 65, ¶ 10). The Commissioner designated the NCCI to be the rate making entity in West Virginia and specifically to set loss cost rates for each of the classifications that were adopted in this State. Loss cost rates are simply one component of the premium necessary to cover the medical and indemnity losses for each classification. (App. 65-66, ¶ 11). BrickStreet uses an LCM as another component of the premium rate to recoup administrative expenses. Other components of the LCM allow BrickStreet to recover for costs associated with adjusting claims, defending its insureds in claim litigation, purchasing reinsurance, subscribing to NCCI and achieving a reasonable profit. (App. 66, ¶ 12). BrickStreet requested an LCM of 1.288, to be effective January 1, 2006. An agent commission was not included in the calculation. The OIC approved an LCM of 1.105. (App. 66, ¶ 13). BrickStreet requested an LCM of 1.254, with an acquisition expense of 3.0% of premium, to be effective July 1, 2006. An agent commission was included in the LCM calculation and appears in the rate filing. The OIC selected an acquisition expense of 1% and approved an LCM of 1.17. BrickStreet was required to apply the same LCM to determine the premium for all insureds. (App. 66, ¶ 14). Although not all BrickStreet insureds have an agent, for policies written through an agent, the portion of the premium attributable to commission is not retained by BrickStreet. For policies written direct, that portion of the premium collected is retained by BrickStreet and attributed to acquisition and servicing costs to offset the increased expenses in administering direct policies through the performance of a number of services. (App. 66, ¶¶ 15-17).

The LCM approved by the Insurance Commissioner recognizes that BrickStreet incurs an acquisition expense for all policies: for eighty to ninety percent (80-90%) of insureds, as an agent commission, and for the balance, as an increased cost for writing and handling policies directly. Thus, there is no separate fee or charge to any insured for an agent commission.

Rather, the LCM incorporated into the rate for all insureds includes an acquisition expense. Agent commission is one factor considered in the acquisition expense incurred by BrickStreet, which is one type of administrative cost, which is a single component of the LCM. The Insurance Commissioner approved one LCM for all insureds, which was then applied to the loss cost base rates. In no instance was the acquisition expense or the LCM the Insurance Commissioner approved the number initially requested by BrickStreet. Instead, the Insurance Commissioner selected lower amounts for both. BrickStreet then followed and charged the approved rate, as it was required to do. There is no allegation by Bunch that BrickStreet charged any premium other than the filed rate.

Moreover, BrickStreet did not charge any insured a premium that included a charge for an expense that it did not incur. As set forth in the Stipulation of Facts, for policies written through an agent, the portion of the premium attributable to commission is not retained by BrickStreet. For policies written direct, that portion of the premium collected is retained by BrickStreet and attributed to acquisition and servicing costs to offset the increased expenses in administering direct policies through the performance of a number of services. (App. 66, ¶¶ 15-17).

As set forth in the Affidavit of Mr. Mahler, the LCM ultimately established by the Insurance Commissioner assumed that some policies would not be written through an agent and would not have a commission expense (App. 69, ¶ 3). BrickStreet advised the Insurance Commissioner prior to adoption of the LCM that only about eighty-percent (80%) of its premium was written through an agent of record and the remaining was written direct (App. 69, ¶ 3). For policies written through an agent, the portion of the premium attributable to commission is not retained by BrickStreet. For policies written direct, that portion of the premium collected is retained by BrickStreet and is attributed to acquisition and servicing costs to offset the increased expenses in administering direct policies through the performance of a number of services. (App. 69, ¶¶ 4, 5). For new direct business, BrickStreet does the following:

- Provide basic policy information and/or information about the need for workers' compensation insurance
- Collect the application and provides technical assistance to potential customers
- Enter the application into the policy administration system, which includes notifying the applicant if there is a duplicate or other submission and following up with the applicant for additional information if an incomplete application is received
- Analyze the risk, which includes reviewing and validating business operations, validating the need for a loss control survey, assigning appropriate classification codes and reviewing payroll allocation
- Apply relevant underwriting guidelines regarding loss analysis, scheduled rating, deductibles, etc.
- Determine if PEO Guidelines apply
- Identify potential combinability with other policies and/or out-of-state experience and evaluating the NCCI e-mod if applicable
- Collect the initial premium due
- Issue, book, print and delivering the policy
- Decline a submission if applicable

(App. 69-70, ¶ 6). For the renewal of direct business, the services BrickStreet provides include soliciting updated renewal information, such as class codes, payroll, e-mod, and loss information; updating information in the policy administration system; collecting the premium due; issuing, booking, printing and delivering the policy; and validating a non-renewal request or non-renewing a policy if applicable. (App. 70, ¶ 7). For managing direct business inquiries, BrickStreet identifies and authenticates the inquirer; identifies and validates the inquiry requested and reviews the policy; and determines an appropriate response and delivers that response to the customer (App. 70, ¶ 8). To manage certificates of insurance for direct business, BrickStreet validates the request and issues and delivers the certificate (App. 70, ¶ 8). These services performed by BrickStreet are the same if not more than what an appointed agent does for an insured (App. 70, ¶ 9).

These facts contained in the Stipulation and in the Affidavit were supported by other evidence in record before the Insurance Commissioner. The Circuit Court, however, did not consider these facts in their entirety, if at all. Instead, the October 31, 2011 Order reaches a conclusion of law based on a misconstruction and misapplication of the stipulated and uncontested facts.

II. THE CIRCUIT COURT ERRED IN CONCLUDING THAT THE INSURANCE COMMISSIONER WAS CLEARLY WRONG IN FINDING THAT THE RATES CHARGED BY BRICKSTREET WERE REASONABLE IN RELATION TO THE BENEFITS PROVIDED.

The Circuit Court erred in concluding that the finding by the Insurance Commissioner that “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 business which would otherwise be handled by appointed agents” is clearly wrong in light of the record. There were a number of documents in the record before the Insurance Commissioner to support this finding. At a minimum, the Circuit Court failed to defer to the factual findings of the Commissioner. Because a reviewing court is obligated to give deference to factual findings rendered by an administrative agency, a circuit court is not permitted to substitute its judgment for that of the hearing examiner with regard to factual determinations. *Wilson v. W. Va. Univ. Sch. of Med.*, 2011 W. Va. LEXIS 545 (W. Va. Oct. 21, 2011), *citing* Syl. Pt. 1, in part, *Cahill v. Mercer County Bd. of Educ.*, 208 W.Va. 177, 539 S.E.2d 437 (2000).

The documents in the record before the Insurance Commissioner include the Stipulation of Facts and the Affidavit of Mr. Mahler, as outlined above. The Insurance Commissioner also identified in the brief filed with the Circuit Court those documents in the record which support the claim that BrickStreet previously disclosed its intentions to the Commissioner concerning the use of its filed rates and especially in incurring certain administrative costs and expenses in directly handling policies written through it, as opposed to acquisition costs incurred through the

use of an appointed agent, citing for example, pages 1205, 1212-1219, 1469, 1561-1578, 1583, 1592, 1626, 1640 and 1671 of the record. (App. 277). In addition, the Insurance Commissioner noted that there were meetings and telephonic communications with BrickStreet regarding these issues, as referenced throughout the record, including at page 1671. (App. 277).

It is important to note that the quantity and nature of communications between BrickStreet and the Insurance Commissioner were not typical for an insurance company. As set forth in the Stipulation of Facts, Governor Joe Manchin issued a proclamation on January 24, 2005, calling the members of the Legislature into special session to address the long-term actuarial funding crisis in the state-run monopolistic workers' compensation system. W. Va. Code § 23-2C-1(a) (1) (2005). (App. 63, ¶ 1). During the special session, the West Virginia Legislature passed Senate Bill 1004 which called for the privatization of the workers' compensation system by January 1, 2006. (App. 63, ¶ 2). The Governor signed Senate Bill 1004 into law on February 16, 2005, thereby authorizing the creation of BrickStreet as a "domestic, private, nonstock corporation" with its principal place of business located in Charleston, Kanawha County, West Virginia. W. Va. Code § 23-2C-3(a) (2005). (App. 64, ¶ 3). BrickStreet was created to provide a means for employers to obtain workers' compensation insurance that is reasonably available and affordable and to compensate employees of mutual policyholders who suffer workplace injuries. W. Va. Code § 23-2C-1(b) (2005). (App. 64, ¶ 4). BrickStreet was the sole source of workers' compensation insurance coverage for all employers in West Virginia from January 1, 2006 through June 30, 2008. Effective July 1, 2008, other licensed property and casualty carriers were allowed to write workers' compensation insurance this State. (App. 64, ¶5). West Virginia law provides that the "workers' compensation board of managers, in consultation with the insurance commissioner, shall issue an exempt legislative rule to govern ratemaking and premium collection." W. Va. Code § 23-2C-18(g). (App. 64, ¶ 7). The exempt legislative rules are found at 85 C.S.R. 8-8, and later at 85 C.S.R. 8-11.2. (App. 64-65, ¶¶ 8, 9). BrickStreet became licensed with the West Virginia Office of the Insurance

Commissioner to transact business in this State and began a collaborative effort to create a rate making system. (App. 65, ¶ 10). As part of this massive privatization effort, BrickStreet and the Insurance Commissioner exchanged correspondence regarding rates, including communications outside the formal rate filing process. Based on these communications, as well as the institutional knowledge of the Insurance Commissioner, the Commissioner independently verified that BrickStreet disclosed its intentions concerning the use of its filed rates. Yet the Circuit Court disregarded these facts in the record, as well as the peculiar knowledge and expertise of the Insurance Commissioner, and substituted its own judgment as to whether the insurance rate was reasonable in relation to the benefits provided.

III. THE CIRCUIT COURT ERRED IN CONCLUDING THAT THE AFFIDAVIT SUBMITTED BY BRICKSTREET COULD NOT BE CONSIDERED AS PART OF THE RECORD BEFORE THE INSURANCE COMMISSIONER.

The Circuit Court was incorrect in concluding that the Affidavit submitted by BrickStreet could not be considered because it was not litigated in this case and was not subject to cross-examination by Bunch. As set forth above, the Circuit Court held that the finding by the Insurance Commissioner that “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 business which would otherwise be handled by appointed agents” was clearly wrong in light of the record. The Circuit Court acknowledged that the respondents below argued that this finding was supported by the Affidavit of Mr. Mahler that was submitted by BrickStreet with its Motion for Summary Judgment in the Cabell County action. The Circuit Court, however, held as follows:

At best, BrickStreet can argue that the affidavit could be considered by this Circuit Court by implication or some type/kind of judicial notice. But, even if some kind of judicial notice is imputed to form some factual basis it is not enough. Having never been litigated in this case, or being susceptible to cross-examination by the Petitioner makes it fatally defective if it were to be allowed to slip into this case.

(App. 357-358).

Although the Circuit Court was correct in finding that the Affidavit of Mr. Mahler was filed in the prior Cabell County action, it disregarded the fact that the Affidavit was also part of the record before the Insurance Commissioner. Bunch filed the Amended Class Action Complaint in the Cabell County action with its Consumer Complaint before the Insurance Commissioner. For that reason, BrickStreet submitted the Answer it filed in the Cabell County action, as well as the Stipulation of Facts and the Affidavit, with its Answer to Consumer Complaint. The Insurance Commissioner then obtained most of the remaining pleadings and orders from the Cabell County action, as they were listed in the Designation of the Record.² (App. 151-154). Thus, most of the record of the Cabell County action was incorporated into the record before the Insurance Commissioner proceeding which, in turn, became the record on the appeal in the Circuit Court of Kanawha County, as part of this continuous rate challenge by Bunch. The Circuit Court cited and relied on part of that record in the October 31, 2011 Order.

It was inconsistent for the Circuit Court to rely upon the Stipulation of Facts filed in the Cabell County action, to determine that BrickStreet charged some insureds an expense for agent commissions that it did not incur, but then to refuse to consider the Affidavit also filed in the Cabell County action, to determine that BrickStreet incurred other acquisition and servicing expenses in handling direct business that would otherwise be handled by appointed agents. Furthermore, affidavits are admissible in an action heard without a jury. *Pauley v. Kelly*, 162 W.Va. 672, 717, 255 S.E.2d 859, 883 (1979). *See also, Sanson v. Brandywine Homes, Inc.*, 215 W.Va. 307, 311-12, 599 S.E.2d 730, 734-35 (2004) (affirming order of Circuit Court of

² November 3, 2008 Order from the Circuit Court of Cabell County in Civil Action No. 07-C-0852 Granting Plaintiffs' Motion for Summary Judgment and Denying BrickStreet's Motion for Summary Judgment; Motion for Relief from Judgment filed by BrickStreet on December 18, 2008 in the Circuit Court of Cabell County; Plaintiffs' Response to BrickStreet's Motion for Relief from Judgment filed on January 28, 2009 in the Circuit Court of Cabell County; BrickStreet's Reply to Plaintiffs' Response to Motion for Relief from Judgment filed on January 29, 2009 in the Circuit Court of Cabell County; February 27, 2009 Order from the Circuit Court of Cabell County Granting the Motion for Relief from Judgment; Petition for Appeal filed by Bunch in the Supreme Court of Appeals of West Virginia on June 19, 2009; and Order Refusing the Petition for Appeal by the Supreme Court of Appeals of West Virginia dated November 3, 2009.

Kanawha County enforcing settlement agreement in action regarding purchase, financing, and installation of a double-wide manufactured home even though manufacturer declined to cross-examine purchasers and instead submitted affidavit from their former counsel regarding authorization for settlement on which Circuit Court relied).

Bunch had the opportunity to challenge the Affidavit or to depose the affiant in the Cabell County action, when it had the full range of procedural tools to do so, but did not. Instead, Bunch moved for summary judgment, raising no genuine issues of material fact. Moreover, Bunch did not object to the filing of the Affidavit in the proceeding before the Insurance Commissioner or in the appeal before the Circuit Court. Further, the Circuit Court twice denied motions by Bunch to supplement the record and thereby precluded Bunch from being able to contest the Affidavit. But even if the Affidavit of Mr. Mahler could not be considered because it was not cross-examined by Bunch in the Insurance Commissioner proceeding, the proper remedy was to remand the case to the Commissioner, rather than to reverse and vacate the July 9, 2010 Order. This would have allowed for further proceedings to develop the record regarding the expenses BrickStreet incurred in handling direct business that would otherwise be handled by appointed agents and, thus, to allow Bunch to question the testimony contained in the Affidavit.

Furthermore, the Circuit Court denied a Motion to Supplement the Record filed by Bunch on June 23, 2011, seeking to permit the introduction of additional evidence and to present testimony to supplement the "barren record" submitted by the Insurance Commissioner, alleging that the Commissioner refused its request to make a proffer for the record and that such evidence was necessary for Bunch to prove its case that BrickStreet committed a *per se* violation of West Virginia law. The Order of July 12, 2011 held that Bunch had not provided the Court with good cause or any irregularities that occurred before the Insurance Commissioner, that the record had sufficient evidence from both the Insurance Commissioner and the Circuit Court of Cabell County, and that any further discovery in the case was costly and unnecessary

in light of the record provided. (App. 223-224). Bunch filed another Motion to Supplement the Record on October 24, 2011, after the hearing of October 18, 2011, seeking to introduce additional evidence and present testimony regarding certain “proprietary and confidential” documents submitted by BrickStreet to the Insurance Commissioner regarding its plans for agent commissions in the open market, as referenced in pages 1561-1562 of the record before the Commissioner. The Circuit Court entered a Second Order Denying Petitioner’s Motion to Supplement the Record on October 28, 2011, again stating that “the record in this case has sufficient evidence from both the Insurance Commissioner and the Circuit Court of Cabell County.” (App. 349).

The Circuit Court was again fundamentally inconsistent with its rulings in the present case. It twice found that the record from the Insurance Commissioner, as well as the Cabell County action, was sufficient, yet it ultimately concluded that there was insufficient evidence in the record to support the finding that the increased cost to BrickStreet of administering direct policies offsets the agent commission. It also disregarded the Affidavit filed not only in the Cabell County action, but also with the Insurance Commissioner, even though it is entirely consistent with the finding in the July 9, 2010 Order that “BrickStreet disclosed its intentions to the West Virginia Offices of the Insurance Commissioner concerning the use of its filed rates and especially in incurring certain administrative costs and expenses in directly handling policies written through it as opposed to acquisition costs incurred through the use of an appointed agent.” (App. 85, ¶ 18). The October 31, 2011 and November 22, 2011 Orders should, therefore, be reversed.

IV. THE CIRCUIT COURT ERRED IN REVERSING AND VACATING THE JULY 9, 2010 ORDER OF THE INSURANCE COMMISSIONER.

By granting the relief requested by Bunch and reversing and vacating the July 9, 2010 Order of the Insurance Commissioner, the Circuit Court effectively reinstated the November 3, 2008 Order from Judge Cummings in the Cabell County action, which has since been reversed,

and reexamined the rates previously approved by the Commissioner, which is directly contrary to the holding in *State ex rel. CitiFinancial, Inc. v. Madden*, 223 W.Va. 229, 672 S.E.2d 365 (2008). This Supreme Court of Appeals of West Virginia in the *CitiFinancial* case held as follows:

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 West Virginia 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 West Virginia 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 West Virginia Code § 33-6-30(c) (2002) (Repl. Vol. 2006) may only be rebutted in a proceeding before the Insurance Commissioner.

Syl. Pts. 2, 3, and 4, *CitiFinancial*, 223 W.Va. at 231, 672 S.E.2d at 367. In this decision, the Supreme Court examined the relevant insurance statutes and stated that rates charged for casualty insurance may not be “excessive, inadequate or unfairly discriminatory.” W.Va. Code § 33-20-3(b). Once a particular rate has been approved by the Insurance Commissioner, a presumption arises that such rates “are in full compliance with the requirements of this chapter [chapter 33].” W.Va. Code § 33-6-30(c). The Insurance Commissioner has the continuing authority to disapprove an insurance rate for noncompliance with the requirements of chapter thirty-three, article twenty. W.Va. Code § 33-20-5(c). Besides the right to reexamine approved insurance rates that is statutorily extended to the Insurance Commissioner, an aggrieved person or organization has the right to demand a hearing for the purpose of challenging any insurance filing as being noncompliant with the statutory requirements that govern insurance rate setting. W.Va. Code § 33-20-5(d).

The respondent in *CitiFinancial* argued that the language of W.Va. Code § 33-6-30(c) that accords approved insurance rates only a presumption of statutory compliance allows judicial involvement in issues of rate making. This Court held, however, that to accept this position would require it to view the inclusion of the presumption language in W.Va. Code § 33-6-30(c) as an express vitiation of the rate-making authority previously granted to the Insurance Commissioner in the insurance statutes and the West Virginia Consumer Credit Protection Act. This Court found that this statutory language underscored the Legislature's intent to remove issues involving insurance rates from the purview of judicial review.³ With the 2002 amendments to the statutory provision, the Legislature was clear in its intent, which was to curb judicial intrusion into issues of insurance rate setting. W.Va. Code § 33-6-30(b). This Court further stated as follows:

It stands to reason that if a circuit court is allowed to invade this administrative arena and reexamine the issue of whether a given insurance rate is reasonable or excessive, the judiciary will necessarily be substituting its determinations as to permissible insurance rates for those previously determined by the Commissioner and supplanting its opinion in matters expressly delegated to the Commissioner's expertise and jurisdiction. A further peril that cannot be overlooked is that judicial intervention in the rate making area would open the door to conflicting decisions amongst the various circuits regarding what constitutes an unreasonable or excessive charge for credit insurance. In this manner then, the uniformity of regulation that the Legislature has established by delegating all matters involved 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, 223 W.Va. at 237, 672 S.E.2d at 373.

The Supreme Court in *CitiFinancial* then held that the respondent should have sought relief under W.Va. Code § 33-20-5(d), which expressly provides the right to a hearing before the Commissioner for the purpose of challenging approved insurance rates. While monetary damages cannot be awarded in connection with an administrative hearing held pursuant to

³ W.Va. Code § 33-6-30(b)(5) not only requires a complainant to proceed before the Insurance Commissioner, but it also specifically provides that it was not intended to provide the basis for monetary damages in the form of premium refunds or partial premium refunds.

W.Va. Code § 33-20-5(d), that provision is the procedural mechanism established by the Legislature for challenging insurance rates, and the absence of monetary damages does not suggest that the aggrieved party can bypass the procedures expressly set in place to question approved rates. *CitiFinacial*, 223 W.Va. at 238-39, 672 S.E.2d 374-75. This Court in *CitiFinacial* noted that nothing prevents an aggrieved party from seeking monetary relief under the Consumer Credit Protection Act (“CCPA”) for excess charges after a rate charge has been found not to comply with the requirements for assessing such charges.

In the present case, Bunch has not asserted and cannot assert a claim under the CCPA. However, Bunch did file a Motion to Alter or Amend Judgment and Motion to Amend the Complaint in the Circuit Court, requesting leave to file an amended complaint to revive the previously asserted class action allegations prior to the entry of judgment. (App.). Although the Circuit Court denied the Motion by Order of November 22, 2011, Bunch has since filed a new class action in the Circuit Court of Kanawha County, Civil Action No. 11-C-2265, seeking monetary relief for the unlawful excess charges as determined by the Final Order of October 31, 2011.

This Court in the *CitiFinacial* case was also not persuaded by the argument that any finding by the Insurance Commissioner that an insurance rate does not meet statutory requirements is meaningless because such rulings are necessarily prospective in effect pursuant to W.Va. Code § 33-20-5(d), which provides that the Commissioner shall set a reasonable date for effecting any rate disapproval and specifying that any such directive “shall not affect any contract or policy made or issued prior to the expiration of the period set forth in said order.” This Court stated that given the contractual nature of insurance policies, it stands to reason that any rulings that disapprove specific insurance rates can only have a prospective effect. *Id.*, at n. 26.

The Supreme Court in *CitiFinacial* concluded that the inclusion of the statutory language that creates a presumption of compliance occurred as part of the Legislature’s attempt

to strengthen the rate making powers of the Commissioner, and through its adoption of this statutory language, the Legislature established a procedural mechanism by which insurance rates are presumed to be in compliance with all regulatory requirements upon their approval by the Insurance Commissioner. While approved insurance rates are still subject to challenge, the burden for disproving the validity of such rates is placed on the entity who seeks to set the rates aside. That entity cannot challenge this presumption before the circuit court because the legislation was enacted to prevent judicial reexamination of approved insurance rates. Thus, the presumption of statutory compliance for approved insurance rates may only be rebutted in a proceeding before the Insurance Commissioner. Although this Court in *CitiFinancial* further held that a final order of the Insurance Commissioner on whether insurance rates are reasonable or lawful is subject to judicial review, that review must occur as a result of the Administrative Procedures Act, W.Va. Code § 29A-5-1 to 5, C.S.R. § 114-13-8 and W.Va. Code § 33-2-13. A review of approved rates cannot occur through filing a cause of action for damages in circuit court.

Upon dismissal of the Cabell County action, Bunch did file a Consumer Complaint before the Insurance Commissioner to challenge the rate charged by BrickStreet. However, on the appeal of the July 9, 2010 Order from the Insurance Commissioner, Bunch asked the Circuit Court to supplant that decision with the November 3, 2008 Order from Judge Cummings in the Cabell County action. The Circuit Court granted the relief Bunch requested. Although the October 31, 2011 Order is couched in terms of the Administrative Procedures Act, in finding that the Insurance Commissioner was clearly wrong, the Circuit Court essentially substituted its opinion as to whether the rates charged by BrickStreet were reasonable in relation to the benefits provided. As set forth above, a circuit court is not allowed to invade the administrative arena and reexamine the issue of whether a given insurance rate is reasonable or excessive or to supplant its opinion in matters expressly delegated to the expertise and jurisdiction of the Insurance Commissioner. A peril presented by the decision from Judge Kaufman is conflicting

decisions among the various judges and circuits regarding what constitutes an unreasonable or excessive charge for workers' compensation insurance when the insured does not use an appointed agent. Bunch is only one insured that did not have an agent to procure or renew workers' compensation insurance with BrickStreet when such coverage novated from the State, and since Bunch could not pursue this claim as a class action, any other insured could file a similar action. This, in turn, undermines the uniformity of regulation that the Legislature established by delegating all matters involving rate making and rate filings to the Commissioner. Accordingly, even though a claimant can appeal a decision from the Insurance Commissioner to the Circuit Court, in matters involving insurance rates, the court must be restrained by the parameters established in *CitiFinancial*, so as not to second guess the reasonableness of rates previously approved by the Insurance Commissioner. This is exactly what Bunch advocated and what the Circuit Court did in the present case.

V. THE CIRCUIT COURT ERRED IN CONCLUDING THAT THE INSURANCE COMMISSIONER SHOULD NOT HAVE ALLOWED BRICKSTREET TO CHARGE FOR AN AGENT COMMISSION WHEN NO SUCH EXPENSE WAS INCURRED.

Lastly, the Circuit Court erred in concluding that West Virginia law permits BrickStreet to charge a premium only for expenses actually incurred and that the Insurance Commissioner should not have allowed BrickStreet to charge for an agent commission when no such expense was incurred. This is not a correct interpretation of the applicable legislative rules, either 85 C.S.R. 8-8 or 85 C.S.R. 8-11.2, and amply illustrates why a court should not be allowed to substitute its determination as to permissible insurance rates for those previously determined by the Insurance Commissioner or to supplant its opinion in matters expressly delegated to the expertise and jurisdiction of the Commissioner.

Both versions of the rule expressly permit BrickStreet and now other private workers' compensation carriers to charge a premium rate which includes, in addition to the base rates, a reasonable provision for expenses related to administration costs, including not only underwriting expenses such as commissions to agents and brokers, but also other policy

acquisition or servicing expenses. Nothing in these regulations expressly states or even implies that for BrickStreet to request or the Insurance Commissioner to approve a certain LCM, the insurer must subsequently incur every expense component considered in that LCM for each particular policy or for a particular insured. As set forth above, BrickStreet does incur policy acquisition and servicing expenses for every policy issued, but for some that may prove to be an agent commission, while for others it may be the increased cost to BrickStreet of performing services the agent normally handles. Regardless, the manner in which the Insurance Commissioner has interpreted and applied this legislative rule to the BrickStreet rates is well within its authority, is consistent with the language of the rule itself, and is not inconsistent with the intent of the Legislature in any controlling statute.

It is also not a correct interpretation of the regulation by the Circuit Court that for a certain component of the LCM to be factored into the premium rate, the insurer must have already incurred that expense, such as having paid a commission to an agent or broker. At the time an insurer submits a rate filing and the Insurance Commissioner approves a rate for a prospective insurance premium, the insurer has not yet incurred any such expense. It would be virtually impossible for the Insurance Commissioner to predict and thereby approve separate LCMs for each insured based on whether the insurer will actually incur every administrative cost or underwriting expense for a particular policy. Each of these errors, both individually and collectively, demonstrates that the Circuit Court of Kanawha County should be reversed on appeal.

CONCLUSION

For the reasons set forth above, the Petitioner prays that this Court accept this appeal, reverse the October 31, 2011 and November 22, 2011 Orders of the Circuit Court of Kanawha County and affirm the July 9, 2010 Order from the Insurance Commissioner.

**WEST VIRGINIA EMPLOYERS' MUTUAL
INSURANCE COMPANY d/b/a BRICKSTREET
MUTUAL INSURANCE COMPANY,**

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IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

No. 11-1750

**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.

CERTIFICATE OF SERVICE

I, Erica M. Baumgras, counsel for the Petitioner, West Virginia Employers' Mutual Insurance Company d/b/a BrickStreet Mutual Insurance Company, do hereby certify that the "BRIEF OF PETITIONER, WEST VIRGINIA EMPLOYERS' MUTUAL INSURANCE COMPANY d/b/a BRICKSTREET MUTUAL INSURANCE COMPANY" was served upon the following parties by depositing true copies thereof in the United States Mail, first class, postage prepaid, this 23rd day of March 2012:

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